BLUE ONE CASE

STATEMENT OF FACTS

1. **Red Corp. "Claimant"** is a restaurant, hotel, beverage, and shop business incorporated under Negoland's law. **Blue Inc. "Respondent"** is a beverage producer and distributor incorporated under Arbitria's law. Claimant and Respondent shall be referred to collectively as **"Parties."**

2. **October 2010,** Hiromi Red, the president of Red Corp, and Taro Blue, the president of Blue Inc, met to discuss a business deal by which Red Corp. would import Blue Inc's very best wine **"Blue One"** and distribute it in Red Corp.'s restaurants, hotels, and shops. Taro Blue gave Hiromi Red a handwritten note indicating that Blue Inc. will provide 200 cases of Blue One annually. (exhibit 3-1) This note was intended to be a memorandum of understanding (MOU) and not a legally binding document because the Parties entered into formal contracts later on.

3. **Every year from 2011** onwards, Claimant imported Blue One along with second and third label wines from Respondent. The quantity and price of the wines differed each year.

4. **In 2020,** Claimant offered to purchase 200 cases of Blue One. Unfortunately, Respondent replied that it could only sell 100 cases that year due to the high demands of Blue One. It is a normal business practice to sell the goods to those who offer the highest price. However, Respondent decided to still sell 100 cases of Blue One to Claimant due to the long-established relationship between the Parties.

5. **September 26 2020,** Claimant and Respondent entered into a sale contract for 100 cases of Blue One. **"2020 Sales Contract"** (exhibit 6) The mode of delivery was sea freight, and the term FOB from Incoterms 2020 applied. However, Claimant informed Respondent by email dated October 1 2020, to deliver Blue One by air instead to save time. (exhibit 7)

6. **October 6 2020,** Respondent handed over 100 cases of Blue One to a forwarding company to be handed over to the air carrier as instructed. The next day when the container was being loaded onto the airplane, the largest thundercloud occurred, and the lightning struck the bounded area where the container was located, causing a fire that completely burned the container. Both Parties did not have insurance to cover the loss.

7. **March 2021**, Claimant filed a petition for arbitration proceedings claiming damages caused by the non-delivery of 200 cases of Blue One despite the fact that the obligation of Respondent under 2020 Sales Contract was only 100 cases and Respondent already performed such obligation by handing 100 cases of Blue One to the air carrier as instructed by Claimant.

8. The substantive governing law is UNIDROIT Principles of International Commercial Contracts (2016) **"UNIDROIT Principles"** The law governing arbitration proceedings is UNCITRAL Arbitration Rules **"UNCITRAL Rules."**

SUMMARY OF ARGUMENTS

1. Respondent does not have an obligation to sell 200 cases of Blue One to Claimant annually because there was no legally binding contract as the written memo had no legal status. Even if the Tribunal decides that Respondent had an obligation to sell 200 cases annually, such obligation was modified by the agreement of the Parties reflected in the subsequent contracts.

2. Respondent is not liable for the loss of 100 cases of Blue One because there was no non-performance since Respondent already performed its obligation under the 2020 Sales Contract. Even if the Tribunal decides that there was a non-performance, such non-performance is excused because it was caused by force majeure.

3. Respondent is not liable for any damages and restitution claimed by Claimant. In the event that the Tribunal finds that Respondent is liable for the loss of 100 cases of Blue One (quod non), the payable amount shall be 948,000 USD. In the event that the Tribunal finds that Respondent is liable for the 200 cases of Blue One (quod non), the payable amount shall be 1,896,000 USD.

ARGUMENTS

ISSUE 1: RESPONDENT DOES NOT HAVE AN OBLIGATION TO SELL 200 CASES OF BLUE ONE TO CLAIMANT ANNUALLY

A. The written memo had no legal status

9. To determine whether the Parties had intended to be bound legally by the written memo, Article 4.2 of the UNIDROIT Principles applies. Setting out that statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could have been unaware of that intention. If the party's intention cannot be found, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

10. In this case, the Parties' conduct can be interpreted that the written note was not a contract, but it was a memorandum of understanding of sorts. The fact to support this claim is that subsequent to the negotiation and handing over the written note, the Parties entered into formal contracts. Had they intended to be bound legally by the written memo, they would not have made a formal legal document later on.

11. Not to mention the fact that the subsequent contracts did not state the word "annually". Hence, this can be interpreted as the Parties' intention to bound for only the period written in each year's contract. Furthermore, the quantity and prices differed annually. These circumstances all contribute to the intention of the Parties to be bound by the yearly contracts and not the written memo.

12. Even though in 2013 Taro Blue informed Hiromi Red to keep the promise to purchase 200 cases of Blue One[1], it was a business negotiation that was normal and reasonable for businesses to benefit mutually and did not rely on the (non-existent) obligation in the written memo.

