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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1077/5/7/07

Victoria House
Bloomsbury Place
London WC1A.2EB

Tuesday, 26th June, 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

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 the Defendant.

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HEARING

1 THE CHAIRMAN: Before we start as a Tribunal we have some comments to make. First, can I
2 thank everybody for their skeleton arguments which have been very helpful. I am also very
3 pleased that we have managed to sort out the representation that Mr. Osgood can appear and I
4 note that the mention in the Press about the Rap was not actually correct.
5 First, on whether permission is required: there seems to be some question as to whether
6 Morgan have conceded the issue or not. There is a letter from Emerson of 13th June and
7 Emerson's skeleton argument which seems to indicate that Morgan no longer seeks to rely on
8 the requirement for permission. But Morgan's letter of 15th June considers the permission is
9 still relevant and a live issue. We would like to know from Morgan today what the position is
10 because we need to know in order to structure this hearing. That is the first question on
11 permission.
12 The second question we have is that we would like to hear submissions on the proper
13 construction of s.47A(5) and 47A(8). That has been dealt with to some extent in the skeletons
14 but I think it would be helpful if that was expanded in oral submissions. As you know, we do
15 not want a repetition of the skeletons.
16 Then, on whether permission should be granted, and I suppose in relation to that also on the
17 question of if it was granted do we stay the action. The question seems to us to be why
18 Morgan would be prejudiced if the claims were to proceed either by granting permission or if
19 granting permission by a stay, and why the claimants similarly would be prejudiced the other
20 way.
21 Then we come to the limitation point and we would like to hear oral submissions today on
22 whether the time limits for bringing a claim for damages under s.47A go to the Tribunal's
23 jurisdiction as Morgan submits or whether it is a statutory condition that exists solely for the
24 benefit of, and so potentially might be able to be waived by the parties.
25 I think it is the submissions of the claimants raise the Limitation Act and suggest that the
26 Limitation Act is analogous. At present, and subject to you convincing us otherwise today, we
27 do not consider that the Limitation Act is analogous to looking at the issues in this case and I
28 think in *BCL Old Co. Ltd v Aventis SA* the Tribunal has already indicated to that effect.
29 The next point there is the issue and meaning and scope of the stipulation of dismissal and, in
30 particular, the meaning of the words "sales made outside the United States" which is in the first
31 sentence of para.3 of the Stipulation of Dismissal. Of course, the same interpretive issue arises
32 in relation to the Morgan Settlement Agreement as to the meaning of "Purchases in the United
33 States". So we would be interested to hear submissions today as to the meaning of those two
34 phrases – "Sales made outside the United States" and "Purchases in the United States".

Then we come to the settlement issue. I think we are all on the same understanding today that the issue before the Tribunal is solely on the application of Rule 40 of the Tribunal Rules. That Rule provides that the Tribunal may of its own initiative, or on the application of a party after giving the parties an opportunity to be heard, reject in whole or in part a claim for damages at any stage of the proceedings if it considers that there are no reasonable grounds for making the claim.

The Tribunal provisionally considers – and this is subject to submissions – that the test for rejecting a claim for damages at this stage should be whether it is certain that the claim is bound to fail. On the material before the Tribunal to date, and of course subject to any submissions today, our feeling at the moment is that we cannot be certain that the Morgan Settlement Agreement precludes the claim. It seems to us that the construction of the Morgan Settlement Agreement is very complex. We provisionally consider that it would be inappropriate to reject the claim at this stage. We feel that there is clearly room for argument on the question of construction from the materials and from the skeleton arguments which we have now read. So from what we have seen so far we do not consider it would be appropriate to dispose of the claim summarily today. Of course we have not heard your submissions on that orally, but we have read your written submissions and I thought it was useful that you should know how much you have to convince us.

It seems to us that it will be necessary to consider, on the issue of the Morgan Settlement Agreement, what evidence is admissible to construe the agreement and we are not clear at the moment on the materials before us what is admissible, and what is not admissible, and I think that is quite a complex issue in itself, as to, for example, the witness statement and how one gets that in and one has to consider very carefully actually what the submissions are as to what background can be taken in etc. In that regard there are a number of matters which we think we ought to highlight.

There are several recent Judgments of the House of Lords that deal with the principles that apply to the construction of contracts. For example, the speech of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* and the case of *Bank of Credit and Commerce International v Ali* in which the House of Lords considered a general release of claims in a Settlement Agreement. I think I am right in saying that neither of those cases, or that line has been put before us today, and I am not sure how we deal with construction if we have not looked to see what one is entitled to take into account.

Next there is the question of when was the Morgan Settlement Agreement signed, entered into and when did it take effect. When I say "entered into", it is made or entered into. Emerson claims the Morgan Settlement Agreement was drafted, negotiated and signed in February

1 2005. You say that in para.16 of the response to the defendant's skeleton dated 18th May. In
2 reality, because of the opt out, etc, it may be that it was not actually entered into or made until
3 February 2006. I think that appears also to be recognised or acknowledged at para.15 of the
4 same skeleton.
5 What we would like to know is what the parties' positions are on when the Morgan Settlement
6 Agreement was, I say, made or entered into. We know when it was approved. That might
7 have some relevance as to what information one can take into account in construing it.
8 I think I have already mentioned the witness statement submitted by the claimants which
9 relates to the evidence in relation to negotiating the Morgan Settlement Agreement. Of course,
10 in relation to that, as I have said, there is the question of admissibility.
11 There also appears, and I am not sure it is relevant for today, to be an issue in relation to one of
12 the claimants, Bosch, as to whether it has settled its claim against Morgan in the UK. I do not
13 know if that is relevant today, but it might be relevant generally. They are named as a
14 claimant, so it seems a little odd that it is now being said that they have settled.
15 As I have said, what background or surrounding circumstances can be adduced to shed light on
16 what the parties intentions were and/or what the construction of the contract is, is something
17 that needs to be considered before one can construe the contract.
18 I then go on to the District Court's judgment of 30th August in *Re Electrical Carbon Products*
19 *Anti Trust Litigation*, and I quote the Judge who said:
20 "Additionally, the Crowell & Moring plaintiffs have entered into agreements with the
21 Morgan, Schunk and SGL Defendants relating to matters outside the scope of this
22 class action."
23 I think you find that in footnote 6 to the judgment. We have assumed, but you may tell us
24 wrongly, that that includes the Tolling Agreement. What we do not know is whether there are
25 other matters which are relevant and to which he was referring.
26 Those are the points that we thought we ought to mention before you started so that you had
27 some idea of how our minds were thinking. I do not know whether you want a few moments
28 to think about those before you start.
29 MR. SPITZ: I think that would be very helpful.
30 THE CHAIRMAN: How long do you think you would need, ten minutes, and start at 11?
31 MR. SPITZ: Yes.
32 THE CHAIRMAN: Thank you very much.
33 (Short break)
34 THE CHAIRMAN: Thank you very much. Mr. Osgood, you were going to start.

1 MR. OSGOOD: Yes, thank you madam Chairman. Perhaps I should start with the first point that
2 you mentioned and that is what is Morgan's position on whether permission is required?
3 Morgan's position is this: if we assume the worst case from the perspective of the first
4 defendant, namely, that the settlement and release is ineffective and that the Tolling Agreement
5 is effective to tack on an additional year to Rule 31, and we assume that we have lost the
6 jurisdictional point which we will discuss today regarding Rule 31 and the two year time
7 period, and if we assume that time has not yet begun to run by reason of the pending appeals
8 by the 2nd and 3rd defendants, then it is our respectful submission that permission to proceed
9 against Morgan, whom I shall refer to as a 2 per cent defendant, should be denied, and it
10 should be denied on a variety of grounds which I can either go into now or we can postpone
11 that longer discussion for later in the day.
12 THE CHAIRMAN: Can I just say the question of the Morgan Settlement Agreement seems to me to
13 come at the end. I know you put it first, I find that rather confusing because it seems to me that
14 you have to have an action for us to decide whether or not the Morgan Settlement Agreement
15 then precludes the action. You cannot decide whether or not the Morgan Settlement
16 Agreement precludes the action before the action started.
17 MR. OSGOOD: Our review of the Morgan Settlement Agreement is it is a dispositive issue and
18 were the Tribunal to agree with us on the position that we advance then one never has to reach
19 ----
20 THE CHAIRMAN: I appreciate all that but I think we need to have proceedings on foot before we
21 get to the question of whether the Morgan Settlement Agreement precludes those proceedings.
22 MR. OSGOOD: I see, yes. Shall I go on to address the proper construction of 47A(5) and 47A(8) if
23 that is agreeable?
24 THE CHAIRMAN: Yes.
25 MR. OSGOOD: If we start with the Competition Act 1998 we note in 47A(5) that no monetary
26 claim may be made, and "(B) otherwise than with the permission of the Tribunal during any
27 period specified in subsection 7 or 8 which relates … "interpreting: to the European
28 Commission Decision on liability which stands as the basis for a proceeding."
29 So we are focussed on 5(b) and (8). We then go down to 47A(8):
30 "The periods during which proceedings in respect of a claim made in reliance on a
31 decision or finding of the European Commission may not be brought without
32 permission are …"
33 interpreting: during the period in which one can appeal; and (b) if there is an appeal the period
34 before there is a decision on the appeal.
35 THE CHAIRMAN: Yes.

1 MR. OSGOOD: Now in order to understand how those words play out in this situation we have to
2 look at a number of other rules, so I would invite attention first to Rule 31 of the CAT Rules,
3 and if you will bear with me, we are going on a little journey here through a number of rules
4 but if we can start with Rule 31 (1):
5 "A claim for damages must be made within a period of two years beginning with the
6 relevant date."
7 And we know that the relevant date is the date of the European Commission's decision, and in
8 this case that date was 3rd December 2003. So Rule 31 tells us a claim must be made within
9 two years of 3rd December 2003. It is enlightening to go down to Rule 31(3) – what does Rule
10 31(3) provide? In essence the Tribunal may give its permission for an early claim. It says:
11 "The Tribunal may give its permission for a claim to be made before the end of the
12 period referred to …"
13 And I would note that there is no similar rule that says the Tribunal may extend the two year
14 period in para.(1). If I may then go back to the Enterprise Act 2002, Schedule 4, para.11 of
15 part 2 – in **Butterworths** that is on p.292. Paragraph 11 of the Enterprise Act, 2002 says:
16 "(1) Tribunal rules may make provision as to the period within which and the manner
17 in which proceedings are to be brought."
18 (2) That provision may, in particular –
19 (a) provide for time limits for making claims to which section 47A of the
20 1998 Act applies in proceedings under s.47A or 47B.
21 (b) provide for the Tribunal to extend the period in which any particular
22 proceedings may be brought."
23 If we look again at Rule 31, we know that Rule 31 does not provide for the extension of the
24 two year period as Rule 31(3) provides for proceedings to start early, and it is our submission
25 that private parties cannot amend those Rules.
26 Contrary to the suggestion found in the claimants' skeleton, para.47 of their April 17 skeleton,
27 the claimants suggest that the Tribunal can make rules. That is clearly in error. Under s.15 of
28 the Enterprise Act 2002 - let us go to that, **Butterworths** p.149:
29 "15 Tribunal rules
30 (1) The Secretary of State may, after consulting the President and such other persons
31 as he considers appropriate, make rules with respect to proceedings before the
32 Tribunal.
33 (4) The power to make Tribunal is exercisable by statutory instrument subject to
34 annulment in pursuance of a resolution of either House or Parliament."

1 So the principle is that the Competition Appeals Tribunal is a statutory body with limited
2 jurisdiction circumscribed by the 1998 Act and the rules are promulgated by the Secretary of
3 State in consultation with the President, which may be annulled by Parliament.
4 It is illuminating to refer to other rules that have been properly promulgated that do allow an
5 extension of time. Let us look at Rule 8 of the CAT Rules. Rule 8, second paragraph - this is
6 Part II having to do with commencing appeal proceedings. I am looking at p.362 of
7 **Butterworths** handbook. Part II Appeals is not about monetary claims. Part II is, as you
8 know, about commencing appeal proceedings, and it says in the second paragraph:
9 "The Tribunal may not extend the time limit provided under paragraph (1) …"
10 - that is the two month period -
11 "… unless it is satisfied that the circumstances are exceptional."
12 So here we have a specific rule saying that when it comes to appeals one may allow an
13 extension of a two month period if you are satisfied that the circumstances are exceptional.
14 The presence of Rule 8 negates the idea that there is authority under Rule 19(i) which the
15 claimants propose, that you can use Rule 19(i) liberally simply to get around Rule 31.
16 Let me take you one more step if I may. Part III of the Tribunal Rules, Rule 28(2). Rule 8(2)
17 is incorporated into Part III of the Tribunal Rules having to do with mergers and market
18 investigations. Rule 28(2) provides that a four week period in which to file an application with
19 respect to mergers and a two month period with respect to file an application regarding market
20 investigations may be extended if the Tribunal is satisfied that there are exceptional
21 circumstances. I would respectfully submit that it is quite a different case where we have
22 specific rules empowering the Tribunal to extend time where the time periods are short in
23 contrast to Rule 31 which says that if you are going to bring a claim for monetary damages it
24 must - M U S T, must - be brought within two years of the date of the European Commission
25 decision. So that is my journey through the rules to interpret s.47A and 47A(5) and (8) in
26 response to the question posed.
27 THE CHAIRMAN: That is very helpful. Thank you very much. You are sitting down. Are you
28 going to continue?
29 MR. OSGOOD: Would you like to hear me on other issues?
30 THE CHAIRMAN: Does that complete your submissions on the permission issue or have you got
31 other submissions on the permission issue?
32 MR. OSGOOD: I have a number of other comments on whether permission should be granted.
33 THE CHAIRMAN: That is different. The only question that I have in my mind and which goes in
34 with the question of the Tolling Agreement really, as to whether the parties can extend the time
35 and at the back of my mind there are some cases which I have not managed to explore where

1 the courts have said that certain provisions which may be procedural rather than jurisdictional
2 and therefore the parties can extend the time. Now, I do not know where those cases fall – I
3 cannot even give you the reference to the cases – and the question is if you are right, yes, you
4 get to that stage but you still might need to look at whether it is procedural or jurisdictional.
5 MR. OSGOOD: My view of that ----
6 THE CHAIRMAN: Is that it is jurisdictional.
7 MR. OSGOOD: -- of Morgan Crucible is that there is abundant evidence that in this case Rule 31 is
8 clearly jurisdictional, and I do not think the jurisdiction of the Tribunal to entertain claims can
9 be amended by private agreement.
10 THE CHAIRMAN: Well we will hear what the claimants say. They have used an analogy with the
11 Limitation Act, which may or may not be right – for the moment I am minded that it is not
12 right – but from that there may be another route, but you have not explored that, so let us just
13 see what the claimants say, shall we. Mr. Spitz.
14 MR. SPITZ: If I can take the issues in the same order as my colleague did and deal with the
15 question of Morgan's approach to permission and whether or not there is a concession first
16 because having heard my colleague it is still not entirely clear to me what position is being
17 taken on the question of permission, so if I can address that first.
18 It seems to me that once Morgan takes the view that the two year time period that is
19 contemplated under Rule 31 has run, then it seems to me that one is no longer dealing with the
20 first issue that was posed by the Tribunal for the parties' consideration, because the question of
21 whether or not permission is required is only a live issue when a claimant comes before the
22 Tribunal and asks to commence the proceedings before that time period has expired.
23 Our understanding from the position adopted in the skeleton arguments on behalf of Morgan
24 has been that whereas initially they argued both that the claims were too early or, alternatively,
25 too late, they are then decided on a particular position and the position that they adopted in the
26 skeleton was to say the time period has now run. If that is their position then the question from
27 permission from the point of view of the exercise of the Tribunal of its discretion falls away in
28 our submission and that is not yet clarified.
29 THE CHAIRMAN: I am sorry, I do not actually understand your logic, because as I understand it –
30 and Mr. Osgood will tell us if we are wrong. They say the two year period has expired. They
31 say it cannot be extended by the parties, therefore that is it. They also say that you could apply
32 and you have effectively applied for permission outside the two year period because the two
33 year period has not actually started is your case. Then we have to look at (5) and (8) of 47A. I
34 do not see that what you are saying gets you anywhere.

