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**IN THE COMPETITION**

Case No. 1077/5/7/07

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

Thursday, 13<sup>th</sup> December 2007

Before:  
MARION SIMMONS QC  
(Chairman)

ADAM SCOTT TD  
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EMERSON ELECTRIC CO.  
(2) VALEO SA  
(3) ROBERT BOSCH GmbH  
(4) VISTEON CORPORATION  
(5) ROCKWELL AUTOMATION, INC

Claimants

and

MORGAN CRUCIBLE COMPANY PLC

Defendant

—————  
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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

Mr. Derek Spitz and Miss Jane Wessel (instructed by Crowell & Moring) appeared for the Claimants.

Mr. Robert Osgood and Mr. Ben Rayment (instructed by Sullivan & Cromwell) appeared for defendant Morgan Crucible.

Mr. Stephen Wisking (Partner, Herbert Smith) appeared for the proposed defendant Schunk.

Mr. Mark Hoskings (instructed by Freshfields) appeared for the proposed defendant SGL Carbon AG.

Mr. Daniel Beard (instructed by Ross & Co) appeared for the proposed defendant Le Carbone Lorraine SA.

1 THE CHAIRMAN: Good afternoon. Can I begin by saying that, subject to any submissions  
2 today to the contrary, the Tribunal does not consider that observations made by a proposed  
3 defendant, as referred to in Rule 31(3) of the Tribunal Rules, would give rise to a  
4 submission to the jurisdiction. I think that accords with the procedure under the CPR, so if  
5 that allays any fears – unless there are any submissions to the contrary.

6 MR. HOSKINS: The only question it raises in my mind is whether, madam, that is an indication  
7 as to the law or whether it is just the Tribunal giving us comfort that it will not be treated as  
8 – it may not make a practical difference, but it is important to clarify.

9 THE CHAIRMAN: Before us I think we would not treat it as, but I have been very careful how I  
10 put it. It is observations made by a proposed defendant as referred to in Rule 31(3). It may  
11 be that what some are seeking to do is to go beyond that and I am not going to make any  
12 remark or any comfort in relation to anything else that one does.

13 MR. HOSKINS: Thank you, madam.

14 THE CHAIRMAN: There are two distinct reasons why we are here today, it was easier for  
15 everybody to come on the same day. The first is the directions in the Emerson claimants'  
16 claim against Morgan Crucible for which we have given permission to the Emerson  
17 claimants to make a claim. The second is in relation to whether we give permission for the  
18 Emerson claimants to make a claim against the proposed second to fifth defendants.  
19 Can I just make some remarks in relation to each of those separately? It seems to us at the  
20 moment, and of course it is subject to all submissions – it is only our thinking – that the first  
21 question we need to consider today is whether the settlement agreement issue as between  
22 the Emerson claimants and Morgan Crucible should be decided as a preliminary issue. If  
23 that is the way forward then, of course, the directions will be directed at that preliminary  
24 issue. Our intuitive reaction at the moment, and of course subject to any submissions, and  
25 those submissions are from Morgan Crucible and the Emerson claimants, is that the  
26 Tribunal should actually decide the settlement agreement issue as a preliminary issue,  
27 because if the claim has been settled then there would be no point in hearing the rest of the  
28 case. There may be a knock-on effect in relation to whether we give permission in relation  
29 to the proposed defendants, and I will come on to that in a moment – I want to try and keep  
30 it separate.

31 The first thing we think we need submissions on, subject to what is thought by the Morgan  
32 Crucible and the Emerson claimants, is as to whether that should be a preliminary issue, and  
33 one has to consider in doing that proportionality and the costs of hearing the whole claim as

1 against hearing that part of it, and then seeing whether there has been a settlement and, if  
2 there has not been a settlement, then of course the case would proceed.

3 Also in relation to the claim for which we have given permission from the submissions we  
4 have seen there are, as appear to us two other interlinked matters, namely disclosure and  
5 alternative dispute resolution – mediation, or some other resolution. We understand that  
6 there is some agreement, at least in principle, between the Emerson claimants and Morgan  
7 Crucible relating to disclosure. I do not know how far that has gone, and perhaps we can be  
8 informed of the up to date position, and we can discuss if any particular orders need to be  
9 made in relation to that, so that raises disclosure.

10 In relation to mediation, or alternative dispute resolution, there seems to be an issue as to  
11 whether it is appropriate for that to take place before or after a full defence. We also  
12 wonder whether another factor is whether the settlement agreement issue should be decided  
13 first or whether, in fact, it is one of the issues within the mediation – if there is going to be  
14 mediation.

15 Of course, this Tribunal – as I think I said on behalf of another Panel in *Burgess* a couple of  
16 weeks ago – supports alternative dispute resolution and will try to assist the parties insofar  
17 as it can in settling cases, and sometimes directions can assist in that, so I think that needs to  
18 be kept in mind.

19 I think those are all the remarks we want to make in relation to the Morgan Crucible v  
20 Emerson case.

21 We then turn to the proposed defendants, and the permission application under Rule 31(3)  
22 of the Tribunal Rules. Rule 31(3) is only directed to whether the Tribunal gives permission  
23 for a claim to be made before the end of the period. It does not involve whether that is a  
24 good or a bad claim.

25 The observations that we have seen are mainly directed to the jurisdiction to bring a claim  
26 which is submitted to arise from Articles 5(3) or 6(1) of the Brussels Regulation – that is on  
27 the basis that the second to fifth proposed defendants are not domiciled within the  
28 jurisdiction, which would be the other way of the jurisdiction attaching.

29 Now if the claim between the Morgan Crucible and the Emerson claimants has been settled  
30 then we understand the submission of the second to fourth defendants – I think the fifth  
31 defendant has not yet put in submissions on this point – to be that Article 6(1) cannot apply  
32 because there would be no claim to which it can be attached and therefore the Emerson  
33 claimants need to make out a case under Article 5(3) in order for the Tribunal to have

1 jurisdiction. That is, as we understand it, the point that is being made – it may be that we  
2 have misunderstood, but that is what we understand the point to be.

3 The issue, however, now is whether or not there should be permission granted by the  
4 Tribunal to make the claim. Our intuitive thought on this is that for the purposes of the  
5 application under Rule 31(3) the Emerson claimants would need to make out a prima facie  
6 case on Articles 5(3) and/or 6(1) of the Brussels' Regulation. The way we are thinking is  
7 that in relation to the proposed second to fifth defendants the directions that we need to  
8 make today are for the purposes of the submissions by the Emerson claimants in relation to  
9 those matters, or the basis upon which they say a claim can be made against the second to  
10 fifth defendants, and then any observations by the proposed second to fifth defendants  
11 which are in addition (and not repetitive of) the observations that have already been put in,  
12 and then if the second to fifth defendants would want to make oral observations then an  
13 opportunity for that to be done at an oral hearing.

14 I hope that is helpful; I hope it shows how our minds are working so that if we have  
15 misunderstood the position we can be put right. I do not know who is going to start?

16 MR. HOSKINS: Can I just say it would actually be helpful to me if I could take instructions.

17 THE CHAIRMAN: So you would like us to rise for five minutes?

18 MR. HOSKINS: If that is possible I would be very grateful.

19 THE CHAIRMAN: So shall we say 25 past?

20 MR. HOSKINS: Excellent, thank you.

21 (Short break)

22 THE CHAIRMAN: Can I just mention one matter which I think I left out, and which we need to  
23 put on the agenda today because it has been raised, and that is the confidentiality of the  
24 copy of the application for annulment by SGL Carbone, so we need to discuss what we  
25 should do about that and I just thought it should not be overlooked – I do not know if I have  
26 left anything else.

27 MR. HOSKINS: I have got yellow stickers!

28 THE CHAIRMAN: Good.

29 MR. OSGOOD: Madam Chairman, members of the Tribunal, as to Morgan Crucible, I believe  
30 you have raised three subjects, and let me address them, please.

31 THE CHAIRMAN: I am just wondering if you should start or the claimant should start?

32 MR. OSGOOD: I am happy to give way to my learned friend.

33 MR. SPITZ: Thank you, Madam Chairman. Starting with the question of the preliminary issue,  
34 our position on that is that it is really a matter for Morgan to determine whether or not they

1 want to take that point on as a preliminary issue – we do not know if they are persisting  
2 with that or not. We would suggest that it ought to be raised and pleaded in a defence that goes  
3 to the question of quantum and all of the other issues at the same time, and not simply that  
4 the defence is confined to the scope of the release.

5 We say that for two main reasons. First, in our view a determination of the preliminary  
6 issue for argument's sake in Morgan's favour would not end the litigation between the  
7 claimants and all of the parties, and we say that because jurisdiction, on the basis of Article  
8 6(1) has already been established in relation to all of the parties save in relation to Bosch's  
9 claim against SGL and against Schunk.

10 THE CHAIRMAN: I have personally a problem with this word "jurisdiction" in everybody's  
11 submissions because it can mean different things to different people. Can you make sure  
12 when you use "jurisdiction" you say what your point is?

13 MR. SPITZ: Yes. In relation to what the Tribunal determined on the scope of the release, the  
14 Tribunal dismissed the application to strike out. What the Tribunal did in reaching that  
15 decision was to say it was not bound to fail. What the cases require, in order to bring an  
16 application against defendants that are outside the jurisdiction using Article 6(1) is that  
17 there should be a serious issue to be tried against the anchor defendant and then that the  
18 claim should be sufficiently closely connected that it would avoid the risk of  
19 contradicting ----

20 THE CHAIRMAN: So what you are saying is that because we have decided there is a serious  
21 issue to be tried ----

22 MR. SPITZ: Yes.

23 THE CHAIRMAN: -- that you are entitled to make the claim against the others.

24 MR. SPITZ: Indeed, save in relation to the Bosch claim which raises a narrower jurisdiction  
25 point, and our understanding has been that SGL Schunk and Emerson – I know  
26 unfortunately I am bringing the two sides of it together in making the submissions – that we  
27 are at one on that. There was some initial correspondence from SGL and Schunk that  
28 suggested it was necessary to determine the preliminary issue between Emerson and  
29 Morgan because if that issue went Morgan's way there would be no jurisdiction to bring the  
30 claims against the other proposed defendants. We responded and said that we thought that  
31 was wrong as a matter of law. We thought that once the Tribunal found a serious issue to  
32 be tried against the anchor defendant we could bring our claims against the others.

33 THE CHAIRMAN: Let us just think that through. Assume you are right, we give permission  
34 against everybody on the basis that Article 6(1) gives that jurisdiction. The whole thing

1 goes to the end. At the end we determine against you that there was a settlement. Had that  
2 been determined at the beginning Article 6(1) would not have given jurisdiction, so there  
3 may be that issue – I am not saying it would not, but there is an issue as to whether it feeds  
4 back. Secondly, there could be no damages against Morgan Crucible, but you would say  
5 there could be – subject to the point that I just made – damages against the second to sixth,  
6 even though there can be no damages against Morgan Crucible?

7 MR. SPITZ: That is correct, and the damages against the second to the sixth could include on the  
8 basis of joint and several liability the quantum of the claims against Morgan. Those claims  
9 could not be advanced against Morgan if the release point is good, but they would be  
10 available to form part of the quantum in relation to the others.

11 (The Tribunal confer)

12 THE CHAIRMAN: I am not sure we quite understood what you are saying. If we found the  
13 claim against Morgan Crucible had been settled, how can that claim have any effect on joint  
14 and several liability because that claim has been settled, so your claims would be confined  
15 to the second to fifth defendants?

16 MR. SPITZ: Let me come back to that point. Let me start by talking about the question of a  
17 finding on the release point in favour of Morgan.

18 THE CHAIRMAN: Yes.

19 MR. SPITZ: Even if, as a preliminary issue, or in trying that point with the merits of the claim.  
20 Even if the Tribunal at that stage determined that the release point was good and those  
21 claims against Morgan had been settled, that would not impact on the requirements that the  
22 claimants have to set out in order to persuade the Tribunal that jurisdiction already existed.  
23 That test we say we have satisfied.

24 THE CHAIRMAN: No, we understand that bit, that would not impact on whether there had  
25 initially been jurisdiction to bring a claim under Article 6(1) against the second to fifth  
26 proposed defendants – yes?

27 MR. SPITZ: That is correct.

28 THE CHAIRMAN: That we understand, it is the next point.

29 MR. SCOTT: Just to be clear about that, what you are saying is once we are seized of  
30 jurisdiction, once we have all the defendants before us, two to five do not cease to be  
31 defendants even if we throw out the claim against the first defendant?

32 MR. SPITZ: That is so.

33 THE CHAIRMAN: Once seized of jurisdiction properly then claims can proceed against all  
34 defendants and normal consequences follow.

1 MR. SPITZ: That is correct.

2 THE CHAIRMAN: In any case where this would happen – forget about this, say you had some  
3 sort of joint liability for an accident – it may turn out that there is no claim against the first  
4 defendant, the second, third and fourth have been joined only because the national court had  
5 jurisdiction in relation to the first defendant, and then it is proved that it was the third  
6 defendant who was liable. You cannot say “Actually, stop it there” and they have to go  
7 back to their national court.

8 MR. SPITZ: Quite so, and one cannot wait until the end of the trial to determine in retrospect.

9 THE CHAIRMAN: That, at the moment, sounds a sensible submission, yes.

10 MR. SPITZ: Thank you. As far as the scope then of the claims that would be in issue is  
11 concerned, there would be claims against each of the proposed defendants for the actual  
12 purchases.

13 THE CHAIRMAN: That is second to fifth?

14 MR. SPITZ: Yes. And there would be claims against each of those defendants for joint and  
15 several liability.

16 THE CHAIRMAN: Yes.

17 MR. SPITZ: There is a caveat in relation to the Bosch claim and I will come to that. We submit  
18 that the claims against Morgan would form part of the exposure that the other claimants  
19 bear for joint and several liability because we would submit if it is found that Morgan is  
20 released under that agreement what has happened is that the claimants in effect agreed not  
21 to sue Morgan for their losses. It does not mean that those losses were not suffered, there  
22 was simply no remedy in relation to Morgan because of the release.

23 THE CHAIRMAN: But do you not have to give credit?

24 MR. SPITZ: Well it would not form part of giving credit because it would still be a loss suffered  
25 but the avenues for recovery would be narrowed, and there would be no avenue for recovery  
26 against Morgan ----

27 THE CHAIRMAN: But you would have double recovery?

28 MR. SPITZ: Well it would not be double recovery, it would mean that the same loss has been  
29 suffered but because of the release Morgan is not available as a party against whom to  
30 proceed to recover that loss.

31 THE CHAIRMAN: Can I just see whether I understand what you are saying? You cannot  
32 recover in the action against Morgan Crucible in those circumstances, but the second to fifth  
33 defendants are jointly liable with Morgan Crucible in relation to the damage suffered.



1 Therefore, you say, you – Emerson – can claim the amount suffered against Morgan  
2 Crucible against the second to fifth defendants.

