DIFFICULT AND NOVEL LEGAL ISSUES EXPLORED BY THE STUDENTS WHO REPRESENTED THE UNIVERSITY OF BUCHAREST IN THE 2023-2024 EDITION OF THE WILLEM VIS MOOT COURT COMPETITION

PROBLEME DE DREPT DIFICILE ȘI DE ACTUALITATE EXPLORATE DE STUDENȚII CARE AU REPREZENTAT UNIVERSITATEA DIN BUCUREȘTI LA EDIȚIA 2023-2024 A CONCURSULUI DE PLEDOARII WILLEM VIS

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ABSTRACT

This article provides an overview of the Willem Vis International Commercial Arbitration Moot in general and of the novel and difficult legal issues raised by the 2023-2024 moot Problem. On the merits, the main legal issues involved liability for misdirected payments as a result of cyberattacks and the existence of an obligation of information and/or good faith in the performance of a contract between commercial parties to a contract governed by the CISG. The procedural issues concerned the mechanisms for adding a new claim after the signature of the Terms of Reference and/or for consolidating two arbitrations, under the ICC Rules, in the presence of several arbitration agreements, comprising a clause included in a framework agreement and clauses included in specific purchase orders under the umbrella of that framework agreement.

Keywords: *Willem Vis; moot; arbitration agreement; cyberattack; data privacy; payment; obligation of information; obligation of good faith; terms of reference; new claim; ICC Rules; party autonomy*

REZUMAT

Acest articol oferă o privire de ansamblu asupra concursului internațional în domeniul arbitrajului comercial internațional Willem C. Vis și a chestiunilor

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juridice noi și dificile ridicate de Problema care a făcut obiectul ediției 2023-2024 a concursului. Pe fond, principalele aspecte juridice au vizat răspunderea pentru plăți direcționate incorect ca urmare a unor atacuri cibernetice și existența unei obligații de informare și/sau bună-credință în executarea unui contract între părți la un contract comercial guvernat de CISG. Problemele procedurale implicate au vizat mecanismele de adăugare a unei noi cereri după semnarea Termenilor de Referință și/sau de conexare a două arbitraje, în conformitate cu Regulile ICC, în prezența mai multor convenții arbitrale, inclusiv o clauză inclusă într-un acord-cadru și clauze incluse în anumite comenzi sub umbrela respectivului acord-cadru.

CUVINTE CHEIE: *Willem Vis; concurs; convenție arbitrală; atac cibernetic; protecția datelor personale; plată; obligația de informare; obligația de bună-credință; termeni de referință; cerere nouă; Regulile ICC; principiul voinței părților*

In March 2024, the oral phases of the 31st edition (Vienna) and 21st edition (Hong Kong), respectively, of the Willem C. Vis International Commercial Arbitration Moot competition ("**Willem Vis Moot**") were held, in person. The 2023-2024 competition brought together over 4,000 students and 1,000 practitioners and academics and was attended by 373 law schools (Vienna) and 144 law schools (Hong Kong) from more than 80 countries. Universities such as Harvard, Yale, Columbia, New York University, Paris 1 Panthéon-Sorbonne, University College London, Queen Mary, Freiburg, Heidelberg, Munich, Singapore Management etc. attend the competition every year. As such, the Willem Vis competition is the largest private law competition in the world, combining international contract law and commercial arbitration.

The Willem Vis moot, conducted in English, is an amazing cultural and professional opportunity for law school students. It tests not only legal knowledge in the areas of international contracts and international commercial arbitration, but also practical skills: how to prepare written legal documents and how to conduct effective oral advocacy.

The Willem Vis moot includes several phases. The written phase involves drafting a Memorandum for Claimant and a Memorandum for Respondent (for the latter, in response to a Memorandum for Claimant of another law school). The pre-moot phase involves preparation for the final oral phase by participation at various pre-moots to test the oral arguments developed in support of the written submissions. The oral phase consists of four pleadings in the general rounds (two as Claimant and two as Respondent) against other teams, in front of "arbitral tribunals" consisting of practitioners and academics. Based on the results obtained in the general rounds, 64 teams (Vienna edition) and 32 teams (Hong

Kong edition) enter the elimination rounds. After successive knockout pleadings, the remaining two teams argue in the final.

