

Singapore International Arbitration Centre
Equapack, Inc. v. Medi-Machines, S.A., Vis Moot 11 East 1
Procedural Order No. 3

1. To what extent are the parties bound by Procedural Order No. 2?

Procedural Order No. 2 was issued by the President of the arbitral tribunal after consultation with the parties. Consequently, the parties may not go beyond the four questions that are set out. Specifically, no discussion of monetary compensation by way of restitution of the purchase price, damages, interest or the like should be included either in the memoranda or in the oral arguments. If the arbitral tribunal were to decide that there was a breach of the contract, the amount of monetary compensation would be in issue. That would not take place during the period of the Moot, but in subsequent hearings in the arbitration (that would not be part of the Moot). Questions relating to the relationship between Mr. Arbitrator 1 and Mr. Langweiler are also not to be raised. Not only do they not appear in Procedural Order No. 2, but SIAC Rule 13.1 provides that a challenge to an arbitrator must be made within 14 days after the circumstances that would give rise to the challenge became known. That was not done.

As noted in Procedural Order No. 2, para. 3, SIAC Rule 17 gives the arbitral tribunal broad authority to determine the procedure to be followed in the absence of agreement of the parties on a particular procedure. Specifically, it gives the tribunal the authority to determine whether any amendment to the statement of case or the statement of defense should be allowed. Therefore, in the arbitration [not the Moot] the parties would be able to request the tribunal to allow them to raise new claims or defenses, so long as those claims or defenses were within the perimeters of the arbitration agreement. Until such a request was made and granted, arguments going to those claims or defenses would not be allowed.

In regard to the question as to whether “the condition of the Model 14 machines constitute[d] fundamental breach and [whether] the letter of 19 October 2002 from Mr. Swan to Mr. Drake constitute[d] a declaration of avoidance of the contract”, any argument relative to fundamental breach or a declaration of avoidance may be raised.

2. Are Equatoriana and Mediterraneo party to the CISG?

Yes, and they made no declarations when acceding to the Convention.

3. Are Equatoriana and Mediterraneo common law or civil law countries?

The law of Equatoriana is based on that of England while the law of Mediterraneo is based on that of Italy. Neither country is a member of the European Union.

Equatoriana does not, however, give more consideration to decisions of the English courts than it does to those of any other country.

4. What court in Danubia, if any, would be competent to issue an order in respect of this arbitration?

When Danubia adopted the UNCITRAL Model Law on International Commercial Arbitration it specified in Article 6 of the Model Law that the competent court for matters arising under the Model Law would be the Commercial Court in Vindobona. Danubia made no amendments or additions to the Model Law when adopting it.

5. Are there any agreements between Danubia, Equatoriana or Mediterraneo relevant to enforcing arbitral awards other than the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)?

No.

6. Have Equatoriana, Danubia or Mediterraneo enacted the UNCITRAL Model Law on Cross-Border Insolvency?

Although none of the three has enacted the Model Law, all three have insolvency laws that implement the same policies as are found in the Model Law.

7. What does the title “Advocate at the Court” mean?

Lawyers go under various headings in different countries. Advocate at the Court is one of those. It would carry the idea that the person is authorized to represent clients before the court of his or her country. Whatever other significance it might have would depend on the law of the country in question.

8. Did Equapack, Inc. and Medi-Machines, S.A. enter into any agreement other than what is set out in the Statement of Case?

No, except that only that part of Medi-Machines, S. A.’s General Conditions relevant to the dispute have been reproduced. There was no guarantee of performance in the General Conditions.

9. Does it normally fall under a works manager’s responsibility to purchase packing machines?

Mr. Swan, Works Manager of Equapack, Inc., was given that responsibility.

10. How many years have Equapack, Inc. and Medi-Machines, S.A. been in business?

Both have been in business for over 30 years. When Equapack, Inc. began packaging small quantities of tea, coffee, rice, sugar and the like in 1997, it purchased one second hand auger feeder machine, which was sufficient for its purposes until the contract with A2Z.

11. Why did Medi-Machines, S.A. offer to arrange for shipping the machines and why did Equapack, Inc. accept that offer in spite of the fact that the contract was F.O.B.?

