

GERMAN INSTITUTION OF ARBITRATION (DIS)

CASE No. DIS-SV-B-MOOT 10

MEMORANDUM FOR THE RESPONDENT

On behalf of:

Against:

The Respondent

The Claimant

Medipack SA
395 Industrial Place
Capitol City
Mediterraneo

Equafilm CO.
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Oceanside
Equatoriana



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AAA	American Arbitration Association
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CLOUT	Case Law on UNCITRAL Texts (Internet database), edited by the UNCITRAL Secretariat http://www.uncitral.org/
Contra proferentem	Against the author
Convention, the	see CISG
DIS	German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V)
DIS Rules	DIS Arbitration Rules 1998
Ex officio	On own initiative
Ex tunc	From then
Favorem validatis	Interpretation in favour of the validity of an agreement
IBA	International Bar Association
IBA Rules of Ethics	IBA Rules of Ethics for International Arbitrators
ICC	International Chamber of Commerce
IHK	Industrie- und Handelskammertag
In extenso	All of
Inter alia	Among others
MAL	Model Law on International Commercial Arbitration as adopted by UNCITRAL on 21 June 1985
N.Y. Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 – effective 7 June 1959

Pretium certum	Definite price
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, Rome 1994
UNILEX	International case law and bibliography on the CISG and UNIDROIT Principles (http://www.unilex)

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I. Dr. Arbitrator is biased and should therefore be removed from the Tribunal

1. Even if it cannot be required of arbitrators that they sever all ties with the business community "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges" as U.S. Supreme Court justice Black said in the courts important decision in Commonwealth Coatings, judgement by the U.S. Supreme Court, 11 November 1968. MEDIPACK urges the Tribunal to uphold and safeguard the integrity of the arbitral process by disqualifying Dr. Arbitrator.
2. EQUAFILM has maintained that it does not matter that Multiland Associates, the law firm in which Dr. Arbitrator is now a partner, has represented EQUAFILM on more than one occasion and expects to act for the firm in the future (EQUAFILM's Memorandum, para. 9 et seq.).
3. MEDIPACK submits that the business relationship between Multiland Associates and EQUAFILM does matter. An arbitrator must be and remain impartial and independent and may be challenged if circumstances give rise to justifiable doubts as to his impartiality or independence; Art. 12(2) MAL. Therefore, an arbitrator must be seen as impartial in the eye of the parties, who submit – with no right of appeal - their fate in the arbitrator's hands.
4. MEDIPACK suggests that since lawyers from the Oceania office of Multiland Associates who represented EQUAFILM are biased in favour of EQUAFILM, Dr. Arbitrator as a partner in Multiland Associates is biased. MEDIPACK submits that for the test of "justifiable doubts" to be met, a mere appearance of bias is sufficient, and that establishing actual bias is thus not required as alleged by EQUAFILM; infra 17 et seq.
5. Furthermore, in his acceptance to sit as arbitrator Dr. Arbitrator breached his duty to disclose any circumstances likely to give rise to doubts about his impartiality and independence; Art 12(1) MAL. That, in itself creates justifiable doubts that Dr. Arbitrator is biased in favour of EQUAFILM; infra 29 et seq.

I.1. Dr. Arbitrator is biased in favour of EQUAFILM as his firm Multiland Associates has represented EQUAFILM in the past and expects to do so in the future

6. The former law firm of Dr. Arbitrator and Multiland Associates merged 1 January 2003, more than four months before the scheduled oral hearings in these arbitration proceedings.

Multiland Associates has represented EQUAFILM in several matters in the past prior to the merger. Thus, Dr. Arbitrator is a partner of a law firm where other lawyers or partners have acted directly as counsel for EQUAFILM. Furthermore, the lawyers from Multiland Associates Oceania office have every expectation of representing EQUAFILM in the future (Procedural Order No. 1, para. 18) and thus the firm as such has every expectation of representing EQUAFILM in the future.

7. As a partner in the merged firm Dr. arbitrator is entitled to a share in the total profits of the firm. Furthermore, Dr. Arbitrator has access to information on files and cases from the Oceania office, merely on request to receive this information (Procedural Order No. 2, 19 and 23).
8. A partnership that involves revenue sharing is viewed differently than affiliations between law firms which only consist of referring cases to each other or from the special English barrister system; Bishop & Reed, Secs. III(c)(iv). When the firms share close economic involvement, an appearance of bias is present, because there is a possibility or risk that the arbitrator will render an award in favour of the client, as that would imply an economical advantage to the partner sitting as arbitrator as well as the firm as such.
9. In the present case, a partner's share in the profits in Multiland Associates is in part determined by the profits of the total firm, and must thus be considered a "close economic involvement" which excludes Dr. Arbitrator from sitting on the Tribunal.

I.1.1. As one or more lawyers in Multiland Associates is biased, all lawyers in Multiland Associates appear biased in favour of EQUAFILM

10. MEDIPACK submits that the lawyer who has represented EQUAFILM, and thereby all lawyers and partners of the merged firm, including Dr. Arbitrator, is biased in favour of EQUAFILM due to the firm's direct relationship with EQUAFILM and the following financial interest in the dispute. The firm brands itself to the business community as one entity, as one large international law firm that can handle transnational matters.
11. Although Multiland Associates is not currently representing EQUAFILM, the client relation cannot be characterized as a past business relationship with no relevance in the current dispute. A business relationship with a client does not necessarily involve pending cases at all times. Multiland Associates has every expectation of representing EQUAFILM in the

future; supra 6, which constitutes a dependency on the lawyer from Multiland Associates that has represented EQUAFILM, because the relationship between the parties indeed is ongoing. This dependency would bar the lawyer from sitting as an arbitrator in a dispute involving EQUAFILM.

12. Multiland Associates has a financial interest in the dispute. Any client-firm relationship represents a financial interest, as continuous representations constitute the economic basis of a law firm. When expecting a future representation of an appointing party, any partner from the law firm has a financial interest in the award due to the firm's future income from the party.
13. When one lawyer in a firm is barred from acting as arbitrator because he is biased in favour of a client, all lawyers in the firm – regardless of whether they themselves have acted as counsel for the client - appear biased in a dispute involving this client. As long as the firm has an expectation of a future representation for the client, there exists an economical interest, which creates a risk that an award will be rendered in favour of the client for inappropriate reasons. Consequently, not only the lawyer that has acted for EQUAFILM but also all lawyers in Multiland Associates would be biased and should not sit as arbitrator in the dispute. That is why a prudent arbitrator always searches the firm's databases and inquires with his fellow colleagues for potential conflicts due to present or prior representation.
14. Furthermore, although the Equatoriana and the Oceania offices of Multiland Associates are located in two different countries, the nature of the merger involves the possibility of receiving information on clients and cases involved with any office in Multiland Associates. The physical separation is of no importance, since the distance is not a barrier to communication and exchange of information.
15. EQUAFILM has asserted that the practical separation of the offices excludes bias or dependency between Dr. Arbitrator and EQUAFILM; an argument based on the Laker Airways case; judgement by the English High Court, 20 April 1999 (EQUAFILM's Memorandum, para. 9-10). However, MEDIPACK suggests that this much-criticised judgement is easily distinguished from the question in dispute in this case. The Laker Airways case was decided by the English High Court and turned on the English system of barristers who share chambers but practice independently and do not share revenues. The

independence of barristers is rooted in law, tradition and facts and is unique for the English judicial system. It is based on de facto “chinese walls” between the members of chambers, an assumption that is inapplicable through analogy or otherwise outside of England; Brown Sec. III.

16. Consequently, the distance within offices in the same firm does not change the fact that all partners and lawyers are colleagues in a true partnership and thus, if the lawyer who has acted as counsel to EQUAFILM is biased, all lawyers and partners in Multiland Associates appear biased. As a partner, Dr. Arbitrator should therefore be removed from the Tribunal.

