TWENTIETH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
22–28 MARCH 2013
VIENNA

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF NEW SOUTH WALES

CLAIMANT
MEDITERRANEO EXQUISITE
SUPPLY, Co
45 COMMERCE ROAD
TEL: (0) 485 62 00
FAX: (0) 485 62 11
EMAIL: INFO@EXQUISITE.ME

RESPONDENT
EQUATORIANA CLOTHING
MANUFACTURING, LTD
286 THIRD AVENUE
TEL: (0) 238 86 00
FAX: (0) 238 86 01
EMAIL: OFFICE@CLOTHING.EQ

SMRITI ARORA • FIONA CHONG • YIXIN GONG • JESSICA JI
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   (iv) Considering Mr Short’s written statement ensures an efficient process ............ 6

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C. Even if the IBA Rules are applied, the Tribunal should still consider Mr Short’s written statement .......................................................... 8
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(i) Excluding Mr Short’s written statement from evidence would prevent RESPONDENT from presenting its case, under NY Convention Art V(b) ............ 10

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A. The parties validly agreed to disregard any national reservations in the Contract .................................................................................. 11

B. Alternatively, a proper interpretation of CISG Arts 12 and 96 leads to the application of the law of Equatoriana, which permits oral contractual amendments ........................................................................... 12

(i) The sole legal effect of Mediterraneo’s Art 96 reservation is that CISG Arts 11, 29 and Pt II do not apply ................................................................. 13

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(i) RESPONDENT made an offer to amend the Contract during the phone conversation ................................................................. 15

(ii) CLAIMANT accepted RESPONDENT’S offer by stating that it would ensure all of the paper work reflected the new delivery date................................. 16

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B. Therefore, as the contractual delivery date was validly amended by oral agreement, RESPONDENT complied with its obligations under CISG Art 3320

IV. ALTERNATIVELY, CLAIMANT IS NOT ENTITLED TO REMEDIES SOUGHT FOR DELAY IN DELIVERY ............................................................... 20

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B. Alternatively, RESPONDENT is not liable to pay the fixed sum of USD 27,500 under Art 10 of the Contract ................................................................. 20

(i) The Tribunal may reduce a fixed sum where it is grossly excessive .................. 21

(ii) The fixed sum under Art 10 of the Contract is grossly excessive ...................... 21

C. Alternatively, if RESPONDENT is liable to pay the fixed sum of USD 27,500 under Art 10 of the Contract, RESPONDENT is not liable to pay damages under CISG Art 74 for any loss caused by delay because Art 10 of the Contract exhaustively enumerates CLAIMANT’s remedies for delay ............ 22

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<td>Free Alongside Ship</td>
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UN
United Nations

UNCITRAL
United Nations Commission on International Trade Law

UNIDROIT
International Institute for the Unification of Private Law

US
United States of America

USD
United States dollars

v
versus
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| **ILO Convention No 138** | International Labour Organisation Minimum Age for Admission to Employment or Work (No 138), Geneva, 1973 |

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| **ILO Convention No 182** | International Labour Organisation Worst Forms of Child Labour Convention (No 182), Geneva, 1999 |

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| **NY Convention** | Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 |

Cited in 16, 45–6

| **PICC** | UNIDROIT Principles on International Commercial Contracts, 2004 |

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| **UML** | UNCITRAL Model Law on International Commercial Arbitration, 1985 |

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IBA Rules of Evidence or IBA Rules  IBA Rules on the Taking of Evidence in International Arbitration, 2010  7, 16, 31–7, 40, 48

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**UNIVERSITY OF NEW SOUTH WALES**

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STATEMENT OF FACTS

1. Equatoriana Clothing Ltd (‘RESPONDENT’) is a clothing manufacturer that produces a wide range of clothes at highly competitive prices. Mediterraneo Exquisite Supply Co (‘CLAIMANT’), a company jointly owned by Oceania Plus Enterprises (‘Oceania Plus’) and Atlantica Megastores, procures clothing for its related entities.

2. The parties previously contracted in April 2008. Before concluding that contract, CLAIMANT audited RESPONDENT’s business in 2007. Although the audit raised suspicions of child labour in RESPONDENT’s manufacturing process, it the audit was nevertheless approved by CLAIMANT. CLAIMANT has not conducted any audits of RESPONDENT since then.

3. On 5 January 2011, CLAIMANT entered into another contract with RESPONDENT (‘Contract’) despite having doubts about whether RESPONDENT still complied with its ethical policy. Under the Contract, RESPONDENT agreed to deliver 100,000 ‘Yes Casual’ polo shirts for USD 550,000 FAS Incoterms Oceanside, Equatoriana, by 19 February 2011.

4. On 9 February 2011, RESPONDENT informed CLAIMANT by phone that it could no longer deliver the shirts by the agreed date as a third-party supplier could not provide the necessary inputs on time. CLAIMANT agreed to ensure all of the paper work reflected the new date of 24 February 2011. Shortly afterwards, RESPONDENT received a new letter of credit with the amended delivery date but retaining the same purchase price. The Contract was completed on 24 February 2011 when the shirts were delivered to Oceanside, Equatoriana, and the letter of credit was paid.

5. Over one month passed during which the shirts were sold in Oceania without CLAIMANT contacting or making any objections to RESPONDENT. On 8 April 2011, CLAIMANT purported to avoid the Contract with RESPONDENT on the grounds that RESPONDENT delivered shirts that allegedly could not be sold in Oceania. CLAIMANT alleged that RESPONDENT used child labour in violation of Art 12 of the Contract and referred to a Channel 12 documentary, part of which had apparently been filmed in one of RESPONDENT’S production facilities. RESPONDENT replied on 10 April 2011, assuring CLAIMANT that it had not breached the Contract as no child labour had been involved in producing the shirts in any way. Despite this, CLAIMANT made a rush purchase of 90,000 substitute shirts from Gold Service Clothing.

6. On 1 July 2012, CLAIMANT lodged a Notice of Arbitration to CEAC, claiming a total of USD 2,127,500, with a substantial part of these damages arising out of third party losses. On 4 August 2012, RESPONDENT filed its Statement of Defense.
SUMMARY OF ARGUMENT

I. THE TRIBUNAL SHOULD CONSIDER MR SHORT’S EVIDENCE EVEN THOUGH HE IS UNAVAILABLE FOR EXAMINATION AT ORAL HEARING

7. The Tribunal is bound by CEAC Rules Art 17 and UML Art 18 to consider Re Ex 1, Mr Short’s written statement, as evidence which is pertinent to determining the issue of delay. The Tribunal is not bound to apply the IBA Rules. However, in any event, the application of the IBA Rules Art 4.7 would require the Tribunal to consider Re Ex 1. If the Tribunal disregards Re Ex 1, any award rendered risks being unenforceable under the NY Convention.

8. The Tribunal should give equal weight to both Mr Short’s and Mr Long’s written statements. Further, no adverse inference should be drawn from Mr Short’s inability to attend the hearing.

II. THE APPLICABLE LAW THAT GOVERNS THIS CONTRACTUAL DISPUTE ALLOWS ORAL CONTRACTUAL AMENDMENTS

9. The Tribunal should disregard Mediterraneo’s Art 96 reservation, as the parties validly agreed to disregard ‘any national reservations’ in Art 10 of the Contract. Even if Art 10 is invalid, the applicable law governing formal requirements is the law of Equatoriana, which allows oral amendments. This is because the sole effect of Mediterraneo’s Art 96 declaration is that the CISG does not govern the form requirements of the Contract. Rather, the law of Equatoriana applies on the basis of Danubian conflict of law rules, or on the basis that it is the ‘appropriate’ law to govern the dispute.

III. RESPONDENT COMPLIED WITH ITS CONTRACTUAL OBLIGATIONS BY DELIVERING SHIRTS ON 24 FEBRUARY 2011

10. The parties amended the contractual delivery date to 24 February 2011 by oral agreement. This amendment is valid despite not being in writing. As RESPONDENT delivered the shirts on 24 February 2011, it complied with its obligations under CISG Art 33.

IV. CLAIMANT IS NOT ENTITLED TO REMEDIES FOR DELAY IN DELIVERY

11. RESPONDENT is not liable to pay USD 27,500 under Art 10 of the Contract as this amount is grossly excessive. Alternatively, if RESPONDENT is liable for the full amount under Art 10, CLAIMANT is not entitled to damages under CISG Art 74 for loss caused by delay, as Art 10 exhaustively enumerates CLAIMANT’s remedies for delay.

V. RESPONDENT COMPLIED WITH ITS CONTRACTUAL OBLIGATIONS BY DELIVERING CONFORMING SHIRTS

12. RESPONDENT complied with its obligations under the Contract and the CISG by delivering shirts conforming to the required quality under Annex 1 of the Contract. Although Art 12 of
the Contract does not create an enforceable obligation, RESPONDENT nevertheless complied with any obligations created under Art 12, and hence CISG Arts 45 and 35(1), as no child labour was used in producing the shirts. Further, as the shirts could be resold, they were fit for their ordinary purpose in accordance with CISG Art 35(2)(a). RESPONDENT was not made aware of the Oceanian market’s peculiar sensitivities to ethical standards, and thus complied with the particular purpose made known to it under CISG Art 35(2)(b).

VI. CLAIMANT’S PURPORTED AVOIDANCE OF THE CONTRACT IS INVALID AS RESPONDENT DID NOT COMMIT A FUNDAMENTAL BREACH

13. RESPONDENT did not commit a fundamental breach, as RESPONDENT’s alleged breaches did not substantially deprive CLAIMANT of what it was entitled to expect. Alternatively, such deprivation was not reasonably foreseeable. Hence, CLAIMANT wrongfully avoided the Contract and is not entitled to restitution of the purchase price under CISG Art 81.

VII. FURTHER, CLAIMANT IS NOT ENTITLED TO DAMAGES SOUGHT FOR BREACHES OTHER THAN DELAY

14. CLAIMANT is not entitled to damages for the settlements it reached with Doma Cirun and Oceania Plus. This is because the nature and extent of these claims were unforeseeable, and CLAIMANT failed to mitigate its losses. In any event, RESPONDENT’s liability to pay damages must be reduced by the benefits CLAIMANT derived from selling the shirts to Pacifica Trading.

ARGUMENT ON PROCEDURE

I. THE TRIBUNAL SHOULD CONSIDER MR SHORT’S WRITTEN STATEMENT ALTHOUGH HE IS UNAVAILABLE FOR EXAMINATION

15. RESPONDENT is entitled to adduce evidence in the form of Mr Short’s written statement [Re Ex 1] to support its contention that the contractual delivery date was orally modified [CEAC Rules Art 27.2]. This is the case despite Mr Short’s inability to attend an oral hearing [PO1 ¶4]. CLAIMANT has misinterpreted CEAC Rules Art 17.3 in arguing that the Tribunal would breach CEAC Rules Art 17.3 if Mr Short is unavailable for examination [Cl Mem ¶21]. That provision only requires that the Tribunal hold a hearing – rather than deciding ‘on the papers’ – where requested [OLG Ger 21/02/2002; PT Asuransi], as will be satisfied here; it does not require the parties to present all witnesses whose presence has been requested.

16. The Tribunal, in exercising its important procedural discretion under CEAC Rules Art 17.1, should consider Re Ex 1 [A]. The IBA Rules are inapplicable to this dispute [B]. Even if applied, the Tribunal should still consider Re Ex 1 [C]. In considering Re Ex 1, the Tribunal should give equal weight to both Mr Short’s and Mr Long’s written statements [D]. Further,
the Tribunal should not draw an adverse inference from Mr Short’s unavailability under IBA Rules Art 9.6 [E]. If the Tribunal fails to consider Mr Short’s written statement, its award risks being unenforceable under the NY Convention [F].

17. Ultimately, CLAIMANT bears the burden of proving that Re Ex 1 is inadmissible, contrary to its submissions [Cl Mem ¶36] because CLAIMANT seeks to prevent the Tribunal from considering Re Ex 1 [Fouchard 694; Redfern/Hunter 387].

