SUMMARY OF SUBMISSIONS

BLUE ONE CASE

I. Blue Inc. ('Blue') was obligated to deliver 200 cases of Blue One to Red Corp ('Red').
II. Blue was liable for all risks and any loss stemming from the non-delivery of Blue One.
III. Red is entitled to an award of damages in the amount of USD 2,016,000 (plus interest) resulting from Blue's non-performance.

KANPAI CASE

IV. Red is entitled to terminate the Exclusive Distribution Agreement for Kurenai ('Kurenai Agreement') due to Blue's non-performance.
V. Red is entitled to terminate the Exclusive Distributorship Agreement of Kanpai ('Kanpai Agreement') due to non-performance.
VI. The only impediment to Blue's performance was a lack of warehousing space. This is not a sufficient basis for a claim of either hardship or force majeure by Blue.
VII. Interim measures reinstating the Kurenai Agreement and the Kanpai Agreement should not be ordered.

ARBITRATION PROCEDURE

VIII. Neither the Assignment of Contract Agreement ('Assignment Agreement') (clause 5) nor the Exclusive Distribution Agreement ('Distribution Agreement') (clause 15(b)) give the tribunal jurisdiction over the Kanpai dispute.

BLUE ONE CASE

I. Blue Inc. ('Blue') was obligated to deliver 200 cases of Blue One to Red Corp ('Red').

A The purchase and supply agreement concluded between Red and Blue on 26 September 2020 is part of a long-term contract between the parties.

1. Blue and Red have been in a contractual relationship for 10 years. They have concluded the same purchase and supply agreement ('Sales Contract') [Exhibit 6] annually since 2011 [Para 19, Common Facts].
2. The UNIDROIT *Principles of International Commercial Contracts* 2016 ('UNIDROIT Principles')[1] Art. 1.11 defines a 'long-term contract' as one performed 'over a period of time'. The Commentary to article 1.11[2] makes clear that the duration of the contract, an ongoing relationship between the parties, and the complexity of the transaction distinguish a long-term contract from an 'ordinary exchange contract'.
3. The decade-long contract between Red and Blue [Exhibit 6] satisfies these requirements. Complexity of the transaction is not a necessary element where these other two elements are satisfied [UNIDROIT Principles Art. 1.11].
4. This long-term contract comprises the original memo written by Taro Blue [Exhibit 3-2], the annual sales agreements, and the subsequent conduct of the parties which are consistent.
5. The parties have not limited the form of the long-term contract through a merger clause or form requirements.

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[1] Page references to the UNIDROIT Principles 2016 in this Memorandum are to the online version available at: https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf (Accessed 28 October 2021)
[2] UNIDROIT Principles, Comment 3, 30

B Blue breached its obligation to supply Red with 200 cases of Blue One in 2020.

6. Blue and Red agreed that Red would purchase, and Blue would supply, 200 cases of Blue One annually.
7. Party intent can be determined by considering all relevant circumstances, including statements and other conduct of the parties [UNIDROIT Principles 2016Art. 4.3].
    7.1. The quantity, price and commencement terms of the handwritten memorandum became terms of the long-term contract between Red and Blue [Exhibit 3-1; UNIDROIT Principles 2016Art. 2.1.19].
    7.2. The parties' subsequent conduct between 2011 and 2020 has been consistent with these terms [UNIDROIT Principles Art. 4.3(c); Para 20] and confirmed in 2013 when they agreed not to vary the obligation to purchase and supply 200 cases [Exhibit 3-1; Exhibit 3-2]. It was Taro Blue who requested that Red 'keep the agreement' between the parties [Exhibit 3-2] because Blue '[had] been making plans on the premise that we will provide 200 cases to your company every year' [Exhibit 3-2].
    7.3. All shipments of Blue One since 2011 have been a minimum of 200 cases, reflecting the parties' contractual agreement and subsequent conduct [Exhibit 4].
    7.4. Red reasonably relied upon this agreement, Blue's reconfirmation in 2013, [see 7.2 above] and the pattern of annual purchase and supply when it lodged its 2020 order.
    7.5. Blue cannot now act inconsistently with its earlier confirmation that the purchase and supply of 200 cases of Blue One was a core mutual obligation. Red reasonably relied on this, to its detriment [UNIDROIT Principles Art. 1.8].
    7.6. Blue will assert that the quantity to be supplied was varied by agreement. Red disputes this. Red did not acquiesce to a reduced supply of 100 cases. Red accepted the 100 cases offered by Blue in the 26 September 2020 purchase and sale agreement 'for now', and with the understanding that Blue would supply the additional cases [Exhibit 5]. Red expressly rejected Blue's assertion that Blue's obligation was limited to 100 cases. Red's September 28 email [Exhibit 5] clearly stated 'that should not be interpreted as our acceptance of your company'.
8. Blue offered only 100 cases under the 2020 supply contract, knowing that it was unable to fulfil its contractual obligation to deliver an additional 100 cases to Red [Exhibit 5].
9. Therefore, Blue has breached its obligation to deliver 200 cases of Blue One to Red in 2020.