I.1.2. The appearance of bias is sufficient to create “justifiable doubts” about the independence and impartiality of an arbitrator

17. EQUAFILM has argued that the parties agreed to arbitrate under the Arbitration Rules of the German Institution of Arbitration (hereinafter DIS Rules) (EQUAFILM’s Memorandum, para. 25). Even though MEDIPACK contests the existence of an arbitration agreement; infra 36 et seq., it acknowledges the DIS Rules and the UNICTRAL Model Law on International Commercial Arbitration (hereinafter MAL) as applicable to the issue of bias.
18. EQUAFILM has asserted that appearance of bias is not sufficient to remove an arbitrator, but that “a real danger” in form of factual evidence of actual bias is required. It is based on the practice developed under the English Arbitration Act; (EQUAFILM’s Memorandum, para. 12). MEDIPACK disagrees in the applicability of that standard and submits that the decisive test is whether the appearance of bias can be proven.
19. Furthermore, MEDIPACK submits that the consensual nature of arbitration and the lack of appeal require that a rigorous standard of conduct for arbitrators is pertinent in regard to independence and impartiality.
20. Under Sec. 18.1 DIS Rules an arbitrator may be challenged if justifiable doubts exist as to whether the arbitrator is biased in favour of one of the parties or the issue in dispute. The DIS Rules are based on the MAL, which also contains the requirement of “justifiable doubts” in order to challenge an arbitrator. Scholars agree and case law supports that the test is an objective standard, which entails that doubts that are substantiated and justifiable in the eyes of a reasonable and fair-minded person can meet the standard of justifiable doubts; Fouchard et al., p. 571 and challenge decision, Washington D.C., 11 January 1995.

21. Actual bias can only be proved by access to the arbitrator's state of mind, which obviously is not possible, unless the arbitrator voluntarily reveals this. The rules are primarily relevant when the arbitrator denies bias, as the need for protection is greatest in those instances. Consequently, the assessment will be based on an appearance of bias in the preponderant part of challenge cases.
22. The appearance-of-bias test is substantiated by internationally accepted codes of ethics, which are used for interpretation of procedural rules in international arbitration. As the DIS Rules and the MAL do not include any interpretation as to what constitutes "justifiable doubts", it is relevant to look beyond the DIS Rules and the MAL. Although codes of ethics are not directly applicable in this dispute, they can reasonably be used for the interpretation of "justifiable doubts" and the standard of bias that needs to be established.
23. In the IBA Rules of Ethics for International Arbitrators appearance of bias is an accepted standard: "Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias" (italics added); Art. 3.2. Furthermore, in the Code of Ethics for Arbitrators in Commercial Disputes, a set of rules provided by the American Bar Association, appearance of bias is sufficient to create doubts as to the independence and impartiality of the arbitrator; "After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias" (italics added); Canon I, D.
24. Case law and scholars also support the standard of the appearance of bias; Cane et al., p. 84 and judgement by U.S. Supreme, 11 November 1968, in which the court held that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias".
25. Choosing arbitration as dispute resolution method constitutes an exclusion of the traditional court system. Judges in the court system, being guardians of the integrity of the justice system, are limited in their judicial power by strict rules in a system with the right to appeal. The possibility of having a case tried before a different judge to get a second opinion does not exist in the arbitration system. Thus, when choosing arbitration and thereby waiving the

legal guaranties of the court system, the parties expect only arbitrators in whom they may repose complete confidence.

26. Considering the nature of the arbitration system, it is of paramount importance not only that the arbitrators act fairly but also appear to act fairly. In arbitral proceedings as in the courts “justice should not only be done but should also be seen to be done”; Cane et al., p. 84.
27. Acknowledging the appearance of bias as ground for dismissing an arbitrator supports the parties’ confidence in the arbitrators. Accepting only actual bias in form of factual evidence of bias to dismiss an arbitrator may cause awards that the parties cannot accept, which undermines the efficiency of and trust in the arbitration system. Such mistrust is undesirable as it is likely to annihilate arbitration as alternative to the courts. Even though MEDIPACK does not doubt the general integrity of Dr. Arbitrator, MEDIPACK cannot have confidence in the proceedings under the circumstances at hand, which should be given precedence to the effectiveness of the process.
28. In conclusion, the nature of the arbitration system requires arbitrators to possess a high standard of integrity, and to protect this standard by allowing a party to challenge an arbitrator based on the appearance of bias.

I.2. Dr. Arbitrator’s failure initially to disclose his involvement with Multiland Associates creates an appearance of bias which in itself is grounds for dismissal

29. EQUAFILM commenced these proceedings against MEDIPACK at the German Institution of Arbitration (DIS) on 23 May 2002. Following the procedure provided by the DIS, EQUAFILM nominated Dr. Arbitrator as arbitrator in the dispute. The DIS informed Dr. Arbitrator of the nomination 5 June 2002. Dr. Arbitrator accepted the nomination on 21 June 2002 stating: "I know of no circumstances that are likely to give rise to doubts as to my impartiality or independence". At this point in time Dr. Arbitrator was involved in intimate negotiations between his law firm and Multiland Associates to merge (Procedural Order No. 2, 16). Dr. Arbitrator became aware of the relation between the Oceania office and EQUAFILM on 12 August 2002. Only subsequently did Dr. Arbitrator enquire into the nature of previous cases, which information he received on 20 August 2002. He disclosed the relation on 22 August 2002.

30. Under Sec. 16.3 DIS Rules “An arbitrator shall disclose to the parties and the DIS Secretariat circumstances likely to give rise to doubts as to his impartiality or independence also throughout the arbitral proceedings”. In addition, Art. 12(1) MAL states: “when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator shall from the time of his appointment and throughout the arbitral proceedings without delay disclose any such circumstances to the parties unless they have already been informed of them by him”. This duty of disclosure is considered a separate ground for disqualification if the arbitrator fails to abide by it; IBA Rules of Ethics, Art. 4.1.
31. In international arbitration, disclosure is of crucial importance, since it is virtually impossible for the parties to get access to information regarding the relationships of an arbitrator on their own, especially if he is domiciled in a foreign country; Craig, Park, Paulsson, 2000, p. 216. It is the only means to safeguard the integrity of the arbitral process in this respect. If disclosure is taken lightly, the lack of appeal works to bar just results and the promotion of due process in arbitration will be curtailed. The importance of due process is acknowledged by its inclusion on the New York Convention's short list of grounds for refusal of recognition and enforcement.
32. Case law also illustrates that failing to disclose relevant information is considered a separate ground for disqualification; judgement by U.S. Supreme Court, 11 November 1968. In this case an arbitrator had failed to disclose a relationship to one of the parties, which led to setting aside the award.
33. The requirement is that "any circumstances" are disclosed, not only what the nominated arbitrator is immediately and actually aware of. From 5 June 2002 and until 21 June 2002 when accepting the nomination, Dr. Arbitrator ought to have enquired on a possible relation between Multiland Associates and any of the parties to the arbitral proceedings. Two months passed before Dr. Arbitrator became aware of the relation between the Oceania office and EQUAFILM. It is submitted that Dr. arbitrator ought to have become aware of the relationship within that period, in light of the express requirement to enquire on and disclose any relevant circumstances. In judgement by United States District Court, 9 November 1999, the court vacated an award because the arbitrator had failed to make reasonable enquiries and disclose the relationship he ought to have been aware of. The arbitrator’s law firm had

represented a parent company to the firm of a party, but the arbitrator was not aware of the fact that his law firm had represented the parent company, since he only ran a conflict check on the firm of the party, and not the parent company. The court stated: "...though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality...".

