

**MEMORANDUM  
for Respondent**

**EQUAFILM CO. v. MEDIPACK S.A.**



**ALBERT-LUDWIGS-UNIVERSITÄT FREIBURG**

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Christian Knorst • Pia Schirmer • Nils Schmidt-Ahrendts

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<b>Art./Arts.</b>	Article/Articles
<b>BGH</b>	Bundesgerichtshof (German Federal Supreme Court)
<b>BGHZ</b>	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the BGH in civil matters)
<b>CIF</b>	Costs Insurance Freight (Incoterms 2000)
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
<b>December Agreement</b>	The contract concluded between the parties on 15 December 2000
<b>DIS</b>	Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)
<b>e.g.</b>	<i>exemplum gratia</i> (for example)
<b>Engl.</b>	English Version
<b>et seq.</b>	<i>et sequentes</i> (and following)
<b>Ex.</b>	Court of Exchequer
<b>Ger.</b>	German Version
<b>GmbH</b>	Gesellschaft mit beschränkter Haftung
<b>IBA Ethics</b>	International Bar Association Ethics of International Arbitrators
<b>i.e.</b>	<i>id est</i> (that means)
<b>ICC</b>	International Chamber of Commerce
<b>Intro</b>	Introduction
<b>IPRax</b>	Praxis des Internationalen Privat- und Verfahrensrechts
<b>J.D.I.</b>	Journal du Droit International

<b>JUS</b>	Juristische Schulung
<b>JZ</b>	Juristen Zeitung
<b>L.Ed.</b>	Lawyers' Edition
<b>LG</b>	Landgericht (German Regional Court)
<b>Lloyd's Rep.</b>	Lloyd's List Law Report
<b>Multiland</b>	Multiland Associates
<b>New York Convention</b>	The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
<b>NJW</b>	Neue Juristische Wochenschrift
<b>No.</b>	Number
<b>OGH</b>	Oberster Gerichtshof (Austrian Supreme Court)
<b>ÖJZ</b>	Österreichische Juristenzeitung
<b>OLG</b>	Oberlandesgericht (German Court of Appeal)
<b>OPP</b>	Oriented Polypropylene
<b>p./pp.</b>	page/pages
<b>para./paras.</b>	paragraph/paragraphs
<b>PECL</b>	Principles of European Contract Law
<b>RabelsZ</b>	Rabels Zeitschrift für ausländisches und internationales Privatrecht
<b>RIW</b>	Recht der internationalen Wirtschaft
<b>Sec.</b>	Section
<b>UCC</b>	Uniform Commercial Code (USA)
<b>UN</b>	United Nations

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<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Model Law</b>	UNCITRAL Model Law on International Commercial Arbitration
<b>UNILEX</b>	International Case Law & Bibliography on CISG & UNIDROIT Principles, <a href="http://www.unilex.info">www.unilex.info</a>
<b>U.S.</b>	United States Supreme Court Reports
<b>US Supreme Court</b>	United States Supreme Court
<b>YCA</b>	Yearbook Commercial Arbitration
<b>WM</b>	Wertpapier-Mitteilungen
<b>ZPO</b>	Zivilprozeßordnung (German Code of Civil Procedure)
<b>ZZP</b>	Zeitschrift für Zivilprozeß

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**AUSTRIA**

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**STATEMENT OF FACTS**

- 7 December 2000 Mr. Herbert Storck of Equafilm Co. (hereafter referred to as "CLAIMANT") telephoned Mr. Reginald Black of Medipack S.A. (hereafter referred to as "RESPONDENT"). During the telephone conversation Claimant and Respondent agreed on the delivery of 200 tons of opaque white OPP film. In view of the quantities Claimant expected to sell each year, Respondent was granted a discount of eight percent from the list price of \$1,800 per ton on its very first order.
- On the same day, Claimant sent Respondent a letter in which the terms of the purchase order were included. It was noted that the price included a discount of eight percent of the list price and that Respondent will always receive Claimant's best price.
- 15 December 2000 A contract of sale was signed by Claimant and Respondent for the first order of 200 tons of OPP (hereafter referred to as "DECEMBER AGREEMENT"). Apart from the price and exact quality of the OPP, Claimant and Respondent agreed upon general terms of payment and shipment, the choice of law, namely "Equatorianian commercial law", and the form of dispute settlement, namely arbitration in accordance with the rules of the "German Arbitration Association" by a panel of three arbitrators in Vindobona, Danubia.
- 3 April 2001 Respondent telephoned Claimant to place a further order of 1.350 tons of OPP. It was stated that similar conditions of the December Agreement were to apply.
- After the telephone conversation Respondent sent a confirmation fax of the assumed contract.
- Independent from Respondent's letter, Claimant sent a confirmation form in which the price set forth was \$2,615,809 (Claimant's current list price including a discount of four percent only).
- 6 April 2001 Respondent replied by fax stating that the alleged contract had a major error with regard to the price and said that the purchase price should have reflected the eight percent discount.
- 9 April 2001 Claimant sent a fax stating that an eight percent discount from the list price was not granted for this order.
- 10 April 2001 Respondent replied by fax stating that it had only ordered a second quantity of the OPP in reliance on receipt of the promised eight percent discount.

- 12 April 2001 Claimant replied by stating that it had assumed the eight percent discount granted in the December Agreement was only a one-off discount.
- 27 April 2001 Claimant sent a new fax asking Respondent to communicate its intention.
- 2 May 2001 Respondent replied stating that it had returned to Polyfilm GmbH as its supplier for OPP.
- 23 May 2002 Claimant gave notice that it wished to commence arbitration proceedings against Respondent under the English language version of the Arbitration Rules of the German Institution of Arbitration.
- 1 June 2002 Claimant nominated Dr. X as arbitrator for the dispute.
- 22 August 2002 Dr. X gave notice that his law firm has entered into an agreement to merge with Multiland, which had represented Claimant in two matters unrelated to this arbitration dispute and expects further representation for Claimant.
- 19 September 2002 Respondent gave notice that it wished to challenge Dr. X in accordance with the rules of the German Institution of Arbitration.

**STATEMENT OF PURPOSE**

We respectfully submit the following request on behalf of Respondent.

May it please the honourable Tribunal to find that:

- The application of the challenge of Dr. X must be granted **(PART 1)**;
- The Arbitral Tribunal has no jurisdiction **(PART 2)**;
- The domestic law of Equatoriana and not the CISG is the law applicable to the alleged contract **(PART 3)**;
- No contract of sale was concluded between Claimant and Respondent on 3 April 2001 **(PART 4)**;
- Claimant is not entitled to lost profit and interest thereon **(PART 5)**;
- The Arbitral Tribunal is not entitled to award Claimant the sum of \$575,477.98 based on an ‘action for the price’ **(PART 6)**;
- Claimant shall bear the costs of the arbitral proceedings.

By this Memorandum, Counsel will respond to Claimant’s demands and demonstrate that they have no legal or factual basis.

**PART 1: THE APPLICATION OF THE CHALLENGE OF DR. X MUST BE GRANTED**

1. In its Memorial for the Claimant (hereafter referred to as “Memorandum for Claimant”) Claimant deals with the question concerning the jurisdiction of the Arbitral Tribunal in first place. Contrary to this sequence of issues, Respondent requests the Tribunal to persist on its order provided in Procedural Order No. 1, para. 14, and therefore to decide on the challenge of Dr. X first. The issue of jurisdiction should not be dealt with by an arbitrator who is biased in favour of Claimant.

2. Although Respondent does not doubt Dr. X’s personal integrity, the application of the challenge must be granted as the merger between Dr. X’s law firm and Multiland Associates (hereafter referred to as “MULTILAND”) constitutes sufficient grounds to raise justifiable doubts as to his independence.

3. According to Sec. 18(1) of the Arbitration Rules of the German Institution of Arbitration (hereafter referred to as “DIS Rules”) “an arbitrator may only be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence [...]”. The record states that Dr. X’s law firm merged with Multiland on 1 January 2003 and that Claimant was represented twice by Multiland which expects further representation of Claimant (Procedural Order No. 2, para. 18).

4. Claimant alleges that the merger of the law firms is in itself insufficient to draw the inference that Dr. X will be prejudiced against Respondent or biased in favour of Claimant (Memorandum for Claimant, para. 17). It thereby assumes that only actual bias would constitute grounds for the challenge of an arbitrator in terms of Art. 18(1) DIS Rules. However, Counsel will demonstrate that the appearance of bias suffices to challenge Dr. X, and that the relationship between Dr. X and Claimant constitutes such an appearance.

5. Contrary to Claimant’s assumption, Sec. 18(1) DIS Rules does not require Dr. X’s actual bias. This is supported by the wording of Sec. 18 DIS Rules, which only requires “justifiable doubts” but not, for example, evident partiality. Moreover, with regard to practical interests, it is the appearance of bias rather than actual bias which may disqualify an arbitrator (*Commonwealth Coatings v. Continental Casualty*; WEIGAND/WEIGAND, p. 74, FOUCHARD, para. 1038; BERGER, p. 177; on “justifiable doubts” in Art. 1033(1) Code of Civil Procedure (Netherlands): WEIGAND/LAZIC/MEIJER, p. 907), since it is practically impossible to prove actual bias (Cour d’Appel de Paris, 9 April 1992; FOUCHARD, para. 1038).

