ARGUMENT ON MERITS

ISSUE: RESPONDENT IS NOT LIABLE FOR THE LATE DELIVERY AND

INSTALLATION OF THE MASTER CONTROL SYSTEM.

Respondent submits that it is not liable for the late delivery and installation of the master control system for two reasons. First, Specialty Devices and High Performances are not third parties under Art. 79(2) of CISG (B), Respondent is exempted from liability pursuant to Art. 79 (1) of CISG. Second, assuming that the tribunal decides there is a third party in this case, Specialty Devices would be the only third party, and Respondent would still be exempted under Art. 79(2) (C).

A. Respondent is exempt from liability pursuant to Art.79 (1) and (2) of CISG.

As Specialty Devices and High Performance are not “third parties” under the scope of Art. 79(2), Respondent only has to prove that it is exempt from under Art. 79(1) *(1)*. Under Art. 79(1), Specialty Devices’ late delivery constitutes an impediment beyond Respondent’s control *(2)*; Respondent could not have reasonably expected the late delivery at the time of the conclusion of the contract *(3)*; Respondent could not have reasonably avoided or overcome the consequences of the impediment *(4)*.

(1) Specialty Devices and High Performance are not “third parties” under the scope of Art. 79(2) of CISG.

Article 79(2) of CISG imposes special requirements on a party claiming an exemption from contract liability. A key issue, in this regard, is the meaning of "a third person whom he has engaged to perform the whole or a part of the contract.” Article 79(2) and its legislative history indicate that “third persons” must be construed narrowly*.*

“Third persons” under Art. 79(2) are parties “independently” engaged by the seller to perform all or part of the contract directly to the buyer*.* In the present case, however, High Performance was contracted by Specialty Devices to produce D-28 for the processing units designed by Specialty Devices. Specialty Devices signed the contract only with Respondent to provide the processing unit for Respondent. In other words, Specialty Devices and High Performance were not engaged by Respondent to perform all or part of the contract directly toClaimant, thus are not “third parties” to Respondent under Art. 79(2).

(2) Specialty Devices’ late delivery constitutes an impediment beyond Respondent’s control.

Although Claimant asserts that the fire at High Performance constituted the impediment, Respondent believes that the late delivery by Specialty Devices was the direct cause of the Respondent’s inability to fulfill its obligations under the original contract.

According to one court decision, an “impediment” must be an “unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness”.

Since fulfilling the contract requires too high an economic cost, Respondent’s economic impossibility constituted an impediment under Art. 79 of CISG.

(3) Respondent could not have reasonably expected the late delivery when the contract was concluded.

Denis Tallon(a scholar) states that a party should neither be too optimistic nor over-pessimistic*.* In this case, Respondent could not have foreseen that a fire would occur soon after the chips were put into production, nor could Respondent have foreseen that the remaining chips could not have been procured from other sources.

(4) Respondent could not have reasonably avoided or overcome the impediment or its consequences.

Respondent is not responsible for any alleged failings to procure the chips from High Performance and Atlantis Technical Solutions. Respondent did not contract with High Performance. It cannot be held responsible for failing to negotiate with High Performance to procure part of the remaining chips.

Also, commercial customs recognize High Performance’s right to deal with its remaining chips as it saw fit. High Performance has the right to distribute the remaining chips in any reasonable manner, and Specialty Devices has no choice but to respect High Performance’s allocation.

Moreover, according to a German case, the Respondent can be exempt from liability when suitable goods are no longer available in the market. D-28 chips were no longer available in the market as a consequence of the impediment and there were no suitable substitutes.

In conclusion, Respondent’s late performance was caused by the impediment of Specialty Devices’ late delivery and was beyond Respondent’s control. Respondent could have neither predicted such an impediment nor have avoided or overcome the consequences. Respondent is thus exempt from liability under Article 79(1).

B. Even if Specialty Devices constitutes a “third person”, Respondent is still exempted from liability for damages under Art. 79(2) of CISG.

Suppose that Respondent’s failure was due to the failure by a “third party”, Specialty Devices would be the only “third party” engaged by Respondent in this case*(1)*. Under such an assumption, Specialty Devices is also exempted for three reasons. First, Specialty Devices’ default was due to an impediment beyond its control *(2)*; second, Specialty Devices could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract *(3)*; finally, Specialty Devices could not have avoided or overcome the impediment or its consequences *(4)*.

1. Specialty Devices is not responsible for any alleged failings on the part of High Performance.

Claimant argues that Respondent is responsible for the failure of its entire supply chain to perform on time. However, High Performance was only a general supplier of goods and is hence not a third party of Respondent’s under Art. 79 of CISG. Respondent is not obliged to prove whether High Performance can be exempted from liability. Specialty Devices was only one of High Performance’s many customers. High Performance was a separate legal entity and its actions were out of Specialty Devices’ sphere of control. Therefore Specialty Devices is not responsible for any failings on High Performance’s part.

1. Specialty Devices’ failure to meet its contractual date of delivery was due to an impediment beyond its control.

First, since High Performance was the only supplier of the D-28 chips, Specialty Devices had no control over the choice of the supplier or its performance. In such cases, the supplier’s default may be established as a genuine impediment beyond the control of Specialty Devices.

Second, the impediment falls beyond Specialty Devices’ control. The fire at High Performance’s production facility was an accident, which is generally acknowledged as a situation of force majeureand considered is as an impediment beyond a company’s control.

Therefore, High Performance’s failure to perform constituted an impediment beyond Specialty Devices’ control.

(3) Specialty Devices could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract.

In the present case, unlike usual events that could be foreseen by professional traders, the fire that had occurred soon after production started was an unusual event that Specialty Devices could not have foreseen.

Furthermore, Specialty Device could not have foreseen High Performances’ subsequent failure to deliver D-28 chips. Specialty Devices’ order was a relatively small one. Without being too pessimistic, Specialty Devices could not reasonably foresee that High Performance would allocate all of the remaining chips to other companies.

1. Specialty Devices could not have avoided or overcome the impediment or its consequences.

When High Performance had first informed Specialty Devices of the fire, they had already decided that they would satisfy the needs of their regular customers first. Specialty Devices was not considered a regular customer of High Performance’s or an important long-term customer. Specialty Devices has no right to interfere with High Performance’s free will of allocation, obtaining chips from High Performance was not possible. Moreover, the D-28 chips were no longer available in the market and suitable replacements did not exist. Therefore, Specialty Devices could not have avoided or overcome the impediment or its consequences.

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In conclusion, Respondent breached the contract is exempted from liability pursuant to Art. 79 (1). Even if the Tribunal finds that there is a third party in the present case, Specialty Devices would be the only third party to this contract and would also be exempted under Art. 79(2). Consequently, Respondent is not liable for the late delivery and installation of the control system.