MEMORANDUM FOR RESPONDENT

On Behalf of:

McHinery Equipment Suppliers Pty
The Tramshed
Breakers Lane
Westeria City 1423
Mediterraneo

Against:

Oceania Printers S.A.
Tea Trader House
Old Times Square
Magreton
00178 Oceania

RESPONDENT

CLAIMANT

NATIONAL UNIVERSITY OF SINGAPORE

CHAN XIAOHUI DARIUS · KIMBERLY SCULLY
NG CHUEN CHIAT JEFFREY · YONG SHUK LIN VANESSA
MEMORANDUM FOR RESPONDENT

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1. This Tribunal should determine the applicable law through a cumulative application of the conflict of laws rules of the countries having a connection to this claim. ................................................................................................................................. 4

2. Applying Mediterraneo’s conflict of laws rules, the law of Mediterraneo is the applicable governing law. ................................................................................................................................. 5

3. Applying Oceania’s conflict of laws rules, the law of Mediterraneo is the applicable governing law. ................................................................................................................................. 5

   i. Art. 8(1) Oceania Conflicts of Law Act leads to the application of the law of Mediterraneo...................................................................................................................................................... 5

   ii. Art. 8(2)(b) Oceania Conflicts of Law Act is inapplicable. ........................................................................... 6

B. ALTERNATIVELY, THIS CLAIM IS SUBJECT TO A TWO-YEAR LIMITATION PERIOD PRESCRIBED BY THE LAW OF MEDITERRANEO, WHICH IS THE GOVERNING LAW IN ACCORDANCE WITH THE “CLOSEST CONNECTION” RULE. ................................................................. 7

1. This contract is more closely connected to Mediterraneo because Mediterraneo is the place of business of the party rendering the characteristic performance of the contract. ................................................................................................................................. 7

2. Furthermore, this contract is more closely connected to Mediterraneo because Mediterraneo is the place of conclusion of the contract. ................................................................................................................................. 9

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1. The limitation period commenced on 1 July 2002, which was the date the Respondent handed over the flexoprint machine. ..................................................11

2. The Claimant instituted arbitral proceedings more than one year after the expiration of the two-year limitation period stipulated by the law of Mediterraneo. ..................................................................................12

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2. Failing such designation by the parties, Art. 32(1) CIDRA Rules requires the applicable law to be determined by applicable conflict of laws rules. .........................13

3. In addition, the phrase “the law” in Art. 32(1) CIDRA Rules requires the application of a national system of law. .................................................................15

4. Even if this Tribunal decides to apply the UNIDROIT Principles, this claim was instituted after the expiration of the stipulated three-year limitation period. ........16

II. THE RESPONDENT DELIVERED A FLEXOPRINT MACHINE THAT WAS IN CONFORMITY WITH THE CONTRACT. ............................................17

A. THE FLEXOPRINT MACHINE WAS DELIVERED IN ACCORDANCE WITH ART. 35(1) CISG SINCE THE CONTRACT DID NOT EXPRESSLY OR IMPLIEDLY REQUIRE THE MACHINE TO BE ABLE TO PRINT ON EIGHT MICRON FOIL. ............................................17

1. The Claimant’s subjective intent that the flexoprint machine is able to print on eight micron foil did not become a term of the contract. ...........................................17

2. A reasonable person would not have interpreted the contract as requiring the flexoprint machine to be able to print on eight micron foil. .........................19

B. FURTHERMORE, THE FLEXOPRINT MACHINE CONFORMED TO THE CONTRACT IN ACCORDANCE WITH ART. 35(2)(b) CISG .................................................................20

1. The particular purpose of the flexoprint machine was not made known to the Respondent at the time of conclusion of the contract. ........................................20

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III. ASSUMING THE RESPONDENT IS IN BREACH OF CONTRACT, ANY LOST PROFIT SUFFERED BY THE CLAIMANT IS IRRECOVERABLE. .................................................................................. 26

A. The claimant failed to take adequate preventive measures to mitigate the lost profit suffered. .......................................................... 26

1. It is reasonable to expect the claimant to take more effective mitigating measures such as importing printed eight micron foil when it failed to find a substitute machine. .......................................................... 27

2. The claimant was required to take more extensive measures to mitigate harm because of the gravity of the losses involved. .......................................................... 28

B. Alternatively, lost profits due to the claimant’s loss of renewal of the Oceania Confectionaries contract and loss of reputation are irrecoverable because both losses were unforeseeable and uncertain. .......................................................... 29

1. Any lost profits resulting from the loss of renewal of contract and loss of reputation were unforeseeable since the contract’s protective purpose did not cover renewal and reputation. .......................................................... 30

   i. The claimant’s loss of profit from renewal of the Oceania Confectionaries contract was unforeseeable because the parties did not intend for the renewal to be protected under the contract. .......................................................... 30

   ii. Similarly, lost profit due to loss of reputation was unforeseeable because the parties did not intend for reputation to be protected under the contract. .......................................................... 31

2. Furthermore, the lost profits due to the loss of renewal of contract and loss of reputation were both highly uncertain. .......................................................... 31

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   iii. Similarly, any loss of profit due to loss of reputation suffered by the claimant is highly uncertain. .......................................................... 33

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<td>American Journal of International Law</td>
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<td>Audiencia Provincial (Spanish Appellate Court)</td>
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<td>Chicago International Dispute Resolution Association</td>
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<tr>
<td>GmbH</td>
<td>Gesellschaft mit beschränkter Haftung (Limited Liability Company)</td>
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<td>H.L.</td>
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<td>Commercial Court (Switzerland)</td>
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<td>UNIDROIT</td>
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MEMORANDUM FOR RESPONDENT

SUMMARY OF ARGUMENTS

I. Applicable Limitation Period

A. Law of Mediterraneo As The Governing Law

This claim is subject to a two-year limitation period prescribed by the law of Mediterraneo. This Tribunal will arrive at this result by applying the conflict of laws rules of Mediterraneo and Oceania cumulatively. The cumulative approach stipulates that in instances where the conflict of laws rules of the jurisdictions touching the dispute point towards the same substantive law, arbitrators can simply apply this law. Applying Art. 14 Private International Law Act of Mediterraneo, the law of Mediterraneo is the applicable law governing this claim. Similarly, applying Art. 8(1) Oceania Conflicts of Law Act, the law of Mediterraneo is the applicable governing law. Art. 8(2)(b) Oceania Conflicts of Law Act is inapplicable since the Respondent is only under a duty to deliver the machine on board the vessel at the port of shipment in Greece.

Alternatively, this claim is subject to a two-year limitation period prescribed by the law of Mediterraneo, which is the governing law in accordance with the conflict of laws rule of “closest connection”. The determinative connecting factor is the place of business of the party undertaking the characteristic performance of the contract. In a contract of sale, the law of the seller is the applicable law because the seller renders the characteristic performance. In the present case, the Respondent undertook the essential obligations arising under the contract. Furthermore, this contract is more closely connected to Mediterraneo because Mediterraneo is the place of conclusion of the contract. The Respondent’s letter of 27 May 2002, with its enclosure of a document labelled “Contract” and manufacturer’s manual, constitutes an offer since it indicated the goods, price and quantity. The contract is formed at the time the Respondent received the signed document in Mediterraneo on 30 May 2002.

B. Claim Instituted After Expiration of Limitation Period

Under the law of Mediterraneo, the event giving rise to this claim is the handing over of the allegedly non-conforming machine to the Claimant. This occurred on 1 July 2002 and the limitation period expires in two years on 1 July 2004. However, the Claimant commenced arbitral proceedings on 5 July 2005, more than a year after the expiration of the two-year limitation period.
C. Application of Lex Mercatoria As The Governing Law Is Prohibited

The direct application of the UNIDROIT Principles to determine the relevant limitation period contravenes the CIDRA Rules that bind this Tribunal. The parties neither expressly, nor impliedly, designated the application of lex mercatoria. In the absence of a designated applicable law, Art. 32(1) CIDRA Rules requires this Tribunal to determine the governing law through the application of conflict of laws rules. The governing law cannot be applied directly. Moreover, Art. 32(1) CIDRA Rules only allows the application of a national system of law. Accordingly, Art. 32(1) CIDRA Rules prohibits this Tribunal from applying the UNIDROIT Principles, or any component of lex mercatoria, as the governing law. Even if this Tribunal decides to apply the UNIDROIT Principles, the Claimant instituted this claim after the expiration of the three-year limitation period provided in Art. 10.2 UNIDROIT Principles.

II. Conformity of the Machine

The Respondent delivered a machine that was in conformity with the contract. During the entire negotiations spanning six weeks, there was only one fleeting mention of eight micron foil in the Claimant’s first letter. This mention of “may be of 8 micrometer thickness” is vague and susceptible to differing interpretations. The Respondent understood the phrase as an estimate of the foil measurement and not a definite contractual requirement. Such an interpretation is reasonable since the Respondent is not an expert in foil printing or confectionary industry requirements. In such circumstances, the Respondent did not know and could not reasonably be expected to know that the Claimant required a machine that could print on eight micron foil.

Furthermore, there was no reliance on the Respondent. There is no reliance when a buyer participates in the selection of the goods or inspects the goods before purchase. Mr. Butter was able to describe the machine the Claimant required in technical language and inspected the machine in Greece. Any such reliance must be reasonable as well. The Claimant was a printer and was generally knowledgeable about printing machines. Faced with a lucrative contract worth $3,200,000, the Claimant failed to act prudently by not verifying the specifications of the machine even after the machine was refurbished and tested and a demonstration was made at its premises.
III. Lost Profit and Moral Harm

The Claimant can claim neither lost profit nor damages for moral harm. In attempting to mitigate the harm suffered, the Claimant failed to take adequate preventive measures. After it failed to procure a substitute machine, it should have imported printed eight micron foil. In the light of a highly profitable contract and the presence of imminent competition from Reliable Printers, such an act would reasonably be expected of a printer with the Claimant’s expertise. Since the loss of the contract flowed from the Claimant’s failure to mitigate, this loss and all subsequent loss must be irrecoverable.

