Twenty Fourth Annual Willem C. Vis International Commercial Arbitration Moot

ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS

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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 Vis Moot web site, https://vismoot.pace.edu/site/24th-vis-moot/the-problem. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No 2 and subsequent comments.

This analysis of the Problem is primarily 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 this analysis to their teams ***before*** the submission of the Memorandum for RESPONDENT.

The analysis will be sent to all teams after all Memoranda for RESPONDENT have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. For that reason, this analysis often does not more than merely flag the issue without mentioning the arguments for or against a certain position. It contains no full analysis of the problem.

All arbitrators should be aware that the legal analysis contained herein may not be 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. The amount of issues that arise out of the fact situation makes it necessary for the teams to take a decision which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

The Facts

On 31 May 2016, Mr Fasttrack sent a Request for Arbitration to the President of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) for his client, Wright Ltd (CLAIMANT) raising claims against SantosD KG (RESPONDENT).

CLAIMANT is a highly specialized manufacturer of fan blades for jet engines, incorporated in Equatoriana.

RESPONDENT is a medium sized manufacturer of jet engines, incorporated in Mediterraneo. Until 2010, CLAIMANT and RESPONDENT were both subsidiaries of Engineering International SA, a multinational based in Oceania and active in various fields of engineering. Following the financial crisis in 2008 and the need to restructure its financing, Engineering International SA divested itself of several of its previously held subsidiaries to reduce its debts and to concentrate on its core business. In June 2010, CLAIMANT was sold to CLAIMANT's present parent company, which was then renamed Wright Holding PLC. RESPONDENT was sold one month later to SpeedRun, a Private Equity Fund.

At the time of their sale in 2010, CLAIMANT and RESPONDENT were in negotiations to jointly "develop" a new fan blade for the next generation of RESPONDENT's high-spec jet engine, JE 76/TL 14b. The fan blade was to be based on CLAIMANT's newest model of swept fan blades, the TRF 192, which had been released few months earlier. The engine was to be developed for use in the newest version of the signature executive line 100 jet of Earhart SP ("Earhart"), a world-wide operating aircraft manufacturer for medium size and range passenger and business jets.

The TRF 192-I was to be developed jointly under the technical leadership of CLAIMANT. RESPONDENT agreed to buy at least 2,000 of the swept fan blades in the first year. At the time the Parties entered into the contract, the final development and production costs for the new blade were not yet certain. Nevertheless, RESPONDENT insisted on fixing a maximum price to be paid, in order for it to be able to make a binding offer for the engine to Earhart (Claimant's Exhibit C 1). To reflect the uncertainty as to the actual production cost for the blades and to share the risks resulting from that the Parties agreed on a flexible price structure for the fan blade. It was determined largely by CLAIMANT's production costs but provided for a maximum price to ensure, as far as possible, that both Parties would generate a profit from the overall transaction and that RESPONDENT could already at that stage offer the engine at a largely fixed price to Earhart. Furthermore, RESPONDENT insisted on a price in US$ though CLAIMANT's production costs would be incurred in Equatorianian Denars (EQD).

In their Development and Sales Agreement (DSA) of 1 August 2010 (Claimant's Exhibit C 2) RESPONDENT ordered 2,000 swept fan blades, model TRF 192-I, from CLAIMANT for a price per blade between US$ 9,975 and US$ 13,125. The price range in Section 4 DSA was determined on the basis of an estimate by CLAIMANT about the likely cost per blade to which a certain profit was to be added. This profit was to decrease with the increase of the costs. Given a production cost of US$ 9,500 per blade a profit of 5% would be added. However, that profit component in the price would reduce to 0% if the unit-cost per blade was US$ 13,125 or higher. US$ 13,125 was the maximum price RESPONDENT would be required to pay per blade under normal circumstances. According to the agreed risk sharing structure of the agreement CLAIMANT had to bear the risk that the production cost would be actually above that maximum price, subject to the ordinary hardship defence.

On the basis of its recent experience with the TRF 192, CLAIMANT estimated that the production costs per blade would be around EQD 20,000. That would have been around US$ 10,000 on the then prevailing exchange rate, which had largely stayed the same for the last three years fluctuating between US$ 1 = EQD 2.00 and US$ 1 = EQD 2.02. Section 4 DSA contained, however, no rule as to the applicable exchange rate.

