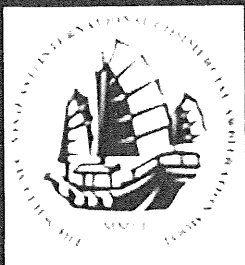


THE DANUBIA FILES: AWARD WRITING LESSONS FROM THE VIS MOOT



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Cover Design by Louise Barrington

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Outskirts Press, Inc.
<http://www.outskirtspress.com>

Paperback ISBN: 978-1-4787-1179-7

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PRINTED IN THE UNITED STATES OF AMERICA

LAW / International

PRACTICAL ADVICE ON WRITING INTERNATIONAL ARBITRATION AWARDS

At last, the students, coaches and arbitrators who have dedicated so many hours to the Danubia Files will see the results of their labours. Six tribunals of renowned international arbitrators and educators have issued awards in the Vis Problems XIV to XIX. Each award considers the issues and sets out the decision of the tribunal in their own words and style.

And at last, here is a reference text that deals with one of the most important - yet most neglected - stages in arbitration procedure: the drafting of the arbitration Award.

The first lesson of this book is that there is no single "right" way to draft an award. Each tribunal has its own voice, its own character; there are many styles that can produce a good award.

"A wonderful achievement and highly innovative and useful contribution that will be of great interest to all international arbitration lawyers, scholars and students." – Gary Born, Chair, International Arbitration Group, Wilmer Cutler Pickering Hale and Dorr LLP

"I wish I'd thought of it! This book will immediately become a "must-have" for law firm international arbitration groups. The awards not only increase the already rich value of the Vis problem materials for advocacy training, they also are a much-needed resource for award drafting practice. Be sure to read the down-to-earth drafting guides by Louise Barrington and Pierre Karrer." – Lucy Reed, Global co-Head, International Arbitration, Freshfields

"You can measure the height of the Great Pyramid at Cheops without climbing it by multiplying the height of a pole by the ratio of the two shadows (500 BC). You can put little wheels on luggage (1970). Great ideas in retrospect seem obvious, and the Danubia files are another." – Jan Paulsson, President, International Council of Commercial Arbitrators (ICCA)



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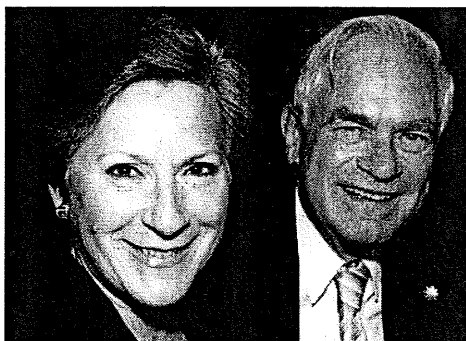
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This book is a tribute to Eric E. Bergsten



Eric Bergsten and his right hand, Brigitta Bergsten

Eric E. Bergsten

***Director of the Willem C. Vis International Commercial Arbitration Moot
Professor Emeritus and Deputy Director of the Institute of International
Commercial Law at Pace University, New York***

After a distinguished sixteen-year career with the United Nations where he served the United Nations Commission on International Trade Law (UNCITRAL) as Senior Legal Officer, as UNCITRAL Secretary and as Chief of the International Trade Law Branch of the Office of Legal Affairs, Professor Bergsten taught a number of commercial law and international law courses at Fordham University, the University of Iowa, and Northwestern University. His numerous writings and teaching focus on commercial law and international trade law.

With colleagues Michael Sher and Al Kritzer, Professor Bergsten developed Pace's Willem C. Vis International Commercial Arbitration Moot held annually in Vienna, Austria. For twenty years Professor Bergsten has dedicated his "retirement years" to directing the Vis Moot, developing it into one of the world's foremost international competitions for law students. As the leader of thousands of Mooties, Professor Bergsten enjoys the respect, gratitude and affection of students and professionals around the globe.

In recognition of his generous and tireless devotion to the Moot, Professor Bergsten has received a Special Award from the International Law and Practice Section of the New York State Bar Association, a Special Commendation for his achievements as Director of the Willem C. Vis International Commercial Arbitration Moot by the Section on Dispute Resolution of the American Bar Association, and the Silver Medal of Honor (Silberne Ehrenzeichen) from the City of Vienna, Austria, home of the Vis Moot.

XVII VIS MOOT – 2009-10 – PUMPS

XVII WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VII WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2009-2010: THE PUMPS FILE

Problem:

Vis Moot

<http://www.cisg.law.pace.edu/cisg/moot/moot17.pdf>

Vis Moot (East)

<http://www.cisgmoot.org/2009-2010moot.htm>

Memoranda and Awards

Vis Moot

<http://www.cisg.law.pace.edu/cisg/moot/awards17.html>

Vis Moot (East)

<http://www.cisgmoot.org/memoranda2010.html>

**Australian Centre for International Commercial Arbitration
Case No 17/2010**

Mediterraneo Engineering Co. (Claimant)
v
Equatoriana Super Pumps S.A. (Respondent)

Final Award

Place of Arbitration: Vindobona, Danubia

The Arbitral Tribunal:
Prof. Dr Ingeborg Schwenzer, LL.M. (Chairperson)
Dr Lisa Spagnolo (Co-Arbitrator)
Dr Cláudio Finkelstein (Co-Arbitrator)

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I. Parties

- [1] The claimant in this arbitration is Mediterraneo Engineering Co., a corporation organized under the laws of Mediterraneo, and located at 415 Industrial Street, Capitol City, Mediterraneo (**Claimant**).
- [2] Claimant is represented in this arbitration by Mr Horace Fasttrack, Advocate at the Court, 75 Court Street, Capitol City, Mediterraneo.
- [3] The respondent in this arbitration is Equatoriana Super Pumps S.A., a corporation organized under the laws of Equatoriana, and located at 58 Industrial Road, Oceanside, Equatoriana (**Respondent**).
- [4] Respondent is represented by Mr Joseph Langweiler, Lawyer, 14 Capitol Boulevard, Oceanside, Equatoriana.
- [5] Claimant and Respondent are together referred to as the 'Parties' in this Award.

II. Arbitration Agreement and Applicable Law

- [6] The present dispute arises out of a contract between the Parties for the sale of pumps concluded 1 July 2008 (**Contract**).
- [7] Clause 18 of the Contract reads as follows:

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by conciliation in accordance with the UNCITRAL Conciliation Rules. The parties will be represented by their Chief Executive Officer. The conciliation shall take place in Vindobona, Danubia and be administered by the Danubia Arbitration and Conciliation Center.

If the dispute has not been settled pursuant to the said conciliation procedure, the dispute shall be resolved by arbitration in accordance with

the ACICA Arbitration Rules. The seat of arbitration shall be Vindobona, Danubia. The language of the arbitration shall be English. The number of arbitrators shall be three.

[8] As concerns the applicable procedural law the Parties agreed that the seat of this arbitration as well as for the conciliation shall be Danubia. The *lex arbitri* thus is the UNCITRAL Model Law on International Commercial Arbitration, including the 2006 Amendments, as it has been enacted in Danubia (**UNCITRAL Model Law**). Furthermore, Danubia has enacted the UNCITRAL Model Law on International Conciliation which therefore governs the conciliation procedure. The Parties have agreed in their Contract that conciliation will be conducted according to the UNCITRAL Rules on Conciliation. For their arbitration they have chosen the ACICA Arbitration Rules (2005)(**ACICA Rules**). Neither of the Parties has disputed the general applicability of these laws and rules. Furthermore, as Mediterraneo and Equatoriana are both parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, this Convention might also be taken into consideration where it seems appropriate.

[9] As concerns the applicable substantive law Art. 28(1) UNCITRAL Model Law and Art. 34.1 ACICA Rules primarily rely on the law chosen by the Parties. In the case at hand there has been no choice of law. According to Art. 28(2) UNCITRAL Model Law the tribunal must therefore determine the applicable law according to the conflict of laws rules, whereas pursuant to Art. 34.1 ACICA Rules the tribunal is to select the law which it considers applicable. As both Parties have their places of businesses in States that are Contracting States of the CISG it seems appropriate to apply the CISG to this contract (Art. 1(1)(a) CISG). This is the law that is most closely connected to the Contract and that would also be designated by Danubian law. None of the Parties has objected to the application of the CISG. As concerns matters not governed by the CISG the Tribunal considers it appropriate to apply the laws of Equatoriana as the law of the seller's place of business, which has the closest relation to the sales contract.

