

FOURTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA - 30 MARCH TO 5 APRIL 2007

MEMORANDUM FOR CLAIMANT



ALBERT-LUDWIGS-UNIVERSITÄT FREIBURG

ON BEHALF OF:

AGAINST:

EQUATORIANA OFFICE SPACE LTD.
415 CENTRAL BUSINESS CENTRE
OCEANSIDE
EQUATORIANA

MEDITERRANEO ELECTRODYNAMICS S.A.
23 SPARKLING LANE
CAPITOL CITY
MEDITERRANEO

CLAIMANT

RESPONDENT

COUNSELS:

FLORIAN DRESSEL · CLARA GOETHE · BENJAMIN HERZBERG
INDRA V. MIRBACH · KALINA PENEVA · CHRISTIAN SCHMOLLINGER
DAVID TEBEL · OLIVER UNGER · DIRK WIEGANDT



TABLE OF CONTENTS

INDEX OF ABBREVIATIONS	V
INDEX OF AUTHORITIES.....	X
INDEX OF CASES	IXX
INDEX OF AWARDS	XXII
STATEMENT OF FACTS.....	1
ARGUMENT TO THE PROCEDURAL ISSUE	2
ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION	2
A. The Arbitral Tribunal has jurisdiction based on the parties' arbitration agreement leading to institutionalised proceedings under the RA-CAB.....	2
I. The parties validly agreed on arbitration	2
II. The parties agreed on the application of the RA-CAB.....	3
a. An interpretation of the term "International Arbitration Rules used in Bucharest" demonstrates that the parties agreed on the RA-CAB	4
aa. The reference to "Rules used in Bucharest" reveals the parties' intent to arbitrate under rules with a specific link to Bucharest, i.e. the RA-CAB.....	4
bb. The corresponding wordings of clause 34 and the RA-CAB Model Clause reveals the parties' intent to arbitrate under the RA-CAB.....	5
cc. The reference to "International Arbitration Rules" does not confute the parties' intent to arbitrate under the RA-CAB	6
dd. The fact that CLAIMANT drafted the arbitration clause does not call for an interpretation against CLAIMANT	7
b. The parties did not intend to apply the UNCITRAL Arbitration Rules by virtue of Art. 72(2) RA-CAB	7
B. Alternatively, the Arbitral Tribunal has jurisdiction based on the arbitration agreement and the application of the UNCITRAL Model Law in an <i>ad hoc</i> arbitration	8
I. Any alleged failure to designate a specific set of arbitration rules would not invalidate the parties' common intent to arbitrate.....	9
II. The arbitration clause is operable under the UNCITRAL Model Law	10
Result of Issue 1	11



ARGUMENT TO THE SUBSTANTIVE ISSUES.....	12
LAW APPLICABLE TO THE MERITS OF THE DISPUTE.....	12
ISSUE 2: RESPONDENT DID NOT DELIVER FUSE BOARDS IN CONFORMITY WITH ITS OBLIGATIONS UNDER THE CONTRACT DATED 12 MAY 2005 ...	12
A. RESPONDENT breached the contract by not delivering fuse boards containing JP type fuses	13
I. The contract called for fuse boards containing JP type fuses	13
II. By delivering fuse boards containing JS type fuses RESPONDENT breached the contract.....	13
B. RESPONDENT breached the contract by not delivering fuse boards “lockable to Equalec requirements”	14
I. RESPONDENT breached the contract under Art. 35(1) CISG.....	14
a. The parties agreed on the delivery of fuse boards “lockable to Equalec requirements”	14
aa. The note “lockable to Equalec requirements” was made part of the contract.....	15
bb. RESPONDENT had to deliver fuse boards which would actually be connected to the electrical grid by Equalec.....	16
b. The delivered fuse boards did not conform to the parties’ agreement	17
II. Alternatively, RESPONDENT breached the contract under Art. 35(2)(b) CISG...	17
a. CLAIMANT made known the particular purpose of the fuse boards.....	18
b. CLAIMANT reasonably relied on RESPONDENT’s skill and judgement	19
Result of Issue 2	21
ISSUE 3: RESPONDENT’S CONTRACTUAL OBLIGATIONS WERE NOT MODIFIED	22
A. The contract was not validly modified on 14 July 2005.....	22
I. The substitution of JP with JS type fuses would have required a modification of the contract.....	22
II. The contract was not modified due to Mr. Hart’s lack of power of representation.....	22
a. Mr. Hart had no power of representation	23
b. CLAIMANT is not precluded from invoking Mr. Hart’s lack of authority	23



III. The contract was not modified due to the lack of written form	23
a. The parties did not comply with the requirement of written form	24
b. CLAIMANT is not precluded from invoking the lack of a written modification.....	24
aa. The telephone conversation of 14 July 2005 does not preclude CLAIMANT from invoking the requirement of written form	24
bb. CLAIMANT's inactivity subsequent to 14 July 2005 does not preclude CLAIMANT from invoking the requirement of written form.....	25
cc. Taking delivery and making payment does not preclude CLAIMANT from invoking the requirement of written form.....	26
B. Any alleged modification did not have discharge RESPONDENT from its obligation to deliver fuse boards "lockable to Equalec requirements"	27
Result of Issue 3	28
ISSUE 4: CLAIMANT'S OMISSION TO FILE A COMPLAINT ABOUT EQUALEC'S POLICY DOES NOT EXCUSE RESPONDENT'S FAILURE TO DELIVER GOODS CONFORMING TO THE CONTRACT.....	29
A. CLAIMANT's omission to file a complaint does not exempt RESPONDENT from its liability under Art. 80 CISG	29
I. CLAIMANT's omission to file a complaint with the EERC did not cause RESPONDENT's failure to deliver fuse boards containing JP type fuses	29
II. CLAIMANT's omission to file a complaint with the EERC did not cause RESPONDENT's failure to deliver fuse boards "lockable to Equalec requirements"	30
B. CLAIMANT's omission to file a complaint does not constitute a breach of CLAIMANT's duty to mitigate under Art. 77 CISG to mitigate the loss	30
I. Requiring CLAIMANT to complain to the EERC is unreasonable since it would inappropriately reverse the parties' contractual obligations	31
II. A complaint was not reasonable since the proceedings would have lasted too long and the amount of damages would have increased	31
III. A complaint was not reasonable since its prospects of success were highly uncertain.....	32



a. The policy was put into place two years ago and has not been challenged since.....	33
b. The policy serves a legitimate purpose	33
c. Art. 14 and 15 EESRA provide Equalec with discretionary power which has not been obviously exceeded.....	33
Result of Issue 4	35
REQUEST FOR RELIEF	35
CERTIFICATE	XXV



INDEX OF ABBREVIATIONS

\$	Dollar(s)
AG	Amtsgericht (German Local Court)
Am. J. Comp. L.	American Journal of Comparative Law
Arb. Int'l.	Arbitration International
Art.	Article
BLP	Schiedsgericht der Börse für Landwirtschaftliche Produkte, Vienna
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
CA	Cour d'Appel (French Court of Appeal)
CCIR	Chamber of Commerce and Industry of Romania
Cf.	Confer
CICA	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
Circ.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods



Clunet	Journal du Droit International
Cornell Int'l L.J.	Cornell International Law Journal
E.D.L.A.	Eastern District of Los Angeles
E.D.La.	Eastern District of Louisiana
E.D.N.Y.	Eastern District of New York
EERC	Equatoriana Electrical Regulatory Commission
EESRA	Equatoriana Electrical Service Regulatory Act
e.g.	exempli gratia
emph. add.	emphasis added
et seq.	et sequentes (and following)
FDA	United States Food and Drug Administration
Geneva Convention	Geneva Convention on Agency in the International Sale of Goods (17 February 1983)
H. L.	House of Lords
HGB	Handelsgesetzbuch (German Commercial Code)
ibid	ibidem (the same)
ICC	International Chamber of Commerce
I.C.L.Q.	International & Comparative Law Quarterly



ICSID	International Centre for the Settlement of Investment Disputes
i.e.	id est
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
J. Int'l Arb.	Journal of International Arbitration
JZ	Juristenzeitung
LCIA	London Court of International Arbitration
Louisiana L. Rev.	Louisiana Law Review
Ltd.	Limited
MHz. Std.	Mega Hertz Standard
mm	millimeter
MüKoBGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
MüKoHGB	Münchener Kommentar zum Handelsgesetzbuch
N.D.Cal.	Northern District of California
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
No.	Number



N.Y.A.D.	New York Appellate Division
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Upper Regional Court)
p.	page
para.	paragraph
P.O.	Procedural Order
pp.	pages
Q.B.D.	Queen's Bench Division
RA-CAB	Rules of Arbitration recommended by the Chamber of Commerce and Industry of Romania
RIW	Recht der internationalen Wirtschaft
S.A.	Société Anonyme (French Joint Stock Company) Sociedad Anónima (Spanish Joint Stock Company)
S.a.r.l.	Société à responsabilité limitée (Limited Liability Company)
S.p.a.	Società per azioni (Italian Joint Stock Company)
SCC	Stockholm Chamber of Commerce
SchiedsVZ	Die neue Zeitschrift für Schiedsverfahren



S.D.N.Y.	Southern District of New York
Supr. Ct.	Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
U.S. Circ. Ct.	United States Circuit Court
U.S. Ct. App.	United States Court of Appeals
U.S. Dist. Ct.	United States District Court
v.	versus
VJ	Vindobona Journal



- Achilles, Wilhelm
Albrecht** Kommentar zum UN-Kaufrechtsübereinkommen (CISG)
Luchterhand, Neuwied 2000
cited as: *Adilles*
- Audit, Bernard** La vente internationale de marchandises: convention des
Nations-Unis du 11 avril 1980
L.G.D.J., Paris 1990
cited as: *Audit*
- Bamberger, Heinz Georg
Roth, Herbert** Kommentar zum Bürgerlichen Gesetzbuch, Band 3
C.H. Beck, Munich 2005
cited as: *Bamberger/ Roth/ author*
- Berger, Klaus Peter** Set-Off in International Economic Arbitration
in: *Arbitration International* 1999, pp. 53-84
cited as: *Berger, Arb. Int'l 1999*
- Berger, Klaus Peter** Internationale Wirtschaftsschiedsgerichtsbarkeit
Walter de Gruyter, Berlin 1992
cited as: *Berger*
- Berger, Klaus Peter** Arbitration Interactive
Peter Lang, Frankfurt am Main 2002
cited as: *Berger, Arbitration Interactive*
- Berglin, Hakan** The Iranian Forum Clause decisions of the Iran-
United States Claims Tribunal
in: *Arbitration International* 1987, pp. 46-71
cited as: *Berglin, Arb. Int'l 1987*
- Bertrams, Roeland
Velden, Frans van der** Overeenkomsten in het internationaal privaatrecht en het
Weense Koopverdrag
Tjeenj Willink, Zwolle 1994
cited as: *Bertrams/ van der Velden*
- Bianca, Cesare M.
Bonell, Michael J.** Commentary on the international Sales Law: the 1980
Vienna Sales Convention
Giuffrè, Milan 1987
cited as: *Bianca/ Bonell/ author*
- Born, Gary B.** International Commercial Arbitration: Commentary and
Materials, 2nd Edition
Ardsley, New York 2001
cited as: *Born*



- Chengwei, Liu** Remedies for Non-Performance
available at: <http://www.cisg.law.edu/cisg/biblio/chengwei-74.html>
cited as: *Chengwei, Remedies*
- Conrad, Peter** Die Lieferung mangelhafter Ware als Grund für eine Vertragsaufhebung im einheitlichen UN-Kaufrecht (CISG)
Schulthess, Zurich 1999
cited as: *Conrad*
- Craig, Laurence Park
William Paulsson, Jan** International Chamber of Commerce Arbitration, 3rd Edition
Oceana Publications, Paris/New York 2000
cited as: *Craig/ Park/ Paulsson*
- Davis, Benjamin G.** Pathological Clauses: Frédéric Eisemann's Still Vital Criteria
in: *Arbitration International* 1991, pp. 365-388
cited as: *Davis, Arb. Int'l* 1991
- Enderlein, Fritz
Maskow, Dietrich
Strohbach, Heinz** Internationales Kaufrecht
Haufe, Berlin 1991
cited as: *Enderlein/ Maskow/ Strohbach*
- Fouchard, Philippe
Gaillard, Emmanuel
Goldman, Berthold** International Commercial Arbitration
Kluwer Law International, The Hague 1999
cited as: *Fouchard/ Gaillard/ Goldman*
- Fox, Thomas** Das Wiener Kaufrechtsübereinkommen: ein Vergleich zum italienischen und deutschen Recht
Rechtswissenschaftl. Forschung und Entwicklung, Vol. 447
Munich 1994
cited as: *Fox*
- Gabriel, Henry** Practitioner's Guide to The Convention on Contracts for the International Sale of Goods (CISG) and The Uniform Commercial Code (UCC)
Oceana Publications, New York 1994
cited as: *Gabriel*
- Hackney, Philip** Is the United Nations on the International Sale of Goods Achieving Uniformity?
in: *Louisiana Law Review* 2001, pp. 473-486
cited as: *Hackney, Louisiana L.Rev.* 2001
- Haraszti, Györgi** Some fundamental problems on the law of treaties
Akad. Kiado., Budapest 1973
cited as: *Haraszti*



- Heilmann, Jan** Mängelgewährleistung im UN-Kaufrecht: Voraussetzungen und Rechtsfolgen im Vergleich zum deutschen internen und zu den Haager Einheitlichen Kaufgesetzen
Duncker & Humblot, Berlin 1994
cited as: *Heilmann*
- Herber, Rolf
Czerwenka, Beate** Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf
C.H. Beck, Munich 1991
cited as: *Herber/ Czerwenka*
- Hillman, Robert A.** Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of “No Oral Modification” Clauses
in: Cornell International Law Journal 1988, pp. 449-466
cited as: *Hillman, Cornell Int’l L.J. 1988*
- Hochbaum, Johann-Friedrich** Missglückte internationale Schiedsvereinbarungen: Zweckverfehlung bei internationalen Schiedsvereinbarungen nach deutschem Recht
Recht und Wirtschaft, Heidelberg 1995
cited as: *Hochbaum*
- Honsell, Heinrich** Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)
Springer, Berlin 1997
cited as: *Honsell/ author*
- Hoyer, Hans
Posch, Willibald** Das Einheitliche Wiener Kaufrecht
Wirtschaftsverlag Dr. Anton Orac, Vienna 1992
cited as: *Hoyer/ Posch/ author*
- Hußlein-Stich, Gabriele** Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit
Carl Heymanns, Cologne 1990
cited as: *Hußlein-Stich*



