



Alfred Deakin International Commercial Arbitration Moot 2021

Moot Scenario

Note:

1. This is a hypothetical scenario. All the persons, cities, and countries are fictitious except the place of arbitration (Melbourne, Australia). This means that no facts should be presumed or inferred from the real world, except as specifically mentioned, eg., where the law of certain countries might be identical to the law in the real world.
2. All exhibits except the ones related to the formation of the Sales Agreement in dispute have been omitted. Please assume that the exhibits, including the witness statements and the news reports, are generally consistent with the facts disclosed in the Problem.
3. Please also assume all descriptions of facts are accurate and supported by evidence unless there are clearly omissions and inconsistencies in materials provided by different parties.

NOTICE OF ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

BETWEEN:

Helles World GmbH

(Claimant)

-AND-

Mega Creative Co. Ltd.

(Respondent)

Notice of Arbitration

Introduction

1. This Notice of Arbitration, together with Exhibits A to G, is submitted on behalf of Helles World GmbH (hereinafter '**Helles World**') pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (the "**UNCITRAL Arbitration Rules**") against Mega Creative Co. Ltd. (hereinafter '**Mega Creative**'), (hereinafter collectively referred to as the '**Parties**').

Part I: Parties

2. Helles World is a manufacturer of lighting products and accessories. Helles World's headquarters and main factories are all located in Wolfsburg, Cookland. The address of the headquarters is 54A High-tech Industrial Park, Wolfsburg, Cookland.
3. Mega Creative is a major media advertising service provider in Rico Pacific. Its address is 6-8/F 101 Capital Road, Rockdale, Rico Pacific. Mega Creative has extended its business from its own country to its neighbouring country, Diamor Republic, in the last few years.

Part II. The Factual Basis

4. Mega Creative used to order lighting products and accessories from Helles World from time to time for use in advertising projects in Rico Pacific. The amount paid under each order was in the range of USD 8,000,000 to USD 15,000,000. In every transaction, Mega Creative contacted the representative of Helles World to communicate brief information about the order and the estimated timeframe. Then Mega Creative sent a standard order form to Helles World, and Helles World then sent a confirmation of order to finalise the details of the deal. This pattern was consistently followed in the last three years, covering five dealings before the initiation of the contract in dispute.
5. On 13 April 2020, Ms Emilia Denton, Mega Creative's representative, phoned Mr Dan Lee, Helles World's salesperson in Rico Pacific, to discuss an order that Mega Creative proposed to place in the near future. In the conversation, Ms Denton briefly mentioned Mega Creative's new projects in Diamor Republic, especially those in Springfield, the largest city in Diamor Republic. Ms Denton said that "some of the products in this order might be used in these fascinating new projects." She also said that the market in Diamor Republic had great potential for both companies, and it would be a great opportunity for them to cooperate in projects like the ones in Springfield. Then Ms Denton and Mr Lee proceeded to discuss the detailed types of products, numbers, and delivery details respectively.
6. Mr Lee was a usual contact when staff from Mega Creative communicated with Helles World. Ms Denton, however, was only promoted to her position in relation to procurement shortly before this communication and had called Mr Lee for the first time. This was the first occasion on which she had called and spoken with Mr Lee in her new capacity.
7. Following this phone call, on 20 April 2020, Helles World received an email from Ms Denton (Exhibit A), enclosing Mega Creative's order form (Exhibit B). The order form contained critical information about the order. It included three delivery instalments of four types of LED lighting products, one to Charlottesville in Rico Pacific and two to Port Stephenson in Diamor Republic. The goods contained in each instalment were identical. Port Stephenson is the largest port in Diamor Republic and only 100 kilometres from Springfield. Port Stephenson is approximately 600 kilometres from the nearest city in Rico Pacific. The order, however, did not specify whether the goods delivered to Diamor Republic were to be used in any projects in this country or any other places.
8. On 23 April 2020, Mr Lee sent Ms Denton an email (Exhibit C), attaching the Confirmation of Order for Contract No. 9367 (Exhibit D). In this Confirmation of Order, the details of the purchase were generally repeated, except that the dates of delivery were slightly changed, as explained in the covering email. The Confirmation of Order followed Helles World's template used in all past dealings with Mega Creative and was never rejected or disputed. This template was also used in all Helles World's other contractual dealings unless expressly rejected by the other

party. The last line of the Confirmation of Order clearly stated: "All dealings of Helles World GmbH are subject to the General Provisions unless otherwise specified." A summary of the provisions was provided on the next page. It also provided that the full contents were available on Helles World's website. Both the attached summary and the full contents provided that any contractual dispute would be subject to arbitration.

9. The goods under Contract No.9367 were delivered as scheduled. In particular, the goods delivered to Port Stephenson were properly received and collected by Mega Creative on 20 June 2020 and 8 August 2020 respectively. The price was also paid for properly in several instalments during 2020.
10. Helles World continued to deal with Mega Creative in subsequent contracts. After the conclusion of Contract No.9367, Mega Creative made two further orders with Helles World in a similar manner. The value of the goods under these two contracts was USD 9,000,000 under Contract No. 9452 and USD 12,000,000 under Contract No. 9527. These goods were to be delivered to cities in Rico Pacific (other than Port Stephenson) in several instalments from late 2020 to mid-2021. As of the end of Jan 2021, the two companies were negotiating for another order, but the formal order has not yet been made.
11. Despite the other dealings, Helles World did not hear further from Mega Creative in relation to Contract No.9367 until Mr Spencer, a senior representative of Mega Creative, called Mr Lee on 10 February 2021 and sent him an email (Exhibit E) on the same date complaining of the quality of the goods. According to the telephone communication and the email, the LED lighting products used in the projects in Springfield showed a significant failure rate in the winter season.
12. Mega Creative reported that the lighting devices used in these projects started failing since December 2020. This required Mega Creative's staff to undertake frequent urgent repair over the following few months. In addition, Mega Creative claims that they needed to utilise reserve devices purchased from Helles World which had been intended as replacements to last for three years. These quickly consumed in the 2020-2021 winter season, and the failures continued to occur with the replacements. Mega Creative claimed to have spent extra amounts on the extra hours of repair work, and on the urgent purchase of replacements from the local market in Diamor Republic.
13. The two parties agreed to negotiate a solution to this difficult situation. On 3 March 2021 representatives of both parties attended a virtual meeting. At the meeting, representatives of Helles World proposed to provide replacement goods covering those consumed during the winter season and offered a discount for any future purchases. The CEO of Mega Creative, however, furiously criticised the quality of the goods and said, "We only want our money, not your worthless products". He even threatened to terminate all ongoing contracts and suspend the negotiations of all

future deals between the two companies if Helles World did not pay a significant sum. The negotiation eventually failed.

