MEMORANDUM FOR RESPONDENT

ON BEHALF OF
Equatoriana Clothing Manufacturing, Ltd.

AGAINST
Mediterraneo Exquisite Supply, Co.

RESPONDENT

CLAIMANT

AGNIESZKA BIBRO • MAGDALENA JAWORSKA • BIANCA KREMER • HELEN LOREZ
ALINA SEEL • YOANNA SCHUCH • ALEXANDER ZOJER • STEFAN ZWEIKER
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1. Contract Clause 10 does not derogate from the damages regime of the CISG
2. RESPONDENT is exempt from liability under the CISG
3. Alternatively, CLAIMANT is estopped from claiming damages as it waived its right implicitly

D. Conclusion

III. RESPONDENT DID NOT BREACH THE CONTRACT AS THE GOODS WERE IN CONFORMITY WITH THE CONTRACT

A. The Polo Shirts Delivered by RESPONDENT Were of the Quality Required by the Contract (Art 35(1) CISG)

1. The polo shirts were produced in accordance with the Contract specifications
2. RESPONDENT acted in conformity with Contract Clause 12
   a. The CISG has no missionary function
   b. Contract Clause 12 does not prohibit the use of child labor

B. CLAIMANT Cannot Claim Damages Based on a Violation of 35(2)(b) CISG

C. CLAIMANT Is Estopped from Claiming Liability

D. CLAIMANT Was Not Entitled to Avoid the Contract

1. CLAIMANT was not substantially deprived of what it was entitled to expect under the Contract
2. RESPONDENT could not have foreseen the reaction of the public at the conclusion of the Contract

E. There Is No Issue with CLAIMANT's Notice of Avoidance

F. CLAIMANT Was Not Entitled to Avoid the Contract under Art 3.2.2 UNIDROIT Principles

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<td>contra proferentem</td>
<td>against the one bringing forth</td>
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<td>Contract</td>
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<td>Doma Cirun</td>
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<td>e contrario</td>
<td>converse argument</td>
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e.g. exempli gratia (for example)
ed./eds. Editor/Editors
et al. et alteri (and others)
et seq. et sequentes (and the following)
etc. et cetera (and others)
ex post after
FAS Free Alongside Ship (INCOTERMS© 2010)
FN footnote
idem the same (as before)
in dubio when in doubt
i.e. id est (that is)
ILO Convention 182 International Labour Organization Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour as adopted by the Conference at its eighty-seven session, Geneva, 17 June 1999
INCOTERMS INCOTERMS© 2010
inter alia among other things
L/C letter of credit
lege artis according to the professional practice
lex nexus closest connection principle
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<td>Principles of European Contract Law</td>
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<td>PER</td>
<td>Parol Evidence Rule</td>
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<td>Private International Law (conflict of laws)</td>
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<td>quod non</td>
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**Secretariat Commentary** UNCITRAL Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods

SoD Statement of Defense

sub subsection

supra above

SuprCt Supreme Court

status quo existing state

telos purpose

TransOcean Independent Shipping Company employed by CLAIMANT to ship the polo shirts from Equatoriana to Oceania

Tribunal The Tribunal seated in Danubia selected by the Parties to solve the dispute at hand

travaux préparatoires preparatory works

UN United Nations

UNCITRAL United Nations Commission on International Trade Law

UNCTAD United Nations Conference on Trade and Development

UNIDROIT Principles Principles of International Commercial Contracts 2010 as issued by the United Nations International Institute for the Unification of Private Law

USD US Dollars

v versus (against)

venire contra factum proprio

no one may set himself in contradiction to his own previous conduct

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STATEMENT OF FACTS

1 **CLAIMANT**, Mediterraneo Exquisite Supply, Co., organized under the laws of Mediterraneo, is a subsidiary of Oceania Plus (hereinafter OP) and Atlantica Megastores (hereinafter AM) which contracts with manufactures of the clothing industry to supply leisure clothing to various international members of the OP group and the AM conglomerate (*AfA* ¶¶5, 7).

2 **RESPONDENT**, Equatoriana Clothing Manufacturing, Ltd., organized under the laws of and seated in Equatoriana, a country where child labor is commonly employed, is a manufacturer of clothing such as polo shirts (*AfA* ¶¶3, 9; *SoD* ¶3). It has supplied CLAIMANT with clothing before but none of the previous contracts was about delivering goods destined for Oceania (*PO2* ¶15). In connection with the 2007/2008 contract, an audit performed by CLAIMANT turned up some evidence indicating that RESPONDENT was using child labor (*AfA* ¶9; *PO2* ¶3). CLAIMANT contracted with RESPONDENT nonetheless.

3 On 2 January 2011, DC, one of OP’s clothing retail chains seated in Oceania, learnt that its manufacturer had failed to provide 100,000 polo shirts of the brand ‘Yes Casual’ and instructed CLAIMANT to procure a manufacturer that would be able to handle the order on a rush basis (*AfA* ¶8). Among three possible offers, CLAIMANT chose RESPONDENT who in order to revitalize its business relationship with CLAIMANT was willing to deliver at a price barely covering the production costs, even beating the original supplier’s offer (*AfA* ¶10; *PO2* ¶6). CLAIMANT did not perform another audit, despite not having dealt with RESPONDENT since 2008 and in violation of OP group policy.

4 On 5 January 2011, CLAIMANT and RESPONDENT concluded a Contract for the supply of the polo shirts that required delivery to Equatoriana by 19 February 2011 (*AfA* ¶¶10-11). The Contract contained *inter alia* the boilerplate clause regarding ethical standards generally used by OP; the policy itself was not attached to the Contract (*Cl Ex 1* ¶12; *PO2* ¶4).

5 By 9 February 2011, it became evident that due to a strike at its supplier’s factories, RESPONDENT would only be able to deliver the polo shirts on 24 February 2011 (*PO2* ¶12; *Re Ex 1*). RESPONDENT instantly called CLAIMANT and made clear that it could not keep the initial delivery date (*AfA* ¶13). CLAIMANT assured that “all the paper work would reflect the new delivery date” which RESPONDENT understood to include the Contract (*PO2* ¶27; *Re Ex 1*). CLAIMANT duly amended the L/C (*AfA* ¶15). Since then, CLAIMANT never once mentioned the alleged late delivery until it filed the *AfA* one and a half years later.
6 On 5 April 2011, a documentary was broadcast in Oceania condemning DC for contracting with manufacturers engaging in the use of child labor, showing children producing trousers allegedly in one of Respondent’s manufacture facilities (AfA ¶18; PO2 ¶17). By 6 April 2011, DC registered a sales drop in comparison to the previous year, which it attributed to the negative publicity in connection with the TV documentary (AfA ¶20). Two days later, DC avoided its contract with Claimant (AfA ¶¶20, 22).

7 On 8 April 2011, Claimant notified Respondent that it was avoiding the Contract because of breach of contract (AfA ¶23; Cl Ex 6). Respondent denied the breach pointing out that no children have been involved in the production of the polo shirts, which is undisputed between the Parties (Cl Ex 7; PO1 ¶8). On 20 April 2011, Claimant sold the remaining polo shirts to Pacifica Trading Co (AfA ¶24).

8 On 1 July 2012, Claimant issued an application for arbitration claiming not only damages in connection with the child labor issue, but also with regard to the alleged five-day delay.

9 On 4 October 2012, Claimant requested the Tribunal to disregard the written Witness Statement of Short, Respondent’s sole witness, who is prevented from testifying at the hearing (PO1 ¶4).
PROCEDURAL ARGUMENT

I. SHORT’S WITNESS STATEMENT SHOULD BE ADMITTED AS EVIDENCE

10 The CEAC Rules require the Tribunal to admit Short’s Witness Statement (A.1). Should the Tribunal, however, apply the IBA Rules rather than the CEAC Rules, Art 4(7) IBA Rules requires the Tribunal to admit Short’s Witness Statement despite him not being available for examination at the oral hearings (A.2). Further, non-admittance of Short’s Witness Statement would in any event violate RESPONDENT’s right to be heard (B.1) and right to equal treatment (B.2). CLAIMANT’s reliance on the Parol Evidence Rule is misguided (C). Non-admittance of Short’s Witness Statement would put the award at risk of being set aside in Danubia and denied enforceability in either Mediterraneo or Equatoriana (D).

A. The Applicable Arbitration Rules Require the Tribunal to Admit Short’s Witness Statement

11 According to the Model Law, the lex loci arbitri (AfA ¶32), the parties enjoy wide autonomy as to the arbitral procedure (Redfern/Hunter ¶3.42; Born, International Commercial Arbitration pp 1752 et seq.; Born, Law and Practice p 107; Lew/Mistelis/Krüll pp 523 et seq.; Waincymer p 192). Specifically, pursuant to Art 19 ML, “the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceeding”. In the present case, the Parties made use of this option by agreeing on the CEAC Rules (Cl Ex 1 ¶19).

12 The CEAC Rules do not impose a general requirement that witnesses need to appear and be questioned at oral hearings. Rather, these rules stipulate that written witness statements may be presented and that witnesses “may be heard […] by the arbitral tribunal” (Artt 27(2), 28(2) CEAC Rules, emphasis added). As the word ‘may’ implies, there is no duty on arbitral tribunals to hear witnesses at oral hearings. Moreover, Art 30(3) CEAC Rules permits tribunals to make an award based on the evidence before it – including inter alia written witness statements – in case the party offering a written witness statement can show sufficient cause as to why that witness cannot be produced for questioning at an oral hearing.

13 The procedural part of the CEAC Rules dealing with witnesses is based on the 2010 UNCITRAL Arbitration Rules (CEAC website). The 2010 UNCITRAL Arbitration Rules are a revised version of the 1976 UNCITRAL Arbitration Rules (UNCITRAL website). Specifically, Art 27(2) last
sentence of the 2010 UNCITRAL Arbitration Rules concerning written witness statements is modelled on Art 25(5) of the 1976 UNCITRAL Arbitration Rules. During the conception of the 1976 UNCITRAL Arbitration Rules, the American delegate expressed concern over the fact that Art 25(5) implied that written statements should have the same weight as the statements of witnesses who appeared in person. He suggested that witness statements of witnesses who do not appear before the tribunal should be attributed less weight than those who were available for cross-examination. Finally, he concluded that the reasons for the absence of a witness should also be considered (UNCITRAL Committee of the Whole (II) ¶43). This proposal was ultimately rejected due to great variations of national practices in regard to witness statements and the ultimate goal to promote the admissibility of witness statements (UNCITRAL Committee of the Whole (II) ¶¶44-46, 48). This means that the CEAC Rules attribute the same weight to written witness statements as to oral testimony.

Applied to the present case, the CEAC Rules permit the Tribunal to admit Short’s written Witness Statement and make an award based (only) on his statement. They do not require that Short appears at the oral hearing.

Furthermore, Short’s statement met all formal requirements as set forth in Art 27(2) CEAC Rules.

