FOURTEENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA - 30 MARCH TO 5 APRIL 2007

MEMORANDUM FOR RESPONDENT

ALBERT-LUDWIGS-UNIVERSITÄT FREIBURG

ON BEHALF OF:	**AGAINST:**
MEDITERRANEO ELECTRODYNAMICS S.A.	EQUATORIANA OFFICE SPACE LTD.
23 SPARKLING LANE	415 CENTRAL BUSINESS CENTRE
CAPITOL CITY	OCEANSIDE
MEDITERRANEO	EQUATORIANA
RESPONDENT	**CLAIMANT**

COUNSELS:

FLORIAN DRESSEL · CLARA GOETHE · BENJAMIN HERZBERG
INDRA V. MIRBACH · KALINA PENEVA · CHRISTIAN SCHMOLLINGER
DAVID TEBEL · OLIVER UNGER · DIRK WIEGANDT

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INDEX OF ABBREVIATIONS

$	US Dollar(s)
Arb. Int'l.	Arbitration International
Art.	Article
BG	Bundesgericht (Swiss Supreme Court)
BGH	Bundesgerichtshof (German Federal Supreme Court)
CA	Cour d'Appel (French Court of Appeal)
Cf.	Confer
CICA	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
Circ.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
EERC	Equatoriana Electrical Regulatory Commission
EESRA	Equatoriana Electrical Service Regulatory Act
e.g.	exempli gratia
emph. add.	emphasis added
et seq.	et sequentes (and following)

Geneva Convention	Geneva Convention on Agency in the International Sale of Goods (17 February 1983)
Gmbh	Gesellschaft mit beschränkter Haftung (German limited liability company)
Gmbh & Co.KG	Gesellschat mit beschränkter Haftung und Kommanditgesellschaft (limited partnership with a limited liability company as a general partner)
HG	Handelsgericht (Swiss Commercial Court)
HGB	Handelsgesetzbuch (German Commercial Code)
HK	Hong Kong
ibid.	ibidem (the same)
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
i.e.	id est
Inc.	Incorporated
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
J. Int'l Arb.	Journal of International Arbitration
LG	Landgericht (German Regional Court)

Ltd.	Limited
mm	millimetre
MüKoBGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
MüKoHGB	Münchener Kommentar zum Handelsgesetzbuch
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NJW	Neue Juristische Wochenschrift
No.	Number
NOM-Clause	No-Oral-Modification Clause
OG	Obergericht (Swiss Appellate Court)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Upper Regional Court)
p.	page
para./paras.	paragraph/paragraphs
PCA	Permanent Court of Arbitration (The Hague)
P.O.	Procedural Order
pp.	pages

RA-CAB	Rules of Arbitration recommended by the Chamber of Commerce and Industry of Romania
S.A.	Société Anonyme (French Joint Stock Company) Sociedad Anónima (Spanish Joint Stock Company)
SJZ	Schweizerische Juristen-Zeitung
S.P.A.	Società per azioni (Italian Joint Stock Company)
S.D.N.Y.	Southern District of New York
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S. Ct. App.	United States Court of Appeals
v.	versus
V.J.	Vindobona Journal
Vol.	Volume

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STATEMENT OF FACTS

RESPONDENT Mediterraneo Electrodynamics S.A. ("RESPONDENT") is a distributor and occasional fabricator of electrical equipment. Its principal office is in Mediterraneo.

CLAIMANT Equatoriana Office Space Ltd. ("CLAIMANT") is a developer of residential and business properties. Its principle office is in Equatoriana.

4 May 2005 RESPONDENT receives a purchase order from CLAIMANT for five distribution fuse boards to be delivered at a new development in the city of Mountain View, Equatoriana. RESPONDENT is provided with detailed engineering drawings containing two descriptive notes: "Fuses to be Chat Electronics JP type in accordance with BS88" and "to be lockable to Equalec requirements". RESPONDENT sends a complete but unsigned contract to CLAIMANT. The contract provides that any amendment shall be in writing.

12 May 2005 CLAIMANT substitutes the arbitration clause and returns the contract to RESPONDENT which then signs it.

14 July 2005 Mr. Stiles, RESPONDENT's Sales Manager, informs Mr. Hart, an employee in CLAIMANT's Purchasing Department, that RESPONDENT is temporarily incapable of delivering fuse boards equipped with Chat Electronics JP type fuses. The parties orally agree on the delivery of fuse boards equipped with JS type fuses.

22 August 2005 RESPONDENT delivers fuse boards equipped with JS type fuses to the building site in Mountain View.

24 August 2005 CLAIMANT pays the purchase price of $168.000.

8 September 2005 The local electrical supply distribution company, Equalec, refuses to connect the delivered fuse boards to the electrical grid because fuse boards containing JS type fuses do not meet its standards.

9 September 2005 CLAIMANT informs RESPONDENT of Equalec's refusal to connect. RESPONDENT is temporarily incapable of procuring different fuse boards containing JP type fuses, CLAIMANT's substitute purchase amounts to $200,000, including additional construction costs.

15 August 2006 CLAIMANT submits a request for arbitration to the Chamber of Commerce and Industry of Romania located in Bucharest.

Issue 1: The Arbitral Tribunal has no jurisdiction

1 The arbitration agreement is the "foundation stone" of international commercial arbitration [*REDFERN/HUNTER, PARA.1-08*] and the source of any arbitral tribunal's jurisdiction [*FOUCHARD/GAILLARD/GOLDMAN, PARA.648; REDFERN, J. INT'L. ARB. 1986, P.29; LIONNET/LIONNET, P.179*]. CLAIMANT submits that clause 34 of the parties' contract of sale [*CLAIMANT'S EXHIBIT NO.1*] contains a valid agreement to arbitrate under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("RA-CAB") [*CLAIMANT'S MEMORANDUM, PARA.45-72*].

2 Contrary to the CLAIMANT's submissions, RESPONDENT will demonstrate that clause 34 is as ambiguous as to render it incapable of being performed according to Art.8(1) UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") and Art. 2(3) New York Convention of the Recognition and Enforcement of Arbitral Awards ("New York Convention").

3 First, the jurisdiction of the Arbitral Tribunal may not be based on an interpretation of clause 34 as an agreement on institutionalised arbitration under the RA-CAB [**A**]. Second, the jurisdiction of the Arbitral Tribunal may not be based on an interpretation of clause 34 as an agreement on *ad hoc* arbitration [**B**].

A. The jurisdiction of the Arbitral Tribunal may not be based on an interpretation of clause 34 as an agreement on institutionalised arbitration under the RA-CAB

4 In order to validly agree on institutionalised arbitration, the parties have to determine an arbitral institution with a significant degree of certainty [*FOUCHARD/GAILLARD/GOLDMAN, PARA.485*]. If it is impossible to infer from the arbitration agreement which institution the parties intend to designate, this will prevent the arbitration from taking place at all [*CA GRENOBLE, 24 JAN 1996; CRAIG/PARK/PAULSSON, P.130; FOUCHARD/GAILLARD/GOLDMAN, PARA.484; VAN DEN BERG, P.159*].

5 The arbitration clause found in paragraph 34 of the parties' contract of sale [*CLAIMANT'S EXHIBIT NO.1*] reads:

> ***Arbitration:*** *All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by the International Arbitration Rules used in Bucharest. The arbitral award shall be final and binding.*
> *The Arbitral Tribunal shall be composed of three arbitrators.*
> *The arbitration shall be in the English language. It shall take place in Vindobona, Danubia.*

6 Clause 34 does not refer to any arbitral institution. It only refers to "International Arbitration Rules used in Bucharest". However, a set of arbitration rules with this exact name does not exist. Thus, the plain wording of clause 34 does neither determine an arbitral institution nor a specific set of arbitration rules.

7 CLAIMANT considers it to be "self-evident" that clause 34 refers to the RA-CAB [*CLAIMANT'S MEMORANDUM, PARA.46*]. Further, CLAIMANT alleges that at this stage of the proceeding RESPONDENT is precluded from asserting the invalidity of the arbitration clause [*CLAIMANT'S MEMORANDUM, PARA.64*]. However, an interpretation of clause 34 does not lead to the applicability of a specific set of arbitration rules [**I**]. Furthermore, RESPONDENT is not precluded from asserting the ambiguity of clause 34 [**II**].

I. An interpretation of clause 34 does not lead to the applicability of a specific set of arbitration rules

8 RESPONDENT agrees with CLAIMANT's submissions that the arbitration agreement contained in clause 34 of the parties' contract of sale has to be interpreted according to the law of Mediterraneo supplemented by general principles of international commercial law [*CLAIMANT'S MEMORANDUM, PARAS.16-30*]. However, an interpretation of clause 34 according to these principles does not lead to the application of the RA-CAB. First, the wording of clause 34 does not indicate a common intent of the parties to opt for the RA-CAB [**a**]. Second, an effective interpretation of clause 34 would allow for the hypothetical application of various sets of arbitration rules and does not support the application of the RA-CAB [**b**]. Third, the principle of *contra proferentem* requires an interpretation against CLAIMANT, i.e. against the application of the RA-CAB [**c**].

a. The wording of clause 34 does not indicate a common intent of the parties to opt for the RA-CAB

9 Arbitration agreements have to be interpreted according to the common intent of the parties and the understanding of reasonable third persons of the same kind [*FOUCHARD/GAILLARD/GOLDMAN, PARA.477; UNIDROIT PRINCIPLE 4.1*]. This is also accepted by CLAIMANT [*CLAIMANT'S MEMORANDUM, PARA.45*]. As a valid arbitration agreement excludes the jurisdiction of domestic courts [*ART. 8 UNCITRAL MODEL LAW; ART. II(3) NEW YORK CONVENTION; FOUCHARD/GAILLARD/GOLDMAN, PARA.662; WEIGAND, P.20*], the parties' intent to abstain from this possibility may not airily be presumed. Accordingly, the task conferred on the arbitrators is to follow the clearly expressed intentions of the parties [*BG, 8 JUL 2003; BGH, 3 MAR 1955; ICC AWARD NO.4392; ICC AWARD NO.2138; BERGLIN, ARB. INT'L 1987, P.68;*

RÜEDE/HADENFELDT, P.62]. Applying these principles of interpretation, clause 34 does not indicate a common intent of the parties to opt for the RA-CAB.

10 First, clause 34 calls for "*the* International Arbitration Rules" (*emph. add.*). The capitalised spelling of these three words as well as the definite article show that the parties intended to refer to a specific set of arbitration rules with that specific title. Yet, the RA-CAB are simply labelled "Rules of Arbitration". Thus, they are not referred to in clause 34.

11 Second, CLAIMANT considers it a matter of fact that the term "International Arbitration Rules used in Bucharest" can only refer to a set of arbitration rules which is actually used in Bucharest, i.e. the RA-CAB [*CLAIMANT'S MEMORANDUM, PARA.48*]. By contrast, the term "International" rather indicates that the parties intended to choose a set of arbitration rules specifically and exclusively designed for international arbitral proceedings. Provisions specifically dealing with international arbitration are only contained in Chapter VIII of the RA-CAB, whereas all other chapters merely concern domestic arbitration. Furthermore, approximately eighty percent of the cases before the Court of International Commercial Arbitration ("CICA") are domestic [*P.O. NO.2, PARA.11*]. This demonstrates that the RA-CAB are primarily designed for and used in domestic arbitration. Therefore, the term "International Arbitration Rules" in clause 34 does not refer to the RA-CAB.

