LENZ & STAEHELIN

Lenz & Staehelin
Avvocati
Route de Chêne 30
CH-1211 Ginevra 17

Telefono +41 58 450 70 00
Fax +41 58 450 70 01
www.lenzstaehelin.com

Paolo Michele Patocchi
Partner
Fax diretto +41 58 450 70 04
paolomichele.patocchi@lenzstaehelin.com

ICC International Court of Arbitration
Attn: Mr. Julien Fouret
Ms. Anne Caudrillier
38, Cours Albert 1er
FR – 75008 Paris

Cc:
Avv. Dr. Werner Thelen
Frankenwerft 5
DE – 50667 Colonia

Avv. Filippo Solari
Bolla Bonzanigo & Associati
Via G.B. Pioda 5 – CP 5202
CH – 6901 Lugano

By e-mail and telecopier

ICC Case No. 14953/FM
1. **Klinkert Ltd. UAE (Emirati Arabi Uniti)** ***2.*** **Willow Trust Ltd. (Guernsey)** ***3.*** **Friedrich Klinkert (Croazia)** ***4.*** **Sansego Trust (Guernsey)** ***c/*** **Sig. Fausto Mattiussi (Italia)**

5 May 2011
16602.001 / PATOM

Dear Mr. Fouret, dear Ms. Caudrillier,

I am writing further to *(i)* Ms. Caudriller's letter dated 26 April 2011 asking me to comment on Dr. Thelen's e-mail dated 14 April 2011 and on Klinkert Ltd. UAE's challenge of the undersigned, dated 29 March 2011, which the ICC dismissed in its letter dated 6 April 2011 and *(ii)* Ms. Caudriller's email dated 4 May 2010 asking me to comment on four further challenges sent to me for the first time by counsel for Klinkert Ltd. UAE, Sansego Trust, Willow Trust Ltd. and Mr. Friedrich Klinkert on 4 May 2011.

I have examined the five challenges carefully and the following are my comments on the two challenges made by Klinkert Ltd. UAE dated 28/29 March 2011.

The other challenges (*viz.* the challenges filed by Sansego Trust, Willow Trust Ltd. and Mr. Friedrich Klinkert dated 28 March 2011) do not in my view call for any further comments

As to the two challenges made by Klinkert Ltd. UAE and dated 28 and 29 March 2011, they are substantially identical, save that only the one dated 29 March 2011 is signed and there is a minor difference in the pagination.

Klinkert Ltd. UAE challenged me for "presumed partiality" relying mostly on some of the reasons which I gave in my Award of 22 February 2011. He further sought from the undersigned "an official declaration".

My comment is that the challenge is inadmissible and, in any event, it is without foundation.

The challenge is inadmissible for the following reasons.

Firstly, the undersigned is presently *functus officio*. My Award was notified to the Parties by the ICC on 28 February 2011. On that date the arbitration proceedings came to an end, and the effects of my appointment ended thereupon. The challenge of 28/29 March 2011 is therefore inadmissible, as the ICC correctly noted in its letter dated 6 April 2011.

Secondly, a challenge cannot be based simply on the fact that a party disagrees with the reasons given or the decision made by an arbitrator for it is not a procedural device enabling courts and arbitral institutions to review arbitral awards on the merits.

The challenge of 28/29 March 2011 is essentially a disguised appeal against the award, which is inadmissible both as a matter of ICC practice and Swiss law.

Thirdly, the challenge contains objections made against the taking of the evidence at the hearing of 3 and 4 May 2011. The challenge is similarly inadmissible in that respect, on a twofold ground:

(i) a party dissatisfied with the conduct of an arbitration is to raise its objections forthwith or as soon as possible, both as a matter of ICC practice and Swiss law, but the Claimant and the new Parties raised no objections whatsoever throughout the hearing;

(ii) the Claimant and the new Parties at the end of the hearing expressly stated on the record that they had no objections to raise in relation to the manner in which the proceedings had been conducted (Transcript, day 2 page 183).

I am further unable to agree with, and therefore reject, the points made by Klinkert Ltd. UAE as to my alleged friendship with Avv. Filippo Solari, counsel for the Respondent in the arbitration.

To begin with, I disclosed that Avv. Solari and myself grew up in Lugano and got to know each other at school some forty years ago. When I address Avv. Solari in Italian and I am not sitting, I would use the pronoun *"tu"*, a fact which I disclosed from the outset at the preliminary hearing in Lugano back on 8 January 2008. No comments were ever made on this disclosure there and then, or subsequently in the course of the arbitration for that matter. Klinkert Ltd. UAE and the new Parties raised this matter in their challenge for the first time.

In paragraph 12 of Klinkert Ltd. UAE's challenge, it is alleged that I indicated at the hearing of May 2010 that it was customary to use the pronoun *"tu"* among lawyers. That is false. After the explanation I gave at the preliminary hearing of 8 January 2008 in this respect (the separate challenge by Mr. Klinkert refers to the correct date in this respect, at p. 5 ¶ 9), I never had any reasons to explain anything in the further course of the arbitration and did not do so.

Avv. Solari is an old acquaintance, not a personal friend. I have not met him either socially or privately in the last thirty-five years or so. A challenge based on such basis is therefore meritless.

Dr. Thelen, counsel for Klinkert Ltd. UAE, has represented his clients in this arbitration which is an arbitration conducted in the Italian language. Dr. Thelen does not speak or understand Italian, as he disclosed from the outset. As a consequence, I had to decide whether I would insist on Italian being spoken even at telephone calls and meetings, or whether a more expedient solution could be found by agreement with counsel. With the express agreement of counsel for the respondent, it was agreed that counsel and I would all speak German at least in part so as to enable Dr. Thelen to understand directly rather than have to rely on Mr. Klinkert's or Miss Klinkert's translation, as a matter of professional courtesy to Dr. Thelen. This was agreed there and then in order to save costs (and time). It is remarkable that even that favour to counsel for the Claimant should now be relied upon by Klinkert Ltd. UAE as a ground for challenge.

Even if Klinkert Ltd. UAE's attempt to deny my impartiality and independence were admissible at all, it would be without foundation, since Klinkert Ltd. UAE complaints in essence go to the weighing of the evidence and the substance of the decisions I made in relation to its claims.

Even if Klinkert Ltd. UAE's request for a declaration on my part is devoid of any foundation, I am happy to confirm that I had no contacts whatsoever with Avv. Solari outside the hearings, whether in writing or otherwise, and did not receive from him any documents whatsoever other than those which were filed in the arbitration.

I have also read Dr. Thelen's email of 14 April 2011. The final sentence in this letter says *"To involve the Schweizer Bundesgericht we need a formal decision of the International Court of*

Arbitration". That does not reflect the position of Swiss law in relation to setting aside proceedings.

..*.*.*

Very truly yours,

Paolo Michele Patocchi