14. Later in April 2021, Mr Lawrence, Mega Creative's counsel, forwarded to Helles World a formal claim of compensation for the value of USD \$5,000,000 for costs and interest incurred, and the loss of its potential commercial interests and reputation in Diamor Republic's market due to the failures of its projects (Exhibit F). The claim was based on the quality issue, quoting their technician's opinion that the quality of the lighting devices failed to meet the requirements of normal operation and normal life span in the cold weather (-20 to -35°C) in Diamor Republic and, in particular, in Springfield. They demanded that the amount be paid before 30 April 2021.
15. While Cookland is located in the southern hemisphere, both Rico Pacific and Diamor Republic are in the northern hemisphere. Geographically, Diamor Republic is in the far north and adjacent to the northern part of Rico Pacific. The normal temperature of Springfield in winter is -5 to -20°C, with only one or two extreme cold days reaching -30 degrees every year. However, the winter of late 2020 to early 2021 was unusual, as the region where Springfield is located was hit by a snowstorm in late December 2020, and extremely cold weather of -20 to -35°C persisted for more than two weeks, with the lowest extreme of -38°C. The weather in Rico Pacific was significantly warmer and the temperature never dropped under -10°C in the same winter season.
16. Helles World's products were tested by a renowned third-party agency, Tech Lab, for their sustainability and efficiency in normal conditions. According to Tech Lab's report dated in 2015 (Exhibit G), the life span of Helles World's products covered by this contract reached 45,000-50,000 hours in an ambient temperature of 25°C. This performance was at the higher end of the industrial standard.
17. The representatives of Helles World attempted to reach out by various phone calls and emails for further negotiations but without any success. The only response Helles World received from Mega Creative was that it would terminate all dealings and bring a claim to the Commercial Court of Rico Pacific if the amount was not paid before the due date.
18. To the surprise of Helles World, the responses from Mega Creative referred to the words on the last line of their order and their email communications, which referred to the Terms and Conditions provided by Rico Pacific's Advertising and Marketing Business Association. Although this set of clauses referred to the exclusive jurisdiction of the Commercial Court of Rico Pacific, their contents were never directly made available to Helles World.
19. As Helles World did not pay the amount demanded by 30 April 2021, Mega Creative informed Helles World on 3 May 2021 that all the pending payments to Helles World subject to the two contracts not fully performed (Contract No.9452 and Contract

No.9527) would be suspended until further notice. It also cancelled all current negotiations on the new deal.

20. On 12 June 2021, Helles World received court documents in relation to a claim filed by Mega Creative before the Commercial Court of Rico Pacific for damages on the basis of the non-conformity of goods. Helles World then filed a claim disputing the jurisdiction of the court on 28 June 2021. The proceeding is currently pending before the court.

Part III. Legal Foundation of the Claim

21. Helles World raises the claims detailed below based on the arbitration clause in Helles World's General Provisions, which was incorporated into this contract when it was referred to in the Confirmation of Order. The Confirmation of Order was the final written document recording the contract. Clause 19 of the General Provisions stated:

'Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled amicably between the parties in good faith. If the amicable negotiations fail, the dispute should be solved by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force. The appointing authority shall be the Australian Centre for International Commercial Arbitration (ACICA).

The number of arbitrators shall be three. The place of arbitration shall be Melbourne, Australia.

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

22. In accordance with this arbitration clause, the dispute shall be heard by the arbitral tribunal duly established under the Rules indicated above.
23. The jurisdiction of this tribunal is based on the fact that Clause 19 of the General Provisions was incorporated into the series of contracts between Helles World and Mega Creative regarding the goods in disputes. In particular, the final written documents providing all accurate details of this dealing were always supplied by Helles World. Therefore, it should bind the parties.
24. Mega Creative breached Clause 19 by failing to negotiate for a solution in good faith and bringing a claim to its local court, which was against the parties' consent that the dispute should be solved by arbitration.
25. The 'Limited Warranty Clause' in the Confirmation of Order validly excluded the application of any implied terms. It stated:

'Helles World GmbH warrants that the products provided under this contract will remain in good condition for 40,000 hours under normal use. In case of any failure, it is the option of Helles World GmbH to replace the goods or refund the fee paid for the products.'

This warranty is exclusive in lieu of all other warranties whether written, oral, expressed or implied and shall constitute the sole and exclusive remedy of the Buyer and liability of Helles World GmbH.'

26. Helles World supplied goods in conformity with the details specified in Contract No.9367 between the parties. In particular, Helles World was not subject to any implied obligation, as provided by the Limited Warranty Clause (above). The failure of products of Helles World in Springfield was caused by unexpected extreme weather, which was beyond the expectation and control of Helles World. Further, this situation was not covered by the contractual obligations of Helles World under Contract No.9367.
27. In addition, Mega Creative also breached its contractual obligation to pay under Contracts No.9452 and No.9527.

