Part I: Blue One Case

A. Salient Facts in relation to Blue One Case

1. The dispute between Blue Inc ("Blue") and Red Corp ("Red") in the Blue One case concerns the sale and purchase of a red wine known as "Blue One", which was produced by Blue. In this connection:

    1.1. Blue and Red entered into negotiations pertaining to the sale and purchase of Blue One circa October 2010, whereby Taro Blue wrote a non-binding memo ("Memo") recording Blue's and Red's intention to enter into a business relationship for Blue One.

    1.2. Since 2011, Blue and Red had been entering into fresh sales contracts ("Sales Contract") on an annual basis without fail, for a period of 9 years, from 2011 to 2019 (***See***: ¶17).

2. The dispute between parties arose in 2020, when Blue informed Red that it could only sell 100 cases of Blue One to Red in 2020. Red's position is that Blue was legally obliged to sell 200 cases of Blue One to Red annually, while Blue's position is that it has no such obligation (***See***: ¶19).

3. Eventually, parties concluded a Sales Contract dated 26.9.2020 for 100 cases of Blue One, whereby the agreed method of shipment was FOB (INCOTERMS®2020). (***See:*** Sales Contract at Exhibit 6). The Sales Contract was signed late given the fact Red contacted Blue in September instead of July. In previous years Sales Contracts were signed In July and shipping was done in September. (***See***: ¶19).

4. Thereafter, Red requested to vary the mode of delivery to delivery by air via an email dated 1.10.2020, and confirmed that it would "… bear all costs and risks", to which Blue abided (***See:*** Email dated 1.10.2020 at Exhibit 7).

5. On 7.10.2020, between the time the air carrier received the container containing the 100 cases of Blue One ("Container") and the time it was to be loaded onto the airplane, lightning struck the bonded area where the Container was located, causing a fire which completely burned the Container ("Fire Incident") (***See***: ¶23).

6. Arising from the destruction of the Container, Red demanded that Blue deliver 200 cases of Blue One, to which Blue had refused to do so (***See***: ¶24).

B. Issue 1: Blue does not have the legal obligation to deliver 200 cases of Blue One to Red

7. It is Blue's position that it does not have the legal obligation to deliver 200 cases of Blue One to Red, as there was never a contract between the companies to deliver 200 cases of Blue One in 2020.

8. To determine whether Blue has the legal obligation to deliver 200 cases of Blue One to Red, Articles 2.1.1 and 4.3 of the UNIDROIT Principles of International Commercial Contracts (2016) ("UPICC") are pertinent. In this connection:

    8.1. Article 2.1.1 provides that: "A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement."

    8.2. To prove whether there was an agreement, one must consider the relevant circumstances shown by Article 4.3 (Relevant Circumstances).

B1. The Memo is intended by both parties to be non-binding in nature

9. It is Blue's position that the Memo is non-binding in nature, as it is only a preliminary expression of an acceptance of the offer to step into a business relationship, briefly setting the terms which

shall be further governed with a Sales Contract. Both parties confirm in their respective statements that they did not prepare a contract (***See:*** Exhibit 3-1 and 3-2).

10. In the event Red claims that the Memo should be read as an agreement, Blue would argue that the Memo is a mere note for negotiation which does not and cannot be deemed to be sufficient to serve as a contract to govern parties' obligations. The Memo also does not contain salient terms governing parties' contractual obligations such as terms of delivery, governing law, and dispute resolutions. Details such as the number of cases and the price were made clear via the sales and purchase agreements drawn up each year (***See***: ¶20).

11. Further, having examined the established customs between the parties (***See:*** UPICC 1.9, Usages and Practices), we submit that, from the past transactions of Blue One (***See:*** Exhibit 4) that differing from the contents of the Memo (200 cases, 100 USD per bottle) was in fact possible. The sales contracts were in fact concluded with different quantities and prices depending on the circumstances each year, in view of the nature of the wine business.

12. In fact, it is undisputed by both parties that there was no continuous contract for the continuous purchase of 200 cases Blue One. As submitted at paragraph 1.2 above, both parties enter into a fresh contract without fail every year, pertaining the sale and purchase of Blue One to specify the details of the Sales Contract, including the number of cases, price, terms of delivery, governing law and mode of dispute resolution (***See***: ¶20).

13. If parties had intended for the contents of the memo to be legally binding for a specified period of time, both parties would have entered into a continuous contract for the sale and purchase of Blue One without having to enter into a fresh contract every year. That was not the case here.

