
List of Abbreviation

- “¶” : Paragraph
 - “Ex.” : Exhibit
 - “Art.” : Article
 - “UPICC” : Unidroit Principles of International Commercial Contract 2016
 - “Green” : Green Corp.
 - “Yellow” : Yellow Corporation
 - “GBA rules” : the rules on dispute resolution in the General Business Agreement
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THE BLUE ONE CASE

Red hereby seeks the following arbitral awards:
Blue shall pay 2,016,000 USD to Red

Red submits that:

Issue 1

- A. Preliminary negotiation is considered as Red's offer;
- B. Handing Attached Memo is considered as Blue's acceptance;

Issue 2

- C. Blue breached its obligation to deliver 100 cases of Blue One to Red;
- D. Blue bears the risk and is liable for its non-performance;
- E. Blue cannot exempt itself from its liability because of force majeure;

Issue 3

- F. As there was a breach of obligation to deliver 200 cases of Blue One, Blue shall pay 2,016,000 USD to Red;
- G. As there was a breach of obligation to deliver 100 cases of Blue One, Blue shall pay 1,320,000 USD to Red.

Issue 1

Blue had the legal obligation to deliver 200 cases of Blue One to Red

The continuous trading contract to deliver 200 cases of Blue One every year was concluded between Red and Blue. Under UPICC 2.1.1, “*a contract may be concluded either by the acceptance of an offer*”. In this case, Red negotiated for the continuous trading of 200 cases of Blue One as an offer. Blue handed the Attached Memo to Red to show the agreement as an acceptance[Ex.3-1]. The Attached Memo stated the agreement of “*Continuous Trading of Blue One with Red*”, “*200 cases every year*”, “*100 USD per a bottle*” and “*from 2011*”[Ex.3-1, Attached Memo].

A. Preliminary negotiation is considered as Red's offer

UPICC 2.1.2 stipulates that “*a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance*”.

1) Red's offer is sufficiently definite

Whether the offer is sufficiently definite or not is considered by 2 conditions. One is that “*whether or not the offeror by making the offer, and the offeree by accepting it, intend to enter into a binding agreement*”[UPICC 2.1.2 COMMENT 1]. The other is that “*the missing terms can be determined by interpreting the language of the agreement in accordance with Articles 4.1 et seq*”[UPICC 2.1.2 COMMENT 1].

a) Both parties showed its intention to be bound by the offer and by the acceptance

Whether both parties have the intention to be bound by the agreement or not shall be determined in accordance with UPICC 4.2 and 4.3. UPICC 4.2(1) stipulates that the conduct “*shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention*”. In applying UPICC 4.2, regard shall be given to all the relevant circumstances[UPICC 4.3].

i) Preliminary negotiations between the parties[UPICC 4.3(a)]

The 2 facts ①Blue told Red that the minimum and maximum production volume would be 500 to 1,000 cases per year[Ex.3-2], and ②negotiation about the price of the wine, are determined as the intention to be bound by the agreement. ①The reason why Blue told Red the production volume is that Blue wanted to secure a long term trading contract with Red by confirming the minimum production volume. ②The both parties negotiated whether the price of the wine per bottle should be 80 USD or 100 USD. This is because both parties intended to be legally bound by the price determined in this negotiation for a long time. From these facts, both parties had the intention to be bound by the agreement.

ii) The conduct of the parties subsequent to the conclusion of the contract[UPICC 4.3(c)]

The 2 facts that ①continuous transaction, and ②transaction of 2013 are determined as the intention to be bound by the agreement. ①The fact that Red purchased 200 cases of Blue One every year[Ex.3-1, 3-2] shows that each party intended to be bound by the agreement. There was an agreement to purchase a minimum of 200 cases of Blue One every year and both parties traded based on this agreement[Ex.4]. ②Red informed Blue to limit the number of cases to 100 in 2013 however, Blue said “*Please keep the agreement between us. We have been making plans based on the premise that we will provide 200 cases to your company every year*”[Ex.3-2]. From these facts, Blue claimed that Red has the obligation to purchase 200 cases of Blue One every year and agreed to provide 200 cases. Thus, both parties had the intention to be bound by the agreement.