As already indicated during the negotiations of the Development and Sales Agreement, RESPONDENT subsequently decided to order the same number of clamps needed for connecting the blades to the shaft of the fans. As suggested by RESPONDENT the Parties added a handwritten addendum onto the original contract which provided under the heading "Addendum of 26 October" as follows (Claimant's Exhibit C 2):

> *The Buyer may request the Seller to produce and deliver 2,000 clamps to attach the fan blades to the fan shaft. The Price for the clamps shall be on a cost coverage base and be paid in US$.*
>
> *Other terms as per main Agreement.*
>
> *The exchange rate for the agreement is fixed to US$ 1= EQD 2.01.*

The Parties were successful in improving the TRF 192 so that the new TRF 192-I gave the required noise reduction. CLAIMANT delivered the fan blades and the clamps on 14 January 2015 to RESPONDENT as per contract and attached invoices for both goods, an invoice of US$ 20,438,560 for the fan blades and an invoice of US$ 183,343.28 for the clamps. In both cases the fixed exchange rate of US$ 1 = EQD 2.01 from the Addendum was applied to convert CLAIMANT's costs into US$. The costs incurred for the production of each fan was EQD 19,586 or US$ 9,744.28 when converted on the basis of the fixed exchange rate. Between the conclusion of the Addendum and the production of the fans the conversion rate had, however, fallen considerably. Had CLAIMANT applied the conversion rate at the time of production of the blades, which was US$ 1 = 1.79 EQD the costs in US$ would have been 10,941.90 which would have resulted in a contract price of US$ 22,723,800 for the fan blades.

On 15 January 2015, Mr Cyril Lindbergh, RESPONDENT's Chief Financial Officer, e-mailed Ms Amelia Beinhorn, the Chief Operating Officer of CLAIMANT, internally responsible for the TRF 192-I project, that he had effected payment of US$ 20,438,560 and US$ 183,343.28 to the CLAIMANT's account at the Equatoriana National Bank (Claimant's Exhibit C 3) for the fan blades and clamps respectively.

Immediately after receiving the e-mail, Ms Beinhorn contacted Mr Lindbergh to inform him that the invoice for the fan blades was based on a mistake in their accounting department applying the fixed exchange rate for the clamps also to the fan blades. She made clear that in CLAIMANT's view, the fixed exchange rate in the Addendum only applied to the clamps but not the fan blades. For the latter the costs incurred were to be converted on the basis of the exchange rate at the time of production, resulting in an overall purchase price for the 2,000 fan blades of US$ 22,723,800 (Claimant's Exhibit C 5). Ms Beinhorn asked for the payment of an additional amount of US$ 2,285,240 to CLAIMANT's account.

On 29 January 2015, US$ 20,336,367.20 was credited to the CLAIMANT's account at the Equatoriana National Bank. It subsequently turned out that the Equatoriana Central Bank had deduced a fee of 0,5%, i.e. US$ 102,192.80, from the amount transferred by RESPONDENT for the fans for a money-laundering investigation per Section 12 of Regulation ML/2010C (Claimant's Exhibit C 8).

On 9 February 2015, Ms Beinhorn notified Mr Lindbergh by e-mail that CLAIMANT was demanding the outstanding payment of US$ 2,387,432.80 by 4 March 2015 (Claimant's Exhibit C 6).

In his reply of 10 February 2015, Mr Lindbergh denied that any additional purchase price payment was due (Claimant's Exhibit C 7). He reiterated RESPONDENT's view that the costs per fan blade amounted to only US$ 9,744.28, insisting again on the application of the fixed exchange rate set out in the Addendum to the Development and Sales Agreement for converting the cost incurred by CLAIMANT in EQD into US$. Furthermore, Mr Lindbergh stated that RESPONDENT was not aware of any reason why US$ 102,192.80 had been deducted from the US$ 20,438,560 it had transferred.

In line with the requirements in Section 21 DSA, CLAIMANT tried to resolve the dispute amicably. CLAIMANT made several offers combining a reduction in the sales prices for the 2,000 fan blades directly covered by the Development and Sales Agreement with a firm commitment for further fan blades to be delivered within the next five years. RESPONDENT, however, insisted on costs of US$ 9,744.28 per fan blade.

In reaction CLAIMANT sent its Request for Arbitration on 31 May 2016. The Request for Arbitration, however, deviated in two respects from the requirements of the CAM-CCBC Rules.

The attached power of attorney was not from CLAIMANT but from its parent company Wright Holding PLC. Furthermore, instead of R$ 4,000 only R$ 400 were originally paid. In its letter of 1 June 2016, the President of CAM-CCBC informed CLAIMANT that before RESPONDENT would be notified about the Request for Arbitration these deficiencies should be remedied and granted CLAIMANT 10 days to comply with the requirements of Article 4.1. CAM-CCBC Rules.

On 7 June 2016, Mr Fasttrack sent the required power of attorney from CLAIMANT and informed CAM-CCBC that the outstanding amount had been paid.