6. This view is underlined by the fact that the appearance of bias is sufficient to disqualify state judges (e.g. Sec. 42 ZPO; Sec. 52 Rules of Civil Procedure (Italy)). Since “arbitrators have completely free reign to decide the law as well as the facts and are not subject to appellate re-

view” (*Commonwealth Coatings v. Continental*), the requirements which suffice to disqualify state judges must at least be sufficient to grant the challenge of an arbitrator (WEIGAND/TRITTMANN/DUVE, p. 334; SCHÜTZE, p. 28; GLOSSNER/BREDOW/BÜHLER, p. 85, all referring to Sec. 42 ZPO; WEIGAND/RUBINO-SAMMARTANO, p. 844, referring to Sec. 52 Rules of Civil Procedure (Italy); WEIGAND/V. TABOUILLOT, p. 961, referring to Arts. 219, 220 Constitutional Law of Judicial Power (Spain)). The fact that the parties, when agreeing to arbitration, derogate from court’s jurisdiction, i.e. the due process of national law, confirms this argumentation. To ensure and protect the parties’ trust in arbitration, the standards for arbitrators’ impartiality and independence must at least be identical to the standards established for the application of a challenge of state judges. Consequently, the appearance of bias should be deemed to be sufficient for a challenge in the present dispute.

**7.** Since the client expects solidarity not only from its contact person in the law firm but from the entire partnership (LACHMANN, para. 595), it is often the previous acting of a member of the arbitrator’s law firm for one of the parties which affects an arbitrator’s independence (WEIGAND/WEIGAND, p. 74). This is even true if an international operating partnership represents the party in another country (LACHMANN, para. 596). In the present dispute, Claimant relies on the solidarity of the entire partnership of Multiland, which has represented it previously. Therefore, Dr. X’s independence must be considered to be affected despite the fact that both Claimant and Multiland were situated in two different countries at the time of Claimant’s representation.

**8.** The US Supreme Court ruled that “the slightest pecuniary interest” should set a judge’s decision aside (*Tumey v. Ohio*). Since this standard also applies to arbitral proceedings (*Commonwealth Coat. v. Continental*) reasonable doubts to the independence of Dr. X arise from the fact that he benefits personally from the outcome of the award by receiving a share in Multiland’s profits. The share in profits Multiland grants to its partners is in part determined by the profits of the firm (Procedural Order No. 2, para. 19). Hence, Claimant partly contributes to Dr. X’s personal income. Multiland’s profit would decrease if Claimant did not remain as a client. It is certainly probable that Claimant will choose to stay with Multiland if Dr. X acts in favour of Claimant. Thus, Dr. X’s financial interest constitutes appearance of bias.

**9.** Moreover, Dr. X is professionally interested in keeping Claimant as a client of his law firm. Since he is a new partner to Multiland (Procedural Order No. 2, para. 19) and his reputation and standing will be affected if Multiland loses Claimant as an important client, he cannot afford to lose Claimant as a client. Aiming to establish his reputation and standing, Dr. X takes advantage of the relationship between his law firm and Claimant.

**10.** Furthermore, Respondent suggests that Dr. X can gain access to information concerning Multiland's previous representation of Claimant by simply asking for it (Procedural Order No. 2, para. 23). Hence, Multiland fails to adequately separate Dr. X from confidential information. It does not establish a "firewall" which would impede its partners from gaining any information about a party involved in a present dispute. An arbitrator having free access to detailed information related to one of the parties does not meet with his obligation to treat the parties equally. Therefore, Dr. X's knowledge about previous dealings between Multiland and Claimant does not allow transparent proceedings, but substantiates an appearance of bias.

**11.** In its Memorandum for Claimant (para. 14), Claimant mentions Sec. 3(4) of the International Bar Association Ethics for International Arbitrators (hereafter referred to as "IBA Ethics"), according to which, past business relationships will not operate as an absolute bar to the acceptance of appointment. Respondent points out that the IBA Ethics are not applicable to the dispute at hand since they were not adopted by the parties. In the event that the Arbitral Tribunal decides to take the IBA Ethics into account, Counsel stresses the fact that Claimant did not mention the entire Sec. 3(4) IBA Ethics. Pursuant to this rule, past business relationships indeed constitute an absolute bar as soon as they are "likely to affect the arbitrator's judgement". As shown above, the past relationship between Claimant and Multiland is likely to affect Dr. X's judgement. Furthermore, since the Oceanian office of Multiland expects further representation of Claimant (Procedural Order No. 2, para. 18) this relationship is likely to be continued in the future. Thus, not only past relationships are matter to the present challenge.

**12.** Claimant might assert that predisposition was acceptable for the co-arbitrators nominated by the parties and that high standards must only be fulfilled by the chairman since the Arbitral Tribunal consists of three arbitrators. Yet, this stance must be rejected. Sec. 16 DIS Rules provides that "**each** arbitrator must be impartial and independent". This language must be applied in a strict sense. The practice of non neutral arbitrators exists only in United States arbitration disputes. In international disputes, the practice of appointing non neutral arbitrators is only accepted in ad hoc arbitrations, since the rules of most institutions require arbitrators to be independent and impartial (REDFERN/HUNTER, p. 210). Thus, it must be held that the aforesaid standards apply not only to the chairman, but also to Dr. X.

**13.** Finally, Claimant might allege that the application of a challenge can only be granted if the relationship between the arbitrator and one of the parties is considered to be direct, definite and capable of demonstration. Although this standard might apply to the aforementioned

US arbitration system with the idea of non neutral arbitrators, it is not applicable to the present case under the DIS Rules.

**14.** Consequently, Dr. X is apparently biased because of his relationship to Claimant. This appearance of bias is sufficient for a successful challenge under Sec. 18(1) DIS Rules.

**15. Result:** The application of the challenge of Dr. X must be granted.

## **PART 2: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION**

**16.** Counsel respectfully requests the Arbitral Tribunal to find that it has no jurisdiction and, therefore, does not have the competence to decide on the merits of the present dispute.

**17.** It will be demonstrated that no valid arbitration agreement between Claimant and Respondent covering the present dispute has come into existence. Claimant submits that in clause 13 of the contract concluded on 15 December 2000 (hereafter referred to as “DECEMBER AGREEMENT”) the parties validly agreed on arbitration before the DIS Tribunal (Memorandum for the Claimant, para. 2). This arbitration agreement is supposed to have been incorporated in an alleged contract dated 3 April 2002 (Memorandum for Claimant, para. 7). However, Counsel will demonstrate that there has never been a valid agreement to arbitrate before the DIS Tribunal, since the parties referred in their December Agreement to a non-existent arbitration organization (A). Even if there was a valid arbitration agreement in December, it would not govern the present dispute (B). Additionally, on 3 April 2001 no arbitration agreement was validly incorporated, since the parties did not conclude a contract of sale (C).

### **A. CLAUSE 13 OF THE DECEMBER AGREEMENT IS INVALID**

**18.** Respondent will illustrate that the parties did not agree on arbitration before the DIS Tribunal since the “German Arbitration Association” does not exist (I). Furthermore, an alleged meeting of minds to arbitrate before the DIS was not fixed in writing and thus, it would not have met the formal requirements (II).

#### **I. THE PARTIES DID NOT AGREE ON ARBITRATION BEFORE A DIS TRIBUNAL**

**19.** In clause 13 of the December Agreement the arbitral organization referred to is the “German Arbitration Association” (Claimant's Exhibit No. 2, clause 13). Claimant itself admits that an organization of this name does not exist (Memorandum for the Claimant, para. 11; Procedural Order No. 1, para. 5). It asserts that the name of the arbitral institution is “obvious[ly]” a mistranslation of the ‘Deutsche Institution für Schiedsgerichtsbarkeit e.V.’ (Statement of Claim, para. 15). Moreover, it puts forward that “the plain and natural reading of the parties’ reference [...] is that they intended the Arbitral Tribunal to be constituted by an established German arbitral association” and that the DIS “is the closest to meeting that description” (Memorandum for Claimant, para. 14). However, Claimant fails to give any rules of interpretation that would support these conclusions.

**20.** Contrary to Claimant’s assumption, the parties did not agree on arbitration before the DIS Tribunal. An arbitration is based on the parties’ common intent, which leads to a ‘meeting of

minds' on arbitration in terms of Art. 7 UNCITRAL Model Law on International Commercial Arbitration (hereafter referred to as "UNCITRAL MODEL LAW") and Art. II New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter referred to as "NEW YORK CONVENTION"). Claimant alleges (Memorandum for the Claimant, para. 5) and Respondent agrees that both provisions shall be applied as the laws governing this arbitration clause.

**21.** By agreeing on arbitration the parties derogate from their fundamental right of litigation. Hence, the interpretation of an arbitration clause must be restrictive (BGH, 3 March 1955; RÜEDE/HADENFELDT, p. 62). Such interpretation requires that a dispute should only be governed by arbitration where the parties had the express and unambiguous intention to arbitrate.

