THE BLUE ONE CASE

Summary of Facts

In 2010, Blue Inc. was approached by Hiromi Red to begin a business relationship. From 2011, Blue Inc. and Red Corp. had a contractual relationship to deliver cases of Blue One. The price and quantity of the orders were renegotiated on a year-by-year basis. The order for the year 2020 was left unspecified by Red Corp. but Blue Inc. reserved 100 cases for it. However, Red Corp. alleged that Blue Inc. was contractually obligated to deliver 200 cases of Blue One despite the lack of a valid contract on the matter. Red Corp. eventually agreed to purchase the 100 cases of Blue One and requested that they be delivered by air, and for Blue Inc. to arrange the flight. When the wine was with the air carrier, lightning struck the storage space with the wine and caused a fire which destroyed all 100 cases of Blue One.

ISSUE 1: BLUE INC. IS NOT LEGALLY OBLIGATED TO DELIVER 200 CASES OF BLUE ONE TO RED CORP.

A. For the year 2020, there was no contract obligating the delivery for 200 cases of Blue one to Red Corp.

1. Blue Inc. was only obligated to deliver 100 cases of Blue One per the Sales Contract signed on 26 September 2020 ("Sales Contract 2020", Exhibit 6). The relevant rule is found in Article 2.1.1 of the UNIDROIT Principles of International Commercial Contracts ("**PICC**") which necessitates that all contracts are concluded "*either by the acceptance of an offer or by the conduct of the parties that is sufficient to show agreement*", and Article 1.3 which states that a contract validly entered into is binding upon its parties. The Sales Contract 2020 is a valid contract under Article 1.3 of the PICC, duly signed by both parties (Exhibit 5). The Sales Contract 2020, which parties are bound by, thus stipulates that Blue Inc. is only obligated to deliver 100 cases, contrary to Red Corp.'s claim.

B. Blue Inc. is not bound by prior agreements as contractual obligations are reviewed on a yearly basis.

2. There is no subsisting obligation to deliver 200 cases of Blue One annually to Red Corp. since all contracts regarding the sale of Blue One only bind parties for a period of one year.

3. The relevant rule is found in Article 1.1 of the PICC, which states that parties are free to enter into a contract and determine its content. Under Comment 1, the freedom of contract acts as "*a basic principle*" in the context of international trade. Blue Inc. and Red Corp. exercised the freedom not to form a subsisting contract that obligated the continual delivery of 200 cases of Blue One each year. Both parties did not have an agreement for the continual purchase of 200 cases (Exhibit 3-1; Exhibit 3-2) as written statements by Hiromi Red and Taro Blue state that "*We did not prepare anything particular like a contract for the continuous purchase of 200 cases of Blue One' annually*".

4. Blue Inc. and Red Corp. have no fixed agreement on the quantity of Blue One to be purchased per year, as evinced by Exhibit 4. Misconstruing the terms of the current contract would compromise both parties' intentions when they signed the agreement. Failing to uphold what the parties agreed

to would be an unfair outcome and would undermine their freedom to contract, which is enshrined under Article 1.1 of the PICC.

C. There are no implied terms in the agreement between Blue Inc. and Red Corp.

4. Even on the basis that there was a subsisting contract between Blue Inc. and Red Corp., this supposed contract has no implied term obligating the delivery of 200 cases of Blue One.
5. The relevant rule is set out in Article 5.1.1 and Article 5.1.2 of the PICC. Article 5.1.1 states that contractual obligations may be expressed or implied. Article 5.1.2 can only be invoked if the implied terms fill gaps in the contract or are so obvious that the obligation 'went without saying', per the Comment under the Article. This is such that implied obligations stem from the nature and purpose of the agreement, the practices established between the parties, good faith and reasonableness.
6. There is no implied term that Red Corp. can reasonably rely on. The handwritten memo by Taro Blue ("**the Memo**", Exhibit 3-1) stipulates an indefinite duration of partnership while all contracts are limited to the year it was formed (as explained in Paragraph 3). Extending the duration of the contract contrary to the parties' intentions would lead to commercial uncertaintyy. This uncertainty is harmful in the present case, as agreed details to the quantity of Blue One are paramount to the business relationship. Further, the Memo was not intended to act as a legal contract, as Blue Inc. had no intention for the memo to be contractually binding (Exhibit 3-2). If anything, the Memo was meant to simply create business relations between Blue Inc. and Red Corp. to open up subsequent negotiations to contract each year for the sale of Blue One.
7. Even if Red Corp. relies on past business agreements with Blue Inc., there will be no obligation for Blue Inc. to deliver 200 cases. This is because this implied obligation is not so obvious that it 'goes without saying', given that Red Corp. had to make a new offer each year with a specific quantity of Blue One in mind, and this quantity varies, as seen from the sales record in Exhibit 4.