3 MR. SPITZ: That is correct.

4 THE CHAIRMAN: Now, I go back to what I was saying. If you settled the claim against  
5 Morgan Crucible then you have received sums of money in relation to that claim. If you are  
6 able to claim it again against the second to fifth defendants there would be double recovery,  
7 so it would seem to me as a matter of commercial sense – forget about the law – that you  
8 would have to give credit for the amount that you had recovered, unless the law said  
9 something different, and I am using a rugged mix – legal principles with commercial - but  
10 as a matter of commercial sense you would be estopped from saying that you had suffered  
11 any further loss because you had settled on the basis that that was the loss that you had  
12 recovered. That seems commercially, to the Tribunal, a response.

13 MR. SPITZ: What that would raise is, I think, in relation to the consideration that was given for  
14 the release one could not have the benefit of that consideration, but it may well be that there  
15 is a distinction to be drawn between the consideration paid for such a release and the extent  
16 of the loss.

17 THE CHAIRMAN: That is my second limb of commercial sense where I mixed a legal principle  
18 with commercial sense, but commercial sense would say “When you settled you said that  
19 was the amount, you should not be able to recover for more”, and my legal analysis, subject  
20 to it being shown that that is not the principle, would be that you are estopped from doing  
21 that; that there should be a principle of law that says that you cannot do that, or one has to  
22 justify why one can – as a matter of commercial sense, and I always start on commercial  
23 sense and then move on, because the law should actually reflect commercial sense.

24 MR. SPITZ: Yes, the difference that the Tribunal is pointing to is a situation where one has a  
25 remedy against a number of defendants and elects not to pursue that remedy against one  
26 particular that does not preclude you from pursuing the remedy against the others. What is  
27 different from that situation and the situation that the Tribunal is outlining is where there is  
28 consideration through a release, and on that point ----

29 THE CHAIRMAN: And the terms of the release.

30 MR. SPITZ: And the terms, we would need to examine what the case law says in relation to the  
31 estoppel issue and see whether we are wholly precluded.

32 THE CHAIRMAN: I am only raising, I am not saying what the principles of law are.

33 MR. SPITZ: Indeed.

1 THE CHAIRMAN: But to make commercial sense it does not seem to be something that the  
2 commercial community would say was right, they would raise their eyebrows, so one has to  
3 be able to justify it.

4 MR. SCOTT: The additional complication there is that no doubt the second to fifth defendants  
5 would then want to join the first defendant back in, in terms of contribution.

6 MR. SPITZ: Yes. The essence of the submission that we are making is that a determination of  
7 the release would not go quite as far as may be thought in disposing of the entire action, and  
8 certainly what it would leave ----

9 THE CHAIRMAN: Well if what I was putting to you was the position then it would, would it  
10 not?

11 MR. SPITZ: Then it would leave the joint and several liability ----

12 THE CHAIRMAN: Against the second to fifth.

13 MR. SPITZ: -- against two to five.

14 THE CHAIRMAN: And Morgan Crucible would be out.

15 MR. SPITZ: Yes.

16 THE CHAIRMAN: And if Morgan Crucible is out then why have they sat there through the  
17 whole of the action? That does not seem to be proportionate.

18 MR. SPITZ: We would say on that that it is a matter for them to decide whether they want to  
19 pursue that release point and really what one is looking at at this stage for the purposes of  
20 directions and proportionality is whether they should be required to put in a defence that  
21 goes beyond the preliminary issue and deals with the merits.

22 THE CHAIRMAN: I can understand your submission. You are saying that there was no release,  
23 “The settlement agreement does not release it, we are not taking that point” – naturally.

24 MR. SPITZ: Of course.

25 THE CHAIRMAN: “So we can make a claim, that claim is not in it.” Therefore it has to be  
26 raised as a defence. The next question is, do they have to raise it as a defence in a full  
27 pleading, or if they come and make an application and say “Actually, it is pointless us  
28 putting in a whole defence because we are going to make this discrete point, and that is the  
29 end of us being here”, then can the Tribunal say: “We will deal with that discrete point, and  
30 it is not necessary to put in a whole defence.” In other words, do they have to put it in as  
31 one of a number of defences or can they raise their hand and say: “Actually we have an  
32 issue here”?

33 MR. SPITZ: The Tribunal has a discretion to control the extent of the defence, that is clear.  
34 What would be involved is a balancing process. When one looks at the additional costs that

1 would relate to putting a defence in on all of the issues and takes into account the benefit  
2 that a full defence would have in clarifying what is at stake in this case, in perhaps having  
3 an impact on promoting a settlement of the case, one would factor those issues in ----

4 THE CHAIRMAN: That is a different point, is it not?

5 MR. SPITZ: All I am saying is that the Tribunal has that discretion and there are factors to weigh  
6 on both sides and the additional cost of putting in a defence so that the claimants can finally  
7 see what it is that Morgan is contending, we say the factors in favour of requiring them to  
8 do that outweigh the advantage of limiting the defence.

9 THE CHAIRMAN: Do you think we ought to find out from Morgan Crucible whether they are  
10 going to put forward this defence.

11 MR. SPITZ: Yes, thank you.

12 MR. SCOTT: Before you sit down, can you clarify one point for me, and it is this: are you in any  
13 sense arguing that there being a full defence assists in deciding the scope of the settlement.  
14 Do you see what I am saying? In other words, at the moment, what we are going to have is  
15 an argument as between your claim and the settlement. Are you suggesting that matters  
16 would be advance if, in addition to your claim and the settlement, we had a full defence  
17 which gave a better idea of the first defendant's view of the scope of the matters between  
18 you?

19 MR. SPITZ: With your permission I would like to consider that briefly, and I fully understand  
20 the point as to whether a pleading on the merits will impact on how one interprets the scope  
21 of the release. I do not know the answer to that offhand, so I will consider that and then  
22 come back and answer it.

23 MR. SCOTT: Yes.

24 MR. OSGOOD: I was unsure whether the claimants wished for time now?

25 THE CHAIRMAN: No, no, I do not think so. I think we need to know, because we need to know  
26 how to proceed, so we need to know whether you are going to take this defence, or whether  
27 you are prepared to tell us whether you are going to take this defence or not.

28 MR. OSGOOD: Thank you, madam Chairman. We believe very strongly that the release  
29 language in the settlement agreement extinguished the claims against Morgan Crucible. We  
30 would be happy for that issue to be treated in mediation. We are interested in the most  
31 efficient, least costly proceeding in view of the fact that my client is a 1 per cent defendant.  
32 The claimants have substantially ordered no more than €2 million worth of sales out of a  
33 total claim of €291 million and if the settlement agreement can be mediated at an early date  
34 it seems to me that that would be a very efficient way to proceed.

1 THE CHAIRMAN: What you are asking for is mediation of the settlement agreement issue?  
2 MR. OSGOOD: More than that, mediation of the entire claim against Morgan Crucible,  
3 including the settlement agreement issue. I would add to this we would still be perfectly  
4 willing to proceed with disclosure at the same time.  
5 THE CHAIRMAN: For the purposes of mediation.  
6 MR. OSGOOD: For purposes of mediation and early in the New Year I would offer to the  
7 claimants the primary documents that were submitted to the European Commission, so that  
8 they would have the benefit of those documents. We can also set a schedule for  
9 simultaneous disclosure of other documents in the coming year.  
10 MR. SCOTT: Mr. Osgood, one point – you have again today emphasised, if you like, the  
11 slightness of Morgan’s involvement, but you have already heard the claimants mention joint  
12 and several liability and in the sense that this is a cartel there is the question of joint and  
13 several liability, so it is not just the sales by Morgan, it is the sales by the entire Cartel that  
14 come into play.  
15 MR. OSGOOD: That is the theory of the claimants; I am not aware of any case similar to this one  
16 which has held that in these circumstances there is joint and several liability. I appreciate  
17 that it is a general principle of jurisprudence, but I think it is still to be established in a  
18 damages’ claim such as this one before this Tribunal. So I do not take it as written.  
19 THE CHAIRMAN: What you are saying is that before we proceed to decide, if we decide to take  
20 it as a preliminary issue – the settlement agreement issue – the cards on your side of the  
21 table are that you would like mediation to deal with all the issues, including that one and  
22 possibly including the joint and several liability one, and for that purpose you are going to  
23 give disclosure of the European Commission documents and some other documents – I am  
24 not quite sure what they are going to be – but that is not for me at the moment, but it is  
25 simultaneous disclosure because that means there will be disclosure on the other side as  
26 well, which would relate to the damages. What you are saying from that is – I assume –  
27 you are not saying that a defence needs to be put in for the purposes of that mediation?  
28 MR. OSGOOD: That is correct. We would have thought that a mediation could be more informal  
29 and make more progress than that. Our objective here, as a very minor defendant, is to find  
30 a streamlined, efficient way to see if we can resolve this matter.  
31 THE CHAIRMAN: I do not know, and it has not yet been mentioned, what approach the Emerson  
32 claimants take to that or whether there has been some discussion or whatever.  
33 MR. OSGOOD: We have received a letter in response to our letter which I think was shared with  
34 the Tribunal -----

1 THE CHAIRMAN: Yes, which says that they would like a defence first.

2 MR. OSGOOD: And we have also been in some discussions which are not yet concluded on a  
3 schedule for discovery. We have not heard anything beyond that which was in the letter in  
4 regard to mediation. Perhaps I should go on to say that if the issue of the settlement  
5 agreement becomes part of the case in chief then it seems to me there are a number of  
6 factors that come into play.

7 First, I believe that the release language in the settlement agreement in the class action in  
8 the United States was the same in respect of each of the defendants. I would have thought  
9 that that fact would have implications for the rights of the other defendants, and I do not  
10 know that they had raised any arguments that they may wish to make with respect ----

11 THE CHAIRMAN: Can I say something about that? First, the agreements between the two  
12 parties, the other agreements are between different parties and they have different factual  
13 backgrounds, and different ways of interpreting them, and so our initial reaction is that the  
14 question in issue is between the two parties and the others have no interest in that.

15 The second point is that if they wanted to intervene in some way they would have to be  
16 made parties, and they would have to submit to the jurisdiction, because we could not hear  
17 them on that and that is why I was very careful at the beginning to say on what I was saying  
18 they were not submitting to the jurisdiction. From the approach taken so far that does not  
19 seem to be what they wanted to do.

20 The claim at the moment before us is a claim by Emerson claimants against Morgan  
21 Crucible and that is it. What we are considering is how that claim proceeds.

22 MR. OSGOOD: Yes, madam Chairman, and perhaps one final thought on the settlement issue,  
23 should it become a matter of the case in chief, earlier on the Tribunal raised a very  
24 interesting question, and it was now months ago, and that question was: Should one go  
25 back to the US court and the judge who was in charge of the class action to have  
26 clarification?

27 THE CHAIRMAN: Well I think that has gone out of the window now because of the way that the  
28 latest decision was worded.

29 MR. OSGOOD: My only comment was going to be that we would want some opportunity to  
30 consider that simply ----

31 THE CHAIRMAN: They do not have exclusive jurisdiction.

32 MR. OSGOOD: We quite agree, but we have not directly addressed – at least in our own minds –  
33 whether that course of action would be a prudent course of action.

1 THE CHAIRMAN: It is rather unfortunate that we come here today for directions and these  
2 matters have not been addressed in your own mind, because that seems to be a delaying  
3 tactic, I think.

4 MR. OSGOOD: That is not meant as a delaying tactic, certainly. My major proposal is, as I  
5 began, that Morgan Crucible would like to find the most efficient way to proceed.

6 THE CHAIRMAN: I think everybody wants to find the most efficient way to proceed, and I  
7 think the question is if the parties want to mediate what is the most efficient way of  
8 mediating? If the parties consider that it is necessary to have some directions in this  
9 Tribunal before mediation and some further material, e.g. disclosure or defence, then we  
10 have to consider that and see whether it is appropriate proportionately to make those  
11 directions, and if we do not make those directions, then it may be that mediation does not  
12 proceed because that is the only basis upon which the parties can agree on mediation. We  
13 cannot force mediation.

14 MR. OSGOOD: I understand.

15 THE CHAIRMAN: I do not know what the position is on mediation.

16 MR. SPITZ: Madam Chairman, the position is that we would welcome a mediation at the right  
17 time. The right time will be once we have a defence and once we have disclosure, because  
18 that will crystallise what it is we will be discussing in the mediation.

19 MR. SCOTT: Just to be clear, Mr. Spitz, when you say “mediation” do you mean mediation in  
20 respect of all three of the settlement issues – the substantive issue in relation to sales by  
21 Morgan, and the substantive issue in relation to joint and several liability?

22 MR. SPITZ: Yes, that is correct, that is what we mean, and that is why we need the ----

23 MR. SCOTT: I understand that, we just needed to make sure we were clear about that.

24 THE CHAIRMAN: On that basis it seems to me – and we will see if everybody else nods – that  
25 there is not an agreement about mediation at the moment.

26 MR. OSGOOD: There is?

27 THE CHAIRMAN: There is not an agreement because your proposal is no defence, their  
28 proposal is defence, therefore there is no agreement. Therefore we must proceed on the  
29 basis that this action goes on unless and until there is some agreement, and then there can be  
30 an application for a stay.

31 MR. SPITZ: (After a pause) Yes, I think that accurately summarises the position.

32 THE CHAIRMAN: Right, so the position is that both parties would like to try and mediate, that  
33 that is an expedient way of trying to dispose of the case, but in order to mediate you say “I

1 need disclosure and a defence”; the other side says: “Only disclosure”. We have to decide  
2 whether a defence is a good idea or not.

3 MR. SPITZ: Yes, that is correct, and it may be helpful to hear from Morgan what their position is  
4 in relation to the release as a preliminary issue, rather than have me ----

5 THE CHAIRMAN: Well what they are saying is that they would like to mediate that. As I  
6 understood it from you, you said you would like to mediate that as well?

7 MR. SPITZ: Yes, with the qualification.

8 THE CHAIRMAN: And because you would prefer a full defence and see what it is all about  
9 because it may be very costly for the Tribunal to decide the settlement agreement and then  
10 to have a mediation. It may be better to put the whole thing in and if that does not work then  
11 we proceed.

12 MR. SPITZ: Quite so.

13 MR. OSGOOD: Madam Chairman, just one word, perhaps it would be helpful if I took five  
14 minutes with my friend and we talked about this further because I do not think we are that  
15 far apart even on procedure.

16 THE CHAIRMAN: I am happy to give you five minutes, if that would help?

17 MR. OSGOOD: I think it would.

18 THE CHAIRMAN: All right, we will adjourn until ten past three.

19 (Short break)

20 THE CHAIRMAN: Can I just mention that there is a problem in this room if any one has a  
21 device which is on – whether they are Blackberrys (which is a wireless device) or a mobile  
22 phone or anything else that has been invented I-tune, whatever it is, can it be please turned  
23 off because otherwise it does not always pick up what we are saying and we will not get a  
24 proper transcript.

25 MR. SPITZ: Thank you, Madam Chairman. Happily we can report some progress between  
26 Emerson and Morgan in relation to perhaps some agreed directions. What we have agreed is  
27 that Morgan will put in a full defence to all of the issues that they propose to raise a defence  
28 in relation to by the end of January. Both sides will then make standard disclosure by the  
29 end of March, and there will be a mediation between the parties after disclosure.

30 THE CHAIRMAN: So standard disclosure by the end of March, how long do you think it will  
31 take to analyse or peruse those documents before mediation can take place?