III. Arbitral Tribunal

[10] The Tribunal was constituted on 18 September 2009 as a panel of three members:

Prof. Dr Ingeborg Schwenzer (Chairperson), University of Basel, Peter Merian-Weg 8, CH-4002 Basel, Switzerland;

Dr Lisa Spagnolo, Faculty of Law, Commercial Law Group, Monash University, Wellington Road, Clayton, 3800 Australia;

Dr Cláudio Finkelstein, Pontifical Catholic University, Rua Monte Alegre, 984, 4 andar, SP, Brazil].

[11] Dr Lisa Spagnolo was appointed to the Tribunal by Claimant on 15 July 2009 in a letter filed before ACICA. Dr Cláudio Finkelstein was appointed by the Respondent in its letter submitted to ACICA on 17 August 2009.

[12] In accordance with Art. 10.1 ACICA Rules it was agreed by the two party-appointed arbitrators that Prof Dr Ingeborg Schwenzer should serve as Chairperson. Prof Schwenzer agreed to the appointment which was communicated to ACICA by Dr Spagnolo on 18 September 2009.

[13] It should be noted that Dr Spagnolo notified counsel for Respondent on 18 September 2009 that she had previously been appointed as an arbitrator by counsel for the Claimant in an arbitration before the Mediterraneo Arbitration Centre, but had no other contact with Mr Fasttrack or the Claimant.

IV. Arbitral Proceedings

[14] On 15 July 2009 Claimant filed before ACICA its Notice of Arbitration and Statement of Claim dated 15 July 2009 and thus commenced the proceedings of this arbitration.

- [15] By letter dated 20 July 2009, the ACICA Secretary General indicated that the proposed seat of arbitration, Vindobona, Danubia, was acceptable to ACICA.
- [16] On 17 August 2009 Respondent submitted to ACICA an Answer to Notice of Arbitration and Statement of Defense dated 17 August 2009.
- [17] The Respondent served two Witness Statements with ACICA with its Answer to Notice of Arbitration and Statement of Defense as follows:
- (a) Mr Horace Wilson, Procurement Officer, Oceania Water Services dated 9 August 2009 (Respondent Exhibit No 2 (Resp Ex #2));
 - (b) Mr James Fisher, Sales Manager, Trading Company of Mediterraneo dated 10 August 2009 (Resp Ex #3).
- [18] On 2 September 2009 Claimant filed with ACICA a Reply to Answer dated 2 September 2009.
- [19] On 16 September 2009 Respondent indicated to ACICA it did not wish to comment on Claimant's Reply to Answer.
- [20] On 2 October 2009 pursuant to Art. 17.3 ACICA Rules, the Chairperson convened a conference call to discuss the procedure, during which the Parties reached an agreement on preliminary issues concerning the conduct of the arbitration.
- [21] Based on discussions of the same date, on 2 October 2009 Procedural Order No 1 was issued by the Tribunal, confirming the agreement of the Parties that:
- (a) the arbitration was to be conducted in two stages (Procedural Order No 1 [1]-[3] (PO #1)):

- (i) a first stage dealing with issues of jurisdiction, breach of contract and mitigation; and
 - (ii) a second stage dealing with relief, including calculation of damages, interest and costs;
- (b) Parties would exchange written memoranda of their submissions, with Claimant submitting by 3 December 2009, and Respondent by 21 January 2010 (PO #1 [5]);
- (c) oral hearings would occur in Vindobona, Danubia, from 26 March to 1 April 2010 (PO #1 [7]).

[22] On 29 October 2009 Procedural Order No 2 was issued by the Tribunal in response to queries of the Parties invited by the Chairperson in Procedural Order No 1 [4]. It directed that, in relation to the merits, the Parties were to address all matters concerning Respondent's obligation including arguments concerning the excuse of any consequences. Additionally, other more specific matters were also addressed.

[23] Written memoranda of submissions were served by Claimant on 3 December 2009, and by Respondent by 21 January 2010.

[24] Oral hearings took place in Vindobona, Danubia from 27 March to 1 April 2010 in accordance with Procedural Order No 1 [7].

[25] Following the oral hearings the Parties were invited to make further written submissions. Counsel for both Parties submitted these to the Tribunal on 4 April 2010. On 5 April 2010, after consultation with the Parties, the proceedings were closed by the Tribunal.

V. Factual Background

[26] Claimant is a Mediterraneo company engaged in planning and implementing rural and urban development projects in Mediterraneo and

elsewhere. Respondent is a corporation which manufactures pumps in Equatoriana, and supplies them to more than 50 countries, including Mediterraneo. Two years earlier it had supplied pumps to Claimant for an irrigation project in Patria.

1. The Project Contract

- [27] A call for tenders for a project for renewal of an irrigation system located in Oceania was issued by government authority, Oceania Water Services (**Water Services**). On 4 May 2008 Mr Samuel Barber, director of Claimant entered into phone discussions with Mr Richard Haycock, Respondent's sales manager, to discuss Claimant's proposed bid. A letter by Mr Barber to Mr Haycock the following day, 5 May 2008 (Claimant Exhibit No 1 (CI Ex #1)), confirmed the irrigation project would be 'to furnish and install new pumps and to do other associated work', similar to the earlier Patria project, and that Claimant anticipated working on the bid with Respondent and purchasing the pumps from it should the bid succeed.
- [28] Subsequently, Respondent reviewed the proposed bid, and suggested the type of pumps necessary and their prices. A draft contract of sale for such pumps was prepared and signed by Claimant contingent on the success of Claimant's bid.
- [29] Claimant's bid was successful and Claimant was awarded the contract with Water Services to renew the irrigation project in Oceania (**Project Contract**). The Project Contract did not specify from which supplier Claimant should obtain pumps, and provided for penalties for delays in overall project completion (Procedural Order No 2 [8], [22] (PO #2)). Although the Project Contract did not stipulate the pumps were to be new rather than used, Water Services anticipated they would be newly manufactured (PO #2 [25]).
- [30] On 25 June 2008 the director of Claimant, Mr Barber, informed Respondent's sales manager, Mr Haycock, of the successful bid by phone, and mentioned Claimant's obligation to deliver the pumps to the

project site by 2 January 2009 (PO #2 [14]). On the same day, Claimant in a letter sent by email 25 June 2008 (CI Ex #2), sought to 'underline the importance of meeting the delivery date called for in the contract (which remains the same as that in the draft contract). [The Project Contract] has strict performance times with substantial penalties attached to delays and any delay in your delivery of the pumps would endanger our ability to meet at least some of the performance times. The people in Oceania are nervous about the political situation, which is leading them to be very strict in ensuring that all will be done properly'.

2. The Pumps Contract

[31] The contract in question in this arbitration is that entered between Claimant and Respondent for the sale of pumps (**Contract**). The draft contract prepared earlier was signed by Respondent's representative on 1 July 2008 (CI Ex #3). It contained terms including the following clauses:

1. [Respondent] hereby sells to [Claimant] the pumps from its N series as described in Annex I together with three P-52 pumps for a total price of US\$1,214,550 DES (Incoterms 2000) Capitol City, Mediterraneo. Delivery is to be in a single shipment and effected by 15 December 2008. The pumps are for installation in Oceania by [Claimant] under the contract between it and Oceania Water Services signed 25 June 2008 for the irrigation project IR 08-45Q.
2. The pumps shall meet the technical specifications set out in Annex I. [Respondent] warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania.
3. Payment to be made against documentary credit subject to UCP 600 issued by a first class bank.

- [32] Annex I contained specifications relating to the pump type, power and efficiency, but not composition of the steel used in their manufacture (PO #2 [6]).
- [33] Respondent had several P-52 pumps in inventory at the time the contract was signed on 1 July 2008. It informed Claimant of this in a letter dated 1 July 2008 sent by courier and email (Resp Ex #1), stating '[p]articularly in light of the imperative nature of the delivery dates, which you emphasize in your letter, it is fortunate that we have several P-52 pumps in inventory ready for shipment. As you may well imagine, a pump of its size and complexity takes considerable time to manufacture'. Respondent was aware the P-52 pumps would be installed in a pump house (PO #2 [7]).

