

TENTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2002 – 2003

MEMORANDUM

FOR

MEDIPACK S.A.

-RESPONDENT-



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ANJA RÖDLER

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INTERNATIONAL
COMMERCIAL ARBITRATION MOOT
2002 – 2003

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WHITE PLAINS, NEW YORK
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DEUTSCHE INSTITUTION FÜR SCHIEDSGERICHTSBARKEIT
GERMAN INSTITUTION OF ARBITRATION

MOOT CASE No. 10

LEGAL POSITION

ON BEHALF OF

MEDIPACK S. A.

395 INDUSTRIAL PLACE

CAPITOL CITY

MEDITERRANEO

(RESPONDENT)

AGAINST

EQUAFILM Co.

214 COMMERCIAL AVENUE

OCEANSIDE

EQUATORIANA

(CLAIMANT)

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INDEX OF ABBREVIATIONS

\$	Dollar
%	Per cent
§	Paragraph
A.L.R.	Arbitration Law Review
AAA	American Arbitration Association
AAA Rules	International Arbitration Rules of the American Arbitration Association
AC	Appellate Court
ADRLJ	The Arbitration and Dispute Resolution Law Journal
All. E. R.	All England Law Reports
Appx.	Appendix
Arb. Int'l.	Arbitration International
Art.	Article
ASA Bull.	Association suisse de l'arbitrage Bulletin
Ass.	Associates
ASTM	American Society for Testing and Materials
BB	Betriebs-Berater
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the German Federal Supreme Court in Civil Matters)
cf.	Confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLOUT	Case law on UNCITRAL texts
Co.	Corporation
DIHT	Deutscher Industrie- und Handelstag (Association of German Chambers of Industry and Commerce)

DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V. (German Institution of Arbitration)
DIS Rules	Arbitration Rules of the German Institution of Arbitration
Disp. Res. J.	Dispute Resolution Journal
Dr.	Doctor
Draft Joint Report	International Bar Association Draft Joint Report of the Working Group on Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration
e.g.	exemplum gratia (for example)
e.V.	Eingetragener Verein (registered association)
et al.	Et alia (and others)
et seq.	Et sequentes (and following)
Ets.	Etablissements
Fed.	Federal
Fn.	Footnote
GmbH	Gesellschaft mit beschränkter Haftung (Limited liability company)
i.e.	Id est (that means)
IBA	International Bar Association
IBA Rules	International Bar Association Rules of Ethics for International Arbitrators
IBA working group	IBA Working Group on Guidelines Regarding The Standard Of Bias And Disclosure In International Commercial Arbitration
ICC	International Chamber of Commerce
Inc.	Incorporated
Incoterms	International Commercial Terms of the International Chamber of Commerce (ICC) of 2000
Int.	International

Int. Arb. L. R.	International Arbitration Law Review
IPRax	Praxis des Internationalen Privat- und Verfahrensrecht
Journal Int'l. Arb.	Journal of International Arbitration
JZ	Juristenzeitung
KG	Kammergericht (Court of Appeal of Berlin, Germany)
LCIA	London Court of International Arbitration
LG	Landgericht (Regional Court, Germany)
Lloyd's Rep.	Lloyd's List Law Reports
Ltd.	Limited
mm	Millimeter
Mr.	Mister
NJW	Neue Juristische Wochenschrift
No.	Number
Nos.	Numbers
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OGH	Oberster Gerichtshof (Supreme Court of Austria)
OLG	Oberlandesgericht (Court of Appeal, Germany)
OPP	Oriented Polypropylene Film
p.	Page
pp.	Pages
Rev. arb.	Revue de l'arbitrage
RIW	Recht der internationalen Wirtschaft
S.P.A.	Societa per azioni
SCC Institute	Stockholm Chamber of Commerce Institute
Sec.	Section
Sté	Société
U.K.	United Kingdom
U.S.	Unites States of America
UN	United Nations

UNCITRAL	United Nations Commission on International Trade
UNICTRAL ML	Model Law of the United Nations Commission on International Trade on International Commercial Arbitration
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods
Utd.	United
v.	Versus (against)
Vol.	Volume
WIPO	World Intellectual Property Organization
YCA	Yearbook of Commercial Arbitration

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STATEMENT OF FACTS

2000

07 December EQUAFILM CO. (hereafter: CLAIMANT) sent a fax to MEDIPACK S.A. (hereafter: RESPONDENT) confirming the contract concluded during the telephone conversation of the same day. CLAIMANT stated that RESPONDENT would always receive the “best price” and identified this price as being 8%.

15 December CLAIMANT signed a sales contract with RESPONDENT. It contained precise specifications of the purchased good, i.e. 200 tons of 1,100 mm wide, 30 micron thick, opaque white Oriented Polypropylene film to ASTM Standard D2673-99 (hereafter: OPP), and the shipping and payment procedures. An arbitration agreement designating a non-existing arbitration institution and a choice-of-law clause, both relating to that contract, were incorporated. The parties agreed upon the promised discount of 8%.

2001

03 April RESPONDENT and CLAIMANT had a telephone conversation in order to conclude a new contract. The terms were to be the same as in the contract of 15 December 2000. Shipment details and the list price were changed accordingly. There was no explicit mention of the applicable discount rate.

03 April RESPONDENT sent a fax to confirm the contract that it thought had been concluded during the telephone conversation with CLAIMANT earlier that day. It contained precise specifications of the purchased good, 1,350 tons of OPP for a list price of \$1,900 per ton and referred to the contract of 15 December for payment, shipping and similar terms.

03 April CLAIMANT confirmed what it thought was agreed upon in the telephone conversation in a fax containing the specifications of the good, the list price and the 4% discount. It stated that all other provisions of the contract of 15 December 2000 were to apply to the new contract.

- 06 April** RESPONDENT informed CLAIMANT that it thought that an 8% discount had been agreed upon and therefore obviously an error had occurred in CLAIMANT's confirmation fax.
- 09 April** CLAIMANT sent a fax to RESPONDENT explaining why it thought that a 4% discount should be applied to their new contract and informing RESPONDENT that space had been booked for the first shipment.
- 10 April** RESPONDENT informed CLAIMANT that it never intended to conclude a contract including a 4%, and told CLAIMANT that it would seriously consider returning to its old supplier for future requirements if CLAIMANT did not meet its own commitments.
- 12 April** CLAIMANT again explained why, from its perspective, a 4% discount was applicable.
- 27 April** CLAIMANT informed RESPONDENT about the canceled booking of the first shipment. It told RESPONDENT that it would not deliver the goods unless RESPONDENT would accept CLAIMANT's pricing policy.
- 02 May** RESPONDENT sent a fax declaring it no longer expected delivery from CLAIMANT and had already covered its needs from its former supplier.
- 2 0 0 2**
- 23 May** CLAIMANT filed its Statement of Claim with the DIS.
- 27 May** Mr. Bredow, Secretary General of the DIS, sent a fax to Mr. Langweiler, CLAIMANT's advocate, confirming that the Statement of Claim was received.
- 01 June** Mr. Langweiler sent a fax to Mr. Bredow including CLAIMANT's nomination of Dr. [...] (Arbitrator nominated by CLAIMANT, hereafter Dr. [...]) as party-appointed arbitrator.
- 05 June** Mr. Bredow sent a fax to Mr. Langweiler confirming CLAIMANT's nomination of an arbitrator and the payment of the DIS Administrative Fee and the Provisional Advance on arbitrator's cost.

- 05 June** Mr. Langweiler sent a fax to Medipack S.A. informing RESPONDENT that arbitral proceedings were initiated against it.
- 05 June** Mr. Bredow sent a fax to Dr. [...] informing him of his nomination as CLAIMANT's party-appointed arbitrator.
- 22 August** Dr. [...] sent a fax to Mr. Bredow informing him of the merger of Dr. [...]’s law firm with Multiland Ass. effective on 1 January 2003, that represented CLAIMANT in the past, and alleging that he did not consider the merger to affect his impartiality and independence.
- 22 August** Mr. Bredow sent a fax to Mr. Langweiler and Dr. Comstock (RESPONDENT’s advocate) forwarding Dr. [...]’s fax of 7 August 2002 and inviting the parties to comment on the statement of Dr. [...].
- 02 September** Dr. Comstock sent a fax to Mr. Bredow requesting Dr. [...]’s withdrawal.
- 02 September** Mr. Bredow forwarded Dr. Comstock’s statement to Dr. [...] and informed him of the opportunity to comment on this statement.
- 09 September** Dr. [...] replied, stating that he would not resign as an arbitrator.
- 10 September** Mr. Bredow sent a fax forwarding the document of 9 September 2002 to Dr. Comstock.
- 19 September** Dr. Comstock sent a fax to the Chairman of the Arbitral Tribunal declaring the challenge of Dr. [...].

INTRODUCTION

We respectfully make the following submissions on behalf of our client Medipack S.A., RESPONDENT, and respectfully request the Arbitral Tribunal to decide that:

- The challenge of Dr. [...] is upheld [**First Issue**].
- The Tribunal has no jurisdiction to rule on the merits of the case [**Second Issue**].

Assuming but not conceding that the Tribunal has competence to rule on the merits of the case, we respectfully request it to decide that:

- The law chosen by RESPONDENT and CLAIMANT is the domestic law of Equatoriana [**Third Issue**].
- No contract of sale was concluded between RESPONDENT and CLAIMANT [**Fourth Issue at A**].