- Hyland, Robert** Conformity Of Goods To The Contract Under The United Nations Sales Convention and The Uniform Commercial Code
in: Schlechtriem, Peter. Einheitliches Kaufrecht und Nationales Obligationenrecht: Referate und Diskussionen der Fachtagung Einheitliches Kaufrecht
Nomos, Baden-Baden 1987
cited as: *Hyland*
- Jarvin, Sigvard** Observations to ICC Award No. 4472
in: Journal du Droit International (Clunet) 1987, pp. 1051-1054
cited as: *Jarvin, Clunet 1987*
- Karollus, Martin** UN-Kaufrecht: eine systematische Darstellung für Studium und Praxis
Springer, Vienna/Heidelberg 1991
cited as: *Karollus*
- Kaufmann-Kohler, Gabrielle** Identifying and applying the law governing the arbitration procedure – the role of the law of the place of arbitration
in: ICCA Congress Series No. 9, pp. 336-365
Paris, 1999
cited as: *Kaufmann-Kohler, ICCA Congress 1999*
- Kern, Christoph** Les droits de rétention dans la Convention de Vienne
in Meyer, Rudolf; Falck, Andreas von; Rudolf Meyer zum Abschied
Unité de droit allemand, Geneva 1999
cited as: *Kern, Rudolf Meyer zum Abschied*
- Kircher, Wolfgang** Die Voraussetzungen der Sachmängelhaftung beim Warenkauf
Mohr Siebeck, Tübingen 1998
cited as: *Kircher*
- Kritzer, Albert H.** Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods
Kluwer Law and Taxation, Boston 1989
cited as: *Kritzer*
- Lachmann, Jens-Peter** Klippen für die Schiedsvereinbarung
in: Die neue Zeitschrift für Schiedsverfahren 2003, pp. 28-33
cited as: *Lachmann, SchiedsVZ 2003*



- Lando, Ole** CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law
in: American Journal of Comparative Law 2005,
pp. 379- 401
cited as: *Lando, Am. J. Comp. L. 2005*
- Lionnet, Klaus**
Lionnet, Annette Handbuch der internationalen und nationalen
Schiedsgerichtsbarkeit, 3rd Edition
Richard Boorberg, Stuttgart 2005
cited as: *Lionnet/ Lionnet*
- Lookofsky, Joseph M.** Understanding the CISG in the USA: a compact guide to the
1980 United Nations Convention on Contracts for the
International Sale of Goods
Kluwer Law International, Den Haag 1995
cited as: *Lookofsky*
- Neumayer, Karl H.**
Ming, Catherine Convention de Vienne sur les Contrats de Vente
Internationale de Marchandises
CEDIDAC, Lausanne 1993
cited as: *Neumayer/ Ming*
- Okekeifere, Andrew I.** Commercial Arbitration as the Most Effective Dispute
Resolution Method: Still a Fact or Now a Myth?
in: Journal of International Arbitration 1998, pp. 81-106
cited as: *Okekeifere, J. Int'l Arb. 1998*
- Park, William** The lex loci arbitri and International Commercial Arbitration
in: Int. & Comparative Law Quarterly 1983, pp. 21-52
cited as: *Park, I.C.L.Q. 1983*
- Piltz, Burghard** Internationales Kaufrecht: Das UN-Kaufrecht (Wiener
Übereinkommen von 1980) in praxisorientierter Darstellung
C.H. Beck, Munich 1993
cited as: *Piltz*
- Redfern, Alan**
Hunter, Martin Law and Practice of International Commercial Arbitration,
4th Edition
Sweet & Maxwell, London 2004
cited as: *Redfern/ Hunter*
- Reinhart, Gert** UN-Kaufrecht: Kommentar zum Übereinkommen der
Vereinten Nationen vom 11. April 1980 über Verträge über
den internationalen Warenkauf
C.F. Müller, Heidelberg 1991
cited as: *Reinhart*



- Roßmeier, Daniela** Schadensersatz und Zinsen nach UN-Kaufrecht - Art. 74 bis 78 CISG
in: Recht der internationalen Wirtschaft 2000, pp. 407-415
cited as: *Roßmeier, RIW 2000*
- Saidov, Djankhongir** Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods
available at: <http://www.cisg.law.pace.edu/cisg/biblio/saidov.html>
cited as: *Saidov, Limiting Damages*
- Sanders, Pieter** International Encyclopaedia of Comparative Law
Volume XVI, Chapter 12, Arbitration
Mohr, Tübingen 1996
cited as: *Sanders*
- Schäfer, Frederike** Commentary on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 80 of the CISG
available at:
<http://www.cisg.law.pace.edu/cisg/principles/uni80.html>
cited as: *Schäfer*
- Schlechtriem, Peter** Vertragsmäßigkeit der Ware als Frage der Beschaffenheitsvereinbarung
in: Praxis des Internationalen Privat- und Verfahrensrechts 1996, pp. 12- 16
cited as: *Schlechtriem, IPRax 1996*
- Schlechtriem, Peter** Anmerkung zu BGH 2 März 2005 - VIII ZR 67/04
in: Juristenzeitung 2005, pp. 846- 848
cited as: *Schlechtriem, JZ 2005*
- Schlechtriem, Peter** Einheitskaufrecht in der Rechtsprechung des Bundesgerichtshofs
in: 50 Jahre BGH: Festgabe aus der Wissenschaft
cited as: *Schlechtriem, 50 Jahre BGH*
- Schlechtriem, Peter** Internationales UN-Kaufrecht, 3rd Edition
Mohr Siebeck, Tübingen 2005
cited as: *Schlechtriem*



- Schlechtriem, Peter** Noch einmal: Vertragsgemäße Beschaffenheit der Ware bei divergierenden öffentlich-rechtlichen Qualitätsvorgaben in Praxis des Internationalen Privat- und Verfahrensrechts 2001, pp. 161- 163
cited as: *Schlechtriem, IPRax 2001*
- Schlechtriem, Peter** Vertragsmäßigkeit der Ware und öffentlich-rechtliche Vorgaben
in: Praxis des Internationalen Privat- und Verfahrensrechts 1999, pp. 388- 390
cited as: *Schlechtriem, IPRax 1999*
- Schlechtriem, Peter** Damages, avoidance of the contract and performance interest under the CISG
available at:
http://www.cisg-online.ch/cisg/Schlechtriem_Damages_Avoidance.pdf
cited as: *Schlechtriem, Damages*
- Schlechtriem, Peter
Schwenzer, Ingeborg** Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd Edition
Oxford University Press, Oxford 2005
cited as: *Schlechtriem/ Schwenzer/ author (E)*
- Schlechtriem, Peter
Schwenzer, Ingeborg** Kommentar zum Einheitlichen UN-Kaufrecht, 4th Edition
Ch. Beck, Munich 2004
cited as: *Schlechtriem/ Schwenzer/ author*
- Schmidt, Karsten** Münchener Kommentar zum Handelsgesetzbuch, Vol. 6
C.H. Beck, Munich 2004
cited as: *MiKoHGB/ author*
- Schroeter, Ulrich G.** Freedom of Contract: Comparison between Provisions of the CISG (Art. 6) and Counterpart Provisions of the Principles of European Contract Law
in: Vindobona Journal of International Law and Arbitration 2002, pp. 257-266
cited as: *Schroeter, VJ 2002*
- Soergel, Hans Th.
Stein, Ursula** Kommentar zum Bürgerlichen Gesetzbuch
Kohlhammer, Stuttgart 2000
cited as: *Soergel/ author*
- Staudinger, Julius von** Kommentar zum Bürgerlichen Gesetzbuch, CISG
de Gruyter, Berlin 2005
cited as: *Staudinger/ author*



- Stern, Elisabeth** Erklärungen im UNCITRAL-Kaufrecht
Manz, Vienna 1990
cited as: *Stern*
- Su, Yingxia** Die vertragsgemäße Beschaffenheit der Ware im
UNCITRAL-Kaufrecht im Vergleich zum deutschen und
chinesischen Recht
Lit Verlag, Münster 1996
cited as: *Su*
- Sykes, Andrew** The Contra Proferentem Rule and the Interpretation of
International Commercial Arbitration Agreements – the
Possible Uses and Misuses of a Tool for Solutions to
Ambiguities
in: *Vindobona Journal of Commercial Law & Arbitration*
2004, pp. 65-79
cited as: *Sykes, VJ 2004*
- Tallon, Denis** The Buyer's Obligations under the Convention on Contracts
for the International Sale of Goods
in: Nina Galston (ed.), *International Sales: The United
Nations Convention on Contracts for the International Sale
of Goods*
Bender, New York 1984
cited as: *Tallon, International Sales*
- United Nations** United Nations Conference On Contracts For The
International Sale of Goods
United Nations Publication, New York 1981
cited as: *Official Records*
- Wasmer, Wolfgang** Vertragsfreiheit im UN-Kaufrecht
Dr. Kovač, Hamburg 2004
cited as: *Wasmer*
- Weigand, Frank-Bernd** Practitioner's Handbook on International Arbitration
C. H. Beck Munich, DJOF Copenhagen, 2002
cited as: *Weigand*
- Westermann, Harm
Peter** Münchener Kommentar zum Bürgerlichen Gesetzbuch,
Vol. 3, 4th Edition
C.H. Beck, Munich 2005
cited as: *MiKoBGB/ author*



Witz, Wolfgang
Salger, Hanns-Christian
Lorenz, Manuel

International Einheitliches Kaufrecht
Recht der Wirtschaft, Heidelberg 2000
cited as: *Witz/ Salger/ Lorenz/ author*

Zeller, Bruno

Comparison between the provisions of the CISG on mitigation of losses (Art. 77) and the counterpart provisions of PECL (Art. 9:505)
in: Ole Lando & Hugh Beale (ed.), Principles of European Contract Law: Parts I and II, pp. 445-448
Kluwer Law International, Den Haag 2000
cited as: *Zeller*

Zeller, Bruno

Four Corners – The Methodology for Interpretation and Application of the UN-Convention on Contracts for the International Sale of Goods
available at: <http://cisgw3.law.pace.edu/cisg/biblio/4corners.html>
cited as: *Zeller, Four Corners*



INDEX OF CASES

Austria

Oberster Gerichtshof, 12 February 1998
CISG-online No. 349
cited as: *OGH, 12 Feb 1998*

Oberster Gerichtshof, 20 March 1997
CISG-online No. 269
cited as: *OGH, 20 Mar 1997*

Oberster Gerichtshof, 6 February 1996
CISG-online No. 224
cited as: *OGH, 6 Feb 1996*

Belgium

Rechtbank van Koophandel Veurne, 25 April 2001
CISG-online No. 765
cited as: *RB Veurne, 25 Apr 2001*

France

Cour d'Appel Paris, 6 November 2001
CISG-online No. 677
cited as: *CA Paris, 6 Nov 2001*

Germany

Bundesgerichtshof, 25 June 1997
CISG-online No. 277
cited as: *BGH, 25 Jun 1997*

Bundesgerichtshof, 8 March 1995
CISG-online No. 144
cited as: *BGH, 8 Mar 1995*

Oberlandesgericht Braunschweig, 28 October 1999
CISG-online No. 510
cited as: *OLG Braunschweig 28 Oct 1999*

Amtsgericht München, 23 June 1995
CISG-online No. 368
cited as: *AG München, 23 Jun 1995*



Great Britain

Armagas Ltd. v. Mundogas S.A. (The "Ocean Frost"), 22 May 1986
House of Lords
[1986] 2 Lloyd's Law Rep. 109
cited as: *Armagas v. Mundogas, H.L.*

Mangistaumunaigaz Oil Production Assoc. v. United World Trade Inc., 21 February 1995,
Queen's Bench Division
[1995] 1 Lloyd's Law Rep. 617
cited as: *Mangistaumunaigaz Oil Production Assoc. v. United World Trade Inc., Q.B.D.*

Suncorp Insurance and Finance v. Milano Assicurazioni S.p.a., 1 March 1993, Queen's Bench
Division (Commercial Court)
[1993] 2 Lloyd's Law Rep. 225
cited as: *Suncorp Insurance and Finance v. Milano Assicurazioni, Q.B.D.*

Italy

Federal Commerce & Navigation Co. Ltd. v. Giuseppe Rocco, 22 March 1980
Corte di Appello of Naples
Yearbook of Commercial Arbitration, Vol. VIII, pp. 380 - 381
cited as: *Corte di Appello of Naples, 22 Mar 1980*

Switzerland

Bundesgericht, 22 December 2000
CISG-online No. 628
cited as: *Bundesgericht, 22 Dec 2000*

United States of America

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 23 February 1983
U.S. Supr. Ct.
460 U.S. 1, 24
cited as: *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., Supr. Ct.*

Laboratorios Grossman S.A. v. Forest Laboratories Inc., 19 December 1968
Supr. Ct. N.Y. App. Div. (1st Dep.)
31 A.D.2d 628
cited as: *Laboratorios Grossman S.A. v. Forest Laboratories Inc., Supr. Ct. (N.Y.A.D.)*

Delma Engineering Corp. v. K & L Construction Co., 20 November 1958
Supr. Ct. N.Y. App. Div.
181 N.Y.S.2d 794
Cited as: *Delma Engineering Corp. v. K & L Construction Co., Supr. Ct. (N.Y.A.D.)*



Schmitz-Werke Gmbh & Co. v. Rockland Industries Inc., 21 June 2002

U.S. Ct. App. (4th Circ.)

CISG-online No. 625

cited as: *Schmitz-Werke v. Rockland Industries*, U.S. Ct. App. (4th Circ.)

Hannex Corp. v. GMI Inc., 25 March 1998

U.S. Ct. App. (2nd Circ.)

140 F.3d 194

cited as: *Hannex Corp. v. GMI Inc.*, U.S. Ct. App. (2nd Circ.)

Interocean Shipping Co. v. National Shipping & Trading Corp., 23 June 1973

U.S. Ct. App. (2nd Circ.)

462 F.2d 673

cited as: *Interocean Shipping Co. v. National Shipping & Trading Corp.*, U.S. Ct. App. (2nd Circ.)

Almacenes Fernandez S.A. v. Golodetz et al., 10 April 1945

U.S. Ct. App. (2nd Circ.)

148 F.2d 625

cited as: *Almacenes Fernandez S.A. v. Golodetz et al.*, U.S. Ct. App. (2nd Circ.)

Asante Technologies Inc. v. PMC-Sierra Inc., 20 July 2001

U.S. Dist. Ct. N.D.Cal.

164 F.Supp.2d 1142

cited as: *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, U.S. Dist. Ct. (N.D.Cal.)

Medical Marketing International Inc. v. Internazionale Medico Scientifica S.R.L., 17 May 1999,

U.S. Dist. Ct. E.D.La

Source: 1999 WL 311945

cited as: *Medical Marketing International Inc. v. Internazionale Medico Scientifica S.R.L.*, U.S. Dist. Ct. (E.D.La)

Graves Import Company Ltd. and Italian Trading Company v. Chilewich International Corporation, 22. September 1994,

U.S. Dist. Ct. S.D.N.Y.

CISG-online No. 128

cited as: *Graves Import Company Ltd. and Italian Trading Company v. Chilewich International Corporation*, U.S. Dist. Ct. (S.D.N.Y.)

Oriental Commercial and Shipping Co. v. Rosseel N.V., 9 May 1989

U.S. Dist. Ct. S.D.N.Y.

