FOURTEENTH ANNUAL WILLEM C. VIS
International Commercial Arbitration Moot

UNIVERSITY OF STOCKHOLM
Memorandum for Respondent

NATALIA BELOMESTNOVA – FRAUKE BRAR – TATSIANA FADZEYEVA
YAROSLAV PETROV – JACOB ROSOFF – GORSHA M. SUR
MEMORANDUM FOR RESPONDENT

ON BEHALF OF:

MEDITERRANEO ELECTRODYNAMICS S.A.

23 Sparkling Lane,
Capitol City, Mediterraneo

(Respondent)

AGAINST:

EQUATORIANA OFFICE SPACE LTD

415 Central Business Centre,
Oceanside, Equatoriana

(Claimant)
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LIST OF ABBREVIATIONS

AAA  American Arbitration Association

AC  Advisory Council

                   Geneva, 17 February 1983

Art. / Arts.  Article / Articles

ASA  Swiss Arbitration Association

AUS  Austria

CCIG  Geneva Chamber of Commerce and Industry

CICA Rules  Rules of Arbitration of the Court of International
             Commercial Arbitration attached to the Chamber of
             Commerce and Industry of Romania

CISG  United Nations Convention on Contracts for the
       International Sale of Goods, 11 April 1980

Cl. Ex.  Claimant's Exhibit

Cl. Memo.  Claimant’s Memorial

ECJ  European Court of Justice

e.g.  *exempli gratia* (for example)

FR  France
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<td>GB</td>
<td>Great Britain</td>
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<td>GER</td>
<td>Germany</td>
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<td>Ibid.</td>
<td>ibidem (at the same place)</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICCA</td>
<td>International Council of Commercial Arbitration</td>
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<tr>
<td>i.e.</td>
<td>id est (that is)</td>
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<td>Inc.</td>
<td>Incorporated</td>
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<td>No. / Nos.</td>
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St. of Claim
Statement of Claim

UNCITRAL
United Nations Commission on International Trade Law

UNCITRAL Rules

USA
United States of America

v.
versus (against)

Vol.
Volume
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MEMORANDUM FOR RESPONDENT

STATEMENT OF FACTS

Mediterraneo Electrodynamics S.A. (“Respondent”) is a wholesaler of electrical equipment who sometimes also fabricates certain types of electrical equipment using standard parts it would otherwise sell individually.

Equatoriana Office Space Ltd (“Claimant”) is a constructor of residential and business properties.

On 12 May 2005, Claimant and Respondent concluded a sale contract (“the contract”) for five primary distribution fuse boards (“fuse boards”). Claimant provided the engineering drawings for Respondent to assemble the fuse boards accordingly. Subsequently, Chat Electronics, Claimant’s favored provider for electrical equipment, encountered production difficulties and therefore Respondent was not able to procure the type of fuses that were named on Claimant’s engineering drawings. Mr. Stiles, Respondent’s sales manager, immediately called Mr. Konkler, Claimant’s purchasing director on 14 July 2005. When Mr. Stiles asked to speak to Mr. Konkler, he was told that Mr. Konkler was not available, but that he could talk to Mr. Hart, a professional in the procurement office. Acknowledging Claimant’s preference for Chat Electronic equipment, Mr. Stiles made the proposal to use Chat Electronics JS instead of JP type fuses. Claimant’s representative Mr. Hart accepted the proposal and told Respondent to “go ahead”.

On 22 August 2005 Respondent delivered the fuse boards to Mountain View and they were installed on 1 September 2005. On 8 September 2005 Equalec, a private electricity supplier, refused to connect the fuse boards to the electrical grid, stating that the fuse boards would not comply with Equalec’s private safety policy. Contrary to the regulations of the Equatoriana Electrical Regulatory Commission (“Commission”), Equalec’s policy requires J type fuses rated 400 amperes and below to be only JP type fuses.

On 9 September 2005 Claimant called Respondent alleging that the fuse boards are not in conformity with the contract because Equalec refused to connect the supplied fuse boards to the electrical grid. On the same day, Claimant purchased substitute fuse boards for USD 180,000. Thereby, Claimant passed up the chance to get the fuse boards connected by a complaint to the Commission, which could have compelled Equalec to change its policy. Claimant now claims USD 180,000 for the substitute purchase and USD 20,000 for the replacement of Respondent’s fuse boards.
SUMMARY OF ARGUMENT

1. THE TRIBUNAL LACKS JURISDICTION TO DETERMINE THIS CASE ON THE MERITS
This Tribunal does not have jurisdiction to hear this case on the merits because the arbitration clause is unenforceable due to irreparable ambiguity and the lack of any mention of an arbitral institution. The ambiguity in the arbitration clause should be construed against Claimant. Additionally, the Tribunal lacks jurisdiction because it was formed as an institutional tribunal under the CICA Rules contrary to the agreement of the parties.

