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**To: Perto & Dinello Law Firm**

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**Subject: Case No. SA 350/2013– Procedural Order No 2**

Dear Ms Gonzalo, dear Ms Perto,

The Arbitral Tribunal hereby confirms receipt of the requests concerning the procedure and the facts of the case made by the parties. The members of the Tribunal have discussed the issues and decided to make the following clarifications regarding:

**1. The General Terms:**

- 1.1.** Is there any reference in the wording of the Contract the parties concluded on 27<sup>th</sup> April 2012 to the General Terms of Prime Construction or was the only occasion when these terms were mentioned in the correspondence between the parties?

The Arbitral Tribunal was provided with a complete version of the Contract concluded between the parties. It is, however, silent with regard to the issue of how the General Terms should be treated.

- 1.2.** Prime Construction attached the General Terms to the e-mail of April 1<sup>st</sup>, 2012. Were these terms used before and specifically, were they used in the contract between Prime Construction and Antylland Ceramic concluded in 1999?

Indeed, the General Terms of Prime Construction were attached to the e-mail of April 1<sup>st</sup> 2012 and additionally José Nanni referred to the availability on Prime Construction's web-page. In its contracts, Prime Construction always uses its General Terms. Therefore, it can be assumed, that also in the contract between Prime Construction and Antylland Ceramic in 1999 the General Terms became part of the contract.

- 1.3.** Did the General Terms contain any provisions on parties' performance and did any of the parties perform accordingly with such provisions?

The General Terms contain overall and standard provisions. The document also applies to parties' performance. However, any circumstances or situation specified in the General Terms have not occurred before. The present conflict between the parties is the first issue that may or may not be solved according to the regulation contained in the General Terms.

- 1.4.** Was it normal practice for Antylland Ceramic to use general terms in its contracts? Had it its own version of General Terms?

As Antylland Ceramic as well is a business person it is used to include General Terms in contracts. The Arbitral Tribunal was not provided with general terms that may be used in practice by Antylland Ceramic.

- 1.5.** The process of negotiation had taken several months. Were any issues, which are regulated by the provisions of the General Terms, subject to this process? Have any provision of the General Terms been changed or moved to the main contract? What were the "small changes" that Mr. Meyer mentioned in his e-mail of April 6<sup>th</sup>, 2012?

The parties did not change any provisions of the General Terms. In practice those terms were not a subject during the negotiation process. Furthermore, the "small changes" refer to clauses of minor importance, which were agreed by both parties and are beyond dispute.

- 1.6.** Why does the provision in the General Terms of Prime Construction include the wording "this contract"? Are there any references in the General Terms to the main contract?

The provision in the General Terms include the wording "this contract" due to the fact that Prime Construction in its standard practice treats this Document as a valid one only in a connection with a proper contract.

- 1.7.** Were the General Terms attached to the Agreement of 27<sup>th</sup> April 2012 as signed by the Parties?

The General Terms were among the documents that have been passed on to Mr. Thomas Frog, Deputy of General Manager on 27<sup>th</sup> April 2012 together with the signed Contract.

## **2. The Applicable Law:**

- 2.1.** How should the footnotes on pages 4 and 20 of the case be understood: may it be assumed that DCFR is actually the statutory law in force in all three states mentioned in the case?

As the applicability of the DCFR to the material issues in the present case is in dispute, it should only be assumed for the purpose of this Moot that the DCFR entered into force.

**2.2.** Can generally applicable law of the European Union be applied in this case, in particular, but not exclusively, Rome I regulation. This would be justified since all three countries in the case are member states of the EU.

In all three countries: Antylland, Reinoland and Poland the law of the European Union, including Rome I regulation, is applied.

**2.3.** Did the Contract include any reference to the matter of jurisdiction? If yes, in which provision and what was its content?

The Contract between the parties concluded on 27<sup>th</sup> April 2012 does not contain any reference to the matter of jurisdiction. The only provisions regarding jurisdiction can be found in the General Terms of Prime Construction.

**2.4.** Are the New York Convention on recognition and enforcement of arbitral awards and the UNIDROIT Principles applicable in the case at hand?

For the purpose of this Moot, it can be assumed that Antylland, Reinoland and Poland are all signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Furthermore, they all have adopted the UNCITRAL Model Law on International Commercial Arbitration.

**2.5.** Are Reinoland and Antylland common law or civil law countries?

Reinoland is a civil law country. Antyllands legal system is based on a common law tradition.

### **3. Damage claims:**

**3.1.** Did the Contract contain any provisions on financial penalties (like liquidated damages) for its non-performance, in particular with regard to delay in construction works or non-completion of the construction?