3. Oceania 1 August Regulation

- [34] Respondent normally used Equatoriana steel to manufacture its pumps. Traces of beryllium are present in all Equatoriana iron ores, and while it can be eliminated during ore refinement or steel production, since it is a natural hardening agent, this would necessitate replacement with an alternative imported hardening agent. Consequently beryllium is normally not removed by Equatoriana steel producers.
- [35] On 1 August 2008, a month after the Parties entered the Contract, Water Services informed Claimant of a new Oceania regulation effective immediately restricting use of beryllium in steel products with moving parts to be used in enclosed spaces (CI Ex #4) (**1 August Regulation**). Claimant notified Respondent by email the same day, enclosing a copy of the Water Services notice (CI Ex #5). It noted that if there were beryllium in Equatoriana steel Respondent would 'have to find steel from some other source in producing those pumps'. It is common ground that the 1 August Regulation affected the P-52 pumps but not the field pumps (Statement of Claim [11] (SoC); Statement of Defense [11] (SoD)), since only P-52 pumps were to be enclosed in a pump house.

- [36]** In its emailed letter to Claimant dated 2 August 2008 (CI Ex #6), Respondent stated that it had previously 'expected to have completed the manufacture of the pumps by 30 October [2008]' but the need to procure and import new steel for manufacture of P-52s due to the 1 August Regulation would cause delay in completion by 'several weeks' and an 'increase in costs of approximately US\$30,000'. It further declared 'we cannot be held responsible for the delay in shipping the pumps to you. Moreover, we cannot be expected to absorb the extra expense caused by the completely unforeseen change in the regulations ... [as] we have no direct relationship with Oceania and had no reason to be monitoring political or regulatory developments, as you have'. Claimant, being located in a country contiguous to Oceania, was more aware of developments than Respondent, but did not know of plans to restrict beryllium in metal products (PO #2 [5]).
- [37]** Respondent imported the beryllium-free steel for manufacture of P-52 pumps. Once confident production would be complete by 15 November 2008, Respondent contacted a freight forwarder. The first available ship scheduled for Capitol City, Mediterraneo after 15 November 2008 was the 'Merry Queen' which was due to leave on 22 November 2008. A week between production and shipping was normally required for packing into a container, transport and loading. The pumps were loaded onto the 'Merry Queen' by 20 November 2008 (PO #2 [12]).
- [38]** On 22 November 2008, Respondent advised Claimant by email of the anticipated arrival in Mediterraneo on 22 December 2008, 'a week later than originally anticipated' (CI Ex #7). It was common ground this would still allow sufficient time for Claimant to transport the pumps to the project site in neighbouring Oceania in time to meet the Project Contract schedule (CI Ex #7, SoD [12]), which required delivery to the project site in Oceania by 2 January 2009 (CI Ex #12). Claimant responded on 24 November 2008 by email stating '[w]e realize that there is little that can be done about it now, so we have to go along with you', that the schedule 'will be very tight' and '[a]ny further delays and the entire irrigation project may be at risk' (CI Ex #8).

4. The Shipping Accident

[39] The 'Merry Queen' left port on 22 November 2008 (PO #2 [12]). However, the ship did not arrive at the port of Capitol City, Mediterraneo as expected on 22 December 2008. Another ship caused extensive damage to the locks in the Isthmus Canal on 28 November 2008, the day before the ship carrying the pumps was due to transit the canal on 29 November 2008 (CI Ex #7). Ships had been delayed in the Isthmus Canal before, but it was a rare occurrence (PO #2 [13]).

[40] Respondent notified Claimant on the day of the accident (CI Ex #9), reporting that it had enquired whether a longer route might be taken to avoid the Canal, but had been told this would take much longer than the lock repairs. It would have been almost impossible to transfer the pumps to another ship going around the continent, and this would not have led to earlier arrival in Mediterraneo in any event (PO #2 [14]). The lock repairs took 10 days, and the backlog of ships awaiting passage through the canal created further delay. Consequently, the 'Merry Queen' did not make its way through the canal until 12 December 2008 (CI Ex #10), and did not arrive at its destination until 6 January 2009.

[41] On 24 November 2008 Respondent received payment of the price of US\$1,214,550 pursuant to a letter of credit upon presentation of the required documents following the ship's departure but before its arrival on 6 January 2009 (SoC [13], Respondent Post-Hearing Further Memorandum).

5. The Change of Government in Oceania

[42] On 1 December, while the pumps were still in transit, the Oceania government resigned and a military regime took power. The Military Council, which still retains power, took the following steps:

- (a) **28 December Decree Prohibiting Import of Products Containing Beryllium** The Military Council passed a decree on

28 December 2008, effective 1 January 2009, prohibiting import of any products containing beryllium (**28 December Decree**). Claimant advised Respondent on the same day (CI Ex #11), stating individual applications for an exception 'will have to be made to an office that is to be established'.

- (b) Cancellation Policy for Foreign Supply Contracts in Breach**
Furthermore, the Military Council cancelled various projects and instructed government departments administering projects to cancel contracts with foreign suppliers who were in breach, on grounds of breach (CI Ex #12).

[43] On 28 December 2008 in an emailed letter Claimant informed Respondent (CI Ex #11) that in a phone call earlier that day to Mr Barber, Mr Horace Wilson, Water Services procurement officer, had said 'it was vital for the pumps to be in Oceania by midnight of 31 December [2008]' and when told of the 6 January 2009 arrival, had said he had 'no idea what the consequences' might be. However, in a Witness Statement submitted by Respondent (Resp Ex #2), Mr Wilson says when told of the 6 January arrival date, he answered 'that was too late', and he had 'urged Mr Barber to see whether he could do anything'. He also adds in his Witness Statement that the 'contract was in serious danger of being cancelled' but it would 'help if there could be at least partial delivery of pumps that would conform to the contract by 2 January'.

[44] In another Witness Statement filed by Respondent (Resp Ex #3), Sales Manager of Trading Company of Mediterraneo, Mr James Fisher, states that from 12 November 2008 through to April 2009, his company had 28 used pumps in stock which would have met the specifications for some of the pumps required by the Project Contract, and that these were located in Gotham, Mediterraneo, on the border of Oceania, so could have been delivered within 36 hours. The pumps were only slightly used, contained no beryllium or other elements mentioned in the 28 December Decree, and would have been acceptable to Water Services (PO #2 [25]). According to Mr Fisher, the pumps were advertised for

sale on the company website, but he was not contacted by Claimant. While several Claimant personnel including Mr Haycock were aware of Trading Company of Mediterraneo, Claimant had never previously purchased from or sold to it. Indeed, Respondent had never heard of it before preparing its case for arbitration (PO #2 [23], [24]). Claimant had sufficient financial resources to purchase such pumps (PO #2 [26]).

- [45] Although prior to 5 January 2009 Claimant had considered applying for an exception to the 28 December Decree, it did not do so, since it estimated chances would be slim that the submissions office would be established quickly and grant approval (PO #2 [21]). The submissions office was not in operation until 2 March 2009, and by 16 April 2009, had approved 27 of the 73 outstanding applications (PO #2 [20]).
- [46] On 5 January 2009 Water Services notified Claimant that it had cancelled the irrigation project immediately on grounds that the pumps had not been delivered to the project site by 2 January 2009 as required by the Project Contract (CI Ex #12). Water Services did not refer to any potential violation of the 28 December Decree, but did refer to the Military Council's cancellation policy for foreign party supply contracts in breach.
- [47] On the same day, Claimant notified Respondent of the Project Contract cancellation and the grounds given by Water Services, but commented that this was 'only an excuse'. In that emailed letter, dated 5 January 2009 (CI Ex #13), Claimant purported to avoid the Contract, saying that, given cancellation of the Project Contract 'we have no further use for the pumps that are now due to arrive in port tomorrow. Consequently, we are in turn forced to cancel our contract with you'. It requested return of the purchase price by documentary credit, indicated it might seek damages from Respondent for loss of the Project Contract, and sought instructions for the pumps' disposal, offering to store them for Respondent's account.
- [48] By letter dated 15 January 2009 to Respondent (CI Ex #14), counsel for Claimant asserted that the Contract had been avoided, and demanded US\$320,000 in damages for cancellation of the Project Contract on the

grounds it resulted directly from Respondent's alleged breach of the Contract. Return of the price of US\$1,214,550 was also demanded. The pumps' storage in Claimant's warehouse was noted, and instructions for disposal sought.