If the Tribunal finds that a contract was concluded between RESPONDENT and CLAIMANT, we respectfully request it to find that:

- The sales contract included an 8% discount [**Fourth Issue at B**].
- RESPONDENT lawfully avoided that contract after CLAIMANT had committed a fundamental breach of contract regardless of the discount rate, i.e. 4% or 8%, and, therefore, CLAIMANT is not to be awarded damages [**Fifth Issue**].

In the event that the Tribunal does award damages, we respectfully request it to rule that:

- CLAIMANT is not entitled to the amount of damages claimed [**Sixth Issue**].
- CLAIMANT is not entitled to interest [**Seventh Issue**].

FIRST ISSUE: THE CHALLENGE OF DR. [...] MUST BE UPHELD

1 RESPONDENT respectfully objects to Dr. [...]’s participation on the panel. It must be emphasized at the outset that no criticism is made of Dr. [...] personally. His reputation and personal integrity are not doubted. Yet, the objectivity of the Tribunal is endangered because justifiable doubts as to Dr. [...]’s independence exist. By application of the relevant standard to determine an arbitrator’s independence under Sec. 18.1 DIS Rules [A], the relationship between Dr. [...] and CLAIMANT is too close to maintain the objectivity of the Tribunal’s decision making process [B].

A. The standard for justifiable doubts has to be determined under Sec. 18.1 DIS Rules

2 CLAIMANT initiated proceedings under the DIS Rules and the Tribunal is to be constituted under these Rules irrespective of RESPONDENT’s challenge of the jurisdiction of this Tribunal (*infra Second Issue*). Therefore, the standard for the challenge is determined under Sec. 18.1 DIS Rules. Considering the characteristics of arbitration, the independence of an arbitrator is subject to a high standard [I]. CLAIMANT may not assert that the disclosure of facts that are relevant under Sec. 18.1 DIS Rules suffices to meet this provision’s standard [II].

I. Due to the peculiarities of arbitration, an arbitrator’s independence under Sec. 18.1 DIS Rules is subject to a strict standard

3 The challenge under Sec. 18.1 DIS Rules requires that the challenging party, i.e. RESPONDENT, has justifiable doubts as to the arbitrator’s independence. Taking into account the characteristics of arbitration, the evaluation of an arbitrator’s independence under Sec. 18.1 DIS Rules has to be done by application of a strict standard. Parties performing arbitration have chosen ‘private justice’ in contrast to ‘state justice’. Art. 10 of the Universal Declaration of Human Rights contains the right to a fair trial, which includes the right to be heard by “an independent and impartial tribunal”. Since justice must, as a basic principle, be beyond all suspicion as to any lack of independence and impartiality, no matter whether it is administered by the courts or an arbitral tribunal (*JAKSIC, p. 275; DAVID, p. 252*), a high standard as to the independence of arbitrators is required. The strict standard that ensures a judge’s independence also applies to arbitration (*AT&T v. SAUDI CABLE, 15.05.2000, U. K.; LAKER AIRWAYS v. FLS AEROSPACE, 20.04.1999, U. K.; LACHMANN, p. 515; HOLTZMANN/NEUHAUS, p. 391*), as accepted by virtually all jurisdictions

(Draft Joint Report, p. 12), but erroneously rejected by CLAIMANT (*Claimant's Memorandum at 8*).

- 4 There is even strong support for a more rigorous standpoint. Thus, it has been proposed that the consensual nature of arbitration dictates a higher standard for arbitrators and that it is appropriate to disqualify an arbitrator if a reasonable party to the arbitration apprehends that the arbitrator might be biased (*GEARING, p. 46*). Appellate review is only available for judgments rendered in court proceedings, but not in arbitration. Therefore, it was held that there may not be the slightest reason for doubts as to independence and impartiality of an arbitrator (*COMMONWEALTH COATINGS V. CONTINENTAL CASUALTIES, 18.11.1968, U. S.; SHORE, p. 34*). This standard equally applies to party-nominated and sole arbitrators (*FOUCHARD/GAILLARD/GOLDMAN p. 573; HUNTER, p. 173; JAKSIC, p. 257; BERGER, Arbitration Interactive, p. 145; WEIGAND-WEIGAND, p. 73*).
- 5 Also it must be noted that the arbitrator has to serve the parties. It is not the arbitrator who has an interest to be protected by the rules of the challenging procedure, but the party feeling uncomfortable with the present situation, i.e. RESPONDENT in the present case. The arbitration is for the parties, not for the arbitrator (*LACHMANN, p. 516*).
- 6 Moreover, CLAIMANT wrongfully identifies flexibility (*Claimant's Memorandum at 8*), cost effectiveness and efficiency (*Claimant's Memorandum at 13*) as the fundamental principles of arbitration. This view confuses mere practical advantages of arbitration with fundamental legal principles. Independence and impartiality of the arbitrators are the fundamental legal principles of every arbitration (*VAN DEN BERG, p. 377*) since they serve to safeguard the integrity of the Tribunal's decision making.
- 7 Finally, CLAIMANT misleadingly introduces the Sphere Drake case (*SPHERE DRAKE V. ALL AMERICAN, 09.10.2002, U. S.*) in support of its allegations (*Claimant's Memorandum at 10*). In this case, a considerably different standard than that required in the present case was employed. That judgment examined the facts under the aspect of 'evident partiality' under § 10 (a) (2) Federal Arbitration Act, while the present discussion is whether there are 'justifiable doubts' under Sec. 18.1 DIS Rules as to Dr. [...]s independence. This case does not, therefore, indicate anything for the outcome of this challenge. CLAIMANT may not rely on that decision.

II. The mere disclosure of facts relevant under Sec. 18.1 DIS Rules does not lead to the result that the arbitrator is independent

- 8 CLAIMANT cannot rely on the assertion that the disclosure of the facts relevant under Sec. 18.1 DIS Rules indicates an arbitrator’s independence (*Claimant’s Memorandum at 14*). Disclosure is a mere fulfillment of the arbitrator’s obligation under Sec. 16.3 DIS Rules. Therefore, it cannot lead to the assumption that subsequent to a disclosure an arbitrator is “capable of acting impartially”, as suggested by CLAIMANT (*Claimant’s Memorandum at 14*). It has to be emphasized that the disclosed facts are the very **basis** for RESPONDENT’s evaluation of the situation, which led to Dr. [...]’s challenge. A mere failure to disclose relevant facts by itself constitutes a possible ground for disqualification (*4.1 IBA Rules; BERGER, pp. 260 et seq.*). Thus, the disclosure cannot exonerate Dr. [...].
- 9 Moreover, the Tribunal but not Dr. [...] has to decide whether the challenge is justified. Hence, CLAIMANT may not rely on Dr. [...]’s opinion (*Claimant’s Memorandum at 7*) that he is qualified to sit on the panel. It is not the challenged arbitrator’s subjective judgment that decides over the challenge, but the existence of justifiable doubts from the perspective of the challenging party.

B. The relationship between Dr. [...] and CLAIMANT is too close to maintain his independence

- 10 Applied to the circumstances of the case, the standard as defined above leads to the result that RESPONDENT’s challenge under Sec. 18.1 DIS Rules will be successful. After the merger of Dr. [...]’s law firm and Multiland Ass., which has represented CLAIMANT in the past, the close relationship between Dr. [...] and CLAIMANT is sufficient to establish justifiable doubts as to his independence.
- 11 This result finds support by application of the “general standard” recently published in the “Draft IBA Guidelines Regarding The Standard Of Bias And Disclosure In International Commercial Arbitration” (Draft Joint Report) on the basis of Art. 12 (2) UNCITRAL ML, which is identical to Sec. 18.1 DIS Rules. The “White List” introduced therein enumerates specific situations where no appearance of a conflict of interest for an arbitrator exists from an objective point of view. These situations differ considerably from the facts as established in the present case. Included in this “White List”, for example, is the situation where services are rendered to one of the parties by a firm in association with the arbitrator’s law firm in another country. In the present case it is

not an **associated** firm, but the arbitrator's law firm **itself** which has the questioned contact. Thus, under the "general standard" suggested by the IBA working group, Dr. [...] is not an independent arbitrator in accordance with the "White List".