In each of the two versions of the competition (Vienna and Hong Kong, respectively) there are four categories of awards for the written and the oral phase of the competition: (a) *Pieter Sanders/David Hunter award* for the best Memorandum for Claimant, (b) *Werner Melis/Fali Nariman award* for the best Memorandum for Respondent, (c) *Frédéric Eiseman/Eric Bergsten award* for teams that qualify to the elimination rounds and (d) *Martin Domke/Neal Kaplan award* for best individual oralist (to be eligible, a student must argue once as Claimant and once as Respondent).

The Willem Vis moot Problem always involves a dispute arising out of a contract governed by the UN Convention on Contracts for the International Sale of Goods ("**CISG**"). The contract contains an arbitration clause through which the parties establish the arbitral tribunal competent to resolve their disputes. The applicable rules of procedure vary from year to year. At the 2023-2024 edition, the 2021 Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce ("**ICC Rules**")[2] were used.

I. THE VIS MOOT PROBLEM

The Problem used for the 2023-2024 edition of the Willem Vis moot involved, once again, novel and difficult legal issues.

On the merits, the main legal issues involved liability for cyberattacks and the resulting misdirected payments, and the existence of an obligation of information and/or good faith in the performance of a commercial contract governed by the CISG. The cyberattack fact pattern also required exploring the relevance of privacy data laws in the context of international commercial contracts.

On the procedural side of things, the issues tested by the Willem Vis Problem were the mechanisms (and timing thereof) for adding a new claim after the signature of the Terms of Reference and for consolidating two arbitrations, under the ICC Rules. An interesting twist was the extent to which the parties could depart from the ICC Rules, pursuant to the principle of party autonomy, including by granting authority to consolidate to the arbitral tribunal rather than to the ICC Court. A secondary twist concerned the interplay between arbitration agreements included in a framework agreement and different arbitration agreements included in purchase orders concluded under the umbrella of that framework agreement.

[2] Available at https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/, last accessed 24 May 2024.

A. The Facts

To get more granular, the main facts of the 2023-2024 Willem Vis Problem were the following: SensorX plc., based in Mediterraneo (a fictitious country), was a leading Tier 2 producer of sensors used in various applications in the automotive industry, in particular for all types of autonomous driving applications ("**Claimant**"), while Visionic Ltd., based in Equatoriana (another fictitious country), was a Tier 1 producer of optical systems which are used by many of the leading car manufacturers for their autonomous parking systems ("**Respondent**"). In 2019, Claimant and Respondent entered into a Framework Agreement to regulate the future supply of Respondent with Claimant's sensors. According to the Framework Agreement, Respondent was entitled to order up to 2,500,000 sensors per year. Individual purchase orders had to be placed three months in advance and could not exceed 800,000 sensors per quarter. Payment was to be effected by transfer to one of the two bank accounts specified in the Framework Agreement, with prices being agreed in a semi-annual price fixing meeting by the Heads of Sale and Purchasing. In their first meeting in December 2019 the Parties agreed, however, upon an annual price fixing.

Between June 2019 and January 2022, Respondent submitted 22 different purchase orders under the Framework Agreement and Claimant delivered more than 5,000,000 sensors to Respondent without any problems. With two exceptions all orders submitted since June 2019 related to the S4 sensors and were handled on Claimant's side by Ms Audi, the account manager responsible for Respondent. The orders had been in the range of 200,000 – 400,000 units.

In January 2022, Respondent submitted two orders. On 4 January 2022, Respondent submitted a purchase order for 200,000 L-1 sensors (the "**L-1 Order**"). Due to the dual use options of that sensor the negotiation of the order and its processing were handled on Claimant's side by the special department for dual use sensors and not by Ms Audi. The sensors were delivered in accordance with the order on 16 February 2022 and Respondent made the first payment of USD 12,000,000 as requested on 18 March 2022. The second payment of USD 12,000,000 was, however, never made, as Respondent alleged that the sensors were defective in terms of quality. The missing payment was only discovered on 1 September 2023.