As Short is RESPONDENT’s sole and material witness, RESPONDENT did everything it could to make Short appear. However, due to Short’s new employment, he will not be present at the hearing [see ¶¶21-23]. Thus, Short will not be available for oral testimony for reasons beyond RESPONDENT’s control. Witness examination through means of telecommunication (Art 28(4) CEAC Rules) is no viable option in the present case as Short’s refusal to appear, as stated, is grounded in his employer’s unequivocal instruction not to become involved in third party arbitrations, which is also in line with his new employer’s general policy (PO1 ¶4; PO2 ¶26). On the other hand, mandatory appearance in arbitral proceedings by court order is not possible (PO2 ¶28). Accordingly, pursuant to Art 30(3) CEAC Rules, the Tribunal is permitted to render an award based on Short’s written testimony only. In doing so, the Tribunal does not violate fundamental procedural rights of either Party [see ¶¶26-33].

Furthermore, contrary to CLAIMANT’s assertion (MfC ¶2), the Tribunal does not need to refer to the IBA Rules when deciding the issue. The IBA Rules only intend to “fill in gaps intentionally left” (IBA Review Subcommittee, Preamble, sec (i), emphasis added). Contrary to CLAIMANT’s assertions (MfC ¶3) and as set out above, the CEAC Rules comprehensively settle the question of the admissibility of Short’s Witness Statement. In this context, RESPONDENT notes in passing that the case law cited by CLAIMANT (cf OLG Frankfurt Case; Ericsson Case; Korsnäs Case – MfC ¶8)

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deals with the IBA Guidelines on Conflicts of Interest in International Arbitration; CLAIMANT’s reference to this case law is therefore misguided.

However, if one would, for the sake of the argument, draw upon the IBA Rules, Short’s Witness Statement is to be admitted regardless – see below.

2. **Art 4(7) IBA Rules mandates admission of Short’s Witness Statement**

   a. **There are valid reasons for Short not to appear**

Art 4(7) of the IBA Rules provides that “[i]f a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances the Arbitral Tribunal decides otherwise.”

Valid reasons in this context are reasons which render the witness unable to appear for examination (Swiss SuprCt 19 June 2006 ¶6.3; cf Bond/Paralika/Secomb in Mistelis p 358; cf Born, International Commercial Arbitration p 1901; Born, Law and Practice p 169; cf Kröll/Mistelis p 199; cf Kurkela/Snellman p 140; Oetiker p 259; Zuberbühler p 103).

In the present case, as stated, Short is unable to attend the oral hearings due to his firm’s general policy to avoid any involvement in third party actions (PO1 ¶4; PO2 ¶26) as well as due to his new employer’s direct order not to appear before the Tribunal if he was called for (PO1 ¶4).

By attending the oral hearings, Short would thus violate his legal duty to adhere to his employer’s orders and business policies. As a consequence, Short would put himself at risk of getting dismissed as well as render himself potentially liable for any economic consequences to his new employer, Jumpers Production. In this context, it needs to be kept in mind that Jumpers Production has only recently succeeded in being listed by CLAIMANT as a potential supplier and now looks forward to an unfolding business relationship to their mutual benefit (PO2 ¶26). This business relationship would be gravely endangered should Short, in his role as the head of the purchase department of Jumpers Production (PO1 ¶26), testify against CLAIMANT in the arbitration proceedings at hand - something CLAIMANT could surely not expect as being to its benefit.

In summary, Short’s appearance would not only contravene a direct order from his new employer, but also potentially cause massive monetary damage to Jumpers Production and endanger Short’s professional future as head of the purchase department (PO1 ¶26). Short is therefore simply unable pursuant to Art 4(7) IBA Rules to testify in person for legal (direct order)
and economic reasons (ruin of the beginning business relationship with CLAIMANT; endangerment of own position).

In any event, there are ‘exceptional circumstances’ in the sense of Art 4(7) IBA Rules that mandate the Tribunal to admit Short’s Written Statement into the record.

b. **There are exceptional circumstances that would excuse non-appearance**

The Tribunal has no means to summon Short to the stand itself, as Equatoriana does not provide for the mandatory appearance of a witness to testify in an arbitral proceeding either in person or by video link (PO2 ¶28). The term ‘exceptional circumstances’ needs to be interpreted broadly so as to prevent the exclusion of witness testimony relevant to a case (cf Oetiker p 261). In the present case, to prevent exclusion of key evidence [see ¶28] to the detriment of RESPONDENT, it is therefore necessary to find that the reasons for Short’s non-appearance are exceptional and hence (also), so as not to violate RESPONDENT’s right to be heard, warrant the admittance of his written witness statement.

**B. Due Process Requires the Tribunal to Admit Short’s Witness Statement**

1. **RESPONDENT’s right to be heard requires admittance of Short’s Witness Statement**

The right to be heard is a fundamental right guaranteed in the present dispute by Art 17(1) CEAC Rules and Art 18 ML (cf Born, Law and Practice p 152; Waincymer pp 80, 183). In essence, it provides that every party must be granted a reasonable opportunity of presenting its case (Van den Berg p 358). It therefore guarantees the parties a variety of specific rights such as inter alia the right to produce all evidence they may deem necessary for the resolution of their dispute (Jaksic p 239). The right to evidence can only be denied in case the evidence offered is not admissible, suitable or relevant (Jaksic p 239).

As outlined above [see ¶¶11-25], Short’s Witness Statement is admissible pursuant to the CEAC Rules as well as the IBA Rules. It is also a suitable means of conveying Short’s witness testimony, as it is composed in a very plain and comprehensible narrative. Furthermore it is highly relevant as it provides information on key aspects of the dispute such as the telephone conversation concerning the amendment of the delivery date of 9 February 2011 (Re Ex 1). Therefore, RESPONDENT is to be granted the right to evidence in form of Short’s Witness Statement.

In addition, it is important to note that Short’s Witness Statement is RESPONDENT’s sole means of providing evidence. Short is RESPONDENT’s sole material witness, his testimony runs counter
to CLAIMANT’s evidence. For example, in his written Witness Statement, Short states that CLAIMANT’s witness Long agreed to “make sure that all the paper work reflected the new delivery date” and that Short “understood him to mean” the Contract itself (Re Ex 1). Long, however, while agreeing that he has used “a wording along these lines”, claims that he meant to only amend the shipping contract and the letter of credit (Cl Ex 2; PO2 ¶27). It is therefore essential that Short’s written Witness Statement be admitted into the record.

Furthermore, CLAIMANT’s reliance on the Paklito Case which states that “[t]he right to comment on the report of the Tribunal-appointed expert has been held to be a basic right by a Hong Kong court” (MfC ¶11) is irrelevant. That case is not applicable. Aside from the fact that the present case, unlike the Paklito Case, does not concern an investment dispute, Short is not only not an expert witness, he is furthermore not appointed by the Tribunal. Moreover, this case would not improve CLAIMANT’s position because it is not disputed that CLAIMANT has the right to comment on Short’s Witness Statement.

Likewise, CLAIMANT’s allegation (MfC ¶11, Stuttgart Case) that allowing the Witness Statement to be entered without Short’s appearance would be analogous to a refusal to hear witnesses is not accurate. While it is true that CLAIMANT would not be able to question the witness, it would still be allowed to comment on every aspect of its written testimony before the Tribunal which would satisfy CLAIMANT’s right to be heard to the fullest (ICC 9333; Paklito Case; cf ML Digest Art 34 ¶65; Jermini p 608). Quite to the contrary, not allowing Short’s Witness Statement would have to be considered a refusal to hear witnesses, as RESPONDENT’s sole witness, Short, would not be heard at all.

2. RESPONDENT’s right to equal treatment requires the Tribunal to admit Short’s Witness Statement

The principle of procedural equality is one of the most fundamental requirements that a tribunal must follow when implementing procedural rules (Redfern/Hunter ¶¶6.11 et seq.; Born, Law and Practice p 152; Schlabrendorff/Sheppard p 766). In this context, Art 17(1) CEAC Rules requires that “[...] the parties are treated with equality [...]”. More specifically, equal aspects of the proceedings are to be treated equally and unequal aspects unequally. There is no need to put parties into identical procedural situations (requirement of material equality as opposed to formal equal treatment) (Kurkela/Snellman p 148; cf Waincymer p 82).

In the present case, to maintain equal treatment, the Tribunal must admit Short’s written testimony. The status quo is that Long is available for oral hearings, and Short is not – obviously, therefore, the factual background with respect to the two witnesses is different and beyond
RESPONDENT’s control. If the Tribunal were to reject Short’s Witness Statement, and thereby disregard RESPONDENT’s key evidence in its entirety, while at the same time admitting Long’s testimony, the Parties would in essence be treated materially differently. RESPONDENT’s right to equal treatment would thus be violated. In contrast, admitting Short’s written Witness Statement and preserving CLAIMANT’s undisputed right to comment thereon (as equivalent to RESPONDENT’s right to cross-examine Long), would maintain (material) equality.

It is also to be noted that it is within the discretion of the Tribunal to decide whether to allow a witness statement without testimony (cf Art. 27(4) CEAC Rules). Should the Tribunal indeed find, against RESPONDENT’s submission, that material equality actually requires that cross-examination cannot be substituted by comprehensive comments to written statements, the present facts would still necessitate admittance of Short’s written statement. In this case, the Tribunal, using its discretion, could exempt Long from cross-examination – thereby, both Parties would be treated (formally) equally. In either case, Short’s written Witness Statement must be admitted.

C. The Parol Evidence Rule Is Irrelevant in the Present Situation

CLAIMANT’s reliance on the Parol Evidence Rule (hereinafter PER) is misguided for the following reasons:

First, the PER, whose basic purpose is “to preserve the integrity of written contracts by refusing to allow the admission of [prior] oral statements or previous correspondence to contradict the written agreement” (DiMatteo, International Contracting p 230; CISG AC No 3), is a principle developed by common law courts and has no equivalent in civil law jurisdictions. Further, the PER has not been incorporated into the CISG (CISG AC No 3). In cases where the CISG is applicable, the PER is therefore inapplicable (Perales Viscasillas/Rames Muñoz FN 24; cf Cross p 146; cf MCC-Marble v Ceramica; cf Aircraft Parts Case).

Second, the PER is applicable only to facts that occur prior or contemporaneous to the conclusion of the written contract. It does not apply to any agreements or expressions made subsequent to the written contract (Calamari/Perillo p 335; cf Corbin p 603). Short’s Witness Statement is such a subsequent occurrence. Contrary to CLAIMANT’s allegations (MfC ¶13), neither the Frozen Bacon Case nor Art 8(3) CISG apply in the present situation as RESPONDENT did not submit the witness testimony to support its interpretation of the Contract and the Tribunal is not required to determine the Parties’ intent when deciding on whether to admit a witness statement or not.

Third, the PER is a question of weight of evidence, not of its admissibility (Corbin p 604). In the present case, however, the only issue is one of admissibility of Short’s written statement.
D. Disregarding Short’s Witness Statement Would Endanger the Award’s Enforceability

38 As stated, Short’s Witness Statement is RESPONDENT’s sole material witness; not admitting his Witness Statement would violate due process. Therefore, an award rendered under these circumstances would be at risk of being set aside in Danubia as well as being denied recognition and enforcement abroad, including in Mediterraneo and Equatoriana.

