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Frankfurt/ Main
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MEMORANDUM FOR

RESPONDENT

TEAM MEMBERS

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7 February 2003

Claimant : Equafilm Co.
214 Commercial Ave.
Oceanside
Equatoriana
(hereafter referred to as “CLAIMANT” or “Equafilm”)

Represented by: Deakin University, Australia

versus

Respondent: Medipack S.A.
395 Industrial Place
Capitol City
Mediterraneo
(hereafter referred to as “RESPONDENT” or “Medipack”)

Represented by: Anna von Oettingen, Christian Annen,
Jens Gal and Sebastian Kneisel
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Index

	p.
§ 1 Challenge of Dr.	1
1.1 The challenge did satisfy the procedural requirements.....	1
1.2 Dr. ... is dependent.....	2
1.2.1 Dr. ... is economically dependent.....	2
1.2.2 Dr. ...'s expertise does not exempt him from his duty to be impartial and independent.....	4
1.2.3 An arbitral award with Dr. ... as part of the Arbitral Tribunal would not be enforceable.....	5
§ 2 This Arbitral Tribunal has no jurisdiction over the present dispute.....	5
2.1 The parties did not agree on an arbitration agreement to cover the alleged contract of 3 April 2001.....	5
2.1.1 The arbitration clause of the contract of 15 December 2000 does not apply to the present dispute.....	5
2.1.2 No arbitration agreement was formed during the telephone conversation on 3 April 2001.....	7
2.1.3 No arbitration agreement was formed by the exchange of faxes on 3 April 2001.....	7
2.2 No valid arbitration agreement was formed as no main contract existed.....	8
2.3 Any arbitration agreement would not have met the applicable form requirements.....	9
2.3.1 The faxes sent by the parties do not satisfy the writing requirement.....	9
2.3.1.1 The reference is not made in a clear and unambiguous manner.....	10
2.3.1.2 A general reference does not suffice to incorporate an arbitration clause.....	10
2.3.1.3 An attachment of the document referred to is necessary.....	11
2.3.2 The exchange of Statement of Claim and Statement of Defence does not constitute an arbitration agreement in writing.....	12
2.4 The arbitration clause is void because of a pathology.....	12

2.4.1	No common intention of the parties can be found.....	12
2.4.2	The verbatim of the arbitration clause is ambiguous.....	13
2.4.3	All other methods of interpreting the intent lead to an ambiguous result.....	13
§ 3	The domestic commercial law of Equatoriana is applicable to this dispute	15
3.1	The choice of law clause of the contract of 15 December 2000 was incorporated by reference into the alleged contract.....	15
3.2	The parties chose the domestic commercial law of Equatoriana to govern this dispute.....	16
3.2.1	The application of the CISG is generally presumed to be excluded merely by the parties' choice of law of a Contracting State.....	17
3.2.2	The implied exclusion of the CISG is indicated by the parties' choice of law.....	17
3.2.3	A reasonable person in Medipack's position must not have been aware of CLAIMANT's intention to apply the CISG.....	18
§ 4	No contract was concluded between Equafilm and Medipack on 3 April 2001.....	20
4.1	No contract under the domestic commercial law of Equatoriana.....	20
4.2	No contract under the CISG.....	20
4.2.1	The requirements of Arts. 23 and 14 (1) CISG are not met: no agreement on the price.....	20
4.2.1.1	No explicit agreement on the price.....	22
4.2.1.2	No tacit agreement on the price.....	22
4.2.2	Art. 55 CISG cannot stipulate any price.....	24
4.2.3	No implicit derogation or variation from the requirements of Art. 14 (1) CISG.....	25
4.2.4	No modification of the contract of 15 December 2000.....	26
4.2.5	No framework contract.....	26

§ 5	Alternatively: A contract was formed including a discount of 8%.....	27
5.1	The interpretation of the parties' statements leads to a discount of 8%.....	27
5.2	A modified contract and a framework contract lead to a discount of 8%.....	28
§ 6	Breach and Damages.....	28
6.1	Medipack did not commit a breach, because there was no sales contract at all	28
6.2	If the Arbitral Tribunal finds that there was a contract with an 8 % discount, then there was no breach by Medipack.....	28
6.3	If the Arbitral Tribunal finds that there was a contract with a 4% discount, CLAIMANT is not entitled to damages in the amount of \$ 575,477.98.....	29
6.3.1	The costs for CIF are not part of the damages	29
6.3.2	The discount of 4% reduces the profit	30
6.3.3	Correct calculation of the damages	30
§ 7	Interest.....	30
§ 8	Claims for Relief.....	31

Statement of Purpose

In accordance with the Arbitral Tribunal's Procedural Order dated 4 October 2002 we hereby respectfully submit this Memorandum on behalf of RESPONDENT. As will be outlined in detail below, Medipack requests the Arbitral Tribunal to declare

- that Dr. ... is not independent and thus the challenge must be successful;
- that the Arbitral Tribunal has no jurisdiction to consider the dispute between Equafilm and Medipack;
- alternatively, that no sales contract was concluded between Equafilm and Medipack on 3 April 2001
- alternatively, that a contract concluded on 3 April 2001 between Equafilm and Medipack included a discount of 8%;
- in the latter alternative, that Medipack did not breach the contract;
- that Equafilm is in any event not entitled to damages exceeding the sum of \$ 461,700;
- that Equafilm is in any event not entitled to claim interest on a sum exceeding \$ 461,700; and that
- Equafilm should bear the costs and fees of the arbitration.

§ 1

Challenge of Dr. ...

1. Medipack confirms its challenge of Dr. ... and submits that circumstances exist that give rise to justified doubts as to Dr. ...'s independence.

1.1 The challenge did satisfy the procedural requirements

2. Contrary to CLAIMANT's statement (see Memorandum for Claimant, para. 50), Medipack *challenged* Dr. ... and not merely *suggested* Dr. ...'s withdrawal. In the first letter dated 2 September 2002 Medipack requested that the DIS Secretariat suggests Dr. ... to withdraw. This formulation was appropriate as Sec. 18 (2) DIS gives the challenged arbitrator the opportunity to resign without a decision of the Arbitral Tribunal on the matter. Only if the arbitrator declares not to resign, the challenging party may ask the Arbitral Tribunal to decide on the withdrawal. In compliance with the said provision RESPONDENT requested the Arbitral Tribunal to decide on the withdrawal by its letter dated 19 September 2002.

3. Medipack's challenge of Dr. ... was made within the time limits set in Sec. 18 (2) DIS. Sec. 18 (2) DIS contains overall three time limits and not only one as CLAIMANT submitted (see Memorandum for Claimant, para. 50). The first time limit of two weeks starts when a party gets knowledge of circumstances that could give rise to any doubts as to the impartiality or independence of an arbitrator. Within these two weeks the party can make a substantiated challenge to the DIS Secretariat, in which it proposes the withdrawal of the arbitrator. On 22 August 2002 Dr. ... disclosed the information about the merger of his law firm with Multiland Associates. Only 11 days later, therefore within the time limit, RESPONDENT sent a letter (dated 2 September 2002) to the Secretary General of the DIS, in which Medipack requested that the DIS Secretariat suggests Dr. ... to withdraw.

4. The second time limit giving Dr. ... a reasonable time period to explain the doubts as to his impartiality or independence was determined by the DIS Secretariat. Dr. ... explained his point of view 7 days later (letter dated 9 September 2002) and declared that he would not resign. As a legal consequence he triggered the third time limit provided by Sec. 18 (2) DIS, according to which the party that proposed the withdrawal can within two weeks request the Arbitral

Tribunal to decide on the impartiality and independence of the challenged arbitrator. Medipack also met this time limit and requested a decision from the Arbitral Tribunal in its letter dated 19 September 2002, i.e. 10 days after Dr. ... explained that he would not resign.

5. Finally, the challenge was addressed correctly. CLAIMANT submits that under the UNCITRAL Model Law on International Commercial Arbitration (hereafter referred to as ML) the notification of a challenge must be addressed to the Arbitral Tribunal and that Medipack incorrectly sent the challenge to the DIS Secretariat (see Memorandum for Claimant, para. 53). This argument lacks any legal and factual basis.