- 12 An examination of the specific circumstances of the case confirms this result. There is a connection between Dr. [...] and CLAIMANT which involves financial interest. Since the merger, effective as of 1 January 2003 between Dr. [...]’s former law firm and Multiland Ass., Dr. [...] is a partner in his new law firm. In the past, Multiland Ass. has represented CLAIMANT. Even though there is no present representation of CLAIMANT, the office that had represented CLAIMANT has every expectation of doing so again (*Procedural Order No. 2 at 18*). More importantly, since all clients to a firm are regarded as every partner’s clients (*KENDALL, p. 148*), legally CLAIMANT is Dr. [...]’s client. As a partner, Dr. [...] gets a share of the firm’s total profits (*Procedural Order No. 2 at 19*). Consequently, Dr. [...] has a pecuniary interest in the outcome of this arbitration. Any such interest creates a relationship of subordination and therefore is a compelling ground for challenge (*LOCABAIL V. BAYFIELD, 17.11.1999, U. K.; CRAIG/PARK/PAULSSON, p. 211; BERGER, Internationale Wirtschaftsschiedsgerichtsbarkeit, p. 177*).
- 13 Further, Dr. [...] can access confidential information about CLAIMANT from the firm’s past contacts. Many large firms today have set up ‘Chinese / Ethical Wall’ systems, which prevent the possibility of communicating any information between lawyers in cases with potential for conflicts of interest (*GÜNTHER, p. 53*). However, Dr. [...]’s new law firm does not have such a system, since access to the files of the former representations of CLAIMANT is granted upon simple request (*Procedural Order No. 2 at 23*).
- 14 Additionally, CLAIMANT may not rely on the Laker decision (*LAKER AIRWAYS V. FLS AEROSPACE, 20.04.1999, U. K.*). By finding that this case is based on a comparable situation (*Claimant’s Memorandum at 10*), CLAIMANT misinterpreted the facts of that decision. While the organization of Dr. [...]’s new law firm embodies integrated offices, the arbitrator in Laker was not an associate of the other parties’ representative, but was a barrister in the same “chamber”. In Great Britain, barristers in those “chambers” only share one address and have a common office service but work entirely independent of each other and are self-employed. The Laker case would have had a different result if a solicitor rather than a barrister, organized in an integrated office, would have been in the arbitrator’s position (*GEARING, p. 48*). While Dr. [...] as a partner of Multiland Ass. is legally responsible for the professional acts of his partners, in Laker

there was no connection between the arbitrator and the other party. It only appeared to exist because one address was shared and the challenging party was not aware of the structure that “chambers” have in Great Britain. The challenge was therefore dismissed. Hence, this case cannot serve as precedent for the question of Dr. [...]’s independence.

- 15 Finally, CLAIMANT’s assertion that the Faraway office, which had represented CLAIMANT in the past, is geographically too far away to be relevant in this respect (*Claimant’s Memorandum at 13*), is not persuasive. In the age of modern communication technologies it is practically impossible that any office in the world is too far away to be relevant in means of exchange of information.
- 16 For these reasons, Dr. [...] is not independent as required by Sec. 18.1 DIS Rules. Hence, the Tribunal is requested to find that Dr. [...] may not participate on the panel.

SECOND ISSUE: THE TRIBUNAL HAS NO JURISDICTION TO RULE ON THE MERITS OF THE CASE

- 17 RESPONDENT submits that, based on the principle of competence-competence in accordance with Art. 16 (1) (1) UNCITRAL ML, the Tribunal can rule on its own jurisdiction. RESPONDENT, however, contests the jurisdiction of the Tribunal to adjudicate the merits of the present dispute. Due to the absence of consent, the parties did not enter into an arbitration agreement [A]. In addition, the correspondence relied upon by CLAIMANT (*Claimant’s Exhibits Nos. 3, 4*) does not fulfill the form requirement of Art. 7 (2) (3) UNCITRAL ML [B]. Even if the Tribunal decides that the form requirement was met, the arbitration agreement is still defective and therefore inoperable [C].

A. In absence of consent, no arbitration agreement was entered into

- 18 RESPONDENT and CLAIMANT failed to conclude any agreement as will be shown in greater detail below (*infra Fourth Issue*). In regard to the alleged sales contract, the parties’ declarations of intent as to the applicable purchase price did not correspond. Thus, no contractual relationship was established between the parties. Since no contract was agreed upon from the outset, no arbitration agreement was entered into.
- 19 The Doctrine of Separability does not lead to a different result. The Doctrine, as set out in Art. 16 (1) (2) UNCITRAL ML, provides that an arbitration agreement has to be seen as an autonomous contract with the consequence that its validity has to be evaluated separately from the validity of

the main contract. Thus its defects do not invalidate the arbitration agreement. This rule finds its exception in the situation where both contracts suffer from the same “birth defect” (*STÉ NAVIMPEX V. STÉ WIKING TRALER*, 06.12.1988, France; *FOUCHARD/GAILLARD/GOLDMAN*, p. 201; *SCHLOSSER*, p. 292; *AHRENS*, p. 18). In other words, the Doctrine is designed to support the parties’ intent to submit disputes to arbitration, but limited to cases where the parties have reached an agreement on the main contract and the arbitration agreement included in it. The Doctrine of Separability only deals with cases of subsequent invalidity and not of initial non-existence of the main contract (*CATO*, p. 107; *MUSTILL/BOYD*, pp. 108 et. seq.; *MUSTILL/BOYD Companion*, p. 266; *SAMUEL*, p. 44; *RUBINO-SAMMARTANO*, p. 225; *VAN DEN BERG*, p. 145; *BERGER*, *Arbitration Interactive*, p. 103). If this main contract is voidable or terminated, an arbitration agreement will not suffer the same fate but instead remain effective as an autonomous contract unless the same mistake invalidates both contracts (*SCHWEBEL*, p. 11). This issue has been addressed by scholars, stating that in case “...the agreement was never entered into at all, its arbitration clause never came into force. If the agreement was not validly entered into, then, *prima facie*, it is invalid as a whole, as must be all of its parts, **including its arbitration clause**” (*BORN*, p. 71, *emphasis added*).

20 In the present case, the lack of consent impeded the existence of both contracts. RESPONDENT and CLAIMANT neither had the corresponding intent to enter into a sales contract nor to submit disputes to arbitration. In the absence of consent, there is no such intent that could be safeguarded by the Doctrine of Separability. Consequently, there is no basis for the jurisdiction of the Tribunal.

B. In addition, the faxes of 3 April 2001 did not meet the form requirements of Art. 7 (2) (3) UNCITRAL ML

21 The UNCITRAL ML is in force in Danubia (*Procedural Order No. 2 at 10*), the place of arbitration, and thus applies to the formal validity of the arbitration agreement according to its Art. 1 (1) (2). The form requirement of Art. 7 (2) (3) UNCITRAL ML was not satisfied by the correspondence between the parties (*Claimant’s Exhibits Nos. 3, 4*). None of the exchanged faxes contained an arbitration clause. Therefore, an arbitration agreement could only have been incorporated by reference to the arbitration agreement included in the contract of 15 December 2000 in accordance with Art. 7 (2) (3) UNCITRAL ML. However, not even the most essential requirement of this provision, i.e. a reference to an arbitration clause, is fulfilled in the present

case [I]. Even if the Tribunal finds that a reference to the arbitration clause in the contract dated 15 December 2000 was made, this reference was not such as to make the arbitration clause contained therein part of the alleged contract according to Art. 7 (2) (3) UNCITRAL ML [III].

I. The parties did not refer to the arbitration clause contained in the contract dated 15 December 2000

22 The parties did not refer to the arbitration clause contained in the contract of 15 December 2000 as required by Art. 7 (2) (3) UNCITRAL ML. CLAIMANT's fax referred to "all provisions" of the contract dated 15 December 2000 (*Claimant's Exhibit No. 4*). This might be understood as including the arbitration clause. However, such a meaning can certainly not be attached to RESPONDENT's fax of 3 April 2001. This fax merely mentioned "payment, shipment and similar terms" (*Claimant's Exhibit No. 3*). The wording "similar terms" only included issues of substantive nature, such as payment and shipping, and no issues of procedural nature. RESPONDENT, therefore, did not refer to the arbitration clause. Hence, the faxes did not correspond as to the reference to the arbitration agreement contained in the previous contract but were contradicting in this regard. Thus, it is impossible that the parties agreed to arbitrate by referring to the arbitration agreement in the contract dated 15 December 2000.

II. Even if the Tribunal finds that the parties referred to the arbitration clause contained in the contract dated 15 December 2000, this reference was not such as to make it part of the alleged contract

23 Even if the Tribunal finds that a corresponding reference was made in the faxes, the arbitration clause of the alleged contract dated 15 December 2000 was not validly included into the contract of 3 April 2001. Only a reference expressly mentioning the arbitration clause incorporated in the contract of 15 December 2000, i.e. a specific reference, would have been sufficient to meet the form requirements of Art. 7 (2) (3) UNCITRAL ML. However, there were no specific references in the faxes dated 3 April 2001. The parties globally referred to "all provisions" respectively "similar terms" of the previous contract (*Claimant's Exhibits Nos. 3, 4*).

24 Inclusion by reference requires that both parties are aware of the derogation from the usual way of dispute resolution (*BOMAR OIL v. ENTREPRISE TUNISIENNE*, 09.11.1993, *France*; *CRAIG/PARK/PAULSSON*, p. 74), i.e. court proceedings, because the writing requirement serves both a warning (*VAN DEN BERG*, *YCA 1989*, pp. 528, 551 *et seq.*; *BERGER*, p. 137) and an evidence

function (*STÉ CONFEX V. ETS. DAHAN*, 25.02.1986, France; *BERGER*, p. 137). Unambiguous fulfillment of the form requirement is important because parties which renunciate their constitutional right to be heard by a court have to be entirely aware of the consequences (*CLEARSTAR V. CENTRALA MORSKA IMPORTOWO - EKSPORTOVA*, 09.04.1991, Switzerland; *BERGER*, p. 150; *WERNER*, p. 17). Therefore, the inclusion of an arbitration clause from a separate document can only fulfill the writing requirement if it is drafted as a specific reference (*CONCORDIA AGRITRADING V. CORNELDER HOOGWERFF*, 13.10.1999, Singapore; *CIGNA LIFE INSURANCE V. INTERCASER S.A.*, 18.05.2001, U. K.; *GRANITALIA V. AGENZIA MARITTIMA SORRENTINI*, 22.12.2000, Italy; *VAN DEN BERG*, p. 218; *VAN DEN BERG, YCA 1989*, p. 528, 552; *RUBINO-SAMMARTANO*, pp. 208 et seq.). Only under special circumstances can a general reference, i.e. a reference to the whole document in which the arbitration clause is contained, be sufficient.

