Twenty Second Annual Willem C. Vis International Commercial Arbitration Moot

Analysis of the Problem

For use of the Arbitrators

Organiszed by:
Association for the organisation and promotion of the Willem C. Vis International Commercial Arbitration Moot

And

Twelfth Annual
Willem C. Vis (East)
International Commercial Arbitration Moot
Hong Kong

Organized by:
Vis East Moot Foundation Limited

Introduction

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/22nd-vis-moot. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November including Procedural Order №.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 the analysis often does not more than merely flagging the issue without mentioning the arguments against or for a certain position or containing a 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 11 July 2014 Mr Fasttrack initiated arbitral proceedings with the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (ICC) for his client, Vulcan Coltan Ltd (CLAIMANT), against Mediterraneo Mining SOE (RESPONDENT). At the same time Mr Fastrack asked for an Emergency Measure pursuant to Article 29 ICC-Arbitration Rules preventing RESPONDENT "from disposing any of the 100 metric tons of coltan which are needed to fulfil the contract with CLAIMANT".

CLAIMANT is a broker of rare minerals, in particular coltan, based in Equatoriana. It is a 100% subsidiary of Global Minerals Ltd ("Global Minerals"), which brokers rare minerals world-wide and is based in Ruritania. CLAIMANT has been created by its parent company especially to enter the very difficult competitive market in Equatoriana. Equatoriana has a highly developed electronics industry which is responsible for 10% of the Equatoriana's GDP.

RESPONDENT is a state-owned enterprise based in Mediterraneo. It operates all the mines in Mediterraneo including the only coltan mine. In addition to coltan RESPONDENT extracts copper and gold.

Coltan is a mineral composed of columbite and tantalite. It is primarily used in the production of the tantalum capacitors which are found in many electronic devices. The market conditions for coltan are characterised by high volatility and instability. Times of oversupply are followed by times where it is even difficult to get sufficient coltan at all, in particular conflict free coltan. In the past, the volatility could be attributed to the release of major electronic innovations, like play consoles and smartphone additions. Increasingly also political crises influence the price of coltan. Some of the world's larger coltan deposits are found in conflict areas. Like many of its customers CLAIMANT is a Global Compact company. Therefore it only purchases conflict free coltan which considerably limits its choice of suppliers.

On 23 March 2014 Mr Storm, the Chief Operating Officer of Global Minerals, and Mr Summer, the Chief Operating Officer of CLAIMANT, approached Mr Winter, the general sales manager of RESPONDENT, to enquire about a delivery of 100 metric tons of coltan to CLAIMANT. The original proposal was that CLAIMANT would buy the coltan and get the same payment and delivery conditions as Global Minerals. The offer was inacceptable to RESPONDENT. In light of previous experiences with an insolvent subsidiary of Global Minerals in 2010, CLAIMANT's lack of assets and the difficult market in Equatoriana, RESPONDENT wanted to either contract directly with Global Minerals or at least some security for payment by them. In the end an agreement was reached providing for the purchase of 30 metric tons by CLAIMANT for US$ 45 per kilogram. The contract, which listed CLAIMANT and RESPONDENT as buyer and seller, was signed by them 28 March 2014 (Exhibit C 1). As requested by RESPONDENT, the contract was "Endorsed for Global Minerals" by Mr. Storm who signed directly below the signatures of the Parties. The parties did not discuss the exact legal nature of this "endorsement". As was stated in the witness statement of Winter (Exhibit R 1) RESPONDENT, while thinking that the endorsement made Global Minerals "at least a "quasi"-party [to the contract] responsible for the payment", was not really concerned about the Global Minerals exact legal status due to the existing other security for the price.

The price for the coltan was US$ 1,350,000 and was to be paid by an irrevocable letter of credit to "be established by the Buyer not later than fourteen days after the Buyer received the Notice of Transport in regard to shipment". The Notice of Transport had to be given once the agreed quantity of coltan became available for transport, but at the latest by 31 August 2014. During the negotiation CLAIMANT made clear that it was interested in delivery at an earlier time.

The contract furthermore contained the following arbitration clause:

> Art 20: Arbitration
>
> All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The seat of arbitration shall be Vindobona, Danubia, and the language of the arbitration will be English. The contract, including this clause, shall be governed by the law of Danubia.

RESPONDENT send the Notice of Transport (Exhibit C 2) on Wednesday, 25 June 2014. In the accompanying e-mail (Exhibit C 3) RESPONDENT informed the CLAIMANT and Global Minerals that one of its major customers had become insolvent and had defaulted on a purchase of coltan. As a consequence RESPONDENT had 150 tons coltan available at short notice and could also perform the contract with CLAIMANT earlier than originally anticipated.

