

**INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE**

ICC CASE NO 21856/TO

IN THE MATTER OF AN ARBITRATION BETWEEN

GRANBIO LLC

and

BIOFLEX AGROINDUSTRIAL S.A.

Claimants

- and -

BETA RENEWABLES S.P.A.

and

BIOCHEMTEX S.P.A.

Respondents

**SECOND RESPONDENT'S ANSWER
TO THE REQUEST FOR ARBITRATION
AND JURISDICTIONAL APPLICATION**

19 May 2016

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I. INTRODUCTION

1. The Second Respondent, BioChemtex S.p.A. (**BioChemtex**) hereby submits this Answer to the Request for Arbitration (the **Answer**) in accordance with Article 5(1) of the Rules of Arbitration of the International Chamber of Commerce (**ICC**), effective from January 2012 (the **ICC Rules**), in respect of the Request for Arbitration dated 7 April 2016 submitted on behalf of the Claimants, GranBio LLC (**GranBio**), and BioFlex Agroindustrial S.A. (**BioFlex**) (the **Request**). Except where inconsistent with terms defined below, defined terms in the Request are adopted for convenience but without making any admissions thereby.

2. The Request purports to allege claims under three separate contracts, namely:

- (a) A License Agreement between GranBio and Beta Renewables S.P.A. (**Beta**) dated 15 May 2012 (the **License**);
- (b) A Basic Engineering and Technical Services Agreement (**Engineering Agreement**) between BioFlex and BioChemtex dated 15 May 2012; and
- (c) An Equipment Supply Agreement (**Equipment Agreement**) between BioFlex and BioChemtex dated 15 May 2012.

3. Although the Request purports to be on behalf of GranBio and BioFlex, for the reasons set out in the jurisdictional application below, this Answer is submitted on behalf of BioChemtex only. For the same jurisdictional reasons, a separate Answer has been submitted on behalf of Beta. Subsequent references to the 'Claimant' accordingly refer only to BioFlex.

4. At the outset, BioChemtex does not consent to the jurisdiction of any eventual tribunal constituted under the ICC Rules to hear and determine, in one single arbitration, claims raised under the License together with any alleged disputes arising under the Engineering and Equipment Agreements. This objection to jurisdiction is set out in detail further below. BioChemtex's submissions going to the merits of the allegations raised in the Request are made entirely without prejudice to BioChemtex's primary position that any eventual tribunal constituted under the ICC Rules does not have jurisdiction to hear, in one single arbitration, the alleged disputes arising out of the three separate contracts. For the avoidance of doubt, nothing in this Answer is intended to waive BioChemtex's right to object to the jurisdiction of any eventual tribunal constituted under the ICC Rules on this issue.

5. As to the merits of the Claimant's claims, BioChemtex's primary position is that no proper factual case has been set out that would substantiate any of the allegations made by the Claimant to date. Without prejudice to that primary position, BioChemtex rejects any allegations of actionable misrepresentations. Any representations given by BioChemtex – the burden of proving the existence of which falls on the Claimant – were true or, at a minimum, were not made with knowledge of their falsity. In any event, the Claimant clearly did not rely on any such representations to its detriment. Further, allegations of gross negligence are specifically denied, and the Claimant has not even so much as attempted to demonstrate that its allegations go beyond basic wrongdoing and reach levels of egregiousness warranting the description of 'gross' negligence. The same point applies in respect of allegations of 'gross' incompetence.

6. The Claimant's contrived tort claims must be placed into their proper commercial context – the Claimant took on a calculated commercial risk in investing in a technology that had not yet been put into industrial-scale operation. Now that the risks apparent in scaling up that technology have materialised, the Claimant has sought to resile from the bargain that it struck, despite at all times being aware of those risks. In short, the Claimant knew that when it entered into the Engineering Agreement and Equipment Agreement (together, **the Engineering and Supply ("E&S") Agreements**) that the technology it was investing in was in its development phase. Indeed, the Claimant actively sought to benefit from that technology's development by taking on risk in exchange for having an exclusive "first mover advantage" in the promotion of the technology in South America. Now that the Claimant has not seen an immediate reward from its commercial risk – because adjustments and changes are required to optimise the industrial scale operation of the technology at issue, consistent with the new and developing state of the technology and the shared understanding of such between the parties – it has attempted to eschew the contractual framework in the E&S Agreements that both parties negotiated to insulate themselves from the very risks that have now transpired.

7. Unsurprisingly, this is why the Claimant has avoided mentioning the fundamental contractual provisions germane to this dispute. In particular, the Claimant has avoided discussion of the liability caps and liquidated damages clauses in the E&S Agreements, which apply to all forms of dispute under the E&S Agreements. This is because those provisions have a significant limiting effect on the Claimant's claims under the E&S Agreements.