- 25** CLAIMANT, which is revealing, provides no case law in support of the inclusion of arbitration clauses through general reference. The special circumstances fulfilling the purposes of Art. 7 (2) (3) UNCITRAL ML and Art. II (2) NY Convention were found to exist in cases of a long-term relationship based on identical contract terms (*KABUSHIKI KAISHA V. DREW CHEMICAL*, 03.05.1980, Japan), an arbitration clause found on the back of the contract (*FERRARA V. UTD. GRAIN GROWERS*, 02.12.1977, U. S.) or a trade usage leading to arbitration (*BOMAR OIL V. ENTREPRISE TUNISIENNE*, 09.11.1993, France; *BGH*, 03.12 1992, Germany). All of these situations differ considerably from the case at hand. RESPONDENT had no prior experience with such a clause (*Procedural Order No. 2 at 30*). Additionally, the clause referred to was not individually negotiated, but instead adopted from CLAIMANT's standard terms (*Procedural Order No. 2 at 30*). Since it was part of a contract that was entered into over three months earlier, it was not ensured that RESPONDENT consciously decided to include the arbitration clause into the alleged contract. These circumstances indicate that RESPONDENT was not sufficiently aware that it ousted the jurisdiction of the state courts. Therefore, the purpose of Art. 7 (2) UNCITRAL ML and Art. II (2) NY Convention, to warn the parties, was not fulfilled.
- 26** Hence, the arbitration clause of the contract dated 15 December 2000 was not validly included by means of general reference according to Art. 7 (2) (3) UNCITRAL ML. Consequently, the Tribunal has no jurisdiction to decide the present dispute.

C. Even if the Tribunal finds that the arbitration agreement was incorporated into the contract, it is still defective and therefore inoperable

27 Assuming the arbitration agreement was validly referred to in the contract, the Tribunal still lacks jurisdiction to hear this dispute. The clause does not lead to arbitration under the auspices of the DIS [I]. Even if the Tribunal rules that the DIS was validly designated, the scope of the given clause was too narrow to cover disputes regarding the existence of the contract of sale [III].

I. Due to the ambiguous designation of the arbitral institution, the DIS was not determined by the arbitration agreement

28 RESPONDENT requests the Tribunal to hold that arbitration is not to be performed under the auspices of the “German Institution of Arbitration” (DIS). The arbitration clause does not mention the DIS. Instead, it states that arbitration shall be conducted in accordance with the rules of the “German Arbitration Association” (*Claimant’s Exhibit No. 2*). There is no association by that name. An arbitration clause is inoperative if it designates a non-existent institution (*CRAIG/PARK/PAULSSON, p. 130*). The arbitration clause at hand may not be construed to designate an existing institution.

29 Whilst interpreting the arbitration clause in order to give effect to the parties’ real intention, it has to be reckoned that a defective clause can only be salvaged if a significant degree of certainty regarding the real intention of the parties is achieved via interpretation (*FOUCHARD/GAILLARD/GOLDMAN, p. 264*). The principle *in favorem validitatis* does not justify fictitious arbitration agreements. The established facts promote the conclusion that a significant degree of uncertainty exists as to the arbitral institution that should be designated by the arbitration clause. Any ambiguities contained in a clause drafted by a party have to be interpreted *contra proferentem*, or against that party (*UNIDROIT Principle 4.5; BERGER, p. 551; FOUCHARD/GAILLARD/GOLDMAN, p. 259; BERNSTEIN/LOOKOFSKY, p. 131; DIMATTEO, p. 202*). In interpreting the clause it has to be taken into account that this clause is part of CLAIMANT’s standard terms (*Procedural Order No. 2 at 30*). It was not drafted as a midnight clause, which would have made the appearance of mistakes more likely. Instead, it can reasonably be expected that those standard terms were carefully chosen. CLAIMANT had sufficient time to consider the wording of its clause and make sure that the chosen institution was determined correctly. Still, neither the official English name of the DIS (German Institution of Arbitration) was mentioned, nor the official abbreviation used in the clause drafted by CLAIMANT. Moreover, the DIS

provides a standard clause which could have simply been adopted by CLAIMANT to unequivocally choose the DIS Rules to govern the arbitration. However, CLAIMANT did not do so. Instead, CLAIMANT adopted the standard clause of the “American Arbitration Association” (AAA) and also used its name “Arbitration Association”. CLAIMANT merely inserted the word “German” instead of the word “American”. Thus, the arbitration clause employed by CLAIMANT is ambiguous.

- 30** CLAIMANT’s allegation that the DIS was designated, is not supported by the case it relies upon (*KG Berlin, 15.10.1999, Germany*). The ambiguity cannot be resolved by the solution this case proposes. The case addressed the situation where only one geographic reference was given. The court decided that arbitration was to be conducted under the rules of an institution located in the place designated by the parties, i.e. Germany. Here, **three** different geographic references can be found. Vindobona, Danubia was designated as the place of arbitration (*Statement of Claim at 13, Claimant’s Exhibits Nos. 2, 3, 4*). The word “German” was part of the name of the institution chosen by the clause. The arbitration clause was the standard clause of the AAA, which has its seat in New York. Thus, there is no hint as to which of the geographical references shall prevail to designate the rules governing this arbitration.
- 31** Moreover, in the cited case the parties had referred to the “German Central Chamber of Commerce”. The court only came to the conclusion that the DIS had been designated because the German Chambers of Commerce are associated with the DIS, the DIS being a subordinate of the “Association of German Chambers of Industry and Commerce” (DIHT). Since there is no such link in the present case, CLAIMANT may not rely on the KG Berlin decision as it addresses a different situation.
- 32** Therefore, the lines of interpretation employed in the cited case may not be employed to resolve the ambiguity of the present clause. Since this ambiguity has to be interpreted against the drafter, it must be held that no institution has been validly chosen.
- 33** Even if the Tribunal finds that the word “German” indicates that the parties intended to perform arbitration under the auspices of a German arbitration organization, it has to be taken into account that numerous organizations exist in Germany that perform international arbitration in the area of commodities. One of these organizations could as well have been intended to handle this dispute, e.g. *The Arbitration Panels of the German Chambers of Commerce, Hamburg Friendly Arbitrage, Waren-Verein der Hamburger Börse e.V.*

34 This shows that the DIS cannot be clearly identified to be the designated institution for this arbitration. Therefore, the arbitration clause is inoperative.

II. In addition, disputes regarding the existence of the contract lay outside the scope of the arbitration agreement

35 The arbitration clause contained in the contract dated 15 December 2000 does not cover disputes as to the question of **existence** of the contract. Since the arbitration clause is a contract, the parties have the power to exactly determine which disputes shall be settled by an arbitral tribunal. Parties who wish to arbitrate disputes regarding the **existence** of the contract may explicitly agree in an arbitration clause that “existence” is included and thus grant the arbitrators power to decide whether a contract was entered into at all (*BANK OF AMERICA V. DIAMOND STATE INSURANCE*, 26.06.2002, U.S.; *RENUSAGA POWER V. GENERAL ELECTRIC*, 16.08.1984, India; *BARON*, p. 173). The wording of the present arbitration clause “...arising out of...” (*Claimant’s Exhibit No. 2*) does not cover disputes as to whether the contract was ever made (*SUTTON/KENDALL/GILL*, pp. 60 *et seq*). The second part of the wording “...relating to...” (*Claimant’s Exhibit No. 2*) only covers rectification of a contract, as well as mistake and misrepresentation (*SUTTON/KENDALL/GILL*, p. 62). Neither wording covers the issue of the existence of the contract. This is supported by the fact that the standard clauses of several arbitration institutes, e.g. *WIPO*, *LCIA*, *SCC Institute*, *DIS*, specifically address “validity” as an issue to be decided by the respective tribunal. Since the clause in question neither includes “formation issues”, “validity” nor “existence”, but simply refers to disputes relating to “this contract” (*Claimant’s Exhibit No. 2*), arbitration may only be initiated to settle disputes in connection with an undisputedly established contractual relationship. As the main question of the present dispute is whether or not a contract was ever concluded between the parties, the arbitration clause is worded too narrowly to grant the Tribunal jurisdiction to decide this controversy.

36 For all these reasons, we submit that the Tribunal has no jurisdiction to decide on the merits of this case. Should the Tribunal find that it has jurisdiction to decide on the merits of the present dispute under the rules of the DIS, we make the following submissions.

THIRD ISSUE: ANY ALLEGED CONTRACT IS GOVERNED BY THE DOMESTIC LAW OF EQUATORIANA

37 The choice-of-law clause designates the “Commercial Law of Equatoriana” (*Claimant’s Exhibit No. 2*). We submit that according to its clear wording this is a reference to the domestic law of Equatoriana and not to the CISG. The interpretation of the choice-of-law clause must be made in light of the fact that it was CLAIMANT’s standard clause and considering that the CISG would have governed the contract even without a choice-of-law clause. An interpretation against this background leads to the exclusion of the CISG [A]. Neither the characteristics of the CISG nor the cases cited by CLAIMANT promote a different result [B].