2. THE CONTRACT WAS ORALLY AMENDMENT AND THE DELIVERED FUSE BOARDS ARE IN CONFORMITY WITH THE AMENDED CONTRACT
Claimant’s claim for damages is unfounded because Respondent delivered fuse boards in conformity with the contract. The original contract was validly amended during the telephone conversation between Mr. Hart and Mr. Stiles. The amendment superseded any previous descriptions of the goods. Furthermore, the conformity of the supplied goods cannot be assessed under Article 35(2) CISG because the application of this article is excluded by the structure of Article 35 CISG.

3. RESPONDENT DID NOT BREACH THE ORIGINAL CONTRACT
Even if the contract was not validly amended, the fuse boards delivered by Respondent conform to the original contract as required by Article 35(1) CISG. The change from JP to JS type fuses itself was insignificant because the fuse types are factually and functionally the same. Additionally, the term “to be lockable to Equalec requirements” is not a description in the sense of Article 35(1). If the Tribunal finds Article 35(1) CISG not applicable, the fuse boards were fit for any ordinary purpose under Article 35(2)(a) CISG. Finally, the fuse boards did not have to conform to any particular purpose under Article 35(2)(b) CISG.

4. ANY FAILURE OF RESPONDENT IS EXCUSED
Even if the Tribunal finds the fuse boards do not conform to the contract, Respondent is not liable for any damages of Claimant because Claimant failed to properly fulfill its obligation to mitigate under Article 77 CISG. Additionally, Respondent’s failure is excused under Article 80 CISG because any nonconformity of the fuse boards was caused by Claimant.
1. **THE TRIBUNAL LACKS JURISDICTION TO DETERMINE THIS CASE ON THE MERITS**

1. The arbitration clause is fatally flawed due to ambiguity and the Tribunal constituted under the CICA Rules does not have jurisdiction to decide the dispute. Contrary to Claimant’s allegations (Cl. Memo., paras. 23-25, 31), the Tribunal formed under the CICA Rules does not have jurisdiction to determine this case on the merits because it lacks the consent of the parties. However, Respondent agrees with Claimant that the universally accepted principle of competence-competence allows the Tribunal to rule on its own jurisdiction (Cl. Memo., para. 3; Model Law, Art. 16(1)). Yet, Respondent is not waiving its right to later challenge the award or resist enforcement by agreeing that the Tribunal can determine its own jurisdiction (Model Law, Arts. 4, 16(2), 34(2)(a)(iv), 36(1)(a)(iv); New York Convention, Art. V(1)(d)).

2. The fatal ambiguity of the arbitration clause is not resolved by Claimant’s analysis of the formation of the arbitration clause. Claimant argues that the arbitration agreement was validly formed under the CISG (Cl. Memo., paras. 5-6, 8). However, the Tribunal did not instruct the parties to address matters regarding the formation of the contract, including formation of the arbitration clause (Procedural Order No. 1, para. 11), and this is not an issue in contention. The issue before this Tribunal is whether the arbitration clause is sufficiently clear for the Tribunal to resolve the dispute in accordance with the parties’ arbitration agreement.

3. A tribunal’s power to decide a dispute between two parties is derived solely from the parties’ consent expressed in an arbitration agreement (Redfern/Hunter para. 1-08; Fouchard/Gaillard/Goldman, para. 471; Berger, p. 16; Weigand, para. 154; Chukwumerije, p. 172; ICC 6379/1990; Bovis v. Jay-Tech (Singapore)). If the contents of an arbitration agreement are vague or uncertain, a tribunal should determine if and in what manner the parties intended to arbitrate (Fouchard/Gaillard/Goldman, para. 476; Karrer, p. 120; Lew/Mistelis/Kröll, para. 7-60). General principles of contract interpretation should be used when interpreting an arbitration agreement (Ibid.). However, the Tribunal will reach the same conclusion even if it agrees with Claimant that the CISG governs the arbitration clause because both the CISG and general
principles of contract interpretation support the same method of interpretation: a tribunal should first examine the wording of the arbitration clause to determine the intent of the parties to arbitrate (CISG, Art. 8; UNIDROIT Principles, Art. 4.2; Davis, pp. 369-373; CCIG Award of 21 October 2002; CCIG Award of 29 November 1996). If the consent of the parties is not clear from the face of the text, arbitral tribunal should attempt to determine the common intent of the parties (Ibid.). If the latter is impossible, it should refer to the understanding that a reasonable person of the same kind as the parties would have had under the same circumstances (Ibid.).