2) There is no missing terms in this contract

Red offered the transactions of Blue One, 200 cases every year, 100 USD per bottle, since 2011, when Red and Blue negotiated in October 2010. In other words, the goods to be delivered, the price to be paid to Blue, and the time of performance was clearly determined. Thus, there are no missing terms in this contract.

B. Handing Attached Memo is considered as Blue's acceptance

UPICC 2.1.6(1) stipulates that a “*conduct of the offeree indicating assent to an offer is an acceptance*”. The indication of assent may “*be inferred from the conduct of the offeree*”[UPICC 2.1.6 COMMENT 2]. In this case, Blue handed Attached Memo to Red[Ex.3-1]. Therefore, the conduct which Blue handed Attached Memo to Red is an acceptance from Blue.

In conclusion, Blue had the legal obligation to deliver 200 cases of Blue One to Red.

Issue 2

Blue is liable for non-performance of obligation concerning 100 cases of Blue One in relation to the sales agreement dated September 26, 2020[Ex.6]

Blue is obligated to deliver 100 cases of Blue One on board the airplane. However, 100 cases of Blue One were burned down because of fire caused by lightning[¶23]. As a result, 100 cases of Blue One were not on board the airplane.

C. Blue breached its obligation to deliver 100 cases of Blue One to Red

1) Blue's obligation was changed to deliver the goods on board the vessel to the airplane

Blue had the obligation to deliver 100 cases of Blue One under the Sales Contract which was entered into for 100 cases of Blue One("the Sales Contract")[Ex.6].

a) Blue's obligation was to place the goods on board the vessel before the mode of transport was changed[Ex.6, Art.2, FOB rules]

Ex.6, Art.2 stipulates that both parties follow FOB rules of INCOTERMS®2020 as terms of delivery. FOB rules stipulate that "*the seller must deliver the goods...by placing them on board the vessel*"[INCOTERMS®2020]. Thus, delivering the goods to the buyer means placing the goods on board the vessel. Therefore, Blue was obligated to place 100 cases of Blue One on board the vessel before the mode of transport was changed.

b) Blue's obligation changed to place the goods on board the airplane after the mode of transport was changed[Ex.7], and Blue breached its obligation

Blue's obligation was changed to placing the goods on the airplane, instead of the vessel. On October 1, Red sent an email to Blue and asked to ship 100 cases of Blue One by air[Ex.7]. The mode of transportation was changed to airplane by email but a new agreement which confirmed the new terms of delivery was not concluded between two parties. Thus, FOB rules are continued to apply and Blue's obligation is placing the products on board the airplane. However, Blue breached its obligation. In this case, "*on October 7, between the time the air carrier received the container and the time it was to be loaded onto the airplane*", the container was burned, because of the fire caused by lightning[¶23]. Thus, 100 cases of Blue One were never placed on board the airplane and Blue breached its obligation.

Therefore, Blue's obligation is to place 100 cases of Blue One on board the airplane Blue breached its obligation to deliver 100 cases of Blue One to Red.

D. Blue bears the risk and is liable for its non-performance[UPICC 7.1.2]

The fire caused by lightning that arose Blue's non-performance is not another event for which Red bears the risk.

1) Blue bears the risks of fire caused by lightning based on FOB rules

Ex.6, Art.2 stipulates that both parties follow FOB rules of INCOTERMS as terms of delivery. FOB rules stipulates that "*The risk of loss of or damage to the goods transfers when the goods are on board the vessel*". In this case, Blue is obligated to place 100 cases of Blue One on board the airplane. The Sales Contract[Ex.6] was partly modified by the

email sent from Red[Ex.7] as follows. Red asked Blue “*would you please ship them by air...We will bear all costs and risks, but would you arrange the airplane*” in the email sent on October 1, 2020[Ex.7]. This means that Red bears all the risk which is related to arranging the airplane because Red asked Blue to arrange it in spite of FOB rules.

The fire was caused before 100 cases of Blue One were placed on board the airplane[¶23] and Blue bears the risks. Even if FOB rules do not apply to this case, Red does not bear the risk for the fire caused by lightning because Red bears all risk only related to arranging the airplane[Ex.7]. From these facts, Blue bears the risk of the fire caused by lightning.

In conclusion, Blue is liable for its non-performance under UPICC 7.1.2.

