NINETEENTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

and

NINTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (CIETAC)
Case No. M20110999

Mediterraneo Elite Conferences Services, Ltd, CLAIMANT

v.

Equatoriana Control Systems, Inc, RESPONDENT

Analysis of the Problem
For use of the Arbitrators

If you do not already have a copy of the Problem, it is available on the Moot web site, http://www.cisg.law.pace.edu/vis.html.

This analysis of the Problem is for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are strongly urged not to communicate any of the ideas contained in it to their teams before the preparation of the memorandum for RESPONDENT. The analysis will be sent to all teams after the memorandum for RESPONDENT is submitted. Many of the team coaches/professors participate as arbitrator at the Moot and therefore receive this analysis and it only seems fair that all teams should have it for the oral arguments. If it contains ideas they had not thought of before, it will still be necessary to construct the arguments to support the position they are taking.

All arbitrators should be aware that the legal analysis contained herein is probably not the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. Full credit should be given to those teams that present different, though properly developed and fully appropriate, arguments.

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REGULATORY AND FACTUAL FRAMEWORK

PARTIES

Mediterraneo Elite Conference Services, Ltd (hereinafter referred to as "CLAIMANT" or "Elite") is a company incorporated under the laws of Mediterraneo; it operates high-end venues for conferences held by small to medium sized businesses and professional associations. It has six land-based facilities and, in spring 2010, purchased a luxury yacht, the M/S Vis, for use as a seventh conference venue. CLAIMANT sought to refurbish the yacht to a high level of luxury, superior to anything else available on the market. In order to do so, CLAIMANT engaged a number of subcontractors and suppliers to work on the refurbishing.

Equatoriana Controls Systems, Inc (hereinafter referred to as "RESPONDENT" or "Controls Systems") is a company organised under the laws of Equatoriana. RESPONDENT contracted with CLAIMANT to supply, install and configure a Master Control System on the M/S Vis yacht. The parties' dispute arises from this contract.

CONTRACT

CLAIMANT sought to refurbish the M/S Vis yacht with the latest in cabin and conference technologies, superior to anything otherwise available on the market. In particular, the conference technology had to meet the highest standards. Elite managed the refurbishment itself, using a range of subcontractors and suppliers. The refurbishing of the M/S Vis was scheduled to be completed on 12 November 2010**.** Elite scheduled ten weeks for testing all of the systems prior to scheduling the first event.

Elite contracted the supply and installation of the various elements of the on-board technology to a number of firms, including the RESPONDENT, Equatoriana Control Systems, Inc. The contract with Control Systems was signed on 26 May 2010. (CLAIMANT's Exhibit No. 1)

RESPONDENT was to supply, install and configure the master control system that is critical to venue operation, working with other specialist suppliers and installers to make sure everything functioned according to plan. The core element in the overall control system is a series of semi-configurable processing units. Manufacture of the processing units was to be done by Oceania Specialty Devices, incorporated in Oceania (hereafter "Specialty Devices").

ARBITRATION CLAUSE

The arbitration clause is found in the Contract (CLAIMANT's Exhibit No. 1). It reads as follows:

"15.1 Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The arbitration shall take place in Vindobona, Danubia. The arbitration shall be in the English language. "

This clearly calls for arbitration in accordance with the CIETAC Rules in force at the commencement of the arbitration. The seat of arbitration is Vindobona, Danubia and language of the proceedings English.

APPLICABLE RULES OF LAW

Procedural Law/Rules of Law

- March 2011 CIETAC Arbitration Rules (See Moot website for a copy of the rules. The Rules are in force for the purposes of the Moot, but have not yet been formally adopted by CIETAC.)
- 1985 UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.
- 1958 New York Convention on the Recognition and Enforcement Arbitration Awards: Equatoriana, Mediterraneo, Oceania, Atlantis and Danubia are all party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)
- International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration (IBA Guidelines)

Substantive Law/Rules of Law

- The contract has a choice of law clause. It provides:

  15.2 This contract is subject to the law of Mediterraneo

- Equatoriana and Mediterraneo as well as Danubia are all party to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Consequently, pursuant to CISG article 1(1)(a) the contract is governed by the Convention.
- Danubia, Equatoriana and Mediterraneo are party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

SUMMARY OF FACTS

There are many facts on file, originally made available through the case file, the statement of claim, the statement of defense and the exhibits presented by the CLAIMANT and the RESPONDENT, as well as in Procedural Order no. 2. It is essential that the teams use the facts available to them and to use them to their case's benefit. The facts are to be applied to the law(s) in question.