32 MR. SPITZ: I think we are probably looking at a mediation in May, I would think that that is a  
33 reasonable amount of time, but of course it depends on the extent of the disclosure, and  
34 perhaps that is something that ----

1 THE CHAIRMAN: So we could fix a CMC for June?  
2 MR. SPITZ: Yes, we could.  
3 THE CHAIRMAN: And either that goes by the board – I just want to keep it rolling, that is all.  
4 MR. SPITZ: Indeed, that we could do. Then there was one final point that we reached agreement  
5 on and that is in relation to the documents that Morgan made available to the Commission  
6 which would form part of the disclosure. Those documents Morgan is prepared to make  
7 available to us by the end of January.  
8 THE CHAIRMAN: Documents – is it provided or made available, because those are two  
9 different things?  
10 MR. SPITZ: Provided, I think. Mr. Osgood will correct me if I am wrong.  
11 THE CHAIRMAN: Because “made available” does not mean they were provided.  
12 MR. OSGOOD: You did say disclosure by both parties?  
13 THE CHAIRMAN: Well it is standard disclosure, so yes.  
14 MR. SPITZ: I am sorry, so far as the date for the Commission document is concerned, I believe  
15 that Morgan said they could do it in early January. If they are willing to do that then that  
16 would be helpful.  
17 THE CHAIRMAN: Is there a date by which you consider you can do that – the Commission  
18 documents – because I think you said at some previous time they are all in a room waiting to  
19 be ----  
20 MR. OSGOOD: Yes, I would like to be able to go back for my holidays and have two or three  
21 weeks.  
22 THE CHAIRMAN: Why would it take two or three weeks?  
23 MR. OSGOOD: Because my staff is not always back when I am. Let us pick a date.  
24 THE CHAIRMAN: Yes, let us pick a date.  
25 MR. OSGOOD: The third Friday in January, whatever it is.  
26 MR. SCOTT: 18<sup>th</sup> January.  
27 THE CHAIRMAN: Is that all right, 18<sup>th</sup> January?  
28 MR. SPITZ: Yes, that is all right.  
29 THE CHAIRMAN: In any order we make the mediation would not go in the order. What would  
30 go in the order is the CMC in June, permission to apply and ....  
31 MR. SPITZ: Yes, indeed.  
32 (The Tribunal confer)  
33 THE CHAIRMAN: As I said earlier, sometimes it may be helpful to use the Tribunal as a means  
34 of giving directions for a mediation rather than using a mediator. First, that may be cheaper,



1 and secondly, we are apprised of the matter now, whereas the mediator may not yet be  
2 apprised, and so that facility is available, and when we say “permission to apply” that  
3 facility is available – it may well be that it can be done by a telephone discussion, and it may  
4 well be – depending on what the point is – that it is done by me alone and not with the other  
5 members, so it can be done as an emergency, or urgently. I just offer that service, if it helps.

6 MR. OSGOOD: Thank you very much.

7 MR. SPITZ: Thank you very much.

8 THE CHAIRMAN: So we need to do a CMC in June – do we have June diaries? What date in  
9 June would you like.

10 MR. SPITZ: Towards the end of June, perhaps the week from Monday, 23<sup>rd</sup> June, at any point  
11 during that week.

12 THE CHAIRMAN: Shall we say 24<sup>th</sup>?

13 MR. SPITZ: That is fine, thank you.

14 THE CHAIRMAN: We will say 10.30 on 24<sup>th</sup> June, and we will see what is involved – if  
15 anything is involved – we can see whether it is a half day or a whole day, or whether we do  
16 it in the afternoon instead of the morning. So 10.30, 24<sup>th</sup> June.

17 MR. HOSKINS: Although it does not make any difference, but I know I have a trial all that  
18 week.

19 THE CHAIRMAN: At the moment that does not make a difference.

20 MR. HOSKINS: I thought you might say that, but I thought I would mention it.

21 THE CHAIRMAN: For the moment it does not make a difference – unless you want it to make a  
22 difference by becoming a party.

23 MR. HOSKINS: It is also my birthday, but I think that is even lower ---- (Laughter)

24 THE CHAIRMAN: “Party” in two senses! (Laughter)

25 MR. SCOTT: You would like a 7 p.m. start, would you? (Laughter)

26 THE CHAIRMAN: Shall we turn to the application under 31(3) against the proposed second to  
27 fifth defendants. First, Mr. Spitz, I think, and then we will see ----

28 MR. SPITZ: In relation to the Tribunal’s intuitive thoughts concerning the need to be able to  
29 make out a prima facie case, as far as Article 6(1) is concerned, for the reasons we have  
30 already canvassed, we believe that we have made out that case. The only jurisdictional issue  
31 that seems to be a live one is the question of Bosch. Bosch has a claim against SGL and that  
32 is the only claim for direct purchases against SGL. SGL faces the joint and several liability  
33 claims, but no other claims from direct purchasers.

1 There is a claim that Bosch has against Schunk, and Schunk has raised the same point in  
2 relation to jurisdiction under Article 5(3). They have contended on the basis of the *SanDisk*  
3 Decision that the Tribunal does not have authority to deal with Bosch's claim.

4 THE CHAIRMAN: I did have a copy of the regulation and in my usual way it has disappeared.  
5 (After a pause) Article 5(3) is where the harmful event occurred, and Article 6(1) is the  
6 latching on?

7 MR. SPITZ: Yes. There is another ground as well, madam, and this is an argument that I will not  
8 be able to develop at length now, but the argument in a nutshell is that we also assert  
9 jurisdiction in relation to Schunk and to SGL on the basis of Article 2 domicile and we do  
10 that via the single economic entity doctrine, and we argue that the decision itself describes  
11 the addressees as having sites in a number of jurisdictions, including sites in the United  
12 Kingdom, and we say that there are subsidiaries of both of those companies that  
13 implemented and gave effect to the cartel in the United Kingdom and we would seek at the  
14 appropriate time to make an argument that the single economic entity doctrine allows us to  
15 contend for jurisdiction on the basis of domicile as well.

16 THE CHAIRMAN: So we have a single economic entity option – is that against them all, or only  
17 against ----

18 MR. SPITZ: That is against the three – Schunk, SGL and Carbone, if the point is taken by  
19 Carbone as well.

20 THE CHAIRMAN: Right now you said that you have already made out the case under Article  
21 6(1) ?

22 MR. SPITZ: Save for the Bosch claim. One will have clarification from Schunk and SGL as to  
23 whether there is an issue between us in relation to that.

24 THE CHAIRMAN: I may be able to short circuit it – is there a document that you have produced  
25 which sets out your claim under 6(1) and 5(3)?

26 MR. SPITZ: Yes, I believe it is in the complaint.

27 THE CHAIRMAN: Can we check that now?

28 MR. SPITZ: From paragraph 99.

29 THE CHAIRMAN: 5(3) is dealt with, 99 and 100.

30 MR. SPITZ: That is correct.

31 THE CHAIRMAN: Then 2(1) and 6(1) are 101.

32 MR. SPITZ: And 102 is the single economic entity point.

33 THE CHAIRMAN: Right, so you have made up your claim effectively in paras. 99 to 102.

34 MR. SPITZ: That is correct.

1 MR. SCOTT: For completeness, there is presumably an equivalent to this in the revised claim  
2 embracing ----

3 MR. SPITZ: I am grateful for the point being raised because the application for permission and  
4 the amendment does contain the same case, save that I believe in relation to para.102 I do  
5 not think that the proposed amendment deals with Carbone's position in the same way as  
6 Schunk and SGL are dealt with in 102.2 and 102.3.

7 THE CHAIRMAN: So that needs to be done?

8 MR. SPITZ: That would need to be done.

9 THE CHAIRMAN: Can I just ask you something else, so we make sure we all know what  
10 documents are here for the record? Have you made any written submissions, skeleton  
11 argument, whatever one calls it, in relation to 99 to 102?

12 MR. SPITZ: No, the only point that we have made is the one that I have already mentioned in  
13 relation to Article 6(1) as it applies to all the claims, save for the Bosch claims.

14 THE CHAIRMAN: So that would need to be done if we are going ----

15 MR. SPITZ: To deal with the jurisdiction issue, yes.

16 THE CHAIRMAN: That is very helpful. Where does that take us?

17 MR. SPITZ: The point that I wanted to make was in relation to the order of things, whether one  
18 deals with permission on the basis that the Tribunal has suggested, establishing a prima facie  
19 case of jurisdiction or not. Our primary submission would be from the point of view of  
20 costs. It is probably more sensible to deal with the question of permission and then allow  
21 any objection to jurisdiction to be taken by those who wanted to take it in the ordinary way,  
22 just as one would if proceedings had been served on a party under the CPR ----

23 THE CHAIRMAN: We cannot do that because our Rule says we have to receive and consider the  
24 observations of the proposed defendants in deciding whether permission is to be granted;  
25 that is the problem.

26 MR. SPITZ: Yes, there are really two main points that are taken by Schunk and SGL. The one  
27 which we have thought goes to the question of permission is the scope of the appeals before  
28 the CFI, the other is the question of jurisdiction, so that it seems to us that the Tribunal  
29 would be able to look at that question in relation to the CFI appeals and decide whether or  
30 not to give permission without – as the Tribunal has made clear – that amounting to a  
31 submission to jurisdiction, and then one could deal with the jurisdiction in the face of an  
32 application.

33 THE CHAIRMAN: I think I follow what you are saying. I think what you are saying is that one  
34 has to be careful to make sure that the observations of the proposed defendants go to the

1 question of whether we should grant permission to make a claim, rather than, having made a  
2 claim, whether there are other questions which means that the claim should not proceed  
3 against them in this jurisdiction?

4 MR. SPITZ: Yes, that is correct.

5 THE CHAIRMAN: And what you say is that the Brussels' regulation comes in the second stage  
6 and not the first stage.

7 MR. SPITZ: That is correct, once there is a party served, that would be the appropriate time to  
8 raise ----

9 THE CHAIRMAN: And you say that corresponds with the CPR?

10 MR. SPITZ: That is correct. And from a costs' point of view it would be less expensive to deal  
11 with the question of permission if the Tribunal is not minded to grant permission, then the  
12 costs spent on the jurisdiction debate would not be necessary.

13 THE CHAIRMAN: But what are the matters that we should take into account on your  
14 submission in relation to permission?

15 MR. SPITZ: It would be whether the grounds and the nature of the appeals before the CFI are  
16 such as to provide a barrier to the Tribunal granting permission in circumstances where case  
17 management directions can be utilised to regulate the conduct of the case going forward.  
18 That seems to be the only issue that has been raised thus far.

19 MR. SCOTT: Before we get ourselves into difficulties in open court, we may need guidance as to  
20 where you are with confidentiality and the CFI applications.

21 MR. SPITZ: Yes, indeed.

22 THE CHAIRMAN: I think that has clarified the problem. Mr. Hoskins is going first, is he?

23 MR. HOSKINS: Regardless of the order or numbers I will go first. Madam, our suggestion is  
24 that the applications for permission to bring the claim should be adjourned pending  
25 clarification of the claim against Morgan Crucible; either it is settled and they drop out, or  
26 there is a preliminary issue in front of the Tribunal on settlement and they potentially drop  
27 out and let me explain why we put it that way.

28 THE CHAIRMAN: Yes.

29 MR. HOSKINS: Madam, we do say that if the claim against Morgan Crucible disappears, if I can  
30 use that vernacular, for whatever reason – settlement or a determination of the settlement –  
31 before the question of permission to bring the claims against us is determined, then we will  
32 certainly submit that there is no jurisdiction. The reason we say that is that in the  
33 correspondence that went to the Tribunal the claimants referred to the case of *Petrotrade*,  
34 and what *Petrotrade* tells you is that when looking, for the purposes of Article 6(1) whether

1 there was a relevant anchor defendant i.e. someone domiciled in the UK, you look at the  
2 date of issue of the proceedings; that is what *Petrotrade* was about.

3 There is also a relevant ECJ authority called *Reisch*.

4 THE CHAIRMAN: That would be against you, would it not?

5 MR. HOSKINS: I am going to come to that.

6 THE CHAIRMAN: No, no, but I am right in thinking that that would be against you?

7 MR. HOSKINS: Well that would be a question then as to what does “issue” mean, and I am  
8 going to come to that, I am just flagging up the authorities and the principles.

9 THE CHAIRMAN: All right.

10 MR. HOSKINS: There is also a case in the ECJ called *Reisch* which says that when you bring  
11 claims against a number of defendants, and it transpires that the claim against the anchor  
12 defendant is inadmissible, then there is still jurisdiction.

13 THE CHAIRMAN: Why.

14 MR. HOSKINS: The reason why we say that there is still an issue as to jurisdiction here is that in  
15 both *Petrotrade* and *Reisch* at the time the claim was brought against the foreign defendants,  
16 there was an extant claim against the anchor defendant. Madam, the position would be  
17 different here if, before we get to the question of permission, Morgan Crucible has  
18 disappeared, there will not be a live claim against us at the same time as there is a live claim  
19 against Morgan Crucible, and therefore the order in which the Tribunal decides permission  
20 on jurisdiction is actually crucial.

21 THE CHAIRMAN: What was going through my mind, and I want to take it away from the facts  
22 of this case, so I am using my personal injury analogy, the claimants bring a personal injury  
23 action against defendant one, who is within the jurisdiction, no problem. Defendants two to  
24 four are anchored on to that claim under the Brussels’ regulation. The claim proceeds a bit  
25 and it is decided that the claim against the first defendant was an abuse of process, or  
26 inadmissible or something else. Are you saying that *Reisch* would mean that the claim  
27 against the second to the fourth could continue?

28 MR. HOSKINS: Yes, but I am saying that our case is different.

29 THE CHAIRMAN: I understand that.

30 MR. HOSKINS: Because of the timing problem.

31 THE CHAIRMAN: Yes.

32 MR. HOSKINS: Unusually in this case jurisdiction is actually in the gift of the Tribunal.

33 THE CHAIRMAN: Yes. And if the claimant is saying: “I want to go ahead with my permission  
34 application before anything else is decided”, the permission application is only permission

1 to bring the claim, or to “make the claim” as the words are, is it right that the Tribunal says  
2 “Well actually I am going to adjourn that application until I see whether or not the first  
3 claim is settled”, because that would go against *Reisch*, would it not – as an analogy, I am  
4 not saying ----

5 MR. HOSKINS: Madam, the point about Article 6(1) is that first of all it is an exception from the  
6 general rule of jurisdiction, which is Article 2, based on domicile, so it must be narrowly  
7 construed. The oddity about 6(1) is that even being narrowly construed it can give rise to  
8 some extreme situations e.g. *Reisch*. So we would say that the issue that has come before  
9 the Tribunal will have to be determined at some stage – we say in fact it will have to be  
10 determined today, it is in your gift what happens to jurisdiction. There should be restrictive  
11 jurisdiction, there is no right on the claimants to come and demand that the Tribunal in the  
12 exercise of its jurisdiction gives it the benefit of Article 6(1). What one has to remember is  
13 our submission is that it is clearly within the Tribunal’s power to decide in what order to  
14 deal with these issues.