Alternatively, claims for the loss of profits from (i) renewal of the contract; and (ii) loss of reputation must be denied. First, the Respondent could not have foreseen such a loss when a reasonable interpretation of the contract shows both parties did not contemplate the Respondent being so liable. In particular, the Claimant did not inform the Respondent that the latter was liable for the risk of such losses. Negotiations prior to contracting only emphasised the Respondent’s responsibility to hand over the flexoprint machine to the Claimant before 15 July 2002. Secondly, renewal was highly uncertain because of imminent competition for it. The phrase “subject to renewal” in the Oceania Confectionaries contract did not necessarily entail renewal. Furthermore, claims for the loss of the chance to renew the contract and the chance to develop a reputation must be denied because provision of these chances was not the pre-dominant purpose of the contract. Lastly, should this Tribunal award compensation, the calculation of damages ought to exclude inflation because this would result in an inaccurate assessment of the Claimant’s loss.

In accordance with the Arbitral Tribunal’s Procedural Order No. 1, the Respondent respectfully submits that:
(a) The applicable law governing the limitation (prescription) period of the contract is Mediterraneo law;
(b) This claim is not actionable because it was instituted after the limitation (prescription) period of two years;
(c) The 7 stand Magiprint Flexometix Mark 8 machine delivered by the Respondent was in conformity with the contract; and
(d) Any lost profit and moral harm incurred by the Claimant is irrecoverable.
ARGUMENTS

1. THIS CLAIM IS NOT ACTIONABLE BECAUSE THE CLAIMANT COMMENCED ARBITRATION PROCEEDINGS AFTER THE EXPIRATION OF THE APPLICABLE LIMITATION PERIOD.

1. It is not disputed that since both parties to this claim have their place of business in States that are parties to the CISG, this contract is subject to the CISG [Art. 1(1)(a) CISG; Claimant’s Exhibit No. 7]. However, the CISG does not govern limitation periods so this Tribunal must decide on the applicable law governing the limitation (prescription) period [hereinafter “limitation period”] of the contract by referring to the conflict of laws rules it deems applicable [Art. 32(1) CIDRA Rules].


A. THIS CLAIM IS SUBJECT TO A TWO-YEAR LIMITATION PERIOD PRESCRIBED BY THE LAW OF MEDITERRANEO, WHICH IS THE GOVERNING LAW BY APPLYING THE CONFLICT OF LAWS RULES OF MEDITERRANEO AND OCEANIA CUMULATIVELY.

1. This Tribunal should determine the applicable law through a cumulative application of the conflict of laws rules of the countries having a connection to this claim.

3. The Respondent submits that this Tribunal should determine the applicable law through the cumulative application of the conflict rules of both Oceania and Mediterraneo because they point to the same law. This approach involves examining the various conflict of laws rules of the jurisdictions significantly touching this claim [Naón, p. 50; Juenger, p. 19; Martinek; ICC Award No. 6268 of 1990]. In instances where the relevant conflict rules all point towards the same substantive law or yield a similar result, arbitrators ought to apply this law [ICC Case No. 953 of 1956; ICC Case No. 2272 of 1975; ICC Case No. 3043 of 1978; ICC Case No. 1176; Chukwumerije, p. 128; Greenberg, V.J. (2004) 315, p. 322; Lew, p. 373; Rubino-Sammartano, p. 433; Derains, p. 233]. This approach has been adopted in cases involving disputes about the applicable law [ICC Case No. 5118 of 1986; ICC Case No. 2172 of 1974; ICC Case No. 1424 of 1966].
By adopting such a cumulative approach, arbitrators are able to inject an international element into the proceedings. Both parties are assured that the issue has not been determined through a narrow application of the conflict rules of one State, which might not necessarily be predominantly related to the dispute [Craig/Park/Paulsson, p. 327; Greenberg, V.J. (2004) 315, p. 322; Sanders-Model Law, p. 177].

Applying this approach to our case, the three jurisdictions touching this claim are Oceania, Mediterraneo and Danubia. The Supreme Court of Danubia has held that the conflict of laws rules of Danubia are not applicable in international commercial arbitration held in Danubia [Procedural Order No. 2, para. 6]. Therefore, this Tribunal is left to consider the conflict of laws rules of Oceania and Mediterraneo.

Both the laws of Oceania and Mediterraneo contain the basic principle that the law of the seller’s country applies to all instances of an international contract of sale [Procedural Order No. 1, para. 6]. Accordingly, the conflict of laws rules of both jurisdictions will lead to the same result – the application of the law of Mediterraneo.

2. Applying Mediterraneo’s conflict of laws rules, the law of Mediterraneo is the applicable governing law.

Under Art. 14 Private International Law Act of Mediterraneo, the law applicable to an international sale of goods is that of the seller [Procedural Order No. 1, para. 4]. In the present case, the relevant transaction is an international contract of sale for a flexoprint machine with the Respondent as the seller. Accordingly, the law of the Respondent’s place of business, Mediterraneo, should be applied to the contract.

3. Applying Oceania’s conflict of laws rules, the law of Mediterraneo is the applicable governing law.

i. Art. 8(1) Oceania Conflicts of Law Act leads to the application of the law of Mediterraneo.

Art. 8(1) Oceania Conflicts of Law Act states that where the law applicable to a contract of sale has not been chosen by the parties, the contract is governed by the law of the seller’s place of business at the time of conclusion of the contract [Procedural Order No. 1, para. 7].
MEMORANDUM FOR RESPONDENT

9. In the von Mehren Report’s commentary on Art. 8 Hague Convention from which Art. 8 Oceania Conflicts of Law Act was adopted, Art. 8(1) Oceania Conflicts of Law Act was seen as the fundamental determinant of the law applicable to the contract. This proposition was approved by all 54 delegations involved in the drafting of the Hague Convention [von Mehren Report, p. 17 and 29]. Accordingly, since the Respondent’s place of business is Mediterraneo, Art. 8(1) Oceania Conflicts of Law Act leads this Tribunal to the application of the law of Mediterraneo.

ii. Art. 8(2)(b) Oceania Conflicts of Law Act is inapplicable.

10. Art. 8(2)(b) Oceania Conflicts of Law Act is not applicable in our case because there is no express obligation in the contract requiring the Respondent to deliver the machine to Oceania. Art. 8(2)(b) applies only in situations where there is an "express obligation in the contract on the seller to deliver goods in the buyer’s State" [von Mehren Report, paras. 75, 77]. An obligation to arrange for a contract of carriage to a certain destination is insufficient [Fawcett/Harris/Bridge, p. 885; von Mehren Report, para. 76; Mather, J.L.C. (2001) 155, fn. 125]. In our case, the contract specified the term “CIF Port Magreton, Oceania” [Claimant’s Exhibit No. 7]. This CIF INCOTERM only obliges the Respondent to deliver the goods on board the vessel at the port of shipment in Greece [ICC INCOTERMS; Bridge, p. 157] and to bear the freight and insurance costs. It does not establish an express obligation to deliver the goods to Oceania [von Mehren Report, para. 76].

11. This CIF term was the result of negotiations between the parties where the Respondent gave a quotation based on the CIF INCOTERM in its first letter [Claimant’s Exhibit No. 2]. Since the rest of the contract only states an obligation comprising installation and refurbishment [Claimant’s Exhibit No. 7], the contract does not satisfy Art. 8(2)(b)’s requirement of an express obligation to deliver to buyer’s premises.

12. Moreover, Art. 8(2)(b) is meant to be interpreted restrictively and its application invoked only in exceptional circumstances [von Mehren Report, para. 73; Garbor, Nw. J. Int’l. L. & Bus. (1986) 696, p. 716]. Therefore, since a cumulative application of the conflict rules of Mediterraneo and Oceania both lead to the law of Mediterraneo, this Tribunal should apply the law of Mediterraneo to govern the limitation period of the contract.
B. ALTERNATIVELY, THIS CLAIM IS SUBJECT TO A TWO-YEAR LIMITATION PERIOD PRESCRIBED BY THE LAW OF MEDITERRANEO, WHICH IS THE GOVERNING LAW IN ACCORDANCE WITH THE “CLOSEST CONNECTION” RULE.

13. Should this Tribunal reject the cumulative application of the conflict of laws rules of Mediterraneo and Oceania, this Tribunal can apply the general conflict of laws rule of “closest connection”. This rule stipulates that a contract is to be governed by the system of law belonging to the place with which the transaction has its closest and most real connection [Art. 4(1) Rome Convention]. Such a rule is widely accepted by writers, national courts and arbitral tribunals [Berger, p. 503; de Boer, p. 195; Frick, p. 60; Nygh, p. 299; Sykes & Pryles, p. 606; Derains-ICC Case No. 3742 of 1983, p. 913; Dicey & Morris, p. 1234; Redfern/Hunter/Blackaby/Partasides, p. 144 para. 2-79; Bonython v. Commonwealth (on appeal from Australia to Privy Council); Mendelsohn v. Providores (Australia); Rothwells v. Connell (Australia); ICC Case No. 3316 of 1979; ICC Case No. 4996 of 1985; ICC Case No. 4237 of 1984; Art. 8(3) Oceania Conflicts of Law Act].

1. This contract is more closely connected to Mediterraneo because Mediterraneo is the place of business of the party rendering the characteristic performance of the contract.

14. The Respondent submits that the law of the place of business of the party rendering the characteristic performance is the connecting factor best suited for determining the applicable law to the contract. Conventions, tribunals and writers concur that a contract is most closely connected with the law of the place of business of the party who performs the characteristic performance of the contract [Art. 4(2) Rome Convention; von Mehren Report, para. 15; Cheshire & North’s, p. 569; Fawcett/Harris/Bridge, p. 689; ICC Case No. 4237 of 1984].

