

## **Spain defaults on State Bonds -**

### **How the Fugger fared in the Financial Crisis of 1557**

The case-study focuses on Spain's state bankruptcy in 1557. It was the first of a series of state defaults and compulsory consolidations under the reign of Philippe the Prudent of Spain and his successors. The Fugger loans and the measures of the Spanish crown are historical facts. So are the direct quotations from the Fugger's correspondence, which we render as translated by H. M. Lucas.<sup>1</sup>

However, the *Constitutio Commercialis Carolina* – an early version of Energy Charter Treaty - and the dispute are our invention. In real life, the Fugger bank had to accept the haircut and – in order not to lose its capital – to go on lending to the Spanish Crown. The independence of the Netherlands cost the Fugger at least 1.5 million ducats (arrears including interest in 1673).

Ehrenberg calculated that, all in all, the Fugger probably lost the greater part of their earnings in the course of a hundred years.<sup>2</sup> – In our case-study, they embark on the quest to reclaim it in arbitration.

Although the facts of the case and the proceedings take place in the 16th century, treaties, customary public international law and case law are those of the 21st century.<sup>3</sup>

### **The Free City of Augsburg and the Age of the Fugger**

The Holy Roman Empire consisted of a multitude of territories ruled by secular or clerical princes. It happened that the princes waged war against each other and even against the Emperor. The Holy Roman Empire cannot be equated to a modern day federal state.

Some territories of the Empire were not under the authority of any prince but only subject to the authority of the Emperor himself and of the Imperial Diet. These Free and Imperial Cities were also represented at the Imperial Diet. They controlled their own trade and permitted little interference from the outside. As Free Cities they were not subject to certain imperial taxes.

The Fugger business started off in weaving and trade. A Hans Fugger is mentioned for the first time in the tax register of the Free City of Augsburg in 1367. Jakob Fugger (1495 – 1525) expanded the business into silver mining and trade with Venice, earning himself the epithet "The Rich". He also started the banking business, which included notable clients such as the Pope and members of the Habsburg family. He also engaged considerably in charitable work and founded the Fuggerey almshouses in Augsburg.

The way the Fugger banking worked was that the Fugger lent to the Emperor (or another customer) and re-financed the loan on the market (at lower interest rates) by selling so-called "Fugger bonds" to other investors. The Fugger bonds were much sought after investments as the Fugger were regarded as "safe debtors". Thus, the Fugger used their own superior credit standing in the market to secure financing for their customers whose credit was not as well regarded. The idea was – provided the Emperor and the other customers honored their commitments - they would make a profit from the difference in interest between the loans the Fugger extended and the interest payable on the Fugger bonds.

### **When the Fugger made an Emperor**

The preeminent role of the Fugger banking business, also described as the 'Age of the Fugger' started with their support for Charles V of Spain's campaign to become Holy Roman Emperor.

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<sup>1</sup> Cf. Ehrenberg, *Capital and Finance in the Age of the Renaissance – A Study of the Fuggers and their Connections*, New York, 1928.

<sup>2</sup> *Ibid*, p. 131.

<sup>3</sup> For avoidance of doubt, for the purposes of this case-study, the Treaty of Lisbon has not yet entered into force.

Even before that, the Fugger had lent to Emperor Maximilian and had financed Charles, when he was Duke of Burgundy (today the Netherlands, Belgium and Luxembourg) and King of Spain. The rise of the Fugger to financial and political power is intertwined with Charles's quest for the crown of the Empire and marked by his rivalry with François I of France. Both expended lavishly to bribe the electors.

With the help of a consortium of lenders the Fugger had arranged, Charles was elected in 1519. The Fugger's own tally stood at 543,000 florins, the equivalent of 407,250 ducats (about 1,425 kg of Gold).

### **It all started with a Diet of Worms**

The Holy Roman Empire had quite an unholy problem – some of which was linked to the writing of a certain German monk – who had been interrogated by the Papal legate in the house of the Fugger in 1518. Said monk occupied a lot of time at the 1521 Diet of Worms – which caused other important events at the Diet to be forgotten.

As part of his *capitulatio caesarea*, Charles had agreed with the electors on certain conditions for his reign in the event of his subsequent election.<sup>4</sup> It provided, *inter alia* for the so-called *Reichsregiment* – an advisory counsel with Emperor's brother as chairman which would govern the Empire in the Emperor's absence. This *Reichsregiment* was adopted at the Diet of Worms in 1521. It was abolished in 1531 after Ferdinand's election as King of the Romans (see below).

