

UNIVERSITY OF SARAJEVO
FACULTY OF LAW

LEGAL CLINIC IN INTERNATIONAL SALE OF GOODS AND
ARBITRATION LAW

PROBLEM FOR ANALYSIS

Sarajevo, March 2020

Instructions:

1. Students should read the Problem carefully.
2. Each student should decide if they wish to argue the case for Claimant OR Respondent.
3. Students are expected to provide written memorandum in English (on behalf of Claimant or Respondent, depending on the choice) replying ONLY to the two issues presented at the last Problem Analysis page:
 - Should Equatoriana Best Tech be exempted from liability under the provisions of CISG, Article 79?
 - Equatoriana Best Tech, Inc has asked the tribunal to order that Dr. Elisabeth Mercado should be removed from the legal team representing the Claimant because of her relationship with the presiding arbitrator. Should the tribunal make such an order?
4. Students may work in pairs. There cannot be more than two students working on one memorandum.
5. The memorandum should be between 12 – 18 pages long (Times New Roman, 12 pt, 1,5 spacing). This does NOT include the cover page, index of authorities, index of cases.
6. Additional guidance (how to write a memorandum, case analysis tips, research tips) will be provided via email in the course of the semester.
7. The final deadline for submission of the written memorandum is 31 May 2020.

Horace Fasttrack
Advocate at the Court
75 Court Street
Capital City, Mediterraneo
Tel. (0) 146-9845
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15 July 2011

Secretariat
International Court of Arbitration of the International Chamber of Commerce (ICC)

Subject: Request for Arbitration

Dear Sirs:

I represent Mediterraneo Full Compliance, Ltd. Mediterraneo Full Compliance, Ltd hereby submits five copies of its Request for Arbitration against Equatoriana Best Tech, Inc. I enclose a copy of my power of attorney to represent Mediterraneo Full Compliance, Ltd in this arbitration.

The total claimed is USD 670,600 plus interest and costs. As noted, the claim is denominated in US dollars. At an exchange rate of 6.39935 CNY per USD, the claim is CNY 4,291,404. The contract giving rise to this arbitration provides that the seat of arbitration is Vindobona, Danubia and that the arbitration will be in English.

The required documents are attached to the Request for arbitration.

Sincerely yours,
(Signed)
Horace Fasttrack

Attachment:

Request for Arbitration
Registration of Mediterraneo Full Compliance, Ltd. in Company register, Mediterraneo Power of Attorney

Mediterraneo Full Compliance, Ltd, Claimant

v.

Equatoriana Best Tech, Inc, Respondent

Request for Arbitration

1. Claimant: Mediterraneo Full Compliance, Ltd, a company incorporated under the laws of Mediterraneo.

Registered at 45 Conference Place, Capital City, Mediterraneo

Tel. (0) 486 25 00; Telefax (0) 486 25 11; E-mail: Info@Conferences.me

The person in charge: Samuel Trusty, Chairman of Board of Directors

Arbitral Agent: Horace Fasttrack

75 Court Street, Capital City, Mediterraneo

Tel. (0) 146-9845; Telefax (0) 146-9850; E-mail Fasttrack@lawyer.me

2. Respondent: Equatoriana Best Tech, Inc, a company incorporated under the laws of Equatoriana.

Address: 286 Second Avenue, Oceanside, Equatoriana

Tel. (0) 237 86 00; Telefax (0) 237 86 01; office@controls.eq

3. The Arbitration Agreement this Request Relies Upon: The arbitration clause—Article 15.1 of the Contract for the sale, installation and configuration of the master control system on the M/S Vis, No. 472/2010, signed by and between the Claimant, Mediterraneo Full Compliance, Ltd, and the Respondent, Equatoriana Best Tech, Inc, reads: *"Any dispute arising from or in connection with this Contract shall be submitted to the International Court of Arbitration which shall be conducted in accordance with the ICC Rules of Arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The arbitration shall take place in Vindobona, Danubia. The arbitration shall be in the English language."*

4. Arbitral Claims:

1. The Respondent shall pay the Claimant USD 670,600 in damages, representing:

a. USD 448,000 for the cost of chartering a substitute vessel for the M/S Vis, the substitute vessel having been chartered by Mediterraneo Full Compliance, Ltd. to provide conference services for the annual conference held by Worldwide Corporate Executives Association.

b. USD 60,600 for the standard Yacht broker commission of 15% of the rental cost.

c. USD 50,000 for the Yacht broker's success fee.

d. USD 112,000, the amount paid to the Worldwide Corporate Executives Association to make a partial refund of the conference fee paid by its members.

2. The Respondent shall pay the costs of arbitration, including the Claimant's expenses for legal representation, the arbitration fee paid to ICC and the additional expenses of the arbitration as set out in ICC Rules.