15 If it deals with Morgan Crucible first before jurisdiction, and Morgan Crucible drops out  
16 there is no real connection with the United Kingdom in relation to the remainder ----

17 THE CHAIRMAN: Well that would have been true in *Reisch* or whatever it is called.

18 MR. HOSKINS: It is, but that is my point, it all turns on Article 6(1) says that as long as there is  
19 a live claim at the same time against co-defendants you are all right. But our point is if there  
20 is not a live claim at the same time adopting a strict interpretation, which one must – that is  
21 clear from the case law in relation to Article 6(1)(5), all the exceptions from Article 2 – then  
22 there is no jurisdiction; it is a plain situation here.

23 THE CHAIRMAN: But if the claimant says: “I want to proceed with this application; I do not  
24 know what is going to happen. I want to get the cases on” and there is no agreement to  
25 adjourn, is it right that the court says: “Well actually I am going to wait”. Where is the  
26 power of the court? How can the court trump the fact that a party wants to get a case  
27 issued?

28 MR. HOSKINS: It is then purely a case management decision for the Tribunal. If you decide, as  
29 a matter of case management, that it makes sense to hold the ring here, for the parties not to  
30 expend money until the Morgan Crucible situation is settled, then that is a purely domestic  
31 housekeeping decision as to proper case management. If you decide on that basis that is the  
32 appropriate way forward it does not make any sense to spend any more money until Morgan  
33 Crucible is determined. There is no problem with Article 6(1) then, that is a domestic  
34 housekeeping issue, that is resolved and then you come to jurisdiction.

1 THE CHAIRMAN: So if we look at the wording of 6(1):

2 “Where he is one of a number of defendants, in the courts for the place where any  
3 one of them is domiciled, provided the claims are so closely connected that it is  
4 expedient to hear and determine them together to avoid the risk of irreconcilable  
5 judgments resulting from separate proceedings.”

6 So the test that we have to apply in 6(1), or what we have to take account of is whether they  
7 are so closely connected that it is expedient to hear and determine them together to avoid the  
8 risk of irreconcilable judgments resulting from separate proceedings.

9 MR. HOSKINS: Madam, there are actually two conditions in 6(1), the first one is one I have  
10 identified as you must issue claims – I use the word “issue” because that comes from  
11 *Petrotrade*. You must have issued claims against the co-defendants – or there must be  
12 outstanding issued claims against co-defendants concurrently. That is the first condition.

13 MR. SCOTT: That is so there is a claim to be closely related to ----

14 MR. HOSKINS: Absolutely, and if you do have the concurrent existing claims against co-  
15 defendants then there is a further condition that has to be satisfied in Article 6(1).

16 THE CHAIRMAN: That I do not understand. You only need one claim against a defendant.

17 MR. HOSKINS: The crucial issue here, madam, and it echoes, madam, the way you introduced  
18 the nature of the permission, the question is: at the moment is there an issued claim against  
19 the proposed defendants, or is there only an issued claim once the Tribunal has given  
20 permission to bring that claim, and that is the legal issue.

21 THE CHAIRMAN: Let me write that down.

22 MR. HOSKINS: In *Petrotrade* it said that what is crucial for the first condition of 6(1) is whether  
23 there are concurrent claims ----

24 THE CHAIRMAN: Just a minute – you will have to go slower than that. In *Petrotrade* the first  
25 condition of 6(1) is whether there are concurrent ----

26 MR. HOSKINS: Concurrent claims against defendants at the time of issue, and you are looking  
27 at the time of issue against the anchor defendant.

28 THE CHAIRMAN: Well the time of issue, which is when we give permission I think – unless  
29 you tell me that is wrong.

30 MR. HOSKINS: The proceedings have been issued against Morgan Crucible.

31 THE CHAIRMAN: Yes. “Proceedings issued against Morgan Crucible”, yes.

32 MR. HOSKINS: If claims have been issued against the proposed defendants as things currently  
33 stand then there is jurisdiction under 6(1). However if, because of the requirement for  
34 permission to bring a claim there are currently no proceedings issued against the proposed

1 defendants, and if at the time permission comes to be decided there is no outstanding claim  
2 against Morgan Crucible, then there will not be jurisdiction under Article 6(1) against the  
3 proposed defendants.

4 MR. SCOTT: And then what is therefore ----

5 THE CHAIRMAN: Can you just wait one moment? You say that is *Petrotrade*?

6 MR. HOSKINS: Well the problem is, madam, we did not come armed to argue substantive points  
7 and we have not brought copies of *Petrotrade* or *Reisch*.

8 THE CHAIRMAN: If that is the case this has to go over, does it not, because we would need to  
9 see these cases?

10 MR. HOSKINS: It is probably sensible, yes. We simply did not anticipate we would get into  
11 this ----

12 MR. SCOTT: What I was going to say was then you are forced back into those aspects at 99 to  
13 102 and equivalent for the fifth defendant.

14 MR. HOSKINS: Then the further argument would be, in Article 6(1) we say we will drop out of  
15 the picture. There will no doubt be debate, there will be submissions because I am sure the  
16 claimants will say they do not agree with my submissions on 6(1). We say it is a point to be  
17 decided. Then whatever happens there will no doubt be a question on Article 5(3), which  
18 will apply the *SanDisk* case and there will be an argument about the domiciled single  
19 economic entity.

20 THE CHAIRMAN: So I assume you are going to say this is a bad point? (Laughter)

21 MR. HOSKINS: I thought he might say that! (Laughter)

22 THE CHAIRMAN: Then what we need to do is to have a hearing at which this point is  
23 elucidated as well as the other points. If, at the end of the day we decide you are right, then  
24 that means that we should not give permission.

25 (The Tribunal confer)

26 THE CHAIRMAN: You would say we should not give permission under 6(1), but then the  
27 question is whether there are other grounds upon which permission can be given. 6(1) gets  
28 knocked out.

29 MR. HOSKINS: It would be a reason for not giving permission under 6(1), it may not be the only  
30 reason.

31 THE CHAIRMAN: Yes, and there may be other reasons because they are relying on other  
32 Articles as to whether we ought to give permission. So what we need to do is to set up a  
33 hearing in order to deal with whether permission ought to be granted, which would include



1 your point, because they would be saying 6(1), you would be saying “no” because of this  
2 point.

3 MR. HOSKINS: Madam, there is another complication which I think I have teased out, which is  
4 the question – the order in which the Tribunal decides jurisdiction and permission is  
5 fundamental, because it is only if Morgan Crucible has gone out of the picture that the 6(1)  
6 argument arises. So if one determines permission first before the Morgan Crucible issue is  
7 determined, we do not have ----

8 THE CHAIRMAN: No, but one of your submissions will be that we ought not to determine it  
9 first and so that is part of what we will have to decide – I will express this and see if I get  
10 nods – at the moment it seems to me that it would not be appropriate for the Tribunal to  
11 decide to adjourn it, to wait, when the claimants are saying “No, we want to go ahead” and  
12 when we have made the directions in the Emerson/Morgan Crucible that is standing that a  
13 defence is going to be served.

14 MR. HOSKINS: Madam, as I understand the position, as I have put it, jurisdiction in this case is  
15 within the gift of the Tribunal as a case management issue, and I am sure my learned friend  
16 and I could agree a preliminary issue that will encapsulate the point that we are discussing,  
17 which is – let me put it, just drafting on the hoof.

18 THE CHAIRMAN: Yes.

19 MR. HOSKINS: If the claim against Morgan Crucible is determined, whether by settlement or by  
20 Judgment of the Tribunal, before the Rule 31(3) permission application is determined, will  
21 the Tribunal have jurisdiction under Article 6(1) against the proposed defendants?

22 MR. SCOTT: That is rather more narrowly drawn than I think the argument Mr. Spitz is making  
23 in his claim.

24 MR. HOSKINS: That is deliberately so because, as I say, the question which you determine  
25 settlements, permission, jurisdiction is absolutely fundamental, and the trouble is if you do  
26 all of jurisdiction first then you enter into a very difficult world, where are we to assume  
27 Morgan Crucible is in or out or not?

28 THE CHAIRMAN: Yes, but what happens if Article 5 or Article 2 gives jurisdiction in any  
29 event.

30 MR. HOSKINS: I suppose those could be determined in any event because the presence of  
31 Morgan Crucible – I think I am correct – does not affect the answer to either of those. So  
32 what one could have is a preliminary issue, the narrow preliminary issue I have described in  
33 relation to Article 6(1) because if Mr. Spitz wins then you have jurisdiction under 6(1). If I

1 win then you go on to consider jurisdiction under 5(3) and jurisdiction under 2, so it is a sort  
2 of mix and match ----

3 THE CHAIRMAN: We can do it altogether. We can have one hearing in which we consider all  
4 of this.

5 MR. HOSKINS: That is fine, except in relation to 6(1), the question under 6(1) has to be  
6 narrower because it is only a relevant issue.

7 THE CHAIRMAN: No, what we can do – I think – in the way that one has alternative  
8 Judgments, we can say that we either agree with you or do not agree with you on your  
9 narrow preliminary issue but, assuming we agree with you we will have decided 6(1) in the  
10 following way.

11 MR. HOSKINS: (After a pause) Yes, so you decide 6(1) on the assumption there is not an  
12 outstanding claim against Morgan Crucible at the time permission is given.

13 THE CHAIRMAN: We decide which way we go, but we give the reasons we would have  
14 decided it in the alternative, had we come to the other conclusion, so it is all there, so  
15 therefore it is all in a decision which can then be considered as to whether this is going to go  
16 further on this interesting point which may or may not have been decided and may have to  
17 go up to the ECJ.

18 MR. HOSKINS: The reason I am hesitating is if you decide it both ways in a broad sense – does  
19 Article 6(1) apply – then you are pre-empting in a sense what is going to happen with  
20 Morgan Crucible. I am not quite sure how the Tribunal will then approach the question of  
21 whether or not to grant permission.

22 THE CHAIRMAN: My difficulty is that I do not think it is for this Tribunal to adjourn something  
23 if it is not consented to in order to make it in the gift of the Tribunal as to whether or not this  
24 argument is a good argument or a bad argument.

25 MR. HOSKINS: I understand but the flipside also applies because it is in the gift of both parties,  
26 whichever way you decide it, it is either a gift to Mr. Spitz's clients or a gift to my clients,  
27 you cannot avoid making a gift.

28 THE CHAIRMAN: But the normal principle that one works on is that claimants make a claim.  
29 They have made an application to make the claim and the courts ought to hear that  
30 application within a reasonable time. Now, if the claimants are saying we ought to get on  
31 with this, and we do not know what is happening with the other action, then it does not seem  
32 to me appropriate for a court, who has to take a neutral position, to side with the proposed  
33 defendant and say "We are going to adjourn".

1 MR. HOSKINS: I am not saying it should be an arbitrary decision – “I favour Mr. Spitz” because  
2 you prefer his tie to mine, it is a question of housekeeping. If you, as a matter of your own  
3 housekeeping, take the view that it is sensible to have the Morgan Crucible issue determined  
4 first before you come to permission, and you are perfectly entitled to do that; it is a perfectly  
5 reasonable thing to do.

6 THE CHAIRMAN: I think what I am saying as a matter of housekeeping – if it is housekeeping,  
7 I am not sure it is – but if it is housekeeping it does not seem to me appropriate to use our  
8 discretion in that way.

9 MR. HOSKINS: One of the issues that comes out of this in terms of the submissions that were  
10 made earlier in relation to, for example, the settlement issue is that certain aspects of the  
11 settlement issue are going to have to be determined in any event either through mediation or  
12 the Tribunal because, for example, madam, you made the point that one has to avoid double  
13 counting. There is also an issue as to the terms of the release and one of the issues is, in  
14 fact, whether the settlement between these two parties – not my client – actually releases all  
15 the claims, because as a matter of construction one of the possible constructions is in doing a  
16 deal with Morgan Crucible actually releases all the defendants from that aspect of the claim.

17 THE CHAIRMAN: Well that submission makes me think that actually that is a submission – if  
18 we did not have the Article 6(1) problems etc – in favour of , if we say making the claim  
19 issue ----

20 MR. HOSKINS: Yes.

21 THE CHAIRMAN: -- now, so that all of that could be rolled into – I use these words which are  
22 quite useful although I am saying it is not within these – it would be expedient to avoid the  
23 risk of irreconcilable Judgments, and in a sense expedient in the whole scenario of all these  
24 claims.

25 MR. HOSKINS: Madam, if we are looking at irreconcilable Judgments and we are looking at the  
26 need to take a restrictive interpretation of Article 6(1) my submission would be that if  
27 Morgan Crucible has gone, there will be no risk of irreconcilable Judgments.

28 THE CHAIRMAN: No, what I was saying was *mutatis mutandis* I am taking those words, in  
29 settling all the claims it would be expedient.

30 MR. HOSKINS: But there is no expediency, there is no need for this Tribunal to have all these  
31 defendants before it if Morgan Crucible is not here, because if Morgan Crucible is not here  
32 and you do not have jurisdiction the risk of irreconcilability does not arise at all. That is why  
33 I draw on the second condition in Article 6(1), it is actually something which I say  
34 supports ----

1 THE CHAIRMAN: We cannot deal with that now because we have not got the authorities and  
2 because the claimants were not alerted to this and are not here to make the submissions. It is  
3 a very interesting point.

4 MR. HOSKINS: I am just concerned that we identify what the point is.

5 THE CHAIRMAN: Well the answer is that what we need to do, it seems to me – I do not know if  
6 you are speaking for everybody here, are you?

7 MR. HOSKINS: I am probably not. I am going first but not necessarily for everyone, no – unless  
8 they happen to agree with me.

9 THE CHAIRMAN: It seems to me – we will see if we get nods – the answer to this is we give  
10 some directions, we fix a CMC at which this can be argued and the whole point on  
11 permission can be argued, and if at that hearing it turns out that, because of the way you put  
12 the submissions and the way it is answered, we should not go further, then that is one thing.  
13 If we consider it should go further and we need the other points then we decide it that way.  
14 The answer is that one puts everything in the basin and then sees what happens at that  
15 hearing.

16 MR. HOSKINS: The caveat of that is that you have made the gift, because if you put permission  
17 with jurisdiction ----

18 THE CHAIRMAN: No, I have not, because it may well be at that point we decide that we have  
19 not made the gift.

20 MR. HOSKINS: Madam, if you decide that irrespective of the question of jurisdiction you are  
21 minded to give permission then there will be an issued claim ----

22 THE CHAIRMAN: No, but you are going to make the submission that we should not make the  
23 gift.

24 MR. HOSKINS: As long as that is understood madam.

25 THE CHAIRMAN: Yes, you are going to make the submission that you should not make the gift,  
26 and we will hear submissions about whether you make the gift or not.

27 MR. HOSKINS: (After a pause) I am sorry, madam.

28 THE CHAIRMAN: If the situation is that Article 6(1) was not there, so there was no question of  
29 whether you could gain jurisdiction under Article 6(1) Mr. Spitz would still say that he can  
30 get in under Article 2 or Article 5.