B. Even if there was an obligation to sell 200 cases of Blue One annually, such obligation was already modified by the agreement of the Parties

13. Once there is a valid contract, parties must be bound by such contract according to Article 1.3 of the UNIDROIT Principles and a fundamental legal principle *pacta sunt servanda.* However, a contract may be modified whenever the parties so agree. In this case, the Parties agreed to modify the obligation to sell 200 cases of Blue One under the written memo by agreeing in the subsequent annual contracts to sell Blue One at quantity and prices deviated from what was specified in the written memo.

[1] Moot Problem p.18 Exhibit 3-1

14. If the written memo was deemed to constitute a contract, it would create an obligation binding Respondent to "sell 200 cases of Blue One at the price of 100 USD per bottle annually"[2] However, purchase records show that the price and quantity of Blue One varied throughout the years. The purchase quantity in 2014 and 2016 was different from the quantity agreed in the written memo, not to mention the price was not 100 USD since 2015. This means that the Parties agreed to modify the obligation fixing the quantity and price; hence, the original obligations under the written memo no longer stand. The modification by agreement of both Parties confirms that the intention of the Parties went from "200 cases annually for 100 USD per bottle" to "sell annually, but the quantity and price will be further discussed."

15. In addition, even though Claimant raised a claim that the subsequent contracts did not alter the obligation to sell 200 cases of Blue One because the Parties always maintained the quantity to be 200 or above, such a claim would be irrelevant. There is nowhere in the written memo that states to sell a "minimum" of 200 cases of Blue One. Furthermore, even all relevant circumstances are taken into account to interpret the Parties' intention according to Article 4.2 and 4.3 of the UNIDROIT Principles, nowhere in the Parties' negotiation and communications mentioned setting 200 cases as the minimum quantity of sales but rather a fixed amount.

C. The quantity specified in the 2020 Sales Contract was 100 cases and not 200 cases

16. Article 4.1 of the UNIDROIT Principles, the contract shall be interpreted according to the common intention of the Parties (i.e. subjective approach.) If such common intention cannot be established, the intention shall be interpreted according to a reasonable person of the same kind as the Parties. (i.e. objective approach)

17. From a subjective interpretation point of view under Article 4.1 (1), The 2020 Sales Contract clearly stipulates that Respondent has an obligation to sell only 100 cases of Blue One. Had Claimant really wished to enter into a sales contract for 200 cases, it could have specified the quantity as 200 and requested Respondent to deliver 100 cases first to prevent any delay. This shows the Parties' common intention to enter into a sales contract for 100 cases of Blue One.

18. It is true that Article 4.3 of the UNIDROIT Principles states that the interpretation of the contract must consider all relevant circumstances such as preliminary negotiations between parties and the subsequent conducts of the parties, the fact which the Claimant argued that Claimant made it clear of which Respondent still had an obligation to deliver an additional 100 cases of Blue One in the email dated October 11 2020[3], such a claim would be irrelevant. Being a unilateral request, it cannot be interpreted as an agreement but merely an offer to modify the 2020 sales contract. However, the Respondent never explicitly and implicitly accepted such an offer. Therefore, the obligation to sell 100 cases of Blue One stood firm and was not modified by the Claimant's email or other conduct.

19. Not to mention the interpretation from an objective point of view according to Article 4.1 (2), a reasonable person of the same kind and circumstances as the Parties would also interpret the 2020 Sales Contract to be binding for 100 cases of Blue One and not 200 cases. A major, long-established business with professional legal personnel like Claimant would not have been unaware that the key elements of a sales contract such as quantity and price must be specifically included in the contract to be legally binding. Signing a sales contract containing the term specifying quantity as 100 cases means that Claimant agreed to be bound by such quantity and nothing more. This shows the Parties' intention to enter into a sales contract for 100 cases of Blue One based on a reasonable person standard under Article 4.1 (2) of the UNIDROIT Principles.

ISSUE 2: RESPONDENT IS NOT LIABLE FOR THE LOSS OF THE 100 CASES OF BLUE ONE

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[2] Moot Problem p.19 Exhibit 3-1

[3] Moot Problem p.23 Exhibit 5

20. Under the 2020 Sales Contract, Respondent had an obligation to deliver 100 cases of Blue One to Claimant. Unfortunately, the 100 cases of Blue One were entirely burnt during the loading process at the bonded area caused by lightning. Contrary to Claimant's allegation, Respondent is not liable for the loss of 100 cases of Blue One due to the following arguments.

A. Respondent has performed its obligation under the 2020 Sales Contract.

21. Under Article 5.1.1 of the UNIDROIT Principles, the contractual obligations of the parties may be expressed or implied, and Article 5.1.2 determines that the performance may be the duty to achieve the specific result. In this case, the Parties expressly agreed to enter into a sales contract of 100 cases of Blue One[4] and to deliver them via Air flight 200 on October 7 2020.[5] Delivering the 100 cases of Blue One is the specific result which the Respondent shall fulfil.

