

FOURTEENTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

On Behalf Of:

**Mediterraneo Electrodynamics
S.A.**

23 Sparkling Lane
Capital City, Mediterraneo

RESPONDENT

Against:

**Equatoriana Office Space
Ltd.**

415 Central Business Centre
Oceanside, Equatoriana

CLAIMANT



NATIONAL UNIVERSITY OF SINGAPORE

LEO ZHEN WEI LIONEL · TAN LIANG YING
TANG YONG' AN, MICHAEL · WU ZHIQING ELIZABETH

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INDEX OF TERMS & ABBREVIATIONS

§/§§	Section/Sections
Art.	Article
BGH	Bundesgerichtshof (German Federal Supreme Court)
BS	British Standard
CAIS	Convention on Agency in the International Sale of Goods
CICA	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Ed.	Editor[s]
ed.	Edition
GmbH	Gesellschaft mit beschränkter Haftung (Limited Liability Company)
ICC	International Chamber of Commerce
Inc.	Incorporated
KG	Kammergericht
LG	Landgericht (German District Court)
Ltd.	Limited
Memo	Memorandum
No.	Number
OLG	Oberlandesgericht (German Provincial Court of Appeal)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
p.	Page/Pages
para.	Paragraph/Paragraphs
P.C.	Privy Council
S.A.	Société Anonyme
S.D.N.Y.	Southern District of New York
Supp.	Supplement
UK	United Kingdom
US	United States of America
UNCITRAL	United Nations Commission on International Trade Law

UNIDROIT International Institute for the Unification of Private Law
v. Versus
Y.B. Comm. Arb. Yearbook of Commercial Arbitration

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STATEMENT OF FACTS

Equatoriana Office Space Ltd. (“Claimant”) is a developer of residential and business properties incorporated and doing business in Equatoriana. Mediterraneo Electrodynamics S.A. (“Respondent”) distributes and fabricates electrical equipment and is a corporation organised under the laws of Mediterraneo. The Claimant constructed a new development named Mountain View Office Park (“Mountain View”) in Equatoriana. The electrical supply company in that area is Equalec.

On 12 May 2005, the Claimant entered into a contract with the Respondent to purchase five primary distribution fuse boards with J type fuses for connection to the electrical supply at Mountain View, at US\$168,000 (“Fuse Board Contract”). Each fuse board contained fuseways of different ratings, but all for less than 400 amperes. Each fuseway in turn has three fuses. Attached to the contract were engineering drawings based on comments by a third party, Equatoriana Switchboards Ltd. On the drawings were two descriptive notes:

- Fuses to be “Chat Electronics” JP type in accordance with BS 88.
- To be lockable to Equalec requirements.

Equalec, the electrical supply company, normally locks the primary distribution fuse boards with a small padlock to prevent unauthorised access to the electrical supply (a commercial factor) and to prevent interference with the fuses (a safety factor).

The Fuse Board Contract is governed by the law of Mediterraneo, which is a party to the CISG. It provides in clause 34 that all disputes shall be settled by the “International Arbitration Rules used in Bucharest”. The Claimant had replaced the original dispute resolution clause drafted by the Respondent when it signed the Fuse Board Contract. Clause 32 also requires amendments to the contract to be in writing.

On 14 July 2005, Mr. Peter Stiles, Sales Manager for the Respondent, attempted to contact Mr. Herbert Konkler, Purchasing Director for the Claimant. Mr. Stiles was referred to Mr. Steven Hart in the Purchasing Department since Mr. Konkler was on a business trip. Mr. Stiles informed Mr. Hart that the Respondent did not have JP type fuses in stock and that Chat Electronics was facing production difficulties. Mr. Stiles explained that there were

three options: to wait until August 2005 for Chat Electronics JP type fuses, use JP type fuses from another manufacturer, or Chat Electronics JS type fuses.

Mr. Stiles assured Mr. Hart that JP and JS type fuses were functionally identical up to 400 amperes and since the ratings in the fuse boards were all below 400 amperes, either type could be used. Mr. Hart decided that since the Claimant was under tight time pressures to give occupancy to its Mountain View tenants, it could not wait for Chat Electronics JP type fuses to become available. Mr. Hart also decided that since the Claimant had a preference for Chat Electronics equipment, JS type fuses should be used. He instructed Mr. Stiles to proceed on that basis.

On 22 August 2005, the Respondent delivered the distribution fuse boards. The Claimant transferred US\$168,000 as payment on 24 August 2005. On 8 September 2005, Equalec came to make the electrical connection but refused to do so, upon discovering that the distribution fuse boards contained JS type fuses. Mr. Stiles learnt about this from Mr. Konkler the next day, and explained that Equalec was required to have made the connection because both JP and JS fuses met the requirements of the Equatoriana Electrical Regulatory Commission (“Equatoriana Commission”). The Respondent had never encountered problems when delivering many JS fuses for less than 400 amperes to Equatoriana over the years.

However, Mr. Konkler merely asked Equalec for a letter stating their policy, but did not alert or complain to the Equatoriana Commission. The Claimant then bought fuse boards using Chat Electronics JP type fuses from Equatoriana Switchboards Ltd. for US\$180,000, including additional installation costs of US\$20,000.

ARGUMENTS

I. THIS TRIBUNAL HAS NO JURISDICTION TO RULE ON THE MERITS OF THE DISPUTE.

1. Although the Respondent had participated in the constitution of this Tribunal, it is not precluded from challenging the latter's jurisdiction [A]. This Tribunal was instituted under the CICA Rules and thus has no jurisdiction because the parties only had a common intention to submit to *ad hoc* arbitration [B]. Only a new *ad hoc* tribunal not constituted with the participation of the CICA would have jurisdiction to hear the parties' dispute [C].

A. THE RESPONDENT IS NOT BARRED FROM CHALLENGING THIS TRIBUNAL'S JURISDICTION.

2. Despite participating in the constitution of this Tribunal, the Respondent has consistently challenged its jurisdiction [*Letter from Fasttrack conveying Answer; Answer, para. 14-17, 24; Procedural Order No. 1, para. 4*]. The seat of the arbitration, Danubia, has enacted the UNCITRAL Model Law ("Model Law"), which is the applicable procedural law [*Statement of Claim, para. 21*]. Article 16(2) of the Model Law states that a party is not precluded from raising a plea that the Tribunal does not have jurisdiction by the fact that he has participated in the appointment of an arbitrator [*Holtzmann/Neuhaus, p. 480*].

B. THE ARBITRATION AGREEMENT CAN ONLY PROVIDE FOR AD HOC ARBITRATION BECAUSE THERE IS NO COMMON INTENTION TO ARBITRATE INSTITUTIONALLY.

3. The parties' common intention to arbitrate under the specified circumstances is a fundamental condition for the enforcement of an arbitration agreement [1]. The arbitration agreement evinces no common intention for institutional arbitration under the auspices of the CICA [2]. Further, the arbitration agreement can only be interpreted to show a common intention to submit to *ad hoc* arbitration [3]. Consequently, this Tribunal should decline to enforce the arbitration agreement and hold that it has no jurisdiction to resolve this dispute.

1. The essence of an arbitration agreement is the parties' common intention to arbitrate under specified conditions.

4. The contract between the parties is the fundamental constituent of international arbitration [*Gaillard/Savage, para. 46*]. As a contract, the arbitrators' power to resolve a

dispute is founded solely upon the common intention of the parties [*Gaillard/Savage, para. 44-45; “Nordsee” Deutsche Hochseefischerei v. Reederei Mond Hochseefischerei (Europe)*]. Therefore, scholarly writings and case law support that an arbitral tribunal must seek to establish the parties’ intention, and give effect to this common intention [*Gaillard/Savage, para. 485; Craig/Park/Paulsson, p. 85; Rubino-Sammartano, p. 214-217; KG Berlin, 15 October 1999 (Germany); OLG Köln, 26 October 2004 (Germany); Laboratorios Grossman, S.A. v. Forest Laboratories Inc. (US); ICC Case No. 6709 of 1991*].

5. The case authorities relied on by the Claimant do not detract from this principle. In *OLG Köln, 26 October 2004 (Germany)*, the court discerned that the parties could only have intended to arbitrate under the Chamber of Commerce and Industry of the Russian Federation, and therefore ordered arbitration under that institution. Similarly, in *KG Berlin, 15 October 1999 (Germany)*, the court investigated the circumstances of the case to discern the parties’ real intention. A broad interpretation was applied because it was considered that this was necessary to meet the parties’ intention. It is evident that the courts in these cases were actually giving effect to the common intention of the parties to arbitrate under particular institutions. These cases establish that the parties’ common intention is determinative as to the meaning of an arbitration agreement. However, the cases are not directly applicable to this case apart from this principle. The cases cited by the Claimant all involve a clear intention to arbitrate institutionally. As will be argued, there is no discernable common intention for institutional arbitration in this case. Therefore, this Tribunal should take the opposite stance and decide that it has no jurisdiction to determine the merits of this case.

6. In addition, the common intention to arbitrate should not be regarded as assent to arbitration under any circumstances, but only to arbitration under the circumstances defined in the arbitration agreement, which must include the specific set of procedural rules agreed upon.

