

Eleventh Annual Willem C. Vis International Commercial Arbitration Moot
2003-2004
Vienna, Austria

MEMORANDUM FOR THE RESPONDENT

On behalf of:

Medi-Machines, S.A.
415 Industrial Place
Capitol City
Mediterraneo

RESPONDENT

Against:

Equapack, Inc.
345 Commercial Avenue
Oceanside
Equatoriana

CLAIMANT



University of Pittsburgh School of Law

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Index of Abbreviations

AAA	American Arbitration Association
a.M.	am Main
Art.	Article
Arts.	Articles
ASA Bulletin	Association Suisse de l'Arbitrage Bulletin
BGH	Bundesgerichtshof (German Federal Supreme Court)
C.B.	Claimant's Brief
C.E.	Claimant's Exhibit
CCIG	Geneva Chamber of Commerce and Industry
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CLOUT	Case Law on UNCITRAL Texts http://www.uncitral.org/en-index.htm
E.R.	Expert's Report
ed.	editor
et seq.	et sequentes (and those that follow)
GmbH	Gesellschaft mit beschränkter Haftung (limited liability company)
HG	Handelsgericht
ICC	International Chamber of Commerce
ICC Rules	Arbitration Rules of the International Chamber of Commerce
Id.	Ibid., same as previous citation
Inc.	Incorporated
LCIA	London Court of International Arbitration
LCIA Rules	Arbitration Rules of the London court of International Arbitration
LG	Landgericht
Ltd.	Limited
ML	UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985
No.	Number

Nos.	Numbers
NY CONVENTION	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OLG	Oberlandesgericht (Court of Appeal, Germany)
p.	Page
pp.	Pages
P.O.	Procedural Order
SA/S.A.	Sociedad Anónima
S.C.	Statement of the Case
S.D.	Statement of the Defense
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre
S.L.R.	Singapore Law Reports
U.S.	United States
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	see ML
UNCITRAL Rules	Arbitration Rules (ad hoc) of UNCITRAL
UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sales of Goods
v.	versus
Vol.	Volume
YBCA	Yearbook of Commercial Arbitration
ZCC	Zurich Chamber of Commerce
ZR	Zurich

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We hereby respectfully submit this Memorandum on behalf of our client, Medi-Machines, S.A., RESPONDENT. As will be discussed in detail below, Medi-Machines, S.A. requests the Arbitral Tribunal to hold that:

- The CISG governs the contract between CLAIMANT and RESPONDENT [§ 1].
- RESPONDENT did not breach the contract [§ 2].
- CLAIMANT unlawfully avoided the contract [§ 3].
- The applicability of the UNCITRAL ML is limited to its mandatory provisions [§ 4].
- An order for security for costs must be granted to ensure equal treatment of the parties [§ 5].
- CLAIMANT is prohibited from disclosing information to Equatoriana Investors [§ 6].
- The Tribunal has the power to order confidentiality and should do so [§ 7].
- If CLAIMANT violates an order of confidentiality it will be subject to consequences [§ 8].

§ 1

The CISG governs the contract between CLAIMANT and RESPONDENT

1. CLAIMANT, Equapack, Inc., and RESPONDENT, Medi-Machines, S.A., agreed to have the CISG as the governing law of their contract. The parties have their places of business in different States (*S.C. at 1, 2; S.D. at 1, 2*). As both Equatoriana and Mediterraneo are Contracting States (*P.O. No. 3 at 2*), Art. 1(1)(a) CISG provides that the CISG applies to the parties' contract for the sale of six Model 14 auger-feeder machines.

§ 2

RESPONDENT did not breach the contract

A. The contract did not call for machines that were capable of packaging salt.

I. The Model 14 machines adhered to the specifications of the contract and were of the quality required by the contract under Art. 35(1) CISG.

2. Art. 35(1) CISG provides that the seller (here, RESPONDENT) "must deliver goods which

are of the quantity, quality and description required by the contract.” In the present case, the goods RESPONDENT delivered were of the quality explicitly required by the contract. The primary test of whether delivered goods are of the quality required by the contract is “what characteristics of the goods are laid down in the contract by means of qualitative descriptions” (*Schlechtriem/Schwenger, Art. 35 at 6*). Nowhere did the contract expressly call for machines capable of packaging salt (*C.E. No. 2*). The contract merely called for auger-feeder machines (*C.E. No. 2*). This is what RESPONDENT delivered. Moreover, the machines were to be capable of being used with a wide range of products, which the Model 14 machines were (*C.E. No. 2*). Therefore, since RESPONDENT delivered goods that complied with the contractual descriptions, the machines are in conformity under Art. 35(1).

3. The contract did not impliedly call for machines capable of packaging salt since CLAIMANT did not specify during negotiations that it desired machines that could be used with salt. The contract negotiations are relevant to interpreting the contract under the provisions of Art. 8(3) (*see infra at 6*). Here, CLAIMANT wrote to RESPONDENT on 24 June 2002 to inquire about the purchase of packaging machines suitable for use over a “wide range of products” (*C.E. No. 1*). The Model 14 machines that were offered to CLAIMANT in RESPONDENT’s letter of 3 July 2002 (*C.E. No. 2*), and which CLAIMANT accepted in the letter of 12 July 2002 (*C.E. No. 3*) met this qualification. The machines were versatile and could package both fine and coarse goods (*C.E. No. 2*).

4. Nowhere in CLAIMANT’s letter did CLAIMANT indicate that it specifically wished to use the machines with salt (*C.E. No. 1*). RESPONDENT’s description of the offered Model 14 machines’ capabilities mirrored almost exactly the specifications that CLAIMANT included in its inquiry (*C.E. No. 1, 2*). Salt was not listed by CLAIMANT as a product that would be used with the machines. The ability to package it was not a quality that was mentioned in either CLAIMANT’s own inquiry or RESPONDENT’s offer.

5. RESPONDENT did not offer CLAIMANT Model 17 machines which were capable of packaging salt because CLAIMANT did not indicate in its inquiry that this was a necessary feature of the machines it desired to purchase. RESPONDENT could reasonably conclude that a responsible

buyer making such an expensive purchase would have, at least, consulted RESPONDENT's website or sales literature while trying to make a decision. Moreover, CLAIMANT stressed price as an item essential to the conclusion of the contract (*C.E. No. 1*). Expressing such a concern would not indicate to RESPONDENT that CLAIMANT was in the market for a salt-packaging machine, as Model 17 machines were considerably more expensive than Model 14 auger-feeder machines.

6. Art. 8 governs the interpretation of contracts under the CISG. Art. 8(2) provides that statements made by and conduct of a party should be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances, while Art. 8(3) indicates that negotiations, usages, and subsequent conduct of parties are all relevant to determining parties' intent. Here, under Art. 8(2), RESPONDENT's actions must be interpreted according to the understanding that a reasonable person of the same kind as the CLAIMANT would have had in the same circumstances. Since RESPONDENT's offer did not specifically indicate that the machines could package salt (*see supra at 4*), CLAIMANT could not reasonably believe the offer included a machine with such capabilities. It is well-known both in and out of the food packaging industry that salt is corrosive. For example, it is common practice that goods shipped by sea must be specially packaged in order to avoid destruction by the corrosive salt water. A reasonable buyer who, like CLAIMANT, is somewhat familiar with the trade should have recognized that machines need special materials to process salt. Moreover, under Art. 8(2), the "generally accepted" or "relevant view" of a "reasonable person" involved in international sale of goods transactions "is that of a specialist who is aware of the practice in his trade sector . . . and [with] the technical characteristics of the goods and their use" (*Schlechtriem/Junge, Art. 8 at 7*). A specialist involved in the food packaging trade would know that machines capable of packaging salt would require corrosive-resistant metal (*S.C. at 9; C.E. No. 7; S.D. at 4; E.R. at 5*). Therefore, a reasonable person in CLAIMANT's position would not have interpreted RESPONDENT's offer as encompassing machines with salt-packaging capabilities unless this was specifically mentioned.

7. Furthermore, the "decisive criterion" for the packaging capability of the machines was versatility, and not, as CLAIMANT contends "grainity," (*C.B. at 8*). CLAIMANT is trying to imply from the list it gave RESPONDENT that the criteria was granularity, but such an implication cannot

be made since any examples, in their operation as a non-exhaustive list, are inherently ambiguous. Furthermore, “flour,” which was listed as one of the examples (*C.E. No. 1*) is not a granular item, while it is questionable whether beans are granular. Rather, CLAIMANT requested, and RESPONDENT offered, machines capable of packaging a variety of goods. Even if granularity was the “decisive criterion” for the packaging capability of the machines, CLAIMANT could not reasonably interpret RESPONDENT’s offer as including machines capable of processing salt. Simply indicating that a machine can package a “wide range of products” (*C.E. No. 2*) does not guarantee that it can process every single product that may conceivably exist within that range. “Wide range” is not the equivalent of “all.” Rather, it would have been reasonable for CLAIMANT to conclude that the machines were able to process all products in the sample range only if RESPONDENT specified this in its offer. RESPONDENT, however, did not so specify. Moreover, if CLAIMANT desired machines that could package every product in the sample range of “granularity” that it claims to have provided RESPONDENT with, then CLAIMANT should have expressly made that clear in its own letter of inquiry.