**22.** This intention is to be interpreted according to the circumstances of the negotiations and usages conforming to the needs of international commerce (ICC Award No. 146, 465, rendered by SANDERS (Chairman), GOLDMAN and VASSEUR, upheld by Cour d'Appel de Paris, 21 October 1983; CRAIG/PARK/PAULSSON, 3<sup>rd</sup> Edition, p. 53; REDFERN/HUNTER, 3<sup>rd</sup> Edition, p. 124).

**23.** Firstly, in cases similar to the case at hand the Cour d'Appel de Grenoble and the OLG Hamm held that the arbitration clause was invalid. The French Court ruled that the term "International Court of Arbitration of the Hague" was not referring to "The permanent Court of Arbitration of The Hague" (Cour d'Appel de Grenoble, 24 January 1986, in 124 J.D.I. 1997, p. 115). The German court decided that the designation "Arbitral Tribunal of the International Chamber of Commerce in Paris, seat in Zurich" would only ambiguously refer to the actual "Arbitral Tribunal of the International Chamber of Commerce" (OLG Hamm, 15 November 1994, RIW 1995, p. 681). Thus, even when the name was almost correct, the courts held the arbitration clauses were null and void as they did not refer to the intended arbitration institution. This argument is supported by cases where the parties referred to an arbitral organizations which had ceased to exist and the courts ruled the arbitration clause invalid (BGH, 10 January 1994 on reference to Arbitration Court at the Chamber of Foreign Trade of the German Democratic Republic, in NJW 1994, p. 1008; In a similar case: *Tennessee Imports v. Pier Paulo Filippi and Prix Italia*, on reference to Arbitration Court of Chamber and Commerce in Venice).

**24.** Secondly, the arbitration clause is a standard clause as it was not negotiated with Respondent, but has been proposed in all of Claimant's contracts since November 1999 (Procedural Order No. 2, para. 30). Claimant itself caused the dispute by ignoring the official English name "German Institution of Arbitration" provided in the introduction of the DIS Rules. In

light of the fact that Claimant used the arbitration clause for all of its contracts, it should have used the proposed formulation in order to avoid confusions. It is simply injudicious to introduce an arbitration clause whose contents have not been checked in depth (LACHMANN, para. 301, SCHWAB/WALTER, p. 21). Hence, it is internationally accepted that such an ambiguous declaration must be interpreted *contra proferentem*. Thus, Claimant bears the risk that Respondent did not understand the clause as referring to the DIS Tribunal.

**25.** Thirdly, Claimant might allege that the intention of the parties is to be interpreted by applying the principle of *falsa demonstratio non nocet*. According to this principle the parties' common intention shall prevail where the parties have expressed themselves misleadingly. However, Respondent never understood clause 13 as referring to the DIS. Conversely, Respondent had no intention to arbitrate under the rules of the DIS (Statement of Defence, para. 11). Hence, there was no meeting of minds, which is required for the applicability of the cited principle.

**26.** Fourthly, Claimant argues that the DIS would be "the most appropriate forum" for the present dispute (Memorandum for Claimant, para. 13). However, Claimant cannot validate the arbitration agreement by relying on the appropriateness of an arbitration forum. Claimant apparently referred to the doctrine of *forum non conveniens*. Yet, this disputed doctrine is only applicable to Common Law Jurisdictions and, thus, does not apply to international arbitration. The purpose of *forum non conveniens* is not to accord jurisdiction to the most appropriate forum (SCHACK, 2<sup>nd</sup> Edition, para. 498), but to enable a court to deny its own jurisdiction in certain circumstances (SPYKES/PRYLES, pp. 80 *et seq.*; *Gulf Oil Corp. v. Gilbert*). Thus, the arbitration agreement must unambiguously name the arbitration institution; mere appropriateness is not sufficient.

**27.** Finally, Claimant alleges that the DIS Tribunal has jurisdiction because the parties agreed to arbitrate before a "German Arbitration Association" (Memorandum for Claimant, para. 12). This allegation must be rejected since Respondent has never been aware that the clause was supposed to refer to the DIS Tribunal. Respondent and Claimant had no experience with the DIS (Procedural Order No. 2, para. 31) and did not realize the alleged mistranslation prior to the Statement of Claim (Procedural Order No. 2, para. 33). Consequently, the Arbitral Tribunal has not been chosen by the parties and, therefore, the arbitration clause should be deemed invalid.

**II. AN ALLEGED MEETING OF MINDS TO ARBITRATE BEFORE THE DIS WAS NOT FIXED IN WRITING - THE FORMAL REQUIREMENTS ARE NOT MET**

**28.** Even if the Arbitral Tribunal holds that there was a meeting of minds concerning arbitration before the DIS, a valid agreement would not exist, since such meeting of minds has not been fixed in writing. Therefore, the alleged arbitration agreement would not meet the formal requirements of Art. 7(2) UNCITRAL Model Law and Art. II(2) New York Convention.

**29.** The correct designation of the parties' intent has not been fixed in writing since Claimant made a substantial mistake in its arbitration clause by referring to a non existing arbitral organization. In the present dispute, the alleged agreement on arbitration before the existing DIS Tribunal can only be reached by relying on the 'real intention' of the parties, *falsa demonstratio non nocet*. However, this 'real intention' was not laid down in writing. Applying the aforesaid principle might lead to a substantial agreement but it cannot exempt the parties from meeting the formal requirements (BGH, 4 December 1969, WM 1972, p. 314; WIEHLING, JZ 1983, p. 760). Thus, the alleged agreement does not meet the formal requirements of Art. 7 UNCITRAL Model Law and Art. II New York Convention.

**30.** Claimant may put forward that, pursuant to Art. 16(2) UNCITRAL Model Law, the agreement is valid, as Respondent did not object Claimant's failure to meet the formal requirements in its Statement of Defence. Art. 16(2) UNCITRAL Model Law determines that "a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submissions of the statement of defence". However, Respondent objected to the jurisdiction of the Arbitral Tribunal (Statement of Defence, para. 10) and Art. 16 UNCITRAL Model Law does not demand a specific reference to the opponent party's lack of formal requirements. Moreover, in case of violation of mandatory provisions such as Art. 7 UNCITRAL Model Law, Art. 16 UNCITRAL Model Law does not preclude the parties to object to the jurisdiction of the Tribunal (HUBLEIN-STICH, p. 92; UN-Doc.A/CN.9/264, Art. 16, para. 56). Thus, Respondent did not waive its right to object to the lack of formal requirements. Consequently, the arbitration agreement does not meet the formal requirements.

**B. ALTERNATIVELY, AN ASSUMED AGREEMENT ON ARBITRATION IN DECEMBER DOES NOT GOVERN THE PRESENT DISPUTE**

**31.** Even if the Arbitral Tribunal holds that an arbitration agreement was validly concluded in December 2000, Counsel will demonstrate that this arbitration agreement does not govern the present dispute.

**32.** Claimant asserts that the dispute at hand falls within the ambit of clause 13. To support its interpretation, Claimant puts forward that the formulation “arising out of or relating to this contract” has been interpreted broadly in cases similar to the present dispute (Memorandum for Claimant, para. 9).

**33.** Counsel acknowledges a broad interpretation in the above decisions, but points out that in neither decision the tribunal ruled that the expression “arising out of or relating to” encompassed the notion of a second contract. Counsel submits that the expression merely aims at ensuring the competence of the arbitral tribunal to rule over concurring claims in tort in connection with the contract, but not to rule over any disputes related to a second contract (CRAIG/PARK/PAULSSON, p. 65; LIONNET, p. 168; SCHLOSSER, para. 42).

**34.** In fact, in the first decision cited by Claimant (*Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A.*) the tribunal ruled that claims in tort would also “arise out of” the contract and hence be settled by the arbitral tribunal. In two other decisions cited by Claimant (OLG Frankfurt, 24 September 1985, RiW 1986, pp. 379 *et seq.*; *Ethiopian Oilseeds & Pulses Export Co. v. Rio del Mar Foods, Inc.*) the tribunal ruled that the arbitration clause “all disputes arising out of this contract” also encompasses claims out of a promissory note and respectively a party’s claim for rectification of a confirmation note.

**35.** However, in all of these decisions the tribunal had to deal with one single contract only. In none of the aforementioned cases the arbitration clause applied to a second, independent contract. Thus, the cited decisions do not support Claimant’s argument that clause 13 of the December Agreement applies to the dispute at hand.

**36.** Contrary to Claimant’s assumption, Counsel puts forward, that by strict interpretation of the wording of the arbitration clause, the question as to the validity of the main contract is not governed by clause 13. Claimant changed the formulation proposed by the DIS which reads, “all disputes arising in connection with the contract or its validity”, by stating “any controversy arising out of or relating to this contract”. It deviated from the proposed reference to the “validity” when revising its standard terms in 1999. Thus, Respondent asserts that Claimant must not act contrary to its own prior behaviour by submitting that the arbitration clause should be extended to the validity of the contract. Consequently, the arbitration agreement does not govern the present dispute.