2. *The arbitration agreement evinces no common intention to arbitrate institutionally under the CICA.*

i. The plain wording of the arbitration agreement does not refer to institutional arbitration.

7. The Claimant contends that the parties chose institutional arbitration administered by the CICA by way of reference to its rules [*Claimant’s Memo, para. 28*]. This is erroneous.

The arbitration agreement provides that disputes shall be settled by the “International Arbitration Rules used in Bucharest” [*Claimant’s Exhibit No. 1*]. It is unreasonable to read this arbitration agreement as providing for institutional arbitration under the CICA because it is patently ambiguous as to whether institutional arbitration was intended in the first place.

8. As noted by the Claimant, the plain and natural meaning of the words used is generally accepted to be the first point of reference when construing contractual terms [*Claimant’s Memo, para. 26; Anson’s Law of Contract; Farnsworth, § 7.11; Palandt-Heinrichs, § 133, para. 14*]. The arbitration agreement makes no mention of the CICA or any arbitral institution explicitly. The arbitration rules of the CICA are named the “Rules of Arbitration”. It would be unreasonable to equate the “Rules of Arbitration” of the CICA with the “International Arbitration Rules used in Bucharest”. Therefore, the plain and natural meaning of the words used would lead a reasonable person to conclude that the common intention of the parties is for *ad hoc* arbitration.

9. This is especially true because the arbitration agreement was not drafted as a midnight clause, which would have made the appearance of mistakes more likely. Mr. Konkler had informed Mr. Stiles that the arbitration agreement was replaced with the present one because “the president of Equatoriana Office Space had told them to always use this clause” [*Respondent’s Exhibit No. 1*]. Therefore, since this was the standard arbitration agreement used by the Claimant, it should reasonably be expected that those standard terms would be carefully chosen.

10. Moreover, the CICA provides a standard clause, which states that disputes “shall be settled by the *Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania*, in accordance with the Rules of Arbitration of this Court”. This model clause could have simply been adopted by the Claimant to unequivocally choose to arbitrate institutionally under the CICA. However, the Claimant did not do so. In fact, the arbitration clause inserted by the Claimant differs significantly from the standard arbitration clause of the CICA. Therefore, seen in light of the surrounding circumstances, the arbitration agreement is patently ambiguous as to whether institutional arbitration under the CICA was intended.

- ii. The wording of the arbitration agreement cannot be overstretched to refer to institutional arbitration.

11. In many cases, courts and tribunals attempt to salvage an arbitration clause by restoring the true intention of the parties, which was previously distorted by the parties' ignorance of the mechanics of arbitration [*Gaillard/Savage, para. 484*]. However, the intention of the parties is still paramount. Courts and tribunals do not overstrain the wording of arbitration clauses to a point where the intention of the parties is neglected. Where parties have consciously agreed upon an arrangement that is 'pathological' [*Eisemann; Schmitthoff*], there is no room for arbitrators to rewrite the terms of the bargain to remedy it [*Petrochilos, para. 5.11*]. General examples of inoperative pathological arbitration clauses are ones which are too broadly phrased, ambiguous or simply meaningless [*Redfern/Hunter, para. 3-69; Craig/Park/Paulsson, p. 127-135*]. Where it is ambiguous upon which arbitral institution the parties agreed, courts and arbitral tribunals have been reluctant to refer parties to arbitrate under a specific arbitral institution, just because that institution is the closest possible designation [*OLG Hamm, 15 November 1994 (Germany); Nokia Mallefer S.A. v. Mazzer (Switzerland)*].

12. For example, in *OLG Hamm, 15 November 1994 (Germany)*, the German court refused to enforce an arbitration agreement because the competent arbitral tribunal "is neither unambiguously determined nor unambiguously determinable". The court declined to read the clause to refer to arbitration under the closest designation because "it is uncertain whether this would be in accordance with the expectation of the parties". In *Nokia Mallefer S.A. v. Mazzer (Switzerland)*, the clause initially provided under 'forum' for jurisdiction under the courts of Milan. Subsequently, the term 'Milan' was replaced by 'International Chamber of Commerce, Paris', with no mention of the fact that the jurisdiction of the courts was excluded and replaced by arbitration. The court declined to enforce the arbitration agreement because it held that "it was not possible to ascertain the common intent of the parties". These cases evidence that the arbitration agreement should not be overstretched to refer to arbitration under the CICA unless there is a discernable common intention to arbitrate institutionally under the CICA.

13. On the facts, it cannot be argued that it is self-evident that the rules of arbitration of an entity entitled Court of International Arbitration are international arbitration rules [*Answer, para. 15*]. The CICA Rules are designed for both domestic and international arbitrations.

The only part of the CICA Rules that are specifically for international arbitrations are in Chapter VIII, Articles 72 to 77, which do not give a complete set of rules but only certain modifications of the otherwise applicable rules. In fact, the CICA Rules are mostly used for domestic arbitrations, as almost 80 percent of the cases before the CICA are domestic [*Procedural Order No. 2, Clarification 11*].

3. *The arbitration agreement can only be interpreted to show a common intention to submit to ad hoc arbitration.*

i. The ambiguity in the arbitration agreement may only be salvaged to refer to *ad hoc* arbitration.

14. In cases containing ambiguous arbitration clauses which make no reference to any arbitral institutions, courts have tried to remedy the clauses by referring the parties to *ad hoc* arbitrations.

15. For example, in *Libyan National Oil Company v. WETCO (Switzerland)*, the arbitration clause provided that “disputes shall be settled by arbitration in Geneva”. Although no arbitral institution was named, the court decided to refer the parties to *ad hoc* arbitration, using local rules. In *Della Sanara Kustvaart-Bevrachting v. Fallimento Cap. Giovanni (Italy)*, the arbitration clause, which states “General average/arbitration, if any, in London in the usual manner”, was held to refer to *ad hoc* arbitration. In *Guangdong Agriculture Company Ltd. v. Conagra International (Hong Kong)*, the court held that although the reference to the “rules of Hong Kong” could be to one of several sets of arbitration rules, the intention to arbitrate was clear and the Model Law could resolve imprecision in the number of arbitrators. Therefore, should this Tribunal decide that the agreement to arbitrate should be upheld despite there being no reference to any arbitral institution, the arbitration agreement can only be enforced as an *ad hoc* arbitration.

16. This position is bolstered by the fact that it would be patently unclear which set of procedural rules should apply, if this Tribunal finds in favour of institutional arbitration. Article 72(2) of the CICA Rules provides that the parties are free to decide to use other rules, including the UNCITRAL Arbitration Rules. However, Article 5 of the CICA Rules deems the parties to have agreed to use the CICA Rules, unless the parties have agreed otherwise in writing prior to the organisation of the arbitration. This Tribunal is thus bound to apply the CICA Rules if it holds that it has jurisdiction as an institutional arbitral tribunal. However, to

apply the CICA Rules in the absence of a common intention contravenes Article 19 of the Model Law, which guarantees the parties' autonomy to choose the procedures, failing which the arbitral tribunal has the power to decide.

ii. The principle *in favorem validitatis* is inapplicable.

17. While an arbitration clause may be interpreted to give effect to the parties' real intention, a defective clause can only be salvaged if a significant degree of certainty regarding the real intention of the parties can be achieved through interpretation [Gaillard/Savage, para. 485]. The principle *in favorem validitatis* that the Claimant relies on cannot be used to remedy the arbitration agreement to refer to institutional arbitration.

18. Many academics have contended that it is inappropriate to resort to a general principle of interpretation *in favorem validitatis* [Gaillard/Savage, para. 481]. Although arbitration agreements should not be read "restrictively", it remains perfectly legitimate to choose to have one's international disputes settled by the courts. In contrast to statutory interpretation, there is no place here for the logic of principle and exception. All that matters is the parties' common intention. A mere allegation that an arbitration agreement exists will not raise a presumption that the allegation is well-founded by virtue of a supposed principle of *favorem validitatis* [Gaillard/Savage, para. 481].

iii. The arbitration agreement should be interpreted *contra proferentem*.

19. As the drafter of the arbitration agreement, the Claimant must bear the risk of its ambiguity, as otherwise, the Claimant would be rewarded for having drafted the arbitration clause without due care.

20. The *contra proferentem* rule is a widely recognised principle that finds expression in many national laws, for example in Belgium [Belgian Civil Code, Article 1162], the Netherlands [Dutch Civil Code, Book 6, Article 238(2)], Spain [Spanish Civil Code, Article 1288], Germany [BGH, 15 March 2001 (Germany)], France [Article 1162, French Civil Code] and Hong Kong [Tan Wing Chuen v. Bank of Credit and Commerce Hong Kong Ltd. (Hong Kong)]. The rule is also recognised in international law [Gaillard/Savage, para. 479; Garnett/Gabriel/Waincymer/Epstein, p. 46; ICC Case No. 8261 of 1996; Buenos Aires (Argentina), 10 December 1997; ICC Case 4727 of 1987, enforced in Swiss Oil v. Petrogab (France)]. It is reflected in Article 4.6 of the UNIDROIT Principles of International

Commercial Contracts (“UNIDROIT Principles”) and also incorporated in the *lex mercatoria* [Sykes, p. 66].

