

German Institution of Arbitration (DIS)

Arbitral proceedings
EQUAFILM CO./MEDIPACK S.A.
DIS-SV-B-Moot 10

EQUAFILM CO.
Claimant

v.

MEDIPACK S.A.
Respondent

Procedural Order No. 2

Following the procedure agreed upon by the parties and set forth in Procedural Order No. 1, the parties have submitted a number of requests for clarifications. The responses to those requests are set forth below.

General

1. What are the languages spoken in Mediterraneo and Equatoriana?

There is a local language in both countries. They both typically employ English for any international transactions. The telephone conversations, contract and all the correspondence was in English.

2. What do S.A. and GmbH in the names of the companies signify?

These are forms of business organization of a corporate nature.

Applicable Law

3. Was Mediterraneo a party to the United Nations Convention on Contracts for the International Sale of Goods?

No, it was not.

4. Has Equatoriana made any reservations or declarations in regard to the CISG?

No.

5. Under the law of Equatoriana what is the relationship between a treaty and the domestic law on the same subject, e.g., the domestic law of sales and the CISG?

A treaty is considered to enter the domestic legal order and give rights and obligations to private individuals. Where a treaty covers a narrower subject area than the domestic law, such as the international sale of goods in contrast to all sales of goods, the treaty would be given precedence.

6. Are Equatoriana and Mediterraneo civil or common law jurisdictions?

Both fall outside either clear category. They have often been referred to in the literature as mixed jurisdictions.

7. Are Mediterraneo, Equatoriana and Danubia parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes.

8. Are Mediterraneo, Equatoriana and Danubia parties to any other multilateral or bilateral conventions concerning arbitration that might be relevant?

No.

9. Are Mediterraneo, Equatoriana and Danubia members of the European Union? Have they adopted the Convention on the Law Applicable to Contractual Obligations (Rome Convention, 19 June 1980)?

No, none of the three are members of the European Union. Although none of the three are party to the Rome Convention, they all have the same choice of law rule in regard to commercial sales of goods; the law applicable to the contract and to any question as to whether a contract was concluded is the law of the seller's country.

10. Has the UNCITRAL Model Law on International Commercial Arbitration been adopted in Danubia, Equatoriana and Mediterraneo?

It has been adopted in all three countries. It has also been adopted in Germany in a slightly modified form.

11. What is the period of limitations/prescription in Equatoriana?

Two years.

Arbitration

12. Is the English language version of the German Institution of Arbitration (DIS) Arbitration Rules an official text?

Although the footnote to the rules indicates that the English language version is a translation and that only the German text is authoritative, the translation can be relied upon. It should be noted that the arbitration clause in the contract provides that the arbitration will be in English (and the rules of the Moot provide that the Moot will be in English).

13. Why did Equafilm wait for over a year before commencing the arbitration?

Equafilm had been attempting to persuade Medipack to purchase from it once again. It was only after those efforts failed that Equafilm decided to commence legal proceedings, i.e., the arbitration.

Challenge

14. What rules govern the challenge of Dr.?

The challenge is governed by the German Institution of Arbitration (DIS) Arbitration Rules, Sections 15 and 18.

15. Why did Mr. Comstock in his letter to Mr. Bredow of 17 June 2002 refer to Section 1040(1) of the German Arbitration Law?

He was simply indicating that he was aware that in Germany, as well as in Danubia, the challenge would be considered by the Arbitral Tribunal and not by the Institution, as is the case in many arbitral institutions. He might also have referred to the German Institution of Arbitration (DIS) Arbitration Rules, Section 18.2.

16. Did Dr. know that his law firm would merge with Multiland Associates effective 1 January 2003 when he accepted to become an arbitrator in this dispute?

There had been discussions with Multiland Associates about merging but no firm agreement had been reached.

17. When did Dr. learn that the office of Multiland Associates in Faraway City, Oceania had represented Equafilm Co.?

He first learned of it on 12 August 2002. He then inquired as to the nature of the representation and received the information on 20 August 2002.