22. On October 7 2020, Respondent delivered 100 cases of Blue One by handing them to the forwarding company as obligated. Therefore, Respondent has already performed its obligations under the 2020 Sales Contract, and there was no non-performance. As a result, Respondent is not liable for the lost 100 cases of Blue One.

23. Even though Article 4.1 and 4.3 of the UNIDROIT Principles states that the interpretation of the contract (including contractual obligations) must consider all relevant circumstances such as preliminary negotiations between parties and the subsequent conducts of the parties, Claimant's email dated October 11, 2020, stating that Respondent still had an obligation to deliver the remaining 100 cases is not relevant. Such a statement was unilaterally declared by the Claimant and was never agreed by Respondent. Therefore, it should not be taken into consideration when interpreting Respondent's obligation under the 2020 Sales Contract.

B. The risk was borne by Claimant

24. According to the 2020 Sales Contract, the Parties have agreed to use the Free on Board (FOB) INCOTERMS 2020 as a term of delivery of the 100 cases of Blue One. However, subsequent to the conclusion of the Contract, Claimant instructed Respondent to change the mode of delivery to the aircraft carrier to reduce time. This results in an inapplicability of the FOB term in the Sales Contract as the term FOB can be applied only to the water transfer method.[6]

25. In the event that the INCOTERM is not applicable, the issue of risk transfer must be analyzed based on UNIDROIT Principles as the governing law of the sales contract. Article 4.2 states that the intention of the parties may be interpreted through the statements and any other conduct of the parties in certain circumstances. Also, Article 4.3 determines the conduct which can be interpreted to find the intention of the parties, such as the preliminary negotiation between parties, practices, conduct after the conclusion of the contract.

26. In this case, when Claimant informed Respondent to change the mode of delivery, Claimant also specified that it shall bear all the costs and risks[7]. The term "all the costs and risks" was not explicitly defined; however, after the email, Claimant also paid all the expenses incurred after the change of plan. These conducts show the clear intention of the Parties that Claimant will bear the responsibility of all the costs and risks arising from the change in the mode of delivery. According to the fact, the loss occurred at the bonded area where the goods were to be loaded. Had the Parties used the sea cargo as originally agreed, this incident would not have happened. Thus, this loss resulted from the switching mode of delivery, and the risk was borne by Claimant. Respondents shall not be liable for the lost 100 cases of Blue One.

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[4] Moot Problem P.26 Exhibit 6

[5] Moot Problem P.28 Exhibit 7

[6] Manal Bensafi, Rontavian Mack, Nadine Nassef, Paisley Simonnet, University of Montpellier, Centre du Droit de l'Entreprise, Program of Master 2 "Droit du Commerce International, , published January 31,2017 [online] Available at: Https://www.acc.com/resource-library/incoterms-too-simple

[7] Moot Problem P.28 Exhibit 7

27. Where the Tribunal considers that Incoterms 2020 is applicable, the Incoterms FCA should be applied, not FOB. Intention can be derived from the conduct between parties under Article 4.3. The Claimant offered to bear all the costs and risks, and the Respondent accepted it. It refers to the EXW Incoterm, where the buyer is responsible for the cost and risk at the moment the goods leave the buyer's premises. Nonetheless, the fact also shows that the Respondent had arranged the aircraft and forwarding company[8]. The entire facts are interpreted at the Parties' intention to apply incoterm FCA in which the Respondent shall have a duty to arrange and hand the goods to the carrier, and that point forward, the cost and risk shall be passed to the Claimant already. If so, the Respondent have no liability for the loss of 100 cases of Blue One.

C. Even if there was a non-performance, such non-performance is excused because it was caused by force majeure

28. In the event that the Tribunal is not convinced by the aforementioned arguments and decides that the loss of 100 cases of Blue One constitutes non-performance, such non-performance is excused because it was caused by force majeure.

29. Stated in UNIDROIT Article 7.1.7, force majeure refers to the non-performance that is due to an impediment beyond control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

30. The Parties also included the Force Majeure clause in the 2020 Sales Contract, stating that neither party shall be liable for failure in fulfilling its obligation due to the causes beyond its reasonable control, including an act of God.[9]

31. An Act of God is an event that occurs beyond human's control whose effects cannot be reasonably prevented, such as a natural disaster or natural phenomena.[10] In this case, all the 100 cases of Blue One were burnt by the lightning of the biggest-recorded thundercloud hitting the bonded area at the time where the cases were to be loaded. The thundercloud is a kind of natural phenomenon that cannot be prevented from happening. The Respondent cannot control the weather, and it cannot exercise any reasonable measures to prevent such natural phenomena.

32. Since the loss was caused by force majeure, Respondent is not liable for the non-performance (quod non) because such non-performance is excused under Article 10 of the 2020 Sales Contract and Article 7.1.7 of the UNIDROIT Principles.

