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

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 at the beginning of November including Procedural Order №.2.

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 at the Moot and therefore receive this analysis. It only seems fair that all teams should have it 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.

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. That is particularly true this year: 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 reply 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 6 June 2013 Mr. Fasttrack initiated with the Belgian Centre for Arbitration and Mediation ("CEPANI") arbitration proceedings for his client, Innovative Cancer Treatment Ltd (Claimant) against Hope Hospital (Respondent).

Claimant, based in Mediterraneo, is one of the few manufacturers world-wide of particle therapy equipment. In particular, it specialises in proton therapy and is the market leader for facilities using a passive beam scattering technique.

Respondent is a university teaching hospital and the national centre for cancer research and treatment in Equatoriana. It is renowned outside Equatoriana for its treatment of localized tumours by the conventional methods of surgery and radiotherapy with X-rays.

On 13 January 2008, after lengthy and intensive negotiations for nearly a year, the Parties concluded a Framework and Sales Agreement ("**Framework and Sales Agreement"** – Claimant's Exhibit No. 2). It provided for the purchase of a fully-equipped proton therapy facility consisting of one proton accelerator and two separate treatment rooms using a passive-beam scattering technique. At the same time the Framework and Sales Agreement was intended to lay down the framework for the Parties' future cooperation in operating and extending the facility.

The purchase price for the facility was USD 50 million and was to be paid in several installments by Respondent. The initial payment of USD 10 million was made on 1st February 2008 and upon completion of the facility on 15 April 2010 Respondent started to make its semi-annual payments of USD 7.5 million.

In May 2011 Respondent approached Claimant with regard to the purchase of an additional third treatment room using a more sophisticated active scanning technology. The purchase of that technology had already been extensively discussed during the negotiation of the Framework and Sales Agreement. At that time Claimant had been in the final stages of developing this new technique for delivering the proton beam. It had therefore been looking for a renowned cancer research facility to provide and verify the required data and engage in clinical studies. The original negotiation had, however, not been successful.

When approached again in 2011, Claimant still had not finalized the development of the active scanning technology which it considered to be important for the further development of the company. Consequently it had a strong interest in co-operating with Respondent to make the necessary clinical studies and verify the data. In particular, Respondent's input was crucial in developing, testing and refining the necessary steering software for the accelerator and the proton beams used for treatment.

The market value of such a treatment room with active scanning technology was around 9,5 million. In light of Claimant's interest in developing the technology and subsequently selling it also to other customers uninhibited from any intellectual property rights, Claimant was willing to agree very favorable financial terms for Respondent.

It was agreed that Respondent would pay for the relevant components, the new software package and the training USD 3.5 million. In exchange, it was obliged to provide the trial data necessary for Claimant to develop the software and hold the required number of clinical trials (Claimant's Exhibit No. 5). To arrive at this reduced price the parties attributed a value of USD 6 million to Claimants contribution, which had a market value of USD 1,5 million (Procedural Order No 2 para. 27).

On 20 July 2011 a Sale and Licensing Agreement was concluded concerning the third treatment room and the software necessary to use the active scanning technology (Claimant's Exhibit No. 6). The third treatment room, including the equipment and the software became available on 13 January 2012 and Respondent subsequently made the initial payment of USD 2 million on 2 February 2012.

On 15 August 2012 Respondent informed the Claimant that it would not make any further payments, neither the final payment under the Framework and Sales Agreement nor the outstanding payment under

the Sale and Licensing Agreement (Claimant's Exhibit No. 7). The reason given by Respondent for its non-payment under the Framework and Sales Agreement was that the proton therapy facility could – contrary to Claimant's representation –not be run economically have a lower capacity than represented. Concerning the non-payment under the Sale and Licensing agreement Respondent alleged that the software was incapable of steering the beam with the required accuracy. Claimant contested both allegations.

All efforts to settle the dispute amicably failed and in the end Claimant submitted its request for arbitration to CEPANI.

Claimant asked for the payment of USD 11,5 million consisting

- USD 10 million outstanding purchase price for the proton therapy facility under the Framework and Sales Agreement and
- USD 1,500,000 for the software for the active scanning technology under the Sale and Licensing Agreement.

