MODEL COURTS OF JUSTICE 2023

ICC International Court of Arbitration

Study Guide

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SUPERVISED BY UMUT EROL

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LETTER OF THE SECRETARY-GENERAL

Esteemed Participants,

It is my pleasure to welcome you all to the twelfth edition of the Model Courts of Justice, as the Secretary-General. My name is Umut Erol and I am a senior law student at Ankara University.

The participants of the Model Courts of Justice will witness the court simulation in the field of international commercial arbitration for the first time with the International Chamber of Commerce. The case that will be simulated is *'Starleo v. Metalius'* which is a fictional case in which the notion of fundamental breach will come up in connection with related legal instruments. The participants planning to participate in the Willem C. Vis International Arbitration Moot will have the possibility to practice before the moot and improve their both written and oral skills.

I would like to first thank Mr. Huseyn Alili for writing this fictional case and showing marvellous effort despite the obstacles that he had to face during the process. Second, I appreciate the Assistant-to-Secretary General, Miss Özge Soycan and the trainee of the International Chamber of Commerce, Mr. Yaşar Melekoğlu for their devotion and contributions to the preparation phase. Last, I would like to thank the Director-General of the Model Courts of Justice 2023 and my beloved partner, Miss Selin Özgören for enduring organizational excellence and professionalism with her wonderful organization team.

Before attending the sessions, I highly recommend all the participants read the Study Guide and Rules of Procedure, and bring the printed version of these documents with them while coming to the Conference.

If you have any questions or hesitations about the Conference, please do not hesitate to contact me at secretarygeneral@modelcj.org

Sincerely,

Umut Erol

Secretary-General of the Model Courts of Justice 2023

LETTER OF THE UNDER-SECRETARY-GENERAL

Esteemed participants,

My name is Hüseyn Alili and I am a senior law student at Ankara University Faculty of Law. Currently, I am an exchange law student at Toulouse 1 Capitole University, France. As the Under-Secretary-General responsible for the ICC International Court of Arbitration, I wholeheartedly welcome you all to the 12th session of the Model Courts of Justice.

Participants of this arbitral tribunal will need to make a decision regarding a dispute between two companies, Starleo and Metalius. It was the first time in the aerospace field that a state was going to launch its satellite into space relying on a private company's rocket. To prepare the rocket, Starleo bought Al-Li alloys from Metalius. However, the delivered material by Metalius was defective and caused the rocket to explode at the 15th second of the lunch.

It was a great pleasure for me to work with such an Academic Team. I especially thank our Secretary-General Mr. Umut Erol, who helped me during this long process; Ms. Özge Soycan who will guide this committee during the conference, and my Academic Trainee Mr. Yaşar Melekoğlu who always fulfilled the required tasks and surpassed my expectations. I extend my gratitude to Director-General Ms. Selin Özgören and her Organization Team for their great effort to make the 12th session of Model Courts of Justice.

If you have any queries about the committee, please do not hesitate to contact me at icc@modelcj.org.

I wish the best of luck to all participants,
Hüseyn Alili
Under-Secretary-General responsible for ICC International Court of Arbitration

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I. INTRODUCTION TO THE INTERNATIONAL COMMERCIAL ARBITRATION

1. Dispute Resolution Systems

Throughout history, as interpersonal relations have increased, the number of disagreements on different issues has also augmented. In ancient times, these conflicts were sometimes resolved through violence, with the victor dictating his will. Sometimes, the savant was consulted to solve the dispute. In Ancient Rome, for example, one of the most known methods of solving disputes was the principle of eye-for-an-eye. However, this method not only resolved conflicts but also led to the emergence of new disagreements. Therefore, to avoid interpersonal turmoil, it was decided in Ancient Roma to compensate for the damage with a certain amount of money. Cases related to these disputes started to be heard in state courts. As time passed, the judiciary became dependent only on the state and became one of the three main forces of the modern state.

As we approached the modern period, casuistic laws came into force in almost every field. For this reason, the activity of the court became much more important. However, the number of disagreements did not decrease; on the contrary, it increased even more. This rise in some periods of our age has increased the burden of the state. For instance, the Chief Justice of the United States and several federal and state court judges expressed their great concern over the enormous rise in the number of cases filed each year. The public budget faces a financial burden from litigation. Processing civil cases costs $2.2 billion, and processing criminal cases costs an additional $4 billion annually.[1]

Is there any other method to alleviate the state's burden on this issue? Alternative Dispute Resolution (ADR), which has been developed over the centuries and has become more important in law since the 20th century, is a remedy for this obstacle. Presenting more flexible methods, arbitration and mediation are the most known methods of ADR.

Lastly, it is significant to note the quote of Gus. J. Solomon, former Senior Judge of the United States District Court for the District of Oregon to understand the key point about the legal disputes:

[1] Gus J Solomon, 'Alternate Methods of Dispute Resolution' (1984) 2 Preventive Law Reporter 181.

'Of course, it is always desirable that written agreements be clear, concise, and unequivocal. Here, the role of a lawyer is critical. It is to define and clarify to avoid controversy rather than try to resolve a controversy after it has occurred.[2]

Indeed, a lawyer's duty is to prevent a controversy; however, although lawyers try to fulfil this duty through casuistic laws, the number of disputes increases progressively. Therefore, ADR has become more important in the progress of time.

a) Litigation

One of the oldest methods of dispute resolution, litigation is a method of resolving disputes by hearing cases before State Courts. During the trial, each party submits all necessary evidence and tries to convince the judge in favour of itself. The Losing Party generally has the right to file an appeal to the relevant appellate court to request the reversal of the judgment issued by the first instance court.[3] Generally, the cases are resolved quite late as there is the right to appeal the court decision. In this method, judges are appointed to solve the case regardless of the specifications of the problem, such as energy, maritime trade, and investment. This means that there is a high probability that the judge who will be selected to resolve the dispute is not an expert in the topic of the concrete case.

b) Mediation

Through the non-binding process of mediation, the parties can discuss their disagreements and reach their own resolution.[4] Mediation offers some unique advantages over other forms of alternative dispute resolution, such as litigation, such as informality, flexibility, voluntariness, and non-binding character.[5]

Mediation does not limit itself to a few legal arguments that only advocates usually understand. The sphere of mediation deals with the interests of the parties, which allows the opponents to negotiate more and reach an agreement with the help of the third party.

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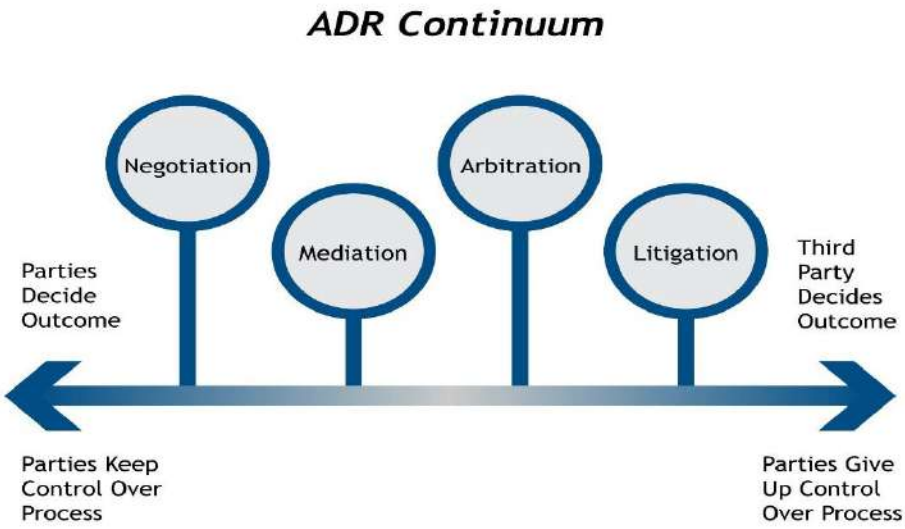
[2] *ibid.*
[3] Nilgün Serdar Şimşek and Kerim Bölten, 'General Overview as to the Distinction between Litigation and Alternative Dispute Resolution Methods'.
[4] Patrice S Arend, 'Alternative Dispute Resolution' (2003) 49 Wayne Law Review 221.
[5]Kenneth R Feinberg, 'Mediation - A Preferred Method of Dispute Resolution' (1989) 16 Pepperdine Law Review.



