

FOURTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On Behalf Of:

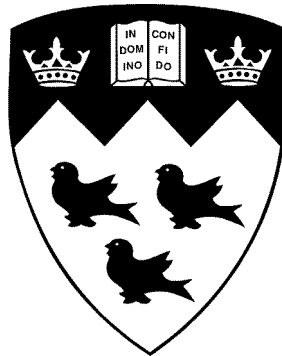
**EQUATORIANA
OFFICE SPACE LTD.**
415 Central Business Centre
Oceanside
Equatoriana

CLAIMANT

Against:

**MEDITERRANEO
ELECTRODYNAMICS S.A.**
23 Sparkling Lane
Capitol City
Mediterraneo

RESPONDENT



FACULTY OF LAW, MCGILL UNIVERSITY

ALBERT CHEN · MARTIN DOE · ANNIE GUÉRARD-LANGLOIS · RACHEL ST. JOHN



TABLE OF CONTENTS

LIST OF ABBREVIATIONS III
INDEX OF AUTHORITIES V
INDEX OF ARBITRAL CASES XI
INDEX OF COURT CASES XIV
STATEMENT OF FACTS 1
SUMMARY OF ARGUMENTS 3
ARGUMENT 4
I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE 4
1. THE CICA RULES GOVERN THE ARBITRATION 4
(a) The Parties chose the CICA Rules 5
i. By the phrase "International Arbitration Rules used in Bucharest," the Parties intended to specify the CICA Rules 5
ii. The principle of effective interpretation (effet utile) reinforces the choice of CICA Rules 8
iii. The rule of contra proferentem has no application to the present arbitration clause 8
(b) No other rules were chosen through Art. 72(2) CICA Rules 10
2. IN ANY EVENT, THE JURISDICTION OF THE TRIBUNAL DOES NOT DEPEND ON A VALID DESIGNATION OF RULES OF PROCEDURE 10
(a) An invalid designation of rules would not vitiate the Parties' undertaking to arbitrate 11
i. The choice of rules of procedure may be severed in order to preserve the validity of the Arbitration Clause 11
ii. The Parties intended their Arbitration Clause to be valid 12
iii. The Parties' undertaking to arbitrate did not depend on a particular choice of rules 12
iv. The Model Law facilitates the severance by providing default arbitral rules 13
(b) An invalid designation of rules would not affect the Tribunal's proper constitution 13
i. Whether the Tribunal has been properly constituted is not a jurisdictional issue 14
ii. In any event, the Tribunal has been properly constituted irrespective of which rules are found to apply 15
iii. An objection to the validity of the Tribunal's constitution is in any case barred by waiver under Art. 4 Model Law 17
II. THE RESPONDENT BREACHED THE CONTRACT BY DELIVERING NON-CONFORMING GOODS UNDER ART. 35 CISG 18
1. THE FUSE BOARDS WERE NOT OF THE QUALITY AND DESCRIPTION REQUIRED BY THE CONTRACT WITHIN THE MEANING OF ART. 35(1) CISG 18
(a) The Respondent knew of the Claimant's specific intention to purchase Chat JP fuses conforming to Equalec requirements 19
i. The Respondent knew that the Contract called for Chat JP Type Fuses 19
ii. The Respondent knew that the Contract called for fuses that conformed to Equalec 20



(b) A reasonable person would have understood the Claimant’s intent 21

2. THE FUSE BOARDS ARE NOT FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO THE RESPONDENT PURSUANT TO ART. 35(2)(B) CISG22

(a) The particular purpose was expressly and impliedly made known to the Respondent..... 22

(b) It is the Respondent’s burden to be aware of and comply with Equalec policy 23

(c) The Claimant reasonably relied on the Respondent’s skill and judgment 24

3. THE FUSE BOARDS WERE NOT SUITABLE FOR ORDINARY USE UNDER ART. 35(2)(A) CISG ..24

4. THE CLAIMANT COULD NOT HAVE BEEN AWARE OF THE NON-CONFORMITY AT THE TIME OF CONTRACT UNDER ART. 35(3) CISG25

III. THE CONTRACT WAS NOT VALIDLY AMENDED..... 25

1. THE RESPONDENT FAILED TO PROVIDE A WRITTEN AMENDMENT AS REQUIRED BY THE CONTRACT25

2. A CHANGE OF FUSE TYPES IS MATERIAL, REQUIRING IT TO BE IN WRITING26

3. IT WAS NOT REASONABLE FOR THE RESPONDENT TO HAVE RELIED ON THE CLAIMANT’S CONDUCT27

(a) Mr. Hart did not have the authority to modify the Contract..... 27

(b) It was unreasonable for the Respondent to believe Mr. Hart had the proper authority..... 28

(c) Any changes by the Parties lacked the Claimant’s proper consent..... 28

(d) It was the Respondent’s failure to include a written amendment that perpetuated the Claimant’s ignorance of the change in fuse type..... 30

IV. THE RESPONDENT CANNOT BE EXCUSED FROM ITS BREACH OF CONTRACT 30

1. COMPLAINING TO THE COMMISSION WOULD NOT HAVE AVOIDED THE DAMAGES AND DOES NOT EXCUSE THE RESPONDENT'S BREACH30

(a) Complaining to the Commission would not have mitigated damages..... 31

i. There is no evidence that the policy would have been found to be invalid31

ii. The complaint would likely have taken more than three weeks to be resolved 32

iii. Demanding that the Claimant complain to the Commission is beyond the contractual norms that the Parties agreed to 32

(b) The Claimant was obliged to make a substitute transaction to avoid consequential losses..... 33

(c) The Respondent failed to do all that it could to perform the Contract 34

2. ON THE FACTS OF THIS CASE, THE RESPONDENT CANNOT RELY ON ARTS. 79 AND 80 CISG.34

(a) The Claimant’s failure to complain to the Commission did not cause the Respondent’s non-performance..... 34

(b) The Claimant’s failure to complain to the Commission did not constitute an impediment to performance..... 34

PRAYER FOR RELIEF 35



LIST OF ABBREVIATIONS

¶ / ¶¶	Paragraph / Paragraphs
§ / §§	Section / Sections
A	Ampere / Amperes
AAA Rules	American Arbitration Association Rules
Art. / Arts.	Article / Articles
Art. <i>n</i> CICA	Article <i>n</i> of the CICA Rules
Aug	August
CAISG	UNIDROIT Convention on Agency in the International Sale of Goods, 17 February 1983
ch.	Chapter
Chat	Chat Electronics Ltd.
CICA	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CICA Lists	List of Arbitrators and List of the Foreign Arbitrators maintained by the CICA
CICA Regulations	Regulations on the Organisation and Operation of the CICA
CICA Rules	Rules of Arbitration of the CICA
CISG	United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980
Clar.	Clarification
Cl.Ex.	Claimant's Exhibit
Ed. / Eds.	Editor / Editors
<i>e.g.</i>	<i>Exemplum gratii</i> [for example]
emph. add.	Emphasis added
<i>et seq.</i>	<i>Et sequential</i> [and following]
European Principles	Principles of European Contract Law 2002
ICC Rules	Rules of Arbitration of the International Chamber of Commerce, in force as from 1 January 1998
LCIA Rules	London Court of International Arbitration Rules



mm	Millimetres
Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
n.	Note
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Oct	October
p. / pp.	Page / pages
Proc. Ord.	Procedural Order
R.Ex.	Respondent's Exhibit
Rome Convention	Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC)
Romanian <i>Code</i>	Romanian <i>Code of Civil Procedure</i>
Q.	Question
Sept	September
St. of Cl.	Statement of Claim
St. of Indep.	Statement of Independence
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2004
v.	<i>versus</i>
Vol.	Volume
WIPO Rules	World Intellectual Property Organization Arbitration Rules



INDEX OF AUTHORITIES

AUDIT, Bernard	<i>Droit international privé</i> 4 ^e edition, Economica, Paris 2006 Cited as: <i>Audit</i>
BACHAND, Frédéric	<i>L'intervention du juge canadien avant et durant un arbitrage commercial international</i> LGDJ, Paris 2005 Cited as: <i>Bachand</i>
BERGER, Klaus Peter	<i>International Economic Arbitration</i> Kluwer Law and Taxation Publishers, Deventer 1993 Cited as: <i>Berger</i>
BIANCA, C.M. and BONELL, M.J.	<i>Commentary on the International Sales Law: The 1980 Vienna Sales Convention</i> Giuffrè, Milan 1987 Cited as: <i>Bianca/Bonell</i>
BINDER, Peter	<i>International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions</i> 2 nd edition, Sweet & Maxwell, London 2005 Cited as: <i>Binder</i>
BONELL, Michael Joachim	<i>An International Restatement of Contract Law: the UNIDROIT Principles of Commercial Contracts</i> Transnational Publishers, Ardsley, New York 2005 Cited as: <i>Bonell International Restatement of Contract Law</i>
BONELL, Michael Joachim (ed.)	<i>The UNIDROIT Principles in Practice: Caselaw and Bibliography on the Principles of Commercial Contracts</i> Transnational Publishers, Ardsley, New York 2002 Cited as: <i>Bonell</i>
BORN, Gary B.	<i>International Arbitration and Forum Selection Agreements: drafting and enforcing</i> 2 nd edition, Kluwer Law International, The Hague 2006 Cited as: <i>Born Arbitration and Forum Selection Agreements</i> <i>International Commercial Arbitration</i> 2 nd edition, Kluwer Law International, The Hague 2001 Cited as: <i>Born</i>
CADICK, John	<i>Electrical Safety Handbook</i> 3 rd edition, McGraw-Hill, New York 2006 Cited as: <i>Electrical Safety Handbook</i>



CADIET, Loïc	“La renonciation à se prévaloir des irrégularités de la procédure arbitrale” 1 Rev. Arb. 3 (1996) Cited as: <i>Cadiet</i>
CAPATINA, Octavian	“Romania” in: <i>International Handbook on Commercial Arbitration</i> , Paulsson, Jan (ed.), Suppl. 26 (February/1998) Cited as: <i>Capatina</i>
CARON, David D., CAPLAN, Lee M. and PELLONPÄÄ, Matti	<i>The UNCITRAL Arbitration Rules : a commentary</i> Oxford, New York 2006 Cited as: <i>Caron/Caplan/Pellonpää</i>
CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA	<i>Annual Report 2004</i> Available online at: http://www.ccir.ro/ccirweb/resources/ menuPublicatii/uploads/CCIRB_2004_annual_report.pdf Cited as: <i>CCIRB Annual Report 2004</i>
CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA, Court of International Commercial arbitration attached to the (CICA)	<i>Statistical Analysis of its Activity, January 2005-September 2006</i> Paper presented to the ICC European Arbitration Group, Oct. 2006 (unpublished) Cited as: <i>CICA Statistics</i> Website of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania http://arbitration.ccir.ro/ Cite as: <i>CICA Website</i>
CLAY, Thomas	<i>L'arbitre</i> Daloz, Paris 2001 Cited as: <i>Clay</i>
DAVIS, Benjamin G.	“Pathological Clauses: Frédéric Eisemann's Still Vital Criteria” 7(4) Arb. Int'l 365 (1991) Cited as: <i>Davis</i>
DEL PILAR PERALES VISCASILLAS, Maria	“Modification and Termination of the Contract (Art. 29 CISG)” 25 J. of L. & Comm. 167 (2005) Cited as: <i>del Pilar Perales Viscasillas</i>
DERAINS, Yves and SCHWARTZ, Eric	<i>A Guide to the ICC Rules of Arbitration</i> 2 nd edition, Kluwer Law International, The Hague 2005 Cited as: <i>Derains/Schwartz</i>



DIMATTEO, Larry A., DHOOGHE, Lucien, GREENE, Stephanie, MAURER, Virginia and PAGNATTARO, Marisa	“The Interpretative Turn in International Sales Law” 24 Nw. J. Int’l L. & Bus. 299 (2004) Cited as: <i>DiMatteo et al.</i>
ENDERLEIN, Fritz	“Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods” in: <i>International Sale of Goods: Dubrovnik Lectures</i> , Petar Sarcevic and Paul Volken (eds.), Oceana Publications, New York 1986 Cited as: <i>Enderlein</i>
FLORESCU, Grigore	“The Evolution of Commercial Arbitration in Romania” 10(1) J. Int’l Arb. 95 (1993) Cited as: <i>Florescu</i>
GAILLARD, Emmanuel	“Les manoeuvres dilatoires des parties et des arbitres dans l’arbitrage commercial international” Rev. Arb. 759 (1990) Cited as: <i>Gaillard</i>
GAILLARD, Emmanuel and SAVAGE, John (eds.)	<i>Fouchard Gaillard Goldman on International Commercial Arbitration</i> Kluwer Law International, The Hague 1999 Cited as: <i>FGG</i>
GLOBAL LEGAL GROUP	<i>The International Comparative Legal Guide to: International Arbitration 2006</i> Global Legal Group, London 2006 Cited as: <i>Int’l Comparative Legal Guide</i>
GOODE, Roy, KRONKE, Herbert, MCKENDRICK, Ewan and WOOL, Jeffrey	<i>Transnational Commercial Law: International Instruments and Commentary</i> Oxford University Press, Oxford 2004 Cited as: <i>Goode et al.</i>
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 Int’l L. J. 449 (1988) Cited as: <i>Hillman</i>
HOLTZMANN, Howard and NEUHAUS, Joseph E.	<i>A Guide to UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary</i> Kluwer Law and Taxation Publishes, Deventer, The Netherlands 1989 Cited as: <i>Holtzmann</i>
INSTITUTE OF ELECTRICAL & ELECTRONICS ENGINEERS	<i>IEEE Standard Dictionary of Electrical and Electronics Terms 6th ed.</i> Institute of Electrical and Electronics Engineers Standards Office: New York 1997 Cited as: <i>IEEE Std. Dict. Electrical and Electronics Terms</i>



-
- KIRCHNER, Jörg and MARRIOTT, Arthur L.** “International Arbitration in the Aftermath of Socialism – The Example of the Berlin Court of Arbitration”
10(1) J. Int’l Arb. 5 (1991)
Cited as: *Kirchner/Marriott*
-
- KRAMER, Ernst A.** “Contractual Validity According to the UNIDROIT Principles”
1 Eur. J. L. Reform 3 (1999)
Cited as: *Kramer*
-
- KRUISINGA, Sonja A.** *(Non-) conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?*
Intersentia, Antwerp 2004
Cited as: *Kruisinga*
-
- LANDAU, Toby** “Composition and Establishment of the Tribunal: Articles 14 to 36”
9 Am. Rev. Int’l Arb. 45 (1998)
Cited as: *Landau*
-
- LEW, Julian d. M. and MISTELIS, Loukas A. and KRÖLL, Stefan M.** *Comparative International Commercial Arbitration*
Kluwer Law International, The Hague 2003
Cited as: *Lew/Mistelis/Kröll*
-
- LEWISON, Kim** *The Interpretation of Contracts*
Sweet & Maxwell, London 2004
Cited as: *Lewison*
-
- LIU, Chengwei** “Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL”
Sept 2003
Online: <http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>
Cited as: *Liu*
-
- LOOKOFSKY, Joseph** “Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules”
39 Am. J. Comp. L. 403 (1991)
Cited as: *Lookofsky Loose Ends*

