

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

RESPONDENT'S MEMORANDUM



CLAIMANT

Mediterraneo Engineering Co.
415 Industrial Street
Capitol City
MEDITERRANEO

RESPONDENT

Equatoriana Super Pumps S.A.
58 Industrial Road
Oceanside
EQUATORIANA

BASANOVIC COURTNEY BRZEZINSKI MATTHIAS PARTANEN ANTTI-JUSSI

REDL LINDA

TROFAIER CONSTANZA

ALMA MATER RUDOLPHINA

UNIVERSITY OF VIENNA



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LIST OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Full text</u>
AAA	American Arbitration Association
ACICA	Australian Centre for International Commercial Arbitration
ACICAMR	ACICA Mediation Rules
ADR	Alternative Dispute Resolution
Art / Artt	Article / Articles
AUS	Australia
AUT	Austria
Bd	Band (Volume)
BG	Schweizerisches Bundesgericht (Swiss Supreme Court)
BGH	Bundesgerichtshof (German Supreme Court)
BTTP	Bulgarska turgosko-promishlena palata (Bulgarian Chamber of Commerce and Industry)
CCIG	Chambre de commerce, d'industrie et des services de Genève
CEx	CLAIMANT'S Exhibit
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods of 1980
CLAIMANT	Mediterraneo Engineering Co.
Clause 2	Clause of the technical specifications set out in Annex I and the warranty of the Contract signed on 1 July 2008 (CEx 3)
Clause 18	Multi-tiered dispute resolution clause of the Contract signed on 1 July 2008 (CEx 3)
CLOUT	Case Law on UNCITRAL Texts
CM	Memorandum for CLAIMANT from the Faculdade Paulista de Direito Pontificia Universidade Católica de Sao Paulo
Contract	Contract concluded between CLAIMANT and RESPONDENT signed on 1 July 2008 (CEx 3)
Deputy CEO	Deputy Chief Executive Officer
DES	Delivered Ex Ship (ICC Incoterms 2000)
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V. (German Institution for Arbitration)



DISMCR	DIS Mediation/Conciliation Rules
e.g.	<i>exempli gratia</i> (for example)
ed / eds	Edition, Editor / Editors
ESP	Spain
et al	<i>et alteri</i> (and others)
et seq / et seqq	<i>et sequens / et sequentes</i> (the following page(s) or paragraph(s))
FCA	Australian Federal Court
Fn	Footnote
FRA	France
GER	Germany
Health Regulation	Regulation of the Oceania Office of Environmental Health adopted on 1 August 2008 restricting the use of Beryllium
HG	Handelsgericht (Commercial Court)
HK	Hong Kong
i.e.	<i>id est</i> (that is)
IAMACR	Institute of Arbitrators and Mediators Australia Conciliation Rules
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICCADRR	ICC ADR Rules
ICSID	International Centre for Settlement of Investment Disputes
Incoterms	International Commercial Terms 2000 published by the International Chamber of Commerce
Irrigation Contract	Contract between CLAIMANT and Water Services signed 25 June 2008 for the irrigation project IR 08-45Q (CEx 3)
Irrigation Project	Project between CLAIMANT and Water Services which is underlying the Contract signed on 1 July 2008
ITA	Italy
LG	Landesgericht (German Provincial Court)
MBCA	Model Business Corporation Act (prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association and is followed by twenty four U.S. states)
MAL	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted 2006
MCL	UNCITRAL Model Law on International Commercial Conciliation 2002



MDR	Multi-tiered Dispute Resolution
Military Decree	Decree of the Oceanian Military Council effective on 1 January 2009 prohibiting the import or manufacture of products containing any amounts of a number of rare elements, including Beryllium [CEx 11]
NED	The Netherlands
NJILB	Northwestern Journal of International Law and Business
No	Number
NSWSC	New South Wales Supreme Court
NYC	New York Convention – Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
OJ	Official Journal of the European Union
O.R.	Official Record
Oceanian Regulations	Oceania’s Health and Beryllium Regulations
OG	Obergericht (Canton Appellate Court)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Provincial Court of Appeal)
p / pp	page / pages
PO 2	Procedural Order Number 2 – Answers to the requests for clarification
para / paraa	Paragraph / paragraphs
Parties	CLAIMANT and RESPONDENT in the dispute at hand
Problem	Statement of Claim of 15 July 2009, Answer and Statement of Defense of 17 August 2009 and Reply to Statement of Defense of 17 August 2009
QBD	Queen’s Bench Division
REx	RESPONDENT’S Exhibit
Rec	Recueil
RESPONDENT	Equatoriana Super Pumps S.A.
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
Sec	Section
SUI	Switzerland
Tribunal	The arbitral tribunal in the current dispute
UCR	UNCITRAL Conciliation Rules
UK	United Kingdom
UN	United Nations



UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States of America
VJ	Vindobona Journal of International Commercial Law & Arbitration
Vol	Volume
Water Services	Oceania Water Services
YB	Yearbook
§	Paragraph



LIST OF AUTHORITIES

Books

<u>Title</u>	<u>Cited as</u>	<u>Para</u>
<i>Bernstein, H. / Lookofsky, J.</i> , Understanding the CISG in Europe, Kluwer Law International: London (2003).	<i>Bernstein/Lookofsky</i> , page	36, 38, 72
<i>Bianca, C. M. / Bonell, M. J. (eds)</i> , Commentary on the International Sales Law, Giuffrè: Milan (1987).	<i>Author</i> in <i>Bianca/Bonell</i> , Article, paragraph	36, 55, 69, 91, 93
<i>Binder, P.</i> , International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 2 nd ed, Sweet & Maxwell: London (2005)	<i>Binder</i> ² , paragraph	3
<i>Born, G. B.</i> , International Commercial Arbitration, 3 rd ed, Kluwer Law International: Alphen aan den Rijn (2009).	<i>Born</i> ³ , page	3, 9, 10, 16, 20, 33
<i>Bühler, M. W. / Webster, T. H.</i> , Handbook of ICC Arbitration: Commentary, Precedents, Materials, Sweet & Maxwell: London (2005).	<i>Bühler/Webster</i> , page	33
<i>Craig, W. L. / Park, W. W. / Paulsson, J.</i> , International Chamber of Commerce Arbitration, 3 rd ed, Oceana Publications, Inc: Dobbs Ferry, NY (2000)	<i>Craig/Park/Paulsson</i> ³ , page	6
<i>DiMatteo, L. A. / Dhooge, L. J. / Greene, S. / Maurer, V. / Pagnattaro, M. A.</i> , International Sales Law – A Critical Analysis of CISG Jurisprudence, Cambridge University Press: Cambridge / New York / Melbourne / Madrid / Cape Town / Singapore / Sao Paulo (2005).	<i>DiMatteo et al</i> , page	79



Enderlein, F. / Maskow, D. , International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Oceana: London (1992).	<i>Enderlein/Maskow</i> , page	91, 93
Ferrari, F. / Flechtner, H. / Brand, R. A. (eds) , The Draft UNCITRAL Digest and Beyond: Cases, Analyses and Unresolved Issues in the U.N. Sales Convention, Sellier: Munich (2004).	<i>Author in Ferrari/Flechtner/Brand</i> , page	48, 72, 74, 76
Fouchard, P. / Gaillard, E. / Goldman, B. , International Commercial Arbitration, Kluwer Law International: The Hague / Boston / London (1999).	<i>Fouchard/Gaillard/Goldman</i> , paragraph	10, 34, 38
Fowler, H.W. / Fowler, F.G. / Thompson, D. , The Concise Oxford Dictionary of Current English, 9 th ed Clarendon Press: Oxford (1995).	<i>Oxford Dictionary</i> ⁹ , page	43
Friedland, P. D. , Arbitration Clauses for International Contracts, 2 nd ed, Juris Publishing: New York (2007).	<i>Friedland</i> ² , page	17
Gaillard, E., / DiPietro, D. , Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice, Cameron May Ltd: London (2008)	<i>Author in Gaillard/DiPietro</i> , page	34
Goode, R. , Commercial Law, 3 rd ed, LexisNexis: Wiltshire (2004).	<i>Goode</i> ³ , page	27



<p>Gutknecht, U., Das Nacherfüllungsrecht des Verkäufers bei Kauf- und Werklieferungsverträgen, Bd 5 in Magnus, U. (ed), Internationalrechtliche Studien: Beiträge zum Internationalen Privatrecht, zum Einheitsrecht und zur Rechtsvergleichung, Peter Lang GmbH Europäischer Verlag der Wissenschaften: Frankfurt (1997)</p>	<p><i>Gutknecht</i>, page</p>	<p>76</p>
<p>Henschel, R. F., The Conformity of Goods in International Sales, Thomson: Copenhagen (2005).</p>	<p><i>Henschel</i>, page</p>	<p>44, 52, 54, 55, 56, 60</p>
<p>Honnold, J. O., Documentary History of the Uniform Law for International Sales: The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations, Kluwer Law and Taxation Publishers: Deventer (1989).</p>	<p><i>Secretariat Commentary</i>, O.R., Article, paragraph</p>	<p>54, 64, 74, 83</p>
<p>Honnold, J. O., Uniform Law for International Sales: Under the 1980 United Nations Convention, 3rd ed, Kluwer Law International: The Hague (1999).</p>	<p><i>Honnold</i>³, paragraph</p>	<p>38, 54, 69, 74</p>
<p>Honsell, H., Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG), 2nd ed, Springer-Verlag: Heidelberg (2010)</p>	<p><i>Author in Honsell</i>², Article, paragraph</p>	<p>60, 69, 75, 83, 84, 103</p>
<p>Huber, P. / Mullis, A., The CISG – A new text book for students and practitioners, Sellier: München (2007).</p>	<p><i>Huber/Mullis</i>, page</p>	<p>56, 89</p>



Kruisinga, S. A. , (Non-)Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept? Intersentia: Antwerp – Oxford – New York (2004).	<i>Kruisinga</i> , page	56, 62
Lew, J. D. M. / Mistelis, L. A. / Kröll, S. M. , Comparative International Commercial Arbitration, Kluwer Law International: London (2003).	<i>Lew/ Mistelis/ Kröll</i> , paragraph	16
Lord, R. A. , Williston on Contracts, 4 th ed, West Group: USA, (2009).	<i>Lord</i> ⁴ , paragraph	18, 19
Ludwig, K. S. , Der Vertragsabschluß nach UN-Kaufrecht im Spannungsverhältnis von Common Law und Civil Law: Dargestellt auf der Grundlage der Rechtsordnung Englands und Deutschlands, Peter Lang GmbH Europäischer Verlag der Wirtschaften: Frankfurt (1994).	<i>Ludwig</i> , page	69
Moses, M. L. , The Principles and Practice of International Commercial Arbitration, Cambridge University Press: Cambridge (2008).	<i>Moses</i> , page	30
Piltz, B. , Internationales Kaufrecht: Das UN-Kaufrecht in praxisorientierter Darstellung, 2 nd ed, C.H. Beck München (2008).	<i>Piltz</i> ² , paragraph	69, 103
Ramberg, J. , ICC Guide to Incoterms 2000, ICC Publishing S.A: Paris (2000).	<i>Ramberg</i> , Incoterms, page	48, 49, 51
Ramberg, J. , International Commercial Transactions, 3 rd ed, ICC Publication N°691 : Stockholm (2004)	<i>Ramberg</i> ³ , page	19



<p>Ramberg, J., CISG and Incoterms 2000 in Connection with International Commercial Transactions, in Andersen, C. B. / Schroeter, U. G. (eds), <i>Sharing International Commercial Law across National Borders: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday</i>, Wildy, Simmonds & Hill Publishing (March 2008) pp 394-403</p> <p>Available at http://www.cisg.law.pace.edu/cisg/biblio/ramberg2.pdf</p>	<p><i>Ramberg</i>, in <i>Andersen/Schroeter</i>, page</p>	<p>51</p>
<p>Ramberg, J. / Herre, J., <i>Internationella köplagen (CISG): En kommentar</i>, 3rd ed, Norstedts Juridik: Stockholm (2009)</p>	<p><i>Ramberg/Herre</i>³, page</p>	<p>71</p>
<p>Redfern, A. / Hunter, M. / Blackaby, N. / Partasides, C., <i>Law and Practice of International Commercial Arbitration</i>, 4th ed, Sweet & Maxwell: London (2004).</p>	<p><i>Redfern/Hunter</i>⁴, paragraph</p>	<p>3, 33</p>
<p>Risse, J.(ed), <i>Wirtschaftsmediation</i>, Verlag C.H. Beck: München (2003)</p>	<p><i>Risse</i>, §, paragraph</p>	<p>16</p>
<p>Rubino-Sammartano, M., <i>International Arbitration Law and Practice</i>, 2nd ed, Kluwer Law International: The Hague (2001)</p>	<p><i>Rubino-Sammartano</i>², page</p>	<p>6, 34</p>
<p>Saidov, D., <i>The Law of Damages in the International Sale of Goods: The CISG and other International Instruments</i>, Oxford and Portland: Oregon (2008).</p>	<p><i>Saidov</i>, page</p>	<p>107</p>
<p>Schlechtriem, P., <i>Internationales UN-Kaufrecht</i>, 2nd ed, J.C.B. Mohr (Paul Siebeck): Tübingen (2003).</p>	<p><i>Schlechtriem</i>², paragraph</p>	<p>54, 66, 83</p>



Schlechtriem, P. / Butler, P. , UN Law on International Sales: The UN Convention on the International Sale of Goods, Springer-Verlag Berlin: Heidelberg (2008).	<i>Schlechtriem/Butler</i> , paragraph	62, 103
Schlechtriem, P. / Schwenger, I. (eds) , Commentary on the UN Convention of the International Sale of Goods (CISG), 2 nd ed, Verlag C.H. Beck: München (2005).	<i>Author in Schlechtriem/Schwenger²</i> , Article, paragraph	42, 48, 49, 52, 55, 60, 65, 73, 74, 79, 84, 89, 99
Schlechtriem, P. / Schwenger, I. (eds) , Kommentar zum einheitlichen UN-Kaufrecht (CISG), 5 th ed, Verlag C.H. Beck: München (2008).	<i>Author in Schlechtriem/Schwenger⁵</i> , Article, paragraph	45, 64, 86, 94, 107
Schmidt, K. , Münchener Kommentar zum Handelsgesetzbuch, Vol 6, 2 nd ed, Verlag C.H. Beck: München (2007)	<i>Author in MuKoHGB VT²</i> , Article, paragraph	75, 76
Schwab, K.H. / Walter, G. , Schiedsgerichtsbarkeit Kommentar, 7 th ed, Verlag C.H. Beck: München (2005)	<i>Schwab/Walter⁷</i> , Article, paragraph	6
Sutton, D. / Gill, J. (eds) , Russell on Arbitration, 22 th ed, Sweet & Maxwell: London (2003).	<i>Sutton/Gill²</i> , paragraph	6, 16
Staudinger, J. , Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 13 th ed, Sellier de Gruyter: Berlin (2005)	<i>Author in Staudinger¹³</i> , Article, paragraph	56, 75, 76
Wallgren, C. , in Goldsmith, J.C., / Ingen-Housz, A. / Pointon, G. H., ADR in business: Practice and Issues across Countries and Cultures, Kluwer Law International: Alphen aan den Rijn (2006), pp 3-19	<i>Wallgren</i> , page	10



<p>Westermann, H.P. (ed), Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol 3: Schuldrecht Bes. Teil, Part I, 5th ed, Verlag C.H. Beck: München (2008).</p>	<p><i>Author in MuKo III/I⁵, Article, paragraph</i></p>	<p>100, 107</p>
<p>Whincup, M. H., Contract Law and Practice the English System and Continental Comparisons, 4th ed, Kluwer Law International: The Hague (2001).</p>	<p><i>Whincup⁴, page</i></p>	<p>27</p>
<p>Zeller, B., Damages under the Convention on Contracts for the International Sale of Goods, Oceana Publications: Dobbs Ferry, New York (2005).</p>	<p><i>Zeller, page</i></p>	<p>92, 103</p>



