XX Annual Willem C. Vis International Commercial Arbitration Moot
In the matter of arbitration under
the Chinese European Arbitration Centre Hamburg Arbitration Rules
Case No. 20120107

UNIVERSITY OF BELGRADE

MEMORANDUM FOR CLAIMANT

CLAIMANT
Mediterraneo Exquisite Supply, Co.
45 Commerce Road
Capital City
Mediterraneo

RESPONDENT
Equatoriana Clothing Manufacturing, Ltd.
286 Third Avenue
Oceanside
Equatoriana

COUNSEL
VLADIMIR BOŠKOVIĆ ♦ MARIJA BUČKOVIĆ ♦ MAŠA MIŠKOVIĆ ♦ ANDRIJANA MIŠOVIĆ
TAMARA MOMIROV ♦ DRAGANA NIKOLIĆ ♦ DINA PROKIĆ ♦ DEJAN SIVČEV
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<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>China International Economic and Trade Arbitration Commission</td>
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<td>Danubian Arbitration Law</td>
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<td>e.g.</td>
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<td>et al.</td>
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<td>Lex arbitri</td>
<td>The procedural law of the seat of arbitration, i.e. the place where arbitration will take place</td>
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Year LIX

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STATEMENT OF FACTS

1. **Mediterraneo Exquisite Supply, Co.** (hereinafter: **CLAIMANT**) is one of the jointly owned subsidiaries of Oceania Plus Enterprises (hereinafter: **Oceanía Plus**) and Atlantica Megastores, serving as their apparel supplier.

2. **Equatoriana Clothing Manufacturing, Ltd.** (hereinafter: **RESPONDENT**) is an apparel manufacturer.

3. On 2 January 2011 **CLAIMANT** was contacted by Doma Cirun, also a subsidiary of **Oceanía Plus**, which urgently needed **CLAIMANT**’s services in order to launch “Yes Casual” polo shirts for the summer selling season in **Oceanía**, on 15 March 2011.

4. In order to comply with Doma Cirun’s needs, on 5 January 2011 **CLAIMANT** and **RESPONDENT** (hereinafter: the **Parties**), concluded a contract for the production of 100,000 “Yes Casual” polo shirts which were to be delivered by 19 February 2011 (hereinafter: the **Contract**). The **Contract** stipulated that all suppliers to **Oceanía Plus** or its subsidiaries had to conform to the highest ethical standards in the conduct of their business. The **Contract** also stipulated that all disputes arising out of or relating to it will be submitted to the Chinese European Arbitration Centre for arbitration, taking place in Vindobona, Danubia.

5. On 9 February 2011 Mr. Short, Contracting Officer at **RESPONDENT**, called Mr. Long, the Procurement Specialist at **CLAIMANT**, and stated its inability to make the shipping date of 19 February. Although it meant that **CLAIMANT** would not be able to deliver polo shirts to Doma Cirun on time, which was pointed out to **RESPONDENT** as an important fact during the negotiations, Mr. Long agreed to accept the late delivery.

6. On 5 April 2011 Channel 12 television broadcasted a shocking documentary, showing children working in appalling conditions in production of **RESPONDENT**’s “Yes Casual” brand. This was followed by an article in Oceanía Times, which condemned Oceanía Plus’s cooperation with **RESPONDENT**. Since Oceanía was internationally known as strongly opposing child labor, the film and the article led to public upheaval, which ultimately resulted in sales decline of polo shirts. This further caused a drop of Oceanía Plus’s share price, numerous lawsuits against Oceanía Plus, and finally avoidance of the contract by Doma Cirun on 8 April 2011 and various costly settlements. Upon receipt of the notice of avoidance by Doma Cirun, **CLAIMANT** immediately avoided the **Contract** with **RESPONDENT** due to non-compliance of the polo shirts.
with contractual requirements. 

RESPONDENT denied having breached the Contract and refused to take back the shirts.

7. On 1 July 2012 CLAIMANT filed its Application for Arbitration to the CEAC. On 4 August 2012 RESPONDENT submitted its Statement of Defense. The arbitrators were appointed by 7 August 2012. On 30 August 2012 the arbitrators’ declarations of acceptance and statements of independence were submitted to the CEAC. On 6 September 2012 CEAC confirmed that the arbitral tribunal was constituted. On 5 October and 1 November 2012 Procedural Orders 1 and 2 were issued respectively.

**INTRODUCTORY REMARKS ON LEGAL ARGUMENTS AND APPLICABLE LAW**

8. CLAIMANT, as buyer, and RESPONDENT, as seller, entered into a Contract for the sale of 100,000 units of polo shirts with “Yes Casual” label on the inside collar on 5 January 2011, calling for delivery on 19 February 2011, portside Oceanside, Equatoriana [CE1 ¶1; SC ¶10; SD ¶5] (hereinafter: the Contract). The Parties have agreed in the Contract to have any dispute, controversy or claim arising out of or relating to their Contract, or the breach, termination or invalidity thereof, settled by institutional arbitration administered by the Chinese European Arbitration Centre (hereinafter: the CEAC) in accordance with the 2012 CEAC Hamburg Arbitration Rules (hereinafter: CEAC Rules) [CE1 ¶19; SC ¶30; SD ¶11]. CEAC Rules incorporate the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter: UNCITRAL Rules) (Art. 1(3) CEAC Rules) and are largely identical to them due to the limited amount of tailor-made adjustments and amendments [CEAC.com, 2(a)]. For that reason, when discussing operation and meaning of certain articles of the CEAC Rules, CLAIMANT will occasionally refer to drafting history and commentaries of corresponding articles of the UNCITRAL Rules.

9. The Parties also agreed that the arbitration shall take place in Vindobona, Danubia [CE1 ¶19.a], thus agreeing to the law of Danubia as the lex arbitri. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments, including Option II of Article 7 (hereinafter: DAL) [SC ¶32]. Furthermore, Mediterraneo, Equatoriana and Danubia are all parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter: the NYC) [SC ¶32] and the Vienna Convention on the Law of Treaties (hereinafter the VCLT) [PO2 q.36], whereas Mediterraneo, Equatoriana and Oceania are
all party to the Convention on the Worst Forms of Child Labour (hereinafter: ILO Convention) [SC ¶32].

10. Finally, Clause 20 of the Contract deals with the applicable substantive law in the following manner: “This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law” [CE1]. Both Equatoriana and Mediterraneo are parties to the CISG [SC ¶32]. Whilst Mediterraneo has made the Article 96 declaration, Equatoriana made no reservations or declarations when ratifying the CISG [SC ¶32].

11. On 1 July 2012 CLAIMANT initiated this arbitration claiming, inter alia, recovery of purchase price and damages for RESPONDENT’s breach of Contract [SC ¶37]. In its Statement of Defense, RESPONDENT did not, at any point, object to any of the abovementioned, nor did it question the validity of the arbitration agreement, or the fact that it encompasses the present dispute [SD ¶¶11,12]. RESPONDENT did, however, contest the foundation of CLAIMANT’s claim alleging that it did not breach the Contract either by delivering non-conforming shirts or by making a late delivery [SD ¶¶14,15]. Furthermore, the Parties are not in accord as to the effect of the applicable law provision and its operation, and consequently the alleged modification of the Contract [SC ¶33; SD ¶14; PO1 ¶6]. Finally, the Parties are in disagreement over whether the Tribunal should take into account Mr. Short’s written witness statement if he is not available for examination at an oral hearing [PO1 ¶¶4,5].

12. CLAIMANT will thus address these points of divergence, as directed by the Tribunal’s Procedural Order No. 1 ¶10, and prove that on the basis of the abovementioned facts and the applicable law:

- Mr. Short’s written witness statement should not be considered by the Tribunal if he is not available for examination at an oral hearing (§I.),
- RESPONDENT was late in delivering the polo shirts as contracted delivery date was not modified (§II.),
- RESPONDENT delivered non-conforming polo shirts (§III.),
- CLAIMANT was entitled to avoid the Contract (§IV.) and
- CLAIMANT should be compensated for the full amount of requested damages (§V.)
I. TRIBUNAL SHOULD NOT CONSIDER MR. SHORT’S WRITTEN WITNESS STATEMENT IF HE IS NOT AVAILABLE FOR EXAMINATION AT AN ORAL HEARING

13. The Parties to this arbitration have, when submitting their written briefs, accompanied their legal arguments with written evidence in support of their respective positions. CLAIMANT has included the written witness statement of Mr. Long, its Procurement Specialist, while RESPONDENT has submitted the statement of Mr. Short, its Contracting Officer at the time of the conclusion of the Contract [CE 2; RE 1]. However, during the conference call held on 4 October 2012, the Tribunal and CLAIMANT were informed by RESPONDENT that Mr. Short would not attend the oral hearing since his new employer had instructed him not to appear before the Tribunal [PO1 ¶4]. Consequently, his written witness statement should not be considered if he is not available for examination at an oral hearing (2.). Mr. Short does not have a valid reason not to appear at the hearing and there are any extraordinary circumstances justifying his absence (3.). Thus, CLAIMANT respectfully submits that Mr. Short’s written witness statement should be disregarded when making the final award on the merits. CLAIMANT submits that the Tribunal, when making a decision on this matter, should apply not only the CEAC Rules and DAL, but also the 2010 IBA Rules on the Taking of Evidence in International Arbitration (hereinafter: IBA Rules) (1).

1. THE TRIBUNAL SHOULD APPLY THE IBA RULES

14. Even though the Parties have agreed to apply the CEAC Rules to the proceedings, CLAIMANT submits that there are no obstacles for the Tribunal to apply the IBA Rules to the question of evidentiary procedure. What is more, the IBA Rules are designed to be used as a supplement to institutional or ad hoc rules governing international arbitrations [Schwarz/Konrad, 415; von Segesser, 737].

15. IBA Rules may apply to international commercial arbitration proceedings if the parties so agree or the tribunal so orders [Schwarz/Konrad, 415]. Although the Parties are in disagreement about the applicability of the IBA Rules [PO1 ¶10.2], there are several reasons which should persuade the Tribunal to employ the IBA Rules in the present case.

16. Firstly, it should be emphasized that the IBA Rules “provide a reasonably well-formulated, predictable set of basic procedures and substantives standards for the evidence-taking process” [Born, 1794]. This is particularly important when the parties come from different legal traditions [Preamble IBA Rules; Shenton, 124]. Accordingly, they are to be perceived as a useful tool that balances commonly used
procedures in international arbitration, as they reflect processes developed in both civil and common law systems. Since CLAIMANT and RESPONDENT belong to different legal traditions \[PO2 q.36\] and may have different perspectives on evidentiary procedures, in light of the fact that the CEAC Rules do not provide for detailed provisions on evidentiary procedure, it makes perfect sense for this Tribunal to apply the IBA Rules as a supplement to the applicable arbitration rules.