Understanding the CISG in the USA, 2nd ed.
Kluwer Law International, 2004
Cited as: *Lookofsky Understanding*
-
- MAYER, Pierre** “L’autonomie de l’arbitre dans l’appréciation de sa propre compétence”
217 R.C.A.D.I. 319 (1989)
Cited as: *Mayer*
-



NORTH, Peter Machin and FAWCETT, J.J.	<i>Cheshire and North's Private International Law</i> 13 th edition, Butterworths, London 1999 Cited as: <i>Cheshire and North</i>
REDFERN, Alan, HUNTER, Martin, BLACKABY, Nigel and PARTASIDES, Constantine	<i>Law and Practice of International Commercial Arbitration</i> Sweet & Maxwell, London 2004 Cited as: <i>Redfern</i>
RÜEDE, Thomas and HADENFELDT, Reimer	<i>Schweizerisches Schiedsgerichtsrecht</i> Zurich 1980 Cited as: <i>Rüede/Hadenfeldt</i>
SAIDOV, Djakhongir	“Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods” 14 Pace Int’l L.Rev. 307 (2001) Cited as: <i>Saidov</i>
SAMUEL, Adam	<i>Jurisdictional Problems in International Commercial Arbitration : A Study of Belgian , Dutch, English, French, Swedish, Swiss, U.S. and West German Law</i> Zürich, Schulthess Polygraphischer Verlag 1989 Cited as: <i>Samuel</i>
SCHLECHTRIEM, Peter and SCHWENZER, Ingeborg (Eds.)	<i>Commentary on the UN Convention on the International Sale of Goods</i> 2 nd edition, Oxford University Press, Oxford 2005 Cited as: <i>Schlechtriem</i>
SCHLECHTRIEM, Peter	<i>Commentary on the UN Convention on the International Sale of Goods</i> Oxford University Press, Oxford 1998 Cited as: <i>Junge in Schlechtriem</i>
SCHLOSSER, Peter	<i>Das Recht der internationalen privaten Schiedsgerichtsbarkeit</i> 2 nd edition, Tübingen 1989 Cited as: <i>Schlosser</i>
STIGLER, George and SHERWIN, Robert A.	“The Extent of the Market” 28 J. L. & Econ. 555 (1985) Cited as: <i>Stigler The Extent of the Market</i>
SYKES, Andrew	“The Contra Proferentem Rule and the Interpretation of International Commercial Arbitration Agreements - the Possible Uses and Misuses of a Tool for Solutions to Ambiguities” 8 Vindobona J. of Int’l Comm. L. & Arb. 65 (2004) Cited as: <i>Sykes</i>

**UNCITRAL (United Nations Commission on International Trade Law)**

Document A/CN.9/264
XVI UNICITRAL Y.B. (1985)
United Nations Publications, Vienna
Cited as: *Analytical Commentary A/CN.9/264*

Document A/CN.9/SER.C/DIGEST/CISG/29
UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Article 29, online:
http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html
Cited as: *UNCITRAL Digest Art. 29*

Document A/CN.9/SER.C/DIGEST/CISG/77
UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, Article 77, online:
http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html
Cited as: *UNCITRAL Digest Art. 77*

UNIDROIT (International Institute for the Unification of Private Law)

UNIDROIT Principles of International Commercial Contracts 2004
UNIDROIT, Rome 2004
Cited as: *UNIDROIT Commentary*

VON STAUDINGER, Julius

Commentary on the German Civil Code with all other relevant laws
Buch, Recht der Schuldverhaltnisse Wiener UN Kautrecht (2005)

WEBSTER, John G.

Wiley Encyclopedia of Electrical and Electronics Engineering, Vol. 6.
Wiley, New York 1999
Cited as: *Wiley Encyclopedia of Electrical and Electronics Engineering*

WEBSTER, Len F.

Wiley Dictionary of Civil Engineering and Construction
Wiley, New York 1997
Cited as: *Wiley Dict. Civ. Engineering and Construction*



INDEX OF ARBITRAL CASES

AD HOC ARBITRATION

Award of 24 May 1982 – The Government of the State of Kuwait v. The American Independent Oil Co. (AMINOIL)
21 I.L.M. 976 (1982); IX Y.B. Comm. Arb., P. Sanders (e.d) 71 (1984)
Cited as: *AMINOIL*

CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA AND BUCHAREST, Court of International Commercial arbitration attached to the, (CICA)

Award No. 45 of 27 March, 2000
Arbitral Commercial Jurisprudence, 1953-2000
CCIRB (CICA) 2003, p.13
Cited as: *CICA 45/2000*

Award No. 70 of 23 June, 1997
Arbitral Commercial Jurisprudence, 1953-2000
CCIRB (CICA) 2003, p.53
Cited as: *CICA 70/1997*

Award No. 108 of 23 June, 1999
Arbitral Commercial Jurisprudence, 1953-2000
CCIRB (CICA) 2003, p.53
Cited as: *CICA 108/1999*

GENEVA CHAMBER OF COMMERCE AND INDUSTRY (CCIG)

Interlocutory Award on Jurisdiction in Case No. 117 of November 29, 1996
3 ASA Bulletin 534 (1997)
Cited as: *CCIG 117*

Interim Award in Case No. 193 of 21 October 2002
24(1) ASA Bulletin 61 (2006)
Cited as: *CCIG 193*

GERMAN COFFEE ASSOCIATION

Award of 28 September 1992 – Panamanian buyer v. Papua New Guinean seller
XIX Y.B. Com. Arb., A.J. van den Berg (ed.) 48 (1994)
Cited as: *GCA 28 Sept 1992*

HUNGARIAN CHAMBER OF COMMERCE AND INDUSTRY, Arbitration Court attached to the,

Arbitral award in Case No. Vb/97142 of 25 May 1999
CLOUT Case 266, online: http://www.uncitral.org/uncitral/en/case_law/abstracts.html
Cited as: *HCCI Vb/97142*

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Award in Case No. 1434 of 1975
103 J.D.I. 978 (1976)
Cited as: *ICC 1434*



Award in Case No. 2114 of 1972
V Y.B. Comm. Arb., P. Sanders (ed.) 186 (1980)
Cited as: *ICC 2114*

Preliminary Award in Case No. 2321 of 1974
I Y.B. Comm. Arb., P. Sanders (ed.) 133 (1976)
Cited as: *ICC 2321*

Award in Case No. 3460 of 1980
108 J.D.I. 939 (1981)
Cited as: *ICC 3460*

Award in Case No. 4023 of 1984
111 J.D.I. 950 (1984)
Cited as: *ICC 4023*

Award in Case No. 6281 in 1989
XV Y.B. Comm. Arb., Albert H. Kritzer (ed.) 96 (1990)
Cited as: *ICC 6281*

Award in Case No. 8574 in 1996
11:2 ICAB 57-61 (2000)
Cited as: *ICC 8574*

Final award in Case No. 5294 of 1988
XIV Y.B. Comm. Arb., A.J. van den Berg (ed.) 137 (1989)
Cited as: *ICC 5294*

Partial award in ICC Case No. 6709 of 1991
119 J.D.I. 998 (1992)
Cited as: *ICC 6709*

Partial Award in Case No. 7920 of 1993
XXIII Y.B. Comm. Arb., A.J. van den Berg (ed.) 80 (1998)
Cited as: *ICC 7920*

Preliminary Arbitral Award in Case No. 9759 of 1999
In: Bonell, M.J., *The UNIDROIT Principles in Practice: Caselaw and Bibliography on the Principles of Commercial Contracts*, Transnational Publishers, Ardsley, NY 2002, p. 617
Cited as: *ICC 9759*

Award in Case No. 10623 of 2001
21 ASA Bulletin 1 (2003)
Cited as: *ICC 10623*



IRAN-US CLAIMS TRIBUNAL

Award in Case No. 34 (206-34-1) of 3 December 1985
XII Y.B. Comm. Arb., A.J. van den Berg (ed.) 257 (1987)
Cited as: *Iran-US 206-34-1*

**RUSSIAN FEDERATION
CHAMBER OF COMMERCE AND
INDUSTRY, Tribunal of
International Commercial
Arbitration at the**

Arbitration proceeding 175/2002 of 4 June 2003
On-line: <http://cisgw3.law.pace.edu/cases/030604r1.html>
Cited as: *RFCCI 175/2002*

**UKRAINE CHAMBER OF
COMMERCE AND TRADE,
Tribunal of International
Commercial Arbitration
attached to the,**

Ukraine 25 November 2002
Online: <http://cisgw3.law.pace.edu/cases/021125u5.html>
Cited as: *UCCT 25 Nov 2002*

**ZURICH CHAMBER OF
COMMERCE**

Preliminary Award of 25 November 1994
XXII Y.B. Comm. Arb., A.J. van den Berg (ed.) 211 (1997)
Cited as: *ZCC 25 Nov 1994*



INDEX OF COURT CASES

AUSTRALIA

Downs Investments Pty Ltd v. Perwaja Steel SDN BHD
[2000] QSC 421, 17 Nov. 2000 (Supreme Court of Queensland)
Cited as: *Downs Investments v. Perwaja Steel*

AUSTRIA

Oberster Gerichtshof, 30 November 1994
XXII Y.B. Comm. Arb., A.J. van den Berg (ed.) 628 (1997)
Cited as: *Oberster Gerichtshof 30 Nov 1994*

Oberster Gerichtshof, 2 Ob 100/00 w, 13 April 2000
Cited as: *Oberster Gerichtshof 2 Ob 100/00 w*

Oberster Gerichtshof, 7 Ob 301/01t, 14 January 2002
Online: <http://cisgw3.law.pace.edu/cases/020114a3.html>
Cited as: *Oberster Gerichtshof 7 Ob 301/01t*

CANADA

Compagnie nationale Air France v. MBaye
[2003] J.Q. (Quicklaw) No. 2900; [2003] R.J.Q. 1040; 2465 Rev. Arb.
(2003) (Quebec Court of Appeal)
Cited as: *Air France v. MBaye*

Ghirardosi v. British Columbia (Minister of Highways)
[1966] S.C.R. 367 (Supreme Court of Canada)
Cited as: *Ghirardosi v. BC*

ENGLAND

David Wilson Homes Ltd. V. Survey Services Ltd. And Others
[2001] 1 All ER 449 (Court of Appeal)
Cited as: *David Wilson Homes v. Survey Services*

Star Shipping A.S. v. China National Foreign Trade Transportation Corporation
(The STAR TEXAS)
[1993] 2 L.L.R. 445 (Court of Appeal)
Cited as : *Star Shipping v. CNFTTC*

FRANCE

Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors
121 J.D.I. 432, 20 Dec. 1993 (1994) (Cass. 1e civ)
Cited as: *Khoms El Mergeb v. Dalico*

M. Caiato Roger v. S.F.F.
13 Sept1995 (Grenoble Court of Appeal)
Cited as: *M. Caiato Roger v. S.F.F.*

Société Cámara Agraria Provincial de Guipuzcoa v. André Margaron
29 March 1995 (Grenoble Court of Appeal)
Cited as: *Cámara Agraria v. André Margaron*

**GERMANY**

Bundesgerichtshof, VIII ZR 159/94, 8 March 1995

(Federal Supreme Court)

Online: <http://www.cisg.law.pace.edu/cases/950308g3.html>

Cited as: *Bundesgerichtshof VIII ZR 159/94*

Kammergericht Berlin 28 Sch 17/99, 15 October 1999

CLOUT Case 373, online: http://www.uncitral.org/uncitral/en/case_law/abstracts.html

Published in German: [2000/2] *Recht und Praxis der Schiedsgerichtsbarkeit* 13

Cited as: *Kammergericht Berlin 28 Sch 17/99*

Oberlandesgericht Düsseldorf, 17 U 146/93, 14 January 1994

Online: <http://cisgw3.law.pace.edu/cases/940114g1.html>

Cited as: *OLG Düsseldorf 17 U 146/93*

Oberlandesgericht Celle, 3 U 246/97, 2 September 1998

CLOUT Case 318, online: http://www.uncitral.org/uncitral/en/case_law/abstracts.html

Cited as: *OLG Celle 3 U 246/97*

Oberlandesgericht Hamburg, 1 U 167/95, 28 February 1997

Online: <http://cisgw3.law.pace.edu/cases/970228g1.html>

Cited as: *OLG Hamburg 1 U 167/95*

Oberlandesgericht Hamm, 11 U 206/93, 8 February 1995

Online: <http://cisgw3.law.pace.edu/cases/950208g3.html>

Cited as: *OLG Hamm 11 U 206/93*

Oberlandesgericht München, 7 U 1720/94, 8 February 1995

Online: <http://cisgw3.law.pace.edu/cases/950208g1.html>

Cited as: *OLG München 7 U 1720/94*

HONG KONG

China Nanhai Oil Joint Service Cpn v. Gee Tai Holdings Co Ltd.

XX Y.B. Comm. Arb. 671 (1995)

Cited as: *China Nanhai Oil v. Gee Tai Holdings*

Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering Limited

High Court of Hong Kong (Kaplan J.), 5 May 1993

XX (1995) Y.B. Comm. Arb., A.J. van den Berg (ed.) 280 (1995)

CLOUT Case 57, online: http://www.uncitral.org/pdf/english/clout/abstracts/A_CN.9_SER.C_ABSTRACTS_4.pdf

Cited as: *Lucky-Goldstar v. Ng Moo Kee*

NETHERLANDS

Gerechtsbof Arnhem, 97/700 and 98/046, 27 April 1999

Online: <http://cisgw3.law.pace.edu/cases/990427n1.html>

Cited as: *Gerechtsbof Arnhem 97/700*



J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij BV, 7 November 1997
Online: <http://www.unilex.info/case.cfm?pid=1&id=333&do=case>
(Hoge Raad)
Cited as: *Schuermans v. Boomsma*

Malaysia Dairy Industries Ptd. Ltd. v. Dairex Holland BV, 9981/HAZA 95-2299, 2 Oct 1998 (Hertogenbosch District Court)
Online: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981002n1.html>
Cited as: *Malaysia Dairy v. Dairex Holland*

SINGAPORE

Bovis Land Lease Pte Ltd v. Jay-Tech Marine & Projects Pte Ltd
Case No O/S 77/2005, 166/2005, 6 May 2005 (High Court of the Republic of Singapore)
Cited as: *Bovis Land Lease v. Jay-Tech Marine*

SPAIN

Manipulados del Paper v. Sugem Europa,
4 Feb 1997 (Appellate Court Barcelona)
Cited as: *Manipulados del Paper v. Sugem Europa*

SWITZERLAND

Bundesgericht, I. Zivilabteilung (Swiss Supreme Court, 1st Civil Chamber), 21 November 2003 (4P.162/2003)
22(1) ASA Bulletin 144 (2004)
Cited as: *Bundesgericht 4P.162/2003*

UNITED STATES

Astra Footwear Industry v. Harnyn Int'l, Inc.
442 F.Supp. 907 (S.D.N.Y. 1978)
Cited as: *Astra Footwear v. Harnyn Int'l*

Château des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.
5 May 2003 (Federal Appellate Court, 9th Circuit)
Cited as: *Château des Charmes v. Sabaté*

Euro-Mec Import, Inc. v. Pantrem & C., S.p.A.
Not Reported in F.Supp., 1992 WL 350211; E.D.Pa., 1992
XIX Y.B. Comm. Arb., A.J. van den Berg (ed.) 781 (1994)
Cited as: *Euro-Mec v. Pantrem*