CLAIMANT engaged RESPONDENT to supply, configure and install the on-board master control system. The contract between CLAIMANT and RESPONDENT was signed on 26 May 2010 and provided that the "[i]nstallation and configuration of the control system shall be completed by 12 November 2010". This date was chosen due to the fact that ten weeks of testing were required before the master control system would be fully functional. Although CLAIMANT was aware that third-party suppliers would be involved in its procurement of the master control system, it had no specific knowledge that the manufacture of the processing units would be performed by someone other than RESPONDENT. As such, the contract contained no requirement as to suppliers.

CLAIMANT contracted with Worldwide Corporate Executives Association ("WCEA"), a high profile, long-standing client, to hold its annual conference aboard the M/S Vis from 12-18 February 2011. WCEA demanded the very finest in comfort and efficiency, and was delighted to be the first to hold an event on the M/S Vis. WCEA emphasized in its publicity for the event that it would be held on a luxury yacht. RESPONDENT was informed of the conference on 5 August 2010.

The core element in the master control system is a series of semi-configurable processing units. Although the contract between CLAIMANT and RESPONDENT only mentioned performance requirements and made no mention of the specific component parts, RESPONDENT contracted with Oceania Specialty Devices ("Specialty"), who manufactured the processing units to be solely compatible with the D-28 "super chip". The D-28 chip is designed and produced by another party, Atlantis High Performance Chips ("High Performance").

On 13 September 2010, RESPONDENT informed CLAIMANT that it would be unable to meet its contractual obligation to deliver the control system by 12 November 2010 due in part to a fire in the production facility of the D-28 super chips. While there were enough chips in existence that a distribution to Specialty could have been made that would have sufficed to complete the master control system on time (Claimant's Exhibit No. 3), High Performance distributed the chips to only one of its regular customers. As a result, delivery of the control system was delayed until 14 January 2011 and installation, configuration and verification were delayed until 11 March 2011. CLAIMANT paid the full purchase price of USD 699,950 to RESPONDENT on 21 March 2011.

When it learned that the M/S Vis would not be available for the WCEA event, CLAIMANT offered WCEA use of one of its on-shore facilities for the conference, but WCEA refused to accept this alternative. CLAIMANT proceeded to make arrangements for a suitable substitute location. CLAIMANT chartered a substitute yacht, the M/S Pacifica Star, at a cost of USD 448,000 which included USD 404,000 rental fee plus port and handling fees of USD 44,000. It also incurred the cost of a standard broker commission of 15%, or USD 60,600, and a Broker Success Fee of USD 50,000. Finally, CLAIMANT made a rebate payment of USD 112,000 to WCEA to maintain the goodwill of its long-time client.

CLAIMANT by a written communication sent to RESPONDENT on 9 April 2011 requested that RESPONDENT compensate CLAIMANT for costs it incurred from the delay in the installation of the control system. RESPONDENT replied several days later categorically refusing

ISSUES

CLAIMANT referred this dispute to CIETAC on 15 July 2011 seeking a total of USD 670,600 in damages due to RESPONDENT'S late performance of its contractual duties. RESPONDENT denies all liability for damages, challenges the jurisdiction of the Tribunal to hear all claims in relation to the lease of the M/S Pacifica Star based on allegations of bribery, and challenges the participation of Dr. Elisabeth Mercado as a member of CLAIMANT'S legal team. Further, RESPONDENT attempts to reserve a right to challenge Professor Presiding Arbitrator as arbitrator in the case, if the challenge to counsel is not successful.

