THIRTEENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

7 – 13 APRIL 2006

MEMORANDUM FOR RESPONDENT

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

ON BEHALF OF:	**AGAINST:**
McHinery Equipment Suppliers, Pty.	Oceania Printers, S.A.
The Tramshed, Breakers Lane	Tea Trader House, Old Times Square
Westeria City, 1423	Magreton, 00178
Mediterraneo.	Oceania.
RESPONDENT	**CLAIMANT**

COUNSELS:

Lukas Elias Assmann · Peer Borries · Tobias Hoppe

Sabine Friederike von Oelffen · Charlotte Schaber · Caroline Siebenbrock gen. Hemker

Stefanie Caroline Vogt · Lena Walther · Anne-Christine Wieler · Natalie Verena Zag

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LIST OF ABBREVIATIONS

$	Dollar(s)
§(§)	Section(s)
%	Per cent
AAA-AR	Arbitration Rules of the American Arbitration Association
Alt.	Alternative
AR	Arbitration Rules
Arb. Int.	Arbitration International (International Periodical)
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
BGB	Bürgerliches Gesetzbuch (German Civil Code), 1 January 1900
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the German Federal Supreme Court in civil matters)
CA	Cour d'appel (French Court of Appeal)
CIDRA (-AR)	(Arbitration Rules of the) Chicago International Dispute Resolution Association
CIF	Cost, Insurance and Freight (INCOTERM 2000)
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980

Cl. Exh. No.	CLAIMANT's Exhibit Number
Cl. Memorandum	CLAIMANT's Memorandum
Clunet	Journal du Droit International (French Periodical)
Co.	Company
DAF	Delivered At Frontier (INCOTERM 2000)
DCF	Discounted Cash Flow
DDP	Delivered Duty Paid (INCOTERM 2000)
DDU	Delivered Duty Unpaid (INCOTERM 2000)
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)
Ed(s).	Editor(s)
ed.	Edition
e.g.	exempli gratia (for example)
et al.	et alii (and others)
et seq.	et sequentes (and following)
fn.	Footnote
GmbH	Gesellschaft mit beschränkter Haftung (German Limited Liability Company)
Hague Convention	Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, The Hague, 22 December 1986

HG	Handelsgericht (Swiss Commercial Court)
i.e.	id est (that means)
ibid.	ibidem (the same)
ICC (-AR)	(Arbitration Rules of the) International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporation
INCOTERMS	International Commercial Terms
Inter-American Convention	Inter-American Convention on the Law Applicable to International Contracts, Mexico, 17 March 1994
IPR	Internationales Privatrecht (Private International Law)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (German Periodical)
JIA	Journal of International Arbitration (International Periodical)
LCIA (-AR)	(Arbitration Rules of the) London Court of International Arbitration
LG	Landgericht (German District Court)
lit.	litera (subsection)
Ltd.	Limited Company

MED-Law	Law of Obligations of Mediterraneo
MED-PIL	Private International Law Act of Mediterraneo
Mr.	Mister
NJW	Neue Juristische Wochenschrift (German Periodical)
NJW-RR	Neue Juristische Wochenschrift-Rechtsprechungs Report-Zivilrecht (German Periodical)
No.	Number
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
OC-Law	Law of Obligations of Oceania
OC-PIL	Conflicts of Law in the International Sale of Goods Act of Oceania
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeal)
p(p).	Page(s)
PECL	Principles of European Contract Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (German Periodical)
Re. Exh. No.	RESPONDENT's Exhibit Number
Rev. Arb.	Revue de l'Arbitrage (French Periodical)

Rome Convention	Convention on the Law Applicable to Contractual Obligations, Rome, 1980
S.A.	Société Anonyme (French Corporation)/ Sociedad Anónyma (Spanish Corporation)
s.r.l.	Società a Responsabilità Limitata (Italian Limited Liability Company)
SRIA	Swiss Rules of International Arbitration
TC	Tribunal Cantonal (Swiss District Court)
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UN-Limitation Convention	United Nations Convention on the Limitation Period in the International Sale of Goods, New York, 14 June 1974
US	United States of America
USSR	Union of Soviet Socialist Republics
v.	versus
WIPO (-AR)	(Arbitration Rules of the) World Intellectual Property Association
WL	Westlaw
YCA	Yearbook of Commercial Arbitration

STATEMENT OF FACTS

- **17 April 2002:** Oceania Printers S.A., a company organised under the laws of Oceania [hereinafter CLAIMANT], inquired into the possibility of purchasing a flexoprinter machine. It emphasised its urgent need for a versatile flexoprinter at RESPONDENT's best price.
- **25 April 2002:** McHinery Equipment Suppliers Pty., a company organised under the laws of Mediterraneo [hereinafter RESPONDENT], offered a second hand "7 stand Magiprint Flexometix Mark 8" and invited CLAIMANT to inspect the machine at the works of the former owner in Athens, Greece.
- **5/6 May 2002:** The parties met in Athens. CLAIMANT was given the opportunity to inspect the machine, but it merely inquired whether it had worked to the satisfaction of the previous owner.
- **10 May 2002:** CLAIMANT confirmed that the "machine looked to be just what [it] need[ed]" and informed RESPONDENT about its contract with Oceania Confectionaries.
- **16 May 2002:** In order to grant CLAIMANT's request for urgent delivery, RESPONDENT offered to despatch the machine directly from Greece to Oceania.
- **21 May 2002:** CLAIMANT ordered the machine "as discussed".
- **27 May 2002:** RESPONDENT sent the contract to CLAIMANT. In its letter it explicitly referred to the enclosure of the maker's manual containing the specifications of the machine.
- **30 May 2002:** CLAIMANT signed the contract document containing the exact name of the machine, an arbitration agreement and a choice of law clause in favour of the CISG.
- **8 July 2002:** Installation, refurbishment and test runs of the machine were completed. CLAIMANT requested technical support from RESPONDENT's working crew. RESPONDENT immediately came to CLAIMANT's assistance.
- **1 August 2002:** CLAIMANT informed RESPONDENT that Oceania Confectionaries was threatening to cancel the contract. Although RESPONDENT's personnel had been "working diligently", the machine continued to crease the foil and tear it.
- **15 August 2002:** CLAIMANT informed RESPONDENT about the cancellation of the contract with Oceania Confectionaries and requested damages.
- **10 September 2002 – 14 October 2004:** RESPONDENT rejected various attempts by CLAIMANT to recover damages.
- **27 June 2005:** CLAIMANT submitted its claim by mail to CIDRA and to RESPONDENT.

ARGUMENT

I. THE LIMITATION PERIOD HAS EXPIRED PRIOR TO THE COMMENCEMENT OF THE ARBITRATION

1 In response to Procedural Order No. 1 § 14, Question 1, RESPONDENT submits that – contrary to CLAIMANT's allegations *(Cl. Memorandum §§ 68 et seq.)* – the period of limitation has expired prior to the commencement of the arbitration. The action brought by CLAIMANT arises out of the contract concluded between the parties on 30 May 2002 [hereinafter Sales Contract], providing for the delivery of "one second-hand 7 stand Magiprint Flexometix Mark 8 flexoprinter machine" *(Cl. Exh. No. 7)*. The limitation period commences when the event giving rise to the claim occurs *(Procedural Order No. 2 § 5)*, and ceases to expire with the beginning of the arbitral proceedings *(SCHROETER p. 109)*. Presently, the limitation period began to run by 8 July 2002 – when the alleged lack of conformity of the machine was discovered *(Re. Exh. No. 2)* – and ceased to expire with the receipt of CLAIMANT's Statement of Claim by CIDRA on 5 July 2005 *(Mr. Baugher's letter 7 July 2005)* pursuant to Article 3 (2) CIDRA-AR.

2 In repudiation of CLAIMANT's assertions *(Cl. Memorandum §§ 68 et seq.)*, RESPONDENT submits that the claim has become time-barred. Although the parties subjected their contract to the CISG *(Cl. Exh. No. 7 § 5)*, this Convention contains an external gap with regard to limitation *(BOELE-WOELKI § 2.2; KRITZER p. 24; OGH 24 October 1995 (Austria); OLG Hamburg 5 October 1998 (Germany))*. Therefore, should the Tribunal follow the substantive classification of limitation undertaken by the countries involved in the present dispute – Oceania, Mediterraneo and Danubia *(Procedural Order No. 2 § 4)* – the law applicable to limitation must be determined according to Article 32 CIDRA-AR. This provision does not lead to the four-year limitation period of the UN-Limitation Convention **(A.)**, but to the two-year period provided by the MED-Law **(B.)**. Even if limitation is classified as procedural, a two-year limitation period remains applicable **(C.)**.

A. The Four-Year Limitation Period of the UN-Limitation Convention Is Not Applicable

3 Countering CLAIMANT's contention *(Cl. Memorandum § 93)*, neither the UN-Limitation Convention, nor its four-year prescription period (Article 8 UN-Limitation Convention) are applicable to the present dispute. The Convention does not apply automatically pursuant to its Article 3 (1), as it has not been ratified by the involved countries *(Procedural Order No. 2 § 1)*. It can only be applied by express or implied party consent according to

Article 32 (1) 1st Alt. CIDRA-AR. The agreement between the parties neither contains an explicit reference to the UN-Limitation Convention, nor an implied choice.

4 An implied designation of law requires a rather unambiguous choice by the parties *(PELLONPÄÄ/CARON p. 82)* appearing clearly from the contract itself, as well as from its surrounding circumstances *(LANDO RABELSZ p. 65)*. The lack of the parties' will to designate the UN-Limitation Convention already results from the absence of an express reference in the contract, as the parties clearly intended to prevent legal uncertainty. They designated arbitration rules, an arbitral forum and the CISG to govern the substance of potential disputes *(Cl. Exh. No. 7 §§ 12, 13)*. Particularly the express choice of the CISG – which would have been applicable even without the parties' designation *(Statement of Claim § 14)* – demonstrates their intent to effectuate clear choices of law by inclusion in the contractual document. Had the parties intended to apply the UN-Limitation Convention, they would certainly have designated it in an express manner. There is a "certain artificiality involved" when a substantive law is found to have been selected through a tacit choice of the parties *(REDFERN/HUNTER § 2-76)*. This is especially apparent when the parties have given little or no thought to the question of the law applicable *(ibid.)*. By applying a law which the parties have ignored, excess of arbitral authority can be established *(CARBONNEAU p. 33)* and the award is likely to be set aside *(KLEIN p. 198; MANN p. 171)*.

5 Furthermore, the application of the UN-Limitation Convention cannot be inferred from the parties' designation of the CISG – as asserted by CLAIMANT *(Cl. Memorandum § 93)* – since the Conventions lack the alleged close affiliation. They were drafted in different places and different years – the UN-Limitation Convention in New York in 1974 *(Introductory Note to the UN-Limitation Convention § 1)* and the CISG in Vienna in 1980 *(GIRSBERGER p. 157)*. Moreover, the number of their members varies considerably – the CISG having been ratified by 66 *(http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)*, the UN-Limitation Convention merely by 19 countries (*http://www.uncitral.org/uncitral/en/uncitral_texts/ sale_goods/ 1974Convention_status.html)* – indicating that the provisions of the former were easier to agree on than those of the latter *(SONO § 2 A)*. Above all, the drafters' restraint from unifying the Conventions when the UN-Limitation Convention was amended in 1980 clearly demonstrates their intent to maintain the CISG as a separate and independent convention. Thus, the parties' choice of the CISG does not constitute an implied designation of the UN-Limitation Convention.

6 CLAIMANT's allegation that the UN-Limitation Convention's prescription period of four years is representative of an international consensus *(Cl. Memorandum §§ 93 et seq.)* cannot be upheld. This period exceeds the length of prescription under many national laws and is

particularly disliked by exporters in Western Europe *(BONELL p. 18; DIEDRICH p. 362 fn. 83)*. In fact, during the drafting process of the UN-Limitation Convention there were numerous proposals to adopt a two-year period for claims arising out of "open defects" of goods *(SCHLECHTRIEM UNIDROIT PRINCIPLES p. 2)*. Furthermore, among the 19 states having ratified the UN-Limitation Convention *(see § 5 above)*, the United States is the only major exporting country *(http://www.mapsofworld.com/world-top-ten/world-top-ten-exporting-countries-map.html)*. In light of these circumstances, the parties cannot be found to have impliedly designated the UN-Limitation Convention according to Article 32 (1) 1st Alt. CIDRA-AR.