8. Despite the Claimant's misbegotten efforts to avoid the application of the liability caps and liquidated damages provisions by bringing unfounded claims sounding in tort, this is, in essence, a contract dispute. The parties freely and carefully negotiated the E&S Agreements and the Claimant purports to have grievances for breach of contract under those agreements. Those allegations of breach of contract are denied, but where such claims are brought, the parties specifically

negotiated for the application of liability caps and limitation provisions. At all relevant times the Claimant was aware of this and, tellingly, has affirmed the continuing existence of the E&S Agreements on several occasions. Now the Claimant has conjured up allegations of ‘gross negligence’ and baseless tort claims which must be seen for what they are – bald attempts to avoid the effects of the bargain they struck in the E&S Agreements.

9. The Claimant’s fall back claims of contractual breach are also denied. For the reasons set out below, BioChemtex has not breached its obligations set out in the E&S Agreements. It is emphasised that BioChemtex’s obligations under the E&S Agreements were limited in scope and nature. Under the Engineering Agreement, BioChemtex’s obligations were limited to the supply of the Basic Engineering Package (**BEP**), whilst detailed engineering was the responsibility of the Claimant. Under the Equipment Agreement, BioChemtex’s obligations were limited to the supply and delivery of some of the critical equipment necessary for the Plant, whilst all other equipment and materials necessary for the construction and operation of the Plant were the responsibility of the Claimant and its chosen subcontractor. Accordingly, much of the Claimant’s complaints go to issues outside the scope of the E&S Agreements and are not the proper subject of claims brought pursuant to those Agreements.

10. In addition to the denials in respect of the Claimant’s unfounded claims, BioChemtex also brings a counterclaim for unpaid invoices under the E&S Agreements, which is set out further below.

II. JURISDICTIONAL APPLICATION

11. The Claimant has sought impermissibly to commence these proceedings to determine alleged claims in respect of all three agreements cited above. At the outset, it is noted that the Claimant has not even attempted to engage with the ICC Rules¹ concerning determination of disputes under multiple arbitration agreements in a single arbitration. Rather, the Claimant has simply assumed that claims arising under all three agreements may be heard in one proceeding. For the reasons given below, this assumption is false.

12. On 12 May 2016, counsel for GranBio and BioFlex wrote to BioChemtex’s (and Beta’s) counsel regarding this question of jurisdiction (the **12 May 2016 Letter**)². Therein, the Claimant pre-emptively defended its efforts to bring a single arbitration proceeding in respect of

¹ Specifically, Articles 6(3), (4), and 9 of the ICC Rules, which are set out below.

² Letter from Wilmer Cutler Pickering Hale & Dorr (**WilmerHale**) to Quinn Emanuel Urquhart and Sullivan (**Quinn Emanuel**) dated 12 May 2016, **R2-1**.

claims originating from three different agreements. Where appropriate below, reference is made to the 12 May 2016 Letter. This letter was in response to a letter from BioChemtex's counsel dated 5 May 2016 in which BioChemtex invited the Claimant to consent to separate proceedings in respect of the disparate disputes under the three agreements. As can be seen from the 12 May 2016 Letter, the Claimant rejected BioChemtex's proposal, a decision which should be considered in the allocation of costs emanating from this jurisdictional application.

13. BioChemtex does not consent to have claims arising under the E&S Agreements heard along with claims arising under the License in one single arbitration proceeding. For the avoidance of doubt, it is common ground that there is no single arbitration agreement binding all four of the parties to the three agreements listed above. Whilst the three separate arbitration agreements in the agreements noted above are, in substance, identical there is no 'umbrella' arbitration agreement pertaining to all three agreements. Nor do the arbitration agreements contain express joinder provisions or otherwise refer to one another. Accordingly, the Claimant's suggestion in the 12 May 2016 Letter that "the text [...] of the Agreements show that the parties intended and consented to all claims under the Agreements being determined in the same arbitration proceeding..." is specifically rejected.³

14. Article 9 of the ICC Rules does *allow* for the hearing of claims arising under different arbitration agreements in one proceeding, subject to important exceptions:

Subject to the provisions of Articles 6(3)-(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

15. Article 6(3) of the ICC Rules, however, allows a party to challenge attempts to hear disputes arising from multiple agreements in one arbitration proceeding:

If any party against which a claim has been made [...] raises one or more pleas [...] concerning whether all the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

16. Article 6(3) of the ICC Rules does not specify when the Secretary General should refer such a jurisdictional question to the ICC Court. However in order for the Secretary General to decide *not* to do so, the Secretary General must determine that the party objecting to jurisdiction does not have a reasonable possibility of obtaining a ruling in its favour from the ICC Court.⁴ For the

³ Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R2-1**, para 3.

⁴ T. Webster and M. Bühler, *Handbook of ICC Arbitration*, (3rd ed., 2014), para. 6-33, **R2LA-1**.

reasons set out below, there is a clear reasonable possibility that BioChemtex's jurisdictional challenge would be accepted by the ICC Court.

17. If the Secretary General decides not to refer the jurisdictional question to the ICC Court, the issue will be considered and determined by the tribunal constituted under the ICC Rules. Similarly, if, after a reference by the Secretary General to the ICC Court on such a jurisdictional question, the ICC Court decides not to prevent the arbitration from proceeding, a tribunal will make a decision on jurisdiction. If and when a tribunal comes to consider the question, it will take into account the same criteria under Article 6(4) as the ICC Court would. BioChemtex specifically maintains the arguments set out above and below should the Secretary General and/or the ICC Court allow the arbitration to proceed as currently pled by the Claimant, and expressly reserves the right to make additional arguments concerning this jurisdictional objection to any eventually-constituted tribunal.

