

Meiji University

PRELIMINARY MEMORANDUM

English Team



Red corp.

This is based on the 22nd Intercollegiate Negotiation Competition Problem.

Words and phrases in this memorandum are abbreviated as follows:

Paragraph = ¶, Exhibit = Ex.

UNIDROIT principles of international commercial contracts 2016 = UPICC

UNCITRAL Arbitration Rules = UNCITRAL

Memorandum of Understanding for Launch Exploration = the MOU

AGREEMENT ON DISTRIBUTION OF LUNAR DATA AND MATERIALS = the agreement of Ex.6

Agreement for Cost Sharing for the Lunar Probe Project = the agreement of Ex.7

Excerpts from the Act on the Promotion of Business Activities for the Exploration and
Development of Space Resources of Arbitria = the act of Ex.8

Excerpts from the Space Resources Act of Negoland = the act of Ex.11

Order concerning handing of data pertaining to the Moon = the order of Ex.13

【Moon Case】

A-I. Blue has the obligation to transfer half of the materials extracted from Area β and a complete copy of the data records obtained from Area β to Red.

1. Blue has the obligation to transfer half of the materials extracted from Area β to Red.

Red and Blue jointly work on resource extraction on the Moon [¶10]. The agreement of Ex.6 was signed regarding the distribution of the fruits of the exploration [¶12]. To interpret the article 2.1 of the agreement of Ex.6 according to the common intention of the parties, it is based on UPICC 4.1 and 4.3.

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

Red and Blue negotiated to jointly work on the project to extract resources from the Moon and asteroids [¶10]. The resources can be utilized for the development of their business [¶6, 7].

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

In this case, Blue claims that "*it could not hand over the material taken from Area β to Red*" [¶20]. Therefore, Blue recognized its obligation to hand over the materials to Red. Furthermore, since the statement was claimed before dividing the materials, Red and Blue recognized the obligation to transfer the materials before the division.

1.3 Conclusion [UPICC 4.1]

Considering the above, Red and Blue recognized that the materials and the data would be distributed to each party. Also, the obligation to transfer the materials before division. Therefore, Blue has the obligation to transfer half of the materials to Red.

2. Blue's obligation to transfer the materials does not include the transfer of the ownership.

When the agreement of Ex.6 was signed in May, 2020, there were no laws in terms of the ownership of space resources in either Arbitria and Negoland [¶12]. Since the lack of clear provisions in terms of the ownership of space resources, the rights regarding materials provided in the agreement of Ex.6 are not based on the ownership. Thus, the agreement of Ex.6 cannot include the transfer of the ownership. Therefore, Blue's obligation to transfer the materials does not include the transfer of the ownership.

3. The act of Ex.11 does not prevent Blue's performance.

On May 1, 2023, the Negoland Space Resources Act entered into force in Negoland [¶17]. The act of Ex.11 prohibits Red from owning and possessing space materials [Ex. 11]. However, since the act is a domestic law, it only affects within the sovereign territory of Negoland. Thus, the law does not prohibit Blue from transferring the materials to Red [Ex. 11]. Therefore, the act of Ex.11 does not prevent Blue's performance.

A-II. Blue has the obligation to transfer a complete copy of the data records obtained from Area β to Red.

4. Blue has the obligation to transfer a complete copy of the data β to Red.

The agreement of Ex.6 provides "Distribution of Data" of the exploration. Under the article 1.1 to 1.3 of the agreement of the Ex.6, Blue is obligated to transfer a complete copy of the data to Red. Red

and Blue jointly own the data and have the equal rights regarding the data [Art 1.1 and 1.2 of Ex.6]. Neither party shall withhold the data from the other party [Art 1.3 of Ex.6]. However, as an exception, the party may withhold the data from the other party in case "as expressly provided for under the terms of this Agreement or as required by applicable law." In this case, although the order of Ex.13 applies "applicable law", it does not require to withhold the data. Thus, Blue cannot withhold the obligation. Therefore, Blue is obligated to transfer a copy of the data to Red.