A. An interpretation of the choice-of-law clause results in the exclusion of the CISG

38 Generally, an exclusion of the CISG can be made impliedly or explicitly (*REITHMANN/MARTINY, p. 531*). An implied exclusion is sufficient where the intent of the parties is determinable (*CZERWENKA, p. 170; FERRARI, p. 151; KROPHOLLER, p. 457; JANZEN/ALPMANN, p. 14*). Hence, CLAIMANT may not assert that in the absence of an explicit exclusion the CISG was not excluded (*Claimant’s Memorandum at 19*). Parties intending to exclude a certain law may do so by designating a different law (*SCHLECHTRIEM KOMMENTAR-FERRARI, Art. 6 at 21; FERRARI, p. 156; BIANCA/BONELL-BONELL, Art. 6 at 1.2; STAUDINGER-MAGNUS, Art. 6 at 30*). The choice-of-law clause designated the “Commercial Law of Equatoriana”.

39 When interpreting this wording it has to be taken into consideration that the choice-of-law clause is CLAIMANT’s standard clause. It was unilaterally drafted by CLAIMANT. Again, reference is to be made to the principle *contra proferentem* (*supra First Issue, C I*). When drafting that clause, CLAIMANT had as much time as it required to design a clause that satisfies its function. However, it drafted a clause that was ambiguous and therefore did not fulfill its function to clearly designate the law governing CLAIMANT’s contracts. Had CLAIMANT intended to unequivocally determine the CISG it should have employed a different wording, e.g. “the CISG applies to this contract”. Then, there would have been no need for interpretation.

40 Furthermore, in order to subject the contract to the CISG, CLAIMANT did not need to include a choice-of-law clause into the contract, as both the buyer’s and the seller’s domestic conflict-of-laws rules lead to the application of the CISG (*Statement of Claim at 13*). Therefore, the only purpose the choice-of-law clause could possibly serve was to exclude the CISG and designate a different law, i.e. the domestic commercial law of Equatoriana. According to the principle *effet*

utile or effective interpretation (*UNIDROIT Principles 4.4*), one should prefer the interpretation which gives effect to the clause, rather than rendering it useless or nonsensical (*BONELL-BASEDOW, p. 134; FOUCHARD/GAILLARD/GOLDMAN, pp. 250, 825*).

- 41 The interpretation of CLAIMANT's standard choice-of-law clause therefore leads to the result that the CISG was excluded. The autonomous domestic commercial law of Equatoriana applies to the contract instead.

B. The characteristics of the CISG and the cases cited by CLAIMANT do not lead to a different result

- 42 The international and uniform character of the CISG is of no importance for the interpretation of the clause. According to Art. 28 (1) (1) UNCITRAL ML, the parties may choose any law they wish, no matter how inappropriate it appears to be (*OLG MÜNCHEN, 18.12.1985, Germany; BERGER, p. 491; CALAVROS, p. 122; GOTTWALD, p. 20*). In this case, the domestic law of Equatoriana was not even inappropriate as it has always applied to national as well as to international contracts (*Procedural Order No. 2 at 35*). Hence, the characteristics of the CISG offer no relevant advantages in comparison with the domestic law of Equatoriana.
- 43 In addition, CLAIMANT's allegation that the CISG was not excluded, is not supported by the cases it cites (*Claimant's Memorandum at 17, 18*). The ICC Award No. 8574 (*ICC Award No. 8574, September 2000*) does not even examine a choice-of-law clause, while the OLG Hamm 9 June 1995 (*OLG Hamm, 09.06.1995, Germany*) decision deals with an exclusion of the CISG through reference to national law during the proceedings, but does not examine a choice-of-law clause either.
- 44 In accordance with legal doctrine and case law, it has to be held that the reference to the law of a contracting state is an implied exclusion of the CISG (*ARBITRAL TRIBUNAL FLORENCE, 19.04.1994, Italy; MUSGRAVE LTD. V. CÉRAMIQUE CULINAIRE, 26.09.1995, France; NOUVA FUCINATI V. FONDMETAL INTERNATIONAL, 14.01.1993, Italy; KAROLLUS, pp. 38 et seq.; MANN, p. 647; VEKAS, p. 346*), because everything else would render the intent of the parties useless. Therefore, the reference to the commercial law of Equatoriana is an implied exclusion of the CISG.
- 45 Even if the Tribunal concludes that the choice of a national law does not by itself result in an implied exclusion of the CISG, RESPONDENT and CLAIMANT still excluded the CISG. The reference made in CLAIMANT's choice-of-law clause specifically addresses the **commercial law** of Equatoriana but not the entire **law** of Equatoriana as such. In case a specific or domestic

law of a Contracting State is chosen, e.g. the Commercial Law, the CISG is excluded (*cf. FERRARI, p. 156 at Fn. 712; KAROLLUS, p. 38*).

- 46 The result of the interpretation is therefore neither influenced by the case law offered by CLAIMANT nor by the characteristics of the CISG. The domestic law of Equatoriana governs the contract.

FOURTH ISSUE: NO SALES CONTRACT INCLUDING A 4% DISCOUNT WAS CONCLUDED

- 47 RESPONDENT and CLAIMANT did not conclude a contract of sale [A]. Should the Tribunal rule that a contract was concluded, an 8% discount was incorporated [B]. In any case, CLAIMANT cannot rely on Art. 55 CISG [C].

A. No sales contract was concluded

- 48 A contract of sale was not concluded between RESPONDENT and CLAIMANT on 3 April 2001 irrespective of whether the Tribunal finds Equatorianian law to be applicable, as submitted by RESPONDENT [I], or the CISG, as alleged by CLAIMANT [II].

I. Under Equatorianian law no sales contract was concluded

- 49 CLAIMANT does not contest that under Equatorianian law no contract of sale was concluded (*Procedural Order No. 1 at 8*). Equatorianian sales law is very strict regarding the statement of the purchase price and considers a contract invalid if the price has not been stated expressly (*Statement of Defence at 16; Procedural Order No. 1 at 8, Procedural Order No. 2 at 36*). Since the price for the whole purchase has not been mentioned expressly, no contract of sale was concluded under Equatorianian Law (*Procedural Order No. 1 at 8*).

II. Should the Tribunal apply the CISG, no sales contract was concluded either

- 50 Even if the Tribunal finds that the CISG is applicable, no contract of sale was concluded between the parties. According to Art. 8 (1) CISG, the parties must be held to their real intent. RESPONDENT and CLAIMANT never had corresponding intentions regarding the purchase price. Because the purchase price is an *essentialium negotii* according to Art. 14 CISG, an agreement over the purchase price is essential for the conclusion of a contract of sale.

- 51 The true intent of RESPONDENT was to receive an 8% discount of the list price. This is evidenced by RESPONDENT's repeated explanations in the subsequent correspondence (*Claimant's Exhibits Nos. 5, 7*). CLAIMANT, on the other hand, intended to only grant a 4% discount for this purchase as revealed by its later correspondence (*Claimant's Exhibits Nos. 6, 8, 9*). CLAIMANT even stated itself that a disagreement regarding the discount existed (*Claimant's Memorandum at 28*).
- 52 Under Art. 8 (1) CISG, the parties' intent did not correspond in regard to the price. Since the parties did not come to an agreement on such an essential part it does not matter that they did agree on several other parts, e.g. the quantity of the OPP. There can be no contract conclusion if offer and acceptance do not correspond in **all** essential parts (*ACHILLES, Art. 14 at 1*).
- 53 Contrary to CLAIMANT's allegations (*Claimant's Memorandum at 21*), the fact that both RESPONDENT and CLAIMANT treated their faxes dated 3 April 2001 as confirmations does not evidence that a contract was concluded. Regardless of the fact that RESPONDENT and CLAIMANT thought that a contract was concluded, the failure to agree on the price prevented the existence of a valid contract.

B. Should the Tribunal find that a sales contract was concluded, the contract included an 8% discount

- 54 Alternatively, if the Tribunal finds that Art. 8 (1) CISG is not applicable in this case, the declarations of the parties have to be interpreted according to Art. 8 (2) CISG. This interpretation leads to the result that a sales contract with an 8% discount was concluded. According to Art. 8 (2) CISG, the understanding of a reasonable person is relevant for the interpretation of a statement. Any reasonable person would have understood CLAIMANT to be willing to grant an 8% discount [I]. In accordance, a reasonable person could only have understood RESPONDENT's behavior likewise [II].