D. Blue Inc. acted in good faith to comply with the practice to sell Blue One to Red Inc., and this practice did not establish any obligation to deliver the quantity of 200 cases.

8. Any practice established between Blue Inc. and Red Corp. entails only the buying and selling of Blue One, and not specifically the quantity of 200 cases. The relevant rule can be gleaned in Article 1.7 and Article 1.9 of the PICC. Article 1.7 states that each party "*must act in accordance with good faith and fair dealing*" while Article 1.9 (1) states that the parties are legally bound "*by any practices which they have established between themselves*". The practice established between Blue Inc. and Red Corp involves only the buying and selling of Blue One yearly. Blue Inc. and Red Corp. have a standard course of dealing each year (see paragraph 3).
9. Blue Inc. acted in good faith and was in line with the spirit of fair dealing. In the email exchange detailing the negotiations for the sale of Blue One in 2020 (Exhibit 5), Blue Inc. reserved 100 cases of Blue one for Red Corp. despite Red Corp. having placed a late order. This is analogous with the illustration under Article 1.9 for Comment 2, where A cannot object to a late notice from B when it is an established practice between them such that it will be binding on A. As established above, prior dealings led Blue Inc. to reserve 100 cases of Blue One for Red Corp. in an exercise of good faith.

ISSUE 2: BLUE INC. IS EXEMPT FROM LIABILITY FOR THE NON-PERFORMANCE IN RELATION TO THE SALES CONTRACT 2020.

A. Red Corp. bore the risks of air delivery.

10. A term which states that Red Corp. is to bear the risks of air delivery should be supplied. Pursuant to Article 4.8, where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

11. Red Corp. and Blue Inc. have not agreed with respect to the allocation of risks which might arise during the delivery process, which is a term important for a determination of their rights and duties. Prior to the modification of the mode of delivery, Clause 2 of the Sales Agreement (Exhibit 6) allocated the delivery risks with reference to the Free On Board rule from INCOTERMS 2020. The use of the Free On Board rule, however, is restricted to goods which are transported by 'sea or inland waterways' (FOB Incoterms® 2020). This rule, hence, is not appropriate for air delivery. As such, there exists a need to supply a term which clearly sets out the allocation of risks for air delivery.

12. The term that should be supplied here would be one which states that Red Corp. bears the risks of air delivery. Pursuant to Article 4.8, in determining what is an appropriate term, regard shall be had, among other factors, to the intention of the parties, the nature and purpose of the contract, good faith and fair dealing, and reasonableness.

13. The intention of the parties establishes such a term. The correspondence between the parties clearly indicates that the parties intended for Red Corp. to bear the risks of air delivery. In its email to Blue Inc. on 1 October 2020 (Exhibit 8), Red Corp. stated that it would 'bear all costs and risks'. Blue Inc. replied saying that it 'understood', and promptly arranged a flight. The intention of the parties, therefore, clearly suggests that a term which states that Red Corp. bears all risks of air delivery should be supplied.

14. The supplication of a term which states that Red Corp. is to bear the risks of air delivery is also required by good faith and fair dealing. Red Corp. was the party which requested that the cases of Blue One be delivered by air (Exhibit 8). Red Corp. is hence better-positioned to protect itself from any risks of air delivery. That Red Corp. failed to procure an insurance policy which covers such risks is a negligent omission on Red Corp.'s part, for which Blue Inc. should not be held responsible.