15. Notably, the Rome Convention has created a presumption in favour of using characteristic performance as the determinative connecting factor when establishing the applicable law [Plender & Wilderspin, p. 114; Cheshire & North’s, p. 568; Guilano-Lagarde Report, p. 21; Dutoit, p. 48]. This presumption states that “the law of closest connection” is that of “the place where the party which is to effect the performance that is characteristic of the contract has its central administration at the conclusion of the contract” [Art. 4(2) Rome Convention].
16. It is a justified conclusion that the seller’s obligations constitute the characteristic performance in a contract of sale. First, the performance for which payment is due, not the payment of the price, is characteristic of the contract [Cheshire & North’s, p. 569; Guiliano-Lagarde Report, p. 20; Forsyth & Moser, I.C.L.Q. (1996) 190, p. 193-194]. In an international contract of sale, this performance is rendered by the seller [CIETAC, 29 December 1999 (China); LG Düsseldorf, 11 October 1995 (Germany); LG Heilbronn, 15 September 1997 (Germany); Elastar Sacifia v. Bettcher Industries Inc. (Argentina); AP Barcelona, 7 June 1999 (Spain); OLG Frankfurt, 13 June 1991 (Germany)].

17. Secondly, the seller’s performance is generally more complex than the buyer’s obligation to pay the price for this performance [von Mehren Report, p. 17; ICC Case No. 5713 of 1989]. Since the seller has the comparatively heavier burden in any contract of sale, he should be able to rely on laws that are more familiar to him [von Mehren Report, p. 17].

18. Thus, the Claimant’s contention that the contract is more closely connected to Oceania because the place of performance of the contract was in Oceania is contrary to the widely accepted position. In fact, tribunals and courts reject place of performance as a significant connecting factor and prefer to apply the law of the place of business of the party performing the characteristic performance in disputes involving international contracts of sale [ICC Case No. 1424 of 1966; OLG Zweibrücken, 2 February 2004 (Germany); OLG Düsseldorf, 2 July 1993 (Germany)].

19. In our case, the Respondent sourced for the machine, procured the machine from its previous owners and arranged with the previous owners to allow the Claimant to inspect the machine in Greece [Claimant’s Exhibit No. 2]. It then prepared a contract [Claimant’s Exhibit No. 7] and enclosed the manufacturer’s manual [Claimant’s Exhibit No. 6]. Under the CIF term of the contract, the Respondent was responsible for the insurance and freight costs of transporting the machine [Claimant’s Exhibit No. 7].

20. The Respondent also sent a team of workmen to Oceania to install, refurbish, and test the machine [Claimant’s Exhibit No. 4 & 8]. Thereafter, the workmen gave a demonstration of the machine to the Claimant’s personnel and entertained further requests to adjust the machine [Claimant’s Exhibit No. 8 & 9]. On the other hand, the Claimant was merely obliged
to pay the price by way of a letter of credit [Claimant’s Exhibit No. 6 & 7]. Thus, the Respondent undertook the essential obligations arising under the contract. Accordingly, the law of Mediterraneo, which is the place of business of the Respondent, should be applied to the contract of sale.

2. Furthermore, this contract is more closely connected to Mediterraneo because Mediterraneo is the place of conclusion of the contract.

21. The Respondent does not dispute the Claimant’s contention that the place of conclusion of contract is another connecting factor determining the law of the contract [Castel, p. 560; Coggins, para. A; Pistorius & Hurter; ICC Case No. 6268 of 1990; Kahler v. Midland Bank (U.K.); British South Africa v. Debeers (U.K.); Rosencrantz v. Union Contractors (Canada); Re Columbia Shirt (Canada); Crawford v. Manhattan Life Ins. Co. (U.S.); Jones v. State Farm Mutual Automobile (U.S.); Commissioner for Inland Revenue v. Estate Whiteway (South Africa); Bishop v. Conrath (South Africa)]. This connecting factor has been legislated in numerous national jurisdictions [Art. 20 Syrian Civil Code; Art. 19 Libyan Civil Code; Art. 19 Somalian Civil Code; Art. 18 Algerian Civil Code; Art. 20 Jordanian Civil Code; Art. 11 Sudanian Civil Code; Art. 19 Civil Code of the United Arab Emirates; Art. 10 Civil Code of Mauritania; Art. 27 Afghanistan Civil Code; Art. 13 Civil Code of Morocco].

22. The Claimant contends that the contract was formed on 21 May 2002 when in response to the Respondent’s offer in letter dated 16 May 2002 [Claimant’s Exhibit No. 4], the Claimant sent an acceptance in its letter dated 21 May 2002 [Claimant’s Exhibit No. 5]. However, the Respondent submits that the offer was made in the Respondent’s subsequent letter [Claimant’s Exhibit No. 6 & 7] since the enclosed document contained indications of the price, quantity and goods [Art. 14(1) CISG].

23. Should this Tribunal find that the Respondent’s letter of 16 May 2002 constitutes an offer, it was not accepted by the Claimant. A reply to an offer that contains modifications constitutes a counter-offer [Art. 19(1) CISG]. Additional terms relating to payment and place of delivery materially modify the terms of the previous offer [Art. 19(3) CISG]. In the Claimant’s purported acceptance [Claimant’s Exhibit No. 5], the stated mode of payment and place of delivery substantially modified the terms stated in the Respondent’s purported offer.
of 21 May 2002 [Claimant’s Exhibit No. 4]. Hence, the Claimant’s letter dated 21 May 2002 constitutes a counter-offer and cannot be construed as an acceptance.

24. Similarly, the Respondent’s subsequent letter of 27 May 2002 [Claimant’s Exhibit No. 6 & 7] cannot be construed as an acceptance of this counter-offer because the enclosed document contains modifications to material terms by containing an updated mode of payment clause, an arbitration clause and a stipulation of the port of destination under the CIF term [Art. 19(3) CISG; Schlechtriem, Art. 19 p. 140 para. 8 fn. 23; Bianca/Bonell-Farnsworth, Art. 19 p. 180 para. 2.8; Secretariat Commentary, Art. 19 p. 24 para. 13; Sono, section 2(4); Brand & Fletcher, J.L.C. (1993) 239, section II; Filanto v. Chilewich (U.S.)]. Accordingly, this letter dated 27 May 2002 constitutes a counter-offer made by the Respondent [Art. 19(1) CISG].

25. Moreover, the Respondent stated unequivocally in this letter: “Please sign and send it (the enclosed document) to me immediately so that the machine can be sent to you quickly.” The document to be signed was labelled “Contract”. These are clear indications that under this letter, the Respondent had an intention to be bound only when the Claimant signed and returned the enclosed document [Art. 14(1) CISG]. Such a firm indication to be legally bound was not present in any of its previous letters.

26. Accordingly, since the offer is contained in the letter of 27 May 2002, the Respondent submits that the contract was concluded on 30 May 2002 in Mediterraneo. In accordance with Art. 18 CISG, the contract is formed the moment the indication of assent reaches the offeror. In this case, the contract was signed and returned to the Respondent in Mediterraneo on 30 May 2002.

27. Therefore, since the place of business of the party performing the characteristic performance of the contract and the place of conclusion of the contract is Mediterraneo, the applicable law governing the contract in the absence of choice by the parties is the law of Mediterraneo.

1. The limitation period commenced on 1 July 2002, which was the date the Respondent handed over the flexoprint machine.

28. The law of Mediterraneo stipulates that the limitation period “commences when the event giving rise to the claim occurs” [Procedural Order No. 2, para. 5]. Since the claim instituted by the Claimant concerns the failure to provide a machine in accordance with the contract, the Respondent submits that the event giving rise to this claim is the handing over of the allegedly non-conforming machine. Accordingly, the limitation period commenced on 1 July 2002 because the flexoprint machine was installed and refurbished on this date [Statement of Claim, para. 9; Claimant’s Exhibit No. 8; Respondent’s Exhibit No. 2].

29. The Claimant contends that “the event giving rise to the claim” is the resale of the machine. However the Claimant’s claim is primarily one of lack of conformity, which is independent of the resale of the machine. Prior to the attempts by the parties to reach an agreeable settlement, the claim for lack of conformity had already arisen, and simultaneously, the limitation period had already commenced.

30. Even though both Oceania and Mediterraneo are not parties to the Convention on Limitation Period, Mediterraneo’s law in this regard is similar to the Convention on Limitation Period whereby the basic principle is that the limitation period “commences on the date on which the claim accrues”. In claims for lack of conformity, the event that brings about the claim is the handing over of the goods to the buyer, which means placing the goods under the buyer’s actual control where inspection of the goods is possible [Arts. 9 & 10 Convention on Limitation Period; Commentary on Convention on Limitation Period, p. 156 para. 4; Explanatory Note on the Convention on Limitation Period, para. 12].

31. Using these principles as an interpretative aid to the law of Mediterraneo, the same commencement date of 1 July 2002 is reached. By 1 July 2002, the machine was installed and refurbished at the Claimant’s premises [Statement of Claim, para. 9; Claimant’s Exhibit No. 8; Respondent’s Exhibit No. 2]. This meant the machine was under the actual control of the Claimant which was in the position to inspect the machine. Accordingly, the limitation period commenced on 1 July 2002.
2. The Claimant instituted arbitral proceedings more than one year after the expiration of the two-year limitation period stipulated by the law of Mediterraneo.

32. Applying this two-year limitation period, the Claimant had until 1 July 2004 to institute proceedings. Art. 3(2) CIDRA Rules states that arbitral proceedings are “deemed to commence on the date on which the statement of claim is received by CIDRA”. CIDRA only received the Claimant’s Statement of Claim on 5 July 2005 [CIDRA letter of 7 July 2005]. As such, the Claimant’s contention that it commenced arbitral proceedings on 27 June 2005 is wrong [Claimant’s Memo, paras. 13, 24 & 33]; it commenced proceedings more than a year after the expiration of the two-year limitation period.

D. FURTHERMORE, THE USE OF UNIDROIT PRINCIPLES, OR OTHER COMPONENTS OF LEX MERCATORIA AS THE GOVERNING LAW, IS PROHIBITED BY CIDRA RULES.

33. Both parties have agreed that any claim arising out of or relating to the contract shall be determined by arbitration in accordance with the rules of CIDRA [Claimant’s Exhibit No. 7], and the principle of party autonomy requires strict adherence to this choice of CIDRA Rules [Art. 1(1) CIDRA Rules; Holtzmann & Neuhaus, p. 564; Chukwumerije, p. 78-79; Redfern/Hunter/Blackaby/Partasides, p. 9; Lew, p. 71-72].