7 Finally, RESPONDENT rejects CLAIMANT's assertion that the UN-Limitation Convention should be applied on the basis of a presumed intent of the parties *(Cl. Memorandum § 95)*, as a hypothetical will is not relevant for the determination of the applicable law under Article 32 (1) CIDRA-AR. This provision expressly provides that where parties have failed to designate an applicable substantive law, the Tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Thereby, regard cannot be paid to a presumed intent of the parties *(DICEY&MORRIS Rule 174 § 32-107; LANDO ARB. INT. p. 113)*, as this would result in great legal uncertainty *(LANDO ARB. INT. p. 108; LANDO ZWEIGERT p. 162)* and contradict the purpose of Article 32 (1) Alt. CIDRA-AR. Therefore, the UN-Limitation Convention is neither applicable due to a choice of law by the parties, nor due to an alleged hypothetical intent.

B. The Claim Is Time-Barred Pursuant to the Applicable Two-Year Limitation Period

8 Under Article 32 (1) 2nd Alt. CIDRA-AR, the two-year limitation period provided by the MED-Law applies directly **(1.)**, by way of the MED-PIL **(2.)**, the OC-PIL **(3.)**, and the cumulative approach **(4.)**. It is also reasonable in light of international standards **(5.)**.

1. The MED-Law Is Directly Applicable

9 In accordance with CLAIMANT's allegations *(Cl. Memorandum §§ 76 et seq.)*, the Tribunal is entitled to apply a substantive law directly, regardless of the wording contained in Article 32 (1) CIDRA-AR **(a)**. Direct application leads to the two-year limitation period provided by the MED-Law (Article 87 MED-Law) through the closest connection principle **(b)** as well as the principle of *lex loci contractus* **(c)**. The Law of Danubia cannot be applied directly **(d)**.

(a) The Direct Application of Substantive Law Is Widely Accepted

10 The direct application of substantive law has become "widely accepted" in international arbitration *(DERAINS/SCHWARTZ p. 221; KAISER p. 150; LALIVE p. 181; MANIRUZZAMAN ARB. INT. p. 393; WORTMANN p. 98)*, as it allows an accelerated and cost-effective procedure *(LEW p. 371; LIONNET/LIONNET p. 78; WEIGAND p. 9)*. Tribunals have frequently applied substantive law directly, regardless of provisions identical to Article 32 (1) CIDRA-AR *(BAKER/DAVIS p. 266; ICC 3880; ICC 4132; ICC 4381; ICC 5835; ICC 7375; ICC 8261; ICC 8502; Anaconda-Iran v. Iran; Amoco International v. Iran)*. Furthermore, the rules of most major arbitral institutions avoid references to conflict of law rules altogether *(BLESSING p. 54)*, such as the SRIA (Article 33 (1)) – "a new and modern product" in arbitral practice *(PETER p. 15)* –, the AAA-AR (Article 29 (1)), the LCIA-AR (Article 23 (a)), and the WIPO-AR (Article 59). Direct application was also introduced in Article 17 (1) of the modernised version of the ICC-AR in force since 1 January 1998 due to the increasing tendency of arbitrators to resort to this method *(ADEN p. 263; SCHWAB/WALTER p. 541; UNCTAD ARBITRATION AGREEMENT p. 54)*. The direct application of substantive law is thus widely accepted, even where provisions expressly provide for the application of conflict of laws rules. Consequently, the direct application of substantive law is also *intra legem* with Article 32 (1) CIDRA-AR.

(b) The Closest Connection Principle Leads to the Application of the MED-Law

11 As contended by CLAIMANT *(Cl. Memorandum § 79)* and undisputed by RESPONDENT, applying the substantive law with the closest connection to the contract is an established approach in international practice. However, contrary to CLAIMANT's allegation *(Cl. Memorandum § 92)*, RESPONDENT submits that this principle leads to the application of the MED-Law.

12 It is generally accepted that the characteristic performance in a contract of sales is that of the seller *(LANDO ŠARČEVIĆ p. 143; MATIĆ p. 63)*, and that the contract is thus most closely connected to the seller's country *(BLESSING CONGRESS SERIES p. 414)*. This view is also supported by case law *(OLG Karlsruhe 10 December 2003 (Germany); ICC 953; ICC 5713; ICC 5885)*. RESPONDENT points out that even Article 4 (2) Rome Convention, falsely relied on by CLAIMANT *(Cl. Memorandum § 79),* explicitly sets forth that the law of the seller is most closely connected to the contract (*CA Colmar 20 October 1998 (France); Unitras-Marcotec GmbH v. R.A. Mobili s.r.l. (Italy))*. Additionally, CLAIMANT relies on Article 9 (2) of the Inter-American Convention *(Cl. Memorandum § 79)* which states that the contract is to be governed by the law of the state which has "the closest ties" to the contract. However, this does not exclude the application of the law of the seller. Especially "in a sale of movables, it is the country of the

seller which provides the law applicable to the contract" *(LANDO RABELSZ p. 67)* as "the seller has to calculate, prepare and perform most of his varied and more complicated obligations in his own country" *(LANDO RABELSZ p. 73; ZHANG p. 141)*. Faced with this multitude of obligations, the seller is more likely to be sued for alleged breaches of contract than the buyer. Consequently, the interest to deal with its own law is stronger on behalf of the seller than on behalf of the buyer, contrary to CLAIMANT's allegation *(Cl. Memorandum § 91)*.

13 The application of the seller's law is justified in light of the circumstances of the present case, as RESPONDENT performed all characteristic obligations of the contract. It not only drafted the contract *(Cl. Exh. No. 6 § 2)* and organised the transportation of the machine to Oceania *(ibid. § 4)*, but further dismantled, shipped, refurbished and installed the machine *(Cl. Exh. No. 7 § 3; Statement of Claim § 9)*. Contrarily, CLAIMANT's sole contribution to the contract was to pay the price *(Cl. Exh. No. 6 § 3)*. This duty is common to all buyers of goods and thus cannot be considered as "characteristic" *(BLESSING CONGRESS SERIES p. 408; MATIĆ p. 64; ICC 4237)*.

14 In contrast to CLAIMANT's allegations, none of the factors relied on with reference to ICC 6840 *(Cl. Memorandum § 90)*, point to the law of Oceania. The arbitrators based their decision on the place of payment and contract conclusion, which, in the present case, are both located in Mediterraneo *(Cl. Exh. No. 7 § 3; see § 16 below)*. Additionally, not even the connecting factors of the place of delivery or contractual negotiations point to CLAIMANT's country *(see §§ 25-28 below)*. Consequently, in application of the reasoning of the cited case, the law of Oceania is inapplicable.

15 CLAIMANT further relies on ICC 7375 to establish the relevance of subjective factors when determining the closest connection, such as the bargaining position of the parties and the lack of a prior business history *(Cl. Memorandum § 88)*. However, this case is not comparable to the present one, as it involved a far more complex contractual relationship between the parties, in fact the conclusion of nine contracts over seven years. It was only this complexity which rendered the closest connection rule insufficient to designate the applicable substantive law. In order to come to a just decision, the tribunal therefore applied other subjective factors *(ICC 7375)*. Presently, however, – as shown above *(see § 12 above)* – the prevailing seller's law principle is sufficient to determine the applicable law. Consequently, the MED-Law is applicable pursuant to the principle of closest connection.

(c) The Principle of *Lex Loci Contractus* Leads to the Application of the MED-Law

16 The application of *lex loci contractus* – a modification of the closest connection principle – also leads to the application of the MED-Law. This principle gives preference to the law of the place where the contract was concluded, and is in conformity with constant theory and case law

(BLESSING CONGRESS SERIES p. 415; ICC 1404; USSR Maritime Arbitration Commission). Contrary to CLAIMANT's allegation, the contract was concluded in Mediterraneo *(Cl. Memorandum § 92)*. The place of contract conclusion must indirectly be determined according to the time at which the contract was concluded *(DELAUME p. 32)*. Pursuant to Article 23 CISG, a contract is concluded when the acceptance of an offer becomes effective, thus at the moment when it reaches the offeror (Article 18 (2) CISG). CLAIMANT's acceptance to RESPONDENT's offer reached RESPONDENT shortly after 30 May 2002 in Mediterraneo *(Statement of Claim § 8)*. The acceptance thus became effective in Mediterraneo, establishing it as the place of contract conclusion. Therefore, the *lex loci contractus* principle determines Mediterraneo as the country with the closest connection to the dispute and renders the MED-Law applicable.

(d) The Law of Danubia Is Not Directly Applicable

17 CLAIMANT might allege that the direct application of substantive law leads to the law of Danubia, where the Tribunal is located. However, the tribunal's seat is generally not considered a connecting factor to a contract *(CRAIG/PARK/PAULSSON p. 322; LALIVE p. 159; MANIRUZZAMAN JIA p. 151; ICC 1512)*, especially where the parties' selection is purely coincidental (*CROFF § I.B.2; PELLONPÄÄ/CARON p. 83; ICC 1422)*. The choice of Danubia as the arbitral forum *(Cl. Exh. No. 7 § 13)* was merely based on the consideration that it represents a neutral country. None of the parties or their businesses are connected to Danubia *(Statement of Claim §§ 1, 2)*, and the contract was neither signed, nor were any obligations arising out of it performed there. Consequently, the substantive law of Danubia lacks connection to the dispute and should not be applied.

2. The MED-PIL Is Applicable Pursuant to Article 32 (1) 2nd Alt. CIDRA-AR

18 Should the Tribunal prefer to determine the applicable substantive law by way of conflict of law rules pursuant to Article 32 (1) 2nd Alt. CIDRA-AR, RESPONDENT will show that the MED-PIL – leading to the two-year limitation period provided by Article 87 MED-Law – is applicable to the present dispute. The MED-PIL is applicable – contrary to CLAIMANT's allegations *(Cl. Memorandum § 75)* – as it provides a predictable result **(a.)** and ensures the enforceability of the Tribunal's eventual award **(b.)**.

(a) The Application of the MED-PIL Guarantees Legal Certainty

19 CLAIMANT correctly states *(Cl. Memorandum § 49)* that in choosing conflict of law rules, the aim of arbitration to guarantee legal certainty *(CROFF § I.B.1.)* through foreseeability must be reflected *(BERGER p. 499; DERAINS p. 189)*. "It is absolutely essential for the parties to know the

potential applicable law in advance" *(BERGER p. 499; LANDO ZWEIGERT p. 159; WORTMANN p. 100)*, especially where the subject matter is complex *(BLESSING CONGRESS SERIES p. 438)*, e.g. due to its interrelation with various countries (*KLEIN p. 203)*. Particularly in a sale of movables, the seller's country provides the law applicable to the contract, and thus the law with which both parties could and should have reckoned *(LANDO ARB. INT. p. 113; MATIĆ p. 64; STOLL p. 78)*.

20 Article 14 MED-PIL provides for the applicability of the seller's law *(Procedural Order No. 1 § 4)*, thereby complying with the internationally accepted seller's law principle *(see § 12 above)*. Hence, this unambiguous and well defined rule best serves the need for foreseeability. Contrarily, the method for determining the applicable law under the OC-PIL is vague and ambiguous, as the interpretation of its numerous exceptions can lead to controversial results *(ZHANG p. 177)*. Especially in international disputes, where differences between national laws can be considerable, parties desire certainty and predictability concerning their legal framework *(BORN p. 525)*. Consequently, the Tribunal should decide in favour of the MED-PIL as it guarantees a maximum amount of legal certainty, not provided by the OC-PIL. CLAIMANT cannot challenge this result by contending that the OC-PIL allegedly complies with international standards. The fact that it was directly adopted from the Hague Convention *(Answer § 7)* does not speak in favour of its application, as the Hague Convention was adopted by a mere four countries *(http://www.hcch.net/index_en.php?act=conventions.status&cid=61)* and can thus not be considered as an international standard.