15. Furthermore, the supplication of a term which states that Red is to bear the risks of air delivery would be reasonable. It is within reason that the party which requests a modification to the contract should bear any risks which might arise as a consequence of this modification.

16. Owing to the aforementioned reasons, a term which states that Red Corp. is to bear the risks of air delivery should be supplied. Pursuant to Article 7.1.2, a party may not rely on the nonperformance of the other party to the extent that such nonperformance was caused by an event for which the first party bears the risk. As such, Blue Inc. is exempt from any liability for its nonperformance.

B. Even if Red Corp. did not bear this risk, Blue Inc. would still be exempt from liability, because Blue Inc.'s non-performance was excused by clause 10 of the Sales Agreement

17. Blue Inc.'s non-performance was excused, as per clause 10 of the sales agreement (the '*force majeure* clause').

18. The *force majeure* clause stipulates 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.* [emphasis added]

19. Blue's failure to fulfil its obligation was attributable to a cause beyond its reasonable control. Blue was unable to deliver the 100 cases of Blue One because they were destroyed in a fire. This was clearly a cause beyond the reasonable control of Blue Inc., as the *force majeure* clause expressly cites 'fires' as an example of such causes. The fact that the fire was caused by lightning which emanated from the largest thundercloud in recorded history fortifies Blue Inc.'s position. Blue Inc. could not have foreseen that such a large thundercloud would form and taken preventive measures to protect the cases of Blue One against any harm the thundercloud could cause.

20. Blue Inc. gave prompt notice to Red Corp. of its invocation of the *force majeure* clause. Blue Inc. informed Red Corp., through email, of the storm and the fire, as well as the destruction of the cases of Blue One, on 8 October, less than a day after the destruction occurred.

21. Blue Inc. also made diligent efforts to resume its performance despite the *force majeure*. From the way the *force majeure* clause is structured, it is clear that the duty it imposes on the non-performing party to resume performance is a duty of best efforts. Pursuant to Article 5.1.4, a duty of best efforts requires only that a party make such efforts as would be made by a reasonable person in the same circumstances.

22. Blue Inc. offered, in its email to Red Corp. on 9 October 2020, to deliver 100 cases of second label of five famous chateaux, which Blue Inc. had secured for its domestic customers, in place of the 100 cases of Blue One which had been destroyed. As the remaining cases of Blue One held by Blue had been sold to other parties, Blue could not have delivered those to Red.

23. While five famous chateaux is not as prestigious as Blue One, it is nonetheless a highly valued wine label. As per Exhibit 16, Red Inc. would have made the same profits had they purchased the second label of five famous chateaux instead of Blue One. The alternative proposed by Blue was hence entirely reasonable in the circumstances, and amounts to a diligent effort to resume its performance.

24. As Blue Inc.'s nonperformance was due to a cause beyond its reasonable control, and Blue Inc. gave prompt notice to Red Corp. and made diligent efforts to resume performance, it is exempt from liability under the *force majeure* clause of the Sales Agreement.

ISSUE 3: IN THE CASE THAT LIABILITY IS ESTABLISHED FOR NON-PERFORMANCE, THE DAMAGES PAYABLE BY BLUE INC. SHOULD BE REDUCED SIGNIFICANTLY.

A. Red Corp. failed to take reasonable steps to mitigate the harm resulting from Blue Inc.'s non-performance.

25. Pursuant to Article 7.4.8, the non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
26. Following the alleged breach, Blue Inc. offered to sell 100 cases of five famous chateaux in place of Blue One, as per Exhibit 5. Red Corp., however, declined this offer.
27. Given that Red Corp., would have made the same profits from sales of five famous chateaux (Exhibit 16), Red Corp., should have accepted the offer, as it would have significantly reduced the harm resulting from Blue Inc.'s non-performance.
28. Therefore, the damages to be paid by Blue Inc. should be significantly reduced, as Red Corp. did not act to mitigate the harm resulting from the alleged breach where it was perfectly reasonable to have done so.
29. If liability is established for 200 cases, Blue Inc. should pay damages of 1,000 USD * 100 cases * 12 bottles = <u>1,200,000 USD</u>.
30. If liability is established for only 100 cases, Blue Inc. should pay damages of 1,000 USD * 100 cases * 12 bottles = 1,200,000 USD. However, this is subject to our next submission.