II. Blue was liable for all risks and any loss stemming from the non-delivery of Blue One.

A The parties selected Incoterms® 2020 as their framework for allocating the risks arising from the transport and delivery of Blue One.

10. The annual Sales Contracts recorded Terms of Delivery as 'FOB' or 'Free on Board' terms of the Incoterms® 2020. FOB indicates that 'delivery' to the buyer occurs once the goods have been loaded onboard a vessel.
11. Blue will argue that the FOB term does not apply to the 2020 delivery of Blue One to Red because Red requested a change to the mode of transporting the goods -- from sea to air.
12. The application of FOB is limited to 'sea or inland waterway transport where the parties intend to deliver the goods by placing the goods on board a vessel.'[3] The Incoterms® 2020 make it clear that FOB 'is not appropriate where goods are handed over to the carrier before they are

[3] International Chamber of Commerce, *Incoterms® 2020: ICC Rules for the Use of Domestic and International Trade Terms*, 91.

on board the vessel, for example where goods are handed over to a carrier at a container terminal' and recommend that parties use the Free Carrier ('FCA') rule[4] in that case.

13. Red and Blue failed to amend the terms of the Sales Agreement to take account of transport by air. However, as experienced commercial entities, if they had considered this, they would have chosen FCA: it is the recommended substitute Incoterm for the type of transaction they planned; it is analogous to and the most proximate term to FOB; and is thus a commercially reasonable substitute for FOB.
14. In the absence of express agreement about risk allocation for the 2020 order, it is reasonable that the tribunal infer that FCA terms apply [UNIDROIT Principles Art. 4.8].
15. Under the FCA rule, the seller bears all risks of loss of or damage to the goods until they have been delivered. 'Delivery' is completed either 'when the goods have been loaded on the means of transport provided by the buyer'[5] or 'when the goods are placed at the disposal of the carrier, or another person nominated by the buyer on the seller's means of transport ready for unloading.'[6]
16. Applying the FCA rule, Blue remained liable for the risks and costs of delivery when the container containing the 100 cases of Blue One was handed to a forwarding company and placed in the bonded area of the airport. At this point, there was no 'delivery' to Red.

B Red's acceptance of risk regarding the transport of the goods is limited to the shipment by air.

17. When Red requested shipment of the goods by air in its October 1 email [Exhibit 7], it varied part of the 2020 Sales Contract through writing in confirmation [UNIDROIT Principles Art. 2.1.12]. However, Red did not intend to displace the allocation of risk agreed by the parties in their standard terms [Exhibit 6] for transporting the goods while on the ground. Red's offer to 'bear all costs and risks' [Exhibit 7] related only to the air transport stage of the shipment.
18. The words 'bear all costs and risks' must be interpreted considering the common intention of the parties and other conduct [UNIDROIT Principles Art. 4.1, 4.2]. Red's email of 1 October 2020 [Exhibit 7] dealt solely with the change to the mode of transportation -- from sea to air. So those words should be read 'in light of the whole contract [and] statement in which they appear' [UNIDROIT Principles Art. 4.4]. The change to risk allocation in that email should be construed as applying to the mode of transportation – not to all stages up to delivery.
19. This construction is consistent with the parties' established commercial conduct. Blue was responsible for the goods until they were 'delivered', usually by being loaded onboard a ship. The parties chose this risk allocation by adopting the Incoterms® 2020 [Exhibit 6; UNIDROIT Principles Art. 4.3].
20. For this shipment, Blue and its agents were responsible for the goods at all stages prior to them being loaded onto the aircraft. Red had no knowledge of transport and storage arrangements made by Blue and so could not have reasonably assumed the risk for these.
21. Blue bore the risk for the goods prior to delivery, consistent with Incoterms® 2020 FCA, and so is liable for its failure to deliver those goods to Red.

C Blue cannot rely on *force majeure* as a defence for non-performance.

22. Blue's explanation for the loss of Red's consignment of Blue One was *force majeure* [UNIDROIT Principles 7.1.7], in the form of 'the largest thundercloud in recorded in history' occurring near the airport and a fire caused by 'lightning' striking the bonded area, which

[4] The FCA Rule states 'the seller must deliver the goods to the carrier or another person nominated by the buyer at the named point, if any, at the named place, or procure goods so delivered.' The seller bears all risks of loss or damage to the goods until they have been delivered accordingly.
[5] International Chamber of Commerce, *Incoterms® 2020: ICC Rules for the Use of Domestic and International Trade Terms*, 91.
[6] Ibid, 31.

destroyed the container of Blue One [Exhibit 8; Common facts, para 23].

