XXth ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
Xth ANNUAL WILLEM C. VIS (EAST)
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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, http://www.cisg.law.pace.edu/vis.html. If you downloaded the Problem during October you will need to download the revised version issued in early November including Procedural Order №.2; to ensure that you have the final version, check that you have both Procedural Order №.2 and paragraph 10(5) of Procedural Order №.1 which was part of the final set of corrections.

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

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

The Facts

[NOTE: all dates are 2011 unless otherwise stated.]

On 1st July 2012, Counsel for Mediterraneo Exquisite Supply ("Exquisite") submitted a Notice of Arbitration to the Chinese European Arbitration Centre (Hamburg) ("CEAC"); the claim was against Equatoriana Clothing Manufacturing Ltd ("Equatoriana Clothing") and was for US$ 2,127,500 plus interest and costs.

Exquisite, registered and managed in Mediterraneo, is jointly owned by Oceania Plus Enterprises ("Oceania Plus") and Atlantica Megastores. Oceania Plus is a large multinational group supplying leisure clothing to (i) a number of internationally famous brands, (ii) leading supermarket chains and (iii) other buyers from around the world. It also owns several retail clothing chains, one of which is Doma Cirun, also located in Oceania. Oceania Plus is known for its high ethical standards. Atlantica Megastores owns a chain of megastores in Atlantica and several other countries. Those stores sell casual clothing, among many other products.

Exquisite (and other similar jointly owned subsidiaries of Oceania Plus and Atlantica Megastores) contract with manufacturers of the clothing required by the joint parents and a conventional sale/purchase contract is entered Exquisite and the applicable joint parent. Similarly a conventional sales contract is entered into between the retail chains, such as Doma Cirun, and Exquisite. In this regard the companies act independently of one another, such independence being required by the authorities in the three countries.

On 2nd January Doma Cirun learned that the manufacturer contracted to produce "Yes Casual" (Doma Cirun's house brand for sportswear and other casual clothing) polo shirts for it for the 2011 summer season had become bankrupt and the shirts would not be delivered. The bankruptcy was particularly unfortunate, since polo shirts are an important item in the stock of a clothing retailer for the summer season in Oceania and because the procurement of the substitute shirts would now be a rush job. Doma Cirun immediately asked various Oceania Plus subsidiaries to find a manufacturer that would be able to handle the order in time.

Exquisite found that Equatoriana Clothing was one of three manufacturers that would be able to handle the order on a rush basis. It had contracted with Equatoriana Clothing in the past, but not since April 2008. As a matter of Oceania Plus policy, all members of the group contracting with third party manufacturers were required to audit the manufacturing firms to ensure that they conformed to Oceania Plus policies in regard to ethical and other matters. In regard to this dispute the policies covered labor matters and especially the use of child labor. The audits covered not only the manufacturers themselves, but also the subcontractors that the manufacturers used. The last audit conducted by Exquisite of Equatoriana Clothing had taken place in connection with the 2008 contract (see above) and, while here had been several items in the audit that had caused some concern, including suspicions of use of child labor, the evidence of the use of child labor was unclear. All of the items of concern were discussed with Equatoriana Clothing before the audit was approved.

Two other manufacturers contacted by Exquisite could have handled the order but at a higher price than Equatoriana Clothing so the latter was awarded the contract which was duly signed on 5th January. The contract

between Exquisite and Doma Cirun was signed on 7th January. The Exquisite/ Equatoriana Clothing contract was for the delivery of 100,000 polo shirts of various colors and sizes as per contractual technical specifications at a price of USS 550,000 FAS INCOTERMS®2010 Oceanside, Equatoriana. Delivery was required by 19th February, giving an estimated arrival at Port City of 28th February which would be the latest that would allow for onward delivery to Doma Cirun's retail stores in time for the launch date of the summer season on 15th March. A major advertising campaign, which featured the Yes Casual line of clothing, would precede the launch date.

Exquisite arranged for the shipping from Oceanside, Equatoriana to Port City, Oceania for 19th February and had a letter of credit opened by a Mediterraneo Bank in favor of Equatoriana Clothing. The letter called for documents indicating arrival of the goods at the port ready for loading by 19th February. The letter was confirmed by Equatoriana Clothing's Bank.