31 MR. HOSKINS: Yes.

32 THE CHAIRMAN: He must be entitled, in any event, to make that application – right?

33 MR. HOSKINS: Absolutely, yes.

1 THE CHAIRMAN: So we must deal with Article 2, Article 5, and then the question is Article  
2 6(1). He fails on Article 2, he fails on Article 5, he is only left with Article 6(1). He must  
3 be entitled now – your point does not go to his Article 2/Article 5 point?  
4 MR. HOSKINS: That is right.  
5 THE CHAIRMAN: So we must be able to have a hearing on Article 2/Article 5 in any event? So  
6 we should not adjourn this matter because there is the Article 2/Article 5 point. We then  
7 come on to the Article 6(1) point. You say he has not yet made the claim – I will put this in  
8 a very summary way and probably get it slightly wrong – but if he has not made the claim  
9 therefore we cannot give permission because he has to have made the claim before Article  
10 6(1) kicks in.  
11 MR. HOSKINS: I would say he has not made a relevant claim against the proposed defendants.  
12 THE CHAIRMAN: Because he can only do so with permission?  
13 MR. HOSKINS: That is right, and if the claim against Morgan Crucible disappears before the  
14 question of permission is determined you will not have jurisdiction.  
15 THE CHAIRMAN: I think you can make it more simply, because at the point that we hear this he  
16 has not made a claim, or Emerson claimants have not made a claim because they need the  
17 permission of the Tribunal so to do. If a claim has not been made then Article 6(1) does not  
18 kick in . Therefore Article 6(1) is not relevant – I am not sure how to put this ----  
19 MR. HOSKINS: That is the problem.  
20 THE CHAIRMAN: That is the problem, is it not?  
21 MR. HOSKINS: That is why I tried to define “narrow”.  
22 THE CHAIRMAN: That is right. We have identified what the problem is, it is a sort of circular  
23 point. It is no good us discussing it now because this really needs to go back to the drawing  
24 board and for everybody to be thinking about what the pros and cons of those arguments are,  
25 but that is a point that will have to be heard at whatever hearing this is, and then if you win  
26 on that point then Article 6(1) goes out of the window. If you lose on that point then Article  
27 6(1) is there?  
28 MR. HOSKINS: Yes.  
29 THE CHAIRMAN: And we will have to make a decision as to whether under Article 6(1) he  
30 could make the claim.  
31 MR. HOSKINS: Yes.  
32 THE CHAIRMAN: The question may be – I am not sure whether it is because I have not thought  
33 about this point before ----  
34 MR. HOSKINS: I am not sure many of us have! (Laughter)

1 THE CHAIRMAN: It is a very clever point. It is the question of what ‘status’ – I am not sure I  
2 have the right word – the requirement for permission has on Article 6(1).

3 MR. HOSKINS: Yes.

4 THE CHAIRMAN: I think your instructing solicitor might want to say something.

5 MR. HOSKINS: (After a pause) I think there are three questions wrapped up in this. The first is  
6 what is the status of an application for permission under Rule 31(3)? Because if it is  
7 equivalent to an issued claim form, then that is the end of the matter. That is the first issue.

8 THE CHAIRMAN: Yes

9 MR. HOSKINS: The second issue is if it is not equivalent to an issued claim form then will the  
10 claimant still be able to found jurisdiction under Article 6(1) even if the Morgan Crucible  
11 claim is disposed of before the Rule 31(3) permission question is determined. If Mr. Spitz is  
12 correct in that again, that is the end of the matter. If I am correct on that then the next  
13 question is in what order does the Tribunal decide, as a matter of case management, to deal  
14 with the question of permission? Is it before the position of the Morgan Crucible claim is  
15 clarified and that might be either by letting it run to mediation or by directing a preliminary  
16 issue of the settlement issue, or does it want to take permission first.

17 THE CHAIRMAN: Or possibly another way of putting it, is there an exception to *Reisch*?

18 MR. HOSKINS: I think the second question is directed to that.

19 THE CHAIRMAN: We will not hold you to those questions, just in case when you think it  
20 through again ----

21 MR. HOSKINS: That is certainly the way I have analysed it in my mind.

22 THE CHAIRMAN: Yes. It may be that the questions could be agreed. It may be, for good  
23 reasons, not for being awkward, that there are more questions, so it might be helpful if  
24 everyone sat down and thought it through, worked out what they think the questions are and  
25 then see if we can have an agreed second question because it may be that the parties are not  
26 agreed as to whether that question is relevant or not. Do you see what I mean?

27 MR. HOSKINS: Absolutely, it is very similar to the situation where the court has decided to  
28 order a preliminary reference to Luxembourg and what I would anticipate doing, if you are  
29 happy with it, is I will draft up the questions, hopefully on the basis of the three issues I  
30 have identified, and circulate it and see if we can agree it. If we cannot agree it then one can  
31 put in alternative wording and the Tribunal can see different sides and determine that, or  
32 indeed, maybe just add different questions, but there will be alternatives.

33 THE CHAIRMAN: It may be a bit of a brainstorming exercise, because you may say: “The  
34 question is X” and they say: “Well actually there are another three on this and actually the

1 question is Y". It is only because of the way we are looking at it, it may not be possible to  
2 agree.

3 MR. HOSKINS: But what happens with the preliminary ruling questions is that someone has to  
4 prepare the first draft in a sense to get the ball rolling and either one simply communicates  
5 by email, or indeed one has a meeting and thrashes out either an agreement, or at least  
6 alternative questions, which will go to the Tribunal.

7 THE CHAIRMAN: Do you think that is sensible? I am going to ask the others in a moment?

8 MR. SPITZ: We have some concerns with that because it seems to me that to cover the issues of  
9 both permission and jurisdiction in the way that was suggested earlier to bring it all into the  
10 pot and deal with the issues and to allow my learned friend to make his submissions on  
11 those points would be a preferable way of proceeding because it will not confine us to a  
12 wording of questions that turns out later perhaps not to address what it needs to address. So  
13 we think that the preferred way of going about it is to deal with the permission application  
14 that we brought quite some time ago and to take this point and hear the argument as to why  
15 the Tribunal should not go ahead and give permission – the “gift” language that my learned  
16 friend has used.

17 If the Tribunal is not inclined to use that sort of flexibility then, of course, we will sit down  
18 and attempt to formulate questions that can be dealt with but there is a real concern that that  
19 may prove not ----

20 THE CHAIRMAN: I am sorry, I do not follow. I am not trying to limit anything. I am just  
21 trying to work out what we are going to decide, and I am just trying to make sure that you  
22 do not make submissions in one area and Mr. Hoskins and everybody else makes  
23 submissions in another area and they do not meet, because it is going to become too  
24 complicated. If everybody set out what their headings are in their submissions then  
25 everybody knows that that is what is going to be addressed, and we have full submissions.  
26 Whereas, if we leave it in a vacuum, we may pass in the night without ever meeting each  
27 other.

28 MR. SPITZ: If the submissions are staggered with the opportunity to reply then that difficulty  
29 may not arise.

30 THE CHAIRMAN: It would be easier if we start at the outset knowing what we think those  
31 issues are, so that you can address them to start with and then they can address them, rather  
32 than you address half the points, and then address some other points; then we go back for  
33 you to have to address, it is not very expeditious. I am not trying to limit what is argued.

1 MR. SPITZ: Yes. We do not want to be awkward about it at all. It would have just seemed to  
2 me that one could say: "Let us have the first party's submissions in relation to the  
3 application for permission and in relation to what they have to say on jurisdiction and then  
4 there would be time to respond to whatever points are put forward on that basis.  
5 THE CHAIRMAN: You are saying that the defendant should go first on submissions?  
6 MR. SPITZ: It may well make sense.  
7 THE CHAIRMAN: And then you respond?  
8 MR. SPITZ: After all, one is looking for the opportunity to comment under the Tribunal's Rules.  
9 THE CHAIRMAN: So they could make their observations first and we respond, and you do not  
10 put anything in until then.  
11 MR. SPITZ: We are quite content with that.  
12 THE CHAIRMAN: And then they would have an opportunity to make observations in reply if  
13 you said something which ----  
14 MR. SPITZ: Indeed.  
15 MR. SCOTT: So in essence, your existing claim and the additional claim would stand as your  
16 opening, they respond (and then you respond) with their observations?  
17 MR. SPITZ: Yes.  
18 THE CHAIRMAN: Mr. Hoskins, what do you think about that?  
19 MR. HOSKINS: It is cold towel around the head time – this completely misses the point –  
20 because if we approach it that way Mr. Spitz has gone under the Christmas tree and he has  
21 taken my gift, and he has taken it home and he has ----  
22 THE CHAIRMAN: No, no, he has not, it is only the observations, it is only the submissions.  
23 MR. HOSKINS: Sorry, if I have misunderstood. My understanding was that he wants the  
24 submissions to deal with permission at the same time, and my point is that the timing is  
25 absolutely fundamental, and that is why ----  
26 THE CHAIRMAN: We are going to deal with permission, that is what the application is and you  
27 are saying we cannot deal with permission because of this point. So we have to decide this  
28 point, if we decide this point against you we deal with permission.  
29 MR. HOSKINS: That is right, madam.  
30 THE CHAIRMAN: Will that be at the same hearing?  
31 MR. HOSKINS: My concern is the third issue that I identified, and it necessarily follows is ----  
32 THE CHAIRMAN: That is ----  
33 MR. HOSKINS: It presumes I have lost on the first two questions.  
34 THE CHAIRMAN: Yes.



1 MR. HOSKINS: But it seems slightly odd then before the Tribunal has actually determined ----  
2 THE CHAIRMAN: Courts often hear everything and then if they decide that there is a single  
3 point which wipes it out that is it, but in this case it seems to me at the moment – and I am  
4 not holding myself to it, that because it is such an important point on the construction of the  
5 Brussels’ regulation it would be appropriate for the Tribunal to say what it would have done  
6 in any event so that that can be taken forward, because otherwise you will have to come  
7 back and there is no point in coming back.  
8 MR. HOSKINS: Madam, it is probably my deficiency and I apologise ----  
9 THE CHAIRMAN: No, no, do not apologise.  
10 MR. HOSKINS: -- the three issues – I am sorry, I will repeat them briefly but it is the only way I  
11 can break up the problem – first of all, what is the current status of the application for  
12 permission to bring claims under Rule 31(3)?  
13 THE CHAIRMAN: Is that effectively equivalent to a claim form?  
14 MR. HOSKINS: That is right, an issued claim form. The second one is the legal issue, which is  
15 if you like by reference to *Reisch*.  
16 THE CHAIRMAN: Yes.  
17 MR. HOSKINS: Is there jurisdiction under Article 6(1) where you do not have a current claim,  
18 and then having decided that, the third question is: in what order should the Tribunal  
19 determine the question of Morgan Crucible or permission?  
20 THE CHAIRMAN: Should we adjourn it?  
21 MR. HOSKINS: Exactly. I understood Mr. Spitz to be saying we would all put forward  
22 submissions as to whether permission should be granted, and my point is that that is  
23 premature.  
24 THE CHAIRMAN: No, it is not, because if we decide that the right answer is that we go ahead,  
25 then at that point we ought to say “go ahead”. If you then say we are wrong you can appeal  
26 me.  
27 MR. HOSKINS: The crucial things is what happens if the Tribunal decides it should not go ahead  
28 on the third question, does the Tribunal simply say “We decide not to go ahead”?  
29 THE CHAIRMAN: That is what I am saying. If we decide that we should not go ahead– and this  
30 is a matter which we can consider at the time, or we will consider in our Judgment – we can  
31 either say we have decided not to go ahead for the following reasons and it is not  
32 appropriate for us to decide any other issue, even though those have been argued before us.  
33 Or, we say we have decided that we should not go ahead, we accept Mr. Hoskins’

1 submissions, but if we had not accepted Mr. Hoskins' submissions then we would have done  
2 the following.

3 MR. HOSKINS: Madam, it is the second part I am concerned about. I am not sure what the  
4 utility is and why one would do it.

5 THE CHAIRMAN: Because if you appeal us, and the Court of Appeal know what we would  
6 have done ----

7 MR. HOSKINS: Madam, what you would have done is irrelevant if I have won.

8 THE CHAIRMAN: Pardon?

9 MR. HOSKINS: What you would have done is irrelevant if I have ----

10 THE CHAIRMAN: No, it is not. Often in Judgments the court tells you what it would have done  
11 in the alternative, so that the Court of Appeal knows what you would have done so if they  
12 say "No, actually question 3 was answered wrongly by this Tribunal" they can then see what  
13 we would have done and they do not have to send it back to us.

14 MR. HOSKINS: Madam, can I put it another way? Let us presume on the first question you find  
15 for me, so there is no valid issued claim against the proposed defendants at this stage. Let us  
16 presume on the third issue you find for me which is that the question of permission should  
17 be determined after the Morgan Crucible position has become clarified. If, in your  
18 Judgment, you say: "But we are going to decide to grant permission", then any realistic  
19 prospect of me winning on the third issue goes out of the window, because you have already  
20 decided you are going to grant permission. With respect it completely undercuts the  
21 purpose.

22 THE CHAIRMAN: At the moment I do not understand what your problem is at this juncture.

23 MR. HOSKINS: I want to have a reasonable opportunity of persuading you that you should not  
24 decide whether or not to grant permission until after the position of the Morgan Crucible  
25 defendant be settled.

26 THE CHAIRMAN: I understand that and you are going to have a reasonable opportunity at the  
27 hearing that we fix. If you persuade us at that hearing – you cannot persuade us today ----

28 MR. HOSKINS: I am not trying to persuade you today.

29 THE CHAIRMAN: No, if you persuade us at that hearing then we will have to determine how we  
30 then proceed.

31 MR. HOSKINS: Absolutely.

32 THE CHAIRMAN: There is no point in us dealing with it today because we cannot, as you agree.

33 MR. HOSKINS: I am absolutely with you to where you have got to, madam, which is we then  
34 have to decide how to proceed. It is the next ----

1 THE CHAIRMAN: No, what we do not want to do is to be in a situation where you have pre-empted the position by that hearing not dealing with everything. Because if we decide that  
2 we are going to proceed, or that we can proceed, then we must go on and deal with  
3 permission ----  
4  
5 MR. HOSKINS: And I do not have a problem ----  
6 THE CHAIRMAN: -- because otherwise you have pre-empted us under Article 6(1) – you have  
7 taken the gift.  
8 MR. HOSKINS: My problem is that if I have won on the three questions and you hypothetically  
9 decide what the question on permission is then it becomes wholly artificial for you to decide  
10 “It is right that was should not decide is until what permission is until a later stage but we  
11 are going to decide it now.”  
12 THE CHAIRMAN: But can we reserve this – we are going to deal with the whole of the  
13 permission issue, including, subject to what you are saying ... (Laughter) ... if I can put it  
14 this way then you know where you are going to pick it up.  
15 MR. BEARD: I get a feeling I know where you may be going, madam.  
16 MR. HOSKINS: Madam, can I pass the baton to Mr. Beard, you have probably heard enough  
17 from me on this?  
18 THE CHAIRMAN: All right.  
19 MR. HOSKINS: And I am not sure I can put it any differently.  
20 MR. BEARD: Madam, members of the Tribunal, since it is the first time on which I have  
21 appeared before you in this matter, I suppose I had better recite the proper caveat that  
22 nothing I say should be taken as conceding or submitting to jurisdiction and, just for  
23 clarificatory purposes, by that I mean that this Tribunal has the power to be seized of claims  
24 against Carbone Lorraine as set out by the claimants.  
25 THE CHAIRMAN: Sorry, you may be saying that.  
26 MR. BEARD: I am simply placing the caveat, of course, I cannot be iron clad in these matters,  
27 much as I would wish it.  
28 THE CHAIRMAN: That is what you would like the position to be.  
29 MR. BEARD: Yes. If only I could click my heels three times and it would be true, but  
30 unfortunately it is beyond the power of advocates.  
31 The Tribunal has already had submissions, outline observations in relation to these matters  
32 from Carbone Lorraine, I will not rehearse those. If I may, just dealing with the approach  
33 that is being canvassed by the Tribunal now, the three questions set out by Mr. Hoskins, it  
34 would seem to me are likely to take a good day of this Tribunal’s time to deal with. Mr.

