Table of Contents

BLUE ONE CASE

ISSUE 1: Blue has no legal obligation to deliver 200 cases of Blue One to Red

Blue submits that Blue's legal obligations arise only from the individual annual sales contracts that the parties have signed.

Blue's legal obligations arise only from the annual sales contracts

1. The parties did not intend to enter a legally binding contract in 2010. Blue and Red were simply negotiating when they created the Memo in October of that year [Ex. 3-1]. Only the later individual sales contracts legally bind the parties. The parties should have the intention to be bound by the agreement to conclude the contract [U. 2.1.2, U. 2.1.1. Comment 2]. Blue and Red expressly showed their intention to be legally bound by signing the detailed annual sales contracts beginning in 2011, but did not in 2010 [Ex. 6].
2. There is a sharp contrast between the Memo and the first sales contract in 2011 [Ex. 6]. We submit that these annual sales contracts were sufficiently definite and detailed to indicate the intention of the parties to be bound. These contracts specify terms other than the quantity and price of the goods and clarify the meaning of each term in detail [Ex. 6, 1-12]. Red and Blue have signed such contracts each year since. This expressly demonstrates their intention to be bound.
3. Moreover, the fluctuation in the purchase quantity and the price of Blue One traded over the 9 years of transactions between the parties is significant [Ex. 4]. Red and Blue traded 200 cases for USD 100 per bottle for only the first 3 years. For the next 6 years, the purchase quantity and price varied. This shows that it was the individual annual sales contracts that reflected the parties' actual agreement, not the Memo. Even when the quantity and price for the transactions in 2011, 2012, and 2013 were the same as the Memo, the parties deliberately prepared a separate sales contract. This shows that the individual annual sales contracts supersede the preliminary negotiation in 2010. We submit that this is the case even if the Memo predicted some terms for the first 3 years of the trading relationship.
4. Our argument is strengthened by the fact that Red and Blue had a habitual practice of signing a written contract when they intended to be legally bound. For example, they did this for the exclusive distributorship agreements (EDA) for Kurenai [Ex. 9] and Kanpai [Ex. 11].
5. We further submit that the fact that detailed matters were left in 2010 for subsequent negotiations is consistent with a lack of intention to be bound [Ex. 3-2, ¶4, Ln. 3-5] because the parties had never done business together before and were contemplating trading a considerable amount of an expensive, luxury product. As the parties are sophisticated globally-active corporations, they would have prepared a written contract to specify their rights and duties and reduce the likelihood of disputes if they had intended to be bound in 2010.
6. Our argument is that the 2010 Memo was no more than an agreement to agree. Subsequent events show that this is the case. Specifically, in 2013, Red asked Blue to limit the number of cases

traded to 100. This is a quantity below the purchase quantity stated in the Memo [Ex. 3-1]. This clearly shows that the parties did not intend to fix the purchase quantity in 2010.

ISSUE 2: Blue is not liable for non-performance of Blue's obligation relating to delivering 100 cases of Blue One under the sales contract dated September 26, 2019

Blue submits that:

A. Blue has fulfilled its contractual obligations relating to delivering 100 cases of Blue One to Red.

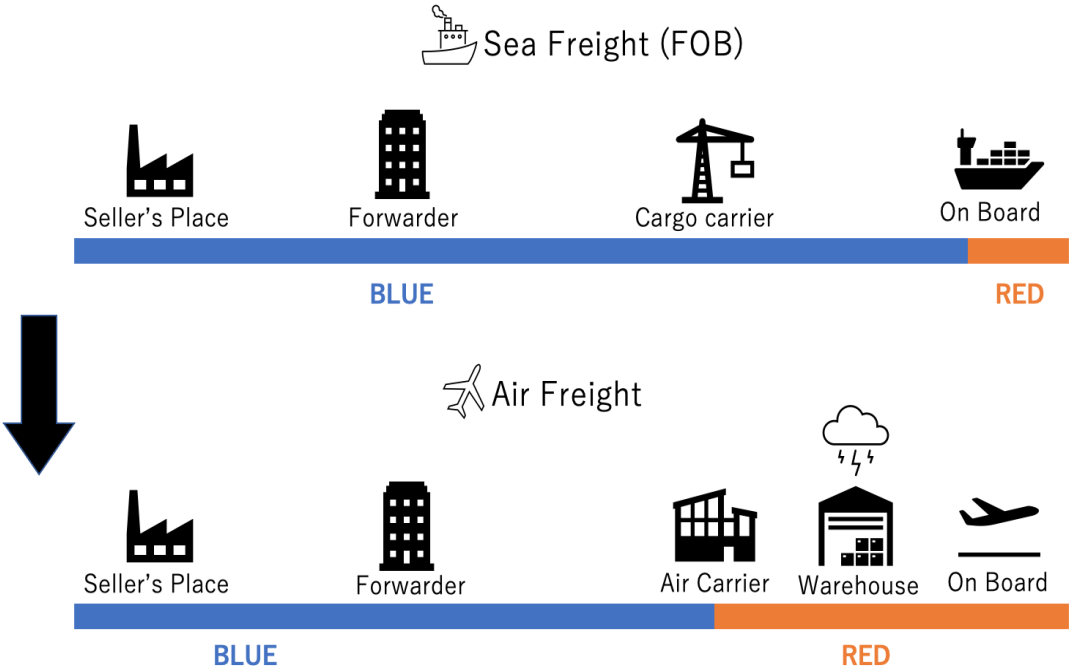
B. Even if Blue did not fulfill its contractual obligation relating to delivery, Blue is not liable for its non-performance since the force majeure doctrine applies the loss of the wine.

A. Blue has fulfilled its contractual obligations relating to delivering 100 cases of Blue One to Red

7. We know that the parties were in the habit of agreeing that the INCOTERMS would govern their contracts. The 2020 contract was substantially the same as the sales contract in 2010. According to the International Chamber of Commerce (ICC) Guide to INCOTERMS 2010, INCOTERMS rules determine the point in the shipping process where the risk of loss transfers from seller to buyer, and the seller's obligations are complete.

   The parties initially adopted Free on Board shipping terms (FOB), which are INCOTERMS, as the wine was to be transported by ship on September 26, 2020. However, Red asked Blue to change the shipping arrangements at short notice because Red delayed the order and Blue agreed on October 3. Red promised to "bear all costs and risks" in order to convince Blue to accept the change. Blue accepted this offer [Ex. 7]. Accordingly, the parties modified the shipping terms by mutual agreement [U. 1.3].

8. We submit that the risk of loss was transferred from Blue to Red when Blue's forwarding company handed the goods to the air carrier on October 7 and Blue fulfilled its obligation at that point. "All of the Incoterms rules are based on the same principle that the risk of loss of or damage to the goods is transferred from the seller to the buyer when the seller has fulfilled his delivery obligation." [ICC Guide to Incoterms 2010]. It is clear that Red's offer was to take on additional responsibility for risk to induce Blue to firstly accept the changes Red wanted to make and secondly go to the trouble of arranging an air carrier at short notice. This shows that the risk was passed from Blue to Red when the goods were handed over the air carrier. Therefore, Blue has already performed its obligation at this point.



B. Even if the risk did not shift from Blue to Red, Blue is not liable for its non-performance because force majeure doctrine applies

9. The parties agreed that the force majeure doctrine applies to the 2020 contract. Clause 10 provides three conditions as follows [Ex. 6].

"*Neither party shall be responsible for any failure to fulfill its obligations hereunder*

(a) due to causes beyond its reasonable control ...provided that

(b) it gives prompt notice to the other of its invocation of this provision and

(c) makes diligent efforts to resume its performance despite such force majeure".

10. We submit that Blue has fulfilled all three of these conditions, and is not liable for its non-performance.

Condition (a): First, the loss of Blue One occurred due to "the largest thundercloud in recorded history", which occurred near the airport. This was unforeseeable and "beyond [Blue's] reasonable control" [¶23]. In addition, the fire which then burned down the Blue One container in the bonded area was also "beyond [Blue's] reasonable control". Blue could not have been reasonably expected to do more to prevent the fire. Blue shipped Blue One by an airport well equipped with standard equipment [¶23].

Condition (b): Second, Blue gave "prompt notice" to Red, "the other of its invocation of this provision". Blue notified Red on October 8, 2020 [Ex. 8] that the fire caused by lightning had destroyed the goods on October 7, 2020 [¶23]. Therefore, this notice within 24 hours was "prompt".