4. Claimant suggests that the Tribunal has jurisdiction to decide this dispute despite the ambiguities contained within the arbitration clause (Cl. Memo., paras. 23, 25). However, these ambiguities are severe and cannot be resolved to clarify what type of arbitration, if any, the parties agreed to. Therefore, the Tribunal should find that the arbitration clause is too ambiguous to give legal effect to the parties’ alleged agreement to arbitrate (A). Furthermore, the Tribunal should find it does not have jurisdiction because it was constituted not in accordance with the agreement of the parties (B).

A. THE ARBITRATION CLAUSE IS NOT AN ENFORCEABLE ARBITRATION AGREEMENT

5. The arbitration clause, clause 34 of the contract, refers to “the International Arbitration Rules used in Bucharest.” (Cl. Ex. No. 1). Contrary to Claimant’s assertion that this clause can only refer to the CICA Rules titled the “Rules of Arbitration” (Cl. Memo., paras. 23, 25), the clause is too ambiguous to ascertain the intended reference and thus the clause cannot be given legal effect. The arbitration clause is unenforceable because the parties’ intent to arbitrate under a certain set of rules cannot be determined (1), any ambiguity should be interpreted against Claimant to prevent it from benefiting as the drafter of this ambiguous arbitration agreement (2) and the clause fails to identify any arbitral institution (3).
1. The parties’ choice of arbitration rules cannot be determined from the arbitration clause

6. Clause 34 of the contract is too ambiguous to serve as an enforceable arbitration agreement between the parties. This ambiguity cannot be resolved through contract interpretation. Respondent agrees with Claimant that “an arbitration agreement must be clear and capable of being given a sensible meaning and where the clause is so ambiguous and uncertain that no sense can be made of it, both the tribunal and the court must declare it null and void” (Cl. Memo., para. 9; see also: Domke, sect. 8:8; Redfern/Hunter, paras. 3-67 to 3-71; Born, p. 189; Fouchard/Gaillard/Goldman, para. 471; Craig/Park/Paulsson, p. 131; Zeckman v. Merril Lynch (USA)).

7. When interpreting an arbitration clause, a tribunal should give effect to all explicit terms in an arbitration clause (UNIDROIT Principles, Art. 4.5; Star Shipping v. China Foreign Trade (GB); Brasserie du Pêcheur v. Germany (ECJ); ICC 1434/1975; ICC 3380/1980; ICC 4145/1984; ICC 5103/1988; CCIG Award of 27 August 1999). Claimant accepts this principle by applying Article 4.5 of the UNIDROIT Principles to the interpretation of the arbitration agreement (Cl. Memo., para. 11). This article states that “[c]ontract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of the effect” (UNIDROIT Principles, Art. 4.5).

8. To determine what rules the parties intended to use by the reference to “the International Arbitration Rules used in Bucharest” the Tribunal must first examine the plain text of the arbitration clause. Claimant asserts it is evident that the arbitration clause referred to the CICA Rules (Cl. Memo., para. 23), although they are titled “Rules of Arbitration”. The use of the definite article “the” and the fact that the first letters in the words “International”, “Arbitration” and “Rules” are capitalized indicate that the parties referred to the rules specifically named “International Arbitration Rules” (Marks v. Presstek (USA)). It was found that an arbitration clause, which read “the International Arbitration rules” was too vague to indicate a specific set of rules and the court refused to compel arbitration on these grounds (Ibid.). Thus, the examination of the plain text of the arbitration clause shows that the reference to international arbitration rules is too vague to indicate which rules are applicable.
9. Even if the Tribunal assumes that Claimant intended to use the CICA Rules when it drafted clause 34 of the contract, Respondent did not know and could not have been aware of such an intention. Mr. Stiles noted in his witness statement that the contents of clause 34 of the contract were not clear to him (Resp. Ex. No. 1, para. 4). No further evidence shows that Respondent was aware of any intent by Claimant to arbitrate under the CICA Rules. Thus, the parties’ common intent cannot be determined.

10. The reference to “the International Arbitration Rules” could be objectively understood to refer to any one of many different institutional rules so named. For example, the rules of American Arbitration Association, Zurich Chamber of Commerce and Milan Chamber of Commerce are all named “International Arbitration Rules” and could be used in Bucharest (CCP Romania, Art. 341, para. 2 – parties may choose a set of arbitration rules). However, there is no clear indication that the parties intended to use any of these rules. Therefore, the Tribunal may not ignore the fact that the parties wanted to apply “the International Arbitration Rules”.