E. Blue cannot exempt itself from its liability because of force majeure[Ex.6, Art.10]

Blue cannot be exempt from its liability by force majeure as set forth in Ex.6, Art.10.

1) Blue cannot claim force majeure under INCOTERMS rule

As Blue’s obligation continues until loading the product on the airplane under FOB rules, Blue should bear all the risks until loading the product on the airplane. Because risk allocation under INCOTERMS applies to all the risks for which neither party is responsible, such risks naturally include force majeure events. Therefore, Blue cannot exempt itself from its liability by force majeure.

2) Blue did not give prompt notice of its invocation of this provision

In this case, Blue notified Red that, (1)there 100 cases of Blue One was burned because of fire caused by striking lightning, (2)it has become impossible for Blue to deliver 100 cases Blue One[Ex.8]. Thus, Blue did not notify Red about the invocation of Ex.6, Art.10.

3) Blue did not make diligent efforts to resume its performance despite such force majeure

Diligent efforts mean that Blue negotiates with other buyers to send other stock to Red to compensate for 100 cases of Blue One which was burned by the fire. In this case, on October 9, 2 days after the fire happened, Blue still had 200 cases of Blue One left[Ex.8]. Blue had other buyers whose deadline for the performance of Blue’s obligation is later than Red[Ex.8]. Blue should have told other buyers that there was a buyer who lost the product because of fire, and should have negotiated with them by offering the second labels of the five major châteaux to resume its performance. However, Blue did not try to negotiate with other buyers. From these facts, Blue did not make diligent efforts to resume its performance despite such force majeure and is not exempt from its liability.

In conclusion, Blue is not exempt from its liability because of force majeure.

Issue 3

F. As there was a breach of obligation to deliver 200 cases of Blue One, Blue shall pay 2,016,000 USD to Red

The details of 2,016,000 USD which Blue shall pay is as follows

- (a) 120,000 USD as paid under the agreement dated September 26, 2020[Ex.6]
- (b) Lost profit of 1,896,000 USD on the sale of 200 cases of Blue One

1) Blue shall pay 120,000 USD under the Sales Contract[Ex.6] to Red

Red may terminate the Sales Contract under UPICC 7.3.1(1), and claim restitution of 120,000 USD under UPICC 7.3.6(1).

In this case, Red expected to receive 100 cases of Blue One. However, Red could not receive it because of Blue's failure. Thus, Blue's non-performance amounts to a fundamental non-performance and Red may terminate the Sales Contract[UPICC 7.3.1(1)(a)]. In addition, Red had already paid 120,000 USD to Blue[¶22]. From these facts, Red may claim the restitution of 120,000 USD from Blue[UPICC7.3.6(1)].

2) Blue shall pay 1,896,000 USD to Red as lost profit

The details of 1,896,000 USD which Blue shall pay are as follow:

- ① Sales for Restaurants and hotels : 1,680,000 USD
- ② Sales for shops:216,000 USD

Under UPICC 7.4.1, Red shall claim the damages in the amount of 1,896,000 USD. Firstly, there is a causal link between the non-performance and the lost profits[UPICC 7.4.2] because there is no dispute that the entire volume would have been sold and Red would have gained profits if Blue One had been delivered[Ex.16]. Secondly, the damages was certain[UPICC 7.4.3] because there is no dispute about the amount of profits specified in ① and ② above[Ex.16]. Finally, it was foreseeable at the time of conclusion of the contract[UPICC 7.4.4] because Red would not be able to sell the goods and would incur ① and ② if Blue did not perform its obligation.

Therefore, Red may claim damages of 1,896,000 USD in lost profits under UPICC 7.4.1.

3) The damages cannot be reduced[UPICC 7.4.8(1)]

Amount of damages cannot be reduced under UPICC 7.4.8(1) since the second label of the five major châteaux cannot be a substitute for Blue One. It is not a reasonable measure for Red to purchase the second label of the five major châteaux as a substitute for Blue One in order to mitigate its damages.

UPICC 7.4.8(1) stipulates that, "*the non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps*". In this case, on September 26, 2020, Blue prepared only 100 cases of Blue One to sell Red, and offered the second labels of the five major châteaux as for the remaining 100 cases instead[Ex.5]. Blue also made a similar proposal on October 9, 2020, the day after the 100 cases of Blue One were burned. However, given the background of the dealings, the second label of the five major châteaux cannot be a substitute for the Blue One.