4.1 The order of Ex.13 applies applicable law.

Applicable law includes domestic laws of Arbitria and Negoland regarding the performance of the obligation to transfer the data. The article 1.3 of the agreement of Ex.6 is based on the space that has a nature of insufficient legal regulations. Thus, the purpose of the article following "other than" is to avoid harming that should be protected by any subsequent regulations concerning data that arise after the conclusion of the agreement. Thus, a law regarding distribution of data is "applicable law". In this case, the order of Ex.13 is related to the data that restricts the transfer of the data. Since the order of Ex.13 related to the obligation of data, it applies as applicable law.

4.2 Blue can obtain permission from the government of Arbitria.

The data can be transferred if the permission of the state has been obtained in advance [Ex.13]. In this case, Blue can obtain the permission by accepting the condition set by Arbitria [¶20]. The condition is that Blue shall submit a document stating that "Blue's guarantee 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]. If Arbitria determines that Red has used the data in a manner that is contrary to the national security of Arbitria, Blue shall pay a fine of US\$1,000,000 [¶20]. Regarding the condition, although the standards for what constitutes a violation of national security are currently unclear, it would be possible to clarify these standards in the future negotiations between Arbitria, Red and Blue. It is unreasonable for Red to decide to decline the condition by Blue's own judgement. Red and Blue initiated negotiation for the project in January 2017, and the actual launch occurred 7 years later, in January 2023[¶9, 14]. Also, Red is responsible for half of the total cost amount to US\$200 million [¶21, Art 3.2 of Ex. 7]. Red and Blue took a significant amount of time and money for the project. Considering such situation, it is unreasonable to decline the condition for permission due to a penalty of US\$10 million. Thus, Blue should accept the condition for permission and obtain the permission. Since the order of Ex.13 does not require to withhold the data, Blue has the obligation to transfer the data. Therefore, under the article 1.3 of the agreement Ex.6, Blue is obligated to transfer the data to Red.

A-III. If Blue is obligated to hand over half of the materials, the arbitral tribunal should divide based on weight and value, then hand over one rock weighing about 10 kg to Red.

5. The arbitral tribunal should divide based on weight and value, then hand over one rock weighing 10 kg to Red.

The materials collected from the Moon should be divided equally [Art 2.1 of Ex.6]. Also, the article 2.2 of the agreement of Ex.6 provides the criteria for division. In this case, to ensure a fair division for

Red and Blue, the arbitral tribunal should divide based on weight and value. As a result, 10 kg rock should be handed over to Red.

5.1 The materials should be divided fairly.

In this project, Red and Blue seek different materials [Art 1- ① of Ex.5]. It is difficult to divide the materials evenly. Thus, it is natural for Red and Blue to assume the materials should be divided fairly. Therefore, all materials should be divided fairly and handed over to Red and Blue. To maximize the profits for Red and Blue, the arbitral tribunal should divide the materials based on weight and value.

5.2 One rock weighing 10 kg should be handed over to Red.

Since Blue is unable to utilize the materials collected in Area β immediately, Blue reached an agreement to sell half of the materials to Black Company and Arbitria for US\$50 million each [¶24, Ex. 13-1]. The method of dividing the materials for sale is not yet determined [¶24]. Since Blue has agreed a US\$50 million sale for half the materials, Blue can gain US\$50 regardless of how the materials are divided. On the other hand, Red has plans to utilize the materials collected from Area β for research in order to expand its business [¶6, 15]. Especially, Red puts more value on the 10 kg rock which is the most notable for research. Considering the value and weight, the materials collected from Area β can be divided into one rock weighing about 10 kg and the other rocks and regolith which total 10 kg. Therefore, considering the value and weight, one rock weighing 10 kg should be handed over to Red.

B-I. If Blue is obligated to deliver to Red half of the materials collected in Area β and the data, Red can refuse to make payment until Blue fulfills such obligation.

6. Red may withhold performance of obligation to make payment.

Where the parties are to perform simultaneously, Red may withhold performance until Blue tenders its performance [UPICC 7.1.3(1)]. In applying UPICC 7.1.3(1), it is necessary to consider UPICC 6.1.4(1) "Order of performance". In this case, since the requirements of UPICC 6.1.4(1) are fulfilled, UPICC 7.1.3(1) should be applied. Therefore, Red may withhold performance of obligation to make payment.

