

Thirteenth Annual

Willem C. Vis

International Commercial Arbitration Moot

Vienna, Austria

2005-2006

MEMORANDUM

**For
McHinery Equipment Suppliers Pty**

- Respondent -





Chicago International Dispute Resolution Association

CIDRA

Moot Case No. 13

LEGAL POSITION

On Behalf Of

McHinery Equipment Suppliers Pty

The Tramshed

Breakers Lane

Westeria City, Mediterraneo 1423 **[Respondent]**

Against

Oceania Printers S.A.

Tea Trader House

Old Times Square

Magreton, Oceania 00178 **[Claimant]**



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**INDEX OF ABBREVIATIONS**

Art.	Article
Arts.	Articles
CIDRA	Chicago International Dispute Resolution Association
C. Exb.	Claimant's Exhibit
C. Exbs.	Claimant's Exhibits
C. Memo.	Claimant's Memorandum of Law
CIF	Cost, Insurance, and Freight
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Corrections	Official Corrections Page
Statement of Claim	Claimant's Statement of Claim
ICC	International Chamber of Commerce
Limitation Convention	1974 New York Convention on the Limitation Period in the International Sales of Goods
n.	Footnote
No.	Number
para.	paragraph
paras.	paragraphs
p.	page
pp.	pages
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
Pt.	Part



R. Exb.	Respondent's Exhibit
R. Exbs.	Respondent's Exhibits
Answer	Respondent's Answer
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985
UNIDROIT	UNIDROIT International Institute for the Unification of Private Law Principles
v.	versus

**SUMMARY OF FACTS**

- 17 April 2002** Oceania Printers S.A. (Claimant) wrote to McHinery Equipment Suppliers Pty (McHinery) stating that it was “interested in printing on coated and uncoated papers for wrapping,” including polyester and metallic foils, for the confectionary market and that the typical thickness of foil used in that market “may be of 8 micrometer thickness” [C. Exb. 1].
- 25 April 2002** McHinery responded by stating it had a “7 stand Magiprint Flexometix Mark 8 Machine” (Machine) for \$44,500 CIF Port Magreton, Oceania, and offered Claimant an opportunity to inspect [C. Exb. 2].
- 5-6 May 2002** Claimant’s owner and President inspected the Machine and stated that the Machine “looked to be just what we need” [C. Exb. 3].
- 10 May 2002** Claimant indicated that it signed a contract with Oceania Confectionaries (printing contract) and requested to move “fast” [C. Exb. 3].
- 16 May 2002** McHinery offered to deliver the Machine from Greece directly to Oceania for a reduced price of \$42,000 [C. Exb. 4].
- 27 May 2002** McHinery sent a written contract (Contract) to Claimant and included the instruction manual for the Machine [C. Exb. 6].
- 30 May 2002** Claimant signed and returned the Contract to McHinery [C. Exb. 7].
- 8 July 2002** McHinery furnished Claimant with a fully functioning and refurbished Magiprint Flexometix Mark 8 machine, and Claimant unsuccessfully attempted to print on 8 micrometer foil [R. Exb. 2].
- 1 August 2002** Claimant informed McHinery that Reliable Printers purchased a machine capable of printing on 8 micrometer foil and the machine was working well [C. Exb. 9].
- 15 August 2002** Claimant informed McHinery that the printing contract had been cancelled and that it intended to hold McHinery responsible for its lost profits.
- 14 October 2002** Claimant sold the Machine to another company for \$22,000 [PO 2 para. 30].
- 5 July 2005** CIDRA received Claimant’s statement of claim [CIDRA Letter 7 July 2005].



SUBMISSIONS

McHinery Equipment Pty respectfully submits the following in regard to the limitation period:

- That the CIDRA Rules, and Art. 32(1) therein, require this Tribunal to apply conflict of laws rules to determine the applicable limitation period;
- That the application of conflict of laws rules leads to a two-year limitation period;
- That the limitation period has expired and Claimant's action is time-barred.

McHinery Equipment Pty respectfully submits the following in regard to the Contract:

- That the Machine satisfied the standard for conformity set forth in Art. 35(1) CISG because it was of the quantity, quality, and description of the Contract;
- That the Machine also satisfied the conformity requirement of Art. 35(2) CISG because it was fit for the purpose for which a machine of that description would ordinarily be used and Claimant did not make the particular purpose of printing on 8 micrometer foil known;
- That Art. 35(3) CISG precludes McHinery from liability;
- That McHinery therefore fulfilled its contractual obligations, and Claimant is not entitled to damages;
- That if this Tribunal awards damages, it should limit those damages according to Art. 74 CISG to foreseeable damages, which do not entitle Claimant to loss of profit;
- That if this Tribunal should choose to award loss of profit damages, Claimant is only entitled to \$67,000 because it failed to mitigate its damages as required by Art. 77 CISG;
- That when calculating the amount of damages, this Tribunal should take into consideration the time value of money.



ARGUMENT

I. Claimant's action is time-barred because the limitation period determined by the applicable conflict of laws rules expired before CIDRA received the claim

1. The parties to this action expressly designated that all claims arising from their Contract would be determined by arbitration according to the rules of CIDRA [*C. Exb. 7 para. 13*]. Art. 32(1) CIDRA provides a predictable method for determining the limitation period governing this action. **(A.)** Claimant agrees that under Art. 32(1) CIDRA, this Tribunal should apply conflict of laws rules to determine the limitation period because the parties did not designate a law to govern the limitation period [*C. Memo. para. 1*]. **(B.)** All applicable conflict of laws rules direct this Tribunal to apply a two-year limitation period. **(C.)** Further, the CISG does not govern limitation periods, and it would therefore be inappropriate to follow Claimant's suggestion to apply the UNIDROIT Principles or the Limitation Convention under Art. 7(2) CISG. **(D.)** The requirement in Art. 32(1) CIDRA that the parties must designate a national law to govern any disputes precludes this Tribunal from inferring that the parties chose the UNIDROIT Principles or the Limitation Convention to govern the limitation period. This Tribunal should not infer that the parties chose the law of Danubia to govern the limitation period because arbitral tribunals have recognized that the law of the forum is not applicable.

A. This Tribunal should apply conflict of laws rules to determine the national law governing the limitation period because the parties failed to designate a law governing the limitation period

2. Under Art. 32(1) CIDRA, this Tribunal "shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable." The CIDRA Rules take precedence over a national arbitration act unless the national provision in question is mandatory [*Art. 1(2) CIDRA Rules*]. The national arbitration act of Danubia, the seat of this arbitration, is the UNCITRAL Model Law [*C. Exb. 7 para. 13*]. Art. 28 Model Law, which determines the rules applicable to the substance of a dispute, is not mandatory [*Blessing p. 49*]. Therefore, Art. 32 CIDRA governs the conflict of laws issue. Applying Art. 32(1) CIDRA, **(1.)** this Tribunal must first determine whether the parties designated a law applicable to the substance of the dispute. If so, this Tribunal is bound to apply



that law. (2.) If the parties did not designate a law, this Tribunal “shall apply the law determined by the conflict of laws rules which it considers applicable” [Art. 32(1) CIDRA Rules].

1. The parties failed to designate a law governing the limitation period

3. The parties selected the CISG as the substantive law governing the Contract [C. Exb. 7 para. 12]. Each State connected with this dispute considers the limitation period to be a matter of substantive law [PO 2 para. 4]. However, as recognized by Claimant, the CISG contains no express provisions that govern the limitation period [C. Memo. para. 1]. Claimant also acknowledges that the parties made “no other choice of law to govern other legal issues that might arise under the Contract” [C. Memo. para. 1]. Therefore, as Claimant agrees, this Tribunal is required to proceed to the second sentence of Art. 32(1) CIDRA and determine the limitation period by the applicable conflict of laws rules [C. Memo. para. 1].

2. This Tribunal should apply the national law determined by the conflict of laws rules which it considers applicable

4. Pursuant to the second sentence in Art. 32(1) CIDRA, if the parties fail to designate a law applicable to the substance of the dispute, “the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” Art. 32(1) CIDRA specifically requires that arbitrators apply the “law” to resolve this dispute. In the field of conflict of laws, the word “law” signifies “the [substantive] law in force in a State other than its choice of laws rules” [Saf section 2.2]. This meaning of the word “law” has been well established since 1985, when the UNCITRAL Model Law working group thoroughly debated using this word in Art. 28 Model Law [UNCITRAL Model Law, 326th Meeting, paras. 11, 22]. The CIDRA Rules were not created until 1997, nearly a decade after this debate. Therefore, the word “law” in Art. 32(1) CIDRA indicates that the limitation period must be determined “under a national domestic law as identified by conflict of laws rules” [Saf section 2.2].

5. Limitation periods vary widely among States [Schlechtriem Limitations Doc. 68, pp. 4-5]. CIDRA’s president, Peter Baugher, promotes the CIDRA Rules as a solution to the unpredictability of international business disputes [Austermiller/Baugher pt. II, para. 3]. Therefore, Art. 32 CIDRA provides a way to predictably determine which of these national limitation periods applies in this action. Commentators and arbitral decisions frequently cite the importance of uniformity and predictability in choosing the applicable law [Holtzmann/Neuhaus, pp. 765, 770; Rubino-Sammartano, pp. 440-441]. Thus, this Tribunal should choose the



applicable conflict of laws rules in a manner that will promote uniformity and predictability in accordance with the goals of CIDRA and international commercial arbitration.