23. The parties expressly agreed, in clause 10 of the Sales Contract, what kinds of events would constitute *force majeure*. Clause 10 does not list 'thunderclouds' or 'lightning' [Exhibit 6]. Nor is 'thunderstorm' included within the Oxford Dictionary of Law's definition of 'act of God.'[7]
24. Blue may assert that clause 10 is non-exhaustive and includes 'fires' and so the warehouse fire qualifies as a *force majeure* event. 'Fires' should be construed in light of the whole clause in which the word appears [UNIDROIT Principles Art. 4.4]. Clause 10 provides for 'acts of God', 'floods', 'riots' and 'wars': all of these are large-scale, catastrophic events that are materially different from a localised warehouse fire.
25. UNIDROIT Principles Art. 7.1.7 requires that the *force majeure* impediment be beyond the claiming party's control and of a kind that they 'could not reasonably be expected to have taken …into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences'. 'Fire' in its ordinary meaning is a foreseeable, insurable risk when transporting goods.[8]
26. Even if a warehouse fire is interpreted as being within the scope of what the parties agreed, Clause 10 of the Sales Contract requires Blue to 'make diligent efforts to resume its performance despite such force majeure' [Exhibit 6]. Blue made no such efforts: it did not attempt to redirect other orders to Red or manage its inventory to meet its obligations to Red. Blue's bare statement that 'It is impossible for us to deliver' [Exhibit. 8] does not amount to a 'diligent effort'.
    26.1. Blue will assert that it met the requirements of Clause 10 by offering Red 100 cases of Five Famous Châteaux as a replacement for the destroyed cases of Blue One on 9 October 2020 [Exhibit 8]. However, Red's email of 28 September 2020 made it clear that Red did not regard Blue One and Five Famous Châteaux as equivalent [Exhibit 5]. There is no dispute that Blue One is made with 'only the very best quality Cabernet Sauvignon, selected from grapes harvested in the best terroir from Blue's vineyards, and thus difficult to produce in any greater quantity' [Common facts, para 13]. Premium wines are not fungible; their value to the consumer lies in their scarcity and uniqueness.

III. Red is entitled to an award of damages in the amount of USD 2,016,000 (plus interest) resulting from Blue's non-performance.

A Preliminary Matters

27. Red is entitled to recover damages from Blue for losses that flow foreseeably from Blue's non-performance [UNIDROIT Principles 7.4.4]. This includes losses suffered directly (in this case the original purchase price of the goods) and gain of which it has been deprived (in this case lost profits) [Exhibit 16; UNIDROIT Principles Art. 7.4.2].
28. Blue will argue that Red was obliged to mitigate its loss by: (a) accepting the substitute goods offered following the warehouse fire; and (b) accepting the substitute goods offered when Blue failed to fulfil the balance of the initial order for 200 cases of Blue One. We outlined in paragraph 26.1. above why the substitute goods offered were unacceptable. As a practical matter, even if Red had accepted the substitution of 100 cases of Five Famous Chateaux on September 28, those cases would have been destroyed in the same fire. Therefore, the amount payable should not be adjusted for failure to mitigate as no mitigation was realistically possible in the circumstances.
29. Blue is liable only for harm that it could have reasonably foreseen at the time the contract was concluded [UNIDROIT Principles Art. 7.4.4]. Red argues that warehouse fires are foreseeable,

[7] 'act of God' (v7, def 2b), Oxford English Dictionary (2nd ed, 1989)

[8] Stefan Vogenauer (ed) *Commentary on the UNIDROIT Principle of International commercial Contracts (PICC)* (2nd ed)(Oxford, 2015) notes that 'Even if there might be a factual presumption of *force majeure*, these impediments may only qualify as such if they or their consequences are reasonably unavoidable or insurmountable' 871

insurable risks when transporting goods. The standard fire-preventing equipment in the bonded area also suggests the foreseeability of fire. The harm must also be 'likely to result' from non-performance. Red's lost profits flow foreseeably from the non-delivery of a scare premium product for which there is demonstrated demand.

30. Red further claims that interest on these damages is payable by Blue for non-performance of a non-monetary obligation [UNIDROIT Principles Art. 7.4.10] and accrues from the time of non-performance, 7 October 2020 to the date of the arbitral award
31. Article 7.4.10 is silent on the rate of interest and scholarly commentary suggests that this can be determined by the applicable law.[9] The parties have chosen the UNIDROIT Principles as the law of their contract, and Red argues that Art. 7.4.9(2) can be applied analogously to provide a means of calculation.[10] It provides that the rate of interest 'shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment' and if such a rate is not available … the same rate in the State of the currency of payment can be applied [UNIDROIT Principles Art. 7.4.9(2)].
32. Here the payment currency for the Sales Contract, and Red's claim for damages is USD. Absent information on interest rates in Negoland or Arbitria, we base our calculation on commercial lending rates to prime borrowers in the United States. As of September 2020, this was 3.25% per annum.[11]

B Blue owes Red USD 2,016,000 in damages for losses flowing from non-delivery of 200 cases.