With its Request for Arbitration CLAIMANT asked for the payment of what it considered to be the still outstanding purchase price. In its view, the fixed exchange rate of US$ 1= EQD 2.01 contained in the Addendum applied only to the clamps but not to the fan blades. The price for those were to be calculated on the basis of the current exchange rate which is US$ 1 = EQD 1.79. Consequently, in CLAIMANT's view, the purchase price under Section 4 DSA was US$ 22,723,800 and not US$ 20,438,560, which RESPONDENT wanted to pay. Furthermore, CLAIMANT was of the view that RESPONDENT had to bear the levy of 0,5% charged by the Equatoriana Central Bank.

Statement of Relief sought:

More specifically, CLAIMANT raises the following claims:

1. to order RESPONDENT to pay the still outstanding purchase price in the amount of US$ 2.285.240 and
2. to order RESPONDENT to pay the bank charge in the amount of US$ 102,192.80.

RESPONDENT asks the Arbitral Tribunal

1. to reject the claims.
2. to order CLAIMANT to provide Security for Costs in the amount of minimum US$ 200,000.

RESPONDENT submits that CLAIMANT's claims are already inadmissible since the arbitration proceedings were initiated too late. Pursuant to Section 21 DSA the arbitral proceedings had to be initiated "within 60 days after the failure of the negotiation". According to RESPONDENT, the time limit started to run from 1 April 2016 onwards, when CLAIMANT declared the negotiations to be failed (Respondent's Exhibit R 3). Consequently, the arbitration proceedings had to be initiated on 31 May 2016 at the latest. The Request for Arbitration submitted by CLAIMANT on 31 May 2016, however, was not sufficient to start arbitral proceedings as it did not comply with the requirements of Article 4.1 and 4.2 CAM-CCBC Rules. Consequently, the arbitration proceedings only started when CLAIMANT remedied the effects, i.e. at the earliest on 7 June 2016 and thereby too late.

In addition, RESPONDENT considers the claims to be unjustified. In its view, the Parties had agreed in the Addendum to the Development and Sales Agreement on a fixed exchange rate of US$ 1 = 1.79 EQD for the cost element of the price formula for the clamps as well as for the fan blades. Thus, the price for the fan blades was only US$ 20,438,560.

In relation to the 0,5% levy by the Equatoriana Central Bank for the examination of its Financial Investigation Unit under Section 12 Regulation ML/2010C, RESPONDENT submits that the levy has to be borne by CLAIMANT. It is no part of the ordinary bank charges for payments but based on a very specific public law regulation in Equatoriana where CLAIMANT has its place of business. No comparable rule exists in Mediterraneo or any other country known to RESPONDENT. Had RESPONDENT been aware of the levy it would either have taken the levy into account in the price calculations or would have insisted on the inclusion of an explicit provision into the contract that CLAIMANT should bear this extraordinary charge arising from circumstances which are much more associated with CLAIMANT than with RESPONDENT. CLAIMANT by contrast knew of the levy or at least ought to have known about it. Enquiries with other engine producers made by RESPONDENT after the initiation of this arbitration have revealed that the levy has been charged by the Equatoriana Central Bank already before at least on two occasions where payments had been made to CLAIMANT. In one of these cases, CLAIMANT also paid the levy.

The Request for Security for Costs pursuant to Article 8 CAM-CCBC Rules was submitted on 6 September 2016 following an information in the Carioca Business News (Respondent's Exhibit

R 6) that CLAIMANT had not complied with another CAM-CCBC award. According to RESPONDENT, that information justified the conclusion that CLAIMANT might also not comply with a likely award on costs rendered in favour of RESPONDENT if CLAIMANT's claims should be rejected. Furthermore, the non-compliance with the other award in combination with further information about CLAIMANT's financial situation, which allegedly had been presented by CLAIMANT too positively, raised doubts as to the financial ability of CLAIMANT to fulfill such an award.

CLAIMANT asks the Arbitral Tribunal to reject such request. In its view, the claim was not mentioned in the terms of reference and RESPONDENT had failed to submit any evidence about exceptional circumstances which could justify the granting of an order for security for costs. CLAIMANT explained the non-compliance with the other award with its willingness to set off the claim with another claim for a larger amount owed to CLAIMANT's parent company.

The Parties agreed that the Request for Security for Costs could be decided jointly with the other requests as CLAIMANT's chairman was willing to undertake a personal guarantee ensuring compliance with an order should it be granted.