34. If Dr. Arbitrator had enquired timely on a possible relationship between Multiland Associates and one of the parties, he would have realized the relation with EQUAFILM much sooner, and would have been able to disclose this potentially disqualifying fact to the DIS before accepting his nomination. If the negotiations to merge were confidential and Dr. Arbitrator was not in a position to disclose the possible relation, he should not have accepted the nomination, since the merger might become reality, and it might affect his position in regard to the parties.
35. This conduct by Dr. Arbitrator is contrary to the generally accepted duty to enquire on possible relations and the duty to disclose such relations. His misconduct causes MEDIPACK to have reasonable doubts of his independence and impartiality, and he should be removed from the Tribunal on that ground.

II. The Tribunal does not have jurisdiction to decide on the merits of the dispute

36. EQUAFILM has argued that the Tribunal has jurisdiction over the merits of the case. Thus, EQUAFILM considers the mistake regarding the name of the arbitration institution in the 15 December 2000 contract to be immaterial, and alleges that it may be inferred from circumstances and knowledge of the existing German institutions of arbitration that the institution appointed was the DIS. MEDIPACK disagrees, and submits principally that the arbitration clause of the 15 December 2000 contract is invalid, and alternatively that as no contract was ever formed on 3 April 2001 there was no agreement to arbitrate.

II.1. The arbitration clause in the 15 December 2000 contract is invalid, as it appoints a non-existing institution of arbitration and is thus inoperative

37. The cornerstone of arbitral proceedings is the free will of the parties to arbitrate. MEDIPACK's assent to arbitration should not be regarded as assent to arbitration under any and all circumstances but, as it is the case with other contract terms, as tied to specific expectations, for example that a specific set of procedural rules were agreed on. It would be

unreasonable to presume that MEDIPACK intended to provide EQUAFILM with the right to choose among all German institutions of arbitration. Such a carte blanche would tilt the balance of the contract, as it would enable EQUAFILM to choose the most advantageous institution once the issue in dispute was known.

II.1.1. The arbitration agreement of 15 December 2000 points to the rules of a non-existing institution and is too ambiguous to be amended by means of interpretation

38. The institution designated in the 15 December 2000 contract does not exist. This fact is acknowledged by EQUAFILM. However, EQUAFILM has asserted that this must lead to the appointment of the most likely German institution of arbitration, and that a legal practice exists, which entitles the Claimant to select the arbitration institution in case of doubt (EQUAFILM's Memorandum, para. 27).
39. The contract signed by the parties on 15 December 2000 reads "Any controversy or claim between Equafilm Co. and Medipack S.A. shall be determined by arbitration in accordance with the rules of the German Arbitration Association by a panel of three arbitrators with the place of arbitration being Vindobona, Danubia and the language of the arbitration English".
40. In accordance with Art. 8.1 MAL the arbitration clause is invalid if it is "inoperative or incapable of being performed". This standard is recognized internationally beyond MAL see e.g. NY Convention Art. II.3. and Redfern & Hunter, p. 177. Case law generally takes a pragmatic approach to the interpretation of misspelled or otherwise incorrectly named arbitration institutions. It is common ground that if the institution intended can be identified with a significant degree of certainty, such clauses will remain effective albeit their apparent inoperability; Fouchard et al., p. 264. However, there is not a principle of in favorem validatis; Fouchard et al., p. 261. Hence, tribunals do not overstrain the wording of arbitration clauses to a point where the intention of the parties is neglected. The intention of the parties is still paramount. General examples of inoperative arbitration clauses are ones which are too broadly phrased, ambiguous or simply meaningless; Redfern & Hunter, p. 178, Craig, Park, Paulson, 1990, pp. 157 et seq.
41. Examples from case law rendering arbitration clauses invalid due to such flaws are:
42. Award of the Zurich Chamber of Commerce, 25 March 1996, in which a clause referring to the non-existent "Arbitration Commission in Switzerland" was held invalid;

43. Judgement by Vaud Cantonal Court, 30 March 1993 which held a clause worded “International Chamber of Commerce in Paris” invalid on the grounds that since the word “Milan” had appeared under the heading “forum” in earlier contracts, the Tribunal could not resolve the question of the competent jurisdiction “in a clear and indisputable manner”;
44. Judgement by Oberlandesgericht Hamm, 15 November 1994, where it was found that the wording “Arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich” was too ambiguous and therefore void;
45. Award of CA Grenoble, 24 January 1996, where the Tribunal did not interpret the parties' clause which read “International Court of Arbitration of The Hague” as meaning “The Permanent Court of Arbitration in The Hague”.
46. MEDIPACK does not challenge that the DIS is German, that it is an association or that it conducts arbitration. However, it is not the only body, which can be described by these three words. There are numerous commercial associations conducting arbitral proceedings in Germany e.g. IHK zu Leipzig institutionelles Schiedsgericht, Hamburg Friendly Arbitrage and Berlin Arbitration Court, all of which can be said to be German arbitration associations.
47. It follows that any choice of procedural rules based on the clause of the 15 December 2000 contract will entail a choice among these, and thus uncertainty. Since the default dispute resolution method is court proceedings, it takes something to deprive a party the right to have a case tried before the courts. This something is the consent of the party. Unless such consent is present, arbitration is not an option.
48. MEDIPACK denies having agreed to arbitrate under circumstances that allow EQUAFILM to choose any institution that matches the wording (Statement of Defence, para. 11). Therefore, EQUAFILM must provide proof that MEDIPACK did in fact convey an assent to arbitrate specifically under the DIS. As there was never even mention of arbitration during the negotiations, it is unlikely that MEDIPACK intended to agree to the DIS rules; all the less to EQUAFILM having a right of choice. As it cannot be proven with a reasonable degree of certainty which of several German institutions of arbitration the contract of 15 December 2000 appoints, the Tribunal must find that it does not have jurisdiction and defer the case to the courts.

II.1.2. EQUAFILM as the author of the 15 December 2000 contract must bear the risk of its ambiguousness, as EQUAFILM would otherwise be rewarded for having drafted the arbitration clause without due care

49. As mentioned supra 37 the consent of MEDIPACK to arbitrate covers not only to the dispute resolution method, but also the application of procedural rules, which have different advantages and disadvantages depending on the issue in dispute. If EQUAFILM is allowed to choose among a number of possible institutions in case of doubt, EQUAFILM can browse among a number of procedural regimes, “forum shopping”, and thus choose the regime most advantageous to it. Logically, this advantage on EQUAFILM’s part would constitute a detriment to MEDIPACK.
50. Such differences are for instance that arbitration before the DIS is almost twice as expensive as arbitration before The Court of Arbitration of the Hamburg Chamber of Commerce. It might be argued that the latter is best suited for national German arbitrations. However, its procedural rules are readily available in English, which makes it perfectly possible to arbitrate under this institution.
51. Furthermore, Sec. 18.1 DIS Rules provides for the same standard as MAL regarding the challenge of an arbitrator, i.e. “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”. In contrast, Art. 20, Sec. 3 of Local Usage in Commodity Trade in Hamburg reads “An arbitrator may be challenged for the same reasons and on the same conditions which justify challenging a judge.” Now, MEDIPACK does not know the German law on impartiality or independence of judges. However, it is fair to believe that it is not entirely analogous with the MAL/DIS standard regarding arbitrators. It follows that MEDIPACK may reasonably fear that its legal position on a material issue is in the hands of EQUAFILM if the choice of procedural rules is based on EQUAFILM’s allegations of its own intentions when drafting the arbitration clause of the 15 December 2000 contract.
52. In accordance with Art. 4.6 UNIDROIT Principles the *contra proferentem* doctrine applies to international commercial contracts. Thus ambiguities are held against the author of the contract. Allowing EQUAFILM the choice of several institutions, will award the ambiguity created solely by EQUAFILM, and thus infringe the rights of MEDIPACK to have its case heard before the courts and the *contra proferentem* doctrine. Conversely, dissolving the Tribunal in favour of regular court proceedings would leave both parties in an equal position

with all ordinary procedural options, thus protecting MEDIPACK's rights and leaving EQUAFILM procedurally unscathed.