6. Firstly, the ML is not applicable to this matter. Dr. ... was nominated under the rules of the DIS. Insofar he can only be challenged under these rules, but not under the ML.

7. Secondly, CLAIMANT neglects that there are two letters which are dealing with the challenge of Dr. The first letter dated 2 September 2002 was addressed to the DIS Secretariat. The second letter which contained the request to decide upon Dr. ...'s independence and impartiality from 19 September 2002, was addressed to the Chairman of the Arbitral Tribunal. Both letters were addressed in accordance with the requirements set forth by Sec. 18 (2) DIS.

1.2 Dr. ... is dependent

8. As will be shown below, the circumstances of the case give justifiable doubts as to Dr. ...'s independence. We wish to reiterate the statement in our letter dated 2 September 2002 that we do not have any doubts as to Dr. ...'s personal integrity. As Dr. ... is, however, economically dependent of CLAIMANT, the challenge must be successful.

1.2.1 Dr. ... is economically dependent

9. In *Icori* the Paris Court of Appeal defined dependence as “*a material or intellectual link with one of the litigants*“ (see *KFTCCIC v. Icori Estero*, Paris Court of Appeal (Cour d'Appel de Paris), 28 June 1991, in: *Rev. arb.* 1992, p. 568). Such a material link exists for the following reasons:

10. Dr. ... was a partner in the law firm that is merging and will be a partner in the merged firm. As partner he profits economically from all clients the law firm is counselling (see Procedural Order N° 2, para. 19). The office of Multiland Associates in Faraway City, Oceania, has represented Equafilm on two occasions in the past (see Procedural Order N° 2, para. 18). Dr. ...'s statement that his office will not counsel Equafilm in the future is insofar irrelevant, as it does not apply to all the other offices of the law firm. Rather, the Faraway City office in which Dr. ... has his share of profit as well has every expectation of representing CLAIMANT again in Oceania. That is why there is a financial conflict of interest: The law firm in which Dr. ... has a financial interest will profit from the continued relationship with Equafilm. An adverse arbitral decision might trouble that relationship. This is generally established (see Craig/ Park/ Paulsson, p. 230).

11. It is true that Dr. ... never counselled Equafilm in person. However, taking into account that the merged law firm has only 75 partners and 216 associates it is likely that colleagues of Dr. ... that will counsel Equafilm in the future might ask him for his legal opinion. Furthermore, the German Supreme Court recently decided a case in which a lawyer left his law firm and started working for another law firm. The Court held that the new firm must resign from all cases in which the former firm counselled the opposite party, even if the new lawyer did not work directly on them. The Court based its decision on the fact that the lawyer was a *partner* in his old law firm. According to the Court one partner is always acting in the name of all other partners. Therefore, every client is not only counselled by one partner, but by the entire law firm and in the name of all other partners (see German Supreme Court (BGH), 6 November 2000, in: NJW 2001, p. 1572). In the case at hand the interest conflict is even worse as Dr. ... is not only a partner of the law firm, but also profits from the client relationship.

12. To support its allegation that Dr. ... must be regarded as independent, CLAIMANT illegitimately compares the case at issue with *Amoco Iran* (see Memorandum for Claimant, para. 63). The two matters are, however, not comparable. CLAIMANT misstates Klaus Peter Berger's opinion by insinuating that in *Amoco Iran* the arbitrator went too far when he resigned because his own firm had represented one of the parties in another country (see Memorandum for Claimant, para. 63). However, in *Amoco Iran* (see *Amoco Iran Oil Co. v. The Islamic Republic of Iran*, Iran-US Claims Tribunal, 30 December 1982, in: IX YCA 1984, p. 239) the arbitrator

had been administrative president of a Swiss subsidiary of Morgan Stanley Corp., New York, which appeared as expert witness for the claimant. Iran feared that such an arbitrator would not readily agree to the appointment of an independent expert witness, whose testimony might supersede that of the witness to whom he is related. Mr. Berger then states that “*this view stretches the grounds for challenge beyond their proper scope. An arbitrator’s relation to a witness has to be considerably more extensive and significant than that to a party since a witness need not have per definitionem an interest in the outcome of the case*” (see Berger 1993, p. 246). In the case at issue Dr. ... did not have a relation to a *witness*. He rather has a relation to Equafilm, one of the *parties*, which, of course, does have an interest in the outcome of the case.

13. CLAIMANT points out that the burden of proof for showing the circumstances giving rise to justifiable doubts in Dr. ...’s independence lies on Medipack (see Memorandum for Claimant, para. 55). Medipack has satisfied this burden. Since a clear and unambiguous proof of the dependence of the arbitrator is very difficult to furnish, it is widely recognised that the appearance of dependence viewed from the objective perspective of the parties is sufficient for a successful challenge under all laws (see Berger 1993, p. 252). Medipack has explained its doubts in detail and has substantiated that these doubts are supported by facts.

1.2.2 Dr. ...’s expertise does not exempt him from his duty to be impartial and independent

14. CLAIMANT’s considerations that it might be difficult to find another arbitrator with Dr. ...’s expertise are beside the point and do not justify a different conclusion. First, as even CLAIMANT admits, it will only be “*difficult*” to find such an arbitrator (see Memorandum for Claimant, para. 66), but it will not be impossible. RESPONDENT hereby wants to present a few figures to Equafilm which evidence that it is not that difficult to find an experienced and independent arbitrator. The American Arbitration Association for example provides a roster of nearly 11,000 experts, the ICC has 116 members from 76 countries (including the Chairmen and the alternate members) and the SIAC International Panel consists of 66 arbitrators from 18 countries (see homepages of the aforementioned institutions).

15. Second, it is exactly because of the growing law firm network that the rules about independence and impartiality become more and more important. If a partner in a law firm

profits financially from a client he cannot reproach the other party in an arbitral procedure to have justified doubts as to his economic independence.

1.2.3 An arbitral award with Dr. ... as part of the Arbitral Tribunal would not be enforceable

16. Finally, RESPONDENT wishes to draw CLAIMANT's attention to Art. V New York Convention, according to which the lack of independence of a member of the Arbitral Tribunal will lead to an unenforceable award. As both parties are concerned to solve this dispute efficiently and economically reasonable, it cannot be in the interest of CLAIMANT to sustain its objection to the challenge. Rather, a substitute arbitrator for CLAIMANT should promptly be appointed.

§ 2

This Arbitral Tribunal has no jurisdiction over the present dispute

17. Within the scope of its competence-competence this Arbitral Tribunal should find that it has no jurisdiction over the present dispute as no arbitration agreement was concluded.

2.1 The parties did not agree on an arbitration agreement to cover the alleged contract of 3 April 2001

18. RESPONDENT and CLAIMANT never agreed on any arbitration agreement to govern their alleged contract of 3 April 2001.

2.1.1 The arbitration clause of the contract of 15 December 2000 does not apply to the present dispute

19. The arbitration clause included in the contract of 15 December 2000 does not, as asserted by CLAIMANT (see Memorandum for Claimant, para. 9 et seq.), govern the present dispute.

20. Sec. 13 of the aforementioned contract reads as follows: "*Any controversy or claim between Equafilm Co. and Medipack S.A. arising out of or relating to this contract 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” (see Claimant’s Exhibit N° 2).

21. CLAIMANT’s argument that Sec. 13 is phrased broadly enough to include future transactions, such as the alleged contract of 3 April 2001 (see Memorandum for Claimant, para. 14), cannot be maintained. One can hardly assume from the formulation “*arising out of or relating to **this** contract*” (emphasis added), that the parties intended the arbitration agreement to extend to other contracts.