21. Article 4.6 of the UNIDROIT Principles, which is an encapsulation of the *contra proferentem* rule, states: “If contract terms supplied by one party are unclear, an interpretation against that party is preferred”. The *contra proferentem* rule may thus play a supportive role in discovering the parties’ intent to arbitrate by granting a presumption in favour of what the non-drafter prefers [Sykes, p. 74]. It provides a more favourable interpretation to a non-drafter claiming that a drafter cannot rely on an ambiguous arbitration clause, and that there is consequently no agreement to arbitrate [Sykes, p. 76].

22. In the present case, the Claimant had rejected an arbitration clause prepared by the Respondent which provided for arbitration at the Mediterraneo International Arbitral Center (“MIAC”), and had inserted the present arbitration agreement which has deliberately deleted the reference to an arbitral institution [Answer, para. 5; Respondent’s Exhibit No. 1]. Pursuant to the *contra proferentem* rule, this Tribunal should presume that, had the Claimant intended for institutional arbitration under the CICA, it would have cared to insert the name of the CICA, even if in an erroneous approximation, and not to leave the reference ambiguously as “International Arbitration Rules used in Bucharest”. If the Claimant had intended a different meaning, they should have clarified this with the Respondent when Mr. Stiles asked Mr. Konkler why a different arbitration clause was inserted [Respondent’s Exhibit No. 1]. This Tribunal would unjustly reward the Claimant’s careless drafting and infringe the *contra proferentem* doctrine if it were to find in favour of institutional arbitration.

23. On the other hand, the surrounding facts and circumstances support the conclusion that the Respondent did not intend for institutional arbitration under the CICA. The arbitration clause initially contemplated by the Respondent explicitly names the arbitral institution, the MIAC [Answer, para. 5]. When the Claimant deleted the reference to the MIAC and failed to name another arbitral institution, it was reasonable for the Respondent to interpret the reference to “International Arbitration Rules used in Bucharest” to provide for *ad hoc* arbitration. Thus, Mr. Stiles noted that the removal of an arbitral institution made the arbitration agreement look strange because “no institution was mentioned” [Respondent’s Exhibit No. 1].

24. Further, of the three arbitrations that the Respondent has had, two of them were conducted by the MIAC, and the third was an *ad hoc* arbitration in Oceana under the UNCITRAL Arbitration Rules [*Procedural Order No. 2, Clarification 15*]. The Respondent had only arbitrated institutionally under the MIAC, which is based in Mediterraneo. In the instance where the MIAC was not designated, *ad hoc* arbitration was chosen. The facts thus indicate that the Respondent usually arbitrated under an institution it was familiar with, and in situations where this was perhaps not possible, opted for *ad hoc* arbitration. The Respondent has no known connections with Bucharest or Romania, and would likely have objected if it had construed the arbitration agreement to provide for institutional arbitration under the CICA.

25. It also cannot be argued that the Respondent could have intended for arbitration under the CICA using the UNCITRAL Arbitration Rules, pursuant to CICA Rules, Article 72(2). It may arguably be true that the Respondent is familiar with the UNCITRAL Arbitration Rules because it had participated in one previous *ad hoc* arbitration under this set of rules. However, the UNCITRAL Arbitration Rules are known only for being the most commonly used in *ad hoc* arbitrations [*Born, p. 12*]. Further, the CICA has rarely ever administered arbitrations under the UNCITRAL Arbitration Rules [*Procedural Order No. 2, Clarification 12*]. Therefore, it is likely that the Respondent considered that the arbitration agreement provided for *ad hoc* arbitration and that the reference to Bucharest was merely a designation of a neutral State as a point of reference.

C. THE ARBITRATION AGREEMENT CAN ONLY BE ENFORCED BY A NEW *AD HOC* TRIBUNAL.

26. Because of its constitution, this Tribunal cannot claim jurisdiction as an *ad hoc* tribunal [1]. Also, the principle of good faith relied by the Claimant does not bar the Respondent from challenging this Tribunal's jurisdiction [2].

1. *This Tribunal does not have jurisdiction as an ad hoc arbitration tribunal.*

i. This Tribunal must be constituted as an *ad hoc* tribunal for it to have jurisdiction.

27. As the Claimant has conceded, if this Tribunal decides that the arbitration agreement should be upheld as an *ad hoc* arbitration, a new *ad hoc* tribunal would need to be constituted [*Claimant's Memo, para. 58*]. This Tribunal may not claim jurisdiction as it was not constituted as an *ad hoc* tribunal.

28. This Tribunal was constituted by the CICA as an institutional arbitral tribunal. This can be seen from the Claimant's request for arbitration pursuant to Article 36 of the CICA Rules [*Letter from Langweiler conveying claim*]. There is no mention of Article 78 of the CICA Rules, which is meant to apply to *ad hoc* arbitration. Further, the CICA had requested for fees in accordance with Article 1(1) letter B of its Schedules of Arbitral Fees and Expenses [*Letter from Court of Arbitration to Office Space acknowledging receipt of claim*]. That Article applies to institutional arbitration. Had the CICA constituted this Tribunal as an *ad hoc* tribunal, it would have requested for fees pursuant to Article 8 of its Schedules of Arbitral Fees and Expenses.

29. When parties decide to switch from institutional to *ad hoc* arbitration, a new arbitration agreement is required [*Redfern/Hunter, para. 3-66*]. Where a tribunal has been constituted for institutional arbitration, it cannot decide subsequently that it has jurisdiction for an *ad hoc* arbitration. For example, in *ICC Case No. 3383 of 1979*, after arbitration was instituted under the auspices of the ICC, the parties decided that they wanted *ad hoc* arbitration. Although the same arbitrators were retained, the parties had to withdraw from ICC jurisdiction and reconstitute a fresh arbitration on an *ad hoc* basis. This demonstrates that once an institutional tribunal decides that the arbitration agreement only provided for *ad hoc* arbitration, it has to find that it has no jurisdiction to determine the dispute.

ii. The Model Law cannot be the basis for this Tribunal's jurisdiction.

30. Furthermore, it cannot be argued that this Tribunal may derive jurisdiction as an *ad hoc* tribunal from the Model Law, just because the procedure of the appointment of the arbitrators in the present case mirrors the default position in Article 11(3) of the Model Law. In *Star (Universal) Co Ltd. v. Private Company "Triple V" Inc. (Hong Kong)*, the court held:

“Article 11(3) is only engaged where the failure to agree [on] the appointment of an arbitrator is because the parties have not agreed on a procedure for his appointment. It is not engaged where the failure to agree is because the parties do not agree that there should be an arbitration at all, or that the arbitration should involve a particular party.” This interpretation of Article 11(3) of the Model Law is supported by the heading for Chapter III of the Model law (including Article 11), which reads: “Composition of Arbitral Tribunal” [*Star (Universal) Co Ltd. v. Private Company “Triple V” Inc. (Hong Kong)*].

31. Therefore, although the procedure adopted for the constitution of this Tribunal mirrors the default position under Article 11(3) of the Model Law, this Tribunal has not been constituted pursuant to the Model Law. Article 11(3) is only applicable if the parties disagreed on the procedure for the appointment of the arbitrators. Here, the disagreement is not only on the appointment of the arbitrators, but also on the proper *ad hoc* arbitral tribunal to hear the dispute. Hence, it cannot be argued that this Tribunal has been constituted under Article 11(3) of the Model Law, which only provides for a default procedure and does not confer jurisdiction.

32. Furthermore, a reconstituted *ad hoc* tribunal would, contrary to the Claimant’s assertions, differ in material respects from this Tribunal [*Claimant’s Memo, para. 42*]. The most important difference would lie in the appointment of the presiding arbitrator. The presiding arbitrator was appointed in accordance with Article 23 of the CICA Rules [*Letter from Ms. Arbitrator 1 appointing Prof. Dr. Presiding Arbitrator*]. Article 23 provides that in the case of an arbitral tribunal made up of three arbitrators, the two arbitrators shall “select a presiding arbitrator from among the arbitrators enrolled in the list of arbitrators”. If a new *ad hoc* tribunal were constituted, the appointment of the presiding arbitrator would not be restricted to those enrolled on the CICA list. The Model Law does not contain any similar restriction on the appointment of the presiding arbitrator. Therefore, this Tribunal should hold that it has no jurisdiction to decide this case because a properly reconstituted *ad hoc* tribunal might differ materially from this Tribunal.

2. *The Respondent is not barred by the principle of good faith from requesting for the reconstitution of a proper ad hoc tribunal.*
 - i. The principle of good faith does not preclude challenges to a tribunal's jurisdiction.

33. The Claimant asserts that the principle of procedural good faith bars the Respondent from challenging jurisdiction as it would only cause delay and additional costs without providing any material benefit to either party [*Claimant Memo, para. 42*]. This is an erroneous interpretation of the principle of good faith.