39 Tribunals are under an obligation to decide the case in a final and adjudicatory manner by rendering an award (Redfern/Hunter ¶9.10; Jaksic p 320), which must be enforceable (Horvath p 135; Voser/Schramm p 280 FN 19; Platte p 308). Indeed, if the award is unenforceable, “the whole arbitration proceeding will have been a waste of time and energy” (ICC 4695 sub 31). As Derains/Schwartz conclude, the enforceability of the award is “of course, the raison d’être of the arbitration process” (Derains/Schwartz p 385).

40 Accordingly, the Tribunal must observe Art 34 ML to avoid the risk of challenge at the seat of arbitration, Danubia, or refusal of recognition and enforcement (Art V NYC), in particular at RESPONDENT’s place of business, Equatoriana (AfA ¶3) and CLAIMANT’s place of business (AfA ¶5), Mediterraneo, where enforcement is most likely to be sought.

41 More specifically, the award could be set aside in Danubia, respectively be denied recognition/enforcement in (particularly) Mediterraneo for violation of due process due to non-admittance of Short’s Witness Statement, RESPONDENT’s sole material witness (Art 34(2)(a)(ii) ML; Art V(1)(b) NYC). Moreover, should the Tribunal choose to apply the IBA Rules rather than the CEAC Rules which have been agreed upon by both Parties, it would violate the rules of procedure agreed upon by the Parties (Art 34(2)(a)(iv) ML respectively Art V(1)(d) NYC in conjunction with Art 17(1) CEAC Rules)(Redfern/Hunter ¶6.03; Born, International Commercial Arbitration p 2595; ML Digest Art 19 ¶5).

E. Conclusion

42 Short’s written Witness Statement is admissible under the CEAC Rules as the Parties’ chosen arbitration rules, which regulate the subject matter conclusively. Should the Tribunal - against the Parties’ undisputed agreement on the CEAC Rules - take recourse to the IBA Rules, Short’s written Witness Statement is also admissible pursuant to Art 4(7) IBA Rules.

43 Short, who is unable to appear at the oral hearings, is RESPONDENT’s sole and material witness. His written Witness Statement provides crucial information on key aspects of the dispute. In order to maintain RESPONDENT’s fundamental procedural rights, namely its right to be heard and
right to equal treatment, Short’s written Witness Statement must be admitted as evidence. Non-admittance would put the award at risk of being set aside in Danubia, as well as being denied enforceability abroad, particularly in Mediterraneo or Equatoriana.

44 On a final note, CLAIMANT’s reliance on the ‘Parol Evidence Rule’ is misguided.

SUBSTANTIVE ARGUMENTS

II. RESPONDENT DID NOT BREACH THE CONTRACT AS THE CONTRACT WAS AMENDED

45 Contrary to CLAIMANT’s contention, RESPONDENT did not breach its contractual obligation to deliver on time, since the Parties had agreed upon an amendment of the contractual delivery date (A). This oral amendment was perfectly permissible under the applicable law (B). Even if the Parties had not validly agreed on an amendment, CLAIMANT would not be entitled to claim damages in any case, as RESPONDENT is exempt from liability, or, alternatively CLAIMANT is estopped from claiming damages (C).

A. The Parties Amended the Contract Pursuant to Art 29 CISG

46 The Parties amended the Contract orally in the course of the telephone call on 9 February 2011. The CISG is governed by the principle of freedom of form (Arts 11, 29(1) CISG; Dividing Wall Panels Case). Art 29(1) CISG explicitly provides that ‘mere agreement’ between the parties is the only prerequisite for amending a contract under the CISG (Propane Case; Ferrari in Ferrari et al. Art 29 ¶4; Schroeter in Schlechtriem/Schwenzer Art 29 ¶4; Salger in Witz et al. Art 29 ¶1). Contrary to CLAIMANT’s contention (cf MfC ¶¶47-49), the existence of a trade usage is not required for an oral amendment to be valid.

47 There was thus no legal obstacle for modifying the Contract by telephone, as is common practice in the business world (Propane Case; Raw Materials v Forberich; Graves v Chilewich; Ferrari in Ferrari et al. Art 29 ¶3; Enderlein/Maskow p 123 ¶1.1; Gsell in Honsell Art 29 ¶¶1, 8; Eiselen §d). When RESPONDENT called CLAIMANT on 9 February 2011, it made clear that it intended to amend the contractual delivery date (1). CLAIMANT agreed to modify the Contract, which was evidenced by its statement and subsequent conduct (2). At any rate, CLAIMANT’s own statement concerning the adaption of the paper work amounts to a proposal to modify the Contract – pulling the rug out from under CLAIMANT’s legal position (3). Even if a measure of ambiguity should remain
concerning CLAIMANT’s statements, these would have to be interpreted *contra proferentem* and thus in favor of RESPONDENT (4).

1. **RESPONDENT** made clear that it wanted to amend the contractual delivery date

Due to its supplier’s delay (*Cl Ex 2; Re Ex 1; AfA ¶14; PO2 ¶12*) and by no fault of its own, RESPONDENT found itself in a highly unfavorable situation: It was clear that delivery on 19 February 2011 would be impossible [*see ¶¶102-104, 106*] and indeed, “there was nothing [it] could do now but to get the order out as fast as possible” (*Cl Ex 2; PO2 ¶13*). At the same time, RESPONDENT faced a 1.5% deduction for each single day of late delivery (*Cl Ex 1 ¶10*), even though the initial contract price barely covered the production costs (*PO2 ¶6*). To resolve this situation, RESPONDENT sought to reach an agreement with CLAIMANT on the modification of the Contract. By calling CLAIMANT and explicitly telling it that delivery could only be effected on 24 February (*Re Ex 1; Cl Ex 2*), RESPONDENT made clear that it intended to amend the Contract. In doing so, RESPONDENT sufficiently substantiated the new terms it intended to be bound by.

CLAIMANT was obliged to respond in good faith (*cf Bergsten in Festschrift for Kritzer* p 55; *Lookofsky* p 37) and take RESPONDENT’s legitimate interest to amend the Contract into account (*Art 8(3) CISG; Cutter Head Case; Chemical Products Case; Schmidt-Kessel in Schlechtriem/Schwenzer Art 8 ¶30*). Indeed, since the contractual balance was disrupted by unforeseen aggravating circumstances [*see ¶105*], CLAIMANT was under the duty to cooperate and renegotiate the terms of the Contract in order to restore it (*cf Scafom v Lorraine; Perillo; Veneziano; cf *Artt 5.1.3 and 6.2.3 UNIDROIT Principles, which the Parties agreed upon in the Contract, cf Cl Ex 1 ¶20*).

In sum, contrary to CLAIMANT’s assertions (*MfC ¶¶40-41*), it has no legitimate grounds for denying that RESPONDENT made an offer to amend the Contract. Indeed, the mere notification of late delivery alone is commonly understood as an offer to amend a contract (*Schlechtriem, UN Kaufrecht ¶296; Benedick ¶499*) – especially if the delay was not directly caused by a contracting party, as in the present case (*PO2 ¶13*).

2. **CLAIMANT** agreed to a modification of the Contract

In order to determine whether CLAIMANT is to be considered as having agreed to an amendment of the Contract, the CISG requires that CLAIMANT’s statement and conduct be interpreted according to the understanding of a reasonable business person (*Art 8(2) CISG; Hanwha v Cedar; Loin Ribs Case; Zuppi in Kröll et al. Art 8 ¶21; Farnsworth in Bianca/Bonell Art 8 ¶2.4*) in the same position and with the same knowledge as the other party, *i.e.* RESPONDENT (*Honnold Art 8 ¶107.1; Schmidt-Kessel in Schlechtriem/Schwenzer Art 8 ¶20*). In doing so, all relevant circumstances need to be taken into account, including the parties’ subsequent conduct (*Art 8(3) CISG; Fabrics Case;*
When applying this standard to the case at hand, it becomes apparent that RESPONDENT, as well as any reasonable business person, would have interpreted CLAIMANT’s statement and conduct as an agreement to modify the contractual delivery date.

First, in the course of the telephone call on 9 February 2011, Long explicitly said that it would take care of adjusting “all of the” paperwork so that it would reflect the new delivery date (Re Ex 1; PO2 ¶27; conceded by CLAIMANT on MfC ¶42). According to Art 8(2) CISG, when interpreting a party’s statement, priority needs to be given to its exact wording (Building Materials Case; Chemical Products Case; Ferrari in the Draft Digest p 185; Schmidt-Kessel in Schlechtriem/Schwenzer Art 8 ¶21). This holds all the more true for the case at hand where Long’s wording, i.e. ‘all of the’ paperwork, was unambiguous and perfectly clear. Any reasonable person would have understood that any paperwork concerning the transaction would be amended. Naturally, the Contract, the core document of the transaction, was the first piece of paperwork that came to Short’s mind when CLAIMANT made this statement. If Long – as CLAIMANT now alleges – did not intend to refer to the Contract despite its adverse statement, he ought to have chosen a different wording. But instead, CLAIMANT explicitly made a statement indicating its assent to the modification of the Contract (Art 18 CISG). Thus, CLAIMANT did the very opposite of remaining silent and its desperate attempt to now escape from the consequences of its own carelessness by relying on the principle that silence as such does not constitute agreement (MfC ¶37) is doomed to fail.

Second, a reasonable business person must assume that CLAIMANT wanted to foster the business relationship with RESPONDENT, who was able to offer very favorable contract terms to CLAIMANT. In fact, CLAIMANT itself pointed out that there were only very few suppliers on the market that would have been able to handle the manufacturing of 100,000 polo shirts of various colors and sizes within only seven weeks (AfA ¶¶10-11; Cl Ex 2). On top of that, RESPONDENT had offered the polo shirts at a price that barely covered its own production costs (PO2 ¶6). It even undercut the offer of the initial supplier, who went bankrupt so as to win CLAIMANT as a long term business partner (idem). Against this backdrop, CLAIMANT was expected to accommodate RESPONDENT’s interests by agreeing to a change of the delivery date of only five days, especially since the delay was not even caused by RESPONDENT [see ¶¶102-104, 106] – and its statement and conduct have to be interpreted accordingly.

Third, CLAIMANT’s subsequent conduct was perfectly in line with the clear wording of CLAIMANT’s statement. CLAIMANT willingly undertook all the steps that an amendment of the contractual delivery date entailed, including amending the L/C and the shipping contract (AfA ¶15). The modification only concerned an amendment of the delivery date of a few days; therefore, it was reasonable for RESPONDENT not to insist on receiving an amended version of
the written Contract, considering that the CISG explicitly permits oral modifications ([Re Ex 2]) [see ¶46-47]. RESPONDENT only counted on receiving an amended L/C ([Re Ex 1; SoD ¶7]) as a result of the Contract modification, which it needed in order to obtain payment from the Export and Import Bank of Mediterraneo ([AfA ¶12]) – and was readily provided with it.

