



CHRISTIAN-ALBRECHTS-UNIVERSITÄT ZU KIEL

GERMANY



MEMORANDUM
FOR
CLAIMANT

SIXTH ANNUAL

WILLEM C. VIS
INTERNATIONAL
COMMERCIAL ARBITRATION MOOT

1998-1999



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VIENNA, AUSTRIA
1998-1999

TEAM MEMBERS

ANDREAS DOOSE • DANIELA GENTZSCH • CORNELIA GROTH

ON SUBMISSION TO
AMERICAN ARBITRATION ASSOCIATION

MEMORANDUM FOR CLAIMANT

– CASE N^o. MOOT 6 –

ON BEHALF OF

SUPERB PAPER, PLC.
123 INDUSTRIAL AVENUE
HIGHLANDS
MEDITERRANEO

CLAIMANT

AGAINST

ESSENTIAL CONTROLS, S.A.
26 EXPORT PL.
SOUTHSIDE CITY
EQUATORIANA

RESPONDENT

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STATEMENT OF FACTS

Superb Paper, Plc. [hereinafter SUPERB] is incorporated in the country of Mediterraneo and is specialized in the production of paper and paper products. In order to take advantage of the new technologies available in the control of the paper making process, SUPERB entered into a contract with Essential Controls, S.A. [hereinafter CONTROLS], which is incorporated in Equatoriana and produces control systems for the making of paper and paper products. By this contract dated 10 June 1996, Respondent agreed to sell and install in the facilities of SUPERB a new control system at a cost of \$500,000. The contract provided that the installation and final testing should be completed by 16 September 1996.

Since Respondent was not authorized to do installation work in Mediterraneo and found it undesirable to apply the licensing requirements, he entered into an installation contract with Reliable Installation Co., Hanseatica [hereinafter RELIABLE]. This contract dated 7 June 1996 required that the installation and testing to be completed on or before 16 September 1996 as well.

The control system was delivered on 20 August 1996 to the premises of SUPERB. The contractually agreed payment of \$400,000 was made on 22 August 1996. Ten percent of the total purchase price, which is \$50,000, would have followed ten days after the final installation. The rest of \$50,000 had to be paid six months after the completion of the final testing.

On 27 August 1996 Respondent informed SUPERB by telephone call that RELIABLE's installation team died in an airplane crash the day before. Nevertheless, Respondent confirmed RELIABLE's assurance that he would assign a new team to the job and that the installation will be completed by contract date. This confirmation was emphasized by Respondent in several telephone calls on 30 August, and 4, 9 and 12 September 1996.

SUPERB reminded Respondent in his letter dated 13 September 1996 of the importance of the control system being fully operational by 16 September 1996 as contractually agreed. Respondent gave no response. By letter dated 18 September 1996 SUPERB fixed an additional period of time for the complete installation by 9 October 1996 at the latest. On this occasion SUPERB suggested that Respondent should secure the services of a different installation firm if RELIABLE was not able to install the control system. Only after SUPERB had fixed this additional period of time, Respondent asked in a faxed letter dated 19 September 1996, whether SUPERB would be satisfied if the installation was completed by 30 October 1996. In his fax of 19 September 1996 Respondent informed SUPERB that RELIABLE has had unexpected problems with his key personnel. Therefrom it was obvious that Respondent did not expect to meet the deadline of 9 October 1996. Nevertheless, SUPERB waited three weeks

until the deadline expired on 9 October 1996. At that day SUPERB declared the avoidance of the contract between SUPERB and Respondent by letter. By declaring avoidance SUPERB demanded the repayment of the already paid \$400,000 and stated to hold the control system as security. To avoid further damages SUPERB entered into a replacement contract with Bridget Controls GmbH on 10 October 1996 for a comparable control system for a price of \$550,000 including the installation. After the avoidance of the contract between SUPERB and Respondent on 10 October 1996 Respondent informed SUPERB that the installation could be completed prior to 30 October 1996. During the following four months there were negotiations over the consequences that should result from these events. Respondent was not willing to return the advance payment of \$400,000 and thus, SUPERB could have returned the control system. Consequently, these negotiations came to a deadlock. In a letter dated 13 March 1997 SUPERB announced the sale of the control system if Respondent would not return the advance payment of \$400,000 within the next ten days. As Respondent did not react, the control system was sold on 4 April 1998 for \$250,000 by a broker who was experienced in the sale of similar equipment. The costs of preserving the control system prior to his sale and the selling costs amounted to \$3,000, that only the sum of \$247,000 was left as net receipts.

SUMMARY OF ARGUMENTS

I. Respondent may not refer to Arts. 79 (1) and (2) (a) CISG for exemption from paying damages as a result of the delayed installation.

1. The parties have implicitly excluded Art. 79 CISG according to Art. 6 CISG, since SUPERB as well as Respondent has had the mutual intention to exclude exemption.

2. The air crash does not allow Respondent to invoke Art. 79 (1) CISG. Respondent's failure to install the control system was not due to an impediment beyond his control. Furthermore, Respondent could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. Finally, Respondent could have overcome the consequences of the impediment, since Respondent could have engaged another company to do the installation work or should have applied for a license to do electrical work in Mediterraneo on his own.

3. Respondent is estopped from relying on Art. 79 CISG, since he has always assured timely performance of the installation of the control system even after he had notice of the great difficulties his subcontractor was in.

II. SUPERB was authorized to avoid the contract on 9 October 1996 pursuant to Art. 49 (1) (b) CISG.

1. SUPERB had the right to avoid the contract on 9 October 1996 according to Art. 49 (1) (b) CISG. By not installing the control system Respondent has not delivered within the contractually fixed period of time pursuant to Art. 49 (1) (b) CISG, since the delivery of the control system and its installation are two independent contractual obligations for Respondent and the obligation to install falls under the scope of the Convention.

Additionally SUPERB has fixed an additional period of time according to Art. 47 (1) CISG, since he fixed up 9 October 1996 for the performance of the installation and this period of time was of reasonable length.

2. SUPERB's right to avoid the contract according to Art. 49 (1) (b) CISG was not barred by Respondent's offer to deliver until 30 October 1996 pursuant to Art. 48 (2) CISG. Respondent had no right to remedy his failure to perform pursuant to Art. 48 (2) CISG, since the letter dated 18 September 1996 excluded Respondent's right to remedy his failure to perform and if not, a right of Respondent to remedy his failure until 30 October 1996 would have caused an unreasonable delay for SUPERB according to Art. 48 (1) CISG. Furthermore, Art. 48 (2) CISG is subject to an avoidance pursuant to Art. 49 CISG and moreover, Respondent's reliance on the application of Art. 48 (2) CISG constitutes an abuse of rights.

3. The right to avoid the contract was not limited in regard to the obligation to install pursuant to Art. 51 (1) CISG, since the missing installation amounts to a fundamental breach of contract according to Art. 51 (2) CISG.

III. SUPERB was authorized to sell the control system and the sale was made by an appropriate means pursuant to Art. 88 (1) CISG.

1. SUPERB was authorized to sell the control system pursuant to Art. 88 (1) CISG, since SUPERB was bound to preserve the control system in accordance with Art. 86 (1) CISG. Furthermore, there has been an unreasonable delay by Respondent in repaying the purchase price. Moreover, SUPERB has given reasonable notice to Respondent of the intention to sell the control system.

2. The sale of the control system was made by an appropriate means as SUPERB has chosen an experienced broker to sell the control system. Additionally, the reached purchase price was reasonable.

IV. If Respondent qualifies under Arts. 79 (1) and (2) (a) CISG for exemption from paying damages as a result of the delayed installation of the control system, RELIABLE shall not be joined to this arbitration as it was requested by Respondent.

1. No respective arbitration agreement exists between SUPERB, Respondent and RELIABLE. SUPERB and Respondent contractually agreed to “consolidation”, but RELIABLE did not, and SUPERB did not agree to “joinder” which was contractually agreed to between Respondent and RELIABLE.
2. The contractually agreed prerequisites for joining RELIABLE to the arbitration conducted between SUPERB and Respondent are not met, since the application of the UNIDROIT Principles, which are incorporated in the contract between Respondent and RELIABLE, raises new questions of law.
3. Joining RELIABLE would endanger the award’s enforceability, since an award violating the principles of international public policy is unenforceable under the New York Convention, and RELIABLE’s waiver of the right to participate in the creation of the tribunal violates the international public policy.

ARGUMENTS

I. Jurisdiction

This Tribunal possesses jurisdiction to adjudicate this case, since SUPERB and CONTROLS agreed in their contract dated 10 June 1996 to refer any controversy or claim to arbitration.¹ Following this agreement, the arbitration shall be in accordance with the International Arbitration Rules of the American Arbitration Association [hereinafter AAA-Rules] and is to be administered by the International Arbitration Center of Danubia. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration. The law governing the arbitration is the United Nations Convention for the International Sale of Goods (1980) [hereinafter CISG] according to the parties’ contractual agreement².

II. Merits

In the following, SUPERB will demonstrate that: First, Respondent may not refer to Arts. 79 (1) and 79 (2) (a) CISG for exemption from paying damages as a result of the delayed installation. Second, SUPERB was authorized to avoid the contract on 9 October 1996 pursuant to Art. 49 (1) (b) CISG. Third, SUPERB was authorized to sell the control system pursuant to Art. 88 (1) CISG and the sale was made by an appropriate means. Fourth, if Respondent qualifies under Art. 79 (1) and (2) (a) CISG for exemption from paying damages as a result of the

¹ Claimant's Ex. No. 1.

² Id.

delayed installation of the control system, RELIABLE shall not be joined to this arbitration as it was requested by Respondent.

Issue I: Respondent May not Refer to Arts. 79 (1) and (2) (a) CISG for Exemption From Paying Damages as a Result of the Delayed Installation

In the following SUPERB will demonstrate that Respondent may not refer to Arts. 79 (1) and 79 (2) (a) CISG for exemption from paying damages as a result of the delayed installation. First, the parties have implicitly excluded Art. 79 CISG. Second, even if this Tribunal should come to the conclusion that the parties have not excluded Art. 79 CISG, the air crash does not allow Respondent to invoke Art. 79 CISG. Third, even if this Tribunal should come to the conclusion that the air crash allows Respondent to invoke Art. 79 CISG, Respondent is estopped from relying on Art. 79 CISG.