1 MR. SPITZ: Well, madam Chairman, what I am saying is that we only require the permission of the
2 Tribunal if we are coming early. The position that Morgan has adopted is that we are not
3 coming early we are coming late, and the position that we have adopted is that the two year
4 period has commenced to run and indeed it has expired without Morgan appealing the decision
5 of the Commission to the Court of First Instance.
6 THE CHAIRMAN: So you are out of time unless you can rely on the Tolling Agreement?
7 MR. SPITZ: Yes, that is correct.
8 THE CHAIRMAN: So you say you do not need permission?
9 MR. SPITZ: We do not need permission and the question of ----
10 THE CHAIRMAN: And you are not making an alternative argument. So if we decide two years has
11 expired, Tolling Agreement does not help you then you are out of time, are you?
12 MR. SPITZ: No, then we are applying, so from that point of view it is ----
13 THE CHAIRMAN: That is why I am saying that I did not see the logic of your argument.
14 MR. SPITZ: The question of whether we seek permission on the basis of – well the impact of the
15 Tolling Agreement on the question of permission only arises in the circumstances that you
16 have suggested.
17 THE CHAIRMAN: Absolutely, so Mr. Osgood says time has expired, Tolling Agreement does not
18 help you and he does not want us to grant permission. You say that time has expired, Tolling
19 Agreement does help you, but if you are wrong then you want permission?
20 MR. SPITZ: Indeed.
21 THE CHAIRMAN: Yes?
22 MR. SPITZ: Yes, we are at one now.
23 THE CHAIRMAN: So you would have to convince us that you can extend the time. He says that
24 we cannot extend the time.
25 MR. SPITZ: Yes.
26 THE CHAIRMAN: So that is probably where you want to start.
27 MR. SPITZ: Yes, indeed. And he says that we cannot extend the time for two reasons, the first
28 reason being that the time limit is jurisdictional and the second reason being that there is no
29 power under the Rules to extend. Our position in relation to the question of jurisdiction is to
30 say that whether the time period is jurisdictional or not is a question of statutory construction
31 and when one looks at the enabling legislation and at the Rules we submit that it is not a
32 jurisdictional time limit ----
33 THE CHAIRMAN: Well you are going to have to make that good.

MR. SPITZ: I will endeavour to do so. It is akin to a procedural time limit, and we say that Rule 19(2)(i) is the place to look for the power that the Tribunal has to extend any time limit, whether that time limit has expired or not.

On the first question of whether the time limit is jurisdictional or not, we say that it is necessary to look at the enabling legislation, and that legislation is permissive and I am looking again at Part 2 of s.11 Schedule 4 of the Enterprise Act. It is permissive in the sense that it provides that Tribunal Rules may make provision as to the period within which and the manner in which proceedings are to be brought, and that provision may – pausing there, again that is permissive; in particular provide for time limits for making claims to which s.47A applies; and (b) provide for the Tribunal to extend the period in which any particular proceedings may be brought."

THE CHAIRMAN: And you rely on Rule 99 for the extension, and then that raises the question as to why in the other provisions have they made explicit reference.

MR. SPITZ: Yes, and what they have done in Rule 8, in our submission, they have cut down a wider discretion that exists, for example in 19(2)(i) by specifying the conditions under which that discretion may be exercised, and they do that 8(2) by providing that the Tribunal may not extend the time limit provided under para.1 unless it is satisfied that the circumstances are exceptional. That narrowing of the discretion would be unnecessary unless there was already a pre-existing power to grant an extension of time on a wider discretionary basis and we say that 19(2)(i) responds to that point.

19(2)(i) gives the Tribunal the power to abridge or extend any time limits, and we say there is no reason to read that in a narrow or constricted fashion.

THE CHAIRMAN: Because you say that Rule 8(2): "The Tribunal may not extend the time limit …" there must be something else in the Rules that says it can extend the time limit?

MR. SPITZ: Quite so, madam Chairman. What 8(2) does is to specify the grounds that will trigger the exercise of the discretion.

THE CHAIRMAN: Yes.

MR. SPITZ: The same argument applies to 28(2) as well. If that were not the case, and if the Tribunal were not in a position to extend this time limit, it is not difficult to see circumstances where potential injustice might arise. The question is whether this is a necessary interpretation, the interpretation advanced on behalf of Morgan, because on the basis of prior decisions of the Tribunal unless an interpretation that could lead to procedural difficulties or injustice is a necessary one, the Tribunal will be loathed to adopt that interpretation and we submit that Morgan's interpretation is not a necessary one given the power in 19(2)(i).

THE CHAIRMAN: Well you would go further than that, you would say it is wrong because you would say there has to be a power to extend before you limit the power.

MR. SPITZ: Well as I submit it, indeed. The question about whether the time period is jurisdictional or not – we say that it does not follow merely from the fact that a Body is a statutory Tribunal that a time period applicable to that statutory Tribunal is jurisdictional. We say that it depends on the enabling statute and on the specific rules. Now, Morgan refers to the legislation that applies in the Industrial Tribunals, to the enabling legislation and to the Rules, but the language of those statutory provisions was preclusive in a way in which, by contrast the enabling statutory language here is enabling.

MR. SCOTT: Here I take it you are referring to Schedule 4 ----

MR. SPITZ: That is correct.

MR. SCOTT: The enabling provision?

MR. SPITZ: That is correct. The statutory language that was relevant in the authorities to which Morgan have referred, in particular the *Dedman v British Building and Engineering Appliances*' case, the language there provided, The language there provided:

> "In relation to proceedings on complaints under s.106 of the 1971 Act the Tribunal shall not entertain such a complaint unless it is presented before the end of the period of four weeks:
>
> "(a) in the case of a complaint relating to dismissal, with the effective date of termination unless the Tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented before the end of that period."

What the court says about that provision and the reason it was held to be jurisdictional and therefore not capable of extension by agreement between the parties is because the rules which were made under the power contained in schedule 6 also provide in relation to proceedings or complaints under s.106 of this Act:

> "The Regulations shall also include a provision precluding an industrial tribunal from entertaining such a complaint unless …"

- and then the language mirrors the language of the statute, and so the court says that a construction of the rules which treats them as procedural rather than jurisdictional would conflict with schedule 6 since it would result in the Tribunal only being precluded from entertaining a late complaint if the employer took the point.

THE CHAIRMAN: You are reading from a case there?

MR. SPITZ: Yes, it is from our skeleton argument.

THE CHAIRMAN: Could you give the reference?

1 MR. SPITZ: I am reading from para.40 of our skeleton argument, which deals with the decision of
2 *Westward Circuits* and the extract is from paras.303 and 304 of that decision.
3 THE CHAIRMAN: Can you just give us the date of the skeleton argument because you have
4 different skeleton arguments?
5 MR. SPITZ: It is 15th June. It is the skeleton argument in reply to Morgan's submissions on
6 permission and the Tolling Agreement.
7 THE CHAIRMAN: Thank you very much.
8 MR. SPITZ: The reference is to *Westward Circuits* [1973] ICT 301, 304. What we say is since the
9 enabling legislation in that decision required the rules to preclude industrial tribunals from
10 hearing complaints brought out of time unless the exception applied, it followed that any
11 interpretation of the rules that did not have this preclusive effect would be inconsistent with the
12 enabling legislation. It was that that compelled the conclusion that the time limit there was
13 jurisdictional.
14 The enabling legislation here in the schedule does not provide that unless a claim is brought
15 within the stipulated time period the Tribunal shall not entertain it. What it provides is that
16 rules may make provision to deal with the time periods, so it is of a very different and far more
17 permissive nature, the enabling legislation for the Competition Appeal Tribunal, and that
18 submission is a very important difference.
19 It is not necessary to interpret the enabling legislation as imposing a jurisdictional requirement
20 on the Tribunal in the way that it was necessary in the authority to which I have referred.
21 THE CHAIRMAN: I suppose you would go on to say that if you are out of time and you can use
22 9.2(i) to extend then you look at the Tolling Agreement, and if the parties have agreed it then
23 we can consider whether to extend on that basis?
24 MR. SPITZ: Yes, that is correct. That would be one factor that would be relevant in the exercise of
25 the discretion to grant permission. In fact, it would be an important factor because that would
26 be giving the parties the benefit of what they bargained for.
27 THE CHAIRMAN: Therefore it does not actually on that basis whether it is jurisdictional or
28 procedural, because the jurisdiction allows us, you say, to extend, and we should take account
29 of what the parties agreed, that would only be fair and therefore we ought to extend?
30 MR. SPITZ: Yes, that is correct. It is for Morgan to show both that the time limit is jurisdictional
31 and there is no power to extend. In the event that the Tribunal decides that the time limit is
32 jurisdictional but there is a power to extend, which is common and occurs indeed in the
33 industrial tribunal cases, that is sufficient for the purposes of obtaining the permission.
34 THE CHAIRMAN: You still need 19(2)(i)?
35 MR. SPITZ: One does.

1 I do not know whether the Tribunal wants to hear at this stage any submissions in relation to
2 the question of the wording in 47A(5) and (8) referring to any proceedings or whether that is
3 not an issue now?
4 THE CHAIRMAN: I think that has just been dealt with, so we need to deal with your submissions.
5 If you are wrong on what you have just submitted then we do need to turn to whether or not we
6 can use 47A(5) or (8) as an alternative argument, so I think you need to deal with that.
7 MR. SPITZ: What we say about 47A(5) and (8), and I think is not necessary to read through those
8 again, the real issue in relation to permission is this: does a claimant need permission to
9 institute a claim against a defendant who does not challenge a decision of the Commission, and
10 for whom the time period in which to bring that challenge has elapsed in circumstances where
11 there are other proposed defendants or potential defendants who have themselves brought
12 appeals to challenge the decision? That is the question.
13 Our submission is that 47A(8) and the reference to "proceedings" there ought to be read as a
14 reference to proceedings brought by the defendant against whom the claimant is now being
15 brought in this Tribunal, rather than reading it to encompass other proposed or potential
16 defendants who have brought appeals to challenge the decision.
17 THE CHAIRMAN: "Proceedings" is used in a number of respects in 47A(8), so you do need to look
18 at the section. "The period during which proceedings", the first "proceedings" are the
19 proceedings here.
20 "The periods during which proceedings in respect of a claim made in reliance on a
21 decision or finding of the European Commission …"
22 - and the question is "in reliance on a decision". Is that a decision against Morgan Crucible?
23 MR. SPITZ: Indeed.
24 THE CHAIRMAN: One decision comes out of the European Commission, but that decision is
25 addressed to a number of parties, so the question is whether that decision is the whole decision
26 or just the bit addressed to the particular party. It then goes on "may not be brought without
27 permission". So one decision depends on whether it is the part addressed or the decision in
28 general. Then it says:
29 a) the period during which proceedings against the decision or finding may be
30 instituted in the European Court;"
31 There the proceedings are different proceedings. They are the proceedings in the European
32 Court.
33 "(b) if any such proceedings …"
34 - and that is the proceedings in the European Court. So we have got in the first sentence of (8)
35 "proceedings" being the proceedings here; and in (a) and (b) it is the European Court

1 proceedings. Then we have the question of the decision or finding, whether the decision or
2 finding is the only part addressed to the particular party or whether it is the decision or finding
3 as a whole.
4 MR. SPITZ: Yes, and wrapped up in that issue is the question of too early versus too late. If the
5 time period relates to proceedings that could have been brought by Morgan, and that period has
6 elapsed, then permission is not required; but if the time period relates to the proceedings in
7 relation to the decision regardless of which party has brought those proceedings then the time
8 period has not ----
9 THE CHAIRMAN: Absolutely, so the question is what do they mean by the word “decision” in
10 47A(8)?
11 MR. SCOTT: Which means going back to 6D?
12 MR. SPITZ: Yes, a decision of the European Commission that the prohibition in Article 81 has been
13 infringed.
14 What the authorities we have put in our skeleton suggest is that the decision that is not
15 appealed against is final and binding against that party who has not appealed it, irrespective of
16 what takes place in an appeal tribunal.
17 THE CHAIRMAN: That means that if you are wrong on your first argument, which is that you are
18 within time, you also lose under this?
19 MR. SPITZ: If we are wrong then we require the extension power.
20 THE CHAIRMAN: No, because if you are wrong and if you are saying that the decision is the
21 decision addressed to the particular party there is no appeal in relation to Morgan Crucible, and
22 the result is that 47A will not help you.
23 MR. SPITZ: Then the time period commenced to run and then if that is so we require the one year
24 period of the Tolling Agreement to bring us within time.
25 THE CHAIRMAN: Just forget about whether you are in time or not originally. Just assume that the
26 only question here was whether you needed permission or whether you should have started the
27 action first. Your argument on 47A(8) as I understand it is that you never get to 47A(8) in this
28 case because there was not an appeal by Morgan Crucible. Since there was not appeal by
29 Morgan Crucible there were no proceedings which 47A(8) can catch.
30 Let me give you the other argument. The other argument is that the decision that is referred to
31 in 47A(8) is the whole decision. You do not look at it in the European way that it is a divisible
32 decision and it is actually lots of decisions. You say it is the whole decision and any
33 proceedings that have been brought in relation to that whole decision by any addressee means
34 that that puts the barrier down and you have to ask for permission. That has some sense
35 because it means that you have all the cases together, and it means that somebody in your

1 position does not have to start an action and then think about what they are going to do because
2 they can wait until everybody is there.
3 As I understand it, you are not relying on the second argument I have just given you, you are
4 only relying on the first?
5 MR. SPITZ: We are not going to choose, in fact, between those two arguments. We are going to be
6 trying to make the argument as an alternative argument. Our primary argument is the
7 argument I have already outlined.
8 THE CHAIRMAN: What is your secondary argument?
9 MR. SPITZ: Our secondary argument is that the time period has not commenced to run, and if that
10 is so then we need permission to come to the Tribunal and commence the claim against
11 Morgan while the other claims are continuing.
12 THE CHAIRMAN: You base that secondary argument on the construction of 47A(8), and what is
13 your construction?
14 MR. SPITZ: That the decision refers to the entire European Commission decision and that the
15 proceedings contemplated there are proceedings that are brought by any of the potential
16 defendants.
17 THE CHAIRMAN: I think that is clear now, thank you. That is probably all your submissions on
18 the permission point now?
19 MR. SPITZ: That is correct.
20 THE CHAIRMAN: So Mr. Osgood?
21 MR. OSGOOD: May I reply?
22 THE CHAIRMAN: Yes.
23 MR. OSGOOD: First, may we look at Rule 19(2)(i)? My friend says that Rule gives the Tribunal
24 the power – the absolute power – to extend all time limits no matter what. Now, let us look at
25 Rule 19 and get a feel for what Rule 19 is about. First, I noted that the heading of Rule 19 is
26 "Case Management", and just running the eye down through the second section, the subject
27 matters are: "Oral hearing, reply, rejoinder, additional pleadings, skeleton arguments, evidence,
28 documents, witness statements, cross-examination, costs and expenses", it does not read like a
29 rule that gives the Tribunal the kind of authority that the claimants suggest.
30 THE CHAIRMAN: So where does the authority come from to extend the time in Rule 8?
31 MR. OSGOOD: It comes from the Rule itself.
32 THE CHAIRMAN: But it is written in a negative way: "The Tribunal may not extend the time
33 limit", it does not say: "The Tribunal may extend the time limit, but only …" it says: "The
34 Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied .."