On 9th February Mr Russell Long, Exquisite's Procurement Specialist received a telephone call from Mr Tomas Short, Contracting Officer at Equatoriana Clothing, in which the latter said that it would not be able to make the 19th February shipping date. Mr Short said that they would be able to deliver to the port on 24th February in time for loading that day. Mr Long repeated the importance of the 19th February delivery date since that was the latest by which the shirts could be in the stores by 15th March. Mr Short said that the delay (irrecoverable) had been caused by one of its suppliers failing to deliver the required materials on time. Mr Long repeated that they urgently needed the polo shirts, but that under the circumstances he would take care of the necessary adjustments. Shipping would be arranged for the 24th February and the letter of credit would be amended to reflect the new date. Nothing was said about amending the shipping date in the contract itself. A new shipping contract was entered into calling for delivery to the port in time for loading on 24th February and the letter of credit was duly amended.

Mr Long immediately notified Doma Cirun of the delay and they (i) reminded him that it would mean that the polo shirts would not be in the stores on the 15th March launch date (ii) stated that they would hold Exquisite responsible for the delay and (iii) said that they were pleased to hear that there had been no amended of the contractual delivery date.

The polo shirts were delivered to the port on 24th February, the ship arrived at Port City on 5th March 2011, and shirts were delivered to Doma Cirun's warehouse on 11th March; delivery to Doma Cirun's retail stores was completed on 20th March.

On 5th April, a shocking TV documentary was broadcast, in part based on film allegedly taken at one of Equatoriana Clothing's production facilities, showing children as young as eight working in appalling conditions. Although it was not clear whether the polo shirts in this dispute had been produced at the facility in question, the TV program condemned both Oceania Plus and Doma Cirun in strong terms for dealing with such a manufacturer.

Further, on 8th April, the leading newspaper in Oceania published an investigative article concerning the use of child labor in the supply chains of leading firms, both national and international, especially in the technology and clothing industries. Inter alia, the article described the leading role that Oceania had taken in the work leading to the Convention on the Worst Forms of Child Labor in 1999 (the "ILO-Convention"), Oceania's work in this regard having been strongly supported by its business community and the leading civic organizations. This leading role led to the strong public reaction in Oceania to the TV program and the newspaper: immediately upon the broadcast of the program there were demonstrations at Doma Cirun stores throughout the country, which continued for the following two weeks. On 6th April sales in Doma Cirun stores were 30% below those of the previous year and the drop in sales became progressively greater over the following two days. There was an additional drop after the publication of the newspaper article in the Oceania Times, with sales now running about 50% down. There were almost no sales of Yes Casual polo shirts.

Further consequences included (i) Oceania Plus's share price dropping 25%, wiping hundreds of millions of dollars of value off its stock market valuation; (i) the Prime Minister of Oceania calling on Oceania Plus to take urgent action; (iii) the Children Protection Fund of Oceania, which had a major investment in Oceania Plus shares in its investment portfolio, announcing its intention to sue Oceania Plus and its directors for its losses and for the damage to its reputation; (iv) additional law suits were threatened by investors who had lost substantial sums because of the loss in the value of their holdings of Oceania Plus stock, and eventually were filed.

In the late afternoon of 8th April Doma Cirun notified Exquisite that it was avoiding the contract and that Exquisite should arrange to dispose of the remaining stocks of the polo shirts. Upon receipt of that notification, Exquisite immediately notified Equatoriana Clothing that it was avoiding the contract and demanded that Equatoriana Clothing arrange to dispose of the unsold stock.

Equatoriana Clothing denied that there had been any breach of contract and refused to take back the polo shirts or to make arrangements for their disposal.

On 20th April Exquisite sold the remaining 99,000 shirts to Pacifica Trading Co. at a price of US$ 470,000 FCA INCOTERMS®2010 Port City.

At Doma Cirun's request Exquisite contracted with Gold Service Clothing Co("Gold Service") for 90,000 polo shirts for US$ 612,000 on a rush basis. Because of the urgent need for the polo shirts the first 20,000 were shipped by air

to Oceania with the remaining 70,000 delivered by ship, which was the normal and far less expensive mode of carriage.

On 15th September, Doma Cirun began arbitration proceedings against Exquisite pursuant to the arbitration clause in their contract. The asserted claim was for US$1,825,000, consisting of: (i) reimbursement from Exquisite of the purchase price of the polo shirts; (ii) the lost sales because of the late delivery of the polo shirts manufactured by Equatoriana Clothing; (iii) the lost sales from the lack of polo shirts from 8th to 30th April when the replacement polo shirts were ready for sale in Doma Cirun's stores; (iv) the difference between the purchase price of the Equatoriana Clothing polo shirts and the Gold Service ones; (v) air freight and shipping costs; (vi) damage to the Doma Cirun reputation and to the Yes Casual brand of merchandise.