A. Considering Mr Short’s written statement is consistent with CEAC Rules Art 17.1

18. The CEAC Rules govern the admissibility of Re Ex 1 as the parties expressly agreed to their adoption [Cl Ex 1 ¶19; Cl Mem ¶21]. The Tribunal’s power to determine the admissibility of Mr Short’s written statement [CEAC Rules Art 27.4] must be exercised in accordance with CEAC Rules Art 17.1. Hence, the Tribunal should consider Mr Short’s written statement to ensure that both parties have a reasonable opportunity to present their cases [i], are treated with equality [ii], and are provided with a fair [iii] and efficient process that avoids unnecessary delay and expenditure [iv] [CEAC Rules Art 17.1].

(i) The Tribunal should consider Mr Short’s written statement to provide both parties with a reasonable opportunity to present their cases

19. Under CEAC Rules Art 17.1, Tribunal must provide the parties with a reasonable opportunity to present their cases. The Tribunal is also bound by UML Art 18 [Statement of Claim ¶32] – a mandatory law of Danubia, the seat of arbitration [Methanex; Born 111; Waincymer 183] – to provide the parties with a ‘full opportunity’ to present their cases. The parties cannot contract out of the mandatory provisions of the lex arbitri [Pryles 2–3; Redfern/Hunter 367]. Consideration of Re Ex 1 would ensure that RESPONDENT has a full opportunity to present its case [a] and would not deprive CLAIMANT of a full opportunity to present its own case [b].

a. RESPONDENT would be provided with a reasonable opportunity to present its case

20. There is a real dispute as to what was said in the phone conversation between Mr Short and Mr Long on 9 February 2011 [Statement of Defense ¶7; Statement of Claim ¶14]. RESPONDENT should be able to introduce Re Ex 1 into evidence to establish that the contractual delivery date was modified and cast doubt on CLAIMANT’s version of events. Re Ex 1 is therefore a key piece of evidence. If it were not considered, this would ‘seriously and unfairly’ impair RESPONDENT’s ability to show that it did not breach the contractual delivery date, thereby depriving RESPONDENT of a full opportunity to present its case [O’Malley 196]. CLAIMANT has failed to consider this.
b. **CLAIMANT would not be denied a reasonable opportunity to present its case**

21. The examination of a counterparty’s witness is not necessary for providing a party with a reasonable opportunity to present its case [*Born 156–67; Waincymer 886; Redfern/Hunter 367*], despite CLAIMANT’s erroneous argument to the contrary [*Cl Mem ¶¶31–3*].

22. On the facts of this case, the Tribunal’s consideration of Re Ex 1 will not deny CLAIMANT a reasonable opportunity to present its case because CLAIMANT has had, and will have, a sufficient opportunity to address the disputed factual evidence in its written and oral arguments [*Xerox; Glamis Gold; contra Cl Mem ¶31*]. CLAIMANT has already adduced a significant volume of evidence to attempt to support its proposition that no oral agreement was reached, including Mr Long’s written statement recounting his phone conversation with Mr Short [*Cl Ex 2*]. Moreover, CLAIMANT will have the opportunity to respond to Mr Short’s written statement during the oral hearing, even without his physical presence. Therefore, the Tribunal should reject CLAIMANT’s argument that it would be denied a reasonable opportunity to present its case if Mr Short’s written statement were admitted [*Cl Mem ¶¶31–3*].

(ii) **Considering Mr Short’s written statement ensures equal treatment**

23. CEAC Rules Art 17.1 requires the Tribunal to ensure that the parties are treated with equality, which cannot be overridden by party agreement [*Born 152–3*]. As CLAIMANT has identified, equal treatment requires that neither party is placed at a substantial disadvantage vis-à-vis the other [*Cl Mem ¶31; Dombo*]. However, RESPONDENT would suffer substantial disadvantage if Mr Short’s written statement were to be disregarded, but Mr Long’s written statement were allowed to stand. RESPONDENT has not requested examination of Mr Long, providing the Tribunal with the ability to consider the content of the written statements of both Mr Short and Mr Long without substantially disadvantaging either party. Therefore, both written statements should be considered by the Tribunal.

(iii) **Considering Mr Short’s written statement provides the parties with a fair process**

24. CEAC Rules Art 17.1 requires the Tribunal to provide the parties with a fair process. Although CLAIMANT argues that it would be unfair to consider Re Ex 1 if RESPONDENT cannot secure Mr Short’s attendance [*Cl Mem ¶31*], it is in fact unfair to place the burden of securing Mr Short’s attendance entirely on RESPONDENT. This is because the parties are in a unique situation, in which CLAIMANT is in a better position to secure Mr Short’s attendance than RESPONDENT for two reasons: first, Mr Short’s employer, being a competitor of RESPONDENT, is reluctant to assist RESPONDENT by allowing Mr Short to appear for oral examination [*PO2 ¶26*]. Second, Mr Short’s employer has recently succeeded in being listed by CLAIMANT as a
potential supplier [PO2 ¶26] and therefore has a commercial interest in maintaining a positive working relationship with CLAIMANT.

25. However, CLAIMANT has taken no steps to assist in securing Mr Short’s attendance – not even in the form of a phone call to him or his employer – despite RESPONDENT inviting CLAIMANT to do so [PO1 ¶4]. RESPONDENT did everything in its power to secure Mr Short’s attendance by requesting that he appear [PO1 ¶4]. Contrary to CLAIMANT’s submissions [Cl Mem ¶37], it would have been futile for RESPONDENT to seek a procedural order requesting Mr Short’s attendance, since the Tribunal cannot legally compel Mr Short to appear [PO2 ¶8].

CLAIMANT’s refusal to assist in any way [PO1 ¶4] suggests that it is motivated by a desire to exclude evidence detrimental to its case – as is often the case in arbitration [Park 452–3] – rather than by any genuine belief that it would be treated unfairly. Further, CLAIMANT itself relies upon Re Ex 1 where it finds it convenient to do so [Cl Mem ¶¶15, 42, 44, 102].

26. CLAIMANT argues that the Tribunal’s consideration of Mr Short’s written statement would deny CLAIMANT a ‘fair trial’ [Cl Mem ¶31]. Even though this principle is not applicable to arbitration, which focuses on commerciality and efficiency [2012 Int Arb Survey ii; Park 450–1; Born 9, 13], admitting Re Ex 1 into evidence would still satisfy the standards of fairness to both parties. This is because fairness requires each party to have knowledge of, and the ability to comment on, all the evidence relied upon by the other party [Mantovanelli]. Since CLAIMANT will have known the entirety of the evidence upon which RESPONDENT seeks to rely for over seven months prior to the oral hearing [Letter 04/08/2012], CLAIMANT cannot complain of an unfair process due to surprise or ambush.

(iv) Considering Mr Short’s written statement ensures an efficient process

27. CEAC Rules Art 17.1 requires the Tribunal to provide the parties with an efficient process. The has been entirely overlooked by CLAIMANT. For three reasons, it is efficient for the Tribunal to consider Mr Short’s written statement instead of requiring his oral testimony.

28. First, removing the need for witness testimony – the most expensive element of arbitral proceedings – would minimise the costs and time taken in arbitration [Bishop 46; Rivkin 661; Hanotiau 99] and deliver significant cost savings [McIlwraith ¶4]. In fact, many parties select arbitration for its efficiency and informality in contrast to ‘the time-consuming formalities of proceedings in a national court’ [Redfern/Hunter 300, 304; 2012 Int Arb Survey ii; Born 9, 13]. This is reflected in CEAC Rules Art 17.1 [Moens/Sharma 22].

29. Second, the Tribunal should ensure that the time and money spent in resolving the dispute is proportional to its value [McIlwraith ¶4], while still hearing full argument on the issue [PO1 ¶3]. Since the issue of delay involves a claimed amount of only USD 27,500 [Statement of
Claim ¶33] – representing only 1.29% of the total claim of USD 2,127,500 – the Tribunal should avoid the additional expense of requiring Mr Short’s oral testimony.

30. Third, requiring Mr Short’s appearance would be inefficient because his oral examination would not be productive [Mehren/Salomon 287]. Given that neither Mr Long nor Mr Short remember the exact wording of the phone conversation of 9 February 2011 [PO2 ¶27], Mr Short’s oral testimony would serve only to repeat the content of Re Ex 1 [O’Naghten/Vielleville 6; Fouchard 698], rather than provide further knowledge of crucial facts [Bishop 46]. Examining Mr Short would be unlikely to reveal ‘hitherto unrevealed truth’ [Ibig 16] since both parties generally agree about Mr Short’s wording [PO2 ¶27], and should therefore not be required. Indeed, the majority of those involved in the arbitral process believe that use of written witness statements is an effective substitute for direct examination at an oral hearing [2012 Int Arb Survey 3].

B. The IBA Rules should not be used to determine the admissibility of Mr Short’s written statement

31. The IBA Rules should not be applied to this dispute as binding rules [i] or guidelines [ii].

(i) The IBA Rules do not bind the Tribunal as the parties did not adopt them

32. Party autonomy is the fundamental cornerstone of international commercial arbitration [Redfern/Hunter 365; Fouchard 648], a fact recognised by CLAIMANT [Cl Mem ¶20]. The parties did not include the IBA Rules in any part of the Contract [Cl Ex 1; PO2 ¶24]. Parties wishing to adopt the IBA Rules should provide for this in their arbitration agreement since the IBA Rules cannot have any direct binding force upon the tribunal without party consent [Lew 560; Waincymer 757]. That the parties have not chosen to adopt the IBA Rules in their arbitration agreement, despite being ‘free to select the rules they consider most appropriate’ [Hanotiau 96–7; Born 55], suggests that they did not wish the IBA Rules to apply [Cl Ex 1 ¶19]. This is because CLAIMANT and RESPONDENT carefully considered the content of the arbitration clause, as demonstrated by the refinement of the clause during its drafting [PO2 ¶10]. The parties could easily have incorporated the IBA Rules if they desired given that the IBA Rules provide clear recommendations for their express incorporation [O’Naghten/Vielleville 42; IBA Rules Foreword]. Hence, the adoption of the IBA Rules in these circumstances against the parties’ choice would cause ‘great dissatisfaction’ with the arbitral process, as it would undermine the principle of party autonomy [O’Malley 7].
Further, the IBA Rules should not be used as a guide by the Tribunal in exercising its discretion under CEAC Rules Art 17.1

33. Although the Presiding Arbitrator has expressed a desire to follow international practice [PO2 ¶24], the IBA Rules should not be applied, for two reasons [contra Cl Mem ¶¶22–3].

34. First, multiple international standards have developed apart from the IBA Rules that could constitute international practice [ICC Rules; AAA Rules; ICC Techniques]. For example, the ICC Techniques emphasise the need to reduce unnecessary witness evidence in international arbitration [ICC Techniques 537; Born 27–8].

35. Second, concerns have been raised about the IBA Rules, despite CLAIMANT’S submission that they embody fairness and equality [Cl Mem ¶22]. Specifically, the IBA Rules have been expressed as ‘constitut[ing] a misguided combination of … different traditions’ [Shore 76–80], providing for the domination of common law, especially in relation to cross-examination [Waincymer 759–60]. This is in contrast to the general preference in international arbitration for documentary evidence [Pietrowski 391; O’Malley 105]. Accordingly, there is no general consensus that the IBA Rules represent the undisputed international standard.

36. Ultimately, the Tribunal should use its discretion to determine the appropriate procedure for the specific circumstances of the case [Landolt 173], guided by the commercial realities and requirements of CEAC Rules Art 17.1 that should lead the Tribunal to admit Re Ex 1.

C. Even if the IBA Rules are applied, the Tribunal should still consider Mr Short’s written statement

37. Even if the IBA Rules are applied, Re Ex 1 is still admissible as Mr Short’s absence can be excused under IBA Rules Art 4.7 [i]. Alternatively, exceptional circumstances apply here [ii].

(i) Mr Short has a valid reason for not appearing before the Tribunal within the meaning of IBA Rules Art 4.7

38. Mr Short is primarily unavailable for an oral hearing is because his new employer Jumpers Production – one of RESPONDENT’S competitors – has specifically told Mr Short not to appear [PO1 ¶4; PO2 ¶26]. RESPONDENT agrees with CLAIMANT that matters ‘entirely’ within a party’s control or assumption of risk do not constitute valid reasons for non-attendance [O’Malley 129–30]. However, securing Mr Short’s attendance is presently not entirely within RESPONDENT’S control or assumption of risk.