Respondent objected to the jurisdiction of the Arbitral Tribunal and to having both claims raised dealt with in a single arbitration proceedings.

The Tribunal, after establishing with the parties the Terms of Reference for the complete proceedings, decided to bifurcate the proceedings for reasons of procedural economy. In the first part of the proceedings, which are the object of this Moot the parties should concentrate on the questions of jurisdiction and joinder of the cases as well as on the law applicable to the merits. Provided that the Tribunal comes to the conclusion that it has jurisdiction the merits of the case would then 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 3 (p 53). That paragraph of the Procedural Order states in its relevant part that

"3. In light of these considerations the Arbitral Tribunal makes the following orders:

(1) In their next submissions and at the Oral Hearing in Danubia (Hong Kong) the Parties are required to address the following issues:

a. Does the Arbitral Tribunal have jurisdiction to deal with the payment claims raised by Claimant?
b. Assuming that both contracts contain a valid arbitration clause, should both claims be heard in a single arbitration or does the Arbitral Tribunal lack jurisdiction and/or competence to do so or should refrain from doing so?
c. Does the CISG govern the claims arising under the Sales and Licensing Agreement of 20 July 2011? On the basis of the Parties' submissions this includes in particular the following questions:
    i. Whether the Sales and Licensing Agreement constitutes a sales contract in the sense of the CISG?

ii. Whether the July 2011 version of Standard Terms and Conditions of Sale been validly included into the contract?
iii. What would be the effect of the choice of law clause contained in section 22 of these Standard Terms and Conditions of Sale provided they have been included?

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

Jurisdictional and Procedural Issues : Procedural Order No 1- #3(a)(b)

Background

The jurisdictional issues to be addressed by the parties under question concern the broad question of the limits to party autonomy in arbitration, i.e. whether it is possible to agree on a limited finality of the award and on arbitration clauses favouring one party. Question b deals then with the Claimant's decision to try to make use of Art. 10 CEPANI-Rules and to initiate one set of arbitration proceedings for disputes arising from different contracts between the same parties.

Question a: Jurisdiction of the Arbitral Tribunal

Claimant based its request for arbitration for both claims on the disputes resolution clause contained in Art. 23 of the Framework and Sales Agreement ("FSA") (p 11). Consequently, structurally the validity of the arbitration clause in Art. 23 FSA should be discussed first and then in a second step, whether this clause also covers disputes under the Sale and Licensing Agreement ("SLA").

I. Valid Arbitration Agreement in the Framework and Sales Agreement

The dispute resolution clause in Art. 23 FSA has been discussed and agreed upon by Claimant's general manager Mr. Karl Power and Respondent's COO, Dr Mathieu Excell, at a meeting on 4 November 2007 (Claimant's Exhibit No 3, p 14). Though neither of them is a lawyer the clause was included verbatim into the contract. Art. 23 is a so called multi-tier dispute resolution clause providing for negotiations, then for meditation and only if no settlement can be reached for arbitration under the CEPANI Rules. The relevant parts of the clause provide as follows:

> *(3) If the matter in dispute is not resolved through such mediation within thirty (30) days after the start of the mediation, then, but not before the expiry of the 30th day, such dispute shall become subject to arbitration, to be finally settled under the CEPANI Rules of Arbitration before CEPANI – The Belgian Center for Arbitration and Mediation at Rue des Sols/Stuiverstraat Nr. 8, 1000 Brussels. The arbitration shall be conducted before three arbitrators, in the English language and shall be held in Vindobona, Danubia.*

(4) The award shall be final and binding upon the Parties. Each Party has, however, the right within three months after it has received the award to refer the case to the applicable state courts if it considers the award to be obviously wrong in fact or in law. The state court shall then have jurisdiction to review the case and to decide the issue in accordance with the applicable law.
(5) The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo.
(6) In addition, the Seller has the right to bring any and all claims relating to payments in the courts of Mediterraneo. The Buyer herewith submits to the jurisdiction of the courts of Mediterraneo.