No. The Contract between the parties does not contain any penalty clause.

**3.2.** Did the parties discuss any other way of resolving the problem, once Antylland Ceramic discovered that no Binder's concrete has been used?

As it was an essential agreement for Antylland Ceramic, that only Binder's concrete should be used in the construction process, discovering the use of substitute concrete meant a great loss of confidence to Mr Meyer, especially considering the prior contract in 1999. Mr Meyer therefore saw himself forced to react immediately and to exclude Prime Construction from the building site. He did not discuss other ways of resolving the problem.

**3.3.** What did Antylland Ceramic do after regaining the possession of the construction site on August 3, 2013?

After Prime Construction left the construction site, Antylland Ceramic turned to another professional construction company asking this firm to make any possible improvements of areas where the substitute concrete was used and to continue the construction process.

**3.4.** What was the stage of works when Prime Construction learned that there was the fire in Binder's seat and hence all deliveries of its concrete will be delayed for half a year?

Prime Construction received information from Binder Company on November 30, 2012- it was about 2 weeks after 1<sup>st</sup> stage of construction process was finished and accepted by Antylland Ceramic.

**3.5.** In comparison to the value of the contract, how significant was the proportion of the cost of materials needed to continue the completion of the entire project, which had been already bought by Prime Construction by the time of termination of the contract?

Before August 2013 Prime Construction bought all materials needed to continue and complete the entire project. Those materials were intended mainly for finishing and completions of the building, and their value was about 50% of total remuneration that should be paid for two left stages.

- 3.6.** How significant for Prime Construction would have been the cost of more than 7 months delay in construction of the seat? (sub-construction agreements, etc.)

During the 7 months time delay, Prime Construction would have suffered financial losses as all materials required for work were at Antyllands building site. To perform other contracts it would be necessary to rent substitute materials which would raise costs. This is aggravated by the further delay at Antyllands building site.

#### **4. The concrete:**

- 4.1.** Quality of the substitute concrete. Is it suitable for the respondent's purpose, especially concerning the ability to close cracks itself?

Antylland Ceramic is building new offices in which it also has to receive potential customers. In its first building site the bricks used on the floor of the offices are cracked, which makes a bad impression on the customers. To avoid this was the reason for Antylland Ceramic to spare no efforts and to perform the report about concretes in the market. However, as it was underlined by Prime Construction, the substitute concrete was used by the constructor in some projects and it also fulfilled requirement of professional level.

- 4.2.** Was the information about fire in Binder's factory and store of the concrete a commonly known fact?

Information about the fire in Binder's factory was not hidden by the company and it was published by a local newspaper.

- 4.3.** Was it possible to obtain Binder's concrete from any source (e.g. second-hand source or through local distribution network) after the fire in Binder's factory and store within a reasonable period of time?

Prime Construction did not try to obtain Binder's concrete from other sources than the producer considering that it would increase the costs of construction process due to the fact that Prime Construction was one of the biggest Binder's customers with the highest possible discount.

**4.4.** How much of Binder's concrete did Prime Construction buy at the outset of works in relation to the overall quantity needed for completion of the project? At the beginning of work Prime Construction did not buy the Binder's concrete because the company had a substantial reserve of it in the stock.

**4.5.** What does the contract exactly say about the concrete to be used in the construction by Prime Construction? Does it contain any description of qualities of the concrete to be used?

No. There are no specifications in the contract concerning the quality of the concrete or the producer of the concrete.

**4.6.** What is the reputation of the substitute concrete used by Prime Construction? How long is it available on the market?

The substitute concrete used by Prime Construction is perceived as a concrete that fulfilled requirement of professional level and it is available on the market since 2008.

**4.7.** Did the topic of the concrete to be used occur throughout the negotiations or was it mentioned only at the outset of the negotiations and after conclusion of the Contract?

The topic of the concrete was one of the main issues that were raised between the parties and both companies, but especially Antylland Ceramic, referred to it during the entire negotiation process.

**4.8.** How good was the concrete used by Prime Construction as Binder's concrete's substitute in comparison to Binder's concrete? What are the differences in regard to quality and attributes between those two concretes?

Both concretes function on the market with an opinion of high quality professional materials. There are no official tests prepared by an authorized institution that compare both concretes.

**4.9.** How well could the substitute concrete be used for the same construction purposes that the Binder's concrete?

A binding answer to this question could only be prepared by an expert appointed to analyze the case at hand. Neither Prime Construction nor Antylland Ceramic has ordered such an opinion.