7. Red and Blue are bound to perform simultaneously.

To the extent that the performances of Red and Blue can be rendered simultaneously, Red and Blue are bound to render them simultaneously unless the circumstances indicate otherwise [UPICC 6.1.4(1)]. The requirements are that¹: (i) there is a sufficient connection between the obligations; (ii) the obligations can be performed simultaneously; (iii) there are no circumstances indicating otherwise. In this case, all requirements are fulfilled.

7.1 Requirement (i) is fulfilled.

Considering the backgrounds of agreements of Ex.6 and Ex.7, and relationship of the obligations, there is a sufficient connection. Red has an obligation to pay to Blue for the project under the agreement of

¹ Vogenauer, Commentary on the UNIDROIT Principles of International Commercial Contracts (OUP, 2nd ed. 2015) p.739

Ex.7. As mentioned in ¶1 of this memorandum, Blue's obligation is under the agreement of Ex.6. In other words, Red's payment obligation arises from the agreement of Ex.7, while Blue's transfer obligation arises from the agreement of Ex.6. Both agreements were signed under the same MOU [¶12]. The MOU was prepared as a result of discussion about the project [¶10]. According to the MOU, Red and Blue are interested in materials that can be utilized for their future business [Art 2 of Ex.5]. The project includes the examination of these materials [Art 1-⑤ of Ex.5]. Since the agreements of Ex.6 and Ex.7 are under the MOU, each agreement was concluded to realize the project [¶12]. The distribution of the fruits as provided in the agreement of Ex.6 would be impossible without the cost-sharing for probe and rockets as provided in the agreement of Ex.7. In other words, the cost-sharing is for obtaining the fruits of the project. Thus, each obligation mutually influences. Therefore, there is a sufficient connection between Red's payment obligation and Blue's transfer obligation.

7.2 Requirement (ii) is fulfilled.

In this case, on June 1, 2023, Blue sent an invoice to Red [¶21, Art 3.3 of Ex.7]. Since more than one month has passed, the time of Red's performance has arrived. The time of Blue's performance is not mentioned in the agreement of Ex.6. Thus, Blue should perform "within a reasonable time after the conclusion of the contract" [UPICC 6.1.1(c)]. As mentioned in ¶7.1 of this memorandum, since Red and Blue are interested the materials and data collected in the Moon, the purpose of the project is to examine the materials and the data. To achieve the purpose promptly, "within a reasonable time" means as soon as the capsule returns to the Earth. It means, the time of Blue's performance has arrived. Therefore, the obligations can be performed simultaneously.

7.3 Requirement (iii) is fulfilled.

In this case, there are no circumstances indicating otherwise.

8. Red can refuse to make payment until Blue fulfills the transfer obligation.

As mentioned in ¶7 of this memorandum, Red and Blue are bound to perform simultaneously [UPICC 6.1.4(1)]. Therefore, Red can refuse to make payment until Blue fulfills the obligation to transfer half of the materials and the data [UPICC 7.1.4(1)].

B-II. If Blue does not have such obligation, Red should pay US\$150 million. In case the sale of Area β extracted material to Black Company and to Arbitria, and once the payment therefor has been received in full, Red should pay US\$75 million.

9. Red should pay US\$150 million to Blue.

Red and Blue bear the cost of US\$200 million, splitting the total cost equally [¶21, Art 3.2 of Ex.7]. In this case, US\$50 million was borne by Red and US\$350 by Blue [¶21]. Therefore, Red is obligated to pay Blue US\$150 million [Art 3.3 of Ex.7] (As refer to the formula).

① Total cost burden for Red = US\$200 million

② Red's pre-paid amount = US\$50 million

Formula: (①) – (②) = US\$150 million

10. Red has no obligation to pay an additional US\$10 million.

Red is not obligated to pay Blue the additional US\$10 million specified in Ex.12. The agreement of Ex.7 may be amended only by written agreement of the both parties [Art 4.1 of Ex.7]. In this case, there is no written agreement of Red and Blue. Thus, the amendment to the agreement of Ex.7 is not recognized. Therefore, Red has no obligation to pay the additional cost.

