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C O N T E N T S

PAGE

PRELIMINARY MATTERS.....6

WITNESS:

JODI-ANN STEPHENSON

Direct examination by Mr. Pantin.....18

Cross-examination by Ms. Davis.....22

Redirect examination by Mr. Pantin.....32, 35

CLOSING ARGUMENTS

ON BEHALF OF THE CLAIMANT:

By Mr. Pantin.....38

ON BEHALF OF THE RESPONDENT:

By Ms. Davis.....46

REBUTTAL ARGUMENT

ON BEHALF OF THE CLAIMANT:

By Mr. Pantin.....55

TRIBUNAL DELIBERATION.....58

CLOSING REMARKS.....69

P R O C E E D I N G S

1
2 MR. FRANÇOIS LASALLE: Hello, everyone, and
3 apologies for the slight delay in starting this Mock
4 Virtual Hearing.

5 I just wanted to welcome you. The BVI IAC is
6 proud to work with an esteemed panel of practitioners you
7 can see here on the screen to present this webinar today.
8 But before we start, I wanted to briefly explain what we
9 are trying to achieve here:

10 Instead of having a panel conversation about how
11 to use Zoom or another software, we thought it would give
12 you a better feel to become a little mouse in a real fake
13 hearing. So, essentially, we wanted to demystify virtual
14 hearings and showcase the effectiveness and reliability of
15 individual hearings to resolve disputes in a time like
16 now, with the pandemic and all, but also in the future.

17 The BVI IAC has provided its services virtually
18 for over three years now, whether they be for hearings or
19 case management conferences or even fundholding services,
20 so this is not something new to us, and we thought it
21 would be a good idea to play this little game. The Mock
22 Hearing that you are about to witness is based on a case
23 scenario and is designed to address both the practical and
24 procedural issues which frequently arise when using
25 individual platforms, so we've planned some hiccups--a

1 loss of feed, a witness not playing ball with the
2 Tribunal, and things like that--just to showcase how to
3 deal with these situations in an individual setting.

4 Now, the last thing I wanted to mention is that we
5 faced some constraints to pull this off, and I wanted to
6 run you through a couple of noticeable differences that
7 are going to be with a real hearing:

8 First, because we only have two hours, we will not
9 go through everything you would find in a hearing. We
10 will focus on specific scenes and issues.

11 Second, in a normal individual set-up, we tend to
12 use multiple platforms and multiple screens for each
13 participant. So, for instance, we may use Zoom or WebEx
14 for the videoconference; we may use LiveLitigation for the
15 trial transcripts; and we may use TrialMax for the
16 presentation of electronic exhibits. And, as a result,
17 participants would usually use different screens and
18 log-in access to access these different platforms.

19 Now, for obvious reasons and for the purpose of
20 the audience being able to, you know, get a feel for how
21 things work in a real virtual setup, we could not
22 replicate the three-screen set-up and multiple log-in for
23 the audience, so we were are only using one platform for
24 this webinar. And this is LiveLitigation that you can see
25 on the screen, and it's an app that allows us to present

1 on one screen every component of a hearing, so you will
2 see the videoconference on one side, the live transcript
3 on the other side. We will be able to present exhibits,
4 as well.

5 It is important to note, however, that this is not
6 a normal set-up, and it has certain limitations. So, for
7 instance, the private deliberations the Tribunal would
8 normally take place in a completely different environment
9 in a separate platform with different log-in details,
10 although here we will just remove counsel and experts from
11 the screen to fake the situation so that you can actually
12 witness the deliberation.

13 And that's all I had to say. So, without further
14 ado, I will leave Calvin Hamilton to introduce the
15 participants, their roles as well as the scenario and the
16 flow of the Hearing.

17 Calvin, this is for you.

18 MODERATOR HAMILTON: Thank you, François.

19 Good morning, good afternoon, good evening to you
20 all, and thank you for joining us.

21 Rather than going through the introduction of the
22 individual participants, in the interest of time, I will
23 direct you to where you can locate--

24 (Sound interference.)

25 MR. FRANÇOIS LASALLE: Well, it looks like we had

1 our first technical issue.

2 Calvin, we've lost the feed for you, so we've lost
3 the video and the sound. This is a really good start.

4 MODERATOR HAMILTON: I am here. Can you hear me?

5 MR. FRANÇOIS LASALLE: We can hear you now.

6 MODERATOR HAMILTON: Fine.

7 I started to say--and apologies for that--I
8 started to say that, in the interest of time, I will not
9 belabor the issue of describing the different
10 personalities but direct you to the Web page of the BVI
11 International Arbitration Centre, and you can get all the
12 information on each and every one of us. That's all
13 there. But what I will do is go right into the program.

14 And, of course, remote participation in
15 arbitration proceedings is nothing new. The arbitration
16 community has used the remote connectivity over the past
17 years to accommodate witness testimony from a far-off
18 location. We have also conducted case management
19 conferences by videoconference or by telephone for a very
20 long time now. Prior to the pandemic, ICSID proceedings,
21 included a videoconference component.

22 During the first wave of the pandemic, evidentiary
23 hearings either had to be postponed or be conducted
24 remotely. In those circumstances, participants to a
25 dispute had to connect individually and separately from

1 different locations due to the Government-regulated
2 lockdowns. Over these past few months, we have also
3 witnessed an exponential increase in webinars and
4 conferences globally which were attended by most of the
5 arbitration community with very satisfactory results.
6 Virtual business meetings had become commonplace with
7 equal satisfaction.

8 Are we approaching an inflection point where
9 physical location is no longer relevant to successful
10 participation in arbitration? There are discussions on
11 the relevance of accepting virtual hearings in the
12 mainstream. Reservations, for the most part, have to do
13 with the security of the technology platform, the
14 integrity of the procedural process, including credibility
15 of the witness, and the enforceability of the awards.

16 Different time zones will always present a
17 challenge to this abrogated proceeding; but, on the other
18 hand, technological advances are making in-person assembly
19 ever less significant. What is certain is that we can now
20 meet and have hearings remotely and easily, and this
21 should allow us to question the conventional wisdom that
22 evidentiary hearings can only effectively be conducted by
23 face-to-face meetings.

24 Would it make sense to structure proceedings in
25 such a way as to benefit from the use of technology,

1 including the virtual platform? Would it make sense to
2 only agree in-person hearings where absolutely necessary?
3 Who will be responsible for ensuring the smooth work of
4 the technology application required?

5 Arbitration institutions are addressing some of
6 these questions through their Rules. For instance,
7 Article 17(1) of the Rules of the BVI International
8 Arbitration Centre gives broad discretion to the
9 Arbitration Tribunal to conduct the Arbitration, provided
10 the Parties are treated with equality, and each Party
11 given a reasonable opportunity of presenting its case.

12 Article 17(3) of the same Rule, the Tribunal is
13 required to conduct the proceedings so as to avoid
14 unnecessary delay and expense and to provide a fair and
15 efficient process for resolving the Parties' dispute.

16 Likewise, and importantly, Article 28(4) of the
17 Rules expressly provide for witness examination by the
18 Parties.

19 Section 44.3 of the BVI Arbitration Act provides
20 that the Arbitration Tribunal is required to act fairly
21 and impartially as between the Parties, giving them a
22 reasonable opportunity to present their respective case
23 and to deal with the cases of their opponent, and to use
24 procedures that are appropriate to the particular case,
25 avoiding unnecessary delay or expense so as to provide a

1 fair meeting for resolving disputes to which the arbitral
2 proceedings relate. The ICC and LCIA have made effective
3 changes to their rules to allow for the comprehensive
4 solution in favor of virtual hearings.

5 Our program today will identify some of the issues
6 that would arise in arbitration proceedings using a
7 virtual platform. We have received and reviewed the Fact
8 Pattern and other documents, including the Tribunal's
9 Procedural Order, which deals with many of the issues that
10 allow for seamlessness of the virtual platform.

11 So, before I turn the proceedings over to the
12 Tribunal, I just wanted to again remind that you that the
13 bios of the participants can be located in the
14 registration page of the BVI International Arbitration
15 Centre's website.

16 And without ado, it is now my pleasure to hand the
17 proceeding over to the Tribunal.

18 Madam Chair?

19 CHAIR REID: Good morning, everyone.

20 On behalf of my colleagues on the Tribunal,
21 Professor Janet Walker and Sir Dennis Byron, I welcome you
22 all to this evidentiary hearing in BVI IAC Case
23 No. 2020-10. We again, on behalf of the Tribunal, thank
24 the Counsel and Party representatives for both sides for
25 their effective and productive collaboration and, of

1 course, the BVI IAC for their very effective support to
2 enable this proceeding to proceed virtually, taking full
3 advantage of the technological means that are available to
4 ensure the fair and efficient and effective conduct of
5 these proceedings.

6 I will remind the participants that, because of
7 the platform on which this Hearing will proceed, we will,
8 of course, take into account any of the technological
9 requirements, and those include practical considerations
10 such as keeping your microphone on mute when you are not
11 speaking. They also, of course, include the
12 considerations reflected in Procedural Order No. 1, which
13 reflects the proposals, the Agreements of the Parties, and
14 the Rulings of the Tribunal regarding how precisely this
15 Hearing will proceed.

