2012 Vis Moot
CILE/CLDP Training and Middle East Pre-Moot

OUTLINE OF ISSUES

I. <u>Issue:</u> Does the Tribunal have jurisdiction to decide the question of removal of Dr. Mercado?

A. <u>Facts</u>

1. Agreement of the Parties
    - Article 15.1 of the parties' contract specifies that "any dispute arising from or in connection with this Contract shall be submitted to the [CIETAC] for arbitration which shall be conducted in accordance with the Commission's arbitration rules. . . ." [Cl. Ex. 1].

B. <u>Law</u>

1. CIETAC Rules
    - Art. 20: party's choice of counsel must be "authorized Chinese and/or foreign representative"
    - Art. 33 "the arbitral tribunal shall examine the case in any way it deems appropriate"
    - Art. 22: arbitrators must "remain independent of the parties and treat them equally"
    - Art. 30 (1) allow parties to move to dismiss an arbitrator when there are "justifiable doubts as to the impartiality or independence of an arbitrator"
2. Customary International Law
3. Case Law
    a. Claimant
        - Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, ICSID Case No. ARB/05/24 [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69]
            - Respondent's late appointment of counsel (who was a member of the same barrister's chamber as the arbitrator) created reasonable doubt as to the impartiality and independence of Tribunal. The Tribunal removed counsel.
        - Rompetrol v. Romania (ICSID Case No. ARB/06/3)
        - Fraport v. Philippines
        - Pope & Talbot v. Canada

- Biderman: national courts have exclusive jurisdiction to remove counsel as a matter of public policy

b. Respondent
- Hibbard Brown & Co. v. ABC Family Trust: Fourth Circuit affirmed dismissal of challenge to counsel so as to not interfere with the arbitration proceedings.
- Not much case law outside of ICSID that allows for removal and no procedural rules seem to allow it!

II. Issue: Should Dr. Mercado be removed as counsel for Claimant?

A. Facts

1. Claimant
- R. 24 President Arbitrator is on the CIETAC panel of arbitrators (approved by CIETAC)
- R. 40 p. 22: Dr. Mercado appeared as counsel 3 times before Presiding Arbitrator Peter and "no question of challenge ever arose."
- R. 39 p. 19: Dr. Mercado is not employed by the University, she is a third-party service supplier

2. Respondent
- R. 39 p. 21: Dr. Mercado is a godmother to President Arbitrator's youngest child.
- R. 39 p. 21: Dr. Mercado is on first name terms with President Arbitrator's wife.
- R. 39 p. 16: Dr. Mercado was added to the team of counsel representing Elite.
- R. 34 Arbitral Tribunal was formed on 30 August 2011
- R. 40 Respondent sent their statement of defense on Sept. 2 2011.
- R. 26 Presiding Arbitrator appointed 10 August 2011.
- R. 39 p. 17 President Arbitrator has experience in arbitration
- R. 40 p. 22: In each of the 3 cases where Dr. Mercado was counsel before the Presiding Arbitrator, the issue was decided in favor or her client each time
- R. 50 Q. 29: 30 Respondent learned of Dr. Mercado's addition to the CLAIMANT's legal team on 30 August 2011 (Clarification 29), three days before the submission of the statement of defence on 2 September 2011, though the date she joined the team is not given.

B. Law

1. CIETAC
- Art. 22: arbitrators must "remain independent of the parties and treat them equally"

2. CIETAC Ethical Rules for Arbitrators

- Article 5 of the CIETAC Ethical Rules focuses on "*debt, property and monetary relationships; business relationships and relationships in commercial co-operation*".

3. IBA Guidelines
   - The Red and Orange Lists under the IBA Guidelines do not consider an academic relationship between an arbitrator and a counsel as an actual or a potential source of conflict of interest
   - 4.4.1: "membership in the same professional association or social organization"
4. N.Y. Convention Art. V(1)(d)
5. UNCITRAL Model Law Art. 34(2)(a)(ii)

III. <u>Issue:</u> Can Respondent reserve its right to challenge Professor Presiding Arbitrator?

A. <u>Law</u>

1. Cases
   - US: Island Territory of Curacao v. Solitron Devices Inc.
   - England: ASM Shipping Ltd. v. TTMI Ltd
   - Germany: Colgne, 9 SchH 30/00 Mealey's IAR 34
   - Russia: International Commercial Court at the RF Chamber of Commerce N 22/2007
   - Investment Arbitration:
     - Suez and others v. Argentina
     - CEMEX v. Venezuela
2. UNCITRAL Model Law Art. 13(2) – time limit for challenging an arbitrator is 15 days after reason for challenge has become known
3. CIETAC Rule Article 30(3): "the party may challenge the arbitrator in writing within fifteen (15) days after such reason [for a challenge] has become known".

IV. <u>Issue:</u> Whether Control Systems is exempted from liability for damages resulting from its failure to deliver the control system by the contractual deadline?