Charles was King of Spain and Portugal as well as Emperor of the Holy Roman Empire, but neither Spain nor Portugal was part of the Empire - nor other territories under Charles' reign, which spanned nearly four million square kilometers across Europe, the Far East, and the Americas. To further commerce and economic exchange in all these territories, the electors therefore also insisted as part of the *capitulatio caesarea* on a Constitution of Commerce (*Constitutio Commercialis Carolina*, CCC). The deliberations on the Carolina took several years. It is rumored that the Fugger and other great trading houses, such as the Höchstetter and Welser, were strong supporters of the Carolina.

The treaty was finally ratified as a mixed agreement by the Holy Roman Empire and its territories as well as Charles V on behalf of his territories outside the Empire. The instrument of ratification was deposited with the Imperial Diet at the 1532 Diet of Regensburg. It entered into force on 27 July 1532.

### **The Rise of the Fugger Bank**

Also at the 1521 Diet of Worms, the Emperor and the Fugger reached an agreement on the repayment of debt under which part of the loan was transferred to Tyrol, which belonged to Charles as King of the Romans and Count of Tyrol and part to Spain. However, repayment was slow. In 1523, Jakob Fugger wrote a stern letter to the Emperor:

*"It is well known that Your Imperial Majesty could not have gained the Roman Crown save with mine aid, and I can prove the same by the writings of Your Majesty's Agents given by their own hands. In this matter I have not studied mine own Profit. For had I left the House of Austria and had been minded to further France, I had obtained much money and property, such as was then offered to me. How grave a Disadvantage had in this case accrued to Your Majesty and the House of Austria, Your Majesty's Royal Mind well knoweth."<sup>5</sup>*

The letter was delivered to the Emperor on 24 April 1523. We do not know how he reacted. However, we do know that in 1524, the Fugger signed a lease of the revenues of the Spanish Crown from the three ecclesiastical Orders of Knights (the so-called Maestrazgos). The initial

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<sup>4</sup> The capitulation was an agreement signed before the election by the candidate (Charles) and the electors. The electors sought to limit the power of the emperor. Charles V was the first candidate to sign such a document. It later became customary.

<sup>5</sup> The letter is reproduced in Ehrenberg, p. 80.

contract was for three years. Later the quicksilver mines of Almaden and the silver mines of Guadalcanal were added. The Fugger paid 135,000 ducats in rent. After five years during which the Genovese rented the income, the Fugger again leased the Maestrazgos in 1533. They continued to hold leases (each between 3 and 6 years) until the events of 1557.

Jakob Fugger was succeeded by Anton Fugger in 1525. Anton wanted to close the Imperial lending business, but could not because Charles demanded more money and they would have lost the invested capital. In the following years, the Fugger continued to make loans to the Emperor. In the balance sheet of 1546 more than half of the outstanding claims were in Spain; in total, more than 1,5 million ducats (even excluding claims relating to the Maestrazgos).

The Emperor continued to need money – and the Fugger obliged.

The Emperor and his son Philippe had moved to Brussels in the Netherlands in 1553, which meant that the center of operations of the Fugger's lending business also moved to Antwerp, where Matthias Oertel directed the Fugger's business as their agent.

### Imperial Debt

Before his death, Charles had borrowed extensive amounts of money from the Fugger. The Fugger had committed so much of their capital to loans to the Emperor that, when asked for a loan by the English Crown, they had to refuse for they had already lent all they could to the Emperor.

On 1<sup>st</sup> August 1548 the Fugger lent the Emperor 150,000 ducats in return for a charge on the Neapolitan revenues at 12 per cent interest. At this point in time, loans granted during the War against the League of Schmalkalden between 1546 and 1547 were still in arrears. The new loan and the Schmalkalden debt were consolidated into one debt, which, inclusive of interest at 12 per cent as of February 1552 amounted to 273,161 ducats ("**1552 Consolidated Loan**").