17. Secondly, the IBA Rules are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations \[Tawil/Gill, 2\] and “have proved to be extremely effective in practice” \[Blackaby et al., 79\]. Through practice they have been recognized as an international standard and as such have not been questioned, neither in concept nor in principles they embody \[Kühner, 667; Wijnen, 353\]. On the contrary, a detailed 2012 survey of international arbitration practice shows that IBA Rules were adopted in 60% of arbitrations, whereas 85% of the participants in the survey consider the adoption of the IBA Rules useful \[QM/WC\].

18. Hence, given that the IBA Rules enjoy widespread recognition and acceptance by the international arbitration community, this Tribunal should not hesitate to apply them in the case at hand.

2. **MR. SHORT’S WRITTEN WITNESS STATEMENT SHOULD BE DISREGARDED IF HE IS NOT AVAILABLE FOR EXAMINATION AT AN ORAL HEARING**

19. It is CLAIMANT’s submission that CEAC Rules and the IBA Rules, expressly entitle it to examine RESPONDENT’s witness (2.1). Any consideration of the written witness statement of Mr. Short when deciding on merits would violate fundamental principles of arbitration procedure if he is not available for examination at an oral hearing (2.2). On the other hand, disregarding his witness statement would not jeopardize the effectiveness of the award (2.3). For all these reasons, the only way for the Tribunal to preserve the fundamental due process principles of these arbitration proceedings and avoid jeopardizing the enforceability of the award is by disregarding Mr. Short’s witness statement.

2.1. **CEAC Rules and the IBA Rules entitle Claimant to examine Mr. Short**

20. Article 27(2) CEAC Rules states that unless otherwise directed by the arbitral tribunal, statements by witnesses may be presented in writing and signed by them. However, Art. 17(3) CEAC Rules states that if at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses. The same is stipulated in Art. 8(1) IBA Rules which, inter alia, provides that a witness has to appear for testimony at
the evidentiary hearing if such person’s appearance has been requested by any party. Furthermore, it is also commonly accepted and often expressly provided in many other institutional arbitration rules that witnesses who submit a written witness statement must appear for, or that the opposing party can request, oral cross-examination at an evidentiary hearing (e.g. LClA Rules, Art. 20(4); CPR Rules, Rule 12.2; ICSID Rules, Rule 35(1)).

21. This generally accepted approach is not surprising since the purpose of witness’ statements is to prepare the parties and the arbitral tribunal for the evidentiary hearing [Schlaepfer, 65]. It promotes efficiency of the proceedings [Grierson/Van Hooff, 170; Schwarz/Konrad, 493; Bishop et al., 1493] since a written witness statement stands as a replacement for an often lengthy direct examination [Schwarz/Konrad, 496]. On the other hand, cross-examination is one of the most important tools for testing witness’ credibility [Bishop et al., 1490; Lörcher, 149; Born, 1842; Cairns, 183; Schwarz/Konrad, 465; Collins, 534; Molitoris/Abt, 192] and finding out the truth in arbitral proceedings [Dimolitsa, 14; Schlaepfer, 73]. It is thus indispensable for giving evidentiary weight to a written witness statement [Redfern et al., 365; Hunter, 352; Oetiker, 260,261].

22. In light of all the abovementioned, given that CLAIMANT has duly made a request to examine Mr. Short [PO1 ¶4], and that such request apparently cannot be fulfilled [PO1 ¶4], the Tribunal should disregard his written witness statement.

2.2. Considering Mr. Short’s written witness statement when deciding on the merits would violate fundamental principles of arbitral procedure

23. By effectively denying CLAIMANT’s right to question Mr. Short, the Tribunal would not only violate provisions of Arts. 17(3) CEAC and 8(1) IBA Rules, but it would also deprive CLAIMANT of its rights which stem from the fundamental principles of any arbitral proceedings, e.g. principles of equal treatment, fairness of process and the right to present one’s case. In the present case, those principles are singled out in the CEAC Rules and DAL.

24. Art. 17(1) CEAC Rules states that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, has to conduct the proceedings so as to avoid unnecessary delay and expense and provide a fair and efficient process for resolving the parties’ dispute. Furthermore DAL, as lex arbitri, in Art. 18 states that the parties shall be treated with equality. Such principle has been qualified as Magna Charta of arbitral proceedings [Sanders, 102]. Similarly, Art. 9(2)(g) IBA Rules allows the exclusion from evidence of any statement for reason...
of proportionality, fairness or equality of the Parties that the arbitral tribunal determines to be compelling. Moreover, these principles are recognized as fundamental in many arbitration rules (UNCITRAL Rules Art. 17 (1); ICC Rules 2012 Art. 22 (4); AAA/ICDR Rules Art. 16 (1); LCIA Rules Art. 14.1(i); CIETAC Rules Art. 33 (1)) and widely accepted in doctrine as set out below.

25. It is undisputed that the right to equal treatment requires the arbitral tribunal to apply similar procedural rules and necessitates application of equal requirements for all parties with respect to the exchange of written submissions, the filing of documentary evidence, the questioning of witnesses, etc. [Roney/Müller, 58]. In order to preserve the equality of the parties the arbitral tribunal “may not refuse to one party what it has granted to the other and may not grant to one party what it has refused to the other” [Roney/Müller, 58]. “It is the arbitral tribunal’s duty to ensure […] the equality of arms between parties from different legal traditions” [Dimolitsa, 12]. Acceptance of a written witness statement encompasses the right of the other party to cross-examine the witness orally unless that other party explicitly waives its right to do so [Lévy1, 119; Oetiker, 258]. Likewise, it is well-established in legal doctrine that a party’s right to present its case would be severely violated if its request to hear the witness of the other party were dismissed [Sachs/Lörcher, 323; Lévy2, 101]. It is also a matter of fairness that, where written witness statements are used, the witness must appear at the oral hearing to face questioning by the other party [Schwarz/Konrad, 493].

26. The facts of this case, however, do not provide for equal treatment of the Parties unless CLAIMANT’s request to disregard witness statement of Mr. Short is granted. Namely, CLAIMANT would like to draw the Tribunal’s attention to the fact that RESPONDENT’s right to cross-examine CLAIMANT’s witness - Mr. Long - has not been jeopardized. RESPONDENT simply chose not to examine Mr. Long at the hearing. Quite the contrary, CLAIMANT insists on cross-examining Mr. Short, yet is deprived of such an opportunity. Therefore, if the Tribunal were to take Mr. Short’s statement into consideration when deciding on the merits, without CLAIMANT having the opportunity to cross-examine him, the Parties would be put in unequal position.

27. Moreover, having in mind the principles set out above, the necessity to question Mr. Short is further emphasized by the contents of his written witness statement. Mr. Short’s statement does not only contain a detailed description of purely objective facts, but often conveys his impressions and thoughts with respect to the telephone conversation that occurred between him and Mr. Long. Mr. Short uses phrases such as: “I understood him to mean…”, [RE1 ¶4]. Unlike Mr. Short’s statement, the statement of Mr. Long is specific, written in clear terms and does not lack preciseness. Absent the opportunity to question at the hearing why and how those impressions
of Mr. Short came into being, his witness statement to a considerable degree represents a testimony of his train of thoughts instead of objective facts.

28. Examining witnesses is an important supplement which clarifies uncertainties concerning the relevant facts [Oetiker, 253; Schneider, 303], and the parties must be given the opportunity to present their view on presented evidence [C Cas. 17.07.1978]. Therefore, depriving CLAIMANT of the opportunity to question the credibility and accuracy of Mr. Short’s recollections of the relevant facts, the right that CLAIMANT never waived, would prevent CLAIMANT from fully presenting its case and would jeopardize the fairness of the proceedings. Thus, the Tribunal’s failure to hear Mr. Short in person, might invite a challenge to the resulting award for failure to afford the protesting party the opportunity to present its case i.e. for violation of CLAIMANT’s due process rights [see NYC Art. V(1)(b); Sheppard, 771-772; Born, 1832].

2.3. Disregarding Mr. Short’s written statement would not jeopardize the effectiveness of the award

29. RESPONDENT might argue that disregarding Mr. Short’s written statement for his failure to appear at the oral hearing would amount to violation of its due process rights and, consequently, would represent a ground for setting-aside the award or refusal of its recognition. However, no such threat exists and the decision not to take Mr. Short’s written testimony into account would in no way jeopardize the validity and enforceability of this award.

30. Article 27(1) CEAC Rules, just like numerous other rules (e.g. AAA/ICDR Rules Art. 19(1); CIETAC Rules Art. 39(1)), provides that each party shall have the burden of proving the facts it relies on to support its claim or defense, or the facts in its favor. This is also undisputed in doctrine since the tribunal is not responsible for generating any evidence [Molitoris/Abt, 183; Shenton, 120]. Hence, the inability to produce one’s witnesses before an arbitral tribunal is an inherent risk borne by parties that submit to arbitration and is not a basis for setting an award aside [STET Case ¶51].

31. In the case at hand, not only did RESPONDENT fail to meet that burden but also showed a complete lack of effort in that regard. Nothing in the record suggests that, save for one telephone call to Mr. Short, RESPONDENT undertook any actions to ensure his participation at the hearing. It neither made further inquiry to Mr. Short, nor did it contact his new employer in an effort to secure participation of Mr. Short. To put it simply, RESPONDENT did nothing. At the first hint, it gave up any effort whatsoever to make Mr. Short available for the oral hearing.

32. Pursuant to Art. 4(9) IBA Rules, RESPONDENT could have even asked the Tribunal to take whichever steps are legally available to obtain the testimony of the person in question or to seek
leave from the Tribunal to take such steps itself. RESPONDENT had done nothing of the sort. Instead, in a surprising turn of events, RESPONDENT suggested that its burden of securing its own evidence should be borne by CLAIMANT, and that it is CLAIMANT who should make further efforts in securing the presence of Mr. Short [PO1 ¶4]. This clearly demonstrates RESPONDENT’s failure to comprehend (or respect) the basics of the arbitral proceedings. Therefore, by not securing Mr. Short’s appearance at the hearing, RESPONDENT effectively failed to meet its burden of proof and should bear the consequences of its failure.

33. In conclusion, no procedural rights of RESPONDENT would be violated if the Tribunal disregards a written testimony of a witness that RESPONDENT itself failed to provide for examination.