1 MR. OSGOOD: And that confirms that the Tribunal is a Body of limited authority, but it grants the
2 ability to extend the limit under exceptional circumstances.
3 MR. SCOTT: No, it cannot, because the words used in 8(2) are "may not", there is no "may" in
4 8(2). Now, if you go back to Schedule 4(11)(2) you find a set of things which include the very
5 sorts of procedural things that you mentioned – "form, contents, amendment,
6 acknowledgement, documents …" and so on, placed alongside the provision for the Tribunal to
7 extend the period so that those are being held together in schedule 4. The difficulty to which
8 we are adverting is that outside Rule 19 we cannot find a Rule which allows us to extend in a
9 positive way against which 8(2) provides a limitation, and the same in Rule 28. That is the
10 problem, unless you imply that Rule 19, amongst other things gives effect to 11(2)(b) and that
11 sort of positive, you cannot find a positive against which to place the negative.
12 MR. OSGOOD: I understand the point, but I do think that s.11 when it says: "Tribunal Rules may
13 …" gives you the authority if it is followed up by an 8 ----
14 THE CHAIRMAN: But Rule 8 does not – if you look at the wording of Rule 8 it is negative, it is not
15 positive. So the Secretary of State has power to provide rules to extend time, he has not
16 provided any rule to extend time under Rule 8. All he has done is he has said that if you do
17 extend time you do it only in exceptional circumstances. So where is the power to extend the
18 time.
19 MR. OSGOOD: I am grateful that this is not a Rule 8 proceeding.
20 THE CHAIRMAN: But you were quite right to show us all of this, and it is a very interesting
21 argument because the power to extend time is not contained in Rule 8(2).
22 MR. OSGOOD: I think the primary point here about Rule 19 is that it is a case management rule,
23 and I would refer you, as we did in our skeletons to the *Floe Telecom* case, where it was said
24 that Rule 19 allowed the Panel to make directions concerning what was to happen after ----
25 THE CHAIRMAN: But they were not considering whether Rule 19 also had a wide power in it. We
26 take your point, which we will have to consider that the heading is "Case Management", Rule
27 19 is directions and that it appears on its reading – or on one reading of it, that you have to
28 have proceedings on foot before you get to the powers. On the other hand (i) happens to give
29 the fuel to 8.
30 MR. OSGOOD: And was it not the court's opinion in the *Floe Telecom* case that because there were
31 no proceedings on foot that Rule 19 did not apply, which is our point here.
32 THE CHAIRMAN: Proceedings had finished. What the Court of Appeal said was we were *functus*
33 *officio*.
34 MR. OSGOOD: So one has to have a subsisting properly commenced proceeding is the lesson of the
35 *Floe Telecom* case for this damages' claim. It is also interesting that in the *Floe Telecom* case

1 the Court of Appeal said: "If it was intended that the CAT should have powers of that kind I
2 would expect them to have been identified expressly."
3 THE CHAIRMAN: And then it says what we should have done was not quash the decision but left
4 it in the air and then we could have used Rule 19, as has now been done in some of the other
5 cases.
6 MR. OSGOOD: But here, given Rule 31 ----
7 THE CHAIRMAN: An interesting point.
8 MR. OSGOOD: -- saying that a claim must be brought within two years, under subsection (1) and
9 then (3) saying that you may bring it early, there is no comparable Rule and one would have
10 expected there to be to extend the two year time period.
11 MR. SCOTT: Except that if you go back to Schedule 4, Parliament clearly has in mind the
12 possibility of a time period being extended. Now, you can argue that that was then not
13 implemented, that Rule 19 does not implement that but that takes you back to the Rule 8 point.
14 But we are in a situation here where Parliament clearly intended the possibility of extension.
15 THE CHAIRMAN: It seems to me, and nobody has looked at it in this way, that your point under
16 Rule 8 is very interesting , and I think one of the questions is whether a negative draftsmanship
17 can provide the positive or whether you need another positive and something like **Bennion** on
18 Statutory Interpretation may assist us.
19 MR. OSGOOD: I think at this point I have said what I need to say on the issue.
20 THE CHAIRMAN: I do not know if anyone has **Bennion** over lunch, but we could just have a look
21 and see what it says as to whether you can construe it positively; whether you can imply the
22 positive obligation if it provides the negative without another provision?
23 MR. OSGOOD: Certainly, we are not talking in the realm of implication ----
24 THE CHAIRMAN: Into a Statute.
25 MR. OSGOOD: -- rather than an express provision, and it seems to me that that is a meaningful
26 distinction. One needs to reach out to grab an implication.
27 THE CHAIRMAN: If you cannot do that then maybe the Court of Appeal were wrong about Rule
28 19, and this shows that they may have been wrong.
29 MR. OSGOOD: I express no view on whether the Court of Appeal was wrong or right. I assume, as
30 a lawyer, it was right!
31 THE CHAIRMAN: Thank you. Mr. Spitz, do you have anything to answer that, or are you happy to
32 leave it there?
33 MR. SPITZ: Yes.
34 THE CHAIRMAN: It would be helpful actually over lunch if one could look at this
35 positive/negative point and see whether you can fuel – it is an interesting way of putting it –

1 whether you can fuel 8(2) without using Rule 19. Shall we break for five minutes and then go
2 on to the limitation point? Thank you very much – we will have a five minute break.
3 (Short break)
4 THE CHAIRMAN: Mr. Osgood.
5 MR. OSGOOD: With the Tribunal's permission I will address the question of the two year period.
6 Of course, we start with Rule 31 saying that the claim for damages must be made within a
7 period of two years. We accept our friend's concession that the claims would have had to have
8 been launched by Valentine's Day 2006 absent the Tolling Agreement. That is an admission
9 that they make in their April 17 skeleton at para.17. So they say absent the Tolling Agreement
10 and the effectiveness of the Tolling Agreement they were required to file by 14th February
11 2006. We know that their claim was not filed until nearly a year later, February 9th, 2007 – in
12 fact, we did not receive a copy of the claim until February 27th , 2007. So one comes to the
13 question: does the private Tolling Agreement amend Rule 31 or the court's jurisdiction? Does
14 the two year period become three years? Morgan Crucible respectfully submits that the
15 answer is "no".
16 Let me address the Tolling Agreement itself, which I believe is before the Tribunal as annex 1,
17 it is annex 1 to the claimant's April 17 skeleton. The Tolling Agreement between the Morgan
18 defendants and the Emerson plaintiffs entered into as of February 11th, 2006, had certain
19 defined terms. If I may refer you to p.2 of that document, the key provision is para.1(b), the
20 definition of foreign claims. It was only foreign claims that were tolled for a period of 12
21 months. So what is a foreign claim? A foreign claim, according to para. 1(b) shall mean
22 claims …
23 "1. based on allegations of an agreement among competitors with respect to the
24 prices charged for electrical carbon products manufactured and sold to the plaintiffs
25 by the Morgan defendants outside the United States of America during the period
26 between October 1998 and December 1999.
27 2. Arising and asserted exclusively under the laws of jurisdictions located outside the
28 territorial boundaries of the United States of America; and
29 3. Asserted exclusively in the courts of such non-US jurisdictions."
30 Now, I would like to focus on the words "asserted exclusively", and "arising and asserted
31 exclusively". First, we note that it is in the past tense. It is not "to be asserted", the verb is in
32 the past tense.
33 It is undisputed that in the US litigation these claimants asserted claims with respect to their
34 European purchases from Morgan Crucible. In our opening skeleton we quote a large number
35 of excerpts from their complaint. We also have provided the Tribunal with their memoranda

1 of law in the Carbone continuing proceeding in which they also assert claims based on
2 European purchases. So they have asserted claims already in the United States and indeed in
3 their skeleton of June 15, at p.9, para.26(b) of their reply skeleton they say:
4 "The US plaintiffs sought to define and recover their loss by reference to worldwide
5 sales."
6 So their claims were asserted, but more than that they are still being asserted in US litigation.
7 They are being asserted today as we stand here. In regard to their claims against Carbone for
8 Carbone's liability for Morgan's sales in Europe we have attached their memorandum of law
9 and indeed at p.52 of their memorandum of law they refer to Carbone's joint liability for acts
10 of other cartel members. Correction, it is the transcript of the oral argument of the argument of
11 the motion to dismiss the case in the United States, and that is appended to our reply skeleton
12 of June 15th.
13 THE CHAIRMAN: What page is it, it is the annex?
14 MR. OSGOOD: It is the annex to the main reply skeleton, p.54 of the transcript, lines 4 and 5,
15 where Mr. Murphy refers to liability under joint and several liability for acts of the other cartel
16 members.
17 THE CHAIRMAN: Mr. Murphy is acting for who?
18 MR. OSGOOD: Mr. Murphy is from Crowell & Moring. He is here today and acted for the
19 claimants in the US litigation.
20 THE CHAIRMAN: He is the gentleman sitting over there.
21 MR. OSGOOD: Could I also ask for permission to hand up the claimants' complaint?
22 THE CHAIRMAN: You are referring to which lines?
23 MR. OSGOOD: Lines 4 and 5.
24 THE CHAIRMAN: The jurisdiction for both Le Carbone Lorraine and the individual defendants?
25 MR. OSGOOD: Page 54 of the transcript.
26 THE CHAIRMAN: Now that you are holding up, I have got something that looks different.
27 MR. OSGOOD: This is our June 15 reply memorandum.
28 THE CHAIRMAN: It is page ----
29 MR. OSGOOD: It is p.54 of the transcript.
30 THE CHAIRMAN: It is p.48.
31 "The effects that we are talking about we are alleging were directed by them and
32 controlled by them and they participated in them and also there is the liability under
33 the joint and several liability facts of other cartel members."

1 MR. OSGOOD: Yes, so that is a reference to the fact that they are alleging that Carbone is liable for
2 Morgan's European sales by virtue of the theory of joint liability. That is a claim that is
3 currently being asserted in the United States.
4 THE CHAIRMAN: As I understand it, in the United States - and you will put me right because I am
5 not a United States lawyer - *Empagran* has allowed certain claims which are claims which
6 relate to matters outside the jurisdiction, but has precluded certain claims. I assume from what
7 I have read what is being claimed in the US proceedings against Carbone is what I will now
8 call the "*Empagran* allowed claims" . Therefore, there may be - I do not know because this
9 has not really been explained to us - that there are claims in the US in relation to Europe which
10 are within the *Empagran* allowed claims, and there are claims which relate to sales which are
11 not allowed through the *Empagran* claims, which therefore cannot be asserted in the US.
12 MR. OSGOOD: The question of whether they may proceed against Carbone for all claims is now
13 *sub judice* in the US. The court has the issue under advisement. All argument, as we can see
14 from the transcript, has been held. To my knowledge there has been no decision.
15 THE CHAIRMAN: One of the questions we were going to ask you is when that was going to
16 happen, when we were going to get judgment.
17 MR. OSGOOD: Maybe the other side knows.
18 MR. SPITZ: Yes, madam, what I can advise the Tribunal is that the District Court Judge has
19 indicated that he is going to reject the claims for European purchasers. He has not handed
20 down his judgment ----
21 THE CHAIRMAN: Where has he done that?
22 MR. SPITZ: In conference with the parties themselves he has done.
23 THE CHAIRMAN: When you say that he has rejected the claims for European purchasers, what
24 does "European purchasers" mean?
25 MR. SPITZ: He is going to uphold the motion that was brought to dismiss those claims that were
26 advanced on the basis of purchases made in Europe. We do not know the basis on which he is
27 going to reject them, but presumably it will be on the basis that *Empagran* does not permit
28 these sorts of claims for the payment of cartel prices for products purchased in Europe in US
29 anti trust proceedings, but I cannot take it any further than.
30 MR. SCOTT: Mr. Osgood, while you pause, you made a point that asserted or related to the past in a
31 Tolling Agreement which appears to relate to future foreign claims. It may not matter to you,
32 but I think it is worth drawing your attention to the fact that you said the word "asserted" was
33 past. I am not convinced from the reading that it is necessarily past, but I find it difficult to
34 hold together with the rest of the document.

1 THE CHAIRMAN: Can I just, Mr. Osgood, explain what is in my mind so that you understand my
2 concerns. I do not know anything about how these sales were made. If you have a sale which
3 is effectively negotiated within somewhere in the United States, within the US jurisdiction, for
4 delivery in Europe, that, I assume, might come within the *Empagran* inclusion. If you have a
5 sale which is negotiated outside the jurisdiction, so it is all done in England say, for delivery in
6 Europe, then I assume that is not within the *Empagran* jurisdiction. What I do not know is
7 whether here we are talking about the first or the second or both.
8 MR. OSGOOD: Those are very interesting questions and we will await Judge Simandle's ruling in
9 Camden New Jersey on those questions, but it is my submission that it does not matter how he
10 rules. What matters is whether these claims were asserted in the United States because if they
11 were asserted in the United States they are not within the definition of a foreign claim.
12 With the permission of the Tribunal I would like to hand up the amended complaint by the
13 claimants against Carbone, and I would refer to p.44, para.(b). This is under the request for
14 relief. As you can see on the prior page, the practice in the United States is to delineate the
15 allegations and then at the end of the complaint to say what it is you are asking the court to do.
16 Paragraph (b) state:
17 "The Plaintiffs recover damages as provided by law, that the Defendants be held
18 jointly and severally liable for the damages suffered by the Plaintiffs and that
19 judgment in favour of Plaintiffs be entered against the Defendants in an amount
20 trebled [etc]."
21 So it is absolutely clear that in the United States, by virtue of their claim for joint liability,
22 Carbone has asserted a claim based on Morgan's European purchasers.
23 THE CHAIRMAN: I do not think that shows it in (b).
24 MR. OSGOOD: It shows it because they are alleging joint liability.
25 THE CHAIRMAN: Yes, but you have to show me the bit where they are asserting it claims in
26 relation to European goods.
27 MR. OSGOOD: That is all through the complaint.
28 THE CHAIRMAN: I am not suggesting they did not.
29 MR. OSGOOD: (After a pause) Could I refer you to p.17 of our skeleton, which is annex A,
30 April 17. Annex A is the complaint against Morgan and others, and I am going to come to the
31 complaint against Carbone in just a minute. Annex A excerpts the allegations that the same
32 claimants made in the United States against Morgan talking about raising ----
33 THE CHAIRMAN: This is a summary of what you say it is. What I would like to see is the original
34 document.

1 MR. OSGOOD: It is tab 2 of the April 17 skeleton. What we have done, merely as an efficiency,
2 was ----
3 THE CHAIRMAN: I appreciate that, but I would just like to see it from an original document.
4 MR. OSGOOD: The original document is on tab 2.
5 THE CHAIRMAN: What are you going to refer us to?
6 MR. OSGOOD: Paragraph 64 of the original document, p.18, where it is alleged that the defendants
7 artificially raised the price of the electrical carbon products in the United States, Europe and
8 elsewhere.
9 THE CHAIRMAN: Where does it say that they are claiming in relation to the European sales?
10 MR. OSGOOD: These are the allegations in their complaint.
11 THE CHAIRMAN: One would normally expect them to say, “and we suffered loss in relation to”.
12 MR. SCOTT: There seems to be to a distinction going on. If you look back to paras.62 and 63, in
13 62 you have got the distinction between inter-state foreign trade and commerce. Foreign trade
14 and commerce would appear in the context of the United States to be trade and commerce
15 going between the United States and other states. You then go on in para.64 to free and open
16 inter-state competition, and I assume - I am not an American lawyer - that “inter-state” there
17 refers to the United States. So various distinctions are being drawn as we go through these
18 paragraphs.
19 MR. OSGOOD: To answer the Chairman’s question, could I refer you to para.103(d) of the
20 complaint, which says under “Effects”, what were the effects of the alleged conspiracy? The
21 plaintiffs, including these claimants before you, paid more for electrical carbon products in the
22 United States, Europe and elsewhere. That is a clear allegation that they are claiming injury on
23 the basis of European sales.
24 THE CHAIRMAN: They are alleging that that is the effect, but where do they say that they are
25 claiming for that loss?
26 MR. OSGOOD: That is the addendum clause in the request for relief. They ask to recover damages
27 as provided by law that the defendants be held liable for the damages suffered by plaintiffs and
28 that judgment be entered in favour of plaintiffs.
29 THE CHAIRMAN: In triple damages, as provided by law. As provided by law would be US, plus
30 whatever *Empagran* allows, not what *Empagran* does not allow?
31 MR. OSGOOD: Yes, and remember the word that started us off on this discussion is “asserted”.
32 THE CHAIRMAN: What is asserted is as provided by law. So what is asserted is what is in
33 *Empagran*.
34 MR. OSGOOD: What is asserted is what is in the complaint, it has been asserted in the complaint.
35 THE CHAIRMAN: Yes, that the plaintiffs recover damages as provided by law.