22. In particular, the application of the group of contracts doctrine does not lead in the present case to an extension of the arbitration clause to the 3 April 2001 agreement, if any. Such a group of contracts is normally constituted of a main contract, and one or several subsequent contracts that were concluded *in the frame* of the original agreement and were to be considered as an accessory thereof (see Bobigny Commercial Court, France (Tribunal de Commerce de Bobigny), 29 March 1990, in: Rev. Arb. 1992, p. 66). These contracts must form an indivisible whole (see Hanotiau, p. 310 et seq.). However, as the contract of 15 December 2000 and the alleged contract of 3 April 2001 are independent of each other, they cannot form a group of contracts. First, the alleged contract does not qualify as an accessory of the anterior contract, because it did not specify or implement terms in order to support the anterior contract’s performance. Second, the contract of 15 December 2000 and the new contract, if any, were concluded under significantly different conditions. The alleged contract intended to obligate CLAIMANT to deliver 1,350 tons of OPP, an amount considerably higher than the 200 tons of OPP contracted on 15 December 2000.

23. Several ICC arbitral tribunals held that an agreement to arbitrate relates only to the contract in which it is contained, unless the parties have provided otherwise or unless there is sufficient evidence that they may have intended such agreement to extend to other related contracts (see Derains/ Schwartz, p. 98). To establish such an intention an arbitral tribunal has to determine whether the dispute was the kind of controversy that the parties to the arbitration agreement had in mind when they drafted it (see Hanotiau, p. 315). When drafting the arbitration clause, neither Equafilm nor Medipack showed any intention to extend their agreement to future contracts, in particular to the alleged contract. Rather, as confirmed by the header of the contract

of 15 December 2000: “*Equafilm Co. agrees to sell and Medipack S.A. agrees to buy 200 tons [...] OPP*” (see Claimant’s Exhibit N° 2), this contract was limited to a single transaction. If it had been CLAIMANT’s intent to extend the arbitration clause of the contract of 15 December 2000 to the alleged contract, it would have had to make this unequivocally clear.

2.1.2 No arbitration agreement was formed during the telephone conversation on 3 April 2001

24. Contrary to CLAIMANT’s assertion (see Memorandum for Claimant, para. 15), no valid arbitration agreement was orally concluded during the parties’ telephone conversation on 3 April 2001. Pursuant to Art. 7 (2) ML, oral agreements, whether evidenced in writing or not, are always null and void (see Roth, in: Weigand, Part 5, Art. 7 para. 7; Holtzmann/ Neuhaus, p. 260). This is why the faxes exchanged subsequent to the conversation, contrary to CLAIMANT’s argument, cannot evidence any such oral agreement.

2.1.3 No arbitration agreement was formed by the exchange of faxes on 3 April 2001

25. Had an arbitration agreement ever been concluded, it could have only been by the faxes themselves. Equafilm implicitly admits that the exchange of the faxes cannot constitute the conclusion of an arbitration agreement, because CLAIMANT qualifies these faxes as evidence of an oral agreement (see supra, para. 24).

26. The interpretation of the faxes shows that an inclusion of the arbitration agreement of the contract of 15 December 2000 into an anticipated new contract was *not* intended. CLAIMANT’s fax of 3 April 2001 states that “*payment, shipping and similar terms of the contract of 15 December 2000 are to apply*” (see Claimant’s Exhibit N° 3). The arbitration agreement does, however, not constitute a term similar to payment and shipping and was therefore not validly included by this reference into the new contract, if any. CLAIMANT has not submitted any argument in how an arbitration agreement resembles a contract clause concerning shipment or payment, which would allow to qualify it as a “*similar term*”. In fact, an arbitration agreement differs significantly from those aforementioned clauses. It does not concern the performance of a transaction, but rather governs possible disputes over a contract.

27. If Medipack had wanted an incorporation of all clauses of the prior contract including the

arbitration clause, it would have had to make a general reference. By demanding that only *similar* terms should be included, RESPONDENT implicitly excluded the arbitration clause from incorporation. Any other interpretation ignores the use of the word *similar*.

28. Besides the fact that the arbitration clause cannot be qualified as a *similar* term in the sense of Medipack's fax of 3 April 2001, it does moreover not constitute a *term* (of contract) at all. By basing its argumentation on the principle of separability (see Memorandum for Claimant, para. 11 et seq.), CLAIMANT itself regards the arbitration agreement as an individual contract. The rationale of the doctrine of separability has been formulated by Judge Schwebel as follows: "*When the parties to an agreement containing an arbitration clause enter into that agreement they conclude not one but two agreements...*" (see Schwebel, p. 5). Having qualified the arbitration agreement as an individual contract, such an individual contract may not be considered as a term of another contract.

2.2 No valid arbitration agreement was formed as no main contract existed

29. Even if this Arbitral Tribunal were to find that there is evidence that the parties planned to transmit the alleged contract of 3 April 2001 to arbitration, an arbitration agreement would still not have been validly formed, as no main contract existed. Since non-existence of the main contract must extend to the arbitration clause as well (see L.B. Cassia v. Pia Investments, French Supreme Court (Cour de Cassation 1ère civile), 10 July 1990, www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=19647; van den Berg, in: Sanders/ van den Berg, Vol. III, p. 8; Lazic/ Meijer, in: Weigand, Part 4, F para. 50), the separability rule is, contrary to CLAIMANT's assertion, not applicable in the case at issue. Pursuant to Art. 16 (1) ML "*...an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is **null and void** shall not entail ipso jure the invalidity of the arbitration clause*" (emphasis added). The said provision considers the arbitration clause to be autonomous from the main contract in which it is contained. Yet it does so, only if the defect of the main contract is its voidance or its nullity. However, in the case at issue the main contract is neither null nor void, but simply non-existent.

30. In specific, the Court of Appeal of Madrid held that the inexistence of the main contract,

if derived from a lack of consent, as in the case at issue (see *infra*, § 4, 4.2.1), should also be extended to the arbitration agreement (see Madrid Court of Appeal (Audiencia Provincial de Madrid), 7 November 1995, in: RVDPA 1 (1997), § 112).

31. Furthermore, an interpretation of the verbatim of the arbitration clause shows, that the parties did not intend to submit a possible dispute over the *formation* of a contract to arbitration. By stating that only disputes concerning “*this contract*” (emphasis added) are submitted to arbitration, Sec. 13 presumes that a contract has actually been formed. Had the parties intended to submit disputes concerning the formation of the contract to arbitration, they could have used a formulation stating exactly this. The German Maritime Arbitration Association for example provides in its model arbitration clause, that “*all disputes arising out of or in connection with this contract or concerning its validity shall be finally settled by arbitration*” (emphasis added).

2.3 Any arbitration agreement would not have met the applicable form requirements

32. Finally, CLAIMANT’s assertion that the writing requirement of Art. 7 (2) ML is fulfilled, is unsustainable.

2.3.1 The faxes sent by the parties do not satisfy the writing requirement

33. The faxes exchanged on 3 April 2001 by Equafilm and Medipack (see Claimant’s Exhibit N° 2 and 3) do not fulfil the form requirements set out by the ML. Art. 7 (2) ML demands: “*The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract*” (emphasis added).

34. In the case at issue RESPONDENT and CLAIMANT submitted to each other two faxes, both dated 3 April 2001, which must be qualified as an exchange of letters. Yet, neither do these faxes provide a record of the arbitration agreement, nor is the alleged reference in those faxes such as to make that clause part of the contract.

2.3.1.1 The reference is not made in a clear and unambiguous manner

35. The references in the faxes are not made in a clear and unambiguous manner. This is, however, a necessary condition for an arbitration agreement by reference to bind the parties (see *Western Vegetable Oils Co. v. Southern Cotton Oil Co.*, US Court of Appeals, 9th Circuit, in: *Am. Juripr. ADR* § 75). As already discussed above (see *supra*, para. 26), the verbatim “*all similar term*” is not as such as to refer to the arbitration clause, even more it is not as such as to refer to it in a clear and unambiguous manner.

36. In 1991 the English Court of Appeal held in *Aughton* that distinct and specific words are required in order to incorporate an arbitration clause (see *Aughton Ltd. v. M.F. Kent Services Ltd*, Court of Appeal, 4 November 1991, in: *ASA Bulletin*, 1992, p. 555). Equafilm and Medipack have not used distinct and specific words to incorporate the agreement, but only used the ambiguous terms “*all provisions*” and “*similar terms*”.