14. To bring home our point above, Blue respectfully draws the Tribunal's attention to Article 2.1.13 of the UPICC, which provides that:

> "… the course of negotiations one of the parties insists that the Contract is <u>not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters in that form</u>". (emphasis added)

<u>B2. Red was late to place its order for 200 cases of Blue One in September 2020</u>

15. According to the established practice between Blue and Red from 2011 to 2019, as well as the nature of the winemaking for Blue One whereby production capacity is only 1,000 cases per year, it is understood between parties that orders for Blue One, if any, ought to be made by July each year. (***See***: ¶13).

16. However, in 2020, there was a delay by Red to place its order for 200 cases of Blue One. As a result, by the time Red placed its order for 200 cases of Blue One, 900 cases out of 1,000 cases had been ordered by other customers (***See***: ¶21).

17. The following provisions under the UPICC are pertinent:

    17.1. Article 1.9 of UPICC provides that "*The parties are bound by any usage to which they have agreed and by any* practices *which they have established between themselves*"; and

    17.2. Article 1.8 of UPICC provides that "*A Party cannot act inconsistently with an understanding that it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment*".

18. In light of the established practice between Red and Blue and Articles 1.8 and 1.9, we submit that Red ought to be bound by any usage to which they have agreed and by any practices which they have established between them from 2011 to 2019.

19. Since Red had failed to place its order for Blue One by July 2020, there was no legal obligation for Blue to deliver any amount of Blue One to Red at all.

C. Issue 2: Blue is not liable for the non-performance of obligation concerning 100 cases of Blue One in relation to the sales agreement dated 26.9.2020

C1. Red had agreed to assume all risks arising from the change of mode of delivery from carriage by sea to carriage by air

20. In Red's email dated 1.10.2021, Red had stated that it *"… will bear all costs and risks*" arising from its request to change the mode of delivery from carriage by sea to carriage by air due to the fact that "*the time of shipment is delayed compared to normal years*". (***See:*** Exhibit 7).

21. Pursuant to Red's request and reliance on Red's representation that it would assume all costs and risks of the change in the mode of delivery, Blue had arranged for shipment of the 100 cases of Blue One via Arbitria Air Flight 200 on 7.10.2020. (***See:*** Exhibit 7, emails dated 1.10.2020 and 3.10.2020).

22. At the time of the Fire Incident, despite agreeing to vary the mode of transportation for shipping the 100 cases, the parties remained silent on the "terms of delivery" (i.e., FOB), among others; (***See:*** Exhibit 7, emails dated 1.10.2020 and 3.10.2020). Both Blue and Red also did not identify the precise new point of delivery; (***See:*** Exhibit 7, emails dated 1.10.2020 and 3.10.2020) and Blue had handed over and the air carrier had received the 100 cases of Blue One on 7.10.2021. (***See:*** Exhibit 8, email dated 8.10.2020 from Blue to Red).

23. It is Blue's position that the FOB terms of delivery had ceased to be applicable, in view of the change of mode of delivery by air, as FOB is used only for carriage by sea or inland waterway. Under paragraph 2 of the explanatory notes of FOB, FOB is "used only for sea or inland waterway transport where the parties intend to deliver the goods by placing the goods on board a vessel." (***See:*** INCOTERMS®2020 at page 92).

24. In view of the inapplicability of FOB, it is pertinent to determine the applicable rules governing delivery of Blue One based on the facts that Red had assumed all costs and risks of delivery of Blue One; (***See:*** Exhibit 7, email dated 1.10.2020) and both parties did not agree on a precise new point of delivery. (***See:*** Exhibit 7).

25. In this connection, the following INCOTERMS®2020 rules for carriage by air may be applicable under the circumstances of this case:

    25.1. Ex Works (EXW) or Free Carrier (FCA), in which the rule on place or point of delivery is that where parties do not agree on a specific place or point of delivery, the parties are taken to have left it to the seller to select the point "that best suits its purpose (***See:*** INCOTERMS®2020 at pages 21 and 28);

    25.2. Carriage Paid To (CPT), in which the rule on place or point of delivery is that where parties do not agree on a specific place or point of delivery, the default position is that risk transfers when the goods have been delivered to the first carrier at a point entirely of the seller's choosing and over which the buyer has no control (***See:*** INCOTERMS®2020 at page 40);

