

ELEVENTH ANNUAL WILLEM C. VIS  
INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
2003-2004

Institute of International Commercial Law  
Pace University School of Law

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MEMORANDUM FOR CLAIMANT

**University of Zurich**

Thomas G. Albert, Marija Djordjevic, Stefan Günther, Sonia Hausherr, Florian Utz



**on behalf of**

**EQUAPACK, INC.**

345 Commercial Ave.  
Oceanside, Equatoriana  
Telephone (0) 555-1235  
Telefax (0) 555-1237  
(„CLAIMANT“)

**versus**

**MEDI-MACHINES, S.A.**

415 Industrial Place  
Capitol City, Mediterraneo  
Telephone (0) 487-2314  
Telefax (0) 487-2320  
("RESPONDENT")

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**INDEX OF ABBREVIATIONS**

All E.R.	All England Law Reports
Art./s.	Article/s
ASA	Association Suisse de l'arbitrage (=Swiss Arbitration Association)
BB	„Der Betriebsberater“ (Auditor Journal)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (=Decisions of the Swiss Federal Court of Justice)
BGH	Bundesgerichtshof (German Supreme Court)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
cons.	Consideration
Corp.	Corporation
Dr.	Doctor
ed.	Edition
Ed.	Editor
e.g.	<i>exempli gratia</i> (=for example)
et al.	<i>et alii</i> (=and others)
etc.	<i>et cetera</i> (=and so on)
et seq.	<i>et sequentes</i> (=and following)
Eur. Ing.	European Engineer; Title registered by the Fédération Européenne d' Associations d' Ingénieurs
F. Supp.	Federal Supplement
GmbH	Gesellschaft mit beschränkter Haftung (=Limited Liability Company)
ICC	International Chamber of Commerce
i.a.	<i>inter alia</i> (=among other)
i.e.	<i>id est</i> (=that is)
Inc.	Incorporation
kg	Kilograms
LCIA	London Court of International Arbitration
lit.	<i>litera</i> (=letter)
Ltd.	Limited Liability Company
M&A	Mergers and Acquisitions
Mio.	Million

ML	Model Law on International Commercial Arbitration
Mr.	Mister
New L. J.	New Law Journal
NJW-RR	Neue Juristische Wochenschrift – Rechtssprechungs-Report
N/s	Note/s
No/s., no/s.	Number/s
p./pp.	Page/s
para.	Paragraph
S.A.	<i>Société Anonyme</i> (=joint-stock corporation)
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre
S\$	Singapore Dollars
U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States (of America)
US\$	US Dollars
v.	<i>versus</i> (=against)

## INDEX OF LEGAL TEXTS

CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
ICC Rules	Arbitration Rules of the International Chamber of Commerce (1998)
LCIA Rules	Arbitration Rules of the London Court of International Arbitration (1998)
NY Convention	(New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Singapore Arbitration Act	International Arbitration Act of Singapore (first published 1994; 3 <sup>rd</sup> ed. 2002)
SIAC Arbitration Rules	Arbitration Rules of the Singapore International Arbitration Centre (first published 1991; 2 <sup>nd</sup> ed. 1997)
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, adopted by the General Assembly of the United Nations under Resolution 31/98 (1976)
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration (1985)
Hague Convention	29 <sup>th</sup> Hague Convention on International Access to Justice

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## STATEMENT OF FACTS

- 24 June 2002            Equapack, Inc. (CLAIMANT) asks Medi-Machines, S.A. (RESPONDENT) for an offer for up to six packaging machines that will be used “over a wide range of products, both fine goods, such as ground coffee or flour, and coarser goods such as beans or rice.” CLAIMANT needs new machines because of a contract under which it is bound to package many more groceries than hitherto (CLAIMANT’s Exhibit No. 1).
- 3 July 2002            RESPONDENT proposes that CLAIMANT buy six Model 14 machines costing US\$ 65,000 each. This model 14 is a discontinued model which has not sold as well as anticipated. – The parties agree that eventual disputes arising out of the sale-contract shall be resolved by a court of arbitration in Vindobona in accordance with the SIAC Rules; the CISG shall be applicable (CLAIMANT’s Exhibit No. 2/Procedural Order No. 3, para. 32).
- 12 July 2002           CLAIMANT accepts RESPONDENT’s offer and initiates payment (CLAIMANT’s Exhibit No. 3).
- 23 July 2002           CLAIMANT enquires by telephone as to the status of the order. On this occasion, CLAIMANT also mentions explicitly that the machines will be used for the packaging of salt. A day later, RESPONDENT answers by facsimile that the machines are packed and will be collected by the freight forwarder the following Monday (CLAIMANT’s Exhibit No. 4 and 5).
- 30 August 2002        After delivery the machines have been installed and put into service (Notice of Arbitration, para. 8).
- 18 October 2002       CLAIMANT informs RESPONDENT on the telephone that the machines can no longer be used because of corrosion due to the use of salt. CLAIMANT therefore requests that the purchase price and further costs be reimbursed. A day later, a written confirmation is sent to RESPONDENT (CLAIMANT’s Exhibit No. 6).

- 27 October 2002      RESPONDENT turns down CLAIMANT's request, but offers a rebate on the purchase of Model 17, which is fit for use with highly corrosive products such as salt (CLAIMANT's Exhibit No. 7).
- 10 February 2003      CLAIMANT initiates legal proceedings against RESPONDENT (**Notice of Arbitration**; Mr. Langweiler's letter, p. 2).
- 24 February 2003      SIAC asks the parties to pay the due half of the management fee of S\$ 4,988 as well as a deposit of S\$ 10,000 (pursuant to Rule 27) within the following 7 days. The parties also have to appoint an arbitrator (Letter of SIAC, p. 18 et seq.).
- 11 March 2003      SIAC acknowledges receipt of the requested sum from CLAIMANT and informs Mr. (Arbitrator 1) about the most important points such as the Practice Notes or the Code of Ethics (Letters of SIAC, p. 22 et seq.)
- 26 March 2003      After three reminders dated 6, 13 and 20 March 2003 respectively, RESPONDENT informs SIAC that it has paid the requested sum (Mr. Fasttrack's letter, p. 29).
- 27 March 2003      Mr. (Arbitrator 1) consents to his appointment as arbitrator.
- 17 April 2003      RESPONDENT submits its **Statement of Defense** and appoints Dr. (Arbitrator 2) as arbitrator who accepts the appointment in the following (Mr. Fasttrack's letter, p. 30).
- 20 June 2003      Professor (Presiding Arbitrator) informs the parties that it was agreed to appoint Eur. Ing. Franz van Heath-Robinson as expert to test the machines which have not been used for the packaging of salt (Procedural Order No. 1).
- 6 August 2003      Eur. Ing. Franz van Heath-Robinson states that for fine products the machines have a production rate that lies considerably under the average industry rate of 180 1kg bags per minute. He also states that in his opinion the damage of the other four machines is caused by the corrosion resulting from the use of salt (Extracts from report, p. 35).

- 1 September 2003      RESPONDENT requests the Tribunal to order CLAIMANT to provide security of US\$ 20,000 for its legal costs, because it doubts CLAIMANT's ability to pay and it mistrusts the courts in Equatoriana. RESPONDENT would be willing to consider this request if CLAIMANT were to provide information relevant to the matters discussed. CLAIMANT strongly resists this request in a letter of 9 September 2003 (Mr. Fasttrack's letter, p. 36 et seq., and Mr. Langweiler's letter, p. 38).
- 17 September 2003      RESPONDENT requests the Tribunal to order CLAIMANT not to divulge any aspect of the current arbitration. CLAIMANT resists the request arguing that such an order could come only be made by a competent court of Danubia (Mr. Fasttrack's letter, p. 39, and Mr. Langweiler's letter, p. 40).

## STATEMENT OF PURPOSE

CLAIMANT has prepared this Memorandum in compliance with the Arbitral Tribunal Procedural Orders No. 1, 2 and 3, issued on 20 June 2003, 3 October 2003 and 5 November 2003.

It is argued that:

- the Arbitral Tribunal has no jurisdiction to order security for costs (I.A.);
- should the Tribunal hold that it has the jurisdiction, such should be exercised with great reticence (I.B.);
- should the Tribunal have jurisdiction to order security for costs, the pertinent material requirements are lacking (I.C.);
- the Arbitral Tribunal has no jurisdiction to order compliance with a duty of confidentiality (II.A.);
- should the Tribunal have such jurisdiction, there exist no grounds for ordering compliance with a duty of confidentiality (II.B.);
- RESPONDENT breached its obligations by delivering defective machines (III.);
- this constitutes a fundamental breach pursuant to Art. 25 CISG (IV.); and
- CLAIMANT has made use of the resulting right to avoid the contract (V.).

In arguing these propositions, CLAIMANT shall demonstrate the legal and factual bases for its claim.

## ARGUMENTS

### I. NO SECURITY FOR RESPONDENT'S LEGAL COSTS

- 1 The Arbitral Tribunal was requested to order CLAIMANT to post security for RESPONDENT's legal costs in the amount of US\$ 20,000 (Mr. Fasttrack's letter of 1 September 2002). Below, CLAIMANT will show that the Tribunal does not have jurisdiction to order security for costs, since no such power is granted by the *lex arbitri* (A.). Should the Tribunal nevertheless affirm jurisdiction to order security for costs, it should be reticent in exercising it for the several reasons given below (B.). CLAIMANT shall further show that the material requirements to order security for costs are not fulfilled in the case at hand (C.). Should the Tribunal decide to order security for costs it should review the requested amount and redefine the final sum and the form of the ordered security (D.).
- 2 In its Procedural Order No. 3, para. 45, the Tribunal drew the parties' attention to the Singapore Arbitration Act. Pursuant to Art. 32 SIAC Rules the parties are in agreement that the International Arbitration Act as amended from time to time is applicable only if the place of arbitration is Singapore. In the case at hand, the seat of the arbitration is Danubia (CLAIMANT's exhibit No. 1, para. 15). Therefore, the Singapore Arbitration Act, in particular Art. 12(1)(a), should not be taken into consideration by the arbitrators.