12 Third, a comparison between clause 34 and the model clause recommended by the CICA does not point to the RA-CAB. CLAIMANT alleges that "it cannot be reasonably argued that the similarity in wording is a mere coincidence" [*CLAIMANT'S MEMORANDUM, PARA.53*]. However, the CICA model clause states that "All disputes arising out of or in connection with this Contract or regarding its conclusion, execution or termination, shall be settled by *the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania*" [*HTTP://ARBITRATION.CCIR.RO/ARBCLAUSE.HTML, emph. add.*]. It expressly designates the CICA as competent institution. Clause 34 by contrast does not mention an arbitral institution, but refers to "International Arbitration Rules". Thus, the two clauses differ in the crucial point, wherefore one cannot deem this difference a "mere clerical error" [*CLAIMANT'S MEMORANDUM, PARA.52*]. Quite to the contrary, the fact that CLAIMANT did not implement the wording of the model clause demonstrates that the parties did not intend to choose the RA-CAB. Otherwise, they would simply have used the original model clause. There was no need to alter the model clause and thereby increase the risk of ambiguity. Thus, a comparison of clause 34 with the model clause recommended by the CICA does not point to the RA-CAB but is rather a sign for the parties' common intent to opt for a different set of arbitration rules.

13 Fourth, CLAIMANT construes the word "Bucharest" contained in clause 34 as a reference to the

CICA arguing that this is "the only organization in Bucharest that conducts international commercial arbitration" [*CLAIMANT'S MEMORANDUM, PARA.46*]. However, this construction contradicts the wording of the arbitration agreement. Clause 34 mentions the word "Bucharest" as a part of the term "International Arbitration Rules *used in Bucharest*" (*emph. add.*). In this context, "Bucharest" serves as a closer designation of a specific set of arbitration rules and not as reference to an arbitral institution. Thus, the construction of the word "Bucharest" as reference to the CICA is contrary to the wording of clause 34.

14 Case law provides persuasive evidence that clause 34 does not indicate a common intent of the parties to opt for the RA-CAB. In *MARKS 3-ZET-ERNST MARKS GMBH & CO.KG V. PRESSTEK, INC., U.S. CT. APP., (1ST CIRC.)* ("*MARKS V. PRESSTEK*") the arbitration clause provided for "*arbitration in The Hague under the International Arbitration rules*". The Permanent Court of Arbitration at The Hague ("PCA") declined jurisdiction finding that there was no clear agreement on the UNCITRAL Arbitration Rules, which is the only set of rules capable of giving the PCA the competence to act. *MARKS* filed a petition to compel arbitration in the U.S. District Court of New Hampshire asking for an order directing that arbitration should proceed "in The Hague under the American Arbitration Act's International Rules". The District Court held that there exists no set of arbitration rules with this title. Thus, it dismissed *MARKS*' petition and the Court of Appeals confirmed this judgement of dismissal. In *MARKS V. PRESSTEK* the determination of "arbitration at The Hague under the International Arbitration rules" was not sufficient to give the PCA the competence to act. At hand, clause 34 also contains only a reference to International Arbitration Rules and the city of Bucharest. The Arbitral Tribunal is requested to follow the decision in *MARKS V. PRESSTEK* and to find that the wording of the arbitration clause does not indicate the common intent of the parties to opt for the RA-CAB.

b. Effective interpretation of clause 34 would allow for the hypothetical application of various sets of arbitration rules and does not support the application of the RA-CAB

15 CLAIMANT relies on the principle of effective interpretation and deduces from this principle a presumption of the validity of the arbitration clause [*CLAIMANT'S MEMORANDUM, PARAS.57-62*]. Yet, the principle of effective interpretation only requires that in case of doubt one should prefer an interpretation which gives meaning to the words rather than one which renders them useless or nonsensical [*FOUCHARD/GAILARD/GOLDMAN, PARA.478; BERGLIN, ARB. INT'L. 1987, P.65, ICC AWARD NO.1434*]. Contrary to CLAIMANT's submissions [*CLAIMANT'S MEMORANDUM, PARA.56*], this principle does not allow to deduce from the mere existence of an arbitration clause the validity of that very clause [*FOUCHARD/GAILLARD/GOLDMAN, PARA.481*]. If effective inter-

pretation of the arbitration agreement yields more than one possible result, the arbitration agreement cannot be held valid based on a presumption of validity [*BGH, 02 DEC 1982*]. At hand, effective interpretation of clause 34 allows for the application of various sets of arbitration rules.

16 CLAIMANT submits that the construction of clause 34 as a reference to the RA-CAB "is the only way to read [clause] 34 so that the whole makes sense" [*CLAIMANT'S MEMORANDUM, PARA.61*]. In doing so, it obviously construes the term "Bucharest" in clause 34 as a reference to the CICA which is the sole organisation in Bucharest conducting international arbitral proceedings [*P.O.NO.2, PARA.10*]. However, even if the word "Bucharest" made reference to the CICA it would not be clear which rules the CICA would have to apply when establishing the arbitral tribunal or conducting the arbitration. In case of international arbitral proceedings Art. 72(2) RA-CAB provides that the parties are free to decide either for these rules or for other rules of arbitral procedures. Clause 34 calls for "International Arbitration Rules". There are indeed rules labelled "International Arbitration Rules", e.g. the arbitration rules provided by the American Arbitration Association. Furthermore, the reference to "*International* Arbitration Rules" (*emph. add.*) could also be understood as a reference to rules specifically drafted for international arbitral proceedings, e.g. the UNCITRAL Arbitration Rules which are actually mentioned in Art. 72(2) RA-CAB. Yet, clause 34 does not contain any indication which of these possibilities the parties might have had in mind when signing the contract. Thus, clause 34 remains unclear even if the word "Bucharest" was construed as a reference to the CICA.

17 Second, CLAIMANT submits that in case the term "International Arbitration Rules used in Bucharest" was void because of its ambiguity "the Tribunal should regard Clause 34 as allowing either party to institute arbitration proceedings under any institution provided that the proceedings complied with the provisions of the Model Law" [*CLAIMANT'S MEMORANDUM, PARA.78*]. CLAIMANT thereby relies on the decision of *LUCKY-GOLDSTAR INTERNATIONAL (HK) V. NG MOO KEE ENGINEERING LTD., HIGH COURT HONG KONG ("LUCKY-GOLDSTAR").* In this case, the arbitration agreement provided for arbitration "*in the 3rd Country, under the rule of the 3rd Country and in accordance with the rules of procedure of the International Commercial Arbitration Association*". The Court held that this clause would allow the claiming party to choose a seat of arbitration in any country other than the ones of the parties. Yet, contrary to the CLAIMANT's submissions [*CLAIMANT'S MEMORANDUM, PARAS.75 AND 78*], the Court did not interpret this clause as providing for a free choice of the arbitral institution in this country. Furthermore, the arbitration agreement in *LUCKY-GOLDSTAR* is not comparable to clause 34. The agreement in *LUCKY-GOLDSTAR* consists of very general terms and offered the parties a freedom of choice concerning the seat of the arbitration. By contrast, clause 34 does not offer the parties such a freedom of

choice since it expressly designates Vindobona, Danubia as the seat of the arbitration. Therefore, contrary to CLAIMANT's submissions [*CLAIMANT'S MEMORANDUM, PARA.76*], it is not entitled to choose an arbitral institution based on an analogy to the judgement in *LUCKY-GOLDSTAR*.

18 The facts of the present case are rather comparable to those in *OLG HAMM, 15 NOV 1994.* In this case the arbitration clause referred to "*the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich*". The Court held that this reference "has more than one meaning since not only the International Chamber of Commerce in Paris but also the Zurich Chamber of Commerce has a permanent arbitration tribunal and their own rules". Thus, the arbitration clause was considered to be null and void.

19 This case demonstrates that even a clause being *prima facie* clear must be considered ambiguous, if the wording of the clause allows for more than one possible interpretation. Clause 34 is even less clear than the agreement in *OLG HAMM, 15 NOV 1994*. In the latter case the International Chamber of Commerce as competent arbitral institution was named accurately and it also had an office in Zurich which was determined as seat of arbitration. Clause 34 by contrast does not mention any arbitral institution and only refers to a non-existing set of rules. Thus, the Arbitral Tribunal is requested to follow the decision in *OLG HAMM, 15 NOV 1994* and to find that effective interpretation of clause 34 allows for the application of various sets of arbitration rules.

c. The principle of *contra proferentem* requires an interpretation against CLAIMANT, i.e. against the application of the RA-CAB

20 The *contra proferentem* rule provides that any ambiguous clause, which has not been individually negotiated, has to be interpreted against the party that drafted the clause [*SYKES, V.J. 2004, P.66; BERGER, P.551; DIMATTEO, P.202; FARNSWORTH, P.287; FOUCHARD/GAILLARD/GOLDMAN, PARA.479; UNIDROIT PRINCIPLE 4.6*]. CLAIMANT alleges that the "*contra proferentem* rule is only to be adopted where all other rules of interpretation fail" [*CLAIMANT'S MEMORANDUM, PARA.70*] and that "the principle of effectiveness has to be given more weight than the *contra proferentem* rule" [*CLAIMANT'S MEMORANDUM, PARA.71*]. This reasoning fails convince.

21 First, as shown above, even a broad interpretation of clause 34 based on the principle of effectiveness does not allow to construe this clause as an unambiguous reference to an arbitral institution or a specific set of arbitration rules [*SUPRA, PARAS.15-19*]. Thus, contrary to CLAIMANT's submissions [*CLAIMANT'S MEMORANDUM, PARA.72*], other methods of interpretation did fail.

22 Second, even if the principle of effective interpretation led to a result, the application of the *contra proferentem* rule would still not be excluded. The function of this rule is to prevent the use of unintelligible terms through the sanction of applying an interpretation against the drafter [*SYKES, V.J.*

2004, P.66; HARASZTI, P.188]. In the case at hand, CLAIMANT has substituted the original arbitration clause drafted by RESPONDENT [*RESPONDENT'S EXHIBIT NO.1, 4TH PARA.*]. Accordingly, CLAIMANT has to bear the risk of the clause being ambiguous. Arguing that the application of the *contra proferentem* rule is excluded only because a broad interpretation based on the principle of effectiveness already led to some result, CLAIMANT tries to shirk responsibility for the ambiguity of the arbitration clause. If any result achieved by a broad and effective interpretation would exclude the application of the *contra proferentem* rule, this rule would almost never apply and thus would be rendered useless.

23 The application of the principle of *contra proferentem* is particularly appropriate in the present case. CLAIMANT did not only draft clause 34, but asserted clause 34 in replacement of an arbitration clause drafted by RESPONDENT. The latter provided arbitration at the Mediterraneo International Arbitral Center [*RESPONDENT'S EXHIBIT NO.1, 4TH PARA.*]. Thus, it undisputedly designated an arbitral institution as well as its set of rules. Substituting a valid and clear clause, CLAIMANT all the more has to bear the risk of misunderstanding. Therefore, the principle of *contra proferentem* has to be applied and clause 34 has to be interpreted against CLAIMANT, i.e. against the application of the RA-CAB.

II. RESPONDENT is not precluded from asserting the ambiguity of clause 34

24 CLAIMANT submits that RESPONDENT is precluded from asserting the invalidity of the arbitration clause [*CLAIMANT'S MEMORANDUM, PARA.64*]. However, the concept of estoppel, which is derived from the fundamental requirement of good faith, states that a party is precluded from acting contrary to its former conduct if the other party relied on that conduct [*ICSID AWARD, 25 SEP 1983; UNITED STATES V. NICHOLS, U.S. CT. APP.; 10TH CIRC.; BLACK V. TIC INVESTMENT CORP, U.S. CT. APP., 7TH CIRC; VAUPEL TEXTILMASCHINEN KG V. MECCANIA EURO ITALIA SPA, U.S. CT. APP, FEDERAL CIRC.*]. At hand, there was neither contradictory conduct on the part of RESPONDENT nor reliance on the part of CLAIMANT.