Paragraph 4 was included to take into account that Respondent, as a University Hospital, would have to overcome considerable resistance to submit to a dispute resolution method under which it would be bound by decisions which may be obviously wrong (Claimant's Exhibit No. 3, p 11). In its Circular No 265 (Respondent's Exhibit No. 1) the Auditor-General of Equatoriana had requested government entities not to "forego the right of review of manifestly erroneous decisions of courts or tribunals". While the Circular as an administrative guideline was not directly binding, Respondent wanted to comply with its content, to avoid any discussions which previous deviations had raised (Procedural Order No. 2 para 9, p 58).

Respondent challenged the validity of the arbitration clause due to the included appeal and review mechanism in paragraph 4. In the relevant parts of its submission Respondent states:

> 7. First, it is not clear what type of dispute resolution the Parties have in fact agreed upon. It is a characteristic feature of arbitration that it results in a binding decision. In the present case the Parties, however, explicitly provided for a comprehensive appeal and review mechanism to the state courts which, in our view, is incompatible with the principles of arbitration. Thus, it is doubtful that the Parties ever wanted to agree on arbitration.
>
> 8. Second, even if the Parties had intended, in principle, to agree upon arbitration such agreement would be invalid. It is obvious that the parties cannot agree upon the appeal and review mechanism provided for in Art. 23 of the Framework and Sales Agreement. Without the appeal and review mechanism Respondent would never have agreed to arbitration. Thus, invalidity of the appeal and review mechanism would render the whole arbitration agreement invalid.

Both arguments are closely related and may be made depending on how the appeal and review mechanism is interpreted. One could either question already whether the parties truly wanted arbitration or – what is probably more convincing in the case at hand – whether such an appeal and review mechanism is valid in the context of an arbitration clause. The exact mode of operation of the clause is not clear from its wording. On the one hand it could be interpreted as a modification of Art. 34 Model Law allowing for an extended review of the award. On the other hand it could be interpreted as a clause limiting the binding force of an award to those cases in which no court proceedings are initiated. Such court proceedings would then, however, not review the decision of the arbitrator but decide the case anew, as if there had been no previous arbitration. Both interpretations have been adopted by courts in cases involving comparable clauses. The German

Supreme Court adopted the later interpretation in a case of 1 March 2007 (case III ZB 7/06, 25 ASA Bulletin 2007, p 810; see also Yearbook of Commercial Arbitration 2008) and classified the clause as a valid arbitration clause. In its view the principle of party autonomy allowed the parties to make the binding force of an award dependent on the non-initiation of court proceedings. By contrast the American Supreme Court (*Hall Street v Matell* 552 US 576 (2008)) and the New Zealand Court of Appeal (*Gallway Cook Allen v Carr* [2013] NZCA 11) have come to different interpretations. They considered comparable clauses to constitute inadmissible extensions of court review on arbitral awards. In their view, in essence, extended review-mechanisms which would allow an appeal on the merits are contrary to characterizing features of arbitration, i.e. the finality of awards. Consequently, they were also beyond an agreement by the parties.
In case one follows the interpretation of the two common law courts and their view as to the validity of such extended review clauses or considers the decision by the German Supreme Court for other reasons to be wrong (see Wolff, 26 ASA Bulletin 3/2008, p 626 – finality of awards is a characteristic feature of arbitration not at the parties' disposal) the question arises whether the invalidity of the extended review mechanism also renders the whole arbitration clause invalid. That was assumed at first instance in the New Zealand case but rejected by the Court of Appeal. Again there are good arguments for both sides.

b. In addition, Respondent challenges the validity of the arbitration clause for its one- sidedness. According to paragraph 6 the Claimant has the "right to bring any and all claims relating to payments in the courts of Mediterraneo. The Buyer herewith submits to the jurisdiction of the courts of Mediterraneo". No such right exists for the Respondent.
There are decisions in Model Law Countries such as Russia (Supreme Arbitrazh Court of the Russian Federation *Russkaya Telefonnaya Kompaniya v. Sony Ericsson Mobile Communication Rus*, 1 September 2012; see also in the context of forum selection clauses the French Cour de Cassation, *Mme X v. Bank Privée Edmond de Rothschild*, 26 September 2012) which have considered such clauses to be invalid. By contrast in other jurisdictions such one sided arbitration or forum selection clauses have been considered to be valid (for a forum selection clause the English High Court *Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd and Anonther* [2013] EWHC 1328).

c. Last but not least, if one considers Art. 23 or at the least the arbitration clause contained in it to be invalid, the question arises whether or not the dispute resolution clause in Section 21 of Claimant's standard terms revives. It reads as follows:

Section 21 Dispute Resolution

(1) Any dispute arising out of or in connection with this Agreement shall be finally settled under the Arbitration Rules of CEPANI – The Belgian Centre for Arbitration and Mediation by one or more arbitrators appointed in accordance with the said Rules.
(2) The place of the arbitration shall be Capital City, Mediterraneo.
(3) The arbitration shall be conducted in English.
(4) Any right of appeal shall be excluded.

