

ELEVENTH ANNUAL WILLEM C. VIS  
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

**MEMORANDUM**  
*for*  
**RESPONDENT**

*Against:*

EQUAPACK, Inc.  
345 Commercial Ave.  
Oceanside  
Equatoriana

**CLAIMANT**

*On Behalf of:*

MEDI-MACHINES, S.A.  
415 Industrial Place  
Capitol City  
Mediterraneo

**RESPONDENT**



**NATIONAL UNIVERSITY**  
*of* **SINGAPORE**

**COUNSEL**

ADRIAN WONG WEI ERN

GITTA SATRYANI JUWITA

GAIL WONG LI-JING

CHUI LIJUN

JON-NATHANIEL NAIR

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	I
TERMS & ABBREVIATIONS .....	V
TABLE OF AUTHORITIES .....	VI
CASES AND AWARDS .....	XV
INDEX OF LEGAL SOURCES .....	XX
OTHER SOURCES .....	XXIII
STATEMENT OF FACTS.....	1
ISSUES.....	3
<b>I. THE MODEL 14 MACHINES CONFORMED TO THE CONTRACT.....</b>	<b>3</b>
A. THE MODEL 14 MACHINES CONFORMED TO THE CONTRACT UNDER ART. 35(1) CISG....	3
1. <i>The contract was concluded on 12 July 2002.....</i>	<i>3</i>
2. <i>The Model 14 machines that RESPONDENT delivered conformed to the “quantity, quality and description” required by the contract under Art. 35(1) CISG.....</i>	<i>3</i>
3. <i>The 23 July 2002 telephone conversation did not introduce any new contractual requirements.....</i>	<i>4</i>
B. THE MODEL 14 MACHINES CONFORMED UNDER ART. 35(2)(A) CISG BECAUSE THEY WERE FIT FOR THE PURPOSES FOR WHICH MACHINES OF THE DESCRIPTION “A WIDE RANGE OF PRODUCTS” WOULD ORDINARILY BE USED.....	5
1. <i>The Model 14 machines conformed because they could perform all ordinary purposes expected of machines of that description.....</i>	<i>5</i>
2. <i>The Model 14 machines conformed because the ability to pack salt is not an ordinary purpose of machines of that description.....</i>	<i>6</i>
3. <i>The Model 14 machines conformed because they were of the quality expected in the performance of these purposes.....</i>	<i>6</i>
C. THE MODEL 14 MACHINES CONFORMED UNDER ART. 35(2)(B) CISG BECAUSE THE PARTICULAR PURPOSE OF PACKING SALT WAS NOT MADE KNOWN AT THE TIME OF THE CONCLUSION OF THE CONTRACT. ....	7
1. <i>At the time of the conclusion of the contract on 12 July 2002, CLAIMANT had not made known the particular purpose of packing salt. ....</i>	<i>8</i>

2.	<i>The particular purpose of packing salt was not made known in the 23 July 2002 telephone conversation.</i>	8
3.	<i>RESPONDENT is under no corresponding duty to inquire into CLAIMANT's particular purposes.</i>	9
D.	THE MODEL 14 MACHINES CONFORMED UNDER ART. 35(2)(B) CISG BECAUSE CLAIMANT RELIED UNREASONABLY ON RESPONDENT'S SKILL AND JUDGMENT. . .	10
1.	<i>CLAIMANT did not rely on RESPONDENT's skill and judgment.</i>	10
2.	<i>CLAIMANT's reliance on RESPONDENT's skill and judgment was unreasonable.</i>	10
3.	<i>CLAIMANT's reliance was unreasonable because no duty to inform applied to RESPONDENT.</i>	11
<b>II. THE CONDITION OF THE MODEL 14 MACHINES DID NOT CONSTITUTE FUNDAMENTAL BREACH OF THE CONTRACT UNDER ART. 25 CISG. ....</b>		
A.	CLAIMANT HAS NOT SUFFERED DETRIMENT THAT SUBSTANTIALLY DEPRIVED ITS EXPECTATIONS UNDER THE CONTRACT. ....	12
1.	<i>There has been no substantial deprivation because CLAIMANT's essential expectations under the contract were not breached.</i>	12
2.	<i>CLAIMANT's economic loss does not amount to substantial deprivation of its expectations under the contract.</i>	13
3.	<i>CLAIMANT has not suffered consequences that are sufficiently serious to constitute substantial deprivation of its expectations under the contract.</i>	14
B.	IN ANY EVENT, THE RESULT WAS NOT FORESEEABLE UNDER ART. 25 CISG. ....	15
1.	<i>The foreseeability of this result is determined at the time of conclusion of the contract on 12 July 2002.</i>	15
2.	<i>RESPONDENT did not foresee and a reasonable person would not have foreseen the result on CLAIMANT's machines.</i>	16
<b>III. CLAIMANT'S LETTER OF 19 OCTOBER 2002 WAS NOT A VALID DECLARATION OF AVOIDANCE OF THE CONTRACT. ....</b>		
A.	THE 19 OCTOBER 2002 LETTER WAS NOT A DECLARATION OF AVOIDANCE BECAUSE CLAIMANT HAD LOST THE RIGHT TO DECLARE THE CONTRACT AVOIDED UNDER ART. 49(2)(B)(I) CISG. ....	17
1.	<i>The "reasonable time" period started before 30 September 2002 because CLAIMANT "ought to have known" of the breach at the onset of corrosion.</i>	17

2.	<i>CLAIMANT did not declare avoidance within a “reasonable time” from the onset of corrosion.</i> .....	17
3.	<i>CLAIMANT did not declare avoidance within “reasonable time” even if it knew of the breach only at the end of September 2002.</i> .....	18
B.	THE 19 OCTOBER 2002 LETTER WAS NOT A DECLARATION OF AVOIDANCE BECAUSE CLAIMANT HAD LOST THE RIGHT TO AVOID THE CONTRACT UNDER ART. 82(1) CISG.	19
C.	THE 19 OCTOBER 2002 LETTER WAS INSUFFICIENTLY DEFINITE TO CONSTITUTE A VALID DECLARATION OF AVOIDANCE.....	19
1.	<i>The letter did not express a clear intention to avoid the contract.</i> .....	19
2.	<i>The letter did not specify the subject or grounds for avoidance.</i> .....	20
<b>IV. THE TRIBUNAL SHOULD GRANT RESPONDENT’S REQUEST FOR SECURITY FOR COSTS.....</b>		<b>20</b>
A.	THE TRIBUNAL HAS AN UNFETTERED DISCRETION UNDER SIAC R. 27.3 TO ORDER CLAIMANT TO POST SECURITY FOR COSTS. ....	21
B.	THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION AND REQUIRE CLAIMANT TO POST SECURITY FOR COSTS. ....	22
1.	<i>There is reason to believe that CLAIMANT will not be able to pay for costs if its claim is unsuccessful.</i> .....	22
2.	<i>Even if CLAIMANT can afford to pay the costs, it may be able to avoid payment..</i> 23	
3.	<i>Additionally, RESPONDENT’s request does not constitute harassment amounting to an abuse of right.....</i>	24
<b>V. THE TRIBUNAL IS AUTHORISED TO ISSUE AN ENFORCEABLE DECISION TO GIVE EFFECT TO THE DUTY OF CONFIDENTIALITY .....</b>		<b>26</b>
A.	CLAIMANT MUST REFRAIN FROM DIVULGING THE EXISTENCE OF THE ARBITRATION AND ALL DETAILS IN CONNECTION WITH IT UNDER ITS CONTRACTUAL OBLIGATIONS OF CONFIDENTIALITY IN SIAC R. 34.6. ....	26
1.	<i>CLAIMANT has a duty of confidentiality under SIAC r. 34.6.</i> .....	26
2.	<i>CLAIMANT is not exempted from the duty of confidentiality by both exceptions in SIAC r. 34.6 it has relied on.</i> .....	27
B.	THE TRIBUNAL HAS THE AUTHORITY TO RESTRAIN CLAIMANT FROM DIVULGING THE EXISTENCE OF THE ARBITRATION. ....	28
1.	<i>The Tribunal has the power to issue an award to restrain CLAIMANT from violating its duty of confidentiality.</i> .....	28

MEMORANDUM *for* RESPONDENT

---

2. *The Tribunal has the power to issue a provisional order to restrain CLAIMANT from making disclosure. ....* 29

C. IF CLAIMANT FAILS TO OBSERVE THE INTERIM MEASURE, RESPONDENT MAY SEEK REDRESS FROM THE TRIBUNAL OR A COURT ..... 30

1. *RESPONDENT may apply to the Tribunal to enforce the interim measure.....* 30

2. *RESPONDENT may apply to the relevant Equatoriana Courts to enforce an award preserving confidentiality under the New York Convention. ....* 31

**VI. REQUEST FOR RELIEF.....** 32

**TERMS & ABBREVIATIONS**

Am. Rev. Int'l Arb.	American Review of International Arbitration
Am. U. Int'l L. Rev.	American University International Law Review
Arb. J.	Arbitration Journal
Arb. Int'l	Arbitration International
Art.	Article
ASA	Swiss Arbitration Association
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Const. L.J.	Construction Law Journal
Ed.	Editor[s]
ed.	Edition
Int'l A.L.R.	International Arbitration Law Review
ICC	International Chamber of Commerce
LG	Landgericht (District Court, Germany)
J. Int'l Arb.	Journal of International Arbitration
OGH	Oberster Gerichtshof (Austria)
OLG	Oberlandesgericht (Regional Court of Appeal, Germany)
NAI	Netherlands Arbitration Institute
No.	Number
SIAC	Singapore International Arbitration Centre
Temp. Int'l & Comp. L.J.	Temple International and Comparative Law Journal
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States of America
U.K.	United Kingdom
V.J.	Vindobona Journal
v.	Versus
Y.B. Comm. Arb.	Yearbook of Commercial Arbitration

**TABLE OF AUTHORITIES**

- Andersen, Camilla B.** Reasonable Time in Article 39(1) of the CISG - Is Article 39(1) Truly a Uniform Provision?  
< <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html>>  
[cited: Andersen]
- Audit, Bernard** *La vente internationale de marchandises: Convention des Nations Unies du 11 avril 1980*, Paris (1990).  
[cited: Audit]
- Babiak, Andrew** Defining Fundamental Breach Under the United Nations Convention on Contracts for the International Sale of Goods. 6 Temple International and Comparative Law Journal (1992) at 113.  
[cited: Babiak, Temp. Int'l & Comp. L.J. (1992) 113]
- Bainbridge, Stephen** Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions. 24 Virginia Journal of International Law (1984) at 619.  
[cited: Bainbridge, Va. J. Int'l L. (1984) 619]
- Barin, Babak** Carswell's Handbook of International Dispute Resolution Rules, Scarborough, Ontario (1999).  
[cited: Barin/commentator]
- Bernstein, Herbert**  
**Lookofsky, Joseph** Understanding the CISG in Europe: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods, The Hague, London, Boston (1997).  
[cited: Bernstein/Lookofsky]
- Bianca, Cesare**  
Massimo  
**Bonell, Michael**  
Joachim Commentary on the International Sales Law: the 1980 Vienna Sales Convention, Milan (1987).  
[cited: Bianca/Bonell/commentator]
- Binder, Peter (Dr.)** International Commercial Arbitration in UNCITRAL Model Law Jurisdictions: An International Comparison of the UNCITRAL Model Law on International Commercial Arbitration, London (2000).  
[cited: Binder]
- Boo, G.S. Lawrence** Halsbury's Laws of Singapore, Arbitration, vol. 2, Singapore (2003).  
[cited: Boo, Halsbury's]
- Born, Gary B.** International Commercial Arbitration: Commentary and Materials, 2<sup>nd</sup> ed., New York, The Hague (2001).  
[cited: Born, Commentary]

- Born, Gary B.** International Civil Litigation in United States Courts: Commentary & Materials, 3<sup>rd</sup> ed., The Hague, Boston (1996).  
[cited: Born, U.S.]
- Brandner, Gert** Admissibility of Analogy in Gap-filling under the CISG (1999)  
Online: <<http://www.cisg.law.pace.edu/cisg/biblio/brandner.html>>  
[cited: Brandner]
- Brown, Alexis** Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration.  
American University International Law Review (2001) at 969.  
[cited: Brown, Am. U. Int'l L. Rev. (2001) 969]
- Coderch, Pablo** The Principle Contra Proferentum in Standard Form Contracts. In particular, the Spanish Case” 1(2) Global Jurist Topics, Article 4 (2001).  
Salvador **Garcia**, Juan Antonio Ruiz  
Online: <<http://www.bepress.com/gj/topics/vol1/iss2/art4>>  
[cited: Coderch/Garcia]
- de Zylva, Martin O.** International Commercial Arbitration: Developing Rules for the  
**Harrison, Reziya** New Millenium, Bristol (2000).  
[cited: de Zylva/Harrison/commentator]
- Denoix De Saint Marc,** Confidentiality of Arbitration and the Obligation to Disclose  
Valéry Information on Listed Companies or During Due Diligence Investigations.  
Journal of International Arbitration vol.20(2) (2003) at 211.  
[cited: Denoix, J. Int'l Arb. vol..20(2) (2003)]
- Di Pietro, Domenico** Enforcement of International Arbitration Awards: The New York  
**Platte, Martin** Convention of 1958, London (2001).  
[cited: Di Pietro/Platte]
- Eiselen, Sieg** Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Articles 71 and 72 of the CISG: Editorial Remarks (2002).  
<<http://www.cisg.law.pace.edu/cisg/principles/uni71,72.html>>  
[cited: Eiselen]
- Enderlein, Fritz** Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods.  
International Sale of Goods: Dubvrovnik Lectures, Oceana (1996), Chap. 5.  
[cited: Enderlein]
- Enderlein, Fritz** International Sales Law, New York (1992).  
**Maskow, Dietrich** [cited: Enderlein/Maskow]

- Farnsworth, Allan E.** Unification of Sales Law: Usage and Course of Dealing.  
 <[http://tldb.unikoeln.de/php/pub\\_show\\_document.php?pubdocid=111900](http://tldb.unikoeln.de/php/pub_show_document.php?pubdocid=111900)>  
 [cited: Farnsworth, Unification]
- Ferrari, Franco** Interpretation of Statements and Conduct under the Convention for the International Sale of Goods (CISG) in the Light of Case Law. *International Business Law Journal/ Revue de droit des affaires internationales* No. 1 (2003) at 96.  
 [cited: Ferrari, International Business Law Journal No. 1 (2003) 96]
- Flechtner, Harry M.** Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C. *Journal of Law and Commerce* (1988) at 53-108.  
 <<http://www.cisg.law.pace.edu/cisg/text/flecht25.html>>  
 [cited: Flechtner]
- Frommel, Stefan N.  
 Rider, Barry A.K.** *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*, The Hague, Boston (1999).  
 [cited: Frommel/Rider/commentator]
- Gaillard, Emmanuel  
 Savage, John** *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague (1999).  
 [cited: Gaillard/Savage(Eds.)]
- Garro, Alejandro** Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods.  
 <<http://www.cisg.law.pace.edu/cisg/biblio/garro1.html>>  
 [cited: Garro]
- Graffi, Leonardo** Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention.  
 <<http://www.cisg.law.pace.edu/cisg/biblio/graffi.html>>  
 [cited: Graffi]
- Herber, Rolf** The Rules of the Convention Relating to the Buyer's Remedies in Cases of Breach of Contract.  
 <<http://www.cisg.law.pace.edu/cisg/biblio/herber.html>>  
 [cited: Herber]
- Heuzé, V.** *La vente internationale de marchandises*, Paris GLN, Joly, (1992).  
 [cited: Heuzé]