125 F.R.D. 398

cited as: *Oriental Commercial and Shipping Co. v. Rosseel N.V.*, U.S. Dist. Ct. (S.D.N.Y.)

Astra Footwear Industry v. Harwyn International INC., 10 January 1978

U.S. Dist. Ct. S.D.N.Y.

442 F.Supp.907

cited as: *Astra Footwear Industry v. Harwyn International INC.*, U.S. Dist. Ct. (S.D.N.Y.)



INDEX OF AWARDS

Arbitration Court of the German Coffee Association

Panamanian buyer v. Papua New Guinean seller,
28 September 1992
Rechtsprechung kaufmännischer Schiedsgerichte Vol. 5, Sect. 3B
cited as: *German Coffee Association, 28 September 1992*

Court of Arbitration at the Bulgarian Chamber of Commerce and Industry

Bulgarian Sport Organisation v. Greek Sports Organisation, 3 December 1984
Award No. 151/1984
Yearbook of Commercial Arbitration, Vol. XV, p. 63
cited as: *Bulgaria Court of Arbitration, Award No. 151*

Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

German Exporter (seller) v. Romanian Foreign Trade Company (buyer), 24 June 1977
Yearbook of Commercial Arbitration, Vol. XIII, pp. 164 - 165
cited as: *CCIR, 24 Jun 1977*

Romanian agency v. French firm, 21 January 1983
Award No. 4/1983
Yearbook of Commercial Arbitration, Vol. XIV, pp. 191 – 193
cited as: *CCIR Award No. 4/1983*

Agent (Romania) v. Seller (nationality not indicated), 30 September 1993
Award No. 33/1993
Yearbook of Commercial Arbitration, Vol. XXII, pp. 113 - 127
cited as: *CCIR Award No. 33/1993*

International Chamber of Commerce

National Enterprise v. Company (Canada/UK) (1975)
Award No. 1434
Journal du Droit International 1976, pp. 978 – 989
cited as: *ICC Award No.1434*

Transporter (France) v. Enterprise (UK) (1975)
Award No. 2291
Journal du Droit International 1976, pp. 989 – 992
cited as : *ICC Award No.2291*



Solel Boneh (Israel) v. Republic of Uganda (1974)
Award No. 2321
JDI 1975, pp. 938 – 944
cited as: *ICC Award No.2321*

Claimant (Germany) v. Defendant (Germany) (1984)
Award No. 4472
JDI 1984, pp. 946 – 950
cited as: *ICC Award No.4472*

Société Dattel-Productions (France) v. King Productions SARL (France) (1987)
Award No. 5423
JDI 1987, pp. 1048 – 1054
cited as : *ICC Award No.5423*

Licensor (Germany) v. Licensee (France) (1992)
Award No. 6709
JDI 1992, pp. 998 – 1005
cited as: *ICC Award No.6709*

Parties unknown, 1 January 1995
Award No. 7754
CISG-online No.834
cited as: *ICC Award No.7754*

Seller (Russian Federation) v. Buyer (Canada), 1 March 1998
Award No. 9117
CISG-online No.777
cited as: *ICC Award No.9117*

Seller (unknown) v. Buyer (Germany), 1 June 1999
Award No. 9187
CISG-online No. 705
cited as: *ICC Award No.9187*

International Centre for Settlement of Investment Disputes

Amco Asia Corporation, Pan American Development Limited, PT Amco Indonesia v. Republic of Indonesia, 10 October 1990
Case No. ARB/81/1
WL 10095695 (APPAWD)
cited as: *ICSID Case No. ARB/ 81/1*

Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich

Australian seller v. German Buyer, 15 June 2004
SCH-3418
CISG-online No. 120
cited as: *Arbitral Tribunal Vienna, 15 Jun 2004*



Schiedsgericht der Börse für Landwirtschaftliche Produkte, Vienna

Seller (Austria) v. Buyer (Poland), 10 December 1997
S 2/97
CISG-online No. 351
cited as: *BLP Vienna, 10 Dec 1997*

Zurich Chamber of Commerce

Seller (Europe) v. Buyer (Canada/China), 25 November 1994
Bulletin of the Swiss Arbitration Association (1996), pp. 303 - 318
cited as: *Zurich Chamber of Commerce, 25 Nov 1994*

**STATEMENT OF FACTS**

- CLAIMANT** Equatoriana Office Space Ltd. (hereinafter referred to as “CLAIMANT”) is a developer of residential and business properties. Its principle office is located in Equatoriana.
- RESPONDENT** Mediterraneo Electrodynamics S.A. (hereinafter referred to as “RESPONDENT”) is a fabricator and distributor of electrical equipment. Its principal office is located in Mediterraneo.
- 4 May 2005** RESPONDENT receives a purchase order from CLAIMANT for five distribution fuse boards to be installed at a new development in the city of Mountain View, Equatoriana. RESPONDENT sends a complete but unsigned contract to CLAIMANT. The contract provides that any amendment shall be in writing.
- 12 May 2005** The contract is sent back by CLAIMANT. It includes a substituted arbitration clause and RESPONDENT signs the contract. Detailed engineering drawings are attached to the contract providing that the fuse boards are to be equipped with JP type fuses and are to be “lockable to Equalec requirements”.
- 14 July 2005** Mr. Stiles, RESPONDENT’s Sales Manager, informs Mr. Hart, an employee in CLAIMANT’s Purchasing Department, that RESPONDENT is incapable of delivering the fuse boards equipped with JP type fuses. Mr. Stiles proposes the replacement of the JP type fuses with JS type fuses. Mr. Hart orally accepts the proposal, yet anticipating a written confirmation.
- 22 August 2005** RESPONDENT delivers fuse boards with JS type fuses.
- 24 August 2005** CLAIMANT pays the purchase price.
- 8 September 2005** The local electrical supply distribution company Equalec refuses to lock the fuse boards to the electrical grid because fuse boards containing JS type fuses do not meet its safety standards.
- 9 September 2005** CLAIMANT informs RESPONDENT of Equalec’s refusal to connect. Since RESPONDENT is incapable of delivering JP type fuse boards, CLAIMANT makes a substitute purchase in the amount of \$180,000. The additional costs for installing new fuse boards amount to \$20,000.
- 15 August 2006** CLAIMANT submits a request for arbitration to the Chamber of Commerce and Industry of Romania located in Bucharest.



ARGUMENT TO THE PROCEDURAL ISSUE

ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION

- 1 The Arbitral Tribunal is requested to find that it has jurisdiction under the arbitration clause contained in the contract of 12 May 2005 [*CLAIMANT'S EXHIBIT NO.1*].
- 2 The Arbitral Tribunal has authority to decide on its own jurisdiction. Danubia, the chosen seat of arbitration, has adopted the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as "UNCITRAL Model Law") [*STATEMENT OF CLAIM, PARA.21*]. Since the arbitration is governed by the law of the seat of the arbitral tribunal [*BORN, P.573*], the UNCITRAL Model Law applies as the *lex loci arbitri*. Pursuant to Art. 16(1) UNCITRAL Model Law "the tribunal may rule on its own jurisdiction, including any objections with respect to [...] the arbitration agreement". Thus, the Arbitral Tribunal has competence-competence.
- 3 It will be demonstrated that the Arbitral Tribunal has jurisdiction based on the parties' arbitration agreement leading to institutionalised proceedings under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (hereinafter referred to as "RA-CAB") [A]. Even if the Arbitral Tribunal were to find that the parties did not agree on the application of the RA-CAB, its jurisdiction would be based on the arbitration agreement and the application of the UNCITRAL Model Law as the *lex loci arbitri* in an *ad hoc* arbitration [B].

A. The Arbitral Tribunal has jurisdiction based on the parties' arbitration agreement leading to institutionalised proceedings under the RA-CAB

- 4 RESPONDENT contests the jurisdiction of any arbitral tribunal established under the RA-CAB [*RESPONDENT'S ANSWER, PARA.17*]. In order for an arbitral tribunal to have jurisdiction in an institutionalised arbitration, a valid arbitration agreement and the choice of arbitration rules that belong to an arbitral institution are necessary [*REDFERN/HUNTER, PARA.1-99*]. In the case at hand, the parties validly agreed on arbitration [I] and on the application of the RA-CAB [II].

I. The parties validly agreed on arbitration

- 5 The parties' agreement on arbitration is the primary source of the arbitral tribunal's jurisdiction [*REDFERN/HUNTER, PARA.1-13; CRAIG/PARK/PAULSSON, P.44*]. By signing a contract containing an arbitration clause, the parties to that contract are deemed to have agreed on arbitration [*ICC AWARD NO.2321; ZURICH CHAMBER OF COMMERCE, 25 NOV 1994*] and are



precluded from submitting their disputes to any state court [ART. II NEW YORK CONVENTION; SANDERS, P.5; HUSSLEIN-STICH, P.45; LACHMANN, SCHIEDSVZ 2003, P.28].

6 Clause 34 of the parties' contract of sale provides [CLAIMANT'S EXHIBIT NO.1]:

34. Arbitration. All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by the International Arbitration Rules used in Bucharest. The arbitral award shall be final and binding.

The Arbitral Tribunal shall be composed of three arbitrators.

The arbitration shall be in the English language. It shall take place in Vindobona, Danubia.

7 This clause provides clear evidence that the parties intended any disputes arising out of their contractual relationship to be finally resolved by arbitration instead of litigation. An unequivocal decision of the parties in favour of arbitration has to be upheld under any circumstances [MOSES H. CONE MEMORIAL HOSPITAL V. MERCURY CONSTR. CORP., SUPR. CT.; LABORATORIOS GROSSMAN S.A. V. FOREST LABORATORIES INC., SUPR. CT. (N.Y.A.D.)]. Thus, by signing the contract containing the aforementioned arbitration clause the parties waived their right of having access to the courts and validly agreed on arbitration.

II. The parties agreed on the application of the RA-CAB

8 In its answer, RESPONDENT asserts that due to its alleged ambiguity clause 34 should not be interpreted as an agreement on the application of the RA-CAB. In doing so, RESPONDENT relies on two arguments: First, RESPONDENT alleges that since clause 34 calls for "International Arbitration Rules" while the RA-CAB are officially labelled "Rules of Arbitration" clause 34 "does not refer to any existing set of rules of any arbitral organization in Bucharest" [RESPONDENT'S ANSWER, PARA.15]. Second, RESPONDENT alleges that even if clause 34 could be construed as a reference to the RA-CAB it would not be clear what procedures were to be followed. In doing so, RESPONDENT asserts that the parties are "free to decide to use the UNCITRAL Arbitration Rules" pursuant to Art. 72(2) RA-CAB, and that those rules were "more likely to be the rules referred to in the arbitration clause" [RESPONDENT'S ANSWER, PARA.16].

9 First, an interpretation of the term "International Arbitration Rules used in Bucharest" demonstrates that the parties agreed on the RA-CAB [a]. Second, the parties did not intend to apply the UNCITRAL Arbitration Rules by virtue of Art. 72(2) RA-CAB [b].



a. An interpretation of the term “International Arbitration Rules used in Bucharest” demonstrates that the parties agreed on the RA-CAB

10 An arbitration agreement is to be interpreted in accordance with the general principles governing international commercial transactions, first and foremost with the principle of good faith [ICC AWARD NO.2291; FOUCHARD/GAILLARD/GOLDMAN, PARA.476]. Applying this principle, an arbitral tribunal has to investigate the real intent of the parties [MANGISTAUMUNAIGAZ OIL PRODUCTION ASSOC. V. UNITED WORLD TRADE INC., Q.B.D.; ICC AWARD NO.6709]. When the plain wording of an arbitration clause does not fully reflect the parties’ real intent but the latter can be established by interpretation, an arbitral tribunal shall give full effect to the parties’ real intent [ICSID AWARD NO. ARB/81/1; ICC AWARD NO.1434; FOUCHARD/GAILLARD/GOLDMAN, PARA.477].

11 An interpretation of the term “International Arbitration Rules used in Bucharest” in light of the parties’ real intent conveys that the parties agreed on the application of the RA-CAB. First, the reference to “Rules used in Bucharest” reveals the parties’ intent to arbitrate under rules with a specific link to Bucharest, i.e. the RA-CAB [aa]. Second, the corresponding wordings of clause 34 and the RA-CAB Model Clause reveals the parties’ intent to arbitrate under the RA-CAB [bb]. Third, the reference to “International Arbitration Rules” does not confute the parties’ intent to arbitrate under the RA-CAB [cc]. Fourth, the fact that CLAIMANT drafted the arbitration clause does not call for an interpretation against CLAIMANT [dd].

aa. The reference to “Rules used in Bucharest” reveals the parties’ intent to arbitrate under rules with a specific link to Bucharest, i.e. the RA-CAB

12 According to the principle of effective interpretation, an arbitration clause is to be interpreted in a manner which gives it effect rather than leaves it devoid of meaning [ICC AWARD NO.1434; FOUCHARD/GAILLARD/GOLDMAN, PARA.478].

13 The wording of clause 34 refers to “the International Arbitration Rules used in Bucharest” [CLAIMANT’S EXHIBIT NO.1]. While in general a reference to a specific city could be understood as a designation of the seat of the arbitral proceedings [ICC AWARD NO.4472], clause 34 explicitly provides that the arbitration “shall take place in Vindobona, Danubia” [CLAIMANT’S EXHIBIT NO.1]. Thus, the reference to “Bucharest” is not to the seat of the arbitral proceedings.

14 By contrast, the term “Rules used in Bucharest” would be rendered useless if not understood as a reference to the origin of the rules. The RA-CAB constitute the only set of rules with a specific link to Bucharest. They were drafted by the Chamber of Commerce and Industry of Romania (hereinafter referred to as “CCIR”), the sole organisation in Bucharest conducting international



arbitrations [P.O. No.2, PARA.10]. Admittedly, other sets of international arbitration rules may also be used in Bucharest. Yet, if in theory numerous sets of rules fall within the ambit of the wording of an arbitration clause, in practice the set of rules to be deducted from the clause is narrowed to the one which provides for a specific link to it [CF. *HANNEX CORP. V. GMI INC., U.S. DIST. CT (E.D.N.Y.)*; *DAVIS, Arb. Int'l 1991, p.367*]. At hand, solely the RA-CAB are *specifically* used by an arbitral institution in Bucharest. Hence, the term “Rules used in Bucharest” reveals the parties’ intent to arbitrate under the RA-CAB. As the choice of the rules of an arbitral institution leads to an institutionalised arbitration [*LIONNET/LIONNET, p.195*], the choice of the RA-CAB leads to an institutionalised arbitration administered by the CCIR. Two awards provide persuasive authority that such finding would be appropriate.

15 In *GERMAN COFFEE ASSOCIATION, 28 SEPTEMBER 1992*, the arbitration clause in a contract concerning the sale of coffee stipulated “*Arbitration: Hamburg West Germany*”. There are numerous courts of arbitration attached to coffee trade organisations worldwide but only one in Hamburg. The tribunal considered the specific link to Hamburg as sufficiently clear to commence institutionalised arbitral proceedings and to apply the arbitration rules of the German Coffee Association at the Hamburg Chamber of Commerce.

