MEMORANDUM FOR CLAIMANT
AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION

On Behalf of:
Mediterraneo Engineering Co.
415 Industrial Road
Capitol City, Mediterraneo
CLAIMANT

Against:
Equatoriana Super Pumps, S.A.
58 Industrial Road
Oceanside, Equatoriana
RESPONDENT

STETSON UNIVERSITY COLLEGE OF LAW

AMANDA ADAMS • JOSEPH ETTER • JOSEPH HERBERT •
JENNA JORDAN • JACKSON MARTIN • MEAGAN MARTIN
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B. Engineering took reasonable steps to mitigate.

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   b. A substitute transaction would have been excessively costly and risky.

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INTRODUCTION
This dispute arises out of a contract between Mediterraneo Engineering Co. [hereafter “Engineering”] and Super Pumps S.A. [hereafter “Super Pumps”]. Engineering is an urban and rural development planning company organized under the laws of Mediterraneo. Super Pumps is a manufacturer of pumps for agricultural, municipal, and industrial water and irrigation systems organized under the laws of Equatoriana. It delivers to over 50 countries worldwide.
Under the contract between the parties, Super Pumps was obligated to manufacture and deliver a number of small pumps and three larger pumps for use in a public irrigation project in Oceania. Super Pumps delivered the pumps more than three weeks after the date specified in the 1 July 2008 contract. As a result of delayed delivery of the pumps, Oceania Water Services [hereafter “Water Services”] cancelled the project. Engineering subsequently declared its contract with Super Pumps avoided. Engineering now requests this Tribunal award it the price it paid to Super Pumps under the contract, the lost profits from the cancelled project, fees and costs of arbitration, and interest. This Tribunal should hold a complete hearing in order to determine the extent of Super Pumps’ liability for the damages suffered by Engineering and hold Super Pumps liable for its failure to deliver pumps by the date specified in the contract.

STATEMENT OF THE FACTS

4 May 2008
Engineering contacted Super Pumps to discuss working together on an irrigation project for Oceania Water Services. The irrigation project was similar to one in which Engineering and Super Pumps had previously collaborated two years prior. Engineering expressed interest in purchasing the necessary pumps from Super Pumps in the event of a successful bid. Super Pumps expressed agreement with this idea.

5 May 2008
Engineering sent correspondence to Super Pumps confirming their conversation, and negotiation of the irrigation project.

25 June 2008
When Engineering was awarded the irrigation project, it contracted Super Pumps to finalize the agreement between the parties. Engineering notified Super Pumps that the project had “strict performance times with substantial penalties.” Engineering stated that because of the political situation, Water
Services would be “very strict in ensuring that all will be done properly.” The delivery date required for the irrigation project was 2 January 2009.

1 July 2008

Engineering forwarded a signed contract draft to Super Pumps. Super Pumps signed it on this date. The contract called for various pumps, including three medium-sized pumps, designated the P-52, to be delivered at the port of Capitol City, Mediterraneo, in accordance with the DES [Incoterms (2000)] on or before 15 December 2008. One provision stated, “Super Pumps warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania.” The contract further specified for a multi-tiered dispute resolution. The resolution called for a conciliation precondition to arbitration.

1 August 2008

The government in Oceania adopted a regulation restricting the use of beryllium in steel products such as some of the pumps in the contract. [“Regulation 1”]. The steel used by Super Pumps had contained beryllium. Engineering immediately notified Super Pumps of the new regulation and attached a copy of the notice sent from Water Services. Regulation 1 affected the three P-52 pumps, therefore, Super Pumps had to procure new steel for the three P-52s in order to conform to Regulation 1.

2 August 2008

Super Pumps wrote to Engineering, indicating that it had previously anticipated completing all pumps on 30 October 2008. Super Pumps notified Engineering that importing new steel would “delay the completion of the job by several weeks” and involve additional costs of approximately 30,000 USD.

15 November 2008

Production of the new P-52s was completed.

22 November 2008

The pumps were loaded on a ship for delivery to Capitol City, Mediterraneo. The ship then left port. Upon departure of the ship and issuance of the bill of lading, Super Pumps presented documents and letter of credit was paid. for the original price of the pumps. Super Pumps notified Engineering of the departure and the expected arrival of the pumps on 22 December 2008, “a week later than originally anticipated.”
Engineering acknowledged the anticipated delay in delivery and reiterated that the irrigation project schedule was very tight and that “[a]ny further delays and the entire irrigation project may be at risk.”

A shipping accident damaged the locks of the Isthmus Canal. The accident caused temporary closure of the Canal. Super Pumps notified Engineering of this delay.

The Government of Oceania resigned. The Oceania Military assumed power.

The Isthmus Canal re-opened after repairs were completed.

Super Pumps notified Engineering that the ship carrying the pumps transited the Isthmus Canal. Super Pumps indicated a new expected delivery date of 6 January 2009—four days past the irrigation project deadline.

Super Pumps did not deliver any pumps.

Super Pumps again did not deliver any pumps.

The military regime passed an environmental decree effective 1 January 2009 prohibiting the import or manufacture of products containing any amounts of beryllium. [hereafter “Regulation 2”]. Engineering notified Super Pumps of this impending Regulation and its possible effects. Engineering informed Super Pumps that arrival of the pumps before 1 January 2009 was vital.

Regulation 2 became effective.

Water Services cancelled the irrigation project on the grounds of failure to deliver pumps to the project site. Water services cited the Military Council instructions to cancel any projects with foreign parties that were “in breach of any element of the contract.” Engineering subsequently notified Super Pumps of the loss of the project and its intention to avoid the contract. Engineering requested instructions for disposition of the pumps upon arrival.

Engineering requested reimbursement of the contract price, which had been paid. Engineering again requested instructions for disposition of the pumps.

Super Pumps answered Engineering’s letters, declaring that it had fulfilled its contractual obligations and offered to assist Engineering in selling the pumps. Super Pumps indicated it would not seek the 30,000 USD in costs.
26 January 2009  Engineering notified Super Pumps that the pumps had been moved into a warehouse belonging to Engineering. Engineering also notified Super Pumps of its intention to sell the pumps on the account.

18 March 2009  Engineering wrote to Super Pumps suggesting conciliation on 28 May 2009, during an industrial conference. Super Pumps agreed. Correspondence regarding the conciliation ensued, including notification of each party’s representative to the other. The job title of Engineering’s representative did not appear in this correspondence.

28 May 2009  Conciliation took place in Vindobona, Danubia. Super Pumps was represented by Mr. James Steckler, its Chief Executive Officer. Engineering was represented by Mr. William Holzer, its Deputy Chief Executive Officer. The conciliation failed. Upon arrival at the conciliation procedures, Mr. Stecker of Super Pumps received a copy of the list of participants at the industrial conference. Mr. Holzer’s name and title appeared on that list.

4 June 2009  The conciliator stated that efforts at conciliation were no longer justified.

15 July 2009  Engineering submitted a request for arbitration to the Australian Centre for International Commercial Arbitration.

SUBMISSIONS

On behalf of the Claimant, Engineering, Counsel submits the following for consideration by the Tribunal. For the reasons stated herein, Engineering respectfully requests the Honorable Tribunal find:

- The precondition to arbitration has been satisfied;
- Super Pumps had an obligation to deliver pumps in conformity with regulations adopted in Oceania as warranted in the contract;
- Super Pumps breached its obligation by failing either the original delivery due date or the extended date;
- Engineering made reasonable efforts to mitigate the loss caused by Super Pumps’ breach.
ARGUMENT

1. A longstanding pillar of international commerce is the notion that agreements must be kept. In order to maintain this long held principle, Super Pumps should be held accountable for its promises. For the reasons stated herein, Part One will address why this Tribunal should take jurisdiction. Part Two will address why Super Pumps breached its contractual obligations to deliver the goods, and that Engineering is entitled to both restitution and damages as a result of Super Pumps’ breach.

PART ONE: ARGUMENTS REGARDING THIS TRIBUNAL’S JURISDICTION

2. The parties’ intent is central to interpreting the contract. Intent forms the basis of the language used in the contract. Parties also show intent through their actions. When interpreting an arbitration agreement with a condition precedent, the intent and actions of the parties are evidence of their agreement. Super Pumps and Engineering’s intent and conduct demonstrated a desire to be represented by a party with settlement authority. This tribunal should take jurisdiction because the parties satisfied the condition precedent to arbitration.

I. THE PARTIES SATISFIED THE CONDITION PRECEDENT TO ARBITRATION.

3. The validity of the arbitration agreement is undisputed. [R. 34 ¶ 8]. However, the condition precedent required the parties to participate in conciliation before proceeding to arbitration. [R. 12 ¶ 18]. Super Pumps argues that the condition precedent required the presence of both parties’ CEOs. [R. 33 ¶ 7]. This Tribunal should exercise jurisdiction over Super Pumps by finding the parties satisfied the condition precedent. The parties satisfied the condition precedent because: (A.) the conciliation proceeded in accord with the parties’ intent; (B.) the doctrines of waiver and estoppel prohibit Super Pumps’ current objection; (C.) remanding the parties to conciliation is futile; and (D.) any award rendered by this Tribunal is enforceable under the New York Convention.

A. The Conciliation Proceeded in Accord with the Parties’ Intent.

4. This Tribunal should find that the conciliation satisfied the intent of the parties. Specifically, this Tribunal should (1.) apply the CISG in determining the intent of the parties through their conduct. The parties’ conduct preceding, during, and following the conclusion of the contract indicates that (2.) Mr. Holzer possessed the requisite authority to settle at conciliation and (3.) Mr. Holzer, the Deputy CEO of Engineering, possessed the requisite settlement authority to represent Engineering at the conciliation proceeding.
1. The CISG Applies in Determining the Intent of the Parties through their Conduct.

5. The parties agreed that the UNCITRAL Conciliation Rules ("Conciliation Rules") would govern the conciliation. [R. 12 ¶ 18]. However, the Conciliation Rules do not specify a governing law. [See generally Concil. Rules]. Without a governing law, tribunals traditionally interpret the arbitration agreement through the law of the seat of arbitration. [Redfern/Hunter, p. 83]. Here, the parties specified Vindobona, Danubia as the seat of arbitration. [R. 12]. Thus, this Tribunal should use the laws of Danubia to govern the parties’ dispute.