3. ABSENCE OF MR. SHORT FROM THE HEARING CANNOT BE EXCUSED

34. RESPONDENT might argue that Mr. Short’s failure to appear is justified and should therefore be excused. However, the reasons offered for his absence are insufficient to excuse his non-appearance. Art. 4(7) IBA Rules sets forth that if 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 should disregard any witness statement related to that evidentiary hearing by that witness unless absence was justified by exceptional circumstances (see also Art. 20.4 LCIA Rules). This stance is widely supported, both in doctrine and case-law [ICSID Case No. ARB/01/11, 37; Schwarz/Konrad, 493; LCIA Case No. 6827; ICDR Case No. 50154; ICC Case No. 12990]. Tribunals occasionally set the exoneration bar even higher, excusing the non-appearance only if the there are both valid reasons and extraordinary circumstances that prevent appearance at the hearing [ICC Case No. 13046; ICC Case No. 13054].

35. In the case at hand, the only reason for Mr. Short’s non-appearance at the oral hearing, as put forward by RESPONDENT’s counsel, is the fact that Mr. Short’s “new employer [does] not wish him to be involved any further in matters concerning Equatoriana Clothing Manufacturing and specifically had told him not to appear before the tribunal if he was called” (emph. added) [PO1 ¶4]. CLAIMANT will demonstrate that this does not constitute a valid excuse for Mr. Short’s non-appearance before this Tribunal, let alone an exceptional circumstance.

36. Namely, according to doctrine and case-law, only certain objective circumstances can truly correspond and be subsumed under the term “valid reason”: e.g. death, illness, and necessity of long-distance travel or disappearance [O’Malley, ¶4.56; Zuberbühler et al., 103]. In the case at hand, the only reason put forth for Mr. Short’s non-appearance before the Tribunal is the purported
instruction of his employer. There are no legal, contractual or any objective impediments that would prevent Mr. Short’s oral examination, or any extreme difficulties justifiably preventing him from appearing in the case at hand. Therefore, the Tribunal should find that the reason for Mr. Short’s non-appearance at the oral hearing cannot be considered as excusable under the applicable procedural rules.

37. In conclusion, the Tribunal should not hesitate to decide that Mr. Short’s written statement should not be considered when deciding on the merits.

♦ ♦ ♦

38. In case the Tribunal, for whatever reason, decides not to disregard Mr. Short’s written witness statement, and in order to safeguard its procedural position, CLAIMANT will occasionally make reference to the testimony of Mr. Short in the remaining portion of this Memorandum and reserves the right to make reference and comment on it during the oral hearing and in the post hearing brief. This should not be construed as CLAIMANT’S waiver on the request to disregard Mr. Short’s testimony. Should, however, Tribunal decide to disregard Mr. Short’s witness statement, it is also kindly invited to disregard said references in its deliberations on other points.

II. RESPONDENT WAS LATE IN DELIVERING POLO SHIRTS AS CONTRACTED DELIVERY DATE WAS NOT MODIFIED

39. It is undisputed between the Parties that RESPONDENT delivered the “Yes casual” polo shirts on 24 February 2011 [SC ¶17; SD ¶8], and not by 19 February 2011, as required by the Contract of 5 January 2011 [CE1 ¶3]. However, RESPONDENT alleges that the delivery date from the Contract was modified during the telephone call between Mr. Short and Mr. Long of 9 February 2011 [SD ¶¶7,14], thus making its delivery on 24 February 2011 timely.

40. Contrary to RESPONDENT’s allegations CLAIMANT will prove that no modification of the delivery date ever occurred because, first and foremost, any modification to the Contract, pursuant to reservation under Art. 96 CISG submitted by Mediterraneo and the interpretation given to it by the Supreme Court of Mediterraneo, had to have been in writing (1). In the alternative, even if one were to disregard the written form requirement, the Parties never reached an oral agreement as to modification of the Contract regarding the date of delivery (2). Hence, the Tribunal should have no difficulty finding that RESPONDENT breached the Contract by not delivering goods on 19 February 2011.
1. **There was no modification of the delivery date since any modification of the Contract had to be in writing**

41. RESPONDENT alleges that, despite the fact that Mediterraneo made an Art. 96 declaration when it ratified the CISG, oral modifications of the Contract are permissible [SD ¶¶2,14]. According to RESPONDENT, such reservation should be disregarded on the basis of choice-of-law provision contained in the Contract and the interpretation given to Art. 96 by the courts of Mediterraneo should be deemed irrelevant [SD ¶2]. However, it is CLAIMANT’s contention that this position is erroneous.

42. While it is true that Art. 29(1) CISG provides that a contract may be modified by the mere agreement of the parties, this provision does not apply in the case at hand due to the reservation made by Mediterraneo under Art. 96 CISG. The choice of law clause in the Contract cannot and does not exclude the effectiveness of the reservation made by Mediterraneo (1.1.). Consequently, the law of Mediterraneo is applicable to the question of form by virtue of the reservation made under Art. 96 CISG and it imposes the obligation that all modifications have to be in writing (1.2.). Finally, CLAIMANT will prove that RESPONDENT was well aware of the writing requirement before the commencement of these proceedings (1.3.).

1.1. **Choice-of-law clause contained in the Contract does not exclude the effectiveness of the reservation made under Art. 96 CISG**

43. CLAIMANT submits that the ability of the Parties to exclude application of the CISG or any of its provisions is governed by the CISG itself (A.), and that, consequently, the Parties were not free to exclude the reservation made by Mediterraneo under Art. 96 CISG by agreeing to the text of applicable law clause found in Clause 20 of the Contract, since the CISG does not allow such exclusion (B.).

A. **The CISG controls the extent of the exclusion or derogation from its provisions**

44. Although CLAIMANT acknowledges that the Contract contains a choice-of-law clause which designates the CISG as the governing law for the Contract [CE1 ¶20], CLAIMANT contends that the part of this provision which calls for application of the CISG “without regard to any national reservation” is incompatible with the CISG and consequently has no effect.

45. RESPONDENT’s position that the Parties were, as a matter of principle, free to opt out of any provisions of the CISG [SD ¶14] is erroneous, as an attempt to evade certain provisions of the applicable law is generally considered as not necessarily effective [Gaillard/Savage, 797]. While
derogations from the CISG, or modifications of its provisions by the parties might be appropriate and desired in some instances [Mistelis, 107], the formation and interpretation of the exclusion of the CISG remain subject only to the rules of the CISG, as the CISG determines its sphere of application autonomously [Schwenzer/Hachem1, 104].

46. In the case at hand, it is undisputed that absent the choice of law provision, the Contract would nevertheless be governed by the CISG, as preconditions for its applicability contained in Art. 1 CISG have been met [SC ¶32; SD ¶12]. Therefore, the autonomy of the Parties to opt out of the CISG or to derogate from any of its provisions was rooted in the provisions of the CISG, rather than in the provisions of any particular national law. This is why any exercise of party autonomy with respect to applicable law to the present Contract had to have been made in accordance with the provisions of the CISG. Consequently, this Tribunal should find that the issue of whether the Parties were empowered to opt out of Art. 96 reservation is an issue governed by the CISG itself.

B. The Parties were not free to exclude the reservation made by Mediterraneo under Art. 96 CISG, since the CISG does not allow such exclusion

47. Article 6 CISG provides that the parties may exclude the application of this Convention in entirety. However, if they wish merely to vary the effect of any of its provisions, their autonomy is subjected to Art. 12 [OLG Linz 23.01.2006; Tr. Padova 11.01.2005; ICAC 09.06.2004]. Art. 12 CISG, among other things, provides that Art. 29 CISG, allowing freedom of form for contract modifications, does not apply where one of the contracting parties has its place of business in a State which has made reservation under Art. 96 CISG. As a matter of fact, Art. 12 CISG was drafted precisely with a purpose to articulate the effect of Art. 96 CISG reservation [Honnold, 186]. Hence, it is fair to observe that Art. 12 has a close relationship with Art. 96 CISG [Schroeter1, 7].

48. When determining whether the Parties were entitled to derogate from Mediterraneo’s Art. 96 reservation in their choice-of-law provision, the Tribunal should analyze Art. 6 CISG in conjunction with Art. 12 CISG. It should interpret the wording of Arts. 12 and 96 CISG with the ordinary meaning to be given to its terms, as provided by Art. 31(1) VCLT, confirmed by legal doctrine [Enderlein/Maskow, Art. 7 ¶2.2; Happ, 377-378; Reinhart, Art. 7 ¶8; Witz, Art. 7 ¶6]. Accordingly, Art. 12 CISG explicitly states that “the parties may not derogate from or vary the effect of this article,” (emph. added) and that is confirmed by the wording of Art. 6 CISG and relevant case-law [ICAC 16.03.2004]. For this reason, Art. 12 CISG is regarded as mandatory [Schlechtriem/Schmidt-Kessel, 216; Viscasillas, 194]. The only way to exclude the effect of Art. 12
CISG is if the Parties had opted for the exclusion of the CISG in its entirety [Schroeter1, 35]. Thus, Arts. 12 and 96 CISG always apply whenever CISG represents the governing law to the contract, irrespective of whether the location of the dispute resolution forum is in a reservation state or not [Schroeter2, 447; HR 07.11.1997; Rb Rotterdam 12.07.2001; Rb Hasselt 02.05.1995]. That is why some authors regard Arts. 12 and 96 CISG as a sort of “supermandatory rules” [Torsello, 251].

49. In conclusion, the Tribunal should find that the choice of law clause in the Contract cannot and does not exclude the effectiveness of Mediterraneo’s reservation under Art. 96 CISG and that, as a result, Art. 29(1) CISG does not apply in the present case. Not agreeing with CLAIMANT on this point would be contrary not only to case law and doctrine, but most importantly to the plain language of the CISG and would lead to effective opting out of the ‘supermandatory rules’. CLAIMANT urges the Tribunal to avoid such an outcome.

1.2. By virtue of reservation made under Art. 96 CISG Mediterraneo’s law is applicable to the form of the Contract

50. CLAIMANT has already demonstrated that the choice of law clause in the Contract, despite its wording, does not exclude the effectiveness of the reservation made by Mediterraneo under Art. 96 CISG and that the freedom of form principle of the CISG does not apply in the case at hand. CLAIMANT will further demonstrate that the reservation made by Mediterraneo under Art. 96 CISG entails automatic application of Mediterraneo’s law as to the question of the formal validity of the Contract modification.