25 First, the fact that the Arbitral Tribunal is already established does not impede RESPONDENT's assertion of the ambiguity of clause 34. The CLAIMANT submits that the parties already expended much time and effort on these proceedings which would be wasted, if the Arbitral Tribunal refused jurisdiction [*CLAIMANT'S MEMORANDUM, PARA.64*]. However, RESPONDENT contested the jurisdiction of the Arbitral Tribunal as early as in its statement of defence [*RESPONDENT'S ANSWER, PARA.17*]. Furthermore, until present, only the Arbitral Tribunal has been established, which is a mandatory prerequisite for the decision whether the arbitration agreement is valid or not. If the establishment of an arbitral tribunal already precluded one party

from asserting the nullity of an arbitration agreement, one could never contest the jurisdiction of an arbitral tribunal.

26 Second, CLAIMANT may not argue *at a later stage of the proceedings* that the approval of clause 34 could evoke reliance on the part of CLAIMANT which now precludes RESPONDENT from asserting the ambiguity of that clause. RESPONDENT did not initially perceive the nullity of clause 34. When signing the contract, Mr. Stiles, who is no expert in arbitration [*RESPONDENT'S EXHIBIT NO.1, 4TH PARA.*] considered clause 34 as "strange" [*IBID.*] Yet, one cannot expect a lay-man to accurately interpret a legal text. Mr. Stiles simply compared clause 34 with the arbitration clauses familiar to him, i.e. the arbitration clause used by RESPONDENT, and recognised that clause 34 was different since it did not mention an arbitral institution. However, the inoperability of clause 34 did not occur to him. Hence, RESPONDENT's present assertion of the ambiguity of clause 34 does not contradict its former conduct. Furthermore, Mr. Stiles perception of clause 34 was not made known to CLAIMANT. Thus, the approval of clause 34 could not evoke reliance on the part of CLAIMANT, wherefore RESPONDENT is not precluded from asserting the ambiguity of clause 34.

27 Summarising, the jurisdiction of the Arbitral Tribunal may not be based on an interpretation of clause 34 as an agreement on institutionalised arbitration under the RA-CAB.

B. The jurisdiction of the Arbitral Tribunal may not be based on an interpretation of clause 34 as an agreement on *ad hoc* arbitration

28 CLAIMANT may not argue *during a later stage of the proceedings* that the ambiguity of the term "International Arbitration Rules used in Bucharest" solely invalidates this specific term and that the present Arbitral Tribunal has jurisdiction in an *ad hoc* arbitration based on the remaining terms of clause 34. First, clause 34 does not contain an implicit agreement on *ad hoc* arbitration [**I**]. Second, in an *ad hoc* arbitration the present Arbitral Tribunal would have to be established anew [**II**].

I. Clause 34 does not contain an implicit agreement on *ad hoc* arbitration

29 The extent of an arbitral tribunal's jurisdiction coincides exactly with the limits of the arbitration agreement [*FOUCHARD/GAILLARD/GOLDMAN, PARA.648*]. An arbitral tribunal is not authorised to exceed the limits of the authority the parties have vested in it by virtue of the arbitration agreement [*POZNANSKI, J.INT'L. ARB.1987, P.83*; *REDFERN/HUNTER, PARA.5-04*]. At hand, the scope of the arbitration agreement is limited to proceedings according to detailed arbitration rules.

30 First, the wording of clause 34 as well as the arbitration clause originally contained in the contract indicate that the parties intended to ensure that their arbitral proceedings would be governed by a

detailed set of arbitration rules. The arbitration clause originally inserted by RESPONDENT called for arbitration at the Mediterraneo International Arbitral Center [*RESPONDENT'S EXHIBIT NO.1, 4TH PARA.*]. According to this clause, the arbitration would have been conducted according to the rules recommended by this institution. Clause 34 also intends to refer to a specific set of arbitration rules. An *ad hoc* arbitration, on contrast, would only be governed by the general provisions of the *lex loci arbitri*, i.e. the UNCITRAL Model Law which is in force in Danubia [*STATEMENT OF CLAIM, PARA.21*]. Thus, an *ad hoc* arbitration would contradict the parties' intent expressed during their pre-contractual negotiations and the wording of clause 34.

31 Second, an *ad hoc* arbitration would violate the parties' common intent to achieve a high degree of legal security for the conduction of the arbitral proceedings. The incorporation of a detailed set of arbitration rules ensures that there are clear provisions for every problem which may arise during the conduction of the arbitral proceedings [*REDFERN/HUNTER, PARA.1-101*]. In an *ad hoc* arbitration the arbitral tribunal itself has to intervene once a problem has arisen which is not dealt with by the *lex loci arbitri*. Thus, an *ad hoc* arbitration would violate the parties' common intent to achieve a high degree of legal security for the conduction of the arbitral proceedings.

32 Therefore, clause 34 does not contain an implicit agreement on an *ad hoc* arbitration.

II. In an *ad hoc* arbitration, the present Arbitral Tribunal would have to be established anew

33 In an *ad hoc* arbitration the Arbitral Tribunal would possibly have a different presiding arbitrator since the options of the arbitrators would not be limited by the list recommended by the CICA. The present Presiding Arbitrator was appointed in accordance with Art. 23 RA-CAB [*LETTER FROM 15 SEPTEMBER 2006*] which states that the Presiding Arbitrator of a tribunal consisting of three arbitrators has to be enrolled in the list recommended by the CICA. However, the UNCITRAL Model Law as *lex loci arbitri* in Danubia does not contain any such limitations concerning the choice of the presiding arbitrator. Thus, in an *ad hoc* arbitration the present Arbitral Tribunal would presumably have a different presiding arbitrator wherefore in this case it would have to be established anew. Summarising, the jurisdiction of the Arbitral Tribunal may not be based on an interpretation of clause 34 as an agreement on *ad hoc* arbitration.

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34 **Result of Issue 1:** The present Arbitral Tribunal has no jurisdiction since clause 34 may neither be interpreted as an agreement on institutionalised arbitration under the RA-CAB nor as an agreement on *ad hoc* arbitration.

Issue 2: RESPONDENT delivered fuse boards in conformity with its obligations under the contract dated 12 May 2005

35 On 12 May 2005 the parties concluded a contract of sale calling for the delivery of five distribution fuse boards at a price of $168,000. CLAIMANT asserts that the fuse boards containing JS type fuses delivered by RESPONDENT on 22 August 2005 were not in conformity with the contract under Art. 35(1) CISG [*CLAIMANT'S MEMORANDUM, PARA.90*]. Furthermore, CLAIMANT alleges that RESPONDENT breached the contract since Equalec, the electrical supply company in the area, refused to connect the delivered fuse boards because of its policy demanding exclusively JP type fuses for circuits of 400 amperes or less [*CLAIMANT'S MEMORANDUM, PARA.124*].

36 RESPONDENT agrees with the application of the CISG. However, contrary to CLAIMANT's allegations, RESPONDENT did not breach the contract by delivering fuse boards containing JS instead of JP type fuses [**A**]. Furthermore, RESPONDENT did not breach the contract by delivering fuse boards which Equalec refused to connect [**B**].

A. RESPONDENT did not breach the contract by delivering fuse boards containing JS instead of JP type fuses

37 According to Art. 35(1) CISG the seller must deliver goods which are of the quantity, quality and description required by the contract. CLAIMANT alleges that RESPONDENT was in breach of the contract by delivering fuse boards equipped with JS type fuses [*CLAIMANT'S MEMORANDUM, PARAS.86-90*]. It stresses that one of the two descriptive notes which were found on the drawings attached to the contract, reads "[f]uses to be 'Chat Electronics' JP type in accordance with BS 88". Confuting CLAIMANT's reasoning, RESPONDENT submits that applying a reasonable interpretation as required by Art. 8 CISG, the delivery of fuse boards containing JS instead of JP type fuses constitutes but an immaterial discrepancy. Moreover, CLAIMANT could not have had any particular interest to require exclusively JP type fuses when the contract was concluded.

38 In general, the discrepancy between actual and contractual condition of the delivered goods constitutes a lack of conformity. However, an exception is made if the discrepancy is immaterial [*MÜKOHGB/BENICKE, ART. 35, PARA.6; HONSELL/MAGNUS, ART. 35, PARA.8; SCHLECHTRIEM/SCHWENZER/SCHWENZER(E), ART. 35, PARA.9; KIRCHER, P.51*]. A discrepancy is immaterial, if it does by no means affect the utility or the value of the goods [*NEUMAYER/MING, ART. 35, PARA.2*]. Strict formalism in regard to immaterial discrepancies would ignore the reality of business life [*CF. REINHART, ART. 35, PARA.3*]. This view is confirmed by case law.

39 In *HG ZÜRICH, 30 NOVEMBER 1998*, the seller delivered lambskin coats with article numbers di-

verging from the specifications in the contract. The court held that, although the seller must deliver goods conforming to the contract, such lack of conformity does not rise to a breach of contract as the goods matched all relevant contractual standards.

40 First, fuse boards containing JS type fuses are functionally identical to fuse boards containing JP type fuses. All fuseways in the fuse boards are designed for less than 400 amperes. Up to 400 amperes, either fuse type can be installed and is fully satisfactory [*STATEMENT OF CLAIM, PARA.11*]. The only difference is that the fixing centres are 82 mm for JP and 92 mm for JS type fuses [*IBID.*]. However, this difference in size only matters when constructing the fuse boards. Once built, the size of the fixing centres does not affect the utility of the fuse boards. In addition, both fuse types are manufactured by Chat Electronics, the company preferred by CLAIMANT "whenever possible" [*STATEMENT OF CLAIM, PARA.12*]. More importantly, the use of both fuse types has been certified by the Equatoriana Electrical Regulatory Commission ("EERC") and both meet the BS 88 standard [*P.O.NO.2, PARA.28; RESPONDENT'S EXHIBIT NO.2*].

41 Second, having regard to all facts and circumstances of the case, including negotiations and subsequent conduct, Art. 8(3) CISG, CLAIMANT could not have had a particular interest to require JP type fuses. CLAIMANT initially asked for "fuse boards with *J type* fuses" (*emph add.*) without mentioning whether it required the JP or the JS type [*RESPONDENT'S ANSWER, PARA.3*]. Since JS and JP type fuses are functionally identical and CLAIMANT does not follow a fixed policy to exclusively use JP type fuses [*STATEMENT OF CLAIM, PARA.11; P.O.NO.2, PARA.25*], the only reason why CLAIMANT could have possibly had a particular interest in JP type fuses was to ensure that the fuse boards were in accordance with Equalec's policy. However, it was unaware of Equalec's policy until four months *after* the contract was concluded [*STATEMENT OF CLAIM, PARA.15*].

42 Moreover, CLAIMANT provided RESPONDENT with detailed engineering drawings. On the contract or in the drawings itself, a specific fuse type requirement could have easily been indicated. However, the JP type was only mentioned on a descriptive *note* [*STATEMENT OF CLAIM, PARA.9*] that has to be distinguished from the *drawings*.

43 Furthermore, CLAIMANT's subsequent conduct evinces that it had no particular interest to require JP type fuses. During the telephone conversation on 14 July 2005, CLAIMANT insisted on the fuses to be 'Chat Electronics' [*STATEMENT OF CLAIM, PARA.12*]. Yet, it expressed no doubts as to whether the substitution of JS instead of JP type fuses would be acceptable.