16 In *BULGARIA COURT OF ARBITRATION, AWARD NO.151*, the parties agreed on the following arbitration clause: “*All possible disputes shall be resolved by the International Arbitration at the Bulgarian Foreign Trade Chamber*”. Neither the Court of Arbitration nor the Bulgarian Chamber of Commerce and Industry were named accurately. Since there were no other institutions in Bulgaria entitled to settle international commercial disputes, the tribunal concluded that the parties must have had intended to submit their disputes to the Court of Arbitration attached to the Bulgarian Chamber of Commerce and Industry and that its rules were to be applied.

17 Concluding, the Arbitral Tribunal is requested to follow the examples of *COFFEE ASSOCIATION* and *BULGARIA AWARD NO.151* and to find that the reference to “Rules used in Bucharest” reveals the parties’ intent to arbitrate under the RA-CAB.

bb. The corresponding wordings of clause 34 and the RA-CAB Model Clause reveals the parties’ intent to arbitrate under the RA-CAB

18 Confronted with the question whether an arbitration clause validly designates a set of arbitration rules, tribunals and scholars frequently compare the arbitration clause with the model clauses of the arbitral institution to which it *prima facie* refers [*ICC AWARD NO.4472; HOCHBAUM, p.65*]. In case parties agree on an arbitration clause similar to a model clause recommended by an arbitral institution, the parties are presumed to have agreed on the rules issued by this institution



[ICC AWARD NO.4472; JARVIN, CLUNET 1987, P.1052]. The introductory part of clause 34, providing that “[a]ll disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by..” [CLAIMANT’S EXHIBIT NO.1], is identical with the model clause recommended by the CCIR [HTTP://ARBITRATION.CCIR.RO/ARBCLAUSE.HTM]. The passage “all disputes arising out of or in connection with” is frequently used in model clauses [CF. ICC MODEL CLAUSE; LCIA MODEL CLAUSE, SCC MODEL CLAUSE]. By contrast, the wording “conclusion, execution or termination” is unique to the RA-CAB Model Clause. Concluding, the corresponding wordings of clause 34 and the RA-CAB Model Clause reveals the parties’ intent to arbitrate under the RA-CAB.

cc. The reference to “International Arbitration Rules” does not confute the parties’ intent to arbitrate under the RA-CAB

- 19 In its answer, RESPONDENT stresses that the RA-CAB are “labelled simply Rules of Arbitration” while clause 34 calls for “International Arbitration Rules” [RESPONDENT’S ANSWER, PARA.15]. According to RESPONDENT, clause 34 does not refer to the RA-CAB since they are “designed for domestic arbitrations as well as international arbitrations” [RESPONDENT’S ANSWER, PARA.15]. In other words, RESPONDENT asserts that the term “international” calls for rules *exclusively* drafted for international arbitration. RESPONDENT emphasizes that the only part of the RA-CAB “specifically” drafted for international arbitrations, Chapter VIII, did not provide for a complete set of rules and that therefore clause 34 could not lead to the application of the RA-CAB [RESPONDENT’S ANSWER, PARA.15]. This view is inconclusive.
- 20 The term “international” marks the contrary to *purely national* [REDFERN/HUNTER, PARA.1-21]. It is solely determined by objective factors [FOUCHARD/GAILLARD/GOLDMAN, PARA.99]. Thus, in order for a set of rules to be “international” it is necessary and sufficient that they are *de facto* applicable to international disputes. Pursuant to Art. 2(1) RA-CAB, both, domestic and international disputes can be settled under the RA-CAB. Moreover, the suitability of the RA-CAB for international disputes is revealed by numerous awards [CCIR, 24 JUNE 1977; CCIR AWARD NO.4/1983; CCIR AWARD NO.33/1993]. Thus, the RA-CAB are “international”.
- 21 When RESPONDENT argues that Chapter VIII of the RA-CAB does not give a complete set of rules, it ignores that in cases of international disputes Chapter VIII is not applied in itself but in conjunction with the other provisions of the RA-CAB. The existence of Chapter VIII does not diminish but emphasize the international character of the RA-CAB. By including the term “International”, the parties certainly did not intend to choose one single chapter but wished to ensure that any arising dispute would be settled according to the *special* provisions of



Chapter VIII as well as *all general* provisions of the RA-CAB. In other words, clause 34, providing for the “International Arbitration Rules used in Bucharest”, has to be read as providing for the *international version* of the RA-CAB.

22 Concluding, the reference to “International Arbitration Rules” does not confute the parties’ intent to arbitrate under the RA-CAB.

dd. The fact that CLAIMANT drafted the arbitration clause does not call for an interpretation against CLAIMANT

23 Initially, RESPONDENT had inserted a clause calling for arbitration in its own country at the Mediterraneo International Arbitration Center [*RESPONDENT’S EXHIBIT NO.1, 4TH PARA.*]. CLAIMANT substituted this clause by a different arbitration clause providing for a neutral forum and institution. RESPONDENT may not argue that the mere fact that CLAIMANT drafted clause 34 justifies an interpretation *contra proferentem*, i.e. against CLAIMANT and the applicability of the RA-CAB. The rule of *contra proferentem* applies only in case the drafting party was entirely responsible for the arbitration clause in question [*HARASZTI, P.191; BERGLIN, ARB. INT’L 1987, P.69*]. It does not apply in case there is clear evidence that the non-drafting party directed its attention to an individual arbitration clause and specifically agreed to it [*SYKES, VJ 2004, P.67*].

24 RESPONDENT expressly admits that it had perceived clause 34 as being ambiguous by stating that clause 34 “looked strange” to it [*RESPONDENT’S EXHIBIT NO.1, 4TH PARA.*]. Despite its perception, RESPONDENT signed the contract assuming that the clause “was not something [it] was going to worry about” [*RESPONDENT’S EXHIBIT NO.1 4TH PARA.*]. Approving of a substituted clause despite its perceived ambiguity, RESPONDENT must be deemed in part responsible for clause 34 in its current version. Thus, the fact that CLAIMANT drafted the arbitration clause does not call for an interpretation against CLAIMANT.

25 To conclude, an interpretation of the term “International Arbitration Rules used in Bucharest” demonstrates that clause 34 is not ambiguous and that the parties agreed on the RA-CAB.

b. The parties did not intend to apply the UNCITRAL Arbitration Rules by virtue of Art. 72(2) RA-CAB

26 RESPONDENT alleges that even if it were thought to be possible that clause 34 referred to the RA-CAB, clause 34 would still be unclear [*RESPONDENT’S ANSWER, PARA.16*]. In doing so, RESPONDENT relies on Art. 72(2) RA-CAB which enables the parties to opt out of the RA-CAB in favour of other rules of arbitral procedure. According to RESPONDENT, it is



“more likely” that clause 34 referred to the UNCITRAL Arbitration Rules [*RESPONDENT’S ANSWER, PARA.16*].

- 27 The parties are free to determine the arbitration rules governing the arbitral procedure in their arbitration agreement [*OKEKEIFERE, J. INT’L ARB. 1998, P.95*]. When an arbitration clause designates a set of rules, its purpose is to provide for the application, not for the exclusion of these rules. Clause 34 merely provides for the application of the RA-CAB. Moreover, the CCIR has rarely, if ever been asked to administer arbitrations under the UNCITRAL Arbitration Rules [*P.O. NO.2, PARA.12*]. Thus, RESPONDENT would need to provide unequivocal evidence of the parties’ intent to opt for the UNCITRAL Arbitration Rules. It seems illogical and self-contradictory that by the wording “International Arbitration Rules” the parties should have chosen a set of rules and simultaneously discarded it.
- 28 Moreover, contrary to RESPONDENT’s allegation [*RESPONDENT’S ANSWER, PARA.16*], a comparison of both set of rules demonstrates that the RA-CAB do not diverge in “many important” aspects from the UNCITRAL Arbitration Rules. Thus, there was hardly any incentive for the parties to opt for the UNCITRAL Arbitration Rules. Referring to “International Arbitration Rules used in Bucharest” the parties intended to ensure that any dispute would be settled according to the “international version” of the RA-CAB [*supra, PARA.21*]. Hence, contrary to RESPONDENT’s allegation the parties did not intend to apply the UNCITRAL Arbitration Rules by virtue of Art. 72(2) RA-CAB.
- 29 Summarising, the parties validly agreed on arbitration and the application of the RA-CAB. The Arbitral Tribunal has jurisdiction.

B. Alternatively, the Arbitral Tribunal has jurisdiction based on the arbitration agreement and the application of the UNCITRAL Model Law in an *ad hoc* arbitration

- 30 Even if the Arbitral Tribunal were to find that the arbitration clause does not validly refer to the RA-CAB, such finding would not deprive the Arbitral Tribunal of its jurisdiction henceforth determined by the subsidiary application of the *lex loci arbitri* of Danubia, i.e. the UNCITRAL Model Law.
- 31 Any alleged failure to designate a specific set of arbitration rules would not invalidate the parties’ common intent to arbitrate [I]. The arbitration agreement would be operable under the UNCITRAL Model Law [II].



I. Any alleged failure to designate a specific set of arbitration rules would not invalidate the parties' common intent to arbitrate

- 32 When determining whether a failure to designate a specific set of rules invalidates the parties' common intent to arbitrate, courts have held that the validity of the arbitration agreement stands and falls with the dominant purpose of the agreement to settle disputes by arbitration [*LABORATORIOS GROSSMAN S.A. v. FOREST LABORATORIES INC.*, SUPR. CT. (N.Y.A.D.); *DELMA ENGINEERING CORP. v. K & L CONSTRUCTION CO.*, SUPR. CT. (N.Y.A.D.)]. In general, the "instrumentality through which arbitration [is] effected" is deemed to be of secondary importance [*LABORATORIOS GROSSMAN S.A. v. FOREST LABORATORIES INC.*, SUPR. CT. (N.Y.A.D.)]. In order for an arbitration agreement to be void, a party must unequivocally rebut the presumption that the dominant purpose of the arbitration agreement was to assure that any dispute would be settled by arbitration and not by litigation [*ALMACENES FERNANDEZ, S.A. v. GOLODETZ et al.*, U.S. CIRC. CT. (2ND CIRC.); *INTEROCEAN SHIPPING CO. v. NATIONAL SHIPPING & TRADING CORP.*, U.S. CT. APP. (2ND CIRC.)]. On the present facts, RESPONDENT is impeded from asserting that the alleged failure to designate a specific set of rules invalidated the parties' common intent to arbitrate.
- 33 First, both parties inserted an arbitration clause into the draft contracts that they exchanged during their negotiations [*RESPONDENT'S EXHIBIT NO.1, 4TH PARA.*] Irrespective of the question what particular rules of arbitral procedure were to be applied, the parties had a dominant intent to arbitrate. By contrast, the parties certainly did not intend that the failure to designate a specific set of rules would lead to the invalidity of the parties' decision in favour of arbitration and thereby to the jurisdiction of a state court in one of the parties' home country.
- 34 Second, RESPONDENT itself admits to have accepted the arbitration clause although it "looked strange" to it that no institution was mentioned [*RESPONDENT'S EXHIBIT NO.1, 4TH PARA.*]. When interpreting this statement, one must deduce that RESPONDENT neither foresaw whether arbitration would be conducted as an *ad hoc* or an institutionalised proceeding nor what arbitration rules would eventually be applied. Nevertheless, RESPONDENT signed the arbitration agreement without any attempt to rectify the clause's perceived ambiguity. Thus, it must be deduced that RESPONDENT's will to arbitrate was not subject to any implied condition. Its primary interest was to ensure that arbitration and not litigation would serve as the method of dispute resolution. RESPONDENT may thus not argue that it intended to arbitrate under a particular set of arbitration rules exclusively. The reasoning that the failure to designate a specific set of arbitration rules does not invalidate the parties' common intent to arbitrate is acknowledged in arbitral practice.



- 35 In *SOCIÉTÉ DATEL-PRODUCTIONS V. SOCIÉTÉ KING PRODUCTIONS S.A.R.L*, [ICC AWARD NO.5423] the component of the arbitration clause determining the appointment of the tribunal was ambiguous and thus held invalid. However, the tribunal pointed out that the parties' intent to arbitrate was to be preserved under any circumstances. The tribunal found that, since the parties' will to arbitrate was clear, the nullity of one component of the clause did not lead to the nullity of the entire arbitration agreement. The tribunal was established according to the *lex loci arbitri*.
- 36 In *ASTRA FOOTWEAR INDUSTRY V. HARWYN INTERNATIONAL INC.*, U.S. DIST. CT. (S.D.N.Y.), the arbitration clause determined that the "Chamber of Commerce in New York is competent". The Court held that the clause referred to the New York Chamber of Commerce which at that time had ceased to arbitrate disputes. Since the purpose of the arbitration agreement was to arbitrate in general rather than to arbitrate before a particular organisation, the Court upheld the agreement and appointed the arbitrators pursuant to the *lex loci arbitri*.
- 37 The Arbitral Tribunal is respectfully requested to follow the reasoning of *SOCIÉTÉ DATEL* and *ASTRA FOOTWEAR*. Applying the principle of *in favorem validitatis* [*ORIENTAL COMMERCIAL AND SHIPPING CO. V. ROSSEEL N.V.*, U.S DIST. CT. (S.D.N.Y); *BERGER, ARB. INT'L*. 1999, p.61], the failure to designate a specific set of arbitration rules does not invalidate the parties' common intent to arbitrate.

II. The arbitration clause is operable under the UNCITRAL Model Law

- 38 Arbitral procedures are always governed by the *lex loci arbitri* [*REDFERN/HUNTER, PARA.2-14*]. The choice of arbitration rules merely enables the parties to complement the *lex loci arbitri* and to deviate from its non-mandatory provisions [*LIONNET/LIONNET, p.158*]. However, the designation of a specific set of arbitration rules is not obligatory [*WEIGAND, p.17; BERGER, p.95*]. In case the parties refer to non-existent rules the arbitration clause is not void but regarded as equivalent to an agreement that does not specify any rules [*CF. WARNES S.A. V. HARVIC INTERNATIONAL LTD.*, U.S DIST. CT. (S.D.N.Y.)]. Accordingly, tribunals apply the *lex loci arbitri* as a "fall back set of rules", if parties fail to expressly agree on specific procedural rules [*CORTE DI APPELLO OF NAPLES, 22 MAR 1980; BERGER, ARBITRATION INTERACTIVE, PARA.1-52*]. The UNCITRAL Model Law is the *lex loci arbitri* since Vindobona, Danubia is the seat of arbitration.
- 39 RESPONDENT may not argue that the application of the UNCITRAL Model Law would be unforeseeable or unjust. The concept that arbitration is governed by the law of the seat of the tribunal is well-established in international arbitration [*REDFERN/HUNTER, PARA.2-14; PARK, I.C.L.Q. 1983, p.21; KAUFMANN-KOHLER, ICCA CONGRESS 1999, p.352*] and thus foreseeable.