Condition (c): Blue made "diligent efforts to resume its performance". Red was not entitled to the remaining stock of Blue One in Blue's warehouse. Blue had already specified the cases of Blue One allocated to Red when it was selected and loaded for the shipment for Red

from Blue's warehouse. It would be contrary to public policy and threaten the stability of international commerce if Red were able to ask Blue to breach its contracts with third parties and deliver their cases to Red. The remaining cases in the warehouse were already secured for other customers when Blue received an order from Red on September 18, 2020 [Ex. 5]. Further, Blue already knew that Blue's other customers would not share the cases of this rare wine already allocated to them. Blue had already asked its other customers if they would spare some cases from their allocation on September 29, 2020.

Moreover, it was no longer possible for Blue to resume its obligation to deliver the 100 cases of Blue One allocated to Red, since the goods were completely lost. Nonetheless, Blue made efforts to minimize Red's loss by volunteering to deliver 100 cases of the second label of five famous châteaux at a discount. We submit that, in doing so, Blue offered Red a creative solution that went beyond the required "diligent efforts". However, Red rejected Blue's offer. We submit that while Blue's "diligent efforts" were not successful, this was solely due to Red's lack of cooperation.

ISSUE 3: Even if Blue is liable for non-performance of an obligation to deliver either 200 cases or 100 cases of Blue One, Blue is entitled to reduce the damages to be paid to Red

Blue submits that:

A Blue may reduce the amount of damages by USD 1,200,000 because Red did not take reasonable steps to mitigate the harm and that harm could have been avoided if Red had done so.

B Red should not recover the cost of the 100 cases destroyed on October 7 if Blue is not liable for the non-performance concerning this shipment.

C In all cases, the total amount to be paid by Blue is substantially reduced.

A. Blue may reduce the amount of damages by USD 1,200,000 because Red did not take reasonable steps to mitigate the harm

11. U. 7.4.8 states that the non-performing party is not liable for the harm which the aggrieved party could have reduced by taking reasonable steps. The Official Comment on U.7.4.8 explains that the aggrieved party is required to mitigate the harm (a) because the harm should be as limited as possible from the economic standpoint, (b) as long as the steps do not take too much time and costs. Blue may reduce the damages to the extent that Red could have mitigated the harm.

Comment (a): It is clear from this UNIDROIT provision that Red had a duty to accept Blue's offer. Red agrees that it would have earned the same amount of profit from the substitute wine as from Blue One [Ex. 16, Note]. When it was clearly impossible to receive Blue One, Red knew that Red would suffer monetary harm if it took no steps to avoid this. Accordingly, it is appropriate for Red's damage to be reduced.

Comment (b): It would not have been time-consuming or costly for Red to accept Blue's offer and sell 100 cases of the second label wines from five famous châteaux. Red could have sold those wines as easily as it could have sold Blue One. It had dealt with wines from these chateaux before [Ex. 8]. Red agrees that Blue's offer would have covered the whole profit from selling 100 cases of Blue One [Ex. 16, Note]. Moreover, Blue offered to sell the substitute wines at a discounted price even though Blue had expected that their prices would be about 50% higher than Blue One [Ex. 5]. Blue's offer was not onerous as a reasonable step for Red to take to mitigate Red's harm.

B. Red should not recover the cost of the 100 cases destroyed on October 7 if Blue is not liable for the non-performance concerning this shipment

12. If the seller, Blue, is not liable for the loss of goods, the buyer, Red, may not refuse to pay the purchase price [ICC Guide to INCOTERMS®2010, p. 206].

13. Blue will not be obliged to refund the purchase price of goods to Red if the arbitral tribunal rules that the loss of 100 cases of Blue One on October 7 was caused by a force majeure event.

C. In all cases, the total amount to be paid by Blue is substantially reduced.

Unit: USD

Liability for 100 cases not supplied	Liable for 100 cases not delivered	Liable for 100 cases not delivered	NOT liable for 100 cases not delivered	NOT liable for 200 cases not delivered
Liability for 100 cases destroyed	Liable for 100 cases destroyed	NOT liable for 100 cases destroyed	Liable for 100 cases destroyed	NOT liable for 100 cases destroyed
Total liability	200 cases	100 cases	100 cases	No liability
Refund of purchase price	120, 000	0	120,000	0
Damages for lost profit	1,896,000	1,200,000	1,200,000	0
Harm not mitigated	-1,200,000	-1,200,000	-1,200,000	0
Total	816,000	0	120,000	0

KANPAI CASE

ISSUE 1: Red is not entitled to terminate the exclusive distributorship/distribution agreements (EDA) for Kurenai and Kanpai

Blue submits:

Ⅰ. Red may not validly terminate the EDA for Kurenai.