A. The Parties Have Implicitly Excluded Art. 79 CISG

The parties have implicitly excluded Art. 79 CISG according to Art. 6 CISG. Pursuant to Art. 6 CISG the parties may derogate from any of the provisions of the Convention. A respective exclusion can be agreed implicitly,³ provided that none of the states contracting to this Convention, where any party has his place of business, made a declaration under Art. 96 CISG that contracts have to be in writing. For an implicit exclusion of parts of the Convention both parties must have a common intention⁴, which is shown by the parties' conduct,⁵ e.g. the contents of letters and phone calls. The mutual intention to exclude an exemption under Art. 79 CISG can be derived from the parties' conduct: On the one hand there is the assurance of proper performance after a possible reason for exemption appears and on the other hand there is the fact that performance is still expected. In the present case, it was Respondent's as well as SUPERB's intention to exclude any exemption under Art. 79 CISG. Respondent's intention can be concluded from his constant assurance of willingness to perform. Respondent's

³ Michael Joachim Bonell, in Commentary on the International Sales Law 55 (C.M. Bianca & M.J. Bonell et al. eds, 1987) [hereinafter Bianca/Bonell]; Rolf Herber, in Commentary on the UN Convention on the International Sale of Goods 54 et seq. (P. Schlechtriem ed., 1998) [hereinafter Schlechtriem/Commentary on the CISG]; Ulrich Magnus in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG) 104, 109 (J. von Staudinger ed., 1994) [hereinafter Staudinger]; Alexander Lüderitz, in Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Schuldrecht II 2244 (H. Th. Soergel et al. eds., 1991); see Theo Rauh, Leistungserschwerungen im Schuldvertrag 64 (1992) [hereinafter Rauh/Leistungserschwerungen].

⁴ Judgement of 18 October 1995, Rechtbank van Koophandel, Hasselt (Belg.), summarised translation in UNILEX D.1995-28.1.0; Michael Joachim Bonell, in Bianca/Bonell, supra note 3, at 57; Rolf Herber, in Schlechtriem/Commentary on the CISG, supra note 3, at 54; Ulrich Magnus, in Staudinger, supra note 3, at 104; see Dietrich Maskow, in International Sales Law 48 (F. Enderlein & D. Maskow eds, 1992) [hereinafter Enderlein/Maskow].

⁵ See Oberlandesgericht München, Judgement of 08 March 1995, reprinted in UNILEX E.1995-8 (for the conclusion of a contract only through conduct of the parties), cf. Rolf Herber, in Schlechtriem/Commentary on the CISG, supra note 3, at 55.

steady conveyance that the installation would be completed in time must be regarded as an obvious assurance of performance in time. In his letter dated 27 August 1996 Respondent refers to an earlier phone call and confirms that RELIABLE assured “that the installation should be completed by contract date”.⁶ This confirmation was made after Respondent received information about the air crash and its consequences. The assurance of immediate performance was repeated at least four times during phone calls on 30 August, 4, 9 and 12 September 1996.⁷ Corresponding to Respondent’s intention SUPERB desired the exclusion of Art. 79 CISG as well. The steady repetition of the demand of the performance during the several phone calls with Respondent⁸ after the impediment appeared shows SUPERB’S intention to exclude Art. 79 CISG. This implicit exclusion of Art. 79 CISG is also possible since none of the states contracting to the Convention have made a declaration under Art. 96 CISG according to which contracts would have to be in writing.⁹

B. The Air Crash Does not Allow Respondent to Invoke Art. 79 (1) CISG

Even if this Tribunal should come to the conclusion that the parties have not excluded Art. 79 CISG, the air crash does not allow Respondent to invoke Art. 79 CISG as Respondent does not meet all prerequisites of Art. 79 (1) CISG. According to Art. 79 (1) CISG a party is exempted only if the party’s failure is due to an impediment beyond his control, if he could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract and he could not have overcome the consequences of the impediment. First, Respondent’s failure to install the control system was not due to an impediment beyond his control. Second, Respondent could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. Third, Respondent could have overcome the consequences of the impediment.

1. Respondent’s Failure to Install the Control System Was not Due to an Impediment Beyond His Control

Respondent’s failure to install the control system was not due to an impediment beyond his control, since Respondent enlarged his sphere of risk covering any impediments on the side of his subcontractor, i.e. a failure by RELIABLE. An impediment is in party’s control, if it has its origin inside the party’s sphere of risk.¹⁰ The range of this sphere of risk is set by parties’ contractual agreement and their intention during the conduct of the

⁶ Claimant’s Ex. No. 2.

⁷ Claimant’s Ex. No. 3.

⁸ Id.

⁹ Procedural Order No.2, Legal Questions No. 1.

¹⁰ Ulrich Magnus, in Kommentar zum UN-Kaufrecht 987 (H. Honsell ed., 1997) [hereinafter Honsell]; see Hans Stoll, in Schlechtriem/Commentary on the CISG, *supra* note 3, at 610; Ulrich Ziegler, in Leistungsstörungenrecht nach dem UN-Kaufrecht 217 (1995) [hereinafter Ziegler/Leistungsstörungenrecht].

contract.¹¹ In case a subcontractor is involved, a seller remains fully responsible for the whole performance of the contract.¹² Consequently, seller is fully liable even if the engagement of a third person has been proposed by buyer.¹³

In the present case Respondent enlarged his sphere of risk as it was his contractual obligation to install the control system. Respondent had the contractual obligation to install the control system, as clause No. 1 of the contract between SUPERB and Respondent states that “[t]he system is to be installed by seller []”¹⁴ and clause No. 1 of the contract between Respondent and RELIABLE determines that “CONTROLS expects that he will undertake to install the control system”.¹⁵ Regardless of whether SUPERB proposed RELIABLE as a company to do the installation work during the negotiations,¹⁶ Respondent took over complete responsibility by adopting RELIABLE as an independent subcontractor.¹⁷

Additionally, Respondent guaranteed timely performance after RELIABLE was in difficulties. A guarantee is the promise of responsibility if the guaranteed result cannot be obtained.¹⁸ Therefore a guarantee implies the enlargement of guarantor’s sphere of risk. An assurance of performance amounts to a guarantee if the confirmation of proper performance is made after circumstances appeared that could make a fulfillment improbable. As shown above, it was Respondent’s intention in his multiple phone calls with SUPERB between 27 August and 12 September 1996¹⁹ to assure that performance would be made in time.²⁰ Respondent made these statements even though he knew that RELIABLE was in great difficulties because of the loss of a main part of his key personnel. Furthermore, it was clear that RELIABLE’S remaining installation team qualified for the job was assigned to another large contract.²¹

¹¹ Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 3, at 613; Ulrich Magnus, in Honsell, supra note 10, at 987; Ziegler/Leistungsstörungenrecht, supra note 10, at 219.

¹² Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 3, at 616; Ulrich Magnus, in Honsell, supra note 10, at 990; Ziegler/Leistungsstörungenrecht, supra note 10, at 224; F. Vischer, Gemeinsame Bestimmungen über Verpflichtungen des Verkäufers und des Käufers, in Veröffentlichungen des Schweizerischen Institutes für Rechtsvergleichung III: The 1980 Vienna Convention on the International Sale of Goods. Lausanne Colloquium of November 19-20, 1984 173, 180 (1987).

¹³ Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 3, at 616; Denis Tallon, in Bianca/Bonell, supra note 3, at 585.

¹⁴ Claimant’s Ex. No. 1.

¹⁵ Respondent’s Ex. No. 1.

¹⁶ Statement of Defense and Counterclaim I.5.

¹⁷ Cf. Respondent’s Ex. No. 1.

¹⁸ Cf. Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 3, at 625.

¹⁹ Claimant’s Ex. No. 2 and 3.

²⁰ Supra, pages 4, 5.

²¹ Statement of Defense and Counterclaim I.7.

2. Respondent Could Reasonably Be Expected to Have Taken the Impediment Into Account at the Time of the Conclusion of the Contract

Respondent could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. An impediment can reasonably be taken into account if it is foreseeable.²² A situation is foreseeable if the defaulting party should have considered the risk of its realization by the time of the conclusion of the contract.²³ A party should have considered the risk of realization of the impediment if it has knowledge of circumstances which increase the risk of its realization.²⁴ In the case at hand, a special risk of non-performance results from the fact that RELIABLE is a company relying on human sources. Furthermore, it must be taken into account that RELIABLE is a merely small company.²⁵ Therefore, only few internal alternatives are given to compensate difficulties like illness or death of personnel.²⁶

Respondent knew both circumstances as he was aware of the work to be done by RELIABLE²⁷ and SUPERB informed him about the size of the company.²⁸ This risk known by Respondent was realized by the fact that a part of RELIABLE's staff is not longer available after the air crash.

3. Respondent Could Have Overcome the Consequences of the Impediment

Respondent could have overcome the consequences of the impediment. This obligation, which even existed at the time of conclusion of the contract,²⁹ requires the seller to take adequate steps to preclude the consequences of any impediment.³⁰ In the case at hand, Respondent could have turned to another company to do the installation work [a)], and he could have applied for a license to do electrical work in Mediterraneo himself [b)].

a) Respondent Could Have Engaged Another Company to Do the Installation Work

Respondent could have engaged another company to do the installation work, since Respondent was allowed to do so and as three other companies were available to install the control system.

²² Hans Stoll, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 3, at 611; Denis Tallon, *in* Bianca/Bonell, *supra* note 3, at 580.

²³ Denis Tallon, *in* Bianca/Bonell, *supra* note 3, at 580 et. seq.

²⁴ Cf. Ulrich Magnus, *in* Staudinger, *supra* note 3, at 629.

²⁵ Statement of Defense and Counterclaim I.5.