II.2. Even if the arbitration clause in the 15 December 2000 contract is held to appoint the DIS, the arbitration clause is not binding on the parties as a contract was never formed

53. As discussed *infra* 67 et seq., it is MEDIPACK's submission regarding the merits of the case that no contract was ever formed between the parties as there was never agreement on the issue of the price. For the sake of the present submissions, the non-existence of the main contract is presupposed. EQUAFILM has alleged that even if the contract is invalid, the Tribunal retains its competence to rule on the merits of the dispute due to the separability of the arbitration clause. In response, MEDIPACK submits that since no contract was formed on 3 April 2001, no arbitration clause was agreed to either.

II.2.1. The Tribunal has no jurisdiction beyond the competence to rule on its own jurisdiction, as the doctrine of separability cannot be applied to the current dispute

54. MEDIPACK acknowledges the doctrine of separability as a universally recognized rule of international arbitration. The principle is also found in Art. 16 MAL. However, MEDIPACK respectfully disputes the pertinence of the doctrine in this case. Scholars agree that a distinction must be made between contracts becoming invalid, and contracts never even formed. As for contracts becoming invalid *ex tunc*, the doctrine of separability upholds the validity of the parties' common intention of subjecting disputes to arbitration, thus leaving the resolution of the economic aftermath under the jurisdiction of the Tribunal. However, in cases where no contract is formed, logically there is neither an agreement on the arbitration clause; Varády et al., p. 126. Svernlov, p. 37.
55. EQUAFILM has referred to Bermuda JOC Oil, award of The USSR Chamber of Commerce and Industry, 9 July 1984, in support of the application of the doctrine of separability in this case. However, in judgement by Court of Appeal, Bermuda, 7 July 1989, in reviewing the 1984 Russian award the court held that the applicability of the doctrine of separability is dependent on the distinction between invalid and non-existent contracts. If a contract is never formed, neither is the arbitration clause; Várady et al, p. 128.

56. In conclusion, it is MEDIPACK's submission that since there was never a contract in the current dispute, the arbitration clause of the 15 December 2000 contract is useless, regardless of whether the arbitration clause is valid in itself.

III. The domestic commercial law of Equatoriana applies to the dispute arising from the 3 April 2001 contract

57. EQUAFILM has argued that the CISG is the applicable law governing the substantive issues in the current dispute. MEDIPACK disagrees and submits that the parties agreed on the national commercial law of Equatoriana.
58. The 15 December 2000 contract states: "Choice of law. This contract is subject to the commercial law of Equatoriana". According to EQUAFILM this choice of law clause merely reaffirms the default rule in Art. 1(1)(b) CISG that if the rules of private international law points to the application of the sales law of a CISG contracting state, the CISG applies. MEDIPACK disputes this and will demonstrate that the parties made an explicit choice of law in the 15 December 2000 contract, thereby contracting out of the CISG under Art. 6 CISG, making the dispute subject to the national commercial law of Equatoriana.

III.1. The choice of law clause in the 15 December 2000 contract was incorporated into the 3 April 2001 contract

59. MEDIPACK agrees that the choice of law clause in the 15 December 2000 contract was incorporated into the 3 April 2001 contract, if that contract was formed. This is the mutual understanding of the parties.
60. Had EQUAFILM argued that the choice of law clause was not incorporated into the 3 April 2001 contract MEDIPACK would have referred to the wording " Similar terms..." (Exh. No. 3) which shows that MEDIPACK intended such incorporation.

III.2. The choice of law clause points to domestic Equatoriana law, as the actual words must be afforded meaning and as any uncertainty as to the parties intentions must be held against EQUAFILM as the author of the clause

61. Due to the ambiguities in the choice of law clause drafted by EQUAFILM the tribunal must determine which law governs the dispute. MEDIPACK submits that several principles of interpretation support its submission that the parties indeed did derogate from the CISG in accordance with Art. 6 CISG.

62. Firstly, the principle of effective interpretation enunciates that contract clauses are presumed to have (some) legal effect, and that they should be interpreted to empower that intended effect; Art. 4.5 UNIDROIT Principles. Art. 1(1)(b) CISG appoints the CISG as the default regime. Thus, to have any significance, the choice of law clause must be read to derogate from the CISG and appoint the national commercial law of Equatoriana.
63. Secondly, the *contra proferentem* doctrine, which points to an interpretation in EQUAFILM's disfavour, since EQUAFILM has drafted the clause, is also reflected in Art. 8(2) CISG.
64. Thirdly, MEDIPACK asks that the Tribunal should attempt to infer the meaning that a reasonable person would have given to the clause, cf. Art. 8(2) CISG and find that the parties intended the national commercial law of Equatoriana to apply. The meaning attachable to statements is subject to an objective standard, giving only effect to the understanding that a reasonable person of the same kind and under the same circumstances would have had.
65. It is not uncommon that merchants wish to solve conflicts under their own national law. To have cases decided under a well known legal system provides for legal certainty and is practical and advantageous for the party, in that its advisors are familiar with that legal system. It follows that it is reasonable to assert that when EQUAFILM drafted the choice of law clause, it intended that exact effect. In reading and adhering to such a clause, MEDIPACK was reasonable in thinking that EQUAFILM wanted its own legal system to apply. Had EQUAFILM intended the CISG to apply, and wished to emphasize this for reasons of clarity, it could simply have stated, "the CISG is to apply". By not doing so EQUAFILM created a reason for MEDIPACK to believe that the national law of Equatoriana would apply. It would be unreasonable if EQUAFILM were allowed to benefit from its own careless drafting.
66. Thus, the wording of the choice of law clause may reasonably be understood to appoint the national commercial law of Equatoriana, and the Tribunal must support MEDIPACK's reliance on the clause, and appoint the national commercial law of Equatoriana to apply to the merits of the case.

IV. No contract was formed on 3 April 2001 as the parties did not agree on a price

67. MEDIPACK submits that no contract was formed during the telephone conversation on 3 April 2001 regardless of whether the contract is governed by domestic Equatoriana law or the CISG.
68. Formation of a contract requires that the parties agree on all essential terms. MEDIPACK and EQUAFILM did not agree on the price and therefore the essential meeting of the minds that is the basis of every contract was not present. MEDIPACK was under the legitimate impression that it bought 1,350 tons of OPP film at a price of \$ 1,900 per ton less eight percent discount whereas EQUAFILM believed it was selling at \$ 1,900 less four percent discount.

IV.1. No valid contract was formed between the parties as the domestic law of Equatoriana precludes the conclusion of a contract with no price

69. Following the submission of MEDIPACK that domestic Equatoriana law governs the dispute; supra 57 et seq., it is further submitted that the contract was not validly concluded on 3 April 2001 as the parties did not – with the required level of certainty – reach an agreement regarding the price of the 1,350 tons of OPP film.
70. According to domestic Equatoriana law governing the formation of contracts there is a very strict requirement that the quantity and the price of the goods of a contract must be clearly determined or determinable at the time of the formation of contract (Procedural Order No. 2, 36). In other words; domestic Equatoriana law does not allow a contract to be concluded without a clear agreement on the price. As EQUAFILM thought they were selling at a four percent discount and MEDIPACK believed the agreed discount to be eight percent, the price was not determined or determinable at the time of the formation of the contract. Consequently, the contract is invalid under domestic Equatoriana law. MEDIPACK notes that EQUAFILM acknowledges this (Procedural Order No. 2, 36).