#### A. The UNCITRAL Model Law Does not Give Arbitral Tribunals the Power to Order Security for Costs

- 3 Pursuant to the statements in CLAIMANT's exhibit No. 1, para. 14 and the confirmation by the Arbitral Tribunal in its Procedural Order No. 3, para. 6 and 47, Danubia and Equatoriana have both adopted the UNCITRAL ML excluding later amendments. Therefore, the UNCITRAL ML constitutes the *lex arbitri* in the case at hand.
- 4 Pursuant to Art. 17 UNCITRAL ML a Tribunal "may only grant interim measures in respect of the subject-matter of the dispute" (WEIGAND, p. 1204, 1228). The security for legal costs as an interim measure of protection has nothing to do with the subject-matter of these arbitral proceedings, which is the breach of contract by RESPONDENT caused by the non-conformity of the machines (CLAIMANT's Exhibit No. 1, para. 17; Mr. Fasttrack's letter of 1 September 2003; Procedural Order No. 2, para. 2). Con-

sequently, the Tribunal has no power to order CLAIMANT to post security for costs and should not hear RESPONDENT's request.

- 5 Furthermore, it is stated in the Report of the UNCITRAL Working Group II on Arbitration on the work of its thirty-seventh session in Vienna of 7-11 October 2002 (cited as A/CN.9/523) that it must be discussed *inter alia* whether or not an Arbitral Tribunal has the power to order interim measures of protection, e.g. security for costs, and if so, under which circumstances it would be appropriate to exercise such power.
- 6 The scope of interim measures should embrace "measures providing a preliminary means of security for assets out of which an award may be satisfied" (compare A/CN.9/508, para. 74). In this context, a widely shared view was that the provisional measure of protection should not "[d]eal in general terms with the costs of arbitration but limit itself to securing the enforcement of the award." (A/CN.9/523, para. 37). In the case at hand, the requested amount is solely to secure RESPONDENT's legal costs – not the award – in the event that CLAIMANT should not prevail in these proceedings. In addition, the UNCITRAL ML clearly leaves open whether security for legal costs of any party should be contemplated at all (A/CN.9/523, para. 37, 38). It may thus be concluded that *de lege lata* no basis in law for such orders exists, pending a reopening of the discussion, which has been reserved for a future session (A/CN.9/523, para. 38). An Arbitral Tribunal is thus not authorized to accede to RESPONDENT's request for security for its legal costs.

## **B. Power to Order Security for Costs Should Be Exercised with Reticence**

- 7 As mentioned below (1.-2.) security for costs should only be granted in extraordinary circumstances and with the greatest reticence (WEIGAND, p. 253, para. 6; A/CN.9/523, para. 17). Such extraordinary circumstances do not obtain in the matter here in dispute, as CLAIMANT will show below.

### **1. There Is no Express Agreement between CLAIMANT and RESPONDENT Concerning Security for Costs**

- 8 According to Mr. Langweiler's Statement of Case of 10 February, 2003, the contract of purchase and sale between CLAIMANT and RESPONDENT does not contain an express clause regarding security for costs. In practice, arbitration clauses rarely provide for orders for security for costs because neither party has any desire to make concessions in exchange for what seems to be a relatively minor procedural detail (HOELLERING, cited in RUBINS, p. 6). There are no reasons apparent for assuming that the

priorities of the contracting parties in the case at hand differ from this general rule. It can thus be concluded that the contracting parties did not intend to empower the Tribunal to order security for costs absent a specific clause to the contrary (BUCHER, para. 195; SANDROCK, p. 24, 25; LALIVE, POUURET & REYMOND, p. 162).

9 Furthermore, RESPONDENT's general sales conditions, which form part of the agreement, remain silent on this topic. Obviously, RESPONDENT did not envisage that in any conceivable case the opposing party could be ordered to provide security for costs. In the absence of an express basis for such a measure, any power of the Arbitral Tribunal to order security for costs would have to be furnished by the *lex arbitri* or institutional rules chosen by the contracting parties (*Mavani v. Ralli Brothers Ltd.*, 1973, 1 All E.R. 468, 472.). Accordingly, the general sales conditions state that any dispute arising out of or in connection with the contract shall be referred to and finally resolved in Vindobona, Danubia, in accordance with SIAC Rules (CLAIMANT's Exhibit No. 2, para. 15). As CLAIMANT will show below, the UNCITRAL ML, which takes precedence over the SIAC Rules, does not empower the Tribunal to order security for costs.

**2. There Is only Limited Power of Arbitral Tribunal to Order Interim Measures of Protection (Art. 25(j) and (l)), in Particular Security for RESPONDENT's Legal Costs pursuant to Art. 27.3 SIAC Rules**

10 The applicable institutional rules give the Tribunal the power to make orders or give directions to any party for an interim injunction or any other interim measures (Art. 25(j) SIAC Rules) as well as to ensure the enforcement of any award made during the proceeding (Art. 25(l) SIAC Rules). In particular, Art. 27.3 SIAC Rules states that the Tribunal shall have the power to order any party to provide security for costs. At first sight, it might be inferred that pursuant to Art. 27.3 SIAC Rules the Tribunal should be empowered to order security for costs in every case. However, the SIAC Rules state that they "shall govern the arbitration save that, where any of these rules is in conflict with a provision of the applicable law of the arbitration from which the parties cannot derogate, that provision shall prevail" (Art. 1 SIAC Rules). The UNCITRAL ML undoubtedly does prevail over any institutional rules in that regard. Consequently, since the UNCITRAL ML does not grant the Tribunal the power to order security for costs, it should not issue such an order. Should the Tribunal nevertheless consider ordering CLAIMANT to provide security for RESPONDENT's legal costs, it should be reticent in applying a provision of the institutional rules that is in conflict with the prevailing *lex arbitri*.

- 11 When the SIAC Rules were introduced they were largely based on the UNCITRAL Arbitration Rules and LCIA Rules, with some modifications ([http://www.siac.org.sg/2\\_dwnldPDF.htm](http://www.siac.org.sg/2_dwnldPDF.htm); visited on 1 December 2003). As there are no comments on the SIAC Rules it may be helpful to consult those arbitration rules regarding the requirements which must be fulfilled for ordering a party to post security for costs.
- 12 The LCIA Rules, in particular Art. 25(2) concerning interim and conservatory measures, do not give precise answers as to when such a measure might be appropriate. In view of the controversial discussions regarding the power of an arbitral Tribunal to order security for costs it cannot be assumed *a priori* that the arbitrators are authorized to do so in every case absent specific reasons.
- 13 Pursuant to Art. 26(2) UNCITRAL Arbitration Rules the Tribunal shall be entitled to require security for costs for measures, which it deems necessary in respect of the subject matter (Art. 26(1) UNCITRAL Arbitration Rules). Three problems arise in connection with the subject-matter of the dispute.
- 14 Firstly, the Tribunal should consider whether an envisaged interim measure is necessary in order to preserve the rights, which form part of the subject-matter of the dispute (REDFERN/HUNTER, p. 354; REDFERN, p. 6; ZULEGER, p. 160). The interim measure of protection is not the subject-matter in this dispute (Section 4). Consequently, the Tribunal should not entertain this request.
- 15 Secondly, as such interim measures can be established in the form of an interim award (Art. 26(2) UNCITRAL Arbitration Rules, BLESSING, p. 266), the Tribunal might inadvertently appear biased in favour of RESPONDENT. In addition, if the institutional rules or even the parties themselves vest the Tribunal with the authority to order security for costs, the Tribunal should be very hesitant to exercise such authority, especially if it seems thereby that it is prejudging the merits of the case (HUNTER, p. 46). RESPONDENT asserts security for costs solely on the premise - and not based on facts that it will succeed on the merits of the dispute - that the Tribunal will in the final award pursuant to Art. 30.3 SIAC Rules order CLAIMANT to pay RESPONDENT's legal costs. Ordering security for costs in the case at hand would violate the neutrality principle, as such an order would *a priori* favour RESPONDENT to the detriment of CLAIMANT (compare also SANDROCK, p. 25).
- 16 Thirdly, Art. 26(1) UNCITRAL Arbitration Rules confers on the Tribunal the power to order interim measures, such as security for costs, but only under the condition that the Tribunal deems this necessary. There is no necessity of security for costs here because the relevant conditions are not fulfilled

(see below I.C.). Even were the conditions fulfilled, it would be a paradox to grant security for costs because "[w]hile contending that CLAIMANT's financial state is such that it cannot meet a future cost award, RESPONDENT, at the same time, requests that it provide security in the like amount" (NEEDHAM, p. 126).

### **C. Conditions for Exercising Power to Order Security for Costs Are not Fulfilled**

17 Even were the Tribunal to entertain the ordering of security to be posted to cover RESPONDENT's legal costs, these costs would have to prove to be reasonable (KARRER/DESAX, p. 1). Thereby, the Tribunal would have to exercise its discretion with considerable restraint (ICC Case No. 10032 of 9 November 1999), and only in extreme cases (KARRER/DESAX, p. 348). For reasons stated below, no such extreme case obtains here, nor would it be reasonable to award such security, because (1.) CLAIMANT has reachable assets in the jurisdiction; (2.) CLAIMANT is able to pay the arbitration costs and other legal costs; (3.) the application is out of time; (4.) there are no relevant problems to enforce a prospective award and, even if there were; (5.) the posting of security on this basis would discriminate CLAIMANT.

