SEVENTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2009-2010

MEMORANDUM FOR RESPONDENT

ON BEHALF OF
Equatoriana Super Pumps S.A.
58 Industrial Road
Oceanside, Equatoriana

AGAINST
Mediterraneo Engineering Co.
415 Industrial Street
Capital City, Mediterraneo

RESPONDENT

CLAIMANT

University of Ottawa
Faculty of Law

Heather Geertsma, Jean-Christophe Martel, Gregory Miskie,
Aida Setrakian, Kristina Vranjkovic
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(i) The text of the sales contract indicates that the standard of conformity was determined by the regulations in force at the time of the conclusion of the contract

(ii) The parties agreed on a warranty, not a guarantee

(iii) The parties’ behaviour subsequent to the conclusion of the contract demonstrated the understanding that the respondent was not contractually bound to conform to changes in Oceania

(iv) Interpreting the warranty as requiring the Respondent to assume the risk of changes in regulations is commercially unreasonable

(v) The contra proferentem rule of interpretation is not applicable

(vi) The time of assessment for conformity is the passing of risk, while the standard of assessment for conformity remains the regulations in force at the contract conclusion

B. The Pumps Delivered By The Respondent Were Fit For Their Ordinary Purpose

C. The Seller’s Duty To Deliver Goods That Are Fit For Their Particular Purpose Did Not Require The Respondent To Adapt To Changes In Regulations In Oceania

(i) The circumstances show that the Claimant did not rely on the Respondent’s skill and judgment to adapt to new regulations in Oceania

(ii) In any event, Article 35(2)(b) CISG does not require the seller to adapt to changing regulations in the country of use

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(i) On 2 August 2008 the Respondent made an offer to modify the sales contract

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<td>CEO</td>
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**University of Ottawa**

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Preliminary Matters

I. Statement of Facts

1. The Respondent, Equatoriana Super Pumps S.A., is a corporation organized under the laws of Equatoriana that manufactures pumps for agricultural, municipal, and industrial water and engineering systems. The Claimant, Mediterraneo Engineering Co., is a corporation based in Mediterraneo that provides planning services for urban and rural development, with a focus on irrigation projects.

2. On 4 May 2008, the Claimant informed the Respondent that it was considering responding to a contract tender for the renewal of an irrigation project in Oceania, a country contiguous to Mediterraneo, and that it would be interested in purchasing the necessary pumps from the Respondent. The Respondent agreed to work on the bid and if the bid was successful, to furnish the pumps. The Respondent suggested which pumps were required to fulfill the tender as well as their prices. On 25 June 2008, Oceania Water Services (“OWS”) awarded the contract to the Claimant.

3. The Claimant and the Respondent entered into the sales contract on 1 July 2008. The Respondent agreed to sell field pumps from its N-Series as well as three P-52 pumps, for US$1,214,550 and deliver them to Capitol City, Mediterraneo. The contract required delivery according to DES (Incoterms 2000) in a single shipment completed by 15 December 2008. Upon request from the Claimant, the Respondent included a warranty in the contract that the pumps be compliant for importation into Mediterraneo and for use in Oceania. The sales contract also included a multi-tiered dispute resolution clause, stipulating that the parties would first attempt to resolve disputes arising out of the contract through conciliation, followed by arbitration if necessary.

4. On 1 August 2008, Oceania adopted a regulation restricting the use of beryllium in steel products that had moving parts and that were to be used in enclosed spaces, thereby affecting the P-52 pumps. On 1 August 2008, the Claimant informed the Respondent of the regulation change and indicated that steel from another source would have to be used to manufacture the pumps. On 2 August 2008, the Respondent replied that the changes would delay completion and delivery as well as increase costs by US$30,000. On 15 November 2008, the Respondent completed the manufacture of the beryllium-free pumps. They were shipped on 22 November 2008 with an expected arrival date of 22 December 2008.
5. While in transit, an accident at the Isthmus Canal occurred on 28 November 2008, a day before the ship was expected to transit the canal. The Respondent advised the Claimant of the accident and the resulting anticipated delay. On 12 December 2008, the Respondent informed the Claimant that the ship had transited the canal. As a result of the accident, the pumps were due to arrive in Mediterraneo on 6 January 2009.

6. Meanwhile, a military coup occurred in Oceania on 1 December 2008. The new regime passed a decree on 28 December 2008 taking effect 1 January 2009 that prohibited the importation of products containing any amount of beryllium. The regime also set a policy of cancelling any foreign contracts with breached terms and cancelled several projects. A spokesman for the regime said that an appeal office was expected to be functioning within two months.

7. On 28 December 2008, a procurement officer from OWS informed the Claimant that delivery on 6 January 2009 would be too late and that the procurement contract was in serious risk of being cancelled. The officer indicated that it would help if there could be at least partial delivery of pumps by 2 January 2009. Some field pumps that conformed to the contract were available for sale by a trading company in Mediterraneo in November that could have been bought and shipped to Oceania within 36 hours.

8. The Claimant did not purchase these pumps and on 5 January 2009, OWS cancelled the procurement contract with the Claimant due to late delivery. On 5 January 2009, the Claimant cancelled the sales contract for the pumps for reason of failure to deliver regulatory compliant pumps by the contract deadline.

9. On 18 March 2009, the Claimant suggested to the Respondent that the parties attempt conciliation pursuant to the arbitration clause of the sales contract. The conciliation took place in Vindobona, Danubia from 28 to 30 May 2009. The conciliation was unsuccessful and on 4 June 2009, the conciliator stated that efforts at conciliation were no longer justified. A week following the conciliation, the Respondent learned that the Claimant was represented by its Deputy CEO, rather than its CEO as stipulated in the contract.

II. SUMMARY OF ARGUMENTS

11. **The arbitral tribunal does not have jurisdiction to hear the dispute.** The condition precedent to arbitration was not properly fulfilled. The multi-tiered arbitration clause in the sales contract called for the parties to resolve any dispute first through conciliation. The sales contract also stipulated that the parties would be represented by their CEOs, yet the Claimant was represented by its Deputy CEO. The parties must return to conciliation to properly fulfill the mandatory condition precedent to arbitration. Moreover, an award made in favour of the Claimant would be unenforceable.

12. **The Respondent did not have the obligation to provide pumps that were in conformity with regulations adopted by Oceania after the conclusion of the sales contract.** A textual and contextual interpretation of the warranty in clause 2 of the sales contract shows that the standard of conformity contracted for by the parties was the regulations in force in Oceania at the time of the conclusion of the sales contract. The Respondent complied with the requirements of the contract since the pumps were fit for their ordinary purpose at their delivery. Finally, the seller’s duty to provide goods fit for their particular purpose did not require the Respondent to adapt to regulations adopted by Oceania after the sales contract’s conclusion.

13. **The sales contract was modified to extend the delivery deadline to 23 December 2008.** The Respondent offered a modification on 2 August 2008, which included an additional US$30,000, a reasonable delay and beryllium-free P-52 pumps. The Claimant’s response was silence, which should be interpreted as acceptance given the circumstances. In the alternative, the 1 August 2008 Oceania regulation created a hardship for the Claimant and the tribunal should alleviate the hardship by adapting the contract. If the tribunal decides that the Respondent had an ongoing conformity obligation, the sales contract was still modified by the parties’ correspondence on 22 and 24 November 2008.

14. **The Respondent should not reimburse the purchase price, as the Claimant failed to properly avoid the contract.** On 12 December 2008 the Respondent requested the Claimant to make it known whether it would accept delivery on 6 January 2009. Under Article 48(2) CISG where such a request is made, if the Claimant does not object the Respondent can deliver on the specified date. The Claimant did not object, thereby
foregoing its right to avoid the contract until 6 January 2009. Further, the Claimant cannot avoid the contract as the breach was not fundamental.

15. **The Respondent is not liable for the Claimant’s damages, namely the loss of the procurement contract.** The Respondent is not liable for the damages because the cancellation of the procurement contract was unforeseeable at the conclusion of the sales contract. In addition, the Respondent is not liable because the Claimant did not mitigate the losses by taking reasonable measures. The Claimant was aware of the probability of the procurement contract being cancelled on 28 December 2008, but took none of the reasonable mitigation measures available. In any event, the Respondent is exempt from damages due to the accident on the Isthmus Canal.

**III. EXPLANATION**

16. This memorandum responds directly to the Doshisha University Claimant’s memorandum. Owing to the nature of the moot, it will also address arguments that could be raised by the Claimant beyond those found in the Doshisha memorandum.