**C. ADDITIONALLY, ON 3 APRIL 2001 NO ARBITRATION AGREEMENT WAS VALIDLY INCORPORATED, SINCE THE PARTIES DID NOT CONCLUDE A CONTRACT OF SALE**

**37.** Counsel submits that a contract of sale has never come into existence (see below Part 4) and hence, no arbitration agreement was reached. The following submissions will show that Claimant cannot invoke the principle of separability (I). Alternatively, Counsel submits that an incorporation of clause 13 into the alleged contract would not meet the formal requirements of Art. 7 UNCITRAL Model Law and Art. II New York Convention (II).

**I. THE DOCTRINE OF SEPARABILITY IS NOT APPLICABLE**

**38.** Claimant alleges that the arbitration agreement is valid despite the invalidity of the main contract. It seeks to rely on the ‘doctrine of separability’ (Memorandum for Claimant, para. 8). It will be demonstrated that this principle is not applicable to the present dispute and, therefore, no arbitration agreement has been reached.

**39.** Claimant relies on Art. 21 “Model Law” (Memorandum for Claimant, para. 8). Apparently, Claimant referred to the UNCITRAL Arbitration Rules, which are not applicable to the case at hand. Claimant should have referred to Art. 16(1) UNCITRAL Model Law, stating that “a decision made by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause”. However, this provision does not concern the validity of the arbitration agreement itself, but supports the concept of ‘Kompetenz-Kompetenz’ (SCHWEBEL, p. 18). Moreover, the principle of separability of an arbitration agreement is not applicable to cases where a contract has never come into existence (HUBLEIN-STICH, p. 37; REDFERN/HUNTER, p. 156; STEYN, YCA VIII (1983), p. 11). The distinction has to be made between a contract being ‘void from the outset’ (“*ab initio*”) or ‘void due to later occurring reason’ (“*ex post facto*”) (SCHWEBEL, p. 11). Since the question is not whether the arbitration clause should survive the termination of the contract but whether a principle agreement was actually reached, the doctrine of separability is not applicable (SCHWEBEL, p. 11). It would be detrimental to the acceptance of international arbitration if a party would lose its right to litigation when a contractual relationship never existed.

**II. THE FORMAL REQUIREMENTS OF AN ARBITRATION AGREEMENT BY INCORPORATION WOULD NOT HAVE BEEN MET**

**40.** In case the Arbitral Tribunal shall apply the doctrine of separability, Counsel will demonstrate that an incorporation of clause 13 would not meet the formal requirements of Art. 7(2)

UNCITRAL Model Law and Art. II(2) New York Convention. These articles require an arbitration agreement to be “in writing”.

**41.** Claimant might argue that the terms “all other provisions” in Claimant’s fax and “similar terms are to apply” in Respondent’s fax on 3 April 2001 (Claimant's Exhibits Nos. 3 and 4) suffices to meet the formal requirements, as the December Agreement is in writing. According to Art. 7(2) UNCITRAL Model Law, a reference is satisfactory if “the contract is in writing and the reference is such as to make that clause part of the contract”.

**42.** However, the arbitration clause in the December Agreement is a standard term. For standard terms a ‘general reference’ to the written document does not suffice to meet the formal requirements. Where an arbitration clause is a standard term, an explicit, ‘specific reference’ is required even though the party might have access to the arbitration clause (Corte di Cassazione, 13 December 1971 No. 3620 and 22 April 1976 No.1439 in YCA II (1977), p. 249, VAN DEN BERG, p. 216; LINDACHER, p. 171; VON HÜLSEN, p. 59; NEUTEUFEL, ÖJZ 1967, p. 231).

**43. RESULT:** The Arbitral Tribunal is respectfully requested to find that it has no jurisdiction.

**PART 3: THE CISG IS NOT APPLICABLE TO THE ALLEGED CONTRACT**

**44.** In clause 12 of the December Agreement it is stated that "this contract is subject to the commercial law of Equatoriana" (Claimant's Exhibit No. 2). Claimant asserts and Respondent agrees that this choice of law clause shall be applied to the present dispute.

**45.** Claimant alleges that the reference to the "commercial law of Equatoriana" clearly indicates that the CISG as the "international law" of Equatoriana was intended to be the law governing the alleged contract (Memorandum for Claimant, para. 36). Counsel, however, will refute this interpretation and demonstrate that by their choice of law clause the parties referred to the domestic law of Equatoriana and, pursuant to Art. 6 CISG, excluded the application of the CISG.

**46.** According to Art. 6 CISG, "the parties may exclude the application of this Convention". Such exclusion may also be made tacitly (LG München, 29 May 1995; OLG Celle, 24 May 1995, SCHLECHTRIEM/FERRARI (Ger.), Art. 6, para. 18; HONNOLD, Art. 6, para. 76; SCHLECHTRIEM, Uniform Sales Law, p. 35; AUDIT, p. 38; LINDBACH, p. 253), e.g. by choosing the law of a Contracting State (SCHLECHTRIEM/FERRARI (Ger.), Art. 1, para. 72; LINDBACH, p. 162; MEYER-SPARENBERG, p. 93).

**47.** In order to determine whether the Convention has been excluded pursuant to Art. 6 CISG, the parties' choice of law must be interpreted according to the understanding of a reasonable person in terms of Art. 8(2) CISG. Counsel submits the following arguments to illustrate that a reasonable person would have understood clause 12 as referring to the domestic law of Equatoriana.

**48.** Firstly, the 'choice of law' clause was a standard clause used by Claimant in all of its contracts. A reasonable person in the shoes of Respondent must have assumed that Claimant intended to refer to its domestic law, i.e. the law of Equatoriana, since this is the law it is most acquainted with. Respondent has no doubt that Claimant carefully elaborated the clause in dispute. However, it did not mention the CISG. If Claimant had the initial intention to choose the CISG it should have expressly designated it. Thus, Respondent could only understand the choice of law as being that of the domestic law of Equatoriana. It certainly cannot be held that the party which proposed the choice of law clause thereafter refers to the 'unified law' of that state, simply because the aforesaid law is favourable for that party within the particular dispute (REHBINDER, JZ 1986, pp. 350 *et seq.*).

**49.** Secondly, a reasonable person in the shoes of Respondent could not foresee the application of the CISG. The applicability of the CISG by choosing the law of a particular state will usually not be taken into account by the parties (LINDBACH, p. 149; WITZ/SALGER/LORENZ,

Art. 6, para. 6; PÜNDE, RIW 1990, p. 873). The party agreeing to the application of the law of a Contracting State can hardly be deemed to have foreseen that it has thereby agreed to the application of the Convention (MANN, JZ 1986, p. 647). Thus, Respondent had to reasonably assume that by signing the December Agreement it merely accepted to arbitrate under the non unified law of Equatoriana.

**50.** Thirdly, the understanding of a reasonable person that the ‘domestic law’ should apply is highlighted by the fact that if clause 12 led to the application of the CISG, the elaboration of this clause would have been superfluous. Even if there had been no choice of law at all, the Convention would have been applicable, according to Art. 1(1)(b) CISG, Sec. 23(2) DIS Rules. If the parties had merely referred to “Equatorianian law” Claimant might argue that this choice of law aimed at determining the relevant domestic provisions applicable to the question which are not administered by the Convention. Yet, this argument is unconvincing in the circumstances of the present case since the parties referred to “the commercial law of Equatoriana”. In general, a commercial law deals with the same legal issues as the CISG. It would thus be senseless to apply both laws at one time.

**51.** Fourthly, the choice of law clause of the December Agreement referred to “the commercial” law of Equatoriana and therefore, to specific provisions of the domestic law. There is strong authority that where the parties referred to certain provisions of a domestic law, e.g. the sales law of the German Civil Code or the law of the German Commercial Code, the CISG has been excluded (SCHLECHTRIEM/FERRARI (GER.), Art. 6, para. 21; STAUDINGER/MAGNUS, Art. 6, para. 30; WITZ/SALGER/LORENZ, Art. 6, para. 11). The fact that there is no “commercial law code” in Equatoriana (Procedural Order No. 2, para. 35) cannot be interpreted to Respondent’s disadvantage. It is irrelevant whether or not a specific commercial law code exists.

**52.** Fifthly, clause 12 of the December Agreement is a standard clause used by Claimant since November 1999 (Procedural Order No. 2, para. 30). This clause is somewhat opaque, since it does not expressly state whether or not the CISG is applicable. Pursuant to one of the general principles of the CISG, such ambiguous statements must be interpreted *contra proferentem* (SCHLECHTRIEM/FERRARI (Ger.), Art. 7, para. 56; FERRARI, JZ 1998, pp. 11 *et seq.*; ACHILLES, Art. 7, para. 8). Hence, Claimant bears the risk that Respondent could interpret this clause as referring to specific provisions of the “commercial law” within the domestic law of Equatoriana. Respondent did not have an obligation to verify a standard contract clause that had been used by Claimant for more than three years.

**53.** Sixthly, Claimant asserts that the CISG should apply as the “most appropriate source of law” (Memorandum for Claimant, para. 36). Yet, this argument must be rejected. Under

Sec. 23 DIS Rules, the Arbitral Tribunal is not entitled to apply the law which it determines to be “most appropriate”. By contrast, it shall apply the law most closely connected to the contract. As such the DIS Rules are different from provision of other arbitration Rules, e.g. Sec. 17(1) ICC Rules.