6. Danubia has adopted both the UNICITRAL Model Law on Conciliation ("Model Law on Conciliation") and the UNCITRAL Model Law on Arbitration ("Model Law on Arbitration"). [R. 8 ¶ 25]. Because the parties agreed to Danubia as the seat of arbitration, the Model Law on Conciliation and the Model Law on Arbitration should govern their dispute.

7. The Model Law on Conciliation is silent on intent. [See generally ML Conciliation]. However, the text of Article 2(2) of the Model Law on Conciliation states that "[q]uestions…which are not expressly settled in [the Model Law] are to be settled in conformity with the general principles on which this Law is based." Specifically, paragraph 40 of the commentary to the Model Law on Conciliation states that Article 2(2) was "inspired by Article 7" of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). Since, the CISG and the Model Law share the same principles this Tribunal may utilize the CISG to interpret the parties’ intent.

2. The Parties’ Intended for the Representative to Possess Settlement Authority.

8. The parties’ intent was not for a strict interpretation of the arbitration clause. Instead, their conduct indicates their preference for a liberal interpretation. In accord with Article 8(2) of the CISG, the intent of the party must be given the same interpretation as that of a “reasonable person of the same kind as the other party would have had in the same circumstances.” Finally, CISG Article 8(3) permits this Tribunal to consider “all relevant circumstances,” “negotiations,” and “any subsequent conduct” in determining the intent of the parties. Scholars believe that the reasonable person standard, promulgated by CISG Article 8, requires parties to conduct themselves as a reasonable person would in all interactions. [Schlechtriem 1984; Hillman]. The reasonable person standard has been nuanced as an ethical obligation to “be judicious and fair.” [Van der Velden]. Thus, in interpreting the intent of the parties, this Tribunal should consider “all relevant circumstances” in the context of a reasonable, judicious, and fair person. [CISG Art.
These circumstances include: (a) prior negotiations of the parties and (b) subsequent conduct of the parties.

**a. The Parties Did Not Discuss CEO Representation During Negotiations.**

9. A reasonable party in Engineering’s position would understand the intent of the arbitration clause to mean that any individual with settlement authority may serve as a representative at conciliation. In accord with Article 8(2) of the CISG, Super Pumps’ conduct preceding and following the conclusion of the 1 July 2008 contract guided Engineering’s understanding. [*CISG Art. 8*]. There are three separate instances of this conduct that led to this interpretation. First, the CEO requirement in the arbitration clause was boilerplate language and was never referenced in negotiations between Richard Haycock, the sales representative for Super Pumps, and Samuel Barber, the director for Engineering. Second, Mr. Haycock and Mr. Barber were the exclusive points of contact when negotiations began on 5 May 2008 and when direct contact ended on 5 January 2009. [*R. 10, 24*]. Third, the fact that executive approval was not needed to conclude this contract indicates the common nature of this contract for Super Pumps. Thus, considering the boilerplate language in the contract and the omission of CEO representation from all negotiations, this Tribunal should find that the parties’ intent was simply for a representative with settlement authority to be present at conciliation.

**b. Super Pumps Subsequent Conduct Indicated that CEO Representation was Immaterial.**

10. Super Pumps manifested an intent to permit representation through any party possessing settlement authority. *CISG Article 8(3)* allows this Tribunal to consider “all relevant circumstances,” “negotiations,” and “any subsequent conduct of the parties” in determining the intent of the parties. Engineering provided notice in good faith and in conformity with the conciliation rules that Mr. Holzer was the representative. [*R. 52 ¶ 3; Concil. Rules Art. 6*]. Mr. Stecker did not know who the CEO of Engineering was and made no attempt to find out. [*R. 52 ¶ 37*]. Upon arriving at the conference, Mr. Stecker received a list with Mr. Holzer’s name and title. [*R. 52 ¶ 29*]. Mr. Stecker failed to read the list during the conciliation period. [*R. 33 ¶ 7*]. On 28 May 2009, Mr. Stecker began the conciliation with Mr. Holzer. [*Id.]*. Again, Mr. Stecker failed to inquire as to Mr. Holzer’s title. [*Id.*]. Finally, Mr. Stecker sat in the same room with Mr. Holzer for two days during the conciliation and never questioned his authority. [*R. 52 ¶ 37*]. Mr. Stecker discovered that Mr. Holzer was the Deputy CEO of Engineering in the first week of June 2009. [*R. 33 ¶ 7*]. That same week the conciliator notified Mr. Stecker and Mr.
Holzer that the conciliation was no longer justified. [R. 52 ¶ 32]. Even though Mr. Stecker knew that Mr. Holzer was not the CEO of Engineering in the first week of June, he waited until 17 August 2009 to object. [R. 32]. This objection was not raised until Engineering attempted to escalate the dispute to arbitration. [Id]. In accord with Article 8(3) of the CISG, this Tribunal should consider Mr. Stecker’s complete disregard for Mr. Holzer’s title before, during, and after the conciliation in interpreting the arbitration clause. [see CISG Art. 8(3)]. This complete disregard of Mr. Holzer’s title is an indication that the parties intended only for a representative with settlement authority to be present at the conciliation.

3. Mr. Holzer Possessed the Requisite Authority to Settle at Conciliation.

The parties intended for the representative at conciliation to possess settlement authority, which is specifically authorized by Article 6 of the Conciliation Rules. [Concil. Rules]. In accord with Article 6 of the Conciliation Rules, a party is permitted to be “represented or assisted by [the] persons of [its] choice.” [Art. 6 Conc. Rules]. Specifically, Article 6 provides that the parties must inform each other of the representative’s “name and address.” [Id.]. Professor Isaak Dore, a Zambian scholar on international arbitration, provides two reasons for Article 6’s notification requirements: (1) to prevent undue surprise, and (2) to provide the opposing party with knowledge that the representative party possesses settlement authority. [Dore 1986].

Each party chose a representative and informed the other of its selection. In accord with Professor Dore, there was no undue surprise because Super Pumps possessed the requisite information. The notification indicated that Mr. Holzer was operating under a duty delegated to him by Engineering’s CEO. [R. 52 ¶ 28]. Therefore, the selection of the intended representatives and subsequent notification satisfies the requirements of Article 6 of the Conciliation Rules.

B. The Doctrines of Waiver and Estoppel Prohibit Super Pumps’ Current Objection.

Since Super Pumps failed to object timely at conciliation, the doctrines of waiver and estoppel prevent it from objecting to this Tribunal’s jurisdiction. As a result, this Tribunal should prohibit Super Pumps’ untimely objection to Mr. Holzer’s representation because (1) Super Pumps waived its right to object to Mr. Holzer’s representation, and (2) Super Pumps is estopped from denying this Tribunal’s jurisdiction.

1. Super Pumps Waived Its Right to Object to Mr. Holzer’s Representation.

Super Pumps failed to protest to Mr. Holzer’s representation in a timely manner and, therefore, waived its right to object to this Tribunal’s jurisdiction under the doctrine of waiver. By
selecting Danubia as the seat of arbitration, the parties implicitly agreed to be governed by laws in which waiver is an express component. [R. 12]. This doctrine is encompassed in both the Model Law on Arbitration and the Conciliation Rules. [ML Arbitration Art. 4; ACICA Rules Art. 31]

15. The parties could have expressly agreed to the Model Law on Arbitration because they selected Danubia as the seat of arbitration. By choosing the seat of arbitration the parties implicitly agreed to be governed by the laws of the seat of arbitration. [Redfern/Hunter, p. 83]. In addition, the parties expressly agreed to be governed by the ACICA Arbitration Rules. [R. 12].

16. Both the ACICA Rules and the Model Law on Arbitration contain a waiver provision. [ML Arbitration Art. 4; ACICA Rules Art. 31]. The waiver provisions contained in both the ACICA Rules and the Model Law on Arbitration are functionally identical. [Id]. Therefore, regardless of which provision this Tribunal selects the outcome will be the same.

17. “[M]ost developed arbitration regimes require that parties object to procedural...rulings during the proceedings in order to preserve their rights to subsequently seek annulment of an award.” [Born, p. 2593]. ICC Case 9977 illustrates this position. There, the parties agreed to a condition precedent to arbitration, which required senior management to negotiate an amicable settlement prior to escalating the dispute to arbitration. [ICC Case 9977]. However, when a dispute arose the claimant sent its legal representative as opposed to a member of senior management to negotiate the dispute. [Id]. The tribunal held that the respondent waived its right to object because it failed to do so during the negotiation procedures. [Id].

18. Similarly, Super Pumps waived its right to object to arbitration. Mr. Stecker claimed that he was unaware of Mr. Holzer’s title throughout conciliation. [R. 33 ¶ 7]. However, Mr. Stecker was presented with numerous opportunities to ascertain Mr. Holzer’s title. First, the parties communicated to one another indicating the names and addresses of their respective representatives. [R. 52 ¶ 31]. Although, that communication did not indicate Mr. Holzer’s title, when Mr. Stecker later arrived at the conference he obtained a list of names and titles of the representatives. [R. 52 ¶ 29]. This list plainly revealed Mr. Holzer’s name and title. [R. 52 ¶ 29]. Second, Mr. Stecker neglected to ask Mr. Holzer his title during the two-days they were together for conciliation. [R. 52–53 ¶ 32]. Third, Mr. Stecker inadvertently discovered Mr. Holzer’’s title while searching for the contact information of another individual. [Id]. This fortuitous discovery indicates that Mr. Stecker was not concerned with Mr. Holzer’s title even after the conclusion of the conciliation. [Id]. Finally, Mr. Stecker waited two-and-a-half months after the
conciliation proceedings terminated before objecting to Mr. Holzer’s representation. [R. 32]. Accordingly, this Tribunal should find that Mr. Stecker waived his right to object by failing to do so “during the proceedings.” [Born, p. 2593].

