MEMORANDUM FOR CLAIMANT

UNIVERSITY OF HEIDELBERG

MATTHIAS HART • JOAN FELICE HOFMANN
ANICK MOITEAUX • DOMINIC MÜLLER • GIEDRE PLENTAITE
MEMORANDUM FOR CLAIMANT

ON BEHALF OF:

Equapack, Inc.
345 Commercial Ave.,
Oceanside,
Equatoriana

(CLAIMANT)

AGAINST:

Medi-Machines, S.A.
415 Industrial Place,
Capitol City,
Mediterraneo

(RESPONDENT)
TABLE OF CONTENTS

TABLE OF CONTENTS
ABBREVIATIONS
INDEX OF AUTHORITIES
INDEX OF CASES
INDEX OF ARBITRAL AWARDS
STATEMENT OF FACTS
SUBMISSIONS

A. The Tribunal should not make use of its discretionary power to order security for costs
   I. An order for security for costs would constitute an unjustifiable prejudgment of the merits of the case
   II. The unimpaired effectiveness of the eventual award and the exemplary behavior of CLAIMANT militate against an order for security for costs
      1. There is no prospect of RESPONDENT being unable to recover an eventual award of costs from CLAIMANT
         (a.) The enforcement of the award is not endangered by the reluctance of the Equatorianian courts in recognizing and enforcing foreign arbitral awards
         (b.) CLAIMANT’s financial situation does not necessitate security for costs
      2. The respective behavior of CLAIMANT and RESPONDENT in the arbitration disfavors CLAIMANT to be ordered to provide security for costs

B. CLAIMANT is allowed to divulge all matters related with the arbitration to Equatoriana Investors
   I. The revelation of the fact of arbitration and its details to Equatoriana Investors does not constitute a disclosure
      1. Informing Equatoriana Investors would not result in publication or uncontrollable spread of confidential information
      2. Informing Equatoriana Investors would only reveal to them what they
already know or could easily deduce

II. CLAIMANT’s disclosure would be justified under SIAC Rule 34.6(d)

1. CLAIMANT is under a duty to disclose imposed by Equatorian law

2. The financial or business situation of CLAIMANT is materially affected by the arbitration

C. The Tribunal does not have authority to order CLAIMANT to refrain from divulging any aspect of the current arbitration

I. The Tribunal has now power to order confidentiality by award under SIAC Rule 28

II. The Tribunal has no power to order confidentiality by interim measure

D. No consequences would follow if CLAIMANT were to violate an order of confidentiality

I. CLAIMANT could not be punished by fine

1. The Tribunal cannot lay a fine on the order

2. An order of confidentiality would not be enforceable

II. The arbitration agreement could not be declared avoided

III. CLAIMANT would not be liable in damages

IV. The Tribunal could not disadvantage CLAIMANT in the further arbitration proceedings

E. The Model 14 auger-feeders were not in conformity with the contract

I. The Model 14 machines were not of the quality required

1. The Model 14 machines were not suitable for packaging corrosive products such as salt as was called for by the contract

2. The Model 14 machines were not fit for the particular purpose of packaging salt

3. The Model 14 machines were not fit for their ordinary use

II. The Model 14 machines did not perform at the speed to be expected
1. The Model 14 machines did not perform at the speeds required under the contract 19
2. The Model 14 machines did not perform at speeds which could ordinarily be expected 20

F. The condition of the Model 14 machines and RESPONDENT’s conduct constituted fundamental breach whereupon CLAIMANT avoided the contract 20

I. The non-conformity of the Model 14 machines and RESPONDENT’s failure to warn each in itself constituted fundamental breach 21

1. RESPONDENT committed two breaches of contract 21
   (a.) RESPONDENT breached the contract by delivering non-conforming machines 21
   (b.) RESPONDENT breached its obligation to inform CLAIMANT of the effect the use of salt would have on its machines 21

2. Any detriment caused by RESPONDENT’s breaches substantially deprived CLAIMANT of what it was entitled to expect under the contract 23
   (a.) CLAIMANT’s expectation interest could be clearly discerned from the communication with RESPONDENT 23
   (b.) CLAIMANT’s detriment reached such degree of gravity as to be substantial 23
       (i) The detriment caused by RESPONDENT’s breach was substantial 23
       (ii) It was not reasonable for CLAIMANT to have recourse to less ultimate remedies 25

3. CLAIMANT’s substantial detriment was foreseeable 25
   (a.) Substantial detriment caused by the delivery of non-conforming machines could have been foreseen by a reasonable seller at time of conclusion of contract 26
   (b.) Substantial detriment was foreseeable to RESPONDENT as a reasonable merchant on 23 July 2002 at the latest 27
       (i) Knowledge acquired by RESPONDENT after conclusion of the contract is relevant when determining foreseeability of CLAIMANT’s substantial detriment 27
       (ii) CLAIMANT addressed the purpose of packaging salt in a manner sufficient to alert RESPONDENT during the phone call 28

II. The letter of 19 October 2002 from Mr. Swan to Mr. Drake constituted a declaration of avoidance of the contract 28
1. CLAIMANT was entitled to declare avoidance of the contract under Art. 49(1)(a)
2. Art. 82 does not deprive CLAIMANT of its right to declare avoidance of the contract
3. CLAIMANT validly declared avoidance of the contract by its letter dispatched on 19 October 2002
   
   (a.) The letter of CLAIMANT constituted effective notice of avoidance of the contract
   
   (b.) The letter of CLAIMANT constituted timely notice of avoidance of the contract

   (i) CLAIMANT could not and ought not to have known of RESPONDENT’s breach before the end of September 2002
   
   (ii) CLAIMANT by its letter of 19 October 2003 declared avoidance within reasonable time
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§</td>
<td>Section</td>
</tr>
<tr>
<td>AG</td>
<td>Amtsgericht (German Petty District Court)</td>
</tr>
<tr>
<td>AISCC</td>
<td>Arbitration Institute of the Stockholm Chamber of Commerce</td>
</tr>
<tr>
<td>Art.</td>
<td>Article</td>
</tr>
<tr>
<td>Artt.</td>
<td>Articles</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof (German Federal Supreme Court)</td>
</tr>
<tr>
<td>BGHZ</td>
<td>Sammlung von Entscheidungen des Bundesgerichtshofs in Zivilsachen (Official Reporter of cases decided by the German Federal Supreme Court)</td>
</tr>
<tr>
<td>CA</td>
<td>Cour d’appel (French Appeal Court)</td>
</tr>
<tr>
<td>CCIB</td>
<td>Chamber of Commerce and Industry of Budapest</td>
</tr>
<tr>
<td>cf.</td>
<td>compare (conferatur)</td>
</tr>
<tr>
<td>ed.</td>
<td>edited</td>
</tr>
<tr>
<td>e.g.</td>
<td>for example (exempli gratia)</td>
</tr>
<tr>
<td>FOB</td>
<td>Free On Board (INCOTERM)</td>
</tr>
<tr>
<td>HG</td>
<td>Handelsgericht (Swiss Commercial Court)</td>
</tr>
<tr>
<td>Ibid.</td>
<td>in the same place (ibidem)</td>
</tr>
<tr>
<td>i.e.</td>
<td>that means (id est)</td>
</tr>
<tr>
<td>ICARFCCI</td>
<td>Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Center for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>INCOTERM</td>
<td>Incoterms 2000, International Commercial Terms of the ICC</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
</tr>
<tr>
<td>LG</td>
<td>Landgericht (German Regional Court)</td>
</tr>
<tr>
<td>Ltd.</td>
<td>Limited</td>
</tr>
<tr>
<td>MCC</td>
<td>Danish Maritime Commercial Court</td>
</tr>
<tr>
<td>NAI</td>
<td>Netherlands Arbitration Institute</td>
</tr>
<tr>
<td>Term</td>
<td>Abbreviation</td>
</tr>
<tr>
<td>----------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>n.</td>
<td>note</td>
</tr>
<tr>
<td>No.</td>
<td>Number</td>
</tr>
<tr>
<td>Nos.</td>
<td>Numbers</td>
</tr>
<tr>
<td>OG</td>
<td>Obergericht (Suisse Appellate Court)</td>
</tr>
<tr>
<td>OGH</td>
<td>Oberster Gerichtshof (Austrian Supreme Court)</td>
</tr>
<tr>
<td>OLG</td>
<td>Oberlandesgericht (German Regional Court of Appeal)</td>
</tr>
<tr>
<td>O R.</td>
<td>Official Records</td>
</tr>
<tr>
<td>p.</td>
<td>page</td>
</tr>
<tr>
<td>pp.</td>
<td>pages</td>
</tr>
<tr>
<td>para.</td>
<td>Paragraph</td>
</tr>
<tr>
<td>S.D.N.Y</td>
<td>United States District Court, Southern District of New York</td>
</tr>
<tr>
<td>et seq.</td>
<td>the following (sequential)</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>v.</td>
<td>versus</td>
</tr>
<tr>
<td>Y.B.</td>
<td>UNCITRAL Yearbook</td>
</tr>
</tbody>
</table>
INDEX OF AUTHORITIES

ACHILLES, Wilhelm-Albrecht  
Kommentar zum UN-Kaufrechtsübereinkommen (CISG)  
Neuwied 2000  
(Cited as: Achilles)

AUDIT, Bernard  
La vente internationale de marchandises  
Paris 1990  
(Cited as: Audit)

BABIAK, Andrew  
in: Temple International and Comparative Law Journal (Spring) 1992, p. 113  
(Cited as: Babiak)

BERGER, Klaus Perter  
Arbitration interactive  
Frankfurt 2002  
(Cited as: Berger)

BERNSTEIN, Herbert  
LOOKOFSKY, Joseph  
Understanding the CISG in Europe  
(Cited as: Bernstein/Lookofsky)

BERNSTEIN, Ronald  
TACKABERRY, John  
MARRIOTT, Arthur L.  
WOOD, Derek  
Handbook of Arbitration Practice  
(Cited as: Berstein/Tackaberry/Marriott/Wood)

BIANCA, Cesare Massimo  
Commentary on the International Sales Law the 1980 Vienna Sales Convention  
Milan 1987  
(Cited as: Bianca/Bonell-AUTHOR)

BLACK, Henry Campbell  
Black’s Law Dictionary  
Definition of Terms and Phrases of American and English Jurisprudence, Ancient and Modern  
(Cited as: Black)

BORN, Gary B.  
International Commercial Arbitration  
The Hague 2001  
(Cited as: Born)
<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Location</th>
<th>Year</th>
<th>Cited as</th>
</tr>
</thead>
<tbody>
<tr>
<td>BOTZENHARDT, Bertrand</td>
<td>Die Auslegung des Begriffs der wesentlichen Vertragsverletzung im UN-Kaufrecht</td>
<td>Frankfurt</td>
<td>1998</td>
<td>Botzenhardtl</td>
</tr>
<tr>
<td>BUCHER, Andreas</td>
<td>Die neue internationale Schiedsgerichtsbarkeit in der Schweiz</td>
<td>Basel</td>
<td>1989</td>
<td>Bucher</td>
</tr>
<tr>
<td>BUCHER, Eugen (Ed.)</td>
<td>Wiener Kaufrecht - Berner Tage für die juristische Praxis</td>
<td>Bern</td>
<td>1991</td>
<td>AUTHOR in BTJP</td>
</tr>
<tr>
<td>COLBRAN, Stephen</td>
<td>Security for costs</td>
<td>Melbourne</td>
<td>1993</td>
<td>Colbran</td>
</tr>
<tr>
<td>CRAIG, W. Laurence</td>
<td>International Chamber of Commerce arbitration</td>
<td></td>
<td></td>
<td>Craig/Park/Paulsson</td>
</tr>
<tr>
<td>PARK, William W.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PAULSSON, Jan</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DENOIX DE SAINT MARC, Valéry</td>
<td>Confidentiality of Arbitration and the Obligation to Disclose Information of Listed Companies or During Due Diligence Investigations in: Journal of International Arbitration (2003) 211</td>
<td>Bern</td>
<td>1991</td>
<td>Denoix de Saint Marc</td>
</tr>
</tbody>
</table>
DUNCAN, Tom
MORIARTY, Sandra E.

A communication-based marketing model for managing relationships
_in: Journal of marketing, Volume 62, Issue 2, 1 – 13
New York 1998
(Cited as: Duncan/Moriarty)

DESSEMONTET, Francois

Arbitration and Confidentiality
299
(Cited as: Dessemontet)

ENDERLEIN, Fritz
MASKOW, Dietrich

International Sales Law, Commentary
New York 1992
(Cited as: Enderlein/Maskow)

ENDERLEIN, Fritz
MASKOW, Dietrich
STROHBACH, Heinz

Internationales Kaufrecht
Berlin 1991
(Cited as: Enderlein/Maskow/Strohbach)

ERDEM, Ercüment

La livraison des marchandises selon la Convention de Vienne
Fribourg 1990
(Cited as: Erdem)

FELTHAM, Glenn

The United Nations Convention on Contracts for the International Sale of Goods
(Cited as: Feltham)

First Committee Report

UNCITRAL First Committee Report, U.N. GAOR, 1<sup>st</sup>
Comm.
U.N. Document No. A/Conf.97/11
Vienna 1981
(Cited as: First Committee Report, A/Conf.97/11)

FLECHTNER, Harry M.