10.1 There is no written agreement of Red and Blue.

In this case, Red and Blue verbally agreed that Red would pay US\$10 million more than Blue [Ex.12]. Then, a PDF file of the transcribed data was sent to Red and Blue on the following day [Ex.12]. Neither party raised any objections to its contents [Ex.12]. A written agreement requires signatures or acknowledgments. The PDF file is only a transcription of the verbal content and lacking signatures or acknowledgments. It cannot be considered the PDF as a written agreement. Since there is no written agreement, the amendment to the agreement of Ex.7 is not recognized. Therefore, Red has no obligation to pay the additional US\$10 million.

10.2 Even if the written agreement of Red and Blue is recognized, the agreement is not validly fulfilled.

In this case, Blue proposed an adjustment of the cost-sharing burdens based on the discussion responding to the data analysis [Ex.9]. Based on the proposal, Red and Blue agreed to adjust the cost-sharing burdens in the meeting on May 7, 2023 [Ex.12]. Thus, the agreement on the cost-sharing adjustment should be interpreted based on the sound record of Ex.9. Project Manager of Blue stated that "*if we could only examine Area β and could not examine Area α , the benefits your company will gain will be much greater than ours. In such a case, will your company adjust the cost-sharing burdens?*" [Ex.9]. Considering the statement, the purpose is to guarantee the risk of Blue suffering disadvantage by investigating Area β first. In fact, Area β was examined first and Area α could not be examined. However, Red has not gained any materials and data. It cannot be said that only Blue suffers a disadvantage. The purpose of the agreement is invalidly fulfilled. Therefore, Red is not obligated to pay US\$10 million more than Blue.

11. In case the sale of Area β extracted materials and data to Black Company and to Arbitria, and once the payment therefor has been received in full, Red should pay US\$75 million.

If the sale of the materials and the data has been completed, the amount claimed will be reduced by US\$75 million. Therefore, Red is obligated to pay Blue US\$75 million.

11.1 Regarding the sale of materials, the amount claimed should be reduced by US\$50 million.

Blue stated that "it would reduce its claim against Red by half of the proceeds from the sale of the materials extracted from Area β " [¶25]. Therefore, upon the completion of the sale of materials and receipt of the proceeds, the amount claimed should be reduced by US\$50 million.

11.2 Regarding the sale of copy of the data, the amount claimed will be reduced by US\$25 million.

Even if Blue is not obligated to transfer to Red the data, the article 1.1 and 1.2 of the agreement of Ex.6 are still effective. Red and Blue jointly own the same data [Art 1.1 of Ex.6]. Furthermore, Red and Blue have equal rights to the same data [Art 1.2 of Ex.6]. In this case, Blue executed the right to distribute and reached an agreement to sell a copy of the data to Arbitria [¶24]. Red and Blue have the equal right to benefit from the data. Thus, the benefits earned from executing the rights are equally entitled to Red and

Blue. Thus, Red executes the right and claims US\$25 million reduction from the amount claimed, which is half of the proceeds from the sale of a copy of the data. Therefore, upon the completion of the sale of a copy of the data and receipt of the proceeds, the amount claimed will be reduced by US\$25 million.

11.3 Conclusion

Above all, in case the sale of materials and copy of the data, and once payment has been received, the amount claimed will be reduced by US\$75 million.

C. Red's petition for interim measure should be granted.

12. Red seeks an injunction ordering Blue to sell half of the materials collected from Area β and a copy of the data to Black Company and to Arbitria.

UNCITRAL is applied [Art 8.1 of Ex.6]. The article 26 (1) of UNCITRAL lists potential measures as interim measure. In this case, interim measure by Red is directly linked to the claims in Issue1. Red seeks the measure with the aim of ensuring that the determination of the dispute is effective. Therefore, Red orders an injunction as interim measure under (a): Maintain or restore the status quo pending determination of the dispute. Since the article 26 (3)(a), (b) of UNCITRAL is satisfied, interim measure is granted. The requirements are: (i) The harm cannot be adequately reparable by an arbitral award that allows for harm in the case that interim measures are not granted; (ii) the harm suffered by the party if interim measures are not granted, substantially exceeds the harm that be incurred by the other party if interim measures are granted; (iii) there is a reasonable possibility that a main petition for arbitration will be granted.

I. Red's petition for interim measure regarding the materials should be granted.

13. All requirements are fulfilled.

Red's petition for interim measure regarding the materials should be granted.