(b) Applying the MED-PIL Ensures the Enforceability of an Eventual Award

21 To best ensure the enforceability of an eventual award, tribunals are requested to consider the conflict law of the country where the award is likely to be enforced *(CROFF § I.B.3; KLEIN p. 192; WORTMANN p. 109)*. As enforcement is often sought in the country where the defendant has its seat *(VON HOFFMANN p. 19; HULEATT-JAMES/GOULD p. 20)*, an eventual award rendered against RESPONDENT would most likely have to be enforced before a national court in Mediterraneo. The state court before which enforcement is sought would apply its own conflict law in order to verify whether the Tribunal has applied the correct substantive law. Therefore, by applying the MED-PIL, the Tribunal avoids designating a law different from that of the state court.

22 Additionally, applying the MED-PIL is in line with the generally accepted practice to apply the conflict law of the country of the ousted jurisdiction *(CROFF § I.B.1; KLEIN p. 191; VON HOFFMANN p. 130)*. The idea behind this principle is that "if the arbitration is to oust the jurisdiction of a national court, its validity and its effects can only be evaluated having regard to the law [which] that court would have applied had the dispute been submitted to it" *(KLEIN*

p. 191). Therefore, the Tribunal had to decide which national court would have had jurisdiction to hear the present dispute. In the present case, the Problem does not provide any information with regard to provisions on international jurisdiction. However, recourse has to be had to the general rule of *actor sequitur forum rei (GRIGERA NAÓN p. 59)*, the essence of which is that claims have to be brought before the national courts of the place where the defendant has its seat. Following this principle, the courts of Mediterraneo would have had jurisdiction to decide the present dispute. Thus, the MED-PIL should be applied.

3. The Application of the OC-PIL Leads to the MED-Law

23 Contrary to CLAIMANT's allegation *(Cl. Memorandum §§ 82 et seq.)*, even the application of the OC-PIL leads to the MED-Law. Article 8 OC-PIL, which was directly adopted from Article 8 Hague Convention *(Procedural Order No. 1 § 7)*, mainly and generally provides for the application of the seller's law pursuant its Article 8 (1) *(MATIĆ p. 64)*. It merely specifies four exceptional cases according to which the buyer's law is applicable under Articles 8 (2), (3) OC-PIL. The relevant exceptions contained in Article 8 (2) (b) OC-PIL **(a)** and Article 8 (3) OC-PIL **(b)** do not correspond to the present case. Consequently, the prevailing seller's law remains applicable, leading to the MED-Law and thereby to a two-year limitation period.

(a) The Exception of Article 8 (2) (b) OC-PIL Is Not Fulfilled

24 CLAIMANT cannot reasonably base its allegations on Article 8 (2) (b) OC-PIL *(Cl. Memorandum §§ 82 et seq.)* as this exception is not applicable to the present case. In order for the buyer's law to be applied pursuant to Article 8 (2) (b) OC-PIL, the contract must expressly provide that the seller has to perform its obligation to deliver the goods in the buyer's state. This provision cannot be considered a "strong" rule of presumption in favour of the buyer's law *(LANDO RABELSZ p. 75)*, and must be applied restrictively as it was only introduced at a late stage and in a hurried attempt to reach a compromise *(LANDO RABELSZ p. 72)*.

25 As neither the parties contract *(Cl. Exh. No. 7)*, nor their negotiations expressly provide for the place of delivery to be located in the country of the buyer, the application of Article 8 (2) (b) Hague Convention is excluded. At the Hague Conference, the delegates who proposed the provision stated that it would only apply when the parties had agreed *expressis verbis* that the goods shall be delivered in the buyer's country *(LANDO RABELSZ p. 72 with reference to Plenary Session, Minute No. 5 § 13; MATIĆ p. 65; VON MEHREN p. 33)*.

26 Contrary to CLAIMANT's allegation *(Cl. Memorandum § 85)*, the CIF clause in the contract *(Cl. Exh. No. 7 § 1)* – requiring the seller to bear the **C**osts for **I**nsurance and **F**reight *(LANDO RABELSZ p. 72)* – does not suffice to designate Oceania as the place of delivery. CIF and other

transport clauses do not fulfil the requirements of Article 8 (2) (b) Hague Convention *(LANDO RABELSZ p. 72 with reference to Plenary Session, Minute No. 5 § 13; PELICHET p. 152)*, as they "do not in themselves establish the obligation to deliver the goods at the specified destination" *(VON MEHREN p. 33)*. Furthermore, the place of delivery is located where the risk of loss shifts from the seller to the buyer *(Lando in BIANCA/BONELL Art. 31 § 1.1)*. The CIF clause provides for the risk to pass to the buyer as soon as the goods have passed the ship's rail at the port of shipment *(BREDOW/SEIFFERT p. 73)*. Therefore, the risk shifted to CLAIMANT when the machine was loaded for shipment in Greece. Accordingly, Greece is the place of delivery. Had the parties intended to shift the place of delivery to the buyer's country, they could have easily chosen other INCOTERMs like DAF, DDU or DDP, all stipulating that the risk of loss passes at the place of destination *(BREDOW/SEIFFERT p. 16)*.

27 Contrary to CLAIMANT's assertion, the reasoning of ICC 6560 *(Cl. Memorandum §§ 87, 90)* does not render the CIF-Clause sufficient under Article 8 (2) (b) OC-PIL, as the appliance of this case to the present dispute leads to the law of the seller. Both the place of payment (*Cl. Exh. No. 7 § 3)* and the place of contract conclusion *(see § 16 above)* – the two main criteria in ICC 6560 – are located in Mediterraneo. The place of negotiations and the headquarters of the parties – two other factors considered – do not lead to a different result as Oceania and Mediterraneo are equally involved in this regard.

(b) The Exception of Article 8 (3) OC-PIL Is Not Fulfilled

28 Article 8 (3) OC-PIL applies "by way of exception" where the contract is – under consideration of all relevant circumstances – manifestly more closely connected to a law besides that of the seller or the buyer *(MATIĆ p. 66)*. However, no other country besides Mediterraneo or Oceania is remarkably connected to the present dispute. As a consequence, the basic rule of the seller's law remains applicable according to Article 8 (1) OC-PIL.

4. The Cumulative Approach Leads to the Application of MED-Law

29 If the Tribunal prefers not to render a decision in favour of one of the parties' national conflict laws, it can follow the cumulative approach by comparing solutions provided by both systems of law connected to the dispute. If the different systems lead to the same national substantive law, the arbitrator is exempt from its duty to choose between them *(CROFF § I.B.4)*.

30 The cumulative application of conflict of law rules is widely accepted *(BASEDOW p. 18; CRAIG/PARK/PAULSSON p. 326; DERAINS p. 177; GIARDINA p. 462; MOSS § 2. 2. 2; ICC 1512; ICC 2879; ICC 4434; ICC 5103; ICC 5314; ICC 6149; ICC 6281; ICC 6527)*. Contrary to CLAIMANT's allegations *(Cl. Memorandum § 78)*, it also constitutes an easy and fair way of

determining the applicable law *(BERGER p. 498)* by ensuring "a solution which is likely to be equally acceptable to both sides of the dispute" *(BLESSING CONGRESS SERIES p. 411)*. Moreover, the cumulative approach guarantees that any country where the award might be enforced will recognise the applicable law, since the choice is grounded on all conflict of law systems that are related to the action *(DERAINS ARBITRAGE p. 121)*. In the present case, the cumulative application of the private international laws of Mediterraneo (Article 14 MED-PIL) and Oceania (Article 8 OC-PIL) lead to the same result, namely to the application of the MED-Law *(see §§ 24-26 above)*.

5. A Limitation Period of Two Years Is Appropriate in International Trade

31 Contrary to CLAIMANT's allegations that the MED-Law deviates from the minimum international standard on limitation *(Cl. Memorandum §§ 97, 98)*, a prescription period of two years is appropriate in international trade. Businessmen have to calculate their expenses to make reasonable decisions about investment and expansion. It is thus unreasonable for them to have to reckon with the high financial risks of the outcome of disputes after a certain time *(COESTER-WALTJEN p. 541; DIEDRICH p. 362 fn. 82)*. A short limitation period also promotes legal certainty, as obscured facts raise serious difficulties in bringing evidence *(BOELE-WOELKI p. 2; DORSANEO § 72.01)*.

32 Furthermore, CLAIMANT can neither contend the four-year limitation period of the UN-Limitation Convention *(Cl. Memorandum § 93)*, nor the three-year limitation period of the UNIDROIT Principles *(Cl. Memorandum §§ 70, 96)* to be appropriate in the present case. These bodies of law do not distinguish between different types of claims (Article 8 UN-Limitation Convention, Article 10.2 UNIDROIT Principles), which are usually subject to completely diverse lengths of prescription periods. In Italy, for example, the general limitation period is ten years (Article 2946 Codice Civile), whereas the period for claims arising out of sales contracts brought by the buyer against the seller is only one year (Article 1495 (3) Codice Civile). In Spain, the general prescription period amounts to fifteen years (Article 1964 Código Civil), while the period for sales contracts expires after only six months (Article 1490 Código Civil). These examples illustrate the inappropriateness of applying a uniform limitation period irrespective of various types of claims. Consequently, the limitation periods of the UN-Limitation Convention and the UNIDROIT Principles should not be taken into account.

33 Additionally, a two-year limitation period is appropriate in light of an international comparison. Danish, Swedish and Austrian Law provide for a prescription period of two years in case of a lack of conformity of the goods *(FREYER p. 167)*. The German Civil Code provides for a general two-year period of limitation for claims out of contracts for the sale of movables after

the risk of goods has passed (§ 438 (1) lit. 3 BGB). Italy and Switzerland know a prescription period of only one year, and Spanish and Greek law even provide for a limitation period of only six months *(FREYER p. 167)*. Conclusively, a limitation period of two years is reasonable in light of international standards.

34 Finally, CLAIMANT cannot contest the application of the two-year limitation period as it provides a reasonable and fair result in light of the circumstances of the present case. Promptly after the printing machine was turned over to CLAIMANT on 8 July 2002, its workers began their first production job *(Re. Exh. No. 2 § 2)*. The very same day, they discovered the alleged lack of conformity and requested assistance from RESPONDENT's workman, Mr. Swain *(Answer § 10)*. Considering how extraordinarily fast the alleged lack of conformity became evident, there was no reason for CLAIMANT to wait two and a half years until it finally decided to take legal action. This behaviour runs contrary to the need for a prompt execution of contracts in international business. Furthermore, CLAIMANT's eventual hope to settle the matter with RESPONDENT without having recourse to arbitration was illusionary as RESPONDENT rejected CLAIMANT's claim "in totality" from the beginning *(Re. Exh. No. 3 § 2)*. Thus, CLAIMANT could easily have initiated the arbitral proceedings within the limitation period of two years.

C. Should the Tribunal Classify the Limitation Period as a Matter of Procedural Law, CLAIMANT's Claim Remains Time-Barred

35 In case of procedural classification, CLAIMANT's claim remains time-barred. Although limitation is considered a matter of substance in all countries involved in the present dispute (*Procedural Order No. 2 § 4*), the tribunal might also classify it as procedural *(SCHLOSSER § 742)*, since it is an institute of procedural law particularly in common law countries *(GEIMER § 351; HAY p. 197; Schütze in SCHÜTZE/TSCHERNING/WAIS § 608)*. The limitation would then be governed by the procedural law applicable to the arbitral proceedings. However, neither the CIDRA-AR, nor the *lex arbitri* of Danubia contain regulations concerning the expiry of the limitation period. This would result in the lack of a limitation provision applicable to the present claim, violating basic principles of most legal systems *(KROPHOLLER p. 252)* and endangering the enforceability of a final award (Article V (2) (b) NYC, *in force in all countries involved in the dispute, Moot Rules § 19*). To prevent such an unfavourable result, the Tribunal might consider the following two approaches – both leading to a limitation period of two years.