18. In determining whether jurisdiction to conduct a single arbitration exists in the face of multiple arbitration agreements, the ICC Court will have reference to Article 6(4) of the Rules, which states:

In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. In particular:

[...]

(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

19. Thus, the ICC Court will be required to decide whether the three arbitration agreements here, even if "compatible", were, in fact intended to permit consolidation of disputes under different contracts in a single arbitration.⁵ In other words, the key question is simply whether, as a matter of interpretation, the parties agreed to a single arbitration. This process of interpretation is a question of English law, since the issue of jurisdiction is subject to the law of the arbitration agreement⁶ (here, English law). As such, the question for the ICC Court will be whether a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract,⁷ would understand the

⁵ G. Born, *International Commercial Arbitration*, (2nd ed., 2014), **R2LA-2**, p. 2613.

⁶ See T. Webster and M. Bühler, *Handbook of ICC Arbitration*, (3rd ed., 2014), **R2LA-1**, para. 6-42.

⁷ See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, **R2LA-3**.

contractual framework to mean that the parties agreed to have disputes arising under the disparate agreements to be heard in a single arbitration. For the reasons set out below, it is submitted that a reasonable person in the position of the parties in the present case would not find the existence of such an agreement.

20. Although there is little to suggest that the three arbitration agreements at issue here are “incompatible” under Article 6(4)(ii)(a), the *four* parties to the *three* agreements at issue here clearly did not agree that any disputes under the various agreements would be determined together in a single arbitration as required by Article 6(4)(ii)(b). As a matter of interpretation, that was clearly not the parties’ intention under the arbitration agreements. The first and most fundamental point in this respect is that the parties collectively entered into three separate agreements, with different entities, each agreement containing its own distinct arbitration clause.

21. The closest the Claimant comes in the Request to addressing the substantive criteria for the single hearing of disputes arising under separate arbitration agreements under the ICC Rules is at paragraph 28 where it states: “[t]ogether, the Agreements comprise a single transaction...”. This statement is wrong. Though related, each contract represents its own transaction. In truth, had the four parties intended to agree that claims under the three agreements could be determined together in a single arbitration, as a single transaction, they could have:

- (a) agreed this expressly in a separate document, to which all four entities were a party, such as master agreement;
- (b) agreed this expressly in the wording of the three arbitration clauses; and/or
- (c) agreed this expressly by way of an ‘umbrella’ arbitration clause in one or more of the agreements.

22. The above options, none of which are uncommon in commercial contracts, reflect the fact that there does not need to be a single agreement to which all the relevant entities are party, provided each party’s arbitration agreement demonstrates their consent to the chosen mechanism for dealing with disputes.⁸ As it was, the parties chose none of these options. Where this is the case, the *prima facie* position should be that the disputes ought to be heard separately, in separate proceedings, to reflect the intentions of the parties.

⁸ D. Sutton, J. Gill QC and M. Gearing QC, *Russell on Arbitration*, (24th ed., 2015), para. 3-53, **R2LA-4**.

23. In the 12 May 2016 Letter, the Claimant argues⁹ that the Supplemental Agreement¹⁰ demonstrates an agreement on the part of all four parties to the three agreements to have disputes arising under the separate and distinct agreements heard together. This is incorrect for several reasons. Firstly, there are no claims brought under the Supplemental Agreement and, notably the Claimant does not even mention it in the Request. Secondly, the Supplemental Agreement does no more than highlight an example of the four parties contracting together in one single agreement, which is in stark contrast to the parties entering into the three separate agreements noted above, which are between different parties, have different subject matter and distinct and different rights and obligations. For the avoidance of doubt, the Supplemental Agreement is not a form of master agreement, which is clear on its face.

24. Further, the substantially different ownership structure of Beta and Biochemtex (as set out by the Claimant itself at paragraphs 7 and 8 of the Request) means that each entity has different obligations to different shareholders from each other. Almost a third of the equity in Beta is held by two separate companies who are unrelated to Beta or BioChemtex and are not parties to these proceedings. Namely, TPG ESCH S.a.r.l (**TPG**) holds 22.51%, and Novozymes Bio-Industrial Holdings A/S (**Novozymes**) holds 9.95% of the equity in Beta. This alone is a compelling reason, with clear commercial logic,¹¹ why Beta and Biochemtex demonstrably did not choose to be bound under the same arbitration clause for each of their respective agreements so as to allow disputes arising under the different agreements to be resolved in a single arbitration. Put briefly, the Respondents have disparate identifies and should not be forced to defend claims against them jointly.

25. The Claimant has suggested in the 12 May 2016 letter that it would be “commercially illogical and entirely artificial for the parties to have agreed that [disputes] must be determined in one arbitration proceeding under the Supplemental Agreement [but not in the other agreements].”¹² This overstates the point. The Supplemental Agreement effects uncontroversial amendments to separate agreements. The function of the Supplemental Agreement is therefore procedural in nature and does not have the substantive function of the other agreements. Its fundamentally different nature from the other agreements makes it entirely reasonable for there to be four-way agreement to arbitration in the Supplemental Agreement but not in the other agreements. The parties were aware of this difference and expressly demonstrated their consent to a single arbitration in the Supplemental Agreement but

⁹ Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R2-1**, para. 4.