**4.10.** What did the report prepared by different experts for the Management Board of Antylland Ceramic say about concrete of other producers? Was any concrete close to Binder's concrete regarding quality and its ability to close cracks itself according to that report?

The aim of the report was not to create a technical comparison of different types of concrete but to directly indicate a concrete, which was recommended by experts to construction process and which meet the expectations set by Antylland Ceramic when the report was ordered.

**4.11.** What are the business relations between Antylland Ceramic and Binder Sociedad Limitada?

There are no business relations between Antylland Ceramic and Binder Sociedad Limitada. Antylland Ceramic in its business activity does not use any kind of concrete. The report was the reason why Antylland Ceramic chose Binder's concrete.

**4.12.** Did the contract from 1999 provide any specific type of concrete?

No. The contract of 1999 did not contain a specific type of concrete. It was Antylland Ceramics first building site and because of its lack of experience it did not order a report. Furthermore, the market of concrete was not as varied as it is nowadays.

## **5. Powers and representation:**



**5.1.** What are the rules on representation of Prime Construction and Antylland Ceramic provided for in their Articles of Association? Were Mr Meyer and Mr Nanni authorised to individually represent their companies, respectively as the General Manager and Project Manager?

Mr Meyer and Mr Nanni are authorised to individually represent their companies during contract conclusions.

**5.2.** Was Prime Construction aware of the content of the Power of Attorney, i.e. was this document disclosed to Prime Construction so that they knew that Mr Frog never had the power to sign a contract with General Terms?

Unfortunately, during the long negotiations and the long-awaited contract conclusion, both parties forgot about the document, so that the Power of Attorney itself was not disclosed to Prime Construction before 27<sup>th</sup> April 2012. However, the document empowered Mr Thomas Frog, it was handed out to him by Mr David Meyer and it was attached to the Contract at the day of contract conclusion.

**5.3.** Did Thomas Frog participate in any stage of negotiations? Was he aware of the scope of authorization? Did he know history of communication between the parties with regard to the contract from 27<sup>th</sup> April 2012?

Thomas Frog did not take part in contract negotiations. He had only the powers attributed to him in the Power of Attorney reproduced on pp. 21 f of the case. Thomas Frog received this document and presented it to Mr Nanni the day the contract was concluded.

## **6. Antylland Ceramic's new seat**

**6.1.** Who made the project of the Antylland Ceramic's new seat?

Prime Construction prepared a project of the Antylland Ceramic's new seat. Preparation of the project constituted a part of the 1<sup>st</sup> stage.

**6.2.** Antylland Ceramic has already planned its business strategy and it scheduled the first appointments in its new offices in Reinoland. Therefore, Antylland Ceramic stipulated the strict schedule regarding the construction process.

## **7. Inspection of the construction site**

**7.1.** Did the representatives of Antylland Ceramic inspect the construction site at any time between December 2012 and 2<sup>nd</sup> August 2013?

Yes, the representatives of Antylland Ceramic inspected the construction site in November 2012, when the 1<sup>st</sup> stage was finished and before the payment for the 1<sup>st</sup> stage was made.

## **8. Delay in the construction process**

**8.1.** Was Prime Construction delayed with the 2<sup>nd</sup> stage of the construction at the moment of the termination of the contract (3<sup>rd</sup> August 2013)?

Prime Construction was delayed approximately two months because of the first delayed delivery on behalf of Binder which was communicated to Antylland Ceramic (see Statement of Claim No. 6, 7, 8 p. 3 of the case).

## **9. Parties' main seats**

**9.1.** Are central administrations of Antylland Ceramic and Prime Construction located respectively in Antylland and Reinoland?

Yes. Antylland Ceramic has its central administration in Antylland and Prime Construction has its central administration in Reinoland.

## **10. Dates' correction**

**10.1.** Power of Attorney empowering Mr Frog, i.e. a document enclosed in Exhibit - R1- It contains a reference to the e-mail from Mr. Nanni sent on 7 May 2012.

The Organizers inform that there is a mistake in the content of the Exhibit-R1 on page 22 of the Case, where the date 7 May 2012 was used. The adequate date is 7 April 2012.

**10.2.** When was the contract actually signed? Does the reference to “27<sup>th</sup> April 2013” para. 3 refer in fact to 27<sup>th</sup> April 2012?

The Organizers inform that there is a mistake in the content of the Statement of Defense on page 18, No.3 of the Case, where the date 27<sup>th</sup> April 2013 was used. The adequate date is 27<sup>th</sup> April 2012.

Yours sincerely,

Mr Chairman

(on behalf of the Arbitral Tribunal)