B. Red Corp. is liable for the destruction of the 100 cases of Blue One.

31. Pursuant to Article 7.4.5, where the harm of an aggrieved party is due to an event for which said party bears the risk, the amount of damages would be reduced to the extent that that event contributed to the harm.
32. If liability is established only for 100 cases, Red Corp.'s harm - its loss of profits from the 100 cases of Blue One, would be due to the cases being destroyed by a fire while at the airport. As per the correspondence between Red Corp. and Blue Inc. (Exhibit 8), the parties agreed that Red Corp. would bear all risks of air delivery. As such, the amount of damages Red Corp. pays should be reduced to the extent that the fire contributed to the harm.
33. Given the direct and obvious causal link between the fire and Red Corp.'s loss, the fire contributed significantly to Red Corp.'s loss. The damages to be paid should be reduced significantly, by 80%-90%. The appropriate amount of damages would hence be between 10% * 1,200,000 = <u>120,000 USD</u> and 20% * 1,200,000 = <u>240,000 USD</u>.

THE KANPAI CASE

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. signed an exclusive distributorship agreement for Kanpai Beer produced by Yellow Corpo. (the

“**Kanpai Agreement**”) In 2018, Yellow Corp. 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.

ISSUE 1: RED CORP. IS NOT ENTITLED TO TERMINATE THE EXCLUSIVE DISTRIBUTORSHIP AGREEMENTS FOR KURENAI OR KANPAI

A. Red Corp. violated Article 7.1.2 of the PICC when it interfered with Blue Inc.’s performance of the Kurenai Agreement.

34. Blue Inc. was not in breach of Article 16(4) of the Exclusive Distributorship Agreement as Blue Inc did not fail to meet the minimum sales target, of 10,000 cases as specified in Article 9 of the agreement, for two consecutive years.

35. Red mandating that Blue focus its manpower and resources away from Kurenai is in violation of Article 7.1.2 of the PICC which provides that

> *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.* [emphasis added].

36. Given the unique target audience of Kurenai and it being sold exclusively to high-end customers, it is clear that maintaining strong sales figures of Kurenai is no easy feat for Blue Inc. However, throughout their relationship under the agreement, Blue Inc has consistently maintained its sales of Kurenai above the minimum target under Article 9.

37. On the facts, Blue Inc was able to more than double the sales of Red Corp’s Kurenai sake while maintaining the drink’s unique brand image as a special drink for special occasions. (Exhibit 4) This is owed to the strength of Blue Inc’s manpower and distributor network focusing heavily on the sales of Kurenai.

38. Consequent to Red Corp’s takeover for the production of Kanpai beer, which had poor sales figures, Red Corp explicitly ordered Blue Inc to *“put [Blue Inc’s] energy into “Kanpai” rather than “Kurenai” at least until 2019”* (Exhibit 13) in a bid to boost Kanpai’s sales.

39. The sales of Kurenai in 2019 was thus *“below that in the fiscal year 2018* ***as manpower was allocated to sales of Kanpai****.”* [emphasis added] (para. 32) Manpower was allocated to Kanpai’s sales under the instruction of Red Corp as they are the primary decision maker on matters pertaining to distribution of its beverages. As Red Corp. administers both the Kurenai agreement and Kanpai agreement, non-adherence with Red Corp’s instructions could put not one, but two, distributor agreements at risk. Red Corp. made representations to Blue Inc. to shift its focus from Kurenai to Kanpai, and Blue Inc. had no choice but to comply with the orders of Red Corp.

40. Red’s interference in the allocation of manpower and resources caused the shortfall in sales in 2019. Considering Blue’s strong track record in selling Kurenai (Exhibit 10), had Red Corp not mandated Blue Inc. to shift its attention away from Kurenai, sales of Kurenai would have stayed significantly above the minimum of 10,000 cases

41. In accordance with Article 7.1.2, Blue's non-performance of Article 9 of the Kurenai Agreement in 2019 "loses the quality of non-performance" altogether. Therefore, Blue Inc had performed its obligations under Article 9 of the Kurenai Agreement in 2019. Red Inc. has no grounds for termination under Article 16(4) of the Kurenai Agreement as there was no failure to meet minimum sales for two consecutive years.