34. The Claimant contends that in the event this Tribunal decides that the present contract is not subject to either party’s national law, the UNIDROIT Principles ought to be applied to determine the relevant limitation period. The Respondent agrees on the use of lex mercatoria to aid in interpreting the provisions of the CISG [UNIDROIT Principles, preamble; Garro, T.L.R. (1995) 1149, p. 1188; Bonell-UNIDROIT, p. 255; Bonell-Practice, section VI(b); Ziegel]. However, in our case where the issue is not governed by the CISG, Art. 32(1) CIDRA Rules prohibits the direct application of lex mercatoria, or any component of lex mercatoria, as the applicable law.

1. The parties have not expressly or impliedly designated lex mercatoria to govern the limitation period of the contract.

35. Tribunals have declined to apply lex mercatoria as the governing law in the absence of any clear indication that the parties intended or agreed to such an application [ICC Case No. 4650 of 1985; ICC Case No. 8873 of 1997; Davidson; Craig/Park/Paulsson, p. 337; Marrella, V.J.T.L. (2003) 1137, p. 1177]. In ICC Case No. 7319 of 1992, the tribunal held that the parties must make reference to lex mercatoria expressly, or in an implied manner
which is “reasonably certain” to the arbitrators. The failure of the parties to agree on the governing law “cannot be interpreted as an implied reference” to lex mercatoria.

36. The Claimant contends that the submission of the contract to the CISG is an implicit rejection of either party’s national law as the governing law of the contract [Claimant’s Memo, para. 28]. However, tribunals have held that submission of the contract to the CISG does not render the national laws of the parties inapplicable [LG Heilbronn, 15 September 1997 (Germany); LG Düsseldorf, 11 October 1995 (Germany); ICC Case No. 6560 of 1990; OGH, 25 June 1998 (Austria); Art. 7(2) CISG]. Hence, it is not reasonably certain that a submission to the CISG indicates an intention by the parties to apply lex mercatoria to their contract.

37. This is especially so since neither the Claimant nor the Respondent made any mention of lex mercatoria during negotiations. In particular, it is difficult to accept the Claimant’s contention that they have implicitly adopted the limitation period under the UNIDROIT Principles. This is because UNIDROIT Principles only stipulated a limitation period in 2004, and contained no provision relating to limitation periods in 2002 when the contract was negotiated and formed.

2. Failing such designation by the parties, Art. 32(1) CIDRA Rules requires the applicable law to be determined by applicable conflict of laws rules.

38. CIDRA Rules do not permit a tribunal to decide which law is applicable to a contract without prior reference to applicable conflict of law rules. In this regard, it is different from certain national laws and institutional arbitration rules which allow “voie directe” – whereby a tribunal can decide which law or rules of law are applicable without referring to conflict rules [Frick, p. 79; Berger, p. 497; Rubino-Sammartano, p. 434; Maniruzzaman, Am. U. Int’l L. Rev. (1999) 657, p. 706-707; Schäfer/Verbist/Imhoos, p. 85; Redfern/Hunter/Blackaby/Partasides, p. 146-147].

39. A comparison of the relevant provisions in the CIDRA Rules shows how it differs from the “voie directe” approach adopted by other national laws and arbitration rules. French law, which practises the “voie directe” approach, states that in the absence of a choice by the parties, the arbitrator shall settle the dispute in accordance with “those rules which he considers to be applicable.” [Art. 1496 French Code of Civil Procedure]. Likewise, Art. 1054
Netherlands Arbitration Act states that failing a choice of law by the parties, the Tribunal shall determine its award “in accordance with the rules of law which it considers appropriate”. Art. 17(1) ICC Rules also allows the Tribunal to “apply the rules of law it determines to be appropriate” without applying any conflict of laws rule [see also Art. 13.1(a) London Court of International Arbitration Rules; Art. 28(1) American Arbitration Association International Arbitration Rules; Art. 59(a) World Intellectual Property Organization Arbitration Rules].

40. Conversely, Art 32(1) CIDRA Rules explicitly states that in the absence of a law chosen by the parties, “the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable”. Art. 32(1) CIDRA Rules is modelled after the UNCITRAL Rules [Schroeter, p. 106]. In this aspect, it is also similar to the UNCITRAL Model Law. Both set of arbitral rules advocate the classical “indirect” method of using conflict of laws rules to determine the applicable substantive law in the absence of a choice of law by the parties [Art. 28(2) UNCITRAL Model Law; Art. 33(1) UNCITRAL Rules; Berger, p. 497-498; Holtzmann & Neuhaus, p. 770; Blessing, J. Int’l Arb. (1997) 39, p. 53; Schroeter, p. 106; Fernández-Armesto, section 5]. Accordingly, this Tribunal – by virtue of Art. 32(1) CIDRA Rules – is obliged to proceed to its choice of law via the application of a conflict of laws rule.

41. The Claimant contends that this Tribunal should disregard Art. 32(1) CIDRA Rules and proceed using the “voie directe” approach. Although this approach has been adopted by some tribunals in contravention of arbitral rules [Pabalk Ticaret v. Norsolor (Austria); Fougerolle v. Banque de Proche Orient (France)], the Respondent submits that this Tribunal should not proceed likewise. It has been recognised that the Austrian Supreme Court’s upholding of the tribunal’s reference to lex mercatoria in Pabalk Ticaret v. Norsolor (Austria) was merely a recognition of the limited powers of the court to interfere in situations where an arbitral tribunal’s reasoning is being contested [Mann, p. xxiv; Mustill, Arb. Int’l (1988) 86, p. 106]. Furthermore, the tribunal in Pabalk Ticaret v. Norsolor (Austria) applied lex mercatoria only because the connecting factors to either party’s national laws were equally matched. However as submitted in paras. 20 and 27, the connecting factors in our case point to the law of Mediterraneo.
42. Moreover, the “voie directe” approach has been widely criticised. The “voie directe” approach results in unpredictability and uncertainty since parties have significantly less foresight concerning which law the tribunal might choose. [Born, p. 531; Frick, p. 83]. The “voie directe” approach is also against the interests of the parties as it allows arbitrators to reach a decision without being obligated to explain the legal grounds on which the applicable law has been determined [Blessing, J. Int’l Arb. (1997) 39, p. 54; Bucher & Tschanz, p. 101; ICC Case No. 2735 of 1976; Greenberg, V.J. (2004) 315, p. 325; Frick, p. 85].

43. In our case, there is no evidence that either party has intended the application of UNIDROIT Principles. Instead both parties, by choosing the rules of CIDRA, have expressed their desire to restrain this Tribunal; therefore this Tribunal must determine the applicable law only through the adoption of a conflict of laws methodology [Claimant’s Exhibit No. 7]. Consequently, if this Tribunal adopts the “voie directe” approach, it will be acting contrary to party expectations.

3. In addition, the phrase “the law” in Art. 32(1) CIDRA Rules requires the application of a national system of law.

44. Art. 32(1) CIDRA Rules is modelled after Art. 33(1) UNCITRAL Rules [Schroeter, p. 106] and the latter mandates that the phrase “the law” be interpreted as pointing to the national law of solely one State [Aden, p. 650; Blessing, p. 53; van Hof, p. 226]. This reading of the phrase “the law” was subsequently affirmed during the drafting process of the UNCITRAL Model Law [Broches, p. 143; Holtzmann & Neuhaus, p. 768; Explanatory Note on Model Law, para. 35].

45. Conversely, the UNCITRAL Model Law allows the tribunal to apply “rules of law” which are explicitly chosen by the parties [Art. 28(1) UNCITRAL Model Law; Explanatory Note on Model Law, para. 35]. This encompasses trade usages, lex mercatoria, any transnational concepts of law, as well as principles and notions reflected in international conventions [Blessing, J. Int’l Arb. (1997) 39, p. 55; Derains & Schwartz, p. 217; Holtzmann & Neuhaus, p. 766-768; Maniruzzaman, Am. U. Int’l L. Rev. (1999) 657, p. 708]. However, if the parties fail to designate an applicable law or rules of law, the tribunal is still restricted to applying a national system of law determined by conflict of law rules [Art. 28(2) UNCITRAL Model Law; Explanatory Note on Model Law, para. 35].
46. The Respondent submits that the CIDRA drafters’ decision to restrict tribunals operating under CIDRA Rules to applying “the law” instead of “such rules of law”, at a time when this distinction was discussed extensively, indicates an endorsement of the traditional approach in which arbitrators can only apply a particular national law. [Sanders, p. 301; Schroeter, p. 112, Derains & Schwartz, p. 221]. Therefore, this Tribunal does not have the authority to apply a non-national system of law, such as the UNIDROIT Principles or the Convention on Limitation Period [Roth, p. 1254-1255].

4. Even if this Tribunal decides to apply the UNIDROIT Principles, this claim was instituted after the expiration of the stipulated three-year limitation period.

47. Art. 10.2 UNIDROIT Principles prescribes a limitation period of three years, commencing the day after the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised. The Respondent submits that the Claimant knew or ought to have known the facts allowing it to exercise its right on 1 July 2002, and not on 14 October 2003 [Claimant’s Memo, paras. 23-24] or 8 July 2002 [Claimant’s Memo, para. 33] as the Claimant contends.

48. The flexoprint machine was installed and refurbished by 1 July 2002 [Statement of Claim, para. 9; Claimant’s Exhibit No. 8; Respondent Exhibit No. 2]. A test run was completed and final adjustments were already made. The machine worked perfectly. [Respondent’s Exhibit No. 2]. Thereafter, the machine was in the possession of the Claimant. The Claimant was in the position to execute any test runs which would have revealed the machine’s alleged lack of conformity. Moreover, Art. 38(1) CISG states that the buyer is obliged to examine the goods within as short a period of time as was practicable in the circumstances. As such, by 1 July 2002, the Claimant knew or ought to have known of the facts allowing it to exercise its right.

49. Accordingly, the limitation period commenced on 2 July 2002 and expired on 2 July 2005 [Art. 10.2 UNIDROIT Principles]. By instituting a claim only on 5 July 2005, the Claimant failed to institute arbitral proceedings prior to the expiration of the three-year limitation period prescribed by the UNIDROIT Principles.
II. THE RESPONDENT DELIVERED A FLEXOPRINT MACHINE THAT WAS IN CONFORMITY WITH THE CONTRACT.