#### **1. CLAIMANT Has Reachable Assets in the Jurisdiction**

18 The circumstances in the case at hand are not comparable to cases in which an award to post security was rendered. For example, in *Oilex A.G. MM Mitsui & Co.*, a Swiss plaintiff was ordered to post US\$ 25,000 in security. The primary concern of the court was that, *inter alia*, "it appear[ed] that plaintiff has no assets or is out of business." The circumstances in the case at hand obviously differ, because it has not been argued or even established that CLAIMANT has no assets or is out of business. Thus, the argument of a complete lack of funds cannot be used by RESPONDENT to request the Tribunal to order a measure of protection.

#### **2. CLAIMANT Is Able to Pay Arbitration and Other Legal Costs**

19 It has not been established that CLAIMANT is not able to pay the costs of this arbitration or other legal costs. It is true that there have been cases where the payment of a substantial sum of money was at the root of orders for security for costs, in which courts or arbitral tribunals viewed the financial health of the plaintiff as a major factor to be taken into consideration when contemplating a security request for security. Some U.S. Courts have also seen impecuniousness as the primary justification for security requirements, and this element is nearly always part of the consideration of such measures when ordered by arbitrators. Thus, for example, in *Frontier International Shipping Corp. v. Tavros*, the Federal Court of Canada denied security for costs, holding that such measures would be appropriate only given "the expected high cost of the arbitration by reason of complex technical issues which might only be investi-

gated and arbitrated at great expense and the fact that if the party seeking security was successful, it might, because of the other's clear precarious financial position, be at risk in being able to collect costs at the end of the day" (para. 21). CLAIMANT has established that it takes its obligations seriously. Firstly, it fulfilled the contract of sale with RESPONDENT without any delays. Further, unlike the RESPONDENT, it advanced the arbitral costs in the amount of S\$ 12,494 immediately. CLAIMANT has given no reason to RESPONDENT or the Tribunal to doubt its willingness or capacity to make payments. In his letter of 9 September 2003 Mr. Langweiler stated expressly that CLAIMANT would not have any difficulty or hesitation in paying arbitration or other legal costs should CLAIMANT would lose these proceedings (Mr. Langweiler's letter of 9 September 2003). CLAIMANT is a large company with solid annual sales between US\$ 8,000,000 and US\$ 10,000,000 (Procedural Order No. 3, para. 44). The mere fact that it is currently involved in a due diligence process with Equatoriana Investors, one of the largest financial firms in Equatoriana, serves as corroboration. There are no reasons to fear that CLAIMANT will be unable to pay.

### **3. The Application Is out of Time**

20 CLAIMANT submitted its Notice of Arbitration against RESPONDENT on 10 February 2003. A copy thereof was sent to RESPONDENT that same day. RESPONDENT requested the Arbitration Tribunal on 1 September 2003 to order CLAIMANT to provide security for costs in the amount of US\$ 20,000. Several months and numerous appropriate opportunities passed by without RESPONDENT taking any action in this respect. Thus, it cannot be assumed that CLAIMANT's ability to pay RESPONDENT's legal costs or the latter's concerns that the final award may remain enforceable only arouse at this late stage of these arbitral proceedings. Accordingly, RESPONDENT has missed the opportunity to timely request the Tribunal to order security for legal costs and therefore the Tribunal should reject its request.

### **4. Problems, if any, with Enforcement of Foreign Awards in Equatoriana Are not Relevant**

21 RESPONDENT further argues that CLAIMANT should be ordered to provide security for costs due to the fact that the state courts of Equatoriana have not been rigorous in their enforcement of foreign awards. While this point has not been argued hitherto in the context of RESPONDENT's request for security for costs, CLAIMANT must address it here for the avoidance of any doubt at this stage.

22 RESPONDENT justifies its request in particular with the alleged fact "that the national courts of Equatoriana have not been rigorous in their enforcement of foreign awards" and that "they have found ways to avoid enforcing awards against firms from Equatoriana when the firm is in financial difficulties, even though not as yet in insolvency proceedings" (Mr. Fasttrack's letter of 1 September 2003). Firstly, it must

be pointed out that CLAIMANT has never been involved in any such proceedings. The cases mentioned have nothing to do with CLAIMANT. Secondly, RESPONDENT has not shown that CLAIMANT has difficulties in paying arbitral costs or any other legal costs in connection with these proceedings. There is no evidence that CLAIMANT would be hesitant to effect all payments if ordered to do so. Finally, the argument against security derived from residence is further strengthened by the assumption that RESPONDENT knew the nationality and place of residence of its counterparty and therefore can fairly be deemed to have assumed the risk of dealing with CLAIMANT (compare also RUBINS, p. 24). Accordingly, RESPONDENT's argument should not be taken into consideration by the Tribunal to order the security of costs.

### **5. The Posting of Security Would Discriminate CLAIMANT**

23 Finally, as Equatoriana is a party to the NY Convention, its national courts are obliged to recognize as binding and enforce any arbitral award (Art. III NY Convention). RESPONDENT requested security for costs *inter alia* based on a statement made in the report regarding the experience with court enforcement of awards under the NY Convention prepared by the International Arbitration Committee of the International Commercial Law Association (Mr. Fasttrack's letter of 1 September 2003). In this respect, the case at hand may be compared to *ICC Case No. 7047 (1994)*, where an arbitral tribunal refused a Yugoslav respondent's request for US\$ 600,000 in security for procedural costs requested as protection against the impecunious Panamanian Claimant's obvious inability to pay any costs award. Respondent made three arguments: (1) the claimant was an off-shore company with no assets (except US\$ 10,000 in share capital); (2) Yugoslavia had no bilateral convention ensuring enforcement with claimant's state of domicile, Panama; and (3) without security, Art. 26 of the ICC Rules could not be implemented should the respondent prevail. The arbitrator held that the respondent's considerations were inconclusive for two reasons: (1) security would overburden the claimant, since the respondent had declined to advance its half of procedural fees; (2) respondents knew the nationality and financial position of the claimant at the time the contract was signed and was aware of the absence of any enforcement treaty. The situation here is similar: RESPONDENT well knew the conditions prevailing in Equatoriana's state courts when entering into the agreement with CLAIMANT. In addition, to burden CLAIMANT on the basis of its nationality would violate the principle of equal treatment regardless of nationality. This non-discrimination concern is embodied in the 29<sup>th</sup> Hague Convention on International Access to Justice, which forbids any practice requiring litigants to give security for costs on account of their residence in an another country (SEDMAN, p. 313 et seq.). Requiring a party in international arbitration to post security for costs for the reason that it is a resident of Equatoriana, a country which is not the country of the seat of the arbitration, would

therefore be tantamount to a violation of the *ordre public international* (compare also KARRER/DESAX, p. 345; FOUCHARD/GAILLARD/GOLDMAN, para. 1256).

#### **D. Appropriate Amount of Security for Costs**

24 Should the Tribunal decide to exercise the power to order security for legal costs, the amount would have to correspond as closely as possible to the security needs of RESPONDENT in order to minimize oppression to CLAIMANT. This would require an examination of RESPONDENT's legal fee estimates for reasonableness, both as regards to rates and number of hours (O'REILLY, p. 247, 249).

25 "The view is that in international arbitration party representation costs may vary widely because of a number of factors, including the vastly different conditions under which lawyers work around the world and the varying ability of lawyers used to their domestic civil procedure to adapt to the often unfamiliar ways of international commercial arbitration" (KARRER/DESAX, p. 1). In CLAIMANT's view the UNCITRAL ML should be followed that security for costs cannot be granted for costs already incurred (compare also *BGE 79 II 305*; *BGE 118 II 88, cons. 2*). Pursuant to UNCITRAL ML security for costs is conceived as a measure of protection (A/CN.9/523). The aim of ordering security for costs should therefore be to prevent irreparable harm to the requesting party. RESPONDENT's costs for legal defense due at the date of filing its request for security for costs (1 September 2003) are already paid and therefore cannot be protected anymore. Consequently, even were the Tribunal to contemplate awarding security for costs, the requested amount would have to be reconsidered by the Arbitral Tribunal.

#### **E. Conclusion**

26 CLAIMANT moves the Arbitral Tribunal should not order security for costs as it has no jurisdiction to do so under the UNCITRAL ML. Should the Tribunal hold that it has jurisdiction, CLAIMANT has demonstrated that such jurisdiction should be exercised with great reticence and that all the substantial arguments advanced above should lead the Tribunal to reject RESPONDENT's request.

## **II. THE PROPOSITION OF A DUTY OF CONFIDENTIALITY FOR CLAIMANT IS TO BE REJECTED**

27 The duty of confidentiality is often cited as an advantage of arbitration over litigation in state courts (REDFERN/HUNTER, p. 23). Unfortunately, it is also a duty which has been defined differently in several legal texts, and as a result, even if both parties to an arbitration have agreed on a duty of confidentiality, various exceptions must be taken into account. Very often a conflict arises between the interest of a

party to disclose the fact that arbitration proceedings are pending, on the one hand, and its duty to maintain confidentiality on the other hand. In a planned acquisition or in a due diligence process it can be essential to divulge all matters that could affect a company either materially or financially. For this reason the interest to disclose the fact of an arbitral process can be valued higher than the duty to maintain confidentiality. A strict duty of confidentiality also in this case would mean that no company involved in an arbitral proceeding could merge with other companies. This would obviously lead to an unreasonable result. An obligation to maintain confidentiality must protect legitimate interests and cannot be invoked only to harass the other party.