39. The directive issued by Jumpers Production to not appear before the Tribunal is in Jumper Production’s own absolute control, rather than RESPONDENT’S [PO2 ¶26]. Moreover, Re Ex 1 may still be considered despite Mr Short’s non-attendance since the event preventing
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attendance – the refusal of Mr Short’s new employer to allow him to give oral testimony – was unforeseeable at the time RESPONDENT proffered Re Ex 1 [O’Malley 130]. CLAIMANT’s analysis mistakenly assumes that the list of unforeseeable events provided by O’Malley is closed [Cl Mem ¶25]. However, those factors are explicitly described as being non-exhaustive [O’Malley 130]. Since the arbitration is confidential [Cl Ex 1 ¶¶19(d), 19(e)], RESPONDENT could not have foreseen at the time of proffering Re Ex 1 that Mr Short’s new employer would have any reason to refuse his attendance at an oral hearing.

40. The circumstances of the current case contrast markedly with situations in which the IBA Rules have been applied to exclude written evidence. For example, in Vivendi, the tribunal held that a party had no valid reason where that party knew that its witness would be unavailable on the date of the hearing, yet failed to inform the other party of this fact despite numerous queries. In contrast, RESPONDENT immediately informed CLAIMANT that Mr Short would be unavailable when CLAIMANT first made its request [PO1 ¶4; contra Cl Mem ¶25].

(ii) In any event, exceptional circumstances apply to this case under IBA Rules Art 4.7

41. In determining what constitutes ‘exceptional circumstances’, the Tribunal should adopt a liberal approach to admissibility of evidence, in line with usual arbitral practice; tribunals are ‘reluctant to be limited by technical rules of evidence’ that prevent them from ‘establishing the facts necessary for the determination of the issues between the parties’ [Redfern/Hunter 386–7]. This is especially the case here, because the Tribunal has little other evidence to consider [O’Malley 131]. In the absence of Re Ex 1, the Tribunal is limited to the evidence adduced by CLAIMANT. This would fail to provide the Tribunal with a holistic picture of the phone conversation of 9 February 2011, the content of which is highly contentious. Obtaining a holistic picture is important as the parties have a particular interest in resolving the issue of whether the contractual delivery date was modified [PO1 ¶3]. In this case, the Tribunal is able to take measures other than excluding Re Ex 1 [O’Malley 131], including allowing CLAIMANT to challenge Re Ex 1 in writing and offer rebuttal evidence [Soh Beng Tee].

D. The Tribunal should give equal weight to the written statements of both parties

42. In determining the weight to be given to evidence [CEAC Rules Art 27.4; O’Malley 216], the Tribunal should give equal weight to Mr Long’s and Mr Short’s written statements. Full weight should be given to Re Ex 1, as it has considerable probative value, given that Mr Short provides a first-hand account of his phone conversation with Mr Long [O’Malley 200–1].

43. In any event, if the Tribunal accepts CLAIMANT’s reasons for giving diminished weight to Re Ex 1 [Cl Mem ¶¶39–40], the Tribunal should also give diminished weight to Mr Long’s
statement as the issues raised by CLAIMANT apply equally to Mr Long’s statement. Mr Long, like Mr Short, will not be ‘orally tested’ [Cl Mem ¶39], there being nothing in the facts suggesting that Mr Long will attend the hearing. Further, Mr Long’s account of the conversation was neither contemplated nor committed to writing until more than six months after the conversation was held [Cl Ex 2; Redfern/Hunter 389].

E. Further, the Tribunal should not draw an adverse inference from Mr Short’s unavailability under IBA Rules Art 9.6

44. Although not raised by CLAIMANT, the Tribunal should not draw an adverse inference on the basis that the evidence would be contrary to RESPONDENT’s interests [Craig/Park/Paulsson 451] for three reasons. First, Mr Short’s inability to be examined should not be grounds for drawing an adverse inference because his non-attendance is due to his new employer’s prohibition on his attendance, rather than because his version of events would not support RESPONDENT [PO2 ¶26; Marossi 529; Waincymer 930]. In fact, RESPONDENT is willing to have Mr Short’s testimony tested as RESPONDENT is confident in its content. This is evidenced by RESPONDENT’s efforts to speak to Mr Short in order to secure his appearance before the Tribunal [PO1 ¶4]. Second, as explained in ¶¶38–40, the evidence – Mr Short’s oral testimony – is not accessible to RESPONDENT [O’Malley 217]. Third, adverse inferences are designed to encourage ‘appropriate disclosure’ and facilitate ‘full evaluation of the merits’ [Sharpe 550]. The exclusion of Re Ex 1 would defeat these aims as Mr Short is not accessible to RESPONDENT and moreover, the issue of delay cannot be fully evaluated without Re Ex 1.

F. If Mr Short’s written statement is not considered, the Tribunal’s award risks being unenforceable under the NY Convention

45. RESPONDENT wishes for the award, including any costs order against CLAIMANT, to be enforceable and the dispute finally resolved. Further, arbitrators have a widely-accepted duty to use their best endeavours to render an enforceable award [Redfern/Hunter 624; Waincymer 97]. Accordingly, Mr Short’s written statement should be considered in order to deliver an enforceable award under NY Convention Art V(b) [i] and Art V(d) [ii].

(i) Excluding Mr Short’s written statement from evidence would prevent RESPONDENT from presenting its case, under NY Convention Art V(b)

46. Any award delivered by the Tribunal risks being unenforceable if the Tribunal does not consider Re Ex 1, since that is a key piece of evidence upon which RESPONDENT relies. For the reasons provided above in ¶20, RESPONDENT would be unable to present its case as required under NY Convention Art V(b) if the Tribunal did not consider Re Ex 1.
CLAIMANT argues that its inability to examine Mr Short would prevent CLAIMANT from presenting its case [Cl Mem ¶27]. However, the Tribunal should reject this argument. In OLG Ger 21/02/2002, the Court held that the parties had been able to present their cases without an oral hearing. Further, as CLAIMANT has had a sufficient opportunity to submit additional evidence and arguments in response to RESPONDENT’s evidence [Rotoaria; Loral], CLAIMANT has already been provided with the opportunity to present its case.

(ii) Excluding Mr Short’s written statement would not accord with the parties’ agreed arbitral procedure or the lex arbitri, under NY Convention Art V(d)

As explained above in ¶32, the parties did not expressly or impliedly choose the IBA Rules in the Contract [Cl Ex 1], despite having the ability to do so [Bishop 45]. Hence, if the Tribunal were to apply the IBA Rules to exclude Re Ex 1, the arbitral process would be contrary to the parties’ agreed procedure [Cl Ex 1 ¶19].

Result I: The Tribunal should consider, and give full weight to, Mr Short’s written statement despite his unavailability for oral hearing.

II. THE APPLICABLE LAW THAT GOVERNS THIS CONTRACTUAL DISPUTE ALLOWS ORAL CONTRACTUAL AMENDMENTS

CLAIMANT argues that the contractual delivery date could not be orally amended as Mediterraneo, CLAIMANT’s place of business, has made an Art 96 reservation under the CISG [Cl Mem ¶¶53–8]. Contrary to CLAIMANT’s submissions, the Tribunal should conclude that the applicable law allows oral contractual amendments.

First, the parties validly and expressly agreed to disregard any national reservations in the Contract [Cl Ex 1 ¶20] [A]. Second, even if the Tribunal considers Mediterraneo’s reservation, the mere effect of this is that certain provisions, which allow contractual and their modifications to be made orally [CISG Arts 11, 29, Pt II] do not apply to the Contract [CISG Art 12]. The Tribunal must still determine the applicable law for formal requirements of the Contract. In this case, the law of Equatoriana applies to allow the Contract to be amended orally [B]. The agreement to modify the delivery date is considered in ¶¶69–85 below.

A. The parties validly agreed to disregard any national reservations in the Contract

Although Mediterraneo has made a reservation under CISG Art 96, the parties expressly and validly agreed to disregard this. Article 20 of the Contract states: ‘This contract shall be governed by the [CISG] without regard to any national reservation’ [Cl Ex 1]. Contrary to CLAIMANT’s submissions [Cl Mem ¶58], this exclusion is valid for two reasons.
First and foremost, the Tribunal is bound to apply the law chosen by the parties to be applicable to the substance of their dispute [CEAC Rules Art 35(1)]. This accords with the general principle of party autonomy in international arbitration [Gaillard 199; Redfern/Hunter 195; Lew 426; PO2 ¶33]. Here, the parties have chosen to apply the CISG ‘without regard to any national reservation’ [Cl Ex 1]. Indeed, they have done so by adopting, in exact form, Model Clause B under the CEAC Rules [CEAC Rules Art 35(1)(b); Cl Ex 1 ¶19]. Model Clause B is designed to allow parties to exclude, inter alia, reservations to the CISG under Art 96 [CEAC Explanatory Comments]. The Tribunal, as a body constituted under the CEAC Rules by the parties’ consent [Bjorklund 184], should respect the parties’ intention and uphold the validity of Model Clause B, and therefore, Art 10 of the Contract.

Second, CLAIMANT mistakenly argues that since CISG Art 12 is a ‘mandatory provision’, the only way to exclude it is by excluding the entire CISG [Cl Mem ¶58]. In an arbitration – as opposed to a court proceeding – the basis and limits of the parties’ freedom to choose the applicable law is determined by the lex arbitri and arbitral rules chosen by the parties, not the CISG and its allowable reservations [Schroeter (2012) 33].

The parties can choose the ‘rules of law’ governing the substance of their dispute under both UML Art 28(1) and CEAC Rules Art 35(1), the applicable lex arbitri and arbitral rules [Statement of Claim ¶32; Cl Ex 1 ¶19]. The parties can therefore validly choose the CISG, except those provisions giving national reservations effect, as the ‘rules of law’ governing the Contract [Schroeter (2012) 33; Lew 426; CEAC Rules Art 35(1)(b); Cl Ex 1 ¶20]. Consequently, despite CLAIMANT having its place of business in a reservation State, CISG provisions allowing contracts and their modifications to be made orally [CISG Arts 12, 29, Pt II] are included as applicable rules of law [Schroeter (2012) 33].