50. It is not disputed that the Claimant gave timely notice of the alleged lack of conformity in accordance with Art. 39(1) CISG [Claimant’s Exhibit No. 9]. However, the flexoprint machine delivered by the Respondent was in full compliance with the requirements under Art. 35(1) and Art. 35(2)(b) CISG. It was of the description required by the contract and it was fit for all particular purposes made known to the Respondent at the time of conclusion of contract. The Respondent was also under no obligation to inform the Claimant that the machine was unable to print on eight micron foil. Therefore, the Respondent has fully complied with its obligations under the contract.

A. THE FLEXOPRINT MACHINE WAS DELIVERED IN ACCORDANCE WITH ART. 35(1) CISG SINCE THE CONTRACT DID NOT EXPRESSLY OR IMPLIEDLY REQUIRE THE MACHINE TO BE ABLE TO PRINT ON EIGHT MICRON FOIL.

51. The Respondent submits that in accordance with Art. 35(1) CISG, all the contract required was a machine that could perform the specifications as stated in the manufacturer’s manual provided [Procedural Order No. 2, para. 17]. Conformity under Art. 35(1) CISG is determined by the express or implied requirements of the contract at the date of its conclusion [Secretariat Commentary, Art. 35 para. 4; Schlechtriem, Art. 35 p. 276 para. 7; Bianca/Bonnell-Bianca, Art. 35 p. 272 para. 2.3; Enderlein & Maskow, Art. 35 p. 141 para. 1]. The contract neither expressly nor impliedly indicated any requirement that the flexoprint machine was to be able to print on eight micron foil [Claimant’s Exhibit No. 7].

1. The Claimant’s subjective intent that the flexoprint machine is able to print on eight micron foil did not become a term of the contract.

52. The contract did not require a machine that could print on eight micron foil because the Respondent did not know, and could not have been unaware, of any such intention by the Claimant. Any interpretation of the contract according to the Claimant’s intent is appropriate only when Respondent “knew or could not have been unaware of what that intent was” [Art. 8(1) CISG; BRI Production "Bonaventure" v. Pan African Export (France); Bernstein & Lookofsky, p. 28; Enderlein & Maskow, Art. 8 p. 62-63; Schlechtriem, Art. 8 p. 70 para. 4; see also Art. 4.2(1) UNIDROIT Principles].

53. Claimant contends that the use of the phrase “may be of 8 micrometer thickness” by the Claimant in its first letter [Claimant’s Exhibit No. 1] and the Respondent’s reply of 25
April 2002 [Claimant’s Exhibit No. 2] meant that the Respondent knew, or must have known, the Claimant’s subjective intent.

54. The fact that it is now necessary for the Claimant to offer a precise interpretation of the phrase “may be of 8 micrometer thickness” [Claimant’s Memo, para. 70] shows how the phrase is subject to differing interpretations. The Respondent understood the phrase simply as an estimate, and not a definite measurement of foil the machine must be capable of printing on. Should the Claimant want a machine that could print on eight micron foil, such an intent would be clear if it had said “we need a machine that could print on eight micron foil”.

55. Furthermore, in light of the entire negotiations spanning six weeks (17 April 2002 to 30 May 2002), the fleeting mention of eight micron only once in the Claimant’s first letter was neither specific nor certain enough to inform the Respondent of the Claimant’s subjective intent [see also Art 6:101 Principles of European Contract Law]. Accordingly, in the Respondent’s reply of 25 April 2002 [Claimant’s Exhibit No. 2], the use of the phrase “for your task” was in response to the Claimant’s general query for a flexoprint machine that could print foil for confectionaries. It was not directed at any specific foil measurements.

56. Similarly, the Respondent’s statement that the machine would be able to “meet the needs of all your customers” [Claimant’s Exhibit No. 6] was an assurance that the machine would be able to perform according to its specifications. It was not an indication that the Respondent had understood the Claimant’s requirement of eight micron as a definite contractual obligation.

57. Moreover, even though the specifications of the machine were not listed in the contract, the Claimant was given a manufacturer’s manual prior to the conclusion of the contract. In Beijing Light Automobile Co. v. Connell (Sweden), the seller had replaced a part of a machine it was selling. Although this replacement was not reflected in the contractual documents, it was reflected in the service manual delivered with the machine. Despite being reflected only in the accompanying manual, the tribunal held that the replacement constituted part of the contract. Similarly, since the specification of the flexoprint machine was stated in the manufacturer’s manual provided to the Claimant, the machine was in conformity with the contract.
2. A reasonable person would not have interpreted the contract as requiring the flexoprint machine to be able to print on eight micron foil.

58. If Art. 8(1) CISG is inapplicable, the Respondent submits that a reasonable person in the Respondent’s position would not have interpreted the contract as requiring the machine to be able to print on eight micron foil under Art. 8(2) CISG [Schlechtriem, Art. 8 p. 71 para. 7; Bernstein & Lookofsky, p. 42; Honnold, Art. 8, p. 118 para. 107.1]. A reasonable person is a person whose conduct is that expected of a normal prudent person in the same circumstances [Opie, section III; Vilus; Weiszberg, p. 617; see also Art. 1:302 Principles of European Contract Law].

59. The Claimant is a printer experienced in printing on paper stock. Its President and owner, Mr. Butter, is generally knowledgeable about printing machines [Procedural Order No. 2, para. 13]. It approached the Respondent with technical terms – stating it needed a “six colour machine with a varnishing stand” [Claimant’s Exhibit No. 1]. Conversely, the Respondent is not an expert in foil printing, but a seller of a wide range of industrial equipment. Flexoprint machines constitute only five to ten percent of its business [Procedural Order No. 2, paras. 23-24]. In addition, eight micron foil is not a standard thickness for confectionary purposes [Procedural Order No. 2, para. 21]. It cannot be contended that a reasonable seller of industrial equipment would be cognisant of the foil measurements used in the confectionary market.

60. Furthermore, the Swiss Federal Supreme Court in Roland Schmidt v. Textil-Werke Blumenegg (Switzerland) held that it was up to the buyer, who was an expert, to acquaint herself with the operation of the machinery she was purchasing, especially when it was a second hand machine that might not perform in accordance with technical expectations. Since the buyer had viewed and approved of the machine, a reasonable seller is entitled to expect that the buyer contracted with full knowledge of the specifications of the machine [Roland Schmidt v. Textil-Werke Blumenegg (Switzerland)]. Similarly, since the Claimant viewed the machine and approved of it, it was reasonable for the Respondent to expect that the Claimant had contracted with full knowledge of the machine’s specifications.
MEMORANDUM FOR RESPONDENT

B. FURTHERMORE, THE FLEXOPRINT MACHINE CONFORMED TO THE CONTRACT IN ACCORDANCE WITH ART. 35(2)(b) CISG.

61. Art. 35(2)(b) CISG requires the goods to be fit for any particular purpose expressly or implicitly made known to the seller at the time of the conclusion of the contract [Enderlein & Maskow, Art. 35 p. 144 para. 11; Schlechtriem, Art. 35 p. 281 paras. 20-21; ICC Case No. 8213 of 1995]. The machine delivered by the Respondent conformed with Art. 35(2)(b) CISG because the Claimant did not make known its purpose of printing on eight micron foil at the time of conclusion of the contract on 30 May 2002. Furthermore, the Claimant had not relied on the Respondent’s skill and judgment.

1. The particular purpose of the flexoprint machine was not made known to the Respondent at the time of conclusion of the contract.

62. The particular purpose of printing on eight micron foil was neither expressly nor impliedly made known to the Respondent when the contract was concluded on 30 May 2002. A particular purpose must be “crystal clear and recognisable” [LG München, 27 February 2002 (Germany)]. This is to give the seller the opportunity to refuse to contract if it is unable to furnish the required goods [Secretariat Commentary, Art. 35 p. 32 para. 8].

63. Throughout the six weeks during which the parties negotiated (17 April 2002 to 30 May 2002), the Claimant made only one fleeting mention of eight micron. Furthermore, as submitted in paras. 54–55, this sole mention of “may be of 8 micrometer thickness” is subject to differing interpretations. It cannot be said that this intended purpose was crystal clear and recognisable. This is especially so since the machine could be used for different purposes and to print on various materials of varying thickness [Rijn Blend Case, NAI, 15 October 2002 (The Netherlands)].

64. Furthermore, the contra proferentem rule dictates that since the Claimant created an ambiguity, the ambiguity must be resolved against it [Honnold, Art. 8 p. 118 para. 107; Lookofsky, D.J.C.L. (2003) 263, section IV; Gaillard & Savage, paras. 476, 479; Coderch & Garcia; Sykes, V.J. (2004) 65, para. j; Stanivukovic; Lando & Beale, p. 293; Henschel, N.J.C.L. (2004), p. 10]. The stipulates that if contract terms supplied by one party are unclear, an interpretation against that party is preferred [ICC Case No. 8261 of 1996; Bobux Marketing Ltd v. Raynor Marketing Ltd (New Zealand); CIETAC, 23 April 1997 (China); CIETAC, 20 January 2000 (China); see also Art. 4.6 UNIDROIT Principles; Art. 5.103
Principles of European Contract Law]. Since the Claimant opted to use a vague formulation of “may be of 8 micrometer thickness”, the phrase must be interpreted against it.

2. The Respondent was under no corresponding duty to inquire into the Claimant’s intended purpose for the flexoprint machine.

65. The Claimant alleges that even if it has not made known the purpose of the machine, the Respondent was under a corresponding duty to inquire into the Claimant’s intended purposes [Claimant’s Memo, para. 103]. However, such a duty to inquire is not required under the CISG.

66. Such a duty does not arise upon a literal reading of Art. 35(2)(b) CISG. There are three levels of knowledge in the CISG: “ought to have known”, “could not have been unaware” and “knew”. A duty to inquire can only arise from the phrase “ought to have known” [Honnold, Art. 35 p. 260 para. 229; Poikela, N.J.C.L. (2003), p. 52]. All these terms are not found in Art. 35(2)(b) CISG, which simply states that the goods must be fit for any purpose “expressly or impliedly made known to the seller”. Such a duty does not apply even if Art. 35(2)(b) CISG is read with Art. 8(1) CISG. The level of knowledge required of the Respondent under Art. 8(1) CISG is “knew or could not have been unaware” and imposes no duty to inquire or investigate [Schlechtriem, Art. 35 p. 285 para. 35; Honnold, Art. 35 p. 260 para. 229].