The use of a trade term such as F.O.B. designates, among other things, which shipping costs are to be paid by the seller and which by the buyer. The International Chamber of Commerce has standardized a number of those terms in its INCOTERMS, but there are other definitions in use, particularly in trade with the United States. In the case of F.O.B. (INCOTERMS), which is to be used only for voyages by sea, the seller pays the costs to the point the goods are loaded on the ship. It is the responsibility of the buyer to arrange for the ship and to inform the seller when and where, within the limits specified in the sales contract, the ship will be available for loading. When the goods in question are commodities, grain, ore, petroleum, etc., the buyer may own its own ships or regularly arrange for the carriage of the goods. However, when the buyer is an occasional purchaser, as in this case, the seller is more likely to have regular transport arrangements than is the buyer. In that case it is often agreed that the seller will arrange for the transport for the account of the buyer.

12. Why was the letter of credit opened for \$430,000 when the purchase price was \$390,000?

It is typical for a letter of credit to be opened for 10% more than the purchase to cover any unexpected additional costs.

13. How did Mr. Swan come to know that Medi-Machines, S.A. produced the kind of packing machines that would be required?

Mr. Swan had known of Medi-Machines, S.A. for some time. It is a well-known company in the field.

14. Did Mr. Swan or anyone else in authority at Equapack, Inc. know that salt is highly corrosive and might require special equipment?

Mr. Swan, as the Works Manager, was the responsible person. He will be prepared to testify that he did not know, and had no reason to know, that salt was so corrosive that it would require special equipment to handle it. He will be prepared to say that, if he had known, he would certainly not have used the Model 14 machines for packing salt without first making sure that they were appropriate for that purpose.

15. Has Medi-Machines, S.A. been involved previously in disputes about the quality of its product?

There have been complaints of one form or another over the years, as would be true of any firm, but no there has never been a legal action in court or arbitration.

16. Is salt considered to be “dry stuff”?

Yes. Of course it can get wet, but then it would not be in condition to be packed by Equapack, Inc.

17. Did Mr. Drake at any point refer Mr. Swan to Medi-Machines, S. A.'s literature or website prior to the conclusion of the contract?

No.

18. Was any technical literature on the Models 14, 16 or 17 furnished by Medi-Machines, S.A. to Equapack, Inc. prior to the conclusion of the contract?

No.

19. Did the technical literature furnished with the Model 14 machines when they were delivered meet all mandatory requirements of Mediterraneo and Equatoriana?

The mandatory requirements of the two countries in respect of commercial equipment sold to a commercial purchaser are limited to elements that go to health and safety. All of those requirements were met.

20. Has Equapack, Inc. visited the website of Medi-Machines. S.A. at any point of time?

They had not done so at any time before the dispute arose.

21. Is there a transcript of the telephone conversation of 23 July 2002 between Mr. Swan and Mr. Drake?

As indicated in the Statement of Defense, para. 6 a complete transcript would be furnished to Equapack, Inc. if it were willing to pay to have it done. Equapack could have requested the Tribunal to order a transcription to be prepared and included as one of the costs of the arbitration. However, it was not requested in the conference call of 1 October 2003 and was not included in Procedural Order No. 2. Therefore, no complete transcript can be made available at this stage of the arbitration.

22. What did Mr. Drake say during the telephone conversation of 23 July 2002 when he told Mr. Swan "that the Model 14 machines should not be used for salt?" (Claimant's Exhibit No. 7)

The tape recording does not indicate that he replied to Mr. Swan's statement about salt in that conversation. In the telephone conversation of 18 October 2002, when Mr. Swan telephoned to complain about the corrosion, Mr. Drake said that which he repeated in his letter of 27 October 2002, i.e. that salt was a special product and that the Model 17 machines were designed to pack it.

23. Could Medi-Machines, S.A. have stopped the shipment of the Model 14 machines immediately following the telephone conversation of 23 July 2002?

Yes. As indicated in Mr. Drake's telefax of 24 July 2002 (Claimant's Exhibit No. 4), the machines were packed for shipment but they were still at Medi-Machines, S.A.