34. While it is true that the principle of good faith obliges parties to abstain from acts which unduly delay the arbitral proceedings [*ICC Case No. 3896 of 1982*], it does not mean that it would be in bad faith to challenge the existence or validity of the arbitration agreement [*Gaillard/Savage, para. 477*]. The principle of good faith is typically invoked where a party challenges the validity of an arbitration agreement for failure to meet the writing requirement, after acquiescing in its creation [*Garnett/Gabriel/Waincymmer/Epstein, p. 46; Berger, p. 148*]. The principle is simply a less technical expression of the need to find the parties' common intention, rather than merely examining the literal meaning of the terms used [*Gaillard/Savage, para. 477*]. In essence, "the fundamental principle of good faith... entails searching for the common intention of... the parties" [*Gouvernement Royal Hellénique v. Gouvernement de sa Majesté Britannique; Gaillard/Savage, para. 1470*].

35. Thus, it can be seen that the good faith principle only applies in interpreting the common intention of the parties to arbitrate. It does not apply to impose a duty on parties to arbitrate simply because delay is caused. The Claimant's assertion finds no support in precedents or authority. Although Article 16(2) of the Model Law is cited by the Claimant [*Claimant's Memo, para. 43*], that Article deals with the specific problem of time limits for jurisdictional challenges and cannot be extended to impose a broad duty of good faith.

36. Not only is the Claimant's argument not supported by authority, it contravenes one of the most fundamental principles of international arbitration – party autonomy [*Garnett/Gabriel/Waincymmer/Epstein, p. 3; Redfern/Hunter, para. 6-03; Article 19(1) Model Law*]. An arbitral tribunal derives its jurisdiction from the consent of the parties as enshrined in an arbitration agreement [*Gaillard/Savage, para. 647; Redfern/Hunter, para. 1-11*]. In the

present case, the arbitration agreement does not confer jurisdiction on this Tribunal. There can therefore be no duty to submit to arbitration under this Tribunal, regardless of the costs or benefits to the parties.

- ii. Even if the principle of good faith applies to preclude jurisdictional challenges, the Respondent has not acted contrary to good faith.

37. Even if it were thought that the principle of good faith might apply to bar jurisdictional challenges, the Respondent has not acted in bad faith. While a proper definition of good faith is elusive, it is submitted that a cost perspective may elucidate the operational standard of the good faith principle. Good faith performance occurs when a party exercises discretion to capture opportunities preserved upon entering the contract, whereas bad faith performance occurs when discretion is used to recapture opportunities foregone upon contracting [*Burton, p. 373*].

38. In the present case, it cannot be said that the Respondent is barred from requesting for the constitution of an *ad hoc* tribunal. That option was left open by the arbitration agreement. In fact, the constitution of a new *ad hoc* tribunal is precisely what the arbitration agreement requires.

II. THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE FUSE BOARD CONTRACT.

39. The Respondent delivered goods conforming to the Fuse Board Contract under Article 35(1) of the CISG because the goods conformed to the contractual agreement based on the parties' intent [A]. The fuse boards also conformed to the Fuse Board Contract under Article 35(2) because they were fit for their ordinary purpose and for the particular purpose made known to the Respondent [B]. Alternatively, the Fuse Board Contract was amended to provide for the use of JS type fuses [C].

A. THE FUSE BOARDS PROVIDED BY THE RESPONDENT CONFORMED TO THE ORIGINAL FUSE BOARD CONTRACT PURSUANT TO ARTICLE 35(1).

40. Article 35(1) of the CISG permits the delivery of goods that are functionally identical to those described in the contract [*Kruisinga, p. 30, 37; Lambskin Coats Case (Switzerland); G. & C. v. I. S.A. (Switzerland)*]. The Respondent delivered fuse boards that conformed to

the parties' intent under the Fuse Board Contract [1]. Further, the Fuse Board Contract did not require the fuse boards to adhere to Equalec's policy [2].

1. The Claimant intended to include under the Fuse Board Contract JS type fuses as functional equivalents of JP type fuses.

41. While the contract is the primary source for assessing conformity, the specific content of the contract is based on the interpretation of the parties' agreement under Articles 8 and 9 of the CISG [*René Henschel, p. 148; Bianca/Bonell-Bianca, Article 35, para. 2.1; Schlechtriem/Schwenzer-Schwenzer, p. 143; Kruisinga, p. 29; Roland Schmidt GmbH v. Textil-Werke Blumenegg AG (Switzerland)*]. Therefore, each party's subjective intent is relevant where the other party subjectively or objectively ought to have been aware of such intent [*Article 8(1) CISG; Article 8(2) CISG*]. Such intent is to be determined by considering all relevant circumstances such as usages and the parties' subsequent conduct [*Article 8(3) CISG*]. In the present case, a reasonable person in the Respondent's shoes would have understood the Claimant's statements and subsequent conduct to indicate its subjective intent to include JS type fuses for use in the fuse boards as functional equivalents of JP type fuses [*Article 8(2) CISG; Schlechtriem/Schwenzer-Schmidt-Kessel, p. 119; Honnold, Article 8, p. 118*].

42. It was only indicated on a note in the engineering drawings that the fuses were "to be... JP" [*Statement of Claim, para. 9*]. The drawings were attached to the contract [*Statement of Claim, para. 10*], and not brought to Respondent's attention as a contractual requirement. Furthermore, the drawings and notes were made according to comments by Equatoriana Switchboards Ltd. and not because the Claimant specifically required every detail [*Statement of Claim, para. 9*]. When the Claimant called the Respondent to inquire if it could furnish the fuse boards, it only asked for J type fuses [*Answer, para. 3*]. The Claimant's intent in buying the distribution fuse boards from the Respondent was simply to equip the Mountain View development with electricity at the best price [*Statement of Claim, para. 10*]. This intent was functional, and did not turn on the exact type of fuse used. The Claimant was not procuring specific types of fuses for resale or other purposes for which the make and type would be essential. The notes on the engineering drawings were therefore not rigid stipulations that had to be met for their own sake, but standards of quality (of Chat Electronics' quality and conforming to the safety standards of BS 88) and functional capacity

(for use under 400 amperes). Therefore, under Article 8(1) of the CISG, the Claimant's subjective intent for functional usage of the fuse boards was made known to the Respondent, and is relevant in interpreting the wording of the Contract.

43. The Claimant's subsequent conduct, which can be examined under Article 8(3) of the CISG, also demonstrates its intent [*Article 8(3) CISG*]. Mr. Stiles presented the choice to Mr. Hart between non-Chat Electronics JP type fuses, Chat Electronics JS type fuses, or Chat Electronics JP type fuses but with a possible delay of a few months. The Claimant recognised that since JP and JS type fuses are functionally identical for use up to 400 amperes, Chat Electronics JS type fuses would be acceptable under the Contract [*Answer, para. 8; Respondent's Exhibit No. 1*]. Even if this decision is an agreement between the parties not amounting to a valid amendment of the Contract, the Claimant's conduct clearly demonstrates its intent simply to connect the Mountain View development to the electricity supply promptly and effectively.

44. A reasonable person in the Respondent's shoes would also have understood the Claimant's statements and conduct as intent to include JS type fuses as functional equivalents [*Article 8(2) CISG; Schlechtriem/Schwenzer-Schmidt-Kessel, p. 119; Honnold, Article 8, p. 118*]. The Claimant is a property developer with its place of business in Equatoria [*Statement of Claim, para. 1*]. The Claimant was the party contracting with Equalec for the supply of electricity, and had the advice of its own engineering department [*Claimant's Exhibit No. 2*]. The Respondent mostly distributed and occasionally fabricated electrical equipment on buyers' requests [*Respondent's Exhibit No. 1*], and had sought instructions on what type and make of fuses to use. Given the Claimant's instruction to proceed using Chat Electronics JS type fuses, no reasonable seller in Respondent's position could be expected to guess that only JP type fuses should be used.

45. Furthermore, where the goods delivered are of equal value and their utility is not reduced, the lack of formal conformity to the contract does not rise to the level of a breach of contract [*Lambskin Coats Case (Switzerland); Kruisinga, p. 37; G. & C. v. I. S.A. (Switzerland)*]. In the *Lambskin Coats Case (Switzerland)*, the court held that the delivered goods were to be considered as conforming to the contract under Article 35 of the CISG, because except for the allegedly different article numbers the delivered lambskin coats matched in all relevant points the contractual standards.

46. JS type fuses are functionally identical to JP type fuses for use up to 400 amperes [*Respondent's Exhibit 1*]. The fuse boards delivered under the Contract were likely of equal value because the JS type fuses used were of similar prices or the same price as JP type fuses [*Respondent's Exhibit 2*]. They were probably of the same quality since they were also manufactured by Chat Electronics [*Procedural Order No. 2, Clarification 26*]. The distribution fuse boards were therefore perfectly suitable for connection to the electricity supply, and thus of equal utility.

2. *The Respondent had no obligation to adhere to any Equatoriana public law requirements, much less Equalec's policy, which was neither a public law requirement nor a term of the Fuse Board Contract.*

47. Equalec's unreasonable requirement that only JP type fuses be used for below 400 amperes was not a term of the Fuse Board Contract. The phrase "lockable to Equalec requirements" was the only reference to Equalec. As the Claimant explains, this phrase referred to the fuse boards being securable by padlock so that Equalec would have exclusive access to the fuses and fuseways inside [*Statement of Claim, para. 8; Procedural Order No. 2, Clarification 21*]. There was no indication that Equalec would have the special policy of not supplying electricity where JS type fuses were used for below 400 amperes [*Procedural Order No. 2, Clarification 23*]. The Claimant also could not have intended [*Article 8 CISG*] for the phrase to mean that the fuse boards must adhere to Equalec's policy, since even Mr. Konkler did not know at the conclusion of the contract that Equalec had implemented such a policy [*Statement of Claim, para. 15; Claimant's Exhibit 3; Claimant's Exhibit 4*]. Since the policy was not within the contemplation of the Claimant, the Claimant could not have intended for the policy to be a contractual requirement. The Respondent was therefore not contractually bound to deliver goods complying with Equalec's peculiar requirement.

