

*Thirteenth Annual Willem C. Vis
International Commercial Arbitration Moot 2005-2006*

MEMORANDUM FOR THE CLAIMANT



Faculty of Law
University of Ottawa

MEMORANDUM FOR THE CLAIMANT

Case no CIDRA 2005-0013

On Behalf Of

Oceania Printers S.A.
Specialist Printers
Tea Trader House
Old Times Square
Magreton
00178 Oceania

“CLAIMANT”

Against

McHinery Equipment Suppliers Pty
The Tramshed
Breakers Lane
Westeria City 1423
Mediterraneo

“RESPONDENT”

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List of Abbreviations

Art./Arts.	Article / Articles
BGH	Bundesgerichtshof (German Federal Supreme Court)
CIDRA Rules	Rules of the Chicago International Dispute Resolution Association
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl.	Claimant
Claimant	Oceania Printers S.A.
Contract	Contract between Oceania Printers S.A. and McHinery Equipment Suppliers Pty dated May 30, 2002
Et al.	And other authors
Ex.	Exhibit
ICC	International Chamber of Commerce
<i>Lex arbitri</i>	The procedural law of the arbitration
LG	Landgericht (German Regional Court)
Machine	Second hand 7 stand Magiprint Flexometix Mark 8 machine
MAL	UNCITRAL Model Law on International Commercial Arbitration
Manual	Maker's manual for the 7 stand Magiprint Flexometix Mark 8 machine sent to the Claimant on 27 May 2002
Memorandum	The memorandum for the Claimant, dated 8 December 2005
No.	Number
NY Convention	United Nations Convention on the Recognition and

	Enforcement of Foreign Arbitral Awards, 1958
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeal)
P./pp.	Page / pages
Para./paras.	Paragraph / paragraphs
Parties	Oceania Printers S.A. and McHinery Equipment Suppliers Pty
Q.	Question
Resp.	Respondent
Respondent	McHinery Equipment Suppliers Pty
S.	Section
SBG	Schweizerisches Bundesgericht (Swiss Federal Supreme Court)
Tribunal	Arbitral Tribunal formed under the rules of the Chicago International Dispute Resolution Association, convened for the Thirteenth Annual Willem C. Vis International Commercial Arbitration Moot 2005-2006
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, Rome 2004
UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods
USD	United State Dollars

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List Of Conventions and Rules

CIDRA Rules	Rules of the Chicago International Dispute Resolution Association (2005)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLPISG	United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Convention on the Limitation Period in the International Sale of Goods (1974)
Hague Convention	Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods
ICC Rules (1975)	Rules of Arbitration of the International Chamber of Commerce (1975)
ICC Rules (1998)	Rules of Arbitration of the International Chamber of Commerce (1998)
MAL	United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration (1985)
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Rome Convention	Convention on the Law Applicable to Contractual Obligations (1980)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2004)
UNCITRAL Rules	United Nations Commission on International Trade Law (UNCITRAL) UNCITRAL Arbitration Rules (1976)

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(Germany, 1996)**

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Hamburg, 21 March/21 June 1996

[CLOUT Case No. 166]

SECTION 1. PRELIMINARY MATTERS

1.1 STATEMENT OF FACTS AND TIMELINE OF RELEVANT EVENTS

1. The Claimant is a printing firm, with its principal office located in Oceania. Before the present case, its activities involved printing on non-specialized forms of paper stock. The Claimant had never owned a flexoprint machine.
2. The Respondent is a seller of new and used industrial equipment, with its principal office located in Mediterraneo. The sale of used flexoprint machines comprises five to ten percent of its total business. The Parties had no prior dealings and were unfamiliar to each other.

- 17 April 2002** The Claimant requests urgent sale and delivery of a flexoprint machine, listing several materials for printing for the confectionery market, including 8 micrometer aluminum foil for chocolate wrappers.
- 25 April 2002** The Respondent offers a second hand 7 stand Magiprint Flexometix Mark 8 machine (the “Machine”), \$44,500USD CIF Port Magreton, claiming it is fit for the Claimant’s “task.” The Machine, located in Greece, would first be refurbished at the Respondent’s works in Mediterraneo.
- 5-6 May 2002** The Parties jointly view the Machine at works of previous owner in Greece.
- 10 May 2002** The Claimant tells the Respondent the Machine appears fit for its contract with Oceania Confectionaries. It needs it urgently as it must be printing by 15 July 2002. This contract is all that makes the purchase worthwhile, and would generate annual profits of \$400,000USD. The Claimant fears a rival firm, Reliable Printers, may purchase a similar machine, but believes it will not if the Claimant already has one.
- 16 May 2002** In response to the Claimant’s urgent need, the Respondent offers direct delivery from Greece and refurbishment on site in the Claimant’s premises, reducing the sale price to \$42,000USD CIF Port Magreton.
- 21 May 2002** The Claimant orders the Machine.
- 27 May 2002** The Respondent sends the Claimant the Contract and a copy of the maker’s manual (the “Manual”), again assuring the Claimant that the Machine will meet its needs.

- 30 May 2002** The Claimant signs and returns the Contract to the Respondent. Meanwhile, the Claimant spends \$50,000USD preparing its premises.
- 1 July 2002** The Machine is delivered, installed and refurbished. Test runs follow, through to 8 July 2002, adding \$25,000USD to the Claimant's costs. This increases the Claimant's total expenditures to \$117,000USD.
- 8 July 2002** The Machine is turned over to the Claimant. It attempts to print on 8 micrometer foil to fulfill its contract with Oceania Confectionaries, but the Machine creases and tears the foil and the colours are out of register. The Claimant informs the Respondent's foreman, who tells the Claimant that the Machine is not designed to print on foil less than 10 micrometers thick.
- The Claimant immediately attempts to find a replacement flexoprint machine, but it cannot obtain one in time to meet its obligations to Oceania Confectionaries. The Claimant therefore asks the foreman to adjust the Machine's settings. The foreman agrees to try.
- 1 August 2002** The Claimant informs the Respondent that Oceania Confectionaries is threatening to cancel the contract. The Claimant tells the Respondent that Reliable Printers purchased a flexoprint machine when it discovered the Claimant was having trouble with the Machine. The Claimant tells the Respondent that it fears Reliable Printer will get the contract with Oceania Confectionaries. The Machine is still unable to print on 8 micrometer foil.
- 15 August 2002** The contract with Oceania Confectionaries has been cancelled. The Claimant informs the Respondent of its intent to claim compensation from the Respondent as a consequence of losing the contract.
- 10 September 2002** The Respondent denies all liability, and offers to re-purchase the Machine for \$20,000USD.
- 14 October 2002** The Claimant sells the Machine to Equatoriana Printers for \$22,000USD.
- 5 July 2005** The Claimant files a notice of arbitration and statement of claim with the Chicago International Dispute Resolution Association, claiming \$3,295,000USD.

1.2 LAW AND RULES APPLICABLE TO THE ARBITRATION

3. The *lex arbitri* is the law of Danubia, the seat of the Tribunal, and as a matter of law its mandatory provisions apply [Redfern & Hunter - 1999, pp. 92-93; Cl.'s Ex. No. 7]. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") without amendment [Statement of Claim, para. 16]. Danubia, Mediterraneo and Oceania are Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "NY Convention"). Consequently, an award rendered in Danubia is enforceable in Oceania and Mediterraneo. The Parties designated the arbitration rules of the Chicago International Dispute Resolution Association (the "CIDRA Rules") to govern controversies and claims arising out of or relating to this contract. The CIDRA Rules were amended on 1 July 2005, and as the Claimant submitted a request for arbitration on 5 July 2005, these Rules are deemed to apply to the arbitration. Art. 32(1) of the CIDRA Rules provides that the Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute, or failing such, the law determined by the conflict of laws rule it deems appropriate.

1.3 SUBSTANTIVE LAW OF THE CONTRACT

4. The Contract between the Parties designated the CISG as applicable law. Even without this designation, the CISG would apply as both Oceania and Mediterraneo are signatory states [Statement of Claim, para. 14]. Matters governed but not expressly settled by the CISG are to be settled in conformity with the principles on which it is based or in accordance with private international law [Art. 7(2) CISG]. These principles are found in the CISG itself or in such documents as the 2004 UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles"). Limitation period (prescriptive period) is neither governed nor settled under the CISG.

1.4 STATEMENT OF PURPOSE

5. Based on the above facts and in response to Procedural Order No. 1, we respectfully make the following submissions on behalf of our client, Oceania Printers, S.A.:
- the period of limitation (prescriptive period) did not expire before the commencement of the arbitration;
 - the Respondent did not deliver goods in conformity with the description in the Contract;

- alternatively, the Respondent did not deliver goods fit for the purpose of printing on 8 micrometer foil; a purpose known to the Respondent before the Contract's conclusion;
- the Claimant suffered a loss of \$3,295,000USD as a result of the Respondent's breach of the Contract;
- the Claimant's loss was foreseeable by the Respondent before the breach occurred;
- and
- the Claimant took reasonable steps to mitigate its loss.

SECTION 2. THE LIMITATION PERIOD HAS NOT EXPIRED

2.1 THERE IS NO CHOICE OF LAW TO GOVERN THE LIMITATION PERIOD

6. The Parties have failed to expressly designate a law to govern the limitation period. To fill this absence, the Claimant's position is that the appropriate limitation period is: four years, applying the Law of Obligations of Oceania, or three years applying Danubian law. In the alternative, the UNIDROIT Principles, which also recognises a three-year limitation period, applies. The Respondent contends that the limitation period is two years, applying the Law of Obligations of Mediterraneo. Accordingly, the controversy regarding the limitation period is what law, or principles, apply to the substance of the dispute. The dispute is a matter of substance, not procedure, as limitation periods are a matter of substance in the Parties' countries, Oceania and Mediterraneo, and in the place of arbitration, Danubia [*Procedural Order No. 2, q. 4*].
7. To defeat the claim, the limitation period must have expired before these arbitral proceedings commenced. Arbitral proceedings are deemed commenced on the date a statement of claim is received by CIDRA [*Art. 3(2) CIDRA Rules*], which in these proceedings was 5 July 2005 [*Letter dated 7 July 2005 signed by Marilyn Turner, Case Administrator*].
8. The following chart outlines and attempts to concretise the limitation period, the relevant dates, and the commencement standard for each of the proposed applicable laws and principles. The commencement standard determines the tangible event that starts the proverbial "clock" running on the limitation period.