²⁶ Hans Stoll, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 3, at 608; Ulrich Magnus, *in* Honsell, *supra* note 10, at 988; Martin Karollus, *UN-Kaufrecht* 208 (1991) [hereinafter Karollus/*UN-Kaufrecht*].

²⁷ Both parties signed a contract about the installation, Respondent's Ex. No. 1.

²⁸ Statement of Defense and Counterclaim I.5.

²⁹ Rauh/*Leistungser schwerungen*, *supra* note 3, at 77.

³⁰ Denis Tallon, *in* Bianca/Bonell, *supra* note 3, at 581; Hans Stoll, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 3, at 612; Ulrich Magnus, *in* Honsell, *supra* note 10, at 989.

First, Respondent was allowed to turn to another company since clause No. 4 of the contract between SUPERB and Respondent which states that “[t]he control system is to be installed by Reliable Installation Co.”,³¹ has no legal effect. Questions concerning the application of certain contract clauses are to be solved by interpretation according Art. 8 (1) CISG. The interpretation is based on the aim of the contract and the parties’ intention. In this case, the clauses No. 1 and 4 of the contract between SUPERB and Respondent contain diverging responsibility. Clause No. 1 states “[t]he system is to be installed by Seller[Respondent]”, following clause No. 4, in which it is stated that “[t]he control system is to be installed by Reliable Installation Co.”. Regarding the fact that the contract between SUPERB and Respondent includes Respondent’s obligation to deliver and install the control system and that Respondent made a separate installation contract with RELIABLE,³² it is obvious that, in the relationship between SUPERB and Respondent, the latter had the duty to perform the installation. The fact that the contract between Respondent and RELIABLE was made a few days earlier shows that clause No. 4 of the contract between SUPERB and Respondent is an assurance of SUPERB’s acceptance of RELIABLE as a subcontractor engaged to fulfil Respondent’s obligation to install the control system.

However, even if clause No. 4 has legal effect, SUPERB gave his consent to a performance by another company. According to Art. 29 (1) CISG the contract may be modified by the mere agreement of the parties. As shown above, seller is required to take adequate steps to overcome the consequences of the impediment. This includes the obligation to exercise every suitable legal right.³³ Respondent had the possibility to overcome the consequences by trying to modify the contract, e.g. proposing the change of the installation company. SUPERB even offers a modification of the contract by suggesting to turn to another installation firm by letter on 18 September 1996.³⁴

Second, three other companies were potentially available to install the control system.³⁵ All three were licensed in Mediterraneo.³⁶ They were able to install the control system by contract date themselves. These three firms alternatively indicated that they could have shifted personnel as to have an installation team available.

³¹ Claimant’s Ex. No. 1.

³² Respondent’s Ex. No. 1.

³³ Cf. Ulrich Magnus, *in* Honsell, *supra* note 10, at 989.

³⁴ Claimant’s Ex. No. 4.

³⁵ Procedural Order No. 2, Factual Questions No. 14.

³⁶ *Id.*

Additionally, Respondent knew or at least should have known of their existence and therefore of the possibility to turn to another installation firm.³⁷

b) Respondent Should Have Applied For a License to Do Electrical Work in Mediterraneo Himself

Respondent could have applied for a license to do electrical work in Mediterraneo himself. It can be expected that a party overcomes the impediment even if it results in incurring greatly increased costs and business loss.³⁸ In the present case, Respondent had the possibility to overcome the impediment by applying for a license and by carrying out the installation of the control system on his own. That is proved by the fact that in some countries Respondent is licensed to do the electrical work that is necessary for an installation.³⁹ However, he did not apply for a license in Mediterraneo, since the requirements were “undesirable”⁴⁰ to him.

C. Respondent Is Estopped From Relying on Art. 79 CISG

Even if this Tribunal should come to the conclusion that the air crash allows Respondent to invoke Art. 79 CISG, Respondent is estopped from relying on Art. 79 CISG. The principle of estoppel, i.e. the prohibition of venire contra factum proprium, is a special application of the general principle of good faith,⁴¹ which is one of the “general principles on which the CISG is based”.⁴² Pursuant to this principle, a party is legally hindered to deviate from a certain kind of conduct on which the other party relied.⁴³ In the present case, invoking Art. 79 CISG would violate Respondent’s earlier behavior. Thus, the Respondent is legally hindered to deviate from his earlier conduct. Article 79 CISG would exempt Respondent from his obligation under the contract to install the control system. However, this would contradict any previous behavior of Respondent as he always strengthened his ability to perform in time.⁴⁴ This impression was given at least five times, i.e. in writing on 27 August 1996 by the statement: “[RELIABLE] assured me that [] the installation should be completed by

³⁷ Cf. id.

³⁸ Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 3, at 612.

³⁹ See Procedural Order No. 2, Factual Questions No. 17.

⁴⁰ Id.

⁴¹ Fritz Enderlein, in Enderlein/Maskow, supra note 4, at 59; Rolf Herber & Beate Czerwenka, Internationales Kaufrecht 107 (1991) [hereinafter Herber/Czerwenka]; Rolf Herber, in Schlechtriem/Commentary on the CISG, supra note 3, at 66; Klaus Peter Berger, International Economic Arbitration 548 (1993) [hereinafter Berger/Arbitration].

⁴² Arbitral Award of 15 June 1994, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft SCH-4318 (Wien) (Aus.), summarised translation in UNILEX D.1994-13; Albert H. Kritzer, in Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods 82 (A.H. Kritzer ed., 1994); [hereinafter Guide to Practical Applications]; see John O. Honnold, Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice, 143, in Einheitliches Kaufrecht und nationales Obligationenrecht 115, 143 (Peter Schlechtriem ed., 1987) [hereinafter Honnold/Uniform Words].

⁴³ See Honnold/Uniform Words, supra note 42, at 140.

⁴⁴ Supra, pages 4, 5.

contract date”,⁴⁵ as well as orally on 30 August and on 4, 9 and 12 September 1996 by phone⁴⁶, whereby it was emphasized that “Reliable was working on assembling the new installation team”.⁴⁷

Additionally, SUPERB always relied on this conduct and never acted in a way to make Respondent doubt this reliance. This is shown by SUPERB’S letter dated 13 September 1996, stating “how important it is [] to have [the control system] working, and working promptly”.⁴⁸ Moreover, SUPERB did not take any steps which could have shown that he was no longer interested in the installation of the control system. In particular, SUPERB did not buy a substitute control system until 10 October 1996.⁴⁹

Issue II: SUPERB Was Authorized to Avoid the Contract on 9 October 1996 Pursuant to Art. 49 (1) (b) CISG

SUPERB was authorized to avoid the contract on 9 October 1996 pursuant to Art. 49 (1) (b) CISG. First, SUPERB had the right to avoid the contract on 9 October 1996 pursuant to Art. 49 (1) (b) CISG. Second, SUPERB’S right to avoid the contract was not barred by Respondent’S offer to deliver pursuant to Art. 48 CISG. Third, this right was not limited pursuant to Art. 51 (1) CISG.

A. SUPERB Had the Right to Avoid the Contract on 9 October 1996 According to Art. 49 (1) (b) CISG

SUPERB had the right to avoid the contract on 9 October 1996 according to Art. 49 (1) (b) CISG. Pursuant to Art. 49 (1)(b) CISG the buyer may declare the contract avoided in case of non-delivery, if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with Art. 47 (1) CISG. First, by not installing the control system Respondent has not delivered within the contractual agreed period of time pursuant to Art. 49 (1) (b) CISG. Second, SUPERB has fixed an additional period of time according to Art. 47 (1) CISG. Third, Respondent has not delivered within that additional period of time fixed by SUPERB.

1. By Not Installing the Control System Respondent Has Not Delivered Within the Contractually Fixed Period of Time Pursuant to Art. 49 (1) (b) CISG

By not installing the control system on or before 16 September 1996 Respondent has not delivered within the

⁴⁵ Claimant’S Ex. No. 2.

⁴⁶ Claimant’S Ex. No. 3.

⁴⁷ Id.

⁴⁸ Claimant’S Ex. No. 3.

⁴⁹ Claimant’S Ex. No. 8.

contractually fixed period of time pursuant to Art. 49 (1) (b) CISG, since first, the delivery of the control system and its installation are two independent contractual obligations for Respondent; and second, the obligation to install falls under the scope of the Convention.

a) The Delivery of the Control System and its Installation Are Two Independent Contractual Obligations for Respondent

The delivery of the control system and its installation are two independent contractual obligations for Respondent as it could be inferred from the contract unequivocally. In clauses No. 1 and 3 of the contract Respondent has committed himself to a “delivery of the control system to the facilities of [b]uyer”.⁵⁰ Moreover, in clauses No. 1, 3 and 4 of the contract the parties have agreed that the control system shall “be installed by [s]eller”.⁵¹ The parties’ intention to impose two independent obligations is supported by the accentuation in the contract. The accentuation in the contract is shown by the side by side position in the named contractual clauses.⁵² Furthermore, there is no clause in the contract which excludes that the delivery of the control system and its installation are two independent obligations.⁵³ In addition, there are no legal objections to the possibility of contractual agreement about two or more obligations.⁵⁴

b) The Obligation to Install Falls Under the Scope of the Convention

The obligation to install falls under the scope of the Convention, since it comes within the terms of the Convention pursuant to Arts. 3 (1) and (2) CISG. According to Art. 3 (1) CISG the contracts for the supply of goods to be manufactured or produced are to be considered sales, except for those cases pursuant to Art. 3 (2) CISG where the preponderant part of the obligation of the party who furnishes the goods consists in the supply of work or other service. If a contract containing elements of supply of work and other services falls under the scope of the Convention, the Convention is applicable to the whole contract.⁵⁵ Therefore, the rules of impairment of performance have to be applied to the service obligation.⁵⁶

⁵⁰ Claimant’s Ex. No. 1.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Cf. Judgement of 26 April 1995, Handelsgericht Zürich No. HG 920670, reprinted in UNILEX E.1995-12.1; Warren Khoo, in Bianca/Bonell, supra note 3, at 42; Guide to Practical Applications, supra note 42, at 24; Monica Droste, Der Liefervertrag mit Montageverpflichtung 162 (1991); Ulrich Magnus, in Staudinger, supra note 3, at 72; Alexander Lüderitz, in Soergel, supra note 3, at 2241; Peter Schlechtriem, Internationales UN-Kaufrecht 18 (1996) [hereinafter Schlechtriem/UN-Kaufrecht].