3. The Respondent shall pay the Claimant interest on the amounts set forth in items 1 and 2 from the date, those expenditures were made by Claimant to the date of payment by the Respondent.

Facts

5. Mediterraneo Full Compliance, Ltd. (hereafter “Full Compliance”) operates high-end venues in which it provides a complete conference package. Its core strategy is to focus on small to medium-sized businesses and professional associations that hold a “flagship” event at least once a year. The venues are designed to service events of a maximum of 150 persons. They combine the conference facilities proper, plus a luxury hotel and restaurant. Full Compliance has a highly trained staff that works with the event teams of its customers to provide a top of the line service for demanding clients.

6. For the past ten years, it has operated six land-based facilities in desirable locations in different countries. In spring 2010 it purchased a luxury yacht, the M/S Vis, for use as a seventh conference venue offering the same level of service as its land-based venues. Full Compliance sought to refurbish the yacht with the latest in cabin and conference technologies, superior to anything otherwise available on the market. In particular, conference technology had to meet the highest standards. Full Compliance managed the refurbishment itself, using a range of subcontractors and suppliers.

7. The refurbishing of the M/S Vis was scheduled to be completed on 12 November 2010. Full Compliance scheduled ten weeks for testing all of the systems prior to scheduling the first event. Full Compliance contracted the supply and installation of the various elements of the on-board technology to a number of firms, including Equatoriana Best Tech, Inc (hereafter “Best Tech”). The contract with Best Tech was signed on 26 May 2010.

8. Best Tech was to supply, install and configure the master control system that is critical to venue operation, working with other specialist suppliers and installers to make sure everything functioned according to plan. The core element in the overall control system is a series of semi-configurable processing units. Manufacture of the processing units was to be done by Oceania Specialty Devices, incorporated in Oceania (hereafter “Specialty Devices”).

9. Specialty Devices had designed the processing units to use the D-28 “super chip” recently announced by Atlantis High-Performance Chips, incorporated in Atlantis (hereafter “High Performance”). The D-28 contained novel technology that offered significant improvements over rival chips. On 26 May 2010, the chip was not yet in production, but that was scheduled to begin in the middle of August 2010, i.e. in good time for the refurbishment. It was expected that it would be another six months, i.e. circa February 2011, before any rival chip with comparable qualities would be available.

10. The facilities on the M/S Vis would need a total of three of the processing units, installed in duplicate, to ensure an uninterrupted service. All of the units would need the D-28 chips in various numbers.

11. Worldwide Corporate Executives Association (hereafter “Corporate Executives”) is a high-profile organization of top-level corporate executives and is a long-standing client of Full Compliance. The members of the association demand the very finest in comfort and efficiency in their meeting locations. During the meeting between Full Compliance and Corporate Executives to plan the event, the Corporate Executives events team was delighted to be invited by Full Compliance to be the first of their clients to hold an event on the M/S Vis. The event was scheduled 12-18 February 2011. The venue was a popular choice among the Association’s members and the event was soon fully booked.

12. On 13 September 2010 Best Tech telephoned Full Compliance and then confirmed in writing that the processing units for the Best Tech would not be available to it until at least late November. As a result, delivery of the Best Tech could not be expected before the middle of January 2011, with installation, configuration, and verification to take another ten weeks or so. The explanation given by Best Tech was that on 6 September 2010 there had been a fire at the facility where High Performance produced the D-28 chip. Production (which had started as scheduled in August) had ceased until the damage was repaired, which was expected to be about 24 October 2010. Specialty Devices currently expected delivery of the D-28 chips to it beginning of November. It in turn expected to deliver the processing units to Best Tech at the end of November 2010. The Best Tech would be delivered to the M/S Vis in the middle of January, at which time installation could begin.

13. High Performance had a limited supply of the chips in its warehouse when the fire occurred. The chips in the warehouse had not as yet been designated for a specific customer, although there were several, including Specialty Devices, to whom shipment was due. It had been expected that the balance of the various orders would have been filled from the production that was interrupted by the fire. There was not a sufficient supply in the warehouse to fulfil all of the High Performance’s contractual obligations by the various contractual due dates. Neither the contracts High Performance had with its customers nor the law of Atlantis required it to pro-rate its immediately available supply among its customers. Even had there been such a requirement, anything less than the full contract amount would not have permitted Specialty Devices to finish the processing units it was manufacturing for Control Systems.

14. When High Performance informed Specialty Devices about the fire, it acknowledged that the Specialty Devices’ order would require only a small portion of the stock in the warehouse and that it could have filled the order from its stock. It said, however, it intended to supply its regular customers to the extent possible from the limited supply available in the warehouse. Specialty Devices was neither a regular customer nor could it be expected to become one. High Performance expected delivery of the D-28 chips to Specialty Devices early in November 2010.