In this case, Red offered to purchase Blue One because they heard that the marriage between food and wine at Red's Arbiterian restaurant was not satisfactory, and searched for the most suitable wine[¶15]. In addition, Red was impressed with Blue One and started the business transaction. From these facts, even if the second labels of five major châteaux is highly rated, there are no products which can be substituted for Blue One except for Blue One.

Thus, it is not a reasonable measure to purchase the second labels of the five major châteaux instances because the second labels of five major châteaux cannot be substituted

for Blue One. Therefore, Blue cannot reduce the amount of damages under UPICC 7.4.8(1).

In conclusion, as there was a breach of obligation to deliver 200 cases of Blue One, the amount of damages to be paid is 2,016,000 USD.

G. As there was a breach of obligation to deliver 100 cases of Blue One, Blue shall pay 1,320,000 USD to Red

The breakdown of the 1,320,000 USD to be paid by Blue to Red is as follows.

- (a) 120,000 USD already paid under the Sales Contract
- (b) 1,200,000 USD in lost profit on the sale of 100 cases of Blue One

1) Blue shall pay 120,000 USD under the Sales Contract[Ex.6] to Red

The argument of (1) is the same as F(1).

2) Blue shall pay 1,200,000 USD in lost profits on the sale of 100 cases of Blue One

(b) For sale in restaurants and hotels: 1,200,000 USD.

Under UPICC 7.4.1, Red may claim the damages in the amount of 1,200,000 USD. Firstly, if only the 100 cases of Blue One had been delivered to Red, it is clear that the entire quantity would have been sold at the restaurant/hotel, where the profit rate is good, because the amount that Red could sell would be the half of which Red expected. In that case Red would have earned the profits set forth in (b) above. Thus, there is a causal link between Blue's default and lost profits[UPICC 7.4.2]. Secondly, the damage was certain[UPICC 7.4.3] because there is no dispute as to the amount of lost profits if 100 cases of Blue One were sold in restaurants and hotels. Finally, it was foreseeable at the time of the conclusion of the contract that Red would not be able to sell the goods unless Blue performed its obligations and the lost profits would be incurred[UPICC 7.4.4].

From these reasons, Red may claim the damages in the amount of 1,200,000 USD in lost profits for 100 cases of Blue One under UPICC 7.4.1.

3) The reduction in damages claimed by Blue is not acceptable

The argument of (1) is the same as F(3).

Therefore, as there was a breach of obligation to deliver 100 cases of Blue One, Blue shall pay 1,320,000 USD.

KANPAI CASE

Red hereby seeks the following arbitral awards:

The tribunal shall dismiss the claim of Blue

Claim of Blue: Blue seeks a declaration of the continued existence of the exclusive distributorship agreements for Kurenai and Kanpai entered into between Red and Blue

Petition by Blue to seek interim measures: Blue demands that Red stop selling Kurenai and Kanpai to Green and that it continue selling Kurenai and Kanpai to Blue according to the exclusive distributorship agreements.

Red submits that:

Issue 1

- A. Red may effectively terminate the exclusive distributorship agreement for Kurenai;
- B. Red may terminate the exclusive distribution agreement for Kanpai;

Issue 2

- C. The interim measures sought by Blue shall not be accepted;

Issue 3

- D. The arbitral tribunal does not have jurisdiction over disputes related to the agreement for Kanpai.

Issue 1

Red may effectively terminate the exclusive distributorship agreement for Kurenai and Kanpai with Blue

A. Red may effectively terminate the exclusive distributorship agreement for Kurenai (“the agreement for Kurenai”)[Ex.9]

Blue proposed and agreed that Red would have the right to terminate the agreement for Kurenai if Blue failed to sell 10,000 cases for 2 consecutive years[¶28, Ex.9, Art.16(4)]. Even though Blue itself proposed to put termination clauses, Blue failed to meet the minimum sales volume in 2019 and 2020. Therefore, Red terminated the agreement for Kurenai.