28 The following passages will show that the Tribunal has no power to order CLAIMANT to keep the fact of the arbitration confidential (A.) and that even were the Tribunal to have such power, no grounds exist for exercising it (B.). Consequently, there is no duty incumbent on CLAIMANT to keep the fact that an arbitration is in progress confidential.

#### **A. Lack of Jurisdiction of the Tribunal to Address this Issue**

29 CLAIMANT shall demonstrate that the Arbitral Tribunal has no power to order interim measures of protection with regard to a duty of confidentiality.

30 Pursuant to Art. 25(j) SIAC Rules, Art. 9 and Art. 17 UNCITRAL ML the Tribunal may under certain specific circumstances issue an interim order (KÜHN, p. 52). Consequently, the Tribunal has to consider whether the interim measure is necessary to preserve the rights that are the subject matter of the dispute, pending the Tribunal's decision, and in order to avoid irreparable damage to the applicants (REDFERN/HUNTER, p. 354; REDFERN, p. 6; ZULEGER, p. 160; FOUCHARD/GAILLARD/GOLDMAN, p. 735).

#### **1. A Duty of Confidentiality Is not Part of the Subject-Matter of the Dispute**

31 Art. 17 UNCITRAL ML first sentence states explicitly that all interim measures must be related to the subject-matter of the dispute (REDFERN/HUNTER, p. 307; WEIGAND, p. 1226; HOLTZMANN/NEUHAUS, p. 530; BÖCKSTIEGEL, p. 101). In the dispute between CLAIMANT and RESPONDENT, the conformity of the machines delivered with the sales contract constitutes CLAIMANT's main concern, and therefore any interim measures must be directly related thereto. As RESPONDENT is only worried about a possible disclosure to Equatoriana Investors, not even to the public, and hence requests the Tribunal to order interim measures, it is highly questionable whether there is any relation to the question of the conformity of the goods and, as a result, to the subject-matter of the dispute. Pursuant to Art. 17 UNCITRAL ML no

interim measures of protection should be granted since these would not be related to the subject-matter of the dispute.

## 2. Conclusion

32 In the case at hand, there is no doubt that the Tribunal has no power to order CLAIMANT to maintain confidentiality. As substantially submitted above, the interim measures are not related to the subject-matter of the case; therefore, the Tribunal should not order the interim measures requested by RESPONDENT.

33 Should the Arbitral Tribunal nevertheless come to the conclusion that it has the power to order interim measures of protection, CLAIMANT will demonstrate that no substantial grounds exist for assuming the existence of a duty of confidentiality.

### B. The Disclosure at Hand Does not Conflict with Art. 34.6 SIAC Rules

34 Even should the Tribunal hold that it has the power to make an order in this respect, it must take into account that neither the NY Convention (BROWN, p. 10) nor the UNCITRAL ML, the governing *lex arbitri* (Secretariat Note A/CN.9/460), makes any provision for a duty of confidentiality. CLAIMANT and RESPONDENT agreed that arbitration proceedings should be resolved in accordance with the SIAC Rules (CLAIMANT's Exhibit No. 2). Although it is undisputed that Art. 34.6 SIAC Rules contains a duty of confidentiality, the extent of this duty is far from being clear. There are certain conditions which must be met before an Arbitral Tribunal can exercise its power to order that the whole proceedings must be kept confidential. First, the order must be based on legal grounds, second, obligations to disclose the existence of an ongoing arbitration process, based on either national mandatory laws or requirements of an authority which are customarily observed, must be respected, third, CLAIMANT's interests to disclose prevails over the interests of RESPONDENT, and forth, no substantial possibility exists that the requesting party will succeed on the merits of the dispute.

#### 1. Legal Grounds

35 Art. 34.6 SIAC Rules states that all parties shall at all times treat all matters relating to the proceedings (including the existence of the proceedings) and the award as confidential. However it allows, besides the prior written consent of the other party or parties to disclose, several exceptions. While confidentiality is not protected by the UNCITRAL Arbitration Rules (OBERHAMMER, p. 1155), it is governed by a blanket norm in the LCIA Rules which is too vague to give any practical guidance (BROWN, p. 10). The

ICC too considered it dangerous to set out mandatory rules of conduct regarding confidentiality and recommended that this principle should not be absolute (CRAIG/PARK/PAULSSON, p. 314). Tribunals have held that there is no general principle of confidentiality in international arbitration (*United States v. Panhandle Eastern Corp.*), that there may be exceptions to the duty of confidentiality (*C. Dolling-Baker v. Merrett*), and that the existence of an arbitration as well as documents produced during proceedings may as well as may not be kept confidential (*Esso Australia Resources v. Plowman*).

36 It is absolutely unusual to include a confidentiality obligation in a simple purchase contract. Nevertheless, should absolute confidentiality be a main concern to both parties it is possible to include an agreement of confidentiality in the written contract with a binding effect for all contracting parties. Since no agreement exists between CLAIMANT and RESPONDENT (Procedural Order No. 3, para. 37), Art. 34.6 SIAC Rules is the principal legal norm dealing with all matters related to confidentiality.

## **2. CLAIMANT's Obligation to Disclose the Existence of Current Arbitration Proceedings during a Due Diligence Investigation**

### **a) Matters in Question Materially Affect the Financial and Business Situation of CLAIMANT**

37 The courts of Equatoriana, including the Supreme Court, have held in a number of cases that the party being purchased (a "target company") must divulge all matters that materially affect either its financial or its business situation (Mr. Langweiler's letter of 24 September 2003; Procedural Order No. 3, para. 38). Due to the failure of the Model 14 auger-feeder packing machines CLAIMANT was forced to purchase new machines from Oceanic Machinery, GmbH at a much higher price; together with all additional costs it suffered a financial loss of US\$ 537,650 (Statement of Case, para. 5), i.e. an estimated loss of 5% to 7% of the annual sales (Procedural Order No. 3, para. 44). Furthermore, the inability to fulfill the contract with A2Z, Inc. jeopardized CLAIMANT's good reputation as a responsible company; a matter causing probably more damage than the above-mentioned financial loss. For these reasons the arbitration proceedings strongly affect CLAIMANT's financial and business situation.

### **b) Compulsory Binding Decisions of the Supreme Court of Equatoriana**

38 Exception (d) in Art. 34.6 SIAC Rules makes disclosure possible if otherwise the party would not be in compliance with the provisions of the laws of any State which are binding on the party making the disclosure. As Equatoriana has a Common Law system (Procedural Order No. 3, para. 3, which refers to the fact that the law of Equatoriana is based on that of England), the primary source of law is case law.

Consequently, all decisions of the Supreme Court of Equatoriana are binding on any other Equatoriana court and should be considered as applicable national law (compare ZWEIGERT/KÖTZ, p. 253). Thus, CLAIMANT is required by common law in Equatoriana to disclose all matters concerning the arbitral proceedings, and cannot be ordered by the Tribunal to maintain confidentiality.

c) Requirements of Supreme Court of Equatoriana Are Customarily Observed

39 Should the Tribunal come to the conclusion that the decisions of the Supreme Court of Equatoriana cannot be considered equivalent to statutory national law, the awards have to be examined under the aspect of general terms of the transaction business in accordance with the constant practice of the Supreme Court of Equatoriana.

40 Art. 28(4) UNCITRAL ML states that an Arbitral Tribunal should always take into account the relevant terms of the business transaction in line with the legitimate interests of the parties (WEIGAND, p. 1259). It is important to note that the consistent legal practice of the Supreme Court in Equatoriana (Mr. Langweiler's letter of 24 September 2003; Procedural Order No. 3, para. 38) founds the assumption that it is customary in M&A transactions that due diligence investigations take place involving full disclosure of pending legal proceedings by the target company.

41 It may be added in this context that CLAIMANT's right to disclose the fact of these arbitration proceedings is also governed by Art. 34.6(e) SIAC Rules: As the Supreme Court of Equatoriana requires a target company to disclose full facts as to its true financial and business situation, this requirement is obviously observed customarily, given the fact that all courts in Equatoriana are bound to follow the decisions of the Supreme Court. In view of this trade usage, CLAIMANT cannot be ordered to keep the arbitration proceedings confidential as this would be in contradiction to Art. 28(4) UNCITRAL ML as well as Art. 34.6(e) SIAC Rules.

**3. CLAIMANT's Interest to Disclose Prevails over the Interest of RESPONDENT to Maintain Confidentiality**

42 If one balances the interests of the two parties, there is no doubt that those of CLAIMANT prevail. To preserve the legitimate rights of the requesting party, the measures must be necessary (BERGER, p. 336). In spite of a general duty to maintain confidentiality, the Australian Court held in *Esso Australia Resources v. Plowman* that the agreement to arbitrate contains a condition that all documents and in-

formation produced during the proceedings must be kept confidential except where disclosure of the material is required for the protection of the party's legitimate interests.