MR. OSGOOD: And they have asserted that they have been injured by paying too much in respect of European sales.

THE CHAIRMAN: Yes, as provided by law in relation to the *Empagran* ones. You understand what I mean, I am using rather short shorthand.

MR. OSGOOD: Yes.

MR. SCOTT: You can argue that what is going on here is they express the international nature of the cartel, but when they come to their claim, as our Chairman has pointed out, they limit it. So they are not asserting anything wider than is provided for in para.(b).

THE CHAIRMAN: What we do not know at the moment is what is provided by law because we are waiting for the decision.

MR. OSGOOD: Clearly if one reads their memorandum of law submitted to the US court there is no question that what they are claiming and they have asserted ----

THE CHAIRMAN: Can we have a look at that. You referred it to us before. It is tab 5.

MR. OSGOOD: It is tab 5 of our 17 April skeleton. It is a lengthy document and the reply is another memorandum submitted by the claimants, which is tab 6. Just to pick a page, let us go to p.20 of tab 5, where they say:

> "The Global Plaintiffs' foreign overcharge injuries are 'inextricably bound up with' the cartel's illegal behaviour in the US to the extent that the domestic and foreign impacts are part of a single economic relationship between a Global Plaintiff and the cartel."

THE CHAIRMAN: What you are, I think, saying to us is that what they have done in the Carbone litigation is to say that everything in Europe is within *Empagran*, and what they have been arguing before the Judge in New Jersey is that all their European purchases, however they arose, are within *Empagran*. Now the Judge apparently is going to say something like, "No, that is not right", but we do not know quite how he is dividing the spoils. I am getting nods from this side.

MR. OSGOOD: Just to finish my references, what we have been talking about is the claim against Morgan and the claim against Carbone. I would like to just finish up with the complaint against Carbone and refer you to what I handed up a moment ago.

MR. SCOTT: Just before you leave tab 5, tab 5, p.15 contains the words:

> "On their own, these allegations of unified purchasing and presence in the US are sufficient to establish jurisdiction over the Global Plaintiffs' claims."

That seems to summarise the situation.

THE CHAIRMAN: I am not sure about that actually. It does not say what the claims are.

MR. SCOTT: No, that is true.

1 MR. OSGOOD: I think if one had time to read the memorandum as a whole it would become quite
2 clear that the claims include claims before the Tribunal.
3 THE CHAIRMAN: I think, it appears that the way I just summarised it, and I was specifically
4 looking at the claimants to see whether they thought that I was right, was correct, which is I
5 think what you are saying. What has gone into the Carbone claim is all the European claims,
6 but what is being decided by the Judge is whether that is correct, or whether he thinks that
7 some of them fall outside the *Empagran* group that can be brought. What you say, as I
8 understand it, is that what they have done is asserted in the US all the claims, and by asserting
9 in the US all claims that excludes it from foreign claims under (b).
10 MR. OSGOOD: That is a very accurate and fair summary of a lot of our words. Thank you,
11 Madam, that is exactly right.
12 THE CHAIRMAN: Thank you.
13 MR. OSGOOD: I would just add a reference to the claimants' complaint against Carbone, which we
14 handed up a moment ago, and I invite your attention to p.41, para.112(d):
15 "As a direct and proximate result of the illegal conspiracy plaintiffs paid more for
16 electrical carbon products in the United States, Europe and elsewhere."
17 THE CHAIRMAN: You say that fits in the last page, "The plaintiffs recover damages as provided
18 by law"?
19 MR. OSGOOD: Yes, Madam, and that not only did they assert these claims against my client in the
20 United States, they are asserting those claims now. The language of the Tolling Agreement is
21 not whatever claims survive an *Empagran* by Judge Simandle in the United States, it is foreign
22 claims mean only claims that have not been asserted in the United States. So they were
23 asserted against Morgan and they are still being asserted now against Carbone. Therefore, the
24 definition of "foreign claims" in the Tolling Agreement takes the Tolling Agreement out of
25 operation before this Tribunal.
26 THE CHAIRMAN: What was the Tolling Agreement to cover?
27 MR. OSGOOD: The Tolling Agreement - I do not want to get into subjective intent.
28 THE CHAIRMAN: I know.
29 MR. OSGOOD: It is something that my friends asked for. We made no representations in the
30 Tolling Agreement. It says we make no representations.
31 THE CHAIRMAN: We have got that passage before the court between the Judge and another
32 counsel, and when he asked you - do you know which passage I am talking about - you say
33 you are agnostic.
34 MR. OSGOOD: That was on a different issue as to whether the US court could enter what we call a
35 "bar order". That was something that was asked for by Schunk. We put in no papers and at

1 the oral argument the Judge asked me what my position was on behalf of Morgan Crucible I
2 said, "I am agnostic, but if you are going to give it to Schunk give it to us too", and that was
3 the extent of my response.
4 THE CHAIRMAN: You will find what I am talking about, it is the claimants' response to the first
5 defendants skeleton argument and it is divider 2, p.19 at the top, 24 at the bottom, and it is
6 asking whether the European claims were settled and Mr. Murphy says that they were not, and,
7 as I understood it, you said you were agnostic on the subject, whatever that meant.
8 MR. OSGOOD: It means I take no position. That is what I meant it to mean. I said that, in fact, I
9 take no position on the merits.
10 THE CHAIRMAN: But what this exchange was about was whether they had settled the European
11 claims, and Mr. Murphy (for Schunk) agreed with the court that there is no claim that
12 European claims are extinguished.
13 MR. OSGOOD: I was not addressing that.
14 THE CHAIRMAN: You were not addressing that – ah!
15 MR. OSGOOD: I was addressing whether a bar order should be entered.
16 THE CHAIRMAN: I see, but it does appear from the exchange above that the court was told that the
17 Morgan Settlement Agreement did not exclude the European claims. I know we have gone off
18 to the Morgan Settlement Agreement and not the Tolling Agreement.
19 MR. OSGOOD: This is one of those places where I can only say that it is what it is. I do not think
20 any conclusions can be drawn from that dialogue.
21 THE CHAIRMAN: We have also noted that in the Judgment of the District Court – we will find you
22 the reference – what the Judge says at the beginning of this is:
23 "The European Community also investigated and levied fines upon various parties
24 for anti-competitive practices of various defendants for conduct in the European
25 market place which is not part of this litigation or settlement."
26 MR. OSGOOD: May I respond?
27 THE CHAIRMAN: Yes. You know what I am talking about?
28 MR. OSGOOD: Yes, I do. First, there was never an issue put before the court that required any
29 Ruling. Secondly, this is pure *dicta* it was not an adjudicated issue. Thirdly, it is explainable
30 from the court's perspective if the court was focusing on who were in the class. We recognise
31 that there is a distinction between the class members and the claims that were settled.
32 THE CHAIRMAN: Yes.
33 MR. OSGOOD: The court was focusing on fairness to the class. In order to approve the settlement
34 the Judge in the United States had to review whether on the whole, in the round, this was a
35 good settlement for the class. Unquestionably the class was defined as those in the United

1 States that were purchasers, that was much more narrow than the claims that were being
2 settled, and what one has to look to, I think, is the Judgment and order of the court which says
3 that the parties are released in respect of their individual Settlement Agreements which puts
4 one back to the release language in the Morgan Settlement Agreement.
5 Just to polish off this point, if I could refer you to our April 17 skeleton., the final order
6 approving the settlement.
7 THE CHAIRMAN: Yes.
8 MR. OSGOOD: On page 4 of that document, para.6 reads:
9 "All Released Claims (as defined in each Settlement Agreement) of Class Plaintiffs
10 and the Settlement Class that were asserted against the Settling Defendants and the
11 Releasees (as defined in each Settlement Agreement) in the Action are dismissed
12 with prejudice, and, except as provided for in each Settlement Agreement, without
13 costs."
14 So the controlling Judgment and language is that the claims are released as provided for in
15 each of the Settlement Agreements, so one has to look at the Morgan Settlement Agreement to
16 see what ----
17 THE CHAIRMAN: And just to note that I think the claimants in their skeleton say that the claims
18 were withdrawn, but that is not correct, they were dismissed.
19 MR. OSGOOD: They were dismissed with prejudice and without costs. That is the correct
20 characterisation.
21 THE CHAIRMAN: The other thing that had been going through my mind when I was reading all
22 this is to what the Judge understood when he made the order, because if he understood that it
23 did not include European claims, and he approved it ----
24 MR. SCOTT: If you go back to p.392, when he is introducing the way in which he is approaching it,
25 having just said that the conduct in the European market place is not part of this litigation in
26 settlement, he then finds that the proposed Settlement Agreements are fair, reasonable and
27 adequate, etc., dismissing all released claims, which is where you have got to, so that what he
28 is indicating is that he is approaching that task in the context of believing that European
29 conduct is not part of the settlement. Now, as far as we are aware nobody steps forward to
30 contradict that as the basis upon which he is approving the settlement.
31 MR. OSGOOD: But there is not an occasion when one could step up and say: "But Judge, you're
32 wrong". He writes the opinion and this is pure *dicta* and it answers the order. The order was
33 perfectly satisfactory, the final judgment was perfectly satisfactory and we are quite happy
34 with it because to us the Morgan settlement released ----

1 THE CHAIRMAN: Yes, but then we have the problem in this country, maybe we should go and ask
2 the Judge.
3 MR. OSGOOD: I propose that one has to look at the final judgment to see what was released.
4 THE CHAIRMAN: But if he did it on the basis that he thought that it did not include anything to do
5 with Europe he may have done it on the wrong basis and nobody corrected him. He must have
6 got that from somewhere, and of course the claimants were not going to tell him he was wrong
7 because that is what they understood – or that is what they are arguing now. That may mean,
8 the result of that could be the whole approval is wrong, because there is also the question about
9 how you get to the amount of sales and all of that, and the value.
10 MR. OSGOOD: It is fair to say that there was no perception in the final judgment that carved out
11 from settlement in release the claims that are now before this Tribunal. I think everyone would
12 agree to that.
13 THE CHAIRMAN: The whole situation is very confused.
14 MR. OSGOOD: It is quite clear to us! (Laughter)
15 THE CHAIRMAN: And it is quite clear to the other side as well, but very different, so therefore it
16 must be confused.
17 MR. OSGOOD: Shall I continue on the Tolling Agreement.
18 THE CHAIRMAN: I am just wondering – how long are you going to be? We have taken up some
19 of your time here.
20 MR. OSGOOD: And I appreciate the patience of the Tribunal. I have a number of other points I
21 want to make.
22 THE CHAIRMAN: You are going to be more than five minutes?
23 MR. OSGOOD: yes.
24 THE CHAIRMAN: So why do we not adjourn until five past two? Can we just work out how we
25 are going to deal with the afternoon. You are going to be what – another?
26 MR. OSGOOD: 20 minutes.
27 THE CHAIRMAN: How long do you think you are going to be in response?
28 MR. SPITZ: On the question of the Tolling Agreement I think we can be fairly brief, 15 minutes.
29 On the question of the settlement that will take more time ----
30 THE CHAIRMAN: Yes, the settlement is the third thing. So we will be able to deal with this part of
31 it in about 40 minutes, which will take us to about a quarter to three. We will then have a five
32 minute break and we will start with the settlement, and hopefully we will manage to deal with
33 the settlement before we finish today. We cannot sit tomorrow, but hopefully we can do it in,
34 say, two hours. I do not want to cut you.
35 MR. OSGOOD: I think we should be able to finish for our part today.

1 THE CHAIRMAN: I am a little concerned that the materials before us are not sufficient for us to be
2 able to decide these points because of the questions that are being raised now.
3 MR. OSGOOD: Of course the Tribunal may always make further directions to ask the parties to
4 submit further materials.
5 THE CHAIRMAN: Perhaps you could consider that over lunch from the discussions we have been
6 having whether we do have the right materials and also whether we ought to wait in any event
7 for the decision of the Judge – whether it is material or not we do not know until we have seen
8 his decision – and then have further submissions before we came to a decision. If we did that
9 then I suppose the question is whether we should get on to the Morgan Settlement Agreement
10 today or whether we should just adjourn this hearing?
11 MR. OSGOOD: We are prepared to address the Morgan Settlement Agreement today.
12 THE CHAIRMAN: I know you are prepared to but I am just wondering whether it is an efficient
13 way of using time if we are going to have to come back. I am just a little concerned that we do
14 not actually have all the materials to decide, and it may well turn out that we do not have the
15 materials in relation to the Morgan Settlement Agreement for the reasons that I said originally.
16 I just leave you with those thoughts – they are thoughts, they are not written in any stone at all,
17 but it is just going through my mind.
18 MR. OSGOOD: Yes, madam Chairman, I would propose that we see how we go this afternoon.
19 THE CHAIRMAN: Absolutely – and not cut into our lunch any further.
20 MR. OSGOOD: Yes.
21 (Adjourned for a short time)
22 MR. OSGOOD: Madam Chairman, members of the Tribunal, over lunch I was reminded of the
23 beginning of the letter that someone wrote saying: "Had I more time this letter would be
24 shorter", and now I have had time over lunch to think about the Tolling Agreement and I do
25 not request any further time to discuss that, I think we covered all of the issues this morning.
26 So with your permission – unless you have questions about the Tolling Agreement – we might
27 go on to the issue of settlement.
28 THE CHAIRMAN: So does that mean that Mr. Spitz should now reply to what you were saying, so
29 that we deal with that and then we deal with settlement? I think so?
30 MR. OSGOOD: Yes.
31 MR. SPITZ: Thank you, madam. Our submissions on the Tolling Agreement are brief ones. We
32 begin from the position that meaning has to be given to this Tolling Agreement and the
33 Tribunal will do its best to ascribe meaning to the agreement rather than to conclude that it is
34 empty or devoid of content or, indeed, otiose.

1 The way to give meaning to the Tolling Agreement is to start off from the point of view that it
2 is forward looking, not backward looking. It is clear that at the time it was concluded the
3 parties had in mind certain purchases in relation to Europe and, indeed, other parts of the
4 world. Part 1 of the definition ----
5 THE CHAIRMAN: Shall we have it in front of us?
6 MR. SPITZ: -- of foreign claims in the Tolling Agreement, it is at the back of the claimants'
7 response to the skeleton on settlement, behind tab 4. The definition of "foreign claims" is in
8 clause 1(b). The first component of that definition begins by saying:
9 "Foreign claims shall mean claims based on allegations of an agreement among
10 competitors with respect to the prices charged for electrical carbon products
11 manufactured and sold to the plaintiffs by the Morgan Defendants out side of the
12 United States of America during the period between October of 1988 and December
13 1999."
14 That time period is the time period over which the Commission decided that the European
15 cartel operated, so it is clear that this was within the contemplation of the parties. Foreign
16 purchases arising out of the facts set out in the first leg of the definition.
17 THE CHAIRMAN: It is also important that it manufactured and sold outside of the United States of
18 America, so they have to be manufactured and sold outside, which might suggest what one was
19 dealing with was the stuff that does not fall within *Empagran*.
20 MR. SPITZ: Yes, indeed. That would be fair. When one comes to the next two legs in relation to
21 arising and asserted exclusively in leg 2, and asserted exclusively in leg 3, what is being dealt
22 with there is an answer to the question which claims qualify for an additional one year period
23 of time within which they can be brought. The answer to that question is that they are claims
24 that are asserted exclusively under the law of jurisdictions located outside the territorial
25 boundaries of the United States; the claims before the Tribunal satisfy that requirement.
26 THE CHAIRMAN: Why do they satisfy that requirement?
27 MR. SPITZ: Because they are asserted in this forum and not in any other forum, and because the
28 agreement is forward looking.
29 THE CHAIRMAN: Do we know that they are not asserted in the *Empagran*, i.e. the second claim,
30 the claim that was made when you opted out, which is now continuing as the Carbone claim?
31 MR. SPITZ: Well certainly they were not asserted on the basis of an infringement of Article 81 of
32 the Treaty.
33 THE CHAIRMAN: Is that sufficient? It does not say that here. Because if the damage is the same
34 you would have double recovery?