Remedies Under the New International Sales Convention: The Perspectives from Article 2 of the U.C.C.
(Cited as: Flechtner)

FOUCHARD, Philippe
GAILLAIRD, Emmanuel
GOLDMAN, Berthold

Traité de l’Arbitrage commercial international
Paris 1996
(Cited as : Fouchard/Gaillard/Goldman)
<table>
<thead>
<tr>
<th>Author/Title/Year</th>
<th>Citation/Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Frawley, Robert D.</td>
<td>Due Diligence – The Crucible, In: New Jersey Lawyer, the Magazine (December 2002) 45 (Cited as: Frawley)</td>
</tr>
<tr>
<td>Geiben, Jörg</td>
<td>Die Privatsphäre und Vertraulichkeit im Schiedsverfahren, Eine rechtsvergleichende Untersuchung des deutschen, englischen und US-amerikanischen Schiedsrechts, Cologne 2001 (Cited as: Geiben)</td>
</tr>
<tr>
<td>Heilmann, Jan</td>
<td>Mängelgewährleistung im UN-Kaufrecht, Berlin 1994 (Cited as: Heilmann)</td>
</tr>
<tr>
<td>Herber, Rolf &amp; Czerwenka, Beate</td>
<td>Internationales Kaufrecht, Commentary, Munich 1991 (Cited as: Herber/Czerwenka)</td>
</tr>
<tr>
<td>Heuzé, Vincent</td>
<td>La vente internationale de marchandises, Paris 2000 (Cited as: Heuzé)</td>
</tr>
<tr>
<td>Author(s)</td>
<td>Title</td>
</tr>
<tr>
<td>---------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>HOLZMANN, Howard M. NEUHAUS, Joseph E.</td>
<td>A guide to the UNCITRAL Model Law on international Commercial Arbitration, Commentary</td>
</tr>
<tr>
<td>HONSELL, Heinrich</td>
<td>Kommentar zum UN-Kaufrecht, Commentary</td>
</tr>
<tr>
<td>HUßLEIN-STICH, Gabrielle</td>
<td>Das UNCITRAL Modelgesetz über die internationale Handelschiedsgleichbarkeit</td>
</tr>
<tr>
<td>KAROLLUS, Martin</td>
<td>UN-Kaufrecht: eine systematische Darstellung für Studium und Praxis</td>
</tr>
</tbody>
</table>

XI
<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Publisher/Year</th>
<th>Cited as</th>
</tr>
</thead>
<tbody>
<tr>
<td>KLÖTZEL, Thomas R.</td>
<td>Comment on Singapore in Provisional Remedies in International Commercial Arbitration</td>
<td>Berlin 1994</td>
<td>Klötzel</td>
</tr>
<tr>
<td>KOCK, Annette</td>
<td>Nebenpflichten im UN-Kaufrecht</td>
<td>Regensburg 1995</td>
<td>Kock</td>
</tr>
<tr>
<td>LEW, Julian D. M.</td>
<td>Comparative International Commercial Arbitration</td>
<td>The Hague 2003</td>
<td>Lew/Mistelis/Kröll</td>
</tr>
<tr>
<td>MISTELIS, Loukas A.</td>
<td>The Hague 2003</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KRÖLL, Stefan</td>
<td>Contemporary Problems in International Arbitration</td>
<td>The Hague 1987</td>
<td>AUTHOR in Lew</td>
</tr>
<tr>
<td>LIEBSCHER, Christoph</td>
<td>The Healthy award</td>
<td>The Hague 2003</td>
<td>Liebscher</td>
</tr>
</tbody>
</table>
LORENZ, Manuel
SALGER, Hans-Christian
WITZ, Wolfgang

Internationales Einheitliches Kaufrecht, Commentary
Heidelberg 2000
(Cited as: Salger/Lorenz/Witz-AUTHOR)

MARCHAC, Grégoire

Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules
(Cited as: Marchac)

MERKT, Hanno

Internationaler Unternehmenskauf,
(Cited as: Merkt)

NEEDHAM, Michael J.

Orders for Security for a Party’s costs
in: Journal for Commercial International Arbitration (1997) 22
(Cited as: Needham)

NEUMAYER, Karl H.
MING, Catherine

Convention de Vienne sur les contrats de vente internationale de marchandises, Commentary
Paris 1993
(Cited as: Neymayer/Ming)

OAKLEY-WHITE, Olivier

Confidentiality revisited: Is International Arbitration losing one of its major benefits
(Cited as: Oakley-White)

OR

UN-Document No. A/CONF.97/19
Vienna 1981
(Cited as: O.R.-AUTHOR, A/CONF.97/19)

O’REILLY, Michael P.

Costs in Arbitration Proceedings
(Cited as: O’Reilly)

PICH, Cathrine

The Convention on contracts for international Sale of Good and the uniform Commercial Code
in: North Carolina Journal for International Law and Commercial Regulation, Spring 2003, p. 519

XIII
PICOT, Gerhard
Unternehmenskauf und Restrukturierung
(Cited as: Picot)

PILTZ, Burghard
Internationales Kaufrecht: das UN-Kaufrecht in praxisorientierter Darstellung
Munich 1993
(Cited as: Piltz)

PILTZ, Burghard
Neue Entwicklungen im UN-Kaufrecht
in: Neue Juristische Wochenschrift (1996) 2768
(Cited as: Piltz, NJW)

POUDRET, Jean-Francois
Droit comparé de l’arbitrage international
Geneva 2002
(Cited as: Poudret/Besson)

POUDRET, Jean-Francois
BESSON, Sébastian
Droit comparé de l’arbitrage international
Geneva 2002
(Cited as: Poudret/Besson)

REDFERN, Alan
HUNTER, Martin
Law and Practice of International Commercial Arbitration
(Cited as: Redfern/Hunter)

REDFERN, D. Alan
Arbitration and the Courts: Interim measures of protection – is the Tide about to turn?
(Cited as: Redfern)

REINHART, Gert
UN-Kaufrecht, Commentary
Heidelberg 1991
(Cited as: Reinhart)

RUBINO-SAMMARTANO, Mauro
International Arbitration Law and Practice
The Hague, 2001
(Cited as: Rubino-Sammartano)

RUBINS, Noah
In God we trust, all others pay cash : Securtiy for costs in International Commercial Arbitration
(Cited as: Rubins)

SALGER, Hanns-Christian
LORENZ, Manuel
WITZ, Wolfgang
International Einheitliches Kaufrecht, Commentary
Heidelberg 2000
(Cited as: Salger/Lorenz/Witz-AUTHOR)
SCHÄFER, Erik
VERBIST, Herman
IMHOOS, Christophe
L’arbitrage de la Chambre de Commerce Internationale (CCI) en pratique
Brussels 2002
(Cited as: Schäfer/Verbist/Imhoos)

SCHLECHTRIEM, Peter
Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods
Vienna 1986
(Cited as: Schlechtriem, Vienna)

SCHLECHTRIEM, Peter
Kommentar zum Einheitlichen UN-Kaufrecht, Commentary
(Cited as: Schlechtriem-AUTHOR)

SCHLECHTRIEM, Peter
Uniform Sales Law in the decisions of the Bundesgerichtshof
in: 50 Years of the Bundesgerichtshof (BGH), 2000
(Cited as: Schlechtriem, BGH)

SCHLECHTRIEM, Peter
Internationales UN-Kaufrecht
(Cited as: Schlechtriem, Internationales Kaufrecht)

SCHREUER, Christoph
The ICSID Convention: A Commentary,
Cambridge 2001
(Cited as: Schreuer)

SCHWARTZ, Eric A.
Vol. 4 (1993) 8
(Cited as: Schwartz)

Secretariat Commentary
UNCITRAL Commentary on the Draft Convention on Contracts for the International Sale of Goods
UN-Document No. A/CONF. 97/5
(Cited as: Secretariat Commentary)

SMIT, Hans
Confidentiality
(Cited as: Smit)

SOERGEL, Hans Theodor
Kommentar zum Bürgerliches Gesetzbuch (13 Band)
(Cited as: Soergel-AUTHOR)

XV
SOO, Gary
Securing costs in Hong Kong Arbitration
(Cited as: Soo)

STARKE, J.G.
Security for costs in respect of arbitration proceedings:
impecuniosity not a ground for ordering such security,
Australian Law Journal (March 1989) 210
(Cited as: Starke)

TRAKMAN, Leon E.
Confidentiality in International Commercial Arbitration
(Cited as: Trakman)

VAN DEN BERG, Albert Jan
(Cited as: van den Berg)

VÖLKER, Gregor
Vorvertragliche Pflichten und Gefährtragung beim
Unternehmenskauf
Munich 2003
(Cited as: Völker)

VON STAUDINGER, Julius
Kommentar zum BGB mit Einführungsgesetz und
Nebengesetzen – Wiener UN-Kaufrecht (CISG)
(Cited as: Staudinger-Magnus)

WANG, Peter J.-H.
Das Wiener Übereinkommen über internationale
Warenkaufverträge vom 11. April 1980
_in: Zeitschrift für Vergleichende Rechtswissenschaft
(1988) 184-202
(Cited as: Wang)

WEIGAND, Frank-Bernd
Practitioner’s Handbook on International Arbitration
Munich 2002
(Cited as: Weigand)

WERBICKI, Raymond J.
Arbitral Interim measures: Fact or fiction?
in: Dispute Resolution Journal (November 2002 – January
2003) 62
(Cited as: Werbicki)

ZIEGLER, Ulrich
Leistungsstörungsrecht nach dem UN-Kaufrecht
Baden-Baden 1995
(Cited as: Ziegler)
INDEX OF CASES

Austria

OGH, 2 Ob 48/02a, 27 February 2003
<http://www.cisg.law.pace.edu/cases/030227a3.html>
(Cited as: OGH 2 Ob 48/02a (Austria 2003))

OGH, 2 Ob 100/00w, 13 April 2000
<http://cisgw3.law.pace.edu/cases/000413a3.html>
(Cited as: OGH 2 Ob 100/00w (Austria 2000))

OGH, 2 Ob 163/97b, 11 March 1999
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990311a3.html>
(Cited as: OGH 2 Ob 163/97b (Austria 1999))

Australia

Lall v. 53-55 Hall St. Pty Ltd. [1987] 1 N.S.W.R. 310
(Cited as: Lall v. 53-55 Hall St. Pty Ltd. (Australia 1987))

Denmark

MCC – Maritime Commercial Court, 31 January 2002
<http://cisgw3.law.pace.edu/cases/020131d1.html>
(Cited as: MCC (Denmark 2002))

England

(Cited as: Bank Mellat vs. Helliniki Techniki SA (England 1984))

(Cited as: Chopée Levalin NV v. Ken-Ren Chemicals and Fertilisers Ltd. (England 1995))

(Cited as: Porzelack KG v. Porzelack U.K. Limited (England 1987))
Court of Appeal, [1987] 2 Lloyd’s Rep. 445
(Cited as: *Havbulk I v. Korea Shipbuilding & Engineering (England 1987)*)

France

Caiato Roger v. La Société française de factoring international factor France « S.F.F. » (SA)
CA Grenoble, 93/4126, 13 September 1995
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950913f1.html>
(Cited as: *Roger Caiato v. Société française de factoring international factor France (France 1995)*)

Enterprise Alain Veyron v. Société E. Ambrosio
CA Grenoble, 93/1613, 26 April 1995
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950426f1.html>
(Cited as: *Enterprise Alain Veyron v. Société E. Ambrosio (France 1995)*)

S.N.T.M. Hyproc v. Snach,
Cour de Cassation 08 June 1995
Revue de l’arbitrage 1996, p. 125
(Cited as: *S.N.T.M. Hyproc v. Snach (France 1995)*)

SARL Bri Production « Bonaventure » v. Société Pan African Export
CA Grenoble, 93/3275, 22 February 1995
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950222f1.html>
(Cited as: *SARL Bri Production v. Société Pan African Export (France 1996)*)

Société Coq’in v. Société Polarcup Bénélux BV
Cour de Cassation, 08 February 2002
<http://cisgw3.law.pace.edu/cases/020108f1.html>
(Cited as: *Société Coq’in v. Société Polarcup Bénélux BV (France 2002)*)

Germany

AG Berlin, 102 O 181/98, 25 May 1999
<http://cisgw3.law.pace.edu/cases/990525g1.html>
(Cited as: *AG Berlin 102 O 181/98 (Germany 1999)*)

AG Oldenburg, 5 C 74/89, 24 April 1990
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/900424g1.html>
(Cited as: *AG Oldenburg 5 C 73/89 (Germany 1990)*)
BGH VIII ZR 51/95, 03 April 1996
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960403g1.html>
   (Cited as: **BGH VIII ZR 51/95 (Germany 1996)**)

BGH, VIII ZR 60/01, 31 October 2001
   <http://www.cisg.law.pace.edu/cases/011031g1.html>
   (Cited as: **BGH VIII ZR 60/01 (Germany 2001)**)

BGH, VIII ZR 121/98, 24 March 1999
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html>
   (Cited as: **BGH VIII ZR 121/98 (Germany 1999)**)

BGH, VIII ZR 137/75, 24 November 1976
   in: BGHZ 67, 359
   (Cited as: **BGH VIII ZR 137/75 (Germany 1976)**)

BGH VIII ZR 159/94, 08 March 1995
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950308g3.html>
   (Cited as: **BGH VIII ZR 159/94 (Germany 1995)**)

BGH, VIII ZR 172/77, 05 July 1978
   in: Neue Juristische Wochenschrift (1978) 1841-1842
   (Cited as: **BGH VIII ZR 172/77 (Germany 1978)**)

BGH, VIII ZR 287/98, 03 November 1999
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/991103g1.html>
   (Cited as: **BGH VIII ZR 287/98 (Germany 1999)**)

BGH, VIII ZR 300/96, 25 June 1997
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970625g2.html>
   (Cited as: **BGH VIII ZR 300/96 (Germany 1997)**)

BGH, VI ZR 310/78, 16 June 1983
   in: Neue Juristische Wochenschrift (1983) 2165-2166
   (Cited as: **BGH VI ZR 310/78 (Germany 1983)**)

LG Landshut, 54 O 644/94, 05 April 1995
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950405g1.html>
   (Cited as: **LG Landshut 54 O 644/94 (Germany 1995)**)

LG München, 5HK O 3936/00, 27 February 2002
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020227g1.html>
   (Cited as: **LG München 5HK O 3936/00 (Germany 2002)**)

LG München, 10 HKO 23750/94, 20 March 1995
   <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950320g1.html>
   (Cited as: **LG München 10 HKO 23750/94 (Germany 1995)**)

**XIX**
LG Stendal, 22 S 234/94, 12 October 2000
<http://www.cisg.law.pace.edu/cases/001012g1.html>
(Cited as: LG Stendal 22 S 234/94 (Germany 2000))

LG Stuttgart, 3 KfH O 97/89, 31 August 1989
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/890831g1.html>
(Cited as: LG Stuttgart 3 KfH O 97/89 (Germany 1989))