**54.** Finally, Claimant might submit that since the parties chose the law of a Contracting State a general presumption in favour of the CISG exists. Yet, the mere fact that the parties chose the law of a Contracting State, cannot lead to a presumption in favour of the CISG (NEUMAYER/MING, Art. 6, para. 5; WEY, *Vertragschluss*, para. 163; LOEWE, p. 31; STOFFEL, 1990, p. 174). Applying a presumption in favour of the Convention would constitute a “purely political” approach and be *contra legem* as it has no legal basis in the Convention (NEUMAYER/MING, Art. 6, para. 5; BYDLINSKY, p. 48; VÉKÁS, *IPRax* 1987, p. 346). The parties will and real intention would be “violated” (KAROLLUS, p. 39). Thus, even in case the parties refer to the law of a Contracting State, the ‘domestic law’ of this state shall be applied (*Ad hoc Tribunal Florence*, 19 April 1994; *Kantonsgericht Zug*, 16 March 1995).

**55.** Consequently, according to the understanding of a reasonable person in terms of Art. 8 CISG, the parties did opt out of the Convention pursuant to Art. 6 CISG.

**56. RESULT:** The domestic law of Equatoriana, and not the CISG, is the law applicable to the contract.

**PART 4: NO CONTRACT OF SALE HAS BEEN CONCLUDED**

**57.** In application of the domestic law of Equatoriana (see Part 3), Respondent asserts and Claimant does not deny that no contract has been formed (Procedural Order No. 1, para. 8).

**58.** Assuming that the Arbitral Tribunal should consider that the CISG applies to the case at hand, Counsel will demonstrate that no valid contract was concluded under the CISG because an agreement on the price was not reached. Claimant itself concedes and regrets that “there has been a misunderstanding concerning the price” (Statement of Claim, para. 8). The following submissions will show that, firstly, due to this “misunderstanding”, no contract was concluded according to Arts. 14 *et seq.* CISG (**A**). Secondly, the application of Art. 55 CISG does also not lead to a valid contract (**B**).

**A. NO VALID CONTRACT WAS CONCLUDED ACCORDING TO ARTS. 14 ET SEQ. CISG**

**59.** Claimant relies on a contract concluded by its offer and Respondent’s acceptance (Memorandum for Claimant, para. 41). However, on the given facts it cannot be determined who made the offer and who accepted it, since the telephone conversation of 3 April 2001 was not recorded (Procedural Order No. 2, para. 34). Consequently, Claimant bases its subsequent argumentation on a misleading assumption.

**60.** Respondent asserts that the formation of a contract under the CISG requires an agreement on the price. Since the parties did not come to such agreement, no contract was concluded. The CISG does not provide any rules for the conclusion of contracts besides the rule of “offer and acceptance” (SCHLECHTRIEM, JZ 1988, p. 1040). According to Art. 7(2) CISG, this gap is to be filled in accordance with the general principle that any contract conclusion requires the parties’ consensus and has to meet the minimum material requirements laid down in Arts. 14 *et seq.* CISG (SCHLECHTRIEM/SCHLECHTRIEM (Engl.), Intro to Arts 14-24, para. 5; STAUDINGER/MAGNUS, Intro to Artt. 14 *et seq.*, para. 5; WITZ/SALGER/LORENZ, Intro to Artt. 14-24, para. 5; LUDWIG, p. 294; Lookofsky, p. 29). Therefore, a contract could only have been concluded if the parties had “expressly or implicitly fixed or made provisions for determining the [...] price” pursuant to Art. 14(1) CISG. Thus, a dissent on the price impedes the conclusion of the contract.

**61.** There is agreement that the applicable discount had not been expressly mentioned on the phone (Procedural Order No. 2, para. 34). Moreover, in order to show that the parties did also not implicitly agree on a price in terms of Arts. 14 CISG, Counsel will illustrate the parties’ diverging intention by interpreting the parties’ subsequent conduct, i.e. the faxes following their telephone conversation (Claimant’s Exhibits Nos. 3-10) (**I**). Subsidiary, in case Claimant

shall rely on the understanding of a reasonable person in terms of Art. 8(2) CISG, it will be shown that having regard to the parties' prior conduct a reasonable person would by no means have understood that the parties agreed on a 4% discount (II).

**I. TAKING INTO ACCOUNT THE PARTIES' SUBSEQUENT CONDUCT, AN AGREEMENT ON THE DISCOUNT HAD NOT BEEN REACHED**

**62.** Claimant asserts that it always intended to apply a 4% discount (Memorandum for Claimant, para. 52). Counsel will demonstrate that Respondent never had the intention to apply a 4% discount. Thus, an agreement concerning the price has not been reached. Interpreting Respondent's intention due consideration is particular to be given to its faxes sent after the telephone conversation of 3 April 2001. In none of these faxes, Respondent agreed to a 4% discount. By contrast, as soon as Respondent became aware of the parties' disagreement and misunderstanding, it expressly and constantly insisted on its intention to receive an 8% discount.

**63.** Claimant submits that Respondent demonstrated its understanding to have concluded a contract including a 4% discount by the term "agreement" in its fax dated 3 April 2001 (Memorandum for Claimant, para. 56). Indeed, Respondent assumed that it had concluded a contract, but only a contract including an 8% discount. In its fax dated 3 April 2001, Respondent did not realize that there had been a misunderstanding concerning the price. Hence, the wording "agreement" does by no means indicate Respondent's intention to agree on a 4% discount.

**64.** Referring to this fax, Claimant could also assert that Respondent's failure to expressly indicate the exact price could imply Respondent's approval of a 4% discount. However, in this fax Respondent referred to the December Agreement by acknowledging that "payment, shipment and similar terms are to apply" (Claimant's Exhibits No.3). It specified its intention by stating that "the discounted price we are to pay" would increase in accordance with Claimant's risen list price. Since 8 % was the discount Respondent was to pay for the purchase in December, it also intended to refer to a discount of 8% in its fax of 3 April 2001.

**65.** In its attempt to prove Respondent's intention of an 4% discount Claimant relies on the term "our contract" used by Respondent in its letter of 6 April 2001 (Memorandum for Claimant, paras. 56 and 59). However, in the same letter, Respondent expressly stated that the confirmation sent by Claimant had "a major error in regard to the price". Consequently, contrary to Claimant's assertion, Respondent's fax of 6 April 2001 proves that Respondent always assumed that the parties merely had agreed on an 8% discount. One must deduce that Respondent never intended to conclude a contract including a 4% discount.

66. Finally, the wording of Respondent's fax dated 10 April 2001 "if you do not intend to keep your commitment to give us an 8% discount" also substantiates the interpretation that Respondent always intended to conclude a contract including an 8% discount. Hence, taking into account Respondent's subsequent conduct, it is evident that Respondent never had the intention to agree on a discount of 4%.

67. Consequently, the parties' intention concerning the price were diverging. Claimant excuses itself for the "confusion in [the parties'] communication" (Claimant's Exhibit No. 6) and admits that there had been "a misunderstanding" in regard to the contract price (Statement of Claim, para. 8). Thereby, Claimant demonstrated that an agreement concerning the contract price required by Arts. 14 *et seq.* CISG has never been reached. Thus, a contract was not concluded.

## II. ALTERNATIVELY, AN INTERPRETATION ACCORDING TO THE UNDERSTANDING OF A REASONABLE PERSON EXCLUDES AN AGREEMENT ON A 4% DISCOUNT

68. Claimant might attempt to argue that a reasonable person in regard to the parties' prior negotiations and the circumstances of the purchase would have assumed that the parties agreed on a discount of 4%. However, as a precaution, Counsel will disprove such an interpretation.

69. Firstly, Respondent points out that Claimant gives "special discounts for special reasons" (Procedural Order No. 2, para. 40), while a 4% discount is constantly granted for regular customers (Claimant's Exhibit No. 1; Procedural Order No. 2, para. 38). Having regard to the huge quantity of 1.350 tons of OPP ordered, a reasonable person would have considered this amount as a "special reason" to accord Respondent an 8% discount. Claimant itself was well aware that Respondent was regularly purchasing substantial amounts of OPP (Procedural Order No. 2, para. 37). Therefore, it had the intention to enter into a long and fruitful business relationship with this new customer (Memorandum for Claimant, para. 42; Claimant's Exhibit No. 1). Thus, Claimant itself regarded Respondent as a special customer being entitled to a discount of 8%.

70. Secondly, Respondent had received a discount of 8% for its first order of 200 tons in December 2000. This discount was not routinely given by Claimant (Procedural Order No. 2, para. 37), but was granted to initiate Respondent to change its supplier (Memorandum for Claimant, paras. 42 and 51). For the purchase in dispute, Respondent indicated its intention to buy an amount almost seven times the amount of its first order. Respondent was entitled to as-

sume reasonably that for such a huge order it would receive at least the same discount as before.

**71.** Thirdly, in its Memorandum Claimant alleges that Respondent's expectation of an 8% discount would be "unreasonable" and "lacking in commercial reality" (Memorandum for Claimant, para. 51). This interpretation must be rejected, since Claimant's gross margin of the list price is 22%. Hence, Claimant has quite a broad discretion to grant discounts to its 'special' customers. Respondent might not have been aware of Claimant's exact gross margin, but such margin could be expected in the industry (Procedural Order No. 2, para. 55). Thus, Respondent knew that even by offering an 8% discount Claimant would still make a purchase being "economically viable" for Claimant (Memorandum for Claimant, para. 51).