37. Moreover, the terms used by the parties do not refer to each other, but are contradictory and, thus, do not provide a record of the agreement. The requirement of written form demands that the documents are exchanged between the parties and that the declarations contained therein refer to each other (see Weigand, Part 3, para. 37). CLAIMANT has not fulfilled its burden of proof as it has not submitted any argument how the parties’ declarations refer to each other. In fact, they cannot logically refer to each other, as both faxes were sent the same day, without either party having received or read the other party’s fax before sending its own. Rather, the faxes only refer to the telephone conversation held earlier that day, which is not sufficient to fulfil the form requirement.

2.3.1.2 A general reference does not suffice to incorporate an arbitration clause

38. For an incorporation of the arbitration agreement in the contract of 3 April 2001, if any, an explicit mentioning of the arbitration clause would have been mandatory. In *Bomas Oil* the French Cour de Cassation, normally known for its liberal view on the necessity of rigid form requirements (see Fouchard/ Gaillard/ Goldmann, p. 360 et seq.), stated that “*the existence of* [an arbitration clause] *must be stated in the contract, unless the parties entertain regular*

relationships which produce the result that the parties are fully aware of all the terms which regulate their business ” (see *Bomas Oil N.V. v. ETAP*, French Supreme Court (Cour de Cassation 1^{ère} civile), 9 November 1993, in: *Clunet* 1994, p. 690). The French Supreme Court hereby pointed out that the incorporation of an arbitration clause by reference is only possible, where it is explicitly mentioned in the reference. Here, neither CLAIMANT nor RESPONDENT explicitly mentioned the arbitration clause in their faxes (nor in the course of their telephone conversation). However, the explicit mention of the arbitration clause was absolutely mandatory to the parties, as they did not entertain a regular business relationship. The parties had only two prior business contacts (see Procedural Order N° 2, para. 43), the first in 1996 that concerned a different kind of product.

39. The French decision reflects the position of several courts (see e.g. *S.I.A.T v. Navigation Transocéanique*, Italian Supreme Court (Corte di Cassazione), 14 November 1981, in: *IX YCA* 1984, p. 416, 417) and is shared by various scholars (see e.g. van den Berg, p. 217 et seq.; Hunter/ Paulsson/ Rawding/ Redfern, p. 61). Furthermore, the French Court’s position is also supported by the ‘raison d’être’ (teleological interpretation) of the writing requirement. The form requirement serves to sufficiently warn the parties of the reach of their consent and the effects of it (see *Tradex Export SA v. Amoco Iran Oil Comp.*, Swiss Federal Supreme Court (Schweitzer Bundesgericht), 7 February 1984, in: *XI YCA* 1986, p. 532, 535). Admitting general references to another document in order to incorporate an arbitration clause would have a detrimental effect on the warning function (see Weigand, Part 3, para. 45).

2.3.1.3 An attachment of the document referred to is necessary

40. If a general reference was to fulfil the writing requirement, the document referred to including the arbitration clause would need, at least, to be attached to the document expressing the incorporation. This demand is convincing, as the warning function of the writing requirement has to be upheld. This position is supported by a number of national courts. The Munich Court of Appeal for example ruled in 1995 that an arbitration agreement lacked the written form, as the general conditions, containing the clause, were not annexed (Munich Court of Appeal (OLG München), 8 March 1995, in: *RIW* 1996, p. 854, 855). The Austrian Supreme Court (OGH, 2 May 1972, in: *X YCA* 1985, p. 417, 418) and the Schleswig Court of Appeal (OLG Schleswig,

30 March 2000, in: RIW 2000, p. 706, 707) have decided analogue cases in the same manner, regarding arbitration agreements contained in a document not annexed as formally invalid. The contract of 15 December 2000 was not annexed to either one of the faxes. As a consequence, the writing requirement for the arbitration agreement is not fulfilled.

2.3.2 The exchange of Statement of Claim and Statement of Defence does not constitute an arbitration agreement in writing

41. The arbitration agreement has not been concluded by the exchange of Statement of Claim and Statement of Defence, as incorrectly asserted by Equafilm (see Memorandum for Claimant, para. 24 et seq.). Art. 7 (2) ML states that an arbitration agreement is in writing, if there is “*an exchange of statements of claim and defence in which the **existence** of an agreement is **alleged** by one party **and not denied** by another*” (emphasis added). Medipack strongly denied the existence of the arbitration agreement (see Statement of Defence, para. 10). It was not necessary that Medipack specified its argumentation already in its first statement addressed to the DIS, but rather the summary as given sufficed.

2.4 The arbitration clause is void because of a pathology

42. Even if this Arbitral Tribunal should find that the arbitration clause was validly incorporated into the alleged contract of 3 April 2001, it still has to decline its jurisdiction. As the arbitration clause in the contract of 15 December 2000 refers to a non-existing arbitral institution, the arbitration clause is void.

2.4.1 No common intention of the parties can be found

43. CLAIMANT states correctly that Equafilm and Medipack agreed on a non-existing arbitral institution in the arbitration agreement contained in the contract of 15 December 2000. Moreover, CLAIMANT alleges that both parties had the common intention to agree on the German Institution of Arbitration (hereafter referred to as DIS). This assumption, however, fails. As will be set out below there are at least two alternative institutions the parties could have meant.

2.4.2 The verbatim of the arbitration clause is ambiguous

44. CLAIMANT states that the term German Arbitration Association results from a “*minor error in translating*” (see Memorandum for Claimant, para. 35). RESPONDENT rejects this assumption. The error is very serious. The only intention which can be certainly deduced from the term German Arbitration Association is, that both parties wanted to agree on an arbitral organization in Germany.

45. In Germany there are, however, three arbitral organizations dealing with international commercial arbitration: The German Maritime Arbitration Association (GMAA), the Hamburg Chamber of Commerce and the German Institution of Arbitration. Regarding the verbatim of the arbitration clause, it is possible that the parties intended to agree on the German Maritime Arbitration Association. The parties’ designation merely omits the word “*maritime*”, all other words are identical to the German Maritime Arbitration Association. Further, the application of the Rules of the GMAA is not restricted to maritime disputes (see § 1 “Scope of Application”, Rules of the GMAA). Insofar the verbatim cannot be interpreted unequivocally and the pathology of the arbitration agreement cannot be healed. As generally established, this leads to the voidance of the clause (see Berlin District Court (Kammergericht Berlin), 15 October 1999, in: BB 2000, supplement 8, p. 13; German Supreme Court (BGH), 2 December 1982, in: RIW 1983, p. 209; Paris Court of Appeal (Cour d’Appel de Paris), 14 February 1985, in: Rev. Arb. 1987, p. 325, 327 et seq.).

2.4.3 All other methods of interpreting the intent lead to an ambiguous result

46. CLAIMANT names two methods of interpreting the intent of the parties: The *effective interpretation* and the *good faith*-principle and tries to substantiate its position with several authorities (see Memorandum for Claimant, para. 31 et seq.) Neither of these methods does, however, lead to an unambiguous interpretation.

47. CLAIMANT describes the *good faith*-principle as the obligation to “*look for the parties’ common intention, rather than simply restricting oneself to examining the literal meaning of the words used*” (see Fouchard/ Gaillard/ Goldman, p. 257). As shown above, the literal meaning of the arbitration clause leads to a pathology, as no German Arbitration Association exists. Insofar

the Arbitral Tribunal has to look for the parties' common intention.

48. CLAIMANT explains that the Arbitral Tribunal could find a common intention by applying the principle of *effective interpretation*. This principle establishes that one should “*prefer the interpretation which gives meaning to the words, rather than that which renders them useless*” (see Fouchard/ Gaillard/ Goldman, p. 258). There are at least two possibilities to give meaning to the words (see *supra*, para. 42). Not only the interpretation that the parties agreed on the DIS would be supported by this method but also an agreement on the German Maritime Arbitration Association.