- 43 On the one hand, the duty to maintain confidentiality could have a severe impact on the purchase process with Equatoriana Investors: CLAIMANT's difficulties in servicing the contract with A2Z, Inc. raised concerns among Equatoriana Investors (telephone conversation mentioned in the letter of Mr. Fasttrack dated 17 September 2003). If CLAIMANT does not explain the context of its difficulties, which is only possible by disclosing the facts of the arbitration, it could endanger the takeover which is essential for further expansion and establishment in new markets; strategic elements on which Equapack's business merits largely build. Therefore, the takeover has a severe impact on the business situation of Equapack, Inc. (Mr. Langweiler's letter of 24 September 2003; Procedural Order No. 3, para. 42).
- 44 It must be assumed that by invoking a duty of confidentiality RESPONDENT only wishes to harm CLAIMANT and to delay any progress in this arbitration. CLAIMANT intends to disclose the arbitration proceedings only to its prospective purchase-partner, Equatoriana Investors, and does not intend to make them public. As Equatoriana Investors are under a duty to CLAIMANT not to disclose knowledge acquired during the due diligence process (Procedural Order No. 3, para. 39), the facts of the arbitration proceedings will not be unjustifiably divulged to a third party. In addition, the management of Equatoriana Investors, which is involved in the due diligence process and would be informed about the arbitration, comprises only a few investors (Procedural Order No. 3, para. 41).
- 45 On the other hand, CLAIMANT points out that there is no evidence that a disclosure of the arbitration proceedings will cause any detriment at all to RESPONDENT (Mr. Fasttrack's letter of 17 September 2003 which at no point refers to any possible future damage to RESPONDENT caused by a disclosure). In addition, RESPONDENT neither mentioned a reason nor an interest at stake which could justify a duty of confidentiality of CLAIMANT. Therefore, RESPONDENT's reputation is obviously in no way affected by the disclosure. Nevertheless, had confidentiality been of great importance for RESPONDENT, it should have included a specific term in the sales contract. Furthermore, as stated in CLAIMANT's Exhibit No. 7, RESPONDENT provides its customers with a wide range of information about its products either on the internet or in specific literature, and therefore all details which will eventually be discussed during the arbitral proceedings are already accessible to the public. Neither business secrets nor customer lists of RESPONDENT will be revealed since they are of no relevance in the arbitral proceedings. There-

fore, no measures have to be taken to avoid any irreparable damage, since revealing restricted information to Equatoriana Investors would not lead to any harm to RESPONDENT.

46 For the sake of completeness it should be added that the burden of proof lies with the party claiming damages. If RESPONDENT claims that a breach of confidentiality has occurred, which CLAIMANT strenuously denies, then RESPONDENT must show that the breach of confidentiality caused injury and that quantifiable and compensable monetary damage was the result (BROWN, p. 18).

47 Consequently, the disclosure of arbitration material is legitimately required for protecting the completion of the sale between Equatoriana Investors and CLAIMANT which constitutes a well founded interest of CLAIMANT which should be valued higher than RESPONDENT's interests to invoke any obligation to maintain confidentiality. Under the given circumstances, could it be reasonable for CLAIMANT not to comply with its obligation to disclose full facts of the arbitration to Equatoriana Investors, especially if no detriment would thereby be caused on RESPONDENT? No. Therefore, the entire request for an order to maintain confidentiality should be rejected.

#### **4. No Substantial Possibility that the Requesting Party Will Succeed on the Merits of the Dispute**

48 Interim measures, as a general rule, are only granted if the applicant has established a reasonable likelihood of success on the merits (A/CN.9/523). As will be demonstrated later in this memorandum the analysis of the case on the merits clearly favors CLAIMANT's position: Its claim is based on documentary evidence supporting its arguments that RESPONDENT breached the contract and, moreover, that the non-conformity of the machines with the contract constituted a fundamental breach. It would therefore be incumbent on RESPONDENT to establish that in all probability it will prevail on the merits, since the burden of proof for the interim measures requested by RESPONDENT is on the latter.

#### **C. Conclusion**

49 As shown above, there are limits to a duty of confidentiality in arbitration proceedings. Moreover, an obligation to disclose material of the arbitration may be derived either from national statutory laws or the requirements of an authority which are customarily observed. Besides, taking into consideration that CLAIMANT's interest to disclose prevails over the interest of RESPONDENT to maintain confidentiality and that the obligation of confidentiality is not a legal obligation, RESPONDENT's contention that there exists

an absolute obligation of confidentiality is not justified. Consequently, the entire request for an order to comply with a purported obligation of confidentiality should be rejected.

### **III. THE DELIVERED MACHINES ARE NOT IN CONFORMITY WITH THE CONTRACT**

50 Below, CLAIMANT shall set out why the machines delivered by RESPONDENT are not in conformity with the contract. Firstly, CLAIMANT will demonstrate why the unsuitableness of the delivered machines for the packaging of salt is in violation of the contract. Secondly, CLAIMANT will explain why the production rate is too low and therefore not according to the contract.

#### **A. The Machines Are not in Conformity with the Contract due to Incompatibility with Salt**

##### **1. RESPONDENT Is in Breach of its Obligation under Art. 35(1) CISG**

51 According to the contract, the machines delivered by RESPONDENT have to be appropriate for the use of salt. But they are not. On the contrary, the use of salt has destroyed the machines.

52 Art. 35(1) CISG states that the seller has an obligation to deliver goods which are of the quantity, quality and description required by the contract.

53 In the letter of 24 June 2002, CLAIMANT inquired as to the possibility of purchasing up to six packaging machines. It wrote that these machines should be “capable of packaging dry bulk commodities into retail packages of 500 grams to 1 kg” and that the machines will be used for “a wide range of products, both fine goods, such as ground coffee or flour, and coarser goods such as beans or rice” (CLAIMANT’s Exhibit No. 1).

54 An analysis of these statements (CLAIMANT’s Exhibit No. 1) reveal criteria which the packaged goods shall fulfill. By reference to grounded coffee or flour, CLAIMANT says that it will use the machines for all kinds of groceries; it did not intend to exclude any groceries. The mention of the sizes of the bulk commodities makes it clear that the machines shall at least be appropriate for all commodities of a size not finer than the finest commodity mentioned (flour) and not coarser than the coarsest commodity (beans). The information that the packages will have a size of between 500 grams and 1 kg indicates that CLAIMANT will package groceries that are sold in these quantities. It is furthermore clearly mentioned that the products may be bulk commodities.

- 55 In other words, CLAIMANT stated that the machines will be used for the packaging of every conceivable commodity which meets four preconditions: First, it may be a dry nourishment; second, comparable to flour and beans concerning the coarseness; third, packaged usually in a quantity of between 500 grams and 1 kg; and fourth, it may be a bulk commodity. Salt fulfills these four requirements. Other preconditions are not apparent; in particular, the wide range of the foodstuffs mentioned shows that the machines should be appropriate for every conceivable commodity which fulfills these four preconditions.
- 56 A reasonable person of the same kind as RESPONDENT would have been aware of the fact that CLAIMANT – who has hitherto only bought one machine for the packaging of groceries and is therefore not experienced at all (Procedural Order No. 3, para. 10) – would not state more (implied) preconditions for the goods to package other than those mentioned (compare Art. 8(2) CISG). RESPONDENT knew or should have been aware of CLAIMANT's limited experience since CLAIMANT did not ask for a particular machine but only specified to RESPONDENT the purposes for which the machines will be used.
- 57 It is irrelevant whether the Tribunal agrees with CLAIMANT's opinion that the four preconditions are mentioned explicitly, since an agreement concerning certain attributes may also be implicit (ACHILLES, Art. 35, para. 3). It is neither practicable nor wished by any party that every single commodity which the machine has to be able to package must be mentioned explicitly – for this reason it is common usage to merely give examples.
- 58 Pursuant to Art. 8(3) CISG the conduct of the parties after the closure of the contract must also be considered. CLAIMANT stated on 23 July 2002 not only impliedly, but even explicitly that the machines would be used for salt, (CLAIMANT's Exhibit No. 5). That statement took place after the conclusion of the contract but before the delivery of the machines. Pursuant to Art. 8(3) CISG these statements are relevant for the interpretation of the contract in good faith. CLAIMANT's statement reflects its understanding of the contract. RESPONDENT's behavior can be interpreted in two ways: Either it already knew at the time of the conclusion of the contract that CLAIMANT wished to buy machines that are fit for the use of salt and did not react for fear of endangering the sale of the machines. Or RESPONDENT was so negligent that it did not even understand CLAIMANT's clearest requirements. The parties to a contract may – according to good faith – assume mutually correct behavior. Therefore, CLAIMANT was entitled to assume that RESPONDENT was aware of its clear requirements, just as a conscientious party to a contract would have reacted to CLAIMANT's statements concerning the salt if it were not in agreement with them. Since RESPONDENT did not react, CLAIMANT was entitled to assume that RESPONDENT shared its opinion that

salt is part of the “wide range of products” and could therefore expect delivery of machines which are fit for the packaging of salt.

59 A further point which indicates that the machines are not in conformity with the contract is the fact that RESPONDENT praised the Model 14 as a “top product” (CLAIMANT’s Exhibit No. 2). “Top product” can stand either for a great number of sales or for the quality of the machines. The number of sales is obviously not meant, as the Model 14 was not sold as well as expected (Procedural Order No. 3, para. 32). “Top product” leads to an expectation of excellent quality. These expectations have not been met since the machines are not appropriate for the use of salt – whereas the usability for a wide range of products is part of what is meant by excellent quality – due to steel of minor quality (normal instead of stainless steel). Nevertheless, quality is a fundamental issue of every sales contract. A reliable quality is impliedly agreed, if nothing else is stated, since an average quality is very important for a typical user. This need not be explicitly stated but applies as a matter of course.

60 In summary: The contract requires that the machines must be useable for the packaging of salt (letter of 3 July 2002 in combination with the letters of 24 June and 12 July 2002 as well as the conversation of 23 July 2002). Therefore, RESPONDENT has breached its obligation to deliver goods in the quality and description required by the contract.

## **2. RESPONDENT Is in Breach of its Obligation under Art. 35(2)(a) CISG**

### **a) The Machines Are not Fit for Ordinary Purposes**

61 Should the Tribunal disagree with CLAIMANT’s contention that the contract implies that the machines must be able to package salt, Art. 35(2)(a) CISG must be taken into consideration. Art. 35(2) CISG lists the relevant criteria from an objective point of view for conformity with the contract where the contract does not include a sufficiently precise description of the required attributes of the goods. The subparagraphs of that article “apply whenever the parties have not agreed otherwise. They contain such provisions which the parties agree by reason or usage” (ENDERLEIN/MASKOW, p. 141).