Another crisis occurred in 1552: the Elector Maurice of Saxony openly turned against the Emperor. Again, the Fugger had the Emperor's fate in their hands. Charles was at Innsbruck without money and troops. Any attempts to raise money were fruitless. Charles wrote:

*"It seems, as if the merchants were agreed together to serve me no longer. I find neither in Augsburg nor elsewhere any man who will lend to me, howsoever large a profit be offered to him."*<sup>6</sup>

Unable to pay for soldiers, the Emperor could not march against Maurice. At the end of March, the Emperor sent a handwritten letter to Anton Fugger and asked him to come to Innsbruck in all haste:

*"This is what I now most greatly desire."*<sup>7</sup>

Anton Fugger set out without delay. Upon his arrival in Innsbruck, feverish negotiations with Eraso, the Emperor's secretary, were held. Only a small garrison protected the fortress. Maurice was about to destroy the Emperor. The imperial troops, insufficient in numbers and badly provisioned, were unable to hold Innsbruck against Maurice. The Emperor and his Court, including Anton Fugger, had to flee to Villach, as the Elector invested and then took Innsbruck.

Anton Fugger entered into a loan agreement with the Emperor for the enormous sum of 400,000 ducats ("**Villach Loan**"). The Villach Loan greatly increased the Fugger's exposure, especially in Spain. The loan was secured in Spain and all Spanish revenues were mortgaged up to 1557. In order to finance this loan, Anton Fugger himself had to borrow heavily in Augsburg and Nürnberg.

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<sup>6</sup> Ehrenberg, p. 107.

<sup>7</sup> Ibid.

Anton Fugger was getting increasingly nervous:

*“no Resolution as to our debts will come from the Court. Verily in these heavy times they have much else to do, but it is yet hazardous and these affairs are tedious.”*<sup>8</sup>

When one of the re-financing loans fell due in 1554, the Fugger had trouble raising money in the market for its repayment. Anton Fugger repeatedly ordered Oertel to raise the money at any price *“for my credit stands thereon,”* and, again, *“I think as much on men’s mockery as on the money itself.”*<sup>9</sup>

In order to pay off their own loans, the Fugger had to transfer funds from Spain to Augsburg, but – as we will see – this was not an easy task.

### **Philippe and Ferdinand succeed Charles**

Over the course of 1555 and 1556, Charles V gradually withdrew from power. In October 1555, he handed the Netherlands and Burgundy to his son Philippe, Castile, Aragon and the two Sicilies followed on 16 January 1556. Philippe also inherited Spain’s possessions in the Americas.

However, Philippe did not become emperor when Charles abdicated in summer 1556. Charles had made provisions for his succession early on. His brother Ferdinand, who had in his possession the Austrian lands, had been elected “King of the Romans” on 5 January 1531. The title “King of the Romans” by that time had already become to signify the equivalent of a crown prince of the Empire. However, Ferdinand was not formally recognized as Emperor by the electors until February 1558. Until that date, Charles continued to be the Emperor, if only in name, as he had retired to a Spanish monastery. Charles died on 21 September 1558.<sup>10</sup>

### **Royal Debt**

Charles left his son, the newly crowned Spanish King Philippe II, in severe financial difficulties. As Philippe put it later, it was impossible to fulfill his engagements, which he would have wanted, *“even with my own blood”*<sup>11</sup>. However, the war with France required an ever increasing amount of money.

As Charles V before him, Philippe employed the services of Eraso<sup>12</sup> to extricate loans from the Fugger. Anton Fugger’s aim to withdraw from the lending business remained an idle wish when Matthew Oertel his agent undertook to pay King Philippe a sum of 400,000 ducats in February 1556. Again the loan was to be repaid in Spain. The King needed money to pay his troops, which threatened to molest and ravish the population.

As a condition for the loan, the parties agreed that the King would issue a bond on secure revenues for everything he owed the Fugger, plus of interest at 12 %. There was also a personal undertaking by the highest officials of the Netherlands to guarantee repayment in their own person. Thus, in April 1556 the Fugger took over more than 656,250 ducats in Dutch bonds.

So instead of being repaid in cash, the Fugger had to accept a conversion of the debt and to continue lending to the Habsburgs. As Ehrenberg put it: *“Erasso fairly pumped them dry; and they got no thanks for this either from him or his master.”*<sup>13</sup> In fact, Eraso was openly hostile to the Fugger.

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<sup>8</sup> Ibid., p. 109.

<sup>9</sup> Ibid., p. 110.

