

FOURTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On Behalf of:

Equatoriana Office Space Ltd.

415 Central Business Centre
Oceanside
Equatoriana

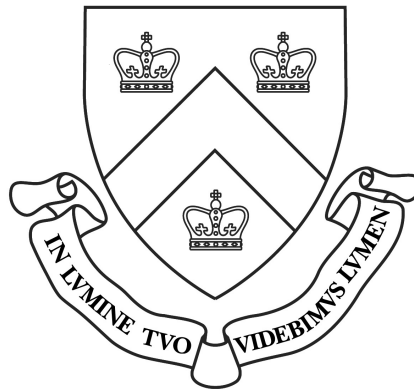
CLAIMANT

Against:

Mediterraneo Electrodynamics S.A.

23 Sparkling Lane
Capitol City
Mediterraneo

RESPONDENT



COLUMBIA UNIVERSITY SCHOOL OF LAW

ZUZANA BLAZEK · TANNER JONES · GARY LI
MEYGHAN MCCREA · SHAWN OAKLEY · NINA YADAVA

TABLE OF CONTENTS

LIST OF ABBREVIATIONS	IV
INDEX OF AUTHORITIES	VI
INDEX OF CASES	XV
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
PART ONE. THE TRIBUNAL HAS JURISDICTION.	4
I. THE TRIBUNAL IS COMPETENT TO DETERMINE ITS OWN JURISDICTION.	4
II. THE TRIBUNAL SHOULD FIND THAT THE PARTIES CONCLUDED A VALID ARBITRATION AGREEMENT.	5
A. The arbitration agreement is within the scope of Article II of the New York Convention.	5
B. The parties agreed to submit their dispute to arbitration.	5
C. The arbitration agreement is valid.	6
1. The arbitration agreement is not null and void.	6
2. The arbitration agreement is not inoperative.	6
3. The arbitration agreement is not incapable of being performed.	6
III. PARAGRAPH 34 OF THE CONTRACT CALLS FOR ARBITRATION UNDER THE ARBITRATION RULES OF THE COURT OF INTERNATIONAL COMMERCIAL ARBITRATION ATTACHED TO THE CHAMBER OF COMMERCE & INDUSTRY OF ROMANIA.	8
A. The parties agreed to institutional arbitration.	9
B. The parties agreed to institutional arbitration under the Romanian Rules.	10
C. The parties agreed to institutional arbitration administered by the Court of International Commercial Arbitration attached to the Chamber of Commerce & Industry of Romania.	11
IV. THE PARTIES' DISPUTE FALLS WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT AND IS ARBITRABLE.	12
A. The dispute is within the scope of the arbitration agreement.	12
B. The Claim is arbitrable.	12
PART TWO. RESPONDENT BREACHED THE CONTRACT AND IS LIABLE TO CLAIMANT	13
I. RESPONDENT BREACHED THE CONTRACT BY DELIVERING NON-CONFORMING GOODS. ...	13

A.	The Boards were not of the quality and description required by the Contract.....	13
1.	Respondent was bound by the notes on the Drawings.	14
	<i>a. Respondent knew or could not have been unaware of Claimant’s intent to incorporate the notes on the Drawings....</i>	<i>14</i>
	<i>b. A reasonable person in Respondent’s position would have understood Claimant’s intent.</i>	<i>15</i>
2.	Respondent failed to deliver Fuse Boards containing Chat JP fuses.....	16
	<i>a. The Contract did not require fuses directly from the maker Chat.....</i>	<i>16</i>
	<i>b. Respondent should have been aware that the distinction between JP and JS fuses was important.</i>	<i>17</i>
3.	Respondent failed to deliver fuse boards lockable to Equalec requirements.....	18
	<i>a. The Contract required fuse boards lockable to Equalec requirements.</i>	<i>18</i>
	<i>b. The Contract incorporated Equalec’s connection requirements to the extent that they were pre-requisites for locking the Fuse Boards.</i>	<i>19</i>
B.	The Fuse Boards were not fit for a particular purpose made known to Respondent.....	20
1.	Claimant made known the particular purpose of connecting to Equalec’s grid.....	20
2.	Claimant relied on Respondent’s skill and judgment.	21
3.	Claimant’s reliance was reasonable.	21
II.	THE CONTRACT WAS NOT MODIFIED TO PERMIT DELIVERY OF JS FUSES.	22
A.	The 14 July 2005 phone call did not modify the Contract.	22
B.	Respondent did not reasonably rely on the 14 July 2005 phone call.	23
1.	Hart did not have actual authority to modify the Contract.....	23
2.	Respondent could not reasonably have believed Hart to have the authority to modify the Contract.	24
	PART THREE. RESPONDENT IS NOT EXCUSED FROM LIABILITY.	25
I.	RESPONDENT’S LIABILITY IS NOT EXCUSED UNDER ART. 79 CISG.....	25
A.	No part of Respondent’s failure to perform was due to the lack of complaint.....	26
1.	Respondent’s failure to deliver Chat JP fuses was not due to the lack of complaint.	26
2.	Respondent’s failure to meet Equalec’s requirements was not due to the lack of complaint.....	26
	<i>a. Respondent was required to meet Equalec’s requirements regardless of their validity under Equatoriana law.</i>	<i>26</i>
	<i>b. There is no reasonable basis to believe the Fuse Policy is invalid.</i>	<i>27</i>
3.	Respondent’s failure to deliver Fuse Boards that could be connected to Equalec’s electrical grid was not due to the lack of complaint.	27
B.	Respondent could reasonably be expected to have taken the lack of complaint into account beforehand.....	28
1.	The parties did not explicitly agree to exonerate Respondent’s failure.....	29
2.	The parties implicitly understood performance would be required despite an impediment.	29
3.	Respondent could reasonably have anticipated the fuse policy beforehand.	29
C.	Respondent could reasonably be expected to have overcome Claimant’s lack of complaint or its	

consequences.....	30
1. Respondent itself could reasonably have complained to the Commission.	30
2. Respondent could reasonably have provided timely substitute goods.....	30
D. Respondent is fully liable for its failure to give timely notice under Art. 79(4) CISG.	31
1. Respondent was obliged to give specific and timely notice of any impediment to its ability to perform from Claimant’s lack of complaint.....	31
2. Respondent failed to give specific or timely notice of impediment.....	32
E. The scope of Art. 79 CISG precludes the application of external hardship principles.	32
II. RESPONDENT IS NOT EXCUSED UNDER ART. 80 CISG BECAUSE NO PART OF ITS FAILURE WAS CAUSED BY CLAIMANT.	33
III. COMPLAINT TO THE COMMISSION WAS NOT REQUIRED AS A MITIGATION MEASURE UNDER ART. 77 CISG.	34
PRAYER FOR RELIEF	35

LIST OF ABBREVIATIONS

AG	Amtsgericht [<i>Petty District Court—Germany</i>]
amp/amps	ampere/amperes
Austl.	Australia
Austr.	Austria
Arb.	Arbitration
Arg.	Argentina
Art. / Arts.	Article / Articles
Assoc.	Association
Belg.	Belgium
BGH	Bundesgerichtshof [<i>Federal Supreme Court—Germany</i>]
Bulg.	Bulgaria
Can.	Canada
CCI	Chamber of Commerce and Industry
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Ex.	Claimant's Exhibit
Clar. Q.	Clarifications given by the President of the Tribunal in Procedural Order No. 2 of 30 October 2004
Co.	Company
Convention on Agency	Convention on Agency in the International Sale of Goods 17 February 1983
cf.	compare favorably
Corp.	Corporation
Ct.	Court
Dist.	District
Ed.	Edition
ed. / eds.	Editor / Editors
<i>e.g.</i>	<i>exemplum gratii</i> [<i>for example</i>]
ESRA	Equatoriana Electric Service Regulatory Act
F.Supp.	Federal Supplement [<i>United States Federal District Court reporter</i>]
Fed.	Federal
Fin.	Finland
FN	Footnote
Fr.	France
Ger.	Germany
H.K.	Hong Kong
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce
<i>id.</i>	<i>idem</i> [<i>the same</i>]
<i>i.e.</i>	<i>id est</i> [<i>that is</i>]
LCIA	London Court of International Arbitration
LG	Landgericht [<i>District Court—Germany</i>]
Ltd.	Limited

Mfg.	Manufacturing
Neth.	Netherlands
No.	Number
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 7 June 1959
OGH	Oberster Gerichtshof [<i>Supreme Court—Austria</i>]
OLG	Oberlandesgericht [<i>Court of Appeal—Germany and Austria</i>]
¶ / ¶¶	paragraph / paragraphs
Para.	paragraph
PRC	People’s Republic of China
Pty. Ltd.	Proprietary Limited
Re.	Respondent
RCCP	Romanian Code of Civil Procedure
Rep.	Report
Romanian Rules	Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce of Romania
Rus.	Russia
§	Section
SBGH	Schweizerisches Bundesgericht [<i>Federal Supreme Court—Switzerland</i>]
S.A.	Société Anonyme [<i>France</i>]
SpA	Societate per Azioni [<i>Italy</i>]
S.r.l.	Societate a Responsabilitate Limitata [<i>Italy</i>]
S.D.N.Y.	Southern District of New York [<i>Federal District Court—USA</i>]
Switz.	Switzerland
Swiss Rules	Swiss Rules of International Arbitration
U.K.	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of 1984
UNIDROIT Rules	UNIDROIT Arbitration Rules
USA	United States of America
\$	United States Dollars
v.	versus [<i>against</i>]
Vol.	Volume

INDEX OF AUTHORITIES

- American Law Institute** RESTATEMENT (THIRD) OF AGENCY § 2.03
2006
cited as: USA REST 3d AGEN § 2.03
- American Subcontractors Association** “Getting Adjustments When Material Prices Increase Requires Planning,”
Stand Up For Subcontractors (Feb. 2005), available at:
<<http://www.asaonline.com/pdfs/FebruaryMediaAlert.doc>>
cited as: ASA
- Arfazadeh, H.** ORDRE PUBLIC ET ARBITRAGE INTERNATIONAL A L’EPREUVE DE LA
MONDIALISATION
LGDJ, 2005
cited as: Arfazadeh
- Audit, Bernard** LA VENTE INTERNATIONALE DE MARCHANDISES, CONVENTION DES
NATIONS-UNIES 1980 NO. 181
Paris: 1990
cited as: Audit
- Berman, Harold J.** “Excuse for Nonperformance in the Light of Contract Practices in
International Trade,”
63 COLUMBIA LAW REVIEW (1963 1413-39)
cited as: Berman63
- Bianca, Cesare
Massimo and
Bonell, Michael
Joachim (eds.)** COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA
SALES CONVENTION
Milan: Giuffrè, 1987
cited as: Bianca/Bonell
- Bishop, R. Doak** “A Practical Guide for Drafting International Arbitration Clauses,” available
at: <<http://kslaw.com/library/pdf/bishop9.pdf>>
cited as: Bishop
- Born, Gary B.** INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES,
COMMENTARY AND MATERIALS, 2d ed.
The Hague: Kluwer Law International, 2001
cited as: Born
- Broches, Aron** COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL
COMMERCIAL ARBITRATION
Boston: Kluwer, 1990
cited as: Broches

- Bund, Jennifer M.** “Force Majeure Clauses: Drafting Advice for the CISG Practitioner”
17 JOURNAL OF LAW AND COMMERCE 381 (1998)
cited as: Bund
- Cavalieros, Phillippe** “Note: Sentence arbitrale du 18 avril 2000 dans l’affaire CCI no. VB/99130 rendue à Budapest”
REVUE DE L’ARBITRAGE (4-2002), pp. 1020-33
cited as : Cavalieros
- Capatina, Octavian** “Romania” in J. Paulsson, (ed.), INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Suppl. 26, Feb. 1998
cited as: Capatina
- CISG Advisory Council** CISG Advisory Council Opinion no. 2, “Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39,” 7 June 2004
cited as: CISG-AC2
- Cooper Bussmann, Inc.** “SPD Electrical Technical Handbook: Selecting Protective Devices Based on the National Electrical Code,” 2002
available at: <http://www.bussmann.com/library/docs/Spd.pdf>
cited as: Bussmann
- Craig, W. Laurence, Park, William W., and Paulsson, Jan** INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, 3rd ed.
Oceana Publications, 2000
cited as: Craig/Park/Paulsson
- Davis, Benjamin** “Pathological Clause: Frederic Eisemann’s Still Vital Criteria,”
7 ARBITRATION INTERNATIONAL 365 (1991)
cited as: Davis
- Derains, Y. and Schwartz, E.** A GUIDE TO THE NEW ICC RULES OF ARBITRATION, 1998
cited as: Derains/Schwartz
- DiMatteo, Larry A. et. al.** INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE
Cambridge: Cambridge University Press, 2005
cited as: DiMatteo
- DiMatteo, Larry A. et al.** “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,”
34 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS (Winter 2004) 299-440
cited as: DiMatteo04

- Eiselen, Sieg** REMARKS ON THE MANNER IN WHICH THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS MAY BE USED TO INTERPRET OR SUPPLEMENT ARTICLE 29 OF THE CISG 2002
cited as: Eiselen
- Eisemann, Frédéric** “La clause d’arbitrage pathologique” in ARBITRAGE INTERNATIONAL: ESSAIS IN MEMORIAM EUGENIO MINOLI
Rome: UTET (1974)
cited as: Eisemann
- Electric Utility Week** “Wisconsin Electric pays \$25.2-Million in settlement of electric injury case,”
30 Mar. 1992
cited as: Electric Utility Week
- Enderlein, Fritz** “Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods” in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES (eds. Petar Šarčević & Paul Volken)
New York: Oceana Publications, 1996
cited as: Enderlein96
- Enderlein, Fritz and Maskow, Dietrich** INTERNATIONAL SALES LAW
New York: Oceana Publications, 1992
cited as: Enderlein/Maskow
- Ferrari, Franco** “Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000,”
REVUE DE DROIT UNIFORME (2001-1) 203-15
cited as: Ferrari01
- Ferrari, Franco (ed.)** THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES
Milan: A. Giuffrè ; Sellier : European Law Publishers, 2003
cited as: author in Ferrari03
- Flambouras, Dionysios P.** “The Doctrines of Impossibility of Performance and clausula rebus sic stantibus in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis,”
13 PACE INTERNATIONAL LAW REVIEW (Fall 2001) 261-93
cited as: Flambouras01
- Flambouras, Dionysios P.** “Remarks on the Manner in Which the PECL may be Used to Interpret or Supplement Article 79 CISG” (May 2002)
available at <<http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html>>
cited as: Flambouras02