36 First, as the Tribunal cannot infer the procedural law governing limitation from the *lex arbitri* – determined by the arbitration clause – the most appropriate solution would be to apply

the national procedural law which would prevail, had an arbitration clause not been concluded. Pursuant to the widely recognised principle of *lex forum regit processum (SCHACK § 40)*, this is the law of the country with international jurisdiction for the claim. It can reasonably be assumed that the countries involved in the dispute follow the well established principle of *actor sequitur forum rei*, establishing the country of the defendant – Mediterraneo – as the place of international jurisdiction *(see § 22 above)*. Consequently, the Tribunal would have to seek out a prescription regulation within the procedural law of Mediterraneo. As this body of law does not provide such a rule, the Tribunal will have to refer to the only limitation regulation provided by Mediterranean law – contained in Article 87 MED-Law – and reinterpret this provision as procedural. This approach would not lead to a result surprising for CLAIMANT, as it generally has to reckon with having to bring its claim before a court in Mediterraneo in the case of a void arbitration clause.

37 Second, the Tribunal might apply Article 32 CIDRA-AR to designate the substantive law applicable to limitation, and reinterpret this provision as procedural *(KROPHOLLER p. 252; BGH 14 December 1992 (Germany))*. As shown above, the application of Article 32 CIDRA-AR leads to the substantive law of Mediterraneo, providing for a limitation period of two years. *(see §§ 9-30 above)*. In conclusion, even if the Tribunal considers the limitation period a matter of procedural law, CLAIMANT's action remains time-barred.

II. RESPONDENT PERFORMED ITS OBLIGATIONS UNDER THE CONTRACT AND THE CISG

38 In response to Procedural Order No. 1 § 14, Question 2, RESPONDENT submits that it fulfilled its obligations under the contract and the CISG. RESPONDENT delivered a 7 stand Magiprint Flexometix Mark 8 flexoprinter machine of the quality and description required by the contract pursuant to Article 35 (1) CISG **(A.)**. Additionally, the delivered machine was fit for the particular purpose of the contract according to Article 35 (2) (b) CISG **(B.)**. Alternatively, CLAIMANT cannot rely on Article 35 (3) CISG as it could not have been unaware of the alleged lack of conformity when the contract was concluded **(C.)**.

A. The Delivered Machine Is of the Quality and Description Required by the Contract Under Article 35 (1) CISG

39 Article 35 (1) CISG stipulates that the seller must deliver goods which are of the quantity, quality and description required by the contract. The contract explicitly provides for a second-hand 7 stand Magiprint Flexometix Mark 8 flexoprinter machine, capable of printing on aluminium foil of at least 10 micrometer thickness **(1.)**. The requirement to print on

8 micrometer aluminium foil cannot be derived from the parties' contractual negotiations **(2.)**. The maker's manual reflects the parties' agreement for a machine capable of printing on aluminium foil of at least 10 micrometer thickness **(3.)**.

1. The Contract Document Provides for a Machine Capable of Printing on Aluminium Foil of at Least 10 Micrometer Thickness

40 Contrary to CLAIMANT's line of argumentation *(Cl. Memorandum § 7)*, the content of the contract must primarily be determined according to Article 35 (1) CISG, which recognises the contract as the overriding source for the standard of conformity *(Bianca in BIANCA/BONELL Art. 35 § 2.1; GERNY p. 176; Magnus in HONSELL Art. 35 § 18; KAROLLUS p. 116; KRUISINGA p. 29 § 1; POIKELA p. 19; REINHART Art. 35 § 2; Schlechtriem in SCHLECHTRIEM/SCHWENZER COMMENTARY Art. 35 § 6; SECRETARIAT COMMENTARY Art. 35 § 1; LG Regensburg 24 September 1998 (Germany))*. The present contract, manifested by the mutually signed contract document, clearly stipulates the name of the machine – "Magiprint Flexometix Mark 8" – as well as its type – "second hand 7 stand […] flexoprinter machine" *(Cl. Exh. No. 7)*. For CLAIMANT – a well-experienced businessman with a good reputation in its field *(Procedural Order No. 2 §§ 23, 26)* – this information was utterly sufficient to clarify the substrate limits of the machine with regard to aluminium foil. Even Reliable Printers was immediately aware that the machine could not print on foil thinner than 10 micrometers when it was informed of its name *(Procedural Order No. 2 § 22)*. Thus, the contract document unambiguously provided for a machine suitable for printing on aluminium foil of at least 10 micrometer thickness.

2. The Requirement to Print on 8 Micrometer Aluminium Foil Cannot Be Derived From the Parties' Contractual Negotiations

41 Contesting CLAIMANT's allegation *(Cl. Memorandum §§ 9-11)*, RESPONDENT submits that the contract – interpreted in light of the negotiations conducted by the parties – does not provide for delivery of a machine suitable for printing on 8 micrometer aluminium foil. The object of performance under the contract is defined by the parties' contractual negotiations according to their objective meaning pursuant to Articles 8 (2), (3) CISG *(BRUNNER Art. 8 § 3; KAROLLUS p. 49; Schmidt-Kessel in SCHLECHTRIEM/SCHWENZER Art. 8 § 19)*. Thereby, consideration must be given to the hypothetical understanding of a reasonable business person of the same kind as the party in question (Article 8 (2) CISG) *(Schmidt-Kessel in SCHLECHTRIEM/SCHWENZER Art. 8 § 21; Schiedsgericht Wien 10 December 1997)* and all relevant circumstances shall be taken into account (Article 8 (3) CISG). The ability to print on

8 micrometer foil did not become a term of the contract as it can neither be derived from CLAIMANT's letter of 17 April 2002, nor from any subsequent negotiations.

42 In its inquiry of 17 April 2002, CLAIMANT failed to unambiguously express its intent to contract for a machine capable of printing on 8 micrometer aluminium foil. A reasonable person in RESPONDENT's position had to understand CLAIMANT's first letter as a general request for quotation. At the time of its inquiry, CLAIMANT merely knew "from [RESPONDENT's] website" that the latter could generally "supply refurbished flexoprint machines" *(Cl. Exh. No. 1 § 1).* It could neither know of the current availability of a flexoprinter in RESPONDENT's stock, nor the exact price or conditions of delivery of such a machine, as neither of these facts were provided on the website *(Procedural Order No. 2 § 8).* Indeed, CLAIMANT did not request a specific machine, rather expressing its general interest in obtaining a refurbished six-colour flexoprinter with a varnishing stand *(Cl. Exh. No. 1 § 1)* and the need to acquire "such a machine urgently" and at the "best price" *(ibid.).* From this general inquiry, RESPONDENT could derive that CLAIMANT aimed to find the best supplier of such a machine before entering into a more detailed discussion as to its technical specifications.

43 This result cannot be rebutted by CLAIMANT's contention that it "placed additional and particular emphasis on foil products" and was "very explicit" with regard to the ability of the machine to print on 8 micrometer foil *(Cl. Memorandum §§ 9, 10).* Quite to the contrary, CLAIMANT did not attach any particular importance to the ability of the machine to print on foil of 8 micrometer thickness. In fact, it lacked any precision with regard to the materials it intended to print on, merely giving a general overview of a wide potential variety of materials – ranging from "coated and uncoated papers" and "polyester" to "metallic foils" – only one out of which "may be of 8 micrometer thickness" *(Cl. Exh. No. 1 § 2, emphasis added).* Moreover, CLAIMANT failed to specify the exact area of use for these materials, stating that they could be utilised "in the confectionery market and similar fields" *(ibid.).* Finally, CLAIMANT did not establish any link between its intention to develop a commanding lead in the printing market in Oceania and the ability of the machine to print on 8 micrometer foil. It stated that "[t]here is no other flexoprint operator in Oceania" and that it therefore believes that "the machine […] will enable [it] to develop a commanding lead" *(ibid. § 3).* Thereby, it created the impression that its leading position on the market did not depend on the ability to print on 8 micrometer foil but solely on the possession of a versatile flexoprinter machine.

44 In its reply to CLAIMANT's inquiry, RESPONDENT offered a recently acquired 7 stand Magiprint Flexometix Mark 8 flexoprinter machine – a specific machine from the class of six-colour flexoprinter machines requested by CLAIMANT *(Cl. Exh. No. 1 § 1)* – for $ 44,500

(Cl. Exh. No. 2). RESPONDENT did not give any details regarding the further technical specifications and did not refer to the mentioned printing materials. Rather, it invited CLAIMANT to inspect the machine prior to its purchase and to decide on the suitability for its intended use itself *(ibid.)*. Consequently, RESPONDENT's assurance that it had "indeed a […] machine for [CLAIMANT's] task" *(ibid.)* merely implied that it had a versatile flexoprinter machine that could be "acquired urgently" and at the "best price" *(see § 42 above)*, rather than a machine that could print on 8 micrometer aluminium foil as suggested by CLAIMANT *(Statement of Claim § 4)*.

45 During its visit to Athens, CLAIMANT had the opportunity to examine the machine and make extensive inquiries about its performance *(Procedural Order No. 2 § 13)*. It thereafter concluded that "[t]he Magiprint Flexometix machine looked to be just what [it] needed" *(Cl. Exh. No. 3 § 2)*. A seller is entitled to believe that a buyer, declaring that it will purchase an inspected machine, has agreed to its objectively determinable specifications *(Schweizerisches Bundesgericht 22 September 2000 (Switzerland))*. CLAIMANT thus accepted the machine as inspected and impliedly disavowed from its alleged requirement to print on 8 micrometer aluminium foil. Moreover, CLAIMANT signed its contract with Oceania Confectionaries [hereinafter Printing Contract] three days after the inspection *(Cl. Exh. No. 3)*. Hence, RESPONDENT could reasonably assume that printing on 8 micrometer aluminium foil was not required for the fulfilment of the contract with Oceania Confectionaries. In conclusion, the contract does not provide for delivery of a machine suitable for printing on 8 micrometer aluminium foil.

3. The Maker's Manual Reflects the Parties' Agreement on a Machine Capable of Printing on Aluminium Foil of at Least 10 Micrometer Thickness

46 RESPONDENT rejects CLAIMANT's contention that the maker's manual was sent as a mere formality *(Cl. Memorandum § 28)* and submits that it rather underlines the parties' agreement to contract for a Magiprint Flexometix Mark 8 flexoprinter machine capable of printing on aluminium foil of at least 10 micrometer thickness. RESPONDENT sent the maker's manual attached to the contract, which needed to be signed and sent back by CLAIMANT. Beyond instructions on operation and maintenance, maker's manuals usually contain only the technical specifications of the machine. By stating that the machine was "easy to operate and […] very reliable" *(Cl. Exh. No. 6 § 2)*, RESPONDENT deferred CLAIMANT from reading the manual's sections on operation and maintenance. However, by stating that "[CLAIMANT] certainly wish[ed] to have a copy" *(ibid.)*, RESPONDENT obviously considered it important for CLAIMANT to regard the manual before signing the contract. In fact, it indirectly drew CLAIMANT's attention to the section on the machine's technical specifications, unambiguously

stipulating its ability to print on aluminium foil of at least 10 micrometer thickness *(Re. Exh. No. 1)*. Therefore, the contract could not be understood as providing for a machine capable of printing on 8 micrometer aluminium foil, as the maker's manual clearly reflected the parties' agreement on a machine suitable for printing on aluminium foil of at least 10 micrometer thickness.

B. The Delivered Machine Was in Conformity With the Contract Under Article 35 (2) (b) CISG

47 RESPONDENT denies CLAIMANT's charge that the Magiprint Flexometix Mark 8 was not in conformity with the contract pursuant to Article 35 (2) (b) CISG *(Cl. Memorandum §§ 8 et seq.)*. The particular purpose made known to it in accordance with Article 35 (2) (b) CISG merely entailed the need to print on various products for the confectionery market and was fulfilled by the machine **(1.)**. An expert in the general printing industry, CLAIMANT could not reasonably rely on RESPONDENT's skill and judgement **(2.)**.