On 14th January 2012 a settlement agreement was reached in the Doma Cirun/Exquisite arbitration for US$ 850,000, which was duly paid by Exquisite.

The law suits by the Children Protection Fund of Oceania and the other investors in Oceania Plus were settled with Oceania Plus paying a total of US$ 700,000. This was an extremely favorable settlement for Oceania Plus, since the damages claimed in the law suits totaled US$ 15,000,000.

On 15th February 2012 Oceania Plus brought suit against Exquisite in the courts of Oceania claiming reimbursement of the foregoing US$ 700,000; on 25th June 2012, following the taking of legal advice, Exquisite agreed to pay the full amount claimed.

The Issues

The issues before the Tribunal, and therefore at issue in the Moot, are set forth in Procedural Order No.1, paragraph 10. That paragraph of the Procedural Order states that

"10 In light of the above discussions the Arbitral Tribunal makes the following orders in relation to the issues to be addressed by Counsel in their memoranda and the oral hearing as well as to the clarifications needed and the timing:

1. Counsel should address the issue of delay in delivery
2. Counsel should address the issue of whether the witness statement of Mr Short should be considered by the tribunal if he is not available for examination at an oral hearing. In their arguments reference may be made to the IBA Rules of Evidence though their relevance remains controversial between the Parties.
3. Counsel should address the issue whether the tribunal should follow the interpretation given to the Mediterraneo reservation to Art.96 and the interpretation given to it by the Supreme Court of Mediterraneo.
4. Counsel should address the issue as to whether Mr Long should be considered to have agreed to an amendment of the delivery date in the contract when he said he would "make sure that all of the paper work reflected the new delivery date."
5. Counsel should address the issue as to whether Mediterraneo Exquisite Supply had grounds to avoid the contract and claim damages."

Discussion of these issues is subject to the agreements reached between the Parties' respective Counsel as recorded in Procedural Order №.1, paragraphs 8 and 9, as follows

"8. [It is] agreed that for the purposes of the arbitration, it would be assumed, but without any admission by Equatoriana Clothing, (i) that the latter had in fact used child labor in at least one of its plants but that (ii) no child labor had been used in the production of the polo shirts the subject of the contract. They further agreed that they would be prepared to argue whether Equatoriana Clothing Manufacturing had breached the contract by using child labor in its operations, despite such usage not being in connection with the production of the polo shirts that were the subject matter of the contract. In return neither Party will ask the arbitral tribunal or any other third party to engage in further investigations as to the use of child labor.

9. [It is] agreed that they would not argue in the first stage of the arbitration any issues in regard to the quantum of damages arising out of the breach, if the tribunal were to decide that there had been such a breach. Similarly, they would leave to later the allocation of the costs of arbitration."

A. Procedural Issues

The two procedural issues to be addressed by the students, i.e. the absent witness and whether the form requirements of the law of Mediterraneo apply in light of the Art.96 reservation declared by Mediterraneo, are closely linked with the question of whether there was an amendment of the contract concerning the delivery dates. Consequently, there may be teams which treat the issues jointly with the issue of delay (No. 1 Procedural Order). While that is conceptually not wrong Procedural Order No.1 lists those issues separately. Thus, it indicates that the Tribunal intends also the Art.96 reservation issue to be treated up front as a question of determining the applicable

law relevant for the decision. The refusal of the Presiding Arbitrator to decide the issue alone on the basis of his authority to deal with procedural matters was merely due to the importance of the question.

A1. A Witness Absent from the Oral Hearing

A1.1 The Background

Mr Tomas Short, Equatoriana Clothing's Contracting Officer, had provided a Witness Statement dated 18th August 2011; during a procedural meeting by telephone, Mr Fasttrack, Counsel for Exquisite, requested that he appear at an oral hearing to answer questions on that witness statement. Mr Langweiler, Counsel for Equatoriana Clothing, replied that that would not be possible since Mr Short had left the company's employment and, on being contacted, he had said his new employer (i) did not wish him to be involved any further in matters concerning Equatoriana Clothing and (ii) had specifically told him not appear before the tribunal if he was called.

The Tribunal is required to rule as a procedural matter that whether or not the witness statement of Mr Short should be considered by it in the circumstances of his unavailability for examination. Mr Fasttrack has already said "no" and Mr Langweiler has said "yes" given the circumstances. Counsel in the arbitration are therefore required to address the issue before the tribunal.