On Friday, 27 June 2014 at 15:05 Ruritanian Standard Time ("RST"), Mr Storm sent a fax to RESPONDENT offering to take delivery of 100 metric tons, on the terms which had been offered

for such an amount during the original negotiations (Exhibit C 4). CLAIMANT presented that offer in its Request for Arbitration as "a favour" it wanted to do to RESPONDENT. According to RESPONDENT, however, the background of this offer was probably privileged information about the political situation in Xanadu which Mr Storm had most likely received from his brother, the Ruritanian Ambassador in Xanadu. Xanadu is one of the major producers of conflict free coltan and the Ambassador had been informed on Friday that the government would probably be dissolved over the weekend (Exhibit R 3).

Due to the time difference of 5 hours between RST, relevant for Equatoriana and Ruritania, on the one hand, and Mediterraneo Standard Time ("MST") on the other hand, the fax only arrived at 20:05 MST at RESPONDENT's office in Mediterraneo. By that time Mr Winter had already left the company. He only read the fax the next Monday; at which point the news about the failure of the government in Xanadu had spread and had led to nervous reactions on the market for Coltan resulting finally in a moderate price increase of 1 US$ at the end of Monday (PO 2 para 30).

Mr Winter was very annoyed by the actions of CLAIMANT which in his view tried to take advantage of privileged information to the detriment of its contractual partners. Consequently, and in light of the changed market situation, he made clear to his own personnel that he had no intention to accept the offer. Mr Winter did, however, not inform CLAIMANT officially of his intention to reject the offer. As it turned out later during the proceedings the information about the rejection of the offer had, however, been passed on by Mr Winter's assistant Ms Masrov to Mr Rüthli a friend working at the time for CLAIMANT in a private telephone call (Exhibit R 2). Mr Rüthli, who had been fired directly after the telephone call, had not passed that information to Mr Storm or any other person at CLAIMANT (PO 2 para 26).

After waiting for some days for an official reply to its offer CLAIMANT then asked Global Minerals to instruct RST Trade Bank Ltd ("Trade Bank"), Global Minerals' bank in Ruritania, to issue a Letter of Credit. On 4 July 2014 at 10:00 Trade Bank faxed an irrevocable Letter of Credit (145/2014) to RESPONDENT (Exhibit C 5). The original was then sent by courier. The unusual way of issuing the Letter of Credit was in line with the parties' agreement (PO 2 para 25). The Letter of Credit was issued for US$ 4,500,000 relating to 100 metric tons of coltan. It allowed for partial shipping and provided for payment against the following documents:

- Transport Document (CIP Vulcan Coltan, 21 Magma Street, Oceanside, Equatoriana)
- Packing List (Coltan – not less than 30 metric tons per shipment)
- Examination Certificate

By that time news had leaked out that the world largest producer of electronic game consoles, which has a large manufacturing plant in Equatoriana, had developed a new game console. As a consequence the price of coltan increased immediately by nearly 1US$/kg, as an increased demand of coltan was expected.

About an hour later Mr Winter left a voicemail message on Mr Summer's phone rejecting the Letter of Credit provided as not conforming to the contractual requirements, which in his view were still determined by the original contract of 28 March 2014. He asked for the correct Letter of Credit to be provided immediately and threatened to terminate the contract, if no letter would be received by Monday morning. Mr Storm, when being informed of the message by Mr Summer, immediately emailed Mr Winter stating that the Letter of Credit was largely in line with the changed contract (Exhibit C 6) with the exception of the delivery term which provided for CIP CLAIMANT's address. That could be changed to CIF Oceanside and that CLAIMANT would then expect delivery within the next 2 months.

On 7 July 2014, RESPONDENT replied by sending a letter declaring avoidance of the contract of 28 March 2014 (Exhibit C 7). Irrespective of that CLAIMANT had Trade Bank issue a new letter of credit the following day allegedly complying with the terms of the original contract. CLAIMANT made clear that it was still of the view that the contract had been validly changed and that the letter was primarily issued as a precautionary measure, to ensure at least a delivery of the 30 metric tons agreed under the original contract which CLAIMANT had already sold on to its customers (Exhibit C 10).