¹⁰ Supplemental Agreement between Beta Renewables S.p.A., Chemtex Italia S.p.A., Graal Bio LLC and BioFlex Agroindustrial Ltda dated 15 May 2012, **R2-2**.

¹¹ Contrary to the suggestion of commercial illogicality and/or artificiality in paragraphs 5 and 6 of the 12 May 2016 letter.

¹² Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R2-1**, para. 5.

chose not to consent in this way in the other agreements. Finally, as noted above, the Claimant has opted against bringing claims under the Supplemental Agreement in any event, so it is irrelevant for purposes of this jurisdictional application.

26. The E&S Agreements to which BioChemtex is a party are also different in nature from the License. Whilst the License is concerned with the licencing of intellectual property, the E&S Agreements are concerned with the supply of basic engineering and some equipment relevant to the design by the Claimant of a second generation bioethanol plant. Thus, at the time the parties entered into the different agreements, it is entirely reasonable to assume that they may have preferred to have different proceedings pertaining to such different subject matters.¹³ Had their intentions been to the contrary, they could have easily chosen to expressly link the arbitration clauses by reference, but they opted not to. Clearly, a dispute concerning the licencing of technology, the payment of royalties and performance guarantees related to that technology is substantively different from disputes concerning engineering or the supply of equipment. The parties recognised this in opting to include three distinct arbitration agreements in the various agreements listed above.

27. Further to that point, it would have been possible for the parties to have entered into the E&S Agreements independently of the License. There is no material inter-dependence between the E&S Agreements and the License. Although the three agreements may have been entered into pursuant to a common end goal, that was an end goal involving other legal entities and is not the same as saying that they comprised a single transaction.¹⁴ In short, it would have been possible for BioChemtex to provide the engineering services and provision of equipment independently of the License.

28. All the above points reflect a fundamental principle of international arbitration: that parties agree to arbitrate with particular other parties, according to specified procedures – not to arbitrate with just anyone in any set of proceedings.¹⁵ In other words, the consensual nature of arbitration will usually prevent the introduction into proceedings of claims or parties which were not within the scope of what the contracting parties agreed to.¹⁶

¹³ See footnote 11, *supra*.

¹⁴ Accordingly, the Claimant's reliance on the contracts being the "same economic transaction" (paragraph 6 of the 12 May 2016 letter) or reference to the "structure" of the Agreements (paragraph 3 of the 12 May 2016 letter) does not advance its position.

¹⁵ G. Born, *International Commercial Arbitration*, (2nd ed., 2014), **R2LA-2**, p. 2569.

¹⁶ D. Sutton, J. Gill QC and M. Gearing QC, *Russell on Arbitration*, (24th ed., 2015), **R2LA-4**, para. 3-049 and fn. 160.

29. Biochemtex has chosen not to pursue two separate arbitration proceedings under the Engineering and Equipment Agreements, respectively. This is for precisely the reasons set out above that BioFlex purports to ignore – the parties subject to those two agreements are identical and their subject matter is roughly similar. This is to be contrasted with the position of Beta and the License Agreement – the parties to that agreement are different from the E&S Agreements and their subject matter is markedly different. As such, splitting the dispute related to the E&S Agreements from disputes under the License is both justified as matters of principle and practicality and as a matter of BioChemtex’s contractual right under the arbitration agreements in the E&S Agreements.

30. As set out above, the E&S Agreements and the License concern the supply of basic engineering and some equipment relevant to construction of a plant, and intellectual property, respectively. In these circumstances, the Claimant’s suggestion in its 12 May 2016 Letter that there is a risk of conflicting or otherwise inconsistent¹⁷ arbitration awards should there be separate proceedings under the different agreements is baseless. Awards rendered under the three separate agreements will address fundamentally different issues and relate to distinctly different obligations on the part of separate parties. Accordingly, there is no risk of inconsistency between them. Furthermore, even if (which is denied) the agreements were part of the same economic transaction, the agreements dealt with fundamentally different aspects of the transaction. An award dealing with one part of the transaction would not conflict with an award on a different part of the transaction. Moreover, to the extent that it is possible for there to be any inconsistency (which is denied), the differing identities of the parties makes it difficult to see how any inconsistency could have any substantive consequences in any event.

31. In truth, the Claimant’s attempt to pigeonhole all four parties into a single arbitration is an enforcement-driven ploy to drive a coach and horses through the careful separation of the parties between the various agreements. Such a tactic should not be entertained, and the ICC Court and/or tribunal should be alive to this commercial impetus of the Claimant. To allow the Claimant to ignore this careful separation of parties would undermine the fundamental English law principle of separate legal personality in respect of companies and impute agreement where there is none. Further to this point, the Claimant’s attempt (without explanation) to assign joint and personal liability to Beta and Biochemtex (which is rejected below) is a further effort to disguise the Claimant’s enforcement strategy in the unlikely event it is able to obtain an award in its favour.