16 Before we go any further, could I have the
17 appearances of counsel for the record, please.

18 Claimant?

19 MR. PANTIN: Thank you, Madam Chairman,
20 Distinguished Panel. I'm Gregory Pantin. I'm counsel for
21 the Claimants in this Arbitration.

22 CHAIR REID: Thank you, Mr. Pantin.

23 For the Respondent?

24 MS. DAVIS: Tameka Davis, appearing on behalf of
25 the Respondent, BOT Energy.

1 CHAIR REID: Thank you, Ms. Davis.

2 Mr. Pantin, it appears I inadvertently cut you
3 off.

4 MR. PANTIN: No problem, Madam Chair.

5 So, may I proceed, Madam Chair?

6 CHAIR REID: Before you proceed, Mr. Pantin, just
7 to reflect for the record, the Tribunal received by e-mail
8 Claimant's application to lead limited evidence from your
9 Expert Witness through examination-in-chief. This will be
10 in addition to the Witness Statement that your Expert
11 Witness has already submitted. We take note of that
12 Application. We ask Respondent's counsel if Respondent
13 has any observations or objection to that Application by
14 the Claimant.

15 MS. DAVIS: No, Madam Chairperson. At this stage
16 we will obviously deal with that in our cross-examination.

17 CHAIR REID: Thank you very much, Ms. Davis.

18 Do we have the Expert Witness in our virtual room?
19 If not, Mr. Pantin, if you could ensure that your witness
20 joins the room.

21 MR. PANTIN: Thank you, Madam Chair. She's not
22 currently in the room, and I will make arrangements for
23 her to join.

24 Ah, here she is.

25 MR. PANTIN: With leave, I would like to call

1 Ms. Jodi-Ann Stephenson.

2 JODI-ANN STEPHENSON, CLAIMANT'S WITNESS, CALLED

3 CHAIR REID: Thank you very much, Mr. Pantin.

4 Good morning, Ms. Stephenson. My name is Natalie
5 Reid. I'm Chair of this Tribunal.

6 Excellent. That sounds like you were hearing me
7 correctly, and it sounds like you are.

8 THE WITNESS: (Speaking in low volume) Yes, thank
9 you very much, Madam Chair.

10 CHAIR REID: Okay. Before we proceed, I will
11 exhibit for you the solemn Declaration that we ask expert
12 witnesses to recite into the record so that we have it in
13 the record, so I will...

14 (Pause.)

15 CHAIR REID: Do you see that, Ms. Stephenson?

16 THE WITNESS: (Speaking in low volume) Yes, Madam
17 Chair, I can see it.

18 CHAIR REID: Okay. If you could read that
19 Declaration, please, from the words "I solemnly declare."

20 THE WITNESS: (Speaking in low volume) I solemnly
21 declare upon my honor and conscience that I speak the
22 truth, the whole truth, and nothing but the truth, and
23 that my statement will be in accordance with my sincere
24 belief.

25 CHAIR REID: Thank you very much, Ms. Stephenson.

1 THE WITNESS: (Speaking in low volume) You're
2 welcome.

3 CHAIR REID: Again, because of the virtual nature
4 of this Hearing, I will ask you a few questions just to
5 confirm that everything will proceed in accordance with
6 Procedural Order No. 1:

7 First, Ms. Stephenson, have you received a copy of
8 Procedural Order No. 1 or discussed its contents with
9 counsel for the Claimant?

10 THE WITNESS: (Speaking in low volume) Yes, I
11 have, Madam Chair.

12 CHAIR REID: Excellent.

13 So, then to confirm certain of the provisions that
14 are set out in Procedural Order No. 1, can you confirm
15 that you are not currently in a public setting?

16 THE WITNESS: (Speaking in low volume) Yes, I can
17 confirm that I'm not in a public setting.

18 CHAIR REID: Thank you.

19 Can you also confirm that you're not using a
20 virtual background, and that what we see behind you in
21 your video is, in fact, the wall behind you?

22 THE WITNESS: (Speaking in low volume) Yes, I can.
23 Would you like me to show you a scan of the room?

24 CHAIR REID: Yes, please, if you could show us a
25 scan of the room so that all participants can see ideally

1 a 360-degree scan of your room.

2 (Witness indicates.)

3 THE WITNESS: (Speaking in low volume) That was
4 it.

5 CHAIR REID: Excellent. Thank you very much,
6 Ms. Stephenson.

7 And, finally, if you could confirm that the desk
8 or table at which you're sitting is clear, that there are
9 no documents on that desk with the video device?

10 THE WITNESS: (Speaking in low volume) Yes, I can
11 confirm there are no documents on the desk. I have a
12 glass of water, and that is it.

13 CHAIR REID: Excellent. Thank you very much,
14 Ms. Stephenson.

15 Are there any questions from other Members of the
16 Tribunal for Ms. Stephenson regarding her set-up?

17 ARBITRATOR WALKER: Madam Chair, if I might,
18 Ms. Stephenson, you appear to be speaking quite clearly,
19 but it's a bit soft. Is it possible just to turn the
20 volume up slightly?

21 THE WITNESS: Are you hearing me better now?

22 ARBITRATOR WALKER: Yes, thank you.

23 THE WITNESS: Okay.

24 ARBITRATOR BYRON: Thank you, Madam Chair. I
25 don't have any other questions to advance.

1 CHAIR REID: Thank you very much, Sir Dennis.

2 Counsel for Respondent, Ms. Davis, do you have any
3 concerns or objections regarding the Witness's set-up
4 before we proceed?

5 MS. DAVIS: No, Madam Chair.

6 CHAIR REID: Excellent. Thank you.

7 Mr. Pantin, the floor is yours.

8 MR. PANTIN: Thank you, Madam Chair.

9 DIRECT EXAMINATION

10 BY MR. PANTIN:

11 Q. Ms. Stephenson, I'm going to ask you a few
12 questions. I notice at least on my end a bit of a time
13 lag between is said and what I receive and what I'm
14 hearing, so I would ask you to kindly speak slowly and
15 clearly so that the record will reflect your answers. Do
16 you understand?

17 A. I understand, and I will.

18 Q. Okay. Thank you very much.

19 For the record, Ms. Stephenson, can you kindly tell us
20 your qualifications and experience?

21 A. I'm a fully qualified and experienced
22 engineer and have worked with GC Engineers Inc. for the
23 past 15 years. I'm currently employed as a Senior Project
24 Engineer. And, prior to that, I worked with PC LLC.

25 Q. Thank you.

1 You have had communications with the Respondent during
2 the course of the Contract, which is the subject of this
3 Arbitration. To whom have you been communicating?

4 A. I had perhaps been communicating with
5 Mr. Frank Wilson.

6 Q. Thank you.

7 Can you describe or give examples of the manner of such
8 communications?

9 (Lost video connection.)

10 MR. PANTIN: Sorry, Madam Chair. It seems I have
11 lost the video feed of my witness. I don't know if that
12 is for me experiencing that.

13 MR. FRANÇOIS LASALLE: Apologies for the
14 interruption. It looks like we have lost Ms. Stephenson's
15 feed.

16 This is a typical situation that could happen and
17 appear in an individual hearing. In such a case, a
18 support person from the BVI IAC will be contacting here
19 right now to re-establish that feed, which we are doing,
20 and she should be back momentarily.

21 (Pause.)

22 MR. FRANÇOIS LASALLE: Welcome back,
23 Ms. Stephenson.

24 THE WITNESS: Sorry about that. I had some
25 connection issue, and it (drop in audio) resolved very

1 quickly. Sorry about that.

2 (Echo of audio.)

3 CHAIR REID: We're glad to see you back,
4 Ms. Stephenson.

5 Mr. Pantin, for clarity of the record, could you
6 repeat your question?

7 MR. PANTIN: Thank you, Madam Chair.

8 BY MR. PANTIN:

9 Q. Ms. Stephenson, please describe or give
10 examples of the manner of communications you have had with
11 the Respondent, Mr. Frank Wilson.

12 A. Very well.

13 On several occasions, I raised the concerns
14 regarding the delay in the progression of the work. The
15 Respondent did not conclude its performance. I documented
16 these concerns to the Respondent as a result and
17 designated representative under the Contract, Mr. Frank
18 Wilson, by electronic mails to their electronic e-mail
19 address at "frank.wilson@bot.com," as well as by
20 registered post to the Respondent's registered office in
21 Bridge Street, Bridgetown, Barbados.

22 Frank Wilson has at all times responded by
23 electronic mail from the electronic mail address at
24 "frank.wilson@bot.com" and in addition to letters issued
25 from the Respondent's registered office.

1 ARBITRATOR WALKER: Madam Chair, might I speak?

2 BY MR. PANTIN:

3 Q. Ms. Stephenson--

4 CHAIR REID: Yes, go ahead, Professor Walker.

5 ARBITRATOR WALKER: It just appears that the
6 Witness is reading from a document, but we saw no
7 documents on the desk.

8 THE WITNESS: No, I'm not reading from a document.
9 I'm just speaking very slowly and clearly so that you can
10 hear me.

11 CHAIR REID: Are there any further questions,
12 Professor Walker?

13 ARBITRATOR WALKER: Thank you very much, Madam
14 Chair.

15 CHAIR REID: Sir Dennis? Okay.

16 Mr. Pantin, you may proceed.

17 MR. PANTIN: Thank you.

18 Those were the extent of my questions, Madam
19 Chair.

20 ARBITRATOR BYRON: Madam Chair, I apologize--

21 CHAIR REID: Thank you, Mr. Pantin.

22 ARBITRATOR BYRON: But I have (drop in audio)
23 unmuted. I had nothing to do with it. But I did not have
24 any other questions to ask.