	Limitation Period	Commencement Standard	Commencement Date	Expiry Date
Law of Obligations of	2 years <i>[Statement of</i>	The date when the event giving rise to	8 July 2002	8 July 2004

	Limitation Period	Commencement Standard	Commencement Date	Expiry Date
Mediterraneo	<i>Defence, para. 24]</i>	the claim occurs <i>[Procedural Order No. 2, q. 3]</i>		
Law of Obligations of Oceania	4 years <i>[Procedural Order No. 1, para. 5]</i>	The date when the event giving rise to the claim occurs <i>[Procedural Order No. 2, q. 3]</i>	8 July 2002	8 July 2006
Danubian Law	3 years <i>[Procedural Order No. 2, q. 3]</i>	The date when the event giving rise to the claim occurs <i>[Procedural Order No. 2, q. 3]</i>	8 July 2002	8 July 2005
UNIDROIT Principles	3 years <i>[Art. 10.2(1) UNIDROIT Principles]</i>	The day after the day the Claimant knew or ought to have known the facts as a result of which the Claimant's right can be exercised <i>[Art. 10.2(1) UNIDROIT Principles]</i>	9 July 2002	9 July 2005

9. Based on the chart, both the date when the event giving rise to the claim occurred, and the day the Claimant knew or ought to have known the facts as a result of which the Claimant's right can be exercised, is 8 July 2002. It is on this date that the Claimant became aware that the Machine would not print on 8 micrometer foil *[Resp.'s Ex. No. 2]*. Therefore, it is only Mediterraneo's two-year limitation period that time-bars the claim because the arbitral proceedings commenced within the limitation period under the Law of Obligations of Oceania, Danubian Law, and the UNIDROIT Principles.
10. The Respondent may argue that the date when the *event giving rise to the claim occurred*, and the day the Claimant *ought to have known the facts as a result of which the Claimant's right can be exercised*, was the date the Contract was formed. As the Contract is governed by the CISG, this was shortly after 30 May 2002, when the Respondent received the signed Contract *[Art. 23 CISG]*. The Respondent had sent the Manual along with the Contract on 27 May 2002, and the Manual indicated, on pages 22-23, that the Machine could not print on 8 micrometer foil *[Procedural Order No. 2, q. 19]*. However, this argument requires that the information found at the end of the Manual ought to have been known by the Claimant at that

time. This is the only information that could have informed the Claimant that the Machine would likely not print on 8 micrometer foil. Unfortunately, the Claimant did not actually know this information at that time, and it is unreasonable to expect that the Claimant ought to have known this information at that time. The Respondent presented the Manual as something to consult when operating the Machine [*Cl.'s Ex. No. 6*]. As such, it is reasonable that the Claimant would only have consulted the Manual once the Machine was handed over to the Claimant. As it happens, this was also 8 July 2002 (for further discussion on the Manual, see paras. 64-68 of the Memorandum).

11. It is important to note that the issue of the commencement date is only relevant where the Tribunal applies Danubian law or the UNIDROIT Principles as both call for a three-year limitation period. Consequently, if the commencement date were deemed to be shortly after 30 May 2002, instead of 8 July 2002, the claim would have expired before the commencement of the arbitral proceedings on 5 July 2005. Furthermore, the commencement date is irrelevant if the Tribunal applies Mediterranean law given its two-year limitation period. Finally, should the Tribunal apply Oceania's law, any permutation of the commencement date falls well within Oceania's four-year limitation period.

2.2 THE LAW OF OBLIGATIONS OF MEDITERRANEO DOES NOT APPLY

12. According to the arbitration clause between the Parties, any controversy shall be determined in accordance with the CIDRA Rules [*Cl.'s Ex. No. 7*]. The applicable rule for controversies regarding what law is applicable to the substance of a dispute is Art. 32(1):

The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

13. Danubia, the place of arbitration, is a MAL jurisdiction and therefore MAL Art. 28(1) and Art. 28(2), which deal with rules applicable to the substance of the dispute, must be considered. However, MAL Art. 28 is not a mandatory provision of the MAL and therefore may be validly replaced by the express application of the CIDRA Rules. In any event, MAL Art. 28(1) and Art. 28(2) and Art. 32(1) of the CIDRA Rules are largely in accord with each other.
14. The most straightforward resolution of the controversy is for the Tribunal to apply the law expressly designated by the Parties. However, the Parties have not expressly designated a

law applicable to the substance of this particular dispute. The Parties have expressly designated that the Contract is subject to the CISG [*Cl.'s Ex. No. 7*], but “[t]he [CISG] does not contain a statute of limitations” [*Schlechtriem-Sales Law, p. 72*]. The CISG contains a general provision for gap filling, but it only applies to matters governed by the CISG which are not expressly settled by it [*CISG, Art. 7(2)*]. Limitation periods are not governed by the CISG. The CISG “...governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract” [*Art. 4 CISG*]. While the CISG governs the rights of the seller and buyer this does not extend to governing the length of time that such rights are exercisable [*UNCITRAL A/CN.9/SER.C/GUIDE/1, 4B31*]. In addition, UNCITRAL has a separate convention that governs limitation periods, the Convention on the Limitation Period in the International Sale of Goods (“CLPISG”). The CLPISG applies only if the places of business of the parties to a contract of international sale of goods are in contracting states, or if the rules of private international law make the law of a contracting state applicable to the contract [*Art. 3(1) CLPISG*]. Neither Oceania nor Mediterraneo are party to the CLPISG.

15. Aside from applying the law expressly designated by the Parties, Art. 32(1) of the CIDRA Rules provides the Tribunal with additional methods to resolve the controversy. The Tribunal may apply the law determined by the conflict of laws rules which it considers applicable (Law of Obligations of Oceania) [2.2.1]; apply the law tacitly designated by the Parties as applicable to the substance of the dispute (UNIDROIT Principles); directly apply the law which the Tribunal considers appropriate (UNIDROIT Principles) [2.2.2]; or apply the law of the forum designated by the Parties (Law of Danubia) [2.2.3]. None of these methods leads to the application of the Law of Obligations of Mediterraneo.

2.2.1 The Tribunal should apply the law determined by the close connection rule (Law of Obligations of Oceania)

16. Under Art. 32(1) of the CIDRA Rules, if the Parties have not expressly designated an applicable law, the Tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. The reference in Art. 32(1) is to conflict of laws “rules” not conflict of laws “laws”, so there is no requirement for the Tribunal to make reference to a “conflict system” of a given State unless it deems that such a system is applicable [*ICC Case No. 7375 of 1996; Holtzmann & Neuhaus, p. 559, n.36 (note that these authorities deal with Art. 13(3) of the ICC Rules (1975) and Art. 28(2) of the MAL, respectively, which also*

reference “rules”]). Consequently, neither the Private International Law Act of Mediterraneo nor the Oceania Conflicts of Law in the International Sale of Goods Act should be applied. These are merely domestic codifications of a widely used and well-accepted conflict of laws rule. Their strict application in the present circumstances would be inappropriate given that neither the law of Mediterraneo nor the law of Oceania has yet been determined to apply. The Conflicts of Law in the International Sale of Goods Act of Oceania adopts certain provisions of the Hague Convention that are referred to below, but these are referenced only by way of example.

17. The conflict of laws rule that the Tribunal should consider applicable is the close connection rule. The close connection rule is “[t]he conflict rule which, beyond doubt, has received, on a...worldwide basis, the strongest support...[and] is common to most (national) conflict of laws system[s]” [*ICC Case No. 7375 of 1996*]. At its most basic level, the close connection rule attempts to apply the law that is most closely connected to the contract. However, there is dispute as to how this determination is to be made.
18. Most countries and arbitral awards have attached “...a preponderant weight to the place of business...of the Party which has to perform the so-called “characteristic performance[”]...” of the contract [*ICC Case No. 7375 of 1996*] and is the rule generally applied by arbitral tribunals [*Redfern & Hunter - 2004, para 2-76*]. Typically this is the seller because in most sale of goods contracts, it is the seller who effects the characteristic performance (*i.e.* production, preparation for shipment, delivery), while the buyer merely pays a sum of money [*Unitras-Marcotec GmbH v. R.A. Mobili s.r.l., Italy, 18 July 1997*]. Certain conventions that have attempted to codify the close connection rule in more precise terms reflect these principles [*Art. 4(2) Rome Convention; Redfern & Hunter – 2004, para 2-79; Art. 8(1) Hague Convention*]. On the contrary, only “[s]ome...countries attach a preponderant weight to the place where such characteristic performance has to be rendered...” [*ICC Case No. 7375 of 1996*].
19. Regardless, it is only a presumption that the law that is most closely connected to the contract is the law of the place of business of the party effecting the characteristic performance of the contract. For example, both the Rome Convention and the Hague Convention provide exceptions that envisage the possibility that in certain circumstances the law that is most closely connected to the contract may be a law other than the law of the place of business of the party effecting the characteristic performance of the contract [*Art. 4(2), 4(5) Rome*

Convention; Art. 8(2), 8(3) Hague Convention]. The Rome Convention exceptions have been followed in a number of cases [*Bloch c. SOC. Lima, France, 6 February 1991; Société Ammerlaan Agro projecten c/ Société Les serres de Cosqueron et autres, France, 2 March 1999; SA Cofermet c/ Société Gottscholl Alcuilux, France, 12 October 2000*]. In addition, these exceptions contemplate that in a particular set of circumstances the law that is most closely connected to the contract may be the law of the place where the characteristic performance is rendered. For example, one case applying the Rome Convention has held that a contract for the sale of technical equipment, placing obligations on the seller to both deliver and ensure the goods function, is governed by the law where the obligation is to be performed (*i.e.* at the buyer's place of business) [*Krauss Maffei v. Bristol Myers Squibb S.p.A., Italy, 10 March 2000*].

20. The following chart outlines the distinctive characteristic performance elements required by the Contract in this case. The elements are broken down into those performed by the seller and those performed by the buyer, and the performance location of each.