8. Art. 9(2) states that trade usages of which parties knew or ought to have known, and which are widely known to, and observed by, parties to similar contracts in a particular trade, are impliedly made applicable to the contract and its formation. The treatment of salt as a “special product” (*C.E. at 7*) constitutes a trade usage in the packaging industry under Art. 9(2). Another trade usage has developed around this: the requirement that a buyer must inform the seller if it plans to use a “special product” such as salt. This can be evidenced in many ways. First, the vast majority of firms that repackaging dry bulk products do not pack salt (*P.O. No. 3 at 27*). Additionally, manufacturers need special notification if a buyer plans to package that product (*C.E. No. 7*). Furthermore, any food-packaging machines meant for use with salt have to be specially manufactured with corrosive-resistant metals, such as stainless steel (*S.D. at 4; E.R. at 5*). These machines are considerably more expensive than other packaging machines (*S.C. at 12; C.E. No. 7*). Therefore, the need to use corrosive-resistant metals with machines designed to handle salt constitutes a trade usage under Art. 9. An accepted industry standard has been established with regard to what types of corrosive-resistant metal should comprise salt-packaging machines (*E.R. at 5*). RESPONDENT uses grade 316 stainless steel to manufacture a separate line of special machines, Model 17s, in accordance to

this standard (*S.D. at 4; C.E. No. 7*). Moreover, when CLAIMANT bought replacement machines, Oceanic Machinery provided machines specifically “capable of packaging salt” (*S.C. at 12*).

9. Furthermore, a usage forming part of the contract takes priority over other dispositive provisions of the CISG (*Schlechtriem/Junge, Art. 9 at 2*). Since the “special” treatment of salt and salt-related contracts and the requirement that salt be handled only by machines manufactured with corrosive-resistant metal (such as stainless steel) both constitute trade usages under Art. 9(2) (*see supra at 8*), CLAIMANT cannot argue that it was unaware of these trade usages when entering into contract negotiations or forming a contract with RESPONDENT. A newcomer to an international market may not be aware of certain usages, but “[h]e must familiarize himself with such usages, because they also apply to him” (*Schlechtriem/Junge, Art. 9 at 11*). Such a view is consistent with the idea that the relevant view of a “reasonable person” under Art. 8(2) is that of someone who is a specialist in the trade (*see supra at 8*). Provisions such as these discourage merchants from remaining deliberately ignorant of the operation of a given trade or its particular usages. For example, here, although CLAIMANT argues that it “did not know and had no reason to know” (*S.C. at 4*) of such usages, CLAIMANT had been involved in the food packaging business for five years at the time of the conclusion of the contract (*P.O. No. 3 at 10*).

II. The capability to package salt was not a “particular purpose” of the machines, under Art. 35(2)(b) CISG, that was made known to RESPONDENT at the time of the conclusion of the contract.

10. According to Art. 35(2)(b), in order for goods to conform with the contract they must be fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. Under the provisions of Art. 35(2)(b), packaging salt did not constitute a “particular purpose” of the Model 14 machines under the contract since CLAIMANT did not expressly make this purpose known to RESPONDENT at the time of the conclusion of the contract (*C.E. No. 1, 2; 24.09.1998 UNILEX, Germany; 20.04.1994 UNILEX, Germany*). Neither during the contract negotiations nor prior to its acceptance of RESPONDENT’s offer did CLAIMANT expressly inform RESPONDENT of its intention to use the Model 14 machines to package salt. Since it is advisable that a buyer should make an express reference in the contract to the particular

purposes for which the goods will be used (*Schlechtriem/Schwenzer, Art. 35 at 21*), it is reasonable to expect CLAIMANT to have done this. Furthermore, as salt is a special product, CLAIMANT was obliged to inform RESPONDENT of its intention to package salt (*see supra at 8, 9*).

11. In the food packaging industry there are certain trade usages involving salt to which CLAIMANT is required to know and adhere (*see supra at 8, 9*). Particularly in light of these trade usages, it was more imperative than usual for CLAIMANT to expressly make known its intention to package salt. Since CLAIMANT failed to so inform RESPONDENT of its particular purpose to process salt at the conclusion of the contract, RESPONDENT was not required to provide machines capable of packaging salt.

12. CLAIMANT also did not impliedly make known its purpose of packaging salt to RESPONDENT at the time of the conclusion of the contract. A reasonable seller would not have recognized the particular purpose from the circumstances (*Schlechtriem/Schwenzer, Art. 35 at 22*) because a different industry standard exists for machines that will process salt than for other machines. It is expected that a buyer who is planning to package salt will expressly inform the seller of this intent (*see supra at 8; C.E. No. 7*).

13. CLAIMANT's statements to RESPONDENT that it wished to use the machines with "dry stuff" (*C.E. No. 1*) were not enough to implicitly alert RESPONDENT to its intention that the machine package salt. "Dry stuff" is too broad of a categorization to imply that CLAIMANT intended to process anything that could be so categorized. For example, sulfuric acid pellets could be considered "dry stuff," but clearly machines expected to package "dry stuff" in general would not reasonably be expected to package such material. CLAIMANT provided RESPONDENT with several examples of items that it planned to package. These specific examples, "ground coffee, flour, beans, and rice" (*C.E. No. 1*), were all food items. Salt, on the other hand, is a mineral and cannot be grouped with such items. Salt can also be distinguished from the aforementioned examples because it is highly corrosive. Since salt can be distinguished in these two respects from the examples provided to RESPONDENT, CLAIMANT did not provide sufficient information to RESPONDENT to even implicitly inform RESPONDENT of the intention to package salt.

14. According to Schwenger, it may be the “seller’s actual awareness” which is relevant to whether the particular purpose was made known to the seller (*Schlechtriem/Schwenger, Art. 35 at 21*). Here, the RESPONDENT-seller did not have any constructive awareness of CLAIMANT’s plan to use the machines with salt. Thus, there was no particular purpose under Art. 35(2)(b) with which the machines needed to comport. Since the particular purpose did not exist, RESPONDENT did not breach an obligation.

15. Even if packaging salt is found to be a “particular purpose” of the machines under the contract, CLAIMANT cannot depend on the fitness of the machines for this particular purpose if it was unreasonable for CLAIMANT to rely on RESPONDENT’s skill or judgment (*CISG Art. 35(2)(b); Schlechtriem/Schwenger, Art. 35 at 25; Honnold, Art. 35 at 226*). CLAIMANT was required to know of the trade usages involving salt, specifically that salt is a specialty item to package and that anyone who wishes to do so must explicitly inform the manufacturer at the time of purchase (*see supra at 8-9*). Moreover, CLAIMANT is held to the standard of reasonableness of a specialist in the trade under Art. 8(2) (*see supra at 6*). It was therefore unreasonable for CLAIMANT to rely on RESPONDENT’s skill or judgment in providing machines that could package salt since CLAIMANT did not provide all of the relevant information that was required if RESPONDENT was to select the right machines.

III. Packaging salt was not an “ordinary purpose” of the Model 14 auger-feeder machines under Art. 35(2)(a) CISG.

16. Art. 35(2)(a) stipulates that in order for goods to conform with the contract they must be fit for the purposes for which goods of the same description would ordinarily be used. Goods are fit for “ordinary” use when they possess the characteristics normally required from goods as described by the contract (*Bianca/Bonell, Art. 35 at 2.5.1*). Contrary to CLAIMANT’s assertions, these auger-feeder machines were not designed to package salt (*C.E. No. 7; S.D. at 4; E.R. at 5*). Rather, the “ordinary use” of auger-feeder machines is the ability to package non-corrosive dry goods. Since the Model 14 auger-feeder machines sold to CLAIMANT were, in fact, able to process a variety of non-corrosive dry goods, they therefore conformed to the contract under Art. 35(2)(a) (*Id.*).

17. Furthermore, the “fitness of the goods for other purposes for which they would ordinarily be used must be decided by reference to the objective view of a person in the trade sector concerned” (*Schlechtriem/Schwenzer, Art. 35 at 13*). An objective person involved in the food packaging trade would know that the Model 14 auger-feeder machines were not designed to package salt, and that a special request must be made for such salt-packaging machines (*C.E. No. 7; S.D. at 4; E.R. at 5*). Thus, packaging salt could not be considered an “ordinary use” of the Model 14 auger-feeders.

18. The machines were not, contrary to what CLAIMANT asserts (*C.B. at 25*), labeled as “food” packaging machines (*C.E. No. 2*). Even if that were case, salt is a corrosive mineral, not a food. In its letter of inquiry, when CLAIMANT listed goods that it expected to package with the new machines (*C.E. No. 1*), these goods were all types of non-corrosive foods. Similarly, RESPONDENT’s offer also did not indicate in any way that the machines could process corrosive materials.

19. Even if the Model 14 auger-feeder machines were sold as “food” packaging machines, this did not guarantee that they would process all foods. Here, CLAIMANT never indicated that it desired machines which could package all foods, nor did RESPONDENT offer such machines. To read as broad a characterization as “food” to indicate “all food” is unreasonably over-inclusive. While it is true that the Model 14 machines are designed to process a variety of foods, the “ordinary purpose” of a food packaging machine cannot be reasonably construed as the ability to package all foods.

20. Packaging salt is not an ordinary use of auger-feeder machines because there is a separate industry standard for machines manufactured specifically to package salt (*see supra 8, 9*). RESPONDENT produces separate Model 17 auger-feeder machines that are specially designed for use with salt. This information is clearly set out and readily available on RESPONDENT’s website and in its sales literature (*C.E. No. 7*). Similarly, all of the available evidence indicates that machines which would be capable of packaging salt are produced according to a separate industry standard than that of regular auger-feeder machines (*S.C. at 12; C.E. No. 7; S.D. at 4; E.R. at 5*). Machines designed to package salt, which is a highly corrosive substance, must use either a high-

grade steel or some other corrosive-resistant metal (*see supra at 8*). Moreover, a buyer wishing to purchase a machine capable of packaging salt must expressly make this known to the seller (*C.E. No. 7*). Thus, if there are machines which are manufactured separately and specially for the purpose of packaging salt, there is no basis for CLAIMANT's argument that an "ordinary purpose" of the auger-feeder machines was to process salt.