ISSUE 3: RESPONDENT IS NOT LIABLE FOR DAMAGES AND RESTITUTION CLAIMED BY CLAIMANT

33. As argued in Issue 1 and Issue 2 that Respondent does not have an obligation to sell 200 cases of Blue One to Claimant annually and Respondent already performed its obligation to deliver 100 cases of Blue One under the 2020 Sales Contract, Respondent is not liable to pay any damages or restitution to Claimant. Even if the Tribunal decides that the lost 100 cases constitute a non-performance, Respondent is still not liable to any damages or restitution because the non-performance was excused by force majeure according to Article 10 of the 2020 Sales Contract.

A. The amount payable by Respondent in the event that the Tribunal decides that Respondent is liable for the lost 100 cases of Blue One is 948,000 USD

34. In the event that the Tribunal finds that Respondent is liable for the loss of 100 cases of Blue One due to the non-performance not being excused, the amount payable by Respondent is 948,000 USD and not 1,320,000 USD as claimed. The analysis is divided into (a) restitution for the amount paid by Claimant under the 2020 Sales Contract (b) damages for the lost profit.

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[8] *id*

[9] Moot Problem P.26 Exhibit 6

[10] Cornell Law School, Definition of an 'Act of God' [online] Available at: https://www.law.cornell.edu/wex/act_of_god

(a) Restitution for the amount paid by Claimant under the 2020 Sales Contract is not payable by Respondent

35. Under Article 7.3.6 of the UNIDROIT Principles, a party is entitled to restitution once the contract is terminated. To exercise the right to terminate a contract, the party wishing to terminate must give the other party a notice of termination according to Article 7.3.2. Without a valid termination of the contract, there will not be a ground for restitution.[11]

36. In this case, Claimant has not yet given Respondent notice of termination pursuant to Article 7.3.2; therefore, the 120,000 USD restitution claimed by Claimant is not payable by Respondent.

(b) Damages for the lost profits is 948,000 USD and not 1,200,000 USD as claimed

37. Even though Claimant is granted a right to claim damages under Article 7.4.1and 7.4.2 to claim its lost profit as "its gain of which it was deprived", the number 1,200,000 USD is not accurate because it was based on the false assumption that all of the Blue One would be sold in restaurants and hotels. According to Article 7.4.3, the calculation of compensation may only be due for the loss of a chance in proportion to the probability of its occurrence. In fact, only 70% of Blue One will be sold in restaurants and hotels, and the rest will be sold in the shops which will yield less marginal profits.[12] If the calculation is adjusted to the correct proportion of sales, the lost profit will be as follows:

(1) From sales at restaurants and hotels: 1,000 USD x 70 cases x 12 bottles = 840,000 USD
(2) From sales at shops: 300 USD x 30 cases x 12 bottles = 108,000 USD

B. The amount payable by Respondent in the event that the Tribunal decides that Respondent is liable for the 200 cases of Blue One is 1,896,000 USD and not 2,016,000 USD as claimed

38. As illustrated in (a) that there is no ground for restitution, the 120,000 USD is not payable by Respondent. Therefore, the amount payable by Respondent is 1,896,000 for the damages (lost profit) and not 2,016,000 USD as claimed.

KANPAI CASE
STATEMENT OF FACTS

39. **Blue Inc. "Claimant"** is a beverage producer and distributor incorporated under Arbitria's law. **Red Corp. "Respondent"** is a restaurant, hotel, beverage, and shop business incorporated under Negoland's law. Claimant and Respondent shall be referred to collectively as **"Parties."**

40. On November 1 2014, Claimant and Respondent entered into an exclusive distributorship agreement regarding Kurenai sake, **"the Kurenai Agreement"** (exhibit 9). The Agreement was made effective on January 1 2015. Under this Agreement, Respondent was the supplier, and Claimant was the exclusive distributor.

41. Apart from the Kurenai Agreement, Claimant also had an exclusive distributorship agreement regarding Kanpai beer **"the Kanpai Agreement"** (exhibit 11) with Yellow Corporation. The Agreement was made effective on March 1 2017. Under the Kanpai Agreement, Yellow Corporation was the supplier, and Claimant was the exclusive distributor.

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[11] Commentary 4 on Article 7.3.6 UNIDROIT Principles
[12] Moot Problem p.5 para 18

42. Kanpai Agreement referred to the General Business Agreement **"the GBA"** (exhibit 11 annex) for a dispute resolution mechanism. The GBA clearly stipulated that any disputes that cannot be settled amicably shall be resolved by arbitration.

43. On September 15 2018, Yellow Corporation assigned the right to produce and supply Kanpai to the Respondent. This Assignment of Contract **"the Assignment"** (exhibit 12) rendered Respondent the supplier under Kanpai Agreement in place of Yellow Corporation.

44. In November 2020, Respondent agreed to provide Kurenai and Kanpai for Claimant to sell in the Negoland Fair scheduled to take place in the last week of November 2021.

