



CHRISTIAN-ALBRECHTS-UNIVERSITÄT ZU KIEL

GERMANY



MEMORANDUM
FOR
RESPONDENT

SIXTH ANNUAL

WILLEM C. VIS
INTERNATIONAL
COMMERCIAL ARBITRATION MOOT

1998-1999



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VIENNA, AUSTRIA
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TEAM MEMBERS

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ON SUBMISSION TO
AMERICAN ARBITRATION ASSOCIATION

MEMORANDUM FOR RESPONDENT

– CASE N^o. MOOT 6 –

ON BEHALF OF

ESSENTIAL CONTROLS, S.A.

26 EXPORT PL.
SOUTHSIDE CITY
EQUATORIANA

RESPONDENT

AGAINST

SUPERB PAPER, PLC.

123 INDUSTRIAL AVENUE
HIGHLANDS
MEDITERRANEO

CLAIMANT

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STATEMENT OF FACTS

Essential Controls, S.A. [hereinafter CONTROLS] is incorporated in the country of Equatoriana and is specialized in the production of control systems for various manufacturing processes, including the production of paper and paper products. On 10 June 1996 CONTROLS entered into a contract with Superb Paper, Plc. [hereinafter Claimant], who is incorporated in Mediterraneo and is a producer of paper and paper products. By this contract CONTROLS agreed to sell and install a computerized control system in the facilities of Claimant for a total price of \$500,000. The contract required a payment of \$400,000 to be made upon delivery of the control system. A further payment of \$50,000 was due ten days after final installation. The rest of \$50,000 had to be paid six months after the completion of the final testing.

Since CONTROLS was not authorized to install the control system in Mediterraneo himself, Claimant gave to consider that the installation and final testing should be done by Reliable Installation Co. [hereinafter RELIABLE], which is a small firm with a good reputation incorporated in Hanseatica. Claimant had prior experience with RELIABLE and found him to be a good firm to work with. Therefore CONTROLS entered into a contract with RELIABLE to do the installation and testing. Both the contract between CONTROLS and Claimant and the contract between CONTROLS and RELIABLE required that the installation and testing to be completed on or before 16 September 1996. CONTROLS made the stipulated delivery of the control system on 20 August 1996 and Claimant paid the agreed \$400,000 on 22 August 1996.

On 25 August 1996 the charter airplane in which the team from RELIABLE was flying to Mediterraneo crashed and the whole team was killed. The day after, RELIABLE notified CONTROLS of the air-crash and assured despite the loss of the whole installation team, that he could assemble a new team so that the installation should be completed by contract date. CONTROLS notified Claimant of the air-crash on 27 August 1996.

RELIABLE telephoned CONTROLS on 29 August 1996 to inform that there might be a delay of a few days in sending another installation team. This team was the only personnel qualified to install the control system, since unexpected problems with another installation had arisen. CONTROLS telephoned RELIABLE almost daily to inquire when it would commence the installation of the control system and to remind RELIABLE of the importance to meet the contract date. RELIABLE continuously assured CONTROLS that the installation team was about to leave for Mediterraneo. On 13 September 1996 CONTROLS sent RELIABLE a fax that, unless a firm date was given by which he would begin the installation at Claimant's premises, CONTROLS would have to turn to another firm. RELIABLE thereupon replied that he would give a firm date by 20 September 1996 at the latest.

Upon receipt of Claimant's fax on 18 September 1996 CONTROLS immediately sent a fax to RELIABLE stating that, if he did not send a new installation team to Claimant until 9 October 1996, CONTROLS would terminate the contract and seek a new firm to do the installation. Since RELIABLE had still not informed CONTROLS when the installation team would arrive in Mediterraneo, it remained doubtful whether the installation would be completed by Reliable, but Reliable gave no definite date when he would begin. Therefore, CONTROLS sent a fax to Claimant on 19 September 1996 asking whether Claimant would be satisfied by completion within the next six weeks, i.e. by 30 October 1996. CONTROLS did not get a reply until 9 October 1996 when Claimant faxed a notice that the contract was cancelled and that he would return the control system only upon return of the \$400,000. On 10 October 1996 CONTROLS telephoned and faxed to Claimant that he had insisted to RELIABLE that the installation had to be completed prior to 30 October 1996, and that it had been promised by RELIABLE that the installation would be completed by then. Claimant replied that it was too late and that the contract was already cancelled.

During the next four months CONTROLS pointed out in multiple oral negotiations and also by letters dated 17 February and 20 March 1997 that Claimant had no justifiable grounds for his alleged avoidance of the contract. CONTROLS demanded in his letter dated 17 February 1997 the control system to be returned to it promptly and he gave notice about the damages he had suffered. On 13 March 1997 Claimant wrote that, if CONTROLS did not return the \$400,000 within the following ten days, Claimant would sell the control system in its possession and reimburse himself from the proceeds. CONTROLS replied on 20 March 1997 reiterating the position he had taken in his letter of 17 February 1997 that Claimant was the party who had breached the contract. In this letter he specifically offered to reimburse Claimant the \$400,000 less his damages of \$70,000, since he wanted to settle this matter amicably. CONTROLS also warned Claimant that CONTROLS would hold Claimant responsible for the consequences if he would sell the control system, but Claimant failed to reply to that letter and sold the control system for \$250,000.

QUESTIONS ASKED BY THE TRIBUNAL

1. Does CONTROLS qualify under Article 79 (1) and (2)(a) CISG for exemption from paying damages as a result of the delayed installation of the control system?
2. Was Claimant authorized to avoid the contract on 9 October 1996 under Article 49 (1) (b) CISG?
3. Was Claimant authorized by Article 88 CISG to sell the control system on 4 April 1997 and was the sale made by an appropriate means?

4. If CONTROLS qualifies under Article 79 (1) and (2)(a) CISG for exemption from paying damages as a result of the delayed installation of the control system, should RELIABLE be joined to this arbitration as requested by CONTROLS?

SUMMARY OF RESPONDENT'S ARGUMENTS

I. CONTROLS is exempt from paying damages pursuant to Arts. 79(1) and (2)(a) CISG as a result of the delayed installation, since the prerequisites of Art. 79 CISG are fulfilled. To begin with, the air-crash constitutes an impediment within the meaning of Art. 79 CISG, since the death of Reliable's whole installation team constituted an unexpected change in circumstances. Furthermore, the delayed performance was due to the air-crash, as the air-crash is the exclusive cause of RELIABLE's delayed performance. The air-crash was beyond CONTROLS' sphere of control, since the air-crash was not in CONTROLS' typical sphere of risk. Moreover, CONTROLS did not enlarge his sphere of risk covering any impediment on the side of his subcontractor. CONTROLS could not reasonably be expected to have taken the air-crash into account at the time of the conclusion of the contract. Even if this Tribunal should come to the conclusion that the impediment is not the air-crash, but RELIABLE's delayed performance, this delay in performance was not foreseeable. Additionally, CONTROLS was not able to have overcome the consequences of the air-crash, since CONTROLS' requests were fully sufficient to remind RELIABLE of his duty to install the control system as soon as possible. Furthermore, engaging another installation firm was not an appropriate alternative, as CONTROLS was contractually bound to engage RELIABLE and engaging another firm did not seem to be necessary by any time. Finally, applying for a license to do the installation himself would not have been an appropriate alternative for CONTROLS.

II. Claimant was not authorized to avoid the contract on 9 October 1996. The contents of CONTROLS' letter dated 19 September 1996 barred Claimant from any right to avoid the contract on 9 October 1996 according to Art. 48 (2) CISG. To begin with, CONTROLS made a request for an additional period of time to install the control system pursuant to Arts. 48 (2), (4) CISG, which Claimant failed to respond to within a reasonable time. Additionally, CONTROLS was entitled to rely on Art. 48 (2) CISG being applicable, since CONTROLS' right to request an additional period of time for installation according to Art. 48 (2) CISG is not only in accordance with the terms of Art. 48 (2) CISG, but also with the policy behind Arts. 47, 48, 49 CISG. Furthermore, Claimant had no right to avoid the contract according to Art. 49 (1) (b) CISG, since the fixed additional period for installation until 9 October 1996 was not reasonable according to Art. 47 (1) CISG. In

addition, CONTROLS has not refused to install before expiration of the additional period of time ending on 9 October 1996 as fixed by Claimant. Moreover, Claimant's right to declare the contract avoided was limited according to Art. 51 (1) CISG. The delivery and the installation of the control system are two independent contractual obligations and the delivery of the control system was made in time. Additionally, Claimant cannot reasonably assert that his right to avoid is extended pursuant to Art. 51 (2) CISG, since the missing installation did not amount to a fundamental breach of contract.

III. Claimant was not authorized to sell the control system pursuant to Art. 88 CISG. Claimant had no right to sell the control system according to Art. 88 (2) CISG, since the control system was not subject to rapid deterioration and the preservation of the control system in the facilities of Claimant would not have incurred unreasonable expenses. Furthermore, Claimant had no right to sell the control system according to Art. 88 (1) CISG, as there was no unreasonable delay by CONTROLS in taking the control system back and in paying the costs of preservation. Moreover, Claimant gave no reasonable notice to CONTROLS.