B. Alternatively, a proper interpretation of CISG Arts 12 and 96 leads to the application of the law of Equatoriana, which permits oral contractual amendments

Contrary to CLAIMANT’s submissions [Cl Mem ¶¶54–7], the sole legal effect of Mediterraneo’s Art 96 reservation is that CISG Arts 12, 29 and Pt II cease to apply [i]. The Tribunal must still determine the applicable law governing form requirements and should conclude that the law of Equatoriana is the relevant applicable law [ii]. Consequently, the Contract can be validly amended by oral agreement [iii].
The sole legal effect of Mediterraneo’s Art 96 reservation is that CISG Arts 11, 29 and Pt II do not apply

CLAIMANT has misinterpreted and overstated the effect of Mediterraneo’s Art 96 reservation by arguing that if a contracting party has its place of business in a reservation State, then the law of that State automatically applies so as to require the contract to be amended in writing [Cl Mem ¶54]. Contrary to CLAIMANT’s submissions [Cl Mem ¶55], the Tribunal is not bound by the interpretation given to Mediterraneo’s Art 96 reservation by the Supreme Court of Mediterraneo. Rather, RESPONDENT urges the Tribunal to adopt the prevailing view, namely, that the sole legal effect of Mediterraneo’s Art 96 reservation is that CISG Arts 11, 29 and Pt II do not apply and that conflict of law rules must be applied to determine what the applicable national law is on requirements as to form [Schlechtriem 215; Honnold 188; Enderlein 75; Schroeter (2012) 22; Forestal Guarani; Hispafruit]. This is the preferred view as it is consistent with the language of the CISG [a], and the legislative history and purpose of Art 96 reservations [b]. It is also the dominant approach in international practice [c].

a. This approach is preferred, as it is consistent with the language of the CISG

CISG Art 12, which describes the legal effect of an Art 96 reservation [Schlechtriem 1192; Honnold 186], merely states that the named provisions concerning freedom of form do not apply where a party has its place of business in a reservation State [Enderlein 75; Schroeter (2012) 23]. The language of the CISG supplies no positive provision on the applicable formal requirements [Enderlein 75; Schroeter (2012) 23]. Thus, as questions as to form are not ‘expressly settled’ in the CISG where an Art 96 reservation has been made, these should be determined by ‘the rules of private international law’ [CISG Art 7(2); Forestal Guarani].

b. It reflects the legislative history and purpose of Art 96 reservations

During the process of drafting, UNCITRAL considered but rejected an alternative wording of CISG Art 96 [UN Doc A/CN.9/SR.308], which would have had the effect argued by CLAIMANT [Cl Mem ¶54]. It was rejected on the basis that the law of the reservation State – in particular, its form requirements – would have been made too widely applicable [Honnold 187–8; Schroeter (2012) 24]. CLAIMANT’s interpretation of CISG Arts 12 and 96 also goes beyond the purpose of Art 96 declarations [Schroeter (2012) 24]. CISG Arts 12 and 96 were included as a compromise between States that felt strict formal requirements were inconsistent with modern commercial practice, and States that had domestic legislation imposing such requirements [Honnold 186] to remove the latter’s public law obligation to respect the CISG’s
freedom of form provisions [Schroeter (2012) 14]. This purpose is fulfilled under the prevailing interpretation, which is the interpretation advanced by RESPONDENT.

c. It is also the dominant approach in practice

60. RESPONDENT’s interpretation has consistently been adopted by courts in Austria [OG Austria 22/10/2001; LG Austria 06/02/2003], Hungary [Adamfi Video], the Netherlands [JTSchuermans; Hispafruit], Russia [Tumensky] and the US [Forestal Guarani]. Even one of the cases cited by CLAIMANT [Vital Berry; Cl Mem ¶56] as supporting its interpretation, in fact applied conflict of law rules to determine that the law of the reservation State applied, rather than solely relying upon the reservation State’s Art 96 reservation [Schroeter (2008) 444].

61. Hence, the sole legal effect of Mediterraneo’s Art 96 reservation is that CISG Arts 11, 29 and Pt II do not apply. The Tribunal must determine what the applicable national law for form is.

(ii) The applicable law governing formal requirements is the law of Equatoriana

62. The Tribunal ought to conclude that the law of Equatoriana applies, as required by Danubian conflict of law rules [a] and as the appropriate law to govern the dispute [b].

a. The law of Equatoriana applies in accordance with Danubian conflict of law rules

63. Under Danubian conflict of law rules, the applicable law is that of the country which has the closest connection to the Contract [PO2 ¶33], which is the law of Equatoriana in this case. The Contract was concluded in Equatoriana [PO2 ¶7]. Equatoriana is the place where RESPONDENT, the manufacturer and seller of the shirts and hence the party making the ‘characteristic performance’ [OLG Ger 14/10/2002; Redfern/Hunter 233–4] has its place of business [Statement of Claim ¶3] and holds all its tangible assets [PO2 ¶28]. Equatoriana is also the place of delivery under the Contract [Cl Ex 1 ¶3]. In fact, the shirts did not at any time pass through Mediterraneo, as they were shipped directly to Oceania [Statement of Claim ¶11]. The sole connection the Contract has with Mediterraneo is that CLAIMANT’s business is located there. This alone is insufficient to conclude that the Contract has the closest connection to Mediterraneo [CIETAC PRC 29/03/1999; Russia 09/06/2004].

b. The law of Equatoriana applies as it is the appropriate law to govern the dispute

64. CLAIMANT could, but did not, argue that this Tribunal is not bound to follow Danubian conflict of law rules, but instead is free to choose the law that it considers appropriate [Redfern/Hunter 233; Sapphire]. However, even under this approach, the law of Equatoriana ought to be applied as it gives effect to the reasonable expectations of the parties, as expressed in the Contract [Lew 424]. The parties’ chosen applicable law clause [Cl Ex 1 ¶20] and choice not to include a clause requiring amendments to be in writing [PO2 ¶9], clearly evince an
intention to embrace the modern commercial practice of removing strict formal requirements \[\text{Honnold 186; CISG Art 9}\], which is reflected in the law of Equatoriana \[\text{PO2 ¶34}\].

(iii) Therefore, the applicable law allows the Contract to be orally amended

65. As Equatoriana has not made an Art 96 declaration \[\text{PO2 ¶34}\], CISG Arts 11, 29 and Pt II are enlivened \[\text{Schlechtriem 215; Schroeter (2012) 31–2, 34–5}\], such that the parties can validly amend the Contract by mere oral agreement \[\text{CISG Art 29; Schlechtriem 473}\].

66. This conclusion holds even if the Tribunal takes the view that it is the domestic form requirements of the law of Equatoriana, rather than the freedom of form provisions in the CISG, which apply \[\text{Flechtner 196}\]. This is because all contracts may be concluded and modified orally under the law of Equatoriana \[\text{PO2 ¶34}\].

67. Result of II: Under the law of Equatoriana, the applicable law, the Contract can be validly amended by oral agreement.

ARGUMENT ON MERITS

III. RESPONDENT COMPLIED WITH ITS CONTRACTUAL OBLIGATIONS BY DELIVERING SHIRTS ON 24 FEBRUARY 2011

68. RESPONDENT did not breach its contractual obligations as the delivery date was validly modified \[\text{A}\] and RESPONDENT delivered the shirts within this modified time \[\text{B}\].

A. The parties agreed to amend the contractual delivery date to 24 February 2011 during their phone conversation of 9 February 2011

69. As established in §§50–67 above, the applicable law allows the Contract to be amended orally. The existence of such agreement is determined by CISG Pt II, which sets out the contract formation rules \[\text{Schlechtriem 472; Viscasillas 171; OLG Ger 22/02/1994}\]. Accordingly, RESPONDENT’s offer to extend the delivery date \[\text{i}\], and CLAIMANT’s reciprocal acceptance, establish the parties’ mutual intent to modify the Contract \[\text{CISG Art 23; Schlechtriem 373}\]. This acceptance was manifested by Mr Long’s statement that he would ‘make sure that all of the paper work reflected the new delivery date’ \[\text{Re Ex 1}\] \[\text{ii}\], or alternatively, if the Tribunal should find that statement ambivalent, by Mr Long’s silence and subsequent conduct \[\text{iii}\].

(i) RESPONDENT made an offer to amend the Contract during the phone conversation

70. During their conversation, Mr Short told Mr Long that RESPONDENT would be unable to deliver the shirts on time, and offered to deliver them on 24 February 2011 instead \[\text{Cl Ex 2; Re Ex 1}\]. This was a sufficiently definite offer to modify the contractual delivery date to 24 February 2011, and indicated RESPONDENT’s intention to be bound in case of acceptance.
as Mr Short had Mr Long update all the relevant documents to reflect the new date [Cl Ex 2; Re Ex 1]. CLAIMANT does not dispute this.

(ii) CLAIMANT accepted RESPONDENT’s offer by stating that it would ensure all of the paper work reflected the new delivery date

71. Contrary to CLAIMANT’s submissions [Cl Mem ¶47], Mr Long’s intention not to modify the contractual delivery date is irrelevant. This is because it was not manifested to Mr Short [CISG Art 8(1)] [a]. As such, the Tribunal must resort to an objective interpretation of Mr Long’s statement that he ‘would make sure that all of the paper work reflected the new delivery date’ [PO2 ¶27]. In these circumstances, a reasonable person in Mr Short’s position would have interpreted Mr Long’s statement as an acceptance of Mr Short’s offer to extend the contractual delivery date [CISG Art 8(2)] [b].

a. CLAIMANT’s subjective intention to maintain the original contractual delivery date is irrelevant as it was not manifested to RESPONDENT

72. Mr Long’s subjective intention not to amend the delivery date [Cl Ex 3] is irrelevant as Mr Short could have been unaware, and in fact did not know, of this intent [CISG Art 8(1); Schlechtriem 153]. Although it is undisputed that Mr Long did not explicitly refer to the Contract [PO2 ¶27; Cl Ex 2], this silence, contrary to CLAIMANT’s submissions, does not equate to Mr Long being ‘very clear on his intentions not to amend the Contract’ [Cl Mem ¶47]. Instead, it proves that Mr Long’s subjective intention was not articulated to Mr Short.

73. Mr Short’s subjective unawareness is most plainly evidenced in Re Ex 1. He did not know that Mr Long wished to refrain from amending the Contract, as he believed Mr Long had assured him that all three documents – including the Contract – would be updated [Re Ex 1]. In this context, there is no need for Mr Short to offer an explanation as to why he concluded this, contrary to what CLAIMANT argues [Cl Mem ¶42]. CISG Art 8(1) merely requires an inquiry as to whether the addressee of the information knew the addressee’s subjective intention [Schlechtriem 153], rather than the reasons for the addressee’s understanding.

74. Even if the Tribunal determines that Re Ex 1 cannot be considered, all of the relevant circumstances [CISG Art 8(3); Bianca/Bonell 100] nevertheless weigh against a finding that Mr Short could not have been unaware of Mr Long’s subjective intention [CISG Arts 8(1), 8(3)]. In this regard, CLAIMANT has incorrectly stated that the Tribunal must determine whether Mr Short ‘should have known of Mr Long’s intent through Mr Long’s statement’ [Cl Mem ¶47 (emphasis added)]. ‘Could not have been unaware’ requires a much greater degree of carelessness on the part of Mr Short [Schlechtriem 153–4], which as explained in ¶¶76 –80
was not present here. However, for the purposes of CISG Art 8(1), it is sufficient to note that Mr Short could certainly have been unaware of Mr Long’s subjective intention as Mr Long’s words and conduct suggested that he had agreed to the amendment: he accepted the late delivery [Cl Ex 2] and begrudgingly, but nevertheless, assured Mr Short that he would update the relevant documentation, without any mention of the deduction for delay under the fixed sums clause of the Contract [Cl Ex 2; PO2 ¶27; Cl Ex 1 ¶10].

75. In citing commentary which states that CISG Art 8 places a ‘burden on both parties to follow reasonable steps to either know or at least not be unaware of what the intent was’ [Zeller 623 (emphasis added); Cl Mem ¶47], CLAIMANT impliedly concedes that Mr Long was also under an obligation to take steps to uncover Mr Short’s intentions. Contrary to CLAIMANT’s allegation that Mr Short failed to take steps to uncover Mr Long’s intentions [Cl Mem ¶47], Mr Short actually took all the active steps: he made the phone call, he fully informed Mr Long of the delay, and he had Mr Long agree to the delay and update the paper work [Cl Ex 2]. In doing this, he was trying to determine whether Mr Long was willing to accept the late delivery. Mr Long on the other hand, took no steps to clarify Mr Short’s intention.

b. A reasonable person in RESPONDENT’s position would have understood CLAIMANT’s statement as acceptance of RESPONDENT’s offer

76. CLAIMANT argues that no reasonable person in Mr Short’s circumstances would have understood Mr Long’s statement as evincing intent to amend the Contract [Cl Mem ¶48]. However, for the three reasons explained below, the better view is that such a reasonable person would have understood Mr Long’s reference to all the paper work as including the Contract [CISG Art 8(2)]. As the facts on which these reasons are based are corroborated by other sources, these reasons stand even if the Tribunal chooses to disregard Re Ex 1.

77. First, RESPONDENT disputes that CLAIMANT explicitly referred to the letter of credit and shipping contract [Statement of Defense ¶7]. In any event, a reasonable person would not conclude that Mr Long did not intend to amend the Contract because he only referred to the letter of credit and shipping contract [Cl Ex 2]. In CIETAC PRC 15/04/1997, the tribunal held that the parties validly amended the payment term of their contract, by reaching an agreement to amend this in the related letter of credit, even though they did not specifically refer to their contract. Hence, a reasonable person would have understood Mr Long’s express agreement to amend the letter of credit as an agreement to amend the contractual delivery date also.