2. Super Pumps is Estopped From Denying This Tribunal’s Jurisdiction.

19. Engineering relied to its detriment on Super Pumps’ conduct and, as a result, Super Pumps should be estopped from objecting to this Tribunal’s jurisdiction. Given that both the Conciliation Rules and the Model Laws on Conciliation are silent on estoppel, this Tribunal may use its discretion in applying the general principles on which estoppel is based. [ML Conciliation Art. 2(1)]. Scholars suggest that tribunals should estop a party from raising a procedural objection when it manifests an intent not to object. [Berger, p. 15–16; Born, p. 842].

20. The laws chosen by the parties are silent on estoppel. [See generally ACICA Rules; ML Arbitration]. Therefore, this Tribunal should apply the general principles of estoppel from the lex mercatoria, which are established in the UNIDROIT Principles. [Berger, p. 1]. UNIDROIT Article 1.8 states that a “party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.” [UNIDROIT Art. 1.8; Bonell, p. 88]. Specifically, comment 2 to UNIDROIT Article 1.8 states that the “understanding may result . . . from silence when a party would reasonably expect the other to correct a known error or misunderstanding that was being relied upon.” [Id].

21. Under principles of international commerce, tribunals have invoked the doctrine of estoppel. [Rolled Metal Sheets Case]. In Rolled Metal Sheets, the tribunal found that a party was estopped from raising a defense when it originally expressed an intent not to. [Id]. In doing so, the Honorable Chair, Michael J. Bonell stated “a legal position of a party must be regarded as having been forfeited whenever that party's conduct could be construed as meaning that it no longer wished to exercise its right or its defence, and the other party acted in reliance on the new situation.” [Id].

22. Here, this Tribunal should estop Super Pumps from objecting to Mr. Holzer’s representation because Super Pumps expressed an intent not to raise such an objection. Therefore, Super Pumps acted “inconsistently” with its previous conduct. Further, as previously mentioned, Mr. Stecker had at least five opportunities to question Mr. Holzer’s authority. [R. 52 ¶¶ 29, 31, 32]. Despite the fact that Mr. Stecker had numerous opportunities to question Mr. Holzer’s authority in the months before and during the conciliation, he did not raise an objection once. [Id].
accord with Comment 2 to Article 1.8 of the UNIDROIT principles, Mr. Stecker’s silence caused Engineering to understand that Mr. Holzer’s representation was proper and, as a result, Super Pumps may not act inconsistently by now objecting to Mr. Holzer’s representation.

23. Moreover, Engineering relied on Super Pumps silence and that reliance was to Engineering’s detriment. Engineering relied on Super Pumps’ silence by escalating the dispute to arbitration. [R. 3]. The cost of filing for arbitration caused detriment to Engineering. [Id.]. Engineering sacrificed resources by spending time and money that could be directed to other projects.

24. In sum, this Tribunal should find that Super Pumps’ conduct indicated that it “no longer wished to exercise its right” to CEO representation, as in Rolled Metal Sheets. Furthermore, Engineering “acted in reliance” on Mr. Stecker’s failure to object by elevating the dispute to arbitration. As a result of Engineering’s reliance on Mr. Stecker’s failure to object, it expended time, money, and sacrificed other resources in an effort to resolve this dispute. As such, this Tribunal should estop Super Pumps from objecting to Mr. Holzer’s representation, find that the parties satisfied the condition precedent, and exercise jurisdiction over Super Pumps.

C. Remanding the Parties to Conciliation is Futile.

25. Remanding the parties to conciliation would be wasteful and contrary to the parties’ intent. Parties choose conciliation as a condition precedent to arbitration because of its non-binding, voluntary, and amicable nature. [Dore 1986, p. 34; Comm. ML Conciliation ¶ 6]. They also choose this congenial atmosphere because it fosters compromise and enhances communication. [Id.]. The futility argument is commonly accepted by courts and tribunals when parties have reached a stalemate. [Sanders, p.827]. Specifically, Sanders posits that forced participation in conciliation may result in “cooperation and consent on settlement” is “wishful thinking.” [Id.].

26. Previously, tribunals refuse to remand parties to conciliation when it already occurred. [ICC Case No. 8445]. There, both parties held polar positions and were unlikely to compromise. [Id.]. Furthermore, the Zurich Tribunal established three factors in determining whether remanding the case was futile. [Id]. First, litigation had already begun, so it determined that an “amicable settlement was even more remote.” [Id]. Second, the lapsing of time and the large claim for damages evidenced the futility of forcing negotiations. [Id]. Third, the original agreement calling for an attempted settlement was primarily an “expression of intention” that must be examined through the present situation. [Id]. The tribunal held that the original intention to force settlement negotiation should not be obligatory if it would be fruitless or delay resolution. [Id].
27. Like *ICC Case No. 8445*, this Tribunal should find that conciliation would be futile. First, Super Pumps and Engineering have already entered arbitration, which decreases the likelihood of an “amicable settlement.” [R. 7 ¶23]. Second, Engineering requested remuneration on 5 January 2009—nearly a year ago. [R. 23]. Remanding to conciliation would cause further delay to a settlement in this dispute. Finally, the parties’ present situation was completely unforeseen at the conclusion of the 1 July 2008 contract. Specifically, the 25 June 2008 letter from Mr. Barber to Mr. Haycock expressed an intent to maintain a future working relationship with Super Pumps and preceded the conclusion of the 1 July 2008 contract by less than a week. [R. 11]. This letter indicates that at the conclusion of the 1 July 2008 contract the “express intention” of the parties was to collaborate on future projects, requiring them to settle any disputes in an amicable fashion. [*Id.*]. However, since the 25 June 2008 letter, the parties have completely severed ties, and at the first conciliation expressed a willingness to “sacrifice any future business contacts.” [R. 52 ¶ 32]. The conciliator terminated the first conciliation because the parties were unable to compromise. [*Id.*]. Therefore, given the parties’ irreparable relationship and their unwillingness to negotiate a proposal in the first conciliation proceeding, this Tribunal should find that any attempt at a second conciliation would be futile.

**D. Any Award Rendered By This Tribunal Will Be Enforceable.**

28. An award rendered by this Tribunal will be enforceable under the New York Convention. This Tribunal has a duty under the NY Convention to issue an enforceable award because all parties to the agreement are signatories to the Convention. [R. 8]. In relevant part, Article V(1)(d) requires that the arbitral procedure must be consistent with the agreement of the parties. [NY Conv., Art. V(1)(d)]. This Tribunal is given wide discretion in how it executes these procedures. [Jan van den Berg, p. 323]. Here, this Tribunal should find that the parties intended for a liberal interpretation of the arbitration clause. Specifically, the parties required a representative with settlement authority to conciliate the dispute prior to escalating to arbitration. Mr. Holzer possessed this settlement authority and, as a result of his presence at conciliation, Engineering satisfied the condition precedent. However, since this Tribunal is given wide discretion in conducting the arbitration in accord with the parties' agreement, it may find that parties intended for CEO representation. If this is the case, Super Pumps waived this requirement by failing to object to Mr. Holzer's representation. Alternatively, this Tribunal should estop Super Pumps from objecting to Mr. Holzer's representation because Super Pumps manifested an intent not to raise such an objection.
CONCLUSION ON JURISDICTION

29. Any award rendered by this Tribunal will be enforceable under the New York Convention because the arbitral proceedings were consistent with the parties' agreement. The arbitral proceedings are consistent because the parties satisfied the condition precedent to arbitration. The parties satisfied the condition precedent to arbitration for two reasons: (1) the parties conducted the conciliation proceedings in accord with their intent, and (2) the doctrines of waiver and estoppel prohibit Super Pumps’ current objection. As a result, this Tribunal should find that the parties satisfied the condition precedent and exercise jurisdiction over Super Pumps.

PART TWO: ARGUMENTS ON THE MERITS

30. When a party breaches its foremost contractual obligations to another, international commerce demands that party be held accountable for its actions. Engineering requests this Tribunal reimburse the purchase price it paid for goods it was unable to use. In addition, because Super Pumps breached its contractual obligations, Super Pumps is liable for the loss of Engineering’s Irrigation Project with Oceania Water Services. This Tribunal should grant Engineering’s requests for relief because (I) Super Pumps was contractually obligated to conform with all relevant regulations adopted in Oceania; (II) Super Pumps breached the delivery date provided for in the contract or any extended date; and (IV) Any argument that Engineering did not take reasonable steps to mitigate its losses is unsound.

II. SUPER PUMPS WAS CONTRACTUALLY OBLIGATED TO CONFORM WILL ALL RELEVANT REGULATIONS.

31. Super Pumps’ obligation to deliver pumps in conformity with all regulations adopted in Oceania included any prospective regulations. Article 35 of the CISG governs conformity in this case. [CISG Art. 35]. The CISG applies to all disputes involving contracts for the sale of goods between parties from different signatory states. [CISG Art. 1(1)(a)]. Here, all parties belong to different signatory. [R. 7 ¶24]. Therefore, the CISG governs this dispute.

32. The contract required Super Pumps’ conformity with changes in regulations adopted in Oceania for three reasons: (A.) First, in accordance with Article 35 of the CISG, Super Pumps was required to conform with any provision expressly or impliedly found in its own contract. Here, Super Pumps did not comply with an express warranty to deliver pumps in conformity with “all relevant regulations.” (B.) Secondly, Super Pumps was further obligated in accordance with Article 35(2)(a) to deliver pumps fit for ordinary use in Oceania. (C.) Finally, in accordance with
Article 35(2)(b) Super Pumps had an obligation to deliver pumps that conformed to the particular purpose for use in the Irrigation Project referred to in the parties’ contract.