⁵⁵ Ulrich Magnus, in Staudinger, supra note 3, at 72; Karollus/UN-Kaufrecht, supra note 26, at 24.

⁵⁶ See Ulrich Magnus, in Staudinger, supra note 3, at 72; Dietrich Maskow, in Enderlein/Maskow, supra note 4, at 37,38.

First, the contract between SUPERB and Respondent falls under the scope of Art. 3 (1) CISG. According to Art. 3 (1) CISG contracts for the production, delivery and installation come within the terms of the Convention. This principle is supported by the award of the ICC arbitral tribunal in the case 23.08.94, No. 7660/JK.⁵⁷ In that case, the contract between an Italian seller and a Czech buyer provided that the seller had to deliver the machinery and to install it. The Tribunal held that the contract fell within the scope of the Convention under Art. 3 (1) CISG, being a contract for the production, delivery and installation of machinery. In the present case, it was not only Respondent's obligation to produce and deliver the control system to the premises of SUPERB, but he was also bound to install the control system as it can be clearly derived from the contract and the Statement of Claim.⁵⁸

Second, the application of the Convention is not excluded by Art. 3 (2) CISG, since the installation does not constitute the preponderant part of the contract. The preponderant part of the contract depends on the major part in value.⁵⁹ In addition, the interest of the parties in the particular obligation must be taken into account.⁶⁰

The major part in value is the control system itself. The installation is less valuable than the control system as the contractually agreed payment by installment shows. Both parties have agreed that \$400,000 of the total purchase price amounting to \$500,000 should have to be paid after delivery of the control system, but only \$100,000 should have to be paid after the installation. Both, SUPERB and Respondent, are interested in the performance of the contractually agreed obligations. On the one hand, SUPERB was first of all interested in taking advantage of the new technologies available in the control of the paper making process by using a control system produced by Respondent.⁶¹ On the other hand, Respondent is a producer of control systems for the paper industry.⁶² For that reason, Respondent realizes his profits by the sale of the produced control systems and not by their installation.

2. SUPERB Has Fixed an Additional Period of Time According to Art. 47 (1) CISG

After Respondent failed to deliver within the contractually agreed period of time, SUPERB has fixed an additional

⁵⁷ Arbitral Award of 23.08.1994, ICC Court of Arbitration – Paris No. 7660/ JK, reprinted in UNILEX E. 1994-20.

⁵⁸ Statement of Claim I.4 and I.5, Claimant's Ex. No. 1.

⁵⁹ See Judgement of April 26, 1995, Handelsgericht Zürich HG 920670 (Switzerland), reprinted in UNILEX E.1995-12.1; Judgement of April 26, 1995, Cour d'Appel de Grenoble Chambre Commerciale RG 93/4879, Marques Roque Joachim v. La Sarl Holding Manin Riviere (France), reprinted in UNILEX E.1995-14; Herber/Czerwenka, supra note 41, at 28, 29; Rolf Herber, in Schlechtriem/Commentary on the CISG, supra note 3, at 39; Alexander Lüderitz, in Soergel, supra note 3, at 2142; Karollus/UN-Kaufrecht, supra note 26, at 24; Ulrich Magnus, in Staudinger, supra note 3, at 72; Gert Reinhart, UN-Kaufrecht 20 (1991).

⁶⁰ Ulrich Magnus, in Staudinger, supra note 3, at 71; Karollus/UN-Kaufrecht, supra note 26, at 24.

⁶¹ Statement of Claim I.3.

⁶² Id.

period of time according to Art. 47 (1) CISG. Pursuant to Art. 47 (1) CISG the buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. First, SUPERB fixed an additional period of time until 9 October 1996; and second, the additional period of time was of reasonable length.

a) SUPERB Fixed an Additional Period of Time Until 9 October 1996

SUPERB fixed an additional period of time until 9 October 1996, since he has sent a notice with his letter dated 18 September 1996 to Respondent.⁶³ The notice concerning an additional period must warn the seller that a deadline has been “fixed”.⁶⁴ SUPERB informed Respondent that he expected the completion of installation by that date “at the latest”.⁶⁵ Moreover, SUPERB insistently declared to look for his “legal rights” if the installation of the control system was not completed by 9 October 1996.⁶⁶

b) The Additional Period of Time Was of Reasonable Length

The additional period of time was of reasonable length, since it met the interests of both parties, SUPERB and Respondent. The reasonableness of an additional period depends on the circumstances of each case,⁶⁷ especially on the opposite interests of both parties.⁶⁸ While the seller must have the possibility to perform within the given time,⁶⁹ the nature of the impediment for delivery⁷⁰ and the buyer’s interest in rapid delivery⁷¹ must also be taken into account, which might be the most important factor.⁷²

First, Respondent would have been able to install the system within the given time, since there were three other firms in addition to RELIABLE available about to install the control system in Mediterraneo.⁷³ Thus, Respondent had the possibility to engage another subcontractor who could have installed the system within the additional

⁶³ Claimant’s Ex. No. 4.

⁶⁴ John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention 306 (1982); Michael Will, in Bianca/Bonell, supra note 3, at 345; Ulrich Magnus, in Staudinger, supra note 3, at 395.

⁶⁵ Claimant’s Ex. No. 4.

⁶⁶ Id.

⁶⁷ Michael Will, in Bianca/Bonell, supra note 3, at 345; Anton K. Schnyder & Ralf Michael Straub, in Honsell, supra note 10, at 528; Marcel Martin Lohs & Norbert Nolting, Regelung der Vertragsverletzung im UN-Kaufrechtsübereinkommen, in Zeitschrift für vergleichende Rechtswissenschaft 4, 15 (1998) [hereinafter Lohs/Nolting/Regelung der Vertragsverletzung]; Karollus/UN-Kaufrecht, supra note 26, at 139.

⁶⁸ Alexander Lüderitz, in Soergel, supra note 3, at 2291, 2083, 2084; Anton K. Schnyder & Ralf Michael Straub, in Honsell, supra note 10, at 528.

⁶⁹ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 3, at 396; Alexander Lüderitz, in Soergel, supra note 3, at 2291, 2083, 2084.

⁷⁰ Cf. Judgement of 24 May 1995, OLG Celle 20 U 76/94, reprinted in UNILEX E. 1995.16; Michael Will, in Bianca/Bonell, supra note 3, at 345; Fritz Enderlein, in Enderlein/Maskow, supra note 4, at 182,183; Ulrich Magnus, in Staudinger, supra note 3, at 395; Alexander Lüderitz, in Soergel, supra note 3, at 2291, 2107.

⁷¹ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 3, at 396; Michael Will, in Bianca/Bonell, supra note 3, at 345; Karollus/UN-Kaufrecht, supra note 26, at 139.

⁷² Ulrich Magnus, in Staudinger, supra note 3, at 395; see Alexander Lüderitz, in Soergel, supra note 3, at 2291, 2084.

⁷³ Procedural Order No. 2, Factual Questions No. 14.

period of time.⁷⁴ The additional period of time ending on 9 October 1996 was fixed on 18 September 1996.⁷⁵ Consequently, the additional period lasted three weeks. Three other firms available for the installation in Mediterraneo agreed that the installation of a control system takes only two weeks.⁷⁶ For that reason, the installation in the facilities of SUPERB could have been made within two weeks. Hence, one week was left for Respondent to engage another sub-contractor. Furthermore, the three available firms have indicated that on occasion an installation could have been undertaken on as little as one week's notice.⁷⁷

Second, while allowing Respondent to install the system, the time limit also took care of SUPERB's interest in speedy delivery. SUPERB was interested in speedy delivery as he wanted to take advantage of the new technologies available in the control of the paper making process.⁷⁸ He expected to make significant cost savings from the new system over time.⁷⁹ It was important for SUPERB to have the control system "working promptly".⁸⁰ Furthermore, the contract provided that the system had to be tested in place and be fully operational on or before 16 September 1996.⁸¹ By this, he also declared to accept a premature delivery before due date to which he was not obliged to Art. 52 CISG. This is a further indication that SUPERB had an interest in speedy delivery. Respondent recognized this interest when he confirmed that the control system had to be installed at SUPERB's plant promptly on the 19 September 1996.⁸² Therefore, Respondent was also aware of SUPERB's interest in rapid delivery.

3. Respondent Has Not Delivered Within that Additional Period of Time Fixed By SUPERB

Respondent has not delivered, i.e. he has failed to install the control system within that additional period of time fixed by SUPERB. On 9 October 1996, when the additional period of time fixed expired, the installation was not completed.⁸³

⁷⁴ Supra, pages 8-10.

⁷⁵ Claimant's Ex. No. 4.

⁷⁶ Procedural Order No. 2, Factual Questions No. 14.

⁷⁷ Id.

⁷⁸ Statement of Claim I.3.

⁷⁹ Procedural Order No. 2, Factual Questions No. 23.

⁸⁰ Claimant's Ex. No. 3.

⁸¹ Claimant's Ex. No. 1.

⁸² Claimant's Ex. No. 5.

⁸³ Claimant's Ex. No. 4 and 6.

B. SUPERB's Right to Avoid the Contract According to Art. 49 (1) (b) CISG Was not Barred by Respondent's Offer to Deliver until 30 October 1996 Pursuant to Art. 48 (2) CISG

Respondent's argumentation,⁸⁴ that SUPERB's right to avoid the contract on 9 October 1996 was barred by his offer to deliver until 30 October 1996 pursuant to Art. 48 (2) CISG is unfounded. The letter of 19 September 1996 from Respondent to SUPERB is a counter-offer to perform until 30 October 1996 pursuant to Art. 48 CISG. SUPERB has fixed an additional period of time for performance until 9 October 1996⁸⁵ and Respondent suggested a longer additional period of time until 30 October 1996.⁸⁶ This counter-offer does not bar SUPERB's right to avoid the contract as first, Respondent had no right to remedy his failure to perform pursuant to Art. 48 (2) CISG. Second, even if Respondent had a right pursuant to Art. 48 (2) CISG, it would not bar a right to avoid which already had been exercised. Third, Respondent's reliance on application of Art. 48 (2) CISG constitutes an abuse of rights.