Trade Bank sent the new Letter of Credit (Exhibit C 8) over US$ 1,350,000 by 24 hours courier on 8 July 2014 (Exhibit C 9) to RESPONDENT. In addition, Global Minerals faxed the Letter of Credit to RESPONDENT on 8 July 2014 to ensure that the deadline was adhered to. The fax was sent at 17.42 RST, which meant 22.42 MST (Exhibit C 10). It was only read by Mr Winter the next morning. By that time he had already received the original of the Letter of Credit. Working late, he had been called by the night porter shortly after midnight MST, which was 19.05 RST, when the courier had arrived with the original Letter of Credit.

Mr Winter replied directly on 9 July 2014 (Exhibit R 4). He made clear that RESPONDENT considered the contract terminated by its letter of 7 July 2014, returned the second letter of credit and made clear that RESPONDENT would not deliver any coltan. Furthermore, as a "purely 'precautionary measure' " Mr Winter declared the contract once more terminated. In his view, the second letter of credit had been delivered too late and was not conforming to the requirements asking for the presentation of a commercial invoice for any payment, which had not been a condition under the first letter.

That refusal to deliver resulted in CLAIMANT's Request for Arbitration as well as its application for emergency measures. In the main proceedings CLAIMANT originally made the following request in relation to the delivery of the coltan:

1)a) order RESPONDENT to deliver to CLAIMANT immediately after the issuance of an award 100 metric tons of coltan as required by the provisions of the contract as amended by Global Minerals' fax of 27 June 2014;

in the alternative to

b) order RESPONDENT to deliver to CLAIMANT immediately after the issuance of an award 30 metric tons of coltan as required by the provisions of the contract concluded between CLAIMANT and RESPONDENT on 28 March 2014.

From the Emergency Arbitrator CLAIMANT requested the following two orders in relation to coltan.

1) a) order RESPONDENT to refrain from disposing of any of the 100 metric tons of coltan which are needed to fulfil the contract with CLAIMANT in line with the provisions of the contract as amended by Global Minerals' fax of 27 June 2014;

in the alternative to

b) order RESPONDENT from disposing of any of the 30 metric tons of coltan which are needed to fulfil the contract with CLAIMANT in line with the provisions of the contract concluded between CLAIMANT and RESPONDET on 28 March 2014

RESPONDENT objected to the jurisdiction of the Emergency Arbitrator, as in its view the parties had implicitly excluded the application of Article 29 ICC-Rules in their contract by regulating interim relief in Article 21.

Moreover, RESPONDENT considered neither the emergency measures requested nor the requests in the main proceedings to be justified as in its view it had rightfully avoided the contract.

On 26 July 2014 the Emergency Arbitrator appointed by the ICC, Ms Chin Hu, rendered the following decision:

1. The Application is admissible pursuant to Article 29(1) of the Rules and the Emergency Arbitrator has jurisdiction to order the emergency measures sought by the Applicant.
2. Responding party is to refrain from disposing of any of the 100 metric tons of coltan which are needed to fulfil the contract with CLAIMANT in line with the provisions of the contract as amended by Global Minerals' fax of 27 June 2014
3. Responding party shall bear the costs of the Emergency Arbitrator proceedings and shall consequently reimburse the Applicant the amount of US$ 40 000.

On 8 August 2014, RESPONDENT in its Answer to the Request for Arbitration requested rejection of CLAIMANT's main requests as well as the lifting of the order of the Emergency Arbitrator. Furthermore, RESPONDENT requested the joinder of Global Minerals to the arbitral proceedings as an additional party and brought a counterclaim for damages resulting from the order of the Emergency Arbitrator.

CLAIMANT and Global Minerals objected to the inclusion of the latter as an Additional Party into to arbitral proceedings as Global Mineral was in their view not a party to the underlying sales contract. At the same time, Global Mineral accepted the arbitrators appointed until then.

Moreover, following the additional information from the witness statement of Ms Masrov that she informed Mr Rüthli about RESPONDENT's unwillingness to accept the new offer, CLAIMANT amended its prayers for relief. Without formally acknowledging that RESPONDENT validly rejected the offer of 27 June 2014, CLAIMANT "as a sign of goodwill does not pursue its does not pursue its claim for an order for 100 metric tons (claim 1a) any further. Instead it reduces it claims to an order for the delivery of 30 metric tons as originally agreed in the contract and requested as claim 1b". Equally the CLAIMANT agreed that the order of the Emergency Arbitrator could be changed accordingly, i.e. limiting the amount to be kept at 30 metric tons (Answer to Counterclaim and Joinder, para. 4)

The Tribunal decided to bifurcate the proceedings for reasons of procedural economy, after establishing with the parties the Terms of Reference for the complete proceedings. In the first part of the proceedings, which are the object of this Moot the parties should concentrate on

- the questions of jurisdiction over the Additional Party,
- the claims for performance raised by the CLAIMANT
- the lifting of the remaining part of the order of the emergency arbitrator

By contrast the merits of RESPONDENT's counterclaims would be determined in the second phase of the arbitration, which is not part of this Moot.