A. <u>AUTHORITY:</u>

1. CISG Article 79
   a. 79(1): A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an **impediment beyond his control** and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

b. 79(2): If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
    (a) he is exempt under the preceding paragraph; and
    (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
c. Control Systems is exempted from liability if it, or a third party performing part of the contract, meets the requirements of 79(1)

2. CISG Article 30: Requires seller to deliver goods according to the terms of the contract
3. CIETAC Rules Art. 39(1): Control Systems bears the burden of proof in determining whether it meets the exemption requirements under Article 79(1) CISG. See also UNCITRAL Rules Art. 24(1)
4. Secretariat's Commentary
    a. An exception to suppliers falling within the seller's "sphere is responsibility" is when the supplier is the sole provider of a particular good
5. CISG Advisory Opinion No. 7
    a. An obligor cannot claim exemption for a risk that he was in the best position to avoid or minimize [§2, Comment 25]
6. Schlectrim/Schwenzer
    a. Third party suppliers are within the seller's "sphere of control" and there failure to perform does not satisfy Article 79(1) because such a failure is not an impediment beyond the seller's control [p. 1067, ¶11; pp. 1071-72, ¶¶ 18-19]
    b. A fire can be deemed an impediment that could not have been controlled or foreseen [Art. 79, ¶16]
    c. The seller stills qualifies for exemption where a supplier fails to provide the necessary goods as a result of an event outside of the control of all of the suppliers. [Art. 79, ¶26]
7. Honnold/Flechtner
    a. Article 79 exemption provision should be applied strictly and have limited application [Section 534]
    b. Burden of proof falls on party claiming exemption [Section 467]
    c. In selecting third parties, the seller assumes the risk that these parties may fail to perform
8. Cases:
    a. HG Zurich 26/4/1995 – burden of proof falls on Control Systems
    b. CIETAC (PRC) 29/9/1997; OLG Hamburg 28/2/1997 – foreseeable impediment

c. BGH (Ger) 24/3/1999 – failure of suppliers or sub-suppliers to perform is not an impediment beyond the seller's control
d. ICC Award No. 8790 – If the supply of good that the seller is relying on is destroyed by a *force majeure* event, then the seller is excused if there are no available alternatives
e. BGH 28/2/1997 - The seller stills qualifies for exemption where a supplier fails to provide the necessary goods as a result of an event outside of the control of all of the suppliers.
f. CIETAC 30/11/1997 – In order to overcome an impediment, the breaching party may provide the other party with a commercially reasonable alternative.

B. FACTS FOR CLAIMANT

1. Control Systems does not dispute that it failed to deliver and install the control system by the contractual date. [*St. Def.*, p. 37, ¶ 2]
2. Installation and configuration of the control system was to be completed by 12 November 2010. [*Contract*, p. 9]. However, the control system was not delivered to Elite until 29 November 2010 and installation/configuration was not complete until 11 March 2011. [*St. Claim*, p. 6, ¶16].
3. The first even on the M/S Vis was scheduled for 12-18 February 2011. [*St. Claim*, p. 6, ¶11]. Therefore, the event could not take place on the M/S Vis as planned and Elite had to make substitute arrangements. [*St. Claim*, p. 7, ¶¶16-18].
4. The fire did not destroy the entire supply of D-28 chips. [*St. Claim*, p. 6, ¶13].
5. Elite tried to reach out to Control Systems to reach an agreement for covering the costs accrued by Elite due to late delivery. [St. Claim, p. 7, ¶19]

C. FACTS FOR RESPONDENT

1. Elite sough to refurbish the yacht with the latest in cabin and conference technologies, superior to anything otherwise available on the market. [St. Claim, p. 5, ¶6]. The D-28 chip contained novel technology that offered significant improvements over rival chips. [St. Claim, p. 5, ¶9]
2. Failure to timely deliver the control system was due to third parties [*St. Def.*, pp. 37-38, ¶¶ 7-9]
3. The fire on 6 September 2010 started accidentally in High Performance's electrical system, destroying a large portion of chips and halting production [*P.O. No. 2*, p. 47, ¶8]
4. Control Systems notified Elite of the fire and delay on 13 September 2010 [St. Claim, p. 6, ¶12]

5. High Performance determined that it would give the remaining chips to its longstanding customer. [St. Claim, p. 6, ¶14]. Control Systems was not a longstanding customer. [Cl. Ex. 3]

V. <u>Issue:</u> Whether the "success fee" paid by Elite was a bribe, and whether that payment should affect Elite's claim for damages in the arbitration?