49. The legal authorities that CLAIMANT submits to support its position that the DIS Rules have validly been agreed upon are not applicable. Among others CLAIMANT refers to a decision by an arbitral tribunal of the German Coffee Association (see Memorandum for Claimant, para. 36). In this case the parties agreed on ‘Hamburg, West Germany’ under the heading ‘Arbitration’, with no indication of a specific arbitral tribunal. CLAIMANT states that “*as the Coffee Association was the only organisation capable of conducting the dispute pursuant to its rules, it was clearly the organisation intended by the parties*” (see Memorandum for Claimant, para. 36). The result is correct, but CLAIMANT does not mention the reason for this decision. The parties had based their contract on Art. 43 of the European Contract for Coffee providing that any dispute which the parties are unable to resolve amicably shall be determined by arbitration at the place stated in the contract and under the rules and customs of the coffee trade organization there established (see German Coffee Association, 28 September 1992, in: XIX YCA 1994, p. 48). Insofar, the intention was clear and not ambiguous. In the case at issue the parties did not agree on specific rules which could be helpful for interpreting the arbitration clause.

50. Furthermore, CLAIMANT confuses the problem of an incorrectly named arbitral organization with a geographical error in the arbitration clause (see Memorandum for Claimant, para. 39). A geographical error is, however, not that serious, as at least the arbitral institution can be identified. If parties agree on a well known arbitral institution but mistake its seat, a common intention can be found more easily than in the case at issue.

51. Finally, it must be emphasized that RESPONDENT supports the position that a

pathological arbitration clause must be interpreted '*in favorem validitatis*'. But such an interpretation is only possible when the parties' intention can be found unambiguously. As set out above, in the case at issue it is not possible to construe the arbitration clause in this way. Regardless of the method of interpretation the intention remains unclear and ambiguous. Insofar, stating that the parties agreed on the DIS is a speculation and violates the parties' autonomy. The pathology of the arbitration clause cannot be healed. The arbitration clause is void and this Arbitral Tribunal has no jurisdiction.

§ 3

The domestic commercial law of Equatoriana is applicable to this dispute

52. Should this Arbitral Tribunal, however, find that it has jurisdiction over the case at issue, then RESPONDENT submits that it is the domestic commercial law of Equatoriana which governs this dispute.

53. RESPONDENT has not waived its right to invoke the domestic commercial law of Equatoriana, as CLAIMANT falsely asserts (see Memorandum for Claimant, para. 81). CLAIMANT bases its argumentation on the incorrect assumption, that the contract of 15 December 2000 could not have been validly formed under the domestic law of Equatoriana, as the price was not sufficiently determinable. This is why CLAIMANT deduces, that Medipack by relying on the existence of this contract, implicitly acknowledged the CISG to be the applicable law. Therefore, CLAIMANT qualifies RESPONDENT's application of the domestic law to the new contract, if any, as contradictory to its previous conduct. This cannot be followed. Rather, the price in the contract of 15 December 2000 is not only determinable, but explicitly mentioned in its Sec. 1 (see Claimant's Exhibit N° 2). Insofar CLAIMANT's subsequent argumentation fails.

3.1 The choice of law clause of the contract of 15 December 2000 was incorporated by reference into the alleged contract

54. The parties have incorporated the choice of law clause contained in their contract of 15

December 2000 into the alleged contract. After the telephone conversation on 3 April 2001 between Mr. Storck and Mr. Black both parties sent faxes, stating that “*all provisions*” respectively “*similar terms*” of their contract of 15 December 2000 are to apply to the new contract, if any (see Claimant’s Exhibit N° 3 and N° 4). This included the choice of law clause of the contract of 15 December 2000.

55. CLAIMANT argues that it would be inconsistent to rely upon the qualification of the choice of law clause as a *similar term* while denying this qualification to the arbitration agreement (see Memorandum for Claimant, para. 26). RESPONDENT hereby stresses that by using the formulation *similar terms* in the fax it indeed intended to restrict the incorporation to terms similar to payment and shipment. Insofar, this did not include the choice of law clause. As a choice of law clause creates a separate contract just like an arbitration agreement, it cannot constitute a similar term (see argumentation supra, para. 26).

56. However, if this Arbitral Tribunal finds that the arbitration clause was validly incorporated by the parties’ reference to “*similar terms*” of the contract of 15 December 2000, then consequently the choice of law clause must be regarded as a similar term, as well. Therefore, only if the Arbitral Tribunal decides that the arbitration clause was incorporated by reference to the similar terms, RESPONDENT alternatively submits that the choice of law clause was validly incorporated by reference.

3.2 The parties chose the domestic commercial law of Equatoriana to govern this dispute

57. The parties agreed on the *domestic* commercial law of Equatoriana to govern their transaction of 3 April 2001. Contrary to CLAIMANT’s assumption (see Memorandum for Claimant para. 71), the CISG, as the special part of the commercial law of Equatoriana for the international sale of goods, is inapplicable to this dispute. The parties excluded the application of the Convention pursuant to Art. 6 CISG by their choice of law. Art. 6 CISG reads as follows: “*The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.*” Here, as will be outlined in detail below, the intention to exclude the application of the CISG is indicated by the parties’ choice of the *commercial* law of Equatoriana.

3.2.1 The application of the CISG is generally presumed to be excluded merely by the parties' choice of law of a Contracting State

58. CLAIMANT states that an expressed derogation of the CISG is preferable to an implied exclusion in order to avoid later conflicts (see Memorandum for Claimant, para. 75). However, it is commonly accepted that an *implied* exclusion remains possible under the Convention (see Schlechtriem II, Art. 6 para. 12; Bianca/ Bonell, Art. 6 para. 2.3., Honnold, Art. 6 para. 76). In order to establish such an implied exclusion it is sufficient to demonstrate an hypothetical intention of the parties to exclude the application of the CISG (see German Supreme Court (BGH), in: BGHZ Vol. 96, p. 313, 319). Here, the parties had the hypothetical intention to exclude the application of the CISG as they have chosen the law of a Contracting State. In these cases there is a general '*presumption of derogation*' of the CISG (see Vekas, p. 346). In particular, a Swiss District Court held in 1998 that the mere choice of the law of a Contracting State without further additional terms is sufficient to establish the parties' intention to exclude the Vienna Convention (see Weinfeld District Court (Bezirksgericht Weinfeld), 23 November 1998, in: SZIER 1999, p. 198). Since the parties did not expressly agree on the application of the CISG, their choice of law clause, thus, constitutes an exclusion of the Convention.

3.2.2 The implied exclusion of the CISG is indicated by the parties' choice of law

59. However, if this Arbitral Tribunal were to find that this generalised approach is inadequate, then there would still be an implied exclusion of the Convention.

60. The parties demonstrated their intention to exclude the application of the CISG by choosing the *commercial* law of Equatoriana instead of just the law of Equatoriana. The verbatim of the choice of law clause clearly indicates the parties' intention to derogate from the CISG by specifically choosing the domestic commercial law of Equatoriana.

61. An Italian Arbitral Tribunal decided that the verbatim "*this contract is governed exclusively by Italian law*" in a choice of law clause amounts to an implied exclusion of the CISG (see Florence Arbitral Tribunal, 19 April 1994, in: SZIER, p. 58). Compared to the formulation "*exclusively Italian law*", the parties' choice of the commercial law of Equatoriana

appears much more specific to demonstrate the parties' intention. If, however, a choice of law clause with such an extensive verbatim is sufficient to constitute an implied exclusion of the Convention, then the narrow and precise choice of law clause in the case at issue must also be adequate to establish a derogation of the Convention.

62. Moreover, choosing a domestic sales code is a typical case for an implied exclusion (see Schlechtriem II, Art. 6 para. 14). As there is no separate commercial code in Equatoriana (see Procedural Order N° 2, para. 35) the parties could not have made such a choice by expressly naming a domestic sales code (e.g. "This contract is subject to the Equatorian Commercial Code.").