Articles

<u>Title</u>	<u>Cited as</u>	<u>Para</u>
<i>Berger, K. P.</i> , Law and Practice of Escalation Clauses, in <i>Arbitration International</i> , Vol 22 No 1, (2006), pp 1-17.	<i>Berger</i> , page	9, 10, 30
<i>Blessing, M.</i> , The Law Applicable to the Arbitration Clause, in ICCA Congress Series No 9 (1999), pp 168-188.	<i>Blessing</i> , page	16
<i>Boog, C.</i> , How to Deal with Multi-tiered Dispute Resolution Clauses – Note – 6 June 2007 – Swiss Federal Supreme Court in <i>ASA Bulletin</i> , Vol 26 No 1 (2008), pp 103 – 112.	<i>Boog</i> , page	7, 9, 10, 13, 16
<i>Carter, J. H.</i> , Part I - Issues Arising from Integrated Dispute Resolution Clauses, in ICCA Congress Series No 12 (Beijing 2004), van den Berg (ed) (2005), pp 446-469.	<i>Carter</i> , page	7, 8
<i>Davis, K. R.</i> , A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power, in <i>26 Fordham Urban Law Journal</i> 167, (1999), pp 167-208.	<i>Davis</i> , page	18
<i>De Fina, A. A.</i> , Comparative Analysis of Power of Arbitrators to Determine Procedures under Various Arbitration Rules, in ICCA Congress Series No 7, (Vienna 1994) van den Berg (ed) (1996), pp 56 – 64.	<i>de Fina</i> , page	33
<i>DiMatteo, L. A. / Dhooge, L. J. / Greene, S. / Maurer, V. / Pagnattaro, M. A.</i> , The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence, in <i>34 Northwestern Journal of International Law and Business</i> (Winter 2004), pp 299-440.	<i>DiMatteo et al</i> , page	79
<i>Duhl, G. M.</i> , Conscious Ambiguity: Slaying Cerberus in the Interpretation of Contractual Inconsistencies, in <i>University of Pittsburgh Law Review</i> , Vol. 71, (2009), pp 71-116.	<i>Duhl</i> , page	18, 19



Ferrari, F. , Fundamental Breach of Contract Under the UN Sales Convention: 25 Years of Article 25 CISG, in 25 <i>Journal of Law and Commerce</i> (Spring 2006) pp 489-508.	<i>Ferrari</i> , page	81, 85
Figueres, D. J. , Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration, ICC International Court of Arbitration Bulletin, Vol 14 No 1, (2003), pp 71-88.	<i>Figueres</i> , page	6
Flechtner, H. , Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice thereof under the United Nations Sales Convention ("CISG"), in 36 Boston University International Law Journal (2008) pp 1-28.	<i>Flechtner</i> , page	56
Hermann, G. , Conciliation as a new method of dispute settlement, in ICCA Congress Series No 1 (Hamburg 1982), Sanders (ed) (1983), pp 145-165.	<i>Hermann</i> , page	24, 31
Horvath, G. J. , The Duty of the Tribunal to Render an Enforceable Award, in Journal of International Arbitration, Vol 18 No 2, (2001), pp 135-158.	<i>Horvath</i> , page	33
Huber, P. , Some introductory remarks on the CISG, in IHR (6/2006) pp 228-238, page 237, http://www.cisg.law.pace.edu/cisg/biblio/huber-08.html	<i>Huber</i> , page	45
Jolles, A. , Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement, in 72 Arbitration 4 (2006), pp 329-338.	<i>Jolles</i> , page	8, 9, 12
Jones, D. , Dealing with Multi-Tiered Dispute Resolution, in 75 Arbitration 2 (2009), pp 188-198.	<i>Jones</i> , page	6, 9, 16, 24
Kimbel, E. P. , Nachfrist Notice and Avoidance under the CISG, in 18 Journal of Law and Commerce (1999), pp 301-331.	<i>Kimbel</i> , page	73, 74
Kirby, M. , Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts, in 24 Statute Law Review 95, (2003), pp 95-111.	<i>Kirby</i> , page	18



Lew, J. D. M. , The Law Applicable to the Form and Substance of the Arbitration Clause, in ICCA Congress Series No 9 (Paris 1998) van den Berg (ed) (1999), pp 114-145.	<i>Lew</i> , page	33
Liu, C. , Force Majeure – Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law [2 nd ed: Case annotated update (April 2005)], http://www.cisg.law.pace.edu/cisg/biblio/liu6.html#fmiv .	<i>Liu</i> , paragraph	95
Lye, K. C. , Agreements to Mediate: The Impact of Cable & Wireless plc v IBM United Kingdom Ltd [2003] BLR 89, in Singapore Academy of Law Journal, Vol 16 (2004), pp 530-540.	<i>Lye</i> , page	34
Magnus, U. , The Remedy of Avoidance of Contract Under CISG: General Remarks and Special Cases, in 25 Journal of Law and Commerce (2005-06) pp 423-436.	<i>Magnus</i> , page	81
Mullis, A. , Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases, in Andreas & Jarborg eds, Anglo-Swedish Studies in Law, Lustus Forlag (1998), pp 326-355.	<i>Mullis</i> , page	81
Neumann, T. , Features of Article 35 CISG: Equivalence, Burden of Proof and Awareness, in Vinodobona Journal of International Commercial Law & Arbitration, Vol 11 No 1 (2007), pp 81-98.	<i>Neumann</i> , paragraph	52
Perales Viscasillas, P. , Modification and Termination of the Contract (Art. 29 CISG), in 25 Journal of Law and Commerce (2005-06), pp 167-179.	<i>Perales</i> <i>Viscasillas</i> , page	64
Pryles, M. , Multi-Tiered Dispute Resolution Clauses, in Journal of International Arbitration, Vol 18 No 2 (2001), pp 159-176.	<i>Pryles</i> , page	6, 7, 8, 9



Rimke, J. , Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial, in Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000), pp 193-243.	<i>Rimke</i> , page	91, 93
Sanders, P. , UNCITRAL's Model Law on International Commercial Conciliation, in Arbitration International Vol 23 No 1 (2007), pp 105-142.	<i>Sanders</i> , page	13, 31
Sykes, A. , The Contra Proferentem Rule, in Vindobona Journal of International Commercial Law & Arbitration, Vol 8 No 1 (2004), pp 65-79.	<i>Sykes</i> , page	18, 19
Van Houtte, H. , Changed Circumstances and Pacta Sunt Servanda, in Gaillard, E. (ed), Transnational Rules in International Commercial Arbitration, ICC Publ. Nr. 480,4, Paris (1993); pp 107-123.	<i>Van Houtte</i> , page	21
Voser, N. , Note – Kassationsgericht Zürich ,15 März 1999, in ASA Bulletin Vol 20 No 2 (2002), pp 376-381.	<i>Voser</i> , page	10
Wolrich, P. M. , Multi-tiered clauses: ICC perspectives in light of the new ICC ADR rules, available at http://www1.fidic.org/resources/contracts/multi_tiered_clauses-wolrich02.pdf .	<i>Wolrich</i> , page	6, 16, 24



Case Law

Court decisions

Australia

- High Court of Australia, 62 ALJR 110, 19 February 1988 *Waltons Stores (Interstate) Ltd v Maber* Para 27
 available at Westlaw
- Supreme Court of Queensland, 12 March 1990, *Allco Steel (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd* Para 11
 Unreported
- NSWSC (Common Law Division, Construction List: Giles J, 13 April 1992 *Hooper Bailie Associated Ltd. v. Natcon Group Pty. Ltd.* Paraa 11, 32
 In New South Wales Law Report Vol 28 (1992), pp 194-214
- NSWSC 996, No 55020/99, 1 October 1999, *Aiton Australia Pty Ltd. v. Transfield Pty Ltd.* Paraa 6, 11
 available at www.austlii.edu.au

Austria

- OGH [AUT], 20 March 1997, 2 Ob 58/97m Para 42
<http://cisgw3.law.pace.edu/cases/970320a3.html>
- OGH [AUT], 13 April 2000, 2 Ob 100/00w Paraa 56, 57
http://www.cisg.at/2_10000w.htm
- OGH [AUT], 14 January 2002, 7 Ob 301/01t Para 107
<http://cisgw3.law.pace.edu/cases/020114a3.html>
- OGH [AUT], 25 January 2006, 7 Ob 302/05w Paraa 55, 56, 57
<http://cisgw3.law.pace.edu/cases/060125a3.html>
- OLG Graz [AUT], 24 January 2002, 4 R 219/01k, Para 103
<http://cisgw3.law.pace.edu/cases/020124a3.html>

**Germany**

BGH [GER] 8 March 1995, VIII ZR 159/94 http://cisgw3.law.pace.edu/cases/950308g3.html	Para 56
BGH [GER] 3 April 1996, VIII ZR 51/95 http://cisgw3.law.pace.edu/cases/960403g1.html	Para 83
BGH [GER] 24 March 1999, VIII ZR 121/98 http://cisgw3.law.pace.edu/cases/990324g1.html	Para 103
BGH [GER] 2 March 2005, VIII ZR 67/04 http://cisgw3.law.pace.edu/cases/050302g1.html	Para 56
BGH [GER] 19 April 2007, OA.2000.459 http://cisgw3.law.pace.edu/cases/070419s1.html	Para 55
OLG Celle [GER] 2 September 1998, 3 U 246/97 http://cisgw3.law.pace.edu/cases/980902g1.html	Para 107
OLG Düsseldorf [GER] 13 September 1996, 17 U 18/96 http://cisgw3.law.pace.edu/cases/960913g1.html	Para 107
OLG Frankfurt [GER] 30 August 2000, 9 U 13/00 http://cisgw3.law.pace.edu/cases/000830g1.html	Para 42
OLG Hamburg [GER] 28 February 1997, 1 U 167/95 http://cisgw3.law.pace.edu/cases/970228g1.html	Para 107
OLG Koblenz [GER], 11 September 1998, No 2 U 580/96, http://cisgw3.law.pace.edu/cases/980911g1.html	Para 60
OLG Köln [GER], 22 February 1994, No 22 U 202/93, http://cisgw3.law.pace.edu/cases/940222g1.html	Para 69



OLG Rostock [GER], 15 September 2003, No 3 U 19/03, http://cisgw3.law.pace.edu/cases/030915g1.html	Para 68
Hong Kong	
Court of First Instance [HK], No [2004] 2 HKC 505, 14 April 2004, <i>Hyundai Engineering and Construction Co. v. Vigour Ltd</i> available at Lexis Nexis International	Para 9
Italy	
Tribunale di Forli [ITA], 16 February 2009 http://cisgw3.law.pace.edu/cases/090216i3.html	Paraa 55, 69
Netherlands	
Hof Arnhem [NED], 97/700 and 98/046, 27 April 1999 http://cisgw3.law.pace.edu/cases/990427n1.html	Para 58
Spain	
Audiencia Provincial de Navarra, sección 3ª [ESP], 27 December 2007 http://cisgw3.law.pace.edu/cases/071227s4.html	Paraa 16, 42
Switzerland	
Appellationsgericht Basel-Stadt [SUI], 16/2007/MEM/chi, 26 September 2008 http://cisgw3.law.pace.edu/cases/080926s1.html	Para 38
BG St. Gallen [SUI], 3PZ 97/18, 3 July 1997 http://cisgw3.law.pace.edu/cases/970703s1.html	Para 38
HG Aargau [SUI], OR.2001.00029, 5 November 2002 http://cisgw3.law.pace.edu/cases/021105s1.html	Para 85



Kantonsgericht Zug [SUI], A3 2004 30, 2 December 2004 http://cisgw3.law.pace.edu/cases/041202s1.html	Para 69
Kassationsgericht Zürich [SUI], ZR 99 (2000) No 29, 15 March 1999 available at Swisslex	Para 10
OG Thurgau [SUI], RBOG (2001) No 18, 23 April 2001, available at www.obergericht.tg.ch/	Para 11
OG Zürich [SUI], ZR 101 (2002) No 21, 11 September 2001 available at Swisslex	Para 11
Tribunal Federale [SUI], 4A_18/2007, 6 June 2007, http://www.kluwerarbitration.com/document.aspx?id=ipn30112 .	Para 16
United Kingdom	
House of Lords, [UK], No [1843-1860] All ER Rep 1, 10 July 1856, <i>Scott v Avery (and others)</i> , available at Lexis Nexis International	Para 6
Court of Appeal [UK], [1925] 1 K.B. 745, 25 February 1925, <i>Smith v Martin</i> available at Westlaw	Para 34
Court of Appeal [UK], [1975] 1 All ER 716, 28 November 1974, <i>Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd</i> , available at Lexis Nexis International	Para 10
QBD [UK] (Commercial Court), 1 August 2001, <i>National Boat Shows Ltd v Tameside Marine</i> , available at Westlaw	Para 9



QBD [UK], No [2003] EWHC 316 (Comm), 27 February 2003, <i>Cable & Wireless plc v IBM United Kingdom Ltd</i> , available at Lexis Nexis	Para 7
United States of America	
U.S. Court of Appeals, 8 th Circuit [U.S.], 11 July 1997, <i>Terra Intern., Inc. v. Mississippi Chemical Corp</i> , Available at Westlaw	Para 19
U.S. Court of Appeals, 9 th Circuit [U.S.], 18 Jan 1995, <i>Atwood v. Newmont Gold Co, Inc.</i> , Available at Westlaw	Para 18
U.S. District Court, Eastern District of Louisiana [U.S.], No 99-0380 Section "K" (1), 17 May 1999, <i>Medical Marketing v. Internazionale Medico Scientifica</i> http://cisgw3.law.pace.edu/cases/990517u1.html	Para 56
Supreme Court of Connecticut [U.S.], 229 Conn. 465, 641 A.2d 1381, 31 May 1994, <i>White v Kampner</i> , available at Westlaw	Para 6
Arbitral awards	
American Arbitration Association (AAA)	
AAA Final Award of 12 December 2007, <i>Macromex Srl. v Globex International Inc.</i> , No. 50181T 0036406, http://cisgw3.law.pace.edu/cases/071212a5.html .	Para 95
Arbitral Tribunal – Vienna (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft)	
Arbitral Tribunal - Vienna 15 June 1994, SCH-4366 http://cisgw3.law.pace.edu/cases/940615a3.html	Para 107

**Bulgarian Chamber of Commerce and Industry (BTTP)**

BTTP Case No 56/1995, 24 April 1996

Para 99

<http://cisgw3.law.pace.edu/cases/960424bu.html>

International Court of Arbitration of the International Chamber of Commerce (ICC)

ICC Case No. 1434 of 1975,

Para 10

in 1976 Journal du droit international pp 978-989

ICC Case No 1512 of 1971,

Para 27

Yearbook Commercial Arbitration, Vol I (1976), pp 128 – 129

ICC Case No 6276 of 1990,

Paraa 9,
16, 25

in *Figueres, D. J.*, Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration, ICC International Court of Arbitration Bulletin Vol. 14/No. 1, Spring 2003.

ICC Case No. 6653 of 26 March 1993,

Para 36

<http://cisgw3.law.pace.edu/cases/936653i1.html>.

ICC Case No. 7920 of 1993,

Para 10

Yearbook Commercial Arbitration, Vol XXIII (1998), pp 80-85.

ICC Case No. 7929 of 1995,

Para 16

Yearbook Commercial Arbitration, Vol. XXV (2000), pp 11-432.

ICC Case No. 8324 of 1995,

Para 38

<http://cisgw3.law.pace.edu/cases/958324i1.html>

ICC Case No. 8445 of 1996,

Para 29

Yearbook of Commercial Arbitration Volume XXVI (2001), pp. 167-180.