- Hillman,** Robert A. Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity. Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) 21.  
[cited as: Hillman]
- Huber,** Ulrich *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge.* Rabels Zeitschrift Für Ausländisches und Internationales Privatrecht vol.43 (1979).  
[cited: Huber, Rabels Z.]
- Holtzmann,** Howard M. **Neuhaus,** Joseph E. A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Deventer (1989).  
[cited: Holtzmann/Neuhaus]
- Honnold,** John O. Uniform Law for International Sales under the 1980 United Nations Convention, 3<sup>rd</sup> ed., Boston, (1999).  
[cited: Honnold]
- Jacobs,** Christopher M. Notice of avoidance under CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability. University of Pittsburgh Law Review vol. 64 (2003) at 407.  
[cited: Jacobs, U. Pitt. L. Rev. vol. 64 (2003) 407]
- Kazimierska,** Anna The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods.  
<<http://www.cisg.law.pace.edu/cisg/biblio/kazimierska.html>>  
[cited: Kazimierska]
- Koch,** Robert The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG).  
<<http://www.cisg.law.pace.edu/cisg/biblio/koch.htm>>  
[cited: Koch]
- Kojovic,** Tijana Court Enforcement of Arbitral Decisions on Provisional Relief: How Final is Provisional. Journal of International Arbitration vol.. 18(5) (2001) at 511.  
[cited: Kojovic, J. Int. Arb. vol..18(5) (2001) 511]
- Kritzer,** Albert H. Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Deventer, Boston (1991).  
[cited: Kritzer]

- Lew, Julian D.M.** Comparative International Commercial Arbitration, The Hague, London, New York (2003).  
**Mistelis, Loukas A.** [cited: Lew/Mistelis/Kröll]  
**Kröll, Stefan**
- Lew, Julian D.M.** Introduction to the Work of the Arbitration Practice Sub-Committee. Arbitration: Journal of the Chartered Institute of Arbitrator vol. 63(3) (1997) at 166.  
 [cited: Lew, Arb. vol.63(3) (1997) 166]
- Lew, Julian** Commentary on Interim and Conservatory Measures in ICC Arbitration Cases. ICC International Court of Arbitration Bulletin vol.11(1) (2000) at 23.  
 [cited: Lew, I.C.A. Bulletin vol.11(1) (2000) 23]
- Liebscher, Christopher** The Healthy Award: Challenge in International Commercial Arbitration, The Hague (2003).  
 [cited: Liebscher]
- Liu, Chengwei** Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL (2003).  
 <<http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>>  
 [cited: Liu Chengwei]
- Lorenz, Alexander** Fundamental Breach under the CISG.  
 <<http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>>  
 [cited: Lorenz]
- Murray, John E. (Jr)** An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods. Journal of Law and Commerce vol. 8 (1988) at 11.  
 [cited: Murray, J.L. & Com. vol.8 (1988) 11]
- Magnus, Ulrich** General Principles of UN-Sales Law.  
**Haberfellner, Lisa** <<http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>>  
 [cited: Magnus/Haberfellner (trans.)]
- Needham, Michael John** Order for Security for a Party's Costs. Arbitration: Journal of the Chartered Institute of Arbitrator Arbitration vol.63(3) (1997) at 122.  
 [cited: Needham, Arb. vol.63(3) (1997) 122]
- Neumayer, Karl** *Convention de Vienne sur les contrats de vente internationale de marchandises - Commentaire*, Lausanne (1993).  
**Ming, Catherine** [cited: Neumayer/Ming]

- Paulsson, Jan** May or Must under the New York Convention: An Exercise in Syntax and Linguistics.  
Arbitration International vol.14(2) (1998) at 227.  
[cited: Paulsson, Arb. Int. vol. 14(2) (1998) 227]
- Poikela, Teija** Conformity of Goods in the 1980 United Nations Convention on Contracts for the International Sale of Goods.  
Nordic Journal of Commercial Law of the University of Turku, Finland, vol. 1 (2003).  
<<http://www.njcl.utu.fi>>  
[cited: Poikela, Nord. J. C. L. vol. 1 (2003)]
- Povrzenic, Nives** Interpretation and Gap-Filling under the United Nations Convention on Contracts for the International Sale of Goods.  
< <http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html>>  
[cited: Povrzenic]
- Rauda, Christian** Warranty for Intellectual Property Rights in the International Sale of Goods.  
**Etier, Guillaume** Vindobona Journal of International Commercial Law and Arbitration, vol.4(1) (2000) at 30.  
[cited: Rauda/Etier, V.J. vol.2(1) (2000) 30]
- Redfern, Alan** Law and Practice of International Commercial Arbitration, 3<sup>rd</sup> ed., London  
**Hunter, Martin** (2000)  
[cited: Redfern/Hunter]
- Rubino-Sammartano, Mauro** International Arbitration Law and Practice, 2<sup>nd</sup> rev. ed., The Hague, London, Boston, (2001).  
[cited: Rubino-Sammartano]
- Rubins, Noah** In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration.  
American Review of International Arbitration vol.11(3) (2000) at 314.  
[cited: Rubins, Am. Rev. Int. Arb. vol.11(3) (2000) 314]
- Sandrock, Otto** The *Cautio Judicatum Solvi* in Arbitration Proceedings.  
Journal of International Arbitration vol.. 14(1) March 1997 at 17.  
[cited: Sandrock, J. Int'l. Arb. vol.14(1) (1997) 17]

- Schaefer, Jan K.** New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared.  
Electronic Journal of Comparative Law vol.2(2) 1998.  
< <http://law.kub.nl/ejcl/22/art22-2.html> >  
[cited: Schaefer, E.J.C.L. vol.2(2) 1998]
- Schlechtriem, Peter** Commentary on the UN Convention on the International Sale of Goods (CISG), 2<sup>nd</sup> ed (in translation), Oxford (1998).  
[cited: Schlechtriem]
- Schlechtriem, Peter** Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods, Vienna (1986).  
<<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-35.htm>>  
[cited: Schlechtriem, CISG 1986]
- Schlechtriem, Peter** Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany.  
< <http://www.cisg.law.pace.edu/cisg/text/schlechtriem25.html> >  
[cited: Schlechtriem, Uniform Sales Law in Germany]
- Schlechtriem, Peter** 50 Years of the *Bundesgerichtshof* (Federal Supreme Court of Germany): A Celebration Anthology from the Academic Community.  
<<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>>  
[cited: Schlechtriem, 50 Years of the *Bundesgerichtshof*]
- Schmitz, Winfried F.** Due Diligence for Corporate Acquisitions, Association. *Internationale des Jeunes Avocats*/International Association of Young Lawyers.  
[cited: Schmitz]
- Soergel, Hans Theodor** *Bürgerliches Gesetzbuch mit Einführungsgesetzen und Nebengesetzen*, 12<sup>th</sup> ed., Stuttgart (1991).  
[cited: Soergel/commentator]
- Smit, Hans** Breach of Confidentiality as a Ground for Avoidance of the Arbitration Agreement.  
*American Review of International Arbitration* Vol.11 (2000) at 567.  
[cited: Smit, Am. Rev. Int. Arb. Vol.11 (2000) 567]
- Sono, Kazuaki** Formation of International Contracts under the Vienna Convention: A Shift above the Comparative Law.  
<<http://www.cisg.law.pace.edu/cisg/biblio/sono2.html>>  
[cited: Sono]
- Soo, Gary** Securing Costs in Hong Kong Arbitration.  
*International Arbitration Law Review* (2000) at 25.  
[cited: Soo, Int'l A.L.R. (2000) 25]

- Sutton**, David      Russell on Arbitration, London (2003).  
 St. John              [cited: Sutton/Gill]  
**Gill**, Judith
- Tan**, Boon Teik      Establishing International Dispute Resolution Laws and Institutions, The  
 Maritime Advocate.  
 <[http://www.maritimeadvocate.com/i1\\_foru.htm](http://www.maritimeadvocate.com/i1_foru.htm)>  
 [cited: Tan]
- Tan**, Kevin,  
 Y.L.                    The Singapore Legal System, 2<sup>nd</sup> ed., Singapore (1999).  
 (Tan/commentator)
- Trakman**,  
 Leon                  Confidentiality in International Commercial Arbitration.  
 Arbitration International vol. 18(1) (2002) at 1.  
 [cited: Trakman, Arb. Int'l. vol.18(1) (2002) 1]
- Van den Berg**,  
 Albert J.              International Arbitration and National Courts: The Never Ending Story,  
 The Hague (2001).  
 [Van den Berg/commentator]
- Veneziano**,  
 Anna                  Nonconformity of goods in international sales: a survey of current case  
 law on CISG/ *Non-conformité des marchandises dans les ventes  
 internationales: étude de la jurisprudence actuelle sur la CVIM*.  
 International business law journal/ *Revue de droit des affaires  
 internationales* (1997) at 39.  
 [cited: Veneziano, International Business Law Journal No. 1 (1997) 39]
- Vilus**, Jelena        References to Reasonableness in the CISG (civil law comparative citing  
 André Trunc, Alan Farnsworth, other sources).  
 Homenaje a Jorge Barrera Graf, Bd. 2, Mexico, (1989) at 1440.  
 <<http://www.cisg.law.pace.edu/cisg/text/reason.html#vilus>>  
 [cited: Vilus]
- Weiszberg**,  
 Guillaume          *Le raisonnable en droit du Commerce International* (2003).  
*Pour le doctorat en droit de l'Université Panthéon-Assas* (Paris II).  
 <<http://www.cisg.law.pace.edu/cisg/biblio/Reasonableness.html>>  
 [cited: Weiszberg]
- Wirth**, Markus      Interim or Preventive Measures in Support of International Arbitration in  
 Switzerland.  
 Swiss Arbitration Association (ASA) Bulletin vol. 18(1) (2000) at 31.  
 [cited: Wirth, ASA Bulletin vol. 18(1) (2000) 31]
- Witz**, Claude        A Raw Nerve in Disputes relating to the Vienna Sales Convention: The  
 Reasonable Time for the Buyer to Give Notice of a Lack of Conformity.  
 ICC International Court of Arbitration Bulletin *Vol. 11/No.2* (Fall 2000)  
 15.  
 [cited: Witz]

**Ziegel, Jacob S.** Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (1981).  
<<http://www/cisg.law.pace.edu/cisg/text/ziegel35.html>>  
[cited: Ziegel, Report]

**Ziegel, Jacob S.** The Remedial Provisions on the Vienna Convention, Some Common Law Perspectives.  
Gabon / Smit (Eds.): International Sales, The United Nations Convention on the International Sale of Goods at 9.  
[cited: Gabon/Smit/Ziegel]

## CASES AND AWARDS

### Austria

- 2000 Oberster Gerichtshof (Supreme Court), 13 April 2000, 2 Ob 100/00w.  
<<http://cisgw3.law.pace.edu/cases/000413a3.html>>  
[cited: OGH, 13 April 2000 (Austria)]

### Australia

- 1993 Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums (Australasia) Pty Ltd. (1993) 118 A.L.R. 644.  
[cited: RCI v. Ray Bolwell and Resort Condominiums (Australia)]

### France

- 1995 Roger Caiato v. Société Francaise de Factoring International Factor France 'S.F.F.', 13 September 1995, Cour d'appel (Appellate Court) Grenoble.  
[cited: Roger Caiato v. Société Francaise (France)]
- 1999 Brasoil v. GMRA, 1 July 1999, Cour d'Appel,(Appellate Court) Paris.  
[cited: Brasoil v. GMRA (France)]
- 2003 Société H. H... GmbH & Co. v. SARL MG..., 10 September 2003, Cour d'Appel (Appellate Court) Paris.  
<<http://cisgw3.law.pace.edu/cases/030910f1.html>>  
[cited: Société H. H... GmbH & Co. v. SARL MG...(France)]

### Germany

- 1995 Oberlandesgericht (Appellate Court) Oldenburg, 1 February 1995, 11 U 64/94.  
<<http://cisgw3.law.pace.edu/cases/950201g1.html>>  
[cited: OLG Oldenburg, 1 February 1995]
- 1995 Bundesgerichtshof (Federal Supreme Court), 8 March 1995, VIII ZR 159/94.  
< <http://cisgw3.law.pace.edu/cases/950308g3.html>>  
[cited: New Zealand Mussels, Germany BGH, 8 March 1995]
- 1996 Bundesgerichtshof (Federal Supreme Court), 3 April 1996, VIII ZR 51/95.  
<<http://cisgw3.law.pace.edu/cases/960403g1.html>>  
[cited: Germany BGH, 3 April 1996]
- 1997 Oberlandesgericht (Provincial Court of Appeal) Koblenz, 31 January 1997, 2 U 31/96.  
< <http://cisgw3.law.pace.edu/cases/970131g1.html>>  
[cited: OLG Koblenz, 31 January 1997]

- 1998 Landgericht (District Court) Regensburg, 24 September 1998.  
<<http://cisgw3.law.pace.edu/cases/980924g1.html>>  
[cited: LG Regensburg, 24 September 1998]
- 1999 Oberlandesgericht (Provincial Court of Appeal) Bamberg, 13 January 1999, 3 U 83/98.  
<<http://cisgw3.law.pace.edu/cases/990113g1.html>>  
[cited: OLG Bamberg, 13 January 1999]
- 1999 Bundesgerichtshof (Federal Supreme Court), 3 November 1999, VIII ZR 287/98.  
<<http://www.jura.uni-freiburg.de/urteile/text/475.htm>>  
[cited: Germany BGH, 3 November 1999]
- 2001 Bundesgerichtshof (Federal Supreme Court), 31 October 2001, VIII ZR 60/01.  
<<http://cisgw3.law.pace.edu/cases/011031g1.html>>  
[cited: Germany BGH, 31 October 2001]
- 2002 Landgericht (District Court) München, 27 February 2002.  
<<http://cisgw3.law.pace.edu/cases/020227g1.html>>  
[cited: LG München, 27 February 2002]
- 2002 Oberlandesgericht (Provincial Court of Appeal) Schleswig, 22 August 2002, 11 U 40/01  
<<http://cisgw3.law.pace.edu/cases/020822g2.html>>  
[cited: OLG Schleswig, 22 August 2002]

### **Hong Kong**

- 1994 China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., Supreme Court of Hong Kong, High Court, 13 July 1994. Y.B. XX (1995) at 671 (Hong Kong No. 8).  
[cited: China Nanhai v. Gee Tai Holdings (H.K.)]
- 1999 China Ocean Shipping Co. Owners of the M/V Fu Ning Hai v. Whistler International Charterers of the M/V Fu Ning Hai (1999) unreported, HCCT No. 20 of 1999, 24.05.99.  
[China Shipping v. Whistler International (H.K.)]