As mentioned before, another feature that makes mediation advantageous is that it is voluntary and its decisions are not binding. Possessing complete control of the process from the beginning to the end, the parties are entitled to withdraw from the proceedings.

The informality of procedures makes mediation more flexible and adaptable. Negotiations, discussions, collection of information, and communication of the mediator with the parties are almost not subject to any formality.

Although mediation does not always result positively, it paves the way for the resolution of cases that have been inconclusive for years in a short time. This makes mediation also 'cost friendly' than litigation which prolongs the resolution and requires more expense. For example, famous American attorney Kenneth Feinberg wrote: *"It took only three months to settle a ten-year-old antitrust dispute between competitors in the telephone paging business. It took only ten days to resolve another dispute between a shipper and a supplier. Moreover, minimizing time means minimizing legal fees, which are often the costliest aspect of a business dispute".*[6]

Figure I: *Diagram illustrating features of some Alternative Dispute Resolution methods.*[7]

[6] *ibid.*

[7] <https://biz.libretexts.org/Bookshelves/Law/Fundamentals_of_Business_Law_(Randall_et_al.)/04%3A_Alternative_Dispute_Resolution> accessed 16 July 2022.

c) Arbitration

A contractual method of resolving disputes, arbitration allows the parties to privately settle disagreements by submitting them to one or more arbitrators for a final decision.[8] The majority of the time, arbitration results in a final, binding decision that is enforceable in a national court.[9] This enforceability is possible by virtue of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, shortly the New York Convention. There are many characteristics of arbitration that differ from litigation such as private trials, affordability, flexibility, and resolution in a short time.

One of the main reasons for the preference for arbitration, especially commercial arbitration, is the fear of 'home court advantage. This means that the case will not be heard in the national court of one of the parties, creating a belief in a fair and impartial trial.

In order to resort to arbitration, the parties must specify this issue in their own contracts or conclude a new agreement regarding the use of arbitration. The parties can determine the seat of arbitration, the place of the hearing, the language in which the trials will be held, and the code through which the case will be resolved. It is necessary to note that the terms "the seat of the arbitration" and "the place of the hearing" should not be confused. By choosing the location where the procedural law regarding arbitration will be applied, the parties determine the seat of arbitration. On the contrary, by deciding upon the place of hearing, parties merely determine the physical venue where the hearing will be held.

Arbitration hearings are held in complete confidentiality and a third party may attend the trials only with the consent of the parties. This is a crucial point for contractors, especially traders, who want information about the event and themselves to be kept confidential.[10]

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[8] *ibid.*
[9] Margaret L Moses, The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008).
[10] ibid.

In modern times, there are two most important types of arbitration: *ad hoc arbitration and institutional arbitration.* Both have their own advantages and disadvantages.

Although quite similar in general, the main feature that distinguishes these two types of arbitration is whether an arbitration institute has administrative authority or not. The arbitration will be ad hoc if it is not administered by an institution as the arbitration agreement does not specify an institutional arbitration. In other words, parties can create their own proceeding rules, especially for the concrete case. They can choose the procedural rules of UNCITRAL since they are the most applied rules for ad hoc hearings. Ad hoc arbitration is particularly useful when one of the parties is a state because the latter needs more flexibility in the procedure.

One of the positive sides of ad hoc arbitration is its cost-effectiveness. The parties only pay fees of the arbitral tribunal, lawyers and the costs incurred for conducting the arbitration etc. They do not pay the arbitration institution's administration fees which, if the amount in dispute is large, can be expensive. Additionally, the parties have a chance to select any place for the venue of the hearings. [11]

Institutional arbitration, on the other hand, is a process of arbitration administered by a certain institution. The arbitral tribunal and the institution should not be confused. It is the arbitral tribunal, composed of one or more arbitrators, who resolves the disputes; however, the institution solely supervises the process.

[11] Sundra Rajoo, 'Institutional and Ad Hoc Arbitrations: Advantages and Disadvantages' [2010] The Law Review 554.

In the contract, the parties may draft the name of the institution. The prominent arbitration institutions are as follows: the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), and the International Center for Settlement of Investment Disputes (ICSID).

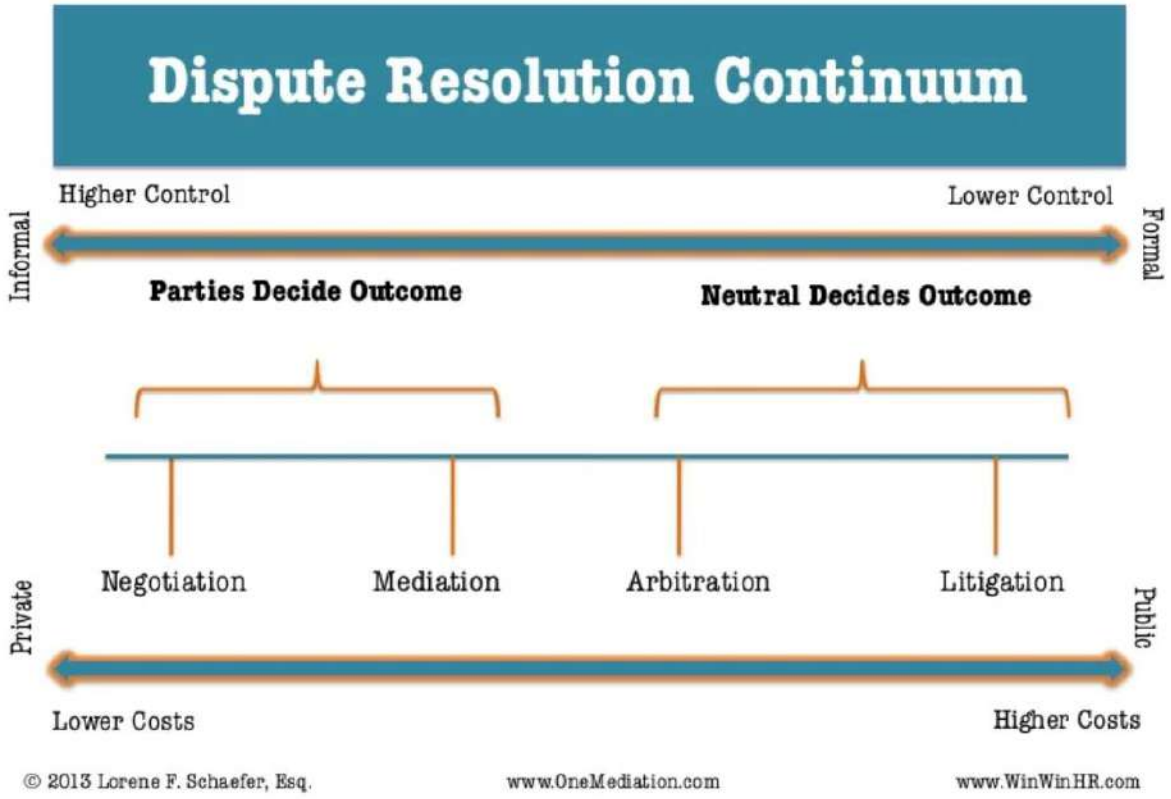

Figure II: *Diagram depicting qualifications of four ADR methods.*[12]

The benefit of institutional arbitration is that the majority of institutional organizations have established a specific reputation. This will have an impact on supervising courts' perception of the awards issued under the rules of that institution. The enforcement will therefore be facilitated by

[12] <https://www.slideshare.net/LoreneSchaefer/dispute-resolution-continuum> accessed 17 July 2022.

the fact that an award granted, for example, is granted by the ICC Court or the LCIA, the institutions which have an international reputation.[13]

It is the main objective and strong interest of every arbitration institution to preserve its prestige since this is a vital matter in terms of its functionality. Therefore, every institution has an entity that scrutinises the proper conduct of the proceedings. In the case of the ICC Court, it supervises both the proceedings and the arbitral award rendered by the arbitral tribunal. The ICC Court can do recommendations to the arbitral tribunal, which is not bound by such recommendations.[14] On the contrary, such quality control does not exist in ad hoc arbitration.

2. Difference between Litigation and Arbitration

As mentioned above, the practice of arbitration has grown tremendously over the last decades. Douglas A. Darch, a Chicago attorney who represents companies in employment cases, explains this leap as follows:

"The answer is the federal civil system - where most employment cases are litigated - is broken. It is so time-consuming and so expensive that companies that want to resolve disputes are looking for other ways to do it."[15]

As a result of the quote, in order to profoundly understand the rise of application of the arbitration, it is necessary to comprehend what drives the parties to resort to arbitration.