- Friedland, Paul and Hornick, Robert** “The Relevance of International Standards in the Enforcement of Arbitration Agreements under the New York Convention,”
6 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (1995) 149-90
cited as: Friedland/Hornick
- Gaillard, Emmanuel and Savage, John** FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION
Boston: Kluwer, 1999
cited as: Gaillard/Savage
- Galston, Nina M. and Hans Smit (eds.)** INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
Matthew Bender, New York 1984
cited as: author in GS
- Henschel, René Franz** “Interpreting or supplementing Article 35 of the CISG by using the UNIDROIT Principles of international Commercial Contracts and the Principles of European Contract Law” Nov. 2004
available at: <<http://www.cisg.law.pace.edu/cisg/biblio/henschel.html>>
cited as: Henschel
- 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
21 CORNELL INTERNATIONAL LAW JOURNAL (1988) 449-466
cited as: Hillman
- Honnold, John** UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 3d ed.
The Hague: Kluwer Law International, 1999
cited as: Honnold
- Honnold, John (ed.)** DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS AND DECISIONS THAT LEAD TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS
Deventer: Kluwer Law & Taxation Publishers, 1989
cited as: Honnold89
- Hyland, R.** “Conformity Of Goods To The Contract Under The United Nations Sales Convention And The Uniform Commercial Code”
in SCHLECHTRIEM, P., EINHEITLICHES KAUFRECHT UND NATIONALS OBLIGATIONENRECHT: REFERATE UND DISKUSSIONEN DER FACHTAGUNG EINHEITLICHES KAUFRECHT
Freiburg i. Breisgau (16./ 17. February 1987) 305-41
cited as: Hyland/Freiburg

- Jenkins, Sarah Howard** "Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles -- A Comparative Assessment,"
72 TULANE LAW REVIEW (1998) 2015-2030
cited as: Jenkins
- Kritzer, Albert H.** GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
Deventer, Boston 1989
cited as: Kritzer
- Kruisinga, Sonja** (NON-)CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS : A UNIFORM CONCEPT?
Antwerp; New York: Intersentia; [Maastricht]: METRO, 2004
cited as: Kruisinga
- Lando, Ole and Beale, Hugh (eds.)** PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II
The Hague: Kluwer Law International, (2000)
cited as: Lando
- Lew, Mistelis and Kröll** COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION
Kluwer 2003
cited as: Lew/Mistelis/Kröll
- Lohbeck, David** "Hazardous-voltage primer", EDN, 11 May 2006
cited as: Lohbeck
- Lookofsky, Joseph and Bernstein, Herbert** UNDERSTANDING THE CISG IN THE USA: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 2nd ed.
The Hague: Kluwer Law International, 2004
cited as: Lookofsky04
- Maniruzzaman, A.F.M.** "Choice of Law in International Contracts – Some Fundamental Conflict of Laws Issues,"
16 JOURNAL OF INTERNATIONAL COMMERCIAL ARBITRATION (4-1999) 141-172
cited as: Maniruzzaman
- National Electrical Contractors Association** "Material Price Increases: Strategies For Recovery And Protection," 21 Oct. 2005
available at:
<<http://www.necanet.org/cms/index.cfm?fa=viewArticle&ARTICLEID=2393>>
cited as: NESA

- Neumayer, Karl and Catherine Ming** CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MERCHANDISES: COMMENTAIRE
Lausanne: CEDIDAC 1993
cited as: Neumayer
- Nicholas, Barry** “Force Majeure and Frustration,”
27 AMERICAN JOURNAL OF COMPARATIVE LAW 231 (1979)
cited as: Nicholas
- Nicholas, Barry** Nicholas, Barry *in* Galston, Nina M. and Hans Smit (eds.), INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
New York: Matthew Bender, 1984
cited as: Nicholas84
- Paulsson, J. (ed.)** INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Suppl. 29 (December/1999)
cited as: Paulsson
- Perillo, Joseph M.** “Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts” in CONTRATACIÓN INTERNACIONAL. COMENTARIOS A LOS PRINCIPIOS SOBRE LOS CONTRATOS COMERCIALES INTERNACIONALES DEL UNIDROIT
Universidad Nacional Autónoma de México—Universidad Panamericana (1998) 111-32
cited as: Perillo
- Piltz, Burghard** INTERNATIONALES KAUFRECHT: DAS UN-KAUFRECHT (WIENER ÜBEREINKOMMEN VON 1980) IN PRAXIS-ORIENTIERTER DARSTELLUNG
Munich: Verlag C.H. Beck, 1993
cited as: Piltz
- Reitz, John C.** “Centennial World Congress on Comparative Law: Political Economy as a Major Architectural Principle of Public Law,”
75 TULANE LAW REVIEW (Mar. 2001) 1121-58
cited as: Reitz
- Redfern, Alan, Martin Hunter, N. Blackaby and C. Partasides** LAW AND PRACTICE OF INTERNATIONAL ARBITRATION, 4th ed.
London: Sweet & Maxwell, 2004
cited as: Redfern/Hunter
- Šarčević, Petar/Volken, Paul (ed.)** THE INTERNATIONAL SALE OF GOODS REVISITED
The Hague: Kluwer Law International, 2001
cited as: Šarčević / Volken

- Scalbert, Hugues and Marville, Laurent** “La Clause d’Arbitrage Pathologique,” *REVUE DE L’ARBITRAGE* (1-1998) 117-36
cited as: Scalbert/Marville
- Schäfer, Friederike** “Commentary on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 80 of the CISG” (July 2004) available at: <http://cisgw3.law.pace.edu/cisg/text/anno-art-80.html>
cited as: Schäfer
- Schlechtriem, Peter and Ingeborg Schwenzer (eds.)** COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), 2nd. ed.
Oxford: Oxford University Press, 2005
cited as: author in Schlechtriem2005
- Schlechtriem, Peter, ed.** COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, 2nd ed.
Oxford: Oxford University Press, 1998
cited as: author in Schlechtriem98
- Schlechtriem, Peter** “Commentary on German Supreme Court Decision on conformity of goods and impediments excusing party from damages (BGH 24 Mar. 1999)” in 15/16 *JURISTENZEITUNG* (13 Aug. 1999) 794-97
cited as: Schlechtriem99
- Schlechtriem, Peter** UNIFORM SALES LAW—THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS
Manz, Vienna, 1986
cited as: Schlechtriem
- Shihata, Ibrahim** THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPÉTENCE DE LA COMPÉTENCE
The Hague: M. Nijhoff, 1965
cited as: Shihata
- Staudinger, Julius and Ulrich Magnus** JULIUS VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN, 13th ed.
Berlin: Sellier/de Gruyter, 2005
cited as: Staudinger/Magnus
- Stoll, Hans and Gruber, Martin** *in* Schlechtriem, Peter and Ingeborg Schwenzer (eds.), COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), 2nd ed.
Oxford: Oxford University Press, 2005
cited as: Stoll/Gruber

- Tallon, Denis** *in* Bianca, Cesare Massimo and Michael Joachim Bonell (eds.), COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION
Milan: Giuffrè, 1987
cited as: Tallon
- Tunc, André** “Commentaire sur les Conventions de La Haye du 1er juillet 1964 sur la Vente internationale des objets mobiliers corporels et la Formation du contrat de vente” *in* Ministry of Justice of the Netherlands (ed.), DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS (THE HAGUE, 2-25 APR. 1964) - RECORDS AND DOCUMENTS OF THE CONFERENCE, VOL. 1 – RECORDS
The Hague (Government) (1966) 355-91
cited as: Tunc
- UNCITRAL** SECRETARIAT COMMENTARY TO THE 1978 DRAFT OF THE CISG,
available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/>
cited as: Secretariat
- Utter, Robert F. and Lundsgaard, David C.** “Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective,”
54 OHIO STATE LAW JOURNAL (Summer 1993) 559-607
cited as: Utter
- van den Berg, Albert Jan** THE NEW YORK ARBITRATION CONVENTION OF 1958
Boston: Kluwer, 1981
cited as: van den Berg
- Wechem, T.H.M and Christiaans, C.R.** “Verdrag der Verenigde Naties inzake internationale koopovereenkomsten betreffende roerende zaken” *in* Nieuwenhuis, J.H. et. al, TEKST & COMMENTAAR VERMOGENSRECHT
Deventer: Bijlage 26 (2002) 1775-1911
cited as: Wechem/ Christiaans
- Weigand, Frank-Bernd, (ed.)** PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION
Munich: C.H. Beck, 2002
cited as: Weigand
- Winship, Peter** “Exemptions under article 79 of the Vienna sales convention,”
68 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (2004) 495-510
cited as: Winship
- Wright, Arthur and Newbery, P. Gordon** ELECTRIC FUSES
Peter Peregrinus Ltd (2004)
cited as: Wright/Gordon

Zeller, Bruno

DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS

Dobbs Ferry: Oceana Publications, 2005

cited as: Zeller

INDEX OF CASES

- Argentina** Enrique C. Wellbers S.A.I.C. A. G. v. Extraktionstechnik Gesellschaft für Anlagenbau M.B.M.: S/ Ordinario (Cámara Nacional de Apelaciones en lo Commercial–Sala, 26 Sept. 1988)
cited as: CLOUT Case 27 (Arg.)
- Australia** McRae v. The Commonwealth Disposals Commission, 84 CLR 377
cited as: McRae (Aust.)
- Austria** Landesgericht [*District Court*] Salzburg 2 Feb. 2005 (Hydraulic crane case)
cited as: LG Salzburg 2 Feb. 2005 (Aus.)
- Oberster Gerichtshof [*Supreme Court*] 20 Mar. 1997 (2 Ob 58/97m)
cited as: OG 20 Mar. 1997 (Aus.)
- Belgium** Hof van Beroep [*Appellate Court*] Gent 28 Jan. 2004
cited as: HB Gent 28 Jan. 2004 (Belg.)
- Bulgaria** Bulgarian Chamber of Commerce and Industry Arbitration Award case No. 56/1995 of 24 Apr. 1996
cited as: Arb. No. 56/1995 (Bulg.)
- Canada** Globe Union Industrial Corp. v. G.A.P. Marketing Corp (British Columbia Supreme Court, 18 Nov. 1994)
cited as: CLOUT Case 114 (Can.)
- Onex v. Ball Corp. (Ontario Ct. of Justice, 24 Jan. 1994)
cited as: Onex v. Ball Corp. (Can.)
- Finland** Helsinki Court of Appeal 30 June 1998 (S 96/1215)
cited as: Helsinki CA (Fin.)
- France** Paris Court of Appeal, Judgment of 29 Mar. 1991
cited as: Paris Court of Appeal, Judgment of 29 Mar. 1991 (Fr.)
- Epoux Convert v. Société Droga (Cour de Cassation, 14 Dec. 1983)
cited as: Cour de Cassation, 14 Dec. 1983 (Fr.)
- Sacovini/M Marrazza v. Les fils de Henri Ramel, Cour de Cassation [*Supreme Court*] 23 Jan. 1996 (CLOUT Case. No. 150)
cited as: Sacovini (Fr.)
- Calzados Magnanni v. Shoes General International, Cour d'appel [*Appellate Court*] Grenoble 21 Oct. 1999 (CLOUT case No. 313)
cited as: Calzados (Fr.)

Caito Roger v. Société française de factoring, Cour d'appel [*Appellate Court*]
Grenoble 13 Sept. 1995 (CLOUT case No. 202)
cited as: Caito (Fr.)

Marques Roque Joachim v. Manin Rivière, Cour d'appel [*Appellate Court*]
Grenoble 26 Apr. 1995 (CLOUT case No. 152)
cited as: Marques (Fr.)

Germany

Landgericht Duisburg, 17 Apr. 1996
cited as: LG Duisburg, 17 Apr. 1996 (Ger.)

Hanseatisches Oberlandesgericht (Hamburg) 11 Sch 6/01, 24 Jan. 2003
cited as: Hanseatisches OLG (Hamburg), 24 Jan. 2003 (Ger.)

Bundesgerichtshof [*Supreme Court*], 9 Jan. 2002 (VIII ZR 304/00)
cited as: BGH 9 Jan. 2002 (Ger.)

Bundesgerichtshof [*Supreme Court*] 3 Nov. 1999 (CLOUT case No. 319)
cited as: BGH 3 Nov. 1999 (Ger.)

Bundesgerichtshof [*Supreme Court*], 24 Mar. 1999 (VIII ZR 121/98; CLOUT case
No. 271)
cited as: BGH 24 Mar. 1999 (Ger.)

Landgericht [*State Court*] Aachen 14 May 1993 (43 O 136/92; CLOUT case No.
47)
cited as: LG Aachen 14 May 1993 (Ger.)

Schiedsgericht der Handelskammer [*Arbitral Panel of the Chamber of Commerce*]
Hamburg, 21 Mar. / 21 June 1996 (CLOUT case. No. 166)
cited as: SGH Hamburg 21 Mar 1996 (Ger.)

Bayerisches Oberstes Landesgericht, 28 Feb. 2000
cited as: Bayerisches Oberstes LG 28 Feb. 2000 (Ger.)

Bundesgerichtshof [*Supreme Court*] 11 Dec. 1996 (CLOUT case No. 268)
cited as: BGH 11 Dec. 1996 (Ger.)

Landgericht [*District Court*] Paderborn 25 June 1996
cited as: LG Paderborn 25 June 1996 (Ger.)

Landesgericht Kassel, 15 Feb. 1996 (11 O 4187/95), CISG-online 190
cited as: LG Kassel 15 Feb. 1996 (Ger.)

Oberlandesgericht Hamm, 27 Sep. 2005, 29 Sch 1/05
cited as: OLG Hamm, 27 Sep. 2005 (Ger.)

- Oberlandesgericht Karlsruhe 1987
cited as: OLG Karlsruhe 1987 (Ger.)
- M.V. “CEM Freighter v. T.S.,” German Maritime Arbitration Association, 8 Nov. 2005, available at: www.gmaa.de/gmitsp11.htm
cited as: CEM Freighter 2005 (Ger.)
- Hong Kong** Lucky-Goldstar International (H.K.) Ltd. v. Ng Moo Kee Engineering Ltd., (CLOUT Case 57: High Court of Hong Kong (Kaplan J.), 5 May 1993)
cited as: Lucky-Goldstar (H.K.)
- Italy** Bielloni Castello S.p.A. v. EGO S.A., Corte di Appello di Milano, 11 Dec. 1998
cited as: Bielloni (Ita.)
- Rheinland Versicherungen v. Atlarex, Tribunale [*District Court*] di Vigevano 12 July 2000
cited as: Rheinland (Ita.)
- Tribunale Civile [*District Court*] Monza 14 Jan. 1993 (R.G. 4267/88; CLOUT case. No. 54)
cited as: TC Monza 14 Jan. 1993 (Ita.)
- Corte di Appello [*Court of Appeal*], Salerno 31 Dec. 1990
cited as: Corte di Appello, Salerno 31 Dec. 1990 (Ita.)
- Netherlands** Arrondissementsrechtbank [*District Court*] 's-Hertogenbosch 2 Oct. 1998 (9981/HAZA 95-2299; UNILEX)
cited as: HG 2 Oct. 1998 (Neth.)
- J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij, Hoge Raad [*Supreme Court*] 7 Nov. 1997
cited as: Schuermans (Neth.)
- Netherlands Arbitration Institute, Case No. 2319 15 Oct. 2002
cited as: Arb. Case No. 2319 (Neth.)
- People’s Republic of China** China International Economic & Trade Arbitration Commission Arbitration proceeding of 7 May 1997 (Sanguinarine case)
cited as: CIETAC 7 May 1997 (PRC)
- Russia** CLOUT Case 403 (Moscow City Court, 13 Dec. 1994)
Cited as: CLOUT Case 403 (Rus.)
- Arb. No. 155/1994
Cited as: Arb. No. 155/1994 (Rus.)
- Switzerland** Preliminary Award of 25 Nov. 1994, Zurich Chamber of Commerce
cited as: Zurich CC 1994 (Switz.)

Thermo King (Fr.); TD 15 Jan. 1998
cited as: Thermo King (Switz.)