17. This memorandum responds to Procedural Order 1, as amended by Procedural Order 2.

**IV. APPLICABLE LAWS AND RULES**

**A. The Law Applicable To The Arbitration Is Danubia’s Arbitration Law**

18. The parties have chosen Danubia as the seat of arbitration, therefore the *lex arbitri*, which governs the arbitration, is the law of Danubia [*Redfern and Hunter ¶2, 19; Cl. Ex. 3*]. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration (“MAL”) with the 2006 amendments [*Cl. Stmt. Clm. ¶25*]. The MAL applies to all international commercial arbitrations that take place in the territory of Danubia [*MAL Art. 1(1), (2)*]. The arbitration is international since the parties have their places of business in different states [*MAL Art. 1(3)(a)*]. In addition, Equatoriana, Mediterraneo, Oceania and Danubia are parties to the *New York Convention* [*Cl. Stmt. Clm. ¶25*].

19. The fact that the arbitration agreement is a multi-tiered arbitration clause does not exclude it from the MAL’s scope. Agreements that provide for more than one tier of dispute resolution that ultimately culminate in arbitration still constitute arbitration agreements for the purpose of international arbitration conventions and national legislation [*Born 242;*]
The presence of the conciliation step in clause 18 of the sales contract, which requires parties to conciliate before either party can commence arbitration proceedings, does not change its character as an arbitration clause [Cl. Ex. 3]. The first tier of the arbitration agreement is governed by the law applicable to the conciliation. However, the agreement as a whole is still subject to the provisions of the *New York Convention* and the MAL. In addition, the parties have selected the ACICA Rules to apply to their dispute [Cl. Ex. 3].

20. The Tribunal’s discretion to decide if they have jurisdiction to hear the dispute comes from the principle of competence-competence [*Gaillard/Savage 213-14*]. This principle is stated in Article 16(1) of the MAL and is also stated in the ACICA Rule 24.1.

**B. The Law Applicable To The Conciliation Was The MCL**

21. Danubia has adopted the UNCITRAL Model Law on International Commercial Conciliation ("MCL") [*Cl. Stmt. Clm. ¶25*]. The MCL applies to all international commercial conciliations taking place in Danubia [*MCL Art. 1(1)*]. Article 1(8) indicates that the MCL applies irrespective of the basis upon which the conciliation is carried out, whether it be an agreement between the parties or legal obligation [*Van Ginkel 7; UNCITRAL Guide ¶20; Working Group 35th Session ¶20*]. As a result, the MCL applied to the parties’ conciliation as it took place in Danubia.

22. Article 6(1) of the MCL permits parties to agree on a set of rules to govern the conduct of the conciliation [*UNCITRAL Guide ¶53*]. Accordingly, the parties have also designated the UNCITRAL Conciliation Rules to govern their conciliation [Cl. Ex. 3]. While the MCL applies to attempts at conciliation, it applies only insofar as its provisions do not conflict with the Conciliation Rules, with the exception of the MCL’s mandatory provisions [*MCL Art. 3; UNCITRAL Guide ¶42*]. As such, the Conciliation Rules, along with the MCL, governed the conciliation proceeding.

**C. The Law Applicable To The Sales Contract Is The CISG**

23. The law applicable to the sales contract is the CISG. The CISG applies as the three requirements of Article 1(1)(a) CISG are met.
24. First, there was a sale of goods. A sale is an exchange of goods for money. This definition is derived from the obligations of the seller [Art. 30 CISG] and of the buyer [Art. 53 CISG; PVC Case; Schlechtriem 1 2]. Goods are moveable and tangible objects [PVC Case; Tessile; Market Study Case]. The contract was a sale of goods since the Respondent agreed to deliver pumps to the Claimant for a price of US$1,214,550. The fact that the Respondent had to manufacture the pumps does not affect the status of the contract as a sale [Art. 3(1) CISG].

25. Second, the parties have places of business in different States [Art. 1(1)(a) CISG; Floor Tiles Case; Porcelain Case]. The Claimant and the Respondent carried out their business activities in two different countries, Mediterraneo and Equatoriana respectively.

26. Finally, the States are contracting states to the CISG. The fact that Mediterraneo and Equatoriana are contracting states to the CISG triggers the application of the Convention to the sales contract between the Claimant and the Respondent [Cl. Stmt. Clm. ¶24]. Since the three requirements of Article 1(1)(a) CISG are met, the provisions of the CISG apply.
ARGUMENTS

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE DISPUTE

27. The arbitral tribunal should exercise its competence to find that it does not have jurisdiction to hear the dispute for the following reasons: the condition precedent to arbitration was not properly fulfilled (A); the Respondent did not waive its right to challenge the jurisdiction of the arbitration (B); and an award in favour of the Claimant would not be enforceable (C).

A. The Condition Precedent To Arbitration Was Not Properly Fulfilled

28. The conciliation procedure was a condition precedent to arbitration (i). The conciliation procedure was not properly completed (ii). As a result, the parties must return and properly complete the conciliation before initiating arbitration (iii). Finally, sending the parties back to conciliation would not be fruitless (iv).

(i) The conciliation procedure was a condition precedent to arbitration

29. The sales contract requires that the parties resolve any dispute, controversy or claim arising out of, relating to or in connection with the contract, by conciliation before proceeding to arbitration [Cl. Ex. 3, Clause 18]. In several jurisdictions, including France, Germany, Australia, Ireland, Switzerland, England, Egypt and the United States, dispute resolution steps in multi-tiered arbitration clauses are viewed as conditions precedent [Born 843; Berger 7; Sanders 109; Jimenez-Figueres 94; Cremades 13; Jolles 331-3; Channel Tunnel case; Pryles 167-8; Aiton]. Conditions precedent form an integral part of an arbitration agreement whereby failure to comply with a condition precedent can constitute “a jurisdictional defect affecting the arbitral proceedings or the arbitration agreement” [Born 842].

30. Whether a dispute resolution step is enforced as a condition precedent hinges on the precise wording of the clause [Van den Berger 4]. Generally, English courts have held that the more precise the clause, the more likely it will be interpreted and enforced as a condition precedent [Poudret & Besson 12]. Accordingly, the clause must be “sufficiently definite to permit enforcement” [Berg 454; Elizabeth Bay in Pryles 161]. Where a dispute resolution step is “drafted in a mandatory fashion (‘the parties shall meet and negotiate’) and the right
to arbitrate is arguably conditioned on compliance with this requirement,” it should be enforced as a condition precedent to arbitration [Born 842]. Moreover, the use of the word “shall” before the first step of the agreement, and the word “if” before the arbitration step, signals that the parties agreed that the first step is a condition precedent to arbitration [Berger 5].

31. Clause 18 of the sales contract is sufficiently precise to form an enforceable condition precedent. The first part of the clause states that the parties “shall” resolve any dispute through conciliation. The arbitration clause in the next paragraph is preceded by the conditional term “if”, indicating that the parties have agreed to conciliate before proceeding to arbitration [Cl. Ex. 3]. Finally, the clause is precise about which rules apply to conciliation proceedings, by whom the parties will be represented, and by which body the conciliation shall be administered [Cl. Ex. 3].

(ii) The proper fulfillment of the conciliation procedure was a condition precedent to arbitration

32. Clause 18 of the sales contract required a precise conciliation procedure: “The parties will be represented by their [CEO]. The conciliation shall take place in Vindobona, Danubia and be administered by the Danubia Arbitration and Conciliation Center.” The parties insisted that arbitration would begin only “if the dispute [was] settled pursuant to the said conciliation procedure…” [Cl. Ex. 3]. Therefore, the condition precedent to arbitration was not solely conciliating but also entailed the proper fulfillment of the procedure as contractually stipulated by the parties.

33. Case law holds that when the procedural requirements for conciliation are contractually mandated, the tribunal or court does not have jurisdiction unless “strict compliance with its requirements [have] been followed” [De Valk; Born 843]. Furthermore, a tribunal may decline jurisdiction if the implicit obligation of cooperation derived from the principle of good faith is absent from the conciliation [ICC Award 9977; Art. 2(1) MCL].

(iii) The conciliation procedure was not properly completed

34. The Claimant was represented by its Deputy Chief Executive Officer [Re. Stmt. Def. ¶7]. The Claimant’s failure to be represented in accordance with the agreed stipulations has thus led to a defect in the conciliation procedure. It can be implied that the requirement for the
presence of the CEO of each party at the conciliation derived from the need to ensure that
each party could fully engage in a knowledgeable resolution of the dispute. Non-
compliance with this particular contractual stipulation led to two additional defects to the
conciliation procedure.

35. In order to fully cooperate during the conciliation, good faith suggested that the Claimant
disclose the quality of its representatives. The Respondent was the only party at the
conciliation with the knowledge that it was not represented by its CEO. The Respondent
did not inform any of the other parties of this defect. The Claimant participated in the
conciliation process in good faith with the understanding that both parties were committed
to the possibility of settling the dispute through their CEOs.

36. The conciliator terminated the proceedings in accordance with Conciliation Rule 15
without the knowledge of the defect in the conciliation. When the conciliator wrote to the
parties stating that conciliation was “no longer justified,” he was unaware of the defect as
the titles of the representatives were never communicated [Cl. Stmt. Clm. ¶23]. This can be
surmised from two facts: the Respondent did not learn of the presence of the Claimant’s
Deputy CEO until the week after the conciliation, and the Claimant did not at any time
state its representative’s title throughout the conciliation [Re. Ans. ¶7]. It is possible that the
conciliator would not have terminated the proceedings if he had been aware of improper
representation. Therefore the conciliator’s termination of the conciliation proceedings was
itself defective.