25 CHAIR REID: Excellent. Thank you for confirming

1 that, Sir Dennis.

2 Ms. Davis, to you for cross-examination of
3 Ms. Stephenson.

4 MS. DAVIS: Thank you, Madam Chair.

5 CROSS-EXAMINATION

6 BY MS. DAVIS:

7 Q. Good morning, Ms. Stephenson.

8 A. Good morning, Ms. Davis.

9 Q. I will be asking you a few questions about
10 your qualifications generally and your written report
11 submitted into evidence.

12 Ms. Stephenson, during your examination-in-chief, you
13 mentioned that you worked for PC LLC?

14 A. Yes. That's where I worked for five years.

15 Q. And how long have you worked for PC LLC?

16 A. For five wonderful years.

17 Q. And you would say you had a good relationship
18 with PC LLC?

19 A. Absolutely the best working environment.
20 It's an awesome place to work. I could enjoy working
21 there. I have a great relationship with everyone there.
22 It's a lovely, lovely employer.

23 Q. And who is Mr. James Spitfire?

24 A. Mr. James Spitfire, he's the on-site Engineer
25 for PC LLC, and he's very, very capable, if I may say so

1 myself, very capable Engineer, very good to work with.

2 Q. When you say you had a good relationship of
3 trust and (drop in audio)?

4 A. Absolutely. We have a great relationship of
5 trust and confidence. There is nobody I trust more. We
6 have worked together on a number of projects, and he comes
7 highly recommended.

8 Q. You currently work for GC Engineers Inc.; is
9 that correct?

10 A. Yes, I do.

11 Q. And how long have you been at GC Engineers
12 Inc.?

13 A. Well, GC Engineers has--was actually founded
14 by myself and my partner, Mr. Jerry Stiller, several years
15 ago, and I'm very proud of this.

16 Q. Ms. Stephenson, can I turn briefly to your
17 written report?

18 A. Sure.

19 Q. As you know, my client, BOT Engineering (sic)
20 is a global leader in the energy markets (unclear) and
21 power plants worldwide. The Claimant, LP Power Company
22 Limited, by letter dated 3rd of January 2020, issued the
23 Notice of termination ostensibly as a result of what it
24 says for delays performance and conclusion, and sought
25 damages in the sum of USD 15,125,545. The Notice of

1 Termination and the damages sought relies heavily, if not
2 exclusively, on your Report.

3 Indeed, you are the one that assessed damages in that
4 amount?

5 A. Yes, that is correct.

6 Q. And, in particular, at Paragraph 36 of your
7 Report, you state--and did repeat with some vigor during
8 your examination-in-chief--you did state that you raised
9 concerns about the progression of the Works but that the
10 (unclear) client failed to implement its performance?

11 A. Yes. I didn't speak or raise such concerns,
12 and the clients really could have--he could have done
13 better with all the work that was progressed cited, yes,
14 and indeed did raise those concerns.

15 Q. But in raising those concerns, did you take
16 into account variations to the power plant's
17 specification?

18 A. Yes. I believe there was some mention of
19 that. I--

20 (Overlapping speakers.)

21 Q. Let me rephrase the question.

22 Weren't you told by your client in the driving force
23 (unclear) was that LP, your client, was acquiring a
24 specification for a power plant contrary to what had been
25 agreed?

1 A. Yes, I believe there was some mention of
2 that, but I'm not sure, and that would not justify the
3 delay of someone. That would not justify such a delay.

4 Q. And why would you say that?

5 A. Well, the industry standard, where there is
6 (drop in audio) product, where there are changes of
7 products (unclear) even were significant, that would not
8 be more than two months.

9 (Overlapping speakers.)

10 Q. --in your Report, do you?

11 (Overlapping speakers.)

12 MR. PANTIN: Sorry, Madam Chair, there is an
13 objection. I do apologize, but I think counsel has cut
14 off my witness from completing an answer. The question
15 asked was why she was still in the process of explaining
16 herself. If she could be allowed to finish answering the
17 question.

18 CHAIR REID: Yes, Mr. Pantin.

19 Ms. Davis--and counsel, frankly, for both
20 sides--both for clarity of the record and given the
21 virtual nature of this Hearing, it is important that we
22 ensure that each person speaking be allowed to complete
23 their thought or their question respectively before the
24 next person speaks.

25 Ms. Davis, can you repeat your last question?

1 MS. DAVIS: Well, Madam Chair the question was a
2 straightforward one, and Ms. Stephenson, let me rephrase
3 it so can you understand it.

4 BY MS. DAVIS:

5 Q. Did you include these matters in your written
6 report? You mentioned the variation and the delay and
7 impact that delay would have on the performance (unclear)
8 deadline?

9 A. Well, no, I did not.

10 Q. So, you never considered a variation of sorts,
11 did you?

12 A. I thought about this, but I was not asked to
13 consider it in my Expert Report, so I didn't include it.
14 They didn't ask me to put it in there, so I didn't put it
15 in there.

16 Q. And, frankly, Ms. Stephenson, I note in your
17 Report that (unclear) your statement of independence is
18 missing.

19 Ms. Stephenson, you appear to be looking around the
20 room. Are you--

21 A. No, I--I'm not sure why it wouldn't be in my
22 Report. I would have done so. I'm a very independent and
23 impartial engineer (unclear). I would have included it in
24 the Report. If it's not there, it must be some kind of
25 oversight. I'm very independent and impartial. I

1 wouldn't be doing anything untoward in such matters, so it
2 must have been an error, a clerical error or something
3 because it--

4 (Overlapping speakers.)

5 Q. It's not there, Ms. Stephenson, and that is a
6 critical failure, but moving along.

7 Is this PC and PC LLC Limited, is that acronym for a
8 power company?

9 A. I believe so.

10 Q. You "believe so." You worked with PC LLC for
11 a number of years; and, in your examination-in-chief, you
12 were at pains to point out how wonderful those years were.
13 You do not know the name of the company for which you
14 spent many wonderful years?

15 Moving along.

16 Why did you fail to mention that Mr. Spitfire was held
17 in I believe your expression was "high regard." Why did
18 you fail to mention that he was also an engineer for the
19 Claimant LP Power Company?

20 A. I thought that I did. I thought I did. I
21 did, didn't I? I thought I did.

22 Q. You did not.

23 Did you also mention that PC LLC was a subsidiary of
24 the Claimant incorporated in Curaçao?

25 ARBITRATOR WALKER: Madam Chair, there appears to

1 be some--

2 CHAIR REID: Yes, Professor Walker. Indeed, I
3 noticed that myself.

4 Ms. Stephenson, is there someone else in the room
5 with you?

6 THE WITNESS: No, no, there is no one in the room
7 with me. I'm just feeling a bit nervous because Ms. Davis
8 is being kind of harsh with me, and I don't know why that
9 is. I have done my job as an expert, and I'm a great
10 engineer. I have been doing this for a long time, and
11 Ms. Davis seems to be trying to undermine my integrity,
12 and it's making me very uncomfortable.

13 (Echoing.)

14 CHAIR REID: Ms. Stephenson, we understand that
15 you, before your examination started, showed us the room
16 and your desk.

17 Ms. Davis, would you require that Ms. Stephenson
18 show the room again, or are you content to proceed with
19 your cross-examination?

20 MS. DAVIS: Madam Chair, I'm content at this stage
21 to proceed with my cross. I did express some concerns,
22 although rightly early on, but let's carry on--

23 THE WITNESS: Would you like me to show you the
24 room again?

25 MS. DAVIS: I have a few more questions for this

1 Witness.

2 CHAIR REID: I believe that would be helpful. If
3 either counsel for Respondent does not require it, I think
4 the Tribunal would be grateful if you could briefly show
5 us the room again, including your desk.

6 THE WITNESS: I'm a woman of integrity, so I have
7 no problem doing that one more time.

8 (Witness indicates.)

9 THE WITNESS: There is no one in the room with me.
10 This is my desk as it was before.

11 May I proceed?

12 CHAIR REID: Thank you, Ms. Stephenson.

13 Ms. Davis, you may proceed with your
14 cross-examination.

15 MR. PANTIN: Sorry, Madam Chair, if I may--

16 MS. DAVIS: Thank you, Madam Chair. Where I
17 left--

18 (Overlapping speakers.)

19 MS. DAVIS: --highlighted would have been
20 important to mention not only that Mr. Spitfire worked
21 for--was an engineer but that PC LLC was a subsidiary of
22 the Claimant and that the Expert Witness declares her
23 independence, that it would have been important certainly
24 in the Report to disclose that connection.

25 BY MS. DAVIS:

1 Q. Wouldn't it have been an important fact,
2 Ms. Stephenson, to disclose in your Expert Report the
3 crucial matter which goes to the heart of your opinion?

4 MR. PANTIN: Madam Chair, I do apologize to
5 interrupt counsel again, but I would like to say for the
6 matter of good order (drop in audio) your permission the
7 record reflect that the Witness had, in fact, shown the
8 room by a camera and it was, in fact, empty, (drop in
9 audio) only being present in the room.