Roland Schmidt GmbH v. Textil-Werke Blumenegg AG, Bundesgericht [*Supreme Court*] 22 Dec. 2000
cited as: Roland (Switz.)

T.S.A. v. R. Établissement, HG Zurich, 30 Nov. 1998
cited as: HG Zurich 1998 (Switz.)

Geneva CCI, Case No. 193, Interim Award of 21 Oct.2002
cited as: Geneva CCI, Case No. 193, Interim Award of 21 Oct.2002 (Switz.)

United Kingdom

Tsakiroglou & Co Ltd v. Noble & Thorl GmbH (1962) Appeal Cases 93, House of Lords
cited as: Tsakiroglou (U.K.)

Fowler v. Merrill Lynch (June 10 1982) High Court, Queen's Bench Division (Commercial Court)
cited as: Fowler v. Merrill Lynch (U.K.)

United States

I.T.A.D. Associates, Inc. v. Podar Brothers, 636 F.2d 75 (4th Cir. 1981)
cited as: I.T.A.D. Associates (USA)

Ledee v. Ceramichie Ragno, 684 F.2d 184 (1st Cir. 1982)
cited as: Ledee v. Ceramichie Ragno (USA)

Astra Footwear Industry v. Harwyn International, 442 F.Supp. 907 (S.D.N.Y. 1978)
cited as: Astra Footwear (USA)

Georgia Power Co. v. Cimarron Coal Corp., 526 F.2d 101 (6th Cir.1975)
cited as: Georgia Power (USA)

Laboratorios Grossman v. Forest Laboratories Inc., 295 N.Y.S.d 756 (1968)
cited as: Laboratorios Grossman (USA)

Zechman v. Merrill Lynch, Pierce, Fenner & Smith Inc., 742 F. Supp. 1359 (N.D. Ill. 1990)
cited as: Zechman v. Merrill Lynch (USA)

Samson Resources Co v. Int'l Business Partners, Inc., 906 F. Supp. 624 (N.D. Okla. 1995)
cited as: Samson Resources (USA)

Lark Int., David L. Threkeld & Co. v. Metallgesellschaft Ltd. 923 F.2d 245, 248 (2d Cir 1991)
cited as: Lark, Threkeld & Co. (USA)

Pepsico Inc v. Oficina de Asesoria y Ayuda Tecmica Ca, 945 F. Supp. 69 (SDNY 1996).

cited as: Pepsico Inc (USA)

Canadian Industrial Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 383 (1932)

cited as: Canadian Industrial (USA)

Wilson v. Lignotock U.S.A., Inc., 709 F.Supp. 797, E.D.Mich.,1989

cited as: Wilson v. Lignotock (USA)

Schulze & Burch Biscuit Co. v. Tree Top, Inc., 642 F.Supp. 1155, 1156-57 (N.D. Ill. 1986)

cited as: Schulze & Burch Biscuit Co. v. Tree Top, Inc. (USA)

Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Lauro, 555 F.Supp. 481 (D.C.Virgin Islands,1982)

cited as: Rhone Mediterranee v. Achille Lauro (USA)

MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino 144 F.3d 1384 (11th Cir. 1998)

cited as: MCC (USA)

**International
Chamber of
Commerce
Arbitrations**

ICC Case No. 5103 (1994)

cited as: ICC Case No. 5103

ICC Case No. 5294 (1998) (Karrer)

cited as: ICC Case No. 5294

ICC Case No. 6149 (1990)

cited as: ICC No. Case 6149

ICC Award No. 8128 (1995)

cited as: ICC Case 8128

ICC Award No. 7197 (1992)

cited as: ICC Case 7197

ICC Award No. 7453

cited as: ICC Award No. 7453

Partial Award in ICC Case No. 7920, 1993

cited as: Partial Award in ICC Case No. 7920,1993

STATEMENT OF FACTS

Equatoriana Office Space Ltd. (“**Claimant**”) is a property developer incorporated and based in Equatoriana [*Statement of Claim* ¶1]. For a development in Mountain View, Equatoriana, Claimant required five primary distribution fuse boards (“**the Fuse Boards**”) to connect the development to the electrical grid of the only local supplier, Equalec [*Statement of Claim* ¶5; *Clar. Q.* 31]. Claimant prepared detailed engineering drawings for the Fuse Boards (“**the Drawings**”) based on comments from Equatoriana Switchboards Ltd. (“**Switchboards**”) [*Statement of Claim* ¶9]. The Drawings specified that the fuses were to be “Chat Electronics JP type,” that is, JP type fuses made by Chat Electronics (“**Chat**”), and that the Fuse Boards were “to be lockable to Equalec requirements” [*id.*]. Switchboards quoted a price of US\$180,000 for the Fuse Boards [*Statement of Claim* ¶10].

In search of a lower price, Herbert Konkler, Claimant’s Purchasing Director, contacted Peter Stiles, Sales Manager for Mediterraneo Electrodynamics S.A. (“**Respondent**”), on 22 Apr. 2005 [*Re. Ex.* 1]. Claimant asked Respondent, who has specialized in the fabrication and distribution of electrical equipment for over forty years [*Answer* 2; *Re. Ex.* 1], whether it could fabricate the Fuse Boards. Respondent replied, “we would certainly be able to do it,” but requested the Drawings before quoting a price [*Re. Ex.* 1]. After Respondent reviewed the Drawings, the parties agreed to a price of US\$168,000, and concluded a written contract (“**the Contract**”) on 12 May 2005 [*Cl. Ex.* 1]. The Contract stated that the Drawings “are attached and made part of the contract” [*id.*] and that “amendments...must be in writing” [*id.* ¶32]. It also included an arbitration clause. Initially, Respondent offered its standard arbitration clause, calling for institutional “arbitration at the Mediterraneo International Arbitration Center” [*Answer* ¶5; *Re. Ex.* 1]. Claimant, however, substituted its own clause, which required disputes to be “settled by the International Arbitration Rules used in Bucharest” [*Cl. Ex.* 1 ¶34]. Respondent acknowledges that it “did not object to its inclusion” [*Answer* ¶5; *Re. Ex.* 1].

Sometime that spring, Respondent ran out of Chat JP fuses [*Re. Ex.* 1]. Respondent tried to order the Chat JP fuses it needed to fulfill the Contract but learned that Chat could not deliver Chat JP fuses until at least mid-August due to production problems [*id.*]. On 14 July 2005, Stiles attempted to contact Konkler, who had exclusively handled the negotiations [*Re. Ex.* 1; *Cl. Ex.* 2]. Konkler was away on a business trip [*Cl. Ex.* 3]. Stiles spoke instead with Steven Hart, an employee in Claimant’s Purchasing Department. Stiles said that delivery of the Fuse Boards would be delayed until “early September at the earliest” [*Re. Ex.* 1], and that the only “three possible actions” were to wait for Chat to deliver JP fuses, use a different brand of JP fuses or use Chat JS type fuses [*Re. Ex.*

1]. Hart replied that it was not possible to wait for Chat to fix its problems since the development had an occupancy deadline of 1 Oct. 2005, and the Fuse Boards were required to connect to Equalec's electrical grid in order to allow occupancy [*id.*]. Hart said that Claimant preferred Chat equipment [*Cl. Ex.* 2], but that he himself was "not very well versed" in electrical goods [*Re. Ex.* 1]. Hart sought Stiles' recommendation. Stiles explained that JS fuses are larger than JP, so that "once one type is installed it cannot be replaced by the other" [*id.*], and that only JS fuses are available at ratings of more than 400 amps [*Re. Ex.* 1; *Re. Ex.* 2]. As the fuses here were all less than 400 amps [*Statement of Claim* ¶9; *Re. Ex.* 1; *Clar. Q.* 27], Stiles assured Hart that "it really did not matter which type was used," but that Respondent needed to know "promptly" [*Re. Ex.* 1]. Stiles suggested using Chat JS fuses as the "better solution" [*Cl. Ex.* 2]. Hart said that that "was probably the best way to proceed" [*id.*]. Neither party ever submitted a written amendment request [*id.*].

The Fuse Boards, using Chat JS fuses, were delivered on 22 Aug. 2005 and installed on 1 Sept. 2005 [*Statement of Claim* ¶14]. The Fuse Boards could not be properly inspected until they were connected [*Clar. Q.* 32]. On 8 Sept. 2005, Equalec personnel refused to make the electrical connection [*Statement of Claim* ¶14]. Claimant immediately complained to Equalec [*Cl. Ex.* 3]. Equalec explained that it had adopted a policy ("**the Fuse Policy**") in July 2003 of connecting to JS fuse boards only for loads greater than 400 amps, to reduce the safety risk of improperly rated fuses [*Cl. Ex.* 4].

The next morning, Claimant demanded that Respondent provide conforming goods [*Cl. Ex.* 3; *Re. Ex.* 1], but Respondent stated that it "might be several months yet" before it could deliver [*Re. Ex.* 1]. As Respondent already knew, an electrical connection for the Fuse Boards was essential to meeting the development's impending occupancy deadline of 1 Oct. 2005; otherwise, Claimant risked significant penalties and lost profits [*Re. Ex.* 1; *Statement of Claim* ¶16]. Respondent suggested complaining to Equalec or the Equatoriana Electrical Regulatory Commission ("**the Commission**"), but Claimant had already complained to Equalec to no avail, and there was not enough time to start a Commission proceeding [*Re. Ex.* 1]. Claimant informed Respondent of its intent to find another supplier and to hold Respondent liable for its costs [*Cl. Ex.* 3; *Re. Ex.* 1]. Within three weeks, Claimant removed the original Fuse Boards to install substitutes from Switchboards, paying US\$180,000 for the substitutes and US\$20,000 for installation [*Cl. Ex.* 3; *Statement of Claim* ¶18]. On 15 Aug. 2006, Claimant submitted this dispute ("**the Claim**") to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, located in Bucharest [*Notice of Arbitration*].

SUMMARY OF ARGUMENT

PART ONE. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT'S CLAIM.

The Tribunal may rule on its own jurisdiction under the Romanian Rules and according to the well-established *kompetenz-kompetenz* principle. The Tribunal should look to the standards set out in Art. II of the New York Convention to rule that the arbitration agreement is valid and enforceable. The parties clearly intended to submit disputes arising out of the Contract to arbitration, and their agreement is neither null and void, nor inoperable, nor incapable of being performed. Moreover, the parties agreed to institutional arbitration, and, specifically, to institutional arbitration under the Romanian Rules. The only possible institution which the parties could have contemplated at the time of contracting—according to the plain language of the arbitration agreement and the parties' conduct—is the Court of International Commercial Arbitration attached to Chamber of Commerce and Industry of Romania. Finally, the present dispute is within scope of the arbitration agreement and is arbitrable.

PART TWO. RESPONDENT BREACHED THE CONTRACT AND IS LIABLE TO CLAIMANT.

Respondent breached the Contract by delivering fuse boards that were neither of the quality and description required by the Contract nor fit for a particular purpose made known to Respondent under Art. 35 CISG. The Contract was never amended to permit the delivery of JS fuses because the parties explicitly agreed to a “no oral modification” provision and Claimant is not precluded from asserting its requirements under Art. 29(2) CISG. Thus, Respondent is liable under Art. 36 CISG.

PART THREE. RESPONDENT IS NOT EXCUSED FROM LIABILITY.

Respondent cannot escape liability under any theory of exemption. Respondent's liability is not excused by the fact that Claimant did not complain to the Commission about Equalec's refusal to connect the Fuse Boards. Under Art. 79 CISG, Respondent cannot satisfy the requirements of causality, unforeseeability, unavailability, and notice. Under Art. 80, Respondent is not excused because no part of its failure was caused by Claimant's conduct. Lastly, complaint to the Commission was not required as a mitigation measure under Art. 77 CISG.

ARGUMENT

PART ONE. THE TRIBUNAL HAS JURISDICTION.

1. The Tribunal has jurisdiction over Claimant's claim. Generally, an arbitral tribunal may assume jurisdiction over a claim when it determines that a valid arbitration clause exists. According to the *kompetenz-kompetenz* principle, it is generally recognized that the tribunal itself is empowered to make this determination. This Tribunal is competent to rule on its own jurisdiction (I). Moreover, the Tribunal should determine that a valid arbitration agreement exists (II) and that the parties agreed to the application of the Romanian Rules (III). Finally, the Tribunal should find that the claim falls within the scope of the parties' arbitration agreement and is arbitrable (IV).

I. THE TRIBUNAL IS COMPETENT TO DETERMINE ITS OWN JURISDICTION.

2. This Tribunal is constituted under the Romanian Rules [*Letter to the Court of International Commercial Arbitration attached to the CCI of Romania, 4 Sept. 2006, p. 18*]. Under the Romanian Rules, the Tribunal is competent to rule on jurisdictional objections and therefore may dispose of Respondent's contention at Para. 17 of its Answer. Art. 15(2) of the Romanian Rules states in relevant part that "the Arbitral Tribunal verifies its own authority to settle the dispute." Similarly, pursuant to Art. 79 of the Romanian Rules, those rules are supplemented by the Romanian Code of Civil Procedure ("RCCP"). Art. 3433 thereof provides that "the arbitral tribunal shall examine its jurisdiction to settle the dispute."
3. Even if the Romanian Rules did not apply to this arbitration, a determination by the Tribunal of its own jurisdiction is in keeping with established practice in international arbitration [*Gaillard/Savage 213; Redfern/Hunter ¶¶5-39 to 5-44; see Rule 4(6) of the ICC Rules; see Art. 21 of the UNCITRAL Arbitration Rules; see Art. 23 of the LCLA Rules*]. Indeed, where an arbitration agreement fails expressly to provide for such authority, it is generally accepted that the authority exists as an inherent power of the arbitral tribunal [*Redfern/Hunter ¶5-38 (the power of the arbitral tribunal "to investigate its own jurisdiction...is a power inherent in the appointment of an arbitral tribunal")*; *Shibata 47; Arfazadeh 46-8*].
4. Additionally, the Tribunal may look to the law of the arbitral *situs* [*Redfern/Hunter ¶¶2-10, 2-14; Born 84; see also ICC Case No. 5294; Derains/Schwartz 200; Gaillard/Savage 254*]. Here the parties chose to site their arbitration in Danubia, which has adopted the 1985 UNCITRAL Model Law in its entirety without amendment [*Statement of Claim ¶21*]. The above-referenced *kompetenz-kompetenz* principle is codified in Art. 16 of Danubia's Arbitration Law, which states that an arbitral tribunal may "rule on its own jurisdiction, including any objections to the existence or validity of the arbitration

agreement.” Determinations by arbitral tribunals under identical provisions of the UNCITRAL Model Law have repeatedly been upheld by national courts reviewing such awards [*see, e.g., CLOUT Case 114 (Can.), CLOUT Case 403 (Rus.), CLOUT Case 27 (Arg.)*]. There is no reason to believe that Danubian courts would rule otherwise.

II. THE TRIBUNAL SHOULD FIND THAT THE PARTIES CONCLUDED A VALID ARBITRATION AGREEMENT.

5. The arbitration agreement concluded by the parties in Para. 34 of the Contract is both valid and enforceable. Art. II of the New York Convention governs the formation of the arbitration agreement (A). Para. 34 of the Contract is an arbitration agreement under Art. II(1) of the New York Convention (B) and is legally valid under Art. II(3) of the New York Convention (C).