(iv) The parties must return to conciliation before initiating arbitration

37. Since there was a defect in the conciliation procedure, the condition precedent to arbitration
has not been completed. The parties must properly fulfill the conciliation procedure before
an arbitral tribunal can properly be seized with jurisdiction [Kemiron; Born 842].

38. Article 13 of the MCL states that “where parties have agreed to conciliate and have
expressly undertaken not to initiate during a specified period of time or until a specified
event has occurred arbitral or judicial proceedings with respect to an existing or future
dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until
the terms of the undertaking have been complied with…” Given the Claimant’s failure to
comply with the terms of the conciliation agreement, the tribunal should note that the
conciliation was not properly fulfilled, find the MCL Article 13 persuasive and bar these arbitral proceedings [UNCITRAL Guide ¶80].

39. According to their agreement, the parties agreed to conciliate and expressly undertook not to initiate arbitration until conciliation was attempted. Representation by their respective CEOs at the conciliation was an explicit term. The conciliation could not have properly proceeded or concluded without this representation. As such, arbitral proceedings should not commence until the parties have complied with the terms of the arbitration agreement.

(v) Sending the parties back to conciliation would not be fruitless

40. While parties should not return to a dispute resolution process if it would lead to further delays [Cable & Wireless ¶35; Aiton ¶166; ICC Case No. 8445 ¶4; Born 844; Jolles 331]; this does not represent the situation between the parties in this case.

41. Conciliation allows for dialogue between the parties with an unlimited range of solutions beyond just damages [Chalk 13; Bühring-Uhle 182]. Conciliation is not a fixed process and is tailor-made to the parties involved [Bühring-Uhle 182, 206]. The information exchange is dynamic and the result is dependent on the particular parties present [Hill 178]. Accordingly, different individuals might have a better chance at reaching a consensual solution.

42. In this case, neither party has given indication that it would approach conciliation without the intent of successfully finding a resolution. Moreover, by complying with the terms of the contract, each party would be represented by an official in a position to make a final and binding decision. As such, should the parties return to conciliation with the proper representatives, the outcome may very well change. The parties should be sent back to conciliation and be given a proper chance to reach an agreement.

B. The Respondent Did Not Waive Its Right To Challenge The Tribunal’s Jurisdiction

43. The Respondent did not waive its right to challenge the jurisdiction of the arbitral tribunal. The arbitration agreement between the parties does not establish a timeline for the initiation of arbitration after conciliation. Had there been a timeframe provided in the agreement, it would have been the Respondent’s duty to raise a defect to arbitration
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University of Ottawa

within that timeframe. Absent a contractual time limit, the reasonable timeframe to use was that provided by the rules chosen by the parties to govern the arbitration.

44. Both the ACICA Rules and the MAL establish a precise time limit. Rule 24.3 of the ACICA Rules states that objections to jurisdiction should not be raised later than the Statement of Defence. Under Article 8(1) of the MAL, challenges to the jurisdiction of an arbitral tribunal must be submitted no later than the “first statement on the substance of the dispute” [Born 989]. The Respondent has complied with both of these requirements. The first statement on the substance of the dispute was the Statement of Defence in which the Respondent challenged the jurisdiction of the arbitral tribunal based on the flaw in the conciliation process [Re. Stmt. Def. ¶8].

45. The Claimant argues that the Respondent has waived its right to object to any requirement under the arbitration agreement if it does not raise its objection before proceeding to arbitration [MAL Art. 4]. The Secretariat’s Analytical Commentary on the Model Law states that four conditions must be met in order to invoke Article 4: the procedural requirement, which has not been complied with, is contained in the arbitration agreement; the party knew or ought to have known of the non-compliance; the party does not state its objection without delay and; the party proceeds to arbitration without stating its objection [Secretariat’s Commentary Art.4 MAL in Binder 43]. The last three criteria have not been met in this case.

46. The Claimant argues that the Respondent should have known that the Deputy CEO was attending in place of the CEO [Cl. Ans. ¶2]. The Claimant bases this on the fact that at the conference attended by both parties during the conciliation, a pamphlet was distributed with the name and title of the Claimant’s Deputy CEO [Cl. Memo ¶67-68; Cl. Reply ¶2; Proc. Ord. 2 Q.29]. This pamphlet contained the names and titles of the parties, but it does not follow that the Respondent would know that the person on the list would necessarily be the representative of the Claimant at the conciliation. This could have been avoided had the Claimant’s representative communicated his title [Proc. Ord. 2 Q.31].

47. The Respondent did not have an obligation to raise its objection before the required arbitral time limits. It has complied with both the MAL and the ACICA Rules in making its cause against the commencement of arbitration. Furthermore, the MCL and
the Conciliation Rules do not have any waiver provisions. The Respondent has raised its objection at the appropriate time, with the intention of ensuring that the proper procedure under the agreement is fulfilled.

48. Finally, the presence of the Deputy CEO, and the Claimant’s non-disclosure of his identity at the conciliation goes against the good faith requirement in conciliation [supra ¶35]. The Claimant cannot invoke an equitable claim of waiver when its non-disclosure was the reason for the defect in the conciliation.

C. An Award Made In Favour Of The Claimant Would Not Be Enforceable

49. An award in favour of the Claimant would be unenforceable as it would be made in violation of the arbitral procedure established by the parties. MAL Article 36(1)(a)(iv) allows enforcement of the arbitral award to be refused if a court finds that the arbitral procedure was not in accordance with the agreement of the parties. Furthermore, Article V(1)(d) of the New York Convention allows the court to refuse recognition or enforcement of the award if the arbitral procedure was not in accordance with the agreement of the parties [Van den Berg 1].

50. The parties have a clear multi-tiered agreement which states that conciliation is the first procedural step in resolving any dispute. This step was not properly fulfilled as the quality of representation for conciliation was not met. The defect in the conciliation procedure represents a defect in the entire arbitral procedure. As such, an award made in favour of the Claimant would suffer the same defect and would thus not be enforceable under the terms of the MAL and the New York Convention [Paulsson 613; Jolles 336; Leisinger 1 17; Poiré; MCL travaux ¶50]. As a result, the tribunal should return the parties to properly complete conciliation with the required representation.

II. The Respondent Fulfilled its Obligation to Provide Pumps That Conformed With Regulations in Oceania in Force At the Time Of the Conclusion of the Sales Contract

51. The Respondent had an obligation to manufacture and supply pumps that conformed to the requirements of the contract [Art. 35(1) CISG]. The standard of conformity contracted for by the parties was the regulations in force in Oceania at the time of the conclusion of the sales contract (A). The Respondent complied with the requirements of the contract since
the pumps were fit for their ordinary purpose \[Art. 35(2)(a) CISG\] (B). The pumps did not have to be fit for a particular purpose, as the Claimant did not rely on the Respondent’s skill and judgment to adapt to changes in Oceania regulations \[Art. 35(2)(b) CISG\] (C).

A. The Sales Contract Required Conformity With Regulations In Force At The Time Of Its Conclusion

52. A seller’s conformity obligation derives primarily from the provisions of the contract \[Art. 35(1) CISG\]. The sales contract established the standard of conformity for the pumps in clause 2 \[Cl. Ex. 3\]. Interpreted both textually and contextually, this clause provides that the standard of conformity is the regulations in force in Oceania on 1 July 2008, the date of the sales contract’s conclusion.

(i) The text of the sales contract indicates that the standard of conformity was determined by the regulations in force at the time of the conclusion of the contract

53. The primary source of contractual interpretation is the text of the contract \[Art. 8(2) CISG; Chemical Products Case\]. The Claimant is arguing for a shifting standard of conformity, but the parties agreed to a fixed standard \[Cl. Memo ¶73\]. The fact that the parties agreed to a set standard is demonstrated by the principle that terms of a contract should be interpreted in light of the statement in which they appear \[Article 4.4 PICC; Sandvik Asia\]. Clause 2 of the sales contract establishes both the regulatory and technical conformity of the pumps. It would not be contextually appropriate to read clause 2, a single clause, as having both a fixed standard for one aspect of conformity, namely the technical requirements in Annex 1, and a fluctuating standard for another, namely the regulations in Oceania. Moreover, a fixed standard of conformity is a more reasonable interpretation of clause 2 because it fulfills the need for certainty in commercial transactions \[Art. 8(2) CISG; Lambskin Coat Case\].

54. Moreover, contract terms should be interpreted so as to give them effect \[Article 4.5 PICC; Sandvik Asia\]. The conformity warranty in this sales contract clearly uses the present tense; it establishes that the pumps “are in compliance” with regulations in Oceania \[Cl. Ex. 3\]. In order for the use of the present tense to be given effect, the warranty should be interpreted
as conformity that is comprised of the known regulations in force at the time of the formation of the contract.