62 Pursuant to Art. 35(2)(a) CISG the seller has to guarantee that the delivered goods “are fit for the purposes for which the goods of the same description would ordinarily be used”. What are decisive are the ordinary purposes of an average customer (HONSELL, Art. 35, para. 13).

63 As salt is a dry bulk commodity, any machine for the packaging of dry bulk commodities must be fit for the use of salt, since salt is a principal commodity in the mercantile field and not an exotic sort of grocery. Salt is a staple food, with a world-wide consumption of about 200 Mio. tons per year (compare [www.gsf.de/Aktuelles/Zeitschriften/Broschueren/asse/Asse\\_280703.pdf](http://www.gsf.de/Aktuelles/Zeitschriften/Broschueren/asse/Asse_280703.pdf) visited on 3 December 2003). Furthermore, most of the food bought in a supermarket already has salt added to it – and it is precisely the purpose of the machines to pack such groceries for the customers of CLAIMANT.

64 For these reasons, the packaging of salt is an ordinary usage. Therefore, the delivered packaging machines do not meet the requirements of Art. 35(2)(a) CISG.

b) RESPONDENT Has not Delivered a Serviceable Operations Manual

65 Independently of the question whether RESPONDENT had to deliver machines which are fit for the packaging of salt, it has breached its obligation to deliver an operations manual.

66 According to doctrine and precedents Art. 35(2)(a) CISG contains a duty of the seller to deliver an operations manual (SCHLECHTRIEM, Art. 35, para. 14; PILTZ, para. 5, N 40; compare also BGH NJW-RR 1997, p. 690: In this case the seller delivered computer-hardware without enclosing an operations manual. The operations manual for the software was insufficient, and this according to the BGH amounted to a breach of the contract).

67 In the case at hand, the operations manual delivered by RESPONDENT was unserviceable. The manual only contains only the instruction that “the Model 14 is not intended for the use with highly corrosive products” (Procedural Order No. 3, para. 25). Mr. Swan, as an average buyer of the machines, “did not know, and had no reasons to know, that salt was so corrosive” (Procedural Order No. 3, para. 14). Such delivery of unusable operations manual must, as argued above (Section 66), be deemed a breach of the contract pursuant to Art. 35(2)(a) CISG.

**3. RESPONDENT Is in Breach of its Obligation under Art. 35(2)(b) CISG**

a) The Machines Delivered by RESPONDENT Are not Fit for the Particular Purposes Made Known to the Seller

68 Should the Tribunal come to the conclusion that RESPONDENT is not in breach of its obligations either under Art. 35(1) CISG or Art. 35(2)(a) CISG, it should at least find that RESPONDENT breached its obliga-

tion under Art. 35(2)(b) CISG. This provision governs the case where the purchased goods shall be fit for a particular purpose. As explained, the use of salt is in CLAIMANT's opinion even a normal purpose, but it is at least – as set out below – a particular purpose made known to the seller.

69 Pursuant to Art. 35(2)(a) CISG the delivered goods have to be “fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract”. There is no requirement that the demands of the buyer be contained in the contract itself; the history of the CISG shows that a corresponding proposal of the Federal Republic of Germany was explicitly rejected by the countries which first signed the CISG (the text proposed by the Federal Republic of Germany was "... are fit for any particular purpose expressly or impliedly made part of the contract" [compare <http://www.cisg.law.pace.edu/cisg/Fdraft.html>; visited on 21 November 2003]). For this reason, it is sufficient that the seller knows or should have known the buyer's requirements (SCHLECHTRIEM, Art. 35, para 21).

70 In the case at issue, the buyer wrote to the seller that the machines should be appropriate for “a wide range of products, both fine goods, such as ground coffee or flour, and coarser goods such as beans or rice” and that they shall be “capable of packaging dry bulk commodities into retail packages of 500 grams to 1 kg” (CLAIMANT's Exhibit No. 1). As explicated above (Sections 54 and 55), this statement defines four criteria of the goods to be packaged (dry nourishment/coarseness/quantity of the packages/bulk commodity). As salt fulfills these criteria, the machines have to be fit for the packaging of salt. – Even if these criteria were not – contrary to CLAIMANT's opinion – a part of the contract, they have to be observed in application of Art. 35(2)(b) CISG, by virtue of which it is sufficient that the seller was aware of the buyer's requirements.

71 Art. 35(2)(b) CISG contains only one exception to the rule mentioned above: There is no obligation to guarantee the assured qualities, if “the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment”. In the case at hand, CLAIMANT obviously relied on the skills of RESPONDENT, because RESPONDENT is – at its own admission – “a premier manufacturer of equipment for the food packaging industry” (CLAIMANT's Exhibit No. 2) and has also been in the business for over 30 years (Procedural Order No. 3, para. 10). Consequently, the exception does not apply.

72 Moreover, it does not matter whether the seller did actually realize the buyer's requirement: It is sufficient that the seller had the possibility to do so (SCHLECHTRIEM, Art. 35, para. 21). Since the letter from 24 June 2002 makes clear what CLAIMANT had in mind, RESPONDENT at least had the possibility to realize CLAIMANT's requirements. Mr. Swan clearly pointed out that the machines shall be "capable of packaging dry bulk commodities into retail packages of 500 grams to 1 kg" and that they will be used for "a wide range of products, both fine goods, such as ground coffee or flour, and coarser goods such as beans or rice" (CLAIMANT's Exhibit No. 2). In addition, the statement in which CLAIMANT explicitly mentioned salt has – as shown above (Section 58) – to be considered as well. Therefore, CLAIMANT expressly made it known that the machines have to be fit for the use of salt; and if not expressly, then at the very least implicitly.

73 For all of these reasons RESPONDENT did not deliver machines which met the requirement of the ability to pack salt. As a result, RESPONDENT is in breach of the contract pursuant to Art. 35(2)(b) CISG.

b) RESPONDENT Is in Breach of its Obligation to Counsel CLAIMANT

74 Legal writers infer a general obligation for the seller to counsel the buyer from Art. 35(2)(b) CISG (KOCK, p. 186 et seq.). Such counsel must be appropriate to the purposes which the offered goods fit. The seller also has to inform the buyer about the purposes for which the goods are not appropriate (KOCK, p. 187 et seq.). The only precondition for this obligation is the existence of an adequate professional knowledge of the seller (KOCK, p. 187; compare also: HONSELL, Art. 45 para. 18, according to which the seller has, if necessary, the duty to inform and warn the buyer; see for comparison (under German law) BGH, BB 1984, p. 1895, according to which the confidence of a layperson in the knowledge of the selling expert gives rise to a duty of care and counsel of the seller – even under the German law which in general is less severe as regards the seller's obligations than is the CISG).

75 The obligation to counsel includes a duty to dissuade the other party from a purchase if the seller realizes that the buyer might not be able to use the goods for all the purposes it expects. Therefore any seller who recognizes that the goods are not suitable for a special purpose envisaged by the buyer must warn him thereof (KOCK, p. 188).

76 In the case at hand, RESPONDENT as "a premier manufacturer of equipment for the food packaging industry" was undoubtedly in a position to counsel CLAIMANT. It was obvious for RESPONDENT that CLAIMANT needed such counseling, since it is – as RESPONDENT knew or should have known (Sec-

tion 56) – inexperienced in the packaging of bulk commodities (Procedural Order No. 3, para. 10) and consequently could not know which machines fit which purposes. Therefore, RESPONDENT had an obligation to counsel. This obligation has been violated: RESPONDENT never informed CLAIMANT that the machines are not appropriate for the use of salt, although it ought to have known that CLAIMANT was at least interested in the packaging of salt. RESPONDENT also knew that salt is a special product, as it produces different types of machines, with and without stainless steel.

77 RESPONDENT did not even inform CLAIMANT when during the telephone call of 23 July 2002 it explicitly said that the machines would be used for the packaging of salt (CLAIMANT's Exhibit No. 5). Although that call took place after the conclusion of the contract this statements is relevant to the contract since Art. 8(3) CISG states that the "subsequent conduct of the parties" is relevant for the interpretation of the contract in good faith. Therefore, RESPONDENT should have explicitly disagreed when CLAIMANT made it clear that in its opinion salt is part of the mentioned "wide range of products" (Section 58).

78 Furthermore, RESPONDENT should have realized that it had violated its obligation to counsel and that it was obliged in good faith to rectify this by informing CLAIMANT that the machines are not suitable for packaging salt. At that time it was not too late, since the machines had not yet been delivered (CLAIMANT's Exhibit No. 4). There would not have been any problems or added costs involved for RESPONDENT had it proposed a change of the order, i.e. delivery of Model 17 instead of Model 14; it would even have gained, since CLAIMANT had to pay more for Model 17 (Procedural Order No. 3, para. 23).

79 Be this as it may, RESPONDENT culpably failed to counsel CLAIMANT – whether negligently (because of not paying attention to CLAIMANT's requirements) or willfully (because of the possibility to sell an out-dated machine) is irrelevant in the civil law case at issue.

80 For all these reasons RESPONDENT is in breach of its obligation pursuant to 35(2)(b) CISG to counsel CLAIMANT.

#### **4. Art. 35(3) CISG Cannot Be Applied**

81 Pursuant to Art. 35(3) CISG the seller is not liable under Art. 35(2) CISG for any lack of conformity of the goods if the buyer knew or could not have been unaware of such lack of conformity at the time of conclusion of the contract.