IV.2. Even if the CISG applies no valid contract was formed between the parties as the Convention does not allow for the conclusion of contracts without a fixed price under the present circumstances

71. EQUAFILM has argued that Art. 14 CISG must be read in conjunction with Art. 55 CISG (EQUAFILM's Memorandum, paras. 68 et seq.). It has further argued that the combination of the two articles proves that contracts in which the price is not fixed are allowed under Art. 14 CISG.
72. MEDIPACK respectfully submits that the interpretation suggested by EQUAFILM should be rejected. MEDIPACK submits that Art. 55 CISG does not alter the requirements of Art. 14 CISG. Further, MEDIPACK submits that Art. 14 CISG establishes the presumption that when no price is agreed upon the parties did not conclude a contract.
73. MEDIPACK submits that the interpellation between Arts. 14 and 55 CISG should be understood as to the effect that Art. 55 CISG deals with situations where the parties have (expressly or implicitly) derogated from Art. 14 CISG or where the Convention Part II on formation of contract has not been adopted and leaves Art. 14 CISG inapplicable. This interpretation allows for both of the provisions to have effect without contradicting each other and is supported in literature; Schlechtriem, p. 461.
74. This interpretation, in addition to resolving the apparent conflict between Arts. 14 and 55 CISG also gives meaning to the word "validly" in Art. 55 CISG. Since the Convention as a main rule is not concerned with validity; Art. 4(a) CISG, the word "validly" in Art. 55 CISG would be meaningless, were it not to signify that open-priced contracts are not always valid.
75. The 1978 Secretariat Commentary to (what later became) Art. 55 CISG supports this view: Art. 14(1) CISG "provides that the proposal for concluding a contract is sufficiently definite so as to constitute an offer if, inter alia, "it . . . expressly or impliedly fixes or makes provisions for determining . . . the price". Therefore, article [55] has effect only if one of the parties has his place of business in a Contracting State which has ratified or accepted this Convention as to Part III (Sales of goods) but not as to Part II (Formation of the contract) and if the law of the State provides that a contract can be validly concluded even though it does not expressly or impliedly fix or make provisions for determining the price."

76. The suggested interpretation is also supported by scholars; e.g. Schlechtriem pp. 109 et seq., and by case law; *Pratt & Whitney v. Malev*, judgement by Supreme Court of Hungary, 25 September 1992, and arbitral award of the Russian Federation Chamber of Commerce and Industry, 3 March 1995, which both reached the result that Art. 14 CISG bars open-priced contracts. Even if EQUAFILM believes that the Malev case may be criticised (EQUAFILM's Memorandum, paras. 72 et seq.), it cannot be criticised in relation to its conclusion regarding Art. 14 CISG.
77. However, the fact that the parties may derogate from the demand by Art. 14 CISG that a price be fixed means that the article cannot be said to contain a strict *pretium certum*-rule. Its meaning must therefore be of interpretative value. In other words: "there should be a presumption that the parties do not intend a contract to be formed before the price is fixed or determinable. If it can be proved that the parties intended to form the contract despite the open price, that intent should prevail"; Karollus, Sect. IV.3 – whether one wishes to express this latter situation to the effect that the parties have impliedly derogated from Art. 14 CISG is rather a matter of taste.
78. Seen in this light Art. 14 CISG simply expresses the typical frame of mind of a contracting party: It is unlikely that a party meant to enter into a contract, if the quality and quantity of the goods and the price were not known. Therefore, it should only be found that a contract was formed without these three factors being fixed or determinable if special circumstances are present. It is submitted that no such special circumstances are present in the dispute between EQUAFILM and MEDIPACK.
79. EQUAFILM supports its view of the interrelationship between Arts. 14 and 55 CISG on two judgements, namely judgement by *Handelsgericht des Kantons Argau*, 26 September 1997 and judgement by *Oberster Gerichtshof*, 10 November 1994. Allegedly, the courts held that contracts had been concluded in these cases notwithstanding that the parties failed to specifically fix the purchase price. It is submitted that the cases do not support EQUAFILM's legal standpoint.
80. In the judgement by *Handelsgericht des Kantons Argau* the parties had a number of previous dealings and had thus established a trade usage. The trade usage was adhered to in the disputed sale and a reasonable understanding lead to the conclusion that the price had been impliedly set by reference to the previous tradings. Furthermore, the plaintiff seller had

manufactured the goods ordered uniquely for the defendant and they were not suited for sale to others. Transactional consequences that are not present in the case between EQUAFILM and MEDIPACK made it highly unreasonable to declare the sale null.

81. In the judgement by Oberster Gerichtshof the parties had effectuated a sale of chinchilla pelts at a price of DM 35-65. The parties had agreed to sell at a price range of DM 35-65 and had thus made a derogation from Art. 14 CISG, which differentiates the case from the present situation. The pelts had been resold and there had been no protest to the price. Thus, in this case too transactional consequences were heavily against the result that the sale was null.
82. In both cases the presumption that the parties had not intended to conclude a contract without a price was rebutted by factors not present in the case between EQUAFILM and MEDIPACK: transactional considerations and party behaviour.
83. In summary, the suggested interpretation of the relationship between Arts. 14 and 55 is supported by the wording of the Convention, by the preparatory works, by scholars and by case law. Therefore, MEDIPACK submits that Art. 14 CISG bars open-priced contracts under the present circumstances.

IV.2.1. The interpretation of the relationship between Arts. 14 and 55 CISG suggested by EQUAFILM denies meaning to Art. 14 CISG

84. MEDIPACK submits that the Convention should be interpreted so as to give effect to all of its provisions rather than to deprive some of them of effect.
85. The interpretation proposed by EQUAFILM effectively means that open-priced contracts are valid without limitations (EQUAFILM's Memorandum, paras. 68 et seq.). Art. 14(1), second sentence CISG states that a "proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price". The demand by this provision that an offer determine the price, either implicitly or expressly, would be deprived of any effect if the interpretation submitted by EQUAFILM that open priced contracts are valid without limitations were to be adopted.
86. Furthermore, MEDIPACK submits that the plain meaning of the wording of Art. 55 CISG "...when a contract has been validly concluded..." could hardly be understood in any other sense than to the effect that the provision is subsidiary to the contract formation rules.

87. Therefore, the interpretation suggested by EQUAFILM should be rejected.

IV.2.2. The requirement of Art. 14 CISG regarding price was not met as it was objectively impossible to identify an agreed price

88. Art. 14 CISG requires that the offer must fix the price to be paid or make provision for determining the price; supra 71 et seq.

89. EQUAFILM and MEDIPACK, respectively, believed they had fixed the price and none of them wished to defer the fixation of price for later or wanted the price to be determined according to the market price.

90. Lack of agreement on the discount results in lack of agreement on the price as the discount is as essential as the list price when determining the contract price. Both list price and discount influence and determine the price and just as an agreed discount is useless without a list price, a list price is equally useless without the fixed discount in the present case.

91. Therefore, the requirement of Art. 14 CISG was not met during the negotiations between EQUAFILM and MEDIPACK. Even though the parties respectively believed their offer to be unmistakable, it turned out that both misunderstood the other party. The parties never reached any agreement on the price, and consequently no contract was formed in accordance with Art. 14 CISG.

IV.2.3. The parties did not derogate from Art. 14 CISG in order to apply Art. 55 CISG

92. The parties may derogate from or vary the effect of any of the provisions in the CISG; Art. 6 CISG. This can also be done implicitly; Schlechtriem, p. 54.

93. Case law supports that Art. 55 CISG cannot be employed where the parties have indicated that the price should be otherwise set. In award of the Russian Federation Chamber of Commerce and Industry, 3 March 1995, Art. 55 CISG could not be applied as the parties had implicitly indicated the need to reach an agreement on the price in the future.