1. Respondent Had No Right to Remedy his Failure to Perform Pursuant to Art. 48 (2) CISG

Respondent had no right to remedy his failure to perform pursuant to Art. 48 (2) CISG as it is an implementing instruction⁸⁷ of Art. 48 (1) CISG. Thus, Art. 48 (1) CISG must apply to Art. 48 (2) CISG. Pursuant to Art. 48 (1) CISG the seller may exercise his right to remedy any failure to perform his obligation merely subject to Art. 49 CISG. First, the letter dated 18 September 1996 excluded Respondent's right to remedy a failure to perform of Respondent under Art. 48 (1) CISG; and second, even if this Tribunal comes to the conclusion that SUPERB's letter of 18 September 1996 did not contain a conditional declaration of avoidance, a right of Respondent to remedy until 30 October 1996 would have caused an unreasonable delay for SUPERB according to Art. 48 (1) CISG.

a) The Letter dated 18 September 1996 Excluded Respondent's Right to Remedy His Failure to Perform

The letter dated 18 September 1996 excluded Respondent's right to remedy his failure to perform under Art. 48 (1) CISG, since it contains not only an additional period of time pursuant to Art. 47 (1) CISG, but also a conditional declaration of avoidance according to Art. 49 (1) (b) CISG. The wording of Art. 48 (1) CISG "subject to Art. 49" expressively indicates the intention to make clear that the seller's right to remedy his failure shall not

⁸⁴ Statement of Defense and Counterclaim II.16.

⁸⁵ Claimant's Ex. No. 4.

⁸⁶ Claimant's Ex. No. 5.

⁸⁷ Anton K. Schnyder & Ralf Michael Straub, in Honsell, supra note 10, at 545.

frustrate buyer's right to declare avoidance of the contract under Art. 49 CISG.⁸⁸ Therefore buyer's right to avoid the contract pursuant to Art. 49 (1) frustrates the seller's right to remedy a failure to perform granted in Art. 48 (1) CISG.

A conditional declaration of avoidance will take effect if the seller does not perform within the additional period.⁸⁹ We like to draw this Tribunal's attention to a case decided by the Federal Supreme Court of Germany.⁹⁰ In that case it was regarded as a conditional declaration of avoidance where a letter from the buyer's lawyer requested the seller "for the last time" to deliver by a particular date and stated that if he did not deliver by that date the lawyer was "instructed to claim damages for non-performance".⁹¹ To begin with, SUPERB requested Respondent to install the control system by 9 October 1996 "at the latest".⁹² Furthermore, he clearly indicated that he will exercise his "legal rights" in case of non-performance by Respondent after the date fixed, i.e. the 9 October 1996.⁹³ Thereby he indicated, that he will avoid the contract after the additional period of time fixed by SUPERB would be expired. Hence, the conditional declaration of avoidance of the contract by SUPERB anticipates the refusal of Respondent's counter-offer according to Art. 48 CISG.

b) A Right of Respondent to Remedy his Failure Until 30 October 1996 Would Have Caused an Unreasonable Delay for SUPERB According to Art. 48 (1) CISG

Even if this Tribunal comes to the conclusion that SUPERB's letter of 18 September 1996 did not contain a conditional declaration of avoidance, the right of Respondent to remedy his failure until 30 October 1996 would have caused an unreasonable delay for SUPERB according to Art. 48 (1) CISG, since SUPERB would be seriously handicapped. The right to remedy a failure to perform within the additional period fixed by Respondent causes an unreasonable delay. The seller must perform within an additional period of reasonable length which depends on the circumstances of the particular case.⁹⁴ The delay is unreasonable if it amounts to a fundamental breach of contract,⁹⁵ however the right to remedy a failure to perform is not only excluded if there are unbearable handicaps

⁸⁸ Ulrich Huber, Der UNICITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge, in 59 Rabels Zeitschrift für ausländisches und internationales Privatrecht 413, 486 et seq. (1979), see Lohs/Nolting/Reglung der Vertragsverletzung, supra note 67, at 10, 14.

⁸⁹ Huber, in Schlechtriem/Commentary on the CISG, supra note 3, at 412, 413; Herber/Czerwenka, supra note 41, at 230; Alexander Lüderitz, in Soergel, supra note 3, at 2291; Ulrich Magnus, in Staudinger, supra note 3, at 415; Karollus/UN-Kaufrecht, supra note 26, at 153.

⁹⁰ See Judgement of March 28, 1979, Bundesgerichtshof VIII ZR 37/78 (Germany), reprinted in BGHZ 74, 193, 204; Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 3, at 426.

⁹¹ Id.

⁹² Claimant's Ex. No. 4.

⁹³ Id.

⁹⁴ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 3, at 405.

⁹⁵ Fritz Enderlein, in Enderlein/Maskow, supra note 4, at 186.

for the buyer, but also if the buyer is seriously handicapped.⁹⁶

SUPERB wanted to make significant cost savings with the new control system produced by Respondent.⁹⁷ Hence, an additional period of more than six weeks, from 18 September 1996 until 30 October 1996, results in financial damages for SUPERB. Moreover, SUPERB wanted to take advantage of the new technologies available in the control of the paper making process.⁹⁸ Such a long additional period of more than six weeks as it is intended by Respondent reduces SUPERB's possibilities of disposition in regard to future contract negotiations and performance of present and future contracts within this period.

2. Art. 48 (2) CISG is Subject to an Avoidance Pursuant to Art. 49 CISG

Even if Respondent had a right under Art. 48 (2) CISG, nevertheless Art. 48 (2) CISG is subject to an avoidance pursuant to Art. 49 (1) CISG. According to Art. 48 (2) CISG the seller may perform within the time indicated in his request, if the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time. This right to remedy a failure to perform under Art. 48 (2) CISG concerns all cases of the seller's failure to perform.⁹⁹ Therefore, the right to remedy according to Art. 48 (2) CISG also concerns the case of the seller's failure regulated by Art. 48 (1) CISG, i.e. the wording of this Article "subject to Art. 49 CISG" must also be applied to Art. 48 (2) CISG. As shown above,¹⁰⁰ the letter by SUPERB to Respondent dated on 18 September 1996 contained a combination of the additional period of time and a conditional declaration of avoidance pursuant to Art. 49 CISG. Hence, this letter excluded a right to remedy of Respondent pursuant to Art. 48 (2) CISG.

3. Respondent's Reliance on Application of Art. 48 (2) CISG Constitutes An Abuse of Rights

Respondent's reliance on application of Art. 48 (2) CISG constitutes an abuse of rights. The abuse of rights is a special application of the principle of good faith,¹⁰¹ which is one of the "general principles on which the CISG is based".¹⁰² The principle of abuse of rights requires that a discretionary right is exercised reasonably and with due

⁹⁶ Anton K. Schnyder & Ralf Michael Straub, *in* Honsell, *supra* note 10, at 540.

⁹⁷ Procedural Order No. 2, Factual Questions No. 23.

⁹⁸ Statement of Claim I.3.

⁹⁹ Ulrich Huber, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 3, at 411.

¹⁰⁰ *Supra*, pages 16, 17.

¹⁰¹ Rolf Herber, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 3, at 67; Ulrich Magnus, *in* Staudinger, *supra* note 3, at 480; Werner Melis, *in* Honsell, *supra* note 10, at 91; Burghard Piltz, *Internationales Kaufrecht* 66 (1993); Herber/Czerwenka, *supra* note 41, at 48; *see also* Vincent Heuzé, *La vente internationale de marchandises* 79 (1992); *cf.* Karl H. Neumayer & Catherine Ming, *in* *Convention De Vienne Sur le Contracts De Vente Internationale De Marchandises Commentaire* 161-62 (1993).

¹⁰² Arbitral Award of June 15, 1994, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft SCH-4318 (Wien) (Aus.); *Guide to Practical Applications*, *supra* note 42, at 82.

regard to the interest of the other party.¹⁰³ Art. 48 (2) CISG is intended to give the seller a means to clarify whether the buyer will reject repair or delivery of substitute goods on the ground of unreasonable delay and declare the contract avoided on account of a fundamental breach of contract.¹⁰⁴ In the case at hand, SUPERB fixed an additional period of time in accordance with Arts. 49 (1) (b) and 47 (1) CISG to perform the installation obligation until 9 October 1996 within the letter dated 18 September 1996.¹⁰⁵ It is obvious, that an additional period of time fixed by Respondent which is longer than the additional period fixed by SUPERB contradicts the interest of SUPERB. Therefore, there was no need for giving Respondent a means to clarify whether SUPERB would reject performance of the obligation to install, i.e. the intention of Art. 48 (2) is not given.

C. The Right to Avoid the Contract Was not Limited Pursuant to Art. 51 (1) CISG

Should Respondent argue that SUPERB's right to avoid the contract was limited in regard to the obligation to install pursuant to Art. 51 (1) CISG, this argumentation would be unfounded. According to Art. 51 (1) CISG the buyer can exercise his legal rights given by the Convention, especially the right to avoid the contract, only in respect of the part which is missing or which does not conform, if the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract.

To the contrary, SUPERB had the right to avoid the whole contract, because the missing installation amounts to a fundamental breach of contract pursuant to Art. 51 (2) CISG. Pursuant to Art. 51 (2) CISG the buyer may declare the contract avoided in its entirety if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of contract. Whether a breach of contract is fundamental depends on Art. 25 CISG. Pursuant to Art. 25 CISG a breach of contract committed by the seller will be fundamental if it results in such a detriment to the buyer as substantially to deprive him of what he is entitled to expect under the contract. This Article refers to the buyer's subjective interest in performance.¹⁰⁶ SUPERB expected to keep up with the pace of the technical progress by entering into a contract with Respondent and to make significant cost savings from the new system overtime.¹⁰⁷ The control system has no use for SUPERB before it is installed and SUPERB's expectations cannot be fulfilled.