First of all, litigation hearings are held publicly and are recorded because of the principle of publicity. This is one of the top reasons why many parties, especially parties in trade and antitrust cases, do not want their dispute to be settled by the state court.

Secondly, arbitral trials are more informal, thus creating a more comfortable atmosphere to settle the dispute. The trials are also realized without adverseness, contrary to that of litigation.

Thirdly, in most cases, judges appointed to resolve a particular case do not have in-depth knowledge of the concrete case and this can lead to wrong decisions. Assuming that a case

[13] Gordon Blanke, 'Institutional versus Ad Hoc Arbitration: A European Perspective' (2008) 9 ERA Forum 275.
[14] *ibid.*
[15] Martha Neil, 'Litigation over Arbitration' (2005) 91 ABA J 50

involving a maritime accident is heard in court, the judge appointed to hear the case is unlikely to have much knowledge of the intricacies and technology of ships. This could lead to an incorrect judgment made by the courts. Conversely, the arbitrators responsible for solving the case are people who have deep knowledge of the concrete case, which often leads to the right decisions being made.

Subsequently, state courts immensely lack finality, because of the chance of the request to appeal and carrying the case to higher courts. For example, real-estate litigations can be prolonged to three or four years; however, the same case can be resolved in six months owing to arbitration.[16] The extension of the resolution of the case also means increased expenses. This makes litigation much more expensive than arbitration and other ADR methods.

Although arbitration is always considered cost-friendly, the expense to the arbitrators and the arbitration institution can be equal to the cost spent during the litigation process. The immediate-past chair of the ABA Section of Dispute Resolution, Richard Chernick clarifies this phenomenon as thusly.

"And even though arbitrating a matter might end up costing almost as much as litigation, businesses like being able to limit discovery, set their own rules for presenting evidence, schedule proceedings at their own convenience and select the third party who will decide their cases, says Richard Chernick of Los Angeles, the immediate-past chair of the ABA Section of Dispute Resolution".[17]

3. Commercial Arbitration

Trade has had an important place in our lives since the existence of humanity. Commerce was not only a profession but also one of the main livelihoods of people in ancient times. Since the beginning of the sedentary lifestyle, the number of disputes in the field of trade has also augmented.

[16] Arthur Mazirow, 'The Advantages and Disadvantages of Arbitration As Compared To Litigation'.
[17] *ibid.*

It is necessary to note that these commercial disputes were mostly resolved through arbitration. For example, Oxyrhynchus Papyri from 427 AD show that in arbitrations dating back to the time of Ancient Egypt, merchants eagerly recognized as binding the judgments of other traders who had knowledge and experience in the relevant subject. [18]

Although thousands of years passed, one characteristic of tradesmen has never changed: A trader was and is much more focused on preserving business relationships rather than defending his legal rights.[19]

For this reason, not only in the modern age, but also in ancient times, tradesmen wanted disputes to be resolved not by state courts, but by a third person with deep knowledge of the trade so that fairer decisions could be made.

It is worth noting that private arbitration predates the public court system.[20] Lacking central authority, the pre-Islamic Arab community also resorted to arbitration when a dispute arises from commercial relations. If the parties were unable to settle their issues through negotiations, a hakam (arbitrator) was chosen. Any person with excellent character, a good community reputation, and skill in conflict resolution could be considered a hakam.[21]

In earlier times, the applicable law was only the established practice among the traders in a particular field and the principle of *ex aequo et bono*, which literally means "according to the right and good". *Ex aequo et bono* means that the arbitrator may avoid taking the law into account and instead focus only on what they consider to be fair and equitable in the specific case at hand. Varying in every community and concrete case, arbitration decisions were either binding or not.

[18] Georgios I Zekos, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008) p. 10
[19] Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 University of Pennsylvania Law Review and American Law Register 132.
[20] Georgios I Zekos, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008) p. 9
[21] Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 Santa Clara Journal of International Law.

During the medieval period in Europe, the common rules used by the merchants are called *Lex mercatoria*, which exactly means "merchant law". This means that *lex mercatoria* has been used as the applicable law during the arbitral trials of the medieval era.[22]

As we approach modern times, the bond between the traders has increased and the disputes have often been resolved by arbitration tribunals established among themselves. For instance, The New York Chamber of Commerce established an arbitration system when it was founded in 1768, and the Chamber's arbitration panels were independent of the judiciary.[23]

As of today, usually resolved in prominent institutions, commercial arbitration is one of the most significant branches of arbitration.

[22] Aneta Spaic and Larry A DiMatteo, 'Interpreting Fundamental Breach' [2014] International Sales Law–A Global Challenge, Cambridge 237.
[23] Georgios I Zekos, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008) p. 11

II. THE INTERNATIONAL CHAMBER OF COMMERCE

Founded in 1919, the International Chamber of Commerce (hereinafter "the ICC") resolves commercial disputes, gives advice and assists businesses around the world. The main function of the ICC which will be covered in the next pages is dispute resolution service.

1. History

From restrictive laws to the existence of unsafe economic environments, trade and business have faced many difficulties throughout the history of humanity. Especially, after the industrial revolution and massive increase in production, these restrictive laws showed even worse effects on tradesmen, preventing the rise of export and import and creating mistrust towards the business environment of many countries. For this reason, especially at the end of the 19th century and at the beginning of the 20th century, it was aimed to establish an international organization that would facilitate the practice of world trade and industry.

In this regard, the International Congress of Chambers of Commerce and Industrial and Commercial Organizations was established in 1904. However, because of the lack of a permanent directory, staff, and headquarters, the International Congress failed to achieve the goals set in the meetings.[24]

After the end of devastating World War I, the small town called Atlantic City which is situated in New Jersey had been chosen as a place for the upcoming International Trade Conference. In October 1919, as a result of the conference, the International Chamber of Commerce had been established. The chief functions of the ICC, therefore, will be to consider laws affecting commerce, to suggest changes and enactment of new measures which will improve conditions and to effect reforms on their initiative in business customs and practices which will bring better results. These purposes are still enshrined in Article 1 of the Constitution of the ICC.

[24] John H. Fahey (1921). 'The International Chamber of Commerce', 'The ANNALS of the American Academy of Political and Social Science', 94(1), 126–130

2. Governance

The governing bodies of the ICC are as follows: *World Council, Chairmanship and International Secretariat, and Executive Board.*[25]

a) World Council

The World Council is the supreme governing body of the ICC, an equivalent of the general assembly of an intergovernmental organisation. It is necessary to note that the delegates are not government officials, but the executives of renowned businesses.

b) Chairmanship and Secretary-General

The chair, their immediate predecessor, and the vice chairs constitute the chairmanship. They are selected by the World Chair for a two-year term. The International Secretariat, the ICC's operational arm, is headed by the Secretary-General. Article 9(2) of the ICC Constitution states that the Secretary-General is responsible for implementing the Executive Board's strategic decisions, policies, and action plans. Additionally, the Secretary-broad formulates or proposes broad policy recommendations for the ICC and for the creation of rules, which are subsequently reviewed by the Chairmanship and approved by the Executive Board. As the Chair, the Secretary-General is elected by the World Chair.

c) Executive Board

The Executive Board is responsible for developing and implementing ICC's strategy, policy and programme of action and for overseeing the financial affairs of the institution. The Executive Board is composed of 28 members, each having equal rights. At present, Executive Board has 6 committees as follows: Governance Committee, Finance Committee, Governing Body for Dispute Resolution Services, Nominations and Human Resources Committee, Policy Commissions Committee and Global Networks Committee.

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[25] <https://iccwbo.org/about-us/governance/> accessed 22 July 2022.

3. ICC International Court of Arbitration

The ICC International Court of Arbitration ("the Court"), established in 1923, resolves disputes involving international commerce and business in order to promote investment and trade.[26] Below, the overview of the dispute resolution service of the ICC will be seen. Secondly, the arbitral procedure behind the Court will be examined.

a) Overview

The ICC realizes its principal objectives by resolving commercial disputes, giving advice and assisting businesses around the world. The main function of the ICC which will be covered is the dispute resolution service. This service mainly consists of 3 committees, including ICC International Court of Arbitration, ICC International Centre for ADR, and ICC Belt and Road Dispute Resolution services.[27]

ICC International Court of Arbitration is founded after 4 years of the establishment of the ICC. The Court does not directly solve the disputes; however, as previously noted, it is an administrative establishment. More specifically, the Court performs an administrative function with the authority to issue specific decisions in accordance with the ICC regulations, while arbitrators only exercise judicial power.