	Mediterraneo (Seller's country)	Oceania (Buyer's country)	Greece (neutral location)
Seller (Respondent)		Installation of machine [<i>Cl.'s Ex. No. 7</i>] Refurbishment of machine [<i>Cl.'s Ex. No. 7</i>]	Dismantling of machine [<i>Cl.'s Ex. No. 6</i>] Preparation for shipment [<i>Cl.'s Ex. No. 6</i>] Delivery (from Greece to Oceania directly) [<i>Cl.'s Ex. No. 4, 7</i>]
Buyer (Claimant)		Preparation of Claimant's plant for the installation of the machine [<i>Statement of Claim, para. 24</i>]	

21. As the chart reveals, no characteristic performance elements of the Contract are connected to Mediterraneo. As a result, the law of Mediterraneo bears little or no connection to the Contract. While the preponderant part of the Respondent's obligations under the Contract did not require the Respondent to supply labour or other services (thereby not excluding the transaction under Art. 3(2) of the CISG) performance of the Contract did require delivery and installation of the Machine on the Claimant's premises. This circumstance weighs in favour of Oceania's law being more closely connected to the Contract. The Claimant acknowledges that this is an exception to the presumption favouring a seller's law. However, the particulars of this transaction called for the Respondent to perform the Contract primarily in Oceania.

Given the overall context of the Contract, applying the law of Mediterraneo without additional and relevant connecting factors linking the transaction with Mediterraneo would be arbitrary.

2.2.2 *In the alternative, the Tribunal should apply the UNIDROIT Principles as a codification of the international principles tacitly designated by the Parties*

22. If the Tribunal does not apply the close connection rule, an alternative method is to apply the law tacitly designated by the Parties. Absent a clear choice of law, the circumstances surrounding the contract may make it possible to infer an implied choice [*Redfern & Hunter - 1999, p. 129*]. In this case, two factors suggest that the Parties have tacitly designated international principles – and not domestic law – to apply: there was an implicit choice not to apply domestic law [2.2.2.1], and the international character of the Contract points to an implicit intent to apply international principles to matters not governed by the CISG [2.2.2.2].

2.2.2.1 There was an implied choice not to apply domestic law

23. A tribunal may find that parties to a contract, by failing to choose a system of domestic law to apply to the substance of a dispute, have made an “implied negative choice” of domestic law; that is, that through their “shouting silence” they tacitly expressed an intent to have neither party’s domestic law apply [*ICC Case No. 7375 of 1996*]. The Parties have expressly designated the CISG as applicable to matters governed by the CISG. However, there is a palpable absence of an express law applicable to matters not governed by the CISG, such as limitation periods. The Parties’ contractual silence on the matter is indicative of an implied choice not to have domestic law apply to the limitation period. In this respect, any application of domestic law by the Tribunal would appear, at best, arbitrary, and at worst contrary to the Parties’ intentions.

2.2.2.2 The international character of the Contract indicates an implied intent that international principles should apply to matters not governed by the CISG

24. The following is a list of the international characteristics of the Contract:
- Initial solicitation done through website from Mediterraneo to Oceania [*Cl.’s Ex. No. 1*];
 - Negotiations conducted by letters between Oceania and Mediterraneo and in Greece [*Cl.’s Ex. No. 1-6*];
 - Machine located in Greece where it was inspected by the Claimant and dismantled and shipped by the Respondent [*Cl.’s Ex. No. 2, 3, 6*];

- Reference to INCOTERMS in the Contract [*Cl.’s Ex. 7; Procedural Order No. 2, q. 28*];
- Express choice of law that the Contract is subject to the CISG, despite both Oceania and Mediterraneo being parties to the CISG [*Cl.’s Ex. 7; Statement of Claim, para. 14*].

25. One tribunal, although not in the tacit designation context, considered that international aspects of a contract, such as a reference to international trade terms (*i.e.* INCOTERMS), showed a willingness by the parties “...to have their [c]ontract governed by international trade usages and customs...” in the absence of a choice of law [*ICC Case No. 8502 of 1996*]. As is evident from the above list, the international characteristics of the Contract reveals a similar willingness by the Parties to have matters not governed by the CISG governed by international customs or principles.

2.2.2.3 The Tribunal should apply the UNIDROIT Principles as a codification of the international principles tacitly designated by the Parties

26. According to the New Zealand Court of Appeal, the UNIDROIT Principles are a codification of the accepted international principles of contract law [*Hideo Yoshimoto v. Canterbury Golf International Ltd., New Zealand, 27 November 2000*]. They “...are in the nature of an international restatement of the general principles of contract law” [*Redfern & Hunter - 1999, p. 123*] that “...aim to reflect existing international contract law” [*Lew, Mistelis, & Kröll, p. 463*]. The UNIDROIT Principles provide that “[t]hey may be applied when the parties have agreed that their contract shall be governed by “general principles of law”, the *lex mercatoria* or the like” [*Preamble, UNIDROIT Principles*]. As a result, applying the UNIDROIT Principles to the present case resolves any uncertainty surrounding a tacit designation of international principles and provides a concrete limitation period of three years.
27. There is some debate as to whether Art. 32(1) of the CIDRA Rules (which is identical to Art. 33(1) of the UNCITRAL Rules), allows arbitral tribunals to apply general legal principles such as the UNIDROIT Principles. Art. 32(1) of the CIDRA rules uses the term “law”, while other rules and legislation, such as Art. 28(1) of the MAL and Art. 17(1) of the ICC Rules (1998) use the term “rules of law”. Commentary on the MAL suggests that even the use of the broader term “rules of law” may still prevent the application of general legal principles [*Holtzmann & Neuhaus, p. 554-559*].
28. However, interpreting the rule this way may force the Tribunal to apply domestic laws that, as has been demonstrated, are either arbitrary or run contrary to the intentions of the Parties.

More significantly, from a practical perspective this limitation is not adhered to in modern arbitral practice. Arbitral tribunals, applying Art. 13(3) of the ICC Rules (1975) which also used the term “law” have applied the UNIDROIT Principles in the absence of an express reference to them by the parties [*ICC Case No. 8502 of 1996; ICC Case No. 8817 of 1997*].

2.2.3 In the further alternative, the Tribunal should directly apply the UNIDROIT Principles

29. If the Tribunal does not find that the Parties have tacitly designated international principles, it has the authority to directly apply the UNIDROIT Principles. The UNIDROIT Principles also provide that “[t]hey may be applied when the parties have not chosen any law...” [*Preamble, UNIDROIT Principles*].
30. There is some debate regarding whether or not, under Art. 32(1) of the CIDRA Rules and similar provisions, a tribunal must resort to a traditional conflict of laws rule in deciding which law to apply, or whether it may simply choose which law it deems is most appropriate to the circumstances. Some recent practice suggests that tribunals may do the latter. For example, Art. 17(1) of the ICC Rules (1998) modified Art. 13(3) of the ICC Rules (1975) and removed the obligation to resort to conflict rules. However, Art. 28(2) of the MAL kept the obligation found in Art. 32(1) of the CIDRA Rules. The UNCITRAL Working Group and Commission favoured the more restrictive approach requiring recourse to conflict rules [*Holtzmann & Neuhaus, p. 559*].
31. Despite this, it appears that in general the “...intention [of applicable laws rules] is that the arbitral tribunal should be given almost complete freedom to choose the applicable law in the absence of any choice of law by the parties” [*Redfern & Hunter - 1999, p. 133*]. The direct approach is to be commended, “[i]f an arbitral tribunal can be trusted to decide a dispute, presumably it can be trusted to determine the set of legal rules..., [i]f the parties do not wish the arbitral tribunal to have such freedom... [t]hey should agree upon the applicable law...” [*Redfern & Hunter – 2004, para 2-84*]. Applying the substantive law/principles that the arbitral tribunal considers appropriate in the particular circumstances of the case directly is what arbitrators do in practice when looking at conflict of laws issues from a pragmatic and functional perspective [*Lew, Mistelis, & Kröll, p. 424, 435*]. This approach accords better with present international arbitration practices in which arbitral tribunals frequently apply substantive law/principles by direct means [*Holtzmann & Neuhaus, p. 559; Craig, Park, & Paulsson, p. 111-112*]. What is essential is that the tribunal be able to apply the most

appropriate law or principles, but in doing so not defeat the reasonable expectations of the parties [*Lew, Mistelis, & Kröll, p. 424*].

32. In this case, it is appropriate to apply an international standard, given the international character of the Contract. The international trend is a limitation period of three years [*Zimmermann, pp. 86-92*]. Art. 10(2) of the UNIDROIT Principles also recognises the trend towards a three-year limitation period. Moreover, as has been argued, its application will not defeat the reasonable expectations of the Parties.

2.2.4 In the further alternative, the Tribunal should apply the Law of Danubia

33. If the Tribunal is unable to make a determination under the close connection rule, by tacit designation, or by direct application, “[o]ne criterion for attributing a choice of law to the parties, in the absence of any express choice, is that based on a choice of forum by the parties” [*Redfern & Hunter - 1999, p. 129*]. It can be inferred that a choice of forum is a choice of law [*Redfern & Hunter - 1999, p. 130*]. Although this position once had significant weight, it is now seen as inconclusive since it is recognised that a particular forum may be chosen for numerous reasons [*Redfern & Hunter - 1999, p. 129*], or few reasons at all.
34. Nevertheless, should the Tribunal find it unsatisfactory to apply the aforementioned methods under Art. 32(1) of the CIDRA Rules, deeming the choice of forum as a choice of law is appropriate. Given the difficulties associated with the aforementioned methods, the choice of forum as a choice of law is a fair application of law under Art. 32(1) of the CIDRA Rules and does not defeat the reasonable expectations of the Parties. Both the Claimant and the Respondent agreed to Danubia as the forum for their dispute, and as sophisticated business Parties, they should have been aware of the possibility that the law of the forum may apply in different ways, including substantive matters not governed by the CISG.

SECTION 3. THE RESPONDENT BREACHED THE CONTRACT

35. The Respondent breached its obligations to the Claimant by delivering goods not in conformity with the Contract [*Art. 35 CISG*]. The Respondent did not deliver goods in conformity with the description provided by the Contract, as required by Art. 35(1) CISG [3.1]. Alternatively, the Machine was not fit for the particular purpose of printing on 8 micrometer foil as required by Art. 35(2)(b) CISG [3.2]. The Respondent cannot escape liability using Art. 35(3) CISG because the Claimant could not have known that the Machine was not in conformity with the Contract [3.3].