Graves Import Co. Ltd. and Italian Trading Company v. Chilewich International Corp.
92 Civ. 3355 (JFK), 22 Sept 1994 (U.S. Federal District Court of N.Y.)
Cited as: *Graves v. Chilewich*

Laboratorios Grossman, S.A. v. Forest Laboratories, Inc.
295 N.Y.S.2d 756 (1968)
Cited as: *Laboratorios Grossman v. Forest Laboratories*



Medical Marketing International v. Internazionale Medico Scientifica
E.P. Louisiana Civ. A. 90-0380 (U.S. District Court)
Cited as: *Medical Marketing Int'l v. Internazionale Medico Scientifica*

Rosgoscirc v. Circus Show Corp.
1993 WL 277333 (S.D.N.Y. 1993)
Cited as: *Rosgoscirc v. Circus Show*

Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.
05-13995, 12 Sept. 2006 (U.S. Court of Appeals, 11th Circuit)
Cited as: *Treibacher Industrie v. Allegheny Technologies*

Warnes SA v. Harvic Int'l Ltd
1993 WL 228028 (S.D.N.Y. 1993)
Cited as: *Warnes v. Harvis Int'l*

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



STATEMENT OF FACTS

1. Equatoriana Office Space Ltd. (“**Claimant**”) is a corporation based in Oceanside, Equatoriana [*St. of Cl.* ¶1]. In **2004/2005**, the Claimant aspired to expand its commercial leasing business and undertook its first development in the city of Mountain View [*St. of Cl.* ¶3]. In **April 2005**, the Claimant contacted Mediterraneo Electrodynamics S.A. (“**Respondent**”) to inquire if it could provide fuse boards for the project [*Answer* ¶3]. The Respondent assured the Claimant that the fuse boards could be delivered, but requested the Claimant’s engineering drawings in order to provide a “firm answer” [*R.Ex.1* ¶2]. Based on the drawings, which included specifications that the fuse boards be Chat JP type fuses and “lockable to Equalec requirements” [*St. of Cl.* ¶9], the Parties entered into a contract on **12 May 2005** (“**Contract**”) [*Answer* ¶¶3-4]. Equalec is the monopoly electrical distribution company in Mountain View [*Clar.Q.31*]. The Claimant had no previous dealings with Equalec [*St. of Cl.* ¶4].
2. On **14 July 2005**, one month before the delivery date, Peter Stiles, Sales Manager for the Respondent, telephoned Herbert Konkler, Purchasing Director for the Claimant, with whom he had negotiated the Contract [*R.Ex.1* ¶7]. Mr. Konkler was away until **25 July 2005** and could not be reached [*Cl.Ex.3* ¶1]. The secretary transferred Mr. Stiles to Steven Hart, a new staff member in Mr. Konkler’s Purchasing Department [*R.Ex.1* ¶7; *Cl.Ex.2* ¶1]. Mr. Stiles informed Mr. Hart of the Respondent’s inability to procure Chat JP type fuses [*R.Ex.1* ¶7]. Alternative fuses would need to be selected; otherwise, the Claimant would face a delay of two months [*Cl.Ex.2* ¶2]. After Mr. Hart informed Mr. Stiles of his inexperience with electrical equipment [*R.Ex.1* ¶8], Mr. Stiles recommended substituting JS type fuses [*R.Ex.1* ¶10]. Mr. Stiles provided assurances that it did not matter which fuse type was used [*R.Ex.1* ¶9]. Due to time constraints and relying on these assurances, Mr. Hart “acknowledged that Mr. Stiles’ recommendation was probably the best way to proceed” [*Cl.Ex.2* ¶4]. As Art. 32 of the Contract contained the Respondent’s standard provision that any amendments were to be in writing [*Cl.Ex.1*], Mr. Hart expected to receive a written request from the Respondent for an amendment to the Contract specifications [*Cl.Ex.2* ¶4]. The Respondent never provided a written request for the purported changes [*St. of Cl.* ¶13]. On **22 August 2005**, the Respondent delivered the fuse boards with JS fuses [*Answer* ¶10] and they were installed on **1 September 2005** [*St. of Cl.* ¶14].
3. Equalec arrived on **8 September 2005** but refused to make the connection because the fuse boards were equipped with JS fuses [*St. of Cl.* ¶14]. Mr. Konkler called Equalec and was told that for safety reasons its policy was to only connect JP fuses [*Cl.Ex.3* ¶3; *Cl.Ex.4* ¶3]. The next day, **9 September 2005**, Mr. Konkler called Mr. Stiles to inform him of Equalec’s refusal to connect the fuse boards and



that the fuse boards were not in conformity with the Contract [R.Ex.1 ¶12]. He pointed out that the Contract explicitly called for JP fuses [Cl.Ex.3 ¶5] and required modifications to be in writing [R.Ex.1 ¶12]. When Mr. Konkler inquired how long it would take to replace the fuses, Mr. Stiles responded with uncertainty, estimating that it would be at least two more months [Cl.Ex.3 ¶7]. To meet its **1 October 2005** deadline for building occupancy [R.Ex.1 ¶8], the Claimant was forced to buy conforming fuse boards containing Chat JP fuses from another supplier, who was able to deliver within three weeks [Cl.Ex.3 ¶¶7-8]. This avoided serious financial harm from lost rental income and late occupancy penalties [St. of Cl. ¶16].

4. On **15 August 2006**, the Claimant submitted a claim to the Court of International Commercial Arbitration (“CICA”) pursuant to Art. 34 of the Contract (“Arbitration Clause”) [Letter dated 15 Aug 2006]. The Arbitration Clause stipulates that any potential disputes are to be resolved by a tribunal composed of three arbitrators in Vindobona, Danubia according to “the International Arbitration Rules used in Bucharest” [Cl.Ex.1]. The Arbitration Clause ultimately included in the Contract had replaced the Respondent’s standard arbitration clause which referred disputes to the Mediterraneo International Arbitral Centre [R.Ex.1 ¶4]. At the time of the conclusion of the Contract, Mr. Stiles noticed the change in the Arbitration Clause, including uncertainties as to the designation of arbitral rules and institution [R.Ex.1 ¶4]. He nonetheless agreed to the substitution [R.Ex.1 ¶4]. In a subsequent conversation, Mr. Stiles inquired about the change in the Arbitration Clause [R.Ex.1 ¶5]. He did not, however, object to the clause or seek clarification of it [R.Ex.1 ¶5].
5. By letter dated **15 August 2006**, the Claimant appointed Ms. Arbitrator 1 [p.3]. By letter dated **4 September 2006**, the Respondent appointed Prof. Arbitrator 2 [p.18]. By letter dated **15 September 2006** [p.37], Ms. Arbitrator 1 and Prof. Arbitrator 2 selected Dr. Presiding Arbitrator to complete the Tribunal. On **2 October 2006**, the Tribunal empowered Dr. Presiding Arbitrator to make procedural decisions, subject to later approval by the Tribunal [Proc.Ord.1 ¶2].
6. Shortly thereafter, on **5 October 2006**, a conference call was held between the Presiding Arbitrator and both Parties’ counsels [Proc.Ord.1 ¶3]. During the call, the Respondent contested the jurisdiction of the Tribunal, as it had previously done in its *Answer* filed on **4 September 2006**, on the basis that “the arbitration clause was so unclear as to what it meant” [Proc.Ord.1 ¶4]. The Presiding Arbitrator assured counsel for the Respondent that the Tribunal would examine whether it had jurisdiction at the hearings of **March 2007** [Proc.Ord.1 ¶5, 11]. During those hearings it would also consider whether the Respondent breached the Contract and whether such breach could be excused [Proc.Ord.1 ¶11].



SUMMARY OF ARGUMENTS

7. Pursuant to *Procedural Order 1*, the Claimant will address the four questions put to it by the Tribunal:

I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

8. The Arbitration Clause validly designates the CICA Rules when it specifies the “International Arbitration Rules used in Bucharest” since these are the only rules that the Parties could have intended. That other rules could have been chosen through Art. 72(2) CICA Rules is irrelevant since there was no intention to make use of any other rules. In any event, the Parties’ consent to arbitration and the Tribunal’s proper constitution are clear despite the ambiguity in rules of procedure. Therefore the designation of rules cannot affect the Tribunal’s jurisdiction.

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

9. The fuse boards were not of the quality and description required by the Contract. In addition, they did not conform to the particular purpose communicated by the Claimant. The Respondent cannot be excused from its failure to deliver conforming goods as the Claimant relied on the Respondent’s particular skill. Finally, the fuse boards provided by the Respondent are not fit for the purposes for which they would ordinarily be used. The Respondent cannot be excused from liability, as the Claimant could not have known of the lack of conformity at the time of the Contract’s completion.

III. THE CONTRACT WAS NOT VALIDLY AMENDED

10. The Contract included a clause requiring all modifications to be written. The Respondent failed to provide a written amendment. Even if changes to the Contract need to be more than a minor change to require written confirmation, this requirement is met given the important differences between JS and JP fuses. The Respondent cannot benefit from the reliance exception since it was not reasonable for the Respondent to have relied on Mr. Hart’s or the Claimant’s conduct.

IV. THE RESPONDENT CANNOT BE EXCUSED FROM ITS BREACH OF CONTRACT

11. Complaining to the Commission of Equalec’s policy would not have avoided the damages caused by the Respondent’s breach of contract. There is no evidence that the Equalec policy would have been found invalid before the Claimant’s impending deadline. It was reasonable for the Claimant to make a substitute transaction that enabled it to meet its deadline and avoid late penalties and lost rental income. In addition, there was no impediment to the Respondent’s performance nor did the Claimant fail to perform its obligations to the Respondent.



ARGUMENT

I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

12. In its *Answer*, the Respondent “contests the jurisdiction of any arbitral tribunal established under the Arbitration Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania” [¶17]. The Respondent’s objection is twofold. Its main argument is that “it is completely unclear to what the clause refers” [*Answer* ¶15] when it calls for disputes to “be settled by the International Arbitration Rules used in Bucharest” [*Cl.Ex.1*]. The Respondent asserts that this ambiguity relating to the applicable procedural rules is so severe as to render the entire Clause “a nullity” [*Proc.Ord.1* ¶4]. In the alternative, the Respondent further contends that even if a choice of the CICA Rules “[was] thought to be a possible construction of the clause... it would [still] not be clear what procedures should be followed in establishing the arbitral tribunal or in conducting the arbitration” because Art. 72(2) CICA Rules allows parties to elect rules other than the CICA Rules to govern their arbitration [*Answer* ¶16].
13. The Respondent’s jurisdictional objection is ill-founded. First, any alleged ambiguity in the designation of the rules applicable to this arbitration can be resolved in favour of the application of the CICA Rules **(1)**. Second, even if this Tribunal were to find that the Arbitration Clause does not contain a valid designation of the applicable arbitration rules, this conclusion would have no bearing on the Tribunal’s jurisdiction: in no way would it affect the validity of the parties’ undertaking to arbitrate nor would it affect the validity of this Tribunal’s constitution **(2)**.

1. THE CICA RULES GOVERN THE ARBITRATION

14. In their Contract, the Parties chose to have their disputes “settled by the International Arbitration Rules used in Bucharest” [*Cl.Ex.1*]. The Respondent now contests the Tribunal’s jurisdiction on the basis that such designation is “completely unclear” [*Answer* ¶15]. However, any reasonable interpretation leads to the conclusion that the Parties intended the CICA Rules to be applicable **(a)**.
15. Further, the Respondent’s alternative argument pointing to Art. 72(2) CICA Rules is not supported by the facts of this case. The Claimant submits that the Parties clearly did not intend to exercise the option given to them in that particular provision of the CICA Rules **(b)**.
16. There is no doubt that the CICA rules govern this arbitration.

**(a) The Parties chose the CICA Rules**

17. International commercial arbitration agreements are to be construed in accordance with general principles of contractual interpretation [FGG ¶452; *Khoms El Mergheb v. Dalico*; *Kammergericht Berlin 28 Sch 17/99*; *ICC 9759*; *Art. 7(2) CISG*]. The dominant methodology for assessing the validity of arbitration agreements relies on two of these principles. First, the broad interpretation principle requires that the Tribunal refrain from using a strict or literal approach and rather adopt a contextual approach that seeks to meet the parties' real intentions [*Kammergericht Berlin 28 Sch 17/99*; *ICC 2321*; *ICC 9759*]. Second, the effective interpretation principle requires that, when faced with more than one possible intended meaning, the Tribunal choose the interpretation that both gives specific effect to the words used and preserves their effectiveness "rather than that which renders them useless or nonsensical" [*ICC 1434 p.982*; *FGG ¶478*; *UNIDROIT 4.5*; *European Principles 5:106*; *UNIDROIT Commentary p.124*; *CICA 70/1997*; *CICA 108/1999*; *ICC 2321*; *ICC 3460*; *AMINOIL*]. Accordingly, the Tribunal must look beyond the literal text of the Arbitration Clause, ascertain the parties' real intentions, and give effect to them [*FGG ¶476 et seq.*; *Laboratorios Grossman v. Forest Laboratories*; *Kammergericht Berlin 28 Sch 17/99*; *ICC 1434*; *ICC 2321*; *ICC 6709*; *ICC 7920*; *ICC 9759*].
18. Applying this approach to the present case leads to an inescapable conclusion: the Parties intended to choose the CICA Rules. When analyzed in context, the phrase "International Arbitration Rules used in Bucharest" can only be reasonably understood as designating the CICA Rules **(i)**. Any remaining ambiguity may be resolved through the principle of effective interpretation **(ii)**. Meanwhile, the rule of *contra proferentem* – which the Respondent might wish to rely on given that the Claimant drafted the Arbitration Clause – cannot be invoked against the Claimant on the facts of this dispute **(iii)**.
- i. By the phrase "International Arbitration Rules used in Bucharest," the Parties intended to specify the CICA Rules**
19. The Parties have expressed the intention to arbitrate under the "International Arbitration Rules used in Bucharest" [*emph. add.*]. In the context of international arbitration, "Bucharest" can only point to the CICA [*CICA 45/2000*]. Created in 1953, the CICA – which is located in Bucharest – is the only permanent arbitration institution in Romania [*Florescu p.97*]. No other organization in Bucharest conducts international arbitrations [*Clar.Q.10*; *CICA 45/2000*].
20. Bucharest is not only the seat of the CICA; it was also part of its name until recent years [*Clar.Q.10*]. The Court of International Arbitration was formerly "attached to the Chamber of Commerce and Industry of Romania and Bucharest" [*Clar.Q.10, emph. add.*]. The institution changed its name as part of a



restructuring [*Clar.Q.10*]. In fact, Bucharest is still part of the name of the CICA's rules since these have yet to be amended to reflect the name change [*Clar.Q.10*]. Common problems are created when arbitral institutions change names, merge, or cease to exist altogether [*e.g. Astra Footwear v. Hamlyn Int'l*]. This is particularly so in the rapidly evolving setting of Central and Eastern Europe [*Lew/Mistelis/Kröll ¶7.80; Kirchner/Marriott; Oberster Gerichtshof 30 Nov 1994*]. The interpretation of an arbitral clause in the particular context of Central and Eastern Europe should thus be afforded added flexibility.