IV. Although CLAIMANT does not make this argument at this time, the phone call of 23 July 2002 did not result in a modification of the contract pursuant to Art. 29 CISG.

21. The quality required for goods to conform to the contract under Art. 35(2)(b) is determined at the time of conclusion of the contract (*Schlechtriem/Schwenger, Art. 35 at 22; Honnold, Art. 35 at 226; Bianca/Bonell Art. 35 at 2.5.2; Ferrari/Flechtner/Brand/Flechtner, Art. 35 at 10*). Thus, CLAIMANT's statement that it was going to package salt did not result in an Art. 35(b)(2) obligation for RESPONDENT under the original contract because it was made on 23 July 2002, after the contract had been concluded.

22. Although Art. 29(1) allows for modifications to be made to the contract, the "agreement of the parties" necessary to effectuate such a modification was not present in this case. CLAIMANT made an off-handed statement pertaining to the packaging of salt during a conversation focused entirely on a different aspect of the contract (*S.C. at 6, 7; C.E. No. 7; S.D. at 5, 6*). At no point in this conversation did CLAIMANT indicate that it wanted to discuss the qualities of the ordered machines. This inconspicuous reference to salt did not alter the required capabilities of the contracted-for machines. CLAIMANT cannot reasonably expect that a single off-handed remark would replace the contractually specified qualities of the machines which had already been carefully negotiated during the formation of the contract. At no point did RESPONDENT indicate that it agreed to or that it was sending machines which were capable of packaging salt. Rather, RESPONDENT remained silent on this point. The failure to object to a party's unilateral attempt to materially alter the terms of an otherwise valid agreement does not constitute "agreement" under Art. 29 (*05.05.2003 UNILEX, USA*). Moreover, under Art. 18(1), "silence or inactivity does not in itself indicate amount to acceptance." Finally, it is unreasonable for such an inconspicuous statement, made so long after the conclusion of the contract, to substantially increase

RESPONDENT's obligations under the contract. If CLAIMANT's statements on 23 July 2002 were to be taken as a modification of the contract, RESPONDENT would be burdened with an obligation to deliver substantially more expensive salt-packaging machines at the same price as under the original contract. This result would be unfair and unreasonable, and is an example of why the specific qualities of goods are determined at the conclusion of the contract, when the seller has an opportunity to refuse such obligations.

B. RESPONDENT did not breach an obligation under Art. 45(1) CISG to warn CLAIMANT to refrain from using the Model 14 machines with salt.

I. RESPONDENT had no obligation under Art. 45(1) CISG to warn CLAIMANT not to use the Model 14 machines with salt.

23. Under the CISG, there is no general obligation for a seller to warn the buyer against certain uses of a product. Such an obligation only exists when the contract mandates an affirmative obligation to warn (*Schlechtriem/Huber, Art. 45 at 3*). Furthermore, and contrary to CLAIMANT's argument (*C.B. at 32*), no obligation to warn arises under Art. 45(1). Rather, a plain reading of Art. 45(1) clearly reveals that it governs purely procedural matters; no legal obligations arise under this provision. Art. 45(1) merely lays out the remedies available to a buyer in the case of a seller's breach of contractual obligations. Therefore, CLAIMANT's assertion that an obligation to warn originates in this provision is mistaken.

24. The contract concluded between CLAIMANT and RESPONDENT included no provisions for an obligation to warn (*C.E. No. 2*). Not only did the contract itself fail to mention salt, but the term was also glaringly absent from the contract negotiations (*C.E. No. 1*). Thus RESPONDENT had no duty to warn CLAIMANT not to use the Model 14 machines with salt. Furthermore, since the goods did not violate Arts. 35(2)(a) or 35(2)(b) there was no such obligation derived from those Articles.

II. Even if there is an obligation to warn, it did not attach because RESPONDENT was never sufficiently informed of CLAIMANT's intent to use salt with the Model 14s.

25. Even after the conclusion of the contract, RESPONDENT was not sufficiently informed of CLAIMANT's intention to use salt with the machines so as to be put on notice of this intent. Thus, RESPONDENT did not have to warn CLAIMANT not to use salt. The off-handed mention of salt that CLAIMANT made during the telephone conversation of 23 July 2002 did not sufficiently alert RESPONDENT that CLAIMANT planned to use the Model 14 machines when packaging salt. CLAIMANT called RESPONDENT with the express purpose of ascertaining when its machines would be delivered (*S.C. at 6; C.E. No. 4-5; S.D. at 5*). CLAIMANT's referral to salt was a casual remark made during a phone conversation entirely about something else. At no time did CLAIMANT indicate that it wanted to discuss the qualities or capabilities of the machine. RESPONDENT was not put on notice that it needed to scrutinize every statement CLAIMANT made during that call which was irrelevant to the delivery of the machines. Nor could RESPONDENT be reasonably expected to exercise this level of scrutiny. Moreover, simply because CLAIMANT mentioned salt during this conversation did not mean that CLAIMANT was planning to use the Model 14 machines to package salt. Although CLAIMANT was using the Model 14s to service the A2Z contract, it never explicitly told RESPONDENT that it was relying solely on those machines. CLAIMANT had been in the food re-packaging business for five years when this contract was completed (*P.O. No. 3 at 10*). As far as RESPONDENT was concerned, CLAIMANT could have already owned salt-packaging machines.

III. RESPONDENT fulfilled any obligation to warn with the Model 14 operations manual.

26. Even if RESPONDENT had an obligation to warn, this obligation was fulfilled when RESPONDENT provided CLAIMANT with an operations manual for the Model 14 machines. This manual explicitly warned against using the machines with "highly corrosive products." This language was sufficient to alert CLAIMANT not to use the Model 14 machines with salt.

27. Since salt is widely known as a corrosive product, it falls under the category "highly corrosive products" as mentioned in the Model 14 operations manual. Because of this,

RESPONDENT was not obligated to specifically mention salt in its operations manual. Moreover, if RESPONDENT were to list any examples of corrosive products (such as salt) in its operations manual, some buyers may interpret that to mean that the list is exhaustive, and that anything not included in the list is not corrosive. Rather than create this false impression, it is reasonable for RESPONDENT to simply use the category “highly corrosive products.” Moreover, as previously discussed under Art. 9(2), there is a trade usage that any machine expected to package salt must be made of special material. CLAIMANT is expected to know and follow this usage (*see supra at 8, 9*), and so cannot blame its use of the Model 14s with salt on the fact that the operations manual warned only against “highly corrosive materials” without specifying salt.

C. The Model 14 machines were in conformity with the contract under Art. 35(1) CISG in terms of speed and design.

28. Contrary to CLAIMANT’s assertion, the parties did not contract for “top” machines in terms of quality (*C.B. at 39*). The use of the word “top” contained in RESPONDENT’s offer was merely the persuasive language of a salesman (*C.E. No. 2*), and a reasonable buyer, under the standards of Art. 8(2), would have understood that. Moreover, the term “top” in the letter does not necessarily describe quality, and without such an explicit association, CLAIMANT could not reasonably discount those other meanings so as to understand the contract to be for top quality machines. “Top products” can also be reasonably interpreted as top-selling. Thus, the Model 14 machines conformed to the contract under Art. 35(1).

29. Furthermore, the paramount quality that the parties specified in the contract was that the machines could package a wide variety of goods, some of which included fine goods (*C.E. No. 1-2*). The contract did not mention machine speed at all, let alone the speed specifically for fine goods (*Id.*). The Model 14 machines were at or near the average industry standard for speed for other types of items (*E.R. at 3*). Moreover, a standard for “average” speed means, by definition, that some machines will package products at a speed below the average. Nothing in the contract assured that the machines would perform at the average speed for packaging fine goods. Even more significantly, Art. 35 “does not contain an express provision imposing on the seller a duty to deliver goods of average quality” (*Bianca/Bonell, Art. 35 at 3.1*). The RESPONDENT only needs to deliver

machines within some “useable” range. From the facts, there is no indication of what the standard deviation from average is for auger-feeder machines, so CLAIMANT cannot determine if the Model 14s did not comply with this. Therefore, since the Model 14 machines are of “merchantable” quality and are still useable (*E.R. at 6*), they meet the requirements of Art. 35(1).

30. In its letter of inquiry, CLAIMANT expressly stated that the only essential items of the contract were the price and delivery terms (*C.E. No. 1*). This indicates to a “reasonable” seller under Art. 8(2) that price and delivery were the most important terms, to the exclusion of quality. CLAIMANT inquired as to which machine RESPONDENT could offer to meet the specified combination of best price and fastest delivery. This was the Model 14 (*C.E. No. 2*).

31. Despite CLAIMANT’s assertion, the Model 14 machines were not below the “industry average” in terms of design (*C.B. at 40*). There is no indication that the use of highly polished chromium plated product paths is an industry standard for auger-feeder machines. The Expert’s Report simply stated that machines are available which possess these qualities (*E.R. at 4*).