1 MR. SPITZ: But that would not, in our submission, impact on the way in which the language here
2 was interpreted. One would not be entitled to double recovery, but that would be on principles
3 that relate to the prohibition against double recovery rather than whether an extension of time
4 applied to the bringing of these claims.
5 THE CHAIRMAN: But if they are asserted in the US under the Sherman Act, and whatever else,
6 and if they are asserted also under Article 81 then are they asserted exclusively under Article
7 81?
8 MR. SPITZ: If they are asserted after the conclusion of the Tolling Agreement.
9 THE CHAIRMAN: But if they have already asserted within the claim that happened after the opt
10 out, the Emerson claim?
11 MR. SPITZ: Well that was prior to the conclusion of this agreement.
12 THE CHAIRMAN: Absolutely so then they were asserted there and they were then asserted here.
13 MR. SPITZ: But if that is the interpretation then everything – all these claims would be hit and none
14 of them would enjoy the benefit of ----
15 THE CHAIRMAN: That is what Mr. Osgood's argument is.
16 MR. SPITZ: Indeed it is, and that would mean that this agreement had no content. It is difficult to
17 imagine what claims would be preserved and would benefit from an extension of time if the
18 fact that damages claimed for purchases of European products was in the US court under US
19 anti-trust law was sufficient to ----
20 THE CHAIRMAN: Well if you take *Empagran* claims, and non-*Empagran* claims then what could
21 be in somebody's mind is that the *Empagran* claims are within, that the non-*Empagran* claims
22 cannot be within and therefore must be exclusively asserted outside.
23 MR. SPITZ: Yes.
24 THE CHAIRMAN: I do not know if that is right. It may be, as I said, that we need to first of all
25 have the Judgment, which has not yet been published, and see what that says but it might be
26 that we need to find out from the Judge what he understood was being settled.
27 MR. SPITZ: What he seems to have understood is based on the passage of the Judgment that the
28 Tribunal referred to earlier and ----
29 THE CHAIRMAN: And the exchange between him and Mr. Murphy.
30 MR. SPITZ: It goes further than that because he also discusses the size of the settlement fund in his
31 Judgment, and the settlement fund is calculated on the basis of purchases in the United States
32 and that reference is in the Judgment at p.146 of the paginated papers, the Judgment itself is
33 behind tab 1 of the claimants' skeleton argument of 17th May, the first full paragraph read with
34 151, two-thirds of the way down the page, beginning with the words: "The net settlement fund
35 …"

1 THE CHAIRMAN: Can you tell me how many lines up or down?
2 MR. SPITZ: 10 lines from the bottom of p.151.
3 THE CHAIRMAN: Oh, not 147?
4 MR. SPITZ: Well one reads them together, but the crux of it is on p.151.
5 THE CHAIRMAN: I see. "The net settlement fund".
6 MR. SPITZ: "The net settlement fund".
7 THE CHAIRMAN: Yes, but that does not help because you could have a Settlement Agreement
8 whereby the amount of the settlement fund is based only on US but everybody agrees that they
9 will drop all claims worldwide.
10 MR. SPITZ: What it suggests is that in assessing the reasonableness of the settlement this is how the
11 settlement fund is put together and in addition to that the Judge starts off by saying that the
12 European purchasers do not form part of this litigation or the settlement.
13 THE CHAIRMAN: Where does he say that in here.
14 MR. SPITZ: That is in the passage that the chair referred to earlier. It seems that the Judge, before
15 he is in a position to approve the settlement for its fairness and reasonableness and adequacy it
16 seems to be a necessary step for him to decide which claims fall within the scope of the
17 settlement.
18 THE CHAIRMAN: I think we will find out when we see what he says in his next Judgment because
19 if that is what he thought then he is going to say it, is he not?
20 MR. SPITZ: Well he may do.
21 THE CHAIRMAN: So this is rather underlining what I was saying before lunch that in fact before
22 he pronounces in writing it would not be appropriate for us to decide this, we really ought to
23 adjourn and have more submissions when we have had his Judgment.
24 MR. SPITZ: If the Tribunal would just bear with me for a moment. (After a pause) Madam, we
25 would be content with that suggestion. It may be that the decision distinguishes between
26 certain kinds of claims that fall within the *Empagran* rule, and certain kinds fall without, but
27 we would say that the Tribunal would be in a position to determine what the Judge said in this
28 Judgment as to the scope of the settlement on the basis of the passages that we have referred to
29 because it was a necessary step in his reasoning.
30 THE CHAIRMAN: Yes, but I do not know at the moment what was in his mind for: "… conduct in
31 the European market place which is not part of this litigation or settlement", so some of it may
32 be part and we are going to discover that, so I do not think it is absolutely clear from what he
33 said. That is why I keep saying that the stuff that falls within *Empagran* and the stuff that falls
34 without *Empagran*. I do not know whether that was what was in his mind. If he says that
35 everything falls outside then that would support your argument. If he says it is half and half it

1 may not. It is not clear from here, it is ambiguous. As I said, you could settle on the basis - he
2 may have been convinced that it was the right thing to do for various reasons, and he said there
3 were other mattes that you settled outside. If you went along and said, "Look, I am absolutely
4 content, we have settled all the global claims, but we are quite prepared only to be paid on the
5 basis of the US purchases". If that is what he was told he might well have said, "For various
6 reasons, the difficulty of Europe, and all sorts of things, double recovery, there were not that
7 many, if they are happy to do that I am prepared to approve it". I am not saying he did do that,
8 I am just saying that I could see that is a possibility. We should find that out from his
9 document.
10 MR. SPITZ: Yes, save that these were not claims that were asserted in the original class complaint.
11 THE CHAIRMAN: No, that is the other interesting thing, because I appreciate they were not
12 asserted in the original class complaint. If the date - and that is why I say the date is so
13 important - if you have all agreed that is backdated to 15th February 2005 then we can only
14 look at the construction after that date and everything is out. If the situation is that that was not
15 what was agreed and we are looking at 2006 then we are looking at a completely different
16 scenario of background. That is why I say I do not think at the moment that we have got the
17 materials to decide any of this because I do not think that the real complex part of this has
18 really been thought through. In any event, as I said at the beginning and we will wait for your
19 submissions, we have to be confident. It is the "sure" test really on the Morgan Settlement
20 Agreement but on this different. Anyway, we have gone slightly off.
21 MR. SPITZ: Very well, but the issue then is, to take those suggestions further, whether what the
22 Tribunal is proposing is a limited amount of written submissions if that would be of assistance
23 in relation to the points raised concerning the Morgan Settlement Agreement and the two
24 decisions that were referred to at the beginning of this morning, and in addition to determine
25 what further materials might assist the Tribunal.
26 THE CHAIRMAN: Personally I think both sides need to think it through as to how we do construe
27 an agreement. The same thing goes for the Tolling Agreement because there may be
28 background to the Tolling Agreement which would assist in knowing what foreign claims and
29 what (b) means.
30 MR. SPITZ: Yes.
31 THE CHAIRMAN: The question is what is the admissible material?
32 MR. SPITZ: Yes, and the principle is widely cast in Lord Hoffmann's speech.
33 THE CHAIRMAN: I do not know what the position is, but at the moment our hands are tied because
34 we have not got the submissions or the materials.

1 MR. SPITZ: The submissions that I would make to you in relation to the Tolling Agreement do not
2 go beyond the points in relation to having to give meaning to that agreement and looking at it
3 from a forward looking point of view.
4 THE CHAIRMAN: We do not know. It is electrical carbon products manufactured and sold outside
5 the United States. They could be manufactured in the United States and sold outside the
6 United States, they could be manufactured outside the United States and sold outside the
7 United States. The agreement for selling might be within the United States. Is that sold
8 outside the United States?
9 MR. SPITZ: Yes, I am alive to those difficulties.
10 THE CHAIRMAN: I do not know how we construe this at the moment for the purposes of a strike-
11 out application or a non-admissibility application.
12 MR. SPITZ: The test in relation to the Morgan Settlement Agreement, the test that was suggested in
13 terms of certainty ----
14 THE CHAIRMAN: This is to do with whether the claim is admitted to start with, which is different
15 from the Morgan Settlement Agreement, but it is right that the same problem arises, does it
16 not, about the construction?
17 MR. SPITZ: Yes. If the Tribunal exercised its discretion to give permission on the basis that the
18 time period had not yet run then of course it is not necessary to get to the Tolling Agreement.
19 THE CHAIRMAN: Yes, absolutely.
20 MR. SPITZ: We are in the Tribunal's hands.
21 THE CHAIRMAN: Because of the way we have been doing you should make your submissions this
22 afternoon and then we will see at the end where we get to.
23 MR. SPITZ: Those are the submissions, save for this: what one cannot do under the definition of
24 foreign claims is assert a claim based on European competition law in a US court, and one
25 cannot assert a claim based on US anti-trust law in any court.
26 THE CHAIRMAN: Could we do that anyway? Could I assert in the US court ----
27 MR. SPITZ: Perhaps there is a cause of action based on fraud where some of the conduct took place
28 in the United Kingdom and that related to the facts set out in sub-para.(1) of the definition
29 where English law would be the applicable law. That would not be something for which the
30 one year period of extension of claims under the Tolling Agreement applies.
31 THE CHAIRMAN: We do not know at the moment if you assert that all the goods are manufactured
32 and sold outside the United States.
33 MR. SPITZ: Can I take instructions. (After a pause) I am told that we do take the position that they
34 were all manufactured and sold outside the United States.
35 THE CHAIRMAN: Manufactured and sold outside the United States?

1 MR. SPITZ: I am told that that factually is the position.
2 THE CHAIRMAN: We have no evidence to support that?
3 MR. SPITZ: No, we do not.
4 THE CHAIRMAN: Then the next thing is "arising and asserted exclusively under the laws of a
5 jurisdiction located outside the territorial boundaries of the United States". We do know that
6 these claims have been asserted in the US.
7 MR. SPITZ: Yes, and we say the time to measure that is at the date of conclusion of the agreement
8 and looking forward.
9 THE CHAIRMAN: At the date of the conclusion of the Tolling Agreement those claims had been
10 asserted in the US?
11 MR. SPITZ: Yes, that is correct.
12 THE CHAIRMAN: How do you use (ii)?
13 MR. SPITZ: Because what has to be asserted exclusively - the time period from which one measures
14 the exclusive assertion of these claims is from the conclusion of the Tolling Agreement and
15 henceforward.
16 THE CHAIRMAN: At which point the claim would be dismissed in the US?
17 MR. SPITZ: Yes.
18 THE CHAIRMAN: But the fact that they had been dismissed?
19 MR. SPITZ: It does not matter that the claims were asserted in the US, because if it did matter then
20 one is in the difficult position of trying to find what claims are preserved by this definition.
21 MR. SCOTT: In essence, what you are saying in distinction to what Mr. Osgood is saying -
22 Mr. Osgood is saying that the presence of the word "asserted" means that they have been
23 asserted; you are saying this is a Tolling Agreement, a Tolling Agreement is a forward looking
24 agreement and therefore we have to read 1(b) in a future sense governed by "shall" rather than
25 a past sense governed by "asserted"?
26 MR. SPITZ: Yes, indeed.
27 THE CHAIRMAN: I still do not understand that, because they had been asserted. The claims had
28 been dismissed on the merits with prejudice, so it was not that it was not there at all any more.
29 How is it arising and asserted exclusively under the laws of jurisdiction, because they had
30 already been?
31 MR. SPITZ: The claims that had been dismissed - it takes one back into the Morgan Settlement
32 Agreement - were claims relating to purchasers in the United States from a facility in the
33 United States.
34 THE CHAIRMAN: My understanding is that it included purchases outside the United States. I may
35 be wrong, but that is what my understanding was from the documents that we have seen.

1 MR. SPITZ: Not in the class complaint.
2 THE CHAIRMAN: I am talking about the complaint that was made when you opted out. That
3 complaint included ----
4 MR. SPITZ: What was sought there were damages for purchases that went beyond the United States
5 on the basis that those could be taken into account as a part of a claim based on a violation of
6 US anti-trust law..
7 MR. SCOTT: So inside *Empagran*?
8 MR. SPITZ: Yes, that was the argument.
9 THE CHAIRMAN: I think without knowing the actual position and working out the date structure it
10 is not easy to apply this and we do not have that information.
11 MR. SPITZ: In terms of the date structure in relation to the ----
12 THE CHAIRMAN: You have got the first claim, then you have got the proposed Settlement
13 Agreement, then you have got the opt-out, then you have got what is called the Emerson claim,
14 then you have got whatever the settlement was which led to you opting in again and for the
15 approval of the settlement and the dismissal of, I think, both claims, the original claim and the
16 Emerson claim.
17 MR. SPITZ: Yes. The Emerson claim goes by means of the stipulation of dismissal.
18 THE CHAIRMAN: Absolutely. The question is the Tolling Agreement comes in some part of that
19 chronology.
20 MR. SPITZ: The Tolling Agreement is at the same time as the stipulation of dismissal is concluded.
21 THE CHAIRMAN: Yes, I think it is all on the same date.
22 MR. SPITZ: Yes, February 11 2006.
23 THE CHAIRMAN: So at that stage there was some collateral agreement between you all deciding
24 that on that basis you were going to enter into the Settlement Agreement.
25 MR. SPITZ: Well it was the Tolling Agreement in relation to Morgan, it was the conclusion of the
26 Tolling Agreement. I will check that, I do not believe there was a separate agreement.
27 THE CHAIRMAN: Well we did not know, it was one of the questions that I asked to start with,
28 whether the Judge was referring to anything else but the Tolling Agreement.
29 MR. SPITZ: There is no other Settlement Agreement between Morgan and Emerson.
30 THE CHAIRMAN: Just the Tolling Agreement.
31 MR. SPITZ: Just the Tolling Agreement.
32 THE CHAIRMAN: So at the stage when you entered into the Tolling Agreement ----
33 MR. OSGOOD: If I may just help, the Tolling Agreement para.3 requires the Emerson plaintiffs to
34 go back into the settlement.