<sup>10</sup> Whether it was his gout, the haemorrhoids, diabetes or, indeed, malaria which killed him is still open to discussion.

<sup>11</sup> Ehrenberg, p. 113.

<sup>12</sup> Francisco de Eraso was the Kings secretary. His name is sometimes also spelled Erasso.

<sup>13</sup> Ehrenberg, p. 114.

Oertel, the Fugger's agent in Antwerp, wrote to Anton Fugger in April 1557:

*"I wot not how to bring it about to make Erasso our friend, for I have never yet met his like, for he speaks a man fair to his face and behind his back saith ever the contrary. He agreeth with no one in Summa save with his own agents whom he hath created that they may do his pleasure in all things. Now that is not your Honour's way, and from us he hath had little in gifts and the like. This brings upon us more disfavour and weary running to and fro than ought else; for he and his men say to all men that from no one do they have so much trouble and so little profit as from us."<sup>14</sup>*

The Fugger tried to win Eraso's support by "small gifts". However, Eraso had extricated "gifts" from all major banks lending to the Emperor and the King over the course of 14 years. He had become a rich man, mostly by accepting gifts with thanks and doing exactly as he pleased.

### **The State Bankruptcy of 1557**

In spring 1557, the crisis reached its peak. King Philippe ordered a deferral of all quarterly payments to the creditors. In summer 1557, the King ordered that no further payments would be made to his creditors, both in the Netherlands and in Spain. He also ordered the confiscation of two cargoes of silver which were headed to Flanders for the Fugger. The silver had been mined in mines which were rented to the Fugger as part of the Maestrazgos. The value of the two cargoes was 570,000 ducats.

Anton Fugger grew very nervous. At his behest, Oertel pleaded with the King to abide by his contracts with the Fugger and promised that his masters would continue to make loans to the King when he needed money. Eraso's answer on behalf of King Philippe was scathing. He replied that Anton Fugger had already prayed the King to *"trouble him no further for loans because he would have peace"*<sup>15</sup>.

Oertel replied:

*"That the Fugger had never deserted His Majesty in his need, but in the space of 1 ½ years had served him with 1 ½ million of gold."<sup>16</sup>*

All efforts proved futile. Philippe made it clear to Oertel that, although with the greatest reluctance, he would not pay the Fugger citing great necessity. Otherwise his people, said the King, might take hurt from the armies.

Oertel, however, blamed Eraso. He alleged that Eraso was behind the scheme and simply did not want the Fugger to be repaid. He stated that *"the matter had gone too far"*<sup>17</sup> and that it was now too late to win Eraso with money. Anton Fugger made Oertel responsible for the losses incurred and reproached him. *"The devil thank you for this agency"*<sup>18</sup>, he wrote to him and withdrew power to lend money on the Fugger account.

Anton sent his son and the agent Sebastian Kurz to Antwerp with the task to recover what could be recovered in order to pay off the Fugger's debts.

Referring to the Fugger's own financial position, Anton Fugger wrote in 1558: *"The creditors are many. A man might shudder to think off them."*<sup>19</sup> Because of Spain's default, the Fugger themselves had to take out more loans. Since their credit standing was good they were able to borrow large sums at 8-10 per cent. Despite high mistrust in the market, the "Fugger bonds" were still much sought after – there were no other financial products of similar safety available.

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<sup>14</sup> Ibid., p. 114.

<sup>15</sup> Ibid., p. 115.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

The Fugger's balance sheet was in an extreme imbalance (for the standards of the 16<sup>th</sup> century)<sup>20</sup>: In the year 1560 the Fugger's Spanish claims (including interest at 12-14 %) were as high as 3 million ducats, whereas the Fugger's own capital only amounted to 1.5 million. When Philippe made a proposal for composition of the Spanish claims, the Fugger objected. According to the proposal the interest rate was to be reduced to 5 % and the Fugger would also have incurred great losses on the principal capital.

### The Spanish Haircut

Anton Fugger died on 14 September 1560 with the Spanish business still unsettled. Hans Jakob Fugger, Anton's eldest nephew, took over the administration. The name of the firm "Anton Fugger and Nephews" remained unaltered. The credit of the firm, however, fell rapidly and the "Fugger bond" was by no means considered a safe investment any longer.