78. As it was uncertain whether Mr Long intended to amend the Contract, a reasonable person in Mr Short’s position would have expected Mr Long to clarify that CLAIMANT would still hold RESPONDENT responsible for the delay or that CLAIMANT would claim a deduction under Art
10 of the Contract [Cl Ex 2]. This is precisely what Doma Cirun did in its correspondence with Claimant when it was informed of the delay [Cl Ex 3]. Absent this clarification, a reasonable person would have concluded that when Mr Long subsequently assured Mr Short that he would take care of ‘all of the paper work’ [PO2 ¶27], this included the Contract. Since CISG Art 8(3) provides an objective test for interpreting Mr Long’s statement [Schlechtriem 155], Claimant erroneously relies on Mr Long’s subjective intention [Cl Mem ¶48] and actual motive [Cl Mem ¶50] for amending the letter of credit and shipping contract.

79. Second, the plain meaning of ‘all the paper work’ [PO2 ¶27] reasonably covers all three documents, and can be contrasted with ‘both documents’ or ‘those documents’, either of which would unambiguously refer to the letter of credit and shipping contract only. In this respect, Claimant’s submission – that since the Contract was not specifically referred to, it follows that the Contract was never discussed [Cl Mem ¶42] – is flawed. Parties can implicitly refer to documents without explicitly naming them. Indeed, implied amendments and even implied terminations have been held to be valid [OG Austria 29/06/1999; AG Swi 12/09/2008; Raw Materials]. In particular, an impliedly agreed contractual modification is more likely where the relevant circumstances have changed, such as one of the parties’ ability to deliver the goods [Schlechtriem 477]. This is precisely the situation faced by Claimant and Respondent, as Respondent’s ability to deliver the shirts on time was affected by its supplier’s failure to provide the necessary inputs [Cl Ex 2].

80. Third, Claimant has overstated the inferences that can be drawn from the importance of timeliness by arguing that ‘it is clear that time were of the essence [and hence] no reasonable person would construe [Mr Long’s] statement as an agreement to amend the contractually agreed delivery date’ [Cl Mem ¶49]. Even if time was of the essence, which Respondent does not concede as explained below in ¶130, that would not necessarily lead a reasonable person to conclude that the date could never be amended. Indeed, if time had been of such importance, a reasonable person would have expected Mr Long to insist on preserving the contractual delivery date and to make an immediate claim under Art 10 of the Contract. For these reasons, a reasonable person would have understood Mr Long to have voluntarily accepted the risks and losses flowing from the delay in delivery.

(iii) Alternatively, a reasonable person would understand Claimant’s silence and subsequent conduct as an acceptance of Respondent’s offer

81. A reasonable person in Mr Short’s position would understand Mr Long’s silence as tantamount to acceptance having regard to the following circumstances [CISG Arts 8(2),
8(3)], none of which are solely based on Re Ex 1. For the same reasons as explained above at ¶¶72–5, Mr Long’s subjective intention is also irrelevant in this context [CISG Art 8(1)].

82. First, CLAIMANT correctly identified that an agreement to amend the contractual delivery date would render the fixed sums clause without consequence [Cl Mem ¶51]. Therefore, if a party wished to reject an offer to modify the delivery date, it would be expected that they would immediately make a claim for the deduction and benefit from the savings, as it would be uncommercial to wait. However, in this case, Mr Long specifically did not say anything about the deduction for late delivery during the phone conversation with Mr Short [Cl Ex 2]. Since CLAIMANT refrained from actions that a party would normally take when rejecting an offer to modify, the CLAIMANT’S behaviour suggested acceptance [OLG Ger 22/02/1994].

83. Second, while Mr Long amended the date of delivery in the letter of credit, he did not reduce the purchase price, which he would have believed he was entitled to do, had there been no modification of the Contract. Art 10(b) of the Contract states: ‘for late delivery … a deduction of 1% of the contract price per day late’ [Cl Ex 1]. Importantly, ‘deduction’ implies an upfront reduction of the contract price, rather than an ex post penalty. A reasonable person would have expected Mr Long to reduce the price when amending the letter of credit delivery date, especially as Mr Long knew exactly the days of delay and could have easily calculated the relevant deduction [Statement of Claim ¶15]. Hence, on receiving the amended letter of credit, in which only the date and not the price had been modified, a reasonable person in Mr Short’s position would have understood Mr Long’s conduct as confirming his agreement to amend the Contract and waive CLAIMANT’S right to a deduction in the price [CIETAC PRC 15/04/1997].

84. Third, Mr Long’s subsequent acceptance of the ‘late’ delivery of the shirts on 24 February 2011 [Statement of Claim ¶17], where he again failed to refer to the deduction, further reinforced the impression that CLAIMANT had waived its right to claim a deduction and agreed to amend the Contract [Statement of Claim ¶17]. This impression was maintained for nearly seven months. Should Re Ex 1 be admitted, this impression is also supported by Mr Short’s reasonable belief that ‘[a]s far as we were concerned, the [C]ontract had been successfully completed’ [Re Ex 1]. CLAIMANT only sought to rely on the delay after it purported to avoid the Contract for the unrelated issue of nonconformity of goods [Statement of Claim ¶33].

85. Hence, CLAIMANT’S silence and moreover Mr Long’s behaviour and conduct during and after the phone conversation of 9 February 2001 constituted acceptance of RESPONDENT’S proposal to extend the contractual delivery date [CISG Art 18(1); Honnold 160; Schlechtriem 323].
B. Therefore, as the contractual delivery date was validly amended by oral agreement, **RESPONDENT complied with its obligations under CISG Art 33**

86. As explained above in ¶¶50–67, since the law of Equatoriana allows contracts to be orally amended, the new contractual delivery date was 24 February 2011. **RESPONDENT delivered the shirts to Oceanside, Equatoriana, as requested, on 24 February 2011** [Statement of Claim ¶17], and therefore complied with its contractual obligations under CISG Art 33(a).

87. **Result of III: Respondent complied with its contractual obligations by delivering the shirts on 24 February 2011, as the parties had orally agreed that this would replace the original contractual delivery date of 19 February 2011.**

IV. **Alternatively, Claimant is not entitled to remedies sought for delay in delivery**

88. If the Tribunal concludes that **RESPONDENT breached the contractual delivery date, RESPONDENT is nevertheless not liable to pay either damages under CISG Art 74 or the fixed sum of USD 27,500 under Art 10 of the Contract, as it is exempt from liability under CISG Art 79(1)** [A]. Alternatively, **RESPONDENT is not liable to pay the fixed sum under Art 10 of the Contract because it is grossly excessive** [B]. As a further alternative, since Art 10 of the Contract exhaustively enumerates **CLAIMANT’S remedies for delay, RESPONDENT is not liable to pay damages under CISG Art 74 to the extent that CLAIMANT claims damages for any consequential losses caused by delay in delivery** [C].

A. **RESPONDENT is exempt from liability under CISG Art 79(1)**

89. **RESPONDENT’S delay was caused by its supplier’s failure to deliver inputs on time due to a strike at the supplier’s plant** [PO2 ¶12]. This was an impediment beyond **RESPONDENT’S control** [CISG Art 79(1)]. Hence, **RESPONDENT is exempt from payment of both damages and the fixed sum under Art 10 of the Contract** [Schlechtriem 1083; CISG-AC Opinion No 10 §5].

90. Contrary to **CLAIMANT’S allegation, RESPONDENT did not accept absolute liability for non-performance** [Cl Mem ¶12] as there is no clear and express statement in the Contract that **RESPONDENT was willing to accept the risk for uncontrollable, unforeseeable or unavoidable impediments** [Schlechtriem 1087].

91. **RESPONDENT could not have avoided or overcome the consequences of the strike, which was the impediment. CLAIMANT’S argument that RESPONDENT should have engaged substitute suppliers is unjustifiable** [Cl Mem ¶14] as **RESPONDENT is only required to take reasonable steps to avoid or overcome the impediment** [Southerington §3.2.2.1]. A cost increase of 100% of the contract price is a useful rule of thumb for assessing if a seller would incur
unreasonable hardship [*Brunner* 427–8; *Enderlein* 324–5]. Engaging substitute suppliers would have required RESPONDENT to incur *more than* a 100% cost increase, since the suppliers would have charged RESPONDENT 100% more than the original supplier [*PO2 ¶13*] and *moreover*, could not guarantee timely delivery [*PO2 ¶13*], thereby leaving RESPONDENT *additionally* exposed to the risk of liability under Art 10 of the Contract [*Cl Ex 1*].

92. Industrial action is usually beyond the seller’s control [*Southerington* §3.2.2.1]. *A fortiori*, industrial action taking place at a supplier’s plant – a plant not owned or managed by RESPONDENT – was beyond RESPONDENT’S control. RESPONDENT could not have foreseen the strike, since it did not have any knowledge of the labour conditions at the supplier’s plant.

93. As conceded by CLAIMANT [*Cl Mem ¶15*], the additional requirements under CISG Art 79(2) are not relevant in this case, as upstream suppliers are not ‘third parties’ [*CISG-AC Opinion No 7 ¶18; Schlechtriem 1078–9; Enderlein 326; Honnold 634–5; Lookofsky 142–3*].

**B. Alternatively, RESPONDENT is not liable to pay the fixed sum of USD 27,500 under Art 10 of the Contract**

94. Although the parties agreed that the quantum of damages would not be the subject of argumentation before the Tribunal [*PO1 ¶9*], RESPONDENT addresses this point for completeness and in response to CLAIMANT’S submissions [*Cl Mem ¶¶10–1*]. The Tribunal may [i] and should [ii] reduce the fixed sum of USD 27,500 because it is grossly excessive.

(i) **The Tribunal may reduce a fixed sum where it is grossly excessive**

95. The parties agreed that the law governing the Contract was the CISG, supplemented by the PICC for matters not governed by the CISG [*Cl Ex 1 ¶20*]. The validity of Art 10 of the Contract is not governed by the CISG [*Cl Ex 1; CISG Art 4(a); Hachem 222–3*] and hence must be determined by reference to the PICC [*CISG Art 7(2); ICC No 7197; PO2 ¶33*].

96. Under PICC Art 7.4.13(2), the Tribunal may reduce the amount payable by RESPONDENT for delay in delivery under Art 10 of the Contract to a reasonable amount where it is grossly excessive [*PICC Art 7.4.13(2); PICC Commentary 285*].

(ii) **The fixed sum under Art 10 of the Contract is grossly excessive**

97. CLAIMANT relies upon *Russia 05/06/1997* to assert that the fixed sum is not excessive, being only five percent of the contract price [*Cl Mem ¶10*]. However, in so doing, CLAIMANT fails to recognise that the amount of the fixed sum in relation to the contract price is only one of several factors considered by tribunals in determining whether a fixed sum is excessive [*Russia 05/06/1997*]. Another factor, which is particularly significant in arbitral practice, is whether the fixed sum is disproportionate in relation to the actual losses suffered by
CLAIMANT [Russia 05/06/1997; Russia 04/04/2003; Russia 25/01/2001; PICC Art 7.4.13(2)]. For example, in Russia 05/06/1997, the tribunal held that a fixed sum can be considered excessive if the party claiming the sum has presented no evidence as to the loss suffered from the relevant breach. In this case, CLAIMANT has similarly presented no evidence as to the amount of loss suffered directly from the delay in delivery [contra Cl Mem ¶10]. Hence, applying Russia 05/06/1997, CLAIMANT should not be able to claim USD 27,500.

C. Alternatively, if RESPONDENT is liable to pay the fixed sum of USD 27,500 under Art 10 of the Contract, RESPONDENT is not liable to pay damages under CISG Art 74 for any loss caused by delay because Art 10 of the Contract exhaustively enumerates CLAIMANT’S remedies for delay

98. By agreeing to Art 10 of the Contract, the parties have agreed upon the amount of damages payable by RESPONDENT in the event of delay in delivery. RESPONDENT should be liable for no more than that agreed amount. Hence, RESPONDENT should not be required to pay damages under CISG Art 74 to the extent that CLAIMANT seeks compensation for losses caused by RESPONDENT’s delay in delivery [Statement of Claim ¶26; Cl Mem ¶111].