OLG Celle, 20 U 76/94, 24 May 1995
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950308g3.html>
(Cited as: OLG Celle 20 U 76/94 (Germany 1995))

OLG Frankfurt, 5 U 15/93, 18 January 1994
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940118g1.html>
(Cited as: OLG Frankfurt 5 U 15/93 (Germany 1994))

OLG Frankfurt, 5 U 164/90, 17 September 1991
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910917g1.html>
(Cited as: OLG Frankfurt U 164/90 (Germany 1991))

OLG Frankfurt, 13 U 51/93, 20 April 1994
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940420g1.html>
(Cited as: OLG Frankfurt 13 U 51/93 (Germany 1994))

OLG Frankfurt, 02 May 1990
In: Recht der Internationalen Wirtschaft (1990) 590
(Cited as: OLG Frankfurt RIW 1990, 590 (Germany 1990))

OLG Hamburg, 1 U 167/95, 28 February 1997
<http://www.cisg.law.pace.edu/cases/970228g1.html>
(Cited as: OLG Hamburg U167/95 (Germany 1997))

OLG Hamm, 19 U 97/91, 22.09.1992
<http://www.cisg.law.pace.edu/cases/920922g1.html>
(Cited as: OLG Hamm 19 U 97/91 (Germany 1992))

OLG Koblenz, 2 U 31/96, 31 January 1997
<http://www.cisg.law.pace.edu/cases/970131g1.html>
(Cited as: OLG Koblenz U 31/96 (Germany 1997))

OLG Köln, 18 U 121/96, 21 August 1997
<http://www.cisg.law.pace.edu/cases/970821g1.html>
(Cited as: OLG Köln 18 U 121/96 (Germany 1997))

XX
OLG Köln, 27 U 58/96, 08 January 1997
   <http://www.cisg.law.pace.edu/cases/970108g1.html>
   (Cited as: OLG Köln 27 U 58/96 (Germany 1997))

OLG München, 7 U 4427/97, 11 March 1998
   <http://www.cisg.law.pace.edu/cases/980311g1.html>
   (Cited as: OLG München 7 U 4427/97 (Germany 1998))

OLG Oldenburg, 12 U 40/00, 5 December 2000
   <http://www.cisg.law.pace.edu/cases/001205g1.html>
   (Cited as: OLG Oldenburg 12 U 40/00 (Germany 2000))

Hungary

CCIB, VB/94124, 17 January 1995
   <http://www.cisg.law.pace.edu/cases/951117h1.html>
   (Cited as: CCIB VB/94124 (Hungary 1995))

Italy

Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.
   Tribunale di Rimini, 3095, 26.11.2002
   <http://cisgw3.law.pace.edu/cases/021126i3.html>
   (Cited as: Al Palazzo v. Bernardaud di Limoges (Italy 2002))

Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A
   Tribunale di Vigevano, n. 405 (12 July 2000)
   <http://www.cisg.law.pace.edu/cases/000712i3>
   (Cited as: Rheinland Versicherungen v. Atlarex and Allianz Subalpina (Italy 2000))

Spain

Manipulados del Papel y Cartón SA v. Sugem Europa SL
   <http://www.cisg.law.pace.edu/cases/970204s4.html>
   (Cited as: Manipulados del Papel y Cartón SA v. Sugem Europa SL (Spain 1997))
Sweden

Bulgarian Bank Co. v. AI Trade Finance, Inc.
Svea Court of Appeal, Dept. 16, 30 March 1999
(Cited as: Bulgarian Bank v. AI Trade Finance, Inc. (Sweden 1999))

Bulgarian Bank Co. v. AI Trade Finance, Inc.
Swedish Supreme Court, Case no. T 1881-99, 27 October 2000
(Cited as: Bulgarian Bank v. AI Trade Finance, Inc. (Sweden 2000))

Switzerland

HG Aargau, OR.2001.00029, 05 November 2002
<http://www.cisg.law.pace.edu/cases/021105s1.html>
(Cited as: HG Aargau, OR.2001.00029 (Switzerland 2002))

OG Luzern, 11 95 123/357, 08 January 1997
<http://www.cisg.law.pace.edu/cases/970108s1.html>
(Cited as: OG Luzern, 11 95 123/357 (Switzerland 1997))

Roland Schmidt GmbH v. Textil-Werke Blumenegg AG
Bundesgericht, 4C.296/2000/rnd, 22. December 2000
<http://cisgw3.law.pace.edu/cases/001222s1.html>
(Cited as: Roland Schmidt v. Textil-Werke Blumenegg (Switzerland 2000))

United States of America

Atlanta Shipping Corp. v. Chemical Bank
U.S. Circuit Court of Appeals (2d. Cir.),1987
818 F.2d 240
(Cited as: Atlanta Shipping Corp. v. Chemical Bank (US 1987))

451 F.Supp. 1040
(Cited as: Carolina Power and Light Comany v. Gie Uranex (US 1977))

Esso Australia Resources Ltd. v. Plowman
High Court of Australia, 128 ALR 391 (1995)
(Cited as: Esso Australia Resources Ltd. v. Plowman (US 1995))

XXII
Filanto v. Chilewich Int’l Corp.
Dis. Ct., Southern Dis. of N.Y., 92 Civ. 3253, 14 April 1992
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920414u1.html>
(Cited as: Filanto v. Chilewich Int’l Corp. (US 1992))

Dockets 95-7182, 95-7186, 06.12.1996
<http://cisgw3.law.pace.edu/cases/951206u1.html>
(Cited as: Delchi Carrier, S.p.A. v. Rotorex Corp. (US 1995))

MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino S.p.A.,
<http://www.cisg.law.pace.edu/cases/980629u1.html>
(Cited as: MCC, Inc. v. Ceramica Nuova D’Agostino (US 1998))

Oilex A.G. MM Mitsui & Co
United States District Court, Southern District of New York
669 F.Supp 85 (S.D.N.Y. 1987)
(Cited as: Oilex A.G. MM Mitsui & Co (US 1987)
INDEX OF ARBITRAL AWARDS

ICC Award, Case No. 8786, unpublished, referred to in: Rubins, p. 341
(Cited as: ICC Award No. 8786)

ICC Award, Case No. 7047, unpublished, referred to in: Rubins, p. 372
(Cited as: ICC Award No. 7047)

ICC Award, Case No. 8611/HV/JK, 23.01.1997
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/978611i1.html>
(Cited as: ICC Award No. 8611)

ICC Award, Case No. 8213, March 1995
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/958213i1.html>
(Cited as: ICC Award No. 8213)

ICC Award, Case No. 2444
(Cited as: ICC Award Case 2444)

Maritime International Nominees Establishment (MINE) v. Republic of Guinea
ICSID ARB/84/4, Washington 1988
(Cited as: Maritime International Nominees Establishment v. Republic of Guinea)

NAI Award, Case No. 2319, 15.10.2002
<http://cisgw3.law.pace.edu/cases/021015n1.html>
(Cited as: NAI Case No. 2319)

ICARFCCI Arbitration proceeding 54/1999; 24.01.2000;
<http://cisgw3.law.pace.edu/cases/000124r1.html]
(Cited as: ICARFCCI 54/1999)

ICARFCCI Arbitration Proceeding 166/1995, 12.03.1996
<http://www.cisg.law.pace.edu/cases/960312r1.html>
(Cited as: ICARFCCI 166/1995)

Beijing Light Automobile Co. v. Connell Limited Partnership
AISCC Award, 05 June 1998
<http://www.cisg.law.pace.edu/cases/980605s5.html>
(Cited as: Beijing Light Automobile Co. v. Connell)
STATEMENT OF FACTS

2002
24 June CLAIMANT enquires into the purchase of six machines capable of packaging dry bulk commodities

3 July RESPONDENT offers six Model 14 auger-feeders at US$65,000 per machine.

12 July CLAIMANT accepts RESPONDENT’s offer

23 July CLAIMANT enquires into the status of the order in a telephone call

24 July RESPONDENT promises shipment of the Model 14 auger-feeders later that week, stating that machines are still at its warehouse

2 August CLAIMANT’s account is debited with the purchase price

21 August Model 14 auger-feeders delivered to CLAIMANT

30 August CLAIMANT installs the machines and puts them into operation

End of September Four machines used for packaging salt show serious signs of corrosion

18 October CLAIMANT telephones RESPONDENT to inform him about the corrosion

19 October CLAIMANT requests reimbursement of the purchase prize and other expenses and places the machines at RESPONDENT’s disposal.

27 October RESPONDENT offers to supply CLAIMANT with Model 17 auger-feeder at a substantially lower price than usual

2003
10 February CLAIMANT sends letter with Notice of Arbitration to SIAC.

24 February SIAC acknowledges Notice of Arbitration, requesting the parties to appoint arbitrators and pay the advance on costs within 7 days

5 March CLAIMANT appoints Arbitrator 1.

6 March First reminder to RESPONDENT, calling for payment of the arbitration fees within the next 7 days

11 March SIAC acknowledges CLAIMANT’s payment of the arbitration fees and appointments Arbitrator 1
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 March</td>
<td>Second reminder to RESPONDENT, calling for payment of arbitration fees within the next 7 days</td>
</tr>
<tr>
<td>20 March</td>
<td>Third reminder to RESPONDENT, calling for payment of arbitration fees within the next 7 days</td>
</tr>
<tr>
<td>26 March</td>
<td>RESPONDENT’s letter to SIAC recognizing the claim and including a copy of the payment order for the advance on costs</td>
</tr>
<tr>
<td>17 April</td>
<td>Submission of Statement of Defense and appointment of Arbitrator 2 by RESPONDENT</td>
</tr>
<tr>
<td>20 June</td>
<td>Procedural Order No. 1, appointing Eur.Ing. Franz van Heath-Robinson as expert engineer to test Model 14 auger-feeders</td>
</tr>
<tr>
<td>6 August</td>
<td>Expert engineer’s report</td>
</tr>
<tr>
<td>1 September</td>
<td>RESPONDENT requests CLAIMANT to be ordered to provide security for costs.</td>
</tr>
<tr>
<td>9 September</td>
<td>CLAIMANT replies to RESPONDENT’s application, rejecting it</td>
</tr>
<tr>
<td>17 September</td>
<td>RESPONDENT request the Tribunal to order CLAIMANT to keep all matters concerning the arbitration confidential.</td>
</tr>
<tr>
<td>24 September</td>
<td>CLAIMANT challenges obligation not to disclose and the Tribunal’s competence to order otherwise</td>
</tr>
<tr>
<td>3 October</td>
<td>Procedural Order No. 2 requesting more detailed explanation of the positions in a memorandum.</td>
</tr>
</tbody>
</table>
**SUBMISSIONS**

In view of the above facts and in response to Procedural Order No. 2, we respectfully make the following submissions on behalf of our client, Equapack, Inc. (CLAIMANT):

- the Tribunal should not order CLAIMANT to post security for costs;
- CLAIMANT is allowed to divulge the fact of and all details in connection with the arbitration to Equatoriana Investors;
- the Tribunal is not authorized to order CLAIMANT to refrain from such disclosure;
- CLAIMANT would face no consequences were it to violate such an order;
- the Model 14 auger-feeders were not in conformity with the contract;
- RESPONDENT committed a fundamental breach and CLAIMANT validly avoided the contract.

_________________________
Signature (Counsel)
A. The Tribunal should not make use of its discretionary power to order security for costs

1. RESPONDENT requested that the Tribunal should order CLAIMANT to provide security for RESPONDENT’s legal costs as it doubts that an eventual award of costs to it would be recoverable from CLAIMANT due to the latter’s alleged illiquidity and the reluctance of Equatorianian courts in enforcing foreign arbitral wards against firms facing financial problems. CLAIMANT and RESPONDENT agreed upon the applicability of the Arbitration Rules of Singapore International Arbitration Centre (“SIAC Rules”) [Claimant’s Exhibit No. 2], and SIAC Rule 27.3 confers upon the Tribunal the wide discretionary power “to order any party to provide security for legal or other costs”. The separation of this power from the Tribunal’s general competence to afford interim relief under SIAC Rule 25(j) suggests, however, that it should be exercised sparingly, rather than routinely [Horning, p. 167].

2. Such a cautious and conservative approach is reinforced by the consideration that the Tribunal, when granting procedural orders, should always be adamant to foster procedural fairness and proper conduct of the arbitration [Berstein/Tackaberry/Marriot/Wood, para. 2-327; Rubino-Sammartano, p. 814]. In view of the merits of the case the Tribunal should therefore not order CLAIMANT to post security for costs so as to avoid an unjustifiable pre-judgment of the case (I.). Moreover, the balance of the parties’ interests in a properly conducted arbitration and a fully recoverable award tips towards CLAIMANT (II.).

I. An order for security for costs would constitute an unjustifiable pre-judgment of the merits of the case

3. CLAIMANT has submitted a carefully considered and substantiated claim to the Tribunal, which has yet to be considered on its merits, but does not appear to be based on unfounded allegations or lack legal foundation. As CLAIMANT’s cause of action can thus not be described as prima facie “scandalous or oppressive” [O’Reilly, p. 83] or “clearly hopeless” [Colbran, p. 240; Lall v. 53-55 Hall St. Pty. Ltd. (Australia, 1987)], a pre-judgment of its merits would be unbecoming [Porzelack KG v. Porzelack U.K. Limited (England 1987)] and must therefore be avoided in the overriding interest of just arbitration [Fouchard/Gaillard/Goldman, para. 188; Art. 18 Model Law] embodied in SIAC Rule 17.2. Ordering CLAIMANT to post security for RESPONDENT’s legal costs would, however, have substantially the same consequences as a final award dismissing the claim brought forward by CLAIMANT for these costs would be the only financial burden placed upon the latter.
II. The unimpaired effectiveness of the eventual award and the exemplary behavior of CLAIMANT militate against an order for security for costs

5. There is no prospect that RESPONDENT would be unable to enforce the eventual award before a competent Equatorianian court and actually recoup the costs awarded by the Tribunal from CLAIMANT (1.). An order for security for costs would furthermore violate the principles of equality and fairness vis-à-vis CLAIMANT’s and RESPONDENT’s respective behavior during the present arbitration (2.)