44 Summarising, the delivery of fuse boards containing JS instead of JP type fuses constitutes but an immaterial discrepancy and CLAIMANT could not have had any particular interest to require JP type fuses. Hence, RESPONDENT did not breach the contract by delivering fuse boards containing JS instead of JP type fuses.

B. RESPONDENT did not breach the contract by delivering fuse boards which Equalec refused to connect

45 Contrary to CLAIMANT's allegations [*CLAIMANT'S MEMORANDUM, PARAS.90, 122-134*], it will be shown that by delivering fuse boards which Equalec refused to connect, RESPONDENT did neither fail to deliver goods in conformity with the contract under Art. 35(1) CISG [**I**], nor under Art. 35(2)(b) CISG [**II**], nor under Art. 35(2)(a) CISG [**III**].

I. RESPONDENT did not fail to deliver goods in conformity with the contract under Art. 35(1) CISG by delivering fuse boards which Equalec refused to connect

46 CLAIMANT alleges that the descriptive note "[t]o be lockable to Equalec requirements" imposed a contractual obligation on RESPONDENT to deliver fuse boards that conform to Equalec's policy [*CLAIMANT'S MEMORANDUM, PARAS.86 AND 124*]. Yet, the word "lockable" merely implies that the fuse boards should provide for the possibility to lock them with a padlock [**a**]. Alternatively, the note could not have incorporated a policy as surprising as Equalec's [**b**].

a. The word "lockable" merely implies that the fuse boards should provide for the possibility to lock them with a padlock

47 In light of the objectivity attained through Art. 8(3) CISG, special weight is to be given to the usual meaning of the words used by the parties [*SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL(E), ART. 8, PARA.40; STAUDINGER/MAGNUS, ART. 9, PARA.32*]. Art. 8 CISG allocates the risk of unclear formulation to the party making the statement [*ICC AWARD NO.9187; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL(E), ART. 8, PARA.41*]. In other words, the relevant understanding is that "by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind" [*C.A. SINGAPORE, 6 APR 2005*].

48 The usual meaning of the word "lockable" is that an object is capable of being fitted with a lock [*WEBSTER'S INTERNATIONAL DICTIONARY, P.1328; OXFORD ENGLISH DICTIONARY, P.704; KUCERA DICTIONARY OF SCIENCE AND TECHNOLOGY, VOL. VIII, P.1087*]. In addition, following normal procedures, distribution fuse boards are locked with a padlock so that users do not have access to unmetered electrical supplies [*STATEMENT OF CLAIM, PARA.8*]. A reasonable third person would thus understand "lockable" to mean that the fuse boards should provide for the possibility to lock them with a padlock. CLAIMANT could not reasonably expect RESPONDENT to attach any meaning to the word "lockable" that is beyond its usual meaning. This is underlined by the fact that CLAIMANT is English speaking, while RESPONDENT's native language is

Latin based [*P.O.NO.2, PARA.3*]. CLAIMANT had thus to expect that the English terms used would be understood in accordance with their common meaning.

49 Furthermore, this understanding of "lockable" corresponds with the context of the entire phrase "lockable to Equalec requirements". It is indeed an "Equalec requirement" that the fuse boards were to be locked with a padlock in order to ensure Equalec's exclusive access [*STATEMENT OF CLAIM, PARA.8*]. In addition, testimony proves that the phrase "lockable to Equalec requirements" meant that Equalec would lock the fuse boards with a padlock [*P.O.NO. 2, PARA.21*].

50 Even the designers of CLAIMANT who prepared the engineering drawings did not know of Equalec's policy [*P.O.NO.2, PARA.25*]. On the other hand, they did know that following normal procedures, the fuse boards were to be locked with a padlock by Equalec [*STATEMENT OF CLAIM, PARA.8*]. Hence, with the note "lockable to Equalec requirements" the designers indicated that Equalec should be able to lock the fuse boards with a padlock. Only when CLAIMANT learned about Equalec's policy, it attached a different meaning to the word "lockable" in order to support its claim that RESPONDENT was obliged to deliver fuse boards conforming to Equalec's policy. Hence, the word "lockable" merely implies that the fuse boards should provide for the possibility to lock them with a padlock.

b. The note could not have incorporated a policy as surprising as Equalec's

51 Even if the note "lockable to Equalec requirements" was understood as a reference to the policy set forth by Equalec, RESPONDENT was not contractually obliged to adhere to it.

52 Not a single electrical supply company has a policy similar to that of Equalec [*P.O.NO.2, PARA.23*]. RESPONDENT had thus delivered many JS type fuses for circuits below 400 amperes over the years to Equatoriana without any difficulties [*RESPONDENT'S ANSWER, PARA.12*]. Equalec's policy, adopted *inter alia* because "it reduced the amount of inventory that the service trucks were required to carry" [*CLAIMANT'S EXHIBIT NO.3, 3RD PARA.*], is therefore of surprising and unorthodox character. The more a policy deviates from what can reasonably be expected, the more an express and unmistakable incorporation is necessary. However, the policy was indirectly introduced by a misleading descriptive note found somewhere on detailed engineering drawings. RESPONDENT could not foresee that a "descriptive note" on "*engineering* drawings" should inform it about such surprising *administrative* matters. Mentioning merely the name "Equalec" on this note was not sufficient to impose a contractual obligation upon RESPONDENT to adhere to the surprising policy set forth by Equalec. RESPONDENT was not notified of Equalec's policy [*P.O.NO.2, PARA.24*], the legal validity of which is subject to serious doubts [*INFRA PARA.118-137*]. The mentioning of "Equalec" randomly referred to RESPONDENT a company carrying

that name. Hence, the note "lockable to Equalec requirements" could not oblige RESPONDENT to adhere to Equalec's policy.

53 To conclude, RESPONDENT did not breach the contract in terms of Art. 35(1) CISG.

II. RESPONDENT was not obliged to comply with Equalec's policy by virtue of Art. 35(2)(b) CISG

54 CLAIMANT stresses that RESPONDENT knew that the fuse boards were to be installed in Mountain View and alleges that therefore, RESPONDENT could not have been unaware that "the purpose of the fuse boards was to connect the project with an Equalec connection" [*CLAIMANT'S MEMORANDUM, PARA.124*]. CLAIMANT further alleges that it was "completely reasonable" to rely on RESPONDENT's skill and judgement and that therefore RESPONDENT failed to deliver conforming goods under Art. 35(2)(b) CISG [*CLAIMANT'S MEMORANDUM, PARA.126*]. However, CLAIMANT's allegations cannot be upheld. It will be shown that Equalec's policy was not made known to RESPONDENT **[a]**. In any case, CLAIMANT could not reasonably rely on RESPONDENT's skill and judgement **[b]**.

a. Equalec's policy was not made known to RESPONDENT

55 A particular purpose in the sense of Art. 35(2)(b) CISG requires the seller to be informed in a "crystal clear and recognisable way" [*LG DARMSTADT, 9 MAY 2000; LG, MÜNCHEN 27 FEB.2002*] that the buyer's decision to purchase certain goods depends on their suitability for a particular use [*C.A. HELSINKI, 30 JUN 1998; SOERGEL/LÜDERITZ/SCHÜSSLE-LANGEHEINE, ART. 35, PARA.12; SECRETARIAT'S COMMENTARY, ART. 35, PARA.8*].

56 CLAIMANT did neither expressly nor impliedly make known to RESPONDENT that the fuse boards had to comply with Equalec's policy **[aa]**. Further, RESPONDENT, as the seller, was not obliged to observe the requirements applicable in Equatoriana **[bb]**.

aa. CLAIMANT did neither expressly nor impliedly make known to RESPONDENT that the fuse boards had to comply with Equalec's policy

57 CLAIMANT did not expressly make known to RESPONDENT that the fuse boards had to comply with Equalec's policy. As pointed out above [*SUPRA, PARAS.46-49*], the note "lockable to Equalec requirements" merely required the fuse boards to be lockable with a padlock. Merely dropping the name "Equalec" on a descriptive note does not indicate the intended compliance with Equalec's policy in a sufficient "crystal clear and recognisable way".

58 Moreover, CLAIMANT did not impliedly make known to RESPONDENT that the fuse boards

had to comply with Equalec's policy. Whether a particular purpose is impliedly made known in terms of Art. 35(2)(b) CISG is determined according to the *actual awareness* of the seller [*SECRETARIAT'S COMMENTARY, P.32, ART. 33, PARA.8; REINHART, ART. 35, PARA.6; HYLAND, P.321; HEILMANN, P.180*]. A simple *reason to know* must be deemed insufficient on two grounds: First, such view would contradict the wording of Art. 35(2)(b) CISG ("made known"). Second, the buyer would be able to shift the risk of utility for its purposes on the seller, although the factors affecting the utility lie in the sphere of the buyer [*HYLAND, P.321; HUTTER, P.42*].

59 At hand, contrary to CLAIMANT's assertions [*CLAIMANT'S MEMORANDUM, PARA.124*], RESPONDENT did not learn about Equalec's policy until four months *after* the contract had been concluded [*STATEMENT OF CLAIM, PARA.15*]. When informed that Equalec refused to make the connection, Mr. Stiles responded that it was "the first time he had ever heard of such a policy" [CLAIMANT'S EXHIBIT NO.3, 4TH PARA.].

60 Hence, CLAIMANT had neither expressly nor impliedly made known to RESPONDENT that the fuse boards had to comply with the policy set forth by Equalec.

bb. RESPONDENT, as the seller, was not obliged to observe the requirements in CLAIMANT's country

61 Even if a *reason to know* was deemed sufficient, RESPONDENT would not have been obliged to adhere to Equalec's policy. The seller cannot be expected to be aware of the particular requirements in the buyer's state [*HONSELL/MAGNUS, ART. 35, PARA.20; KUHLEN, P.76; STAUDINGER/MAGNUS, ART. 35, PARA.34; FREIBURG, P.94; PILTZ, NJW 1996, P.2768; HEUZÉ, P.220; DAUN, NJW 1996, P.29*]. This is due to the fact that the particular requirements are often difficult to investigate [*FREIBURG, P.94*]. It is rather the buyer who has to ascertain the special provisions applying in its country and make them part of the contract [*SCHLECHTRIEM/SCHWENZER/SCHWENZER(E), ART. 35 PARA.17; HAGER, P.333*]. Especially where the standards in the buyer's state are higher than those in the seller's state, the buyer must draw that fact to the seller's attention and not *vice versa* [*SCHLECHTRIEM/SCHWENZER/SCHWENZER(E), ART. 35, PARA.16*].

62 This view is confirmed by case law. In the "Mussels Case", *BGH, 8 MARCH 1995*, a Swiss seller delivered to a German buyer New Zealand mussels containing a cadmium concentration exceeding the limit recommended by the German authorities. The Court held that the Swiss seller could not be expected to be aware of the public law standards in the buyer's country and that therefore the seller did not breach the contract. Various supreme court decisions confirmed this decision [*OGH, 25 JAN 2006; OGH, 14 APR 2000; BGH, 2 MAR 2005*].

63 CLAIMANT cannot convincingly argue that an exception to the aforementioned case is applicable [*CF. CLAIMANT'S MEMORANDUM, PARA.127*]. The German Federal Supreme Court pointed out that an exception is only conceivable in three situations: When the same provisions exist in the export state, when the buyer informed the seller about such provisions, or when the seller had knowledge of the provisions due to "special circumstances". First, Equalec's policy is unique to the area of Mountain View [*P.O.NO.2, PARA.23*]. There is no indication that such standards exist in Mediterraneo. Second, CLAIMANT did not inform RESPONDENT about Equalec's policy. Third, RESPONDENT had no knowledge due to "special circumstances" as it neither maintains a branch in Equatoriana, nor did it have a longstanding business relation with CLAIMANT. Admittedly, RESPONDENT frequently exported to Equatoriana. However, it had previously delivered many JS type fuses for circuits of less than 400 amperes to Equatoriana without difficulty [*RESPONDENT'S ANSWER, PARA.12*]. Apparently, it had not yet delivered to the area where Equalec's policy applies. Hence, none of the exceptions of the "Mussels Case" is applicable.