Section 21 like Art. 23 FSA provides for CEPANI Arbitration, so that at least the Tribunal would not be constituted under the rules of a wrong institution. It contains, however, a different place of arbitration than the clause under which the proceedings were initiated. To what extent a clause in standard conditions from which the parties wanted to derogate becomes applicable again if the individually agreed clause turns out to be invalid is open to discussion as is the effect of a different place of arbitration in the clause under which the arbitration was initiated.

II. Valid Arbitration Agreement in the Sales and Licencing Agreement ("SLA")?

According to Claimant's request for arbitration Art. 23 FSA also constitutes the basis for the tribunal's jurisdiction to decide upon the payment claim arising from the SLA. Claimant justifies the extension of the clause to disputes arising from the Sales and Licensing Agreement by Art. 45 FSA. It provides that the provisions of the FSA also "govern all further and future contracts concluded by the Parties in relation to the Proton Therapy Facility purchased where such contracts do not contain a specific provision to the contrary".

In Respondent's view Art. 23 SLA constitutes such a "provision to the contrary" (Answer to Request para. 11, p 32). It provides:

> ***Art. 23 Dispute Resolution***
> (1) The Parties hereby agree that for interim and provisional urgent measures application may be made to the courts of Mediterraneo or Equatoriania as applicable.
> (2) In addition, both Parties shall have the right to bring any and all claims in the courts of Mediterraneo or Equatoriania to the jurisdiction of which they hereby submit.

Respondent interprets the provision as a completely new dispute resolution clause which replaced Art. 23 FSA. By contrast Claimant considers the clause to constitute merely an amendment of paragraphs 5 and 6 of Art. 23 FSA while the rest remained in force. In the end this is a question of interpreting the dispute resolution clause. There are arguments for both views.

Question b: Can and should both claims be heard in a single arbitration?

Claimant has initiated one set of arbitration proceedings for claims arising from two separate contracts, i.e. the FSA and the SLA. Both contracts are, however, closely connected. They concern the same Proton Therapy Facility and Art. 45 FSA explicitly provides that its provisions also apply to subsequent contracts concluded in connection with the Proton Therapy Facility unless these contracts contain provisions to the contrary. In particular, has Claimant based the jurisdiction for both claims on the arbitration clause in Art. 23 FSA, which has, however, been slightly modified at least in relation to the availability of court proceedings. For the joint treatment of the two claims in a single arbitration Claimant has relied on Art. 10 CEPANI Rules which provides in its relevant part:

> **Article 10. - Multiple Contracts**
> 1. Claims arising out of various contracts or in connection with same may be made in a single arbitration.

This is the case when the said claims are made pursuant to various arbitration agreements:
a) if the parties have agreed to have recourse to arbitration under the CEPANI Rules and
b) if all the parties to the arbitration have agreed to have their claims decided within a single set of proceedings.

2. Differences concerning the applicable rules of law or the language of the proceedings do not give rise to any presumption as to the incompatibility of the arbitration agreements.

3. Arbitration agreements concerning matters that are not related to one another give rise to a presumption that the parties have not agreed to have their claims decided in a single set of proceedings.

Respondent has objected to the consolidation of the claims in a single set of proceedings (Answer to Request, para 12 et seq, pp 32, 33). In its view the two claims, notwithstanding that they concern the same Proton Therapy Facility, are legally and factually largely separate: legally, because according to Claimant's submission both claims are based on different laws, i.e the Law of Mediterraneo for the FSA-claim and the CISG for the SLA-claim; factually, because both claims allegedly turn on different points requiring a different expertise from the arbitrators. For the later reason Respondent also nominated different arbitrators for both claims, a health economist for the first and a software specialist for the second.