94. MEDIPACK and EQUAFILM did not state, neither by fax nor by any other behaviour, that Art. 14 CISG should be derogated from. Hence no explicit derogation was made.

95. In order to determine whether an implicit derogation from Art. 14 CISG was made, Art. 8 CISG must be applied; Bianca & Bonell, pp. 55 et seq. It is submitted that no reasonable

person would consider the negotiations between the parties as including such derogation. Both EQUAFILM and MEDIPACK firmly believed that they had reached common agreement on a fixed price in accordance with Art. 14 CISG. It cannot reasonably be derived from the mere fact that a dissent was present that derogation from Art. 14 CISG was intended by the parties.

96. Consequently, no derogation was made in accordance with Art. 6 CISG, neither explicitly nor implicitly. Art. 14 CISG therefore applies in its entirety.

IV.3. Should the Tribunal hold that a contract with an open price term is allowed under Art. 14 CISG in this case, the parties never formed a contract as there was never an exchange of corresponding offer and acceptance

97. EQUAFILM has stated that since the parties agreed to the list price of \$ 1,900 they concluded a binding contract, irrespective of whether the discount to apply should be four or eight percent (EQUAFILM's Memorandum, paras. 56 et seq.). It is MEDIPACK's submission that in the present case MEDIPACK could only be bound by an open price term if this was intended by the parties; Art. 8 CISG. MEDIPACK submits that the parties respectively intended a four and an eight percent discount to apply and neither party intended any price in between whether specifically agreed upon or determined under Art. 55 CISG.
98. The intentions of the parties take priority over any rule contained in the Convention. This principle of freedom of contract follows from Art. 6 CISG. To allow an open price term contract under the Convention presupposes that the parties wanted such a contract.
99. It is submitted that the parties never formed a contract on 3 April 2001 as there was a latent dissent regarding the discount to be deducted from the list price of \$ 1,900 and in the alternative, that the parties' communications could only reasonably be understood as an application of an eight percent discount to the 3 April 2001 contract.

IV.3.1. The parties never formed a contract on 3 April 2001 as there was a latent dissent regarding the discount to be deducted from the list price of \$ 1,900

100. In order to conclude whether or not the parties actually reached an agreement, it is necessary to introduce the relevant facts of the negotiations which took place around 3 April 2001.
101. The contract for the sale of OPP film was allegedly concluded during the telephone conversation between EQUAFILM and MEDIPACK on 3 April 2001. There is only limited

information available as to the content of the conversation. It was mentioned that the list price had gone up to \$ 1,900 from \$ 1,800 but no specific discount was mentioned (Procedural Order No. 2, 34).

102. The parties' disagreement was not evident during the telephone conversation where they believed they were in agreement. Hence, other communications between the parties must be interpreted in order to establish what they really intended. According to Art. 8(3) CISG the subsequent conduct of the parties can be a source for determining the parties' intent.
103. The subsequent acts and statements between the parties reveal that there was never any corresponding offer and acceptance even if this remained undisclosed for a while. EQUAFILM wrote in a fax to MEDIPACK on 3 April 2001 (Exh. No. 4) that a four percent discount was to apply. MEDIPACK believed this to be an error and responded on 6 April 2001 (Exh. No. 5) that the agreed discount was eight percent and asked EQUAFILM to confirm this price. On 9 April 2001 EQUAFILM responded (Exh. No. 6) that it did not agree that the discount was eight percent. It hereby became evident that the parties failed to reach a common understanding of the price. The statements showed that there was a price-gap between the parties. They both relied on prices that the other party was not willing to accept.
104. The parties were in agreement on the quantity and quality of the OPP film and MEDIPACK was aware that EQUAFILM's list price had risen to \$ 1,900. That is evidenced in the order confirmations exchanged between the parties on 3 April 2001 (Exhs. Nos. 3 and 4). Furthermore, they were both aware that some discount should be applied. EQUAFILM mentions the discount in its order confirmation (Exh. No. 4) and MEDIPACK refers to "the discounted price we are to pay" in its order confirmation (Exh. No. 3). However, they did not have mutual understanding and never agreed on the size of the discount.
105. The price intended by EQUAFILM for the sale of 1,350 tons of OPP film would be \$ 2,464,200 (1,350 tons x 1,900 \$/ton less 4 % discount). The price intended by MEDIPACK for the purchase was \$ 2,359,800 (1,350 tons x 1,900 \$/ton less 8 % discount). The difference between the two prices is thus \$ 104,400 (\$ 2,464,200 - \$ 2,359,800) - which can hardly be perceived as a trivial difference. It is a difference of such magnitude that MEDIPACK would never have contracted with EQUAFILM in the first place if the price suggested by EQUAFILM was to apply.

106. The parties' intention to buy or sell cannot be separated from the terms, which are to apply. It might not have been important for MEDIPACK whether the OPP film was opaque or transparent but it would always be of crucial significance what the price for the film would be. The price is perhaps the single most important term in a contract; Honnold, p. 152.
107. EQUAFILM has argued that the faxes exchanged between the parties clearly indicated the parties' intentions to be bound to the contract (EQUAFILM's Memorandum, paras. 50 et seq). MEDIPACK contests this position.
108. It is true that the faxes on the face seemed to demonstrate acceptance and intent to be bound by the contract. MEDIPACK wrote that it was "pleased to confirm..." that it agreed on the purchase (Exh. No. 4) and EQUAFILM likewise confirmed the agreement and repeated the conditions it believed were agreed. However, MEDIPACK's intent only went as far as the intent to buy at an eight percent discount and EQUAFILM only accepted to sell at a four percent discount. The intent is connected to the price and does not stand alone. As soon as the parties realized that the other party referred to a different discount, they stated that they were not interested in the other party's offer. MEDIPACK wrote on 6 April 2001 (Exh. No. 5) that EQUAFILM's confirmation contained a "major error in regard to the price". EQUAFILM wrote in the fax of 9 April 2001 (Exh. No. 6) that it had offered its best price being a four percent discount and on 12 April 2001 it confirmed that the eight percent discount mentioned in the first offer was a "one-time discount".
109. Since the order confirmations were all based on misunderstandings they fail to prove any intent to conclude a contract. An order confirmation must confirm the agreement but there was no agreement to be confirmed, even if the parties originally thought so, as the parties had different understandings of the price. It is thus disputed that the intent can be regarded as independent of the price as argued by EQUAFILM.
110. To disagree whether the discount should be four or eight percent is substantially different from agreeing that the price should be somewhere between four or eight percent. Following EQUAFILM's submission that the parties concluded a contract with an undetermined discount would not be in accordance with the parties' intent as their intent was to apply a discount of respectively four and eight percent.

111. Since MEDIPACK never agreed to buy at the price offered by EQUAFILM and vice versa it is impossible to establish any agreement between them. Without an agreement there can be no contract between the parties. MEDIPACK had no intent to conclude a contract at any other price than the list price less an eight percent discount. Consequently, the parties never agreed on a sale under the CISG.

IV.3.2. In the alternative, the parties' communications could only reasonably be understood as an application of an eight percent discount to the 3 April 2001 contract

112. EQUAFILM has argued that the 7 December 2000 fax (Exh. No. 1) must reasonably be understood as an agreement that a four percent discount should apply to future orders. EQUAFILM has argued that it "clearly follows" from the fax of 7 December 2000 that it was EQUAFILM's intention to charge the list price less a discount for future offers (EQUAFILM's Memorandum, para. 59). MEDIPACK agrees that a discount was to apply but disagrees on the interpretation of the 7 December 2000 fax.

113. It is submitted that a reasonable understanding of the communications between the parties is that an eight percent discount would apply to future orders placed by MEDIPACK; Art. 8(2) CISG.