¹⁰³ Bin Cheng, General Principles in Law 134 (1953).

¹⁰⁴ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 3, at 411.

¹⁰⁵ Claimant's Ex. No. 4.

¹⁰⁶ Schlechtriem/UN-Kaufrecht, supra note 54, at 68.

¹⁰⁷ Procedural Order No. 2, Factual Questions No. 23.

Issue III: SUPERB Was Authorized to Sell the Control System and the Sale Was Made by An Appropriate Means Pursuant to Art. 88 (1) CISG

In the following it will be demonstrated that SUPERB was authorized to sell the control system pursuant to Art. 88 (1) CISG [A.] and the sale was made by an appropriate means [B.].

A. SUPERB Was Authorized to Sell the Control System Pursuant to Art. 88 (1) CISG

SUPERB was authorized to sell the control system pursuant to Art. 88 (1) CISG. Pursuant to Art. 88 (1) CISG a party, who is bound to preserve the goods in accordance with Arts. 85 and 86 CISG, may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the costs of preservation, provided that reasonable notice of the intention to sell has been given to the other party. First, SUPERB was bound to preserve the control system in accordance with Art. 86 (1) CISG; second, there has been an unreasonable delay by Respondent in repaying the purchase price; and third, SUPERB has given reasonable notice to Respondent of the intention to sell the control system.

1. SUPERB Was Bound to Preserve the Control System in Accordance with Art. 86 (1) CISG

SUPERB was bound to preserve the control system in accordance with Art. 86 (1) CISG. According to Art. 86 (1) CISG a buyer, who has received the goods and intends to exercise any right under the contract or the Convention to reject them, must take such steps to preserve them as are reasonable in the circumstances.

SUPERB received the contractually agreed control system on 20 August 1996.¹⁰⁸ Furthermore, after receiving the control system SUPERB has not only intended, but in fact exercised his right to reject the control system by avoiding the contract on 9 October 1996. The buyer intends to exercise his right to reject if he asserts the avoidance of the contract pursuant to Art. 49 (1) CISG.¹⁰⁹ From the content of the declaration of avoidance it must be obvious that the buyer is no longer willing neither to perform his own obligation nor to accept performance by the seller.¹¹⁰ On 9 October 1996, SUPERB informed Respondent that the contract is cancelled.¹¹¹ As a result, it is obvious that SUPERB was no longer interested in Respondent's performance and that he was no longer willing to fulfil his own contractual obligation, i.e. to pay the agreed price.

¹⁰⁸ Statement of Claim I.5.

¹⁰⁹ See Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 3, at 673.

¹¹⁰ Anton K. Schnyder & Ralf Michael Straub, in Honsell, supra note 10, at 562.

¹¹¹ Claimant's Ex. No. 6.

2. There Has Been an Unreasonable Delay by Respondent in Repaying the Purchase Price

There has been an unreasonable delay by Respondent in repaying the purchase price pursuant to Art. 88 (1) CISG.

First, the demanded repayment of the purchase price amounting to \$400,000 is object of Art. 88 (1) CISG, since SUPERB was authorized to demand restitution and therefore to make the return of the control system dependent on repayment. Even though Art. 88 (1) CISG only presupposes an unreasonable delay in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, nevertheless the buyer, who has declared the avoidance of the contract and who has already paid the purchase price, has the right to resell the goods, if the seller causes an undue delay in repayment of the price.¹¹² If the buyer's right to reject the goods is based on his avoidance of the contract, and the purchase price has already been paid, the buyer has the right to make the restitution under Art. 81 (2) CISG of the goods dependent on the repayment of the price.¹¹³ Pursuant to Art. 81 (2) CISG, in case of an avoidance the party, who has performed the contract either wholly or in part, may claim restitution from the other party of whatever the first party has supplied or paid under the contract.

Respondent caused an unreasonable delay by not repaying the price as demanded. SUPERB was authorized to demand the repayment of the purchase price amounting to \$400,000 as restitution, since he exercised his legal right to declare the contract avoided.¹¹⁴ Moreover, SUPERB also paid a part of the purchase price amounting to \$400,000 on 22 August 1996 as agreed.¹¹⁵

Second, the obligation of repayment was not fulfilled by Respondent¹¹⁶ and therefore caused an unreasonable delay since 13 March 1997. An unreasonable delay is a delay in excess of what is normal in the particular case.¹¹⁷ If the parties are in dispute with each other about the right to avoid the contract, the repayment will have to be delayed, however, until the confrontation has come to a deadlock.¹¹⁸ A confrontation comes to a deadlock when no new essential arguments can be exchanged.¹¹⁹

Already on 9 October 1996, when SUPERB declared the contract avoided, he informed Respondent by letter of 9 October 1996 that they were holding the control system for Respondent's account and that he would have

¹¹² Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 3, at 681; Dietrich Maskow, in Enderlein/Maskow, supra note 4, at 360.

¹¹³ Dietrich Maskow, in Enderlein/Maskow, supra note 4, at 360.

¹¹⁴ Supra, pages 11 et seq.

¹¹⁵ Statement of Claim I.5.

¹¹⁶ Claimant's Ex. No. 9; Statement of Claim I.11.

¹¹⁷ Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 3, at 681.

¹¹⁸ Dietrich Maskow, in Enderlein/Maskow, supra note 4, at 360.

¹¹⁹ Id.

returned it to Respondent upon the return of the redemanded purchase price.¹²⁰ During the negotiations between both parties for the next four months SUPERB has consistently insisted that Respondent should return the advance payment and Respondent claimed that SUPERB had no right to avoid the contract.¹²¹ If such a dispute lasts four months and no agreement is reached¹²² it can be concluded that the essential arguments have been exchanged and that the dispute has come to a deadlock.

3. SUPERB Has Given Reasonable Notice to Respondent of the Intention to Sell the Control System

SUPERB has given reasonable notice to Respondent of the intention to sell the control system. A notice of intention to sell is reasonable if it is given within a reasonable time interval before carrying out the sale¹²³ and if it contains a monition for the seller, that he may take steps to avoid the self-help sale and the indicated sale can only be understood as a self-help sale.¹²⁴

First, SUPERB gave the notice before carrying out the sale within a reasonable time interval of ten days. A notice of the intention to sell is given within a reasonable time interval before carrying out the sale if the seller has enough time to avert the self-help sale by meeting his obligations.¹²⁵ SUPERB informed Respondent about his intention to sell the control system by his letter dated 13 March 1997 and indicated that he would sell the control system if Respondent will not have reimbursed the purchase price amounting to \$400,000 within the next ten days, i.e. by 24 March 1997.¹²⁶ The transfer of a payment is a common and simple operation in commercial and banking practice and thus not a subject to a specific risk.¹²⁷ For this reason, a period of ten days is suitable to transfer \$400,000 as repayment. Moreover, Respondent was solvent in regard to the repayment of the purchase price within the ten days fixed by SUPERB. SUPERB has previously paid Respondent the amount of \$400,000.¹²⁸ Respondent knew that the installation by RELIABLE was “a difficult situation”.¹²⁹ Hence, Respondent knew about the risk of a non-installation by RELIABLE and was aware of the fact that he had to put the sum of \$400,000 aside.

¹²⁰ Claimant's Ex. No. 6.

¹²¹ Statement of Claim I.10 and 11; Claimant's Ex. No. 7, 8, 9.

¹²² Claimant's Ex. No. 9.

¹²³ Bundestags-Drucksachen, 11/3076 61; Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 3, at 682; Ulrich Magnus, in Staudinger, supra note 3, at 678.

¹²⁴ Jorge Barrera Graf, in Bianca/Bonell, supra note 3, at 629; Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 3, at 682.

¹²⁵ Cf. Rolf H. Weber, in Honsell, supra note 10, at 1052.

¹²⁶ Claimant's Ex. No. 9.

¹²⁷ Alfons Humpert, in Geld-, Bank- und Börsenwesen 611 (G. Obst, O. Hintner eds., 1993); Thomas Hartmann & Andreas Pflingsten & Martin Weber, Bankbetriebslehre 730 et seq. (1998); Wolfgang Grill & Hans Perczynski, Wirtschaftslehre des Kreditwesens 532 et seq. (1997); Gerd Sandkühler, Bankrecht 85 (1993).

¹²⁸ Statement of Claim I 5.

¹²⁹ Claimant's Ex. No.5.

Respondent has not given a declaration of insolvency to SUPERB as well.

Second, the notice contains a monition for the Respondent, that he may take steps to avoid the self-help sale and can only be understood as a self-help sale. With regard to the content it is relevant to indicate how long the entitled party wants to wait.¹³⁰ By the letter of 13 March 1997 SUPERB informed Respondent that he would sell the control system if Respondent will not reimburse \$400,000 within the next ten days.¹³¹ Furthermore, SUPERB did not sell on his own account, but he indicated that he wanted to reimburse himself from the proceeds of the sale.¹³²

B. The Sale Was Made by an Appropriate Means

The sale was made by an appropriate means. Means are appropriate if a reasonable person of the same kind as the party, obligated to preserve the goods, would choose them in the same circumstances, e.g. the using of the service of an officially authorized auctioneer or by a broker,¹³³ and if the chosen means promise a reasonable price.¹³⁴

Although the list price for the control system “Ex Works” was \$390,000 in 1997, Respondent realized that the system could not be sold for this amount in all probability.¹³⁵ For this reason Respondent advised SUPERB not to sell the control system for less than \$290,000.¹³⁶ SUPERB sold it for \$250,000 and does not dispute that Respondent - as a firm specialized in the business of selling control systems - may have been able to sell it for a better price.¹³⁷ However, it cannot be expected that SUPERB may reach the same amount in the sale of a control system as a specialized firm can. Furthermore, regard must be given to the fact that Respondent only estimated the proceeds from the sale at about \$290,000.¹³⁸ It must be taken into consideration that Respondent had no buyer for the system at this amount or proved that \$290,000 could be reached in a sale.¹³⁹ Moreover, SUPERB used the service of an experienced broker to avoid inappropriate proceeds from the sale of the control system.¹⁴⁰ Additionally, as the President of this Tribunal has determined, the price of \$250,000 realized in the sale of the system was a fair price for a system sold by a broker experienced in the sale of similar equipment.¹⁴¹

¹³⁰ Dietrich Maskow, in Enderlein/Maskow, supra note 4, at 361.