18. What was the nature of the representation of Equafilm?

There were two matters. One was the purchase by Equafilm of a small company in Oceania. The other was an intellectual property dispute with another firm in Oceania. Although there is no continuing representation of Equafilm, Multiland Associates has every expectation of representing them again in Oceania. Multiland Associates has not represented Equafilm any other place and has no particular expectations of doing so.

19. What is Dr.'s role in the law firm?

He was a partner in the firm that is merging and will be a partner in the merged firm. A partner's share in the profits of the firm is in large part determined by the profits of the individual office and in part determined by the profits of the total firm.

20. Will Dr. keep the entire amount of his fee as an arbitrator or will some or all of it be part of the firm's revenue?

The fee will part of the firm's revenue, but he will be given credit for having brought the work into the firm.

21. Has Dr.'s law firm or Multiland Associates ever represented Medipack?

No.

22. How large is Multiland Associates?

After the merger on 1 January 2003 Multiland Associates will have 15 offices in 12 countries. There will be 75 partners and 216 associates.

23. Will Dr. be isolated from any information about Equafilm that would be available because of the prior representation of it by the Faraway City, Oceania of Multiland Associates?

Dr. would not have access to the files of those representations unless he asked for them. There is no reason to believe that he would have any information arising out of Multiland Associates' representation of Equafilm.

24. Would the withdrawal or successful challenge of the arbitrator cause delay or additional expense to the parties to the arbitration?

Yes, there would be delay before a replacement arbitrator was nominated and confirmed. In a real arbitration there would have been a separate hearing on the challenge. That would have increased the expenses.

25. Is there any known reason why Dr. did not withdraw as an arbitrator once he was challenged?

Nothing beyond what he said in his letters, i.e., that he did not consider that the merger of the law firms and the fact that the office in Faraway City, Oceania had represented Equafilm would in any way affect his impartiality and independence as an arbitrator in the arbitration.

26. Is there any particular reason why Equafilm nominated Dr. as an arbitrator?

This is the first time he has been nominated by Equafilm in any arbitration. He is a person with a good reputation in the field, as is true of all the arbitrators in this matter.

27. What is the position of Equafilm in regard to the challenge to Dr.?

According to the DIS Arbitration Rules, Section 18.3, if either the challenged arbitrator or the non-challenging party agree to the challenge, a replacement arbitrator will be nominated. Equafilm did not reply to comment on the challenge at the time it

was made. Therefore, under Section 18.2 the challenge goes to the Arbitral Tribunal for decision. Equafilm is supporting the decision of Dr. not to withdraw.

28. Why are the names of the arbitrators omitted in the Problem?

In the oral arguments in the Moot there will be three arbitrators who would obviously not have the same names as the arbitrators in the (fictitious) arbitration. In the oral argument the challenged arbitrator should be referred to as “Dr. Arbitrator”. There will be no designation as to which of the three arbitrators on the panel is the challenged arbitrator. Even though the problem suggests that all the arbitrators are male, except perhaps Dr., female members of the panel should be addressed appropriately.

29. Why are the declarations of the two other arbitrators not included in the Problem file?

The desire was simply to reduce the size of the file by two pages. Both declarations were filed. The Respondent nominated arbitrator and the Chairman fulfill all the requirements to serve and there is no challenge to either of them.

Arbitration Clause

30. Was the arbitration clause in clause 13 of the contract of 15 December 2000 a negotiated term?

No, it was in the contract terms proposed by Equafilm Co. and accepted by Medipack S.A. That was also true of the choice of law clause, clause 12. The contract terms have been proposed in all of Equafilm’s contracts of sale since November 1999 when its forms were revised. On occasion they have been rejected by the purchasing party, usually in favor of its own terms. Medipack had had no prior experience with such a clause.