Part IV Relief Sought

Helles World seeks the tribunal to render:

- a) An anti-suit injunction, requiring Mega Creative to withdraw from the current litigation before the Commercial Court of Rico Pacific, and prohibiting Mega Creative to pursue any litigation in the future;
- b) Mega Creative to resume the payments under Contracts No. 9452 and No.9527;
- c) Mega Creative to bear the loss suffered by Helles World, including the costs of the arbitration.

EXHIBIT A

From: e.denton@megacreative.com.rp
To: dan.lee@hellesworld.com.cl
cc: purchasing@megacreative.com.rp
Subject: Purchase Order No. 20-0152 Helles World – Lighting Devices
09:20:45 20 April 2020

Dear Mr Lee,

I hope this email finds you well.

Following our telephone communication on 13 April 2020, please find the enclosed Purchase Order. Please note that the deliveries of the three instalments are to two different destinations. I understand that you never delivered goods to Port Stephenson before and therefore choose the term 'FOB Origin' for your benefit for these two instalments. For the other instalment, the term is still 'FOB Destination' as usual.

We are impressed by the performance of your products we have used previously. We hope this is another new milestone in our long-term cooperation, especially at the time when we are expanding our business to Springfield, Diamor Republic.

Should there be anything to be further clarified, please do not hesitate to contact me.

Kind regards,

Ms Emilia Denton
Director (Resourcing & Purchasing)
Mega Creative Co. Ltd.

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WARNING: The content of this email is confidential and intended for the recipient specified in the message only. It is strictly forbidden to share any part of this message with any third party, without the written consent of the sender. If you received this message by mistake, please reply to this message and follow with its deletion, so that we can ensure such a mistake does not occur in the future.

Mega Creative – Outdoor Advertisement Expert in Rico Pacific and Overseas
We are a leading member of Rico Pacific's Advertising and Marketing Business Association (AMBA) and adopts the AMBA's Values, Policies, Terms and Conditions
Please refer to www.amba.org.rp for AMBA's Terms and Conditions

EXHIBIT B

Purchase Order

No. 20-0152

Purchaser:
Mega Creative Co. Ltd.
6-8/F 101 Capital Road,
Rockdale, Rico Pacific

Vendor:
Helles World GmbH
54A High-tech Industrial Park
Wolfsburg, Cookland

1. Goods and Prices (USD)

Item	Quantity	Price per unit	Amount
<i>LED Lighting Type A</i>	<i>5,000</i>	<i>300</i>	<i>1,500,000</i>
<i>LED Lighting Type B</i>	<i>7,500</i>	<i>200</i>	<i>1,500,000</i>
<i>LED Lighting Type C</i>	<i>4,000</i>	<i>50</i>	<i>2,000,000</i>
<i>LED Lighting Type D</i>	<i>10,000</i>	<i>100</i>	<i>1,000,000</i>
			<i>Total: 6,000,000</i>

2. Delivery terms and schedule

Helles World GmbH shall deliver the goods following the instructions below:

Items & Quantity	Delivery terms and place	Destination
<i>LED Type A:1,000 LED Type B:2,000 LED Type C: 1,000 LED Type D: 2,000</i>	<i>FOB Charlottesville, Rico Pacific by 30 May 2020</i>	<i>Charlottesville, Rico Pacific</i>
<i>LED Type A:2,000 LED Type B:3,000 LED Type C: 1,000 LED Type D: 4,000</i>	<i>FOB Port Erfelden, Cookland by 20 June 2020</i>	<i>Port Stephenson, Rico Pacific</i>
<i>LED Type A:2,000 LED Type B:2,500 LED Type C: 2,000 LED Type D: 4,000</i>	<i>FOB Port Erfelden, Cookland by 10 July 2020</i>	<i>Port Stephenson, Rico Pacific</i>

3. Payment terms and schedule

30 days after delivery and invoicing

Authorised by:

Emilia Denton

Ms Emilia Denton, Director (Resourcing and Purchasing)

Date: 20/04/2020

EXHIBIT C

From: dan.lee@hellesworld.com.cl
To: e.denton@megacreative.com.rp
cc: purchasing@megacreative.com.rp; sales@hellesworld.com.cl
Subject: Re: Purchase Order No. 20-0152 Helles World GmbH – Lighting Devices
11:03:27 23 April 2020

Dear Ms Denton,

We are pleased to inform you that your order is now finalised. Please find enclosed our Confirmation of Order, which records the final details of this transaction.

To bring to your attention, we made some final adjustments to the delivery date. We've recently been informed that there would be major infrastructure work at Port Erfelden from 5 June to 10 July, during which the delivery of goods might be disrupted. As a result, we moved the date of the delivery of the second and third instalments accordingly.

We believe that both of us are committed to ensuring the future success of our cooperation in Rico Pacific and other countries. We look forward to the good news from you. Please contact me directly or any of my colleagues from the sales team should you need any further assistance.

Best regards,

Dan Lee
Senior Sales Representative
Helles World GmbH

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Helles World GmbH – For a Better and Brighter World
Helles World GmbH puts the security of the client at a high priority. Therefore, we have put effort into ensuring that the message is error and virus-free. Unfortunately, full security of the email cannot be ensured as, despite our efforts, the data included in emails could be infected, intercepted, or corrupted. Therefore, the recipient should check the email for threats with proper software, as the sender does not accept liability for any damage inflicted by viewing the content of this email.