ICC International Centre for ADR consists of numerous dispute resolution forms such as negotiation and mediation.[28] On the other hand, ICC Belt and Road DR is a special commission which aims to resolve commercial disputes that will arise from investment and trade along the Belt and Road Initiative.[29]

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[26] <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> Accessed 22 July 2022.
[27] https://iccwbo.org/about-us/who-we-are/dispute-resolution/ - will be written later
[28] <https://iccwbo.org/dispute-resolution-services/mediation/icc-international-centre-for-adr> Accessed 23 July 2022.
[29] <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/#:~:text=ICC%20created%20the%20Belt%20and,Road%20spectrum%2C%20particularly%20in%20China> Accessed 23 July 2022.

Since the study guide will only concentrate on the ICC International Court of Arbitration, it is important to define arbitration, to elaborate on the trial proceedings of the court and the procedure for bringing disputes before the ICC.

b) Proceedings

According to Article 1(1) of the ICC Rules of Arbitration 2021[30], the Court is independent of various bodies of the ICC. As written above, even though the name of the institution carries "the court", it has administrative authority over the arbitral tribunal. This has been expressed thusly in Article 1(2) of the statute.

"The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules")."

In other words, while the arbitral tribunal resolves the dispute and renders an award, the Court administers and supervises the proceedings and the judgment made by the tribunal.

It should be noted that the Rules of the Arbitration, which came into force in 1923 for the first time, change periodically, with the latest ones in 2017 and 2021.

One of the most necessary regulations of the rules is written in Article 34.

"Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form."

[30] <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_30new> Accessed 23 July 2022.

As mentioned before, there is one main reason for the supervision of the Court over arbitral awards: *to preserve the reputation of the institution*. Undoubtedly, no arbitration centre wants wrong verdicts to come out from the arbitral tribunal organized by them.

To resort to the Court, it is enough to mention the name of the ICC in the contract. Then, the request for arbitration must be filed with the ICC Secretariat for the ICC Arbitration Court. The Request for Arbitration must be filed with the ICC Secretariat for the ICC Arbitration Court at ICC Headquarters. The request must include; a) the name, description and address of each of the parties; b) a description of the nature and circumstances of the dispute giving rise to claims; c) a statement of the relief sought including any compensation claimed, if required; d) the copy of the relevant contract and arbitration agreement; e) all relevant particulars concerning the constitution of the Arbitral Tribunal; f) any preference for place of arbitration, the applicable rules of law and the language of the arbitration. [31]

The Request must be filed with enough copies for each respondent party, each arbitrator, and the Secretariat. The Request must also be accompanied by some fees as an advance payment of administrative costs.[32]

The parties may determine the seat of arbitration, the place of the hearing, the language of the tribunal, and the code through which the case will be resolved.

Another necessary point about the rules is Article 31, which regulates the time limit for the final award. According to the Article, the final award should be rendered in six months. If not so, the increase of the time is possible only if the Court permits it after the request of the arbitral tribunal. The Court itself also can extend the deadline on its own initiative.

[31] Rekha Panchal, 'The ICC International Court of Arbitration' (2016) 3 Ct. Uncourt 6.
[32] *Ibid.*

III. KEY CONCEPTS

Key concepts are necessary notions that must be profoundly known to comprehend the case that will be resolved by the arbitral tribunal.

1. Fundamental Breach

Before explaining the fundamental breach, it should be noted that this concept and upcoming legal notions will be analysed according to the United Nations Convention on Contracts for the International Sale of Goods (the CISG). That is to say, these legal notions should not be perceived according to their meanings in national laws, which change from nation to nation. In this guide and in the conference, these legal notions will be used in accordance with only the CISG.

Before explaining the fundamental breach, it would be beneficial to touch briefly on the CISG. There had been several attempts to unify international commercial law. The first two drafts of CISG had very limited acceptance by the international law community. However, the newly established agency of the United Nations, UNCITRAL[33] put more effort into creating common grounds for the international sale of goods and overcoming the differences between common law and civil law traditions on this subject.[34] Finally, the third draft was signed on April 11, 1980, and entered into force on January 1, 1988.

As of today, 94 countries, representing two-thirds of the world trade, signed and ratified the CISG.[35] The major non-signatory countries, on the other hand, are The United Kingdom, India, South Africa, and Nigeria.

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[33] United Nations Commission On International Trade Law
[34] Eduardo Grebler, 'Fundamental Breach of Contract under the CISG: A Controversial Rule' (2007) 101 Cambridge University Press.
[35] <https://iicl.law.pace.edu/cisg/page/cisg-table-contractingstates#:~:text=As%20of%20September%2024%2C%202020,States%20have%20adopted%20the%20CISG.> Accessed 24 July 2022.

It must be pointed out that the breach of the contract is not defined by the CISG. In other words, Article 25 only delineates the notion of the fundamental breach as follows:

"A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

At this point, it is highly recommended to the reader pay serious attention to the next paragraphs to seize the core of the fundamental breach that will be considerably utilized during the hearings of the arbitral tribunal.

In order to fully comprehend this regulation, it should be divided and examined into several parts. We can say that it consists of one affirmative statement, two conditions, and one exception. One by one, each of them will be examined below.

- "A breach of contract committed by one of the parties is fundamental" – affirmative statement
- "If it results in such detriment to the other party" – condition
- "As substantially to deprive him of what he is entitled to expect under the contract" – second condition
- "Unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result" – exception

a) A breach of contract committed by one of the parties is fundamental

As noted before, the definition of the 'breach' is not given by the CISG. However, it is quite possible to interpret this word in its traditional sense. Namely, the breach is the non-fulfilment of one of the contractual obligations. What results the breach produces is the question of the national laws and the case law developed their continuous application.

Under the CISG, every breach is not considered 'fundamental'. In order to be regarded as 'fundamental', certain requirements should be met. Those requirements are two conditions which will be further explained below. If those conditions have not been complied with, it is a non-fundamental breach.

Fundamental and non-fundamental breach under the CISG has different consequences which will be examined below.

b) If it results in such detriment to the other party

This is the first condition for the occurrence of the fundamental breach. In other words, a breach must cause a detriment to the other side. However, the existence of the damage is not sufficient for the emergence of the fundamental breach. In order to rank as fundamental, a breach must be of a certain nature and weight, such as not fulfilling a basic liability or substantially depriving the other party of what he/she is entitled to expect.[36]

c) As substantially to deprive him/her of what he/she is entitled to expect under the contract

The aggrieved party must have suffered such detriment as to substantially deprive it of what he/she is entitled to expect under the contract. The breach must therefore nullify or essentially depreciate the aggrieved party's justified contract expectations. What expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on customary usages, and on the provisions of the Convention.[37]

d) Unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result

This is an exception to the occurrence of the fundamental breach. For example, if one party's breach caused damage (*first condition)* to the other contracting side to the degree that he/she is deprived of what he/she is entitled to expect *(second condition)*, it is possible to think that the fundamental breach occurs. Nevertheless, it should be examined in detailly whether the party in breach should forecast the result or not; and whether a reasonable person of the same kind in the same circumstances would have predicted such a consequence or not. If it is also impossible for a reasonable person of the same kind in the same situation to foresee the outcome, it does not

[36] *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (UNCITRAL 2016) p. 114
[37] *ibid.*

constitute a fundamental breach. Conversely, if it could be predicted, the requirements for the occurrence are met.

After analysing the meaning of Article 25, it is noteworthy to mention the consequences of the fundamental breach.

In simple terms, the breach of the contract gives rise to simple remedies: for instance, damages and price reduction. On the other hand, fundamental breach results in more drastic consequences, such as the termination of the contract.

More precisely, under the CISG, the fundamental breach is a precondition for the exercise of certain rights, such as avoidance (or termination) of the contract *(Articles 49(1)(a) and Article 64(1)(a))* the request by the buyer for delivery of substitute goods *(Article 46(2))*, and the preservation of remedies after the passing of risk *(Article 70(2))*.[38]

2. The Rocket

Generally,[39] The term 'rocket' refers to various vehicles, such as fireworks, skyrockets, guided missiles, and launch vehicles for spacecraft.[40] The rocket that will be the topic of the case is related to vehicles that carry satellites, spacecraft and other required machines to space.