45. Despite the Parties long-established business relationship, Respondent suddenly notified Claimant of its intention to terminate the exclusive distributorship for Kurenai and Kanpai in the email dated January 10 2021[13]. Claimant informed Respondent that both Contracts were not validly terminated, but Respondent still insisted the same.

46. Later on, in October 2021, Respondent breached both exclusive distributorship agreements by providing Kurenai and Kanpai to Green Corp.

47. Claimant filed a petition for arbitration proceedings seeking the declaration of the existence of two exclusive distributorship agreements, and interim measures to order Respondent to suspend sales of Kurenai and Kanpai to Green Corp. and provide the beverages to Claimant as Respondent agreed to do so to ensure the supply for the upcoming Negoland Fair.

48. The law governing substantive issue is UNIDROIT Principles of International Commercial Contracts (2016) **"UNIDROIT Principles"** The law governing arbitration proceedings in the Kurenai Agreement shall be UNCITRAL Arbitration Rules **"UNCITRAL Rules"** The Parties did not agree on the law governing arbitration proceedings in the Kurenai Contract; however, the Parties agreed to merge the cases and argue them before the same arbitral tribunal.

SUMMARY OF ARGUMENTS

1. Respondent is not entitled to terminate the Kanpai Agreement because there was no non-performance since the failure to meet minimum purchases was caused by force majeure.

2. Respondent is not entitled to terminate the Kurenai Agreement because Claimant is entitled to invoke hardship to request renegotiation. Respondent failed to perform its duty of cooperation, good faith and fair dealing; therefore, it is not entitled to terminate the Kurenai Agreement. Even if the Tribunal decides that there was no hardship, Respondent is barred from relying on such non-performance to terminate the Agreement as the non-performance was caused by Respondent's acts itself.

3. The interim measures should be granted because the requirements under Article 26.3 of the UNIDROIT Principles are met; the Japanese Arbitration Act also allows the Tribunal to grant interim measures.

4. The Tribunal has jurisdiction over disputes related to Kanpai Agreement because there is a valid arbitration agreement regardless of whether the Tribunal applies UNIDROIT Principles or the contract law of Japan and Japan Arbitration Act as the law governing the arbitration agreement.

[13] Moot Problem p.47 Exhibit 15

ARGUMENTS

ISSUE 1: RESPONDENT IS NOT ENTITLED TO TERMINATE THE EXCLUSIVE DISTRIBUTORSHIP AGREEMENTS FOR KURENAI AND KANPAI.

49. On January 10 2021, Respondent notified Claimant about the termination of the exclusive distributorship agreements for Kurenai and Kanpai. Respondent relied its ground for termination on Article 16 (4) of the Kurenai Contract and Article 10 (b) (iii) of the Kanpai Contract, reasoning that Claimant could not achieve the minimum sales volume of Kurenai and minimum purchase volume of Kanpai specified by the agreements.[14] However, the Respondent is not entitled to terminate the contracts based on the following reasons.

A. Claimant did not breach any provision of the Kanpai Agreement because the failure to meet minimum purchase was caused by force majeure.

50. Under Article 17 of the Kanpai Agreement, no party will be deemed to be in breach of any provision of the Agreement for failure in performing any obligation of this Agreement when such failure is due to force majeure. In this case, it is undisputed that Arbitria severely suffered from the Coronavirus outbreak, and its economy only recovered after April 2021.[15] This directly resulted in a significant drop in sales of Kanpai. Furthermore, the Parties also explicitly agreed that pandemic is one of the force majeure events.[16] As a result, Claimant's failure to meet minimum purchase will not be deemed to be in breach of the Kanpai Agreement.

B. Respondent is not entitled to terminate the Kurenai Agreement since it failed to perform its duty to cooperate, good faith and fair dealing by refusing to renegotiate after Claimant's request in the case of hardship.

51. In 2020, the novel coronavirus infection spread in Arbitria. Arbitrian government requested restaurant owners, including restaurants in hotels, to refrain from operating their restaurants after 9 P.M, and to refrain from serving alcohol even before 9 P.M.[17] This constitutes hardship which grants Claimant the right to renegotiate under Article 6.2.2 of UNIDROIT Principles.

52. Under Article 6.2.2 of UNIDROIT Principles, hardship is a situation where the occurrence of events fundamentally alters the equilibrium of the agreement, and those events must meet the requirements: (a) Events occur or become known after the conclusion of the agreement, (b) Events could not reasonably have been taken into account by disadvantaged party, (c) Events beyond the control of the disadvantaged party, (d) Risks must not have been assumed by the disadvantaged party.[18]

53. As a distributor, Claimant had a duty to meet minimum sales requirements for Kurenai. However, Claimant's performance was affected by the Arbitrian government's request for voluntary restraint to stop the spread of the novel coronavirus infection. Such a request caused a significant drop in sales of alcoholic beverages to Claimant's restaurants since most restaurants in Arbitria obeyed the government's request.[19] As a result, the Arbitrian government's request fundamentally altered the equilibrium of the Kurenai Agreement. The Supreme Court of Spain in Case No.333/2014 also affirmed that the economic crisis (which can be caused by the pandemic situation) could have substantially altered the equilibrium of the agreement.[20] Moreover, such a request (a) became known only after the conclusion of the Agreement, (b) could not reasonably