### **Sweden**

- 1998 Beijing Light Automobile Co. v. Connell, 5 June 1998 (Stockholm Chamber of Commerce Arbitration Award).  
<<http://cisgw3.law.pace.edu/cases/980605s5.html>>  
[cited: Stockholm Chamber of Commerce Arbitration Award, 5 June 1998]

**Switzerland**

- 1995 Commercial Court Zürich, 26 April 1995, HG 920670.  
< <http://cisgw3.law.pace.edu/cases/950426s1.html> >  
[cited: Commercial Court Zürich, 26 April 1995 (Switzerland)]
- 1997 Arbitral Decision of 25 September 1997.  
ASA Bulletin 19(4) (2001) 745.  
[Decision of Arbitral Tribunal 25 September 1997, ASA Bulletin 19(4) (2001) 745]
- 1998 Arbitral Decision of 21 December 1998  
ASA Bulletin vol. 19(2) (1999) 59.  
[cited: Arbitral Decision of 21 December 1998 (ASA)]
- 2000 Bundesgerichtshof (Federal Supreme Court), 15 September 2000,  
4C.105/2000.  
<<http://cisgw3.law.pace.edu/cases/000915s2.html>>  
[cited: Switzerland BGH, 15 September 2000]
- 2000 Roland Schmidt GmbH v. Textil-Werke Blumenegg AG, Bundesgerichtshof  
(Federal Supreme Court), 22 December 2000.  
<<http://cisgw3.law.pace.edu/cases/001222s1.html>>  
[cited: Roland Schmidt v. Textil-Werke Blumenegg (Switzerland)]
- 2001 Award in Case No. 415 of 20 November 2001.  
ASA Bulletin 20(3) (2002) 467.  
[cited: Award in Case No. 415 (ASA)]
- 2002 Commercial Court des Kantons Aargau, 5 November 2002, OR.2001.00029.  
<<http://cisgw3.law.pace.edu/cases/021105s1.html>>  
[cited: Commercial Court des Kantons Aargau, 5 November 2002  
(Switzerland)]

**The Netherlands**

- 1993 Gruppo IMAR S.p.A. v. Protech Horst, 6 May 1993,  
Arrondissementsrechtbank Roermond.  
[cited: Gruppo IMAR S.p.A. v. Protech Horst (The Netherlands)]
- 1996 Interim Award in Netherlands Arbitration Institute (NAI) Case No. 1694.  
Y.B. Comm. Arb. vol. 23 (1998) 97.  
[cited: NAI Case No. 1694]
- 2002 Netherlands Arbitration Institute, 15 October 2002, Case No. 2319.  
<<http://cisgw3.law.pace.edu/cases/021015n1.html>>  
[cited: Rijn Blend Case, NAI, 15 October 2002]

**United Kingdom**

- 1977 Pearson and Another v Naydler & Others (1977) 3 All E.R. 531  
[cited: Pearson v. Naydler (U.K.)]
- 1994 S.A. Coppée Lavalin N.V. v. Ken-Ren Chemicals and Fertilizers Ltd. (In Liquidation In Kenya) (1995) 1 A.C. 38 HL  
[cited: Coppée-Lavalin v. Ken-Ren Chemicals (U.K.)]
- 1996 Regia Autonoma de Electricitate Renel v. Gulf Petroleum International Ltd. (1996) 2 All E.R. 319.  
(Regia Autonoma v. Gulf Petroleum (U.K.))

### **United States of America**

- 1988 Ministry of Finance and Planning v. Onyx Development Corp., 1989 U.S. Dist. Lexis 11995 (S.D.N.Y. 24 June 1988).  
[cited: Ministry of Finance v. Onyx (U.S.)]
- 1994 Yasuda Fire & Marine Insurance Co of Europe v. Continental Casualty Co., 37 F.3d 345 (7<sup>th</sup> Cir, 1994).  
[cited: Yasuda v. Continental Casualty (U.S.)]
- 1995 Delchi Carrier SpA v. Rotorex, 71 F.3d 1024 (2d Cir. 1995).  
<<http://cisgw3.law.pace.edu/cases/940909u1.html>>  
[cited: Delchi Carrier v. Rotorex(U.S.)]
- 2000 Publicis v. True North Communication Inc., 206 F.3d 725 (2000).  
[cited: Publicis v. True North Communication (U.S.)]

### **ICC Awards**

- 1983 ICC Case No. 3790 of 1983.  
[cited: ICC Case No. 3790 of 1983]
- 1986 ICC Case No. 5073 of 1986.  
[cited: ICC Case No. 5073 of 1986]
- 1992 Arbitration Case No. 6697 of 1992.  
Revue de l'Arbitrage (1992) at 135.  
[cited: ICC Arbitration Case No. 6697 of 1992]
- 1994 ICC Arbitration Case No. 7531 of 1994  
<<http://cisgw3.law.pace.edu/cases/947531i1.html>>  
[cited: ICC Case. No. 7531 (France)]
- 1994 ICC Arbitration Case No. 7660 of 1994..  
< <http://cisgw3.law.pace.edu/cases/947660i1.html>>

- [cited: ICC Case No. 7660 of 1994]
- 1995 ICC Arbitration Case No. 8213 of March 1995 (Partial award)  
<<http://cisgw3.law.pace.edu/cases/958213i1.html>>  
[cited: ICC Case No. 8213 of 1995]
- 1995 ICC Arbitration Case No. 8324 of 1995.  
<<http://cisgw3.law.pace.edu/cases/958324i1.html>>  
[cited: ICC Case No. 8324 of 1995]
- 1998 ICC Final Award in Case No. 9154 of 1998.  
[cited: ICC Case No. 9154 of 1998]
- 1998 ICC Final Award in Case No. 9593 of 1998.  
[ICC Case No. 9593 of 1998]

#### **UNCITRAL Rules Arbitration**

- 1990 Wintershall A.G. v. Govt. of Qatar.  
XV Y.B.C.A. 30 (1990).  
[cited: Wintershall A.G. v. Govt. of Qatar (UNCITRAL Rules)]

## INDEX OF LEGAL SOURCES

1.	<p>United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) (11 April 1980).          United Nations Commission on International Trade Law (UNCITRAL).          Online: &lt;<a href="http://www.uncitral.org/en-index.htm">http://www.uncitral.org/en-index.htm</a>&gt;          [cited: CISG]</p>
2.	<p>List of Lex Mercatoria Principles, Rules and Standards          CENTRAL Transnational Law Database          Online: &lt;<a href="http://tldb.uni-koeln.de/php/pub_show_toc.php">http://tldb.uni-koeln.de/php/pub_show_toc.php</a>&gt;          [cited: CENTRAL Transnational Law Database]</p>
3.	<p>Legislative History to Art. 14 CISG.          Pace Law School Institute of International Commercial Law, CISG Database.          Online: &lt;<a href="http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-14.html">http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-14.html</a>&gt;          [cited: Legislative History, Art. 14]</p>
4.	<p>Annotated Text of CISG, “Words and Phrases”, Article 26.          Pace Law School Institute of International Commercial Law, CISG Database.          Online: &lt;<a href="http://www.cisg.law.pace.edu/cisg/text/e-text-26.html">http://www.cisg.law.pace.edu/cisg/text/e-text-26.html</a>&gt;          [cited: Annotated Text, Words and Phrases, Art. 26]</p>
5.	<p>Text of the Secretariat Commentary on Article 33 of the 1978 Draft (draft counterpart. of CISG Article 35).          Pace Law School Institute of International Commercial Law, CISG Database.          Online: &lt;<a href="http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html">http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html</a>&gt;          [cited: Secretariat Commentary, Art. 35]</p>
6.	<p>Text of the Secretariat Commentary on Article 24 of the 1978 Draft (draft counterpart of CISG Article 26).          Pace Law School Institute of International Commercial Law, CISG Database.          Online: &lt;<a href="http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-26.html">http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-26.html</a>&gt;          [cited: Secretariat Commentary, Art. 26]</p>
7.	<p>International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (1994).          International Institute for the Unification of Private Law.          &lt;<a href="http://www.unidroit.org/english/principles/blackletter.pdf">http://www.unidroit.org/english/principles/blackletter.pdf</a>&gt;          [cited: UNIDROIT Principles]</p>
8.	<p>Principles of European Contract Law (complete and revised version 1998/1999).          Pace Law School Institute of International Commercial Law, CISG Database.          &lt;<a href="http://www.cisg.law.pace.edu/cisg/text/textef.html">http://www.cisg.law.pace.edu/cisg/text/textef.html</a>&gt;          [cited: Principles of European Contract Law]</p>

MEMORANDUM *for* RESPONDENT

<p><b>9.</b></p>	<p>Singapore International Arbitration Centre (SIAC) Arbitration Rules (2<sup>nd</sup> ed., 22 October 1997). Singapore International Arbitration Centre. Online: &lt;<a href="http://www.siac.org.sg/2_SIACrules.htm">http://www.siac.org.sg/2_SIACrules.htm</a>&gt; [cited: SIAC Rules]</p>
<p><b>10.</b></p>	<p>The London Court of International Arbitration (LCIA) Arbitration Rules (1<sup>st</sup> ed., 1 January 1981). Pieter Sanders (ed.), Y.B. Comm. Arb. vol. X (1985) at 157. [cited: LCIA Rules 1981]</p>
<p><b>11.</b></p>	<p>The London Court of International Arbitration (LCIA) Arbitration Rules (2<sup>nd</sup> ed., 1 January 1998). The London Court of International Arbitration. Online: &lt;<a href="http://www.lcia-arbitration.com/lcia/arb/uk.htm#y">http://www.lcia-arbitration.com/lcia/arb/uk.htm#y</a>&gt; [cited: LCIA Rules 1998]</p>
<p><b>12.</b></p>	<p>Hong Kong International Arbitration Centre (HKIAC) Domestic Arbitration Rules (1 April 1993). Hong Kong International Arbitration Centre. Online: &lt;<a href="http://www.hkiac.org/pdf/e_domestic.pdf">http://www.hkiac.org/pdf/e_domestic.pdf</a>&gt; [cited: HKIAC Rules]</p>
<p><b>13.</b></p>	<p>United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (15 December 1976). United Nations Commission on International Trade Law. Online: &lt;<a href="http://www.uncitral.org/en-index.htm">http://www.uncitral.org/en-index.htm</a>&gt; [cited: UNCITRAL Rules]</p>
<p><b>14.</b></p>	<p>Convention on the Settlement of Investment Disputes between States and Nationals of Other States Part. IV (Arbitration) (14 October 1966). International Centre for Settlement of Investment Disputes (ICSID). Online: &lt;<a href="http://www.worldbank.org/icsid/basicdoc/pArt.A.htm">http://www.worldbank.org/icsid/basicdoc/pArt.A.htm</a>&gt; [cited: ICSID Convention]</p>
<p><b>15.</b></p>	<p>United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (21 June 1985). United Nations Commission on International Trade Law. Online: &lt;<a href="http://www.uncitral.org/en-index.htm">http://www.uncitral.org/en-index.htm</a>&gt; [cited: Model Law]</p>
<p><b>16.</b></p>	<p>UNCITRAL Model Law on International Commercial Arbitration: UNCITRAL Notes on Organising Arbitral Proceedings. Foreign Trade Information System (SICE). &lt;<a href="http://www.sice.oas.org/DISPUTE/comarb/uncitral/arbproce1.asp">http://www.sice.oas.org/DISPUTE/comarb/uncitral/arbproce1.asp</a>&gt; [cited: UNCITRAL Notes on Organising Arbitral Proceedings]</p>

MEMORANDUM *for* RESPONDENT

---

<b>17.</b>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (7 June 1959). United Nations Commission on International Trade Law (UNCITRAL). Online: < <a href="http://www.uncitral.org/en-index.htm">http://www.uncitral.org/en-index.htm</a> > [cited: New York Convention]
------------	--

**OTHER SOURCES**

Flexible Packaging Plastic Bags.

<<http://www.flexible-packaging-plastic-bags.com/food-packaging.htm>

[cited: Flexible Packaging]

All-Fill Inc., Manufacturer of Auger Fillers, Piston Fillers, Pump and Cup Fillers.

<<http://www.all-fill.com/afi/content/productsguide/augerfillers/multifill/multifill.htm>>

[All-Fill Inc.]

Auger Manufacturing Specialists.

<<http://www.augermfgspec.com/standard.html>>

[cited: Auger Manufacturing Specialists]

Universal Packaging, Inc.

<<http://www.unipachou.com/machinesmn.html>>

[cited: Universal Packaging]

European Salt Producers' Association.

<<http://www.eu-salt.com/manufact/frame.html>>

[cited: European Salt Producers' Association]

Packaging EZ Research, Company Listing.

<[http://www.thomasregisterdirectory.com/packaging/packaging\\_list.html?display=listing&az=25431008&pn=55622757&search\\_type=product&search\\_string=Packaging&seq=1&uuid=THEzsrch&ezlocation=http://www.thomasregisterdirectory.com/packaging/food\\_packaging\\_0070548\\_1.html](http://www.thomasregisterdirectory.com/packaging/packaging_list.html?display=listing&az=25431008&pn=55622757&search_type=product&search_string=Packaging&seq=1&uuid=THEzsrch&ezlocation=http://www.thomasregisterdirectory.com/packaging/food_packaging_0070548_1.html)>

[cited: Packaging EZ Research]

Rovema Packaging Machines, Form Fill Seal Machines.

<<http://www.packexpo.com/ve/36674/main.html>>

[cited: Rovema Packaging Machines]

## STATEMENT OF FACTS

Medi-Machines, S.A. [hereinafter RESPONDENT] is a company incorporated in Mediterraneo and is a manufacturer of machinery. Equapack Co. [hereinafter CLAIMANT] is a company incorporated in Equatoriana and has been in the business of packaging many different types of goods for 30 years.

CLAIMANT wrote to RESPONDENT on 24 June 2002 to ask about machines to pack a “wide range of goods”. CLAIMANT stressed price and prompt delivery as essential elements in its purchasing decision. In response, RESPONDENT offered CLAIMANT a choice of Model 14 or Model 16 machines to pack a wide range of goods. The older Model 14 machines were cheaper and could be delivered immediately. CLAIMANT selected six Model 14 machines on 12 July 2002.