Figure III: Saturn V rocket lifting off from Cape Canaveral Air Force Station, Florida, with the Apollo 15 spacecraft, July 26, 1971.

First of all, the first word that needs to be deeply understood in order to grasp the rocket and its operation is *'propel'*. Two nouns related to this verb, 'propellant' and 'propulsion' will also be analysed due to their wide use in the space industry.

The verb 'propel' literally means to push or move something somewhere, often with a lot of force.[41] An example sentence given in Cambridge Dictionary is as follows. "A rocket propelled through space".

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[38] Eduardo Grebler, 'Fundamental Breach of Contract under the CISG: A Controversial Rule' (2007) 101 Cambridge University Press, p. 409

[39] <https://www.britannica.com/technology/rocket-jet-propulsion-device-and-vehicle/images-videos#/media/1/506283/117688> Accessed 29 August 2022.

[40] <https://www.britannica.com/summary/rocket-jet-propulsion-device-and-vehicle> Accessed 29 August 2022.

[41] <https://dictionary.cambridge.org/dictionary/english/propel> Accessed 29 August 2022.

'Propulsion' is a noun that designates the action of propelling or a force that pushes something forward.[42] For example, in the rocket industry, 'the propulsion system' is used to refer to the system that will move the rocket to the sky.

'Propellant', on the other hand, means an explosive substance that causes something to move forwards.[43] In fact, the propellant is a combination of fuel and oxidizer. When burned, this chemical mixture provides propulsion. In other words, rocket engines turn the fuel into hot gas. The engine pushes the gas out its back and the gas makes the rocket move forward.[44]

The two most common types of propellants are liquid and solid. Solid fuels were always used in the earliest rockets and their utilization was widespread till the middle of the XX century. The liquid propellant, invented in the first decades of the twentieth century, offered more efficient and controllable alternatives.

When it comes to the brief history of the rocket, the technology of rocket propulsion appears to have its origins in the period 1200–1300 in Asia, where the first 'propellant had been in use for about 1,000 years for other purposes'.[45] From those ages, rockets are used only for military

[42] <https://dictionary.cambridge.org/dictionary/english/propulsion> Accessed 29 August 2022.
[43] <https://dictionary.cambridge.org/dictionary/english/propellant> Accessed 29 August 2022.
[44] <https://www.nasa.gov/audience/forstudents/k-4/stories/nasa-knows/what-is-a-rocket-k4.html> Accessed 29 August 2022.
[45] <https://www.britannica.com/technology/rocket-jet-propulsion-device-and-vehicle/Development-of-rockets -> Accessed 29 August 2022.

purposes. In the early XX century, Russian scientist Konstantin E. Tsiolkovsky and American scientist Robert H. Goddard are known for their contribution to the development of the rocket. The most notable achievement of this era is the production of V-2 rockets, which used liquid propulsion, by Germans in the 1930s.[46] [47]

There are four main parts of the rocket: the structural system, the payload system, the guidance system, and the propulsion system.

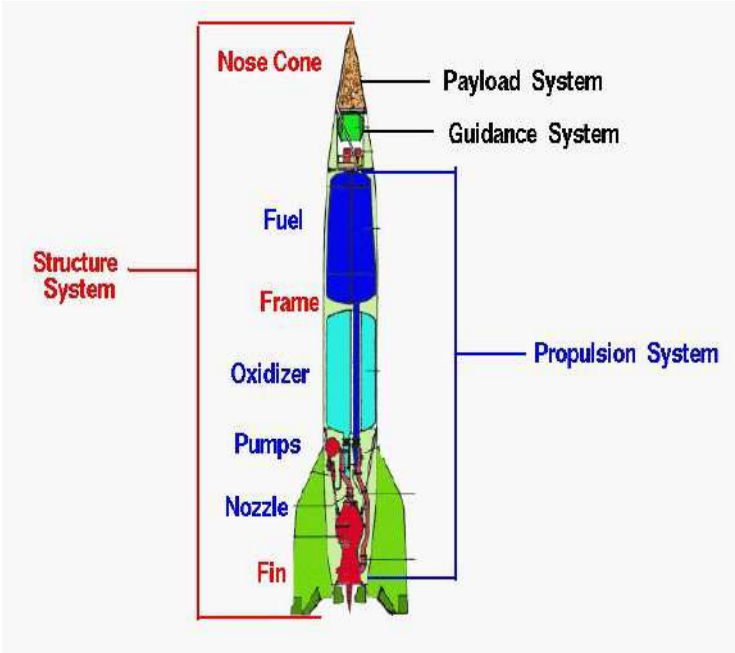

Figure IV. The image depicting the parts of the rocket

The structural system, or frame, is similar to the fuselage of an airplane. The frame is made from very strong but lightweight materials, like titanium, aluminium, or aluminium-lithium alloys.[48]

The payload system of a rocket depends on the rocket's mission. The earliest payloads on rockets were fireworks for celebrating holidays. The payload of the German V-2, for example, was several thousand pounds of explosives. Following World War II, many countries developed guided ballistic missiles armed with nuclear warheads for payloads.[49] In simple words, if the mission of the rocket is to carry a satellite to space, the satellite will be installed on the payload. If the spacecraft will be carried, the spacecraft will be placed on the payload.

The guidance system of a rocket may include very sophisticated sensors, onboard computers, radars, and communication equipment to manoeuvre the rocket in flight. Modern rockets typically

[46] *ibid.*
[47] <https://www.grc.nasa.gov/WWW/k-12/rocket/structure.html#:~:text=There%20are%20four%20major%20components,fairings%2C%20and%20any%20control%20fins.> Accessed 29 August 2022.
[48] <https://www.grc.nasa.gov/WWW/k-12/rocket/rockpart.html> Accessed 29 August 2022.
[49] *ibid.*

rotate the nozzle to manoeuvre the rocket. The guidance system must also provide some level of stability so that the rocket does not tumble in flight.[50]

Finally, as noted before, the propulsion system serves to launch the rocket into the sky.

3. Aluminium-lithium Alloy

Aluminium-Lithium (Al-Li) alloy development has a long history going back to the 1920s. However, it is only since the 1990s that the fundamental understanding of these alloys has matured. This enabled the development of a family of alloys with excellent combinations, the so-called third-generation Al-Li alloys.[51]

Generally, titanium (Ti), aluminium (Al), or carbon fibre (CF) is used to fabricate the frame of the rocket. However, these materials have some disadvantages that pushed the manufacturers to find more stable, light, and less dense material. Al-Li is exactly the material that researchers tried to find at this point. On top of that, Al–Li alloys have been found to exhibit superior mechanical properties as compared to the conventional Al alloys in terms of higher specific strength and enhanced resistance.[52] Further, Al–Li alloys are technologically more attractive as compared to the newer structural materials such as Ti alloys and composites, which are prohibitively expensive.[53]

The general history and the chemical substance of the Al-Li alloys will be briefly analysed in this part.

Although Al-Li alloys have been commercially used on some level since the 1920s, the composition of Al-Li alloys has significantly evolved over the past decades. *The evolution of Copper (Cu) and Lithium (Li) content in these alloys is not only important for the history of this material, but also for the case before the arbitral tribunal.*

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[50] *ibid.*
[51] RJH Wanhill, 'Aerospace Applications of Aluminum-Lithium Alloys' [2014] Aluminum-Lithium Alloys.
[52] N Eswara Prasad, A. A Gokhale and P Rama Rao, 'Mechanical Behaviour of Aluminium-Lithium Alloys' [2003] Sadhana.
[53] *Ibid. (nesvara prassad)*

The reason to add Li to Al is to make Al alloy much less dense. Indeed, Li is the lightest metallic element. Each unit addition of Li to aluminium offers nearly 3% in density advantage.