§ 3

CLAIMANT unlawfully avoided the contract

A. RESPONDENT did not fundamentally breach the contract.

32. CLAIMANT was not entitled to avoid the contract because RESPONDENT did not breach the contract (*see supra at § 1*). Even if RESPONDENT breached the contract, it did not rise to the level of a fundamental breach and Art. 49 requires that there be a fundamental breach, as defined by Art. 25, for a declaration of avoidance to be valid. Art. 25 provides that a breach is fundamental only if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.

33. CLAIMANT was not substantially deprived of its interests by the fact that the Model 14s were below the average industry speed for packaging some goods. While these machines may have fallen below the average speed, CLAIMANT acknowledges that the machines “worked reasonably

well” (*S.C. at 8*). These machines, though slow, were still operable (*S.C. at 8; E.R. at 5*), and could be used to service the A2Z contract. For example, for all items besides fine goods, the Model 14s operated at a speed at or near the industry average (*Id. at 3*). Moreover, they could be used to package a wide variety of goods, which was the crucial quality that CLAIMANT expressly contracted for (*C.E. No. 2*). If goods can still be used according to their purpose, a fundamental breach has not occurred (*CLOUT Case No. 171; CLOUT Case No. 79; see infra at 40*).

34. Under the contract, RESPONDENT had no obligation to warn CLAIMANT not to use the Model 14s with salt (*C.B. at 32; see supra at 23-27*). Even if RESPONDENT were deemed to have that duty, RESPONDENT fulfilled such an obligation by sending CLAIMANT an operations manual with the Model 14 auger-feeders. The operations manual explicitly included a warning against using “highly corrosive products.” Salt is well-known to be a highly corrosive product, both in the trade and outside of it (*see supra at 8, 9*). Thus, CLAIMANT’s argument that RESPONDENT fundamentally breached the contract in this regard must fail.

35. Art. 25 requires that an aggrieved party’s loss from a breach of contract must be foreseeable to the breaching party in order to be considered in the fundamental breach analysis. The relevant time to determine foreseeability is at the conclusion of the contract (*Schlechtriem, Art. 25 at 15*). Here, even if the contract called for machines capable of packaging salt, it was not foreseeable to RESPONDENT at the time of the conclusion of the contract that CLAIMANT would incur such damage to the machines as to amount to a fundamental breach. First, it was certainly not foreseeable that CLAIMANT would ignore the warnings provided in the Model 14 operations manuals. The manual specifically warned against using these machines with “highly corrosive products,” a category which encompasses salt (*P.O. No. 3 at 25*). Moreover, it was not foreseeable that such a large degree of corrosion would take place. Corrosion is a slow process. It was therefore unforeseeable that CLAIMANT, once it noticed some corrosion of the machines taking place, would continue to use the machines until they were completely inoperable (*C.E. No. 1 at 8; P.O. No. 3 at 28*). A reasonable buyer would have discontinued use earlier in the process and before the corrosion reached the point where it destroyed four machines.

B. CLAIMANT did not successfully avoid the contract under Art. 49 CISG.

36. Art. 49 permits a buyer to avoid the contract if the seller's failure to perform an obligation constitutes a fundamental breach of the contract. Here, since RESPONDENT did not commit a fundamental breach of the contract (*see supra at 32-35*), CLAIMANT could not avoid the contract. In particular, RESPONDENT neither committed a fundamental breach by delivering machines incapable of packaging salt nor by delivering machines which packaged some goods below the average industry standard for speed.

37. Even if RESPONDENT is found to have committed a fundamental breach as to the quality of the machines operating at below-average speed, CLAIMANT could not avoid the contract because CLAIMANT did not comport with the Art. 26 requirement to give notice of avoidance to RESPONDENT. In its letter of 19 October 2002, CLAIMANT does not avoid the contract as to the machines which are operating below average industry speed (*C.E. No. 6*). Nor does the record indicate that CLAIMANT informed RESPONDENT that it was avoiding the contract with respect to these two machines during the phone conversation of 18 October 2002 (*S.C. at 9; C.E. No. 6*). Rather, all of CLAIMANT's statements regarding avoidance of the contract refer only to the four machines which had been used with salt (*C.E. No. 6*). The language in the letter of 19 October 2002 indicates that only those four machines were unusable, that those were the machines being put at RESPONDENT's disposal, that CLAIMANT needed to replace only those, and that it desired reimbursement only as to the corroded machines (*Id.*). Consequently, a reasonable person would understand from CLAIMANT's notice of avoidance, that CLAIMANT was only avoiding the contract as to the four corroded machines.

38. Even if CLAIMANT was entitled to avoid the entire contract, it did not fulfill the requirements of Art. 49, and thus is deprived of that remedy. Here, CLAIMANT did not make a declaration of avoidance within a reasonable time after it knew or ought to have known about the breach, violating Art. 49(2)(b)(i). CLAIMANT determined that the four corroded machines were unusable more than two weeks before notifying RESPONDENT of its intent to avoid the contract (*S.C. at 8*). Two weeks is not a "reasonable time" after CLAIMANT knew of the breach (*31.01.1997 UNILEX, Germany*). Waiting for such a long time to avoid the contract simply compounded the

damages that CLAIMANT now seeks. This is contrary to the provisions of Art. 77, which state that a party relying on a breach of contract “must take such measures as are reasonable in the circumstances to mitigate the loss” resulting from the breach. CLAIMANT should have mitigated its damages by ceasing to use the machines once the seriousness of the corrosion became apparent rather than waiting until the machines were completely unusable.

39. Even more telling is that, from the beginning, CLAIMANT knew that the Model 14s operated at a rate slower than that to which they were accustomed (*S.C. at 8*). Yet CLAIMANT did not attempt to avoid the contract on such grounds until a month and a half after the machines were installed (*S.C. at 8*). This contravenes the concept of “reasonable time” even more than in the case of the corroded machines (*see supra at 38*). Even if CLAIMANT did not have constructive knowledge of the breach relating to the speed of the machines, it “ought to have known” that this breach existed almost immediately after the Model 14s were delivered. Pursuant to Art. 38, CLAIMANT was obliged to examine the goods upon delivery by performing, for example, a test run (*05.12.2000 UNILEX, Germany; 21.03.2003 UNILEX, Germany; 25.06.1997 UNILEX, Germany*). However, there is no indication that such an examination was carried out (*S.C. at 8*). Similarly, CLAIMANT should have been put on notice by the Model 14s operations manual that it needed either to perform an inspection or keep a heightened watch for the signs of corrosion if it was using the machines with corrosive material, such as salt. The Art. 38 inspection is one of the most important determinants of whether a declaration of avoidance has been made within a reasonable time after a party ought to have known of the breach (*Schlechtriem/Huber, Art. 49 at 43*). Thus, as a result of its own negligence, CLAIMANT did not adhere to the Art. 49(2)(b)(i) timeliness requirements for either the corroded machines or the slow machines, and cannot now avoid the contract.

40. If it is found that RESPONDENT has fundamentally breached the contract in regards to the ability of the Model 14s to package salt, CLAIMANT still should not be permitted to declare avoidance. This finding should apply even if CLAIMANT is not precluded from declaring avoidance under the provisions of Art. 26 or Art. 49. Since CLAIMANT can be otherwise compensated in damages for the four corroded machines and the two still-useable machines, there

is no need to exercise such a drastic remedy. As the German Bundesgerichtshof has ruled, the remedy of avoidance for non-conformity of the goods represents the last resort in respect to the other remedies available to the buyer (*CLOUT Case No. 171; 13.12.2001 UNILEX, Italy*). Here, CLAIMANT can be compensated for the four corroded machines with monetary damages. Additionally, the breach of the still-operable Model 14s is probably not fundamental. The decisive criteria in determining whether a non-conformity is fundamental is whether the buyer can still make use of the goods (*CLOUT Case No. 171; see supra at 33*). Thus, instead there could be a price reduction for the other two operable machines. This would acknowledge the fact that they are useable, yet take into account that they are unable to process salt. Finally, if the aforementioned monetary damages were insufficient, under the provisions of Art. 51(1) CLAIMANT could avoid the contract, but only as to the four corroded machines. Art. 51(1) provides that if only some delivered goods are non-conforming a buyer can avoid the contract in respect of that non-conforming part. Partial avoidance would still be less intrusive, less burdensome, and less extreme than the last resort of avoiding the entire contract.

C. Even if CLAIMANT was entitled to avoid the contract, it was precluded from doing so by the provisions of Art. 82 CISG.

41. CLAIMANT is barred from avoiding the contract by Art. 82(1). This provision stipulates that a buyer loses his right to declare the contract avoided if it is impossible for that buyer to return the goods “substantially in the condition in which he received them.” Great damage caused due to improper use of the goods by the buyer constitutes impossibility to return goods “substantially in the condition” in which they were received (*Enderlein/Maskow, Art. 82 at 2.1; Schlechtriem/Leser, Art. 82 at 9*). Here, it is obvious that CLAIMANT cannot return the machines which have been used with salt in “substantially the condition” in which they were received. The machines have been corroded to the point that they are unusable.