On 17 January 2022, Respondent submitted a purchase order for 1,200,000 S-4 sensors (the "**S-4 Order**"). The sensors were to be delivered in two instalments in April and May 2022. Claimant delivered both instalments in accordance with the contractual provisions, the first 600,000 sensors on 3 April 2022 and the second 600,000 on 30 May 2022. Payments for both deliveries were due 30 days after delivery, *i.e.* on 3 May 2022 and 30 June 2022 respectively. Respondent made both payments, but to neither of the bank accounts mentioned in the Framework Agreement. Instead, Respondent transferred the money to a different

bank account in accordance with a request in a phishing email of 28 March 2022 allegedly coming from Ms Audi. However, that email came from hackers which had infiltrated Claimant's IT-system via a sophisticated phishing attack on 5 January 2022, when Ms Audi (disregarding internal cybersecurity guidelines) had inadvertently downloaded a trojan horse and other malware. This allowed the hackers to access all communication between Claimant and Respondent. While Claimant had discovered the phishing attack on 23 January 2022, it had underestimated its scope at the time and had not informed Respondent or other customers about the attack. When, finally, the true scope of the attack became apparent, Claimant had to shut down its internal planning and accounting system from 15 May until 30 June 2022. Due to problems resulting from the shut down as well as the termination of Ms Audi's employment contract, it took until 25 August 2022 to realize that the two payments for the S-4 Order had not been received in Claimant's account but had been made by Respondent, on time, to the bank account given to them by the hackers impersonating Ms Audi. In light of the payments made, Respondent did not want to pay the amount a second time to the correct bank account.

On the basis of these facts, Claimant submitted a Request for Arbitration to the ICC on 9 June 2023, asking for an order that Respondent must pay Claimant USD 38,400,000 (the price of the 1,200,000 S4 sensors), with simple interest at the annual rate of 4% on the amount of USD 19,200,000 from 4 May 2022 onwards, and on the amount of USD 19,200,000 from 1 July 2022 onwards, under the S-4 Order.

On 10 July 2023, Respondent submitted its Answer to the Request for Arbitration, asking the tribunal to reject Claimant's claims as unfounded. In essence, Respondent submitted that due to Claimant's failure to inform Respondent about the phishing attack, the email of 28 March 2022 impersonating Ms Audi should be attributed to Claimant who should bear its consequences and, therefore, that Respondent's payments to the new (fake) bank account should be considered as performance of its payment obligation. Respondent alternatively argued that Claimant should not be entitled to rely on Respondent's failure to perform pursuant to Article 80 CISG, as the non-performance was in the end the result of the risk created by Claimant by not informing Respondent about the phishing attack, and, further alternatively, that Claimant's behaviour should be treated as a violation of the obligation to mitigate the damages pursuant to Article 77 CISG.

On 30 August 2023, the Arbitral Tribunal, which had been constituted on 11 August 2023, agreed with the parties on Terms of Reference, which, *inter alia*, provided: "Subject to any new claims (Article 23(4) of the ICC Rules), which will only be authorized if they result in noticeable savings in cost and time, and any further allegations, arguments, contentions and denials contained in submissions

as will be made in the course of this arbitration, the Arbitral Tribunal may have to consider, in particular, the issues listed in this paragraph (but not necessarily all of these or only these, and not necessarily in the following order) ...".

On 1 September 2023, Claimant discovered that that the second payment of USD 12 million due under the L-1 Order had not been made. The belated discovery was caused by the fact that Ms Peugeotroen, the account manager responsible for that order, had to be taken to hospital on 15 April 2022 in an emergency and, following an early birth of her twins, no proper hand-over to her successor had taken place. In combination with the computer problems due to the cyberattack, Ms Peugeotroen's successor only discovered the non-payment on 1 September 2023. Respondent alleged that it had informed Claimant telephonically about the quality issues. The Framework Agreement provided, however, for a particular (written) template and process for disputing quality issues, as well as certain strict deadlines for doing so. Respondent alleged that, during the telephonic conversation, the parties had agreed to waive some or all of these requirements.