15. There was only one customer, Atlantis Technical Solutions, to which High Performance supplied chips from the warehouse prior to the resumption of production. There were several other customers who might well be described as regular customers. The real reason that High Performance supplied Atlantis Technical Solutions with the entire stock of chips in the warehouse was that the CEOs of the two firms were longstanding close friends who had served as witnesses at each other’s weddings.

16. Once the D-28 chips became available to Specialty Devices on 2 November 2010, it completed the processing units and shipped them on 29 November 2010 to Control Systems. The control system was delivered by Best Tech to the M/S Vis on 14 January 2011. Installation, configuration and verification were completed on 11 March 2011. Payment of the full contract

price of USD 699,950 was made by Full Compliance to Best Tech via the Mediterraneo National Bank on 21 March 2011.

17. When it became evident that the M/S Vis would not be available to host the Corporate Executives' event, Full Compliance contacted it to discuss the alternatives. One of the Full Compliance's on-shore facilities were available, but the officials from Corporate Executives stated that the publicity for the event had emphasized that it would be held on a luxury yacht. They had received many positive comments from their membership and would not accept an on-shore venue as a substitute.

18. Making arrangements for a suitable substitute location for the Corporate Executives' event was rather expensive. After some effort, since there are very few comparable yachts, Full Compliance was able to charter an appropriate substitute yacht, the M/S Pacifica Star, at a cost of USD 404,000 plus port and handling fees of USD 44,000. The standard brokerage commission was 15 % of the rental cost, USD 60,600. In addition, Full Compliance paid the broker a USD 50,000 success fee on top of the commission. Finally, in order to retain the goodwill and future business from Corporate Executives, Full Compliance made an ex gratia payment of USD 112,000 to Corporate Executives so that it could make a partial refund to the delegates to its event.

19. On 9 April 2011 Full Compliance wrote Best Tech requesting it to contribute to the costs arising out of the delay in the installation of the master control system. Best Tech answered on 14 April 2011 categorically refusing. In turn, Full Compliance wrote on 25 April 2011 that Best Tech was legally responsible for those costs. Even after the fire the producer of the chip, Atlantis High-Performance Chips, had had the possibility of supplying the chips needed for the processing units but had decided to allocate its entire stock of the D-28 chips to a company whose CEO was a close friend of its CEO. The last communication in this sequence was a letter from Best Tech rejecting all responsibility.

Applicable law

20. The choice of law clause, clause 15.2 of the contract, provides for the application of the law of Mediterraneo. Mediterraneo and Equatoriana are parties to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Consequently, pursuant to CISG article 1(1)(a) the contract is governed by the convention.

21. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. Danubia, Mediterraneo, Equatoriana, Oceania and Atlantis are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

Conclusion

22. Best Tech did not deliver the master control system at the time required by the contract. Even though the delay in performance was caused by an impediment that Best Tech itself could neither overcome nor avoid, under CISG, Article 79(2), Best Tech was not exempted from liability where it had engaged a third party (Specialty Devices) to perform the whole or a part of the contract unless that party met all of the conditions of CISG, Article 79(1). Specialty Devices was not exempt under CISG, Article 79(2), because the third party it had engaged to perform part of the contract (Atlantis High-Performance Chips) could have overcome the impediment of the fire by allocating the "relatively small order" of D-28 chips to Specialty Devices from its stock in the warehouse.

23. The tribunal should, therefore, hold Best Tech liable to pay the damages set out in paragraph 4, above.

Sincerely yours,
(Signed)
Horace Fasttrack

15 July 2011

Contract Excerpts

472/201
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1. Equatoriana Best Tech, Inc hereby agrees with Mediterraneo Full Compliance, Ltd. to supply, install and configure the master control system for the M/S Vis.
2. The control system shall meet the technical specifications set out in Annex I.
3. Installation and configuration of the control system shall be completed by 12 November 2010.
4. The total contract price is USD 699,950. The price of the control system is USD 650,000. Installation and configuration are USD 49,950.
5. The price to be paid by letter of credit issued by the Mediterraneo National Bank against certification by Accurate Technical Consultants of completion of the contract.



15.1 Any dispute arising from or in connection with this Contract shall be submitted to the International Court of Arbitration, for arbitration which shall be conducted in accordance with the ICC Rules of Arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The arbitration shall take place in Vindobona, Danubia. The arbitration shall be in the English language.

15.2 This contract is subject to the law of Mediterraneo.

Claimant's Exhibit

Atlantis High-Performance Chips

14 High Avenue
Technology Center, Atlantis

10 September 2010

Ms. Gloria Martins

Oceania Specialty Devices
322 Fortune Road
Oceania City, Oceania

Dear Ms. Martins:

I wish to confirm our telephone call this morning.

The fire at our production facility on 6 September 2010 was more serious than we had thought at first. There will have to be a halt in our production of the D-28 chips that you have ordered for about seven weeks. As you may well imagine, this is a particularly bad time for such a fire to have happened, since the chips had just gone into commercial production.