- 40 Further, a comparison of the RA-CAB and the UNCITRAL Model Law shows that there are no significant differences. The RA-CAB provide for more detailed provisions of arbitral procedure but do not contain provisions contradictory to the UNCITRAL Model Law. In particular, the establishment of the Arbitral Tribunal follows the same pattern. Thus, the application of the UNCITRAL Model Law is just.
- 41 Summarising, any alleged failure of the parties to designate the RA-CAB does neither invalidate the parties' common intent to arbitrate nor render the arbitration clause inoperable.

42 **Result of Issue 1:** The jurisdiction of the Arbitral Tribunal is based on the parties' arbitration agreement leading to the application of the RA-CAB and institutionalised proceedings. Even if the parties failed to validly agree on the application of the RA-CAB, the Arbitral Tribunal's jurisdiction would still be based on the parties' arbitration agreement and the applicability of the UNCITRAL Model Law as the *lex loci arbitri* in an *ad hoc* arbitration.



ARGUMENT TO THE SUBSTANTIVE ISSUES

LAW APPLICABLE TO THE MERITS OF THE DISPUTE

43 The United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “CISG”) is applicable according to Art. 1(1)(b) CISG. Pursuant to this provision, the CISG applies in case “the rules of private international law applicable to the dispute lead to the application of the law of a Contracting State”. At hand, the rules of private international law are to be found within the UNCITRAL Model Law, which is applicable as the *lex loci arbitri* of the seat of the arbitration. Art. 28(1)(1) UNCITRAL Model Law provides for the application of the “rules of law chosen” by the parties. In clause 33 the parties subjected their contract to the law of Mediterraneo [*CLAIMANT’S EXHIBIT NO.1*]. Mediterraneo is party to the CISG [*STATEMENT OF CLAIM, PARA.19*]. Thus, the CISG applies by virtue of Art. 1(1)(b) CISG. Furthermore, by choosing the law of Mediterraneo the parties did not impliedly exclude the application of the CISG in terms of Art. 6 CISG. The choice of the law of a Contracting State does not in itself amount to an exclusion of the CISG [*OGH, 12 FEB 1998; ICC AWARD NO.9187; ASANTE TECHNOLOGIES INC. V. PMC-SIERRA INC., U. S. DIST. CT. (N. D. CAL.); CA PARIS, 6 NOV 2001; SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM(E), ART. 6, PARA.22*]. Hence, the CISG is the law applicable to the merits of the dispute.

ISSUE 2: RESPONDENT DID NOT DELIVER FUSE BOARDS IN CONFORMITY WITH ITS OBLIGATIONS UNDER THE CONTRACT DATED 12 MAY 2005

44 On 12 May 2005 a contract of sale calling for five distribution fuse boards at a price of \$168,000 was concluded between CLAIMANT and RESPONDENT. The contract contained a clause providing that the engineering drawings submitted by CLAIMANT were made part of the contract [*CLAIMANT’S EXHIBIT NO.1*]. Two descriptive notes on these drawings called for the fuses to be “‘Chat Electronics’ JP type in accordance with BS 88” and “lockable to Equalec requirements” [*STATEMENT OF CLAIM, PARA.9*].

45 It will be demonstrated that RESPONDENT breached the contract by not delivering fuse boards containing JP type fuses [A]. Furthermore, it will be shown that RESPONDENT breached the contract by not delivering fuse boards “lockable to Equalec requirements” [B].



A. RESPONDENT breached the contract by not delivering fuse boards containing JP type fuses

46 According to Art. 35(1) CISG, the seller must deliver goods which are of the quantity, quality, and description required by the contract. The contract is breached if the goods are not in conformity with the contractual requirements [*HONSELL/MAGNUS, ART. 35, PARA.8; BERTRAMS/VAN DER VELDEN, P.150; SOERGEL/LÜDERITZ/SCHÜSSLER-LANGEHEINE, ART. 35, PARA.4*]. First, the contract called for fuse boards containing JP type fuses [I]. Second, by delivering fuse boards containing JS type fuses RESPONDENT breached the contract [II].

I. The contract called for fuse boards containing JP type fuses

47 The seller's obligations under Art. 30 CISG *et seq.* are defined by the parties' agreement [*ICC AWARD NO.7754; BUNDESGERICHT, 22 DEC 2000; SCHLECHTRIEM, P.94; LOOKOFSKY, P.43*].

48 CLAIMANT and RESPONDENT agreed on the purchase of five distribution fuse boards [*CLAIMANT'S EXHIBIT NO.1*]. Since distribution fuse boards are fabricated to meet the specific requirements of each customer [*STATEMENT OF CLAIM, PARA.9*], they had to be built in accordance with the CLAIMANT's specifications. CLAIMANT's designers prepared detailed engineering drawings based on comments of Equatoriana Switchboards Ltd., CLAIMANT's usual supplier of electrical goods [*STATEMENT OF CLAIM, PARA.9*]. These drawings were submitted by CLAIMANT to RESPONDENT, attached to and expressly made part of the contract [*CLAIMANT'S EXHIBIT NO.1*].

49 One of the two descriptive notes on these drawings required the fuses to be Chat Electronics JP type [*STATEMENT OF CLAIM, PARA.9*]. Being part of the drawings, this note constitutes a part of the contract and thus defines the contractually required quality of the fuses in terms of Art. 35(1) CISG. By signing the contract, RESPONDENT agreed to its content and had to assure that the fuse boards were constructed to fully meet the requirements of the drawings. Concluding, the contract called for fuse boards containing JP type fuses.

II. By delivering fuse boards containing JS type fuses RESPONDENT breached the contract

50 Any discrepancy between actual and contractual condition of the delivered goods constitutes a lack of conformity [*REINHART, ART. 35, PARA.3; SCHLECHTRIEM/SCHWENZER/SCHWENZER, ART. 35, PARA.32; STAUDINGER/MAGNUS, ART. 35, PARA.11*]. An exception is made only in case the discrepancy is immaterial and within usages or practices in terms of Art. 9 CISG [*MÜKOHGB/BENICKE, ART. 35, PARA.6; NEUMAYER/MING, ART. 35, PARA.2; KIRCHER, P.51*]. In



the dispute at hand neither of these requirements is met.

51 First, there is no indication whatsoever that CLAIMANT and RESPONDENT agreed upon any usages or that any practices had been established between them. Second, the substitution of JP with JS type fuses is not an immaterial discrepancy. JP and JS type fuses significantly differ in the size of their fixing centres [*RESPONDENT'S EXHIBIT NO.2*]. For electric parts as small as fuses the size is a critical characteristic. Especially in electric systems which usually contain very small components, a difference of 10 mm in the size of the fuses' fixing centres, as in the case at hand [*ibid.*], cannot be regarded an immaterial discrepancy. Moreover, it has to be taken into consideration that once the boards are constructed the type of fuses cannot be changed without replacing all of the sockets for the fuses [*CF. RESPONDENT'S EXHIBIT NO.1, 9TH PARA.*].

52 Summarising, RESPONDENT breached the contract by not delivering fuse boards containing JP type fuses.

B. RESPONDENT breached the contract by not delivering fuse boards "lockable to Equalec requirements"

53 On 22 August 2005, RESPONDENT delivered fuse boards which Equalec refused to connect to the electric grid because the boards did not comply with its requirements [*RESPONDENT'S ANSWER, PARA.11*]. By not delivering fuse boards "lockable to Equalec requirements", RESPONDENT breached the contract under Art. 35(1) CISG [I]. Subsidiarily, it breached the contract under Art. 35(2)(b) CISG [II].

I. RESPONDENT breached the contract under Art. 35(1) CISG

54 First, the parties agreed on the delivery of fuse boards "lockable to Equalec requirements" [a]. Second, the delivered fuse boards containing JS type fuses did not conform to the parties' agreement [b].

a. The parties agreed on the delivery of fuse boards "lockable to Equalec requirements"

55 RESPONDENT argues that the note "lockable to Equalec requirements" is not part of the contract but was rather directed to the personnel of CLAIMANT or to the construction firm it engaged to construct the development in Mountain View [*RESPONDENT'S ANSWER, PARA.25C*]. Such an argumentation fails to convince. First, the note "lockable to Equalec requirements" was made part of the contract [aa]. Second, RESPONDENT had to deliver fuse boards which would actually be connected to the electrical grid by Equalec [bb].



aa. The note “lockable to Equalec requirements” was made part of the contract

- 56 When interpreting the parties’ agreement, the understanding of a reasonable third person in the same type of business under the same circumstances is decisive, Art. 8(2) CISG [OGH, 20 MAR 1997; BLP VIENNA, 10 DEC 1997; STAUDINGER/MAGNUS, ART. 8, PARA.17; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, ART. 8, PARA.2]. Due consideration is to be given to all relevant circumstances including the prior and subsequent conduct of the parties, Art. 8(3) CISG. Having regard to these circumstances, a reasonable third person would conclude that the note constitutes an integral part of the contract.
- 57 The engineering drawings were made part of the contract [CLAIMANT’S EXHIBIT NO.1]. These drawings contained the note “lockable to Equalec requirements” [STATEMENT OF CLAIM, PARA.9]. By asserting that this note is not directed to it [RESPONDENT’S ANSWER, PARA.25C], RESPONDENT attempts to selectively avoid the part of the contractual requirements that it was unable to perform. The note “lockable to Equalec requirements” was not directed to CLAIMANT’s personnel or to the construction firm which would install the fuse boards. In contrast, the note was addressed to the fabricator, i.e. RESPONDENT, to build the fuse boards lockable to the requirements of the electrical distribution company which would connect them to the electric current. Neither CLAIMANT’s personnel nor the construction firm did require such instruction but RESPONDENT as the fabricator of the fuse boards did. Otherwise, a portion of the drawings sent to the fabricator would have served no purpose. It would be illogical to conclude that the parties intended that certain instructions on the drawings had to be observed and others could be ignored.
- 58 Both parties regarded the design drawings as a key element for the construction of the fuse boards [CF. STATEMENT OF CLAIM, PARA.9; RESPONDENT’S EXHIBIT NO.1, 2ND PARA.]. The drawings represented the only source from which RESPONDENT could directly derive the information necessary to construct the fuse boards. Just like a legend on a map the notes describe the drawings and both, the notes and the drawings, are inseparably intertwined. Consequently, any reasonable third person would deduce that the notes must be considered part of the contract.
- 59 Furthermore, as regards the note referring to JP type fuses, RESPONDENT itself appears to consider that note as part of the contract. No other conclusion can be drawn from its phone call on 14 July 2005 in which RESPONDENT inquired whether CLAIMANT would accept the substitution of JP with JS type fuses. There is no reason why one should consider the note referring to JP type fuses as part of the contract and assume at the same time that the note referring to fuse boards “lockable to Equalec requirements” is not. A reasonable person will



deduce that both notes were made part of the contract.

60 Concluding, the note “lockable to Equalec requirements” was made part of the contract.

bb. RESPONDENT had to deliver fuse boards which would actually be connected to the electrical grid by Equalec

61 According to Art. 35(1) CISG, the delivered goods must meet all contractual specifications [WITZ/SALGER/LORENZ/SALGER, ART. 35, PARA.8; GABRIEL, ART. 35, PARA.1]. When determining the meaning of the contract’s specifications the interpretation rules of Art. 8 CISG must be taken into account [BIANCA/BONNELL/FARNSWORTH, ART. 8, PARA.2.2].

62 A reasonable understanding of the note “lockable to Equalec requirements” provides that RESPONDENT had to deliver fuse boards that Equalec would connect to the electric grid [CF. FOR THE USAGE OF “LOCKABLE” AS A SYNONYM TO “CONNECTABLE” THE SPECIFICATIONS AT: [HTTP://WWW.NOVATECH-INSTR.COM](http://www.novatech-instr.com): „lockable to 1 or 2 MHz Std.”]. The note not only mentions the name of the electrical supplier “Equalec” but expressly refers to its “requirements”. Therefore, the contract obliged RESPONDENT to deliver fuse boards which would meet these special requirements of Equalec.

63 RESPONDENT purports that the Equalec requirements are “contrary to the law” [RESPONDENT’S ANSWER, PARA.25C] and that it was therefore not obliged to fulfil them [CF. RESPONDENT’S ANSWER, PARA.25C]. As will be discussed below [*infra*, ISSUE 4], the Equalec requirements appear to be in accordance with the law of Equatoria. However, even if this were not the case, RESPONDENT would still have been obliged under the contract to deliver goods conforming to these requirements, due to the following reasons.

64 First, the principle of party autonomy enables the parties to agree on the Equalec requirements with effect *inter partes*. The principle of party autonomy is inherent in the CISG [RB VEURNE, 25 APR 2001; SCHLECHTRIEM, P.49; ZELLER, FOUR CORNERS, CHAPTER 8, 2C, PARA. 4; LANDO, AM. J. COMP. L. 2005, P.386]. It empowers the parties to agree on any subject-matter of contract they may please [SCHROETER, VJ 2002, P.493; WASMER, P.21 *et seq.*, P.25]. The Equalec requirements constitute a restriction on a certain type of fuses. For circuits below 400 amperes Equalec only accepts JP type fuses but not JS type fuses [CLAIMANT’S EXHIBIT NO.4, 3RD PARA.]. Even if the restriction set forth by Equalec was “contrary to the law” *vis-à-vis* CLAIMANT [RESPONDENT’S ANSWER, PARA.12], the parties could agree on such restrictions within their contract. Hence, the principle of party autonomy enabled the parties to agree on such restrictions *inter partes*. Thus, RESPONDENT had to deliver fuse boards conforming to the Equalec requirements.



65 Second, RESPONDENT cannot have been unaware of the fact that it was of crucial importance to CLAIMANT to obtain fuse boards that would in fact, and not merely in theory, be connected in Mountain View. When the usability of the goods is dependent on the goods' compliance with standards in the place of destination, neither the validity nor the legitimacy but merely the factual impact of such standards is decisive [MüKOBGB/GRUBER, ART.35, PARA.18; SCHLECHTRIEM, IPRAX 1996, P.13; Cf. BGH, 5 JUL 1989]. In the case at hand, RESPONDENT had to anticipate that any non-compliance with the standards set forth by Equalec would at least have caused the connection of the fuse boards in Mountain View to be delayed or even definitely refused. RESPONDENT could not have been unaware that if the completion of the whole construction had been delayed, additional costs would have incurred. Thus, it was apparent to RESPONDENT that it was of crucial importance to CLAIMANT to obtain fuse boards that would in fact be connected in Mountain View according to the Equalec requirements. By contrast, the legitimacy of the standard was of no importance.