IV. If this Tribunal decides that CONTROLS 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 be joined to this arbitration as it was requested by CONTROLS. CONTROLS, Claimant and RELIABLE consent to the joinder of RELIABLE to the arbitration, since CONTROLS and Claimant have agreed on the joinder of RELIABLE to the arbitration and CONTROLS and RELIABLE have agreed on the joinder of RELIABLE as well. Moreover, the joinder of RELIABLE to the arbitration is not prevented by RELIABLE's non-participation in the creation of the arbitral tribunal. Furthermore, the fact that CONTROLS and Claimant have agreed on a "consolidation" does not exclude an implicit agreement on a "joinder". RELIABLE's joinder to the arbitration is reasonable, since the joinder of RELIABLE will not lengthen and complicate the arbitration. Finally, the working relationship between Claimant and RELIABLE will not be disturbed by RELIABLE'S joinder.

ARGUMENTS

I. Jurisdiction

This Tribunal possesses jurisdiction to adjudicate this case, since Claimant 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, CONTROLS will demonstrate that: First, CONTROLS is exempt from paying damages pursuant to Arts. 79 (1) and (2)(a) CISG. Second, Claimant was not authorized to avoid the contract on 9 October 1996. Third, Claimant was not authorized to sell the control system pursuant to Art. 88 CISG. Fourth, if this Tribunal decides that CONTROLS 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 should be joined to this arbitration as it was requested by CONTROLS.

Issue I: CONTROLS Is Exempt from Paying Damages pursuant to Arts. 79 (1) and (2)(a) CISG

Contrary to Claimant's contentions,³ CONTROLS is exempt from paying damages as a result of the delayed installation of the control system pursuant to Arts. 79 (1) and (2)(a) CISG, since Art. 79 CISG does apply to this case. According to Art. 79 CISG a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. First, the air-crash constitutes an impediment within the meaning of Art. 79 CISG. Second, the delayed performance was due to the air-crash. Third, the air-crash was beyond CONTROLS' sphere of control.* Fourth, CONTROLS could not reasonably be expected to have

¹ Claimant's Ex. No. 1.

² Id.

³ Memorandum for Claimant, at 6-7.

* Additional Argument – Not in response to Claimant.

taken the air-crash into account at the time of the conclusion of the contract. Fifth, CONTROLS could not have overcome the consequences of the air-crash.

A. The Air-Crash Constitutes an Impediment Within the Meaning of Art. 79 CISG

In contrast to Claimant's assertion,⁴ the air-crash constitutes an impediment pursuant to Art. 79 CISG. The term "impediment" refers to an unexpected change in circumstances which prevents the promisor from performance of one of his contractual obligations.⁵ In the case at hand, RELIABLE's whole installation team died at once in that terrible air-crash. This tragic event was an unexpected change in circumstances which prevented CONTROLS from timely performance.

B. The Delayed Performance Was Due to the Air-Crash

Claimant's contention that "the plane crash and subsequent deaths of the installation team were not the events which prevented CONTROLS from finishing performance of the contract"⁶ is untenable, as the air-crash is the exclusive cause of RELIABLE's delayed performance.

For exemption from paying damages under Art. 79 CISG the delay in performance must be due to an impediment and thus the impediment must necessarily be the exclusive cause of the failure to perform.⁷ In the case at hand, the air-crash in which the installation team of RELIABLE had died, was the exclusive cause of the delayed installation, since the control system would surely have been installed in time, if the plane had not crashed. Claimant even acknowledged in his letter dated 10 October 1996 "that RELIABLE would have installed the control system within the contract period if there had not been the airplane crash".⁸

C. The Air-Crash Was Beyond CONTROLS' Sphere of Control

The air-crash was beyond CONTROLS' sphere of control. First, the air-crash was not in CONTROLS' typical sphere of risk. Second, CONTROLS did not enlarge his sphere of risk covering any impediment on the side of his subcontractor.

⁴ Memorandum for Claimant, at 7.

⁵ Denis Tallon, in Commentary on the UN Convention on the International Sales Law 575 (C.M. Bianca & M.J. Bonell et al. eds., 1987) [hereinafter Bianca/Bonell]; Peter Schlechtriem, Uniform Sales Law 102 (1986) [hereinafter Schlechtriem/Uniform Sales Law]; Ulrich Magnus, in Kommentar zum UN-Kaufrecht 988 (H. Honsell ed., 1997) [hereinafter Honsell].

⁶ Memorandum for Claimant, at 7.

⁷ Hans Stoll, in Commentary on the UN Convention of the International Sale of Goods 612 (P. Schlechtriem ed., 1998) [hereinafter Schlechtriem/Commentary on the CISG]; Denis Tallon, in Bianca/Bonell, supra note 5, at 538.

⁸ Claimant's Ex. No. 8.

1. The Air-Crash Was Not in CONTROLS' Typical Sphere of Risk

The air-crash was not in CONTROLS' typical sphere of risk, since the risk of losing a whole installation team in an air-crash was not covered by CONTROLS. Every promisor has a typical sphere of risk only within which it is objectively possible for him to secure the trouble-free passage of the measures necessary to perform the contract by measures of organization and appropriate control.⁹

In the present case the air-crash cannot be held to have been in CONTROLS' typical sphere of risk. The airplane was owned by a well respected charter company and it was flown by a pilot of that company.¹⁰ CONTROLS had no control over any element concerning the flight itself. Thus, the flight was not in CONTROLS', but in the charter company's sphere of risk.

2. CONTROLS Did Not Enlarge His Sphere of Risk Covering Any Impediment on the Side of His Subcontractor

CONTROLS did not enlarge his sphere of risk covering any impediment on the side of his subcontractor, since Claimant himself suggested RELIABLE as the company to install the control system. Claimant might argue that the promisor should be fully liable for failures concerning his contractual obligations even if a third person was engaged to perform those. But the range of the promisor's sphere of risk is not set by one party, but by the parties' contractual agreement and their intention during the conduct of the contract.¹¹ CONTROLS submits that an extension of risk would have required that CONTROLS had chosen the subcontractor. In the case under consideration, Claimant has suggested that the installation and testing of the control system should be done by RELIABLE.¹² This proposal was even entered into the contract between CONTROLS and Claimant.¹³

D. CONTROLS Could Not Reasonably be Expected to Have Taken the Air-Crash into Account at the Time of the Conclusion of the Contract

Contrary to Claimant's allegations,¹⁴ CONTROLS could not reasonably be expected to have taken the air-crash into account at the time of the conclusion of the contract between CONTROLS and Claimant [1.].

⁹ Hans Stoll, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 7, at 610; Ulrich Magnus, *in* Honsell, *supra* note 5, at 987; *cf.* Dietrich Maskow, *in* *International Sales Law* 322 (F. Enderlein & D. Maskow eds., 1992) [hereinafter Enderlein/Maskow].

¹⁰ Procedural Order No. 2, Factual Question No. 20.

¹¹ Hans Stoll, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 7, at 613; Ulrich Magnus, *in* Honsell, *supra* note 5, at 987; Ulrich Ziegler, *Leistungsstörungsrecht nach dem UN-Kaufrecht* 219 (1995) [hereinafter Ziegler/*Leistungsstörungsrecht*].

¹² Statement of Defense and Counterclaim, Fact No. 5.

¹³ Claimant's Ex. No. 1, clause No. 4.

¹⁴ Memorandum for Claimant, at 8.

Even if this Tribunal should come to the conclusion that the impediment is not the air-crash, but, as Claimant alleged,¹⁵ RELIABLE's delayed performance, this delay in performance was not foreseeable [2.].

First, the air-crash could not reasonably be taken into account at the time of conclusion of the contract. An impediment can only reasonably be taken into account if it is foreseeable.¹⁶ 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.¹⁷ This rule does not require "foreseeability per se".¹⁸ It means that events, which are given general foreseeability,¹⁹ or which are general risks like traffic accidents,²⁰ do not have to be taken into account if they are not expected to materialize before the contract is performed.²¹ In the case at hand the air-crash could not be taken into account by the time of contract negotiations. There were no indications that the air-plane, which was owned by a well regarded charter company and flown by a pilot of that company²² and which was chartered by RELIABLE, might crash.

Second, even if this Tribunal should come to the conclusion that the impediment is not the air-crash, but, as Claimant alleged,²³ RELIABLE's delayed performance, this delay in performance was not foreseeable. Contrary to Claimants contentions, the effect of the air-crash on the performance of the contract, i.e. the installation by RELIABLE was delayed, was not foreseeable by the time of the conclusion of the contract, either. CONTROLS' and Claimant's knowledge that RELIABLE is a small firm²⁴ did not imply that there might be a delay in performance that could be expected by the time of contract negotiations. It did not also imply a knowledge about how many teams qualified to do the installation work RELIABLE had. Therefore, Claimant's contention that "CONTROLS knew that RELIABLE had a limited number of employees qualified to perform the SUPERB installation"²⁵ is not tenable.

¹⁵ Memorandum for Claimant, at 7.

¹⁶ Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 7, at 611; Denis Tallon, in Bianca/Bonell, supra note 5, at 580.

¹⁷ Denis Tallon, in Bianca/Bonell, supra note 5, at 580 et seq.; Ulrich Magnus, in Honsell, supra note 5, at 989.

¹⁸ Denis Tallon, in Bianca/Bonell, supra note 5, at 581; Dietrich Maskow, in Enderlein/Maskow, supra note 9, at 323.

¹⁹ Dietrich Maskow, in Enderlein/Maskow, supra note 9, at 323 et seq.; cf. Ulrich Magnus, in Honsell, supra note 5, at 989; cf. Ziegler/Leistungsstörungsrecht, supra note 11, at 219.

²⁰ Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 7, at 612.

²¹ Dietrich Maskow, in Enderlein/Maskow, supra note 9, at 324.

²² Procedural Order No. 2, Factual Question No. 20.

²³ Memorandum for Claimant, at 7.

²⁴ Statement of Defense and Counterclaim, Fact No. 5.