    25.3. Carriage and Insurance Paid To (CIP), in which the seller delivers the goods and transfers risks to the buyer by handing them over to the carrier contracted by the seller or by procuring the goods so delivered. The seller may deliver the goods by giving the carrier physical possession of the goods in the manner and at the place appropriate to the means of transport used. In CIP, the risk transfers from seller to buyer when the goods are delivered to the buyer by handing them over to the carrier (***See:*** INCOTERMS®2020 at pages 49 and 52)

26. In gist, under all the applicable rules of delivery under the INCOTERMS®2020 rules (except for CIP as stated above), the point at which the risk is transferred to the buyer is left to the discretion of the seller (i.e. Blue) where the parties have not agreed to or identified the specific point of delivery (***See:*** INCOTERMS®2020 at pages 23, 31, and 40).

27. By applying the facts at paragraphs 21 to 23 above, Blue submits that the INCOTERMS®2020 rule on Ex Works (EXW) is the most appropriate rules to apply to the new arrangement between Blue and Red, where the buyer (i.e. Red) assumes all costs and risks.

28. Under the EXW terms of delivery:

    28.1. If no specific point has been agreed within the named place of delivery, and if there are several points available, the seller may select the point that best suits its purpose. The seller must deliver the goods on the agreed date or within the agreed period (***See:*** INCOTERMS®2020 at page 23).

    28.2. In the absence of an agreement providing who bears the risk of loss prior to loading the goods to the carrier, risk of loss of or damage to the goods occurring while the loading operation is carried out by the seller, lies with the buyer. (***See:*** INCOTERMS®2020 at page 21).

29. Blue respectfully submits that it had transferred the risks to the buyer when it handed over and the air carrier received the 100 cases, and as a result thereof, it is not liable for the destruction of the 100 cases of the Blue One due to the Fire Incident.

30. Further and in any event, since Red had expressly agreed to assume its liability, Blue respectfully submits that Red is not entitled to claim from Blue the losses of 100 cases of Blue One which it had expressly assumed liability for.

31. Blue's position is consistent with Article 1.8 of the UPICC, which provides that:

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

32. In the circumstances, Blue should not be held liable for the destruction of the 100 cases of Blue One during the Fire Incident.

C2. In any event, Blue cannot be held responsible for loss/non-delivery of the 100 cases of Blue One as Blue One was destroyed due to a force majeure event.

33. Article 10 of the Sales Contract provides that:

    "Neither party shall be responsible for any failure to fulfill its obligations hereunder due to causes beyond its reasonable control, including without limitation ... acts of God, shortages of materials, transportation delays, fires, (…) provided that it gives prompt notice to the other of its invocation of this provision and makes diligent efforts to resume its performance despite such force majeure." (emphasis added)

34. Blue submits that it had complied with all conditions under Article 10 of the Sales Contract:

    34.1. The 100 cases were lost through a fire, which is an event of force majeure identified under Article 10 of the Sales Contract.

    34.2. After the goods were destroyed by fire, Blue was unable to deliver the 100 cases of Blue One because, at that point, there were only 200 cases remaining in Blue's warehouse and those 200 cases were already sold to another buyer. (***See:*** Exhibit 8, email dated 9.10.2020 from Blue to Red)

34.3. Blue sent a notice about the loss of 100 cases on 7.10.2021 or a day after the occurrence of the force majeure event. (***See:*** Exhibit 8, email dated 8.10.2020 from Blue to Red)

34.4. Blue made a reasonable attempt to deliver 100 cases when Blue offered to deliver 100 cases of valuable second label wines of the five major chateaux as a substitute for Blue One. (***See:*** Exhibit 8, email dated 9.10.2020 from Blue to Red)

35. In the circumstances, we respectfully submit that Blue is entitled to rely on Article 10 of the Sales Contract to exempt Blue from any liability for failure to perform any obligation thereunder (i.e. to deliver 100 cases of Blue One) due to force majeure.

D. Issue 3: If the liability of Blue for non-performance of obligation is recognized for 200 cases or 100 cases of Blue One, the quantum payable by Blue to Red in each respective case

36. Blue's submissions at Part D herein are strictly without prejudice to Blue's position at Part B and Part C above and only premised upon the assumption that liability is established for 200 cases or 100 cases of Blue One.

