The 22nd Intercollegiate Negotiation Competition

Round A

December 9th, 2023

Preliminary Memorandum for Red Corp.

University of Tokyo
English 1

Abbreviation

- Problem Paragraph：¶
- UNIDROIT Principles of International Commercial Contracts 2016：U
- UNCITRAL Arbitration Rules：UNCITRAL
- Memorandum of Understanding for Lunar Exploration Project：MOU (Ex.5)
- Agreement on Distribution of Lunar Data and Materials：Distribution Agreement (Ex. 6)
- Agreement for the Cost Sharing for the Lunar Probe Project：Cost Agreement (Ex. 7)
- Sound Recording of discussion between Red Corporation and Blue Inc.：Sound Recording (Ex.9)
- Excerpts from the Space Resources Act of Negoland：Negoland Act (Ex. 11)
- Sound Recording of the meeting between Red Corporation and Blue Inc：Sound Recording (Ex. 12)
- Order concerning handling of data pertaining to the Moon：Arbitrian Order (Ex. 13)
- Satellite Launch Agreement：Launch Agreement (Ex. 14)

Moon Case

Issue 1: Blue's obligation to transfer the material and the data to Red

Red seeks an arbitral award demanding Blue to transfer to Red:

a) half of the material extracted & b) a complete copy of the data obtained

Issue 2: Red's obligation to pay part of the contractual cost to Blue

Red seeks an arbitral award dismissing Blue's demand for the payment of USD 160 Million.

Issue 3: Red's petition for interim measures

Red seeks an interim measure prohibiting Blue from selling:

a) the materials to either Black Company or Arbitria & b) the data to Arbitria

ISSUE 1. Blue is obliged to transfer a) half of the materials and b) a complete copy of the data collected from Area β to Red

Executive Summary

Under U4.1&4.3, the meaning that "reasonable persons of the same kind as the parties would give to" the contract "in the same circumstances" guides the interpretation of contract provisions. Accordingly, we submit that:

i. The words "divided equally" in Distribution Agreement (Ex. 6) Art. 2.1 shows that Blue has a legal duty to transfer half of the materials to Red. Further, it is not "impossible in law" (U7.2.2(a)) to perform this duty, despite the Negoland Act (Ex. 11) Art. 5.2.

ii. The words "jointly owned" in Distribution Agreement (Ex. 6) Art. 1.1 shows that Blue must transfer a copy of the data to Red. Further, Arbitrian Order (Ex. 13) Art. 1 does not make it "impossible in fact" (U7.2.2(a)) for Blue to perform this duty.

iii. The words "weight" and "value" in Distribution Agreement (Ex. 6) Art. 2.2 shows that the tribunal should divide the materials "equally" based on objective standards of "weight", while taking into account subjective standards of "value" as determined by both parties (Distribution Agreement (Ex. 6) Art. 2.2). The "value" each party holds towards the materials should be determined under ¶19 and the MOU (Ex.5), thus, Red should receive the 10 kg rock.

Ⅰ. a) Blue's duty to transfer half of the materials to Red

i. Blue is obliged to transfer half of the materials to Red under Distribution Agreement (Ex. 6) (U4.1&4.3)

1. Distribution Agreement (Ex. 6) Art. 2.1 provides "All materials…shall be divided equally between Red and Blue." This article is to "be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances" (U4.1(2)). In addition, U4.3 provides that when applying U4.1, "regard shall be had to all the circumstances," listing some in particular;

Under U4.3(a), the parties' "preliminary negotiations" are relevant:

2. MOU (Ex. 5) was prepared in January 2019 as a record of discussion between Red and Blue before entering into Distribution Agreement (Ex. 6) (¶10). Under MOU (Ex. 5), the mission of this project between Red and Blue includes resource extraction from the Moon and examination of the extracted materials (Ex. 5 1.②, ⑤). Red is particularly interested in extracting materials that can be used to manufacture semiconductors (Ex. 5 1. ② ⅰ), and it is necessary for Red to determine whether the materials from Area β meet Red's needs. Accordingly, MOU (Ex. 5) contemplates Blue transferring extracted materials to Red.

Under U4.3(d), the contract's "nature" is relevant:

3. Under Distribution Agreement (Ex. 6) Art. 2.3, both parties are to have "equal rights to access" the materials. Further, under Distribution Agreement (Ex. 6) Art. 3.2, each party is "to store their respective shares separately." These provisions strongly indicate that the transfer of the materials is not only anticipated by the contract, but is intrinsic to the very "nature of the contract."

Under U4.3, the words used by the parties are the priority factor among "all the circumstances":

4. According to Vogenauer's Commentary (2015) of U4.3, "the only prima facie priority that is relevant under Chapter 4 of the PICC is that accorded to the words used by the parties."[1] The title of Section 2 of Distribution Agreement (Ex. 6) is "Distribution of Materials," and the dictionary meaning of "distribution" is "the process of giving things out to several people,"[2] meaning that "distribution" obviously implies dividing and transferring the materials.
5. Therefore, the words "divided equally" in Distribution Agreement (Ex. 6) Art. 2.1 should be interpreted as a physical division and transfer of half of the materials from Blue to Red (U4.1(2)).

ii. Negoland Act (Ex. 11) does not exempt Blue from its obligation to transfer half of the materials (U7.2.2(a))