On 11 September 2023, Claimant requested from the tribunal to include an additional claim for payment of USD 12 million under the L-1 Order into the arbitration which had already been commenced, pursuant to Article 23(4) ICC Rules. Alternatively, Claimant requested to consolidate the arbitration proceeding under the S-4 Order with a new arbitration proceeding to be separately commenced for the missing payment under the L-1 Order.

B. The Procedural Issues

Claimant's request for the addition of the payment claim under the L-1 Order as a new claim to the pending arbitration under the S-4 Order raised a number of legal and strategic questions. Many teams argued that the additional claim was based on a different contract (the L-1 Order) than the claim so far treated in the arbitral proceedings, which arose from the S-4 Order because, notwithstanding the existence of the Framework Agreement each of the two orders should be classified as a separate contract. However, the mere fact that the two claims are based on separate contracts does not exclude their treatment in a single arbitration. Article 9 ICC Rules explicitly states: "*[s]ubject to the provisions of Articles 6(3)-6(7) and 23(4) claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules*".

The additional hurdle for teams arguing on behalf of Claimant was that the Terms of Reference were signed on 30 August 2023 and were sent to the ICC Court *before* Claimant's request to add a new claim was made, on 11 September 2023. Thus, the case was governed by Article 23(4) ICC Rules which provides: "*After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has*

been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances." Consequently, teams had to argue either that the additional claim under the L-1 Order was already inside "the limits of the Terms of Reference" or that the tribunal should authorize its addition.

In determining, what "other relevant circumstances" the tribunal may take into account, guidance could be sought from Article 6(4) ICC Rules, regulating the criteria which the ICC Court should consider when exceptionally charged with the decision of determining whether claims arising from separate contracts should be treated in one arbitration: "*The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. In particular [...] where claims [...] are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.*"

Consequently, one relevant circumstance was the compatibility of the arbitration agreements contained in the contracts on which the claims were based. The drafters of the Willem Vis Problem did not make things easy for the students, by including three subtly different arbitration agreements: one in the Framework Agreement, a second in the L-1 Order and a third in the S-4 Order. The students had to carefully analyse the compatibility (or lack thereof) of these arbitration agreements. Students were tested on whether they understood that some of the obvious differences in wording might only have very limited effects in practice at the relevant stage of the proceedings, such as (i) the law chosen for the merits (*i.e.* a national law or the CISG as part of that national law), (ii) the number and appointment process for the arbitrators, or (iii) the exclusion of the emergency arbitrator.

Most teams representing Claimant argued that the tribunal had jurisdiction over both claims under the arbitration agreement contained in the Framework Agreement, which directly excluded any arguments based on an alleged non-compatibility of the various arbitration agreements and was an argument in favour of the treatment of the claims in one arbitration. However, that argument presupposed that the arbitration agreement contained in the Framework Agreement was not (wholly or partially) superseded by the later arbitration agreements in the two purchase orders. Respondent teams contested Claimant's general proposition that both claims were based on the arbitration agreement contained in the Framework Agreement.

For the question of whether the tribunal in the present arbitration could rely for its jurisdiction on the arbitration agreement contained in the Framework Agreement, several facts and considerations were relevant. On the one hand,

Claimant invoked and quoted the arbitration clause in the S-4 Order as the basis for the jurisdiction of the tribunal in its Request for Arbitration, and it was consequently also quoted in the ICC's Case Information and also in the Terms of Reference. On the other hand, Claimant had stated in its Request for Arbitration that "a comparable arbitration clause" (to the one in the S-4 Order) was also found in the Framework Agreement. Some teams representing Claimant relied on the principle of *iura novit arbiter* to argue that it requires the tribunal to apply the law independent of the parties' pleadings and that it allows the tribunal to provide a new legal justification for the claims, including the tribunal's jurisdiction.

In relation to the procedural question of whether the payment claim arising from the L-1 Order should be added, the majority of teams focused on subsuming the case under the criteria for the admission of new claims pursuant to Article 23(4) ICC Rules and/or eventual additions or specifications in the Terms of Reference, which seemed to add a condition that any addition result in "noticeable savings in cost and time". Of course, it was hard to argue that adding something to an ongoing arbitration would save costs and time. Complicated mathematical calculations ensued.