A. Red's termination would frustrate the purpose of the force majeure provision in the EDA.

B. Red cannot rely on non-performance that Red caused as grounds for terminating the EDA.

Ⅱ. Red may not validly terminate the EDA for Kanpai.

A. Red may not invoke the termination clause because the minimum purchase requirement was, on the facts, met in 2019 due to the carry-over clause.

B. Even if Blue did not meet the minimum purchase requirement in 2019, the force majeure doctrine prevents Red from exercising the termination clause.

Ⅰ. Red may not validly terminate the EDA for Kurenai

A. Red's termination would frustrate the purpose of the force majeure provision in the EDA

14. The Kurenai EDA Art. 16 [Ex. 9] states, "Seller may terminate this Agreement… if (4) Distributor fails to meet the minimum sales written in Article 9". Red and Blue agreed on this provision to underscore Blue's contractual obligation to sell Kurenai as the exclusive distributor in Arbitria [¶28].

15. The Kurenai EDA Art. 18 [Ex. 9] states, "The other party shall not be liable for any failures to perform resulting from causes beyond the control of either party... including requirements or regulations of any government". In this case, the market shrank dramatically due to an unforeseeable force majeure event, described in Exhibit 9 Article 18. Red's attempt to terminate would frustrate the purpose of article 16, which was to protect both parties from these kinds of events.

16. The unforeseeable force majeure event was in 2020, when due to the COVID-19 pandemic, the Arbitrian government asked restaurants to stop serving alcohol and offered a financial incentive to comply [¶33]. Blue had been selling Kurenai only at restaurants at Red's insistence. This Kurenai market shrank dramatically since 90% of Blue's customers who had previously sold Kurenai complied with the governmental request. This governmental request continued intermittently for 9 months in total in 2020 [¶34]. This is a force majeure event that could not have been controlled either by Red or Blue. This meant it was impossible to sell 10,000 cases in the year 2020. Blue would have had to sell an entire year's quota within around 3 months.

B. Red cannot rely on non-performance that Red caused as grounds for terminating the EDA

17. According to U. 7.1.2, "*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*". In this case, Red intervened and contributed to Blue's non-performance.

18. Specifically, in 2020, Blue proposed expanding the market for Kurenai to retail stores and online shops to counter the sharp decline in the restaurant sales of Kurenai. This was the only way for Blue to meet the minimum sales target [¶34]. However, Red rejected this proposal [Ex. 14]. This intervention by Red means that Red may not terminate the contract based on Blue's non-performance [U. 7.1.2 Comment].

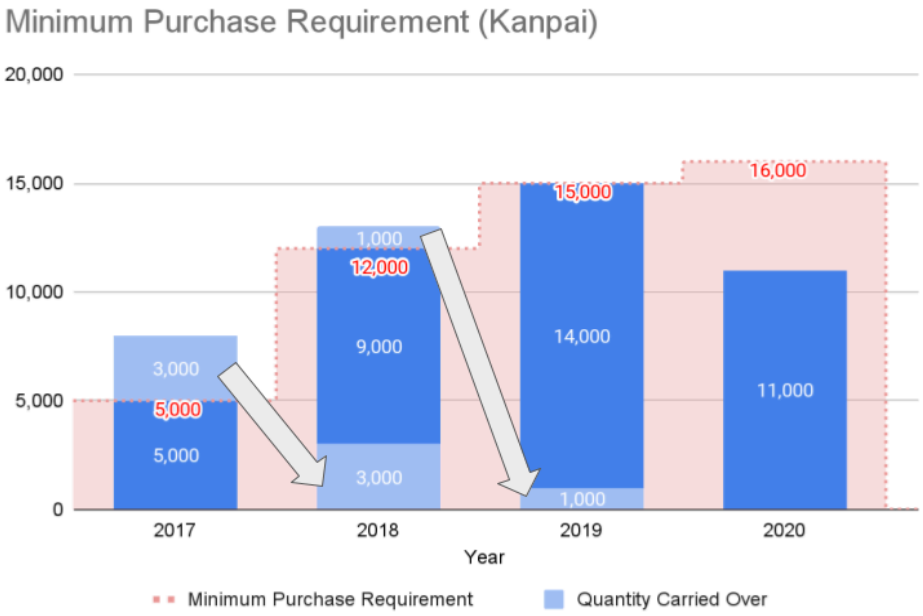
Ⅱ Red may not validly terminate the EDA for Kanpai