The Issues

The issues before the Tribunal, and therefore at issue in the Moot, are set forth in Procedural Order No.1, paragraph 5 (p 60 et seq). That paragraph of the Procedural Order states in its relevant part that

a. Has RESPONDENT rightfully avoided the contract of 28 March 2014 by its declarations of avoidance of
    i. 7 July 2014 or
    ii. 9 July 2014 ?
b. Should the Arbitral Tribunal lift the remaining part of the order made by the Emergency Arbitrator against RESPONDENT on 26 July 2014?
c. Does the Arbitral Tribunal have jurisdiction over the Additional Party, i.e. Global Minerals?

No further questions going to the merits of the claims should be addressed.

General Considerations

The case includes a number of problems encountered frequently in international business transactions. Not all of them are in the end relevant for the "solution" of the case and will have to be discussed in detail in the written submissions or the oral pleadings. In part that only becomes obvious once the students have understood the relevant instruments such as the letter of credit and the content of the various INCOTERMS used. Some of the "mistakes" (e.g. reference to the wrong INCOTERMS CIP in Notice of Transportation; overlooked discrepancy in second letter of credit "commercial invoice") or the not completely accurate presentation of the facts in the submissions (CLAIMANT not clearly distinguishing between its own relationship with RESPONDENT and that of the parent company) are included by purpose to make the students think and give room for discussions.

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

1) In relation to arbitration:
    a. Interim Relief by the Emergency Arbitrator under the ICC-Rules
    b. Extension of the arbitration agreement to non-signatories under the group of companies doctrine and under good faith
2) In relations to the CISG:
    a. Fundamental breach in case of commodity trade
    b. Calculating time in international trade

There are several ways to structure the submissions and presentations. Procedural Order No 1 left it to the parties "to decide in which order they address the various issues". The particularities of the present case could justify to answer the questions in the order asked and to deviate from the normal order that first procedural issues are discussed. That is due to the fact that Global Minerals was only joined after the order of the Emergency Arbitrator had already been issued and for the sole purpose of having a solvent debtor should the counterclaim succeed. Until the joinder the proceedings including the whole Emergency Arbitrator proceedings were only conducted between CLAIMANT and RESPONDENT. Furthermore, also the substantive issues to be discussed in this part of the arbitration largely only concern CLAIMANT and RESPONDENT.

Arbitration Questions:

I. Joinder of Global Minerals: Procedural Order No 1- #5(c)

1. Background

The question of joining Global Minerals as an additional party pursuant to Article 7 ICC-Rules concerns the scope of the arbitration agreement and its extension to third parties. In accordance with its Rules the ICC has listed Global Mineral as an Additional Party being "prima facie satisfied that an arbitration agreement may exist" which binds Global Minerals. The actual decision about whether that is actually the case is left to the tribunal.

The two doctrines upon which RESPONDENT relies to support its request for extending the arbitration agreement are "group of companies" and "good faith". The materials contain only limited information about the recognition of the doctrines and their requirements in the various jurisdictions involved (Answer to Counterclaim para. 7; PO 2 paras 46, 47). Consequently, the discussion will in principle involve a balancing exercise between the various factors speaking for an inclusion and the factors speaking against an extension of the agreement. There are sufficient arguments for both sides in the facts given the strong involvement of Global Minerals (via Mr Storm) in the negotiation and the performance of the contract on the one hand and the contractual provisions and negotiations on the other hand, showing that, at least legally, Global Minerals did not want to become a party to the contract. There is abundant case law about factors which may or may not be relevant for such an extension. While there is at least one case dealing with an "endorsement", in the end, the decision is solely dependent on the particular circumstances of this case and the parties' intentions and understanding.

2. Extension to Global Minerals

RESPONDENT wants to join Global Minerals to the arbitration to have a solvent debtor "to ensure that [its] counterclaim and its claim for costs are not frustrated" in case RESPONDENT is successful with its claims. In its view Global Minerals is subject to the arbitration clause due to its signature under the contract containing the clause and its role in the negotiation and fulfilment of the contract. As confirmed by Mr Winter's witness statement due to CLAIMANT's limited financial resources and previous bad experiences, RESPONDENT always required the involvement of Global Minerals during the negotiation. That was the background for the "endorsement" of the contract by Global Minerals (Exhibit R 1).

