25th Annual Willem C. VIS International Commercial Arbitration Moot

Selection Procedure for Team Members – Model Case

Bergsten Machines Ltd (hereinafter “Bergsten Machines”) is a company established under the laws of Equatoriana, with its registered office and place of business in Oceanside, Equatoriana. It specializes in manufacturing of various kinds of textile industry machines; in particular it is well known for its high-quality sewing machines sold world-wide.

Taylor Tailor & Co (hereinafter “Tailor & Co”) is a company operating under the laws of Mediterraneo, with its registered office in Capital City, Mediterraneo, and several subsidiaries in both Mediterraneo and Polaria. It manufactures exclusive formal and business attire and is renowned outside Mediterraneo especially for its tailored suits and coats for prominent customers.

In January 2016, Tailor & Co contacted Bergsten Machines to discuss a purchase of some 800 sewing machines for its subsidiaries in Mediterraneo and Polaria. Representatives of both parties met in the beginning of February 2016 to negotiate conditions of the purchase contract. They agreed that Tailor & Co will purchase 800 units of high-speed electronic sewing machines for professional use and 200 units newly designed sewing machines for heavy weight fabrics to be used by its subsidiaries in Polaria, especially for the coming collection 2016/2017 of winter coats. All the sewing machines should be delivered no later than on July 31, 2016, to the buyer’s main place of business in Capital City, Mediterraneo.

On February 28, 2016, Mr. Promesso, main negotiator of Bergsten Machines, sent a letter to Dr. Chic, CEO of Tailor & Co, in which he informed that Bergsten Machines’ lawyers had drafted the purchase contract as agreed on their previous meeting. The draft contract was enclosed to the letter. Further, Mr. Promesso stated that their company only conducted business in line with their standard terms and conditions (hereinafter as “ST&C”). However, their ST&C were being revised at that time, and the new version was unfortunately available only in Equatorianean language and was to be found on the Bergsten Machines’ website. Nonetheless, the English version of the new ST&C should be finalized no later than within a week. Mr. Promesso promised that he would send a copy of the new ST&C, as soon as the English version was ready.

The parties signed the purchase contract on their meeting on March 15, 2016. Each party retained one original copy thereof. The entire contract was in English and contained, among others, these provisions:

*Art 34*

*1. Any dispute arising out of or in connection with this Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by a panel of three arbitrators. The place of arbitration shall be in Vindobona, Danubia, and the proceedings shall be conducted in English.*

*2. Additionally, if any of the Parties considers the award to be obviously wrong in fact or in law, it shall have the right to commence court proceedings before national courts of Equatoriana or Mediterraneo within the period of two months. The court shall than be competent to review the case and to decide the issue in accordance with the applicable law. If no claim is filled within the said time limit, the award shall become final and binding on the Parties.*

*Art 35*

*This Contract is subject to the Bergsten Machines’ 2016 Standard Terms and Conditions.*

The ST&C included, inter alia, the following provision:

*Art 22*

*The contract between the parties shall be governed by the Civil and Commercial Code of Equatoriana.*

The English version of the Bergsten Machines’ ST&C was uploaded on its website on March 16, 2016, in the afternoon. Until then, only Equatorianean version of the new ST&C and English version of 2007 Standard Terms and Conditions was available on-line. Mr. Promesso never sent a paper copy of English version of the new ST&C, as promised. Neither was Dr. Chic informed that the English version was already uploaded on the website.

On July 29, 2016, two fully loaded trucks with sewing machines arrived to the buyer’s enterprise in Capital City, Mediterraneo. Tailor & Co has already paid half of the purchase price, the rest to be paid within fourteen days after the delivery. The 200 sewing machines for heavy weight fabrics were immediately shipped to the subsidiaries in Polaria. The rest of the delivery was stored in buyer’s main warehouse. After ten days, when employees of Tailor & Co began to install the sewing machines, they discovered that some of the sewing machines were completely damaged, most likely as a result of the transportation and poor packaging. Further, after two more weeks, employees from Polaria subsidiaries started to complain about the quality of the new sewing machines – mainly, they were unable to cope with the heavy fabrics used for winter coats. On August 30, 2016, Tailor & Co sent a letter to Bergsten Machines, in which it informed the seller that it would not pay the rest of the purchase price due to the non-conformity and caused damages of the goods. It also decided to send the non-conforming sewing machines back to the seller.