¹³¹ Claimant’s Ex. No.5.

¹³² Id.

¹³³ Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 3, at 682.

¹³⁴ Dietrich Maskow, in Enderlein/Maskow, supra note 4, at 359; Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 3, at 682.

¹³⁵ Cf. Respondent’s Ex. No. 6.

¹³⁶ Respondent’s Ex. No. 6.

¹³⁷ Defense to Counterclaim and Reply to Request for Joinder of Third Party No. 3.

¹³⁸ Procedural Order No. 3, Clarifications No. 4.

¹³⁹ Id.

¹⁴⁰ Defense to Counterclaim and Reply to Request for Joinder of Third Party No. 3.

¹⁴¹ Procedural Order No. 2; Factual Questions No. 3.

Issue IV: If Respondent Qualifies Under Art. 79 (1) and (2) (a) CISG For Exemption From Paying Damages as a Result of the Delayed Installation of the Control System, RELIABLE Shall Not Be Joined to This Arbitration As It Was Requested by Respondent

Even if this Tribunal should come to the conclusion that Respondent qualifies under Art. 79 (1) and (2) (a) CISG for exemption from paying damages as a result of the delayed installation of the control system, RELIABLE shall not be joined to this arbitration as it was requested by Respondent. First, no respective arbitration agreement exists between SUPERB, Respondent and RELIABLE. Second, even if this Tribunal should find that an agreement to join RELIABLE to the arbitral proceedings conducted between SUPERB and Respondent can be derived from the contract concluded between SUPERB and Respondent as well as from the one concluded between Respondent and RELIABLE, nevertheless the contractually agreed prerequisites for joining RELIABLE are not met in the case at hand. Third, even if this Tribunal comes to the conclusion that the prerequisites for joining RELIABLE to this arbitration are met, this joinder would endanger the award's enforceability.

A. No Respective Arbitration Agreement Exists Between SUPERB, Respondent and RELIABLE

No respective arbitration agreement exists between SUPERB, Respondent and RELIABLE. There are two types of multiparty arbitration known as “joinder” and “consolidation” that exclude each other.¹⁴²

“Joinder” is defined as the uniting of different persons acting as one party to the arbitration.¹⁴³ A “joinder” involves only one arbitral agreement and one dispute arising thereunder, with a third party being allegedly responsible for that dispute.¹⁴⁴ In the described type of procedure neither the bilateral structure of the arbitration is changed,¹⁴⁵ nor is there a need to modify the applicable process rules.

“Consolidation” is the uniting of two separate arbitration processes into one hearing before the same panel of arbitrators.¹⁴⁶ A “Consolidation” may involve disputes arising from two or more arbitral agreements, or two or more disputes arising from the same agreement, which could technically be resolved separately.¹⁴⁷ The usual two-

¹⁴² C.C.A. Voskuil & J.A. Wade, Domestic Law – Conflict of Laws – Multiparty Arbitration 129 (1985) [hereinafter Voskuil & Wade/Multiparty Arbitration]; David St. John Sutton & John Kendall & Judith Gill, Russell on Arbitration 105 (1997) [hereinafter Russell on Arbitration].

¹⁴³ Klaus Lionnet, Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit 205 (1996) [hereinafter Lionnet/Schiedsgerichtsbarkeit].

¹⁴⁴ Isaak I. Dore, Theory and Practice of Multiparty Commercial Arbitration with Special Reference to the UNCITRAL Framework 41 (1990) [hereinafter Dore/Multiparty Arbitration].

¹⁴⁵ Lionnet/Schiedsgerichtsbarkeit, supra note 143, at 209.

¹⁴⁶ Voskuil & Wade/Multiparty Arbitration, supra note 142, at 129.

¹⁴⁷ Dore/Multiparty Arbitration, supra at 144, at 41.

party-structure of the arbitration¹⁴⁸ is deviated and all parties involved must have a consensual agreement about the process rules. The most common example for a consolidation of two processes is a claim filed by a buyer against a seller which himself made a second contract with a subcontractor.¹⁴⁹

A multiparty arbitration process requires that all parties possibly involved must declare their consent either to a consolidation of two claims or to the joinder of a third party.¹⁵⁰

First, the three parties involved did not agree on a “joinder”; and second, the three parties involved also did not agree on a “consolidation”.

1. The Three Parties Involved also Did Not Agree on a “Joinder”

The three parties involved also did not agree on a “joinder”. It is true that RELIABLE and Respondent agreed to “joinder”, but SUPERB did not. Clause No. 14 of the contract dated 7 June 1996 between Respondent and RELIABLE contains an agreement for “joinder”.¹⁵¹ It was laid down that “RELIABLE agrees to defend CONTROLS against that portion of the claim based on the alleged failure”¹⁵² caused by RELIABLE. Even after the contract had been concluded RELIABLE confirmed that he would defend the action on Respondent’s behalf.¹⁵³ Thus RELIABLE merely agreed to join in a bilateral arbitration. There are no procedural agreements except the usual two-party-arbitration-clause for possible claims between Respondent and RELIABLE.

In contrast to this clause, in clause No. 24 of the contract dated 10 June 1996 Respondent and SUPERB agreed on “consolidation”.¹⁵⁴ This clause states that the “Buyer agrees that the claim of Seller against the supplier may be settled in the arbitration between Buyer and Seller”.¹⁵⁵ From the wording of the contract and the party’s intention at the time of the conclusion of the contract it has to be concluded that SUPERB as well as Respondent desired to conduct a possible arbitration process with three independent parties and more than one claim.

Furthermore, SUPERB did not agree on a “joinder” after the conclusion of the contract. In the Defense to Counterclaims SUPERB resists Respondent’s request for “joinder” since “the request is not in accord with the

¹⁴⁸ Russell on Arbitration, *supra* note 142, at 104.

¹⁴⁹ Id.

¹⁵⁰ Dore/Multiparty Arbitration, *supra* note 144, at 41; Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 184 (2nd ed., 1991); Lionnet/Schiedsgerichtsbarkeit, *supra* note 143, at 211, 217; Berger/Arbitration, *supra* note 41, at 311, 312; Jens-Peter Lachmann, Handbuch für die Schiedsgerichtspraxis 273 (1998) [hereinafter Lachmann/Schiedsgerichtsbarkeit].

¹⁵¹ Claimant’s Ex. No. 1.

¹⁵² Respondent’s Ex. No. 1, clause 14.

¹⁵³ Respondent’s Ex. No. 7.

¹⁵⁴ Claimant’s Ex. No. 1.

¹⁵⁵ Claimant’s Ex. No. 1, clause 24.

arbitration agreement between Claimant and Respondent in the contract of 10 June 1996".¹⁵⁶ From this it has to be concluded that SUPERB is not willing to accept any process that differs from the process as contractually agreed.

2. The Three Parties Involved Did Not Agree on a „Consolidation“

The three parties involved did not agree on a “consolidation” since RELIABLE has not declared his consent to “consolidation”. The necessity of prior consent of a supplier which might join the arbitration between Respondent and SUPERB is required by clause No. 24 of the contract between Respondent and SUPERB. In this contract it is laid down that “Buyer agrees that the claim of Seller against supplier may be settled in the arbitration between Buyer and Seller, provided that the supplier agrees to have the claim of Seller against [him] settled in the arbitration”.¹⁵⁷ RELIABLE did not agree to the settlement of a claim against him.

First, the contract between Respondent and RELIABLE does not contain any respective agreement. RELIABLE merely accepted financial liability for damages caused by a mistake in connection with his contractual obligations.

By letter dated 3 August 1998 RELIABLE confirmed that he would just “defend the action on [Respondent’s] behalf”.¹⁵⁸ This does not comprise any statement whether RELIABLE would agree to have a possible claim against him settled in the arbitration between SUPERB and Respondent. Additionally, the contract between Respondent and RELIABLE does not contain a special multiparty arbitration clause since the parties chose the standard arbitration clause recommended by the AAA.¹⁵⁹ The use of a standard arbitration clause normally leads to a two-party-arbitration.¹⁶⁰

Second, the faxed letter from RELIABLE to Respondent dated 3 August 1998 does not contain any consent to a consolidation of arbitral proceedings. By the statement that he “would be bound by the result in respect of any claim”¹⁶¹ Respondent might have against him, RELIABLE rather acknowledges merely financial liability concerning this Tribunal’s award.

¹⁵⁶ Defense to Counterclaims and Reply to Request for Joinder of Third Party No. 4.

¹⁵⁷ Claimant’s Ex. 1, clause 24.

¹⁵⁸ Respondent’s Ex. No. 7.

¹⁵⁹ Respondent’s Ex. No. 1, clause 13, Standard Clause American Arbitration Association (visited 13 October 1998) <www.adr.org/rules/international_arb_rules.html>.

¹⁶⁰ Cf. Hubertus W. Labes, Schiedsgerichtsvereinbarungen in Rückversicherungsverträgen 32 (1996).

¹⁶¹ Respondent’s Ex. No. 7.