67. There is no duty to inquire even if Art. 35(2)(b) CISG is interpreted with regard to the observance of good faith required under Art. 7(1) CISG [BGH, 31 October 2001 (Germany); Poikela, N.J.C.L. (2003), p. 37]. This duty does not arise when the business parties are dealing at arm’s length because they are expected to state their intentions clearly [Rauda & Etier, V.J. (2000) 30, p. 45; Herber, p. 112; Caiato Roger v. Société française (France); Ferrari, I.B.L.J. (2003) 96, p. 98; ICC Case. No. 8234 of 1995]. It is the buyer’s responsibility to specify the particular purpose and not the seller’s responsibility to inquire [OLG Koblenz, 11 September 1998 (Germany); LG Regensburg, 24 September 1998 (Germany)]. Imposing such a duty would only burden the Respondent with high information costs [Veneziano, I.B.L.J. (1997) 39, p. 46] and “contravene good faith” [BGH, 31 October 2001 (Germany)].
3. There was no reasonable reliance by the Claimant on the Respondent’s skill and judgment.

   i. The Claimant did not rely on the Respondent’s skill and judgment.

68. Should this Tribunal find that the Respondent knew of the Claimant’s intended purpose, the machine is still in conformity under Art. 35(2)(b) CISG because the Claimant did not rely on the Respondent’s skill and judgment. There is no actual reliance when a buyer participates in the selection of the goods or inspects the goods before purchase. [Enderlein & Maskow, Art. 35 p. 145 para. 13].

69. The Respondent submits that the Claimant not only participated in the selection of the machine; in addition, the Claimant’s actions and statements further indicated that it was an experienced member of the printing industry. Mr. Butter described the machine required in technical terms – a “six colour machine with a varnishing stand” and listed the various materials he needed to print on [Claimant’s Exhibit No. 1; Secretariat Commentary, Art. 35 p 32 para. 9]. As submitted in paras. 54–55, he also provided an estimate of the foil measurement. He then inspected the machine and inquired from the previous owners about the condition of the machine [Procedural Order No. 2, para. 13]. Indeed, he confirmed that the “machine looked to be just what we need” [Claimant’s Exhibit No. 3]. The fact that Mr. Butter omitted to inquire about eight micron foil during the inspection does not negate the fact that he was given an opportunity to, and that he did participate in the selection of the machine.

70. Even though it was the Respondent who recommended the particular machine, this recommendation was not in response to the Claimant’s intended purpose since it did not know of any such purpose. In Manipulados del Papel v. Sugem Europe (Spain) and Schmitz-Werke v. Rockland (U.S.), the Appellate Court of Barcelona and U.S. Federal Appellate Court both held that there was reliance in instances where the seller gave a clear recommendation of the goods for the intended purpose, which allowed for no other interpretation. The Respondent made statements assuring the Claimant about the working condition of the machine [Claimant’s Exhibit No. 6], but never made any recommendation that the machine could print on eight micron foil.
ii. Alternatively, any such reliance by the Claimant on the Respondent’s skill and judgment was unreasonable.

71. If the Claimant did rely on the skill and judgment of the Respondent, any such reliance was unreasonable. This precludes the Claimant from asserting a lack of conformity under Art. 35(2)(b) CISG. Reasonableness is determined according to the conduct expected of the normal prudent person in the position of the Claimant. [*Opie, section III; Magnus & Haberfellner; Weiszberg, p. 617*].

72. The Claimant failed to act in accordance with the conduct expected of a normal prudent person in similar circumstances. It purchased a flexoprint machine of substantial worth ($42,000) in anticipation of a large contract from Oceania Confectionaries worth $3,200,000 over eight years. Even though the Claimant admitted that the amounts at stake were large [*Claimant’s Exhibit No. 3*], the Claimant failed to inquire about the capabilities of the flexoprint machine it was purchasing at any stage during the negotiations of the contract, nor during the inspection, test run and demonstration of the machine [*Procedural Order No. 2, para. 16*]. A prudent person in the position of the Claimant would have at least inquired about the performance characteristics of the machine, especially when a contract worth $3,200,000 was at stake.

73. Furthermore, the Claimant’s reliance is unreasonable since the Respondent did not represent itself as “having any special knowledge in respect of the goods in question” [*Secretariat Commentary, Art. 35 p. 32 para. 10; Kritzer, p. 283; Schlechtriem, Art. 35 p. 282 para. 23*]. The Respondent did not represent itself to have special knowledge with regard to flexoprint machines and foil printing. It is not a supplier of flexoprint machines for use in confectionary industry printing [*Procedural Order No. 2, para. 24*]. Even if the Respondent is expected to be knowledgeable about flexoprint machines, this knowledge is limited to procurement, refurbishment and installation of flexoprint machines in general. It does not entail knowing that the confectionaries would require eight micron foil and that the Claimant a machine that could print on eight micron foil [*Bianca/Bonell-Bianca, Art. 35 para. 2.5.3*]. Therefore, any reliance by the Claimant was unreasonable.
C. Even if there had been a lack of conformity, the Claimant knew or could not have been unaware of the lack of conformity at the time of conclusion of contract.

74. If this Tribunal finds that there had been a lack of conformity under Art. 35(2)(b) CISG, the Respondent submits that given the circumstances of the case, the Claimant knew or could not have been unaware of the alleged lack of conformity. As such, the seller will not be liable for any lack of conformity arising under Art. 35(2) CISG [Art. 35(3) CISG; Schlechtriem, Art. 35 p. 284 para. 34; Tribunal Cantonal du Valais, 28 October 1997 (Switzerland)].

75. Art. 35(3) CISG does not impose a duty onto the Claimant to inquire or investigate the machine. However, if a buyer chooses to examine the goods, he must carry out an examination in accordance with the normal practice in his branch of trade. The buyer “could not have been unaware” of the lack of conformity if this lack of conformity could have been reasonably discovered during the examination [Bianca/Bonell-Bianca, Art. 35 p. 278 para. 2.8.2; Enderlein & Maskow, Art. 35 p. 147 para. 20].

76. The Respondent submits that the Claimant could have reasonably discovered the alleged lack of conformity. Even if it is contended that the phrase "one could not have been unaware" requires gross negligence on the part of the buyer [Schlechtriem, Art. 35 p. 285 para. 34], the Claimant was indeed grossly negligent.

77. First, Mr. Butter’s examination of the machine in Greece was grossly inadequate. A simple question by Mr. Butter would have revealed that the machine was not suitable for his needs. Instead, he omitted to verify the specifications of the flexoprint machine. During the inspection, he only asked general questions about the working condition of the flexoprint machine [Procedural Order No. 2, para. 13]. Mr. Butter did not make use of the manufacturer’s manual during the inspection. As the owner of a printing company who was knowledgeable about printing machines [Procedural Order No. 2, para. 13], he must have known that the thickness of material each machine can handle is different. He failed to verify this even when he had highlighted that contract with Oceania Confectionaries was particularly valuable to his company [Claimant’s Exhibit No. 1; Claimant’s Exhibit No. 3; Claimant’s Exhibit No. 9; Statement of Claim, para. 3].
78. This careless attitude continued well after the contract was formed. The Respondent’s workmen provided the Claimant with a full demonstration of the machine. The workmen conducted print runs to demonstrate how to set up the machine for various materials and widths on which it could print [Procedural Order No. 2, para. 16]. The Claimant had intended to use the flexoprint machine to print on eight micron foil, yet the Claimant’s personnel failed to notice that the workmen did not demonstrate using eight micron foil.

79. The Claimant also failed to notice that the Respondent’s workmen did not request for eight micron foil during the tests that were done on the full range of products for which the machine was designed. In fact, the Claimant’s personnel were seldom present [Procedural Order No. 2, para. 15]. Since the Claimant alleges that being able to print on eight micron foil was critical [Claimant’s Exhibit No. 9], it should have noted that the Respondent’s workmen had not used eight micron foil on the machine at all.

80. Secondly, the Claimant knew or could not have been unaware of the alleged lack of conformity because it was provided with the manufacturer’s manual prior to the signing of the contract on 30 May 2002. The Respondent drew the Claimant’s attention specifically to the manufacturer’s manual [Claimant’s Exhibit No. 6] and even emphasised to the Claimant the importance of the manual by informing the Claimant that it would “certainly wish to have a copy”. The Claimant contends that it did not know of the lack of conformity because the manual was delivered only after the contract was formed. [Claimant’s Memo, paras. 112-113]. To the contrary, the manufacturer’s manual was given on 27 May 2002, before the formation of the contract on 30 May 2002. Accordingly, the Claimant knew or could not have been unaware of the alleged lack of conformity.

D. THE RESPONDENT WAS UNDER NO DUTY TO INFORM THE CLAIMANT THAT THE FLEXOPRINT MACHINE WAS UNABLE TO PRINT ON EIGHT MICRON FOIL SINCE IT DID NOT KNOW OF THE CLAIMANT’S INTENDED PURPOSE.

81. The Claimant contends that the Respondent has breached a duty to inform it that the machine could not print on eight micron foil. While the Respondent does not dispute the Claimant’s contention that a duty of good faith exists during contractual negotiations, this does not translate to a duty on the seller to inform the buyer about non-suitability of goods if he did not know the intended purpose of the goods. In particular, BGH, 31 October 2001 (Germany) cited by the Claimant held that a recipient of an offer must be given a reasonable
chance to consider the standard conditions if they are to constitute part of the offer. A burden must not be imposed on the recipient to inquire about clauses that have not been made known to him.

82. Similarly, a burden must not be imposed on a seller to inform the buyer about the unsuitability of goods if the intended purpose of the goods was not made known to him. A duty to inform only applies in the limited situations where (i) the contract mandates it [Schlechtriem, Art. 45 p. 357 para. 3] or (ii) the seller knew that the intended purpose will fail [Secretariat Commentary, Art. 35 p. 32 para 10; OLG Koblenz, 11 September 1998 (Germany); Pelliculest v. Morton International (France)].