1 Hoskins and Mr. Spitz are concerned about who gets the treasure chest, the gift, in relation  
2 to these matters. At the moment we have a great deal of sympathy with the way in which  
3 Mr. Hoskins has put the matter. We think that is right and a proper interpretation of  
4 *Petrotrade* – that perhaps comes as little surprise to the Tribunal.

5 THE CHAIRMAN: Mr. Spitz thinks you are wrong, but anyway.

6 MR. BEARD: Mr. Spitz may be wise in these matters but for the moment we may doubt it. In  
7 any event, the position we have is that we have three questions that are going to take a day.  
8 We have a situation where Morgan Crucible and the claimants have agreed that they are  
9 going to mediate this matter. That mediation is not going to be settled for some long time in  
10 the sense that it is not going to be dealt with before May of next year.

11 In the circumstances, it would seem pragmatic to break in two the issues on the one hand to  
12 do with the interpretation of the Brussels' Regulation, therefore Articles 2, 5, 6(1) – the  
13 questions that Mr. Hoskins has articulated – enabling the Tribunal to assess those matters.  
14 The questions can be agreed, the process suggested is a sensible one. At the end of that the  
15 Tribunal is meeting the possibility of a sort of half-time decision whether or not to proceed  
16 to the next section of submissions or not. Given the timing it would seem more appropriate  
17 to list two hearings both of which come on before the culmination of the mediation – the  
18 first to deal with those issues relating to Brussels' Regulation which I shall, if you forgive  
19 me, madam, loosely refer to as 'jurisdiction issues'. That will then give the Tribunal  
20 opportunity to make a half-time Judgment at a rather more leisurely pace in order that there  
21 is time set aside for matters then to be dealt with in relation to permission, properly so-  
22 called, pursuant to Rule 31(3) and in relation to Rules 47(a)(5).

23 THE CHAIRMAN: What is left?

24 MR. BEARD: The point is that if, at the half-time decision, this Tribunal concludes that Mr.  
25 Hoskins is right, and in fact it would be appropriate for that permission assessment to be  
26 dealt with after the conclusion of the mediation between Morgan Crucible and the claimants  
27 then effectively the second hearing can be pulled.

28 THE CHAIRMAN: How long is the second hearing going to take?

29 MR. BEARD: I think in the circumstances it is wrong to presume, as Mr. Spitz appears to be  
30 doing, that all that falls to be dealt with under the application pursuant to s.47(a)(5) is  
31 simply what the scope of appeals are before the CFI. It seems to us – at least at first blush –  
32 there may be a range of other procedural considerations, namely, fairness, proportionality,  
33 the overall objective of any sort of litigation.

34 THE CHAIRMAN: Does that not all relate to the CFI proceedings?

1 MR. BEARD: It may or may not do.

2 THE CHAIRMAN: What, other than the CFI proceedings, would you be relying on to say that  
3 we should not give permission?

4 MR. BEARD: Well obviously the CFI proceedings must be the predicate. I am not suggesting  
5 that they are not important, of course that is the case. My point is simply that there may be  
6 further issues than that.

7 THE CHAIRMAN: Yes, but what are they?

8 MR. BEARD: It will be the ramifications of the fact of those proceedings, the nature of any  
9 proceedings that are going on, what sort of steps could or could not be taken in those  
10 circumstances appropriately ----

11 THE CHAIRMAN: Yes, that all relates to the CFI.

12 MR. BEARD: Of course it all relates to the CFI proceedings, that must be the case because  
13 definitionally we are only within the relevant period because of those CFI proceedings, so as  
14 a matter of logic that is, of course, true. The point I was making was a narrower one that,  
15 although that is the predicate of this hearing that I am postulating, it does not mean that the  
16 only question is: "What is the scope of those CFI proceedings?" because there may be  
17 ramifications to those arguments. It may be that it only takes another half day to deal with  
18 such matters, but nonetheless it is logistically much more sensible to break these matters in  
19 two, that way there is no suggestion that either side is getting an early gift.

20 THE CHAIRMAN: I do not understand that.

21 MR. BEARD: Because, if Mr. Hoskins' arguments are right, the second hearing is pulled and it  
22 will be adjourned to a period after the mediation ----

23 THE CHAIRMAN: Yes, but what happens if that gets appealed, the Court of Appeal say that we  
24 were wrong?

25 MR. BEARD: If what gets appealed? Well if it does, it does.

26 THE CHAIRMAN: No, the Court of Appeal says we are wrong, we should have heard the whole  
27 thing, and now we are in a very odd situation where effectively the claimants ought to have  
28 been able to bring the claims, and because we have done this in two bites they cannot.

29 MR. BEARD: No, I am not sure that necessarily follows. It may well be that protective direction  
30 could be put in place if an appeal is being made in those circumstances, and it will of course  
31 depend on when any Court of Appeal hearing were to be undertaken. If – hypothetically  
32 – you were to find for Mr. Hoskins on these arguments, the claimants then turn 'round and  
33 say "We do not like this, this is not the appropriate way to interpret Article 6(1)" *inter alia*  
34 but they may appeal on other issues, I suppose, in those circumstances you would have a

1 situation where the Court of Appeal would then be seized of those matters but they would  
2 then be dealt with. If they were upheld by Court of Appeal the matter would be at an end.  
3 If, on the other hand, you were to go ahead at that point and hear the permission issues  
4 properly so-called, in circumstances where you – because all you can do is decide what you  
5 think would be a proper application of the law – as a Tribunal have decided that it is not  
6 appropriate to deal with that permission application until after the Morgan Crucible matters,  
7 but go ahead and deal with that anyway, then it seems almost inevitable that in those  
8 circumstances an appeal would be following from someone who is saying: “Well, you  
9 should have stopped there”.

10 THE CHAIRMAN: No, no, because the Court of Appeal would say it is completely hypothetical.

11 MR. BEARD: Why would it say it was hypothetical?

12 THE CHAIRMAN: Because we decided that there was no jurisdiction and therefore we cannot  
13 grant permission. We do not have to go on to the granting of permission.

14 MR. BEARD: I am not sure that that is the basis on which an appeal would be brought. It would  
15 be as Mr. Hoskins suggests, I anticipate – a question of this Tribunal having already directed  
16 its mind to precisely these issues and not being an open-minded Tribunal if they were to  
17 come up again before the same Panel at a subsequent hearing. That would be the difficulty  
18 that would then arise. The proposal that is being suggested is one that obviates the risk of  
19 these matters causing difficulties. It is unduly to complicate this to try and accommodate the  
20 Court of Appeal because it is possible that the Court of Appeal, if it recognises that there is  
21 an urgency in relation to these matters that these matters could be disposed of quickly. Of  
22 course, the Court of Appeal urgency will only relate to an issue pertaining to 6(1) it would  
23 appear, so it will be a relatively narrow point. It is not as if this is an extensive re-reading of  
24 some grand evidential scheme.

25 THE CHAIRMAN: I can see what is going to happen here. Until these two points have been  
26 decided there is not going to be a mediation because the parties are not going to agree on a  
27 date. It is very simple.

28 MR. BEARD: I am sorry, madam, I am not sure I understand.

29 MR. SCOTT: Let me explain to you. At the moment if we are to use 6(1) to found the  
30 jurisdiction the claimants on 6(1) need Morgan still with an outstanding claim against them,  
31 so they have absolutely no reason for settling that claim if they need that claim in order to  
32 bring the proposed defendants 2 to 5 before us.

1 MR. BEARD: Of course, but as the Chairman of the Tribunal said earlier, it is within the gift of  
2 these Tribunals to set down directions in relation to mediation. The normal procedure  
3 before a court will be ----

4 THE CHAIRMAN: No, no, I did not say that. I did not say that. What I said was that we will  
5 assist with directions to assist the mediation. We are not setting directions for a mediation,  
6 and I specifically said that in relation to the order I am not going to include any reference to  
7 mediation.

8 MR. BEARD: But it would be open to this Tribunal, if it thought fit, to set down a time within  
9 which it considered it would be appropriate ----

10 THE CHAIRMAN: No, I am sorry ----

11 MR. BEARD: -- in circumstances of being ----

12 THE CHAIRMAN: -- I am sorry, because what I also said was that we are not going to order a  
13 mediation ----

14 MR. BEARD: Of course.

15 THE CHAIRMAN: -- that is not appropriate. Therefore the parties can pull out at any time.  
16 They have indicated an intention that they would like to mediate, and they would like to  
17 mediate in May, but they are not bound by that. There is no sanction.

18 MR. BEARD: I understand.

19 THE CHAIRMAN: And one or other party, for whatever reason, may decide not to mediate.  
20 Now, one of the reasons why they may decide not to mediate is because the claimants say:  
21 "Look, if we mediate and settle we have all these problems so I think it is better that we  
22 actually continue with the claim.

23 MR. BEARD: Well if they are going to take such an approach in the light of the indications given  
24 in relation to mediation then these matters will simply roll forward. But it does not in any  
25 way detract from the structure being suggested of having a proper separation of those  
26 particular elements of a hearing. It will inevitably be beneficial in terms of the costs of  
27 preparation because what you will get is a situation where there is a discrete preparation in  
28 relation to the Brussels' regulation matters that can then be dealt with. The half-time  
29 hearing can be undertaken.

30 THE CHAIRMAN: Two separate days, whether it is one day and a half day, or one day and a  
31 day, with an intervening period is always more costly and will be more costly to this  
32 Tribunal than having the whole thing looked at over one period.

33 MR. BEARD: That is only the case, madam, if it is necessary to use the second day. The point  
34 that is being made here is that given that there are good arguments ----

1 THE CHAIRMAN: You do not need to use the second day, all right.

2 MR. BEARD: -- you do not need to use the second day, there is no need to incur all the  
3 preparation, and in those circumstances all those costs will fall away, so it is not a  
4 comparison of the incremental cost of separated preparation, it is one whole chunk of  
5 preparation and hearing by this Tribunal entirely falling away and therefore I would stress  
6 that there is the opportunity to operate this more efficiently.

7 It must be said that coming at this from the perspective of Carbone Lorraine, who are late  
8 arrivals – late invitees – to this party, there is as I think as is clear from the observations that  
9 have been made, something of a lack of clarity on our part about precisely where the ground  
10 lies, what has been going on and who has been saying what to whom in these matters. There  
11 is therefore a great interest on our part in ensuring matters are clearly delineated, separated  
12 out, and we are most grateful to the Tribunal for indicating that an approach referring to  
13 specific questions is a sensible way forward. We are slightly concerned in our own minds,  
14 perhaps unnecessarily of the incident in ‘Bridget Jones’ where we turn up wearing a highly  
15 inappropriate costume for the relevant party.

16 THE CHAIRMAN: Well it is up to you whether you make observations or not.

17 MR. BEARD: That is not entirely true. In the simple sense of a Hobsian freedom, yes we are not  
18 chained and we may or may not.

19 THE CHAIRMAN: You are not a party ----

20 MR. BEARD: In terms of our freedom in the positive sense life is rather harder for us because we  
21 have not necessarily had the education we might if ... were answering the question. In those  
22 circumstances I am not sure it is true to say that we are entirely free, but perhaps issues of  
23 liberty go a little beyond the scope of today’s hearing.

24 MR. SCOTT: Just to clarify two points. I understand these matters are not entirely unfamiliar to  
25 your lay client.

26 MR. BEARD: But we are in litigation in the US. Obviously we are in litigation in the US. We  
27 have met these sort of people before ... (Laughter) ... we think they have got it very badly  
28 wrong. We think they have got it badly wrong in the States, we are resisting the claims  
29 here. We think they are getting it badly wrong here – we are pretty sure they are but we are  
30 not entirely clear what they are saying and what they said in the process.

31 MR. SCOTT: That was really going to be my substantial question. Just where have you got to in  
32 the documentation?

33 THE CHAIRMAN: Can I just make sure that we understand – I think what is being said is that in  
34 order for the Tribunal to alert you to the fact that there is this application for permission



1 against you so that you can make observations your clients were sent by this Tribunal the  
2 documents that have been lodged. Then what happened was that the claimants – I think also  
3 under instruction or request by the Tribunal – sent the documents as well. I think we have  
4 seen a letter which suggests that possibly you did not get the first ----

5 MR. BEARD: We did not get the first set.

6 THE CHAIRMAN: We do not understand that.

7 MR. BEARD: No, we do not understand it either, but we did not get them.

8 THE CHAIRMAN: But you got the second set?

9 MR. BEARD: We have received materials from the claimants. It is clear from the  
10 correspondence we have had from the Tribunal and copied in on one or two letters there  
11 have been all sorts of submissions lodged which pertain to various of the issues that appear  
12 to be arising because of today. We do not have that material.

13 THE CHAIRMAN: Are you taking a point on the fact that you did not get the first set.

14 MR. BEARD: We are reserving our position.

15 THE CHAIRMAN: If that is the case then I think we possibly need to clarify that now – not  
16 today, but that needs to be dealt with, because the documents were sent and I have not got it  
17 before me on what basis, how they were sent ----

18 MR. BEARD: I can confirm that we received a copy of the application and claim form from the  
19 claimants ----

20 THE CHAIRMAN: No, I am concerned about the application and claim form that the Tribunal  
21 sent to you.

22 MR. BEARD: We did not receive it under cover of 7<sup>th</sup> November email. We have subsequently  
23 received it later in the month from the Tribunal as well as from the claimants.

24 THE CHAIRMAN: And how did you receive it from the Tribunal subsequently?

25 MR. BEARD: I think it was by email primarily – I think it may have been by post, I can confirm  
26 that.

27 THE CHAIRMAN: Let me just check. (After a pause)

28 MR. BEARD: If it assists I believe we have received it by post ----

29 THE CHAIRMAN: When?

30 MR. BEARD: -- from the Tribunal. I think that was under cover of a letter of 28<sup>th</sup> November.

31 THE CHAIRMAN: So what you did not receive was the email of 7<sup>th</sup> November.

32 MR. BEARD: No, but we have had a hard copy of it since, so we have seen it.

33 THE CHAIRMAN: 28<sup>th</sup> November you were alerted to the fact that an application had been  
34 made, and you were entitled, if you wanted to, to make observations?