We have only a limited supply of the chips on hand. There are nowhere enough to satisfy the orders we have received for them. This is, of course, a difficult situation for our customers as well as for us.

We have discussed within the firm on what basis we should allocate the limited stock available to us. We had considered filling small orders first; in which case we would have been able to fill your order from our stock. We had also considered allocating the stock on a pro-rata basis. However, that would not have been satisfactory for the majority of our customers. Finally, we have decided to satisfy the needs of our regular customers first. As noted, your order was a relatively small one and it appears likely to remain the only one in the near future.

I can only express our regret that this unfortunate event has occurred. We look forward to fulfilling your need for specialty chips in the future.

Sincerely,

(Signed)
Henry Swenson

Claimant's Exhibit

Mediterraneo Full Compliance, Ltd

45 Conference Place
Capital City, Mediterraneo
Tel. (0) 486 25 00
Telefax (0) 486 25 11
Info@Conferences.me

9 April 2011

Mr. Samuel Horn

Equatoriana Best Tech, Inc
286 Second Avenue
Oceanside, Equatoriana

Re. Contract 472/2010

Dear Mr. Horn:

We are very pleased with the master control system that you have installed on the M.S Vis. It does everything that we had hoped for.

That makes it particularly unpleasant to raise the subject of the significant delay in the installation of the system. The contract date for delivery of the control system was early November. A comfortable period for installation, configuration, and verification of the system were written into the contract. Specifically, everything was to be completed in January.

As you are aware, we had booked the annual conference of the Worldwide Corporate Executives Association for the period 12 to 18 February 2011. They were delighted that they were to be the first to hold an event on the M/S Vis. You can imagine their disappointment when we informed them that the yacht would not be available after all.

The Association is a high-profile organization and we count it as one of our most important clients. It was not easy to find an appropriate substitute yacht to host the event. We finally did locate one, but it was very expensive. Altogether it cost us USD 670,600. I can, if you wish, furnish you with an itemized description of those costs.

We would suggest that it would be fair if you and we were to share in the costs arising out of the delay. That means that we would suggest that you reimburse us USD 335,300.

I hope that you understand and appreciate our position.

Sincerely

(Signed)
Joseph Alright

Excerpt from

Technology Reporter

20 September 2010

Page 4

Consternation in the high-tech world

The fire at Atlantis High-Performance Chips two weeks ago is causing more unhappiness in certain sectors than anticipated. The D-28 chip had been greeted with enthusiasm by the industry as a major advance on all similar products. Production of the D-28 chip had just begun when the fire occurred. That by itself would have been met with consternation by the trade at large and with some scarcely concealed relief by rival chip producers.

What is now causing unhappy comments in technology circles is that the entire supply of chips already produced has been shipped to Atlantis Technical Solutions with none of the other orders having been filled even to the extent of receiving a single chip as a token gesture. When Henry Swenson, CEO of Atlantis High-Performance Chips, was accused of unduly favouring his old friend, Roger Abt, CEO of Atlantis Technical Solutions, he said that if it had not been for the support of Atlantis Technical Solutions during a particularly difficult period five years ago, "we would have gone out of business". Henry Swenson and Roger Abt were witnesses at each other's weddings.

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2 August 2011

Ms. Secretary
Secretariat
International Court of Arbitration

Mediterraneo Full Compliance, Ltd, Claimant v. Equatoriana Best Tech, Inc, Respondent
Case No. M20110999

Dear Sirs:

Claimant, Mediterraneo Full Compliance, Ltd, appoints Ms. Arbitrator 1 as the Claimant appointed arbitrator. Ms. Arbitrator 1 is not on the ICC Panel of Arbitrators. Her appointment is made pursuant to ICC Rules. Her CV is attached.

Claimant and Respondent, Equatoriana Best Tech, Inc, have agreed to appoint Professor Presiding Arbitrator as chairman of the tribunal. Professor Presiding Arbitrator is on the ICC Panel of Arbitrators and is a native of Danubia, where the arbitration will take place. Professor Presiding Arbitrator has agreed with the two parties that he would be willing to chair the tribunal.

Sincerely yours,
(Signed)
Horace Fasttrack

Attach. CV Ms. Arbitrator 1

Joseph Langweiler
Lawyer
14 Capital Boulevard
Oceanside, Equatoriana
Tel. (0) 214 77 32
Telefax (0) 214 77 33
langweiler@host.eq

3 August 2011

Ms. Secretary
Secretariat
International Court of Arbitration

Mediterraneo Full Compliance, Ltd, Claimant v. Equatoriana Best Tech, Inc, Respondent
Case No. M20110999

Dear Sirs:

I refer to your letter of 21 July 2011 addressed to Equatoriana Best Tech, Inc conveying notice of arbitration in the referenced case.