Historically, the development of these alloys has been divided into three generations. The first generation of Al-Li alloys was developed as part of research programmes by the United States and the Soviet Union during the Cold War era. It contained approximately 4.5wt% Cu and 1.2wt% Li. ("wt" is the abbreviation of the weight)[54]

The second and third generations of Al-Li alloys are invented after the utilization of the first generation. The main difference between these two generations, as emphasized before, is the Li:Cu ratio. The second-generation Al-Li alloys contain high concentrations of Li (generally greater than 2wt%) with low Cu levels (less than 2wt%). However, the second generation of Al-Li alloys was unsuccessful in practice due to various factors.[55]

The modern version, or the third generation, of Al-Li alloys contain Cu as a major alloying element. In contrast to second-generation alloys, the Li:Cu ratio of these alloys is much lower with Li contents generally being between 1–2wt% and Cu contents generally being between 2–4wt%. These alloys have found numerous uses in both military and commercial aerospace applications, such as wing and fuselage skins.[56]

When it comes to the significance of this material for this case, the third generation of Al-Li alloy is used for the fabrication of the frame of the Eagle Heavy rocket of Starleo.

[54] Thomas Dorin, Alireza Vahid and Justin Lamb, 'Aluminium Lithium Alloys', *Fundamentals of Aluminium Metallurgy* (Woodhead Publishing 2018), p. 388
[55] Thomas Dorin, Alireza Vahid and Justin Lamb, 'Aluminium Lithium Alloys', *Fundamentals of Aluminium Metallurgy* (Woodhead Publishing 2018), p. 389
[56] *ibid.*

IV. CASE BEFORE THE ARBITRAL TRIBUNAL *(STARLEO v. METALIUS)*

1. Overview

a) Starleo

Specializing in rocket manufacturing and launching, "Starleo" is a company located in California, the United States of America. Starleo carries out rocket launches in return for a certain fee. Starleo also produces its own rockets, among which the two most known are "Eagle Heavy" and "Eagle Light".

Figure V. The logo of Starleo

Possessing a more powerful engine, Eagle Heavy is utilized for heavy volume launches; more precisely, for super heavy-lift launches. The super heavy-lift launch means that the rocket can lift more than 50 metric tons by NASA classification.

Eagle Light is used for heavy-lift launches. In other words, this vehicle is capable to lift between 20 to 50 metric tons.

Figure VI. The logo of Metalius

b) Metalius

Specializing in the production and sale of materials, 'Metalius' is a company located in Shanghai, China PR. Although it produces many different materials, the company is mostly known for selling aluminium and aluminium-lithium alloys, aluminium honeycomb, carbon fibre, and stainless steel in different forms and of high quality. These materials are widely used in aircrafts, satellites, rockets, etc. For this reason, several businesses in the space industry signed contracts with Metalius concerning the purchase of required materials.

2. Facts of Case

a) The Contract between Starleo and Metalius

Starleo drew up the Purchase and Supply Agreement (the PSA) with Metalius to buy materials on 1 November 2022. According to the contract, Starleo will buy the required materials, especially aluminium-lithium alloy for the production of the rockets and related reasons.

Furthermore, it is noted that the contract and sales and purchases of materials will be subject to the United Nations Convention on Contracts for the International Sale of Goods (hereinafter 'the CISG').

The contract also regulated that in case of a dispute, the parties agree to resolve the dispute by arbitration under the auspices of the ICC. The seat of arbitration is agreed to be Ankara, a city almost equally distanced from their headquarters.

b) The Launch of Eagle Heavy Rocket

On August 22, 2022, aiming the satellite to be launched into space at the beginning of December 2022 at the latest, the government of Bosnia and Herzegovina ordered the launch of its satellite by Eagle Heavy and paid the required amount. After the order, Starleo drew up Purchase and Supply Agreement with Metalius on November 1, 2022. Receiving the goods on 14 November, Starleo was in a difficult situation as the difference between the delivery date and the launch date of the rocket was very short. Relying on the delivery of all materials in a qualitative manner since 2018, the company immediately used the delivered materials in production without testing. Despite working hard, Starleo informed the Bosnian government that it would not be able to launch the rocket until December 2022. Consequently, the parties set February 15, 2023 as the launch date.

On February 15, 2023, at 12:00 Florida time, the Eagle Heavy rocket of Starleo carrying the Bosnian satellite started to be launched at Kennedy Space Centre. However, 15 seconds after the beginning of the operation of the engines, the rocket exploded.

CEO of Starleo considered carrying the Bosnian satellite to space as the most important mission that the company has ever realized since its foundation in 2012, considering that it was the first time that the company received an order from a foreign state. In other words, space agencies of many states are deeply interested in the outcome of this launch, because the success of the launch means that the necessary vehicles can be launched into space by a private company at less cost. As a result, many states would be able to order a private company to launch their vehicles into space instead of contracting with another state. However, the explosion of the rocket badly affected

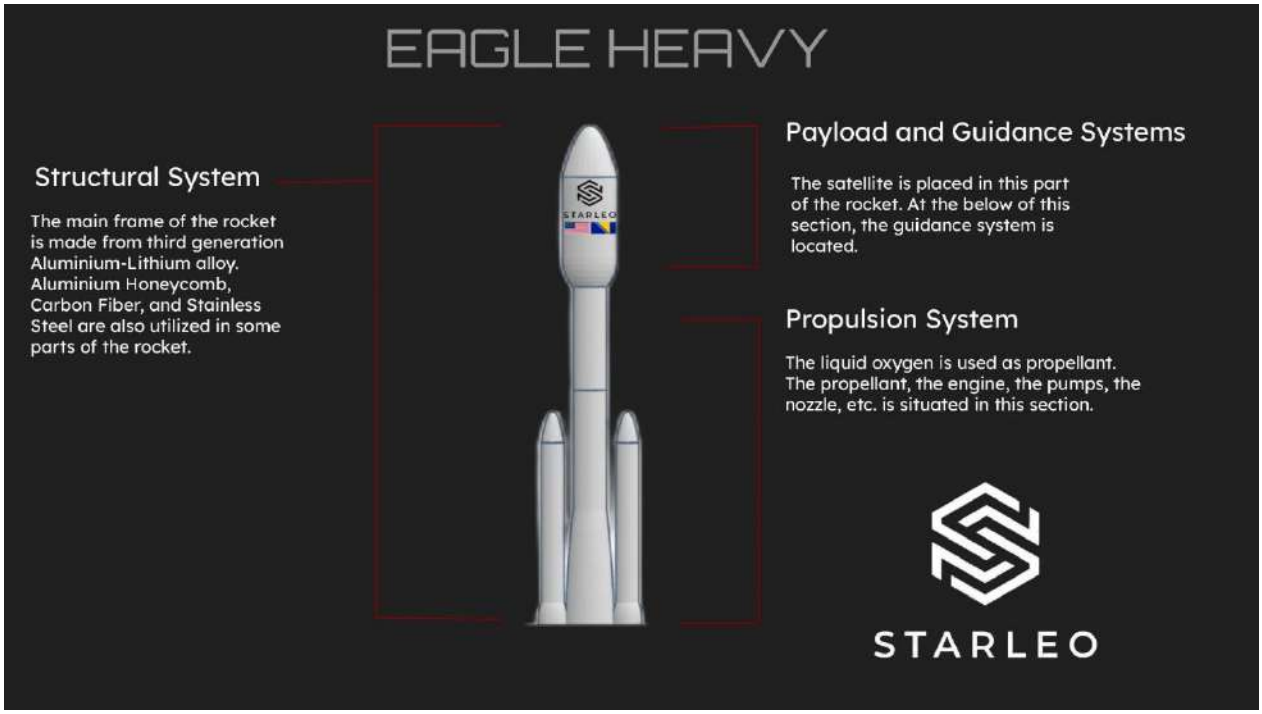

Figure VII: The first part of the presentation of Eagle Heavy on the website of Starleo

the company's fame. Because it created an image in the international arena that a private company was still not capable of launching a rocket.

The company immediately started to examine the reason for the explosion. After one week of intense investigation, there was clear evidence that the explosion was caused by materials. Further examination proved that defective materials were the only reason behind the failure of the launch.

The result of the investigation, written in the report of chemical engineers is shown on page 31, 'Report of Chemical Engineers'.

To prove that a private company could launch a vehicle into space, Starleo started to build a new rocket entirely on its own account. The Company obtained the necessary materials, not from

Metalius, but from a local company for a more expensive price. The launch date was set for 10 June 2023 and the launch was successful.

Starleo terminated its Purchase and Supply Agreement with Metalius based on the fundamental breach of the contract. However, Metalius claimed that this termination was unlawful because, according to them, the fundamental breach of the contract had not occurred.