B. Further or in the alternative, Red Corp's inconsistent behaviour regarding the Kurenai Agreement has violated Article 1.8 of the PICC.

42. Red Corp's claim is inconsistent with their initial behaviour and is a violation of Article 1.8 of the PICC which states that:

    > *A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.*

    Red Corp caused Blue Inc to have an understanding that sales volumes need not be maintained above the sales target of 10,000, as stipulated in Article 9. Therefore, Blue Inc. did not fail to meet the minimum sales target for two consecutive years and Red Corp has no grounds for termination.

43. As explained above, Blue's success or failure to sell Kurenai is inextricably tied to the amount of manpower and resources it allocates to promoting the beverage. The common intention of the parties was to have Blue shift its focus onto Kanpai beer to boost its sales. Red Corp explicitly instructed Blue Inc to *"put your energy into "Kanpai"* ***rather than*** *"Kurenai""* (Exhibit 13) Given the limited manpower and resources of Blue, it is mutually understood that Kurenai sake would not receive the same focus from Blue than it did in previous years. It can also be inferred that both parties were aware that the consequence would be that Kurenai's sales could drop, possibly below the required amount.

44. Blue Inc. relied on Red Corp's representations. Manpower was allocated to boost Kanpai's sales under the instruction of Red Corp. For Red Corp. to then renege on the understanding caused is not only harmful to commercial relations and in bad faith, but also a breach of Article 1.8 of the PICC.

45. Red Corp. is also aware of the shortfall of sales of Kurenai Sake in 2019, as per Article 12 of the Agreement. However, Red Corp did not instruct Blue Inc to alter its performance or improve the volume of Kurenai sold. Red Corp. is aware that Blue Inc. has relied on the representations that they have made. The circumstances here are similar to Illustration 2 furnished under Article 1.8 of the UNIDROIT principles, which state that:-

    > *2. B mistakenly understands that its contract with A can be performed in a particular way.* ***A is aware*** *of this and* ***stands by*** *while B's performance proceeds. B and A meet regularly. B's performance is discussed but no reference is made by A to B's mistake.* ***A will be precluded from insisting that the performance was not that which was required under the contract.*** [emphasis added]

    That Red Corp did not instruct Blue Inc. to rectify its performance highlights their intention for efforts to be temporarily shifted away from Kurenai and their understanding that sales of Kurenai would not meet the minimum set out in Article 9 of the distributor agreement.

46. Blue Inc had reasonably relied on Red Corp's instructions and continued to shift its focus from Kurenai to Kanpai. It is averred that Red Corp's claim is inconsistent with its initial behaviour and

has caused detriment to Blue, who has relied on their statements and shifted focus away from promoting Kurenai Sake to Kanpai Beer.

47. Therefore, Red Corp should not be allowed to act inconsistently with their representations and insist that Blue Inc. had failed to meet their contractual obligations in 2019. The termination of the Kurenai Agreement under Article 16(4) is in bad faith and has no grounds.

C. Blue Inc has not breached Clause 9 of the Kanpai Agreement on a minimum purchase requirement.

48. Blue Inc has not breached Clause 9 of the Exclusive Distribution Agreement for Kanpai (Exhibit 11) as they have met the minimum purchase requirement set out, by purchasing a total of 32,000 cases from 2017 to 2019.

49. Clause 9(a) of the Exclusive Distribution Agreement (Exhibit 11) states that:

> "*purchases of Products in excess of the minimum requirements set forth for any period shall be credited towards the minimum purchase requirements set forth below for the* ***subsequent period****.*" [emphasis added]

50. In light of an absence of definition for the term "subsequent period" within the Exclusive Distribution Agreement, the term shall be interpreted "according to the common intention of the parties" (Article 4.1 of PICC). In applying Article 4.1, Article 4.3 lays out that regard shall be had to all the circumstances, including "practices which the parties have established between themselves" (Article 4.3(b)) and "the nature and purpose of the contract" (Article 4.3(b)).