²⁵ Memorandum for Claimant, at 8.

E. CONTROLS Was Not Able to Have Overcome the Consequences of the Air-Crash

In contrast to Claimant's allegation,²⁶ CONTROLS was not able to have overcome the consequences of the air-crash. A promisor is required to take necessary steps to prevent the occurrence of the impediment and to preclude the consequences of any impediment.²⁷ First, CONTROLS did everything in his power to secure the installation of the control system. Second, Claimant hindered CONTROLS to fulfill his obligation to install.

1. CONTROLS Did Everything in His Power to Secure the Installation of the Control System

Claimant has submitted that CONTROLS failed to take the necessary steps to overcome the consequences of the air-crash. He claims that any of CONTROLS' actions to remind RELIABLE to perform the installation were "merely polite requests" and CONTROLS did not take any steps to secure "the services of a different firm to complete the installation".²⁸ However, CONTROLS' requests were fully sufficient to remind RELIABLE of his duty to install the control system as soon as possible [a], and engaging another installation firm was not an appropriate alternative [b]. Additionally, applying for a license to do the installation himself would not have been an appropriate alternative for CONTROLS [c]*.

a) CONTROLS' Requests Were Fully Sufficient to Remind RELIABLE of his Duty to Install the Control System As Soon As Possible

CONTROLS' requests were fully sufficient to remind RELIABLE of his duty to install the control system as soon as possible, since RELIABLE was well aware of the seriousness of CONTROLS' requests and therefrom he knew about the seriousness of the installation of the control system.

Pursuant to Art. 8 (1) CISG, statements of a party have to be interpreted according to its intent where the other party knew that intent or could not have been unaware of it. In the present case, CONTROLS' requests, while being in polite business language, were serious, determined and demanding. RELIABLE knew that intent, as the circumstances did not allow any other interpretation. RELIABLE knew that the control system was to be installed, he knew of the importance of an installation as soon as possible and he had been informed by CONTROLS that he would be forced to engage a different installation firm if RELIABLE had not begun installation until 9 October 1996.

²⁶ Memorandum for Claimant, at 9-10.

²⁷ Denis Tallon, in Bianca/Bonell, supra note 5, at 581; Hans Stoll, in Schlechtriem/Commentary on the CISG, supra note 7, at 612; cf. Ulrich Magnus, in Honsell, supra note 5, at 989.

²⁸ Memorandum for Claimant, at 9.

* Additional Argument – not in response to Claimant.

b) Engaging Another Installation Firm Was Not an Appropriate Alternative

Engaging another installation firm was not an appropriate alternative, as first, CONTROLS was contractually bound to engage RELIABLE, and second, engaging another firm never seemed to be necessary.

First, CONTROLS was contractually bound to engage RELIABLE to perform the installation and final testing of the control system.²⁹ Claimant never indicated his willingness to derogate from this requirement and to accept a different installation firm. Claimant's statement in his letter dated 18 September 1996, by which he mentioned that he wondered why CONTROLS had "not looked to some another firm",³⁰ was a mere obiter dictum in this regard. To ascertain the meaning of this statement, this Tribunal should give due consideration to the relevant circumstances, including prior and subsequent conduct. In multiple telephone calls on 30 August, 4, 9 and 12 September 1996³¹ and the faxed letter dated 13 September 1996,³² Claimant continuously referred to RELIABLE as the one and only firm to do the installation. Additionally, it was Claimant, who suggested that installation and final testing of the control system should be done by RELIABLE.³³ Furthermore, Claimant was informed by CONTROLS with letter dated 19 September 1996³⁴ that RELIABLE would begin installation "within the next three weeks" and did neither object to it.

Second, engaging another installation firm never seemed necessary to secure the installation of the control system. There were never ever any indications that RELIABLE would not be able to perform the contract. Although RELIABLE had considerable difficulties after one of his teams was killed in the air-crash, CONTROLS was convinced that RELIABLE would perform his duties and that this performance would be accepted by Claimant. On 16 September 1996 RELIABLE had informed CONTROLS that the installation team would arrive soon.³⁵ CONTROLS had no reason to doubt this, since RELIABLE had a good reputation and recommended by Claimant. Furthermore, Claimant had announced that RELIABLE would begin installation at the latest on 9 October 1996. Since Claimant continuously had insisted on RELIABLE doing the installation, CONTROLS had to interpret Claimant's silence as a willingness to accept such performance. Thus, there was no reason to engage another installation firm.

²⁹ Claimant's Ex. No. 1, clause No. 4.

³⁰ Claimant's Ex. No. 4.

³¹ Claimant's Ex. No. 4.

³² Claimant's Ex. No. 3.

³³ Statement of Defense and Counterclaim, Fact No. 5.

³⁴ Claimant's Ex. No. 5.

³⁵ Respondent's Ex. No. 3.

c) Applying for a License to Do the Installation Himself Would Not Have Been an Appropriate Alternative for CONTROLS

Applying for a license to do the installation himself would not have been an appropriate alternative for CONTROLS, since CONTROLS has never had a reason to apply for a license to do electrical work in Mediterraneo himself. In the case at hand, CONTROLS and Claimant have agreed that RELIABLE should do the installation work.³⁶ It was for sure that RELIABLE would have been able to perform the complete installation even after the air-crash. Therefore, there was no need for CONTROLS to have applied for a license himself at any time. Furthermore, it is our submission that the licensing would probably last a long time. It is generally known that it will take a long time since applications will have passed through the administrative channel. It is not clear how long the application of a license in Mediterraneo would last and whether CONTROLS would have got this special license in such a short term.

2. Claimant Hindered CONTROLS to Fulfill His Obligation to Install

CONTROLS was not able to have overcome the consequences of the air-crash, since Claimant hindered CONTROLS to fulfill his obligation to install. Claimant has denied performance of the installation by RELIABLE at 10 October 1996. When he informed Claimant in his letter dated 10 October 1996 that RELIABLE's second team qualified to the job would begin the installation by 14 October 1996 and would complete the job already at 25 October 1996.³⁷ Opposite to Claimant's earlier conduct, by which he accepted a delay in complete performance until 30 October 1996,³⁸ Claimant denied any installation by RELIABLE in his letter to CONTROLS³⁹ by saying that "it is too late now" and that he "entered into a replacement contract with Bridget Controls GmbH".

Issue II: Claimant Was not Authorized to Avoid the Contract on 9 October 1996

Claimant argues that he was authorized to avoid the contract on 9 October 1996.⁴⁰ However, this assertion is based neither in law nor in fact. First, the contents of CONTROLS' letter dated 19 September 1996 barred Claimant from any right to avoid the contract on 9 October 1996 according to Art. 48 (2) CISG. Second, Claimant was not even entitled to avoid the contract according to Art. 49 (1)(b) CISG. Third, even if this

³⁶ Claimant's Ex. No. 1, clause No. 4.

³⁷ Claimant's Ex. No. 7.

³⁸ See *supra*, page 10.

³⁹ Claimant's Ex. No. 8.

⁴⁰ Memorandum for Claimant, at 10 et seq.

Tribunal should find that CONTROLS' letter dated 19 September 1996 did not bar Claimant from avoiding the contract and Claimant had a right to avoid the contract, this right was limited pursuant to Art. 51 (1) CISG.

A. The Contents of CONTROLS' Letter Dated 19 September 1996 Barred Claimant From Any Right to Avoid the Contract on 9 October 1996 According to Art. 48 (2) CISG

In contrast to Claimant's assumption,⁴¹ the contents of CONTROLS' letter dated 19 September 1996 barred Claimant from any right to avoid the contract on 9 October 1996 according to Art. 48 (2) CISG, since this letter contains a request for an additional period of time to install the delivered control system. If the seller requests the buyer to make known whether he will accept performance and the buyer fails to respond to the request within a reasonable time, the seller may perform within the time indicated in his request according to Art. 48 (2) CISG. During that period the buyer is not entitled to resort to any remedy inconsistent with performance. Especially buyer's right to avoid the contract is barred.⁴² In the present case, CONTROLS made a request for an additional period of time to install the control system pursuant to Arts. 48 (2), (4) CISG [1.], which Claimant failed to respond to within a reasonable time [2.]. Additionally, although Claimant asserts that CONTROLS was not entitled to rely on Art. 48 (2) CISG being applicable, the opposite holds true [3.].

1. CONTROLS Made a Request for an Additional Period of Time to Install the Control System Pursuant to Arts. 48 (2), (4) CISG

CONTROLS made a request for an additional period of time to install the control system pursuant to Arts. 48 (2), (4) CISG. Such a request according to Art. 48 (2) CISG must contain the question whether the buyer is willing to accept late performance and a specified period of time.⁴³ This request becomes effective when it is received by the buyer pursuant to Art. 48 (4) CISG. In his faxed letter dated 19 September 1996,

⁴¹ Memorandum for Claimant, at 19-21.

⁴² Fritz Enderlein, in Enderlein/Maskow, supra note 9, at 189; Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 7, at 412; Alexander Lüderitz, in Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Schuldrecht II 2295 (H. Th. Soergel et al. eds., 1991) [hereinafter Soergel]; Rolf Herber & Beate Czerwenka, Internationales Kaufrecht 223 (1991) [hereinafter Herber/Czerwenka]; Burghard Piltz, Internationales Kaufrecht: Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung 229 (1993) [hereinafter Piltz/Internationales Kaufrecht]; Uta Gutknecht, Das Nacherfüllungsrecht des Verkäufers bei Kauf- und Werklieferungsverträgen 346 (1997) [hereinafter Gutknecht/Nacherfüllungsrecht]; Martin Karollus, UN-Kaufrecht 145 (1991) [hereinafter Karollus/UN-Kaufrecht]; Peter Schlechtriem, Internationales UN-Kaufrecht 100 (1996) [hereinafter Schlechtriem/UN-Kaufrecht].