The parties decided to resolve this dispute by arbitration in Ankara, as stated in their agreements.

c) Chronology

The chronology is detailly written above to facilitate for the reader to comprehend the case.

- **August 22, 2022** – The government of Bosnia and Herzegovina orders the launch of its national satellite via Eagle Heavy. The date of the launch is decided to take place on March 2022.
- **November 1, 2022** – Purchase and Supply Agreement is signed between Starleo and Metalius. The price is paid on the same day. Starleo proposes the date of delivery for 20 February. However, Metalius do not accept due to the workload. The date of delivery is mutually decided to be 14 November 2022.
- **November 14, 2022** – The date of the delivery of bought materials.
- **December 12, 2022** – Starleo informed the Bosnian government that it will not be possible to carry out the launch in late December 2022. The date is changed to February 2023.
- **February 15, 2023** – The launch of Eagle Heavy Rocket, carrying a Bosnian satellite, takes place in Kennedy Space Centre, Florida, USA. However, after 15 seconds, the rocket exploded.
- **February 25, 2023** – The chemical engineers proved that the only reason behind the explosion is the defective Al-Li alloys.
- **June 10, 2023** – Second launch of Bosnian satellite via Eagle Heavy. The launch was successful.

3. Claims of Parties

The parties are bounded by their claims and counsels will defend their clients based on these claims.

a) Claims of Starleo

Starleo claims that the fact that the goods were defective enough to cause the rocket to explode, despite their great trust in the goods to the extent that they did not even test it are reasons for the occurrence of a fundamental breach. In Article 2(b) of the Purchase and Supply Agreement, the component of Al-Li alloys is clearly written. Even though other party was aware that even one per cent more lithium weight can cause major problems, the fact that delivered Al-Li alloys had 12% Li weight is a serious and major fault. Moreover, CEO of Starleo, Clayton Rogers stated again to CEO of Metalius via email that the launch is the most important mission of the company. He also wrote that the company has quite limited time due to demands of Bosnian government. Subsequently, Cai Yue assured that CEO should not have worries about this topic. Thus, according to the mentioned reasons, the fundamental breach has occurred and Starleo has a right to avoid the contract as well as retains the right to claim compensation.

Therefore, Starleo's claims are as follows:

- To decide on fundamental breach
- To decide on the payment of compensation

a) Claims of Metalius

Metalius, on the other hand, argues that they are ready to pay for the damages caused by the explosion of the rocket, but that the compensation should be significantly reduced due to the utilization without testing. In the general terms of Metalius, which is included in the contract as Art. 3(b), it is written that defective materials can be renewed only when the quality of materials is checked. It means that Metalius would give new Al-Li alloys at its own cost. However, Starleo did not fulfil their responsibility and only blame Metalius for the explosion. The use of goods without testing is not a trust, but negligence. In the aerospace industry, everything should be checked before use and engineers are responsible for this task. Shortly, hurry is not a justification

for not testing the alloys. As a result, contrary to what Starleo argues, the fundamental breach does not occur in the present case.

In consequence, the claims of Metalius are as follows:

- To decide that fundamental breach is not occurred
- To significantly reduce the compensation since Starleo did not test the quality of alloys

4. Established Agenda

The arbitral tribunal will be responsible to resolve case at hand. In doing so, the tribunal will only decide on the following points in order of importance.

- To decide whether fundamental breach occured in the present case
- Whether Metalius should pay compensation or not.

The tribunal cannot make a judgment on issues that are not on the established agenda. However, the tribunal may decide on following issue.

- Whether Metalius should pay spiritual damages or not.

5. Exhibits

Exhibits are necessary documents related to the case at hand. While reading the file, it would be beneficial to read the exhibits carefully since they will be largely used during the arbitral hearings.

a) Purchase and Supply Agreement between Starleo and Metalius

Emphasizing the cooperation of the two companies and the mutual trust created by two previous contracts;

….

The parties have agreed on

PURCHASE AND SUPPLY AGREEMENT

Article 1: PARTIES

Metalius Inc, West Nanjing Road 810, Shanghai, People's Republic of China is "**SELLER**",

and

Starleo Inc, Vermont Avenue 509, Los Angeles, California, United States of America is "**BUYER**"

Collectively referred to as "**the Parties**"

Article 2: SELLER'S OBLIGATIONS

SELLER undertakes

a. To supply 3rd generation of Aluminium-Lithium Alloys ("**Alloys"**) that will be used to prepare the fuselage of Eagle Heavy Rocket, models and for other related reasons.

b. The Li:Cu (Lithium-Cuprum) ratio in the weight of the alloys will be as follows: 1-2% for Li and 2-4% for Cu.

c. To deliver the alloys on 10 November 2022 via shipping to Port Tampa Bay, Florida, USA ("**Port**"). More details are regulated in Article 13.

Article 3. BUYER'S OBLIGATIONS

BUYER undertakes

a. To pay the required amount to the SELLER and to take possession of the alloys at the Port.

b. To consider the Terms and Conditions of Metalius while fulfilling obligations.

Article 15: DISPUTE RESOLUTION AND APPLICABLE LAW

Any dispute, controversy or claim arising out of or in relation to this agreement, or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the ICC Arbitration Rules 2021.

a. The place of the arbitration shall be Ankara, Turkey.

b. The language to be used in the arbitral proceedings shall be English.

c. The agreement is governed by CISG.

1 November 2022

SELLER	**BUYER**
CEO of Metalius	CEO of Starleo
Ms. Cai Yue	Mr. Clayton Rogers

b) Terms and Conditions of Metalius

Article 9 of Terms and Conditions of Metalius is crucial to solve the case at hand. The Article is as follows:

'After receiving purchased material, the request for replacement due to defective materials is subject to having the materials checked by the buyer. This request can be made in 90 days after the check. If the defect is found, the purchased goods will be replaced'.

It is necessary to note that it is the first time that parties included Terms and Conditions of Metalius into the contract.

c) Report of Chemical Engineer

From: jessicaross@starleo.org

To: ceo@starleo.org

Date: 25 February 2023

Mr. Rogers,

I hope this mail finds you well.

Upon your request, engineers of our company started to analyse the main reason behind the explosion. As the head of investigation, I write the conclusion. All related documents are attached to below.

The team stayed in the office for the whole week and came to the conclusion that there was no problem neither with the quality of propellant, nor with engine, software, or other parts of the vehicle. The only reason behind this explosion is Al-Li alloys.

The frame of the rocket is fabricated from third-generation Al-Li alloy. The Li:Cu ratio of this alloy is vital for the rocket to be fully ready for launch. The weight of Li contents must be between 1-2%; on the other hand, it must be between 2-4% for Cu. This fact is also clearly regulated in Art. 2(b) of Purchase and Supply Agreement. Even one or two more per cent Li weight is sufficient for the explosion. However, it is detected that there was 12% of Li in Al-Li alloys delivered by Metalius. Every company in this industry always consider the ratio of the material. The existence of 12% of Li is nothing but an unfortunate irresponsibility.

This is why the rocket, which we eagerly prepared for a year, without considering day and night, shattered in front of our eyes in just 15 seconds, because of the negligence of the best company in this industry.

Best regards,

Jessica Ross

Head of Chemical Engineering of Starleo

d) Correspondences between parties

From: ceo@starleo.org

To: caiyue@metalius.org

Date: 5 November 2022

Ms. Cai Yue,

I hope this mail finds you well,

I want to state that I have a total belief to our new cooperation that will bring success. As we talked earlier, if this launch will be successful many states will use our rockets to launch their satellites and other aerospace technologies to the space. In other words, this is the most crucial launch of our company.

For this reason, I sincerely ask again to pay high attention to the production of our Al-Li alloys. Because Bosnian government wants to launch the rocket as earliest as possible, and we decided to launch the rocket on 1st April of this year. As you understand we have limited time, only two months, to fully prepare the rocket for the launch.

We highly believe and expect that the materials will be delivered on time and that the quality of Al-Li alloys will be as described in our agreement.

Best regards,

Clayton Rogers

From: caiyue@metalius.org

To: ceo@starleo.org

Date: 6 November 2022

Mr. Clayton Rogers,

I hope you are doing well, and it is pleasure for me to connect with you again.