6. Blue cannot say that it cannot perform its obligation to physically transfer half of the materials to Red, due to Negoland Act (Ex. 11 &¶20) making it "impossible in law" to transfer ownership of the materials to Red (U 7.2.2(a)).
7. First, the issue of ownership under Negoland Act (Ex. 11) is one that only concerns Red and Negoland. The attribution of ownership to Red in Negoland has no connection with Blue's performance of its obligation to physically transfer the materials, because Distribution Agreement (Ex. 6) Art. 7.1 is governed by and construed in accordance with UPICC, not the acts of Negoland. Thus, Blue cannot invoke the Negoland Act (Ex. 11) in order to avoid the performance.
8. Second, Negoland Act (Ex. 11) Art. 5.2 provides "Unless ownership has been transferred by the state, no person…may own space resources." Red has committed to negotiating with Negoland to have Red's ownership of the materials recognized (¶22). There is a possibility that the Negoland government will transfer ownership of the materials to Red in the future, after Red reports that Red is possessing the materials. Even if Negoland does not grant ownership of the materials to Red, the possession is still important, as Red can make use of the materials for research while possessing them.
9. Therefore, Blue cannot claim that the performance is "impossible in law" (U7.2.2(a)) and cannot escape its obligation to transfer half of the materials to Red.

b) Blue's duty to transfer a complete copy of the data to Red

i. Blue is obliged to transfer a copy of the data to Red under Distribution Agreement (Ex. 6) (U4.1&4.3)

10. Distribution Agreement (Ex. 6) Art. 1.1 provides "All data…shall be jointly owned by the Parties." This article is to be interpreted according to U4.1&4.3 as mentioned above.

Under U4.3(a), the parties' "preliminary negotiations" are relevant:

11. The MOU (Ex. 5) states the understanding between both parties, concerning the transmitting of the data from the exploration probe back to Earth, and the analysis of the data (Ex. 5 1.⑤, 2.②). It is obviously necessary for Red to have access to the data. Therefore, the MOU (Ex. 5) contemplates Blue's transferring of the data to Red.

Under U4.3(d), the contract's "nature" is relevant:

12. Under Distribution Agreement (Ex. 6) Art. 1.2, "both parties shall have equal rights" concerning the data. Sharing the data is obviously necessary for Red to exercise "equal rights" regarding the use of the data. Further, Distribution Agreement (Ex. 6) Art. 1.3 provides that "Neither party shall withhold any portion of data from the other Party…," which shows that the transfer of the data is anticipated in principle unless Distribution Agreement (Ex. 6) or applicable law prevents the transfer.

Under U4.3(d), the contract's "purpose" is relevant:

[1] Stefan Vogenauer, (2015), *Commentary on the UNIDROIT principles of international commercial contracts,* 2nd ed., Oxford University Press, p.596.

[2] Cambridge University Press & Assessment, (2023), *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/distribution

13. Red and Blue “discussed the distribution of…the data to be obtained by the project.” (Ex. 6 Preamble). The purpose of Distribution Agreement (Ex. 6) is distribution of the data, namely, the act of copying and transferring the data.

Under U4.3, the words used by the parties are the priority factor among "all the circumstances":

14. As mentioned in [4], the title of Distribution Agreement (Ex. 6) Section 1 is “Distribution of Data,” which means that the parties clearly had a “common intention” (U4.1(1)) that the word “distribution” would include copying and transferring the data. In the alternative, “reasonable persons of the same kind as the parties” (U4.1(2)) would interpret that Blue is obliged to transfer a copy of the data to Red.
15. Therefore, the words “jointly owned” in Distribution Agreement (Ex. 6) Art. 1.1 should be interpreted to mean that the data is to be jointly owned and held by the Parties (U4.1(2)).

ii. Arbitrian Order (Ex. 13) concerning handling of data pertaining to the Moon does not exempt Blue from its obligation to transfer the data (U7.2.2(a), 6.1.14(a), 5.1.4(2))

16. Blue cannot say that it is impossible to transfer the data to Red due to Arbitrian Order (Ex. 13) (¶20), arguing that it is "impossible in fact” (U7.2.2(a)).
17. Arbitrian Order (Ex. 13) Art. 1 requires the permission of the Arbitrian government before transferring the data. Under U6.1.14(a) where a public permission is needed to perform contractual duties, the party that “has its place of business” in the relevant State – in this case Blue – must “take the measures necessary to obtain the permission.” Further, under U5.1.4(2), Blue must make “best efforts” to obtain the permission.
18. In this case, Arbitria informed Blue that it would give permission to Blue on the condition that “Blue guarantees to the Government of Arbitria that Red will never use the data in a manner that is contrary to the national security of Arbitria” (¶20). However, Blue has refused to ask for the permission, stating that it cannot take risks of having to pay a fine of USD 1 Million in the case where Red violates Arbitrian National Security Act (¶20).
19. The data obtained in Area β was originally meant to be transmitted to earth in real time, if it were not for the malfunction of Avrio's data transmission(¶18). Therefore, naturally, Red had expectations to obtain the data real-time, and such Red's expectations are being betrayed due to unexpected circumstances. Red had expectations of obtaining the data, and Blue should make its “best efforts” to ensure these expectations should be protected.
20. Moreover, as Arbitrian Order (Ex.13) concerns Red's actions and data, Blue should have first consulted Red about this order before unilaterally stating that Blue cannot transfer the data. Considering the fact that Red and Blue have been important business partners for 43 years (¶4), endeavoring on this joint project together, Blue is not fulfilling its “best efforts” to take such actions and withhold the data gained from this joint project, without even trying to convey or discuss possible solutions with Red.
21. Although Blue may not have anticipated this situation at the time of the contract, in general, space business related to national security often requires some kind of permission (U4.3(f)), and Blue should make “best efforts” to obtain such permission. In other words, Blue has already factored in the risk when they agreed to the Distribution Agreement (Ex. 6), and if Blue has not factored in that risk, Blue should be made to bear responsibility for its failure to perform its contractual duties.
22. Therefore, Blue is not fulfilling its “best efforts” to obtain the permission of transferring a copy of the data from the Arbitrian government (U 5.1.4(2)). Blue cannot claim that its performance is “impossible in fact” (U7.2.2(a)), and must seek permission from the Arbitrian government to transfer the data to Red.