ICC Case No 8462 of 1997, in <i>Figueres, D. J.</i> , Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration, ICC International Court of Arbitration Bulletin Vol. 14/No. 1, Spring 2003.	Para 11
ICC Case No 9977 of 1999, in <i>Figueres, D. J.</i> , Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration, ICC International Court of Arbitration Bulletin Vol. 14/No. 1, Spring 2003.	Paraa 17, 27
ICC Case No 10256 of 2000, in <i>Figueres, D. J.</i> , Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration, ICC International Court of Arbitration Bulletin Vol. 14/No. 1, Spring 2003.	Para 16
ICC Case No 11849 of 2003, http://cisgw3.law.pace.edu/cases/031849i1.html	Para 85
Chambre de commerce, d'industrie et des services de Genève (CCIG)	
CCIG Interim Award of 27 August 1999, ASA Bulletin, Vol. 19 No. 2 (2001), pp. 265-275.	Para 17
Arbitration Institute of the Stockholm Chamber of Commerce (SCC)	
SCC Case 10/2005 Stockholm International Arbitration Review Vol 2007:2, pp 235-253	Para 8
International Centre for Settlement of Investment Disputes (ICSID)	
ISCID Case, 25 September 1983, <i>Amco Asia Corp. and others v. Republic of Indonesia</i> , Yearbook of Commercial Arbitration, Vol X (1985), pp 61-70.	Para 17
Iran/U.S. Claims Tribunal	



Iran / U.S. Claims Tribunal 28 July 1989, *Watkins-Johnson v. Islamic Republic of Iran*, <http://cisgw3.law.pace.edu/cases/890728i2.html>

Para 103

List of Legal Texts

ACICA Arbitration Rules	The Rules of Arbitration of the Australian Centre for International Commercial Arbitration (ACICA), 12 Jul 2005.
ACICA Mediation Rules	Mediation Rules published by the Australian Centre for International Commercial Arbitration (ACICA), 17 July 2007.
CISG	United Nations Convention on Contracts for the International Sale of Goods, 11 Apr 1980.
Conciliation Rules of the Institute of Arbitrators & Mediators Australia	Conciliation Rules published by the Institute of Arbitrators & Mediators Australia (IAMA), 16 November 2006.
DIS Mediation/Conciliation Rules	The Mediation/Conciliation Rules of the Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS) (German Institution of Arbitration), 1 January 2002.
ICC ADR Rules	ADR Rules of the International Chamber of Commerce, 1 July 2001.
INCOTERMS	Published by the International Chamber of Commerce, first version was introduced in 1936 and the present dates from 2000.
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 7 Jun 1959.
PECL	The Principles of European Contract Law. Prepared by the Commission on European Contract Law in 1999.
UNCITRAL Arbitration Rule	UNCITRAL Arbitration Rules, 28 Apr 1976.
UNCITRAL Conciliation Rules	UNCITRAL Conciliation Rules, 23 Jul 1980.
UNCITRAL Model Law on International Commercial Arbitration	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, 21 Jun 1985.



UNCITRAL Model Law on International Commercial Conciliation UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, 24 Jun 2002.

UNIDROIT Principles UNIDROIT Principles of International Commercial Contracts 2004.

STATEMENT OF FACTS

CLAIMANT	Mediterraneo Engineering Co. (“CLAIMANT”), organized under the laws of Mediterraneo, provides services for urban and rural development.
RESPONDENT	Equatoriana Super Pumps S.A. (“RESPONDENT”), organized under the laws of Equatoriana, is a manufacturer of pumps.
04 May 2008	CLAIMANT approached RESPONDENT regarding supply of the goods for a tender to Oceania Water Services.
01 Jul 2008	The contract for supply of pumps was concluded between the Parties (“Contract”). The Contract contained a MDR-Clause requiring the fulfillment of a defined conciliation procedure as a prerequisite for commencing arbitration (“Clause 18”).
01 Aug 2008	CLAIMANT informed RESPONDENT of the Oceanian regulation restricting use of Beryllium indoors. CLAIMANT, aware that the steel used by RESPONDENT contains Beryllium, requested that RESPONDENT procure new steel for the three P-52 pumps; the field pumps remained acceptable.
02 Aug 2008	RESPONDENT informed CLAIMANT it could procure new steel, but this was not within its original contract obligations, would extend delivery to around 22 Dec 2008 and create an additional cost for CLAIMANT of approx. US\$30.000
30 Oct 2008	Initial date for completion of manufacturing.
15 Nov 2008	Manufacture of pumps completed.
22 Nov 2008	Pumps left Equatoriano on the Merry Queen bound for Mediterraneo. CLAIMANT paid RESPONDENT in full pursuant to the letter of credit.
28 Nov 2008	Accident at Isthmus Canal caused delay in shipping.
01 Dec 2008	The Oceanian government resigned and the military took over.
12 Dec 2008	RESPONDENT informed CLAIMANT that Merry Queen had passed through Isthmus Canal and was scheduled to arrive in Mediterraneo on 6 Jan 2009.
22 Dec 2008	Date around which the pumps were to arrive per contract modification.
28 Dec 2008	Oceanian military passed a decree prohibiting import or manufacture of products containing Beryllium (“Military Decree”), and ordered government departments to cancel contracts with foreign companies where possible. CLAIMANT was informed that partial delivery of goods by 31 Dec 2008 could suffice to ensure the Contract remained viable until the Merry Queen arrived.
05 Jan 2008	Water Services cancelled the contract with CLAIMANT. CLAIMANT avoided the Contract with RESPONDENT on the grounds of alleged failure to meet the



	contractual delivery date.
06 Jan 2009	Ship carrying the pumps arrived in Mediterraneo.
16 Jan 2009	First time CLAIMANT raised the issue of non-conformity of the pumps.
28 May 2009	3 days of Conciliation proceedings began in Vindobona. RESPONDENT was represented by its CEO as stipulated in Clause 18. CLAIMANT only sent its Deputy CEO without informing CLAIMANT.
04 Jun 2009	Conciliation efforts were terminated by the conciliator.
02 Jun to 08 Jun 2009	RESPONDENT by pure coincidence found out about the true position of CLAIMANT'S representative.
15 Jul 2009	CLAIMANT submitted a Request for Arbitration and Statement of Claim with the ACICA and paid the registration fee.
17 Aug 2009	RESPONDENT submitted its Statement of Defense to the ACICA, containing its timely objection to the Tribunal's jurisdiction on the grounds CLAIMANT was not adequately represented at the conciliation as required by the Contract.

ARGUMENTS IN REGARD TO JURISDICTION OF THE TRIBUNAL

A. THE PRECONDITIONS TO ARBITRATION AS PROVIDED IN CLAUSE 18 OF THE CONTRACT WERE NOT FULFILLED AND THUS THE TRIBUNAL DOES NOT HAVE JURISDICTION

- 1 On 1 July 2008, the Parties signed the Contract containing a multi-tiered dispute resolution clause ("Clause 18") that required the fulfillment of a defined conciliation procedure as a prerequisite for commencing arbitration. After a dispute arose out of the Contract, conciliation was conducted from 28 to 30 May 2009. However, in this conciliation procedure, CLAIMANT was not represented by its CEO, as required under Clause 18, but only by its Deputy CEO. [Problem, pp 7, 41]. The conciliation procedure was therefore not in accordance with the Parties' agreement.
- 2 In the following, it will be shown that CLAIMANT'S failure to comply with the mandatory conciliation tier of Clause 18 is a jurisdictional issue leading to the Tribunal's lack of authority to decide the case [1]. CLAIMANT'S representation during the conciliation was in breach of Clause 18 [2] and RESPONDENT has not foregone its right to object to CLAIMANT'S lack of representation [3]. As a result, re-commencing the conciliation is reasonable and in accordance with the best interest of the Parties [4]. Finally, by granting jurisdiction, the Tribunal risks that the award can be set aside or denied enforcement according to the MAL and NYC [5].



1. As a result of the non-compliance with the mandatory conciliation tier of Clause 18 by CLAIMANT the Tribunal lacks jurisdiction

3 CLAIMANT asserts that Art 24.1 ACICA Rules codifies the principle of Competence–Competence which provides the Tribunal can determine its jurisdiction [CM, para 2]. RESPONDENT does not object to this as the principle of Competence–Competence is a generally accepted principle in international arbitration, laid down also in Art 16 MAL [Born³, pp 855-856; Redfern/Hunter⁴, para 5-39; Binder², paraa 4-003 *et seqq*]. However, while CLAIMANT alleges that the breach of the conciliation tier of Clause 18 should be treated as a mere breach of contract, not affecting the Tribunal’s jurisdiction [CM, para 40], RESPONDENT denies this assertion.

1.1 Analysis of Clause 18 shows that the conciliation tier is a mandatory and enforceable procedural condition precedent for commencing the arbitration

4 CLAIMANT blatantly attempts to mislead the Tribunal by omitting important parts of Clause 18 and quoting only the arbitral tier [CM, para 2]. In doing so, CLAIMANT tries to conceal the fact that the Parties agreed, first and foremost, to resolve their disputes in a conciliation procedure as a procedural condition precedent to the arbitration (i.e. a mandatory requirement to be fulfilled prior to commencing further proceedings) under the second paragraph of Clause 18.

5 The correct wording of the escalation mechanism in Clause 18 states that “(a)ny dispute, controversy, or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by conciliation in accordance with the UNCITRAL Conciliation Rules. The parties will be represented by their Chief Executive Officer. (...) If the dispute has not been settled pursuant to the said conciliation procedure, the dispute shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. (...)”.

6 Clause 18 thus stipulates a two-tiered dispute resolution mechanism. When a dispute arises, the Parties, represented by their respective CEOs, first have to attempt resolving it by conciliation under the UCR. Only if such “*conciliation procedure*” does not lead to a resolution of the dispute can arbitration be initiated. In order for a conciliation tier to be considered a procedural condition precedent, this must be reflected in the phrasing of the clause [Figueres, p 73; Wolrich, p 4; Pryles, p 168; *Aiton Australia Pty Ltd. v. Transfield Pty Ltd*; *Scott v. Avery*]. This is the case here as the Parties agreed on a clear and express obligation to submit the dispute to conciliation and, further, agreed that arbitration shall be initiated only after the fulfillment of the conciliation tier, “(...) (*if the dispute has not been settled pursuant to the said conciliation procedure (...)*)”. It is therefore required that the conciliation procedure was properly held, making it a procedural condition precedent for the subsequent arbitral proceedings [Jones, p 191; *Sutton/Gill*²², para 2-055; *Craig/Park/Paulson*³,



pp 105-106; *Rubino-Sammartano*², pp 254 *et seq*; *Schwab/Walter*⁷, p 47; *White v. Kampner*]. The Parties were not only obliged to comply with the UCR but also with the explicitly agreed requirement to be represented by their respective CEOs.

- 7 Further, the conciliation procedure is mandatory and enforceable, as all necessary prerequisites, developed in case law and scholarly writings, are fulfilled. [see *Boog*, pp 105 *et seq*; *Pryles*, pp 168 *et seq*; *Carter*, p 462]. Firstly, the obligatory nature must be expressed in unqualified terms. Thus it must be derived from the wording of the clause that the pre-arbitral tier is compulsory [*Figueres*, p 72; ICC 1025; *Cable & Wireless v. IBM United Kingdom Ltd.*]. This is fulfilled due to the use of the imperative words “*shall*” and “*will*” as opposed to a mere permissive “*may*” (“... *any dispute, controversy or claim (...)* shall be resolved by conciliation (...)”); the Parties “*will be represented*” by the CEO) which clearly evidences the Parties’ agreement on an obligatory clause.
- 8 Secondly, the MDR clause should precisely indicate the framework to be followed and the stage at which the efforts will be deemed exhausted [*Pryles*, p 168; *Jolles*, p 336; SCC 10/2005]. This can be achieved by referring to a set of established rules to govern the procedure [*Carter*, p 467]. In the case at hand, reference to the UCR, which provide details on the possibilities of terminating the procedure at any time under Art 15, was therefore sufficient to satisfy this prerequisite. As the relevant prerequisites are fulfilled, the conciliation tier of Clause 18 is a mandatory procedural precondition for the arbitration tier.

1.2 The non-fulfillment of mandatory pre-arbitral steps is a matter of jurisdiction leading to the dismissal of the claim as premature

- 9 There is a broad international consensus that non-conformity with a mandatory contractual pre-arbitral process is a question of the tribunal’s jurisdiction and not a merely substantive issue [*Born*³, p 844; *Pryles*, p 160; *Berger*, pp 6-7; *Boog*, p 108; *Jolles*, p 336; *Jones*, p 191; ICC 6276; *National Boat Shows Ltd. v Tameside Marine*; *Hyundai Engineering and Construction Co. v. Vigour Ltd*; CM, para 5].
- 10 In the current dispute CLAIMANT tries to prove the material nature of the conciliation tier by referring to a Swiss decision from 1999 [Kassationsgericht Zürich [SUI], 15 Mar 1999], omitting the fact that scholars have criticized the legal reasoning of the Swiss court for not having reconciled with the sense and purpose of escalation clauses [see *Berger*, p 7; *Voser*, pp 376-381]. If non-compliance with Clause 18 were a mere breach of contract, the remedy would be damages, which would be very hard, if not impossible, to establish. This cannot be a satisfactory result [*Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*; *Boog*, p 108; *Wallgren*, p 3; *Voser*, p 377] and cannot be deemed to be the intent of the Parties. Thus, rather than rendering a provision



useless, a tribunal should give it a proper meaning [*Fouchard/Gaillard/Goldman*, para 478; *Born*³, p 1065; ICC 1434, 7920; Art 4.5 UNIDROIT Principles].

- 11 Notably, in later decisions Swiss courts have indeed several times held that compliance with a pre-arbitral conciliation tier is a jurisdictional issue and that commencement of arbitral proceedings prior to the due completion of the conciliation tier must be held inadmissible [OG Zürich [SUI], 11 Sep 2001; OG Thurgau [SUI], 23 Apr 2001]. Furthermore, in ICC 8462, a case where the underlying facts were similar to the *Cassation Court's* decision from 1999, the tribunal regarded the non-fulfillment of the pre-arbitral steps as a matter of jurisdiction. Further, CLAIMANT refers to an unreported Australian case, the facts of which cannot be verified due to lack of publication [*Allco Steel (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd.*; CM, para 37]. CLAIMANT also deliberately fails to mention that Australian courts have held several times after *Allco* that compliance with a pre-arbitral tier is a jurisdictional issue [*Hooper Bailie Associated Ltd. v. Natcon Group Pty. Ltd.*; *Aiton Australia Pty Ltd. v. Transfield Pty Ltd.*].
- 12 Even the main authority submitted by CLAIMANT does not support its argument; rather to the contrary: Referring to *Jolles*, CLAIMANT alleges that it is only a matter of jurisdiction when the Parties have explicitly agreed that failure to comply with pre-arbitral steps affects the tribunal's jurisdiction [CM, para 39]. This is a blatant misquotation as *Jolles* states the exact opposite, i.e. that the issue concerning the contractual pre-arbitration requirement should be treated as a procedural – not substantive – matter since if “*the issue were treated as a matter of substantive (material) contract law, the consequences of non-compliance would be either unsatisfactory or unreasonably harsh*”. [*Jolles*, p 336].
- 13 Above facts show that the mandatory pre-arbitral steps are jurisdictional in nature. Thus, the breach of Clause 18 has to lead to the dismissal of the claim on procedural grounds as premature [*Boog*, p 108]. It should be noted that this conclusion is mandated also by Artt 16 UCR and 13 MCL [*Sanders*, p 135]; the latter stating that “[*w*]here the parties have agreed to conciliate and have expressly undertaken not to initiate (...) until a specified event has occurred arbitral or judicial proceedings” the tribunal must give effect to such undertaking “until the terms of the undertaking have been complied with”. It is therefore clear that the conciliation procedure can only be understood as a procedural condition precedent to arbitration.

2. The Parties' representation at the conciliation proceedings was in breach of Clause 18

- 14 RESPONDENT firstly notes that Clause 18 is drafted in clear and express terms leaving no room for extensive contractual interpretation. However, in the following RESPONDENT will nonetheless demonstrate that even according to the interpretation of Clause 18 CLAIMANT breached its contractual obligation by sending its Deputy CEO instead of its CEO [2.1] and that the *contra*



proferentem rule is not applicable [2.2]. Consequently, as the UCR have been varied in accordance with the principle of party autonomy [2.3], CLAIMANT breached the fundamental principle of *pacta sunt servanda* when sending its CEO's substitute [2.4]. Thus, the due fulfillment of the CLAIMANT'S contractual obligations should be enforced by the Tribunal.