51. As Art. 96 CISG has public international law character [Schroeter2, 427], it was meant to allow individual nations to accede to the CISG whilst retaining autonomy on whether they wished to enforce oral agreements, or require written form [Forestal Guarani Case]. What is more, Art. 96 CISG reservation was designed to enable prospective member states to safeguard their pivotal public interests and policy objectives [Wang/Andersen, 145-146]. Consequently, as it is often reiterated in legal doctrine and case-law, domestic written form requirements of Art. 96 reservation states have internationally mandatory application [Medwedew/Rosenberg, 34; Schroeter1, 25; Long, 97; Li, 121; ICAC 09.06.2004.] and the contract involving the party from the reservation State must be in writing to be formally valid [Zuppi, 640; Garro, 219; Eorsi, 2-32; Chen, 25-26]. Such view has also been confirmed in jurisprudence of the Supreme Court of Mediterraneo [SC ¶32; SD ¶12].

52. With this in mind, it is CLAIMANT’s submission that the Tribunal should give full effect to Art. 96 reservation made by Mediterraneo and enable “preservation of the formal requirements of the declaring State to all contracts involving companies from such States,” since the CISG respects the underlying
purposes of such legislation [Reinhart, Art. 12, ¶3; Rehbinder, 151; Stoffel, 60; Piltz Art. 3, ¶114; Medwedew/Rosenberg, 34]. Consequently, the Tribunal should apply the law of the reservation state – Mediterraneo, which requires a written form for the contract modification [SC ¶31]. This would be in line not only with the decisions of Mediterraneo courts, but also with numerous cases decided under the CISG in regard to this issue in Austria [OGH 31.08.2005], Belgium [Rb Hasselt 02.05.1995], United States [Zhejiang Shaoxing case], China [CIETAC 17.10.1996; CIETAC 06.09.1996; CIETAC 31.12.1997], and Russia [VAS 16.02.1998; VAS 25.03.1997].

1.3. Respondent was aware of the requirement of writing

53. CLAIMANT already requested the Tribunal not to take into consideration the written statement of Mr. Short (see § I.). However, should the Tribunal find otherwise, an analysis of the written statement of Mr. Short reveals that RESPONDENT was aware that any modifications to the Contract – if they were to be made - would have to be in writing.

54. The relevant standard for interpretation of parties’ action and conduct is found in Art. 8 CISG, which provides in paragraph 1 that statements and conduct of the parties to a contract are to be interpreted according to the actual intent of the parties when such intent was known to the other party or the other party could not have been unaware of such intent. If a party was unaware of other party’s intent, Art. 8(2) provides that statements and conduct of such party are to be interpreted from the point of view of a reasonable person of the same kind and in the same circumstances. Pursuant to Art. 8(3), in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all 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 [CISG-AC Opinion 3 ¶2.2; Huber, 236; Schmidt-Kessel, 118; AP Cáceres 14.07.2010].

55. Mr. Short’s testifies that, when Mr. Long said over the phone that he would take care of paperwork regarding the new delivery date, Mr. Short “understood him to mean all three documents on paper, the contract, the shipping contract and the letter of credit” (emph. added) [RE1 ¶4]. Given that Mr. Long had never made a specific reference to the Contract [PO2 q. 27], and that Mr. Short normally does not expect contract modifications to be in writing [RE1 ¶4], this ‘understanding’ can only be interpreted as Mr. Short’s awareness that any modifications made to the Contract had to be executed in written form.

56. Given that Art. 8(3) CISG gives weight to parties’ subsequent actions and conduct in determining the intent of the parties at the time of conclusion of the Contract, this statement by
Mr. Short supports CLAIMANT’s submission that the insertion of the text of the applicable law provision, as one found in Clause 20 of the Contract, was not understood by either Party to mean that a written form was not required for an amendment to a Contract to be valid.

57. In conclusion, for all the above-mentioned reasons and given that RESPONDENT failed to prove that any written modification of the Contract ever occurred, the Tribunal should find that the Contract was not modified and that consequently, RESPONDENT did not deliver the goods on time.

2. THERE WAS NO ORAL MODIFICATION OF THE CONTRACT

58. Even if the Tribunal were to find that Mediterraneo’s Art. 96 reservation does not impose the requirement of writing for amendments to the Contract, CLAIMANT will prove that the Parties have never agreed to modification of the Contract, not even orally.

59. Clause 3 of the Contract set the delivery time by 19 February 2011. On 9 February 2011 Mr. Short informed Mr. Long, by telephone call, that due to the delay of one of RESPONDENT’s suppliers, it would be impossible to meet the contracted date of delivery and that consequently, the goods cannot be delivered before 24 February 2011 [CE2 ¶4; RE1 ¶2]. Mr. Long reiterated the importance of urgent delivery of goods and replied that, in light of the fact that there was no possibility for the goods to be delivered by 19 February, “he would take care of the necessary adjustments” [RE1 ¶4; SC ¶14; SD ¶7].

60. RESPONDENT might allege that such a reply of Mr. Long should be construed as his acceptance of the modification of the Contract with respect to the delivery date. However, it is undisputed between the Parties that, in a telephone call from 9 February 2011, Mr. Long never made a specific reference to the Contract [PO2 q.27]. Therefore, CLAIMANT invites the Tribunal not to follow RESPONDENT’s line of reasoning, but rather interpret parties’ statements and actions in line with the interpretation standards set by Art. 8 CISG.

61. CLAIMANT’s main reason for entering into contract with RESPONDENT was the pressing need to urgently provide goods to Doma Cirun that would be delivered in time to its stores for the summer season, since Doma Cirun’s supplier went bankrupt and was thus unable to meet its demands [SC ¶8]. The importance of the narrow timeframe was made known to RESPONDENT even before the Contract was concluded. Namely, Mr. Long, as a representative of CLAIMANT, emphasized to Mr. Short at the time they entered into the Contract that this was a rush job and that the delivery date was of the utmost importance [RE1 ¶4; SD ¶6; SC ¶14; CE2 ¶3]. RESPONDENT was also informed that the final destination of the “Yes Casual” polo-shirts was
the retail chain Doma Cirun \([PO2 \ q.16]\) and that they had to be in Oceania in time for the opening of the summer selling season scheduled for 15 March 2011 \([RE1 \ ¶4]\). Finally, the Contract itself contained a clause which expressly set the deadline for delivery to 19 February 2011, so as to allow CLAIMANT to transport the goods to Doma Cirun’s warehouse and then ship them to retail stores throughout Oceania before the summer season started \([SC \ ¶11; \ SD \ ¶6]\).

62. When informed on 9 February 2011 that it would be impossible for RESPONDENT to meet the contracted date of delivery and that the goods could not be delivered before 24 February 2011 \([RE1 \ ¶3, \ SC \ ¶13]\), CLAIMANT had no other choice but to “accept that the delivery would be late” \([CE2 \ ¶5]\), since the alternative would be to abandon its loyal client altogether. It was impossible for CLAIMANT to engage in another rush job order to fix the first that went wrong.

63. There is nothing in the Record to suggest that CLAIMANT’S acknowledgment that the goods will be late ever amounted to acceptance of modification of the Contract. Quite the contrary, in the telephone conversation on 9 February 2011, Mr. Long expressed his displeasure for the delay and, being aware that it would not have been possible to find another supplier and provide timely delivery, he did the only possible thing under the circumstances: he attempted to mitigate the damage caused by RESPONDENT’S anticipated late performance by making the necessary technical adjustments of the letter of credit and the organization of the shipping from the port to the retailers in order to get the goods as soon as possible – i.e. by 24 February 2011. But it never agreed to an amendment of the Contract, nor did it waive its rights to claim RESPONDENT liable for the delay.

64. In light of Art. 8(1) CISG, the Tribunal should find that RESPONDENT was fully aware that CLAIMANT was bound by the fixed dated contract to Doma Cirun \(\text{(see } ¶61)\), that RESPONDENT knew that CLAIMANT’S amendment of the Contract and postponement of the delivery date would be completely nonsensical and would run contrary to CLAIMANT’S clearly expressed interest to meet the deadline towards Doma Cirun. Even if the Tribunal were to assume that RESPONDENT was unaware that CLAIMANT was ‘locked in’ a sequence of deadlines, pursuant to Art. 8(2) CISG, no reasonable person would expect that a contracting party accepts modification of a contractual deadline that is certain to be missed, and thus weakens its legal position on a wide range of issues. Rather, a reasonable person would always interpret grudging acknowledgment of a late delivery as nothing more than that. There is nothing in the subsequent conduct of CLAIMANT that could have suggested otherwise.

65. In conclusion, the Tribunal should find that CLAIMANT never assented to a change of delivery date and that by delivering goods on 24 February 2011 RESPONDENT breached the Contract,
since Art. 33(a) CISG stipulates that if a date is fixed by the Contract the seller must deliver on that date.

### III. RESPONDENT DELIVERED NON-CONFORMING POLO SHIRTS

66. Contrary to RESPONDENT’s allegations [SD ¶15], CLAIMANT will show that not only had RESPONDENT failed to deliver polo shirts on time (see §II.), but it also failed to deliver shirts conforming to the Contract because the delivered polo shirts were not of the quality required by the Contract. Namely, the manufacturing process of RESPONDENT included child labor, in direct contravention to the policy of Oceania Plus Enterprises (1), tainting all of the goods it produced, including the polo shirts and making them non-compliant with the terms of the Contract. In the alternative, delivered shirts were not fit for the particular purpose made known to RESPONDENT at the time of the conclusion of the Contract (2). In any event, RESPONDENT failed to comply with the widely accepted international trade usage in the apparel industry (3).

1. **RESPONDENT FAILED TO DELIVER POLO SHIRTS OF THE QUALITY REQUIRED BY THE CONTRACT**

67. It is evident from the wording and structure of Art. 35 CISG that the obligations of the seller are primarily determined by the terms of the contract [Neumann, ¶3; Henschel, 65; Krusinga, 28; Schlechtriem/Butler, 113; Mullis, 130; BGH 03.04.1996; HG St. Gallen 03.12.2002], and that the decisive source for the standard of conformity is the contract between the parties [Sec. Comm. Art. 33, ¶4; Schwenzer, 413]. Hence, the seller must undertake all that is necessary to make the goods usable in conformity with the agreement [Neumayer/Ming, 275, 276].

68. Article 35(1) CISG, *inter alia*, states that the seller must deliver goods which are of the *quantity, quality and description* required by the contract. While CLAIMANT does not contest that the quantity of the delivered shirts was as agreed upon, and that the physical quality of the shirts, in particular the material to be used, the sizes and the colors of the shirts were as described in Annex 1 [CE1 ¶1; PO2 q.9], and that the shirts carried the label “Yes casual” on the inside collar [CE1 ¶1], CLAIMANT will hereby refute RESPONDENT’s allegations that the goods “met every specification in the contract” [SD ¶15]. Namely, the Contract contained another important determinant of the agreed upon quality of the polo shirts as Clause 12 of the Contract required polo shirts to be produced...
in accordance with the ‘child labor free’ policy of Oceania Plus Enterprises (hereinafter: Oceania Plus) (1.1.), which RESPONDENT failed to adhere to (1.2.).