CLAIMANT suggests that, after the fire at the production facility of Atlantis High Performance Chips, the latter could have delivered all the D-28 chips needed for the master control system from the amount already produced and in its warehouse. It further states that the only reason the chips were not delivered to Oceania Specialty Devices was because of the close friendship between the CEO of High Performance and the CEO of Atlantis Technical Solutions, to whom the entire stock in the warehouse at the time of the fire was delivered. This speculation is based upon a news story in the *Technology Reporter*. (CLAIMANT's Exhibit No. 7)

Control Systems, Inc accepts that the entire supply of D-28 chips in the warehouse was delivered to Atlantis Technical Solutions and that the two CEOs were good friends. This, however, is not enough to reach the factual conclusion that that was the only reason the chips were delivered to Atlantis Technical Solutions.

It also does not prove that, even if that was the reason, the necessary amount of chips would have been delivered from the stock in the warehouse to Oceania Specialty Devices. The available chips might have been allocated on a pro rata basis among all of the orders placed with High Performance. In that case Oceania Specialty Devices would have received some chips, but not enough to fabricate all of the processing units for the M/S Vis.

Assuming that Elite is able to convince the Tribunal at the appropriate time that High Performance could have performed its contractual obligations to Specialty Devices, Control Systems may nevertheless not be liable to Elite. CISG Article 79(1) provides that

> "[a] party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control ..."

The impediment to Control System's performance, according to RESPONDENT, was the failure to receive the processing units from Oceania Specialty Device. Article 79(2) goes on to say that where the RESPONDENT's "failure is due to the failure by a third party whom he has engaged to perform the whole or a part of the contract", ie Specialty Devices, is exempt under the conditions of article 79(1). Specialty Devices also could not meet its contractual date of delivery of the processing units to Control Systems for reasons that were beyond its

control, ie the failure of High Performance to deliver the D-28 chips to it at the contractual date of performance.

RESPONDENT challenge the participation of Dr Mercado on the Elite legal team and request the tribunal to rule that she should cease all activities in this arbitration. If the challenge to Dr. Mercado is not accepted by the Tribunal, RESPONDENT reserves its right to challenge Professor Presiding Arbitrator for the reasons of certain proximity to Dr Mercado.

RESPONDENT requests that the Tribunal decide that Dr. Elisabeth Mercado shall terminate her role in the legal team representing Elite; on the merits decide that Equatoriana Control Systems is exempt from liability for the late delivery and installation of the master control system on the M/S Vis; decide that, if Equatoriana Control Systems is held liable for the delay, the ex gratia payment of USD 112,000 is not an allowable item of damages; decide that the payment of USD 50,000 as the yacht broker's "success fee" that was used by the broker in part to pay a bribe is not an allowable item of damages; decide that the corruption in the procuring of the lease contract for the M/S Pacifica Star renders all costs associated with that lease contract not allowable items of damages; award the costs of arbitration including the cost of legal representation to Equatoriana Control Systems.

As such the jurisdiction of the Tribunal is not fully contested: due to the arbitration clause in the Contract between CLAIMANT and RESPONDENT, the Tribunal has jurisdiction to hear this case. There are, however, other legal questions requiring attention from participating teams. These include:

- Has the Tribunal the power to remove Counsel from the arbitral process?
- Can RESPONDENT reserve its right to challenge Professor Presiding Arbitrator?
- Has RESPONDENT breached the Contract for late delivery and late installation?
- What damages is CLAIMANT is entitled to recover under Art. 74 CISG?
- Is there an exemption from liability to pay damaged pursuant to Art. 79 CISG?
- What is the impact of the allegation of bribery?

Has this Arbitral Tribunal the Power to Remove Dr Mercado from the Arbitral Process?

Relevant Facts

Professor Presiding Arbitrator is the Schlechtriem Professor of International Trade Law (ITL) at Danubia National University. At Danubia National University, the ITL faculty covers Sales Law, CISG and International Commercial Arbitration. Professor Presiding Arbitrator is a world-renowned specialist in trade law but arbitration as such is not his main focus. He sits on the Management Committee of the ITL Faculty and thereby is responsible with the other members of the Committee for all ITL activities, including arbitration. He sits as arbitrator in investor-state arbitrations including ICSID as well as in WTO arbitrations and occasionally in commercial disputes. It is because of this broad experience that he was designated as the presiding arbitrator in this arbitration by the joint agreement of the two parties.