I. A reasonable person must have understood CLAIMANT to grant an 8% discount

- 55 A reasonable person would have understood CLAIMANT's behavior in such a way that CLAIMANT was willing to grant an 8% discount.
- 56 First, this conclusion can be drawn from the correspondence exchanged between the parties during the negotiations of the contract dated 15 December 2000. In its first fax of 7 December

2000 (*Claimant's Exhibit No. 1*), CLAIMANT stated that RESPONDENT would always receive its "best price". In that same fax, only seven lines below that promise, CLAIMANT identified 8% as the "best price". Therefore, a reasonable person could only understand "best price" as meaning the list price minus an 8% discount. CLAIMANT's allegation that the discount was only given as an introductory offer (*Claimant's Exhibit No. 6*) fails to convince. It is of no importance what CLAIMANT meant with the discount and which results it wanted to derive from it, since CLAIMANT's subjective intent is irrelevant. What is important is that no reasonable person could have understood that offer as an introductory one, as CLAIMANT never stated that in any of its correspondence before the conclusion of the latest contract. Moreover, in 1996 RESPONDENT and CLAIMANT had already concluded a first sales contract prior to the one in December 2000 (*Procedural Order No. 2 at 43*). Thus, CLAIMANT did not include the 8% discount in its first offer, but instead into its second one, while the actual introductory offer in 1996 did not contain a discount at all. Contrary to CLAIMANT's allegations (*Claimant's Memorandum at 29*), RESPONDENT could not know from the circumstances that CLAIMANT intended the 8% discount to be a one-time special offer. The 8% discount had been offered to other customers before (*Procedural Order No. 2 at 34*). It was not outrageously high (*Procedural Order No. 2 at 40*). In order for RESPONDENT to be aware of the lower discount, CLAIMANT should have explicitly mentioned the changed discount. But instead of doing so, CLAIMANT only informed RESPONDENT that the list price of the OPP had risen and did not mention that it wanted to decrease the discount (*Procedural Order No. 2 at 34*).

57 Second, CLAIMANT's behavior during and after the contract negotiations made it clear to a reasonable person that it wanted to grant an 8% discount. As the faxes exchanged by the two parties can be used as evidence for what had been agreed upon during the telephone conversation (*Procedural Order No. 2 at 34*), it has to be concluded that both parties agreed to apply "all other provisions" or "similar terms" from the contract dated 15 December 2000 (*Claimant's Exhibits Nos. 3, 4*). These clauses are invoked by CLAIMANT to incorporate the choice-of-law clause and the arbitration agreement from the first contract into the present contract. Following the argumentation that CLAIMANT accepts these two parts of the contract as validly included, there are no reasonable grounds to exclude the discount from this clause. A broad reference such as "all provisions" as made by CLAIMANT cannot serve to make such distinction. It is untenable to claim that through the same wording some parts of the previous contract were included, while others were excluded.

II. A reasonable person must have understood RESPONDENT's intent to include an 8% discount

- 58 From a reasonable person's perspective, RESPONDENT could only be understood as intending to purchase at a discount rate of 8%. It must be considered that RESPONDENT only started "to commence buying from Equafilm [...] because of the [...] price, [namely] an eight percent discount", as evidenced by its fax dated 10 April 2001 (*Claimant's Exhibit No. 7*). According to Art. 8 (3) CISG, subsequent behavior can be used to interpret previous behavior. With its statement RESPONDENT confirmed its intent to get an 8% discount.
- 59 During the contract negotiations, RESPONDENT stated that it would agree to incorporate "similar terms of the contract dated 15 December" (*Claimant's Exhibit No. 3*). Thereby, from a reasonable person's perspective, RESPONDENT made clear that it intended to apply the same conditions as in the last contract, namely an 8% discount.
- 60 CLAIMANT may not assert that RESPONDENT stayed silent (*Claimant's Memorandum at 30*) and thereby accepted the contract with a 4% discount. Immediately after CLAIMANT had informed it that it thought a 4% discount was applicable, RESPONDENT notified CLAIMANT of this error and repeated that an 8% discount was applicable (*Claimant's Exhibits Nos. 5, 7*) until it avoided the contract (*infra Fifth Issue*). Moreover, silence would not have had any legal consequence. Silence can only amount to acceptance under Art. 9 CISG if the contracting parties are aware of such effect because it can be invoked in their own legal systems (*OLG FRANKFURT, 05. 07. 1995, Germany; LUDWIG, p. 320; SCHLECHTRIEM, JZ 1988, p. 1043; VAN ALSTINE, pp. 237 et seq.*). This is not the case here.

C. CLAIMANT in either case cannot rely on Art. 55 CISG

- 61 Regardless of whether or not the Tribunal finds a contract to be concluded, CLAIMANT cannot rely on Art. 55 CISG. Art. 55 CISG can only be invoked if there was a **valid conclusion** of contract, but the parties **left a gap** concerning the price (*HOYER/POSCH-POSCH, p. 147; WITZ/SALGER/LORENZ-WITZ, Art. 14 at 11; FOX, p. 29 et seq.*). Therefore, Art. 55 CISG cannot apply when no valid contract was ever concluded. Neither is there any room for Art. 55 CISG when the price is determined or determinable.
- 62 Since neither a contract was concluded nor the price sufficiently determined, Art. 55 CISG is not applicable.

63 Regarding contract conclusion, RESPONDENT submits that a sales contract was not concluded, whatever law is applicable. For that reason, there is no contractual relationship whatsoever between the parties that RESPONDENT could have violated. Alternatively, if the Tribunal finds that a contract was concluded, that contract contained an 8% discount.

FIFTH ISSUE: RESPONDENT DID NOT COMMIT ANY BREACH OF THE ALLEGED CONTRACT

64 RESPONDENT never breached the contract including an 8% discount but lawfully declared it avoided due to a fundamental breach by CLAIMANT [A]. Even if the Tribunal decides that the contract was concluded with a 4% discount, this contract was lawfully avoided by RESPONDENT because CLAIMANT committed a fundamental breach [B].

A. RESPONDENT did not breach the contract including an 8% discount but lawfully avoided it

65 Contrary to CLAIMANT's allegation (*Claimant's Memorandum at 40 et seq.*), RESPONDENT's behavior on 2 May 2001 was not a fundamental breach of contract but a declaration of avoidance in compliance with Art. 72 CISG [I]. RESPONDENT was entitled to avoid the contract as CLAIMANT had committed a fundamental breach of contract on 27 April 2001 [II].

I. RESPONDENT declared avoidance under Art. 72 CISG

66 RESPONDENT did not breach the contract but made a declaration of avoidance as required under Art. 72 CISG in its fax of 2 May 2001. When RESPONDENT stated that it had "...placed an order with Polyfilm GmbH for the polypropylene film that we had expected to purchase from you" (*Claimant's Exhibit No. 10*), RESPONDENT unequivocally declared that it was no longer interested in performance of the contract. A declaration is sufficient to avoid a contract when the party's intention is clear (*LG FRANKFURT, 16.09.1991, Germany; STAUDINGER-MAGNUS, Art. 26 at 7*). Since RESPONDENT's declaration was received and understood correctly by CLAIMANT (*Claimant's Memorandum at 41*), RESPONDENT validly declared avoidance according to Art. 26 CISG.

67 Contrary to CLAIMANT's allegation (*Claimant's Memorandum at 41*), RESPONDENT did not have the obligation to notify CLAIMANT of its intention to avoid the contract under Art. 72 (2), before it declared avoidance. As CLAIMANT had already declared that it would not perform its

obligations, no notification had to be made pursuant to Art. 72 (3) CISG. This will be discussed subsequently.

II. CLAIMANT committed a fundamental breach of contract under Art. 25 CISG on 27 April 2001

68 By notifying RESPONDENT on 27 April 2001 that it had canceled the shipment, CLAIMANT breached the contract fundamentally according to Art. 25 CISG [1]. It was foreseeable that the breach was going to be fundamental and it was anticipatory [2]. CLAIMANT's behavior was not justified as RESPONDENT had not violated its contractual obligations [3].

1. CLAIMANT's cancellation of shipment in connection with an unjustified demand for price increase constituted a fundamental violation of the contract

69 CLAIMANT's behavior constituted a fundamental breach of the contract concluded on 3 April 2001 according to Art. 25 CISG. Under this provision, a breach is fundamental if it results in such detriment to the other party as substantially to deprive it of what it could expect under the contract. An unjustified demand for altered terms, e.g. price increase, in connection with a definite refusal to perform, is such a fundamental breach (*STAUDINGER-MAGNUS, Art. 72 at 11; SCHLECHTRIEM-SCHLECHTRIEM, Art. 25 at 17*).

70 CLAIMANT's declarations that led to the fundamental breach have to be interpreted from a reasonable person's perspective under Art. 8 (2) CISG. CLAIMANT repeatedly insisted on a 4% discount to apply to the contract, although an 8% discount was contractually agreed upon (*supra*). In its fax dated 9 April 2001 CLAIMANT stated that it would give "...a **four** per cent discount from [its] list price" (*Claimant's Exhibit No. 6*). In its next fax dated 12 April 2001, CLAIMANT stated that it was "...still prepared to grant...a **four** per cent discount" (*Claimant's Exhibit No. 8*). RESPONDENT did not comply with this demand to alter the purchase price in CLAIMANT's favor.

71 CLAIMANT then canceled the shipment space scheduled for 25 to 27 April 2001 (*Claimant's Exhibit No. 9*). Connected with the cancellation, CLAIMANT demanded that RESPONDENT acknowledge that the discount applicable to the contract was 4%. By stating "I had hoped... that you accepted our pricing policy..." (*Claimant's Exhibit No. 9*), CLAIMANT made clear that the acceptance of the 4% discount was the prerequisite for delivery. Under Art. 8 (2) CISG, RESPONDENT therefore had to understand that CLAIMANT would continue to cancel

shipments until RESPONDENT accepted the pricing policy. This constituted a final and definite refusal to perform the contract according to the terms agreed upon. Due to the anticipated non-performance by CLAIMANT, RESPONDENT was substantially deprived of what it could expect under the contract.