In 1561, the Spanish financial crisis hit the South German merchants, who had lent the bankrupt Spanish King, with such force that some of them themselves went bankrupt – which had repercussions on the economy as a whole. The market feared that the same could happen to the Fugger. The Fugger had to borrow extensive amounts of money in order to fulfill their obligations – but they survived.

In 1562 the Fugger were forced to agree to a settlement with Spain which had been negotiated against the following background: In 1556, Philippe had his agents initiate negotiations with his creditors to obtain, if possible, their voluntary acceptance to a composition of debt. In this composition, Spain wanted to repay all claims of their creditors but not in repayment of money (which at the time was in the form of minted gold or silver) as stipulated in the contracts. Instead, the Crown wanted to issue government bonds called "**Juros**". Although the Juros were to be given out as a form of repayment, their bearer would have had no right whatsoever to claim their stated value from Spain. In fact, the money would be bound in Spain in perpetuity. The Juros only obliged Spain to pay interest at 5 %. In theory, it was envisaged that the bearer of the Juros could sell the Juros to a third party, if he wanted to recover the stated value. But since there was no right to convert Juros to money (i.e., gold or silver), it was foreseeable that it would not be possible to sell them for their stated value. It is thus understandable that this idea was not warmly welcomed by the creditors.

However, Philippe was in no mood for discussion and bargaining. In the same year, he passed the above mentioned decree by virtue of which all debt was cancelled and everything that once formed part of Spain's revenues was re-transferred to the Crown. He also directed that only creditors who would accept his offer of repayment in Juros would not entirely lose their capital but would receive interest according to their contracts until the year 1556 in money and from 1 January 1557 in Juros. Creditors who would not accept the offer would lose all claims. It is not surprising that the Juros have been characterized later "*as a kind of compulsory payment*"<sup>21</sup>. The Fugger neither accepted the decree nor the offer. In the following years the relationship between them and Spain was at freezing point. It remained that way even in 1560, when Philippe and most of his other creditors came to a settlement about the debt.

The Fugger waited and hoped for the best. However, when negotiations started again in 1562, the Fugger had to agree to an arrangement which some authors describe as considerably less favourable than those of creditors received who had settled earlier.

The settlement provided for the following terms:

1. The Fugger were forced to take over the lease of the Maestrazgos at an extremely high price from 1562 for a period of 10 years.
2. The interest rate of all loans of 14 % was reduced to 13 %.

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<sup>20</sup> Cf. Ehrenberg, p. 116.

<sup>21</sup> Ehrenberg, p. 336.

3. It was agreed that one third of the repayment should be made in promissory notes on gold from India, another third in real estate, and the last third in Juros.

However, the landed estates were worth only 75 per cent of their face value and the Juros were worth less than 50 per cent. Thus, it is safe to say that the Juros constituted a conversion of the Spanish debt into a fairly worthless bond. For the Fugger, this conversion meant that they had to write off significant amounts of their repayment claims.

According to a 1563 balance sheet, the Fugger incurred losses with respect to the Spanish claims against the King of 984,361 ducats in total. Of this amount 370,000 ducats had to be written off following the 1562 settlement – the other part had already been written off by the Fugger. Surprisingly however in this settlement, the Spanish Court recognized the Villach Loan, although it had been granted to the Emperor.

### **Hans Jakob's Last Service**

It has been said that Hans Jakob Fugger was a great patron of the arts, but by no means equal to the task of bringing the Fugger business through the crisis of 1557. Indeed, he left the firm after a scandal in 1563 and later entered the service of Duke Albrecht V of Bavaria.

When his brothers, Georg, Raymund and Christopher met him in Munich, they were introduced to the headmaster of the newly founded Paedagogium, a Jesuit, who reminded them of the CCC and recommended a lawyer.