1.1. Adherence to the ‘child labor free’ policy is one of the determinants of the quality required by the Contract

69. Under the CISG the quality of the goods comprises not only of physical conditions, but also of all factual and legal circumstances concerning the relationship of the goods with their surroundings [Schwenzer1, 414; C Cas. 23.01.1996; LG Aachen 03.04.1990; LG Landshut 05.04.1995; OLG Köln 21.05.1996]. Consequently, the parties are deemed free to agree on non-physical or intangible characteristics of the goods [BGH 03.04.1996], including prohibition of child labor [Henschel, 162]. Agreed upon ethical standards thus become part of the contract and may be enforced, or their violation sanctioned, in the same way as with any other term of the contract [Schwenzer/Leisinger, 268]. Since it is irrelevant whether the mentioned circumstances affect the usability of the goods due to their nature and durability [Schwenzer/Leisinger, 267], the goods will be non-conforming under Art. 35(1) CISG if these requirements are not respected by the seller, even though the departure from the contractual description has no bearing on the usability or value of the goods [OLG Köln 21.05.1996].

70. In the case at hand, such non-tangible characteristics of “Yes casual” polo shirts were agreed upon by the Parties by inserting Clause 12 into the Contract, a standard term included by CLAIMANT and other members of Oceania Plus Group in all their contracts with suppliers, including previous contracts with RESPONDENT [PO2 qq.4,5,15]. It states that “all suppliers to Oceania Plus Enterprises or one of its subsidiaries will adhere to the policy of Oceania Plus Enterprises that they will conform to the highest ethical standards in the conduct of their business” (emph. added). Given that CLAIMANT is one of fifteen jointly owned subsidiaries of Oceania Plus and Atlantica Megastores [SC ¶7] and that RESPONDENT is CLAIMANT’s supplier under this Contract, by inserting this clause in the Contract both Parties evidently agreed to be bound by the Oceania Plus Policy in the conduct of their business. Hence, any violation of such Policy should be deemed breach of the Contract.

71. Specifically, given that the Policy referred to in Clause 12 of the Contract contains “certain broad ethical and environmental standards to be complied with in the production of the goods by the counterparty and its suppliers” (emph. added) [PO2 q.4], the Tribunal should find that the goods produced by methods violating the contractually fixed ethical standards should not be considered as of the quality required by the Contract, even if all other specifications of the goods are complied with.
Furthermore, CLAIMANT submits that by consenting to Clause 12 of the Contract, RESPONDENT not only agreed to comply with Oceania Plus Policy in general, but it specifically agreed to refrain from using child labor in the overall conduct of its business.

1.2. RESPONDENT failed to adhere to the ‘child labor free’ policy of Oceania Plus

72. RESPONDENT does not contest that reference to the Oceania Plus Policy covers the use of child labor as put forward by CLAIMANT [SD ¶3; SC ¶9]. This is hardly surprising given that CLAIMANT handed out the text of the policy to RESPONDENT during the audit process required for a listing as a possible supplier in 2007 [PO2 q.4]. Moreover, as a result of CLAIMANT’s suspicion that child labor was being employed, the Policy was extensively discussed between the Parties in the negotiations following the audit [PO2 q.4; SC ¶9; SD ¶3], which, in RESPONDENT’s words, “was normal following an audit in this part of the world” [SD ¶3]. Thus, RESPONDENT was aware of its contractual obligation and agreed upon it.

73. RESPONDENT, however, contests that the previous audit “caused some [ethical] concerns” [SD ¶3] and that it failed to comply with the requirement from Clause 12 as, allegedly, no child labor was involved in the manufacturing of the delivered shirts [SD ¶15; CE7 ¶1,2]. Contrary to RESPONDENT’s allegations, it is CLAIMANT’S contention that it is irrelevant whether the child labor was employed in connection to the production of delivered shirts, as long as RESPONDENT in fact used child labor in even one of its plants, an occurrence which RESPONDENT’S counsel has agreed to assume for the purposes of this arbitration [PO1 ¶8] and which RESPONDENT failed to refute in its written submissions [CE7 ¶2; SD ¶15] even when faced with media accusations of that sort [SC ¶¶18,19]. This is because the language of Clause 12 of the Contract is clear in prohibiting any violation of the Oceania Plus Policy in the conduct of Parties’ business [CE1 ¶12]. Hence, if the Tribunal were to find that RESPONDENT employed child labor in any of its facilities, it should also find that by doing so RESPONDENT breached the Contract, since under Art. 35(1) CISG, any deviation from the contractual description and agreed upon quality of the goods amounts to a breach of contract [Mullis, 132].

74. Consequently, the Tribunal should find that RESPONDENT breached the Clause 12 of the Contract and delivered non-conforming goods as their quality was tarnished by the use child labor in the manufacturing process of RESPONDENT.
2. **IN THE ALTERNATIVE, DELIVERED POLO SHIRTS WERE UNFIT FOR THE PARTICULAR PURPOSE FOR WHICH THEY WERE PURCHASED**

75. Even if the Tribunal finds for whatever reason that the contents and scope of the provision of Clause 12 of the Contract are unclear, or that CLAIMANT’s understanding thereof is incorrect, the Tribunal should nevertheless find that RESPONDENT breached the Contract by delivering polo shirts which were not in compliance with the particular purpose made known to RESPONDENT at the time of conclusion of the Contract, as required by Art. 35(2)(b) CISG, i.e. resale in Oceania [YC ¶34].

76. It is widely accepted in doctrine and case-law that where the buyer expressly or impliedly makes known to the seller a particular purpose of the goods, the seller must deliver the goods fit for such purpose [Poikela, 42; Kruisinga, 218; Flechtner, 5]. The buyer’s specification of the goods’ particular purpose puts the seller’s duties in more concrete terms [Schlechtriem/Butler, 119].

77. In the case at hand, RESPONDENT does not deny that it was aware that the shirts were purchased so that they could be resold in Oceania [SD ¶6]. RESPONDENT claims that no child labor was used in its manufacture, whilst not offering any evidence thereof [CE7; SD ¶15]. Furthermore, RESPONDENT claims that it cannot be liable for the reaction of the public in Oceania to media broadcasts and publications that did not relate to the goods in question [SD ¶15], whilst not denying that the market in Oceania is susceptible to ethical considerations.

78. CLAIMANT will, however, prove that both the actual use of, and a mere suspicion of, use of child labor in the manufacturing process of RESPONDENT makes all of RESPONDENT’s products unfit for resale in Oceania (2.1.). Furthermore, CLAIMANT will prove that RESPONDENT knew or ought to have known that Oceania is a market which places special emphasis on fair trade and the observance of ethical principles (2.2.). Consequently, since there is no evidence that CLAIMANT failed to rely on RESPONDENT’s skill and judgement (2.3.), there should be no obstacles for the Tribunal to find that by delivering goods tainted by child labor accusations, RESPONDENT delivered non-conforming goods.

2.1. **Both the actual use of, and a mere suspicion of, use of child labor in the manufacturing process of Respondent makes all of Respondent’s products unfit for resale in Oceania**

79. It is often emphasized in doctrine and case-law that where the seller has been made aware of the country in which the goods will be used, it must accommodate the characteristics required for the actual use of the goods in this country and observe local standards, such as for instance the
applicable public law provisions [Schwenzer2, 580; Kröll1 520; Poikela, 56; LG Ellwagen 21.08.1995; CA Grenoble 13.09.1995; OGH 19.04.2007; Medical Marketing Case]. This is due to the fact that local standards - public law regulations, technical standards, cultural traditions or religious convictions - are circumstances that influence the ability to use goods [Schlechtriem2, § IV]. It is also stated in legal doctrine that a particular purpose may exist if the buyer is operating in a market with special emphasis on fair trade and the observance of ethical principles [Schwenzer/Leisinger, 267; Schwenzer2, 580].

80. In the case at hand, it is undisputed that CLAIMANT intended to resell polo shirts in Oceania [SC ¶11] and that RESPONDENT was aware of such purpose [SD ¶6]. Furthermore, it is well-known that Oceania prides itself on its policy of being very ethical [SC ¶20], which explains the leading role it has taken in the work leading to the adoption of the Convention on the Worst Forms of Child Labour in 1999 (hereinafter ILO Convention) [SC ¶19]. It is also noteworthy that Oceania was one of the first countries to ratify this Convention [SC ¶20]. Oceania’s efforts in combating child labor are supported both by the business community in Oceania (numerous firms, including Oceania Plus, which participate in the UN Global Compact) and the leading civic organizations, such as Children Protection Fund of Oceania [SC ¶19].

81. Both the ILO Convention (Art. 1) and principle 5 of the UN Global Compact Principles advocate for the “effective abolition of child labor”, at least with regard to its worst forms, such as work involving dangerous machinery (ILO Recomm. No. 190 ¶3(c)), as well as work in an unhealthy environment which may expose children to hazardous substances, noise levels or vibrations damaging to their health (ILO Recomm. No. 190 ¶3(d)). Moreover, it should be noted that since children in the textile industry handle dangerous machinery and are exposed to high noise levels [Atmaca et al., 722], the work of children in the apparel industry represents one of the worst forms of child labor.

82. Irrespective of whether the goods intended for resale in Oceania are expected by law to comply with ethical policy of Oceania, the Tribunal should nevertheless find that it was an unavoidable practical market requirement. This is because if this requirement is not complied with, the goods cannot be resold in Oceania, as the facts of this case demonstrate.

83. Upon publication of information on the use of child labor in RESPONDENT’s facilities there was a strong public reaction in Oceania [SC ¶¶20,27], followed by a significant drop in sales of the shirts leading to a complete stop within only a few days [PO2 q.19]. The Prime Minister of Oceania himself had to interfere and request urgent action upon being made aware of this information [SC ¶27]. Furthermore, this chain of events significantly affected the Oceania Plus’
share price, wiping hundreds of millions of dollars of value of its stock market valuation, and exposed Oceania Plus to numerous high value lawsuits \[SC \¶21,36\]. The overall expectations of the market in Oceania are further confirmed by Oceania Plus’ insisting on making its Policy part of all sales contracts of both its subsidiaries and suppliers \[PO2 q.4\], and the fact that it requires ethical audits to be performed with potential suppliers before the contracts with them are entered into \[SC \¶9\].