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[14] Moot Problem p.44 Exhibit 14
[15] Moot problem p.10 para 38
[16] Moot Problem p.39 Article 17
[17] Moot Problem p.9 para 33
[18] Article 6.2.2 UNIDROIT Principles
[19] Moot Problem p.10 para 34
[20] The Supreme Court of Spain, Case No.333/2014

have been taken into account by both Parties, (c) was beyond the control of both Parties, and (d) risk was not assumed by either Party. Therefore, Claimant is entitled to invoke hardship under Article 6.2.2 of UNIDROIT Principles.

54. Once hardship is validly invoked, Article 6.2.3 of UNIDROIT Principles grants Claimant, as a disadvantaged party, a right to renegotiate the original terms of the agreement. The tribunal in Award of the Arbitration Centre of Mexico of November 30 2006, also affirmed that in a case of hardship, the disadvantaged party has the right to ask for renegotiation of the distributorship agreement with a view to adapting it to the changed circumstances.[21] To exercise the right to renegotiate, the request for renegotiation must be made along with the grounds on which the request for renegotiation is based.[22]

55. In June 2020, Claimant sent an email to propose Respondent regarding the adaptation of sales policy for Kurenai and Kanpai to overcome the hardship; therefore, this email constitutes a notice to renegotiate under Article 6.2.3. Unfortunately, Claimant's request to renegotiate was ignored by Respondent.[23]

56. When the request has been made, both parties have the duty to conduct the renegotiations in a constructive manner by refraining from any form of obstruction and by providing all the necessary information according to the general principle of good faith and fair dealing and to the duty of cooperation.[24] The tribunal in the ICC Case No. 9994 reasoned that good faith imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances which may have occurred after its execution.[25] Therefore, Respondent has the duty to conduct the renegotiations and is not entitled to terminate the Kurenai Agreement until it performs the renegotiation duty.

C. **Respondent cannot rely on Claimant's non-performance to terminate Kurenai Agreement because such non-performance was caused by Respondent's interference.**

57. Under Article 7.1.2 of the UNIDROIT Principles, 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.

58. In the email dated July 24 2018[26], Respondent ordered Claimant to prioritize sales of Kanpai over Kurenai at least until 2019. Subsequent to that email in 2020, the Coronavirus infection spread in Abitria, and the Arbitrian government made a request as mentioned in section B. Immediately after this request, Claimant notified Respondent that most restaurants followed the government request and the sale of Kurenai and Kanpai was dropping significantly. Hence, Claimant asked to obtain Respondent's consent to start selling Kurenai to individuals instead of exclusively in restaurants to prevent possible loss from the pandemic and the government's request. However, Respondent refused to accept Claimant's proposal, causing the failure to meet minimum sales requirements for the year 2020.

59. The acts that Respondent instructed Claimant to prioritize sales of Kanpai over Kurenai in 2019 and refused to accept Claimant's proposal to sell Kurenai to individuals to overcome the pandemic of novel Coronavirus were the cause of Claimant's failure to achieve the minimum sales volume of Kurenai in 2019 and 2020. As Respondent did not act in good faith according to Article 1.7 of the UNIDROIT Principles, which is the fundamental idea underlying in Article 7.1.2 of the UNIDROIT Principles, the termination was not justified. The tribunal in Arbitration Court of the Lausanne Chamber of Commerce and Industry of January 25 2002, also affirmed that the party who caused such acts by its own behavior was barred

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21 Award of the Arbitration Centre of Mexico (CAM) of 30 November 2006
22 Article 6.2.3 (1) UNIDROIT Principles
23 Moot Problem p.44 Exhibit 14
24 Commentary 5 on Article 6.2.3 UNIDROIT Principles
25 ICC Case No. 9994 of 2001
26 Moot Problem p.42 Exhibit 13

from invoking acts of allegedly imperfect performance by Claimants.[27] Therefore, Respondent is barred from relying on Claimant's non-performance to terminate Kurenai Agreement under Article 7.1.2 of the UNIDROIT Principles.

ISSUE 2: THE INTERIM MEASURES SOUGHT BY CLAIMANT SHOULD BE ACCEPTED

60. Under UNCITRAL Rules Article 26 (b), the Tribunal has the power to grant interim measures upon a party's request to prevent current or imminent harm to the requesting party or the arbitral process.

61. The guiding factors in determining whether the interim measures should be granted are terms of the arbitration agreement (whether the parties agree/oppose to interim measures), the UNCITRAL Rules, the laws of the place of the arbitration (i.e. Japan), and the laws of any jurisdiction in which such enforcement may be sought (i.e. Negoland and Arbitria)[28] As the Parties did not specify any information regarding interim measures in their agreements, only UNCITRAL Rules and Japanese Arbitration Act will be discussed.