1 THE CHAIRMAN: Yes, so the Tolling Agreement comes first, and the Tolling Agreement comes
2 before the stipulation of dismissal. So at the time the Tolling Agreement is entered into those
3 proceedings are still on foot. That is why I am saying one needs to get the chronology right, so
4 at that stage you have got the Emerson claim on foot.
5 MR. OSGOOD: Paragraph 2 gives the plaintiffs five business days to submit the stipulation of
6 dismissal to the court.
7 THE CHAIRMAN: Yes, so my chronology is right?
8 MR. OSGOOD: Yes.
9 THE CHAIRMAN: So it may not be right to say that when you look at foreign claims those claims
10 are gone, because they were still there.
11 MR. SPITZ: But clearly what this Tolling Agreement is intending to do is to preserve the right to
12 bring a particular kind of claim which has not been brought here.
13 THE CHAIRMAN: The question is what claim was it there to preserve? Mr. Osgood will say that
14 this went in and it may be you were thinking of something else, or it may be that the way one
15 interprets it is it is the non-*Empagran* claims.
16 MR. SPITZ: Perhaps if we do present the chronology to the Tribunal in a written format and look at
17 the Judgment when it comes down in relation to Carbone may be a way of clarifying the
18 murkiness.
19 THE CHAIRMAN: It does seem that it is rather murky at the moment for us to make a decision on
20 it. (After a pause) The other thing that is again slightly lying in the air is that we know the
21 stipulation dismissal dealt with the dismissal of the Emerson, the second action, which was
22 brought after the opt out.
23 MR. SPITZ: Yes.
24 THE CHAIRMAN: And the reason for the opt out. What is, I think, called "the third class action"
25 or something, which is the first – it is the only one we are dealing with.
26 MR. SPITZ: It is the class complaint that was the subject of the settlement ----
27 THE CHAIRMAN: And that was settled and approved, and the settlement was approved so I
28 assume that something happened to that action, it was either dismissed or withdrawn, or
29 something?
30 MR. SPITZ: It was dismissed.
31 THE CHAIRMAN: It was dismissed. As I understand it the class action – the first one – did not
32 have any of this European stuff in it?
33 MR. SPITZ: Yes, that is correct.
34 THE CHAIRMAN: Then you opted out to put the European stuff in?
35 MR. SPITZ: Yes, and then opted back in.

1 THE CHAIRMAN: And then opted back in and you thought that that allowed you to continue with
2 the European stuff abroad.
3 MR. SPITZ: Yes, and concluded the Tolling Agreement ----
4 THE CHAIRMAN: But you can see we are going to have to decide at some point what the wording
5 means, but it would not be fair to either side if we do that without having full materials about
6 it, and full submissions on the points that I am raising.
7 MR. SPITZ: And perhaps a witness statement that deals with these issues.
8 THE CHAIRMAN: Maybe, we have to be very careful as to what is admissible and what is not
9 admissible.
10 MR. SPITZ: Yes, quite.
11 THE CHAIRMAN: Is there anything else?
12 MR. SPITZ: No, thank you.
13 THE CHAIRMAN: Does that deal with all those submissions?
14 MR. SPITZ: Yes.
15 THE CHAIRMAN: So we can get on to the Morgan Settlement Agreement.
16 MR. SPITZ: Yes, indeed.
17 THE CHAIRMAN: Thank you very much. We are on to the Morgan Settlement Agreement.
18 MR. OSGOOD: Madam Chairman, and members of the Panel, the Settlement Agreement in
19 Morgan's view is dispositive and sweeps away all of these interesting issues that we have been
20 talking about earlier in the day. I invite your attention to our skeleton of 17 April, which
21 contains the Settlement Agreement between these claimants and Morgan, at tab 1 of our initial
22 skeleton.
23 THE CHAIRMAN: You want us to look at the Settlement Agreement or your skeleton?
24 MR. OSGOOD: The Settlement Agreement is tab 1.
25 THE CHAIRMAN: I have the Settlement Agreement.
26 MR. OSGOOD: At p.9 is para.21 headed "Release Terms". We may need to read para.21 in parts
27 as we pass the language to ascertain its meaning. So let me begin by saying that the paragraph
28 releases – fourth line down, and I am going to skip through some of this:
29 "… all manner of claims … of any kind whatsoever .. arising under the Antitrust
30 Laws of the United States or of any state or other jurisdiction, or under any similar
31 statutory or common law, whether sounding in antitrust, unfair or deceptive trade
32 practices or unfair competition, through the date on which this Settlement Agreement
33 receives Final Approval, which have been [asserted], might have been [asserted] are
34 now or could be asserted and which relate to or arise out of any alleged unlawful
35 conspiracy to fix, raise, maintain or stabilize the prices of Electrical Carbon Products

1 in the United States or that are in any way connected with any fact, circumstance,
2 statement, event or matter of any kind that was raised or referred to or could have
3 been raised or referred to in this Litigation."

4 Then there is a carve out on para.21, and let us look at what the carve out is, the excluded
5 claims from that very broad language that I just read. The carve out is for: "… commercial
6 claim arising out" ----

7 THE CHAIRMAN: Is it (a) or are you going to (b).

8 MR. OSGOOD: (a) – I will go back:

9 "Nothing in this Settlement Agreement shall: (a) limit the right of any Plaintiff to
10 submit a claim and participate in the Settlement or to exercise its right to exclude
11 itself from the Class; (b) constitute a release of any commercial claim arising out of
12 an alleged product defect or breach of contract relating to Electrical Carbon Products;
13 or (c) …"

14 And indirect purchaser claims are carved out as well. So we have in the release terms that the
15 claimants agreed that they would be bound to expressly in the Tolling Agreement and in the
16 stipulation of dismissal, they expressly agreed that they would be bound by these terms that we
17 have just read. We have a very broad release of claims, as we would say "It has everything in
18 there but the kitchen sink." If there is anything to be excluded it is identified at the bottom of
19 para.21.

20 In our skeleton itself we pass the language. Before I go to the skeleton, let me assume with
21 you for a moment hypothetically that the claimants wanted to preserve these claims before the
22 Tribunal, how would they do that? We have three examples of how they did that. We have
23 first the Schunk agreement, which is a public document, and which the claimants have no
24 difficulty with our handing up to the Panel, so if I may we will observe the language they
25 negotiated ----

26 THE CHAIRMAN: This is a public document.

27 MR. OSGOOD: This is a public document accessible on the internet.

28 MR. SCOTT: The interpretation of which ----

29 MR. OSGOOD: The is the redacted version of the Schunk Settlement Agreement.

30 MR. SCOTT: This is the agreement referred to by the District Judge in terms of there being a
31 dispute in the hearing in April?

32 MR. OSGOOD: Sorry, I do not think so, unless there is a proceeding that I do not understand.

33 MR. SCOTT: In the transcript of the Carbone hearing in April there is a reference to the Schunk
34 agreement being disputed before him.

35 MR. OSGOOD: Ah, yes, this may be the agreement but I am not certain of that.

1 MR. SCOTT: Right.
2 MR. OSGOOD: If I could draw your attention to p.3 of the Schunk Settlement Agreement and
3 release, eight lines from the bottom, and perhaps I might give you a moment to read it.
4 THE CHAIRMAN: "Subject to para.24 below" is that where you want to go?
5 MR. OSGOOD: Yes.
6 THE CHAIRMAN: (After a pause) Yes.
7 MR. OSGOOD: So what is being released are claims which relate to any direct or indirect purchase
8 from a facility located in North America, or the end delivery of which occurred in North
9 America ----
10 THE CHAIRMAN: You say a facility located outside North America and the end delivery which
11 occurred outside North America?
12 MR. OSGOOD: I am looking at a few lines above that. It is stated both ways. Above that it says in
13 effect what is being released are claims which relate to purchases from a facility located in
14 North America. Do you see where I am on p.3, about eight lines from the bottom?
15 THE CHAIRMAN: Yes:
16 "Subject to paragraph 24 below nothing in this Agreement shall discharge any claim
17 that relates to any purchase of electrical carbon products."
18 MR. OSGOOD: Higher up.
19 THE CHAIRMAN: Thank you.
20 MR. OSGOOD: We start with, "and which relates to any direct or indirect purchase of electrical
21 carbon products by the releasing parties from any of the released parties", and I would
22 underline "from a facility located in North America or the end delivery of which occurred in
23 North America the released claims". Then we go on to the language which you noted, Madam,
24 "nothing shall discharge claims relating to purchase of products from a facility located outside
25 North America and the end delivery of which occurred outside North America." So it was a
26 very clear statement.
27 THE CHAIRMAN: It mirrors the words effectively in (b) of the Tolling Agreement? It is the same
28 language, it is manufactured and sold outside the US?
29 MR. OSGOOD: One would not find this language in any way, shape or form in the Morgan
30 Settlement Agreement. This is a specific limitation narrowing the release of claims, saying
31 that the release only goes to US manufactured or delivered product. There is nothing like it in
32 the Morgan release.
33 Number two, we have attached to the same skeleton tab 7. Tab 7 was the claimants' attempt to
34 persuade Morgan to limit the release to exclude foreign claims. If one looks at tab 7, p.3,
35 para.5 there are two matters to note.

1 THE CHAIRMAN: Are we supposed to look at this as a matter of statutory construction?
2 MR. OSGOOD: I think as a matter of statutory construction, yes. We are not asking for subjective
3 intent, we are looking at the face of a document.
4 THE CHAIRMAN: This is settlement discussions, which is something that one is not supposed to
5 look at.
6 MR. OSGOOD: I am only relying on the language of para.5 and not going into any dialogue or
7 subjective intent or what was meant by ----
8 THE CHAIRMAN: At the moment we look at it *de bene esse*, and we will see where we get to, if
9 there is no objection from that side?
10 MR. SPITZ: Save that in *West Bromwich* previous negotiations are specifically mentioned as falling
11 outside what one can have regard to.
12 THE CHAIRMAN: That is what I just said. We will look at it *de bene esse* and we will argue about
13 it afterwards - is that all right?
14 MR. SPITZ: Yes, that is fine.
15 MR. OSGOOD: Two observations if I may on para.5. First, one notices on the fifth line the phrase
16 "in the proposed release arising under the anti-trust laws of the United States or of any State".
17 Obviously that did not make its way into the agreement.
18 THE CHAIRMAN: What is this document?
19 MR. OSGOOD: This is a proposal by the claimants.
20 THE CHAIRMAN: In relation to the Settlement Agreement?
21 MR. OSGOOD: In relation to the Settlement Agreement and the Tolling Agreement. The Tolling
22 Agreement ended up requiring them to be bound by the Settlement Agreement.
23 THE CHAIRMAN: What was insisted on is the terms of the original Settlement Agreement which
24 was drafted back in 2005.
25 MR. OSGOOD: Yes, and what we are looking at now is an attempt by the claimants to vary and
26 change the language of the original agreement.
27 THE CHAIRMAN: And they can get away with it.
28 MR. OSGOOD: This is their proposal in para.5. The first observation is, if one ascribes any
29 importance to whether the word "State" is capitalised or not. Here it is, in the original
30 agreement it is not, so that is a change. Then in the last four lines you will see proposes - if I
31 may refer to it as the Schunk language in effect.
32 THE CHAIRMAN: No, it is not necessarily, because it is only the end delivery, so it does not matter
33 where it was manufactured.
34 MR. OSGOOD: Correct, but it is the general concept that we are going to carve out of the release
35 non-US delivered product. Then it goes on to say:

1 "Nothing in this Agreement shall discharge any claim that relates to any purchase of
2 Electrical Carbon Products by the Plaintiffs from the Morgan Defendants, the end
3 delivery of which occurred outside of the United States."
4 So that stands in contrast to what was agreed. There was a very clear attempt to limit the
5 release which was unsuccessful from the perspective of the claimants.
6 There was a third example of how one might limit the release, the broad release language that
7 we referred to. For that I will not refer to a specific agreement, I will refer only to the written
8 submissions to the Panel of SGL. As you know, you invited submissions on behalf of the
9 second and third defendants. SGL submitted written observations in respect of today's
10 hearing, and you will find at para.11, p.4, of their written submissions the following statement:
11 "The US settlement between SGL and the Claimants is not in the same terms as the
12 Morgan settlement. The SGL settlement did not extend to claims relating to sales of
13 Electrical Carbon Products from a facility located outside of the US and the end
14 delivery of which occurred outside the US."
15 THE CHAIRMAN: So they did not enter into the standard form Settlement Agreement?
16 MR. OSGOOD: No, they did not. With respect to the claimants, what we learned from para.11 is
17 that there was another arrangement, a more limited release.
18 THE CHAIRMAN: We get that from para.15 as well.
19 MR. OSGOOD: Yes, indeed. So the US settlement that Morgan entered into had no carve-out like
20 the Schunk redacted Settlement Agreement, or apparently like the SGL Settlement Agreement.
21 Just to round off this discussion, we need to look at the stipulation of dismissal, which is also
22 in the April 17 skeleton, tab 3. It is behind the Tolling Agreement at annex A, and I invite
23 your attention to para.2:
24 "Plaintiffs and the Morgan Defendants shall adhere to and be bound by all terms of
25 the Settlement Agreement entered into on February 3, 2005 … and the terms of the
26 MDL Settlement shall apply with full force and effect as to the Plaintiffs and the
27 Morgan Defendants, including without limitation the release terms of paragraphs 21
28 and 22 thereof …"
29 THE CHAIRMAN: When one looks at that Settlement Agreement, 3rd February 2005 was before the
30 Emerson claim was commenced?
31 MR. OSGOOD: Correct.
32 THE CHAIRMAN: So all one is looking at at that stage is the class action which did not include
33 foreign claims?
34 MR. OSGOOD: I beg to contradict. The original class action complaint did allege foreign claims,
35 and if that was not clear in our submissions we would like to make that very clear. The

1 allegation was that it was a worldwide cartel that fixed prices not only in the United States but
2 elsewhere, and it claimed injury from this international cartel. It was not limited to US
3 purchases or product delivered in the US or product manufactured in the US. It was a
4 wholesale allegation of a wholesale conspiracy in the United States, and the words kept
5 repeating "and elsewhere".
6 We made sure, when we had the stipulation of dismissal with these claimants in the United
7 States, that they would be bound by para.21. That was the negotiation. That is what the
8 Tolling Agreement is really about. My friend says it is of no effect. Well, it certainly was of
9 some effect for us, because that is what they were required to do, accept the terms of para.21.
10 THE CHAIRMAN: Schunk, etc, did not accept it?
11 MR. OSGOOD: Schunk, for reasons that I cannot get into and do not know, sought another ----
12 THE CHAIRMAN: They managed to force another agreement?
13 MR. OSGOOD: They managed to force a less attractive agreement, because their release ----
14 THE CHAIRMAN: Less attractive to you?
15 MR. OSGOOD: Less attractive to Schunk, more attractive to my friends at the end of the table, and
16 apparently the same with SGL. They agreed to do what we refused, in other words. So they
17 are bound by this language. I do not know whether the Tribunal would like me to go through
18 the language?
19 THE CHAIRMAN: You have done it in your written submissions.
20 MR. OSGOOD: We have. We have done it, I think, quite carefully in the skeleton of April 17.
21 THE CHAIRMAN: I am not saying that we accept what you say.
22 MR. OSGOOD: I understand. The only point I would make, and I will not repeat the skeleton, is
23 that the last phrase is in the alternative.
24 THE CHAIRMAN: The last phrase being?
25 MR. OSGOOD: The last phrase in para.21, and I think this is a significant point. Again, if we go to
26 the release terms, which is tab 1.
27 THE CHAIRMAN: I have got it, p.9.
28 MR. OSGOOD: Page 9, seven lines from the bottom.
29 THE CHAIRMAN: "Or that are in any way connected", that is your point?
30 MR. OSGOOD: Yes, that is a separate and independent clause that is extremely broad, and if you
31 had any doubt about the efficacy of the prior language in para.21 it should be resolved in
32 favour of Morgan, given the alternative language which says that if the fact of the conspiracy,
33 the worldwide conspiracy which they alleged, that is a fact that was in any way connected to
34 the litigation it was in fact connected ----

1 THE CHAIRMAN: Well that brings us back to *Empagran*, because if it is a non-*Empagran* claim,
2 then it may not be in any way connected with any fact, circumstance or statement, because that
3 is rather the words used – sort of – in *Empagran*.
4 MR. OSGOOD: You see I have a little difficulty with the chronology when you mention *Empagran*,
5 because Morgan entered into a Settlement Agreement which required them to agree to the
6 provisions of para.21 and, at the same time, entered into a Tolling Agreement which said that if
7 you bring a claim it has to be a claim exclusively outside the United States, and you cannot
8 have asserted it before. Now, why would we agree to enter into an agreement with them which
9 was contingent on a future proceeding in which we are not a defendant but there is another
10 party that may make a motion or may not make a motion.
11 THE CHAIRMAN: No, you were a party before the stipulation of dismissal.
12 MR. OSGOOD: But we are not a party to this *Empagran* motion.
13 THE CHAIRMAN: I am talking about the *Empagran* decision, I am not talking about the *Empagran*
14 motion in this case. I am talking about the original *Empagran* decision which says that some
15 non-US claims are in and some, what could be classified as non-US claims are out.
16 MR. OSGOOD: But the Tolling Agreement that was not phrased in terms of if a Judgment of a court
17 finds that those claims could be asserted it was claims asserted, and they were asserted in the
18 first case, they were asserted in the second case, and they have been asserted here a third time.
19 MR. SCOTT: Just sticking with the stipulation of dismissal, it goes on to para.3, which is seen to be
20 already envisaging there is going to be an argument taking place and discussing what you are
21 going to agree between you is or is not admissible in that argument.
22 MR. OSGOOD: Yes, sir, that is exactly right, because we were asked to limit the release as was
23 Schunk and SGL. We refused. Of course, we said in that document: "The fact that we sign
24 this document cannot be read as agreeing to anything. You are still bound by the terms of
25 para.21 of the first Settlement Agreement", and that is what they signed. So, yes, we
26 anticipated there would be this dispute, we did not know that it would be today before this
27 Tribunal, but it was clearly on everyone's mind.
28 MR. SCOTT: And furthermore, the other Settlement Agreements were public; I cannot remember
29 the exact chronology but what is in my mind is that at some juncture you knew that foreign
30 claims in relation to the other defendants were still an open possibility and that as a co-
31 conspirator you might be brought back into those, but presumably you had no settlement with
32 the co-defendants in the United States to bar them from joining you in proceedings in relation
33 to foreign claims?
34 MR. OSGOOD: That is correct.