55. In the Kurenai and Kanpai Agreements, Blue Inc is obligated to meet a minimum sales requirement for Kurenai (Exhibit 9 Clause 9), and minimum purchase requirement for Kanpai (Exhibit 11 Clause 9) respectively. Moreover, only the Kanpai Agreement allows for accreditation of the minimum amount across years (Exhibit 11 Clause 9).

56. This supports the parties' intention for a simple minimum overall profit for Kanpai, while they were more concerned with the consistency and image for Kurenai, leading to the difference in requirements between them.

57. Referencing the purchase record of Kanpai (Exhibit 10) and the minimum purchase requirement (Exhibit 11 Clause 9), Blue Inc only failed to meet the required amount in 2020. Blue Inc purchased 3,000 excess cases in 2017, credited towards the minimum amount in 2018. Factoring in this excess, Blue exceeded their requirement once again, and purchased 1,000 cases in excess of their 2018 requirement. This is then credited towards the minimum amount in 2019, where Blue purchased the minimum required cases. There were no excess cases to credit beyond 2019.

58. Hence, the only year in which Blue Inc failed to meet the minimum purchase amount was in 2020. Red Corp is only permitted to terminate the Kanpai Agreement if Blue Inc fails to meet the minimum annual purchase quantities agreed for two years (Clause 10(b)(iii)), which Blue Inc has not as set out above. Thus, Red Corp is not entitled to terminate the exclusive distributorship agreement for Kanpai.

D. Even if the intentions of the parties cannot assist in construing the ambiguous term "subsequent period", the term must be interpreted against Red Corp per Article 4.6 of the PICC.

59. The ambiguous term "subsequent period" must be construed in Blue Inc's favour to mean any subsequent year from the year of surplus, following the contra proferentem rule (Article 4.6 of the PICC), where Red Corp supplied the ambiguous term.
60. Article 4.6 of the PICC sets out that where the "contract terms supplied by one party are unclear, an interpretation against that party is preferred." As Yellow Corp supplied the terms of the Kanpai Agreement, the contra proferentem rule then quite clearly states that interpretation of the term "subsequent period" must be done against them.
61. However, the dispute is between Red Corp and Blue Inc here, as Yellow Corp has assigned the Kanpai Agreement to Red Corp. In determining if Red Corp should be considered as the party who supplied the termst, Article 9.2.8 of the PICC states that in assignment of contracts, the assignee is subject to all the assignor's "performance under the contract in respect of the obligation transferred", if the assignor asserts so.
62. The principle behind this rule is in maintaining the sanctity of the original contract. Where the assignor has been fully discharged, the assignee is entitled to the full benefit enjoyed by the assignor, but also the full obligations of them. Otherwise, the assignee would be operating on terms wholly inconsistent with the original contract, not agreed upon the formation of the contract.
63. According to the facts, Clause 2 of the Assignment of Contract between Yellow Corp and Red Corp states that Red Corp will assume all of Yellow Corp's "interest, rights, duties and obligations remaining in the Contract". This would be done "as if [Red Inc] were an original party therein". Assuming Red Corp to be an original party alongside Yellow Corp in the Exclusive Distributorship Agreement with Blue Inc, they would hence be considered the supplier of the terms to the contract in the way Yellow Corp was.
64. Given that Red Corp is taken to be the supplier of terms after the assignment of contract, the contra proferentem rule applies to them in this case, and interpretation of "subsequent period" must be done against Red Corp. Hence, Blue Inc's interpretation to mean any subsequent years must be accepted, and Blue Inc has not breached Clause 9 of the Exclusive Distributorship Agreement as calculated above.

