SEVENTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
27–30 MARCH 2010
VIENNA

MEMORANDUM FOR RESPONDENT

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(i) The Accident in the Isthmus Canal constituted an impediment  

a. The accident was beyond RESPONDENT’s control  

b. RESPONDENT could not reasonably have foreseen the accident  

c. RESPONDENT could not have avoided the consequences of the accident  

d. The accident caused late delivery of the pumps  

(ii) RESPONDENT did not assume the risk of the accident in the Isthmus Canal because the DES Incoterm does not apply to Art. 79 CISG  

(iii) RESPONDENT gave CLAIMANT notice and acted in good faith  

E. Alternatively, any late delivery is exempted under Art. 80 CISG  

IV. CLAIMANT FAILED TO MITIGATE UNDER ART. 77 CISG  

A. CLAIMANT did not adopt core measures of mitigation  

(i) CLAIMANT’s avoidance of the contract did not constitute mitigation  

(ii) CLAIMANT’s attempt to resell the pumps does not constitute mitigation  

(iii) Political updates and requests for delivery did not amount to mitigation  

B. CLAIMANT failed to take other measures of mitigation  

(i) CLAIMANT ought to have arranged, or requested, separate shipment of the field pumps when they were ready on 30 October 2008  

a. Separate shipments would have minimised losses  

b. Separate shipment was a reasonable measure in the circumstances  

(ii) CLAIMANT ought to have made a cover purchase  

a. A cover purchase would have minimised losses  

b. A cover purchase was a reasonable measure in the circumstances  

(iii) CLAIMANT ought to have sought an exemption for the field pumps  

a. Seeking an exemption would have minimised losses  

b. Seeking an exemption was a reasonable measure of mitigation  

(iv) CLAIMANT ought to have continued attempts to resell or re-used the pumps  

a. Further attempts to resell or re-use the pumps would have minimised losses  

b. Further attempts to resell or re-use the pumps was a reasonable measure  

C. CLAIMANT is not entitled to damages under Art. 77 CISG
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REQUEST FOR RELIEF

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STATEMENT OF FACTS

RESPONDENT, Equatoriana Super Pumps S.A., is a manufacturer of irrigation pumps. CLAIMANT, Mediterraneo Engineering Co. is a provider of development planning services.

CLAIMANT entered a contract with RESPONDENT (“the contract”) on 1 July 2008 to supply pumps for an Oceanian irrigation project that CLAIMANT was awarded (“Water Services contract”) by Oceania Water Services (“Water Services”). The contract required RESPONDENT to deliver field pumps and three P-52 pumps complying with relevant Oceanian government regulations existing at the time of contracting. Any dispute arising out of or in connection with the contract was to be resolved by first conciliation, then arbitration.

An Oceanian regulation change affecting the beryllium content of the P-52 pumps was passed on 1 August 2008. RESPONDENT agreed to produce new compliant P-52 pumps and the parties agreed on a new delivery date to allow RESPONDENT to do so.

The pumps were loaded on the Merry Queen on 22 November 2008 and were expected to arrive on 22 December 2008. However, an accident in the Isthmus Canal on 29 November delayed the Merry Queen’s passage. The pumps arrived on 6 January 2009.

On 1 December 2008, the military took over the Oceanian government and passed an environmental decree prohibiting the importation or manufacture of products containing any beryllium on 28 December 2008 (effective 1 January 2009). Oceania’s military regime ordered cancellation of any government contract breached by a foreign supplier.

On 5 January 2009, Water Services cancelled the irrigation contract on the grounds of non-delivery. CLAIMANT avoided the contract with RESPONDENT on the grounds of late delivery and delivery of non-compliant field pumps.

From 15 January 2009, CLAIMANT indicated its intention to pursue legal channels for its alleged claim to $320,000 damages and return of the $1,214,550 purchase price. On 18 March 2009, CLAIMANT suggested that the parties undertake conciliation. RESPONDENT agreed. This occurred over 29–30 May 2009. CLAIMANT was represented by its Deputy CEO, whilst RESPONDENT was represented by its CEO, as required by clause 18. On 4 June 2009, the conciliator declared further efforts futile. CLAIMANT then lodged a request for arbitration and Statement of Claim with the Australian Centre for International Commercial Arbitration (“ACICA”) on 15 July 2009. On 17 August 2009, RESPONDENT lodged its Answer and Statement of Defense, appointing Arbitrator 2. CLAIMANT responded by lodging its Reply to Answer with ACICA on 2 September 2009.
SUMMARY OF ARGUMENT

I. THE TRIBUNAL HAS NO JURISDICTION AS CLAIMANT FAILED TO FULFILL THE PRECONDITIONS TO ARBITRATION

The Tribunal does not have jurisdiction to hear the merits of the dispute as CLAIMANT has not fulfilled the conciliation precondition to arbitration. The conciliation agreement required that both parties be represented by their CEOs in person. CLAIMANT’s representation by its Deputy CEO breached this requirement. Even if the agreement permitted delegation of representation, CLAIMANT’s representative was nonetheless improper. In any case, CLAIMANT’s conduct was in bad faith. As this non-compliance was not waived, and further conciliation is not futile, the Tribunal ought to close the proceedings.

II. RESPONDENT DID NOT BREACH ITS OBLIGATION TO DELIVER PUMPS COMPLYING WITH OCEANIAN REGULATIONS

The contract was modified after the first regulation change and RESPONDENT delivered pumps in compliance with this. There was no modification of the contract after the military decree. Further, RESPONDENT was not obligated to comply with regulations operative after the contract was signed. Consequently, RESPONDENT fulfilled its Art. 35 CISG obligations. Should the Tribunal find any non-conformity, RESPONDENT’s breach is exempted by the military decree, which amounted to an Art. 79 CISG impediment.

III. RESPONDENT DID NOT BREACH ITS CONTRACTUAL OBLIGATIONS BY DELIVERING PUMPS ON 6 JANUARY 2009

The contract delivery date was modified to require delivery by early January. RESPONDENT complied. Even if RESPONDENT breached this date, CLAIMANT was not entitled to avoid as it failed to provide an effective Art. 47 CISG notice. Further, RESPONDENT’s breach is exempted as the accident in the Isthmus Canal amounted to an impediment under Art. 79(1) CISG. Alternatively, CLAIMANT’s request for contract modification for the P-52 pumps was an ‘act’ under Art. 80 CISG causing delayed delivery.

IV. CLAIMANT FAILED TO MITIGATE UNDER ART. 77 CISG

In any event, CLAIMANT’s claim for damages should be reduced in full because it did not undertake reasonable measures to keep the Water Services contract on foot. CLAIMANT’s avoidance of the contract, attempt to resell the pumps, provision of political updates and requests for delivery did not mitigate losses. Instead, CLAIMANT could have procured pumps from Trading Company, sought separate shipment of the field pumps and made better efforts to sell the pumps. In failing to do so, CLAIMANT is not entitled to full damages.
ARGUMENT ON JURISDICTION

I. THE TRIBUNAL HAS NO JURISDICTION AS CLAIMANT FAILED TO FULFILL THE PRECONDITIONS TO ARBITRATION

1. RESPONDENT respectfully asserts that the Tribunal does not have jurisdiction to hear the merits of these proceedings on the ground that CLAIMANT did not properly fulfill the clause 18 preconditions to arbitration.

2. RESPONDENT does not dispute that clause 18 of the contract is a valid arbitration agreement that is governed by the ACICA Rules, the UNCITRAL Model Law on International Commercial Arbitration (‘Model Law’) and the UNCITRAL Model Law on International Commercial Conciliation (‘Model Law on Conciliation’) [Statement of Defense ¶6; Cl. Mem. ¶¶1–5]. Nor does RESPONDENT dispute the Tribunal’s authority to determine its own jurisdiction under the doctrine of kompetenz-kompetenz [Cl. Mem. ¶5].

3. RESPONDENT, however, submits that the conciliation agreement was an enforceable and binding precondition to arbitration [A] requiring each party to be represented by its CEO. CLAIMANT’s representation by its Deputy CEO contravened this precondition [B]. Thus, RESPONDENT asserts that the Tribunal has no jurisdiction to hear the merits [C].

A. CONCILIATION IS AN ENFORCEABLE AND BINDING PRECONDITION TO ARBITRATION

4. Conciliation under clause 18 [Cl. Ex. 3] is a compulsory precondition to arbitration. It is not merely a vague ‘agreement to agree’ [Elizabeth Bay; Paul Smith]; rather, it is a particular election to participate in ‘a process from which cooperation and consent might come’ [Hooper Bailie 206]. CLAIMANT could argue that conciliation is only enforceable if it is a sufficiently clear and mandatory obligation [Born 847; Cremades 5–9; Boog 105–6; Berger 4–5]. That certainty can be discerned from five indicia.

5. First, the clause stipulates that disputes ‘shall be resolved by conciliation’ [Cl. Ex. 3, emphasis added]. Use of the mandatory term shall rather than the permissive may suggests that conciliation is binding [ICC 10256; ICC 9984; Cremades 7, 9].

6. Secondly, conciliation was a clear precondition to arbitration: ‘if the dispute has not been settled pursuant to the said conciliation procedure, the dispute shall be resolved by arbitration’ [Cl. Ex. 3, emphasis added]. If and shall together establish unequivocally a binding prerequisite to arbitration [Berger 5]. In contrast, there was no precondition where a clause stated negotiation was ‘no hindrance’ to arbitration [BG Switz. 6/6/2007 106].
7. Thirdly, the conciliation’s procedure was clear. It was to be governed by UNCITRAL Conciliation Rules, administered by the Danubia Arbitration and Conciliation Centre, and located in Danubia [Cl. Ex. 3]. Where the parties have set a clear procedure, it would ‘fly in the face of public policy’ to deny enforcement [Cable & Wireless 1327; Hyundai v. Vigour; HIM Portland; Poiré v. Tripier; Cremades 12–4; DeBattista 234–5; File FN10].

8. Fourthly, the benchmarks for ending conciliation and beginning arbitration are clear; fixed time limits are not necessary [Carter 457, 466–7; Art. 16 UNCITRAL Conciliation Rules; Art. 13 Model Law on Conciliation]. Clause 18 prohibits arbitration unless the dispute is not settled in conciliation. This is determinable under UNCITRAL Conciliation Rules: the conciliator may terminate the proceedings [Art. 15(b)], and parties may jointly [Art. 15(c)] or unilaterally end conciliation [Art. 15 (d)]. Clauses using the latter method [ICC 9984] or ‘pre-established and stereotyped rules’ [ICC 6276] have been considered enforceable.

9. Finally, CLAIMANT undertook conciliation, admitting it was a ‘prerequisite to arbitration’ [Statement of Claim ¶27]. CLAIMANT cannot now deny conciliation’s mandatory nature.

B. CLAIMANT FAILED TO FULFILL CONCILIATION REQUIREMENTS

10. Clause 18 required that CLAIMANT be represented by its CEO [i]. Even if the clause permitted delegation, CLAIMANT’s Deputy CEO was an unfit representative [ii]. Further, CLAIMANT acted in bad faith [iii], which is not excused by waiver [iv].

   (i) The conciliation agreement did not permit delegation and required parties be represented by their CEOs in person

11. The parties mutually intended to be represented by their CEOs in person [a]. No exception ought to be implied [b]. By alleging that the clause permitted representation by any employee acting with the CEO’s authority, CLAIMANT has misapplied the principles of effective interpretation [c] and contra proferentem interpretation [d] [Cl. Mem. ¶24].

   a. The parties’ common intention was to be represented by their CEO

12. Both parties agree that clause 18 ought to be interpreted according to the parties’ common intention [Cl. Mem. ¶24; Fouchard/Gaillard/Goldman ¶477]. The parties intended to be represented by their CEOs in person and not, as CLAIMANT suggests, by any employee delegated with authority to represent the company [Cl. Mem. ¶24].

13. First, the terms of clause 18 are clear: the parties ‘will be represented by their Chief Executive Officer’. The parties were large, experienced businesses [Statement of Claim ¶¶2, 4] that had drafted the contract together over nearly two months [Statement of Claim ¶¶5–7; Cl. Ex. 1, 2]. Had they wished to qualify the representation requirement, they would have
done so. Rather, clause 18 did not permit general representation by ‘senior executives’ \[Fluor Enterprises\] nor substitution if the CEO was ‘unable to attend’ \[Cable & Wireless 1323\].