The most important factors weighing in favour of admitting the claim under the L-1 Order were: the early stage of the arbitral proceedings, the fact that both orders were made under the same Framework Agreement, comparable legal questions concerning the relationship between the individual orders and Framework Agreement, the potential relevance of the cyberattack for both claims, the absence of (major) negative consequences for the conduct of the proceedings on the original claim (bifurcation with no alteration of original timetable), and limited risk of conflicting decisions. The most important factors weighing against admitting the claim under the L-1 Order were: differences between claims (legal basis/product involved/persons involved), limited overlap of factual and legal questions to be treated, and limited risk of conflicting decisions.

Regarding Claimant's alternative request for consolidation of the claims under the S-4 Order and the L-1 Order, this was based on Article 41(4) of the Framework Agreement which provided: "Consolidation. If the Parties initiate multiple arbitration proceedings in relation to several contracts concluded under this framework agreement, the subject matters of which are related by common questions of law or fact and which could result in conflicting awards or obligations, then the Arbitral Tribunal of the first arbitration proceedings has the power to consolidate all such proceedings into a single arbitral proceeding."

By granting the power to consolidate the arbitral proceedings to the tribunal, Article 41(4) of the Framework Agreement deviated from the consolidation provision in the ICC Rules. According to Article 10 ICC Rules, the power to consolidate is vested in the ICC Court and is submitted to criteria and requirements which differ from those in Article 41(4) of the Framework Agreement. Article 10

ICC Rules provides: "*The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: a) the parties have agreed to consolidation; or b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible. In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.*"

In practice, the subsidiary and conditional consolidation claim could raise the additional problem of whether the conditional initiation of the second arbitration is possible at all. That may be dependent not only on the cooperation of the ICC and the ICC Rules but also on the law applicable to the arbitration which has to allow for such conditional claims. To simplify this practical problem, the drafters of the Willem Vis Problem created an undertaking by Claimant to take all necessary steps to properly initiate the second arbitration, should the alternative consolidation request be (conditionally) granted.

In their arguments on consolidation, the students had to, once again, assess the interplay between the three arbitration agreements and analyse whether the arbitration agreement in the Framework Agreement was superseded by the special arbitration agreements in the purchase orders (which contained no provision on consolidation by the arbitral tribunal). Thereafter, assuming that the provisions on consolidation (by the arbitral tribunal) contained in Article 41(4) of the Framework Agreement were still applicable, the students had to analyse whether the parties could change the allocation of powers under the ICC Rules, by vesting consolidation powers to the arbitral tribunal instead of the ICC Court. That raised the broader question of the relationship between party autonomy and arbitration rules where the latter do not explicitly state that they are subject to an agreement of the parties. In practice, there have been cases where the ICC has accepted deviation from its ICC Rules even where they were not explicitly authorized and cases where it has refused to administer the case as an ICC arbitration in light of the changes made by the parties (e.g. exclusion of scrutiny), such as the *Insigma Technology v. Alstom Technology* decision.[3]

The third issue to be addressed was the relevant criteria for consolidation. If the parties can transfer the power to consolidate, they can probably also change the criteria for consolidation as they seem to have done through Article 41(4)

[3] Available at https://www.elitigation.sg/gdviewer/s/2009_SGCA_24, last accessed on 24 May 2024.

of the Framework Agreement. The question was whether the criteria set out in Article 41(4) of the Framework Agreement were exhaustive or supplementing or specifying the criteria in Article 10 ICC Rules. If the relevant requirements for a consolidation are defined exhaustively in the arbitration clause, the students had to argue that the different claims are "related by common questions of law or fact ... which could result in conflicting awards or obligations" if decided in separate arbitral proceedings. The only directly obvious possible joint legal questions on both claims were the relationship between the Framework Agreement and the individual purchase orders, and whether and to what extent the writing requirement of any amendment had been superseded by the parties' agreement or practice.