82 In the case at hand, the conditions for the application of Art. 35(3) CISG are not given. CLAIMANT did not know that the ordered machines are not fit for the packaging of salt; otherwise, it would not have ordered the Model 14 (Procedural Order No. 3, para. 14) and it would not have said during the conversation of 23 June 2002 that the machines would be used for the packaging of salt (according to Art. 8(3) CISG, this statement made after the closure of the contract has to be considered when investigating a party's intention). CLAIMANT has also had no reason to know this. It is not experienced in the business of packaging groceries since it has only packaged low quantities of groceries with one secondhand machine (Procedural Order No. 3, para. 10). As a result, it did not order a specific machine but informed RESPONDENT of the purposes for which it would use the machine and then ordered the machine which RESPONDENT recommended. In other words: it placed full trust in the competence of RESPONDENT. Furthermore, RESPONDENT did not consider it necessary to inform CLAIMANT about the machines by furnishing a brochure or technical literature to CLAIMANT (Procedural Order No. 3, para. 18); it did not even inform of the possibility of gaining information on the internet (Procedural Order No. 3, para. 17).

83 The simple fact that some information was available on the internet do not lead to the assumption that CLAIMANT "could not have been unaware" of the non-suitability of the machines for the use of salt. According to SCHLECHTRIEM (Art. 35, para. 34), "could not have been unaware" is namely more than gross negligence. CLAIMANT's behavior cannot be considered as negligent, as the internet is not an usual source of information if the parties have personal contact. How could it be practicable to say that every buyer has to consult the fine print on the internet before every closure of a contract? This would open widely the doors for abuse!

84 In view of its negligent behavior, RESPONDENT cannot free itself under Art. 35(3) CISG from liability for the assured qualities.

### **B. The Machines Are not in Conformity with the Contract Because of the Substandard Production Rate**

85 The delivered goods have to meet an average quality in order to suffice the requirements of Art. 35(2)(a) CISG (ACHILLES, Art. 35, para. 6; *Landgericht Berlin, decision of 15 September 1994*). In the absence of an agreement to the contrary, the quality need not be a superior quality, but neither shall it be inferior to the industry average.

- 86 An important attribute for a machine is its production rate: The higher the performance of the machine, the fewer machines have to be bought and the less manpower needs to be invested for maintenance, with the result of a lower production price (the causing of “unusual costs” must be considered as unsuitability for ordinary use [BIANCA/BONELL, Art. 35, para. 2.5.1.]). For this reason, CLAIMANT was not only forced to buy four new machines (to replace those destroyed due to the packaging of salt). It had to replace all six machines, since the costs caused by the substandard production rate were obviously too high to be acceptable (otherwise, CLAIMANT would in its own interest obviously not have ordered other machines).
- 87 An average machine can fill about 180 1kg bags per minute, regardless of whether the groceries are fine or coarse (report of Eur. Ing. Franz van Heath-Robinson). The machines delivered by RESPONDENT – even without any damage caused by the salt (Procedural Order No. 3, para. 30) – work generally slower than the industrial average. For certain groceries such as ground coffee, this average lies not less than 38% over the performance of RESPONDENT’s products ( $130 \times 1.38 = 180$  [slowest speed of Model 14 for ground coffee x factor of loss of speed = average industry rate]).
- 88 RESPONDENT did not mention a single word that the Model 14 machines work so slowly (Procedural Order No. 3, para. 8). On the contrary, RESPONDENT held itself out to be a “premier manufacturer” and told CLAIMANT that Model 14 “was one of our top products”. As mentioned above (Section 59), this statement can only be understood as a promise to deliver machines in a good quality due to poor sales of Model 14. This promise is strengthened by the following sentence: “I am sure that you would be more than satisfied with it” (CLAIMANT’s Exhibit No. 2). If CLAIMANT assumes that average quality brings average satisfaction, this promise must be understood as a pledge to deliver machines in a quality that is better – but at least not worse – than the average.
- 89 The obligation to deliver machines of at least average quality – which has even been strengthened by RESPONDENT’s promises to deliver satisfactory quality – has been violated. The machines are of below-average since the production rate is generally lower than the industrial average. A difference of more than 38% for very common – and explicitly mentioned (CLAIMANT’s Exhibit No. 1) – products is unacceptable where the seller did not call the buyer’s attention to this fact.

## C. Conclusion

90 The delivered machines were not in conformity with the contract because they are not fit for the packaging of salt and because their performance rate for certain goods is too low. Furthermore, RESPONDENT has violated its obligation to counsel CLAIMANT.

## IV. FUNDAMENTAL BREACH OF CONTRACT BY RESPONDENT

91 If the party affected by a disturbance to the contract is to have a right to avoid the contract, there must be a *fundamental* breach of contract according to Art. 25 CISG (SCHLECHTRIEM, Art. 25, para. 4). According to SCHLECHTRIEM the following elements must be fulfilled: Breach of an obligation (A.); impairment of a material interest - detriment (B.) and foreseeability (C.).

### A. Breach of an Obligation

92 A breach of an obligation is a first prerequisite for a breach of contract (SCHLECHTRIEM, Art. 25, para. 7). Below, CLAIMANT will remind the Tribunal that there was a breach of the obligation by delivering Model 14 packaging machines not responding to the offered and settled "wide range of products" and not being competitive regarding the production rate.

#### 1. „Wide Range of Products“

93 "Where the buyer has insisted that goods be fit for a particular purpose, or where he has notified the seller for which purposes he would need the goods (expressing his special interest that the goods be fit for that purpose), then any defect affecting this particular use is also to be regarded as a fundamental breach" (KLUWER REVIEW 1999, p. 217).

94 As CLAIMANT concluded above (Section 90) the delivered machines were not in conformity with the contract because they are not fit for the packaging of salt and because they work much too slowly with certain materials. In addition, RESPONDENT violated its obligation to counsel CLAIMANT.

#### 2. Production Rate

95 To emphasize the relevance of the breach of obligation, there is a second prerequisite which has also not been met and which is on an equal footing with the unsuitability of the machines for packaging salt. According to the report of Eur. Ing. Franz van Heath-Robinson, the production rate of the delivered machines was for some products noticeably below the average industry rate of 180 bags per minute for both coarse and fine products. In other words: The machines delivered by RESPONDENT worked gener-

ally slower. As mentioned above (Section 87), the difference between the Model 14 and the average is up to 38%. Such a difference has to be considered as a breach of the promise to deliver satisfactory, if not at least average quality.

## **B. Impairment of a Material Interest - Detriment**

96 According to Art. 25 CISG the party affected by the breach must suffer a detriment which, by virtue of Art. 25, must be such as substantially to deprive him of what he is entitled to expect under the contract. This is not a reference to the *extent* of the damage but to the nature and importance of the interest which the contract and its individual obligations actually create for the promisee; the *extent* of the possible damage to the promisee will be of considerable importance (SCHLECHTRIEM, Art. 25, para. 9).

97 The order of the six Model 14 packaging machines was decisively promoted by the mandate of A2Z, Inc. evidenced by a large contract (Statement of Case, para. 4). The importance of packaging a wide range of products, including most common goods such as salt, and this at least at an average industry rate (bags per minute) is an obvious result of economic common sense. CLAIMANT would never have ordered these six packaging machines had it not been in the explained circumstances. Not only is there no need for packaging machines which are limited for the initial purpose of utilization because of their inability regarding salt, but they also were disappointing considering their noticeably low production rate – the detriment is substantial since these packaging machines cannot be used anymore.

98 The damage to CLAIMANT is considerable. The US\$ 537,650 which comprises all reimbursement and expenses caused by the present case (Statement of Case, para. 18) is a large amount, especially when compared with the annual sales of US\$ 8,000,000 to 10,000,000 (Procedural Order No. 3 para. 44); this considerable detriment underlines the importance of a satisfactory delivery of usable packaging machines which has not been effected.

## **C. Foreseeability for RESPONDENT**

99 Pursuant to Art. 25 CISG a breach of contract is fundamental unless the party in breach did not foresee (subjective element) and a reasonable person of the same kind in the same circumstances pursuant to Art. 8(2) CISG would not have foreseen such a result (objective element; BIANCA/BONELL, Art. 25, para. 2.2.). The CISG does not determine the time when this foreseeability must exist. While interpretations vary between the time of the conclusion of the contract and that of the breach of contract playing a role,

some authors advocate that subsequent information should be taken into account as well (ENDERLEIN/MASKOW, Art. 25, para. 4.3).

### 1. „Wide Range of Products“

100 RESPONDENT states in its Statement of Defense that Mr. Swan's language was not sufficient to alert Mr. Drake or Medi-Machines, S.A. that the Model 14 machines being delivered to Equapack, Inc. would be used to pack salt. As CLAIMANT has shown above (Section 51 et seq.) the contract contains the requirement for machines which are appropriate for the packaging of salt (letter of 3 July 2002 in combination with the letters of 24 June 2002). Moreover, that salt was mentioned in the telephone call of 23 July 2002 remains an incontrovertible fact. According to the letter dated 19 October 2002 (CLAIMANT's Exhibit No. 6), Mr. Drake writes that he told Mr. Swan on the occasion of the telephone call of 18 October 2002 that salt is a very special item to handle (CLAIMANT's Exhibit No. 7). During this telephone conversation the mere fact that Mr. Swan mentioned salt in connection with the Model 14 packaging machines should have made Mr. Drake react instantaneously and stop the delivery process in time. In gaining this information he ought to have foreseen that packaging salt with Model 14 machines would cause corrosion. Therefore, the subjective element is fulfilled.