To check on the shipping CLAIMANT called RESPONDENT on 23 July 2002. CLAIMANT talked about its client whom they would be packing goods for, and said that they would need to pack goods ranging from coarse to fine. The word ‘salt’ was mentioned as an illustration of a fine good. Upon delivery, CLAIMANT installed the machines themselves and used the machines from 30 August 2002 onwards. The machines worked reasonably well.

The operations manual that came with the Model 14 machines warned that the Model 14 should not be used with corrosive materials. Despite this, CLAIMANT used four of the machine to pack salt. The machines therefore showed serious signs of corrosion by the end of September 2002, when CLAIMANT made its decision not to use the machines.

However, CLAIMANT did not inform RESPONDENT of its problems until 18 October 2002. Furthermore, the letter CLAIMANT sent on 19 October 2002 only stated “if you want the machines, they are yours”. In reply, RESPONDENT sent a letter on 27 October 2002 stating that salt was a very special item to handle and that they do not and cannot assume that a customer intends to pack salt unless specifically told.

Subsequently, no written communication took place and CLAIMANT submitted the matter for arbitration. Meanwhile, CLAIMANT purchased two salt-packing machines from Oceanic Machinery GmbH at US\$125,000 each and four non salt-packing machines at US\$75,000 each.

By 1 September 2003, it had been reported by the reputable financial press in Equitoriana that CLAIMANT had cash flow problems, possibly from late 2002. RESPONDENT made a

request for security for costs which it was willing to withdraw if CLAIMANT provided cent financial information. CLAIMANT has not provided such information. It was also discovered that CLAIMANT might be acquired, and intended to divulge the existence of these proceedings despite the duty of confidentiality owed to RESPONDENT.

*In accordance with the Arbitral Tribunal's Procedural Order No. 2, Counsel for RESPONDENT argues that:*

- a) The Model 14 machines conformed to the contract [RESPONDENT Memorandum, para. 1-33];
- b) The condition of the machines did not constitute fundamental breach [RESPONDENT Memorandum, para. 34-56];
- c) The letter of 19 October did not constitute a declaration of avoidance [RESPONDENT Memorandum, para. 57-72]
- d) CLAIMANT should post security for costs [RESPONDENT Memorandum, para. 73-93];
- e) CLAIMANT is obligated to refrain from divulging the existence of the arbitration and all details in connection with it [RESPONDENT Memorandum, para. 94-102];
- f) The Tribunal is authorised to issue an interim measure to give effect to the duty of confidentiality which would be enforceable by the Tribunal or a court under the New York Convention. [RESPONDENT Memorandum, para. 103-117]

## ISSUES

### I. THE MODEL 14 MACHINES CONFORMED TO THE CONTRACT.

#### A. The Model 14 machines conformed to the contract under Art. 35(1) CISG.

1. The Model 14 machines delivered by RESPONDENT conformed under Art. 35(1) CISG because they were of the “quantity, quality and description” required [2] under the contract concluded on 12 July 2002 [1]. The machines conformed even if the 23 July 2002 telephone conversation is taken into account [3].

*1. The contract was concluded on 12 July 2002.*

2. The Model 14 machines conformed to the contractual requirements under Art. 35(1) CISG. Conformity under Art. 35(1) CISG is determined by the requirements of the contract at the date of its conclusion [Secretariat Commentary, Art. 35, para. 4; Schlechtriem, at 276; Bianca/Bonell/Bianca at 272; Enderlein/Maskow, at 141].

3. The contract was concluded on 12 July 2002 when CLAIMANT accepted RESPONDENT’s offer [Art. 23 CISG]. RESPONDENT’s letter of 3 July 2002 was a “sufficiently definite” offer under Art. 14(1) CISG because it indicated the goods, price and quantity. RESPONDENT offered Model 14 machines, at US\$65,000 each, for a minimum order of six machines [Problem at 9]. CLAIMANT too has characterised the letter of 3 July 2002 as an “offer” [Problem at 4, 14]. RESPONDENT’s offer of 3 July 2002 expressed RESPONDENT’s intention to be bound as it offered to arrange for shipping [Problem at 9] and provided its “General Conditions of Sale” [Problem at 10]. A contract is concluded when offeror’s intention to be bound is reciprocated by offeree’s indication of assent [Art. 18 CISG; Bernstein/Lookofsky at 34, 40; Sono at 118; Enderlein/Maskow at 83]. CLAIMANT reciprocated by affirmatively “accepting” the offer in the letter of 12 July 2002 [Problem at 4, 12]. Therefore the contract was concluded on 12 July 2002.

*2. The Model 14 machines that RESPONDENT delivered conformed to the “quantity, quality and description” required by the contract under Art. 35(1) CISG.*

4. The Model 14 machines conformed under Art. 35(1) CISG because they were of “the quantity, quality and description required by the contract”. The contract required RESPONDENT to provide machines fulfilling the express contractual description of packing “a wide range of products” [Problem at 8, 35]. The Model 14 machines are able to pack a

“wide range of products” like beans and rice [*Problem* at 4]. This has been verified by the expert witness [*Problem* at 35]. Therefore the Model 14 machines are in conformity with the contractual description.

5. The phrase “a wide range of products” is a general contractual description only. It does not amount to an express contractual quality under Art. 35(1) CISG [ICC Case No. 8213 of 1995; LG Regensburg, 24 September 1998; Rijn Blend Case, NAI, 15 October 2002; OGH, 13 April 2000 (Austria)]. Hence the parties did not contract for the ability to pack salt, or for the machines to operate at a particular rate as contractual qualities [RESPONDENT Memorandum, para. 6]. Furthermore, a contractual quality cannot be implied. There were also no prior dealings between the parties [*Problem* at 8] suggesting that a term of quality should be implied [Société H. H...GmbH & Co. v. SARL MG... (France)]. Performance rate also cannot be implied as a contractual quality as no reference was made to particular industry standards [Schlechtriem at 276-277]. Since the Model 14 machines conformed to the contractual description “a wide range of products” and breached no contractual quality, they conformed under Art. 35(1) CISG.

*3. The 23 July 2002 telephone conversation did not introduce any new contractual requirements.*

6. The contractual requirements were not changed by the 23 July 2002 telephone conversation, which took place after the conclusion of the contract. Furthermore, it cannot be argued that the parties intended to affect the contractual terms in their telephone conversation. The parties must intend for a term to be a contractual requirement [Ziegel, Report; Rb Roermond (Netherlands) 12 June 1975 and BGH WM 1933, 12 et seq. in Legislative History, Art. 14]. The purpose of CLAIMANT’s call on 23 July 2002 was to check on the progress of shipment of the machines [*Problem* at 4, 14, 31]. Under Art. 8(1) CISG, CLAIMANT did not intend to affect the contractual terms, therefore the telephone conversation did not introduce any new contractual requirement.

7. Even if the Tribunal holds that the contract was concluded during or after the telephone conversation on 23 July 2002, the ability to pack salt was still not a contract requirement. A contractual requirement must be specific and show agreement between the parties [OLG Schleswig, 22 August 2002; Bianca/Bonell/Bianca at 275]. In the telephone conversation, the word ‘salt’ was mentioned once only, and in the middle of a long sentence [*Problem* at 32].

Such a passing mention does not amount to a contractual requirement. Furthermore, under Art. 8(2) CISG, a reasonable person under those circumstances would not have been alerted that CLAIMANT intended to pack salt. Therefore, the contract contained no requirement to pack salt, and the Model 14 machines conform under Art. 35(1) CISG.

**B. The Model 14 machines conformed under Art. 35(2)(a) CISG because they were fit for the purposes for which machines of the description “a wide range of products” would ordinarily be used.**

8. The Model 14 machines conformed under Art. 35(2)(a) CISG because they were “fit for the purposes for which goods of the same description would ordinarily be used”. The Model 14 machines could perform all ordinary purposes expected from machines of that description [1]. The ability to pack salt was not an ordinary purpose [2]. Additionally, the machines were of the quality expected in the performance of these purposes and were therefore “fit” under Art. 35(2)(a) CISG [3].

*1. The Model 14 machines conformed because they could perform all ordinary purposes expected of machines of that description.*

9. The Model 14 machines conformed because they could perform all ordinary purposes expected of machines able to pack “a wide range of products”. Under Art. 35(2)(a) CISG, the machines are not required to fulfil all possible purposes [Herber at 113; Bianca/Bonell/Bianca at 274; Secretariat Commentary, Art. 35, para. 5]. An ordinary purpose is to be objectively determined with reference to a particular industry [Stockholm Chamber of Commerce Arbitration Award, 5 June 1998; Secretariat Commentary, Art. 35, para. 5; Schlectriem at 279]. RESPONDENT was in the food packing machinery industry [*Problem* at 3]. Hence the purposes must be ordinary in the food packing machinery industry.

10. These ordinary purposes according to various manufacturers include: the ability to pack bags of different sizes and weights [All-Fill Inc.; Flexible Packaging; Universal Packaging; Auger Manufacturing Specialists], the ability to pack products of different sizes from granular, fine powder to grains [Universal Packaging], and the ability to pack in different packing styles [Rovema Packaging Machines; Packaging EZ Research].

11. The Model 14 machines could pack bags of different sizes and weights, products of different sizes and weights, and pack in different packing styles [*Problem* at 3, 31]. In contrast, CLAIMANT only contemplated machines that were able to pack goods of different

sizes and weights [*Problem* at 8]. Not only could the Model 14 machines pack the products CLAIMANT contemplated, they even fulfilled all the ordinary purposes in the food packing industry. Therefore the machines conformed under Art. 35(2)(a) CISG.

*2. The Model 14 machines conformed because the ability to pack salt is not an ordinary purpose of machines of that description.*

**12.** Art. 35(2)(a) CISG does not require the machines to perform a special purpose in order to be fit for ordinary purposes [Secretariat Commentary, Art. 35, para. 6]. The Model 14 machines conformed because the ability to pack salt is a special, and not an ordinary purpose. Salt is highly corrosive and there is a special salt packing industry [*Problem* at 17; *Procedural Order No. 3*, para. 27]. In fact, the packing of salt for food purposes is considered a special purpose even within that industry [European Salt Producers' Association, see under "S" for Specialities]. Furthermore, the vast majority of firms do not pack salt [*Procedural Order No. 3*, para. 27], and both Oceanic Machinery GmbH. and RESPONDENT produce a separate line of machines for packing salt. In fact, Oceanic's salt packing machines cost US\$125,000 as opposed to US\$75,000 for machines for all other products [*Problem* at 5]. Also, CLAIMANT had never been called upon to pack salt in all of its five years in the food packing business [*Procedural Order No. 3*, para. 14]. Hence the ability to pack salt is a special purpose and the Model 14 machines conformed under Art. 35(2)(a) CISG.

*3. The Model 14 machines conformed because they were of the quality expected in the performance of these purposes.*

**13.** The Model 14 machines conformed because their productivity was of a quality "fit" for ordinary purposes under Art. 35(2)(a) CISG. There are three possible approaches for determining quality: the highest average quality approach, the reasonable quality approach and the merchantability approach. Both the average and merchantability quality approaches originate from domestic legal systems [Bianca/Bonell/Will at 274; Enderlein/Maskow at 143]. In view of the international character and need to promote uniformity in the application of the CISG [Art. 7(1) CISG], the reasonable quality approach is preferred [Bernstein/Lookofsky at 59-60; Stockholm Chamber of Commerce Arbitration Award, 5 June 1998; Rijn Blend Case, NAI, 15 October 2002, para. 117].

**14.** Under the reasonable quality approach, the Model 14 machines were of reasonable quality if their productivity met CLAIMANT's reasonable expectations.

[Bernstein/Lookofsky at 60; Stockholm Chamber of Commerce Arbitration Award, 5 June 1998]. The machines' price and the parties' prior contractual relations are important factors [Rijn Blend Case, NAI, 15 October 2002, para. 117; Bianca/Bonell/Bianca at 281]. A reasonable buyer can expect that less expensive machines perform at a lower rate [Roland Schmidt v. Textil-Werke Blumenegg (Switzerland); Bianca/Bonell/Bianca at 279]. CLAIMANT themselves acknowledged that the low price of US\$65,000 "was so reasonable because the Model 14 had been discontinued in favour of their [sic] Model 16" [*Problem* at 14]. In fact, faster multi-head-weigher machines are considerably more expensive than the Model 14, indicating that price is related to speed [*Problem* at 9]. Furthermore, CLAIMANT and RESPONDENT had no prior commercial relations [*Problem* at 8]. Since the Model 14 machines performed at a rate appropriate to their low price, they were of reasonable quality.

**15.** The Model 14 machines conformed even under the highest average quality approach. Average quality requires that the machines were more or less good within a tolerable degree, at least not conspicuously below the standard reasonably expected [Bianca/Bonell/Bianca at 281; Rijn Blend Case, NAI, 15 October 2002, para. 100; Poikela, Nord. J. C. L. vol. 1 (2003) at 38]. It therefore does not matter that Model 14's packing rate for some products was below the industry rate of 180 bags/min. Any average standard is merely a guide and not binding [New Zealand Mussels, Germany BGH, 8 March 1995; ICC Case No. 8213 of 1995]. As CLAIMANT has not shown proof that the packing rate of the Model 14 is intolerably below the required standard, there can be no finding of non-conformity [Rijn Blend Case, NAI, 15 October 2002, para. 100]. Therefore, under both the average quality and reasonable quality approaches the Model 14 machines conformed to the quality required under Art. 35(2)(a) CISG.

**C. The Model 14 machines conformed under Art. 35(2)(b) CISG because the particular purpose of packing salt was not made known at the time of the conclusion of the contract.**

**16.** The Model 14 machines conformed under Art. 35(2)(b) CISG because CLAIMANT had not expressly or impliedly made known the particular purpose of packing salt by the conclusion of the contract on 12 July 2002 [1]. This particular purpose was still not made known even if the 23 July 2002 telephone conversation is taken into account [2].

1. *At the time of the conclusion of the contract on 12 July 2002, CLAIMANT had not made known the particular purpose of packing salt.*

17. The particular purpose of packing salt was not expressly “made known” to RESPONDENT by 12 July 2002, when the contract was concluded. [RESPONDENT Memorandum, para. 3]. This particular purpose was also not impliedly “made known”. A particular purpose must be “crystal clear and recognisable” [LG München, 27 February 2002] to be impliedly made known. Since there are many possible interpretations of the phrase “a wide range of products”, the particular purpose was not clear and recognisable enough for the RESPONDENT to react [Schlechtriem at 281; LG Regensburg, 24 September 1998]. Therefore a reasonable seller in the position of RESPONDENT would not have known of the particular purpose of packing salt.