37. In deciding the quantum payable by Blue to Red, the following facts and issues of law are pertinent:

37.1. Article 7.4.7 of the UPICC provides that where the harm is due in part to an act or omission of the aggrieved party or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each parties. Blue submits the harm suffered by Red (if any) was in fact caused by factors attributable to Red, as follows:

Delays in placing orders for Blue One

37.1.1. There were delays by Red in placing the order for 200 cases of Blue One.

37.1.2. As submitted at Part B2 above, Red only attempted to place orders for Blue One 2 months later than usual (***See:*** Exhibit 5, ¶19). It is within Red's knowledge that Blue One is produced in a limited quantity i.e. maximum 1,000 cases per year (***See:*** Exhibit 3). Yet, Red entered into negotiation late.

37.1.3. Red's delays in entering negotiations was in fact the cause of Blue's inability to sell 200 cases of Blue One to Red.

Change of mode of delivery pursuant to Red's instructions

37.1.4. It was Red who had instructed Blue to change the mode of delivery from carriage by sea to carriage by air by expressly stating that it would assume all costs and risks.

37.1.5. But for the change in the mode of delivery, the 100 cases of Blue One would not have been destroyed in the Fire Incident.

37.2. Article 7.4.8 (1) of the UPICC provides 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 regard:

37.2.1. Blue had in fact tried to offer Five Famous Chateaux as compensation with a cheap price despite the fact that Blue could sell the Five Famous Chateaux with higher Baker Points at a higher price. Five Famous Chateaux is a second label wine which is gaining popularity among Red's customers (***See:*** Exhibit 4).

37.2.2. Hiromi Red also acknowledged that the name Five Famous Chateaux is famous (***See:*** Exhibit 3) and can be used to sell wine in order to reduce loss from 100 cases short.

37.2.3. Despite all these, Red had refused all offers from Blue and insisted for Blue to do the impossible i.e. to deliver 100 cases of Blue One, refusing to mitigate its harm.

38. In the circumstances, should the Tribunal decide that the Blue is liable for the non-delivery of 200 cases or 100 cases of Blue One, the quantum of damages to be awarded to Red should be as follows:

Quantum of damages for 100 cases of Blue One:

38.1. It is Blue's position that the damages payable to Red should liability for non-delivery of Blue One be determined to be 100 cases should be in the amount of **USD47,400** which is derived as follows:

38.1.1. Loss of profit for 100 cases is derived as follows:

1000 USD x 70 cases[1] x 12 bottles = USD84,000 300 USD x 30 cases[2] x 12 bottles = USD10,800 USD84,000 + USD10,800.00 = USD94,800.00

38.1.2. In view of the matters submitted at paragraphs 37.1.5, 37.1.6 and 37.2.1 to 37.2.4 above, it is Blue's position that the amount of damages payable to Red ought to be reduced to half. As such, the damages payable to Red shall be **USD47,400**.

Quantum of damages for 200 cases of Blue One

38.2. It is Blue's position that the damages payable to Red should liability for non-delivery of Blue One be reduced to 200 cases should be in the amount of **USD94,800**, which is derived as follows:

38.2.1. First 100 cases of Blue One: USD47,400 (see paragraph 38.1 above)

38.2.2. Second 100 cases of Blue One: USD47,400 (same method of calculation as paragraph 38.1.1 above). In view of the matters submitted at paragraphs 37.1.1 to 37.1.5 above, it is Blue's position that the amount of damages payable to Red for the 2nd 100 cases of Blue One ought to be reduced to half i.e. **USD47,400**.

38.2.3. USD47,400 (as calculated at (42.2.1)) + USD47,400 (as calculated at (42.2.2)) = USD94,800.

Part II: Kanpai Case

E. Salient Facts in relation to Kanpai Case

39. Red and Blue entered into an Exclusive Distributorship Agreement dated 1.11.2014 ("EDA for Kurenai") wherein Red had agreed to grant Blue with exclusive distributorship rights to sell Kurenai in the territory of Arbitria for a period of 5 years with 3 years renewal term (***See***: Exhibit 9).

40. Under the EDA for Kurenai, Blue was obliged to sell annually at least 10,000 cases of Kurenai only to restaurants or hotels in Arbitria, and was not allowed to sell any individuals directly or indirectly.