11. Claimant argues that the ambiguity found in the arbitration clause can be resolved by using the principle of effective interpretation (Cl. Memo., para. 11). Yet, effective interpretation merely provides a method for resolving two competing ways of interpreting an arbitration clause by preferring the interpretation that enables the arbitration clause. (Cl. Memo., para. 11; Fouchard/Gaillard/Goldman, para. 478). However, if the interpretation of the clause is not possible, the clause is void due to uncertainty and contradiction (Lew/Mistelis/Kröll, para. 7-59; OLG Hamm, 15 November 1994 (GER); OLG Hamburg (GER); Stein/Jonas/Schlosser, sect. 1025, para. 15; Zöller/Geimer, sect. 1025, para. 11). The principle of effective interpretation does not empower the Tribunal to invent an arbitration agreement for the parties by means of aggressive interpretation.

12. Using the principle of effective interpretation does not remedy the ambiguity in the arbitration clause. The “International Arbitration Rules” could be interpreted as any of many sets of international arbitration rules that can be used in Bucharest. Any of these interpretations would enable the clause (see para. 10 above). Since there are multiple ways to interpret the arbitration agreement to be effective, the principle of effective interpretation does not resolve the ambiguity in the arbitration clause. As it is impossible to determine which rules the parties intended to apply by reference to “the International
Arbitration Rules used in Bucharest”, the arbitration agreement is unenforceable due to irreparable ambiguity.

2. Clause 34 should be interpreted against Claimant

13. The Tribunal should not follow Claimant’s interpretation of the arbitration clause because otherwise, Claimant could arbitrarily choose the rules of arbitration it prefers. The principle of contra proferentem is applicable to the interpretation of arbitration agreements (Fouchard/Gaillard/Goldman, para. 479). The principle of contra proferentem provides that an unclear agreement should be interpreted against the party that drafted it (UNIDROIT Principles, Art. 4.6; Fouchard/Gaillard/Goldman, para. 479; Berger, p. 551; Bernstein/Lookofsky, p. 131; DiMatteo, p. 202; Mastrobuono v. Shearson (USA); Société Swiss v. Petrogab (FR)). Claimant drafted the ambiguous clause. Applying the principle of contra proferentem should prevent Claimant from gaining the benefit of “rules shopping”.

14. The arbitration clause in the contract does not identify what rules should be used in the arbitration between the parties (see paras. 8-10 above). Contrary to Claimant’s assertion that Respondent is acting in bad faith by challenging the arbitration clause (Cl. Memo., paras. 29-30), it is Claimant who is attempting to take undue advantage of its drafting of the ambiguous arbitration clause. Claimant drafted this clause of the contract (Resp. Ex. No. 1, para. 4) and subsequently initiated this arbitration with the Court of Arbitration using the CICA Rules. If the Tribunal finds it has jurisdiction to hear this case on the merits then Claimant would ultimately be allowed to take advantage of the ambiguity in the arbitration clause by unilaterally choosing the rules of arbitration it prefers. Therefore, the Tribunal should find that the arbitration clause is unenforceable to prevent Claimant from benefiting from the ambiguity it created.

3. The arbitration clause fails to adequately specify an institution

15. Clause 34 is unenforceable because it does not specify an institution to administer arbitral proceedings. Institutional arbitration may proceed only if the parties sufficiently identified the institution (Karrer, p. 123). If the parties attempt, but fail to precisely and
correctly identify the institution in their arbitration agreement, then the arbitration agreement is unenforceable (Wilske/Krapfl, p. 80; Kiriluk, p. 99). Clauses that sufficiently identify an arbitral institution include certain words to evidence the parties’ conscious choice of institutional arbitration instead of ad hoc arbitration. Such words are “institution”, “chamber” or “trade” (Karrer, p. 122). In the cases that Claimants cites, where courts or tribunals found an arbitration clause indicated valid institutional arbitration, the clause contained words such as “institution”, “institute”, “chamber”, or “association” (Cl. Memo., paras. 15-21). The absence of such terms in the arbitration clause means that the parties failed to identify an institution and thus, the arbitration clause is unenforceable.

16. Claimant contends that clause 34 of the contract makes a reference to the Court of Arbitration and its rules (the CICA Rules). However, clause 34 of the contract does not contain any words evidencing a choice of an arbitral institution. Claimant’s argument that the Court of Arbitration is the only arbitral institute in Bucharest (Cl. Memo., para. 23) is irrelevant because the parties did not specify an arbitral institution in their agreement. Since clause 34 does not indicate an institution, the parties did not agree to institutional arbitration and conclude that the arbitration agreement is unenforceable.

17. To conclude, the Tribunal should find that the arbitration clause is too ambiguous to be given effect. The ambiguity creates multiple interpretations of the arbitration clause and nothing indicates which interpretation the parties intended. The principle of contra proferentem requires that the arbitration clause is interpreted against the Claimant as the drafter of the ambiguous arbitration clause. Moreover, the arbitration agreement does not adequately specify an arbitral institution to administer the proceedings. If the Tribunal upholds the arbitration agreement, it risks conducting the arbitral procedure without the consent of the parties, which would provide grounds to challenge the forthcoming award.