2. *The particular purpose of packing salt was not made known in the 23 July 2002 telephone conversation.*

18. The particular purpose of packing salt was not made known during the 23 July 2002 telephone conversation. Such a purpose must be made known “at the time of the conclusion of the contract” [Art. 35(2)(b) CISG], which in this case is on 12 July 2002 [RESPONDENT Memorandum, para. 3].

19. Even if the contract was concluded during or after the 23 July 2002 telephone conversation, the particular purpose of packing salt was still not “made known”. The packing of salt is a special purpose [RESPONDENT Memorandum, para. 12]. Therefore, a reasonable person under Art. 8(2) CISG would not have considered the single mention of ‘salt’ as a particular purpose made known during the telephone conversation. Furthermore, CLAIMANT created an ambiguity which must be resolved against it according to the *contra preferentum* rule [Honnold at 191; Schlechtriem at 113; Gaillard/Savage(eds.), para. 476, 479; Art. 4.6 UNIDROIT Principles; Art. 5.103 Principles of European Contract Law; Coderch/Garcia]. Given that the parties are dealing at arm’s length in an international contract of sale, it is unreasonable to find that CLAIMANT had made known a particular purpose when RESPONDENT had already acted on an earlier communication [Magnus/Haberfellner (trans.)]. By 23 July 2002, RESPONDENT had acted in reliance by packing the Model 14 machines for ocean shipment and arranged for shipping [Problem at 13]. Therefore the particular purpose of packing salt was not “made known”.

3. *RESPONDENT is under no corresponding duty to inquire into CLAIMANT's particular purposes.*

**20.** CLAIMANT has alleged that even if it has not made known, RESPONDENT is under a corresponding duty to inquire into CLAIMANT's intended particular purposes under the contract [CLAIMANT Memorandum, para. 23]. In response, RESPONDENT argues that it is not under such a duty.

**21.** The duty to inquire does not apply under the governing law of the contract, the CISG [*Problem* at 5]. First, the duty to inquire does not apply on a literal reading of Art. 35(2)(b) CISG. There are three levels of knowledge in the CISG: “ought to have known”, “could not have been unaware”, and “knew”. A duty to inquire only arises from the phrase “ought to have known” [Honnold at 260; Poikela, Nord. J.C.L. vol. 1 (2003) at 52]. All these terms are not found in Art. 35(2)(b) CISG.

**22.** Second, the duty to inquire does not apply even if Art. 35(2)(b) CISG is read with Art. 8(1) CISG. The level of knowledge required of RESPONDENT under Art. 8(1) CISG is “knew or could not have been aware”. This imposes no such duty to inquire [Enderlein/Maskow at 170; Huber, *Rabels Z.* at 503; Soergel/Luderitz, Art. 42 para. 4; Honnold at 350].

**23.** Third, the duty to inquire does not apply even if it is argued that Art. 35(2)(b) CISG should be interpreted with “regard [to]...the observance of good faith in international trade” under Art. 7(1) CISG [Germany BGH, 31 October 2001; Poikela, Nord. J.C.L. vol. 1 (2003) at 37]. This duty depends on the circumstances [Rauda/Etier, V.J. vol. 2(1) (2000) 30 at 45; Herber, at 112]. It does not apply here, in an arm's length business dealing where the parties are expected to clearly state their intentions [Roger Caiato v. Société Francaise (France); Ferrari, *International Business Law Journal* No. 1 (2003) 96 at 98; ICC Case No. 8324 of 1995]. It is therefore unreasonable in these circumstances to impose a duty to inquire which would require RESPONDENT to guess what CLAIMANT did not know and “expressly exclude the fitness of the goods for all possible employments he could imagine” [Herber, at 112]. Such a duty would impose a high informational cost on RESPONDENT [Veneziano, *International Business Law Journal* No. 1 (1997) 39, *International Business Law Journal* No. 1 (1997) 39 at 46] and in fact “contravene good faith” [Germany BGH, 31 October 2001]. Therefore, RESPONDENT has no corresponding duty to inquire into CLAIMANT's

intended particular purposes under the contract.

**D. The Model 14 machines conformed under Art. 35(2)(b) CISG because CLAIMANT relied unreasonably on RESPONDENT's skill and judgment.**

24. Even if particular purpose was made known, the Model 14 machines conformed under Art. 35(2)(b) CISG because CLAIMANT “did not rely” on RESPONDENT’s “skill and judgment” [1]. In any case, CLAIMANT’s reliance was unreasonable [2] and RESPONDENT was under no duty to inform CLAIMANT that special machines were required [3].

*1. CLAIMANT did not rely on RESPONDENT's skill and judgment.*

25. The machines conformed because CLAIMANT did not rely on RESPONDENT’s skill and judgment under Art. 35(2)(b) CISG. There is no actual reliance where a buyer participates in the selection of the goods [Enderlein/Maskow at 174]. CLAIMANT personally selected the Model 14 over the Model 16 [*Problem* at 12]. CLAIMANT selected the discontinued Model 14 machine [*Procedural Order No. 3*, para. 32]. Hence it was up to CLAIMANT to inform itself about the operation and equipment of the machinery [Roland Schmidt v. Textil-Werke Blumenegg (Switzerland)]. Therefore CLAIMANT did not rely on the skill and judgment of RESPONDENT.

*2. CLAIMANT's reliance on RESPONDENT's skill and judgment was unreasonable.*

26. Even if CLAIMANT relied, such reliance was unreasonable under Art. 35(2)(b) CISG. Reasonableness is determined according to the conduct expected of the normal prudent person in the position of CLAIMANT [Audit at 51; Magnus/Haberfellner (trans.); Weiszberg at 617]. This is the prudent business person with 30 years experience, five in packing foodstuffs [*Procedural Order No. 3*, para. 10]. CLAIMANT purchased machines worth US\$390,000 [*Problem* at 9] “in anticipation of a large contract from A2Z Inc” [*Problem* at 9]. This was a large contract. Yet CLAIMANT did not act prudently by verifying RESPONDENT’s reputation or check RESPONDENT’s website [*Procedural Order No. 3*, para. 20].

27. Furthermore, CLAIMANT’s reliance is unreasonable since RESPONDENT had not represented itself as a seller having special knowledge [Secretariat Commentary, Art. 35, para. 10; Kritzer at 283; Schlechtriem at 282]. CLAIMANT believed that RESPONDENT

had “a good reputation” [*Problem* at 14] on the mere basis that its Works Manager knew that RESPONDENT was a “well known company in the field” [*Procedural Order No. 3*, para. 13]. Therefore CLAIMANT’s reliance on RESPONDENT’s skill and judgment was unreasonable under Art. 35(2)(b) CISG.

*3. CLAIMANT’s reliance was unreasonable because no duty to inform applied to RESPONDENT.*

**28.** CLAIMANT has asserted that RESPONDENT was under a duty to inform CLAIMANT that special machines were required to pack salt, and therefore CLAIMANT’s reliance was reasonable [CLAIMANT Memorandum, para. 17–22]. In response, RESPONDENT argues that it was under no duty to inform CLAIMANT.

**29.** RESPONDENT has no duty to inform under the governing law of the contract, the CISG [*Problem* at 5]. First, the duty to inform is not contained in the express provisions of the CISG, and is also not one of the “general principles on which (the CISG) is based” under Art. 7(2) CISG [Magnus/Haberfellner (trans.); CENTRAL Transnational Law Database]. Even where the phrase “duty to inform” is used in the CISG, it only describes the procedural notice requirements, for example the duty to “inform” when a contract is avoided [Eiselen, para. k] or an offeror’s duty to “inform” an offeree that an offer has lapsed [Art. 21 CISG].

**30.** Second, the duty to inform should not apply even if it exists in domestic law [Povrzenic]. This restrictive approach is justified because the wholesale application of a domestic legal concept may be arbitrary [Magnus/Haberfellner (trans.); Brandner]. In addition, this would not reflect the “international character” of the CISG or the need to promote a uniform interpretation which Art. 7(1) CISG requires [Magnus/Haberfellner (trans.); Garro].

**31.** Third, the duty to inform does not apply as a trade usage that is “widely known...and regularly observed by parties to contracts” for the sale of food packing machines under Art. 9(2) CISG. Such usages must be clear and concrete, and proven with reference to trade literature or experts [Farnsworth, *Unification* at 85; Bainbridge, *Va. J. Int’l L.* (1984) 619 at 640]. CLAIMANT has not shown evidence that the duty to inform is such a usage [CLAIMANT Memorandum, para. 16].

**32.** RESPONDENT is therefore not under this duty to inform, and it is unreasonable for CLAIMANT to rely on RESPONDENT’s skill and judgement.

33. In conclusion to [I], if the Tribunal decides that the Model 14 machines conformed to the contract, CLAIMANT's case should be dismissed.

**II. THE CONDITION OF THE MODEL 14 MACHINES DID NOT CONSTITUTE FUNDAMENTAL BREACH OF THE CONTRACT UNDER ART. 25 CISG.**

34. The condition of the Model 14 machines did not constitute fundamental breach of the contract. Under Art. 25 CISG, CLAIMANT suffered no “detriment... as substantially to deprive him [CLAIMANT] of what he [CLAIMANT] is entitled to expect under the contract” [A]. In any case, RESPONDENT and a reasonable person in the same circumstances would not have seen such a result [B].

**A. CLAIMANT has not suffered detriment that substantially deprived its expectations under the contract.**

35. Art. 25 CISG requires CLAIMANT to show that it suffered a detriment that substantially deprived it of what it was entitled to expect under the contract [hereinafter “substantial deprivation”] [Kritzer at 205; Schlechtriem at 181; Bianca/Bonell/Will at 216]. CLAIMANT has asserted that its essential expectations under the contract were not fulfilled, the economic loss suffered amounts to substantial deprivation, and that it suffered serious consequences arising from the condition of the machines [CLAIMANT Memorandum, para. 30-34].

36. In response, RESPONDENT argues that CLAIMANT has not suffered substantial deprivation because there has been no breach of CLAIMANT's essential expectations under the contract [1]. CLAIMANT's economic loss does not amount to substantial deprivation [2], and the consequences suffered are insufficiently serious as to amount to substantial deprivation [3].

*1. There has been no substantial deprivation because CLAIMANT's essential expectations under the contract were not breached.*

37. CLAIMANT has not been substantially deprived of its essential expectations under the contract of 12 July 2002. CLAIMANT has based its argument on the unproven assertion that the ability to pack salt was an essential expectation under the contract [CLAIMANT Memorandum, para. 31].

38. In response, RESPONDENT argues that the ability to pack salt was not an essential

expectation under the contract concluded on 12 July 2002 for any one of the following three reasons. First, as the ability to pack salt was not a term of the contract [RESPONDENT Memorandum, para.. 4-5], it cannot be an expectation that is essential.

**39.** Second, the ability to pack salt was not an expectation under the contract as the particular purpose of packing salt was not made known to RESPONDENT [RESPONDENT Memorandum, para. 16-23]. The expectation of packing salt may have existed under the contract between CLAIMANT and A2Z Inc. However if this expectation was not even made known to RESPONDENT, it cannot be an essential expectation under the contract between CLAIMANT and RESPONDENT.

**40.** Third, the ability to pack salt was not an essential expectation under the contract. Such an expectation must be repeatedly and unequivocally emphasized as important [Schlechtriem at 177; Germany BGH, 3 April 1996; Schlechtriem, 50 Years of the *Bundesgerichtshof*], and must be clear to the parties from a consideration of the language of the contract and surrounding circumstances [Babiak, Temp. Int'l & Comp. L.J. (1992) 113 at 120-121]. In contrast, CLAIMANT only emphasised price and prompt delivery as “essential” elements of the contract [*Problem* at 8, 9, 12, 14]. The expectation of packing salt was never repeatedly and unequivocally emphasized as important.

**41.** If there is any doubt, the ability to pack salt cannot be an essential expectation under the contract. An essential expectation must be clear because its consequence is the drastic remedy of avoidance [Kazimierska at 107; Hillman at 30]. Similarly, non-conformity amounts to fundamental breach only in the most drastic of cases [BGH NJW 82, 2730 in Schlechtriem, 50 Years of the *Bundesgerichtshof*]. This is not such a case. Therefore CLAIMANT has not been substantially deprived of any essential expectation under the contract.

*2. CLAIMANT's economic loss does not amount to substantial deprivation of its expectations under the contract.*

**42.** CLAIMANT's economic loss did not substantially deprive its expectations under the contract of 12 July 2002. CLAIMANT has asserted that its economic loss is the single most decisive element for assessing its substantial deprivation. [CLAIMANT Memorandum, para. 30]. In response, RESPONDENT argues that economic loss should not be considered the single most decisive factor.

**43.** First, the view is widely held that economic loss is not the single most decisive factor in assessing substantial deprivation under a contract. [Schlechtriem, Uniform Sales Law in Germany at 22; Bianca/Bonell/Will at 211; Koch at 218; Graffi at 339-340; Switzerland BGH, 15 September 2000 as cited in CLAIMANT Memorandum, para. 30; ICC Case. No. 7531 (France); *Delchi Carrier v. Rotorex* (U.S.)]. This view is consistent with both a literal interpretation of Art. 25. CISG [Koch at 343], and the remedial system of the CISG which favours performance remedies like damages rather than avoidance which is a consequence of fundamental breach [Enderlein/Maskow at 112; Koch at 343].

**44.** Second, the uncertainties inherent in the economic loss test do not promote the goal of uniform application of the CISG as required by Art. 7(1) CISG. There is no settled definition of the scope of economic loss, with various interpretations ranging from percentage of defective goods [*Delchi Carrier v. Rotorex* (U.S.)], to cost of repair [ICC Case. No. 7531 (France)]. It is further unclear when a monetary loss is sufficient to constitute a substantial deprivation under the contract [Koch at 266].

**45.** Even if CLAIMANT's alleged economic loss is considered, an assessment is impossible because CLAIMANT's Memorandum neither states the actual economic loss, nor provides any standard for assessing its loss. Therefore CLAIMANT's economic loss has not substantially deprived its expectations under the contract.

*3. CLAIMANT has not suffered consequences that are sufficiently serious to constitute substantial deprivation of its expectations under the contract.*

**46.** CLAIMANT has asserted substantial deprivation because it could not fulfil its contract with A2Z Inc. and had to purchase six new machines [CLAIMANT Memorandum, para. 32].

**47.** In response, Respondent argues that CLAIMANT suffered no substantial deprivation because there was no deviation from an agreed quality, and CLAIMANT was able fulfil its intended purposes under the contract with A2Z Inc. [Koch 220-221].