Pursuant to Art. 12 (1) CEPANI-Rules the Arbitral Tribunal decides on requests of hearing the two claims together. The mere fact, that CEPANI, in line with Claimant's Request for Arbitration, has appointed only one Arbitral Tribunal so far does not prejudice the Arbitral Tribunals power to do so.

The decision will turn on the interpretation of Art. 10 (1) CEPANI-Rules which are not completely clear in this regard. The first issue is the relationship between the first and the second sentence of Art. 10 (1) CEPANI-Rules. In particular looking at the French version of the Rules, one could argue that the additional requirements in sentence 2 cover only the cases in which the claims are based on two different arbitration agreements but that in case of a single arbitration agreement the Arbitral Tribunal has discretion to decide on the joint treatment of claims. It should then be argued of whether or not the Arbitral Tribunal should exercise its discretion.

The second issue, if one sees the relationship differently, is how the requirement in Art. 10 (1)2(b) CEPANI-Rules has to be understood, that "all the parties to the arbitration have agreed to have their claims decided within a single set of proceedings. Does that require an express consent for the particular arbitration after the dispute has arisen, or is such consent implied in agreeing on the application of the CEPANI-Rules for those separate claims?

If one assumes the latter, the question arises of whether the Arbitral Tribunal should in this case follow Claimant's request to have a single set of proceedings or not.

Substantive (Merits) Issues: Procedural Order No 1- #3(c)

Background

Unlike in previous years the CISG-question does not related to the rights and obligations of the parties under Part III. Instead, the first phase of the arbitral proceedings is limited to the question of whether the CISG is applicable at all. It thus concerns primarily the CISG's Part I in the context of which, however, also Part II becomes relevant. It has to be determined whether the choice of law clause in the Claimant's new standard terms has been included in the Sales and Licensing Agreement and constitute an exclusion of the CISG.

The discussion only concerns the law applicable to the Sales and Licensing Agreement. The Framework and Sales Agreement (FSA) only provides the back drop for the analysis of the Sales and Licensing Agreement. The Procedural Order No 1 clearly states that any legal issues that may arise in regard to the FSA should not be addressed during the arbitral hearing in Vienna or Hong Kong. Both parties consider the FSA to be governed by the non-harmonized law of Mediterraneo.

In principle there are two issues to be addressed in the argument concerning the applicable law: First, whether the CISG is applicable at all to the Sales and Licensing Agreement, due to the important software component and Respondent's role in developing the software. Second, whether the CISG has been excluded by the parties due to the choice of law clause contained in Claimant's new standard conditions of July 2011 (Claimant's Exhibit No.9, p 24). To answer that latter question one has to determine first whether these standard conditions have become part of the contract at all. To facilitate the treatment of this second question it has been divided in two sub-questions which the teams may treat separately

Structurally, the obvious way is to discuss first whether the CISG is applicable at all before discussing its exclusion, as the latter would the also be governed by the CISG. In the present case, a different order is also possible. As both parties were apparently in agreement that the FSA was governed by the non-harmonized domestic law of Mediterraneo one could also first determine positively that the SLA is governed by a different law, due to the new choice of law clause contained in the standard conditions. In a second step one would then have to determine whether the CISG is the law chosen, i.e. whether the contract falls within its scope of application.

Question c (i): *Whether the Sales and Licensing Agreement constitutes a sales contract in the sense of the CISG?*

In regard to whether the Sales and Licensing Agreement constitutes a sales contract two issues should arise. There is no compelling order in which those issues should be discussed. The appearance of the Sale and Licensing Agreement as well as the description of the goods sold in Art. 2 SLA make it difficult to separate the different elements of the contract and consider them to be separate contracts submitted to different rules.

a. Article 3 CISG

A crucial part of the Sales and Licensing Agreement was the delivery of the steering software for the proton bean. The software still had to be developed by Claimant for Respondent's facility but it was intended to sell it later also to other customers. Respondent played an important role in the development of this new software. It provided and verified the required data and engaged in clinical studies for Claimant in regard to the development of the new software. According to Claimant's Request for arbitration Respondent "input was crucial in developing, testing and refining the necessary steering software" for the

new active scanning technology [Statement of Claim para 9, pp 5, 6; Answer to Request para 19, p 34; Procedural Order No 2 para 22, p 61].

