

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

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

TEAM NUMBER

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THIS TRIBUNAL LACKS JURISDICTION OVER THESE PROCEEDINGS

- I. The tribunal lacks jurisdiction over this dispute because Respondent did not sign the contract and, thus, did not provide its consent to arbitration.
 - a. Consent is one of the essential pillars of arbitration, and is, thus, crucial
[Girsberger & Hausmaninger, 130]
 - i. Arbitration is a creature of contract.
 - ii. When a party agrees to arbitrate, it is giving up its right to seek redress through the local courts; this makes consent a crucial requirement for arbitration.
 - iii. Parties legitimate expectation: only the two parties that negotiated the contract should be bound to the terms of the contract [Societe D'étude et Representations Navales et Industrielles v. Societe Air Sea Broker Limited].
 - iv. Lack of consent is sufficient to invalidate a contract [Clear Star Ltd. V. Centrala Morska Importowo-Eksportowa "Centromor" & Centromor S.A].
 - b. The UNCITRAL Model law Art. 7.1 explicitly requires for consent of the parties
 - c. Privity of contract: only those that have signed the contract should be allowed to invoke it [Gaillard & Savage, 432-34].
 - i. It is meant to protect the non-signatory from having an obligation unfairly imposed upon it.
 - ii. Allowing Claimant to unjustifiably force Defendant into arbitration would defeat the protections afforded by the privity of contract.

- d. In this case, Respondent is a non-signatory and should therefore not be bound to arbitration
 - i. Companies played a minor role in performance.
 - ii. Only one company provided its consent by signing the contract, therefore, only that one company should be bound.
- II. Even if this tribunal finds that it has jurisdiction over a non-signatory, the claim for damages that Claimant is seeking falls outside the scope of the arbitration clause.
 - a. Consent is needed not only to establish the consent to arbitrate, but also the subject matter that the parties have agreed to arbitrate.
 - i. The tribunal should not exceed the powers that it has been granted by the parties by arbitrating disputes that are outside the scope of the arbitration agreement [Mediterranean Enterprises, Inc. v. Ssangyong Corporation].
 - ii. Pacta sunt servanda [Gaillard & Savage, 382]:
 - 1. The terms of the arbitral clause should be considered mandatory to the parties.
 - 2. The terms of the arbitral clause forms part of the law that the tribunal must consider when determining arbitrability [ICC Case 5485].
 - 3. Extending the reach of this clause by asserting jurisdiction over this dispute would deprive Defendant of the benefit of its bargain by ignoring part of the law to which the contract has been submitted to.

- iii. Going outside of its jurisdiction risks the award being set aside or deemed unenforceable [NY Convention Art. V.1(c)].
- b. The tribunal should turn to the text of the arbitration clause to determine whether the clause grants it jurisdiction to evaluate the dispute [Pennzoil Company v. Arnold Oil Company].
 - i. In this case, the parties deviated from the model clause provided by the rules, which establishes that all controversies should be mediated by arbitration.
 - ii. Instead, the parties opted for a narrower clause that only allows for the arbitration to disputes relating to the interpretation of the contract.
 - 1. The deviation from the model clause demonstrates the parties' intention to limit the jurisdiction of the tribunal.
 - 2. It is, thus, clear that the consent of the parties to arbitrate disputes is only limited to dispute arising from the interpretation of the contract and cannot be extended to Claimant's request for damages.
- c. Furthermore, the tribunal must interpret the text of the arbitration clause strictly as it is an indication of the parties' intent [Gaillard & Savage, 259]. Doing so would be consistent with:
 - i. The consent of the parties
 - ii. The legitimate expectation of the parties.

CLAIMANT'S ALLEGATIONS LACK MERIT BECAUSE THE FORCE MAJEURE PRINCIPLES ARE APPLICABLE AND CLAIMANT FAILED TO MITIGATE DAMAGES

III. Respondent should be excused from paying the claimed amount because the Force Majeure principles are applicable in this case.

a. Pursuant to Article 1 of the ICC Force Majeure Clause:

i. The failure to perform was caused by an impediment beyond

Respondent's reasonable control

1. ICC Cases 3099 and 3100: held that governmental restrictions constituted force majeure

2. Similarly, in this case, the drop in the price was due to a new governmental regulation.

ii. The event was not foreseeable; and could not have, therefore, been taken into account at the time of the conclusion of the contract.

1. Respondent must show that the events could not have been reasonably foreseeable [ICC Case 650].

2. In this case, all reports stated that the price would remain the same as that contracted for.

iii. Respondent could not have reasonably avoided or overcome its effects.

1. Reasonable is that which a reasonable person would do under similar circumstances [Brunner 159].

2. Respondent was unable to overcome its effects because the new regulation dramatically lowered the price of the product, making it virtually impossible to provide it at the agreed upon price.

- IV. Even if this tribunal were to find that the Force Majeure principles are not applicable in this case, Claimant is not entitled to the damages it claims because it failed to properly mitigate damages.
- a. A party that has been harmed by the breach of the other may recover damages so long as the party has tried to mitigate the damages that have arisen from the breach.
 - i. ICC Case 2478: It is the duty of the harmed party to take the necessary measures to avoid an increase in the damages
 - ii. ICC Case 2103: Emphasized Claimant's duty to mitigate damages and reduced the damages by 50%, which is how much Claimant could have reasonably have mitigated.
 - b. In this case, Claimant had a duty to mitigate its damages
 - i. Could have mitigated damages by either trying to find other buyers or stop sending the monthly shipments to Respondent.
 - ii. Claimant did the contrary:
 - 1. Did not try to mitigate the damages, and
 - 2. Kept providing the product fully knowing that Respondent would not be able to pay the agreed upon price.
 - c. In the event that this tribunal finds that the principles of Force Majeure do not apply, this tribunal should reduce the amount awarded by an amount that is proportional to the losses that Claimant should have mitigated.