20TH/ 10TH (EAST) ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

[Problem available at: http://www.cisg.law.pace.edu/cisg/moot/moot20.pdf]

Analysis of the problem for use of the Arbitrators

TABLE OF CONTENTS

A. THE FACTS OF THE CASE

Mediterraneo Exquisite Supply, Co. (Claimant) is one of 15 jointly owned subsidiaries of Oceania Plus Enterprises and Atlantic Megastores. Its seat of business is in Mediterraneo, and it is Oceania Plus' procurement arm. Oceania Plus is a large multinational group supplying leisure clothing to a number of internationally famous brands. Oceania Plus promotes ethical business practices, particularly the ban of child labour, which generates goodwill in its conscientious customers. Next to its suppliers, Oceania Plus also owns several retail clothing chains, e.g. Doma Cirun. Both Oceania Plus' and Doma Cirun's seat of business are in Oceania. Equatoriana Clothing Manufacturing, Ltd. (Respondent) is a clothing manufacturer with its seat in Equatoriana. The instant dispute between Claimant and Respondent evolved as follows:

04/08 Claimant audited Respondent to ensure Respondent satisfied Oceania Plus' ethical production standards. Respondent received the Ethic Rules of the Oceania Plus group, that commit everybody dealing with an entity of the group to follow these rules. Claimant thereafter entered into business relations with Respondent.

05/01/11 Claimant and Respondent enter into the contract at issue. The contract is concluded for the production of 100,000 polo shirts on a rush basis, so that Claimant can cover Doma Cirun's shortfall for the summer selling season. The polo shirts would carry the name of Doma Cirun's housebrand, „Yes Casual“. The contract was initially concluded for delivery by 19 February 2011. The contract includes an arbitration clause to settle any dispute under the auspices of the CEAC using their arbitration rules.

07/01/11 Claimant and Doma Cirun signed a contract for timely delivery of the 100,00 polo shirts. Their retail would be accompanied by a major advertisement campaign.

09/02/11 Mr Short (Respondent) called Mr Long (Claimant), informing him that delivery could take place no earlier than 24 February 2011 due to a production incapacity in one of its supplier's plants. Later on it is disputed whether the delivery date was postponed or whether the contract was amended to the later delivery date. This is especially controversial since Claimant relies on the

Mediterranean writing requirement pursuant to Artt., 96, 12 CISG. Moreover, it will later be argued whether Mr Short's witness statement may be used as standalone evidence.

24/02/11 The polo shirts were loaded for shipment to Oceania.

05/03/11 The polo shirts arrived at Portcity, Oceania.

11/03/11 The polo shirts were delivered to the warehouse of Doma Cirun.

20/03/11 The polo shirts are now ready for sale.

05/04/11 Channel 12 broadcast a shocking documentary showing children working in appalling conditions, some of which were facilities that belonged to Respondent. Both Oceania Plus and Doma Cirun are strongly condemned for their business association with Respondent.

06/04/11 Following the documentary, sales in Doma Cirun's stores fell 30 % below those of the previous year.

08/04/11 Oceania Times, the leading newspaper in Oceania, published an investigative article concerning the use of child labour in the supply chains of leading national and international firms. After the publication, there was another serious drop in Doma Cirun's sales.

Oceania Plus' share price fell 25%, erasing hundreds of millions of dollars from its stock market valuation. The Prime Minister of Oceania called on Oceania Plus to take urgent action. The Children Protection fund, which had a major investment in Oceania Plus' shares in its investment portfolio, announced its plans to sue Oceania Plus and its directors for its losses and for the damage to its reputation. Additional lawsuits were threatened by other investors.
Doma Cirun notified Claimant that it was avoiding the contract. Consequently, Claimant notified Respondent that it was avoiding the contract.

10/04/11 Respondent denied that it had breached the contract, refusing to take back the polo shirts and to arrange for their disposal.

20/04/11 Claimant sold the remaining 99,000 polo shirts to Pacifica Trading Co. at a price of USD 470,000.

15/09/11 Doma Cirun initiated arbitration proceedings against Claimant, which were finally settled for USD 850,000.

15/02/12 Oceania Plus brought suit against Claimant. Claimant had to pay USD 700,000 to settle the dispute.