EXHIBIT D

**Confirmation of Order
Contract No. 9367**

Client Name: Mega Creative

Date: 23/04/2020

Description of goods:

Lighting Devices	LED A	LED B	LED C	LED D
Quantity	5,000	7,500	4,000	10,000
Price per unit	300	200	50	100
				Total: 6,000,000

Delivery of goods:

Instalments	Delivery terms	Departing Port	Destination
Instalment 1 <i>LED A:1,000 LED B:2,000 LED C: 1,000 LED D: 2,000</i>	<i>FOB Charlottesville, Rico Pacific by 30 May 2020</i>	<i>Port Erfelden, Cookland</i>	<i>Charlottesville, Rico Pacific</i>
Instalment 2 <i>LED A:2,000 LED B:3,000 LED C: 1,000 LED D: 4,000</i>	<i>FOB Port Erfelden, Cookland by 3 June 2020</i>	<i>Port Erfelden, Cookland</i>	<i>Port Stephenson, Rico Pacific</i>
Instalment 3 <i>LED A:2,000 LED B:2,500 LED C: 2,000 LED D: 4,000</i>	<i>FOB Port Erfelden, Cookland by 15 July 2020</i>	<i>Port Erfelden, Cookland</i>	<i>Port Stephenson, Rico Pacific</i>

Payment:

30 days after delivery and invoicing

Specific Terms and Conditions:

Limited Warranty. Helles World GmbH warrants that the products provided under this contract will remain in good condition for 40,000 hours under normal use. In case of any failure, it is Helles World GmbH's option to replace the goods or refund the fee paid for the products.

This warranty is exclusive in lieu of all other warranties whether written, oral, expressed, or implied, and shall constitute the sole and exclusive remedy of the Buyer and liability of Helles World GmbH.

Signed off by:

Dan Lee

Mr Dan Lee

Senior Sales Representative

Helles World GmbH – For a Better and Brighter World
All dealings of Helles World GmbH are subject to the General Provisions unless otherwise specified (see back of the page for the details).

Helles World GmbH – For a Better and Brighter World
www.hellesworld.com.cl

Our Most Popular Products

Product	General Features	Price/Quote

(Images and Contents Omitted)

Our Values

- Make best efforts to meet the needs of our customers
- Greeting our customers cheerfully and respectfully
- Communicating honestly, courteously, and knowledgeably
- Always acting consistently and in good faith
- Act with integrity, commitment, and high ethical standards

Customer Services and Contacts

- Global service number: XXXXXXXXXX
- Cookland City D Office: XXXXXXXXXX
- Cookland City E Office: XXXXXXXXXX
- Cookland City F Office: XXXXXXXXXX
- General inquiries: admin@hellesworld.com.cl

Summary of Our General Provisions

- Terms of Delivery. The term of delivery shall be EXW.
- Prices. Prices of our products are provided in the annual catalogue calculated on the basis of the term EXW.
- Warranty. The limited warranty excludes any implied warranties and will be the exclusive remedy offered by Helles World GmbH.
- Force Majeure. In case of a force majeure event, any party should be exempted from performing any further contractual obligations.
- Termination of contract. In case of any failure to perform or any breach of any fundamental contractual obligations, the aggrieved party is entitled to terminate the contract.

- Merger clause. There will be no representations, promises, or agreements between the parties except those found in the final order confirmation.
- Applicable Law. Any dispute arising from the contract should be governed by the law of Cookland.
- Dispute Resolution. Amicable negotiation and arbitration (UNCITRAL Rules).

For the full texts of the General Provisions, please visit:

www.hellesworld.com.cl/GeneralProvisions.pdf

Response to the Notice of Arbitration

Helles World GmbH

(Claimant)

-AND-

Mega Creative Co Ltd

(Respondent)

Introduction

1. This Response to the Notice of Arbitration is submitted on behalf of Mega Creative Co Ltd (**Mega Creative**, or **Respondent**) regarding the Notice of Arbitration submitted by Helles World GmbH (**Helles World**, or **Claimant**) dated 30 June 2021.

Part I: Factual Basis

2. In the Notice of Arbitration, the Claimant only told the part of the story favouring their arguments which were unfair and misleading. Opposite to what was stated in the Notice of Arbitration, the Respondent was entitled to claim for the non-conforming goods subject to the sale agreement reached in April 2020, as recorded in Purchase Order No. 20-0152.
3. The Respondent procured various types of lighting devices from Helles World in the last few years on five different occasions. It was made clear through extensive negotiations and dealings that Mega Creative's purpose of procuring LED lighting devices was to use them in advertising projects, especially in the outdoor environments.
4. The Respondent's dealings with Helles World followed the same pattern in the past few years. While the details were negotiated first via phone calls, the details are always finalised by the Respondent in the form of a written document, a Purchase Order. Helles World would then send Mega Creative a confirmation acknowledging their receipt of the Purchase Order without any change of the contents. This pattern was never disputed in past dealings prior

to this dispute. And this was also the case regarding Purchase Order No.20-0152.

5. In March 2020, Mega Creative won the tender of the outdoor advertising projects from Springfield City Council in Diamor Republic. Following this event, the Respondent's employee Ms Denton initiated the discussion on this purchase via phone call on 13 April 2020. Although Ms Denton never worked with Helles World before, she was trained and assisted by other staff from Mega Creative who had dealings with Helles World before and she was well aware of the pattern adopted in the dealings between these two companies, as provided above.
6. On 13 April 2020, Ms Denton and Mr Lee discussed and finalised all the details of this deal during the phone communication regarding the products, quantity, price, delivery and payment methods, etc. In the negotiation, Ms Denton clearly emphasised the strong connection between this purchase and projects in Diamor Republic, especially Springfield. (Exhibit H: Ms Denton's Witness Statement)
7. The details of this contract, such as the products, quantity, price, delivery, and payment methods, were accurately recorded in the Purchase Order Ms Denton circulated on 20 April 2020. Ms Denton emphasised again the connection between this purchase and projects in Springfield in the associated email.
8. In particular, this Purchase Order followed Mega Creative's standard template. The last line of this template, as well as the associated email signature, referred to the Terms and Conditions provided by Rico Pacific's Advertising and Marketing Business Association (Exhibit I). This set of clauses is not mandatory, but is widely used by members of this association, and was well-known to both domestic and foreign suppliers of Rico Pacific's advertising and marketing industry. The dispute resolution clause in the Terms and Conditions referred to the exclusive jurisdiction of the Commercial Court of Rico Pacific.
9. In particular, what was not mentioned in the Notice of Arbitration was that Ms Denton's reply to the Confirmation of Order (Exhibit J) once again emphasised the purpose of the cooperation as well as referred to AMBA. In the past dealings, the staff of Mega Creative always replied to the Confirmation of Order in an email, in which the signatures also referred to the AMBA Terms and Conditions.
10. This standard template of the Purchase Order was used in all orders made by

the Respondent with Helles World before and after the Purchase Order No.20-0152 was made and was never disputed in contract negotiation or in the performance of these orders.