14. Secondly, it was mandatory that parties ‘will be represented by their Chief Executive Officer’ \[Cl. Ex. 3, emphasis added\]. The use of will does not, as CLAIMANT contends, indicate a lesser standard than if the clause had stated parties shall be represented by their CEO \[Cl. Mem. ¶¶27–29\]. Rather, will and shall are both obligatory \[Black’s Law Dictionary 1592, 1379–80; CC (Italy) 2/11/1987; ICC Case 5872; cf ICC 10256; Woodhouse v. Consignia, cited by CLAIMANT in support of its proposition that will is merely permissive, is irrelevant. That case concerns statutory interpretation and an arbitration agreement must never be interpreted as a statute \[Fouchard/Gaillard/Goldman ¶480; Insigna\].

15. Thirdly, the parties’ intention must be examined according to what they ‘reasonably and legitimately envisaged’ \[Amco; Fouchard/Gaillard/Goldman ¶477\]. The parties’ use of a two-tier clause demonstrates their intention to exhaust expeditious, economical and non-adversarial conciliation before turning to arbitration as a last resort.

16. Finally, stipulating that CEO representation is necessary gives effect to the aforementioned intention on five grounds. First, conciliation may require a particular representative \[Freyer 8; Jolles 329; Pryles 159\]; this choice is crucial as different managers enter conciliation with ‘considerably different perspectives on the “ideal outcome” for the company’ \[Picker 22; Bühring-Uhle 175\]. Secondly, the CEO, as the highest ranking employee with the widest authority, possesses the judgment necessary to maximise the prospect of settlement \[Bühring-Uhle 117\]. Thirdly, the Deputy CEO was merely in charge of business ‘operations’ as opposed to external interactions \[PO2 ¶28\]. Fourthly, a Deputy is an inferior employee considered more likely to be unconciliatory due to fear that any concessions made must be justified to superiors \[Bühring-Uhle 118\]. Fifthly, the CEO’s presence would have been taken as a good faith gesture that the business relationship is valued and importance is being placed on the resolution of the dispute in conciliation.

b. The Tribunal ought not imply any exception to the CEO requirement

17. Clause 18 contains no exception to the clear requirement that the CEOs conciliate in person. As the Tribunal’s jurisdiction turns on the parties’ specifically agreed terms \[Fouchard/Gaillard/Goldman ¶752; Redfern/Hunter ¶1-13\], no exception should be implied \[ICC 2138\], particularly as RESPONDENT does not question the validity of the arbitration agreement itself, but is interpreting its scope \[ICC 7920; Born 1078\].

18. Even if an exception is implied, it must be necessary to yield a ‘commercially logical and sensible construction’ \[Insigna; Lew/Mistelis/Kröll ¶7-60; Born 1081\]. An exception would
not contemplate attendance at a family wedding [PO2 ¶30], as it was not a matter of business urgency and, as CLAIMANT admits, its CEO would have known of a wedding ‘prepared long in advance’ [Cl. Mem. ¶25]. Yet, the CLAIMANT deliberately chose a conciliation date when its CEO could not attend [Statement of Claim ¶23] without mentioning this to RESPONDENT. CLAIMANT evidently wished to avoid the consequences of conciliation.

c. No exception is implied by effective interpretation

19. CLAIMANT has misapplied the principle of effective interpretation. Instead, CLAIMANT has applied the universally rejected principle of interpretation in favorem validatis by automatically concluding that the ‘effective interpretation’ of clause 18 is one that permits representation by its Deputy CEO, thus resulting in the arbitration being ‘effective’ [Cl. Mem. ¶26]. An arbitration agreement cannot be held valid based on the presumption of validity [Fouchard/Gaillard/Goldman ¶440, 481].

20. Properly applied, effective interpretation operates in situations of ambiguity to ‘prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical’ [Fouchard/Gaillard/Goldman ¶478]. Unlike the inconsistent terminology referring to corporations in ICC 1434 [Cl. Mem. ¶26], the terminology ‘Chief Executive Officer’ is clear. As ICC 3380 states, the ‘natural and ordinary’ meaning of the terms is paramount [Cl. Mem. ¶3380]. Moreover, considering the significant value in dispute, $1,534,550 [Cl. Ex. 14], it is not onerous to require the CEO to be present in person [Sherman 2105; Heileman v. Joseph Oat 654].

21. Further, CLAIMANT relies on ICC 2321 [Cl. Mem. ¶24], which held that the parties were ‘presumed to have been willing to establish an effective machinery’ for settling disputes. That case related to a single-tier arbitration clause. As outlined [supra ¶16], an ‘effective machinery’ in two-tiered clause 18 reasonably required personal attendance of the CEOs.

d. No exception is implied by contra proferentem interpretation

22. Contrary to CLAIMANT’s contention, RESPONDENT was not the sole drafter of clause 18 and does not ‘bear the risk of interpretative doubts occurring from [its] unclear and ambiguous formulation’ under contra proferentem interpretation [Cl. Mem. ¶25]. That principle only applies where clause 18 is so pathological and ambiguous that no reasonable result can be deduced [ICC 3380; Fouchard/Gaillard/Goldman ¶479, 484], which is not the case here; requiring attendance by the CEO in person is a reasonable result. Further, the contract was drafted collaboratively [Statement of Claim ¶¶5–7; Cl. Ex. 1, 2]. CLAIMANT finalised contract drafting, was first to sign the contract [Cl. Ex. 2] and itself stated that its
CEO had doubts at contract conclusion about whether he could attend [Cl. Mem. ¶25]. Thus, CLAIMANT considered the clause and specifically agreed to its plain terms [Sykes 67].

(ii) **Even if clause 18 permitted delegation, CLAIMANT’s representation was improper**

23. Even if clause 18 permitted delegation [Cl. Mem. ¶¶24–6], representation by the Deputy CEO was improper on two grounds. First, the person with ultimate power to settle must be present in order for conciliation to be effective [Sherman 2106; Bühring-Uhle 175]. However, the Deputy CEO was granted only express authority to ‘represent’ CLAIMANT as opposed to authority to agree to any conciliation settlement [Reply to Answer ¶1]. Authority to settle was not incidental to representation [Art. 9(2) Agency Convention; Heileman v. Joseph Oat 653; Carter 458]. Nor was power to settle impliedly granted from the parties’ words or conduct [Art. 9(1) Agency Convention]; the CEO expressed his confidence in his deputy’s ability to ‘represent’ the company at both the irrigation ‘conference’ and ‘conciliation’ without distinguishing between the legal requirements and consequences of the two, suggesting the CEO had no intention to actually delegate authority to settle upon Deputy CEO [PO2 ¶30]. This informal grant stands in contradistinction to grant of power to settle by a board meeting resolution recorded in official minutes, as is commonly required [Bowstead/Reynolds 106].

24. **Secondly, the Deputy CEO was concerned with internal ‘operations’ [PO2 ¶28] and did not customarily exercise, and was not delegated with, the full range of the CEO’s daily responsibilities and powers that would enable the Deputy CEO to ‘see [and take advantage of] opportunities for interest-based or problem-solving negotiation’ [Riskin 1110].**

(iii) **The requirement that CLAIMANT be represented by its CEO was not satisfied by ‘good faith’ representation by its Deputy CEO**

25. CLAIMANT relies on ICC 9977 to assert that the procedures of a ‘prior mandatory process of communication’ are not ‘of the essence’, and all that is required is good faith conduct [ICC 9977; Cl. Mem. ¶16]. However, good faith is determinative only where there are no other objective criteria [ICC 6276] and the clause itself requires merely amicable efforts [ICC 9977; Freyer 9; Cremades 13; Welborn v Medquist; Jolles 334]. In contrast, clause 18 was a ‘necessary precondition’ to arbitration, requiring representation by the CLAIMANT’s CEO in person, and therefore must be ‘strictly observed’ [Aiton ¶43]; substantial performance and good faith were insufficient [DeValk Lincoln Mercury 336]. Similarly, ICC 6276 held referral of the dispute to an engineer was ‘governed by precise rules which may not be transgressed’.
26. In any case, CLAIMANT’s conduct was not in good faith. There were no communications from its CEO [cf. ICC 9799]. In ICC 6276, genuine efforts consisted of waiting three years before resorting to arbitration, in which time there were ‘signs of reciprocal good will’ [ICC 6276]. RESPONDENT evinced good faith by waiving its claim for the $30,000 cost of remanufacturing the pumps and by offering to help re-sell CLAIMANT’s pumps free of charge [Cl. Ex. 15], whereas CLAIMANT misled RESPONDENT about its willingness to conciliate by deliberately choosing an unsuitable date [supra ¶18].

(iv) RESPONDENT did not waive CLAIMANT’s improper representation

27. RESPONDENT did not have waive the requirement that CLAIMANT be represented by its CEO in person as RESPONDENT had no knowledge of the non-compliance at conciliation [a] and objected without undue delay [b]. Further, there was no estoppel [c]

a. RESPONDENT had no obligation to challenge CLAIMANT’s representation at the time of conciliation

28. RESPONDENT did not waive CLAIMANT’s improper representation as RESPONDENT is only required to protest non-compliance of which it is actually aware [Art. 4 Model Law; Art. 31 ACICA Rules; Dore 149]. RESPONDENT did not have actual knowledge at conciliation that CLAIMANT’s CEO was not present [cf ICC 9977] and is therefore not raising a ‘post-factual argument’ [Cl. Mem. ¶16]. RESPONDENT’s CEO had not read the list of participants at The Future of Irrigation conference [PO2 ¶29], and therefore did not know that Mr Holtzer was in fact the Deputy CEO [PO2 ¶31]. As actual knowledge is required, no knowledge should be imputed upon RESPONDENT [Sanders 64–5].

29. In any case, nothing indicates that RESPONDENT ‘could not have been unaware’ of non-compliance [Holtzmann/Neuhaus 198–9]. The conference and the conciliation were unrelated and happened to coincide at a convenient time [Statement of Claim ¶23]. It is unreasonable to expect RESPONDENT’s CEO to study conference documents unrelated to the conciliation. Further, a list of conference participants, unlike a conference itinerary, was not even essential to the CEO’s participation in the conference itself. Even if RESPONDENT could have known of the list, ‘negligent ignorance’ does not show waiver [Secretariat Note Art. 4 ¶3]. RESPONDENT was entitled to rely on CLAIMANT, who suggested the conciliation date [PO2 ¶29], to properly fulfill its contractual obligations or at least inform RESPONDENT in good faith that its CEO could not attend.

b. RESPONDENT’s objection was made without undue delay

30. RESPONDENT did not waive its right to object. Neither the contract nor Danubian law limit objection to a period of days, much less 16 days as CLAIMANT suggests [Cl. Mem. ¶19].
Waiver exists only if RESPONDENT proceeded with arbitration knowing of the non-compliance without objecting ‘promptly’ [Art. 31 ACICA Rules] or ‘without undue delay’ [Art. 4 Model Law]. Commentators universally prefer the latter standard to the more stringent ‘prompt’ objection standard in Art. 30 UNCITRAL Arbitration Rules [Holtzmann/Neuhaus 199: Sanders 65], upon which Art. 31 ACICA Rules is based [Luttrell/Moens 2].

31. In any case, RESPONDENT satisfies both standards as it did not proceed with arbitration in silence; rather, it objected immediately upon receiving the notice of arbitration on 17 August 2008 [Art. 3 Model Law], CLAIMANT’s first communication with RESPONDENT after the conciliation ended. RESPONDENT’s Statement of Defense was a proper challenge of CLAIMANT’s arbitration [Statement of Defense ¶¶6–8; Art. 16 Model Law; Art. 24(3) ACICA Rules]. The appointment of an arbitrator and payment of arbitration costs is not tacit acceptance [Egypt Award 2004] and RESPONDENT did not proceed to defend a claim on the merits without objection [Union of India; Hungary Award 25/5/1999: ICC 1512].

c. RESPONDENT’s conduct did not constitute estoppel

32. RESPONDENT never indicated CLAIMANT’s representation was proper. Though the ACICA and UNCITRAL waiver provisions also encompass estoppel [Sanders 64], CLAIMANT further argues that RESPONDENT should be estopped from ‘behav[ing] in a manner that is contrary to the understanding it has caused in [CLAIMANT] by its prior conduct’ [Cl. Mem. ¶21]. However, CLAIMANT alleges only that RESPONDENT’s conduct ‘while the conciliation was undertaking [sic]’ [Cl. Mem. ¶21] was misleading. As outlined, RESPONDENT could not condone the non-compliance with no knowledge of it [supra ¶29].