Ⅱ. How to divide the materials (U4.1&4.3)

23. Distribution Agreement (Ex. 6) Art. 2.1 stipulates “All materials … shall be divided equally…,” and Art. 2.2 stipulates “Such division shall be made based on weight, volume, and/or value as determined by the Parties.” These articles should be interpreted in light of U4.1&4.3 as mentioned above.
24. As for objective standards on how to divide the materials, Distribution Agreement (Ex. 6) Art. 3.1 states that “the materials shall be handled and stored in a manner that maintains their integrity and value". Based on this provision, the materials cannot be physically splitted as it will greatly lessen “their integrity and value"

The only way in this case to equally and objectively divide the materials, is to divide the materials "based on weight"; dividing the materials into two groups of the 10 kg rock, and the other materials including seven rocks (1 kg each); ten rocks (100 g each); and a regolith (2 kg), which weighs 10 kg in sum.

25. Concerning each parties' subjective viewpoints based on the "value," Red has constantly insisted from the start that Red places value on the materials extracted from Area β, where there is a possibility of the existence of titanium (¶19). Red has expressed that it "is particularly interested in...materials...to manufacture semiconductors" in the MOU (Ex. 5), and furthermore has specifically expressed interest in Area β at the material extraction stage (Sound Recording (Ex. 9)). On the other hand, Blue's head researcher expressed interest in Area α, where there is a possibility of the existence of water (Ex. 9, ¶19).
26. Therefore, in order to make an equal distribution, all materials from Area β should be "divided equally" both on objective standards based on "weight" and subjective standards based on "value." The arbitral tribunal should divide the materials by balancing these two standards. Thus, Red should receive the 10 kg rock, which is the most notable for research purposes(¶19), and Blue should take the rest including: seven rocks (1 kg each); ten rocks (100 g each); and a regolith (2 kg), which weighs 10 kg in sum.

ISSUE 2. Red is not obliged to pay Blue USD 160 Million

Executive Summary

U7.1.3(2) and 6.1.1(a) /U7.1.3(1) and 6.1.4(1) provide guidance on how to interpret the timing of performance. Applied in this case, we submit that:

i. Under Cost Agreement (Ex. 7) Art. 3.1, Red can withhold cost payments of USD 150 Million until;

a) Red having already received transfer the materials and the data from Blue, or

b) Red receives transfer the materials and the data simultaneously

Under U2.1.18 first sentence, Red is not obliged to pay the additional USD 10 Million because the verbal agreement at Sound Recording (Ex. 12) does not amend Cost Agreement (Ex. 7).

Since Blue cannot sell the materials, it cannot claim that half of the proceeds from the sale of the materials to Arbitria and Black Corporation should be reduced from the invoiced amount.

Ⅰ. Red is not obliged to pay costs to Blue until the delivery of materials and data is completed (U7.1.3(2)&6.1.1(a) / U7.1.3(1)&6.1.4(1))

Performance in advance

27. U7.1.3(2) provides "the party that is to perform later may withhold its performance until the first party has performed" Further, under U6.1.1(a), "if a time is …determinable from the contract," a party, here Blue "must perform its obligations…at that time."
28. The sharing of all costs required for Avrio's launch and exploration is subject to Cost Agreement (Ex. 7)(¶12). In principle, Cost Agreement (Ex. 7) Art. 2.1 provides that the costs associated with each party's roles and responsibilities as outlined in Art. 1 are to be borne by each party respectively.
29. However, Cost Agreement (Ex. 7) Art. 3.1&3.2 provides that the costs will be calculated and split equally when the probe has returned and "all project activities" have been completed. The words "all project activities" are to be interpreted under U4.1&4.3 to reasonably determine the timing of performance by Blue.
30. Distribution Agreement (Ex. 6) was concluded on May 10th before Cost Agreement (Ex. 7) was concluded on May 15th (¶12). This means that Red and Blue envisioned transfer of the materials and data before the cost settlement as a "nature of the contract" (U4.3(d)).
31. Furthermore, it would be contrary to "good faith and fair dealing" (U1.7) to assert that the contract could be concluded without the physical transfer of the data and materials. These are critical "project activities" under Cost Agreement (Ex. 7) Art. 3. Accordingly, as Blue has not performed its obligations, the contract has not been completed and Red has no legal duty to perform its obligation to pay the outstanding part of its half share of the aggregated costs (U4.3(d)).
32. Therefore, the words "all project activities" should be interpreted to include transfer of the materials and the data (U4.1&4.3). It is clear that the time of performance is determinable from Art. 3 and the transfer

corresponds to performance in advance (U6.1.1(a)) , which means that there is no obligation to pay costs until transfer is made. (U7.1.3(2)).