33. Red Corp. has suffered a loss in the amount of USD 2,016,000 (plus interest) flowing from non-delivery of 200 cases of Blue One [Exhibit 16; UNIDROIT Principles Art. 7.4.2). That total comprises:

Purchase Amount paid by Red under Sales Contract dated 26 September 2020	USD 120,000
Anticipated lost profit	
From sales of Blue One at restaurants and hotels (USD1,000 USD x 140 cases x 12 bottles)	USD 1,680,000
From sales of Blue One at shops ($300 USD x 60 cases x 12 bottles)	USD 216,000
Total	USD 2,016,000
Interest	3.5% per annum as from 7 October 2020

KANPAI CASE

IV. Red is entitled to terminate the Kurenai Agreement due to Blue's non-performance.

A Blue has failed to comply with the annual sales targets in the Kurenai Agreement.

34. Article 9 of the Kurenai Agreement specifies an annual 10,000 cases sales target.
35. Article 16(4) of the Kurenai Agreement [Exhibit 9] entitles Red to terminate the agreement if Blue fails to meet sales targets for two consecutive years. Blue has failed to meet this sales

[9] Vogenauer, 1019

[10] Eckart Broedermann, *UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary* (Wolters Kluwer, 2018) Chapter 7, 32

[11] Based on the prime rate in the United States as at September 2020, as reported by Wall Street Journal Bank Survey, available at: https://www.bankrate.com/rates/interest-rates/prime-rate.aspx (Accessed 28 October 2021)

target in 2019 and 2020 [Exhibit. 10]. Red is therefore entitled to terminate the Kurenai Agreement with Blue.

36. Blue may argue that its failure to meet sales targets under the Kurenai Agreement is a direct result of the closure of Arbitrian restaurants during a pandemic. However, the closure of Arbitrian restaurants does not affect Red's entitlement to terminate.
37. Article 18 of the Kurenai Agreement provides that the parties are not liable for losses caused by a *force majeure* event [Exhibit 9], but it does not specify that a *force majeure* event prevents either party from terminating the Agreement for non-performance.
38. This is consistent with UNIDROIT Principles Art. 7.1.7 (4) which expressly states that *force majeure* does not prevent a party from terminating a contract.
39. Red is seeking termination of the Kurenai Agreement and not compensation for losses. Accordingly, *force majeure* does not provide a legal basis for Blue's claim that Red be directed to continue selling Kurenai to Blue under the Kurenai Agreement [Exhibit 16].
40. Blue may argue that Red is obligated to renegotiate the Kurenai Agreement because a *force majeure* event has occurred. However, the relevant event here is Arbitrian public health measures that encouraged, but did not require, restaurant closures.
41. Article 18 of the Kurenai Agreement list supervening events such as embargoes, riots, strikes, and other events that make it physically impossible for goods to reach market.
42. The guideline issued by the Arbitrian government encouraged voluntary acts by businesses, rather than being a 'requirement or regulation' of the kind referred to in Article 18. Under this guideline, restaurants had the option to stay open and to sell alcohol; there was no penalty for non-compliance. The only impediment to Blue selling Kurenai was a reduced demand for the product, arising from voluntary restaurant closures. This affected the size of the market and its fluctuating conditions, but neither are within the scope of Article 18.
43. Therefore, no *force majeure* event has occurred.

B Blue's email correspondence in June 2020 does not constitute a request to renegotiate.

44. Blue may argue that the closure of 90% of Arbitrian restaurants during a pandemic could be characterised as a hardship event of the kind that would entitle Blue to request renegotiation of the Kurenai Agreement [UNIDROIT Principles Arts. 6.2.2, 6.2.3].
45. Blue did request Red's permission to make Kurenai sales to individuals [Exhibit 14] but this was not a renegotiation request. This email was seeking consent to a set of actions and invited a 'Yes/No' response. It did not invite substantive discussion of contract alteration.
46. There are no form requirements for a request to renegotiate. However, the Commentary on UNIDROIT Principles Art 6.2.3[12] suggests a co-operative process of problem-solving that attracts the duty of cooperation and fair dealing.
47. Blue's request that Red consent to a set of unilateral actions did not appear to have the cooperative character of renegotiation, nor did contain proposals such as venue, timing, mode of discussion, or details such as revised quantities.
48. The parties' subsequent conduct is also inconsistent with understanding this as a request to renegotiate. When Red responded by accepting the Kanpai proposal in the email, but rejecting the Kurenai proposal, Blue immediately acquiesced: 'We understand your company's policy' [Exhibit14]. Blue did not follow up with a request for further discussion.
49. Blue may assert that Red failed to act in good faith in this exchange, but Red's conduct amounts to considering two one-line proposals in an email. It would be commercially unreasonable to insist that Red cannot exercise its right to terminate for non-performance, on grounds expressly agreed by the parties, because it did not respond affirmatively to a proposal by Blue.