2.1 Interpretation of Clause 18 reveals that the Parties intended to be represented by their respective CEOs in person

- 15 CLAIMANT alleges that the interpretation of Clause 18 leads to the result that, despite its explicit wording to the contrary, CLAIMANT did not breach its obligations set forth in the clause [CM, paraa 11, 14]. RESPONDENT denies this allegation. Firstly, the clear and express wording does not leave room for extensive interpretation of the Parties' intent. Secondly, even the interpretation mandates the Tribunal to decide that CLAIMANT breached its contractual obligations.
- 16 It is widely accepted that MDR-clauses, just like arbitration agreements [*Lew/Mistelis/Kröll*, para 7-60; *Born*³, p 1063], shall be interpreted in accordance with the general principles of contract interpretation [*Boog*, p 105; Tribunal Federale [SUI], 6 Jun 2007; *Risse*, § 3 paraa 13 *et seq.*]. Even though preference should be given to the common subjective intent of the parties at the time of the signing of the contract, unequivocally proving such intent is usually very difficult once a dispute arises. Therefore, in practice, the objective intent of the parties as interpreted by a tribunal will in most cases prevail. [*Born*³, p 1063, *Blessing*, p 171; *Sutton/Gill*²², para 2-031; ICC 7929]. Further, when a clause is drafted in clear and express terms, tribunals have typically used the wording of the clause as the primary source of reference [*Jones*, p 191; *Wolrich*, p 3; ICC 10256, 7929, 6276; Audiencia Provincial de Navarra [ESP], 27 Dec 2007].
- 17 In the case at hand the fact that RESPONDENT in good faith sent its CEO to the conciliation expecting CLAIMANT to do the same [Problem, p 33] must be considered to mirror the common subjective intent of the Parties. However, should the Tribunal consider the aforementioned fact not to be decisive, the Tribunal is invited to assess the objective intent of the Parties. Such intent is the understanding a reasonable third person would have had in the same situation as the parties [CCIG Interim Award, 27 Aug 1999; Artt 8(2), 8(3) CISG; Art 4.1(2) UNIDROIT Principles; *Amco Asia Corp. and others v Republic of Indonesia*]. When reasonable commercial parties contractually expressly designate their formal representatives to seek to resolve a potential future dispute, they indeed intend and envisage both parties to be represented by such designated representatives. The Parties explicitly agreed on representation by their CEOs, unambiguously stating that “[*t*]he parties will be represented by their Chief Executive Officer.” Thus, following the wording it must be clear that CEO means CEO and nothing else. If the Parties had wanted to



allow a substitute or a mere senior executive representation to participate in the procedure, they could have stated so in Clause 18 by including the wording “CEO, or substitute,” or “members of its upper management” [see examples in *Friedland*², pp 124, 126; ICC 9977]. They could have easily done so as they both participated in the extensive Contract negotiations lasting for almost 2 months [Problem, pp 4-5]. In the light of the above, interpretation of the clear and unambiguous Clause 18 irrefutably demonstrates that the Contract required attendance of each Party’s CEO in the conciliation procedure prior to the arbitration.

2.2 The *contra proferentem* rule does not require interpretation against RESPONDENT

18 CLAIMANT alleges that Clause 18 should be applied against RESPONDENT pursuant to the *contra proferentem* rule [CM, para 15]. However, firstly, the *contra proferentem* rule does not apply to “[t]erms that are merely vague or indefinite” [*Atwood v. Newmont Gold Co, Inc.*] but can be only applied to terms that are ambiguous on the face of it [*Dubl*, p 96; *Lord*⁴, para 32:12]. Here, Clause 18 is not vague, let alone ambiguous. The clause clearly states that Parties have to be represented by their respective CEOs [CEx 3]. Secondly, the *contra proferentem* rule is a rule of last resort, i.e. should only be applied where an ambiguity cannot be resolved by other means of interpretation [*Sykes*, p 68; *Davis*, fn 203; *Kirby*, p 105]. As shown above, the subjective and objective interpretation of Clause 18 already yields that the Parties had to be represented by their CEOs [paraa 15-17].

19 Finally, the rule applies if a possible lack of clarity of the formulation is attributable to one of the parties only [*Sykes*, p 68; *Ramberg*³, p 34]. As the reasoning behind the rule is that the party actually drafting the contract is in a better position to write clear language to avoid uncertainty, the rule should not be applied where both parties have relatively equal bargaining power or are experienced businesspersons, since both parties have the opportunity to review the agreement to prevent ambiguity [*Dubl*, p 96-97; *Lord*⁴, para 32:12; *Terra Intern., Inc. v. Mississippi Chemical Corp.*]. In the current case, the Parties, as large international corporations negotiating at arm’s length [Problem, p 4], can be deemed to have equal bargaining power. Moreover, CLAIMANT cannot assert that during the 2 month negotiation period [Problem, pp 4-5], it has not directed its attention to Clause 18. Furthermore, Clause 18 was already in the contract for a joint Irrigation Project in Patria in 2006 [PO 2, para 27]. In the light of the above, the *contra proferentem* rule does not require Clause 18 to be interpreted against RESPONDENT.

2.3 The Parties have varied the UCR by adding a mandatory obligation to be represented by their Chief Executive Officers

20 CLAIMANT alleges that the Deputy CEO had full authority to represent its company in the conciliation procedure as Art 6 UCR states that “[t]he parties may be represented or assisted by persons of



their choice?. However, CLAIMANT fails to notice that the Parties have made use of the possibility granted by Art 1(2) UCR and have varied the non-mandatory Art 6 UCR by explicitly providing for specific representatives. Consequently, the Parties' agreement prevails. This is in line with the guiding principle of party autonomy in dispute resolution [*Born*³, pp 96 *et seq*]. Thus, even if CLAIMANT'S representation had been in accordance with Art 6 UCR, this is of no legal significance, as it was not in accordance with the prevailing Parties' agreement. Furthermore, it is in this context irrelevant whether – as CLAIMANT contends [CM, paraa 16-23] – the substitute had the same authority as the actual CEO or whether the prerequisites of the “*classic theory of representation*” are fulfilled. The Parties agreed on a specified representative and could reasonably expect the attendance of that very person.

2.4 CLAIMANT has breached the fundamental rule of *pacta sunt servanda*

21 CLAIMANT itself relies on *pacta sunt servanda* as a paramount principle in determining the issues concerning the fulfillment of contractual requirements [CM, para 13]. According to this principle underlying all legal systems, the parties need to honor their contractual obligations [*van Houtte*, p 108]. However, even though CLAIMANT itself propagates this paramount principle, it was CLAIMANT who breached Clause 18 by sending its Deputy-CEO instead of its CEO and thus has shown its unwillingness to honor contractual obligations.

3. RESPONDENT has not foregone its right to rely on CLAIMANT'S breach

22 CLAIMANT alleges that RESPONDENT should have objected to the attendance of Mr Holzer “*prior or at the time of the conciliation*” [CM, para 24]. Thus, it is argued, RESPONDENT has waived its right and is estopped from challenging CLAIMANT'S representation [CM, para 24]. In the following it will be shown that RESPONDENT has neither waived its right during nor after the conciliation procedure [3.1] and is not estopped as the doctrine of estoppel is not applicable [3.2].

3.1 RESPONDENT'S timely objection means that it is not barred by any applicable waiver rules

23 As shown above, the agreed conciliation procedure is a procedural condition precedent to the arbitral proceedings and concerns the jurisdiction of the Tribunal [paraa 9]. The agreed arbitral procedural rules contain clear provisions as to when an objection against the jurisdiction of the Tribunal has to be made. Those provisions were properly complied with as RESPONDENT made its objection to the Tribunal's jurisdiction at the earliest time possible as provided in Artt 24, 31 ACICA rules and Art 4 MAL, i.e. in its Statement of Defense [Problem, pp 33 *et seq*].



- 24 When CLAIMANT asserts that RESPONDENT failed to object to Mr. Holzer’s attendance during the conciliation, it tries to apply to the conciliation the waiver provisions that belong to arbitration proceedings, thus blurring the border between the two individual methods of dispute resolution. Notably, there are no waiver provisions to be found in the MCL or any leading conciliation or mediation rules [e.g. UCR, ICCADRR, DISMCR, IAMACR, ACICAMR]. This is logical given that conciliation, like any amicable means of dispute resolution, is by its nature a voluntary and informal institution. It is therefore not justified to apply formal waiver provisions suitable for adversary procedures to a fundamentally different concept [*Hermann*, p 159; *Jones*, p 368]. Thus, it is perfectly in accordance with the applicable rules to raise the issue of non-compliance with the conciliation tier at the beginning of the arbitration [*Wolrich*, p 4].
- 25 Further, CLAIMANT itself admits that the aim of Art 6 UCR is “*to endow the parties with the necessary information about each other’s representation, giving them the opportunity to challenge it if necessary*” [CM, para 25]. However, the objective of Art 6 UCR is to inform the other party with whom it is dealing with. As in the case at hand it was agreed that the respective CEOs are obliged to attend, any deviation from this requirement should have been communicated to the other Party in order “*to endow [it] with the necessary information*”. CLAIMANT was therefore obliged to communicate not only name and address, but also the function of its representative which it failed to do [PO 2, para 31]. ICC Case 6276 supports this duty of CLAIMANT. The tribunal in that case held that it was the party initiating the arbitral proceedings who was under the obligation to ensure that all duties in regard of the pre-arbitral steps were complied with. As the claimant failed to do so – as in the case at hand –, the tribunal saw no other option than to dismiss the arbitration as premature.
- 26 CLAIMANT further alleges that RESPONDENT failed to inform itself about the name and title of CLAIMANT’S CEO prior to commencement of the conciliation [Problem, p 41]. RESPONDENT, however, was under no obligation to do so and did not have to expect a violation of the agreed representation requirement from CLAIMANT’S side. After the conciliation ended, RESPONDENT by pure coincidence found out that CLAIMANT had sent the wrong person [Problem, p 33]. What is relevant is that it was CLAIMANT who failed to reveal the actual position of Mr. Holzer even in the communication under Art 6 UCR. When CLAIMANT sent its Deputy CEO, RESPONDENT was tricked to conciliate with a person not expected and not supposed to represent CLAIMANT. However, at that point there was no legal obligation for RESPONDENT to react [para 24].



3.2 The doctrine of estoppel does not operate to preclude RESPONDENT from requiring the fulfillment of the contractual conciliation procedure

- 27 In the following it will be shown that, contrary to CLAIMANT’S allegations [CM, paraa 30-32], RESPONDENT is not estopped from insisting on compliance with Clause 18 as the doctrine of estoppel is not applicable. In order to apply the doctrine, a party claimed to have created the estoppel must have made a clear and definite representation or promise [*Whincup*⁴, para 3.65]. Moreover, the concept requires active conduct, promise or assertion of facts on the part of the party claimed to be in estoppel inducing the other party to act in reliance of such conduct or promise. This reliance needs also to be foreseeable to the party claimed to be in estoppel. [*Goode*³, p 106; *Waltons Stores (Interstate) Ltd v Maher*] In ICC Case 1512 to which also CLAIMANT refers [CM, para 31], the tribunal held that the party claimed to be in estoppel must “*blow hot and cold – affirm at one time and to deny at another*”. Moreover, ICC Case 9977 which CLAIMANT relies on to support its argumentation [CM, para 32] is not applicable as there are no pre-requisites for the estoppel doctrine to be found.
- 28 The estoppel doctrine cannot be applied as RESPONDENT did not make any representation, promise or other assurance to CLAIMANT that RESPONDENT would not rely on both tiers of Clause 18. Further, it did not in any way actively cause CLAIMANT to believe that it would not invoke CLAIMANT’S lack of representation, should CLAIMANT start any further proceedings before complying with the conciliation. As there was no active conduct from RESPONDENT to this effect, CLAIMANT’S alleged belief that RESPONDENT would not rely on both tiers of Clause 18 was not, and cannot be, foreseeable to RESPONDENT. Moreover, a broader look at the Parties’ actions throughout the Contract negotiations or subsequent behavior leaves no indication – explicit or implicit – that RESPONDENT intended to forego its contractual rights or allow CLAIMANT to act in a way contrary to the negotiated unambiguous contract terms.

4. Commencing the conciliation procedure is reasonable and in accordance with the best interests of the Parties

- 29 CLAIMANT argues that a repetition of the conciliation procedure “*will not bring success and will be a waste of time and money*”, quoting ICC Case 8445. However, due to the fundamentally different underlying facts of the two cases they cannot be treated the same way. In ICC Case 8445 the parties were obliged to attempt to merely settle the dispute amicably without a reference to any established ADR rules. By contrast, in the current case the Parties would conduct the conciliation under the clear and detailed framework of UCR, specifically designed to guarantee the structured



and efficient conciliation with the lead of a skilled conciliator. Moreover, the applicable UCR ensure that endless negotiations are avoided saving time and costs [see para 8].

- 30 Further, in a new conciliatory attempt, both CEOs would be attending, improving the conciliatory atmosphere substantially. It is widely recognized that executives at the highest organizational level are most likely to reach an amicable settlement as they are ultimately responsible for the profitability of the company and have a real business incentive to seek out resolutions to avoid the delay, costs and waste of company resources caused by arbitration [*Moses*, p 47; *Berger*, p 5]. They are also more objective and not unduly attached to the actual project subject to the dispute. As Deputy-CEO in charge of operations [PO 2, para 28], it is unquestionable Mr. Holzer was heavily involved in the active management of also the Oceanian project and thus not fully objective.
- 31 Further, while it is possible to conduct settlement talks during arbitration proceedings, it has to be borne in mind that settlement talks and a separate conciliation procedure are completely different concepts. The on-going arbitration is by its nature and purpose adversary [*Hermann*, p 154]. This underlying attitude – which can be deemed in some cases to affect the parties’ attitudes towards settlement – can be contrasted with separate flexible conciliation procedure, the whole purpose and framework of which is to facilitate the parties’ settlement. It is thus recommended by leading commentators on conciliation that during conciliation procedures parties should not resort to arbitration proceedings and, moreover, any on-going arbitration should be discontinued [*Hermann*, pp 160-161; *Sanders*, p 121].
- 32 Finally, contrary to CLAIMANT’S contentions, CLAIMANT is not forced into conciliation but rather held to comply with the clear contractual terms to which it committed itself. Most importantly, as stated in a seminal decision regarding MDR-clauses, “... [*w*]hat is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come.” [*Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd*]. Notably, the most fundamental resistance to compromise can translate to co-operation and consent if the dispute is exposed to procedures designed to promote compromise as a repetition of the conciliation would surely be.

5. If the Tribunal decides that it has jurisdiction and continues with the arbitration, the award can be set aside or denied enforcement according to the MAL and NYC

- 33 One of the main goals for arbitration proceedings is to achieve an enforceable award [*Lew*, p 119; *Born*³, p 2537; *Horvath*, p 135; *de Fina*, p 57-58; *Bühler/Webster*, p 155]. RESPONDENT has the possibility to challenge an award rendered by the Tribunal before the courts of Danubia, the place of arbitration, under the challenge grounds in Art 34 MAL. These grounds are taken from



Art V NYC [*Redfern/Hunter*⁴, paraa 9-02, 9-18]. According to Art V NYC, enforcement of arbitral awards may be denied on the grounds listed therein if the award should be enforced in one of the member states. Notably, here all relevant countries are parties to the NYC [Problem, p 8]. If the Tribunal disregards RESPONDENT'S arguments and affirms its jurisdiction, there are grounds that would warrant both a challenge and a denial of enforcement of the award.