1) Red may terminate the agreement for Kurenai[Ex.9, Art.16(4)]

Ex.9, Art.16 stipulates that Red may terminate the agreement at any time if any of paragraph 1 through 5 would occur. Among them, paragraph 4 stipulates the situation that Blue “*fails to meet the minimum sales as specified Article 9 of this Agreement for the consecutive two years*”. As for the minimum sales volume, Ex.9, Art.9 stipulates that the Blue “*shall sell at least 10,000 cases of Products to its customers in each calendar year*”

In this case, the sales volume of Kurenai is 9,000 cases in 2019 and 7,000 cases in 2020[Ex.10]. From this fact, Blue could not sell 10,000 cases in consecutive 2 years and failed to meet the minimum sales volume for 2 consecutive years.

Therefore, Red may effectively terminate the agreement for Kurenai[Ex.9, Art.16(4)].

2) Blue’s non-performance in 2019 was not caused by Red[UPICC 7.1.2]

Blue's non-performance is not caused by Red under UPICC 7.1.2. Red told Blue to put more energy into the Kanpai rather than Kurenai at least until 2019[*Ex.13*]. However, Red intended that Blue makes its best effort to increase sales of Kanpai in the same way as Blue did with Kurenai. It did not mean that Blue could neglect the sale of Kurenai.

Therefore, Blue's non performance was not caused by Red under UPICC 7.1.2 and Red may terminate the agreement for Kurenai.

3) Blue's non-performance in 2020 was not caused by Red[UPICC 7.1.2]

Red refused the proposal from Blue about selling Kanpai to individuals in order to maintain Kurenai's brand image[*Ex.14*], however it did not constitute Red's omission. Ex.9, Art.8 stipulates that Blue shall not sell Kurenai to any individuals. Thus, Red is not obligated to allow Blue to sell Kurenai to individuals.

From these facts, Blue's non-performance was not caused by Red's omission, under UPICC 7.1.2 and Red may terminate the agreement for Kurenai.

4) Red's claim to terminate the agreement for Kurenai shall not be affected by force majeure[Ex.9, Art.18]

Blue's non-performance in 2020 was caused not by the spread of novel coronavirus, but by Blue's failure to make enough effort for sale. In 2019, the sales volume of Kurenai decreased by 5,000 cases compared to the previous year. As a result, Blue could not meet the minimum sales volume in 2019. This sharp decrease occurred because Red did not make enough effort to sell Kanpai and not by the spread of novel coronavirus. On the other hand, the sales volume of Kurenai was decreased by only 2,000 cases from 2019 to 2020 which has the effect of the spread of novel coronavirus[*Ex.10*]. From these facts, without the decrease of 5,000 cases due to Blue's failure to make enough effort, Blue would have met the minimum sales requirement even under novel coronavirus.

Even if Blue is not liable for the non-performance under Ex.9, Art.18, Red may terminate the agreement under UPICC 7.1.7(4) which stipulates that "*exercising a right to terminate the contract is not prevented*". Ex.9, Art.18 will be subject to UPICC articles under Ex.9, Art.21.

Therefore, Red may terminate the agreement for Kurenai under Ex.9, Art.16(4).

B. Red may terminate the exclusive distribution agreement for Kanpai("the agreement for Kanpai")[Ex.11]

Yellow and Blue had concluded the agreement for Kanpai[*Ex.11*]. Kanpai is a brand of beer, produced by Yellow, a beverage company in Negoland. In 2018, Red took over the business of Kanpai from Yellow[¶30]. The agreement for Kanpai[*Ex.11*] was assigned to Red under Assignment of Contract[*Ex.12*]. However, in 2019 and 2020, Blue failed to meet the minimum annual purchase quantities as set forth in Ex.11, Art.9 for consecutive 2 years. For this reason, Red may terminate the agreement for Kanpai[*Ex.11*].

1) Red may terminate the agreement for Kanpai[Ex.11, Art.10(b)(iii)]

a) Terms of termination[Ex.11, Art.10(b)(iii)]

Ex.11, Art.10(b) stipulates that "*This Agreement may be terminated by either Party by giving 10 calendar days written notice of such termination to the other Party in the event*

of the Material Breach by the other Party”. Ex.11, Art.10(b)(iii) also stipulates that the Material Breach includes Blue’s “failure to meet the minimum annual purchase quantities agreed for 2 consecutive years”.

b) Blue fails to meet the minimum annual purchase quantities for consecutive 2 years

Blue is obligated to meet or exceed the minimum purchase requirements[*Ex.11, Art.9(a)*]. However, when the purchased amount exceeds the minimum purchase requirements, that shall be credited towards the minimum purchase requirements for the subsequent period[*Ex.11, Art.9(a)*]. The following chart shows the minimum purchase requirements and the purchase volume regarding the amount of credit to next year.