B. The applicable conflict of laws rules lead to a two-year limitation period, which bars the present claim

6. Claimant suggests that under Art. 32(1) CIDRA this Tribunal must apply the conflict of laws rules of the State with the “most significant relationship” to the Contract [*C. Memo paras. 1, 23-24*]. However, Art. 32(1) CIDRA states that this Tribunal must apply the conflict of laws rules which it “considers applicable.” Art. 32(1) CIDRA gives this Tribunal considerable freedom in selecting the applicable conflict of laws rules. Therefore, this Tribunal may apply (1.) the conflict of laws rules of any State connected with the Contract, (2.) applicable international conventions, or (3.) a cumulative approach combining conflict of laws rules. Even if this Tribunal follows Claimant’s suggestion to apply the conflict of laws rules of the State with the most significant relationship to the Contract [*C. Memo. para. 24*], this action is time-barred because the conflict of laws rules of every State connected to the Contract lead to a two-year limitation period.

1. The national conflict of laws rules of the States connected with the dispute indicate that the claim is time-barred

7. Claimant suggests that Mediterraneo, McHinery’s place of business [*C. Memo para. 1*], Oceania [*C. Memo. para. 23*], Greece [*C. Memo. para. 22*], and Danubia [*C. Memo para. 25*] have connections to this Contract. Accordingly, this Tribunal should consider the conflict of laws rules of these States. (a.) The conflict of laws rules of Mediterraneo lead to a two-year limitation period barring this action. (b.) Similarly, a two-year limitation period applies under the conflict of laws rules of Oceania. In addition, the conflict of laws rules of both (c.) Greece and (d.) Danubia lead to the conclusion that this action is time-barred.

a) The conflict of laws rules of Mediterraneo require this Tribunal to apply a two-year limitation period, which bars the present claim

8. Art. 14 of the Private International Law Act of Mediterraneo provides that the law applicable to an international sale of goods transaction shall be that of the seller [*PO I para. 4*]. The rationale underlying this rule is that the seller’s law should apply in the absence of a choice of law by the parties because the seller risks legal liability on a broad range of complex issues. In contrast, the buyer’s only obligation is to pay the purchase price [*Lipstein p. 410*]. The place



of business of the seller in this transaction is Mediterraneo [*Statement of Claim para. 2*]. Thus, the conflict of laws rules of Mediterraneo lead to the application of Mediterraneo's limitation period.

9. Art. 87 of the Mediterraneo Law of Obligations provides a two-year limitation period for sales of goods [*PO 1 para. 5*]. This period begins running when the event giving rise to the claim occurs [*PO 2 para. 5*]. McHinery and Claimant have agreed that the event giving rise to this claim occurred in July 2002 [*Statement of Claim para. 10*]. Art. 3(2) CIDRA provides that arbitral proceedings "commence on the date on which the statement of claim is received by CIDRA." CIDRA received notice of this claim on 5 July 2005, at which time approximately three years had elapsed, and this claim was barred under the law of Mediterraneo [*CIDRA Letter 7 July 2005 para. 1*].

b) The conflict of laws rules of Oceania require this Tribunal to apply a two-year limitation period, which bars the present claim

10. Oceania has adopted Arts. 1 through 15 of the 1986 Hague Convention in its International Sale of Goods Act (ISGA). Claimant asserts that ISGA leads to Oceania's four-year limitation period [*C. Memo. para. 24*]; however, according to Art. 8(1) ISGA, "the contract is governed by the law of the State where the seller has his place of business." McHinery is the seller in this transaction and has its place of business in Mediterraneo [*Statement of Claim para. 2*]. Thus, Mediterraneo's Law of Obligations, which provides a two-year limitation period, must apply to this dispute and bar the present claim [*supra para. 9*]. Furthermore, Claimant concedes that Oceania's law recognizes that the law of the seller's country applies to all contractual disputes with limited exceptions [*PO 1 para. 6*]. Contrary to Claimant's assertion [*C. Memo. para. 23*], neither of the narrow exceptions in Arts. 8(2)(b) or 8(3) ISGA rebut the presumption in favor of Mediterraneo's law.

11. The first exception, Art. 8(2)(b) ISGA, leads to the application of the buyer's law when "the contract provides expressly that the seller must perform his obligation to deliver goods in [the buyer's] State" [*PO 1 para. 7*]. The only express delivery obligation in the Contract was a CIF Incoterm [*C. Exb. 7 para. 1*]. According to the CIF Incoterm, "the seller delivers when the goods pass the ship's rail in the port of shipment" [*Incoterms 2000*]. Art. 67 CISG confirms that "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer." Claimant agrees that the "buyer must bear all risks of loss of or damage to the



goods from the time they have passed the ship's rail at the port of shipment" [*C. Memo. para. 64*]. Therefore, the Machine was delivered when it passed the ship's rail at the port of shipment in Greece. Because the Contract expressly required McHinery to deliver the Machine in Greece, as opposed to Oceania, the Contract fails to meet the Art. 8(2)(b) ISGA exception.

12. The second exception, Art. 8(3) ISGA, applies if the Contract is "manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2" [*PO 1 para. 7*]. The drafters of the 1986 Hague Convention created this provision to provide an opportunity for the application of a third State's law, other than the law of the buyer's or seller's place of business [*Von Mehren p. 33*]. A proposal to delete Art. 8(3) was rejected after supporters of the provision stated that "deletion of the paragraph would require that a series of rules be included in the Convention for situations in which a third State's law should apply" [*Von Mehren p. 33*]. Because Mediterraneo and Oceania are the States in which the buyer and seller have their principle places of business, the exception in Art. 8(3) ISGA should not be interpreted to lead to the application of either Mediterraneo's or Oceania's law. However, even if this Tribunal interprets Art. 8(3) ISGA to allow for the application of the buyer's law, Art. 8(3) does not lead to Oceania's law because it is not "manifestly more closely connected" with the Contract [*infra. para. 16-19*].

13. The States other than Mediterraneo and Oceania which have a connection to the Contract are Danubia and Greece. The parties' choice of Danubia as the seat of arbitration does not make the Contract "manifestly more closely connected" with Danubia's law. The place of arbitration often has no connection with the substantive issues of the dispute and instead is chosen because the parties prefer the type of arbitration offered there or the neutral location [*Redfern/Hunter pp. 79, 121-122*]. On the other hand, McHinery concedes that Greece has connections to the Contract. If this Tribunal determines that Greece is "manifestly more closely connected" with the Contract than Mediterraneo, the claim is still time-barred. The Greek Law of Obligations, like Art. 87 of the Mediterraneo Law of Obligations, provides a two-year limitation period for sales of goods [*Art. 554 Greek Law of Obligations*]. Because the limitation period for this Contract would be the same under the laws of Greece or Mediterraneo, this Tribunal would reach the same result if it finds that Greece is manifestly more closely connected to the Contract.



c) The conflict of laws rules of Greece require this Tribunal to apply a two-year limitation period, which bars the present claim

14. Greece is a signatory to the Rome Convention [*Rome Convention State Parties*]. Art. 3(1) of the Rome Convention requires the law chosen by the parties to govern a contract. In the absence of a choice, Art. 4(1) looks to the “law of the state to which [the contract] is most closely connected.” Art. 4(2) presumes that “the contract is most closely connected with the country where the party who is to effect the performance characteristic of the contract has...his habitual residence.” In a sale of goods transaction, the seller completes characteristic performance [*Unitras-Marcotec GmbH v. R.A. Mobili s.r.l., Italy (1997)*; *Giuliano/Legarde Art. 4 para. 3*; *Lipstein p. 407 n. 22*]. Thus, the Contract is most closely connected with the seller’s State. The seller in the present dispute is McHinery, which resides in Mediterraneo. Therefore, Mediterraneo’s two-year limitation period should be applied to bar the present claim.

15. Art. 4(5) of the Rome Convention provides a limited exception to the presumption that the law of the seller is most closely connected with the contract when “the circumstances as a whole” indicate that the contract is “more closely connected” with another State. Claimant suggests that several factors indicate a State’s connection with a contract: the place of performance of the contract; the location of the subject matter of the contract; the place where the contract is formed; and the place of negotiation [*C. Memo. para. 1*]. Claimant misplaces its discussion of these factors by using them to determine which conflict of laws rules apply [*C. Memo. paras. 1, 23-24*]. These factors are more appropriately considered when analyzing whether a State is “more closely connected” to a contract under Art. 4(5).

16. Although Claimant attempts to establish that the Contract was formed in Oceania [*C. Memo. para. 14*], the Contract was formed in Mediterraneo where McHinery received the signed Contract [*infra para. 47*]. A contract is formed when an “acceptance of an offer becomes effective” [*Art. 23 CISG*], and acceptance becomes effective “at the moment the indication of assent reaches the offeror” [*Art. 18(2) CISG*]. McHinery received Claimant’s assent to the Contract in Mediterraneo. Therefore, the Contract was formed in Mediterraneo.

17. Despite Claimant’s assertion that the place of negotiation is a relevant factor [*C. Memo. para. 1*], this approach is a remnant of the era when a contract would often be negotiated, written, and signed by both parties together in the same place. In today’s business climate, however, the place of negotiation is often irrelevant because advances in communication allow



the parties to be in different places throughout the transaction. This Contract is the product of written negotiations by both parties sent from and received in their respective States from 17 April 2002 until the Contract was signed on 30 May 2002. In this transaction, the only time the parties met face-to-face was in Greece [*C. Statement of Case para. 5*]. Given the nature of this transaction, the places of negotiation are not helpful in determining the Contract's connections to a particular State, and this Tribunal should look to other factors.