(ii) The parties agreed on a warranty, not a guarantee

55. When there is disagreement between parties as to the mutual intent expressed in the contract, problems of contractual interpretation are governed by the objective standard of Article 8(2) CISG [Art. 8(1)(2) CISG; Honnold 156]. In international sale of goods transactions, the relevant objective standard is the view of a specialist who is aware of the practice in his trade sector [Schlechtriem 72]. Thus, in this situation both parties agreed to particular language in expectation that the other party, as a specialist in international transactions, would be aware of the distinctions between warranties and guarantees.

56. The sales contract uses the term “warrants” to establish the Respondent’s conformity commitment [Cl. Ex. 3]; this term was used in place of a commonly used but distinct term “guarantees”. The Claimant insisted upon the inclusion of a warranty [Proc. Ord. 2 Q. 9] and expressed its understanding that clause 2 was a warranty [Cl. Memo ¶77-82]. The meaning commonly given to the term warranty in the trade sector relates to present or past facts [Art. 4.3(e) PICC; ICC Case 10335; Commercial Lease Case; Black’s 724; Garner’s 394]. Here, the Claimant appears to be relying on a definition of guarantee which implies a future standard [Black’s 724; Garner’s 394].

57. Further, the CISG confirms the distinction between a warranty and a guarantee. Articles 36(2) and 39(2) CISG use the term “guarantee” in the context of conformity of the goods for a future period after the passing of risk. On the other hand, Article 42 CISG is referred to as a “warranty” [Flechtner 376, 377]. Indeed both provisions speak to the standard of conformity as being a statement of fact as expressed in the contract as opposed to a promise of a future potential standard. Article 35(1) CISG states conformity as “required by the contract” and Article 42 CISG specifies that the seller is responsible for intellectual property based claims of which it knew at “the conclusion of the contract.”

58. Thus, in accordance with its use of the term “warranty”, the Respondent’s conformity obligation should refer to a standard fixed at the conclusion of the contract. Accordingly, a specialist aware of his trade sector would have understood this term in such manner [Schlechtriem 72].
(iii) The parties’ behaviour subsequent to the conclusion of the contract demonstrated the understanding that the respondent was not contractually bound to conform to changes in Oceania

59. A way to determine the parties’ understanding of the terms of the contract is to examine their behaviour after the contract’s conclusion [Art. 8(3) CISG; Fabrics Case; Textiles Case].

60. Subsequent to the conclusion of the contract, the Respondent consistently stressed that conformity of the pumps was to be fixed according to regulations in force in Oceania on 1 July 2008. Specifically, it did so on 2 August 2008 when regulations adopted in Oceania restricted the use of beryllium in products including the P-52 pumps [Cl. Ex. 6]. The Respondent’s adaptation to the 1 August 2008 regulations was not made pursuant to its warranty of conformity but rather, due to a modification of the sales contract [infra ¶83-97].

61. When the Claimant informed the Respondent of the 1 August 2008 regulation and of the 28 December 2008 decree, the Claimant did not invoke the warranty [Cl. Ex. 5; Cl. Ex. 11]. Furthermore, the Claimant remained silent after the Respondent made it clear on 2 August 2008 that it was not bound to comply with the new regulations [Cl. Ex. 6]. The Claimant’s behaviour therefore demonstrates that the Respondent had no duty to monitor regulations in Oceania after conclusion of the contract. The Claimant neither requested that the Respondent monitor developments, nor did the Claimant make efforts to include the Respondent in communications between itself and OWS [Cl. Ex. 5; Cl. Ex. 11].

(iv) Interpreting the warranty as requiring the Respondent to assume the risk of changes in regulations is commercially unreasonable

62. A statement made in a contract should be interpreted in the manner that is the most commercially reasonable [Art. 8(2) CISG; Chemical Products Case]. It is not commercially reasonable to interpret the warranty obligation as requiring the Respondent to assume the risk of any and all changes in relevant Oceania regulations. The sales contract only allowed for a period of four and a half months to manufacture the required pumps [Cl. Ex. 3].

63. A warranty that required the pumps to conform to new changes at any point until delivery would require the Respondent to manufacture and ship the pumps with the possibility of the pumps being rejected. If the Respondent had assumed such a risk, it ultimately would
not only have been the supplier but the insurer of the Claimant as well; this would be a commercially unreasonable burden [Cl. Stmt. Clm. ¶4].

(v) The contra proferentem rule of interpretation is not applicable

64. The Claimant contends that because the Respondent supplied the last sentence of clause 2 of the sales contract, the application of the contra proferentem rules allows the sentence to be interpreted favourably toward the Claimant [Cl. Memo ¶82; Proc. Ord. 2 Q.9]. In its view, this would mean that the Respondent had to adapt to relevant regulations adopted after 1 July 2008.

65. The contra proferentem rule should not be applied to this situation for two reasons. First, the terms of the contract are clear and therefore nullify the use of the contra proferentem interpretation [Art. 4.6 PICC]. The Claimant has not established the existence of two equally plausible interpretations for clause 2 and, in fact, its own interpretation is ambiguous in that it fails to establish a clear relevant time after the contract’s conclusion for determining conformity [Cl. Memo ¶73-98].

66. Second, the fact that the sales contract emerged as a result of a joint drafting effort is a circumstance forbidding the application of the contra proferentem rule [ACLCCI Case; Bonell 242; Lewison 209; Levison; Kleinwort]. In this case, the Claimant was the party who insisted on the warranty, the Respondent supplied the wording, and the Claimant agreed that the wording was satisfactory [Proc. Ord. 2 Q.9].

67. Should the tribunal find the contra proferentem principle applicable, this rule would actually benefit the Respondent. As adopted in Article 4.6 PICC, the contra proferentem rule is directed towards the initiator, or “supplier”, of the contested term rather than the drafter [Gelot 270]. The English version of the rule uses the term “supplier”. Although the rule could be directed at the Respondent, as drafter or technically “supplier” of the clause, this understanding would be inconsistent with other linguistic interpretations. The French (“proposer”), Spanish (“dictar”), Italian (“stabilire”) and German (“verwenden”) versions of Article 4.6 PICC are interpreted as the party who proposes the particular phrase or term instead of the drafter. The underlying rationale for this is that the initiator is the party benefiting from the clause and should therefore ensure its clarity [McMeel 190; Canada Steamship; Gelot 264-273; Gendron 104, 107]. As it is the Claimant who would benefit
from the warranty and insisted on the clause, the Claimant should have ensured its clarity. Given the Claimant’s actions in this respect, the clause should be read in favour of the Respondent.

(vi) The time of assessment for conformity is the passing of risk, while the standard of assessment for conformity remains the regulations in force at the contract conclusion

68. Article 36(1) CISG states that the Respondent is liable, in accordance with the contract, for any lack of conformity that exists at the time of the passing of risk. In this case, the contract stipulates that the passing of risk is established by the DES Incoterm, which fixes the passing of risk to when the pumps arrive at the port of Capitol City, Mediterraneo and are made available for unloading to the Claimant [DES (Incoterm 2000) 98]. As such, the DES Incoterm simply provides for the time of assessment for conformity, which is at the passing of risk; it does not provide for an ongoing conformity standard until the passing of risk. In any event, the DES Incoterm is limited to governing physical loss or damage [DES (Incoterm 2000) 98], and not other risks such as changes in the country of import’s public law provisions.

69. While the moment for assessment of conformity is determined under Article 36 CISG, it is Article 35 CISG that provides the standard for assessment of conformity. As previously established, the standard of conformity that the pumps were to comply with, and did comply with, at their delivery was the regulations in force at the time of contract conclusion on 1 July 2008.

B. The Pumps Delivered By The Respondent Were Fit For Their Ordinary Purpose

70. The seller’s conformity obligation is not limited to the goods being of the description required by the contract [Art. 35(1) CISG; Flechtner 4] but extends to include the subsidiary requirements of Article 35(2) CISG [Schlechtriem 1 78]. Under Article 35(2)(a) CISG the goods must be fit for their ordinary purpose. This entails that the seller must provide goods of “reasonable quality” according to the parties’ normal expectations in the concerned market [Leisinger 20; Condensate Crude Oil Mix Case]. The purposes for which the goods are occasionally used are not covered by this provision, but rather by Article 35(2)(b) CISG [Leisinger 18].
In this case, the ordinary purpose for the pumps was their use in any irrigation project, while their particular purpose was their use in the IR 08-45Q Oceania irrigation project. The pumps delivered by the Respondent on 6 January 2009 could still be used in irrigation projects in any country other than Oceania [Proc. Ord. 2 Q.19], or sold in a reasonably short delay [Re. Ex. 3]. The pumps provided by the Respondent were therefore fit for their ordinary purposes under Article 35(2)(a) CISG.