[12] UNIDROIT Principles, Comment 5, 225

C Alternatively, Red's rejection of Blue's proposal to vary the Kurenai contract was reasonable.

50. Blue's request to sell Kurenai to 'retail stores and online shops to individuals' could be viewed as a request to vary the existing Kurenai Agreement.
51. However, the proposal ran counter to Red's product vision and marketing for Kurenai. Article 8 of the Kurenai Agreement restricts Kurenai sales to restaurants or hotels in Arbitria [Exhibit 9]. This was a deliberate inclusion to maintain Kurenai's brand image as a high-end product for special occasions [Common facts, para 28]. Allowing sales to individuals would jeopardize the long-term reputation of the product.
52. A request for renegotiation attracts the duty of cooperation and fair dealing, but Red is not obliged to alter the essence of the contract to benefit Blue. It was, therefore, reasonable for Red to reject this proposal for contract variation.

D A request for renegotiation does not excuse-non-performance.

53. To qualify as hardship, an event must fundamentally alter the equilibrium of the contract. This entitles a party enduring hardship to request a renegotiation of the contract [UNIDROIT Principles Art. 6.2.2]. However, UNIDROIT Principles Art. 6.2.3.1(1) indicates that a request to renegotiate in circumstances of hardship does not excuse non-performance.
54. The Commentary for UNIDROIT Principles article 6.2.2[13] indicates that hardship is only relevant where performance is not yet rendered.
55. Although Blue has experienced difficult market conditions, a claim of hardship cannot prevent termination, because the non-performance has already occurred [Exhibit 10].
56. Therefore, Red's termination is still valid, even if Blue's communication is characterized as a request to renegotiate.

E Red's instruction to focus on Kanpai sales does not permit Blue to breach the Kurenai Agreement.

57. The emails in Exhibit 13 do not evidence an intention by Red to waive Blue's sales target obligations. At no time did Red suggest that Blue could ignore essential terms of the Kurenai Agreement.
58. An exchange between Sapphire and Hiromi Red makes clear that the common intention of the minimum sales targets was to ensure Red's product would have sufficient market penetration to justify the exclusive distributorship agreement [Common facts, para 28].
59. Red's request to Blue on 28 July 2018 was focused on improving poor Kanpai sales. Red accepted the Kurenai sales figures, but the words 'for now' show that the request to 'put energy into Kanpai rather than Kurenai' was aimed at improving Kanpai sales, while not compromising long-term Kurenai sales [Exhibit 13].

F Red validly terminated the Kurenai Agreement.

60. Art. 7.3.2 of the UNIDROIT Principles provides a default position where notice of termination must be made within a reasonable time after the terminating party is aware of non-performance. What constitutes 'a reasonable time' depends on the circumstances.
61. Blue's failure to meet its sales targets (its non-performance) would have been clear at the end of 2020. Red gave notice without undue delay on 10 January 2021 of its intention to terminate effective 31 March 2021 [Exhibit 15].
62. Red provided a formal notice period of almost three months [Exhibit 15], despite the Article 16 of the Kurenai Agreement permitting termination 'at any time' for non-performance [Exhibit 9, A].
63. Red, therefore, terminated the Kurenai agreement with adequate notice to Blue.

[13] UNIDROIT Principles, Comment 4, 221

V. Red is entitled to terminate the Kanpai Agreement due to non-performance.

A The Kanpai Agreement establishes minimum purchase quantities for 2017-2021.

64. Blue's failure to meet the 2019 and 2020 purchase targets set out in clause 9(a) of the Exclusive Distributorship Agreement of Kanpai ('Kanpai Agreement') [Exhibit11] is a breach that entitles Red to terminate the Agreement.
65. Clause 9(a) provides that purchases exceeding the required annual volume may be credited towards 'the subsequent period'. However, this clause must be read as allowing purchase quantities to be carried forward for one year only. This intention is shown in the following ways:
    65.1. Clause 9(a) uses the singular form of 'period'. A plain reading suggests that excess purchases may be credited towards only the following year's requirement.
    65.2. If clause 9(a) is read as allowing excess purchases to be credited in perpetuity, this would defeat the purpose of the agreement, which measures Blue's performance as a distributor through annualised sales, not over the life of the agreement.
    65.3. Such a reading would also be inconsistent with the purpose of the two-year consecutive breach standard in clause 16(4), which references the purchase volumes in clause 9(a).
66. Between 2016-2018, Blue made total purchases in excess of 1000 cases, with no excess generated in the 2018 period. These past excess quantities, however, cannot be carried forward to help meet the 2019 or 2020 purchase targets, for the reasons given above.
67. Blue cannot rely on clause 9(a) to excuse its breach -- the failure to meet its sales targets.