18. Contrary to Claimant's assertion that the place of delivery was Oceania [*C. Memo. para. 20*], McHinery met its delivery obligation when it handed over the Machine to the carrier in Greece [*supra para. 11*]. As Claimant concedes, the Machine was located in Greece, and the inspection of the Machine occurred there as well [*C. Memo. para. 22*]. McHinery's workers disassembled the Machine in Greece, then reassembled and calibrated it in Oceania [*C. Exb. 6 para. 4*]. Claimant attempts to establish that Oceania has the most significant relationship to the Contract because the Contract required McHinery to reassemble and calibrate the Machine in Oceania [*C. Memo. para. 17*]. However, this connection is insufficient to rebut the presumption in favor of Mediterraneo's law. Looking at the circumstances as a whole, if any State has a closer connection to the Contract than Mediterraneo, it is Greece, where the passing of the risk from seller to buyer, the inspection, and delivery of the Machine occurred [*ICC Award 2637, 1975; C. Exb. 7 para. 1; C. Exb. 3 para. 1; PO 2 para. 13; C. Exb. 6 para. 4*]. Therefore, if a State is manifestly more closely connected to the Contract than Mediterraneo, it is Greece, and the claim is time-barred.

19. Although McHinery took subsequent measures in Oceania to modify the Machine according to Claimant's request, these measures did not make the Contract more closely connected to the laws of Oceania [*C. Exbs. 9-10*]. These measures were neither expected nor required under the Contract. Placing any weight on these measures would discourage sellers from making good-faith efforts to maintain long-term relations with buyers for fear of tipping the balance of a contract's connections. Typically, tribunals only use Art. 4(5) Rome Convention to apply the law of the buyer's State when reviewing contracts that involve the transfer of the right to manufacture or of technical knowledge, which are better characterized as service contracts [*ICC Award 4132, 1983*]. In those cases, the characteristic performance is the training or the transfer of rights rather than the delivery of goods [*ICC Award 4132, 1983; ICC Award 2637, 1975*]. Unlike those cases, the characteristic performance in this Contract was the transfer of



goods, which McHinery performed, and therefore Mediterraneo's two-year limitation period applies.

d) The conflict of laws rules of Danubia require this Tribunal to apply a two-year limitation period, which bars the present claim

20. The Supreme Court of Danubia has ruled that Danubian domestic conflict of laws rules cannot apply when there is no Danubian party to an action [*PO 2 para. 6*]. Instead, the Model Law governs as Danubia's international law of commercial arbitration. When the parties to a dispute have not selected an applicable law, Art. 28 Model Law requires an arbitral tribunal to apply the "law determined by the *conflict of laws rules* which it *considers applicable*" [*emphasis added*]. This language is identical to the language of Art. 32(1) CIDRA and leads to the same result: a two-year limitation period which bars this claim.

2. This Tribunal may apply international conflict of laws conventions to determine that the claim is time-barred

21. Another way to determine the applicable conflict of laws rules "involves finding common or widely accepted principles in the main systems of private international law" [*Fouchard/Gaillard/Goldman p. 873*]. Accordingly, arbitrators often refer to existing international conventions on the conflict of laws, irrespective of their enforcement. Specifically, **(a.)** the 1955 Hague Convention on the Law Applicable to International Sales of Goods, **(b.)** the 1980 Rome Convention on the Law Applicable to Contractual Obligations, and **(c.)** the 1986 revised Hague Convention are often used by arbitrators as sources of international conflict of laws rules.

a) The conflict of laws rules under the 1955 Hague Convention lead to a limitation period that bars the present claim

22. The 1955 Hague Convention is widely recognized, and because it is universally accepted, the application of this convention is not limited to Signatory States [*Saf section 2.1*]. The convention directs this Tribunal to apply the law of the seller's place of business, with no relevant exceptions [*Art. 3(1) 1955 Hague Convention*]. Art. 3(1) of the 1955 Hague Convention requires the application of Mediterraneo's two-year limitation period, which bars this claim [*supra para. 9*].



b) The conflict of laws rules under the 1980 Rome Convention lead to a limitation period that bars the present claim

23. Like the 1955 Hague Convention, the Rome Convention is widely adopted [*Saf section 2.1*]. The analysis under the Rome Convention is the same as the analysis under Greek conflict of laws rules [*supra paras. 14-19*]. As explained above, this analysis leads to the application of Art. 87 of the Mediterraneo Law of Obligations, or Art. 554 of the Greek Law of Obligations, both of which mandate a two-year limitation period and bar this claim.

c) The conflict of laws rules under the 1986 Hague Convention lead to a limitation period that bars the present claim

24. Arbitral tribunals have also used the 1986 Hague Convention as “representative of prevailing principles in the field” [*ICC Award 6527, 1991* (applying the 1986 Hague Convention rather than *lex fori* when parties did not choose a law)]. The analysis under this convention is the same as the analysis under the conflict of laws rules of Oceania [*supra paras. 10-13*]. As discussed above, this analysis leads to the application of Art. 87 of the Mediterraneo Law of Obligations or Art. 554 of the Greek Law of Obligations, both of which bar this claim.

3. The cumulative approach leads to the conclusion that the claim is time-barred

25. Another approach is the cumulative application of relevant choice of laws rules, which leads to a foreseeable result and should be used where the conflict of laws rules agree on a result [*Petrochilos pt. I(A)*; *Fouchard/Gaillard/Goldman, p. 872*; *ICC Award 953, 1956*; *ICC Award 7197, 1992*]. The ability of the arbitrators to choose among rules is limited when the application of each conflict of laws rule leads to the same result [*Petrochilos pt. I(A)*]. As demonstrated in the chart below, the conflict of laws rules of each State with a connection to this Contract and the applicable international conventions lead to a two-year limitation period.



Conflict of Laws Rules	Rule Description	Resulting Law	Period
Mediterraneo Law of Obligations	Applicable law is that of the seller	Mediterraneo	2 Years
1955 Hague Convention			
Oceania Law of Obligations	Seller's law applies unless delivery occurs in the buyer's State or circumstances indicate that the contract is more closely connected with another State	Mediterraneo or Greece	2 Years
1986 Hague Convention			
Greek Law of Obligations	Presumption that seller's law applies unless the circumstances rebut that presumption	Mediterraneo or Greece	2 Years
1980 Rome Convention			
Danubia	Under Art. 28(1) Model Law, the Tribunal determines conflict of laws rules	Mediterraneo or Greece	2 Years
Closest-Connection Test	Law of the State most closely connected with the contract applies	Mediterraneo or Greece	2 Years

26. The national conflict of laws rules of each State with a connection to this Contract and the application of international conflict of laws rules commonly used in international sales of goods transactions lead to a two-year limitation period for this claim. Therefore, this Tribunal will best serve the goal of predictability by applying a two-year limitation period to this claim. Contrary to Claimant's assertion that a two-year limitation period is "too short" [*C. Memo. para. 35*], a two-year limitation period is one of many generally used to ensure that "peace under the law [is] restored by finally cutting off the threat of litigation" [*Schlechtriem Limitations Doc. 54; Doc. 68; see also Zimmerman p. 63*]. McHinery could have fairly assumed that the limitation period expired because two years passed from the time Claimant received the manual showing the Machine's specifications and Claimant filed no claim [*Answer para. 13*]. Claimant's expectation to have four years to prepare its claim was unreasonable given the parties' express choice of the CIDRA Rules, which lead to the application of a two-year limitation period.

C. Although the parties referred to the CISG in the Contract, the parties did not designate the CISG to govern the limitation period

27. Although the Contract is governed by the CISG [*C. Exb. 7 para. 12*], (1.) the CISG does not provide an applicable limitation period in this case. Therefore, Claimant's assertion that this Tribunal should apply (2.) the UNIDROIT Principles or (3.) the Limitation Convention under



Art. 7(2) CISG cannot be sustained, and the period must be determined in accordance with the conflict of laws approaches discussed above.

1. The CISG does not govern the limitation period

28. Art. 4 CISG restricts the scope of the CISG to “only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.” Under this language, limitation periods fall outside the scope of the CISG. As Claimant points out, the “CISG does not address the question of limitation periods” [*C. Memo. para. 1*]. Indeed, nearly every tribunal that has addressed this issue has determined that the issue of the limitation period falls outside the scope of the CISG [*ICC Award 7660, 1994; Russian Federation Tribunal Award 406/1998 (2000); Case 1230, Switzerland (1997); Case 2U271999, Germany (1999); Case 3KFO653/93, Germany (1997); Case 2O50694, Germany (1995); Case 11 U 191/94, Germany (1995); M.S.P.A. v. N, Rechtbank van Koophandel, Germany (1991); Case 8 Ob 364/97 f, Germany (1998)*]. The drafters of the CISG specifically excluded the principles of the Limitation Convention from the scope of the CISG because the Limitation Convention was largely rejected by the international community and therefore “might have adversely affected” the implementation of the CISG [*Boele-Woelki section 5.5*]. Instead, UNCITRAL issued a protocol amending the Limitation Convention to bring it in line with the CISG [*Sono pt. I(A); 1980 Protocol*]. The limitation period is not governed by the CISG, and the law applicable to the limitation period has not been designated by the parties. Therefore, under Art. 32(1) CIDRA, this Tribunal should apply conflict of laws rules, which lead to a two year limitation period.