55 **Fourth**, any reasonable business person would have understood the amendment of the L/C as an indication that the Contract itself was amended, since a L/C reflects the actual terms of the contract ([Germanium Award; Hispafruit v Amuyen; Schroeter in Schlechtriem/Schwenzer Art 29 ¶7] [see ¶¶96-98]). In fact, CLAIMANT itself emphasized the importance of outside documents, when it comes to interpreting a party’s statements under Art 8 CISG ([MfC ¶36]). By voluntarily amending the L/C to the new delivery date ([AfA ¶15]), CLAIMANT consequently indicated that it had agreed to a change of the Contract. This is specifically reaffirmed by the fact that CLAIMANT was under no pressure, let alone under any legal obligation, to change the L/C if the Contract had not been altered ([cf Sugar Award, sub IV (2)]. Moreover, CLAIMANT did not diminish the payment granted by the L/C ([AfA ¶14-15; AfA ¶37]), even though the Contract provided for this remedy ([Cl Ex 1 ¶10]) and withholding (part of) one’s own performance is also a common remedy under the CISG ([CISG AC No 5; Nyer p 72; Chengwei Liu §8]). Hence, there cannot be any serious doubt that CLAIMANT’s conduct clearly reflected its agreement to modify the Contract.

56 Contrary to CLAIMANT’s allegations, the Hot-rolled Steel Award which CLAIMANT seems to be referring to on [MfC ¶39](even though the actual reference provided in the MfC is false) also supports RESPONDENT’s position. It confirms the general principle that the buyer usually indicates an amendment of the contractual delivery date by altering the L/C. CLAIMANT misapplies the case in a desperate attempt to find any support of its mistaken position.

57 **Fifth**, CLAIMANT’s allegation that it did not have any subjective intent to amend the Contract is plainly a subterfuge. Its actions at the time speak louder than its *ex post* denials 1.5 years later. At any rate, any such mental reservation would be irrelevant, as it did not become manifest in any fashion towards RESPONDENT in the course of the telephone call ([Packaging Machine Case; Textiles Case; Ferrari in the Draft Digest p 178]) – the only relevant point in time for interpreting CLAIMANT’s acts pursuant to Art 8(1) CISG ([Enderlein/Maskow/Strohhb Ach 8 ¶3.1; Magnus in Staudinger Art 8 ¶15]). Again, in a desperate attempt to clutch at straws in lack of any real support for its position, CLAIMANT substantially misquotes the law in its submission when stating that a party’s intent matters if the other party “could have been aware” of it ([MfC ¶42]). Art 8(1) CISG – which CLAIMANT is apparently referring to – sets forth the exact opposite: a party’s intent is only relevant if the other party “could not have been unaware of that intent” (Art 8(1) CISG). Thus, a party’s intent is irrelevant as soon as there is any possibility that the other party could have
been unaware of that intent (Saenger in Ferrari et al. Art 8 ¶2; Ferrari in the Draft Digest pp 176-178).

This constitutes a substantial difference in the standard of evidence (Schmidt-Kessel in Schlechtriem/Schwenzer Art 8 ¶17; Witz in Witz et al. Art 8 ¶5). Furthermore, CLAIMANT (mis)quotes the Italdecor Case in its favor (MfC ¶36) to give weight to its own intent. However, in the Italdecor Case the defendant never even notified the buyer about the delay.

In conclusion, given the circumstances of the case at hand, it is crystal clear that any reasonable business person would have interpreted CLAIMANT’s statement and conduct the same way RESPONDENT did, i.e. as an agreement to amend the contractual delivery date. If CLAIMANT had not wanted to amend the Contract it should not have acted in diametrical opposition to what it now suddenly claims to have truly intended.

3. Alternatively, CLAIMANT’s conduct and statement constituted a proposal to amend the Contract

CLAIMANT’s attempt to seek shelter from the consequences of its own conduct under the offer and acceptance regime of the CISG (cf MfC ¶¶40-41) does not lack irony. Even if RESPONDENT’s conduct is not to be qualified as an offer to amend the Contract – quod non – CLAIMANT’s own statement certainly is. In the course of the telephone call, CLAIMANT itself stated that it would make sure to amend all of the paperwork to reflect the new delivery date [see ¶52]. An offer to amend the Contract to call for the delivery on 24 February 2011 could not have been more precise than this and, naturally, RESPONDENT instantly consented to this modification.

4. Alternatively, CLAIMANT’s statement regarding the paperwork is to be interpreted in favor of RESPONDENT

Art 8(2) CISG is based on the internationally accepted rule of ‘contra proferentem’ (Schmidt-Kessel in Schlechtriem/Schwenzer Art 8 ¶49), reflecting a general principle of contract law (Art 7(2) CISG; cf Art 4.6 UNIDROIT Principles; Art 5:103 PECL; Baldus p 118). This principle sets forth that contract terms as well as statements and conduct by a party have to be interpreted in favor of the party against whom they are employed (Perillo §i; Stanivukovic pp 276-277). It is undisputed between the Parties that CLAIMANT had said something along the lines that it would make sure that “all of the paper work would reflect the new delivery date” in the course of the telephone call (PO ¶27; MfC ¶42). As indicated above [see ¶51-58], this wording is clear and was to be understood as an expression of CLAIMANT’s intent to modify the Contract, especially as this interpretation was entirely supported by its conduct. However, even if the Tribunal should come to the conclusion that there was any ambiguity with regard to CLAIMANT’s statement and conduct – quod non – this would still not change the outcome of the case, as any ambiguity would have to
be interpreted in accordance with the *contra proferentem* rule (*Automobiles Case*). Moreover, the party making a statement is under the duty to avoid expressions with ambiguous meanings (*cf* Honnold Art 8 ¶107.1). As a consequence, CLAIMANT’s statements are to be interpreted *in dubio* against CLAIMANT and in favor of RESPONDENT, *i.e.* as an agreement to modify the Contract. RESPONDENT therefore respectfully requests the Tribunal not to accept any interpretation of ambiguities in favor of CLAIMANT.

5. **Conclusion**

CLAIMANT is bound by the Parties’ mutual agreement of 9 February 2011 to modify the contractual delivery date to 24 February 2011 (Art 29(1) CISG; Art 33 CISG; *Valero v Green*).

RESPONDENT clearly proposed to modify the Contract in the course of the telephone call and CLAIMANT’s instant agreement was perfectly reflected in its statement and conduct. Alternatively, CLAIMANT’s own statement, indicating that it would amend all of the paperwork, was to be interpreted as an offer to amend the Contract itself which RESPONDENT accepted [*see ¶48-50*].

B. **The Oral Amendment Was Permissible under the Applicable Law**

The Art 96 declaration of Mediterraneo only concerns the conclusion of a contract – and is therefore irrelevant for its modification (1). Even if it were relevant, it would not impose a writing requirement on RESPONDENT in the present case (2): Wording and purpose of Art 96 CISG are clear and require the application of PIL principles for determining any applicable form requirements (2.a). Hence, Equatorianean law applies and does not impose any form requirements (2.b). Alternatively, the L/C satisfies the written form requirement (3).

1. **The Art 96 declaration of Mediterraneo is not relevant for the modification of the Contract**

The present case is about the oral *modification* of a contract, not its conclusion. The wording of Art 96 CISG is ambiguous in regards to the scope of the declaration. It can cover either the conclusion of a contract and its modification or only one of these. Art 96 sets forth that a declaration allows a state to impose a writing requirement on “a contract of sale or its modification”. If the state making a declaration does not clarify its scope explicitly in the declaration itself, it remains unclear. The fact that the SuprCt of Mediterraneo felt the need to explicitly address its scope (*AfA ¶32*), confirms that this ambiguity exists also regarding Mediterraneo’s declaration.

The content of this decision, however, is irrelevant for the Tribunal – as RESPONDENT brings forward (*SoD ¶12*). The jurisprudence relating to the interpretation of national legal rules is only
relevant for an international tribunal if these form part of the applicable law (Born, International Commercial Arbitration p 2963). As shown below, contrary to CLAIMANT’s allegations (see MfC ¶¶27-30), Mediterranean law is not applicable to the present dispute [see ¶83]. Consequently, the ambiguity of the scope of Art 96 CISG cannot simply be resolved by pointing to decisions of Mediterranean courts. It needs to be resolved by means of interpretation.

65 First, exceptions to a general principle need to be interpreted narrowly (Kramer p 155). Art 11 CISG enshrines the freedom of form principle as a fundamental maxim underlying the Convention (UNICTRAL Digest Art 7 CISG). Art 12 CISG, which is triggered by the declaration pursuant to Art 96 CISG, represents an exemption to this basic rule (UNICTRAL Digest Art 11) and therefore needs to be interpreted narrowly.

66 Second, the CISG aims at facilitating international trade by avoiding unnecessary formalities and national peculiarities (Mather supra note 4 p 158; Eiselen in CISG Methodology p 61; McMahon). A teleological interpretation thus militates for a narrow interpretation of Art 96 CISG (Berger p 15).

67 In sum, a lege artis interpretation of the scope of Art 96 CISG mandates that it concerns only the conclusion of contracts whenever the declaration itself does not specifically state otherwise. Thus, Mediterraneo’s declaration is not relevant in the present case – which only concerns the modification of the Contract.

2. Even if the Art 96 declaration of Mediterraneo was relevant, it would not impose a writing requirement on the present Contract

68 Contrary to its scope of application, the effects of Article 96 are clear on its face. Wording and purpose of Art 96 CISG in regard to its effect are unambiguous and militate for the application of the PIL approach for determining whether a form requirement is to be applied (a).

69 Therefore, even if Art 96 were to apply to the present case (quod non), this declaration would necessarily lead to the application of Equatorianean law – which does not impose any form requirements for the modification of a contract at any rate (b). This is in conformity with PIL principles (b.1) and the Parties’ intent (b.2). CLAIMANT’s attempts to argue otherwise fail – and in fact support RESPONDENT’s position (b.3).

a. Wording and purpose of Art 96 CISG are clear and require the application of PIL principles for determining any applicable form requirements

1) The wording of Art 96 CISG and the systematic structure of the CISG militate for the application of the PIL approach

70 The wording of Art 96 CISG only clarifies which Contracting States can make a declaration – namely states “whose legislation requires contracts of sale to be concluded in or evidenced by
writing”. Art 96 CISG does not, however, point to the law that is relevant for determining any applicable form requirement if such a declaration has actually been made.

71 This constellation constitutes a textbook example for the application of Art 7(2) CISG. This provision reads: “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law” (emphasis added).

72 The application of Art 96 CISG necessarily entails a decision on whether any form requirements are applicable in case of a declaration. This issue thus evidently represents a “question concerning matters governed by this Convention”. However, as Art 96 CISG does not specify the law applicable to decide this issue, this question is “not expressly settled” in the CISG itself. Further, there are no relevant “general principles” in the sense of Art 7(2) CISG with respect to this question (cf the principles in UNCTRAL Digest Art 7 CISG). As a result, Art 7(2) CISG provides that the matter needs to be resolved based on “the rules of private international law” (Hispafruit v Amuyen; Viscasillas in Kröll et al. Art 7 ¶48; Schwenger/Hachem in Schlechtriem/Schwenger Art 7 ¶42).

73 Art 96 CISG in connection with Art 7(2) CISG thus declare the rules of PIL relevant for determining the form requirement applicable to the Contract in the present case.

2) The purpose of Art 96 CISG and the CISG as a whole militate for the application of the PIL approach

74 Some commentators and courts have erroneously argued – in spite of the clear wording and structure of the CISG – that it would be preferable to always apply the writing requirement contained in the declaration state’s legal system whenever there is a party seated in an Art 96 declaration state. It is a generally accepted principle of interpretation that the clear wording constitutes the “primary and most important indication of a provision’s meaning” (Kramer p 59). It should thus be respected unless there are strong indications to the contrary. No such indications exist in the present case. To the contrary, any additional considerations clearly advocate for the application of PIL principles as well.