13.1 Requirement (i) is fulfilled.

In case interim measure regarding the materials is not granted, Red will suffer harm that cannot be adequately reparable by an arbitral award. The harm suffered by Red is that: ① the breach of the obligations and right of the agreement of Ex.6 [Art 2.1-2.3 of Ex.6]; ② the loss of the opportunity to expand Red's business. Regarding ①, since Red cannot possess the materials, it is impossible to divide the materials and exercise the rights regarding materials. In other words, "Distribution of Materials" of the agreement of Ex.6 become ineffective. Regarding ②, Red has plans to develop more advanced space projects in the future by utilizing the materials collected from the Moon [¶6]. However, as long as Red cannot gain the materials, Red surely and entirely loses the opportunity for business expansion. Furthermore, Black Company is internationally recognized as a competitor of Red [¶24]. Arbitria would use the materials to support the expansion of space business that could compete with Red. Actually, Arbitria has been working diligently to foster private space operators, and private operators become more active in the space business [¶4]. In the developing space business, falling behind competitors would lose the opportunities for obtaining international patent and acquiring market share. Thus, Red loses the opportunity to expand its business. The harm as a loss of opportunity includes not only visible harm but

also potential harm that would arise in the future. Considering the nature of the harm, it would increase in proportion to time and it is difficult to determine the extent of harm. Therefore, the harm cannot be reparable by an award of damage.

13.2 Requirement (ii) is fulfilled.

As mentioned in ¶13.1 of this memorandum, the harm to Red substantially exceeds the harm that be incurred by Blue if the measures are granted. The harm suffered by Blue is that: ① The loss of US\$100 million expected from the sale to Black Company and Arbitria; ② The non-monetary harm regarding losing support of Arbitria. Although ① has a certainty, ② does not.

In this case, the Minister of Science stated that if Blue refuse the sale to Arbitria, "*we would like you to consider that it will be difficult to obtain future support for space development from the Government of Arbitria*" [Ex.13-1]. Although the statement is directly related to the economy, the Minister of Economy, Trade and Industry did not say anything about imposing a disadvantage if we refuse the request [Ex.13-1]. Since it involves government's annual budget, it is impossible for the Minister of Science to greatly reduce or cut off without the permission of the Minister of Economy, Trade and Industry. Thus, the occurrence of harm regarding losing support is not certain.

As mentioned in ¶13.1 of this memorandum, Red's harm in case interim measure is not granted cannot be reparable by an award of damage. Red also entirely loses the opportunity to expand its business. On the other hand, in case the interim measure is granted, the harm against Blue is ① monetary harm and ② non-monetary harm. Although ① has a certainty, it can be reparable by an award of damage. Thus, it does not substantially exceed the irreparable Red's harm. Also, since ② has no certainty, so that it does not substantially exceed the certain Red's harm. Therefore, Red's harm substantially exceeds Blue's harm.

13.3 Requirement (iii) is fulfilled.

As mentioned in Issue1, there is a reasonable possibility that Red's petition will be accepted.

II. Red's petition for interim measure regarding the data should be granted.

14. In this case, all requirements are fulfilled.

Red's petition for interim measure regarding the data should be granted.

14.1 Requirement (i) is fulfilled.

In case the interim measure regarding the data is not granted, Red will suffer harm that cannot be adequately reparable by an arbitral award. The harm suffered by Red is that: ① the loss of the opportunity to expand Red's business; ② the loss of the data's value.

Regarding ①, Arbitria would use the data to support the expansion of business that could compete with Red. As mentioned in ¶13.1 of the memorandum, in the developing space business, falling behind competitors would lose the opportunities for obtaining international patent and acquiring market share. Thus, Red loses the opportunity to expand its business. Considering the nature of the harm as a loss of opportunity, the harm would increase in proportion to time and it is difficult to determine the extent of harm. Regarding ②, since a data can be copied, the rarity of the data is lost once it is sold. It is impossible to determine the extent of harm. Therefore, the harm cannot be reparable by an award of damage.

14.2 Requirement (ii) is fulfilled.

As mentioned in ¶14.1 of this memorandum, the harm to Red substantially exceeds the harm that be incurred by Blue if the measure is granted. The harm suffered by Blue is that: ① The loss of US\$50 million expected from the sale to Arbitria; ② The non-monetary harm regarding losing support of Arbitria. Although ① has a certainty, ② does not.