72 CLAIMANT additionally put RESPONDENT under considerable pressure. CLAIMANT was aware that RESPONDENT was in urgent need of OPP and had its own commitments to meet (*Claimant's Exhibit No. 6; Statement of Claim at 5*). RESPONDENT could only fulfill these commitments if the large amount of OPP it expected from CLAIMANT was delivered in time. Placing a new order with another company would have been time consuming and would have endangered the fulfillment of RESPONDENT's commitments. Thus, time was of the essence. Therefore, CLAIMANT committed a fundamental breach of contract on 27 April 2001.

2. The fundamentality of CLAIMANT's breach was foreseeable under Art. 25 CISG and the breach was anticipatory according to Art. 72 CISG

73 It was foreseeable for CLAIMANT that its breach was going to be fundamental under Art. 25 CISG. Foreseeability is determined by the knowledge a reasonable person in the same position would have (*SCHLECHTRIEM KOMMENTAR-SCHLECHTRIEM, Art. 25 at 11; BIANCA/BONELL-WILL, Art. 25 at 2.2; ACHILLES, Art. 25 at 14; STAUDINGER-MAGNUS, Art. 25 at 15*). Any person in CLAIMANT's position would have been able to foresee that its behavior would substantially deprive RESPONDENT of what it was to expect under the contract, namely to receive the delivery in time in order to meet its own commitments.

74 A breach is anticipatory according to Art. 72 (1) CISG if it is committed before performance is due. Delivery was not due before 10 May 2001, and the breach was committed on 27 April 2001. Therefore, CLAIMANT committed an anticipatory breach of contract.

3. CLAIMANT's behavior was not justified as RESPONDENT had not violated the sales contract

75 CLAIMANT's behavior was unjustified because RESPONDENT had not violated any of its contractual obligations.

76 It was contractually agreed that RESPONDENT had to pay 30 days after delivery of the OPP (*Claimant's Exhibits Nos. 2, 3, 4*). Hence, RESPONDENT only had to fulfill its obligations, to pay the price and accept the OPP after CLAIMANT's delivery according to Art. 30 CISG.

Furthermore, the parties agreed on the Incoterm “CIF” (*Claimant’s Exhibits Nos. 1, 2, 3, 4*). “CIF” only obliges the buyer to take care of customs, pay the price and accept the goods (*ICC Incoterms 2000; BREDOW/SEIFFERT, p. 81; SPANOGLE/WINSHIP, pp. 178 et seq.*). As CLAIMANT never shipped the OPP, RESPONDENT was never in the position to violate any obligations.

77 Consequently, CLAIMANT wrongfully asserts that RESPONDENT committed a breach of contract on 10 April 2001 by denying its contractual duties (*Statement of Claim at 16*) because at that point in time there were no duties to be fulfilled by RESPONDENT.

78 An interpretation of RESPONDENT’s behavior according to Art. 8 CISG shows that RESPONDENT had no intention not to act in accordance with its only contractual duty, i.e. take delivery of the OPP. RESPONDENT’s statement “if you do not intend to keep your commitment to us to give us an eight percent discount...we will have to consider seriously to return to Polyfilm GmbH for our future requirements of polypropylene film” of 10 April 2001 (*Claimant’s Exhibit No. 7*) meant and could only be understood by CLAIMANT that RESPONDENT would take delivery according to the contractual terms, i.e. an 8% discount. The conditional wording using “if” shows clearly that RESPONDENT would **only** consider returning to its old supplier for its future requirements in case CLAIMANT did not give the contractually fixed 8% discount. In other words, had CLAIMANT delivered the goods for the price agreed upon, RESPONDENT would have fulfilled its part of the contract, i.e. taken delivery and paid the price without any objections.

79 Therefore, CLAIMANT had no right to refuse performance of the contract, and committed a fundamental breach of that contract under Art. 25 CISG.

80 As a conclusion, RESPONDENT lawfully declared avoidance of the contract following an anticipatory and fundamental breach of CLAIMANT. CLAIMANT is therefore not entitled to damages.

B. Should the Tribunal find that a contract with a 4% discount was concluded, RESPONDENT still lawfully avoided that contract

81 Even if the Tribunal finds that a contract with a 4% discount was concluded, RESPONDENT still lawfully declared the contract avoided in the fax of 2 May 2001 (*supra A. I.*). CLAIMANT was not entitled to suspend delivery under Art. 71 (1) CISG [I]. Hence, by doing so, CLAIMANT

substantially deprived RESPONDENT of what it was entitled to expect under the contract and thus committed a fundamental breach of contract under Art. 25 CISG [II].

I. CLAIMANT was not entitled to suspend delivery under Art. 71 (1) CISG

- 82 In its fax dated 27 April 2001, CLAIMANT suspended delivery although the requirements of Art. 71 (1) CISG were not met. It declared that it had canceled shipment and rescheduled it for a later day. Further, it requested RESPONDENT to declare acceptance of its price including a 4% discount and thereby made clear that it would not deliver even after the date of performance unless RESPONDENT accepted the 4% discount (*supra A*).
- 83 Under Art. 71 (1) CISG a party can only suspend delivery when it becomes apparent that the other party will not fulfill a substantial part of its contractual obligations. This is not the case here, since RESPONDENT never refused to perform a substantial part of its obligations.
- 84 First, it may not be argued that RESPONDENT refused to perform the contract dated 3 April 2001 in its fax dated 10 April 2001. RESPONDENT merely insisted on paying 4% less because it erroneously thought that this price had been agreed upon. Nevertheless, it was willing to fulfill its duty to take delivery of the OPP and pay for it. In its fax RESPONDENT stated that it would “seriously consider returning to [its former supplier] for [its] future requirements” (*Claimant’s Exhibit No. 7*). As rightfully asserted by CLAIMANT (*Claimant’s memorandum at 30*), the term “future requirements” was meant and had to be understood as referring to subsequent transactions, and not to that current contract. The term “future” cannot refer to a present transaction. Thus, RESPONDENT never gave any hint that it would consider not performing the present contract. Instead, it made clear that it wanted to execute this contract.
- 85 Second, a substantial part of the contract was not in question. A proportionally small part of the contractual obligations is not a substantial part (*HERBER/CZERWENKA, Art. 71 at 5; RUDOLPH, Art. 71 at 4; SCHLECHTRIEM KOMMENTAR–LESER/HORNUNG, Art. 71 at 8*). This also applies for small portions of an essential part of the contract under Art. 14 CISG (*STAUDINGER-MAGNUS, Art. 71 at 15*). Instead, this obligation has to be of such magnitude as to seriously threaten successful performance (*KAROLLUS, p. 87*). In case law, the right to suspend delivery was even denied where the entire payment of a prior instalment had not yet been made (*OGH, 12. 02. 1998, Austria*). RESPONDENT only doubted its duty to pay 4% of the entire price while 96% of that obligation was going to be fulfilled in complete conformity with the contractual terms. Such a minor part

cannot be found to constitute a substantial part of RESPONDENT's obligations. Hence, CLAIMANT was not entitled to invoke Art. 71 CISG.

- 86 CLAIMANT may also not assert that a *Nachfrist* under Art. 63 CISG was set. CLAIMANT misinterprets the provision's requirements (*Claimant's Memorandum at 41*). A *Nachfrist* cannot be set before performance is due (*STAUDINGER-MAGNUS, Art. 63 at 10; ACHILLES, Art. 63 at 3*). More than that, the strict requirement of a determined expiration date (*STAUDINGER-MAGNUS, Art. 63 at 12 et seq.; ACHILLES, Art. 63 at 3; WITZ/SALGER/LORENZ-WITZ, Art. 63 at 7; HERBER/CZERWENKA, Art. 63 at 3, Art. 47 at 3*) was not met for a declaration of *Nachfrist*. Hence, CLAIMANT may also not rely on Art. 63 CISG.

II. CLAIMANT's unjustified suspension amounted to a fundamental breach of contract

- 87 CLAIMANT's invalid suspension of delivery deprived RESPONDENT of what it was entitled to expect under the contract. CLAIMANT therefore committed a fundamental breach of contract on 27 April 2001 according to Art. 25 CISG.
- 88 The party relying on Art. 71 CISG bears the risk that the requirements of this provision are not fulfilled. Therefore, the party unrightfully relying on Art. 71 CISG is in breach of the contract (*OLG KÖLN, 08.01.1997, Germany; HAMMER, p. 82; HERBER/CZERWENKA, Art. 71 at 11; SCHLECHTRIEM KOMMENTAR-LESER/HORNUNG, Art. 71 at 25; WITZ/SALGER/LORENZ-LORENZ, Art. 71 at 20*). CLAIMANT therefore violated the contract when it suspended delivery.
- 89 This breach amounted to a fundamental breach according to Art. 25 CISG. A party that is left in uncertainty about whether, and if so when, delivery takes place, is substantially deprived of what it could expect under the contract (*OLG HAMBURG, 28.02.1997, Germany*). This is evident where the suspending party knows that time is of the essence as CLAIMANT did in the present case (*Claimant's Exhibit No. 6, Statement of Claim at 5*). After CLAIMANT's cancellation, RESPONDENT knew that timely delivery of the OPP would not take place. CLAIMANT suspended delivery of the entire 1,350 tons of OPP, thus depriving RESPONDENT of what it could have reasonably expected under the contract. Therefore, CLAIMANT's behavior constituted a fundamental breach. This was foreseeable for CLAIMANT (*supra A*). The breach was anticipatory (*supra A*).
- 90 As a conclusion, we submit that CLAIMANT's allegation that RESPONDENT fundamentally breached the contract (*Claimant's Memorandum at 40 et seq.*) is unfounded. On the contrary,

RESPONDENT lawfully avoided the contract. Consequently, CLAIMANT cannot recover damages.