29. Claimant asserts that Art. 7(2) CISG allows the UNIDROIT Principles and the Limitation Convention to act as “gap fillers” with respect to the limitation period [*C. Memo. paras. 27, 31*]. However, because the issue of the limitation period falls outside the scope of the CISG under Art. 4, it is inappropriate to apply Art. 7(2) CISG in this case. The CISG does not cover periods of limitation, and neither the Limitation Convention nor the UNIDROIT Principles may be applied in this case as a supplement to the CISG. Therefore, there is no gap to be filled under Art. 7(2) CISG, and this Tribunal must apply the conflict of laws rules under Art. 32(1) CIDRA, which lead to the application of Mediterraneo’s limitation period of two years. Further, it is worth noting that even the exceptional court which determined that the limitation period was governed by but not expressly settled in the CISG applied the rules of private international law, leading to the seller’s domestic limitation period [*Case 4607/2000, France (2001)*].



2. The limitation period in the UNIDROIT Principles should not be applied, and even if this Tribunal applies the UNIDROIT Principles, the action is time-barred

30. (a.) This Tribunal should not apply the UNIDROIT Principles on the limitation period because these principles are not representative of a common international practice, and the parties could not have foreseen their application to resolve this dispute. (b.) Even if this Tribunal applies the UNIDROIT Principles, the claim is time-barred.

a) This Tribunal should not apply the UNIDROIT Principles

31. Claimant asserts that the UNIDROIT Principles are commonly used as *lex mercatoria* to fill gaps under Art. 7(2) CISG [*C. Memo para. 27*]. However, the UNIDROIT Principles on the limitation period do not reflect the *lex mercatoria*, unlike other UNIDROIT Principles. *Lex mercatoria* represents the principles merchants follow in the course of international business, whether codified or simply the common practice in an industry [*Carbonneau p. 21; ICC Award 7375, 1996* (general principles applicable in limitation period case)]. The UNIDROIT Principles do not represent the common practice with respect to the limitation period because there is no common practice with respect to this issue. Although Claimant suggests that UNIDROIT's three-year period is reasonable and representative of some kind of balance [*C. Memo. para. 31*], limitation periods differ significantly among States [*Schlechtriem Limitations Doc. 64; Doc. 68*]. Thus, the UNIDROIT Principles on the limitation period actually represent an arbitrary choice among these differing periods. In contrast, the parties could have foreseen, at the time of contracting, the limitation period designated by the conflict of laws rules discussed above based on their choice of the CIDRA Rules [*Ziegel section III; ICC Award 5717, 1988*]. Therefore, this Tribunal should not use the UNIDROIT Principles on the limitation period as a gap filler for the CISG.

32. Further, although the UNIDROIT Principles are sometimes applied to fill gaps in the CISG, the provisions on the limitation period have rarely, if ever, been used by arbitral tribunals or courts [*See generally UNILEX Art. 10.1-10.8*]. In addition, because the UNIDROIT Principles on the limitation period did not come into effect until 2004, two years after the Contract was formed, the parties could not have intended for these principles to be applied to resolve this dispute.

33. Although Claimant concludes that Oceania has the most significant relationship to the Contract, Claimant also suggests that the UNIDROIT Principles should apply to this action



because no State has a predominant connection to the Contract [*C. Memo. para. 29*]. This inconsistency ignores the general presumption in favor of the seller's law, giving the seller's law a "predominant connection" to the Contract. Mediterraneo's two-year limitation period bears a predominant connection to the Contract through the applicable conflict of laws approaches. Therefore, this Tribunal should not apply the UNIDROIT Principles on the basis that there is no other law with a satisfactory connection.

b) Even if this Tribunal applies the limitation period from UNIDROIT, the claim is time-barred because the period has already expired

34. Art. 10.2(1) UNIDROIT provides a three-year limitation period "beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised." Claimant asserts that it could not have had notice of the Machine's alleged non-conformity until 8 July 2002 [*C. Memo. para. 37*]. However, when Claimant inspected the Machine on 6 May 2002, the manual containing the Machine's specifications was available [*PO 2 para. 13*]. This manual specified that the Machine could not print on foil thinner than 10 micrometers [*R. Exb. 1*]. On 30 May 2002, Claimant received the Machine's manual along with the Contract for signature and was in possession of the manual from that time onward [*C. Exb. 6 para. 2*]. Claimant ought to have known by this time that the Machine would not print on 8 micrometer foil. If this Tribunal chooses to apply the UNIDROIT Principles, the limitation period should begin running on 31 May 2002, the day after Claimant received the manual, not 8 July 2002 as Claimant suggests. At the very latest, the period commenced on 1 July 2002, the date on which McHinery's engineers began test runs and made final adjustments [*R. Exb. 2*]. Claimant could have requested that they test 8 micrometer foil and therefore ought to have known of the alleged defect at that time.

35. Contrary to Claimant's assertion that the limitation period ceased when its claim was sent [*C. Memo. para. 39*], under Art. 3(2) CIDRA, the period ceased when the claim was received by CIDRA. CIDRA received notice of Claimant's action on 5 July 2005, which was 35 days after the limitation period's expiration [*CIDRA Letter 7 July 2005, para. 1*]. Thus, even if this Tribunal chooses to apply the UNIDROIT Principles to reach a three-year limitation period this claim is barred.



3. The Limitation Convention should not be applied to the present claim because neither party operates its business in a Contracting State to the Convention

36. Contrary to Claimant's assertion [*C. Memo. paras. 27, 31, 35*], this Tribunal should not consider the Limitation Convention to determine the limitation period, nor to indicate an international trade usage for a "reasonable" period because the parties did not designate the Limitation Convention to apply to this action. Neither party to this action has a place of business in a State that has ratified the Limitation Convention [*PO 2 para. 1*]. Further, even though the Limitation Convention has an "international character," it has largely been rejected by the international community. There are only 26 State Parties to the unamended Limitation Convention and even fewer to the version amended by the 1980 Protocol. Additionally, the application of the Limitation Convention has been rejected when the parties to a dispute do not have their places of business in Contracting States [*Case 1230, Switzerland (1997)*]. Because the international community cannot agree to accept the Limitation Convention, it is inappropriate to infer that the parties agreed to the application of this Convention. This Tribunal should not apply the Limitation Convention to the Contract because doing so would not only be contrary to the scope of the Convention but also to the parties' expectations of fairness and predictability.

D. This Tribunal should not rely on a speculative implied choice of law when the parties' express choice of the CIDRA Rules provides a predictable approach

37. Claimant suggests that this Tribunal should infer an implied negative choice to exclude national law in favor of international principles such as *lex mercatoria* because nothing in the Contract indicates that the parties' national laws should apply [*C. Memo. para. 28*]. However, **(1.)** under Art. 32(1) CIDRA, which the parties chose to govern this dispute, this Tribunal is obligated to apply the national law designated by the parties, or failing such designation the national law applicable through a conflict of laws approach. Thus, there is no indication that the a-national UNIDROIT Principles, or Limitation Convention should govern the limitation period. **(2.)** Further, the parties' choice of Danubia as the seat of arbitration should not be seen as an implied choice of the limitation period of Danubia.



1. The parties' express choice of the CIDRA Rules requires a national law to be selected to govern the limitation period, and under that choice the claim is time-barred

38. An implied negative choice occurs when the parties indicate intent to exclude the application of each other's national laws by refusing to mention their respective laws in the contract or during negotiations, and instead expressly refer to international principles in the contract [*Blessing p. 44*]. Although this theory does not represent the mainstream solution to conflict of laws issues, it has been applied by arbitral panels in ICC decisions [*ICC Award 7375, 1996* (finding that denationalized contracts lead to generally accepted principles, but noting that negative choice should not lead to conventions not signed by relevant countries); *Blessing pp. 43-49*]. Contrary to situations in which the implied negative choice theory has been considered, the parties' express choice of the CIDRA Rules in this case indicates that a national limitation period should govern this dispute.

39. In ICC Case 7375, the tribunal considered the implied negative choice approach because the parties 1) did not refer to their domestic laws in the contract and 2) expressly chose the ICC Rules, which allowed for the application of a-national principles. Unlike ICC Case 7375, in this case the parties cited to their respective national laws [*Answer para. 24; PO 1 para. 5*]. Further, the parties chose the CIDRA Rules to govern this dispute, which require this Tribunal to apply a national "law" and do not permit the application of a-national "rules of law" [*supra para. 4; Bonell p. 40* (the UNIDROIT Principles are a-national "rules of law")]. Further, there must be factors that indicate it is reasonable to imply that the parties' silence in not choosing either of their national laws indicates that the parties would not have chosen national law for the issue in question [*Blessing pp. 43-44*]. None of these factors are present in this case.

40. The sheer volume of international laws or principles that a tribunal might adopt under the implied negative choice of law theory is likely to lead to significant uncertainty between contracting parties. It encourages both parties in a dispute to simply argue the law most favorable to them and leave the tribunal to sort out the mess. Although an implied negative choice of law might be a useful theory if both parties had been signatories to an international convention that included a limitation period, this is not the case here. It is improper to infer that the parties chose an unrelated international law or set of principles when both have argued for the application of their own national limitation periods in previous submissions to CIDRA [*Answer*



para. 24; PO 1 para. 5]. To the extent this Tribunal considers international principles when interpreting this Contract, this Tribunal should limit its consideration to the 1955 and 1986 Hague Conventions and the Rome Convention. These conventions are based upon international business norms and are also incorporated into relevant national laws [*ICC Award No. 6527, 1991*]. Under the best approach, expressly authorized by Art. 32(1) CIDRA, this Tribunal should consider the applicable conflict of laws rules, which lead to the application of Mediterraneo's two-year limitation period.

41. The Limitation Convention provides an excellent example of the hazards of implying the choice of an international convention. Like the CISG, the Limitation Convention is a product of UNCITRAL [*Boele-Woelki, introduction*]. Neither Mediterraneo nor Oceania adopted the Limitation Convention [*PO 2 para. 1*]. Thus, the Limitation Convention should not apply in this action.

