AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW
LL.M. International Commercial Arbitration Moot Competition
March 9-10, 2012

SAMPLE OUTLINE FOR CLAIMANT
(NOT RESPONSIVE TO THIS YEAR'S PROBLEM)

TEAM NUMBER

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THIS TRIBUNAL HAS JURISDICTION OVER THESE PROCEEDINGS

I. Respondent is relying on mere technicalities when it claims that the tribunal does not have jurisdiction over Respondent because it did not sign the arbitration clause.

a. Tribunals have bound non-signatories to arbitration when they find that one is the alter ego of the other one.

i. Companies are no longer separate entities when they behave in such a way that demonstrates an abandonment of separateness [Thomson-CSF v. American Arbitration Ass'n].

ii. A non-signatory is estopped from refusing to arbitrate when the non-signatory parent was intimately intertwined with a contract containing an arbitration clause [Sunkist Soft Drinks v. Sunkist Growers].

b. Respondent and the company that signed the agreement are not separate entities.

i. The signatory is a subsidiary wholly owned by Respondent.

ii. Respondent had total control of the negotiations of the terms of the contract.

iii. Respondent performed a significant portion of the contract.

c. Failing to bind Respondent to arbitration would go against the reasonable expectation of the parties [Dow Chemical].

i. Respondent has effective control over the signatory

ii. Respondent negotiated the terms of the contract and agreed to fulfill a substantial portion of the contract.

iii. Respondent's involvement in the negotiations and the performance of the contract led to Claimant's reasonable expectation that any dispute would be resolved through arbitration with Respondent.

II. Respondent, once again relying on mere technicalities, is trying to avoid liability by falsely stating that this dispute does not fall within the scope of the arbitration clause.

a. When determining the scope of the arbitral clause, the tribunal should consider the intention of the parties and the subject matters that these parties agreed to arbitrate [Fouchard, et al., 297].

b. If no clear intention of the parties exists, it is not reasonable to assume that the parties wanted to divide the jurisdiction of the tribunal, but rather there is a presumption that the arbitral clause will include all disputes arising out of the contract [Lew, et al., 153].

c. If there is more than one way to interpret the arbitration clause, the tribunal should interpret it in such a manner that is consistent with the intention of the parties [Lew, et al., 469].

i. Thus, when referring to arbitral clauses, the tribunal should give preference to an interpretation that allows for arbitration, rather than an interpretation that makes the clause useless or renders it meaningless [Fouchard, et al., 258].

ii. Any doubt in regards to arbitrability should be resolved in favor of arbitration [Remy Amerique, Inc. v. Touzet Distribution].

iii. The inclusion of an arbitral clause demonstrates the intention of the parties to arbitrate any disputes that arise from the main contract. Thus, there should be a presumption for validity of the arbitral clause [ICC No. 7920].

THE FORCE MAJEURE PRINCIPLES ARE INAPPLICABLE AND RESPONDENT'S ACTIONS PREVENTED CLAIMANT FROM MITIGATING DAMAGES

III. Respondent cannot invoke the force majeure provisions to escape liability.

a. In this case, Respondent cannot meet its burden to show that the events that led to non-performance were unforeseeable.

i. The lack of foreseeability is an element of force majeure that Respondent must demonstrate.

1. If the lack of foreseeability element is not met, then Respondent cannot be relieved of its contractual obligations or escape liability [Craig, 655].

2. There is a presumption that businessmen, such as those that entered into this contract, are sophisticated and highly educated men who are highly trained in international transactions [Craig, 655, ICC No. 2216].

3. The foreseeability element is a case-specific inquiry and it requires the tribunal to evaluate it in terms of what would a reasonable businessmen in the same situation would have foreseen [Brunner, 159, ICC No. 1703].

ii. Respondent has failed to show that the events were, in fact, unforeseeable

1. The possibility of a drop in the prices was a known fact in the international market prior to the signing of the contract:
    a. There were reports by economists that predicted this drop in the world markets.
    b. There were newspaper articles that warned of the possible drop in prices and that stated that it was a matter to be carefully watched.
2. Respondent as a well-regarded participant in this market knew or should have known of the possibility of the drop in prices; thus, the drop in prices was not unforeseeable.

b. Further, Respondent could have reasonably avoided or overcome the effects of the impediment.
    i. At no time during the multiple scheduled deliveries did Respondent object to the market drop in price of the goods, nor did it tried to stop Claimant from delivering more items [Caviar Case].
    ii. Respondent could have simply invoked the Force Majeure Clause, asked Claimant to stop the shipment of goods, or asked for the renegotiation of the contractual terms.

IV. Respondent also seeks to avoid liability by claiming that Claimant failed to mitigate damages, but, in fact, it is Respondent who prevented Claimant from doing so.

a. Even assuming that Respondent is allowed to invoke the force majeure clauses stipulated in the contract, Respondent failed to mitigate the effects of the impediment [ICC Force Majeure, Art. 7].

i. This is consistent with the principles of good faith and the responsibility of the parties to abide by the terms of the contract [Craig, 657].

b. Under the force majeure provisions, once Respondent becomes aware of an impediment, Respondent must notify Claimant of its inability to continue with the performance of the contract [Craig, 657].
    i. This allows for Claimant to take the necessary steps to mitigate its damages.
    ii. The tribunal should not reduce the damages that a claimant is entitled to when claimant was prevented from mitigating its damages due to a lack of notification from Respondent [ICC No. 3880].
        1. The lack of notification reasonably led claimant to believe that, albeit a delay, respondent would perform its contractual obligations.

c. In this case, Respondent's actions prevented Claimant from mitigating its damages
    i. Respondent did not notify Claimant of its inability to pay for the delivered goods due to the drop in the market price.
    ii. Respondent did not invoke the force majeure clauses until after the arbitral proceedings had commenced.
    iii. The lack of notification led Claimant to complete its performance of the contract and believe that Respondent would pay according to the terms of the contract.