B. IT WOULD BE CONTRARY TO THE PARTIES’ AGREEMENT IF THE TRIBUNAL FINDS IT HAS JURISDICTION TO DECIDE THE DISpute

18. Additionally, the Tribunal should decline jurisdiction because it was constituted not in accordance with the parties’ agreement to arbitrate. An arbitrator’s jurisdiction is derived from the will of the parties (Jarvin, p. 83; Redfern/Hunter, para. 5-30). A tribunal does
not have jurisdiction if it was constituted not in accordance with the agreement of the parties (Redfern/Hunter, para. 9-13). The Tribunal lacks jurisdiction because it was formed contrary to the agreement of the parties under the auspices of the Court of Arbitration (1) according to the CICA Rules (2).

1. **Contrary to the agreement of the parties the Tribunal was formed as an institutional tribunal**

19. If the Tribunal finds that the arbitration clause is effective, then the Tribunal nevertheless does not have jurisdiction because there is no indication that the parties intended institutional arbitration. Since the Tribunal was constituted under the auspices of the institution of the Court of Arbitration it does not have jurisdiction over the dispute because it is not an *ad hoc* tribunal. When an otherwise valid arbitration clause fails to indicate a choice of institutional arbitration, the agreement should be interpreted as an *ad hoc* arbitration clause (Fouchard/Gaillard/Goldman, para. 486; Karrer, pp. 119, 128; Kyselova, p. 53; Craig/Park/Paulsson, p. 131, referring to Libyan National Oil Company v. WETCO (FR)).

20. The parties did not agree to institutional arbitration under the CICA Rules because they did not choose an arbitral institution in clause 34 of the contract (see paras. 15-16 above). Consequently, if the Tribunal concludes that the arbitration agreement is enforceable, then it should find that the agreement was for *ad hoc* arbitration. Yet, the Tribunal was constituted as an institutional tribunal under the CICA Rules. In particular, the presiding arbitrator was appointed according to Article 23 CICA Rules (Problem, pp. 35-37), which requires that the party appointed arbitrators select the presiding arbitrator from a list of arbitrators composed by the Court of Arbitration. However, the formation of an *ad hoc* tribunal would not be confined to the selection of a presiding arbitrator from a list of arbitrators (Model Law, Art. 11). The constitution of the Tribunal was unnecessarily restricted by the Court of Arbitration through the application of the CICA Rules. Therefore, the Tribunal should decline jurisdiction because the composition of the Tribunal was not in accordance with the agreement of the parties.
2. The Parties did not intend to use the CICA Rules

21. Furthermore, the Tribunal does not have jurisdiction because the parties did not consent to proceedings under the CICA Rules. The parties could not have intended to arbitrate under the CICA Rules because the CICA Rules are domestic in nature (a) and conflict with the Model Law (b).

   a. The parties did not intend to use domestic arbitration rules

22. The Tribunal should decline jurisdiction because it was formed according to the CICA Rules which the parties did not intend to apply to this arbitration. The arbitration clause in the contract states that disputes “shall be settled by the International Arbitration Rules used in Bucharest”. Giving effect to the “real meaning” to these words (Cl. Memo., para. 14) clarifies that the parties intended to use arbitration rules that are international in nature. The CICA Rules are neither titled “International” (see para. 8 above) nor are these rules international in nature. Numerous references to Romanian national law in the CICA Rules indicate that these rules are primarily drafted for domestic arbitration rather than international arbitration.

23. Admittedly, the general provisions of the CICA Rules are supplemented by provisions of Chapter VIII titled “Special Provisions regarding International Commercial Arbitration” (Cl. Memo., para. 24). Yet, only six out of eighty-one articles of the CICA Rules apply specifically to international commercial. However, no article in the CICA Rules provides that some of the rules contained therein are not applicable to international arbitrations. Consequently, all provisions of the CICA Rules apply to international arbitrations unless the six articles in Chapter VIII modify them.

24. Some of the provisions of the CICA Rules that apply to international commercial arbitration clearly require the use of Romanian domestic law. Many articles of the CICA Rules refer to “the law” (Arts. 26(1), 30, 53(2), 54-2(2), 67(1)), the Code of Civil Procedure (Arts. 1(2), 22(1), 54(2)) or particular laws of Romania (Art. 54-1(1)). For example, arbitrators may be challenged for reasons “provided by the law for the challenge of judges” (CICA Rules, Art. 26(1)) and “are liable to damages in compliance with the provisions of the law” (CICA Rules, Art. 30). Also, an arbitral tribunal may
“order production of any evidence as provided by the law” (CICA Rules, Art. 53(2)). Furthermore, Article 79 CICA Rules stipulates that the Rules are to be complemented by the provisions of the ordinary rules of the Romanian civil procedure. None of the provisions of the CICA Rules suggests that this article is not applicable to international arbitrations. Additionally, the provisions of the international conventions to which Romania is a party shall apply to the settlement of international commercial disputes according to Article 72(1) CICA Rules. Thus, the CICA Rules are patently domestic in nature because they are dependent on Romanian law.