01/07/12 Claimant starts the arbitration proceedings against Respondent

B. THE ISSUES TO BE ADDRESSED

[As stipulated in Procedural Order No.1, p. 49 et seq., para. 10]

1. Counsel should address the issue of delay in delivery
2. Counsel should address the issue of whether the witness statement of Mr Short should be considered by the tribunal if he is not available for examination at an oral hearing. In their arguments reference may be made to the IBA Rules of Evidence though their relevance remains controversial between the Parties.
3. Counsel should address the issue whether the tribunal should follow the interpretation given to the Mediterraneo reservation to Art.96 and the interpretation given to it by the Supreme Court of Mediterraneo.
4. Counsel should address the issue as to whether Mr Long should be considered to have agreed to an amendment of the delivery date in the contract when he said he would "make sure that all of the paper work reflected the new delivery date."
5. Counsel should address the issue as to whether Mediterraneo Exquisite Supply had grounds to avoid the contract and claim damages.

→ It is agreed that for the purposes of the arbitration, but without any admission by Respondent, that it had in fact used child labour in at least one of its plants but that no child labour had been used in the production of the polo shirts the subject of the contract.

→ It is agreed that the parties would not argue in the first stage of the arbitration any issues in regard to the quantum of damages arising out of the breach, if the tribunal were to decide that there had been such a breach. Similarly, they would leave to later the allocation of the costs of arbitration.

C. ISSUES AS TO THE PROCEEDINGS

I. Is Mr Short's written witness statement to be considered by the Tribunal despite his absence at the oral hearing?

1. The background

Mr Tomas Short, Respondent's Contracting Officer, had provided a Witness Statement. During a procedural meeting by telephone, Claimant requested his appearance at an oral hearing to answer questions related to this witness statement. Respondent replied that this would not be possible since Mr Short had left the company's employment and had said his new employer (Jumper's Production) did not wish him to be involved any further in matters concerning Respondent. Jumpers had specifically told him not appear before the tribunal if he was called.

→ Should the written witness statement of Mr Short be considered despite his absence at the oral hearing?

2. Matters for consideration by arbitrators

Reference may be made to the IBA "Rules on the Taking of Evidence in International Arbitration (2010)" (Procedural Order No. 1, p. 49, para. 10), though their relevance remains controversial between the Parties. It will need to be considered whether, given that the IBA Rules have not been expressly adopted in these proceedings, they can be taken as representative of a broad international consensus and therefore apply by implication or whether the Tribunal should exercise its discretion under Artt. 17 (1) CEAC Rules and apply them.

Claimant might argue that:

- There is a gap in Art. 27 CEAC and thus the tribunal should make use of its discretion and take recourse to the IBA Rules, especially because it wants to conduct the proceedings in line with the international practice
- Mr Short has no valid reason for his non-appearance under Art. 4 (7) IBA Rules and there are no exceptional circumstances that allow for the consideration of the written statement
- An award would be unenforceable because Claimant's right to procedural fairness and would be violated if Mr Short's written witness statement was considered without the possibility to cross-examine him

- An oral examination of Mr Short is absolutely necessary since written statements merely serve evidentiary purposes
- It was Respondent's duty to ensure Mr Short's appearance

Respondent might argue that:

- The application of Art. 4 (7) IBA Rules is superfluous because Art. 27 (2) CEAC Rules already addresses the admissibility Mr Short's written witness statement
- The CEAC Rules are binding upon the parties as they agreed on their application whereas the IBA Rules are merely soft law
- Cross-examination is not a pre-condition and written statements can replace oral testimony
- Mr Short's tight timetable and the risk of losing his new job are valid reasons for Mr Short not to appear at the hearing; his employer does not wish him to get involved further into Respondent's business
- Recognition and enforcement of the award may be put at risk if Respondent was not allowed to prove his case by presenting a written witness statement, especially because this is the only piece of evidence available
- Respondent fulfilled its burden of proof. It took all necessary measures
- Rather, Claimant could have supported Mr Short's appearance but it refused to make a simple phone call
- To declare the written statement completely inadmissible is the ultima ratio, it might at the most be given less evidentiary weight but that is not a question of admissibility

II. Does Mediterraneo's reservation as to a writing requirement under Artt.12, 96 CISG apply?

1. The background

It is at issue if the contractual delivery date was amended during the phone call between Respondent's Mr Short and Claimant's Mr Long. This is important for the question, if Respondent failed to deliver on time and if Claimant thus is entitled to damages.