10 CHAIR REID: Thank you, Mr. Pantin.

11 I realize that, because of some time lag, we may
12 not have realized that you were trying to make that point.
13 Your point is reflected in the Transcript, and the view of
14 the Witness's room will be reflected in the recording.

15 MR. PANTIN: Thank you, Madam Chair.

16 CHAIR REID: Ms. Stephenson, do you need
17 Ms. Davis's question repeated?

18 THE WITNESS: Yes, please.

19 (Echoing.)

20 CHAIR REID: Ms. Davis, could you repeat your
21 question, please?

22 MS. DAVIS: Yes, Madam Chair.

23 BY MS. DAVIS:

24 Q. Ms. Stephenson, would it have been a very
25 important matter to include in your Expert Report not only

1 that Mr. Spitfire was an employee of the Claimant when you
2 declared that someone you held in the highest regard, but
3 also that you had previously worked for a subsidiary of the
4 Claimant?

5 A. I guess so. I guess so. I guess--I guess I
6 could have. It's important.

7 Q. And why did you exclude that if you now think
8 it is important?

9 (Lost audio.)

10 Q. Do I hear someone else in the room?

11 (Voices.)

12 MR. PANTIN: I'm sorry, I seem to have lost the
13 video for the Witness (unclear).

14 (Voices.)

15 CHAIR REID: Ms. Stephenson, we lost your video,
16 but it seems that you have rejoined, but we do hear
17 other--what appears to be other voices in the room with
18 you. Is there anyone else in the room with you now?

19 THE WITNESS: No, no. There is no one else in the
20 room with me.

21 (Echoing: "No, no. There is no one else in the
22 room with me.")

23 CHAIR REID: Ms. Davis, do you have any questions
24 for Ms. Stephenson?

25 MS. DAVIS: No further questions, Madam Chair.

1 THE WITNESS: I was just talking to myself. I'm
2 sorry about that.

3 (Echoing: "I was just talking to myself. I'm
4 sorry about that.")

5 (Voices in background.)

6 CHAIR REID: Mr. Pantin, do you wish to re-examine
7 Ms. Stephenson?

8 MR. PANTIN: Yes, please, Madam Chair. Just a few
9 points that have arisen during the course of the
10 cross-examination.

11 REDIRECT EXAMINATION

12 BY MR. PANTIN:

13 Q. Ms. Stephenson, you recall a moment ago
14 counsel for the Respondent was asking you questions
15 concerning what was the driving force--

16 (Overlapping speakers.)

17 A. Can you hear me?

18 Q. Ms. Stephenson, are you hearing me?

19 A. I'm hearing you.

20 Q. Yes. Do you remember--

21 A. I'm sorry, can you repeat that, please?

22 Q. Do you recall when counsel for the Respondent
23 was asking you questions as to the driving force behind
24 the delay for the installation of a new power plant? Do
25 you recall counsel raising those questions with you?

1 A. I don't entirely recall the--the details.

2 Q. Hold on. I'm just asking if you remember when
3 counsel was asking you those questions.

4 A. Oh. Oh, yes. I remember when Ms. Davis
5 asked me--asked me those questions.

6 Q. Thank you.

7 So, in relation to that part of the question in the
8 cross-examination, my question to you is: How did you
9 come to learn that the driving force behind the delay was
10 that LP, who is (unclear and echo) installed as a power
11 plant? How did you come to know about that?

12 A. I don't--I don't recall the details, but it
13 may have been said in passing by one of the PC
14 representatives; that I can't be exactly sure whether it
15 was Mr. Wilson or not.

16 Q. Okay. So, you said it was--you may have heard
17 it in passing. Can you explain why you can't be too sure?

18 A. Well--well, I don't recall seeing every
19 communication, so I really--I really don't know. I just
20 don't know. I'm just not sure.

21 Q. Thank you.

22 And just one further question: Why have you not
23 considered that fact what you've come to learn? Why have
24 you not considered that in your assessment and commented
25 on it in your Report?

1 A. Well, it wasn't specifically brought to my
2 attention, and, for that reason--and in any case, in my
3 view, such a cause for delay should not be more than two
4 months. But I did consider it as it was not within my
5 mandate. I wasn't specifically asked to do so, so I did
6 not.

7 Q. Okay.

8 MR. PANTIN: Thank you, Madam Chair. No further
9 questions on the examination.

10 CHAIR REID: Thank you, Mr. Pantin.

11 Professor Walker or Sir Dennis, do you have any
12 questions for Ms. Stephenson?

13 ARBITRATOR WALKER: Well, only that I might have
14 missed perhaps some materials in the cross-examination,
15 the mention of this last point that has been raised by
16 Mr. Pantin. I don't know where it comes from. It might
17 not redirect. I don't know where it comes from.
18 Otherwise, it doesn't appear to be direct. I'm not quite
19 sure what it's about.

20 CHAIR REID: Thank you, Professor Walker.

21 Mr. Pantin, the last point you had asked
22 Ms. Stephenson about, what is the basis in the record for
23 that point?

24 MR. PANTIN: Yes, please--yes, please, Madam
25 Chair. I'm just going to the Transcript to get to that

1 point.

2 Line of questioning started at about 10:43:51.

3 (Pause.)

4 MR. PANTIN: Sorry.

5 Okay. 10:45:25 you have in the Transcript, it's
6 where counsel for the Respondent started raising questions
7 as to the concerns with variations in power plant
8 specifications, and that flows through.

9 So, at 10:46, that is where I took the Witness
10 back to that, 10:46:03, which is focused on that aspect of
11 the cross-examination.

12 ARBITRATOR WALKER: My apology, Mr. Pantin. I
13 thought when you were talking about a new power plant, you
14 weren't speaking about the variations to this project but
15 an entirely different project.

16 MR. PANTIN: Would you like me to clarify that
17 with the witness in re-examination, if there is a concern
18 there?

19 CHAIR REID: I think it would be helpful if you
20 put the question directly to the Witness, just for the
21 record.

22 MR. PANTIN: Thank you, Professor.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. PANTIN:

25 Q. Ms. Stephenson, in your consideration of the

1 matter, what do you understand to have been the cause of
2 delay?

3 A. In my opinion, the cause of the delay was
4 whether--whether their--the cause of the delay was
5 their--was on their side, and whether (drop in audio) them
6 in touch (drop in audio) as the Engineer.

7 CHAIR REID: Thank you, Ms. Stephenson.

8 Professor Walker, do you have any additional
9 questions for Ms. Stephenson?

10 ARBITRATOR WALKER: I'm afraid that I didn't fully
11 grasp the response otherwise--other than the cause of the
12 delay was the Respondent, full stop.

13 VOICE: All right. It was no fault of the
14 Claimant.

15 ARBITRATOR WALKER: Well, Madam Chair, other than
16 the fact that that is simply for the Tribunal to decide, I
17 think I have understood the evidence of this Witness.

18 CHAIR REID: Thank you, Professor Walker.

19 Sir Dennis, do you have any questions for
20 Ms. Stephenson?

21 ARBITRATOR BYRON: No. Thank you, Madam Chair.

22 CHAIR REID: Thank you very much.

23 Ms. Davis, did have you any very limited recross
24 on the basis of the answers that Ms. Stephenson has just
25 given in the course of re-examination?

1 MS. DAVIS: No, Madam Chair. I think the answers
2 speak for themselves.

3 CHAIR REID: Thank you very much.

4 Ms. Stephenson, you are excused. The Tribunal
5 thanks you for your testimony both in written form and
6 before us in the Virtual Hearing today.

7 THE WITNESS: Thank you for having me. It was
8 great being here. Thank you.

9 (Echoing: "It was great being here. Thank you.")

10 (Witness steps down.)

11 CHAIR REID: Counsel for the Parties, we will now
12 hear--Ms. Stephenson, you can turn off your microphone and
13 your video camera.

14 Counsel for the Parties, we will now hear your
15 limited Closing Submissions. We'll begin with, I believe,
16 counsel for Claimant.

17 (Voices heard in background.)

18 CHAIR REID: I believe that might have been
19 Ms. Stephenson's microphone that was still on.

20 MR. PANTIN: Ms. Stephenson--

21 CHAIR REID: Ms. Stephenson, can you turn off the
22 microphone and please leave the hearing room.

23 THE WITNESS: I'm sorry about that. I don't know.
24 I think--I think my neighbor's cell just came through or
25 something (unclear). It's probably that.

1 I'm really sorry about that. Have a good day,
2 everyone.

3 (Echoing: "I'm really sorry about that. Have a
4 good day, everyone.")

5 CHAIR REID: Okay. We will move to the Parties'
6 Closing Submissions.

7 Closing for the Claimant. Mr. Pantin.

8 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

9 MR. PANTIN: (Speaking in low volume) Thank you,
10 Madam Chair.

11 At the Tribunal knows, in summary, this
12 claim--there has been this claim that has been made and a
13 Preliminary Objection has been made by the Respondent in
14 terms of their Defence and Counterclaim as it relates to
15 the Preliminary Issue. They have challenged, essentially,
16 whether this arbitration has been properly constituted
17 surrounding the failure, as they say, to have served a
18 Notice on the--pursuant to the terms of the Agreement.
19 That is to say, under the terms of the Agreement, there
20 was no nomination, no identification specifically in
21 Clause 2.5 as to the address for the Contractor as the
22 address for electronic transmission systems for the
23 Employer's address. That information has just been
24 absent.