99. This derogation from the usual method of determining entitlement to damages under CISG Art 74 is allowed, as parties are free to derogate from or vary the effect of any the provisions of the CISG [CISG Art 6; Hachem 219]. The Tribunal should uphold the parties’ agreement, in accordance with the principle of party autonomy protected by CISG Art 6 [Hachem 223–4]. Hence, CLAIMANT cannot claim any compensation for delay other than the fixed sum.

100. Result of IV: CLAIMANT is not entitled to the fixed sum under Art 10 of the Contract.

V. RESPONDENT FULFILLED ITS CONTRACTUAL OBLIGATIONS BY DELIVERING CONFORMING SHIRTS

101. RESPONDENT delivered shirts that conformed to the quantity, quality and technical requirements under the Contract [PO2 ¶9]. CLAIMANT agrees that the shirts delivered by RESPONDENT were not produced by child labour [PO1 ¶8]. However, CLAIMANT alleges, without foundation, that RESPONDENT’s use of child labour in a production facility unrelated to the manufacture of the shirts the subject of the Contract [PO1 ¶8], amounts to a breach of contract [Cl Mem ¶61]. To the contrary, RESPONDENT fulfilled any obligations it had under Art 12 of the Contract [CISG Art 45], and so conformed to the quality required by the Contract [CISG Art 35(1)] [A]. Further, the shirts delivered were fit for their ordinary purpose [CISG Art 35(2)(a)] [B] and particular purpose [CISG Art 35(2)(b)] [C].
A. RESPONDENT delivered conforming shirts complying with CISG Arts 35(1) and 45

102. By delivering shirts conforming to all the requirements under Annex 1 of the Contract [PO2 ¶9], RESPONDENT’s shirts conformed to the quality required by the Contract under CISG Art 35(1). CLAIMANT mistakenly argues [Cl Mem ¶¶64–8] that RESPONDENT’s use of child labour in a production facility unrelated to the manufacture of the shirts constituted a breach of Art 12 of the Contract [CI Ex 1], which states: ‘it is expected … all suppliers … will adhere to the policy of Oceania Plus Enterprises that they will conform to the highest ethical standards in the conduct of their business’.

103. This argument is erroneous because Art 12 does not create any enforceable obligations [i]. In any case, RESPONDENT complied with Art 12 because, properly interpreted, any obligations created under that clause were limited solely to the manufacturing processes for the shirts delivered under the Contract [ii]. It is undisputed that RESPONDENT did not use child labour in producing the shirts the subject of the Contract [PO1 ¶8]. Hence, RESPONDENT complied with any obligations it had under Art 12.

104. CLAIMANT could have argued that an Art 12 breach would have entitled it to remedies [CISG Art 45], but such an argument should fail because for the same reasons as explained below, RESPONDENT complied with any obligations it had under Art 12 of the Contract.

(i) Art 12 of the Contract does not create an enforceable obligation

105. Art 12 is not enforceable. This is because the language of Art 12 does not create an obligation [a]. Alternatively, any obligations created by Art 12 are insufficiently clear and definite [b].

   a. The language in Art 12 does not create an obligation

106. Properly construed, the language of Art 12 creates an aspiration, rather than an obligation. First, the phrase ‘it is expected’ [Cl Ex ¶12 (emphasis added)] can be contrasted with the imperative language used in every other part of the Contract such as, ‘shall be’ [Cl Ex 1 ¶19, 20], ‘agrees’ [Cl Ex 1 ¶1] and ‘to be’ [Cl Ex 1 ¶3]. Since, CLAIMANT drafted and incorporated the phrase [PO2 ¶¶4, 7] it could have phrased Art 12 in mandatory language. This language commonly features in the contracts of companies which strictly enforce ethical standards: the ethical policies of the BBC [BBC Policy], Quality Winter Clothing [QWC Standards] and H&M [H&M Policy], which all use the imperative ‘must’ to describe their suppliers ethical obligations [CISG Art 9(2)]. Having failed to do so, Art 12 should be characterised as an optimum standard sought by CLAIMANT, rather than a binding contractual term [NZ Mussels].

107. Second, a reasonable person would have interpreted CLAIMANT’s conduct as suggesting it valued cost savings and working within time constraints more than ensuring its ethical polices
are complied with [CISG Art 8(2)]. In particular, CLAIMANT did not follow its policy to audit suppliers’ compliance when it contracted with Gold Service Clothing to purchase substitute shirts, as it did not audit Gold Service Clothing despite ordinarily being required to do so [PO2 ¶¶22]. Given the time constraints, CLAIMANT preferred to run the risk of trusting the assurances of the supplier [PO2 ¶22]. Moreover, even during pre-contractual negotiations with RESPONDENT, CLAIMANT emphasised cost and failed to mentioned ethical standards [Cl Ex 2]. Therefore, CLAIMANT’S own conduct suggests that the ethical standards referred to in Art 12 are an optimum standard of conduct, instead a strict obligation [CISG Art 8(3)].

b. Even if Art 12 can be considered an obligation, any such obligation is unenforceable as it is insufficiently clear and definite

108. The Tribunal should not enforce the insufficiently clear obligations of Art 12, which require adherence to ‘the highest ethical standards’ [Cl Ex I]. The one page policy contains insufficient details of what RESPONDENT would be required to do, containing only ‘broad ethical and environmental standards’ [PO2 ¶4]. In contrast, in international trade ethical polices are usually specifically enumerated [BBC Policy; Rizues Policy; CISG Art 9]. No further details were made available to RESPONDENT on Oceania Plus’ website [PO2 ¶4].

109. Moreover, there is a risk to be borne for any business decision. The vague nature of Art 12 of the Contract would not have given a reasonable manufacturer the proper opportunity to decide whether it was willing to accept the risk of noncompliance and enter the Contract at all. CLAIMANT did not emphasise the importance of the ethical policy or explain the potential consequences of non-compliance [Cl Ex 2]. Accordingly, CLAIMANT ought to bear the risk of its own failure and should not be able to shift this onto the RESPONDENT.

110. Consequently, Art 12 did not form part of the quality of goods required under the Contract [CISG Art 35(1)], despite CLAIMANT’S arguments to the contrary [Cl Mem ¶¶64–8].

(ii)  Alternatively, RESPONDENT complied with any obligations it had under Art 12, as those obligations were only limited to the production of the shirts

111. Even if Art 12 created any obligations these are limited solely to the business conducted by RESPONDENT to manufacture of the shirts required under the Contract for four reasons. Hence, as RESPONDENT did not use child labour in producing the shirts [PO1 ¶8], it complied with any obligations it had under Art 12 or CISG Art 35(1).

112. First, if CLAIMANT had a subjective intent for ‘their business’ [Cl Ex I ¶12] to extend to every aspect of RESPONDENT’S operations, it failed to make this known to RESPONDENT [CISG Art 8(1)]. CLAIMANT did not mention this to RESPONDENT during the pre-contractual negotiations.
for the Contract [Cl Ex 2; CISG Art 8(3)], and furthermore Oceania Plus’ policy was not attached to the Contract [PO2 ¶4], although CLAIMANT could have easily done so.

113. Second, the term ‘their business’ is ambiguous [PO2 ¶5] and accordingly should be interpreted contra proferentum [PICC Art 4.6; Schlechtriem 170; BG Ger 11/12/1996] against CLAIMANT as it drafted the clause [PO2 ¶¶4, 7]. The term could be interpreted in two ways, the first extending to every facet of RESPONDENT’S business including remote suppliers to sub-contractors, over which RESPONDENT has no knowledge or control. The more reasonable interpretation covers only the business relating to the production of the shirts, over which RESPONDENT had full control and oversight. RESPONDENT did in fact ensure these parts of the business were free from use of child labour [PO1 ¶8]. Accordingly, CLAIMANT’S suggestion that ‘their business’ created an obligation for RESPONDENT to eliminate child labour from even remote parts of its business is impractical and ignores the rushed nature of the Contract. Hence, a reasonable person in CLAIMANT’S position would understand ‘their business’ in the more limited sense [CISG Art 8(2)].

114. Third, contrary to CLAIMANT’s submissions [Cl Mem ¶¶69–73], the more limited interpretation of ‘their business’ is supported by international trade and usage in the fashion industry [CISG Art 9(2)]. Unfortunately, child labour continues to exist in the production chain of many companies due the slow global demand in the retail sector forcing cheaper production costs and margins to decrease. Thus, even for the most careful company, it is difficult to ensure that an item of clothing has not had the involvement of child labour anywhere in the production process [Victoria’s Secret]. Everywhere in the fashion industry inputs have often involved child labour. Indeed, garments one of the products most likely produced by child labour [US Dept of Labor Report xiii, 9, 28]. The reality is that ‘most major retails firms are in the same game, cutting costs … Employing cheap labour without proper auditing and investigation of [a] contractor inevitably means children will be used somewhere along the chain’ [McDougall].

115. For these reasons, the Tribunal ought to give Art 12 the limited interpretation the parties objectively intended [CISG Arts 8, 9(2)]. Hence, RESPONDENT complied with Art 12.

**B. RESPONDENT delivered shirts fit for their ordinary purpose under CISG Art 35(2)(a)**

116. Although not raised, CLAIMANT might have argued that the shirts were not fit for their ordinary purpose [CISG Art 35(2)(a)]. ‘Ordinary purpose primarily means that the goods must be fit for commercial purposes’ [Schwenzer/Leisinger 267], which in CLAIMANT’S resale business, means that it must be possible to resell the shirts [International Housewares]. As CLAIMANT sold the remaining 99,000 shirts to Pacifica Trading [Statement of Claim ¶24], the
ordinary purpose was fulfilled. Ordinary purpose should not be limited geographically to resale in Oceania. In *LG Ger 12/12/2006*, the ordinary purpose was held to be the use of prospering plants, without being specific to Erlangen region, the destination for the plants.

C. **RESPONDENT delivered shirts fit for their particular purpose under CISG Art 35(2)(b)**

117. Although CLAIMANT alleges that the particular purpose was ‘resale in the stores of Doma Cirun, which are mainly located in Oceania’ [*Cl Mem ¶75*], RESPONDENT was not made aware of this particular purpose. RESPONDENT complied with all particular purposes made known to it [i]. Alternatively, CLAIMANT unreasonably relied on RESPONDENT’s skill and judgment [ii].

(i) **RESPONDENT complied with all particular purposes made known to it**

118. That the resale of the shirts in Oceania depended on compliance with Oceania Plus’ ethical policy was not made known to RESPONDENT [a]. In any case, as explained above in ¶¶111–5, RESPONDENT complied with this policy. Further, resale of the shirts in Oceania did not depend on compliance with Oceanian laws. Nonetheless, RESPONDENT complied with these laws [b].

119. A seller’s knowledge of the particular purpose is required so it can refuse to contract with the buyer if it is unable to fulfill the purpose [*Sec Comm Art 33*]. The seller’s actual awareness is relevant [*Schlechtriem 581; Hyland 321*]. Where a geographical component forms part of the particular purpose, like this case, the buyer must make the seller aware of any requirements that must be fulfilled for resale in that region [*NZ Mussels; Smallmon*].

a. **CLAIMANT failed to make RESPONDENT aware that compliance with Oceania Plus’ ethical policy was required for resale of the shirts in Oceania**

120. During contractual negotiations, CLAIMANT never informed RESPONDENT that the resale of the shirts depended on compliance with Oceania Plus’ ethical policy. Rather, CLAIMANT only emphasised that the shirts were being ordered on a rush basis and that timely delivery was important [*Statement of Claim ¶14*]. That the ethical policy was not the focus of the Contract is evident from the fact that the policy was not given to RESPONDENT at any point during the negotiations or at the time of contracting [*PO2 ¶4*].