42. None of the Art. 82(2) exceptions apply in this case. The destruction of the corroded machines was, in fact, due to an “act by the buyer” under Art. 82(2)(a). CLAIMANT used the machines to package salt, using the Model 14 machines in a way which was not contemplated by the contract. Moreover, even when it became apparent that the machines were corroding, CLAIMANT

continued to use the machines with salt. The exception under Art. 82(2)(c) does not apply in this case either. The contract, as concluded between the parties, was not for machines which could package salt (*see supra at 2-22*). The Model 14 auger-feeders were not designed for this purpose. Thus, packaging salt was not within “the course of normal use” for the Model 14s. Even if packaging salt was considered to be within the contracted “normal use” for the machines, CLAIMANT cannot rely on the provisions of Art. 82(2)(c). A buyer, who becomes aware of the lack of conformity of goods but nevertheless continues to use the goods, loses his right to avoid the contract (*Schlechtriem/Leser, Art. 82 at 21*). By its own admission, CLAIMANT waited until the machines showed signs of serious corrosion before it stopped using them. But corrosion is a slow process; CLAIMANT must have been aware that the machines were becoming corroded even before it ceased to use them (*S.C. at 8*). CLAIMANT therefore either discovered or ought to have discovered the lack of conformity significantly before it declared avoidance. However, CLAIMANT continued to use the machines with salt, compounding the problem.

D. CLAIMANT cannot rely on Art. 80 CISG to retain its right to avoid the contract.

43. CLAIMANT argues that even if packaging salt was not a contractual use of the machines, since RESPONDENT failed to warn CLAIMANT not to use the machines with salt, CLAIMANT retains its right to avoid under Art. 80, notwithstanding CLAIMANT’s inability to comply with its Art. 82(1) obligations (*C.B. at 66*). Art. 80 “requires that a party’s failure to perform be ‘caused by’ the other side’s act or omission” (*Ferrari/Flechtner/Brand/Flechtner, Art. 80 at 5*). Even if Art. 80 would govern this kind of question, discussions of Art. 80 in leading commentaries indicate that Art. 80 is intended to prevent one party from relying on a breach of the *contractual* obligations of the other party if the first party, through an act or omission, somehow caused the second party’s breach (*see Honnold, Art. 80 at 436.4; ZCC Award No. 273/95, 31.05.1996; CLOUT Case No. 273*). CLAIMANT’s obligation to return the Model 14s substantially in the condition in which they were received is not a contractual obligation; it arises by virtue of the application of the CISG to this transaction. RESPONDENT, thus, may still rely on CLAIMANT’s obligation to return the machines “substantially in the condition in which they were received” in order for CLAIMANT to successfully avoid the contract, and CLAIMANT is not excused from this obligation under Art. 80. In any event, CLAIMANT’s argument under this provision is moot. Contrary to what CLAIMANT asserts,

RESPONDENT did not have any obligation to warn, or alternatively, if it did, the obligation was not breached since the Model 14 operations manual sufficiently warned against using the machines with salt (*see supra at 23-27*). Thus, the misuse of the Model 14s and resulting damage were the sole responsibility of CLAIMANT.

§ 4

The applicability of the UNCITRAL ML is limited to its mandatory provisions

44. Danubia has adopted the UNCITRAL ML without amendment (*P.O. No. 3 at 47*). The applicable *lex arbitri* in any arbitration is that of its chosen seat (*Berger-UTCA at 19*). Consequently, the *lex arbitri* in the present case is the UNCITRAL ML and CLAIMANT applies the entire UNCITRAL ML in its arguments against security for costs and confidentiality (*C.B. at 3, 68 et seq.*). This blanket application by CLAIMANT is improper as it is contrary to the agreement of the parties.

45. The fundamental principle of the UNCITRAL ML is the recognition of the autonomy of the parties (*Sarcevic/Herrmann at 9*). ML Article 19(1) gives the parties in arbitration the autonomy to agree on the arbitral procedure and allows the arbitral tribunal to conduct the arbitration as it chooses when the parties have agreed on procedural rules (*Holtzmann/Neuhaus at 564; Sarcevic/Herrmann at 9; Alvarez/Kaplan/Rifkin at 183; Weigand/Roth, Art. 19 at 2*). Article 19 may be regarded as “the most important provision of the Model Law” (*Seventh Secretariat Note at Art. 19, 1*). Under ML Arts. 19(1) and 2(e), the parties may determine the rules of their arbitral procedure by referring to standard rules for institutional arbitration (*Seventh Secretariat Note at Art. 19, 2; Seventh Secretariat Note at Art. 2, 4; Sarcevic/Herrmann at 10*). When such a choice is made, the ML acts as a framework, with the parties remaining subject to the mandatory provisions of the ML while the chosen institutional rules take the place of the non-mandatory provisions of the ML (*Holtzmann/Neuhaus at 565; Howell/Duthie/Lim at 43*).

46. The parties in this arbitration exercised their freedom of choice under ML Art. 19(1) by their adoption of the SIAC Rules. When agreeing not to apply the ML, no express language to this effect is required and agreement on institutional arbitration rules is sufficient (*John Holland Pty. Ltd. v.*

Toyo Engineering Corporation, Singapore; Coop International Pte. Ltd. v. Ebel SA, Singapore; Eisenwerk v. Australian Granites, Australia). In their arbitration agreement, the parties agreed to arbitrate any dispute arising out of their contract “in accordance with the Arbitration Rules of Singapore International Arbitration Centre (“SIAC Rules”)” (*C.E. NO. 2*).

47. The freedom of the parties under ML Art. 19(1) is subject only to the mandatory provisions of the ML. (*Holtzmann/Neuhaus at 565; Seventh Secretariat Note at Art. 19, 3*). The only mandatory provisions of the ML are Articles 18, 23(1), 27, 30(2), 31(1), (3), (4), 32 and 33(2), (4), (5) (*Seventh Secretariat Note at Art. 19, 3*). In the determination of the issues of security for costs and an order of confidentiality, the Tribunal may only take into account these mandatory provisions.

48. Every international tribunal is under a duty to ensure the enforceability of a final award (*Berger at 8-26*). Danubia, Equatoriana and Mediterraneo are all party to the NY Convention (*C.E. No. 2*). Under Art. V(1)(d) of the NY CONVENTION, any award made in this arbitration following an arbitral procedure that has included the non-mandatory provisions of the UNCITRAL ML may be set aside for its failure to be “in accordance with the agreement of the parties” (*Derains at 38; Redfern/Hunter at 2-02; Sarcevic/van Houtte at 115*). Therefore, to ensure the enforceability of an award made in favor of either party, the Tribunal must respect the autonomy of the parties to shape their procedural rules and limit the applicability of the ML to its mandatory provisions.

§ 5

An order for security for costs must be granted to ensure equal treatment of the parties

A. The Tribunal has the authority to order security for costs and the freedom to use any standards in its determination of whether to do so.

49. An order of security for costs may be made if there is authority to do so and there is reason to believe that CLAIMANT will be unable to pay the costs of RESPONDENT if he is successful in his defense (*Mustill/Boyd at 336; Weigand/Bühler/Jarvin at Art.23, 23; Goff LJ in Bank Mellat v. Helleniki Techniki SA, England*).

50. SIAC Rule 27.3 expressly grants the Tribunal “the power to order any party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner the Tribunal thinks fit.” The parties have agreed to the application of this rule by their agreement to submit themselves to arbitration under the SIAC Rules (*see supra at 46*). Contrary to CLAIMANT’s contention (*C.B. at 70*), Rule 27.3 does not come subject to any predetermined interpretive test. Under SIAC Rule 34.2, the Tribunal has the power to interpret Rule 27.3 and it is generally agreed that when arbitrators have the power to order security for costs the grounds for the order are entirely within the discretion of the tribunal (*LCIA Art. 25.2; § 38.3, English Arbitration 1996; Marchac at 129; Rubins at 320*).

B. The Tribunal should base its determination on whether the factual situation of the parties has fundamentally changed from that time when the parties entered into their arbitration agreement and, in light of such change, the fairness of proceeding without the assurance given by an order of security for costs.

51. CLAIMANT paints an order for security for costs as a regular interim measure and claims it should be treated as any other form of interim relief (*C.B. at 68, 69*). However, an order for security is dramatically different than any other interim measure and any comparisons between the two must be limited (*Rubins at 315*). Under SIAC Rule 27.5, the Tribunal may refuse to hear claims of a party not in compliance with a Rule 27.3 order. This coercive power sets orders for security apart from other interim measures since a tribunal need not look to domestic courts for enforcement of the order (*Rubins at 315*). Recognizing the gravity of its request for security, RESPONDENT requests security neither on the presumption that it will win on the merits of the case nor, as CLAIMANT alleges, as a means of abuse (*C.B. at 91*). Instead, RESPONDENT relies upon the factual bases of arbitration’s high costs and evidence of a change in the situation of CLAIMANT so significant that it constitutes a serious threat to the enforcement of any possible award absent an order of security (*Letter of Fasttrack of 1 September 2003*).

52. The change in the factual situation of the parties since the agreement was entered into and, in light of such change, the fairness of proceeding without the assurance of an order of security should supplant CLAIMANT’s “balancing of the parties’ interests” (*C.B. at 70*) as the basis for the

Tribunal's determination of the security for costs issue (*Karrer/Desax at 33; ICC No. 10032, 9 November 1999; Sandrock at 32*). If the Tribunal were to find these factors in RESPONDENT's favor, then an order for security for costs would be justified unless CLAIMANT could prove both: 1) that an order of security would deny then the right of access to arbitration for reasons attributable to RESPONDENT and 2) that the making of such an order would be, after considering RESPONDENT's reasons for its request of security, highly unfair to CLAIMANT. (*ICC No. 10032, 9 November 1999; Karrer/Desax at 42*).

C. The evidence shows that the factual situation at present is fundamentally different from that when the parties entered into their arbitration agreement.

I. The financial situation of CLAIMANT is such that RESPONDENT will be unable to recover an award of costs unless the Tribunal enters an order for security for costs.