Simultaneous performance

33. Even if "all project activities" does not include the physical transfer of the materials and data, U7.1.3(1) provides "where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance."
34. Further, U6.1.4(1) provides "to the extent that the performances …can be rendered simultaneously, the parties are bound to render them simultaneously," and the commentary of U6.1.4(1) requires "sufficient connection between the obligations."[3] We will determine whether there is a "sufficient connection" between the obligation of transfer and the obligation of cost payment under U4.1&4.3.
35. First, Ex. 6 and Ex. 7 are separate agreements, but Red and Blue concluded both Distribution Agreement (Ex. 6) and Cost Agreement (Ex. 7) based on MOU (Ex. 6 and 7 Preamble). This means that Red and Blue recognize that there is a "sufficient connection" between transfer and payment as "preliminary negotiations" (U4.3(a)).
36. Moreover, "as part of the process of implementing the Project," Red and Blue "discussed the distribution of the data and materials" (Ex. 6 Preamble), and on the other hand, Red and Blue "discussed how to share the costs" (Ex. 7 Preamble). As "the purpose of the contract" (U4.3(d)), Red and Blue consider transfer and payment as equal parts within "the Project."
37. Furthermore, "while negotiating the delivery of the materials and the data, Red and Blue agreed to proceed with the settlement procedures" (¶21). This suggests that both parties consider the delivery of materials and cost splitting to be subject to simultaneous performance (U4.3(c)).
38. Therefore, the obligation of transfer and the obligation of cost payment have "sufficient connection," and Distribution Agreement (Ex. 6) and Cost Agreement (Ex. 7) are bilateral agreements, which means this case is in simultaneous performance. Thus, Red can withhold the performance of cost payments until Blue performs the obligation of the transfer (U6.1.4(1)&7.1.3(1)).

Ⅱ. Red is not obliged to pay Blue an additional USD 10 Million (U2.1.2/U2.1.18)

39. First, U2.1.2 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."
40. In Sound Recording (Ex. 12), Red proposed that "we think that we could probably adjust the cost-sharing by increasing our share of costs by 10 million USD," which only showed the possibility of adjustment. This means that the proposal is not "sufficiently definite," and therefore there was no agreement on the additional cost (U2.1.2).
41. Second, U2.1.18 first sentence stipulates "A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated," and Cost Agreement (Ex. 7) Art. 4.1 provides "This Agreement may be amended only by written agreement of both Parties." Thus, under U2.1.18, oral agreements are not permitted in Cost Agreement (Ex.7).
42. Since Red's offer to pay the additional payment of USD 10 Million as adjustment for not being able to explore Area α is made only orally, not in written form, the offer did not amend Cost Agreement (Ex. 7).
43. Therefore, Red has no obligation to pay an additional USD 10 Million to Blue.

Ⅲ. Blue cannot sell all of the materials and reduce Red's cost payment

44. Blue announced that it has reached an agreement to sell half of the materials to Black Corporation and other half to Arbitria in September 2023 (¶24), and claims that, when Blue receives payment for these sales, Red's costs payment would be reduced by USD 50 Million.

[3] Vogenauer, p.840.

45. However, as we will show below under Issue 3, this sale itself is an act that impairs the "integrity and value" (Distribution Agreement (Ex. 6) Art. 3.1) of the materials and thus Blue has no legal right to sell any more than half of the materials (see [55] to [57]).
46. Therefore, Blue cannot reduce Red's cost payments by USD 50 Million.

ISSUE 3. Red's petition for interim measures should be granted

Executive Summary

UNCITRAL Art. 26 (1) and (3) provide guidance on granting interim measures to prevent "current or imminent harm" under certain conditions. We submit that Red's petition for interim measures prohibiting the sale of the materials and the data should be granted, as three requirements provided are all met.

The request for an injunction against the sale of a) the materials and b) data should be granted (UNCITRAL Art. 26)

47. According to UNCITRAL Art. 26 (1), the arbitral tribunal may grant interim measures based on the request of the parties, and each item of paragraph 2 states possible measures. In this case, since Blue's plan to sell the materials and data would cause damage to Red, interim measures should be granted under Art.26 (2)(b), which orders a party to "take action that would prevent…current or imminent harm."
48. In order for Red's request for interim measures to be granted in this case, Art. 26 (3)(a) &(b) must be met. Caron and Caplan explain[4] three requirements extracted from items (a) and (b). The requirements are (ⅰ) the arbitral award for damages is to cause harm not adequately reparable by an award of damages; (ⅱ) such harm substantially exceeds the harm caused by interim measures of injunction; and (ⅲ) there is a reasonable possibility that the case will be successfully concluded.

a) Application for interim measures against the sale of the materials

ⅰ) Red will suffer from harm that cannot be compensated through damages once Blue sells the materials to Black Company and Arbitria (requirement (ⅰ))

49. There will be a business risk to Red. The space industry is such a rapidly developing business field and there will be a lot of competitors soon. Thus, it is beneficial for Red to be able to make use of the materials obtained at present. Such intention is included in Red's purpose of conducting an investigation (MOU (Ex. 5) Art. 1. ② i) in this project.
50. If Blue transfers the materials to Black which "is internationally recognized as a competitor of Red"(¶24), the damage to Red would be immeasurable. During the tribunal, Red will not be able to conduct research while Black conducts research. The difference would be critical in this rapidly expanding field.
51. To calculate the approximate damage to Red, half of Red's business profit is gained in its electronics divisions that produce semiconductors and Red's income in 2022 was USD 60 Million (Ex. 3). Considering these facts, Red would suffer from USD 30 Million loss at maximum, if other competitors such as Black gain the materials and manufacture electronics products. Thus, there is a risk that harm not adequately reparable by an award of damages will occur.

ⅱ) The harm to Red caused by the sale of the materials would substantially outweigh the harm to Blue resulting from an interim order (requirement (ⅱ))

52. Even if the request for interim measures is granted, the prohibition on Blue selling its share to a third party will only be temporary until the arbitration award becomes final. Accordingly, any inconvenience to Blue will be very short-term.
53. Blue cannot rely on the Arbitrian Government's threat to discontinue its future support for Blue's business if Blue refuses Arbitrian Government's request to transfer the materials and the data (Blue President's Affidavit (Ex 13-1)). The threat does not give Blue the right to sell Red's share of the materials, or a copy of the data, to Arbitria. Blue's future relationship with Arbitria is entirely Blue's responsibility. This is because

[4] Caron, D. and Caplan, L., (2013), *The UNCITRAL Arbitration Rules (A Commentary),* 2nd ed., Oxford University Press, pp.521-522.