1. There is no prospect of RESPONDENT being unable to recover an eventual award of costs from CLAIMANT

6. Neither CLAIMANT’s alleged financial difficulties (b.), nor the reported lack of stringency on part of the Equatorianian courts in enforcing foreign arbitral awards (a.) form a sufficient basis for the Tribunal to order security for costs.

(a.) The enforcement of the award is not endangered by the reluctance of the Equatorianian courts in recognizing and enforcing foreign arbitral awards

7. Because Equatoriana is a party to the New York Convention [Statement of Case, para. 14], its courts are obliged as a matter of public international law to recognize and enforce foreign arbitral awards. As a consequence, there is a strong presumption that such awards will always be enforceable in Equatoriana [Bucher, p. 76, para. 195; Schreuer, p. 241], which is particularly difficult to rebut when an order for security for costs is sought [cf. Redfern-Hunter, para. 7-32].

8. Given that even the production of clear evidence of an extremely poor record of enforcement of arbitral awards is usually held to be insufficient to show prima facie that the award will be unenforceable [ICC Award No. 8786; Rubins, p. 341], RESPONDENT has failed to rebut the presumption that Tribunal’s final award will be enforceable in Equatoriana.

9. A mere lack of rigor on part of the Equatorianian courts in general [Procedural Order No. 3, para. 46; Letter Fasttrack to Presiding Arbitrator, security for costs, 1 September 2003] is, on the one hand side, not even of comparable seriousness to an “extremely poor record of enforcement” that implies consistent defiance of the New York Convention. On the other hand side, the Tribunal’s final award is unlikely to violate fundamental moral convictions and policies of Equatoriana [van den Berg, p. 360; Lew, para. 403], so that the public policy exception to the general enforceability contained in Art. V(2) of the New York Convention is going to be of no avail to CLAIMANT, irrespective of its financial condition.
10. RESPONDENT was, in any event, aware of CLAIMANT’s nationality before he entered into the contract that contained an arbitration clause [e.g. Claimant’s Exhibit No. 1]. Having thus been able to evaluate the risk of enforcing an arbitral award against CLAIMANT and to extract, if deemed necessary, concessions in advance, an order requiring CLAIMANT now to furnish security for costs would be even more inappropriate [ICC Award No. 7074]

   (b.) CLAIMANT’s financial situation does not necessitate security for costs

11. If, as is presently the case, the Tribunal’s award will be enforceable under the New York Convention, an order for security for costs will only be granted if RESPONDENT can demonstrate convincingly that CLAIMANT will almost certainly be unable to meet an award of costs against it [Redfern-Hunter, para. 7-30; Berstein/Tackaberry/Marriott/Wood, p. 98, para. 2-327; Rubino-Sammaranto, p. 814], which in turn would require CLAIMANT to have already fallen into insolvency [Oilex A.G. v. MM Mitsui & Co. (US, 1987); Atlanta Shipping Corp. v. Chemical Bank (US, 1987); Havbulk I v. Korea Shipbuilding&Engineering (England, 1987)]. CLAIMANT is indisputably not insolvent [Procedural Order No. 3, para. 43].

12. There is also no reason to doubt CLAIMANT’s assurance that it would have no hesitancy or difficulty in paying any costs levied against it by final award [Letter Langweiler to Presiding Arbitrator, 9 September 2003] as CLAIMANT paid all fees that have hitherto become due under the SIAC Rules without delay [Letter SIAC to Langweiler confirming receipt of payment, 11 March 2003] out of its own assets. CLAIMANT did not have to rely, for example, on a third party to cover these costs, making the enforceability of an award of costs dependent upon that party’s continued support [contrast Chopée Levalin NV v. Ken-Ren Chemicals and Fertilisers Ltd. (England 1995)].

13. Furthermore, there is no evidence to suggest that CLAIMANT has removed or intends to remove its assets from the jurisdiction of the Equatorianian courts [Procedural Order No. 3, para. 48], nor that CLAIMANT contributed to its financial difficulties by illicit behavior or that it inflicted debts upon itself to cause a decrease of funds [Bank Mellat vs. Helliniki Techniki SA (England 1984); Fouchard/Gaillard/Goldman, para. 1256; Starke, p. 210; Rubins, pp. 342, 373; Schwartz, pp. 8 et seq.]. On the contrary, it was the harm inflicted upon CLAIMANT’s financial health by the complications arising out of the contract with RESPONDENT – such as the loss in revenue and the necessary purchase of substitute machines [Statement of Case, para. 18] – that were a major reason for the cash-flow problems CLAIMANT is now forced to cope with.
14. In support of his allegations RESPONDENT exclusively relied on various newspaper articles [Letter Fasttrack to Presiding Arbitrator, security for costs, 1 September 2003]. However reputable these sources may be [cf. Procedural Order No. 3, para. 43], they do not wield the same level of credibility that is to be expected from evidence purporting to corroborate an allegation of impecuniosity [Needham, pp. 122 et seq.], such as including annual accounts, statutory returns or company searches.

2. The respective behavior of CLAIMANT and RESPONDENT in the arbitration disfavors CLAIMANT to be ordered to provide security for costs

15. CLAIMANT’s conduct in the present arbitration underlines that RESPONDENT runs little risk of not recovering its legal costs, if awarded. It is, above all, not necessary to induce certain behavior by putting financial pressure on CLAIMANT [Schreuer, p. 212; Rubins, p. 356] as it has fulfilled all its obligations and duties under the SIAC Rules to date [see para. 12, supra; cf. Letter Langweiler to SIAC, appointing arbitrator, 5 March 2003].

16. RESPONDENT, on the other hand, advanced the arbitral fees due only after the third reminder by SIAC and a delay of more than four weeks [SIAC third reminder letter to Medi-Machines, 20 March 2003; Letter Fasttrack to SIAC, advance on cost, 26 March 2003]. Similarly, RESPONDENT failed to appoint an arbitrator within the time limit of 21 days recommended by SIAC Rule 8.2 [Letter Fasttrack to SIAC covering Statement of Defense and naming arbitrator, 17 April 2003], causing a further slowdown of the arbitration and contravening the principle of expeditious decisions in arbitration [cf. SIAC Rule 17.2]. These instances of procedural misconduct, especially when set against the background of CLAIMANT’s exemplary behavior, serve to undermine to legitimacy of RESPONDENT’s request for an order policing CLAIMANT’s further handling of the arbitration.

B. CLAIMANT is allowed to divulge all matters related with the arbitration to Equatoriana Investors

17. CLAIMANT purports to divulge any aspects of the current arbitration, including its very existence, to Equatoriana Investors in the due diligence currently being carried out. This revelation would not constitute a disclosure for the purposes of SIAC Rule 34.6 as Equatoriana Investors are themselves under a strict duty of confidentiality (I.). In addition, CLAIMANT is required by Equatorianian law to disclose the arbitration and can hence rely on the exception provided for by SIAC Rule 34.6(d) (II.).
I. The revelation of the fact of arbitration and its details to Equatoriana Investors does not constitute a disclosure

18. The planned disclosure by CLAIMANT to Equatoriana Investors does not fall within the ambit of SIAC Rule 34.6, because it would not result in publication or uncontrollable spread of information (1.) and, upon any view of that matter, Equatoriana Investors are either aware of or could deduce the pertinent facts before being notified of them by CLAIMANT (2.).

1. Informing Equatoriana Investors would not result in publication or uncontrollable spread of confidential information

19. Equatoriana Investors are contemplating the purchase of CLAIMANT and currently completing due diligence [Letter Langweiler to Presiding Arbitrator, security for costs, 9 September 2003]. Under Equatorianian law, CLAIMANT is duty-bound to divulge all matters to Equatoriana Investors that materially affect its financial or business situation [Procedural Order No. 3, para. 38], whereas Equatoriana Investors owe a duty to CLAIMANT not to disclose any knowledge thus acquired [Procedural Order No. 3, para. 39].

20. By imposing a duty of confidentiality on the parties to an arbitration, SIAC Rule 34.6 seeks to shield the arbitration proceedings and the underlying disputes from public exposure [Denoix de Saint Marc, p. 211] so as to preserve the personal confidence of the parties [Weigand-Weigand, part 1, para. 15; Dessemontet, p. 299; Oakley-White, p.29]. While the publication of an award in a newspaper is therefore to be viewed as a disclosure in violation the obligation of confidentiality, since it results in an uncontrollable spread of confidential information [Bulgarian Foreign Trade Bank v. All Trade Finance Inc. (Sweden 1999, 2000)], the same cannot be maintained in the present case.

21. Just as arbitrators, experts or witnesses involved in the arbitral proceedings, who are all subject to a duty of confidentiality [Trakman, p. 2; Rubino-Sammartano, p. 800; Lew/Mistelis/ Kröll, para. 1-26], Equatoriana Investors are under a strict duty not to reveal any information acquired during the due diligence proceedings [Procedural Order No. 3, para. 39]. Therefore, if CLAIMANT was to inform Equatoriana Investors this would simply enlarge the circle of persons possessing information that are to be maintained confidential.

2. Informing Equatoriana Investors would only reveal to them what they already know or could easily deduce

22. As any prudent investor performing a thorough investigation and assessment of the target company’s business [Frawley, p. 47] from both a technical and a legal perspective [Merkt,
Equatoriana Investors would inevitably come across the damaged machines currently put in storage by CLAIMANT [Statement of Case, para. 11], the order book and the contract with RESPONDENT including the arbitration clause. At the same time as CLAIMANT would be entitled to correctly inform Equatoriana Investors that it has not commenced proceedings against RESPONDENT before a competent state court, it would have to block any enquiry relating to a possible arbitration with reference to their duty of confidentiality.

23. The Tribunal should find that, for those reasons, the revelation of the existence and of all aspects of the present arbitration by CLAIMANT to Equatoriana Investors does not amount to a disclosure caught by SIAC Rule 34.6.

II. CLAIMANT’s disclosure would be justified under SIAC Rule 34.6(d)

24. Even if the contrary was the case, CLAIMANT would nevertheless not be obliged to refrain from divulging the existence of the arbitration and all details in connection with it to Equatoriana Investors by virtue of SIAC Rule 34.6(d). In line with general international arbitration law [Esso Australia Resources v. Plowman (US 1995); Fouchard/Gaillard/Goldmann, para. 384; Geiben, p. 174; Dessemontet, p. 304] SIAC Rules 34.6 does not purport to establish an absolute duty of confidentiality, nor have CLAIMANT and RESPONDENT agreed upon a deviation from this principle [cf. Oakley-White, p. 35]. CLAIMANT’s disclosure would be justified, therefore, under Rule 34.6(d) as Equatorianian law compels CLAIMANT to divulge all matters materially affecting it in its financial or business situation (1.) and CLAIMANT is so affected by the present arbitration (2.).

1. CLAIMANT is under a duty to disclose imposed by Equatorianian law

25. SIAC Rule 34.6(d) justifies disclosure “in compliance with the provisions of the laws of any State which is binding on the party making the disclosure”. As the SIAC Rules were established to promote the resolution of international disputes involving parties from different legal families of the world, “binding laws” for the purposes of SIAC Rule 34.6(d) must be construed so as to comprise any obligation imposed by national law irrespective of its source. This is confirmed by SIAC Rules 34.6(e) and 34(a), according to which disclosure is justified if it is required by a non-binding, though customarily observed, request of a regulatory body or simply advantageous for an application to a state court, respectively; the exceptions contained in SIAC Rule 34.6 all thus resolve a double-bind by giving precedence to national law.
26. The law of Equatoriana is based on the law of England [Procedural Order No. 3, para. 3] and consequently regards the rules emerging from the decisions of the higher courts as one of its essential sources. As the disclosure requirement was established by several precedents of the Supreme Court of Equatoriana [Procedural Order No. 3, para. 38], all inferior Equatorianian cannot but accept it due to the doctrine of stare decisis; it is thus a provision of the laws of Equatoriana binding upon CLAIMANT.

2. The financial or business situation of CLAIMANT is materially affected by the arbitration

27. CLAIMANT must accordingly divulge all matters that materially affect its financial or business situation to Equatoriana Investors [Procedural Order No. 3, para. 38]. In general, the mere existence of arbitration proceedings is liable to significantly affect the value and even the viability of the operation of a company [Denoix de Saint Marc, p. 215], and so all pending or impending arbitration proceedings were to be laid open by CLAIMANT [Picot, para. 44]. Moreover, the considerable impact of the arbitration on the financial and the business situation of CLAIMANT is evident in the individual circumstances of the present case.

28. Due to RESPONDENT’s breach of contract CLAIMANT suffered total damages of US$537,650, amounting to more than 5% of its average annual sales of US$9,000,000 [Procedural Order No. 3, para. 44]. CLAIMANT instituted arbitration proceedings to recover these sums and is consequently materially affected in its financial situation by the outcome.

29. The repercussions of RESPONDENT’s breach of contract also seriously compromised CLAIMANT’s reputation [Letter Langweiler to presiding Arbitrator, confidentiality, 24 September 2003] and its position in the market. After over 30 years in business [Procedural Order No. 3, para. 10] CLAIMANT suddenly found itself unable to properly service its large contract with A2Z, Inc., which represented the valuable opportunity to extend its activities in an important market segment [cf. Statement of Case, para. 49]. The loss of commercial credibility flowing from that disturbance of the contractual relations with a newly-acquired customer is, especially from the perspective of Equatoriana Investors as potential purchaser of CLAIMANT, of utmost importance for the latter’s present and future business situation [Frawley, p. 49; Völker, p. 136; Duncan/Moriarty, p. 3].

30. CLAIMANT is hence obliged to disclose the fact and the details of the present arbitration under Equatorianian law and justified to thereby violate its general duty of confidentiality by
C. The Tribunal does not have authority to order CLAIMANT to refrain from divulging any aspect of the current arbitration

31. RESPONDENT requested the Tribunal to order CLAIMANT to honor its obligation under SIAC Rule 34.6, which does, however, only purport to regulate the behavior of the parties to the arbitration without conferring direct authority on the Tribunal to sanction violations by order. The SIAC Rules neither authorize the Tribunal to make such an order by award under SIAC Rule 28 (I.), nor can SIAC Rule 25(j) serve as a basis for ordering confidentiality by interim measure (II.).