53. It has been reported by the financial press in Equatoriana that CLAIMANT has a cash-flow problem, has been delinquent in paying its trade creditors and has sought additional bank financing (*Letter of Fasttrack of 1 September 2003*). CLAIMANT offers no support for the allegation that these articles cannot be regarded as reliable evidence (*C.B. at 84*). These newspaper reports are reputable and neither the Tribunal nor RESPONDENT has any reason to doubt them (*P.O. No. 3 at 43*). If there is any doubt by the Tribunal as to these reports, they may seek additional financial information from CLAIMANT (*see infra at 58*).

54. CLAIMANT further argues even if the reports are accurate, such a "temporary lack of means cannot by itself be sufficient to grant security for costs in arbitration" (*C.B. at 85, 86*). However, the cases upon which CLAIMANT relies in support of its argument come from English courts which held the "temporary lack of means" alone inadequate without a sufficient connection to England, which was not present (*Bank Mellat v. Helleniki Techniki SA, England; Coppée Lavalin SA/NV v. Ken-Ren Chemicals and Fertilisers Ltd, England*). In this arbitration, this jurisdictional dilemma is not at issue as both parties have voluntarily submitted themselves to arbitration (*see supra at 46*). The Tribunal should thus find CLAIMANT's cash-flow problems are sufficient to establish a changed factual situation justifying an order for security.

55. CLAIMANT also states its financial problems are “merely temporary” (*C.B. at 88*), that it will voluntarily honor any award “without hesitancy” (*C.B. at 76, 77*) and that regardless of its own financial situation, it will pay any potential award on costs as it is “likely” that it will have been purchased by Equatoriana Investors by the time of the enforcement of the award (*C.B. at 89; Letter of Langweiler of 9 September 2003*). There is no support for CLAIMANT’s allegation that its assets must be evaluated at the time of the enforcement of the award (*C.B. at 89*). If that were the case, then logic would have that the orders of security for costs would have no basis in any institutional rules. Furthermore, CLAIMANT has failed to show that this “temporary” nature is not, in fact, indefinite. A “likely” purchase is no guarantee of actual purchase or the ability to pay an award and CLAIMANT has not reported any other prospects by which it will secure additional financing. CLAIMANT has been delinquent in paying its trade creditors (*Letter of Fasttrack of 1 September 2003*) and there is no reason to believe that, despite CLAIMANT’s desire to pay an award promptly, it will have the means to do so when the award becomes enforceable.

56. SIAC Rule 28.1 provides that the Tribunal shall make its award within 45 days from the date on which the hearings are closed. Under SIAC Rule 28.8, the award is final, binding and immediately enforceable. The oral hearings in this arbitration are scheduled to close on 8 April 2004 (*P.O. No. 2 at 9; Rules of the Moot at 70*). The target date for completion of the sale of CLAIMANT to Equatoriana Investors is 12 May 2004 (*P.O. No. 3 at 42*). If the Tribunal were to make its award in the 34 days after the end of the hearings, it would be enforceable prior to the purchase of CLAIMANT. However, it is possible that something may arise in the due diligence that will either delay or terminate the potential sale (*P.O. No. 3 at 42*). Any delay would possibly extend the sale past the 45 days within which the tribunal must make its award. As there are no guarantees to the date of CLAIMANT’s purchase, if any, and no demonstrated means to pay creditors promptly either now or in the near future, the Tribunal should require CLAIMANT to post security for the costs of RESPONDENT in the event that RESPONDENT prevails.

57. Finally, CLAIMANT has alleged that it should not pay security because its financial difficulties were “caused by RESPONDENT itself” (*C.B. at 90*). CLAIMANT fails to carry the burden of proof that RESPONDENT did not properly fulfill its contract with CLAIMANT (*C.B. at*

4 et seq.). CLAIMANT also fails to prove that RESPONDENT was the sole, or even primary, result of its troubles. The re-packaging of bulk commodities has been a small part of CLAIMANT's business (*S.C. at 1*). It is highly unlikely, taking into account CLAIMANT's annual sales of US\$8 million to 10 million (*P.O. No. 3 at 44*) that RESPONDENT, and not another party or parties, was the actual cause of CLAIMANT's severe financial difficulty. Regardless, CLAIMANT has failed to prove otherwise.

58. In case of any doubt as to the financial status of CLAIMANT, the Tribunal may order the production of CLAIMANT's financial documents under SIAC Rule 25(h). In interest of fairness and expediency, RESPONDENT has offered to review its request for security for costs if CLAIMANT were to provide recent financial records (*Letter of Fastrack of 1 September 2003*). CLAIMANT has called this suggestion "outrageous" and has refused to produce the documentation (*Letter of Langweiler of 9 September 2003*). The Tribunal may issue a revocable procedural order for security for costs at present (*Marchac at 130*) and after issuing such an order it may, if it feels it necessary, order the production of the requested financial documents and review its judgment based on those documents. If the CLAIMANT fails to produce the documents, the Tribunal may draw an adverse inference against them (*Karrer/Desax at 37*).

II. RESPONDENT did not assume any risk to recoverability due to CLAIMANT's financial difficulty.

59. Though CLAIMANT has not done so, CLAIMANT may not argue that CLAIMANT's financial difficulty was foreseeable by RESPONDENT. CLAIMANT was not near insolvency at the time of the arbitration agreement, therefore RESPONDENT cannot be said to have assumed any risk of recoverability of an arbitral award (*Karrer/Desax at 35*). No financial information about CLAIMANT was publicly available at the time of the arbitration agreement (*P.O. No. 3 at 43*). Furthermore, the reports concerning CLAIMANT's inability to pay creditors report that such problems appeared after the arbitration agreement had been made (*P.O. No. 3 at 43*). That RESPONDENT entered into a contract with CLAIMANT is in itself indicative of the perceived healthy financial position of CLAIMANT at the time of the contract (*Sandrock at 24 et seq.*).

60. Finally, that CLAIMANT agreed to institutional rules that include an express power to order security for costs is telling of the unforeseeability of financial troubles (*Sandrock at 24*). If at the time of the agreement CLAIMANT had trouble paying creditors or had they foreseen that such a situation could result from a dispute with RESPONDENT, CLAIMANT would have exercised their autonomy and not agreed to SIAC Rule 27.3. As there is no provision of the UNCITRAL ML that makes security for costs mandatory, CLAIMANT had complete freedom to exercise that autonomy.

III. CLAIMANT's financial difficulty presents an enforceability issue that RESPONDENT could not have reasonably foreseen.

61. Courts in Equatoriana have not been rigorous in their enforcement of foreign awards and have generally found means to avoid enforcing awards against firms from Equatoriana when the firm is in financial difficulties (*Letter of Fasttrack of 1 September 2003*). Respondent has submitted an accurate report in regard to the problems surrounding enforcement of arbitral awards in Equatoriana (*P.O. No. 3 at 46*). CLAIMANT argues that a "mere report does not provide the necessary prima facie evidence" (*C.B. at 80*). The case cited by CLAIMANT held that a single Turkish Court of Appeals decision and a case study by a single person released the following day were insufficient to show the possibility of enforcement in Turkey as "less than slim" (*Interim award in ICC No. 8786, 1996*). The case was easily distinguishable because the basis of the court's decision was completely inapplicable in the arbitration. By contrast, the report provided by RESPONDENT in the present arbitration is from a professional association concerning multiple awards made when the claimants were in situation similar to that of the present CLAIMANT (*Letter of Fasttrack of 1 September 2003*). The case used by CLAIMANT should not be regarded as authority pertinent to the current threat to legal enforcement.

62. At the time of the arbitration agreement, CLAIMANT was a resident of a country that is a signatory to the NY Convention and thus it cannot be said that RESPONDENT assumed any risk of non-enforceability of the award. Although it is accurate that when parties enter into agreements they are able to estimate all risks inherent in the agreement (*C.B. at 81*), such ability only extends as far as the factual situation at the time the agreement was signed (*ICC Award No. 7047, 1997*). It is CLAIMANT's changed financial situation and the haling of RESPONDENT into court that have

necessitated a new appraisal of the legal situation in light of a financial crisis that RESPONDENT could not have reasonably foreseen.

D. Given the present situation it is highly unfair for arbitration to proceed without the assurance of financial compensation given by an order for security.

I. The Tribunal must respect the policies of international commercial arbitration.

63. A major purpose of international commercial arbitration is to make the prevailing party in arbitration whole (*Rubins at 312*). If the Tribunal were to ultimately find for RESPONDENT in the present arbitration, RESPONDENT would be entitled to reasonable legal fees and costs under SIAC Rule 30.3. RESPONDENT has an interest that its fees incurred will be recoverable (*Lew/Mistelis/Kröll at 23-52; C.B. at 72*). Without an order for security for costs, such recoverability is not certain (*see supra at 53-57; Karrer/Desax at 340; Redfern/Hunter at 7-30*). It is thus justified for the Tribunal to grant RESPONDENT a procedural order for security for its costs (*Sandrock at 24*). It is quite possible given the present factual situation that CLAIMANT could frustrate the Tribunal's award not deliberately but as a result of their increasingly inaccessible funds or by way of the practice of the Equatorianian courts.