C. Merits Issues

On the merits of the case, pertaining solely to the S-4 Order, the teams had to discuss whether Claimant's payment claim was justified in its entirety or at least in part, which, in turn, depended in essence on the answer to the question whether Claimant's treatment of the cyberattack contributed in a legally relevant way to Respondent's payment to the wrong account and if so, how the different contributions were to be weighed. The parties were in dispute regarding whether, through its payments to the (incorrect) bank account indicated in the phishing email, Respondent has performed its legal duties under the Framework Agreement, whether Claimant can or cannot rely on Respondent's non-performance under Article 80 CISG, and whether Claimant's claims are reduced under Article 77 CISG.

The students had to deal in one way or another with the following three closely related but separate issues: (a) the contractual provisions regulating payments and possible amendments of the Framework Agreement and their modification by the parties' previous conduct, (b) Respondent's negligence in complying with the request in the phishing email, and (c) the existence of an obligation for Claimant to inform Respondent about the cyberattack and the increased risk resulting therefrom on the other side.

These aspects, in turn, required that the students understand the correct effects of "***no oral modification***" clauses, such as the one that existed in Article 40 of the Framework Agreement: "No amendment or waiver of any provision of this Agreement including this Article shall be valid unless the same is in writing and signed by the Parties." The fact pattern suggested that the parties had, in the past, deviated on several occasions from the provisions of the Framework Agreement without complying with the form requirement in Article 40 of the Framework Agreement (for example, when fixing the price at annual, as opposed to semi-annual meetings).

The second crucial element for the evaluation of the merits was the cyberattack on Claimant. The relevant factual background was that the automotive industry in Equatoriana and elsewhere has been the target of an increasing number of cyberattacks over the last few years. In 2020, Respondent had been the victim of a successful cyberattack and immediately informed its business partners about it, including Claimant, who had been one of the most concerned partners and closely monitored Respondent's investigations. In contrast to that, when Claimant discovered the cyberattack that had taken place on 5 January 2022 (the discovery occurred on 25 January 2022), it did not inform Respondent about the attack although Ms Audi, Claimant's account manager for Respondent, had been the entry point. Even when it later became apparent that the cyberattack had been much more severe than originally assumed, resulting in a shut-down of Claimant's IT-system from 15 May 2022 until the end of June 2022, Claimant did not inform Respondent. Mediterraneo had no data protection law which would impose special information and notification duties in case of cyberattacks. Equatoriana's data protection law was essentially identical to the GDPR.[4]

Respondent was not aware of the cyberattack and the resulting risk of an infiltration of Claimant's IT-system when it received the phishing email on 28 March 2022 or when it made the payments on 3 May 2022 and 30 June 2022. Respondent teams argued that Respondent fulfilled its payment obligations by paying to the bank account mentioned in the phishing email of 28 March 2022, alternatively, that Claimant should be prevented pursuant to Article 80 CISG from invoking Respondent's failure to pay due to its failure to inform Respondent about the cyberattack, and, further alternatively, that Claimant's claims should be reduced pursuant to Article 77 CISG due to its failure to prevent or mitigate the loss by informing Respondent about the cyberattack.

For the performance defence, Respondent teams had to argue and prove that the phishing email and the subsequent communications validly amended the payment terms under the Framework Agreement, and that the phishing email could be attributed to Claimant due to its failure to inform Respondent about the cyberattack. This (difficult) argument required Respondent teams to show that Respondent "justifiably" interpreted the phishing email to be an email coming from Ms Audi, that this impression could be attributed to Claimant due to its failure to inform Respondent about the cyberattack and that the amendment either complied with the form requirements of Article 40 of the Framework Agreement or that the Parties have amended or waived the form requirements.

[4] EU General Data Protection Regulation, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1, as subsequently amended.

The Problem provided a number of facts that both teams could use to argue that the reliance was "justified" or "reasonable", or the opposite, most notably the fact that, necessarily, the domain name from which the phishing email was sent was different from Claimant's usual domain name (by one letter, an "m" instead of an "n": semsorx.com v. sensorx.com). Attribution of the phishing email to Claimant was probably the most difficult task. Teams used a variety of theories (agency, apparent authority, etc), all of which required, one way or another, that Claimant had been under an obligation to inform Respondent about the cyberattack.