C. The Seller’s Duty To Deliver Goods That Are Fit For Their Particular Purpose Did Not Require The Respondent To Adapt To Changes In Regulations In Oceania

Conformity under Article 35(2)(b) requires goods to be fit for any particular purpose made known to the seller at the time of the conclusion of the contract. In our case, the Claimant informed the Respondent, through its pre-negotiations and as stipulated in the sales contract that the pumps were to be used for the procurement contract. The conformity obligation under Article 35(2)(b) CISG did not however, require the Respondent to adapt to regulations adopted in Oceania after the contract’s conclusion. The circumstances show that the Claimant did not rely on the Respondent’s skill and judgment to adapt to new regulations (i) and, in any event, Article 35(2)(b) CISG does not require the seller to adapt to changing regulations in the country of use (ii).

(i) The circumstances show that the Claimant did not rely on the Respondent’s skill and judgment to adapt to new regulations in Oceania

According to Article 35(2)(b) CISG, the seller is not liable for failing to deliver goods fit for a particular purpose if the circumstances show that the buyer did not rely, or that it was unreasonable to rely, on the seller's skill and judgment [Honnold 336, 337].

The reasoning of the Mussels and Mammogram cases suggests that it is only in very restrictive and exceptional circumstances that a buyer would reasonably rely on the seller’s skill and judgment to adapt to changes in the regulations of the country of use. These cases provided that if a contract is silent on the seller’s duty to comply with regulations in the country of use, it is only in three exceptional situations that the buyer is reasonably entitled to rely on the seller to comply with foreign regulations in force at the time of the contract’s conclusion [Mussels Case; Mammogram Case]. Therefore, as the seller’s capacity to adapt
to regulations after the contract’s conclusion is an even more demanding skill and judgment, Article 35(2)(b) CISG should require the seller to comply with new regulations only in extraordinary circumstances.

75. On the contrary, the circumstances show that the Claimant did not rely on the Respondent’s skill and judgment to adapt to changes in regulations in Oceania subsequent to the contract’s conclusion. In the context of procurement contracts, reliance by the buyer on the seller’s skill and judgment occurs when the seller “is an accounted specialist or expert in the procurement of goods for the particular purpose intended by the buyer” [Leisinger 16]. Instead, the Respondent sells to more than fifty countries and is not a specialist of irrigation projects in Oceania [Stmt. of Cl. ¶4].

76. Also, it was the Claimant who received direct notice of the changes of regulations in Oceania and acted as the informer to the Respondent each time a change occurred [Cl. Ex. 5, 11]. This is indicative of lack of reliance and obligation on the Respondent to continually monitor the regulations in Oceania after the conclusion of the contract. In fact, before the first regulation change on 1 August 2008, the Claimant was more aware of developments in Oceania than was Super Pumps, especially in regards to Oceania’s environmental policy [Proc. Ord. 2 Q.5].

77. Further, the Respondent informed the Claimant on 1 July 2008 via e-mail that it was fortunate to have several P-52 pumps in stock, as “a pump of its size and complexity takes considerable time to manufacture” [Re. Ex. 1]. Accordingly, it would be unreasonable for the Claimant to rely on the Respondent to remanufacture these time-consuming pumps, at any point in the interim period between the contract conclusion and the date of shipping, without a delay in their delivery.

78. Moreover, the uniqueness and uncommon nature of the 1 August 2008 regulation and of the 28 December 2008 decree is another circumstance that demonstrates that it was unreasonable for the Claimant to rely on the Respondent to comply with them [Proc. Ord. 2 Q.19]: “The buyer’s reliance may also be lacking where special, isolated, or unique public law standards exist in the state of use for the goods” [Schlechtriem 1 423].

79. The leading case regarding changes in regulations in the country of use between the contract’s conclusion and the goods’ delivery is the Frozen Pork case. Yet this case was decided on the basis of Art. 35(2)(a) CISG given that all the countries where the pork could
have been resold had adopted similar regulations banning contaminated meat. Hence the Court’s finding that the seller was in breach of its conformity obligation does not apply to the facts of this case, as the pumps delivered by the Respondent were fit for their ordinary purpose with the sole exception of Oceania [supra ¶70, 71; Proc. Ord. 2 Q.19].

(ii) In any event, Article 35(2)(b) CISG does not require the seller to adapt to changing regulations in the country of use

80. The seller’s obligation to deliver goods that are fit for their particular purpose under Article 35(2)(b) CISG exists only if such purpose is made known to the seller at the time of the conclusion of the contract [Schlechtriem 1 422; Staudinger Art. 35 ¶30; Enderlein/Maskow/Strohbach Art. 35 ¶10; Heilmann 180]. It follows that Article 35(2)(b) CISG does not require the seller to adapt to changing circumstances if the buyer informs the seller of a new particular purpose for the goods after the contract’s conclusion. The rationale underlying this provision is to ensure that the seller knows the extent of its obligations when concluding the contract and does not assume the risk of a change in the purpose of the goods.

81. As Article 35(2)(b) CISG does not require the seller to adapt to a change in the particular purpose of the goods, it should not require the seller to adapt to a change in the regulations allowing for the fulfillment of such purpose. Ultimately, both changes have the same effect on the seller and are risks which the seller could not take into consideration when entering the contract. Accordingly, the risk of a change of regulations in the country of use for the goods after the contract’s conclusion is part of the buyer’s utility risk and would forbid it to make a claim under Article 79 CISG [Schlechtriem 1 827; Staudinger Art. 79 ¶28; Soergel Art. 79 ¶14]. Since Article 35(2)(b) CISG and the sales contract did not require the Respondent to adapt to regulations adopted after the contract’s conclusion, the standard for conformity was regulations in force in Oceania on 1 July 2008.

III. The Delivery Deadline in the Sales Contract was Modified to 23 December 2008

82. The sales contract called for delivery of the pumps by 15 December 2008 [Cl. Ex. 3, ¶1]. Following Oceania’s adoption of the regulation restricting the use of beryllium on 1 August 2008, the parties agreed to amend certain terms of the sales contract and extended the delivery deadline to 23 December 2008 [Art. 29(1) CISG] (A). In the alternative, the 1
August 2008 regulations resulted in a hardship for the Claimant that modified the delivery deadline to 23 December 2008 [Art. 6.2.2, 6.2.3 PICC] (B).

A. The Parties Agreed To Extend The Delivery Deadline Until 23 December 2008

83. A contractual provision is amended by the agreement of the parties [Art. 29(1) CISG] and the existence of such agreement is determined by contract formation rules contained in Part II of the CISG [Schlechtriem 1 329; Viscasillas 170; Rare Hard Wood Case; Câmara Agraria]. Accordingly, an offer and a reciprocal acceptance are therefore the two elements needed to establish the parties’ mutual intent to modify their contract [Art. 23 CISG; Schlechtriem 1 178; Cvetkovik s. Introduction].

84. On 2 August 2008, the Respondent made an offer to extend the delivery deadline to a reasonable date (i). In the circumstances of the case, the Claimant’s silence and inaction amounted to an acceptance of this offer (ii). Finally, the Claimant acknowledged that delivery of the pumps by 23 December 2008 was a reasonable extension (iii).

   (i) On 2 August 2008 the Respondent made an offer to modify the sales contract

85. In its 2 August 2008 e-mail, the Respondent proposed three modifications to the sales contract: that the Respondent undertook to provide beryllium-free P-52 pumps, in exchange; the Claimant would undertake to accept delivery in a reasonable time; and the Claimant would undertake to pay an additional US$30,000 [Cl. Ex. 6].

86. The Respondent made an offer to extend the delivery deadline to a reasonable time. In its e-mail, the Respondent warned that completion of the pumps would require several more weeks and that this would result in a delay in their shipping [Cl. Ex. 6 ¶3, 5]. Under the CISG, delivery must be made within a reasonable time if it is not clearly determinable [Art. 8(2), 33(c) CISG]. The proposed extended date of delivery was reasonable as it would still have enabled the Claimant to fulfill its duty to deliver the pumps to Oceania by 2 January 2009 [Cl. Ex. 12].

87. A proposal by one person to another is an offer “if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance” [Art. 14(1) CISG]. The Respondent’s 2 August 2008 e-mail was, as conceded by the Claimant itself, an offer to modify the sales contract [Cl. Ex. 6; Cl. Memo ¶107-110]. The Respondent’s 2 August
2008 proposal met the criteria of an offer. The Respondent’s proposal was definite (a); and the Respondent demonstrated intention to be bound by this offer (b).

   a. The Respondent’s proposal was definite

88. A proposal that does not precisely set a date for delivery may still be definite, as the minimum elements required for definiteness are the identity of the goods, their price and their quantity [Art. 14(1) CISG last sentence; Schlechtriem 189]. The Respondent’s 2 August 2008 e-mail was sufficiently definite to constitute an offer. As there was a clear indication of the pumps, their quality and price concerned, the absence of a precise delivery date did not affect the definiteness of this offer.

   b. The Respondent demonstrated intention to be bound by its proposal

89. The offeror’s intention to be bound by its proposal is found when the proposal’s objective meaning is that it will result in a contract if accepted [Schlechtriem 196; Cvetkovik s. 1]. The Respondent objectively indicated its intention to be bound in case of acceptance by stating that it “will procure the substitute steel” [Cl. Ex. 6 ¶5]. The Respondent’s statement that the sales contract did not have an ongoing conformity obligation confirms that its proposal did not arise from a pre-existing duty [Cl. Ex. 6 ¶4]. Therefore, the Respondent’s e-mail constituted a new offer.