64. The equal treatment of parties, as required by Art. 18 UNCITRAL ML, is another core policy of arbitration (*Holtzmann/Neuhaus at 550; C.B. at 73*). Article 18 is a mandatory provision from which the Tribunal cannot derogate (*see supra at 47*). An order of security in this arbitration will ensure equal treatment of the parties. Article 18 is not intended to protect a party from its own failures or strategic choices (*CLOUT Case No. 391*). CLAIMANT agreed to arbitration under the SIAC Rules and was aware of SIAC Rule 27.3 when it chose to bring the claim against RESPONDENT. It cannot now use the force of Article 18 to escape a justified request for security. CLAIMANT would not have cast the burden of a claim on RESPONDENT if it were not thought that RESPONDENT had sufficient funds to pay an award. RESPONDENT, on the other hand, no longer has such assurance (*see supra at 53-58, 61-62*). Therefore, to guarantee equal treatment, RESPONDENT is entitled to an order of security.

II. Because CLAIMANT fails to carry its legal burden, the order for security for costs should be made.

65. CLAIMANT has the burden of showing that an order for security of costs would in effect deny them the right of access to arbitration for reasons not attributable to them and that the making of such an order would be highly unfair to CLAIMANT (*see supra at 52; ICC No. 10032, 9 November 1999*). CLAIMANT has failed to carry this burden.

66. As to the question of financial burden (*C.B. at 72, 74, 92*), CLAIMANT has had ample time to prepare themselves financially for the costs of arbitration. RESPONDENT's request for \$20,000 in security (*Letter of Fasttrack of 1 September 2003*) is reasonable considering this amount is only a portion of the actual costs in defending itself against this claim. It has previously been established that security for costs equivalent to US\$21,078 may be reasonable against a party even when that party is in bankruptcy proceedings (*ZCC Award No. 415, 20 November 2001*). CLAIMANT, having agreed to the SIAC Rules, was given notice of the financial risks of the arbitration (*Sandrock at 25*). CLAIMANT has also had one year to prepare for these costs since it filed its Notice of Arbitration (*Letter of Langweiler of 10 February 2003*). While CLAIMANT would be burdened by an order for security, this burden would neither be unfair nor unexpected.

67. CLAIMANT is concerned about the embarrassment of an order of security (*C.B. at 72*). While it is public knowledge that CLAIMANT has financial difficulty (*see supra at 53*), an order for security for costs need not further embarrass CLAIMANT. CLAIMANT would not be required to pay security for costs by bank guarantee. SIAC Rule 27.3 allows for more confidential means of payment and RESPONDENT has already agreed to payment by cash to be placed in escrow with the Tribunal (*Letter of Langweiler of 1 September 2003*).

68. Finally, CLAIMANT's alleges abuse of the arbitral process by RESPONDENT (*C.B. at 91, 93, 94*). RESPONDENT is using neither the security for costs nor the request for confidentiality as an offensive weapon. RESPONDENT's request for security is reasonable (*see supra at 66*) and its request for confidentiality justified (*see infra at 82-84*). CLAIMANT bases their allegation of abuse solely on the fact that RESPONDENT was late in payment of the registration fee to SIAC (*C.B. at*

93). Under SIAC Rule 34.1, CLAIMANT has waived the right to object to this late payment. Furthermore, CLAIMANT omits two key points. First, CLAIMANT was also late with payment of the registration fee (*Letter of Langweiler of 5 March 2003*). Second, all correspondence from SIAC to RESPONDENT was addressed to both “Managing Director” and “General Counsel” (*Letters of SIAC of 24 February, 6 March, 13 March, 20 March 2003*). This confusion as to recipient understandably delayed both payment and retention of counsel.

69. As CLAIMANT has failed to show that an order for security for costs would deny them the right of access to arbitration due to no fault of their own and that such an order would be highly unfair, RESPONDENT’s request for security for costs in the amount of US \$20,000 should be granted.

§ 6

CLAIMANT is prohibited from disclosing information to Equatoriana Investors

70. CLAIMANT has a duty of confidentiality under SIAC Rule 34.6. The Tribunal may order CLAIMANT to respect this duty under SIAC Rule 25(j). RESPONDENT bases its request for an order of confidentiality on its interest in preventing the significant financial harm that will befall it if CLAIMANT is permitted to violate its duty and disclose confidential information to Equatoriana Investors.

A. CLAIMANT has no duty to disclose under Equatorianian law therefore Rule 34.6(d) forbids CLAIMANT from doing so.

71. CLAIMANT alleges that it is bound by the law of Equatoriana to disclose information regarding the arbitration and thus disclosure is in accordance with SIAC Rule 34.6(d) (*C.B. at 95 et seq.*). SIAC Rule 34.6(d) provides that all matters related to the proceedings, including the existence of the proceedings, shall be treated as confidential at all times except when the other party consents or a party must comply with a provision of the law of any State which is binding on the party making the disclosure. CLAIMANT accurately states the legal situation in Equatoriana (*Letter of*

Langweiler of 24 September 2003; P.O. No. 3 at 38). However, this legal situation does not fall within the allowance for disclosure provided by SIAC Rule 34.6(d).

72. Limitations on confidentiality may be imposed to provide for disclosure in statutorily defined cases or on an order from a competent authority (*Smit, Confidentiality at 234; Confidentiality in Arbitration at 339*). SIAC Rule 34.6(d) embodies the acknowledgement of this principle. In this case, however, the duty alleged by CLAIMANT is founded neither on a statutory provision nor an order from a competent authority but rather on distinguishable, and thus non-binding, court decisions (*P.O. No. 3 at 38*).

73. CLAIMANT bases its duty to disclose on the premise that Equatoriana has a common law system (*C.B. at 97*). In a common law system, the doctrine of precedent holds that in some way a judge is bound by a higher court's previous decisions (*Cross at 5*). However, for the doctrine of precedent to bind a later court, the case before the court must not be distinguishable from the earlier case by having materially different facts so as to fall within different areas of law (*Cross at 42-43*). The present situation would not be bound by the doctrine of precedent as, due its basis in arbitration, an element not present in the prior decisions of the Equatorianian Supreme Court, it is materially different from those decisions (*P.O. No. 3 at 38*). Furthermore, CLAIMANT's reliance on precedent is further invalidated by the law it cites, in which "each case must be considered individually as to whether the matters in question 'materially affect' the financial or business situation of the firm to be purchased" (*P.O. No. 3 at 38*). This militates for distinguishing the present case as this requirement recognizes the fundamental factual differences that exist from case to case. Therefore since the decisions handed down by the Equatorianian Supreme Court are not binding upon CLAIMANT as required by SIAC Rule 34.6(d), they cannot be said to require disclosure in this arbitration.

74. Absent a statutory provision requiring disclosure of CLAIMANT, there is no law with which CLAIMANT must comply. As being "in compliance" is a material requirement of SIAC Rule 34.6(d), CLAIMANT cannot justify disclosure under that rule. Nor may CLAIMANT disclose under either the letter or spirit of any other Rule 34.6 exception (*C.B. at 100-104; P.O. No. 3 at 38*).

CLAIMANT's attempt to justify its disclosure by way of "customary obligation" under 34.6(e) (*C.B. at 101-102*) should thus be disregarded. The Tribunal should recognize that CLAIMANT is not compelled by a duty to disclose either under Equatorianian statutory law or common law and thus Rule 34.6(d) does not permit CLAIMANT's desired disclosure.

B. Additionally, the binding duty of confidentiality in Rule 34.6 is in accordance with the principles of international commercial arbitration.

75. CLAIMANT argues that it is not bound by any duty to confidentiality (*C.B. at 107-115*). However, confidentiality has long been recognized as a fundamental characteristic of international commercial arbitration (*Redfern/Hunter at 1-43; Brown at 973*) and the extent of confidentiality will depend on the applicable rules (*Lew at 22*). In the present arbitration, SIAC Rule 34.6 is the applicable rule (*see supra at 46*). The obligation of confidentiality provided for in SIAC Rule 34.6 accords with the principles of international commercial arbitration.

76. Those cases from which CLAIMANT seeks to draw support (*C.B. at 108-115*) and others all either recognize: 1) an obligation of confidentiality where there are institutional rules on point (*Bulgarian Foreign Trade Bank v. A.I. Trade Finance Inc., Sweden; Esso v. Plowman, Australia; US v. Panhandle Eastern, USA, City of Moscow v. Bankers Trust Co., England*), or 2) an implied confidentiality attached to arbitration agreements as matter of law (*Ali Shipping Corp. v. Shipyard 'Trogir', England; Hassneh Insurance Co. v. Mew, England; Dolling-Baker v. Merrett, Canada*). Courts, however, find there to be narrow exceptions to the obligation of confidentiality such as consent of the other party, a statutory duty to disclose, or when enforcing an award before a judicial authority (*Redfern/Hunter at 1-43*). The principles recognized in these cases are reflected in SIAC Rule 34.6 and in Article 30.1 of the LCIA Rules, upon which the SIAC Rules are, in part, based (*Introduction to the SIAC Rules*).

77. CLAIMANT is the party attempting disclosure and the burden of proof necessary to overcome any institutional rule binding it to confidentiality is on CLAIMANT. CLAIMANT fails to carry this burden, as it shows neither consent by RESPONDENT nor a statutory duty with which it must comply (*see supra at 71-76*). The Tribunal should find that CLAIMANT is bound to an

obligation of confidentiality under SIAC Rule 34.6 and this obligation accords with international commercial arbitration.