⁴³ Michael Will, in Bianca/Bonell, supra note 5, at 354; Ulrich Magnus, in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG) 406 (J. von Staudinger et al. eds., 1994) [hereinafter Staudinger]; Herber/Czerwenka, supra note 42, at 223; Gert Reinhart, UN-Kaufrecht 119 (1991) [hereinafter Reinhart/UN-Kaufrecht]; Gutknecht/Nacherfüllungsrecht, supra note 42, at 343; Friederike Hohoff, Das Nacherfüllungsrecht des Verkäufers 14 (1998) [hereinafter Hohoff/Nacherfüllungsrecht].

CONTROLS asked Claimant whether he would be satisfied with an installation of the control system done by 30 October 1996.⁴⁴ Hereby CONTROLS offered a subsequent performance within the following six weeks. Furthermore, CONTROLS informed Claimant that he “await[ed] [Claimants’] reply”.⁴⁵ By Claimant’s own admission, he received CONTROLS’ letter dated 19 September 1996.⁴⁶

2. Claimant Failed to Respond to CONTROLS’ Request Within a Reasonable Time

Claimant failed to respond to CONTROLS’ request within a reasonable time. The reasonableness of the period within the buyer has to answer depends on the circumstances of each case.⁴⁷ Generally, the buyer has to answer within a short period of time.⁴⁸ Especially in situations where the buyer is in the position to decide promptly a very short period is held to be reasonable.⁴⁹ Then the buyer can be expected to react as quickly as possible.⁵⁰ Moreover, the previous flow of information between the parties must be taken into account when defining the reasonableness of the period.⁵¹ Claimant received CONTROLS’ request on 19 September 1996,⁵² but until 9 October 1996 - within the following three weeks - he neither sent a letter to CONTROLS nor did he call him to respond to the request as he was obliged to under Art. 48 (2) CISG. Moreover, in his letter dated 9 October 1996 Claimant did not refer sufficiently to CONTROLS’ request, either.

Even if Claimant should try to convince this Tribunal that this letter constituted an objection against an installation until 30 October 1996 as offered by CONTROLS, it is to emphasize that this letter was not dispatched until three weeks had passed, although Claimant has had the possibility to respond earlier. Claimant had prepared to give up the contract before 9 October 1996⁵³ and had negotiated with Bridget Control GmbH over a replacement contract since 16 September 1996.⁵⁴ Thus, it was already decided by 19 September 1996 that Claimant would object to subsequent installation until 30 October 1996. Furthermore, Claimant himself asserts that he was already on 19 September 1996 certain about objecting to the offered subsequent delivery.⁵⁵ Both Claimant and CONTROLS were in the habit of exchanging

⁴⁴ Claimant’s Ex. No. 6; Statement of Defense and Counterclaim I.10.

⁴⁵ Id.

⁴⁶ Statement of Claim I.7.

⁴⁷ Michael Will, in Bianca/Bonell, supra note 5, at 355; Gutknecht/Nacherfüllungsrecht, supra note 42, at 346, 347.

⁴⁸ Ulrich Magnus, in Staudinger, supra note 43, at 406, 407.

⁴⁹ See Fritz Enderlein, in Enderlein/Maskow, supra note 9, at 188.

⁵⁰ See Michael Will, in Bianca/Bonell, supra note 5, at 354.

⁵¹ Gutknecht/Nacherfüllungsrecht, supra note 42, at 345.

⁵² Supra note 46.

⁵³ Statement of Claim I.8.

⁵⁴ Procedural Order No. 2, Factual Question No. 9.

⁵⁵ Memorandum for Claimant, 19 et seq.

information by letter⁵⁶, fax⁵⁷ or phone.⁵⁸ Regarding the fact that Claimant had already decided to object to CONTROLS' request, he had not only the possibility, but also the duty to inform CONTROLS about his intention by letter, fax or phone on 19 September 1996 immediately. As a consequence, Claimant's letter sent on 9 October 1996 cannot be regarded as a response to CONTROLS' request within a reasonable time.

3. CONTROLS Was Entitled to Rely on Art. 48 (2) CISG Being Applicable

Contrary to Claimants assumption,⁵⁹ CONTROLS was entitled to rely on Art. 48 (2) CISG being applicable. Claimant argues that his prior exercise of his right to fix an additional period of time foreclosed CONTROLS' right to request an additional period of time for an installation of the control system according to Art. 48 (2) CISG.⁶⁰ However, Claimant's argumentation is incorrect, since CONTROLS' right to request an additional period of time for installation according to Art. 48 (2) CISG is not only in accordance with the terms of Art. 48 (2) CISG [a)], but also with the policy behind Arts. 47, 48, 49 CISG [b)].

a) CONTROLS' Right to Request an Additional Period of Time for Installation Is in Accordance with the Terms of Art. 48 (2) CISG

CONTROLS' right to request an additional period of time for installation is in accordance with the terms of Art. 48 (2) CISG since Art. 48 (2) CISG grants this right without any reservations. Seller's right to cure according to Art. 48 (2) CISG merely requires that the seller requests the buyer to make known whether he will accept performance and that the buyer does not comply within a reasonable time. The right to cure according to Art. 48 (2) CISG is not subject to any reservation, especially not subject to buyer's prior fixed additional period of time. For that reason the buyer must object without any delay if he does not agree to seller's proposal. Even in case where the seller has fixed an additional period of time for performance after the buyer has done so and the seller's period is longer, the buyer must object without any delay if he does not agree to that proposal.⁶¹

⁵⁶ Claimant's Ex. No. 3, 4, 5, 6, 7, 9.

⁵⁷ Claimant's Ex. No. 2; Respondent's Ex. No. 5, 6.

⁵⁸ Statement of Claim I.5, I.6, and I.10; Statement of Defense and Counterclaim I.6 and I.11.

⁵⁹ Memorandum for Claimant, at 19-21.

⁶⁰ Memorandum for Claimant, at 20.

⁶¹ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 7, at 412, 422.

b) CONTROLS' Request Is in Accordance With the Policy Behind Arts. 47, 48, 49 CISG

Contrary to Claimant's argumentation,⁶² CONTROLS' request is not only in accordance with the terms of Art. 48 (2) CISG, but also with the policy behind Arts. 47, 48, 49 CISG which is the principle pacta sunt servanda. CONTROLS' request is in accordance with this policy, since CONTROLS' request was intended to be uphold the contract.

The Convention in general favors the existence of a valid contract whereas the right to avoid a contract is only given in rare cases.⁶³ For that reason, whenever possible, on any initiative to avoid by one of the parties one should try to find a solution in favor of the valid existence of the contract and against its avoidance.⁶⁴ Consequently, avoidance is a remedy which must be regarded as an ultima ratio,⁶⁵ since avoidance contradicts the principle pacta sunt servanda. This policy requires that contractual performance by seller must be protected against the buyer's interest in avoidance of a contract and the seller must have the possibility to perform.⁶⁶ Thus, in case the buyer has fixed an additional period of time for performance and the seller considers this period to be too short, he should have the chance to make an offer to perform within a longer period.⁶⁷ If he had no possibility to offer a counterperiod, it would be quite too easy for the buyer to avoid the contract. In addition, if the buyer fixes an additional period to perform he demonstrates that he is still interested in contractual performance even after the contractual agreed date.⁶⁸ Hence, the seller only wants to comply with this interest in performance by making a counter-offer, when he considers the prior fixed additional period as too short.

By his letter dated 19 September 1996 CONTROLS informed Claimant that it would take "an additional several weeks" to complete the installation if CONTROLS had to turn to another sub-contractor.⁶⁹ Therefrom it can be derived that CONTROLS considered the period fixed by Claimant as too short. Nevertheless,

⁶² Memorandum for Claimant, at 19-21.

⁶³ Michael Joachim Bonell, in Bianca/Bonell, supra note 5, at 81; see Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 7, at 199; Ulrich Magnus, Die allgemeinen Grundsätze im UN-Kaufrecht, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 469, 480 (1995) [hereinafter Magnus/Grundsätze]; Peter Schlechtriem, Fristsetzungen bei Leistungsstörungen im Einheitlichen UN-Kaufrecht (CISG) und der Einfluß des § 326 BGB, in Lebendiges Recht – Von den Sumerern bis Gegenwart, Festschrift für Reinhold Trinkner zum 65. Geburtstag 321, 323 (F. Graf von Westphalen & O. Sandrock, 1995).

⁶⁴ Michael Joachim Bonell, in Bianca/Bonell, supra note 5, at 81; Andreas Kappus, Vertragsaufhebung nach UN-Recht in der Praxis, in Neue Juristische Wochenschrift 984 (1994) [hereinafter Kappus/Vertragsverletzung]; Ernst von Caemmerer, Die wesentliche Vertragsverletzung im internationalen Einheitlichen Kaufrecht, in Europäisches Rechtsdenken in Geschichte und Gegenwart II, Festschrift für Helmut Coing zum 70. Geburtstag 33, 50 (N. Horn ed., 1982).

⁶⁵ Judgement of 3 April 1996, Bundesgerichtshof No. VIII ZR 51/95 (Germany), reprinted in Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis 1041, 1043 (1996); Ulrich Magnus, in Staudinger, supra note 43, at 410; Werner Melis, in Honsell, supra note 5, at 91; Kappus/Vertragsverletzung, supra note 64, at 984; see Magnus/Grundsätze, supra note 63, at 483.