25. There is no indication that the parties wanted the domestic laws of Romania to apply to their international arbitration. The parties reside in different countries however, neither of them are domiciled in Romania. The governing law of the contract is that of Mediterraneo, the language of the arbitration is English, and the place of arbitration is in Danubia. These terms in the contract and the arbitration clause indicate that the parties wanted international arbitration. Therefore, giving the words their “real meaning” in the context of the entire contract evidences that the parties did not intend to use arbitral rules that require application of Romanian domestic law. If the Tribunal decides it has jurisdiction to decide the dispute, it will not give effect to the parties’ intent to arbitrate under arbitration rules that are international in nature

26. The parties did not agree to use the CICA Rules to arbitrate their disputes. The parties expressed that they wanted “International Arbitration Rules” for their dispute and the CICA Rules are not international in nature. Therefore, the Tribunal should decline jurisdiction to hear the dispute because it was formed not in accordance with the agreement of the parties.

b. The parties did not intend rules that conflict with the Model Law

27. Contrary to Claimant’s assertion, the parties did not intend to use the CICA Rules because these rules are in conflict with the parties’ clear choice of the place of arbitration and thus the lex arbitri. In the arbitration clause the choice of rules is unclear, while the choice of the place of arbitration is clear. It is doubtful that parties may validly agree on rules that are contrary to the law of the place of arbitration (Redfern/Hunter, para. 5-44).
28. Claimant does not dispute that arbitration must take place in Vindobona, Danubia applying the Model Law as the *lex arbitri* (*Cl. Memo., para. 2*). The Model Law and the CICA Rules differ significantly regarding setting aside proceedings. The CICA Rules, most notably, provide for a shorter time limit to initiate setting aside proceedings and also provide more grounds for setting aside an award. These provisions are significant and affect the remedies available to the parties after the award is rendered. Therefore, the ambiguous wording “*the International Arbitration Rules used in Bucharest*” should not be interpreted to indicate rules that conflict with the law of the place of arbitration.

29. According to Article 71 CICA Rules an action for setting aside may be instituted within one month after the award was communicated to the parties. This time bar to initiate a proceeding to set aside an award directly conflicts with Article 34(3) Model Law under which the time limit is three months. Furthermore, both the Model Law and the CICA Rules respectively provide that an award can only be set aside on the exclusive grounds set forth by each regulation. The grounds for setting aside an award under Article 69(g) and Article 69(h) CICA Rules are not found in the Model Law. For example, under the CICA Rules an arbitral award can be set aside if it “fails to include the order and the reasons, to show the date and place of its rendering, and it is not signed by the arbitrators” (*CICA Rules, Art. 69(g)*) or if “the order of the arbitral award includes provisions which cannot be complied with” (*CICA Rules, Art. 69(h)*). These additional grounds provided by the CICA Rules conflict with the Model Law provision that an arbitral award may be set aside only if the challenge is based on one of the reasons provided in Article 34(2) Model Law.

30. Therefore, the CICA Rules directly conflict with the Model Law and the parties could not have intended to use the CICA Rules. Furthermore, if the Tribunal uses the CICA Rules it can lead to a procedural irregularity because of potential conflicts with the Model Law. If a procedural error occurs then the parties could challenge the arbitral award under Article 35(2)(a)(iv) Model Law because the arbitral procedure was not in accordance with the agreement of the parties.

31. Unlike the CICA Rules, the UNCITRAL Rules contain a provision to address potential conflicts with the *lex arbitri*. Article 1(2) of the UNCITRAL Rules provides that UNCITRAL Rules govern the arbitration “except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties
cannot derogate, that provision shall prevail”. Furthermore, the UNCITRAL Rules are more appropriate for international arbitrations and are well established rules commonly used in international *ad hoc* arbitrations (*Redfern/Hunter, para. 1-104; Wetter, pp. 121-122*). Yet, the Tribunal was not constituted according to the UNCITRAL Rules. Even if the Tribunal interprets the ambiguous reference to mean the UNCITRAL Rules, the Tribunal should decline jurisdiction because it was not constituted according to agreement of the parties.