Respondent's involvement in the development of the active scanning technology warrants a discussion of Article 3 of the CISG:
Pursuant to Article 3(1), the Convention applies to contracts for the sale of goods to be manufactured or produced. This makes clear that the sale of such goods is as much subject to the provisions of the Convention as the sale of ready-made goods. This aspect of the Conventions sphere of application is, however, subject to a limitation: contracts for goods to be manufactured or produced are not governed by the Convention if the party who "orders" the goods supplies a "substantial part" of the materials necessary for their manufacture or production. Article 3 does not provide specific criteria for determining when the materials supplied by the buyer constitute a "substantial part". Different views exist as to whether that should be determined by a purely quantitative or more qualitative test. The different language versions seem to have a different emphasize. While the English version could be understood to refer to a more quantitative test the French version refers to 'an essential part' ('une part essentielle') which points more to a qualitative test.

A different -- albeit related -- issue is whether providing instructions, designs or specifications used for producing goods is the supply of "materials necessary" for the goods' manufacture or production; if so, a sales contract in which the buyer supplies such information is excluded from the Convention's sphere of application if the "substantial part" criterion is met.

In the present case there is an additional twist, that Respondent's support in developing the active scanning technology had a market value of USD 1.5 million but was included into the price calculation with a value of USD 6 million. That raises the question of which of the figures is relevant in determining the application of Art. 3.

The Claimant recounts the facts as follows[1]

> During the previous discussions in 2007 and 2008, the price had been a major stumbling block that finally resulted in Hope Hospital temporarily giving up the project. Consequently, ICT was willing to give a considerable discount so long as it received the required data and could later use the technique unrestricted from any intellectual property rights for world-wide sales. In the end, in July 2011, it was agreed that Hope Hospital would buy the relevant components, the new software package and the training for a heavily reduced price (USD 3.5 million). In exchange, it was obliged to provide the trial data necessary for ICT to develop the software and hold the required number of clinical trials.

In the letter of 5 July 2011 Dr Vis explained to Professor Account[2]

> The draft [contract] takes into account your budget restraints and that the technology used is not yet finally approved for cancer treatment. We are delighted that Hope Hospital will contribute to the final stages of the developments of the active scanning technology (details set out in (draft) Art 10. of the Sales and Licensing Agreement). As already indicated, we are convinced that, through our joint efforts, it will be a straightforward matter to get the technology approved within a short time, leading to a breakthrough in the treatment of certain types of cancer.

The Respondent states[3]

[1] Statement of Claim para 12, p 6.
[2] Claimant's Exhibit No 5, p 17.
[3] Answer to Request para 19, p 34.

> The Sales and Licensing Agreement concerned primarily the development of new software for the particular needs of Respondent and the grant of a license therefor. Consequently the contract falls outside the scope and sphere of application of the CISG which is concerned only with the sale of tangible goods. In the present case only 20% of the contract price can be attributed to the "hardware" as such, in particular the magnets to be delivered.

Respondent Exhibit No 3, the letter from Lisa Maier to Dr Excell of 18 July 2011 (p 39), sets out the price allocation of the different parts of the active scanning technology purchased by Respondent from Claimant.

b. *Software contracts*

It is also controversial whether software contracts fall within the scope of the CISG. That may either be treated under Art. 3 (services) or Art. 1(tangible goods). In the present case the software, was not delivered under a separate contract but constituted a crucial part of a contract for the delivery of a fully equipped treatment room. [In regard to the detailed description of the software and its values see Procedural Order No 2 paras 23 & 24, p 61].

Most of the commentators, in an attempt of 'autonomous interpretation' of the CISG (Article 7(2) CISG), concentrate on the question of whether 'software' is 'goods' under the CISG, and ask if intangibles may also qualify. Green and Saidov succinctly summarize that there is disagreement among the commentators on this issue, and that '"Finally, some commentators take a somewhat ambiguous position by stating that the CISG generally governs tangible objects, but also suggesting that the term "goods" should be interpreted broadly so as to include all kinds of software."[4]

For Huber/Mullis the issue whether the CISG applies to a software contract is not a matter of Art 1 CISG (ie whether software is a "good") but rather a matter of Art 3(1) CISG. Huber/Mullis argue that the CISG can only apply if the intention of the parties is to transfer ownership in the software to the buyer, and not merely to grant a licence on terms to use the software for a certain period of time.