42. Claimant also asserts that the UNIDROIT Principles should be applied because the parties "intended to exclude the application of any domestic law" [*C. Memo. para. 29*]. However, as discussed above, the parties indicated a desire to apply national law by choosing the CIDRA Rules to govern this dispute, which lead to the application of national law. Further, the UNIDROIT Preamble provides that UNIDROIT Principles may be applied when the parties have agreed that their contract should be governed by "general principles of law, the *lex mercatoria* or the like." Aside from the impropriety of inferring that this choice of law provision applies to this Contract, it is highly speculative to infer that the parties would have chosen a set of principles that have no legal connection to the States of either party to this Contract [*Holtzmann/Neuhaus p. 769-70; ICC Award No. 7375, 1996* (noting that negative choice should not lead to a convention not signed by the parties)].

2. The substantive law of Danubia does not govern the limitation period

43. The parties chose Danubia as the seat of this arbitration, and the law of Danubia therefore represents the *lex fori*, or law of the forum [*C. Exb. 7, para. 13*]. Contrary to Claimant's assertion [*C. Memo. para. 25*], the parties did not choose any Danubian laws to apply to their Contract or their dispute. Implying a positive choice of Danubian law would contradict the trend away from using *lex fori* as the applicable substantive law in a dispute, particularly because arbitrations, as opposed to trials, have no true *lex fori* [*ICC Award No. 6527, 1991; Redfern/Hunter pp. 121-122*]. The *lex fori* approach is an acknowledged failure because of its



inability to provide predictable or realistic results [*Tetley p. 672*]. Therefore, this Tribunal should not adopt this approach to infer that the parties made a positive choice of Danubian law.

44. The applicable conflict of laws rules lead to the conclusion that the claim is time-barred. However, if this Tribunal should choose to hear the claim, it should be dismissed on the merits because McHinery fulfilled all of its contractual obligations.

II. The Magiprint Flexometix Mark 8 that McHinery delivered conformed to the Contract

45. The parties entered into a Contract whereby McHinery agreed to sell, and Claimant agreed to purchase, “one second hand 7 stand Magiprint Flexometix Mark 8 flexoprinter machine” [*C. Exb. 7*]. Claimant now alleges that McHinery breached its contractual obligations by delivering a non-conforming good [*C. Memo. para. 120*]. McHinery is not liable to Claimant because it did not breach the Contract. **(A.)** The Machine satisfied the standard for conformity set forth in Art. 35(1) CISG because it was of the quantity, quality, and description of the Contract. **(B.)** The Machine also satisfied the conformity requirement of Art. 35(2) CISG because it was fit for the purpose for which a machine of that description would ordinarily be used. Claimant neither made known to McHinery that the Machine would be used for the particular purpose of printing on 8 micrometer foil nor relied on McHinery to select a machine fit for that particular purpose. Moreover, **(C.)** Art. 35(3) CISG precludes McHinery from liability because Claimant could not have been unaware of the Machine’s specifications due to Claimant’s pre-contractual inspection of the Machine and receipt of the Machine’s manual.

A. The Machine conformed to the Contract under Art. 35(1) CISG because it was of the quantity, quality, and description required by the Contract

46. The conformity analysis under Art. 35(1) CISG begins by determining what characteristics of the machine are laid down between the parties in the contract [*Schlechtriem p. 413*]. **(1.)** The parties formed a Contract when Claimant accepted McHinery’s offer of 27 May 2002 by signing and returning the enclosed Contract [*C. Exb. 7*]. **(2.)** The Contract required McHinery to sell and refurbish “one second hand 7 stand Magiprint Flexometix Mark 8 flexoprinter machine” [*C. Exb. 7*]. **(3.)** McHinery satisfied that obligation when it delivered and refurbished the Machine.



1. McHinery's letter of 27 May 2002 contained an offer in the form of a written contract that Claimant accepted when it signed and returned the Contract

47. Claimant indicated its assent to McHinery's 27 May 2002 offer by signing and returning the Contract to McHinery on 30 May 2002 [*Statement of Claim para. 8*]. A contract is formed when acceptance becomes effective [*Art. 23 CISG*]. Acceptance occurs when there is a statement or other conduct from the offeree indicating assent to the offer [*Art. 18(1) CISG*]. The parties did not consider a contract to have been formed prior to the 27 May 2002 letter, as evidenced by McHinery's statement that Claimant should sign the Contract and "send it to me immediately so that the machine can be sent to you quickly" [*C. Exb. 6*]. McHinery was waiting for Claimant to accept the offer before it performed, by shipping the Machine. Therefore, the parties' agreement was concluded when McHinery received the signed Contract.

48. Claimant asserts that its letter of 17 April 2002 was an offer and McHinery's response of 25 April 2002 was an acceptance [*C. Memo. para. 4*]. However, the letter of 17 April 2002 does not satisfy the requirements of the CISG. Art. 14(1) CISG states, "a proposal for concluding a contract...constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance." Claimant states that a proposal may be an offer even if it is not sufficiently definite, as long as it indicates intent to be bound [*C. Memo. para. 4*]. However, no such intent was present in the letter of 17 April 2002.

49. Claimant's letter was merely an inquiry that expressed its printing "interests" and did not demonstrate intent to be bound to any machine at any price. Claimant did not express an immediate desire to be bound; rather, it requested further information about a printing machine [*C. Exb. 1*]. Also, Claimant inspected the Machine [*C. Exb. 3*]. Following the inspection, Claimant sent a letter on 10 May 2002 inquiring when McHinery could deliver the Machine if Claimant decided to order it [*C. Exb. 3*]. These subsequent communications clarify that Claimant did not intend to be bound by its inquiry of 17 April 2002. The letter of 17 April 2002 thus fails as an offer because it did not indicate intent to be bound [*Sec. Comm. 12 para. 6, draft counterpart Art. 14*].

50. However, even if this Tribunal finds that the letter of 17 April 2002 was an offer, McHinery's response was not an acceptance but a counter-offer because it contained additional material terms. A reply to an offer which contains material additions, limitations, or other modifications is a rejection of the offer and constitutes a counter-offer [*Art. 19(1) CISG*]. Terms



relating to price, payment, or place and time of delivery are considered to alter the terms of the contract materially [*Art. 19(3) CISG*]. McHinery's letter of 25 April 2002 contained additional material terms regarding the price (\$44,500) and manner of delivery (CIF Port Magreton) [*C. Exb. 2*]. Claimant's response of 10 May 2002 contained an additional material term concerning the time of delivery (service by 15 July) [*C. Exb. 3*]. McHinery's letter of 16 May 2002 also contained additional material terms relating to price (\$42, 000) and delivery (directly from Greece to Claimant) [*C. Exb. 4*]. Likewise, Claimant's letter on 21 May 2002 contained an additional material term concerning payment (letter of credit) [*C. Exb. 5*]. Therefore, each of these communications constituted rejections of the previous offers and were counter-offers because they each contained additional and/or differing material terms.

2. The Contract did not require McHinery to deliver a machine capable of printing on 8 micrometer foil

51. The Contract did not expressly require the Machine to print on 8 micrometer foil [*C. Exb. 7*]. Agreeing that no such express provision exists, Claimant suggests that party intent should be used to interpret the contractual obligations [*C. Memo. paras. 47-48*]. A tribunal may consider party intent where both parties were aware of the intent or where a reasonable person in the same circumstances would have understood that intent [*Arts. 8(1), 8(2) CISG*]. The Contract did not require a machine capable of printing on 8 micrometer foil because **(a.)** McHinery was not aware of that intent and **(b.)** a reasonable seller in the same circumstances would not have understood that intent.

a) McHinery was not aware of Claimant's intent that the Machine needed to print on 8 micrometer foil

52. McHinery was unaware of Claimant's intent to obtain a machine capable of printing on 8 micrometer foil because Claimant never made that specific request. Art. 8(1) CISG only allows a party's statements to be interpreted according to its intent where the other party "knew or could not have been unaware" of that intent. "[T]he obligor must communicate his intent, that is, leave the sphere of his own formulation to connect with the other party" [*Schlechtriem p. 116*]. Claimant failed to make this connection with McHinery because it only made a general statement that "[t]ypical plain and coloured aluminum for chocolate wrappers may be of 8 micrometer thickness" [*C. Exb. 1*]. Although 8 micrometer thickness is mentioned, this reference did not make McHinery aware of Claimant's intent because "may" is defined as a "possibility" or



“discretionary” choice [*Black’s Law Dictionary*]. If Claimant had used clear, concrete terms such as “need,” “require,” or “must,” it would be more reasonable to assume that McHinery was actually aware of Claimant’s intentions. However, because Claimant used vague terminology that McHinery understood as merely permissive, the sentence upon which Claimant bases its entire claim fails to inform the reader of its intent.

53. Claimant mentioned 8 micrometer foil only once and never expressed a need to use that type of foil. Accordingly, McHinery did not know and was unaware of Claimant’s intent. Thus, contrary to the requirements of Art. 8(1) CISG, Claimant did not make McHinery aware of its subjective intent, and this Tribunal should not consider such intent when interpreting the Contract.

b) A reasonable person in McHinery’s position would not have understood the Contract to require the Machine to print on 8 micrometer foil

54. This Tribunal should find that under Art. 8(2) CISG the Contract did not require delivery of a machine capable of printing on 8 micrometer foil because a reasonable seller would not have understood that to be a requirement of the Contract. Art. 8(2) CISG provides that statements “are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.” In determining the understanding that a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used [*Sec. Comm. 7 para. 5, draft counterpart Art. 8*].