**A. Super Pumps expressly warranted its compliance with all relevant regulations.**

33. The contract expressly required Super Pumps to deliver pumps in conformity with all relevant regulations adopted in Oceania. [R. 12]. Article 35 of the CISG requires the seller to deliver goods of the quantity, quality and description required by the contract. [CISG Art. 35(f)]. Article 8 of the CISG, instructs this Tribunal to consider “all relevant circumstances” when interpreting the specific content of the parties’ agreement. [CISG Art. 8; Honnold 1999, p. 256]. The contract expressly obligates Super Pumps to provide pumps in conformity with all obligations because: (1.) the plain language of the contract expressly provides for a prospective warranty; additionally, (2.) when viewed in context, the Parties intended to create a prospective warranty; further, (3.) the principle of *contra proferentem* mandates a prospective interpretation of the warranties; and finally, (4.) the parties’ conduct after the conclusion of the contract indicates their intent to create a prospective warranty.

1. **The plain language of the contract expressly provides for a prospective warranty.**

34. The Secretariat provides that when assessing conformity under Article 35, the first source for consideration is the parties’ agreement. [Sec. Comm., Art. 35]. Turning to the express language, Clause 2 provides:

The pumps shall meet the technical specifications set out in Annex I. Equatoriana Super Pumps *warrants* that the pumps are in compliance with *all relevant regulations for importation* into Mediterraneo and for *use* in Oceania.

35. [R. 12 (*emphasis added*)].

36. While initially, use of the word “are” appears to contemplate the present nature of the warranty, other aspects of the clause language indicate otherwise. For instance, the latter portion of the warranty refers to compliance with “all relevant regulations” in two different countries. [R. 12]. The word “all” is broad enough to include the regulations adopted after the date the contract was concluded. In addition, at the time of the conclusion of the contract, all of the pumps were not yet manufactured. [R. 6 ¶12]. Completion of the manufacture of the pumps was scheduled for three months later. [Id.]. Further the “importation” and “use” of the pumps was scheduled to occur five months after the conclusion of the contract. [Id; R. 12]. Finally, the parties could have warranted, all relevant regulations “in existence” at the contract’s conclusion—but chose
not to. Therefore, when viewed as a whole, the language of the warranty refers to future events and was intended to be prospective.

37. Inevitably, when a dispute arises, parties will disagree as to the subjective interpretation of contract language. If the language in Clause 2 is in fact ambiguous, Article 8(2) of the CISG guides this Tribunal to interpret the language in accordance with the understanding of a reasonable person. [Huber, p. 235; CISG, Art. 8(2)]. Here, a reasonable person is an international commercial seller or buyer. [R.4] International sellers and buyers would find the language “all relevant regulations” to encompass regulations adopted after the date of a contract. A reasonable seller or buyer would expect an express contractual warranty to extend to the time when the goods were actually imported and used. A reasonable buyer would not enter into a contract that warrants goods now, but not at the time of use. Thus, when viewed objectively, the warranty language is prospective.

2. Viewed contextually, the parties intended to create a prospective warranty.

38. The context of the entire contract further evidences the parties’ intent to create a prospective warranty. When interpreting a contractual provision, some jurisdictions utilize the Plain Meaning Rule to limit consideration of factors outside the contract. [See Huber]. However, Article 8 of the CISG permits this Tribunal to look beyond the contract language when determining the parties’ true intent. [Ad. Co. Op. No. 3]. CISG Article 8(3) guides this Tribunal to consider all relevant circumstances. Here, Super Pumps and Engineering entered into a five-month long contract. [R. 12]. The contract included the manufacture and delivery of pumps. [Id.]. The contract was entered into on 1 July 2008 and provided for completion of manufacture by 30 October 2008. [R. 6 ¶12]. At the time of contracting, not all of the pumps Super Pumps contracted to manufacture existed. [R. 36]. Therefore, in a contract spanning over three months for manufacture and six months in length, the parties intended for the warranty to extend beyond the contract date.

39. Additionally, in determining the intent of parties, consideration should be given to relevant trade usages. [CISG Art. 8(3)]. In adopting a particular delivery term, parties negotiate and agree when legal liability will pass from the seller to the buyer. [Incoterms p. 97]. The contract between Engineering and Super Pumps called for the pumps to be shipped “DES Incoterms 2000 (Capitol City, Mediterraneo).” [R. 12]. When parties choose “Delivered Ex-Ship” or “DES,” the seller bears all costs and risks involved in bringing the goods to the named port of destination. [Id.]. The seller’s obligations end when the “seller places goods at the disposal of
the buyer, onboard the ship at the named port of destination”. [Id]. When compared to available Incoterms, the “D” term places the most risk upon the seller. [Id].

40. Here, because the parties agreed on a “D” delivery term, specifically “DES,” Super Pumps agreed to assume a substantial amount of risk in the contract. While delivery terms do not encompass parties’ compliance with regulatory procedures, here, the chosen term should be used to interpret the parties overall understanding of their obligations under the contract. The parties negotiated for Super Pumps to bear all risks associated with manufacture and delivery of the pumps. [R. 12]. The allocation of risk under the “DES” delivery term proves consistent with the prospective warranty Super Pumps provided for in Clause 2. A contract which truly contemplates an unequal amount of risk and liability to one party is still a valid contract. Because the contract extended over five months and the parties agreed for Super Pumps to bear a substantial amount of risk, the parties intended to provide for a prospective warranty.

3. **Contra Proferentem** leads to an interpretation of the warranty as prospective.

41. When a reasonable person would find a statement ambiguous, any ambiguity should be resolved against the party who drafted the statement. [Honnold 1999, p. 117; Huber, p. 236]. Scholars suggest Article 8(2) of the CISG places a burden on a statement’s drafter to use language clear enough for a reasonable person to interpret the provision similarly. [Honnold 1999, p. 117; Huber, p. 236]. This interpretive principle, sometimes referred to as contra proferentem, is also found in the UNIDROIT principles. [UNIDROIT Principles Art. 4.6]. The UNIDROIT principles provide a source for this Tribunal to use to “fill the gaps” in areas where the CISG remains silent or is vague. [Id].

42. Similarly, any ambiguity in the warranty language of Clause 2 must be interpreted against Super Pumps. While Engineering requested the contract include a warranty clause, it was Super Pumps who provided the language of Clause 2. [R. 49 ¶9]. It is irrelevant if Super Pumps did not expect the regulations in either Mediterraneo or Oceania to change after the time of contracting. Therefore, the language must be interpreted to include “all” regulations that would affect the pumps’ importation and use because Super Pumps’ ambiguous words must be held against it.

4. **The parties’ conduct reveals their intent to comply with prospective regulations.**

43. The parties’ conduct after the conclusion of the contract reveals Super Pumps’ contractual obligation to comply with all prospective regulations. In accordance with Article 8(3) of the CISG, this Tribunal should consider the parties’ conduct after the conclusion of the contract in determining the parties’ true interpretation of the contract.
44. Here, Super Pumps understanding of its obligation to comply with all regulations adopted after the contract date was expressed through its conduct following the regulation’s enactments. Super Pumps received notice of the regulation change on 1 August 2008. [R. 14]. Super Pumps immediately acknowledged its obligation to comply with the regulation in its 2 August 2008 response to Engineering. [R. 15]. Though it is evident in this letter that Super Pumps was uncomfortable with the extra cost and work it would incur in complying with the new regulation, Super Pumps did not deny it had an obligation. Super Pumps stated “naturally, we will procure the substitute steel so you will have pumps that you will be able to install.” [R. 15 (emphasis added)]. While Super Pumps requested additional money, time, and release from further liability, it began to procure steel and produce new pumps without any indication from Engineering that it accepted these requests.

45. Further, throughout the remainder of the contract, the 2 August 2008 terms were never discussed again. The CISG allows parties to modify their contract by “mere agreement.” [CISG Art. 29]. In order to form a valid acceptance, the CISG requires an offeree either expressly or impliedly assent to the terms of an offer. [CISG Art. 18]. A change in the parties’ contract never occurred because Engineering never accepted Super Pumps’ proposals from its 2 August 2008 letter. In fact, Engineering did not communicate with Super Pumps for over two months. [R. 16–17]. Receipt of an offer alone cannot indicate assent to the terms included in the offer. [Enderlein/Farnsworth]. In some cases, silence coupled with conduct can form a valid acceptance. [Filanto v. Chilewich]. That did not happen in this case.

46. Both parties’ conduct throughout the duration of the contract did not evidence any assent to the terms included in the 2 August letter. On 22 November, Engineering paid the contract price. [R. 6 ¶13]. The amount authorized by Engineering did not include the additional 30,000 USD requested by Super Pumps in its 2 August letter. [R. 26]. Rather, the amount paid represented the original price agreed to under the 1 July contract.

47. Further, Engineering’s 24 November correspondence is not an acceptance of the proposed change in contract delivery date. On 22 November, Super Pumps informed Engineering that it would deliver the goods “a week later than anticipated.” [R. 17]. Put simply, this is not an offer to modify the contract delivery date. Rather, it is a notice of late delivery. Even if the later date was an offer to modify the original delivery date, Engineering never intended to accept it. Engineering refers to the 22 December delivery date as a “week later than contracted for” and as a “week delay in delivery.” [R. 18]. In addition, in this letter, Engineering reiterated the
importance of meeting the schedule provided for in the contract. \[Id.\]. When considering all circumstances, this Tribunal cannot interpret the parties’ conduct as an agreement to change the contract price or the delivery date. Thus, this tribunal should deem both the parties’ statements and conduct after the original contract date as representative of Super Pumps comprehension of its contractual obligations to comply with regulations adopted in Oceania.

**B. Article 35(2)(a) required Super Pumps to deliver pumps for ordinary use in Oceania.**

48. Unless agreed otherwise, an obligation to deliver goods fit for the purposes for which goods of the same description would ordinarily be used is “automatically” assumed by a seller under Article 35(2)(a). \[Lookofsky, p. 90\]. Goods purchased for resale are fit for their ordinary purpose only if the buyer is able to resell them in their intended market. \[Id.\].

49. Even in cases of resale, however, sellers are generally not required to adhere to other countries’ regulations or laws. \[New Zealand Mussels; Bianca\]. In the landmark case New Zealand Mussels, a German Court found certain exceptions to this general rule. One of these “special circumstances” requires a seller to comply with laws in another country where the seller is aware of the foreign laws. \[New Zealand Mussels\].