E. In any event, Blue Inc ultimately has not breached either Agreement due to exclusion clauses in each Agreement.

65. Blue Inc has not breached either the Kurenai or Kanpai Agreements as their failure to meet the respective requirements is due to a force majeure event, which is covered as an exclusion clause in each Agreement.
66. Article 7.1.6 (1) of the PICC allows for an exclusion clause to "exclude one party's liability for non-performance" when invoked.
67. The Exclusion Clause in Clause 17 of the Kanpai Agreement explicitly sets out that no party will be "in breach of any provision" of the Agreement due to force majeure, including "pandemic; epidemic". It is thus clear that Blue Inc has not breached the Kanpai Agreement, and Red Corp cannot terminate this Agreement.
68. The Exclusion Clause in Clause 18 of the Kurenai Agreement sets out that parties shall not be liable for failures to perform due to "force majeure" acts "beyond the control of either party". This interpretation of force majeure is consistent with Article 7.1.7, where such events are "beyond its control" and "could not reasonably be expected".

69. Here, the sudden onset of the "novel coronavirus" qualifies as an unpredictable event outside of the control of either party. Hence, it fits the criteria of a force majeure event.

70. Therefore, Blue Inc cannot be held liable for the alleged failure to perform the minimum sales requirement in 2020. As exclusivity to sell Kurenai is the benefit of the contract to Blue Inc, to allow Blue Inc to bear the cost of non-exclusivity would be akin to holding Blue Inc liable for the force majeure event. Thus, Red Inc is not entitled to terminate the Kurenai Agreement.

ISSUE 2: THE INTERIM MEASURES SOUGHT BY BLUE INC. SHOULD BE ACCEPTED.

71. Blue Inc. seeks interim measures in accordance with Article 26 of the UNCITRAL Arbitration rules for Red Corp to (i) stop selling Kurenai sake and Kanpai beer to Green Corp and (ii) continue selling both products to Blue Inc in accordance with the exclusive distributorship agreements.

72. Per Article 26(2), the proposed interim measures maintain the status quo pending determination of the dispute. These interim measures also prevent prejudice to the arbitral process as it prevents premature actions from Red Corp. that operate on the assumption that the exclusive agreements can be terminated and transferred to Green Corp.

73. Under Article 26(3) of the UNCITRAL Arbitration Rules, the following limbs shall be satisfied to justify the interim measures:

    a. Harm not adequately repairable 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 a reasonable possibility that the requesting party will succeed on the merits of the claim.

A. Requirement (a) of Article 26(3) is satisfied

74. Blue Inc is likely to suffer harm not adequately repairable 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.

75. Blue Inc. has long been regarded as the "**top company** in the beverage industry in Arbitria…[with]...ample experience as an **exclusive** distributor of imported alcoholic beverages". [emphasis added] (para. 28) To allow Green Corp to sell Kurenai and Kanpai would greatly harm Blue Inc's reputation as the leading exclusive distributor of alcoholic beverages in Arbitria to both buyers and sellers alike.

76. Blue Inc's reputation was not built overnight, and it is precisely due to this reputation of being an exclusive distributor for Yellow Corporation that convinced Red Corp. to allow Blue Inc. to exclusively distribute Kurenai. It is not a stretch to say that this reputation has similarly played and would have continued to play a part in Blue Inc landing other exclusive distributor agreements.

77. The harm to Red Corp does not outweigh the harm to Blue Inc. Red Corp stands to profit from the sales of Kanpai and Kurenai regardless of whether Blue Inc. or Green Corp sells it. The harm to Blue Inc's reputation and potential business partnerships should the interim measures not be imposed is disproportionate to the harm to Red Corp should the interim measures be imposed. As such, Section 3(a) of Article 26 is made out.

78. Even if Article 26 s(3)(a) is not satisfied, there is strong authority that suggests interim measures intended to prevent the aggravation of parties' disputes are subject to a lower 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 (pg. 2674). On the facts, it is clear that 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 while aggravating the damage to Blue Inc, even as the dispute is unresolved. Therefore, it is commercially desirable to suspend sales to Green Corp per (i) and continue with Blue Inc as the exclusive distributor per (ii).