75 First, in an international setting, a writing requirement set out in a national legal system will never rule supreme. A state enshrining such a requirement in its law only has a ‘fair chance’ that its national writing requirement will apply – whenever the applicable PIL norms point to its legal system. Any Contracting State making a declaration pursuant to Art 96 CISG only has the legitimate interest to have its writing requirement protected in the same way as it was prior to entering into CISG. The concession made to such states by means of Art 96 CISG was thus
designed to allow them to maintain their status quo, i.e. to keep this ‘fair chance’ alive by not abolishing their national writing requirement altogether (Viscasillas in Kröll et al. Art 12 ¶2). It was not designed to suddenly establish an unconditional guarantee that their national writing requirement will apply in every single case.

76 **Second**, it is a telos inherent in the CISG as a whole to avoid formalities in an effort to facilitate international business [see ¶66]. Imposing writing requirements in isolated national legal systems on other states above and beyond the effect they have based on the governing PIL norms would attribute weight to them and in essence allow them to mutate into internationally applicable uniform law (Schlechtriem/Butler p 62). Such an unreasonable result is clearly not in conformity with the purpose of the CISG (cf Schlechtriem in Caenmerer/Schlechtriem Art 12 ¶2; DiMatteo et al., International Sales Law p 42 FN 44).

77 **Third**, the unconditional application of the declaration state’s law also leads to nonsensical results. Most obviously, it entails irresolvable conflicts whenever the countries of both parties to an international sales contract have made such a declaration (Ziegel Art 12). It is a generally accepted principle of interpretation that provisions should not be interpreted in a way that makes them inoperable (Villinger Art 31 ¶7; Idem Art 32 ¶9; cf Kramer p 123). An interpretation that will regularly result in an irresolvable impasse can evidently not be the correct one.

3) **Courts and commentators have accepted that the PIL approach is correct**

78 The above-discussed considerations show that the application of PIL principles is the only reasonable approach under the CISG. It is therefore not surprising that a clear majority of commentators support this view (and not the unconditional approach of the declaration state’s writing requirement as CLAIMANT incorrectly alleges (MfC ¶¶16 and 18; a position that – tellingly – is contradicted in its own memorandum, e.g. in MfC ¶27) (Viscasillas in Kröll et al. Art 12 ¶8; Schlechtriem/Schmidt-Kessel in Schlechtriem/Schwenzer Art 12 ¶3; Neumayer/Ming p 593; Rajski in Bianca/Bonell Art 96 ¶2.2.; Witz in Witz et al. Artt 11-12 ¶12). These and other commentators support the application of the PIL approach as the correct interpretation of Art 96 CISG for the reasons mentioned above as well as based on a number of further considerations (including arguments based on the historical interpretation of the Convention and its international character).

79 Similarly, a large number of courts have held that the PIL approach is correct (e.g. Hispafruit v Amuyen). These include very recent decisions – which already had the benefit of being able to take into consideration the arguments advanced by commentators and other courts (e.g. Forestal Guarani v Daros International).
b. **The PIL of the forum designates Equatorianean law as applicable, which does not impose a writing requirement on the modification of the Contract**

1) PIL principles point to Equatorianean law

80 As discussed above, the CISG requires the application of PIL principles for determining any applicable form requirement resulting from an Art 96 declaration. It is widely accepted that international tribunals may rely on **generally acknowledged principles of private international law** in resolving conflict of laws issues (Poudret/Besson ¶687; Gaillard/Savage ¶¶1548-1549; Berger in International Economic Arbitration p 506). International tribunals have thus relied on widely accepted principles of PIL, in particular the *lex nexus* principle (ICC 4237) or the closely connected center of gravity principle (ICC 5717) – often with an explicit reference to international conventions which reflect those principles (see FN 71 in Poudret/Besson p 585).

81 Specifically, the reference to the seat of the party making the characteristic performance (cf PO2 ¶33) reflects a modern and widely accepted key principle of PIL – including in international arbitrations (Redfern/Hunter ¶3.215) – for determining the closest connection of a contractual relationship to a particular legal system. Its pivotal importance is acknowledged by leading commentators and reflected in influential international Conventions (Redfern/Hunter ¶3.208, 3.215; Gaillard/Savage ¶1549; see also Rome I; Hague 1955; Hague 1986). In a sales contract, the **seller** is generally accepted to provide the ‘characteristic’ performance (Lipstein p 407; Schlechtriem/Butler FN 73 p 105; see also Bonaldo v AF) – and therefore the state where it has its seat provides the applicable law. Likewise, - and contrary to MfC ¶28 – the place of performance is widely acknowledged as an important reference point for determining the applicable law (see Restatement 71').

82 In the present case, these central factors point in one direction only: the law of Equatoriana. It is in Equatoriana that the seller, Equatoriana Clothing Manufacturing, Ltd. (RESPONDENT), has its seat and where performance of the Contract was to be rendered (AfA ¶11; Cl Ex 1 ¶3). In the present case there are further supporting elements relevant for the determination of the applicable law that support the correctness of this approach – including the place of the conclusion of the Contract (PO2 ¶7, 33) and the fact that – as CLAIMANT concedes – “the manufacturing may have taken place in Equatoriana, and delivery was FAS to an Equatoriana port” (MfC ¶28).

83 On this basis, the applicability of Equatorianean law is crystal-clear. There are simply no relevant circumstances that point to any other law, including the law of Mediterraneo. Specifically, leading commentators have emphasized that the place of negotiation of the contract is irrelevant in applying the ‘closest connection test’ (e.g. Kaufmann-Kohler/Stocki p 131; contrary to MfC ¶28).
CLAIMANT’s far-fetched attempts to argue for a relevant connection to another legal system must necessarily fail (MfC ¶28).

2) The application of Equatorianean law is in line with the Parties’ intent

Within the above-described legal framework, Mediterraneo’s declaration pursuant to Art 96 CISG leads to the application of PIL principles – via Art 7(2) CISG – when determining the form requirement relevant for their Contract. This is the context within which the Parties’ choice of law clause has to be understood:

It is a generally recognized principle of PIL that parties to an international commercial agreement are free to choose the applicable law (Redfern/Hunter ¶3.94). The Parties’ choice of law clause must therefore be taken seriously. Importantly, this clause does not only point to the CISG but adds the wording “…without regard to any national reservation…” (AfA ¶31; Cl Ex 1 ¶20).

Nothing in the record supports CLAIMANT’s allegation that this part of the provision does not reflect any relevant intention of the Parties (MfC ¶21). To the contrary, in negotiating the Contract, the Parties – being sophisticated businesses – must be considered to have carefully chosen the implementation of this wording. They have thus clearly expressed a choice within the PIL environment created by Art 7(2) CISG that the law of Mediterraneo should not apply in determining any relevant form requirement pursuant to Art 96 CISG. The Parties have thus drafted their choice of law clause to implicitly declare the law of Equatoriana – which is the only relevant alternative legal system in the present case – to be the relevant one.

CLAIMANT attempts to deny the relevance of the Parties’ clear choice. Lacking a proper basis for this position, it is forced to refer to principles which are evidently inapplicable. Most strikingly, CLAIMANT seeks refuge under the principle of severability, arguing that the wording “…without regard to any national reservation…” contained in the Parties’ choice of law clause is void but does not affect the rest of the clause (MfC ¶21). This attempt fails for a number of reasons:

First, CLAIMANT has not demonstrated why this wording should be void in the first place. The only relevant allegation that it does not reflect the Parties’ real intent (MfC ¶21) is not supported by the record [see ¶86].

Second, CLAIMANT misunderstands and misapplies the principle of severability. In reality, this principle merely provides that an international arbitration agreement is separable from the underlying contract with which it is associated, so that the fact that the contract is void does not automatically invalidate the arbitration clause (Born, International Commercial Arbitration p 410 et seq.). Indeed, Art 81(1) CISG (and its application in the Filanto Case) – the only reference on which CLAIMANT relies in support of its argument (MfC ¶21) – merely refers to the concept in
this way, as is universally accepted by commentators (Fauntoulakis in Schlechtriem/Schwenzer Art 81 ¶12; Tallon in Bianca/Bonell Art 81 ¶2.3). This principle (just like the second prong of Art 81 CISG) has nothing to do with and has no application regarding a – part of the wording of a – choice of law clause.

3) **CLAIMANT has not advanced any convincing arguments to the contrary**

CLAIMANT has advanced a number of further disparate attempts to justify its conclusion that the form requirement of Mediterraneo must be applied in any event. They all fail.

**First**, CLAIMANT disregards all of the above and does not shrink back form arguing that unconditionally applying the declaration state’s form requirement facilitates the *telos* underlying the CISG. It is manifestly nonsensical, however, to claim that giving undue weight to idiosyncratic national form requirements would facilitate the CISG’s purpose to “make it easier and more economical to buy and sell” (McMahon) (see MfC ¶17).

**Second**, it is on this faulty basis that CLAIMANT then proceeds to conclude that derogating from Art 96 CISG would violate the VCLT as a state cannot act to defeat the purpose of a treaty it signs (MfC ¶20). CLAIMANT overlooks that neither of the Parties is a state nor are they bound by international public law.

**Third**, CLAIMANT’s argument that not applying the Art 96 declaration to the modification of the Contract would also constitute a violation of the law of Mediterraneo (MfC ¶20) assumes its own conclusion and is therefore meaningless.

**Fourth**, CLAIMANT undertakes the far-fetched attempt to build an argument on the principle of estoppel, or *venire contra factum proprium*. Its reasoning is not entirely clear but seems to suggest that RESPONDENT chose Mediterranean law (MfC ¶30), allegedly in line with the Art 96 CISG declaration (MfC ¶ 30), thereby creating justified reliance in the application of Mediterranean law. Not a single element of these arguments withstands scrutiny. Neither does Art 96 CISG entail the application of Mediterranean law [see ¶83], nor have the Parties chosen that legal system as the applicable law [see ¶85]. There thus could be no justifiable reliance by CLAIMANT on which it could build an estoppel argument.

In fact, CLAIMANT merely attempts to hold RESPONDENT responsible for its own neglect. Given the clear legal framework described above, CLAIMANT would have had to negotiate a ‘*no oral amendment*’ clause into the Contract if it wanted to impose a writing requirement on the modification of the Contract. It failed to do so (PO2 ¶11). CLAIMANT cannot now turn around and conjure up non-existing contractual rights on the basis of any alleged disappointed reliance.
3. **Alternatively, the written form requirement is fulfilled by the L/C**

Even if Art 12 and 96 CISG were applicable as CLAIMANT alleges (MfC ¶¶16-32, 39), the amendment of the Contract would still be perfectly valid, since the amendment of the irrevocable L/C sufficiently evidences the modification of the Contract in writing (Conservas v Lanín; Schroeter in Schlechtriem/Schwenzer Art 29 ¶7).