[1] 70% of Blue One are sold at Red's restaurant and bars
[2] 30% of Blue One are sold at shops

41. Yellow Corporation ("Yellow") and Blue entered into an Exclusive Distributorship Agreement dated 1.3.2017 ("EDA for Kanpai"), whereby Yellow had agreed to grant Blue with an exclusive distributorship right to sell Yellow's beer product called "Kanpai" in the territory of Arbitria for 5 years period with 3 year renewal term (***See:*** Exhibit 11). Under the EDA for Kanpai, Blue was obliged to purchase a minimum amount of Kanpai on an annual basis as stipulated under the EDA for Kanpai.

42. By virtue of an assignment contract dated 15.9.2018 ("Assignment Contract"), the EDA from Kanpai was assigned by Yellow to Red, wherein Red had agreed to comply with all the terms, make all payments and perform all conditions and covenants in the EDA for Kanpai as if Red were an original party to the EDA for Kanpai.

43. Circa mid-January of 2021, Red notified Blue on the termination of EDA for Kurenai and EDA for Kanpai from the 31.3.2021 under Article 16 (4) of EDA for Kurenai and Article 10 (b) (iii) of EDA for Kanpai (***See:*** Exhibit 15). It is Blue's position that Red is not entitled to terminate both the EDA for Kanpai and EDA for Kurenai, as the the conditions to terminate the EDA for Kanpai and EDA for Kurenai had not been met.

F. Issue 1: Red is not entitled to terminate the exclusive distributorship agreements for Kurenai and Kanpai entered into with Blue

F1. Red is not entitled to terminate the EDA for Kurenai as the conditions entitling termination under Article 16(4) of the EDA for Kurenai have not been met

44. Blue submits that the non-performance of Blue to achieve sales amount of 10,000 cases in 2019 was **not fundamental** in accordance with UPICC 7.3.1 (2) as:

    44.1. According to Article 16 (4) of EDA for Kurenai, Red can terminate only in case of Blue's non-performance for 2 years consecutively which allows Blue to avoid termination of the contract due to non-performance only in 1 year. Therefore, after Blue successfully overachieved minimum sales target from 2015 to 2018 (***See*:** Exhibit 10), Red instructed Blue to put more energy on selling on Kanpai rather than Kurenai till the end of 2019 (**See,** Exhibit 13) which means Red also understood that failing to achieve sales of 10,000 cases in 2019 after successful sales achievement in previous years is acceptable.

    44.2. Sales amount by Blue in 2019 was 9,000 cases and minimum sales target was 10,000 cases. Non performance was only 1,000 cases, which was an insignificant missing part and didn't deprive Red substantially from getting the expected result (***See*:** Exhibit 10, UPICC 7.3.1. (2) (a).

45. Blue's inability to achieve sales amount of 10,000 cases in 2020 was due to Arbitrian government's restraints on selling alcohol to stop the spread of novel coronavirus (**See:** ¶ 33, 34) which can be considered as **force majeure event** as:

    45.1. The outbreak of the novel coronavirus pandemic and the restraints imposed by the government (in relation to the sale of alcohol in restaurants and hotels) in response thereto in Arbitria was beyond the control of Red and/or Blue.

    45.2. Due to the coronavirus pandemic and various restrictions imposed by the government, 90% of Blue's customers stopped selling alcohol in their restaurants and hotels which was beyond the control of Blue and Red.

46. Non performance of Blue in 2020 is excused due to force majeure by virtue of Article 7.1.7 of UPICC as the occurrence of the force majeure event was beyond Blue's control.

47. As such, Blue's inability to perform its sales obligations in 2020 due to force majeure in 2020 should not be counted in calculation of consecutive 2 years of non-performance and therefore,

due to absence of 2 consecutive years of non-performance, Red is not entitled to terminate the contract in accordance with Article 16 (4) of EDA for Kurenai.

F2. Red is not entitled to terminate the EDA for Kanpai.

48. Blue had achieved the minimum purchase amount in 2019 in accordance with Article 9(a) of the EDA for Kanpai. Therefore, it cannot be a part of consecutive years of not achieving the minimum purchase amount mentioned in Article 10(b)(iii). In this connection:

    48.1. In 2019: minimum purchase amount - 15,000 (***See:*** Exhibit 11) versus actual purchase amount - 14,000 (***See:*** Exhibit 10).

    48.2. Article 9 (a) of the EDA for Kanpai allows Blue to add an excess amount of purchase above the minimum purchase amount in the previous year to the next year (***See*:** Exhibit 9).