33. CLAIMANT could argue that RESPONDENT ought to have objected after conciliation, when its CEO read the conference list. That is to be rejected. First, silence is not an abandonment of rights merely because RESPONDENT’s efforts ‘could have been more energetic’ [White v. Kampner], or because it was occupied with other business [Hooper Bailie 212–3], particularly as the parties had taken three months till conciliation. Secondly, good faith is central to estoppel and CLAIMANT did not reasonably rely in good faith on RESPONDENT’s silence to its detriment [Cl. Mem. ¶21; Amco; Cable & Wireless 1328] as it made no attempt to obtain RESPONDENT’s consent before or after conciliation.

C. CONSEQUENTLY, THE TRIBUNAL HAS NO JURISDICTION TO HEAR THE MERITS OF THE DISPUTE

34. The Tribunal lacks jurisdiction to hear the merits of the dispute as the CLAIMANT failed to properly fulfill the mandatory precondition to arbitration [i]. Further, contrary to
CLAIMANT’s allegation, conciliation cannot be deemed futile, nor is it an abuse of process [Cl. Mem. ¶¶30–3] [ii]. Thus, the Tribunal ought to close [iii] or stay [iv] the arbitration.

(i) CLAIMANT’s breach of an arbitral precondition is a procedural matter depriving the Tribunal of its jurisdiction

35. CLAIMANT could argue that non-compliance with the conciliation precondition is merely a substantial matter irrelevant to the Tribunal’s jurisdiction. However, this is an unsatisfactory and unreasonable approach: the consequences of non-compliance would be damages, which are impossible to quantify and at odds with the procedural nature of the pre-arbitral step [Jolles 336; Lye/Lee 9–10; Boog 108]. Thus, CLAIMANT’s non-compliance is procedural, depriving the Tribunal of jurisdiction to hear the merits [Born 843; Cremades 10–4; Jacobs FN48; Berger 6–7; Poiré v. Tripier; OG Switz. 23/4/2001; BG Ger. 18/11/1998].

(ii) The Tribunal ought not proceed to the merits of the dispute as conciliation cannot be deemed futile

36. The Tribunal may only hear the merits if conciliation is so futile that it is a ‘completely hopeless exercise’ [Cable & Wireless 1328; Berger 14; Lye/Lee 6; File 34; Cl. Mem. ¶¶30–3]. However, the conciliation was not ‘completely hopeless’. The parties are not unconciliatory [a] and will be represented by their CEOs [b]. It is no obstacle that conciliation is non-binding [c]. Further, RESPONDENT’s request is in good faith [d].

a. The parties are not unconciliatory

37. There is a distinct possibility of compromise [Allco Steel; US v. Bankers] considering the parties’ lengthy business relationship over three years [Statement of Claim ¶4] and constant emphasis on maintaining this relationship [Cl. Ex. 1, 2, 8]. Indeed, even after the regulation changes, CLAIMANT hoped ‘it [would] not adversely affect the possibility of collaboration on some future irrigation projects’ [Cl. Ex. 13] and RESPONDENT generously waived its demand for $30,000 [Cl. Ex. 15]. In contradistinction to ICC 8445, cited by CLAIMANT, there were no acrimonious exchanges or intervening litigation [Cl. Mem. ¶32; ICC 8445].

38. It is no hindrance that the parties are ‘sure of their legal positions’ [PO2 ¶32]. Conciliation is not futile merely because CLAIMANT considers it so [Cl. Mem. ¶30; Sherman 2088; Park/Paulsson 75; AWA v. Daniels; US v. Bankers]. Conciliators can manipulate the parties into agreement, achieving results ‘quite beyond the powers of lawyers’ [Dunnett 2436; Halsey ¶10, Lye/Lee 12; Berger 13–5; Lew/Mistelis/Kröll ¶¶1.44–1.54; Park/Paulsson 75; Hill 176; Dore 6; Freyer 11]. Unlike arbitration, conciliation is not necessarily constrained by the parties’ legal rights [Boog 108; Brown/Marriott 110; Dore 7].

b. Properly constituted conciliation may change the results achieved
39. Conciliation is not now futile merely because the previous conciliation did not settle \[PO2 ¶32\] [\textit{Cl. Mem. ¶31}]. A new conciliation would be differently constituted, involving both parties’ CEOs. There had not been multiple communications or a previous unsuccessful meeting between the parties’ CEOs [\textit{cf Himpurna v. PT; Cl. Mem. ¶32}]. Further, \textit{BG Ger. 1984} held that a claimant’s legal action was inadmissible where it bypassed a precondition, even though no settlement had been reached in prior negotiations.

c. \textbf{Non-binding nature of conciliation is not an indication of futility}

40. CLAIMANT could argue that conciliation is futile as it is a non-binding process [\textit{Dore 3–4}]. Although the New York Convention does not enforce conciliations, a settlement agreement is a binding contract [\textit{Art. 14 Model Law on Conciliation; Guide to Enactment ¶89}]. The conciliation need not be binding; all that is required is that there is a prospect of settlement, which exists in this case [\textit{AMF v. Brunswick 460–1}].

d. \textbf{RESPONDENT requests conciliation in good faith}

41. RESPONDENT’s request for conciliation is not an abuse of process [\textit{Cl. Mem. ¶32}]. It was represented by its CEO in conciliation as required and did not frustrate CLAIMANT’s ability to fulfill its reciprocal obligations [\textit{ICC 6149; Cl. Mem. ¶32}]. Conciliation is expeditious and, on average, is five percent the cost of arbitration [\textit{Sourdin 205; Park/Paulsson 73; Dore 7}]. Even if conciliation fails, the parties may proceed to arbitration unimpeded because evidence revealed during conciliation is confidential [\textit{Berger 16; Art. 10 Model Law on Conciliation; Arts. 19, 20 UNCITRAL Conciliation Rules; Dore 36–7}].

(iii) \textbf{Consequently, the Tribunal ought to close the proceedings}

42. As the precondition to arbitration has been unfulfilled, the Tribunal ought to require CLAIMANT conciliate before commencing a new arbitration [\textit{Lye/Lee 119; Born 847; ICC 12739}]. The Tribunal should prefer to close the proceedings, because maintaining a Tribunal on the expectation that conciliation will fail adds unwelcome pressure to the conciliation [\textit{Jolles 337}] and is thus susceptible to abuse of process by CLAIMANT [\textit{Lye/Lee 11}].

(iv) \textbf{Alternatively, the Tribunal should stay the proceedings}

43. Alternatively, the Tribunal may stay the proceedings pending conciliation. As the order may prescribe conditions and deadlines for the conciliation, there is no risk of the parties being indefinitely precluded from arbitration [\textit{Jolles 337; Lye/Lee 11}]. The Tribunal should not permit conciliation and arbitration to occur in parallel. That would result in unnecessary costs and frustrate any chance of the parties maintaining conciliatory and non-adversarial positions. \textbf{Result of Issue I: The Tribunal has no jurisdiction to hear the merits of the claim in these arbitral proceedings.}
ARGUMENT ON THE MERITS

II. RESPONDENT HAD NO OBLIGATION TO DELIVER PUMPS COMPLIANT WITH REGULATIONS AT DATE OF DELIVERY

44. RESPONDENT does not deny that the merits of the dispute are governed by the CISG [Cl. Mem. ¶35]. However, RESPONDENT disputes CLAIMANT’s assertion that the contract obliged RESPONDENT to deliver pumps conforming to regulations adopted even after the date of contract signing. Rather, the parties agreed to modify the contract to require compliance with the 1 August 2008 regulation change. No such modification was made following the 28 December 2008 military decree. RESPONDENT was thus obliged to supply pumps conforming to the contract modified by the regulation change only, which RESPONDENT did [A]. Even if there was no modification, interpretation of the contract pursuant to the parties’ intent or a reasonable person standard indicates that RESPONDENT was not obliged to deliver pumps conforming to regulations adopted after contract signing [B]. Thus, RESPONDENT fulfilled its Art. 35(1) CISG obligation [C]. RESPONDENT also delivered pumps conforming to the contract for the purposes of Art. 35(2) CISG [D]. Alternatively, non-conformity was excused under Art. 79 CISG [E].

A. RESPONDENT’S MODIFIED OBLIGATIONS ONLY REQUIRED COMPLIANCE WITH THE 1 AUGUST 2008 REGULATION CHANGE

45. RESPONDENT agrees with CLAIMANT that the contract was modified [Cl. Mem. ¶¶39–44]. CLAIMANT, however, does not specify what contractual obligations the parties agreed to modify. Rather, CLAIMANT merely provides an extended exposition of the well accepted principle under Art. 29 CISG that ‘mere agreement’ is sufficient to modify the contract [Cl. Mem. ¶¶40–44; Raw Materials; Viscasillas 170–2; cf Art. 96 CISG]. The parties agreed to modify the contract to require that RESPONDENT comply with the regulation change [i]. No such agreement regarding the military decree existed [ii].

(i) The parties validly modified the contract after the 1 August regulation change

46. RESPONDENT urges the Tribunal to find the requisite ‘mere agreement’ to modify the contract after the 1 August 2008 regulation change on two grounds.

47. First, the parties’ express words demonstrate agreement to modify the contract. CLAIMANT wrote to RESPONDENT requesting new P-52 pumps [Cl. Ex. 5]. By way of reply, RESPONDENT stated that this was a new obligation for which it would ‘have to find [new] steel [Cl. Ex. 5]’ but would nonetheless ‘accept’ [Cl. Ex. 6].
Secondly, to fulfill its contractual obligations, RESPONDENT attributed an additional $30,000 to CLAIMANT. Although RESPONDENT, out of good faith, is not pursuing that sum [Cl. Ex. 15], CLAIMANT nonetheless did not oppose the added costs, which was conduct constituting tacit acceptance of modification under Art. 29 CISG [Honnold 229].

(ii) The parties did not agree to modify after the 28 December 2008 military decree

However, no agreement to modify the contract following the military decree in 28 December 2008 is identifiable. At no point did CLAIMANT require RESPONDENT manufacture new field pumps to comply with the military decree; rather, CLAIMANT’s correspondence indicated that it would still accept the pumps as they were [Cl. Ex. 11].

Furthermore, it cannot be deduced that RESPONDENT agreed to fulfill any such obligation before the military decree was imposed. After all, RESPONDENT was not privy to the relationship between CLAIMANT and Oceania Water Services [PO2 ¶8; Cl. Ex. 6] and ‘had no reason to be monitoring political or regulatory developments, as [CLAIMANT had]’ [Cl. Ex. 6]. RESPONDENT therefore depended on CLAIMANT for information. CLAIMANT’s notice of the decree [Cl. Ex. 11] came after the pumps were shipped [Cl. Ex. 7]. RESPONDENT could not have agreed to modify thereafter.

B. RESPONDENT HAD NO EXPRESS OR IMPLIED DUTY TO PROVIDE PUMPS COMPLIANT WITH REGULATIONS AFTER CONTRACTING

Interpretation of the express provisions of the contract according to the parties’ intention under Art. 8(1) CISG [i] or a ‘reasonable person’ standard under Art. 8(2) CISG [ii] precludes CLAIMANT’s assertion that RESPONDENT had an obligation to supply pumps conforming to regulatory changes arising after the pumps were shipped.

(i) RESPONDENT was not obliged under Art. 8(1) CISG to remanufacture pumps to comply with the military decree as it arose after the contract was signed

RESPONDENT’s warranty that pumps would comply with Oceanian regulations [Cl. Ex. 3] did not require compliance with the military decree, which came into existence after shipment. This is determinable from the parties’ subjective intention [Art. 8(1) CISG; MCC-Marble v. Ceramica Nuova], pre-contractual negotiations [a], subsequent conduct [b], established practices [c] and usages [d] [Art. 8(3) CISG].