Dr Mercado is a Visiting Lecturer at Danubia National University, teaching the International Commercial Arbitration courses. She secured her Visiting Lectureship following a public application process of which she had been unaware until she received a telephone call from someone who introduced herself as the Professor Presiding Arbitrator's assistant and said she was calling on his behalf. Dr Mercado was shortlisted along with one other and was selected after interview by a panel of three, chaired by Professor Presiding Arbitrator.

She delivers approximately 50% of the arbitration lectures and is paid per lecture; she is not salaried but is treated as a third party service supplier for payment and tax purposes. The Tax Authorities have accepted this and no issue arises as to her employment status.

In the past, Dr Mercado had been General Counsel of a large international trading company. As a consequence, in addition to her arbitration lectures she delivers lectures to the ITL Faculty as part of Professor Presiding Arbitrator's course on international trade, focusing on the "real world"of international commerce as opposed to the black-letter law. As a consequence, Dr Mercado has occasional contact with Professor Presiding Arbitrator, but the majority of her contact is with the ITL Faculty's full-time staff, particularly the several Course Directors. Face- to-face, she calls him "Peter" but in company normally adopts the more formal "Professor".

Dr Mercado is very good with children and is on first name terms with the Professor's four, aged between 10 and 20. She is godmother to the youngest of the Professor's children. She is also on first name terms with his wife. The two women occasionally meet in the city for lunch or a coffee.

Dr Mercado has appeared as Counsel before Professor Presiding Arbitrator in three previous arbitrations. In the first two, Dr. Mercado's client was successful with a unanimous tribunal. In the third case, Dr Mercado's client was unsuccessful on a majority decision with Professor Presiding Arbitrator issuing a Dissenting Opinion in her client's favor. In none of the three cases were Dr Mercado's client's opponents aware of the connections between Dr Mercado and Professor Presiding Arbitrator. Therefore, no question of a challenge ever arose.

Legal Analysis

The issue of concern is the relation of Dr Mercado to the Presiding Arbitrator. RESPONDENT wishes to have Dr Mercado removed from the legal team of the CLAIMANT arguing that the integrity of the Tribunal may be compromised; it is worth noting that the Presiding Arbitrator did not consider appropriate to make any disclosure of a relation to Dr Mercado.

In this issue we have a rather novel and intriguing question or rather a tension: the challenge is between the right of a party to freely choose its own counsel and the right of the tribunal to take action in order to ensure the integrity of the arbitration process. There is no black-letter answer to this question so any good advocate would have a field day arguing the question either way. A number of smaller legal questions/arguments are to be explored here:

- Has the Arbitral Tribunal the power to deal with this question? The answer must be in the affirmative as Tribunals have a residual jurisdiction to deal with any procedural matter. However, it should also be noted that neither the arbitration agreement, nor the CIETAC Rules, nor the Model Law provides the Tribunal with the express power to remove Dr Mercado. It follows that Tribunal's power would be derived from its general residual procedural powers.
- Would allowing CLAIMANT to retain Dr Mercado compromise the integrity of the arbitral proceeding? There is nothing at law that compels the Tribunal to remove Dr Mercado. Conversely, the Tribunal would risk jeopardising the integrity of the proceedings if it removes Dr Mercado. The circumstances of the relation of Presiding Arbitrator may provide a basis to remove Presiding Arbitrator.
- The right for a party to freely choose its own counsel is a fundamental one; limiting this right in the proceedings could risk the safety of the arbitral award pursuant to Arts. 34(2)(a)(iv) and 36(1)(a)(iv) Model Law and Art. V(1)(d) and V(2) of the New York Convention.

An argument can be made to the effect that Dr Mercado's participation is not, strictly speaking, a procedural aspect directly concerning the integrity of the proceedings, as it does not objectively demonstrate "extraordinary circumstances" a tribunal must find to warrant the exercise of its discretion. As the circumstances of Dr. Mercado's participation have been known to RESPONDENT well before the hearing, there is no "real possibility that the Tribunal" would be biased. Moreover the dismissal of Dr. Mercado based on the procedural discretion of the tribunal would deprive the CLAIMANT from freely choosing their counsel and damage the interest of such counsel although the latter is not bound by the arbitration agreement.

It might be noted that 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.