In light of the negotiation and the wording of the contract, which only mentions CLAIMANT and RESPONDENT as buyer and seller and the special form of the signature (not as a buyer/seller but endorsing the contract), it is very difficult to argue that Global Minerals was a normal party to the contract. It is, however, not impossible. Pursuant to Article 4 of the contract the buyer had to establish a Letter of Credit. It was always clear that Global Minerals would organize the credit and the letters provided have been issued "for the account of Global Minerals" (Exhibits C 5; C 8). At the same time RESPONDENT send most of its correspondence concerning the contract to both parties and also on the "buyer's side" correspondence was regularly conducted by Mr Storm of Global Minerals and not by CLAIMANT (e.g. Exhibits C 4; C 6).

In light of the above difficulties, RESPONDENT's primary arguments for the inclusion are the "group of companies doctrine" and "good faith" considerations, where all the above mentioned factors may also become relevant. In a real arbitration the first issue to be discussed would be which law governs the extension of the arbitration agreement to Global Minerals under the two doctrines. In light of the complex questions of characterisation involved (procedural or contractual nature of the theories), and the divergent approaches in different jurisdictions (law

applicable to the arbitration agreement/ law governing the group) the problem is drafted in a way that the students could leave that question open and did not have to address it explicitly. There was so little information provided about the content of the different laws that a detailed discussion was not triggered or even necessary due to existing differences between the various law. The very good teams would at least flag the conflict of laws problem and probably argue in favour of an application of Danubian law, at least for the group of companies doctrine.

The limited information available also made it very difficult for the students to define exactly the content of the two doctrines. For the group of companies doctrine at least some indications were given. The file contains an explicit reference to an endorsement by a Ruritanian Court of the famous ICC-award in Dow Chemical (Answer to Counterclaim and Joinder, para. 7) which is general considered to be the starting point for the group of companies doctrine. For the good faith doctrine the students had to rely largely on the different factors mentioned in court decisions or the literature for the concept in general without having the benefit of a specific case. Some guidance could be drawn from the provision of Ruritanian Contract Law which adopted verbatim Article 1.7 UNIDROIT Principles. In both cases the question arose, however, whether the Ruritanian law played a role at all.

In connection with the group of companies doctrine factors which would speak for an inclusion are the strong role Mr Storm as representative for Global Minerals played in the negotiation and implementation of the contract, that RESPONDENT insisted on a role of Global Minerals, that the Letter of Credit was provided by Global Minerals and that CLAIMANT in its correspondence often did not clearly distinguish between CLAIMANT and Global Minerals. Whether these connections are sufficient to overcome the factors which speak against applying the doctrine is open to discussion. Speaking against the inclusion of Global Minerals are that CLAIMANT was created as a special purpose vehicle distinct from Global Minerals primarily for the purpose of shielding the latter from becoming party to contracts with relation to Equatoriana, that Global Minerals made clear during the discussions that it did not want to become a party, that the contract only mentions CLAIMANT and RESPONDENT as seller and buyer, that Mr Storm in some of his communications was making clear that he was acting for CLAIMANT and not Global Minerals and that it was always clear to RESPONDENT that only CLAIMANT would be a party to the contract and its arbitration agreement and not Global Minerals. Teams which had determined that the inclusion of Global Minerals under the group of companies doctrine would be governed by Danubian law might also have discussed whether the doctrine is recognized at all under Danubian law. There are some statements to the contrary in the literature which have been picked up by the Claimant side. There are, however, no court decisions as to this issues it and the conclusion drawn from the Supreme Court's emphasis on party autonomy is not compelling. The doctrine of groups of company – unlike good faith – is often considered to be based on an implied consent.

The thrust of RESPONDENT's good faith argument is that Global Minerals by its behaviour and in particular the endorsement of the contract created the impression that it would "stand behind the contract, inducing RESPONDENT to sign it" (RESPONDENTs Answer to the Request, para. 28). On the one hand the witness statement of Mr Winter shows that it was crucial for RESPONDENT to have the financial backing of Global Minerals for the contract. At the same time RESPONDENT stated, however, that the exact legal consequences associated with the endorsement of the contract by Global Minerals were not of greater relevance as at least the payment of the contract price was largely secured by a letter of credit.

II. Emergency Arbitrator: Procedural Order No 1- #5(b)

The question relating to the withdrawal of the emergency measure issued is in the present case of hybrid nature. While it could be considered to form part of the tribunal's decision on the merits, forming also the basis of the counterclaim in case of lifting the decision, it involves primarily procedural questions concerning the institution of an emergency arbitrator. The ICC, like many other institutions, has since the last revision of its arbitration rules special provisions for arbitral interim relief at the time before the tribunal has been appointed. Parties no longer have to opt into that mechanism but must opt out if they do not want to submit to the emergency arbitrator.