(a) RESPONDENT was not alerted to such obligation in pre-contractual negotiations nor did it assume of this risk by virtue of the warranty

CLAIMANT could have argued that RESPONDENT agreed in pre-contractual negotiations to supply pumps complying with subsequent Oceanian regulations [Cl. Ex. 3]. However,
three crucial points demonstrate RESPONDENT had no such intention [Statement of Defense ¶10] where intent of both parties is necessary [OLG Austria 23/1/2006].

54. First, RESPONDENT’s warranty is expressed in the present, not future, tense: ‘Equatoriana Super Pumps warrants that the pumps are in compliance with all relevant regulations’ [Cl. Ex 3]. The words were chosen by RESPONDENT [PO2 ¶9]; RESPONDENT did not and would not have intended to warrant compliance for regulatory changes occurring after the pumps were shipped since pumps took three months to remanufacture [Cl. Ex. 6, 7] and a further month to deliver [Cl. Ex. 7]. This stands in contradistinction to the case in which a contract stated explicitly that the seller would take responsibility if the goods were unfit to be imported into Jordan upon delivery [Jabsheh Trading v. Iberconsa]. Indeed, RESPONDENT explicitly stated that it ‘will have fulfilled [its] contractual obligation in [regard to the warranty]’ [Cl. Ex. 6] since the N-series pumps complied with regulations when the contract was signed, which CLAIMANT conceded in its correspondence [Cl. Ex. 5].

55. Secondly, the U.C.C §2-601 ‘perfect tender rule’, raised by CLAIMANT [Cl. Mem. ¶¶62–67], is inapplicable. CISG is the applicable law [supra ¶44], and must be applied with regard to its ‘international character and to the need to promote uniformity’ [Art. 7 CISG]. Thus, the U.C.C., a U.S. instrument, should not be used as an interpretive tool [Lookofsky/Flechtner].

56. CLAIMANT could argue that RESPONDENT nonetheless remanufactured the P-52s even after contract signing, contrary to the notion that the warranty applied only at that date. RESPONDENT, however, did so out of good faith and in the spirit of collaboration [Cl. Ex. 1, 2, 13], which RESPONDENT also demonstrated by absorbing $30,000 in additional costs.

57. Finally, CLAIMANT did not name RESPONDENT as the contractually specified supplier of the pumps in the irrigation contract [PO2 ¶8], indicating RESPONDENT was not to be held liable for consequences of the Water Services contract. Combined with RESPONDENT’s lack of business connections in Oceania [PO2 ¶5], RESPONDENT could not have intended to make itself liable for the effects regulatory changes occurring beyond contract signing.

b. The parties’ subsequent conduct demonstrates lack of intention to bind RESPONDENT for regulatory changes beyond contract signing

58. Following the regulation change, the parties agreed that new steel must be procured [Cl. Ex. 5, 6]. Given that CLAIMANT emphasised the importance of meeting its own contractual deadlines for installation and completion [Cl. Ex. 2, 8], RESPONDENT would not have intended to bind itself to change the pumps for a decree arising after the pumps were shipped without some renegotiation or hardship clause [France 12/6/2001], especially as it ‘had no reason to be monitoring’ regulation changes [Cl. Ex. 6].
c. The parties’ established Patria practices demonstrate lack of intention to
bind RESPONDENT for regulatory changes beyond contract signing

59. The parties’ Patria collaboration [Cl. Ex. 1] must be taken into account here [Art. 8(3) CISG]. CLAIMANT specifically requested RESPONDENT’s services, indicating that CLAIMANT was satisfied with RESPONDENT’s performance in the Patria project. Indeed, CLAIMANT even noted the similarity of this project to that in Patria [Cl. Ex. 1]. At no point did CLAIMANT highlight political differences. Thus, CLAIMANT relied upon RESPONDENT’s skill only to the extent exercised in the Patria project. Further, none of the 50 other countries to which RESPONDENT exports, have beryllium regulations like Oceania’s [PO2 ¶19]. To oblige RESPONDENT to any greater degree would exceed the scope of their business relationship as demonstrated through conduct.

60. Furthermore, the contract states specifically that the pumps were to be sourced from RESPONDENT’s existing stock [Cl. Ex. 3], all of which contained beryllium. CLAIMANT, having previously received similar pumps in the Patria project, knew of this [Cl. Ex. 1]. It essentially had a sample. CLAIMANT thus knew it was not party to a special manufacturing contract, which might have stipulated that the pumps be remanufactured to accommodate post-contract regulation changes. Therefore, at contract signing, CLAIMANT purchased the existing pumps as conforming to regulations existing at that time.

d. The parties’ usage of DES Incoterms demonstrates lack of intention to bind
RESPONDENT to regulatory changes beyond contract signing

61. CLAIMANT could have argued that use of DES Incoterms [Cl. Ex. 3] demonstrates intention to comply with regulation changes arising after shipment. However, DES Incoterms merely confer upon RESPONDENT the costs and risks ‘involved in bringing the [pumps] to [Capitol City] before discharging’ [Incoterms 2000 Interpretation] or, in other words, ‘of loss of or damage to goods’ [DES Incoterms A5], e.g., as a result of natural disaster, as opposed to public law changes. In this case, the pumps were neither lost nor physically damaged.

(ii) Alternatively, a ‘reasonable person’ would conclude that RESPONDENT needed only to comply with regulations at contract signing under Art. 8(2) CISG

62. Should the Tribunal doubt the parties’ intention [Zeller 19], an ordinary merchant considering the parties’ pre-contractual negotiations, subsequent conduct and usages [Art. 8(3) CISG], would not reasonably conclude that a seller would warrant conformity of goods with volatile public laws unique to Oceania [PO2 ¶19] that would require remanufacture of goods even after shipment. That is a matter of ordinary business sense since remanufacturing and delivering the pumps may take up to four months [Cl. Ex. 6, 7] and necessitates procuring
new steel at enormous cost [Cl. Ex. 6]. Moreover, RESPONDENT was not in the position to have the slightest warning of regulation changes, being outside of the CLAIMANT-Water Services relationship [PO2 ¶8; Netherlands 7/11/1997].

C. RESPONDENT FULFILLED ITS ART. 35(1) OBLIGATION UNDER THE CONTRACT AS MODIFIED AFTER THE REGULATION CHANGE

63. Since the contract was not modified after the military decree and did not require RESPONDENT to comply with regulatory changes subsequent to contract signing, RESPONDENT was required only to supply pumps complying with the contract as modified by the first regulation change [cf Cl. Mem. ¶¶45–52]. RESPONDENT delivered N-series pumps, which CLAIMANT accepted as compliant [Cl. Ex. 6], and three beryllium-free P-52 pumps to the technical specifications, fulfilling its Art. 35(1) CISG obligation.

D. RESPONDENT ALSO SUPPLIED PUMPS THAT CONFORMED TO THE CONTRACT FOR THE PURPOSES OF ART. 35(2) CISG

64. Contrary to CLAIMANT’s assertion that RESPONDENT failed to supply compliant pumps [Cl. Mem. ¶¶45–52], RESPONDENT urges the Tribunal to find: first, the pumps were fit for their Art. 35(2)(a) CISG ordinary use [i]; secondly, even if a particular purpose was made known to RESPONDENT under Art. 35(2)(b) CISG, the pumps were nonetheless fit for it [ii]; and thirdly, CLAIMANT’s early payment of full purchase price indicated its acceptance of the pumps as contract-compliant [iii]. In any case, RESPONDENT is exempted under Art. 35(3) CISG [iv]. RESPONDENT, thus, is not liable for non-conformity under Art. 36 CISG [v]. Art. 39 CISG, as raised by CLAIMANT [Cl. Mem. ¶65], is inapplicable [vi].

65. Ultimately, CLAIMANT bears the burden of proving non-conformity [ICC No. 6653; OLG Austria 1/7/1994; France 24/9/2003; BG Switz. 7/7/2004; Chicago Prime Packers; Netherlands Award 2002; Switzerland 14/1/1998].

(i) The pumps were fit for their ordinary use under Art. 35(2)(a) CISG

66. CLAIMANT could have argued that the pumps were not ‘fit for the purposes for which [pumps] of the same description would ordinarily be used’ [Art. 35(2)(a) CISG] given they could not be imported into, and therefore used in, Oceania. However, the ordinary use of the pumps was for irrigation works [Cl. Ex. 1]; for this, the pumps could be used.

67. Art. 35(2)(a) CISG primarily concerns the commerciality of the pumps [Schlechtriem 416]. CLAIMANT pointed out RESPONDENT wanted to re-export the pumps [Cl. Ex. 13], further demonstrating that the pumps were fit for commercial purposes.

68. Even if Art. 35(2)(a) CISG conformity were determined by reference to quality standards of a certain jurisdiction [UNCITRAL Digest ¶9], case law indicates that it is the laws of the
seller’s, i.e., RESPONDENT’s, jurisdiction that prevail [BG Ger. 8/3/1995; OG Austria 13/4/2000; L. & M. Internacional; BG Ger. 2/3/2005]. Not even CLAIMANT’s emphasis on Oceania’s strict regime [Cl. Ex. 2] suffices to reverse this [Netherlands 27/4/1999]. The pumps complied with Equatorianian laws [Cl. Ex. 6].

69. More importantly, none of the three Art. 35(2)(a) CISG exceptions apply [BG Ger. 8/3/1995; Medical Marketing]. First, Oceania’s national regulations are unique [PO2 ¶19]; secondly, CLAIMANT gave RESPONDENT notice of the military decree after the pumps had been shipped; and thirdly, there are no ‘special circumstances’ [BG Ger. 8/3/1995; Medical Marketing] giving rise to an exception. RESPONDENT had no experience in Oceania, nor ought it to have known of the military decree; it explicitly waived responsibility to monitor such changes [Cl. Ex. 6]. Nor was the decree an industry norm [OLG Ger. 31/3/1998].

70. Even though the German Supreme Court recently departed from BG Ger. 8/3/1995 [BG Ger. 2/3/2005], the latter turned not on regulations but on the fact that the pork traded was ‘potentially harmful for human health’ [Schlechtriem (2005)]. The decree here pertained to ‘environmental effects arising from the production of products’, as opposed to their use [Cl. Ex. 4, emphasis added]. Ultimately, the pumps were fit for use and would not harm human health [Cl. Ex. 6]. In any case, environmental effects in Oceania arising from ‘production’ [Cl. Ex. 4] are irrelevant to RESPONDENT as they would arise in Equatoriana, not Oceania.

71. Furthermore, even if Oceanian regulations apply, only those available at contract signing are relevant. In France 13/9/1995, e.g., it was held that the seller was obliged to observe regulations concerning product expiry dates applicable in France, the purchasing country. However, unlike this case, regulations concerning expiry dates were, by their nature, readily and publicly available at contract signing.

(ii) The pumps were also fit for any particular purpose made known, if at all, to RESPONDENT under Art. 35(2)(b) CISG

72. CLAIMANT could have argued that RESPONDENT knew that the pumps were to be used particularly for a government contract, which was susceptible to regulatory changes. However, critical to Art. 35(2)(b) CISG conformity is the act of making known the particular purpose to the seller [Schlechtriem (1998) 421–2]. Though CLAIMANT informed RESPONDENT of Oceania’s military decree [Cl. Ex. 11], that notice came after the pumps had been shipped and thus well after contract signing, rendering the notice wholly insufficient [Enderlein/Maskow 145; Schlechtriem 422]. Moreover, CLAIMANT never informed RESPONDENT of the Water Services contract’s precise requirements, having expressed only that the pumps were to be used for irrigation [Cl. Ex. 1] without any
stipulation as to beryllium content [PO2 ¶6]. Analogously, the seller in Spain 28/4/2004 was not informed of any specifications that had to be met and the seller’s certified high quality standard did not mean that it ought to have known of the buyer’s specific needs.

73. Even if a purpose was made known, the military decree did not fall within that purpose; it pertained to the ‘import or manufacture’ of products containing beryllium [Cl. Ex. 11, emphasis added], not to the ‘use’ of the pumps, i.e., not to their actual purpose.