(ii) The circumstances show that the Claimant’s silence constituted acceptance of the Respondent’s offer

90. By remaining silent until it was informed that the pumps were shipped, the Claimant accepted the Respondent’s 2 August 2008 offer to amend the sales contract [Cl. Ex. 8]. Silence in conjunction with other circumstances can indicate acceptance of an offer [Art. 18(1) CISG; Schlechtriem 123; Honnold 160]. Unlike contract formation, courts are generally more willing to equate silence with acceptance in the context of contract modification.

91. The extensive prior dealings of the parties (a), the Claimant’s knowledge that the P-52 pumps would be manufactured without beryllium (b), and the Claimant’s invitation to enter negotiations (c), are all circumstances that indicate that the Claimant’s silence constituted an acceptance of the Respondent’s offer.
a. The parties had extensive prior dealings

92. When a contractual relationship already exists between parties and they disagree on a modification, good faith requires that they object within a reasonable period of time [Art. 7(1) CISG; Design of Radio Phone Case; Filanto]. The Claimant and Respondent had previously worked together on a project in Patria, they had prepared the bid for the irrigation project together, and they had jointly drafted the contract in a joint effort [Cl. Stmt. Clm. ¶5, 6; Proc. Ord. 2 Q. 9]. Given their extensive course of prior dealings between the parties, the Claimant had a duty to alert the Respondent of its objections to the proposed modifications [Filanto].

b. The Claimant knew that the Respondent would ultimately manufacture beryllium-free P-52 pumps

93. Silence can amount to acceptance of an offer when the offeror commences performance and the offeree is aware of the situation [Filanto]. The Claimant knew that the Respondent would manufacture beryllium-free pumps and demonstrated this understanding through its silence. Since the Claimant refrained from the actions that a party normally takes when rejecting an offer to modify, the Claimant’s behaviour indicated its acceptance [Rare Hard Wood Case].

c. The Claimant invited the Respondent to enter negotiations

94. In its 1 August 2008 e-mail, the Claimant informed the Respondent of the new regulation and insisted that the P-52 pumps be beryllium-free [Cl. Ex. 5]. It was in the Claimant’s interest to ensure that the Respondent would deliver beryllium-free P-52 pumps. Such proposal did not constitute an offer to modify the sales contract, but was an invitation to enter negotiations. The fact that the Respondent’s offer was made in response to this invitation was therefore an additional circumstance that indicated that the Claimant’s silence constituted acceptance [Art. 18(1) CISG; Schlechtriem 1 223; Honnold 160].

(iii) The Claimant acknowledged that delivery of the pumps by 23 December 2008 was reasonable

95. The Respondent shipped the pumps on 22 November 2008 and informed the Claimant that the pumps would arrive at Capitol City “around” 22 December 2008 [Cl. Ex. 7]. Under
CISG Article 33(c), the Respondent is obliged to deliver the pumps within a reasonable time. The date provided, 22 December 2008, was an approximate date, as evinced by its descriptor of “around”, and therefore includes a margin of days in terms of the exact delivery deadline [Article 8(2); Article 33(b); Schlechtriem 1 63]. In this instance, as determined by the circumstances of the contract a reasonable time would be delivery by 23 December 2008 [Cl. Ex. 7; Cl. Ex. 8].

96. This reasonable time is determined by weighing the interests of both parties [Schlechtriem 400]. As acknowledged by the Claimant, the proposed delivery extension did not put the completion of the procurement contract at risk, as it was still possible to bring the pumps to Oceania by 2 January 2009 [Cl. Stmt. Clm. ¶12; Cl. Ex. 8, 12]. For instance, another company in Mediterraneo would have required one and a half days to bring pumps to the border of Oceania [Re. Ex. 3]. Delivery by 23 December 2008 was therefore fully reasonable under the modified delivery deadline.

97. The Claimant’s reaction was to reluctantly agree to the extended delivery deadline [Cl. Stmt. Clm. ¶12; Cl. Ex. 7]. By doing so, the Claimant acknowledged that delivery of the pumps could be made by 23 December 2008 thus constituting a reasonable delay according to the modified delivery deadline.

B. In The Alternative, The 1 August 2008 Regulation Resulted In A Hardship For The Claimant Which Extended The Delivery Deadline To 23 December 2008

98. The 1 August 2008 regulation restricting the use of beryllium in Oceania resulted in a hardship for the Claimant (i). The tribunal should adapt the sales contract to alleviate the hardship by requiring the Respondent to comply with the 1 August 2008 regulation and by extending the delivery date to 23 December 2008 (ii).

(i) The 1 August 2008 regulation resulted in a hardship for the Claimant

99. The CISG does not deal with situations where the value of performance received by one party is greatly diminished due to an unforeseeable impediment. Article 79 CISG only allows for an exemption where there is an impossibility to perform an obligation [Honnold 621, 622]. However, when the performance of an obligation is made extremely burdensome for one of the parties, the principle of good faith and the reasonable interpretation of contracts suppose that there is a “limit of sacrifice” [Art. 7(1), 8(2) CISG;
In a hardship scenario, the promisee is obliged to accept an adaptation to the contract or to agree to the promisor’s release. Most commentators view hardship as implicitly covered by the CISG [Schlechtriem 1 825, Lindström s. V; Kessedjian 419].

On the other hand, case law has used the gap-filling method of Article 7(2) to insert the hardship defence into the CISG [Rimke 239; Jenkins 2019]. A 2009 judgment from the Belgium Court of Cassation held that the CISG did not contain a provision addressing hardship and therefore general principles of international trade, such as the PICC would fill this gap [Scaform; Art. 6.2.2, 6.2.3. PICC].

In this case, the 1 August 2008 regulation resulted in a hardship for the Claimant, whether under the implied hardship defence in the CISG or Article 6.2.2 PICC. According to these principles, all the conditions for hardship were met: (a) the 1 August 2008 regulation made the value of the expected P-52 pumps diminish as they could no longer be used for their purpose; (b) the suppression of the Claimant’s interest in receiving pumps containing beryllium fundamentally altered the equilibrium of the contract; (c) the 1 August 2008 regulation occurred after the conclusion of the contract; (d) it was not foreseeable at the time of the conclusion of the contract; (e) it was beyond the Claimant’s sphere of control [Schlechtriem 1 827]; and (f) it was not a risk assumed by the Claimant.

(ii) The tribunal should adapt the sales contract to alleviate the hardship

Under the PICC, when hardship affects a party, this party is entitled to request renegotiation of the terms of the contract. If the parties fail to reach an agreement, the court or the tribunal will adapt the contract in order to restore its equilibrium [Art. 6.2.3.2, 6.2.3.4(b) PICC; Scaform; ICC Case 7365; ICC Case 9479].

In the event that the Claimant’s silence did not constitute an acceptance of the Respondent’s 2 August 2008 offer to modify the contract, the tribunal should adapt the contract to imply the Claimant’s acceptance of this offer. Adapting the contract to the modifications proposed on 2 August 2008 by the Respondent would restore a reasonable equilibrium between the parties. Thus the tribunal should adapt the sales contract by requiring the Respondent to comply with the 1 August 2008 regulation and by extending the delivery date to 23 December 2008.
C. In the Alternative, If The Respondent Had An Ongoing Conformity Obligation, The Delivery Deadline Was Modified To 23 December 2008

104. If the Respondent had an ongoing conformity obligation, the Respondent made an offer on 22 November 2008 to extend the delivery deadline to around 22 December 2008 (i). The Claimant accepted the Respondent’s offer to modify on 24 November 2008 (ii).

(i) On 22 November 2008, the Respondent made an offer to modify the sales contract

105. In accordance with the principles of modification and offer [supra ¶85-89], upon shipping the pumps, the Respondent made an offer in its e-mail on 22 November 2008 to extend the delivery date to “around 22 December 2008” [Cl. Ex. 7]. This indicated a delivery date by 23 December 2008 at the latest. While there was no mention of the added costs to manufacture the beryllium-free steel, the extended delivery deadline was reemphasized.