1 MR. SCOTT: So what you thought you were doing was protecting yourself from direct action by the
2 Emerson complainants?
3 MR. OSGOOD: Yes, sir.
4 THE CHAIRMAN: You knew there was a dispute of this sort because that is dealt with in 3.
5 MR. OSGOOD: Yes.
6 THE CHAIRMAN: So both of you had a different interpretation and at some point somebody like
7 us has to decide it, and we have to decide it on the right materials, and to decide it on a
8 summary basis it has to be absolutely clear and so far I cannot see that it is absolutely clear.
9 MR. OSGOOD: It is our respectful submission that the plain meaning of the words in these
10 agreements bring you to the conclusion that these claims were released, the Tolling Agreement
11 is ineffective ----
12 THE CHAIRMAN: That depends.
13 MR. OSGOOD: In any event, if it were effective it cannot vary the jurisdiction of it.
14 THE CHAIRMAN: It depends whether you are right about "… arising under the anti-trust laws of
15 the United States, of any state or other jurisdiction or under any similar statutory or common
16 law …" etc. and you are right about: "… or arise out of any alleged unlawful conspiracy."
17 That is what you rely on and it is whether what you say about those, that that is wider than
18 within the United States, is correct?
19 MR. OSGOOD: Yes, of course, that is the issue, and I think we argue on the plain meaning of those
20 words in para.21 and we leave it to the distinguished members of the Tribunal to decide the
21 question.
22 One final comment: we have given you materials that we say demonstrate that the claimants
23 themselves say their US claims are inextricably bound up with their European claims. I will
24 not belabour that point at the moment, but I think if one refers to the memoranda that our
25 friends have submitted to the US court, to Mr. Murphy's eloquent argument before Judge
26 Simandle, I think you will come away from a review of those papers with the idea that they
27 said this was all connected, related, all one big ball of wax.
28 THE CHAIRMAN: Shall we hear why they say that you are wrong? Or have you some more
29 submissions?
30 MR. OSGOOD: I think with that, those are my current comments on settlement.
31 THE CHAIRMAN: Thank you. I think we are going to have a five minute break and then we will
32 hear your submissions, which I hope will be focused on answering what has been said. Thank
33 you very much.
34 (Short break)
35 THE CHAIRMAN: Mr. Spitz?

1 MR. SPITZ: Thank you, madam. In relation first to clause 21 of the Morgan Settlement Agreement,
2 two points: first, identical settlements with the same release language were concluded with
3 Schunk, SGL and Morgan, and this clause 21, the release terms in clause 21 applied to the
4 Settlement Agreements that were concluded in relation to the class and those defendants.
5 What subsequently took place was that separate Settlement Agreements were then concluded
6 with Schunk and SGL and a Tolling Agreement was concluded between Morgan and Emerson.
7 The Schunk release is in fact broader in its terms than the release under clause 21 because the
8 Schunk Settlement Agreement, and in particular clause 5 thereof, provides a release of certain
9 claims that encompasses not just the United States but Canada, Mexico and any province of
10 either of those. This wider release was obtained because Schunk was willing to pay extra
11 consideration for it.
12 THE CHAIRMAN: I do not quite understand – I am just looking at the recitals. They entered into
13 this Settlement Agreement apparently on December 17th, 2004.
14 MR. SPITZ: Yes, and the class settlement. The Schunk Settlement Agreement and the terminology
15 is confusing, but the document headed “Settlement Agreement and release” involving Schunk.
16 THE CHAIRMAN: The one that has just been handed up?
17 MR. SPITZ: Yes, was concluded on 28th February 2006.
18 THE CHAIRMAN: I understand that, but if you look at the recital the last recital on the first page
19 says that “… on December 17th 2004, the Schunk defendants entered into ----”
20 MR. SPITZ: Yes, madam, the agreement that is referred to in the last of those recitals concluded on
21 December 17th, 2004, that is the class settlement as it pertained to Schunk. That class
22 settlement contains the identical release language ----
23 THE CHAIRMAN: As para.21.
24 MR. SPITZ: Exactly.
25 THE CHAIRMAN: That is what I understand. So they entered into that, and then what happened?
26 MR. SPITZ: And then they entered into in February ----
27 THE CHAIRMAN: They started another action?
28 MR. SPITZ: Yes, then they started – and then Emerson opted out of the class settlements.
29 THE CHAIRMAN: No, what about Schunk?
30 MR. SPITZ: Well Schunk could exercise walk away rights. If a certain percentage of the claims,
31 which had been encompassed in the class settlement were removed from the class settlement
32 by virtue of the exercise of an opt out right. That opt-out right was exercised and the Carbone
33 Lorraine plaintiffs opted out and issued their own complaint. At that point the defendants were
34 threatening to exercise their own walk away rights and after that agreements were reached and
35 the Carbone Lorraine claimants opted back in and among the agreements that were concluded

1 were this agreement and an SGL agreement which, as we have made the point, is confidential,
2 and the Tolling Agreement in relation to Morgan.
3 In return for obtaining the release in clause 5 that extended to cover all of North America
4 Schunk paid a different consideration.
5 THE CHAIRMAN: Sorry, I still do not understand how – they entered into a Settlement Agreement
6 in 2004 and then what happened? They then opted out – is that right? So you enter into the
7 Settlement Agreement and then you opt out, that cannot be right. Can you just take
8 instructions because I think Mr. Murphy is trying to explain it to you.
9 MR. SPITZ: (After a pause) Yes, indeed, if it was not clear the way that I put it, I apologise.
10 THE CHAIRMAN: Do not worry, do not worry, it is rather complicated.
11 MR. SPITZ: It is rather. What took place was that the class Settlement Agreements were concluded
12 by class counsel acting for the class plaintiffs. Crowell & Moring plaintiffs were part of that
13 class, they then decided to opt out.
14 THE CHAIRMAN: Yes.
15 MR. SPITZ: Schunk did not do anything, but Schunk and the other defendants had the right to walk
16 away from the settlement.
17 THE CHAIRMAN: Yes, I understand that. Yes, right, go on.
18 MR. SPITZ: As I have said, there is no separate Settlement Agreement between Emerson and
19 Morgan, there is a Tolling Agreement instead, so one needs to compare the Tolling Agreement
20 to the separate Settlement Agreements.
21 As far as Emerson is concerned, the only release language is the release language in clause 21
22 of the class settlement.
23 THE CHAIRMAN: Yes.
24 MR. SPITZ: When one looks at that language the gateway provision is this requirement that the
25 claims must arise under the anti-trust laws of the United States, or any state or other
26 jurisdiction and I am not going to read the rest of it.
27 THE CHAIRMAN: I think you have to because what is being said is that "… or that in any way
28 connected …" is separate.
29 MR. SPITZ: Yes, it is. The necessary condition for the gateway is that one must establish that the
30 claim arises under the anti-trust laws of the United States, and there is a debate about the
31 meaning of that – whether this entire reference to the anti-trust laws of the United States, any
32 state or other jurisdiction whether that goes beyond the United States, the several states, and
33 those bodies ----
34 THE CHAIRMAN: Washington and Puerto Rico, etc.

1 MR. SPITZ: There is a debate about that. But that is the necessary condition which must be
2 established, and then if that is established one goes on to: "… and which relate to or arise out
3 of any alleged unlawful conspiracy, or that are in any way connected with any fact,
4 circumstance or statement."
5 THE CHAIRMAN: Yes.
6 MR. SPITZ: That is the way that we suggest that this provision ought to be read.
7 THE CHAIRMAN: So you say that if "anti-trust laws of the United or of any state or other
8 jurisdiction or under any similar …" etc only relate to US, i.e. states, Washington, Puerto Rico,
9 etc.
10 MR. SPITZ: Indeed.
11 THE CHAIRMAN: Then you never get to the rest of it?
12 MR. SPITZ: That is exactly right, that is the short point that we advance. It is only if we fail on that
13 that the others become relevant and then this debate between the two parties in relation to what
14 relates to or arises out of an alleged conspiracy to fix prices in the United States. We say that
15 that is the proper interpretation when one has regard to the scope of the class complaint that
16 this is settling.
17 THE CHAIRMAN: You say therefore that this release only relates to it arising under that anti-trust
18 law and of course the *Empagran*-included foreign claims would arise, so we are back to
19 squaring that circle again, which means that we need possibly to see – but then why did the
20 Judge and the conversation between the Judge and Mr. Murphy say that all European stuff was
21 excluded? We now know that Mr. Osgood was not actually saying he was agnostic about that,
22 it was something else, and so he did not make any comment.
23 MR. SPITZ: Well this goes back to the submissions that I was advancing earlier. We say that what
24 the Judge decided was that the scope of the release was confined to purchasers in the United
25 States or from a facility in the United States – that is the meaning that the Judge gave to this
26 release and he had to do that in order to assess the reasonableness of the settlement that he was
27 approving. In fact, we say we are in the terrain of issue estoppel here on the basis of what the
28 Judge had said – it was not *obiter*, it was a necessary step in his reasoning to reach the
29 conclusion where he could sign off on the settlement and that was why the settlement fund is
30 defined only in terms of US purchasers and not purchasers beyond that.
31 THE CHAIRMAN: Just one minute. (After a pause) Yes.
32 MR. SPITZ: That then is the long and the short of it from our point of view. Two steps in relation to
33 the release terms. One, issue estoppel on the basis of that Judgment, final judgment, it is
34 described that way – "final order", necessary step in the reasoning. Two, one reads the
35 "arising under" as the gateway and one does not get through the gate.

Those then are our submissions on the scope of the release.

THE CHAIRMAN: Thank you very much.

MR. SPITZ: Thank you.

THE CHAIRMAN: We know you say that is wrong!

MR. OSGOOD: Just one comment my colleague interprets the phrase in para.21 as being quite limited, that is the phrase: "Anti-trust laws of the United States or of any state or other jurisdiction", I think if one looks at para.22 we have there ----

THE CHAIRMAN: The Californian problem.

MR. OSGOOD: Yes, and there we have the phrase: "… by any law of any state or territory of the United States …." which is different. It is a different expression and it makes clear that it is a State of the United States. That should be contrasted with the phrase used in para.21. It does not say that it is a State of the United States, it says "any State or jurisdiction", and we contend that this is obviously another jurisdiction.

THE CHAIRMAN: What is a territory of the United States? Is that Puerto Rico?

MR. OSGOOD: Puerto Rico, I think that is all there is any more.

THE CHAIRMAN: Hawaii is a State, is it not?

MR. OSGOOD: Hawaii is the 50th State.

THE CHAIRMAN: It is the last State, or is Alaska the last State?

MR. OSGOOD: Hawaii was 49th, yes, and Alaska is the 50th, and that is enough.

MR. SCOTT: I think there may be a few Pacific territories that still have governments.

THE CHAIRMAN: There is - I am going to get this wrong.

MR. SCOTT: Wake Island.

THE CHAIRMAN: There are the US Virgin Islands Are they territories, those things?

MR. OSGOOD: I am out of my depth.

THE CHAIRMAN: In order to construe this we would need to know that.

MR. OSGOOD: I think that is only if you interpret it as being limited to US territories and US States, and that is not our proposition.

THE CHAIRMAN: It would be "Territory of the United States or by any law of any State or Territory of the United States".

MR. OSGOOD: That is the language of para.22, yes.

THE CHAIRMAN: In order to interpret 22 we need to know that.

MR. OSGOOD: I think we will stipulate that we are currently not in a territory of the United States. King George III had something to say about that. This is a Tribunal in a territory that we say is found under para.21, that is that claims have been released with respect to competition law that have been brought in this territory or other state.

1 THE CHAIRMAN: We are not a state, we are a country or a kingdom.
2 MR. OSGOOD: In international law terms one would refer to the United Kingdom as a state. That
3 is not the controversy. The controversy here is how one interprets the words "United States or
4 any State or other jurisdiction" ----
5 THE CHAIRMAN: Or under similar statutory or common law.
6 MR. OSGOOD: My point has been, and forgive me if I repeat it, that the oral language at the end in
7 effect says "or any claims that are in any way connected with" - any claims - "any facts,
8 circumstance, statement, event or matter of any kind that was raised or referred to, or could
9 have been referred to in the litigation.
10 MR. SCOTT: In saying that, what you are suggesting is that when the learned District Judge
11 referred to the "maximum damages" in the course of his opinion, which *prima facie* look as
12 though they are the maximum damages in relation to United States causes of action, he was not
13 thereby making an assumption about the meaning of this paragraph.
14 MR. OSGOOD: Certainly he was not. He was protecting the members of the class, and the
15 constituent members of the class is a different issue than what claims were being settled. We,
16 on behalf of Morgan, settled all the claims that were brought. One does not settle a case as a
17 practical matter without setting the whole case. We settled all the claims that were brought in
18 the first action and in the second action, and that is why we were at great pains to ensure that
19 my friends were bound by the language of the release in para.21.
20 THE CHAIRMAN: That depends on what that language means. Can I just ask you, if the first class
21 action included the foreign claims, if I can call them that, then why did they need to bring the
22 second action?
23 MR. OSGOOD: Procedurally, in the United States they elected to bring a separate case, and they
24 brought it, I believe, in Michigan for reasons that are not entirely clear to me. Maybe one of
25 them ----
26 THE CHAIRMAN: Anyway, it all got sent to ----
27 MR. OSGOOD: The Multi-District Panel then sent it to the main show in Camden New Jersey.
28 That allowed them to assert their claims as class members and be part of this very large
29 settlement that was in discussion ----
30 THE CHAIRMAN: By sending it off. Why did they need to start the action anyway? Maybe I
31 should ask Mr. Spitz.
32 MR. OSGOOD: I wish they had not!
33 THE CHAIRMAN: I know you wish they had not, you wish you were not here! Mr. Spitz, can you
34 explain that? It is something that we raised between ourselves.
35 MR. SPITZ: My understanding is that the original class complaint ----

1 THE CHAIRMAN: Did not include the foreign claims?
2 MR. SPITZ: That is right, because it says, if one looks at para.1, under "Nature of the case" ----
3 THE CHAIRMAN: I think you need to start again, because none of that went into the microphone.
4 MR. SPITZ: If one looks at the class complaint and begins under "Nature of the case" at para.1, one
5 sees there:
6 "This law suit is brought as a class action on behalf of all persons that purchased
7 electrical carbon products defined below in the United States directly from the
8 Defendants."
9 One then turns over the page and looks at the injury that is at issue here, and one sees the
10 words:
11 "Because of the Defendants' unlawful conduct, Plaintiffs and the other class members
12 paid artificially inflated and supra-competitive prices for electrical carbon products in
13 the United States and as a result thereof have suffered anti-trust injury to their
14 business and property."
15 I think it is because of that that it was necessary to issue a separate complaint that was more
16 expansive.
17 THE CHAIRMAN: That is my understanding, but it is not what Mr. Osgood was saying.
18 (The Tribunal conferred)
19 THE CHAIRMAN: It has just been pointed out - I am not sure it takes us any further - that in the
20 Schunk settlement, para.5, we have got "of the United States or of any State thereof, Canada or
21 any province or territory thereof, Mexico, or any province thereof, or any other jurisdiction
22 which had been of", so they have all been specified. I think this raises the question of
23 admissibility of evidence and what we actually can take into account and whether we can look
24 at the Schunk settlement in order to interpret it, whether we can look at your negotiations and
25 that document or not, whether we can look at the witness statement that was put in. These are
26 all interesting areas that I do not know the answer to and you would want to make submissions
27 as to whether or not we can, and as to what we should be taking into account in order to
28 construe it. You say it is simple, all we need to do is look at these words and that is the end of
29 it.
30 MR. OSGOOD: I would revert back to some comments made this morning. If we are right as to
31 Rule 31 and the two year time period, if we are right that it is jurisdictional ----
32 THE CHAIRMAN: So we get to the permission point.
33 MR. OSGOOD: ---- then they are out of time unless they can establish ----
34 THE CHAIRMAN: That it had not yet started.