I read your email carefully and fully understand your concern since you have limited time to prepare the rocket due to the Bosnian government's demands. As you stated this launch will be historic in the aerospace industry. To complete such a mission, we will carefully produce Al-Li alloys with best quality as your reliable partner and please do not have worry about this topic.

Please do not hesitate to write me about every question regarding our contract.

Kind regards,

Cai Yue

V. APPLICABLE LAW

The arbitral tribunal will resolve the case at hand by using the applicable law.

1. United Nations Convention on Contracts for the International Sale of Goods (the CISG)

a) Article 8

This article regulates how the statements of the parties should be interpreted.

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

b) Article 9

This article is about the usage or practices that parties established between themselves.

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

c) Article 25

This article defines fundamental breach as follows:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

d) Article 35

Articles 35 and 36 are about the lack of conformity and when the seller is liable for this lack.

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

e) Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

f) Article 38

This article regulates the examination of the delivered goods.

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

g) Article 39

Article 39 regulates when buyer loses the right to rely on the lack of conformity and Article 40 is about in which situation seller may not rely on the provisions of articles 38 and 39.

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from

the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

h) Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

i) Article 49

This article regulates in which situations the contract can be avoided.

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performances.

VI. CASE LAW

The cases here are the decisions made by different courts in situations similar to the case at hand. It is possible for arbitrators and counsels to get more detailed thoughts on the subject by reviewing these judgments.

1) Industrial Furnace Case[57]

CISG Online No: 1723

Tribunal Cantonal du Jura (Court of Appeal Canton Jura)

The dispute concerned the sale of an industrial furnace for thermal processing. The German buyer rescinded the contract and sued the seller, based in the Jura, for restitution of the advance payments made and for damages. In that connection, it adduced a whole series of defects.

The Court observed that the right of avoidance of a contract was subject to the existence of a fundamental breach of contract, within the meaning of article 25 CISG; in the course of detailed deliberations, it defined the conditions that had to be fulfilled for such a breach to have been committed. The Court acknowledged only one of the alleged defects; some areas of the furnace did not comply with European safety standards in regard to contact with heated surfaces. However, the Court ruled that that defect did not constitute a fundamental breach, concluding that it was possible to make a correction, specifically by installing additional protection, namely metal sheeting, the cost of which was not high. That minor defect, which could readily be made good at little expense, was not such as to affect the essential substance of the contract or seriously jeopardize the economic object pursued by the parties. Thus the court did not acknowledge the buyer's right of avoidance of the contract and it dismissed the buyer's claim.

The concept of fundamental breach of contract must be interpreted restrictively, considering on the one hand the risk of an interpretation which is not uniform between the courts of the various States, and - on the other hand - the divergence of conception which sometimes exists between judges from the same country.

[57] Industrial Furnace Case [2007] Court of Appeal Canton Jura I.37/04.

2) **Citroen Type C5 case**[58]

CISG No: 1377

Oberlandesgericht Linz (Court of Appeal Linz)

Buyer brought an action on 14 May 2003, seeking to have the Seller pay EUR 27,353. Buyer alleged that the car had been defective from the beginning. Buyer alleged the existence of about fifty defects and that, despite eight attempts, Seller had not been able to cure the defects.

In his letter of 15 September 2003, [Buyer] put forth that severe defects had accrued once again. Besides other defects, it was asserted that the suspension still became stiff for no reason and despite the replacement of various suspension parts. Multiple attempts to repair had remained unsuccessful. The additional defects present had caused [Buyer] to refrain from driving the car and to exchange it for another one for safety reasons.

With respect to the defects which – according to the above no. 5.4. – form a fundamental breach of contract, it must be concluded that they were detected by Buyer shortly after his receipt of the vehicle in May 2002. According to the factual findings, defects of electronic parts were notified in mid-June 2002…

3) **Delchi Carrier, SpA v. Rotorex Corp.**[59]

CISG Online No: 140

U.S. Court of Appeals (2nd Circuit)

In January 1988, Rotorex agreed to sell 10,800 compressors to Delchi for use in Delchi's «Ariele» line of portable room air conditioners. The air conditioners were scheduled to go on sale in the spring and summer of 1988. Prior to executing the contract, Rotorex sent Delchi a sample compressor and accompanying written performance specifications. The compressors were scheduled to be delivered in three shipments before May 15, 1988.

Rotorex sent the first shipment by sea on March 26. Delchi paid for this shipment, which arrived at its Italian factory on April 20, by letter of credit. Rotorex sent a second shipment of compressors on or about May 9. Delchi also remitted payment for this shipment by letter of credit. While the

[58] Citroen Type C 5 case [2006] Court of Appeal Linz 6 R 160/05z.
[59] Delchi Carrier, SpA v Rotorex Corp [1995] US Court of Appeals (2nd Circuit) 95-7182, 95-7186.

second shipment was en route, Delchi discovered that the first lot of compressors did not conform to the sample model and accompanying specifications. On May 13, after a Rotorex representative visited the Delchi factory in Italy, Delchi informed Rotorex that 93 percent of the compressors were rejected in quality control checks because they had lower cooling capacity and consumed more power than the sample model and specifications. After several unsuccessful attempts to cure the defects in the compressors, Delchi asked Rotorex to supply new compressors conforming to the original sample and specifications. Rotorex refused, claiming that the performance specifications were «inadvertently communicated» to Delchi.

CISG art. 25. In granting summary judgment, the district court held that «there appears to be no question that Delchi did not substantially receive that which it was entitled to expect» and that «any reasonable person could foresee that shipping non-conforming goods to a buyer would result in the buyer not receiving that which he expected and was entitled to receive.» Because the cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value, the District Court's conclusion that Rotorex was liable for a fundamental breach of contract under the Convention was proper.

4) **Acrylic Blankets Case**[60]

CISG Online No: 256

Oberlandesgericht Koblenz (Court of Appeal Koblenz)

A Dutch seller, plaintiff, delivered acrylic blankets to a German buyer, defendant. The buyer gave notification of the lack of quality of the goods and claimed that five reels of blankets were missing. The buyer also argued that the sale was conditional upon an exclusive distributorship agreement between the parties, which had been violated by the seller. The seller brought an action for the outstanding purchase price and the buyer claimed set-off.

The court held that the seller's claim was justified (Article 53 CISG). Lack of conformity includes lack of both quality and quantity (Article 35(1) CISG), but the buyer had lost its right to rely on the lack of conformity under the Convention. Although the buyer gave notice that five reels of blankets were missing, it did not specify of which design. As the seller had delivered blankets in

[60] Acrylic blankets case [1997] Court of Appeal Koblenz 2 U 31/96.

different designs, the notice did not enable the seller to remedy the non-conformity. Therefore, the notification was said to lack sufficient specification (Article 39(1) CISG).

Moreover, since the seller had made an offer to deliver new goods, which was refused by the buyer, the lack of quality did not amount to a fundamental breach of contract (Article 25 CISG). In considering a breach to be fundamental, account has to be taken not only of the gravity of the defect, but also of the willingness of the party in breach to provide substitute goods without causing unreasonable inconvenience to the other party (Article 48(1) CISG). Thus, in the given case, even a serious lack of quality was said not to constitute a fundamental breach as the seller had offered to furnish additional blankets (Article 49(1) CISG). Therefore, the buyer was not entitled to damages as it had rejected the seller's offer for new delivery without justification (Article 80 CISG). It thereby also lost its right to reduce the price (Article 50 (second clause) CISG). The seller was entitled to interest (Article 78 CISG), determined according to Dutch law.

VII. CONCLUSION

This Starleo is a private aerospace company which aims to produce rockets and launch required aerospace devices to Earth's orbit. One of the best in the sector, Metalius is a private company specializing in producing materials that are used mainly in the preparation of planes and aerospace devices and vehicles. These companies collaborated before for two rocket launches. Starleo was highly satisfied with the quality of the materials. That's why Starleo chose Metalius to obtain the required Al-Li alloys for the most important mission of the company. However, nothing went as expected. Trusting the quality, Starleo did not check the quality of alloys since they had very limited time to fully prepare the rocket for the launch. Unfortunately, the delivered Al-Li alloys were defective enough to cause the explosion.

Based on a fundamental breach, Starleo avoided the Purchase and Supply Agreement. Stating this avoidance is unlawful, Metalius commenced the arbitral proceedings. It is the responsibility of the counsels to defend their clients and the arbitral tribunal to decide whether the fundamental breach occurred or not.

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