SIXTH ISSUE: THE DAMAGES CLAIMED ARE A MISCALCULATION IN FAVOR OF CLAIMANT

91 Should the Tribunal find that CLAIMANT is entitled to damages, the amount claimed, i.e. \$575,477.98, cannot be recovered since it does not represent CLAIMANT's lost profit, but is a miscalculation in CLAIMANT's favor. Should the Tribunal find that RESPONDENT breached a contract including an 8% discount, CLAIMANT's lost profit would be no higher than \$359,100 [A]. Should the Tribunal find that a 4% discount was agreed upon and RESPONDENT breached the contract, the lost profit would be \$461,700 [B].

A. Should the Tribunal find that CLAIMANT is entitled to damages and apply an 8% discount, CLAIMANT's lost profit would equal \$359,100

92 The claimed amount of \$575,477.98 does not equal the lost profit of CLAIMANT. As correctly asserted by CLAIMANT, the goal of Art. 74 CISG is to place the injured party in the same economic position that it would have been in had the contract been performed (*SHENG-LIN, p. 247; Claimant's Memorandum at 43*). Damages can only be claimed for loss actually suffered. They may not serve as an enrichment for the party that has suffered the loss. Therefore, CLAIMANT can only claim its lost profit and nothing more. CLAIMANT not only applied the wrong discount - 4% instead of 8% - to calculate its lost profit, but furthermore used an obviously wrong calculation method. The following calculation method [I], as opposed to CLAIMANT's calculation [II], leads to the correct amount.

I. Profit equals purchase price minus production costs

93 The basic rule is that the profit equals the price minus production cost. CLAIMANT itself stated that the gross margin was "22 % of the list price" (*Claimant's Exhibit No. 2, Procedural Order No. 2 at 55*). The price for the OPP is \$2,565,000, i.e. the list price of \$1,900 times the 1,350 tons that were ordered. Twenty-two percent of the list price is \$564,300. Hence, the gross margin is \$564,300.

94 To determine the production costs, one has to take the list price of the OPP, i.e. 100% or \$2,565,000, and subtract the gross margin of 22%. This amounts to 78% of the list price, or

\$2,000,700. The production costs are a fixed amount unless the process of production is altered, becomes more effective or cheaper. CLAIMANT did not change the process. Hence, the costs for the production remained the same.

- 95 As the list price and the production costs are fixed figures, the only figure that can be affected by the discount is the gross margin. When given, a discount will not decrease the production cost, but solely the seller's gross margin. Applying this method, the 8% discount is subtracted from the gross margin of 22%. The then calculated profit of 14% equals \$359,100. This amount is not equal to the amount claimed by CLAIMANT, i.e. \$575,477,98. This difference may not be explained by including CIF charges in the damage claim, since they were never spent and would not have increased CLAIMANT's profit. Hence, CLAIMANT wrongly applied Art. 74 CISG and claimed more than its actual profit.

II. CLAIMANT used an incorrect method to determine its damages

- 96 When calculating its lost profit, CLAIMANT unrightfully based its calculation on the assumption that, no matter how much discount it would give, its profit would always remain 22%. Consequently, CLAIMANT wrongfully subtracted the discount not only from its profit but also from the production costs. The following example is used to illustrate this error:
- 97 CLAIMANT's production costs are 78% of the list price. When there is no discount, CLAIMANT's profit is 22% (*Procedural Order No. 2 at 55*). If CLAIMANT gave a 22% discount, its profit would be 0% using the right calculation method. This is also obviously based on sheer logic, as the production costs are a fixed amount. If a discount in the amount of the profit is given, this profit must be \$0. CLAIMANT, however, with its calculation method erroneously reduced the production costs when it subtracted the discount. Using CLAIMANT's method of calculation, after subtracting a 22% discount, it would still gain a profit of \$440,154.
- 98 CLAIMANT's method of profit calculation is not correct for the reasons presented above. Hence, CLAIMANT may claim no more than \$359,100 as opposed to \$575,477.98, which is a severe miscalculation.

B. Assuming that the alleged contract included a 4% discount, CLAIMANT's lost profit would equal \$461,700

- 99 Should the Tribunal find that a 4% discount was agreed upon, the lost profit would be only 18% of the total purchase price, as the gross margin of 22% would have to be decreased by the 4%

discount. The method for calculating the damages remains the same. CLAIMANT's lost profit would then amount to \$461,700.

SEVENTH ISSUE: CLAIMANT IS NOT ENTITLED TO INTEREST

100 Even if the Tribunal finds that CLAIMANT is entitled to damages, it still cannot claim interest. Interest can only be recovered on sums that are in arrears [A]. Even if the Tribunal rules that a claim for interest on unliquidated sums is justified, CLAIMANT may not claim interest from the date of the alleged breach [B]. Additionally, CLAIMANT can only recover interest on four instalments [C].

A. CLAIMANT is not entitled to interest because the damages claimed are no sum in arrears

101 The wording of Art. 78 CISG only allows recovery interest on sums in arrears. In order for a sum to be in arrears, it has to be liquidated (*HONNOLD, Art. 78 at 422; BIANCA/BONELL-NICHOLAS, Art. 78 at 3.1*). However, damages are never liquidated (*HEUZÉ, p. 399; HONNOLD, Art. 78 at 422*). Hence, they are not recoverable under Art. 78 CISG. Should the Tribunal follow the opinion that damages can be liquidated and may therefore be a sum in arrears (*STAUDINGER-MAGNUS, Art. 78 at 8; ACHILLES, Art. 78 at 3; SPANOGLA/WINSHIP, p. 305*), they were not liquidated in the present case. CLAIMANT applied the wrong discount. Additionally, CLAIMANT used an incorrect calculation method in both, the 4% and the 8% discount damage calculation (*supra, Sixth Issue*). Finally, CLAIMANT added an undeterminable amount of CIF charges into the calculation. Hence, it was unpredictable for RESPONDENT which interest to expect under the given circumstances. Art. 78 CISG shields parties from such uncertainties (*ACHILLES, Art. 78 at 3*). Therefore, no interest should be awarded.

B. Should the Tribunal find that CLAIMANT is entitled to interest, interest cannot be charged from the moment of the alleged breach of contract

102 Should the Tribunal find that CLAIMANT is entitled to interest, interest cannot be charged from the moment of the alleged breach of contract. The earliest interest can be claimed from, is the point at which a claim is raised (*ENDERLEIN/MASKOW/STROHBACH, Art. 78 at 4.2*). For the purposes of interest, this is the date when the request for arbitration is received by the other party

(*FOUCHARD/GAILLARD/GOLDMAN, p. 659*) Otherwise the debtor does not know what is expected from it and has no possibility to fulfill its obligation. CLAIMANT raised its claim on 23 May 2002. Consequently, that day is the date from which CLAIMANT can recover interest.

103 Should the Tribunal rule that interest can be claimed from an earlier point in time, CLAIMANT is entitled to claim interest only from the day payment was due (*Statement of Claim at 18*), i.e. 30 days from the 10th day of May, June, July and August.

C. In addition, the claim for interest is restricted to four instalments

104 Finally, RESPONDENT stresses that CLAIMANT has only claimed interest on four of the nine instalments in its Statement of Claim (*Statement of Claim at 18*). Only in its memorandum CLAIMANT asked for interest on all nine instalments and thereby extended its claim (*Claimant's Memorandum at 46*). Hence, any possible claim for additional interest on further instalments should be rejected by the Tribunal in order to guarantee legal certainty.

CONCLUSION

In response to the Tribunal's Procedural Orders No. 1, dated 4 October 2002, No. 2, dated 5 November 2002 and No. 3, dated 11 November 2002, CLAIMANT's Statement of Claim dated 23 May 2001 and CLAIMANT's Memorandum dated 12 December 2002, we respectfully make the above submissions on behalf of our client Medipack S.A. For the reasons stated in this Memorandum for RESPONDENT and for additional reasons which will be detailed in the further proceedings, we respectfully request the Tribunal to declare that:

- The challenge of Dr. [...] is upheld.
- The Tribunal has no jurisdiction to rule on the merits of the case

If the Tribunal holds that it has jurisdiction to rule on the merits of this case, we request it to find that:

- The law chosen by RESPONDENT and CLAIMANT is the Commercial Law of Equatoriana.
- No contract of sale was concluded between RESPONDENT and CLAIMANT.

Alternatively, that:

- The sales contract included an 8% discount.
- RESPONDENT lawfully avoided that contract after CLAIMANT had committed a fundamental breach of contract regardless of the discount rate, i.e. 4% or 8%, and, therefore, CLAIMANT is not to be awarded damages.

Alternatively, that:

- CLAIMANT is not entitled to the amount of damages claimed.
- CLAIMANT is not entitled to interest.

For Medipack Co.

(signed) _____, 7 February 2003

ATTORNEYS