- 34 According to Art V(1)(c) NYC (mirrored in Art 34(2)(a)(iii) MAL), a ground for refusal of enforcement is that the award deals with a difference not falling yet within the ambit of the submission to arbitration [*Fouchard/Gaillard/Goldman*, para 1700; *van den Berg in Gaillard/DiPietro*, p 58]. It has been argued that until the procedural conditions precedent to an arbitration clause are fulfilled, the commencement of arbitration is premature and the tribunal lacks jurisdiction to decide the case [*Smith v Martin; Lye*, p 538; *Rubino-Sammartano*², p 254] as in the case at hand [paraa 3-13]. Therefore, as the conciliation procedure has not yet been duly complied with, the dispute cannot proceed to the arbitration which clearly concerns disputes that were subject to prior conciliation. By continuing proceedings, the Tribunal would thus exceed its authority as stipulated by Clause 18. Moreover, the award may also be refused enforcement according to Art V(1)(d) of the NYC (mirrored in Art 34(2)(a)(iv) MAL) if the arbitral procedure was not in accordance with the agreement of the parties. The non-fulfillment of the conciliation-tier is clearly in violation of the party-agreed procedure as stipulated in Clause 18. Therefore, the arbitral procedure, if continued, endangers the enforcement of the future award.

Answer to Procedural Order 1 on the jurisdiction: CLAIMANT breached Clause 18. The mandatory conciliation obligation breached by CLAIMANT is a jurisdictional issue leading to the Tribunal's lack of authority. RESPONDENT has not foregone its right to object to this breach. By deciding that it has jurisdiction and continuing with the arbitration, the Tribunal deprives the Parties a chance to settle the dispute amicably and jeopardizes the enforceability of the award.

ARGUMENTS IN REGARD TO THE MERITS OF THE CLAIM

B. RESPONDENT FULFILLED ITS OBLIGATIONS AS THE PUMPS CONFORMED WITH THE OCEANIAN REGULATIONS IN FORCE ON THE DATE OF CONCLUSION OF CONTRACT

- 35 On 1 July 2008 the Parties concluded the Contract for delivery of irrigation pumps. Clause 2 thereof contains an explicit warranty defining the quality of the goods in the sense of Art 35(1) CISG [CEx 3]. CLAIMANT now disregards the explicit agreement between the Parties and instead asserts that the pumps were not in conformity with Art 35(2)(b) CISG [CM, para 49]. RESPONDENT will show that, firstly, under the warranty it merely had an obligation to deliver



pumps in conformity with Oceanian regulations in force at the time of signing the Contract [1]. Secondly, Art 35(2) CISG – superseded by Art 35(1) – is not applicable [2.1] and would not, in any event, even if Art 35(2) CISG were applicable, RESPONDENT’S obligation to observe Oceanian regulations does not extend beyond the time of signing the Contract [2.2-2.3].

1. RESPONDENT only warranted delivery of the pumps compliant with Oceanian regulations at the time of the conclusion of the Contract, which obligation was met

36 Pursuant to Art 35(1) CISG the seller must deliver goods that are of the quantity, quality and description required by the contract. A seller’s warranty for goods is a typical contractual obligation as to the required quality and description of the goods [ICC 6653; *Bernstein/Lookofsky*, pp 76-77; *Bianca in Bianca/Bonell*, Art 35, para 2.5.2].

37 The Contract contains a specific warranty on the pumps’ conformity with regulations in Oceania [CEx 3]. However, contrary to CLAIMANT’S allegations, the Clause only warrants conformity of the pumps with Oceanian regulations in force at the time of the conclusion of the Contract and not at the time of delivery of the goods. In the following RESPONDENT will show that this conclusion is mandated by both subjective [1.1] and objective interpretation [1.2] of the Contract, and that the *contra proferentem* rule is not applicable in the case at hand [1.3]. Further, it will be established that the trade term DES (Incoterms 2000) does not mandate RESPONDENT to bear the risk of any subsequent Oceanian regulatory changes [1.4]. Finally, RESPONDENT will expose that CLAIMANT knew of the Beryllium content of the pumps before concluding the Contract and is therefore precluded from objecting to these characteristics as non-conforming [1.5].

1.1 The Parties’ conduct indicates their subjective intent to contract for pumps compliant with Oceanian regulations in force at time the Contract was concluded

38 In Art 8(1), the CISG gives priority to the subjective intent of the parties where the other party knew or could not have been unaware of what the intent was [*Bernstein/Lookofsky*, p 42; ICC 8324]. Art 8(3) CISG supplements Art 8(1) CISG by giving guidance on the relevant factors to consider when interpreting parties’ intent, including subsequent conduct of the parties after the date of the agreement [*Honnold*³, para 111; BG St. Gallen [SUI], 3 Jun 1997]. Such conduct has been described as a very useful instrument to determine the true intent of the parties [*Fouchard/Gaillard/Goldman*, para 477]. The parties’ intent may also be deduced from an omission, when a party has failed to respond to other party’s clearly formulated communication on the proper interpretation of a clause after the conclusion of the contract [Appellationsgericht Basel-Stadt [SUI], 26 Sep 2008].



- 39 It has been RESPONDENT'S continuous position that the warranty only refers to the time of conclusion of the Contract. RESPONDENT stated this explicitly in its letter of 2 Aug 2008 [CEx 6], shortly after the signing of the Contract on 1 July 2008 [CEx 3]. Here, RESPONDENT reminds CLAIMANT that the pumps it intended to deliver were regulation-compliant when the Contract was signed and thus it has fulfilled its contractual obligations in that regard. RESPONDENT also reiterates that it is not RESPONDENT'S but CLAIMANT'S obligation to bear the risk of the change in Oceanian regulations after the conclusion of the Contract. CLAIMANT did not object to these statements at the time, demonstrating that it was of the same understanding.
- 40 CLAIMANT never clarified its position during the Contract negotiations or even during Contract performance. In fact, CLAIMANT even failed to invoke a lack of regulation-compliance when avoiding the Contract [CEx 13] or in its subsequent letter demanding the reimbursement of the purchase price of the pumps [CEx 14]. It only countered RESPONDENT'S statement almost 6 months later [CEx 16]. This was several weeks after avoiding the Contract when the dispute had already arisen and such understanding was more favorable to its position.
- 41 In light of the above the Tribunal is invited to reject CLAIMANT'S belated allegations and to decide that the Parties' true intent was compliance of the pumps with the Oceanian regulations in force at the time of the conclusion of the Contract. This conclusion is supported by the objective interpretation of the Parties' agreement, as shown below.

1.2 Objective interpretation confirms the pumps only needed to conform with applicable Oceanian regulations in force when the Contract was signed

- 42 According to Art 8(2) CISG, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have under the circumstances [OGH [AUT], 20 Mar 1997; OLG Frankfurt [GER], 30 Aug 2000]. Such interpretation should follow the usual meaning of the words [*Schmidt-Kessel in Schlechtriem/Schwenzger*², Art 8, para 40; Audiencia Provincial de Navarra [ESP], 27 Dec 2007].
- 43 The warranty in Clause 2 states that "*pumps shall meet the technical specifications set out in Annex P*" and that "*the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania*" [CEx 3]. The crucial point here is the verb "*are*". This is a present tense of the verb "*be*" [*Oxford Dictionary*⁹, p 65], i.e. referring to the point of time when the warranty was given. This point of time is the date of the conclusion of the Contract, 1 July 2008. By contrast, if the Parties had intended the point of reference for the regulatory conformity to be somewhere in the future after the issuance of the warranty, e.g. at the delivery date of the pumps, they would surely – as a minimum requirement – have used the verb's future tense such as "*will be*" or "*shall be*".



44 Further, this is the only interpretation that objectively and reasonably makes sense. Generally, a manufacturer who promises regulatory compliance of the goods in the country of destination is able to review the applicable regulations in such country up to – and only up to – the point of time when the promise is given. The manufacturer does not know future changes in regulations entailing a risk of extraordinary costs. A reasonable businessperson cannot be assumed to take such a risk without an explicit contract provision stating clearly that that he/she needs to do so and identifying a date until which the compliance needs to be warranted. In other words, a “*seller cannot be presumed to have entered into a contract which results in extraordinary costs for him*” [Henschel, p 285]. In the light of above, the reasonable interpretation of the Contract can only be that the conclusion of the Contract, 1 July 2008, shall be the point of reference to define the regulation conformity of the pumps. At that point there was no discrepancy with the pumps and the Oceanian regulations [Problem, p 5; CEx 5]. Therefore, RESPONDENT has fully complied with its contractual obligations concerning the conformity of the goods.

1.3 The principle of *contra proferentem* is not applicable in the case at hand

- 45 CLAIMANT alleges that pursuant to *contra proferentem* the warranty in Clause 2 should be interpreted against RESPONDENT as RESPONDENT allegedly “*must bear the burden of having created an unclear provision, in such a way that it cannot benefit from its own fault*” [CM, paraa 64-66]. RESPONDENT denies this allegation. The *contra proferentem* rule – which implies that a contractual clause is to be interpreted against the party which included the clause in the contract – does not apply to terms that are merely vague or indefinite. Even when the rule applies, it is a supportive rule of last resort, i.e. should only be applied where an ambiguity cannot be resolved by other means of interpretation [paraa, 25-26; *Schmidt-Kessel in Schlechtriem/Schwenzer*⁵, Art 8, para 47; *Huber*, p 237]. Clause 2 is not genuinely ambiguous as the true intent of the Parties is discernable and can be unequivocally determined by Art 8 CISG [paraa 38-44]. Thus the *contra proferentem* does not apply.
- 46 Moreover, the rule only applies if a possible lack of clarity of the formulation is attributable solely to one of the parties; the rule should not be applied where both parties have relatively equal bargaining power or are sophisticated, since both parties have the opportunity to review and correct the term to prevent ambiguity [para 19]. Firstly, the Parties, being large international corporations negotiating at arm’s length [Problem, p 4], can be deemed to have equal bargaining power. Secondly, RESPONDENT may have supplied the warranty sentence, but CLAIMANT directed its attention to the sentence, reviewed it and “*agreed that it was satisfactory*” [PO 2, para 9]. Thus, both Parties have had the opportunity to review the clause and any vagueness can no longer be attributed to any one side, rendering the *contra proferentem* rule unfeasible to apply.



1.4 The trade term DES (Incoterms 2000) does not mandate that RESPONDENT bear the risk of regulatory changes in Oceania after the conclusion of the Contract

- 47 CLAIMANT alleges that RESPONDENT “*was aware that there was a risk that the [Oceanian regulations] might change until the moment of delivery. Respondent assessed such risk, and decided to undertake it.*” [CM, para 61] Not only is this allegation incorrect [paraa 38-44], it is also in contradiction with the allocation of risks under the Incoterms term agreed upon by the Parties, as will be shown below.
- 48 When assessing the risk allocation between the parties, it is crucial to separate the risk concerning loss of and damage to the goods from the legal risks concerning the goods [*Erauw in Ferrari/Flechtner/Brand*, pp 293-297; *Hager in Schlechtriem/Schwenzer*², Art 66 paraa 3 *et seq.*]. The allocation of risks of the first category, concerning the actual physical detriment to the goods, is covered by Sec A5 and B5 of Incoterms 2000 [*Ramberg*, Incoterms, p 60]. Whereas the allocation of legal risks concerning legislative acts of states, such as adoption of restrictions or prohibitions, is covered by Sec A2 and B2 Incoterms [*Erauw in Ferrari/Flechtner/Brand*, p 296].
- 49 In the Contract the Parties agreed on the trade term DES (Incoterms 2000) (hereafter “DES”) Capitol City, Mediterraneo [CEx 3]. As to the first risk category Sec A5 of DES stipulates as a main rule that RESPONDENT bears all risks of loss of and damage to the goods until the goods are delivered to CLAIMANT under Sec A4 DES. Under A4 the seller’s delivery obligation is fulfilled when the seller places the goods at the disposal of the buyer on board of the vessel at the agreed destination. [*Ramberg*, Incoterms, p 149] This risk allocation does not, however, apply to the legal risks. Pursuant to Sec A2 of DES, the seller is only obliged to obtain at its own risk and expense the official authorization necessary for the goods’ export and transit through a third country, but does not include the import of the goods. This risk is placed upon the buyer pursuant to Sec B2 [*Ramberg*, Incoterms, pp 148, 151]. This allocation of legal risks is also in line with the general principle under Art 66 CISG: in case of doubt, the buyer should only bear the risk of any export ban, not the risk of an import ban [*Hager in Schlechtriem/Schwenzer*², Art 66 para 4].
- 50 RESPONDENT undertook the obligation to warrant that the pumps conform to the regulations for importation in Mediterraneo and for use in Oceania up to the conclusion of the Contract [CEx 3]. Further, under the DES RESPONDENT assumed the legal risks of any subsequent export prohibitions imposed on the pumps while on route to the destination. As to the time after the conclusion of the Contract, the Parties agreed by incorporation of DES that it was CLAIMANT – not RESPONDENT – who undertook the legal risk of any changes in regulations for the import or commercial use of the goods in the import country or any subsequent country of destination.



51 Should CLAIMANT have wanted RESPONDENT to assume the risk of import prohibitions and other such restrictions, it could easily have suggested that the contractual trade term DES be replaced by the term DDP (Delivered Duty Paid) and specified the destination as a location in Oceania. Under Section A2 of DDP, the seller bears the risk of both export and import and must do everything necessary to provide the buyer with the goods, including assuming the risk of import prohibitions [Ramberg, Incoterms, p 172; Ramberg, in Andersen/Schroeter, p 399]. CLAIMANT failed to do this and cannot be now allowed *ex post* to change the contractual risk allocation between the Parties. As of the conclusion of the Contract, RESPONDENT was only obliged to bear only the risk of subsequent regulatory changes in the export country Equatoriana or in any transit countries, but not in Mediterraneo or Oceania.

1.5 CLAIMANT was aware of and thus accepted the original composition of steel used

52 When determining the contractual characteristics of the goods in the sense of Art 35(1) CISG, the condition of the goods, as known to the buyer at the time of the agreement was made, should be the basis for defining the content of the agreement between the parties [Henschel, p 288; Schwenzler in Schlechtriem/Schwenzler², Art 35 para 38]. If a buyer knows at the conclusion of the contract the characteristics of the goods which it later alleges to amount to non-conformity, the buyer should be precluded from making these allegations as it “*has merely received what has been agreed*” [Henschel, p 285; Neumann, para 52].

53 CLAIMANT knew at the conclusion of the Contract that the steel used to manufacture the pumps contained Beryllium. This can be derived from CLAIMANT’S statement, made less than a month after the conclusion of the Contract when it informed RESPONDENT that it now wanted P-52 pumps that did not contain Beryllium [CEX 5; see also Problem, p 5 para 11]. Thereby it modified the original Contract, as will be shown below [para 64-75]. At the same time CLAIMANT stated that the fact that the field-pumps contained Beryllium was not an issue. As CLAIMANT knew that the pumps contained Beryllium, it has merely received what has been agreed and thus is precluded from basing its non-conformity claims on the Beryllium content of the pumps.