A. The arbitration agreement is within the scope of Article II of the New York Convention.

6. The Tribunal should apply the standards in the New York Convention because those standards are the ones that national courts look to, in the absence of other applicable law, in deciding whether to compel arbitration and to recognize and enforce awards. The standards articulated in Art. II are the threshold requirements for a determination that a valid arbitration agreement exists. The New York Convention is directly applicable because Equatoriana, Mediterraneo, and Danubia are all parties to it [*Clar. Q. 1, Statement of Claim ¶21; Statement of Claim ¶2*]. Therefore, the parochial nuances of national law are not relevant to a threshold determination of whether a valid arbitration agreement exists, so long as the requirements of Art. II of the New York Convention are satisfied [*van den Berg 123, 282-4; Friedland/Hornick 149-60*]. In international commercial arbitration, tribunals often look to Art. II of the New York Convention because an arbitration agreement in conformity with the requirements of Art. II ensures that any award will not be refused enforcement for reasons of *ex ante* invalidity [*van den Berg 177; Gaillard/Savage 124; Redfern/Hunter 10-25; Lew/Mistelis/Kröll 159; Born 168; see also ICC Case No. 6149*].

B. The parties agreed to submit their dispute to arbitration.

7. The arbitration agreement, in Para. 34 of the Contract, manifests the clear intent of the parties to submit their dispute to arbitration. Art. II(1) of the New York Convention defines an arbitration agreement as “...an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship....” Art. II(2) defines an “agreement in writing” as “an arbitral clause in a contract...signed by the parties....” The arbitration clause here constitutes such an agreement.

8. Both Claimant and Respondent agreed to submit disputes “arising out of or in connection with” the Contract to arbitration [*Cl. Ex. 1* ¶34]. It is common ground that the parties intended to submit their dispute to arbitration [*see Answer* ¶15]. The contract originally prepared by Respondent contained an arbitration clause calling for arbitration at the Mediterraneo International Arbitral Center [*Re. Ex. 1*]. In its counter-offer (ultimately accepted by Respondent and reflected by the Contract), Claimant replaced Respondent’s arbitration clause with the one providing this Tribunal with jurisdiction. Respondent acknowledges that it “did not object to its inclusion” [*Answer* ¶15].

C. The arbitration agreement is valid.

9. The arbitration agreement is valid under Art. II(3) of the New York Convention. Under Art. II(3), an arbitration agreement is invalid if it is “null and void, inoperative or incapable of being performed.” Since Respondent has alleged invalidity [*Proc. Ord. No. 1* ¶4], it bears the burden of showing that the arbitration agreement is invalid [*Gaillard/Savage 124*]. However, the arbitration agreement at issue before this Tribunal is neither null and void (1), nor inoperative (2), nor incapable of being performed (3).

1. The arbitration agreement is not null and void.

10. There was no defect in the formation of the arbitration agreement that would render it “null and void.” Generally, subject to specific national law definitions of the same, as well as UNCITRAL Model Law Art. 8, an arbitration agreement is null and void when it was defective or invalid at formation, typically as a result of “fraud, duress, illegality, mistake, and lack of capacity” [*van den Berg 155-8; Born 160*]. Here, Respondent did not—because it could not—provide this Tribunal with evidence of any of the above-referenced deformities or any other grounds of nullity.

2. The arbitration agreement is not inoperative.

11. Respondent cannot legitimately claim that the arbitration agreement is inoperative. Tribunals may find that an agreement is inoperative where it was once valid but has ceased to have effect. This may be the case, *inter alia*, where the agreement was explicitly or implicitly revoked or waived, where it is *res judicata*, or where a relevant time limit has expired [*van den Berg 158-9; Born 160*]. Respondent has not argued and cannot argue any of these. Therefore, the Tribunal should not find the arbitration clause inoperative.

3. The arbitration agreement is not incapable of being performed.

12. The arbitration agreement is sufficiently comprehensive, specific, and clear to permit performance. Courts have found performance impossible where the parties have agreed upon a specific procedure

that cannot be realized or where the terms of an arbitration agreement are so vague, indefinite, or internally contradictory that the Tribunal cannot ascertain the parties' intent [*Born 160; Corte di Appello, Salerno 31 Dec. 1990 (Ita.); Wilson v. Lignotock (USA); Fowler v. Merrill Lynch (U.K.)*]. Such clauses are commonly referred to as "pathological" [*Lew/Mistelis/Kröll 154; see also Eisemann 129 (origin of the term "clause d'arbitrage pathologique")*].

13. Tribunals and courts have found arbitration clauses to be pathological in the following circumstances: 1) equivocation as to whether binding arbitration is intended; 2) designation of an arbitrator who is deceased or refuses to participate; 3) designation of an arbitral institution that does not exist or refuses to organize an arbitration; 4) conditions specified by the parties cannot be met by the arbitrators; and 5) the agreement specifically provides for procedures that are mutually exclusive or indiscernible [*Bishop 18-19; see also Lew/Mistelis/Kröll 154-9; Davis 367-8, 378*]. Even a pathological clause will be upheld, however, as long as the court or the tribunal can discern and give effect to the parties' intent [*Lew/Mistelis/Kröll 156-7; Gaillard/Savage 264*]. Respondent alleges only that the arbitration agreement fails to indicate clearly the applicable rules of procedure and/or an arbitral institution and therefore is so unclear as to be a "nullity" [*Proc. Ord. No. 1 ¶4*]. This argument fails.
14. As will be discussed below (*see infra ¶¶16-28*) the arbitration agreement is not so ambiguous or vague as to be pathological. The arbitration clause is valid because the parties unequivocally agreed to submit disputes "arising out of or in connection with" the Contract to arbitration [*Cl. Ex. 1¶34*]. Never during the negotiations did the parties consider submitting their dispute to an alternative forum. Moreover, the procedures chosen by the parties do not render the agreement invalid. As will be discussed below (*see infra ¶¶16-28*), the parties' intent to arbitrate under the Romanian Rules and under the aegis of the Court of International Commercial Arbitration attached to the CCI of Romania is discernable and should be given effect.
15. Moreover, if the Tribunal were to find that the arbitration agreement is so ambiguous or vague as to be pathological, it should nevertheless give expression to the parties' intent by curing the ambiguity [*Lew/Mistelis/Kröll 156-7; Gaillard/Savage 264-6; Davis 378*]. Ambiguities in the wording of an arbitration agreement are usually not fatal (*see infra ¶¶16-28*). Where, as is the case here, it is clear that both parties intended to submit their dispute to arbitration, the Tribunal should interpret the agreement in a manner that favors validity and respects the parties' intent [*Lew/Mistelis/Kröll 155; (when clauses "show clearly that the parties intended to submit their disputes to arbitration...courts and tribunals are*

reluctant to consider these clauses void for uncertainty.”); Gaillard/Savage 264].

III. PARAGRAPH 34 OF THE CONTRACT CALLS FOR ARBITRATION UNDER THE ARBITRATION RULES OF THE COURT OF INTERNATIONAL COMMERCIAL ARBITRATION ATTACHED TO THE CHAMBER OF COMMERCE & INDUSTRY OF ROMANIA.

16. The Tribunal should respect the parties’ intent to submit their dispute to institutional arbitration at the Court of International Commercial Arbitration attached to the CCI of Romania. The New York Convention favors party autonomy and places strong emphasis on the interpretation of party intent [*van den Berg 282; Broches ¶3; Gaillard/Savage 125*]. Tribunals and courts dealing with contested (and allegedly pathological) clauses similar to the one before this Tribunal generally seek to uphold the parties’ intent to arbitrate and interpret the clauses so as to render them effective [*Gaillard/Savage 262-3; Lew/Mistelis/Kröll 155-6*]. This Tribunal should do the same.
17. Where a party has alleged that the terms of an arbitration agreement are ambiguous, ascertaining the parties’ intent requires the Tribunal to consider the following factors: whether the parties agreed to arbitrate, whether they intended institutional or ad hoc arbitration, and where and under which rules the arbitration should take place [*see, e.g. Geneva CCI, Case No. 193, Interim Award of 21 Oct.2002 (Switz.); Partial Award in ICC Case No. 7920, 1993; OLG Hamm, 27 Sep. 2005 (Ger.); see also Born 185-9; Scalbert/Marville 118-9, 128-9; Gaillard/Savage 264*]. Evidence of such intent can be found in both the language of the arbitration agreement and in the surrounding circumstances [*Gaillard/Savage 262-3; Lew/Mistelis/Kröll 155-6*].
18. Once a tribunal has established that the parties intended arbitration, it will give effect to that intent by construing the language of the clause broadly [*see, e.g. Lucky-Goldstar (H.K.) (reference to a non-existent institution and rules disregarded by J. Kaplan and ad hoc arbitration instituted, in order “to give effect to the clear intention of the parties [to arbitrate].”); Laboratorios Grossman (USA) (no clear designation of an arbitral institution or procedural rules, but a dominant purpose by the parties to submit their disputes to arbitration; the court cured the agreement and directed arbitration before the “most appropriate” tribunal in the circumstances.)*]. A broad construction of an arbitral clause will look to the geographical specifications included in the parties’ agreement in order to choose between ad hoc and institutional arbitration and to determine the institution and rules most likely intended by the parties. For example, in *Lucky-Goldstar*, the tribunal held a clause providing for arbitration in a “third country” under non-existent rules (those of the International Commercial Arbitration Association) to commit the parties to ad hoc arbitration [*Lucky-Goldstar (H.K.)*]. By contrast, where the agreement included specific geographical indications, such as “Tribunal de la Seine” [*Craig/Park/Paulsson 159 n.4*] or “Court of Arbitration of Budapest,

Hungary” [*Cavalieros* 1022-5], arbitrators and courts have referred the parties to arbitration before a tribunal most clearly linked to that geographical location. Arbitral clauses have not been given effect only in those instances where the parties explicitly designated a non-existent or non-inferable institution [*see, e.g. Scalbert/Marville* 128; *Gaillard/Savage* 264-8; *Lew/Mistelis/Kröll* 155-9].

19. In this case, both the language and the circumstances indicate that the parties not only agreed to institutional arbitration (A), but also to institutional arbitration under the Romanian Rules (B), administered by the Court of International Commercial Arbitration attached to the CCI of Romania (C).

A. The parties agreed to institutional arbitration.

20. The Tribunal should find that the arbitration agreement manifests an intent by the parties to submit their dispute to institutional arbitration. According to the arbitration agreement, the parties chose the “International Arbitration Rules used in Bucharest” [*Cl. Ex. 1* ¶34]. Despite the language of Para. 34, Respondent may argue that the agreement calls for ad hoc arbitration. However, the language of the agreement itself calls for arbitration under the “International Arbitration Rules used in Bucharest” (emphasis added). This reference to use in a particular geographic location cannot be read to call for ad hoc arbitration because ad hoc arbitration, unlike institutional arbitration, is not tied to an institution situated in any one geographic location [*Gaillard/Savage* ¶201].
21. Furthermore, the surrounding circumstances—essential in ascertaining party intent—refute the argument that the parties intended ad hoc arbitration. During contractual negotiations, Respondent initially offered its standard arbitration clause, calling for institutional “arbitration at the Mediterraneo International Arbitral Center” [*Re. Ex. 1*]. Respondent had engaged in institutional arbitration under this clause in two out of three of its past arbitrations [*Clar. Q. 15*]. Since Respondent’s own default choice of arbitral proceedings was institutional arbitration, it is reasonable to assume that Respondent intended institutional arbitration in this case as well. Claimant’s alternative arbitration clause, which subsequently became the arbitration agreement, did not alter this expectation—but only the form [*Re. Ex. 1*]. As for Stiles’ later statement—made after the request for arbitration was filed—that “it looked strange to him” that “no institution was mentioned” in the amended clause, the Tribunal should note that reference to rules rather than an institution is commonplace [*Zurich CC 1994 (Switz.)*; *ICC Case No. 5103*; *see also Born* 187-8].
22. Not only does the text of the parties’ agreement indicate that institutional arbitration was intended, but it is also reasonable to presume that the parties wished to avail themselves of the benefits of

institutional arbitration. Institutional arbitration offers, among other benefits, advantages such as the security of established procedural rules and professional supervision of the proceedings, recourse to independent review and revision of the award, greater certainty with regard to costs, and a body of practice and commentary to inform the resolution of complex issues that may arise [Redfern/Hunter ¶¶1-101 to 1-102; Born 12]. This reasonable presumption in favor of institutional arbitration, in combination with the language of the arbitration agreement and the circumstances surrounding its formation, indicates that the parties intended institutional arbitration in this case.

B. The parties agreed to institutional arbitration under the Romanian Rules.

23. The arbitration agreement designates the Romanian Rules as the procedural rules that govern the Claim. As noted above, the agreement specifically calls for the arbitration to be “settled by the International Arbitration Rules used in Bucharest” [Cl. Ex. 1 ¶34]. Respondent may note that the proper title of the Romanian Rules is in fact “Arbitration Rules” [Art. I(1) Romanian Rules]. However, the Tribunal should not sacrifice the substance of the parties’ intent on the altar of banal linguistic formality. Chapter Eight of the Romanian Rules, which is entitled “Special Provisions Regarding International Commercial Arbitration,” contains those portions of the Romanian Rules that are specific to international arbitrations. Thus, use of the term “International” conveys the parties’ intent that these specific provisions of the Romanian Rules apply. Likewise, the capitalization by the parties of “International Arbitration Rules” indicates that such designation was not meant to be merely descriptive, but denotes a proper name. The parties’ decision to designate the rules in this way shows that they intended arbitration according to specific named rules rather than a general set of “international rules.”
24. The term “the International Arbitration Rules used in Bucharest” also indicates party intent to select the rules most closely associated with Bucharest and constitutes an attempt to distinguish the rather ambiguously-named “Arbitration Rules” from similar procedural frameworks. As noted above (*see infra* ¶17), tribunals have relied on the geographic location specified by the parties to determine party intent to arbitrate under the rules most commonly associated with that geographical location [*see, e.g., Preliminary Award of 25 Nov. 1994, Zurich CC (Switz.) (“international trade arbitration organization in Zurich” interpreted as Zurich Chamber of Commerce International Arbitration Rules); ICC Case No. 5103 (reference to Paris Chamber of Commerce interpreted as reference to ICC); see also Gaillard/Savage 262-3; Lew/Mistelis/Kröll 156 (where designation of the institution under the rules of which an arbitration should take place was unclear, “the reference to a particular city...allowed the courts to identify the chosen institution.”)]]. There*

is no other organization in Bucharest that conducts international commercial arbitrations [*Clar. Q. 10*]. The CCI of Romania most often organizes arbitrations according to the Romanian Rules [*Clar. Q. 12*]; in fact, the letter of 28 Aug. 2006 from the Court of International Commercial Arbitration to Respondent refers to the Romanian Rules as “our rules” [*Letter to Re., 28. Aug. 2006, p.16*]. No procedural rules other than the Romanian Rules satisfy the parties’ express requirements that the rules be specific to international commercial arbitration and have a particular attachment to Bucharest.