83. In our case, the Respondent had no reason to advise or warn the Claimant of the unsuitability of the machine. As submitted in paras. 52–57, the Respondent was unaware of the Claimant’s intention to print on eight micron foil. It could not have warned the Claimant of the unsuitability of the machine if it did not know of the Claimant’s intention to print on eight micron foil. This is especially so since the Respondent was dealing with an experienced printer, which it had no reason to believe was less technically competent than itself [OLG Koblenz, 11 September 1998 (Germany)].

III. ASSUMING THE RESPONDENT IS IN BREACH OF CONTRACT, ANY LOST PROFIT SUFFERED BY THE CLAIMANT IS IRRECOVERABLE.

A. THE CLAIMANT FAILED TO TAKE ADEQUATE PREVENTIVE MEASURES TO MITIGATE THE LOST PROFIT SUFFERED.

84. Where a loss of profit could have been made good or avoided through mitigation, it is entirely irrecoverable [Schlechtriem, Art. 77 p. 586 para. 3, p. 589 para. 12; Enderlein/Maskow, Art. 77 para. 5]. The Respondent submits that the Claimant’s lost profit could have been avoided through mitigation, and hence is entirely irrecoverable.

85. In order to claim damages for a loss of profit, the Claimant is not at any point in time “permitted to await passively incurrence of the loss” [Schlechtriem, Art. 77 p. 558 para. 9; Bianca/Bonell-Knapp, p. 559; Saidov, section 4(a); Enderlein & Maskow, para. 2]; it is “obliged to take adequate preventive measures to mitigate” its loss [Bianca/Bonell-Knapp, p. 559]. When the measures taken are insufficient to avert or lessen the harm, the Claimant is deemed as having failed to mitigate if it was “in a position to take more effective measures
and it could reasonably be expected to do so” [Bianca/Bonell-Knapp, p. 559]. Measures that would reasonably be expected of the Claimant are those “expected of a prudent person acting in good faith, who is in the same circumstances as the aggrieved party” [Schlechtriem, Art. 77 p. 588 para. 9; Opie, section III; Zeller, para. II; Saidov, section 4(b)]. The circumstances in question include purpose of the contract and the aggrieved party’s skills and experience [Saidov, section 4(b); Lando & Beale, section B].

1. It is reasonable to expect the Claimant to take more effective mitigating measures such as importing printed eight micron foil when it failed to find a substitute machine.

86. The Claimant’s attempt to look for another flexoprint machine was not an adequate preventive measure. Due to the object of the contract and the Claimant’s experience as a printer, it was in a position to be more effective in mitigating the damage, and could reasonably be expected to do so. The Respondent submits that a reasonable mitigating measure would be importing printed eight micron foil to fulfil its initial obligation to Oceania Confectionaries on 15 July 2002 [Claimant’s Exhibit No. 3]. If the Claimant had done so, it would have had ample time to purchase a substitute machine, await its delivery, install the machine and print the next batch of foil products for subsequent delivery to Oceania Confectionaries.

87. The object of the contract between the Claimant and the Respondent was to enable the Claimant to provide Oceania Confectionaries with eight and ten micron foil products [Procedural Order No. 2, para. 21]. Since the object of the contract was to fulfil the Oceania Confectionaries contract, it is reasonable that the Claimant would, as a prudent person, have imported eight micron printed foil.

88. The knowledge and experience possessed by the Claimant also makes the importation of printed foil a reasonable measure for a party in its position. It was fully aware that importing printed foil into Oceania was common practice for users of foil products, to the extent of knowing that it was expensive to do so [Claimant’s Exhibit No. 1]. This suggests a degree of familiarity and experience with the foil products market.

89. In OLG Köln, 8 January 1997 (Germany), the aggrieved party had a contract for tannery machines in order to treat its leather goods, but the seller could not re-deliver the
machines in time. The tribunal determined that the aggrieved party’s act of contracting the goods to be treated by a third party, instead of treating it itself, constituted a reasonable measure. Similarly, the Claimant should have contracted a third party to do what it had initially intended to do independently (i.e. print eight micron foil) but was now unable to. Hence, the Claimant would have been expected to take the reasonable measure of importing printed foil from a third party.

90. The Claimant contends that it has mitigated the loss through the resale of the flexoprint machine [Claimant’s Memo, para. 129]. However, mitigation is adequately preventive only when directed either to limiting the extent of the loss or to avoiding any increase in the initial harm [Comment on UNIDROIT Principles, Art. 7.4.8 Comment 1 p. 244]. Reselling the machine does not limit the extent of profit lost or avoid any increase in lost profit; it is unrelated to the profit to be gained from keeping the Oceania Confectionaries contract.

91. Therefore, the Claimant has not reasonably mitigated its loss of profit. It had the means and the option to import a batch of printed foil to satisfy its initial obligations to Oceania Confectionaries. It was in a position, and would reasonably be expected, to take other more effective measures when it failed to procure another machine.

2. The Claimant was required to take more extensive measures to mitigate harm because of the gravity of the losses involved.

92. The principle of good faith necessitates that when a party is taking greater risks than normal with a contract, the requirements pertaining to the measures expected of it should likewise be increased [Schlechtriem, Art. 77 p. 558 para. 9]. In ICC Case No. 7197 of 1992, the tribunal determined that measures to preserve and sell perishable goods may be additionally required of the aggrieved party because the nature of the goods made the risk and extent of loss significant [Schlechtriem, Art. 77 p. 558 para. 9 fn. 27]. This is consistent with the principle protecting the aggrieved party from having to undertake excessive or unreasonable costs [Schlechtriem, Art. 77 p. 558 para. 9].

93. In our case, the Claimant recognised that losing $3,200,000 in profit is significant [Claimant’s Exhibit No. 3]. In particular, the Claimant knew that it faced real and imminent competition from Reliable Printers [Claimant’s Exhibit No. 3], thus increasing the risk of it
losing this “handsome profits” [Claimant’s Exhibit No. 3]. With a contract worth $3,200,000 at stake, the Claimant should have taken more extensive measures to prevent this loss, such as importing printed foil, when it realised it could not procure a substitute machine.

94. Instead, it merely gave directions to Mr. Swain to adjust the machine even though Mr. Swain explicitly informed Mr. Butter that adjustments were unlikely to be successful [Procedural Order No. 2, para. 18]. Beyond giving these instructions, the Claimant did nothing further to mitigate the risk of losing the profit. Such passivity, even after being informed that the machine was unlikely to be adjusted, violates the principle that the aggrieved party should be an active participant with a responsibility to itself to limit the harm it suffers.

95. Although importing printed foil is costly [Claimant’s Exhibit No. 1], the Respondent submits that it is by no means an excessive cost. Mitigation costs are excessive when they are disproportionate to the benefit of the cure. [BGH, 25 June 1997 (Germany)]. However, when the expenditure stands in reasonable proportion to the benefit of the cure, it is considered acceptable [OGH, 14 January 2002 (Austria)]. Since the cost of one batch of printed foil is unlikely to come close to $3,200,000, which was the benefit the Claimant would be likely to receive from the contract, this expenditure is reasonable.

96. In conclusion, the Claimant would not have lost the Oceania Confectionaries contract but for its failure to mitigate. Since the lost profit of 8 years, loss of renewal of contract and loss of reputation are consequences of this failure, the Claimant must be held solely responsible and denied recovery for these losses.

B. ALTERNATIVELY, LOST PROFITS DUE TO THE CLAIMANT’S LOSS OF RENEWAL OF THE OCEANIA CONFECTIONARIES CONTRACT AND LOSS OF REPUTATION ARE IRRECOVERABLE BECAUSE BOTH LOSSES WERE UNFORESEEABLE AND UNCERTAIN.

97. The Claimant seeks (i) $1,784,544 in lost profit due to loss of renewal of the Oceania Confectionaries contract; and (ii) $325,000 in lost profit due to a loss of reputation [Claimant’s Memo, paras. 143 & 160]. The Respondent submits that both instances of lost profits are irrecoverable because the renewal of the Oceania Confectionaries contract and the loss of reputation are in themselves unforeseeable and uncertain.
MEMORANDUM FOR RESPONDENT

1. Any lost profits resulting from the loss of renewal of contract and loss of reputation were unforeseeable since the contract’s protective purpose did not cover renewal and reputation.

98. To claim for lost profit, the loss must have been reasonably foreseeable [Art. 74 CISG]. Yet a party in breach should not bear an overly onerous duty. Hence, he will not be liable for a particular loss even if it were actually foreseen by him, when in the circumstances “a reasonable interpretation of the contract shows that the parties did not intend the protective purpose of the contract to cover” this loss [Schlechtriem, Art. 74 p. 568 para. 36].

99. This is particularly so when an unusually high damage is likely to result from a breach of contract and the aggrieved party does not draw attention to this risk [Schlechtriem, Art. 77 p. 587 para. 6; Herber & Czerwenka, Art. 77 para. 6]. Drawing attention to the risk involves informing the other party that its breach “would cause exceptionally heavy losses or losses of an unusual nature” [Bianca/Bonell-Knapp, p. 514], thus making the other party cognisant of this risk being imputed to him, and allowing him the opportunity to decline such liability [Schlechtriem, Art. 74 p. 568 para. 36; Liu, section 14.2.1].

i. The Claimant’s loss of profit from renewal of the Oceania Confectionaries contract was unforeseeable because the parties did not intend for the renewal to be protected under the contract.

100. While it is not disputed that the contract’s protective purpose covered the first four-year contract with Oceania Confectionaries, a reasonable interpretation of the contract shows that the parties did not intend the contract’s protective purpose to extend to protection of profit from the renewal of the contract. Instead, the parties’ negotiations suggest that the Claimant wanted assurance that the machine would be ready fast, and not that the Respondent would assume the risk of losing the renewal.