25 From that point of view, it is important,

1 respectfully, as we consider on the preliminary point
2 whether this arbitration, in fact, has been duly
3 constituted by virtue of the Notice that has been issued
4 and received by the Respondent.

5 Is the Tribunal with me so far?

6 So...

7 ARBITRATOR BYRON: Madam Chair? Madam Chair?

8 CHAIR REID: Yes, Sir Dennis.

9 ARBITRATOR BYRON: Counsel's tone is very soft.
10 I'm have to strain to get his submissions. Can you ask
11 him to increase his volume?

12 (Echoing: "Can you ask him to increase his
13 volume?")

14 CHAIR REID: Yes, of course.

15 Mr. Pantin, if you can be sure to both speak
16 directly into your microphone and increase your volume.

17 MR. PANTIN: Thank you, Madam Chair. Is this
18 better?

19 ARBITRATOR BYRON: Not really.

20 (Echoing: "Not really.")

21 MR. PANTIN: Yes.

22 CHAIR REID: It certainly is clearer on my end,
23 and Sir Dennis, you may wish to also consult the
24 Transcript which the Stenographer is keeping in realtime,
25 which at least as far as I can hear is keeping track quite

1 accurately of what the participants have been saying.

2 ARBITRATOR BYRON: Thank you, Madam Chair.

3 MR. PANTIN: Thank you, Madam Chair. I will also
4 speak a little bit louder, so hopefully that will help.

5 So, the first issue I would like to confront, it's
6 the legal effect of the delivery of the Notice of the
7 Respondents to the registered office given that the
8 Contract Data was left blank, so there is no doubt on the
9 Fact Pattern, and there is no dispute on the Fact Pattern,
10 that, during the course of the communication--during the
11 course of the Contract there has been some exchanges of
12 correspondence from the Claimants to the Respondent to the
13 direct registered office, as well as we heard from
14 Ms. Stephenson in the course of her examination-in-chief
15 speak to the fact that, during the course of Contract, she
16 has been in communications with the Respondents via e-mail
17 address as well as the registered address of the
18 Respondent. And she has also given evidence of that, and
19 we received communications from either Party--from that
20 Party by either means.

21 So, what we are confronting now is--

22 (Phone rings.)

23 MR. PANTIN: Sorry, I hear a phone ring. It's not
24 on my end.

25 ARBITRATOR BYRON: Madam Chair, I have to

1 apologize. That was on my end. That's (unclear).

2 CHAIR REID: Thank you, Sir Dennis. And if you
3 could turn off your microphone. If you could go on mute,
4 that will be helpful.

5 ARBITRATOR BYRON: Thank you.

6 CHAIR REID: Mr. Pantin, if you could proceed.
7 We, of course, are keeping an eye on the clock.

8 MR. PANTIN: Thank you, Madam Chair.

9 So, as I was saying, as a matter of fact, we have
10 captured that correspondence has been sent and received by
11 Respondent at their registered address. We have accepted
12 that that has not been identified in Contract Documents
13 because there is no address identified in the Contract
14 Documents. And, as the evidence of Ms. Stephenson has
15 demonstrated, during the course of the Contract, there was
16 an exchange or at least communication between the Parties
17 using the registered address.

18 Similarly, during the course of the Contract, as
19 Ms. Stephenson's evidence has pointed out in
20 examination-in-chief, she has issued communications to an
21 electronic address and has received communications from
22 that electronic address that she entered into the record
23 of Mr. Frank Wilson. We submit, clearly, there has been
24 communications between the Parties during the course of
25 this Contract and specifically as it relates to the

1 Notice, which the Respondent now seeks to ignore on this
2 technical basis. They are doing so with the full
3 understanding or full knowledge of having received the
4 information contained in these notices.

5 So, the question, respectfully, is really: Has
6 the Respondent's received notice, which is the first part?
7 It's a matter of fact or factual evidence is clearly yes.

8 The second question is: Has the failure to
9 receive the Notice, and we respectfully submit, that
10 technically pre-appointed address, is that technical
11 failure fatal to the communication of the Notice to the
12 Respondent? We respectfully submit no, it cannot be.

13 The legal effect of the (unclear)--sorry. Let's
14 pause.

15 If we take them one by one, the written
16 communications that we would send to the Respondent was
17 sent to the Respondent's registered address. It is quite
18 common whether, as a matter of the Barbados Companies Act,
19 the Guyana Companies Act, the registered address of a
20 company is effectively required and gives Notice to the
21 (unclear) to that address. There is no dispute that was
22 sent to that address. Failure of the Parties to nominate
23 or to expressly state some address or any address in the
24 Contract cannot be used to trump what is the, we
25 suggested, default position as a matter of law in either

1 jurisdictions of these parties. It just simply cannot be
2 appropriate at this stage for the Parties to say, "Well,
3 we are now going to choose on a technical basis to ignore
4 all of the communications because we did not, as Parties,
5 pre-identify an address for the purpose of this Notice."

6 As the Panel will understand, the law must be
7 applied to make sense of the Contract. To suggest
8 otherwise or to suggest that the failure of identifying an
9 address will mean that there is no address for the
10 purposes of communication between the Parties is to create
11 a fallacy and a nonsense of the Contract. That is trite
12 position. We submit that the only sensible approach is to
13 look at the facts established: One is communication to
14 the registered address of the Party, and the other is
15 communication to an established e-mail of the Party. And
16 the fact is that communications would go in both
17 directions from either Party and, as such, over the course
18 of the Contract, has created a course of dealings that has
19 come to the aid of the Parties to supplement.

20 To put another way, has this been the shoe is on
21 the other foot, it would be wrong for either Party to say
22 whether we cannot have any arbitration because we cannot
23 send any Notice effectively because we cannot--we refused
24 or failed in the past to pre-nominate the address. It
25 just does not work out.

1 As it relates to the sending--the effect of
2 sending the documents via e-mail, so if the Panel is not
3 with me as it relates to the registered addresses and the
4 correspondence addressed at the registered address, we
5 have heard from Ms. Stephenson that, in fact, she has sent
6 e-mails to Mr. Frank Wilson, as she has received e-mails
7 from Mr. Frank Wilson. She read into the record the
8 e-mail address that has been used. That is also a matter
9 that is not--that is not in dispute.

10 We submit that effectively sending any document
11 via e-mail constituted sufficient or proper notice to the
12 Respondent. And when I say "sufficient and proper
13 notice," we mean sufficient, proper, and actual notice.
14 There has been no assertion that they did not know what
15 has been happening in this matter; that they did not know
16 the Parties' intention to trigger arbitration and to
17 proceed with some form of the dispute resolution.

18 Just my view of the time, I think that point has
19 been made on the evidence.

20 As it relates to the third point I would like to
21 address, which is the question on the issue of application
22 of a waiver.

23 Even if we accept that, pursuant to the
24 contractual language, the Claimant was wrong in sending
25 correspondence addressed to the registered address of the

1 Parties in the absence of a specified address beings
2 provided for in the Contract Documents, even if we are
3 wrong on that, there are three factors, in our view, that
4 suggest that such irregularity--the effect of such
5 irregularity, if there was one, has been waived by
6 Respondent.

7 Firstly, once again, based on the evidence, in the
8 course of dealings throughout the Contract, they were
9 communicating with each other through the media of written
10 communications and registered addresses and through media
11 of e-mails. Through the evidence we have identified that
12 the Respondent received responses from the registered
13 addresses as well as from e-mail. This has been back and
14 forth between the parties.

15 Third point is, having actually received the
16 actual Notice of Arbitration, actions of the Respondent
17 are not without prejudice. What the Respondent sought to
18 do was, in fact, raised the preliminary point yes but, in
19 fact, have also counterclaimed under the
20 dispute-resolution provisions. They, themselves, have
21 brought their components of agreement into this
22 arbitration. Those actions, we respectfully submit,
23 suggest waiver of any irregularity if, in fact, there was
24 one on the part of the Respondent; and, therefore, it is
25 inappropriate for the Respondent to now seek--to cast out

1 the pre-agreed provisions of the Parties as relates to
2 dispute resolution on the basis of a technicality that had
3 no bearing during the course of the Contract and course of
4 communications as between the Parties.

5 So, in a nutshell, Madam Chair and the Panel,
6 those are the extent of our submissions on the preliminary
7 points.

8 CHAIR REID: Thank you, Mr. Pantin.

9 Ms. Davis, Closing Submissions on behalf of the
10 Respondent.

11 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

12 MS. DAVIS: Thank you, Madam Chair. I'm assuming
13 that I limit my submissions to the preliminary point that
14 my learned friend has addressed the rest of the panel on
15 for the past 10 minutes?

16 CHAIR REID: Yes, I believe that it was clear in
17 the Procedural Order and the test session that we had that
18 the Parties would provide closing submissions on the
19 issues that had been bifurcated for consideration by the
20 Panel.

21 MS. DAVIS: Yes, Madam Chair, because I will deal
22 with that in the due course because our position is very
23 straightforward, 1.2 (unclear) provides service at a
24 specified address in the Schedule. There is no address
25 stated in the Schedule, and it was a condition precedent

1 to the Contract.