⁶⁶ Hohoff/Nacherfüllungsrecht, supra note 43, at 6.

⁶⁷ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 7, at 412, 413.

⁶⁸ Reinhart/UN-Kaufrecht, supra note 43, at 115.

⁶⁹ Claimant's Ex. No. 5.

CONTROLS was interested in the continuation of the contract. In addition, he had to presuppose that Claimant was still interested in contractual performance. Balancing these interests and the possibility to perform CONTROLS' request, setting a longer period was intended to uphold the contract.

B. Claimant Had no Right to Avoid the Contract According to Art. 49 (1)(b) CISG

Even if this Tribunal should find that CONTROLS' letter dated 19 September 1996 did not bar Claimant from declaring the contract avoided, Claimant had no right to avoid the contract according to Art. 49 (1)(b) CISG. Pursuant to Art. 49 (1)(b) CISG the buyer may only declare the contract avoided in case of non-delivery, if the seller does not deliver the goods within the additional period fixed by the buyer in accordance with Art. 47 (1) CISG or if he declares that he will not deliver within the period so fixed. Claimant argues that he had fixed a reasonable additional period until 9 October 1996 according to Art. 47 CISG and that CONTROLS has not performed until its expiration.⁷⁰ Moreover, he asserts that he was even authorized to avoid the contract on 19 September 1996, since he considers CONTROLS to have refused to deliver the installation until expiration of the additional period in his letter sent on that day.⁷¹ However, this is not supported by the law or the fact, since first, the fixed additional period for installation until 9 October 1996 was not reasonable according to Art. 47 (1) CISG and second, CONTROLS has not refused to install before expiration of the additional period of time ending on 9 October 1996.

1. The Fixed Additional Period for Installation Until 9 October 1996 Was not Reasonable According to Art. 47 (1) CISG

Contrary to Claimant's argumentation,⁷² the fixed additional period for installation until 9 October 1996 was not reasonable according to Art. 47 (1) CISG, since the additional period fixed by Claimant ending on 9 October 1996 merely meets the interest of Claimant, but it does not meet the interest of CONTROLS in any way.

⁷⁰ Memorandum for Claimant, at 10 et seq.

⁷¹ Memorandum for Claimant, at 14.

⁷² Memorandum for Claimant, at 12 et seq.

The reasonableness of an additional period depends on the circumstances of each case,⁷³ especially on the interests of both parties.⁷⁴ Considering the interests of the seller, his ability to perform⁷⁵ as well as any impediments to delivery⁷⁶ must be taken into account.

First, the fact that the installation team died in the air crash required an additional period of time within the obligation to install the control system could have been fulfilled. If the seller is affected by such an impediment like a fire or a strike the buyer can be expected to wait for a certain time if the delivery is not particularly urgent.⁷⁷ In the case at hand, as CONTROLS has already submitted,⁷⁸ the air crash in which RELIABLE'S employees died, constitutes an impediment. This impediment is as tragic as a fire and even more tragic than a strike. Thus, Claimant could have been expected to wait for a certain time as the installation was not particularly urgent for him. Although he asserted, that the installation was urgent, he failed to prove that he would have suffered losses if the installation had not been completed by 9 October 1996.⁷⁹ To the contrary, the length of the contractually agreed period for performance from 10 June until 16 September 1996⁸⁰ – more than three months – supports that the installation was not particularly urgent. Furthermore, Claimant had the possibility to support the urgency of an installation until 9 October 1996 by objecting CONTROLS' offer to install until 30 October 1996. However, as already shown above, Claimant failed to respond to this offer.⁸¹

Second, it was not possible for CONTROLS to install the system within the given time of three weeks as asserted by Claimant.⁸² The contract between Claimant and CONTROLS provided that the control system was to be installed by RELIABLE. As shown above,⁸³ engaging another installation firm did not constitute an appropriate alternative for CONTROLS to have overcome the impediment. Furthermore, he sufficiently reminded RELIABLE of his duty to install the system. However, RELIABLE had lost some of his experienced

⁷³ Michael Will, in Bianca/Bonell, supra note 5, at 345; Anton K. Schnyder & Ralf Michael Straub, in Honsell, supra note 5, at 528; Marcel Martin Lohs & Norbert Nolting, Regelung der Vertragsverletzung im UN-Kaufrechtsübereinkommen, in Zeitschrift für vergleichende Rechtswissenschaft 4, 15 (1998); Karollus/UN-Kaufrecht, supra note 42, at 139.

⁷⁴ Alexander Lüderitz, in Soergel, supra note 42, at 2291, 2083, 2084; Anton K. Schnyder & Ralf Michael Straub, in Honsell, supra note 5, at 528.

⁷⁵ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 7, at 396; Alexander Lüderitz, in Soergel, supra note 42, at 2291, 2083, 2084.

⁷⁶ Cf. Judgement of 24 May 1995, Oberlandesgericht Celle 20 U 76/94, reprinted in UNILEX E 1995.16; Michael Will, in Bianca/Bonell, supra note 5, at 345; Fritz Enderlein, in Enderlein/Maskow, supra note 9, at 182, 183; Ulrich Magnus, in Staudinger, supra note 43, at 395; Alexander Lüderitz, in Soergel, supra note 42, at 2291, 2107.

⁷⁷ Ulrich Huber, in Schlechtriem/Commentary on the CISG, supra note 7, at 397; Alexander Lüderitz, in Soergel, supra note 42, at 2291, 2107, 2083 et seq.

⁷⁸ Supra page 6.

⁷⁹ Memorandum for Claimant, at 16 et seq.

⁸⁰ Claimant's Ex. No. 1.

⁸¹ Supra pages 13, 14.

⁸² Memorandum for Claimant, at 12 et seq.

⁸³ Supra page 10.

employees in the air crash Nonetheless, he tried to assemble a new team, but there had been unexpected problems with an installation on which RELIABLE'S key personnel, qualified to do the installation at Claimant's, was committed.⁸⁴ Another team from RELIABLE was not available as RELIABLE was a small firm.

2. CONTROLS Has not Refused to Install Before Expiration of the Additional Period of Time Ending on 9 October 1996

Additionally, in contrast to Claimant's assumption,⁸⁵ CONTROLS has not refused to install before expiration of the additional period of time ending on 9 October 1996 as fixed by Claimant. A refusal to deliver requires that the seller seriously and definitely declares that he will not deliver at all.⁸⁶ Moreover, the buyer bears the onus of proof when alleging a refusal to perform on the seller's side.⁸⁷ Claimant argues that CONTROLS gave notice in his letter dated 19 September 1996 that he would not be able to finish the installation until 9 October.⁸⁸ However, by the respective letter CONTROLS only informed Claimant that the installation of the control system would certainly be completed by 30 October 1996, even if CONTROLS had to turn to another installation firm.⁸⁹ Nonetheless, CONTROLS has never ever said that he would not meet his contractual obligation to install at all. To the contrary, he offered another additional period for performance. Thus, Claimant's assumption⁹⁰ that he was authorized to declare the contract avoided upon receipt of CONTROLS' letter dated 19 September 1996 is ill-founded.

With regard to this assumptions, CONTROLS respectfully draws the Tribunal's attention to the judgement of the State Supreme Court Düsseldorf (Germany) 10.02.1994 – No. 6U 119/93.⁹¹ In this case an Italian seller informed a German buyer that he could not deliver the goods at the moment. The Court decided that such a declaration does not meet the legal requirements of a serious and definite refusal to perform. In the case under consideration, CONTROLS has not even declared that the installation would not have been possible by his letter dated 19 September 1996. CONTROLS merely informed Claimant about the problems RELIABLE had.

⁸⁴ Claimant's Ex. No. 5; Respondent's Ex. No. 3.

⁸⁵ Memorandum for Claimant, at 14.

⁸⁶ Ulrich Huber, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 7, at 417, 422; Ulrich Magnus, *in* Staudinger, *supra* note 43, at 414; Anton K. Schnyder & Ralf Michael Straub, *in* Honsell, *supra* note 5, at 576, 530.

⁸⁷ Ulrich Huber, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 7, at 422.

⁸⁸ Memorandum for Claimant, at 13, 14.

⁸⁹ Claimant's Ex. No. 5.

⁹⁰ Memorandum for Claimant, at 14.

⁹¹ Judgement of 10 February 1994, Oberlandesgericht Düsseldorf, No. 6U 119/93, *reprinted in* Neue Juristische Wochenschrift-Rechtsprechungsreport 506 et seq. (1994).

C. Claimant's Right to Declare the Contract Avoided Was Limited Pursuant to Art. 51 (1) CISG

Even if this Tribunal should find that CONTROLS' letter dated 19 September 1996 did not bar Claimant from avoiding the contract and that Claimant had a right to avoid the contract, this right was limited pursuant to Art. 51 (1) CISG, since the delivery of the control system was timely. According to Art. 51 (1) CISG 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 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 does not conform. The delivery and the installation of the control system are two independent contractual obligations [1.], the delivery of the control system was made in time [2.] and Claimant cannot reasonably assert that his right to avoid the contract is extended pursuant to Art. 51 (2) CISG, since the missing installation did not amount to a fundamental breach of contract [3.]*.