Most related case law comes from international investment treaty arbitration rather than international commercial arbitration and as such it is to be considered with certain caution: the argument can easily be made that investment arbitration and commercial arbitration have significant differences so that arguments from one "system" cannot readily be "transposed" to the other one. In any event key investment cases to be considered in this context are:

- HEP v Slovenia (*Hrvatska Elektroprivreda v. The Republic of Slovenia*): this is the most relevant case; a rather bold decision by the Tribunal in order to ensure that the Presiding arbitrator stays on board and distinguishing between good and bad faith occurences.
- Rompetrol v Romania
- *Fraport v Philippines*
- *Pope & Talbot v Canada*
- There is also a small number of arbitral awards in commercial cases, none of which is particularly conclusive.

Given that there is no direct applicable authority most arguments could or should be made along the lines of the reasoning of the Tribunal in *HEP v Slovenia*. In particular, policy and procedural integrity arguments should be particularly welcome. Is this application tactical, a mere dilatory tactic or a genuine concern of the RESPONDENT. A reasoned and balanced assessment of such criteria would distinguish a good team. In such a discussion, teams should be using facts, law, soft law, arbitral case law as well as judicial practice and related commentaries to present and support their arguments.

Can RESPONDENT reserve its right to challenge Professor Presiding Arbitrator?

Relevant Facts

All facts relevant to this issue have been highlighted in the previous section discussing the relation between Dr Mercado and Professor Presiding Arbitrator. While there is rather little law on the issue of the removal of counsel there is both black letter and case law on the issue of removal of arbitrators.

Legal Analysis

It should be noted at the outset that the issue is not before the tribunal and the students should not engage in any discussion of it. Nevertheless, a short discussion here may be of interest to the arbitrators.

The main issue in this factual context is whether the various contacts between Dr Mercado and Professor Presiding Arbitrator may form the basis for a challenge of Professor Presiding Arbitrator for lack of independence and likely lack of impartiality. More pertinently we have in this Arbitration the question of the possibility to reserve the right to challenge an arbitrator, as RESPONDENT attempts to do in the Statement of Defence or make such a challenge conditional on the success (or lack of success) of the effort to have Dr Mercado removed from the case. The questions that could be asked are:

- Is it possible to reserve the right to challenge an arbitrator or is this right to be exercised promptly?
- Is it possible to have a conditional challenge, dependant on the success of the application to remove a counsel from the case?
- Do circumstances exist in this case that would justify a challenge of Professor Presiding Arbitrator?
- Has RESPONDENT waived its right to challenge Professor Presiding Arbitrator by its conduct despite the language used in the Statement of Defence?

Most certainly RESPONDENT did not challenge Professor Presiding Arbitrator within the strict time limit stipulated by the provisions of the applicable procedural rules and arbitration law. Article 30(3) of the CIETAC Rules provides that

> "the party may challenge the arbitrator in writing within fifteen (15) days after such reason [for a challenge] has become known".

The UNCITRAL Model law in Article 13(2) contains the same terms (fifteen days) regarding the time limit of a challenge of an arbitrator.

The RESPONDENT became aware of the reasons in question on the 30th of August 2011. The Statement of Defence was submitted within 15 days after this but it is unclear as to whether it contains a conditional challenge to Professor Presiding Arbitrator or a mere threat of challenge. It does contain a challenge to Dr Mercado as a member of Elite legal team and it adds that in case the challenge of Dr Mercado is not accepted by the tribunal, the RESPONDENT would "reserve... [its] right to challenge Professor Presiding Arbitrator as arbitrator in this case".

Arguments can be made either way as to whether a challenge has to be more specific or not. Such arguments may be policy or legal arguments. There is no doubt that the law sets very tight deadlines as it would be problematic to leave the possibility of a challenge open for a long period of time. It follows that speculative or even opportunistic challenge would not normally be upheld and there would be hesitation to accept a conditional challenge.

The stricter position would advocate that once the time limit stated by the CIETAC Rules and the UNCITRAL Model Law runs out, a party cannot challenge an arbitrator on the basis of reasons known by that party. A party that does not act within this time limit is deemed to have waived its right. Otherwise the time limit would not have any effect and a challenging party would be able to reserve the right to challenge the arbitrator even after the award is rendered or at least after the arbitrator's conduct would evidence his opinion on the merits of the case. Article 4 of the UNCITRAL Model Law provides that a party shall be deemed to have waived its right to object, if it does not state an objection without "undue delay or, if a time-limit is provided therefore, within such period of time", which is 15 days in the present case. The time limit should be applied strictly in order to prevent "tactical and dilatory" challenges.