1. Jurisdiction

RESPONDENT is of the view that the parties implicitly agreed to exclude the provisions on emergency relief by the regulation in Article 21 which provides

> **Art 21: Provisional measures**
>
> The courts at the place of business of the party against which provisional measures are sought shall have exclusive jurisdiction to grant such measures.

The wording of the clause is not clear. The reference to "exclusive jurisdiction" can be used by both parties, in particular if one takes into account the drafting history of the provision. One can understand "exclusive" as referring merely to the distribution of the jurisdictions between the courts. That is the interpretation adopted by the emergency arbitrator in her decision (Order of Emergency Arbitrator para 9).

One can, however, also interpret it to refer to arbitral interim relief as well. In favor of that position one could the *contra proferentem* rule might also be invoked. Article 21 was originally drafted for the "Global Minerals" side and included upon their request into the subsequent contracts. (PO 2 para 13)

The later argument is probably more difficult to make. The provision was included at a time when the ICC Rules did not yet contain Article 29. Thus, there was no need to exclude emergency arbitration so that it is doubtful whether the exclusion was meant that way.

Another argument in this context could be that the arbitration clause was used in that form in contracts since 2010(PO 2 para. 10). At that time it did not result in granting a competence to the emergency arbitrator so that the idea underlying Article 29 (6)(a) ICC-Rules might apply. The argument is weakened by the fact that the parties were aware of the changes in the ICC-Rules at the time when they entered into the contract in question (PO 2 para. 14).

In the one reported ICC case where the issue of exclusion was raised it was rejected.

2. Measures granted.

The ICC rules are largely silent as to the substantive requirements for the grant of emergency measures. In her decision the Emergency Arbitrator relied on "internationally accepted principles of arbitral interim relief which are also the basis for Art. 17A of the Danubian Arbitration Law" (Order of Emergency Arbitrator para 11). Thus, she examined whether CLAIMANT had a good arguable case on the merits and whether without the measure requested a future decision on the merits would be frustrated. There was also some sort of common understanding by the parties that an arguable case on the merits would be one of the requirements (PO 2 para. 32).

The reliance on Art. 17A of the Danubian Arbitration Law by the Emergency Arbitrator is the most obvious solution but by no means compelling. Art. 17A deals directly only with interim relief by an arbitral tribunal not by the emergency arbitrator and one could also try to argue that the absence of any specific criteria in Article 29 ICC-Rules going beyond the urgency requirement in Article 29(1) gives Emergency Arbitrator wide discretion.
Whether the requirements were met at the time of granting the order and are still met at the time when the tribunal makes its decision is an open question and requires argumentation by the students. Facts which may play a role are the market structure and development, CLAIMANTs' need to supply its customers, the time passed since the order and subsequent developments in Xanadu as well as the likelihood to receive coltan from other suppliers.

CISG Issues: Procedural Order No 1- #5(a)

I. Background

The substantive part has as its broad topic the issue of what constitutes a fundamental breach under the CISG in the field of commodity trade. In light of fluctuating markets strict compliance with time limits, specifications and documents to be provided is of considerable importance in that area of trade and also has a bearing on what deviations constitute a fundamental breach. The uncertainties surrounding that concept and its suitability for the commodity trade is one of the reasons why most standard contracts in that area of trade exclude the CISG. It is also one of the main arguments against the suitability of the CISG for commodity trade.

The main issues to be discussed are the calculation of time limits (starting / relevant time zone), the importance of deviations in delivery terms (CIF and CIP) as well as the importance of the documents to be presented for a drawing under the letter of credit. To allow discussions of these topics the letter of credit is issued in a very unusual way which allows, however, for additional arguments concerning what is actually required by the contract. A good understanding of the law of letters of credit as well of the INCOTERMS is required for the discussion.

II. Question a (i):

Has RESPONDENT rightfully avoided the contract of 28 March 2014 by its declaration of avoidance of 7 July 2014?

Following receipt of the first letter of credit on 4 July 2014 and Mr Storm's email of 5 July 2014 reacting the Mr Winter's complaint from the day before, RESPONDENT declared avoidance of the sales contract for the first time on 7 July 2014. RESPONDENT justified that avoidance with the fact that the letter of credit did not conform to the requirements of the original contract concluded on 28 March 2014. Mr Winter particularly criticized that the letter is for "100 metric tons of coltan instead of 30 metric tons" and that "it contains different delivery terms". He then went on to state that "[i]n trading commodities such as coltan any deviation from the contract is considered to be a fundamental breach of contract" (Exhibit C 7).