The Issues

In light of the above agreement, the Arbitral Tribunal has set forth the issues to be decided in the first part of the proceedings, and therefore at issue in the Moot, in Procedural Order No 1 para. 5. It has ordered the Parties to address in their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the following issues:

a. Does the Tribunal have the power and, if so, should it order CLAIMANT to provide security for RESPONDENT's costs?
b. Are CLAIMANT's claims admissible or have they been submitted out of time?
c. Is CLAIMANT entitled to the additional payments from RESPONDENT in the amount of
    i. US$ 2,285,240.00 for the blades based on the present exchange rate (US$ 1 = EQD 1.79)?
    ii. US$ 102,192.80 for the fees deducted by the Equatoriana Central Bank?

It was left to the Parties to select the order in which they address the various issues. It was, however, explicitly stated that no further questions going to the merits of the claims should be addressed.

General Considerations

The case includes several problems which are regularly encountered in international business transactions such as exchange rate fluctuations, changes in legal provisions, and unclear contract terms requiring interpretation. Not all of these problems are in the end relevant for the "solution" of this case and will have to be discussed in the written submissions or the oral pleadings. That applies, for example, to the question of which version of the UNIDROIT Principles has to be applied as the relevant provisions are identical in the two versions which could be applied.

The broad topics to be discussed by the students are the following:

1) In relation to arbitration:
    a. The interpretation of the time limit for initiating arbitral proceedings and the requirements for a valid commencement of arbitral proceedings under the CAM-CCBC Rules, and
    b. Whether the Arbitral Tribunal has the power to order security for costs and whether it should exercise such power in the present case.
2) In relation to the CISG:
    a. How the Parties' contractual agreement has to be interpreted taking into account all circumstances of the case and what is required for a practice established between the Parties.
    b. Who has to bear extraordinary levies imposed in the buyer's country of origin which have primarily a public law nature.

In the case, the procedural problem of security for costs is closely interwoven with the substantive problem. The likely outcome of the case on the merits is an important consideration for the Arbitral Tribunal in exercising its discretion to order security for costs. Consequently, it can make sense to deviate from the "normal" order (and the order of the questions) to first discuss procedural issues and to deal with the Request for Security for Costs only after the merits of the case have been discussed. Procedural Order No 1 left it to the Parties "to decide in which order they address the various issues". The following remarks are merely intended to highlight the legal issues arising from the problem. They do not suggest any order in which issues should be treated. They are deliberately only based on a distinction between procedural and substantive issues and follow the order of the questions posed by the Tribunal. It is for the Arbitrators to evaluate whether the Parties have addressed the problems in a convincing and effective order in their written submission and to suggest an order for the oral hearings should the Parties not have agreed upon an order.

Security for Costs: Procedural Order No 1 para. 5 (1a)

1. Background

RESPONDENT based its Request on Security for Costs on Article 8 CAM-CCBC Rules. It provides in its relevant first paragraph as follows:

> "Unless the parties have otherwise agreed, the Arbitral Tribunal can grant provisional measures, both injunctive and anticipatory, that can, at the discretion of the Arbitral Tribunal, be subject to the provision of guarantees by the requesting party."

The primary justification given by RESPONDENT for the request was a report in the Carioca Business News of 5 September 2016 about CLAIMANT's failure to comply with an award rendered in another CAM-CCBC arbitration and resulting speculations as to CLAIMANT's financial situation (Respondent's Exhibit R 6). According to the paper, the non-compliance with the award, which had been made public by the CAM-CCBC under Article 11.2 CAM-CCBC Rules, "refuels concerns about the financial situation of Wright Ltd.". In addition to the non-compliance with the award, the concerns are based on two other pieces of information. First, there is the outcome of an investment arbitration for the expropriation of a subsidiary where only compensation in the amount of US$ 12 million was granted instead of the US$ 203 million allegedly claimed. While the award had already been rendered on 7 June 2010 the information of the limited success in the arbitral proceedings became only known to the public in the beginning of 2016. The information and CLAIMANT's refusal to comment on the information resulted in a serious drop in the value of CLAIMANT's shares. Second, CLAIMANT had approached several third party funders to fund the arbitral proceedings against RESPONDENT, however, without success.

2. The Power to Grant Security for Costs

The first issue which might be discussed is whether the Arbitral Tribunal has the power under the CAM-CCBC Rules or the UNCITRAL Model Law to grant orders for security for costs. There is no such explicit power either in the CAM-CCBC Rules or the UNCITRAL Model Law. In the CAM-CCBC Rules there is only the general power of the Arbitral Tribunal to grant "provisional measures" under Article 8 CAM-CCBC Rules. In the UNCITRAL Model Law Article 17 (2)(c) ML explicitly mentions as a possible measure to be granted by the Arbitral Tribunal to "provide a means of preserving assets out of which a subsequent award may be satisfied". While the main focus is not the award on costs the wording could be sufficiently broad enough to cover an order for security for costs. The same applies to the broadly worded Article 8 CAM-CCBC which also most likely allows such measures. The drafting history of the Model Law as well as the fact that some Model Law Countries have explicitly included a power to order security for costs leaves room for discussion of whether such a power exists if not explicitly mentioned.[1]

In so far as the ordering of security for costs in arbitration proceedings has been considered to constitute a problem, the issue was not so much the existence of the power as such but rather whether the Tribunal should exercise it in the present case.