32. For all the reasons set out above, the Secretary General is requested to present this application to the ICC Court for determination and the ICC Court is requested to grant this

¹⁷ Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R2-1**, para. 4.

jurisdictional challenge, dismissing this arbitration reference. BioChemtex does not and never has agreed to have disputes between Bioflex and Biochemtex determined in the same arbitration as any disputes between GranBio and Beta. A decision to grant this jurisdictional objection would be entirely consistent with the parties' intentions and expectations under all three agreements that there was to be separate arbitrations on the disputes raised between the different parties.

III. THE PARTIES

33. The Claimant is BioFlex. As an aside, BioChemtex specifically rejects the use of "GranBio" in the Request to refer to *both* GranBio and BioFlex. Not only is this unhelpful and confusing, there is no sound reason for doing so. GranBio and BioFlex are separate and distinct legal entities, just as is the case with BioChemtex and Beta. Any suggestion that GranBio and BioFlex are one and the same, or should at any time be treated as such, is accordingly rejected.

34. For its part, the Claimant, BioFlex is a wholly owned subsidiary of GranBio Investimentos S.A., the parent company of GranBio. By its own description,¹⁸ GranBio is therefore part of a Brazilian biotechnology group that is in the business of creating solutions to transform biomass into renewable products such as biofuels, biochemicals, nano-materials and nutrients. It operates at every level of the biotechnology production process. GranBio Investimentos S.A. has been recognised as one of the most innovative companies in the whole of South America. It is a highly sophisticated and experienced operator in the field of Bio-Sciences. Such experience and expertise is also manifested through BioFlex as a company within the same group.

35. GranInvestimentos S.A.'s Chief Executive Officer and Founder, Bernardo Gradin, holds a Civil Engineering Degree and MBA and has a business background in Bio-Sciences. Bernardo Gradin was formerly Managing Director of Braskem, a well-established and sophisticated Brazilian company in the "bio-tech" sphere.¹⁹ Mr Gradin formed GranInvestimentos S.A. (as it is now called) with Alan Hiltner, the former Planning and Development Vice-President at Braskem, and Goncalo Amarante, a professor of genetics at the Unicamp university in Brazil. The object of GranInvestimentos S.A.'s formation was to develop industrial biotechnology business in Brazil, specifically looking to take advantage of the availability of cheap feedstock in Brazil as well as utilising the significant experience that Mr Gradin and Professor Amarante in particular had in this industry. In short, GranInvestimentos S.A.'s founders and executive were and are highly

¹⁸ GranBio website, 'Who we are', available at <http://www.granbio.com.br/en/conteudos/who-we-are/>, R2-3.

¹⁹ In around 2010 Braskem had entered into a joint venture with Novozymes for production of polyethylene using ethanol from fermentation of sugarcane.

knowledgeable, experienced businessmen in the bio-tech sector. They also brought this wealth of experience and expertise to BioFlex as the controllers of BioFlex's parent company.

36. The Respondent, BioChemtex, is a global leader in the development and engineering of technologies and bio-chemical processes based on the exclusive use of non-food biomass, as an alternative to oil. After seven years of research and 150 million Euros of investment, Biochemtex developed the PROESA™ process. BioChemtex's full corporate name is BioChemtex S.p.A and is a company incorporated under the laws of Italy.

37. BioChemtex's contact information is:

Strada Ribrocca n.11
15057, Tortona (AL), Italy
Tel: +39 0131 810 1
Fax: +39 0131 811 759
Attn: Giovanni Bolcheni
giovanni.bolcheni@gruppomg.com

38. BioChemtex is represented in this arbitration by:

Stephen Jagusch, Q.C.
Matthew Bunting
Timothy L. Foden
James Smithdale
Quinn Emanuel Urquhart & Sullivan LLP
One Fleet Place
London
United Kingdom
Tel: +44 (0) 20 7653 2000
Fax: +44 (0) 20 7653 2100
stephenjagusch@quinnemanuel.com
matthewbunting@quinnemanuel.com
timothyfoden@quinnemanuel.com
jamesmithdale@quinnemanuel.com

39. All communications to BioChemtex in this arbitration should be made to BioChemtex's representatives at the addresses set out above. Quinn Emanuel is empowered to act for BioChemtex in these proceedings.²⁰

40. BioChemtex's membership of the Mossi Ghisolfi Group (**M&G Group**), as raised in paragraph 9 of the Request, is irrelevant. The M&G Group is not a party to any of the arbitration agreements that GranBio and BioFlex seek to rely upon, and accordingly the M&G Group has no relevance to this arbitration.

IV. THE ARBITRATION AND GOVERNING LAW CLAUSES

41. It is common ground between the parties that the E&S Agreements both contain the Dispute Resolution and Governing Law clause set out at paragraph 11 of the Request and that the allegations brought against BioChemtex by BioFlex fall within the scope of that clause.

42. It is further common ground that the Dispute Resolution and Governing Law clause provides for ICC arbitration in London, to be conducted in English.