B. The Contractually Agreed Prerequisites for Joining RELIABLE to the Arbitration Conducted Between SUPERB and Respondent Are Not Met

Even if this Tribunal should find that an agreement to join RELIABLE to the arbitral proceedings conducted between SUPERB and Respondent can be derived from the contract concluded between SUPERB and Respondent as well as from the one concluded between Respondent and RELIABLE, nevertheless the contractually agreed prerequisites for joining RELIABLE are not met in the case at hand. The prerequisites stated within the contract between SUPERB and Respondent for joining RELIABLE to the arbitration are not met, since new questions of law would arise through the joinder of RELIABLE. In clause No. 24 of the contract dated 10 June 1996 SUPERB and Respondent agreed to a possible settlement of the “claim by Seller against the supplier[.]” provided that “the claims of Seller against the supplier raise no new question of law or fact from those to be decided in the arbitration between Buyer and Seller”.¹⁶²

New questions of law will arise. First, the law applicable to the contract between Respondent and RELIABLE are the UNIDROIT Principles. Parties can agree on the UNIDROIT Principles as the proper law governing a contract.¹⁶³ Respondent and RELIABLE agreed that their “contract shall incorporate and be governed by the UNIDROIT Principles of International Contract Law”.¹⁶⁴ In contrast to this, the contract between SUPERB and Respondent refers to the CISG. According to Art. 28 (1) AAA-Rules the tribunal shall apply the substantive law designated by the parties as applicable to the dispute. Therefore, the question is raised which kind of law is applicable to the interpretation of conduct or fact in Respondent’s claim against RELIABLE. Generally, the CISG would be applicable to the contract, because Hanseatica and Equatoriana are parties to the CISG. However, in the case at hand the incorporation of the UNIDROIT Principles in the contract between Respondent and RELIABLE¹⁶⁵ can be interpreted as if the Principles themselves constitute the proper law of the contract and discard the CISG.¹⁶⁶

Second, even if this Tribunal should find that the UNIDROIT Principles cannot constitute the proper law of the contract between Respondent and RELIABLE, however, the application of the UNIDROIT Principles as a

¹⁶² Claimant’s Ex. No. 1.

¹⁶³ Klaus Peter Berger, International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts, in The American Journal of Comparative Law, Vol. XLVI, No. 1 129, 133 (1998) [hereinafter Berger/Arbitral Practice].

¹⁶⁴ Respondent’s Ex. No. 1, clause 12.

¹⁶⁵ Respondent’s Ex. No. 1.

¹⁶⁶ See Hans van Houtte, The UNIDROIT Principles of International Commercial Contracts, in Arbitration International, Volume 11, No. 4 381 (1995) [hereinafter van Houtte/UNIDROIT Principles]; Berger/Arbitral Practice, supra note 163, at 133.

gap-filling instrument leads to a result that is different from the resolution made exclusively under the CISG. The incorporation of the UNIDROIT Principles in the contract between Respondent and RELIABLE binds the parties only to the extent that they do not affect the rules of the CISG from which the parties may not derogate.¹⁶⁷ Thus, the UNIDROIT Principles are used to interpret or to fill gaps in the CISG.¹⁶⁸ That the UNIDROIT Principles fill gaps in the CISG is supported by the dispute between an Austrian and a Swiss Company: The contract between these parties was governed by the CISG, and the sole arbitrator filled the gap to be found in the Convention as to the applicable rate of interest by applying the annual London International Bank Offered Rate (LIBOR) plus two percent which is referred to the rule laid down in Art. 7.4.9(2) of the UNIDROIT Principles.¹⁶⁹ Without reference to the UNIDROIT Principles the same sole arbitrator might have applied a different interest rate.

C. Joining RELIABLE Would Endanger the Award's Enforceability

Even if this Tribunal comes to the conclusion that the prerequisites for joining RELIABLE to this arbitration are met, this joinder would endanger the award's enforceability. According to Art. 27 AAA-Rules the award "shall be final and binding on the parties". Therefore, this Tribunal is obliged to ensure an enforceable award.¹⁷⁰ First, an award violating the principles of international public policy is unenforceable under the New York Convention.¹⁷¹ Second, RELIABLE'S waiver of the right to participate in the creation of the Tribunal violates the international public policy.

1. An Award Violating the Principles of International Public Policy Is Unenforceable Under the New York Convention

An award violating the principles of international public policy is not enforceable under the New York Convention.

First, the standards of enforceability of arbitral awards are referred to in the New York Convention, to which Danubia, Equatoriana, Hanseatica and Mediterraneo are contracting states.¹⁷² Under Art. V (2) (b) New York Convention the recognition and enforcement of an award may be refused for certain reasons. Although the question of enforcement of an arbitral award has to be decided by a national court applying the international

¹⁶⁷ Van Houtte/UNIDROIT Principles, *supra* note 166, at 381.

¹⁶⁸ Berger/Arbitral Practice, *supra* note 163, at 133.

¹⁶⁹ Michael Joachim Bonell, The UNIDROIT Principles in Practice: The Experience of the First Two Years, in *Uniform Law Review*, NS-Vol. II 34, 41,42 (1997).

¹⁷⁰ Cf. Russell on Arbitration, *supra* note 142, at 10-11.

¹⁷¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958, 330 U.N.T.S. 38-49.

¹⁷² Procedural Order No. 2, Legal Questions No. 2.

public policy,¹⁷³ the reasons mentioned in Art. V (2) (b) New York Convention constitute the fundamental principles of commercial arbitration, called international public policy.¹⁷⁴ The fact that this international standard exists is underlined by the aim and object of the Convention, which is “[t]o unify the standards by which agreements to arbitrate are observed”.¹⁷⁵ The principles of international public policy are covered to a large extent by the international public policy of the nations which signed the Convention.¹⁷⁶

Second, an award violating the New York Convention may not be enforced. The enforcement of the arbitral award may be refused if the award is contrary to the international public policy.¹⁷⁷ An award violating the international public policy will also violate the public policy of whatever state where enforcement of the award is sought.¹⁷⁸ The consequence is the abolition of the award.¹⁷⁹

2. RELIABLE’S Waiver of the Right to Participate in the Creation of the tribunal Violates the International Public Policy

RELIABLE’S waiver of the right to participate in the creation of the tribunal before a conflict arises is against international public policy because it violates the principle of all parties’ equality. Parties’ equality is one of the basic principles in arbitration and is laid down in Art. 16 (1) AAA-Rules and Art. 18 UNCITRAL Model Law. The equality of the parties guarantees justice and introduces trust to the parties.¹⁸⁰ The conflicting parties must have equal rights to choose their arbitrators.¹⁸¹ This is to avoid disadvantages for one of the conflicting parties before they become aware of the consequences relating from the arbitration.¹⁸² In the case at hand RELIABLE waived his right to participate in the creation of the arbitral tribunal. To prove that this conduct leads to an unenforceable award, SUPERB respectfully draws the attention of this Tribunal to the case Sociétés BKMI et

¹⁷³ See Albert Jan van den Berg, The New York Arbitration Convention of 1958 361 (1994) [hereinafter van den Berg/Convention].

¹⁷⁴ Franz Satmer, Verweigerung der Anerkennung ausländischer Schiedssprüche wegen Verfahrensmängeln 149 (1994) [hereinafter Satmer/Verfahrensmängel]; van den Berg/Convention, supra note 173, at 361; Felix Dasser, Internationale Schiedsgerichtsbarkeit und lex mercatoria 282 (1984).

¹⁷⁵ Van den Berg/Convention, supra note 173, at 363, citing United States Supreme Court Reports (1972).

¹⁷⁶ Satmer/Verfahrensmängel, supra note 174, at 149.

¹⁷⁷ Cf. Jan Paulsson, Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment (LSA), in The ICC International Court of Arbitration Bulletin Vol. 9, No. 1 14, 17 (1998).

¹⁷⁸ Van den Berg/Convention, supra note 173, at 361.

¹⁷⁹ Karl Heinz Schwab, Die Gleichheit der Parteien bei der Bildung des Schiedsgerichts, in Betriebs-Berater, 15. Beilage 17, 18 (1992) [hereinafter Schwab/Gleichheit der Parteien]; see New York Convention Art. V 2 b.

¹⁸⁰ Klaus Peter Berger, Schiedsrichterbestellung in Mehrparteienschiedsverfahren, in Recht der Internationalen Wirtschaft 702, 706 (1993) [hereinafter Berger/Schiedsrichterbestellung in Mehrparteienschiedsverfahren].

¹⁸¹ Schwab/Gleichheit der Parteien, supra note 179, at 17; cf. Johannes Trappe, The Arbitration Proceedings. Fundamental Principles and Rights of the Parties, in Journal of International Arbitration Vol. 15 No. 3 93, 96-98 (1998).

¹⁸² Schwab/Gleichheit der Parteien, supra note 179, at 18; Berger/Schiedsrichterbestellung in Mehrparteienschiedsverfahren, supra note 180, at 706.

Siemens c. société Dutco¹⁸³ decided by the French Cour de Cassation in 1992. The Court decided that the waiving of the right to participate in the creation of the arbitral tribunal before a conflict has arisen was against the international public policy, since the waiver was made before a conflict arose and therefore hindered the recognition of a tribunal award.

III. Conclusion

In view of the above submissions, SUPERB respectfully asks this Tribunal

- to declare that Respondent may not refer to Arts. 79 (1) and (2) (a) CISG for exemption from paying damages as a result of the delayed installation
- to declare that SUPERB was authorized to avoid the contract on 9 October 1996 pursuant to Art. 49 (1) (b) CISG
- to declare that SUPERB was authorized to sell the control system and the sale was made by an appropriate means pursuant to Art. 88 (1) CISG
- if the Tribunal should find that respondent qualifies under Art. 79 (1) and (2) (a) CISG for exemption from paying damages as a result of the delayed installation of the control system, to declare that RELIABLE shall not be joined to this arbitration as it was requested by Respondent.

Additionally, SUPERB respectfully asks this Tribunal

- to burden the costs of arbitration on Respondent pursuant to Art. 33 AAA-Rules.

For Superb Paper, Plc.

_____, December 4th, 1998
(Andreas Doose) (Daniela Gentzsch) (Cornelia Groth)

Attorneys

¹⁸³ Judgement of 7 January 1992, Cour de Cassation No. 42 P + R (France), translated in Betriebs-Berater, 15. Beilage 27 (1992); Lachmann/Schiedsgerichtsbarkeit, supra note 150, 273; Schwab/Gleichheit der Parteien, supra note 179, at 19.