66 Finally, even if one considered the word "lockable" merely as a reference to the padlock that Equalec is to put on the boards to ensure its exclusive access to them [Cf. P.O. NO.2, PARA.21], the consequence would be the same: Equalec would lock fuse boards with a padlock only if it had previously connected them to the electric grid. Without its requirements being fulfilled, Equalec would neither connect nor padlock any fuse board. Concluding, RESPONDENT had to deliver fuse boards which would actually be connected to the electrical grid by Equalec.

b. The delivered fuse boards did not conform to the parties' agreement

67 RESPONDENT delivered fuse boards containing JS type fuses. These fuse boards were to be connected to circuits designed for 100 to 250 amperes [P.O. NO.2, PARA.27]. Since the Equalec requirements include a policy according to which only fuse boards containing JP type fuses will be connected to circuits below 400 amperes [CLAIMANT'S EXHIBIT NO.4, 3RD PARA.], the delivered fuse boards did not meet these requirements. Containing JS instead of JP type fuses, the fuse boards failed to comply with local safety standards and the electrical supplier Equalec refused to connect them to the electric current. Hence, the delivered fuse boards did not conform to the parties' agreement. Concluding, RESPONDENT breached the contract under Art. 35(1) CISG.

II. Alternatively, RESPONDENT breached the contract under Art. 35(2)(b) CISG

68 Even if the Tribunal were to find that the parties did not contractually agree on the delivery of



fuse boards “lockable to Equalec requirements”, RESPONDENT still committed a breach of contract under Art. 35(2)(b) CISG. According to this provision, the seller is obliged to deliver goods fit for the particular purpose made known to him by the buyer. An exception to this obligation is made only in case the buyer cannot reasonably rely on the seller’s skill and judgement [SU, P.32]. In the case at hand, CLAIMANT made known the particular purpose of the fuse boards which were to be installed in Mountain View according to the Equalec requirements [a]. Furthermore, CLAIMANT reasonably relied on RESPONDENT’s skill and judgement [b].

a. CLAIMANT made known the particular purpose of the fuse boards

69 The purpose is made known when the buyer expressly or impliedly informs the seller about the intended use of the goods [BIANCA/BONELL/BIANCA, ART. 35, PARA.2.5.2; KRITZER, P.282; FOX, P.94 *et seq.*] when concluding the contract [HEILMANN, P.180; KRITZER, P.283; ACHILLES, ART. 35 PARA.7]. It is of no relevance whether the seller actually agrees to or notices the purpose [STAUDINGER/MAGNUS, ART. 35, PARA.28; SU, P.30; HOYER/POSCH/NIGGEMANN, P.84 *et seq.*]. In its judgement of the “Mussels Case”, the German Federal Supreme Court held that the non-compliance of goods with any kind of standards constitutes non-conformity with the contract under the CISG when the buyer expressly pointed them out to the seller [BGH, 8 MAR 1995]. CLAIMANT and RESPONDENT agreed in their contract that the fuse boards were to be connected in Mountain View [CLAIMANTS EXHIBIT, NO.1]. By submitting the drawings even prior to concluding the contract, CLAIMANT informed RESPONDENT that they had to be “lockable to Equalec requirements” [RESPONDENT’S EXHIBIT NO.1, 2ND PARA.; STATEMENT OF CLAIM, PARA.9]. Thus, when the contract was concluded CLAIMANT had expressly made known the particular purpose of the fuse boards to RESPONDENT.

70 Even if the Tribunal were to find that the note “lockable to Equalec requirements” was not directed to RESPONDENT, CLAIMANT would still have impliedly made known the purpose of the fuse boards to be installed in Mountain View in accordance with the Equalec requirements [CF. RESPONDENT’S EXHIBIT NO.1, 2ND PARA.]. RESPONDENT cannot argue that it was unaware of this particular purpose. Non-compliance of goods with standards in the buyer’s country constitutes non-conformity provided that: first, the standards influence the usability of the goods [SCHLECHTRIEM, 50 JAHRE BGH, P.431]; second, the buyer cannot possibly circumvent these standards [MÜKOBGB/GRUBER, ART. 35, PARA.18 *et seq.*; SCHLECHTRIEM, IPRAX 1996, P.12 *et seq.*]; and third, the seller cannot have been unaware of the standards though not expressly but impliedly made known [BGH, 8 MAR 1995]. In the case at hand, these requirements are met.



71 First, the fuse boards were to be connected in Mountain View by Equalec. Therefore, the Equalec requirements have an immediate influence on the usability of the fuse boards. Second, Equalec is the only supplier of electric service in the area of Mountain View [P.O. NO.2, PARA.31]. Thus, CLAIMANT cannot possibly circumvent the currently effective Equalec requirements. Third, RESPONDENT did not only know that the fuse boards were to be delivered to Mountain View, but also that they were to be connected by Equalec. Hence, RESPONDENT cannot have been unaware of the fact that the standards in Mountain View were decisive for the usability of the fuse boards.

72 The facts in the case at hand are comparable to those of *MEDICAL MARKETING INTERNATIONAL INC. V. INTERNAZIONALE MEDICO SCIENTIFICA S.R.L., U.S. DIST. CT. (E.D.LA.)*. In this case, an Italian seller delivered mammography devices to a US buyer. The devices complied with Italian safety standards but not with the standards of the United States Food and Drug Administration. No express reference to these standards had been made in the contract. The arbitral tribunal held that the devices delivered were not in conformity under Art. 35(2)(b) CISG, since the indications impliedly made by the American buyer obliged the seller to observe the aforementioned standards [CF. *HACKNEY, LOUISIANA L. REV. 2001, P.484; SCHLECHTRIEM, JZ 2005, P.846 et seq.*]. The arbitral tribunal thereby followed the *obiter dictum* of the German Federal Supreme Court made in the "Mussels Case", i.e. that standards or requirements have to be considered part of the contract if reference was made to them before the contract was concluded [BGH, 8 MAR 1995; SCHLECHTRIEM, IPRAX 1999, P.389].

73 Concluding, CLAIMANT made known the particular purpose of the fuse boards to be installed in Mountain View according to the Equalec requirements.

b. CLAIMANT reasonably relied on RESPONDENT's skill and judgement

74 Art. 35(2)(b) CISG requires the buyer to reasonably rely on the seller's skill and judgement [SCHMITZ-WERKE GMBH & CO. V. ROCKLAND INDUSTRIES INC., U.S. CT. APP. (4TH CIR.); NEUMEYER/MING, ART. 35, PARA.9].

75 First, CLAIMANT relied on RESPONDENT's skill and judgement. CLAIMANT is a developer of residential and business properties [STATEMENT OF CLAIM, PARA.1]. The tasks arising in the course of a project development are diverse and complex. Therefore, when managing a construction project, CLAIMANT merely coordinates the different processes and delegates their realisation to experts. CLAIMANT itself is not an expert in the field of electrical systems. Therefore, CLAIMANT when designing the engineering drawings first consulted Equatoriana Switchboards Ltd. [STATEMENT OF CLAIM, PARA.9]. CLAIMANT then submitted these drawings



to RESPONDENT, an expert in the fabrication of electrical equipment, in order to have a professional fabricate the fuse boards. Hence, CLAIMANT relied on RESPONDENT's skill and judgement for the fabrication of the fuse boards.

76 Second, CLAIMANT's reliance was reasonable. In general, reliance is reasonable if the seller is skilled in manufacturing goods for the particular purpose made known by the buyer [SCHLECHTRIEM/SCHWENZER/SCHWENZER, ART. 35, PARA.23]. In order to determine whether the seller is skilled one has to take into consideration the size of the seller's business and its knowledge of the market [SCHLECHTRIEM, IPRAX 2001, P.163]. RESPONDENT is a wholesaler of electrical equipment and regularly fabricates "certain types of electrical equipment using standard parts" [RESPONDENT'S EXHIBIT NO.1, 1ST PARA.]. RESPONDENT confirmed that it was "certainly [...] able to" manufacture the five primary distribution fuse boards [RESPONDENT'S EXHIBIT NO.1, 2ND PARA.]. Thus, it can be concluded that RESPONDENT has a particular knowledge in fabricating electrical equipment. Therefore, CLAIMANT reasonably relied on RESPONDENT's skill and judgement.

77 RESPONDENT may not assert that it could not possibly have foreseen Equalec's policy not to connect fuse boards containing JS type fuses to circuits designed for less than 400 amperes [CF. RESPONDENT'S ANSWER, PARA.25C] and that CLAIMANT therefore, did not *reasonably* rely on RESPONDENT's skill and judgement. In case the conformity of goods with a public or private policy constitutes a particular purpose under Art. 35(2)(b) CISG, the spreading and publicity of the policy in question are decisive when it comes to determining whether the buyer reasonably relied on the seller's skill and judgement [SCHLECHTRIEM, IPRAX 2001, P.163; CONRAD, P.34]. Equalec had issued its policy in July 2003 [CLAIMANT'S EXHIBITS NO.4, 3RD PARA.]. The policy was published on the World Wide Web and distributed to all important companies in the Equatorianian electrical sector [P.O. NO.2, PARA.24]. By the time the contract was concluded, in May 2005, the policy had been in effect and publicly available for almost two years. The boundless accessibility of information published on the internet and the duration of a policy's effectiveness evidence its spreading and publicity [CF. CONRAD, P.34]. Furthermore, as a fabricator of electrical equipment selling into Equatoriana on a regular basis [RESPONDENT'S ANSWER, PARA.12] it is reasonable to charge RESPONDENT with knowledge of the Equatorianian requirements relating to electrical equipment. RESPONDENT needs to keep itself informed about ongoing developments in this market.

78 Furthermore, RESPONDENT may not contest the reasonableness of CLAIMANT's reliance because CLAIMANT itself had some knowledge in the business of electrical equipment. The buyer may reasonably rely on the seller's skill and judgement as long as it is not *more*



knowledgeable than the seller [SCHLECHTRIEM/SCHWENZER/SCHWENZER, ART. 35, PARA.23; HYLAND, P.322; MÜKOBGB/GRUBER, ART. 35, PARA.13]. Indeed, equal knowledge is not enough to contradict reasonableness [KAROLLUS, P.117]. In cases of doubt, the seller who fabricates the product is considered to have better skill and judgement [NEUMEYER/MING, ART. 35, PARA.9; HONSELL/MAGNUS, ART. 35, PARA.22]. In the case at hand there is no evidence that CLAIMANT was more knowledgeable about electrical equipment than RESPONDENT. CLAIMANT had to rely on a third party to prepare the detailed drawings. The fact that the Equalec requirements originate in the country in which CLAIMANT has its place of business does not imply that CLAIMANT was or should have been better informed than RESPONDENT about the Equalec requirements. Since RESPONDENT was selling electrical equipment internationally, in particular to Equatoriana, it is responsible for knowing and observing the local standards, especially when the requirements were made known to it in the specifications of the drawings and the details of the requirements were available publicly on the World Wide Web. Thus, CLAIMANT cannot be deemed more knowledgeable than RESPONDENT.

79 As CLAIMANT reasonably relied on RESPONDENT's skill and judgement, RESPONDENT breached the contract under Art. 35(2)(b) CISG.

80 **Result of Issue 2:** RESPONDENT breached the contract twice: First, it breached the contract under Art. 35(1) CISG by not delivering fuse boards containing JP type fuses. Second, it breached the contract under Art. 35(1) CISG, or, subsidiarily, under Art. 35(2)(b) CISG by not delivering fuse boards "lockable to Equalec requirements". As a result, RESPONDENT did not deliver fuse boards in conformity with its contractual obligations as of 12 May 2005.



ISSUE 3: RESPONDENT'S CONTRACTUAL OBLIGATIONS WERE NOT MODIFIED

81 On 14 July 2005, after RESPONDENT discovered that it was unable to supply JP type fuses, Mr. Peter Stiles, RESPONDENT's Sales Manager, called Mr. Steven Hart, a procurement professional in the Purchasing Department of CLAIMANT [*P.O. NO.2, PARA.17*], and proposed the use of JS instead of JP type fuses [*RESPONDENT'S ANSWER, PARA.8*].

82 Following, it will be demonstrated that the contract was not validly modified on 14 July 2005 [A]. Moreover, any alleged modification did not discharge RESPONDENT from its obligation to deliver fuse boards "lockable to Equalec requirements" [B].

A. The contract was not validly modified on 14 July 2005

83 Clause 32 of the contract provides that "amendments to the contract must be in writing" [*CLAIMANT'S EXHIBIT NO.1*]. It is undisputed that the parties never agreed on any modification in writing. Yet, RESPONDENT asserts that "the use of JS rather than JP fuses with the approval of [CLAIMANT] did not constitute an amendment of the contract" [*RESPONDENT'S ANSWER, PARA.25A*]. Alternatively, it asserts that if the substitution required an amendment, the contract was orally modified and CLAIMANT may not invoke the lack of a written modification [*RESPONDENT'S ANSWER, PARA.25B*]. First, the substitution of JP with JS type fuses would have required a modification of the contract [I]. Second, the contract was not modified due to Mr. Hart's lack of power of representation [II]. Third, the contract was not modified due to the lack of written form [III].

I. The substitution of JP with JS type fuses would have required a modification of the contract

84 For a delivery of goods deviating from the parties' agreement to constitute a due performance the contract needs to be amended. By substituting JP with JS type fuses RESPONDENT deviated from the parties' agreement [*supra, PARA.50 et seq.*]. Thus, for the delivery of fuse boards containing JS type fuses to constitute a due performance the contract had to be amended.

II. The contract was not modified due to Mr. Hart's lack of power of representation

85 Whether Mr. Hart had power of representation is determined by the Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983; hereinafter referred to as "Geneva Convention"), a treaty to which both Equatoriana and Mediterraneo are parties [*P.O. NO.2,*



PARA.16]. First, under this convention Mr. Hart had no power of representation [a]. Second, CLAIMANT is not precluded from invoking Mr. Hart's lack of authority [b].

a. Mr. Hart had no power of representation

86 In order to bind his principal an agent must act within his scope of authority, Art. 12 Geneva Convention. Within CLAIMANT's structure of business there is a clear distribution of responsibilities according to which Mr. Konkler [CLAIMANT'S EXHIBIT NO.2, 1ST PARA.] and not Mr. Hart was responsible for the contract with RESPONDENT [P.O. NO.2, PARA.17]. The fact that Mr. Hart had authority to conclude contracts up to a limit of \$250,000 [P.O. NO.2, PARA.17] is not decisive, since Mr. Hart had no responsibilities for the contract in dispute at all. Hence, Mr. Hart had no power of representation to modify the contract.

b. CLAIMANT is not precluded from invoking Mr. Hart's lack of authority

87 Art. 14(2) Geneva Convention provides that the principal may not invoke the lack of authority of the agent in case he "causes the third party reasonably and in good faith to believe" that the agent has power of representation. In the case at hand, CLAIMANT is not precluded from invoking Mr. Hart's lack of authority.

88 First, since the agent itself cannot *ause* appearance of his authority by his own representations [CF. *SUNCORP INSURANCE AND FINANCE V. MILANO ASSICURAZIONI S.P.A., Q.B.D.*; *ARMAGAS LTD V. MUNDOGAS, H.L.*], Mr. Hart's own conduct may not be taken into consideration. Neither did CLAIMANT's secretary, by putting Mr. Stiles through to Mr. Hart [CF. *P.O. NO.2, PARA.18*], cause any appearance of authority. A secretary is not a representative of a company. Further the secretary had not been informed by Mr. Stiles about the purpose of his call. Hence, she was not in a position to create an appearance of authority in Mr. Hart.