1. The Delivery and the Installation of the Control System Are Two Independent Contractual Obligations

Claimant argues that CONTROLS had to deliver a fully operational and functional control system.⁹² However, Claimant completely disregards that the delivery of the control system and its installation are two independent contractual obligations as it can be inferred from the contract unequivocally. In clauses No.1 and 3 of the contract CONTROLS and Claimant have agreed on a "delivery of the control system to the facilities of [C]laimant".⁹³ Moreover, in clauses No. 1, 3 and 4 of the contract it was stipulated between both parties that the control system shall "be installed by RELIABLE" "on behalf of [C]ONTROLS".⁹⁴

2. The Delivery of the Control System Was Made in Time

Claimant submits that there had been a mutual understanding between the parties that the control system has not been at the disposal of Claimant.⁹⁵ This submission is incorrect and is not in conformity with the facts. The delivery of the control system was in time, only the installation was delayed. CONTROLS delivered the control system to the premises of Claimant on 20 August 1996 as stipulated in the contract.⁹⁶ Hence, the control system has been at the disposal of Claimant within the contractually demanded time.

* Additional Argument – Not in response to Claimant.

⁹² Memorandum for Claimant, at 15 et seq.

⁹³ Claimant's Ex. No. 1.

⁹⁴ Id.

⁹⁵ Memorandum for Claimant, at 18.

⁹⁶ Statement of Claim I 5, Statement of Defense and Counterclaim I.4 and I.6; Claimant's Ex. No.1.

Only the installation of the control system that was not finished until Claimant declared avoidance of the contract on 9 October 1996.⁹⁷

3. Claimant Cannot Reasonably Assert that His Right to Avoid the Contract is Extended Pursuant to Art. 51 (2) CISG

Even if Claimant should argue that his right to avoid the contract is extended pursuant to Art. 51 (2) CISG, since the missing installation amounted to a fundamental breach of contract, this argumentation would be unfounded. Pursuant to Art. 51 (2) CISG the buyer may in situations as described by Art. 51 (1) CISG⁹⁸ 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 or not depends on Art. 25 CISG. According to Art. 25 CISG a breach of contract committed by the seller is 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. Thus, the existence of a fundamental breach depends on buyer's objective interest.⁹⁹ 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 installation 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.¹⁰⁰ Consequently, Claimant had predominant interest in the delivery of the control system.

Furthermore, CONTROLS respectfully draws the attention of this Tribunal to the case decided by the State Court Heidelberg (Germany) 03.07.1992 – No. O 42/92.¹⁰¹ In this case an US seller only delivered partially to a German buyer in contrast to the contractually agreement. The Court decided that such a breach of contract is not fundamental when the buyer can obtain substitute goods. In the instant case, the control system had been at the disposal of Claimant within the contractually demanded time, only the installation was missing. There were three other firms available for the installation in Mediterraneo.¹⁰²

⁹⁷ Claimant's Ex. No. 6.

⁹⁸ Anton K. Schnyder & Ralf Michael Straub, *in* Honsell, *supra* note 5, at 598.

⁹⁹ Fritz Enderlein, *in* Enderlein/Maskow, *supra* note 9, at 112; Ulrich Magnus, *in* Staudinger, *supra* note 43, at 216; Herber/Czerwenka, *supra* note 42, at 131.

¹⁰⁰ Statement of Claim I.4 and Claimant Ex. No.1.

¹⁰¹ Judgement of 03 July 1992, Landgericht Heidelberg, No. O 42/92, *reprinted in* UNILEX D.1992-14.

¹⁰² Procedural Order No.2, Factual Question No.14.

Issue III: Claimant Was Not Authorized to Sell the Control System Pursuant to Art. 88 CISG

Claimant was not authorized to sell the control system pursuant to Art. 88 CISG. Claimant neither had a right to sell the control system according to Art. 88 (2) CISG [A.] nor a right to do so according to Art. 88 (1) CISG [B.].

A. Claimant Had No Right to Sell the Control System According to Art. 88 (2) CISG

Contrary to Claimant's submissions¹⁰³, Claimant had no right to sell the control system according to Art. 88 (2) CISG. Pursuant to Art. 88 (2) CISG a party who is bound to preserve goods in accordance with Arts. 85 or 86 CISG can take reasonable measures to sell them, only if the goods are subject to rapid deterioration or their preservation would involve unreasonable expenses. First, the control system was not subject to rapid deterioration and second, the preservation of the control system in the facilities of Claimant would not have incurred unreasonable expenses.

1. The Control System Was Not Subject to Rapid Deterioration

Claimant submits to the Tribunal that the control system rapidly deteriorated in his facilities.¹⁰⁴ This assertion is interesting, but not supported by law or fact.

First, Claimant alleges erroneously that rapid deterioration due to innovative technology was specific to the items of the agreed contract.¹⁰⁵ For the purpose of Art. 88 (2) CISG, rapid deterioration is physical deterioration of goods in a short period of time.¹⁰⁶ Furthermore the onus of proof bears the party that call to it, i.e. the seller.¹⁰⁷ Physical deterioration is given if goods deteriorate to such an extent in their nature and quality that they can be sold only at a greatly reduced price, e.g. food.¹⁰⁸ Claimant as a producer of paper and paper products surely knew how to preserve a control system reasonably. Therefore, physical deterioration like rust and soil of the control system could not be realized. Five months, from 9 October 1996 until 13 March 1997, are not enough time for such a development at a reasonable

¹⁰³ Memorandum for Claimant, at 24-26.

¹⁰⁴ Memorandum for Claimant, at 24-25.

¹⁰⁵ Id.

¹⁰⁶ Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 7, at 683; Ulrich Magnus, in Staudinger, supra note 43, at 679; Karollus/UN-Kaufrecht, supra note 42, at 98; Reinhart/UN-Kaufrecht, supra note 43, at 199; Herber/Czerwenka, supra note 42, at 386; Schlechtriem/UN-Kaufrecht, supra note 42, at 192.

¹⁰⁷ See Reinhard Jung, Die Beweislastverteilung im UN-Kaufrecht 280 (1996).

¹⁰⁸ Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 7, at 683; Ulrich Magnus, in Staudinger, supra note 43, at 679; Rolf H. Weber, in Honsell, supra note 5, at 1054; Albert H. Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods 696 (A.H. Kritzer ed., 1994), [hereinafter Guide to Practical Applications].

preservation place. Moreover, Claimant so far has failed to prove that the control system would deteriorated physically in its premises.

Second, Claimant could not successfully rely on the inclusion of economic deterioration within the meaning of Art. 88 (2) CISG.¹⁰⁹ There was no economic deterioration of the control system from 9 October 1996 until 13 March 1997. The condition of rapid deterioration within the meaning of Art. 88 (2) CISG will be satisfied solely in case of physical deterioration, not in case of economic deterioration of goods in a short time.¹¹⁰ This can be illustrated by the legislative history of Art. 88 (2) CISG. While the text of Art. 77 of the 1978 Draft later transformed in Art. 88 CISG¹¹¹ contained the term “loss“, thus not being limited to physical deterioration¹¹², in Art. 88 (2) CISG the word “loss“ was excluded. Therefrom, one can clearly derive that the exclusion of cases of economic deterioration was intended when creating the CISG provision,¹¹³ as the drafters of the Convention wanted to limit the application of Art. 88 (2) CISG to cases of physical deterioration.

Moreover, even assuming that economic deterioration was within the meaning of Art. 88 (2) CISG, in the instant case such a deterioration was not given. Economic deterioration would have to refer to situations in which the goods threaten to decline rapidly in value because of changes in the market.¹¹⁴ There was only a loss of value from \$430,000 during 1996 to \$390,000 in 1997, i.e. \$40,000.¹¹⁵ The price of the control system during three years decreased from \$430,000 during 1996 to \$350,000 in 1998.¹¹⁶ This was a depreciation of only \$80,000 in three years and this would be in five months a depreciation of near \$11,100 or three percent of the purchase price. Hence, there could not have been significant economic fluctuations in the market from 1996 until 1998. In the case at hand, the period of time between the declaration of avoidance by Claimant on 9 October 1996 and the notice of the intention to sell on 13 March 1997 is less than one year. Consequently, there were no economic fluctuations from 9 October 1996 until 13 March 1997 and no economic deterioration.

¹⁰⁹ Memorandum for Claimant, at 24 – 25.

¹¹⁰ Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 7, at 683; Dietrich Maskow, in Enderlein/Maskow, supra note 9, at 261 et. seq.; Schlechtriem/Uniform Sales Law, supra note 5, at 109; Herber/Czerwenka, supra note 42, at 386; Piltz/Internationales Kaufrecht, supra note 42, at 176; Reinhart/UN-Kaufrecht, supra note 43, at 199.

¹¹¹ Guide to Practical Applications, supra note 108, at 696.

¹¹² Id.

¹¹³ Karollus/UN-Kaufrecht, supra note 42, at 98.

¹¹⁴ Guide to Practical Applications, supra note 108, at 696.

¹¹⁵ Procedural Order No. 2, Factual Question No. 3.

¹¹⁶ Id.

2. The Preservation of the Control System Would Not Have Incurred Unreasonable Expenses

Claimant's assertion that the period of six months from the declaration of avoidance by Claimant until the notice of intent to sell the control system is an amount of time for storage, which would have borne unreasonable expenses,¹¹⁷ is erroneous and should not mislead this Tribunal. To the contrary, the preservation of the control system in the facilities of Claimant would not have incurred any unreasonable expenses. The expenses of preservation are unreasonably high only if they exceed the value of a good or if they exceed the approaching loss in an emergency sale.¹¹⁸ The costs of preserving the control system prior to its sale and the selling costs amounted only to \$3,000.¹¹⁹ This amount contained not only the preservation costs for the control system, but also the salary of the broker who sold the control system. In contrast to this, the control system had a value of \$400,000 and was sold with a loss of \$150,000 five months later.