B. Requirement (a) of Article 26(3) is satisfied

78. There is a reasonable possibility that Blue Inc. will succeed in the claims. Due to Red Corp's interference and inconsistent behaviour with the Kurenai Agreement, contractual ambiguity in the Kanpai Agreement and the express exclusion clauses in both agreements, Blue Inc. has a prima facie case that Red Corp has no legal basis for their termination. The claim brought forward by Blue Inc. is in no way frivolous or arbitrary, and a reasonable possibility of success is present. Therefore, Section 3(b) of Article 26 is made out.

C. Red Corp's premature actions are in bad faith

79. 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.

80. The interim measures sought by Blue Inc. prevent prejudice to the arbitral process and maintain the status quo prior to a decision. If the interim measures are not ordered, Blue Inc. will suffer irreversible damage to its reputation and business relations while Red Corp. will continue to profit from the sales. Further, there is definitely a reasonable possibility that Blue Inc will succeed in its claims. Therefore, the interim measures should be ordered by the arbitral tribunal.

ISSUE 3: THIS TRIBUNAL HAS THE JURISDICTION TO RULE OVER THE KANPAI CASE

A. Arbitration is the intended dispute resolution method.

81. The intention for Blue Inc and Red Corp to arbitrate the dispute is sufficient to prove that arbitration will be the working dispute resolution mechanism, without more.

82. In order for a valid international arbitration agreement to be formed, a simple intention to resolve conflicts by "arbitration" alone will suffice, even if important issues concerning items such as but not limited to the seat of the arbitration or rules applicable to the arbitration are not defined (Gary Born, International Commercial Arbitration (3rd Ed) (Jan 2021) at 820 - 821).

83. This principle is gleaned from multiple case authorities, such as *Direct Response Prod., Inc. v. Roderick*, 2014 WL 12617910, at *3 (M.D. Fla.), where it was held that "the failure to designate an arbitration company or a particular forum also is not fatal to an arbitration provision". In *Green v. U.S. Cash Advance Ill.,* 724 F.3d 787, 788 (7th Cir. 2013), it was similarly found that incorporation

of institutional arbitration rules were "not integral to arbitration agreement", that the parties provided that disputes "shall be resolved by binding arbitration" was sufficient.

84. On the facts, Clause 15 of the Exclusive Distributorship Agreement states the applicable dispute resolution is set out in the General Business Agreement between Yellow Corp and Blue Inc, which is stated to be "finally settled by arbitration". Admittedly, the Agreement leaves out essential terms including the seat of the arbitration. However, the intention of the parties to utilise arbitration is nonetheless evinced, which alone is sufficient for the arbitration agreement to be enforced.

85. The Exclusive Distributorship Agreement is assigned from Yellow Corp to Red Corp subsequently, including Clause 4 of the Assignment of Contract (Exhibit 12) that "the covenants and conditions contained in the Assignment shall apply to and bind the parties". Hence, Red Corp is similarly bound to settle disputes with Blue Inc regarding the Exclusive Distributorship Agreement through arbitration.

86. Given that arbitration is the intended dispute resolution mechanism, the court will then attempt to fill the gaps for the undefined terms in the arbitration agreement.

B. The dispute was intended to be settled in Tokyo in accordance with the UNCITRAL Arbitration Rules.

87. The arbitration is most applicable to be held in Tokyo in accordance with the UNCITRAL Arbitration Rules.

88. In implying an obligation whereby there is a gap within the contract, Article 5.1.2 allows for implied obligations from "practices established between the parties and usages", referencing Article 1.9 that "parties are bound… by any practices which they have established between themselves".

89. Applying the principle of established practices, Blue Inc and Red Corp have consistently used the exact same governing law and dispute resolution clause in clause 5 of the Assignment of Contract (exhibit 12) and Article 21 of the Exclusive Distributorship Agreement (exhibit 9), setting out that arbitration is to be done in Tokyo under the UNCITRAL Arbitration Rules. From their repeated usage of the same clause, Blue Inc and Red Corp have established a common practice between themselves on the governing law and dispute resolution. Any other suggestions would be too arbitrary and random.

90. Furthermore, as Red Corp has no objection to the current arbitral tribunal handling the case if it is recognised that the Kanpai dispute may be resolved by arbitration, this tribunal is not barred by the lack of consent between parties, and this tribunal has jurisdiction to hear the Kanpai case.