11. Helles World was a supplier to many other advertising companies in Rico Pacific and was well aware of the contents of the AMBA Terms and Conditions, including the exclusive jurisdiction clause. In fact, they filed a claim against YTE Advertising, another advertising company in Rico Pacific, before the Commercial Court of Rico Pacific. In that case, the jurisdiction of the court was based on a contract expressly referring to the AMBA Terms and Conditions. (Exhibit K: Court documents)
12. The deal went smoothly until the systematic failure of Helles World's products in various projects across Springfield, Diamor Republic, which Helles World did not deny in its Notice of Arbitration.
13. What was omitted in the Notice of Arbitration was that the Respondent's technician reported (Exhibit E) that the failure was likely caused by some materials used in some components in the LED lighting devices, which worked poorly in the low-temperature situation. This could be easily avoided by using high-quality materials in producing those components or procuring high-quality components by Helles World. This report was also communicated to Helles World prior to the virtual meeting on 3 March 2021.
14. Helles World was not cooperating with Mega Creative in resolving this dispute. It was clearly established that we demand monetary compensations, which was the only adequate remedy for Mega Creative. For one thing, the replacement of goods could not cover the losses Mega Creative suffered in hiring additional staff to repair the failed devices and in urgently purchasing replacements in the local market. Further, the quality issue was likely to exist in the replaced goods as well. This reasonable demand, however, was rejected in the subsequent negotiations.
15. To protect its own interests and mitigate the losses in this deal, Mega Creative suspended payments to Helles World under other contracts.
16. After Helles World's refusal to pay USD 5,000,000 as demanded, we brought a claim on the basis of the exclusive jurisdiction clause in the AMBA Terms and Conditions against Mega Creative. This claim for compensation was on the basis of the non-conformity of goods. This case was filed before the Commercial Court of Rico Pacific on 15 May 2021.

Part II: Legal Analysis

17. The arbitral tribunal does not have the jurisdiction to hear this case because the AMBA's Terms and Conditions, including its exclusive jurisdiction clause, was successfully incorporated into the contract.

18. Article 20 of the AMBA's Terms and Conditions states,

'Each party to this agreement irrevocably agrees that the Commercial Court of Rico Pacific shall have exclusive jurisdiction to hear, settle and/or determine any dispute, controversy, or claim arising out of or in connection with this agreement, including any question regarding its existence, validity, or termination. For these purposes, each party irrevocably submits to the jurisdiction of the Commercial Court of Rico Pacific.'

This clause requires the disputes arising from this contract to be submitted to the Commercial Court of Rico Pacific.

19. In each of the dealings between Mega Creative and Helles World, including Order No.20-0152, the contracts were formed in the telephone conversation and subsequently recorded by the Purchase Orders. It was clear that the contracts were at all times subject to the AMBA's Terms and Conditions. The Confirmations of Order sent by Mega Creative were merely repeating the specific terms of the Purchase Orders.

20. Alternatively, even if the tribunal has the jurisdiction to hear this case, the tribunal should find a breach of contractual obligation by Helles World. The goods provided by Helles World subject to Order No.20-0152 failed to meet its general purpose of being used in various environments and the particular purpose indicated by Mega Creative that it would be used in outdoor advertising projects in the City of Springfield, Diamor Republic. The goods failed to meet the quality requirements indicated by the contract as well as the applicable law, for example, Article 35 of the CISG.

21. Further, Rico Pacific's domestic law clearly required that any provisions limiting or excluding the liability of one party would only be valid if it meets certain standards, including that it must be explicitly stated and consented, and that it must be reasonable and fair. This requirement is mandatory, so even if the 'Limited Warranty Clause' is incorporated into the contract, it is not valid.

22. Finally, the replacement of goods is not a sufficient remedy for Mega Creative. Only monetary compensation would appropriately remedy the losses suffered

by Mega Creative.

Part III: Relief

Mega Creative seeks the tribunal to:

- a) Decline the jurisdiction of hearing this case;
alternatively, if the tribunal determines that it has jurisdiction,
- b) Find the goods not conforming with the contract and/or the applicable law;
and
- c) Render monetary compensation on the basis of the losses suffered by Mega Creative caused by the non-conforming goods.

EXHIBIT J

From: e.denton@megacreative.com.rp
To: dan.lee@hellesworld.com.cl
cc: purchasing@megacreative.com.rp; sales@hellesworld.com.cl
Subject: Purchase Order No. 20-0152 Helles World – Lighting Devices
15:28:01 23 April 2020

Dear Mr Lee,

Thank you for the confirmation of receiving our Purchase Order No.20-0152. We understand the minor adjustments of the dates of delivery of goods for practical reasons; it won't affect the effectiveness of the Purchase Order anyway.

As a leading member of Rico Pacific's AMBA, we always stick to the high standards and comprehensive regimes it promotes and aims to provide high-quality products and services to our clients - You might check out the terms and policies on AMBA's website: www.amba.org.rp. This is why we maintain a long-term relationship with your company and trust you to back us up when we are expanding our business to Diamor Republic. I truly hope that both of us could benefit from this important move in the long run.

Kind regards,

Ms Emilia Denton
Director (Resourcing & Purchasing)
Mega Creative Co. Ltd.

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Mega Creative – Outdoor Advertisement Expert in Rico Pacific and Overseas
We are a leading member of Rico Pacific's Advertising and Marketing Business Association (AMBA) and adopts the AMBA's Values, Policies, Terms and Conditions
Please refer to www.amba.org.rp for AMBA's Terms and Conditions

Procedural Order No 1

15 July 2021

Procedural Summary:

On 10 July 2021, this arbitral tribunal was established in accordance with the UNCITRAL Arbitration Rules.