24. Were the Model 14 machines installed by personnel from Medi-Machines, S.A. or by personnel from Equapack, Inc.?

They were installed by personnel from Equapack, Inc. The installation was not difficult technically and there were no problems in subsequent operation arising out of errors in installation.

25. Does the operations manual for the Model 14 machine include a warning against packing salt with it?

The word "salt" does not appear in the operations manual. All that it says that might be relevant is "The Model 14 is not intended for use with highly corrosive products." The operations manual that accompanied the machines was in English, a language that was understood by all of the relevant personnel at Equapack, Inc.

26. Are there other products for which the Model 14 machine would be inappropriate?

The Model 14 machine would be inappropriate for all other corrosive products. In addition, as stated by Mr. Drake in his letter of 3 July 2002, multi-head weighers would be more appropriate than auger-feeder machines for packing coarser products.

27. Do many companies pack salt using the type machines manufactured by Medi-Machines?

The vast majority of firms that pack dry bulk products into retail sized packages do not pack salt. However, enough do that there is a market for machines designed for that purpose.

28. When did Equapack, Inc. first notice that the machines were deteriorating?

As stated in the Statement of Case, para. 8, the signs of serious corrosion were evident by the end of September. In the nature of corrosion, it did not happen on a given date. No more precise information can be given.

29. Could the machines that had been damaged by salt-induced corrosion have been repaired by, for example, replacing the corroded parts?

The corrosion has affected such a large part of the machinery that it would not be feasible to repair or replace the corroded parts.

30. Were the machines tested by Eur. Ing. Franz van Heath-Robinson ones that had been used for the packaging of salt?

As provided in Procedural Order No. 1, para. 4, the machine delivered to Eur. Ing. Franz van Heath-Robinson for testing was one of the machines that had been

delivered to Equapack, Inc. but that had not been used for packaging salt. It showed no salt corrosion, either from exposure while at Equapack or during the sea voyage when it was delivered to Equapack. In addition, as noted in his report, he visited Equapack and observed the machines that had been used for packaging salt, but did not test them. A representative of Medi-Machines, S.A. was present when he visited Equapack.

31. Were the Model 14 machines routinely cleaned by Equapack, Inc. during the period they were used by it?

Since the machines were used for packing food, they were cleaned regularly and in accordance with all applicable standards and regulations. In particular, they were cleaned whenever there was a change in the product to be packed.

32. Why was the Model 14 machine discontinued?

The model was three years old when discontinued and that was sufficiently close to the average product cycle of five years. The model had not sold as well as had been expected when it was first introduced.

33. Was the Model 14 machines the least expensive machines that Medi-Machines, S.A. could offer at the time the proposal was made?

Yes. The six machines sold to Equapack, Inc. were the last that Medi-Machines, S.A. had in its inventory.

34. What was the industry standard for packaging of fine products using an auger-feeder?

Eur. Ing. Van Heath-Robinson has stated in his report that the average industry rate for both coarse and fine products was 180 bags per minute. It is understood that the average industry rate has not changed in recent years. The parties were represented when he made his tests. According to Procedural Order No. 2 the parties have waived their right to question Eur. Ing. Van Heath-Robinson in a hearing and have waived their right to present their own expert witnesses in regard to the quality of the Model 14 packaging machines. Therefore, the report must be accepted as accurate and self-explanatory in regard to all factual matters going to the quality of the Model 14 machines. As stated in Procedural Order No. 2, “[t]he parties are free to present their conclusions to the Tribunal as [to] the legal significance of the matters stated in the report.”

35. Why did Equapack, Inc. purchase six replacement machines?

Equapack needed six functioning machines to fully service the contract with A2Z.

36. Did Mr. Swan say anything in the telephone conversation of 18 October 2002 that could be taken as a declaration of avoidance of the contract?

Mr. Swan said orally that which he said in his letter of 19 October 2002 (Claimant's Exhibit No. 6), i.e. that Equapack could not use the machines and that Medi-Machines, S.A. should arrange to take them back.