74. At any rate, the circumstances show that CLAIMANT did not rely, or that it unreasonably relied, on RESPONDENT’s skill and judgment to ensure that the pumps were fit for a ‘particular purpose’ [Art. 35(2)(b) CISG]. First, CLAIMANT selected the pumps and thus influenced the manufacturing process [Enderlein/_maskow 146; Schlechtriem 422]; secondly, CLAIMANT did not reasonably rely on RESPONDENT where CLAIMANT had exclusive knowledge of Oceanian regulations [Cl. Ex. 6] and undertook to ‘keep [RESPONDENT] informed’ [Cl. Ex. 11, UNCITRAL Digest ¶10; BG Ger. 8/3/1995].

75. CLAIMANT could also have argued that the particular purpose contemplated public law changes in Oceania. For the reasons specified above [supra ¶¶66–71], however, the public law requirements were not applicable in these circumstances.

(iii) CLAIMANT’s early payment of full purchase price amounted to acceptance by conduct of pumps as being contract-compliant

76. CLAIMANT paid the full purchase price following shipment [Statement of Claim ¶13]. As that was not required by the contract [Cl. Ex. 3; cf DES Incoterms B1], RESPONDENT legitimately concluded that CLAIMANT accepted the pumps shipped as conforming to the modified contract [Netherlands 31/8/2005].

(iv) In any case, CLAIMANT ‘knew or could not have been unaware’ of potential lack of conformity at contract signing under Art. 35(3) CISG

77. Under Art. 35(3) CISG, RESPONDENT need not prove actual awareness on the part of CLAIMANT [Henschel 9]. At the date of contract signing, CLAIMANT ‘could not have been unaware of’ [Art. 35(3) CISG] the potential that the pumps might not conform to Oceanian regulations existing upon delivery. CLAIMANT was aware of the volatile political situation [Cl. Ex. 2], which could give rise to relevant regulatory changes.

(v) Thus, RESPONDENT is not liable for non-conformity under Art. 36 CISG

78. CLAIMANT asserts that RESPONDENT is liable for lack of conformity at passing of risk by virtue of Art. 36(1) CISG [Cl. Mem. ¶64]. The parties contracted under DES Incoterms [Art. 9(2) CISG; Lookofsky 23], which stipulates this [Cl. Mem. ¶55]. However, RESPONDENT supplied compliant pumps and did not breach Art. 36 CISG.
79. Further, RESPONDENT is not liable for non-conformity arising after passage of risk as it did not proffer and breach a specific guarantee that compliance would extend for a certain period [Art. 36(2) CISG; Lavameet]. RESPONDENT warranted only that the pumps complied with regulations known at contract signing [Statement of Defense ¶10]. Further, non-conformity under Art. 36 CISG generally concerns latent defects, such as food which expires early [Schlechtriem 435; Piltz §5 ¶20]. No latent defects existed here.

(vi) Art. 39 CISG, as raised by CLAIMANT, does not apply

80. CLAIMANT asserts that RESPONDENT could not rely on Art. 39 CISG [Cl. Mem. ¶65]. However, Art. 39 CISG does not apply as delivery had not yet occurred pursuant to DES Incoterms when CLAIMANT cancelled the contract [Cl. Ex. 13], an assumption upon which Art. 39 CISG operates [Netherlands Award 2002].

E. IN ANY CASE, ANY NON-CONFORMITY IS DUE TO AN ART. 79 CISG IMPEDIMENT, THAT BEING THE MILITARY DECREE

81. Should the Tribunal find that RESPONDENT delivered non-compliant pumps, RESPONDENT’s breach is exempted under Art. 79 CISG. A military decree restricting importation is a commonly accepted Art. 79 impediment [Brunner 206; ICC Force Majeure Clause ¶3(d)]. The military decree was beyond RESPONDENT’s control [Art. 79 CISG]. It was the sole cause of any breach [a], unforeseeable [b], unavoidable [c]. Further, RESPONDENT did not assume risk for it [d].

(i) The military decree was the sole cause of any non-conformity

82. RESPONDENT could not supply regulation-compliant pumps solely because of the military decree, where the Art. 79 exemption applies to obstacles that are the sole cause of failure to perform [Schlechtriem 818–9; Bianca/Bonell 583; Bulgaria Award 24/4/1996; Brunner 341–2]. But for the military decree, the pumps that RESPONDENT shipped conformed to the contract even as modified by the regulation change [supra ¶¶45–50].

(ii) The military decree was not reasonably foreseeable at contract signing

83. CLAIMANT could have argued that the military decree was foreseeable at date of contract signing because of Oceania’s nervous political situation [Cl. Ex. 2]. However, foreseeability of the military decree is a highly fact-specific determination [Brunner 159]. The military decree was, in fact, not reasonably foreseeable: first, at the time of contracting, there was no indication that Oceanian beryllium regulations would change [BG Switz. 24/4/2001]; secondly, the beryllium prohibition is ‘unique’ to Oceania [PO2 ¶19]; thirdly, CLAIMANT was always more aware of developments in Oceania than RESPONDENT, and in particular, RESPONDENT ‘was not aware of any plans to restrict the use of metal products that
CLAIMANT could have argued that foreseeability of the military decree is assessed at the date of modification on the basis of RESPONDENT’s warranty. However, the warranty was limited to conformity at date of contract signing [Statement of Defense ¶10; supra ¶¶51–62], and it had been agreed, by contract modification [supra ¶¶45–50], that RESPONDENT had ‘fulfilled [its] contractual obligation in that regard’ [Cl. Ex. 6].

Even if foreseeability of the military decree were to be assessed from the date of modification, it was nonetheless unforeseeable. At that point, RESPONDENT believed that even the first regulation change would be reversed because ‘[w]hoever drafted [it] … [did] not understand what they [were] doing’ [Cl. Ex. 6]. This belief is also demonstrated by RESPONDENT’s comment that compliance was needed only ‘for the present’ [Cl. Ex. 6].

(iii) RESPONDENT could not have avoided the consequences of the decree

CLAIMANT could have argued that RESPONDENT should have shipped the field pumps in an earlier shipment. RESPONDENT, however, could not have done so. The contract required single shipment [PO2 ¶11], which was the ‘less expensive’ course of action [PO2 ¶11]. It was up to CLAIMANT, as a buyer entering into what it hoped would be a long-term business relationship [Cl. Ex. 1, 13] and as drafter of the contract [Cl. Ex. 2], to provide some renegotiation or hardship clause should circumstances change [France 12/6/2001].

CLAIMANT could also have argued that RESPONDENT should have recalled the shipped pumps, procured new steel for replacement pumps, and reshipped them. However, economic ‘unaffordability’ may constitute an impediment [Brunner 212]; the thousands of dollars in costs [Cl. Ex. 6], months involved in remanufacturing and redelivering the pumps [Cl. Ex. 6, 7], would have been unreasonably excessive compared to CLAIMANT’s interest in receiving the pumps in a timely manner [Cl. Ex. 2, 8].

Furthermore, in contradistinction to Macromex v. Globex, CLAIMANT did not offer RESPONDENT an alternative to overcome the Art. 79 impediment, such as application to the Military Council for an individual exception. In fact, CLAIMANT dismissed this option and stated that it would still accept the pumps, and would instead inquire into ‘the consequences [of] delay’ [Cl. Ex. 11].

(iv) RESPONDENT did not assume the risk of such a military decree being imposed after the pumps were shipped

CLAIMANT could have argued that RESPONDENT assumed the risk of the military decree under its contractual warranty [Cl. Ex. 3] or through its role as a vendor supplying pumps to
CLAIMANT’s specifications. However, there was no assumption of risk. RESPONDENT did not intend the warranty extend beyond compliance at contract signing [Statement of Defense ¶10; supra ¶¶51–62], especially as the military decree was unforeseeable at contract signing as it did not yet exist [cf ICC 2216].

90. Finally, although the parties contracted under the DES Incoterms, ‘risk’ in DES Incoterms is interpreted narrowly [Ramberg 78, 98, 108, 164]. Under a narrow interpretation, unforeseeable trade prohibitions relieve the seller from his obligations.

Result of Issue II: RESPONDENT fulfilled its obligation, under the modified contract, to supply pumps conforming to the first regulation change. RESPONDENT had no obligation to supply pumps conforming to the military decree.

III. RESPONDENT DID NOT BREACH ITS CONTRACTUAL OBLIGATIONS BY DELIVERING PUMPS ON 6 JANUARY 2009

91. RESPONDENT did not breach its contractual obligations as the delivery date was modified [A] and RESPONDENT delivered pumps within the modified time [B]. CLAIMANT is not entitled to avoid the contract [C] or claim damages because RESPONDENT’s performance is exempted by Art. 79 CISG [D] or alternatively, Art. 80 CISG [E].

A. THE DELIVERY DATE WAS MODIFIED UNDER ART. 29 CISG

92. RESPONDENT agrees that the original contract date was modified on 24 November [Cl. Mem. ¶74]. There was ‘mere agreement’ in good faith for such modification [Art. 29 CISG; LG Ger. 26/9/1990; Honnold 202; Schlechtriem 329; Bergsten 55]. After RESPONDENT informed CLAIMANT that the pumps would be delivered later than scheduled [Cl. Ex. 7], CLAIMANT accepted this delay, stating ‘we will have to go along with you’ [Cl. Ex. 8] and paid for the pumps with this knowledge [Statement of Claim ¶13; Art. 8(2) CISG].

B. CONSEQUENTLY, RESPONDENT DID NOT BREACH THE CONTRACT BY DELIVERING ON 6 JANUARY 2009

93. The modified contract introduced no fixed delivery date [i]. Delivery on 6 January 2009 was well within a reasonable period [Art. 33(c) CISG]. Alternatively, the modified contract created only a fixed period for delivery under Art. 33(b) CISG [ii].

(i) The modified contract introduced no fixed delivery date

94. The parties did not intend to fix 22 December 2008 as the delivery date [a]. A reasonable delivery date under Art. 33(c) would require delivery by mid-January at the earliest [b].

a. 22 December 2008 was merely an estimated date and not a fixed date
Contrary to CLAIMANT’s assertion [Cl. Mem. ¶74], the parties did not agree that 22 December would be a fixed delivery date [Cl. Ex. 6, 7, 8].

96. CLAIMANT cannot unilaterally fix a delivery date simply by informing RESPONDENT after shipment that ‘any further delays [would put] ... the entire Water Services Contract at risk’ [Cl. Ex. 8]. Both parties must agree upon a fixed delivery date [J.M. Smithuis (Belgium); HvB Belgium 8/10/2004; S.A.R.L. Distribution (France); NV Boco (Belgium)].

97. Further, CLAIMANT was aware that RESPONDENT never intended to fix 22 December as a binding delivery date [Art. 8(1) CISG]. Approximately two and a half months after the contract modification, RESPONDENT stated that it would not be held responsible for any shipping delay [Cl. Ex. 6] and that the ship carrying the pumps ‘should pass the Isthmus canal around 29 November and arrive ... around 22 December’ [Cl. Ex. 7, emphasis added]. CLAIMANT knew or was not unaware from this imprecise language that 22 December was merely an estimate [Art. 8(1) CISG]. Alternatively, a reasonable person in CLAIMANT’s position would have understood that this was a mere approximation and not a legally binding promise to deliver on 22 December [Art. 8(2) CISG]. Courts have held that indefinite language such as ‘shoot[ing] for’ a date does not establish it as a fixed date [Norfolk Southern Railway (US)]. Rather, there must be definite language such as ‘would be delivered on’ [NV Boco (Belgium)]. Emphasising the urgency or imperativeness of a delivery date, as CLAIMANT did [Cl. Ex. 8], does not create a fixed date [NV Boco (Belgium); S.A.R.L. Distribution (France); Schlechtriem 397].

98. Additionally, 22 December was not a fixed delivery date considering Art. 9(2) CISG since it is not standard industry practice to set an exact delivery date for long haul ocean shipment [Secretariat Commentary Art. 31]. Rather, in international trade delivery, dates are commonly set in the form of a period to allow the seller some flexibility in shipment [Secretariat Commentary Art. 31], which is exactly what RESPONDENT intended to achieve by deliberately approximating delivery. For example, FedEx generally provides an estimated delivery period and only provides fixed dates for national delivery within the U.S. and Canada [FedEx] and UPS guarantees fixed date delivery only for air freight [UPS].