3.1 THE RESPONDENT DID NOT DELIVER GOODS IN CONFORMITY WITH THE DESCRIPTION PROVIDED BY THE CONTRACT AS REQUIRED BY ART. 35(1) CISG

36. According to Art. 35 (1) CISG, a seller must deliver goods of the quality and description required by the contract. Any non-conformity with the contractual description constitutes a breach of contract, no matter how minor [*Bianca/Bonell - Bianca, Art. 35 para. 1.3*]. In this case, the description of the Respondent's obligations is found in the negotiations [**3.1.1**]. The Respondent expressly agreed to provide a flexoprint machine for printing on 8 micrometer foil during negotiations [**3.1.2**]. Alternatively, the Respondent implicitly agreed to provide a flexoprint machine capable of printing on 8 micrometer foil during negotiations [**3.1.3**]. Furthermore, the Manual sent by the Respondent did not alter the description of its obligations under the Contract, despite indicating that the Machine could not print on 8 micrometer foil [**3.1.4**].

3.1.1 The description of the Respondent's obligations is found in the negotiations

37. The Claimant does not dispute that the Machine was not designed to print on foil of 8 micrometer thickness, and that the unit delivered by the Respondent performs to the specifications of a Magiprint Flexometix Mark 8 flexoprinter machine as named in Cl.'s Ex. No. 7. However, this reference to the model of the Machine is not a complete description of the content of the Respondent's obligations under the contract, and thus delivery of a working Magiprint Mark 8 flexoprinter machine did not satisfy the Respondent's obligations.

38. Under Art. 35(1) CISG, non-conformity with the description required by the Contract is determined through interpretation of the contract, and not measured by an objective standard [*Schlechtriem-Sales Law, p. 67*]. Thus, it would be insufficient for a machine to perform to its design specifications if the Contract required that the machine have particular capabilities. Consequently, in determining conformity, one must first identify the proper content of the seller's obligations by interpreting the contract according to the rules of the CISG, including Art. 8 CISG [*Bianca/Bonell, Art. 35 para. 2.1*].

39. Art. 8 CISG requires that statements or conduct of the Parties be interpreted according to the relevant circumstances even in cases where the contract is embodied in a single document and the terms employed appear to give a clear answer to the question [*Secretariat Commentary, Art. 7; UNCITRAL Digest, Art. 8, para. 3; SBG, Switzerland, 22 December*

2000]. Art. 8(3) CISG defines the scope of admissible evidence, which includes prior negotiations [*Bianca/Bonell*, Art. 8, para. 2.6; *Schlechtriem-Sales Law*, p. 39]. Therefore, to identify the content of the Respondent's obligations under the Contract, one must look beyond any single document and examine all relevant circumstances. Hence, the reference to a brand and model in the Contract should be examined in light of the circumstances surrounding the contract.

40. The content of the seller's obligations may be established in two ways. First, one may find the Parties expressly agreed to a description of the seller's obligations during their negotiations [*Art. 8(3) CISG*; *Schlechtriem-Sales law*, p. 39]. Second, one may find the Parties implicitly agreed to a description of the goods offered by the buyer in its request for the goods if the seller failed to challenge this description [*Bianca/Bonell*, Art. 35 para. 2.3].

3.1.2 The Respondent expressly agreed to provide a flexoprint machine for printing on 8 micrometer foil during negotiations

41. Negotiations are to be interpreted according to the rules set out in Arts. 8(1) and 8(2) CISG [*Art. 8(3) CISG*]. Statements or conduct of a party, including a final contract, are to be interpreted according to that party's intent when the other party knew or could not have been unaware of that intent [*Art. 8(1) CISG*; *Mitchell Aircraft Spares Inc. v. European Aircraft Service AB*, U.S. District Court (Illinois), 28 October 1998]. 'Intent' under Art. 8(1) CISG includes a party's interests in concluding a contract if these interests are known to the other party [*OLG Dresden, Germany*, 7 December 1999]. The standard "knew or could not have been unaware" eases the burden of proving that facts that were before the eyes reached the mind [*Honnold*, p. 257; *Schlechtriem-CISG*, p. 284]. Alternatively, if the standard under Art. 8(1) cannot be met, the Tribunal must determine what understanding a reasonable person "of the same kind as the other party" would have had of the statements or conduct in question [*Art. 8(2) CISG*]. This standard implies a person of the same personal background [*Feltham*, p. 349] and with similar knowledge of dealings between the parties [*Enderlein & Maskow*, p. 65] as the person to whom the statement is addressed [*Schlechtriem-Sales Law*, p. 39].
42. In this case, the Respondent knew that the Claimant's intent was to purchase a flexoprint machine capable of printing on 8 micrometer foil and agreed to supply one [*Art. 8(1) CISG*] [3.1.2.1]. The Respondent also knew that the Claimant's intent was to purchase the Machine to service the contract with Oceania Confectionaries [*Art. 8(1) CISG*], it knew this required products on 8 micrometer foil [*Art. 8(2) CISG*], and it agreed to meet these needs [3.1.2.2].

3.1.2.1 The Respondent knew that the Claimant's intent was to purchase a flexoprint machine capable of printing on 8 micrometer foil and agreed to supply one [Art. 8(1) CISG]

43. The Claimant's intent was to purchase a machine capable of printing on 8 micrometer foil [Cl.'s Ex. No. 1]. The Respondent knew that intent and is therefore bound by it [Art. 8(1) CISG; Cl.'s Ex. No. 2]. However, even if the Respondent did not actually know of the Claimant's subjective intent, under an objective standard the Respondent still agreed to supply a machine to print on 8 micrometer foil [Art. 8(2) CISG; Cl.'s Ex. No. 2].
44. In its initial request for goods, the Claimant informed the Respondent that it wanted a flexoprint machine for printing on a range of materials, such as papers, polyester and metallic foils, for the "confectionary market and similar fields" [Cl.'s Ex. No. 1]. While the Claimant required a flexible machine, its letter explains that a need to print on foil of 8 micrometers thickness was of particular importance and explained this need in two ways. First, the ability to print on foil would allow the Claimant to establish a "commanding lead" in the foil products market because, at that time, all users of foil products had to import them since there were no flexoprint operators in Oceania [Cl.'s Ex. No. 1]. Second, printing on foil for chocolate wrappers was the only task for which detailed specifications were given as to the type (aluminum) and thickness of foil, indicating the Claimant's preoccupation with this activity in particular [Cl.'s Ex. No. 1].
45. The Respondent knew of this intent and agreed to supply a flexoprint machine meeting the description provided by the Claimant [Art. 8(1) CISG; Cl.'s Ex. No. 2]. In its letter of 25 April 2005, it states that it has "... a second hand flexoprint machine for [the Claimant's] task [emphasis added]" [Cl.'s Ex. No. 2]. It is significant that the word 'task' is in the singular form. The Claimant had listed a number of materials in which it was potentially interested, but referred to only one particular printing task, which was of such importance that it provided further information on it. By referring only to a single task, the Respondent indicated it understood the Claimant's intent [Art. 8(1) CISG].
46. Even if this does not prove the Respondent knew the Claimant's subjective intent, a reasonable person would have understood that the Respondent was agreeing to supply a flexoprint machine to print on 8 micrometer foil [Art. 8(2) CISG]. A determination under Art. 8(2) CISG applies the "objective content" of the statement [OLG Frankfurt, Germany, 30 August 2000; Schlechtriem-Sales Law, p. 40]. Put in its objective grammatical context, the statement "for your task" must be a reference to printing on foil of 8 micrometers

thickness for the confectionery market [*Cl.'s Ex. Nos. 1, 2*]. In interpreting the Respondent's statements, one must also consider what a "conscious businessman" would have done in the its place [*LG Oldenburg, Germany, 28 August 1996*]. As the Claimant had been quite specific, a conscious businessperson would have flagged any deviation from the Claimant's description of the proposed machine's capabilities. A reasonable person of the same kind as the Claimant would thus have understood that the Respondent had agreed to supply a machine to print on 8 micrometer foil for chocolate wrappers.

3.1.2.2 The Respondent knew that the Claimant was purchasing the Machine to service the contract with Oceania Confectionaries which required products on 8 micrometer foil

47. In its letter of 10 May 2002, the Claimant clarified that its intent was to purchase the Machine to service its contract with Oceania Confectionaries [*Cl.'s Ex. No. 3*]. The Respondent knew this and agreed to supply a machine specifically for the contract with Oceania Confectionaries [*Cl.'s Ex. No. 4; Art. 8(1) CISG*]. A reasonable person would have understood that this contract required products on 8 micrometer foil [*Art. 8(2) CISG; Cl.'s Ex. Nos. 1, 3*]. Consequently, the Respondent agreed to supply a machine that could print on 8 micrometer foil.
48. The Oceania Confectionaries contract was what made purchasing the Machine "worthwhile" [*Cl.'s Ex. No. 3*]. The Respondent was aware of this and agreed to supply a machine that would allow the Claimant to service the contract. On 16 May 2002, the Respondent unilaterally amended the delivery terms and price to meet the Confectionaries' contractual delivery date because it knew that the Claimant would not purchase the Machine if the contractual delivery date of 15 July 2002 could not be met [*Cl.'s Ex. Nos. 3, 4*]. The Respondent also knew of the Claimant's substantial interest in this matter—i.e. profits of \$400,000USD per year [*Cl.'s Ex. No. 3*—which goes to the Claimant's intent [*Art. 8(1) CISG; OLG Dresden, Germany, 7 December 1999*].
49. A reasonable person in the Respondent's position would have understood that this contract required printing on 8 micrometer foil, because taken together, the Claimant's letters of 17 April and 10 May 2002 indicate such a requirement [*Art. 8(2) CISG*]. In mentioning the contract with Oceania Confectionaries the Claimant did not specifically make reference to the thickness requirement [*Cl.'s Ex. 3*], but this statement was not made in a vacuum, and one must go beyond the words used to examine all relevant circumstances [*Secretariat Commentary, Art. 8, para. 5*]. The question is whether the information the Respondent had

at the time it was informed of the contract was sufficient for it to understand the contract's requirements without further explanation. Courts have faced analogous question when applying Art. 8(2) CISG, in relation to incorporation of standard terms, by reference, into a contract. These decision have consistently held that, if a reference to standard terms is made, they should be incorporated into the contract provided that the full terms are otherwise available to the other party without "unreasonable inconvenience" [*BGH, Germany, 31 October 2001; OLG Düsseldorf, Germany, 30 January 2004*]. Similarly, while no further details on the contract with Oceania Confectionaries were provided when the Claimant informed the Respondent of the contract's existence, this information had already been made available to the Respondent in the Claimant's first letter. A reasonable person of the same kind as the Respondent would have known this [*Art. 8(2) CISG*].