Procedural Order №.1 provides that reference may be made to the IBA "Rules on the Taking of Evidence in International Arbitration (2010)" (the "IBA Rules") though their relevance remains controversial between the Parties. Relevant extracts from Article 4 of the IBA Rules dealing with witnesses of fact are as follows:

7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.
8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.
9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be re

Further, the Danubian Arbitration Law (being the UNCITRAL Model Law with 2006 revisions; DAL) provides

Article 27.Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

A1.2 Matters for Consideration by Arbitrators

This list is not intended to be exhaustive

A1.2.1 Different legal cultures have differing approaches to such circumstances and, in many cases, make little or no distinction between the issue in civil litigation before state courts as opposed to arbitration. The students will be expected to be aware of the difference and avoid the trap of applying strict rules of court (at least directly; there may be indirect arguments to be made)

A1.2.2 There is the somewhat artificial situation that the attendance or non-attendance of a key witness is a matter that, in the real world, has to be sorted out well in advance of the hearing but, in part because the Moot's structure does not allow for such persons to attend, it is to be argued at the Hearing.

A1.2.3 Tribunals will have to respond flexibly to the artificiality, particularly if DAL Art.27 or IBA Rules 8 and 9 (or any equivalent) are to be considered.

A1.2.4 It will need to be considered whether, given that the IBA Rules have not been expressly adopted in these proceedings, they can be taken as representative of a broad international consensus and therefore apply by implication or whether the Tribunal should exercise its discretion under Art. 17 (1) CEAC Rules and apply them; there are arguments in both directions here and it will be interesting to see what the students come up with.

A1.2.5 Given that it is Respondent who wants the witness statement admitted, it is effectively "claimant" on this issue and should lead the argument.

A1.2.6 While there might well be alternative approaches, the obvious one is for Respondent to argue that the IBA Rules, or at least the principles, do apply by implication and that the present circumstances constitute "exceptional" ones in the context of IBA Rule 7.

A1.2.7 If Respondent goes down the A1.2.6 road, it needs a back-up argument in case its argument on the applicability of the IBA Rules fails.

A1.2.8 It is not immediately obvious that DAL Art.27 has any relevance here since the issue is the principle of the admissibility of the Witness Statement, not the mechanics of subpoena etc. However, the availability of means of forcing the witness to appear either before a state court or before the Tribunal to be interrogated directly could be a factor for the Tribunal in the exercise of a possible discretion of how to proceed in the matter.

A1.2.9 In the 'real world', one possible practical solution might be to rule the Witness Statement admissible but to weight it in the light of Mr Short's non-attendance; in that context, a tribunal might wish to consider (inter alia)

(a) the effect of the time gap between the events being attested and the date of the statement;

(b) whether Mr Short had any motive to conceal or misrepresent matters;

(c) whether his statement was his own or was made in collaboration with another person;

(d) whether the circumstances of Mr Short's non-availability are such as to suggest an attempt to prevent proper evaluation of its weight.

A2. <u>The applicable form requirements: CISG Art.96</u>

A2.1 <u>The Background</u>

Mediterraneo is a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) having made the Art.96 declaration pursuant to which

> " any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."

The Supreme Court of Mediterraneo has ruled in three cases that the requirement that the contract be in writing applies to an amendment to the contract as well as to the original contract.

Claimant has an interest in arguing that, in the light of the Art.96 reservation declared by Mediterraneo and the rulings of the Supreme Court, the form requirements of the law of Mediterraneo are applicable to the parties' contract. Respondent can succeed in his argument on the delay issue only if oral amendment of the delivery date is valid. If, conversely, amendments of the contract must be in writing the delivery dates would not have been changed irrespective of what the parties had agreed during the telephone conversation.

The parties have submitted their contract pursuant to the choice of law clause contained in Art.20 to

> "the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) <u>without regard to any national reservation</u>, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts" (Emphasis added).

The critical question in this respect is whether, despite this choice, the reservation declared by Mediterraneo has some effect and leads to the application of the form requirement contained in its law.