Bergsten Machines rejected all allegations and filed a request for arbitration before the International Court of Arbitration of the International Chamber of Commerce, claiming payment of the rest of the purchase price. It argued that according to Section 1412 of the Equatorianean Civil and Commercial Code, which applies to the Contract based on Art. 22 of the ST&C, the risk, in any event, passes to the buyer “when the goods leave the seller’s promises.” Therefore, any damage caused during the transportation does not discharge the buyer from its obligation to pay the purchase price. Additionally, the new sewing machines were tested for all heavy fabrics commonly used in textile industry. The seller was not aware of any special kinds of fabrics used for winter coats in buyer’s subsidiaries in Polaria.

Tailor & Co contested the jurisdiction of the Arbitral Tribunal on the grounds that Art. 34 of the purchase contract does not constitute a valid arbitration agreement. It further argued that the seller cannot rely on Equatorianean national statutes, since the ST&C (including the choice-of-law clause therein) were never made part of the Contract. The CISG is applicable to the Contract instead, and it provides Tailor & Co with the right to refuse to pay the outstanding amount of the purchase price.

In its Procedural Order No. 1, issued on May 9, 2017, the Tribunal has decided to split the proceedings, for reasons of procedural economy, into two parts. In the first part, which is subject of the VIS Moot Team Selection Procedure, the Parties should limit both their written and oral submissions to the following questions:

1. Whether the Arbitral Tribunal has jurisdiction to hear and decide the dispute between the parties (and on what grounds).
2. Whether the Standard Terms and Conditions have been effectively incorporated into the contract. The argumentation shall be based on rules of the CISG.

All of the countries (Danubia, Equatoriana, Mediterraneo, and Polaria) are contracting states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), to the United Nations Convention on International Sale of Goods (1980) and to the Vienna Convention on the Law of Treaties (1969). Further, all countries have modelled their arbitration acts on UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 (Option No. I).

Arbitrator’s Brief

Please be aware that there is neither one particular way, nor the best way the issues may be analysed. It is fully up to the Parties to develop and present arguments which support their position. But remember you must be able to provide authority for every argument and you also must be able to explain why that authority is relevant in the case at hand. The Arbitral Tribunal has decided to provide counsels for the Parties with some of the crucial authorities with regards to the issues which shall be addressed within the first part of the proceedings. The list of the authorities shall, however, not be considered as an exhaustive one.

1. While addressing the question of the Tribunal’s jurisdiction, counsels for the Parties should focus on whether Art. 34 of the purchase contract contains a valid arbitration clause. Accordingly, they may find it useful to consult the following authorities:

* Várady, Tibor. On the Option of a Contractual Extension of Judicial Review of Arbitral Awards or: What is actually Pro-Arbitration?
* Wolff, Reinmar. Party Autonomy to Agree on Non-Final Arbitration? (26 ASA Bulletin No. 3/2008)
* Gallaway Cook Allan v Carr (New Zealand Court of Appeal, 2013)

1. Further, while analysing the question whether the ST&C have been made part of the contract, the counsels should take into consideration the following authorities:

* CISG-Advisory Council Opinion No. 13
* Eiselen, Sieg. The Requirements for the Inclusion of Standard Terms in International Sales Contracts.

**For the purpose of the Selection Procedure you are supposed to write the memorandum for either Claimant or Respondent. It is up to you which Party you are going to represent. The written memoranda shall not exceed three A4 typed pages (does not include the list of authorities) 11 point type, 1,5 line spacing, 2,5 cm margins) and must be submitted by no later than Friday, June 16, 2017, 23:59 local time.**