31. Does either party have a history of arbitrating before the DIS or other arbitral organizations?

This was the first time either party had sought, or had been brought into, an arbitration before the DIS. Both had been respondents in several arbitrations conducted by other arbitration organizations. Neither had previously been the claimant.

32. Has there ever existed an organization with the name “German Arbitration Association”?

No. There have been prior arbitration organizations in Germany, including in the former German Democratic Republic. Their official names were always in German and they did not translate as “German Arbitration Association”. That is true of DIS as well. DIS is the only institution currently existing in Germany that conducts international commercial arbitrations, other than in certain commodity trades.

33. Was either party aware that there was no organization by the name of the German Arbitration Association?

As far as can be determined, no one realized it prior to the preparation of the statement of claim.

Formation of the Alleged Contract and its Termination

34. During their telephone conversation of 3 April 2001 did Mr. Storck and Mr. Black agree to contract on the same terms as in the contract of 15 December 2000 except for the quantity, delivery dates and list price?

The two letters of 3 April 2001, Claimant's Exhibits Nos. 3 and 4, express fairly the understanding of the two men as to what was said in the telephone conversation. There is no transcript or recording of the conversation. They are in agreement that during the telephone conversation there was no explicit mention of the discount to be applied. There was mention of the fact that the list price had gone up to \$1,900 per ton, but not of the price after application of the relevant discount.

35. Does Equatoriana have a separate Commercial Code?

No. There is no formal field of "commercial law" as there is in some countries. Normally references to "commercial law" cover such matters as are listed in the second footnote to article 1 of the UNCITRAL Law on International Commercial Arbitration. See also, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article 1(3). The "domestic" law of Equatoriana is applicable to both domestic and international transactions, unless otherwise indicated. Prior to the coming into force of the CISG in Equatoriana, the domestic law of sales was applied to international contracts of sale without exception.

36. What is the situation under the domestic law of Equatoriana when the two parties both think they have formed a contract but they disagree as to the agreed upon price?

As already indicated, Equatoriana is very strict in requiring full agreement on the price in order to create a contract. Although a court may inquire as to whether there really was agreement on the price, if there was no such agreement, there is no contract. If there has been full or partial performance, compensation may be awarded to the performing party on theories of quasi-contract. Failure to agree on the price is not considered to be grounds for invalidity under theories of mistake or otherwise. Though such a strict rule has often been criticized, the domestic law of Equatoriana is clear on this and Equafilm does not contest that.

The text of CISG Article 14 is not identical to the domestic law of Equatoriana.

37. Has Equafilm routinely offered new customers an 8% discount in the past?

No. It had given such a discount several times in the past on first orders, but it was rare. It did so in this case as a special inducement to Medipack because it expected to receive significant orders over time. It was aware that Medipack had been purchasing substantial amounts of polypropylene film from Polyfilm GmbH. Equafilm expected to, and did, supply the polypropylene film from its normal production.

38. Was a 4% discount always the best price from Equafilm?

That was the discount it gave to its regular customers. Except for those few occasions when it had given an 8% discount, the 4% discount was its best price.

39. Did Medipack know of Equafilm's discount practice?

Not beyond what it was told in regard to the current transactions as reflected in the Claimant's exhibits.

40. What is the discount practice in the polypropylene film industry?

The practice is much like that of Equafilm. Discounts are often given to regular customers. There may be special discounts given for special reasons. It would not be possible to say that there is a "trade practice". The 8% discount was high as far as industry practice goes, but not outrageously so.

41. Are there other trade practices in the industry relevant to this dispute?

There are no other practices in the industry that could be taken to be "trade practices" in the sense of CISG Article 8(2).

42. Is polypropylene film perishable?

No, not within any time period relevant to the dealings between Equafilm and Medipack.

43. Have there been any business dealings between Equafilm and Medipack prior to the contract of 15 December 2000?

There had been only one purchase of a different grade of film in 1996.

44. In Mr. Black's letter of 3 April 2001 (Claimant's Exhibit No. 3) he states that a purchase order will be sent within a week whereas in Mr. Storck's letter of the same date (Claimant's Exhibit No. 4) he thanks Mr. Black for the order. What order is referred to by Mr. Storck?