1. The Machine Was Fit for the Particular Purpose Made Known to RESPONDENT

48 Contrary to CLAIMANT's allegations *(Cl. Memorandum §§ 8 et seq.)*, the delivered machine was fit for the particular purpose made known to RESPONDENT, as it was capable of printing on various products for the confectionery market

49 A particular purpose in the sense of Article 35 (2) (b) CISG requires the seller to be informed – in a crystal clear and recognisable way *(LG Darmstadt 9 May 2000 (Germany); LG München 27 February 2002 (Germany))* – that the buyer's decision to purchase certain goods depends entirely on their suitability for an intended use *(REINHART Art. 35 § 6; Hyland in SCHLECHTRIEM KAUFRECHT p. 321; SECRETARIAT COMMENTARY Art. 35 § 8; Stein in SOERGEL Art. 35 § 12; Helsinki Court of Appeal 30 June 1998 (Finland); District Court Veurne 25 April 2001 (Belgium); Netherlands Arbitration Institute Case No. 2319)*. RESPONDENT rejects CLAIMANT's contention that the need for a machine capable of printing on 8 micrometer aluminium foil was a special purpose of the Sales Contract. CLAIMANT merely stated – at a single point in time, in its first and general inquiry for a flexoprinter machine – that 8 micrometers "may be" one of many potential thicknesses of materials it would later print on *(Cl. Exh. No. 1 § 2)*. Throughout the entire subsequent correspondence, 8 micrometer aluminium foil was never again mentioned, particularly not when CLAIMANT informed RESPONDENT about its Printing Contract *(Cl. Exh. No. 3 § 3)*. Therefore, the high standard set for the establishment of a particular

purpose in the sense of Article 35 (2) (b) CISG can by no means be considered to have been fulfilled with regard to the need to print on 8 micrometer aluminium foil.

50 If any, the only purpose that RESPONDENT could reasonably understand from its correspondence with CLAIMANT was the need to print on products for the confectionery market. By introducing the Printing Contract, it concretised its first general inquiry, clarifying the need to serve a customer from the confectionery industry *(Cl. Exh. No. 3 § 3)*. CLAIMANT specified the profit it expected under the contract and emphasised the need for timely delivery of the machine *(ibid.)*. It did not, however, reiterate or concretise the aforementioned spectrum of materials needed or products to be printed on *(ibid.)*. RESPONDENT therefore reasonably assumed that the machine needed to be fit for printing on a wide range of materials and thicknesses for products in the confectionery market.

51 The confectionery market covers a broad range of products, including candy bars, chewing gum and chocolate of all kinds *(http://www.candyusa.org)*. The materials used for packaging these products, as well as their thicknesses, vary respectively. RESPONDENT fulfilled its obligation by delivering a versatile machine, capable of printing on materials ranging from paper of 40 grams/square metre to aluminium foil of 10 micrometer thickness *(Re. Exh. No. 1)*. These values reflect the respective thicknesses predominantly used for paper and paperboard packaging *(http://www.paperonweb.com/grade11.htm)* and aluminium wrappers *(http://www.alufoil.com/Confectioners_Foil.htm; http://www.alfcon.co.za/confectionery.htm)* in the confectionery industry.

52 Contrary to CLAIMANT's contention *(Cl. Exh. No. 1 § 2)*, 8 micrometer aluminium foil cannot be considered "typical" for wrappers in the confectionery industry, as they are only used to wrap "fine chocolates" *(Procedural Order No. 2 § 21)*. Just like great wines are famous for their grapes from a specific region, cocoa beans from one growing area characterise fine chocolate *(http://www.chocolate.co.uk/currevents.php, http://www.chocolatetradingco.com/browsecategory.asp?ID=30, http://www.nokachocolate.com/faq.html, http://www.schakolad.com/news.asp?nid=10)* and make it an exclusive product in a "high-priced […] niche" in the dark chocolate market *(http://www.pidc-pa.org/newsDetail.asp?pid=172)*. Fine chocolate cannot, thus, be considered typical, neither for the chocolate industry and even less for the confectionery market. Any alleged intention to make the purchase of the machine dependable upon its ability to print on wrappers for "fine chocolates" was never communicated to RESPONDENT. Thus, the sole particular purpose – to print on products for the confectionery market – was fulfilled.

2. CLAIMANT Could Not Reasonably Rely on RESPONDENT's Skill and Judgement

53 Additionally, CLAIMANT cannot convincingly argue *(Cl. Memorandum §§ 15 et seq.)* that it could reasonably rely on RESPONDENT's skill and judgement according to

Article 35 (2) (b) CISG. The buyer cannot rely on the seller's skill and judgement where the buyer itself has more knowledge than the seller *(Magnus in HONSELL Art. 35 § 22)*, especially, if the seller is only a trader, rather than a producer *(REINHART Art. 35 § 6; Enderlein in ŠARČEVIĆ/VOLKEN p. 157 § 1)*.

54 RESPONDENT challenges CLAIMANT's allegation that RESPONDENT has more knowledge about printing machines than CLAIMANT *(Cl. Memorandum § 16)*. CLAIMANT as "Specialist Printers" *(Cl. Exh. No. 1)* is well experienced in the printing business (*Procedural Order No. 1 § 23)* and has a good reputation *(Procedural Order No. 2 § 26)*. Although it had no practical experience in the flexoprinting business, it intended to take over a commanding lead in flexoprinting in Oceania *(Cl. Exh. No. 1 § 3)* and could reasonably be expected to familiarise itself with the particularities of this method of printing. Therefore, it had to be aware that printing on 8 micrometer aluminium foil – an artistry only very few master (*MEYER § 7.4.5)* – is extraordinary and difficult and cannot be expected of any ordinary flexoprinter. CLAIMANT was fully aware of the paramount importance of the ability to print on 8 micrometer foil in order to fulfil the Printing Contract *(Procedural Order No. 2 § 21)* and had several opportunities to verify the technical specification of the Magiprint Flexometix Mark 8 *(see § 40 above)*.

55 In contrast, the sale of flexoprinter machines only amounts to 5 to 10 % of RESPONDENT's business *(Procedural Order No. 2 § 24)*. Contrary to CLAIMANT's allegation, RESPONDENT's website presented it as a "seller of new and used industrial equipment generally" *(Procedural Order No. 2 § 8)* rather than "purpot[ing] to have special knowledge" in the field of flexoprinter machines *(Cl. Memorandum § 18)*. RESPONDENT, even though offering the refurbishment of the Magiprint Flexometix Mark 8, cannot be considered an expert in the field of flexoprinting. The refurbishment only requires limited technical and mechanical skills of assembling and cleaning the machine as well as of exchanging some parts *(http://www.atiqs.net/englisch/flexodruckwerk.htm (Home - Products - Printing machines - Rebuilt flexo print))*. Hence, CLAIMANT as the more experienced party could not rely on RESPONDENT's skill and judgement.

56 Finally, in contrast to its statement *(Cl. Memorandum § 20)*, CLAIMANT cannot rely on RESPONDENT's skill and judgement on the basis of an alleged warranty for printing on 8 micrometer aluminium foil. A seller is only bound by a warranty for a particular purpose, where such warranty is expressly given *(Schmitz-Werke v. Rockland Industries (US)*; *Manipulados del Papel v. Sugem Europa (Spain); Beijing Light Automobile v. Connell)*. The contract has to contain a respectively clear "product quality specification" *(Netherlands Arbitration Institute Case No. 2319)*. RESPONDENT gave no explicit warranty with regard to the machine's ability to print on

8 micrometer aluminium foil in the contract *(see § 40 above)*. CLAIMANT can equally not rely on an implied warranty. Even for an implied warranty it is "crucial" that "the buyer communicat[es] the intended use" and the seller has "knowledge of the nuances of the foreign law or standards" *(DIMATTEO p. 396)*. These requirements were not fulfilled. CLAIMANT only provided vague information to RESPONDENT regarding the technical requirements and intended usages for the flexoprinter machine *(see § 42 above)*. RESPONDENT, in its answer *(Cl. Exh. No. 2)*, only proposed a machine of the type as requested by CLAIMANT while referring CLAIMANT to an inspection of the machine to determine its suitability *(see § 44 above)*. Thereby, RESPONDENT refrained from guaranteeing any technical specifications. In conclusion, CLAIMANT could not reasonably rely on RESPONDENT's skill and judgement as required by Article 35 (2) (b) CISG.

C. CLAIMANT Cannot Rely on Article 35 (2) (b) CISG as It Could Not Be Unaware of the Alleged Lack of Conformity Pursuant to Article 35 (3) CISG

57 According to Article 35 (3) CISG, a buyer cannot rely on an alleged lack of conformity where it knew or could not have been unaware of it. Contrary to CLAIMANT's allegations *(Cl. Memorandum §§ 21-30)*, it had to be aware of the asserted non-conformity of the machine. The case that most clearly falls within Article 35 (3) CISG is "the sale of a specific, identified object that the buyer inspects and then agrees to purchase" *(HONNOLD p. 259)*. A buyer who purchases goods, notwithstanding their apparent and notable defects, is considered to have agreed to the seller's offer as determined by the effective state of the goods *(Bianca in BIANCA/BONELL § 2.8.1)*. In such cases, the buyer is unworthy of protection as it knew or could not be unaware of the non-conformity of the delivered goods *(HENSCHEL NORDIC JOURNAL p. 9)*. CLAIMANT could not have been unaware of the inability of the machine to print on 8 micrometer thickness after the inspection of the machine in Athens **(1.)** and the receipt of the maker's manual **(2.)**.

1. CLAIMANT Could Not Have Been Unaware of the Alleged Lack of Conformity After the Inspection of the Machine in Athens

58 Contrary to CLAIMANT's allegations *(Cl. Memorandum §§ 23 et seq.)*, it could not have remained unaware of the machine's inability to print on 8 micrometer foil after the inspection in Athens. Even though the CISG does not impose a general pre-contractual duty to inspect the goods *(HENSCHEL § 9)*, a buyer who undertakes such an inspection is assumed to purchase the goods as inspected *(TC de Sion 29 June 1998 (Switzerland))*. This is even true if the buyer does not

obtain actual knowledge of the lack of conformity, but could not have been unaware of it *(LOOKOFSKY Art. 35 § 171)*.

59 Contrary to it contention *(Cl. Memorandum § 25)*, CLAIMANT did not only inspect a specimen of the class of printing machines recommended by RESPONDENT on its trip to Athens on 5 and 6 March 2002, but rather the particular machine it was about to purchase. Indeed, in its letter RESPONDENT offered a particular "recently acquired […] 7 stand Magiprint Flexometix Mark 8 machine" *(Cl. Exh. No. 2)* and suggested CLAIMANT inspect exactly that machine in Greece. CLAIMANT could not reasonably be expected to spend three days in Greece to inspect a specimen, while under high time pressure to fulfil its contract with Oceania Confectionaries *(Cl. Exh. Nos. 1 § 1, 3 § 3)*. CLAIMANT could thus convince itself whether the particular machine it intended to acquire was fit for the particular purpose it had in mind.

60 Furthermore, CLAIMANT's argument that it was not given an opportunity to discover the inability of the machine to print on 8 micrometer foil *(Cl. Memorandum § 25)* cannot be upheld. CLAIMANT's inspection of the flexoprinter in Greece was not limited to its physical condition, as CLAIMANT alleges *(Cl. Memorandum § 25)*, but gave CLAIMANT all opportunities to carefully inspect the fully set-up machine *(Cl. Exh. No. 2)*. Moreover, it could have posed questions to RESPONDENT as well as the former owner with regard to the details of the machine. However, CLAIMANT merely inquired into the previous owner's general satisfaction with the machine (Procedural Order No.2, 13). Even the maker's manual of the machine would have been available for its inspection *(ibid.)*. It is the buyer's responsibility to use such opportunities to inspect the goods prior to the purchase *(LG München 27 February 2002 (Germany); TC Valais 28 October 1997 (Switzerland))*. In conclusion, after the trip to Athens, CLAIMANT could not have been unaware of the machine's inability to print on 8 micrometer foil.