[49] Counsel for Respondent in a letter dated 22 January 2009 (CI Ex #15) stated the pumps were 'regulation compliant for export to Oceania' and the 'date of the contract is the relevant date for determination whether they were regulation compliant'. It asserted the cause of the delay was the change of regulations in Oceania after the contract date. Counsel for Respondent also stated that Respondent did 'not expect to pursue its claim ... for the US\$30,000 in extra costs that it incurred for [Claimant's] account ... when it imported steel from outside Equatoriana', and offered to assist in the pumps disposal, waiving any sales commission charges for doing so.

[50] The Parties exchanged correspondence via counsel over the next two months, both maintaining their positions. In a letter dated 26 January 2009 (CI Ex #16), Claimant stated that in the absence of instructions within two weeks regarding disposal, it would exercise its rights under the CISG to sell the pumps on account of Respondent. Claimant's subsequent attempts were unsuccessful. The pumps remain in Claimant's warehouse.

6. Conciliation

[51] Clause 18 of the Contract provided that '[a]ny dispute, controversy or claim arising out of, relating to or in connection with this contract ... shall be resolved by conciliation in accordance with the UNCITRAL Conciliation Rules'. The Parties attended conciliation at Vindobona from 28-30 May 2009 during a conference held in Vindobona at that time. Respondent was represented by Mr James Stecker, its Chief Executive Officer (CEO), and Claimant by Mr William Holzer, its Deputy CEO, but despite two days of discussions, attempts at conciliation proved unsuccessful. Neither party was particularly conciliatory since both were

confident of their legal positions and neither anticipated future business dealings with one another. After consulting the Parties, the conciliator declared in writing to the Danubia Arbitration and Conciliation Center on 4 June 2009 that conciliation efforts were no longer justified (PO #2 [32]).

[52] In accordance with Art. 6 UNCITRAL Conciliation Rules, names and addresses of the Parties' representatives for conciliation had been communicated in writing, however, titles were not indicated. Mr Stecker did not know the name of Claimant's CEO (PO #2 [31]), and Respondent says it only became aware of the fact that Mr Holzer was not the CEO of Claimant a week after conciliation, upon checking a list of conference participants received 28 May 2009 containing Mr Holzer's position and title (SoD [7], PO #2 [29]).

[53] Claimant's CEO did not attend the conference or conciliation as his daughter was getting married on 29 May 2009 (PO #2 [30]). Mr Holzer is in charge of internal operations and exercised other duties delegated to him by Claimant's CEO (PO #2 [28]). Claimant states Mr Holzer was 'acting with the authority' of the CEO and had 'full authority to represent' Claimant at the conciliation (Reply to Answer [1]).

VI. Parties' Requests for Relief

[54] Claimant has requested the Tribunal to:

- (a) find it has jurisdiction to consider this dispute;
- (b) find that Respondent breached the contract;
- (c) find the breach by Respondent constituted a fundamental breach;
- (d) declare that Claimant properly avoided the contract;

- (e) order Respondent to reimburse Claimant for the purchase price of US\$1,214,550;
- (f) order Respondent to pay Claimant damages in the amount of US\$320,000;
- (g) order Respondent to pay interest on the sums in (e) and (f);
- (h) award Claimant its costs of arbitration.

[55] Respondent requests the Tribunal to:

- (a) declare it has no jurisdiction in this dispute;
- (b) or, in the alternative, to find Respondent was not in breach of its contract with Claimant;
- (c) or, in the alternative, to find Claimant did not take the actions it should have taken to avoid or minimize adverse consequences;
- (d) to award Respondent its costs of arbitration.

VII. Issues, Position of the Parties, and Tribunal's Findings and Decisions

A. Jurisdiction of the Tribunal

[56] The Parties disagree on whether this Tribunal has jurisdiction to hear the case.

1. Respondent's Position

[57] It is Respondent's position that the Tribunal does not have jurisdiction to hear the case and should therefore close the arbitral proceedings. Alternatively, Respondent asks the Tribunal to stay the proceedings pending conciliation. According to Respondent conciliation is a precondition to arbitration and was not properly conducted.

- [58] Respondent alleges that conciliation was a compulsory measure to be taken before this arbitration. Respondent argues that the term *shall* was used in the arbitration agreement rather than the permissive term *may*, which suggests that conciliation was a mandatory pre-condition to these arbitration proceedings. This is furthermore underlined by the qualification that arbitration should only be conducted *if* the dispute had not been settled pursuant to the conciliation procedure.
- [59] According to Respondent, Claimant has failed to fulfill this pre-condition.
- [60] First, Respondent argues that Claimant has not adhered to this procedure as it was represented in the conciliation by its Deputy CEO instead of its CEO (above [51]). Clause 18 of the Contract required that both parties be represented by their CEOs and did not allow for any delegation.
- [61] Second, even if the clause permitted delegation, according to Respondent, Claimant's Deputy CEO was an unfit representative. In order to facilitate negotiations that might reach an effective conciliation agreement it was necessary for both parties to be represented by persons with the ultimate power to settle. The CEO is the highest ranking employee with the widest authority and, thus, possesses the judgment necessary to maximize the prospect of settlement. The Deputy CEO, however, had only been granted express authority to 'represent' Claimant which did not include authority to settle. Claimant's representation was furthermore improper because its Deputy CEO was concerned with internal operations (above [53]), and not delegated with the full range of the CEO's daily responsibilities and powers that would enable it to negotiate in a reasonable manner. Due to these specific characteristics of the CEO, no provision in the Contract allowing delegation can be implied.
- [62] Thirdly, Respondent submits that the pre-conditions of conciliation have not been met by a good faith representation by Claimant's Deputy CEO. Claimant had been aware that its CEO would not be able to take part in the conciliation in person and still had refrained from notifying Respondent about the absence.

- [63]** Finally, Respondent contests that it waived its ability to challenge Claimant's improper representation. Respondent had no knowledge of the non-compliance at conciliation (above [52]) and objected without undue delay. In fact, Respondent objected immediately upon receiving the notice of arbitration, Claimant's first communication with Respondent after the conciliation ended (SoD [8]). In addition, Respondent's conduct never conceded that Claimant's representation was proper and therefore Respondent cannot be estopped from challenging it.
- [64]** Consequently, Respondent requests the Tribunal to close these proceedings in order that conciliation can be properly conducted.

2. Claimant's Position

- [65]** Claimant alleges that the Tribunal has jurisdiction over the dispute. Alternatively, should the Tribunal decline jurisdiction at this time, it requests the Tribunal to stay the proceedings, but not close them.
- [66]** According to Claimant, conciliation was not a mandatory pre-condition. In establishing a two-tier dispute resolution process, it is Claimant's submission that the first tier merely suggests efforts to achieve an amicable settlement should be undertaken. Even if the Tribunal should find that conciliation was to be conducted before commencing arbitration proceedings Claimant submits that it has sufficiently complied with the requirements of conciliation.
- [67]** Claimant states that the agreement to conciliate was unenforceable for lack of sufficient certainty. Clause 18 containing the agreement fixed no time at which efforts at conciliation could be regarded as exhausted, thus creating the risk that Claimant would be precluded from access to arbitration for an indefinite time.
- [68]** Should the Tribunal consider differently, it is Claimant's submission that it properly fulfilled the pre-requisite to conciliate.