21. Nonetheless, the Respondent questions the “international” character of the CICA and its rules, stating that “the reference to ‘International Arbitration Rules’ does not refer to any existing set of rules of any arbitral organization in Bucharest” [*Answer ¶15*]. The CICA's capacity to handle international arbitrations remains unquestioned. As the Respondent has pointed out, it is natural to expect that the rules of an institution named “Court of *International* Commercial Arbitration” would be “*International* Arbitration Rules” [*Answer ¶15, emph. add.*]. The Respondent also admits that the rules “are designed for domestic arbitrations *as well as* international arbitrations” [*Answer ¶15, emph. add.*]. Art. 2 CICA Rules makes clear that the CICA organizes “*the settlement of... international commercial disputes.*” The CICA organizes dozens of international arbitrations annually [*CICA Statistics p.1; CCIR Annual Report 2004 p.38; Clar.Q.11*] and is well-equipped to do so. The organisation's handling of domestic arbitrations is irrelevant; what matters in this dispute is that the CICA is an appropriate forum for international arbitrations.
22. The Respondent further mischaracterizes the provisions of Chapter VIII of the CICA Rules when alleging that its six articles “do not give a complete set of rules” [*Answer ¶15*]. Chapter VIII does not exclude the application of the rest of the CICA Rules; it merely modifies them in accordance with the Parties' intention that the arbitration be international in character. Chapter VIII simply removes the restraints imposed by the CICA Rules or Romanian law in domestic arbitrations [*Arts. 72-77 CICA Rules*]. The resulting rules are equivalent in substance to many standard international arbitration rules. In any case, the rules chosen by the Parties are complemented and supported by those of the *lex arbitri* [*see §I.2(a)(iv)*]. Hence, whatever lacunae the Respondent may point to in the CICA Rules are inconsequential since Art. 19(2) Model Law empowers the Tribunal to fill any voids [*Holtzmann p.565*].
23. Furthermore, the choice of CICA Rules conforms to the intention of the Parties to resolve their disputes in a neutral and independent forum. This is characteristic of parties to international arbitrations [*ICC 4023*]. The Parties here agreed to substitute the reference to the Mediterraneo International Arbitral Center [*R.Ex.1 ¶4*] for an arbitral organization not connected with either of the Parties to the case. The CICA is a non-State, non-governmental and independent organisation [*Art. 1*



CICA Regulations; Florescu p.96]. CICA and its rules thus satisfy the intention to provide a neutral framework for the settlement of disputes. The Parties also stipulated a neutral site of arbitration in Vindobona, Danubia [*St. of Cl.* ¶20]. Invalidating the Arbitration Clause would force the Claimant to pursue its claim in the Respondent's domestic courts. This would frustrate the fundamental intent of the Parties to resort to a neutral arbitral forum.

24. It is also worth noting that no contradiction is created for the current proceedings by the fact that “no institution was mentioned” [*R.Ex.1* ¶4]. Even when institutional arbitration is not intended, arbitral institutions can still act as “rule providers” and offer other assistance to an *ad hoc* arbitration [*Bovis Land Lease v. Jay-Tech Marine*]. Art. 78 CICA Rules stipulates that the CICA may assist the parties to an *ad hoc* arbitration by “making available to the parties the Rules of Arbitration and a list of [qualified potential] arbitrators”, “verifying the fulfillment of the formalities required for the composition of the Arbitral Tribunal and the establishment of the arbitrators’ fees” and providing other logistical and secretarial services. The current Arbitration Clause, which deviates in only this respect from the CICA Standard Arbitration Clause [*CICA Website*], could, if necessary, be interpreted as referring to *ad hoc* arbitration under the CICA Rules.
25. While the Respondent could argue that the disputed phrase meant to refer to the international arbitration provisions of the Romanian *Code of Civil Procedure* (“Romanian Code”) [Chapter X, Book IV], it would not have made commercial sense for the Parties to subject their disputes to the domestic Romanian laws of international arbitration. To involve the Romanian Code would potentially involve the Romanian courts in functions already exclusively delegated to Danubian courts under Arts. 5 and 6 Model Law [*e.g. Art. 342 Romanian Code; Int’l Comparative Legal Guide p.357*]. The Parties could not have intended to create such conflicts of jurisdiction. Furthermore, the Parties have specified English as the language of the proceedings [*Cl.Ex.1*]. Yet, the Claimant knows of no authoritative English translation of the Romanian Code and neither Party could be expected to understand the provisions of the Code in Romanian [*Clar.Q.3*]. The CICA Rules, on the other hand, are readily available in English [*CICA Website*]. Lastly, arbitration under the Romanian Code would not afford the Parties the same assistance and services offered by the CICA to help an arbitration run efficiently. Put simply, the idea that businesspersons from different countries would choose to arbitrate unassisted under the provisions of a foreign domestic law in a foreign language does not make sense.
26. In light of all of the above, there is only one set of rules the Parties could have meant: the CICA’s.

**ii. The principle of effective interpretation (*effet utile*) reinforces the choice of CICA Rules**

27. Two specific applications of the principle of effective interpretation also mandate referral to the CICA. First, the Tribunal must give concrete meaning to the stipulation of “Bucharest” within the phrase “International Arbitration Rules used in Bucharest.” Second, the Tribunal must choose an interpretation that gives effect to the designation of rules rather than one that renders such designation invalid.
28. A geographical point of reference may be taken to mean the place of arbitration. In numerous cases, the phrase “ICC in [City other than Paris]” has been interpreted to mean ICC arbitration with its *situs* in that city, for there is only one ICC, located in Paris [*Davis p.367*; *FGG ¶485*; *ICC 2114*]. Here however, the Parties expressly designated Vindobona as the place of arbitration [*St. of Cl. ¶21*]. Therefore, the term “Bucharest” next to “International Arbitration Rules” can only refer to the location of an arbitration institution that is to be the source of those rules. As discussed above, that institution is necessarily the CICA in the case of Bucharest [*see §I.1(a)(ii)*].
29. Arbitral and court practice is consistent with giving Bucharest this meaning. An arbitration clause specifying the “International Trade Arbitration Organization in Zurich” was interpreted to mean arbitration under the Zurich Chamber of Commerce International Arbitration Rules [*ZCC 25 Nov 1994*]. A clause stating only “arbitration: Hamburg, West Germany” led to the jurisdiction of the German Coffee Association, the only arbitration organization in Hamburg appropriate to the Parties’ dispute [*GCA 28 Sept 1992*]. Here too, the Arbitration Clause stipulating the “International Arbitration Rules used in Bucharest” should be taken to mean the CICA, located in Bucharest.
30. Courts and arbitral tribunals deliberately minimize imperfections in arbitration agreements to give effect to the parties’ underlying intentions [*Born ch.3 ¶19(b)*; *ICC 5294*]. In *CICA 45/2000*, a tribunal of this very institution said that, “the inappropriate rendering of the name of the [CICA] is devoid of legal consequences... In interpreting the arbitration clause, consideration must be given to the parties’ actual intention, even though the name of the institution was misquoted. Otherwise, no controversy could be settled through arbitration, although it is beyond dispute that this was the procedure elected by the parties.” As long as a reasonable interpretation exists, it should be given effect and the Parties’ agreement to arbitrate should be carried out accordingly [*FGG ¶485*]. Here, reasonable interpretation can only lead to the application of the CICA Rules.

iii. The rule of *contra proferentem* has no application to the present arbitration clause

31. Given that the Claimant drafted the arbitration clause that was ultimately inserted in the Contract [*R.Ex.1 ¶4*], the Respondent may seek to rely on the rule of *contra proferentem*. *Contra proferentem* is a



subsidiary rule of contract interpretation which suggests that unclear contract terms supplied by one party should be interpreted against that party [UNIDROIT 4.6; *European Principles* 5:103]. However, the sources of this principle make it clear that the rule is “not to be construed in a strict and literal sense but in the light of the purposes and rationale underlying the individual provisions” [Bonell *International Restatement of Contract Law* p.83; *Sykes* p.78; UNIDROIT 1.6; *European Principles* 1:106]. For this reason, the Tribunal would not be justified in applying the rule of *contra proferentem* to defeat its jurisdiction.

32. First, the purposes of the rule are not served. The Respondent has yet to offer any interpretation of the Clause or rules under which it would be willing to arbitrate. The Respondent would instead rely on the rule to establish the nullity of the Arbitration Clause, not to resolve its ambiguity [Proc.Ord.1 ¶4]. This runs counter to the rule’s purpose as well as the clear intention of the parties to submit any dispute to arbitration [*Sykes* p.76]. Moreover, the rule only applies as a last resort when basic methods of contract interpretation have failed to ascertain the common intention of the parties [*Sykes* pp.68, 74; *Iran-US 206-34-7*]. Given that it is possible through normal contractual interpretation or the principle of effective interpretation to construe “International Arbitration Rules used in Bucharest” as the CICA Rules, the rule of *contra proferentem* should not be engaged.
33. Second, the rationale underlying the rule is not served. The substantive purpose of the rule is to mitigate an imbalance in bargaining power great enough to allow one party to dictate the wording of a contract to their relative advantage [*Lewison* p.208; *Bonell International Restatement of Contract Law* pp.156-57]. In this case, there is no relative advantage to be mitigated by the rule. Unlike a choice of forum clause, there is no distinct benefit to the Claimant from arbitration under the CICA Rules [*Born Arbitration and Forum Selection Agreements* p.8; *FGG* ¶479]. Whether under the CICA or any other set of rules, arbitration is intended to be a neutral dispute resolution process underlied by a basic principle of party equality and due process [*Arts. 12, 18 Model Law; Arts. 6, 18, 20 CICA Rules; St. of Indep. pp. 32, 34*]. There is also no indication of an imbalance in bargaining power. The current clause was not part of a standard form or contract of adhesion, typical evidence of an imbalance. Rather, it replaced the Respondent’s standard arbitration clause [*R.Ex.1* ¶4]. Furthermore, given the substitution of clauses and the communications of Mr. Stiles and Mr. Konkler on the subject [*R.Ex.1*], the Arbitration Clause should be seen as fairly negotiated and not unilaterally imposed. As there is no *proferens*, the rule cannot be applied [*Lewison* p.209; *Sykes* pp.66-67; *UNIDROIT Commentary* p.175].

**(b) No other rules were chosen through Art. 72(2) CICA Rules**

34. The Respondent correctly states that Art. 72(2) CICA Rules allows the parties to specify other rules of procedure to be used [*Answer* ¶16]. However, the Respondent offers no evidentiary basis on which to conclude that the Parties chose the CICA Rules as a vehicle to other rules of procedure.
35. When arbitrating at the CICA, “the parties agree *ipso facto* to these Rules” unless they expressly derogate from them in writing [*Art. 5 CICA Rules; Capatina p.18; Int’l Comparative Legal Guide p.355*]. Given that “International Arbitration Rules used in Bucharest” clearly points to the CICA Rules as modified by Chapter VIII therein [*see §I.1(a)*], nothing in the Clause or other facts of the case indicates a further choice of other rules. The Respondent’s argument is purely speculative. In fact, there is no evidence that parties to a CICA proceeding have *ever* chosen the UNCITRAL Rules [*Capatina p.18; Clar.Q.12*].
36. A parallel can be drawn to the treatment of the doctrine of *renvoi* in private international law. *Renvoi* is generally rejected in cases of contractual choice of law [*Cheshire and North pp.64-65; Audit* ¶¶225, 230; *Art. 15 Rome Convention*]. The resulting choice of law includes the internal law of the place of designation, but not its rules governing conflicts of laws. The policy behind the rejection is that *renvoi* introduces unnecessary uncertainty and the idea that when parties specifically choose to apply a given law, they do not intend to include provisions that will effectively disallow that choice: “no sane businessman or his lawyers would choose the application of *renvoi*” [*Cheshire and North p.65*]. The Parties here chose the CICA Rules; they did not just intend the CICA to administrate their dispute under some other set of rules [*see §I.1(a), ¶6 et seq.*]. By analogy to *renvoi*, the Parties did not intend their choice of CICA Rules to include redirecting provisions such as Art. 72(2).

2. IN ANY EVENT, THE JURISDICTION OF THE TRIBUNAL DOES NOT DEPEND ON A VALID DESIGNATION OF RULES OF PROCEDURE

37. Even if this Tribunal were to find that the Arbitration Clause does not contain a valid designation of the applicable arbitration rules, this conclusion does affect the jurisdiction of this Tribunal. The validity of an arbitration agreement rests on two requirements: that the parties have agreed to submit their disputes to arbitration and that the dispute falls within the scope of the arbitration clause [*CCIG 117; CCIG 193*]. Here, as the scope of the Arbitration Clause is unquestioned, the Respondent can only challenge the validity of the Arbitration Clause on the basis of consent. However, the Parties’ consent to arbitrate their disputes is clear despite the alleged ambiguities. Therefore, the Arbitration Clause must stand even if the Tribunal finds the designation of rules invalid **(a)**.
38. Moreover, a claim that uncertainty remains as to the rules to be used “in establishing the arbitral



tribunal or in conducting the arbitration” [*Answer* ¶16] is irrelevant to jurisdiction. Rules of procedure are not jurisdictional. Neither should rules of constitution be considered to have a bearing on jurisdiction. Yet, even if constitution of the Tribunal were to be examined, it could only be found that this Tribunal has been constituted regardless of the rules applicable **(b)**.

(a) An invalid designation of rules would not vitiate the Parties’ undertaking to arbitrate

39. The Respondent contends that the arbitration agreement suffers from ambiguity severe enough to render the entire clause “a nullity” [*Proc.Ord.1* ¶4]. In so doing, the Respondent seems to assume that this Tribunal’s jurisdiction somehow depends on a valid designation of the applicable procedural rules. This assumption is clearly ill-founded. As a general rule, the jurisdiction of an arbitral tribunal does not depend on a valid designation of the arbitration rules. Rather it rests on the parties’ consent to resolve the dispute at issue through arbitration. As long as such consent is clear despite the alleged ambiguity, the designation of rules can be severed **(i)**. Severance would respect the Parties’ intention here since they intended their Arbitration Clause to be valid **(ii)** and did not premise their consent on a particular designaton of rules **(iii)**. Meanwhile, the severance of the disputed phrase is facilitated by the fact that the Model Law will provide default rules to govern the arbitration **(iv)**.

i. The choice of rules of procedure may be severed in order to preserve the validity of the Arbitration Clause

40. Given a clear expression of the parties’ intent to arbitrate, ambiguous terms may be severed in order to preserve the validity of the arbitration clause as a whole [*Redfern* ¶3.68; *Lew/Mistelis/Kröll* ¶7.71 *et seq.*; *Born ch.3* ¶19(e); *Levison* p.275; *Zechman*]. This idea follows from the principle of effective interpretation set out above [§1.1(a)(iii) ¶27]. In order to invalidate the entire arbitration agreement, the Respondent needs to convince the Tribunal that the disputed phrase is so fundamental that it undermines the basic consent to arbitration [*Zechman, Born ch.3* ¶19(e), *UNIDROIT 3.5(1)*].