A. <u>LAW:</u>

- Pursuant to CISG Arts. 45(1)(b) and 74, Elite is entitled to recover full extent of damages if Control Systems has no exemption under Art. 79.
- Concept of "foreseeability" is key from the language of Art. 74. See also Schlechtriem/Schwenzer Commentary, Art. 74.
- Elite responsible to "mitigate" damages under Art. 77, limited to "reasonable" requirement.
- Incidental/consequential expenditures are recoverable under Art. 74 [*Schlechtriem/Schwenzer 1005*]
- Bribery can be imputed to actors who had control or supervision—the concept of agent is defined in UNIDROIT Principle Art. 2.2.2; Bribery can be imputed to "fees" offered with the understanding that it is to be used for bribery, or it may be made contingent on award of the contract, so that the agent has incentive to employ bribery [*OECD Anti-Corruption Division, para. 27*]
- Bribery must be proven beyond a doubt [*Hilmartin v. OT*], but circumstantial evidence may prove this [*ICC case nos. 4150, 6497*]. Excessive compensation has been held to show evidence of bribery [*ICC case 6497*].
- Nothing in the OECD Convention mentions the issue of private bribery
- Most countries have adopted criminal prohibitions and other governmental measures to combat bribery—suggesting international consensus [*Heine 640-641*]. Where international consensus is involved, tribunals will not tolerate matters that rise to the level of public policy violations [*Born II, 2837*].

B. <u>Facts for Claimant:</u>

- Time constraints and the uniqueness of a yacht venue lead Elite to want to pay an additional "success fee" to ensure that its broker could find an adequate vessel [*Proc. Ord. No. 2, Q. 22*].
- At least one reputable news service reported that Elite did not know about the bribe [*R. Ex. No. 1, R. 41; Proc. Ord. No. 2, R. 51, Q. 41*]
- Bribes between private parties are legal in Danubia, where Elite is located
- Nothing in the record indicates that the authorities of Pacifica went after Elite.

- Control Systems knew that Elite had scheduled the conference on its yacht. [*Proc. Ord. No. 2, Q. 20*].
- Would probably be foreseeable that Elite wanted to use M/S Vis for commercial purposes at the time of conclusion of the contract, since Control Systems knew Elite's business [*R. 9].*
- Appears that Broker could not bind Elite without Elite's consent: this indicates that Elite did not have control or supervision over the yacht broker [*Proc. Ord. No. 2, Q. 22*].

C. Facts for Respondent:

- Success fees are not "normal" trade practice, and the broker already had a commission as part of its contract [*Proc. Ord. No. 2, Q. 23*].
- Bribe secured to get an "introduction" to yacht owner. So formation of contract and everything that followed with the M/S Pacifica Star occurred after the bribery [*R. Ex. No. 1, R. 41*]
- All states involved in this action are parties to the OECD Convention Combating Bribery—showing a commitment against it [*Proc. Ord. No. 2, R. 49, Q. 27*]
- The bribe that occurred was illegal under Pacifica law, where the yacht was registered and the owner resided. The bribe resulted in the arrest and conviction of the owner's assistant who received the bribe. [*R. Ex. No. 2, R. 42; Proc. Ord. No. 2, Q. 25-26*].
- Could argue that Elite had good degree of control and supervision over yacht broker's actions, given the large commission and a success fee of nearly the same amount [*Req. for Arb., R. 4*]—broker was mandated by Elite to secure a substitute vessel [*Proc. Ord. No. 2, Q. 22*].

VI. Issue: Whether the "ex gratia" refund that Elite gave Corporate Executives is recoverable as damages under the CISG

A. LAW:

- CISG: reasonable steps to mitigate damages [*Art. 77*] are recoverable under the CISG [*Art. 74*]. This can include damage to a customer relationship, where it is a pecuniary loss of goodwill if financial loss would occur [*AC Op. 6 ¶ 7; Schwenzer, Art. 74 ¶ 34*]
- Damages may only be recovered by the claiming party if the loss was foreseeable to the paying party [*CIG Art. 74*].

B. Facts for Claimant:

- Corporate Executives expressed unhappiness that it did not receive fully what value it had been promised in the M/S Vis [*Proc .Ord. No. 2, Q. 20*]. Elite then offered to reduce the price of the conference, in the form of a partial refund.

- Meant to represent the value between what Corporate Executives paid for in the M/S/ Vis, and the conference it received on the M/S Pacifica Star [*Proc. Ord. No. 2 Q. 20*].
- Control Systems knew that Elite had scheduled the conference for the M/S Vis before it breached the contract [*Proc. Ord. No. 2, Q. 14*]
- Control Systems knew that Elite demanded the highest technology possible [*Req. for Arb.]*, which could result in a unique, irreplaceable venue.

C. Facts for Respondent:

- Corporate Executives did not initiate the request for the refund or threaten to take away its business if it did not receive the refund. [*Proc. Ord. No. 2, Q. 20*].
- The contract between the parties was signed in November 2010, and Control Systems did not know about the conference until 5 August 2010. [*Proc. Ord. No. 2, Q. 14*].
- There is no evidence in the record of loss of business as a result of the late delivery.
- The conference was reporting as a "success" [*Resp. Ex. No. 1, R. 41*] and the M/S Pacifica a "suitable substitute yacht." [*Proc. Ord. No. 2, Q. 20; Req. for Arb.*]

VII.