- [69] First, by drafting the arbitration agreement as a two-tiered dispute resolution clause the parties sought to create an effective dispute settlement mechanism that would allow for greater flexibility in resolving the dispute. The arbitration agreement must therefore be interpreted giving it *effet utile*, meaning that it sufficed for Claimant to be represented by an officer with the full authority of its CEO and not necessarily the CEO itself.
- [70] Secondly, Claimant submits that it cannot be precluded from arbitration as it acted in good faith by participating in conciliation. Indeed, it was Claimant that suggested in the first place that the parties conciliate (SoC [23]). Claimant fully participated with Respondent for two full days of conciliatory discussions before finally requesting arbitration.
- [71] Thirdly, according to Claimant its Deputy CEO acted effectively as the CEO's agent with the CEO's full authority.
- [72] Finally, Claimant alleges that Respondent failed to challenge Claimant's representation at the conciliation thereby waiving its right to do so thereafter Respondent received a copy of the list of participants to the conference containing the Deputy CEO's name and title when registering at the conference on the day conciliation began on 28 March 2009 (above 52). It thus could have raised an objection at any stage during the two days of conciliation. In refraining from doing so it effectively waived its right to challenge Claimant's representation at the conciliation in any subsequent arbitration.
- [73] Alternatively, if the Tribunal finds that Claimant did not fulfill a required pre-arbitral step, it is Claimant's position that it should not in any event invalidate the arbitration agreement. Even if it does not satisfy the pre-condition for arbitration under clause 18 of the Contract, the conciliation was already unsuccessful, and the matter has not been settled since, which demonstrates that both parties were non-conciliatory (above [51]). Also, to close the arbitral proceedings at this point would be costly and cause undue delay, and therefore be contrary to the parties' interests.

[74] Hence, Claimant alleges that the Tribunal should consider further conciliation futile and proceed to hear the merits of the dispute.

3. The Tribunal's findings and decision

[75] The Tribunal has carefully reviewed all of the submissions in relation to this issue and rules that it has jurisdiction to hear the dispute.

[76] In accordance with the principle of competence-competence the Tribunal has the power to decide upon its own jurisdiction. This power also encompasses the question whether any possible pre-conditions to arbitrate were fulfilled by the parties.

[77] The Tribunal has jurisdiction. The Tribunal agrees that conciliation was a pre-condition to arbitration. However, this pre-condition to conciliate was properly fulfilled by the representation of the Claimant by its Deputy CEO.

[78] Conciliation was a pre-condition to arbitration in the case at hand. This finding is supported by the clear wording of the arbitration agreement. As the intent of the parties is paramount to any arbitration proceedings, regard must first be had to the wording of the arbitration agreement. Clause 18 states '[a]ny dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, *shall* be resolved by conciliation in accordance with the UNCITRAL Conciliation Rules' (emphasis added). Further, it is only '*if* the dispute has not been settled pursuant to the said conciliation procedure, [that] the dispute shall be resolved by arbitration in accordance with the ACICA Arbitration Rules' (emphasis added). The use of the mandatory term *shall*, meaning that the parties not only *may*, but instead *must* conduct conciliation, in connection with the unambiguous instruction to turn to arbitration *only if* conciliation has failed lead to the conclusion that conciliation constituted a binding pre-requisite to arbitration (*Berger*, (2006) 22 *Arbitration International* 1 at 4).

- [79]** Also, the Tribunal rejects Claimant's argument that the agreement to conciliate is indefinite and therefore unenforceable due to its failure to fix a time at which to terminate the conciliation efforts (above [67]). The purpose of requiring clarity in such an agreement is to protect parties using a two-tiered escalation clause from uncertainty, and to provide them with clear rules as to how the dispute is to be settled. In order to achieve this aim an agreement to conciliate does not necessarily have to fix express time limits. Rather, the clarity requirement is met when the agreement sets clear indicators for ending conciliation and beginning arbitration. Although the Parties' conciliation agreement does not itself specify any time limits, reference is made to the UNCITRAL Conciliation Rules (above [7]) which provide for an ending of the conciliation procedure via termination by the conciliator (Art. 15(b) UNCITRAL Conciliation Rules), or by termination by the parties, either jointly (Art. 15(c) UNCITRAL Conciliation Rules) or unilaterally (Art. 15(d) UNCITRAL Conciliation Rules) thereby giving the Parties sufficient clarity as to when the conciliation procedure is terminated. In this case, the conciliator affirmed that further efforts were futile (above [51]). This being a clear indicator that the conciliation phase has ended, and it was permissible for the Parties to proceed to arbitration.
- [80]** The Tribunal therefore comes to the conclusion that conciliation was a mandatory pre-condition to be conducted before initiating arbitral proceedings.
- [81]** Further, Claimant effectively participated in conciliation by sending its Deputy CEO to conciliate the dispute. The purpose of a conciliation clause requiring parties to be represented by their Chief Executive Officers, is to ensure that the conciliation is effective and the dispute is settled by those who have the knowledge, the power and the authority to enter a valid conciliation agreement. Thus, giving effect to the aim underlying the conciliation clause at hand, the clause must be interpreted to allow a representation either by the parties' CEOs or by such persons who were capable of effectively representing the CEO.

[82] The Deputy CEO had the full authority to represent Claimant in the conciliation (above [53]) and if an agreement had been reached, there is no evidence to suggest he would have lacked power and authority to validly bind Claimant. To the contrary, once a representative of the CEO is present, having the same powers as the CEO himself, granted in an autonomous and valid document (i.e. a Power of Attorney), then the grantor of such power, for any practical purpose, is present in and for that particular act. This Tribunal has held in Procedural Order No 2 [28], that the powers were delegated to Claimant's Deputy CEO by its CEO, therefore the Tribunal now determines that the CEO was present at conciliation by virtue of the Deputy CEO's presence, and the fact he was present by means of someone with representative powers to act on his behalf did not breach a material requirement of the Contract, irrespective of the inexistence of a specific clause within the Contract allowing delegation of powers for this purpose.

[83] Therefore, by sending its Deputy CEO to represent Claimant in the conciliation procedure Claimant effectively participated in the conciliation and hence, met the pre-requisite to arbitration. Case law supports this finding. As was held in the ICC Case No. 9977 formal descriptions within 'a prior mandatory process' such as 'description of representatives, timing provisions, formal encounters' are not 'of the essence' but rather 'imply an attitude and behavior of the parties inspired in a true and honest purpose of reaching an agreement'.

[84] Secondly, Claimant did not act in bad faith when sending its Deputy CEO instead of its CEO to conciliate the dispute. At hand, Claimant had invited Respondent to conciliate the dispute in the first place (SoC [23]). Also, although neither party was 'particularly conciliatory' (above [51]), their discussions took two full days, hence leading to the conclusion that both at least showed some effort to reach an agreement. Claimant's Deputy CEO was present in and for the entire conciliation procedure and never at any time concealed his position of Deputy CEO. He was attending the same conference (on the 'Future of Irrigation') where all conference attendees were informed of his

title (above [52]). Most of all, if an agreement to settle the case were to have been reached during conciliation, he had full power and authority to enter into it and bind Claimant. The representation was indeed proper for the particular requirement of the Contract. The fact that Respondent may have been unaware Mr Holtzer was not the CEO does not alter this conclusion.

[85] Therefore, no evidence supports the assertion that Claimant acted in bad faith by sending its Deputy CEO to the conciliation.

[86] Finally, the Tribunal addresses Claimant's submission that Respondent waived its right to object to Claimant's participation at the conciliation by not objecting at the time of the conciliation. Because the Tribunal has found that the conciliation was properly conducted by the participation of Claimant's Deputy CEO and arbitration has been rightfully commenced at this time, we leave the issue of waiver open as it would have no effect on our finding of jurisdiction in this case.

[87] In view of the above the Arbitral Tribunal determines that it has jurisdiction to hear the merits of this case.

B. Substantive Law Issues

1. Claimant's Right to Avoid the Contract

[88] It is Claimant's case that Respondent breached the Contract because (a) the pumps were not in conformity with the Contract, and (b) delivery was too late. It alleges that this amounted to a fundamental breach of contract giving rise to Claimant's right to avoid the contract and as a consequence giving Claimant the right to reimbursement of the purchase price.

[89] Respondent denies that it breached the Contract in the first place, and the existence of a fundamental breach in the second.

(a) Non-conformity of the pumps delivered

i. Claimant's position

[90] It is Claimant's position that the pumps did not conform to the Contract according to Art. 35 CISG because the pumps contained beryllium and therefore did not comply with the public law requirements as they existed in Oceania at the date of delivery.

[91] Primarily, Claimant is relying on Art. 35(1) CISG arguing that Clause 2 in the Contract 'Equatoriana Super Pumps warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania' (above [31]) must be construed such that the pumps not only had to comply with all regulations at the time of contracting but rather with all regulations at the time of (actual) delivery which occurred on 6 January 2009. As of 1 January 2009 the import of all products containing any amounts of – among other things – beryllium was prohibited in Oceania. It argues that this is in line with the DES Incoterms 2000 clause that the Parties provided for in clause 1 of their Contract (above [31]). Claimant argues that Respondent bears the risk of any change of the relevant public law requirements because under the DES clause risk of loss does not pass to the buyer prior to delivery at the port of destination – here Capitol City – which took place on 6 January 2009.