**72.** Fourthly, Claimant alleges that the 8% discount was not intended to extend beyond the first transaction (Memorandum for Claimant, para. 52). However, in its letter of 7 December 2000 Claimant unmistakably and explicitly states that Respondent "can be sure that [it] will always receive [Claimant's] BEST PRICE" (Claimant's Exhibit No. 1). In the second paragraph of this letter Claimant specifies this BEST PRICE. "You will receive a discount of 8% [which is] the BEST PRICE". Hence, a reasonable person must have assumed that Respondent would constantly be granted an 8% discount for all future purchases. This expectation was the only reason for Respondent to change its supplier (Claimant's Exhibit No. 7).

**73.** Consequently, the interpretation of the parties' intention excludes the parties' meeting of minds in terms of Art. 14 CISG, and therefore the conclusion of a contract. In case Claimant shall rely on the understanding of a reasonable person in terms of Art. 8(2) CISG, Counsel asserts that such person had not assumed that the parties agreed on a discount of 4%.

#### **B. ADDITIONALLY, NO CONTRACT HAS BEEN CONCLUDED UNDER THE APPLICATION OF ART. 55 CISG**

**74.** Claimant might allege that even if the parties' declarations did not meet the requirements of Arts. 14 *et seq.* CISG, they would still have validly concluded an open price contract and the price could be determined in accordance with Art. 55 CISG. Pursuant to this provision, "where a contract has been validly concluded but does not [...] make provision for determining the price, the parties are considered [...] to have impliedly made reference to the price generally charged at the time of the conclusion of the contract".

**75.** However, Counsel will show that Art. 55 CISG is not applicable to the case at hand. Firstly, the requirement of a "validly concluded contract" has not been met **(I)**. Additionally, the parties did not intend to be bound without fixing the price **(II)**.

## I. A CONTRACT WAS NOT “VALIDLY CONCLUDED” IN TERMS OF ART. 55 CISG

76. Counsel submits that the requirements of Art. 55 CISG are not met since a contract has not been “validly concluded”. The question “where a contract has been validly concluded” has not been subject to a court’s decision and is highly disputed. Although this dispute might be of academic interest, it does not have to be answered in the case at hand since on the given facts both points of view taken in doctrine lead to the same result.

77. According to one opinion, the question of a “valid conclusion” in terms of Art. 55 CISG is governed by Art. 14 CISG, since this provision supersedes Art. 55 CISG (HONNOLD, Documentary History, p. 435; UN-Doc.A/Conf.97 C.I. SR.24; SCHLECHTRIEM/HAGER (Ger.), Art. 55, para. 5; HEUZÉ, p. 129; WITZ, p. 227; GHESTIN, R.D.A.I. 1988, p. 5, GALSTON/SMIT, Sec. 3.04). This is due to the fact that the Convention is based on the idea of a “*pretium certum*” (WITZ/SALGER/LORENZ, Art. 55, para. 2; HUBER, *RabelsZ* 1979, p. 439; DILGER, *RabelsZ* 1981, p. 191; REHBINDER, *Vertragsschluß*, p. 157). As shown above, the parties’ agreement failed to meet the requirements of Art. 14 CISG. Thus, a contract has not been “validly concluded” in terms of Art. 55 CISG.

78. Assuming the Arbitral Tribunal shall follow the second doctrinal point of view arguing that Art. 55 CISG is not superseded by Art. 14 CISG, a contract has still not been “validly concluded”. In this case, the validity of contract conclusion is to be determined by the relevant domestic provisions (HONNOLD, Art. 14, para. 137.6; LOOKOFSKY, p. 29; BIANCA/BONELL/EÖRSI, Art. 55, para. 2.2.1; HOYER/POSCH/GREINER, p. 49; VON CAEMMERER, p. 42; DAWWAS, p. 106), i.e. Equatorian law. This is due to the fact that, pursuant to Art. 4(a) CISG, the Convention “is not concerned with the validity of [a] contract”. Under the domestic law of Equatoriana a contract is not validly concluded if it does not expressly fix the price (Procedural Order No. 1, para. 8).

79. Consequently, according to either opinion the requirement of a valid conclusion of a contract according to Art. 55 CISG is not met. Thus, Art. 55 CISG does not apply to the present dispute.

## II. ADDITIONALLY, THE PARTIES DID NOT INTEND TO BE BOUND WITHOUT FIXING THE PRICE

80. Art. 55 CISG requires at the very least that the parties had the intention to be contractually bound even if no contract price was fixed (SCHLECHTRIEM, UN-Kaufrecht, para. 76; KRITZER, p. 156, SOERGEL/LÜDERITZ/BUDZIKIEWICZ, ART. 55, PARA. 4; SCHLECHTRIEM/HAGER (GER.),

Art. 55, para. 7; see also PECL Art. 2:103(2); UCC Sec. 2-305(4)). Counsel will demonstrate that neither party intended to be bound if an agreement on the price was not reached.

**81.** Claimant alleges that initiating arbitral proceedings would be an ample evidence for its intention to be bound (Memorandum for Claimant, para. 46). However, contrary to Claimant's assumption, it thereby rather demonstrates that its intention to be bound was exclusively based on a contract including a 4% discount, since in its Memorandum it merely requests the Tribunal to find that a contract was concluded including this discount.

**82.** By contrast, Respondent's statements your fax "has a major error in regard to the price" (Claimant's Exhibit No. 5) and "we will have to seriously consider returning to Polyfilm GmbH" (Claimant's Exhibit No. 7) demonstrates that its intention to be bound was dependent on the fact that it would receive the expected discount of 8%.

**83.** Moreover, in its fax of 12 April 2001 Claimant states that an 8% discount would be unusually low and can be granted for first orders only (Claimant's Exhibit No. 8), whereas Respondent states that a 4% discount would "not offer a particular advantage" and would not convince it to terminate the relationship with Polyfilm GmbH (Claimant's Exhibit No. 10). Thus, both parties preferred not to be bound at all, rather than being bound to the conditions proposed by the other party.

**84.** Finally, Claimant could argue that due to the large amount ordered by its client, Respondent depended on Claimant's performance. Yet, the facts show that Respondent was able to satisfy its needs in a short period of time by simply returning to its former supplier and was therefore never dependent on Claimant's performance (Claimant's Exhibit No. 10).

**85. RESULT:** Due to the parties' diverging intentions, a contractual agreement in terms of Art. 14 CISG has not been reached. Additionally, since Art. 55 CISG is not applicable in the case at hand, no contract has been concluded.

**PART 5: CLAIMANT IS NOT ENTITLED TO LOST PROFIT**

**86.** The parties never concluded a contract of sale (Part 4). Therefore, Counsel underlines that Claimant cannot exercise any remedies at all.

**87.** Even if the Tribunal should consider that a contract of sale was concluded, it will be shown that, firstly, the requirements entitling Claimant to damages for loss of profit are not met (**A**). Secondly, Claimant is not entitled to damages in the amount of \$575,477.98 (**B**). Thirdly, Claimant is not entitled to any interest on damages (**C**).

**A. THE REQUIREMENTS FOR DEMANDING LOST PROFIT ARE NOT MET**

**88.** According to Arts. 61(1)(b) and 74 CISG, the seller can claim damages, including lost profit, if the buyer is in breach of contract. However, in order to be entitled to a claim for lost profit Claimant had to declare the contract avoided, but failed to do so.

**89.** Entitling the aggrieved party to lost profit without having declared the contract avoided, would result in an inadmissible combination of maintenance and avoidance of the contract (STOLL, *RabelsZ* 1988, p. 634). This is due the fact that the claim for lost profit exceeds the consequences of contract avoidance, since the demanding party will be put in the same economic position as if the contract had been properly performed (WITZ/SALGER/LORENZ, Art. 74, para. 12; SCHLECHTRIEM/STOLL, (Engl.), Art. 74, para. 3). Hence, liquidating the contract by a claim for lost profit is excluded as long as one party has the right to demand contractual performance (STOLL, *RabelsZ* 1988, p. 632). **Thus**, in order to claim loss of profit the contract must be effectively avoided (SCHLECHTRIEM/STOLL, (Engl.), Art. 74, para. 3; BIANCA/BONELL/BENNETT, Art. 72, para 2.1; STOLL, *RabelsZ* 1988, p. 635). Consequently, a declaration of avoidance under Art. 26 CISG is mandatory.

**90.** In case the Arbitral Tribunal finds that Respondent has committed an anticipatory breach of contract, Counsel admits that Claimant had the right to declare the contract avoided pursuant to Art. 72 CISG. However, Counsel will demonstrate that, firstly, Claimant did not expressly declare the contract avoided (**I**). Secondly, an implicit declaration of avoidance does not suffice (**II**). Thirdly, an alleged implicit declaration of avoidance in the Statement of Claim or Memorandum for Claimant would have been made beyond a reasonable period of time (**III**).