In similar cases, arbitral tribunals and arbitration institutions decline challenges on the grounds that the challenge was untimely, even if the grounds for challenge were present. Such case law exists in the United States, England, Germany, Russia and also in investment Treaty context:

- US: *Island Territory of Curaçao v Solitron Devices Inc*
- England: *ASM Shipping Ltd v TTMI Ltd*
- Germany: *Cologne, 9 SchH 30/00; Mealeys 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*.

The issue of reserving the right to challenge or making it conditional to the challenge of a counsel is quite intriguing too. Technically such right may not easily be reserved as the law requires parties to act swiftly. Timely challenge to an arbitrator allows completing this procedure as soon as possible, while the "challenge" which was made by the RESPONDENT

simply postpones this procedure. Allowing such challenge to be made at a later stage when RESPONDENT deems it appropriate arguably distorts the equal and fair treatment of parties as it would give RESPONDENT more tactical leverage by this extended right to challenge. It is in the interest of fairness and procedural integrity to have such challenges exercised promptly and decided promptly.

A challenge of an arbitrator is a very serious matter as a lack of independence and impartiality goes to the heart of the legitimacy of the arbitration process and an argument can be made that a Tribunal tainted by some issue of lack independence or impartiality is not properly constituted and an award made by such a tribunal is susceptible to a challenge (France, *Tecnimont v Avax*). Therefore, this and every other challenge must be carefully examined.

As far as the substance of the challenge is concerned this challenge concerns academic relations between an arbitrator and a counsel; generally, such connections do not create a conflict of interest. Article 5 of the CIETAC Ethical Rules focuses on "*debt, property and monetary relationships; business relationships and relationships in commercial co-operation*". It appears that the CIETAC Ethical Rules do not regard academic relationships as a potential source of conflict. Similarly, the IBA Guidelines focus on relationships an arbitrator has as a member of a law firm or his affiliation with a party who is a legal entity (*IBA Guidelines, Part I, General Standard 6*). 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. If one were pressed into classifying an academic relationship under any of the IBA Guidelines lists, one would have to find that this relationship is most akin to Art. 4.4.1 Green List which covers the situations where an arbitrator and a counsel are members in "*the same professional association or social organization*" (*IBA Guidelines, Art. 4.4.1*). .

One could compare the current case, the academic relationship between Dr Mercado and Professor Presiding Arbitrator, as one similar to a business relationship, or one similar to the situation where an arbitrator and a counsel sit in the same barrister chambers. Various arguments could be made in this context. There is case law on the issue of counsel and arbitration in the same chambers and such cases would have to be carefully considered.

We might finish this discussion by noting that Article 30(6) of the CIETAC Rules provides

> "The Secretary-General of CIETAC shall make a final decision on the challenge, with or without stating the reasons."

Consequently, under the CIETAC Rules the tribunal would not consider the challenge even if timely.

Has RESPONDENT Breached the Contract?

This is an important but rather simple question. If CLAIMANT wishes to rely on any of the remedies available under the CISG will have to prove that the RESPONDENT is in breach of contract. A CISG breach of contract may well be a breach without fault. On the facts the

RESPONDENT failed to fulfill its obligation under the Contract by 12 November 2010. It appears that CLAIMANT did not consent to any additional period of time for the performance of the Contract. The RESPONDENT was notified of the conference scheduled on the M/s Vis from 12 to 18 February 2011. An obligation of the RESPONDENT to pay damages is subject to Article 79 CISG.

While the question of breach is an important one it is at the same time a simple one and one for which there is abundance of legal authority and commentary so it will not be discussed here. While the establishment of the breach of contract is significant for the discussion which follows it will not be expected that the teams will dedicated too much time or space on this issue but they would at least be expected to apply the facts to the law and provide a basis for the subsequent analysis.

Can RESPONDENT Rely on Article 79 CISG and Be Exempted from Obligation to Pay Damages?