In court proceedings in a Contracting State Art.12 CISG could affect the validity of such a choice. In cases like the present, where one of the parties has its place of business in a Contracting State, Art.12 not only excludes the application of Arts.11 and 29 CISG but also expressly provides that the "parties may not derogate from or vary the effect of this article." Thus, the reservation would at least exclude the direct application of Art.11 CISG. Since neither Art.12 nor Art.96 prescribe which law is to apply to the form requirements in such cases, there are differing views about the law applicable. According to one view the form requirements of the reservation state apply while others want to determine the then applicable form requirements on the basis of a conflict of laws analysis.

Here the question arises, however, in front of an arbitral tribunal. It is generally accepted that arbitral tribunals are not part of the judicial system of the place of arbitration. Consequently, even when the place of arbitration is located in a Contracting State, the CISG is not binding upon the arbitral tribunal by virtue of its nature as an international convention ratified by the State, but only if it is part of the otherwise applicable law. Moreover, the law applicable to the merits, including the form requirements, is generally submitted to party autonomy. Art.28 DAL provides in its relevant parts

> **Article 28. Rules applicable to substance of dispute**
>
> (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given

State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

Equally the CEAC Arbitration Rules provide in Art.35 inter alia

Applicable law, amiable compositeur

ARTICLE 35

1. The arbitral tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. The parties may wish to consider the use of this model clause with the following option by marking one of the following boxes:

The second of these boxes provided for in Art.35 CEAC-Arbitration Rules contain the choice of law clause found in the contract.

These provisions evidence that, unlike in many state courts where the parties may only choose a particular law (i.e. the CISG in its entirety with articles 12 and 96) in arbitration proceedings, parties may also choose "rules of law". As a consequence the parties may have chosen the CISG not as a law but as rules of law without the reservation in Art.96 with the consequence that Arts.11 and 29 would in principle be applicable. Thus, the amendment of the contract could have occurred orally as no form was required.

Irrespective of any direct applicability, the declaration of the Art.96 reservation clearly evidences the importance attached by Mediterraneo to the form requirement contained in the national law. Furthermore the Supreme Court in Mediterraneo has ruled on three occasions that it applies also to amendments of contracts. In light of this Claimant may try to argue that the form requirement constitutes a mandatory provision overriding the parties' choice. There is an argument that even mandatory provisions which do not belong to the lex fori, i.e. Danubian law, may be applied by an arbitral tribunal in case their application seems to be justified. It is hardly questionable that through the Claimant's place of business there are sufficiently close connections of the case with the law of Mediterraneo. Whether the form requirement, however, constitutes an internationally mandatory provision within the sense of the doctrine favoring the application of such provisions seems questionable.

A2.2 Matters for Consideration by Arbitrators

This list is not intended to be exhaustive

A2.2.1 The critical question is whether the parties' choice of CISG without any national reservation is valid and leads to the exclusion of the reservation with the consequence that Arts.11 and 29 would in principle be applicable. The argument concerns the greater freedom given to the parties in arbitration insofar as the CISG may not be chosen as a law (including Arts.12 and 96) but as rules of law without the reservation in Art.96.

A2.2.2 If the choice is considered to be valid it has to be discussed whether the form requirement nevertheless can be applicable as a "third" country mandatory provision which requires application despite the parties' choice. Again the particularities of arbitration may play a role in that there is no sharp distinction between mandatory rules of the forum and of third states since an arbitral tribunal has no lex fori in the same way a state court has.

A2.2.3 In case the exclusion of the reservation is considered ineffective, the controversial "CISG-question" arises as to which law then governs the applicable form requirements. According to one view, it is the law of Mediterraneo as the law of the reservation state. The other view would determine the applicable form requirements on the basis of a conflict of laws analysis. The latter may lead in the present case to the law of Equatoriana depending on the weight given to the various factors relevant in such an analysis.

Teams may approach the issue in different ways. The way it is intended, it is primarily an arbitration issue dealing with the scope of the special conflict of laws provision in Art.28 DAL and Art.35 CEAC rules as well as the application of "third" states' mandatory provisions by an arbitral tribunal. The requests for clarification show, however, that numerous teams might approach the issue from the "CISG perspective" dealing primarily with the controversial question of whether Arts.96 and 12 merely exclude the application or Arts.11 and 29 and, instead, leave the applicable law to be determined by a conflict of laws analysis or whether they require the application of the form requirements of the reservation state. On the basis of the information provided by Procedural Order №.2 concerning the conflict of laws rules applicable in state courts, it is very likely that both views will lead to different results. In a second step the teams would then have to argue that the same principles apply in arbitration proceedings.

B. Substantive (Merits) Issues

B1. Was the Contract Amended to Change the Delivery Date ?