    48.3. Therefore, the actual purchase amount of Blue in 2019 was 15,000 cases (***See*:** Exhibit 10).

49. In year 2020, Blue could not achieve the minimum purchase amount (16,000 cases versus 11,000 cases) due to force majeure event (novel coronavirus pandemic) in 2020 and the non-achievement of minimum purchase target cannot be considered as a default or failure to perform any obligation in the agreement by virtue of Article 17 of the agreement (***See:*** Exhibit 11).

50. In 2020 during the months of January to March, June to September, and November to December, the Arbitrian government had imposed voluntary restraint due to the coronavirus pandemic (***See:*** ¶ 33, 34). In view thereof:

    50.1. Only 10% of Blue's customers were selling beer during the pandemic period. In ordinary times, Blue should purchase 1,333 (16,000/12) cases per month.

    50.2. Only 10% of the target can be achieved for 9 months, which will amount to 1,200 cases and another 3 months 4000 cases (16,000 / 12 x 3 months).

    50.3. Based on the calculation above and based on Blue's past records, the sales volume which Blue could have achieved should be only 5,200 cases in 2020.

    50.4. However, Blue had expended considerable efforts to increase purchase amount to 11,000, which means Blue had doubled their efforts to attempt to achieve the target in 2020, albeit to no avail due to the force majeure event.

51. Based on the above, Blue respectfully submits that Red is not entitled to terminate both the EDA for Kanpai and EDA for Kurenai.

G. Issue 2: The interim measures ought to be granted by the Tribunal

52. Blue respectfully submits that interim measures ought to be granted by the Tribunal, for the reasons submitted in Part G herein.

53. In the EDA for Kurenai, Article 21 stipulates that the applicable rules governing the arbitration procedures arising out of the EDA for Kurenai shall be the UNCITRAL Arbitration Rules for dispute resolution and the seat of arbitration is Tokyo, Japan (***See:*** Exhibit 9). Therefore, the Japan Arbitration Act ("JAA") will apply as the applicable law governing procedures.

54. In the EDA for Kanpai, there is an effective arbitration agreement (***See***: page 39 of Exhibit 11). Although there is no agreement on the seat of arbitration in the EDA for Kanpai, as Red had agreed to merge two arbitration cases and to argue before the same arbitral tribunal, the Arbitral

Tribunal should consider Article 28(2) of JAA stipulating that the Arbitral Tribunal shall provide the place of arbitration by giving regard to the circumstances of the dispute, including the convenience of the parties.

55. In the event that this Tribunal does not agree that the seat of arbitration for the EDA for Kanpai is in Japan, regarding "Rules of Arbitration Procedure" for EDA for Kanpai, Article 26 of the Japan Arbitration Act empowers the Arbitral Tribunal to decide on the arbitration rules governing the arbitration procedure where the arbitration agreement does not stipulate the arbitration rules. Article 26 is reproduced below for the Tribunal's ease of reference:

> "(1) The rules of an arbitration procedure which the Arbitral Tribunal should observe shall be as provided by the agreement of the parties (...).
>
> (2) If an agreement (...) has not been reached, the Arbitral Tribunal may carry out the arbitration procedure in such manner as it finds appropriate, unless such manner violates the provisions of this Act." (emphasis added)

56. Since Red and Blue had agreed to consolidate the cases of Kurenai and Kanpai in one arbitration and in view of the fact that Article 21 of the EDA for Kanpai stipulates the use of the UNCITRAL Arbitration Rules, it would be just and convenient for the Tribunal to adopt the same set of rules for the arbitration in relation to the EDA for Kanpai. As such, Article 26 of the UNCITRAL Arbitration Rules will apply for interim measures.

57. The Tribunal is empowered under Article 26.1 and 2 of the UNCITRAL Arbitration Rules to grant an interim measure. Article 26(3) of of the UNCITRAL Arbitration Rules provides for the test as to whether an interim measure should be granted, as follows:

> "3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
>
> (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
> (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim.." (emphasis added)

58. Further and/or alternatively, in the absence of the application of the UNCITRAL Arbitration Rules in the EDA for Kanpai, this Tribunal is also empowered by Article 24 of the Japan Arbitration Act to grant interim measures.

G1. The harm caused on Blue is irreparable and imminent, if interim measure is not granted

59. It is Blue's position that the EDA for Kurenai and EDA for Kanpai are subsisting, valid and binding. At the outset, we wish to highlight that these agreements are ***exclusive*** in nature.