2 Mr. Pantin has spent, as I said--and I timed it--a
3 number of minutes seeking to persuade this Panel and to
4 engage in essentially intellectual gymnastics, that
5 somehow the e-mail provided them notification and is a
6 mere irregularity and would not be related to the
7 performance of the Contract. In our respectful
8 submission, it is. And in terms of the Contract, it was
9 clear the Parties sat down and negotiated it, and it
10 required a particular address to be set out in the
11 Schedule. That address was not provided for.

12 And even the Notice of Termination, Madam Chair,
13 served more--and this is our primary position--nor was the
14 notice of commencement of arbitration. As we say, the
15 Contract is clear on its terms, and on this there can be
16 no other confusion that there has been a real failure to
17 serve the documents on our client. And contrary to what
18 has been suggested by Mr. Pantin, this is not just a mere
19 technicality, notification this granted under the Contract
20 is plainly important. If it wasn't, the Parties wouldn't
21 have negotiated it. And the Clause is--as I say, it is
22 clear.

23 So, for that reason alone and without having us
24 engaged in intellectual gymnastics which Claimant is
25 encouraging us to engage in, it's clear that the matter is

1 straightforward. Notice of Termination was not served at
2 this e-mail address. The Parties failed to include in the
3 correct address in the Schedule. The actual Notice of
4 Arbitration does not do that. And that, Madam Chair, is
5 entirely specious.

6 If this Panel finds that they should have been
7 although proper service was not, then in our respectful
8 submission that is the end of the matter and need not go
9 further. Certainly, as you say, you would have had
10 written submissions in advance of the issues, but I wanted
11 to comment on this in closing because it was consistent
12 with the resolution that generally the Rule I note the
13 Expert's testimony, and I note that fundamentally we have
14 genuine concerns as to what anything she said certainly in
15 cross-examination should be omitted. There was clear bias
16 and partiality, and there was clearly someone else in the
17 room. She was skittish, if I could put it nicely. So,
18 that is something that I might--as I said, it's not in
19 written submissions because certainly we couldn't have
20 anticipated that action from the witness, who is their
21 primary witness, and in respect of which the Claimant
22 seems to rely primarily on her evidence.

23 So, for the Tribunal and what it has seen for
24 purposes of the record, we suggest that that be
25 reconsidered. But insofar as it concerns the technical

1 point, as I said--and I don't want to repeat myself--the
2 matter is straightforward: There was a requirement to
3 show there was a particular address, and it was not there.
4 That's the end of matter, certainly from the Respondent's
5 perspective.

6 ARBITRATOR BYRON: Madam Chair? Might I say
7 something, Madam Chair?

8 (Echoing: "Might I say something, Madam Chair?")

9 CHAIR REID: Yes, Sir Dennis. Please proceed.

10 ARBITRATOR BYRON: As the Witness demonstrates,
11 she made reference to failure to serve as the appropriate
12 address. Could you please identify what was the
13 appropriate address by reference to the Contract?

14 CHAIR REID: Thank you, Sir Dennis.

15 Since we have excused the Witness, I presume your
16 question is for counsel for the Respondent who just made
17 that submission in her oral argument.

18 (Echoing.)

19 ARBITRATOR BYRON: Yes, because counsel said the
20 Rules state "appropriate address," and I was wondering if
21 she could identify what is the "appropriate address" in
22 terms of the contract.

23 CHAIR REID: Yes, Ms. Davis?

24 MS. DAVIS: Well, the Contract and the Schedule to
25 the Contract should have included that appropriate

1 address, and it did not. And our submission is, because
2 there was no address included in the schedule, that's a
3 fundamental flaw in the Contract itself. And the Parties
4 cannot simply overlook it as an irregularity and serve at
5 some address which the Claimant had indicated previously
6 and a detail that was communicated by an employee. The
7 Contract is (unclear) with this Rule in it, and so be it.

8 There should have been a schedule--well, there is
9 a schedule, or there was no contract--sorry, there was no
10 address specified in the Schedule, and that's a
11 fundamental flaw in the Contract.

12 ARBITRATOR BYRON: Madam Chair, might I put
13 another question to counsel?

14 CHAIR REID: Yes, please proceed.

15 ARBITRATOR BYRON: If counsel today could explain
16 what interpretation we should give to Clause 1.3(b) of the
17 Contract?

18 (Echoing.)

19 MS. DAVIS: Well, Clause 1.2 of the Contract--and
20 if I could directly follow it; just bear with me--provides
21 that, between BT and LP, so my client will decide any
22 certificate, contract termination and notices, which are
23 required to be sent and deliberate, and it is unambivalent
24 in how it is, in fact, expressed (unclear). Must be sent
25 to an address stated in the Schedule to the Contract. And

1 our position is, quite frankly, there was no address
2 stated in the Contract, and that's a fundamental flaw in
3 the Contract itself. Thus, there couldn't have been a
4 proper service of agreement of termination, and there
5 could not be have been, quite frankly, (drop in audio)
6 there could not have been a proper service of the
7 arbitration proceedings, Statement of Claim to commence
8 arbitration in these proceedings.

9 So, this goes to the heart of the matter. The
10 question is whether this Panel has jurisdiction to
11 determine the matter at all and the result of the clear
12 failings in the Contract itself.

13 ARBITRATOR WALKER: Madam Chair, might I ask if
14 the hearing provider could exhibit a document for us.

15 CHAIR REID: Yes, Professor Walker. If the BVI
16 IAC could exhibit the document that includes Clause 1.3 of
17 the Contract.

18 MODERATOR HAMILTON: Madam Chair--

19 CHAIR REID: Yes, I believe those were the
20 letters--indeed, can be found in the Fact Pattern, Page 1
21 of the Fact Pattern.

22 There we go. Professor Walker, the document is on
23 the screen.

24 ARBITRATOR WALKER: Very helpful. Thank you. I
25 can personally enlarge it in my system, but perhaps for

1 those who don't have the possibilities...(fades away)

2 MS. DAVIS: Yes.

3 CHAIR REID: Professor Walker, do you have a
4 question based on the document?

5 ARBITRATOR WALKER: It would helpful, I think, if
6 all looked at the actual language of the document, the
7 document that's now being questioned. I take it, it's
8 Clause 1.3(e); is that correct?

9 MS. DAVIS: Yes, that's precisely it.

10 ARBITRATOR WALKER: Thank you.

11 CHAIR REID: So, if we could go back to the first
12 page, exactly, so we see Clause 1.3(b).

13 VOICE: Madam Chair--

14 (Overlapping speakers.)

15 MS. DAVIS: I ask that we just look at it.

16 CHAIR REID: I'm happy to read Clause 1.3(b) into
17 the record so it's in the Transcript, as well.

18 (Pause.)

19 MS. DAVIS: So, Clause 1.3, it provides as
20 follows: "Wherever these Conditions provide for the
21 giving or issuing of certificates, consents,
22 determinations and notices, these communications shall be
23 in writing and delivered by hand (against receipt), sent
24 by mail or courier or transmitted using any of the agreed
25 systems of electronic transmission as stated in the

1 Contract data; and delivered, sent or transmitted to the
2 address for the recipient's communications as stated in
3 the Contract Data. However, if the recipient gives notice
4 of any other address, communications shall thereafter be
5 delivered accordingly."

6 Madam Chair, the Claimant's position is there was
7 no address stated in the Contract Data, and I take--

8 CHAIR REID: For my ease of following, it would be
9 helpful if the BVI IAC could close the exhibit so that I
10 can follow along with the Transcript as well. Excellent.

11 Ms. Davis, if you could continue your argument
12 with regard to answering Sir Dennis's question about
13 Clause 1.3(b), now that we have all seen it.

14 MS. DAVIS: I'm happy to, Madam Chair.

15 The point, as I said, is a straightforward one, in
16 terms of the Contract is clear, is that per the address
17 stated in the Contract. We weren't shown the Schedule to
18 the Contract, and I don't think we need to because if the
19 Schedule was, in fact, shown, the Panel will see that it
20 was left blank.

21 Now, there is a save, for whatever a better
22 description, in that where there is some other address
23 specified by the recipient--in this case my client--then
24 that would suffice and notice of the--the notification of
25 that particular Clause. What our position is the alleged

1 notification and by Mr. Pantin's client in relation to an
2 e-mail address was not intended certainly by my client to
3 give rise or to circumvent the address that would have
4 been provided in the Contract Data, and that was not
5 communicated in any e-mail to the other side in relation
6 to this alleged e-mail address.

7 So, our position stands. The documents and their
8 determination and the Notice of arbitration were not
9 served in accordance with Clause 1.3, and that is fatal.

10 ARBITRATOR WALKER: Thank you, Madam Chair. That
11 answers my question.

12 MR. PANTIN: Madam Chair--

13 CHAIR REID: Thank you, Professor Walker.

14 Do Professor Walker or Sir Dennis have any
15 questions for either counsel?

16 ARBITRATOR WALKER: No. Thank you, Madam Chair.

17 ARBITRATOR BYRON: No. Thank you, Madam Chair.

18 MR. PANTIN: Madam Chair--

19 CHAIR REID: Thank you to both.

20 Counsel, I believe that we have now reached the
21 end of the Hearing. We have heard your submissions. We
22 thank you for your participation in the Virtual Hearing.

23 (Overlapping speakers.)