48. Furthermore, Article 35 of the CISG does not require sellers to deliver goods conforming to the public law regulations in the buyer's country [*Mussel Case (Germany); Schlechtriem, Bundesgerichtshof; Kruisinga, p. 43-52*]. In view of the uncertain legal situation in the buyer's country, the buyer cannot assume the seller to have clear knowledge and corresponding competence in this respect [*Slechtriem, Bundesgerichtshof*].

49. Equalec's requirements are not public law regulations, but merely a private company's policy that would allow it to decrease its service truck inventory [*Claimant's Exhibit No. 3; Procedural Order No. 2, Clarification 22*]. Nor does Equalec's policy appear necessary to address safety concerns in the way that public law regulations would, since it need only refuse to provide electricity where fuses of excessively high ratings are used inappropriately [*Claimant's Exhibit No. 4*]. However, regardless of whether Equalec's requirements are "undue and unjust" [*Respondent's Exhibit No. 4, Article 14 Equatoriana Electric Service Regulatory Act*], the Respondent had no obligation to adhere to them. Since Article 35 of the CISG does not impose any obligation on sellers to comply with public law regulations in the buyer's country, even where such regulations concern health standards such as cadmium levels in shellfish [*Mussel Case (Germany)*], *a fortiori* Article 35 does not impose any obligation on sellers to comply with private companies' policies which even the buyer is not aware of.

B. THE RESPONDENT PROVIDED FUSE BOARDS IN CONFORMITY WITH THE FUSE BOARD CONTRACT AS THEY WERE SUITABLE FOR THE CLAIMANT'S PURPOSES PURSUANT TO ARTICLE 35(2).

50. Article 35(2) requires that the Respondent provide goods that are fit for the ordinary commercial purposes that the goods are to be used for, or for any particular purposes that the Claimant made known to it. The Respondent provided fuse boards that were fit for ordinary commercial purposes [1], and could not reasonably have known that the fuse boards were for the particular purpose of connectivity solely according to Equalec's specific electrical connectivity requirements [2].

1. The fuse boards were in conformity under Art 35(2)(a) as they were suitable for ordinary commercial purposes.

51. Under Art. 35(2)(a), goods are in conformity if they are fit for ordinary commercial use [*Schlechtriem-1998, p. 279*]. This means that the goods must fulfill certain minimum quality requirements as determined by reference to the objective view of a person in the sector of trade concerned [*Schlechtriem-1998, p. 279; Enderlein/Maskow/Strohbach, Article 35, note 8; Bianca/Bonnell-Bianca, Art 35 at para 3.1*]. The JS fuses in the fuse boards conform to the internationally recognized BS 88 Standard [*Respondent's Exhibit No. 2*] and have been certified by the Equatoriana Commission [*Respondent's Exhibit No. 1 at para. 13*]. They are thus in conformity with ordinary commercial usage.

52. There is no obligation for a seller to observe the statutory requirements of the country of destination from the mere fact that the buyer informed him of the destination; rather, it is for the buyer to ascertain and make special provisions of public law as part of the contract [*Schlechtriem-1998, p. 280; Piltz, §5, para. 2*]. This would apply all the more when the requirements in question are only those of a specific electrical service provider and are even more onerous than the statutory requirements of the country of destination [*Respondent's Exhibit No. 1, para. 13*]. Hence, the fuse boards need not be suitable for the additional purpose of Equalec connectivity. The fuse boards are in conformity with the Contract under Art 35(2)(a) since they are suitable for ordinary commercial purposes.

2. *The fuse boards were in conformity under Art 35(2)(b) as the Respondents did not know and could not have known that they were for the particular purpose of connecting to special Equalec electrical requirements.*

53. Contrary to the Claimant's assertions, the fuse boards did not need to be made according to Equalec's specific requirements for electrical connectivity to be in conformity with the Contract. This particular purpose of the fuse boards was neither made known to the Respondent [i], nor was this purpose reasonably inferable by the Respondent [ii].

i. The Respondent had no actual knowledge that the fuse boards were to be made in accordance with special Equalec requirements for electrical connectivity.

54. Contrary to the Claimant's contention, the Respondent had no actual knowledge that the fuse boards had to adhere to Equalec's special policy, as these requirements were not explicitly made known to the Respondent. For a particular purpose to be made known to the seller, the buyer must inform the seller that the buyer's decision to purchase certain goods depends completely on their suitability for an intended use. [*Secretariat Commentary, Article 35, para. 8; Hyland, p. 321*] This purpose must be "crystal clear and recognizable" [*LG München, 8 February 1995 (Germany); LG Darmstadt, 9 May 2000 (Germany)*], with minimal room for ambiguity.

55. In this case, the phrase 'lockable to Equalec requirements' is not a sufficiently explicit indication that the fuse boards were for connection according to Equalec's specific standards for electrical connectivity. This phrase hardly indicates the purpose of Equalec connectivity

with complete clarity, as it emphasises ‘lockability’ to ‘Equalec requirements’ without mentioning electrical connectivity. If electrical connectivity to Equalec’s special requirements was intended to be an explicitly stated purpose of the fuse boards, then the phrase included in the engineering drawings would have stipulated both ‘electrical connectivity’ and ‘lockability’ to ‘Equalec requirements’. Without this, it would be unreasonable to construe ‘lockable to Equalec requirements’ as an unambiguous indication to the Respondent that the fuse boards were for the particular purpose of electrical connectivity according to Equalec’s special requirements. Given that the Claimant never subsequently mentioned to the Respondent that the fuse boards were for electrical connectivity according to Equalec’s requirements, the Respondent had no actual knowledge of the Claimant’s intended purpose of the fuse boards.

- ii. The Respondent could not reasonably have inferred the purpose of electrical connectivity according to special Equalec requirements.

56. The Respondent refutes the Claimant’s charge that it should have known of the Claimant’s intended purpose of the fuse boards for electrical connectivity according to Equalec’s special requirement. The Respondent is only expected to have recognised the intended purpose of the goods, if it would have been possible for a reasonable seller to have recognised this purpose [*Staudinger/Magnus, Article 35, para. 28; Schlechtriem-1998, p. 281; LG Regensburg (Germany)*].

57. A reasonable seller in the Respondent’s position could not be expected to infer that Equalec would have specific requirements for electrical connectivity of fuses from the phrase ‘lockable to Equalec requirements’. Constructing the fuse boards such that they would be lockable is a separate, discrete requirement by electrical service providers that is unrelated to the installment of special types of fuses within the fuse boards [*Electric Distribution Systems p. 84; Electricity in Europe*]. The requirement of mechanical lockability performs the specific functions of preventing users from having access to unmetered electrical supplies and tampering with the fuse boards [*Statement of Claim, para. 8*]; these have no correlation to the connectivity of the actual fuses used within the fuse boards. Thus, the Respondent could reasonably expect that this phrase was for the benefit of the personnel of General Construction Ltd, which was the firm responsible for constructing and installing the locks on the fuse boards at the actual Mountain View site [*Statement of Claim, para. 14*]. The Respondents could not reasonably be expected to infer that Equalec would have a special set

of requirements for electrical connectivity beyond that of ordinary commercial purposes, especially since the Claimant was silent on the importance of using only JP fuses. According to the *contra proferentem* principle, in the event of disagreement over a controversial clause drafted by the Claimant, such a clause must be interpreted against the Claimant [Schlechtriem-1998, p. 114; Gaillard/Savage, para. 476, 479; Honnold, p. 191; Art 5.103 Principles of European Contract Law (“PECL”); Art 4.6 UNIDROIT Principles]. In this case, ‘lockable to Equalec requirements’ must be presumed to refer to Equalec’s mechanical specifications for ‘lockability’, and not the installment of only JP fuses.

3. *The fuse boards were in conformity with Art. 35(2)(b) because the Claimant did not reasonably rely on the Respondent’s skill and judgment.*

58. Even if the Respondent could have inferred that the fuse boards were for electrical connectivity according to specific Equalec requirements, the Claimant relied unreasonably on the Respondent’s skill and judgment in suggesting JS fuses. The reasonableness of this reliance is to be judged according to that of a normal prudent person in the position of the Claimant [Weiszberg p. 617; Audit, Vente Internationale, p. 51].