121. Contrary to CLAIMANT’s submissions [*Cl Mem ¶¶77, 81*], that the Oceanian market particularly values ethical principles is insufficient to prove that the particular purpose was made known to RESPONDENT. CLAIMANT failed to inform RESPONDENT that Doma Cirun’s customers were peculiarly sensitive as they were unwilling to accept shirts associated with potentially ‘tainted’ goods, despite the fact that the delivered shirts were unquestionably ethically produced [*Smallmon; PO1 ¶7*]. RESPONDENT could not have known of the
sensitivity of the Oceanian market, especially as RESPONDENT has no branches in Oceania, and has never previously delivered goods for any subsidiaries of Oceania Plus for resale in Oceania [PO2 ¶15]. Indeed, in other ‘ethical’ jurisdictions, like Australia, customers are highly unlikely to boycott a company for mere association with child labour [Stern; Sherrin Footballs Article].

b. RESPONDENT complied with all ethical requirements made known to it

122. Contrary to CLAIMANT’s submissions [Cl Mem ¶83], RESPONDENT’s knowledge of the shirts’ final destination is not sufficient to automatically create an obligation for it to comply with all public law requirements applicable in Oceania [NZ Mussels; Eyroflam].

123. While CLAIMANT correctly identifies that Oceania and Equatoriana are both party to the ILO Convention No 182 on the Worst Forms of Child Labour [Statement of Claim ¶32], CLAIMANT incorrectly assumes that both States are party to ILO Convention No 138 on the Minimum Age for Admission to Employment or Work, a complementary but distinct convention [Cl Mem ¶82]. As there is no evidence that either Equatoriana or Oceania have ratified ILO Convention No 138, those requirements have not formed part of either State’s domestic laws and hence have not been made known to RESPONDENT [NZ Mussels]. If RESPONDENT had to comply with ILO Convention No 138 in order for the shirts to be resold in Oceania, CLAIMANT could easily have made RESPONDENT aware of this during pre-contractual negotiations. However, CLAIMANT failed to do so [Cl Ex 2].

124. CLAIMANT does not dispute that RESPONDENT has complied with ILO Convention No 182. There is no evidence that RESPONDENT has conducted its business in a way that involves conditions likely to harm the health, safety or morals of children [ILO Convention No 182 Art 3]. In particular, the documentary cannot provide accurate or conclusive evidence of the conditions in RESPONDENT’s plants, as there is no positive evidence that the documentary was filmed in one of RESPONDENT’s plants [Statement of Claim ¶18]. Therefore, RESPONDENT has complied with domestic regulations common to both States [NZ Mussels].

(ii) Alternatively, CLAIMANT did not rely or unreasonably relied on RESPONDENT’s skill and judgment

125. Contrary to CLAIMANT’s submissions [Cl Mem ¶¶88–90], the circumstances show that CLAIMANT did not rely, or that it unreasonably relied, on RESPONDENT’s skill and judgment to ensure that the shirts were fit for a ‘particular purpose’ [CISG Art 35(2)(b)].

126. First, the pre-contractual negotiations reveal that CLAIMANT solely relied on RESPONDENT’s ability to produce cheap shirts on a rush basis [Cl Ex 2], and not on RESPONDENT’s skill and
judgment in producing shirts for resale in Oceania, a highly sensitive market, since CLAIMANT never mentioned ethical standards.

127. Second, CLAIMANT’s assertion that ‘RESPONDENT states that he is aware of the concerns of child labour in his field of business’ relies on a mistaken citation of the facts [Cl Mem ¶90]. This claim is unsupported. The facts show that there was a ‘technical gap’ between CLAIMANT’s and RESPONDENT’s knowledge of what was required to produce goods that were fit for resale in Oceania [contra Cl Mem ¶90, LG Ger 12/12/2006]. While RESPONDENT has expertise in manufacturing, it is CLAIMANT that has expertise in procuring goods for resale in Oceania according to the ethical standards of both Oceania Plus and Oceania. RESPONDENT had no experience in delivering goods to Oceania for Oceania Plus [PO2 ¶15].

128. **Result of V:** RESPONDENT delivered shirts complying with the Contract and the CISG.

**VI. CLAIMANT’S PURPORTED AVOIDANCE OF THE CONTRACT IS INVALID AS RESPONDENT DID NOT COMMIT A FUNDAMENTAL BREACH**

129. Alternatively, if the Tribunal concludes that RESPONDENT is in breach of the Contract, neither the delay [A] nor the delivery of nonconforming shirts [B] amount to a fundamental breach. Hence, contrary to CLAIMANT’s submissions [Cl Mem ¶91], CLAIMANT is not entitled to avoid the Contract or restitution of the purchase price of the shirts [CISG Arts 49(1)(a), 81].

**A. RESPONDENT’S delay in delivery is not a fundamental breach**

130. Although not relied on as a ground for avoidance, CLAIMANT argued in passing that timely delivery was ‘of the essence’ [Cl Mem ¶49]. This does not accurately describe the situation. Under the fixed sums clause, the parties stipulated that in the event of delay, CLAIMANT could claim damages. That this provides for monetary compensation, rather than termination, suggests that the parties did not intend the Contract to ‘stand or fall’ on timely delivery [Schlechtriem 418; OLG Ger 12/11/2001]. Furthermore, as CLAIMANT subsequently accepted the late delivery of the shirts [Statement of Claim ¶17], it cannot be shown that CLAIMANT would have preferred to receive no delivery at all, rather than a late delivery. This would have been required for CLAIMANT to show that timely delivery was of fundamental importance [Schlechtriem 418; OLG Ger 24/04/1997].

**B. Further, RESPONDENT’s delivery of nonconforming shirts is not a fundamental breach of contract**

131. RESPONDENT’s delivery of nonconforming shirts did not substantially deprive CLAIMANT of what it was entitled to expect under the Contract [CISG Art 25] [i]. Alternatively, such deprivation was not reasonably foreseeable [CISG Art 25] [ii].
(i) **CLAIMANT was not substantially deprived of what it was entitled to expect under the Contract as a result of RESPONDENT’s breach**

132. Tribunals should not, in the case of any doubt, find that a fundamental breach has occurred \[BGer Swi 18/05/2009\]. For two reasons, CLAIMANT has failed to discharge its heavy burden of proving that it was substantially deprived of its legitimate expectations due to RESPONDENT’s breach \[Schlechtriem 415–6\]. These considerations are more significant than CLAIMANT’s argued financial loss \[Cl Mem ¶¶99–100\], which is not a decisive factor \[Kröll 668; Huber 215\].

133. First, it is critical that if RESPONDENT was obliged to follow Oceania Plus’ ethical policy \[Cl Mem ¶97\], CLAIMANT did not objectively represent that this was of essential or paramount importance \[Huber 214; CISG-AC Opinion No 5 §4.2\]. Its importance was not ‘discernible from the contract’ \[Schlechtriem 400–1, 422\]. This is because the Contract – in contrast to the ethical policies of other companies \[BBC Policy; Rizues Policy; cf H&M Policy; CISG Art 9\] – did not explicitly provide CLAIMANT with an immediate right to terminate in case of breach. Moreover, CLAIMANT did not even attach the one-page policy to the Contract \[PO2 ¶4\] or draw RESPONDENT’s attention to it during pre-contractual negotiations \[Cl Ex 2\].

134. CLAIMANT’s subsequent conduct is also relevant in assessing the importance of RESPONDENT’s obligation to follow the ethical policy \[CISG Art 8(3)\]. That CLAIMANT, in contravention of its own policy \[PO2 ¶2\], failed to audit Gold Service Clothing \[PO2 ¶22\] indicates that CLAIMANT did not take Oceania Plus’ ethical policy seriously. As avoidance is a remedy of ‘last resort’ and CLAIMANT can be compensated by way of damages \[Di Matteo 124; Honnold 274\], the Tribunal should, in the absence of clear intention, find that breach of Art 12 of the Contract is incapable of giving CLAIMANT the right to avoid the Contract.

135. Second, delivery of nonconforming goods is not a fundamental breach where the buyer can make reasonable use of the goods \[Ferrari/Flechtner 603; Kröll 664; Schlechtriem 427; Schwenzer 438; BG Ger 03/04/1996; OLG Ger 12/03/2001\]. Hence, it is not fatal that the defect in the shirts could not be remedied \[Cl Mem ¶98\] or that the shirts could not be resold in Oceania \[Cl Mem ¶95\]. In NZ Mussels, the Court held that there was no fundamental breach where the mussels delivered by the seller exceeded the statutory limits on cadmium concentration. This was because those limits expressed an optimum situation and the mussels were still fit for consumption. Similarly, in the present case, the shirts could still be worn. CLAIMANT, being in the business of resale, was easily able to make reasonable use of the shirts by re-selling them to Pacifica Trading \[Statement of Claim ¶24; PO2 ¶21; CISG-AC Opinion No 5 §4.3\]. It does not matter that the shirts were sold at 85% of the contract price.
[Statement of Claim ¶24], since no fundamental breach exists even if goods are sold at a ‘giveaway price’ [Schlechtriem 428]. In analogous circumstances, the Swiss Supreme Court held that delivery of meat valued 75% lower than the contract price was not a fundamental breach as the buyer could resell the meat at a lower price [BGer Swi 28/10/1998].

(ii) Further, it was not reasonably foreseeable that RESPONDENT’s breach would deprive CLAIMANT of the entirety of the Contract

136. Neither RESPONDENT nor a reasonable person in RESPONDENT’s position would have foreseen, at the time of contracting [Ferrari/Flechtner 324–5; Ferrari 500], that CLAIMANT would be deprived of the ‘main benefit’ of the Contract if it were unable to sell the shirts in Oceania [Art 25; Ferrari/Flechtner 713; Huber 216]. The mere fact that RESPONDENT knew the shirts would be sold in Oceania [PO2 ¶15; Re Ex 1] does not support CLAIMANT’s assertion that ‘the essential purpose of the Contract regarding resale in Oceania was well known to RESPONDENT’ [Cl Mem ¶102 (emphasis added)]. Indeed, as RESPONDENT had supplied clothing to CLAIMANT on previous occasions for eventual resale in countries other than Oceania [PO2 ¶15], it was reasonably foreseeable that even if the shirts could not be resold in Oceania, CLAIMANT would derive benefit from the Contract by selling the shirts elsewhere. This is especially the case as CLAIMANT has extensive experience reselling and distributing clothes to subsidiaries of Oceania Plus and Atlantica Megastores [Statement of Claim ¶7; PO2 ¶15] and hence could readily be expected to resell shirts to other customers [CISG-AC Opinion No 5 §4.3; Schlechtriem 429]. Besides, Doma Cirun has markets outside Oceania, to which CLAIMANT could have resold the shirts [PO2 ¶16].

137. Further, contrary to CLAIMANT’s submissions, RESPONDENT did not know that compliance with Oceania Plus’ policy was ‘essential’ [Cl Mem ¶102], as explained in ¶133 above. Hence, RESPONDENT could not have foreseen that breach of this policy would deprive CLAIMANT of the main benefit of the Contract [Schlechtriem 413; Huber 216].

138. A reasonable person in RESPONDENT’s position would not have foreseen this either. If the obligation is as pervasive and ‘essential’ as contended by CLAIMANT [Cl Mem ¶102], such a reasonable person would have expected CLAIMANT to be specific about its desire that RESPONDENT comply with the ethical standards across all facets of its business, including in a plant completely unrelated to the production of the shirts contracted for. However, here, the CLAIMANT did not mention the ethical policy at all during the pre-contractual negotiations [Cl Ex 2]. Furthermore, as explained in ¶¶111–4, the vague nature of Art 12 of the Contract would not have given a reasonable manufacturer the proper opportunity to decide whether it was willing to accept the risk of non-compliance and enter the Contract at all.
139. Therefore, a reasonable person in RESPONDENT’s position would have believed Oceania Plus’ policy was not of ‘essential’ importance [Cl Mem ¶102].

140. During the 2007 Audit of RESPONDENT’s business, when suspicions of child labour were raised, RESPONDENT was given the opportunity to remedy any possible breach of Oceania Plus’ policy before CLAIMANT proceeded to contract with RESPONDENT [PO2 ¶3; Statement of Claim ¶9]. This suggests that CLAIMANT did not regard compliance with Oceania Plus’ ethical policy as being of such importance that it would avoid any association with a company that it suspected of breaching the ethical policy. Indeed, CLAIMANT contracted with RESPONDENT in 2011, despite any ‘hesitancy’ CLAIMANT may have had [Cl Ex 2]. This demonstrates that price and time were of far greater importance than ensuring its suppliers abided by ethical standards throughout their entire business [Cl Ex 2].