A. Red may not invoke the termination clause because the minimum purchase requirement was, on the facts, met in 2019 due to the carry-over clause

19. According to the termination conditions in the Kanpai EDA, "*This Agreement may be terminated by either Party… in the event of the Material Breach by the other Party. 'Material Breach' shall include:… (iii) Distributors failure to meet the minimum annual purchase quantities agreed for two (2) consecutive years*" [Ex. 11 cl.10(b)]. Blue did not fail to meet the minimum annual purchase quantity for two consecutive years because Blue achieved the requirement in 2019 based on the operation of the carry-over clause explained below.

20. Exhibit 11 clause 9 (a) states that in case of excess of the minimum purchase requirement, it "shall be credited towards the minimum purchase requirements for the subsequent period". Both parties agreed that, when Blue's purchases of Kanpai exceed the minimum requirement, the excess should be carried over to the next year. Our graph below shows that due to the carry-over provisions, Blue met the minimum purchase requirement in 2019.

    Specifically, Blue purchased 8,000 cases in 2017 and credited the excess of 3,000 cases toward the minimum purchase requirement in 2018. Blue purchased 10,000 cases in total in 2018 and 1,000 cases were credited towards 2019. In 2019, Blue purchased 14,000 cases and met the requirements to buy 15,000 cases due to the 1,000 cases allocated from 2018 [Ex. 10]. Accordingly, Blue met the minimum requirement in 2019 and did not fail to meet the requirements for 2 consecutive years.



B. Even if Blue did not meet the minimum purchase requirement for consecutive 2 years, the force majeure doctrine prevents Red from exercising the termination clause

21. According to Kanpai EDA clause 17 [Ex. 11], no party will be responsible for failure or delay in performing its obligations under the following three conditions; such failure or delay was caused by force majeure events, there was no fault or negligence of the party, and the party notified the inability to the other party immediately.

22. The local outbreak of COVID-19 led to the Arbitrian governmental request and 90% of the restaurants refraining from serving alcohol [¶33-36]. These three events all connect to the overarching phenomenon which is the pandemic. The force majeure clause in the Kanpai EDA specifically mentions pandemics as a possible force majeure event. 50% of Kanpai had been sold to restaurants, so the market shrank dramatically due to force majeure events [Ex. 14]. Moreover, Blue could not buy Kanpai just to meet the requirement considering that the shelf life of Kanpai is only about 6 months.

23. Therefore, Blue failed to meet the purchase requirement in 2020, because of the force majeure event.

24. Blue was neither at fault nor negligent. Blue made its best efforts to sell Kanpai, despite the slowdown in the food service industry [¶35]. In addition, Blue actively worked on sales to individuals resulting in catching up the sales amount in 2019 as early as from the beginning of the second governmental request [¶35].

25. Further, Blue immediately notified Red of the governmental request each time the request was made [¶33]. Even if Blue did not meet the minimum purchase requirement in 2020, Blue fulfilled conditions for the force majeure doctrine to apply. Accordingly, we submit that Red may not terminate the contract relying on Blue's non-performance as material breach.

ISSUE 2: The interim measures sought by Blue should be accepted

Blue submits that the interim measures regarding Kurenai and Kanpai should be granted, so that Red stops selling Kurenai to Green.

The interim measures regarding Kurenai and Kanpai should be granted, so that Red stops selling Kurenai to Green

26. The Kurenai EDA states that "disputes or controversies shall be finally settled in Tokyo by arbitration in accordance with UNCITRAL Arbitration Rules" [Ex. 9 Art. 21]. Therefore, it is clear that the UNCITRAL Arbitration Rules should be applied in this case. We argue that these rules should also apply to the Kanpai EDA. Our reasoning is available below from paragraph 48 to 52.

27. According to UNCITRAL Arbitration Rules Article 26[2], an interim measure "*is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example… : (a) Maintain or restore the status quo pending determination of the dispute*".

28. In this case, Blue aims to restore the status quo under the Kanpai and Kurenai EDAs as between Blue and Red, during the dispute. Therefore Article 26[2](a) is fulfilled.