64 As the seller cannot be expected to be aware of the public law standards applying nationwide in the buyer's state, the seller *a fortiori* cannot be expected to be aware of a policy that is set forth by a private corporation and only applies within a small region. CLAIMANT may thus not argue that the mere information that the fuse boards were to be installed in Mountain View was sufficient to impose an obligation on RESPONDENT to adhere to Equalec's policy.

65 In this regard, the Tribunal is kindly requested to follow the reasoning of *HOF ARNHEM, 27 APRIL 1999*. A Dutch seller delivered upon order of a German buyer movable room units which were not in accordance with industrial standards in Germany. Although the seller knew that they were to be used in Germany and had been informed by the buyer that German authorities had 'strict regulations', the Court held that it was up to the buyer to inform the seller about the German industrial standards and that therefore the seller did not breach the contract.

66 At hand, RESPONDENT was not informed about any regulations at all. The Tribunal is therefore respectfully requested to find *a maiore ad minus* that RESPONDENT was not obliged to conform to the policy set forth by Equalec.

67 In addition, where the standards existing in the buyer's country are special, isolated, or unique, the seller cannot , even under the assumption of a general obligation to observe the requirements, be expected to know these standards [*SCHLECHTRIEM/SCHWENZER/SCHWENZER(E), ART. 35, PARA.23; SCHLECHTRIEM, IPRAX 2001, P.163; SCHLECHTRIEM, IPRAX 1996, P.16*]. No other electrical supply company has a policy similar to that of Equalec [*P.O.NO.2, PARA.23*]. Equalec's policy is thus special and unique. As it only applies in Mountain View, it is also isolated.

68 Moreover, where the standards in the buyer's state are rarely known, the seller is, even if a general

obligation to observe the requirements was assumed, not obliged to adhere to these provisions [*SCHLECHTRIEM, 50 JAHRE BGH, P.432*]. Equalec's policy did not come into effect before July 2003 [*CLAIMANT'S EXHIBIT NO.4*]. CLAIMANT itself was unaware of Equalec's policy, although it had been active in Mountain View since 2004. Moreover, Equalec's policy was never brought to the attention of the EERC [*P.O.NO.2, PARA.29*]. Equalec's policy is thus rarely known. Hence, RESPONDENT was not obliged to adhere to Equalec's policy.

69 To conclude, Equalec's policy was not made known to RESPONDENT.

b. CLAIMANT could not reasonably rely on RESPONDENT's skill and judgement

70 Even if the Tribunal was to find that RESPONDENT had to be aware of Equalec's policy, CLAIMANT could not, contrary to its assertions [*CLAIMANT'S MEMORANDUM, PARA.126*], reasonably rely on RESPONDENT's skill and judgement.

71 Under Art. 35(2)(b) CISG if the seller has more skill and judgement than the buyer reasonable reliance may be indicated [*STAUDINGER/MAGNUS, ART. 35, PARA.32, HONSELL, SJZ 1992, P.351; HYLAND, P.321; SU, P.31*].

72 Even if RESPONDENT had better knowledge concerning *technical* aspects [*CLAIMANT'S MEMORANDUM, PARA.126*], this was not the case for the relevant *administrative* matters. CLAIMANT has already constructed a number of large commercial and residential developments in Equatoriana [*STATEMENT OF CLAIM, PARA.3*]. As these projects require specific knowledge concerning the compliance with public law standards, CLAIMANT must be deemed well versed in *administrative* matters. Moreover, CLAIMANT has its own department of technical engineers and worked in Mountain View since 2004 [*CLAIMANT'S EXHIBIT NO.2, 4TH PARA.*]. CLAIMANT had thus enough time to investigate any requirements set forth by Equalec. RESPONDENT's business, however, does not comprise the connection of its products to the electrical grid. RESPONDENT mostly sells equipment just as purchased. Less frequently, it "also" fabricates "certain types" of equipment by assembling "standard parts" [*RESPONDENT'S EXHIBIT NO.1, 1ST PARA.*]. RESPONDENT's experience in manufacturing is thus limited to *technical* aspects.

73 Moreover, reliance is unreasonable when the buyer provides precise specifications or insists on a particular brand [*SCHLECHTRIEM/SCHWENZER/SCHWENZER(E), ART. 35, PARA.23; MÜKO BGB/GRUBER, ART. 35, PARA.13; HYLAND, P.321; STAUDINGER/MAGNUS, ART. 35, PARA.33; ENDERLEIN/MASKOW/STROHBACH, ART. 35, PARA.13; AUE, P.76*]. Confronted with the choice between JP type fuses from another manufacturer or JS type fuses from Chat Electronics during the telephone conversation on 14 July 2005, CLAIMANT insisted on the fuses to be "Chat Electronics whenever possible" [*STATEMENT OF CLAIM, PARA.12*] and thus issued strict brand speci-

fications. Moreover, RESPONDENT had to comply with "detailed engineering drawings" [*STATEMENT OF CLAIM, PARA.9*]. CLAIMANT could not reasonably expect RESPONDENT on the one hand to follow the brand specifications and the engineering drawings strictly, and, on the other hand, to undertake any autonomous investigations as to the policy set forth by Equalec.

74 Summarising, RESPONDENT was not obliged to be aware of Equalec's policy. CLAIMANT could not reasonably rely on RESPONDENT's skill and judgement. Hence, RESPONDENT was not obliged to comply with Equalec's policy by virtue of Art. 35(2)(b) CISG.

III. RESPONDENT was not obliged to comply with Equalec's policy by virtue of Art. 35(2)(a) CISG

75 In a further alternative, CLAIMANT alleges that the fuse boards as delivered were not fit for the purpose for which goods of the same description would ordinarily be used according to Art. 35(2)(a) CISG [*CLAIMANT'S MEMORANDUM, PARA.130*]. However, it will be shown that the fuse boards as delivered by RESPONDENT were fit for ordinary use.

76 The fitness of goods for ordinary use is to be determined by the standards in the *seller's* country [*OGH, 25 JAN 2006*]. Fitness for ordinary use in terms of Art. 35(2)(a) CISG does therefore not require that the goods comply with the provisions in the *buyer's* state [*OGH, 25 JAN 2006; STAUDINGER/MAGNUS, ART. 35, PARA.22; HONSELL/MAGNUS, ART. 35, PARA.14; PILTZ, § 5 PARA.41*]. There is no indication that standards similar to Equalec's policy exist in Mediterraneo.

77 Even if the fitness of goods for ordinary use were to be determined by the standards in the buyer's country, the delivered fuse boards were fit for ordinary use. Rare and diverging provisions within the buyer's country do not define ordinary use in terms of Art. 35(2)(a) CISG [*SCHLECHTRIEM, IPRAX 1996, P.15*]. At hand, the policy of Equalec diverges from the provisions existing in the rest of Equatoriana. The delivered fuse boards are functionally adequate for the use in electric circuits not only in Mediterraneo but also in nearly all parts of Equatoriana. Hence, as the delivered fuse boards are fit for ordinary use, RESPONDENT delivered goods in conformity with the contract under Art. 35(2)(a) CISG. Summarising, RESPONDENT did not breach the contract by delivering fuse boards which Equalec refused to connect.

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78 **Result of Issue 2**: RESPONDENT did not breach the contract by delivering fuse boards containing JS instead of JP type fuses. Furthermore, RESPONDENT did not breach the contract by delivering fuse boards which Equalec refused to connect. Hence, RESPONDENT delivered fuse boards in conformity with its obligations under the contract dated 12 May 2005.

Issue 3: The contract was validly amended on 14 July 2005 to provide that JS type fuses should be used in the fuse boards

79 Assuming that the Tribunal should find that the delivered goods did not conform to the original contract, RESPONDENT nevertheless fulfilled its obligations. In response to CLAIMANT's allegations that the contract was not validly amended to provide that JS type fuses should be used in the fuse boards [*CLAIMANT'S MEMORANDUM, PARAS.91-121*], RESPONDENT submits that the contract was validly modified on 14 July 2005 [**A**] and that the fuse boards delivered were in conformity with the modified contract [**B**].

A. The contract was validly modified on 14 July 2005

80 CLAIMANT contests a valid modification of the contract by submitting that Mr. Hart could not conclude a valid agreement [*CLAIMANT'S MEMORANDUM, PARAS.98-110*] and that any amendment to the contract had to be in writing [*CLAIMANT'S MEMORANDUM, PARAS.111-121*]. Yet, it will be shown that the parties validly agreed on a modification of the original contract [**I**]. Furthermore, CLAIMANT may not assert the lack of a written agreement [**II**].

I. The parties validly agreed on a modification of the original contract on 14 July 2005

81 On 14 July 2005 RESPONDENT telephoned CLAIMANT to request a change of the fuse type as it was temporarily unable to supply Chat Electronics JP type fuses [*STATEMENT OF CLAIM, PARA.11*]. In the conversation Mr. Stiles on behalf of RESPONDENT and Mr. Hart on behalf of CLAIMANT agreed on a modification of the original contract [**a**]. Mr. Hart had actual power of representation [**b**]. Alternatively, CLAIMANT may not assert any lack of authority under Art. 14(2) Convention on Agency in the International Sale of Goods ("Geneva Convention") [**c**]. In any case, CLAIMANT ratified the modification of the contract under Art. 15(1) Geneva Convention [**d**].

a. The parties agreed on a modification of the original contract

82 According to Art. 29(1) CISG a contract may be modified by the mere agreement of the parties. In general, an agreement is achieved by offer (Art. 14 CISG) and acceptance (Art. 18 CISG) [*SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM, ART. 29, PARA.2; WITZ/SALGER/LORENZ/SALGER, ART. 29, PARA.9*]. Yet, an agreement is also formed when offer and acceptance cannot be clearly identified but material consensus and the contractual minimum content as put forth in Art. 14(1)(2) CISG are present [*PERALES VISCASILLAS, FORMATION OF CONTRACTS, P.376; REHBINDER, P.166; SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM, VOR ART. 14-24, PARA.5*].

83 For the completion of the fuse boards, RESPONDENT proposed the use of either JP type fuses of another brand or the use of Chat Electronics JS type fuses [*STATEMENT OF CLAIM, PARA.11*]. Insisting on Chat Electronics, Mr. Hart unconditionally accepted the use of JS type fuses telling RESPONDENT to "go ahead with JS fuses" [*RESPONDENT'S EXHIBIT NO.1, 10TH PARA.; CLAIMANT'S EXHIBIT NO.2, 4TH PARA.*]. Furthermore, the goods, quantity and price are sufficiently indicated as required by Art. 14(1)(2) CISG [*CF. CLAIMANT'S EXHIBIT NO.1; CLAIMANT'S EXHIBIT NO.2, 4TH PARA.*]. An agreement for modification was concluded between the parties.