B The 2020 pandemic does not prevent Red from terminating the Kanpai contract.

68. Clause 17 of the Kanpai Agreement excuses breach for non-performance in the case of a *force majeure* event [Exhibit 11].
69. UNIDROIT Principles Art. 7.1.7 provides that *force majeure* events excuse non-performance only where the breaching 'party could not have reasonably overcome or avoided the loss'.
70. Blue cannot rely on clause 17 because it could have overcome losses caused by the pandemic and associated health measures.
    70.1. Unlike the Kurenai Agreement, the Kanpai Agreement has always permitted sales to individuals; the restrictions in clause 2(b) of the Kanpai Agreement are not affected by the relevant voluntary health guidelines in Arbitria [Exhibit 11].
    70.2. Blue could have reoriented their marketing to focus on online sales directly to individuals as a response to the market effects of the health guidelines. When Blue's undertook online marketing in June, its sales figures recovered to 2019 levels by July [Common facts, para 35]. Earlier action by Blue would have overcome subsequent loss.
    70.3. It is reasonable for Blue to modify its sales channels to overcome a *force majeure* event: in *Granuco S.A.L. v. FAO*[14] the Tribunal held that a Claimant could have transferred its animal feed manufacturing plant from Spain to Brazil to overcome EU regulations that made it unviable to continue manufacturing in Spain.
71. Blue's launch of Clear Blue contributed to its losses.
    71.1. Blue's Clear Blue is a competitor to Kanpai. It is not in dispute that the product tastes like Kanpai, and consumers view the products as substitutable [Common facts, para 32].
    71.2. Clear Blue has clearly been tariff-engineered so that it attracts less tax less under Arbitrian law, so increasing its price competitiveness with Kanpai [Common facts, para 32]. The potential for Clear Blue to encroach on the market for Kanpai is clear.

[14] *Granuco S.A.L. v The Food and Agricultural Organization of the United N*ations AA 286, 2009, Permanent Court of Arbitration, Arbitral Award.

71.3. Had Blue not launched Clear Blue, a cheaper substitute for Kanpai, it could have limited the losses resulting from diminished sales of Kanpai.

72. Clause 17 does not vitiate Red's right to terminate the agreement for material breach under Clause 10(b)(iii) of the Kanpai Agreement.

C Blue has no grounds to contest Red's valid termination of the Kanpai Agreement.

VI. The only impediment to Blue's performance was a lack of warehousing space. This is not sufficient for Blue to argue hardship or *force majeure*.

73. Blue is a large beverage company, with an annual turnover nearing USD 1 billion [Exhibit 2].
74. Managing inventory and warehousing space is a core activity of a beverage manufacturer and distributor. Blue accepted responsibility for storing supplies of Kanpai and Kurenai under the respective distribution agreements [Exhibit 9, art. 5(3); Exhibit 11, clause 3(c)].
75. Blue should have reasonably made allowance for additional warehouse space. Given its expertise, it was best placed to do so relative to Red, and it was contractually obliged to do so.

VII. Interim measures reinstating the Kanpai and Kurenai Agreements should not be ordered.

A The requirements for interim measures under the UNCITRAL Arbitration Rules 2010 have not been met.

76. Article 26 of the UNCITRAL Arbitration Rules 2010 ('the UNCITRAL Rules'), entitles Blue to request interim measures to preserve the subject matter of their claims. However, any interim order sought by Blue does not perform this role.
    76.1. Blue's claims in the Kanpai Case concern the reinstatement of agreements that have already been terminated.
    76.2. If the tribunal finds that Red did not properly terminate one or both of these agreements, preservation of the status quo between the parties would require reinstatement of one or both of the agreements, not an interim award.
77. If one or both of the agreements have not been properly terminated, Blue will not suffer harm that cannot be compensated through damages.
    77.1. An interim order under UNCITRAL Rules Art. 26, is only justified when compensation cannot remedy the damage caused to one party, absent the order.
    77.2. If the tribunal's final award finds in favour of Blue, and the Kurenai and Kanpai Agreements are reinstated, the only harm that Blue has suffered between termination of one or both of the Agreements and the final award is lost product sales.
    77.3. This can be compensated by damages at the point of the final award, negating the need for an interim order.
78. The harm to Red resulting from an interim order would outweigh any harm mitigation for Blue.
    78.1. Blue must demonstrate that it will suffer harm that substantially outweighs the harm caused to Red by an interim order [UNCITRAL Rules Art. 17].
    78.2. An interim order reinstating one or both of the Kanpai and Kurenai Agreements would require Red to terminate Exclusive Distributor Agreements with Green. The value of these agreements is significant and exceeds the value of the agreements with Blue. Termination of those agreements would also harm Red's business reputation.
    78.3. The balance of harm rests in Red's favour and no interim order should be made.