50. Moreover, a German Court held a seller did not deliver goods fit for their ordinary purpose even where the nonconformity was due to a new regulation adopted during the contract. \[Frozen Pork Case\]. In this case, the seller contracted to deliver three separate installments of meat. \[Id.\]. After the second shipment, but prior to the third, the buyer’s country adopted a regulation prohibiting meat with the same quality of the seller’s. \[Id.\]. Even though the meat was already produced, and the first two shipments were deemed conforming, the new regulation was held as an implied obligation upon the seller. \[Id.\].

51. Here, Super Pumps was required to conform with all relevant regulations it knew at the time of delivery. Like New Zealand Mussels, the regulations in Oceania were brought to Super Pumps’ attention on 1 July, 1 August, and 28 December 2008. \[R. 12, 14, 21\]. Further, similar to Frozen Pork, Super Pumps had an obligation to deliver goods that conformed to the regulations adopted during the parties’ contractual relationship. Super Pumps knew Engineering purchased the pumps for resale in Oceania. \[R. 11\]. The enactment of each regulation caused the pumps to become nonconforming. Because the regulations adopted affected Engineering’s ability to resell the pumps, Super Pumps had an obligation to comply with the regulations and deliver pumps fit for their ordinary purpose of resale and use in Oceania.
C. Article 35(2)(b) required Super Pumps to deliver pumps fit for their particular purpose.

52. In accordance with Article 35 of the CISG, goods do not conform to a contract unless they are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. [CISG Art. 35(2)(b)]. A buyer does not need to rely on the skill or judgment of the seller where an express warranty is found. [Schlechtriem (1984) pp. 6–22].

53. Super Pumps knew of the pumps’ particular purpose even before it entered into its contract with Engineering. [R. 4 ¶5]. Engineering provided Super Pumps with the specifications for the Irrigation Project in which it intended to use the pumps. [R. 5 ¶6]. In fact, after review of the specifications, Super Pumps recommended the type of pumps necessary for use in the project. [Id.]. Super Pumps sold steel pumps to over fifty countries and previously worked with Engineering on a similar project. [R. 4 ¶5]. Super Pumps had an implied obligation to manufacture and deliver pumps for use in the Irrigation Project. Super Pumps was required to comply with the regulations adopted in Oceania because they affected the pumps’ ability to be used in the Irrigation Project. Regardless, Super Pumps obligated itself to conform to Regulation 1 when it manufactured and dispatched beryllium-free steel pumps. [R. 17]. If this Tribunal finds Super Pumps was only obligated to deliver pumps in conformity with Regulation 1, Super Pumps still failed to perform its obligations under the contract. As discussed further below, Super Pumps breached its contract when it delivered the pumps, whether conforming or not, after the contract date. [see infra §III]

54. In conclusion, the contracts terms and the subsequent conduct of the parties mandated Super Pumps provide goods conforming with all relevant regulations in Oceania. The express language of the contract called for a prospective warranty to all existing and future regulations up to delivery. Moreover, under the contract, the ordinary purpose of the goods was to be fit for resale within Oceania. Finally, the contract required the goods to be in conformity with the Engineering’s Irrigation Project with Water Services of Oceania.

III. SUPER PUMPS BREACHED ITS OBLIGATIONS TO DELIVER THE PUMPS.

55. Super Pumps violated the sanctity of the contract by failing to deliver, and should not be excused for that failure. The CISG provides that the seller’s general obligations involve delivery of the goods and conforming documents, and that the substance of the obligations is defined by the contract. [CISG Art. 30; Schlechtriem & Huber/Widmer, p. 337, ¶1]. Furthermore, a seller
must deliver goods by the date or period of time “fixed by or determinable from the contract.” [CISG Art. 33].

56. Super Pumps’ failure to deliver by the 15 December deadline or by the deadline as extended to 22 December remains uncontested. [R. 8 ¶28]. Super Pumps is liable for breach of contract and the resulting damages because: (A.) Super Pumps failed to deliver by either the contract date or within an extended period of time, and (B.) CISG Article 79 does not exempt Super Pumps from liability for its breach.

A. Super Pumps failed to deliver the pumps by the date specified or as extended.

57. Super Pumps failed to perform on its contract with Engineering on two separate occasions. This Tribunal should find that Super Pumps breached the contract because: (1.) Super Pumps failed to deliver by the original contract delivery date, and (2.) it failed to deliver by the extended date.

1. Super Pumps failed to deliver by the original contract delivery date.

58. The original contract’s terms obligated Super Pumps to deliver goods by 15 December. [Clm. Exb. No. 3]. Under the CISG, a modification of a contract requires an “agreement of the parties.” [CISG Art. 29].

59. While Super Pumps may argue that the August letters are a modification of the contract, the original delivery date was never modified. However, it was extended by the November letters. [R. 17–18]. Engineering notified Super Pumps of Regulation 1. [R. 15]. As described above, this letter serves as nothing more than a notice to Super Pumps of its obligations under the prospective warranty. [supra, ¶ 20]. Super Pumps’ response on 2 August requested changes in price, goods, and delivery. [R. 15]. Even if this Tribunal were to find that this was an offer to modify the contract’s terms, Engineering never responded. There was no agreement here because Engineering never accepted Super Pumps’ August any purported offer to modify.

60. Put plainly, the CISG indicates that acceptance cannot occur through silence alone. [CISG Art. 18]. Article 18 is in accordance with the first line of Article 29 of the CISG, which requires an “agreement of the parties.” [CISG Art. 18(3), 29(1)]. However, CISG Article 18(3) states that the offeree can accept an offer through conduct. In interpreting this provision, scholars indicate that conduct must be measured against a relatively “demanding yardstick.” [Enderlein/Maskow]. In other words, “further activities” are required to bind the parties. [Enderlein/Maskow (emphasis in original)].
61. Engineering did not respond to Super Pumps’ letter on 2 August requesting additional time. [See R. 15]. There was no conduct: there was only silence. In fact, Super Pumps’ subsequent conduct indicated that the new terms in the 2 August letter were just suggestions, as referenced in more detail above. [supra ¶ 45].

62. The 22 November letter was a notification of late performance that was subsequently accepted by Engineering. [See R. 17]. However, this letter is not a modification because it was not agreed upon by the parties. On the contrary, Super Pumps’ statement that delivery would be “a week later than originally anticipated” indicates an understanding that the contract was never modified. [R. 17]. The delivery date was always 15 December 2008. [R. 12]. Engineering’s statement that “we have to go along with you” in its response on 24 November is evidence of the fact that Engineering was forced into granting the extension. [R. 18]. It is not evidence that Engineering agreed to the extension. Therefore, without an express or implied agreement, no modification occurred on either 2 August or 22 November 2008.

2. **Super Pumps breached the extended delivery date of 22 December.**

63. As already established, the contract’s terms mandated delivery of the pumps by 15 December. [R. 12]. However, in its 22 November letter, Super Pumps notified Engineering of a one-week delay in delivery. [R. 17]. This Tribunal should find that Engineering granted an extension of time that can be characterized as either: (a.) a seller’s request to cure under Article 48, or (b.) a Nachfrist period under Article 47. However, even if this Tribunal finds (c.) a modification of the delivery date occurred, regardless (d.) Engineering properly avoided because Super Pumps still breached when it failed to deliver by the extended delivery date.

   a. **The extension was a seller’s request to cure under Article 48.**

64. Super Pumps’ request to perform “a week later than originally anticipated” in conjunction with Engineering’s reluctant acceptance thereof, should be treated as a seller’s cure period. CISG Article 48 allows a seller to cure its failure to perform its obligations. [CISG Art. 48(1)]. A seller’s ability to cure is limited in instances that would not cause the buyer “unreasonable delay” or “unreasonable inconvenience.” [Ziegel, ¶2]. Article 48(3) further provides that “notice by the seller that [it] will perform within a specified period of time is assumed to include a request” that the buyer indicate whether it will accept performance. [CISG Art. 48]. Engineering hesitantly consented to delayed performance on 22 December. [R. 18]. Still, Super Pumps breached the contract when it was unable to deliver by the extended deadline.
65. In this case, Super Pumps stated in its 22 November letter that arrival on 22 December would mean that the pumps would be “a week later than originally anticipated.” [R. 17]. Acknowledgement that arrival on 22 December would be a week later than anticipated illustrates an understanding that the goods were expected on 15 December, and that Super Pumps knew of that expectation. [R. 17]. Consequently, Super Pumps’ 22 November letter indicates that it expected to breach the contract. As a result, this Tribunal should read the correspondence between the parties on 22 and 24 November as a request to extend the delivery date that was approved on 24 November.

66. While Engineering anticipates that Super Pumps will contend the letter on 12 December constitutes an Article 48 request to cure, this interpretation is unreasonable. As established above, a request to cure under Article 48 by the seller cannot cause the buyer any “unreasonable delay” or “unreasonable inconvenience.” [supra ¶ 64]. Pursuant to the Secretariat Commentary on Article 48, buyers retain the right to show that a notification of extended performance is not a request to cure. [Sec. Comm. CISG Art. 48, ¶16]. Under Article 48, a request for cure proves unreasonable if it requires a delay that would result in a fundamental breach. [Huber/Mullis, p. 219].

67. Courts have found sellers’ requests for cure unreasonable when they would result in a breach of the buyer’s contract with third parties. For example, in the Tetracycline Case, the AG München (Petty District Court) found that the buyer was not required to grant a cure period when the seller could not remedy its failure to perform within the time required by the buyer’s customers. [Tetracycline Case].

68. Here, the 12 December letter stated an anticipated delivery date of 6 January. [R. 20]. Delivery on 6 January would push the arrival date back to four days beyond the contract date between Engineering and Water Services, effectively creating a fundamental breach of the Irrigation Project. [R. 50 ¶15]. Super Pumps knew before entering into its contract with Engineering that the Irrigation Project required performance by 2 January 2009. [R. 50 ¶ 15; See R. 22]. Additionally, Engineering specified on 24 November that further delays in delivery would put the irrigation project at risk. [R. 18; R. 6 ¶ 12]. Given Super Pumps’ knowledge of the dates required by the master contract and the previous correspondence in which Engineering already granted Super Pumps an extension, it would be unreasonable to find that there was another request to cure. Alternatively, it would be unreasonable to find that Engineering granted such request. [R. 50 ¶15]. Consequently, the correspondence between the parties on 22 and 24
November should be the only letters interpreted as requesting and consenting to cure, respectively. Moreover, the last date by which Engineering indicated it would accept performance was 22 December 2008.

b. The extension was a Nachfrist period under Article 47.