84 CLAIMANT's denial of a valid agreement due to an alleged lack of contractual intent on its part cannot be followed [*CF. CLAIMANT'S MEMORANDUM PARAS.99-102*]. The intent of a party is determined by recourse to the understanding of a hypothetical reasonable person, Art. 8(2) CISG [*SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, ART. 8, PARA.19; SOERGEL/LÜDERITZ/FENGE, ART. 8, PARA.5; EÖRSI, P.2-17*]. Mr. Hart pointed out that he "was not very well versed in the electrical aspect of the development". Yet, he did not refrain from replying to RESPONDENT's inquiry despite his caveat [*CLAIMANT'S MEMORANDUM, PARAS.101-102*]. Instead he acknowledged that "since the project was under tight time requirements and it was not possible to reach Mr. Konkler that week, [he] thought it best to give an immediate answer" [*CLAIMANT'S EXHIBIT NO.2, 4TH PARA.*]. Mr. Hart never mentioned that his decision might be subject to reservations or that he was awaiting approval by his superior. In view of these circumstances and the fact that one could expect Mr. Hart to be aware of the legal consequences of his decision, he bindingly accepted JS type fuses.

85 Thus, an agreement for modification was concluded between the parties.

b. Mr. Hart had actual power of representation

86 CLAIMANT submits that Mr. Hart did not have the authority to amend the contract [*CLAIMANT'S MEMORANDUM, PARA.103-110*]. CLAIMANT's contention that the relationship between the third party (RESPONDENT) and the principal (CLAIMANT) is determined by the Geneva Convention [*CF. CLAIMANT'S MEMORANDUM, PARAS.98 AND 108*] is undisputed by RESPONDENT. According to Art. 12 Geneva Convention the acts of the agent shall directly bind the principal and the third party to each other, where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent. At hand all of these prerequisites are met.

87 CLAIMANT concedes that Mr. Hart was authorised to answer inquiries in Mr. Konkler's absence [*CLAIMANT'S MEMORANDUM, PARA.103*]. From an economic point of view it is unlikely that Mr. Konkler would have left his office for 15 days with the temporary impossibility to con-

tact him [*CF. CLAIMANT'S EXHIBIT NO.3, 1ST PARA.*] and without arranging proper representation during his absence. Considering that Mr. Hart had been provided with the authority to answer inquiries in regard to the development project and that the development was approaching the final important phase of the project [*CF. STATEMENT OF CLAIM, PARA.12*], Mr. Hart must at least have had authority to make small amendments. Otherwise, the authority to answer inquiries would have been so limited as to render it useless, since any answer given by Mr. Hart would have been given under reservation.

88 Furthermore, Mr. Hart did not exceed his power of representation as he had authority to sign contracts up to $250,000 [*P.O.NO.2, PARA.17*]. The contract concluded between CLAIMANT and RESPONDENT amounted to no more than $180,000 and the fuses in question constitute but a small part of that sum [*CF. RESPONDENT'S EXHIBIT NO.2*]. The fact that Mr. Hart was not in charge for the particular contract within the *internal* organisation of CLAIMANT's business [*P.O.NO.2, PARA.17*] cannot have any effects on his *general* scope of authority enabling him to sign and modify any contract up to $250,000. Hence, Mr. Hart did not exceed his power of representation. Thus, Mr. Hart had actual power of representation.

c. Alternatively, CLAIMANT may not assert any lack of authority

89 Even if the Tribunal found that Mr. Hart had no actual power of representation, CLAIMANT is still bound to Mr. Hart's representations. Art. 14(2) Geneva Convention provides that the principal may not invoke the agent's lack of authority when he "causes the third party reasonably and in good faith to believe" that the agent had authority. At hand, RESPONDENT reasonably believed that Mr. Hart had authority.

90 A principal who had the reputed representative act in a certain way without contradiction, leaves the impression of actually having provided the latter with power of representation [*ENDERLEIN/MASKOW/STROHBACH ART. 14 GENEVA CONVENTION, PARA.2.1*].

91 At hand, CLAIMANT in fact provoked the appearance of authority by the manner it organised its business. During the absence of the person in charge, Mr. Konkler, any inquiry was transferred to Mr. Hart [*P.O.NO.2, PARA.17; STATEMENT OF CLAIM, PARA.11*]. Mr. Hart is a professional of CLAIMANT's procurement office and was "generally aware of what was involved" in the contract with RESPONDENT [*CLAIMANT'S EXHIBIT NO.2, 1ST PARA.; P.O.NO.2, PARA.18*]. Thus, being put through to Mr. Hart immediately and without any further indication, RESPONDENT could reasonably believe that it was talking to an authorised person when inquiring about the contract modification. Moreover, neither did Mr. Hart indicate his lack of authority, nor did CLAIMANT contest Mr. Hart's representation until the delivery of the fuse

boards several weeks later [*CF. CLAIMANT'S EXHIBIT NO.3, PARA.6*]. Thus, CLAIMANT left the impression of having provided Mr. Hart with power of representation.

92 The fact that Mr. Hart affirmed his lack of knowledge in the technical details of the project does not contradict the reasonability of RESPONDENT's belief in Mr. Hart's authority. Mr. Hart merely expressed doubts as to whether a brand other than Chat Electronics would be acceptable to CLAIMANT. Contrary to CLAIMANT's assertion [*CLAIMANT'S MEMORANDUM, PARA.107*], he did *not* indicate insecurity as to whether the substitution of JS type fuses with JP type fuses would be acceptable [*RESPONDENT'S EXHIBIT, 8TH PARA.*]. Having been explained the difference between JP and JS type fuses, Mr. Hart agreed to the proposed substitution [*STATEMENT OF CLAIM, PARAS.11 et seq.*]. Furthermore, although acknowledging that an immediate and binding answer was necessary [*CF. STATEMENT OF CLAIM, PARA.12; CLAIMANT'S EXHIBIT NO.2, 4TH PARA.*], Mr. Hart failed to inform his superior, who had asked to be contacted with regard to urgent matters [*CLAIMANT'S EXHIBIT NO.3, 1ST PARA.*]. Thus, Mr. Hart himself did not consider his lack of technical knowledge as sufficiently important to influence the validity of his answer to RESPONDENT. If even Mr. Hart doubted the significance of his own lack of knowledge it was all the more reasonable for RESPONDENT to believe in Mr. Hart's proper authority.

93 Therefore, CLAIMANT may not assert any lack of authority.

d. In any case, CLAIMANT ratified the modification of the contract under Art. 15(1) Geneva Convention

94 If the Tribunal held that CLAIMANT is not precluded under Art. 14(2) Geneva Convention from invoking Mr. Hart's lack of authority, CLAIMANT is still bound to the modification agreement which was ratified according to Art. 15(1) Geneva Convention as CLAIMANT took delivery and paid for the fuse boards. Art. 15(8)(2) Geneva Convention provides that ratification "may be inferred from the conduct of the principal".

95 CLAIMANT did not mention the modification and never expressed any hesitation to ratify it. Thus, a reasonable person would have presumed that Mr Konkler, the responsible person within CLAIMANT's business, was informed about the telephone conversation with RESPONDENT. CLAIMANT, in assumed awareness of the telephone conversation, unconditionally took delivery and paid for the delivered goods which were in conformity with the modified contract [*STATEMENT OF CLAIM, PARA.14; RESPONDENT'S ANSWER, PARA.10; RESPONDENT'S EXHIBIT NO.1, 11TH PARA.*]. Therefore, a reasonable person would have understood CLAIMANT's conduct as ratification of the contract's modification according to Art. 15(1) Geneva Convention.

96 As a conclusion, Mr Hart's acts bind CLAIMANT according to the Geneva Convention.

II. CLAIMANT is precluded from asserting the lack of an agreement in writing

97 CLAIMANT alleges that clause 32 of the contract is opposed to the validity of the oral modification [*CLAIMANT'S MEMORANDUM, PARA.111-121*]. Clause 32 of the original contract provides that amendments to the contract must be in writing [*CLAIMANT'S EXHIBIT NO.1*]. Notwithstanding, CLAIMANT is precluded by its conduct to rely on this clause pursuant to Art. 29(2)(2) CISG. Art. 29(2)(2) CISG provides that a party may be precluded by his own conduct from asserting a no oral modification clause ("NOM-clause") to the extent that the other party has relied on that conduct. RESPONDENT will demonstrate that CLAIMANT conducted itself in such manner as to be precluded from asserting that the contract was not validly amended [**a**] and that RESPONDENT relied on that conduct [**b**].

a. CLAIMANT conducted itself in such manner as to be precluded from asserting that the contract was not validly amended

98 Conduct under Art. 29(2)(2) CISG is defined as such action of one party that allowing it to later invoke a NOM-clause against the other party would not be appropriate [*SONO, P.130; MÜKOBGB/GRUBER, ART. 29, PARA.13*]. Giving prevalence to the parties' freedom of contract the term "conduct" is interpreted flexibly, thus also including statements within the scope of Art. 29(2)(2) CISG [*SCHLECHTRIEM/SCHWENZER/ SCHLECHTRIEM, ART. 29, PARA.10; PERALES VISCASILLAS, JOURNAL OF LAW AND COMMERCE, P.178 et seq.; MURRAY, PARA.VII*]. This reasoning is also underlined by the wording of Art. 8(1) CISG which mentions "statements […] and *other* conduct" (*emph. add.*), confirming that the drafters of the CISG themselves considered statements as conduct. Insofar an oral modification itself accounts for "conduct" [*BAMBERGER/ ROTH/SAENGER, ART. 29, PARA.4; HONNOLD, ART. 29, PARA.204; HILLMAN, P.452; WEY, PARAS.453, 456*]. Further conduct besides the oral consent is not needed [*MÜKOBGB/GRUBER, ART. 29, PARA.13*]. As Mr. Hart on behalf of CLAIMANT agreed on JS type fuses the oral modification made during the phone call on 14 July 2005 accounts for "conduct" in terms of Art. 29(2)(2) CISG and thus precludes CLAIMANT from asserting that the contract was not amended.

99 Additionally, CLAIMANT may not allege that its silence following the modification agreement is imputable to the lack of knowledge on the part of Mr. Konkler or of the engineering department [*CF. STATEMENT OF CLAIM, PARA.13; CLAIMANT'S EXHIBIT NO.2, 4TH PARA.*]. It was Mr. Hart who failed to inform his superior despite the order to contact him with regard to urgent matters [*CLAIMANT'S EXHIBIT NO.3, 1ST PARA.*]. RESPONDENT on the other hand could reasonably expect that following the normal flow of information any changes made to the contract would im-

mediately be forwarded to the person in charge. RESPONDENT cannot be blamed for the fact that Mr. Hart "no longer thought about" the contract modification [*P.O.NO.2, PARA.20*]. Thus, silence in the case at hand accounts for "conduct" in terms of Art. 29(2)(2) CISG.

100 Assuming that an oral statement should be complemented by further activities in order to account for a "conduct" [*CLAIMANT'S MEMORANDUM, PARA.119*], CLAIMANT is still precluded from asserting the lack of a written agreement. Further activities satisfying the prerequisites for "conduct" are seen in the acceptance without contradiction and payment for the goods [*WITZ/SALGER/LORENZ/SALGER ART. 29, PARA.16; ENDERLEIN/MASKOW(E), ART. 29, PARA.4*]. Upon delivery, CLAIMANT accepted the fuse boards and paid for them within two days [*RESPONDENT'S ANSWER, PARA.23*]. Contrary to CLAIMANT's assertion [*CLAIMANT'S MEMORANDUM, PARA.*120], such conduct is an indication of assent since an examination for the fuse type is easy and could have been done immediately. Yet, on 9 September 2005 CLAIMANT complains only about three weeks after delivery [*RESPONDENT'S EXHIBIT NO.1, 12TH PARA.*]. Moreover, this complaint was solely motivated by Equalec's refusal to connect and not by the delivery of JS type fuses.