99. Many cases demonstrate agreement on a delivery period rather than a fixed date in international trade; of particular note, in AG Ger. 24/4/1990, delivery in ‘July, August, September + -’ was interpreted to require delivery within a period by sometime in September. It would be highly unusual for RESPONDENT to bind itself to a delivery date over which it had no control and where a slight change in the ship’s speed could potentially result in up to 10 days’ difference in delivery time [Sea Rates]. CLAIMANT has not discharged the burden
of proving that a fixed delivery date was agreed [Schelchtriem 400]. At most the parties agreed that 22 December was a non-binding delivery date, requiring delivery by a reasonable date [Art. 33(c) CISG; Schlechtriem 399, 402].

b. A reasonable delivery date would require delivery by early January

100. Since no delivery date was fixed, RESPONDENT was obliged to deliver the pumps within a reasonable time in all the circumstances [Bianca/Bonell 263–4; Schlechtriem 400]. CLAIMANT’s deadlines for pump delivery must be balanced with the fact that RESPONDENT needed to procure new steel from an overseas supplier for the P-52s, taking at least two weeks and the time in transit of five weeks from 2 August when the contract was modified [Cl. Ex. 6,7; Schlechtriem 400; Morrissey/Graves 164]. Considering the additional time required, distance covered and interests of the parties, delivery by early January would be the earliest reasonable date [DiMatteo 107; OLG Ger. 27/4/1999]. Comparably, in RbK (Belgium) 3/10/2001, modification of a four-week delivery period to ‘as soon as possible’, implied a reasonable period of six to seven weeks, within which the seller delivered.

101. Even for an average ten days [Sea Rates] cross-continental delivery from Italy to the Bahamas three months was reasonable [Russia Award 13/4/2006]. Although the distance between Oceania and Mediterraneo is unclear, at least 30 days was required for transit alone, making it comparable to longer shipping distances e.g. UK to Australia with about 22 days [Sea Rates]. RESPONDENT’s delivery on 6 January was therefore reasonable.

(ii) Alternatively, the modified contract only required delivery within a period, which had not expired on 6 January 2009

102. The correspondence of the parties indicated at best agreement for delivery within a fixed period, i.e., the length of the sea voyage [a]. RESPONDENT delivered the pumps by the end of this period [b] and thereby met its contractual obligations.

a. The period fixed was the length of the sea voyage

103. CLAIMANT could have argued that the parties agreed on a fixed period for delivery [Art. 33(b) CISG]. Applying reasonable person interpretation of the correspondence, the only determinable period is the length of the sea voyage [Art. 8 CISG]. RESPONDENT estimated the delivery date based on the length of the sea voyage [Cl. Ex. 7] and CLAIMANT accepted that it must ‘go along with [RESPONDENT]’ [Cl. Ex. 8]. The length of the sea voyage is an acceptable period for delivery despite not being a ‘calendar date’ [Schlechtriem 396].

b. RESPONDENT delivered the pumps by the end of this period

104. RESPONDENT delivered the pumps to CLAIMANT immediately at the end of the sea voyage in fulfilment of the modified contractual obligations [Art. 33(b) CISG]. While a buyer
may protect itself by setting a latest delivery date [Schlechtriem 397; BG Switz. 15/9/2000], CLAIMANT did not unequivocally do so, only stating that ‘there is little that can be done ... now’ and imperativeness of on-schedule delivery[Cl. Ex. 8].

C. CLAIMANT WRONGFULLY AVOIDED THE CONTRACT

105. Assuming but not conceding that delivery on 6 January 2009 constituted breach, CLAIMANT was still not entitled to avoid the contract [i]. Avoidance would only be possible if CLAIMANT had fixed an additional reasonable period for delivery, which it failed to do [iii]. Therefore, CLAIMANT wrongfully avoided the contract [iii].

(i) CLAIMANT was not entitled to avoid the contract for fundamental breach without granting additional time under Art. 47 CISG

106. Even if the Tribunal finds that RESPONDENT breached the delivery date, CLAIMANT was not entitled to avoid the contract on 5 January 2009 [Cl. Ex. 13] without first giving an ‘indispensable’ Art. 47 (1) CISG notice fixing an additional period for performance [Magnus 433; Koch 318; OLG Ger. 1/7/2002]. Unless RESPONDENT refuses to deliver, late delivery alone does not amount to fundamental breach [Art. 25 CISG; ICC 8128]. Otherwise, Art. 49(1)(b) CISG would have no purpose. Dispensing with this requirement is only acceptable if there is prolonged delay [Graffi 340–1; PC (Italy) 24/11/1989], which, contrary to CLAIMANT’s submission [Cl. Mem. ¶¶77–80], was not the case here for three reasons.

107. First, CLAIMANT contends that as time was of ‘special interest’, it was not obliged to set an additional period [Cl. Mem. ¶78; OLG Ger. 28/2/1997]. However, at the time of contracting, RESPONDENT did not reasonably foresee that late delivery would result in Water Services contract cancellation [OLG Ger. 24/4/1997; Schlechtriem 278–288; Enderlein/Maskow 115; Art. 25 CISG]. It was reasonable for RESPONDENT to assume that the pumps could still fulfill the Water Services contract even if they were delivered a few days later [Cl. Ex. 2]; it was aware only that delay in shipment might cause CLAIMANT to pay penalties. This would have been curable by damages and would not deprive CLAIMANT of its contractual expectations [PO2 ¶ 22; Enderlein/Maskow 112], in contrast to cases of fundamental breach where seasonal goods were delivered late and the buyer no longer had any use for them [CA (Italy) 20/3/1998; Audiencia Provincial (Spain) 20/6/1997; OLG Ger. 24/4/1997].

108. Secondly, a reasonable merchant in RESPONDENT’s position would not have foreseen that delivery would deprive CLAIMANT of the entirety of the Water Services contract [Art. 25 CISG; Schelchriem 289; Bianca/Bonell 218]. After all, late delivery occurs frequently in international trade and does not generally give rise to the right to avoid [Art. 9(2) CISG; Graffi 340; Mullis 351; OLG Ger. 28/2/1997; OLG Ger. 1/7/2002; Secretariat Commentary
Art. 43; CA (Italy) 20/3/1998; LG Ger. 27/3/1996. Contrary to CLAIMANT’s assertion [Cl. Mem. ¶77], the Water Services contract’s cancellation was not foreseeable merely because RESPONDENT had some awareness of Oceania’s political tensions; RESPONDENT was not a party to the Water Services contract and had no reason to monitor Oceania’s situation [Cl. Ex. 6, PO2 ¶¶5, 8; Statement of Claim ¶5]. Further, considering the costs and waste associated with avoidance, there is commercial interest in ensuring it should not be easily achievable without granting additional time for performance [Graffi 340–341; Magnus 423].

109. Finally, CLAIMANT’s reliance on OLG Ger. 28/2/1997 is unfounded on four grounds. First, in that case, the buyer granted the seller an additional period of nearly one month to perform. Secondly, the buyer informed the seller that late delivery would result in avoidance, whereas CLAIMANT did not do so [Cl. Ex. 8; PO2 ¶¶8, 22]. Thirdly, the seller left the buyer in complete uncertainty as to whether it would comply with its delivery obligations, whereas RESPONDENT, in good faith, affirmed when it would comply with its obligations [Cl. Ex. 10]. Fourthly, in that case fundamental breach arose from unfairness to the buyer; the three month delay caused the goods’ value to decline significantly by 70 percent [Magnus 434].

(ii) CLAIMANT did not fix an effective period of time under Art. 47 CISG

110. CLAIMANT asserts that it provided an effective Art. 47 CISG notice [Cl. Mem. ¶76]; CLAIMANT failed to fix an effective additional time for performance [a], precluding its right to avoid for fundamental breach [Art. 49 CISG; AG Ger. 24/4/1990; OLG Ger. 10/2/1994; OLG Ger. 22/2/1994; OLG Ger. 24/4/1997]. Even if the form of CLAIMANT’s Art. 47 notice is accepted, the length of time fixed is not reasonable in the circumstances [b].

a. CLAIMANT did not fix an additional period for performance under Art. 47 CISG in the appropriate form

111. First, CLAIMANT’s language was insufficiently certain. Although no particular form is required for such notice [Felemegas 183; Enderlein/Maskow 182], there must be specific demand for performance, a fixed date [Felemegas 183; OLG Ger. 24/4/1997] and notification that the buyer will not extend that deadline and will avoid [Bianca/Bonell 345; Magnus 426]. CLAIMANT’s statement that the ‘entire project may be at risk’ [Cl. Ex. 8, emphasis added] was not a sufficiently unequivocal demand for performance [Bianca/Bonell 345; Honnold 315], much like ‘prompt’ performance without a ‘conclusive and understandable’ deadline is insufficient [OLG Ger. 24/4/1997; Felemegas 183; Bianca/Bonell 345; Honnold 315].

112. Secondly, CLAIMANT’s tolerance of a week delay is not sufficient in the circumstances [Cl. Mem. ¶¶75–76]. Tolerance of delay only constitutes Art. 47(1) CISG notice where the buyers
have already tolerated continuous delays of weeks and repeated requests for performance [Société Giustina (France); Audiencia Provincial (Spain) 3/11/1997].

113. Thirdly, even if 22 December was a fixed delivery date, CLAIMANT’s statement about the importance of meeting strict deadlines only re-emphasised ‘what [RESPONDENT] already [knew]’ about Oceania’s political situation [Cl. Ex. 8]; it did not indicate that CLAIMANT intended to avoid the contract if RESPONDENT failed to deliver, which has been interpreted as necessary for an effective Art. 47(1) CISG notice [OLG Ger. 28/2/1997; Honnold 315; Official Records of CISG Conference ¶¶ 6–7; Bianca/Bonell 345; Magnus 426].

b. CLAIMANT did not fix an additional period of reasonable length for performance as required under Art. 47 CISG

114. Even if CLAIMANT ‘fixed’ an additional week as the final delivery date, this was too short [Cl. Mem. ¶75]; the fixed time must be ‘reasonable’ [Art. 47(1) CISG; Schlechtriem 556; Bianca/Bonell 345; Honnold 315; Enderlein/Markow 181]. A reasonable time would be at least three weeks from the original delivery date to account for shipping time [Perales Viscasillas 98]. After all, the sea voyage is at least one month [Cl. Ex. 7] and some regard must be had to shipping schedule and capacity [Schlechtriem 556]. Longer distances also justify longer ‘reasonable’ time periods e.g. for an average 12 day journey from Germany to Egypt, 11 weeks and from contiguous Germany to Denmark, four weeks was reasonable [OLG Ger. 24/5/1995; OLG Ger. 27/4/1999]. Furthermore, three weeks is reasonable considering that RESPONDENT had set 45 days for delivery [Cl Ex. 6] and the delay was not caused by any neglect of contractual duties per se by RESPONDENT [PECL 8:106 Comments (E); PO2 ¶12; Statement of Defense ¶11].

(iii) Thus, CLAIMANT wrongfully avoided the contract as the reasonable time had not expired

115. The reasonable period had not expired on 5 January 2009 [Cl. Ex. 13] when the contract was avoided, even if the period CLAIMANT waited before avoiding is added to the additional period [LG Ger. 21/3/1995]. CLAIMANT thus had no right to avoid [Art. 47(2) CISG].

D. FURTHER, CLAIMANT IS NOT ENTITLED TO DAMAGES AS ANY LATENESS IN DELIVERY IS EXEMPTED BY ART. 79 CISG

116. Even if RESPONDENT breached its delivery obligations under the contract, its breach is excused under Art. 79 CISG. The accident in the Isthmus canal constituted an uncontrollable, unforeseeable and unavoidable impediment under Art. 79(1) CISG that caused the late delivery [i]. As RESPONDENT did not assume responsibility for Art. 79 impediments [ii],
and notified CLAIMANT of the impediment in good faith [iii], RESPONDENT is not liable in damages for the late delivery.