59. Contrary to the Claimant’s contention, the Respondent’s position as a manufacturer of the product does not necessarily mean that the Claimant’s reliance was reasonable. The reasonableness of the reliance must be assessed from the circumstances in each case [Schlechtriem-1998, p. 282; Staudinger/Magnus, Article 35, para. 33]. The Commission has clearly certified JS fuses safe according to the internationally-recognised BS 88 standard [Respondent’s Exhibit No. 1, para. 13; British Standards; BS 88, p. 1]. A party in the Claimant’s position could not reasonably have expected the Respondent to know of Equalec’s requirement of JP fuses that was far stricter than the standards of electrical connectivity approved by the Commission [Respondent’s Exhibit No. 1, para. 13; Claimant’s Exhibit No. 4, para. 3]. Equalec’s requirements were recently adopted less than two years before the Fuse Board Contract (July 2003-April 2005) [Claimant’s Exhibit No. 4, para 3; Respondent’s Exhibit No. 1, para. 2], and were a marked departure from the requirements of other electrical service providers since the Respondents had supplied both JS and JP fuses frequently to Equatoriana-based customers with no prior problems [Respondent’s Exhibit No. 1, para. 13]. The Respondent is based in Mediterraneo [Notice of Arbitration, para. 2] and cannot be reasonably relied upon to have the same level of familiarity with electrical

requirements in Equatoriana as the Claimant [*Schlechtriem-1998, p. 280; Staudinger/Magnus, Article 35, para. 22, 34; Enderlein/Maskow/Strohbach, Article 35, note 8*]. The Claimant is an experienced commercial and residential property developer in Equatoriana [*Statement of Claim, para. 3*] with first-hand dealings with Equalec for the provision of electricity to the Mountain View development. It could be expected to be aware of any new requirements for electrical connectivity by Equalec. Given that the Claimant was itself unaware of Equalec requirements [*Claimant's Exhibit No. 4 at para 1*], it could not reasonably expect the Respondent to have this knowledge.

60. Furthermore, the Claimant knew that the Respondent's suggestion to use JS fuses was based solely on the Claimant's indicated preference for Chat Electronics [*Respondent's Exhibit No. 1, para. 8*]. It was in this context that Mr. Stiles emphasized that the only Chat Electronics fuses that the Respondent could use to fabricate the distribution boards in time were JS type fuses. The Claimant could not reasonably expect the Respondent to disregard this preference in making its suggestions.

61. In conclusion, the Claimant could not have expected the Respondent to know of Equalec's specific requirements for electrical connectivity and to disregard the Claimant's preference for Chat Electronics. Since the Claimant did not reasonably rely on the Respondent's exercise of skill and judgment in choosing JS fuses, the fuse boards were in conformity with the Fuse Board Contract under Art 35(2)(b).

C. IN THE ALTERNATIVE, THE FUSE BOARD CONTRACT WAS VALIDLY AMENDED TO ALLOW FOR JS TYPE FUSES.

62. Even if the fuse boards did not conform to the original Contract, the Contract was validly amended to allow for the use of JS type fuses because Mr. Hart had apparent authority to amend the Contract [1], or the Claimant ratified his conduct by taking delivery, installing and making payment for the fuse boards [2]. Under Article 29(2) of the CISG, the Claimant is precluded from asserting the no-oral-modification clause in the Contract because the Respondent reasonably relied on its conduct in fabricating the fuse boards [3].

1. Mr. Hart had apparent authority to amend the Fuse Board Contract.

63. Since the principal-agent relationship arose in Equatoriana, the relevant law of agency is Articles 1-20 of the CAIS that is enacted there [*Procedural Order No. 2, Clarification 16*]. Apparent authority is sufficient to bind the principal to the conduct of an agent acting without or outside the scope of his authority [*Article 14(2) CAIS; Bonell on Agency, p. 739*]; therefore it does not matter whether Mr. Hart had actual authority with regard to the Fuse Board Contract. Under Article 14(2) of the CAIS, “where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.” There is no need for the principal to have intended to confer authority on the agent [*Bonell on Agency, p. 740*].

64. When Mr. Stiles called the Claimant to discuss the Fuse Board Contract, a secretary referred him to Mr. Hart in Mr. Konkler’s absence [*Statement of Claim, para. 11; Procedural Order No. 2, Clarification 18*]. As the Claimant is a legal entity that must act through its employees and directors, the secretary’s conduct must be attributed directly to the Claimant. The Respondent did not know and the Claimant did nothing to suggest that Mr. Hart had not been given any additional authority in Mr. Konkler’s absence [*Procedural Order No. 2, Clarification 17*]. Mr. Hart did not indicate that he had no authority to amend the Fuse Board Contract. Instead, Mr. Hart even acted as if he had authority to amend the Fuse Board Contract by asking Mr. Stiles for a recommendation [*Claimant’s Exhibit No. 2; Respondent’s Exhibit No. 1*]. Furthermore, Mr. Hart considered his decision an unimportant one [*Claimant’s Exhibit No. 2*] and chose to give an immediate answer because of the tight time pressures on the Claimant’s lease obligations and the fact that it would not be possible to reach Mr. Konkler that week [*Claimant’s Exhibit No. 2*].

65. The Respondent reasonably and in good faith believed Mr. Hart was authorized to make decisions regarding the Fuse Board Contract. When Mr. Stiles called to speak to Mr. Konkler, it was clearly to discuss the Fuse Board Contract [*Respondent’s Exhibit No. 1*]. Having been referred to Mr. Hart, it was only reasonable for the Respondent to rely on Mr. Hart as acting for the Claimant in replacement of Mr. Konkler and with full authority for the Claimant. It was also reasonable for the Respondent to believe that Mr. Hart was authorized since objectively it would not make business sense for matters relating to the Fuse Board

Contract to be put on hold while Mr. Konkler was away. The Claimant therefore cannot invoke Mr. Hart's lack of authority against the Respondent [*Article 14 CAIS; Bonell on Agency, p. 740*].

66. Therefore, the Claimant is bound by Mr. Hart's actions because the Claimant's conduct caused the Respondent reasonably and in good faith to believe that Mr. Hart had authority with regard to the Fuse Board Contract and was acting within that authority in instructing the Respondent to proceed in acquiring and using JS type fuses.

2. *Even if Mr. Hart had no authority, Claimant ratified Mr. Hart's conduct and is therefore bound by it.*

67. Article 15(1) of the CAIS provides that the principal may ratify, with retrospective effect, an act by an agent who acts without authority. Ratification binds the principal to the agent's act as if the act had initially been carried out with authority. There is no formal requirement for ratification, which may be inferred from the conduct of the principal [*Article 15(8) CAIS; Bonell on Agency, p. 741*]. By taking delivery of the goods, having them installed and making payment [*Answer, para. 10*], the Claimant accepted the distribution fuse boards made with JS type fuses, and in so doing ratified Mr. Hart's amendment to the contract.

3. *The Respondent's reasonable reliance on the Claimant's conduct precludes the Claimant from asserting the Writing Clause in the Fuse Board Contract.*

68. Article 29(2) of the CISG precludes a party from asserting a no-oral-modification clause to the extent that the other party has relied on the first party's conduct that goes towards amending the contract [*Honnold, p. 230; Schlechtriem-1998, p. 215; Bianca/Bonell-Date-Bah, p. 241-2*]. Implicit in this provision is the requirement of 'reasonable' reliance [*Honsell, Article 29, para. 20; Magnus Article 29, para. 17; Hillman, p. 451*]. While the CISG does not define 'reasonableness', it adopts the concept of reasonableness expressed in Article 1:302 of the Principles of European Contract Law [*Kritzer, p.121; Schlechtriem-1998, p. 22, note 41*]. The reasonableness of a party's reliance depends on what persons under the same circumstances and acting in good faith would have considered reasonable [*René Henschel, para. m; Kritzer, p. 121*].

69. In this case, Mr. Stiles reasonably relied on Mr. Hart's representations to modify the Fuse Board Contract, precluding the Claimant from relying on the Writing Clause. When a legitimate agent of a buyer makes oral representations modifying a contract that includes a no-oral-modification clause, a seller may rely on these representations as a valid amendment of the contract [*Graves Import Co. v. Chilewich Intern. Corp (US)*; *Schlechtriem-1998*, p. 215; *Honnold*, p. 230]. The buyer is then precluded from insisting on conformity with the original contract, to the extent that the seller has relied on the oral amendment [*Secretariat Commentary, Article 27, para. 9*; *Honnold*, p. 230]. Since Mr. Hart was a member of the Claimant's purchasing department [*Claimant's Exhibit No. 2, para. 1*] and a valid agent of the Claimant [*Supra para 63-66*], Mr. Stiles was entitled to rely on Mr. Hart's representations.

70. The Claimant argues that Mr. Hart's actions were not intended to be inconsistent with the Writing Clause, because Mr. Hart expected to receive a written request for amendment [*Saarland Claimant's Memorandum, para. 106*]. This was purportedly a valid expectation because the Respondent had drafted the Contract and should have known of the Writing Clause [*Saarland Claimant's Memorandum, para. 107*]. However, it is clear that the Claimant's ability to rely on the Writing Clause is determined by the importance placed on it by both parties during the drafting of the Fuse Board Contract. If both parties bargained informally, were generally unconcerned about the contents of the written contract, and did not carefully bargain over or were ignorant of the inclusion of a no-oral-modification clause, it would not be in good faith for a party to assert the no-oral-modification clause after that party had agreed to an oral modification [*Hillman, p. 463-4, footnote 48*].