1 MR. OSGOOD: And it is their burden that the Tolling Agreement is effective. That seems to me a
2 way through in terms of decision making. Alternatively, another way through is to read the
3 plain language of para.21 of the Settlement Agreement and say the claims have been released.
4 THE CHAIRMAN: I think we are probably still, using your language, agnostic about it.
5 MR. OSGOOD: One area where we would like to make an additional submission is on the
6 allegations of the original complaint, if that is not yet clear. We would obviously respond to
7 any other issues ----
8 THE CHAIRMAN: Have we had all the submissions today? Yes. I think what we will do is rise
9 for, say, ten minutes and we will consider what we are going to do. We will come back and
10 discuss with you what we are going to do, whether we can do it on the material now or whether
11 we need something else. Is that all right?
12 (Short break)
13 THE CHAIRMAN: First, we are still not persuaded that the claim is bound to fail because of the
14 Settlement Agreement. We are not persuaded at the moment that the words in clause 21
15 necessarily include the claims in this Tribunal. If the defendant seeks to persuade us otherwise
16 then we would need to consider the proper construction of the Settlement Agreement; what
17 evidence is admissible to cover the background against which it should be construed. We
18 would need a comprehensive piece of chronology of all the events leading up to the date of the
19 approval of the Settlement Agreement on 30th August 2006 including all the matters to which I
20 referred at the beginning.
21 We would need submissions on the admissibility of Mr. Sedrun's witness statement, and if
22 admissible there is a question of whether he ought to be cross-examined – I do not know if the
23 Defendants would want to apply for that.
24 It may be that delving into the case in that way is not appropriate for a Rule 40 application and
25 a decision under Rule 40 and that perhaps the Tribunal's present view should become the
26 decision under Rule 40. But since evidence was put before us by both sides without addressing
27 the admissibility of that evidence, it seems to us only appropriate that the parties should, if they
28 wish, have effectively a second bite of the cherry. That is our present view on the Settlement
29 Agreement.
30 Secondly, we are not minded to give any decision until the Judgment in the Carbone litigation,
31 which is awaited, becomes available, since that decision may throw light on the proper
32 construction of the Tolling Agreement. In that regard we are also concerned that we are not
33 fully apprised of what the subject matter of either the class action or the Emerson complaint
34 was, in particular we are confused as to whether either included non-*Empagran* claims, so we
35 would like submissions which clearly deal with those points and which identify the relevant

1 passages in the documents before the US courts and any passages in the Judgments of the US
2 courts.
3 We would also like submissions, as I said earlier, on the phrases "sales made outside the US"
4 which is in the stipulation of dismissal and purchases in the US which is in the Settlement
5 Agreement.
6 We are also concerned about the basis upon with the Judge approved the settlement, and we do
7 wonder whether this is a matter which should be referred back to the Judge for clarification
8 before we give any Judgment.
9 That rather leads me to the question of what directions I give today. I want to say one thing
10 before we do that, so I do not forget at the end to say it. We were very pleased to see Mr.
11 Murphy here and with no disrespect to those who are officially representing the claimants we
12 just thought that we should mention for the sake of equality of arms that we would be prepared
13 to consider an application by Mr. Murphy to appear before us in the same way as we
14 considered an application by Mr. Osgood and on the same basis and terms that we have done
15 that we would consider an application for Mr. Murphy to appear before us. I thought we
16 should just say that so that there was no misunderstanding.
17 MR. MURPHY: Thank you very much.
18 THE CHAIRMAN: That leads us to directions. Firstly, we do not know when this Judgment is
19 going to become available – does anybody have any idea? I do not mind Mr. Murphy
20 addressing us if necessary.
21 MR. MURPHY: Judge Simandle informed the parties approximately two weeks ago of what his
22 decision would be, that he would issue a written opinion and he expected that in the next
23 several weeks. So I would guess within the next month or two.
24 THE CHAIRMAN: So it is either the end of June or some time in July.
25 MR. MURPHY: I believe that is right.
26 THE CHAIRMAN: Because any timetable is rather predicated on that. What we were thinking was
27 first, we need the Judgment, secondly, there should be further submissions – probably
28 consecutively because I think that is probably better than both come in and then they have to
29 be answered, - both on the effect of the US Judgment and also on any other matters which have
30 arisen today on which one wants to make further submissions. Then I think we have to
31 timetable a further hearing. It may be we can do it on the papers, it may not, and that depends
32 on how it is approached.
33 We are very happy to hear submissions on what I have said if you want to persuade us to go
34 some other route. Mr. Osgood?

1 MR. OSGOOD: We are happy to follow the guidance that you have outlined. I take it that as you
2 said everything would be keyed off the further Judgment in the United States and we would set
3 time periods from the receipt of that opinion ----
4 THE CHAIRMAN: Yes, that means of course I cannot fix a hearing because we do not know when
5 the Judgment – unless we plumb for September and say we will definitely have it by
6 September and that will be all right and then we can work backwards.
7 MR. OSGOOD: Yes, well I have severe problems in July.
8 THE CHAIRMAN: I do not think we can do it in July because we are not going to have the
9 Judgment.
10 MR. OSGOOD: I think my friends have problems in August as others may, so I think we are
11 probably over into September actually almost regardless of when Judge Simandle will issue his
12 Judgment. Perhaps what we ought to do, if I may suggest it, is assume that we could have
13 either written submissions or a conference call with respect to the schedule after the decision
14 comes out.
15 THE CHAIRMAN: All we can say is we will have written submissions by one side 21 days after the
16 decision comes out and by the other side 14 days or 21 days after that and that we will fix a
17 hearing as soon as possible after that.
18 MR. OSGOOD: The only difficulty I see with that is if the decision should come out tomorrow and
19 we have something to do in 14 days it is going to be extremely difficult because I am going to
20 be in Washington, Africa and Italy in the next four weeks.
21 THE CHAIRMAN: A lot of it is legal and Mr. Rayment may be able to help you. Let us see what
22 Mr. Spitz says about all this?
23 MR. SPITZ: We are satisfied with the suggestion that has been made and it probably does make
24 sense to have a time period of whether it is 21 days or some other time period that will operate
25 once the Judgment comes out because that way we will not have to reconvene.
26 THE CHAIRMAN: And if Mr. Osgood or his team, or your team are in difficulty we will have to
27 see how the timetable works. We do not want this thing to go off indefinitely, and I think it
28 would be unfortunate if it went off beyond September. So we could put in a date in September
29 and hope we will be able to meet it. You are thinking, Mr. Osgood?
30 MR. OSGOOD: Yes, I am thinking about if you want the defendant to go first – I am not sure
31 whether that was your view – or whether you want the claimants to present their views first,
32 and then for the defendants to respond.
33 THE CHAIRMAN: I do not know what your feeling is about whether you are going to be able to
34 persuade us, or whether you want to try and persuade us further on the Settlement Agreement.
35 MR. OSGOOD: Hope springs eternal and I would like to take an opportunity ----

1 THE CHAIRMAN: I am concerned, we were not addressed at all on construction of agreements,
2 etc.
3 MR. OSGOOD: And there are several other issues of course. There is the issue which I suspect the
4 Tribunal could deal with without any other submissions and the effect of the appeals that are
5 pending, one could cut through this ----
6 THE CHAIRMAN: Yes, but we would still get to the Tolling Agreement and we have to give a
7 comprehensive Judgment. I thought about doing that but I am not prepared to do it. I think it
8 would be better to wait until we get the Judgment and then see.
9 MR. OSGOOD: There is a way to do it without ever addressing the Tolling Agreements. If Rule 31
10 means that once there is an appeal pending that goes to the underlying basis of liability by any
11 party it is too early to bring a claim in this Tribunal for money damages.
12 THE CHAIRMAN: Unless you get it to 47A(8) and then what we get, which we have not addressed
13 today, whether we ought to give permission, if we ever get to 47A(8).
14 MR. OSGOOD: Yes, there are other issues that the Tribunal could deal with. You could put to one
15 side the Settlement Agreement, there are other ways through this. I am not advocating those as
16 a position.
17 THE CHAIRMAN: We thought about that but I think it is better to deal with the whole thing. I
18 should point out we have not today dealt with, if we do need to give permission, or if it is not
19 out of time, or in time, or have both sides in it, whether we should stay it. Those have not been
20 dealt with today.
21 MR. OSGOOD: Madam, I would suggest this for your consideration: if you want the first defendant
22 to put in the first set of papers after the Judgment of the US court I would ask for a period of
23 30 days.
24 THE CHAIRMAN: From the date of the Judgment.
25 MR. OSGOOD: Yes, from the date we receive the Judgment, or the date of the Judgment – it should
26 be pretty soon thereafter. If we run into some severe problems we would like to be able to
27 come back to you and say: "We need 45 rather than 30".
28 THE CHAIRMAN: I do not think an extension above 30 will be listened to very sympathetically
29 and I am not sure we would allow 30 anyway – we will think about it in a moment.
30 MR. OSGOOD: But I am trying to avoid having this occur in the middle of some difficult summer
31 months when other people, including my very able barrister who advises me and guides me in
32 all of these matters may want some vacation.
33 THE CHAIRMAN: He knows better than to ask for it! (Laughter)
34 MR. OSGOOD: But perhaps you want to listen to the claimants and the claimants should go first.

1 MR. SPITZ: Well since the application in relation to Rule 40 is their application it probably makes
2 sense for them to go first. Perhaps one might consider scheduling a hearing for the end of
3 September. One cannot be certain about it, depending on the Judgment, but perhaps that is a
4 good idea and then one can work backwards towards the two dates for the sets of submissions.
5 THE CHAIRMAN: If we start with the date of the Judgment being published – you are going to get
6 copies of that Judgment immediately, are you not, because you are a party to it?
7 MR. SPITZ: Yes.
8 THE CHAIRMAN: So you can provide it to Morgan Crucible and the Tribunal?
9 MR. SPITZ: Yes, we can.
10 THE CHAIRMAN: So if we say that there should be written submissions, and of course, you cannot
11 do that before the Judgment, but in relation to the other matters you can prepare that now so it
12 is not an ongoing problem, that can all be prepared. So if we say 21 days from the date you
13 received the Judgment, because I assume you will hand deliver it?
14 MR. SPITZ: Yes, we will.
15 THE CHAIRMAN: (After a pause) So I have said 21 days from the date of receipt of the Judgment
16 further submissions of the defendant to include submissions on the Judgment and any further
17 submissions (if any) on the issues in the applications before us. How long do you need, Mr.
18 Spitz?
19 MR. SPITZ: 21 days, I think.
20 THE CHAIRMAN: You want 21 days as well?
21 MR. SPITZ: Yes.
22 THE CHAIRMAN: So 21 days from receipt of defendant's further submissions, claimants'
23 submissions in response.
24 MR. SPITZ: Yes. 10 days to reply?
25 THE CHAIRMAN: 10 days for any submissions in reply by defendant. That gives us 50 days
26 which, if the Judgment comes in by the end of July, we have August, which is 31 days, and
27 that would take us to something like 20th September would it not? 26th September? Is that all
28 right?
29 MR. SPITZ: Thank you, that is fine, yes.
30 THE CHAIRMAN: I did mention the question about the Judge and on what terms he approved the
31 settlement. What do you think we ought to do about that?
32 MR. SPITZ: This is in relation to your question about whether there is room for further explanation
33 in relation to ----
34 THE CHAIRMAN: There are references to the fact that he may have approved it on the basis that it
35 did not contain any of this. On the other hand, if that is right there are other references that

1 might go the other way. He is the one who will know on what basis he approved it. I do not
2 want to know what he thinks, but if he has got some documentary evidence - he said that non-
3 US claims are not included in the introduction to his judgment, and you would have thought
4 that was the basis on which he was doing it. If that is what was represented that may throw
5 light on all this.
6 MR. SPITZ: I think that the parties between them ought to be able to compile all the materials that
7 were before the Judge.
8 THE CHAIRMAN: Then we are pre-empting it by saying, "This is what the Judge must have
9 thought", whereas we could go to the Judge.
10 MR. SPITZ: I am not in a position to say whether there is provision to go back to the Judge for
11 clarity.
12 THE CHAIRMAN: He has retained jurisdiction in relation to the enforcement of the Settlement
13 Agreement, yes, indeed.
14 MR. SPITZ: Perhaps we can hear from a US colleague on whether it is possible to make that sort of
15 approach.
16 MR. OSGOOD: Since this is a new idea that has come up only today, I would like to take that under
17 advisement and give it some thought.
18 THE CHAIRMAN: I thought you would. I do not know what Mr. Murphy thinks. You may not
19 want to say anything at the moment, but we are rather concerned about this. If he has done it
20 on one basis and we turn out to do it on another basis that is not appropriate.
21 MR. MURPHY: I actually agree with Mr. Osgood, Madam, we would like to take it under
22 advisement. Perhaps the parties can talk about this and propose a way that we could address
23 the concerns of the Tribunal.
24 THE CHAIRMAN: It would be unfortunate if we said one thing and the Judge had actually done
25 something completely different.
26 MR. MURPHY: Correct.
27 THE CHAIRMAN: It is very annoying to Judges when they read other judgments that say they have
28 done something and they have not actually done it.
29 MR. MURPHY: We would agree to meet with our colleagues and see if we could come up with
30 something that would satisfy the Tribunal.
31 THE CHAIRMAN: I will not put anything in the order, it is in the transcript. If we can be of
32 assistance - one of the things that could happen is that we could write to the Judge.
33 MR. MURPHY: If we could just take it under advisement.
34 THE CHAIRMAN: And see what is best. Thank you. Is there anything else?

1 MR. OSGOOD: Thank you, Madam Chairman, I do not have anything else at the moment, but we
2 appreciate your patience with us. I also very much appreciate your indulgence in the sense that
3 you have allowed me to appear before you, and I am very grateful. I am grateful for the very
4 able assistance that I have had from my colleague from Monkton Chambers, from my
5 colleague, Mr. Dunleavy, and from our litigation assistant in the office, Rachel Laurie. Thank
6 you to you all.
7 THE CHAIRMAN: We will see you again on 26th September.
8 MR. SPITZ: Yes, thank you very much.
9 ________
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