RESPONDENT's breach is caused by the failure of Specialty Devices to supply the processing units on time. If Specialty Devices satisfies all of the requirements of Article 79(1) CISG, RESPONDENT may be exempted from liability under Article 79 CISG. High Performance's decision not to supply Specialty Devices with D-28 chips resulted in the latter's failure to supply RESPONDENT with processing units on time and led to RESPONDENT'S breach. The whole chain of sub-contractors will have to satisfy the requirements of Article 79 and the sub-contractors would have to be necessary additional third parties for RESPONDENT to be able to rely on an Article 79 defence.

To be exempted from the liability towards the payment of damages on account of late delivery the RESPONDENT should have met the requirements of Article 79 CISG. According to Article 79 (1) CISG, a party is not liable for a failure to perform any of his obligations if it 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. And in case the failure is due to the failure of a third party, Article 79(2) CISG demands that the requirement of exemption under Article 79(1) CISG be satisfied with respect to both parties, i.e., the party claiming the exemption and the third party before an exemption could be granted. In the case at hand the chain is a bit longer but arguably the same standard is applicable.

RESPONDENT will have to demonstrate that the RESPONDENT itself and Specialty Devices were faced with an impediment beyond their control. RESPONDENT also has to show that neither itself nor Specialty Devices could or should have taken into account the events claimed by them as an impediment. Further RESPONDENT will have to show that there is a causal link between the alleged impediment and the RESPONDENT's failure to perform its obligation. Finally, RESPONDENT will have to demonstrate that **it** and Specialty Devices could not have overcome their alleged impediment.

The RESPONDENT argues that the RESPONDENT's "failure is due to the failure by a third party whom he has engaged to perform the whole or a part of the contract", ie Specialty Devices. Thus the provisions of Article 79(2) are applicable to the case and in order to satisfy the requirements of Article 79(2) CISG, the RESPONDENT needs to prove that both the RESPONDENT and Specialty Devices qualify under Article 79(1) CISG. The burden of proof lies on the RESPONDENT. Article 79 contains four requirements a party must meet to qualify for the exemption of liability. Firstly, there must be "an impediment beyond the defaulting party's control." Secondly, the impediment "could not have been reasonably taken into account by the defaulting party at the conclusion of the contract." Thirdly, the impediment or the consequences of the impediment "could not have been reasonably avoided or overcome". Fourthly, the "defaulting party proves that the challenged non-performance was due to such an impediment." In order to qualify for exemption under Article 79 CISG, the RESPONDENT will have to prove that both the RESPONDENT and Specialty Devices meet all the four requirements mentioned above.

Since no unified notion of "impediment" has been adopted by scholars or practitioners, the question whether an event represents an "impediment" should be assessed in light of the conditions required by the CISG and the accepted international practice. We have here an excellent opportunity for teams to engage in discussion of facts and work on alternative assumptions. There is also useful arbitral and judicial case law to be considered in this context. Objectively identifying the key impediment is a challenging task that would allow very good teams to excel. This is a technical legal determination and should be applied as such. Then the factual and legal causation ought to be demonstrated.

What losses may be recoverable? Is CLAIMANT entitled to damages amounting to USD 670,600.

The loss incurred by CLAIMANT can be recovered if it is a consequence of RESPONDENT's breach of the Contract; these losses must also be reasonably foreseeable to RESPONDENT at the time of contracting. Pursuant to Articles 45(1)(b) and 74 CISG, is entitled to recover the full extent of its loss.

The CLAIMANT will have to show that the RESPONDENT should have been aware that the breach would result in the CLAIMANT's liability to third parties. It should further argue that the CLAIMANT's loss was foreseeable at the time of conclusion of the agreement. The CISG operates on the basis of full compensation. CISG identifies the type of damages to which an injured party is entitled and sets forth a standard limiting their recovery. It follows that any type of damages, if it results from a breach of contract would be covered. The damage from which a party can recover is limited to the damage which the party in breach could or should have foreseen. The principle of full compensation allows for the recovery of consequential as well as incidental loss, as long as the loss is foreseeable and caused by the breach of contract.

Under Article 77 CISG, a party relying on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit and such expenses reasonably incurred in attempting to reduce the harm. Hence the CLAIMANT must

establish that the expenses it incurred for the purpose of avoiding or reducing harm, fall within the range of damages covered by Article 74 to which the CLAIMANT is entitled.