B. Claimant Had No Right to Sell the Control System According to Art. 88 (1) CISG

Contrary to Claimant's position,¹²⁰ Claimant had no right to sell the control system according 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 only 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, there was no unreasonable delay by CONTROLS in taking the control system back and in paying the costs of preservation and second, Claimant gave no reasonable notice to CONTROLS.

1. There Was no Unreasonable Delay By Controls in Taking the Control System Back and in Paying the Costs of Preservation

Contrary to Claimant's contentions,¹²¹ there was no unreasonable delay in taking the goods back and paying the costs of preservation.

First, there was no unreasonable delay by CONTROLS in taking the control system back and in refunding the \$400,000 advance payment as Claimant prevented CONTROLS from doing so. An unreasonable delay is a delay in excess of what is normal in the particular case.¹²² Claimant would only have returned the control

¹¹⁷ Memorandum for Claimant, at 25.

¹¹⁸ Ulrich Magnus, *in* Staudinger, *supra* note 43, at 679; Alexander Lüderitz, *in* Soergel, *supra* note 42, at 2335.

¹¹⁹ Statement of Claim I.11.

¹²⁰ Memorandum for Claimant, at 26-30.

¹²¹ Memorandum for Claimant, at 27-28.

¹²² Hans Hermann Eberstein, *in* Schlechtriem/*Commentary on the CISG*, *supra* note 7, at 681; Herber/Czerwenka, *supra* note 42, at 385.

system upon the return of the advanced payment.¹²³ CONTROLS, however, had suffered damages equivalent to the loss of the profit he would have made on the contract about \$70,000.¹²⁴ Hence, CONTROLS was not able to refund the whole amount of \$400,000. CONTROLS offered to Claimant to refund the difference of \$330,000 and in exchange Claimant should return the control system to CONTROLS.¹²⁵ Moreover, CONTROLS wished to find an amicable settlement.¹²⁶ Nevertheless, Claimant rejected to return the control system and CONTROLS did not have the chance to collect it though being willing and having offered to do so.

Second, there was no unreasonable delay in paying the preservation costs of the control system. Claimant argues that as a result of an alleged unreasonable delay in taking the control system back, there was an unreasonable delay in paying the preservation costs of the control system.¹²⁷ However, CONTROLS did not even know which sum he had to pay for preservation costs. At no time Claimant demanded payment of the costs, specified a sum or a date of payment. Neither the Statement of Claim nor the Exhibits of Claimant contained a definite demand for CONTROLS to pay the preservation costs of \$3,000. Therefore, CONTROLS could not know how much he had to pay. Additionally, Claimant submitted that the amount requested, i.e. \$3,000, contained also the costs of the selling.¹²⁸ It is hardly understandable how the costs of selling should have been paid before arising.

2. Claimant Gave No Reasonable Notice to CONTROLS

Furthermore, Claimant failed to give reasonable notice to CONTROLS 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 sale.¹²⁹ Contrary to Claimant's assertion,¹³⁰ the time interval before carrying out the sale was unreasonable. Claimant informed CONTROLS 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 CONTROLS would not have reimbursed the purchase price within the next ten days, i.e. by 24 March 1997.¹³¹ Therefore, CONTROLS had only ten days to avert the sale by meeting his demands. Ten days were not enough time to prevent the sale

¹²³ Claimant's Ex. No. 6, 8 and 9; Statement of Defense and Counterclaim I.10.

¹²⁴ Statement of Defense and Counterclaim III.17; Respondent's Ex. No. 5 and 6.

¹²⁵ Respondent's Ex. No. 6.

¹²⁶ Id.

¹²⁷ Memorandum for Claimant, at 28.

¹²⁸ Statement of Claim I.11.

¹²⁹ Bundestags-Drucksachen, 11/3076 61; Hans Hermann Eberstein, in Schlechtriem/Commentary on the CISG, supra note 7, at 682; Ulrich Magnus, in Staudinger, supra note 43, at 678.

¹³⁰ Memorandum for Claimant, at 28-29.

¹³¹ Claimant's Ex. No.5.

by refunding the purchase price, since the amount of \$400,000 had to be made available for refunding. No efficient working company is able to freely dispose of an substantial amount of money.¹³² Moreover, even if CONTROLS would have been able to make the amount available within ten days, the remaining period of time was not long enough for a transfer of payment between different countries. The period of time included two weekends.¹³³ One day is needed to order the transfer. Therefore, there were effective only seven days for transferring. A transfer of payment between different countries usually takes more than seven days.¹³⁴ Thus, the time interval before carrying out the sale by Claimant was not reasonable.

Issue IV: If this Tribunal Decides that CONTROLS 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 Be Joined to this Arbitration as it Was Requested by CONTROLS

If this Tribunal decides that CONTROLS 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 be joined to this arbitration as it was requested by CONTROLS. First, CONTROLS, Claimant and RELIABLE consent to the joinder of RELIABLE to the arbitration. Second, RELIABLE's joinder to the arbitration is reasonable.

A. CONTROLS, Claimant and RELIABLE Consent to the Joinder of RELIABLE to the Arbitration

Claimant argues that a joinder of RELIABLE must be nullified without Claimant's consent to it.¹³⁵ However, CONTROLS, Claimant and RELIABLE consent to the joinder of RELIABLE to the arbitration.

Third parties who join the arbitral proceedings can be subject to the tribunal's award only if there is an agreement between all parties concerned.¹³⁶ Such an agreement can be constituted by two separate arbitration agreements that contain the same arbitration clause contemplating the usual panel of three arbitrators.¹³⁷ First, CONTROLS and Claimant have agreed on the "joinder" of RELIABLE to the arbitration. Second, CONTROLS and RELIABLE have agreed on a "joinder" of RELIABLE as well. Third, the joinder of RELIABLE to the arbitration is not prevented by RELIABLE's non-participation in the creation of the arbitral

¹³² Hans-Werner Wohltmann, in Grundzüge der makroökonomischen Theorie 176 et seq. (1994).

¹³³ The period of time from 13 March 1997 until 24 March 1997 contained not only the weekend from 15 March 1997 to 16 March 1997, but also the weekend 22 March 1997 to 23 March 1997.

¹³⁴ Cf. Dieter Kindermann, in Bankrecht und Bankpraxis 6/121-6/122 (Th. Hellner & S. Steuer eds., 1996).

¹³⁵ Memorandum for Claimant, at 35.

¹³⁶ Klaus Peter Berger, International Economic Arbitration 311, 312 (1993) [hereinafter Berger/Arbitration]; Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 184 (1991); Mauro Rubino-Sammartano, International Arbitration Law 184 (1990) [hereinafter Rubino-Sammartano/Arbitration]; Albert Jan van den Berg, The New York Arbitration Convention of 1958 163 (1981); Karl Heinz Schwab, Mehrparteischiedsgerichtsbarkeit und Streitgenossenschaft, in Festschrift für Walter J. Habscheid 289 (W. F. Lindacher et al. eds., 1989).

¹³⁷ Berger/Arbitration, supra note 136, at 317; cf. Hubertus W. Labes, Schiedsgerichtsvereinbarungen in Rückversicherungsverträgen 33 (1996)[hereinafter Labes/Rückversicherungsverträge].

tribunal.* Fourth, the fact that CONTROLS and Claimant have agreed on a “consolidation” does not exclude an implicit agreement on a “joinder”.

1. CONTROLS and Claimant Have Agreed on the “Joinder” of RELIABLE to the Arbitration

CONTROLS and Claimant have agreed on the “joinder” of RELIABLE to the arbitration. “Joinder” is described as the uniting of two different persons acting as one party in the arbitral proceedings.¹³⁸ A “joinder” involves only one arbitral agreement and one dispute arising thereunder, with a third party being allegedly responsible for that dispute.¹³⁹ The parties may agree on a multiparty dispute implicitly.¹⁴⁰ If an implicit agreement on a multiparty arbitration is in existence can be derived from the interpretation of the arbitration agreement. For the interpretation of the arbitration agreement all relevant circumstances have to be taken into account.

The mere inclusion of a standard arbitration clause contemplating the usual panel of three arbitrators indicates the consent to a multiparty arbitration under certain circumstances.¹⁴¹ The parties’ consent to a multiparty arbitration can be derived from the use of a standard arbitration clause only if the parties can be assumed to have foreseen that an arbitration can reasonably be carried out under the inclusion of all of the parties involved. The necessity to join all parties concerned to the dispute can be founded in the fact that the parties are contractually interlocked¹⁴² and therefore have to cooperate intensively.¹⁴³

In the case under consideration, CONTROLS and Claimant have implicitly agreed on the “joinder” of RELIABLE to the arbitration. In the contract between CONTROLS and Claimant the standard arbitration clause of the AAA is used¹⁴⁴ as well as in the contract between CONTROLS and RELIABLE.¹⁴⁵ The parties can be assumed to have foreseen that a dispute between them could lead to a multiparty arbitration. This can be derived from the fact that the three parties are contractually interlocked, i.e. that CONTROLS and Claimant have contractually agreed that RELIABLE shall act as CONTROLS’ subcontractor.¹⁴⁶ Therefore intensive cooperation between CONTROLS and RELIABLE is required by the contract between CONTROLS

* Additional Argument – Not in response to Claimant.

¹³⁸ Klaus Lionnet, Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit 205 (1996).

¹³⁹ Isaak I. Dore, Theory and Practice of Multiparty Commercial Arbitration with Special Reference to the UNCITRAL Framework 41 (1990).

¹⁴⁰ Labes/Rückversicherungsverträge, supra note 137, at 32.