### **The Dispute**

On Thursday, 1 July 1563, the remaining Fugger shareholders, Georg, Raymund and Christopher, write to King Philippe:

*"Your Royal Majesty,*

*We and our family have loyally served Your Royal Majesty and Your Imperial Father in the hours of need for nearly fifty years. Indeed, we worked patiently and diligently and at great risk for ourselves to gain the Roman Crown for Your Imperial Father.*

*For nearly fifty years we have used our own credit and reputation to further the cause of Habsburg and to secure financing for Your and Your Imperial Father's endeavors – unlike other firms which have supported Your and Your Imperial Father's enemies.*

*Now we find ourselves in great Disadvantage. Pledges and promises to us have been breached and we have been treated unfairly. We also see other firms preferred. Our services have been ill-rewarded. Undeservedly, we have incurred the wrath of Eraso, who rather than look out for what is for the benefit of Habsburg has sought to line his own pockets.<sup>22</sup>*

*We sincerely pray Your Royal Majesty to honor the commitments which You and Your Imperial Father made. Otherwise, we would be forced to submit this dispute to the arbiters in accordance with the Constitutio Commercialis Carolina.*

*We remain etc.*

*Georg, Raymund and Christopher Fugger"*

On Monday, 4 October 1563, Georg, Raymund and Christopher Fugger send a memorial to ICSID labeled: "Request to Approve and to Institute Arbitration Proceedings under the Additional

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<sup>22</sup> 1563/1564, Francisco de Eraso faced charges of peculation and misuse of his official authority. He was found guilty in 1566. The verdict condemned him to a fine of 12,600 ducats and stripped him of some, but not all of his offices. Philippe II approved of the verdict.

Facility". The memorial states that it is intended to serve also as statement of claim. (As advised by their lawyers, they submit this document in English.)

It complains about violations of Articles 10, 13 and 14 of the CCC with regard to the following investments:

- **Revenues from the Maestrazgos:** Two silver cargos worth 570,000 ducats
- **Loans to Emperor:**
  - I. 273,161 ducats for the 1552 Consolidated Debt
  - II. 400,000 ducats for the Villach Loan
- **Loans to Philippe:** 370,000 ducats of losses on former loans incurred by the 1562 "agreement" and the remaining 614,361 ducats the Fugger had to write off earlier

The ICSID Secretariat communicates the Request to HE Fernando Álvarez de Toledo, the Duke of Alba, Ambassador of the Kingdom of Spain for comments. Since, Philippe liked to do things himself, Alba sends the Request home to Spain instead of replying in substance and only sends a holding letter to ICSID.

After twelve weeks and after having received numbers of appeals by the Claimants but nothing from the Respondent, the Secretary General decides to approve, registers the case under the Additional Facility and communicates the Notice of Registration to the Parties on Monday, 27 December 1563. Again, nothing is heard from Spain. 61 days after the registration of the Request, the Claimants elect that the tribunal be constituted under Article 9 of the Arbitration (Additional Facility) Rules and appoint Jacques Cujas as their co-arbitrator.

More than 90 days after registration, still no news from Spain is received. Following the Claimants' request, ICSID makes the required appointments on Monday, 16 May 1564. The Secretary-General appoints Mehmet Ebussuud el-Imadi as arbitrator for Spain and Sir Nicholas Bacon as President of the Tribunal.

The Tribunal decides to hold its first session on Monday, 11 July 1564 and invites the Parties to be present. Since only the Claimants indicate their availability, the Tribunal – advised by the Secretariat – decides to hold the session in the absence of both Parties.

On Tuesday, 15 August 1564, ICSID then receives the following letter:

*"We, Felipe, Rey de Castilla y de León (como Felipe II), de Aragón, de Portugal, de las dos Sicilias (Nápoles y Sicilia) (como Felipe I), de Navarra (como Felipe IV), de Jerusalén, de Hungría, de Dalmacia, de Croacia, de Granada, de Valencia, de Toledo, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Córdoba, de Córcega, de Murcia, de Jaén, de los Algarves, de Algeciras, de Gibraltar, de las islas Canarias, de las Indias orientales y occidentales, de las Islas y Tierra Firme del Mar Océano, Archiduque de Austria, Duque de Borgoña (como Felipe V), de Brabante y Lotaringia, Limburgo, Luxemburgo, Güeldres, Milán, Atenas y Neopatria, Conde de Habsburgo, de Flandes, de Artois, Palatino de Borgoña, de Tirol, de Henao, de Holanda, de Zelanda, de Namur, de Zutphen, de Barcelona, de Rosellón y de Cerdaña, Príncipe de Suabia, Margrave del Sacro Imperio Romano, Marqués de Oristán y Conde de Gociano, Señor de Vizcaya y de Molina, de Frisia, Salins, Malinas, y de las ciudades, pueblos y tierras de Utrech, Overijssel y Groninga, Dominador en Asia y África, have been informed by our Ambassador Alba that the partners of the Fugger bank have introduced a claim against our realm which also touches upon the interests of Our Imperial Father and the Holy Roman Empire. We have consulted with Our Brother, the King of the Romans.*