Although a purchase order was to be sent at a later time, Mr. Storck has considered Mr. Black's letter, confirming what was said on the telephone the same day, as an order. The letters were sent by fax in the sequence they are set out as exhibits. Because of the lack of agreement on the price that became evident, no purchase order was ever sent. In this situation where there had been an exchange of letters following the telephone conversation, the function of the purchase order would have been simply to regularize the documentation of what had already been agreed.

45. In Mr. Black's letter of 6 April 2001 (Claimant's Exhibit No. 5) he seems to indicate that he had just received Mr. Storck's confirmation of the order. If Mr. Storck's letter was sent by fax, why did it take so long for Mr. Black to receive it?

Mr. Black had been away from his office on 4 and 5 April 2001. The fax from Mr. Storck had arrived in the afternoon of 3 April but Mr. Black did not see it until 6 April 2001.

46. Why did Mr. Storck not reply to Mr. Black prior to 9 April 2001?

Mr. Storck did not himself receive the fax on Friday, 6 April 2001 but only on Monday, 9 April 2001.

47. Why did Mr. Storck wait until 27 April 2001 to inquire as to Medipack's intentions regarding the second contract?

There is no clear answer to the question and certainly not one that would be known to both parties at this stage of the arbitration.

48. Were all communications between Mr. Storck and Mr. Black by fax?

All the communications were sent by fax with the original sent by the post.

49. Were all of the letters signed by the authors even if that is not indicated on the copy in the exhibits to the Statement of Claim?

Yes.

50. How much was the list price for OPP at Polyfilm GmbH when Medipack purchased from them and how much did Medipack pay?

The list price was the same as at Equafilm, i.e., \$1,900 per ton. Medipack has not told how much it paid to Polyfilm and has no intention of doing so.

51. Does the indication "CIF" in the purchase price refer to Incoterms 2000? If so, why is the buyer paying the CIF charges?

Yes, the CIF term is to be interpreted in accordance with Incoterms 2000. Therefore, the contract price includes cost of the goods, insurance and freight. The calculation of the contract price is often done by adding the three elements together. The most important aspect of the contract being CIF is that the seller contracts with the insurance and freight carriers while, for example, in an FOB contract it is the buyer that contracts for them.

Damages

52. Did the contract of 15 December 2000 contain any provisions specifying that the price included a discount or relating to damages or interest?

No.

53. Had Equafilm begun manufacturing the polypropylene film for the alleged second contract prior to Mr. Black's clear rejection of any contract in his letter of 2 May 2001?

No. The polypropylene would not have been manufactured specifically for the contract with Medipack but would have been supplied from stock. The product is a standard product.

54. Was Equafilm able to sell the film produced for Medipack to someone else?

As noted, there was no film specifically produced for Medipack. Equafilm had the manufacturing capacity to produce the anticipated quantities for Medipack in addition to that it produced for other customers.

55. Did Medipack know that Equafilm had a gross margin of 22%?

No. Of course it knew that Equafilm had a gross margin sufficient to cover a share of the fixed costs and to yield a profit. The gross margin was of the list price. It should be remembered that it was stated in Procedural Order No. 1 that the factual basis for the alleged gross margin of 22% might have to be proven in later proceedings in the (fictional) arbitration but that it was to be accepted at the present time. This is considered reasonable since a gross margin of 22% is about what can be expected in the industry.

56. Did Equafilm incur any expenses in connection with the booking of shipping space for 25-28 April 2001 or for 5 May 2001?

No. It had reserved the space, but was able to cancel the reservation with no cost.

57. In para. 18 of the Statement of Claim interest is requested in regard to four payments. Is that correct?

That is what the Claimant requested.

58. Were the nine shipments to be of approximately 150 tons each?

Yes

(Signed) _____
President of the Tribunal

5 November 2002