63. Furthermore, the fact that the parties actually included a choice of law clause into their contract demonstrates their intention to derogate from the CISG. If they had intended to apply the commercial law of Equatoriana in its totality (including the CISG), there would have been no need to agree on a choice of law clause at all, as the rules of private international law would have lead to the application of the law of the seller, namely the law of Equatoriana (see Statement of Claim, para. 13).

3.2.3 A reasonable person in Medipack's position must not have been aware of CLAIMANT's intention to apply the CISG

64. Contrary to CLAIMANT's assertion (see Memorandum for Claimant, para. 77), Medipack had no reason to believe that Equafilm intended to apply the CISG rather than its domestic commercial law. Taking into account the relevant factors provided by Art. 8 (3) CISG, a reasonable person in Medipack's position would have expected the domestic commercial law of Equatoriana to apply.

65. These relevant factors are among others the industry of the addressee, the market situation, the type of business relation and the knowledge and the experience of the parties (see Enderlein/ Maskow/ Strohbach, Art. 8 para. 5). Medipack is a purchaser of OPP. There are no indications and CLAIMANT does not furnish any proof that the OPP market situation is necessarily of an international character. Insofar, in this case, these two elements cannot be determinative for a reasonable person's understanding.

66. The type of business relation and the experience and knowledge of the parties, however, lead to the conclusion that a reasonable person would have relied on the application of the domestic commercial law of Equatoriana. As the parties had only two prior dealings (see Procedural Order N° 2, para. 43), they could not have been aware of each other's specific intention and, therefore, their statements must be interpreted according to a usual merchant's understanding. Between merchants it is quite common that the seller insists on the application of his well-known domestic law rather than consenting to international law principles. As it was exclusively the seller Equafilm, which drafted the choice of law clause, Medipack must have understood the clause in the way that Equafilm insisted on the application of its own domestic law.

67. When referring to Medipack's knowledge and experience (see Memorandum for Claimant, para. 80), CLAIMANT neglects that a reasonable person in Medipack's position would be deemed to be a purchaser from a non Contracting State. As Medipack is incorporated in Mediterraneo, which is not a Contracting State to the Convention, it is uncertain whether Medipack has made any experience with the CISG. Moreover, Medipack, as a company from a non Contracting State, is even more in need of protection against the unintended application of the CISG in contrast to firms, which have their offices in Contracting States. Further, it is untenable for CLAIMANT to argue that the business relationship between Medipack and Polyfilm GmbH automatically results in Medipack's awareness of the sphere of application of the CISG (see Memorandum for Claimant, para. 77), because the law governing this relationship is unknown to CLAIMANT.

68. Finally, should the Arbitral Tribunal be of the opinion that the clause indeed leaves space for any uncertainties concerning the applicable law, RESPONDENT hereby submits that Art. 8 (2) CISG has its roots in the rule '*contra proferentem*'. The latter provides that uncertainties regarding the formulation of a contract are decided against the drafter (see Honnold, para. 107.1). Since it was Equafilm that drafted the contract, Equafilm bears the risk of a misunderstanding.

§ 4

No contract was concluded between Equafilm and Medipack on 3 April 2001

69. Since CLAIMANT and RESPONDENT have not reached an agreement on the price of 1,350 tons of OPP, no contract between the parties was concluded on 3 April 2001.

4.1 No contract under the domestic commercial law of Equatoriana

70. According to the rules of domestic Equatorian law, Equafilm and Medipack did not enter into a sales contract on 3 April 2001. As submitted by CLAIMANT (see Procedural Order N° 1, para. 8) and by RESPONDENT (see Statement of Defence, paras. 16, 17), the law governing the formation of contracts in Equatoriana is very strict in its requirements. It demands that the quantity and the price of the goods that are the subject of an alleged contract must be clearly determined or be determinable at the time of the conclusion of the contract. The fact that there is a dispute as to whether the price of the OPP was to be calculated of four percent or eight percent from Equafilm's list price would preclude the conclusion of a contract under the domestic law of Equatoriana.

4.2 No contract under the CISG

71. If the Arbitral Tribunal finds that the CISG is the applicable law to the formation of the alleged contract of 3 April 2001, no sales contract was concluded between the parties as no agreement on the price has been reached.

4.2.1 The requirements of Arts. 23 and 14 (1) CISG are not met: no agreement on the price

72. Since the parties' negotiations are lacking an agreement on the price, there is no contract according to the rules of the CISG.

73. According to Art. 23 CISG, "*a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention*". The latter provision requires for a contract under the CISG an offer and an acceptance. When Mr. Black called Mr. Storck on 3 April 2001, the two entered into a discussion. Since it is impossible to

trace the exact conversation, one cannot identify in the retrospective when exactly the alleged offer and acceptance were made.

74. It is generally recognized that, when parties negotiate and it is impossible to isolate offer and acceptance, it suffices that the parties have reached an agreement (see Honnold, para. 132.1). This agreement must contain, however, the minimum requirements of an offer in the sense of Art. 14 (1) CISG in order to form a valid contract, because the requirements for a valid offer also constitute the requirements for the minimum content of the contract (see Schlechtriem II, Intro Art. 14 para. 5). Art. 14 (1) CISG reads: “(1) *A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. 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.*”

75. These requirements of an agreement in the sense of Art. 14 (1) CISG are not met. Equafilm and Medipack have neither expressly nor implicitly agreed on a price. Moreover, the parties have not made any provisions for determining the price. Rather, the parties disagreed on one of the price’s crucial elements, i.e. the discount of 4% or 8%.

76. CLAIMANT exclusively bases its argumentation for the conclusion of a sales contract on the assumption that the discount is *not* part of the price (see Memorandum for Claimant, paras. 89, 101, 112). This lacks a proper legal basis. CLAIMANT solely relies on the author Sevón to support this position (cited as “Sevón in Sarcevic 221”, in: Memorandum for Claimant, paras. 89 and 101). The article cited does, however, not speak of the relation between discount and price *at all*, but rather treats remedies for breach of obligation to pay the price (see Sevón, p. 203-238).

77. RESPONDENT submits that the discount must be qualified as part of the price. The price is constituted of three elements: the list price, the discount, and the CIF charges. This position is supported by the fact that CLAIMANT also indicated in the contract of 15 December 2000 only one final sum including the discount Medipack was to pay. This sum of \$ 353, 927 included all three elements constituting the price (see Claimant’s Exhibit N° 2). Moreover, CLAIMANT states in its letter dated 7 December (see Claimant’s Exhibit N° 1) that “*our usual price ... is a*

discount of four percent from our list price". If Equafilm now claims that the discount must be seen as separate from the price it would set itself in contradiction to its own previous conduct. Not to regard the discount as part of the price and to assume a respective agreement would disregard the economic reality that the discount was crucial to determine the value of the transaction for both CLAIMANT and RESPONDENT. The difference between a price with a discount of 4% or 8% amounts to the considerable sum of \$ 102,600.

4.2.1.1 No explicit agreement on the price

78. However, neither of the parties expressly mentioned the discount during the telephone conversation on 3 April 2001. This is not contested by CLAIMANT (see Statement of Claim, para. 5). The parties agreed only on the goods, namely 1100 mm wide, 30 micron thick, opaque white OPP, and the quantity, namely 1,350 tons. Furthermore, Equafilm's sales manager pointed out to Mr. Black, that Equafilm's list price of OPP had risen from \$ 1,800 to \$ 1,900 per ton. That was the only mention of the parties concerning the price during their telephone conversation. Insofar, there was no explicit mentioning and therefore no explicit agreement on the discount during this conversation. As no discount was fixed expressly, neither could have been the price.

4.2.1.2 No tacit agreement on the price

79. CLAIMANT's assertion that the parties reached a tacit agreement on the discount during their conversation on 3 April 2001 must also be rejected.

80. As CLAIMANT correctly points out (see Memorandum for Claimant, para. 113), it is generally admitted that the price – and consequently the discount – may be indicated in an implied manner, provided it is determinable (see Bianca/ Bonell, Art. 14 para. 2.2.4.3; Sono, p.118 et seq.). Therefore, one must interpret the parties' statements according to Art. 8 CISG. In the present matter, where no statement of the parties can be labelled as an offer or an acceptance, the parties' statements must be interpreted according to Art. 8 (3) CISG, stating that *"...consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties"*.