Equatoriana Best Tech, Inc has instructed me to respond to the letter on their behalf. My power of attorney is attached.

Equatoriana Best Tech, Inc appoints Dr. Arbitrator 2 as the Respondent appointed arbitrator. Since he is not a member of the ICC Panel of Arbitrators, the appointment is made pursuant to ICC Rules. The CV of Dr. Arbitrator 2 is attached.

I have conferred with Mr. Horace Fasttrack, counsel for the Claimant in this arbitration, and we have agreed on Professor Presiding Arbitrator as the chair of the panel. Professor Presiding Arbitrator is a resident of Vindobona, Danubia, where the arbitration is to take place.

Sincerely yours,
(Signed)
Joseph Langweiler

Attach:
Power of attorney, original and one copy
Business License, Equatoriana Best Tech, Inc, five copies
Certificate of Legal Representative, five copies
CV Dr. Arbitrator 2

10 August 2011

Dear Professor Presiding Arbitrator, Ms. Arbitrator 1 and Dr. Arbitrator 2

Re: Notice of Arbitration for Case No. M20110999

Concerning the captioned arbitration case between the Claimant Mediterraneo Full Compliance, Ltd and the Respondent Equatoriana Best Tech, Inc, the Claimant has appointed Ms. Arbitrator 1 as an arbitrator in this case; the Respondent has appointed Dr. Arbitrator 2 as an arbitrator in this case. Both parties have jointly appointed Professor Presiding Arbitrator as the presiding arbitrator.

The Secretariat of the International Court of Arbitration is writing to inquire whether you will accept such an appointment.

I. Please be advised that:

(a) As required by the ICC Rules and the Rules of Arbitrators, an arbitrator shall not represent each party and shall remain independent of the parties and treat them equally. If you accept the appointment, please affix your signature to the enclosed DECLARATION, disclose in writing any circumstances that may cause justifiable doubt regarding your independence or impartiality.

(b) In light of the rules regarding relevant time limits as stipulated in the Arbitration Rules, before accepting the appointment, please make sure you have the time to devote yourself to the arbitral proceeding of the case.

II. Under the Arbitration Rules, the arbitral proceedings are confidential.

III. Information relevant to the dispute is provided for your consideration as follows:

(a) Claimant: Mediterraneo Full Compliance, Ltd
Arbitration Agents: Mr. Horace Fasttrack

(b) Respondent: Equatoriana Best Tech, Inc
Arbitration Agents: I Joseph Langweiler

(c) Procedural Rules: ICC Rules

(d) The amount under dispute: USD 670,600 plus interest and costs

(e) Type of Dispute: Contract for the sale, installation, and configuration of control system

(f) Arbitration Language: English

To facilitate the establishment of the Arbitral Tribunal and to advance the arbitral proceedings of the case, your reply within 5 business days of the receipt of this letter will be very much appreciated. If you accept the appointment, please affix your signature to the enclosed DECLARATION and return it to the International Court of Arbitration promptly. Such DECLARATION and written disclosure will be forwarded to the parties to the dispute. The parties shall, under ICC Rules, decide whether a challenge is to be filed.

The Secretariat looks forward to providing you with prompt, good and effective service.

Sincerely yours,

The Secretariat

Encl.: DECLARATION (blank)

ARBITRATOR'S DECLARATION OF ACCEPTANCE AND STATEMENT OF INDEPENDENCE

Case No. M20110999

Claimant: Mediterraneo Full Compliance, Ltd
Arbitration Agent: Mr. Horace Fasttrack

Respondent: Equatoriana Best Tech, Inc
Arbitration Agent: Mr. Joseph Langweiler

(Please mark the relevant box or boxes)

ACCEPTANCE

- I hereby declare that I accept to serve as an arbitrator in the captioned case. In so declaring, I confirm that I have familiarized myself with the requirements of ICC Rules and am able to serve as an arbitrator accordingly.

INDEPENDENCE

- I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no facts or circumstances, past or present, that need to be disclosed because they might be of such nature as to call into question my independence or impartiality in the eyes of any of the parties.

OR

- I confirm that I know of no circumstance that may lead to my withdrawal under the ICC Rules before I accept to serve as an arbitrator, and I will act impartially, independently, efficiently and diligently as an arbitrator. However, I wish to call your attention to the following facts or circumstances which I hereafter disclose because there exists such a relationship with the party/parties or their counsel as to call into question my independence in the eyes of any of the parties.

DISCLOSURE DUTY

I will disclose immediately, during the case proceedings, if I know of any facts or circumstances that might be of such a nature as to call into question my independence and impartiality.