101. The Claimant mentioned its contract with Oceania Confectionaries as an explanation of why it was “imperative that we move fast on this” [Claimant’s Exhibit No. 3]. In fact, it told the Respondent that as long as the machine was “in place and producing”, they did not fear any competition from Reliable Printers for the contract [Claimant’s Exhibit No. 3].

102. Furthermore, the Claimant did not explicitly inform the Respondent of the special risk of losing the renewal of the contract. The Claimant simply mentioned that the Oceania Confectionaries contract was subject to renewal [Claimant’s Exhibit No. 3], but failed to tell
the Respondent that it would be held liable for a loss of renewal of the contract. The Respondent should not have to glean this from the correspondence. That the Respondent was unaware of its liability is apparent from its reply on 27 May 2002 [Claimant’s Exhibit No. 4] where it showed only an understanding that the Claimant needed urgent use of a flexoprint machine. Therefore, a reasonable interpretation of the parties’ common intention shows that the contract did not include protection against lost profit from a loss of renewal.

ii. Similarly, lost profit due to loss of reputation was unforeseeable because the parties did not intend for reputation to be protected under the contract.

103. Generally, lost profit for loss of reputation is irrecoverable because the latter loss was unforeseeable and not contemplated by Art. 74 CISG [Schlechtriem, Art. 74 p. 558 para. 11; Saidov, section 1(d)]. However, in exceptional cases where the protective purpose of the contract covers a loss of reputation, there can be recovery. This is not the case here.

104. Although the Claimant envisioned itself gaining a “commanding lead” in the foil printing market, this was merely a subsidiary purpose and not the basis of the contract as understood by both parties. The Claimant’s sole reason in contracting with the Respondent was urgent need of a flexoprint machine to service the Oceania Confectionaries contract before 15 July 2002 [Claimant’s Exhibit No. 3]. The Respondent acknowledged that as the contractual basis when he offered a direct dispatch of the machine [Claimant’s Exhibit No. 4].

105. Furthermore, the seller is never liable for a loss of goodwill unless, at the time of conclusion of the contract, the buyer pointed out the risk of this loss [Schlechtriem, Art. 74 p. 571 para. 43] and gave the seller an opportunity to decline liability [Schlechtriem, Art. 74 p. 568 para. 36]. The Claimant neither mentioned any possible risk to its reputation nor the possibility of losing the chance to better its reputation. Consequently, the Respondent was never given the chance to consider and decline such liability.

2. Furthermore, the lost profits due to the loss of renewal of contract and loss of reputation were both highly uncertain.

i. The requirement of certainty of harm suffered, which is to be determined at the time of adjudication, is implicit in the CISG for the recovery of damages.

106. The requirement of certainty of harm is expressed in Art. 7.4.3 UNIDROIT Principles, which can be used to interpret Art. 74 CISG [UNIDROIT Principles, Preamble;
Eiselen, para. h]. It complements Art. 74 CISG by establishing that the existence and extent of the harm compensated must be established with a reasonable degree of certainty [Garro, T.L.R. (1995) 1149, p. 1188; Comment on UNIDROIT Principles, Art. 7.4.3 Comment 1 p. 236]. Significantly, this rule of preventing compensation for future harm that may never occur helps to temper the principle of full compensation under Art. 74 CISG [Eiselen, para. h].

107. Furthermore, although the CISG does not expressly require certainty of harm, courts applying the CISG have required proof of certain harm [Saidov, section 5; OLG Hamburg, 5 October 1998 (Germany); OLG Celle, 2 September 1998 (Germany)]. In order to be reasonably certain whether a loss will occur, the date of judgment is the relevant date for determining the existence and proportion of the loss [Schlechtriem, Art. 74 para. 33]. This prevents compensation for harm that was foreseeable but in all likelihood will not occur [Comment on UNIDROIT Principles, Art. 7.4.3 Comment 1 p. 236].

ii. The possibility of renewal of the Oceania Confectionaries contract and earning the lost profit is highly uncertain.

108. It is highly uncertain that the Claimant will suffer lost profit due to the loss of renewal of the Oceania Confectionaries contract. In 2002, the initial Oceania Confectionaries contract stated that it was “subject to renewal at the end of the period” [Claimant’s Exhibit No. 3]. It is submitted that a reasonable person of the same kind as the Respondent, in the same circumstances [Art. 8(2) CISG] would not take “subject to renewal” to mean that renewal was reasonably certain. In commercial contracts, “subject to renewal” means the contract cannot continue indefinitely or be automatically renewed after four years [US Legal Forms; Burton, p. 946; Avneyon, p. 440; Colin, p. 341; Credit Suisse]; it is contingent on renewal based on factors which have not been disclosed. Therefore, the term “subject to renewal” does not indicate renewal to be reasonably certain. Furthermore, Oceania Confectionaries expressed no particular inclination or obligation in its contract with Oceania Printers, to continue contracting with it after four years.

109. Additionally, this claim has no merit because the prospect of renewing the Oceania Confectionaries contract in 2006 is highly uncertain. This is because the presence of Oceania Generics creates an additional contract from which printers in Oceania can earn substantial profit. With two major contracts available, more competitors will consider it worthwhile to
purchase flexoprint machines and compete for both contracts simultaneously. In 2002 there were already rumours of the construction of Oceania Generics, which materialised in 2005 [Procedural Order No. 2, para. 20]. Hence, it is highly uncertain that the Claimant will suffer lost profit due to the loss of renewal of the Oceania Confectionaries contract.

iii. Similarly, any loss of profit due to loss of reputation suffered by the Claimant is highly uncertain.

110. Claims for loss of reputation seldom fulfil Art. 74 CISG requirements of foreseeability. [Saidov, section 1(d)]. To be foreseeable, any claim for loss of profit due to loss of reputation must be certain: it must, at least, be substantiated with facts [HG Zürich, 10 February 1999, (Switzerland)] to prove an actual loss of business or clients [Sté Calzados Magnanni v. SARL Shoes General International (France)], or other evidence directly showing a loss of reputation [AP Barcelona, 20 June 1997 (Spain)].

111. The Claimant claims for loss of credibility and the resultant loss of profits and clients [Claimant’s Memo, paras. 151, 156 & 147]. The Respondent submits that these are entirely assumptions on the part of the Claimant. A claim based on these unsubstantiated assertions is entirely uncertain.

C. THE CLAIMANT CANNOT CLAIM DAMAGES FOR THE LOSS OF CHANCE TO EITHER RENEW THE OCEANIA CONFECTIONARIES CONTRACT OR BE A MARKET LEADER SINCE THESE CHANCES WERE NOT THE PRE-DOMINANT PURPOSE OF THE CONTRACT ENTERED WITH THE RESPONDENT.

112. Art. 74 CISG allows recovery for lost profit, but not for a loss of a chance to profit [Schlechtriem, Art. 74 p. 563 para. 23], except where the pre-dominant purpose of the contract was to provide a chance [Schlechtriem, Art. 74 p. 563 para. 23; ICC Case No. 9078 of 2001]. The Claimant might have intended one of the purposes of the contract to be procurement of a chance to renew the contract or develop a reputation. However, as submitted in para. 87, this was not the pre-dominant intention of the contract.

113. Furthermore, this loss must be reasonably certain [Art. 7.4.3(1) UNIDROIT Principles]. The loss of both chances is not reasonably certain because renewal of the Oceania Confectionaries contract, as submitted in paras. 108–109, and being a market leader are in themselves uncertain. Regarding the latter loss, the Claimant’s statement that it would have no competitors once they serviced the initial contract with Oceania Confectionaries is
mere speculation [Claimant’s Exhibit No. 3; Claimant’s Memo, para. 164]. As submitted in para. 110, the Claimant is required to show actual proof of potential clients and business in order to substantiate its claim of being a market leader.

114. However, the facts do not show that any printer who contracts with Oceania Confectionaries would necessarily be in a privileged position. In addition, the Claimant has not shown that Reliable Printers has a privileged position because it possesses the Oceania Confectionaries contract. Consequently, the quantification of this lost chance using the potential profits that can be made from minor printing contracts and the Oceania Generics contract [Claimant’s Memo, para. 171] must be seen as fictitious.

D. SHOULD THIS TRIBUNAL ALLOW THE CLAIMANT’S CLAIM FOR LOST PROFIT, THE CALCULATION OF LOST PROFIT CANNOT INCLUDE INFLATION.

115. It is the Respondent’s position that any lost profit suffered by the Claimant is irrecoverable. Should this Tribunal find otherwise, the Respondent submits that the calculation of lost profit cannot include a 2% annual inflation rate.

116. First, Procedural Order No. 1 does not permit a claim for interest. [Procedural Order No. 1, para. 15]. The underlying rationale of awarding interest is to compensate the aggrieved party for any loss in the value of money over time. Likewise, inflation measures the loss in value of money in comparison to a particular basket of goods and services over time [Hall & Taylor, p. 60-62; Dornbusch & Fischer, p. 36-38] Allowing the Claimant’s claim for inflation in effect subverts the Tribunal’s order to exclude a claim for interest.

117. Secondly, the inflation rate of 2% cannot truly reflect the amount of lost profit claimed by the Claimant because this rate and its effects on this loss are uncertain. An inflation rate is determined by comparing the value of money with a basket of goods and services. It is not known whether the basket of goods and services considered in determining the 2% inflation rate was that of the manufacturing or printing industry. The inflation rate could, in actual effect, have no bearing on the Claimant’s production costs or lost profit.

118. Thirdly, assuming the rate is appropriate, the percentage of 2% is not necessarily reflective of a 2% increase in costs of printing foil, but may be the resultant effect of increases in other goods and services within the said basket.
IV. REQUEST FOR RELIEF

119. For the above reasons, we respectfully request that this Tribunal find in favour of the Respondent the following:

(a) The applicable law governing the limitation (prescription) period of the contract is Mediterraneo law;

(b) This claim is not actionable because it was instituted after the limitation (prescription) period of two years;

(c) The 7 stand Magiprint Flexometix Mark 8 machine delivered by the Respondent was in conformity with the contract; and

(d) Any lost profit and moral harm incurred by the Claimant is irrecoverable.

Signed

Counsel for the Respondent

Darius Chan  Jeffrey Ng  Kimberly Scully  Vanessa Yong

26 January 2006