41. This is a very high threshold to meet. Party agreement as to arbitral institution or rules of arbitral procedure is not a requirement for the validity of an arbitration clause [*CCIG 117*; *CCIG 193*; *Berger p.125 citing Rniede/Hadenfeldt p.53 and Schlosser n.261*]. A discrepancy in the name of an arbitral institution [*CICA 45/2000*; *CCIG 193*; *RFCCI 175/2002*; *ZCC 25 Nov 1994*] or an ambiguity in the designation of rules governing the arbitration proceedings [*Euro-Mec v. Pantrem*] does not generally undermine the parties’ intention to arbitrate potential disputes. Arbitration agreements have been upheld even in cases of much more serious defects, such as non-existent institutions [*Astra Footwear v. Hamryn Int’l, Kammergericht Berlin 28 Sch 17/99*; *Rosgoscirc v. Circus Show*], non-existent rules [*Lucky-Goldstar v. Ng Moo*



Kee] or uncertainty as to arbitral *situs* [*Star Shipping v. CNFTTC*] [*Born ch.3 ¶19(d)*]. Even disagreements as to whether arbitration was the intended dispute resolution method have not necessarily resulted in an invalidation of the arbitral agreement [*ICC 5294*; *David Wilson Homes v. Survey Services*].

42. The principle of effective interpretation mandates that the rules be severed. In *Bundesgericht 4P.162/2003*, the Swiss Supreme Court upheld an arbitration clause that unambiguously referred to arbitration but mentioned three possible sets of rules to be followed. In *Lucky-Goldstar v. Ng Moo Kee*, the agreement only stipulated that arbitration should be undertaken in a “3rd” country, under the rule of the 3rd country and in accordance with the rules of procedure of the International Commercial Arbitration Association.” The High Court of Hong Kong upheld the clause, saying, “as to the reference to non-existent arbitration institution and rules, I believe that the correct approach is simply to ignore it...so as to give effect to the clear intention of the parties.” The defective portion of the clause can then be “ignored” instead of completely defeating the parties’ intention to arbitrate disputes [*Lucky-Goldstar v. Ng Moo Kee*; *Warnes v. Harvic Int’l*; *Euro-Mec v. Pantrem*; *Astra Footwear v. Harmyn Int’l*].

ii. The Parties intended their Arbitration Clause to be valid

43. Parties to a contract, when inserting an arbitration clause, intend their clause to establish effective machinery for the resolution of their disputes [*ICC 2321*; *ICC 1434*; *ICC 9759*]. Both Parties here are sophisticated businesses who knowingly concluded an agreement at arm’s length. Both Parties also have experience with international commercial arbitration [*R.Ex.1 ¶¶4,5*; *Clar.Q.15*]. Along with a clear intent to arbitrate, the Arbitration Clause meets all formal requirements for validity [*Redfern ¶1.33*]. In order to ensure the Arbitration Clause’s effectiveness, the Parties further specified the seat of the arbitration, the composition of the Tribunal, and the language of the proceedings [*CLEx.1*]. The Parties intended their arbitration agreement to be valid even in the face of minor alleged imperfections.
44. A three-member arbitral tribunal, with its seat in Vindobona, Danubia, has been properly formed in accordance with the agreement of the Parties. To allow the Respondent’s demand that arbitral proceedings should start again *ab initio* or should be barred completely, when the Parties’ intentions have already been respected in the present proceedings, would introduce unreasonable delay and substantial hardship in the resolution of a dispute that the Parties wanted dealt with swiftly [*ICC 7920*].

iii. The Parties’ undertaking to arbitrate did not depend on a particular choice of rules

45. In this case, an unclear designation of rules may be severed, if necessary, from the rest of the Arbitration Clause. Severance would not undermine the Parties’ intention to arbitrate. The Contract as originally submitted to the Claimant contained the Respondent’s standard arbitration clause pointing to



institutional arbitration [R.Ex.1 ¶4]. This alone demonstrates the Respondent's clear intent to submit disputes to arbitration. Furthermore, Mr. Stiles recounted that, when concluding the Contract, "Mr. Konkler had substituted a different arbitration clause." Mr. Stiles said, "it looked strange to me. For one thing, no institution was mentioned" [R.Ex.1 ¶4]. That is to say, he took specific notice of the present arbitration clause, including the ambiguities that the Respondent now attacks. Nevertheless, it still "was not an issue that [he] was going to let interfere with concluding the sale" [R.Ex.1 ¶4]. The Respondent did not premise his consent to arbitration on a particular designation of arbitration rules or institution. In fact, the Respondent assumed the risks associated with the Arbitration Clause's purported ambiguity [UNIDROIT 3.5(2); Kramer p.276 et seq.].

46. Indeed, in a conversation subsequent to the conclusion of the Contract, Mr. Stiles addressed the Arbitration Clause but did not object to it or seek any clarification [R.Ex.1 ¶4]. His statements further reinforce consent to arbitration under the current Arbitration Clause. Even if the Respondent did not expect any disputes to arise [R.Ex.1 ¶4], the Respondent cannot deny that arbitration was fundamentally chosen as the dispute resolution mechanism.

iv. The Model Law facilitates the severance by providing default arbitral rules

47. An international arbitration agreement is governed by a dualism with respect to arbitral procedure: it is regulated by both the rules agreed upon by the parties and the law of the place of arbitration – the *lex arbitri* [Redfern, 2.05; Art. 36(1)(a)(i) Model Law; Art. V(1)(a) NY Convention]. Danubia adopted the 1985 text of the Model Law without amendment [St. of Cl. ¶8]. By designating the place of arbitration as Danubia [Cl.Ex.1], the parties have adopted the default procedures of the Model Law.

48. As such, if the Tribunal severs the Parties' ambiguous choice of rules, the Model Law will provide subsidiary rules to govern the present proceedings [Holtzmann p.565]. Notably, the Model Law provides that "failing [agreement by the Parties], the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate" [Art. 19(2)]. Accordingly, national courts have declared arbitration agreements valid on the basis of default provisions despite the lack of specific agreements regarding procedural rules (e.g. the appointment process) [Lew/Mistelis/Kröll ¶10.45 n.42; FGG ¶486].

(b) An invalid designation of rules would not affect the Tribunal's proper constitution

49. The Respondent suggests that jurisdiction is affected because the Arbitration Clause does not make "clear what procedures should be followed in establishing the arbitral tribunal or in conducting the arbitration" [Answer ¶16]. Again, this assumes that rules of procedure affect the jurisdiction of the Tribunal. This is not the case. In general, rules regarding the conduct of arbitral proceedings are not



jurisdictional in nature and therefore do not affect the jurisdiction of a tribunal. In fact, as established above in §I.2(a)(iv), the Model Law empowers the Tribunal to determine the “appropriate” rules of procedure to conduct the arbitration before it [*Art. 19(2) Model Law; Holtzmann p.564*]. Only those rules of procedure impacting the constitution of the tribunal could possibly affect its jurisdiction and only if the Tribunal finds it necessary to examine its own constitution in order to uphold its jurisdiction.

50. The Claimant submits that this Tribunal may appropriately determine that questions regarding its constitution should not be considered in the present jurisdictional challenge **(i)**. In such a case, the designation of rules of procedure would be entirely irrelevant to jurisdiction. However, even if this Tribunal chooses to scrutinize its constitution, the Tribunal will find that it has been properly constituted irrespective of what rules could be found to apply **(ii)**.

i. Whether the Tribunal has been properly constituted is not a jurisdictional issue

51. An examination of the jurisdiction of this Tribunal should encompass only issues concerning the validity and the scope of the arbitration agreement [*CCIG 117; CCIG 193*]. The constitution of the Tribunal should not be considered an element of jurisdiction. This narrow view of jurisdiction stems from doctrinal support, the policy goals of the Model Law, and efficiency considerations.
52. Many doctrinal writers support this narrow view of jurisdiction [*Mayer; Clay p.141 n.168*]. Samuel implicitly supports this idea when he excludes the constitution of the tribunal from his list of grounds for jurisdictional challenges [*Bachand ¶450; Samuel pp.224-267*]. Similarly, Redfern treats the constitution of the tribunal as a “further procedural issue” and not an “issue of jurisdiction” [¶¶9.18-9.28].
53. The structure of Art. 16 Model Law supports this exclusion. Under Art. 16(2) Model Law, a plea of lack of jurisdiction must be raised at the latest in the statement of defence. But the Tribunal cannot yet be fully formed until after the statement of defence since that is when the Respondent is expected to appoint their arbitrator of choice. The choice of presiding arbitrator must necessarily come after this point, as has occurred here [*Letter 15 Sept 2006*]. How could issues of constitution possibly then be included in Art. 16 Model Law’s definition of the “jurisdiction” that the Tribunal is meant to review?
54. This idea squares with the Model Law’s general policy of limiting judicial intervention until after the arbitration has finished. Issues of composition, such as impartiality, independence and qualifications of arbitrators [*Art. 12(2) Model Law*], should be challenged within the arbitral context under Arts. 11-13 Model Law. Any issue regarding constitution that is not already addressed by the Model Law should then only be subject to a review by courts once the Tribunal has rendered a final award. Disallowing court intervention in this way gives full effect to the principle of autonomy and the positive effect of



competence-competence [FGG ¶680]. In support of this conclusion, the Quebec Court of Appeal concluded that, on the basis that the chosen rules before it (in this case the UNCITRAL Rules) were silent on court intervention regarding jurisdiction of the tribunal, the Parties meant to exclude such intervention until the merits of their dispute had been finally settled by the arbitral tribunal [*Air France v. MBaye*].

55. A narrow construction of jurisdiction respects the intent of the parties to have a final and expeditious resolution of their disputes. Allowing the courts to intervene at an earlier stage is potentially inefficient as parties would simultaneously be involved in arbitral and judicial proceedings and generally face increased litigation associated with the constitution of the arbitral tribunal [FGG ¶743]. This would allow the exploitation of court proceedings to create undue delays and dilatory tactics aimed at obstructing the arbitration and putting pressure on the Claimant. This would be contrary to the efficiency goals of international commercial arbitration [*Gaillard* ¶771]. For these reasons, jurisdiction should be construed narrowly while allowing a general *a posteriori* review in courts proceedings as to enforcement or setting aside of an award, if necessary. Since courts will review the award at this later stage, this Tribunal can exercise its jurisdiction on the full merits of the issue, “no matter how serious the allegations may be as to irregularities affecting the proceedings” [FGG ¶ 688].

ii. In any event, the Tribunal has been properly constituted irrespective of which rules are found to apply

56. Even if the Tribunal considers objections to the validity of its constitution to be jurisdictional in nature, the Tribunal must conclude that it was properly constituted. The procedure of all rules that may be found applicable consists of the same two basic steps: first, the parties appoint one Arbitrator each; next, the two party-appointed Arbitrators select the Presiding Arbitrator [*Art. 11(3)(a) Model Law; Art. 23 CICA Rules; Art. 7(1) UNCITRAL Rules; Art. 369.2 Romanian Code*]. That procedure has been respected. By letter dated 15 Aug 2006, the Claimant appointed Ms. Arbitrator 1 [p.3]. By letter dated 4 Sept 2006 [p. 18], the Respondent appointed Prof. Arbitrator 2. By letter dated 14 Sept 2006 [p.38], confirmed in a letter dated 15 Sept 2006 [p.37], Ms. Arbitrator 1 and Prof. Arbitrator 2 selected Dr. Presiding Arbitrator to complete the Tribunal. Therefore, irrespective of which rules are found to apply, the method of constitution respects the rules chosen by the parties and, failing the recognition of such agreement, the rules of the *lex arbitri* [*Art. 34(2)(a)(iv) Model Law; Art. V(1)(d) NY Convention*].

57. The Respondent alleges without further support that “[a] comparison of [UNCITRAL Rules and CICA Rules] will demonstrate that they differ in many important respects” [*Answer* ¶16]. Yet a careful examination of all the different sets of rules that may apply reveals only two notable differences. First,



the appointing authorities would differ in the case of a default by either party to appoint an Arbitrator or by the two party-appointed Arbitrators to appoint the Presiding Arbitrator. Second, Art. 23 CICA Rules additionally requires that the Presiding Arbitrator be included on one of the CICA Lists. Neither of these differences affects the constitution of the present Tribunal.

58. First, since there was no default here, the difference in appointing authorities is irrelevant.
59. Second, there was no restriction on the freedom of choice of the parties that would undermine the Parties' intention to arbitrate [FGG ¶761]. Art. 23 CICA Rules does not specify which list of arbitrators the party-appointed arbitrators can choose the Presiding Arbitrator from and therefore does not limit the parties to choose on the basis of nationality [Art. 11(1) Model Law]. Since the desired product of arbitration is a final resolution to the dispute, arbitrators in international arbitrations are expected to take steps to ensure that their awards are enforceable [Art. 35 ICC Rules; ICC 10623]. Faced with uncertainty as to whether the Presiding Arbitrator must be on the CICA Lists or not, the only course of action that would guarantee the proper constitution of the Tribunal – and thereby an enforceable award – would be to select a Presiding Arbitrator from the CICA Lists.
60. Rather than impugning the proper establishment and constitution of the Tribunal, all factors [Landau p.45] uphold it. First, the method of the constitution of the Tribunal honours the principle of autonomy. Each party appointed “one judge of his choice” [Redfern ¶4.17] and they mutually agreed on the choice of the Presiding Arbitrator. Second, controls on quality and qualifications of those appointed are assured via the statements of independence signed by the arbitrators [St. of Indep. pp.32, 34; Art. 24(2) CICA Rules] and the lists of arbitrators provided by the CICA [CICA Website]. Because the Presiding Arbitrator has been drawn from the CICA Lists, the Parties are ensured that at least one member of the Tribunal is specifically qualified as an arbitrator [Redfern ¶4.44]. Third, the appointment of arbitrators was realized in an efficient and speedy fashion. This was facilitated by the support and assistance of the CICA and its rules regarding the appointment process. Fourth, the chosen rules, including the *lex arbitri*, provide a mechanism to solve problems regarding the composition of the tribunal [Arts. 11, 12, 13 Model Law; Arts. 26, 27, 28 CICA Rules]. Last, costs were clearly stipulated to Parties and the Arbitrators and are reasonable [Letter dated 18 Aug 2006, p.15; also pp.17-30].
61. Since neither the rights of the Parties nor the confidence the Parties place in the Tribunal can be affected by the method under which this Tribunal has been constituted [FGG ¶743], there is no reason to conclude that there exists any irregularities in the composition of the present Tribunal.



iii. **An objection to the validity of the Tribunal's constitution is in any case barred by waiver under Art. 4 Model Law**

62. Having not yet explicitly objected to the constitution of the Tribunal, the Respondent has effectively waived its right to do so [*Art. 4 Model Law*]. The principle of waiver (alternatively known as estoppel, *venire contra factum proprium*, or an element of good faith) is “almost universal” in international commercial arbitration [*Binder* ¶1.092 *et seq.*; *Redfern* ¶4.76 *et seq.*; *Caron/Caplan/Pellonpää* p.740; *Derains/Schwartz* p.379; *Art. 4 Model Law*; *Art. 30 UNCITRAL Rules*; *Art. 33 ICC Rules*; *Art. 32 LCIA Rules*; *Art. 25 AAA Rules*; *Art. 58 WIPO Rules*].

63. All four conditions for invoking Art. 4 Model Law [*Analytical Commentary A/CN.9/264*; *Holtzmann* p.196; *Binder* ¶1.082] are met in the present case.

- The non-compliance deals with a non-mandatory provision of the Model Law. Art. 11(2) Model Law clearly states that parties may derogate from the Model Law in setting the procedure for constituting the arbitral tribunal. Also, Art. 11 Model Law is not found in any list of provisions explicitly considered as mandatory in the *travaux préparatoires* [*Holtzmann* p.198 n.11; *Binder* ¶1.085].