Whether that statement is true is one of the main issues to be discussed by the parties. It is beyond doubt that in commodity trade as well as in letter of credit law strict compliance with requirements is of highest importance. The question arises, however, whether that also applies for the deviations in the present case. On the one hand the letter of credit is primarily a security provided by the buyer for the fulfilment of its payment obligation through the involvement of a

solvent third party. On the other hand this involvement of a third requires at least for all issues concerning the drawing under the letter strict compliance with the requirements.

The first letter of credit, deviates in several aspects from the provisions of the original contract. It was

- over a higher quantity and a higher amount,
- provided for a later last-shipment-date and
- for a slightly different delivery term (CIF/CIP).

The deviations are connected to CLAIMANT's efforts to amend the contract to cover a higher quantity by its offer of 27 June 2014 (Exhibit C 4). In light of the witness statement by Ms Masrov, stating that CLAIMANT's Mr Rüthli had been informed about RESPONDENT's rejection of the offer, it is very hard to argue that there was actually an amendment of the contract. CLAIMANT seems to have given up that position but the facts are not unequivocal in this respect and do not completely exclude such an argumentation.

The deviations of the letter of credit from the original contract are mainly in favor of RESPONDENT. At a closer look and taking letter of credit law into account the higher amount and the higher quantity required do not prevent RESPONDENT from drawing under the letter of credit. The allowance of partial shipment and partial drawings make it possible to ship only 30 metric tons as agreed and receive 30% of the payment.

That is different, however, for the delivery terms. While the letter of credit provided for "CIP Vulcan Coltan, 21 Magma Street, Oceanside, Equatoriana", the contract foresaw "CIF (INCOTERMS 2010) Oceanside, Equatoriana, though the ICC suggests not to use CIF for container sales. For their arguments students have to understand the differences between the two terms and how these additional duties affect one side. The price for the additional transport needed in Equatoriana costs between USD 800 – 1000 (PO 2 para 36). In this context it may be relevant, either arguing the fundamentality of the breach or even invoking Article 80 CISG, that RESPONDENT in its Notice of Transport mixed up the two INCOTERMS itself and ticked the CIP box instead of the CIF box. Some teams may even argue that the Notice of Transport constituted an offer to amend the contract to a CIP contract which was then accepted through the issuance of the letter of credit. That seems to be a little bit far fetched and ignores that the letter also deviates in some other respects from the original contract.

In the end it has to be discussed by the parties whether all the above mentioned deviations taken together constitute a fundamental breach due to the particularities of the commodity trade. In this context the question of foreseeability plays a role, albeit a limited one. If one considers that the particularities of the commodity trade require strict compliance with contractual provisions the same reasoning would lead to the foreseeability of the fundamental character of the breach.

Some teams may also try to rely on Article 64 (1)(b) CISG. In the message left on Mr Summer's voicemail Mr Winter asked for a new letter of credit. The exact wording was "Please provide a new conforming letter immediately, at the latest by Monday morning our time. Otherwise we will terminate the contract" (PO 2 para.21). If the argument is raised the teams have to discuss whether that was really intended to be a "Nachfrist" and whether that time limit was reasonable. For the latter question it may be relevant, that even under the most restrictive reading of the time limit in the contract, CLAIMANT had time until 8 July 2014 to provide a letter of credit so that a time limit which expires before that time may not be reasonable.

The avoidance of the contract before the time for providing a letter of credit has expired may also raise additional questions. Teams may lead the whole discussion as one relating to an anticipatory breach under Article 72. Others may raise the question as to a possible cure of the

deficiencies through the second letter of credit. Those are all valid approaches though the present analysis – based on Respondents allegation that the Claimant through the provision of the first letter of credit has fixed the time for performance – has approached the problem under Article 64 CISG.

III. Question a (ii):

Has RESPONDENT rightfully avoided the contract of 28 March 2014 by its declaration of avoidance of 9 July 2014?

On 9 July 2014 RESPONDENT declared a second time that it wanted to avoid the contract for fundamental breach of contract (Exhibit R 4). That declaration was primarily a "precautionary measure" as RESPONDENT considered the contract already terminated by the declaration of 7 July 2014. The reasons for that renewed avoidance were the allegedly belated provision of the second letter of credit as well as the additional document required. Both issues constituted in RESPONDENT's view constituted a fundamental breach of the contract.