B Red is not obliged to continue the Kanpai and Kurenai Agreements to service the Negoland Fair.

79. Blue cannot argue for an interim order providing for the continuation of the Kanpai and Kurenai Agreements based on the prospect of the Negoland Fair.
80. There is no substantive case for reinstatement based on representations in the Common facts, para 38. Nor would such an order satisfy the UNCITRAL Rules Art 26 requirements.
81. Blue may argue that the UNIDROIT Principles Art. 1.8 principle of good faith demands reinstatement of the Kanpai and Kurenai Agreements because a party cannot act inconsistently with an understanding it has induced, when the other party acts in reliance on this understanding to its detriment.
82. No such representation or inducement can be made out from Red's communication to Blue regarding the Negoland Fair [Common facts, para 38]. Red made no representation regarding continuing business to Blue. The exchange in Paragraph 38 related to making additional or alternative supplies of Kurenai and Kanpai available to Blue for the Fair, an event and location that was completely different to the distribution agreements between the parties to that point. Red confirmed receipt of Blue's email and politely indicated that Red 'looked forward to' the Fair. There were no follow up communications or arrangements about quantity or delivery logistics for either product, of the kind that would suggest an ongoing transaction.
83. It was unreasonable for Blue to infer or rely upon a representation of continuing business. What is reasonable depends on the relationship between the parties and the circumstances of their dealings.[UNIDROIT Principles Art. 1.8].[15]
84. Here, such reliance would be unreasonable because: (a) when Blue made its request in November 2020, it had not yet fundamentally breached the Kurenai and Kanpai Agreements and the annualised targets had not yet been crystallized; however (b) Blue knew its own purchase and sales figures at the time in made the request; and (c) when Red terminated the Kanpai and Kurenai Agreements for non-performance, Blue could not reasonably have expected Red to supply them for a new transaction in a new location.
85. In these circumstances, it was commercially reasonable for Red to choose to supply the Fair through a new business partner.

ARBITRATION PROCEDURE

VIII. Neither the Assignment Agreement (clause 5) nor the Kanpai Agreement (clause 15(b)) give the tribunal jurisdiction over the Kanpai dispute.

A. Blue is a third-party, non-signatory to the Assignment Agreement.

86. Clause 5 of the Assignment Agreement [Exhibit 12] requires that any disputes that arise out of, or in relation to, 'this Agreement between both parties' be settled amicably but, in case of failure, to be settled by arbitration.
87. The ordinary meaning of 'this Agreement' in clause 5 would be the Assignment Agreement in which this clause appears.
88. A plain reading of 'Both parties' as they appear in clause 5 would be the two parties to the Assignment Agreement. The preamble to the Assignment Agreement defines 'Parties' as Yellow Corporation ('Yellow') and Red.
    88.1. Blue is not defined as one of the 'Parties' to the Assignment Agreement because the parties to the Agreement (Yellow and Red) did not include Blue.
    88.2. The Assignment Agreement cannot create consent where there was none.
    88.3. Blue is not a party to Agreement and so the operation of clause 5 is limited to disputes between Yellow and Red.
89. As a non-party to the Agreement, Blue cannot enforce clause 5 against Red.

[15] UNIDROIT Principles, Comment 2, 22

B. Even if Blue is able to enforce the agreement to arbitrate, this is limited to disputes arising from the Assignment Agreement.

90. The Assignment Agreement governs the assignment of obligations from Yellow to Red.
91. By contrast, the Kanpai Agreement [Exhibit 11] governs the rights and obligations of the seller and distributor of the Kanpai product.
92. The Kanpai dispute concerns Red's rights as a seller to terminate its distribution agreement (the Kanpai Agreement), not the assignment of obligations from Yellow to Red.
93. Therefore, the Kanpai dispute is not arbitrable under clause 5 because it does not arise out of, or in relation to, the Assignment Agreement.

C. The dispute resolution clause in the Kanpai Agreement (Clause 15(b)) cannot be the basis for arbitrating the Kanpai dispute because it was not validly assigned to Red.

94. Clause 15(b) in the Kanpai Agreement [Exhibit 11] provides that the parties are obligated to resolve disputes 'based on the rules… in the General Business Agreement'.
95. Red is not a party to the General Business Agreement ('the GBA').
96. UNIDROIT Principles Art 1.3 states that once a contract is entered into, it cannot be modified unilaterally. However, if clause 15(b) was assigned to Red as part of the Kanpai Agreement, Yellow and Blue would be able to change its terms without Red's consent by changing the terms of the GBA. This is both contrary to a fundamental principle of bindingness, reflected in Art 1.3 and commercially unreasonable because of the uncertainty it would impose on Red.