89 Second, RESPONDENT could not *reasonably and in good faith believe* that Mr. Hart had power of representation. Mr. Hart made it perfectly clear that he was "not very well versed in the electrical aspect of the development, so that he did not have an independent judgement on it" [RESPONDENT'S EXHIBIT NO.1, 8TH PARA.]. One cannot reasonably and in good faith rely on the authority of a person who unmistakably points out his own incompetence. Mr. Hart did not act within his scope of authority. Further, CLAIMANT is not precluded from invoking this lack of authority. The contract was not modified due to Mr. Hart's lack of power of representation.

III. The contract was not modified due to the lack of written form

90 Clause 32 of the parties' contract contains a no-oral-modification-clause providing that



“[a]mendments to the contract must be in writing” [*CLAIMANT’S EXHIBIT NO.1*]. Pursuant to Art. 29(2)(1) CISG, a contract requiring any modification to be in writing may not be otherwise modified. Under Art. 29(2)(2) CISG a party may by his own conduct be precluded from relying on Art. 29(2)(1) CISG to the extent that the other party could reasonably rely on that conduct.

91 The parties did not comply with the requirement of written form [a]. Furthermore, CLAIMANT is not precluded from invoking the lack of a written modification [b].

a. The parties did not comply with the requirement of written form

92 Art. 29(2)(1) CISG realises the parties’ express intent to subject any modification of their original agreement to high formal prerequisites [*GRAVES IMPORT COMPANY et al. v. CHILEWICH INTERNATIONAL CORP., U.S. DIST. CT. (S.D.N.Y); WASMER, P.86*]. The wording of Art. 29(2)(1) CISG - “may not be otherwise modified” - unequivocally indicates that a written contract containing a no-oral-modification-clause can only be validly modified in writing [*BAMBERGER/ROTH/SAENGER, ART. 29, PARA.3; HONSELL/KAROLLUS, ART. 29, PARA.15; PILTZ, P.106*]. RESPONDENT did not attempt to modify the contract by sending its proposal in writing [*CLAIMANT’S EXHIBIT NO.2, 4TH PARA.*]. Moreover, the parties did not derogate from clause 32 in writing. Hence, the parties did not comply with the validity requirement.

b. CLAIMANT is not precluded from invoking the lack of a written modification

93 According to Art. 29(2)(2) CISG a party may be precluded by his conduct from asserting a no-oral-modification-clause to the extent that the other party has relied on that conduct [*ICC AWARD NO.9117; HONSELL/KAROLLUS, ART. 29, PARA.17; STERN, P.61 et seq.*].

94 It will be shown that neither the telephone conversation of 14 July 2005 [aa], nor the inactivity subsequent to 14 July 2005 [bb], nor taking delivery and making payment do preclude CLAIMANT from invoking the requirement of written form [cc].

aa. The telephone conversation of 14 July 2005 does not preclude CLAIMANT from invoking the requirement of written form

95 RESPONDENT argues that CLAIMANT is precluded from invoking the lack of a written modification, since RESPONDENT relied on the statements Mr. Hart made in the course of the telephone conversation of 14 July 2005 [*CF. RESPONDENT’S ANSWER, PARA.25B*].

96 The oral consent to a proposed modification cannot, in itself, constitute reliance-inducing conduct in terms of Art. 29(2)(2) CISG [*ENDERLEIN/MASKOW/STROHBACH, ART. 29, PARA.4*;



MÜKOHGB/BENICKE, ART. 29, PARA.11; REINHART, ART. 29, PARA.5]. The wording of this provision, “precluded by his conduct”, has to be construed in light of the provision’s purpose to protect the parties’ interest in legal certainty [HILLMAN, CORNELL INT’L L. J. 1988, P.450]. Thus, to assure the effectiveness of Art. 29(2)(1) CISG, the term “conduct” calls for restrictive interpretation [CF. ENDERLEIN/MASKOW/STROHBACH, ART. 29, PARA.4; HILLMAN, CORNELL INT’L L. J. 1988, P.461]. If the oral consent, in itself, were to be considered reliance-inducing conduct, Art. 29(2)(1) CISG would be by-passed and the parties’ interest in preserving the protection provided by the no-oral-modification-clause disregarded [HONSELL/KAROLLUS, ART. 29, PARA.15]. Thus, the consent expressed by Mr. Hart in the course of the telephone conversation cannot be regarded as reliance-inducing conduct under Art. 29(2)(2) CISG.

97 Furthermore, the course of the conversation between Mr. Hart and Mr. Stiles impedes RESPONDENT from reasonably relying on the Mr. Hart’s consent. During the telephone conversation Mr. Hart clearly pointed out that he was “not very well versed in the electrical aspect of the development” [RESPONDENT’S EXHIBIT NO.1, 8TH PARA.]. Mr. Hart had no technical knowledge in the field of electricity. In contrast, Mr. Stiles was capable of explaining the alleged interchangeability of the fuses to Mr. Hart in detail [RESPONDENT’S EXHIBIT NO.1, 9TH PARA.]. The whole conversation was characterised by Mr. Hart’s questions and Mr. Stiles’ explanations. This asymmetrical distribution of knowledge impedes RESPONDENT from relying on any oral statement made by Mr. Hart. It was rather Mr. Hart who relied on Mr. Stiles’ recommendations.

98 Furthermore, contrary to RESPONDENT’s assertion [CF. RESPONDENT’S ANSWER, PARA.8], Mr. Hart’s oral consent was not binding and final. Mr. Hart expected RESPONDENT to send a written confirmation of the telephone call in accordance with clause 32 [CLAIMANT’S EXHIBIT NO.2, 4TH PARA.]. Since the parties had agreed on a no-oral-modification-clause RESPONDENT had to assume that CLAIMANT did not want to make binding decisions without the exchange of written documents. Hence, RESPONDENT could not reasonably rely on any statement made by Mr. Hart during the telephone conversation. Thus, the telephone conversation of 14 July 2005 does not preclude CLAIMANT from invoking the requirement of written form.

bb. CLAIMANT’s inactivity subsequent to 14 July 2005 does not preclude CLAIMANT from invoking the requirement of written form

99 RESPONDENT puts forward that CLAIMANT is precluded from invoking the lack of a written modification, since it did not urge RESPONDENT to use JP type fuses subsequent to the telephone conversation [RESPONDENT’S ANSWER, PARA.25B].

100 Yet, an omission can only amount to a relevant conduct in case the omitting party has a duty to



alert the other party [SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, ART. 8, PARA.36]. CLAIMANT did not have such duty. Under Art. 29(2)(2) CISG a duty to alert the other party that the contract has not been validly modified due to the lack of a written modification only exists in case a party could foresee that the other party erroneously assumed the modification to be valid. CLAIMANT could not foresee that RESPONDENT erroneously assumed the contract to be valid despite the lack of a written modification:

101 According to clause 32 of the contract, amendments had to be in writing. After the telephone call not a single document was exchanged between the parties. Furthermore, RESPONDENT itself had introduced clause 32 into the contract [CF. RESPONDENT'S ANSWER, PARA.4]. CLAIMANT could reasonably presume that RESPONDENT would meet the formal requirements it had previously proposed. CLAIMANT could not foresee that RESPONDENT assumed Mr. Hart's oral consent to be sufficient. Hence, CLAIMANT had no duty to notify RESPONDENT of its contractual obligations. Concluding, the inactivity subsequent to 14 July 2005 does not preclude CLAIMANT from invoking the requirement of written form.

cc. Taking delivery and making payment does not preclude CLAIMANT from invoking the requirement of written form

102 RESPONDENT may not argue that CLAIMANT induced reliance on the validity of the oral modification under Art. 29(2)(2) CISG by taking delivery and making payment of the goods [CF. RESPONDENT'S ANSWER, PARA.23].

103 First, taking delivery of the fuse boards does not induce any reliance. Taking delivery can only be regarded as reliance-inducing conduct in case the buyer accepts the goods in awareness of their non-conformity with the original contract [CF. SECRETARY COMMENTARY EXAMPLE 27A, OFFICIAL RECORDS, P.28]. Immediately upon delivery, CLAIMANT could not have discovered that JS instead of JP type fuses had been installed in the fuse boards [CLAIMANT'S EXHIBIT NO.3, 2ND PARA.]. Since distribution fuse boards are complex electrical goods, their non-conformity would only have been noticeable to an expert and only after inspecting the fuse boards. As an experienced seller of electrical equipment, RESPONDENT must have known that it is not possible to check complex distribution fuse boards for defects or nonconformity immediately upon delivery. Due to CLAIMANT's unawareness of the non-conformity, taking delivery of the fuse boards cannot induce any reliance.

104 Second, the payment does not induce any reliance. In compliance with its contractual obligations to pay "upon delivery" [CLAIMANT'S EXHIBIT NO.1] CLAIMANT initiated a bank transfer on 24 August 2005 [RESPONDENT'S ANSWER, PARA.10]. At the time of delivery, RESPONDENT



could not have expected CLAIMANT to be aware of the non-conformity of the fuse boards as shown above. Only two days elapsed between delivery and payment. This period of time was too short to examine the goods *en detail*. Thus, CLAIMANT could not discover the non-conformity within this period of time. RESPONDENT must have been aware of this fact. Thus, CLAIMANT's payment after two days merely fulfils its contractual obligations and does not induce any reliance.

105 Therefore, RESPONDENT cannot reasonably rely on CLAIMANT's taking delivery or on its payment for the delivered fuse boards. CLAIMANT is not precluded from invoking the lack of a written modification.

106 Summarising, due to the lack of Mr. Hart's power of representation or alternatively due to the lack of written form, the contract was not validly modified on 14 July 2005.

B. Any alleged modification did not discharge RESPONDENT from its obligation to deliver fuse boards "lockable to Equalec requirements"

107 The obligation to deliver fuse boards "lockable to Equalec requirements" was not affected by any alleged agreement on the substitution of JP with JS type fuses.

108 First, according to the original contract the delivered fuse boards had to fulfil two prerequisites. They had to be equipped with JP type fuses and they had to be "lockable to Equalec requirements" [STATEMENT OF CLAIM, PARA.9]. During the telephone conversation RESPONDENT proposed to substitute JP with JS type fuses but did not make any reference to RESPONDENT's contractual duty to deliver fuse boards "lockable to Equalec requirements". Since both prerequisites are distinct and discrete, it may not be argued that the modification of the obligation to deliver JP type fuses automatically included the modification of the obligation to deliver fuse boards "lockable to Equalec requirements".

109 Second, during the telephone conversation RESPONDENT expressly assured CLAIMANT that fuse boards containing JS type and fuse boards equipped with JP type fuses were identical and thus interchangeable. RESPONDENT even recommended the use of JS type fuses [CLAIMANT'S EXHIBIT, NO.2, 4TH PARA.]. Thereby RESPONDENT impliedly assured CLAIMANT that the substituted fuse boards would still be "lockable to Equalec requirements". As RESPONDENT had better knowledge in the field of electrical equipment, CLAIMANT rightfully relied on RESPONDENT's misleading assurance that JS and JP type fuses were identical. It would be undue and unjust to argue that CLAIMANT's rightful reliance on the fuses' fitness for its intended purpose, should have discharged RESPONDENT from its obligation to deliver fuse boards "lockable to Equalec requirements".



- 110 Third, CLAIMANT merely agreed to RESPONDENT's proposal to substitute JP with JS type fuses in order to assure the timely completion of its development in Mountain View [CF. CLAIMANT'S EXHIBIT NO.2, 4TH PARA.]. In case of late performance significant financial losses would have arisen [STATEMENT OF CLAIM, PARA.16]. Yet, in order to assure the timely completion, the fuse boards had to be "lockable to Equalec requirements". Otherwise the completion of Mountain View Office Park using the fuse boards delivered by RESPONDENT would not only have been delayed but rendered entirely impossible. Consenting to the substitution of JP with JS type fuses would not make any sense if it were to be deemed to discharge RESPONDENT from its obligation to deliver fuse boards "lockable to Equalec requirements". The consent to RESPONDENT's proposal to substitute JP with JS type fuses was an act of courtesy on condition Equalec would connect the fuse boards containing substitute fuses. It was certainly not intended to impair CLAIMANT's legal position.
- 111 Summarising, CLAIMANT agreed to the substitution of JP with JS type fuses only provided that they would still be "lockable to Equalec requirements". Thus, any alleged modification regarding the substitution of fuses did not discharge RESPONDENT from its obligation to deliver fuse boards "lockable to Equalec requirements".

-
- 112 **Result of Issue 3:** The contract was not validly modified on 14 July 2005 due to the lack of Mr. Hart's power of representation or alternatively due to the lack of a written modification. In any case, an alleged modification did not discharge RESPONDENT from its obligation to deliver fuse boards "lockable to Equalec requirements".
-



ISSUE 4: CLAIMANT’S OMISSION TO FILE A COMPLAINT ABOUT EQUALEC’S POLICY DOES NOT EXCUSE RESPONDENT’S FAILURE TO DELIVER GOODS CONFORMING TO THE CONTRACT

113 RESPONDENT asserts that CLAIMANT’s omission to complain to the Equatoriana Electrical Regulatory Commission (hereinafter referred to as “EERC”) about Equalec’s policy could “have no legal consequences” for RESPONDENT [*RESPONDENT’S ANSWER, PARA.25D*]. RESPONDENT thus alleges to be exempted from liability.

114 Contrary to RESPONDENT’s reasoning, CLAIMANT’s omission to file a complaint with the EERC does not exempt RESPONDENT from its liability under Art. 80 CISG [A] nor does it constitute a breach of CLAIMANT’s duty to mitigate the loss under Art. 77 CISG [B].

A. CLAIMANT’S omission to file a complaint does not exempt RESPONDENT from its liability under Art. 80 CISG

115 According to Art. 80 CISG, a party may not rely on the other party’s failure to perform to the extent that such failure was *caused* by the first party’s act or omission. As a minimum requirement, the act or omission must have impaired proper performance [*SCHÄFER, PARA.3A; ENDERLEIN/MASKOW/STROHBACH, ART. 80, PARA.5.2; STAUDINGER/MAGNUS, ART. 80, PARA.12; KERN, RUDOLF MEYER ZUM ABSCHIED, P.105 et seq.*].

116 CLAIMANT’s omission to file a complaint with the EERC did not cause RESPONDENT’s failure to deliver fuse boards containing JP type fuses [I] nor did it cause RESPONDENT’s failure to deliver fuse boards “lockable to Equalec requirements” [II].

I. CLAIMANT’S omission to file a complaint with the EERC did not cause RESPONDENT’S failure to deliver fuse boards containing JP type fuses

117 By delivering fuse boards that contained JS type fuses, RESPONDENT did not fulfil its contractual obligation to deliver fuse boards equipped with JP type fuses [*supra, ISSUES 2 AND 3*]. A complaint with the EERC would not have turned JS type fuses into JP type fuses. Hence, even if the EERC would have found Equalec’s policy to be “contrary to the law” [*RESPONDENT’S ANSWER, PARA.25C*], the delivery of fuse boards containing JS type fuses would not have been in conformity with the contract. Thus, CLAIMANT’s omission to file a complaint with the EERC did not cause RESPONDENT’s failure to deliver fuse boards containing JP type fuses.