[92] Alternatively, Claimant wants to rely on Art. 35(2)(b) CISG alleging that the pumps were not fit for the special purpose intended for under the Contract, namely to be used in the irrigation project in Oceania that Claimant had contracted for under the Project Contract. As Respondent knew that the pumps were to be used for installation in Oceania (above [27]-[30]) it should be held to observe all public law requirements of Oceania, even those implemented after the conclusion of the contract (SoC [28], Claimant Memorandum [62](CI Mem)).

ii. Respondent's position

- [93] Respondent alleges that it had no obligation to deliver pumps compliant with regulations at the date of delivery and that therefore the goods were conforming to the Contract under Art. 35 CISG.
- [94] It is Respondent's position that according to Art. 35(1) CISG it was merely obliged to deliver pumps that were compliant to public law requirements at the time of the conclusion of the contract. It thereby mainly relies on the wording of the contractual warranty according to which Respondent 'warrants that the pumps are in compliance with all relevant regulations' (above [31]). In its view the use of the DES Incoterms 2000 clause does not change this result as risk of loss is only concerned with loss of or damage to the goods but not with change of public regulations (SoD [10], Respondent Memorandum [61] (Resp Mem)).
- [95] Respondent further denies that it was obliged to deliver pumps compliant with regulations at the date of delivery under Art. 35(2)(b) CISG. First, it argues that the Oceania's 28 December Decree was made known not only after the conclusion of the Contract, but even after delivery of the goods (Resp Mem [72]). Second, it alleges that Claimant did not rely on Respondent's skill and judgment or that it was at least unreasonable to do so (Resp Mem [74]).
- [96] The fact that Respondent after the conclusion of the Contract agreed to comply with the 1 August Regulation change is seen by Respondent as a modification of the contract, whereas no further such modification was agreed to after the 28 December Decree (SoD [11], Resp Mem [49]). Furthermore, Respondent argues that Claimant's early payment of the full purchase price following shipment evidenced its acceptance of the goods complying to the Contract (above [41], Resp Mem [76]).
- [97] Finally, it is Respondent's position that even if the goods were not in conformity with the Contract it was exempted under Art. 79 CISG

as the 28 December Decree amounted to an impediment beyond its control.

iii. The Tribunal's findings and decision

- [98]** The Tribunal has carefully considered all of the submissions in relation to this issue. It comes to the conclusion that the pumps delivered were in conformity with the Contract.
- [99]** In determining what the Contract calls for under Art. 35(1) CISG the first consideration is the wording of the Contract. As the Contract itself did not contain any technical specifications as to the question whether the steel used for the pumps might contain beryllium or not, it is decisive how the sentence 'Equatoriana Super Pumps warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania' is to be interpreted. It is to be noted that this is not a case about which public law requirements the goods must comply with. The clause clearly refers to those of Mediterraneo and Oceania. Rather the crucial question is the relevant date for determining the relevant regulations.
- [100]** According to Art. 8(1) and (2) CISG the contract must be interpreted according to the common intent of the Parties and if no such common intent can be established, according to the understanding that a reasonable person would have had in the same circumstances. According to Art. 8(3) CISG due consideration is to be given to all relevant circumstances of the case. The starting point - as in all domestic legal systems - is the wording of the contract (*Schmidt-Kessel*, in *Schwenzer* (ed.), *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods*, 3rd edn., Oxford: Oxford University Press (2010), Art. 8 [13]; *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat (A/CONF. 97/5)*, Official Records, 14-66, Art. 7 [5]). As Respondent rightly pointed out, the Parties used the present, not the future tense, i.e. 'are' instead of 'will be' in compliance. A literal interpretation thus indicates

that only compliance with the public law requirements at the time of the conclusion of the contract could be expected by a reasonable person. Since Claimant suggested the content of the clause and Respondent drafted it, the clause has been negotiated between the Parties and hence there is no room for any interpretation *contra proferentem*.

This interpretation is reinforced by the considerations underlying Art. 42 CISG which stipulates the seller's liability in relation to third parties' intellectual property rights. This provision is often referred to where the seller's liability for public law requirements is at stake (*Schwenzer*, in *Schlechtriem & Schwenger Art. 35 [17 et seq.]*). Although primarily cited to determine which public law requirements are to be applied Art. 42 CISG may also be considered when the relevant time is in question. According to Art. 42(1) CISG the seller is only liable for those intellectual property rights which it knew or could not have been unaware of at the time of the conclusion of the contract. The same reasoning must apply as regards public law requirements. If one were to hold the seller liable for any later changes of regulations the seller would not be able to estimate the possible costs.

[101] Other circumstances also support this finding instead of contradicting it. First, the choice of DES Incoterms 2000 cannot be interpreted in the sense that the seller assumes the risk for any change of public law requirements until delivery of the goods in the port of destination. Provisions on risk of loss are designed to distribute the risk of loss or damage to the goods between seller and buyer. These are losses that can be insured against by either seller or buyer. Although it is discussed whether state action may also be subsumed under the provisions of risk of loss (*Hager/Schmidt-Kessel*, in *Schlechtriem & Schwenger*, Art. 66 [5]) this only relates to cases of embargo, seizure and the like, not to changes of regulations affecting the conformity of the goods.

[102] According to Art. 8(3) CISG subsequent conduct of the Parties may also be taken into account when interpreting the Contract. The 1 August Regulation restricted the use of beryllium for products to be

used in enclosed spaces. Respondent was willing to adjust the pumps accordingly (above [36]). However, it announced that 'there will be an increase in costs of approximately US\$30,000' and 'we cannot be held responsible for the delay ... we cannot be expected to absorb the extra expense caused by the completely unforeseen change in the regulations in Oceania' (above [36]). This evidences Respondent's view that it considered the adjustment of the pumps as a modification of the Contract. More importantly, this statement was never contradicted by Claimant. It must be inferred from Claimant's silence that it also regarded this to be a modification of the Contract, and that it did not expect Respondent to be obliged to adjust the pumps to any and all changes of regulations that might be issued after the conclusion of the Contract. Claimant knew that new P-52s would need to be manufactured and that this was a significant change to the plans for supply on which Respondent had previously been proceeding. The fact that Respondent never insisted on Claimant paying the additional US\$30,000 does not lead to a different result.

[103] Claimant furthermore wants to rely on Art. 35(2)(b) CISG alleging that it was the particular purpose of the Contract that the pumps were to be used for the irrigation project and that this implied that they were to comply with any later changes of the public law requirements in Oceania. Even if one were to concede that suitability for the irrigation project in Oceania was the particular purpose that the pumps were intended for, and that Claimant insofar as this particular purpose relied on Respondent's skill and judgment, the very aim of Art. 35(2)(b) CISG contradicts Claimant's position. Again, Art. 35(2)(b) CISG imposes a liability upon the seller as far as the particular purpose is made known to it *at the time of the conclusion of the contract*. It thus makes sure that at this time the seller may calculate its potential risks and may assume or deny liability for such a purpose. Holding the seller liable for any future – unpredictable – developments would contravene this idea (*Schwenzer, Schlechtriem & Schwenzer*, Art. 35 [23]; *Magnus*, in Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG), Berlin: Sellier/de Gruyter (2005), Art. 35 [30]).

[104] The pumps therefore were in conformity with the Contract as it had been amended by the Parties in August 2008. Conformity with the later changed regulations was not required under the Contract.