1 MR. BEARD: Yes. There is no issue taken in relation to that. The points are made in the  
2 observations ----

3 THE CHAIRMAN: All I was concerned with is whether you were going to take that it was for  
4 the Tribunal to ask you for observations and you had not received that request.

5 MR. BEARD: No, I think ----

6 THE CHAIRMAN: You received it at least on 28<sup>th</sup> November, but we must inquiries about what  
7 happened on 7<sup>th</sup> November.

8 MR. BEARD: Yes, I am sorry, I cannot assist. We have made inquiries and we do not know  
9 what happened in relation to that. The points that are taken in relation to these matters are  
10 points reserved, they are set out in the written submissions.

11 THE CHAIRMAN: This is the problem. Can I make a side remark? This was not service, but if  
12 one goes on to service of documents on email and this is one of the problems that occurs ----

13 MR. BEARD: Well I think that may be why the courts are a little reluctant to engage in that sort  
14 of process and they maintain the formalities. You have seen our submissions in relation to  
15 these matters. I do not wish to take the Tribunal through them but I am simply reserving the  
16 position in relation to those observations. I am not suggesting that we have not seen those  
17 documents to which I have referred.

18 THE CHAIRMAN: Or that the process by which you have seen them means that we have done  
19 something wrong under 31(3).

20 MR. BEARD: "... done something wrong under 31(3)" I mean the Tribunal takes a clear view as  
21 to how it wishes to proceed in relation to these matters. The submissions that are being  
22 made orally today are on the basis of what the Tribunal has indicated it thinks is the proper  
23 way of dealing with these matters. Carbon Lorraine has made an indication as to how it  
24 thinks in the round these matters should properly be dealt with but we are trying to engage  
25 constructively to make this work. The point I am making is a much more general one that  
26 this sort of discussion arising is problematic. This lack of clarity for us is a problem,  
27 particularly when we are late arrivals at this ball. I am not saying that we have not been  
28 entertained across "The Pond", that is very kind – we have! (Laughter)

29 THE CHAIRMAN: You have not been to this party before?

30 MR. BEARD: No, sadly not, but we are delighted – of course – to be here.

31 THE CHAIRMAN: Even though you are not submitting to the jurisdiction.

32 MR. BEARD: Of course not. (Laughter)

1 MR. SCOTT: Clearly in this rather strange business of your not submitting to the jurisdiction we  
2 are going to have to have practical arrangements under which everybody feels content that  
3 they are being properly informed in both directions.

4 THE CHAIRMAN: Well I think you now have solicitors so there is now no problem.

5 MR. BEARD: That is the case. In any event, madam, the point that underlay all of this was  
6 simply to illustrate that here was the sort of difficulty that arises where we are dealing with a  
7 sort of pre-claim situation in relation to matters concerning whether or not this court has the  
8 capability to take jurisdiction, whether or not in addition if it has jurisdiction it should be  
9 granted permission in relation to s.47(a). It simply re-emphasises so far as we are concerned  
10 the importance here of ensuring that the particular issues are properly delineated, and to our  
11 mind separating of these issues would assess this process. It would not, in our view, hamper  
12 these matters. It would not cause the sorts of difficulties that are being envisaged if it turns  
13 out that there is no desire for mediation contrary to what was said earlier, in the light of what  
14 has been said today, then so be it. These things will have to proceed, but that is not the basis  
15 on which we should proceed.

16 Unless I can assist the Tribunal further in relation to these matters.

17 THE CHAIRMAN: Thank you very much. Mr. Wisking?

18 MR. WISKING: I will try and make this brief given the time. Like Mr. Beard I would also like  
19 to reserve our position ----

20 THE CHAIRMAN: I thought I said that at the beginning. We understand that nobody is  
21 intending to submit to jurisdiction and any observations that relate to 31(3) the Tribunal  
22 have not considered that as submitting to jurisdiction.

23 MR. WISKING: Thank you.

24 THE CHAIRMAN: But you will have to be very careful of 31(3).

25 MR. WISKING: Indeed. As regards the various submissions that have been made by Mr.  
26 Hoskins and Mr. Beard we support those. We support first of all that there should be  
27 discrete questions for the hearing along the lines that Mr. Hoskins has envisaged. I have had  
28 personal experience in the Tribunal, and Mr. Scott will be aware, where in the mobile phone  
29 cases the use of questions delineating the issue for the parties have made things much easier  
30 and much more efficient.

31 THE CHAIRMAN: It may be said in other cases it has been less efficient, but anyway.

32 MR. WISKING: I have had no experience of those cases. Similarly we would support the use of  
33 clear and discrete questions and I am sure we can agree between ourselves a set of questions

1 or a set of alternative questions where there is no agreement that we can make observations  
2 on for the Tribunal.

3 THE CHAIRMAN: I actually at the moment do not see the problem, because it is not saying you  
4 are only going to answer those questions; it is saying “We are going to answer those  
5 questions and anything else that the parties think about”, but at least everybody knows at the  
6 beginning what they are going to address. If they want to address something else when they  
7 come to consider it there happens to be some other point that arises I was not intending that  
8 that was ruled out.

9 MR. WISKING: Well there is the question Mr. Beard raises – the three questions that have been  
10 delineated to seem questions that would occupy a day with the Tribunal and the more  
11 matters ----

12 THE CHAIRMAN: They may or may not.

13 MR. WISKING: -- that are put into the pot it will take longer. I will not say any more about that  
14 save that I was ----

15 THE CHAIRMAN: Any you adopt Mr. Beard and you adopt Mr. Hoskins.

16 MR. WISKING: The other point that I would like to make is that it is not clear to me from what  
17 has been said so far as to how matters of jurisdiction should be dealt with in this context.  
18 There have been some jurisdictional issues raised.

19 THE CHAIRMAN: Jurisdiction being Brussels’ regulation?

20 MR. WISKING: Indeed. Hitherto we have approached this on the basis that the jurisdictional  
21 matters would arise, dealt with after the question of permissions, which is effectively Mr.  
22 Spitz’s submission. If we are not to go down that route, though I should tell the Tribunal  
23 there is one other jurisdictional matter which we have not fully investigated, and we will  
24 need to do so, which relates to the existence of jurisdiction clauses in the contracts of sale  
25 between my client and the claimant, so that is a further matter. If that is a matter that needs  
26 to be dealt with in this “basin” if you like that will have an impact on timing. If it does not  
27 need to be dealt with then that can follow on in the event that permission is given. It would  
28 only be a matter ----

29 THE CHAIRMAN: My instinctive reaction is that that would be rather like the settlement  
30 agreement issue which we decided was not a matter in relation to permission, because that is  
31 something that if a claim is made against you you say: “Wait a minute, there is a  
32 jurisdictional point.”

33 MR. WISKING: My only point is I do not want to be shut out of making ----

1 THE CHAIRMAN: No, I am just saying that my instinctive reaction is that that probably falls  
2 into the other, but I may be wrong.

3 MR. WISKING: And it would be helpful to have an indication from the claimants that that would  
4 not be the case because, as you appreciate, those sort of arguments may require evidence as  
5 to foreign law and it would be much more complex.

6 THE CHAIRMAN: Which is why it would be better if it were afterwards, if permission was  
7 given.

8 MR. SCOTT: The same sort of question arises as to the jurisdiction of the American court in  
9 relation to the settlement agreement, so it is a similar ----

10 MR. WISKING: I am not aware – this is the first time ----

11 THE CHAIRMAN: That, I think, is a bit of a non-point because everybody agrees there is not  
12 exclusive jurisdiction so it does not actually arise at all.

13 MR. WISKING: That is all I want to say, that I support the preliminary question and I also  
14 support the submission that they should be dealt within two bites, it need not take months,  
15 and having discrete questions would enable the parties to frame written submissions rapidly  
16 and we could be back before the Tribunal on the questions that Mr. Hoskins has articulated.

17 THE CHAIRMAN: Thank you. Have all the defendants had a say? You are saying you have not  
18 had a say?

19 MR. OSGOOD: I think we do. (Laughter).

20 MR. SPITZ: I think one needs to be cautious about this language of gifts, the jurisdiction being in  
21 the “gift” of the Tribunal. This is, after all, an application that was launched in February,  
22 some 10 months ago, seeking permission from the Tribunal to commence this claim against  
23 these proposed defendants, and I do not need to labour the point but, of course, the Tribunal  
24 has got a duty to deal with the application in the form that it arises at the appropriate time,  
25 and within a reasonable time. Now, one can see what is happening here. One can see how  
26 the defendants have seized the matters that arose as a result of the agreement in relation to  
27 mediation, and one can understand why they would do that. Certainly, when they have  
28 nothing to say on the merits of the claim they are obviously going to raise every dilatory  
29 challenge that they can possibly do and that is what we are faced with. It also would be very  
30 interesting to see on this basis of splitting the issues and dealing with the separately what  
31 would happen in the Court of Appeal? Would one have on the other side of the appeal the  
32 claimant as a party but the proposed defendants are not a party? Are they going to be  
33 participating in the appeal and making observations as a non-party? It would be very  
34 curious if that was the case. The rules provide for them to make their observations in

1 relation to permission and for the Tribunal to take a view. If the Tribunal feels it is  
2 appropriate to deal with the jurisdictional questions that have been outlined, then those  
3 should be dealt with at the same time as hearing the arguments in relation to permission, and  
4 it is simply dilatory and unnecessarily complex to try and generate yet another hoop for  
5 claimants with a good claim to jump through. This is not a matter of what is in the gift of  
6 the Tribunal. Assuming Mr. Hoskins is correct, if Morgan is still a claimant at the time  
7 when the permission application is adjudicated, that is not the Tribunal giving a gift; not at  
8 all. So on that basis we would suggest that the submission should be made in relation to  
9 both permission and to the questions of jurisdiction on the basis of a response coming from  
10 the proposed defendants and we will respond to that and then we will have a hearing. If it  
11 runs for more than a day then the Tribunal may be able to set aside two days, that would also  
12 be possible. Those are all my submissions.

13 THE CHAIRMAN: Do you think it will run to more than one day.

14 MR. SPITZ: I still think in relation to the question of permission the only point after months of  
15 being aware of what the issues are the only point has been “Let us look at the scope of the  
16 appeals and let us see how far they go in relation to substance versus reduction of the fine.  
17 No other points have been raised as to the permission issue, and the jurisdiction issues  
18 themselves are fairly circumscribed. One may want to set aside some time as a contingency,  
19 but there is no need to divide the hearings and then have an appeal on the basis of Mr.  
20 Hoskins’ three points; that is not going to assist us in getting to the heart of this.

21 THE CHAIRMAN: What do you think about, I will not say “agreed” list of issues because I do  
22 not really mean an agreed list of issues, and I do not mean that one is confined to those  
23 issues, but that there is set out a list of issues which have to be decided and that everybody  
24 knows before they put in any submissions that they must deal with those list of issues.

25 MR. SPITZ: Yes, that we have no difficulty with on the claimant’s side, provided what we are  
26 dealing with is the application for permission and the jurisdictional questions that have been  
27 raised. With respect, the Tribunal’s point was quite right, Mr. Hoskins is not in any danger  
28 of the Tribunal inadvertently conferring jurisdiction because the Tribunal will hear the  
29 argument and then decide whether it should give permission or not rule on permission so  
30 that does not seem to be a live risk. So provided the issues can be listed, and provided it is  
31 not limited to the three issues suggested by Mr. Hoskins we do not have a difficulty  
32 attempting to agree the issues.

33 (The Tribunal confer)

34 THE CHAIRMAN: Have we heard all the submissions on this now?

1 MR. HOSKINS: If I could say, I think certainly for my part I would like a list of issues. I am  
2 very uncomfortable with somebody adding in what they think.

3 THE CHAIRMAN: No, nobody is confined to those list of issues.

4 MR. HOSKINS: Well I would rather have a list of issues so I know.

5 THE CHAIRMAN: I appreciate you would rather have a list of issues.

6 MR. HOSKINS: I think the Tribunal would be assisted by that as well to be perfectly honest.

7 THE CHAIRMAN: Well, we will see.

8 MR. HOSKINS: There is another point, on the mediation interaction the submissions today, one  
9 of the things that prompted it was the Tribunal's preliminary view, and I accept it is a  
10 preliminary view, was that the settlement issue between the claimants and Morgan Crucible  
11 could usefully dealt with as a preliminary issue, and that is the springboard for my  
12 jurisdiction submissions because if indeed that is a pure housekeeping matter – in fact that is  
13 probably too pejorative – but that is a case management decision. The Tribunal has not  
14 reached a final conclusion but it thought that would be sensible, and if it decided that was  
15 the appropriate way forward then all my jurisdiction arguments flow from that.

16 THE CHAIRMAN: Not necessarily, only if you look at it from your side.

17 MR. HOSKINS: Well I am looking at it from my side for obvious reasons, madam.

18 THE CHAIRMAN: I know.

19 MR. HOSKINS: I do just echo Mr. Beard's submission that if one starts considering things in the  
20 alternative and requiring us to put submissions in the alternative it may simply be costs  
21 wasted and I do submit that the real risk is that if one considers permission even in the  
22 alternative it actually renders the purpose of many of my questions irrelevant, and that is  
23 what I am concerned about.

24 THE CHAIRMAN: Thank you very much. I think we are going to retire and hopefully we will  
25 not be very long.

26 THE CHAIRMAN: What is before us is an application for permission to make a claim under  
27 Rule 31(3). This rule requires the Tribunal in deciding whether to grant permission to take  
28 account of the observations of a proposed defendant. We consider that the appropriate  
29 course to adopt is that the application for permission is heard and, having regard to the  
30 written submissions already made by the proposed defendants and the oral submissions  
31 made today, that the following directions are made:

32 1. That the claimant and each proposed defendant provide a list of the issues which  
33 they each consider require to be determined on this application. (Date to be fixed).

- 1           2. That the claimants file and serve written submissions on the issues set out in the list
- 2           of issues, and on any other issues relating to the application. (Date to be fixed)
- 3           3. That each of the proposed defendants file and serve any observations which they
- 4           require the Tribunal to take into account in deciding whether permission should be
- 5           granted by it. (Date to be fixed).
- 6           4. That there be a hearing to determine the application for permission. (Date to be
- 7           fixed).

8           The question now is the dates. You should be able to get the list of issues out within seven  
9           days I would have thought – yes? Or not?

10       MR. BEARD: I am sorry, madam, I have a real difficulty. I am in a six day hearing from  
11       tomorrow, and so in relation to my input into any list of issues ----

12       THE CHAIRMAN: Well if you do not have any input, you do not have any input.

13       MR. BEARD: Well, madam, with respect, this will put us under a good degree of pressure. We  
14       are newly brought into these proceedings ----

15       THE CHAIRMAN: You have known about this since 27<sup>th</sup> November.

16       MR. BEARD: So two weeks. Madam, in the circumstances, given your indication that this may  
17       deal with a range of jurisdictional issues which we have not had opportunity to canvass it  
18       simply would not be appropriate and we do need more time in which to deal with these  
19       matters. Thank you.

20       MR. SPITZ: We are able to deal with it within the seven day period. I, myself, will be away but  
21       my solicitor will be able to do that.