The applicability of waiver to the present situation can also be seen in practice. Waiver has been applied to explicitly cure the improper constitution of the arbitral tribunal [*Cadiet* ¶7 *et seq.*; *Ghirardosi v. BC*; *China Nanhai Oil v. Gee Tai Holdings*]. Art. 4 can even be a basis for jurisdiction *per se* [*HCCI Vb/97142*; *Art. 7(2) Model Law*; *Holtzmann* p.198].

- The Respondent knew or ought to have known of the non-compliance. In the present case, the Respondent should be deemed to know of the constitution of the Tribunal as of 15 Sept 2006 or shortly thereafter, when communication was made of the appointment of a Presiding Arbitrator [*Letter dated 15 Sept 2006*]. Otherwise, positive knowledge of the constitution of the Tribunal is clear at the latest as of 5 Oct 2006, when the Respondent's counsel participated in a conference call with the Presiding Arbitrator [*Proc.Ord.1* ¶3].
- The Respondent has proceeded with the arbitration without stating the objection. The requirement of proceeding with the arbitration is not strict: “any procedural action is sufficient to fulfil Art. 4 Model Law” [*Binder* ¶1.097]. The Analytical Commentary mentions the examples of “appearance at a hearing or a communication to the arbitral tribunal or the other party” [*Art. 4* ¶5]. Since the constitution of the Tribunal, there have been two *Procedural Orders* involving communication with the Respondent [*Proc.Ord.1*; *Proc.Ord.2*]. The Respondent has accepted directions to put forward a defense on the merits and appear at hearings [*Proc.Ord.1*] as well as requested clarifications from the



Tribunal [*Proc.Ord.2*]. The Respondent cannot claim that it has not proceeded with the arbitration.

- The objection is now untimely. To fulfill its obligations the Respondent must have communicated its objection “without undue delay” [*Art. 4 Model Law*]. No matter how leniently this time limit is construed, the Respondent has not met it. In the first place, an objection should have been made shortly after the constitution of the Tribunal on 15 Sept 2006. Failing that, the objection should have been raised during or immediately after the conference call of 5 Oct 2006 [*Proc.Ord.1*]. Failing that, the objection should have been made within 15 days of that conference call since that would be the latest time for a challenge to an arbitrator under Art. 13(2) Model Law. If a delayed objection is to be excused, the Respondent must show an impediment that justifies the delay [*Binder ¶1.097*]. The Respondent entered no evidence into the record demonstrating such an impediment. Thus, the Tribunal must bar objections as to the constitution of the Tribunal or validate a potential dilatory tactic and deny the rule its primary purpose [*Binder ¶1.080; Holtzmann p.196*].

II. THE RESPONDENT BREACHED THE CONTRACT BY DELIVERING NON-CONFORMING GOODS UNDER ART. 35 CISG

64. Pursuant to *Procedural Order 1*, the Claimant submits that the Respondent failed to fulfill its obligations under Art. 35 CISG. Contrary to the agreement of 12 May 2005 [*Answer ¶4*], the Respondent delivered fuse boards with JS fuses, which are inappropriate to be connected to the electricity supply by Equalec. Fuse boards with JS fuses were not of the “*quality and description*” required by Art. 35(1) CISG **(1)**. Fuse boards with JS fuses were not fit for the particular purpose of being connected to the electricity supply by Equalec, contrary to Art. 35(2)(b) CISG **(2)**. Nor were such fuse boards fit for the ordinary purpose for which fuse boards are used under Art. 35(2)(a) CISG **(3)**. The Respondent cannot be excused from liability under Art. 35(3) CISG as the Claimant did not and could not have known about the lack of conformity at the time the Contract was concluded **(4)**.

1. THE FUSE BOARDS WERE NOT OF THE QUALITY AND DESCRIPTION REQUIRED BY THE CONTRACT WITHIN THE MEANING OF ART. 35(1) CISG

65. The seller must deliver goods that are “*of the quality and description required by the contract*” [*Art. 35(1) CISG*]. In assessing “*quality and description*”, one must primarily focus on the contract between the parties [*Schwenzer in Schlechtriem p.413; Bianca in Bianca/Bonell p.272*]. To ascertain the Respondent’s obligations, the Tribunal must look to the principles of contractual interpretation in Art. 8 CISG, which set out a twofold approach [*Bianca in Bianca/Bonell p.272; Krusinga p.29*]. First, Art. 8(1) CISG provides a subjective test to determine the Respondent’s understanding of the Claimant’s intent. Here,



the Respondent knew of the Claimant's specific intention to procure Chat JP fuses that could be connected to Equalec **(a)**. Where uncertainty remains as to the Respondent's subjective understanding of the Claimant's intent, Art. 8(2) CISG provides an objective test of the understanding a reasonable fabricator of electrical equipment would have had in similar circumstances. A reasonable fabricator would have known that Equalec requirements called for Chat JP fuses **(b)**. The two-part test at Art. 8 CISG is informed by Art. 8(3) CISG: "*due consideration is to be given to all relevant circumstances of the case including the negotiations and practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*"

(a) The Respondent knew of the Claimant's specific intention to purchase Chat JP fuses conforming to Equalec requirements

66. To determine the Respondent's knowledge of the Claimant's intent, the subjective test outlined at Art. 8(1) CISG is the starting point of the analysis: "*statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was.*" This analysis extends to statements made during the contractual negotiation stage as well as any subsequent conduct [*Farnsworth in Bianca/Bonell p.97*]. The negotiations and subsequent conduct of the Parties plainly indicate the Respondent understood the Claimant's intention to procure Chat JP type fuses **(i)** conforming to Equalec requirements **(ii)**.

i. The Respondent knew that the Contract called for Chat JP Type Fuses

67. In response to Mr. Konkler's inquiry regarding the fabrication of fuse boards, Mr. Stiles stated in the 22 April 2005 telephone conversation that "they would certainly be able to do it" [*R.Ex.1 ¶2*], but requested the engineering drawings in order to provide a "firm answer" [*R.Ex.1 ¶2*]. The Claimant fulfilled the Respondent's request and delivered engineering drawings specifying that Chat JP fuses were to be used [*R.Ex.1 ¶2*]. The Respondent examined the drawings, then provided a quote of US \$168,000 [*R.Ex.1 ¶2*]. The Parties subsequently entered into the Contract. Mr. Stiles' later admitted that "the engineering drawings that had been sent to us for price quotation and that were subsequently attached to the contract indicated that the fuses... *were to be Chat Electronics JP type fuses*" [*R.Ex.1 ¶9, emph. add.*]. The Respondent clearly knew that the Contract called for JP fuses

68. Chat JP fuses' unique characteristics dispels the Respondent's claim that the substitution for JS fuses is a minor change that affects neither their quality nor description [*Art. 35(1) CISG*]. There are important qualitative differences between JP and JS fuses. These relate to physical characteristics, safety and cost.

69. Physically, JP fuses are unique. JP fuses' fixing centers are only 82mm long, while JS fuses' measure



92mm [R.Ex.3]. The fuses are not interchangeable. The Respondent recognized this fundamental difference: “once one type is installed it cannot be replaced by the other type” [R.Ex.1 ¶9]. The lack of interchangeability creates a nuisance for the Claimant since replacement JP fuses are immediately available on Equalec service trucks while JS fuses are not [Cl.Ex.3 ¶3].

70. The fact that JP fuses are limited to an electrical current under 400A while JS fuses can have a rating as high as 800A [Answer ¶8] also impacts on safety [Electrical Safety Handbook ¶5.16]. This limitation is critical to the safety of the Claimant’s development project because installing JS fuses introduces the risk that a fuse with a higher rating than the circuit it is meant to protect will be installed. In such a case, there is a risk that when there is a surge in electricity, the circuitry would blow instead of the fuse meant to protect it [Wiley Encyclopedia of Electrical and Electronics Engineering ¶3]. The consequent risk of fire endangers both life and property. In the summer of 2003, Equalec encountered several fuse boards with improperly sized fuses and they were greatly concerned by this [Cl.Ex.4 ¶2].
71. The goods’ price illustrates the fuse types’ qualitative difference. JS fuses are priced differently than JP fuses. This reflects how the market has valued the two products so that they are not interchangeable [R.Ex.2; Stigler *The Extent of the Market*].

ii. The Respondent knew that the Contract called for fuses that conformed to Equalec

72. Where the buyer stipulates specific requirements regarding the quality of the goods, these requirements must be met [M. Caiato Roger v. S.F.F.; Bundesgerichtshof VIII ZR 159/94]. During the preliminary negotiations, the Claimant provided engineering drawings to the Respondent containing express language that the fuse boards be “lockable to Equalec requirements” [St. of Cl. ¶ 9]. The Respondent’s “firm agreement” to deliver fuse boards after reviewing the drawings could only be interpreted to mean that it understood the drawings’ clear requirement to connect the fuse boards to Equalec. The same drawings were then attached to and formed part of the final Contract concluded on 12 May 2005, when the Respondent again indicated consent.
73. Where one party finds the other party’s expressed intent vague or ambiguous, it should make appropriate inquiries [Junge in *Schlechtriem* p.71; OLG Hamm 11 U 206/93]. If it fails to do so, it must bear the consequences of that inaction, even where its interpretation is different than that of the declarant [Schwenzer in *Schlechtriem* p.421]. At no point during the negotiations leading up to the Contract did the Respondent communicate to the Claimant that it required clarification. The Respondent must bear the consequences of its complacency.
74. No conduct following the Respondent’s return of the signed Contract to the Claimant indicated that



the Parties had altered their understanding of the Equalec requirements [Answer ¶4]. During the 14 July 2005 phone conversation, Mr. Stiles informed Mr. Hart that the Respondent could not procure Chat JP fuses [St. of Cl. ¶11]. Options discussed to address this problem ranged from a longer waiting period for Chat JP fuses to become available, to the possibility of using JS fuses [R.Ex.1 ¶7]. Equalec requirements were not mentioned during this conversation. The Parties did not revisit the Equalec stipulation: their earlier understanding remained unchanged.

(b) A reasonable person would have understood the Claimant's intent

75. Where a subjective examination does not suffice to determine the parties' intent, the Tribunal should apply an objective test [Arts. 8(1), 8(2) CISG; *Lookofsky Understanding* p. 40]: “statements made by and other conduct of a party are to be interpreted according to the understanding a reasonable person of the same kind as the other party would have had in the same circumstances” [Art. 8(2) CISG]. The reasonable person is of the same kind and in a similar circumstance as the relevant party [Farnsworth in *Bianca Bonell* 98; *Oberster Gerichtshof 2 Ob 547/93*; *Schuermans v. Boomsma*]. In this case the Respondent is a fabricator and distributor of electrical equipment with over 40 years of experience [R.Ex.1 ¶4]. A similarly-situated fabricator would have understood the specifications.
76. Fuse boards are “fabricated to meet the specific requirements of each customer” [St. of Cl. ¶ 9]. A reasonable fabricator of a custom product heeds the detail in engineering drawings provided in negotiations and agreed to in a signed contract. The requirement in the engineering drawings that the fuse boards be “lockable to Equalec requirements” [St. of Cl. ¶9] is intelligible to the reasonable fabricator of electrical equipment. “[L]ockable” means that the local utility padlocks the fuse boards to limit access exclusively to itself [St. of Cl. ¶7]. A local utility will not padlock fuse boards that do not conform to its standards. A fuse board that is “lockable to Equalec requirements” is therefore one that meets Equalec standards.
77. The Claimant did not stop there: the fuse boards were to be not only lockable by Equalec, but “lockable to Equalec requirements” [St. of Cl. ¶9, *emb. add.*]. The trade usage of “requirements” is a “client’s or building user’s needs to be satisfied by a proposed building” [Wiley Dict. *Civ. Engineering and Construction*]. It is further defined as “a binding statement in a standard or another portion of the contract” [IEEE Std. Dict. *Electrical and Electronics Terms*]. Engineers thus recognize requirements as legal obligations. Here the requirements are established by Equalec’s stipulation that the fuses it padlocks be of JP type [Cl.Ex.4 ¶3]. To the reasonable fabricator, explicit mention of Equalec requirements indicates the Claimant’s intent that such condition be complied with to satisfy the Contract’s quality



and description of the goods. In providing fuse boards that do not conform to Equalec standards, the Respondent failed to act as a reasonable fabricator.

2. THE FUSE BOARDS ARE NOT FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO THE RESPONDENT PURSUANT TO ART. 35(2)(B) CISG

78. It is not enough for the Respondent to meet the specifications for ‘*quality and description*’. The Respondent must also deliver a fuse board fit for the Contract’s particular purpose [Art. 35(2)(b) CISG]. It is not necessary that the particular purpose be stipulated in the written form of the Contract as long as the seller was apprised of it [Kruisinga p.32]. The burden of proof lies with the buyer to demonstrate that it expressly or impliedly made its purpose known to the seller [Art. 35(2)(b); Lookofsky Understanding p.92; Oberlander Schleswig 11 U 40/01]. Once the buyer establishes that it did so, the seller must meet that purpose unless the buyer did not rely on the seller’s skill and judgment, or that such reliance would have been unreasonable [Honnold p.226]. Here the Claimant made its purpose of connecting the fuse boards to Equalec known to the Respondent both expressly and impliedly **(a)**. The burden lay on the Respondent to comply with the Equalec policy **(b)**. The Claimant reasonably relied on the Respondent’s skill and judgment **(c)**.

(a) The particular purpose was expressly and impliedly made known to the Respondent

79. Art. 35(2)(b) CISG stipulates that goods must be “*fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract.*” The particular purpose is sufficiently made known if it can be gleaned from the circumstances [Schwenzer in Schlechtriem p. 422]. Explicit or implicit notification must occur prior to the contract’s conclusion so that the seller can refuse if it is unable to fulfill that particular purpose [Schwenzer in Schlechtriem p.422; Enderlein p.156]. Notification here was both express and implied.

80. The Claimant made the Contract’s purpose expressly known to the Respondent in the engineering drawings. The drawings expressly reference the Equalec requirements and were provided to the Respondent well before the Contract’s conclusion. The Respondent provided a “firm answer” that it would meet the specifications provided to it, and entered into a contract to that effect on 12 May 2005 [Answer ¶4]. A seller, who assures its customer that the offered goods can be used for a particular purpose, commits a breach of contract pursuant to Art. 35(2)(b) through the subsequent delivery of goods unsuitable for the purpose [Manipulados del Paper v. Sugem Europa].

81. The Contract’s particular purpose was impliedly made known from the Parties’ initial telephone conversation of 22 April 2005, in which Mr. Konkler asked for distribution fuse boards “for a project



they were building in Mountain View” [R.Ex.1 ¶3]. It is well-known that distribution fuse boards are purchased by the owner of a building, and managed by the local electrical supplier [St. of Cl. ¶7]. Mountain View had been identified as the development’s locale. Equalec had been identified as the local electricity supplier. It is plain that the fuse boards would need to be connected by Equalec. That is the underlying purpose of fuse boards: they are how buildings “are connected to the incoming electrical supply” [St. of Cl. ¶5]. Because Equalec is the sole electricity distributor in the area [Clar.Q.31], any fuse boards used in Mountain View must meet its requirements.