As mentioned in ¶13.1 of this memorandum, Red's harm in case interim measure is not granted cannot be reparable by an award of damage. Red also loses the opportunity to expand its business. Furthermore, the loss of the data's value certainly occurred. On the other hand, in case the interim measure is granted, the harm against Blue is ① monetary harm and ② non-monetary harm. Although ① has a certainty, it can be reparable by an award of damage. Thus, it does not substantially exceed the irreparable Red's harm. Also, since ② has no certainty, it does not substantially exceed the certain Red's harm. Therefore, Red's harm substantially exceeds Blue's harm.

14.3 Requirement (iii) is fulfilled.

As mentioned in Issue1, there is a reasonable possibility that Red's petition will be accepted.

【Satellite Case】

A. Red does not have the obligation to pay US\$75 million to Blue

15. Blue is obligated to launch Red Star into the geostationary orbit.

Red and Blue signed the agreement of Ex.14 regarding the satellite launch [¶26]. To interpret Blue's obligation based on the agreement of Ex.14, the parties' common intention shall be followed with all the circumstances outlined in UPICC 4.3.

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

Red asked Blue to launch the satellite for its telecommunications business [¶26]. Therefore, Blue understood that the purpose of the agreement of Ex.14 was to launch Red Star into the planned orbit.

15.2 The nature and purpose of the contract [UPICC 4.3(d)]

Since Blue agrees to launch Red Star into the geostationary orbit [Art 1.1 of Ex.14], it shows their awareness of the purpose of the agreement. Additionally, in Attachment B-1 of the agreement of Ex.14, Blue guaranteed to deliver Red Star to the planned orbit.

15.3 Conclusion [UPICC 4.1]

Considering the above, Blue understood that the purpose of the agreement of Ex.14 with Red was to put Red Star into the geostationary orbit and set it as the object in the agreement. Moreover, in Attachment B-1, Blue guaranteed the accomplishment of the purpose. It indicates that Blue recognizes being obligated for the obligation. Therefore, Blue has the obligation under the agreement of Ex.14.

16. Blue's obligation is to achieve a specific result.

Blue's obligation is to achieve the specific result of delivering the satellite to the orbit [UPICC 5.1.5].

16.1 Blue's obligation is to achieve the specific result of placing the satellite into orbit. [UPICC 5.1.5(b)]

The article 3.1 of the agreement of Ex.14 provides that the Final Payment is paid "due upon successful orbital insertion". Moreover, Attachment B-3 provides Blue's liability for liquidated damages if the rocket

fails to deliver the Satellite to the target orbit. It is a penalty clause for Blue if the result of orbital insertion is not achieved [UPICC 5.1.5 Comment 3]. The agreement of Ex.14 provides "PAYMENT TERMS", "WARRANTIES & GUARANTEES" and liquidated damages [Art.8, Attachment B-3 of Ex.14]. It means Red and Blue recognized the specific result of delivering Red Star to the geostationary orbit was to be achieved.

16.2 The degree of risk normally involved in achieving a specific result [UPICC 5.1.5(c)]

Since Blue's Launch success rate is 95% [Attachment A-4 of Ex.14], it is not particularly difficult for Blue to achieve the result of launching Red Star into the geostationary orbit. Blue guaranteed the achievement of the result. Therefore, Blue's obligation to launch Red Star into the geostationary orbit is a duty to achieve a specific result.

16.3 Blue has not performed its obligation to achieve a specific result.

To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve a specific result [UPICC 5.1.4]. In this case, the rocket carrying the Red Star failed to reach its planned orbit and re-entered the atmosphere and vanished with the satellite [¶29]. Thus, Blue was not achieved to launch Red Star into the geostationary orbit. Therefore, Blue has not performed its obligation.

17. Red is not obligated to pay Blue the unpaid balance under "PAYMENT TERMS" in article 3.1 of the agreement of Ex.14 until Blue performs its obligation.