25. Respondent incorrectly alleges that the arbitration agreement is ambiguous because “International Arbitration Rules” could mean either the Romanian Rules themselves or allow for the operation of the UNCITRAL Arbitration Rules [*Art. 72(2) Romanian Rules*]. This interpretation is circular and, if accepted, would endanger the viability of the Romanian Rules themselves. While Art. 72(2) does provide that the parties are “free to decide either for these Rules, or for other rules of arbitral procedure,” it goes on to say that, “in case the parties have opted for UNCITRAL Rules of Arbitration, the Arbitrator Appointing Authority shall be the President of the Court of International Commercial Arbitration.” Thus, the drafters of the Romanian Rules anticipated that if parties intended arbitration under the UNCITRAL Rules in Romania, they should so designate in the arbitration agreement. In fact, Art. 5 of the Romanian Rules specifies that, where organization of the arbitration has been entrusted to the Romanian Court of International Commercial Arbitration, the Romanian Rules apply by default. Art. 72(2) simply codifies the freedom of parties to agree to an institutional arbitration organized by the CCI of Romania but not subject to the Romanian Rules. The parties did not designate the UNCITRAL rules in this case. Moreover, these rules are almost never used by tribunals organized by the CCI of Romania [*Clar. Q. 12*].

C. The parties agreed to institutional arbitration administered by the Court of International Commercial Arbitration attached to the Chamber of Commerce & Industry of Romania.

26. The parties’ arbitration agreement was clear given that the Romanian Rules refer to an institution, the “CCI of Romania and Bucharest,” that no longer exists [*Clar. Q. 10*]. The CCI of Bucharest does not typically deal with international arbitration, while the CCI of Romania has attached to it a “Court of International Commercial Arbitration.” Therefore, the CCI of Romania is the only institution in Bucharest that uses international arbitration rules. In other words, “International Arbitration Rules used in Bucharest” can refer only to arbitration organized by the CCI of Romania.
27. Courts have refused to compel arbitration where an arbitration agreement refers specifically to a

non-existent institution, e.g. the “CCI of Utopia” [see *infra* ¶17; see furthermore *Scalbert/Marville 119; Astra Footwear (USA); Bayerisches Oberstes LG, 28 Feb. 2000 (Ger.)*]. However, where the agreement permits an interpretation that accords with both party intent and logic, the agreement should be construed in favor of arbitration at the institution that best effectuates the parties’ intent [Gaillard/Savage 262-3; Lew/Mistelis/Kröll 155-6; see also *Cour de Cassation, 14 Dec. 1983 (Fr.) (Belgrade Chamber of Commerce interpreted as Foreign Trade Arbitration Court at the Economic Chamber of Yugoslavia)*]. An agreement stating no more than “arbitration: Hamburg, West Germany” was interpreted by the Arbitration Court of the German Coffee Association as conferring jurisdiction based on its reference to a geographical location and party intent expressed outside the agreement. This award was recognized by a German court [*Hanseatisches OLG (Hamburg), 24 Jan. 2003 (Ger.)*]. In the present case, the arbitration agreement not only designated a geographical location, but a set of rules specific to that location, i.e. the International Arbitration Rules.

28. In sum, both the language of the arbitration agreement and the surrounding circumstances indicate that the parties agreed to institutional arbitration under the Romanian Rules administered by the Court of International Commercial Arbitration at the CCI of Romania.

IV. THE PARTIES’ DISPUTE FALLS WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT AND IS ARBITRABLE.

29. Not only is the parties’ agreement to arbitrate valid and sufficiently specific in designating an arbitral institution and a set of procedural rules, but the scope of the agreement is broad enough to encompass the issue in dispute (A) and the Claim is arbitrable (B), both as required by Art. II(1) of the New York Convention.

A. The dispute is within the scope of the arbitration agreement.

30. The specific wording of the arbitration clause determines the scope of the agreement [*Broches 39-40; Redfern/Hunter ¶¶3-37 to 3-41*]. The phrase “arising out of or in connection with” is the broadest language common to standard form arbitration clauses. This language has been interpreted to require arbitration of all claims flowing from contractual obligations [*Redfern/Hunter 3-40; Born 319-20*]. Here, the Contract submits “all disputes arising out of or in connection with [the] Contract” to arbitration [*Cl. Ex. 1 ¶34*], and Claimant has asserted a contract claim.

B. The Claim is arbitrable.

31. An arbitration agreement is valid and an award rendered on the basis of that agreement is enforceable only if the underlying subject matter is arbitrable. Arbitrability is defined in the New

York Convention in Art. II(1), dealing with validity, and Art. V(2)(a), dealing with recognition and enforcement of awards. Both articles require that the subject matter of the arbitration be “capable of settlement by arbitration” in connection with the formation of a valid arbitration agreement [*van den Berg 152-4; Born 243*]. Typically, tribunals have found that claims dealing with “anti-trust and competition, securities transactions, insolvency, intellectual property rights, illegality and fraud, bribery and corruption, and investments in natural resources” are incapable of settlement by arbitration, although even these claims are being increasingly recognized as arbitrable [*Lew/Mistelis/Kröll 201; Gaillard/Savage 339-42*]. The subject-matter of the present dispute, a breach of contract claim for delivery of non-conforming goods, does not fall within any of these categories.

32. Respondent may argue that the Tribunal would be required to consider the legality of Equalec’s refusal to connect the JS Fuse Boards, and that, therefore, the claim is not arbitrable. This, however, does not present an obstacle to arbitrability. The legality of Equalec’s Fuse Policy under ESRA has no effect on the parties’ obligations to each other (*see supra* ¶70).

PART TWO. RESPONDENT BREACHED THE CONTRACT AND IS LIABLE TO CLAIMANT.

33. On 12 May 2005, Respondent contracted to deliver five primary distribution fuse boards for Claimant’s development in Mountain View [*Cl. Ex. 1*]. Respondent breached the Contract under Art. 35 CISG by delivering fuse boards that were neither of the required quality and description nor fit for a particular purpose made known to Respondent (I). The Contract was not modified to allow delivery of JS fuses because the parties explicitly agreed to a “no oral modification” provision and Claimant is not precluded by its conduct from asserting this provision under Art. 29(2) CISG (II).

I. RESPONDENT BREACHED THE CONTRACT BY DELIVERING NON-CONFORMING GOODS.

34. On 22 Aug. 2005, Respondent delivered five primary distribution fuse boards containing Chat JS fuses [*Re. Ex. 1; Statement of Claim* ¶14]. The Fuse Boards did not conform to the Contract because they were neither of the required quality and description under Art. 35(1) CISG (A), nor fit for a particular purpose made known to Respondent under Art. 35(2)(b) (B).

A. The Boards were not of the quality and description required by the Contract.

35. Respondent breached the Contract because it did not provide goods of the required quality and description. Under Art. 35(1) CISG, the seller must deliver goods that are of the “quantity, quality and description required by the contract.” In other words, parties must comply with the terms of their contract [*Bianca in Bianca-Bonell 271; Honnold 254; Lookofsky 90; Sacovini (Fr.); LG Paderborn 25*

June 1996 (Ger.). The seller must respect the particularities of each sale and do all that is necessary to make the goods usable and conform to the parties' agreement [*Neumayer 275-6*]. The agreement between the parties is the primary source for assessing conformity [*Henschel §c, citing UNCITRAL Secretariat Commentary, UNIDROIT Principle 7.1.1 and PECL Art. 8:101; see also Kritzer 282; Schwenger in Schlechtriem98 276*]. Once the buyer has made the claim of non-conformity, the burden of proving conformity shifts to the seller [*Slechtriem05 481*]. Respondent cannot meet this burden. The Contract required Respondent to deliver "five primary distribution fuse boards" [*Cl. Ex. 1*]. The quality and description of the Fuse Boards were defined by expressly incorporating the Drawings [*id.*]. The descriptive notes on the Drawings thereby became binding terms of the Contract under Art. 8 CISG (1) and obligated Respondent to deliver fuse boards that contained Chat JP fuses (2) and that were "lockable to Equalec requirements" (3).

1. Respondent was bound by the notes on the Drawings.

36. The descriptive notes on the Drawings became binding terms of the Contract. Under Art. 8 CISG, the parties' intent is central to interpreting the Contract [*Bianca in Bianca/Bonell 272; Lookofsky 56; Schwenger in Schlechtriem05 413; MCC (USA.)*]. The test for intent is two-fold. First, the Tribunal gives effect to a party's subjective intent under Art. 8(1) if the "other party knew or could not have been unaware" of this intent [*Eörsi in Galston/Smit 2-13; Enderlein/Maskow 63; Farnsworth in BLANCA/BONELL 99; Calzados (Fr.); BGH 11 Dec. 1996 (Ger.)*]. Second, if Art. 8(1) does not apply, the Tribunal looks to the objective "understanding that a reasonable person of the same kind as the other party would have had in the same circumstances" under Art. 8(2) [*Honnold 118; Farnsworth in Bianca/Bonell 98; Schuermans (Neth.); Roland (Switz.); OG 20 Mar. 1997 (Aus.)*]. The notes on the Drawings were binding terms of the Contract because Respondent "knew or could not have been unaware" of Claimant's intent to incorporate them under Art. 8(1) CISG (a). Even if Art. 8(1) does not apply, "a reasonable person" in Respondent's position would have understood Claimant's intent under Art. 8(2) CISG (b).

a. Respondent knew or could not have been unaware of Claimant's intent to incorporate the notes on the Drawings.

37. Respondent's conduct shows that it knew of Claimant's intent to incorporate the notes on the Drawings. On 22 Apr. 2005 Respondent specifically requested the Drawings before quoting a price [*Re. Ex. 1*]. Claimant complied by 4 May 2005, giving Respondent ample time to study the Drawings [*id.*]. When the parties concluded the Contract on 12 May 2005, they explicitly agreed that the Drawings were "attached and made part" of the Contract [*Cl. Ex. 1*]. The descriptive notes

were an integral and necessary part of the Drawings. The quality and description of the Fuse Boards could not be complete without them. These notes specified both that the fuses were to be “Chat Electronics JP type” and that the Fuse Boards were “to be lockable to Equalec requirements” [Statement of Claim ¶9]. After Respondent had depleted its inventory of Chat JP fuses, it attempted to order the Chat JP fuses that it “would need to fulfill the contract” with Claimant [Re. Ex. 1]. Respondent admitted, “engineering drawings...attached to the contract indicated that the fuses...were to be Chat Electronics JP type fuses” [id.]. If a change of fuse type was merely a “minor adjustment...made all the time” [id.], Respondent had no reason to contact Claimant on 14 July 2005 [Cl. Ex. 2; Re. Ex. 1].

38. Even if Respondent was not actually aware of Claimant’s intent, it “could not have been unaware” of it. This standard is met when the intent was expressed clearly enough to be apparent without further inquiry, *i.e.* “facts that are before the eyes of one who can see” [Honnold 260; LG Kassel 15 Feb. 1996 (Ger.)]. Claimant’s intent was literally “before the eyes” of Respondent in the form of two plain notes on the Drawings. Understanding them did not require further investigation or even significant effort on the part of Respondent.

b. A reasonable person in Respondent’s position would have understood Claimant’s intent.

39. Even if Art. 8(1) does not apply, a reasonable person in Respondent’s position would have understood Claimant’s intent to incorporate the notes under Art. 8(2) CISG. Art. 8(2) envisions a reasonable person not in the abstract, but rather, of the same kind as the other party in the same circumstances [Farnsworth in Bianca/Bonell 99; Schmidt-Kassel in Schlectriem05 121-2; Tunc 551]. The relevant circumstances include the “negotiations...usages and any subsequent conduct of the parties” [Art. 8(3) CISG; see also Enderlein/Maskow 66-7]. A reasonable person in Respondent’s position would have understood Claimant’s intent because of the conduct of the parties (*see supra* ¶37), Respondent’s skill and experience, the customized nature of the Fuse Boards, and a prevailing trade usage in the electrical industry.
40. Respondent’s skill and experience implied strict adherence to specifications. Respondent has been a specialist in the fabrication and distribution of electrical equipment for over forty years [Answer ¶2; Re. Ex. 1]. It is well aware that Fuse boards are “fabricated to meet the specific requirements of each customer” based on “detailed engineering drawings” [Fuse Boards “need to be specially fabricated,” Re. Ex. 1; see also Statement of Claim ¶9]. Such highly customized goods demand exacting adherence to

the specifications or, otherwise, fabricators risk creating useless goods of marginal resale value. The Fuse Boards here are a good example. Their residual value was essentially that of the constituent fuses [Clar. Q. 34]. There were 300 to 450 fuses in the Fuse Boards [Statement of Claim ¶¶5-6]. All the fuses were Chat JS type at ratings of 100 to 250 amps [Re. Ex. 1; Clar. Q. 27] with a retail price of US\$37.05 each [Re. Ex. 2]. Assuming the fuses could be resold for retail price, the residual value for the Fuse Boards was US\$11,115 to \$16,672.50—at most, less than one-tenth of the \$168,000 Contract price [Cl. Ex. 1].

41. Respondent was required to strictly adhere to specifications as a trade usage of the electrical industry. In addition to the relevance of usages in determining reasonableness under Art. 8(2), Art. 9(2) CISG directly applies a “usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned” [see also *Honnold 128-9*]. The technical handbook of a major global distributor, for example, states that an “electrical contractor’s proposal shall be based upon the fuses specified...as called for in the specification or on the drawings” [Bussmann 177]. The “type, class and manufacturer specified” of parts are vital to electrical design [*id.*]. Respondent knew or ought to have known of this usage as an experienced fabricator of customized fuse boards (see *supra* ¶40) and as a frequent exporter [“We have often supplied...to customers in Equatoriana,” Re. Ex. 1].
42. Whether by the subjective test of Art. 8(1) or the objective test of Art. 8(2), the conduct of the parties and the circumstances show that the Contract incorporated the notes on the Drawings. The Contract thus obligated Respondent to deliver Fuse Boards containing Chat JP fuses and lockable to Equalec requirements. Respondent failed to do either.

2. Respondent failed to deliver Fuse Boards containing Chat JP fuses.

43. Respondent delivered non-conforming goods by supplying Chat JS fuses instead of Chat JP fuses [Re. Ex. 1; Statement of Claim ¶14]. The Contract required delivery of Chat JP fuses, but did not require that the fuses be directly from the maker Chat (a). Respondent should have been aware that the distinction between JP and JS fuses was important (b).

- a. *The Contract did not require fuses directly from the maker Chat.*

44. There was no contractual requirement that Respondent had to directly obtain the fuses from the maker Chat by any interpretation under Art. 8 CISG. Parties cannot be held to a purely subjective intent if it was not expressed or not expressed clearly [*Schlechtriem05 421*]. The Contract required Chat JP fuses [Statement of Claim ¶9], but the fuses did not need to come directly from the

manufacturer, Chat. There is no hint of such a requirement in the record. In the 14 July 2005 call, for example, Hart stated that there was a “preference in the firm for Chat Electronics equipment” [Cl. Ex. 2]. Even if he had “seemed to insist” [Re. Ex. 1], there was no mention that fuses had to be directly from Chat. In fact, the circumstances point to an implicit understanding that Respondent was free to obtain Chat JP fuses from Chat or secondary sources. The record shows that Chat fuses were generally available from at least three suppliers: Chat, Respondent, and Switchboards [Cl. Ex. 3; Re. Ex. 1]. In all likelihood, there were significantly more suppliers than this because of Chat’s reputation for quality [Clar. Q. 26]. Respondent also knew that Claimant faced tight time pressures [Re. Ex. 1]. In these circumstances, restricting where Respondent could obtain Chat fuses could not have been in the interests of either party nor served any reasonable purpose. There is no evidence, for example, that the Chat fuses from Switchboards were inferior in any way. There is no evidence that either party considered or ever had reason to favor restricting the source of Chat fuses. Even if Respondent had intended that the fuses must come directly from Chat, this intent falls far short of either subjective or objective intent under Art. 8.

b. Respondent should have been aware that the distinction between JP and JS fuses was important.