50. After reading the Claimant's letter of 10 May, a "conscious businessman" would have immediately realized there was a connection between a contract with Oceania Confectionaries and the Claimant's earlier reference to "the confectionery market" [*Cl.'s Ex. No. 1; LG Oldenburg, Germany, 28 August 1996*]. In reading the Claimant's first letter retrospectively, with knowledge of the contract with Oceania Confectionaries, a reasonable person would have understood that the Claimant had this contract in mind when specifying its need for a machine to print on 8 micrometers foil. An obvious connection is the urgency of the Claimant's need. The very first paragraph of the 17 April letter speaks of an "urgent" need [*Cl.'s Ex. No. 1*]. The second letter informs the Respondent that the Claimant stands to earn \$400,000USD in annual profits but needs to "move fast on this", as performance of the Oceania Confectionaries contract was set to commence on 15 July 2002, barely two months hence, while the Machine was still in Greece and not yet refurbished [*Cl.'s Ex. No. 3*]. The logical inference is that negotiations with Oceania Confectionaries prompted the request for goods in the first place. This impression is further strengthened by the first letter in which the Claimant spoke of establishing a "commanding lead", while in its second letter remarking that the contract with Oceania Confectionaries is all that makes purchasing the Machine "worthwhile" [*Cl.'s Ex. Nos. 1, 3*]. Finally, as the Claimant's main preoccupation in the first letter is evidently printing on 8 micrometer foil for chocolate wrappers, a reasonable person would have understood that the contract with Oceania Confectionaries was behind this request.

3.1.3 The Respondent implicitly agreed to provide a flexoprint machine capable of printing on 8 micrometer foil during negotiations

51. Even if one disputes that the Respondent expressly agreed during negotiations to supply a machine fit for printing on 8 micrometer foil, such a requirement will still form part of the contract if the Respondent is found from its conduct to have implicitly agreed [*Art. 35(1); Bianca/Bonell, Art. 35, para. 2.3*]. Under Art. 8 CISG, conduct of a party may be used in interpreting the contract. In one case, the buyer had taken delivery of the goods without contesting the price indicated by the seller, and the court interpreted such conduct as acceptance of the price pursuant to 8(2) CISG [*UNCITRAL Digest, Art. 8, para. 15*]. Likewise, under Art. 35(1) CISG, silence by one party in the face of a stated description of the goods to be bought or sold binds that party insofar as the description is concerned [*Bianca/Bonell, Art. 35, para. 2.3*]. Thus, one court held that standard terms in a language which was not that of the contract would be binding if the other party could reasonably be expected to request a translation [*OLG Hamm, Germany, 8 February 1995*].
52. Accordingly, if the Respondent believed that the Claimant's description was unclear, it should have asked for clarification. The Claimant was entitled to rely on the Respondent's failure to do so as agreeing to supply the Machine as described by the Claimant. A general principle underlying the CISG [*cf. Art. 7 CISG*] is the principle of reliance [*Tribunale d'Appello di Lugano, Switzerland, 29 October 2003*]. In the present context, given the Respondent's knowledge of industrial machinery, it would be reasonable for a person of the same kind as the Claimant to rely on the Respondent to provide a conforming product. As the Respondent is a dealer of industrial machinery that employs its own engineers [*Cl.'s Ex. No. 2*], the Claimant could expect it to be sensitive to the importance of technical requirements in general. The Claimant could also expect the Respondent to be knowledgeable about flexoprint machines in particular. The Respondent publicly advertised that it was a seller of such machines [*Cl.'s Ex. No. 1; Statement of Claim, para. 3*], and informed the Claimant that it would refurbish the machine itself using its own engineers [*Cl.'s Ex. No. 2*]. In a similar case, a court held that as the buyer was an experienced trader of the goods involved, the seller was entitled to rely on him to know that a 12-year old machine would not meet all the technical requirements of a new machine [*SBG, Switzerland, 22 December 2000*]. This Tribunal should reach the same conclusion in the present case.

53. Finally, in the absence of established practices between the Parties, the Parties' conduct subsequent to the conclusion of the contract should be considered to interpret their intentions [*Bezirksgericht St. Gallen, Switzerland, 3 July 1997*]. The Respondent's workmen spent two months trying to adapt the Machine to the Claimant's needs [*Cl.'s Ex. No. 10*], thus supporting that the Respondent's intent was to provide a machine that would allow the Claimant to service the contract with Oceania Confectionaries.

3.1.4 The Manual sent by the Respondent did not alter the description of its obligations under the Contract, despite indicating that the Machine could not print on 8 micrometer foil

54. The Claimant received the Manual on 27 May 2002 [*Cl.'s Ex. No. 6*]. Pages 22 and 23 of the Manual indicate that the Machine can only print on foil of 10 micrometers or thicker [*Procedural Order No. 2, q. 19*]. However, the Parties had already agreed to a description of the goods during negotiations, and there was nothing to indicate that the Respondent intended to substitute the Manual for that description. To the contrary, the Respondent presented the Manual in such a way that a reasonable person would have understood it as being extraneous to the content of the Parties' agreement. Consequently, the description found at the end of the Manual does not absolve the Respondent from its breach of Contract, as Respondent argues in its answer [*Resp. Answer, paras. 25-26*].

55. Understood in the context in which it was sent, the Manual was not part of the Contract. The Manual was included in a set of documents the Respondent sent to the Claimant on 27 May 2002, which also included a letter and the Contract [*Cl.'s Ex. No.s, 6, 7; Resp. Ex. No. 1*]. In the Respondent's letter, a clear distinction is made between the Contract and the Manual. The Respondent writes: "our contract is enclosed," and then goes on to say that a "copy of the maker's manual is also enclosed [emphasis added]" [*Cl.'s Ex. No. 6*]. The Respondent fails to draw any link between the Manual's content and the Contract. In fact, the Respondent downplays the importance of the Manual, stressing the Machine's ease of use, and presents the Manual as something to be consulted should problems arise when using the Machine [*Cl.'s Ex. No. 6*]. A reasonable person would understand this as meaning that the Manual was being sent along as something to consult regarding the operation of the Machine and was not part of the agreement [*Art. 8(2) CISG*].

56. The vagueness of any link between the Contract and the Manual is compounded by the fact that the Manual is 25 pages long [*Procedural Order, No. 2, q. 19*]. Given that the Parties had

already agreed to the essentials of the Contract during the negotiations, a person of the same kind as the Claimant could reasonably have expected that a “conscious businessman” would have drawn the Claimant’s attention to portions of the Manual it considered important or binding such that they would constitute a part of the Contract [*LG Oldenburg, Germany, 28 August 1996*]. Indeed, had the Respondent truly believed that the Claimant should become aware of the contents of the Manual, the logical time to have drawn its attention to it would have been during the inspection visit, as a copy of the Manual was available at that time [*Procedural Order No. 2, q. 13*].

57. If a term is extraneous to the main contract and has not been discussed by the Parties, it cannot be incorporated into the contract without an express reference, even if the term is located on the reverse side of an order form [*CLOUT Abstracts, Case 203*]. Consequently, the inclusion of the Manual cannot be considered as part of the Contract.

3.2 THE MACHINE WAS NOT FIT FOR THE PARTICULAR PURPOSE OF PRINTING ON 8 MICROMETER FOIL AS REQUIRED BY ART. 35(2)(B) CISG

58. Buyers often purchase goods with a particular purpose in mind [*Secretariat Commentary, Art. 35, para. 7*]. Under Art. 35(2)(b) CISG, if a buyer has relied on a seller’s skill and judgment, the seller must deliver goods that are fit for any particular purpose of which it was aware by the time the contract was concluded, unless it was unreasonable for the buyer to rely on the seller or the parties have agreed otherwise [*Secretariat Commentary, Art. 35, para. 7; Lookofsky, p. 93*]. Failure to do so is a breach of contract [*Bianca/Bonell, Art. 35, s. 2.1*]. However, if the buyer knew or could not have been unaware of the non-conformity before the contract was concluded, the seller is not liable [*Art. 35(3) CISG*].
59. In this case, the Claimant told the Respondent that it needed the Machine to print on 8 micrometer foil [3.2.1]. The Claimant relied on the Respondent’s skill and judgment in selecting the Machine [3.2.2]. This reliance was reasonable [3.2.3], and the Respondent failed to indicate that the Machine was not fit for the particular purpose of printing on foil of 8 micrometer thickness as required by Art. 35(2)(b) [3.2.4]. Consequently, the Respondent was in breach of the Contract.

3.2.1 *The Claimant told the Respondent that it needed the Machine to print on 8 micrometer foil*

60. The requirement to deliver goods fit for a particular purpose arises where a seller knew or should have known the buyer's requirements [*Enderlein, p. 156*]. The purpose need not be explicitly described; it is sufficient that it could be reasonably recognised from the circumstances [*Schlechtriem-CISG, p. 281*]. As argued above, the Claimant's first letter informed the Respondent that the Claimant wished to print on 8 micrometer foil [*Memorandum, para. 45; Cl.'s Ex. No. 1*]. This, by itself, satisfies Art. 35(2)(b) CISG [*Enderlein, p. 156*].
61. The Claimant's second letter informed the Respondent that the Claimant was buying the Machine specifically for the Oceania Confectionaries account [*Cl.'s Ex. No. 3*]. A reasonable seller would have recognised from the circumstances that this contract required printing on 8 micrometer foil. The close ties between the Oceania Confectionaries contract and the specifications laid out in the Claimant's first letter have already been explained [*Memorandum, para. 51*]. Although the Claimant did not expressly state that foil of 8 micrometer thickness was required to service the contract with Oceania Confectionaries, under Art. 35(2)(b) actual notice was not required [*Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A., Italy 2000*].
62. The Respondent may argue that the Claimant's letter of 10 May 2002 indicated that the Claimant's only concern was the contract with Oceania Confectionaries and that it considered the Machine fit for that purpose [*Cl.'s Ex. No. 3*]. The Respondent may further argue that it could not have known that the Claimant still wanted a machine that could print on 8 micrometer foil. However, even if one disagrees that the Respondent could have known that the contract with Oceania Confectionaries required printing on 8 micrometer foil, it does not follow that the Claimant no longer wanted this capability. The Claimant had initially informed the Respondent of its need to print on 8 micrometer foil in reference to "chocolate wrappers" and the "confectionery market" [*Cl.'s Ex. No. 1*]. Greater flexibility would increase its likelihood of keeping Oceania Confectionaries satisfied and winning the hoped-for renewal on its contract [*Cl.'s Ex. No. 3*]. Thus, it is more logical to conclude that the Claimant still wanted the full range of capabilities initially set out than to assume that it no longer intended to print on 8 micrometer foil. Consequently, the Respondent is still bound by the purposes laid out in the Claimant's first letter [*Art. 8(2) CISG, Cl.'s Ex. No. 1*].