2. CLAIMANT Could Not Have Been Unaware of the Alleged Lack of Conformity After Receiving the Maker's Manual

61 Contrary to CLAIMANT's allegations *(Cl. Memorandum § 27)*, the circumstances of the introduction of the maker's manual provided a reasonable opportunity for CLAIMANT to become aware of the machine's inability to print on 8 micrometer foil.

62 First, the timing of the introduction of the maker's manual did not hinder CLAIMANT from becoming aware of the machine's inability to print on 8 micrometer foil. RESPONDENT already announced the maker's manual three days in advance *(Cl. Exh. No. 6 § 2)*. The maker's manual consisted of only 25 pages *(Procedural Order No. 2 §19)*. Moreover, the substrate limits were especially highlighted in a frame in the section of technical specifications on only two pages

at the end of the manual *(Re. Exh. No. 1; Procedural Order No. 2 § 19)*. CLAIMANT had the whole day of 30 May 2002 for reviewing and signing the contract. In this timeframe, CLAIMANT could have been reasonably expected to examine the two pages before signing the contract.

63 Second, the fact that CLAIMANT was under time pressure when signing the Printing Contract cannot lead to a different conclusion. In contrast to CLAIMANT's allegation *(Cl. Memorandum § 29)*, it was not RESPONDENT, but CLAIMANT itself who amplified the time pressure when concluding the Sales Contract. In fact, by insisting that CLAIMANT should sign the contract and send it back immediately *(Cl. Exh. No. 6 § 2)*, RESPONDENT only acted in the interest of CLAIMANT, who had declared that it "is imperative that we move fast on the [transaction] *(Cl. Exh. No. 3 § 3)*.

64 Finally, CLAIMANT could have become aware of the machine's inability to print on 8 micrometer foil, even without the maker's manual. CLAIMANT had the opportunity to inquire about the technical specifications of the 7 stand Magiprint Flexometix Mark 8, because RESPONDENT provided the name of the machine in its first letter *(Cl. Exh. No.2)*. Anticipating an investment in a new machine – especially when having a particular purpose in mind – a reasonable business person in CLAIMANT's position would have gathered all relevant information prior to the conclusion of the contract. CLAIMANT, however, failed to inform itself in this regard, although it was given more than a month, between the time the Magiprint Flexometix Mark 8 flexoprinter machine was offered on 25 April 2002 *(Cl. Exh. No. 2)* and the date of contract signature on 30 May 2002 *(Cl. Exh. No. 7)*.

III. THE CLAIM FOR LOST PROFITS WAS NOT APPROPRIATELY CALCULATED

65 Assuming but not conceding that RESPONDENT breached the Sales Contract, it is submitted in response to Procedural Order No. 1 § 14 that CLAIMANT's calculation of damages in the amount of $ 2,549,421 *(Cl. Memorandum § 31)* is incorrect. Contrary to its allegations *(Cl. Memorandum §§ 50 et seq.)*, CLAIMANT cannot recover damages for loss of profit pursuant to Article 74 CISG **(A.)**. Should the Tribunal find that CLAIMANT is entitled to damages, the maximum recoverable amount is $ 32,846 **(B.)**.

A. CLAIMANT Is Not Entitled to Damages Pursuant to Article 74 CISG

66 CLAIMANT is not entitled to damages as it failed to give proper notice of the alleged non-conformity pursuant to Article 39 (1) CISG **(1.)**. Even if a proper notice is found to have been submitted, any asserted damages are not recoverable under Article 74 CISG **(2.)**.

1. CLAIMANT Cannot Rely on the Alleged Lack of Conformity Pursuant to Article 39 (1) CISG

67 RESPONDENT rejects CLAIMANT's contention that a proper notice of non-conformity was undisputedly submitted *(Cl. Memorandum §§ 32, 33)*. Rather, CLAIMANT lost its right to rely on any alleged lack of conformity as neither the phone call of 8 July 2002 **(a)**, nor the letter of 1 August 2002 constituted a notice under Article 39 (1) CISG **(b)**.

(a) The Phone Call of 8 July 2002 Did Not Contain a Proper Notice of Non-Conformity

68 CLAIMANT's phone call to Mr. Swain on 8 July 2002 did not constitute a valid notice of non-conformity pursuant to Article 39 (1) CISG. A notice must not only be submitted within reasonable time – as contended by CLAIMANT *(Cl. Memorandum §§ 32, 33)* – but also be directed towards the right addressee and specify the lack of conformity. The ratio behind Article 39 CISG is to enable the seller to take all necessary steps to cure a lack of conformity *(Sono in BIANCA/BONELL Art. 39 § 2.3; ENDERLEIN/MASKOW Art. 39 § 5; KUOPPALA § 2.4.2.2; Salger in WITZ/SALGER/LORENZ Art. 39 § 1)*, e.g. to prepare additional or substitute goods *(Schwenzer in SCHLECHTRIEM/SCHWENZER Art. 39 § 6)*. The phone call of 8 July 2002 constituted a request for technical assistance, rather than a notice of non-conformity.

69 In a similar case, the buyer of a software programme informed the seller of technical problems it experienced after successful test runs without clarifying its dissatisfaction with the machine itself *(LG München 8 February 1995 (Germany))*. Where a buyer "only request[s] assistance from the [seller] in addressing the problem identified", the message merely amounts to a request for technical support *(ibid.)*. In the present case, CLAIMANT only stated that "the foil would crease and the colours were out of register" *(Re. Exh. No. 2 § 3)*. RESPONDENT challenges CLAIMANT' allegation that it thereby informed RESPONDENT that the machine did not conform to the contract *(Cl. Memorandum § 32)*. In light of the following circumstances, RESPONDENT could not reasonably understand CLAIMANT's communication as anything but a request for technical support.

70 RESPONDENT had no reason to doubt the conformity of the machine, as it was turned over after CLAIMANT had expressly voiced its satisfaction *(Cl. Exh. No. 8 § 1)* and RESPONDENT's workmen performed test runs "on the full range of products for which [it] was designed" *(Procedural Order No. 2 § 15)*. Furthermore, CLAIMANT was a newcomer in the field of flexoprinting *(ibid. § 23)* and had never operated such a machine. Its personnel seldom attended test runs although given the possibility *(ibid. § 15)* and Mr. Butter was not present during the demonstration of the machine's use *(ibid. § 16)*. Therefore, RESPONDENT had to

understand that CLAIMANT was in need of assistance with the operation of the newly acquired machine.

71 Furthermore, Mr. Swain was the wrong recipient of a notice of non-conformity, as the buyer's notice must be addressed "to the seller" (Article 39 (1) CISG). Notice "to an agent, broker or another third person" does not suffice *(Salger in WITZ/SALGER/LORENZ Art. 39 § 10)*. As the foreman of RESPONDENT's working crew, Mr. Swain was merely in charge of the machine's installation *(Answer § 10)*, and never involved in negotiations or contracting. By calling RESPONDENT's technician rather than the seller himself, RESPONDENT could reasonably understand that CLAIMANT requested technical assistance. If CLAIMANT had intended to express its discontent with the machine's specifications, it would have contacted its contract partner – Mr. McHinery – directly. Conclusively, a proper notice of non-conformity in the sense of Article 39 (1) CISG was not submitted.

(b) The Letter of 1 August 2002 Did Not Constitute a Timely Notice of Non-Conformity

72 CLAIMANT could allege that the letter of 1 August 2002 constitutes a sufficient notice of non-conformity. However, this letter was not submitted within "reasonable time" as required by Article 39 (1) CISG. CLAIMANT discovered the alleged lack of conformity on 8 July 2002 *(Re. Exh. No. 2)* but allowed 23 days to elapse before dispatching the letter of 1 August 2002 *(Cl. Exh. No. 9)*. This period exceeds the length of a reasonable period of time in the sense of Article 39 (1) CISG.

(i) A Two Week Standard Is Established by General Practice

73 A maximum period of two weeks is widely accepted as a "reasonable" time-frame under Article 39 (1) CISG *(OGH 27 August 1999 (Austria); OGH 21 March 2000 (Austria); BGH 30 June 2004 (Germany); OLG München 8 February 1995 (Germany); HG Zürich 30 November 1998 (Switzerland); ICC 5713; ICC 9083)*. A two-week standard is also provided by a CISG standard sales agreement drafted by legal scholars *(SCHÜTZE/WEIPERT p. 552)* and the "ICC model international sale contract" *(KRUISINGA p. 77)*. Thus, a maximum period of two weeks is widely established and should be followed in order to guarantee uniformity in interpreting the CISG as required by Article 7 CISG *(Magnus in STAUDINGER Art. 7 § 20)*.

(ii) The Circumstances of the Present Case Require the Application of a Shorter Period

74 The period for notification can be shortened under specific circumstances of the particular case, depending on a "wide range of factors" *(HONNOLD Art. 39 § 257; OLG Düsseldorf 8 January 1993 (Germany); OLG Karlsruhe 25 June 1997 (Germany); OLG Schleswig 22 August 2002*

(Germany); Tribunale di Rimini 26 November 2002 (Italy)). Even a few days can suffice for what is held "reasonable" under Article 39 (1) CISG *(OLG Düsseldorf 10 February 1994 (Germany); LG Landshut 5 April 1995 (Germany); Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al. (US)).* The circumstances of the present case militate towards the application of such a short period.

75 First, CLAIMANT immediately discovered the lack of conformity on 8 July 2002 *(Re. Exh. No. 2 § 2)* and thus did not need any additional time for examination. Second, any knowledge of a buyer requiring speedy notice to the seller – such as a deadline for publication – can shorten the reasonable period of time *(BAASCH ANDERSEN § V.3.2; LG Köln 11 November 1993 (Germany)).* CLAIMANT had to service the Printing Contract by 15 July 2002 *(Cl. Exh. No. 3 § 3).* In order to enable RESPONDENT to cure the alleged defect prior to this deadline, the notification would have had to arrive before it. Finally, a short period of time can be determined by the pace of the parties' previous communications *(Arbitration Court Hungarian Chamber of Commerce 5 December 1995).* The parties' negotiations were conducted rapidly, due to CLAIMANT's time pressure to acquire the machine *(Cl. Exh. No. 1 § 1).* An immediate response regarding the conformity of the machine was thus required. As CLAIMANT waited over three weeks to dispatch its notice, it violated its obligation under Article 39 (1) CISG and lost the right to rely on the alleged lack of conformity.

2. CLAIMANT Is Not Entitled to Damages Pursuant to Article 74 CISG

76 Even if CLAIMANT is found to have given a valid notice of non-conformity, it is not entitled to claim damages pursuant to Article 74 CISG – neither for the four-year period of the Printing Contract **(a)**, nor for the mere chance of its renewal **(b)**.

(a) CLAIMANT Is Not Entitled to Damages for Lost Profit out of the Printing Contract

77 The loss of profit CLAIMANT suffered due to the cancellation of the Printing Contract was neither caused by RESPONDENT's alleged breach of contract *(i)*, nor was it foreseeable *(ii)*.

(i) The Lost Profit Was Not Caused by RESPONDENT's Alleged Breach of Contract

78 Article 74 CISG requires causality – i.e. an objective connection – between the breach of contract and the damage suffered *(Schönle in HONSELL Art. 74 § 20; LIU § 14.2.5; SAIDOV § II.3).* Considering a claim for lost profit, a tribunal has to be "convinced that the profit would actually have been made had the contract been properly performed" (*BRUNNER Art. 74 § 19; NEUMAYER/MING Art. 74 § 1; Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 74 § 22).* RESPONDENT rejects CLAIMANT's contention that the loss of profit was an "evident"

consequence of the alleged breach of contract *(Cl. Memorandum §§ 39, 42)*, as the mere conclusion of the Printing Contract did not guarantee its fulfilment.