24 MR. PANTIN: Sorry, Madam Chair--

25 CHAIR REID: Yes, Mr. Pantin.

1 MR. PANTIN: With your permission, I would just
2 like to make one observation on counsel's last submission
3 as it related to the matter she mentioned as to what her
4 client understood or what her client intended.

5 CHAIR REID: That would have to be very brief,
6 Mr. Pantin. The Tribunal has both your written
7 submissions and has heard your oral submission. So, if
8 you could make your final point very briefly and must, of
9 course, be in direct response to counsel's submissions.

10 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

11 MR. PANTIN: Thank you. Thank you, Madam Chair.

12 (Distorted audio.)

13 REALTIME STENOGRAPHER: This is the Court
14 Reporter. I cannot hear you, Mr. Pantin.

15 (Distorted audio.)

16 REALTIME STENOGRAPHER: This is the Court
17 Reporter. I could not hear Mr. Pantin, what you said, at
18 all. Could you please repeat.

19 MR. PANTIN: The Tribunal has the submission, so I
20 see nothing to do on that.

21 CHAIR REID: Thank you, Mr. Pantin.

22 Ms. Davis, any final very brief point in response
23 to Mr. Pantin's very brief final submission?

24 MS. DAVIS: No, Madam Chair.

25 CHAIR REID: Excellent.

1 Well, then, the Tribunal again thanks counsel and
2 the Parties and, in her absence, Ms. Stephenson for this
3 Hearing. The Tribunal will retire. And, as discussed in
4 the pre-hearing conference, we will begin our
5 deliberations momentarily so that we can effectively
6 consider what we have heard, what the Parties have
7 submitted, and ultimately return with a Decision in due
8 course.

9 MS. DAVIS: Thank you, Madam Chair.

10 CHAIR REID: To be clear, I will not be returning
11 to this session with a Decision. We will be returning to
12 parties with a written Decision, in due course, for
13 clarity of the record.

14 MR. PANTIN: Thank you.

15 CHAIR REID: I will pause now just in the Virtual
16 Hearing to see whether any of our Moderators have any more
17 things they would like to say before we shift into the
18 Tribunal deliberations?

19 MODERATOR HAMILTON: Yes. Just briefly for our
20 audience. I would just like to let them know what we have
21 just seen, the concerns about virtual hearings that were
22 played out in this scenario.

23 One of the obvious concerns was the credibility
24 and testimony of the Witness and how does the virtual
25 platform ensure that there is integrity and credibility of

1 the Witness and the Witness's participation. Could we
2 properly observe the environment, secure the environment?
3 What would have normally been a rotating camera to be able
4 to do that, I think we tried to let you see how that would
5 work. The Tribunal intervened, as was necessary. We see
6 that the ability of the Tribunal to do so was seamless.

7 Now, what may have appeared to the audience as
8 apparent hiccups were deliberately introduced so as to
9 make the particular point that planning is necessary and
10 crucial before you actually have the Hearing because what
11 the planning does is it would allow you to iron out many
12 of these hiccups that you perceived occurred during the
13 last hour-and-a-half or so.

14 For example, the freezing sometimes of the
15 cameras, Sir Dennis's telephone ringing. Those sorts of
16 things happen if you don't have (a) planning and (b)
17 established protocols for the Hearing, and so what we
18 tried to do was to make that obvious as to how annoying or
19 irritating these matters can become if you don't have
20 particular planning.

21 There are a number of issues which I'm sure will
22 come out again as the Tribunal deliberates. So, in the
23 interest of time and because we want to hear what the
24 Tribunal will say, I'll stop with my comments there and
25 turn it over to the Tribunal now to appreciate exactly how

1 they would deliberate and address many of the issues that
2 arise.

3 CHAIR REID: Thank you, Mr. Hamilton.

4 So, we are coming back to Tribunal deliberations.
5 Having closed the session of the Hearing, I would like to
6 confirm that counsel for the Respondent will leave the
7 room, turning off their video cameras and microphones and
8 exiting the room.

9 (Counsel comply.)

10 TRIBUNAL DELIBERATION

11 CHAIR REID: Okay. We note that, just for
12 clarity, the Stenographer remains in our room. That is
13 because this is a Mock Virtual Hearing to make sure the
14 participants can understand what we are saying. We would
15 not normally, of course, have a stenographer for Tribunal
16 deliberations in order to maintain the confidentiality of
17 any type of deliberations.

18 So, Professor Walker, Sir Dennis, that was a
19 remarkable session. I will just note a couple of things.

20 Yes, Professor Walker.

21 ARBITRATOR WALKER: Perhaps, Madam Chair, as the
22 junior co-Arbitrator, I might note that we seem to have
23 for deliberations two very separate issues. The first
24 issue is the issue that relates to Notice, and that was
25 the one that was notably prescribed for us to consider in

1 this brief snippet of a hearing. As it happened, we seem
2 to be preoccupied about fundamental issues of integrity of
3 the witness evidence and the conditions under which the
4 testimony was given.

5 Perhaps if we could just spend fairly rapidly with
6 the issue that we were prescribed for this snippet, I
7 might anticipate, if I may--and if I may be so bold to
8 do--Sir Dennis's concern about the second sentence in
9 subparagraph 1.3(b) of the--1(3)(b) of the Contract which
10 allows Parties to continue with an address that is
11 supplied by the recipient as an alternative address, and I
12 would say only that I was not personally persuaded by the
13 submission that a flaw in the Contract itself that
14 provided for no address was sufficient to say that no
15 address was given on this occasion both because that would
16 be a flaw in the Contract, and why should that stop the
17 Contract from proceeding? But, as a matter of the
18 evidence itself, the Parties addressed that in the
19 Contract by arranging for an alternate address, and they
20 proceeded on that basis.

21 And so, I personally was not persuaded, even
22 though I might mention for the benefit of the audience
23 that I was the nominee of the Respondent, I was not
24 persuaded by that submission. Although that's entirely
25 irrelevant as a consideration, I was not persuade by that

1 submission.

2 So, I'm in your hands, Sir Dennis, as to whether
3 that adequately captures your point.

4 ARBITRATOR BYRON: Thank you very much, Professor
5 Walker. I think that your comments make it unnecessary
6 for me to address further the legal position, and I agree
7 with you completely, and I think that settles that issue.

8 But if you permit me to, we are often discussing
9 the question of the ethical duties of arbitrators, and
10 have just demonstrated that once an arbitrator is
11 appointed, the arbitrator becomes the judicial officer and
12 is obliged to do justice according to the facts and the
13 law, and that is also important to me.

14 CHAIR REID: Very much agreed, and my thanks
15 indeed to Professor Walker for making sure that we didn't
16 get distracted from the question that was, in fact,
17 presented for our consideration in this Hearing by what
18 may have happened in the Hearing itself.

19 I concur with both Sir Dennis in raising the issue
20 and putting it to counsel during argument and in your
21 analysis of what we have in the record, Professor Walker.
22 I was not persuaded by the argument that the absence of a
23 specified address in the Contract itself, particular in
24 light of that final sentence in 1.3(b) would mean that
25 there was no way to proceed to arbitration given that

1 notice was provided.

2 Remember that the Notice was provided to the
3 address that the Parties had used over the course of their
4 dealings under the Contract, but there was no argument
5 that the Respondent had not, in fact, actually received
6 notice, so there was no question of prejudice to them.
7 There was no question of surprise litigation or proceeding
8 to arbitration to their detriment.

9 So I do think that our decision on that point, it
10 seems we are all agreed and would be fairly
11 straightforward.

12 That said, I do think that there are some serious
13 issues that were raised by what happened during the
14 witness examination, frankly, both the examination by
15 Claimant's counsel and the cross-examination by
16 Respondent's counsel.

17 I will pause here to see if either of you wishes
18 to raise your own concerns or note your own observations
19 before I summarize my own.

20 ARBITRATOR WALKER: If you want me to begin?

21 CHAIR REID: I'm happy for either of you to begin.

22 ARBITRATOR BYRON: (Distorted audio sound) You see
23 I think what happened shows that we may have to manage the
24 expectation more carefully because I noted that when the
25 camera was making its rotation around the room, there were

1 certain parts of the room where the camera was elevated.
2 I did not see down to the ground. So, if one demonstrates
3 there was no one in the room on those occasions, (unclear)
4 once camera angles are adjusted, and it might want to pay
5 attention to that and make certain the camera issue is
6 complete as it could be.

7 ARBITRATOR WALKER: Can I say, Madam Chair, for my
8 part, I mean, when I got the pan of the room--and it was
9 quite a lovely room, I might say; I love the colors on
10 each of the walls--but as we reached out to the space that
11 was just off sort of to the right of the Witness, we saw
12 passageway, and it occurred to me when we did the second
13 pan of the room there could well be someone slipping in
14 and out of that passageway.

15 But the point I wish to make is there is no way
16 for any system to prevent people from circumventing the
17 integrity of the process. What I thought this
18 demonstration showed clearly was that you have such a
19 clear view of the person's face that you could see
20 everything going on, so you could wind the recording back,
21 and you see on at least a dozen occasions the Witness
22 looking over to a very specific part of the room and
23 appearing to attend to what was going on there. There
24 were other issues, of course, but to me that was most
25 notable to me to the issues, and what was demonstrated

1 clearly in this platform was that it was very front and
2 center for the Tribunal to see.