First, a L/C includes all the constitutive elements of the Contract and has to be consistent with its actual terms. It therefore constitutes a piece of extrinsic evidence in writing for the contract that fulfils any written form requirement (Russia 25 March 1997; Ng Nam v Tay Ninh; see also Eiselen §k).

Second, a L/C is of considerable evidentiary value: It specifies the goods and their delivery date precisely and the bill of lading is considered evidence that the goods have been duly delivered conforming to the contract (UNCTAD ¶11). On this basis, some tribunals have given prevalence to the L/C over a deviating written contract– specifically in case of an Art 96 reservation (Steel Billets Award).

In the present case, the Parties agreed to modify the contractual delivery date to 24 February 2011 and CLAIMANT duly amended the L/C to reflect their agreement (AfA ¶15; Cl Ex 1), thereby fulfilling the form requirement that would be mandated by Mediterraneo’s Art 96 reservation anyway.

**C. Alternatively, even if the Contract Was not Amended, CLAIMANT Is not Entitled to Damages**

RESPONDENT did not breach its contractual obligations towards CLAIMANT as the Contract had been duly modified to the delivery date of 24 February 2011 [see above ¶¶45-99]. However, even if the Tribunal should hold that the Parties had not validly agreed on a modification of the Contract, CLAIMANT is not entitled to damages. Contract Clause 10 does not derogate from the damages regime of the CISG (1). RESPONDENT is exempt from liability pursuant to Art 79(1) CISG (2) and, finally, CLAIMANT is estopped from claiming damages (3).

1. **Contract Clause 10 does not derogate from the damages regime of the CISG**

Contract Clause 10 stipulates a price deduction of 1.5% for each day of late delivery (Cl Ex 1), granting CLAIMANT the advantage that it would not have to prove the actual amount of loss suffered as a consequence of a late delivery. However, based on the facts of this case, an interpretation of this Clause shows that the Parties did not intend to deviate from any other provisions of the CISG damages regime (except the assessment of the quantum of damages).
Specifically, there is no indication in the record that the Parties intended to deviate from the exemption granted by Art 79 CISG – given that an ‘Incentive’, as Clause 10 was labeled (Cl Ex I), could only impact RESPONDENT’s willingness to perform the Contract as long as RESPONDENT was able to influence the actual delivery date of the goods in the first place [cf ¶¶102-107]. As a rule, it cannot be assumed that parties derogated from Art 79 CISG, unless there is a specific agreement to this effect (ICC 7585; Mohs/Zeller; Enderlein/Maskow/Strohbach Art 79 ¶13.1). Moreover, should the Tribunal be in doubt about the correct interpretation of Clause 10, the Clause needs to be interpreted contra proferentem [see ¶60], i.e. in favor of RESPONDENT, since the Contract was negotiated on the basis of a contract model used by CLAIMANT (PO2 ¶7).

2. RESPONDENT is exempt from liability under the CISG

102 RESPONDENT is exempt from liability pursuant to Art 79 CISG since the late delivery was due to an impediment beyond RESPONDENT’s control, which could neither have been foreseen, nor overcome, nor avoided.

103 RESPONDENT could not meet the initial contractual delivery date because its supplier failed to provide materials required for the production of the polo shirts on time. This in turn made timely performance on the part of RESPONDENT impossible (AfA ¶14; Re Ex I). The supplier’s delay was caused by a strike, which immensely reduced the suppliers’ production capacity (PO2 ¶12). Since RESPONDENT had no means of influencing its supplier’s labor relations, the strike and the supplier’s subsequent default cannot be attributed to RESPONDENT’s sphere and thus constitute an impediment beyond its control. (Art 79 CISG; cf Flippé v Douet, stating in sub III that a failure of performance by a supplier who was to deliver the goods to the seller constituted an impediment beyond the seller’s control). Moreover, no reasonable business person can be expected to take such a rare event as a strike at a vital supplier into account (Magnus in Staudinger Art 79 ¶21; Herber/Czerwenka Art 79 ¶13; Huber pp 476 et seq.), nor could it have been foreseen by RESPONDENT, and there are no facts in the file that would indicate otherwise.

104 RESPONDENT could not, despite its best efforts, have overcome this impediment (AfA ¶14; Re Ex I; PO2 ¶13). RESPONDENT was not informed of the problems its supplier had encountered before the evening of 8 February 2011, i.e. after the decision on how to allocate the remaining capacity to the existing contracts had already been taken by the supplier’s management (PO ¶12). It was not before 9 February 2011 that it became clear to RESPONDENT that timely delivery would in fact be impossible (Re Ex I; PO2 ¶12). Even though RESPONDENT did everything in its power to find another supplier for the goods, not a single substitute provider was able to
guarantee timely delivery on such short notice (PO2 ¶13). Consequently, timely performance had become impossible and RESPONDENT had no other choice but to inform CLAIMANT as soon as possible about this unfortunate situation (AfA ¶13; Cl Ex 2; Re Ex 1) – thereby conforming to the notice requirement prescribed by Art 79(4) CISG and suggesting a new delivery date.

Even if the Tribunal found that timely performance was not impossible, RESPONDENT would be exempt from liability on the basis of hardship, since it would have been excessively onerous and burdensome to deliver on the date initially agreed upon (the concept of hardship has been accepted under the CISG by case law and legal writing, Scafom v Lorraine; CISG AC No 7 §3.1; Atamer in Kröll et al. Art 79 ¶¶78-79; see also Art 6.2.2 UNIDROIT Principles). In ascertaining whether a situation amounts to hardship, primary consideration is to be given to the circumstances of the individual case (Schwenzer p 716). In the present case, the contractual equilibrium was fundamentally disrupted, as offers of alternative suppliers were tremendously more expensive than the price RESPONDENT had initially contracted for (PO2 ¶13). Since RESPONDENT could hardly cover the production costs with the Contract price to be paid by CLAIMANT in the first place (PO2 ¶6), contracting with a substitute supplier would have transformed the deal into a financial disaster for it. Naturally, RESPONDENT cannot be expected to undertake such commercially unreasonable steps (Shoes Case). On the contrary, courts impose a duty to renegotiate the contract on the other party, i.e. CLAIMANT, if the procurement becomes more expensive due to an impediment (Scafom v Lorraine; Schwenzer pp 721-723).

Finally, mere ‘suppliers’ are not to be considered a ‘third person’ within the meaning of Art 79(2) CISG (CISG AC No 7 §2.3; Schwenzer in Schlechtriem/Schwenzer Art 79 ¶37; Magnus in Staudinger Art 79 ¶40). Thus, only RESPONDENT has to fulfill the requirements of Art 79(1) CISG in order to be exempt from liability. However, even if RESPONDENT’s supplier were to be qualified as a ‘third person’ pursuant to Art 79(2) CISG, RESPONDENT would still be exempt under Art 79 CISG, as the supplier itself fulfills all of the requirements set forth by Art 79(1) CISG. RESPONDENT’s provider had been hit by a strike which deprived it of 50 % of its production capability (PO2 ¶12). This impediment could not have been overcome by the supplier, as various other orders already existed and only a few of them could be fulfilled while capacity was reduced (PO2 ¶12). Furthermore, strikes that substantially interfere with normal production are generally qualified as grounds for an exemption under Art 79 CISG (Magnus in Staudinger Art 79 ¶21; Huber pp 413, 476-477).

In sum, the default of RESPONDENT’s supplier, caused by the strike, was a substantial impediment within the meaning of Art 79 CISG that RESPONDENT could not have overcome...
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MEMORANDUM FOR RESPONDENT

without suffering economic hardship. Nothing indicates otherwise. Hence, RESPONDENT is exempt from liability under Art 79 CISG.

3. **Alternatively, CLAIMANT is estopped from claiming damages as it waived its right implicitly**

108 Estoppel or ‘venire contra factum proprium’ is an underlying principle of the Convention pursuant to Art 7(2) CISG and underpins Art 29(2) CISG (Dividing Wall Panels Case; Russia 27 July 1999; Rolled Metal Sheets Award; Ferrari ¶4.2; Kee and Opie in Festschrift for Kritzer pp 232-246; DiMatteo et al., Interpretive Turn p 343). In line with this principle, a party is “precluded from exercising its rights if this party by its conduct has led the other party to believe that it will not exercise the respective right” (Magnus p 249; see also Surface Protective Case; Caterpillar v Usinor Induseel). On this basis, CLAIMANT is estopped from raising a damages-claim for the late delivery in the present case, as for the following three reasons.

109 **First**, after being informed about the fact that RESPONDENT would not be able to meet the initial delivery date, CLAIMANT’s conduct indicated agreement to a modification of the contractual delivery date [of ¶¶51-59].

110 **Second**, CLAIMANT – for a period as long as 1.5 years – acted as if the polo shirts had been delivered on time (AfA ¶14; SoD and AfA e contrario). CLAIMANT never mentioned or even hinted at any intent to claim damages for the alleged late delivery: neither in the course of the telephone call on 9 February 2011, as conceded by CLAIMANT (Cl Ex 2), nor in the two months between the telephone call and the notice of avoidance on 8 April 2011 (Cl Ex 6). CLAIMANT could have promptly and easily done so, since it learnt that it would face a claim for damages by DC on the same day it was notified about the delay (Cl Ex 3). Moreover, as the contractual damages clause pre-calculated the damages (Cl Ex 1 ¶10), CLAIMANT did not need to wait until the damage was substantiated. In addition, as Clause 10 provided for a ‘price deduction’ (Cl Ex 1), RESPONDENT could reasonably assume that any such deduction would occur – if at all – at the occasion of the amendment of the L/C (AfA ¶15); however no deduction was made (AfA ¶37).

111 **Third**, on 8 April 2011, when CLAIMANT finally contacted RESPONDENT to inform it about its intent to avoid the Contract, it did not communicate its intent to initiate a claim regarding the late delivery either (Cl Ex 6). CLAIMANT could reasonably be expected to address any outstanding issues deriving from the very same contractual relationship on this occasion at the latest (cf Clothing Case).

112 **In sum**, CLAIMANT did not even once refer to any claims regarding the issue of the alleged delay, even though there were multiple opportunities to do so. According to relevant case law (Surface...
Protective Case; Caterpillar v Usinor Industeel) and commentary (Magnus p 249), rights are waived implicitly if the conduct of a party cannot reasonably be interpreted any other way. Thus, even inactivity is sufficient to induce reliance on a waiver (Tuzzi Trend v Keijzer-Somers). Therefore, CLAIMANT’s conduct in the present case is to be qualified as an implicit waiver of its right to damages – if such right had ever existed – which RESPONDENT reasonably relied upon. Now, 1.5 years after the alleged late delivery, CLAIMANT’s unjustified, unreasonable and unexpected damages claim poses a severe financial burden for RESPONDENT, as RESPONDENT had already retrieved the full amount from the L/C (Re Ex 2) and trustfully used it to cover the production costs (PO2 ¶6). CLAIMANT’s behavior constitutes a textbook example of venire contra factum proprium which must not be dignified by awarding a damages claim that is justified by nothing.