Signature:

Date:

30 August 2011

Claimant: Mediterraneo Full Compliance, Ltd
Arbitration Agent: Mr. Horace Fasttrack

Respondent: Equatoriana Best Tech, Inc
Arbitration Agent: Mr. Joseph Langweiler

Dear Sirs,

Re: Notice on the Formation of Arbitral Tribunal for Case No. M20110999

Concerning the captioned arbitration case, we hereby notify the parties as follows:

1. The Claimant appointed Ms. Arbitrator 1 as the arbitrator while the Respondent appointed Dr. Arbitrator 2 as the arbitrator. Both parties have jointly appointed Professor Presiding Arbitrator as the presiding arbitrator. The afore-mentioned three arbitrators have formed the arbitral tribunal to hear this case.
2. The copies of the Declarations signed by the three arbitrators are attached hereto.

Sincerely yours,

The Secretariat

Joseph Langweiler
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14 Capital Boulevard
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Tel. (0) 214 77 32
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langweiler@host.eq

2 September 2011

Ms. Secretary
Secretariat
International Court of Arbitration

Mediterraneo Full Compliance, Ltd, Claimant v. Equatoriana Best Tech, Inc, Respondent
Case No. M20110999

Dear Ms. Secretary:

I hereby forward to you five copies of the statement of defense of Equatoriana Best Tech, Inc.

Sincerely,
(Signed)
Joseph Langweiler

Encl.

Mediterraneo Full Compliance, Ltd, Claimant

v.

Equatoriana Best Tech, Inc, Respondent

Case No. M20110999

Statement of Defense

1. Respondent has no independent knowledge as to the statements in paragraphs 1, 4, 5, 6, 11, 17 and 18 of the request for arbitration.
2. Respondent accepts the statements in paragraphs 2, 3, 7 to 10, 12 to 14, 16 and 19 to 21 of the request for arbitration.
3. Respondent accepts the first sentence of paragraph 15. Respondent does not know whether there were other customers that might be described as regular customers of Atlantis High-Performance Chips. Nor does it know whether the fact that the CEO of Atlantis High-Performance Chips and the CEO of Atlantis Technical Solutions were good friends was the “real reason” that all of the chips available to Atlantis High-Performance Chips immediately after the fire were delivered to Atlantis Technical Solutions.
4. Respondent denies paragraphs 22 and 23.

Affirmative defense

5. Claimant, Mediterraneo Full Compliance, Ltd (hereafter Full Compliance), states that, after the fire at the production facility of Atlantis High-Performance Chips, the latter could have delivered all the D-28 chips needed for the master control system from the amount already produced and in its warehouse. It further states that the only reason the chips were not delivered to Oceania Specialty Devices was because of the close friendship between the CEO of Atlantis High-Performance Chips (hereafter High Performance) and the CEO of Atlantis Technical Solutions, to whom the entire stock in the warehouse at the time of the fire was delivered. This speculation is based upon a news story in the Technology Reporter. Equatoriana Best Tech, Inc (hereafter Control Systems) accepts that the entire supply of D-28 chips in the warehouse was delivered to Atlantis Technical Solutions and that the two CEOs were good friends. This, however, is not enough to reach the factual conclusion that that was the only reason the chips were delivered to Atlantis Technical Solutions.

6. It also does not prove that, even if that was the reason, the necessary amount of chips would have been delivered from the stock in the warehouse to Oceania Specialty Devices. The available chips might have been allocated on a pro-rata basis among all of the orders placed with High Performance. In that case, Oceania Specialty Devices would have received some chips, but not enough to fabricate all of the processing units for the M/S Vis.

7. Assuming that Full Compliance is able to convince the tribunal at the appropriate time that High Performance could have performed its contractual obligations to Specialty Devices, Best Tech would nevertheless not be liable to Full Compliance. CISG, Article 79(1) provides that “[a] party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control ...” The impediment to Control System’s performance, which

was the failure to receive the processing units from Oceania Specialty Devices, was certainly beyond its control. Article 79(2) goes on to say that where the Respondent's "failure is due to the failure by a third party whom he has engaged to perform the whole or a part of the contract", ie Specialty Devices, is exempt under the conditions of article 79(1). (Emphasis added) Specialty Devices also could not meet its contractual date of delivery of the processing units to Best Tech for reasons that were beyond its control, ie the failure of High Performance to deliver the D-28 chips to it at the contractual date of performance.

8. In order to be free from liability CISG, Article 79(1) also requires that the party that fails in its performance "could not reasonably be expected ... to have overcome [the impediment] or its consequences." Best Tech could not have overcome the failure to receive the D-28 chips on time. Conceivably High Performance could and should have overcome the impediment to its performance with Specialty Devices, at the expense of its performance to its other customers, which we argue would not be a reasonable position to take.