**Conclusion**

32. This Tribunal does not have jurisdiction to hear this case on the merits because the arbitration clause is unenforceable due to irreparable ambiguity and the lack of any mention of an arbitral institution. Any ambiguity should be construed against Claimant. Additionally, the Tribunal lacks jurisdiction because it was formed as an institutional tribunal under the CICA Rules contrary to the agreement of the parties.
II. THE CONTRACT WAS ORALLY AMENDED AND THE FUSE BOARDS ARE IN CONFORMITY WITH THE AMENDED CONTRACT

33. Respondent delivered fuse boards that are in conformity with the contract. Claimant argues that the notes on the engineering drawings attached to the contract required the fuse boards to be equipped with JP type fuses and to be lockable to Equalec requirements (Cl. Memo., para. 36). However, this argument is irrelevant because the contract was validly amended during the telephone conversation between Mr. Stiles and Mr. Hart (A) and Respondent delivered goods conforming to the amended contract (B).

A. THE CONTRACT WAS VALIDLY AMENDED

34. During the telephone conversation between Mr. Hart and Mr. Stiles the original contract between Claimant and Respondent was validly amended. Contrary to Claimant’s argument, Mr. Hart could amend the contract (1). Furthermore, Claimant is precluded from asserting that the contract cannot be orally amended in accordance with Article 29(2) second sentence CISG (2).

1. Mr. Hart could amend the contract

35. Mr. Hart could amend the contract because he was duly authorized. Claimant states that Mr. Hart acted outside the scope if his authority, and thus Mr. Hart’s acts were not binding on Claimant in accordance with Article 14(1) Agency Convention (Cl. Memo., para. 49). This article provides that “[w]here an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.” Yet, nothing demonstrates that Mr. Hart was not authorized to amend the contract with Respondent despite Claimant’s allegations. On the contrary, the facts indicate that Mr. Hart was an agent of Claimant. Mr. Hart worked in the purchasing department and he was authorized to enter into contracts up to USD 250,000 (Clarification No. 17). The contract in issue was within the limits of the Mr. Hart’s
authority. The Tribunal should not conclude that Mr. Hart lacked authority to amend the contract solely based on Claimant’s unfounded assertion.

36. Even if Mr. Hart had acted outside the scope of his actual authority, a valid amendment would nevertheless have been concluded. Article 14(2) Agency Convention provides an exception to Article 14(1) Agency Convention, which Claimant fails to discuss. Article 14(2) Agency Convention states that “where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.” Respondent reasonably and in good faith relied on Mr. Hart’s authority to validly amend the contract because Respondent was referred to Mr. Hart when Respondent asked to speak to Mr. Konkler. The referral of the telephone call to Mr. Hart (Clarification No. 18) demonstrated that Mr. Hart was the person authorized to make decisions in Mr. Konkler’s absence. Claimant’s conduct caused Respondent to believe that Mr. Hart had authority to represent Claimant.

37. Additionally, Claimant failed to inform Respondent that Mr. Hart lacked authority and thereby caused Respondent to believe that Mr. Hart had the power to amend the contract. A principal appears to give an alleged agent the power of representation, if the principal accepts the alleged agent’s acts without objection (Enderlein/Maskow/Strohbach, Art. 14 Agency Convention, para. 2.1; Arbitration Award SG 215/88). In the case at hand, there is no reason to believe that Mr. Hart was not duly authorized. Claimant subsequently failed to object to the statements Mr. Hart had made during the telephone conversation with Mr. Stiles. This omission by Claimant confirmed Respondent’s belief that Mr. Hart was authorized to amend the contract.

38. Claimant caused Respondent to reasonably and in good faith believe that Mr. Hart was Claimant’s agent and authorized to amend the contract. Therefore, Claimant cannot rely on any lack of authority on the part of Mr. Hart, even if Mr. Hart lacked actual authority.
2. Article 29(2) second sentence CISG allows oral amendments to the contract

39. Claimant contends that the contract could not have been orally amended because the contract contained a provision that all amendments have to be in writing (Cl. Memo., para. 45). To support this argument, Claimant relies on Article 29(2) CISG that states in the first sentence that “[a] contract in writing which contains a provision requiring any modification to be in writing may not be otherwise modified or terminated by the agreement.” However, Claimant ignores the second part of Article 29(2) CISG, which provides that “a party may be precluded by his conduct from asserting such a provision to the extent the other party has relied on that conduct.”

40. The second sentence of Article 29(2) CISG directly affects the validity of oral modifications of the contract and precludes one party from asserting a writing requirement to the extent the other party has relied on its conduct. Article 29(2) second sentence CISG requires that the conduct of one party causes the other party’s reliance on the oral modification (Schlechtriem/Schwenzer, 2nd ed., Art. 29, para. 10; Staudinger/Magnus, Art. 29 CISG, para. 18).