79 Even if CLAIMANT had acquired a machine suitable for printing on 8 micrometer foil, it would have been likely to fail in fulfilling the Printing Contract. Though CLAIMANT is a specialist in executing "small printing contracts" *(Procedural Order No. 2 § 23)*, the Printing Contract called for a large volume of products and constituted "a significant extension of [CLAIMANT's] previous line of activities" *(ibid.)*. When expanding a business to a new volume, problems with logistics and time management are likely to occur. Moreover, CLAIMANT was unfamiliar with the flexoprinting technique *(Cl. Exh. No. 1)* and the aluminium foil it owed, previously having printed only on "various types of non-specialised forms of paper stock" *(Procedural Order No. 2 § 23)*. Finally, CLAIMANT had only a week from the time it received the machine on 8 July 2002 to the time it had to start serving the contract on 15 July 2002. It was thus subjected to time pressure under which errors are likely to occur. Consequently, it was next to inevitable that CLAIMANT would face "something unexpected" *(Cl. Exh. No. 3 § 3)* which would hinder the fulfilment of the Printing Contract. RESPONDENT's alleged breach can therefore not be considered causal for any damages suffered by the non-fulfilment of the Printing Contract.

(ii) The Damages Resulting out of the Printing Contract Were Not Foreseeable

80 Assuming but not conceding that CLAIMANT's loss of profit was attributable to RESPONDENT, the latter repudiates CLAIMANT's contention that the loss was foreseeable *(Cl. Memorandum § 44)*. Foreseeability is determined by what the party in breach knew or ought to have known at the time of contract conclusion *(Knapp in BIANCA/BONELL § 1.3; LIU § 14.2.1; Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 74 § 35; VÉKÁS p. 149)*. The ratio behind this principle is to allow parties to calculate their assumed risk and potential liability when concluding a contract *(Knapp in BIANCA/BONELL Art. 74 § 2.9; LOOKOFSKY § 290)*. RESPONDENT does not dispute that it was informed of the Printing Contract and provided with exact figures of the expected profit *(Cl. Memorandum § 44)*. Nevertheless, it could not foresee that the incapability of the machine to print on 8 mircometers would cause CLAIMANT to suffer damages in the amount of $ 1,369,582.99 *(Cl. Memorandum § 63)*.

81 RESPONDENT could not be aware that the fulfilment of the Printing Contract essentially depended on the machine's capability to print on 8 micrometer foil. Such foil was vaguely mentioned in CLAIMANT's first inquiry *(Cl. Exh. No. 1 § 2, see § 43 above)*, but no longer referenced when the Printing Contract with Oceania Confectionaries was introduced 23 days later *(Cl. Exh. No. 3)*. Packaging needs in the confectionery industry range from wrappers to

cardboard containers, and do not include 8 micrometer foil as a material of standard gauge *(Procedural Order No. 2 § 21)*. RESPONDENT could not foresee that the inability of the machine to print on this material would effectuate the loss of the entire profit out of the Printing Contract.

(b) CLAIMANT Is Not Entitled to Damages for the Non-Renewal of the Printing Contract

82 Contrary to CLAIMANT's assertions *(Cl. Memorandum §§ 38 et seq.)*, the lost profit from an alleged renewal of the Printing Contract [hereinafter Renewal] is irrecoverable. A mere chance of profit is not compensable *(BRUNNER Art. 74 § 19; NEUMAYER/MING Art. 74 § 1; Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 74 § 22)*, as it is "highly speculative" *(ICSID Metaclad v. Mexico; Levitt v. Iran)*. Likewise, the Renewal was mere speculation.

83 Even if CLAIMANT had fulfilled the Printing Contract against all odds *(see § 79 above)*, the contract did not provide for its automatic renewal *(Cl. Exh. No. 3)*. After the expiry of the four-year period, CLAIMANT would have been merely one competitor amongst many and Oceania Confectionaries would have been free and reasonable to seek out the most attractive offeror. CLAIMANT's contention that it would have secured a commanding lead "in a small market" *(Cl. Memorandum § 45)* through the fulfilment of the Printing Contract cannot be upheld. In a similar case that is even cited by CLAIMANT *(Cl. Memorandum § 47)*, the claimant sought lost profit compensation for a seven-year contract and an alleged three-year prolongation, asserting that it would have been in a "leading market position" *(ICC 8445)*. The tribunal held that lost profit was not sufficiently secure due to the existence of possible competition at the contract's expiry *(ibid.)*. As the market for flexoprint products in Oceania is subject to significant growth *(Procedural Order No. 2 § 20)*, the competition will have increased by the time of the alleged Renewal *(Procedural Order No. 2 § 32)*. As an example, Oceanic Generics is likely to demand printing services with an estimated annual profit of $ 300,000 only half a year after expiry of the Printing Contract *(Procedural Order No. 2 § 20)*. Further, RESPONDENT rejects CLAIMANT's assertion that competition was not foreseeable at the time of contract conclusion *(Cl. Memorandum § 58)*. As demonstrated by Reliable Printers *(Procedural Order No. 2 § 22)*, a number of printers are eager to gain the "handsome profits" *(Cl. Exh. No. 3 § 3)* from the Printing Contract. Thus, the envisaged Renewal was uncertain and cannot be attributed to the alleged breach of contract.

B. The Maximum Amount of Damages CLAIMANT Can Claim Is $ 32,846

84 Should the Tribunal find that CLAIMANT is indeed entitled to damages, the calculation amounting to $ 2,549,421 *(Cl. Memorandum § 31)* is incorrect. To avoid overcompensation of an aggrieved party, damages have to be discounted to the actual loss suffered *(ACHILLES Art. 74 § 8; Huber in MÜNCHENER KOMMENTAR Art. 74 § 23; SAIDOV § I 1; Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 74 § 31; Magnus in STAUDINGER Art. 74 § 22; Sapphire International Petroleums v. National Iranian Oil)*. The maximum amount of damages CLAIMANT can seek is $ 1,769,713.65 **(1.)**. These damages could have been mitigated to $ 32,846 pursuant to Article 77 CISG **(2.)**.

1. The Proper Calculation of Damages Amounts to $ 1,769,713.65

85 The maximum amount of damages CLAIMANT can seek is $ 1,769,713.65 as the annual profit out of the Printing Contract is to be reduced to $ 394,150 **(a)** and the total amount must be discounted to the present value **(b)**.

(a) CLAIMANT's Annual Profit Has to Be Depreciated to the Sum of $ 394,150

86 In its memorandum, CLAIMANT – contrary to its Statement of Claim § 25 and Procedural Order No. 2 § 29 – doubts that the annual profit of $ 400,000 is correct *(Cl. Memorandum § 54)*. It alleges that this profit is to be depreciated by its initial investments of $ 95,000 over the machine's life expectancy of 20 years *(ibid.)*. This sum is composed of $ 42,000 for the machine, $ 50,000 for the installation, $ 25,000 for the test runs *(Statement of Claim § 25)* and subtracting $ 22,000 for the resale price *(Procedural Order No. 1 § 10)*. RESPONDENT – though aware that the amount of the profit is not to be questioned at the present stage of the arbitration *(Procedural Order No. 2 § 29)* – accepts CLAIMANT's allegations that its profit must be depreciated in order to avoid overcompensation and agrees that "the claimant [should] obtain the benefit of the bargain and no more" *(GOTANDA p. 110; WELLS § 477)*. Therefore, only the depreciated profit is relevant for calculating future profits *(Himpurna California Energy v. PT Perushaan)*.

87 Rejecting CLAIMANT's calculation, RESPONDENT submits that the depreciated amount over 20 years constitutes $ 117,000. This amount is reached by following CLAIMANT's calculation *(see § 86 above)*, however, without subtracting the resale price of the machine of $ 22,000. The calculation of lost profit aims to place the party in the same position it would have had in case of proper fulfilment of the contract *(see § 84 above)*. As CLAIMANT would not have resold the machine, had it been able to serve the contract with Oceania Confectionaries, the resale price cannot be considered. The amount of $ 117,000 must thus be divided by 20 – the

number of years for depreciation – leading to an annual depreciation of $ 5,850 and an annual net profit of $ 394,150.

88 Contrary to CLAIMANT's allegation that the profit may be given in real or in nominal terms *(Cl. Memorandum § 53)*, RESPONDENT submits that there is no doubt as to the amount of profit CLAIMANT would have earned out of the Printing Contract *(Procedural Order No. 2 § 29)*. From the facts it unambiguously results that CLAIMANT had envisaged profits of "$ 400,000 a year" *(Cl. Exh. No. 3 § 3)*. There is no reason to assume that this sum was indicated in real terms. Even in the hypothetical case that CLAIMANT and Oceania Confectionaries had agreed on real terms, the calculation of damages would be limited to an annual profit of $ 394,150 in nominal terms. As discussed at § 80, the amount of damages under Article 74 CISG "may not exceed the loss which the party in breach foresaw or ought to have foreseen". CLAIMANT made no reference to a payment of profits in real terms. In light of the fact that the loss of profit was exceptionally high, RESPONDENT could not foresee that there would be a higher real profit in later years. Consequently, the calculation of damages is limited to an annual profit of $ 394,150 in nominal terms.

(b) The Lost Profit out of the Printing Contract and Its Renewal Has to Be Discounted to the Present Value of $ 1,769,713.65

89 RESPONDENT agrees with CLAIMANT that the lost profit out of the Printing Contract and its Renewal has to be discounted to the present value *(Cl. Memorandum § 52)* in order to prevent CLAIMANT's overcompensation. As all damages would be awarded presently, CLAIMANT would be placed in a position it would ordinarily not have held until 2010. Thereby, CLAIMANT would gain an unfounded advantage as, due to inflation, the present value of money is higher than its future value and CLAIMANT would be able to reinvest the entire profit at once. In cases of breach of long-term contracts, the prospect of reinvestment of recovered damages in profitable activities elsewhere is an "obviously realistic possibility" *(Himpurna California Energy v. PT Perushaan § 366)*. Furthermore, by awarding the entire amount of profit, CLAIMANT would no longer have to bear the inherent risk of realising its envisaged profit out of the Printing Contract *(see §§ 84 et seq. above)*. "This unexpected […] early security is an advantage to the claimant for which due credit must be also allowed in calculating the amount of the damages" *(Himpurna California Energy v. PT Perushaan § 368)*. Thus, CLAIMANT would be placed in a financial position it would never have been in, had it been able to properly serve the Printing Contract. Damages cannot be calculated irrespective of these advantages because RESPONDENT's recovery would exceed the principle of full compensation under Article 74 CISG *(see §§ 84 et seq. above)*.

90 In accordance with CLAIMANT's suggestion *(Cl. Memorandum § 52)*, the actual worth of CLAIMANT's advantages is therefore to be calculated pursuant to the Discounted Cash Flow (hereinafter DCF) method. The DCF method is "the generally accepted way for parties and tribunals to determine the value of a business that has been destroyed" *(GOTANDA p. 89 with reference to: COPELAND pp. 73-87; BREALEY/MYERS p. 77; GABEHART/BRINKLEY p. 123; U.N. COMPENSATION COMMISSION GOVERNING COUNCIL)*. Already one century ago, three Swiss arbitrators projected the value of a railroad concession over nearly 20 years and discounted it to the present value at the date of its annulment (*Delagoa Bay and East African Railway Co. reported by WHITEMAN pp. 1694-1703)*. For discounting future earnings, a discount rate has to be evaluated, including "the expected rate of inflation, the real rate of return, and the riskiness of the income stream" *(GOTANDA p. 91)*. In contrast to CLAIMANT's submissions *(Cl. Memorandum §§ 55 et seq.)*, RESPONDENT will show that the Printing Contract bore the same risk as an average investment in Oceania. Therefore, the appropriate discount rate is 11 % *(i)*. Moreover, the Renewal bore even higher risks and thus has to be discounted by 18 % *(ii)*.

(i) The Appropriate Discount Rate For the Lost Profit of the Printing Contract Is 11 %

91 To determine the appropriate discount rate, "the expected rate of return from investing in other assets of equivalent risk" is relevant *(Phillips Petroleum Co. v. Iran)*. For calculating the discount, the Tribunal is thus respectfully requested to apply an established rate embodying a risk equivalent to the risk of the Printing Contract.