69. Even if this Tribunal does not consider the November letters a request and consent to cure under CISG Article 48, the letters should be interpreted, at the very least, as a Nachfrist period under CISG Article 47. [R. 8]. The CISG permits a buyer to grant a seller an additional period of time in which it should perform its obligations. [CISG Art. 47]. While buyers are generally the grantor of Nachfrist periods, a strong indication exists that a buyer’s consent to a seller’s request implies a Nachfrist for the purposes of avoidance under CISG Article 49. [Schlechtriem & Müller-Chen, p. 555; Iron Molybdenum Case]. Under these circumstances, a buyer’s response should indicate the importance of the deadline to its own obligations, and that the seller’s failure to perform would result in damages. [Schlechtriem & Müller-Chen, p. 555]. Engineering’s response on 24 November explains that arrival of the goods on 22 December “means that the pumps will arrive a week later than contracted for.” [R. 18]. This language infers that Engineering granted Super Pumps an extension of the delivery date. Additionally, Engineering specified that “the deadline [was] ‘very important’ to [its] own obligations.” [R. 18]. Engineering stated that allowing Super Pumps more time to deliver would result in a “very tight” schedule, and meeting that schedule was “imperative.” [Schlechtriem & Müller-Chen, p. 555; R. 18]. Moreover, Engineering reiterated, “further delays and the entire irrigation project may be at risk.” [R. 18].

70. The overall tone of the 24 November letter is one of frustration. [R. 18]. Engineering explicitly stated that the proposed date was one week later than the contracted-for date, and that late delivery would complicate Engineering’s ability to perform. [R. 18]. Engineering went so far as to specifically state that more delays would put the entire contract at risk. [Id]. Consequently, the 24 November letter meets the requirements of consent to a Nachfrist period under CISG Article 47. [Schlechtriem & Müller-Chen, p. 555].

71. Regardless of whether this Tribunal finds that the extended period of time was a cure period or a Nachfrist period, Super Pumps failed to deliver by the date on which the extension ended. In any event, 22 December was the final date by which Engineering would accept performance and Super Pumps failed to deliver. Therefore, Super Pumps breached the contract by failing to deliver on the contract date of 15 December or as extended to 22 December.
c. Even if there was a modification of the delivery date, Super Pumps breached by failing to deliver the pumps.

72. Even if this Tribunal finds that the 22 November letter was a modification of the contract, Super Pumps still breached by failing to deliver the pumps. [R. 34 ¶11]. Under the CISG, modification of the contract requires only an “agreement of the parties.” [CISG Art. 29]. Accordingly, Super Pumps’ appeal on 22 November for a new performance deadline constitutes an offer. [R. 17]. In its response on 24 November, Engineering reluctantly accepted the one-week delay in delivery, albeit begrudgingly. It said, “we have to go along with you.” [R. 18]. In any event, the new date by which Super Pumps was obligated to perform was still 22 December. The continuation of the Irrigation Project depended on Super Pumps’ ability to deliver conforming goods by the contracted-for date. [R. 4 ¶5; R. 12; R. 50 ¶15]. Super Pumps understood that Engineering relied on its performance. [R. 12; see R. 50 ¶15]. Super Pumps knew that time was of the essence because of its awareness of the date by which Engineering had to perform in the Irrigation Project. [R. 12]. Additionally, Engineering’s reiterations regarding the importance of the delivery dates throughout the duration of the contract make it unreasonable to find that time was not of the essence. [R. 36; See also R. 11, 12, 18, 21]. Therefore, Super Pumps’ failure to deliver by 22 December resulted in a fundamental breach because time was of the essence.

d. Regardless of whether a modification occurred, Engineering properly avoided when Super Pumps breached.

73. Whether this Tribunal interprets the extension of time as a cure period, a Nachfrist period, or a modified delivery date; Super Pumps still failed to deliver by 22 December. As a result, Engineering exercised its right to avoid the contract. [CISG Art. 49].

74. Under the CISG, a buyer maintains its right to avoid in two instances. [CISG Art. 49]. One arises after the breaching party has failed to cure within an extended period of time. [CISG Art. 49(1)(b)]. The duration of time is invoked under CISG Article 47. The period by which the seller can perform is limited by the specified date and the type of performance required. [CISG Art. 47; CISG Art. 48; Schlechtriem & Müller-Chen, p. 560]. Engineering required delivery of the goods by 22 December. [R. 12]. Consequently, Engineering’s avoidance of the contract became permissible when Super Pumps failed to perform by the extended delivery date. [R. 6 ¶14]. Avoidance is made available to Engineering under Article 49(2)(b)(ii). [CISG Art. 49].
75. A second instance in which a buyer can avoid arises when the seller fundamentally breaches the contract. \([CISG\ Art. 49(1)(a)]\). Even if this Tribunal characterizes the November letters as a modification of the delivery term, Engineering still properly avoided. Under Article 49(1)(a) a buyer can avoid if the seller has fundamentally breached the contract. Article 25 defines a breach as fundamental if “it results in such detriment as to substantially deprive the [non-breaching party] of what [it was] entitled to expect” and a reasonable person would have foreseen the results of the breach. \([Art. 25 \textit{CISG}]\). In determining whether a fundamental breach occurred, one strong factor to consider is a party’s inability to perform at all. \([\textit{Koch}, \textit{p. 220–223}]\). Here, Super Pumps’ inability to perform in the same year the contract date called for amounts to a fundamental breach. \([R. 6 \textit{¶}14]\). Super Pumps’ breach resulted in avoidance of a contract worth approximately 300,000 USD to Engineering. Also, as discussed above, Super Pumps knew that time was of the essence, so it must have foreseen the results of late delivery. \([\textit{supra} \textit{¶}72]\). Therefore, Super Pumps fundamentally breached and Engineering properly avoided under Article 49(1)(a).

76. In sum, whether the Tribunal characterizes the November letters as a seller’s request to cure, a \textit{Nachfrist} period, or a modification, Super Pumps breached its contractual obligations when it failed to deliver by 22 December. As a result, Engineering properly avoided the contract under CISG Article 49. Super Pumps is liable to Engineering for damages resulting from its breach of contract.

B. In any event, Super Pumps’ claim for exemption under Article 79 is unfounded.

77. The delay in transiting the Isthmus Canal fails to meet the prerequisites for exemption under CISG Article 79. \([\textit{Ans. \textit{¶}12}]\). While Engineering concedes that the accident in the Isthmus Canal was an impediment beyond Super Pumps’ control, exemption Article 79 of the CISG remains unavailable because: (1) Super Pumps should have taken into account accidents in the canal, and (2) Super Pumps could have avoided or overcome the accident’s effects. Even if this Tribunal finds that Super Pumps is exempt from liability under Article 79, (3) the exemption lasted only as long as the impediment. And, (4) even if this Tribunal finds that Super Pumps is exempt from liability, Engineering is entitled to restitution under Article 81 of the CISG.

1. Super Pumps should have taken into account accidents in the canal.

78. Super Pumps should have contemplated the possibility of a shipping accident in the canal. The CISG exempts a party from liability for a failure to perform its obligations if it “could not reasonably be expected to take the impediment into account at the time of the conclusion of the
contract.” [Art. 79 CISG]. Even if an impediment is beyond the control of the breaching party, the party in breach remains responsible if it could have taken the impediment into account. [Schlechtriem & Stoll/Gruber, p. 817]. The burden of proof falls on the party claiming exemption. [Id].

79. Courts have wrestled with instances where CISG Article 79 was raised as a defense. For example, in the Sunflower Seed Case, the Court of Appeals of Lamia held a seller liable for an impediment that it could not control, but that it should have taken into account. There, the use of another port was made necessary due to a dry spell that lowered the Danube River’s water level. [Sunflower Seed Case, 63/2006]. The court held that the seller should have taken the impediment into account at the time of contracting because it had happened several years prior. [Id].

80. Like the seller in the Sunflower Seed Case, Super Pumps should not be excused for its liability. Super Pumps is an experienced seller that provides pumps to over fifty countries. [R. 4 ¶4]. As a practiced seller, it is reasonable to conclude that Super Pumps should have been aware that delays in trans-oceanic shipping are commonplace. Specifically, the record reveals that delays in the Isthmus Canal, while rare, are not unheard of. [R. 50, ¶14]. The record also indicates that the most efficient route for trans-oceanic shipping was through the Isthmus Canal. [R. 50, ¶ 14]. Therefore, the combination of Super Pumps’ experience and the existence of prior issues transiting through the canal leads to the reasonable conclusion that any issue in the canal would cause a delay in shipping. Consequently, Super Pumps should have anticipated the incident in the canal, or any delay in delivery, at the time of the conclusion of the contract.

2. **Super Pumps could have avoided or overcome the accident’s effects.**

81. Additionally, the CISG does not excuse a party from liability if it could have reasonably avoided or overcome the consequences resulting from an impediment. [CISG Art. 79]. If overcoming the impediment was reasonable and possible, then whether the impediment could have been taken into account is irrelevant. [Schlechtriem & Stoll/Gruber, p. 817]. Professor Honnold defines reasonableness as “what is normal and acceptable in the relevant trade.” [Honnold (1991) p. 148]. Further, Professor Honnold equates this to previous practices established between the parties under CISG Article 9. [Id]. Super Pumps cannot claim exemption under Article 79 because the effects of the accident were avoidable. As elaborated on previously, Super Pumps is an experienced seller that chose to take the burden of shipping entirely upon itself when it adopted the DES Incoterm. [See ¶ 80 above, R. 5 ¶ 9]. In addition, the parties had engaged in previous
similar transactions. [R. 4 ¶5]. Consequently, Engineering relied on Super Pumps’ skill and judgment when it came to providing the goods in a timely manner.