2. RESPONDENT is under no obligation via Art 35(2)(b) CISG to deliver the pumps compliant with Oceanian regulations enacted after the conclusion of the Contract

54 Under the CISG the conformity of goods is to be assessed primarily on the basis of the parties’ agreement [Secretariat Commentary, O.R., Art 33, para 2; Honnold³, para 224; Schlechtriem², para 133] whereas the standards in Art 35(2) CISG apply only to situations where the agreement does not give guidance as to the requirements for the goods [Henschel, p 187; Schlechtriem², para 138]. Nonetheless, CLAIMANT resorts to Art 35(2)(b) CISG and alleges that RESPONDENT has not



delivered pumps fit for their particular purpose due to their non-conformity with Oceanian regulations enacted after the conclusion of the Contract [CM, paraa 49 *et seqq*]. RESPONDENT denies this allegation. In the following it will be shown that RESPONDENT did not have any obligations under Art 35(2)(b) CISG as the explicit warranty in Clause 2 renders the provisions of Art 35(2) CISG inapplicable [2.1]. Moreover, even if the Tribunal deemed Art 35(2)(b) CISG applicable, RESPONDENT was not obliged under Art 35(2) CISG to deliver the pumps compliant with Oceanian regulations as the preconditions of this provision are not fulfilled: RESPONDENT was neither obliged to be aware of Oceanian regulations after the time of the conclusion of the Contract [2.2] nor did CLAIMANT reasonably rely on RESPONDENT'S skill and judgment [2.3]

2.1 As the Contract contains an explicit warranty, the provisions of Art 35(2) CISG are not applicable

55 Art 35(2) CISG should be applied only insofar as the parties' agreement in the sense of Art 35(1) CISG does not sufficiently define the requirements of the goods [*Schwenzer* in *Schlechtriem/Schwenzer*², Art 35, para 12; BGH [GER], 19 Apr 2007; OGH [AUT], 25 Jan 2006; Tribunale di Forlì [ITA], 16 Feb 2009]. Art 35(2) CISG should thus only be applied in the absence of an express or implied contractual provision [*Bianca* in *Bianca/Bonell*, para 2.1; *Henschel*, p 284]. As the Contract contained an explicit provision on the pumps' conformity with Oceanian regulations [CEx 3], the Parties have excluded the applicability of Art 35(2) CISG with regard to this issue. As shown, the pumps conformed to the Oceanian regulations at the time of the conclusion of the Contract [paraa, 35-53].

2.2 Art 35(2)(b) CISG would not oblige RESPONDENT to be aware of Oceanian regulations after the conclusion of the Contract

56 Even if Art 35(2)(b) CISG were applicable, RESPONDENT cannot be required, contrary to CLAIMANT'S allegations [CM, 50 *et seq*], to be aware of the special Oceanian regulations enacted long after the conclusion of the Contract. A foreign seller cannot generally be held responsible to observe the norms, which are often hard to trace or unusual, in the destination state [*Kruisinga*, p 46; *Huber/Mullis*, p 137; *Magnus* in *Staudinger*¹³, Art 35, para 34; *Flechtner*, p 9]. This prevailing view is based on the fact that such compliance is ultimately in buyer's interest and the buyer can typically "*obtain the relevant information more effectively and cheaply than the seller can*" [*Henschel*, p 201]. This prevailing rule – fully disregarded by CLAIMANT – is supported by a substantial body of case law. The leading case where the German Supreme Court ruled that a Swiss seller was not obliged to be aware of the public law regulations in the country of destination, Germany [BGH [GER], 8 Mar 1995], has been widely accepted by legal scholars and also confirmed in several subsequent



decisions [including OGH [AUT], 25 Jan 2006; BGH [GER], 2 Mar 2005; OGH [AUT], 13 Apr 2000; *Medical Marketing v. Internazionale Medico Scientifica*].

- 57 Furthermore, CLAIMANT cannot rely on any of the possible exceptions to this rule. As stated in the first BGH decision and further elaborated in subsequent cases [OGH [AUT], 25 Jan 2006; OGH [AUT], 13 Apr 2000] the special provisions in the destination country are of relevance only if they likewise apply in the seller's country, if the buyer specifically pointed out these special provisions to the seller at the conclusion of the contract or if there are “*special circumstances*” leading to the knowledge of the seller.
- 58 Firstly, the quite unique Oceanian Regulations do not correspond to those prevailing in RESPONDENT’S country [PO 2, para 19]. Secondly, none of the Oceanian health regulations were pointed out to RESPONDENT at the time of the conclusion of the Contract. The buyer is at the time of the agreement expected to specifically inform the seller of specific standards in the country of destination whereas the seller is required to observe only those specific regulations in the destination state that are specifically pointed out to it by the buyer [Hof Arnhem [NED], 27 Apr 1999]. CLAIMANT cannot claim that a mere general reference to Oceanian regulations would impose RESPONDENT an obligation to observe specific Oceanian health regulations. Thirdly, there are no special circumstances that required RESPONDENT, despite CLAIMANT’S failure to specify such regulations, to nonetheless observe the Oceanian health regulations. RESPONDENT is located in a different continent [PO 2, para 5] and has no branch or other direct activities in Oceania [CEx 6]. In addition, CLAIMANT cannot argue that RESPONDENT has ever exported to Oceania. Admittedly, the Parties have done business once three years ago [Problem, p 4], but this was a separate stand-alone project concerning a different country, Patria. This project had nothing to do with the Oceania and its unique health regulations; nor does this individual project make the Parties close and long-standing business partners.
- 59 Following the aforementioned case law, the fact that the buyer makes known the destination of the goods as a particular purpose only leads to an obligation of the seller to inform itself of the regulations in the destination country under exceptional circumstances. Considering that these cases all relate to regulations in force at the time of the conclusion of the contract, any interpretation of Art 35(2)(b) CISG that would lead to a prolonged and ongoing obligation beyond the time of the contract conclusion must be even more restrictive. Therefore, it cannot be claimed that either the warranty in Clause 2 [paraa 35-53] or provisions in Art 35(2)(b) CISG mandate RESPONDENT to take into consideration any Oceanian regulations enacted after the Contract was signed.



2.3 CLAIMANT did not reasonably rely on RESPONDENT'S skill and judgment as required by Art 35(2)(b) CISG

- 60 Even if RESPONDENT were deemed to be aware of the Oceanian regulations after the conclusion of the Contract, Art 35(2)(b) CISG nonetheless requires that the buyer relied on the seller's skill and judgment and it was reasonable for it to do so. Where both parties can be deemed to have equal professional skill and judgment, or when the seller is more knowledgeable, such reliance will be nullified [*Magnus in Honsell*², Art 35, para 22; *Henschel*, p 236; *Schwenzler in Schlechtriem/Schwenzler*², Art 35, para 23; OLG Koblenz [GER], 11 Sep 1998].
- 61 Despite CLAIMANT'S unreasoned argument to the contrary [CM, para 51], CLAIMANT could not reasonably rely on RESPONDENT'S skill and judgment as to the conformity of the pumps with Oceanian regulations. While RESPONDENT is a manufacturer of pumps selling to approximately 50 countries [Problem, p 4], CLAIMANT fails to note that it itself is an experienced implementer and developer of irrigation projects with its core business concentrated in the region nearby Oceania [Problem, p 4; PO 2, para 5]. RESPONDENT, by contrast, is located on a continent distant from Oceania [PO 2, para 5]. Moreover, RESPONDENT'S knowledge and skill cover merely the technical engineering aspects of manufacture of the pumps, not the knowledge of the minutiae of political trends or special public law standards in far-away countries. It was CLAIMANT who was, and who correctly should have been, more aware of the Oceanian developments [PO2, para 5].
- 62 This is in line with the general principle that the foreign seller cannot be expected to have knowledge of the public law requirements in the country of goods' destination [*Kruisinga*, p 46; para 56]. Especially if the public law requirements are particularly unusual, it cannot be assumed that the buyer reasonably relied on the seller's skill and judgment [*Schlechtriem/Butler*, para 139]. In this case, it is the buyer who has the superior knowledge and judgment relating to these public law requirements. CLAIMANT was much more aware of the Oceanian developments than RESPONDENT [PO 2, para 5] and it was in close contact with Oceanian governmental representatives from the Spring 2008 onwards [Problem, p 4; CEx 4]. Moreover, the Oceanian health regulations qualify as extremely unusual, if not unique [CEx 6; PO 2, paraa 5, 19]. Thus, CLAIMANT could and did not reasonably rely on RESPONDENT'S skill and judgment.

C. RESPONDENT DID NOT FUNDAMENTALLY BREACH ITS OBLIGATION TO MEET THE AGREED DELIVERY DATE

- 63 With the correspondence initiated by CLAIMANT in August 2008 [CEx 5 and 6] the Parties agreed that the P-52 pumps would be manufactured using Beryllium-free steel instead of delivering the



P-52 pumps RESPONDENT had in stock. This change also implicated a later delivery date and higher costs than originally contracted for. RESPONDENT will show that this set of facts amounts to a contract modification in accordance with Art 29 CISG [1]. Later, due to an impediment beyond its control in December 2008 [paraa 87 *et seqq*], RESPONDENT requested an additional period of time pursuant to Art 48(1) CISG and the final delivery date was extended to 6 Jan 2009 [2]. Finally, RESPONDENT will demonstrate CLAIMANT was not entitled to avoid the Contract [3].

1. The Parties modified the Contract to use of Beryllium-free steel for P-52 pumps and extended the delivery date to around 22 December 2008

64 Under Art 29(1) CISG a contract can be modified by mere agreement of the parties [*Secretariat Commentary*, O.R., Art 27, para 2] which, pursuant to Art 11 CISG, does not need to meet any formal requirements [*Schlechtriem/Schwenzer* in *Schlechtriem/Schwenzer*⁵, Art 29, para 4]. Thus also written contracts can be modified orally, in writing, by acts, or even by silence or inaction [*Perales Viscasillas*, p 169]. CLAIMANT denies that the Contract, in particular the delivery date, was amended [CM, paraa 88 *et seqq*]. Instead it tries to suggest that the agreed extension of the delivery date to around 22 Dec 2008 was an additional period of time in the sense of Art 47(1) CISG (“*Nachfrist*”) [CM, paraa 103, 112 *et seq*]. Contrary to these assertions, RESPONDENT will show that the Contract was modified by CLAIMANT’S offer [1.1], RESPONDENT’S counter-offer [1.2] and CLAIMANT’S acceptance by conduct [1.3]. It will be further shown that CLAIMANT did not properly set a *Nachfrist* [1.4].

1.1 CLAIMANT’S letter of 1 August 2008 constituted an offer to modify the Contract

65 The original Contract called for delivery of a number of field pumps and “*three P-52 pumps*” [CEx 3] all made of steel containing Beryllium – a fact CLAIMANT was aware of [CEx 5; paraa 52 *et seq*]. With its letter of 1 Aug 2008, one month after the conclusion of the Contract, CLAIMANT requested the P-52 pumps to be made from Beryllium-free steel and suggested that RESPONDENT procure different steel for the manufacture of such pumps [CEx 5]. This letter can at least be qualified as an *invitatio ad offerendum* for Beryllium free pumps. More likely however, it fulfills the prerequisites of Art 14 CISG, according to which a binding offer requisites an indication of addressor’s intention to be bound as well as a minimum content such as description of goods [*Schlechtriem* in *Schlechtriem/Schwenzer*², Art 14, para 2]. CLAIMANT knew that the P-52 pumps originally contracted for were already on RESPONDENT’S stock and ready for delivery [REx 1]. By requesting RESPONDENT to manufacture new pumps and thereby inducing RESPONDENT to start



a production process, CLAIMANT showed its intention to be bound. Therefore, CLAIMANT'S proposal to modify the quality of the P-52 pumps should be seen as a binding offer.

1.2 RESPONDENT'S reply of 2 August 2008 constituted a counter-offer

- 66 With its letter of 2 Aug 2008 RESPONDENT immediately replied to CLAIMANT'S offer to modify the P-52 pumps adding, however, that such modification would lead to a delay in delivery and increase the costs to be borne by CLAIMANT by approximately US\$ 30,000 [CEx 6]. This letter qualifies as a counter-offer in the sense of Art 19 CISG, i.e. a reply to an offer purporting to be an acceptance but containing additional modifications [*Schlechtriem*², para 91].
- 67 Due to the fact that RESPONDENT needed to import different steel and manufacture new P-52 pumps, it could not give a more precise indication than that the modification CLAIMANT asked for “*would delay the completion of the job by several weeks*” [CEx 6]. Even without stating a new fixed time for delivery this description is sufficiently definite for the purposes of Art 33(c) CISG as it corresponds to delivery within a reasonable time under the circumstances, i.e. without undue delay after the procurement of new steel from RESPONDENT'S suppliers.
- 68 In a similar case a German court qualified the buyer's request to alter the design of ketchup-bottles after the conclusion of a contract as an offer to modify the existing contract [OLG Rostock [GER], 15 Sep 2003]. The court held that although at the time of the contract modification the seller could not name the exact later delivery date, the notification of the definite delivery date approximately one month after the contract modification was sufficient. RESPONDENT on 22 Nov 2008 specified its approximation of the delivery time by informing CLAIMANT that the manufacture was completed and new delivery date would be around 22 Dec 2008 [CEx 7]. CLAIMANT confirmed this communication on 24 Nov 2008 [CEx 8]. However, this was before the *force majeure* event [paraa 87 *et seqq*], namely the closing of the Isthmus Canal during the shipment, which rendered RESPONDENT'S delivery date estimate unfeasible [CEx 9].

1.3 CLAIMANT accepted RESPONDENT'S counter-offer by conduct

- 69 A contract can be modified by implied agreements based on conduct [*Gsell in Honsell*³, Art 29, para 10; *Honnold*⁴, para 201; Kantonsgericht Zug [SUI], 2 Dec 2004]. Although pursuant to Art 18 CISG silence or inactivity in itself will not be understood as acceptance, it can amount to such when it is linked to other circumstances [OLG Köln [GER], 22 Feb 1994]. Such other circumstances constituting an acceptance are for example, the buyer paying the purchase price or



ordering the bank to open a letter of credit [*Piltz*², para 3-59; *Farnsworth in Bianca/Bonell*, Art 18, para 2.2; *Ludwig*, p 319; Tribunale di Forlì [ITA], 16 Feb 2009].

- 70 In fact, if a buyer takes the initiative to ask a seller to make an offer and it can be derived from circumstances of the case, e.g. urgency indicated by the buyer, that the buyer intends to give its counter-declaration within a short period after the receipt of the offer, the buyer should also be bound to the offer if he/she fails to explicitly reject it within such time [*Ramberg/Herre*³, p 157]. Therefore, the fact that CLAIMANT did not explicitly reject RESPONDENT'S proposal to alter the delivery date is already sufficient for CLAIMANT be held bound to the modification.
- 71 Moreover, in the current case CLAIMANT even implied an acceptance of RESPONDENT'S aforementioned counter-offer by its subsequent conduct [paraa 66 *et seqq*]. CLAIMANT never objected to the adjustments RESPONDENT proposed, but – entirely to the contrary – continued performance of the Contract. After issuance of the onboard bill of lading in November 2008, CLAIMANT opened the letter of credit and paid the price of the pumps [Problem, p 6]. Further, CLAIMANT informed RESPONDENT that it was promptly relaying the new approximations of the delivery dates to its own contract partner, Water Services [REx 2]. Under the CISG, the parties' statements and conduct must be interpreted in the light of Art 8 CISG. CLAIMANT'S conduct and statements let RESPONDENT know, and would cause any reasonable person in RESPONDENT'S position to safely assume, that CLAIMANT had accepted the amendment of the Contract both with regard to the pumps' characteristics and the delivery date.

1.4 CLAIMANT did not set a *Nachfrist* in the sense of Art 47(1) CISG

- 72 Art 47(1) CISG allows a buyer to fix an additional period of time of reasonable length, a *Nachfrist*, for performance by the seller of his obligations in case of seller's breach [*Gabriel in Ferrari/Flechtner/Brand*, p 354]. If the seller fails to deliver within the set reasonable period the buyer may avoid the contract even without an underlying fundamental breach [*Bernstein/Lookofsky*, p 130]. CLAIMANT now alleges [CM, paraa 111 *et seqq*] that in its letter 24 Nov 2008 [CEX] it set a *Nachfrist* to RESPONDENT by replying “*so we have to go along with you*” to RESPONDENT'S estimate of the delivery date around 22 Dec 2008. CLAIMANT'S assertion is incorrect. As shown above [paraa 65 *et seqq*], CLAIMANT'S letter can only be understood as a contract modification. Moreover, RESPONDENT will below demonstrate that in any event the requirements of Art 47(1) CISG are not fulfilled.
- 73 Firstly, the buyer may not effectively set the *Nachfrist* before the contractual delivery date has passed [*Müller-Chen in Schlechtriem/Schwenzer*², Art 47, para 11; *Kimbel*, p 327]. The initial



contractual delivery date was 15 Dec 2008 [CEx 3] whereas CLAIMANT alleges to have set the *Nachfrist* on 24 Nov 2008 [CM, 112]. Thus the alleged *Nachfrist* attempt was in any case too early.