3.2.2 The Claimant relied on the Respondent's skill and judgment in selecting the Machine

63. If the circumstances of a case show that a buyer relies on the seller's skill and judgment, such a seller is liable for failing to deliver goods fit for a particular purpose if the particular purpose for which the goods have been purchased has been expressly or impliedly made known to the seller [*Secretariat Commentary, Art. 35, para. 9; Bianca/Bonell, Art. 35, para. 2.5.3*].
64. In this case, the Claimant relied on the Respondent's skill and judgment in deciding which flexoprint machine to purchase, as the Claimant was not involved in the selection of the make or model. In its initial request for goods, the Claimant stated its interest in general terms: "a six colour machine with varnishing stand" [*Cl.'s Ex. No. 1*]. Not being an expert in flexoprinters, the Claimant then outlined its purpose in acquiring a flexoprint machine [*Cl.'s Ex. No. 1*]. The Claimant did not select a flexoprint machine by brand name, nor did it describe the machine desired in highly technical terms, either of which would vitiate reliance [*Secretariat Commentary, Art. 33, para. 9; Schlechtriem-CISG, p.282*]. Instead, the Claimant relied on the Respondent to use its knowledge of flexoprint machines to suggest an appropriate model fit for its purposes. The Respondent indicated its understanding of this reliance when, in its letter of 25 April 2002, the Respondent presented the Claimant with a specific unit, stating that it would be suitable for the Claimant's 'task' [*Cl.'s Ex. No. 2*].

3.2.3 The Claimant's reliance on the Respondent's skill and judgment was reasonable

65. For the seller to be liable under Art. 35(2)(b), the buyer's reliance on the seller's skill and judgment must be reasonable [*Secretariat Commentary, Art. 35, para. 9*]. The principle underlying Art. 35(2)(b) is *caveat venditor*, not *caveat emptor* [*Henschel, p. 3*]. Thus, the buyer is not required to inform the seller of its reliance, or of any difficulties associated with designating goods to accomplish a particular use [*Folsom, p. 88*]. Accordingly, reliance will be reasonable if the goods are within the seller's "sphere of influence" [*Henschel, pp. 3,4*]. Goods are within the seller's sphere of influence if it has greater knowledge than the buyer regarding them, or if it is in a better position to determine their fitness for a particular purpose [*Henschel, pp. 3,4*]. This is the case if the seller has sufficient information to provide goods with the necessary qualities [*Slechtriem-Obligations, pp. 6-21*].

66. In this case, the Machine was in the Respondent's sphere of influence until the Contract was concluded [*Henschel*, pp. 3,4]. The Machine was located in Greece, it had been acquired by the Respondent in the ordinary course of its business, and was identified by the Respondent as suitable for the Claimant's purpose [*Cl.'s Ex. No. 2*]. The Respondent had sufficient information about the Claimant's purpose, as the Claimant's first letter was quite detailed in this respect [*Cl.'s Ex. No. 1; Schlechtriem-Obligations*, pp. 6-21].
67. Reliance is also reasonable if a seller holds itself out as having special knowledge concerning the type of goods [*Secretariat Commentary, Art. 33, para. 10; Schlechtriem-CISG p. 282*], especially when the buyer does not have equal knowledge [*Honsell-Magnus, Art. 35, para. 22*]. In this case, the Respondent presented itself as having special knowledge of flexoprint machines. In its letter dated 25 April 2002, the Respondent informed the Claimant that it refurbishes flexoprint machines in its own works [*Cl.'s Ex. No. 2*]. Additionally, in its letter of 16 May 2002, the Respondent offered to have its engineers re-erect and test the Machine, after shipment, on the Claimant's premises [*Cl.'s Ex. No. 4*]. In the case of complex machinery, such operations require a high degree of familiarity and proficiency with the equipment's operations. Thus, a reasonable person would understand from this that the Respondent had extensive knowledge of flexoprint machines [*Art. 8(2) CISG*]. The Respondent's apparent substantial knowledge contrasts with the Claimant's relative ignorance. The Claimant had only ever printed on paper, and the contract with Oceania Confectionaries was significantly outside the normal range of its business [*Procedural Order No. 2, q. 23*]. Its request for a flexoprint machine was couched in general non-technical language without any suggestion of specialised knowledge [*Cl.'s Ex. 1*].

3.2.4 The Respondent failed to indicate that the Machine was not fit for the particular purpose of printing on foil of 8 micrometer thickness as required by Art. 35(2)(b)

68. The principle of good faith requires a seller, who recognises that the goods which a buyer proposes to purchase are not fit for their intended purpose, to inform the buyer that the goods will not meet such a purpose [*Secretariat Commentary, Art. 35, para 9; Schlechtriem-CISG, p. 282; Enderlein, p. 156; Bianca/Bonell, p. 275*]. The seller's obligation under Art. 35(2)(b) CISG includes a duty to advise against a purchase if the seller realizes that the buyer might not be able to use the goods for all the purposes it expects [*Koch, p. 187*]. This obligation arises where the seller has the capacity to know if the goods will not suit a particular purpose.

The Respondent, as an experienced trader of industrial machines and flexoprint machines, was in a position to counsel the Claimant [*Procedural Order No. 2, q. 24*]. Nevertheless, it failed to inform the Claimant that the Machine would be incapable of printing on foil of 8 micrometer thickness.

3.3 THE RESPONDENT CANNOT ESCAPE LIABILITY USING ART. 35(3) CISG BECAUSE THE CLAIMANT COULD NOT HAVE KNOWN THAT THE MACHINE WAS NOT IN CONFORMITY WITH THE CONTRACT

69. Art. 35(3) CISG excludes a seller from liability under Art. 32(2)(b) if, at the time of the conclusion of the contract, the buyer had knowledge or ought to have had knowledge of the lack in conformity of the goods contracted [*Schlechtriem-CISG, p. 284*]. A seller is only responsible for deficiencies in conformity not known to a buyer and which were “not reasonably discoverable by examining the goods” [*Bianca, p.277; UNCITRAL Digest*]. The Claimant did not become aware of the lack in conformity before the conclusion of the Contract. The trip to Greece did not reveal that the Machine could not print on foil of 8 micrometer thickness [3.3.1]; and the Claimant was not required to read the Manual before the conclusion of the Contract [3.3.2].

3.3.1 *The trip to Greece did not reveal that the Machine could not print on foil of 8 micrometer thickness*

70. A buyer who undertakes a pre-contractual inspection and becomes aware that the goods offered by the seller are not fit for a particular purpose is assumed to “purchase such goods as he finds them” [*Lookofsky, p. 94*]. However, a buyer is under no obligation to inspect the goods before placing an order with the seller [*Enderlein, p. 159*]. In determining whether the Claimant should have been aware of the lack of conformity, a subjective standard must be applied [*Schlechtriem-CISG, p. 284*]. One must have regard for the circumstances surrounding the conclusion of the contract and the buyer’s position at the time the contract was concluded. In this case, the Claimant inspected the Machine in Greece on 5 and 6 May 2002 [*Cl.’s Ex. 3*]. However, it did not become aware of the lack of conformity during this inspection, and under the circumstances, it should not have been expected to.
71. Under the standard provided by Art. 35(3), the Claimant did not have an obligation to test the Machine [*Honnold, p. 257; Enderlein & Maskow, p. 1481*]. In any case, it was not provided with any opportunity to test the Machine on 8 micrometer foil since it did not observe any actual printing when it inspected the Machine [*Procedural Order No. 2, q. 12*]. The

Claimant inquired of the previous owner whether it had had any problems with the Machine, and was assured the Machine worked well [*Procedural Order No. 2, q. 12*]. As the Claimant had already been assured by the Respondent that the model in question was fit for the Claimant's "task" [*Cl.'s Ex. 2*], the primary purpose of the inspection was not to determine the Machine's capabilities, but to ensure that the Machine was mechanically sound and that it had satisfied its previous owner. Thus, the Claimant's inquiries to the previous owner were limited to such issues, and as a result there was nothing that occurred during the visit to suggest that the Machine was not fit the purpose of printing on foil of 8 micrometer thickness. Without testing, the non-conformity was not reasonably discoverable by examining the Machine [*Bianca, p. 277; UNCITRAL Digest*], and therefore the Claimant remained unaware of the Machine's lack of conformity.

3.3.2 The Claimant did not read and was not required to read the Manual before the conclusion of the Contract

72. The term "could not have been unaware" does not impose a duty to investigate. It involves facts that are "before the eyes of one who can see" [*Honnold, p. 257; Enderlein & Maskow, p. 148*]. "Could not have been unaware" is a higher standard even than gross negligence [*Schlechtriem-CISG, p. 284*]. It is believed that the CISG used this expression to diminish the burden of proving that "facts that were before the eyes reached the mind" [*Honnold, p. 257; Schlechtriem-CISG, p. 284*]. As such, there is "little practical difference between a provision that refers to facts that a party "knows" and a provision that refers to facts of which a party could not have been unaware" [*Honnold, p. 257*].
73. The specifications regarding the printing capabilities of the Machine are found pages 22 and 23 of the Manual [*Procedural Order No. 2, q. 19*]. Although the Claimant received the Manual before the conclusion of the Contract, the Claimant did not read the Manual. Without reading the Manual, the Claimant could not have been aware that the Machine would be incapable of printing on foil of 8 micrometer thickness.
74. Moreover, the Respondent never indicated to the Claimant that it should review the Manual, it simply indicated it was sent along with the contract as a aid in the use of the Machine once it was delivered: "even though the machine is easy to operate and is a very reliable machine, you will certainly wish to have a copy" [*Cl.'s Ex. No. 6*].