43. As set out above in BioChemtex's jurisdictional application, the parties dispute that the arbitration agreements contained in the E&S Agreements allow for claims brought under the License to be heard in a single proceeding with claims brought under the E&S Agreements.

V. CONSTITUTION OF THE TRIBUNAL

44. The parties continue to hold negotiations concerning the constitution of a 3-member tribunal. Further, BioChemtex does not waive its right, as Respondent, to appoint its party-appointed arbitrator *after* Claimant has appointed its arbitrator.

VI. NATURE OF THE DISPUTE

45. Much of the Request is severely lacking in detail and particularity. BioChemtex will require full particularisation of all allegations in due course.

46. Unhelpfully, the Claimant pleads a misrepresentation claim without setting out in any particularity what the alleged misrepresentations were, by whom they were made or when they were made. For instance, it is unclear as to whether the Claimant has alleged that BioChemtex has made any misrepresentations at all and whether those representations related to Beta's PROESA technology

²⁰ Power of Attorney dated 18 May 2016, **R2-4**.

or the limited obligations that BioChemtex had in respect of supply of basic engineering and some equipment . The Claimant's failure to particularise its claims in this regard not only make answering its allegations difficult, but it further underscores the practical necessity of claims made against BioChemtex and Beta being heard separately. In any event, BioChemtex denies that it made any misrepresentations.

47. Even if there were any misrepresentations, which is denied, Bioflex did not rely on them in entering into any of the agreements in any event. At all relevant times, the Claimant, a sophisticated commercial party with a background in biotechnology and bioethanol fuels, had full access to the BioChemtex laboratories and the pilot plant that BioChemtex had developed in Rivalta-Scrivia, Italy (the **Pilot Plant**), as well as to the PROESA technology and was able to form its own assessment of it and BioChemtex's capabilities. In fact, the parties executed a binding Non-Disclosure Agreement providing BioFlex full and direct access to the Pilot Plant. Thus, at the time that the parties negotiated the E&S Agreements, the Claimant was independently able to verify BioChemtex's capabilities.

48. Insofar as the PROESA technology was in the process of being scaled up from the Pilot Plant to an industrial sized plant, improvements were continuously being made to the PROESA process but the fundamental aspects of the technology remained the same. For the avoidance of doubt, this does not amount to "experimenting" with the technology as alleged at paragraph 20 of the Request. For that matter, the PROESA technology is not, as the Claimant alleges, "fundamentally flawed" and it is denied that BioChemtex ever represented that the Crescentino plant was working at full capacity without issue. Indeed, BioChemtex did not even complete construction of the Crescentino plant until January 2013, well after the execution of the E&S Agreements and even then it was not formally opened until October 2013. As the Crescentino plant is a "demonstration" plant, it is frequently undergoing development, modifications and improvements. Again, the Claimant knew this as it visited the Crescentino plant several times before it was officially commissioned and thereafter.

49. It is denied that BioChemtex provided grossly incompetent and/or deficient performance under the E&S Agreements. For the avoidance of doubt, it is therefore denied that there were any breaches of the E&S Agreements. In fact, the Alagoas plant started ethanol production starting from September 2014, i.e., only a few weeks after the plant's mechanical completion (a few weeks being typically required for the commissioning of a plant). The novelty of the PROESA technology and the risks associated therewith should not be confused with alleged flaws. Until particularised, BioChemtex cannot comment further on the allegation that the technology was not mature, effective, or ready for commercial-scale operations apart from denying that the allegation is true. Pending the necessary further particularisation, it is denied the design plans for the Alagoas

facility were in any way deficient. For the avoidance of doubt, if (which is presently denied) they were deficient, this did not amount to a gross deficiency and/or gross negligence.

50. In any event, even if there were breaches of the E&S Agreements or any non-contractual wrongdoing, which is denied, any such breaches fall within the liability exclusions or limitations in the E&S Agreements set out in Article 5 of the Equipment Agreement and Article 11 of the Engineering Agreement.

51. Further, and for the avoidance of doubt, even if (which is denied) there were breaches (contractual or non-contractual) of any duties on the part of BioChemtex, any characterisation of said breaches as “gross” is misconceived and false. The characterisation of such as “gross” is nothing more than an attempt to circumvent the liability exclusions and limitation provisions in the E&S Agreements. The Tribunal should be alive to this attempted (but futile) linguistic manoeuvre when considering the Claimant’s submissions.

A. Alleged Gross Negligence in Connection with the Design and Engineering of the Plant

52. BioChemtex did provide BioFlex with the Basic Engineering Design (**BEP**) and Critical Equipment as required under the E&S Agreements. It is denied that the BEP or Critical Equipment provided was inadequate, unsuitable or flawed.

53. Further, it is denied that the Plant was not completed until November 2014. The Plant had already begun producing ethanol product in September 2014. It is also denied that BioChemtex did anything in a grossly incompetent manner and any suggestion of the same is denied. In fact, the Claimant’s own performance of the plant construction was deficient in various respects, as will be elaborated on below.

B. Alleged Repeated Misrepresentations after Execution of Agreements

54. Pending further particularisation, it is denied that BioChemtex made any assurances with regard to problems with the PROESA technology or the Crescentino plant.