*The claims are manifestly without legal merit. Also, there is no jurisdiction for these three individuals to rule on claims concerning Our Person or Our Realm.*



*In the name of the Holy Roman Empire we object to any claims raised by citizens of the Free City of Augsburg pertaining to alleged contracts with the Emperor, Our father.*

*The three individuals must reject the claims summarily. Too much time and expense has already been spent by Us on this matter.*

*I have done my duty. – The rest is yours.*

*Felipe"*

In his cover letter, the Duke of Alba explains the delay that the first ship transporting the King's letter had been lost at sea and a second ship brought a new copy of the letter. Alba asks the Tribunal to accept Spain's application under Article 45 (6) of the Arbitration (Additional Facility) Rules as having been filed within the 30-day-time-limit.

The Claimants object to Spain's request: *"30 days are 30 days, and 30 ducats are 30 ducats."*

Before the Tribunal has a chance to decide on the admissibility of Spain's request, it receives a more fully argued memorial labeled "Counter-memorial" from Spain – Spain having in the meantime retained lawyers. This Counter-memorial includes a detailed statement of the Respondent's "objections to jurisdiction and admissibility".

In the light of this, the Tribunal decides to give the Claimants the opportunity to respond to Spain's objections in full and call an oral hearing on jurisdiction and admissibility. Noting the unusual circumstances and that this is an exceptional case, it also decides to hear arguments on the admissibility of Spain's application under Article 45 (6) of the Arbitration (Additional Facility) Rules.

In their reply to the Claimant's Statement of Claim, Spain makes the following requests:

A. That the Tribunal decide on the substance of its application under Article 45 (6) of the Arbitration (Additional Facility) Rules and dismiss the claims with prejudice. The fact that the ship was lost at sea and the first letter was lost cannot be held against Spain.

B. In the alternative, that the Tribunal reject all claims on the basis that it lacks jurisdiction and the claims are inadmissible for the following reasons:

1. Objections against all Claims:

1.1 There is no investment within the meaning of the CCC or ICSID's Additional Facility. Loans to a State and state bonds are not investments. Loans to a king or an emperor are the same as loans to the State.

1.2 Negotiations concerning the loans have involved bribery of Francisco de Eraso by an agent of the Fugger. Francisco de Eraso already faces charges of peculation and misuse of his official authority.<sup>23</sup> Even if there was an investment, it would have been obtained by corruption and would therefore not be protected by the CCC.

2. Objections against Imperial Claims

2.1 The Tribunal does not have jurisdiction concerning claims against the Emperor, since the CCC does not apply between territories of the Empire, or between the Empire and a territory.

2.2 In addition, the Fugger as citizens of the Free City of Augsburg are not Investors of a different State with respect to the Empire. The Free Cities are still Imperial Cities and therefore not States within the meaning of Article 2 of the Additional Facility Rules.

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<sup>23</sup> See footnote 22 above.

2.3 Even if the substantive provisions of the CCC were applicable, any disputes between the Reich and citizens of the Free Cities fall into the exclusive jurisdiction of the Aulic Council or the Imperial Chamber of Justice. Arbitration proceedings would violate the exclusive competence of the Aulic Council in accordance with Article 292 of the *Conventio de Divisione Potestatum Imperii ac Principum Urbiumque* ("Convention on Division of Powers between the Empire and the Princes and Cities", CDP).

2.4 In any event, Spain is the wrong Respondent for the Imperial Claims. The Spanish King, Philippe, did not succeed his father as Emperor. All claims should be directed against His Imperial Majesty Ferdinand.

### 3. Objections against the Spanish Claims

3.1 The Fugger cannot rely on the transfer protection of the CCC. As the Aulic Council held such provisions violated the CDP, the judgment of the Aulic Council is binding on Augsburg. Therefore, Augsburg citizens cannot rely on Article 14 of the CCC.

3.2 All measures taken by the Spanish king are justified by necessity.

3.3 The Fugger have not been discriminated against: First, the Fugger agreed to consolidate the debt much later than other bankers, when the state of necessity was even more severe. Second, the Spanish Court expected further loans from Italian bankers but not from the Fugger.