101 Even a reasonable person of the same kind in the same circumstances pursuant to Art. 8(2) CISG should have foreseen since the conclusion of the contract that – having a potential buyer who is not experienced in handling such products (Statement of Defense, para. 6), who speaks about a “wide range of products” and even mentions salt as a possible product to package – the utilization of the machines with the planned products would corrode those and thus cause detriment.

### 2. Production Rate

102 As mentioned above, the accurate and self-explanatory report of Eur. Ing. Franz van Heath-Robinson (Procedural Order No. 3, para. 34) states that the Model 14 packaging machines can only be used at a speed below the average industry rate. The consequence of using slower machines was foreseeable for Mr. Drake, an expert in the machinery business (subjective element), as well as for any other reasonable person of the same kind in the same circumstances pursuant to Art. 8(2) CISG (objective element): Poorer productivity produces higher costs and even in this case leads to a conflict with the business partner of Equapack, Inc. – A2Z, Inc. – as stated in the letter of 24 June 2002 (CLAIMANT's Exhibit No. 1) and in the letter of 12 July 2002 (CLAIMANT's Exhibit No. 3). Prompt delivery of the new packaging machines was vital because Equapack, Inc. was obligated to commence packaging for A2Z, Inc. within a

short time (CLAIMANT's Exhibit No. 5). Logically, lower productivity represents a grave and foreseeable detriment for CLAIMANT.

## **D. Conclusion**

103 A violation of quality requirements is fundamental when the non-conformity with the contract considerably impedes the fitness for use of the goods and when it is irreparable or a delivery of substitute goods is impossible (ENDERLEIN/MASKOW, Art. 25, para. 3.4). In the present case all the prerequisite elements of Art. 25 CISG are fulfilled. The result of the non-conformity of the Model 14 packaging machines impedes not only in a considerable, but in an absolute and irreparable way the intended utilization. A fundamental breach pursuant to Art. 25 CISG is fulfilled by two facts; the corrosion caused by using salt and the packaging speed below the average production rate.

## **V. AVOIDANCE OF THE CONTRACT**

104 Art. 49 CISG sets out the preconditions for the buyer's right to avoid the contract in the event of the seller's breach of contract. As CLAIMANT has just shown, RESPONDENT is in fundamental breach pursuant to Art. 25 CISG. Consequently, it must now be examined whether the prerequisites for a declaration of avoidance of the contract pursuant to Art. 26 and 49 CISG are fulfilled. Pursuant to Procedural Order No. 2, para. 2, counsel for Medi-Machines, S.A. stated that it had not and would not raise any question under Art. 39 CISG as to whether Equapack, Inc. had given notice of the alleged non-conformity of the machines in time or in a sufficiently detailed manner. Therefore, the examination can be limited to the submission that the letter of Mr. Swan dated 19 October 2002 (CLAIMANT's Exhibit No. 6) constituted a declaration of avoidance of the contract as required by Art. 26 and 49 CISG.

### **A. There Is no Remedy to the Defect**

105 Only if the defect is objectively serious and by its nature not capable of remedy by repair or delivery of substitute goods does the buyer have an immediate right to avoid the contract (SCHLECHTRIEM, Art. 49, para. 11 and 12). According to the report of Eur. Ing. Franz van Heath-Robinson, Section 5, the Model 14 packaging machines were not suitable for the packaging of salt. The six Model 14 packaging machines cannot be used for the purpose for which they were bought. Therefore, it is objectively a very serious defect for CLAIMANT that the machines have been corroded by the packaging of salt (CLAIMANT's Exhibit No. 6). According to Procedural Order No. 3, para. 29 the corrosion affected such a large part of the machinery that it would not be feasible to repair or replace the corroded parts. As to a possible delivery of substitute goods, the only packaging machine which would have been suitable for salt was

Model 17. But neither can this different packaging machine act as a substitute good for the delivered Model 14 machines (compare SCHLECHTRIEM, Art. 46, para. 21) nor has RESPONDENT offered this appropriate Model (letter of 27 October 2002). Given this incapability of remedy and of delivery of substitute goods, CLAIMANT was entitled to immediately declare the contract avoided.

106 Should the Tribunal not agree with CLAIMANT's contention concerning corrosion, the simple fact that the six Model 14 packaging machines do not operate at the average industrial speed (report of Eur. Ing. Franz van Heath-Robinson) constitutes a non-remediable defect. Furthermore, the delivered goods do not correspond to an average quality (Section 89) and RESPONDENT is therefore in fundamental breach pursuant to Art. 25 CISG (Section 103). This lack of speed is a constructional defect that obviously appears regularly in connection with the intended utilization because it is closely connected to the corrosion (report of Eur. Ing. Franz van Heath-Robinson). Moreover, as mentioned above (Section 105), no substitution is possible.

### **B. The Requirements for a Declaration of Avoidance of the Contract Are Fulfilled**

107 Pursuant to Art. 26 CISG the buyer wishing to avoid a contract must declare this; avoidance does not operate *ipso facto*. A written notice need not *explicitly* express the intention to avoid the contract; implicit conduct pursuant to Art. 8 CISG (SCHLECHTRIEM, Art. 26, para. 10) suffices, especially in view of the good faith requirement pursuant to Art. 7 CISG. The day after the telephone conference with Mr. Drake on 18 October 2002, CLAIMANT sent a letter to RESPONDENT (CLAIMANT's Exhibit No. 6) stating clearly that it could not use the machines and that they were at the disposal of Medi-Machines, S.A. It was also stated that CLAIMANT expected RESPONDENT to reimburse the purchase price as well as all the other expenses caused by "this entire fiasco". This behavior fulfils the mentioned requirements of Art. 26 CISG, particularly in view of the lack of jurisdiction regarding the interpretation of the avoidance under CISG (*Case Nr. 2 Ob 58/97m of the Vienna Supreme Court dated on 20.3.1997*).

### **C. Declaration of Avoidance Was Made within Reasonable Time**

108 According to Art. 49(2)(i) CISG the time for a declaration of avoidance begins to run as soon as the buyer knows or ought to have known of the breach (BIANCA/BONELL, Art. 49, para. 2.2.1.2.). Art. 82 CISG does not apply because the packaging machines were used normally before the lack of conformity with the contract was discovered (Art. 82(2)(b) CISG).

## 1. Knowledge of the Breach

109 By the end of September 2002 no more salt had been packaged by CLAIMANT because of serious signs of corrosion (Statement of Case, para. 8). Corrosion is not a defect that occurs from one day to another, but rather it is a sustained process which at some point begins to be serious and then has to be taken into consideration. For CLAIMANT this point was reached when the corrosion was sufficient to block the product and cause stoppages when CLAIMANT tried to package any products. Even prior to these substantial signs the corrosion made it impossible to clean the feeding surfaces properly (Mr. Swan's letter of 19 October 2002). Thus, it can only be assumed that CLAIMANT knew or ought to have known the breach by end of September 2002, when the corrosion became a serious impediment to handling food-stuffs.

## 2. Reasonable Time

110 Depending on the circumstances, it may be reasonable to allow the buyer a certain period during which he can consider and investigate the position and obtain legal advice (SCHLECHTRIEM, Art. 49, para. 44). In some jurisdictions, a period of several months can be regarded as reasonable, so for example in the U.S. (SCHLECHTRIEM, Art. 39, para. 17). In other jurisdictions, e.g. in Germany, only short periods are considered as reasonable. An example is the decision of the *Oberlandesgericht Hamburg, Germany, of 26 November 1999* in which the court deemed 22 days to be a reasonable period of time. In this case the objects were textiles which are more simple to examine than a corrosion process in packaging machines. In the case at hand, CLAIMANT wrote the letter of declaration of avoidance only 19 days after it stopped using the Model 14 packaging machines for packaging (CLAIMANT's Exhibit No. 6). Even in comparison to the restrictive German jurisdiction 19 days is have to be regarded as a very short time. This is evident all the more if the higher complexity of the case at hand is taken into consideration.

## D. Conclusion

111 The prerequisites for a declaration of avoidance of the contract by the buyer are fulfilled. CLAIMANT's behavior highlights the responsibility he assumed on the one hand regarding his activity in the food industry, where corroded surfaces in packaging machines could be a serious matter, and on the other hand regarding the legal consequences declaring the avoidance of the contract only after a thorough examination of the seriousness of the detriment.

## VI. RELIEF REQUESTED

112 CLAIMANT respectfully requests the Arbitral Tribunal to find that:

- it does not have jurisdiction to order the security for costs;
- there are – even if the Tribunal had jurisdiction – no grounds for ordering security for costs;
- CLAIMANT has no duty to maintain confidentiality with which the Arbitral Tribunal can order it to comply;
- RESPONDENT delivered machines which are not in conformity with the contract;
- such non-conformity is a fundamental breach of contract pursuant to Art. 25 CISG; and
- CLAIMANT has properly exercised its consequent right to avoid the contract.

113 Consequently, CLAIMANT respectfully requests the Arbitral Tribunal to order:

- RESPONDENT to pay CLAIMANT the sum of US\$ 537,650 (US\$ 390,000 for the purchase price, US\$ 850 for the shipping, US\$ 39,300 for the custom duties, US\$ 60,000 for the higher costs of the replacement goods, US\$ 5,700 for the additional custom duties, US\$ 42,000 for the loss of revenue less US\$ 200 for the decreased costs of transportation);
- RESPONDENT to pay interest at the prevailing market rate in Equatoriana on US\$ 537,650 from 2 August 2002 until the date of payment to CLAIMANT;
- RESPONDENT to pay all costs of the arbitration, including costs incurred by the parties.

Zurich, 11 December 2003

Thomas G. Albert

Marija Djordjevic

Stefan Günther

Sonia Hausherr

Florian Utz