(b) Late delivery

i. Claimant's position

[105] It is Claimant's position that by delivering the pumps only on 6 January 2009 Respondent breached its obligation to deliver in time, and that this amounted to a fundamental breach of contract giving Claimant the right to avoid the contract. Alternatively, it argues that Respondent did not deliver within an additional period of time (*Nachfrist*) set by Claimant. It denies that Respondent is exempted under Art. 79 or Art. 80 CISG.

ii. Respondent's position

[106] Respondent disputes that it breached its obligations by delivering the pumps on 6 January 2009, arguing that the delivery date had been modified by the Parties. Even if one were to assume that delivery on 6 January 2009 constituted a breach, it nevertheless denies that this breach was fundamental. It argues that a reasonable person at the time of the conclusion of the Contract or at the time of the modification of the Contract, respectively, could not foresee that late delivery would substantially deprive the buyer of what it was entitled to expect under the Contract. As late delivery in itself did not amount to a fundamental breach, Respondent alleges that Claimant should have set a *Nachfrist*, which in Respondent's view had not been done properly. In any case, Respondent alleges to have been exempted under either Art. 79 or Art. 80 CISG for reasons including Claimant's failure to make a timely cover purchase.

iii. The Tribunal's findings and decision

[107] The Tribunal comes to the conclusion that by delivering on 6 January 2009 Respondent breached its delivery obligation and that this breach

amounted to a fundamental breach giving rise for Claimant to avoid the Contract.

- [108]** The original Contract called for delivery on 15 December 2008 DES Incoterms 2000 Capitol City, Mediterraneo. After the Contract was modified to meet the 1 August Regulation Respondent informed Claimant that delivery would be around 22 December 2008, one week later than originally anticipated (above [38]). Claimant agreed to this postponement in its letter of 24 November 2008 (above [38]) by stating: 'We realize that there is little that can be done about it now, so we have to go along with you'. It is Respondent's position that this correspondence did not amount to fixing a new delivery date, rather only that a reasonable delivery date was called for which would run into early January 2009.
- [109]** The question whether the Parties fixed 22 December 2008 as a new delivery date must be decided by interpreting the Parties' conduct in view of all relevant circumstances including their previous dealings (Art. 8(3) CISG). The original Contract called for the delivery date of 15 December 2008. Upon the amendment of the Contract after 1 August 2008 again, Claimant emphasized that '[t]he schedule ... will be very tight and it is imperative that we meet that schedule' (above [38]). Having regard to the initial Contract and the circumstances surrounding the amendment of the Contract a reasonable person would have come to the conclusion that the delivery date was postponed by one week to 22 December 2008 but not to early January 2009. Thus, Respondent breached its obligation to deliver on 22 December 2008.
- [110]** Respondent may not rely on Art. 80 CISG arguing that Claimant caused the failure to perform by asking for a modification of the Contract (Resp Mem [132] *et seq.*) as Respondent itself agreed to such a modification. Furthermore, Respondent cannot argue that the failure to perform was caused by Claimant because Claimant failed to make a timely cover purchase (SoD [13]). The facts brought forward by Respondent did not convince this Tribunal that Claimant breached its duties to effect a timely cover purchase. Not even Respondent who is to be deemed

knowledgeable in the trade knew of this alternative supplier prior to this arbitration. Claimant had never traded with it and the fact that it advertised the availability of used pumps on its website does not make this alternative source obvious. Even if one were to accept the arguments brought forward by Respondent, in any case these facts only arose after the breach had already occurred and thus might only give rise to a breach of the duty to mitigate damages by the Claimant under Art. 77 CISG, but not to an exemption under Art. 80 CISG. Likewise, even if Respondent is exempted under Art. 79 CISG this exemption relates to damages only and leaves any other remedies – especially avoidance of the contract – untouched (Art. 79(5) CISG).

[111] The delay in delivery amounted to a fundamental breach of contract in the sense of Art. 25 CISG giving rise for Claimant to avoid the contract under Art. 49(1)(a) CISG.

[112] As delivery had not been effected in due time, on 5 January 2009 Water Services cancelled the irrigation Project Contract with Claimant. As this was the purpose of the Parties' Contract the breach of the delivery obligation substantially deprived Claimant of what it was entitled to expect under the Contract. At the time of the conclusion of the Contract as well as at the time of the Contract amendment respectively, Respondent must have foreseen this result. From the very beginning of negotiations Respondent was consulted in putting the bid for the project together. Likewise the very wording of the Contract (above [31]) made it clear that the pumps were to be used for the irrigation project. Furthermore, the importance of meeting the schedule was also clear to any reasonable person in the shoes of Respondent. In its email dated 25 June 2008 (above [30]) preceding the contract formation, by pointing out 'the importance of meeting the delivery date', Claimant had made it clear to Respondent that adherence to the delivery date was essential. The wording of the original Contract 'Delivery is to be ... effected by 15 December 2008' (above [31]) must be seen in the light of the prior discussions between the Parties and the prior knowledge of Respondent. Thus, it indicates that the delivery date was of the essence of the Contract. Again, upon

the amendment of the contract after 1 August 2008 the above mentioned email by Claimant (above [33]) reiterated the importance in meeting the schedule. Hence, there was a fundamental breach of contract.

[113] Claimant validly avoided the contract. In its email of 5 January 2009 (above [47]) immediately after having learned that the Project Contract with Water Services had been cancelled, and before the pumps had actually been delivered, Claimant informed Respondent that it had no further use for the pumps and was forced to cancel the Contract. This constitutes a valid declaration of avoidance.

[114] As the contract has been validly avoided according to Art. 81(2) sentence 1 CISG Claimant is entitled to restitution of the purchase price that has been paid to Respondent in the amount of US\$1,214,550. According to Art. 84(1) CISG the seller is to pay interest on the purchase price to be refunded from the date on which the price was paid. The Parties have left it to the Tribunal to determine the interest rate after the Hearing at its discretion. Interest on the purchase price is normally determined by the commercial investment rate prevailing at the seller's place of business (CISG Advisory Council Opinion No. 9, Consequences of Avoidance of the Contract, Rule 3.4). The Tribunal comes to the conclusion that the relevant interest rate is to be set at 4% pa. After the Hearing it has been established that Respondent received payment of the purchase price on 24 November 2008. The interest starts to run as of that date.

2. Claimant's Right to Damages

[115] Claimant asks for damages in the amount of US\$320,000 since the irrigation Project Contract was cancelled by Water Services. Whereas Respondent does not dispute the original amount of loss incurred by Claimant the Parties disagree on whether Respondent is exempted from paying damages under Art. 79 CISG due to the fact that the shipping of the pumps was delayed because of the blockage of the Isthmus Canal. Furthermore, there is disagreement between the Parties whether – if damages are due – Claimant breached its obligation to mitigate loss under Art. 77 CISG.

i. Claimant's position

[116] Primarily, Claimant denies that Respondent is exempted from liability for damages under Art. 79 CISG. It argues that Respondent ought to have reasonably foreseen shipping delays at the time of the conclusion of the Contract as shipping delays account for most common supply chain disruptions and as delays had happened before. Furthermore, it argues that by agreeing to the DES Incoterms 2000 Respondent had assumed this risk, and did not disclaim it by introducing a force majeure clause into the Contract. Finally, Claimant alleges that Respondent could have avoided or overcome the impediment by either sourcing replacement pumps as early as 2 August 2008 from other companies, or sending the pumps in two separate shipments, or by sending the pumps by air cargo.

[117] Further, Claimant alleges that it mitigated losses by avoiding the contract in a timely manner and that there were no other measures available to further mitigate its loss suffered. Especially, it is Claimant's position that there was no substitute transaction available and that seeking an exception from the Military Council Office would not have been a viable option to reduce the loss sustained.

ii. Respondent's position

[118] It is Respondent's position that under Art. 79 CISG it is exempted from paying damages because the accident in the Isthmus Canal constituted an impediment beyond its control which was not foreseeable and which could not have been avoided nor overcome.

[119] First, Respondent argues that it did not assume the risk for shipping delays. It alleges that the accident leading to the blockage of the Canal and thus the delay in delivering the pumps was caused by an unrelated third party, therefore being an impediment beyond Respondent's control. Second, Respondent emphasizes that it could not foresee the impediment although ships had been sometimes delayed in the Isthmus Canal. Third, it rejects any obligation to avoid or overcome the consequences

by arranging for separate shipment, sending the pumps by air freight, taking a different route or providing for pumps from another source.

[120] Finally, even if it were liable in damages Respondent alleges that Claimant violated its obligation to mitigate its loss under Art. 77 CISG by not having requested separate shipment of the field pumps when they were ready on 30 October 2008, or alternatively, not having made a cover purchase or not having sought an exception to the prohibition under the 28 December Decree from the Military Council.

iii. The Tribunal's findings and decision

[121] Having previously found that Respondent breached its delivery obligation by only delivering the pumps on 6 January 2009 it follows that in principle Respondent is liable in damages for any losses incurred by Claimant under Art. 74 CISG. However, in the case at hand Respondent is exempted from liability for damages according to Art. 79 CISG. The delay in delivery was caused by an impediment beyond the control of Respondent that could not have been foreseen, nor avoided or overcome.