55. In the Request and in its open correspondence predating these proceedings, the Claimant has continually and, it must be said, conveniently alluded to alleged representations or “admissions” made by Beta and BioChemtex’s former Chief Executive Officer, Guido Ghisolofi, who passed away in March 2015. This is unfortunate as Mr Guido Ghisolofi is regrettably no longer able to speak to these alleged representations or otherwise challenge them. In any event, these so-called

“admissions” are denied. Alternatively, even if they were representations (which is denied), BioFlex did not rely on them for the reasons provided above and they did not cause BioFlex any loss.

C. The Plant Allegedly Fails to Achieve Stable Operations

56. The Performance Test issue is irrelevant to BioChemtex because it was a contractual concept specific to the License. Without prejudice to that point, insofar as a Performance Test has not taken place, this failure is attributable to the Claimant. Even if that were not the case, which is denied, BioFlex’s claim is, at best, severely limited under the terms of the E&S Agreements in any event. Pending further particularisation, the Claimant’s allegations in respect of this issue are denied.

57. The Claimant was responsible for the construction of the Plant and the purchase of most of the materials and equipment necessary for that purpose, which it failed to carry out competently or in accord with the designs provided. As such, the problems encountered by the Plant amount to contributory negligence on the Claimant’s part, including (without limitation) the utilities problems encountered with maintaining uninterrupted power supply to the Plant and the regular steam supply necessary for PROESA to work properly. For the avoidance of doubt, BioChemtex is not responsible for the Plant’s failures, if any, to meet any performance requirements.

58. It is emphasised again that the Performance Test issue is irrelevant to BioChemtex because that was a concept specific to the License. Without prejudice to that point, a Performance Test could not take place at any time after 26 November 2014 when the Claimant declared that it would be ready to conduct one, because the Plant was not in a state of stable operation that would allow such a test to be conducted. Thereafter, the Claimant did not request a Performance Test. The instability of operation at the Plant was attributable to the Claimant as indicated above. In any event, the Claimant deliberately chose not to pursue a Performance Test.

D. BioFlex’s Alleged Losses Suffered

59. It is denied that BioChemtex has exhibited wrongful conduct, whether under the E&S Agreements or otherwise.

60. Pending proper particularisation of the alleged representations, it is denied that BioChemtex made knowingly any false representations to BioFlex. If, which is denied, there were any misrepresentations, they did not induce BioFlex to enter into the E&S Agreements and/or did not cause BioFlex any loss.

61. There were no breaches of the E&S Agreements. Reference to ‘hundreds’ of revisions to the BEP is misleading and wrong. There were a limited number of revised versions of the

BEP as a whole, and the amendments were not outside the usual and reasonable level of refinement that would be expected as a matter of standard industry practice. The revisions were a product of the developing nature of the technology, of which BioFlex was aware. As such, there were no breaches of the Engineering Agreement. Furthermore, the Critical Equipment supplied was not defective. Biochemtex will address this allegation if and when fully particularised.

62. Further, the fact that equipment may have been replaced at Crescentino is irrelevant, as Alogoas and Crescentino are not carbon-copy plants; the latter is a development plant owned by BioChemtex and undergoing frequent changes. In any event, to the extent that equipment has been replaced, this has been because of design alterations, not defects. Moreover, Article 5 of the Equipment Agreement expressly states that fitness for purpose is not warranted by BioChemtex. As such, there were no breaches of the Equipment Agreement.

63. Further, even if there were breaches of the E&S Agreements, which is denied, then BioFlex's losses are excluded in accordance with the provisions contained at Article 5 of the Equipment Agreement and Article 11 of the Engineering Agreement. For the avoidance of doubt, if there were any breaches (which is denied), then they did not amount to "gross deficiencies" or any other characterisation as "gross". Moreover, and in any event, even if there were any breaches (which is denied), BioFlex would be required to show that such breaches caused recoverable losses, something that BioFlex has not even attempted to do.

64. BioChemtex is not responsible for any alleged breaches of the License because it was not a party to that agreement.

65. It is denied that BioChemtex has been negligent, let alone grossly negligent. BioFlex has not explained why a separate duty of care exists (the existence of which is denied) outside of the parties' contractual arrangement. Even if, which is denied, BioChemtex was negligent in its representations concerning, or performance of the E&S Agreements, such negligence was not gross, and BioFlex has not even attempted to explain why any such negligence was so egregious as to be "gross" within the meaning of the E&S Agreements.

E. Friendly Consultations between the Parties

66. The parties have engaged in friendly consultations pursuant to Article 15.1 of the Engineering Agreement and Article 12.1 of the Equipment Agreement. As the parties disagree fundamentally as to the nature of BioFlex's complaint, the consultations were unsuccessful.

VII. COUNTERCLAIM

67. In accordance with Article 5(5) of the ICC Rules, BioChemtex submits a counterclaim against BioFlex.

68. Under the terms of Article 4 of the Equipment Agreement and the Engineering Agreement, several outstanding invoices issued by BioChemtex to BioFlex remain due and owing **(the Invoices)**²¹ in the sum of €3,588,213.11 . As explained below, the Claimant denies that these amounts are owing. Therefore, BioChemtex hereby claims the sums due under the Invoices.