37. Is there any agreement of confidentiality between Equapack, Inc. and Medi-Machines, S.A. apart from SIAC Rule 34.6?

No.

38. Is Equapack, Inc. under a duty to Equatoriana Investors to disclose the fact of the arbitration and the details of it?

The letter of Mr. Langweiler of 24 September 2003 accurately states the legal situation in Equatoriana. Each case must be considered individually as to whether the matters in question "materially affect" the financial or business situation of the firm to be purchased. The court decisions to which he refers were not based on any statutory provision and they did not involve arbitrations. The court decisions referred to included several of the Supreme Court of Equatoriana. None of the other exceptions to the duty of confidentiality set forth in SIAC Rules 34.6 apply to this arbitration.

39. Are Equatoriana Investors under any duty not to disclose knowledge acquired during the due diligence proceedings including knowledge about the arbitration proceedings?

As is typical of due diligence proceedings, Equatoriana Investors would be under a duty to Equapack, Inc. not to disclose knowledge acquired during the due diligence proceedings. It would have no duty to anyone else not to disclose what it might have learned.

40. Has Equapack, Inc. already disclosed anything about the arbitration to Equatoriana Investors?

No, not yet.

41. Equatoriana Investors was described as "one of the largest financial firms in Equatoriana." Is it large in terms of assets or in terms of the number of investors?

It is large in terms of assets. There are many investors in the firm, but only a few are engaged in the management of the firm.

42. Is Equapack, Inc. actually in the process of being purchased by Equatoriana Investors?

That is the expectation on both sides. The target date for completion of the sale of Equapack, Inc. to Equatoriana Investors is 12 May 2004. Of course, something may arise in the due diligence that would lead to a delay in the sale or even for Equatoriana Investors to decide not to proceed with the purchase. You can assume that as of the oral arguments in April 2004 nothing will have as yet occurred to delay the sale or

lead to its cancellation, but that the possibility is still open. The intended sale is of the company itself and not only of its assets.

43. Is there any further information in regard to Equapack, Inc.'s financial condition? Are the newspaper reports to be accepted as accurate?

The newspaper reports state that "Equapack's cash-flow problems seem to have begun in late 2002." There is no specific information given in the newspaper reports. The only way to know whether the newspaper reports are accurate when they report that Equapack, Inc. has a cash-flow problem, that it has been slow in paying its trade creditors and that it has sought additional bank financing would be if Equapack, Inc. were willing to furnish the information requested by Mr. Fasttrack in his letter of 1 September 2003. The newspapers referred to are reputable. Medi-Machines, S.A. has no information other than the newspaper reports.

44. How large a company is Equapack, Inc.?

There is no publicly available information in regard to the sales, profit or assets of Equapack, Inc. However, it has been estimated in a reputable publication that it has annual sales between US\$8,000,000 and US\$10,000,000.

45. What are the standards in Danubia for the ordering of security for costs?

Danubia has no experience with such requests in arbitration. It may be of interest to note that the Singapore International Arbitration Act, art. 12(1)(a) specifically authorizes an arbitral tribunal to order security for costs.

46. May we accept that the report of the International Arbitration Committee of the International Commercial Law Association is accurate in regard to the enforcement of arbitral awards in Equatoriana?

The report has been carefully prepared and the information contained therein can be accepted as being accurate. Mr. Fasttrack gives a fair description of its conclusions. Unfortunately, while the report on the enforcement of arbitral awards in Equatoriana was made available to the arbitral tribunal and to Mr. Langweiler (see the cc at the end of Mr. Fasttrack's letter of 1 September 2003), it is not possible for technical reasons to reproduce it in these clarifications.

47. What is the domestic law in Equatoriana concerning international commercial arbitration and, in particular, the enforcement of foreign arbitral awards?

Equatoriana has enacted the UNCITRAL Model Law on International Commercial Arbitration without amendment.

48. Does Equapack, Inc. have assets in any country other than Equatoriana that could be used to satisfy an award of costs against it?

No, all of Equapack's assets are in Equatoriana.

(Signed)
Prof. (Presiding Arbitrator)

4 November 2003