(b) It is the Respondent’s burden to be aware of and comply with Equalec policy

82. To conform to the Contract’s particular purpose, the fuse boards delivered must meet the requirements applicable in the place the goods are to be used [Schlechtriem p.418 citing *Staudinger/Magnus* ¶21]. To avoid uncertainty, the buyer must name its purpose as well as the place where it intends to use the goods [Schwenzer in *Schlechtriem* p.419]. The Claimant informed the Respondent from the outset that the fuse boards were to be used for an office development in Mountain View, Equatoriana, thus fulfilling its obligation to identify where the goods would be used [R.Ex.1 ¶2]. The Claimant even went further, specifying plainly that the fuse boards were to be “lockable to Equalec requirements” [St. of Cl. ¶9] prior to the conclusion of the contract. When a buyer draws a seller’s attention to standards in force in the buyer’s jurisdiction, the seller is expected to observe those standards [Oberster Gerichtshof 2 Ob 100/00 n; *Gerechthof Arnhem* 97/700]. Equalec is the monopoly provider of electricity in Equatoriana. There can be no ambiguity as to its standards’ applicability since these regulations were widely communicated and readily available on the internet [Clar.Q.24; Cl.Ex.4 ¶3].
83. The standards a seller can be expected to meet in the Claimant’s jurisdiction include religious considerations, cultural traditions or climatic issues [Schlechtriem cited in *Kruisinga* p.47]. The list is highly inclusive. The policy of a private monopoly electricity provider such as Equalec certainly falls within the range of such standards.
84. A separate burden to comply with standards in the buyer’s country exists where special circumstances can be demonstrated [Bundesgerichtshof VIII ZR 159/94; *Medical Marketing Int’l v. Internazionale Medico Scientifica*]. Customized goods such as fuse boards constitute such a circumstance. Fuse boards are built for a specific locale and must “meet the specific requirements of each customer” [St. of Cl. ¶9]. They are purchased by the owners of buildings, but managed by the local electrical supplier [St. of Cl.¶7]. The Respondent has over 40 years experience fabricating electrical equipment [R.Ex.1 ¶4] and it is surely aware of the custom nature of fuse boards since by their nature they are tailored to each individual



purchaser. The seller is obliged to conform to the local utility's special requirements: that is a fundamental purpose of every fuse board [*St. of Cl.* ¶5].

(c) The Claimant reasonably relied on the Respondent's skill and judgment

85. Once the Claimant has established a *prima facie* case that the Contract's particular purpose was expressly or impliedly made known, it is the Respondent's burden to demonstrate both that the Claimant did not rely on the Respondent's skill and judgment, and that any such reliance would have been unreasonable [*Honnold p.257*]. The Respondent cannot meet this burden.
86. The buyer need only establish that it relied on the seller for those skills it does not possess [*Schwenzer in Schlechtriem* ¶422; *Art. 35(2)(b)*]. The Claimant, a developer of residential and business properties, does not understand the intricacies of electrical equipment fabrication. The Respondent is expert in the fabrication of electrical equipment, having been in this line of business for over 40 years [*R.Ex.1* ¶4]. The Respondent acknowledges and holds itself out as a fabricator [*Answer* ¶2]. The Claimant relied reasonably on the Respondent's skill and judgment for that expertise it did not possess. The Respondent took no action to dispel this reliance.
87. The Respondent seeks to rely on a contractual modification over the telephone. Yet, had the 14 July 2005 telephone conversation validly modified the Contract, the Claimant's reliance on the Respondent could only have been heightened. Mr. Hart was expressly told by the Respondent during the conversation that he did not have much experience [*Answer* ¶8]. The Respondent, acknowledged this lack of expertise: "he was not very well versed in the electrical aspect of the development, so that he did not have an independent judgment on it" [*R.Ex.1* ¶8]. The Respondent cannot rely upon a telephone call as the basis for its alleged amendment to the Contract [*Answer* ¶25], yet ignore it as evidence of the Claimant's reliance. The Claimant's reliance on the Respondent's expertise to secure goods fit for the Contract's purpose was plain to the seller and recognized by both Parties.

3. THE FUSE BOARDS WERE NOT SUITABLE FOR ORDINARY USE UNDER ART. 35(2)(A) CISG

88. Had the Claimant's particular purpose been unclear to the Respondent, the Respondent would nonetheless have been obliged to deliver goods "*fit for the purposes for which goods of the same description would be ordinarily used*" [Art. 35(2)(a)]. Ordinary use is determined through objective analysis of the relevant trade [*Schwenzer in Schlechtriem p.416; Ceramique Culinaire de France S.A. v. Musgrave Ltd.*].
89. Here, the relevant trade is electrical fabrication. Fuse boards that are fabricated are ordinarily



“connected to the incoming electrical supply” [*St. of Cl.* ¶5] and managed by the local electrical supplier [*St. of Cl.* ¶7]. They are built to each customer’s design requirements [*St. of Cl.* ¶9]. The fuse boards supplied by the Respondent failed to connect to the incoming electrical supply and conform to the Claimant’s designs. The Respondent cannot satisfy the CISG’s ordinary purpose requirement.

4. THE CLAIMANT COULD NOT HAVE BEEN AWARE OF THE NON-CONFORMITY AT THE TIME OF CONTRACT UNDER ART. 35(3) CISG

90. A seller is not liable for its non-conformity under Art. 35(2) CISG if the buyer knew or could have known of that non-conformity at the time of the contract’s conclusion [*Art. 35(3) CISG*]. This is a very high burden requiring more than gross negligence [*Kruisinga p. 52; Schwenger in Schlechtriem*]. Here, the Respondent cannot meet this burden.
91. The Respondent did not inform the Claimant it would deliver non-conforming fuses prior to the conclusion of the Contract. It only attempted to modify the Contract after it had been concluded. The Claimant could not have known that the goods stipulated in the concluded contract were subject to significant change since the Respondent made no such explicit stipulation and has entered no evidence suggesting that such stipulations are reasonably implied. Even were such stipulations common industry practice, the Respondent knew that the Claimant is a developer of commercial property and not a member of the electrical equipment fabrication industry. The Claimant was in no position to know of any non-conformity as it lacked the knowledge that the Respondent possessed.

III. THE CONTRACT WAS NOT VALIDLY AMENDED

92. The Respondent submits that the change from JP to JS fuses was so minor that it did not require a written amendment to be effective [*R.Ex.1* ¶13]. However, the Contract was not validly amended because the Art. 32 of the Contract required any modification to be in writing **(1)**. Even if only material changes to the Contract need to be in writing, a change of fuse type is material **(2)**. Finally, the Respondent cannot rely on the reliance exception under Art. 29(2) CISG because it was not reasonable for the Respondent to rely on Mr. Hart’s or the Claimant’s conduct **(3)**.

1. THE RESPONDENT FAILED TO PROVIDE A WRITTEN AMENDMENT AS REQUIRED BY THE CONTRACT

93. Art. 32 of the Contract states “[a]mendments to the Contract must be in writing” [*Cl.Ex.1*]. Furthermore, Art. 29(2) CISG requires that “*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.*”



This no oral modification (“**NOM**”) precludes modifications based on oral representations.

94. Since Art. 32 of the Contract was part the Respondent’s standard form contract that it sent to the Claimant [R.Ex.1 ¶3], the Respondent cannot argue that it did not consider the NOM clause. The *contra proferentem* rule applies against the Respondent since the *contra proferentem* rule allows a contractual clause to be construed against the drafter of the clause [see §I.1.(a)(iii); UNIDROIT 4.6]. In this Contract, the scope of “amendments” in Art. 32 of the Contract is undefined. Using the *contra proferentem* rule, the unqualified wording of “amendments” in Art. 32 of the Contract should be broadly construed to mean that any amendments should be written, no matter whether the Respondent believed they were minor. The existence of a NOM clause means that modifications not confirmed in writing are not given effect [Date-Bah in Bianca/ Bonell p.242; Cámara Agraria v. André Margaron; Graves v. Chilewich; DiMatteo p.331].
95. In this case, when Mr. Hart spoke to Mr. Stiles on 14 July 2005, Mr. Hart relied on the fact that any changes discussed orally would only be effective once the Claimant accepted the new written contractual specifications to be sent by the Respondent [Cl.Ex.2 ¶4]. The Respondent acknowledged that there had been no written amendment to the Contract [Cl.Ex.3 ¶6].

2. A CHANGE OF FUSE TYPES IS MATERIAL, REQUIRING IT TO BE IN WRITING

96. The Respondent argues that the change from JS to JP fuses was “such a minor change that it could hardly be called an amendment of the contract that calls for a writing” [R.Ex.1 ¶13]. Even if the changes to the Contract need to be more than “minor changes” to require written confirmation, the substitution of JP for JS fuses is such a material change requiring a written amendment to the Contract.
97. Arts. 14-24 CISG set out the rules for contractual formation, but are also applicable to contractual modifications since they deal with the threshold of consent required to agree to a contract [UNCITRAL Digest Art. 29; del Pilar Perales Viscasillas p.170; DiMatteo p.332]. In particular, Art. 19(3) CISG has been applied to contractual modification [Château des Charmes v. Sabaté]. Art.19(3) CISG enumerates terms that are material to a contract, stating that “*additional or different terms relating, among other things, to....quality and quantity of the goods ... are considered to alter the terms of the offer materially.*”
98. Since conforming fuse boards are the *raison d’être* for the Contract, any changes relating to the quality of the fuse boards are material. Amending the contract to supply JS instead of JP fuses changes the quality of the goods [see §II.1(a)(ii)]. Since the price for JP and JS fuses in the 100A-250A range is different, replacement JS fuses could potentially be more expensive [R.Ex.2]. Furthermore, the Respondent knew that certain aspects of the fuses might not “be acceptable to Mr. Konkler or the technical staff at



Equatoriana Office Space” [R.Ex.1 ¶8]. Since the Respondent knew of the fuses’ importance to the Claimant, any modification is material: it would alter the basis of the Contract.

3. IT WAS NOT REASONABLE FOR THE RESPONDENT TO HAVE RELIED ON THE CLAIMANT’S CONDUCT

99. The Respondent claims the Art. 29(2) CISG reliance exception, whereby “*a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.*” The Respondent argues that it relied on the conduct of both Mr. Hart and the Claimant and that this obviates the written amendment requirement [Answer ¶23]. However, the Respondent cannot benefit from this reliance exception because Mr. Hart’s conduct was without authority to create legal relations between the Claimant and the Respondent **(a)**, and it was not reasonable for the Respondent to believe that Mr. Hart had such authority **(b)**. Despite it being unreasonable to do so, even if the Respondent did rely on Mr. Hart’s conduct, any changes by the Parties lacked Mr. Hart’s proper consent **(c)**. Finally, the Respondent cannot rely on the Claimant’s conduct since it was the Respondent’s failure to include a written amendment that perpetuated the Claimant’s ignorance of the change in fuse types **(d)**.

(a) Mr. Hart did not have the authority to modify the Contract

100. The *Convention on Agency in the International Sale of Goods* (“CAISG”) is the applicable law in determining whether Mr. Hart had the authority to create legal relations between the Parties [Clar.Q.16]. Although not binding, the articles in Chapter 2, Section 2 of the UNIDROIT Principles are similar to the CAISG and thus aid in interpreting the latter.

101. For Mr. Hart to have validly concluded an amendment to the Contract, he would have required express or implied authority from the Claimant [Art. 9(1) CAISG; see also UNIDROIT 2.2.2]. Mr. Hart is a procurement professional who had no responsibility for the Contract with the Respondent [Cl.Ex.2 ¶2; Cl.Ex.3 ¶6]. There is no evidence that any authority was expressly conferred on Mr. Hart.

102. Implied authority exists whenever the principal’s intention to confer authority on an agent can be inferred from the principal’s conduct, such as assigning a particular task to the agent or a particular course of dealing between the two parties [UNIDROIT Commentary, p.77]. Simply knowing Mr. Hart was “one of [Konkler’s] colleagues in the Purchasing Department” [R.Ex.1 ¶7] is not sufficient to impute authority to Mr. Hart. It would be irrelevant even if Mr. Hart agreed with the change to JS type fuses: he did not have the authority to do so.



103. “Where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other” [Art. 14(1) CAISG; see also UNIDROIT 2.2.5(1)]. As a consequence of Mr. Hart’s lack of proper authority, the Claimant is not bound to the Respondent.

(b) It was unreasonable for the Respondent to believe Mr. Hart had the proper authority

104. The Respondent cannot substantiate the reliance exception whereby “the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority” [Art. 14(2) CAISG; see also UNIDROIT 2.2.5(2)]. To succeed, the Respondent would have to show that “it was reasonable for it to believe that the person purporting to represent the organization was authorized to do so, and that this belief was caused by the conduct of those actually authorized to represent the organization,” such as the Board of Directors or executive officers [UNIDROIT Commentary pp.83-84]. The Respondent cannot meet this burden.

105. In the 14 July 2005 telephone call, it was the secretary who answered and transferred Mr. Stiles to Mr. Hart [Clar.Q.18], a subordinate in Mr. Konkler’s Purchasing Department. The Claimant never made any representations that Mr. Hart had the authority to conclude any contractual modification. That the Respondent knew Mr. Hart was “not very well versed in the electrical aspect of the development, so that he *did not have an independent judgment* on it” [R.Ex.1 ¶8, *emph. add.*], should have alerted the Respondent that Mr. Hart did not have authority to negotiate contractual modifications of a technical nature. This was the first time the Respondent had ever interacted with Mr. Hart, who at the time of the call had only worked for the Claimant for little over a year [Cl.Ex.2 ¶1]. The Respondent had dealt exclusively with Mr. Konkler. It was Mr. Konkler who had signed the Contract on behalf of the Claimant. Therefore, it was not reasonable for the Respondent to rely on Mr. Hart, because this interaction marked a break from the usual pattern of the Parties’ relationship.

(c) Any changes by the Parties lacked the Claimant’s proper consent

106. Despite it being unreasonable to do so, even if the Respondent did rely on Mr. Hart’s conduct, any changes by the Parties lacked Mr. Hart’s proper consent. The Respondent’s negligence caused the change from JP to JS fuses to be hurried and ill-considered. The CISG does not explicitly deal with validity problems, only indicating that a contract may be modified by “mere agreement” between the Parties [Art. 29(1) CISG]. Nonetheless, “without directly imposing an *obligation* on the parties to deal fairly, the CISG provides, in Article 7(1), that the Convention is to be *interpreted* so as to ‘promote the observance of *good faith* in international trade’” [Lookofsky *Loose Ends* p.412 n.76, *emph. in original*]. In the spirit of Art. 7(1) CISG, the NOM rule is a safeguard against modifications that are not well considered



since “reliance on an ill-conceived, hurried, oral modification of a meticulously bargained contract containing a prominent NOM clause may be unreasonable. Enforcement of a NOM clause in such circumstances would not be unfair” [*Hillman* p.465].