(i) The Accident in the Isthmus Canal constituted an impediment

117. The accident in the Isthmus Canal amounted to an Art. 79 CISG impediment because it was beyond RESPONDENT’s control [a], it was not foreseeable [b], and RESPONDENT could not avoid the incident or its consequences [c]. Late delivery was caused by the accident [d].

a. The accident was beyond RESPONDENT’s control

118. The accident in the Isthmus Canal on 28 November caused extensive damage to the locks and led to a backlog of ships transiting in either direction [Statement of Claim ¶14]. Objectively considered, it was a ‘major accident’ outside RESPONDENT’s sphere of control [Schlechtriem 814; Bianca/Bonell 579, 584]. Similarly, poor weather conditions delaying transportation [CIETAC (PRC) 9/8/2002], an accident causing a ship to sink [CIETAC (PRC) 25/6/1997], and an accident between two ships resulting in closure of the Bosporus Strait [Russia Award 10/2/1996] were all considered impediments beyond the seller’s control.

119. First, RESPONDENT only has control over events within its own manufacturing processes e.g. concerning its personnel, production systems, data processing equipment and storage facilities [Schlechtriem 815–6; Enderlein/Maskow 321; Bulgaria Award 12/2/1998; Russia Award 16/3/1995; BG Ger. 24/3/1999; Netherlands 9/7/2008]. As RESPONDENT is not a freighter, it has no control over events that occur during the carriage of goods. As long as RESPONDENT forwards the goods to the carrier in a timely manner, which it did [PO2 ¶12], it is not liable in damages for any delay in delivery [HG Switz. 10/2/1999].

120. Secondly, the late delivery was caused by an unrelated third party’s accident. This impediment was not a ‘general commercial risk’ of contracting, such as market fluctuations, changed production costs or altered personal circumstances, which are all considered to be within the parties’ control [Bulgaria Award 12/2/1998; Schlechtriem 814; Bianca/Bonell 580; Enderlein/Maskow 322; Italy Award 14/1/1993; OLG Ger. 4/7/1997; CIETAC (PRC) 5/2006]. Moreover, RESPONDENT, by contracting under the DES Incoterm, assumed risks only for impediments causing ‘loss or damage’ to goods in transit, and not for shipping delays, which do not affect the pumps’ physical state [Turku Court of Appeal 18/2/1997].

121. Thirdly, the pumps are not generic goods that the RESPONDENT accepted control for procuring and delivering [BG Ger. 24/3/1999; ICC 9887]. CLAIMANT expressly contracted to purchase pumps specially manufactured to CLAIMANT’s technical specifications by RESPONDENT [Cl. Ex. 3]. The pumps were ‘unique’ goods for which RESPONDENT is
exempted from a failure to deliver under an Art. 79(1) CISG event [Secretariat Commentary Art. 65; Schlechtriem 816; Enderlein/ Maskow 320; Cl. Ex. 3; RE. Ex. 1; PO2 ¶6].

b. RESPONDENT could not reasonably have foreseen the accident

122. RESPONDENT could not be expected to have taken into account the possibility of a breakdown of the canal locks at the time of contracting, nor at the time of modification [Enderlein/ Maskow 323; Schlechtriem 817]. Ships are rarely delayed in the Isthmus Canal [PO2 ¶13] and a ten-day delay cannot be considered foreseeable simply because delay has occurred previously [Schlechtriem 817; Statement of Claim ¶14; Cl. Ex. 7, 9, 10; Bianca/Bonell 580–1; Enderlein/ Maskow 323; Perillo 121].

123. Where the consequences of an obvious risk are exceptionally severe, it has been held that the seller could not reasonably have foreseen the event [Raw Materials; Scaform (Belgium) 2009; RvK (Belgium) 2/5/1995]. Similarly in this case, although ships have been delayed in the Isthmus Canal before, RESPONDENT had no reason to foresee such an extensive delay [Cl. Ex. 7; Statement of Defense ¶12] when contracting, thereby constituting an unforeseeable impediment. Secondly, the accident occurred suddenly on 28 November 2008 [Statement of Claim ¶14], once the ship had set off, and is therefore distinguishable from cases where the impediment was already in place at the time of contracting [Netherlands 2/10/1998]. Accidents causing prolonged transportation delays are generally considered unforeseeable impediments [ICC Force majeure clause (Brunner 566); HG Switz. 10/2/1999].

c. RESPONDENT could not have avoided the consequences of the accident

124. CLAIMANT could have argued RESPONDENT ought to have arranged separate shipment; sent the pumps by air freight; taken a different route; or, obtained field pumps from Trading Company. However, these measures were not reasonably available to RESPONDENT and would not have avoided the consequences of the impediment [Schlechtriem 818].

125. First, the contract required single delivery [Cl. Ex. 3; DES Incoterm]. Therefore, RESPONDENT could not arrange separate shipment or air freight without CLAIMANT’s agreement [PO2 ¶11]. Since RESPONDENT was unaware of the consequences attached to late delivery for CLAIMANT [Cl. Ex. 6; PO2 ¶22], it relied on CLAIMANT’s silence to assume that single shipment was sufficient. RESPONDENT was responsible for arranging delivery under the DES Incoterm and would have borne significant costs under alternative delivery methods [PO2 ¶14]. This is not within the scope of the rule that a promisor must bear increased costs and even a business loss [Scaform (Belgium) 2005] since RESPONDENT was not obliged to take preventative measures against the general risk of accidents.
[Schlechtriem 818; Liu 4.5]. It was therefore reasonable for RESPONDENT to assume shipment would arrive in time for CLAIMANT’s purposes [Statement of Defense ¶12].

126. Secondly, once the pumps had been given to the freight forwarder, RESPONDENT no longer had control over the pumps [BG Ger. 24/3/1999] and is not responsible for the carrier’s delay [HG Switz. 10/2/1999]. Once loaded, the ‘task of removing any single container out of sequence [was] time consuming and expensive’ [PO2 ¶14]. Nevertheless, RESPONDENT did all it could by inquiring about alternative routes after the accident [Cl. Ex. 9; AAA Award 23/10/2007]. In any case, alternative shipping routes, including unloading for air freight, would not have delivered the pumps earlier [PO2 ¶14; Cl. Ex. 9].

127. Thirdly, RESPONDENT had no express contractual obligation to acquire pumps from other suppliers [Cl. Ex. 3] such as Trading Company [OLG Ger. 28/2/1999; Hamburg Award 21/6/1996]. RESPONDENT had contracted to manufacture pumps for CLAIMANT’s needs and was not obliged to source pumps from other suppliers [Statement of Claim ¶4; Cl. Ex. 3; Re. Ex. 1]. Further, RESPONDENT was not aware that Trading Company existed [PO2 ¶23; Enderlein/Maskow] and RESPONDENT was under no duty to establish business relations in a narrow timeframe with a supplier in CLAIMANT’s country [Cl. Ex. 10] and CLAIMANT was better placed to know of suppliers in its own region [Statement of Claim ¶2].

d. The accident caused late delivery of the pumps

128. CLAIMANT could argue that late delivery was caused by the modification of the contract. However, the accident is the sole cause of late delivery [Schlechtriem 818]. Had it not occurred, RESPONDENT would have been able to deliver the pumps in time for CLAIMANT to fulfil its Water Services Contract deadlines [Statement of Defense ¶12; Cl. Ex. 7]. Alternatively, an impediment need not be the ‘sole’ cause of failure to perform as long as the impediment ‘consumes’ any other causes [Enderlein/Maskow 321; Liu 4.6; cf Schlechtriem 818; Bianca/Bonnell 583]. RESPONDENT was not in breach at the time of the accident therefore it was the overriding event causing RESPONDENT’s late performance [AAA Award 23/8/2007; Hungary Award 10/12/1996; Bulgaria Award 24/4/1996].

(ii) RESPONDENT did not assume the risk of the accident in the Isthmus Canal because the DES Incoterm does not apply to Art. 79 CISG

129. The DES Incoterm, under which the parties contracted [Cl. Ex. 3], only allocates risks of loss or damage to the goods to RESPONDENT, neither of which occurred in this case [Incoterms 2000 Interpretation (DES)]. The DES Incoterm is not a force majeure clause, nor is it capable of allocating liability for Art. 79 CISG impediments to RESPONDENT because Incoterms do not deal with exemptions under Art. 79 CISG or with remedies for breach of contract [Turku
130. Alternatively, CLAIMANT’s highly unusual prepayment of the pumps before their arrival, together with its statement ‘we will have to go along with you’ [Cl. Ex. 8], altered the DES Incoterm risk allocation. CLAIMANT’s prepayment was an implicit acceptance of risk for loss or damage to the goods in transit [Farnsworth 345], analogous to the CIF Incoterm 2000. Similarly, in Russia Award 6/6/2000, the CIF Incoterm applied where the parties’ actions were in accordance with this trade usage [Art. 9(2) CISG], notwithstanding that it was not expressly incorporated.

(iii) RESPONDENT gave CLAIMANT notice and acted in good faith

131. RESPONDENT informed CLAIMANT of the impediment as soon as it came to its knowledge [Cl. Ex. 9, 10] and thereby fulfilled its notification obligations under Art. 79(4) CISG. Furthermore, RESPONDENT is not attempting to escape its contractual obligations and by relying on an impediment; RESPONDENT acted in good faith at all times [AAA 23/10/2007; France Award 19/1/1998]. RESPONDENT arranged for shipping as soon as practicable [PO2 ¶12] and did not delay performance through negligence, self-interest or bad faith, indeed, at all times RESPONDENT acted in accordance with CLAIMANT’s interests [Statement of Defense ¶11; Re. Ex. 1; PO2 ¶12]. In fact, RESPONDENT exceeded good faith requirements by abandoning its $30,000 claim for the cost producing beryllium-free P-52 pumps to ensure that CLAIMANT does not suffer any further loss [Cl. Ex. 15].

E. ALTERNATIVELY, ANY LATE DELIVERY IS EXEMPTED UNDER ART. 80 CISG

132. RESPONDENT was prepared to ship all the pumps required by the contract around 30 October 2008 [Cl. Ex. 6]. The modification was an act under Art. 80 CISG that caused shipment of the pumps to be delayed until 22 November 2008. RESPONDENT did not accept liability for this. CLAIMANT’s involvement in the shipping delay should, under good faith principles, restrict its right to claim contractual remedies [Art. 80 CISG; OLG Ger. 25/6/1997; Eximin (Israel); ICC 8817; Butler 506; Schäfer 253].

133. Had CLAIMANT not requested beryllium-free pumps, RESPONDENT could have delivered the pumps by 30 October 2008 [Cl. Ex. 6]. Consequently, the ship would have transited the Isthmus Canal three weeks earlier and arrived in time [Statement of Defense ¶12]. CLAIMANT should therefore be prevented from claiming damages [LG Ger. 9/7/1992].

Result of Issue III: RESPONDENT did not breach its delivery obligations. Even if there was a breach, it is excused under either Art. 79 or Art. 80 CISG.
IV. CLAIMANT FAILED TO MITIGATE UNDER ART. 77 CISG

134. CLAIMANT did not take any actions to mitigate losses arising from the cancellation of the Water Services contract. CLAIMANT’s avoidance of the contract on 5 January 2009, failed attempt to resell the pumps, provision of political updates and requests for delivery were all insufficient measures for mitigation [A]. CLAIMANT failed also to pursue other reasonable measures available [B]. Consequently, CLAIMANT should be precluded from claiming the entirety of its damages [C]. Further, CLAIMANT is not entitled to restitution [D].

A. CLAIMANT DID NOT ADOPT CORE MEASURES OF MITIGATION

135. CLAIMANT’s avoidance of the contract [i] and attempt to resell the pumps [ii] did not mitigate losses, nor did providing political updates and requesting delivery [iii].

(i) CLAIMANT’s avoidance of the contract did not constitute mitigation

136. CLAIMANT could argue that avoidance of the contract constitutes mitigation. However, CLAIMANT’s avoidance of the contract on 5 January 2009 was too late to be effective since losses stemming from the Water Services contract cancellation could no longer be overcome. CLAIMANT concedes it was obliged to take reasonable measures to mitigate losses, relying on ICC 8817 [Cl. Mem. ¶91]. This case applies in RESPONDENT’s favor since CLAIMANT’s sudden rupture of contract obliges it to indemnify RESPONDENT for losses.