On 28 July 2021, Mega Creative circulated a Decision on Jurisdiction made by the Commercial Court of Rico Pacific, which declared that the Court had jurisdiction over this case on the basis that the jurisdictional challenge raised by Helles World was submitted out of time, being later than 30 days after the filing of the case, which was required by Rico Pacific's Civil Procedure Law. The Decision also stated in *obiter* that, even if the challenge could be exempted from the time limit, it would still fail, as the arbitration clause was not incorporated into the contract under Rico Pacific's contract law.

On 5 August 2021, Helles World circulated a document stating that the delayed submission of the jurisdictional challenge was caused by technical reasons not attributed to them. The jurisdictional decision was effective and enforceable, but in the meanwhile appealable under the Civil Procedure Law of Rico Pacific. They filed an appeal against this decision on 4 July 2021 and estimated that the outcome would not be available before October 2021.

On 15 August 2021, the first case-management meeting was held remotely. The tribunal decides that, due to the international and domestic travel restrictions in many countries, the first hearing will be held by video conference in September 2021.

Understandings:

The tribunal acknowledges the following matter consented to by the parties during the case-management meeting:

- a) The General Provisions of Helles World GmbH provides that the law applicable to a dispute arising from the contract should be the law of the Cookland. The AMBA Terms and Conditions referred to the law of Rico Pacific as the applicable law;
- b) All involved countries are all Contracting States of the CISG and the New York Convention;
- c) Rico Pacific adopts the UNCITRAL Model Law on International Commercial

Arbitration. It filled Article 6 of the Model Law by the Commercial Court of Rico Pacific and chose Option I for Article 7. Its Civil Procedure Law provides that in the case of a conflict of jurisdictions between two courts on the same substantive matter, the court where the case is filed first should enjoy jurisdiction. However, the law and practice were silent on whether this principle should be applied when an arbitral tribunal is involved.

- d) Cookland adopts the civil law tradition. Cookland's general contract law is a verbatim adoption of the UNIDROIT Principles. Cookland's domestic law has no specific requirements on the validity of the exclusion clause.
- e) Rico Pacific adopts the common law tradition. The contract law of Rico Pacific is identical to Australian contract law. Rico Pacific has a statute on commercial contracts, which requires a valid exclusion clause in all kinds of contracts to be explicitly stated and consented, and that a valid exclusion clause must be reasonable and fair. This rule about the validity of the exclusion clause is mandatory and forms part of the State's public policy in the context of domestic disputes, as provided by its case law. The statute does not provide a definition for the terms 'reasonable' and 'fair', and similar terms. In practice, the case law from time to time referred to some common law cases from the UK (*Unfair Contract Terms 1977*) and Australia (*Consumer and Competition Act 2010*) when interpreting these two terms, although the decisions were not entirely consistent.
- f) The Commercial Court of Rico Pacific is a specialised branch of its Federal Court. Their decision is appealable to the Court of Appeal of the Federal Court and then the Supreme Court of Rico Pacific.

Directions on the First Hearing:

The tribunal decides that ONLY the following issues should be discussed in the first hearing:

1. Whether the tribunal has the jurisdiction to hear this case and in particular,
 - Whether the arbitration clause is incorporated into the contract, including which law applies to such a determination;
 - Whether the tribunal should take into account the Decision on Jurisdiction by the Commercial Court of Rico Pacific;
 - Whether the tribunal could and should issue an anti-suit injunction barring the Respondent from proceeding with the litigation proceedings

before the Commercial Court of Rico Pacific.

2. Whether the Respondent is legally entitled to raise a lack of conformity claim and in particular, what standard of conformity should apply to the goods subject to Order No.20-0152/Contract No.9367, including but not limited to:
 - Whether any implied/statutory liability and/or remedy is excluded by the parties;
 - Whether the goods were required to function normally for use in the Springfield projects during the Winter of 2020/21;
 - Whether such claim is affected by the subsequent actions taken by the Respondent after the failures arose.

In particular, the tribunal does not intend to deal with the quality of materials used in the LED device and its causal connection with the failures, the appropriateness of methods of remedies, or the amount of the monetary damages.

Procedural Order No 2

Corrections

1. On Pages 9 and 11, the price of "LED C" was listed at USD 50 per unit. It should be USD 500 per unit.
2. On page 17 [19], the Moot Problem states, "sent by Mega Creative". It should be "sent by Helles World".
3. The Procedure Order No.1 is issued on 15 August 2021, following the first case management meeting.

Clarifications

Please note that only selected questions are answered. Some questions have already been addressed in the original scenario. Others are intentionally omitted for your research or left open for your discussions and submissions. Please also read the notes on the front page of the Moot Scenario which dealt with the omitted evidence and assumptions you could make.

- 1. Are Cookland and Rico Pacific signatories of the Hague Convention on Choice of Court Agreements?**

Answer: No.

- 2. What is the domestic arbitration law of Cookland (and Diamor)? Are they Model Law jurisdictions?**

Answer: Both are Model Law jurisdictions. The Model Law provisions, however, have been associated with mild modifications and additions to facilitate its operation of their own judicial systems (eg. nominating the appropriate court to take the roles in Art 6). Cookland adopts Option 2 for Article 7. Diamor adopts Option 1 for Article 7.

- 3. What conflict of laws rules are applicable in the Rico Pacific?**

Answer: The Court of Rico Pacific, before which a parallel dispute is pending, tends to apply the conflict rules in Rico Pacific which is identical to the Australian law.

- 4. Does reference "Australian Contract Law" in PO1, Page 21, mean Australian contract law unmodified by statute? Does the Consumer and Competition Act 2010 (Cth) apply in Rico Pacific?**

Answer: The contract law here only refers to the case law. The latter is only relevant to the interpretation of the terms 'reasonable' and 'fair', as illustrated in PO1.