§ 7

The Tribunal has the power to order confidentiality and should do so

A. The Tribunal has the power to order confidentiality under SIAC Rule 25(j).

78. Contrary to CLAIMANT's assertion (*C.B. at 121*), an order of confidentiality falls within the scope of an interim measure (*Brown at 1023; Lew at 31; Wagoner at 69; Holtzmann/Neuhaus at 531*) and would not fail to be provisional (*see infra at 80*). If the Tribunal were to decide that an order of confidentiality is not an interim measure, the applicable rules are then silent on the issue. However the parties would not, as CLAIMANT argues, be forced to go to a Danubian court (*C.B. at 126*). By virtue of the parties' choice of the SIAC Rules under UNCITRAL ML Art. 19(1) (*see supra at 46*), the arbitrators have the power to gap-fill and determine the procedure to ensure adherence to SIAC Rule 34.6 (*Holtzmann/Neuhaus at 565*).

79. Under SIAC Rule 25, and by CLAIMANT's own admission, the Tribunal has the power to issue procedural orders (*C.B. at 120*). Within that power to issue procedural orders, SIAC Rule 25(j) expressly authorizes the tribunal to "make orders or give directions to any party for an interim injunction or any other interim measure." The issuance of an interim measure as a procedural order, differing from an interim award due to the latter's binding nature, also finds support in other institutional rules (*ICC Rules Art.23(1); UNCITRAL Rules Art.26; LCIA Art. 25.1; see Weigand for commentary on the above rules*).

80. An order of confidentiality would not, as CLAIMANT argues, be effectively final (*C.B. at 122*). Despite CLAIMANT's assertion that "the due diligence investigation will most likely be finished before the arbitration proceedings are concluded" (*C.B. at 122*), the record as cited by CLAIMANT only discusses the timing of the purchase in relation to the final award (*Letter of Langweiler of 9 September 2003*). In any event, and as CLAIMANT itself recognizes (*C.B. at 146*), the Tribunal may rescind the order at any time. Any such order would not be an award under Art.

31 of the ML (*Berger at 8-27*) and since it is not binding on the merits, it may also be questioned even after the final award has been made (*Redfern/Hunter, 8-07*).

81. While CLAIMANT maintains that an order of confidentiality by the Tribunal must be associated with the subject-matter of the dispute (*C.B. at 123*), this would only if the order is made as an interim award (*Redfern-Hunter at 7-33*) or if it is made under UNCITRAL ML Article 17 (*Holtzmann/Neuhaus at 532*). The interim measure of confidentiality would not be an award, but a procedural order (*see supra at 79*) and ML Art. 17, governing interim measures, is non-mandatory and thus does not apply to this arbitration (*see supra at 47*). Even if the Tribunal was to decide that, contrary to the parties' intentions, ML Art. 17 applies to this arbitration, the Tribunal still has the power to order confidentiality. ML Article 17 requires that an interim measure must be "in respect of the subject-matter of the dispute." The UNCITRAL Working Group on Arbitration has recommended the deletion of this phrase after the Secretariat noted this phrase is "generally not understood as restricting the power of the tribunal to order any type of interim measure it deems appropriate" (*Secretariat Note at 41; Fry at 157*). Even if the Tribunal were to find the commentary from the Secretariat irrelevant, an order of confidentiality in this case would be associated with the subject-matter of the dispute. CLAIMANT intends to disclose to Equatoriana Investors the details of the arbitration (*Letter of Fasttrack of 17 September 2003*). Any details of the arbitration necessarily entail matters that are "in respect of the subject-matter of the dispute." Therefore, Art. 17, while not applicable, would not stand as a limitation on the power of the Tribunal to order the interim measure of confidentiality.

B. Only an order of confidentiality will prevent significant harm to RESPONDENT.

82. Any disclosure of information in relation to this arbitral proceeding would have significant harm to RESPONDENT. In this arbitration there are claims of lack of good faith, poor quality of goods and misrepresentation (*C.B. at 4, et seq.*). Confidentiality is meant to protect such claims from becoming public (*Redfern/Hunter at 1-43*) and CLAIMANT intends to disclose both the existence of the arbitration and the details of the arbitration (*Letter of Fasttrack of 17 September 2003*). In such an event, the final award, even if in RESPONDENT's favor, will have no impact in the court of public opinion. Once the reputation of RESPONDENT is initially tarnished, its reputation and

subsequently its business opportunities will be irrevocably damaged.

83. Equatoriana Investors is one of the largest financial firms in Equatoriana (*Letter of Langweiler of 9 September 2003*). As such, it is likely that RESPONDENT's business prospects in Equatoriana would suffer even if Equatoriana Investors had a duty to keep the information given to it by CLAIMANT confidential. This, however, is not the case. Whatever information is given to Equatoriana Investors will be able to be disclosed by them to others. Even if Equatoriana Investors has a duty of non-disclosure to CLAIMANT (*C.B. at 131*), it would have no such duty to RESPONDENT (*P.O. No. 3 at 39; Paulsson/Rawding at B3*). Nor could the Tribunal extend its order of confidentiality to Equatoriana Investors as a third-party (*Redfern/Hunter at 7-33; Weigand/Bühler/Jarvin at Art.23, 24*). Thus, any information given by CLAIMANT to Equatoriana Investors would effectively be in the public domain.

84. On the other hand, the Tribunal would not inflict any new harm on CLAIMANT by ordering it to abide by SIAC Rule 34.6. CLAIMANT argues an order would force it to break Equatorianian law (*C.B. at 129*). This is not the case since they have no duty to disclose (*see supra at 71-74*). While CLAIMANT holds that an order of confidentiality endangers the purchase of CLAIMANT (*C.B. at 130*), the Tribunal cannot be held responsible for this even if it were true. CLAIMANT voluntarily agreed to arbitration under the SIAC Rules (*see supra at 46*) and it cannot fault the Tribunal for fairly enforcing those rules. Furthermore, neither CLAIMANT's poor reputation nor its financial difficulties have been proven to be attributable to RESPONDENT (*see supra at 57*). The Tribunal should not let CLAIMANT blame the Tribunal or RESPONDENT for the consequences of its own actions and should thus order confidentiality.

§ 8

If CLAIMANT violates an order of confidentiality it will be subject to consequences

A. If CLAIMANT were to violate the order of confidentiality, the Tribunal could treat the violation as a breach of contract and act accordingly.

85. Arbitration agreements have a contractual nature by virtue of the agreement of the parties

(*Lew/Mistelis/Kröll at 6-2*). By agreement to the SIAC Rules, the parties have a legally enforceable duty of confidentiality in this arbitration (*see supra at 76*). Therefore, non-compliance with an order from the Tribunal could lead to an action for breach of the parties' arbitration agreement (*Redfern at 81; Baldwin at 458; Brown at 1023*) including avoidance of the arbitration agreement or an award of damages (*Smit, Breach at 581*).

86. The Tribunal has the power to declare an arbitration agreement avoided under SIAC Rule 17.2, which grants the Tribunal wide discretion to ensure the just and final determination of the dispute. While the publication of an award might not, by itself, be a breach of a confidentiality obligation (*Bulgarian Foreign Trade Bank v. A.I. Trade Finance Inc., Sweden*), a breach of confidentiality that does substantial harm to the party supporting confidentiality would warrant avoidance of the arbitration agreement (*Smit, Breach at 582*). Upon such avoidance, CLAIMANT would be barred from bringing any subsequent claims in domestic courts under the doctrine of res judicata (*Redfern/Hunter at 8-66*). CLAIMANT's breach, having brought about the avoidance would, as a matter of public policy, bar him from his shot at a second chance. A breach of confidentiality as proposed by CLAIMANT would cause RESPONDENT harm amounting to a level warranting avoidance (*see supra at 82-84*) and the Tribunal should not hesitate in such an eventuality to exercise their power to avoid the agreement.

87. While violation of an order of confidentiality would injure RESPONDENT's reputation as well as its stream of income, such injury is calculable and would be compensable by monetary damages (*Brown at 1016*). Since any disclosure by CLAIMANT, regardless of its substance, would be improper and damage RESPONDENT's interest in maintaining confidentiality, imposition of damages would be proper (*Smit, Breach at 582*).

B. Alternatively, the Tribunal could draw any negative inferences as it sees fit.

88. The Tribunal is entitled to draw adverse conclusions from a party's non-compliance in its decision on costs (*Berger-UTCA at 29; Lew/Mistelis/Kröll at 23-83; Wagoner at 69*). CLAIMANT argues that despite the weight of authority, the Tribunal may not draw negative inferences (*C.B. at 138*). It is sufficient that CLAIMANT, by violating an order of confidentiality, would exhibit bad

faith and the need to refer the matter back to the Tribunal would delay the proceedings. Such a delaying action would by CLAIMANT's own admission, be indicative of CLAIMANT's attitude and reflect in the allocation of costs by the Tribunal (*Lew/Mistelis/Kröll at 24-82; C.B. at 139*).

Conclusion

We hereby respectfully make the above submissions on behalf of our client, Medi-Machines, S.A. For the reasons stated in this Memorandum, we request the Arbitral Tribunal hold that:

- The CISG governs the contract between CLAIMANT and RESPONDENT [§ 1].
- RESPONDENT did not breach the contract [§ 2].
- CLAIMANT unlawfully avoided the contract [§ 3].
- The applicability of the UNCITRAL ML is limited to its mandatory provisions [§ 4].
- An order for security for costs must be granted to ensure equal treatment of the parties [§ 5].
- CLAIMANT is prohibited from disclosing information to Equatoriana Investors [§ 6].
- The Tribunal has the power to order confidentiality and should do so [§ 7].
- If CLAIMANT violates an order of confidentiality it will be subject to consequences [§ 8].

Kerry Sheehan

James Stockstill

Pittsburgh, 6 February 2004