**I. CLAIMANT FAILED TO EXPRESSLY DECLARE THE CONTRACT AVOIDED**

**91.** In its Memorandum for Claimant dated 12 December 2002, Claimant alleges that it has rightfully declared the contract avoided (Memorandum for Claimant, para. 68). However,

Claimant did neither expressly declare the contract avoided in its Statement of Claim dated 23 May 2002 nor in its Memorandum for Claimant dated 12 December 2002. Moreover, Claimant fails to indicate in which statement this declaration could be seen. Since the alleged fundamental anticipatory breach occurred on 2 May 2001, a declaration could have only been made after this time. Thus, Claimant failed to expressly declare the contract avoided.

**92.** In order to justify that it did not expressly declare the contract avoided Claimant relies on Art. 72(3) CISG (Memorandum for Claimant, para. 75). This provision clearly does not exempt Claimant from the duty to make the declaration itself but only from giving notice of its intention to declare the contract avoided.

## **II. AN ASSUMED IMPLICIT DECLARATION WOULD NOT SUFFICE**

**93.** Claimant could argue that it implicitly declared the contract avoided by its claim for damages in its Statement of Claim or its Memorandum. Counsel will demonstrate that this interpretation must be rejected as Art. 26 CISG demands an express declaration of avoidance. This is evidenced by the unequivocal wording of Art. 72(1) CISG, pointing out that the party which is entitled to the avoidance of the contract may “declare” this avoidance.

**94.** According to Art. 26 CISG, a declaration of avoidance is only effective if it is made by notice to the other party. The aim of this provision is to remove the concept of *ipso facto* avoidance and thereby assure legal certainty (OGH, 6 February 1996; LG Frankfurt, RIW 1991, p. 952; SCHLECHTRIEM/LESER/HORNUNG, (Ger.), Art. 72, para. 30; HONNOLD, Art. 26, para. 187.2; HONSELL, Art. 26, para. 11). This goal could not be achieved if an implicit declaration sufficed (REINHART, Art. 26, para. 2; KAROLLUS, p. 151). Hence, a mere claim for damages may never represent a declaration of avoidance (OGH, 6 February 1996; HONSELL, Art. 26, para. 13), given that it does not sufficiently indicate the intention to avoid the contract. Therefore, Claimant’s possible allegation that it implicitly declared the contract avoided must be opposed.

## **III. ALTERNATIVELY, AN IMPLICIT AVOIDANCE MADE IN THE STATEMENT OF CLAIM OR IN THE MEMORANDUM FOR CLAIMANT WOULD HAVE BEEN OUTSIDE THE REASONABLE TIME PERIOD**

**95.** Should the Arbitral Tribunal hold that an implicit declaration of avoidance may generally suffice, Counsel will show that Claimant had already lost its right to declare the contract avoided.

**96.** Respondent acknowledges that the time limit for contract avoidance, contained in Art. 64(2)(b) CISG, cannot be applied to the case at hand since Respondent has not paid the

purchase price. Thus, the contract between Respondent and Claimant would have been suspended until Claimant had decided whether or not it would avoid the contract. As a result, Respondent would be caught in continual legal uncertainty being unable to end this period of uncertainty. Therefore, a declaration of avoidance should be deemed too late if it is uttered outside a reasonable time.

**97.** Since Art. 64 CISG does not provide a time limit for such situations there is a gap in the provisions of the Convention which has to be filled according to Art. 7(2) CISG (LESER, p. 235; SCHLECHTRIEM/LESER (Engl.), Art. 72, para. 32). All provisions dealing with time limits for avoidance are based on the basic idea of the Convention that if the requirements for avoidance are met, the avoidance has to be declared within a reasonable time to prevent legal uncertainty (SCHLECHTRIEM/LESER/HORNUNG (Ger.), Art. 26, para. 14; LESER, p. 235). In the case at hand, Claimant did not react within one year after the alleged breach of contract. This period is significantly longer than could be deemed reasonable. For this reason an implicit declaration made in a Statement of Claim or even later must be deemed to be outside the reasonable time period.

**98.** Claimant might attempt to declare the contract avoided during the oral arbitral proceedings beginning on 10 April 2003. Then, almost two years will have passed since the alleged breach. Hence, this right for avoidance must in any case be deemed to be waived for the reason of being too late.

**99.** Consequently, any alleged declaration of avoidance made by Claimant must be regarded ineffective. Claimant did not rightfully declare the contract avoided and thus is not entitled to lost profit.

#### **B. CLAIMANT IS NOT ENTITLED TO \$575,477.98 AS ITS LOSS OF PROFIT**

**100.** In the event the Arbitral Tribunal finds that Claimant declared the contract avoided, Respondent puts forward that Claimant is not entitled to \$575,477.98 as its lost profit. Counsel will demonstrate that Claimant may not calculate its loss pursuant to Arts. 75, 76 CISG (I). Under Art. 74 CISG, the alleged damages were not foreseeable for Respondent (II). Finally, Claimant did not calculate its lost profit correctly (III).

#### **I. CLAIMANT MAY NOT CALCULATE ITS LOSS PURSUANT TO ARTS. 75, 76 CISG**

**101.** Claimant stresses Arts. 75, 76 CISG to calculate its loss (Memorandum for Claimant, para. 99). However, these provisions are not applicable to the present dispute.

**102.** A calculation of damages pursuant to Art. 75 CISG requires a concrete substitute transaction (SCHLECHTRIEM/STOLL, (Engl.), Art. 75, para. 5; STAUDINGER/MAGNUS, Art. 75, para. 6; WITZ/SALGER/LORENZ, Art. 75, para. 2). However, in the present dispute Claimant

WITZ/SALGER/LORENZ, Art. 75, para. 2). However, in the present dispute Claimant did not engage a substitute transaction.

**103.** Moreover, Claimant argues that it could calculate its damages pursuant to Art. 76 CISG since it did not resell the OPP (Memorandum for Claimant, para. 99). Counsel asserts that this provision is not applicable since it requires a “current price” which does not exist in the case at hand. Even if the Arbitral Tribunal should find that there is a market price in the present dispute, Counsel puts forward that this market price amounts to at least \$1.900 minus 4% discount which equals to the contract price. However, the seller can only calculate damages pursuant to Art. 76 CISG if the market price is lower than the contract price (STAUDINGER/MAGNUS, Art. 76, para. 21; HERBER/CZERWENKA, Art. 76, para. 9) Hence, Claimant cannot calculate its loss pursuant to Art. 76 CISG. Consequently, neither Art. 75 nor Art. 76 CISG apply to the present dispute.

## II. LOST VOLUME DAMAGES WERE NOT FORESEEABLE FOR RESPONDENT

**104.** Since Arts. 75, 76 CISG are not applicable Claimant’s loss may only be calculated pursuant to Art. 74 CISG. Claimant submits that it would have suffered from lost profit which was foreseeable for Respondent pursuant to Art. 74 sentence 2 CISG (Memorandum for Claimant, paras. 91 and 95). Respondent opposes this assumption because it must have presumed that Claimant would be able to avoid such loss by engaging a substitute transaction.

**105.** Claimant could argue that even if it had performed a substitute transaction it could not avoid its damages since it had still suffered lost volume damages. Counsel puts forward that if Respondent had suffered from lost volume damages, these damages were not foreseeable for Respondent. Thus, no damages are recoverable pursuant to Art. 74 CISG.

**106.** Art. 74 sentence 2 CISG (in accordance with the Contemplation Rule developed in the British leading case *Hadely v. Baxendale*, 9 Ex. 341) serves to limit a party’s liability for loss to those inherent risks that can be assumed by the conclusion of the contract (SCHLECHTRIEM/STOLL (Engl.), Art. 74, para. 4, GALSTON/SMIT, § 9.05). The question as to which damages are foreseeable for the party in breach depends on the circumstances it must have been aware of at the time of the conclusion of the contract (STAUDINGER/MAGNUS, Art. 74, para. 31; WITZ/SALGER/LORENZ, Art. 74, para. 30). In the present dispute, Respondent did not know and could not know that Claimant would not produce the OPP specifically for this order. Respondent could not have been aware of Claimant’s huge manufacturing capacity. Since Respondent ordered a large quantity of OPP it could not have assumed that Claimant would have this quantity on stock. Therefore, it must have come to the conclusion that Claim-

ant could mitigate its loss by reselling the OPP in case of a breach of contract. Hence, at the time of the conclusion of the contract, a reasonable person in the situation of Respondent would have assumed that Claimant produced the OPP specifically for Respondent and therefore could sell this OPP to its other customers. Thereby, it could have avoided or at least reduce its loss of profit.

**107.** Consequently, lost volume damages were not foreseeable for Respondent.

### **III. IN ANY CASE, CLAIMANT DID NOT CALCULATE ITS LOST PROFIT CORRECTLY**

**108.** Even if the Arbitral Tribunal should find that lost volume was foreseeable for Respondent, Counsel will show that Claimant did not calculate its loss correctly. Claimant demands damages in the amount of \$575,477.98 (Statement of Claim, para. 18) as its lost profit. Claimant based its calculation on a gross margin of 22% of the contract price but did not give any further indication of the method it used to develop the sum of \$575,477.98. To reach the aforesaid sum, Claimant obviously relied on its gross margin of 22% of the contract price consisting of the discounted list price plus CIF Charges (\$2,615,809).