Therefore, even if the shirts delivered to CLAIMANT were not manufactured by children, they were for all practical purposes not resalable in Oceania since the level of opprobrium and moral repugnance attached to goods tainted by child labor makes them unfit for resale in Oceania. Hence, the Tribunal should follow the line of reasoning already expressed in CISG jurisprudence and find that even a mere suspicion of a product’s adverse impact on human health is sufficient to warrant the existence of non-conformity if coupled with non-resaleability of the product \[BGH 02.03.2005\].

2.2. **Respondent knew or ought to have known that Oceania is a market which places special emphasis on fair trade and the observance of ethical principles**

RESPONDENT states that it had “no independent knowledge” of the fact that Oceania is a market with special emphasis on fair trade and the observance of ethical principles \[SD \¶8\]. However, just as there are exceptions to the rule that the seller cannot be excused for ignorance of the public law requirements of the destination country for goods \[Kröll1, 522; BGH 08.03.1995; OGH 25.01.2006\], the seller’s knowledge of the ethical requirements of the market with a particular emphasis on fair trade has to be imputed when the seller regularly exports goods to that country, has local representation in the country or the standards in that country are in accordance with internationally or regionally recognized standards which should be known to the seller \[Kröll1, 522; Henschel, 207,208; Flechtner, 6; Bianca, 283; Poikela, 54; Krusinga, 218; Lookofsky, 80; BGH 08.03.1995; OGH 13.04.2000; OGH 25.01.2006; RJ \& AM Smallmon Case; LG Ellwagen 21.08.1995\].

Considering that RESPONDENT previously delivered the goods to third parties which were destined for Oceania \[PO2 q.15\], the Tribunal should find that RESPONDENT could not have been unaware of the fact that Oceania is a market with special emphasis on fair trade and the observance of ethical principles, and that the goods intended for resale in Oceania need to comply with these requirements. What is more, RESPONDENT cannot claim that it was oblivious as to the importance of ethical standards in Oceania, since clauses such as the one in Clause 12 of the Contract were regularly included in contracts RESPONDENT has concluded with
CLAIMANT and other members of Oceania Plus group in the past [PO2 q.q.4,5] and ethical audits were regularly performed when dealing with this part of the world [SC ¶9; SD ¶3].

87. In the unlikely event that the Tribunal finds that RESPONDENT did not in fact know of the ethical expectations of Oceania’s market, it should nevertheless find that RESPONDENT ought to be aware of this fact since Oceania’s standards on prohibition of child labor are internationally recognized.

88. Oceania’s standards regarding the prohibition and abolition of child labor have been derived from the ILO Convention, which is binding for all Members who have ratified it (Art. 10) and forms *ius cogens* [Kaufmann/Heri, 6]. It is also important to mention that besides Oceania and 175 other countries [ilo.org], Equatoriana and Mediterraneo have also ratified this Convention [SC ¶32]. Hence, RESPONDENT cannot claim ignorance of Oceania’s ethical requirements, since they are both internationally recognized and directly applicable in its own country. What is more, even if Equatoriana was not a party to the ILO Convention, minimum ethical standards, such as prohibition of child labor, would have to be safeguarded in performance of international sales contracts, as aptly stipulated in legal doctrine [Schwenzer/Leisinger, 265].

89. In any event, the Tribunal should find that RESPONDENT was obliged to organize its manufacturing process in compliance with Oceania’s market fair trade requirements and ethical principles and deliver the goods free of ethical condemnation.

2.3. It was reasonable for Claimant to rely on Respondent’s skill and judgement

90. There is nothing in the Record to indicate that CLAIMANT did not rely on RESPONDENT’S skill and judgment, or that such reliance was unreasonable. In case that RESPONDENT alleges the contrary, it should bear the burden of proof of such facts [Neumann ¶47; Honnold ¶226; Hyland §I]. Nevertheless, CLAIMANT submits that there are numerous reasons rendering its reliance on RESPONDENT’S skill and judgement reasonable.

91. First and foremost, the Parties were in a long-lasting business relationship, they have cooperated on several occasions and RESPONDENT was aware of CLAIMANT’S ethical expectations as a clause identical to Clause 12 was inserted in all contracts between the Parties. Furthermore, RESPONDENT knew that their business cooperation was contingent on a past ethical audit. Moreover, RESPONDENT complied with the Oceania Plus Policy in all dealings with CLAIMANT and other members of the Oceania Plus Group in the past [PO2 q.5]. Finally, RESPONDENT delivered goods that were destined for Oceania on several occasions [PO2 q.15], which implies its knowledge of the
ethical expectations of the Oceania market and the prohibition of child labor – a requirement which is not only internationally recognized but also existent in RESPONDENT’S country.

92. For all these reasons, CLAIMANT had every reason to rely and it did in fact rely on RESPONDENT’S skill and judgement.

3. **In any event, Respondent failed to comply with the widely accepted international trade usage in the apparel industry**

93. CLAIMANT submits that irrespective of the argumentation laid out above, RESPONDENT failed to comply with the Contract as it failed to comply with the international trade usage requiring prohibition of use of the worst forms of child labor as a minimal ethical standard in the apparel industry, a usage that RESPONDENT, as a manufacturer and trader of clothing garments, was obliged to respect under Art.9(2) CISG.

94. It is not uncommon to ascertain what the contract requires by referring to trade usages [Mullis, 131; BGH 02.03.2005], whilst a party who is asserting a trade usage must show the usage’s existence and other party’s implied knowledge thereof [ZGer Basel-Stadt 03.12.1997; OLG Dresden 09.07.1998]. Hence, CLAIMANT will demonstrate that prohibition of child labor is a fundamental ethical standard appropriate to be regarded as an international trade usage (3.1.). Further, it will be demonstrated that the elimination of child labor is a trade usage in the apparel industry which is widely known and regularly observed by when trading internationally (3.2.), of which RESPONDENT knew or ought to have known (3.3.).

3.1. **Prohibition of the worst forms of child labor represents a basic ethical standard appropriate to be regarded as international trade usage**

95. There is a growing consensus that child labor, especially its most intolerable norms, must be abolished. The recent period has seen the efficient harmonization of international child labor standards unlike any other human rights field of international concern [Brown et al., 270]. Particularly, under the United Nations, the International Labor Organization adopted 26 mandatory conventions for specific protection of children, including ILO Convention. [Diller/Levy, 672; Kaufman/Heri, 3-7]. Considering that “the effective elimination of the worst forms of child labour requires immediate and comprehensive action” (emph. added), the prohibition of the worst forms of child labor is recognized as one of four core rights which must be universally respected [ILO Declaration]. Consequently, the ILO Convention was ratified by 175 countries, including Mediterraneo, Oceania and Equatoriana (see ¶88).
96. In addition, the Fifth Principle of the UN Global Compact prohibiting child labor enjoys universal consensus among more than 10,000 companies and other business participants from more than 145 countries [UN Global Compact Survey; Velentzas/Broni, 804; McCrudden, 7], who voluntarily joined this initiative. The relevant surveys show that these companies often change suppliers or other business partners if the concerns arise over protection of human rights in the conduct of their business [Schwenzer/Leisinger, 259].

97. Hence, the prohibition of child labor, particularly its worst forms, represents a minimal unconditional human rights standard which must be respected worldwide [Buller/McEvoy, 332], irrespective of formal status of ILO Convention in countries where the goods are traded [Kaufmann/Heri, 4].

98. Finally, the CISG cannot be deemed neutral toward protection of basic ethical standards important for the UN members, as its Preamble refers to New International Economic Order which deals with ethical concerns, amongst other things. Hence, there should be no doubt that ethical child labor standards could be subsumed under the CISG, including its Art. 9. As rightly pointed out in legal doctrine, “in this day and age, the observance of, at least, basic ethical standards can be regarded as an international trade usage, and, thus, as an implied term in every international sales contract” [Schwenzer/Leisinger, 267].

3.2. The elimination of the worst forms of child labor is a usage in apparel industry which is widely known and regularly observed by when trading internationally

99. Under Art. 9(2) CISG, usages within a distinct branch that are well-known and not uncertain are considered part of the contract [Henshel, 122; Viscasillas2, 158]. The existence of a trade usage is a question of fact [Junge, 79; Schmidt-Kessel, 149; Honnold, 176; OGH 15.10.1998; OGH 21.03.2000], so it must be proven on the basis of all possible means, including statistics and examples. For a usage to be considered as widely known and regularly observed in international trade, it has to be recognized by the majority of people acting in the trade concerned [OGH 21.03.2000]. CLAIMANT will prove that such a usage indeed exists in the apparel industry.

100. There are many different private initiatives throughout the world that address labor issues in transnational business operations, especially in the textile sector. This trend is most evident in clothing and footwear industry [Saibau] as the likelihood of child labor is the highest in these industries [Kolk/Van Tulder, 50]. Hence, the companies alone or together with other companies, trade unions and non-governmental organizations often enact codes of conducts dealing with the
issue, either voluntarily in response to public pressure, or in response to regulatory compulsion [Kolk/Van Tuijl 2029, 293].

101. Almost half of the company codes in the apparel industry prohibit the use of child labor and cooperation with the companies that employ it [Diller, 112]. This is especially true for the world’s largest apparel companies and retailers, such as Levi Strauss [SES Guidebook, 6-7], Warnaco [Warnaco SCC], Phillips-Van Heusen [PVH Requirements, 2] and VF Corporation [VF Principles]. In addition, in the USA, the focal point of the apparel industry, almost every company code surveyed (42 out of 48) contains a reference to the prohibition of child labor and 90% of the labels on their clothing garments contain references to their ‘child labor free’ manufacturing policy [Sajhau].

102. Furthermore, companies in the clothing industry are vigorous not only in adopting policies against child labor, but also in refuting accusations of non-ethical conduct (e.g. Inditex, Victoria’s Secret, Nike, etc.) by emphasizing that they have zero tolerance for underage labor [Nike Controversy]. This is because the most valuable activities in the apparel value chain are not related to manufacturing per se, but are found in the design, branding, and marketing of the products [Gereffi/Federick, 11]. Hence it is not surprising that even the major apparel brands have lost millions of dollars in the past due to the media exposing their occasional unethical behavior [Cory, 9] (e.g. Gap [Guardian], Nike [csmonitor.com], Hanes, Wal-Mart, J.C. Penney and Puma [Kathie Lee Gifford Scandal]). The actions these brands nowadays undertake, aimed prohibiting child labor use, are gradually increasing their reputation which subsequently translates into financial value [Van Dam/Kim, 28].