I. The Tribunal has no power to order confidentiality by award under SIAC Rule 28

32. SIAC Rule 28.8 empowers the Tribunal to make “final and binding” awards on the merits of the case that marks the end of the arbitration proceedings and conclusively resolves the parties’ dispute [Lew/Mistelis/Kröll, para. 24-4]. Since an order of confidentiality, albeit final as regards this very issue, would not settle the dispute that has arisen out of the sales contract between CLAIMANT and RESPONDENT and that is the subject matter of the present arbitration, the Tribunal may not order confidentiality by final award.

33. The Tribunal may further render a “separate final award” pursuant to SIAC Rule 28.6 – frequently referred to as “partial award” [Lew/Mistelis/Kröll 24-20; cf. Article 26(7) LCIA Rules] – that decides specific aspects of the parties’ dispute [Fouchard/Gaillard/Goldman, para. 1360; Lew/Mistelis/Kröll, para. 24-22]. It is not, however, suitable to decide purely ancillary or procedural issues that do not form severable parts of the dispute to be resolved by arbitration, but relate directly to the arbitration proceedings themselves. The Tribunal may thus not compel CLAIMANT to honor its obligation under SIAC Rule 34.6 by partial award.

34. Only an “interim award”, whereby an interim resolution of any issue not leading to a termination of any part of the main dispute may be effected [Lew/Mistelis/Kröll, para. 24-24; Holtzman/Neuhaus, p. 868], could potentially be employed by the Tribunal for the purpose of ordering the confidentiality of the present arbitration. The SIAC Rules, which are based on the LCIA Rules and the UNCITRAL Arbitration Rules [Klötzl, p. 615], remain silent on this type of award and in so doing follow the LCIA Rules, thus expressly refraining from the inclusion of a provision permitting the grant of interim awards such as UNCITRAL Arbitration Rule 26(2) [Craig/Park/Paulson, § 26.05(iii); AAA Rule 36(b); ICC Rule 23(1)].
II. The Tribunal has no power to order confidentiality by interim measure

36. Though SIAC Rule 25 does not provide for a specific order to be granted in support of the parties’ obligation under SIAC Rule 34.6, SIAC Rule 25(j) seemingly endows the Tribunal with an all-embracing competence to order any interim measure it thinks fit. The Tribunal may, however, only ever exercise this power as against the parties to the arbitration agreement for the source of the Tribunal’s jurisdiction is their free will as expressed in the arbitration agreement [Redfern/Hunter 7-12, Marchac, p. 124; Redfern, p. 72; Rubino-Sammartano, para. 23.4; Craig/Park/Paulson, § 26.05(i); Born, p. 925, para. 11; Poudret, para. 606; Bernstein/Tackerberry/Marriott/Wood, para. 2-297; Jarvin, p. 53]. An interim measure cannot be ordered, therefore, that would affect the interests Equatoriana Investors, who are wholly extrinsic to the arbitration agreement between CLAIMANT and RESPONDENT.

37. Only a Danubian state court could make such an order in exercise of its power under Art. 9 UNCITRAL Model Law to act in support or furtherance of the arbitral process [Carolina Power and Light Comany v. Gie Uranex (US 1977), p. 1050; Werbicki, p. 66; Redfern/Hunter, para. 7-33; Lew/Mistelis/Kröll, para. 15-45; Fouchard/Gaillard/Goldman, para. 685; Redfern, p. 87]. Such an application by RESPONDENT is expressly qualified by Art. 9 UNCITRAL Model Law to be compatible with the arbitration agreement and not to constitute a waiver thereof [S.N.T.M. Hyproc v. Snach (France 1995); ICC Award No. 2444; Rubino-Sammaranto, p. 629].

D. No consequences would follow if CLAIMANT were to violate an order of confidentiality

38. Should CLAIMANT not abide by an order to refrain from divulging any matter relating to the arbitration, no consequences would ensue. A binding order to that effect granted by the Tribunal could not be self-executing [Schwartz, p. 59; Born, p. 972], and under the SIAC Rules, the UNCITRAL Model Law, and the New York Convention there are no means of sanctioning any contravention of the order: CLAIMANT’s violation would not punishable by fine (I.), nor could the arbitration agreement be declared avoided for breach of the obligation of confidentiality (II.). CLAIMANT would furthermore not be liable in damages (III.) nor has the Tribunal the power to manipulate the further proceedings or the award to CLAIMANT’s disadvantage (IV.).
I. CLAIMANT could not be punished by fine

39. CLAIMANT could not be ordered to pay a fine as the SIAC Rules do not allow a fine being laid on an order (1.), and, even if a fine could be laid on an order, such an order could not be enforced (2.).

1. The Tribunal cannot lay a fine on the order

40. In absence of an agreement between CLAIMANT and DEFENDANT to the contrary, penalties for non-compliance with orders or directions could only be imposed by the Tribunal if that was provided for by the applicable law [Lew/Mistelis/Kröll, para. 23-82; Schroth, p. 102]; however, neither the SIAC Rules nor the UNCITRAL Model Law empower the Tribunal to attach a penalty to any of its orders to ensure compliance.

2. An order of confidentiality would not be enforceable

41. Whatever its type or designation [Resort Condominius v. Bolwell (1986)], an order of confidentiality would have been neither enforceable under the New York Convention nor under Article 35 UNCITRAL Model Law, as both allow only final and binding awards to be enforced [Lew/Mistelis/Kröll, para. 23-89]: An essentially interlocutory order for confidentiality would thus not be enforceable as it could not be characterized as an award [Schwab, p. 631] settling and terminating the main dispute between CLAIMANT and RESPONDENT [see paras. 32-33, supra]. For the same reason an order by interim award could not be enforced [Y.B. 1999, V. paras. 121 f.].

42. Article 17 UNCITRAL Model Law only addresses the question of competence with regard to interim measures and could equally not function as a vehicle for the enforcement of an order of confidentiality by such measure [Weigand-Roth, part 5, Art. 17 para. 4; Y.B. 1999, V. paras. 122 f.]: This is confirmed by a recent proposal of the UNCITRAL Working group to introduce a special provision into the UNCITRAL Model Law (Article 17bis) to govern the recognition and enforcement of interim measures [A/CN.9/WG.II/WP.125 paras. 4 f.].

II. The arbitration agreement could not be declared avoided

43. CLAIMANT’s breach of its duty of confidentiality in violation of the order would be no reason to declare the arbitration agreement null and void. Indications in earlier decisions [Bulgarian Foreign Trade Bank Co. v. AI Trade Finance Inc. (Sweden 1999)] to the effect that a breach of confidentiality should result in avoidance of the arbitration agreement were
quickly rejected for being “unquestionably to severe”, “harsh” and “extreme” and going far beyond what was required sanction a breach of confidentiality [Fouchard/Gaillard/Goldman, para. 1412; Brown, note 86 Bulgarian Foreign Trade Bank Co. v. AI Trade Finance Inc., (Sweden 1999), paras. 6 f; (2000), paras. 8, 11-20]. Besides, the present case can easily be distinguished from the scenario that misled the court into permitting the avoidance of the arbitration agreement for breach of confidentiality, as the newspaper publication of an arbitral award differs in degree if not kind from informing a third party itself under a duty to maintain complete confidentiality [see para. 20, supra].

III. CLAIMANT would not be liable in damages

44. The disclosure by CLAIMANT could only be considered as breach of good faith giving rise to liability in damages [Dessemontet, p. 318] if RESPONDENT was able to show an injury that was monetarily quantifiable and compensable [Brown, p. 1016; Smit, p. 582]. Damages are granted with great caution in these circumstances [cf. ICC Award No. 6932, para. V] as it is difficult to establish that RESPONDENT suffered loss as a direct result of CLAIMANT’s unauthorized disclosure [Brown, 1016]. Even if RESPONDENT was able to verify that its reputation had suffered because of CLAIMANT’s disclosure to Equatoriana Investors – who were under a duty to preserve secrecy [Procedural Order No. 3, para. 39] – a quantification of the losses in monetary terms could still hardly be accomplished.

IV. The Tribunal could not disadvantage CLAIMANT in the further arbitration proceedings

45. Being obliged by SIAC Rule 17.2 to ensure the proper conduct of the arbitration, the Tribunal would not be entitled to disadvantage CLAIMANT in the further proceedings so as to sanction the latter’s violation of the order of confidentiality. Instead, the Tribunal would have to carefully distinguish the issue of confidentiality from the merits of the case [Hußlein-Stich, p. 103] and render an award accordingly.

46. Furthermore, the Tribunal would not be authorized to stay the proceedings [Hußlein-Stich, p. 103] as SIAC Rule 27.5 expressly reserves this remedy for issues arising in connection with orders under SIAC Rules 27.1 –27.4 pertaining to deposits and security.
E. The Model 14 auger-feeders were not in conformity with the contract

47. CLAIMANT and RESPONDENT concluded a sales contract over six Model 14 auger-feeder packaging machines at price US$65,000 each on 12 July 2002. The CISG is applicable in this case because CLAIMANT and RESPONDENT have their places of business in Equatoriana and Mediterraneo respectively, both of which are ‘Contracting States’ within the meaning of Art. 1(1)(a) CISG [Procedural Order No. 3, para. 2].

48. At the time of delivery the machines were not in conformity with the contract, since they were not capable of packaging all goods required under the contract (I.), and did not perform at the speed to be expected (II.).

I. The Model 14 machines were not of the quality required

49. The six Model 14 machines were not capable of packaging corrosive products such as salt, which was required by the contract (1.). Furthermore, they were not fit for the particular purpose of packaging salt (2.) and did not perform as could ordinarily be expected from machines of the same description (3.).

1. The Model 14 machines were not suitable for packaging corrosive products such as salt as was called for by the contract

50. According to Art. 35(1) CISG, a seller must deliver goods which are of the quality and description required by the contract. Any deviation from the contractual description constitutes a lack of conformity, irrespective of the importance of the defect [Bianca/Bonell-Bianca, Art. 35 paras. 1.3. f.; Schlechtriem-Schwenzer Art. 35 para. 9; Piltz, NJW, p. 2771].

51. In its first enquiry CLAIMANT explicitly expressed its need for machines capable of packaging “a wide range” of “dry bulk commodities”, both “fine […] and coarser goods” [Claimant’s Exhibit No. 1]. Requirements of the contract may be determined expressly or impliedly [Schlechtriem-Schwenzer, Art. 35 para. 7; Herber/Czerwenka, Art. 35 para. 3; Enderlein/Maskow/Strohbach, Art. 35 para. 1]. Since there was no express agreement about the suitability of the machines for packaging certain products, this attribute has to be determined according to the statements and conduct of the parties. Under Art. 8(1) CISG, when interpreting the statements and conduct of the parties, the known or identifiable will according to the knowledge of the other party is to be taken into account [Roger Caiato v. Societe Francaise de Factoring International Factor France (France 1995)]. At the time of
enquiry, CLAIMANT anticipated of entering a contract with A2Z, Inc., a chain of retail food stores, which was the only motivation for it to buy the new machinery. As a matter of fact, the products to be packaged under this anticipated contract had not yet been specified to it. Consequently, CLAIMANT’s intent when purchasing new machines was to be capable of packaging any goods it would eventually be required to under the contract with A2Z, Inc. By not being too specific in its inquiry, CLAIMANT expressed this broad intent.

52. RESPONDENT did not limit this broad intended use in any respect, and therefore the machines could be assumed to package all dry bulk commodities without limitation. Due to its special knowledge – it presented itself as the premier manufacturer of equipment for the food packaging industry [Claimant’s Exhibit No. 2] – RESPONDENT must have been aware that the Model 14 machines were not capable of packaging corrosive dry bulk commodities, such as salt. Consequently, it would have had to raise clear objections as to the intended broad use under the contract [Bianca/Bonell-Bianca, Art. 35 para. 2.3.; Enderlein/Maskow, Art. 35 para. 13], or it would have had to reveal the limitations of this model, since a person with technical skill and knowledge is required to make its statements in such a way as to make its meaning clear to a person not possessing such skill and knowledge [O.R.-Honnold, A/CONF.97/19, p. 261].

53. Moreover, CLAIMANT even clarified its intent of mainly packaging foodstuff by enumerating certain possible items like flour, ground coffee, beans and rice in its inquiry [Claimant’s Exhibit No. 1]. The notion of dry bulk commodities in itself contains salt [Procedural Order No. 3, para. 16]. By even further specifying this concept to foodstuff, CLAIMANT reduced the items possibly to be packaged to an identifiable quantity, still including salt. It is sufficient if a reasonable seller could perceive the purpose of its goods out of the circumstances [Schlechtriem-Schwenzer, Art. 35 para. 21; Enderlein/Maskow/Strohbach, Art. 35 para. 11; Saidov, 2. (d)]. Salt is not a very exotic or abnormal substance and is also often added for conservatory or flavouring purposes. Therefore, RESPONDENT could at least have anticipated that it would be among or at least be contained in the identifiable quantity of items to be packaged according to CLAIMANT’s statements, for it even repeated CLAIMANT’s need of being able to package a “wide range of products” – itself listing some sorts of foodstuff [Claimant’s Exhibit No. 2] in its offer.

54. Further, especially pre-contractual negotiations are relevant when interpreting the parties intent due to Art. 8(3) CISG [BGH VIII ZR 51/95 (Germany 1996); OGH 2 Ob 163/97b (Austria 1999); MCC-Marble Ceramic Center v. Ceramica Nuova Dágotino (US 1998);
Filanto v. Chilewich Int’l Corp. (US 1992)]. Although there was no exhaustive enumeration of the items to be packaged with the Model 14 machines in the contract itself, the parties agreed upon a minimum quality standard of those machines. This was the ability to package a wide range of foodstuff, including fine items – like salt. Such agreement can be presumed since both parties mentioned this specific attribute in their correspondence [Claimant’s Exhibits No. 1 & 2]. Therefore, since specific requirements can also be deduced from the purpose and the circumstances of the contract, even if there is no direct agreement [LG München 5HK O 3936/00 (Germany 2002); ICC Court of Arbitration, Award No. 8213 (France 1995)], this attribute was implicitly incorporated into the contract.