Blue can avoid such a situation by selling half of the materials to Arbitria after this tribunal closes since Blue has the legal right to sell their shares of the materials under Distribution Agreement (Ex.6) Art. 2.3.

54. This means that the harm that may be caused to Red substantially exceeds the harm that will be caused to Blue by the interim injunction.

ⅲ) Blue has no legal right to sell Red's share of the materials to a third party (requirement (ⅲ))

55. Red's merits of the claim are that Blue's sale of the materials including Red's shares is not allowed. Thus, in the following, we will explain that Red's claim just mentioned is legitimate.
56. According to Distribution Agreement (Ex. 6) Art. 3.1, "the materials are to be "handled and stored" so as to "maintain their integrity and value." At this point, the division under Art. 2.2 has not been determined yet, so the materials must be stored in compliance with Art. 3.1. If there were no interim measures granted, the materials will no longer be "stored" and their "integrity" will be lost by Blue arbitrarily dividing them into two lots for sale – in a unilateral manner, without Red's involvement or consent. Accordingly, dividing and selling the materials to Black and Arbitrian government violates this duty of stewardship imposed on Blue by Distribution Agreement (Ex. 6) Art. 3.1.
57. Thus, Red's statement that Blue should not sell the materials is legitimate and there is a reasonable possibility that the arbitral panel will uphold Red's complaint on the merits of Issues 1 and 2.

b) Application for interim measures against the sale of the data

ⅰ) Red will suffer from harm that cannot be compensated through damages once Blue sells the data to Arbitria (requirement (ⅰ))

58. The sale of this data deprives Red of the opportunity to develop new businesses ahead of its competitors.
59. The size of potential business Red wants to cultivate is immense since the space industry is at its infancy and there are a lot of business opportunities with only a few companies having taken them up yet. Moreover, the data was newly obtained from the "surface on the far side of the Moon that had previously only been poorly studied" (¶15). By analyzing the data, Red "has a plan to develop more advanced space projects with an eye to the future, such as extracting materials from the Moon for use in the manufacture of semiconductors" (¶6). This is a business chance that allows Red to conduct business ahead of the rest of the world.
60. As Blue knows, Red entered into this joint project specifically intending to leverage the data to become a leader in this industry. If Blue sells the data to Arbitria, Red will be likely to lose this immense competitive advantage.
61. Arbitrian government will conduct research using the data during the tribunal, since Arbitria is "actively involved in space development" (¶4). It is currently analyzing the data, even during this arbitral proceeding, while Red has no access whatsoever to the data it collected jointly with Blue. The harm already taking place is likely to accelerate, spread and have long-term effects. Only a timely injunction can mitigate that harm and protect Red's access to this rapidly developing industry.
62. Moreover, it is probable that the data will be passed on to Red's competitors and that they may start a similar business before Red does. Arbitria is "working diligently to foster private space operators" (¶4), and there is a probability that the data will be passed on to companies such as Black.
63. Thus, Red will miss business opportunities as shown above and the harm caused to Red will be long-term.

ⅱ) The harm to Red caused by the sale of the data would substantially outweigh the harm to Blue resulting from an interim order (requirement (ⅱ))

64. Secondly, even if the request for interim measures is granted, interim measures will not unduly inconvenience Blue because Blue's attempt to sell the data is a breach of contract and was never intended to be able to sell the data, to anyone, at any time (see [67] to [72]).
65. Even if Blue has the legal right to sell the data, Blue cannot argue that if it declines the request by Arbitria, Arbitria would discontinue its future support for Blue as the Arbitrian Ministry of Science told Blue (Ex. 13-1). This is because Blue can still avoid such a situation by selling the data to Arbitria after these proceedings are finalized.

66. Thus, the harm that Red will suffer if there are no interim measures substantially exceeds the harm Blue will suffer if the Tribunal grants the injunction.

iii) Blue has no legal right to sell the data to other parties (requirement (iii))

67. First, U4.3(d) provides guidance on how to interpret the parties' intentions in light of all the circumstances including the nature and purpose of the contract. Also, U4.4 provides that "terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear."
68. Distribution Agreement (Ex. 6) Art. 1.2 which concerns the data, states that "both Parties shall have equal rights to access, use, distribute, or otherwise benefit from the data." Comparing this with Art. 2.3 which concerns the materials, "[b]oth Parties shall have equal rights to access, use, distribute, sell, or otherwise benefit from these materials," only the word "sell" has been deleted. This is because data only has value if it is monopolized, and it is not originally intended to be sold in this project.
69. Distribution Agreement (Ex. 6) Art. 1.1 stipulates that "all data" "shall be jointly owned by the Parties." In general, ownership entitles one the right to access, use, distribute and sell the object subject to ownership.
70. However, the fact that Distribution Agreement (Ex. 6) Art. 1.2 has specifically omitted the situation to "sell", clearly shows that while all other rights that ownership entitles one in Art. 1.1 are guaranteed, both parties intended on specifically restricting the "sale" of the data.
71. Moreover, compared to the materials, the data can easily be shared to other parties, since the transfer of the materials requires physical distribution of the materials whereas the data does not. Art.1.2 is a reflection of each party's intention to prohibit data sale based on this nature of data.
72. Considering these circumstances, and interpreting under U4.3(d) and Art. 4.4, Distribution Agreement (Ex. 6) Art. 1.2 stipulates that Red and Blue cannot sell the data. Therefore, Blue's sale of this data to Arbitria is not permitted.
73. In conclusion, there is a reasonable possibility that Red's application for an interim measure to prohibit Blue from selling the data will be successful on the merits of the claim.