[chart]

year	A.Minimum purchase requirements	B.Purchase	C.Balance (B-A)	D.Credit from previous year	E.Performing the obligation B-(A-D)
2017	5,000	8,000	+3,000		+
2018	12,000	10,000	-2,000	3,000	+
2019	15,000	14,000	-1,000		-
2020	16,000	11,000	-5,000		-

Based on this chart, the formula for criterion for judgement is as follows,

Purchase(B) - (Minimum purchase requirements(A) - Credit from previous year(D))= (F)
When (F) is a positive number, Blue performed its obligation

From these facts, 3,000 cases which exceeded in 2017(Line C) are credited into 2018(Line D). Thus, the minimum purchase volume of 2018 becomes 9,000 and Blue met such minimum purchase volume since Blue purchased 10,000 cases[*Ex.10*]. However, thereafter in 2019 and 2020, the minimum purchase requirements(Line A) did not change since there was no credit from previous year(Line D), and the Purchase volume(Line B) did not exceed Minimum purchase requirements(Line A). Therefore, Blue failed to meet the minimum purchase requirements for 2 consecutive years.

c) Red notified Blue about the termination of the agreement

On January 10, 2021, Red notified Blue of the termination of the agreement for Kanpai on March 31 by email[*Ex.15*]. From these facts, Red gave Blue written notice about the termination 10 calendar days before termination.

Therefore, Red may terminate the agreement for Kanpai under Ex.11, Art.10(b)(iii).

2) Blue's non-performance was not caused by Red's omission[UPICC 7.1.2]

Blue's non-performance was not caused by Red's refusal to provide the expenses for mass scale advertising[*Ex.13*]. Red is not obligated to provide the expenses for mass scale

advertising under Ex.11. Therefore, Red's refusal is not Red's omission under UPICC 7.1.2.

3) Blue is not exempt from its liability by force majeure[Ex.11, Art.17]

Blue failed to meet the minimum purchase volume for Kanpai not because of the coronavirus pandemic but the sales of Clear Blue. Clear Blue is a new low-malt beer which has been sold since 2019 by Blue. Clear Blue became a great hit as a result of the great hit of low-malt beer in Arbitria[¶32]. However, its success badly affected the sale of Kanpai because Clear Blue was a directly competing product with Kanpai. From these facts, Blue's non-performance in 2020 was due to Blue continuing to sell Clear Blue and not due to the coronavirus pandemic. Thus, Blue is not exempt from its liability under Ex.11, Art.17.

Therefore, Red may terminate the agreement for Kanpai.

Issue 2

C. The interim measures sought by Blue shall not be accepted

Blue demands that Red stop selling Kurenai and Kanpai to Green and that it continue selling Kurenai and Kanpai to Blue according to the exclusive distributorship agreements. However, these demands shall be dismissed. The interim measures sought by Blue are considered as "*maintain or restore the status quo pending determination of the dispute*" as set forth in UNCITRAL Art.26.2(a). However, the interim measures sought by Blue should be dismissed because this case does not meet the requirement of UNCITRAL Art.26.3.

1) Red's damage is greater than Blue's damage

Even if the first sentence of UNCITRAL 26.3(a) is satisfied, "*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*"[UNCITRAL 26.3(a) second sentence] shall not be satisfied.

a) The damage which occurs to Blue if these measures are not ordered is not a great damage

i) Blue might lose the trust from its business partners but this damage is not great

Blue might lose the trust from its business partners due to temporary discontinuance of Kurenai and Kanpai("the Products") but this damage is unlikely to occur. This is because Blue established a relationship with its business partners for many years. Blue is a major beverage producer, established in 1900[¶12]. Thus, it is not easy to break the relationship of trust with business partners. Even if Blue lost its trust from its business partners, the damage is not great.

ii) Blue might be caused the damage due to the different business strategies of Green but such damage is not great