55. Information contained in Claimant’s inquiry letter of 17 April 2002 would not notify a reasonable seller that Claimant needed a machine that would print on 8 micrometer foil because Claimant never actually said that it needed or wanted to do so. In this letter, Claimant expressed a multitude of “interests.” Specifically, Claimant stated that it was interested in printing on: (1) coated paper, (2) uncoated paper, (3) polyester, (4) metallic foil for use in the confectionary market, and (5) metallic foil for use in markets similar to the confectionary market [*C. Exb. 1*]. In addition, Claimant stated that it was interested in printing on plain and colored metallic foil, but did not specify the thickness of foil on which it desired to print [*C. Exb. 1*].

56. At the time of the conclusion of the Contract, the Machine’s manual contained the only definite statement regarding foil thickness. This manual expressly stated that the Machine could only print on 10 micrometer foil or thicker [*R. Exb. 1*]. McHinery notified Claimant of the Machine’s specifications when it sent the manual to Claimant. It is reasonable for a seller to



believe that a buyer, which hoped to make \$3.2 million in profit from a single machine, would read the Machine's manual and object to any adverse specifications. Claimant did not object to the specification of the thickness level at the conclusion of the Contract. Under these circumstances, a reasonable seller would not understand that Claimant subjectively intended to contract for a machine that "must" be capable of printing on 8 micrometer foil.

57. Additionally, Claimant inspected the Machine before entering into the Contract [*C. Exb. 3*]. Given that Claimant inspected the Machine and expressly stated that "[t]he Magiprint Flexometix machine looked to be just what we need" [*C. Exb. 3*], a reasonable seller would understand that the Machine met all of Claimant's needs. Thus, this Tribunal should interpret the Contract according to the understanding that a reasonable seller would have had in the same circumstances and find that the Contract did not require delivery of a machine capable of printing on 8 micrometer foil.

3. McHinery delivered conforming goods by delivering the exact machine for which Claimant contracted

58. Art. 35(1) CISG states that the "seller must deliver goods which are of the quantity, quality, and description required by the contract." Claimant incorrectly states that the Machine was not of the description required by the Contract [*C. Memo. para. 40*]. The characteristics of the goods that parties lay down in their contract by means of quantitative and qualitative descriptions are the primary test for conformity under Art. 35(1) CISG [*Schlechtriem p. 413*].

59. The parties' Contract described the Machine by name as "one second hand 7 stand Magiprint Flexometix Mark 8 flexoprinter machine" to be refurbished by the seller [*C. Exb. 7*]. McHinery delivered the precise Machine described by the Contract [*C. Exb. 8; R. Exb. 2*], and the same Machine that Claimant previously inspected and approved [*C. Exbs. 3, 8*]. Additionally, McHinery produced a Machine of the quality required by the Contract; Claimant admits that the refurbished Machine was in good working order [*C. Exb. 8*]. Finally, McHinery delivered a conforming Machine because it was the quantity required by the Contract, "one" [*C. Exb. 7*]. Therefore, McHinery delivered a conforming Machine because it was of the description, quality, and quantity required by the Contract.



B. McHinery complied with Art. 35(2) CISG because the Machine was fit for the ordinary use of such a good and Claimant did not reasonably rely on McHinery to select a machine for a particular purpose

60. McHinery delivered a conforming good under Art. 35(2) CISG because (1.) the Machine was fit for the ordinary purpose for which it is used, and (2.) Claimant did not convey the particular purpose of printing on 8 micrometer foil, nor did it reasonably rely on McHinery to select a machine fit for that particular purpose.

1. McHinery delivered a conforming good under Art. 35(2)(a) CISG because the Machine was fit for the ordinary purpose for which such goods are used

61. McHinery delivered a conforming Machine because it was fit for the purpose that a machine of the description listed in the Contract is ordinarily used. Although Claimant does not specifically refer to Art. 35(2)(a) CISG, it appears to argue that the Machine is not fit for its ordinary purpose when Claimant points out that printing on 8 micrometer foil is not unusual or extraordinary in the printing industry [*C. Memo. para. 46*]. However, the standard for conformity is stated in Art. 35(2)(a) CISG as “goods do not conform with the contract unless they: are fit for the purpose for which goods of the same description would ordinarily be used.”

62. The Contract described the good as a “Magiprint Flexometix Mark 8 flexoprinter machine” [*C. Exb. 7*]. The ordinary purpose of the Machine is laid out in its Machine’s manual [*Cf. Schlechtriem p. 417* (noting that depending on the type of product, the ordinary purpose can be discerned through technical instructions regarding its operation)]. Printing on 8 micrometer foil cannot be an ordinary purpose of the Machine because the Machine’s manual states that it is not designed for, and is incapable of, printing on such thin foil. The ordinary purpose which is implied from the contract must be ascertained in light of the normal expectations of persons buying goods of the contract’s description [*Sec. Comm. 33 para. 5, draft counterpart Art. 35*]. The normal expectations of a person buying a machine of this description would not include printing on materials outside its design specifications. The Machine performed exactly as indicated by the specifications in the Machine’s manual. It worked on the various paper products Claimant said it was interested in printing on and also on the foil that was of the thickness for which the Machine was designed [*R. Exb. 1; C. Exb. 9; PO 2 para. 17*]. Additionally, printing on 8 micrometer foil is not considered an industry standard [*PO 2 para. 21*]. Therefore, the Machine was fit for its ordinary purpose.



2. Art. 35(2)(b) CISG does not render McHinery liable because Claimant did not communicate to McHinery the particular purpose of printing on 8 micrometer foil and Claimant did not reasonably rely on McHinery's skill and judgment

63. Claimant asserts that its intended purpose for the Machine was to print on 8 micrometer foil [*C. Memo. para. 46*]. The obligation to deliver goods fit for a particular purpose arises only when the buyer makes that purpose known to the seller and the buyer reasonably relies on the seller's skill and judgment [*Art. 35(2)(b) CISG*]. McHinery is not liable for lack of conformity under Art. 35(2)(b) CISG because (a.) Claimant never stated the particular purpose of printing on 8 micrometer foil, (b.) Claimant did not rely on McHinery's skill and judgment, and (c.) any such reliance by Claimant was unreasonable.

a) Claimant did not make known to McHinery the particular purpose of printing on 8 micrometer foil

64. McHinery is not liable because Claimant never made known to McHinery that its particular purpose was to print on 8 micrometer foil. A seller is only liable for lack of conformity to a particular purpose that the buyer "expressly or impliedly made known to the seller at the time of the conclusion of the contract" [*Art. 35(2)(b) CISG*]. The buyer has the burden to prove that the seller knew of the particular purpose [*Honnold p. 257; Enderlein/Maskow p. 146*]. When a buyer only implicitly makes his particular purpose known, the seller's actual awareness is relevant [*Schlechtriem p. 421*]. "As a result, a buyer generally can expect the quality necessary for a particular purpose only if it is expressly described in the contract or he relied on a specialist or expert for the production or supply of goods" [*Schlechtriem Uniform Sales Law p. 66*].

65. McHinery is not an expert or specialist in the production or supply of flexoprinter machines, as the sale of such machines represents only five to ten percent of its business [*PO 2 para. 24*]. Accordingly, Claimant could only expect the quality necessary for its particular purpose by expressly describing the particular purpose in the Contract. Claimant failed to do this. The particular purpose of printing on 8 micrometer foil was not expressly described in the Contract [*C. Exb. 7*]. As Claimant concedes the only purpose which it made known to McHinery was the ability to print on "coated and uncoated papers for wrapping, polyester, and metallic foils for use in the confectionary market and similar fields" [*C. Memo. para. 93*]. The Machine fulfilled this purpose and therefore conformed to the Contract.



66. Claimant incorrectly asserts that McHinery had a responsibility to notify Claimant that the Machine would not meet its particular purpose [*C. Memo. para. 55*]. Furthermore, Claimant alleges that a failure to notify constitutes a breach of the duty of good faith [*C. Memo. paras. 65-68*]. If the seller recognizes that the goods are not fit for the buyer's purposes, its sole obligation is to notify the seller [*Schlechtriem p. 422*]. However, Claimant did not make the particular purpose of printing on 8 micrometer foil known to McHinery. Claimant only mentioned the 8 micrometer requirement once and did not include the term among the materials on which it was interested in printing; rather, it made a separate and more general statement of fact that "[t]ypical plain and coloured aluminum foil for chocolate wrappers may be of 8 micrometer thickness" [*C. Exb. 1*].

67. Even if this Tribunal finds that McHinery did know of Claimant's particular purpose, McHinery fulfilled its obligations to Claimant. If the buyer purchases the goods after receiving notification that a machine may not serve its particular purpose, the seller is not liable under Art. 35(2)(b) CISG [*Schlechtriem p. 422*]. McHinery notified Claimant of the Machine's specifications by providing the manual before contract formation. Thus, McHinery is not liable under Art. 35(2)(b) CISG for Claimant's decision to purchase the Machine, nor did McHinery act inconsistently with principles of good faith.

b) Claimant did not rely on McHinery's skill and judgment in purchasing the Machine

68. Claimant's case also fails because it did not rely on McHinery's skill and judgment. An additional requirement of Art. 35(2)(b) CISG is that the buyer rely on the seller's skill and judgment. If the buyer participates in choosing the goods, inspects the goods before it buys them, selects the manufacturing process, hands over the specifications, or insists on a particular brand, it does not rely on the skill of the seller [*Schlechtriem p. 422; Enderlein/Maskow p. 146*]. Claimant inspected the Machine before buying it [*C. Exbs. 3, 7*]. Thus, Claimant did not rely on McHinery's skill or judgment, but instead, inspected and chose the Machine based on its own judgment. Only after inspecting the Machine and deciding for itself that the Machine "looked to be just what we need" did Claimant order the Machine [*C. Exbs. 3, 5*]. Claimant's inspection and independent choice to purchase the Machine negates any reliance on McHinery's skill or judgment.



c) Any reliance on McHinery's skill and judgment by Claimant was not reasonable

69. Even if this Tribunal finds that Claimant relied on McHinery's skill and judgment, such reliance would be unreasonable. In order to attach liability for lack of conformity under Art. 35(2)(b) CISG, Claimant must not only show that it relied on the skill and judgment of the seller, but that such reliance was reasonable [*Bianca/Bonell/Graf p. 274*]. Claimant fails the second prong of this test because its reliance on McHinery's skill and judgment was not reasonable.