In the present case CLAIMANT also challenges the timeliness of RESPONDENT's Request for Security for cost, in particular, that it was only raised after the terms of reference were signed. If one considers the report in the Carioca Business News to be the triggering event for the request, it was only published after the Terms of Reference were signed. Whether in such cases Article 4.21 CAM-CCBC Rules constitutes an obstacle to a filing for interim relief seems very doubtful.

3. Exercise of the Power

[1] See Greenberg, Kee & Weeramantry, International Commercial Arbitration – An Asia Pacific Perspective, Cambridge 2011, paras 7.205 - 7.212.

Thus, the main focus will be on the discussion of whether the Arbitral Tribunal should grant such measures. Article 8 CAM-CCBC Rules is silent upon the conditions under which a provisional measure, including an order for security for costs, can be granted. It seems very likely that the Arbitral Tribunal has considerable discretion in this regard, which is explicitly mentioned in relation to its power to make the granting of the requested measures dependent on guarantees by the requesting party.

The UNCITRAL Model Law by contrast provides clearer guidance as to when an arbitral tribunal should order interim relief. Pursuant to Article 17A ML the requesting party has to satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

In connection with orders for security for costs, it is often additionally required that the financial situation of the party ordered to provide security must have deteriorated after the parties entered into an arbitration agreement and before the request for the order. The underlying rationale is that a party which agrees to arbitrate with another party does so in principle unconditionally, i.e. without requiring an additional security. Thus, it may then only ask for such security if the financial situation has changed considerably after the parties entered into the contract.

The case contains a considerable amount of facts which can be weighed in determining whether or not the Arbitral Tribunal should exercise its discretion.

According to RESPONDENT, CLAIMANT's non-compliance with the other award as well as the information about CLAIMANT's financial situation, raise considerable concerns as to CLAIMANT's willingness and ability to comply with any award on costs which RESPONDENT will obtain, in case the claims are rejected, what RESPONDENT considers to be very likely. RESPONDENT submits that the information about CLAIMANT's financial situation, in particular, the largely unsuccessful investment arbitration, was not available to RESPONDENT at the time the arbitration agreement was concluded on 1 August 2010. During the negotiation phase, CLAIMANT allegedly always created the impression that a compensation of at least US$ 100 million would be granted in the arbitration and did not inform RESPONDENT about the actual compensation of US$ 12 million after the award had been rendered.

CLAIMANT, by contrast, invokes the fact that its financial situation has not deteriorated considerably since the time the Parties entered into the contract. In the supporting witness statement (Claimant's Exhibit C 9) CLAIMANT's Chief Financial Officer Ms Iliena Jaschin gives details as to the exact financial situation of CLAIMANT. First, she explained the background to CLAIMANT's search for outside funding for the arbitration. That was due to the fact that the recent development of a new fan blade largely depleted CLAIMANT's liquid means resulting in a temporary liquidity squeeze. That is allegedly a situation which is normal for companies like CLAIMANT and a comparable situation also existed at the time of contracting. Second, she explained that while the expectations for a compensation in the investment arbitration may have been higher only an amount of US$ 15 million was inserted into the balance sheet. That raises the question whether expectations or the actual balance sheet are relevant for comparing the financial situation of CLAIMANT.

In addition, CLAIMANT alleges that any lack of funding is primarily due to the failure of RESPONDENT to pay the full price for the goods.

CLAIMANT's justification for the non-compliance with the other award is that the award creditors owe a greater amount to CLAIMANT's parent company as damages for non-conforming goods. CLAIMANT wants to set-off that claim, which is presently litigated in the courts of Ruritania against the award.

Further circumstances which may become relevant in discussion whether an order should be granted as the requirements under Article 17A ML are met are the following:

- Information contained in the excerpts from the balance sheet (PO 2 para 28)
- The application and rejection of third party funding and the purpose of such funding
- Partial payment of filing fee

- Information by CAM-CCBC under Article 11.2 CAM-CCBC Rules despite the alleged set-off opportunity
- Future development of company – uncertainty of such development

<u>Admissibility of the Claims</u>: Procedural Order No 1 para. 5 (1b)

1. Background

The Dispute Resolution Clause included into the Development and Sales Agreement provides in the pertinent part as follows:

> **Section 21: Dispute Resolution**
> All disputes arising out of or in connection with this Agreement shall be settled amicably and in good faith between the parties. If no agreement can be reached each party has the right to initiate arbitration proceedings within 60 days after the failure of the negotiation to have the dispute decided by an arbitrator. The arbitration shall be conducted under the Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC") and in line with international arbitration practice.