Satellite Case

Issue 1: Red's obligation to pay the contractual payment to Blue

Red seeks an arbitral award dismissing Blue's claim that Red is obliged to pay Blue USD 75 Million.

Issue 2: Blue's obligation to pay the contractual refund and liquidated damages to Red

Red seeks an arbitral award ordering Blue to refund USD 75 Million to Red and to pay Red USD 75 Million as liquidated damages.

Issue 3: Blue's petition to have Mr. Bob Orange removed as an arbitrator

Red seeks an arbitral award dismissing Blue's petition to have Mr. Orange removed.

ISSUE 1. Red is not obliged to pay USD 75 Million to Blue

Executive Summary

U5.3.1 provides guidance on how to interpret the condition of the obligation performance "upon the occurrence of a future uncertain event." U5.3.2 provides guidance on timing when the obligation in U5.3.1 takes effect. Accordingly, we submit that:

i. The words "due upon successful orbital insertion" in Launch Agreement (Ex. 14) Art. 3 is regarded as "a future uncertain event." Thus, the payment of USD 75 million as the final payment is stipulated as "suspensive condition," which means that the payment only takes effect if the satellite is successfully inserted into the orbit (U5.3.2).

ii. However, the satellite "re-entered the atmosphere and vanished "(¶29); orbital insertion failed. Red is not obliged to pay USD 75 Million to Blue since the condition of the obligation performance has not arrived based on the above.

I. The final payment stipulated in Launch Agreement (Ex. 14) is "due upon successful orbital insertion" (U5.3.1&5.3.2, 4.1&4.3(d))

74. U5.3.1 stipulates that "a contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition)."
75. Launch Agreement (Ex. 14) Art. 3 provides for the timing of payment from Red to Blue. Art. 3.1 states the "Final Payment" of USD 75 Million is "due upon successful orbital insertion."
76. Since the provision contains the word "successful," the condition for the payment is regarded as "a future uncertain event." Thus, Art. 3.1 for the final payment stipulates suspensive conditions, that on the condition the satellite is successfully inserted into orbit, Red will have a legal duty to make the payment.
77. Moreover, the purpose of Launch Agreement (Ex.14) is to insert Red's satellite into orbit (U4.1&4.3(d)). Also, "in case of launch failure attributed to Blue, a subsequent launch will be scheduled at no additional cost" (Launch Agreement (Ex. 14) Art. 5.1). This shows that considering "nature of the contract", it is expected that Blue conducts the launch until it is successfully done (U4.3(d)).
78. Considering these facts, the suspensive condition for the final payment is not unreasonable for Blue and can be regarded as the mutual intention of Red and Blue. Therefore, the period for performing the final payment of USD 75 Million is "with the condition that the satellite is successfully inserted into orbit."

II. The time when the satellite has been successfully inserted into orbit has not yet arrived

79. As "the rocket carrying the satellite failed to reach its planned orbit due to this effect and re-entered the atmosphere and vanished with the satellite" (¶29), the condition for performing the payment of USD 75 Million, "when the satellite is successfully inserted into orbit," has not yet been met.

ISSUE 2. Blue is obliged to pay USD 150 Million to Red

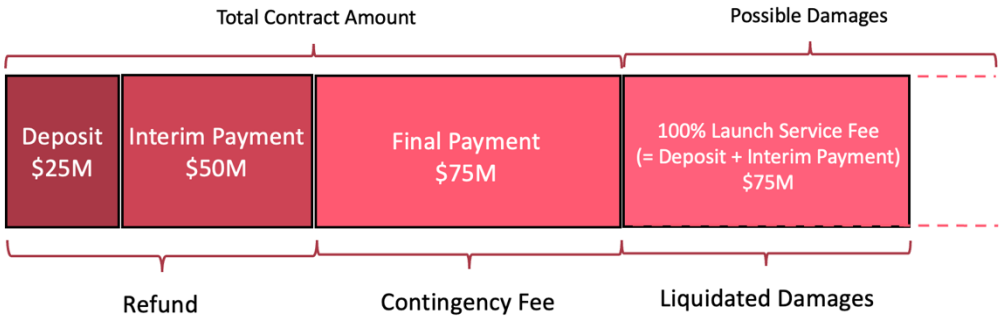
Executive Summary

We submit that Blue is obliged to pay USD 150 Million to Red under Launch Agreement (Ex. 14) Art. 5.1 and the Satellite Launch Agreement (Ex. 14) Attachment B Performance Guarantee Clause 3.

ⅰ. The words "Launch failure attributed to Blue" and "refund" in Launch Agreement (Ex. 14) Art. 5.1 provide for the situation that has arisen in this case, where Blue is liable for the launch failure. This provision requires Blue to refund 50% of the total contract amount to Red. As this situation can be applied in this case, Blue is obliged to refund USD 75 Million to Red.

ⅱ. The words "failure" and "total loss" of Launch Agreement (Ex. 14) Attachment B Performance Guarantee Clause 3 para. (b) item (ⅲ), under the heading "Performance Shortfall," provide for the circumstances that apply in this case, where Blue is liable for losses Red suffers. They require Blue to pay USD 75 Million in liquidated damages, which equals to 100% of Launch Service Fee, to Red. This provision applies in this case, as the satellite failed to reach its planned orbit.