3 CHAIR REID: I was struck by that myself as well,
4 Professor Walker. To respond to your point, Sir Dennis,
5 we can certainly bear in mind this experience for further
6 witness testimony in this Hearing and other hearings as
7 well because presumably so much that even a very focused
8 Tribunal can do if there is a Party or a Witness who is
9 determined to flout the rules. I do think that we saw on
10 the screen--and it is reflected in the recording--frankly,
11 in a way that might not be reflected if it had been an
12 in-person hearing because you wouldn't have necessarily
13 had a camera directly on the Witness. The witness looking
14 off into a particular direction, as Professor Walker
15 noted.

16 I noticed, in fact, when we asked the Witness to
17 pan the room again for the second time, that she made a
18 motion as if she was taking something off her desk and
19 putting it on the floor before she did that second
20 pan--not to mention, of course, the several occasions on
21 which we then clearly heard someone else in the room,
22 which is what prompted our questions to the Witness as to
23 whether there was someone else in the room.

24 The first couple of times that she responded that,
25 Ms. Stephenson responded, the explanation that she was

1 speaking to herself, I think, beggars belief, and then we
2 had--it was at least two separate occasions after that
3 clearly audible, including at least one occasion reflected
4 in the Transcript that there were other voices in the
5 room, then, of course, we excused Ms. Stephenson, and she
6 turned off her video, forgot to turn off her microphone.
7 And I don't know about you, but I heard someone else
8 clearly say "did they hear me, Jodi-Ann?" That's not
9 Ms. Stephenson speaking to herself.

10 So, I think that there were very strong
11 indications that not only was there someone else was in
12 the room, Ms. Stephenson was looking to that person for
13 further direction in what she was saying. That called
14 into question, I think, not only the substance or
15 credibility of what it is that Ms. Stephenson and was
16 testifying to with regard to this particular issue, but
17 frankly her credibility in a more--in a broader sense when
18 it comes to the merits of the case, although, of course,
19 that's not before us now. We are human, and if
20 Ms. Stephenson appears before us again, we have already
21 had this experience with her now.

22 So, I think the question for us is whether
23 anything we saw in Ms. Stephenson's examination and the
24 concerns that we may have about her credibility in any
25 other effect be the substance of the question regarding

1 Notice under the Contract.

2 Professor Walker, you seem to be shaking your
3 head?

4 ARBITRATOR WALKER: I took the two to be
5 unrelated. I did have concerns about her testimony if
6 only because her statement not in terms that she had an
7 alliance with Mr. Spitfire, with whom she had a
8 long-standing personal relationship over the years would
9 cause concern, and the apparent inability to give her own
10 independent evidence to the Tribunal, and apparently
11 relying on another person was inconsistent with that.

12 But having said that, this has no bearing to my
13 mind on the question of Notice; and, if that is what we
14 are to decide, then I think it is not something that's
15 helpful in demonstration.

16 If I could add one further point, I might, if I'm
17 short, is that we had this considerable range of technical
18 failures and issues all of which were addressed, in my
19 view quite, efficiently. It demonstrates to me the
20 absolute critical importance, particularly at this stage
21 in development of the technology and our comfort with
22 having not only an excellent Reporter as we have with us,
23 and also always give tribute to Reporters in virtual
24 hearings because they bear the brunt of these challenges
25 perhaps more than what we do, but also to the importance

1 of a capable hearing centre like the BVI IAC who are able
2 to work with each participant in advance to deal with the
3 technical issues and to get them up and running in terms
4 of their own personal set-up and their access to the
5 platform, but also can troubleshoot in realtime those
6 issues as they arise during the Hearing. There is no good
7 placement for that in this age. They are essential.

8 CHAIR REID: And I couldn't agree more, and I
9 agree with you in commending our Court Reporter and in our
10 thanks to the support that we have received as arbitrators
11 and I know that the Parties and other participants have
12 received from the BVI IAC.

13 Sir Dennis, any thoughts on the questions as to
14 whether any assessment we make as to Ms. Stephenson's
15 credibility would have any effect on the preliminary
16 question of Notice under the Contract?

17 ARBITRATOR BYRON: Madam Chair, I agree completely
18 with Professor Walker, there doesn't seem to be--if one
19 looks at it holistically, there doesn't seem to be any
20 issue as to what were the terms of the Contract, and there
21 was no issue about the chain of communication which had
22 been existing between the Parties. So, those issues were
23 not dependent on the credibility of the Witness. That is
24 a completely separate issue on the merits of the case,
25 which is not exactly before us.

1 I further wanted to add, though, that the whole
2 purpose of this exercise, as I understand this, to
3 demonstrate the effectiveness of virtual hearings, and
4 some people have expressed concerns from time to time
5 about witness credibility when it's a virtual hearing.
6 What I think was demonstrated very clearly today was that
7 the focus of the camera on the Witness was far a greater
8 ability of assessment than if the person was in the
9 witness box (unclear). So, the points that Madam Chair
10 and Professor Walker have picked up were available to be
11 noticed because of the particularity of the camera
12 focusing on the Witness.

13 So, I would think that that also should alleviate
14 concerns as to whether or not the virtual testimony given
15 exposes the Tribunal to a witness. It was extremely
16 skillful to be able for us to do something like that
17 (unclear).

18 And I commend both of you in commending the BVI
19 International Arbitration Centre, the technical support,
20 and what I suppose would not be obvious to everybody else
21 was the preparatory work, the Case Management Conference,
22 this turned out to be excellent use of the technology, so
23 I extend my explicit congratulations to the BVI Centre for
24 this excellent support system.

25 CHAIR REID: Absolutely.

1 So, just to confirm, for the avoidance of doubt, I
2 very much agree with you both on this second point, so
3 noting that we have our credibility--our concerns about
4 the credibility of the witness, but do not think in light
5 of everything in the record that it would have any effect
6 on our conclusion that the Notice provided to the
7 Respondent was sufficient and, therefore, that the
8 Arbitration was correctly commenced; and that we can,
9 indeed, proceed to the merits.

10 We should get a decision to the Parties promptly
11 so that they can continue with the proceedings. Given the
12 clarity of the record and the strength of our consensus, I
13 would propose to keep the drafting pen and to circulate a
14 draft for your review and comment promptly so that we can
15 finalize and get that to the Parties.

16 I trust--I'm keeping the burden on myself that I
17 would have the agreement of you both with that course of
18 action.

19 ARBITRATOR BYRON: Yes, you do.

20 ARBITRATOR WALKER: Yes, thank you.

21 CHAIR REID: Indeed. Excellent.

22 Well, it has been a pleasure to serve with you on
23 the Tribunal generally and in this Hearing, and I look
24 forward to the next phase.

25 I will move things back to the Moderator.

1 Thank you all.

2 CLOSING REMARKS

3 MODERATOR GREER: Thank you, Natalie.

4 I would like to start my closing remarks my
5 sincere thanks to François. When Calvin and I proposed a
6 Mock Virtual Hearing, he didn't hesitate in offering his
7 support, and I believe this support shows his and the
8 Centre's commitment to capacity-building in the future.

9 I also want to thank our Panelists and David, all
10 of whom agreed to participate without hesitation when
11 invited.

12 Lastly, I want to thank the participants. Over
13 200 of your registered for this session. I believe this
14 level of support speaks volumes to the Region's interest
15 in arbitration and their commitment to capacity-building.

16 It is without a doubt that the pandemic has and
17 will continue to change the way we live and work. There
18 are the negative aspects such as the limitations on our
19 movement and the financial impacts to our businesses.
20 However, the adversity caused by the pandemic has forced
21 us to look for new ways of doing business, and there are
22 opportunities for arbitration professionals prepared to
23 use the technology available.

24 As this webinar has demonstrated, systems like
25 LiveLitigation make transcribing and hosting virtual

1 hearings possible. We accept that there are instances
2 where the technology may fail. As we demonstrated with
3 the right support, these can be dealt with and managed
4 effectively.

5 One of the concerns raised by holding hearings
6 virtually is the impact it's likely to have on the quality
7 of the evidence submitted by the Parties. Sir Dennis has
8 highlighted and I concur with him that, in some instances,
9 it does provide some advantages in terms of allowing you
10 to get close to the Witness and observe their demeanor.

11 You will notice as well that when the issue arose
12 in cross-examination and re-examination of the Expert
13 Witness, when it appeared as if the Witness was being
14 coached by a third party, counsel and the Tribunal
15 demonstrated to us how these issues are managed in the
16 Hearing and dealt with in deliberations.

17 Further, when the Tribunal had difficulty hearing
18 counsel, the realtime transcript in LiveLitigation was
19 used to assist in understanding the submission.

20 We also saw the use of the digital file folder
21 which facilitated counsel and the Tribunal to view
22 documents during the Hearing.

23 All of these forms of technology demonstrate that
24 (drop in audio) losing the benefits that we often get in
25 our face-to-face hearings.

1 I hope this hearing has provided you with an
2 insight into the workings of a virtual hearing. A
3 transcript of the proceedings will be made available in
4 the next few days for your reference. Thank you for
5 attending and enjoy the rest of your day.

6 (Whereupon, at 12:06 p.m. (EDT), the Hearing was
7 concluded.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

A handwritten signature in black ink, appearing to read "David A. Kasdan", is written above a solid horizontal line.

DAVID A. KASDAN