55. As CLAIMANT was new in this field of business and had no expert knowledge concerning food-packaging machines at all [Claimant’s Exhibit No. 5], it was dependent on RESPONDENT’s advice. Art. 8 CISG protects the party who attributes a reasonable understanding to the other party’s conditions [BGH VIII ZR 60/01 (Germany 2001); Roland Schmidt v. Textil-Werke Blumenegg (Switzerland 2000); Schlechtriem-Junge, Art. 8 para. 7; Achilles, Art. 8 para. 3, Neumayer/Ming, Art. 8 para. 2; Bernstein/Lookofsky, p. 42]. CLAIMANT’s reasonable understanding of RESPONDENT’s conduct was that the Model 14 machines would be fit for all of its intended usages, since RESPONDENT as the expert strongly recommended the Model 14 machines as reaction to its broad inquiry. Consequently, the fitness of those machines for packaging this broad range of products including salt was assured in the eyes of a person with the same inferior knowledge as CLAIMANT. In addition, due to its anticipated contract with A2Z, Inc., CLAIMANT was in urgent need of supplementary machines and time was of the essence, which was known to RESPONDENT [Claimant’s Exhibit 1-3]. Therefore, CLAIMANT did not have the opportunity to engage in further inquiries, because on the other hand it was urged to order promptly due to the limited availability of this model and the significantly higher price and delivery period of other models [Claimant’s Exhibit No. 2]. Hence, since CLAIMANT reasonably derived a broad usability of the machines out of RESPONDENT’s conduct and statements, this understanding is supported by Art. 8 CISG.

56. Hence, RESPONDENT had a duty to deliver machines being suitable for packaging a wide range of dry bulk commodities, including salt under the contract. Since it did not comply with this implied term which was established by the parties’ statements and conduct, this amounted to a breach of contract under Art. 35(1) CISG.
2. The Model 14 machines were not fit for the particular purpose of packaging salt

57. RESPONDENT also breached its contractual obligations because the Model 14 machines were not fit for the particular purpose of packaging salt. Art. 35(2)(b) CISG requires the goods to be fit for any particular purpose expressly or implicitly made known to the seller at the time of the conclusion of the contract. Therefore, for an implicit notice to be effective it is not necessary to name the particular purpose [Enderlein/ Maskow, Art. 35 para. 11; Schlechtriem-Schwenzer, Art. 35 para. 20].

58. Here RESPONDENT was aware of the broad range of products possibly being packaged by CLAIMANT due to the prior correspondence [see para. 53, supra]. To reveal a concrete purpose, Art. 8 CISG is also relevant to determine the required condition of the goods [SARL Bri Production “Bonaventure” v. Société Pan African Export (France 1996); Salger/Lorenz/Witz-Witz, Art. 8 para. 3]. CLAIMANT not only revealed its broad purpose of packaging fine dry bulk commodities, it even specifically referred to foodstuff. According to such statement, an expert such as RESPONDENT should have at least been able to anticipate the special purpose of packaging salt [ICARFCCI 166/1995 (Russia 1996)]. Consequently, since actual notice is not required [Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A. (Italy 2000)], the particular purpose of packaging salt was implied in the correspondence. According to this discernible purpose, RESPONDENT even would have had to inform CLAIMANT about the unfitness of Model 14 machines for this purpose, since such a duty to clarify is one of the inherent elements of Art. 35(2)(b) CISG [Kock, p. 188; cf. Schlechtriem-Schwenzer, Art. 35 para. 23].

59. Furthermore, CLAIMANT reasonably relied on RESPONDENT’s skill and judgement, as called for by Art. 35(2)(b) CISG [Bernstein/Lookofsky, p. 85; Bianca/Bonell-Bianca, Art. 35 para. 2.5.3.]. It neither had equal knowledge which could exclude reasonable reliance [Honsell-Magnus, Art. 35 para. 22; Staudinger-Magnus, Art. 35 para. 32] nor did RESPONDENT’s conduct imply in any way that it had no special knowledge concerning the machines in question [Secretariat Commentary, Art. 33 para. 10]. The latter presented itself as a “premier manufacturer for the food packaging industry”, recommending CLAIMANT to purchase Model 14 machines which it “would be more than satisfied with”. Further it urged a quick decision since only a limited number of Model 14 machines was available [Claimant’s Exhibit No. 2]. CLAIMANT, having no experience in this sector at all [Claimant’s Exhibit No. 5] had to rely on RESPONDENT’s competence.
3. **The Model 14 machines were not fit for their ordinary use**

60. Generally, the fitness for purposes for which goods of the same description would ordinarily be used under Art. 35(2)(a) CISG is considered having regard to all relevant circumstances [Honnold, Art. 35 para. 225; Honsell-Magnus, Art. 35 para. 13], one being the contract itself. One attribute of the machines described by the contract was the suitability to package a wide range of fine dry bulk commodities, of which mostly foodstuff [Claimant’s Exhibit No. 1 & 2]. When analysing the general fitness, special attention is also to be given to the buyer’s reasonable expectations [NAI Case No. 2319 (Netherlands 2002); Beijing Light Automobile Co., Ltd. v. Connell (Sweden 1998)]. Since salt is a foodstuff falling within this broad notion, it was reasonable for CLAIMANT to expect the machines to be capable of packaging it. As this suitability was not given and the machines were even damaged when packaging salt, this was contrary to CLAIMANT’s reasonable expectations. Thereupon the machines were not fit for their ordinary purpose as described by the contract.

II. **The Model 14 machines did not perform at the speed to be expected**

61. Concerning their production rate, the six Model 14 auger-feeders delivered by RESPONDENT did not perform at the speed expected under the contract (1.) and the speed which could ordinarily be expected (2.)

1. **The Model 14 machines did not perform at the speeds required under the contract**

62. RESPONDENT was required to deliver machines of at least average quality to fulfil its obligations required under the contract. It was obliged to deliver a professional piece of machinery matching up with the quality a reasonable person would expect due to its statements. Art. 8(2) CISG underlines that statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [Enterprise Alain Veyron v. Société E. Ambrosio (France 1995)]. The performance of the Model 14 auger-feeders for all fine products was noticeably below the general industry standard of about 180 bags per minute [Procedural Order No. 1, Report of expert witness para. 3], which is undisputed. RESPONDENT specifically addressed production rate as an issue concerning the different types of machinery available. It stated that auger-feeders in general were slower than multi-head weighers [Claimant’s Exhibit No. 2]. However, it did not specify that its Model 14 auger-feeders performed at a rate noticeably below average compared to the industry standard.
of such auger-feeders [*Procedural Order No. 1, Report of expert witness para. 6*], but praised
the Model 14 series as one of the top products which always had granted complete
satisfaction to its customers [*Claimant’s Exhibit No. 2*]. As RESPONDENT specifically
addressed the speed of its machines, CLAIMANT was entitled to expect a professionally
designed and manufactured major piece of machinery concerning this matter [*Beijing Light
Automobile Co., Ltd v. Connell Limited Partnership (Sweden 1998); Manipulados del Papel y
Cartón SA v. Sugem Europa SL (Spain 1997)*].

2. The Model 14 machines did not perform at speeds which could ordinarily be expected

63. The test for determining conformity under Art. 35(2)(a) CISG is based on objective
criteria [*OGH 2 Ob 48/02a (Austria 2003); Witz/Salger/Lorenz-Salger, Art. 35 para. 9;
Staudinger-Magnus, Art. 35 para. 18; Herber/Czerwenka, Art. 35 para. 4*]. Speed at which
industrial machines perform is a criterion which allows for objective comparability between
machinery of the same kind. Since the production rate of the Model 14 auger-feeders was
noticeably below the average industry standards for both coarse and fine products
[*Procedural Order No. 1, Report of expert witness para. 6*], they did not perform at speed
which ordinarily could be expected of such machines. If goods do not meet the industry
standard, they are not in conformity within the meaning of Art. 35(2)(a) CISG [*BGH VIII ZR
121/98 (Germany 1999)*].

F. The condition of the Model 14 machines and RESPONDENT’s
conduct constituted fundamental breach whereupon CLAIMANT avoided the contract

64. Both RESPONDENT’s delivery of machines not being capable of packaging salt and its
subsequent failure to inform CLAIMANT about this unfitness each were so serious as to
constitute a fundamental breach under Art. 25 CISG. (I.). Consequently, CLAIMANT had the
right to avoid the contract under Art. 49 CISG and did so validly by the letter dated 19
October 2002 (II.).

I. The non-conformity of the Model 14 machines and RESPONDENT’s
failure to warn each in itself constituted fundamental breach

65. All the six Model 14 auger-feeder machines were not capable of packaging salt as was
required by the contract. Furthermore, RESPONDENT did not warn CLAIMANT about this
ineptitude of this unfitness after it should have become aware of its specific intent to package salt. Each of those failures established a breach of contract (1.). In addition, any of those breaches substantially deprived CLAIMANT of what it was entitled to expect under the contract (2.), which was foreseeable (3.).

1. RESPONDENT committed two breaches of contract

(a.) RESPONDENT breached the contract by delivering non-conforming machines

RESPONDENT delivered machines which were not in conformity with the contract and therefore breached its obligation under Art. 35 CISG [see section A, supra].

(b.) RESPONDENT breached its obligation to inform CLAIMANT of the effect the use of salt would have on its machines

During the phone call on 23 July 2002 CLAIMANT mentioned salt as being intended to be packaged with the machines [Statement of Case, para. 7; Claimant’s Exhibit No. 5 para. 5], which is undisputed [Statement of Defence, para. 6]. Due to RESPONDENT’s knowledge as a qualified expert, concerning the devastating effect the use of salt would have on Model 14 machines [Claimant’s Exhibit No. 6] it should have immediately informed CLAIMANT about the restriction on the use of salt.

Under Art. 7 CISG, the principle of good faith applies to the interpretation of the individual contract and to the parties contractual relationship as such [HG Zürich HG 930634, (Switzerland 1998); ICC Award No. 8611 (France 1997); CCIB VB/94124 (Hungary 1995); SARL Bri Production “Bonaventure” v. Society Pan African Export (France 1995)]. This provides for the existence of a duty to inform based on the general principle of co-operation of the contracting parties [BGH VIII ZR 60/01 (Germany 2001); Staudinger-Magnus, Art. 7 para. 47; Schlechtriem-Ferrari, Art. 7 para. 54]. It was clear from only the fact that CLAIMANT mentioned its intent to package salt with RESPONDENT’s machines that it had no clue at all as to the effect of such conduct. By not informing it of this effect, namely the destruction of all six machines, RESPONDENT risked a severe loss on CLAIMANT’s side, thereby substantially endangering the purpose of the contract although its duty was to cooperate and to further it [Maritime International Nominees Establishment v. Republic of Guinea (US 1988); cf. Leigh, p. 598; Witz/Salger/Lorenz-Witz, Art. 7 para. 15; Bianca/Bonell-Bonell, Art. 7 para. 2.3.2.2.]. The fact that RESPONDENT acquired this knowledge some time after the conclusion of the contract – during aforesaid phone call - is of
no importance, as an obligation to communicate essential information can arise whenever such information is necessary [Audit, p. 51; Honnold, Art. 7 para. 100; Klein, p. 125].

69. Even more, RESPONDENT did not address the potential danger of packaging salt until it was already too late, because it did also not dispose itself of its duty to warn under Art. 7 CISG by delivering a manual with to the machines after the phone call. This manual only stated that the machines were “not intended for use with highly corrosive products” [Procedural Order No. 3, para. 25]. Such phrase was not sufficiently clear to alert CLAIMANT, as there was no hint whatsoever that indicated that the machines would suffer any damage by such usage. Furthermore, CLAIMANT did not know and had no grounds to know that salt was not only a corrosive, but a highly corrosive product, as it was inexperienced in the use of such substances [Claimant’s Exhibit No. 5]. In addition, at the time of conclusion of the contract RESPONDENT had not even given the slightest hint as to any specialities to be considered, but even had reassured it that the machines would be fit for all its intended purposes, thereby resolving any lingering doubts [see paras. 51 et seq., supra]. Consequently, RESPONDENT neglected its duty to warn and even cannot excuse itself by referring to the manual.

70. According to Art. 45(1) CISG all failures of a party to perform any of its obligations under the contract can amount to a breach of contract [Herber/Czerwenka, Art. 45 para. 2; Chengwei, para. 2.2.; OLG Köln 27 U 58/96 (Germany 1997)]. If a contract is to be interpreted as requiring the seller to protect, warn or inform the buyer than a breach of this obligation is also judged as such a failure to perform [Schlechtriem, Oxford, Art. 45 para. 3; Achilles, Art. 45 para. 2]. Therefore, by not immediately providing CLAIMANT with such substantial information as how to prevent its machines from being severely damaged, RESPONDENT committed a breach of its obligation under Art. 45 CISG. Such breach of a secondary obligation under the contract can also be fundamental [OLG Frankfurt U 164/90 (Germany 1991); Staudinger-Magnus, Art. 25 para. 7; Herber/Czerwenka, Art.25 para. 5].

2. Any detriment caused by RESPONDENT’s breaches substantially deprived CLAIMANT of what it was entitled to expect under the contract
71. Since the machines were of no further use to CLAIMANT it was deprived of its discernible expectation interests in the contract (a.). This deprivation was substantial within the meaning of Art. 25 CISG (b.).

(a.) CLAIMANT’s expectation interest could be clearly discerned from the communication with RESPONDENT

72. Under Art. 25 CISG, the expectations of a party must have been discernible from the contract [Enderlein/Maskow, Art. 25 para. 3.3.]. According to its inquiry CLAIMANT expected machines suitable for packaging a wide range of dry bulk commodities products without any restrictions, which could have been derived from the contract itself and from the surroundings of the case [cf. paras. 51 et seq., supra]. Consequently, RESPONDENT had to be aware of these interests and had to observe them since such interests dictate the degree to which the other party will suffer harm [Babiak, p. 120]. Furthermore CLAIMANT expected RESPONDENT to warn it of any ineptitude of the machines for its expressly mentioned purpose of packaging salt, which was also discernible since generally a special relationship of trust and confidence arises out of a contract [Botzenhardt, p. 200].