Under PAYMENT TERMS in the article 3.1 of the agreement of Ex.14, Red agrees to pay Blue a total amount of US\$150 million in accordance with the payment schedule as stipulated in the article. In fact, Red and Blue signed the agreement of Ex.14 [¶26], and it was decided on the launch site [¶27]. In accordance with these facts, Red paid Blue US\$75 million as following the "Deposit" and "Interim Payment" of the article 3.1 of the agreement of Ex.14. [¶24]. Considering the above, the "Final payment" of US\$75 million is scheduled to be paid due upon the successful orbital insertion. As mentioned in ¶16.3 of this memorandum, Blue's obligation is to achieve a specific result. Thus, the schedule for the Final Payment provided in the article 3.1, "due upon successful orbital insertion" becomes due only if Blue performs its obligation. In other words, after the successful orbital insertion, Red has the obligation to pay. In this case, Red Star vanished before insertion into the geostationary orbit [¶29]. Thus, Red's obligation to pay the unpaid balance has not arisen. Therefore, Red is not obligated to pay an unpaid balance of US\$75 million to Blue.

B. Blue is obligated to pay US\$150 million to Red for the failure of launch under the Satellite Launch Agreement.

18. Blue has the obligation to pay US\$75 million under Attachment B 3-b(iii)and (iv).

18.1 This case is applied to Attachment B 3-b(iii) and (iv).

Attachment B-3(b)(iii) of the agreement of Ex.14 provides 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 Red. Also, Attachment B-3(b)(iv) of the agreement of Ex.14 provides that the total amount of liquidated damages shall not exceed the total Launch Service Fee paid by Red. In this

case, the rocket failed to reach the target orbit and re-entered the atmosphere with Red Star, resulting in its vanishment [¶29]. Therefore, this case is applied to Attachment B-3(b)(iii) of the agreement of Ex.14. Since Red paid a total of US\$75 million, Blue is obligated to pay US\$75 million under Attachment B-3(b)(iv) of the agreement of Ex.14.

18.2 Blue's responsibility is not excused under Attachment B-4(b).

Attachment B-4(b) of the agreement of Ex.14 provides that Blue shall not be held responsible for performance shortfalls attributed to events beyond Blue's reasonable control. Since the launch failure is not due to events beyond Blue's reasonable control, it is not excused under this clause.

In this case, the performance shortfalls were anomalies in the sensors after the launch. The repair of the sensors was done by only one person before the launch [¶29]. The rules do not clearly provide how many people should do the repairs. However, the repair should have been done carefully to make sure the sensor does not have anomalies again. There was data indicating anomalies in the sensors before the geomagnetic storm occurred [¶29]. It means the sensor anomaly after the launch was not due to events beyond Blue's reasonable control but due to insufficient repair by Blue. Therefore, Blue is not excused from paying the liquidated damages under Attachment B-4 of the agreement of Ex.14.

19. Blue is liable to pay Red US\$75 million in damages.

Red claims damages of US\$75 million, the value of Red Star, from Blue due to the vanishment of Red Star [¶29]. There are four requirements for damages: (i)Existence of non-performance, (ii)Causal relationship between non-performance and harm, (iii)Certainty of damage, (iv)Foreseeability of harm [UPICC 7.4.1-7.4.4]. Red's claim fulfills all requirements for damages of US\$75 million.

19.1 Requirement (i) is fulfilled.

As mentioned in ¶15.3 of this memorandum, Blue's obligation is to launch the Red Star into the geostationary orbit. However, the rocket carrying the satellite failed to reach the orbit [¶29]. Blue has not fulfilled the obligation. Therefore, Blue's non-performance exists.

19.2 Requirement (ii) is fulfilled.

A causal relationship is granted between Blue's non-performance and Red's damages. In this case, Red Star re-entered the atmosphere and vanished [¶29]. If Blue fulfilled its obligation and the rocket reached the planned orbit, Red's damage from the vanishment of Red Star would not have occurred. Therefore, there is a causal relationship between Blue's non-performance and Red's damage.

19.3 Requirement (iii) is fulfilled.

As mentioned in ¶19.2 of this memorandum, Red Star re-entered the atmosphere and vanished. Since the value of Red Star is US\$75 million [¶29], the certainty of the damage is granted.

According to Attachment B-3(b)(iii) of the agreement of Ex.14, It provides in case of total loss of the Satellite. It means Blue could have foreseen the damage from the vanishment of Red Star as a result of non-performance at the time of concluding the agreement of Ex.14.