92 In contrast to CLAIMANT's allegation *(Cl. Memorandum § 55)*, the Printing Contract is not subject to a 3 % risk factor, as this rate only applies to first class borrowers in Oceania *(Procedural Order No. 2 § 33)*. The risk factor of 3 % – contained in the lending rate of 6 % – is the lowest possible rate in Oceania. The status of a first class borrower can therefore be compared to that of an AAA rated borrower. An AAA borrower can loan money at the lowest rates, its solvency guaranteeing a very low credit risk (*http://en.wikipedia.org/wiki/AAA_%28credit_rating%29)*. This risk can definitely not be considered as a "standard commercial credit risk" as alleged by CLAIMANT *(Cl. Memorandum § 56)*. As of 15 March 2005, only seven companies are rated AAA borrowers by all three major credit agencies, e.g. General Electric, Exxon Mobil and Johnson & Johnson *(ibid.)*. Though CLAIMANT might be a reliable printing firm, its contract with Oceania Confectionaries was the first of greater volume in a business area where it was not sufficiently experienced *(see § 78 above)*. CLAIMANT can certainly not be compared to an AAA or prime borrower, especially as it neither supplied evidence of significantly high assets ensuring its

solvency in its Statement of Claim nor in its Memorandum. Therefore, a risk factor for the Printing Contract based on the prime lending rate of 6 % is unsustainable.

93 Instead, the appropriate risk factor is the 11 % rate applicable to the average return on investment capital in Oceania *(Procedural Order No. 2 § 33)*. CLAIMANT alleges that the Printing Contract was "close to risk-free" *(Cl. Memorandum § 55)*. The risk is to be determined by way of "enquiry into all relevant circumstances of a particular case" *(Kuwait v. Aminoil p. 84)*. RESPONDENT submits that, in light of this evaluation, risks inherent in the Printing Contract lead to the application of the 11 % average return on investment.

94 CLAIMANT contends that the conclusion of the Printing Contract eliminated any risk with regard to its fulfilment and the procurable annual profit *(Cl. Memorandum §§ 55 et seq.)*. RESPONDENT retorts that, as shown above, the fulfilment of the Printing Contract was far from guaranteed *(see § 84 above)*. Furthermore, the gain of the annual net profit can be obstructed by risks of production and business interruption caused by operational accidents, mechanical malfunction or mere human failure. The costs of solving such problems, e.g. by replacing machines or reproducing certain product lines, impose a considerable risk on the annual net profit. Moreover, the possibility that one of CLAIMANT's suppliers file for bankruptcy – generating additional costs through delays in delivery and the need to contract with new suppliers – cannot be excluded. In Germany, 39,000 companies – 1.3 % of all German companies – become insolvent every year *(http://www.destatis.de/basis/d/insol insoltab1.php)*. Similarly, Oceania Confectionaries itself might become bankrupt, leading to the total loss of CLAIMANT's profit. . Finally, the price of aluminium foil is subject to drastic increase. When calculating lost profit tribunals must bear in mind that future earnings "may be greatly affected by […] energy prices" *(GOTANDA p. 90)*. Over 40 % of aluminium production costs are energy costs *(http://de.wikipedia.org/wiki/Aluminiummarkt)*. During the first three years of the Printing Contract between 2002 and 2005, the price of aluminium increased by 72 % *(http://www.lme.co.uk/aluminium_graphs.asp)*. Unless CLAIMANT furnishes proof of a supply agreement at a fixed price for eight years, the rising aluminium price certainly poses a risk to its profit. In light of these circumstances, CLAIMANT's alleged lost profit from the Printing Contract must be discounted by 11 %.

95 The appropriate moment from which to calculate lost profit is at the delivery of the goods or the discovery of their non-conformity *(Knapp in BIANCA/BONELL Art. 74 § 3.16; SUTTON p. 743)*. RESPONDENT thus agrees with CLAIMANT that damages must be discounted to their present value on 8 July 2002 *(Cl. Memorandum § 57)*. This leads to the following calculation which is also applied by CLAIMANT *(ibid.)*:

Contract Year	Expected Payment	PV-Factor*	Present Value
1st (2002-2003)	$ 394,150.00	0,900900901	$ 355,090.09
2nd (2003-2004)	$ 394,150.00	0,811622433	$ 319,900.98
3rd (2004-2005)	$ 394,150.00	0,731191381	$ 288,199.08
4th (2005-2006)	$ 394,150.00	0,658730974	$ 259,638.81
		Damages for the Printing Contract	**$ 1,222,828.97**

* present value factor

96 The DCF applies the following formula to calculate the present value factor: PV-Factor = $(1+r)^{-n}$ where "n" stands for the number of years that have passed since 2002 and "r" for the fixed discount rate of 11 %. The present value factor decreases with the number of years as the investor has more years to reinvest the profit. A payment received four years earlier than expected has thus a lower present value than a payment gained merely one year earlier. Consequently, the total loss of profit out of the Printing Contract would constitute $ 1,222,828.97. Contrary to CLAIMANT's assertions *(Cl. Memorandum § 63)*, the actual loss in the amount of $ 95,000 does not have to be included. Procedural Order No. 1 §§ 14, 15 clearly states that only the claim for lost profit and not the claim for actual loss should be discussed at this stage of the arbitration.

(ii) The Applicable Discount Rate for the Renewal Is 18 %

97 Should the Tribunal grant compensation for the Renewal, the calculation of the applicable discount rate follows the same principle as above *(see §§ 89 et seq. above)*. However, it has to be taken into account that the Renewal – a mere chance – bears not only the same risks as the Printing Contract, but considerable additional uncertainties. Thus, RESPONDENT submits that the profit out of the Renewal has to be discounted by a significantly higher risk factor. A risk factor of 15 % was applied by a tribunal, which held that "recognising the uncertain nature of the calculations […] it is reasonable and appropriate to apply an additional discount of fifteen percent to the total [amount]" *(ICC 8445)*. Another tribunal applied a discount rate of 19 % reasoning that this would be most appropriate *(Himpurna California Energy v. PT Perushaan § 371)*. In the present situation, the "uncertain nature of the calculations" is given, as Oceania Confectionaries and CLAIMANT had not yet concluded another contract *(see § 83 above)* and there existed no obligation from Oceania Confectionaries' side to contract with CLAIMANT a second time.

98 Other contributions to a higher discount factor than in the first contract are the "unusually low" interest rates in Oceania during the last five years *(Procedural Order No. 2 § 33)*. The interest rates, including the average return on investments, will most probably rise in the years to come.

Consequently, the low discount rate CLAIMANT proposes with the reasoning of a low inflation rate *(Cl. Memorandum § 65)* is not appropriate at present. As a result, not a risk factor of 11 % – as suggested by CLAIMANT *(Cl. Memorandum § 62)* – but a risk factor of 15 % should be applied. The official discount rate of 3 % – describing the price of lending money in a risk-free market and thus establishing the minimum CLAIMANT can earn with its profit – is added to compensate CLAIMANT's advantage of obtaining the money earlier than expected. This leads to a discount rate of 18 % and the following calculation of damages for the Renewal:

Contract Year	Expected Payment	PV-Factor*	Present Value
5th (2006-2007)	$ 394,150.00	0,437109216	$ 172,286.60
6th (2007-2008)	$ 394,150.00	0,370431539	$ 146,005.59
7th (2008-2009)	$ 394,150.00	0,313925033	$ 123,733.55
8th (2009-2010)	$ 394,150.00	0,266038164	$ 104,858.94
Damages for the Renewal			**$ 546,884.68**

* present value factor

99 From the fifth to the eighth year, the discount rate is 18 %. Applying the same equation as above *(see § 96 above)*, the damages for the Renewal amount to $ 546,884.68. Adding the lost profit from the Printing Contract, CLAIMANT is entitled to a total loss of $ 1,769,713.65.

2. Any Damages Could Have Been Mitigated to $ 32,846 Under Article 77 CISG

100 Even if CLAIMANT is entitled to damages, it failed to take reasonable measures to mitigate its losses as required by Article 77 CISG. RESPONDENT strongly objects to CLAIMANT's allegation that it could not have fulfilled its duty to mitigate the loss *(Cl. Memorandum § 35)*. "The creditor should attempt to undertake everything possible in order to diminish the loss or at least to prevent its increase" *(LIU p. 100)*. However, if the creditor failed to mitigate the loss "the party in breach may claim reduction in the damages in the amount by which the loss should have been mitigated" (Article 77 CISG). RESPONDENT requests the Tribunal to reduce the amount of $ 1,769,713.65 to $ 32,846 as this constitutes the amount to which the loss could have been mitigated.

101 Article 77 CISG may oblige an aggrieved party to make a substitute transaction in order to mitigate its loss *(Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 77 § 9)*. "This is especially the case where a substitute transaction would avoid consequential losses following the non- or defective performance of the contract" *(Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 7 § 9; Huber in MÜNCHENER KOMMENTAR Art. 77 § 8)*. RESPONDENT agrees with CLAIMANT's submission that it would not have been possible to buy a new flexoprinter machine immediately *(Procedural Order No. 2 § 18)*, but that a "temporary solution […] would have been satisfactory"

until a new machine would be available *(Cl. Memorandum §§ 35 et seq.)*. However, as it was unlikely that the Magiprint Flexometix Mark 8 could have been adjusted *(Procedural Order No. 2 § 18)* – as admitted by CLAIMANT *(Cl. Memorandum § 36)* – CLAIMANT should not have remained inactive but should have looked for another temporary solution. One possibility would have been the import of printed aluminium foil, as the obligation to mitigate pursuant to Article 77 CISG includes the duty to buy goods from another supplier in order to fulfil the contract with a third party *(Russian Federation Tribunal 6 June 2000)*.

102 CLAIMANT could have avoided the cancellation of the Printing Contract by purchasing substitute foil from abroad until acquiring another flexoprinter machine. CLAIMANT itself admits that one month ("thiry-one days") would have sufficed to obtain a fully operating flexoprinter *(Cl. Memorandum § 34)*. Had CLAIMANT imported foil for the duration of one month, it would have had to pay the import price. RESPONDENT assumes – until CLAIMANT proves the contrary – that the price for imported foil equals the price that would have been paid by Oceania Confectionaries under the Printing Contract. This is supported by the fact that CLAIMANT – as the only competitor on the market at that time *(Cl. Exh. No. 1 § 3)* – could demand prices of the same magnitude as the price for imported foil. Had CLAIMANT imported substitute foil, it would merely have suffered the loss of profit. At an annual profit of $ 394,150 this would have amounted to $ 32,846 for one month.

103 Furthermore, a measure is 'reasonable' if it can be "expected under the circumstances from a party acting in good faith" *(HERBER/CZERWENKA Art. 77 § 3; Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 77 § 7)*. Taking into account the large sum of $ 1,769,713.65 which CLAIMANT seeks to recover from RESPONDENT and comparing it to the mitigated sum of $ 32,846, a reasonable party would have undertaken the small effort to buy substitute foil. In conclusion, CLAIMANT could have mitigated the damages to $ 32,846 by purchasing imported foil for a month. CLAIMANT's claim for damages should therefore be reduced to this amount.

104 Conclusively, CLAIMANT could have mitigated the damages significantly by purchasing imported foil for one month amounting to $ 32,846. CLAIMANT's claim for damages should therefore be reduced to this amount.

REQUEST FOR RELIEF

In light of the above made submissions, Counsel for RESPONDENT respectfully requests the Honourable Tribunal to find:

- The period of limitation has expired prior to the commencement of the present arbitration **(I.)**.
- The 7 stand Magiprint Flexometix Mark 8 flexoprinter machine delivered by RESPONDENT was in conformity with the contract according to Article 35 CISG **(II)**.
- CLAIMANT is not entitled to damages. Should the Honourable Tribunal find that CLAIMANT is entitled to damages, the proper amount would be $ 32,846 at a maximum **(III.)**.