(b.) CLAIMANT’s detriment reached such degree of gravity as to be substantial

73. Each of the detriments established by RESPONDENT is to be considered substantial, since any of them caused severe loss and interfered to a great extent with CLAIMANT’s commercial activities (i.). Furthermore, the recourse to possible less ultimate remedies which could satisfy its needs was not reasonable (ii.).

(i) The detriment caused by RESPONDENT’s breach was substantial

74. According to Art. 25 CISG, if a party affected by a breach suffers an impairment of a material interest under the contract, this establishes a substantial detriment [Schlechtriem-Schlechtriem, Art. 25 para. 9]. All Model 14 machines were already not suitable for the purpose of packaging salt when they were delivered [Statement of Case, para. 9]. Since a detriment is always considered substantial if the buyer, assumed it would have foreseen the breach at conclusion of contract, would not have contracted at all [OGH 2Ob 163/97b (Austria 1999)], RESPONDENT’s delivery of machines not being capable of packaging salt amounted to a substantial detriment. The six machines were solely purchased for servicing the contract with A2Z, Inc. and were of absolute necessity for this purpose. If there had been any possibility for CLAIMANT to service its contract with A2Z, Inc. by using capacities already available to it, it would have resorted to it instead of buying expensive new machinery. Additionally, it was neither feasible to modify the machines to meet their purpose, since for
that the whole product path would have been needed to be exchanged [Procedural Order No. 1, Report of expert witness para. 4]. Consequently, CLAIMANT could not reasonably use the machines, as they were not suitable and could not be made suitable for packaging salt, which rendered this detriment substantial.

75. As a consequence of serious corrosion, CLAIMANT was substantially hindered in following its commercial and manufacturing activities [Enderlein/Maskow, Art. 25 para. 111; Pich, p. 530; Chengwei, 8.2.2.1.], which amounts to another substantial detriment. After having been used for about one month, the machines had already to be put out of order as they showed serious signs of corrosion [Statement of Case, para. 8]. On one hand, this was caused by the machines actually not having been fit for their intended contractual purpose - packaging salt. On the other hand, it was caused by RESPONDENT failing to duly warn CLAIMANT about this unfitness, although by doing so he could have prevented this detriment. At that point, those breaches not only interfered with one of CLAIMANT’s contracts, but even rendered its fulfilment impossible for over two months [Statement of Case, para. 12], since the corrosion raised serious concerns as to possible contamination of the packaged foodstuff [Statement of Case, para. 8]. Further, since the contract with A2Z, Inc. was the main purpose for purchasing those Model 14 machines, their inability to actually help CLAIMANT perform those contractual obligations – to package foodstuff – also substantially deprived it of what it could have expected under the contract with RESPONDENT [cf. Staudinger-Magnus, Art. 25 para 13; Enderlein/Maskow, Art. 25 para. 3.3; Botzenhardt, p. 166]

76. The term detriment generally has to be interpreted broadly, covering any harmful consequence [Bianca/Bonell-Will, Art. 25 para. 2.1.1.2.; Enderlein/Maskow/Strohbach, Art. 25 para. 3; Lorenz, II. H.; cf. Neumayer/Ming, Art. 25 para. 7; Herber/Czerwenka, Art. 25 para. 6]. By not being able to serve the contract with A2Z, Inc. for two months, the reputation and credibility of CLAIMANT’s firm was seriously damaged. Those attributes are of the utmost importance for the viability and value of a firm [Völker, p. 136]. CLAIMANT’s decrease of reputation and the acquisition of an image of not being reliable and trustworthy has therefore to be regarded as a substantial detriment as well.

77. Further, when determining what kind of deficiency may lead to a fundamental breach, case law mainly focuses on economical criteria, especially the actual loss suffered by the aggrieved party [Graffi, p. 342; Koch, II. C. 2. a), cf. Delchi Carrier, S.p.A. v. Rotorex Corp. (US 1995); LG Landshut 54 O 644/94 (Germany 1995); OLG Hamm 19 U 97/91 (Germany
Not being able to service the contract with A2Z, Inc. for the period of two months CLAIMANT suffered a loss in revenue of US$42,000 [Statement of Case, para. 12]. In addition, the fact that four machines were irreparably corroded [Procedural Order No. 3, para. 29], constituted the damage of US$260,000. This total loss of US$302,000 was directly caused by the unsuitability of RESPONDENT’s machinery for CLAIMANT’s purpose and RESPONDENT’s failure to warn. A comparison of this loss to the overall monetary value of the contract itself [Koch, Part II.B.1.b.(3); Babiak, p. 120] which amounted to US$390,000, establishes a substantial detriment, since the loss suffered is almost equal the value of the contract.

(ii) It was not reasonable for CLAIMANT to have recourse to less ultimate remedies

78. Four out of six machines were corroded to such an extent that repairs were not feasible [Procedural Order No. 3, para. 29], and as a matter of fact those machines completely lost their merchantability. In addition, RESPONDENT never offered any repairs. Therefore, since it is not required that a hundred percent of the goods have to be non-conform to establish a substantial detriment [LG Stendal 22 S 234/94 (Germany 2000)] and since even the application of a strict view denying substantiality whenever the machines could be resold [BGH VIII ZR 51/95 (Germany 1996); OLG Frankfurt, 5U 15/93 (Germany 1994)] is not applicable here, the fact of a substantial detriment is still to be upheld.

79. Additionally, substitution of Model 14 machines was not possible since this line was discontinued [Claimant’s Exhibit No. 2]. RESPONDENT again did at no point offer to deliver substitute goods, but only did he offer a substantial concession on the purchase of stainless Model 17 packaging machines [Claimant’s Exhibit No. 7]. However, such proposal is not deemed to constitute a valid offer of substitution, since such needs to be issued before buyer’s declaration of avoidance [Schlechtriem-Huber, Art. 49 para. 62; cf. Koch, III. C 4. b); Honnold, Art. 25 para. 296], which it was not. Moreover, such an offer also could not be regarded as a valid offer of rectification since RESPONDENT would have to remedy such at its own expenses [Schlechtriem-Huber, Art. 48 para. 12; Honsell-Schnyder/Straub, Art. 48 para. 17]. To offer of a concession itself is not sufficient.

3. CLAIMANT’s substantial detriment was foreseeable

80. Only by proving that a reasonable merchant in its place could not have foreseen CLAIMANT’s substantial detriments, RESPONDENT could avoid a fundamental breach. However, a reasonable merchant in RESPONDENT’s place could have foreseen the
substantial detriment arising from the delivery of machines incapable of packaging salt at the
time of conclusion of the contract (a.). Even more, such merchant would have foreseen the
severe consequences of its breach under Art. 35 CISG and furthermore also the fundamental
breach arising from its failure to warn CLAIMANT at the latest after the phone call of Mr.
Swan on 23 July 2002 (b.).

(a.) Substantial detriment caused by the delivery of non-conforming machines
could have been foreseen by a reasonable seller at time of conclusion of contract

81. Even if RESPONDENT itself did not foresee the substantial detriment, according to Art.
25 CISG it is sufficient if a reasonable merchant in RESPONDENT’s place would have
foreseen it. [Graffi, p. 339; Lorenz, III. B.]. Therefore, even RESPONDENT’s personal lack
of knowledge or incorrect appraisal of the circumstances would be no excuse as regards
foreseeability in this context [Schlechtriem-Schlechtriem, Art. 25 para. 14].

82. A reasonable merchant of the same kind in the same circumstances is to be understood as
a person equating RESPONDENT concerning all attributes [Schlechtriem, Oxford, Art. 25
para. 14] and having knowledge of the whole spectrum of facts and events at the relevant
time [Lorenz, III. B.]. RESPONDENT was a qualified expert concerning the production and
sale of machines for the food packaging industry [Claimant’s Exhibit No. 2]. A reasonable
merchant having such expert knowledge about the special characteristics of its machines
would have known all limitations of use of the different models, as experts generally are
assumed to know about the specialities of their goods, including their usage [Botzenhardt, p.
243; Graffi, p. 340].

83. Such reasonable expert would also have had knowledge about the particular contract and
the previous negotiations [Bianca/Bonell-Will, Art. 25 para. 2.2.2.2.]. Therefore, since there
was no limitation mentioned in the contract concerning the usability of the machines, this
reasonable merchant could have had anticipated that salt as a foodstuff might also be desired
to be packaged, especially since the wording of the agreement was very broad in this context.
Therefore, to establish foreseeability it is sufficient if a certain matter is specifically addressed
by the parties, without later being included in the contract [Schlechtriem-Schlechtriem, Art.
25 para. 13; Botzenhardt, p. 232].

84. Accordingly, a reasonable expert knowing on the one hand about CLAIMANT’s possible
intent of packaging at least some corrosive products and on the other hand being familiar with
exactly this incapability of the Model 14 machines could clearly have foreseen the unfitness of the machines for CLAIMANT’s purposes at the time the contract was concluded.

(b.) Substantial detriment was foreseeable to RESPONDENT as a reasonable merchant on 23 July 2002 at the latest

85. When considering foreseeability of the substantial detriment caused by the machines being damaged due to their unfitness of packaging salt, subsequent knowledge has also to be considered (i). Including such knowledge, a reasonable expert in RESPONDENT’s position would have foreseen the substantial detriment latest during the telephone call on 23 July 2002 (ii).

(i) Knowledge acquired by RESPONDENT after conclusion of the contract is relevant when determining foreseeability of CLAIMANT’s substantial detriment

86. Art. 25 CISG fails to specify at what point of time foreseeability should be measured. However, its legislative history demonstrates that this omission was to permit decision on a case by case basis by also considering subsequent knowledge of the parties [cf. First Committee Report, A/Conf.97/11, 99; Honsell-Karollus, Art. 25 paras. 27 f.; Reinhart, Art. 25 para. 9; Ghestin, p. 22; Wang, p. 197; Erdem, p. 184]. This is asserted when looking at other provisions, e.g., Artt. 74(2), 31(b), 35(2)(b), 42(2)(a), 73(3) and 79(1) CISG, which explicitly address the conclusion of contract as decisive moment, in contrast to Art. 25 CISG. This suggests the inclusion of subsequent knowledge under that article [Botzenhardt, p. 249].

87. Even if one is willing to limit such a broad approach, it has to be at least admitted that subsequent knowledge – when conveyed prior to the accomplishment of the contractual performance – has to be considered in exceptional cases [Honnold, Art. 25 para. 183; Bianca/Bonell-Will, Art. 25 para. 2.2.2.2.5.; Enderlein/Maskow, Art. 25 para. 4.3].

88. The purpose of packaging salt was expressly addressed during the telephone conversation on the 23 July 2002 [Statement of Defence, para. 5], before performance by RESPONDENT. At this point of time the Model 14 machines were still in CLAIMANT’s warehouse and therefore their delivery to the carrier could have been stopped [Procedural Order No. 3, para. 23]. In addition, the sale was FOB, leaving the responsibility to arrange for the shipment on RESPONDENT [Statement of Case, para. 6; INCOTERMS 2000, p. 66]. Thus it would have been even easier for it to simply cancel or delay the shipment. Moreover, the machines were not specifically manufactured or modified for CLAIMANT, so no specific inconvenience would have been caused to RESPONDENT by keeping these machines and delivering proper
ones. Therefore, it would have caused no damage whatsoever to it to simply recall the Model 14 machines and to negotiate about suitable machinery.

89. Furthermore, subsequent information is deemed relevant especially in cases where the contract could be clarified by the information given afterwards [Enderlein/Maskow, Art. 25 para. 4.3; Chengwei, 8.2.3.3; Bianca/Bonell-Willl, Art. 25 para. 2.2.2.2.5.]. In this case the notion of fine dry bulk commodities including foodstuff was clarified by the express mention of salt during the aforesaid phone call. Therefore, due to this possibility of clarifying a substantial contract term and to the possibility of RESPONDENT to smoothly react on CLAIMANT’s explicit subsequent clarification without suffering any damage, this case has to be qualified as being exceptional. Consequently, subsequent knowledge has to be taken into account in this context, even when following the strictly limited view on inclusion of such information.

(ii) CLAIMANT addressed the purpose of packaging salt in a manner sufficient to alert RESPONDENT during the phone call

90. A reasonable expert in RESPONDENT’s position would have been able to deduce from the telephone conversation on 23 July 2002 that the machines soon to be delivered would not suit CLAIMANT’s purposes. At this point of time even the damage eventually caused thereby was foreseeable, because such expert would have known that salt is highly corrosive and thus cannot be packaged with the Model 14 machines. Moreover, RESPONDENT lacked the due alertness of any reasonable merchant since it “did not pay particular attention to [in this context relevant] elements of the conversation” [Statement of Defence, para. 5]. Bearing in mind that the call was an inquiry directly relating to a sale of considerable value, a reasonable merchant would have been very sensitive even to casual comments that might have had an effect on the performance of the contract. Therefore, not warning CLAIMANT of the unfitness of the machines for its intended use on salt, RESPONDENT caused further detriment for CLAIMANT.

II. The letter of 19 October 2002 from Mr. Swan to Mr. Drake constituted a declaration of avoidance of the contract

91. In its letter of 19 October 2002, CLAIMANT notified RESPONDENT that the Model 14 machines were no longer of any use to CLAIMANT as corrosion had rendered them unsuitable for packing foodstuff, which in turn had necessitated the purchase of replacement machines from another manufacturer. CLAIMANT further informed RESPONDENT that it would place the Model 14 machines at RESPONDENT’s disposal and expect a
reimbursement of the purchase price [Claimant’s Exhibit No. 6]. Being entitled to avoid the contract as a result of RESPONDENT’s fundamental breach of contract (1.), and not having lost this entitlement pursuant to Art. 82 CISG (2.), CLAIMANT by the aforementioned letter validly declared avoidance of the contract (3.).