9. Full Compliance would have the tribunal hold that Best Tech as seller of the master control system is responsible for the failure of its entire supply chain to perform on time. (Request for Arbitration, para. 22. That may be true in regard to the quality of the goods since the seller affirmatively delivers the goods to the buyer. It cannot be true with regard to late performance. As noted in paragraph 7, the responsibility for the actions of a third party is to a third party he has engaged to perform the whole or a part of the contract. Best Tech had no dealings with High Performance. It cannot be held responsible for any alleged failings on the part of High Performance.

Damages

10. The damages claimed by Full Compliance have several items that should not be recoverable under any circumstances.

11. Full Compliance made an ex gratia payment of USD 112,000 to Corporate Executives to make a partial refund of the conference fee to those of its members who had registered for the conference on the M/S Vis. An ex gratia payment is a voluntary payment. Best Tech cannot be liable to reimburse a voluntary payment made by Full Compliance.

12. Full Compliance claims that the payment was to "retain the goodwill and future business from Corporate Executives." (Request for Arbitration, paragraph 18) There is no suggestion in the record that Corporate had made any demand for such a payment or that it had threatened to withdraw future business. Full Compliance's belief that it would help retain future business was pure speculation and the payment should not be recoverable.

13. The payment of the USD 50,000 yacht broker's success fee raises more troubling issues. According to an article in the Convention Business News of 25 July 2011, the "success fee" paid by Full Compliance to its yacht broker was passed in part to the personal assistant of Samuel Goldrich, the individual owner of the M/S Pacifica Star, to affect an "introduction" to Mr. Goldrich. The personal assistant was subsequently arrested on charges that of accepting bribes to influence Mr. Goldrich in his various financial affairs.

14. According to the Criminal Code of Pacifica, article 1453, it is illegal for an employee to accept any money or other item of value to assist a third person to obtain or retain business with the employer. Full Compliance should not even have considered claiming this payment made under its authority as damages in this arbitration.

15. The bribery which facilitated the rental of the M/S Pacifica Star raises a further and more serious issue in regard to the claim for damages. The entire lease contract is tainted by the corruption abetted by Full Compliance's agent. The arbitral tribunal should rule that it has no authority to consider the contract for the lease of the M/S Pacifica Star or its consequences.

Challenge to Dr. Elisabeth Mercado as member of Full Compliance Legal Team

16. We have been notified by Mr. Horace Fasttrack that Dr. Elisabeth Mercado has been added to the team of counsel representing Full Compliance. We challenge her participation on the Full Compliance legal team and request the tribunal to rule that she should cease all activities in this arbitration. If the challenge to Dr. Mercado is not accepted by the tribunal, we reserve our right to challenge Professor Presiding Arbitrator for the reasons that will be evident.

17. It is important to begin with the position of Professor Presiding Arbitrator. As is known to the entire tribunal, he is the Schlechtriem Professor of International Trade Law (ITL) at Danubia National University. At Danubia National University, the ITL faculty covers (inter alia) Sales Law (including CISG) and International Commercial Arbitration. Professor Presiding Arbitrator is a world-renowned specialist in trade law but arbitration, per se, is not his focus. He sits on the Management Committee of the ITL Faculty and thereby is responsible for the other members of the Committee for all ITL activities, including arbitration. Although he is not a specialist in arbitration, he sits as arbitrator in investor-state arbitrations including ICSID as well as in WTO arbitrations and occasionally in commercial disputes. It is because of this broad experience that he was designated as the presiding arbitrator in this arbitration by the joint agreement of the two parties.

18. Dr. Mercado is a Visiting Lecturer at Danubia National University, teaching the International Commercial Arbitration courses. She secured her Visiting Lectureship following a public application process of which she had been unaware until she received a telephone call from someone who introduced herself as the Professor Presiding Arbitrator's assistant and said she was calling on his behalf. Dr. Mercado was shortlisted along with one other and was selected after the interview by a panel of three, chaired by Professor Presiding Arbitrator.

19. She delivers approximately 50% of the arbitration lectures, the remaining 50% being delivered by members of the Faculty's full-time staff. She is paid per lecture and is not salaried but is treated as a third-party service supplier for payment and tax purposes. The Tax Authorities have accepted this and no issue arises as to her employment status.

20. In the past, Dr. Mercado had spent time as General Counsel in a large international trading company. As a consequence, in addition to her arbitration lectures, she delivers lectures to the ITL Faculty as part of Professor Presiding Arbitrator's course on international trade, focusing on the "real world" of international commerce as opposed to the black-letter law. As a consequence, Dr. Mercado has occasional contact with Professor Presiding Arbitrator, but the majority of her contact is with the ITL Faculty's full-time staff, particularly the several Course Directors. Face-to-face, she calls him "Peter" but in a company normally adopts the more formal "Professor".

21. Dr. Mercado is very good with children and is on first name terms with the Professor's four, aged between 10 and 20. She is godmother to the youngest of the Professor's children. She is also on first name terms with his wife. The two women occasionally meet in the city for lunch or coffee.