60. Blue has been the exclusive distributor for both Kurenai and Kanpai in Arbitria since 2015 and 2017. During this time, Blue had established its reputation as the exclusive distributor of the products.

61. In the event the interim measure is not granted, Blue will lose its reputation as the exclusive distributor of Kurenai and Kanpai, causing Blue to be perceived as an unstable company, having lost its exclusive distributorship rights. As a result, Blue will lose the trust its business partners had, and lose its business. This loss is irreparable, and cannot be quantified.

62. Therefore, an interim measure is needed to preserve the very essence of the exclusive distributorship agreement pending the determination by this Tribunal.

63. Blue's position above is further supported by the fact that in November 2020, Red had agreed and represented to Blue that it would provide Kurenai and Kanpai for the Negoland Fair in 2021 (***See***: ¶38). In reliance of Red's representation, Blue had expended considerable efforts, both monetarily and in terms of resources to prepare for the Negoland Fair in order to ensure that the sales of Kurenai and Kanpai are maximised. Therefore, it was a known fact that Blue would be selling Kurenai and Kanpai at the Negoland Fair.

64. If the interim measure is not granted by this Tribunal, Blue will suffer imminent loss of reputation in that having advertised extensively that the products would be sold at the fair, but was unable to do so due to Red's breaches of the exclusive distributorship agreements.

65. In addition to this, Blue will lose the profits that it would have made from the sales of the products as the exclusive distributor pending the outcome of the arbitration award. Also, if Blue becomes unable to sell the products at the Negoland Fair, Blue will lose the profit for 1,000 cases each product (***See***: ¶38).

66. Based on the above, it is clear that the harm suffered by Blue, should the interim measure not be granted, is imminent, irreparable, and cannot be compensated by costs. As such, we respectfully submit that interim measures ought to be granted by this Tribunal.

G2. The harm caused to Blue substantially outweighs the harm which would be caused on Red should the interim measure be granted

G2(a) Red will not suffer any losses if the interim measure is granted

67. As a major beverage producer in Arbitria, Blue is entitled to participate in the Negoland Fair, which is a food fair of the largest scale in Arbitria. On the contrary, Green Corp ("Green"), being only a distributor for imported beverages, is not entitled to participate in the food fair (***See***: ¶28).

68. Due to Green's inability to participate in the food fair, Red would suffer the loss of revenue, as Green is unable to sell Kurenai and Kanpai on a large scale at the food fair.

69. On the contrary, should Blue be allowed the interim measure for Red to sell Kurenai and Kanpai to Blue, Red is able to generate great revenue through the sales of those products at the Fair.

70. Further, it is doubtful Green can yield better sales, compared to Blue, because:

    70.1. Green's scale of business and business connection in Arbitria is much smaller than Blue's, and

    70.2. In terms of resources for advertising, Green is less experienced in the marketing of the products compared to Blue (***See***: ¶28).

71. As such, there is no loss suffered by Red and in fact, Red would gain substantial profit, should the interim measure be granted.

G2(b) Even if Red suffered losses, such losses may be compensated monetarily

72. If Red is ordered to suspend sales of Kurenai and Kanpai to Green and to sell them to Blue, the losses suffered by Red are monetary in nature which may be compensated by costs.

73. In the event an interim measure is granted in favour of Blue, Red will not be able to distribute Kurenai and Kanpai to Green, which may be a breach of Red's agreement with Green.

74. Red may be liable to Green for breach of contract. The liability for this breach of contract is easily quantifiable and may be compensated by Blue.

75. Based on the above, Blue respectively submits that the harm suffered by Blue definitely outweighs the harm suffered by Red (if any, which is denied). Considering the imminent and irreparable harm Blue would suffer, the Tribunal ought to grant the interim measures to order Red to suspend the sales to Green and to order Red to sell the products to Blue.

G3. Blue will succeed on the merits of the claim as submitted at Part F above

76. As submitted at Part F above, there are merits in Blue's claims against Red and it is submitted that Blue will succeed on the merits of the claims for the reasons submitted at Part F.

H. Issue 3: The Arbitral Tribunal has jurisdiction to determine the disputes in relation to Kanpai

77. Blue respectfully submits that there is a valid and binding arbitration agreement between Red and Blue in relation to the EDA for Kanpai, and this Tribunal has the jurisdiction to determine the disputes between Blue and Red arising out of the EDA for Kanpai.