D. The obligation to arbitrate has not been validly assigned under the Assignment Agreement because it is governed by the General Business Agreement, not the Kanpai Agreement.

97. Clause 15(b) of the Kanpai Agreement does not create an obligation to resolve disputes by arbitration; it requires disputes to be 'solved based on the rules… in the General Business Agreement' ('the GBA').
98. The 'rules' in the GBA provide that 'any disputes… between Yellow Corporation and Blue Inc… shall be finally settled by arbitration'[Exhibit 11].
99. Clause 15(b) did not create new obligations in the Kanpai Agreement; it merely re-iterates the obligation to arbitrate that arises under the GBA, not the Kanpai Agreement.
100. UNIDROIT Principles Art. 9.3.1 provides that when a contract is assigned, only the 'rights and obligations arising out of [that] contract' are assigned. This is reinforced by clause 2 of the Assignment Agreement, which provides that the 'Assignee…assumes all of Assignor's interests, rights, duties and obligations remaining in the Contract'.
101. The obligation to arbitrate did not 'arise out of' or 'remain' in the Kanpai Agreement, but was created in and remains in, the GBA.
102. Therefore the obligation to arbitrate has not been assigned to Red.

E. The dispute resolution clause in the General Business Agreement has not been incorporated into the Kanpai Agreement by reference.

103. Clause 15(b) of the Kanpai Agreement could be read as an attempt to incorporate the GBA dispute resolution clause [Exhibit 11]. However, there are no clear words evidencing party intention to incorporate the GBA dispute resolution clause (and its reference to arbitration), or pointing to the clause itself, merely a reference to 'rules…in the General Business Agreement'. Absent evidence of express incorporation into the Kanpai Agreement, this argument fails.
104. Consent is foundational for an arbitral tribunal's jurisdiction. This has created the rule, upheld in national courts, that arbitration clauses must be expressly incorporated into contracts with clear words when those arbitration clauses are located in separate documents. This is because a recipient must have knowledge that the referenced document (here, the GBA)

includes an arbitration clause, in order to provide that valid consent.[16] The Kanpai Agreement does not include those clear words.

105. Blue may argue that if the tribunal lacks jurisdiction to proceed with arbitration, based on either clause 5 of the Assignment Agreement or clause 15(b) of the Kanpai Agreement, this leaves Blue without recourse. This is not the case, because Yellow has not discharged its liabilities under the Distribution Agreement.
106. UNIDROIT Principles Art. 9.3.5(2) provides that the other party to an assignment of contract agreement (here, Blue) may consent to the assignment on the basis that they 'retain the assignor [here, Yellow] as an obligor in case the assignee [here, Red] does not perform properly.'
107. It was apparent to Blue at the time of consenting to the Assignment Agreement, that Yellow did not intend to discharge itself from liability under the Kanpai Agreement. Blue may thus pursue its claims and remedies in the Kanpai dispute against Yellow in arbitration.

F. Even if the arbitration clause in the General Business Agreement has been effectively incorporated into the assignment, it is defective and unenforceable.

108. Both Negoland and Arbitria are parties to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention'). Article II(3) of the New York Convention provides that the court of a state party will "refer the parties to arbitration... unless it finds that the said agreement is null and void, inoperative, or incapable of being performed."
109. The arbitration clause in the General Business Agreement (the GBA) is so vague as to be incapable of being performed. It merely records an agreement to arbitrate ('shall be finally settled by arbitration'), without providing any agreement on how (e.g. which rules or institution should govern the arbitration) or where the arbitration should be carried out (e.g. seat of arbitration). A French court, faced with a very similar arbitral clause with a similar lack of detail found it to be defective and thus unenforceable.[17]
110. Red is therefore entitled to challenge the jurisdiction of the tribunal in a national court on the basis of that the clause is completely incapable of being performed.
111. For these reasons, the arbitration clause in the GBA cannot be the basis for the tribunal's jurisdiction, or for arbitrating the Kanpai dispute.

[16] *Thomas & Co Ltd v Portsea Steamship Co Ltd (The Portsmouth*) [1912] AC 1 (Holding that unless there are clear words evidencing the parties' intention to incorporate the external arbitration agreement in a second contract, it cannot be incorporated).

[17] See Decisions of 1 Feb. 1979, T.G.I. Paris, 1980 Rev. Arb. 97 (1980) and 16 Oct. 1979, 1980 Rev. Arb. 101 (1980) where the French court held that a similar arbitral clause, lacking details about the arbitration, was defective: '*In case of a dispute the parties undertake to submit to arbitration* but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction.' (emphasis added)