45. JP type fuses differ significantly from JS type fuses in safety and economic risks. Contrary to Respondent’s assertions that a change of fuse type is a “minor adjustment” and that “it really did not matter which type was used” [Re. Ex. 1], the “type, class and manufacturer specified” of parts are vital to electrical design [Bussmann 177]. A JP fuse fixing center is 82mm, while that of a JS fuse is 92mm [Re. Ex. 2]. “[O]nce one type is installed it cannot be replaced by the other” [Re. Ex. 1], short of replacing the entire fuse board at significant time and expense [Cl. Ex. 3; Statement of Claim ¶18]. Only JS fuses are available at ratings more than 400 amps [Re. Ex. 1; Re. Ex. 2]. In the context of the Fuse Boards, where all the fuses were intended to be less than 400 amps [Statement of Claim ¶9; Re. Ex. 1; Clar. Q. 27], there is a significant safety difference in fuse types. Unlike JP fuses, JS fuses pose the safety risk that fuses at ratings more than 400 amps could be inadvertently or illegitimately used [Cl. Ex. 3; Cl. Ex. 4]. This risk is both in initial installation and in any subsequent replacement of the fuses. Whenever a fuse blows in a primary distribution fuse board, for example, Equalec is responsible for replacing it [Statement of Claim ¶6]. Even if the likelihood of improperly rated fuses is small, the safety and economic consequences are substantial. A properly rated fuse is a safety valve that keeps the flow of current at safe levels [Wright/Gordon; Bussmann 1]. A fuse rated at 100 amps, for example, lets through current of up to 100 amps [Bussmann 1,3]. When the current exceeds 100

amps, the fuse melts, breaking the circuit and preventing the power surge from damaging the rest of the circuit and any connected equipment [*id.*]. Putting an 800 amp fuse, for example, in a circuit designed for 100 amps, would allow currents of up to 800 amps to pass through. Such overcurrents could cause equipment damage, fires, blackouts, and severe monetary losses, if not injury or death [*Lobbeck; Busmann 1*]. It was because of such risks that Equalec adopted its Fuse Policy in July 2003, requiring JP fuses in circuits rated less than 400 amps [*Cl. Ex. 2; Cl. Ex. 3*]. Respondent's delivery of Fuse Boards with JS rather than JP fuses was far from a "minor change;" it implied substantial safety and economic risks in breach of the Contract.

3. Respondent failed to deliver fuse boards lockable to Equalec requirements.

46. Even if Respondent was not obligated to deliver Chat JP fuses, the Fuse Boards still had to be lockable in the manner that Equalec required per Art. 8 CISG (a). Respondent was bound to observe Equalec's connection requirements in so far as they were pre-requisites for Equalec to lock the Fuse Boards (b).

a. The Contract required fuse boards lockable to Equalec requirements.

47. The Contract required the Fuse Boards "[t]o be lockable to Equalec requirements" [*Statement of Claim ¶7*]. Respondent was bound to observe the notes on the Drawings under both Art. 8(1) and Art. 8(2) CISG (*see supra ¶36*). In particular, a reasonable party in Respondent's position would have understood Claimant's intent to incorporate Equalec's requirements under Art. 8(2) for several reasons. Respondent had significant skill and experience in fabricating custom fuse boards (*see supra ¶40*), multiple dealings with clients in Equatoria [Re. Ex. 1], and demonstrated familiarity with electrical supply requirements, such as its knowledge of the Commission and certification [Re. Ex. 1]. Respondent was also bound by a trade usage it either knew or should have been aware of as part of the electrical industry. As the electricity provider in Mountain View, Equalec had managerial control over the Fuse Boards, even though Claimant purchased and installed them [*Statement of Claim ¶7*]. The normal procedure was for Equalec to lock such fuse boards with a small padlock so that it has exclusive access [*Statement of Claim ¶8*]. Such procedures are typical in the industry, especially given the economic, safety, and liability risks involved [*Electric Utility Week*]. Contrary to Respondent's assertion [*Answer ¶25(d)*], Equalec's requirements were then readily known to Respondent and integral to its contractual obligations (*see also infra ¶¶49-50*).
48. Respondent was obliged to meet Equalec requirements despite the fact that Equalec's policies only apply in Equatoria. If a seller has been informed of the country in which the goods will be used,

the seller must “accommodate the characteristics required for the actual use of the goods in this country” [*Schwenzer in Schlechtriem*05 420; *see also Honnold* 256]. In one case, for example, the court ruled that a seller of cheeses, in dealing with the buyer for several months, must have known that the cheese was destined for the buyer's country and was thereby bound to meet the marketing regulations of the buyer's country [*Caito (Fr.)*]. Similarly here, from the day that Respondent received the Drawings around 4 May 2005, through months of dealing with Claimant, Respondent must have known that it was bound to observe Equalec requirements in the country of Equatoria (see *supra* ¶37). Respondent was expressly aware of where the Fuse Boards were to be used even before the conclusion of the Contract (see *infra* ¶53). The only use of the Fuse Boards was for connecting the Mountain View development to Equalec's electrical grid. Equalec's requirements were “characteristics required” for such use. Respondent was then obliged to deliver Fuse Boards meeting Equalec's requirements.

b. The Contract incorporated Equalec’s connection requirements to the extent that they were pre-requisites for locking the Fuse Boards.

49. The Contract required the Fuse Boards “[t]o be lockable to Equalec requirements,” meaning “Equalec’s requirements for connecting the distribution fuse boards to the electric current and to lock the fuse boards” [*Statement of Claim* ¶9]. To conform to the Contract, the Fuse Boards had to be fabricated such that Equalec would lock them. “[L]ockable to Equalec requirements” does not mean only that the Boards must be physically lockable. Both parties were at least generally aware that Equalec would not lock fuse boards unless they met electric service requirements [*Statement of Claim* ¶9; *Re. Ex. 1*]. If the parties had meant only that the Fuse Boards must be physically lockable, then the Contract would have said only that they needed to be “lockable,” and not “lockable to Equalec requirements.” Even if there were testimony that “lockable to Equalec requirements” meant “Equalec would lock the fuse boards with a padlock” [*Clar. Q. 21*], this would not establish that the Contract required only that the Fuse Boards be physically lockable.
50. Regardless, Respondent neither asked for clarification of the Equalec note on the Drawings nor indicated that it had not understood it. Where one party finds the other party’s expressed intent vague or ambiguous, it should inquire as to its meaning [*Junge in Schlectriem*98 71; *Neumeyer* 114]. Consistent with the trade usage that electrical contractors strictly adhere to specifications (see *supra* ¶41), the Equalec note at least put Respondent on notice that Equalec’s requirements were relevant to the Contract. In the circumstances, especially given Respondent’s skill and experience (see *supra* ¶40) as well as its knowledge of Claimant’s tight time pressures [*Re. Ex. 1*], the note would have

prompted a reasonable party to investigate by accessing the Equalec website [*Clar. Q.* 24], consulting with Equalec, knowledgeable suppliers or industry groups, or, at least, by requesting clarification from Claimant itself.

51. Respondent was bound to observe Equalec's connection requirements in so far as they were pre-requisites for Equalec to lock the Fuse Boards. Equalec's refusal to connect and lock the Fuse Boards on 8 Sept. 2005 [*Statement of Claim* ¶14] shows that the Fuse Policy was such a pre-requisite, giving independent grounds for Respondent's breach.

B. The Fuse Boards were not fit for a particular purpose made known to Respondent.

52. Even if the Fuse Boards were of the quality and description required by the Contract under Art. 35(1) CISG, they were not fit for the particular purpose of connecting Mountain View Office Park to Equalec's electrical grid. Goods do not conform to the original contract under Art 35(2)(b) when they are not "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract." This means that regardless of the express terms of the Contract, the goods should fulfill any particular purpose communicated to the seller [*Schwenzer in Schlechtriem* 05 421; *Neumayer* 278; *Bianca in Bianca/Bonell B* 275; *Marques (Fr.)*, cited in *Lookofsky* 93]. However, Art. 35(2)(b) provides an exception where "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement" [*see also Bianca in Bianca/Bonell* 274; *Schlechtriem in Galston/Smit* 6-20; *Lookofsky* 92; *Henschel §m*; *Helsinki CA (Fin.)*]. Claimant expressly or impliedly made known to Respondent the particular purpose of connecting to Equalec's electrical grid (1). Claimant relied on Respondent's skill and judgment (2) and this reliance was reasonable (3).

1. Claimant made known the particular purpose of connecting to Equalec's grid.

53. The particular purpose of the Fuse Boards was for them to connect the Mountain View Office Park to Equalec's electrical grid. Under Art. 35(2)(b) CISG, the communication of a particular purpose may be either "express" or "implied" [*see also Schlechtriem* 280]. Claimant expressly informed Respondent of this purpose by 4 May 2005 when it sent the Drawings with the Equalec note, obliging Respondent to deliver Fuse Boards meeting Equalec requirements (*see supra* ¶46). Even if the specification "lockable to Equalec requirements" was not an express communication of the particular purpose, Claimant impliedly informed Respondent. Respondent, as an experienced specialist [*Answer* 2; *Re. Ex.* 1], knew that the Fuse Boards had no other purpose than to connect to

an electrical grid. The Fuse Boards were not merchantable to any other buyer or for any other purpose, given their highly customized nature [*Re. Ex. 1; Statement of Claim ¶9*] and minimal residual value (*see supra ¶40*). One court has held that such a total lack of merchantability implies that the goods are not fit even for ordinary use under Art. 35(1) CISG [*Arb. Case No. 2319 (Neth.), cited in DiMatteo04 397-8*]. From the first call on 22 Apr. 2005, Respondent knew that the Fuse Boards were for a project in Mountain View [*Re. Ex. 1*]. Together with the notes on the Drawings, Respondent knew that the Fuse Boards were to connect the development to the electrical grid of Equalec, the sole power supplier in the area [*Clar. Q. 31*]. Expressly or impliedly, Claimant made known to Respondent the particular purpose of connecting to Equalec's electrical grid.

2. Claimant relied on Respondent's skill and judgment.

54. After the buyer shows that it communicated a particular purpose to the seller, the burden shifts to the seller to demonstrate that the buyer did not rely, or that it was unreasonable for it to rely, on the seller's expertise [*Kritzer 283; Lookofsky 92; Honnold 257; Hyland/Freiburg 322*]. For the purposes of Art. 35(2)(b), the buyer must only have relied on those skills of the seller which the buyer does not possess [*Neumayer 280, Schwenzler in Schlechtriem05 422*]. Even in marginal cases, where both the buyer and the seller had expertise relevant to the particular purpose, the seller is held to a higher standard and considered to know the goods better [*Staudinger/Magnus Art. 35 §31; Neumayer 280*]. Here, Claimant is a property developer [*Answer ¶1; Statement of Claim ¶1*], while Respondent is a fuse board fabricator and therefore could be expected to have greater knowledge of the policies of power distributors. The Drawings attached to the Contract by Claimant stated only that Claimant required that the Fuse Boards be lockable to Equalec's requirements; it did not spell out what those requirements were. By its plain language, Claimant put itself in Respondent's hands with respect to fulfilling Equalec's requirements. That is the definition of reliance.

3. Claimant's reliance was reasonable.

55. Whether reliance is reasonable depends on the specific circumstances of a given case [*Bianca/Bonell 275; Schlechtriem05 421*]. The CISG does not define the term "reasonableness," but commentators agree that it must be judged according to what persons acting in good faith in the same situation as the parties would consider to be reasonable [*Kritzer 121; see also PECL 1:302; Farnsworth in Bianca/Bonell 99; Tunc 26*]. Furthermore, reliance is per se reasonable where the seller specializes or holds itself out as a specialist in "the manufacture or the procurement of goods for the particular purpose intended by the buyer," unless the seller "informs the buyer that he has no special

knowledge” [*Schlechtriem05 422; see also Bianca in Bianca/Bonell 276*]. Respondent is an experienced specialist with particular knowledge of electrical equipment [*Answer 2; Re. Ex. 1*], implying much greater knowledge of primary distribution fuse boards than Claimant. Claimant reasonably relied on Respondent’s skill and judgment to provide fuse boards that would be fit for the particular purpose of connecting to Equalec’s electrical grid.

56. The Fuse Boards delivered by Respondent were neither of the quality and description required by the Contract under Art. 35(1) CISG nor fit for a particular purpose made known to Respondent under Art. 35(2)(b). Art. 36 CISG provides that the “seller is liable in accordance with the contract and this Convention for any non-conformity which exists at the time when the risk passes to the buyer, even though the non-conformity only becomes apparent after that time” [*see also Enderlein/Maskow 149*]. Respondent is therefore fully liable for its breach of contract to Claimant.

II. THE CONTRACT WAS NOT MODIFIED TO PERMIT DELIVERY OF JS FUSES.

57. The Contract was not modified to allow delivery of JS fuses instead of JP fuses. The 14 July 2005 phone call did not modify the Contract because of the explicit “no oral modification” clause in the Contract (A). Furthermore, Respondent’s reliance on the phone call was not reasonable and it does not preclude Claimant from enforcing the “no oral modification” provision (B).

A. The 14 July 2005 phone call did not modify the Contract.

58. The 14 July 2005 conversation did not amend the Contract to permit Respondent to provide JS instead of JP fuses. The Contract itself and the applicable substantive law governing its interpretation do not allow for oral modifications. According to Art. 29(2) CISG, “a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement.” The purpose of Art. 29(2) is to protect the intent of the parties, ensure clarity of obligations, and prevent any confusion during performance by rendering oral modifications void where the parties have prescribed formalities [*Schlechtriem05 333; Eislen (d); Hillman 449*]. Here, Respondent and Claimant agreed to just such a protective measure. Para. 32 of the Contract reads: “Amendments to the contract must be in writing” [*Cl. Ex. 1*]. Consequently, regardless of any oral statements made during the 14 July 2005 conversation, any modification of the Contract had to be in writing. Since there was no writing, the Contract was never modified to allow delivery of JS fuses.
59. In accordance with the terms of the Contract, which includes this no-oral-modification term, Claimant had a policy requiring that any proposed modifications to a contract be submitted for

review and “circulated to all interested persons...including the engineering department” [*Cl. Ex.* 2]. Therefore, had Respondent submitted a written proposal for a contractual modification for JS instead of JP Fuses, Claimant’s engineers would have noted the substitution and, accordingly, reviewed the conformity of the modification with Equalec’s Fuse Policy. Claimant’s losses could have been avoided or diminished. However, because Respondent proceeded to deliver non-conforming goods without submitting the change in writing, Claimant never had an opportunity to perform this review.

60. Respondent may argue that Art. 29(2) CISG does not apply because it uses the word “modification,” while Para. 32 of the Contract uses “amendment,” but these two words are not different in this context. “Where it has been agreed that writing is necessary to modify or terminate a contract, 29(2) requires all such amendments to comply with the formal requirements agreed.” [*Schlechtriem05 331-2*]. According to this wording, “amendment” includes both modifications and terminations. Thus, the 14 July 2005 phone call did not—because it could not—“modify,” “amend,” or “terminate” any term of the Contract as written and agreed to on 12 May 2005.