(ii) On 24 November 2008, the Claimant accepted the offer to modify

106. In accordance with the principles of modification and acceptance [supra ¶83], the Respondent’s 22 November 2008 e-mail was a definite offer to modify the sales contract [Cl. Stmt. Clm. ¶12], to which the Claimant itself conceded it agreed [Cl. Stmt. Clm. ¶12]. The Claimant responded in agreement that “we have to go along with you” [Cl. Ex. 8]. The Claimant states that its response to the Respondent’s 22 November 2008 e-mail was “reluctant agreement” [Cl. Stmt. Clm. ¶12], however it was agreement nonetheless [Valero].

107. At the time of the Respondent’s offer, the Claimant had other options at its discretion, including to firmly reinforce 15 December 2008 as the only acceptable delivery date or to look for other pumps itself. There were pumps available on the market by a trading company in its home country that the Respondent could have alternatively obtained [Re. Ex. 3], but rather, it conscientiously decided to continue its contractual relations.

IV. The Claimant Was Not Entitled To Avoid The Sales Contract On 5 January 2008

108. The Claimant was not entitled to avoid the sales contract on 5 January 2008 and, as such, may not claim the reimbursement of the purchase price under Article 81(2) CISG. First, the
Claimant avoided the sales contract before the extended deadline (A). In any event, on 5 January 2008, the Respondent’s breach of its delivery obligation was not fundamental (B).

A. The Claimant Avoided The Sales Contract Before The Extended Deadline

109. The extended delivery deadline of the sales contract required arrival of the pumps at Capitol City by 23 December 2008. On 12 December 2008, the Respondent knew that the pumps would not reach Mediterraneo until 6 January 2009 and the request was implicitly accepted by the Claimant.

110. Article 48(2) allows the seller to request the buyer to accept a remedy to a possible breach \[Art. 48(2) \text{CISG}; \text{Schlechtriem} 1571\]. Article 48(1) is the seller’s right to cure a breach if it can be done within a reasonable time and with little inconvenience to the buyer \[Art. 48(1) \text{CISG}\]. Article 48(2) is separate from the requirements of Article 48(1) and does not have to be met in an Article 48(2) remedy \[\text{Schlechtriem} 1571; \text{Will note} 2.2; \text{Honnold} \, \|298\]. Therefore, Article 48(2) does not require a breach to have already occurred, or for the suggested remedy to be reasonable \[\text{Honnold} \, \|298\].

111. Instead, the only two preconditions of Article 48(2) CISG are that: the seller must request the buyer to accept a subsequent delivery and the seller specified a definite period. When such a request is made the buyer must, within a reasonable time, object or there will be an implicit acceptance of the proposed remedy. Once the remedy is accepted, the buyer foregoes its right to avoid the contract, although it maintains all rights to claim damages \[Art. 48(1) \text{CISG}\].

112. In this case, the Respondent met both conditions of Article 48(2) CISG: the Respondent’s notification on 12 December 2008 is a request for the Claimant to accept late delivery (i); and the notification specified a definite date of 6 January 2009 (ii). Further, the Claimant’s silence to the Respondent’s notification is an implicit agreement (iii). As such, the Claimant could not properly avoid the contract until 6 January 2009 (iv).

(i) The Respondent’s 12 December 2008 notification requested acceptance of late delivery

113. The Respondent informed the Claimant on 12 December 2008 that the pumps would not reach Mediterraneo until 6 January 2009 \[\text{Cl. Ex. 10}\]. A notice is automatically considered to include a request that the buyer make known whether the new date is acceptable \[Art.
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48(3) CISG]. Therefore, the Respondent’s notification was a request that the Claimant could either accept or reject.

(ii) The Respondent’s notification specified a definite date of 6 January 2009

114. Article 48(2) requires that the seller provide a specific date, in order to make it evident of the binding conditions to which the buyer is agreeing [Schlechtriem 1 571]. The Respondent specifically stated that delivery would be on 6 January 2009 [Cl. Ex. 10].

(iii) The Claimant’s silence to the Respondent’s notification was an implicit agreement of the request

115. Once the above two preconditions to Article 48(2) are fulfilled, unless the buyer objects in a reasonable time, the request will be considered accepted. Reasonableness will depend on the circumstances of the case; however, in order to minimize costs for the other party, a response should be given promptly [Will note 2.2.2].

116. The Claimant did not respond to the Respondent’s 12 December 2008 notification. The next correspondence from the Claimant was on 28 December 2008, which neither rejects nor accepts late performance [Cl. Ex. 11]. As no express acceptance is necessary, this lack of response should be deemed as acceptance to the Respondent’s request.

(iv) The Claimant could not properly avoid the sales contract until 6 January 2009

117. The Respondent’s request fulfilled the conditions of Article 48(2) CISG and the Claimant’s silence constituted acceptance. Article 48 does not bar damages, though it prevents the Claimant from using a remedy inconsistent with the Respondent’s performance [Art. 48(2) CISG]. Avoiding the sales contract was inconsistent with the Claimant’s acceptance of late delivery on 6 January 2009 [Will note 2.2.3]. Therefore, the sales contract was improperly avoided and the purchase price should not be reimbursed.


118. In order to properly avoid the sales contract, the Claimant must demonstrate that there was a fundamental breach [Art. 49(1)(a) CISG; Graffi 339]. A breach is deemed fundamental if it results in such detriment as to substantially deprive a party of what it is entitled to expect
under the contract [Art. 25 CISG]. An exception is if a reasonable person could not have foreseen that the result of the breach would be the substantial deprivation of the party’s expectations [Art. 25 CISG]. Although the CISG does not specify the relevant time for determination of foreseeability, the majority opinion considers the relevant moment of assessment to be at the conclusion of the contract [Ferrari 500; Schlechtriem 1 290; Lorenz s. II(B); Butler 98]. The rationales behind this assertion relies on the fact that definition of fundamental breach is centred on the aggrieved party’s expectations under the contract and that foreseeability must be measured in conjunction with Article 74 CISG [Koch 229]. It would be inconsistent if the aggrieved party was allowed to avoid the contract, while the grounds justifying such avoidance would be deemed too remote and not allow for the recovery of damages [Koch 229].

119. In this case, the Claimant’s expectation of the sales contract was to receive pumps for use in the procurement contract. The cancellation of the procurement contract would substantially deprive the Claimant of that expectation. The Respondent could not have foreseen that late delivery would result in the entire procurement contract’s cancellation [infra ¶121-125]. Since the Claimant’s expectation of the sales contract is the same as the damages suffered, namely losing the procurement contract, if damages are unforeseeable the deprivation of the Claimant’s expectation is also unforeseeable. Therefore, this case is one where the exception in fundamental breach prevents the Claimant from avoiding the contract.

V. THE RESPONDENT IS NOT LIABLE FOR THE DAMAGES RESULTING FROM THE CANCELLATION OF THE PROCUREMENT CONTRACT

120. The Claimant alleges that the procurement contract was cancelled as a result of the Respondent’s late delivery of the pumps [Cl. Ex. 13; Cl. Memo ¶124]. The Respondent is not liable for the cancellation of the procurement contract as the loss was not foreseeable at the conclusion of the contract (A). In addition, the Respondent is not liable for damages because the Claimant did not take reasonable action to mitigate (B). In any event, the Respondent is exempt from any damages for late delivery until 6 January 2009 as a result of the Isthmus Canal accident (C).
A. The Respondent Is Not Liable For The Cancellation Of The Procurement Contract As The Loss Was Unforeseeable At The Conclusion Of The Contract

121. The Respondent is not liable for damages since it could not have foreseen that a delay in delivery would result in cancellation of the entire procurement contract.

122. In the case of a breach, Article 74 CISG limits the damages to what was foreseeable to the breaching party at the conclusion of the contract. The CISG standard of foreseeability is developed from the common law principle found in Hadley v. Baxendale [Chengwei s. 14.2.4; Saidov s. II(2)(d); Fabric case]. In Hadley v. Baxendale, the standard for foreseeability is both subjective and objective. For the objective element it is enough to show that the breaching party ought to have foreseen the loss. The subjective element is limited to how the contract allocates risk to each party [Schlechtriem 508]. A damage that is foreseeable but has been allocated to a different party in the contract cannot be claimed. Further, the CISG requires that the type and extent of the loss be foreseeable [Honnold 1 446; Chengwei s. 14.2.5].

123. The Respondent entered into the sales contract with the knowledge that late delivery could cause the Claimant to miss certain deadlines of the procurement contract [Cl. Ex. 2]. However, the delivery of the pumps was only one step in the Claimant’s procurement contract and the Respondent was notified that no penalty directly attached to late delivery. It was notified only that late completion of the procurement contract would result in penalties [Proc. Ord. 2 Q.22].

124. Also, the Respondent and Claimant were unaware that Oceania was entering into a political crisis and that a military council would replace the government [Proc. Ord. 2 Q.4]. The Claimant stated that late delivery resulted in the procurement contract’s cancellation because the military council was looking for an “excuse” to cancel contracts with foreign suppliers [Cl. Stmt. Clm. ¶18; Cl. Ex. 13]. The Claimant also stated that due to the present military council, the procurement contract could not be negotiated, as was the usual practice [Cl. Ex. 13]. Hence, the Claimant believed that it was unlikely the original Oceania government would have cancelled the procurement contract due to late delivery.