"The buyer's reliance on the seller's skill and judgment is not justified if the seller is, for example, not the manufacturer of the goods but a mere intermediary and he informs the buyer that he has no special knowledge" [*Schlechtriem p. 422; Bianca/Bonnell/Graf pp. 274-275*].

70. McHinery is not a manufacturer of flexoprinter machines but is a mere intermediary that buys machines for resale on the open market [*PO 2 paras. 8, 24*]. McHinery did not hold itself out as specialist in the field; it does not sell new flexoprinter machines, and the sale of used flexoprinter machines constitutes only five to ten percent of McHinery's business [*PO 2 para. 24*]. Furthermore, McHinery impliedly informed Claimant that it did not have special knowledge when, in response to Claimant's explanation of its "interests," McHinery suggested that Claimant inspect the Machine for itself [*C. Exb. 2*]. Therefore, any reliance by Claimant on McHinery's skill and judgment is unreasonable.

71. Contrary to Claimant's assertion, McHinery's statement that the Machine would allow Claimant to meet the needs of its customers is not a guarantee on which Claimant could reasonably rely [*C. Memo. para. 55*]. It is only reasonable for a party to rely on a statement that is "an *express (contractual) guarantee*," which takes the form of express words within the contract itself [*Lookofsky p. 89 (emphasis in original)*]. The statement to which Claimant refers is not a part of the Contract [*C. Exb. 7*]. Thus, it cannot be "an *express (contractual) guarantee*" on which Claimant could reasonably rely.

72. Moreover, McHinery's statement was made in reliance on Claimant's prior acknowledgement that the Machine "looked to be just what we need," made after Claimant inspected the Machine [*C. Exb. 3*]. Additionally, the Machine performed all of the tasks that Claimant told McHinery it was interested in performing, specifically, printing on coated and uncoated paper, polyester, and metallic foil [*C. Exbs. 1, 8; R. Exb. 2*]. Thus, the statement was correct in light of Claimant's representations. Therefore, the statement is not grounds for



liability because it was not an express contractual guarantee but was made in reliance on Claimant's own representations, and the Machine performed the tasks that Claimant told McHinery it was interested in performing.

C. Art. 35(3) CISG precludes McHinery from liability because Claimant could not have been unaware of the Machine's inability to print on 8 micrometer foil

73. If the buyer, at the time of the conclusion of the contract "knew or could not have been unaware of the lack of conformity," then the seller is excluded from liability under Art. 35(2) CISG [*Art. 35(3) CISG*]. This exemption from liability "is of practical relevance, above all, where specific goods are being sold, such as, in particular, second-hand machines" [*Schlechtriem p. 427; see also Honnold p. 260*]. However, "[t]he CISG provides no information on the yardstick against which 'have to be aware' should be measured" [*Enderlein/Maskow p. 148*].

74. Professor Honnold suggests that a party "could not be unaware" of facts that are "before the eyes of one who can see" [*Honnold p. 260*]. The crucial facts in this case involve the printing specifications of the Machine. A defect not before the eyes of Claimant would be a deficiency that Claimant could have been unaware of, despite the fact that it inspected the Machine and possessed the Machine's manual. If Claimant knew that it needed to print on 8 micrometer foil, it is reasonable that it would both inspect the Machine with regard to this characteristic and read the Machine's manual. Because the specifications of the Machine were not hidden from the buyer, the crucial facts should be considered fairly before the eyes of Claimant.

75. If the buyer inspects the goods prior to contract formation, it cannot later claim that the seller is responsible for recognizable defects [*Schlechtriem p. 427*]. Claimant inspected the Machine in Greece in May 2002 [*C. Exb. 3*], but may attempt to assert that even though it inspected the goods, McHinery is still responsible for the "defect." A buyer is not responsible for hidden defects that need an unusual examination to be detected [*Bianca/Bonell/Graf p. 279*]. However, this only follows from the rule that a buyer is "not ordinarily required to undertake a special analysis of the goods through complex or sophisticated professional methods or to ask for technical expertise" [*Bianca/Bonell/Graf p. 279*]. Because Claimant could have determined the Machine's specifications through proper external observation, reading the Machine's manual, or simply by asking McHinery, the examination should not be considered to require a special analysis or complex, or sophisticated professional methods.



76. By possessing clear specifications of the Machine before signing the Contract, Claimant knew, or should have known, that the Machine was not capable of printing on 8 micrometer foil. Accordingly, under Art. 35(3) CISG, this Tribunal should exclude McHinery from any liability due to lack of conformity.

III. If this Tribunal decides to award damages, it should only compensate Claimant for its actual loss because Claimant's loss of profit was unforeseeable and Claimant failed in its duty to mitigate

77. If this Tribunal chooses to award damages, those damages should be limited according to the principles of the CISG. Art. 74 CISG enables non-breaching parties to recover damages, which "consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." However, the principle of recovery is subject to two limitations. First, Art. 74 CISG only allows a party to recover damages that were foreseeable to the breaching party in light of all facts and circumstances at the conclusion of the contract [*Sec. Comm. 70, draft counterpart 74*]. Second, Art. 77 CISG further limits those damages to the extent that the non-breaching party fails to mitigate.

78. Claimant discusses in detail that the alleged non-conformity by McHinery constituted a fundamental breach; however, such a contention is not pertinent to the issues before this Tribunal [*C. Memo. paras. 69-87*]. A discussion of a "fundamental breach" is relevant when attempting to avoid a contract or demand substitute goods [*Schlechtriem p. 284*]. However, Claimant is only asserting its right to damages [*Statement of Claim para. 24*]. In the event this Tribunal decides Claimant is entitled to damages, McHinery concedes Claimant's actual loss of \$20,000 for the Machine. However, Claimant is not entitled to \$3.2 million in loss of profit because (A.) Claimant's loss of profit was not foreseeable, and (B.) Claimant failed in its duty to mitigate any damages arising from a loss of profit. Furthermore, (C.) when calculating the amount of damages to which Claimant is entitled, this Tribunal should take into consideration the time value of money.

A. This Tribunal should not award loss of profit to Claimant because such damages were not foreseeable

79. Art. 74 CISG permits an aggrieved party to recover loss of profit; however, it limits this recovery to what the breaching party foresaw or ought to have foreseen at the contract's conclusion. The foreseeability of a loss is judged on an objective and subjective standard



[*Schlechtriem p. 765*]. A tribunal should consider what a reasonable person in the position of the breaching party should have foreseen and what he actually foresaw at the time of contract formation [*Schlechtriem p. 765*]. Claimant's loss of profit was not foreseeable subjectively, by McHinery, nor objectively by a reasonable person in McHinery's position.

80. A loss is subjectively foreseeable if, at the conclusion of the contract, the breaching party foresaw that a breach, in the manner of the actual breach, would lead to the harm that actually occurred [*Schlechtriem p. 766*]. McHinery did not actually foresee Claimant's loss of profit. Claimant never mentioned to McHinery that its printing contract or its four-year renewal term required the Machine to print on 8 micrometer foil [*C. Exb. 3*]. Instead, Claimant expressed an "interest in purchasing a flexoprint machine for printing coated and uncoated papers for wrapping, polyester and metallic foils for use in the confectionary market and similar fields" [*C. Memo. para. 93*]. The Machine met all of those requirements. Therefore, McHinery did not foresee that the Machine's inability to print on 8 micrometer foil would cause Claimant to fundamentally breach its printing contract, giving Oceania Confectionaries the right to avoid the printing contract, and causing Claimant to lose its future profits.

81. The objective standard is determined by what a reasonable person in the position of the breaching party and with its knowledge of the circumstances ought to have foreseen [*Schlechtriem p. 765*]. McHinery could not have reasonably foreseen Claimant's loss of profit. Claimant alleges that McHinery should have foreseen Claimant's loss of profit because McHinery is an experienced merchant [*C. Memo. para. 93*]. The fact that McHinery is an experienced merchant does not bestow upon it constructive knowledge of Claimant's contract with Oceania Confectionaries. Therefore, it would not be reasonable that the sale of a second-hand machine worth less than \$50,000 would subject the company to liability exceeding \$3 million, almost a decade of Claimant's speculated profits.