Because neither the Framework Agreement, nor the data protection laws of Mediterraneo, nor the CISG, explicitly provide for such an obligation, an information obligation would have to be deduced either from the parties' behaviour or existing general duties such as the duty to act in good faith in the performance of the contract. This was no easy task as the CISG only mentions, in its Article 7(1) the principle of good faith in the interpretation of the CISG itself.

Relevant facts were the parties' conduct in the context of the cyberattack on Respondent in 2020 (direct information by Respondent, close monitoring by Claimant, request to be kept informed), the fact that Ms Audi was the entry point for the cyberattack through her violation of Claimant's security protocols, the seriousness of the cyberattack, the involvement by Claimant of the leading cybersecurity company CyberSec in the evaluation of the attack, an internal order by Claimant to notify business partners about the cyberattack after 15 May 2022 (but Respondent was not informed), and the decision by the legislator in Mediterraneo against the adoption of a data protection law including information duties.

Legal concepts addressed by the teams in the discussion were: information obligation as usage/practice pursuant to Article 9 CISG, information obligation arising from the principle of good faith underlying the CISG (Article 7) or under the Articles 1.7 and 5.1.2 UNIDROIT Principles (which served, in the fiction of the Willem Vis Problem, as the applicable national law where the CISG did not govern or settle a matter)[5], information obligation arising from the cooperation duty in Article 5.1.3 UNIDROIT Principles,[6] and finally, the information obligation existing under Article 34 of the Equatoranian Data Protection Act (same as Article 34 GDPR) as an overriding mandatory provision.

[5] Article 1.7(1) UNIDROIT Principles of International Commercial Contracts (2016) provides: "*Each party must act in accordance with good faith and fair dealing in international trade.*" Article 5.1.2 UNIDROIT Principles of International Commercial Contracts (2016) provides: "*Implied obligations stem from (a) the nature and purpose of the contract; (b) practices established between the parties and usages; (c) good faith and fair dealing; (d) reasonableness.*"

[6] Article 5.1.3 UNIDROIT Principles of International Commercial Contracts (2016) provides: "*Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.*"

The same considerations were largely relevant in the context of the Article 80 CISG defence invoked by Respondent. Pursuant to Article 80 CISG, Claimant "may not rely" on Respondent's failure to perform its payment obligation "to the extent that such a failure was caused by … [Claimant's] omission." The relevant "omission" could be Claimant's failure to inform Respondent about the cyberattack which in turn would require the existence of an information obligation. Furthermore, Respondent teams had to submit and prove that Respondent's failure to pay the amounts due to the correct account was "caused" by Claimant. There are different views and definitions as to the causal *nexus* required under Article 80, which teams had to explore. Respondent's potential contribution to the failure to perform was relevant, by paying to a new account without having directly spoken to Ms. Audi to receive confirmation.

Finally, in addressing the Article 77 CISG defence, the teams had to discuss first whether Article 77 CISG is at all applicable to claims for performance (payment obligation) or is limited to damage claims. Its wording and drafting history seem to imply the latter. In a second step, fulfilment of the requirements of Article 77 CISG had to be discussed. While the mitigation duty may not necessarily require a legal information obligation of Claimant, the relevant considerations were largely the same as under Article 80 CISG.

II. THE UNIVERSITY OF BUCHAREST TEAM

The team who represented the University of Bucharest in the 2023-2024 edition of the Willem Vis moot and tackled these complex legal issues in writing and during oral argument consisted of six students: Călin-Paul Chițu, Daniel Dijmărescu, Arina Maria Dumitru, Ilinca Leșovschi, Maria Andreea Pacioga and Andreea-Nicola Stoiculescu. The team was coached by Dr Raluca Papadima and Alexandru Kober (associate at the law firm Filip & Company), and also received training and assistance from Dr Mihaela Gherghe (partner at the law firm Rizoiu & Poenaru), Maria Avram (associate at the law firm Țuca, Zbârcea & Asociații), Cristina Badea (senior associate at the law firm Guia, Naghi & Partners), Raluca Rusu (associate at the law firm Filip & Company) and David Oprea, (partner at the law firm Markó & Udrea), as well as many other former participants in the competition, now turned practitioners and supporters of the team, including: Răzvan Banța, Cătălina Bîzîc, Irina Crivăț, Cezara Diaconescu, George Domocoș, Andrei Greceanu, Mihnea Jére, Claudia Mihalcea, Alina Stan and Antonio Timnea.