**48.** First, there was no deviation from an agreed quality under the contract [RESPONDENT Memorandum, para. 5]. The Model 14 machines still fulfilled all ordinary purposes [Art 35(2)(a)] even if quality was implied under the Art. 35(2)(a) CISG [RESPONDENT Memorandum, para. 15]

**49.** Second, CLAIMANT could fulfil its intended purposes of fulfilling the contract with

A2Z Inc. There is no substantial deprivation where at least some of the intended purposes under the contract can be carried out [New Zealand Mussels, Germany BGH, 8 March 1995; Lorenz]. This standard is consistent with the policy behind fundamental breach which is to minimize economic waste in trade [Koch at 334; Bernstein/Lookofsky at 87]. CLAIMANT agrees with this standard when they argue “the breach is fundamental [only] when the buyer’s intended use of the goods becomes **impossible**” [CLAIMANT Memorandum, para. 31]. Applying this standard, the contract with A2Z Inc. only required salt to be packed as one of many intended purposes [*Problem* at 4]. Besides, CLAIMANT could pack all other products with the two non-corroded machines [*Problem* at 4]. Since CLAIMANT could carry out some of the intended purposes under the contract, it suffered no substantial deprivation.

**50.** In conclusion to [II.A], if the Tribunal decides that CLAIMANT suffered no substantial deprivation of what it was entitled to expect under the contract, CLAIMANT cannot avoid the contract.

**B. In any event, the result was not foreseeable under Art. 25 CISG.**

**51.** Even if CLAIMANT was substantially deprived of its expectations under the contract, there is no fundamental breach under Art. 25 CISG because this result was not foreseeable. Foreseeability must be determined at the time the contract was concluded [1]. RESPONDENT did not foresee, and a reasonable person in RESPONDENT’s position would not have foreseen the result [2].

*1. The foreseeability of this result is determined at the time of conclusion of the contract on 12 July 2002.*

**52.** Foreseeability of the result is to be determined as of 12 July 2002, at the conclusion of the contract. This is the dominant interpretation of Art. 25 CISG [Schlechtriem at 180; Neumayer/Ming at 218; Heuzé at 295] and is supported by the French, Spanish, and Russian texts which all use the past tense: “*était*” instead of “*est*,” “*tenia*” instead of “*tiene*,” and “*byla*” instead of “*yesť*” respectively [Koch at 265]. Furthermore, such a reading harmonises Art. 25 CISG with Art. 74 CISG, which explicitly requires damages to be foreseeable “at the time of the conclusion of the contract”, thereby preventing inconsistency in the remedial provisions of the CISG [Kritzer at 207; Gabon/Smit/Ziegel at 9-20].

**53.** The 23 July 2002 telephone conversation took place after the contract was concluded and

should not affect foreseeability. Circumstances after the conclusion of the contract are not to be taken into account once “preparations in view of performance actually did start or should have started” [Bianca/Bonell/Will at 221; Honnold at 209]. This is to enable the seller to make changes to minor details only [Schlechtriem at 181; Honnold at 209]. Preparations in view of performance of the contract had begun [*Problem* at 13]. Therefore the 23 July 2002 telephone conversation did not affect foreseeability of the breach.

*2. RESPONDENT did not foresee and a reasonable person would not have foreseen the result on CLAIMANT’s machines.*

**54.** Under Art. 25 CISG, RESPONDENT “did not foresee, and a reasonable person of the same kind in the same circumstances” would not have foreseen that CLAIMANT would suffer substantial deprivation arising from the inability of the Model 14 to pack salt.

**55.** This result was not foreseeable on both the objective and factual tests contained in Art. 25 CISG. A reasonable manufacturer of the “same kind” as RESPONDENT is one engaged in the same trade [Vilus; Schlechtriem at 179], which is the food packing industry [*Problem* at 9]. A reasonable manufacturer in the food packing industry would not have foreseen such a result. First, the ability to pack salt is not a contractual quality [RESPONDENT Memorandum, para. 5] Second, the ability to pack salt was not a special purpose [RESPONDENT Memorandum, para. 12]. Third, RESPONDENT did not foresee the result because the particular purpose of packing salt was not made known [RESPONDENT Memorandum, para. 16-23].

**56.** In conclusion to [II.B], if the Tribunal decides that CLAIMANT’s substantial deprivation under the contract was not foreseeable, CLAIMANT cannot avoid the contract.

**III. CLAIMANT’S LETTER OF 19 OCTOBER 2002 WAS NOT A VALID DECLARATION OF AVOIDANCE OF THE CONTRACT.**

**57.** Even if there is fundamental breach, CLAIMANT’s 19 October 2002 letter was not a valid declaration of avoidance. The letter was an invalid declaration because CLAIMANT had lost the right to declare avoidance under Art. 49(2)(b)(i) CISG [A]. CLAIMANT also lost the right to avoid the contract under Art. 82 CISG [B]. In any event, the letter did not constitute a declaration of avoidance [C].

**A. The 19 October 2002 letter was not a declaration of avoidance because CLAIMANT had lost the right to declare the contract avoided under Art. 49(2)(b)(i) CISG.**

**58.** The right to declare avoidance was lost under Art. 49(2)(b)(i) CISG because CLAIMANT “ought to have known of the breach” before 30 September 2002 at the onset of corrosion of the machines [1] but did not make a declaration within a “reasonable time” [2]. In the alternative, a declaration of avoidance was not made within a “reasonable time” after CLAIMANT “knew” of the breach at the end of September 2002 [3].

*1. The “reasonable time” period started before 30 September 2002 because CLAIMANT “ought to have known” of the breach at the onset of corrosion.*

**59.** The “reasonable time” period under Art. 49(2)(b)(i) CISG started before 30 September 2002 because CLAIMANT “ought to have known” of the breach at the onset of corrosion. A higher level of awareness is required of a buyer who “ought to have known” than one who “could not have been unaware” [Honnold at 260]. A buyer “ought to have known” even without actual knowledge of the cause of the damage [Germany BGH, 3 November 1999]. Even on the lower standard of “could not have been unaware”, a buyer is deemed to be aware of damage that is apparent on a visual inspection [Honnold at 260] and must not ignore clues [Enderlein/Maskow at 251].

**60.** CLAIMANT installed the Model 14 machines [*Procedural Order No. 3*, para. 24]. In the process, CLAIMANT should have read the Operations Manual which stated “The Model 14 is not intended for use with highly corrosive products” [*Procedural Order No. 3*, para. 25]. Corrosion is apparent on a visual inspection and CLAIMANT had ample opportunity to observe the corrosion as it cleaned the machines regularly [*Procedural Order No. 3*, para. 31]. Hence there was no need for an expert inspection to observe corrosion as CLAIMANT has asserted [CLAIMANT Memorandum, para. 52]. CLAIMANT therefore fails the higher level of awareness required by “ought to have known”, and the reasonable time period started at the onset of corrosion.

*2. CLAIMANT did not declare avoidance within a “reasonable time” from the onset of corrosion.*

**61.** The right to avoid the contract was lost because CLAIMANT did not declare avoidance within a “reasonable time” from the onset of corrosion, as is required under Art. 49(2)(b)(i) CISG. A declaration of avoidance should be made more or less immediately unless

exceptional circumstances lengthen the “reasonable time” period [Enderlein/Maskow, at 192; Soergel/Luderitz, Art. 49, para. 12; Gruppo IMAR S.p.A. v. Protech Horst (The Netherlands); Secretariat Commentary, Art. 26, para. 1]. These circumstances are influenced by the interpretation of the same phrase “reasonable time” in Art. 39(1) CISG [Schlechtriem at 433; Commercial Court des Kantons Aargau, 5 November 2002 (Switzerland); Commercial Court Zürich, 26 April 1995 (Switzerland)]. The circumstances include the time required for consideration, for negotiations between the parties, and to obtain legal advice [OLG Koblenz, 31 January 1997; Schlechtriem, at 430; Liu Cheng Wei at 11.6.1].

**62.** By end September 2002, CLAIMANT had decided that the Model 14 machines should not be used [*Problem* at 4], and there is no evidence that CLAIMANT contacted RESPONDENT or sought legal advice. Hence there are no exceptional circumstances. The declaration was not made more or less immediately, by the end of September 2002 despite the Model 14 machines exhibiting “serious signs of corrosion” [*Problem* at 4]. Therefore CLAIMANT did not declare avoidance within a “reasonable time” and lost the right to declare the contract avoided.

*3. CLAIMANT did not declare avoidance within “reasonable time” even if it knew of the breach only at the end of September 2002.*

**63.** Even if CLAIMANT only “knew...of the breach” at the end of September 2002 [CLAIMANT Memorandum, para. 57], RESPONDENT argues that the letter on 19 October 2002 was still not made within “reasonable time”.

**64.** The period of 19 days was not a “reasonable time” considering the nature of the damage to the machines. The machines only showed “signs of corrosion” on 30 September 2002, but had become literally unusable by 19 October 2002 [*Problem*, at 16]. The corroding Model 14 machines were fast deteriorating goods and therefore similar to perishable goods [Schlechtriem, at 430; Witz at 19; Andersen]. A shorter “reasonable time” is justified where the goods are rapidly deteriorating because any delay creates additional costs and risks for RESPONDENT who cannot repair, resell or repurchase the machines [Kazimierska at 82]. Therefore, the declaration was not made within a “reasonable time” and CLAIMANT still has lost the right to declare the contract avoided.

**B. The 19 October 2002 letter was not a declaration of avoidance because CLAIMANT had lost the right to avoid the contract under Art. 82(1) CISG.**

65. CLAIMANT lost the right to avoid the contract by 19 October 2002 because it was “impossible...to make restitution of the goods substantially in the condition in which [it] received them” [Art. 82(1) CISG]. The corrosion “ha[d] affected such a large part of the machinery that it would not be feasible to repair or replace the corroded parts” [*Procedural Order No. 3*, para. 29].

66. CLAIMANT does not fall under the possible exceptions to Art. 82(2) CISG. Art. 82(2)(a) CISG does not preserve CLAIMANT’s right of avoidance because the machines deteriorated from “serious signs of corrosion” to total unusability while in CLAIMANT’s care. Furthermore, Art. 82(2)(c) CISG does not apply. CLAIMANT continued to use the machines and let them deteriorate after it “discovered or ought to have discovered the lack of conformity”. This must have been at the first onset of corrosion before 30 September 2002. Therefore CLAIMANT has lost the right to declare the contract avoided.

**C. The 19 October 2002 letter was insufficiently definite to constitute a valid declaration of avoidance.**

67. Under Art. 26 CISG, “a declaration of avoidance of the contract is effective only if made by notice to the other party”. The letter of 19 October 2002 was insufficiently definite to constitute a valid declaration of avoidance because it did not express a clear intention to avoid the contract [1] and did not specify the subject and grounds of avoidance [2].

*1. The letter did not express a clear intention to avoid the contract.*

68. A declaration of avoidance under Art. 26 CISG must meet a “high standard of clarity” to inform the reasonable person of the intention to avoid the contract [Flechtner at 83; Jacobs, U. Pitt. L. Rev. vol. 64 (2003) 407 at 410; Germany BGH, 3 April 1996 at 1041; Veneziano, International Business Law Journal No. 1 (1997) 39 at 57]. Contrary to CLAIMANT’s argument [CLAIMANT Memorandum, para. 58], a reasonable RESPONDENT would not have considered that the letter of 19 October 2002 showed a clear intention to avoid the contract.

69. First, CLAIMANT has not met the required standard of clarity. Merely placing machines at the RESPONDENT’s disposal [*Problem* at 16] is not a sufficiently clear communication [Schlechtriem at 425]. Second, the declaration appeared to be conditional only, as shown by

CLAIMANT's statement "If you want the machines, they are yours" [*Problem* at 16]. CLAIMANT later put the six machines into storage "awaiting the decision of Medi-Machines as to what they wish to do with them" [*Problem* at 5]. This subsequent conduct under Art. 8(3) CISG shows the conditionality of the declaration. Third, the statement that replacement machines would have to be purchased "from some other source" [*Problem* at 16] does not in itself convey the intention to avoid the contract [OLG Bamberg, 13 January 1999].

70. CLAIMANT cannot argue that the content of the letter contained an effective notification on the basis of the "principle of informality of the notice" [CLAIMANT Memorandum, para. 60]. The "informality principle does not apply ... to the content of the notice" [Annotated Text, Words and Phrases, Art. 26; Bianca/Bonnell/Rajski at 126]. Therefore the 19 October 2002 letter was not sufficiently definite to constitute a declaration of avoidance.

*2. The letter did not specify the subject or grounds for avoidance.*

71. A declaration of avoidance in the case of non-conforming goods must make specific reference to the non-conformity [Jacobs, U. Pitt. L. Rev. vol. 64 (2003) 407 at 409]. This is especially important where there was no prior notice of non-conformity [Jacobs, U. Pitt. L. Rev. vol. 64 (2003) 407 at 408; Babiak, Temp. Int'l & Comp. L.J. (1992) 113 at 135] as is the case here. CLAIMANT's letter of 19 October 2002 only mentioned that "there is corrosion that is sufficient to cause the product to block and cause outages" [*Problem* at 16]. CLAIMANT did not specify how many replacement machines they would have to purchase or the exact purchase price to be reclaimed [*Problem* at 16]. Given that only four machines were in fact corroded [*Problem* at 4], it is therefore unclear whether in the letter of 19 October 2002, and CLAIMANT was referring to all six machines or only the four corroded machines only.

72. In conclusion to [III], if the Tribunal decides that the 19 October 2002 letter did not constitute a declaration of avoidance, CLAIMANT cannot avoid the contract.

**IV. THE TRIBUNAL SHOULD GRANT RESPONDENT'S REQUEST FOR SECURITY FOR COSTS.**

73. The Tribunal has an unfettered discretion under SIAC r. 27.3 to post security for costs [A] and balancing the parties' interests, the Tribunal should do so [B].

**A. The Tribunal has an unfettered discretion under SIAC r. 27.3 to order CLAIMANT to post security for costs.**

74. The Tribunal has the power under SIAC r. 27.3 to order CLAIMANT to post security for costs. SIAC r. 27.3 confers “the power to order any party to provide security for the legal or other costs” of the other party. The parties have agreed in their arbitration agreement to adopt the SIAC Rules as the governing rules for the arbitration [*Problem* at 5]. CLAIMANT agrees that “the order of security for costs is within the domain of powers of the Tribunal under SIAC Rules Art. 27.3” [CLAIMANT Memorandum, para. 63]. The Tribunal’s power is also consistent with the *lex arbitri* [law of the seat of arbitration]. Danubia, the seat of arbitration has adopted the Model law without amendment [*Problem* at 5]. Art. 19 Model Law gives the parties complete freedom to agree on the arbitration procedure [Seventh Secretariat Note A/CN 9264: Holtzmann/Neuhaus at 565].