20. Blue's non-performance is not excused by the force majeure clause.

The article 6.1 of the agreement of Ex.14 provides that "neither party shall be held liable for failure to perform its obligations due to events beyond Blue's reasonable control and unforeseeable circumstances preventing fulfillment of the contract". However, Blue's non-performance was not due to the events beyond reasonable control and unforeseeable.

The cause of the launch failure was not a G4-level geomagnetic storm, which was beyond Blue's reasonable control. Blue was aware of space forecasts indicating that a G1-level geomagnetic storm could occur [¶29]. If Blue had taken action on the risk of a G1-level geomagnetic storm, the launch failure could have been avoided.

In addition, there are instances of launch failures even in G1-level geomagnetic storms. Geomagnetic storms are known to have the potential to interfere with electronic systems [¶29]. Thus, even at a G1-level, Blue should have considered it as having the potential to lead to an accident like the Red Star accident. In this case, Blue took place the launch on January 13, 2023. However, since the launch window is until January 31 [Art 2.1 of Ex.14], Blue had a choice to postpone the launch. In other words, the launch failure is not beyond Blue's reasonable control and risk is foreseeable. Therefore, Blue's non-performance is not excused by the force majeure clause [Art.6.1 of Ex.14].

21. Red does not waive its claim under the Cross-Waiver clause.

Under the Cross-Waiver clause [Art 4.3 of Ex.14], Red waives all claims for property arising out of the launch service, except in cases of gross negligence. In this case, the property damage caused by the launch failure is the vanishment of Red Star. However, Red does not waive its damage claim against Blue because the damage in this case was caused by Blue's gross negligence. Blue's gross negligence is acting in a way that prevents achieving the object of the agreement of 14, orbital insertion of Red Star. In this case, Blue took action that breached safety protocols. Safety protocols are established safety standards during launch preparations [¶29] and are procedures that must be strictly complied with for successful insertion into orbit. Therefore, failing to comply with safety protocols leads to the launch failure. Blue breached safety protocols three times.

21.1 Excessive drinking behavior the day before the launch.

Despite the occasions that excessive drinking had affected launches twice in 2022, Blue did not take concrete measures to prevent the recurrence of such drinking [¶29]. It had become a problem within Blue, and yet, the launch was also delayed due to excessive drinking. These events indicate that Blue did not manage risks well.

21.2 Incomplete repair

Despite detecting an anomaly in a sensor before the launch, Blue did not repair it sufficiently. Thus, the sensor, that Blue had repaired, was anomalies after the launch again [¶29]. Therefore, Blue's incomplete repair clearly ignored important safety protocols for the launch.

21.3 Underestimating the space forecasts of geomagnetic storm

Despite geomagnetic storms being known to have the potential to interfere with electronic systems, Blue took place the launch as scheduled. Considering there is an instance of launch failures even in G1-level geomagnetic storms, it clearly does not comply with the safety protocols.

21.4 Conclusion

Considering the above, Blue's action is gross negligence. Therefore, Red does not waive its damage claim.

C. Mr. Orange should not be removed.

22. Mr. Orange should not be removed because his impartiality and independence are not in doubt.

The parties agreed to arbitrate in accordance with the "UNCITRAL"[*Art 7.2 of Ex.14*]. Article 12 of UNCITRAL provides "*Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.*" In this case, Orange's impartiality and independence are not in doubt. Therefore, Mr. Orange should not be removed.

Blue argues that Mr. Orange's comments raised doubts about his impartiality to act as an arbitrator for this dispute [¶34]. Impartiality is defined as "*impartiality means that an arbitrator will not favor one party more than another.*"² In this case, Mr. Orange's impartiality is granted because his comment does not favor Red more than Blue.

His comment was not about the Red Star accident because there are other launch failures due to even a G1-level magnetic storm. Furthermore, all participants at the conference could easily assume that Mr. Orange had mentioned the Red Star accident since it involved Red and Blue. Both are very large companies and so popular that the accident became highly publicized. Thus, the reason all participants at the conference could easily assume the Red Star accident was simply because the accident was famous. Therefore, Mr. Orange's impartiality is granted since his comment does not favor Red more than Blue. In conclusion, Mr. Orange should not be removed.

That's all.

² THE UNCITRAL ARBTRATION RULES A COMMENTARY SECOND EDITION, p213