1. Belated provision of the letter of credit

In its Answer to the Request for Arbitration RESPONDENT gave two different reasons of why in its view the letter of credit was provided too late. The first argument was that by

> "sending the first Letter of Credit CLAIMANT and Global Minerals had exercised their right to determine the exact date of performance within the period given. From that time onwards the time for performance was fixed and all subsequent performance was out of time"

The second argument was that the letter did

> "only arrive at RESPONDENT's premises on 9 July 2014 and not as required on 8 July 2014"

In relation to this argument the first issue to be determined is what is required under the contract. In the pertinent part of Article 4 the parties have agreed as follows:

> **Art 4: Payment & Letter of Credit**
>
> A *Letter of Credit* in the amount of US$ 1,350,000 shall be established by the Buyer not later than fourteen days after the Buyer received the notice of transport in regard to shipment. …

It can be argued that the mere consent of the bank to issue a letter of credit is sufficient to meet the requirements of Article 4. The wording of Article 4 only refers to establishing a letter of credit and not to providing the other party with it. However, the unusual way of informing the other side about the letter of credit the considerable efforts made by CLAIMANT to send the letter of credit to RESPONDENT on the 8th July could be taken as indications that the seller had to be informed about the provision of the letter of credit within the mentioned time. In interpreting Article 4 of the contract, Article 8 CISG requires taking into account all circumstances, including the subsequent behavior of the parties.

In case the seller had to be informed about the provision of the letter of credit the question arises, how to calculate the relevant time limit of "fourteen days after the Buyer received the

Notice of Transport". Under numerous arbitration rules the day at which the triggering event occurred is not counted for the calculation but the time only starts to run the next day. The CISG does not address the issue directly. It contains, however, in Article 20 a rule for calculating a period of time for acceptance fixed by the offeror. According to that rule the time starts to run immediately after the occurrences of the triggering event. The rule is considered to enshrine one of the general principles underlying the CISG. There are conflicting rules in the national laws of the

In the present context the better argument seems to be the one based on the CISG since the issue is one of substantive law and not one of procedural law. In that case the relevant period expired on the 8 July 2014. That leads to the additional questions of whether, first, the sending of the fax is or its receipt relevant and, second, which time zone is relevant to determine the expiry of the time limit.

RESPONDENT, arguing that the fax only arrived on 9 July and not on 8 July gave the following reasons for its view in para 34 of its Reply to the Request for Arbitration

> "The fax was sent outside RESPONDENT's the ordinary business hours and was only discovered on 9 July 2014. Therefore, it cannot be considered to have arrived in time. It is not the time of sending but the time of receipt which is relevant in this regard. Consequently, it is also not the time zone of the party performing the contract which is relevant, i.e. RST applicable in Ruritania and Equatoriana, but the zone where the obligation is to be performed, i.e. MST relevant in Mediterraneo, which is five hours ahead."

CLAIMANT by contrast considered the time zone of the sender to be relevant for determining the expiry of the time limit (Request for Arbitration para. 20).

2. Additional requirement of a commercial invoice

The second ground mentioned by RESPONDENT for its avoidance is that unlike the first letter of credit the second letter required as an additional document for presentation the provision of a commercial invoice. Again the first question to be answered, applying Article 8 CISG, is what the contract requires for the presentation. Article 4 is largely silent on the question. It reads in its pertinent part:

> **Art 4: Payment & Letter of Credit**
>
> …
>
> The letter of credit shall be in favour of the Seller or its designee, be acceptable in content to Seller, be consistent with the terms of this Contract, be irrevocable and issued at a first class bank of Ruritania, be valid until 15 December 2014. The Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce (UCP 600).
>
> Payment is due 30 days after presentation of the documents under the Letter of Credit.

Thus one would have to look for other guidance either under Article 8 (3) or Article 9 CISG. The information provided is very limited and students may try to argue with the role of commercial invoices in such transaction as well as the wording of the first letter of credit.

The outcome of this interpretation determines whether the requirement of a commercial invoice constitutes a breach or not.

3. Fundamental nature of breach

In case the letter of credit has either been established too late or is considered to be non-conforming the question arises again whether that breach can be considered to constitute a fundamental breach in the sense of Article 64(1)(b) CISG. Again the question turns on how much weight is given to the particularities of the commodity trade.

4. Article 64 (2)

Teams may additionally argue that the right to avoid the contract is excluded due to the provision of the second letter of credit before avoidance has been declared. In making that argument teams should be aware that Article 64 (2) requires that "the buyer has paid the price" while the provision of a letter of credit is not payment but provision of a payment security. It should at least be discussed whether the provision can also be applied to the provision of a letter of credit.