ⅲ. In conclusion, Red demands Blue to pay the sum of (ⅰ) and (ⅱ), USD 150 Million.



Ⅰ. Blue is obliged to pay Red USD 75 Million as refund under Launch Agreement (Ex. 14) Art. 5.1

80. Launch Agreement (Ex. 14) Art. 5 covers launch failures and contractual breaches. Art. 5.1 provides that "in case of launch failure attributed to Blue, a subsequent launch will be scheduled at no additional cost, or a refund of 50% of the total contract amount will be provided to Red."
81. The "launch failure" occurred and can be "attributed to Blue" for the following reasons.

82. “Blue argues that a sudden severe geomagnetic storm…, which was not predicted by the Space Weather Service, occurred after the launch, affected the rocket's guidance system, and caused the launch failure (¶29).”
83. Blue detected anomalies in the rocket's guidance system on the launch day prior to the launch. Blue considered the anomaly to be due to the sensor and “fixed it” (Ex.15). However, it was later found that Blue had not in fact fixed the anomalies in the guidance system (¶29). This shows that Blue’s inspection and repair work was not thorough enough and anomalies remained even after the repair was done by Blue.
84. Therefore, the most direct cause of the “launch failure” was “the rocket’s guidance system.”
85. Accordingly, Blue is responsible for the direct cause of the failure, which is “the rocket’s guidance system”, and the failure can be “attributed to Blue.”

A) “Force Majeure” (Ex.14 Art. 6.1)

86. Blue’s first counterclaim may be that it is not obliged to refund because the situation falls under Launch Agreement (Ex. 14) Art 6.1 which is headed as “Force Majeure” and covers “events beyond its reasonable control and unforeseeable circumstances.”
87. However, the situation was under Blue’s control, because Blue could have canceled the launch and avoided this result based on two grounds.
    a. First, Blue did not take the forecast of the G1-level geomagnetic storm seriously. There was a forecast for a G1-level geomagnetic storm by a reliable space forecast (¶29). A G1 level storm is not massive; however, there have been cases where even G1 storms have caused launch failures. Given the size of Red’s investment and the onerous nature of Blue’s Performance Guarantee, it would have been prudent for Blue to postpone the launch to avoid such risks.
    b. Second, the launch on January 10 could not be conducted because “several Blue Inc. personnel involved in the launch had been drinking excessively the day before, contrary to Blue’s regulations, and were therefore unable to participate in the launch operations (¶28).” On January 10, no geomagnetic storms occurred (¶29). If it were not for this staff’s misconduct, Blue could have successfully conducted the launch on January 10.
88. Therefore, there were two opportunities for Blue to avoid this failure, so Blue had “reasonable control” over the situation.
89. In conclusion, since this case falls under Launch Agreement (Ex. 14) Art. 5.1, Blue has the legal duty to pay USD 75 Million, which is 50% of the contractual cost, as refund.

Ⅱ. Blue is obliged to pay Red USD 75 Million as liquidated damages under Launch Agreement (Ex. 14) Attachment B Clause 3 (b)(iii)

90. Launch Agreement (Ex. 14) Attachment B Clause 3 provides for the liquidated damages that Blue is obliged to pay to Red if the launch rocket fails to deliver the satellite to the intended orbit. Clause 3(b)(ⅲ) states that “in the case of total loss of the Satellite due to failure of the Launch Vehicle to reach orbit…liquidated damages equivalent to 100% of the Launch Service Fee will be payable to the Client.”
91. Clause 3(b)(iii) applies because “the rocket carrying the satellite failed to reach its planned orbit due to this effect and re-entered the atmosphere and vanished with the satellite” (¶29).
92. Accordingly, Blue is obliged to pay Red USD 75 Million. This amount accounts for 100% of the Launch Service Fee, which is the combined fee of the “Deposit” (USD 25 Million) and “Interim Payment” (USD 50 Million) (Launch Agreement (Ex. 14) Art. 3.1).

B) “Exceptions and Limitations” (Ex.14 Attachment B Clause 4(b))

93. The second counterclaim that Blue may make would be that Blue is not liable for damages because the situation falls under the exception of Blue’s Performance Guarantee in Launch Agreement (Ex. 14) Attachment B Clause 4(b). This exception covers “other events beyond the reasonable control of Blue.”
94. However, this Force Majeure provision does not apply. Blue had control over the situation; Blue could have canceled the launch and avoided this result based on two grounds mentioned above (see above [86] to [88]).

C) “Cross-Waiver of Liability” (Ex.14 Art. 4.3)