B1.1 The Background

On 9th February 2011 Equatoriana Clothing's Mr Short telephoned Exquisite's Mr Long to advise that they would be unable, because the failure of one of its suppliers to deliver certain materials on time, to achieve the contractual shipping date of 19th February, offering 24th February instead. Mr Long repeated that Exquisite urgently needed the polo shirts, but that under the circumstances he would take care of the necessary adjustments. Shipping would be arranged for the 24th and the letter of credit would be amended to reflect the new date. *Critically, nothing was said about amending the delivery date in the contract itself*. A new shipping contract was duly entered into calling for and the letter of credit was duly amended.

On being advised of the delay by Mr Long, Doma Cirun (i) reminded him that it would mean that the polo shirts would not be in the stores in time for the 15th March launch date, (ii) stated that it would hold Exquisite responsible for the delay and (iii) stated that it was pleased to hear that Mr Long had not amended the delivery date in the contract.

The Exquisite/Equatoriana Clothing contract expressly contemplated late delivery, Clause 10 imposing a two-stage penalty: (a) ... (b) for late delivery not exceeding 15 days, a deduction of 1% of the contract price per day late, to a maximum of 15%; (c) for delivery more than 15 days late, a deduction of a further 2% of the contract price per day[1].

B1.2 Matters for Consideration by Arbitrators

This list is not intended to be exhaustive

B1.2.1 If issue A2 is decided in Claimant's favor so that any amendment to the contract had to be in writing, then clearly issue B1 does not arise i.e. the latter applies only if Respondent wins on that point. In the Moot Hearings, although there will have been argument on issue A2, no decision will have been made on issue B1 so it is very much a live issue and open to argument.

B1.2.2 Since Respondent has to show that the contract was amended, it is suggested that Respondent should lead on this issue and Claimant reply.

B1.2.3 The circumstances can be argued to be a failure of 'meeting of minds' in that both of Mr Long and Mr Short understood the key telephone discussion of 9th February differently. Was there such a failure ? If so, was any amendment agreed at all ? Or was an amendment made as evidenced by conduct ?

B1.2.4 Mr Short stated "It is rare that I receive an amendment to a contract in written form when it is a matter of a change in the delivery date of only a few days" but there appears no other statement or evidence on the record either supporting or rebutting this. To what extent then, if any, can any weight be put on such a statement, even before one considers the admissibility issue (see A1 above) ?

B1.2.5 It was clearly necessary to amend both the shipping contract and the L/C to reflect the new delivery date but was it any or all of:

(i) *necessary* to amend the sale of goods contract particularly given its express envisaging of delay ?

(ii) commercially expedient to amend the sale of goods contract, e.g. to give effect to the intent of the parties ?

(iii) logical to amend ?

B1.2.6 Can, with particular reference to Art.7(1) CISG, an accusation of bad faith be made against Mr Long, e.g. in alleging that he deliberately gave Mr Short the wing impression ?

B2. Avoidance of the Contract/Damages

B2.1 The Background

Exquisite, the Claimant, is jointly owned by Atlantica Megastores and Oceania Plus. The latter is known for its high ethical standards, which feature prominently on its website and in its public relations and other communications. As a consequence all members of the Oceania Plus group including Exquisite have to audit potential suppliers for their

[1] To a common lawyer these provisions might, at first sight, scream "unenforceable" very loudly but it is not intended that students should address the issue of enforceability and tribunals are recommended to stop anyone seeking to go down that route. For present purposes, the 5 day delay (assuming the contract was not amended) gives a 5% penalty which probably eats into Equatoriana Clothing's profit margin (and was intended to do so and no more) so is not obviously unfair or unrealistic, particularly given the availability of a healthy bonus for early delivery. Further, given the pressure of time caused by the circumstances surrounding the 15th March launch date and given that Equatoriana Clothing could, arguably, reasonably foresee the consequences on Exquisite of missing that date, the 'penalty' then arguably falls a long was short of unrealistic or unfair.

compliance with the policies in regard to ethical and other matters. In addition, all contracts concluded by Exquisite and other members of the group, including the contract between the parties, explicitly require compliance with the "policy of Oceania Plus" which is a one page document setting out broad ethical and environmental standards. The policy is normally handed out during the audit process required for listing as a possible supplier and discussed with the audited companies. In the ordinary course of business such audits are repeated every four years for suppliers to remain on the list of potential suppliers.