125. Therefore, at the conclusion of the contract the Respondent could not have objectively and subjectively foreseen a military council take-over that would result in cancellation of
contracts with foreign suppliers. The magnitude and type of damage suffered by the
Claimant was beyond the foreseeable risk and therefore the Respondent is not liable.

B. The Respondent Is Not Liable For Damages As The Claimant Did Not Take
Reasonable Measures To Mitigate

126. The Claimant had a duty to mitigate the loss of the procurement contract beginning on 28
December 2008 (i). The Claimant failed to take the reasonable options available to mitigate
(ii). Attempting to resell the pumps was an inadequate attempt to mitigate damages (iii).

(i) The Claimant had a duty to mitigate the loss of the procurement contract
beginning on 28 December 2008

127. The Claimant alleged that due to the Respondent’s late delivery it suffered the loss of the
procurement contract [Cl. Memo ¶121]. The Claimant was aware on 28 December 2008
that it was probable that its procurement contract would be cancelled and had a duty to
begin mitigating such a loss. The Claimant agrees that there was a duty to mitigate [Cl.
Memo ¶123].

128. When it is clear that a breach will occur, a party claiming damages is obliged to take all
reasonable measures to mitigate the loss [Art. 77 CISG; Secretariat Commentary, Art. 73;
Schlechtriem 586; Knapp 559; Huber/Mullis; Excavator Case]. A failure to take reasonable
steps to mitigate will result in the injured party losing its right to claim those damages,
which could have reasonably been avoided [Art. 77 CISG; Jute Case; Bianca/Bonell 562;
Saidov s. 4(a); Schlechtriem 586; Treitel 17].

129. The duty to mitigate is not restricted to actions taken after a breach is claimed. A party
threatened by loss as a consequence of a breach is not permitted to passively await the loss
and then to pursue damages [Knapp 559; Frozen Meat Case; Enderlein/Maskow 307].

130. The military council in Oceania gave instructions to its departments to cancel contracts
with foreign suppliers that had breached their contracts [Cl. Simt. Clm. ¶18]. On 28
December 2008, the Claimant knew that the pumps had to be delivered to Oceania by 1
January 2009 or the procurement contract could be cancelled [Cl. Simt. Clm. ¶16, ¶18; Re.
Ex. 2]. The Claimant was already aware since 12 December 2008 that the pumps would not
arrive until 6 January 2009.
(ii) The Claimant failed to take the reasonable measures available to mitigate

131. The Claimant had reasonable measures available that would have reduced or removed its damages. The Claimant could have made a partial cover purchase to satisfy the procurement contract (a). Additionally, the Claimant could have informed the Respondent of its intention to cancel the contract for breach (b). Finally, the Claimant could have made an appeal to the Oceania military council to reconsider the cancellation of the procurement contract (c).

   a. The Claimant could have made a partial cover purchase to satisfy the procurement contract

132. The Procurement Officer told the Claimant on 28 December 2008 that partial delivery could prevent the cancellation of the procurement contract. The Officer further urged the Claimant to see if there was any way to prevent total late delivery [Re. Ex. 2].

133. Acceptable field pumps were available as of 12 November 2008 from the Trading Company of Mediterraneo (“TCM”) [Re. Ex. 3; Proc. Ord. 2 Q.25]. Even though the Claimant had not engaged in previous business with TCM, the Claimant was aware of the company and made no effort to contact it for replacement pumps [Cl. Memo ¶137; Proc. Ord. 2 Q 23; Re. Ex. 3]. If the Claimant had purchased pumps from TCM on 28 December 2008, the pumps could have arrived in Oceania on 1 January 2009 [Re. Ex. 3].

134. The Claimant had the money to make this purchase, but chose not to even research or look into this possibility [Proc. Ord. 2 Q.26]. The potential gain of saving the procurement contract outweighed any potential financial burden incurred through this purchase. A partial cover purchase was an available and reasonable measure of mitigation.

   b. The Claimant could have appealed the decision to cancel the procurement contract to the military council

135. The Claimant was informed on 28 December 2008 that there would be an office to appeal government contract cancellations [Cl. Memo ¶142; Cl. Ex. 11]. The Military Council opened up its appeal office on 2 March 2009, and shortly thereafter released its first decisions [Proc. Ord. 2 Q.20, Q.21]. The office was responsible for reviewing cancelled contracts and reinstating those that had been incorrectly cancelled [Cl. Ex. 11]. After
avoiding the sales contract, the Claimant did not attempt to submit an application to reverse the cancellation [Proc. Ord. 2 Q.21].

(iii) **Attempting to resell the pumps was an inadequate attempt to mitigate damages**

136. In February 2009, the Claimant invoked its right under CISG Article 88 and attempted to sell the pumps, albeit unsuccessfully [Cl. Stmt. Clm. ¶130; Cl. Ex. 16].

137. Due to the fact that the Claimant’s duty to mitigate began on 28 December 2008 an attempt to sell the pumps after the procurement contract was already cancelled is an unreasonable attempt to mitigate [Cl. Stmt. Clm. ¶132]. The Claimant could have avoided all damages by taking the above steps to save the procurement contract. Further Article 77 CISG requires the Claimant to take all reasonable measures. Taking one measure to mitigate after ignoring several earlier opportunities is not an adequate attempt at mitigation.

138. Therefore, due to the lack of reasonable mitigation measures taken by the Claimant starting 28 December 2008, the Respondent is not liable for damages.

**C. The Respondent Is Exempt From Any Damages For Late Delivery Until 6 January 2009 As A Result Of The Isthmus Canal Accident**

139. The Respondent had an obligation to deliver the pumps by 23 December 2009 [Cl. Ex. 7; Cl. Ex. 8; supra s. III]. The accident at the Isthmus Canal was a temporary impediment that exempted the Respondent from damages due to late delivery.

140. Under Article 79(1) CISG, an impediment allows for an exemption from liability for failure to perform an obligation. This exemption lasts for the period during which the impediment and its consequences exist [Art. 79(3) CISG; Honnold 637; Schlechtriem 621]. Finally, under Article 79(5) CISG, neither party can claim damages arising from a failure to comply with an obligation that occurred due to the impediment [Vine Wax Case].

141. For a non-performing party to establish that it is not liable for a failure to perform, three elements must be proven: the failure to perform is due to an impediment beyond the party’s control; at the contract’s conclusion, the party could not be reasonably expected to take the impediment into account; and after the contract conclusion, the party could not reasonably be expected avoid or overcome the impediment or its consequences [Art. 79(1) CISG; Honnold 613; Schwenzer 566].
142. The accident at the Isthmus Canal was a physical impediment beyond the Claimant’s control. The accident occurred as a result of another ship and the Respondent could not prevent or rectify the accident’s result [Cl. Ex. 9]. At the signing of the contract, the parties could not have reasonably foreseen an accident that would result in the closing of the Isthmus Canal, as accidents at the Isthmus Canal are rare [Proc. Ord. 2 Q.13].

143. At the time the Respondent was notified of the accident at the Isthmus Canal, it was unable to provide a commercially reasonable substitute for performance of delivery. It was “almost impossible” for the Respondent to transfer the pumps to another ship taking an alternative route around the continent [Proc. Ord. 2 Q.14]. In any event, an alternative route around the continent would take longer than the waiting period for the emergency repairs to the locks at the Isthmus Canal [Cl. Ex. 9]. In addition, the Respondent could not have been reasonably expected to avoid the impediment. The Claimant may allege that the accident could have been avoided had the pumps been shipped earlier; however, the Respondent was required to manufacture three beryllium-free P-52 pumps according to a modification of the sales contract [supra s. III]. As a result, an earlier shipping date was no longer tenable.

144. The accident resulted in a 13-day delay in transit. The impediment and its consequences caused the Merry Queen to reach Mediterraneo on 6 January 2009, resulting in late delivery. Consequently, the Claimant is barred from claiming damages that resulted from the impediment or its consequences [Art. 79(5) CISG]. Thus, the Respondent is exempt from damages occurring from late delivery until 6 January 2009, as the only delay in delivery resulted from the accident on the canal [Art. 79(5) CISG].
VI. REQUEST FOR RELIEF

THE RESPONDENT RESPECTFULLY REQUESTS THAT THE ARBITRAL TRIBUNAL:

- FIND that the preconditions of clause 18 were not fulfilled and thus the arbitral tribunal has no jurisdiction in this dispute.
- FIND if there is jurisdiction, that there was no conformity obligation to adapt to the changes in Oceania regulations.
- FIND that the Respondent did not breach its contract with the Claimant.
- FIND if there is a breach, that the Claimant did not take the actions necessary to avoid or minimize the adverse consequences of the breach.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21ST DAY OF JANUARY, 2010

University of Ottawa

Counsel for the Respondent:
University of Ottawa