71. In this case, the Fuse Board Contract that the Respondent sent to the Claimant was a standard form signed contract [*Respondent's Exhibit No. 1, para. 3*], and there were no prolonged negotiations over the contents of the contract, including the Writing Clause. The Claimant gave no indication that it even knew of the existence of the Writing Clause from the conclusion of the Fuse Board Contract and through the process of oral amendment. Despite Mr. Hart's assertion that he 'expected a request for a written amendment' [*Claimant's Exhibit No. 2, para. 4*], the Claimant was obviously so unconcerned with the formality of a written amendment that it neglected for two months (14 July 2005 - 9 September 2005) to ask the Respondent for a written confirmation of the oral amendment after Mr. Stiles' phone call on 14 July 2005 [*Respondent's Exhibit No. 1, para. 7, 12*], and only took issue with the lack of

formal conformity after Equalec refused to connect the fuse boards [*Respondent's Exhibit No. 1, para. 12*]. Given the Claimant's silence on the importance of a written amendment, it was reasonable for the Respondent to rely on the oral amendment and produce goods in conformity with this amendment. This is especially so in light of Mr. Hart's acknowledgment that the change from JS to JP fuses did not seem to be an 'important decision' [*Claimant's Exhibit No. 2, para. 4*], since it would not be in good faith to allow the Claimant to use the Writing Clause to evade its contractual obligations over an oral amendment that the Claimant itself regarded as unimportant [*Hillman, p. 463, footnote 98*]. Finally, since Mr. Hart's expectation of a written request for amendment was never communicated to Mr. Stiles, it would have been reasonable for Mr. Stiles to rely on the oral amendment, without considering the need for a written amendment.

72. The fact that Mr. Hart was not well versed in the electrical aspects of the Mountain View development [*Respondent's Exhibit No. 1, para. 8*] does not mean that Mr. Stiles unreasonably relied on his decision. Mr. Stiles clearly delineated to Mr. Hart the technical similarities and differences between JP and JS type fuses [*Respondent's Exhibit No. 1, para. 8*], and stated that the only way the Respondent could procure Chat Electronic fuses was to use JS fuses [*Respondent's Exhibit No. 1, para. 10*]. Mr. Stiles could reasonably expect that if Mr. Hart had any further doubts about the suitability of JS fuses, he would have first checked with the Claimant's engineering department before electing to orally amend the contract.

73. Nor would it be reasonable to expect Mr. Stiles to know of Equalec's regulatory requirements that are more stringent than Equatoriana public law regulations [*Supra para. 59 on Respondent's Exhibit No. 4, Article 14 Equatoriana Electric Service Regulatory Act.; Respondent's Exhibit No. 1, para. 13*], much less predict Mr. Hart's lack of awareness of these requirements as well [*Supra para 59*]. Since Mr. Stiles could not reasonably have known that Mr. Hart was completely unaware of Equalec's requirements, he reasonably relied on Mr. Hart's instructions to modify the contract to use JS type fuses.

74. Even if Mr. Hart was not an agent of the Claimant, it would still have been reasonable for the Respondent to rely on his statements. If one party allows an employee, with no power of representation, to make or accept declarations modifying the contract, then it is the nature of that party's conduct and its reliance-inducing effects that are decisive in the context of each individual case [*Schlechtriem-1998, p.215; Bianca/Bonell-Date-Bah, Article 29, note*

3.1]. Since Mr. Stiles' reliance on Mr. Hart's statements was reasonable [*Supra para 63-66*], the Claimant is precluded from relying on the Writing Clause to deny the oral amendment.

III. THE CLAIMANT IS NOT ENTITLED TO DAMAGES UNDER THE CISG.

75. Even if this Tribunal holds that the Respondent had breached the Fuse Board Contract, the Claimant is still not entitled to damages under the CISG. The Claimant's failure to complain to the Equatoriana Commission of Equalec's refusal to connect the electrical supply excuses the Respondent, because the Claimant's inaction was not foreseeable [A], and the Claimant had a duty to do so to mitigate its losses [B]. Further, the Claimant is excused because Equalec's failure to connect constitutes an impediment beyond the Respondent's control [C].

A. THE CLAIMANT MAY NOT RECOVER DAMAGES UNDER CISG, ARTICLE 74 BECAUSE ITS LOSS WAS NOT A FORESEEABLE CONSEQUENCE OF THE RESPONDENT'S BREACH.

76. Under Article 74, a party is entitled to damages for foreseeable losses suffered by the other party as a consequence of the breach [*Schlechtriem/Schwenger-Stoll-Gruber, p. 745; Bianca/Bonnell-Knapp, Article 74, para. 1.4*]. It is unclear whether the CISG makes a distinction between losses that are directly and indirectly caused by the breach [*Bianca/Bonnell-Knapp, Article 74, para. 2.6*]. Instead, the criterion of foreseeability suffices to limit the strict objective liability of a promisor for the breach of a contractual promise [*Schlechtriem/Schwenger-Stoll-Gruber, p. 763*]. A party may only be liable for a loss directly or indirectly caused to another party if that loss was foreseeable [*Bianca/Bonnell-Knapp, Article 74, para. 2.5*].

77. Even if the Respondent was in breach of the Fuse Board Contract, the \$200,000 cost incurred by the Claimant in replacing the fuse boards was not a foreseeable consequence of the Respondent's provision of JS fuses. Foreseeability of loss is determined according to the facts and matters which the Respondent knew or ought to have known at the time of the conclusion of the contract [*Schlechtriem-1998, p. 554, 567-568; Schneider, footnote 45; Vékás, p. 164; Saidov, p. 122*]. In assessing such knowledge, the usual or intended use by the buyer should be the decisive factor [*Schlechtriem-1986, p. 97*].

78. At the conclusion of the Fuse Board Contract, the Respondent could not have foreseen that Equalec would have refused to connect JS fuses, thereby requiring the Claimant to completely replace the fuse boards. The Respondent had no actual knowledge that the fuses needed to conform specifically to Equalec's special policy for electrical connectivity, as this purpose was never made known to it [*Supra para. 54-55*]. Nor could the Respondent have inferred from the circumstances that Equalec would have electrical connectivity requirements that were markedly different from the Equatoriana Electric Service Regulatory Act. The interchangeable use of JS and JP fuses was common practice in Equatoriana [*Supra para. 42*], since both performed the exact same functions [*Supra para. 43*]. Both JS and JP fuses have been approved for use by the Equatoriana Commission as they comply with the internationally recognised BS 88 standard [*Supra para. 59*]. Contrary to the Claimant's contention, the phrase 'lockable to Equalec requirements' is not indicative of Equalec's special electrical connectivity requirements [*Claimant's Memo, para. 109; Supra para. 55*], as electrical service providers' mechanical specifications for lockability of fuse boards are unrelated to the electrical connectivity of the fuse board [*Supra para. 57*]. Hence, the Respondent could not have been expected to know of Equalec's special electrical connectivity requirements, and to foresee its refusal to connect JS fuses.

B. THE CLAIMANT FAILED TO MITIGATE ITS LOSSES COMPLETELY BY NOT COMPLAINING TO THE EQUATORIANA COMMISSION.

79. Article 77 of the CISG requires the party relying on a breach of contract to take such measures as are reasonable in the circumstances to mitigate or prevent the loss resulting from the breach [*Enderlein/Maskow citing Bianca/Bonnell-Knapp, p. 560; Lookofsky, p. 157*]. Whether a measure is reasonable is a question of fact [*Opie; Zeller*]. The Supreme Court of Austria has held that "[a] possible measure to reduce damages is reasonable, if it could have been expected as *bona fide* conduct from a reasonable person in the position of the claimant under the same circumstances" [*OGH, 6 February 1996 (Austria); Saidov*].

80. In the circumstances, it could have been expected of a person acting in good faith to make a complaint to the Equatoriana Commission. The Equatoriana Commission is competent to address the legality of Equalec's policy [*Procedural Order No. 2, Clarification 29*] and a mere inquiry by the Equatoriana Commission might have prompted Equalec to change its policy in as little as a week [*Procedural Order No. 2, Clarification 30*]. The fuses were in conformity with the BS 88 requirement used in Equatoriana [*Answer, para. 12*], and

were undamaged [*Procedural Order No. 2, Clarification 32*]. Equalec was arguably in breach of Article 14 of the Equatoriana Electrical Service Regulatory Act for refusing to connect the fuse boards to the electrical supply [*Respondent's Exhibit No. 4, Article 14 Equatoriana Electrical Service Regulatory Act*]. It would not have been onerous for the Claimant to make a complaint to the Equatoriana Commission, or merely to bring Equalec's policy to its attention. The Claimant has its place of business in Equatoriana, where both Equalec and the Equatoriana Commission are located. The Equatoriana Commission was a phone call or an email away, and the Claimant could have at least brought Equalec's policy to the Equatoriana Commission's attention.