Schlechtriem/Butler distinguishes two types of software purchases. In the first category are software contracts where the software is licensed for a limited time. Once the agreed licence period ends, the contract can be renewed or terminated. The licensor might be obliged during the licence period to upgrade and service the software. At the end of the licence period the licence is terminated and the licensee must give back what is capable of being given back (such as manuals or discs). The CISG does not apply to such a contract. The second category concerns contracts where the buyer purchases the software licence indefinitely, that is, for an unlimited time period. In such cases the buyer, after paying the purchase price, can use the software as if it was his or her property. The authors' argue that the CISG does apply to the latter category.

Others distinguish concerning the application of the CISG to software between standard software and customized software.

The case provides sufficient information to discuss all different views. Claimant did not sell a pre-existing standard software to Respondent but developed it specifically for Respondent's facility. It was then, however, intended to be sold to other customers, which also happened. There are a number of indications that the software was only licensed to Respondent (name of agreement; explicit exclusion of royalties in

[4] Green and Saidov "Software as Goods" *Journal of Business Law* 161 at 164-165.

Art. 2). At the same time Art. 2 grants a permanent right to use the software for which no royalties are payable, which comes close to the position of a buyer.

Question c (ii): *Whether the July 2011 version of Standard Terms and Conditions of Sale have been validly included into the contract?*

During the negotiations of the Sale and Licensing Agreement, Claimant informed Respondent about the regular overhaul of its standard terms and that the Agreement would be governed by the new version of the standard terms [Statement of Claim para 14, p 6]. Dr Vis, for the Claimant, had promised to send a copy of the terms once they had been translated into English but he never did. Neither did Ms Meier, the person replacing him during his sick leave [Answer to Request para 17, p 33]. Dr Vis in a letter of 5 July 2011 stated:[5]

> In addition, I would like to mention to you that we have now overhauled our standard terms as already indicated at our last meeting in June. The new standard terms are applicable to all contracts concluded from the beginning of July. At the moment the new standard terms are available on our website only in Mediterranean, as the English translation still has to be finalized. I will send you an English translation within the next week. The changes are, however, of a minor nature and hardly affect our relationship.

Dr Mathieu Excell in his witness statement for the Respondent recalls the issue of the inclusion of the July 2011 standard terms as follows:[6]

> On 2 June 2011 we had a final meeting with the doctors, software-engineers and the business teams of both parties. At the beginning of the meeting Dr Eric Vis pointed out that Claimant had revised its standard terms and was in the process of having them translated into English. He later, in a letter of 5 July 2011, told us that the version in Mediterranean language was already on their website but due to problems with the English translator there had been some delays in preparing the English version. Dr Vis promised that once the translation had been done he would send us an English version of the new standard terms that should in principle apply to all contracts concluded from 1 July 2011 onwards. He assured us, however, that the revision of the standard terms was minor and would not lead to important changes in the relationship between the Parties apart from the liability regime.
> We could not verify that statement on that date since within Hope Hospital only one person, of whom I am aware, speaks Mediterranean. It is a young assistant doctor with a specialization in pediatric cancer. He had been present at some of the earlier meetings while we were discussing the usability of the Proton Therapy Facility to his field of research but he has not been a permanent member of our negotiation team. Moreover, he had been on holiday on 5 July 2011 and had only returned to work on 20 July 2011. There was no reason for us to have doubted the veracity of Dr Vis' statement. In particular, in light of the statement we could not have envisaged 38 that Claimant had been planning to submit all its contractual relationships, including the one with Respondent, to a different law.