The clause was taken from a previous contract between the Parties and was the standard dispute resolution clause used in all contracts between companies belonging to the Engineering International SA group of companies. There is no further information available about the origin or the purpose of the clause.

Thus, the first question to be answered is that of the consequences of an expiry of the 60 days period, i.e. how the dispute resolution clause has to be interpreted. The wording of the clause is silent as to that issue so that the purpose of the clause should be considered. As no specific information is given as to the purpose pursued with the clause by one of the Parties, the general purpose of such time limits and their interpretation in practice may become relevant. The most likely interpretation seems to be that the expiry of the time limit renders the claims inadmissible, not only in arbitration but also in court proceedings.

That raises the second question as to whether CLAIMANT has complied with the time limit. According to RESPONDENT, the time started to run on 1 April 2016. At that date, Ms Beinhorn sent an e-mail to Mr Lindbergh stating that the outcome of the last meeting shows "that it is presently not possible to find an amicable solution" and that CLAIMANT had instructed its lawyer to take the necessary steps to initiate arbitration (Respondent's Exhibit R 3). At the same time, CLAIMANT states in the e-mail that it remains open to negotiations should RESPONDENT be willing to reconsider its position. Consequently, there is at least some room for an argument whether or not the period started on 1 April 2016.

If one considers 1 April 2016 to be the relevant starting point the 60-days period expires on 31 May 2016. On that day, CLAIMANT sent its Request for Arbitration to CAM-CCBC, however, failing to comply with the requirements of Articles 4.1 and 4.2 CAM-CCBC Rules. It did not contain the required power of attorney by the CLAIMANT and the Registration Fee was not paid in full. Consequently, the Secretariat first asked CLAIMANT to remedy the defects before it sent the Request for Arbitration to RESPONDENT (Letter of 1 June 2016/p. 19). Both defects were only remedied on 7 June 2016 after the contractual time limit expired. Thus, the question arises whether the "incomplete" Request for Arbitration was sufficient to stop the time limit from expiring. That depends again on the interpretation of the Dispute Resolution Clause, whether it requires proper commencement under the CAM-CCBC Rules. Should that be the case the question arises whether the incomplete Request for Arbitration was sufficient to commence the arbitration in the sense of Article 4 CAM-CCBC Rules. The wording of CAM-CCBC letter of 1 June 2016 to the CLAIMANT is not conclusive on the issue as it avoids any statement as to the commencement of the arbitration. In a recent commentary on the CAM-CCBC rules[2] the risk that non-compliance with formalities may result in the loss of rights which may become statute barred is explicitly mentioned.

Circumstances which might be relevant in dealing with the issue are inter alia:

- the lack of a power of attorney for the CLAIMANT at the time of submitting the Request for Arbitration – the submission of a power of attorney by the parent company, which is, however a different legal entity
- the fact that CAM-CCBC made service of the Request for Arbitration dependent on compliance with the formalities
- wording of the disputes resolution clause "initiate".

[2] Straube/Finkelstein/Filho (eds.), The CAM-CCBC Arbitration Rules – A Commentary, 2016, Art. 4, para 4.1.

<u>Relevant Exchange Rate</u>: Procedural Order No 1 para. 5 (1 c. i.)

1. Background

The fluctuation of exchange rates constitutes a major problem for parties in international transactions. In most cases, it is clear which party must bear the risk of such developments and to protect or insure against such risks. In the present transaction, however, the Parties have agreed on a formula for the determination of the price which is not completely clear as to who bears the risk for the exchange rate fluctuations which occurred between the conclusion of the Development and Sales Agreement and the production of the fan blades. Those fluctuations resulted in a price difference of US$ 2,285,240 which form the basis of the claim. The exchange rate risk results from the fact that the contract price is calculated in US$ while the costs for the production of the fan blades, constituting a major element of the price formula, were incurred in EQD.

At the time of contracting, the fan blade had not yet been developed and CLAIMANT could only estimate the possible production costs per blade. To accommodate RESPONDENT's wish for a maximum price and to allocate the production risk appropriately between them the Parties agreed on the following price formal in Article 4 DSA:

Section 4 PURCHASE PRICE

1. The purchase price is calculated on a cost-plus basis according to the following formula

- Production Costs per blade ≤ 9,500 US$: 9,975 US$
- Production Costs per blade: 9,500 – 10,500 US$: Costs + 475 US$ (5% of 9,500)
- Production Costs per blade: 10,501 – 11,500 US$: Costs + 420 US$ (4% of 10,500)
- Production Costs per blade: 11,501 – 12,000 US$: Costs + 345 US$ (3% of 11,500)
- Production Costs per blade: 12,001 – 12,500 US$: Costs + 240 US$ (2% of 12,000)
- Production Costs per blade: 12,501 – 13,000 US$: Costs + 125 US$ (1% of 12,500)
- Production Costs per blade ≥ 13,125 US$: 13,125 US$

The minimum price per fan blade irrespective of production costs is US$ 9,975 while the maximum price to be charged per fan blade is US$ 13,125.