95. The third counterclaim that Blue might make would be that Blue is not liable for damages because of the cross-waiver of liability provision in Launch Agreement (Ex. 14) Art. 4.3.
96. However, we argue that in this specific case, this cross-waiver clause is not applicable, rather only the provisions of the Attachment B Performance Guarantee are applicable.
97. The official UPICC commentary explains[5] that "it goes without saying that, in cases of conflict, provisions of a specific character prevail over provisions laying down more general rules."
98. Referring to the wording of Launch Agreement (Ex. 14) Art. 8.2, Red submits that Attachment B lays down specific provisions applying solely to the launch vehicle's performance. In contrast, the main text of Launch Agreement (Ex. 14) consists of general provisions that apply to other situations. Attachment B Clause 3 explains "In the event the Launch Vehicle fails to deliver the Satellite to the target orbit within the specified tolerances, Blue shall... liquidated damages equivalent to 100% of the Launch Service Fee will be payable to the Client."
99. As Attachment B is a specific provision, Launch Agreement (Ex.14) Art. 4.3, which is the cross-waiver of liability provision, does not apply in this specific case because Attachment B Clause 4 is clearly intended to take precedence as the specific provision covering exceptions to liability for liquidated damages.
100. Moreover, even if Launch Agreement (Ex. 14) Art. 4.3 does apply in this case, the exception within that article operates, as there was gross negligence of Blue based on three grounds.
    a. Firstly, as mentioned in [83], Blue did not conduct sufficient investigation or repair.
    b. Secondly, as mentioned in [87], Blue did not pay enough attention to the space forecast of G1-level geomagnetic storm.
    c. Thirdly, as mentioned in [87], Blue had the drinking problem of its workers. Blue postponed launches due to its personnel's excessive drinking twice in 2022. Even though the drinking of Blue's workers was regarded as a problem in the company, "Blue did not take concrete measures to prevent the recurrence of such drinking, but only gave strict warnings to those who participated in the drinking (¶29)." Due to Blue's negligence on the governance of its workers, the workers drank excessively again this time. This kind of unprofessional behavior of Blue towards this problem is Blue's fault.
101. In combination, these three grounds amount to gross negligence by Blue.
102. In conclusion, Blue's counterclaims cannot be accepted. Therefore, Blue is obliged to pay Red USD 75 Million as liquidated damages.

Ⅲ. Red can demand both refund and liquidated

103. Based on the above, Red can combine the demand of USD 75 Million as refund and USD 75 Million as liquidated damages. Therefore Blue is obliged to pay Red USD 150 Million.

ISSUE 3. Mr. Bob Orange should not be challenged as an arbitrator

Executive Summary

UNCITRAL Art. 12.1 guides decisions on when an arbitrator may be challenged on the basis of "justifiable doubts" as to their "impartiality or independence". We will argue that in this case:

a) there is no doubt as to Mr. Bob Orange's impartiality or independence, or

b) in the alternative, there is insufficient doubt as to his impartiality or independence.

Mr. Bob Orange should not be challenged as an arbitrator in this case because there are no circumstances that give rise to "justifiable doubts".

There are no circumstances regarding Mr. Bob Orange that give rise to justifiable doubts as to his impartiality (UNCITRAL Art. 12.1)

104. UNCITRAL Art. 12.1 states that "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality...."

[5] International Institute for the Unification of Private Law, (2016), *UNIDROIT Principles of international commercial contracts 2016*, p.145.

105. We submit that Mr. Orange's remarks at an international academic conference on September, 2023 (¶33) were merely general statements and do not raise justifiable doubts concerning Mr. Orange's impartiality.
106. Firstly, as Caron and Caplan explain[6] that as implied by the word "justifiable," UNCITRAL Art.12.1 clearly intends to establish objective standards for determining whether an arbitrator lacks impartiality or independence. Therefore, even if a party has subjective concerns about fairness and files a challenge, the challenge should be determined objectively.
107. Next, it is clear that the challenge to Mr. Kessler in National Grid PLC v. The Argentine Republic (1976),[7] who was doubted to have "a firm view on issues which are key to the final result of the arbitration" as with Mr. Orange in this case, has to be evaluated in context. Mr. Kessler's statement was based on hypothetical questions. Following this description, we will explain the impartiality of Mr. Orange, considering all the facts based on the objective standards.
108. It would have been difficult for Mr. Orange not to mention geomagnetic storms in a lecture entitled "Force Majeure in Launch Services." Mr. Orange made his comment in this context based on a hypothetical scenario "when the G1 geomagnetic storm occurred. "Since he does not specifically mention the Red Star accident (¶33) and only speaks in "general terms," his comment does not publicly display any bias favoring one party in relation to another party regarding the Red Star accident.
109. Further, in addition to the Red Star launch failure, there have been other serious accidents caused by G1-level geomagnetic storms in the past such as the incident of SpaceX[8], and Mr. Orange's statement is a mere generalization based on these cases. Therefore, on a objective standard, Mr. Orange's statements are impartial.
110. Moreover, according to the IBA Guidelines on Conflicts of Interest in International Arbitration[9], this case falls under Art. 4.1.1 of the "Green List." "The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case)." This Green List is "a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view (IBA guidelines)."
111. Mr. Orange meets the criteria in Green List Art. 4.1.1 because Mr. Orange stated a legal opinion of whether the claim of force majeure should be accepted if one knew that a G1-level geomagnetic storm, which has the potential to cause a serious accident was likely to occur. This is certainly an opinion based on legal issues, not a specific case.
112. Thus, it is arguable that Mr. Orange is impartial and independent under IBA guidelines.
113. Lastly, we would like to state Mr. Orange's uniqueness. Mr. Orange is a lawyer who studied space engineering at a top U.S. university, worked for NASA for 15 years, and then qualified as a barrister in the UK, specializing in space law (¶33). Even one of these accomplishments is difficult to achieve, much less all three, and as the space industry is a relatively new industry, there are few legal professionals. It would be extremely hard to find an alternative for him.
114. Therefore, there are no circumstances that give rise to justifiable doubts about Mr. Orange's impartiality, and he should not be challenged (UNCITRAL Art. 12.1).

[6] Caron and Caplan, p.208.
[7] Caron and Caplan, p.222. "Decision of the LCIA on the Challenge to Mr. Judd L. Kesler; see https://jusmundi.com/fr/document/decision/en-national-grid-plc-v-the-argentine-republic-decision-on-the-challenge-to-mr-judd-l-kessler-monday-3rd-december-2007#decision_1268.
[8] The case of SpaceX (URL: https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2022SW003193)
[9] IBA council, (2014), *IBA Guidelines on Conflicts of Interest in International Arbitration*, p.25.