- 5. Are the countries EU member states? Are they affected by the EU regulation 44/2001 (Brussels I Regulation)? Are they affected by the EU regulation 2201/2003 (Brussels II-A Regulation)? Are they affected by the EU regulation 593/2008 (Rome I Regulation)? Are they affected by the EU regulation 864/2007 (Rome II Regulation)?**

Answer: No, they are not EU Members and not impacted by the EU legislations in any form.

- 6. At the time of entering the contract, have the Claimant and Respondent had legal status in accordance with the law where they were incorporated?**

Answer: Yes, both parties had already been incorporated and in ordinary business for a few years when the contract was entered.

- 7. Do Rico Pacific and Cookland have declarations and reservations when becoming contracting states of CISG?**

Answer: No.

- 8. Do either Cookland or Rico Pacific have any laws governing anti-suit injunctions?**

Answer: Cookland has no legislation on this matter. Rico Pacific's case law allows its courts to make anti-suit injunctions preventing parties from other court proceedings, which is similar to the practice in Australia. The laws in both States are silent on anti-suit injunctions in situations involving arbitration, other than the Model Law itself. However, Rico Pacific had reported cases in which anti-suit injunctions made in the forms of arbitral awards were enforced under the New York Convention. Cookland has no history of enforcing similar injunctions.

- 9. On what date was the Commercial Court of Rico Pacific's decision regarding jurisdiction made?**

Answer: 25 July 2021.

- 10. Are there any legal mutual assistance agreements between Cookland and Rico Pacific?**

Answer: There were no mutual assistance agreements among any of the involved States (Cookland, Rico Pacific, Diamor, and Australia).

- 11. Does the Respondent have any assets outside of Rico Pacific? If so, where?**

Answer: It does not have any other significant portions of assets overseas other than some rented offices, tools and materials in Diamor.

12. Was there an attempt to file made by Helles World between 12th and 14th of June 2021? What technical issues in PO1, [3], are Helles World raising in relation to their attempt to file a jurisdictional dispute?

Answer: The filing of the jurisdictional challenge was delayed by technical reasons until 28 June 2021. Helles World did not raise the challenge immediately after receiving the court documents. There was an infrastructure failure of the electrical grid in the local area of Helles World's headquarter during 18 – 25 June 2021 which impacted its capacity to retrieve and prepare the documents. Helles World's counsel submitted a written application for the extension of the deadline for its submission on 20 June 2021, but such application was not properly processed by the court due to a technical issue. The contents and sender information were not retrievable from the scrambled codes seen from the Court's end, which might be caused by non-compatible formats or virus.

13. Page 3, [7], states Port Stephenson is in Diamor Republic, but the Purchase Order and Confirmation of Order (Exhibits B and D) states that the destination, Port Stephenson, is in Rico Pacific. Is Port Stephenson at Diamor Republic or at Rico Pacific? Were all the goods delivered at Rico Pacific or not?

Answer: The description in [7] is wrong and the Confirmation of Order is correct. Port Stephenson is the largest port in Rico Pacific but geographically close to Springfield in Diamor. Thus, the goods are delivered to Rico Pacific by sea and then transported to Springfield, Diamor by land.

14. Were the products sent to Port Stephenson have the detailed lists of used materials?

Answer: The products sent were only associated with a manual, which includes the safety information, installation instructions, specifications, Q&As, etc. It includes the information such as features and performance, but no descriptions of materials used.

15. Who is the CEO of Mega Creative?

Answer: Mega Creative's CEO, also the founder of the company, is Mr Eden Walker.

16. Is Ms Emilia Denton a director of Mega Creative?

Answer: No, but Ms Denton (or anyone in her position) was specifically authorised to negotiate and sign contracts on behalf of Mega Creative.

17. Is Mr Spencer a director of Mega Creative? What is his role and position? Is he superior to Ms Denton?

Answer: Yes, he is a director and the COO of the company. He is superior to Ms Denton.

18. Is Mr Lee a director of Helles World?

Answer: Yes.

19. Does Mr Lee have the authority to represent Helles World to enter sale contracts with Mega Creative, including but not limited to Contracts Nos. 9367, 9452 and 9527?

Answer: Yes.

20. Were the contracts handled by Ms Denton and Mr Lee ever handled by other employees?

Answer: The drafts were internally processed by Ms Denton's and Mr Lee's team members respectively; however, the communication between two parties were all done by Ms Denton and Mr Lee.

21. Who held the position previous to Ms Denton (name, position, relationship with Mr Lee)?

Answer: There was more than one person in this position in the past few years. Their personal information is not relevant, and they do not have any personal relationship with Mr Lee, although Mr Lee was the primary contact person that staff of Mega Creative would call or email regarding purchases from Helles World. The deals were made in a similar manner to the deal in this case, in which the negotiations started from someone from Mega Creative giving phone calls to Mr Lee and then confirmed in the exchange of emails and documents.

22. Was the template for the order ever rejected by either party for a different template?

Answer: No.

23. Did Hellas World Contracts No. 9452 and 9527 utilise their standard 'Confirmation of Order' as used previously?

Answer: Yes.

24. In the past dealings, when replying to Claimant's 'Confirmation of Order', has the Respondent ever mentioned AMBA anywhere else in their emails other than their signatures?

Answer: The Respondent has not submitted any evidence on this point.

25. What are the exact dates when Contracts No. 9452 and 9527 are accepted? And what is the delivery schedule for Contracts No. 9452 and 9527? To what extent were the Contract No. 9452 and 9527 completed?

Answer: The Confirmation of Order for Contract No.9452 was sent on 26 June 2020, and the Confirmation of Order for Contract No.9527 was sent on 15 September 2020. All goods subject to Contract No.9452 were delivered at the time of May 2021 but the final instalment

of payments of USD 2,000,000 were unpaid. Two instalments of goods subject to Contract No.9527 were delivered at the time of May 2021 (with the total value of 5,000,000) but only one instalment of payment was made (USD 2,500,000).