103. In sum, the survey undertaken shows that child labor prohibition forms usage in the apparel industry, which is widespread, regardless of the form it undertakes - be it companies’ public declarations via codes, contracts, labeling or in any other way, which is regularly observed by the parties in that particular trade.

3.3. **Respondent knew or at least ought to have know of the prohibition of child labor usage in apparel industry**

104. **Respondent** might argue that the usage prohibiting the use of child labor has crystallized only recently and that it is thus not binding. However, it is not material for a usage to be long-standing to be binding. It suffices that its duration justifies the conclusion that the parties knew or ought to have known about it [Honnold, 173]. Since the actions against child labor in apparel industries began in 1990s, and continued to develop over time [Sustainability Report, 3], especially
among branded companies [Gereffi/Memedovic, 7]. Therefore, any company in the apparel industry should be at least aware of intolerance towards child labor.

105. RESPONDENT cannot deny this since it is an experienced supplier of clothes for, at least, four, or more years and plans to develop its business in the future [SC ¶9; SD ¶3; PO2 qq.2,6]. Furthermore, it operates in and trades with the countries which are parties to the ILO Convention [SC ¶32] and it itself admits that child labor issues are often discussed in this part of the world [SD ¶3].

106. In conclusion, the prohibition of child labor, especially its worst forms became international trade usage in the apparel industry. The Tribunal should acknowledge this fact in the resolution of the case at hand and deem such usage an implied term of the Contract via Art. 9(2) CISG. Given that, RESPONDENT failed to respect the prohibition of child labor in its manufacturing processes, the Tribunal should find that it breached, if not an express, then certainly an implied term of the Contract by delivering non-conforming products, tainted by the use of child labor.

IV. CLAIMANT WAS ENTITLED TO AVOID CONTRACT

107. CLAIMANT will prove herein that not only had RESPONDENT delivered non-conforming shirts, but that such a breach was fundamental, thus entitling CLAIMANT to avoid the Contract under Art. 49(1)(a) CISG (1.). Furthermore, CLAIMANT will prove that its avoidance was not precluded by operation of Art. 82 CISG and that it was within its rights when it sold the goods to Pacifica Trading Co. (2.). Finally, CLAIMANT will prove that it effectively avoided the Contract (3.).

1. RESPONDENT COMMITTED A FUNDAMENTAL BREACH OF THE CONTRACT

108. Under Art. 25 CISG a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. CLAIMANT will prove that all elements of a fundamental breach are met in the case at hand i.e. that CLAIMANT was indeed substantially deprived of what it was entitled to expect under the Contract (1.1.) and that the result of the breach was foreseeable to RESPONDENT (1.2.)
1.1. **Claimant was substantially deprived of what it was entitled to expect under the Contract**

109. For a breach of contract to be fundamental it must concern either the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties [Björklund, 337; BG 15.09.2000]. Such a breach results in a *substantial deprivation* of what the injured party expected to receive under the contract [Björklund, 337; C Cas. 13.09.2011; Cortem SpA Case; TSP 16.06.2008].

110. In the case at hand, a substantial deprivation suffered by CLAIMANT was the non-resalability of the delivered goods in Oceania, since they were tainted by the use of child labor in the RESPONDENT’s manufacturing process (see §III), coupled with high financial and reputational detriment in Oceania (see ¶83). Hence, not only was CLAIMANT unable to fulfill the particular purpose it had in mind when entering the Contract with RESPONDENT, but its overall reputation was put to risk by RESPONDENT’s breach. Had CLAIMANT known that RESPONDENT would not be able to deliver products not tainted by child labor it would have most certainly refused to enter the Contract. This is because its parent company - Oceania Plus - follows a stringent policy against the use of child labor and insists on compliance with this Policy [SC ¶9], and because Doma Cirun, the retail chain for which the goods were intended to, operates under the same ethical code [SC ¶7; CE5 ¶4].

111. Hence, for all these reasons the Tribunal should find that CLAIMANT had no interest in further upholding the terms of the Contract and that avoidance was the only reasonable option to pursue.

**1.2. The result of the breach was foreseeable to Respondent**

112. RESPONDENT might allege that the result of the breach was unforeseeable to it. However it knew that the Contract required adherence to Oceania Plus policy and what such policy entailed (see ¶¶70-72); it also knew that the goods were intended for resale in Oceania (see ¶77), and that Oceania is a country highly sensitive to the use of child labor (see ¶¶83,86,88,95). Therefore, RESPONDENT cannot now allege that the non-resalability of the goods resulting from its failure to comply with ethical standards was unforeseeable to it.

113. Consequently, the Tribunal should find that it was entitled to avoid the Contract.

**2. **CLAIMANT did not lose the right to avoid the Contract**

114. Art. 82(1) CISG stipulates that the buyer loses the right to declare the contract avoided if it is impossible for him to make restitution of the goods substantially in the condition in which he
received them. Art. 82(2)(a) further clarifies that the buyer does not lose the right to declare the contract avoided if the impossibility of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission.

115. Although it is true that in the case at hand CLAIMANT cannot make restitution of the goods, as it sold them to Pacifica Trading Co. [SC ¶2], CLAIMANT should not be precluded from avoiding the Contract for this reason, since it was put in this situation by RESPONDENT’S own actions. Namely, when CLAIMANT demanded that RESPONDENT either take back the shirts or make arrangements for their disposal [CE6 ¶3], RESPONDENT replied that “[i]t will not be picking up the polo shirts… It is up to Doma Cirun to dispose of them.” [CE7 ¶3]. Consequently, CLAIMANT was left with no other option but to sell the remaining 99,000 shirts to Pacifica Trading Co. [SC ¶2] as an Art. 88 CISG “self-help sale” [Bacher, 911, 912; Schwenzer4, 1164-1166; Sono, 1178-1181] and keep the proceeds on behalf of RESPONDENT.

116. Hence, the impossibility of restitution of the shirts should not be construed as a consequence of CLAIMANT’s act or omission, but it should be deemed due to RESPONDENT’s refusal to take back the goods. Accordingly, CLAIMANT was not precluded from avoiding the Contract.

3. CLAIMANT EFFECTIVELY AVOIDED THE CONTRACT

117. Under Art. 26 CISG, a declaration of avoidance is effective only if notice is given to the other party. The word ‘avoidance’ need not be used in such declaration [Honnold, 284, 285; Müller Chen, 584, 585]. It is only important that the avoidance is given in clear terms [Björklund, 353, 354; Müller Chen, 584, 585; Fountoulakis, 440, 441]. Furthermore, in order for avoidance to be effective it must occur within a reasonable time after the buyer knew or ought to have known of the breach (Art. 49(2) CISG).

118. In the case at hand, CLAIMANT sent its notice of avoidance in unambiguous terms: “The consequences of your [RESPONDENT’S] breach of the contract were extremely serious and as a result we [CLAIMANT] are avoiding the Contract. I would ask you to immediately make arrangements for the disposal of the shirts” (emph. added) [CE6 ¶3]. Furthermore, such declaration was timely, as it was sent only a day after the first media reports on RESPONDENT’S use of child labor were publicized [CE6; SC ¶18] and on the same date CLAIMANT was informed by Doma Cirun of RESPONDENT’S breach of Contract i.e. the use of child labor in its production processes [CE5].

119. Hence, the Tribunal should find that CLAIMANT was entitled to avoid the Contract and that it had effectively done so.
V. CLAIMANT IS ENTITLED TO THE FULL AMOUNT OF DAMAGES REQUESTED

120. Article 45(1)(b) CISG stipulates that the buyer is entitled to request damages whenever the seller fails to perform any of his obligations. Furthermore, Art. 45(2) CISG clarifies that the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies. The amount of damages requested under the CISG should be calculated, as a general rule, pursuant to Art. 74 which stipulates that damages for breach of contract consist of a sum equal to the loss, including loss of profit, that the aggrieved party suffered as a consequence of the breach. However, such an amount shall be reduced if at the time of conclusion of the contract and in the light of the circumstances of the case such loss was not foreseeable (Art. 74 CISG) or if the party in breach did not take reasonable measures to mitigate the loss, including loss of profit (Art. 77 CISG).

121. In the case at hand, losses suffered by CLAIMANT came as a result of RESPONDENT’S delay in performance, on one hand, and RESPONDENT’S defective performance, on the other. Contrary to RESPONDENT’S allegations, CLAIMANT will prove that it is entitled to all items of damages it requested including recovery of USD 27,500 for late delivery of the shirts (1.) and USD 1,550,000 paid for settlements with Doma Cirun (USD 850,000) and Oceania Plus (USD 700,000) as a result of non-conforming delivery [§C ¶37] (2.).

1. CLAIMANT IS ENTITLED TO DAMAGES FOR LATE DELIVERY

122. As previously elaborated in §II of this Memorandum, RESPONDENT was five days late in performance of its obligations, as the delivery of the polo shirts occurred on 24 February 2011, instead on 19 February 2011. As a consequence, CLAIMANT suffered the loss for which it is now requesting reimbursement.

123. Already at the time of the Contract conclusion the Parties have agreed that RESPONDENT is to pay to CLAIMANT one per cent (1%) of the purchase price for each day of delay [CE2 ¶10]. This is a common type of clause in the contracts for international sale [Schwenzer/Hachem/Kee, 633; DiMatteo, 193; Cremades, 329-330; UNCITRAL Yearbook VIII, 25-64 ¶511], as parties often attempt to sidestep the differences of opinions with respect to establishing the exact amount of loss in case of delay. The need for insertion of such provision in the case at hand was even stronger due to the fact that this was a rush job and that the delivery date was of the utmost
importance to CLAIMANT and Dom Cirun retail store to whom CLAIMANT was to deliver the shirts (see ¶61).

124. Given the abovementioned, it is unclear to CLAIMANT on which basis RESPONDENT now contests its right to the reimbursement of the sum of USD 27,500, which represents a mere 5% of the Contract price [§D ¶13]. If it is because of the alleged modification of the Contract, then the Tribunal should reject such allegations since no modification ever occurred (see §II.2). If, however, RESPONDENT denies the validity of Clause 10 of the Contract, or if it finds it to be of a punitive character, then it must put forward evidence of such contentions.

125. While it is true that the CISG does not contain any provision addressing the fixed sums in commercial contracts payable upon breach of an obligation [Djordjevic, 74; Graves, 2; Hachem2, 141], it is uncontested in legal doctrine that the CISG governs formation of a clause containing a fixed sum [Graves, 3; Schwenzer/Hachem2, 81; Hachem1, 219; Sec. Comm. Art. 46] and that Art. 6 CISG creates no obstacle for the parties to provide for such a clause in their contract [Schlechtriem, 74; Schwenzer, 1022; Konern, 146; Schwenzer/Hachem2, 81; Zeller, 6; FTCA 15.08.2008].