D. Conclusion

113 In conclusion, RESPONDENT is not in breach of contract since the Contract was properly amended [see ¶¶45-51]. The oral amendment is valid, since Mediterraneo’s Art 96 reservation is not relevant in the present case [see ¶¶62-99]. Nonetheless, even if the Contract had not been amended, RESPONDENT cannot be held liable for damages, because RESPONDENT is exempt under Art 79 CISG [see ¶¶102-107]. Alternatively CLAIMANT is estopped from raising a damages claim 1.5 years after it should have been substantiated [see ¶¶108-112].

III. RESPONDENT DID NOT BREACH THE CONTRACT AS THE GOODS WERE IN CONFORMITY WITH THE CONTRACT

A. The Polo Shirts Delivered by RESPONDENT Were of the Quality Required by the Contract (Art 35(1) CISG)

1. The polo shirts were produced in accordance with the Contract specifications

114 By concluding the Contract, RESPONDENT agreed to deliver polo shirts matching the Contract specifications as described in its Annex 1 (Cl Ex 1 ¶f). The Contract specifications only contain detailed physical characteristics such as material, size and color. The specific polo shirts that RESPONDENT delivered undoubtedly conformed to these precise requirements (PO2 ¶9).

2. RESPONDENT acted in conformity with Contract Clause 12

115 Even if one were to look beyond the clear Contract specifications, as CLAIMANT suggests, there is but one conclusion: RESPONDENT acted in conformity with the Contract.
CLAIMANT relies on Clause 12 of the Contract to argue that RESPONDENT violated its obligations and hence should be liable (MFJ ¶56). According to Clause 12, RESPONDENT had to “conform to the highest ethical standards in the conduct of [its] business” (C Ex 1 ¶12). To prevail, CLAIMANT would need to prove that this Clause meant that RESPONDENT was prohibited to use child labor, even in transactions unrelated to the Contract. That is not the case:

a. **The CISG has no missionary function**

Applying the correct legal standard clearly contradicts CLAIMANT’s position already on an abstract level. Interpretation pursuant to Art 8 CISG operates within certain boundaries. In the context of a party’s ethical convictions, one must bear in mind that “[t]he CISG does not have a missionary function: Interpreting contracts according to high moral convictions would lead to an abuse of the CISG and would open the floodgates for diverging results and decisions” (Schlechtriem, Non-Material Damages p 101). To argue, as CLAIMANT would need to, that the term ‘highest ethical standards’ as used in Contract Clause 12 would prohibit RESPONDENT to use child labor even in business unrelated to CLAIMANT and thereby change its whole production methods, or else create liability of RESPONDENT under the present Contract is preposterous and would constitute a prime example of using the CISG as a missionary tool.

b. **Contract Clause 12 does not prohibit the use of child labor**

The Contract, which was drafted by CLAIMANT (PO2 ¶7), nowhere mentions the use or non-use of child labor. If the issue had been of any importance to CLAIMANT, one would expect to find it addressed in sufficient clarity. However, indications as to the meaning of conformity “to the highest ethical standards in the conduct of [its] business”, a vague general term at best, are nowhere to be found. Pursuant to the *contra proferentem* rule, unclear terms are to be interpreted against the person introducing the unclear wording to the contract (Zuppi in Kröll et al. Art 8 ¶24; Schmidt-Kessel in Schlechtriem/Schwenzer Art 8 ¶49[see ¶60]. Since it was CLAIMANT who included its standard policy clause in the Contract (PO2 ¶¶4, 7) without so much as a hint to child labor and, importantly, its purported prohibition even in some unrelated business transaction, CLAIMANT cannot now claim non-conformity of the polo shirts based on its own – legally irrelevant – ethical convictions.

When interpreting an ambiguous term, the CISG generally requires that statements made by a party be interpreted according to that party’s intent where the other party knew or could not have been unaware what that intent was (Art 8(1) CISG) or else according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (Art 8(2) CISG); in all cases “due consideration [needs to] be given to all the relevant
circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties” (Art 8(3) CISG) ([cf Honnold Art 8 ¶107.1]). Looking at the relevant circumstances of the present case, it would be absurd to assume that RESPONDENT breached the Contract because it used child labor in some unrelated project.

120 **First,** as stated, none of the polo shirts delivered to CLAIMANT lacked the requirement of ethical production; more specifically, none of them were manufactured by children ([Cl Ex 7; PO1 ¶8].

121 **Second,** child labor is used in Equatoriana ([SoD ¶5]), where RESPONDENT is seated ([AfA ¶3]. That is why CLAIMANT raised the issue of child labor during the audits back in 2007, before CLAIMANT and RESPONDENT concluded their last contract ([AfA ¶¶9, 34]). With regard to the present Contract, and as opposed to the contract signed in 2008, CLAIMANT did not address the issue at all. Rather, it chose the cheapest offer available to do the job ([Cl Ex 2], an indication that ethical considerations were not at all of the importance CLAIMANT now ascribes to them.

122 **Third,** the fact that CLAIMANT drafted an elaborate clause containing detailed sanctions for various stages of early or late delivery ([Cl Ex 1 ¶10]) but refrained from including any legal consequences for non-compliance with certain ethical standards also contributes to the impression of their low priority.

123 **Fourth,** according to Oceania Plus’ own internal policy, CLAIMANT should have performed a new audit; however, CLAIMANT chose not to do so ([PO2 ¶2]. It must therefore be assumed that CLAIMANT accepted the possibility that RESPONDENT might use child labor at least on some occasions. Indeed, by violating its own policy, it appears that child labor, even if only this one time, was not a decisive factor for CLAIMANT when contracting with RESPONDENT.

124 **Fifth,** CLAIMANT knew that RESPONDENT employed children for the production of its goods on occasion in some of its plants or at least had serious doubts as concerns RESPONDENT’s production methods ([AfA ¶9; Cl Ex 2; PO2 ¶¶3, 5]). If this issue had been of any importance, CLAIMANT would have needed to clarify the present situation prior to executing the Contract with RESPONDENT. CLAIMANT, however, avoided so much as even touching upon the issue. Indeed, according to the facts, CLAIMANT ‘most likely’ would have performed an audit, were it not for the time constraint ([PO2 ¶2] – CLAIMANT thus made a conscious choice and opted for maintaining business over maintaining ethics. Consequently, CLAIMANT’s conduct of its business can only be understood as acceptance of RESPONDENT’s general production methods.

125 **Sixth,** after the default of the initial supplier, RESPONDENT was not the only seller offering a timely delivery for CLAIMANT’s needs ([AfA ¶10]. However RESPONDENT’s offer was the
cheapest (PO2 ¶6; AfA ¶10). RESPONDENT offered to sell the polo shirts for USD 550,000. The next cheapest price on offer was USD 600,000. CLAIMANT knew that child labor was common at RESPONDENT’s seat (SoD ¶3). CLAIMANT also knew that RESPONDENT occasionally used child labor (PO2 ¶3). However, in blatant disregard of its own group policy (PO2 ¶2), CLAIMANT chose not to audit RESPONDENT prior to the execution of the Contract – clearly the only thing that mattered to CLAIMANT was saving money – even as little an amount as USD 50,000.

126 Seventh, CLAIMANT in the present case in fact repeatedly violated its own group policy. After the broadcast of 5 April 2011 and after it had declared the Contract with RESPONDENT avoided, in full knowledge of the reaction of Oceania’s population to any kind of child labor, CLAIMANT again refrained from conducting an audit when it purchased from Gold Service Clothing the polo shirts which it needed to fulfill its own contractual obligations with DC (PO2 ¶22).

127 Considering all these facts, CLAIMANT’s interpretation of Clause 12 that RESPONDENT was contractually obliged not to use child labor in its business at all (MfC ¶60) is flawed. To the contrary, considering the circumstances of the present case, RESPONDENT or, for that matter, any reasonable person having RESPONDENT’s knowledge of the facts (Art 8 CISG) would conclude that Clause 12 in no event prohibits the use of child labor – at least – in projects unrelated to the present Contract. Consequently, RESPONDENT did not breach the Contract.

128 Contrary to CLAIMANT’s assertion (MfC ¶57), the fact that the policy clause was also included in the previous contracts with RESPONDENT (PO2 ¶15) cannot be regarded as a ‘trade usage’. To establish a trade usage between the parties, a certain frequency and duration of the relationship is necessary (Vine Wax Case; Schmidt-Kessel in Schlechtriem/Schwenzer Art 9 ¶8). That requirement clearly is not met: Applied to the present case, it would have been necessary that the Parties shared a common understanding that child labor is not allowed to be used by RESPONDENT in any of its operations, even unrelated to contracts concluded with CLAIMANT, and that this mutual understanding consistently prevailed over a longer period of time. That was not the case. RESPONDENT is not a regular supplier to CLAIMANT (PO2 ¶¶5-6). The last contract between the Parties was concluded years ago, back in 2008 (AfA ¶9) and, moreover, none of the previous contracts between CLAIMANT and RESPONDENT ever concerned shipment to Oceania (PO2 ¶15).

In any event, as demonstrated [see ¶¶120-127], in the present case Clause 12 can clearly not be interpreted such as to prohibit child labor, at least in unrelated transactions. Also for this reason, CLAIMANT’s trade usage argument is beside the point.
B. **CLAIMANT Cannot Claim Damages Based on a Violation of 35(2)(b) CISG**

129 According to Art 35(2)(b) CISG, the buyer cannot expect the goods to be fit for a particular purpose if it “did not rely, or it was unreasonable for it to rely, on the judgment of the seller”.

130 “The global application of the CISG will very often bring together merchants with quite different [...] ethical beliefs, resulting in sometimes extremely diverging social standards for productions methods” (*Schlechtriem, Non-Material Damages* p 101). If particular standards – including compliance with certain manufacturing standards and practices – in the buyer’s state are higher than those in the seller’s state, the buyer must draw the seller’s attention to that fact if it requires compliance with these standards (*New Zealand Mussels Case, Schweizer in Schlechtriem/Schweizer Art 35 ¶16*).

131 The unusually high concern of Oceania’s public about child labor is a perfect example for such a particularity. RESPONDENT could never have foreseen the customers’ disproportionate reaction, *i.e.*, their total refusal to buy ethically correct produced polo shirts because of RESPONDENT’s use of child labor in the production of a different product for a completely different market. CLAIMANT on the other hand knew about those particularities and also about the very different production standards prevailing in Equatoriana (*SoD ¶3*). Therefore, Art 35(2)(b) CISG required CLAIMANT to inform RESPONDENT about the unusually high standards in order to ensure the goods’ fitness for resale in Oceania. However, at no time did CLAIMANT make RESPONDENT aware of the fact that Oceanian consumer behavior obviously differs significantly from Equatorianean consumer behavior and the vague wording of Clause 12 does not convey sufficient information in this respect either. Therefore, it must be concluded for purposes of Art 35(2)(b) CISG that it was unreasonable for CLAIMANT to rely on RESPONDENT’s judgment. Consequently, CLAIMANT cannot rely on Art 35(2)(b) CISG to claim breach of contract asserting it could not resell the polo shirts delivered by RESPONDENT in Oceania.