The issue whether the July version of the Standard Terms and Conditions for Sale have been validly included into the Sales and Licensing Agreement allows the parties to discuss a pertinent issue in any contract law regime. There is ample jurisprudence and literature canvassing the issue, including the latest CISG-Advisory Opinion No 13, issued in May 2013. However, the core issue that parties will have to discuss is not so much the classical debate between knock-out and last shot rule but rather around whether the Respondent, had reasonable opportunity to take notice of Claimant's (new) July 2011 Standard Terms. It allows the parties to use extensively the facts provided in problem to argue their different positions, relying on Art 8 CISG while doing so.[7]

[5] Claimant's Exhibit No 5, p 17
[6] Respondent Exhibit No 2, p 37.
[7] See also Procedural Order No 2 paras 31-36, pp 62, 63.

Question c (iii): ***What would be the effect of the choice of law clause contained in section 22 of the July 2011 Standard Terms and Conditions of Sale provided they have been included?***

Section 22 of the July 2011 Standard Terms reads:"The contract is governed by the law of Mediterraneo." [Claimant Exhibit No 9, p 24] In contrast section 22 of the November 2000 Standard Terms read:"The contract shall be governed by the national law of Mediterraneo as set out in the statutes of Mediterraneo and developed by its courts." [Claimant Exhibit No 2, p 13]. In regard to the latter it is not controversial between the parties that this clause excludes the application of the CISG [Procedural No 2 para 20, p 60].

The issue that arises is whether the change of wording of the standard terms results in the application of the CISG to the Sales and Licensing Agreement. The issue is again a classic CISG issue. There is ample jurisprudence and literature in regard to which contract terminology in- or excludes the application of the CISG to the contract.

Courts and arbitral tribunals have consistently found that a choice-of-law clause stipulating "the substantive laws of a Contracting State" as the governing law of the contract leads to the applicability of the CISG.[8] On the other hand, US Courts have held that a choice of law clause itself constitutes the exclusion of the CISG.[9]

Again the parties have not only to explore the legal arguments but primarily have to have due regard to the facts and their interpretation in the circumstances (Art 8). The most important factors are mentioned by Respondent who contends[10]

> …even the application of the July 2011 version of the standard terms would not have led to the application of the CISG. The substance of the choice of law clause remained unchanged and still provided for the application of the law of Mediterraneo. It has to be read in light of the clear exclusion of the CISG in the November 2000 version of the standard terms and Dr Vis' statement that there would be no "major change" in the new terms but that they would primarily constitute an "update of the previous terms in light of 34 some recent developments" (witness statement of Dr Matthieu Excell, Respondent's Exhibit No. 2). Consequently, the choice of law clause in the July 2011 version was intended to provide for the application of the non-harmonized law of Mediterraneo to the exclusion of the CISG or at least that had to be understood by Respondent as an exclusion.

Claimant by contrast is of the following view:[11]

> [T]he United Nations Convention on the International Sale of Goods 1980 ("CISG") is applicable to the Sales and Licensing Agreement dated 20 July 2011. The Claimant re-drafted its standard terms in June 2011and the new standard terms were included in all contracts concluded after 30 June 2011. Claimant notified the Respondent of the amended standard terms in its letter of 5 July 2011 (Claimant's Exhibit No. 5) and the Sales and Licensing Agreement provided in Art. 46 for their application. Pursuant to section 22 of the new standard terms (Claimant's Exhibit No. 9) Mediterranean law is applicable to the Sales and Licensing Agreement. Mediterraneo is a CISG member state and the Sales and Licensing Agreement is a contract for the sale of goods in the sense of Article 1 CISG.

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[8] *Hamburg Chamber of Commerce Court of Arbitration, March 21, 1996, MDR 1996, 778 = RIW 1996, 766; OLG Cologne, RIW 1994, 972; OLG Düsseldorf, RIW 1993, 325; ICC Arbitration Case No. 6653/1993, JDI 1993, 1040; Tribunale Civile di Monza, il Foro Ital 1994, 918*.

[9] *Viva Vino Import Corp. v Farnese Vini S.r.l.*, 2000 WL 1224903, at 1 (E.D. Pa. Aug. 29, 2000); *Fercus, S.R.L. v. Palazzo*, MP, 2000 WL 1118925, at 3 (S.D.N.Y. Aug. 8, 2000); *Claudia v. Olivieri Footwear Ltd*., 1998 WL 164824, at 4 (S.D.N.Y. April 7, 1998).

[10] Answer to Request para 18, pp 33, 34.

[11] Statement of Claim para 25, p 8.