3.4 The Fugger agreed to the settlement thereby implicitly waiving claims under the CCC.

Upon request of the Tribunal, Spain has provided clarification that the grounds relied on in connection with its objections to jurisdiction and admissibility are also the reasons why the claims are manifestly without legal merit.

The Claimants reply is as follows:

A. Spain's application under Article 45 (6) of the Arbitration (Additional Facility) Rules was lodged out of time. Article 45 (6) sets a strict deadline. There is no power for ICSID or the Tribunal to extend such a deadline. It does not matter whether a party misses a deadline by its own fault or otherwise. Moreover, Spain was constantly represented by Ambassador Alba. If King Philippe wanted to decide everything by himself that is Spain's problem.

B. The Tribunal has jurisdiction and the Claims are admissible:

#### 1. As regards the Objections raised against All Claims:

1.1 Loans to States, the Emperor and the King qualify as investments under the CCC and are therefore protected. There is no legal basis for Spain's claim that such investments are excluded.

1.2 Any bribery cannot be held against the Claimants. The Fugger are not responsible for the actions of Eraso, who managed the financing on behalf of the Emperor and later the King. They suffered because Eraso was extorting money from them. To punish the Fugger now for Eraso's crime would be double jeopardy. Moreover, again, there is no basis in the CCC for excluding claims on grounds of illegality.

#### 2. As regards the Objections raised against the Imperial Claims

2.1 The Tribunal has jurisdiction concerning claims originating from dealings with the Emperor. The CCC is a mixed agreement. It applies between all of its signatories. The Empire, Spain and the Free City of Augsburg are all signatories of the CCC. Thus, the

CCC applies between the Empire and its territories, as well as between the territories themselves and between the Empire and/or its territories and a third state.

2.2 The Fugger as citizens of the Free City of Augsburg are Investors of a different State with respect to the Empire. The Free Cities are de facto sovereign and therefore States within the meaning of Article 2 of the Additional Facility Rules.

2.3 Spain is attempting to mislead the Tribunal. Article 292 of the CDP only applies in state-state cases. Moreover, Article 292 refers to matters covered by the CDP. However, this case concerns the CCC.

2.4 Spain recognized the Imperial claims and is therefore is the right respondent for all claims. Moreover, the Imperial claims were to be repaid in territories which Philippe inherited.

3. As regards the Objections raised against the Spanish claims:

3.1 The Claimant can indeed rely on the transfer protection of the CCC. The judgment of the Aulic Council can have no bearing on rights and obligations under the CCC. The Aulic Council ruled on a treaty between a territory of the Empire and a third State, not on a treaty of the Empire. The alleged violation of the Treaty on the Division of Powers between the Empire and the Princes and Territories was not due to a substantive incompatibility, but simply an alleged competency conflict. A third State (Spain) cannot rely on a decision as *inter alios acta*. And finally, even if there were any violation of national - imperial - law, it would not have any effect of the validity of a treaty under international law.

3.2 There is no necessity defense available under the CCC. Moreover, this is not necessity.

3.3. The Fugger have been treated worse than other investors, notably from Florence. Discrimination defeats any necessity defense.

3.4 The 1562 settlement does not constitute a waiver for a number of reasons, one being that the Fugger were acting under compulsion and that an investor cannot agree to waive CCC rights anyway.

The Tribunal decides to bifurcate the proceedings and orders to hold a hearing at Frankfurt, Germany, on 14 to 18 March 2011 on the admissibility of Spain's request under Article 45 (6) of the Arbitration (Additional Facility) Rules and Spain's objections to jurisdiction and admissibility raised in the Statement of Defence.

The Parties have agreed to hold the hearing in Frankfurt am Main under Article 20 (1) of the Arbitration (Additional Facility) Rules. Hearings will be held at the seat of the Frankfurt International Arbitration Center.

#### **Appendices:**

- CCC
- Judgment of the Aulic Council of 3 March 1526

The CDP is identical with the consolidated version of the Treaty establishing the European Communities as of 29 December 2006. For the purposes of this case-study, the European Commission is the *Reichsregiment*, the Council of the European Union is the Imperial Diet and the European Court of Justice is the Aulic Council.

For the avoidance of doubt, the CDP remains to be in force and was not terminated with the dissolution of the *Reichsregiment*.