114. Since the details of the telephone conversation of 3 April 2001 are not available, the intentions of the parties must be derived from the written communications between the parties to resolve what their intentions were when they allegedly concluded the contract on 3 April 2001.

115. In the fax of 7 December 2000 EQUAFILM promised MEDIPACK that it would "always receive our best price". The fax also stated: "our usual price for favoured customers is a discount of four percent from our list price". Since the "best price" seems to be accentuated as a better price than the "usual price for favoured customers" MEDIPACK could reasonably expect to receive a higher discount than the four percent offered to favoured customers.

116. The fax further stated that EQUAFILM would receive a discount of eight percent and declared this price to be "the best price we have ever offered for any customer for any purchase". Hence, the eight percent discount was referred to as the "best price". Consequently, it was reasonable of MEDIPACK to believe the eight percent discount was the price it would receive for future orders.

117. The fax generally invited MEDIPACK to do business with EQUAFILM. It contained a first paragraph where MEDIPACK in broad terms stated how the parties had a great opportunity to trade on favourable terms. The first paragraph is of little value with regard to determining the specific terms, which should apply to the parties' future business as it is held in broad terms. The language of the first paragraph suggests that it was hardly intended to be an offer; rather it seems to be a general statement welcoming the initiation of a business relationship between the parties.
118. The second paragraph of the fax of 7 December 2000 contains the detailed description of the first contract. It describes the quantity and quality of the OPP film and states the list price and the discount. It does not state that the discount is introductory. When MEDIPACK contacted EQUAFILM on 3 April 2001 regarding the second order MEDIPACK could reasonably expect that if the terms had changed from the first contract EQUAFILM would inform MEDIPACK hereof. Considering the fact that it had been mentioned that the list price had increased to \$ 1,900, it seems odd that EQUAFILM did not inform MEDIPACK that the discount had decreased, as both parameters were equally important for determining the price. It was useless knowledge for MEDIPACK to know that the list price had increased if it was not informed of the discount as well. However, EQUAFILM remained silent about the decrease in the discount.
119. Taking into account that the quantity ordered on 3 April 2001 was more than six times greater than the quantity ordered under the first contract, it was unreasonable to believe that MEDIPACK would agree to an increase in the price. It is hardly the expectation of a merchant that the price will increase when an order significantly larger than the previous is placed. EQUAFILM could not ignore the fact that it would be a surprise to MEDIPACK if the discount were lower. Consequently, EQUAFILM could not be unaware that MEDIPACK was impliedly referring to the eight percent discount and believed it was buying at this price. As EQUAFILM did not mention that it was charging the list price less four percent it impliedly agreed to the discount of eight percent, as it was evident that this was the price MEDIPACK offered to pay.
120. In any event, the conditions stipulated in the fax of 7 December 2000 regarding the future business relationship were at a minimum vague and ambiguous. As it was EQUAFILM that wrote the letter and thus created the ambiguity it should bear the consequence hereof. This

solution finds support in the *contra proferentem* principle according to which uncertainties must be interpreted against the drafter.

121. Consequently, it was not reasonable to believe the four percent discount as agreed upon. It was not specifically mentioned and does not impliedly follow from the fax of 7 December 2000.
122. It must be concluded that the parties did not expressly agree on a fixed price, as there was a latent dissent. Moreover, it is impossible to determine that they intended to conclude a contract with an open price as alleged by EQUAFILM. Furthermore, it was reasonable to regard the eight percent discount as impliedly agreed upon as both the fax of 7 December 2000 and the faxes exchanged between the parties in April 2001 (Exhs. Nos. 3-8) support this.

IV.3.3. In the present case there are no transactional considerations that support the conclusion that a contract was formed as the parties never commenced performance

123. If a party in good faith commences performance it can be given weight when determining if the contract to the actual sale should be rendered invalid; e.g. judgement by Oberster Gerichtshof, Austria, 10 November 1994.
124. On 3 April 2001 when the dissent became apparent none of the parties had commenced any performance. MEDIPACK therefore submits that no weight should be given to any transactional considerations. The fact that EQUAFILM later on, on its own initiative, arranged for the transport does not alter this submission for two reasons. Firstly, because EQUAFILM had no expenses on this arrangement and secondly, because it made the arrangements on its own initiative after it became aware of the disagreement.
125. Consequently, no transactional considerations support the conclusion that a contract was formed.

V. Should the Tribunal hold that a contract was formed, an eight percent discount should be applied to the list price

V.1. If the Tribunal finds that a contract was formed the price should be the list price less an eight percent discount in accordance with Art. 8 CISG

126. If it is found that a valid contract was formed in accordance with Art. 14 CISG, the price to be paid by MEDIPACK must be derived from the circumstances of the negotiations in accordance with Art. 8 CISG. MEDIPACK invites the Tribunal to apply an eight percent discount to the list price as this was intended by MEDIPACK and because EQUAFILM ought to have realized this.
127. In the contract of 15 December 2000 (Exh. No. 2) EQUAFILM granted an eight percent discount. Any reasonable person would consider this discount to apply to the contract of 3 April 2001; supra 112 et seq.
128. Consequently, the discount to be applied to the list price should be eight percent as this is the discount any reasonable person would consider applied to the list price.

V.2. If the Tribunal finds that the price is to be set in accordance with Art. 55 CISG, the price to be applied is the list price less eight percent in accordance with the parties' intentions

129. If it is found that the price should be set in accordance with Art. 55 CISG, it is submitted that the discount to be applied is eight percent.
130. "The price generally charged" is as a starting point based on an objective test; Schlechtriem, p. 462. However, this objective test must be subsidiary to the intentions of the parties as these are the primary sources towards fixation of a price as stated in Art. 55 CISG "... in absence of any indication of the contrary...", and in Art. 6 CISG, which stipulates the parties' intentions as an overriding principle of the Convention.
131. Hence, when using Art. 55 CISG as a gap-filling mechanism to determine the price, the agreed provisions must be adhered to. Otherwise, the parties' intentions would be violated and thereby the principle of party autonomy – a principle which is among the most important and basic in the Convention; e.g. Schlechtriem, p. 103, note 41. In other words, in this case Art. 55 CISG must be used with respect to the parties' intentions; Lookofsky, § 3-3.

Therefore, the discount established pursuant to Art. 55 CISG should be between four and eight percent, as these percentages constitute the outer limits of the parties' respective intentions.

132. When determining the price generally charged it should be taken into account that a comparatively high discount is generally obtainable on large orders. Therefore, the price generally charged is lower on large quantities than on small ones. On 3 April 2001 MEDIPACK ordered 1,350 tons of OPP film, almost seven times more than the first time. On the assumption that the price of the 15 December 2000 contract was the market price, the market price of the 3 April contract must therefore be significantly lower. Therefore, MEDIPACK submits that the price established pursuant to Art. 55 CISG as regards the 3 April contract should be no more than the list price less an eight percent discount.

VI. MEDIPACK did not breach the contract and is therefore not liable to pay damages to EQUAFILM

133. Should the Tribunal hold that MEDIPACK and EQUAFILM formed a contract on 3 April 2001, MEDIPACK has submitted that the contract included an eight percent discount from EQUAFILM's list price; supra 126 et seq. However, EQUAFILM denied MEDIPACK such a discount, which is evidenced by its faxes of 3, 9 and 12 April 2001, in which EQUAFILM conveyed that it would only accept a contract price including a four percent discount (Exhs. Nos. 4, 6 and 8). EQUAFILM hereby denied that an eight percent discount had been agreed upon and showed that it would not perform its obligations under such price terms. Therefore, EQUAFILM committed an anticipatory breach; Art. 72(1) CISG, and MEDIPACK was not obliged to give notice to EQUAFILM concerning MEDIPACK's intention to declare the contract avoided; Art. 72(3) CISG.
134. Thus, MEDIPACK was entitled to make a recovery buy of 1,350 tons of OPP film from Polyfilm GmbH, and is entitled to damages equal to the sum it could have saved by purchasing the OPP film from EQUAFILM at the agreed price. For reasons of competition and out of loyalty to its business partners, MEDIPACK does not wish to make the price of its dealings with Polyfilm GmbH known, and therefore abstains from asserting this claim (Procedural Order No. 2, 50).
135. Under these circumstances MEDIPACK is not liable to pay damages to EQUAFILM.