75. The Tribunal has an unfettered discretion to make an order for security. Its power under SIAC r. 27.3 is not subject to any express limitations [Rubins, *Am. Rev. Int. Arb.* vol. 11(3) (2000) 314 at 320]. This reflects the drafters’ intent to confer on the Tribunal a similar power as the courts [Tan]. Furthermore, such discretionary power is not inconsistent with any mandatory provisions of the Model Law [7<sup>th</sup> Secretariat Commentary A/CN 9264: Holtzmann/Neuhaus at 567].

76. CLAIMANT cannot rely on its comparison with other institutional rules to argue that the Tribunal does not have an unfettered discretion [CLAIMANT Memorandum, para. 63-65]. First, institutional rules are generally unique and must be read independently [Lew/Mistelis/Kröll at 36]. Second, the institutional rules that CLAIMANT cites, UNCITRAL Rules Art. 26 and ICSID Convention Art. 47 [CLAIMANT Memorandum, para. 64], operate in a different context from the SIAC Rules. UNCITRAL Rules Art. 26 is “primarily directed to preservation and the sale of goods” [Lew/Mistelis/Kröll at 592], and ICSID Convention Art. 47 applies only where at least one party is a Contracting State to the ICSID Convention [ICSID Convention Art. 1(2), Art. 36(1); Rubins, *Am. Rev. Int. Arb.* vol. 11(3) (2000) 314 at 346].

77. In contrast, a comparison with arbitral institutional rules that have provisions identical to SIAC r. 27.3 shows that this Tribunal does indeed have an unfettered discretion. SIAC r. 27.3 is identical to LCIA Rules 1981 Art. 15.2, which has since been modified to LCIA Rules

1998 Art. 25.2, as well as HKIAC Domestic Arbitration Rules Art. 11.1(n) [[http://www.hkiac.org/pdf/e\\_domestic.pdf](http://www.hkiac.org/pdf/e_domestic.pdf)].

**B. The Tribunal should exercise its discretion and require CLAIMANT to post security for costs.**

78. When exercising its unfettered discretion, the Tribunal must balance the competing interests of the parties [Lew, *Arb.* vol. 63(3) (1997) 166 at 166; Award in Case No. 415 (ASA) 467]. Security for costs is an English procedural device that is in common use [Rubins, *Am. Rev. Int. Arb.* vol. 11(3) (2000) 314 at 323; Decision of Arbitral Tribunal 25 September 1997, ASA Bulletin 19(4) (2001) 745; Sandrock, *J. Int'l. Arb.* vol. 14(1) (1997) 17 at 23]. Therefore, English cases are particularly helpful in illustrating the factors that arbitrators have taken into account when balancing the interests of the parties.

79. Balancing these interests, it is submitted that the Tribunal should make an order for security for costs. There is “reason to believe” that CLAIMANT will not be able to pay for costs if its claim is unsuccessful [1]. Even if able to pay, CLAIMANT may be unwilling to do so [2]. RESPONDENT’s request for security for costs is made in good faith and does not constitute harassment amounting to an abuse of rights [3].

*1. There is reason to believe that CLAIMANT will not be able to pay for costs if its claim is unsuccessful.*

80. CLAIMANT’s financial condition is a relevant factor in assessing a request for security for costs by RESPONDENT [Needham, *Arb.* vol. 63(3) (1997) 122 at 123; Lew, *Arb.* vol. 63(3) (1997) 166 at 167]. There are two alternative tests to determine whether CLAIMANT is financially able to pay costs if its claim were unsuccessful. On both tests, CLAIMANT’s financial condition strongly supports the order of security. First, security should be ordered if there is “reason to believe” that CLAIMANT would be unable to pay RESPONDENT’s costs [Needham, *Arb.* vol. 63(3) (1997) 122 at 123; *Regia Autonoma v. Gulf Petroleum (U.K.)* at 72; *Soo, Int'l A.L.R.* (2000) 25 at 29, 30]. Second, under the intermediate Swiss-Germanic approach, security should be ordered if there is deterioration in CLAIMANT’s financial condition between the conclusion of the contract and the arbitration proceedings [Sandrock, *J. Int'l. Arb.* vol. 14(1) (1997) 17 at 30].

81. The “reputable” Equatoriana financial press [*Problem* at 36; *Procedural Order No. 3*, para. 43] has reported that CLAIMANT has a “cash-flow problem” [*Problem* at 36]. Such

reports provide “credible testimony” of CLAIMANT’s financial condition [Needham, Arb. vol. 63(3) (1997) 122 at 125]. Furthermore, the reports state that CLAIMANT has been “delinquent” in paying its trade creditors, and has been unsuccessful in seeking additional financing from several banks. These press reports further state that CLAIMANT’s financial problems may have begun in late 2002 [*Procedural Order No.3*, para. 43], which is shortly after the conclusion of the contract on 12 July 2002 [RESPONDENT Memorandum, para. 2-4].

**82.** In contrast, CLAIMANT has not provided any information about its financial condition. [*Problem* at 38]. Hence, there is “reason to believe” that CLAIMANT is financially unable to pay costs. Furthermore, there has been deterioration in CLAIMANT’s financial condition between the conclusion of the contract and the arbitration proceedings. Therefore, an order for security for costs is justified on both tests.

**83.** CLAIMANT cannot rely on its potential acquisition by Equatoriana Investors to argue that it is financially able to pay costs [*Problem* at 38, CLAIMANT Memorandum, para. 67]. First, this acquisition may never occur. CLAIMANT only has an “expectation” of an acquisition [*Procedural Order No. 3*, para. 42], and until the due diligence process is completed, there is no guarantee that an acquisition will take place [*Procedural Order No. 3*, para. 42; Schmitz at 4; Due Diligence in Acquisitions & Mergers of Long Term Care Facilities, <[http://www.tydingslaw.com/pubs/Art.\\_duedi.htm](http://www.tydingslaw.com/pubs/Art._duedi.htm)>].

**84.** Second, even if the potential acquisition occurs, there is no guarantee that Equatoriana Investors will pay CLAIMANT’s costs. Equatoriana Investors is a third party not bound by the arbitration agreement, and therefore has no obligation to pay CLAIMANT’s costs. [*Coppée-Lavalin v. Ken-Ren Chemicals (U.K.)* at 109]. In fact, financial reliance on a third party, in itself, is sufficient reason to make an order for security [*Coppée-Lavalin v. Ken-Ren Chemicals (U.K.)* at 127, *Regia Autonoma v. Gulf Petroleum (U.K.)* at 72]. Since there is also ‘reason to believe’ [RESPONDENT Memorandum, para. 80-82] that CLAIMANT is unlikely to be able to pay costs, the Tribunal should exercise its discretion and make an order for security.

*2. Even if CLAIMANT can afford to pay the costs, it may be able to avoid payment.*

**85.** The Tribunal should order security because CLAIMANT may be able to avoid paying

costs. There is reason to order security where there is evidence that CLAIMANT may be able to avoid paying costs [Lew, Arb. vol. 63(3) (1997) 166 at 167] or a future cost award will not be enforceable. [Rubins, Am. Rev. Int. Arb. vol. 11(3) (2000) 314 at 329, 337; Wirth, ASA Bulletin vol. 18(1) (2000) 31, see also Arbitral Decision of 21 December 1998 (ASA)]. CLAIMANT's assets are in all in Equatoriana. [Procedural Order No. 3, para. 48]. Hence RESPONDENT is likely to seek enforcement of a future cost award in Equatoriana. However, it is reported by the International Arbitration Committee of the International Commercial Law Association that the Equatoriana Courts have generally found means to avoid enforcing foreign awards against local firms that are in financial difficulties [Problem at 36]. Since CLAIMANT appears to be in financial difficulty [RESPONDENT Memorandum, para. 82], it is highly probable that a future costs award will not be enforceable. This is strong reason to make an order for security.

*3. Additionally, RESPONDENT's request does not constitute harassment amounting to an abuse of right.*

**86.** CLAIMANT has asserted that “the request of RESPONDENT [for security for costs] incorporates an abuse of right and should be considered as an attempt to harass CLAIMANT” [CLAIMANT Memorandum, para. 68-69]. Contrary to CLAIMANT's allegation, RESPONDENT has acted in good faith.

**87.** First, RESPONDENT fulfilled its obligations by making advance payment of the administration fees as requested [*Problem* at 29], before requesting for costs [NAI Case No. 1694]. Second, RESPONDENT submitted the request for security in a timely manner [Needham, Arb. vol. 63(3) (1997) 122 at 125; *Regia Autonoma v. Gulf Petroleum (U.K.)* at 73], as it did so immediately upon discovery of the relevant financial reports [*Problem* at 36]. Third, the quantum requested for security is a reasonable estimate to legal costs that would be incurred by the RESPONDENT [Award in Case No. 415 (ASA) where CHF 35,000 (approximately US\$29,000) for security for costs was held to be reasonable by the arbitrator applying Zurich Chamber of Commerce Arbitration Rules].

**88.** In contrast to RESPONDENT, CLAIMANT has been uncooperative in providing the requested financial information [*Problem* at 38]. Furthermore, CLAIMANT has not been forthcoming with information on its potential acquisition. For example, CLAIMANT only disclosed its intention to reveal the existence of the arbitration to Equatoriana Investors after

RESPONDENT's request for security for costs [*Problem* at 38]. Such conduct weighs adversely against CLAIMANT [*China Shipping v. Whistler International (H.K.)*; *Soo, Int'l A.L.R. (2000) 25 at 29*].

**89.** In addition, CLAIMANT cannot suggest that the request for financial information is irrelevant and “outrageous” [*Problem* at 38], that the request has “no clear and direct connection” with the dispute [CLAIMANT Memorandum, para. 68] or that RESPONDENT has no right “worth preserving” [CLAIMANT Memorandum, para. 67]. A request for financial information is relevant because it is “an obvious starting point” to “investigate the CLAIMANT's financial affairs and determine [its ability...] to settle any costs that may be awarded against it” [*Soo, Int'l A.L.R. (2000) 25 at 29*]. This is especially so in the face of negative press reports [RESPONDENT Memorandum, para. 81].

**90.** The request for security is also not outrageous as RESPONDENT offered to review the request once CLAIMANT had furnished the relevant financial information [*Problem* at 37]. In any event, the [the concept] of security for costs is a part of the arbitration procedure under the SIAC regime [SIAC r. 27.3]. While RESPONDENT is aware that the Tribunal should not go into the merits of the case in considering such interim measures like security for costs [Needham, *Arb. vol. 63(3) (1997) 122 at 125*, *Rubins, Am. Rev. Int. Arb. vol. 11(3) (2000) 314*], such a request is not outrageous because RESPONDENT's case has a reasonably good prospect of success [RESPONDENT Memorandum, para. 118]. Since costs follow events [*Rubins, Am. Rev. Int. Arb. vol. 11(3) (2000) 314 at 363*; *Rubino-Sammartano at 815*], RESPONDENT has at least a *prima facie* case of securing costs.

**91.** RESPONDENT seeks to preserve its right to payment through an order for security contrary to CLAIMANT's assertion that RESPONDENT has no right “worth preserving” [CLAIMANT Memorandum, para. 67]. RESPONDENT has shown this Tribunal credible evidence and indication of the necessity of an order for security for costs. Therefore, an order for security would ensure that the RESPONDENT's interest of being reimbursed for its expenses in case of success is protected and preserved [Award in Case No. 415 (ASA)].

**92.** While it is recognised that arbitrators or courts often perceive security for costs as a possible “obstruction of justice” [*Rubino-Sammartano at 814*; *Needham, Arb. vol. 63(3) (1997) 122 at 124, 125*], this Tribunal must not show “such a reluctance to order security for costs that this becomes a weapon whereby the impecunious company can use its inability to

pay costs as a means of putting unfair pressure on a more prosperous company [Rubins, Am. Rev. Int. Arb. vol. 11(3) (2000) 314 at 361; Pearson v. Naydler (U.K.) per Sir Robert Megarry V-C].

**93.** Posting security for costs becomes especially important where strong reasons have been shown, as parties who can “default with impunity in payment of costs” will deprive international business “the assurance of even that institution’s effectiveness” [ICC Arbitration Case No. 6697 of 1992]. Thus, in the event CLAIMANT refuses to comply with such an order, its claims are to be refused pursuant to SIAC r. 27.5.

**V. THE TRIBUNAL IS AUTHORISED TO ISSUE AN ENFORCEABLE DECISION TO GIVE EFFECT TO THE DUTY OF CONFIDENTIALITY**

**94.** CLAIMANT is subject to a duty of confidentiality under SIAC r. 34.6 [A]. This obligation may be enforced as an award or order under the Tribunal’s inherent power or under its power to make interim measures [B]. If CLAIMANT does not comply with such a decision, RESPONDENT may apply to the Tribunal or the Equatoriana Courts for enforcement [C].

**A. CLAIMANT must refrain from divulging the existence of the arbitration and all details in connection with it under its contractual obligations of confidentiality in SIAC r. 34.6.**

**95.** CLAIMANT is obligated under SIAC r. 34.6 to refrain from divulging all details including the existence of the arbitration [1], and the exceptions that CLAIMANT relies on do not apply [2].

*1. CLAIMANT has a duty of confidentiality under SIAC r. 34.6.*

**96.** CLAIMANT must refrain from divulging all details including the existence of the arbitration as part of its duty of confidentiality under SIAC r. 34.6. The parties have essentially contracted for the provisions contained in the SIAC Rules by adopting them [Boo, Halsbury’s at 13]. Therefore, the duty of confidentiality is a substantial contractual obligation binding on CLAIMANT despite the lack of a separate confidentiality agreement [Born, U.S. at 96; Rubino-Sammartano at 803; UNCITRAL Notes on Organising Arbitral Proceedings, para. 31-32; Trakman, Arb. Int’l. vol.18(1) (2002) 1 at 2; Frommel/Rider/Haynes at 103]

2. CLAIMANT is not exempted from the duty of confidentiality by both exceptions in SIAC r. 34.6 it has relied on.

97. The duty of confidentiality under SIAC r. 34.6 applies subject to five specified circumstances [Barin/Hwang & Muttath at 389] that are to be strictly construed. Only one exception applies in this arbitration [*Procedural Order No. 3*, para. 38]. Since CLAIMANT has relied on two exceptions [CLAIMANT Memorandum, para. 70-72], RESPONDENT will show that both the exceptions in SIAC r.34.6(d) [i] and SIAC r.34.6(e) [ii] do not apply.

*i. SIAC r. 34.6(d) does not apply because there are no provisions of the laws of Equatoriana that require disclosure.*

98. The exception in SIAC r. 34.6(d) does not apply because there are no binding “provisions of the laws of any State” that require CLAIMANT to disclose details of the arbitration to Equatoriana Investors. “Provisions” is defined as a stipulation in a “statute or contract” [Merriam-Webster’s Dictionary of Law]. The facts show no such legislative provisions in Equatoriana [*Procedural Order No. 3*, para. 38]. Furthermore, disclosure during due diligence proceedings arises from the willingness of the parties and not legislation. [Denoix, J. Int’l Arb. vol. 20(2) (2003) 211 at 215].