SECTION 4. THE RESPONDENT IS LIABLE FOR \$3,295,000USD IN DAMAGES

75. Art. 45(1)(a) CISG provides that a buyer may claim damages under Art. 74 if the seller breached the contract [*Lookofsky, Art. 74*]. The buyer may claim damages for loss, including loss of profit, caused by the breach [*Art. 74 CISG*]. Accordingly, the aggrieved buyer must prove: the breach of contract [*Claimant's memorandum, s. 3*], the loss suffered by the aggrieved party [4.1], and causality between the breach and the aggrieved party [4.2]. Additionally, the loss must have been foreseeable by the party in breach when concluding the contract, "in light of the facts and matters of which he then knew or ought to have known" [*Art. 74 CISG*] [4.3]. Finally, parties have a duty to take such measures as are "reasonable in the circumstances" to mitigate their losses resulting from the breach [*Art. 77 CISG*] [4.4].
76. In the present case, the Respondent breached its obligations under the contract, causing losses of \$3,295,000USD to the Claimant. These losses were foreseeable by the Respondent as a possible consequence of its breach. The claim for damages should not be reduced as the Claimant took reasonable steps to mitigate its losses.

4.1 THE CLAIMANT SUFFERED A LOSS OF \$3,295,000USD

77. This sum breaks down as follows:
- \$95,000USD in expenditures to acquire and test the machine and prepare the Claimant's premises;
 - \$400,000USD in annual profits for the initial period of the contract with Oceania Confectionaries (4 years = \$1,600,000USD);
 - \$400,000USD in annual profits for the renewal period on the contract (4 years = \$1,600,000USD).
78. The Respondent does not contest the claim for \$95,000USD in lost expenditures [*Resp.'s Answer, para. 27*]. Furthermore, the estimate of annual profits is not presently at issue [*Procedural Order No. 2, q. 29*]. However, the Respondent does contest its liability for lost profits [*Resp.'s Answer, para. 27*].
79. In awarding damages for lost profits under Art. 74, a tribunal must be convinced the profit would have been made; loss of mere opportunity or possibility is insufficient [*Schlechtriem, p. 563*]. The purpose of the provision is to put the aggrieved party in the same economic position as it would have been had the breach not occurred [*Honnold, s. 403; Bianca/Bonell,*

Art. 74, s. 3.1]. This means that damages must be proportionate to the loss suffered and not to the value of the good [*Secretariat Commentary, Art. 74, para. 8*]. The aggrieved party is entitled to profits it, in fact, lost or could have expected, and the period of time for which it may recover the loss of profit is not limited [*Bianca/Bonell, Art. 74, s. 3.4*] In applying these principles to determine the damages, it is best to separate the initial contract period from the renewal, as the relevant facts in each case are different.

4.1.1 Profits under the initial contract were certain to total \$1,600,000USD

80. But for the Respondent's breach, the initial contract with Oceania Confectionaries would have been completed [*Cl. Ex. No. 3*]. Had the Machine been able to print on foil of 8 micrometers thickness, Oceania Confectionaries would have been obliged to pay the contract price leading to \$400,000USD in annual profits to the Claimant for at least four years.

4.1.2 Profits from the renewal period were sufficiently certain and totalled \$1,600,000USD

81. There is an issue with Art. 74 CISG regarding the time at which damages are measured, being either the time of breach, or time of trial/arbitration [*Sutton, s. B1; Bianca/Bonell, Art. 74, s. 3.3*], and there is no consensus within the forensic economics and accounting literature as to whether calculations should be made with the benefit of "hindsight" [*Kolaski, p. 7*]. However, as a general rule, a damages analysis should incorporate any additional factors which may have played a role in the aggrieved party's loss of profits [*Kolaski, p. 4; Honnold, s. 406*]. In this case, the probability of the Claimant's renewal of the Oceania Confectionaries contract may have changed between the time of the Respondent's breach and the time of arbitration. While only a rumour at the time of the Respondent's breach, it is now certain that a new company, Oceania Generics, will require foil products beginning in 2007 [*Procedural Order No. 2, q. 20*]. There is a suggestion that another printing firm, having acquired a machine to service the Oceania Generics contract, could succeed in displacing Reliable Printers on the Oceania Confectionaries account [*Procedural Order No. 2, q. 32*]. Had the Claimant not lost its contract with Oceania Confectionaries, these factors would have influenced its prospects for renewal. As it is, in any case, difficult to differentiate the relative probability "before" and "after", these facts should form part of the damages analysis [*Kolaski, p.4*].

82. In spite of this, the Claimant should be awarded damages for the lost renewal period, as it was very probable to occur [*Art. 74 CISG*]. As Art. 74 covers a wide range of possible claims from both a buyer and a seller, it does not set out specific rules for the appropriate method to determine "the loss ... suffered ... as a consequence of the breach" [*Secretariat Commentary, Art. 74, para. 4*]. The loss must be determined in the way best suited to the circumstances [*Secretariat Commentary, Art. 74, para. 4*]. Damage analyses should not be unreasonable or founded on conjecture or impermissible speculation [*Kolaski, p.4*], but instead, the principle of full compensation underlying Art. 74 requires that damages be awarded if profits were both probable and "calculable" [*Schlechtriem-CISG, p. 563; Bianca/Bonell, Art. 74, s. 3.2*].
83. The "Market Forecast Approach", based on a forecast of expected performance for the aggrieved party's business, is a typical method of calculating lost profits [*Kolaski, p.5*]. Thus, to determine the Claimant's loss of profits, one must consider the realities of the Claimant's business environment. These realities are that the Claimant was unlikely to face any competition for the Oceania Confectionaries contract, and even if it had, its significant advantages make it highly probable that its contract would be renewed.
84. Acquiring a flexoprint machine in Oceania is a risky venture. It entails significant capital outlays of roughly \$117,000USD [*Statement of Claim, para. 25*], with only one or two accounts of sufficient size existing to justify the investment [*Procedural Order No. 2, q. 20*]. This is evidenced by the fact that the Claimant only agreed to purchase the Machine after it had signed the contract with Oceania Confectionaries [*Cl.'s Ex. No. 3*]. Likewise, Reliable Printers only purchased its machine once it was certain that the Claimant would be unable to service the Oceania Confectionaries account [*Procedural Order No. 2, q. 22*].
85. In this market, the already high risk associated with investment in a flexoprint machine would only be compounded by the presence of a well-established maker of foil products, because given the scarcity of available contracts it would further reduce the likelihood of a new and untested firm securing enough business to justify the investment. Consequently, it is very unlikely that a printing firm would acquire a flexoprint machine without first securing a major contract. It is instructive to note that both the Claimant and Reliable Printers only purchased a flexoprint machine once a secure contract was in place. This is so despite there being no well-established competitor [*Cl.'s Ex. No. 3; Procedural Order No. 2, q. 22*].

86. Given the above, it is unlikely that the Claimant would have faced any competition from within Oceania, either for the contract with Oceania Confectionaries or with Oceania Generics. At the end of the initial contract, the Claimant would have had the benefit of a four-year business relationship with Oceania Confectionaries, as well as four years' experience printing on foil products [*Cl.'s Ex. No. 3*]. Any threat of competition for the Oceania Confectionaries account would result from other firms having acquired a flexoprint machine to bid on the new contract with Oceania Generics [*Procedural Order No. 2, q. 20*]. Given that importing foil products substantially increases cost [*Cl.'s Ex. No. 1*], Oceania Generics would most likely opt to purchase locally. However, with an established printing firm such as the Claimant already in place, it is doubtful that Oceania Generics would be willing to contract with a firm that did not at least already possess a working and tried flexoprint machine. Faced with a bidding war against a very strong competitor and the need to make large unsecured capital investments, it is unlikely that another firm would choose to enter the market. This analysis is supported by the facts, given that as of 2 November 2005 there were no other flexoprint operators in Oceania, other than Reliable Printers, even though Oceania Generics is slated to begin production in early 2007 [*Procedural Order No. 2, q. 32*]. Nevertheless, even had competitors emerged, the renewal of the Claimant's contract with Oceania Confectionaries was still very likely, given its prior relationship and greater experience.

4.1.3 The value of the Claimant's dominant position after the initial contract period is quantifiable

87. Quantifying lost profits must be definite and concrete [*Schlechtriem-CISG, p. 587*]. Loss of profit can be the exact profit the aggrieved party expected, or an average profit to be expected at a certain time in a certain place [*Enderlein & Maskow p. 299*]. Accordingly, the concrete value of the Claimant's position after the initial contract with Oceania Confectionaries can be calculated in two ways. First, one may calculate it based on the renewal contract the Claimant was most likely to obtain (Oceania Confectionaries), with annual profits of \$400,000USD over four years (\$1,600,000USD). Second, one may calculate based on an average of the two primary accounts in the market, \$350,000USD in profits over four years (\$1,400,000USD). A four-year period should be used to calculate loss of profits from the renewal because that was the length of the initial contract [*Statement of Claim, para. 24*].