Should the production costs per fan blade exceed US$ 13,125 due to extraordinary unforeseeable circumstances and result in unbearable hardship for the Seller the Parties will enter into good faith negotiations to determine a price which is financially acceptable to both parties.

A clause with a comparable structure, i.e. a cost plus profit-formula, had already been used in two previous agreements between the Parties in 2003 and 2005. In both cases, as well as in the present case the Parties did not discuss the exchange rate to be applied to convert the costs incurred in EQD into US$.

The first specific contractual provision addressing the exchange rate can be found in the Addendum added to the contract on 26 October 2010 which provided for a fixed exchange rate of US$ 1= EQD 2.01. Whether that exchange rate applies only to the clamps purchased under the Addendum or also applies to the fan blades is disputed between the Parties and is one of the central questions to be resolved by contract interpretation.

There are two separate interpretation questions which are to be answered by applying primarily Article 8 CISG, with possible references to Article 4 UNIDROIT Principles. The first concerns the interpretation of Article 4 DSA as originally agreed upon. In that context, the clause concerning the fixed exchange rate may have relevance as a "subsequent conduct of the parties" in the sense of Article 8 (3) CISG evidencing the Parties' intention at the time they entered into the Development and Sales Agreement. The second concerns the interpretation of the Addendum itself, i.e. whether the exchange rate clause was intended to change a previous, eventually deviating agreement of the Parties under the Development and Sales Agreement.

2. Interpretation of Article 4 DSA

Article 4 DSA is silent as to the exchange rate which is relevant for converting the costs incurred in EQD into US$, i.e. whether it is the exchange rate at the time the contract is concluded, i.e. US$ 1 = 2.00 EQD, or the exchange rate at the time the fan blades are produced, i.e. US$ 1 = 1.79 EQD. Consequently, the provision has to be interpreted in accordance with

Article 8 CISG, which provides:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

In the context of the interpretation also some of the considerations listed in Article 4 UNIDROIT Principles may become relevant.

CLAIMANT relies for its interpretation of Article 4 that the conversion of the costs should be done on the basis of the exchange rate at the time of production, i.e. US$ 1 = 1.79 EQD, primarily on the purpose of the clause, as described in particular in Claimant's Exhibit C 1. Only if the costs are converted at the current rate at the time they are incurred CLAIMANT can be sure to recover its actual costs, which was one of the purposes of the price formula.

RESPONDENT, by contrast, relies primarily on the drafting history and previous practice of the Parties. In relation to the drafting history, RESPONDENT invokes a meeting in November 2009 convened by the then mother company of both Parties, Engineering International SA. At that meeting, the potential sale of RESPONDENT was discussed and one of the measure to be taken was to "de-risk" RESPONDENT from all currency risks resulting from existing contracts by agreeing on a fixed rate (Respondent's Exhibit R 1). Concerning previous practice, RESPONDENT relies on the two other contracts which had used a comparable price formula and from which the formula was taken. In both cases, the exchange rate at the time of contracting had been used for the conversion of the costs elements. It seems, however, doubtful whether that can be considered as a "practice which the parties have established between themselves" in the sense of Article 8 (3) CISG. In both cases, the circumstances were different in so far as the Parties still belonged to the same group of companies which used exchange rate fluctuations to allocate profits for tax purposes. Furthermore, the fluctuations were much smaller.

Comparable objections can be raised against the “de-risking” argument. The “de-risking” strategy directly concerned only existing contracts with other companies belonging to the same group. At the time the contract was negotiated and concluded, CLAIMANT itself was up for sale so that the de-risking considerations applied with the same force to CLAIMANT who had an interest in applying the current rate.