82. Contrary to Claimant's assertion that "future loss may also take the form of the loss of a chance" [*C. Memo. para. 107*], the CISG does not provide recovery for the mere chance of profit [*Schlechtriem p. 759*]. Thus, only losses that are definable and concretely provable are taken into account when awarding damages [*Schlechtriem p. 761*]. If losses are awarded, McHinery concedes that \$400,000 annual profit is appropriate at this stage [*PO 2 para. 29*]. Traditionally, courts have refused to allow recovery of loss of profit to businesses without a history of earnings [*Lloyd/Young section 6.1*]. Today, a growing number of courts allow "damages for lost profits of



a new business when those losses can be adequately proven with *reasonable certainty*” [Lloyd/Young section 6.4]. Specifically, courts may look at factors such as a claimant’s prior or subsequent experience, or its expertise in the field to determine the certainty of loss of profit [Lloyd/Young section 6.4]. Claimant is new to the market, and has no prior or subsequent experience to show that it could satisfy its contractual obligations to Oceania Confectionaries.

83. Claimant alleges that the “*company or market forecast approach*” has enabled it to use sales projections for the four-year contract term and the four-year renewal term to calculate the amount of damages it is owed [C. Memo. para. 111 (emphasis in original)]. However, this approach only allows a claimant to request damages for a fixed term, and therefore, any claim for damages should be limited to the loss of profit during the fixed initial contract term [Kolaski/Kuga p. 12]. A renewal of a contract, necessarily based on satisfactory performance of the former contract, cannot be concretely provable before any parts of the original contract’s requirements are met [Seitman v. R.J. Reynolds, USA (1988)]. Therefore, the renewal term of Claimant’s printing contract cannot be considered when calculating damages.

84. Claimant also alleges that it “anticipated 8-year term long lasting business cooperation and this period can be considered as a contractual term” [C. Memo. para. 118]. However, the contractual term between Claimant and Oceania Confectionaries was only signed for four years, and the available renewal upon satisfactory performance by Claimant was by no means automatic. Therefore, even if this Tribunal finds that loss of profit for the initial four-year contract was foreseeable, it should find that the optional four-year renewal contract is not a reasonably foreseeable loss of profit.

B. Any damages awarded for potential loss of profit should be reduced because Claimant failed in its duty to mitigate

85. Claimant asserts it mitigated its damages by reselling the Machine [C. Memo. para. 105]. McHinery does not dispute this act of mitigation. However, Claimant took no steps to mitigate its loss of profit. Claimant is not entitled to the full amount of damages it seeks because (1.) Claimant has an affirmative duty to take reasonable measures to mitigate its losses, including loss of profit and (2.) reasonable measures were available to Claimant. Because Claimant failed to take advantage of these opportunities, (3.) McHinery may not be held responsible for more than \$67,000 in loss of profit.



1. Claimant has an affirmative duty to take reasonable measures to mitigate its losses, including potential loss of profit

86. Art. 77 CISG states that a party entitled to damages has a duty to mitigate any losses caused by the breach, including loss of profit [Art. 77 CISG]. This duty requires the damaged party to take measures that are reasonable in light of the circumstances, and it exists even before a loss arises [Schlechtriem p. 788]. Art. 77 CISG further states that if the aggrieved party fails to take such measures, “the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.” The CISG’s principle of mitigation does not allow Claimant to “passively wait for the loss to take place and then sue the party in breach for this loss” when it could have been avoided by the injured party [Saidov pp. 349-353; Chengwei section 14.5.2].

2. Reasonable measures were available to mitigate the loss, and Claimant’s failure to avail itself of them constitutes a breach of the duty to mitigate

87. Claimant failed to take reasonable measures to mitigate its loss of profit. A measure is reasonable “if under the particular circumstances, it could be expected to be taken by a person acting in good faith” [Schlechtriem p. 586; Saidov p. 352; see also Case 10 Ob 518/95, Austria (1996)]. This Tribunal should find that Claimant did not mitigate damages with respect to loss of profit because it did not purchase a substitute flexoprinter machine, it did not attempt to outsource its task, and it failed to take sufficient measures to preserve its contractual relationship with Oceania Confectionaries.

88. Claimant could have mitigated its damages by subsequently purchasing a machine capable of printing on 8 micrometer foil. In general, the acquisition of an available substitute good is deemed a reasonable mitigation measure if the good would be able to keep the damaged party in production and avoid certain loss [Honhold p. 459-460]. When it became evident that Claimant’s machine was having problems, one of its local competitors, Reliable Printers, purchased a machine capable of printing on 8 micrometer foil [C. Exb. 9]. Reliable Printers’ machine was purchased, shipped, installed, and functioning properly by 1 August 2002 [C. Exb. 9]. The fact that Claimant’s competitor was able to acquire the proper flexoprint machine demonstrates not only that substitute goods were available on the market, but also that these goods could be obtained within a reasonable amount of time.



89. Reliable Printers made preliminary arrangements to purchase a machine capable of printing on 8 micrometer foil [*PO 2 para. 22*]. However, it did not purchase and put the machine in place until after Claimant purchased its Machine [*PO 2 para. 22*]. Claimant did not purchase the Machine until 30 May 2002, and Reliable Printers' machine was installed and working on 1 August 2002 [*C. Exb. 9*]. Therefore, this Tribunal can infer that Claimant could have obtained a substitute machine in the same amount of time, about 60 days. If Claimant acted within a reasonable time after realizing that the Machine was not designed to print on 8 micrometer foil, it would have been able to acquire the proper machine and perform its obligation.

90. Additionally, Claimant may have been able to temporarily outsource its undertaking until it was able to perform. As stated in Claimant's initial inquiry letter, prior to 2002 there were no flexoprinter operators in the entire country of Oceania [*C. Exb. 1*]. As a result, the custom in Oceania had been to import items such as foil wrappers from other countries [*C. Exb. 1*]. One court has found a failure to mitigate under the CISG when the buyer did not look outside of the country or make any explanation of efforts to make a substitute purchase [*Case 3U2446/19, Germany (1998)*]. Because outsourcing foil printing was the custom in Oceania and because Claimant was aware of this practice, it would have been reasonable for Claimant to temporarily outsource the Oceania Confectionary project until such time that its own printing facility was ready for production.

91. Even if subcontracting 60 days' worth of profits to Reliable Printers, or a foreign printing company, was necessary to keep the remaining term of the printing contract, mitigating in this fashion would still have resulted in a net profit of \$3,133,000 without claiming any damages from McHinery at all. Courts have found such measures to be reasonable, even when later challenged by plaintiffs [*see e.g. Nova Tool & Mold Inc. v. London Industries, Canada (2000)* (Canadian appeals court upheld a trial judge's finding that subcontracting the job to a prior competitor at considerable expense was reasonable)]. In assessing the reasonableness of such a measure, it is important to note that Claimant's printing contract was a long-term agreement from which Claimant asserts it would have earned \$3.2 million in profit. A reasonable person would have acted to preserve this long-term, multi-million dollar relationship, even if it resulted in a temporary loss of profit. Claimant's failure to even make inquiries into outsourcing its job constitutes a failure of its duty to mitigate.



3. McHinery is only responsible for \$67,000 in loss of profit

92. Because Claimant did not purchase a substitute flexoprinter machine and did not attempt to outsource its task in order to preserve its contractual relationship with Oceania Confectionaries, this Tribunal should decline to award or substantially reduce any damages relating to loss of profit.

93. Claimant could have ordered an appropriate machine while temporarily outsourcing its obligations under the printing contract. This Tribunal can infer that Claimant could have purchased, installed, and began production with another machine in the same amount of time as did Reliable Printers (60 days). Therefore, Claimant would only have needed to outsource its obligations for 60 days until it was able to perform. Claimant could have outsourced the job abroad, as was the custom in Oceania. Also, Reliable Printers had the necessary equipment to perform Claimant's obligations at the time Claimant would have needed to outsource the work [C. Exb. 9]. Therefore, Reliable Printers could have met Claimant's immediate outsourcing needs so that Claimant could meet its contractual obligations.

94. McHinery concedes that such an act of mitigation would deprive Claimant of its expected profits during the term of outsourcing. Therefore, Claimant's damages should be reduced by the appropriate amount, and this Tribunal should award \$67,000 in loss of profit (calculated as \$400,000 (annual profits)/12 months * 2 months (outsourcing period)).

C. If this Tribunal awards damages to Claimant for loss of profit, it should account for the time value of money

95. If this Tribunal awards Claimant damages for the entire eight-year period, it should account for the time value of money, and discount an appropriate amount for any future loss of profit. Because the loss of profit requested by Claimant would have been earned starting nearly four years ago, there is no need to discount the first four years of loss of profit. However, if this Tribunal decides to award damages beyond that time period, it should note that Claimant has not accounted for the time value of money in its calculation. In determining future losses, the correct amount should not be derived from the total loss of profit that could be expected. Rather, it should be derived from calculating the amount of money that could be invested by the innocent party as a lump sum in a relatively risk-free account to yield the amount the party could have expected had the breach not occurred [Weil p. 16].



96. The official discount rate by the central bank of Oceania is around 3 percent [*PO 2 para. 33*]. Therefore, in order to adjust the amount expected by the renewal term of the printing contract to reflect the time value of money, \$1.6 million is calculated “by applying compound interest forward from the base year to the future year and then taking the reciprocal...the discounted loss is the loss multiplied by the discount factor for that year” [*Weil p. 16*]. This formula of \$400,000 a year multiplied by the compound reciprocal of 3 percent leads to an adjusted amount of \$1,486,839.36 for the renewal term. Thus, in the event that this Tribunal decides to award Claimant loss of profit damages for the four-year renewal term, it should adjust the amount from \$1.6 million to \$1,486,839.36.

REQUEST FOR RELIEF

97. For the above stated reasons, this Tribunal should find that Claimant’s action is time-barred. Additionally, this Tribunal should find that McHinery performed all of its contractual obligations; in the alternative, Claimant’s damages should be reduced in accordance with the principles of the CISG.