99. The decisions of Equatoriana Courts are not “provisions of the laws of any State” under SIAC r. 34.6(d). Such decisions are judicial and not legislative in nature. SIAC r. 34.6(d) was probably not intended to include court decisions because SIAC r. 34.6(c) expressly provides for disclosure in accordance with the “order of a court of competent jurisdiction”. In any event the decisions of the Equatoriana Courts are not based on any legislative or statutory provisions [*Procedural Order No. 3*, para. 38].

100. Even if “provisions of the law” under SIAC r. 34.6(d), the Equatoriana Court decisions are distinguishable. Arbitration is a private procedure where confidentiality is of paramount importance and stands in contrast to litigation in a public court [Sutton/Gill at 214; Lew/Mistelis/Kröll at 8; Redfern/Hunter at 27; de Zylva/Harrison/Allen at 57]. These court decisions did not involve arbitrations [*Procedural Order No. 3*, para. 38], and the competing tensions between disclosure in due diligence proceedings and confidentiality in the context of arbitration were not balanced. The decisions are distinguishable and therefore SIAC r. 34.6(d) does not apply.

*ii. The exception in SIAC r. 34.6(e) does not apply because no regulatory body or other authority has made a request for disclosure.*

**101.** The exception in SIAC r. 34.6(e) does not apply as there is no “request or requirement of any regulatory body or other authority” that CLAIMANT discloses details of the arbitration. First, the Equatoriana Courts are not a “regulatory body”. Both Equatoriana [*Procedural Order No. 3*, para. 3] and Singapore [Tan/Bell at 1] are legal systems with laws based on that of England. Courts in such legal systems are judicial and not regulatory bodies. Second, the previous decisions by Equatoriana courts do not amount to a “request or requirement” for disclosure. The role of court decisions with regards the need to make disclosure is expressly covered by SIAC r. 34.6(c) must be directed to the party in question. There is no such order on the facts. Third, there is no “requirement of any... authority... [that] would be observed customarily”. A customarily observed requirement may include a Takeover Code. However, the available facts do not suggest the existence of any takeover codes or other such rules customarily observed. Therefore, the SIAC r. 34.6(e) exception does not apply.

**102.** Since the exceptions that CLAIMANT relies on do not apply, CLAIMANT is under a duty to preserve confidentiality of the proceedings. As the parties clearly contracted for this duty [RESPONDENT Memorandum, para. 96], any breach is tantamount to a breach of a contractual obligation [Rubino-Sammartano at 804, 805].

**B. The Tribunal has the authority to restrain CLAIMANT from divulging the existence of the arbitration.**

**103.** The Tribunal has the inherent power to make an award as a natural consequence of substantive duties contracted for by the parties [1]. Additionally, SIAC r. 25(j) and Model Law Art. 17 expressly provides for its powers to issue an interim award [1] or interim order [2].

*1. The Tribunal has the power to issue an award to restrain CLAIMANT from violating its duty of confidentiality.*

**104.** The parties have contracted for a substantive duty of confidentiality [RESPONDENT Memorandum, para. 96], Therefore the Tribunal may issue a partial award to enforce this contractual obligation where it considers it is appropriate [ICC Case No. 3790 of 1983; ICC Case No. 5073 of 1986; Wintershall A.G. v. Govt. of Qatar (UNCITRAL Rules); Lew/Mistelis/Kröll at 633]. The power of the Tribunal to issue this partial award is provided

for in SIAC r. 28.6 which states that the Tribunal may make “separate final awards on different issues at different times” [Redfern/Hunter at 380].

**105.** Alternatively, the Tribunal may issue an award prohibiting CLAIMANT from making disclosure under the contractual power conferred on them in SIAC r. 25(j) [Schaefer, E.J.C.L. vol. 2(2) 1998, para. 3.2]. This is consistent with the *lex arbitri* [law of the seat of arbitration]. Art. 17 Model Law which deals with interim measures does not preclude the Tribunal from characterising the decision as an award. The Model Law does not contain a definition of an “award” and it clearly contemplates that there may be more than one award made in the course of arbitration [Redfern/Hunter at 364]. Furthermore, interim measures are frequently issued in the form of an award in ICC arbitrations and in some countries such as Scotland, Australia and Bermuda [Redfern/Hunter at 347].

**106.** It is submitted that the Tribunal should issue the interim measure for confidentiality as an award for the following reasons. First, it will be more likely that CLAIMANT complies with the Tribunal’s decision on confidentiality if issued as an award. [Lew/Mistelis/Kröll at 608]. For the decision to be fully enforceable, it is best issued as an award [Rubino-Sammartano at 738]. Second, it is effectively an award since it is a final determination on the issue which binds the parties [Redfern/Hunter at 362], unlike a purely procedural direction which merely serve to regulate the conduct of the arbitration [Redfern/Hunter at 365]. This position is supported by case law in England, France, Germany and Switzerland which hold that decisions on procedural issues which bring the arbitration to an end are recognisable as awards [Liescher at 139]. Lastly, CLAIMANT has agreed to characterisation of the decision to preserve confidentiality as an award [CLAIMANT Memorandum, para. 75-76].

*2. The Tribunal has the power to issue a provisional order to restrain CLAIMANT from making disclosure.*

**107.** Even if the Tribunal only wishes to give effect to the duty of confidentiality pending the final award by preserving the status quo, it has the power to issue provisional relief under SIAC r. 25(j). Since the parties have agreed on the SIAC Rules in the arbitration [Problem at 5], the Tribunal has the power to issue interim measures that would give effect to the duty of confidentiality. The rules referred to in the arbitration agreement become part of the agreement by reference where the agreement is silent on interim relief [Lew, I.C.A. Bulletin vol. 11(1) (2000) 23 at 25; Lew/Mistelis/Kröll at 591; Sutton/Gill at 77]. SIAC r. 25(j) was

drafted to better equip the Tribunal to deal with the conduct of the proceedings [Barin/Hwang & Muttath at 379] and it clearly provides that the Tribunal can “make orders or give directions” for an interim injunction or any other interim measure.

**108.**The Tribunal’s power to issue an interim measure is consistent with the Model Law. Art. 17 Model Law permits the Tribunal to make interim measures of protection unless the parties provide otherwise [Redfern/Hunter at 346; Born, Commentary at 930] and Art. 19 Model Law allows parties to adopt a set of procedural rules to govern their proceedings. Therefore, the power under SIAC r. 25(j) is consistent with the *lex arbitri*.

**109.**CLAIMANT erroneously asserts that an order of confidentiality can only come from the relevant Courts of Danubia [*Problem* at 40]. While Art. 9 Model Law allows the Courts to issue interim measures, it does not preclude a Tribunal from doing so [Binder at 66-68; Holtzmann/Neuhaus at 333; Redfern/Hunter at 348]. In fact, courts are increasingly supportive of the arbitration process [Lew, I.C.A. Bulletin vol. 11(1) (2000) 23 at 24] and it is more appropriate to apply to an existing Tribunal for interim measures [Redfern/Hunter at 350]. Therefore, the Tribunal is clearly entitled to issue an interim measure to enforce the observance of confidentiality.

**C. If CLAIMANT fails to observe the interim measure, RESPONDENT may seek redress from the Tribunal or a Court**

*1. RESPONDENT may apply to the Tribunal to enforce the interim measure.*

**110.**If CLAIMANT violates an award or an order preserving confidentiality before the conclusion of the final proceedings, RESPONDENT may seek redress from the Tribunal in the following ways.

**111.**First, where the decision has been issued as an award, the Tribunal may issue injunctions against further disclosures [Brown, Am. U. Int’l L. Rev. (2001) 969 at 1016] or give damages where it is ascertainable [Smit, Am. Rev. Int. Arb. vol.11 (2000) 567 at 582; Brown, Am. U. Int’l L. Rev. (2001) 969 at 1016; Rubino-Sammartano at 806]. The Tribunal has the power to give damages since monetary compensation is the “natural” remedy in international commercial arbitration [Redfern/Hunter at 365; Lew/Mistelis/Kröll at 651]. The damages may take the form of a penalty order provided in the prior decision [Lew, I.C.A. Bulletin vol. 11(1) (2000) 23 at 28; ICC Case No. 9154 of 1998].

**112.**Second, where the decision has been issued as an order, the Tribunal may draw adverse inferences from CLAIMANT's non-compliance [Born, Commentary at 972, 610], particularly in the assessment of damages [Lew, I.C.A. Bulletin vol. 11(1) (2000) 23 at 28; Holtzman/Neuhaus at 531; ICC Case No. 9593 of 1998].

2. *RESPONDENT may apply to the relevant Equatoriana Courts to enforce an award preserving confidentiality under the New York Convention.*

**113.**An award rendered by the Tribunal can be enforced in Equatoriana under the New York Convention since it is a party to the New York Convention [*Problem* at 36]. The fact that courts in Equatoriana avoid enforcing awards against local firms in financial difficulty [*Problem* at 36] should not prejudice the issuance of the decision as an award. This is because an arbitral tribunal is concerned with making decisions that are enforceable and is not concerned with whether awards may be enforceable. If the Equatoriana Courts chooses to enforce the arbitral award, it may award damages subject to the laws of its jurisdiction.

**114.**If the decision is issued as a partial award, it may be enforced under the New York Convention as it is final and is subject to the means of recourse applicable to final awards [Lew/Mistelis/Kröll at 634]. Even where the decision is issued as an interim award under SIAC r. 25, the court of enforcement may still choose to enforce the interim award as it is a final determination of the issue of confidentiality [Lew/Mistelis/Kröll at 635; Yasuda v. Continental Casualty (U.S.)]. In fact, the terms “partial award” and “interim award” appear to be synonymous [Redfern/Hunter at 379].

**115.**Furthermore, it cannot be argued on the authority of the RCI v. Ray Bolwell and Resort Condominiums (Australia) [RCI Case], that an interim award will not be enforced under the New York Convention. First, the RCI Case has been discredited on the ground that interim awards should be enforceable so long as the *lex arbitri* regards it as an arbitral award [Van den Berg/Van den Berg at 28]. Second, it imposed a more stringent test than is required under the New York Convention in imposing a requirement of “finality” which is not found in the Convention [Kojovic, J. Int. Arb. vol.18(5) (2001) 511 at 523]. Lastly, the award issued by this Tribunal differs from the interim award issued in the RCI Case as it is likely to be part of the final award [*Problem* at 42].

**116.**CLAIMANT cannot argue that because the Tribunal has decided matters “beyond the scope of the submission to arbitration”, the award will not be enforceable under Art. V(1)(c)

New York Convention [CLAIMANT Memorandum, para. 75]. The Tribunal has the power to allow any parties to “amend any pleadings or submissions” under SIAC r. 25(c). This power has been duly exercised. As agreed by both parties and directed by the Tribunal in Procedural Order No. 2, the submission on the issue of confidentiality would be added in the parties’ memoranda as well as the oral hearings [*Problem* at 41-42]. Hence the award would not fall within Art. V(1)(c) or any other exceptions in Art. V for that matter. Even if any of the exceptions in Art. V applies, the Court retains the discretion to enforce the award because refusal of enforcement under Art. V is not mandatory as seen from the phrase “may be refused” [Paulsson, *Arb. Int. Vol.14(2)* (1998) 227; Van den Berg/Hwang & Chan at 152; *China Nanhai v. Gee Tai Holdings (H.K.)*]. Therefore, it is likely that the Equatoriana Courts will enforce the award of confidentiality.

**117.** Even if the Tribunal makes an interim measure in the form of an order [RESPONDENT Memorandum, para. 107-109], RESPONDENT may enforce the order as an award in the Equatoriana Courts. The Convention does not require a particular form of “award” [Redfern/Hunter at 364; Di Pietro/Platte at 30] and its ability to enforce provisional measures is not restricted [Ministry of Finance v. Onyx (U.S.)]. A decision by the Tribunal will be enforced if it contains a detailed examination of the merits and disposes of the disputed issue in a final manner [Brasoil v GMRA July 1, 1999, Cour d’Appel, Paris (Fr.); Publicis v. True North Communication (U.S.); Kojovic, J. *Int. Arb. vol. 18(5)* (2001) 511 at 527]. If the Tribunal’s order of confidentiality meets these requirements, it is likely that the Equatoriana Courts will enforce the award under the New York Convention.

## **VI. REQUEST FOR RELIEF**

In accordance with the Arbitral Tribunal’s Procedural Order No. 2:

**118.** Counsel for RESPONDENT requests that the Tribunal find against CLAIMANT because:

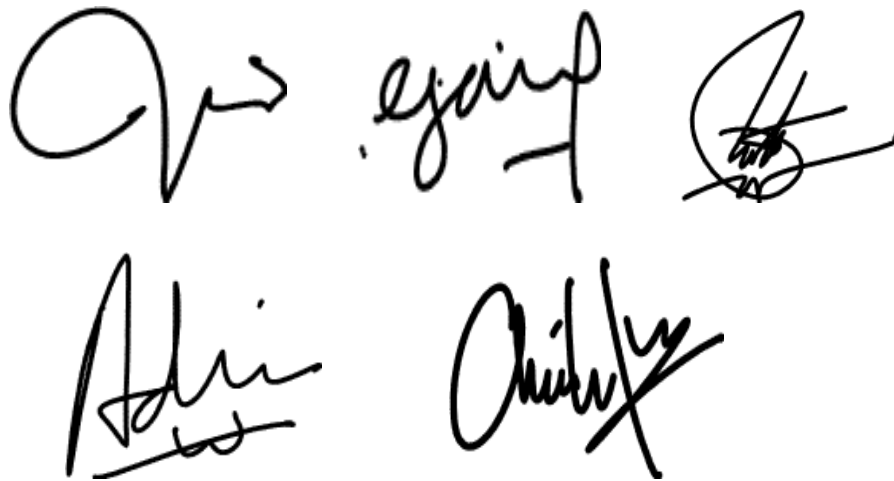
- a) The Model 14 machines conformed to the contract;
- b) The condition of the machines did not constitute fundamental breach;
- c) The letter of 19 October did not constitute a declaration of avoidance of contract.

119. Counsel for RESPONDENT also requests that the Tribunal:

- a) Issue security for costs against CLAIMANT;
- b) Find CLAIMANT obligated to refrain from divulging the existence of the arbitration and all details in connection with it;
- c) Issue a decision enforcing the duty of confidentiality.

Signed:

Counsel for RESPONDENT.



The image shows four handwritten signatures in black ink. The top row contains two signatures: the first is a large, stylized 'Q' followed by a checkmark-like flourish, and the second is a signature that appears to read 'Ajay'. To the right of these is a circular stamp or seal with some illegible text inside. The bottom row contains two more signatures: the first is a signature that appears to read 'Adri', and the second is a signature that appears to read 'Anil'.