126. Notwithstanding the fact that a party autonomy under Art. 6 CISG allows the parties to agree on fixed sums clauses, their validity is to be tested under the applicable domestic law [Schlechtriem, 74; Schwenzer 1022; Schwenzer/Hachem 93; Djordjevic 75; ICAC 13.01.2006; ICC Case No. 7197; OLG München 08.02.1995; FTCA 15.08.2008], as the issues of validity of the Contract or any of its provisions are not governed by the CISG (Art. 4).

127. In the case at hand, given that the Parties agreed that UNIDROIT Principles of International Commercial Contracts (hereinafter: PICC) should apply to issues not governed by the CISG, the validity of Clause 10 should be tested against the provisions of the PICC. In this regard, Art. 7.4.13 of the PICC clearly states that “Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.” (emph. added).

128. Under PICC non-performance includes late performance (Art. 7.1.1. PICC), and the difference between liquidated damages clauses and penalty clauses expressed in different legal systems is deemed irrelevant for the purposes of Art. 7.4.13 PICC [McKendrick, 920]. Consequently, as the Contract, in its Clause 10 clearly sets out a formula which enables the amount of damages to be calculated, the Tribunal should find no obstacles in awarding CLAIMANT the amount of USD 27,500 for RESPONDENT’s five day delay.
129. Finally, if **RESPONDENT** were to claim that the amount calculated on the basis of Clause 10 of the Contract is somehow grossly excessive in relation to the harm resulting from the delay, it must prove so, as it is the breaching party’s burden to prove the basis of such claim [McKendrick, 926].

130. In any event, under an unlikely assumption that **RESPONDENT** succeeds with such request, the Tribunal should not reject **CLAIMANT**’s claim for damages for the late delivery but rather reduce it to what it considers to be the reasonable amount, as provided under Art. 7.4.13(2) PICC. In doing so, it should take into account the purpose of the Contract, the importance of the delivery date, and the fact that **RESPONDENT** was aware of all such circumstances.

2. **CLAIMANT** IS ENTITLED TO DAMAGES FOR NON-CONFORMITY OF THE GOODS

131. The amount of losses suffered by **CLAIMANT** as a consequence of **RESPONDENT**’s late delivery is only a fraction of the losses **CLAIMANT** suffered due to the shirts’ non-conformity. Namely, because of **RESPONDENT**’s disrespect of the clear terms of the Contract and **CLAIMANT**’s particular purpose, **CLAIMANT** faced several law suits within just a few months following delivery of polo shirts. On 15 September 2011 Doma Cirun began arbitration proceedings against **CLAIMANT** due to the fact that the goods delivered by **CLAIMANT** were non-conforming [SC ¶26]. Furthermore, as a consequence of **RESPONDENT**’s violation of Clause 12 of the Contract, Oceania Plus was exposed to USD 15,000,000 valued law suits by the Children Protection Fund of Oceania and other investors in Oceania Plus [SC ¶28], which was the reason why it initiated court proceedings against **CLAIMANT** in Oceania on 15 February 2012, for reimbursement of the amount of USD 700,000 paid as settlement of the dispute with the investors.

132. The outcomes of these disputes were objectively very favorable for **CLAIMANT** [PO2 q. 29] i.e. the settlement agreements were entered into with plaintiffs, and further loss of clientele and reputation was avoided. Nevertheless, **CLAIMANT** incurred significant expenses as it paid USD 850,000 to Doma Cirun, and USD 700,000 to Oceania Plus – a total of USD 1,550,000 under the settlements reached [SC ¶¶27,29] – the amounts it is now seeking to recover from the **RESPONDENT**. Since all these losses caused by **RESPONDENT**’s breach are recoverable under the CISG (2.1.), were foreseeable to **RESPONDENT** at the time of conclusion of the Contract (2.2.), and, moreover, were successfully mitigated by **CLAIMANT** (2.3.), the Tribunal should grant **CLAIMANT**’s request for damages in its entirety.
2.1. All of Claimant’s losses are recoverable

133. The Tribunal should find that all costs incurred as a consequence of Respondent’s breach of the Contract represent allowable items of damages and that Claimant’s request for damages should therefore be granted.

134. The CISG does not exclude explicitly any type of loss from being reimbursable under Art. 74. [Huber1, 268]. As a rule, therefore, every type of loss is compensable (provided that the foreseeability requirement in Art. 74 second sentence CISG is met), including the consequential losses [See. Comm. Art. 74; Huber1, 291; Liu, 485; Stoll/Gruber, 757; BGH 25.06.1997; CIETAC 03.08.2006; CIETAC 06.11.2003], i.e. the principle of full compensation governs the recovery of losses under the CISG [CISG-AC Opinion 6 ¶1; Huber1, 268; Tallon, 677; OGH 14.01.2002; FTCA 11.11.2009].

135. Consequential damages are damages for economic losses from dealing with third parties [Gotanda, 997] i.e. consequential loss may be incurred where the seller’s breach of contract in turn leads to the buyer breaching his contracts with his customers [Schwenzer2, 1013; Stoll/Gruber, 758; OLG Köln 21.05.1996]. The amounts paid under the settlement agreements previously referred to represent a typical example of consequential losses suffered by Claimant, since they are incurred because of Claimant’s liability to third parties (Doma Cirun and Oceania Plus) as a result of Respondent’s breach of Contract (see ¶138).

136. Since consequential losses are generally compensable under the CISG, the Tribunal should not hesitate in granting Claimant’s request in this regard.

2.2. All of Claimant’s losses were foreseeable to Respondent

137. Article 74 CISG provides that only foreseeable losses are recoverable [OGH 06.02.1996; CIETAC 18.04.2008; AAA 23.10.2007; ICAC 19.05.2006; FTCA 15.06.2010]. In determining whether a loss was foreseeable, the CISG adopts both the subjective and the objective criteria [Huber1, 272; Knapp, 541; Saidov, 103; Liu, 464]. This means that the damages will be recoverable not only if the breaching party actually foresaw the loss, but also if a reasonable person in the position of the party in breach with knowledge of the circumstances surrounding the conclusion of the contract ought to have foreseen the damage at the time of conclusion of the contract [Huber1, 272-273; Stoll/Gruber, 765]. Awareness of the aggrieved party’s business is considered to be a factor that can impute knowledge and foreseeability [Saidov, 108]. It is generally held that when the aggrieved party purchases goods for commercial purposes, the party in breach must anticipate the possible liability of the aggrieved party to its customers if the contract is not performed [Schwenzer2, 1021;
Stoll/Gruber, 768; Vékás, 166; CIETAC 05.09.1994; Rb Arnhem 01.03.2006], even if there is no actual knowledge of the existence of third party contracts [CIETAC 03.08.2006].

138. In the case at hand, RESPONDENT knew that CLAIMANT’s sole reason for entering into the Contract with RESPONDENT was to fulfill the needs of a third party – Doma Cirun [SC ¶¶10,11; SD ¶¶4-6]. Hence, it was foreseeable to RESPONDENT that if it breached the Contract with CLAIMANT, CLAIMANT would inevitably breach the contract with its contracting partner, thus exposing it to liability for damages. Consequently, there should be no obstacles to award CLAIMANT the reimbursement of USD 850,000 paid to Doma Cirun under the settlement agreement.

139. Furthermore, RESPONDENT was fully aware of the fact that CLAIMANT was at all times required to comply with Clause 12 of the Contract, or otherwise be liable to its parent company Oceania Plus [SD ¶3; SC ¶9]. This further entails that it was foreseeable to RESPONDENT that if it breached the Contract in terms on non-compliance with the highest ethical standards in business conduct, CLAIMANT’s liability to Oceania Plus would follow. Accordingly, CLAIMANT should be awarded the reimbursement of USD 700,000 paid to Oceania Plus under the settlement agreement.

2.3. Claimant successfully mitigated the loss

140. RESPONDENT might allege that the amount of damages requested by CLAIMANT should be reduced for the alleged failure to undertake reasonable mitigation measures as requested by Art. 77 CISG and confirmed by case-law [OGH 06.02.1996; ICC Case No. 10329; OLG Köln 08.01.1997]. However, not only did the Tribunal not direct the counsels to address the issue of quantum of damages at this stage of the proceedings [PO1 ¶10], but such allegations would also not be substantiated by the Record.

141. It is undisputed that the settlements with Doma Cirun and Oceania Plus were fair in the given circumstances, unavoidable and objectively very favorable for CLAIMANT [PO2 q.29]. Had it not entered into the settlement agreements, CLAIMANT’s liability to third parties would most likely be significantly greater than the amounts reached in the settlements. Furthermore, these amounts would probably further be increased by high attorneys’ fees. Hence, given that actions that CLAIMANT undertook under the circumstances were reasonable, there are no obstacles to fully reimburse CLAIMANT for the losses suffered.

142. In conclusion, since all items of damages requested by CLAIMANT relate to the losses which are recoverable, foreseeable and reasonable, the Tribunal should grant CLAIMANT’s request in its entirety.
REQUEST FOR RELIEF

143. On the basis of the foregoing arguments and CLAIMANT’s prior written pleadings, CLAIMANT respectfully requests the Tribunal, while dismissing all contrary requests and submissions by RESPONDENT, TO ADJUDGE AND DECLARE that:

a) Mr Short’s written witness statement should not be considered by the Tribunal if he is not available for examination at an oral hearing;

b) RESPONDENT was late in delivering the polo shirts as contracted delivery date was not modified;

c) RESPONDENT delivered non-conforming polo shirts;

d) CLAIMANT was entitled to avoid the Contract;

e) CLAIMANT should be compensated for the full amount of requested damages.

And to ORDER RESPONDENT to:

1. Pay the total amount of USD 2,127,500 consisting of:
   a. USD 27,500 for late delivery of the polo shirts;
   b. USD 550,000 for reimbursement of the purchase price;
   c. USD 850,000 for settlement with Doma Cirun;
   d. USD 700,000 for settlement with Oceania Plus.

2. Pay the costs of arbitration, including CLAIMANT’s expenses for legal representation;

3. Pay CLAIMANT interest on the amounts set forth in items 1 and 2 from the date those expenditures were made by CLAIMANT to the date of payment by RESPONDENT.

Belgrade, 6 December, 2012

On behalf of Mediterraneo Exquisite Supply, Co.

Vladimir Bošković Marija Bučković Maša Mišković Andrijana Mišović

Tamara Momirov Dragana Nikolić Dina Prokić Dejan Sivčev