22. Dr. Mercado has appeared as Counsel before Professor Presiding Arbitrator in three previous arbitrations. In the first two, Dr. Mercado's client was successful with a unanimous tribunal. In the third case, Dr. Mercado's client was unsuccessful on a majority decision with Professor Presiding Arbitrator issuing a Dissenting Opinion in her client's favor. In none of the three cases were Dr. Mercado's client's opponents aware of the connections between Dr. Mercado and Professor Presiding Arbitrator. Therefore, no question of a challenge ever arose.

23. We bring to your attention that the Code of Ethics of Dr. Mercado's Bar Association does not address the facts of this case. Nevertheless, the relationship between Dr. Mercado and Professor Presiding Arbitrator is so close that the tribunal should rule that Dr. Mercado should withdraw from the legal team representing Full Compliance. To repeat paragraph 16, above, if the challenge to Dr. Mercado is not accepted by the tribunal, we reserve our right to challenge Professor Presiding Arbitrator as arbitrator in this case.

Relief Requested

24. The Respondent requests the tribunal to:

1. Decide that Dr. Elisabeth Mercado shall terminate her role in the legal team representing Full Compliance;
2. On the merits decide that Equatoriana Best Tech is exempt from liability for the late delivery and installation of the master control system on the M/S Vis;
3. Decide that, if Equatoriana Best Tech is held liable for the delay, the ex gratia payment of USD 112,000 is not an allowable item of damages;
4. Decide that the payment of USD 50,000 as the yacht broker's "success fee" that was used by the broker in part to pay a bribe is not an allowable item of damages;
5. Decide that the corruption in the procuring of the lease contract for the M/S Pacifica Star renders all costs associated with that lease contract not allowable items of damages;
6. Award the costs of arbitration including the cost of legal representation to Equatoriana Best Tech.

(Signed)

Joseph Langweiler

2 September 2011

Convention Business News

25 July 2011

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The conference business does not often lead to the criminal courts, which is what makes the events in Pacifica so unusual.

The conference delegates at the annual meeting in February of the World Wide Corporate Executives Association were satisfied. Mediterraneo Full Compliance was relieved. The meeting had been scheduled to be held on the M/S Vis, the new super floating conference center that has been talked about so much in conference circles.

As was reported in Convention Business News on 28 September 2010, the refurbishing of the M/S Vis was delayed by the anticipated late delivery of the novel conference technology. The opening conference on the newest addition to the Full Compliance list of luxury venues was to be the Association's annual meeting. The choice was popular with the membership. There was dismay when it was reported that a substitute location would be necessary.

The Association insisted the conference should be held on a superyacht. Time was short and the supply of possible alternatives was restricted. There was general relief when it became possible to rent the M/S Pacifica Star, the superyacht owned by Samuel Goldrich.

That was the beginning of the troubles. A source close to the transaction stated that unbeknown to Full Compliance its yacht broker had passed some of a USD 50,000 "success fee" to the personal assistant of Mr. Goldrich for an "introduction". That is bribery under the laws of Pacifica, though not in Mediterraneo where Full Compliance is based. Further investigation showed that the personal assistant had been receiving similar payments for help in doing business with Mr. Goldrich.

Although it appears that no one from Full Compliance knew about the bribery until contacted by the Pacifica police, it is an unhappy ending for them for what otherwise was a successful conference.

Respondent's Exhibit

Criminal Code of Pacifica

Article 1453. (1) It shall be unlawful to pay, promise to pay, or authorize payment of any money, or other items of value to an employee of a third person or company in order to obtain or retain business with that third person.

(2) It shall be unlawful for an employee or agent to receive any money or other item of value to assist the provider of the money or other item of value to obtain or retain business with the employer or principal.

Mediterraneo Full Compliance, Ltd, Claimant

v.

Equatoriana Best Tech, Inc, Respondent

Case No. M20110999

Procedural Order No. 1

1. The tribunal decided during a conference call on 5 October 2011 that the presiding arbitrator was authorized to make procedural decisions subject to later confirmation by the full tribunal.

2. Mediterraneo Full Compliance, Ltd initiated the arbitration to recover damages arising out of the late delivery of the conference technology for installation on the M/S Vis.

3. Equatoriana Best Tech, Inc has raised several defenses.

- a) **It asserts that it is exempt from liability under the provisions of CISG, Article 79.**
- b) **Equatoriana Best Tech, Inc has also asked the tribunal to order that Dr. Elisabeth Mercado be removed from the legal team representing the Claimant because of her relationship with the presiding arbitrator.**

Please respond:

- a) **Should Equatoriana Best Tech be exempted from liability under the provisions of CISG, Article 79?**
- b) **Should the tribunal order removal of Dr. Mercado from the legal team representing the Claimant?**

(Signed)

Professor Presiding Arbitrator
President of the arbitral tribunal

7 October 2011