29. Article 26[3] provides three conditions that must be met by parties requesting interim measures. These are that:

- "Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered"
- "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"
- "There is a reasonable possibility that the requesting party will succeed on the merits of the claim"

Condition 1: Harm that is not adequately reparable by a damages award is likely to result if the measure is not ordered

30. If the Panel does not grant the interim measures, then even if Blue is successful in the Kanpai Case, Blue would not be able to sell Kurenai and Kanpai until the conclusion of this hearing. If the arbitration continues for 6 months, Blue will suffer considerable harm from lost profits from Kurenai and Kanpai. From January to March 2021, Blue sold 3,000 cases of Kurenai and 4,000 cases of Kanpai in 3 months. This suggests that Blue would be able to sell 6,000 cases of Kurenai and 8,000 cases of Kanpai in 6 months. Losing this opportunity to make these sales would lead to lost profits of up to USD 6,200,000 (500 × 6,000 + 400 × 8,000). Moreover, Blue was planning to sell at least 1,000 cases each of Kurenai and Kanpai at the upcoming Negoland Fair [¶38]. The lost profit from this event would amount to 900,000 USD (500 × 1,000 + 400 × 1,000). As a total, the lost profit amounts to 7,100,000 USD, which accounts for 35% of Blue's 2020 operation profit. Considering the fact that Blue suffered severe damage from the COVID-19 pandemic and the

current net income in 2020 was 0, the lost profit is not adequately reparable. This is because Blue would face the financial crisis before an award of damages.

31. Without the interim measures, Blue would also lose the opportunity to expand its brand image at the Negoland Fair. There would not be a similar opportunity in the near future, considering that it is the 100th anniversary for the relationship between Negoland and Arbitria.

Condition 2: 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

32. Red's harm is extremely limited compared to that potentially suffered by Blue shown above. The damage that Red would suffer is only the loss of trust from Green or a claim for compensation by Green.
33. Even if the interim measure is granted, Red can still sell Red's products to Blue. Moreover, Blue is the largest beverage company in Arbitria and would purchase the products at the same price that Green had offered to Red.

Condition 3: There is a reasonable possibility that the requesting party will succeed on the merits of the claim

34. In defining the meaning of reasonable possibility, "The UNCITRAL Arbitration Rules A COMMENTARY [Oxford Commentaries on International Law]" provides a measure to assess this requirement. It quoted the comment from the tribunal in Paushok, "the Tribunal need not go beyond whether a reasonable case has been made which if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal".
35. Blue's arguments on Issue 1 in the Kanpai Case relies on a logical understanding of the given facts and not "frivolous", nor "obviously outside the competence of the Tribunal". Therefore, Blue fulfills this condition.

ISSUE 3: The arbitral tribunal has jurisdiction over disputes related to Kanpai

Blue submits that the arbitral tribunal has jurisdiction over disputes related to Kanpai.

Red and Blue are bound by the Kanpai EDA [Ex. 11] and therefore, the arbitral tribunal has jurisdiction over disputes regarding Kanpai

36. The arbitration agreement between Yellow and Blue has been transferred to Red and Blue.
37. The Assignment of Contract [Ex. 12] transfers the Kanpai EDA [Ex. 11] concluded between Yellow and Blue to Red and Blue.
38. The Assignment of Contract clause 2 states that, "Assignee [Red] agrees to comply with all the terms, make all payments, and perform all conditions and covenants in the Contract as if Assignee

were an original party therein"[Ex. 12]. “The Contract” mentioned here refers to the Kanpai EDA [Ex. 11].

39. The Kanpai EDA contains an arbitration clause which states that “disputes or controversies shall be solved based on the rules on dispute resolution in the General Business Agreement” [Ex. 11 cl.15(b)]. The General Business Agreement provides that “disputes or controversies shall be finally settled by arbitration”. Therefore, the arbitration agreement was transferred to Red and Blue when the Kanpai EDA was assigned to the parties because the arbitration agreement is contained in the Kanpai EDA.
40. Even if Red had not expressed its consent to the transfer of the arbitration agreement within the General Business Agreement, the arbitration agreement between Red and Blue would still be valid. This is because the identities of Yellow and Blue were not a determining factor in signing the original arbitration agreement. Therefore, the arbitral tribunal has jurisdiction over disputes related to the Kanpai EDA.