69. In a letter dated 17 May 2016, counsel for the Claimant denied that any amount was owing as claimed under the Invoices.²² Specifically, counsel for the Claimant argued that the Invoices relating to sums due pursuant to Article 4.2(a) of the Engineering Agreement were invalid because such invoices could only be issued upon “acceptance of the Plant” and that the criteria necessary for such acceptance, which the Claimant alleges is set out in Article 10 of the License, had not yet been satisfied.²³ The Claimant further contends that an invoice issued pursuant to Article 4.3 of the Engineering Agreement was invalid because any “excess services” invoiced by BioChemtex under Article 4.3 of the Engineering Agreement were not attributable to the Claimant.²⁴ These arguments are groundless and the amounts due under the Invoices are outstanding and any tribunal eventually constituted to hear this matter should order the Claimant to pay the outstanding sums.

70. With respect to the Invoices issued pursuant to Article 4.2(a) of the Engineering Agreement, BioChemtex disputes the Claimant’s interpretation of the provision in Article 4.2(a) stating that the final sum due under the Engineering Agreement would become owing “upon acceptance of the Plant”, and specifically its attempt to incorporate references to the License. Even if the Claimant’s interpretation were correct, which it is not, the Claimant’s allegation that the Respondents have “consistently refused to conduct the Performance Test” is denied. As noted above, the Claimant has never requested that a Performance Test be conducted. In any event, the amounts owing under the Invoices remain unpaid, despite the necessary contractual preconditions having been met.

²¹ Invoices from BioChemtex to BioFlex Agroindustrial S.A., dated 27 April 2016, **R2-5**.

²² Letter from WilmerHale to Quinn Emanuel dated 17 May 2016, **R2-6**, para 2.

²³ Letter from WilmerHale to Quinn Emanuel dated 17 May 2016, **R2-6**, para 2.

²⁴ Letter from WilmerHale to Quinn Emanuel dated 17 May 2016, **R2-6**, para 2.

71. With respect to the Invoice issued pursuant to Article 4.3 of the Engineering Agreement, BioChemtex contends that the excess services incurred in relation to that invoice *are* attributable to the Claimant and therefore are proper and owing.

VIII. RELIEF SOUGHT

72. The relief requested by the Claimant is accordingly rejected in its entirety as against BioFlex for the reasons set out above.

73. The Claimant has not even attempted to explain why any alleged losses of should be borne “jointly and severally” by BioChemtex and Beta, the latter of whom, as noted above, is not a party to the E&S Agreements.

74. Further, the Claimant’s request for relief is speculative and baseless as a matter of law. As a matter of any losses said to flow from breach of contract in particular, the Claimant ignores the fact that Beta and BioChemtex are separate legal entities. This is problematic for the Claimant’s case because it has not sought to identify which party has suffered loss in what amount, or set out even a basic case on causation.

75. Accordingly, BioChemtex seeks the following relief:

- (a) A declaration that BioChemtex has complied with its contractual obligations under the E&S Agreements;
- (b) A declaration that BioChemtex owes no liability in any amount to BioFlex, whether contractual or non-contractual;
- (c) An award requiring BioFlex to pay all costs and expenses of the present arbitration and to reimburse all of BioChemtex’s reasonable legal fees, arbitration costs, expenses and other costs incurred in connection with the arbitration, including all internal costs, on a full indemnity basis;²⁵
- (d) Alternatively, if BioChemtex is liable to GranBio, a declaration that such liability is limited in accordance with the provisions set out in the Article 5 of

²⁵ It is noted with some irony that the Claimant has reserved the right to claim all its costs in respect of Biochemtex’s jurisdictional application (see paragraph 7 of the 12 May 2016 Letter) when it was the Claimant itself who presumed to start a single arbitration in respect of three separate agreements containing no common arbitration agreement between the parties. Needless to say, BioChemtex’s rights are similarly reserved on costs pertaining to the jurisdictional application.

the Equipment Agreement and Article 11 of the Engineering Agreement and an award reflecting that limitation.

76. Accordingly, BioChemtex further seeks by way of counterclaim the following relief:

- (a) A declaration that BioFlex is obliged to pay the outstanding amounts under the Invoices to BioChemtex;
- (b) An award requiring BioFlex to pay the outstanding sums under the Invoices to BioChemtex, net of all banking charges and fees;
- (c) Interest on those sums at a rate of 1.2% per month calculated from the date the relevant sum became due for payment, in accordance with Article 4.5 of the Engineering Agreement and the Equipment Agreement.

77. Insofar as any monetary award is made against BioChemtex in respect of liability to BioFlex, BioChemtex requests the sums awarded under the Counterclaim be set off against that primary liability.

IX. CONCLUSION

78. BioChemtex reserves the right to amend or supplement this Answer or to supplement the relief requested under the primary claim or the counterclaim.

Respectfully submitted,

19 May 2016



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QUINN EMANUEL URQUHART & SULLIVAN, LLP

Counsel to the Second Respondent