82. Super Pumps had options at its disposal that would have satisfied it contractual obligations effectively. For instance, at the time that Regulation 1 passed, Super Pumps became aware that some of the pumps it planned to provide no longer conformed. [R. 14]. Pursuant to Article 79 of the CISG, failing to plan for an impediment’s effects prohibits a party from later claiming an exemption. Consequently, Super Pumps could have avoided future cancellation of the contract by sending the conforming pumps that it possessed. Then, Engineering could have started performance on its contract with Water Services. If Engineering had been able to begin performance on the Irrigation Project, Water Services may not have avoided. [R. 37]. While the contract specified the goods arrive in one consignment, the parties could have agreed to allow for more than one shipment. [R. 49 ¶11]. However, Super Pumps never asked to modify the shipping term. [Id]. As a result, Engineering was unable to perform on its contract with Water Services. Ultimately, the effect of Super Pumps’ failure to perform was avoidance of both contracts.

83. Alternatively, Super Pumps could have provided conforming goods in order to avoid some of the consequences of the delay. Under Article 79, the seller may be obligated to provide a substitute good before it can claim exemption. [Schlechtriem & Stoll/Gruber, p. 818]. For example, in the Canned Oranges Case, the China International Economic & Trade Arbitration Commission (“CIETAC”) (PRC) found that the seller was not exempt under Article 79 when there was a flood in the Hunan Province. That flood resulted in a shortage of mandarin oranges. [Canned Oranges Case, CISG/1997/33]. The tribunal held the contract never specified that the oranges had to be Hunan oranges; as a result, the seller should have been able to procure substitute oranges from another region. [Id].

84. Similarly, while the regulations in Oceania required that the goods be beryllium free, the contract did not say that the pumps could come only from Equatoriana. Like the seller in the Canned Oranges Case, Super Pumps should have acquired substitute goods. As Respondent’s Exhibit No. 3 indicates, there was a company in Mediterraneo in possession of goods, which “would have been in compliance with the specifications for some of the pumps that were covered by that contract.” [R. 38]. Given the fact that Super Pumps did not know how long it would take to repair the Isthmus Canal’s locks, it was unreasonable for Super Pumps to sit by and wait for the impediment to pass without ever forming a contingency plan. [See R. 19]. Therefore, Super
Pumps could have—and should have—attempted to acquire substitute goods, or at least to have made an emergency plan in case the locks in the canal were not repaired quickly enough.

85. Finally, where an impediment would not have affected timely delivery, a party delivering late cannot claim exemption under CISG Article 79. [Schlechtriem & Stoll/Gruber, p. 819]. Furthermore, Article 79 of the CISG “presupposes that an unforeseeable and insuperable impediment [was] the sole reason for the failure to perform.” [Id. (emphasis added); see also Tallon, ¶ 2.6.6]. In other words, the inability to perform must be a direct result of the impediment. [Chengwei Liu, § 4.6; Tallon]. Here, Super Pumps knew that Engineering was frustrated about delivery on 22 December, and that the delay would make meeting its schedule more difficult. [R. 18]. In spite of this, Super Pumps brought the pumps to the port, loaded them on the ship, and allowed the ship to sit there for two days before leaving port. [R. 50 ¶12]. If Super Pumps allowed the ship to leave with the goods when it was loaded, the ship would have transited the canal two days earlier—on 27 November—and the impediment would not have hindered Super Pumps’ performance. [See R. 17]. Therefore, the delay is a direct result of Super Pumps’ delinquency, and not a result of the accident in the canal. As a result, any exemption under CISG Article 79 is not available to Super Pumps.

3. **Even if Super Pumps is excused, the exemption lasted only as long as the impediment.**

86. Super Pumps cannot be excused indefinitely for an impediment of definite length. Under Article 79(3), “[t]he exemption provided by [Article 79] has effect for the period during which the impediment exists.” [CISG Art. 79]. Scholars seem to support a strict interpretation of this provision. [Lookofsky; Schlechtriem]. Here, the impediment occurred on 28 November. [R. 19]. The damage to the locks took only ten days to repair. [Stmt. Clm., ¶ 14]. Therefore, Super Pumps should have been in Capitol City by 1 January 2009—ten days after the anticipated date of performance. However, the goods did not arrive until 6 January 2009. [R. 27]. The late delivery resulted in the collapse of both the Irrigation Project, and the contract between Engineering and Super Pumps. [See R. 22–25]. The fifteen-day delay for an impediment lasting only ten days remains unexplained by Super Pumps. Even if the accident in the canal would have rendered Super Pumps exempt from liability, the exemption ceased when the impediment ended. Thus, Super Pumps is not exempt from liability under Article 79.
87. Consequently, Super Pumps’ failure to prove a successful claim under Article 79 results in Engineering’s entitlement to restitution and damages for loss of profit under Articles 81 and 74 of the CISG, respectively.

4. Engineering is entitled, at a minimum, to restitution.

88. Even if this Tribunal finds that Super Pumps has a valid claim under Article 79, Engineering is still entitled to restitution. [CISG Art. 81]. Overwhelmingly, scholars echo this sentiment. [Honnold, Art. 48, § 423, p. 614; Schlechtriem & Stoll/Gruber, p. 830; Reily, p. 137]. Conforming to this basic principle encompasses the CISG general principle of providing relief to an aggrieved party. Accordingly, Engineering is still entitled to restitution under Article 81 of the CISG. Engineering should receive the purchase price of the pumps, which it has already paid.

89. For the reasons stated, Engineering requests that this Tribunal find: (A) that Super Pumps breached its contract by failing to deliver by either the contract date or within an extended period of time, and (B) Article 79 does not exempt Super Pumps from liability because the impediment was foreseeable, avoidable, and surmountable. Accordingly, Engineering requests that this Tribunal award it damages in the amount of 1,534,550 USD plus interest and costs.

IV. ENGINEERING’S CLAIM FOR DAMAGES SHOULD NOT BE REDUCED.

90. The damages claimed by Engineering should not be reduced as it took reasonable steps to mitigate the loss. This Tribunal should deny Respondent’s claim for reduction of damages (A.) Super Pumps has failed to prove the mitigation requirements; (B.) Engineering took reasonable steps to mitigate; or (C.) the measures suggested were not reasonable under the circumstances.

A. Super Pumps has failed to prove the mitigation requirements.

91. Respondent has not provided this Tribunal with facts capable of meeting this burden. The law governing the principle of mitigation states that:

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. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated [CISG Art. 77].

92. It is the party claiming reduction of damages who bears the burden of proof under mitigation. [Saidov p.; Opie]. Invoking Article 77 requires the seller “to put forward detailed facts and supporting evidence showing why the [buyer] has breached its duty to mitigate damages.” [Propane case]. The party must also show “the possibilities of alternative conduct and which part of the damages would have been prevented by this alternative.” [Id.]. This burden extends to
proving that the other party did not act reasonably to mitigate loss, and also to proving that the loss was avoidable. [Tetracycline case; Coke case].

93. In the Coke case, the Tribunal found that the breaching seller argued that the measures taken were unreasonable. [Id]. The seller failed to substantiate its claim for reduction of damages and did not meet its burden of proof. [Id]. Similarly, in the Propane case, the seller claimed on appeal that the buyer failed to mitigate damages. The tribunal in that case noted that the seller simply alleged a failure to mitigate without supplying proof as to what actions would have been reasonable or whether the damages could have been avoided. [Id].

94. Respondent has presented few facts upon which to support a claim for reduction of damages. The strongest evidence that mitigation was possible is found in the statement given by Water Services representative Horace Wilson. [R. 37]. In this letter, Mr. Wilson stated that “[i]t would help if there could [have been] at least partial delivery of pumps that would conform to the contract by 2 January.” [Id]. However, it is unclear how much “help” partial delivery would have been in avoiding project cancellation. Additionally Super Pumps was in the best position to provide such performance. Super Pumps could have shipped the twenty eight field pumps by 30 October with the three P-52s to follow in a second shipment. [R. 15]. There is no clear evidence that the project could have been saved by any action on Engineering’s part.

95. There is, however, evidence that the project would have been cancelled despite any mitigation effort by Engineering. First, the cancellation notice provides that “all contracts with foreign parties . . . in which the contracting party is in breach of any element of the contract are to be cancelled.” [R. 22]. Further, the cancellation notice by Water Services specifically mentions that it would have entertained claims for work already completed under the contract at the time of cancellation (5 January 2009). [Id]. This provision for completed work also shows that even if Engineering had been able to deliver substituted pumps to the project site by 2 January, the remainder of the contract would still have been cancelled.

96. In sum, Super Pumps cannot provide facts sufficient to find that any reasonable action would have reduced damages, similar to the breaching party in the Coke case. Therefore, this Tribunal should find that Respondent failed to carry its burden of proof and deny reduction of Respondent’s obligation to pay damages.

B. Engineering took reasonable steps to mitigate.

97. Because Engineering properly stored and cared for the goods, and helped avoid excess costs, it reasonably mitigated its loss. The CISG requires parties to take “such measures as are
reasonable in the circumstances” in an effort to mitigate loss. [CISG Art. 77]. Engineering took reasonable steps to mitigate losses both before and after avoiding its contract with Super Pumps. Engineering fulfilled its obligation to preserve the goods belonging to Super Pumps after avoiding the contract. [CISG Art. 86]. In addition, had Engineering arranged for the pumps to be stored in a third-party warehouse, Super Pumps would have been responsible for those costs. [CISG Art. 87].

98. Here, Engineering stored the pumps in its own warehouse, where they remain. [R. 7 ¶22]. Engineering also stored the pumps under custom’s seal. [R. 50 ¶16]. That action saved Super Pumps from paying the duties of importing the pumps into Mediterraneo. [Id.]. In a further effort to mitigate the loss, Engineering unsuccessfully attempted to exercise its rights under CISG Article 88 to sell the pumps on Respondent’s account [R. 7 ¶ 22]. Therefore, Engineering took reasonable steps under the circumstances to mitigate its losses.