VII. If a contract including a discount of four percent was formed, EQUAFILM is only entitled to \$ 461,700 in damages in accordance with Art. 74 CISG

136. If the Tribunal holds that a contract was formed on 3 April 2001 with a price including a discount of four percent, MEDIPACK acknowledges that it is liable to pay damages pursuant to Art. 61(1)(b) CISG. However, it will be demonstrated in the following that the amount of \$575,477.98 claimed by EQUAFILM exceeds its loss in that the amount includes CIF costs which were never incurred. The amount thus exceeds the damages warranted by Art. 74 CISG.

VII.1. The damages only amount to \$ 461,700, which equals the profit lost by EQUAFILM

137. As stated by EQUAFILM Art. 74 CISG represents a principle of full compensation (EQUAFILM's Memorandum, para. 110). The language of Art. 74 shows that damages under this provision consist of the effective loss and loss of profit.

138. Since EQUAFILM may only recover its actual loss, the calculation of damages must take into account that since no transport took place, CIF costs were never incurred (Procedural Order No. 2, 56). Therefore, the CIF costs do not represent a loss and should not be compensated. EQUAFILM has claimed damages of \$ 575,477.98 for loss of profit (EQUAFILM's Memorandum, paras. 107 et seq.). This amount includes CIF costs and should therefore be rejected by the Tribunal.

139. The lost profit should be calculated as the difference between the contract price and the costs of manufacturing; judgement by Oberster Gerichtshof, Austria, 28 April 2000. Taking into account that EQUAFILM's gross margin was 22 percent, the lost profit can be calculated as follows:

The contracted price for OPP film was \$ 1,900 pr. ton less 4% discount. 1,350 tons were to be delivered:

$$(\$ 1,900 - 4 \% \text{ discount}) \times 1,350 \text{ tons} = \underline{\$ 2,462,400}$$

EQUAFILM's profit off the list price was 22%. The cost price for 1,350 tons was thus:

$$(\$ 1,900 - 22 \%) \times 1,350 \text{ tons} = \underline{\$ 2,000,700}$$

The loss of profit suffered by EQUAFILM is found by subtracting the cost price from the contracted price:

$$\$ 2,462,400 - \$ 2,000,700 = \underline{\$ 461,700}$$

140. In conclusion, EQUAFILM's loss is no more than \$ 461,700. That is therefore the maximum amount that EQUAFILM may claim in damages.

VIII. Interest

VIII.1. EQUAFILM only seeks interest relative to \$ 205,200 of the damages

141. EQUAFILM has claimed that payment pursuant to the 3 April 2001 contract was due in four instalments (EQUAFILM's Memorandum, para. 116). MEDIPACK submits that nine payments were to be made, namely one for each shipment (Exh. No. 4). MEDIPACK notes that EQUAFILM only seeks interest on four instalments (EQUAFILM's Memorandum, para. 117 and Statement of Claim, para. 18).
142. Since the amount and the price of each instalment were identical, and EQUAFILM only seeks interest on four out of nine instalments, the relevant amount from which to calculate the interest is 4/9 of the damages. As argued supra 137 et seq. the total amount of damages is \$ 461,700. Thus, the amount of damages on which EQUAFILM claims interest is $4/9 \times \$ 461,700 = \$ 205,200$.

VIII.2. EQUAFILM is not entitled to pre-award interest on damages pursuant to Art. 78 CISG, as the damages are not liquidated before an award is rendered

143. EQUAFILM has asserted that it is entitled to pre-award interest, as interest should start to accrue on the dates payments were due under the contract (EQUAFILM's Memorandum, para. 120).
144. MEDIPACK contests this assertion. According to Art. 78 CISG a party is entitled to interest on any "sum that is in arrears". However, the Convention does not define either "sum" or "in arrears". These words must therefore be defined by interpretation; Thiele, Sec. III(B)(1). Reasonably, no "sum" can be said to exist as long as a specific amount has not been determined. Hence, interest cannot start to accrue before this has happened. In just the same way as an award or a judgement must be of a precise, specified amount in order to be fulfilled or to be enforceable, interest must also be of a fixed amount in order to be payable.

And since interest is a product of the principal, interest cannot be said to represent a “sum” before the principal has been established. Scholars support this view in requiring that the principal be liquidated before interest may start accruing; Enderlein & Maskow, p. 314, and Sutton, Sec. III(b)(6). Since the principal is not established with binding effect inter partes before the award is rendered, this is the date on which the sum is liquidated and thus the date from which interest should accrue.

145. It is true that in the judgement by U.S. District Court, New York, 9 September 1994 pleaded by EQUAFILM, the plaintiff was awarded pre-judgement interest on damages pursuant to Art. 78 CISG (EQUAFILM’s Memorandum, para. 120). However, the judgement fails to include any arguments supporting its decision. The judgement has been subject to severe criticism; e.g. in extenso Darkey, whose criticism evolves around the fact that award of interest in the case in question was based on national conceptions and failed to take due consideration to the international character and need to promote uniformity in opposition to Art. 7(1) CISG. MEDIPACK therefore submits that the judgement should not be given any weight in deciding when interest should start to accrue.

VIII.3. Should EQUAFILM be entitled to pre-award interest, interest should accrue from 23 May 2002, alternatively from the dates payments were due under the contract

VIII.3.1. Interest shall accrue from 23 May 2002

146. Should the Tribunal find EQUAFILM entitled to pre-award interest it is MEDIPACK’s primary submission that interest shall start to accrue on 23 May 2002. This was the date when EQUAFILM gave notice to commence arbitration against MEDIPACK and stated a claim for damages and interest thereof.
147. Between 10 May 2001 and 23 May 2002 EQUAFILM did not assert its claim regarding the alleged 3 April 2001 contract vis-à-vis MEDIPACK. MEDIPACK was and is of the opinion that the claim asserted by EQUAFILM is unwarranted. Since EQUAFILM did not take steps to secure payment in the period between 10 May 2001 and 23 May 2002 it would not have made sense for MEDIPACK to effectuate payment in accordance with what EQUAFILM now claims in that period of time. Interest accruing before 23 May 2002 would therefore be an expense for MEDIPACK which it could not have avoided, but which it would have avoided if EQUAFILM had taken steps to secure payment immediately after 10 May 2001, thus ultimately shortening the period in which MEDIPACK would have had to pay interest.

148. EQUAFILM had the sole power to determine when to commence arbitration in pursuit of the sought amount and thus the relative size of the amount of interest. Therefore, EQUAFILM is nearest to bearing that cost.
149. After 10 May 2001, MEDIPACK has organised its business in reliance on the availability of the funds that EQUAFILM now seeks. This reliance was not ill founded. EQUAFILM had it in its sole power to terminate that reliance. Under these circumstances there is reason to protect the reasonable reliance of MEDIPACK as opposed to awarding a sum to EQUAFILM, an expense that it could easily have spared MEDIPACK.
150. Based on these considerations MEDIPACK submits that no interest should accrue before 23 May 2002.

VIII.3.2. In the alternative interest shall accrue from the dates payments were due under the contract

151. In the alternative, MEDIPACK acknowledges that interest shall start to accrue on the dates payments were due under the contract as claimed by EQUAFILM (EQUAFILM's Memorandum, para. 120).

Copenhagen, 7 February 2003

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