101 To conclude, CLAIMANT conducted itself in such manner as to be precluded from asserting that the contract was not validly amended.

b. RESPONDENT relied on CLAIMANT's conduct

102 Reliance in terms of Art. 29(2)(2) CISG manifests itself in an action which would not have been committed, if the original arrangement had not been changed [*PERALES VISCASILLAS, ART. 29, PARA.162B; BIANCA/BONELL/DATE-BAH, ART. 29, PARA.2.5; ACHILLES, ART. 29, PARA.6*]. The seller's production according to the oral agreement as well as the actual delivery show such reliance [*HONNOLD, ART. 29, PARA.204; ENDERLEIN/MASKOW(E), ART. 29, PARA.6.2*].

103 Shortly after the oral modification, RESPONDENT fabricated the fuse boards according to the updated specifications and delivered them accordingly [*RESPONDENT'S EXHIBIT NO.1, 11TH PARA.*]. It was reasonable for RESPONDENT to perceive CLAIMANT's approval to the substitution of JP by JS type fuses as final since it had expressly stressed the significance of timely performance [*CLAIMANT'S EXHIBIT NO.2, 4TH PARA.; RESPONDENT'S EXHIBIT NO.1, 8TH PARA.*]. Moreover, CLAIMANT never mentioned the NOM-clause and thus did not seem to lay importance on the form requirement. Hence, reliance on Mr. Hart's statement and on CLAIMANT's subsequent conduct was reasonable. CLAIMANT is precluded from asserting that the contract was not amended due to a lack of an agreement in writing.

104 Summarising, on 14 July 2005 the parties validly agreed on a modification of the original contract

as Mr. Hart bindingly agreed on an amendment and CLAIMANT is precluded by its own conduct from asserting the lack of an agreement in writing.

B. The fuse boards delivered were in conformity with the modified contract

105 On 22 August 2005, RESPONDENT delivered the distribution fuse boards directly to the building site [*STATEMENT OF CLAIM, PARA.14*]. Contrary to CLAIMANT's allegations [*CLAIMANT'S MEMORANDUM, PARAS.86-110*] RESPONDENT delivered fuse boards in conformity with the modified contract with regard to the fuse type [**I**]. Aditionally, the modification remedied any failure of RESPONDENT to perform its alleged obligation to deliver fuse boards which Equalec would actually connect [**II**].

I. RESPONDENT delivered fuse boards in conformity with the modified contract with regard to the fuse type

106 Art. 35(1) CISG provides that the goods delivered have to be of the quantity, quality and description required by the contract. In accordance with the contractual specifications as of 14 July 2005 the fuse boards had to be equipped with Chat Electronics JS type fuses. In delivering such fuse boards RESPONDENT complied with the modified contract.

II. The modification remedied any failure of RESPONDENT to perform its alleged obligation to deliver fuse boards that Equalec would actually connect

107 CLAIMANT submits that independently from the fuse type or the modification RESPONDENT is in breach of its contractual obligations as it did not deliver fuse boards fit for their particular purpose [*CLAIMANT'S MEMORANDUM, PARAS.129-134*]. RESPONDENT reiterates that the words "lockable to Equalec requirements" on the engineering drawings only referred to the requirement that the fuse boards should be lockable with a padlock [*SUPRA PARAS.46-49*].

108 However, even if actual connectivity of the fuse boards initially was required, RESPONDENT may not be held liable for Equalec's refusal to connect to the extent that this refusal was based on the fact that the delivered fuse boards contain JS type fuses.

109 First, by agreeing on JS type fuses, the parties impliedly revoked any previous obligation to deliver fuse boards that Equalec actually would connect. Interpreting a modified contract pursuant to Art. 8 CISG [*SECRETARIAT'S COMMENTARY, ART. 7, PARA.1*], a reasonable person would, *inter alia*, rely on the importance of observing good faith in international trade as provided for by Art. 7(1) CISG [*OLG HAMBURG, 5 OCT 1998; OG THURGAU, 19 DEC 1995; STAUDINGER/MAGNUS, ART. 8, PARA.10*]. Hence, the parties' most recent agreement should be preferred

[*HILLMAN, P.463*] and absurd or self-contradictory results avoided [*SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, ART. 8, PARA.49*]. When the parties decided on JS type fuses, the obligation to deliver fuse boards that Equalec would actually connect was not mentioned. Nor could it persist in addition to the obligations of the modified contract as Equalec would only connect the fuse boards which were *not* equipped with JS type but with JP type fuses. After the modification, a reasonable person would assume that RESPONDENT had to adhere to the most recent specifications of the fuses (i.e. JS type) and that any other obligation reversing the effects of modification would be rendered void. Obliging RESPONDENT to deliver fuse boards containing JS type fuses and at the same time upholding an obligation *not* to deliver fuse boards containing JS type fuses would be self-contradictory and absurd.

110 Second, as CLAIMANT must have noted that Chat Electronics JS type fuses hindered connection by Equalec, it is meant to have agreed on fuse boards that would not be connected. The buyer who buys goods notwithstanding their notable or apparent defects is meant to have agreed to the seller's proposal as determined by the effective state of the goods [*BIANCA/BONELL/BIANCA, ART.35, PARA.2.8.1; RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY 22 JAN 1997*]. After 14 July 2005, CLAIMANT must have known that the fuse boards would be equipped with JS type fuses [*STATEMENT OF CLAIM, PARA.12; SUPRA PARAS.78-102*] and it was notable to CLAIMANT that the fuse boards would not serve for connection to the electrical grid by Equalec. Thus, it agreed to the effective state of the goods.

111 Hence, the modification remedied any failure of RESPONDENT to perform its alleged obligation to deliver fuse boards that Equalec would actually connect.

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112 **Result of Issue 3:** The contract was validly modified on 14 July 2005. As Mr. Hart's statements bound CLAIMANT, the latter is precluded from alleging any lack of authority or the lack of a written agreement. Furthermore, CLAIMANT delivered fuse boards which conformed to the modified contract, since it adhered to the modified specifications and the modification remedied any failure of RESPONDENT's alleged obligation to deliver fuse boards that Equalec would actually connect.

Issue 4: CLAIMANT's failure to file a complaint with the EERC excuses any alleged failure of RESPONDENT to deliver goods conforming to the contract

113 On 8 September 2005 Equalec refused to connect the delivered fuse boards to the electrical grid [*STATEMENT OF CLAIM, PARA.14*]. According to its policy, it would exclusively connect primary distribution fuse boards employing fuses of 400 Amperes or less to corresponding circuits, if the fuses were of JP type [*CF. CLAIMANT'S EXHIBIT NO.4*].

114 Assuming that the Tribunal found that RESPONDENT failed to deliver conforming goods, RESPONDENT will demonstrate that, in contrast to CLAIMANT's assertions [*CLAIMANT'S MEMORANDUM, PARAS. 135-149*], any such failure would be excused since CLAIMANT was obliged to file a complaint with the Equatoriana Electric Regulatory Commission ("EERC"). Consequently, RESPONDENT requests the Tribunal to reject any claim of damages. This request is submitted on two alternative legal bases.

115 CLAIMANT is prevented from relying on RESPONDENT's alleged failure to perform under Art. 80 CISG [**A**]. In the alternative, CLAIMANT's claim must be reduced to zero, as CLAIMANT failed to comply with its duty to mitigate under Art. 77 CISG [**B**].

A. CLAIMANT is prevented from relying on RESPONDENT's alleged failure to perform under Art. 80 CISG

116 CLAIMANT may not argue *at a later stage of the proceedings* that Art. 80 CISG is not applicable in the case at hand. RESPONDENT will show that CLAIMANT is prevented from relying on RESPONDENT's alleged failure to perform.

117 According to Art. 80 CISG a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission. The promisee's act or omission must have *caused* the promisor's failure to perform ("but-for" rule) [*STAUDINGER/MAGNUS, ART. 80, PARA.12, ART. 74, PARA.28; SCHLECHTRIEM, PARA.297; WITZ/SALGER/LORENZ/SALGER, ART. 80, PARA.2*].

118 CLAIMANT caused an alleged failure on the part of RESPONDENT to deliver fuse boards which Equalec would connect to the electrical grid. If CLAIMANT had successfully complained to the EERC, the EERC would have required Equalec to connect to fuse boards containing JS type fuses. As a consequence, the fuse boards delivered by RESPONDENT would have been connected to the electrical grid and RESPONDENT would have fulfilled its contractual obligation. Thus, CLAIMANT caused RESPONDENT's alleged failure.

119 Furthermore, it has to be taken into consideration that CLAIMANT's *omission to complain* caused

RESPONDENT's failure to perform. An omission is equivalent to an act, if an act in the interest of the promisee was necessary and objectively suited [*SCHLECHTRIEM/SCHWENZER/STOLL/GRUBER(E), ART. 80, PARA.3*].

120 RESPONDENT submits that CLAIMANT's omission to file a complaint is equivalent to an act under Art. 80 CISG, since it would have been objectively suited [**I**] and necessary [**II**].

I. Filing a complaint with the EERC would have been objectively suited

121 Equalec was under an obligation to connect fuse boards containing JS type fuses to the electrical grid [**a**]. A complaint would have timely led to the decision that Equalec had to connect to the fuse boards [**b**].

a. Equalec was under an obligation to connect fuse boards containing JS type fuses to the electrical grid

122 Art. 14 of the Equatoriana Electric Service Regulatory Act ("EESRA") states:

> *Every electric corporation shall provide electric service that is safe and adequate to any legal or physical person who shall have made appropriate arrangements for payment of the charges. There shall be no undue or unjust requirements for providing such service.*

123 CLAIMANT itself concedes [*CLAIMANT'S MEMORANDUM, PARA.141*] that Art. 14 EESRA imposes an obligation on each electric corporation, in this case Equalec, to provide safe and adequate electric service. There are only two possible exceptions from this general obligation to connect – none of which is applicable to the present facts.

124 The first exception according to which electric service shall not be provided to persons who failed to make "appropriate arrangements" for payment of the charges is not applicable in the case at hand.

125 The second exception can be deduced from a reading of Art. 14 s.1 EESRA in combination with Art. 14 s.2 EESRA. Accordingly, an electric corporation can enact additional requirements as long as they are not undue or unjust [*CF. CLAIMANT'S MEMORANDUM, PARA.135*]. Contrary to CLAIMANT's assertions [*CF. CLAIMANT'S MEMORANDUM, PARAS.136-140*], Equalec's policy is to be regarded as an undue requirement in terms of Art. 14 s.2 EESRA. First, the certification of JS type fuses in terms of Art. 15 EESRA excludes any discretionary power on the part of Equalec [**aa**]. Second, the use of JS type fuses is safe and adequate [**bb**].

aa. The certification of JS type fuses in terms of Art. 15 EESRA excludes any discretionary power on the part of Equalec

126 Art. 15 EESRA states that the EERC shall certify the safety of all equipment to which electrical connections have been requested [*RESPONDENT'S EXHIBIT NO.4*].

127 In the case at hand, both JP and JS type fuses were certified by the EERC [*RESPONDENT'S ANSWER, PARA.19; P.O.NO.2, PARA.28*]. Nevertheless, CLAIMANT asserts that Equalec was entitled to refuse the connection of the delivered fuse boards containing certified JS type fuses, since it had discretionary power to decide whether JS type fuses would be safe in individual cases [*CLAIMANT'S MEMORANDUM, PARAS.136 AND 142*]. This reasoning cannot be followed.

128 An electric corporation is not in the position to refuse the use of certified electric items. This is due to the fact that any certification presupposes the items' compliance with a detailed test. Thus, once an electric item is certified by the EERC, it is to be regarded as safe under every circumstance. There is no room for a third party's verification of an item that has already been certified as safe. Otherwise, the certification of the EESRA would be rendered useless and the purpose of such certification, i.e. a uniform standard, would be redundant. Thus, the certification of JS type fuses in terms of Art. 15 EESRA by the EERC excludes any discretionary power on the part of Equalec.

bb. The use of JS type fuses is safe and adequate

129 Art. 14 EESRA requires every electric corporation to provide electric service that is safe and adequate to any legal or physical person [*CF. RESPONDENT'S EXHIBIT NO.4*].