Mediterraneo is a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) having made the Art.96 declaration pursuant to which

> *"any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer,*

acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."

→ Does Mediterraneo's reservation under 12, 96 CISG take any effect and leads to the application of the form requirement contained in its law despite the parties' choice?

2. Matters for consideration by arbitrators

Claimant might argue that:

- The Tribunal should uphold Mediterraneo's writing requirement in arbitration because party autonomy is not without limits
- In order to ensure an enforceable award under the New York Convention regard is to be had to public policy, which Artt. 12, 96 CISG are a part of
- Art. 1.4, 3.3.1 UNIDROIT Principles limit party autonomy by stipulating the compulsory nature of mandatory rules
- States may limit arbitral matters if mandatory state law is not observed by arbitral tribunals
- Private international law also leads to the law of Mediterraneo as it has the closest connection to the case at hand

Respondent might argue that:

- The parties excluded Mediterraneo's writing requirement by means of party autonomy and were allowed to do so as stipulated by Art. 35 (1)(b) CEAC Rules
- Oral modifications to contracts are general international practice and writing requirements are not a part of public policy
- Claimant violates the principle of good faith if it acts contrary to its prior conduct
- Even if Artt. 12, 96 applies, it is unclear which form requirement will apply instead
- According to Art. 1.2, 1.4 UNIDROIT Principles, as the otherwise applicable law, contracts are not subject to any domestic mandatory law in arbitration
- Private international law leads to the law of Equatoriana as it has the closest connection to the case at hand

D. ISSUES AS TO THE MERITS

I. Did the parties orally amend the contractual delivery date?

1. The background

On 9th February 2011 Respondent's Mr Short telephoned Claimant's Mr Long to inform that they would be unable to achieve the contractual shipping date of 19th February because of the failure of one of its suppliers to deliver certain materials on time. Respondent offered to deliver by 24th February instead. Claimant repeated that it urgently needed the polo shirts, but that under the circumstances he would take care of the necessary adjustments. Shipping would be arranged for the 24th and the letter of credit would be amended to reflect the new date. Critically, nothing was said about amending the delivery date in the contract itself. A new shipping contract was duly entered into calling for and the letter of credit was duly amended.

→ It is at issue if the parties reached an agreement on amending the initial delivery date. In that case Claimant would not be entitled to damages for late delivery.

2. Matters for consideration by arbitrators

Claimant might argue that:

- Claimant's Mr Long did not make any explicit reference to the contract itself; the contract itself is not encompassed by the term 'paperwork'
- The only documents to be amended in writing in order to fulfil Claimant's obligation to payment of the purchase price were the letter of credit and the shipping contract
- Claimant would not deliberately waive its right to claim damages for late delivery based on clause 10 of the contract
- All documents so far were in writing – so Claimant would amend the contract in writing, too
- The importance of delivery in time was emphasised on several occasions
- Respondent is not excluded from liability for late delivery under Art. 79 CISG since the strike in its supplier's plant was not an impediment beyond control
- The procurement risk lies with Respondent who chose the supplier
- Respondent had other suppliers that would have been able to provide raw materials but Respondent denied to ensure timely delivery
- The damages claimed are in accordance with Art. 74 CISG as they reflect the actual harm suffered

- Clause 10 of the contract expresses the gradual decline in sales and is therefore not grossly excessive under 7.4.13 UNIDROIT Principles

Respondent might argue that:

- According to Art. 8 (3) CISG both parties intended to amend the initial delivery date
- Claimant's Mr Long accepted late delivery and said that he would make sure that all the documents would reflect the new delivery date – the contract as the main document was encompassed
- Respondent's Mr Short received a letter of credit showing the amended delivery date and entitling him to the purchase price in full, not a deducted amount
- To send the amended contract itself in writing would have been superfluous as Claimant only needed to send the letter of credit in order to fulfil its obligation
- In any case, Respondent is exempt from liability for late delivery under Art. 79 CISG
- The strike in its supplier's plant was an impediment beyond its control since Respondent had no control over the supplier
- This impediment was not foreseeable and not to overcome as no other supplier was willing to guarantee delivery in time
- Respondent duly informed Claimant about the circumstances and delivered by the earliest date possible
- Clause 10 of the contract places an oppressive burden on Respondent and is to be classified as grossly excessive under 7.4.13 UNIDROIT Principles