A. The requirements to grant interim measures under Article 26 of the UNCITRAL Rules are met

62. Under Article 26.3 of the UNCITRAL Rules, there are two requirements to grant an interim measure. First, there must be "harm not adequately reparable" that is likely to occur to the requesting party if the measures are not granted that substantially outweighs the harm that is likely to occur to the party whom the measure is directed against. Secondly, there must be a reasonable possibility that the requesting party will succeed on the merits of the claim.

(a) Harm not adequately reparable is likely to occur to Claimant if the measures are not granted and such harm substantially outweighs the harm that is likely to occur to Respondent if the measures are granted

63. The first requirement is "harm not adequately reparable". It is defined as "harm that cannot readily be compensated by an award of damages."[29] Any non-marginal risk of aggravation of the dispute is sufficient to warrant an order for interim relief.[30] The tribunal in the ICC Case No.10596 reasoned that it would be foolish for the tribunal to wait for a foreseeable, or at least plausibly foreseeable, loss to occur, to provide compensation in the form of damages rather than to prevent the loss from occurring in the first place.[31] To quote K.P. Berger, who refers specifically to Article 26 of the UNCITRAL Rules: "To preserve the legitimate rights of the requesting party, the measures must be "necessary". This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a "substantial" (but not necessarily "irreparable" as known in common law doctrine) prejudice for the requesting party.[32]

64. To consider this requirement under Article 26.3, a balance of convenience test must be applied[33]. In this present case, Claimant is likely to suffer from harm not adequately reparable if Respondent fails to supply 1,000 cases of Kurenai and Kanpai for Claimant to sell at the Negoland Fair in November 2021 and provides them to Green Corp. This Fair is a crucial business opportunity for Claimant, which would significantly improve its business after being harshly affected by the pandemic situation for more than a year. If the measures are not granted and Respondent misses this opportunity, the lost profits would constitute

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27 Arbitration Court of the Lausanne Chamber of Commerce and Industry (Switzerland) of 25 January 2002

28 Handbook of UNCITRAL Arbitration p.350 para 26-8

29 Baker, S.A. and Davis, M.D., *The UNCITRAL Arbitration Rules in Practice – The Experience of the Iran-United States Claims Tribunal*, Wolters Kluwer, 1992, pp. 139-140; Paulsson, J. and Petrochilos, G., *UNCITRAL Arbitration*, Wolters Kluwer, 2017, p. 222.

30 ICC Case No.10596 of 2000 para 18

31 Ibid

32 The UNCITRAL Arbitration Rules: A Commentary p.537

33 UNCITRAL Digest p.87

harm not be adequately reparable. Even if Respondent raised a claim that the harm can be readily compensated by an award of damages, it would still not necessarily eliminate the possibility to grant interim measures[34]

65. Furthermore, Kurenai and Kanpai are crucial to Claimant's core business, which is producing and distributing beverages; meanwhile, selling beverages is merely a small part of Respondent's business apart from its restaurant, hotel, and shop business. Also, there would not be any loss on the Respondent's side if the measures were granted since Respondent would still gain profits from selling Kuranai and Kanpai to Claimant. This balance indicates that the harm that is likely to occur to Claimant if the measures are not granted substantially outweighs the harm that is likely to occur to Respondent if the measures are granted.

(b) There is a reasonable possibility that Claimant will succeed on the merits of the claim

66. The "reasonable possibility" does not equal the final judgement but refers to the requesting party being able to point to facts that support its claim.[35] In other words, the prima facie threshold must be reached[36]. The requesting party must solely demonstrate that its claim is not frivolous or obviously outside the competence of the tribunal.[37] As illustrated in Issue 1, Claimant has supported its claim with contractual clauses between the Parties, legal framework, and facts. This is sufficient to fulfil the second criteria for granting interim measures.

B. Japanese Arbitration Act allows the Tribunal to grant interim measures under Article 24

67. Japanese domestic law also plays a part as the law of the place of arbitration. Article 24 of the Japanese Arbitration Act allows the Tribunal to grant interim measures if necessary upon a party's request. As the Japanese Arbitration Act essentially adopted principles from UNCITRAL Rules[38], the framework of analysis is similar to the requirements discussed above. This further supports the Tribunal's authority and decision to grant the interim measures requested by Claimant.

ISSUE 3: THE TRIBUNAL HAS JURISDICTION OVER DISPUTES RELATED TO KANPAI EXCLUSIVE DISTRIBUTOR AGREEMENT

68. Arbitration agreement is a fundamental agreement that grants tribunal jurisdiction. In this case, there is a valid arbitration agreement regarding disputes related to the Kanpai Agreement.