- 74 Secondly, the buyer has to set the *Nachfrist* with a clear and specific demand for performance; i.e. make the seller well aware of the dire situation that the avoidance will be forthcoming in the event of failure to meet the deadline [*Secretariat Commentary*, O.R., Art 43, para 7; *Kimbel*, p 319; *Honnold*³, para 289; *Magnus in Ferrari/Flechner/Brand*, p 707]. Excessively polite and ambiguous wordings are insufficient [*Müller-Chen in Schlechtriem/Schwenger*², Art 47, para 5]. CLAIMANT'S reply "so we have to go along" fails to meet the requirement of clarity and specificity. CLAIMANT did not articulate a demand for specific performance, nor did it warn RESPONDENT that failure to meet the delivery time would result in avoidance. Therefore this wording lacks the clarity required by Art 47(1) CISG, and rather indicates assent to RESPONDENT'S suggestions.
- 75 Finally, it was RESPONDENT, not CLAIMANT, who initiated the extension of the delivery date [CEx 7]. It is undisputed that the *Nachfrist* is meant to be an offer but an ultimatum from the buyer to the seller [*Schnyder/Straub in Honsel*², Art 47, para 2; *Benicke in MuKoHGB VT*², Art 47, para 4; *Magnus in Staudinger*¹³, Art 47, para 13]. Yet it was RESPONDENT who contacted CLAIMANT to set the new date, necessary on account of the adjustments CLAIMANT had asked for. Interpreting CLAIMANT'S acceptance of RESPONDENT'S suggestion as an ultimate deadline set by CLAIMANT would be an absurd understanding and inappropriate use of Art 47 CISG.

2. RESPONDENT exercised its right to cure pursuant to Art 48(1) CISG by requesting to deliver until 6 January 2009

- 76 Art 48(1) CISG gives the seller the right to remedy any failure to perform his obligations. Under Art 48(2)-(3) CISG, if the seller gives the buyer a notice that the seller will perform within a specified period of time, the buyer must object promptly if it wishes not to be bound by such notification of an intent cure [*Gutknecht*, p 342]. In case of silence the buyer will be bound as if it had explicitly agreed [*Benicke in MuKoHGB VT*², Art 48, para 14; *Magnus in Staudinger*¹³, Art 48, para 41] If the right to cure is thus granted, the buyer cannot avoid or resort to any other remedy during the time specified for the cure [*Magnus in Ferrari/Flechner/Brand*, p 711].
- 77 On 28 Nov 2008 the Merry Queen was stalled due to an accident at Isthmus Canal. RESPONDENT notified CLAIMANT of the ships status and the uncertainty as to the delay this would cause. The ship was allowed to pass on the 12 Dec 2008. On this date, due to this impediment [para 87 *et seqq*] RESPONDENT was forced to exercise its right to cure and to request an additional period of time under Art 48 CISG [CEx 10]. CLAIMANT did not object to this



request. Instead, CLAIMANT even notified RESPONDENT that it had communicated this extended delivery period to Water Services [CEx 11]. If CLAIMANT had really considered this delivery date to be unreasonable, it would have been obliged to inform RESPONDENT immediately to prevent RESPONDENT from invoking its right to cure. By not reacting, CLAIMANT was bound to the extended delivery date of 6 Jan 2009 as if it had explicitly agreed to it.

3. CLAIMANT was not entitled to declare the Contract avoided on 5 January 2009

78 On 5 Jan 2009 CLAIMANT avoided the Contract due to an alleged failure of RESPONDENT “*to deliver regulatory compliant pumps [...] by the contract deadline*” [CEx 13]. Contrary to CLAIMANT’S assertions, RESPONDENT will demonstrate that it did not fundamentally breach the Contract and thus CLAIMANT was not entitled to avoidance on the grounds of Art 49(1)(a) CISG [3.1]. Further, CLAIMANT did not grant a *Nachfrist* [paraa 72 *et seqq*] and therefore was not entitled to avoid the Contract under Art 49(1)(b) CISG [3.2]. Additionally, CLAIMANT cannot avoid the Contract on the grounds of an anticipatory breach under Art 72(1) CISG [3.3].

3.1 CLAIMANT was not entitled to avoid the Contract pursuant to Art 49(1)(a) CISG as RESPONDENT did not fundamentally breach the Contract under Art 25 CISG

79 Avoidance of the contract under Art 49(1)(a) CISG presupposes that the seller failed to perform one of its obligations and that this failure amounts to a “*fundamental breach of contract*” in the sense of Art 25 CISG. [Müller-Chen in *Schlechtriem/Schwenzer*², Art 49, 4; *Di Matteo et al*, p 135]. Art 25 CISG states that a breach is fundamental if a party is substantially deprived of what it was entitled to expect under the contract. This must be interpreted in a restrictive way and in case of doubt it must be considered that conditions of such breach are not fulfilled [*DiMatteo et al*, NJILB, p 412].

80 CLAIMANT asserts that RESPONDENT fundamentally breached the Contract in two ways: firstly, due to late delivery and, secondly, due to non-conformity of the pumps [CM, para 47]. RESPONDENT will demonstrate that neither of these alleged breaches were fundamental in the sense of Art 25 CISG.

81 Concerning the alleged failure to meet the contractual delivery date, RESPONDENT maintains that it did not breach the Contract [paraa 65 *et seqq*]. Should the Tribunal consider otherwise, the delivery on 6 Jan 2009 did not constitute a fundamental breach. Late performance usually only amounts to a fundamental breach if the buyer had a special interest in timely delivery [*Ferrari*, p 504; *Magnus*, p 434]. Therefore, the parties have to make it clear that time is of the essence and that any delay will amount to a fundamental breach [*Mullis*, p 352]. In the current case, it was



CLAIMANT itself who initiated the process leading to the delay by demanding the manufacture of new pumps. Moreover, although CLAIMANT pointed out the importance of meeting the delivery date due to its subcontract with Water Services [CEx 2, 8] it “*went along*” with the later delivery date around 22 Dec 2008 [paraa 69 *et seqq*]. CLAIMANT subsequently affirmed delivery by 6 Jan 2009 and even communicated it to its business partner. To a reasonable person in RESPONDENT’S position CLAIMANT’S conduct did not indicate that it had an overriding interest in timely delivery and the slightest delay would lead to a cancellation of the Contract.

- 82 CLAIMANT also alleges RESPONDENT fundamentally breached the Contract by delivering pumps that did not conform to the Contract [CM, para 47]. RESPONDENT has demonstrated this was not the case [paraa 65 *et seqq*]. Should the Tribunal follow CLAIMANT’S assertion, RESPONDENT’S delivery of partial non-conforming goods did not constitute a fundamental breach.
- 83 CLAIMANT cannot convincingly argue that all pumps were non-conforming [CM, para 47] as at least the P-52 pumps were in conformity with all Oceanian regulations. Pursuant to Artt 49(1)(a) in conjunction with 51(2) CISG, the buyer may avoid the contract only if the failure to deliver a part of the goods in conformity with the contract amounts to a fundamental breach of the whole contract [*Secretariat Commentary*, O.R., Art 47, para 3; *Schnyder/Straub in Honsell*², Art 51, para 49-50]. Under Art 25 CISG, a fundamental breach concerning the quality of the goods occurs only if the goods cannot be used for any other purpose [*Schlechtriem*², para 115; BGH [GER], 3 Apr 1996]. Even if the pumps were no longer useful in the Irrigation Project, they remained usable and resalable. CLAIMANT could have easily sold them, for example to Trading Company [REx 3]. By receiving these pumps CLAIMANT received goods that were still of commercial value and thus avoidance was unjustified.

3.2 CLAIMANT was not entitled to avoid the Contract pursuant to Art 49(1)(b) CISG

- 84 Pursuant Art 49(1)(b) CISG the buyer may avoid the contract if the seller does not deliver within the additional period of time fixed by the buyer in accordance with Art 47(1) CISG [*Müller-Chen in Schlechtriem/Schwenzler*², Art 49, para 15]. Above RESPONDENT has demonstrated that CLAIMANT did not grant an additional period of time pursuant to Art 47(1) CISG [paraa 72 *et seqq*]. However, should the Tribunal consider that CLAIMANT granted a *Nachfrist* until 22 Dec 2008 per Art 47(1) CISG, the Tribunal should take into consideration that RESPONDENT exercised its right to cure pursuant to Art 48 CISG on 12 Dec 2008 [paraa 76 *et seqq*], i.e. before the end of the *Nachfrist* period. The seller’s right to cure pursuant to Art 48 CISG supersedes any



additional period of time granted by the buyer pursuant to Art 47(1) CISG [*Schnyder/Straub in Honsell*, Art 49, para 107]. Thus, if the seller effectively requests an additional period of time under Art 48 CISG, the buyer is not entitled to avoid the contract before this time expired without delivery. Following the priority of Art 48 CISG, RESPONDENT'S right to cure extended the delivery to 6 Jan 2009 and thus CLAIMANT was not entitled to avoid on 5 Jan 2009.

85 Moreover, should the Tribunal find that RESPONDENT did not rightfully exercise its right to cure by requesting to deliver by 6 Jan 2009, it should take into consideration when CLAIMANT avoided the Contract on 5 Jan 2009 it was fully aware that RESPONDENT would deliver the next day. CLAIMANT thereby violated the principle of good faith in international trade by avoiding the Contract merely to serve its own interests since it had lost the contract with Water Services. In ICC 11849 the tribunal found that avoidance can be rendered unjustified if it is done with an ancillary purpose to gain an undue advantage for the avoiding party as this is a violation of the principle of good faith and fair dealings, especially if the terminating party knew the other party would perform its obligations immediately after the avoidance.

86 CLAIMANT'S avoidance of the Contract on 5 Jan 2009 is inconsistent with its previous behavior, as it never stated that it would do so in the event of delayed delivery. To the contrary, CLAIMANT let RESPONDENT believe that delivery by 6 Jan 2009 was in full accordance with the Contract. CLAIMANT unexpectedly reverted to the most severe remedy the CISG offers; its arbitrary exercise of the remedy of avoidance goes against the spirit of the CISG, pursuant to which the maintenance of the contract is to be preferred over its termination [*Ferrari*, p 502; HG Aargau [SUI], 5 Nov 2002].

3.3 CLAIMANT was not entitled to avoid the Contract on the grounds of an anticipatory breach pursuant to Art 72 CISG

87 CLAIMANT asserts that it was entitled to avoid the Contract pursuant to Art 72(1) CISG because RESPONDENT'S letter of 2 Aug 2008 stated that procuring new steel would delay delivery [CM, paraa 106-110]. CLAIMANT relies on this letter to justify its avoidance of the Contract after 5 months, on 5 Jan 2009, because this supposedly allowed CLAIMANT to anticipate RESPONDENT'S alleged breach of the Contract. However, the wording of Art 72(1) CISG makes obvious that the other party may only declare the contract avoided prior to the date of performance – not after. Further, Art 72(2) CISG requires the party intending to avoid the contract to give reasonable notice thereof to the other party in order to allow the latter to provide adequate assurance of its performance. Reasonableness is defined by the urgency of the situation, i.e. in cases where time is of the essence avoidance may even be declared immediately [*Hornung in Schlechtriem/Schwenzler*,



Art 72, para 16]. However, if the party intending to avoid the contract failed to give such notice, the avoidance will be ineffective [*Hornung/Fountoulakis in Schlechtriem/Schwenzer*⁵, Art 72, para 17]. Firstly, CLAIMANT failed to avoid the Contract immediately, which it surely could have done had it feel entitled to do so and, secondly, it failed to give a reasonable notice before avoiding the Contract after 5 months on 5 Jan 2009 [CEx 13]. Thus, even if the breach were fundamental – which RESPONDENT denies [para 79 *et seqq*] – CLAIMANT’S avoidance is not justified.

D. EVEN IF THE TRIBUNAL SHOULD COME TO THE CONCLUSION THAT RESPONDENT WAS IN BREACH, RESPONDENT IS NEVERTHELESS EXCUSED FROM LIABILITY

88 RESPONDENT maintains that it did not breach the Contract. However, should the Tribunal find the Contract was breached, RESPONDENT is excused from liability as all preconditions set forth in Art 79 CISG are fulfilled. In particular, RESPONDENT was not able to deliver the pumps around 22 Dec 2008 because of a ship accident that occurred in the Isthmus Canal [1]. This accident was an unforeseeable impediment [1.1], and RESPONDENT made every effort to avoid and then overcome the consequences of the accident [1.2]. This incident was the exclusive cause for RESPONDENT’S inability to deliver around the 22 Dec 2008 [1.3]. Regarding the partial non-conformity of the pumps, the Military Decree passed on 28 Dec 2008 qualifies as an unforeseeable impediment which RESPONDENT could not have reasonably overcome and which was the sole reason for the non-conformity of the field pumps [2]. It is also to be noted that RESPONDENT must not bear the risk pursuant to DES (Incoterms 2000) [3].

1. RESPONDENT is exempted for the late delivery under Art 79 CISG

89 On 28 Nov 2008 RESPONDENT was informed by its freight forwarder that a ship in line ahead of the Merry Queen had damaged the locks in the Isthmus Canal [CEx 9]. This ship accident blocked the traffic on the Isthmus Canal for 14 days. As a result RESPONDENT could not deliver the pumps by the modified delivery date around 22 Dec 2008, instead the ship arrived in Capitol City on 6 Jan 2009 – precisely 14 days later [Problem, p 6].

1.1 RESPONDENT’S delayed delivery was due to an unforeseeable impediment beyond its control that it could not have been expected to take into account

90 Under Art 79 CISG the unforeseeable impediment must be beyond the non-performing party’s influence. Events such as closing off traffic routes and major accidents are typically considered as these kind of *force majeure* events [*Stoll/Gruber in Schlechtriem/Schwenzer*², Art 79, para 14; *Huber/Mullis*, p 259]. The analysis of the facts of this case clearly demonstrates that the ship accident must qualify as a *force majeure* event. Even though ships passing through the Isthmus



Canal have been delayed before, it is a rare occurrence [PO 2, para 13]. On this basis CLAIMANT asserts that a closure of the Isthmus Canal was foreseeable, and that RESPONDENT should have been aware of and taken into account this risk at the time of conclusion of the Contract [CM, para 120]. CLAIMANT has erred in its assessment of the foreseeability of the ship accident. It was not reasonably foreseeable at conclusion of the Contract that a ship accident would occur at all in the near future, let alone exactly at the time when the pumps were shipped, as such an accident is a random event. Thus RESPONDENT could not have reasonably taken this unlikely event into account. CLAIMANT'S argumentation merely refers to the possibility of an accident in general. However, contrary to CLAIMANT'S contention, not all possible occurrences are reasonably foreseeable under Art 79 CISG.