22       MR. HOSKINS: I am being instructed ...

23       THE CHAIRMAN: Mr. Beard, you have solicitors, do you not?

24       MR. BEARD: I do, madam, but the issue is not just in relation to solicitors. The issue is in  
25       relation to our analysis of the cases being brought against us. It is not simply a matter of us  
26       coming to this case and knowing all about what is being said against us and us having  
27       analysed the background. As I understand it, there have already been substantial analyses  
28       and submissions made earlier this year – in May, as I understand it – by the other parties in  
29       relation to these matters. In order to ascertain what we consider to be the relevant issues that  
30       is an exercise we are going to have to go through.

31       THE CHAIRMAN: Well I will exclude you from the first one and you can deal with whatever  
32       observations you want to make having regard to what you see.

33       MR. BEARD: If we are not bound by the matters then that may be the best way of dealing with  
34       it. I am grateful.



1 THE CHAIRMAN: Each proposed defendant, save for the proposed fifth defendant – is that  
2 right?

3 MR. BEARD: Yes, madam.

4 THE CHAIRMAN: I should give you an opportunity to join in if you want to – or you do not  
5 want to?

6 MR. BEARD: Madam, I just do not know the position at the moment. I cannot possibly comment  
7 today.

8 THE CHAIRMAN: So let me give you an opportunity to join in if you want to.

9 MR. BEARD: Well that is very kind of you, I do not know that anything needs to be said in order  
10 to secure that, does it, in the circumstances?

11 THE CHAIRMAN: Well somebody may say you cannot join in if I do not put it in the order.

12 MR. BEARD: I am sure that all those concerned will be delighted to hear from us.

13 THE CHAIRMAN: Not the proposed fifth defendant – if so advised by the fifth defendant –  
14 everybody knows what I mean, unless you can find some better words.

15 MR. BEARD: I am sorry, I do not mean to be obtuse, but I am not quite sure ----

16 THE CHAIRMAN: What I do not want to do is to exclude you from it and you walk out of the  
17 door and somebody sends you the list and you say: “Actually, I’d like to make a  
18 contribution”.

19 MR. BEARD: I imagine in those circumstances (a) we will be sent the lists; and (b) I am sure the  
20 Tribunal will be indulgent and let us make observations in relation to these matters in due  
21 course, but we simply need the room and time in order to consider them.

22 THE CHAIRMAN: Well I have made you able, I have not actually confined your observations to  
23 the list.

24 MR. BEARD: No, it is the timing that is the issue.

25 THE CHAIRMAN: A long time will pass until you are going to make your observations, this is  
26 only to do with the list. You are not confined to the list, but surely you want an opportunity  
27 to look at the list and say: “Well, actually I think it should be worded differently”?

28 MR. BEARD: I have to say I assumed that the issues would be copied to us in the circumstances.  
29 I did not have any assumption that either the other defendants or claimants ----

30 THE CHAIRMAN: If I take you out of it then they will not do it, so I have ----

31 MR. BEARD: It was more the “if so advised” requirements. I would have thought that in the  
32 circumstances if we were simply excluded from that part of the order as long as those  
33 concerned understand to copy us the material I do not imagine there is going to be any  
34 practical difficulty, and trying to draft this into the order is perhaps unnecessarily

1 complicated in the circumstances. I am sure those here have heard this submission and will  
2 let us know what is going on.

3 THE CHAIRMAN: I know how to deal with this: "... the claimant and each proposed defendant  
4 if so advised ...", that deals with it – all right? The understanding is that Mr. Hoskins is  
5 going to start the ball rolling.

6 MR. HOSKINS: Mr. Spitz asked me *sotto voce* asked me: "Is this a joint list?" and I said "I am  
7 not quite sure" ----

8 THE CHAIRMAN: Yes, it is. The idea is one list.

9 MR. HOSKINS: Then I think Mr. Spitz and I agree that probably seven days is a bit tight if we  
10 are going to ----

11 THE CHAIRMAN: Too tight, all right, so what would you like?

12 MR. SCOTT: Seven days takes you to the 20<sup>th</sup>, in practical terms ----

13 MR. HOSKINS: That is right, that is the problem, yes.

14 THE CHAIRMAN: That is why I was doing the seven days, actually.

15 MR. HOSKINS: I think it would be useful for us to circulate drafts between ourselves and  
16 probably ----

17 THE CHAIRMAN: Does it make any difference if the list goes to the beginning of January, and  
18 that would help Mr. Beard.

19 MR. HOSKINS: Absolutely, it is just simply then if we pick a date in January – obviously people  
20 are away.

21 THE CHAIRMAN: Well, not "pick a date", some time at the beginning of January.

22 MR. HOSKINS: I was going to suggest the 21<sup>st</sup> because ----

23 THE CHAIRMAN: No. We are being very indulgent in the December matter – it really ought to  
24 be dealt with. Is everybody going on holiday over New Year – what date is everybody  
25 coming back.

26 MR. HOSKINS: I am, madam. (Laughter)

27 THE CHAIRMAN: What date are you coming back? Normally we do not take this into account.

28 MR. HOSKINS: No, absolutely. I am back on 7<sup>th</sup>, that is my first day.

29 MR. WISKING: 3<sup>rd</sup>.

30 MR. BEARD: 7<sup>th</sup>.

31 THE CHAIRMAN: You are not into this.

32 MR. OSGOOD: No, but I wonder, as an interested observer ... (laughter) ... if we could be  
33 copied, if you please, as a courtesy to us?

1 THE CHAIRMAN: Well that is a matter for everybody; they can decide what they want to do.  
2 Right, 7<sup>th</sup> is a Monday so if we say the 9<sup>th</sup>. It should have been done before.  
3 MR. HOSKINS: Madam, Mr. Spitz is not here next week, Mr. Beard is not here next week, there  
4 is not going to be any discussion this week, so it leaves us a very narrow window.  
5 THE CHAIRMAN: Oh, I see.  
6 MR. HOSKINS: I just want to make sure it works.  
7 THE CHAIRMAN: What about the 14<sup>th</sup>?  
8 MR. HOSKINS: I am sure the 14<sup>th</sup> will be fine, and if there is a problem ----  
9 THE CHAIRMAN: Is that extending this too far? I am concerned about reasonable time for the  
10 hearing.  
11 MR. SPITZ: Madam, we would like to be sooner than the 14<sup>th</sup>.  
12 THE CHAIRMAN: I am concerned if we do not have the list it is all going to go off half cock  
13 and it is going to extend it at the other end.  
14 MR. SPITZ: Yes.  
15 THE CHAIRMAN: Because of these complicated arguments.  
16 MR. HOSKINS: We are only debating, madam, the suggestion was 9<sup>th</sup> or 14<sup>th</sup>, so if Mr. Spitz  
17 wants it, we are debating 10<sup>th</sup> and 11<sup>th</sup>, it is not a huge amount of difference in the grand  
18 scheme of things.  
19 MR. SPITZ: Perhaps we should make it the 11<sup>th</sup>. (Laughter)  
20 THE CHAIRMAN: By 5 pm 11<sup>th</sup> January 2008. Then how long do you want to do your written  
21 submissions? I suspect that you can do your written submissions within a few days  
22 afterwards because you will know effectively what is in this because there will have been a  
23 lot of discussion. So if we gave you a week would that be sufficient, or do you want some  
24 more?  
25 MR. SPITZ: I think we would need some more.  
26 THE CHAIRMAN: All right, 25<sup>th</sup> then. Are you sure you want some more?  
27 MR. SPITZ: Yes, I am sure.  
28 THE CHAIRMAN: Each of the proposed defendants, how long do you want to put in your  
29 observations after you have received theirs.  
30 MR. HOSKINS: The same as Mr. Spitz.  
31 THE CHAIRMAN: Two weeks. Is everybody happy with that? 8<sup>th</sup> February. Now we need our  
32 diaries.

33 (The Tribunal confer)

1 THE CHAIRMAN: We have quite full diaries in February unfortunately. The dates that are  
2 convenient to the Tribunal are 20<sup>th</sup> and 21<sup>st</sup> February.

3 MR. BEARD: Yes, those dates are fine, madam.

4 MR. SPITZ: Madam Chairman, may I raise the question of an opportunity to put in replying  
5 submissions. I do not think that that will impact on the dates that the Tribunal has just  
6 suggested, but perhaps if the claimant is going first and these are points that one of the  
7 proposed defendants has raised it might be helpful to have the opportunity and we could do  
8 it within a week after the defendant's submissions are presented.

9 THE CHAIRMAN: I left it out deliberately because I did not want the list to become top heavy –  
10 or bottom heavy. I thought if everybody came and made their oral submissions we would be  
11 there. If you want to do that then there is no reason not to. The 14<sup>th</sup> February, which is the  
12 Thursday. (After a pause) If there are any bundles of documents and authorities that would  
13 be probably helpful if they were provided, shall we say, by the 14<sup>th</sup>? Can we have an agreed  
14 bundle?

15 MR. HOSKINS: Madam, there may need to be a bit of a gap just in case there are new authorities  
16 that Mr. Spitz wishes to refer to.

17 THE CHAIRMAN: Then we can add them to the dividers at the end, or something, because that  
18 way we can distribute them, and we have the weekend to have a look at them. So agreed  
19 bundles of authorities and any relevant documents by 14<sup>th</sup> February. Then if you are going  
20 to provide anything else then you can provided copies on 14<sup>th</sup> to be slotted in.

21 MR. SPITZ: Absolutely.

22 THE CHAIRMAN: You probably know what you are going to provide so you could probably get  
23 it re-bundled anyway, even if they have not yet had the submissions.

24 MR. SPITZ: So that leaves, I think the question of the CFI application.

25 MR. HOSKINS: So that everyone knows what has happened to date – a copy has been provided  
26 to the claimants in return for a suitable undertaking. The cases we rely upon are referred to  
27 in our written submission – I have brought copies – I am not sure you will have seen it yet.  
28 These documents are protected by the Registry ----

29 THE CHAIRMAN: What I am concerned about is if it is a rule of the CFI then do we have to go  
30 back to the CFI for them to lift the ban?

31 MR. HOSKINS: Madam, I do not think we do, because we are only putting forward our  
32 pleadings, we are not putting forward, for example, the Commission's pleadings, so I do not  
33 think that is a problem.

34 THE CHAIRMAN: Fine.

1 MR. HOSKINS: Simply we claim confidentiality in relation to our document.

2 THE CHAIRMAN: So how do you want to deal with it? You want some sort of confidentiality  
3 undertaking from everybody else? Does everybody else want to see them, or is it necessary  
4 for anybody else to see them?

5 MR. HOSKINS: That is one question, obviously and it is a matter for the Tribunal whether you  
6 want to deal with it formally or informally, but obviously we would not want the details of  
7 that document to be referred to in the Judgment.

8 THE CHAIRMAN: Well that we are used to dealing with, are we not?

9 MR. HOSKINS: Precisely. So the system will be in our written submissions we will put a  
10 generalised description it. If someone needs to refer to it in the hearing we say “Please will  
11 you read paras. x to y” and hopefully that is the best way we can deal with it.

12 THE CHAIRMAN: We will deal with that at the time, and if necessary we go into private session  
13 and that may mean that when you are making those submissions the other parties will have  
14 to leave the room, unless you can come to some agreement. But if you say that actually it is  
15 in your gift ----

16 MR. HOSKINS: Well I do not see it being a problem, madam, it is just that I wanted to make  
17 sure the Tribunal was satisfied that they treat it as confidential and then the mechanics are  
18 pretty straight forward I would have thought, it is just that you are satisfied.

19 THE CHAIRMAN: “Satisfied that”, or that we treat them as confidential?

20 MR. HOSKINS: Either madam.

21 THE CHAIRMAN: Do the other defendants need to see them?

22 MR. BEARD: I am not in a position to say at the moment.

23 MR. WISKING: I would like to take instructions on that point.

24 THE CHAIRMAN: Take instructions from yourself!

25 MR. WISKING: I cannot envisage that we would need to but ----

26 (The Tribunal confer)

27 THE CHAIRMAN: Well can we leave it on the basis that at the moment there is some  
28 confidentiality undertaking by the claimants; that if there is informal application – a request  
29 – by the other proposed defendants for them, then either that can be sorted out informally or  
30 you can come back to me and I will try and make ----

31 MR. HOSKINS: We may want to see what is in Schunks – we are not sure what the Le Carbone  
32 position is – we might want to see theirs.

33 THE CHAIRMAN: Well there is another question about this - do we treat each request for  
34 permission as an individual request so it is only between the two?

1 MR. HOSKINS: Request for permission to see the ----  
2 THE CHAIRMAN: No, the 31(3) point, is that between each one individually?  
3 MR. HOSKINS: I think, madam, it logically must be; there is an application to bring a claim  
4 against several defendants.  
5 THE CHAIRMAN: That is I think our intuitive reaction. If that is right then you do not all need  
6 to see them.  
7 MR. HOSKINS: But, madam, in deciding that question it may be relevant what the position is in  
8 relation to another defendant.  
9 THE CHAIRMAN: I see.  
10 MR. HOSKINS: We might say, well actually because of what is contained in the Schunk appeal  
11 notice that might have an impact on the way the Tribunal deals with us in the future, so you  
12 cannot compartmentalise them I do not think to that degree.  
13 THE CHAIRMAN: I can see that. I am not saying whether I agree or not, but I can see the point.  
14 MR. WISKING: Just also the point about the efficiency of the hearing if everyone is walking in  
15 and out, or we are referring to things ----  
16 THE CHAIRMAN: It would be better if there ----  
17 MR. WISKING: It is a silent hearing as we read quietly.  
18 MR. HOSKINS: I do not anticipate it being a big problem, actually.  
19 THE CHAIRMAN: Can you try and sort this out. If you cannot sort it out then you can make an  
20 application to me and I will deal with it knowing what all the problems are, but hopefully it  
21 is a matter that you should be able to sort out between you – especially since all of you are  
22 on the same side.  
23 MR. HOSKINS: Exactly. Then we are quite happy the Tribunal will then just treat it as  
24 confidential going forward.  
25 THE CHAIRMAN: Yes. At the hearing in the CFI you would all be present, would you not? Or  
26 are there different hearings?  
27 MR. HOSKINS: It depends if they are joined, which would be common, I think, but I am not  
28 sure these have been joined yet – I do not know is the answer – possibly, possibly not. For  
29 obvious reasons the CFI like to deal with these sorts of appeals ----  
30 THE CHAIRMAN: Joined.  
31 MR. HOSKINS: For obvious reasons.  
32 THE CHAIRMAN: Yes, and if it is joined then you will see them anyway, so seeing them now  
33 makes no difference. It would only make a difference if you were all going to make  
34 submissions to the CFI, either written or oral in the absence of knowing any of those ----

1 MR. HOSKINS: I really do not think this is going to be an issue. I am sure it will not be.  
2 THE CHAIRMAN: It was right to raise it and hopefully I will not have to deal with it again.  
3 MR. HOSKINS: Precisely.  
4 THE CHAIRMAN: And you can remind us at a later stage – at the hearing – that we have to be  
5 careful  
6 MR. HOSKINS: Yes.  
7 THE CHAIRMAN: Anything else? (After a pause) Thank you very much.  
8 \_\_\_\_\_