The case contains numerous other facts which may play a role in interpreting the contract under Article 8 CISG or Article 4 UNIDROIT Principles. Circumstances which may be relevant in the interpretation of the contractual provisions are:

- The invoice issued by CLAIMANT for the clamps was originally based on a calculation adopting the fixed rate agreed upon in the Addendum – there may be plausible explanations for the mistake as the invoice was issued by someone not involved in the transactions (Claimant’s Exhibit C 4)
- Long lasting stability of the exchange rate
- Exchange rate at the time of anticipated contract conclusion US$ 1 = 2.01 EQD; exchange rate at the actual time of contract conclusion US$ 1 = 2.00 EQD
- General principles of risk allocation

Should the interpretation of Article 4 DSA lead to no result, the question as to the relevant exchange rate, in principle, has to be answered either on the basis of usages applicable in that area of trade or on the basis of the dispositive provision of the relevant law, i.e. the CISG or the UNIDROIT Principles.

3. Interpretation of the Addendum – Amendment of the DSA (Art. 29 CISG)

Irrespective of the original agreement between the Parties as to the applicable exchange rate, if any, RESPONDENT can argue that the Addendum supplemented or amended the original Development and Sales Agreement in relation to the exchange rate. In particular, if no agreement had been reached before, it made sense to agree upon an exchange rate after the Parties no longer belonged to the same group of companies.

The following circumstances may inter alia play a role in the Parties' arguments concerning a subsequent amendment:

- Form used: Addendum to the existing contract instead of new contract
- Suggestion by RESPONDENT – *contra proferentem* or interpretation against de-risking strategy
- Smaller value of clamp purchase
- Fixing of exchange rate for "agreement" instead of "addendum"
- Reference to "agreement" and "Agreement"

Deducted Fees for Money Laundering: Procedural Order No 1 para. 5 (1 c. ii.)

1. Background

On 15 January 2015, after the receipt of the first two invoices the day before, RESPONDENT informed CLAIMANT that it had made two payments to CLAIMANT's bank account mentioned in the DSA, one for the clamps in the amount of US$ 183,343.28 and one for the fan blades in the amount of US$ 20,438,560 (Claimant's Exhibit C 3). While the payment for the clamps was credited in full to CLAIMANT's bank account, the Equatoriana Central Bank subtracted a levy of 0,5% from the latter for the investigation of the Financial Investigation Unit for money laundering pursuant to Section 5 Regulation ML/2010C. The Parties are in dispute who has to bear such levy.

Article 4 (3) DSA contains a clear rule concerning the payment of "bank charges for the transfer of the amount" by providing:

> "The BUYER will deposit the purchase price in full into the SELLER's account at the Equatorianian National Bank, Ocean Promenade 3, Equatoriana, IBAN 1209 3456 6798; SWIFT EQXPL6. The bank charges for the transfer of the amount are to be borne by the BUYER."

The question arises whether that provision also applies to the levy and if not, which rules govern the levy. The levy is a particularity of Equatorianian law and not known in other countries, in particular not in Mediterraneo.

2. Interpretation of Article 4 (3) DSA

CLAIMANT considers the levy to be either covered by Section 4 (3) DSA or to fall within the costs associated with the payment of the purchase price which have to be borne by the buyer under the CISG.

RESPONDENT, by contrast, is of the view that the levy does not constitute a "bank charge for the transfer of the amount" in the sense of Article 4(3) DSA since it is not directly associated with the transfer of the amount but is for an investigation for money laundering. Furthermore, due to the peculiar public law nature of the levy RESPONDENT also considers it not to fall under the ordinary costs for the payment of the purchase price to be borne by the buyer. Instead, RESPONDENT wants to compare the situation with that for the conformity of the goods pursuant to Article 35. There, the seller has delivered conforming goods if they comply with the public law provisions of the seller's country while the public law provisions of the buyer's country only become relevant in special cases or where the buyer has informed the seller about them. An analogous application of these principles to the payment obligation would mean, pursuant to RESPONDENT's view, that it would not have to bear the charges which are due to unknown public law provisions in the seller's country of origin, such as the 0,5% money laundering investigation levy.

Whether such an analogy is possible seems doubtful, given the underlying rationale of the concepts as far as the conformity of goods is concerned. For a seller, it is not feasible to know all public law regulation in the buyer's country of origin while the buyer could easily inform the seller about them. The variety of possible charges, levies, and taxes for payments seems to be much more limited and with the Central bank there is usually also a central place for obtaining all information.

In case one considers the analogy to be possible the requirements are most likely met.

Furthermore, one could also consider the existence of a good faith duty to inform the buyer about such levies. RESPONDENT alleges that it would have taken the levy into account in its price calculations or in the contract had it been informed by CLAIMANT.

In dealing with the various arguments the following circumstances may be of relevance:

- CLAIMANT's knowledge about the levy from at least two contracts with other customers
- CLAIMANT's willingness to bear the levy in the contract with JetPropulse from Ruritania (Answer to Request, p. 26 para 19)
- The extraordinary nature of the levy which is not known in other jurisdictions and which is associated with an investigation into money laundering and not a charge for the "physical" transfer of the amount.