The team received final support from the University of Bucharest, as well as from a number of prestigious law firms, through *Asociația Vindobona pentru Promovarea Arbitrajului în România* (the Vindobona NGO for the Promotion of Arbitration in Romania), a non-profit organisation created and managed by young Romanian practitioners, including former and current students and coaches of

the University of Bucharest's Willem Vis team. The main sponsors of the team were law firms: CMS Cameron McKenna, Doru Trăilă & Partners (TAMC), Filip & Company, Guia Naghi & Partners, Mihalcea & Associates, Nestor Nestor Diculescu Kingston Petersen, CI Raluca Papadima, CI Horia Rădulescu, Reff & Partners (Deloitte), Schoenherr, Ţuca Zbârcea & Partners and Stoica & Partners. Moreover, Asociația Vindobona received sponsorships from many natural persons, including Prof. Camelia Toader and other former participants in the moot.

Due to these contributions, the team was able to attend the final rounds in Hong Kong and Vienna and a number of pre-moots, including: Asia Pacific pre-moot, the Berlin pre-moot, the Prague pre-moot and the Cairo pre-moot. Additionally, the team benefited from guidance from leading Romanian practitioners as part of its preparation for the oral rounds through participation in oral arguments organised and hosted by the following law firms: Filip & Company, Guia Naghi & Asociații, Reff & Partners (Deloitte), Schoenherr, and Ţuca Zbârcea & Asociaţii.

The University of Bucharest regularly participates in the Willem Vis moot since 2012, with a track record of achievements. For example, with respect to the oral phases of the competition, the University of Bucharest team reached the semifinals in Vienna in 2018, and the semifinals in Hong Kong in 2014, 2017 and 2019, qualified into the elimination rounds in Vienna or Hong Kong in 2014, 2016, 2017, 2018, and 2019, and obtained individual prizes for students in the best oralist category in 2014, 2016, 2018 and 2019. In addition, with respect to the written phases of the competition, the University of Bucharest has obtained several prizes for written memoranda in 2013, 2014, 2016, 2019, 2020, 2021 (1st prize for Claimant's memorandum) and 2022.

For the 2023-2024 Willem Vis moot, the University of Bucharest was awarded, at the Hong Kong edition, an honourable mention in the *Eric Bergsten* category for qualifying into the elimination rounds (best 32 teams out of 144). To achieve that result, Maria Pacioga and Ilinca Leșovschi went through a total of 4 general rounds against Maharashtra University, London School of Economics, Nankai University and Xiamen University. Then, Maria Pacioga and Ilinca Leșovschi prevailed in the first elimination round, against München University (Germany). In the next elimination round, however, Charles University (Czech Republic) prevailed, and went on until it reached the final round of the competition, which it lost to National Law University Jodhpur (India). The University of Bucharest therefore placed 9th (*ex aequo*) out of 144 participating teams in the *Eric Bergsten* category. Ilinca Leșovschi was also awarded for her stellar performance with an honourable mention (4th place, *ex aequo*) in the Neal Kaplan category, for the best individual oralist.

For the 2023-2024 Willem Vis moot, the University of Bucharest was awarded, at the Vienna edition, an honourable mention (4th place, *ex aequo* out of a total of 373 participating teams) in the *Werner Melis* category for the

Memorandum submitted on behalf of Respondent, which places it in the top 10% in the competition. Arina Dumitru and Andreea Stoiculescu competed in the oral rounds in Vienna and argued against University of Galway, Shanghai University of Political Science and Law, University of Graz, and National Taiwan University in front of tough tribunals during the four general rounds. The oral rounds in Vienna were won by Bucerius University (Germany), and the 1st prizes for the written submissions were awarded to Hamburg University (Germany), for the Claimant memorandum, and to Zürich University (Switzerland), for the Respondent memorandum.