141. Consequently, it was not reasonably foreseeable that compliance with Oceania Plus’ ethical policy was critical for CLAIMANT to derive value from the Contract.

142. **Result of VI:** CLAIMANT’s purported avoidance of the Contract is invalid as RESPONDENT did not commit a fundamental breach. Hence, CLAIMANT cannot claim restitution of the purchase price of the shirts.

**VII. FURTHER, CLAIMANT IS NOT ENTITLED TO DAMAGES SOUGHT FOR BREACHES OTHER THAN DELAY**

143. CLAIMANT is not entitled to damages claimed of USD 1,550,000 for the settlements reached with Doma Cirun and Oceania Plus [Statement of Claim ¶36; Cl Mem ¶109] as CLAIMANT’s losses were unforeseeable [A]. Alternatively, CLAIMANT failed to mitigate its losses [B]. In any event, RESPONDENT’s liability to pay damages must be reduced by USD 470,000 to reflect the amount received by CLAIMANT for the sale of the shirts to Pacifica Trading [Statement of Claim ¶24; CISG Art 88(3); CISG Art 84(2)] [C].

**A. CLAIMANT’s losses were unforeseeable**

144. CLAIMANT bears the onus of proving that CLAIMANT’s losses were reasonably foreseeable to RESPONDENT at the time of contracting [CISG Art 74; Schlechtriem 1019, 1025–6]. Since CLAIMANT’s damages claim reflects losses incurred by third parties associated with the Oceania Plus corporate group [Schlechtriem 1005; Statement of Claim ¶¶5–7, 36; Cl Mem ¶109], the decisive question is whether RESPONDENT could have known that CLAIMANT was pursuing the interests of those third parties [CISG Art 74; Schlechtriem 1005].

145. It is important to stress that RESPONDENT had no independent knowledge of the structure of the Oceania Plus corporate group at the time of contracting [Statement of Defense ¶2]. Each
of the entities in the Oceania Plus group are ‘completely independent’ from one another and negotiate contracts at arms’ length with each other \([PO2 \ ¶1]\), and RESPONDENT contracted only with CLAIMANT. In these circumstances, RESPONDENT could not have foreseen CLAIMANT’s loss as a result of its settlements with Doma Cirun \([i]\) and Oceania Plus \([ii]\).

(i) **CLAIMANT’s loss as a result of its settlement with Doma Cirun was unforeseeable**

146. CLAIMANT must, but has failed to, show that RESPONDENT could have foreseen both the nature \([a]\) and extent \([b]\) of CLAIMANT’s loss as a result of its settlement with Doma Cirun \([Schlechtriem 1020; Saidov 115]\).

   a. **The nature of CLAIMANT’s loss was unforeseeable**

147. At the time of contracting, RESPONDENT could not have foreseen that its breach of contract – by using child labour in areas of its business unrelated to the production of the shirts – would render the shirts unable to be sold, such that Doma Cirun would suffer damage from lost sales and the cost of the replacement purchase, and damage to reputation and the ‘Yes Casual’ brand \([Statement of Claim \ ¶26; Cl Mem \ ¶¶111–2]\). During contractual negotiations, CLAIMANT only emphasised that the shirts were being ordered on a rush basis and that timely delivery was important \([Statement of Claim \ ¶14]\). That the resale of the shirts depended on compliance with Oceania Plus’ ethical policy was never communicated to RESPONDENT, for reasons examined in \¶\¶120–1.

148. CLAIMANT mistakenly relies on Schwenzer/Leisinger to assert that reputational loss as a result of breach of ethical standards is always foreseeable, and hence that RESPONDENT must have foreseen Doma Cirun’s reputational loss \([Cl Mem \ ¶113]\). Nowhere in Schwenzer/Leisinger do the authors state that such foreseeability extends to third parties’ loss of reputation.

   b. **In any case, the extent of CLAIMANT’s loss was unforeseeable**

149. RESPONDENT could not have foreseen the extent of Doma Cirun’s claim against CLAIMANT, which was in excess of 150\% of the contract price of the shirts \([Statement of Claim \ ¶27]\). This is because RESPONDENT lacked knowledge of facts which have ultimately influenced Doma Cirun’s claim, and hence, the extent of CLAIMANT’s losses \([CIETAC PRC 03/06/2003]\).

150. In relation to Doma Cirun’s claim for lost sales, RESPONDENT did not know the price at which the shirts would be sold by CLAIMANT to Doma Cirun, or the price at which the shirts would be sold by Doma Cirun to its customers. In analogous circumstances, in CIETAC PRC 03/06/2003, the tribunal held that the seller could not have foreseen the extent of the buyer’s losses – which exceeded the contract by 100\% as a result of loss of the buyer’s resale contract – where the seller was unaware of the price of the goods at which the buyer would resell the
goods to a third party. Similarly, RESPONDENT could not have foreseen the extent of CLAIMANT’s losses [Statement of Claim ¶26].

151. In relation to Doma Cirun’s claim for reputational loss, RESPONDENT was unaware of the value of Doma Cirun’s goodwill. RESPONDENT did not contract directly with Doma Cirun and hence could not be expected to have sufficiently detailed knowledge of Doma Cirun’s business and customer base. RESPONDENT also did not know with certainty which of Doma Cirun’s stores would sell the shirts [PO2 ¶16]. Doma Cirun is not well-known in Equatoriana, where RESPONDENT is based [PO2 ¶16] and where the shirts were delivered [CI Ex 1 ¶3].

(ii) CLAIMANT’s loss as a result of its settlement with Oceania Plus was unforeseeable

152. Part of CLAIMANT’s damages claim reflects losses suffered by individuals even further removed from RESPONDENT than Doma Cirun – namely, private investors in Doma Cirun’s parent company [Statement of Claim ¶¶21, 28–9]. CLAIMANT must, but has failed to, show that RESPONDENT could have foreseen both the nature [a] and extent [b] of CLAIMANT’s loss as a result of its settlement with Oceania Plus [Schlechtriem 1020; Saidov 115].

a. The nature of CLAIMANT’s loss was unforeseeable

153. RESPONDENT could not have foreseen that investors of Oceania Plus would sue Oceania Plus for reputational damage and a loss in the value of their shareholdings. It is widely accepted that share prices fluctuate, sometimes significantly. However, it is rare that shareholders will suffer such substantial losses that they launch expensive lawsuits against the companies in which they have invested. For the reasons explained in ¶147 above, RESPONDENT could not have foreseen that its breach of contract – by using child labour in areas of its business unrelated to the production of the shirts – would result in such negative implications for Oceania Plus investors.

b. The extent of CLAIMANT’s loss was unforeseeable

154. RESPONDENT could not have foreseen the extent of the investor claims against Oceania Plus, which were well in excess of the contract price of the shirts [Statement of Claim ¶28]. This is because RESPONDENT could not have foreseen that its breach of contract would result in such an extreme public reaction from peculiarly sensitive customers in Oceania and shareholders in Oceania Plus, and the consequent loss of ‘hundreds of millions of dollars’ in Oceania Plus’ share market valuation [Statement of Claim ¶21].

B. In any event, CLAIMANT failed to mitigate its losses as required by CISG Art 77

155. If the Tribunal concludes that the damages claimed by CLAIMANT are recoverable, RESPONDENT should be able to claim a reduction in those damages as CLAIMANT failed to
mitigate its losses [CISG Art 77]. In particular, CLAIMANT failed to conduct an audit of RESPONDENT’s business [i], reassure consumers that the shirts were not produced using child labour [ii], and conduct its substitute purchase in a reasonable manner [iii].

(i) CLAIMANT failed to conduct an audit of RESPONDENT’s business

156. The duty to mitigate damages does not only arise when a loss has already occurred, but also before that time [Schlechtriem 1043]. CLAIMANT failed to mitigate its losses by neglecting to audit RESPONDENT’s business prior to contracting, as a way of assuring itself that RESPONDENT met the requirements of Oceania Plus’ ethical policy [PO2 ¶2]. Given that CLAIMANT is in a far better position than RESPONDENT to assess whether RESPONDENT’s business meets the requirements of the ethical policy, the onus should be on CLAIMANT to take positive steps to satisfy itself of this fact.

157. CLAIMANT has conceded that, given the circumstances, it most likely would have conducted such an audit if it had not been for the rush order [PO2 ¶2]. It was CLAIMANT’s choice to take the risk in prioritising timely delivery over compliance with Oceania Plus’ ethical policy. The losses stemming from this choice were entirely avoidable, and it is unreasonable for CLAIMANT to now seek to shift the losses stemming from that choice onto RESPONDENT.

(ii) CLAIMANT failed to reassure consumers that the shirts were not produced using child labour

158. The fact that there were almost no sales of the shirts after the dissemination of the documentary and news article on child labour [Statement of Claim ¶20] was likely caused by public concern that child labour was used to produce the shirts. However, RESPONDENT did not in fact produce the shirts using child labour [PO1 ¶8] and CLAIMANT failed to reassure consumers of this crucial fact. At very little cost, CLAIMANT could have held a joint media session with Doma Cirun and Oceania Plus to reassure consumers that the shirts purchased from RESPONDENT were ethically produced and that the child labour was revealed in an unrelated part of the business with which these companies had no dealings. These companies could also have demonstrated their goodwill by pledging to set up a fund designed to promote the interests of children in countries where the use of child labour is prevalent. Such steps would have served to restore some consumer confidence in these companies and to reduce the losses ultimately suffered by them and claimed against RESPONDENT.

(iii) CLAIMANT failed conducted its substitute purchase in a reasonable manner

159. CLAIMANT ordered 90,000 shirts from Gold Service Clothing at a price of USD 612,000 [Statement of Claim ¶25]. Although an aggrieved party may mitigate its losses by concluding
a substitute transaction [Riznik §4.2.1; LG Ger 15/09/1994], such a party may nevertheless fail to mitigate if the substitute transaction has insufficiently avoided loss [Riznik §1.3]. In this case, CLAIMANT failed to sufficiently mitigate its losses by shipping the first 20,000 shirts by air – a relatively expensive mode of carriage [Statement of Claim ¶25]. This was unreasonable because only 1,000 shirts had been successfully sold by Doma Cirun up to that point.

C. **RESPONDENT’s liability to pay damages must be reduced by the amount received by CLAIMANT for the sale of the shirts to Pacifica Trading**

160. CLAIMANT must account to RESPONDENT for USD 470,000 under CISG Art 88(3), being the amount received for the sale of 99,000 shirts to Pacifica Trading [Statement of Claim ¶24]. CLAIMANT sold the shirts in an attempt to discharge its obligation to preserve the shirts [CISG Art 88(1); ICC No 7531; OLG Ger 26/11/1999; HC Slov 14/12/2005; Cl Mem ¶96] and hence must account to RESPONDENT for CLAIMANT’s profits from the sale [CISG Art 88(3)]. CLAIMANT’s obligation to account for USD 470,000 also arises under CISG Art 84(2), which requires CLAIMANT to account to RESPONDENT for all benefits that CLAIMANT derived from the shirts [AG Ger 4/05/1994]. Hence, RESPONDENT’s liability should be reduced by USD 470,000 [Watkins-Johnson].

161. **Result of VII: CLAIMANT is not entitled to damages claimed under CISG Art 74.**

**REQUEST FOR RELIEF**

RESPONDENT respectfully requests the Tribunal to decide that all the claims advanced by CLAIMANT be rejected, specifically that:

1. Mr Short’s written statement be considered despite his absence from the oral hearing;
2. Contracts can be validly amended by oral agreement under the applicable law;
3. RESPONDENT complied with its obligations by delivering the shirts on 24 February 2011, as this was the new contractual delivery date agreed upon by the parties;
4. RESPONDENT complied with its contractual obligations, as no child labour was used in producing the shirts the subject of the Contract;
5. CLAIMANT wrongfully avoided the Contract and is hence not entitled to the purchase price, as RESPONDENT did not commit a fundamental breach of contract;
6. CLAIMANT is not entitled to any damages for RESPONDENT’s alleged breaches;
7. RESPONDENT be awarded the costs of arbitration.