69. To determine the formation and validity of an arbitration agreement, the law governing arbitration agreement shall serve as a legal framework for such analysis. As the Parties did not specify the law governing the arbitration agreement in the Kanpai Contract[39], the Tribunal has the option to apply either the law governing the main contract[40] (UNIDROIT Principles) or the law of the seat of the arbitration[41] (Japanese contract law and Arbitration Act), whichever has the closest relation to the dispute and arbitration proceedings. Claimant will illustrate that in this case, there is a valid arbitration agreement regardless of whether the Tribunal applies UNIDROIT Principles or Japanese contract law and Arbitration Act to be the governing law of arbitration agreement.

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[34] The tribunal in *Paushok v. Mongolia*, explained that "[t]he possibility of monetary compensation does not necessarily eliminate the possible need for interim measures

[35] Handbook of UNCITRAL Arbitration p.369 para 26-81

[36] UNCITRAL Digest p.87

[37] See, for example, *PNG Sustainable Development v. Papua New Guinea* [2013], *Paushok v. Mongolia* [2015]

[38] Inoue, A., Sato, M. and MacArthur, D., 2021. *International Arbitration 2021 - Japan | Global Practice Guides | Chambers and Partners*. [online] Available at: https://practiceguides.chambers.com/practice-guides/international-arbitration-2021/japan/trends-and-developments

[39] The Parties only specified governing law of the arbitration procedures, which is UNCITRAL Rules; however, the law governing arbitration agreement is not the same thing as the law governing arbitration procedures and law governing substantive issues

[40] See, for example, *Enka v Chubb* [2020] UKSC 38.

[41] See, for example, *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and Others* [2014] SGHCR 12.

A. Respondent's act of signing the Assignment of Contract constitutes a valid acceptance under UNIDROIT Principles

70. Under Article 1.2 of the UNIDROIT Principles, no particular forms are required to form a valid contract. Therefore, the Respondent's act of signing the Assignment of Contract shall be interpreted in accordance with Article 4.2 to determine whether this is a valid acceptance to form an arbitration agreement. When Respondent signed the Assignment of Contract, it did so with the knowledge that the dispute resolution mechanism was arbitration as stipulated in the General Business Agreement, which was expressly referred to in the Kanpai Agreement. This is a valid acceptance of Claimant's offer to arbitrate, and the arbitration agreement was formed.

71. It is settled that if it is recognized that the dispute related to Kanpai Agreement may be resolved by arbitration, Claimant will not make an objection to the current arbitral tribunal handling the cases.[42] Therefore, the Tribunal has jurisdiction to hear this present case relating to the Kanpai Agreement.

B. Respondent's act of signing the Assignment of Contract constitutes a valid acceptance under Japanese contract law

72. In the event that the Tribunal considers the law of the seat to be the law governing arbitration agreement, there would also be a valid arbitration agreement. Under the contract law of Japan, a contract is formed if there is a valid offer and acceptance without any forms required.[43]

73. Similar to the aforementioned analysis, it is clear that Respondent agreed to arbitrate when it signed the Assignment of Contract, knowing that the disputes arising out of the Kanpai Agreement shall be resolved by arbitration. Therefore, Respondent's act of signing constitutes a valid acceptance, and the arbitration agreement was formed.

C. The arbitration agreement is valid under the Japanese Arbitration Act

74. If the Tribunal decides that the arbitration agreement was formed under Japanese contract law, such agreement must also comply with requirements under the Japanese Arbitration Act to be valid. Article 13 (2) of the JAA states that the arbitration agreement must be in writing.[44] Article 13 (3) elaborates further that if a document containing a clause of an Arbitration Agreement is quoted in a contract concluded in writing as constituting part of said contract, such Arbitration Agreement shall be in writing.

75. In this case, the General Business Agreement is the document containing a clause of an arbitration agreement. It is quoted in the Kanpai Agreement concluded between Blue Inc. and Yellow Corporation (and later Red Corp. after the Assignment in 2018). Therefore, the arbitration agreement shall be in writing, granting the Tribunal jurisdiction to hear disputes related to Kanpai Agreement.

76. Even if Respondent raised an argument that it was never given the General Business Agreement and never saw its content, such argument would be irrelevant. In the Tokyo District Court judgment of March 26, 2008[45], an arbitration clause was cited in the backside of the contract, and only the upper side of the contract was delivered. Nevertheless, the Court recognized that a valid arbitration agreement existed.[46]

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[42] Moot Problem p.49

[43] Mizuo Kimiya, Kentaro Tanaka and Hidenori Nakagawa, Commercial Contracts in Japan. [online] Available at https://www.lexology.com/library/detail.aspx?g=9032b6c6-07aa-47e2-b2b5-b7fc50a3734f

[44] Article 12 Japanese Arbitration Act

[45] Ogawa, K., n.d. *Introduction to Japanese Arbitration Act with Court Cases*. [online] Available at: https://idrc.jp/images/link/Introduction%20to%20Japanese%20Arbitration%20Act%20with%20Court%20Cases%20(English).pdf

[46] *Id*