1.2 RESPONDENT could not avoid the impediment but it informed CLAIMANT immediately and undertook all necessary actions to overcome it

- 91 RESPONDENT denies CLAIMANT'S allegation that it neither avoided nor tried to overcome the impediment [CM, paraa 116 *et seqq*]. To the contrary, RESPONDENT had no means to avoid and did everything in its power to overcome the consequences of the ship accident.
- 92 "To "avoid" means taking all the necessary steps to prevent the occurrence of the impediment" [Tallon in *Bianca/Bonell*, Art 79, para 2.6.4.]. In general, measures only need to be taken against impediments which are looming and, above all, clearly approaching [Rimke, p 216; Enderlein/Maskow, p 324]. In this case, RESPONDENT had no influence on the ship accident. Nonetheless, CLAIMANT asserts that RESPONDENT could have avoided the accident by shipping the pumps earlier [CM, para 127]. However, RESPONDENT chartered the first ship available [PO 2, para 12]. RESPONDENT was only held back and forced to ship the pumps on 22 Nov 2008, because the Parties had contractually agreed upon an extension caused by the necessity to procure new steel due to the change of circumstances [CEx 6]. Moreover, the Parties included DES term in the Contract, according to which the Parties agreed on ocean shipping [CEx 3]. The route passing through the Isthmus Canal was the fastest [PO 2, para 14]. Thus, by shipping at the earliest possible date and using the fastest route RESPONDENT undertook everything feasible to fulfill its obligation.
- 93 After RESPONDENT heard of the ship accident, it immediately explored other options for delivery and informed CLAIMANT [CEx 9]. RESPONDENT thereby fulfilled its duty to inform as set out by Art 79(4) CISG, which mandates the defaulting party to give notice of the impediment to the other party to enable it to take all steps necessary [Zeller, p 186].
- 94 "To "overcome" means to take the necessary steps to preclude the consequences of the impediment" [Tallon in *Bianca/Bonell*, Art 79, para 2.6.4.]. Thus, it needs to be established what a reasonable person



would be expected to do [*Rimke*, p 216; *Enderlein/Maskow*, p 324]. It is clear from the facts [PO 2, para 14] that RESPONDENT did not have any option other than to wait: Moving the pumps or transferring them to another ship, on route, is virtually impossible. The pumps were in a container along with numerous others, removing any single container out of sequence would have been time-consuming and expensive. Even if it could have been done the pumps would not have arrived in Mediterraneo any sooner. Additionally, the long route around the continent takes much longer than any emergency repairs to the damaged locks [CEx 9]. Thus, waiting in the queue to transit the Isthmus Canal was the only way to ensure delivery as quickly as possible.

1.3 The ship accident was the exclusive cause for RESPONDENT'S delay in delivery

- 95 The final precondition to be exempt from liability under Art 79 CISG is that the impediment is the only cause for delay [*Schwenzer in Schlechtriem/Schwenzer*⁵, Art 79, para 15]. The Merry Queen was delayed for 14 days because another vessel damaged the locks of the Isthmus Canal causing a traffic block [Problem, p 6]. As a result the ship did not arrive in Capitol City around 22 Dec 2008 as anticipated, but precisely 14 days later on 6 Jan 2009 [Problem, p 6]. There was no other reason for the delay.
- 96 CLAIMANT'S contention that there was no causality between the impediment and the breach of the Contract is incorrect: firstly, it is based on the false premise that Art 79 CISG is not applicable if there is a breach of contract [CM, para 122], and secondly, in order to rely on such a breach CLAIMANT has concocted a timeline in an attempt to validate speculative conclusions [CM, paraa 125 *et seqq*]. Contrary to CLAIMANT'S submission RESPONDENT was not in breach prior to the impediment [paraa 64 *et seqq*]. Nor would this be relevant to assess its exemption, as shown in the case *Macromex v. Globex International* quoted by CLAIMANT itself. There the tribunal gave consideration to the opinion of *Liu* [*Liu*, para 4.6] that “*it cannot be required that the impediment is the exclusive cause of a breach of contract;... the impediment should also be accepted when a cause overtakes another cause*” and thus did not deny an exemption. However, the tribunal found the seller could have shipped the goods to another port chosen by the buyer, i.e. had a possibility to overcome the impediment, but refused. This scenario does not concur with the case before this Tribunal.
- 97 Further, CLAIMANT accuses RESPONDENT of being in breach of the Contract because according to CLAIMANT'S calculations the ship should have been in the Isthmus Canal a day before the accident occurred [CM, para 126]. By means of a timeline CLAIMANT tries to illustrate that “*the only certainty in this case is that the journey from the Isthmus Canal to Ocean City takes 25 days*” [CM, para 125]. CLAIMANT evidently meant Capitol City, the port of destination. Even in this reading the argumentation is by no means convincing. CLAIMANT admits that little is certain [CM,



para 125], nonetheless it comes to the conclusion that the ship may have been in delay prior to the impediment and RESPONDENT was thus in breach. However, CLAIMANT can not assert such breach prior to the delivery date. Also, shipping is dependant on different factors such as weather and sea conditions, and thus vessels seldom travel at constant speed, so it is not possible to calculate precise time spans. This is one reason why RESPONDENT originally only stated that the ship would arrive at Capitol City around – and not on – 22 Dec 2008 [CEx 7].

2. RESPONDENT is exempt from liability for the delivery of partially non-conforming goods even if the Contract required compliance with Oceanian regulations at the time of delivery

- 98 RESPONDENT has shown above that it was merely obliged to deliver pumps in conformity with Oceanian regulations in force at the time of the conclusion of the Contract and that all pumps delivered were compliant with such regulations [paraa 35 *et seqq*]. Nonetheless, even if the Contract were deemed to warrant that the pumps would need to be regulation compliant at the time of delivery, RESPONDENT is exempted from liability.
- 99 On 1 Dec 2008 the Oceanian Military Council took over government [Problem, p 6]. On 28 Dec 2008 it adopted a decree with effect 1 Jan 2009, banning import of goods containing Beryllium [CEx 11]. Due to this decree, passed without warning only nine days prior to the delivery, the field pumps still containing Beryllium no longer conformed to Oceanian regulations.
- 100 State Interventions preventing performance, such as import bans, are generally outside the parties' sphere of control [*Stoll/Gruber in Schlechtriem/Schwenzer*², Art 79, para 37; BTTP, 24 Apr 1996]. In any event CLAIMANT itself admits that a state intervention *per se* qualifies as an exemption [CM, para 78]. Therefore, even if it had been RESPONDENT'S obligation to ensure such conformity, it is nevertheless exempt from liability under Art 79 CISG because a decree passed at such short notice and with merely four days until it comes into effect must be considered an unforeseeable impediment. The Military Decree was not reasonably foreseeable at the time of conclusion of the Contract as there was no indication that a political crisis was imminent in July 2008 when the Contract was signed. Tension only started during the month of October 2008 leading to the riots in November 2008. [PO 2, para 4]. Furthermore, the Military Decree passed is unique, unusually strict and not in line with international standards [CEx 6; PO 2, para 19].
- 101 Moreover, as CLAIMANT had more insight into the situation in Oceania and was the contracting party with Water Services, it was for CLAIMANT to assess and initiate further steps to react to the impediment [*Mankowski in MuKo III/1*⁵, p 718]. CLAIMANT should have either instructed



RESPONDENT on further action or taken steps to minimize the impact of the impediment. However, CLAIMANT merely stated it would continue to inform RESPONDENT of the developments [CEx 11] and, as shown below [paraa 102 *et seqq*], did not undertake any steps to countervail the development.

3. The DES (Incoterms) does not exclude an exemption under Art 79 CISG

102 CLAIMANT insists that RESPONDENT has to bear all risks during the shipment from Equatoriana to Mediterraneo due to agreement on DES (Incoterms 2000) [CM, para 136 *et seqq*]. However, Incoterms do not deal with exemptions from liability in case of unforeseeable events and therefore the parties may be relieved from the consequences of their non-performance, if they can benefit from exemptions under the applicable law [Ramberg, ICC Guide, p 11 *et seqq*]. Thus in the case at hand, the DES term does not exclude an exemption under Art 79 CISG.

E. CLAIMANT WAS OBLIGED TO MITIGATE THE LOSSES

103 CLAIMANT alleges that it did everything to mitigate its losses [CM, para 172]. This allegation is unjustified. Firstly, CLAIMANT did not take any steps in order to preserve the contract with Water Services [1]. Secondly, CLAIMANT did not apply for an individual exception which would have allowed the use of the contracted pumps [2]. Thirdly, CLAIMANT should have found other ways of mitigating damages [3].

1. CLAIMANT was obliged to uphold the Contract with Water Services in order to mitigate damages

104 Under Art 77 CISG an aggrieved party claiming damages for breach of contract must take all measures reasonable under the circumstances to mitigate its losses, otherwise the party in breach may claim a reduction of the amount of damages [*Magnus in Honsell*², Art 77, para 1; *Schlechtriem/Butler*, p 220; *Bernstein/Loofsky*, p 146; *Piltz*², p 417; OLG Graz [AUT], 24 Jan 2002]. This may even lead to a reduction of the damages to zero [BGH [GER], 24 Mar 1999]. This principle of mitigation is broadly accepted in international trade and arbitration practice [*Zeller*, p 110; Art 7.4.8 UNIDROIT Principles; *Watkins-Johnson v. Islamic Republic of Iran*; *Zeller*, p 110].

105 As shown above, CLAIMANT was not entitled to avoid the Contract [paraa 79 *et seqq*]. However, out of its duty to mitigate damages CLAIMANT should have tried to uphold the contractual relationship with Water Services, thus also saving the Contract with RESPONDENT. To comply with this duty CLAIMANT should have contested the validity of Water Services' avoidance and preserved the Irrigation Contract. As CLAIMANT itself admitted Water Services did not have justifiable grounds to avoid the Irrigation Contract, stating that the avoidance "*is only an excuse, of*



course' [CEx 13]. By not even trying to uphold the contract with Water Services CLAIMANT missed a considerable chance to mitigate damages. Indeed, had the Irrigation Contract been saved there may have been penalties for delay as well as storage costs for the pumps while awaiting the outcome of the negotiations between Water Services and CLAIMANT. However, it is unlikely that such costs would exceed the cost of the cancellation of the Contract.

2. CLAIMANT was obliged to request an individual exception to the Military Decree allowing for the use of the delivered field pumps

106 On 28 Dec 2008 the military regime passed a decree on environmental matters prohibiting the import or manufacture of products containing Beryllium, effective 1 Jan 2009 [Problem, p 6]. Individual exceptions would be made upon application to an office to be soon established [CEx 11]. As an expert in management of irrigation projects [Problem, p 4] and supervising manager in the Oceanian project, CLAIMANT was well informed of the developments in Oceania [PO 2, para 5]. It also had contact with representatives of the Military Council [para 62]. In fact, CLAIMANT already knew of the Military Decree on 28 Dec 2008, the same day the decree had been passed, as well as the possibility of applying for individual exceptions [CEx 11; REx 2]. Thus, CLAIMANT was not only obliged to do everything in its powers to save the contractual relationship with Water Services, but was actually in the best position to do so. However, CLAIMANT, without making any enquiry or further analysis on an individual exceptions, chose to cancel the Contract with RESPONDENT immediately [CEx 13; PO 2 para 21].

107 The Oceanian office dealing with exceptions began to operate on 2 Mar 2009. By the time it was created, 73 requests for exceptions were pending. Of those, more than a third was granted [PO 2 para 20]. Therefore, and taking into account CLAIMANT'S connections to Oceanian authorities, there was in fact a realistic chance that the exception would have been awarded.

3. CLAIMANT had the obligation to procure substitute goods

108 Where goods bought for use in the manufacturing process are delivered late, it may be reasonable to find a replacement for the period of delay, particularly if a timely commencement of use is of the essence [*Saidov*, p 141; OGH [AUT]. 14 Jan 2002]. Generally, reasonable measures may also include entering a cover purchase [*Schwenzer* in *Schlechtriem/Schwenzer*⁵, Art 77, para 10; Arbitral Tribunal - Vienna, 15 Jun 1994; OLG Hamburg [GER], 28 Feb 1997, OLG Düsseldorf [GER], 13 Sept 1996; OLG Celle [GER] 2 Sept 1998]. Special consideration must be given to the fact that one party is in the better position to take measures to mitigate [*Huber* in *MuKo III/1*⁵, Art 77, para 4]. CLAIMANT now alleges that it was not obliged to carry out a cover purchase [CM, para 183]. However, CLAIMANT was in the best position to take measures to mitigate and obliged to



do so: not only did CLAIMANT have superior knowledge of the situation in Oceania [3.1], it also had the time and resources to make the cover purchase [3.2].

3.1 CLAIMANT had all necessary information on the risk to the Irrigation Contract as well as the means to save it

109 The conversation between Horace Wilson, the representative of Water Services and CLAIMANT on 28 Dec 2008 [REx 2] revealed that delivery on 6 Jan 2009 would be too late and due to the situation in Oceania the contract was in serious danger of being cancelled. Mr. Wilson further stated that it would help if there could be at least partial delivery of pumps and strongly urged CLAIMANT'S representative to look for any potential alternatives for such delivery.

110 There were indeed slightly used pumps for sale from Trading Company of Mediterraneo at the end of December 2008 that would have been acceptable for Water Services [PO 2, para 25]. These pumps would have comprised about one-quarter of the number of field pumps called for by the Irrigation Contract [Problem, p. 35]. Although they were slightly used, it was not specified in the Irrigation Contract that the pumps needed to be newly manufactured [PO 2, para 25].

111 CLAIMANT alleges that partial delivery of the pumps would not have been enough to save the Irrigation Contract [CM, para 181]. However, it is clear from Mr. Wilson's statement that the contract would probably not have been cancelled if CLAIMANT had delivered at least a few pumps to Oceania conforming to the contract [REx 2]. It was thus entirely possible to preserve the contractual relationship. Moreover, not only was CLAIMANT well aware of Trading Company [PO 2, para 23], but the pumps of Trading Company were also advertised for sale on the company's web site and they were available for inspection at the company's premises in Mediterraneo, a country bordering Oceania [REx 3]. However, despite all the above facts, CLAIMANT chose to remain passive and thus forego a chance to save the Irrigation Contract.

3.2 CLAIMANT had the time and resources to make a cover purchase

112 RESPONDENT is aware that by the end of the year 2008 the developments in Oceania had put CLAIMANT in a difficult position. However, as a prudent businessperson, CLAIMANT should have been more vigilant and started earlier, at least after 28 Nov 2008 when the ship accident occurred, to search for alternative pumps on the market to fulfill its contractual obligations at least partially to Water Services. Moreover, even if CLAIMANT had started the search for the pumps on 28 Dec 2008, it would have had a legitimate chance of delivering the pumps on time as the delivery by Trading Company would have been extremely fast, taking only 1.5 days [REx 3]. Moreover, as CLAIMANT had the financial resources to purchase Trading Company's pumps [PO



2, para 26], it could have – and should have – entered in a cover purchase or find other means in order to save the contract and mitigate the damages. Instead, it chose to remain passive.

Answer to Procedural Order 1 on the merits: RESPONDENT had no obligation to deliver pumps in conformity with Oceanian regulations passed after the signing of the Contract. This conclusion follows from the interpretation of the warranty in Clause 2, the Incoterms trade term chosen by the Parties, CLAIMANT’S knowledge that the pumps originally contained Beryllium as well as from Art 35(2)(b) CISG. The contractual delivery date was extended to 22 Dec 2008 by modification of the Contract, an action initiated by CLAIMANT. After the accident in Isthmus Canal, RESPONDENT validly requested and was granted an additional period of time to cure this delay. Thus, CLAIMANT’S avoidance is unjustified. Further, CLAIMANT failed to mitigate the loss by neither requesting an individual exception for use of the delivered pumps nor attempting to uphold its contract with Water Services. In any event both Oceanian Regulations and the accident in Isthmus Canal qualify as *force majeure* exempting RESPONDENT from liability.

F. PLEA

113 In light of the above submissions RESPONDENT respectfully requests the Tribunal:

- (i) to find it has no jurisdiction over this dispute and dismiss its proceedings as premature; or
- (ii) *in eventum*: in case the Tribunal assumes jurisdiction, to stay the arbitral proceedings for a repetition of the conciliation proceedings; or
- (iii) *in eventum*: in case the Tribunal assumes jurisdiction and does not stay the arbitral proceedings, to decide on the merits of the case that:

- RESPONDENT delivered pumps in conformity with its obligations under the Contract;
- RESPONDENT did not breach its obligation to deliver within due time; or
- *in eventum*: in case the Tribunal decides that RESPONDENT was in breach of the Contract,
 - RESPONDENT is not liable for a failure to perform any of its obligations in the sense of Art 79 CISG; and
 - CLAIMANT failed to undertake all reasonable measures to mitigate loss in the sense of Art 77 CISG; and
 - thereby RESPONDENT is excluded from paying any damages to CLAIMANT; and

(iv) to order CLAIMANT to bear all the costs of this arbitration, including legal costs incurred by RESPONDENT, on a full indemnity basis.

(signed)

Vienna, 21 Jan 2010