B. Respondent did not reasonably rely on the 14 July 2005 phone call.

61. Respondent cannot raise the defense that it reasonably relied on Claimant’s oral conduct. Under the second sentence of Art. 29(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.” For a breaching party to invoke the second sentence of Art. 29(2) CISG, the reliance must have been reasonable under the circumstances [*Eiselen §j; Hillman 459; Enderlein/Maskow 124*]. The nature of the contract and the circumstances of the case are relevant factors to take into consideration when assessing reasonableness [*Eiselen §j; Kritzer 126; Vilus*]. It was unreasonable in this transaction for a sophisticated party like Respondent (*see supra* ¶40) to rely on the oral statements of an employee with neither actual (1) nor apparent (2) authority under domestic law or the Convention on Agency [*Enderlein/Maskow 123*]. No other conduct is relevant to the validity of the amendment.

1. Hart did not have actual authority to modify the Contract.

62. Respondent did not reasonably rely on the 14 July 2005 conversation because Hart had no actual authority to modify the Contract. Actual authority is generally related to an agent’s actual power of representation granted by his principal [*Schlechtriem05 332; Honnold 231*]. The CISG itself does not address agency and authority. In contracts governed by the CISG, the authority of an agent is determined by the domestic law that governs the relationship between the particular principal and

agent [*Schlechtriem*05 332; *OLG Karlsruhe* 1987 (*Ger.*); *HG Zürich* 1998 (*Switz.*)]. Here Konkler is the principal and Hart his agent. Since this representation occurred in Equatoriana, Equatoriana law governs. Equatoriana has adopted the Convention on Agency as its national law [*Clar. Q.* ¶16]. According to Art. 14(1) thereof, “[w]here an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal.” Hart did not have the authority to change the type of fuses since he had “no responsibility for the contract with Mediterraneo Electrodynamics” [*Clar. Q.* ¶17]. While Hart did have the authority to sign contracts limited to US\$250,000, he did not have any authority over this Contract, as he did not work in the area of electrical goods [*Clar. Q.* ¶17; *Answer* ¶8]. At no point did Konkler grant Hart the actual authority to modify or amend this Contract, even during his absence. Hart was merely one “member of the Purchasing Department” and therefore, had no actual authority to modify the Contract [*Answer* ¶7].

2. Respondent could not reasonably have believed Hart to have the authority to modify the Contract.

63. Konkler, the principal, did not act in any way that could reasonably cause Respondent to believe Hart was authorized to modify the Contract. The second sentence of Art. 14 of the Convention on Agency clarifies that “when the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority,” the principal cannot invoke lack of authority. [*See also USA REST 3d AGEN* § 2.03 (“an agent has apparent authority where it is reasonable for a third party to believe that an agent has authority, so long as the belief is traceable to manifestations of the principal.”) *See also CEM Freighter* 2005 (*Ger.*) (*interpreting* §164(1) *BGB* to mean that a principal is only liable for his agent’s actions under apparent authority when the principal could have known of and prevented such conduct)]. Konkler at no point before, during, or after his vacation indicated or suggested to Respondent in any manner that Hart had any authority in the transaction [*Clar. Q.* ¶17]. Furthermore, when Stiles called on 14 July 2005, he asked to speak to Konkler. Konkler’s secretary told Stiles that Konkler was unavailable, but that he “could” speak to Hart, noting that Hart was merely a “procurement professional” [*Clar. Q.* ¶18]. That Hart did not have authority should have been clear based on the fact that Konkler alone had handled all prior negotiations regarding the Contract [*Cl. Ex.* 2]. Indeed, Hart specifically informed Stiles that “he was not particularly knowledgeable about electrical equipment” and that “it was not the area in which he worked” [*Answer* ¶ 8]. None of Konkler’s conduct was sufficient to cloak Hart in the authority necessary to alter the Contract. Therefore, it was unreasonable for Respondent to rely on a phone conversation with someone lacking knowledge of the subject matter, especially given the highly technical nature of proposed change.

64. As the Contract was not amended to permit the delivery of JS fuses, Respondent breached the Contract and is liable to Claimant.

PART THREE. RESPONDENT IS NOT EXCUSED FROM LIABILITY.

65. Respondent cannot escape liability under any theory of exemption. On 8 Sept. 2005, Claimant learned of Respondent's breach and Equalec's subsequent refusal to connect the Fuse Boards [*Statement of Claim* ¶14; *Cl. Ex. 3*]. The same day, Claimant complained to Equalec [*Cl. Ex. 3*], but Equalec insisted on its Fuse Policy [*Re. Ex. 1*]. Since Respondent was unwilling to promise timely substitute goods [*Cl. Ex. 3*; *Re. Ex. 1*], Claimant was forced to find another supplier. Respondent may allege, however, that its liability is excused by the fact that Claimant did not also appeal to the Commission about Equalec's refusal to connect the Fuse Boards. This claim has no merit. First, under Art. 79 CISG, Respondent fails to satisfy the requirements of causality, unforeseeability, unavailability, and notice (I). Second, under Art. 80 CISG, Respondent is not excused because no part of its failure was caused by Claimant's conduct (II). Last, complaint to the Commission was not required as a mitigation measure under Art. 77 CISG (III).

I. RESPONDENT'S LIABILITY IS NOT EXCUSED UNDER ART. 79 CISG.

66. The drafters of the CISG intended Art. 79 to be a narrow and rarely-applied exemption. Art. 79(1) provides that: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control." Some commentators suggest that Art. 79 applies only to situations of non-delivery or late delivery and is entirely unavailable to sellers, like Respondent, who provide non-conforming goods [*Honnold 477-9*; *Nicholas84 5-14*]. Even advocates of a more generous reading of Art. 79 admit that the possibility of an exemption in cases of defective performance is "something near nil" [*Lookofsky04 127*; see also *Enderlein/Maskow 321*]. Decisions have shown a "rather restrictive attitude towards permitting any exemptions" [*Šarčević/Volken 32*; see also *DiMatteo 159-60*; *HG 2 Oct. 1998 (Neth.)*; *BGH 24 Mar. 1999 (Ger.)*].
67. Even if exemption applies in principle to Respondent's defective performance, Respondent is not excused under Art. 79. No part of Respondent's failure to perform was due to the fact that Claimant did not also complain to the Commission (A). Even if this lack of complaint caused Respondent's failure to perform, Respondent could reasonably be expected to have taken it into account beforehand (B). Respondent could reasonably be expected to have overcome the consequences of any impediment through its own complaint or substitute goods (C). Respondent failed to give timely notice per Art. 79(4) CISG (D). The exhaustive scope of Art. 79 precludes the

application of external hardship principles (E).

A. No part of Respondent’s failure to perform was due to the lack of complaint.

68. To be excused under Art. 79(1) CISG, a party must show that “an unforeseeable and insuperable impediment is the *sole* reason” for its failure to perform [*Stoll/Gruber* 818 (*emphasis added*); *see also Standinger/Magnus* 782; *Tallon* 583; *Arb. No. 56/1995 (Bulg.)*; *ICC Case No. 7197*]. Causality with regard to breach is the “decisive prerequisite for an impediment to be taken into consideration” [*Enderlein/Maskow* 321]. Art. 79 only permits exemption to the degree that the impediment precluded performance [*Honnold* 491]. To escape liability Respondent would have to prove that *all* of its failures to perform were solely “due to” the lack of complaint. Respondent was obliged to deliver fuse boards with Chat JP fuses (1), lockable to Equalec requirements (2), and fit for the particular purpose of connecting to Equalec’s electrical grid (3). None of these obligations required Claimant to complain to the Commission.

1. Respondent’s failure to deliver Chat JP fuses was not due to the lack of complaint.

69. There was no prospect of complaint until Equalec refused to connect the Fuse Boards on 8 Sept. 2005 [*Statement of Claim* ¶14; *Cl. Ex. 3*]. Neither party was aware of the Fuse Policy until that time [*Cl. Ex. 3*; *Clar. Q. 24-5*]. Claimant could not have complained about a policy it was not aware of and had no obligation to be informed of (*see supra* ¶52-55). Respondent delivered the non-conforming Fuse Boards without Chat JP fuses on 22 Aug. 2005 [*Statement of Claim* ¶14]. As early as 14 July 2005, Respondent had committed itself to using Chat JS fuses [*Re. Ex. 1*]. On 9 Sept. 2005, when Claimant demanded that Respondent provide conforming goods, Respondent objected solely on the basis of Chat’s production problems, not because of the lack of complaint [*id.*]. Simply as a matter of timing, Respondent’s failure to deliver Chat JP fuses could not have been due to the lack of complaint or the Fuse Policy.

2. Respondent’s failure to meet Equalec’s requirements was not due to the lack of complaint.

a. Respondent was required to meet Equalec’s requirements regardless of their validity under Equatoriana law.

70. Respondent neither inquired into Equalec’s requirements nor objected to their incorporation into the Contract, so it was bound to deliver fuse boards meeting those requirements (*see supra* ¶¶49-50). This is so regardless of whether the Fuse Policy was valid under Equatoriana’s domestic law. The relevant law in Equatoriana is the Electric Service Regulatory Act (“ESRA”). The ESRA only governs the provision of electric service in Equatoriana; this Contract is not for the provision of

electric service.

b. There is no reasonable basis to believe the Fuse Policy is invalid.

71. Even if the validity of the Fuse Policy were relevant to the parties' obligations, there is no reasonable basis to believe the policy is invalid or even illegal. There is nothing in the text of the ESRA that suggests—as Respondent asserts—that “Equalec was required by law to connect to the fuse boards” [Re. Ex. 1]. Art. 14 ESRA prohibits “undue or unjust requirements for providing” electric service [Re. Ex. 4], but gives no guidance as to what “undue” or “unjust” mean. However, the Tribunal should look to the context of this requirement for guidance. Art. 14 ESRA requires that electric service be “safe and adequate,” while Art. 15 ESRA provides that the Commission “shall certify the safety of all equipment” [Re. Ex. 4]. Taken together, these provisions indicate that the primary goal of the ESRA is ensuring the safety of the power grid.
72. The Equalec Fuse Policy was designed to prevent the use of improperly rated fuses thereby reducing safety risks (*see supra* ¶45). The Fuse Policy does not obstruct or evade the requirements of the ESRA or any safety standards of the Commission; it improves on them. There is no reason to believe that policies such as Equalec’s would be considered “undue or unjust” under Art. 14 ESRA.
73. Claimant reasonably relied on Equalec’s justification of the Fuse Policy [Cl. Ex. 4] and the policy’s general acceptance. “What is ‘reasonable’ can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade” [Honnold 101; *see also Lando 127 ref. PECL 6:104, 6:105 and 6:106(2)*]. The Fuse Policy had been in place since July 2003 without Commission challenge [Clar. Q. 29]. Equalec insisted on its policy even after Claimant’s complaint [“Equalec had said that that was their policy,” Re. Ex. 1] and confirmed the policy in writing by letter dated 15 Sept. 2005 [Cl. Ex. 4]. The general commercial acceptance of the Fuse Policy since its inception is strong evidence of reasonability. Claimant acted no differently than any other firm in the trade [Clar. Q. 29]. The Fuse Policy remains in effect today [*id.*].
 3. Respondent’s failure to deliver Fuse Boards that could be connected to Equalec’s electrical grid was not due to the lack of complaint.
74. The lack of complaint did not frustrate or impede Respondent’s ability to deliver the Fuse Boards for the contractual purpose of connecting to Equalec’s electrical grid. In the circumstances, Claimant made a reasonable effort to obtain an electrical connection. Claimant learned of Respondent’s breach and Equalec’s subsequent refusal to connect on 8 Sept. 2005 [Statement of Claim ¶14; Cl. Ex. 3]. It then immediately appealed to Equalec [Cl. Ex. 3], the sole provider of electric

power in Mountain View [*Clar. Q.* 31]. After Equalec insisted on its Fuse Policy [*Re. Ex.* 1], Claimant gave Respondent the opportunity to provide conforming goods [*Statement of Claim* ¶17; *Cl. Ex.* 3; *Re. Ex.* 1]. Respondent was unwilling to promise timely delivery of conforming goods [*Re. Ex.* 1 (*suggesting a delivery timeframe “in several months yet”*)]. As Respondent knew, an electrical connection for the Fuse Boards was essential to meeting the development’s occupancy deadline of 1 Oct. 2005 [*Re. Ex.* 1; *Statement of Claim* ¶16]. Otherwise, Claimant risked significant penalties and lost profits [*id.*]. Claimant was left with no reasonable option but to find another supplier.

75. Claimant reasonably declined to complain to the Commission. On 9 Sept. 2005, Respondent did not mention the ESRA [*Re. Ex.* 1]. Even if Claimant was familiar with ESRA or had time to investigate applicable laws, Claimant had no reasonable basis to suspect illegality (*see supra* ¶73). The required time for Commission action indefinitely ranged from one week to over two years [*Clar. Q.* 30]. There was not enough time for Claimant to arrange representation and a properly documented complaint to even initiate a Commission proceeding [*“there was not sufficient time to start a proceeding,” Re. Ex.* 1]. Rather than running the substantial risk of greater damages, for which Respondent would ultimately be liable, Claimant prudently limited losses and secured a connection to Equalec’s electrical grid by promptly obtaining substitute fuse boards [*Cl. Ex.* 3; *Statement of Claim* ¶18].

B. Respondent could reasonably be expected to have taken the lack of complaint into account beforehand.

76. Even if Respondent’s failure to perform was due to the lack of complaint, Respondent must further prove that it “could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract” [*Art. 79(1) CISG*]. The Secretariat Commentary recognizes the difficulty of this inquiry in that “[a]ll potential impediments to the performance of a contract are foreseeable to one degree or another” [*Secretariat Art. 65* ¶5 (*draft counterpart of Art. 79*); *see also Perillo 122*]. It anticipated a two-step resolution to the problem of foreseeability in Art. 79. First, the tribunal should enforce, per Art. 6 CISG, any agreement between the parties over the impediment [*Secretariat Art. 65* ¶5]. Parties may agree *explicitly* that “the occurrence of the impending event would exonerate the non-performing party” or *implicitly* that a party would “perform an act even though certain impediments might arise” [*Secretariat Art. 65* ¶5; *see also Tallon 576; Honnold 475; Nicholas84 5-9; Stoll/Gruber 835*]. Second, absent such an understanding, the Tribunal must make a “case-by-case” determination of “whether the non-performing party could reasonably have been expected to take it into account at the time of the conclusion of the contract” [*Secretariat Art. 65* ¶5]. The parties did not explicitly agree to exonerate Respondent’s failure (1). The parties here implicitly understood

performance would be required despite an impediment (2). Even if there was no such understanding, Respondent could reasonably have anticipated the Fuse Policy beforehand (3).

1. The parties did not explicitly agree to exonerate Respondent's failure.

77. There was no explicit agreement between the parties to exonerate Respondent's failure in the event Equalec refused to connect the Fuse Boards and Claimant did not complain about it to the Commission [*Cl. Ex. 1*]. "The seller cannot always control the physical nature of the goods, but he can control the risk of damage liability. If he cannot bear that risk, or does not want to, he must contractually limit it or exclude it" [*Schlechtriem*99 §1(d); see also *Lookofsky*04 128; *Tallon* 576; *Audit* 172]. Practitioners and industry groups alike recommend that exporters, such as Respondent, include their own exemption provisions [*Bund* 10; *Kritzler* 519; *NECA*; *ASA*]. Respondent had ample opportunity to do so as the drafter of the standard form that was the basis of the Contract.