II. Was Claimant entitled to avoid the contract and claim damages?

1. The background

Claimant is jointly owned by Atlantica Megastores and Oceania Plus. The latter is known for its high ethical standards. All contracts concluded by Claimant and other members of the Oceania Plus group require compliance with the "policy of Oceania Plus" which is a one page document setting out broad ethical and environmental standards. The policy is normally handed out during the audit process required for listing as a possible supplier and discussed with the audited companies. In the ordinary course of business such audits are repeated every four years for suppliers to remain on the list of potential suppliers.

The contract between Claimant and Respondent called for the delivery of 100,000 polo shirts of various colours and sizes per the technical specifications attached to the contract. It is not disputed between the parties that the shirts delivered met these technical specifications.

Furthermore, the parties have also agreed that the tribunal should assume that while Respondent had in fact used child labour in at least one of its plants, the polo shirts which were the subject of the contract have been produced without child labour.

→ The critical question is, if Claimant can avoid the contract based on non-conformity of the goods if Respondent had used child labour in one of its facilities but not in regard to the polo shirts ordered by Claimant. Further, it has to be argued whether or not Claimant is entitled to additional damages.

2. Matters for consideration by arbitrators

Claimant might argue that:

- The polo shirts did not conform the requirements of Art. 35 I CISG because non-physical characteristics form part of the goods quality
- Respondent was aware of the high ethical requirements due to pre-contractual negotiations and the policy clause in the contract
- The ILO Convention and the UN Global compact are international trade usage
- Respondent operates at the expense of children
- The polo shirts were not fit for the particular purpose under Art. 35 (2) CISG, Respondent knew about the intended resale to Doma Cirun in Oceania
- The principle of good faith required Respondent to inform about his incapability to fulfil the requirements of the contract
- The breach was fundamental because Claimant was deprived of his expectation to resale the polo shirts to Doma Cirun; Respondent had to make a cover purchase
- The detriment was foreseeable to Respondent since it knew about this purpose from the audit and the contract
- Respondent refused to take back the polo shirts so that Claimant had to divest them elsewhere
- Since Respondent breached the contract, Claimant is further entitled to damages since it had to pay settlements to Doma Cirun and Oceania Plus
- These damages were foreseeable to Respondent and besides the settlements were very favourable

Respondent might argue that:

- The polo shirts conformed to Art. 35 (1) CISG as they meet the specifications such as sizes, colours and quality as stipulated in annex 1 of the contract

- Clause 12 of the contract (the ethic policy clause) did not establish any further quality requirement
- The policy clause was not incorporated into the contract by reference as Claimant failed to attach the policy sheet containing the necessary information
- The clause is too broad – it cannot be meant that Respondent shall adhere to it in all of his future business relationships
- Respondent was not bound by the ILO Convention or the UN Global Compact since these are public law norms and not an international trade usage
- The main focus of the contract was timely delivery of polo shirts
- Respondent cannot be held liable for the reaction of the media
- The polo shirts also conformed to Art. 35 (2) CISG as they were fit for resale (1000 of them were sold by Doma Cirun and the remaining ones to Pacifica Trading)
- The polo shirts had no particular purpose; Claimant could not rely on Respondent's skill and judgement
- Respondent is not liable under Art. 35 (3) CISG either because Claimant was suspicious and aware that child labour is common in Respondent's area of the world but did not take appropriate steps to ensure conformity of the goods
- An alleged breach would not have been fundamental because it was possible for Claimant to resell all of the polo shirts
- A detriment was not foreseeable to Respondent as it was a reaction of the public to a TV-documentary allegedly taken in Respondent's facilities
- Respondent was not familiar with the Oceanian market as it usually delivers elsewhere
- Claimant was not allowed to avoid the contract and did not even declare avoidance in time
- Thus, it is not entitled to recover the settlements with Doma Cirun and Oceania Plus either
- In any case, those damages were not foreseeable to Respondent since it had not to be aware of the internal structures and know the investors of the Oceania Plus group