107. The oral modification was hurried because the Respondent waited until one month before the performance delivery date to notify the Claimant that it did not possess the required Chat JP fuses [R.Ex.1 ¶7]. This is in spite of the fact that the Respondent knew that its inventory of Chat JP fuses was exhausted as early as Spring 2005 [R.Ex.1 ¶6]. During the 14 July 2005 telephone conversation, the Respondent knew that the contracted delivery deadline of the fuse boards was impending and put pressure on Mr. Hart. Mr. Stiles told Mr. Hart that he “needed to know promptly so that [the Respondent] could install the proper supports for the fuses” and that “the *only* way to receive the distribution fuse boards ... was to use JS rather than JP fuses” [R.Ex.1 ¶¶9-10, *emph. add.*]. The Respondent’s last-minute notice also meant that Mr. Konkler was not available at that time. As a result, the Respondent dealt with Mr. Konkler’s subordinate who had neither the technical knowledge nor the authority to make decisions related to this Contract [See §III.3(a),(b)].
108. The negotiations between Mr. Hart and Mr. Stiles were also not properly considered. Mr. Hart did not have a choice but to agree to the change to JS fuses. Mr. Hart “was not very well versed in the electrical aspect of the development, so that he did not have an independent judgment on it” [R.Ex.1 ¶8]. Mr. Hart knew neither the specifics of the new type of fuse proposed by the Respondent, nor whether it conforms to the Contract. Indeed, Mr. Hart had to ask the Respondent to explain the technical difference between JS and JP fuses and also asked for a recommendation from the Respondent [R.Ex.1 ¶¶8,10]. In effect, the context of the discussions leading to the change to JS fuses was in the Respondent’s control. The terms were dictated by the Respondent’s suggestions. This episode constitutes an attempt to unilaterally modify the Contract and undermine the “mere agreement” in Art. 29(1) CISG [UCCT 25 Nov 2002: “the [Seller] has unilaterally altered the conditions of the Contract, the latter has breached its obligations under the Contract”]. Had the Claimant been properly notified by the Respondent about the proposed changes to the fuses through a written amendment, the Claimant would have circulated the changes to all interested parties, including the engineering department [Cl.Ex.2 ¶4]. The engineering department would have immediately drawn attention to any problems with the potential changes [Cl.Ex.2 ¶4] and the Claimant would have been able to adequately consider any contract modification, which did not happen in this case.



(d) It was the Respondent's failure to include a written amendment that perpetuated the Claimant's ignorance of the change in fuse type

109. The Respondent argues that it would have substituted JP fuses from a different manufacturer had it been so notified upon Mr. Konkler's return [*Answer* ¶23]. The Respondent also argues that the "satisfactory" installation of and prompt payment for the fuse boards by the Claimant indicates that the Claimant accepted the change in fuse types [*Answer* ¶23]. However, the Claimant could not have known about the changes in fuse types until Equalec's refusal to connect the fuse boards, an ignorance brought about by the Respondent's failure to modify the Contract through a written amendment.
110. The Claimant fulfilled its obligation under Art. 38(1) CISG to "*examine the goods... within as short a period as is practicable in the circumstances*" when it conducted a visual inspection to see whether there had been damage to the fuse boards during their transport [*Clar.Q.32*]. Since "JP and JS fuses from all manufacturers look the same" [*Clar.Q.26*], it would have been impossible to visually distinguish the two types of fuses. In addition, since "no inspection as to whether they would function properly could be done until they were connected to the electrical supply" [*Clar.Q.32*], it was not until Equalec's refusal to connect the fuse boards that the Claimant became aware of the non-conformity [*Cl.Ex.3* ¶2]. The Claimant's prompt payment is evidence of its good faith efforts to fulfill its contractual obligations to pay the seller "upon delivery to the Buyer" [*Cl.Ex.1; Art. 53 CISG*].

IV. THE RESPONDENT CANNOT BE EXCUSED FROM ITS BREACH OF CONTRACT

111. If the Respondent is found under sections II and III to have breached the Contract, it argues in the alternative that the Claimant's failure to complain to the Commission about Equalec's policy excuses its breach [*Answer* ¶25(d)]. The Respondent is not excused from its breach because the Claimant took all reasonable steps to mitigate the losses **(1)**. Furthermore, on the facts of this case, the Respondent cannot excuse its breach based on other grounds **(2)**.

1. COMPLAINING TO THE COMMISSION WOULD NOT HAVE AVOIDED THE DAMAGES AND DOES NOT EXCUSE THE RESPONDENT'S BREACH

112. The Respondent claims that the failure to complain to the Commission of Equalec's failure to connect the fuse boards excuses its breach of the Contract [*Answer* ¶25(d)]. The Respondent's position is untenable because the Claimant took reasonable steps to avoid its loss under Art. 77 CISG. First, complaining to the Commission would not have mitigated damages **(a)** because the Claimant was under an obligation to make a substitute transaction that avoided further consequential damages **(b)**.



Furthermore, the Respondent failed to comply with its obligation to do all that it could to perform its contractual obligations under Art. 48(1) CISG (c).

(a) Complaining to the Commission would not have mitigated damages

113. Under Art. 77 CISG, “a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach.” Mitigation of damages is an expression of the principle of good faith [Art. 7(1) CISG]. As such, mitigation is required only to the extent that it is reasonable and “could have been expected as *bona fides* conduct from a reasonable person in the position of the claimant under the same circumstances” [OLG München 7 U 1720/94]. Indeed, the injured party is not expected to do more than is required of a “prudent person entitled to damages who is in the same position as the aggrieved party” [Stoll/Gruber in *Schlechtriem* p.790; *Bianca in Bianca/Bonell* p.560].
114. The remedy under Art. 77 CISG is a reduction in damages for the aggrieved party’s failure to mitigate losses: “the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.” It is the party claiming the reduction in damages that has the burden of proof to establish the failure to mitigate and the amount of consequent loss due to this failure [UNCITRAL Digest Art. 77 ¶19; OLG Celle 3 U 246/97; ICC 8574; *Treibacher Industrie v. Allegheny Technologies*].
115. In this case, since it is the Respondent who is claiming that all damages would have been avoided, it is the Respondent who must show that the Claimant’s complaint to the Commission would have resulted in Equalec connecting the fuse boards in the three weeks remaining until the 1 Oct 2005 deadline. At that point, the Claimant would be subject to penalties for failing to have the Mountain View development ready [*St. of Cl.* ¶16]. The Claimant would also be subject to lost rental income from delaying occupancy [*St. of Cl.* ¶16]. The Respondent cannot meet the burden of showing that a complaint to the Commission would have made Equalec connect the fuse boards within three weeks. Even had the Claimant complained to the Commission, it is not shown that Equalec would have connected the fuse boards within three weeks. There is no evidence that the Commission would have found the policy to be invalid (i) and the complaint could reasonably have taken more than three weeks to resolve (ii). In addition, demanding the Claimant make such a complaint goes against the contractual norms the Parties had agreed to (iii).

i. There is no evidence that the policy would have been found to be invalid

116. No evidence is available suggesting that the Commission would have overturned Equalec’s policy. The Claimant called Equalec and was told that the policy was a *bona fides* safety regulation [*Cl.Ex.3* ¶3]. The



policy had been publicized for over two years on the Equalec website [Cl.Ex.4 ¶3] and has not been challenged [Clar.Q.29]. It is therefore not clear that these safety regulations are “undue or unjust requirements for providing services” under Art. 14 of the *Equatoriana Electric Service Regulatory Act* [R.Ex.4]. Since Equalec strongly supports its connection policy for safety reasons [Cl.Ex.3 ¶3; Cl.Ex.4 ¶2], it is likely that Equalec would contest a complaint made to the Commission. The Commission would then require a full investigation [Clar.Q.30], which might defer to Equalec’s safety rationale.

117. The possibility that Equalec’s policy might also give an additional benefit to Equalec’s customers [Cl.Ex.3 ¶3] does not affect the validity of the safety reason. This is reinforced by the letter Equalec sent to the Claimant on 15 Sept 2005 where the customer benefit is not mentioned [Cl.Ex.4].

ii. The complaint would likely have taken more than three weeks to be resolved

118. It is impossible to determine the amount of time it would have taken for the Commission to rule on whether Equalec was required to connect the non-conforming fuse boards [Clar.Q.30]. For the Respondent to rely on this is nothing more than pure speculation without factual support. Indeed, the facts show that it would likely have taken the Commission more than three weeks to rule. While an inquiry from the staff of the Commission may have caused Equalec to change its policy without formal action by the Commission, this might have taken over two months depending on how soon the Commission staff made its inquiry, how quickly Equalec may have reacted, and the extent to which Equalec’s policy is “undue or unjust” [Clar.Q.30; R.Ex.4]. Given that Equalec visited the Mountain View site one week after the fuse boards were installed [St. of Cl. ¶14], Equalec’s past behaviour would suggest its operations are subject to delay. Finally, because the Equalec policy seems valid on its face [see §IV.1(a)(i)], the likelihood of a complaint to the Commission resolving the dispute within three weeks is improbable. More likely, a full investigation would be required, which could take two years or longer before the Commission decided whether Equalec’s policy was justified [Clar.Q.30]. Even after more than two years of investigation, the end result could be a finding that the policy is valid.

iii. Demanding that the Claimant complain to the Commission is beyond the contractual norms that the Parties agreed to

119. To ask the Claimant to complain to the Commission goes beyond its duty of mitigation and beyond any of the expectations of the Parties at the time of the conclusion of the Contract. When determining a reasonable course of action, account should be taken of the nature and purpose of the contract [Liu §14.5.2] and of “the party's skills and position as a businessman” [Saidov]. This dispute is between commercial actors in two different countries. To subject the outcome to the vagaries of a domestic



administrative process would fly in the face of the Parties' intent to govern a transnational dispute in a transparent manner with regard to universal principles, not local subjectivities [*Art. 7(1) CISG; Bonell in Bianca/Bonell p.72*: “[The CISG] once adopted, is intended to replace all the rules in their legal systems previously governing matters within its scope, whether deriving from statutes or from the case law”].

120. Relying on the Commission for a speedy resolution of the issue is therefore unreasonable as there is too much indeterminacy in outcome and delay. Combined with the uncertainty of when the Respondent would eventually be able to deliver conforming goods, the resulting delays would have eroded the Claimant's goodwill, which goes beyond the Claimant's need to mitigate [*Downs Investments v. Perwaja Steel*: “the obligation to mitigate did not require seller to put at risk its commercial reputation by taking technical points to avoid its obligation under its agreement...”]. Given these circumstances, the Claimant acted reasonably to incur the cost of engaging in a substitute transaction to obtain conforming fuse boards.

(b) The Claimant was obliged to make a substitute transaction to avoid consequential losses

121. Art. 77 CISG obliges the party affected by a breach to make a substitute transaction to mitigate the loss [*Stoll/Gruber in Schlechtriem p.791; OLG Düsseldorf 17 U 146/93; ICC 8574; ICC 6281*]. In international sales, substitute transactions are the “usual” form of mitigation [*Saidov, n.247; OLG Hamburg 1 U 167/95; OLG Celle 3 U 246/97*] and are especially relevant where such a transaction would avoid consequential losses due to the breach of contract [*Stoll/Gruber in Schlechtriem p.791*].
122. In assessing whether a substitute transaction is “reasonable in the circumstances” [*Art. 77 CISG*], the Tribunal may take into account deadline pressures where substantial damages claims are threatening and the amount of time ordering a substitute unit from a third party would take [*Oberster Gerichtshof 7 Ob 301/01t*: “It was significant that the buyer would have been subject to considerable damages claims, of which it had also informed the seller”]. Since seeking relief from the Commission could reasonably have taken more than the three weeks remaining before the penalty deadline [*see §IV.1(a)(ii)*] and the Respondent could not deliver conforming fuse boards for “several months” [*R.Ex.1 ¶14*], the Claimant was obliged to purchase conforming fuse boards from Equatoriana Switchboards in order to have its development project ready for its tenants without incurring further damages. This substitute transaction avoided the consequential losses that would have been incurred due to the late penalties and the potential loss of several months of rental income.

**(c) The Respondent failed to do all that it could to perform the Contract**

123. The Respondent also has the obligation to do all it can to fulfill the performance of the Contract. The Respondent has a positive duty under Art. 48(1) CISG to “*even after the date for delivery, remedy at his own expense any failure to perform his obligations.*” The Respondent had produced the non-conforming fuse boards in the month or so between the 14 July 2005 telephone conversation between Mr. Hart and Mr. Stiles and the 24 Aug 2005 delivery of the fuses [*St. of Cl.* ¶¶11,14]. Therefore, nothing suggests that after discovery of the non-conformity, the Respondent could not have been able to produce conforming fuse boards within the remaining three weeks “without unreasonable delay and without causing the buyer unreasonable inconvenience” [*Art. 48(1) CISG*]. The Respondent could have bought conforming fuses from competitors and is required to do so even if it would suffer a loss [*Schlechtriem Art. 48* ¶8]. Moreover, the Respondent could have also called Equalec and the Commission to attempt to convince them to connect the fuses boards. The Respondent failed to take these steps to remedy its own breach of contract and thus should be held liable for the damages it caused the Claimant.

2. ON THE FACTS OF THIS CASE, THE RESPONDENT CANNOT RELY ON ARTS. 79 AND 80 CISG.

124. The Claimant’s not complaining to the Commission did not cause the Respondent’s non-performance under Art. 80 CISG **(a)**, nor did it constitute an impediment within the meaning of Art. 79(1) CISG **(b)**.

(a) The Claimant’s failure to complain to the Commission did not cause the Respondent’s non-performance

125. Art. 80 CISG excuses a party’s non-performance if that non-performance was caused by the other party. In this case, the Claimant’s failure to complain to the Commission did not cause the Respondent’s breach of contract. The Respondent breached its contract when it delivered the non-conforming goods to the Claimant.

(b) The Claimant’s failure to complain to the Commission did not constitute an impediment to performance

126. Art. 79(1) CISG excuses non-performance caused by an impediment beyond a party’s control, provided that party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, nor to have avoided or overcome it or its consequences.

127. In this case, Equalec’s policy is not an impediment beyond the Respondent’s control since the Respondent should have reasonably known about the requirements for the fuses to fulfill their contracted purpose [*see §II.2*]. In *Malaysia Dairy v. Dairex Holland*, a contract called for milk powder



below a certain level of radioactivity to conform to a Singaporean ban on radioactive food imports. The seller claimed under Art. 79 CISG that the regulations were an impediment exempting the seller from performance. The court dismissed the seller's argument because the seller knew at the conclusion of the contract about the regulations.

128. Similarly, the Respondent ought to have known of Equalec's policy at the conclusion of the Contract. The Equalec policy had been publicized since its adoption in July 2003 both on the website and to regular suppliers of fuse boards in areas serviced by Equalec [*Cl.Ex.4; Clar.Q.24*]. The Respondent knew that its fuse boards were for a project in Mountain View, Equatoriana [*R.Ex.1 ¶2*], that Equalec is the only electrical service provider in the region [*Clar.Q.31*], and that fuse boards must meet the standards of electrical services providers. Thus, the Equalec policy was not an impediment to the Respondent's delivery of conforming goods. Nor was the Claimant's failure to complain to the Commission an impediment to performance. Rather, the Respondent's failure to know about the Equalec policy caused the non-conformity. Finally, the Respondent failed to take reasonable steps to overcome the alleged impediment [*see §IV.1(c)*].

PRAYER FOR RELIEF

In light of the above submissions, the Claimant respectfully requests that the Tribunal:

- Find that this Tribunal has jurisdiction to consider the dispute between Equitoriana Office Space Ltd. and Mediterraneo Electrodynamics S.A.;
- Find that the delivered goods did not conform to the Contract;
- Find that there was no valid modification of the Contract;
- Find that the complaining to the Commission would not have avoided the damages and that the Claimant took reasonable steps to mitigate damages by engaging in a substitute transaction;
- Grant Claimant's request for an award of damages due to the breach of Contract including the cost of buying (US\$180,000) and installing (US\$20,000) substitute fuse boards.

(signed)

Albert Chen

Martin Doe

Annie Guérard-Langlois

Rachel St. John

7 December 2006