81. Applying this provision the case at hand leads to the conclusion that the price *cannot* be determined because the parties' expectations concerning the discount were contradictory.

82. In the context of the contract of 15 December 2000, CLAIMANT had promised Medipack that it would always receive Equafilm's *best price* (see Claimant's Exhibit N° 1). The letter also said that the given 8% discount was the best price Equafilm had ever given to any customer for any purchase and that the *usual price* for favoured customers is a discount of 4%. When Equafilm used the terms *usual price* (meaning a discount of 4%) and "*best price*" (meaning a discount of 8%), and at the same time emphasized that Medipack would always receive the "*best price*", then it is not understandable why, all of a sudden, this best price was no longer an 8% discount as stated in the letter, but one of 4%.

83. The usual discount of 4% is, according to Equafilm's letter, given to usual favoured customers. In contrast to these usual favoured customers, Equafilm had granted to Medipack a special position "*in view of the quantity you have indicated ... to purchase each year*" (see CLAIMANT's Exhibit N° 1). Insofar, the usual discount of four percent was to be given to regular favoured customers, whereas Medipack was to receive a special treatment by always receiving the best price of an 8% discount.

84. Furthermore, this is particularly true, as Equafilm had already raised the list price. Such an increased list price in connection with a decreased discount of 4% would deprive Medipack of its special treatment.

85. The subsequent conduct of the parties evidences that Medipack and Equafilm had a dissent over the discount. From the exchange of faxes right after the negotiations over the telephone it became clear that the parties were implying a different discount. Whereas Mr. Black speaks in his fax of "*the discounted price we are to pay*", meaning the list price of \$ 1,900 per ton minus a discount of 8% (confirmed in his letter to Mr. Storck dated 6 April 2001, Claimant's Exhibit N° 5), Mr. Storck confirms Medipack's order, "*including a discount of four percent*".

86. The parties, having concluded only one contract over OPP in the past, have not established any practices between themselves. Practices can neither be deduced from the

conclusion of a contract in 1996, since this transaction was over a different grade of film. Moreover, there are no trade usages (in the sense of Art. 8 CISG) in the industry concerning discounts (see Procedural Order N° 2, para. 41).

87. As a result, when Mr. Black told Mr. Storck on the telephone that Medipack would buy 1,350 tons of OPP from Equafilm to a list price of \$ 1,900 per ton, he implicitly included a discount of 8% per ton of the list price. Equafilm, however, indicated in its statements following the telephone conversation that it implied a discount of 4%. Insofar there was not consent over the discount and therefore no tacit agreement on the price.

4.2.2 Art. 55 CISG cannot stipulate any price

88. Contrary to CLAIMANT's assertion (see Memorandum for Claimant, para. 115), Equafilm cannot rely on Art. 55 CISG to argue that a valid sales contract was concluded between the parties.

89. Art. 55 CISG reads as follows: *“Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned”*. It cannot be taken from Art. 55 CISG that whenever parties agree on a contract without fixing a price, this provision compensates the non-fixation and consequently “saves” the contract. Such a large sphere of application of the latter norm would contradict the interpretation of Art. 14 (1) CISG, demanding at least the *possibility of determining* the price in order to have a valid offer. The present matter is not covered by the sphere of Art. 55 CISG for several reasons.

90. First, a large number of scholars advocate that Art. 55 CISG only applies when Part II (Arts. 14-24) of the CISG is excluded (see Schlechtriem I, Art. 14 para. 6; Enderlein/ Maskow/ Strohbach, Art. 55 para. 2; Herber/ Czerwenka, Art. 55 para. 5). This is not the case here, since Equatoriana as a Contracting State has not excluded Part II of the CISG. Therefore, Art. 14 (1) CISG takes priority over Art. 55 of the Convention.

91. Second, even if one generally applied Art. 55 CISG in cases where the parties *wanted* to leave the price open in the contract, this would not allow the conclusion that a valid contract was concluded between Equafilm and Medipack. In the present matter both parties were aware that there was a discount to fix, they did not want to leave the price open. Since they rather disagreed on the price, it would disrespect the parties' true will to deduce from the lack of mentioning the discount an intention to leave the discount undetermined. The telefaxes from 3 April 2001 sent by the parties immediately after the telephone conversation rather evidence the contrary. As shown above, Mr. Black wanted to be bound by a discount of 8% whereas Mr. Storck talked about a discount of 4%. Furthermore, Medipack expressed unambiguously that it wanted to contract with Equafilm only because of a discount of 8% (see Claimant's Exhibit N° 7).

92. Further, CLAIMANT falsely assumes that a contract was formed as the "*price is not an essential element in order for CISG Article 14 to be satisfied*", because (...) "*the crucial element of CISG Article 14 is an intention to be bound by acceptance of an offer*" (see Memorandum for Claimant, para. 113). CLAIMANT neglects, however, that all essential elements left open must then be determined by applying Art. 55 CISG (see Bianca/ Bonell, Art. 14 para. 2.2.4.3). In the case at issue Art. 55 CISG *cannot* apply, though, as the parties did not want to leave any term open.

4.2.3 No implicit derogation or variation from the requirements of Art. 14 (1) CISG

93. CLAIMANT's argument that the parties tacitly applied Art. 6 CISG to derogate or vary from the price requirement of Art. 14 (1) CISG (see Memorandum for Claimant, para. 116) must be rejected. Even though a derogation from Art. 14 (1) CISG is generally possible, such an act demands at least that the parties have either expressly stated their wish to derogate from the price-concept of Art. 14 (1) CISG or that the parties' intention proves that Art. 14 (1) CISG would contradict their intent (see Honnold, para. 137.5). The parties have never expressly excluded or varied from the price requirement of Art. 14 (1) CISG. Moreover, the fact that the parties' intended to fix the price (see *supra*, para. 85) shows that they did not want to derogate from the price requirement of Art. 14 (1) CISG.

4.2.4 No modification of the contract of 15 December 2000

94. CLAIMANT falsely assumes (see Memorandum for Claimant, paras. 93-101) that the parties have modified the prior contract of 15 December 2000 during their telephone conversation on 3 April 2001 in accordance with Art. 29 (1) CISG, which permits that “*a contract may be modified ... by the mere agreement of the parties*”. Such an agreement cannot be established.

95. It is unquestioned that neither party expressly said that it wanted to modify the contract of 15 December 2000. CLAIMANT assumes, however, an implicit, oral modification, confirmed by the faxes exchanged after the telephone conversation (see Memorandum for Claimant, para. 95). Even though modification agreements can be concluded orally, this was not the case here. The parties agreed that “*similar terms*” of the contract of 15 December are to apply. That means that the parties incorporated only certain elements of their prior contract into the alleged contract by reference. If the parties had wanted to modify the contract of 15 December 2000, their formulation would rather have been the opposite, e.g. “the content of the contract of 15 December 2000 is to apply, except for...”.

96. Finally, CLAIMANT contradicts its own argumentation by asserting that there was a modification agreement. This modification agreement, if any, did not include any alteration of the discount. Since CLAIMANT wants to establish a contract with a discount of 4%, the parties would have needed to mention the discount in the modification agreement. Insofar, CLAIMANT cannot rightfully qualify the alleged contract as a modification, as it relies on a contract including a discount of 4%.

4.2.5 No framework contract

97. CLAIMANT incorrectly assumes, that “*the written contract of 15 December 2000*” establishes “*the framework of the relationship*” between Equafilm and Medipack (see Memorandum for Claimant, para. 102). Insofar, CLAIMANT concludes that the alleged contract of 3 April 2001 constitutes a contract within the frame of the anterior contract of 15 December 2000 (see Memorandum for Claimant, para. 107). This argumentation cannot be followed, since the two contracts do not form an indivisible whole, but are rather independent of each other (see

supra, para. 23). Further, the contract of 15 December 2000 cannot constitute a main contract or a frame, as this contract did not include a method for determining the price for subsequent contracts. A main contract must, however, contain all relevant factors for a contract to be formed within its frame (see Schlechtriem II, Art. 14 para 6). The method for determining the price is such a relevant factor. Contrary to CLAIMANT's assertion, the method for determining the price was not provided in the anterior contract by a reference to the list price (see Memorandum for Claimant, para. 108). First, the contract is in fact not referring to any list price, but rather names a final sum Medipack has to pay, instead of a provision for any future determination of the price (e.g. a formula). Second, the contract of 15 December 2000 does not provide a method for determining the *discount* for further contracts, which is part of the price (see supra, para. 77).