II. CLAIMANT's omission to file a complaint with the EERC did not cause RESPONDENT's failure to deliver fuse boards "lockable to Equalec requirements"

118 The failure on part of RESPONDENT to deliver fuse boards in conformity with Equalec's policy was not a causal consequence of CLAIMANT's omission to file a complaint with the EERC. According to Art. 36(1) CISG, the point of time decisive for determining whether the delivered goods were in conformity with the contract is the passing of the risk, i.e. the time of delivery [STAUDINGER/MAGNUS, ART. 36, PARA.8; MÜKOHGB/BENICKE, ART. 36, PARA.2; SCHLECHTRIEM/SCHWENZER/SCHWENZER (E), ART. 36, PARA.3]. The fuse boards equipped with JS type fuses were delivered by RESPONDENT on 22 August 2005 [STATEMENT OF CLAIM, PARA.14]. At that point of time Equalec's policy ruled out the use of JS type fuses in circuits with 400 amperes or less. Even in case a complaint with the EERC would have been successful, RESPONDENT would still have breached the contract by delivering fuse boards that were not "lockable to Equalec requirements". A successful complaint would at the most have led to a legal obligation imposed on Equalec to connect the delivered fuse boards at any given point of time subsequent to the initial delivery of non-conforming goods. However, it would not have altered the fact that the fuse boards equipped with JS type fuses did not conform to the contract at the time of delivery. Concluding, CLAIMANT's omission to file a complaint with the EERC did thus not cause RESPONDENT's failure to deliver fuse boards "lockable to Equalec requirements".

119 Summarising, RESPONDENT is not exempted from its liability under Art. 80 CISG.

B. CLAIMANT's omission to file a complaint does not constitute a breach of CLAIMANT's duty under Art. 77 CISG to mitigate the loss

120 Art. 77 CISG requires the party who relies on a breach of contract to take such measures as are *reasonable* in the circumstances to mitigate the loss resulting from the breach. The question whether a measure is reasonable must be determined on a case to case basis [MÜKOHGB/MANKOWSKI, ART. 77, PARA.10].

121 For the following reasons, a complaint with the EERC would not have been a reasonable measure of mitigation. First, requiring CLAIMANT to complain to the EERC would inappropriately reverse the parties' contractual obligations [I]. Second, the proceedings would have lasted too long and the amount of damages would have increased [II]. Third, the prospects of success of a complaint with the EERC were highly uncertain [III].



I. Requiring CLAIMANT to complain to the EERC is unreasonable since it would inappropriately reverse the parties' contractual obligations

122 Under the CISG either party has the right to require the other party to perform its contractual obligations, *pacta sunt servanda* [SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN, ART. 28, PARA.12; MÜKOBGB/GRUBER, ART. 28, PARA.3]. Accordingly, the seller may request the buyer to take delivery and to pay the purchase price while the buyer may require the seller to deliver goods in conformity with the contract. In contrast, even in case the contract is breached it remains the seller's quintessential responsibility to ensure that the goods delivered are in conformity with the contract [TALLON, P.7-6 *et seq.*]. Art. 77 CISG does not provide for an exception of the principle of *pacta sunt servanda* [OLG BRAUNSCHWEIG, 28 OCT 1999; STAUDINGER/MAGNUS, ART. 77, PARA.12]. A measure which lies within the ambit of the essential contractual obligations of the party in breach can therefore not be reasonably expected under Art. 77 CISG [AG MÜNCHEN, 23 JUN 1995; SCHLECHTRIEM/SCHWENZER/STOLL/GRUBER (E), ART. 77, PARA.7].

123 At hand, RESPONDENT's essential contractual obligation to deliver conforming goods called for the delivery of fuse boards in accordance with Equalec's policy [*supra*, ISSUES 2 AND 3]. Thus, requiring CLAIMANT to file a complaint with the EERC in order to assure RESPONDENT's due performance would inappropriately reverse the parties' contractual obligations. A complaint with the EERC was therefore not reasonable under Art. 77 CISG.

II. A complaint was not reasonable since the proceedings would have lasted too long and the amount of damages would have increased

124 A measure is deemed "reasonable" under Art. 77 CISG only in case it is suited to effectively reduce the loss as far as possible [BIANCA/BONELL/KNAPP, ART. 77, PARA.2.2]. Any measure which entails extraordinary and inappropriate costs and expenses cannot be considered reasonable [OGH, 6 FEB 1996; BGH, 25 JUN 1997; ZELLER, DAMAGES, P.111; SAIDOV, LIMITING DAMAGES, PARA.II.4(B)]. It will be shown that CLAIMANT could not reasonably be expected to file a complaint with the EERC since it would have lasted too long and it would have increased the amount of damages instead of minimising them.

125 First, a complaint with the EERC could have taken two years or longer in case a full investigation had been necessary [P.O. NO.2, PARA.30]. In consequence, the building project would have been put on hold since CLAIMANT could neither remove nor replace the fuse boards prior to the final decision rendered by the EERC. A party who has already suffered the consequences of non-performance of the contract cannot be required in addition to take time-consuming measures [CHENGWEI, REMEDIES, 14.15.2]. A measure preventing CLAIMANT from fulfilling its



contractual duties towards its lessees for such long period of time can therefore not be deemed reasonable in terms of Art. 77 CISG.

126 More importantly, filing a complaint with the EERC would not have reduced but even increased the loss. If CLAIMANT had not immediately concluded a substitute purchase with Equatoriana Switchboards Ltd. [*STATEMENT OF CLAIM, PARA.18*] but awaited the outcome of a complaint with the EERC, its losses would have exceeded the \$200,000 currently claimed due to the absence of rental income and the penalty clauses in several of the lease contracts [*STATEMENT OF CLAIM, PARA.16.*]. These losses resulting from the duration of the EERC proceedings would have been attributable to RESPONDENT according to Art. 45(1)(b) and 74 CISG. This is due to the fact that RESPONDENT did not deliver fuse boards meeting the Equalec requirements on 22 August 2005 and thus remained obliged to fulfil its contractual duties.

127 A party may be required under Art. 77 CISG to make a substitute transaction out of his duty to mitigate damages [*HERBER/CZERWENKA, ART. 77, PARA.6; SCHLECHTRIEM, DAMAGES, P11*]. This is especially the case where a cover purchase would avoid consequential losses following the defective performance of the contract [*ARBITRAL TRIBUNAL VIENNA, 15 JUN 2004; NEUMAYER/MING, ART. 77, PARA.3; ROSSMEIER, RIW 2000, P.407, 412*]. In the case at hand, CLAIMANT could not obtain the due components from RESPONDENT since the latter was unable to deliver fuse boards equipped with JP type fuses for “several months” [*RESPONDENT’S EXHIBIT NO.1, 14TH PARA.*]. Hence, the only course of action for CLAIMANT to minimize damages was to immediately procure itself with the appropriate fuse boards from a third party. Only in case CLAIMANT had not done so RESPONDENT could and would have rightfully argued that such conduct amounted to a violation of CLAIMANT’s duty to mitigate the loss under Art. 77 CISG, yet not in the case at hand.

128 Concluding, as the proceedings would have lasted too long and the amount of damages would have increased a complaint with the EERC was not reasonable under Art. 77 CISG.

III. A complaint was not reasonable since its prospects of success were highly uncertain

129 Art. 77 CISG requires the aggrieved party to resort to legal remedies as long as such action presents strong prospects of success [*CF. SAIDOV, LIMITING DAMAGES, PARA.II.4(B); AUDIT, P.166*]. That would only be the case if the policy in question was manifestly unlawful. Contrary to RESPONDENT’s assertions, it is not obvious that CLAIMANT has a “legal right to have the fuse boards with [JS] fuses connected to the electrical supply” [*RESPONDENT’S ANSWER, PARA.20*]. A summary appreciation of Equalec’s policy suggests its legitimacy and a complaint



with the EERC would thus not have presented strong prospects of success. First, the policy was enacted two years ago and has not been challenged since [a]. Second, the policy serves a legitimate purpose [b]. Third, Art. 14 and 15 EESRA provide Equalec with discretionary power which has not been exceeded [c].

a. The policy was put into place two years ago and has not been challenged since

130 The policy has been in effect for two years, was widely communicated and could be found on Equalec's website [*CLAIMANT'S EXHIBIT NO.4, 3RD PARA.; P.O. NO.2, PARA.24*]. Until the present day, no one has challenged it or suggested that it might be unlawful [*P.O. NO.2, PARA.29*]. Therefore, CLAIMANT had no reason to assume that Equalec's policy was manifestly unlawful and that a complaint with the EERC presented strong prospects of success.

b. The policy serves a legitimate purpose

131 The policy of Equalec substantially reduces the risk of safety hazards in Mountain View and therefore serves a legitimate purpose. When electric circuits are equipped with fuses that allow for considerably higher amperage than the circuits were designed for, the fuses do not blow as soon as they should. By consequence, inappropriate amperage enters the circuit and may cause serious material damage. All JS type fuses measure 92 mm in size regardless of their amperage rating [*CF. RESPONDENT'S EXHIBIT NO.2*]. Thus, it is not unlikely that JS type fuses of diverging ratings can be confused with one another. Equalec actually enacted its policy due to the fact that such mistakes had happened in the past [*CLAIMANT'S EXHIBIT NO.3, 3RD PARA.*]. While it might be true that JP and JS type fuses "[look] the same" [*RESPONDENT'S EXHIBIT NO.1, 9TH PARA.*], the fixing centres of JS type and JP type fuses substantially differ in size [*RESPONDENT'S ANSWER, PARA.9*]. Hence, Equalec's policy renders a mistake impossible since JP fuses do not fit in fuse boards designed for JS fuses and *vice versa*. Since there are no JP type fuses for more than 400 amperes [*RESPONDENT'S EXHIBIT NO.1, 9TH PARA*], the risk of confusing fuses appropriate for more than 400 amperes with fuses designed for less than 400 amperes is eliminated. Concluding, Equalec's policy substantially reduces safety hazards in Mountain View and thus serves a legitimate purpose.

c. Art. 14 and 15 EESRA provide Equalec with discretionary power which has not been obviously exceeded

132 A summary appreciation of Art. 14 and 15 Equatoriana Electrical Service Regulatory Act



(hereinafter referred to as “EESRA”) [RESPONDENT’S EXHIBIT NO.4], reveals that Equalec is provided with discretionary power which has not been obviously exceeded.

133 The provisions of the EESRA read:

Art. 14. Every electric corporation shall provide electric service that is safe and adequate to any legal or physical person who shall have made appropriate arrangements for payment of the charges. There shall be no undue or unjust requirements for providing such service.

Art. 15. The Equatoriana Electrical Regulatory Commission shall certify the safety of all equipment to which electrical connections have been requested.

134 The terms “safe” and “adequate” constitute a mere standard and do not describe in detail what electric components are to be used. In the absence of such detailed description, those who apply the standard of the statute necessarily have to rely on their own expertise to determine which components would meet the standard. Such determination is based on forecasts on the probabilities of risks related to the usage of electrical components. From the use of the aforementioned terms, one can draw the conclusion that Art. 14 EESRA confers a discretionary power to Equalec as a supplier of electricity in determining what particular electrical installations shall be considered “safe” and “adequate”.

135 RESPONDENT argues that it was unlawful of Equalec to refuse to connect to the fuse boards since “[b]oth JP and JS fuses met the requirements of the [EERC]” [RESPONDENT’S ANSWER, PARA.12]. However, the task of the EERC is merely to ensure the observance of minimum quality standards for each particular component [P.O. NO.2, PARA.26]. An electrical supplier is thus not precluded from introducing higher standards concerning each particular fuse, if that is found to be indispensable for security reasons. Moreover, the fact that an item has been individually certified by the EERC pursuant to Art. 15 EESRA does not mean that the item is “safe” and “adequate” for *any* conceivable use. An electrical installation may consist of several components that have all individually been certified as safe, but which, combined with one another, pose a safety hazard. Yet, the EERC is not in the position to decide on the safety of each particular electrical installation in Equatoriana. Hence, verifying whether the assembly of the individual fuses is “safe” and “adequate” in accordance with Art. 14 s.1 EESRA falls within the primary obligations of the supplier, i.e. within the duties of Equalec and not of the EERC.

136 The contextual interpretation of Art. 14 and 15 EESRA confirms the latter reasoning: By providing that “there shall be no *undue* or *unjust* requirements for providing such [electric] service”, Art. 14 s.2 EESRA restricts the scope of Art. 14 s.1 EESRA. There would have been no



need for such restriction, if the supplier of electricity had no discretionary power exceeding the mere verification of whether the electrical equipment has been certified by the EERC or not. As a supplier of electricity, Equalec was authorized to introduce requirements based on its expertise and additional to those set forth by the EERC.

137 Therefore, it is irrelevant for the legitimacy of the policy that RESPONDENT has delivered many JS fuses for circuits of less than 400 amperes to Equatoriana over the years without any difficulties [*RESPONDENT'S ANSWER, PARA.12*]. The fact that other suppliers have less strict safety policies does not mean that the higher safety standards adopted by Equalec violate the law.

138 Equalec set forth a policy based on safety which is neither undue, nor unjust. Therefore, Equalec did not obviously exceed its discretionary power under Art. 14 EESRA and its policy is not manifestly unlawful. It would thus be an uphill battle for CLAIMANT to challenge it. Concluding, a complaint with the EERC was not reasonable. Summarising, CLAIMANT's omission to file a complaint with the EERC did not constitute a breach of its duty under Art. 77 CISG to mitigate the loss.

139 **Result of Issue 4:** CLAIMANT's omission to complain with the EERC about Equalec's policy not to connect fuse boards equipped with JS type fuses to installations with amperage below 400 amperes, did not exempt RESPONDENT from its liability under Art. 80 CISG nor did it constitute a breach of CLAIMANT's duty to mitigate the loss under Art. 77 CISG. RESPONDENT's failure to deliver goods conforming to the contract is thus not excused.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders and RESPONDENT's Answer, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the honourable Tribunal to declare that:

The Arbitral Tribunal has jurisdiction (**Issue 1**).

RESPONDENT did not deliver fuse boards in conformity with its obligations under the contract dated 12 may 2005 (**Issue 2**).

RESPONDENT's contractual obligations were not modified (**Issue 3**).

CLAIMANT's omission to file a complaint about Equalec's policy does not excuse RESPONDENT's failure to deliver goods conforming to the contract (**Issue 4**).



CERTIFICATE

Freiburg im Breisgau, 7 December 2006

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

(signed) _____
Florian Dressel

(signed) _____
Clara Goethe

(signed) _____
Benjamin Herzberg

(signed) _____
Indra von Mirbach

(signed) _____
Kalina Peneva

(signed) _____
Christian Schmollinger

(signed) _____
Oliver Unger

(signed) _____
David Tebel

(signed) _____
Dirk Wiegandt