The RESPONDENT should have known that the CLAIMANT would expose itself to third party liability if it did not perform its obligations as agreed. The RESPONDENT should also have known the fact that the M/S Vis, when fully refurbished, would be used for the CLAIMANT's business. In the case of the sale of commercial goods to a merchant, it can always be assumed without any further indications that these goods would be used for commercial purposes. .

Non-performance on the part of the CLAIMANT would have caused the CLAIMANT to damage its future relationship with one of its most important clients. The CLAIMANT's business reputation would have suffered a certain damage since it is a company known for its top of the line service for demanding clients, resulting from a long successful relationship with its customers founded on its demonstrated ability to provide the customers with venues appropriate to its clients. A breach of contract would have evidenced the CLAIMANT's inability to perform the services with the quality it claims to be able to provide. A breach of contract with Corporate Executives would have led to a certain damage do the CLAIMANT's reputation which would have resulted in pecuniary loss. Such loss would have to be calculated as the difference between the value of present and former reputation / goodwill.

CLAIMANT will have to establish that the expense related to the lease of the substitute vessel is reasonable because this was the only real (or at least a good) option for CLAIMANT to perform its contractual obligations with third parties. A difficult task for the CLAIMANT is to establish whether the ex-gratia payment was a necessary measure to mitigate further losses and a measure which was taken in a reasonable fashion.

What is the Impact of the Alleged Bribery?

This question relates to the impact on this Arbitration of the bribery of Mr Goldrich's assistant. It can be argued either way, i.e. either it is irrelevant to this Arbitration or it does taint the lease contact and as such may affect enforceability of claims under this contract.

The CLAIMANT will have to argue and show that the CLAIMANT cannot be held liable for any actions that have taken place without its knowledge or consent because the CLAIMANT had no control or supervision over the broker’s actions during the negotiations or after the conclusion of the Lease contract; and the CLAIMANT did not participate in any bribery. Here we have another excellent opportunity for teams to argue on the facts and the law.

Indeed, the broker was mandated by CLAIMANT to secure a substitute vessel for the purposes of holding the conference of Corporate Executives. He acted as an intermediary having no power to represent and bind the CLAIMANT. The fact that the broker did not obey the law in the exercise of his profession cannot take to the conclusion that the CLAIMANT committed bribery. Even if the tribunal were to find that the relation between CLAIMANT and broker was based on agency principles and thus the broker could bind the CLAIMANT by

his actions, different case law have held that broker cannot bind the principal where the person with whom the agent contracts knows that the agent is engaged in self-dealing or acted against principle's interests.

There is as such an argument as to whether the payment by the broker qualifies as bribery or not. Due to the significance of the offence, bribery has to be proven beyond doubt (*Hilmarton v OTV*) and the offenders positively identified. On the facts, CLAIMANT was not even aware of the payment made by the broker after the contract with Mr Goldrich was concluded. The broker and the personal assistant kept their illegal business hidden from CLAIMANT and Mr Goldrich in the mutual understanding that they were engaged in a self-dealing and not representing interests of their principals. CLAIMANT was not aware of the fact of the alleged bribery. In addition, Mr. Goldrich was not aware of his personal assistant's actions and as soon as he realised that his personal assistant gained profit from them, he immediately reported those incidents to the local authorities. The assistant was subsequently convicted of receiving the bribe described in the statement of defence. (Clarification 26)

CLAIMANT considered this USD 50,000 payment only as a "success fee" and nothing more. The fact that the payment of USD 50,000 was made by the CLAIMANT to his broker after signing of the Leasing Contract, but not before, would be a strong argument to the effect that this money was a success fee for the broker, but not a bribe to be transferred to Mr. Goldrich's personal assistant.

CLAIMANT would have in conclusion to show that RESPONDENT'S argument on bribery has no express legal basis under the law applicable to the contract. The broker's success fee and the other expenses "associated" with the Lease Contract are allowable items of damage. Then the burden of proof will shift to the RESPONDENT who will have the task of proving the bribery.

This is not intended as an exhaustive analysis of the problem, merely am indicative list of issues to be discussed in written submission by teams. One should appreciate reasoned and reasonable creativity and ideas beyond those in this limited analysis.