4.2 THE LOSS WAS CAUSED BY THE RESPONDENT'S BREACH

88. The Tribunal must ascertain causality according to the circumstances [*Secretariat Commentary, Art. 74, para. 4*]. Loss of profits is caused when the buyer's clients refuse to accept an alternative product [*LG Düsseldorf, Germany, 5 March 1996*]. Similarly, under its contract with Oceania Confectionaries, the Claimant was required to deliver foil products of 8 micrometers thickness by 15 July 2002 [*Cl.'s Ex. Nos. 3, 9; Procedural Order No. 2, q. 21*]. As this was not done, by 15 August 2002 the contract had been cancelled, and Oceania Confectionaries had contracted with Reliable Printers [*Cl.'s Ex. No. 10*]. The non-conformity caused the cancellation of the first contract in two ways. First, the Machine's inability to print on 8 micrometer foil made it impossible for the Claimant to produce the required wrappers. Second, the fact that it was known to have purchased an unsuitable machine is what led Reliable Printers to go ahead with its planned acquisition of a flexoprint machine [*Procedural Order No. 2, q. 22*].
89. Furthermore, the non-conformity caused the loss of profits from the renewal period. As outlined above, not having secured the initial contract makes winning the renewal highly unlikely. The notion of 'economic position' which underlies the reparation provided by Art. 74 [*Bianca/Bonell, s. 3.1*] is wider than one of mere 'reliance losses', and must also be measured by the promisee's expectations, the so-called "benefit of the bargain" [*Farnsworth*]. The Tribunal must put the Claimant in as good a position as it could expect to be in had the contract been performed [*Honnold, s. 403*]. Losing the initial contract period with Oceania Confectionaries deprived the Claimant of the superior market position it would have enjoyed.

4.3 THE LOSS WAS FORESEEABLE BY THE RESPONDENT

90. To be liable for lost profits, these profits must have been foreseeable at the time of the conclusion of the contract [*Lookofsky, Art. 74; Schlechtriem-CISG, pp. 554-555; Ederlein & Maskow, p. 301*]. The purpose of limiting liability this way is to allow the parties to measure their exposure to risk when signing the contract [*Slechtriem-Sales Law, p. 97; Schlechtriem-CISG, pp. 554-555*]. Art. 74 imposes liability for losses that the breaching party "foresaw or ought to have foreseen." Foreseeability can be objective or subjective [*Chengwei, s. 14.2.2*].

91. Commentators disagree on what precisely must have been foreseen by a party in order for it to be liable [*Chengwei*, s. 14.2.5]. Some believe it is sufficient that the breaching party knew the quantum of profits at stake (general assumption of risk) [*Bianca/Bonell*, Art. 74, s. 2.9; *Saidov*, s. 2(a)(iii)(e)]. Others believe that the breaching party must have been able to foresee the causal nexus tying the breach to the loss (specific assumption of risk) [*Honnold*, s. 406; *Enderlein & Maskow*, p. 301]. This tension need not be resolved in this case, as the Respondent is liable under both standards. In the present case, the two standards can be rephrased in the following way:
1. (General assumption of risk) Could the Respondent foresee that problems with the Machine, in a general sense, could lead to the loss of the Oceania Confectionaries contract and the attendant profits?
 2. (Specific assumption of risk) Could the Respondent foresee that a flexoprint machine that could not print on 8 micrometers would cause the loss of the Oceania Confectionaries contract and attendant profits?
92. Under the first question, the answer is straightforward. The Respondent was aware that the contract with Oceania Confectionaries would provide the Claimant with annual profits of \$400,000USD for four years, with a possibility of renewal, and that the first delivery was due on 15 July 2002 [*Cl.'s Ex. No. 3*]. Therefore, it was foreseeable that should the Claimant not manage to meet the delivery schedule, Oceania Confectionaries would purchase elsewhere.
93. Under the second question the answer is more complex, but still favourable to the Claimant. Even if the Respondent did not know that the contract with Oceania Confectionaries required printing on 8 micrometers, applying the standards of Art. 8 CISG, the Respondent could still have foreseen that a breach on that point would lead to loss of profits.
94. Art. 74 CISG deals with risk and possibility, not knowledge [*Lookofsky*, Art. 74; *Ziegel-Remedial Provisions*, p. 9-38; *Gotanda*, p. 82]. Art. 74 CISG adopts the Anglo-American ‘contemplation rule’, but softens the standard from “probable result” to “possible consequence” [*Honnold*, s. 407; *Saidov*, s.2; *Ziegel-Report*, Art. 74; *Chengwei*, s. 14.1; *Hadley v. Baxendale*]. According to the House of Lords and other commentators, ‘possibility’ can be explained as follows: given a well-shuffled deck of fifty-two cards, it is possible, although not probable, that the top card will be the queen of spades [“*The Heron II*”, *House of Lords*, 1969; *Ziegel-Remedial Provisions*, p. 9-38; *Eiselen*, para. h].

95. Based on the information available, the Respondent knew or ought to have known that it was possible, if not probable, that the contract with Oceania Confectionaries required 8 micrometers. It knew that the Claimant wished to print on 8 micrometers for chocolate wrappers for use in the confectionery market [*Cl.'s Ex. No. 1*]. It knew the purchase was being made to secure a commanding lead in the confectionery market [*Cl Ex. No. 1*]. It knew the contract with Oceania Confectionaries was the only thing that made the purchase “worthwhile” [*Cl.'s Ex. No. 3*]. Even if, in the Tribunal’s opinion, these elements do not add up to objective knowledge of the contract’s requirements, there remains a significant possibility of a link between the contract with Oceania Confectionaries and the ability to print on foil of 8 micrometers thickness. Loss of profits from that account was thus a possible consequence foreseeable under the standard of Art. 74.

4.4 THE CLAIM FOR DAMAGES CANNOT BE REDUCED AS THE CLAIMANT TOOK SUCH STEPS AS WERE REASONABLE TO MITIGATE ITS LOSS

96. Art. 77 CISG requires that parties not passively await the incurrence of loss [*Knapp in Bianca/Bonell, s. 2.1*]. An aggrieved party must take ‘reasonable measures’ to mitigate loss [*Art. 77 CISG*]. Reasonable measures are measures that one would expect a person acting in good faith to take [*Saidov, s. 4(b)*]. This does not include measures that, although they may mitigate the loss, are ‘excessive’ [*Bianca/Bonell, s. 2.3*]. Unless there is a known threat of breach before the actual breach, a party is only required to take steps to mitigate loss after the breach has occurred [*Schlechtriem-CISG, p. 587*]. Since the possibility of breach was unknown to the Claimant before 8 July 2002 [*Resp. Ex. No. 2*], its duty to mitigate should be measured against the circumstances prevailing at that time.

97. Courts are divided on the burden of proof. While some courts have indicated that the aggrieved party must take steps to show that it tried to mitigate its loss, decisions on the ultimate burden of proof “consistently place the burden on the breaching party of establishing the failure to mitigate and the amount of consequent loss” [*UNCITRAL Digest, Art. 77, para. 19*]. Thus, it will suffice if the Claimant outlines the measures it took to mitigate its losses, which it did by reselling the Machine [4.4.1], informing the Respondent of the Oceania Confectionaries contract deadline [4.4.2], attempting to acquire a replacement flexoprint machine [4.4.3], and attempting to repair the Machine [4.4.4].

4.4.1 The Claimant mitigated its loss by reselling the Machine

1. A typical measure to mitigate loss, derived from case law, requires that a buyer attempt to resell the goods [*Bianca/Bonell, s. 2.1; UNCITRAL Digest, Art. 77, para. 8*]. The Claimant resold the Machine at a higher price [*Statement of Claim, para. 13*] than the price offered by the Respondent [*Resp. Ex. No. 3*].

4.4.2 The Respondent was aware of Claimant's contract with Oceania Confectionaries

2. The Claimant, as the buyer, has a duty to inform the Respondent if a third party is affected by the timeliness of the good's delivery [*Amtsgericht München, Germany, 23 June 1995*]. The Claimant informed the Respondent that the Claimant's contract with Oceania Confectionaries had to be serviced by 15 July 2002. In fact, such notice was given on two occasions: before the contract for the Machine [*Cl. Ex. No. 3*] and on 8 July 2002 once discovering the non-conformity of the Machine [*Procedural Order No. 2, q. 18*].

4.4.3 The Claimant attempted to acquire a replacement flexoprint machine

3. The courts have identified the purchase of substitute goods as a reasonable mitigating measure [*UNCITRAL Digest, Art. 77, para. 8*]. The Claimant made efforts to purchase a replacement flexoprint machine immediately after discovering that the Machine was unsuitable for its needs; but as the uncontested facts reveal, it was not possible to make the purchase (within seven days) in time to meet the deadline with Oceania Confectionaries [*Procedural Order No. 2, q. 18*]. Given the difficulty of finding another seller to deliver a conforming flexoprint machine before 15 July 2002 the Claimant's attempt to locate alternative buyers satisfied its duty to mitigate [*Schiedsgericht der Handelskammer Hamburg, Germany, 21 June 1996*]. The only reason Reliable Printers was able to secure a flexoprint machine so quickly was because of its preliminary agreement with a seller which it executed after gaining knowledge of the Respondent's breach [*Procedural Order No. 2, q. 22*].

4.4.4 The Claimant attempted to fix the defective Machine

4. A party must take such measures as are reasonable in the circumstances and according to what can be "expected in good faith" [*OGH, Austria, 6 February 1996*], and thus courts have found that a buyer should attempt to use the defective goods if possible [*UNCITRAL Digest,*

Art. 77, para. 8]. After discovering it would be impossible to replace the Machine in time to meet its obligations with Oceania Confectionaries, the Claimant attempted to make use of the Machine by asking the Respondent's foreman to attempt to adjust the thickness settings [*Procedural Order No. 2, q. 18*]. The Respondent's foreman agreed to attempt to change the Machine's settings, and on 15 July 2002 he told the Respondent that he still believed it was possible, although he was beginning to have doubts [*Resp. Ex. No. 2*]. The Respondent's workers continued their attempts until the time of the cancellation of the Oceania Confectionaries contract [*Cl. Ex. No. 10*]. Their actions indicate that the Claimant's request at that time was a reasonable one and furthers that this claim is both actionable and proper.

SECTION 5. REQUEST FOR RELIEF

THE CLAIMANT RESPECTFULLY REQUESTS THAT THE ARBITRAL TRIBUNAL:

- DECLARE that the period of limitation (prescriptive period) did not expire before the commencement of this arbitration, making this claim actionable;
- DECLARE that the Respondent did not deliver goods in conformity with description in the Contract;
- Alternatively, DECLARE that the Respondent did not deliver goods fit for the purpose of printing on 8 micrometer foil despite the Respondent's knowledge of this requirement before the conclusion of the Contract;
- FIND that the Claimant's loss was foreseeable by the Respondent before the breach occurred;
- FIND that the Claimant took reasonable steps to mitigate its loss.
- AWARD the Claimant \$3,295,000USD as outlined in the Memorandum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8TH DAY OF DECEMBER, 2005

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