2. The parties implicitly understood performance would be required despite an impediment.

78. The "context of the contract" [*Secretariat Art. 65 ¶5*] suggests the parties implicitly understood Respondent's performance would be required despite an impediment. Respondent had particular skill and experience in the fabrication of fuse boards (*see supra* ¶40). Respondent had particular knowledge of electric safety requirements in Equatoriana and knew that Equalec could deny a connection on safety grounds. Even if not, the reference to "Equalec requirements" in the drawings [*Statement of Claim* ¶9] put Respondent on notice that such requirements were at least relevant if not essential to the Contract (*see supra* ¶50). Respondent knew as early as 14 July 2005 of the importance of the Contract and Claimant's tight time pressures [*Cl. Ex. 2*; *Re. Ex. 1*]. On 9 Sept. 2005, Respondent only objected to the request for conforming goods because of Chat's production problems, not because of the lack of complaint [*Re. Ex. 1*]. There was no hint of an impediment claim until a year later [*Letter from Horace Fasttrack, 4 Sept. 2006, 18*].

3. Respondent could reasonably have anticipated the fuse policy beforehand.

79. The Tribunal must determine whether a reasonable businessperson in Respondent's situation would have anticipated the impediment at the time of contracting [*Stoll/Gruber* 817; *Zeller* 181]. Where the impediment existed prior to the conclusion of a contract, "it has to be required that the party concerned neither knew nor, as we believe, ought to have been aware of it because otherwise he would have had to take it into consideration" [*Enderlein/Maskow* 323; see also *Secretariat Art. 65 ¶4*; *Tallon* 580-581; *ICC Case No. 7197*; *Arb. No. 56 (Bulg.)*; *HG 2 Oct. 1998 (Neth.)*; *CIETAC 7 May 1997*

(PRC)]. At the time of contracting, the obligor “must be expected to assure himself by all normal and reasonable methods that there is no impediment to his performance” [Stoll in *Schlechtriem*98 609 *ref. McRae (Aust.)*]. The Fuse Policy, underlying any theory of exemption, had been in place since July 2003 [Cl. Ex. 4]. A prudent businessperson in Respondent’s situation would have been aware of the Fuse Policy through the “normal and reasonable” method of accessing the Equalec website or by contacting knowledgeable parties (*see supra* ¶50).

C. Respondent could reasonably be expected to have overcome Claimant’s lack of complaint or its consequences.

80. Even if Respondent could not have taken the lack of complaint into account beforehand, Respondent could reasonably be expected to have “overcome it or its consequences” [Art. 79(1) CISG; *see also Tallon 581*]. The test here must be “very strict” [Stoll/Gruber 817]. The promisor must overcome an impediment in order to perform even when this results in greatly increased costs [*id.*; *see also Piltz 165; Standinger/Magnus 783; Arb. No. 155/1994 (Rus.)*]. “[A] party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance” [Secretariat Art. 65 ¶7]. After the closure of the Suez Canal, for example, English courts ruled that going around the Cape of Good Hope instead was not “commercially or fundamentally different” and therefore could reasonably be expected of the promisor [Tsakiroglou (U.K.) *cited in Stoll/Gruber 817; see also Berman*63 1420-4]. Far less is asked here. At least two reasonable measures were available to Respondent: Respondent could have complained to the Commission on its own (1) and Respondent could have provided timely substitute goods (2).

1. Respondent itself could reasonably have complained to the Commission.

81. An appeal to the Commission about Equalec’s refusal to connect the Fuse Boards lacked sufficient merit or time to succeed (*see supra* ¶75). To whatever extent Commission complaint could have succeeded, Respondent could have initiated it. The record is silent as to what if any criteria limit who may complain to the Commission. Some countries use a “concrete” model of regulatory enforcement that requires petitioners to have actual interests at stake, whereas others allow “abstract” review [Reitz 1132-6; Utter 592-3]. Respondent’s potential liability in the case at issue allows it to meet even the more restrictive “concrete” review requirement. Even an informal inquiry might have resolved the Fuse Policy issue [Clar. Q. 30].

2. Respondent could reasonably have provided timely substitute goods.

82. Respondent could reasonably have avoided the consequences of any impediment by making a

greater effort to obtain Chat JP fuses. On 9 Sept. 2005, Respondent stated that it could not deliver fuse boards with Chat JP fuses within any period better than “several months yet” because of Chat’s production problems [Re. Ex. 1]. Though the Contract required “Chat Electronics JP type” fuses, it did not require that the fuses come directly from Chat (*see supra* ¶44). Chat JP fuses were readily available from other distributors, such as Switchboards [Statement of Claim ¶14; Cl. Ex. 3; Clar. Q. 33]. Even Claimant, which is not an industry specialist like Respondent (*see supra* ¶40), had no difficulty in obtaining proper fuses [Statement of Claim ¶14; Cl. Ex. 3].

83. Even if other sources were not available or the Contract required fuses directly from Chat, Respondent, as the seller, bears the “acquisition risk” that its supplier will not timely deliver the goods [BGH 24 Mar. 1999 (Ger.); *see also* SGH Hamburg 21 Mar 1996 (Ger.); Lookofsky04 127; ICC Case No. 8128]. In a similar case, the tribunal denied Art. 79 exemption to a seller because it should have foreseen or overcome an emergency production stoppage at its own supplier’s plant [Arb. No. 155/1994 (Rus.)]. In another notable case, under the related doctrine of impossibility, it was physically impossible for the contractually specified refinery to produce the required quantity. Nonetheless, the court ruled that the seller was not excused because it had failed to show what efforts it had made at fulfilling the contract [Canadian Industrial (US), *cited in* Perillo 121]. Respondent here similarly failed to show reasonable effort at providing timely substitute goods.

D. Respondent is fully liable for its failure to give timely notice under Art. 79(4) CISG.

84. Even if Respondent satisfies all the requirements of exemption under Art. 79(1), it must still “give notice to the other party of the impediment and its effect on his ability to perform...within a reasonable time” or otherwise, be held “liable for damages resulting from such non-receipt” [Art. 79(4) CISG]. Respondent was obliged to give specific and timely notice of any impediment from the lack of complaint (1). Respondent failed to do so (2).

1. Respondent was obliged to give specific and timely notice of any impediment to its ability to perform from Claimant’s lack of complaint.

85. The central purpose of notice requires that notice be precise. Notice under Art. 79(4) is meant “to enable the [non-defaulting party]...to take all the steps necessary to overcome the consequences of the failure” [Tallon 586; *see also* Zeller 186]. This is the same underlying policy goal as notice of non-conformity under Art. 39(1) CISG, where courts have held that a notice of non-conformity must be specific enough to enable the seller to take remedial steps [BGH 3 Nov. 1999 (Ger.); LG Salzburg 2 Feb. 2005 (Aus.); HB Gent 28 Jan. 2004 (Belg.); Rheinland (Italy) *cited in* Ferrari01 212; *see also* CISG-AC2

*Case Annex; Enderlein*96 171-2]. The alleged impediment here is the fact that Claimant did not also appeal to the Commission about Equalec’s refusal to connect the Fuse Boards [*Proc. Order No. 1* ¶11]. Mere awareness of the Fuse Policy did not reasonably alert Claimant to the need for steps beyond what it had already taken (*see supra* ¶74). Any claim that the Fuse Policy itself was an impediment is excluded in this stage of arbitration; “[o]nly those issues set out in paragraph 11 of Procedural Order No. 1 are to be discussed” [*Proc. Order No. 2*].

2. Respondent failed to give specific or timely notice of impediment.

86. No communication from Respondent could be construed as proper notice under Art. 79(4). Respondent’s only communication related to the Commission was its inquiry, on 9 Sept. 2005, whether Claimant had “insisted, either to Equalec or to the Commission, that Equalec was required by law to connect” [*Re. Ex. 1*]. By then, both parties were aware of the Fuse Policy and Claimant had already complained to Equalec [*Statement of Claim* ¶14; *Re. Ex. 1*]. Respondent itself implied that complaint “either to Equalec or to the Commission” was enough [*Re. Ex. 1 (emphasis added)*]. In no way did Respondent suggest that the lack of further complaint had had or would have any “effect on his ability to perform,” as Art. 79(4) requires. Respondent only objected to the request for substitute goods because of Chat’s production problems, for example, not because of the lack of complaints [*Re. Ex. 1*]. There was no hint of an impediment claim until a year later when Respondent’s Answer was filed [*Letter from Horace Fasttrack, 4 Sept. 2006, 18*]. To whatever extent that Respondent’s breach was due to the lack of complaint, Respondent’s failure to give timely or proper notice deprived Claimant of a meaningful opportunity to address the impediment.
87. Respondent is then still liable for the full amount of damages under Art. 79(4). Generally, there is a distinction between damages that result from the failure to give notice under Art. 79(4) as opposed to those from non-performance [*Secretariat Art. 65* ¶15; *Stoll/Gruber 834; Audit 176*]. In this case, however, the two are equal because the lack of notice precluded Claimant from taking steps to alleviate the lack of complaint.

E. The scope of Art. 79 CISG precludes the application of external hardship principles.

88. The intent of Art. 79 CISG is to “exhaustively determine the limits of the promisor’s performance guarantee” [*Stoll/Gruber 824*] through a “closed system of remedies” [*Kruisinga 149; see also Wechem/Christiaans 1890*]. The parties’ choice of the CISG [*Cl. Ex. 1; Statement of Claim* ¶19] generally precludes the application of outside hardship principles or laws. First, the use of external

laws, especially domestic provisions such as *Wegfall der Geschäftsgrundlage* or *imprévision*, would produce greatly divergent results, contravening the uniformity mandate of Art. 7(1) CISG [Tallon 593-4; Stoll/Gruber 807; Flambouras02 §2]. Second, gap-filling principles do not allow the introduction of external principles here because there is no relevant gap; the CISG drafters considered the problem of hardship and deliberately omitted it from the CISG [Honold89 349-50; Tallon 593-4]. For both these reasons, where the parties have chosen the CISG, courts have declined to apply outside hardship principles [LG Aachen 14 May 1993 (Ger.); TC Monza 14 Jan. 1993 (Italy); Bielloni (Italy); see also *Winship* 509-10]. Even if external principles could apply, hardship requires unforeseeable circumstances “so severe and fundamental that the promisor cannot be held to its promise in spite of the possibility of performance” [Jenkins 2027; see also *Perillo* 114-6]. The lack of complaint here is neither exceptional nor unforeseeable (see *supra* ¶¶79-80).

89. Respondent can neither satisfy the necessary elements of causality, unforeseeability, unavailability, and notice under Art. 79, nor resort to hardship in principle or on the merits.

II. RESPONDENT IS NOT EXCUSED UNDER ART. 80 CISG BECAUSE NO PART OF ITS FAILURE WAS CAUSED BY CLAIMANT.

90. Art. 80 CISG does not excuse Respondent because Claimant caused no part of Respondent’s failure. Art. 80 provides: “[a] party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.” It is a “concrete manifestation” of the general principle of good faith that a party may not contradict its own behavior [Enderlein/Maskow 335; see also Stoll/Gruber 838; Tallon 596]. The concept of conduct under Art. 80 is broad [Schäfer §2(a)], but the “decisive criterion” is that it was highly probable that the conduct would lead to the failure to perform [Tallon 599]. The breach of contract must be a “characteristic consequence” of the act [Enderlein/Maskow 337]. Where a legal act “by a completely unusual chain of cause and effect, leads to the breach of contract, there will be no reason for exemption” [Enderlein/Maskow 338]. Claimant’s lack of complaint did not cause any part of Respondent’s failure (see *supra* ¶68). Even if it had, Respondent’s failure to deliver conforming goods was not highly probable or a “characteristic consequence.”
91. Any excuse under Art. 80 would be partial at most because Respondent contributed to the failure to perform. If both parties to a contract have contributed to the failure to perform, Art. 80 requires an “apportionment of the causes depending on their degree of objective causation” [Tallon 599; see also Enderlein/Maskow 339; SGH Hamburg 21 Mar 1996 (Ger.)]. If damages are at issue, they are to be

allocated by the portion each party contributed to the failure [*id.*]. Irrespective of its contractual obligations, Respondent contributed to the failure in at least three ways: first, it failed to investigate Equalec requirements; second, it failed to make a reasonable effort at finding other sources of Chat JP fuses (*see supra* ¶74); and third, it failed to complain to the Commission (*see supra* ¶81). In particular, Respondent’s failure to meet Equalec requirements and to further the contractual purpose of connecting to Equalec’s electrical grid are both characteristic consequences of Respondent’s neglect in investigating applicable requirements and other sources of fuses.

III. COMPLAINT TO THE COMMISSION WAS NOT REQUIRED AS A MITIGATION MEASURE UNDER ART. 77 CISG.

92. Claimant was not obliged to complain to the Commission as a mitigation measure under Art. 77 CISG. Art. 77 requires only “such measures as are *reasonable* in the circumstances” [*emphasis added*]; *see also Achilles 77/4; Schlechtriem04 731*. The aggrieved party is not required to take all potential measures that might have mitigated losses, but only those “under the particular circumstances...[that] could be expected...[of] a person acting in good faith” [*Schlechtriem05 588*]. Claimant reasonably acted to mitigate losses in three ways. First, Claimant immediately complained to Equalec about its refusal to connect the Fuse Boards [*Cl. Ex. 3*]. Second, Claimant gave Respondent an opportunity to provide conforming goods (*see supra* ¶74). Last, when Respondent was unwilling to promise timely delivery, Claimant promptly obtained substitute goods from Switchboards [*Cl. Ex. 3; Statement of Claim ¶18*]. Substitute transactions are the typical example of mitigation [*Schlechtriem04 732; Arbitral Tribunal Vienna, 15 June 1994*]. In the circumstances, Claimant reasonably declined to complain to the Commission because such complaint lacked sufficient merit or time to succeed while risking far greater losses (*see supra* ¶75). Even if complaint to the Commission was required for mitigation, Respondent could have done so itself (*see supra* ¶81).
93. By any theory of exemption, Respondent remains fully liable to Claimant.

PRAYER FOR RELIEF

In light of the above submissions, Counsel respectfully request that the Tribunal find that:

- The Tribunal has jurisdiction to consider the dispute between Equatoriana Office Space Ltd and Mediterraneo Electrodynamics S.A.;
- The Fuse Boards did not conform to the Contract;
- The Contract was not amended to allow the delivery of JS fuses;
- Respondent’s liability is not excused by Claimant’s failure to complain to the Commission about Equalec’s refusal to connect the Fuse Boards;

Consequently, Equatoriana Office Space Ltd requests the Tribunal to order Mediterraneo Electrodynamics S.A. to pay:

- Equatoriana Office Space Ltd as damages the sum of US\$200,000, calculated US\$180,000 as the cost of the replacement distribution fuse boards purchased from Equatoriana Switchboards Ltd and US\$20,000 for the cost of removing the non-conforming fuse boards and replacing them with conforming ones;
- Interest at the prevailing market rate in Equatoriana on the said sum from the date of breach to the date of payment; and
- All costs of arbitration, including costs incurred by the parties.

(signed)

/S/ Zuzana Blazek

Zuzana Blazek

/S/ Tanner Jones

Tanner Jones

/S/ Gary Li

Gary Li

/S/ Meyghan McCrea

Meyghan McCrea

/S/ Shawn Oakley

Shawn Oakley

/S/ Nina Yadava

Nina Yadava

7 December 2006