C. The measures suggested were not reasonable under the circumstances.

99. The circumstances surrounding the loss render Super Pumps’ suggestions for mitigation unreasonable. Article 77 of the CISG requires only reasonable measures to mitigate. A measure is reasonable “if in good faith it could be expected under the circumstances.” [Opie, p.]. This determination is to be made “according to the actions of a reasonable person in the same circumstances.” [Id. (emphasis added)]. Inaction does not violate the principle of mitigation where it was reasonable under the circumstances. [Chinese Goods Case]. No active measures were reasonable because: (1.) Engineering was not obligated to avoid its contract with Super Pumps, (2.) engaging a substitute transaction was an unreasonable measure, and (3.) requesting an exception to Government Regulation 2 was unreasonable under the circumstances.

1. Engineering was not obligated to avoid its contract with Super Pumps.

100. Engineering had no obligation to avoid the contract by making a cover purchase since it was entitled to insist upon performance under provisions of the CISG. [CISG Art. 46]. In some cases, a non-breaching party may be required to avoid a contract in order to mitigate damages. [Honold].

101. However, the buyer will only be precluded from awaiting the contract date of performance before avoiding the contract or taking measures to mitigate if it becomes clear that the seller will commit a fundamental breach of the contract. [Gotanda].

102. CISG Article 46(1) states that “[t]he buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this
requirement.” This right is expressly conditional upon foregoing actions inconsistent with seller performance. [CISG Art. 46(1)]. Avoidance of the contract is an action inconsistent with seller performance and would have extinguished the right of the buyer to demand performance. [Honnold (***) §282].

103. This right to specific performance conflicts with CISG Article 77’s mitigation provision when demand for performance results in the reasonable foreseeability of the loss. [Sec. Comm. Art. 77; Honnold S419.3]. The non-breaching party is expected to take reasonable affirmative steps to mitigate losses once it “has reason to know” that failure to perform will cause the loss. [Lookofsky §6.17]. No specific measures are required before the breach manifests itself. [Huber]. This should be applied with restraint so as not to force the buyer to “abandon [its] right to claim performance too quickly.” [Id].

104. The buyer is not obligated to avoid the contract in a period during which it may demand specific performance. [Knapp (discussing the intended interpretation by the Vienna Conference of the tension between CISG Articles 46 and 77.)]. That period is extinguished when it becomes clear that the breaching party’s failure to perform will result in fundamental breach with subsequent loss. [Id]. At that point, the obligation to mitigate will override the right to insist on specific performance. [Id]. The buyer’s “insistence on performance of the contract cannot therefore be criticized as a failure to mitigate the loss, even if he subsequently avoids the contract and claims damages.” [Schlechtriem, p.].

105. Here, Engineering was entitled under Article 46 of the CISG to insist that Super Pumps deliver the pumps purchased under the contract. Engineering had no obligation to avoid its contract with Super Pumps by seeking a substitute transaction until it had reason to know Super Pumps’ performance would likely result in the loss of the Irrigation Project. Until that time, Engineering’s right to specific performance under CISG Article 46 predominated. This obligation to procure a substitute transaction would then have been subject to a reasonableness analysis discussed above. [supra ¶ 99].

106. Further, Engineering did not have reason to know that demanding performance by Super Pumps would likely result in the loss of the Irrigation Project until 28 December. [R. 21]. Provisions of the Irrigation Project indicated that late performance might have been allowed. [R. 11]. However, Engineering considered its responsibility of timely delivery critical, especially in light of the political unrest in Oceania. [R. 18]. The provisions of the Water Services project provided for penalties for late performance by Engineering [R. 51][22]. It did not become clear
that Super Pumps’ breach would be fundamental until Regulation 2 was enacted. Only then was it reasonably foreseeable that Super Pumps’ breach would result in loss of the Irrigation Project. Therefore, this Tribunal should find that Engineering was entitled to demand specific performance until 28 December and had no obligation to avoid the contract before that date.

2. Engaging a substitute transaction was not a reasonable measure.

107. Engaging a substitute purchase of pumps would have been an unreasonable measure of mitigation for two reasons: (a.) there was insufficient time in which to conclude a contract for substitute goods, and (b.) the risks and costs of engaging a substitute transaction were excessive.

   a. There was insufficient time in which to contract for substitute pumps.

108. The time period during which Engineering could have mitigated by substitute transaction was too short to be considered reasonable. Measures to mitigate loss under Article 77 of the CISG need not be excessive. [Huber, p.290, Knapp, p. 559]. Even if a certain measure would mitigate loss to the breaching party, the non-breaching party need not undertake it if the measure is unreasonable. [Knapp, p. 560]. One key consideration for reasonableness of mitigation is the time period during which mitigation would have taken place. [Id]. If the time period in which a cover transaction is too short to be considered reasonable, then the non-breaching party cannot be found in violation of Article 77. [Id]. “[A] two-month timeframe for mitigation would be deemed, under most circumstances, to be unreasonable” [DiMatteo, p.424]. A German court has held that the sale of an order of shoes nearly two months after avoidance was within a reasonable time for mitigation. [Shoes case].

109. The first date on which Engineering could have started searching for a substitute supplier was 12 December. [R. 20]. On 12 December, Engineering first learned that the delivery of the pumps could possibly arrive too late to uphold its obligations under the Water Services project. [R. 20]. Until that time, Engineering did not know how long the canal repairs would take or how late the delivery would be [R. 19]. Even at that point, however, it was not clear that delivery in early January would result in certain cancellation of the Water Services project. That became clear on 28 December [R. 21]. At that point, Engineering could have started searching for a substitute transaction if the available delivery period had been sufficient.

110. Engineering and Respondent were in talks and negotiations from early May until early July, when the parties concluded the contract. [R.10, 12]. The contract for the pumps took, therefore, two months to complete. In addition, the two parties had worked together in the past and had negotiated a similar contract previously. [R. 10].
111. Engineering and Trading Company of Mediterraneo had not previously negotiated any contracts with one another. [R. 51 ¶23]. In fact, they had no previous business dealings whatsoever. [Id]. Even assuming that Engineering should have sought a substitute transaction starting on 12 December, the time period during which Engineering had to locate a supplier, negotiate contract terms, inspect the goods, and arrange for payment is too short to be considered a reasonable period for mitigation. A time period of two months has been held to be reasonable in which to engage in a substitute transaction for the sale of shoes. [Shoe Case]. The goods in this transaction were specialized industrial pumps that were manufactured to conform to Engineering’s specifications. [R. 12]. Unlike in the Shoe case, these pumps were very expensive and specialized. Therefore, the time period was too short to have reasonably expected Engineering to mitigate by seeking a substitute transaction.

b. A substitute transaction would have been excessively costly and risky.

112. “[A] party who has already suffered the consequences of non-performance of the contract cannot be required in addition to take time-consuming and costly measures.” [Liu, §14.5.2]. Further, the non-breaching party is not required to take measures that “entail unreasonably high expenses and risks.” [Saidov, p. §4(b)]. The costs of mitigation must stand in “reasonable proportion to the benefit” to the buyer. [Cooling System Case].

113. The contract between Respondent and Engineering was for over 1.2 million USD. The 28 pumps held by Trading Company of Mediterraneo represented approximately one-quarter of the field pumps purchased by Engineering. [R. 34 ¶13]. Other than these field pumps, the contract between the parties called only for 3 medium-sized P-52 pumps. [R. 12]. Any substantial purchase of replacement pumps would likely have resulted in an expenditure of hundreds of thousands of US dollars. In addition, this expenditure would not have guaranteed prevention of the project cancellation. [R. 34 ¶¶ 34, 37]. Engineering would then have been obligated to pay for the entire contract with Respondent, leaving it with excess pumps. Alternatively, Engineering would have been required to seek to return the excess pumps and reimbursement for their cost.

114. In return for the expense incurred through mitigation, Engineering stood to avoid loss of only 320,000 USD. [R 9 ¶30]. In addition, any late delivery of substitute goods would have reduced this amount under the “substantial penalties” included in the Water Services project. [R. 11].

115. The risk of loss under these circumstances stood in no reasonable proportion to the benefit of cure to the buyer. Because of the costs and risks involved, engaging a substitute purchase of industrial irrigation pumps would not have been a reasonable measure under the circumstances.
3. Requesting an exception to Government Regulation 2 was unreasonable under the circumstances.

116. Requesting an exception from the Military Council would have been an unreasonable measure. The Military Council in Oceania agreed to establish an office in which applications for exception to Regulation 2 would be considered. [R. 21]. However, delivery of the pumps was imminent when the Water Services project was cancelled. [R. 23]. Engineering was faced with the choice of avoiding the contract or accepting delivery with the hope that the office would be created and that an exception would be granted. [R. 51 ¶21]. In addition, the exceptions considered by the Military Council’s office extended only to import regulations and not to the project cancellation. Even if Engineering had requested and later been granted exception, the project would have remained cancelled.

117. Since there was no reasonable likelihood of reduction of loss even if an exception had been sought and granted, Engineering was reasonable in avoiding the contract with Respondent. Engineering was not, therefore, obligated to seek an exception to Oceania’s Regulation 2.

CONCLUSION ON MERITS

As the contractual language explicitly states, Super Pumps had an obligation to deliver pumps in conformity with all regulations adopted in Oceania after 1 July 2008. Further, Super Pumps breached those obligations when it failed to deliver not only on the original delivery due date but the extended delivery due date. Super Pumps cannot evade its liability for failing to uphold those promises. Finally, Engineering made reasonable efforts under the circumstance to mitigate loss.

REQUEST FOR RELIEF

For the foregoing reasons, Engineering respectfully requests that this Tribunal find:

(1) This tribunal may properly exercise its jurisdiction to consider this dispute between Engineering and Super Pumps;

(2) that Super Pumps had an obligation to conform to all regulations adopted in Oceania;

(3) Super Pumps breached its obligations and is liable to Engineering under the contract;

(4) to reimburse Engineering its deposit of 1,214,550 USD;

(5) further pay damages for the breach in the amount of 320,000 USD and pay costs associated with this arbitration.