§ 5

Alternatively: A contract was formed including a discount of 8%

98. If the Arbitral Tribunal finds that a valid sales contract between the parties was concluded on 3 April 2001, what RESPONDENT contests, then this contract includes a discount of 8%.

5.1 The interpretation of the parties' statements leads to a discount of 8%

99. A reasonable person's understanding of the parties' statements leads to the conclusion of a contract with a discount of 8%.

100. As CLAIMANT itself submits, certain terms of the contract of 15 December 2000 including the CIF component and a discount from the list price apply to the new contract (see Memorandum for Claimant, para. 109). During their conversation on 3 April 2001 Mr. Black only mentioned that Equafilm's list price had risen. However, the parties omitted to speak of the discount. A reasonable person would have understood this omission in a way that the parties did not alter the 8% discount that was granted to Medipack in the prior contract.

101. Furthermore, CLAIMANT had promised RESPONDENT in its first letter (see Claimant's Exhibit N°1) that, in view of the quantity Medipack was to purchase in the future, it

was always to receive its best price. As Equafilm itself named the 8% discount granted to Medipack “*our best price*”, a reasonable person would have expected Medipack to receive a discount of 8 % on all its transactions.

5.2 A modified contract and a framework contract lead to a discount of 8%

102. Even if this Arbitral Tribunal should find that the parties concluded a contract by modifying their prior contract or by concluding a new contract in the frame of the prior contract, this would still lead to a discount of 8%. Whenever parties conclude a contract by modifying a prior contract or designing it ‘*in the frame*’ of a main contract all provisions of the anterior agreement apply, unless otherwise provided by the parties. Equafilm and Medipack never mentioned any changes concerning the discount. Consequently, the discount of 8% included in the contract of 15 December 2000 was not altered and therefore also applies to the alleged contract.

§ 6

Breach and Damages

103. RESPONDENT strongly objects that it was in breach of contract. Equafilms’ claims for damages lack any proper basis.

6.1 Medipack did not commit a breach, because there was no sales contract at all

104. As stated above (see supra, § 4), no sales contract was formed between CLAIMANT and RESPONDENT on 3 April 2001. Since there was no contract, Medipack did not breach any such. Consequently, as Medipack did not and could not commit any breach, Equafilm has no right to claim damages on that grounds.

6.2 If the Arbitral Tribunal finds that there was a contract with an 8 % discount, then there was no breach by Medipack

105. If the Arbitral Tribunal finds that a valid sales contract including an 8% discount (see

supra, § 5) has been concluded between the parties, Medipack did not breach the contract either. Medipack was always willing to take over 1,350 tons of OPP and to pay the price of \$ 2,359,800 plus CIF charges (see Claimant's Exhibits N° 3 and 5). It was only when Mr. Storck insisted that Equafilm would deliver the goods exclusively to a price including a discount of 4%, that Medipack considered placing its order with Polyfilm GmbH. This is what Mr. Black told Mr. Storck in his letter dated 10 April 2001 (see Claimant's Exhibit N° 7): *"If you do not intend to keep your commitment to us to give us an eight percent discount (...), we will have to consider (...) returning to Polyfilm"*. In response to that letter, CLAIMANT unambiguously refused to alter its position and informed Medipack accordingly (see Claimant's Exhibits N° 8 and 9). After this final refusal, Medipack had no choice, but to place its order with someone else in order to fulfil its own contractual obligation (see Statement of Claim, para. 5).

106. RESPONDENT reserves its right to launch a counterclaim according to Sec. 10 DIS against CLAIMANT for its refusal to deliver the goods at a price including the 8% discount.

6.3 If the Arbitral Tribunal finds that there was a contract with a 4% discount, CLAIMANT is not entitled to damages in the amount of \$ 575,477.98

107. Even if this Arbitral Tribunal should find that a contract was formed with a discount of 4%, CLAIMANT still would not be entitled to damages of \$ 575,477.98. CLAIMANT did not furnish any proof for the correctness of the calculation of the payment of the alleged damages. RESPONDENT cannot reconstruct how Equafilm gets to a the sum of \$ 575,477.98. Further, if Medipack had breached a contract including a discount of 4%, Equafilm would not be entitled to damages exceeding a sum of \$ 461,700. CLAIMANT's calculation of \$ 575,477.98 as damages includes two elements which are incorrect.

6.3.1 The costs for CIF are not part of the damages

108. First, the costs for CIF are not part of the damages. The use of the Incoterm CIF (Cost, Insurance, and Freight) means that the seller (Equafilm) organises the insurance for the goods, but its costs will be refunded as part of the contracted price. If no goods are shipped, there is nothing to insure. As CLAIMANT does not mention any action which indicates that any kind of insurance payments have been effected, CIF charges cannot be compensated.

6.3.2 The discount of 4% reduces the profit

109. Equafilm operates with a gross margin of 22% (see Procedural Order N° 1, para. 11). That means that Equafilm makes a profit of \$ 418 per ton at a list price of \$ 1,900. The list price minus the profit equals the sales costs that Equafilm spends on the production of one ton of OPP, namely \$ 1,482 ($\$ 1,900 - \$ 418 = \$ 1,482$). As the sales costs remain constant, Equafilm reduces its profit whenever it grants a discount on the list price.

110. In the case at issue, Equafilm grants a discount of 4% on the list price ($\$ 1,900$ minus 4% equals \$ 1,824) and therefore reduces its profit to \$ 342 per ton ($\$ 1,824 - \$ 1,482$ (sales costs) = \$ 342).

6.3.3 Correct calculation of the damages

111. Hence, if the loss of profit is correctly calculated, Equafilm can only claim a loss of profit of \$ 342 per ton, which results in damages of \$ 461,700 ($\$ 342 \times 1,350$ tons).

§ 7

Interest

112. If this Arbitral Tribunal should find that CLAIMANT is entitled to payment of damages, it would need to recalculate the claimed interest. CLAIMANT states correctly that interest must be paid from the time when the damage occurred (see Memorandum for Claimant, para. 143). The parties agreed on shipment in nine monthly instalments, starting on 10 May 2001. Payment should be made for each shipment within 30 days of notification by Equafilm of delivery to the port for shipment (see CLAIMANT's Exhibit N° 2).

113. Interest can only be claimed for \$ 461,700 divided into the nine instalments. The damage of each instalment occurred when the payments were due.

114. I.e., Medipack would be obliged to pay interest on:

\$ 51,300 since 9 June 2001 (30 days after the first shipment)
\$ 102,600 since 10 July 2001 (30 days after the second shipment)
\$ 153,900 since 9 August 2001 (30 days after the third shipment)
\$ 205,200 since 9 September 2001 (30 days after the fourth shipment)
\$ 256,500 since 10 October 2001 (30 days after the fifth shipment)
\$ 307,800 since 9 November 2001 (30 days after the sixth shipment)
\$ 359,100 since 10 December 2001 (30 days after the seventh shipment)
\$ 410,400 since 9 January 2002 (30 days after the eighth shipment)
\$ 461,700 since 9 February 2002 (30 days after the ninth shipment)

§ 8

Claims for Relief

115. RESPONDENT requests the Arbitral Tribunal to dismiss Equafilm's claims and to find that CLAIMANT bears the costs and fees relating to this arbitration.

For Medipack S.A.

(Anna von Oettingen)

(Christian Annen)

(Jens Gal)

(Sebastian Kneisel)

Frankfurt/ Main, 7 February 2003

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