1. CLAIMANT was entitled to declare avoidance of the contract under Art. 49(1)(a) CISG

92. RESPONDENT delivered six auger-feeder machines that were not capable of packaging salt and thus not in conformity with the contract [see paras. 47 et seq., supra], as a result of which CLAIMANT was substantially deprived of what it was entitled to expect under the contract, which was or should have been foreseen by RESPONDENT [see paras. 81 et seq., supra]. The Model 14 machines thus suffered from an objectively serious defect as required by Art. 49(1)(a) CISG [Schlechtriem-Huber, Art. 49 para. 8, Art. 46 paras. 29, 30 f.] that could not be remedied by repair, nor did RESPONDENT offer to supply substitute goods [see para. 79, supra]. CLAIMANT therefore had the right to declare the contract avoided [Schlechtriem-Huber, Art. 49 paras. 9, 12; Bianca/Bonell-Will, Art. 49 para. 2.1.2.; Herber/Czerwenka, Art. 49 para. 2].

93. When RESPONDENT ignored CLAIMANT’s reference to packaging salt in the telephone conversation of 23 July 2002 and failed to immediately caution CLAIMANT that the Model 14 machines could not be used for that purpose, it breached its obligation to inform CLAIMANT implied into the contract by Art. 7 CISG [see paras. 67 et seq., supra]. As it was or should have been foreseeable to RESPONDENT that CLAIMANT would suffer substantial detriment when employing the machines to package salt [see paras. 85 et seq., supra], RESPONDENT committed a second fundamental breach. This resulted in irredeemable damage to the Model 14 machines [see paras. 78-79, supra] and entitled CLAIMANT to avoid the contract.

2. Art. 82 CISG does not deprive CLAIMANT of its right to declare avoidance of the contract

94. Since four of the six Model 14 machines were rendered irrevocably inoperative by salt-induced corrosion [Procedural Order No. 3, para. 29], it is impossible for CLAIMANT to make restitution of these machines “substantially in the condition in which [it] received them” as required by Art. 82(1) CISG. Only the two machines not used for packaging salt are in unimpaired condition [Procedural Order No. 1, Report of expert witness para. 1, 4; cf.
Statement of Case, para. 8] and can be returned to RESPONDENT in partial fulfillment of CLAIMANT’s obligations under Art. 82(1) CISG.

95. CLAIMANT has nevertheless not lost the right to declare the contract avoided because the impossibility of restituting substantially unimpaired goods was due not (solely) to CLAIMANT’s handling of the machines, but to RESPONDENT’s delivery of non-conforming goods and its omission to warn CLAIMANT against packaging salt with Model 14 machines. Hence CLAIMANT can invoke the exception to Art. 82(1) CISG contained in Art. 82(2)(a) CISG, according to which the seller is responsible for an impossibility resulting from a deterioration of the goods that is causally linked to a lack of conformity of the goods [Schlechtriem-Leser, Art. 82 para. 19; Honsell-Weber, Art. 82 para. 17; Staudinger-Magnus, Art. 82 paras. 21, 23; Bianca/Bonell-Tellon, Art. 82 para. 2.2.; UNCITRAL Y.B. V (1974), p. 70, Artt. 78-81 paras. 9 f.].

96. CLAIMANT operated the four Model 14 machines in question on the basis of its legitimate expectations under the contract, viz. that the machines recommended, offered and delivered to it by RESPONDENT would be appropriately fitted to allow the packaging of a wide range of dry bulk commodities, including salt [see paras. 51 et seq., supra]. There is nothing to distinguish CLAIMANT’s “act” from the ordinary use to which the buyer may put defective goods although their deterioration or destruction is unforeseeably triggered thereby: Neither a buyer of a car that suffered from a defect and was destroyed in an accident caused by this defect [Schlechtriem-Leser, Art. 82 para. 19; cf. on German law: BGH VI ZR 310/78 (Germany 1983); BGH VIII ZR 172/77 (Germany 1978)], nor a purchaser of a cleaning apparatus that had caught fire due to a defective switch [cf. on German law: BGH VIII ZR 137/75 (Germany 1976)] would be precluded from avoiding the contract.

97. Moreover, where the seller fails to provide or provides defective operating instructions and the goods are consequently damaged by a handling error of the buyer, the latter may avail itself of Art. 82(2)(a) CISG and still declare avoidance of the contract [Schlechtriem-Leser, Art. 82 para. 20; Honsell-Weber, Art. 82 para. 18; Ziegler, p. 188]. Instead of specifying an appropriately narrow range of foodstuff at the pre-contractual stage, RESPONDENT not only left CLAIMANT in the belief that salt could be packaged by Model 14 machines [see paras. 67 et seq., supra], but also failed to react properly to an indication by CLAIMANT to this effect at a time when the machines were still in its possession. The vaguely-worded and inconclusive manual provided by RESPONDENT was inapt to alert CLAIMANT to the dangers inherent in packaging salt with Model 14 machines [see para. 69, supra]. Given that,
therefore, CLAIMANT could neither foresee [Piltz, § 5 para. 174; Schlechtriem-Leser, Art. 82 para. 20; Schlechtriem, Vienna, p. 106] the deterioration nor be aware of the underlying defect [Schlechtriem, UN-Kaufrecht, para. 327], the conduct on CLAIMANT’s part was not likely to increase the risk of the Model 14 machines being damaged [Schlechtriem, UN-Kaufrecht, para. 327] and CLAIMANT has hence not lost its right to declare avoidance.

3. CLAIMANT validly declared avoidance of the contract by its letter dispatched on 19 October 2002

98. By its letter of 19 October 2002, CLAIMANT validly declared the contract avoided, as the letter constituted effective notice to RESPONDENT that CLAIMANT wished to avoid the contract (a.) and was dispatched to RESPONDENT within reasonable time after CLAIMANT discovered the non-conformity of the Model 14 machines with the contract (b.).

(a.) The letter of CLAIMANT constituted effective notice of avoidance of the contract

99. While Art. 26 CISG stipulates that “notice” of the avoidance is to be made to the other party, the notice does not have to satisfy any formal requirements [Schlechtriem-Huber, Art. 49 para. 29; Honsell-Karollus, Art. 26, para. 10; Herber/Czerwenka, Art. 26 para. 3, Art. 49 para. 11; Bianca/Bonell-Date-Bah, Art. 26 para. 3.1., -Will, Art. 49 para. 2.1.1.; Piltz, § 5 para. 272] and can certainly be conveyed by letter [cf. OLG Frankfurt, RIW 1990, 590 (telex or telefax sufficient)].

100. Similarly, Art. 26 CISG does not prescribe any particular language and may even be read so as to permit sufficiently clear conduct to constitute an implied declaration of avoidance [AG Oldenburg, 5 C 73/89 (Germany 1990); Schlechtriem-Leser, Art. 26, para. 10, -Huber, Art. 49 para. 29; Jacobs, p. 407; Neumeyer/Ming, Art. 26 para. 1, Enderlein, p. 315]. Whereas use of the term “avoidance” or of one of its synonyms is not necessary, the declaration must make the intention to terminate the contractual relations between the parties unequivocally clear [OLG Frankfurt, 13 U 51/93 (Germany 1994); Schlechtriem-Huber, Art. 49 para. 29; Honsell-Karollus, Art. 26 para. 12, Flechtner, p. 82]. Taken as whole, CLAIMANT’s letter contained sufficient indications to that effect, as even each of the main propositions in itself would have satisfied the strict standards [cf. Schlechtriem, BGH, III.1.] set by the German courts: The complaint that the Model 14 machines were not conformity with the contract and would be placed at RESPONDENT’s disposal [BGH, VIII ZR 300/96 (Germany 1997); BGH, VIII ZR 159/94 (Germany 1995); cf. Honsell-Schnyder/Straub, Art. 49 para. 34], the request for a reimbursement of the purchase price [OLG Celle, 20 U 76/94]
and the expression of the intent to buy replacement machines \([\text{OLG Hamburg, 1 U 167/95 (Germany 1997); OLG Frankfurt, 5 U 164/90 (Germany 1991)}]\) would each have constituted without more an effective notice of avoidance as required by Art. 26 CISG.

(b.) The letter of CLAIMANT constituted timely notice of avoidance of the contract

101. CLAIMANT was obliged by Art. 49(2)(b)(i) CISG to declare avoidance within a reasonable time after it knew or ought to have known of RESPONDENT’s breach of contract \([\text{Schlechtriem-Huber, Art. 49 para. 42; Honsell-Schnyder/Straub, Art. 49 para. 38; Flechtner, pp. 84-85}]\). Because CLAIMANT could not and ought not have known of RESPONDENT’s breach before the end of September 2002 (i), CLAIMANT’s letter of 19 October 2002 was a timely declaration of avoidance of the contract (ii).

(i) CLAIMANT could not and ought not to have known of RESPONDENT’s breach before the end of September 2002

102. Precisely at which point CLAIMANT at least ought to have known of the non-conformity of the Model 14 machines and RESPONDENT’s breach of its obligation to warn CLAIMANT of the consequences of packaging salt with those machines is determined by reference to Art. 38(1) CISG \([\text{Schlechtriem-Huber, Art. 49 para. 43; Honnold, Art. 49 para. 308}]\), which imposed a duty upon CLAIMANT to promptly conduct an examination of the auger-feeders that was objectively adequate to reveal recognizable and identifiable defects \([\text{OLG Oldenburg 12 U 40/00 (Germany 2000); OLG Köln, 18 U 121/96 (Germany 1997); Schlechtriem-Huber, Art. 38 paras. 13, 15; Staudinger/Magnus, Art. 38 para. 28; Herber/Czerwenka, Art. 38 para. 5; Heuzé, para. 301; Neymayer/Ming, Art. 38 para. 2; Bernstein/Lookofsky, p. 91; Heilmann, p. 291}]\).

103. Technologically complex processing equipment, such as the auger-feeder machines in question, needs only to be tested by way of a spot check under realistic conditions so as to establish that it is functioning correctly \([\text{Schlechtriem-Schwenzer, Art. 38 para. 14; Honsell-Magnus, Art. 38 para. 16; Enderlein/Maskow/Strohbach, Art. 38 para. 1; Bianca/Bonell-Bianca, Art. 38 para. 2.3.}]\). Seeing that, in addition, CLAIMANT did not possess expert knowledge of the machinery used for packaging bulk commodities \([\text{Statement of Claim, para. 1; cf. Schlechtriem-Schweizer, Art. 38 para. 13}]\), the general inspection of the machines upon their smooth installation on 30 August 2002 \([\text{cf. Statement of Case, para. 8; Procedural Order No. 3, para. 24}]\) was sufficient to discharge CLAIMANT of the obligation imposed by
Art. 38(1) CISG [cf. OLG München 7 U 4427/97 (Germany 1998)]. This examination did not reveal and could not have revealed, however, the intrinsic defect of the Model 14 machines, which only surfaced by the end of September 2002 and led CLAIMANT to instantly decommission the machines [Statement of Case, para. 8].

104. A greater degree of wariness and a more exacting examination would only have been called for if CLAIMANT was actually forewarned of a possible defect in the auger-feeders by, e.g., previous deliveries that had proved defective [LG Stuttgart 3 KfH O 97/89 (Germany 1989); cf. Schlechtriem-Schwenzer, Art. 38 para. 13; Honsell-Magnus, Art. 38 para. 18]. Yet since the manual accompanying the Model 14 machines did not include as clear and explicit a warning as is inherent in an actual notice of a defect in goods supplied previously by the same seller [see para. 69, supra], CLAIMANT was entitled to continue to assume that the machines delivered by the “premier manufacturer” of such equipment [Claimant’s Exhibit No. 2] would comply with the contractual specifications and not compelled to conduct an especially thorough examination.

(ii) CLAIMANT by its letter of 19 October 2003 declared avoidance within reasonable time

105. CLAIMANT dispatched the letter forming its declaration of avoidance to RESPONDENT on 19 October 2002, who must have received it by 27 October 2002, the date of its letter in reply [Claimant’s Exhibit No. 7]. By virtue of Art. 27 CISG, RESPONDENT had to bear the risk of an error in or the failure of the transmission of CLAIMANT’s letter, which consequently took effect as notice of avoidance for the purposes of Art. 26 CISG on the day it was dispatched [Schlechtriem-Schlechtriem, Art. 27 paras. 10, 13; Bianca/Bonell-Date-Bah, Art. 27 para. 2.5.; Herber/Czerwenka, Art. 27 para. 2], i.e. on 19 October 2002, approximately three weeks after CLAIMANT gained knowledge of the breach of contract by RESPONDENT. Even if CLAIMANT was prepared to concede that the time the letter was actually received by RESPONDENT was decisive for Art. 26 CISG [Schlechtriem-Leser, Art. 26 paras. 11 f.; Honsell-Karollus, Art. 26 para. 18, Art. 27 para. 18; Piltz, § 5 para. 274], the notice of avoidance would have become effective on 27 October 2002 at the very latest.

106. Notwithstanding the lapse of three (or four) weeks, CLAIMANT declared its contract with RESPONDENT avoided within reasonable time in the circumstances of the present case [Honsell-Schnyder/Straub, Art. 49 para. 46] as specified in Art. 49(2)(b)(i) CISG: In view of the grave consequences of the decision to avoid the contract for fundamental breach, CLAIMANT was to be granted enough time to carefully consider the decision [Schlechtriem-
Huber, Art. 49, para. 44; Kazimierska, p. 117; Piltz, § 5 para. 282] and to seek advice on, inter alia, legal matters and the possibility of obtaining substitute machines [Honsell-Schnyder/Straub, Art. 49 para. 48]. Established practice suggests that one month can generally be regarded as reasonable time for issuing a declaration of avoidance [BGH VIII ZR 287/98 (Germany 1999); OG Luzern, 11 95 123/357 (Switzerland 1997); SARL Bri Production “Bonaventure” v. Société Pan African Export France (1996); OLG Frankfurt, 5 U 164/90 (Germany 1991)].

107. In conclusion, CLAIMANT had the right to declare avoidance by reason of RESPONDENT’s fundamental breach of the contract, and validly did so by the letter of 19 October 2002.