However, the last audit on Equatoriana Clothing was performed in 2008 and if it had not been for the rush order a new audit would most likely have been conducted before the present contract would have been awarded to Equatoriana Clothing. During the 2008 audit Equatoriana Clothing was suspected of not have complied with the policies inter alia due to the use of child labor in the plants of one of its suppliers. In the ensuing discussions about the results of the audit Equatoriana Clothing could dispel these doubts alleging that the manager in charge of the plant concerned had been fired due to an intervention by Equatoriana Clothing. Irrespective of this Equatoriana Clothing had for this and other reasons not been Claimant's supplier of first choice and consequently had not been awarded another contract since April 2008.

The contract between Exquisite and Equatoriana Clothing called for the delivery of 100,000 polo shirts of various colors and sizes per the technical specifications attached to the contract. It is not disputed between the parties that the shirts delivered met these technical specifications. Furthermore, the parties have also agreed that the tribunal should assume that while Respondent had in fact used child labor in at least one of its plants, the polo shirts which were the subject of the contract have been produced without child labor.

Respondent understood, that the polo shirts produced were to be sold in Oceania (Procedural Order No. 2 para 15). While it had contracted with Claimant before it had never delivered goods for Doma Cirun but only for other subsidiaries of Oceania Plus located outside of Oceania. Furthermore, Respondent had delivered goods to Oceania before on three other occasions, however, to different customers which were not part of the Oceania Plus group.

The country of Oceania prides itself on its policy of being very "ethical", and has played a leading role in the work leading to the ILO Convention against child labor. That also explains the strong public reactions in Oceania to the television program and the article in the Oceania Times.

In light of these facts Exquisite is of the view that the polo shirts were not fit for the particular purpose for which they had been purchased, namely for resale in Oceania. Equatoriana Clothing specifically knew the purpose for which they had been purchased. It also knew from the audit made of the firm in 2007, the subsequent discussions before the audit was approved and Art.12 of the contract that it was of great importance for Claimant that the goods were produced in an ethical manner and, specifically, that child labor was not used by Equatoriana Clothing.

Exquisite considers the use of child labor by Equatoriana Clothing to constitute also a fundamental breach of the contract. Consequently, in conformity with CISG art. 49 Exquisite had assumed a right to avoid the contract and claims restitution of the purchase price of USD 550,000 pursuant to articles 81-84. Furthermore it claims the following additional damages for which it wants to be reimbursed:

- USD 850,000 paid to Doma Cirun as settlement of the law suit brought by Doma Cirun;
- USD 700,000 paid to Oceania Plus as settlement of the law suit brought by Oceania Plus.

Equatoriana Clothing by contrast denies that any breach has occurred let alone a fundamental breach. It submits that the polo shirts delivered met every specification in the contract. No child labor was involved in their production. As a consequence Equatoriana Clothing is of the view that it cannot be made responsible for the reaction of the public in Oceania to the television broadcast or the article in the Oceania Times that did not relate to the goods in question. Therefore, it did not breach any of its obligations under Art.35 CISG in regard to the polo shirts.

The parties had agreed with the tribunal on a bifurcation of the proceedings in this regard in a liability phase, in which it would merely be determined whether there was a breach of the contract and whether it was fundamental and a subsequent damage phase, should the tribunal determine that there had been a breach. Consequently they had agreed with the tribunal that no issues in regard to the quantum of damages should be argued in the first phase. Teams coming from different jurisdictions may have different understandings of how to separate the two stages. Some may want to argue issues relating to damages, such as their foreseeability, obvious mistakes in the damage calculation (no deduction of proceeds from resale to Pacifica Trading) or the validity of the penalty clause, which others consider to belong to the second phase. Arbitrators should take these different approaches into account and provide additional guidance if necessary of what issues they want to have discussed.

B2.2 Matters for Consideration by Arbitrators

This list is not intended to be exhaustive

B2.2.1 Conceptually, the use of child labor by Respondent may constitute a breach of the contract in two respects. First, it may lead to the non-conformity of the goods in the sense of Art.35 CISG. That is the way the parties have argued the case and which is consequently the most obvious way of arguing it.

Second, the use of child labor may also constitute a breach of an additional contractual obligation prescribed by Art.12 of the contract which provides:

> **12. POLICY** It is expected that all suppliers to Oceania Plus Enterprises or one of its subsidiaries will adhere to the policy of Oceania Plus Enterprises that they will conform to the highest ethical standards in the conduct of their business.