The sales policy of Green such as deciding the sales price is based on Red's instruction, the difference of the sales between Blue and Green does not arise. If an interim measure is not ordered, Red will continue to provide the Products to Green. Green will transact with retailers or brokers in Arbitria. In other words, Green will be in business in a way which Blue does not want to follow. This might cause Blue damages or unprofitability when the

interim measure is ended and Blue restarts its business. However, the damage caused to Blue is not great because Green follows Red's instructions the same as Blue did when Blue was a distributor. Thus, the difference of the sales policy is not great and the damage caused to Blue is not great.

iii) Blue might be caused the damage due to losing the position to the only seller of the products but this damage is not great

The fact that Blue is the only company which deals with the Products does not affect the impression of Blue from consumers so the damage to Blue is not great. In the first place, not so many consumers recognize which company sells the Products. In other words, whether Blue is the only company to sell the Products or not does not affect the impression of Blue from customers. Therefore, even though Green became the distributor of the Products, it does not have a negative effect on Blue's impression from consumers.

b) The damage which occurs to Red if these measures are ordered is great

i) Red loses opportunities to sell the Products which will give Red a great deal of damage

Red will not be able to sell the Products to Green if these measures are ordered. Green had offered to conclude the exclusive distribution agreement with enthusiasm and good faith since 2014[¶28]. Then, Red appointed Green as exclusive distributor assuming that certain good results will be achieved. Red will not be able to provide customers with the opportunity to reach the Products without Green. If these measures are ordered, it is hard to assume that Red could obtain the same profit as Green because Blue had already failed to meet the minimum sales for the consecutive 2 years. Therefore, the damage which would occur to Red is great.

ii) Red loses trust from Green which caused Red a great deal of damage

The trust from Green is very important for Red because betraying the trust from other companies causes a great deal of damage to the entire company. Red appointed Blue as exclusive distributor although Green desired to have a transaction with Red from 2014. It is unbearable for Green to cancel the transaction because of interim measures. Thus, losing trust and breaking the relationships with Green could cause great damage to the entire company.

From these facts, the damage which would be caused to Red from losing the trust is great.

Therefore, the damage which would be caused to Red if these measures are ordered outweighs the damage which would be caused to Blue if these measures are not ordered[*UNCITRAL Art.26.3(a)*].

1) There is not a reasonable possibility to succeed in the merits of the claim

From issue 1, there is no possibility that Blue's claim will be accepted. Therefore, there is not a reasonable possibility that the requesting party will succeed on the merits of the claim[*UNCITRAL 26.3(b)*].

In conclusion, the interim measure sought by Blue shall not be accepted.

Issue 3

D. The arbitral tribunal does not have jurisdiction over disputes related to the agreement for Kanpai

It is necessary to have an arbitration agreement between the parties in order that the arbitral tribunal has jurisdiction over dispute. However, in this case, there is no arbitration agreement between Red and Blue to resolve the dispute regarding the agreement for Kanpai by arbitration[*Ex. II*].

It is true that Yellow and Blue agreed to solve the dispute regarding the agreement for Kanpai under the General Business Agreement(“GBA rules”). However, the arbitration agreement status shall not be transferred to Red.

1) The legal status under GBA rules is not transferred to Red

In this case, the agreement for Kanpai[*Ex. II*] does not have an arbitration clause and instead there is a separate arbitration agreement between Yellow and Blue called GBA rules. However, GBA rules stipulate the agreement between Yellow and Blue that both parties will solve any dispute regarding various business transactions between the parties. Therefore, it is illogical that GBA rules, which is a totally different type of agreement, are automatically transferred together with the agreement for Kanpai[*Ex. II*]. Coverage and scope of both agreements is different.

2) There is no agreement of transfer of GBA rules by the parties

If GBA rules are transferred together with the agreement for Kanpai[*Ex. II*], the agreement by the parties for such transfer is necessary. According to UPICC 9.3.3, “*the assignment of a contract requires the consent of the other party*”. In this case, no agreement is found between the assignor Yellow and the assignee Red that GBA rules are transferred together with the agreement for Kanpai[*Ex. II*]. Moreover, even Blue did not show its intention that GBA rules be transferred.

Therefore, before the arbitration agreement concluded between Yellow and Blue which is GBA rules, is not transferred to Red, the arbitral tribunal does not have jurisdiction over disputes related to the agreement for Kanpai[*Ex. II*].

End