137. First, CLAIMANT notified RESPONDENT on 2 August 2008 that changed product specifications ‘will delay the completion of the job by several weeks’ [Cl. Ex. 6] while over four months later, on 24 November 2008, CLAIMANT voiced concerns about the one week delay without indicating any intention to avoid the contract [Cl. Ex. 8].

138. Secondly, CLAIMANT was aware that shipping delays would occur through notices on 2 August 2008, 28 November 2008 and 12 December 2008 [Cl. Ex. 6, 9, 10; Russia Award 27/7/1999]. CLAIMANT was aware also of a high probability that the contract would be cancelled if no pumps arrived before 2 January 2009 [Re. Ex. 2; Cl. Ex. 11].

139. Thirdly, CLAIMANT failed to act in good faith, whereas RESPONDENT arranged for shipment as soon as practicable [Statement of Claim ¶12] and made enquiries as to speedier shipping routes [Cl. Ex. 9] when it was not contractually obliged to [cf Art. 7(1) CISG]. CLAIMANT, acting bona fide, could have—but failed to—avoided the contract and entered a substitute transaction between 2 August and 22 November 2008 [Statement of Claim ¶12]. Consequently, avoidance alone does not constitute mitigation; it ought to have been complemented by a substitute transaction [Russia 10/2/2000 ¶50; Zeller 110–4].
140. Fourthly, CLAIMANT failed to refer to Art. 76 CISG when claiming damages, which constitutes failure to mitigate; even if the seller refuses to deliver, the buyer is entitled to only 10 per cent of the purchase price [Russia 10/2/2000]. RESPONDENT, contrastingly, did not even express ‘serious and final refusal to perform’ [OLG Ger. 28/2/1997].

(ii) CLAIMANT’s attempt to resell the pumps does not constitute mitigation
141. CLAIMANT effectively ignored the situation by taking no proactive measures to mitigate losses [Zeller (2005); Zeller 112; OLG Ger. 28/2/1997]. Further, since some pumps would have been sold by 22 April 2009 at the latest [Re. Ex. 3], CLAIMANT contravened Art. 77 CISG [Russia 10/2/2000; HG Switz. 3/12/2002].

(iii) Political updates and requests for delivery did not amount to mitigation
142. CLAIMANT asserts that it mitigated losses by informing RESPONDENT of Oceania’s political situation [Cl. Mem. ¶99]. However, CLAIMANT, merely noted nervousness in Oceania [Cl. Ex. 2, 8] without suggesting that the Water Services contract may be cancelled.
143. CLAIMANT asserts that it mitigated losses by repeatedly requesting delivery of pumps [Cl. Mem. ¶99]. However, once the pumps left Equatoriana, there was ‘little that [could] be done’ [Cl. Ex. 8] as delivery was out of RESPONDENT’s control [supra ¶104; Ukraine Award 2005]. Further, CLAIMANT could have procured pumps from, e.g., Trading Company, since it was not contractually obliged to procure pumps from RESPONDENT [PO2 ¶25].

B. CLAIMANT FAILED TO TAKE OTHER MEASURES OF MITIGATION
144. A reasonable businessman in CLAIMANT’s position, anticipating the loss [Schlechtriem 788] and acting in good faith [OG Austria 6/2/1996], would have prevented the Water Services contract cancellation by other reasonable measures. CLAIMANT ought to have requested delivery of the field pumps in a separate shipment [i]; made a cover purchase pending RESPONDENT’s delivery [ii]; sought an exemption from the Military Council Office [iii]; or continued attempts to resell the pumps [iv].

(i) CLAIMANT ought to have arranged, or requested, separate shipment of the field pumps when they were ready on 30 October 2008
145. Partial delivery would have reduced losses [a] and was a reasonable measure [b].

a. Separate shipments would have minimised losses
146. Had all pumps, except the new P-52s, been shipped when originally manufactured, or had CLAIMANT procured Trading Company’s pumps, most of the pumps would have arrived by 15 December 2008 [Statement of Claim ¶12]. CLAIMANT knew that partial delivery could prevent contract cancellation: ‘it would help if there could be at least partial delivery … by 2 January 2009’ [Re. Ex. 2; Cl. Ex. 11; Saidov 133].
b. Separate shipment was a reasonable measure in the circumstances

147. Since it was aware the pumps would be delivered later than originally contracted for and had knowledge of the consequences of delay for the irrigation project, CLAIMANT was responsible for finding at least temporary replacement pumps for the period of delay [OG Austria 14/1/2002]. CLAIMANT admits that the only reason it did not request multiple shipment was on economic grounds [Cl. Mem. ¶102]. This is unacceptable on three grounds.

148. First, given the potential financial consequences of losing the Water Services contract, CLAIMANT had a real interest in keeping the contract on foot [Cl. Ex. 2] and in contrast to cases where parties were excused from entering substitute transaction, CLAIMANT had the requisite financial resources to do so [PO2 ¶26; NV Maes (Belgium)]. Secondly, CLAIMANT concedes it could have recovered any costs incurred from RESPONDENT had it taken this measure [Cl. Mem. ¶103 citing China 1996]. Thirdly, CLAIMANT could have requested modification requiring separate shipments of the field and P52 pumps [Art. 29 CISG; PO2 ¶11; Cl. Ex. 3] around 30 October when the field pumps were nearly ready. After all, the single shipment requirement had been merely a matter of convenience for the parties [PO2 ¶11]. This measure should be considered reasonable as CLAIMANT was aware of the harmful consequences of delay [Cl. Mem. ¶¶56–60] and a reasonable business person with CLAIMANT’s experience would have been more proactive in securing the continuation of the Water Services contract [Art. 7(1) CISG; BG Ger. 31/10/2001; OLG Ger. 25/6/1997; OLG Ger. 21/5/1996; LG Ger. 27/3/1996]. Indeed, on 28 December 2008, CLAIMANT was ‘urged’ by the Water Services procurement officer to exhaust any possible avenues to effect ‘at least partial delivery … [to] conform to the contract’ [Re. Ex. 2]. Such commercial prudence was not exercised [PO2 ¶11]; rather, CLAIMANT demonstrated passivity and complacency, asserting that such action was futile and ‘too speculative’ [Cl. Mem. ¶¶101–2, 104] and merely ‘inform[ing] RESPONDENT of developments as [it] learnt of them’ [Cl. Ex. 11]. Once CLAIMANT knew that delivery of the pumps would not be in time to avoid contract cancellation, it had an affirmative duty to act, yet it failed to do so [Lookofsky 157]

(ii) CLAIMANT ought to have made a cover purchase

149. A cover purchase would have minimised losses [a] and was a reasonable measure [b].

a. A cover purchase would have minimised losses

150. A cover purchase would have facilitated partial delivery for the Water Services contract, in turn preventing cancellation [supra ¶146]. Had CLAIMANT procured a cover purchase from Trading Company (or any other supplier) at the latest three days after Water Services urged it
to effect partial delivery [Re. Ex. 2], the pumps could have been installed by 2 January 2009 to comply with the Water Services contract [Re. Ex. 3; PO2 ¶18; PO2 ¶25].

b. A cover purchase was a reasonable measure in the circumstances

151. Cover purchases are a reasonable and ‘typical’ measure of mitigation [Schlechtriem 791–2; Ukraine Award 2005; Austria Award 15/6/1994; Saidov 133]. This is especially so, given CLAIMANT’s international business acumen [Cl. Ex. 1, 2; PO2 ¶19], familiarity with at least Trading Company (and possibly other suppliers) [PO2 ¶23], financial resources [PO2 ¶26] and the importance of on-time delivery [Cl. Ex. 7, 8]. Trading Company pumps would have been delivered by 2 January 2009, as required, thus preventing the Water Services contract cancellation [supra ¶146]. Further, the Trading Company pumps were easy to source [PO2 ¶23] and were suitable replacements for RESPONDENT’s pumps [PO2 ¶25].

152. CLAIMANT ought to have made a cover purchase to mitigate its losses [NV Maes (Belgium)]. It was certainly reasonable for CLAIMANT to purchase pumps from a company in CLAIMANT’s own country readily selling compliant pumps [Re. Ex. 3; PO2 ¶25; Hamburg Award 21/6/1996], particularly since courts have held that buyers have a responsibility to make cover purchases outside their own region [OLG Ger. 2/9/1998].

(iii) CLAIMANT ought to have sought an exemption for the field pumps

153. CLAIMANT could have mitigated losses by seeking an exception for contract cancellation from the Military Council [a] and this measure was reasonable [b].

a. Seeking an exemption would have minimised losses

154. If an exemption had been granted, the Water Services contract cancellation could have been reversed and the resulting losses would have been avoided.

b. Seeking an exemption was a reasonable measure of mitigation

155. CLAIMANT argued that seeking an exemption was unreasonable since the military council was not yet created [Cl. Mem. ¶92]. However, from 16 April 2009, when exemptions were granted [PO2 ¶20], CLAIMANT had a reasonable chance of success; 37 percent in fact [PO2 ¶20], i.e., greater than one in three. CLAIMANT should have for good faith sought an exception, especially given RESPONDENT’s efforts to comply with the 1 August regulation change. Finally, seeking an exemption would not have put CLAIMANT at any undue, unreasonable or excessive expense or risk.

(iv) CLAIMANT ought to have continued attempts to resell or re-used the pumps

156. Further attempts to resell or re-use the pumps would have minimised losses [a] and was a reasonable measure in the circumstances [b].

a. Further attempts to resell or re-use the pumps would have minimised losses
157. CLAIMANT could have resold at least a quarter of the pumps by 22 April 2009 [Re. Ex. 3]. In so doing, CLAIMANT could have recouped some of the purchase price. Indeed, similar pumps were sold by Trading Company [Re. Ex. 2], indicating the presence of a buyer. CLAIMANT could also have used the pumps for another irrigation project since it was in the business of implementing irrigation projects in seven countries [Statement of Claim ¶2].

**b. Further attempts to resell or re-use the pumps was a reasonable measure**

158. Resale of goods is a reasonable measure of mitigation [OG Austria 24/1/2002; Saidov 141] and at least one buyer existed around April 2009 [Re. Ex. 3]. CLAIMANT cannot assert that RESPONDENT ought to have instructed it on disposing of the pumps [Cl. Mem. ¶95]; no such obligation arises under Art. 88 CISG. In any case, as an experienced specialist retailer [Statement of Claim ¶2], CLAIMANT should not require instructions; such inaction confirms its complacency. Further, it is expected that buyers will ‘channel the resources’ in a different direction to mitigate losses, therefore re-using pumps in another project is yet another step CLAIMANT failed to take [Saidov 134; HG Switz. 3/12/2002].

**C. CLAIMANT IS NOT ENTITLED TO DAMAGES UNDER ART. 77 CISG**

159. Since CLAIMANT failed to mitigate loss, its request for damages should be reduced to losses suffered had it adopted reasonable measures of mitigation [Art. 77 CISG; BG Ger. 24/3/1999; OLG Ger. 8/2/1995; Schlechtriem 792; Enderlein/Maskow Art. 77; Lookofsky 135–6].

**D. CLAIMANT IS ALSO NOT ENTITLED TO RESTITUTION**

160. CLAIMANT purports that its avoidance is sufficient to entitle it to restitution [Cl. Mem. ¶88] on the assumption that it avoided within a reasonable time [Cl. Mem. ¶66]. CLAIMANT did not avoid the contract in a timely manner [supra ¶¶136–40]. At any rate, avoidance was premised on Water Services’ cancellation rather than any breach by RESPONDENT, contrary to good faith in international trade [Art. 7(1) CISG].

Result of Issue IV: CLAIMANT’s failure to mitigate loss precludes it from recovering damages from Water Services contract cancellation.

**REQUEST FOR RELIEF**

RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal has no jurisdiction as the precondition to arbitration was not fulfilled;
2. RESPONDENT did not breach its obligations to provide regulation-compliant pumps;
3. RESPONDENT did not breach its obligation to deliver by the agreed delivery date;
4. CLAIMANT failed to mitigate its losses, precluding it from recovering damages;
5. RESPONDENT should be awarded the costs of the arbitration.