26. Page 3, [7], ‘The goods contained in each instalment were identical.’ Is this an error with regard to Exhibit B?

Answer: The types of goods in each instalment are the same. Only the quantities are different.

27. Were the further negotiations under Contract No. 9452 and 9527 either about LED lighting products or other accessories from Helles World? If so, what was the behaviour of these products in Rico Pacific which went through a storm with temperatures that sometimes fell to minus 10°? Did these products also have the same quality issue in the cold weather and failed to meet requirements of normal operation?

Answer: There were no quality issues similar to this in the products used in Rico Pacific. The temperature in Rico Pacific never dropped under -10°C since Helles World’s products were used by Mega Creative.

28. Was the delivery instalment to Charlottesville properly delivered by Helles World and received and collected by Mega Creative? What time?

Answer: Yes, the goods were properly delivered and collected on 30 May 2020 at Charlottesville.

29. Was there previously a complaints policy or procedure for Helles World if their products weren’t up to standard? Had Mega Creative ever experienced faulty products before?

Answer: The customer complaints service of Helles World is generally provided to individual consumers. For large purchases from non-consumers there is no formal complaint policy; rather, complaints were handled on a case-by-case basis. In those situations, Helles World used replacement of faulted goods as its main remedy. There were no significant failures of goods before, so this strategy was never challenged. Mega Creative only claimed for quite a small volume of faulty products provided by Helles Worlds in previous dealings (with a total value of no more than \$40,000) and accepted replaced goods as the remedy.

30. Did prior transactions between the parties also comprise solely of LED A, B, C, D?

Answer: The prior transactions included LED A, B, C, and D as well as other products. These four types of products took approximately 40% of the total purchase. All four products were purchased repeatedly prior to Contract No. 9367.

31. Can the phrase “in a similar manner” be understood that the goods of Contract No. 9452 and 9527 are the same as the goods of Contract No. 9367?

Answer: It refers to the way the deals were concluded. The two further orders included three of the four types of goods (A, C and D) and other types of goods. LED A, C, and D took up to 60% of the total purchases in Contracts No. 9452 and 9527.

32. Has the Claimant replied, in any way, to the content in Exhibit J?

Answer: No, the subsequent communications between these two parties dealt with different matters and not responded to this email.

33. Was there any discussion between the parties regarding the weather in Springfield?

Answer: No.

34. Were there any reliable weather predictions in April 2020 whose reports indicated that there would be unusual temperatures in the coming winter? Had either party been privy to such forecasts?

Answer: No weather predictions was available in April 2020 for the winter weather. It was not until early August some of the weather forecasting institutions around the world started to make statement about the potential impact of the La Niña phenomenon in the coming winter, which were still vague. The information is accessible by the general public.

35. Have there been any disputes between the parties prior to Contract No. 9367?

Answer: There were claims for small volumes of faulty goods (in question 33) and all were solved smoothly.

36. Had Helles World ever created products for other countries with similar conditions to Diamor Republic or Springfield?

Answer: The products of Helles World were never tailored for the special needs of any particular purchaser or situation of a particular State.

37. According to Tech Lab report dated in 2015, products covered by Helles World reached 45,000-50,000 hours in normal temperatures of 25°C. Have other tests been performed by this third-party agency for maximum and minimum temperature lately?

Answer: No.

38. Did the expert report authored by Tech Lab say anything else about the 'industrial standard' or generally expected qualities/standards for these types of LEDs?

Answer: No.

39. Does Helles World have some knowledge about the performance of their products, or even customer feedback about the sustainability and efficiency of the products in different temperatures other than normal conditions?

Answer: Helles World received feedback and complaints from individual customers regularly. Information extracted from those complaints did not make Helles World believe that there would be consistent failure of its products in extreme low temperatures.

40. On what date and circumstance did Mega Creative become aware of the defectiveness?

Answer: The volume of incident reports started to increase in December. Due to the holiday season, the management only noticed the high frequency of incidents in mid-January and started investigation shortly after. When they received the technician's preliminary report in early February, which stated that the likely cause of the failures was the inherent quality issues in Helles World's products, they contacted Helles World for a solution.

41. During the negotiations between the parties after the systematic failure of the Claimant's product, had the Claimant mentioned their motivation as to why they are offering replacements and discounts for future contracts?

Answer: The Claimant's representatives said that it was for the maintenance of a long-term relationship from which both parties could benefit.

42. How much did the repairs carried out by Mega Creative cost?

Answer: According to Mega Creative, the rough costs of repair and maintenance during and after the whole winter season was increased by approximately USD 5,000,000, which they alleged was caused by Helles World's faulty products.

43. What percentage of the order was for replacements? Was this common practice regarding contracts between the parties?

Answer: Mega Creative would usually reserve 3-5% of the LED products for maintenance and replacement purposes. This is an internal decision of Mega Creative. Helles World had no knowledge of it.

44. Is Mega Creative facing economic hardship if it does not receive its proposed compensation of USD 5,000,000?

Answer: No, it will not face economic hardship.

45. Did the devices purchased from the local market to replace the failures also present any issues regarding materials quality? Did they also have poor-quality components?

Answer: No, the replacement products operated generally well.

46. How old were the replacement lights used by Mega Creative?

Answer: The replacement lights were new.

47. Were any of the lights damaged during transportation or delivery either in the possession of Helles World or Mega Creative?

Answer: The volume of damaged goods was insignificant and negligible.

48. To what extent should we exclude the arguments related to 'quality' of goods?

Answer: The tribunal decided that the quality issues of the goods, such as the technical features of the LED devices, the material used in the devices, and its causal link with the failures of such devices, etc., would be reserved for the next hearing when expert witnesses from both sides are called. It means that the tribunal will only decide the 'legal' test of conformity in this hearing.