132 In this context, CLAIMANT, relying on some unspecified ‘international trade usage’ that child labor was prohibited in contracts such as the present one and referring to allegedly prohibited child labor in ‘harmful environments’ pursuant to the ILO Convention 182 on the Prohibition of the Worst Forms of Child Labor, in effect asserts that RESPONDENT was aware of the situation in Oceania (*MfC ¶58*). This assertion is incorrect. The fact that some international concerns use general terms prohibiting child labor does not constitute an internationally binding trade usage – the more so as it is likely that the majority of companies do not have such policies in place. More importantly, the Convention – in contrast to CLAIMANT’s insinuation (*MfC ¶58*) – not only does not contain a term ‘harmful environments’, it does not even prohibit all forms of child labor.
This convention only prohibits the worst forms of child labor such as slavery, prostitution and drug trafficking. Indeed, the ILO Convention 182 (Art 4) leaves it up to the signatory states to enact legislation defining those types of child labor which by their nature or the circumstances in which they are carried out are likely to harm children. Accordingly, the fact that child labor is used in Equatoriana, where Respondent is seated, even though it has ratified the ILO Convention 182 (SoD ¶3; AfA ¶32), is not surprising and in fact permissible pursuant to the ILO Convention 182. Claimant’s ILO Convention 182 arguments do therefore not support its position.

C. Claimant Is Estopped from Claiming Liability

133 It is a universally recognized principle that good faith and fair dealing must be applied in business relationships. This principle also applies to contracts governed by the CISG (Beer Case; for estoppel of Caterpillar v Usinor Industeel; Vissasillas in Kröll et al. Art 7 ¶25; Melis in Hosnell Art 7 ¶3; Bonell in Bianca/Bonell Art 7 ¶2.4.1). In the present case, in light of its previous conduct, Claimant is estopped from claiming liability pursuant to Art 35 CISG:

134 As stated [see ¶124], Claimant was aware that Respondent had in fact used child labor before (PO2 ¶3) and that it is operating in a part of the world where child labor is used (SoD ¶3). Even Claimant’s own group policy would have required an audit prior to the conclusion of the Contract (PO2 ¶2), however, Claimant, out of several offers instantly chose the cheapest one (Cl Ex 2). In fact, despite having had doubts concerning Respondent’s ethical integrity (Cl Ex 2), Claimant entered into several contracts with Respondent, all of them including the OP policy Clause 12 (PO2 ¶4), an extremely vague clause drafted by Claimant. In fact, obtaining the required polo shirts in a timely manner for a low price was of overriding importance to Claimant [see ¶¶121-126].

135 Consequently, to now claim liability under either Art 35(1) CISG or Art 35(2)(b) CISG by attributing to Contract Clause 12 a meaning that would prohibit the use of child labor even in unrelated transactions would violate good faith – under these circumstances, Respondent could at least assume that delivering polo shirts not produced by children (as Respondent did) was in conformity with the present Contract.

D. Claimant Was Not Entitled to Avoid the Contract

136 Even if the Tribunal holds that Respondent did breach the Contract by delivering non-conforming goods, the breach was not fundamental, as Claimant was not substantially deprived of what it was entitled to expect under the Contract (I). In addition, neither Respondent nor a
reasonable person could have foreseen the reaction of the Oceanian public to the publications mentioning child labor (2).

1. **CLAIMANT was not substantially deprived of what it was entitled to expect under the Contract**

   Under the CISG, avoidance is a remedy of last resort (Cobalt Sulphate Case; Schroeter in Schlechtriem/Schwenzer Art 25 ¶51); the breach must be such as to “rip the fabric of the parties” (Honnold ¶181.2). Accordingly, Art 49(1)(a) CISG permits avoidance of a contract only in case of a ‘fundamental’ breach. Pursuant to Art 25 CISG, for a breach to be fundamental, it must result in such detriment as to substantially deprive the other party of what it was entitled to expect under the contract.

   Case law has specified that “[A] breach can only be fundamental [and therefore lead to avoidance of the contract] if the goods are of no use at all for the buyer” (Stainless Steel Plates Case). In case the buyer is able to make any reasonable use of the goods, the breach cannot be fundamental (Apple Juice Case; Gsell in Honsell Art 25 ¶¶43-44). Indeed, if the buyer does not use the goods for production or consumption purposes, but is operating in the trading sector, it can be expected to look for alternative possibilities to find reasonable alternative ways to re-sell the goods (Gsell in Honsell ¶44), even at lower prices (cf Meat Case, in which the German Supreme Court ruled that the seller has to accept a reduction in price of 25.5%; Saenger in Bamberger/Roth Art 25 ¶8a).

   In the present case, the polo shirts were perfectly usable. According to the facts, CLAIMANT managed to find a buyer in Pacifica (a country where CLAIMANT owns supermarkets) that paid a significant portion of the original purchase price only 12 days after CLAIMANT had declared the Contract avoided (AfA ¶¶22-24). Further, AM (CLAIMANT’s second mother company) is situated in a country that is not a party to the ILO Convention 182 (AfA ¶32 *e contrario*), from which it can be derived that this would have been another market less sensitive to child labor. Consequently, any breach by RESPONDENT could not have been fundamental pursuant to Art 25 CISG.

2. **RESPONDENT could not have foreseen the reaction of the public at the conclusion of the Contract**

   Pursuant to Art 25 CISG, a breach of contract is not fundamental if the party in breach did not or a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

   Contrary to CLAIMANT’s assertions (MfC ¶66 *et seq.*), the requirement of foreseeability imposed by Art 25 CISG is not met:
RESPONDENT contracted with CLAIMANT - situated in Mediterraneo (AfA ¶5) - and not with OP. Previous contracts between the Parties never concerned shipment to Oceania or deliveries to DC and most of them were about the delivery of goods for AM (PO2 ¶15). Importantly, as detailed above [see ¶131], RESPONDENT could never have foreseen the extreme reaction of Oceania’s public. In fact, no third party seller in RESPONDENT’s shoes would have foreseen that Oceania’s population would stop buying polo shirts after news that child labor may have been used by RESPONDENT in some transaction unrelated to Oceania and the present Contract respectively.

E. There Is No Issue with CLAIMANT’s Notice of Avoidance

CLAIMANT states that its avoidance of the Contract was properly declared and that notice was provided within reasonable time (MfC ¶¶72-88). As demonstrated [see ¶136], while it is RESPONDENT’s position that CLAIMANT was not entitled to avoid the Contract, it is undisputed that avoidance would have been declared properly and in time. According to the facts, avoidance was made in the appropriate form in any event by letter dated 8 April 2011 (Cl Ex 6), three days after CLAIMANT learned about the TV broadcast on the alleged use of child labor and on the same day as the newspaper article in the Oceania Times was published (AfA ¶¶18-19). Receipt of that letter was confirmed by RESPONDENT with letter dated 10 April 2011 (Cl Ex 7). Accordingly, the notice requirements stipulated in Art 26 CISG are met. Similarly, the requirement of Art 49(2)(b) CISG that avoidance must be declared within reasonable time has been observed.

CLAIMANT’s according submissions are therefore not relevant. For the avoidance of doubt, the question of proper and timely declaration of avoidance can only arise if avoidance as such is justified – which, as discussed, is not the case.

F. CLAIMANT Was Not Entitled to Avoid the Contract under Art 3.2.2 UNIDROIT Principles

Although not submitted by this CLAIMANT, an argument in favor of avoidance based on to Art 3.2.2 UNIDROIT Principles (mistake) is conceivable. It would, however, not have been successful in the present case for the following reasons:

Art 3.2.2 UNIDROIT Principles states that a party may avoid the contract for mistake if the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and – inter alia – the other party
caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

147 In the present case, CLAIMANT in fact knew that RESPONDENT has used child labor before (PO2 ¶3) and that RESPONDENT comes from a part of the world where child labor is used (SoD ¶3) [cf ¶¶121, 132, 134]. This fact alone excludes avoidance for mistake based on the UNIDROIT Principles. Furthermore, even if the Tribunal were to find there was an error, RESPONDENT did not cause it. It never purported not to use child labor in transactions unrelated to the Contract. For that reason, RESPONDENT also did not know respectively ought not have known of CLAIMANT’s mistake, if any.

148 As a result, CLAIMANT would not have been entitled to avoid the Contract for mistake.

G. CLAIMANT’s Submissions as to the Quantum of Damages Are Inadmissible and Inconclusive

149 The Tribunal bifurcated the proceedings and ordered that issues in regard to the quantum of damages arising out of the alleged breach may not be argued in the first stage of the arbitration (PO1 ¶9). CLAIMANT’s submissions as to the issue of mitigation (MfC ¶89) are therefore not admissible.

150 For the sake of completeness, RESPONDENT notes that CLAIMANT’s request for reimbursement of the full purchase price without taking into consideration in any way that it re-sold the remaining polo shirts (AfA ¶24) is also inconclusive and therefore to be rejected.

151 Finally, the Tribunal has to take into consideration that the burden of proving (entitlement to) damages rests firmly on CLAIMANT alone (Gotanda in Kröll et al. Art 74 ¶9; Schwenzer in Schlechtriem/Schwenzer Art 74 ¶64; CISG AC No 6). CLAIMANT would only be entitled to damages if it proves that the damages claimed were foreseeable to RESPONDENT at the time of the conclusion of the Contract (Schwenzer in Schlechtriem/Schwenzer Art 74 ¶45; Gotanda in Kröll et al. Art 74 ¶42). Extraordinarily high damages such as those requested by CLAIMANT – the amount is four times higher than the original purchase price (!) – are most uncommon and cannot, therefore, be considered to have been foreseeable (Huber in Huber/Mullis pp 273-274).

H. Conclusion

152 The polo shirts delivered by RESPONDENT undisputedly meet the Contract specifications. Further, Contract Clause 12 does not prohibit the use of child labor, at the very least as regards transactions unrelated to the Contract. As it is also undisputed between the Parties that the polo shirts delivered have been produced in an ethically correct manner they are in conformity with
the Contract. CLAIMANT failed to inform RESPONDENT, as it would have been obliged to, about the possibility of the Oceanian public reacting in such an irrational and highly disproportionate manner. It cannot therefore claim that the goods may not have been fit for their particular purpose. Thus, RESPONDENT clearly did not breach the Contract. Moreover, since CLAIMANT immediately re-sold the polo shirts to another company, any breach (if one were to assume a breach in the first place) can never have been fundamental - a fundamental breach being the prerequisite for avoidance. CLAIMANT consequently was not entitled to avoid the Contract. Furthermore, CLAIMANT failed to prove that RESPONDENT could have foreseen the possible consequence of its breach when concluding the Contract. This would however have been required for an entitlement to damages. Finally, the claim is inconclusive and CLAIMANT’s submissions as to quantum are inadmissible.

IV. REQUEST FOR RELIEF

In light of the submissions above, RESPONDENT respectfully requests the Tribunal

I. to admit Short’s Witness Statement;

II. to declare on the merits of the case that:

1. the Contract was amended and RESPONDENT fulfilled its obligation in due time;
2. RESPONDENT delivered polo-shirts in conformity with the Contract and therefore CLAIMANT was not entitled to avoid the Contract;
3. CLAIMANT’s claim for damages is rejected;

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

Respectfully signed and submitted by counsel on 17 January 2013

AGNIESZKA BIBRO • MAGDALENA JAWORSKA • BIANCA KREMER • HELEN LOREZ
ALINA SEEL • YOANNA SCHUCH • ALEXANDER ZOJER • STEFAN ZWEIKER