**109.** By this method of calculation, two mistakes occurred since a gross margin of 22% is based on Claimant's list price (Procedural Order No. 2, para. 55), i.e. a non discounted list price excluding CIF Charges.

**110.** Firstly, a gross margin of 22% cannot be applied to the case at hand since it is calculated on the non discounted list price. 78% of the non discounted purchase price are fixed costs, e.g. costs for materials, production and labour supplied. The remaining 22% represent Claimant's gross margin. Since Claimant cannot reduce its fixed costs, any discount given will consequently reduce its gross margin. Thus, the 4% discount given to Respondent had to be deducted from its gross margin of 22%. Giving a discount of 4%, Claimant's gross margin is reduced to 18%.

**111.** Secondly, the calculation of the gross margin should have been taken of a purchase price exclusive of CIF Charges. These costs have to be regarded as a fixed sum being transferred from Respondent to Claimant and from Claimant to third parties, e.g. the freight carrier and the insurance company. Since the OPP had not been delivered, Claimant had not incurred any expenses (Procedural Order No. 2, para. 56). Therefore, any calculation should have been based on a purchase price exclusive of CIF charges.

**112.** Granting a 4% discount, the purchase price excluding CIF charges represents a sum of \$2,462,400. Since Claimant's gross margin is reduced to 18%, its loss of profit equals \$443,232.

**C. IF CLAIMANT WAS GRANTED DAMAGES, CLAIMANT WOULD NEVERTHELESS NOT BE ENTITLED TO INTEREST**

**113.** According to Art. 78 CISG, “if a party fails to pay the price [...] the other party is entitled to interest on it”. Claimant is not entitled to recover any damages (see above). Consequently, Respondent does not owe any interest. However, should the Arbitral Tribunal find Claimant entitled to damages Counsel submits that nevertheless no interest should be granted. Art. 78 CISG provides that interest can only be granted on “any [...] sum that is in arrears”. Thus, a liquidated sum is required to fulfil the prerequisites of Art. 78 CISG (HONNOLD, Art. 78, para. 422; STAUDINGER/MAGNUS, Art. 78, para. 8; BIANCA/BONELL/NICHOLAS, Art. 78, para. 3.1). In the case at hand, a liquidated sum does not yet exist since the Arbitral Tribunal still has to decide on the amount of Claimant’s lost profit. Hence, Respondent is not liable to Claimant for interest.

**114. RESULT:** Claimant is neither entitled to damages nor interest thereon.

**PART 6: THE ARBITRAL TRIBUNAL IS NOT ENTITLED TO AWARD CLAIMANT THE SUM OF \$575,477.98 BASED ON AN 'ACTION FOR THE PRICE'**

**115.** Assuming that the Arbitral Tribunal may find that Claimant's demand for lost profit pursuant to Arts. 72, 74 CISG is unfounded, the Tribunal might hold that Claimant's demand could be based on an 'action for the price' under Art. 62 CISG.

**116.** As a preliminary matter, Counsel is aware that the Arbitral Tribunal is competent to freely determine the legal basis for Claimant's demand. Furthermore, Counsel also acknowledges that according to the legal opinion of the Arbitral Tribunal, an 'action for the price' might be a matter in dispute and that such claim is not limited by Art. 28 CISG (Procedural Order No. 3, para. 6). However, Counsel asserts that the principle of "*ne eat iudex ultra petita partium*" prevents a tribunal from granting a sum exceeding the sum claimed by the parties (SCHLOSSER, para. 536; SCHÜTZE/TSCHERNING/WAIS, para. 510). Thus, any sum awarded by the tribunal which is based on an 'action for the price' must not exceed the amount demanded by Claimant in its Statement of Claim being \$575,477.98.

**117.** The following is to show that an 'action for the price' is unfounded. Firstly, such claim for performance is inconsistent with Claimant's prior claim for damages (A). Subsidiary, since Claimant did not deliver the OPP in advance it cannot be awarded the purchase price (B).

**A. AN 'ACTION FOR THE PRICE' WOULD BE INCONSISTENT WITH CLAIMANT'S PRIOR CLAIM FOR DAMAGES**

**118.** Counsel will demonstrate that such 'action for the price' would be inconsistent with Claimant's prior claims set forth in its Statement of Claim on 23 May 2002 and in its Memorandum on 12 December 2002.

**119.** Counsel submits that Claimant's demand for damages set forth in its Statement of Claim on 23 May 2002 and in its Memorandum on 12 December 2002 is an inconsistent remedy in terms of Art. 62 CISG. This article provides that "the seller may require the buyer to pay the price, [...] unless the seller has resorted a remedy which is inconsistent with this requirement." It is undisputed that the remedy of contract avoidance is inconsistent with the claim for performance (HONNOLD, Art. 62, para. 345; BIANCA/BONELL/KNAPP, Art. 62, para. 3.5; AUDIT, p. 147; NEUMAYER/MING, Art. 62, para. 6; KRITZER, p. 421; PILTZ, Internationales Kaufrecht, p. 262; FOX, p. 245). This is due to the fact that in case of contract avoidance neither party has to perform its contractual obligations. The Arbitral Tribunal could hold that Claimant has merely claimed its loss of profit. However, similar to contract avoidance the claim for lost

profit also exempts either party from performing its contractual obligation (see supra Part 5). Consequently, the claim for loss of profit must also be deemed inconsistent with the demand for specific performance (HONSELL, Art. 62, para. 33; ACHILLES, Art. 62, para. 3). Such a demand for specific performance would violate the principle of the prohibition of “*venire contra factum proprium*” (WITZ/SALGER/LORENZ, Art. 61, para. 4). Hence, by claiming lost profit in its Statement of Claim of 23 May 2002 and its Memorandum of 12 December 2002, Claimant has resorted to a remedy which is contradictory to an action for the price in terms of Art. 62 CISG. Thus, the Arbitral Tribunal is not entitled to award Claimant the purchase price.

#### **B. CLAIMANT DID NOT FULFIL ITS OBLIGATION TO DELIVER IN ADVANCE**

**120.** Should the Arbitral Tribunal nevertheless find that Claimant’s prior demand for lost profit is not inconsistent in terms of Art. 62 CISG, Counsel puts forward that Claimant is not entitled to the purchase price because Claimant failed to deliver in advance. By referring to the December Agreement in their faxes dated 3 April 2002 (Claimant’s Exhibits Nos. 3 and 4), the parties agreed (Memorandum for Claimant, para. 49) that payment was to be made in instalments due 30 days after notification by Claimant of delivery (Claimant’s Exhibit No. 2). Yet, Claimant has failed to deliver any goods at all. Consequently, Claimant is not entitled to the purchase price.

**121.** Claimant might attempt to argue that Respondent cannot rely on Claimant’s duty to perform in advance because Respondent itself has caused the non performance. It might thereby seek to rely on Art. 80 CISG according to which “a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission”. However, Counsel will show that this provision cannot be applied to the case at hand.

**122.** Counsel does not deny that the non delivery by Claimant was a reaction to Respondent’s fax of 2 May 2002. Yet, Art. 80 CISG demands a strict causality between the act or omission of the “first party” and the non performance of the “other party”. The act or omission of the ‘party in breach’ must render performance of the ‘aggrieved party’ practically impossible. The non performance must be imputable (BIANCA/BONELL/TALLON, Art. 80, para. 2; AUDIT, p. 187; NEUMAYER/MING, Art. 80, para. 2; PILTZ, Internationales Kaufrecht, Sec. 4, para. 21). Therefore, Art. 80 does not apply to cases where the “first party” breached the contract and thereby merely induced the “other party” to non performance (FREIBURG, p. 253). Claimant still had the possibility to deliver Oceanside, Mediterraneo as agreed on by the parties. Thus, Respondent did not render Claimant’s delivery impossible and Art. 80 CISG is not applicable.

**123. RESULT:** The Arbitral Tribunal is not entitled to award Claimant the sum of \$575,477.98 based on an ‘action for the price’.

**CLOSING STATEMENT**

In response to the Memorandum for Claimant, dated 12 December 2002, we respectfully ask the honourable Tribunal to agree with Counsel in regard of its arguments submitted in this Memorandum that:

- The application of the challenge of Dr. X must be granted **(PART 1)**;
- The Arbitral Tribunal has no jurisdiction **(PART 2)**;
- The domestic law of Equatoriana and not the CISG is the law applicable to the alleged contract **(PART 3)**;
- No contract of sale was concluded between Claimant and Respondent on 3 April 2001 **(PART 4)**;
- Claimant is not entitled to lost profit and interest thereon **(PART 5)**;
- The Arbitral Tribunal is not entitled to award Claimant the sum of \$575,477.98 based on an ‘Action for the Price’ **(PART 6)**;
- Claimant shall bear the costs of the arbitral proceedings.

By this Memorandum, Counsel demonstrated the factual and legal bases for Respondent’s case and responded to Claimant’s demands.

**CERTIFICATE**

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

\_\_\_\_\_  
Pascal Hachem

\_\_\_\_\_  
Ann-Bernadette Heck

\_\_\_\_\_  
Johannes Huber

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