¹⁴¹ Klaus Peter Berger, Schiedsrichterbestellung in Mehrparteienschiedsverfahren, in Recht der Internationalen Wirtschaft 702, 705 (1993) [hereinafter Berger/Mehrparteienschiedsverfahren]; Labes/Rückversicherungsverträge, supra note 137, at 33.

¹⁴² Labes/Rückversicherungsverträge, supra note 137, at 33; cf. Berger/Arbitration, supra note 136, at 223.

¹⁴³ Labes/Rückversicherungsverträge, supra note 137, at 33; cf. Rolf A. Schütze, Schiedsgericht und Schiedsverfahren 39 (1998).

¹⁴⁴ Claimant’s Ex. No. 1, clause No. 23.

¹⁴⁵ Respondent’s Ex. No. 1.

¹⁴⁶ Claimant’s Ex. No. 1, clause No. 4.

and Claimant. The existence of an intensive cooperation between CONTROLS and RELIABLE is expressed by their contract, in which the respective aspects of the contract negotiations between CONTROLS and Claimant are already included.¹⁴⁷

To prove that a multiparty arbitration can be agreed upon implicitly, CONTROLS respectfully draws the attention of this Tribunal to the case Sociétés BKMI et Siemens c. société Dutco.¹⁴⁸ Therein, the French Cour d'Appel emphasized the element of foreseeability. In that case it was dealt with a standard ICC arbitration clause contained in a consortium contract of three contractors for an international construction project. The Court stated that the arbitration agreement included in the contract, linking the three corporations in an consortium, expresses unambiguously the common intent of the parties to submit "all disputes" arising out of the contractual relationship to an arbitral tribunal consisting of three arbitrators. From this it follows necessarily that, given the multiparty nature of their contract, the parties have acknowledged the option of having a single arbitral tribunal composed of three arbitrators decide on a dispute between the three of them.¹⁴⁹

This case is quite similar to the case under consideration, since CONTROLS, RELIABLE and Claimant are intensively linked through their contracts. These contracts even contain the same standard arbitration clause of the AAA. This leads to the conclusion that the three parties must have foreseen the necessity of multiparty arbitration at the time of conclusion of their contracts.

2. CONTROLS and RELIABLE Have Agreed on a "Joinder" of RELIABLE As Well

CONTROLS and RELIABLE have agreed on a "joinder" of RELIABLE as well. In clause No. 14 of the contract dated 7 June 1996 RELIABLE has agreed to "defend CONTROLS against that portion of the claim based on the alleged failure".¹⁵⁰ Given the fact that RELIABLE has agreed to act as a defendant to CONTROLS both parties act as one party in the arbitration between CONTROLS and Claimant. Additionally, the rules, which should be held to be applicable to any expectant arbitral proceeding are set by clause No. 13 of the contract dated 7 June 1996, which contains the standard arbitration clause recommended by the AAA.¹⁵¹

¹⁴⁷ Respondent's Ex. No. 1.

¹⁴⁸ Judgement of 7 January 1992, Cour de Cassation No. 42 P + R (France), translated in Betriebs-Berater, 15. Beilage 27 (1992); see Jens Peter Lachmann/Handbuch für die Schiedsgerichtspraxis 273 (1998) [hereinafter Lachmann/Schiedsgerichtspraxis]; see Karl-Heinz Schwab, Die Gleichheit der Parteien bei der Bildung des Schiedsgerichts, in Betriebs-Berater, 15. Beilage 19 (1992).

¹⁴⁹ Berger/Arbitration, supra note 136, at 316; Berger/Mehrparteischiedsverfahren, supra note 141, at 705.

¹⁵⁰ Respondent's Ex. No. 1.

¹⁵¹ Respondent's Ex. No. 1, clause No. 13; Standard Clause American Arbitration Association (visited 13 October 1998) <www.adr.org/rules/international_arb_rules.html>.

3. The Joinder of RELIABLE to the Arbitration Is Not Prevented by RELIABLE's Non-participation in the Creation of the Tribunal

The joinder of RELIABLE to the arbitration is not prevented by RELIABLE's non-participation in the creation of the tribunal. The arbitration agreement between the parties merely contains the usual provision that each party appoints one arbitrator who will then select the chairman of the tribunal.¹⁵² All parties usually have the fundamental right to be treated with equality, especially in the creation of the arbitral tribunal.¹⁵³ In this case, RELIABLE has waived any right to participate in the creation of the arbitral tribunal and this waiver does not violate the award's enforceability.

First, in clause No. 15 of the contract between CONTROLS and RELIABLE, RELIABLE agreed that it will "waive any right it might otherwise have to participate in the creation of the tribunal",¹⁵⁴ if a claim of Claimant against CONTROLS is asserted. Finally, RELIABLE has waived his right to participate in the creation of this Tribunal by faxed letter dated 20 March 1997.¹⁵⁵

Second, RELIABLE's waiver does not endanger the award's enforceability. The standards of enforceability are referred to in the New York Convention,¹⁵⁶ to which Danubia, Equatoriana, Hanseatica and Mediterraneo are contracting states.¹⁵⁷ Under Art. V (2)(b) New York Convention the enforcement of the arbitral award may be refused only if it is contrary to international public policy.¹⁵⁸ International public policy is violated in case where the principle of all parties' equality is violated, e.g. if a party waives its right to participate in the creation of the tribunal before a conflict arises. However, RELIABLE has waived his right to participate in the creation of the arbitral tribunal only after the conflict arose.¹⁵⁹ By the time of waiving his right RELIABLE was well aware of the consequences relating from the arbitration. Therefore, the principle of all parties' equality is not violated and the award's enforceability not endangered.

¹⁵² Berger/Arbitration, supra note 136, at 314.

¹⁵³ Berger/Arbitration, supra note 136, at 315; Lachmann/Schiedsgerichtspraxis, supra note 148, at 272; Labes/Rückversicherungsverträge, supra note 137, at 34.

¹⁵⁴ Respondent's Ex. No. 1, clause No. 15.

¹⁵⁵ Respondent's Ex. No. 7.

¹⁵⁶ 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.

¹⁵⁷ Procedural Order No. 2, Legal Question No. 2.

¹⁵⁸ 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).

¹⁵⁹ Respondent's Ex. No. 7.

4. The Fact that CONTROLS and Claimant Have Agreed on a “Consolidation” Does Not Exclude an Implicit Agreement on a “Joinder”.

The fact that CONTROLS and Claimant have agreed on a “consolidation” does not exclude an implicit agreement on a “joinder”. “Consolidation” is the uniting of two separate arbitration processes into one hearing before the same panel of arbitrators.¹⁶⁰ That means that the usual two-party-structure of the arbitration is deviated from.¹⁶¹ In clause No. 24 of their contract CONTROLS and Claimant have agreed on a “consolidation” only in cases to have a liability claim of CONTROLS against RELIABLE settled in the arbitration.¹⁶² In the case at hand, CONTROLS raises no claim against RELIABLE, since RELIABLE has already agreed to be liable to CONTROLS.¹⁶³

B. RELIABLE’s Joinder to the Arbitration Is Reasonable

Claimant’s contentions that the joinder of RELIABLE will lengthen and complicate the arbitration¹⁶⁴ are untenable. In the contract dated 7 June 1996¹⁶⁵ and in his letter dated 3 August 1998¹⁶⁶ RELIABLE agrees that he will be liable to CONTROLS to the same degree and in the same amount as CONTROLS would be found liable to Claimant. Therefore it is certain that RELIABLE would only defend CONTROLS, and this is even as a witness. Thus, it will not lengthen and complicate the arbitral process, if RELIABLE acts as CONTROLS’ defendant.

Claimant contents that RELIABLE’s joinder to the arbitration will disturb the working relationship between Claimant and RELIABLE.¹⁶⁷ This assertion cannot be maintained as there is no working relationship in existence between RELIABLE and Claimant, since the installation contract was formed between CONTROLS and RELIABLE. Anyway, concerning the installation itself, Claimant has no interest in the services of RELIABLE anymore, since he has already entered into a new contract with Bridget Controls GmbH.¹⁶⁸

¹⁶⁰ C.C.A. Voskuil & J.A. Wade/Domestic Law – Conflict of Laws - Multiparty Arbitration 129 (1985); Rubino-Sammartano/Arbitration, *supra* note 136, at 185.

¹⁶¹ David St. John Sutton & John Kendall & Judith Gill, Russell on Arbitration 104 (1997).

¹⁶² Claimant’s Ex. No. 1, clause No. 24.

¹⁶³ Respondent’s Ex. No. 7.

¹⁶⁴ Memorandum for Claimant, at 33-34.

¹⁶⁵ Respondent’s Ex. No. 1.

¹⁶⁶ Respondent’s Ex. No. 7.

¹⁶⁷ Memorandum for Claimant, at 33-34.

¹⁶⁸ Respondent’s Ex. No. 8.

III. Conclusion

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

- to declare that CONTROLS may refer to Arts. 79 (1) and (2)(a) CISG for exemption from paying damages as a result of the delayed installation
- to declare that Claimant was not authorized to avoid the contract on 9 October 1996 pursuant to Art. 49 (1)(b) CISG
- to declare that Claimant was not authorized to sell the control system pursuant to Art. 88 CISG
- if the Tribunal should find that CONTROLS 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 be joined to this arbitration as it was requested by CONTROLS.

Additionally, CONTROLS respectfully asks this Tribunal

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

For Essential Controls, S.A.

(Andreas Doose)

(Daniela Gentzsch)

_____, February 11th, 1999
(Cornelia Groth)

Attorneys