81. The Claimant argues that the illegality of Equalec's policy is uncertain and that even if Equalec's policy was indeed found to be "undue and unjust" by the Equatoriana Commission, the Claimant would already have suffered substantial damages [*Claimant's Memo, para. 135*]. However, Equalec should then be liable to the Claimant for such damages. The Claimant could simply have warned Equalec that it would be held liable for damages if the Equatoriana Commission found Equalec's policy to contravene the Equatoriana Electric Service Regulatory Act. This alone would likely have prompted Equalec to at least make an exception to its policy for the Mountain View development, so as to avoid the risk of hefty damages resulting from the delay to the Claimant's leases. It is unlikely that such correspondence with the Equatoriana Commission and Equalec would have been costly to the Claimant. However, instead of making a complaint or a warning, the Claimant chose to commit to and pay \$200,000 out of pocket under another contract to purchase and install fuse boards [*Statement of Claim, para. 18*]. Considering that the Claimant had already paid the Respondent for the delivered fuse boards, it was unreasonable for the Claimant to go to such expense before complaining to the Equatoriana Commission. The Claimant should have taken this reasonable measure to persuade Equalec to change or make an exception to its policy.

C. THE RESPONDENT IS EXCUSED FROM LIABILITY UNDER ARTICLE 79(1) CISG BECAUSE EQUALEC'S FAILURE TO CONNECT CONSTITUTES AN IMPEDIMENT BEYOND THE RESPONDENT'S CONTROL.

82. Article 79(1) of the CISG provides that a party is excused for a failure to perform if the failure is due to an impediment beyond its control, which it could not reasonably be expected to take into account at the conclusion of the contract, or to have avoided it or its

consequences [*Kruisinga, p. 124*]. This Article applies to excuse delivery of non-conforming goods [1]. The Respondent is excused because Equalec's failure to connect constitutes an impediment beyond the Respondent's control and any failure to deliver conforming goods was "due to" this impediment [2]. These impediments to the Respondent's performance could neither have been foreseen at the time of the conclusion of the Fuse Board Contract, nor was it possible for the Respondent to avoid or overcome them or their consequences [3].

1. Article 79(1) applies to excuse the delivery of non-conforming goods.

83. It has been argued that Article 79(1) only applies to excuse liability of the seller when delivery of the goods is prevented, and does not apply when delivery occurs but the goods are non-conforming [*Honnold, para. 427; Bianca/Bonell-Tallon, Article 79 para. 2.6.1*]. However, this restrictive interpretation overlooks the fact that Article 79 exempts a party's failure to perform "any of his obligations" [*Article 79(1) CISG; Kruisinga, p. 129*], as well as the fact that the seller may deliver substitute goods or repair the defective goods under Articles 46(2) and (3) of the CISG [*Schlechtriem/Schwenger-Stoll-Bruger, p. 810; Lookofsky, p. 161*]. There is also case law support for a liberal interpretation of Article 79 [*TCB, 19 January 1998 (France); OLG Zweibrücken, 31 March 1998 (Germany); LG Köln, 16 November 1995 (Germany)*].

84. The prevailing contemporary view is that Article 79(1) applies to excuse delivery of non-conforming goods when the elements of the Article are fulfilled [*Schlechtriem/Schwenger-Stoll/Gruber, p. 828; Liu; Enderlein/Maskow, p.320; Kruisinga, p. 130*]. For example, Article 79 applies if goods are delivered in country X for export to country Y, but country Y imposes an import ban on the ordered goods after the conclusion of the contract [*Kruisinga, p. 129*]. The goods once delivered will be regarded as defective since they cannot be used as intended by the buyer. This non-conformity is thus caused by an impediment that is beyond the seller's control if this import ban was not foreseeable [*Kruisinga, p.129*].

2. *Equalec's failure to connect constitutes an impediment beyond the Respondent's control and any failure to deliver conforming goods was "due to" this impediment.*

85. Acts of public authorities may be “impediments” under Article 79(1) [*Liu, Kruisinga, p. 133; Arbitration Court of the Hungarian Chamber of Commerce and Industry, 10 December 1996 (Hungary); Arbitration Award Case No. 155/1996, 22 January 1997 (Russia); Arbitral Award 56/1995, 24 April 1996 (Bulgaria)*]. Whether there is such an impediment has to be established objectively [*Kruisinga, p. 134*]. The impediment must be beyond the control of the party in breach, in that it is an event external to that party [*Liu; Schlechtriem/Schwenzer-Stoll-Gruber, p. 814*]. The impediment may exist at or subsequent to the conclusion of the contract [*Slechtriem/Schwenzer-Stoll-Gruber, p. 813*], and must be the sole reason for the failure to perform [*Slechtriem/Schwenzer-Stoll-Gruber, p. 818; Liu*].

86. In the present case, Equalec was a third party to the Fuse Board Contract. Equalec had a monopoly over the supply of electricity to Mountain View [*Procedural Order No. 2, Clarification 31*], and exercised full power in connecting buildings to the electrical supply. As a foreign supplier of electrical equipment, the Respondent did not have any dealings with Equalec and could not in any way control its policy, or compel Equalec to provide the Mountain View development with electricity. Therefore Equalec’s refusal to make the connection on account of its policy was a third party act beyond the Respondent’s control.

87. Furthermore, the failure to connect the Mountain View development to the electrical supply was solely caused by Equalec’s refusal to make the connection. The delivered fuse boards were not damaged [*Procedural Order No. 2, Clarification 32*], were made using JS type fuses that conformed to BS 88 and were therefore certified by the Equatoriana Commission as safe for use in electrical connection [*Equatoriana Electric Service Regulatory Act, Respondent’s Exhibit 4*]. Had Equalec made the connection, the Claimant would have been satisfied with the fuses supplied, and there would have been no damages. Therefore, but for Equalec’s policy, the delivered fuse boards would have been conforming goods.

3. *The impediment could neither have been foreseen at the time of the conclusion of the Fuse Board Contract, nor was it possible for the Respondent to avoid or overcome the impediment or its consequences.*

88. The impediment must not be reasonably foreseeable under the actual circumstances at the time of the conclusion of the contract [*Schlechtriem/Schwenzer-Stoll-Gruber, p. 817*]. Insofar as the impediment was in existence before the contract was concluded, the promisor must not have known or ought to have been aware of it [*Liu*]. The promisor must also take measures that are possible and reasonable for him to overcome the impediment, such as alternative transportation [*Schlechtriem/Schwenzer-Stoll-Gruber, p. 817*].

89. In the present case, Equalec's policy was not reasonably foreseeable at the time of the conclusion of the Fuse Board Contract and the Respondent had no responsibility to know of it. The Respondent had delivered many JS fuses for less than 400 amperes to buyers in Equatoriana over the years without any difficulty [*Answer, para. 12*]. Articles 14 and 15 of the Equatoriana Electric Service Regulatory Act also require electrical distribution companies to connect to facilities that had been certified by the Equatoriana Commission. Based on its prior sales to buyers in Equatoriana and its knowledge of the Equatoriana Electric Service Regulatory Act, it was entirely reasonable for the Respondent to assume that electricity suppliers in Equatoriana would comply with the Act and connect fuse boards conforming to BS 88 [*Answer, para. 12; Equatoriana Electric Service Regulatory Act, Respondent's Exhibit 4*]. Although Equalec posted its policy on its website, given the surrounding circumstances, it would be unreasonable to expect the Respondent to have foreseen that Equalec would impose a requirement that differed from the standard set by the Equatoriana Commission, and the standard used in all other parts of Equatoriana.

90. Furthermore, even the Claimant, which is a developer of residential and business properties in Equatoriana, and which had a direct contractual relationship with Equalec, did not know of Equalec's policy. It was also the Claimant that had decided to use JS type fuses when the Respondent had offered to procure an alternative supply of JP type fuses [*Statement of Claim, para. 12; Claimant's Exhibit No. 2*]. Therefore, the Claimant, more so than the Respondent, was in a position to find out about Equalec's policy and to bear the risks of not conforming with the policy. The Respondent also could not have overcome the impediment or its consequences because it could take no measures within its control such as arranging alternative transport. The Respondent had no means to compel Equalec to connect the fuse

boards. Instead, the Claimant was the proper party to make a complaint to the Equatoriana Commission because it was doing business in Equatoriana and had a contract with Equalec whose policy the Equatoriana Commission had competence to review [*Procedural Order No. 2, Clarification 29*]. Therefore, since the Respondent could not reasonably have foreseen or overcome the impediment posed by Equalec's policy and refusal to make the connection, the Respondent must be exempted from liability under Article 79 of the CISG.

IV. REQUEST FOR RELIEF

91. For the above reasons and in accordance with Procedural Order No. 1, the Respondent respectfully requests that this Tribunal find in favour of the Respondent the following:

1. This Tribunal has no jurisdiction under the arbitration agreement to decide the merits of the parties' dispute;
2. The Respondent had delivered distribution fuse boards that were in conformity with the Fuse Board Contract;
3. The Fuse Board Contract was validly amended to provide that JS fuses should be used in the fuse boards;
4. The failure of the Claimant to complain to the Equatoriana Commission of Equalec's refusal to connect the electrical supply excuses any failure of the Respondent's to deliver conforming goods.

92. Consequently, the Respondent respectfully requests that this Tribunal order:

1. The dismissal of the Claimant's claim as unfounded;
2. The Claimant to pay all costs of arbitration, including the costs of legal representation incurred by the Respondent.

Signed

Counsel for the Respondent

Lionel Leo

Michael Tang

Tan Liang Ying

Elizabeth Wu

25th January 2007