There is argument to be made concerning the use of the word "expected" here

Non-conformity of the goods

B.2.2.2 Concerning the non-conformity of the goods it should be discussed to what extent goods which comply with the technical specifications set out in the contract may nevertheless be non-conforming due to external circumstances such as the general attitude of the public to child labor. In the present case it is to be assumed that the polo shirts themselves were not produced with child labor. Thus, even if teams try to argue that compliance with Art.12 is part of the contractually agreed conformity requirements in the sense of Art.35(1) CISG the goods themselves would have complied with the requirements.

B.2.2.3. The CISG is based on wide concept of conformity which may not only encompass the physical conditions of the goods but also other factual and legal circumstances which concern the relationship of the goods to their surroundings. In practice the issue has been discussed primarily in connection with rules of public law at the buyer's place of business. The problem contains a number of factors which have been discussed in those cases where the alleged non-conformity of the goods was based on conflicts with public law restrictions in a particular country and which may be raised by the teams in their arguments.

B.2.2.4 On the one hand, Respondent knew that the goods were to be sold in Oceania and had delivered to Oceania before. Moreover, Respondent knew that Claimant attached considerable importance to the issue of ethical production methods. The contract contained an express clause to this respect in Art.12 and there had been a previous audit where the issues had been discussed. On the other hand, Respondent had never delivered any goods to Doma Cirun and the contacts with Oceania have been limited to three contracts to other customers not belonging to the Oceania Plus group. Thus, it may be argued that Respondent may not have been aware of the extent of sensitivity in Oceania to child labor.

B.2.2.5 The particularity in the present case is that it is not so much the goods themselves or their production process which caused the problem but the manufacturer and its behavior in relation to other goods. Thus it is at least questionable whether that leads to the non-conformity of the goods in the sense of Art.35(2)(a) or (b) CISG.

B.2.2.6 Teams which go the Art.35(2)(b) CISG route will need to discuss whether it was reasonable for the buyer to rely on the seller's skill and judgment in such circumstances. In this discussion the same factors may play a role

Breach of the contractual duty under Art.12

B.2.2.6 Beyond the issue of non-conformity of the goods one can also treat Art.12 as an additional contractual duty. Pursuant to Art.45 CISG the failure to perform "any of his obligations under the contract" entitles the buyer in principle to the remedies mentioned in that article. The behavioral standard imposed by Art.12 encompasses the complete conduct of the respective business and is not limited to the production process of the goods in question. Even if the wording is not completely clear ("expected") an interpretation of the provision in compliance with Art.8 CISG will lead to the conclusion that the use of child labor in any production process is prohibited. The relevant policy may not have been attached to the contract but had been handed over and discussed during the last audit. Consequently, a breach of this additional contractual obligation can be assumed.

Fundamental breach as prerequisite for avoidance pursuant to Art.49

B.2.2.7 If a breach of the contract can be established, to justify the avoidance of the contract declared by Claimant the breach has to be fundamental pursuant to Art.49 (1)(a) CISG. Teams have to argue whether it substantially deprives Exquisite of what it was entitled to expect under the contract and whether that result was foreseeable to Equatoriana Clothing or a reasonable person in its position (Art.25).

B.2.2.8 There are a number of factors which may play a role in determining the fundamental nature of the breach. They include, the intended purpose to sell the shirts in Oceania and the general attitude of the public, the insistence of Exquisite on ethical production methods, the requirements of audits but also the time passed since the last audit, the remaining on the list of potential suppliers despite incidences of child labor and the lack of an audit in the present case, the sale of the goods by Exquisite to Pacifica Trading Co just to mention the most important ones.

B.2.2.9 At the same time the foreseeability of the fundamental nature of the breach may be an issue. For the discussion largely the same factors as mentioned above remain relevant. Teams may try to argue that while Respondent could have foreseen that production of the goods as such with child labor may constitute in a fundament breach, it was not foreseeable that also such behavior in relation to other contract may have these consequences.

B. In addition to the problems relating to child labor also the delay in delivery, if established would constitute a breach of contract giving rise to damage claims. It is, however, not arguable that it constituted a fundamental breach justifying an avoidance of the contract.

Remedies

Procedural Order №.1 paragraph 10 does not mention remedies and there is to be no discussion thereof; in particular, the questions (i) of quantum of damages (ii) the costs of the arbitration and (iii) any interest chargeable on any sums are all excluded.

This may appear an artificial approach to remedies, but it is necessary to limit the number of issues for discussion in the Moot.