H1. Article 15(b) of the EDA for Kanpai incorporates the General Business Agreement, which contains an arbitration agreement

78. The EDA for Kanpai was assigned from Yellow to Red by virtue of the Assignment Contract (***See:*** Exhibit 12), which provides that:

> "As of the date of this Assignment, Assignee agrees to comply with all the terms … and perform all conditions and covenants in the Contract as if Assignee were an original party therein." (emphasis added)

79. The net result of the Assignment of Contract is that Red had stepped into the shoes of Yellow and is bound by all conditions and covenants of the EDA for Kanpai, as if Red were an original party to the EDA for Kanpai.

80. In this connection, Article 15(b) of the EDA for Kanpai (***See:*** Exhibit 11) refers to the mode of dispute resolution in the General Business Agreement between Yellow and Blue, which provides that the disputes in relation to the exclusive distribution for Kanpai shall be finally settled by arbitration.

81. It is Blue's position that the arbitration agreement falls within the term "covenants" which Red had agreed to by virtue of the Assignment of Contract.

82. In Black's Law Dictionary (11th Edition), the term "covenant" is defined as "to promise or undertake in a covenant" and the following explanatory note is provided in relation to the term "express covenant":

> "Express covenants are such as are created by the express words of the parties in the deed, declaratory of their intention. As the good of society requires that contracts entered into with the solemnity incident to deeds or covenants should be inviolably observed and strictly executed, the law has decreed, that where a man expressly covenants to do an act which he would not otherwise be bound by law to perform, he has, by his own deliberate act, imposed on himself a responsibility, from which in general he cannot be relieved, and is compellable, if he neglect such a duty, to make compensation in damages to the party injured"[3] (emphasis added)

83. Blue's position above is further supported by Article 2(1) of New York Convention which provides that arbitration agreements can be incorporated by reference. By virtue of Article 2(1) of the New York Convention, Article 15(b) of the EDA for Kanpai, the Assignment of Contract and the General Business Agreement, the arbitration agreement had been assigned to Red. As

[3] Thomas Platt, A Practical Treatise of the Law of Covenants 25-26 (1829)

a result thereof, all disputes in relation to the EDA for Kanpai shall be settled by way of arbitration.

84. Article 9.1.13 of the UPICC which enables the obligor, Blue, to assert against the assignee, Red, all defences including procedural defences.

H2. The conditions precedent to refer the dispute to arbitration has been met

85. To invoke the arbitration under Article 15(b) of the EDA for Kanpai (read together with the General Business Agreement), parties must have attempted to settle the dispute amicably before referring the dispute to arbitration.

86. As evinced by the exchange in emails between Red and Blue (***See:*** Exhibit 15), parties had attempted and failed to settle the disputes in relation to EDA for Kanpai amicably, and as such, Blue is entitled to refer the dispute to arbitration.

I. Conclusion

87. In summary, it is Blue's position that:

In relation to Blue One Case

87.1. Blue did not have the legal obligation to deliver 200 cases of Blue One to Red as there was never a contract between the companies to deliver 200 cases of Blue One in 2020, and Red had to place its order for Blue One according to established practice between Blue and Red.

87.2. Blue is not liable for the non-performance of obligation concerning 100 cases of Blue One as Red had agreed to assume all risks and costs in view of the change in mode of delivery from carriage by sea to carriage by air and in any event, the non-delivery was due to force majeure.

87.3. In the event liability of Blue for non-performance of obligation is established for 200 cases or 100 cases, Blue's position is that the quantum of damages should be as follows:

87.3.1. Quantum of damages if liability is established for 100 cases: USD47,400;
87.3.2. Quantum of damages if liability is established for 200 cases: USD94,800.

In relation to Kanpai Case

87.4. Red is not entitled to terminate the EDA for Kurenai and the EDA for Kanpai, as the conditions entitling Red to terminate both EDAs have not been met.

87.5. The interim measures sought by Blue ought to be accepted by this Tribunal because:

87.5.1. The harm caused on Blue is irreparable and imminent should interim measure not be granted;
87.5.2. The harm inflicted on Blue substantially outweighs the harm that is likely to result to Red; and
87.5.3. There is a good possibility that Blue will succeed on the merits of the claim.

87.6. The Tribunal has the jurisdiction to determine the disputes related to the EDA for Kanpai, as there was an effective assignment of the covenant to arbitrate to Red.