[122] The blockage of the Isthmus Canal constituted an impediment beyond the control of Respondent. Although the Contract contained a DES Incoterms 2000 delivery clause, shipping the goods was not within the typical sphere of risk of Respondent. A manufacturer-seller's typical sphere of risk includes responsibility for its own sphere, such as for its financial capacity or for personal circumstances, procurement risk or liability for its own personnel (*Schwenzer*, in *Schlechtriem & Schwenzer*, Art. 79 [11]). There are no allegations that Respondent in one way or another chose an improper carrier or the like. Neither did Claimant argue that the carrier caused the delay, which might have negated Respondent's exemption under Art. 79(2) CISG, the carrier being a third person in the sense of this provision. The blockage of the Isthmus Canal that led to the delay was caused by a third person totally unrelated to Respondent and the Contract between the Parties. This is a typical impediment such as those caused by natural phenomena

and catastrophes (cf. *Magnus*, in Staudinger, Art. 79 [30]). Claimant's argument that by not insisting upon incorporating a force majeure clause into the Contract Respondent voluntarily assumed all transport risks is unavailing. Art. 79 CISG in essence leads to the very same results as a force majeure clause. Force majeure clauses regularly just specify what the Parties regard as being 'impediments' beyond the control of the obligor (*Schwenzer*, in Schlechtriem & Schwenzer, Art. 79 [57]; *Brunner*, UN-Kaufrecht – CISG: Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980, Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht, Bern: Stämpfli (2004), Art. 79 [46]). If the Parties had wanted to hold Respondent liable for any and all events happening during transport of the goods they should have so provided in their Contract which they did not.

[123] At the time of the conclusion of the Contract Respondent could not reasonably be expected to have taken the impediment into account. Although delays of ships that pass the Isthmus Canal have previously happened this has been a rare occurrence (above [39]). Claimant did not allege that there were special known risks involved with transport via the Isthmus Canal. Rather such rare occurrences may happen whatever mode or route of transport is chosen; they do not have to be taken into account at the time of the conclusion of a contract.

[124] Respondent was not obliged to avoid or overcome the consequences of the blockage of the Isthmus Canal and the resulting delay in delivering the pumps. Claimant firstly asserts that Respondent should have sourced replacement pumps as early as 2 August 2008 from other companies. However, this contradicts Claimant's own request. In its email dated 1 August 2008 (above [35]) Claimant itself stated 'you will have to find steel from some other source in producing the pumps'. This shows that Claimant still wanted Respondent to produce the pumps itself. As previously found the Parties modified the original Contract but it was still presumed that Respondent should manufacture the pumps itself. Had Respondent delivered pumps from another manufacturer this would

have been a breach of contract on its part for which it could have been liable. Thus, Respondent could not be expected to source replacement pumps from another supplier.

[125] The same considerations apply to Claimant's argument that Respondent should have sent the pumps in two separate shipments. The Contract provided for 'a single shipment' (above [31]). When modifying the Contract the Parties did not touch this clause. Thus, it was not only Respondent's right to effect delivery in one single shipment, rather it was its obligation to do so. Had Respondent shipped the first part of the pumps Claimant even would have had the right to reject such a partial delivery. If Claimant wanted separate delivery of those pumps which would be ready on 30 October 2008 it should have suggested to modify the Contract accordingly which it did not.

[126] Neither could Respondent be expected to avoid the consequences of the impediment by sending the pumps by air cargo. Again, the Contract itself called for transport by ship, DES Incoterms 2000 standing for 'Delivered Ex Ship'. Upon modification of the Contract Claimant did not mention a possible modification of the mode of shipment. Thus, Respondent would have breached its delivery obligation by choosing another mode of transport. Furthermore, when Respondent shipped the pumps on 22 November 2008 it could expect them to arrive at Capitol City around 22 December 2008 which would have sufficed for Claimant to truck them to the project site in Oceania in sufficient time to meet Claimant's Project Contract dates. The blockage of the Isthmus Canal did not occur until 28 November 2008, when the vessel with the pumps was already on the open sea. At that time, however, it was too late to arrange for any other kind of shipment.

[127] In conclusion, Respondent could neither foresee the impediment nor could it avoid or overcome it or its consequences. Therefore, Respondent is exempted from liability for damages according to Art. 79 CISG.

[128] As Respondent is exempted from liability for damages under Art. 79 CISG there is no need to further discuss any reduction or exclusion of damages due to a possible breach by Claimant of its obligation to mitigate loss under Art. 77 CISG.

VIII. Costs

[129] According to Art. 39 ACICA Rules the Arbitral Tribunal shall fix the costs of arbitration. These costs include the fees of the Arbitral Tribunal, ACICA's registration fee and administration fee as well as several other items and legal and other costs incurred by the successful party to the extent that the Tribunal has determined the amount of such costs to be reasonable.

[130] The costs of the present arbitration as relates to the fees of the Arbitral Tribunal, ACICA's registration fee and administration fee as well as several other items are set by the Arbitral Tribunal at US\$ 120,000 [details omitted].

[131] Each of the Parties has made submissions with respect to their own costs [details omitted]. As concerns Claimant according to Art. 39(e) ACICA Rules the Arbitral Tribunal has determined that an amount of US\$120,000 is reasonable [details omitted].

[132] Each Party has requested the Arbitral Tribunal to order the other Party to reimburse it for its costs in full and to bear all expenses of the Arbitral Tribunal and the ACICA administrative fees.

[133] According to Art. 41.1 ACICA Rules, the costs of arbitration shall in principle be borne by the unsuccessful party. The Arbitral Tribunal may, however, apportion each of such costs between the parties if it determines that apportionment is reasonable. As Claimant has prevailed on the issues of jurisdiction and avoidance of the Contract, and is therefore entitled to reimbursement of the purchase price, and Respondent is exempted from liability to pay damages, the Tribunal finds it fair and just to allocate the

costs with Respondent bearing 90% and Claimant bearing 10% of these costs. In light of the above and in accordance with Art. 41.2 ACICA Rules the Arbitral Tribunal finds it reasonable to order Respondent to reimburse 80% of Claimant's legal and other costs.

IX. Summary of Findings

[134] In summary, the Tribunal has made the following findings which, together with the reasons therefore, are set forth in full in the preceding sections of this Award:

- (a) The Tribunal has jurisdiction to consider the dispute between Claimant and Respondent;
- (b) Respondent breached the Contract by only delivering the pumps on 6 January 2009;
- (c) This amounted to a fundamental breach;
- (d) Claimant rightfully and properly avoided the contract;
- (e) Claimant is entitled to a reimbursement of the purchase price in the amount of US\$1,214,550;
- (f) Claimant is entitled to interest on this sum from 24 November 2008 at the rate of 4% pa;
- (g) Respondent is exempted from liability to pay damages;
- (h) The costs of arbitration fixed at US\$ 120,000 shall be borne 90% by Respondent and 10% by Claimant; and
- (i) Respondent shall reimburse Claimant 80% of its legal and other costs fixed at US\$ 120,000.

X. Award

[135] Having carefully considered all of the evidence and submissions placed before it, and for the reasons set out above, the Tribunal finally decides, determines, finds and awards as follows:

- (a) Respondent shall pay Claimant US\$1,214,550 plus interest at a rate of four percent per annum accruing from 24 November 2008 until the day of full payment.
- (b) The costs of arbitration fixed at US\$120,000 are to be borne by Respondent in the amount of US\$108,000 and Claimant in the amount of US\$12,000.
- (c) Respondent shall pay Claimant US\$ 96,000 as contribution to Claimant's legal costs and expenses being 80% of its legal and other costs fixed at US\$120,000.
- (d) All other claims are dismissed.

[136] The Tribunal is most grateful to counsel to the Parties for their professionalism and good cooperation in this interesting arbitration.

Place of Arbitration: Vindobona, Danubia

Date: 5 December 2012

Signatures:

**Prof Dr Ingeborg Schwenzer, LL.M.
Dr Cláudio Finkelstein
Dr Lisa Spagnolo**