130 CLAIMANT, following the reasoning of Equalec [*CF. CLAIMANT'S EXHIBIT NO.4*], submits that especially the use of JS type fuses in electrical circuits designed for less than 400 Amperes bears severe safety risks, because their use leads to a higher risk of wrongfully installing improperly sized fuses allowing for a larger rating [*CF. CLAIMANT'S MEMORANDUM, PARA.137*]. However, a closer observation reveals the flaw of such argumentation and shows that the use of JS type fuses in distribution fuse boards is as safe as the use of JP type fuses.

131 Main distribution fuse boards - containing the J type fuses in question - are managed by the electrical supplier and a padlock guarantees exclusive access to them [*STATEMENT OF CLAIM, PARAS.7 AND 8*]. Only the personnel of the electrical supplier can gain access to the fuses of a main distribution fuse board [*CF. STATEMENT OF CLAIM, PARA.6 AND 8*]. Accordingly, no other person than Equalec's own trained personnel is able to exchange fuses. All persons having access to the fuse boards are thus aware of the risks of installing wrong fuses. Meanwhile, a policy which as a matter of principle does not allow the use of JS type fuses because of the risk of an improper

replacement, can by no means be regarded as reasonable. It would be more convenient to enhance the personnel's skills than to adopt a restrictive policy.

132 Additionally, the fact that none of the other electrical supply companies in Equatoriana has enacted a similar policy [*P.O.NO.2, PARA.23*] reflects that the problem may not lie with the fuses, but with the staff of Equalec themselves. While it might be correct that the fact that only Equalec has such policy does not necessarily imply the policy's unlawfulness [*CF. CLAIMANT'S MEMORANDUM, PARA.140*], it still has to be regarded as an indication that the problem lies within sphere of Equalec.

133 Furthermore, it has to be taken into consideration, that JP type fuses are available with ratings from 32 to 400 Amperes [*CF. RESPONDENT'S EXHIBIT NO.2*]. Thus, even if, in accordance with Equalec's policy, only JP type fuses were installed in circuits of less than 400 Amperes, there would still be *13* different kinds of fuse ratings [*CF. RESPONDENT'S EXHIBIT NO.2*]. Hence, the installation of an improperly sized JP type fuse is as likely as the installation of improperly sized JS type fuses. The installation of the wrong JP type fuses results in the same severe consequences as the installation of an improperly sized JS type fuse. Thus, the ban on JS type fuses is not suitable to significantly minimise the risks resulting from the installation of improper sized fuses.

134 Hence, the certification of JS type fuses in terms of Art. 15 EESRA excludes any discretionary power on the part of Equalec and the use of JS type fuses is safe and adequate. Therefore, Equalec's policy is to be regarded as undue in terms of Art. 14 EESRA. Consequently, Equalec was under an obligation to connect fuse boards containing JS type fuses to the electrical grid.

b. A complaint to the EERC would have timely led to the decision that Equalec had to connect to the fuse boards

135 CLAIMANT did not file a complaint with the EERC because in its opinion - as Mr. Stiles states- a complaint would have been too time-consuming [*RESPONDENT'S EXHIBIT NO.1, 14TH PARA.*]. It furthermore argues that the in-time completion of Mountain View Office Park was of importance [*CF. STATEMENT OF CLAIM, PARA.16*] and that therefore a complaint to the EERC would not be suitable.

136 At the time when Equalec refused the connection, it might have been impossible to determine with a 100 percent certainty how long it would take the Commission to rule as to whether Equalec was required to connect the fuse boards in Mountain View or not [*P.O.NO.2, PARA.30*].

137 However, the duration of any proceedings before the EERC is only unknown because CLAIMANT did not complain. Since Equalec's policy is undue in terms of Art. 14 EESRA, CLAIMANT should at least have *attempted* to complain. The fact that the duration of the pro-

ceedings before the EERC could not be exactly determined with a 100 percent certainty prior to a complaint should not have kept CLAIMANT from filing a complaint.

138 Moreover, it must reasonably be assumed that the period of time until Equalec would need to change its policy and connect the fuse boards would have been rather short. As already pointed out, the policy is manifestly undue in terms of Art. 14 EESRA [*SUPRA PARA.119-131*]. Thus, a mere inquiry of the staff of the Commission would have been sufficient to cause Equalec to change its policy without formal action. In that case, it would have taken one week until Equalec changed its policy [*CF. P.O.NO.2, PARA.30*].

139 Furthermore, it has to be taken into consideration that Equalec, facing a full investigation by the Commission, most probably would have temporarily connected to the fuse boards delivered by RESPONDENT. This would not only have been an act of goodwill but also would have avoided increased damages in case the complaint was successful. Alternatively, also the EERC could have advised Equalec to connect to the delivered fuse boards for the duration of the investigation, since the mere use of the JS type fuses with the *correct* rating does not bear any safety risks. Consequently, once connected to the electrical grid, CLAIMANT could have fulfilled its lease contracts *and* complained to the EERC.

140 Thus, a complaint to the EERC would have timely led to the decision that Equalec had to connect the fuse boards. Furthermore, Equalec was under an obligation to connect fuse boards containing JS type fuses to the electrical grid. Hence, filing a complaint to the EERC would have been objectively suited.

II. Filing a complaint with the EERC would have been necessary

141 An act in terms of Art. 80 CISG is necessary in cases where the promisee refuses to provide the cooperation required for successful performance [*CF. SCHLECHTRIEM/SCHWENZER/STOLL /GRUBER(E), ART. 80, PARA.3; MÜKOBGB/HUBER, ART.80, PARA.3; ACHILLES, ART. 80, PARA.2, STAUDINGER/MAGNUS, ART 80, PARA.10*]. A complaint to the EERC would have been necessary since CLAIMANT was obliged to provide the required cooperation and was in a better position than RESPONDENT to file a complaint. This is due to the following three reasons.

142 First, unlike RESPONDENT, CLAIMANT was directly affected by Equalec's refusal to connect to fuse boards containing JS type fuses in circuits of less than 400 Amperes. Since Equalec refused to connect to the fuse boards in Mountain View, it is CLAIMANT who faces the possibility of being unable to give access to its buildings in time. Thus, it is CLAIMANT who would have to deal with the direct consequences resulting from a delayed completion of Mountain View Office Park, not RESPONDENT.

143 Second, since CLAIMANT has its place of business in Equatoriana [*STATEMENT OF CLAIM, PARA.1*], it is familiar with the language and local usages, which is of advantage in any investigation. RESPONDENT in turn has its principal office in Mediterraneo [*STATEMENT OF CLAIM, PARA.2*] and is thus not in such an advantaged position as CLAIMANT.

144 Third, the explicit aim of Art. 14 EESRA is the protection of the consumer of electricity against any "unjust or undue" policy of electrical supply distribution companies. CLAIMANT, as a consumer of electricity, is thus directly protected by the provision and a complaint would constitute an exercise of his guaranteed right. By contrast, RESPONDENT is only a fabricator and distributor of electrical equipment and is consequently not directly protected by the EESRA.

145 Hence, CLAIMANT was in a better position to file a complaint than RESPONDENT. Refusing to complain, CLAIMANT did not provide the cooperation required. Thus, filing a complaint with the EERC was necessary.

146 Summarising, since filing a complaint with the EERC was objectively suited and necessary under Art. 80 CISG, CLAIMANT's omission to complain is equivalent to an act. This act caused RESPONDENT's alleged failure to perform its obligations. To conclude, CLAIMANT is prevented from relying on the delivery of allegedly non-conforming goods under Art. 80 CISG.

B. In the alternative, CLAIMANT's claim must be reduced to zero, as CLAIMANT failed to comply with its duty to mitigate under Art. 77 CISG

147 Even if the Tribunal found that the delivery of allegedly non-conforming goods was not imputable to CLAIMANT's omission to complain in terms of Art. 80 CISG, CLAIMANT would have been obliged to mitigate the loss resulting from any alleged non-conformity of the delivered goods under Art. 77 CISG. A reasonable mitigation would have avoided the loss in its entirety.

148 According to Art. 77 CISG, a party who relies on a breach of contract must take reasonable measures to mitigate the loss resulting from that breach. Otherwise the party in breach can claim a reduction in damages [*ICC AWARD NO.8817; WITZ/SALGER/LORENZ/WITZ, ART. 77,PARA.12; BRUNNER, ART. 77, PARA.3*]. The reference point for the determination of "reasonable measures" must be a prudent person in the same position as the aggrieved party [*BAMBERGER/ROTH/SAENGER, ART. 77, PARA.3; OGH, 6 FEB 1996; OLG MÜNCHEN, 8 FEB 1995*].

149 CLAIMANT's reasoning to have done what was reasonable in order to mitigate the loss, by asking how quickly proper fuse boards could be delivered and by replacing the delivered fuse boards with fuse boards delivered by Switchboards [*CLAIMANT'S MEMORANDUM, PARAS.145, 147-149*], cannot be followed. By ordering new distribution fuse boards containing JP type fuses

CLAIMANT did not take all measures which would have been reasonable. It may have mitigated any loss resulting from penalty clauses, but it did not take any measures to mitigate the loss resulting from the fact that the entire fuse boards had to be built a second time. That loss could have been entirely avoided, if only CLAIMANT had filed a complaint with the EERC. Thus, CLAIMANT's reasoning cannot be followed.

150 A complaint to the EERC would have been a reasonable measure to mitigate the loss resulting from Equalec's refusal to connect to its full extent. As demonstrated, a complaint would have been objectively suited for the following reasons: First, Equalec was under an obligation to connect fuse boards containing JS type fuses to the electrical grid according to Art. 14 EESRA. Second, a complaint to the EERC would most possibly have timely led to the decision that Equalec had to connect to the fuse boards. A successful complaint would have required Equalec to connect to fuse boards containing JS type fuses. Consequently, CLAIMANT would not have had to purchase other fuse boards from Switchboards. Hence, CLAIMANT's claim must be reduced to zero, as CLAIMANT failed to comply with its duty to mitigate under Art. 77 CISG.

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151 **Result of Issue 4:** CLAIMANT is prevented from relying on RESPONDENT's alleged failure to perform under Art. 80 CISG. In the alternative, CLAIMANT's claim must be reduced to zero, as CLAIMANT failed to comply with its duty to mitigate under Art. 77 CISG.
Hence, CLAIMANT's failure to file a complaint with the EERC excuses any alleged failure of RESPONDENT to deliver goods conforming to the contract.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders and CLAIMANT's Memorandum, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the honourable Tribunal to declare that:

The Arbitral Tribunal has no jurisdiction **(Issue 1)**

RESPONDENT delivered fuse boards in conformity with its obligations under the contract dated 12 May 2005 **(Issue 2)**

RESPONDENT delivered goods conforming to the contract since the contract was validly modified on 14 July 2005 **(Issue 3)**

CLAIMANT's failure to file a complaint with the EERC excuses any alleged failure of RESPONDENT to deliver goods conforming to the contract **(Issue 4)**

CERTIFICATE

Freiburg im Breisgau, 25 January 2007

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

(signed) _____
Florian Dressel

(signed) _____
Clara Goethe

(signed) _____
Benjamin Herzberg

(signed) _____
Indra von Mirbach

(signed) _____
Kalina Peneva

(signed) _____
Christian Schmollinger

(signed) _____
Oliver Unger

(signed) _____
David Tebel

(signed) _____
Dirk Wiegandt