41. Conduct within the meaning of Article 29(2) CISG often consists of the parties’ oral modification itself (Honnold, p. 230; Official Records, 28; Schlechtriem/Schwenzer, 4th ed., Art. 35, para. 10). Claimant made an oral modification when Mr. Hart told Mr. Stiles to “go ahead” and change the fuses to JS type (Resp. Answer, para. 8). This act suffices to establish conduct in the sense of Article 29(2) second sentence CISG. Furthermore, Mr. Hart’s conduct during the telephone conversation constitutes an agreement to the oral modification of the contract. Even if, as Mr. Hart emphasizes, he was not well-versed in technical matters, he was aware of contract clause 32 (Cl. Ex. No. 1, para. 4). Nonetheless, Mr. Hart never insisted on or brought up the writing requirement. It would have been Mr. Hart's responsibility to indicate that his decision in no way amounted to a waiver of the requirement that amendments must be in writing. Claimant’s acceptance of the amendment is demonstrated by the fact that Claimant never contacted Respondent after the telephone conversation.

42. Reliance pursuant to Article 29(2) second sentence CISG requires more than just an oral statement: it must be manifested by certain acts, for example, by modifying the
production of the goods contracted for in accordance with the amendment (Secretariat Commentary, Example 27A; Enderlein/Maskow/Strohbach, Art. 29, para. 6.1; Schlechtriem/Schwenzer, 4th ed., Art. 29, para. 10; Bianca/Bonnell, p. 242). Respondent manifested its reliance on Claimant’s statement by manufacturing fuse boards with JS type fuses according to the amended contract and delivering them to Mountain View.

43. Claimant behaved in a way as to accept the oral modification of the contract and Respondent factually relied on this conduct. Therefore, Claimant is precluded from invoking the writing requirement under Article 29(2) second sentence CISG.

B. RESPONDENT DELIVERED CONFORMING GOODS UNDER THE AMENDED CONTRACT

44. Claimant could have argued that the goods nevertheless did not conform to the contract, even if it was validly amended. Yet, the fuse boards delivered by Respondent complied with the description of the amended contract as required by Article 35(1) CISG (1). The description of the goods provided by the amendment excludes the application of Article 35(2) CISG (2).

1. The fuse boards were in conformity with Article 35(1) CISG

45. Respondent delivered conforming goods under the amended contract. Article 35(1) CISG requires the goods to be of the quality and description required by the contract. The initial contract included a note on the engineering drawing which stated that the fuses should be “Chat Electronics JP type in accordance with BS 88” (St. of Claim, para. 9). Through the amendment, Claimant and Respondent changed the description given by the note and thereby the description of the goods in the contract. The parties agreed that Respondent should use JS instead of JP type fuses. Hence, Respondent complied with the description of the amended contract by using JS type fuses to manufacture the fuse boards.

46. Claimant cannot convincingly argue that Respondent breached the contract because the fuse boards did not comply with the second note on the engineering drawings, which states “to be lockable to Equalec requirements” (St. of Claim, para. 9). Claimant alleges
that the second note on the engineering drawings means that the fuse boards had to comply with Equalec’s policy concerning the connection of the fuse boards to the electrical grid (Cl. Memo., para. 41). Yet, the note is not sufficiently clear to establish a description with this meaning. The meaning of “lockable” is a question of contract interpretation. Such questions have to be decided according to Article 8 CISG (Secretariat Commentary, Art. 7, para. 2). Article 8(1) CISG requires interpretation in accordance with the actual intent of a party, where the other party knew or could not have been unaware of this intent (Bianca/Bonell, p. 97). In the present case, each party contests the other party’s intent with regard to the notes on the engineering drawings. As there is no conclusive evidence to prove either Respondent’s or Claimant’s position on this issue, Article 8(1) CISG is not applicable. Article 8(2) CISG provides that the contract is interpreted in accordance with the understanding of a reasonable person, when Article 8(1) CISG is not applicable (Bianca/Bonell, p. 100). Article 8(3) CISG furthermore states that “due consideration is to be given to all relevant circumstances of the case” to determine the understanding of a reasonable person.

47. “Lockable” means that Equalec would lock the fuse boards with a padlock (Clarification No. 21). From this definition, a reasonable person would understand the term as a qualification for the physical dimensions of the fuse boards. The term indicates that the fuse boards had to be designed to physically allow a padlock to prevent access to the fuse boards. From the term “lockable to Equalec requirements” a reasonable person would not infer any other obligation than to make the fuse boards lockable. Especially in the context with the other note on the engineering drawings, which determines the type of fuses that should be used, a reasonable person would not have expected any additional technical requirements in the second note.

48. Even if the Tribunal agrees with Claimant’s argument concerning the meaning of the term “lockable to Equalec requirements”, the amendment of the contract superseded both notes on the engineering drawings. The scope of the amendment is again a question of contract interpretation. A reasonable person in terms of Article 8(2) CISG would understand the amendment to encompass both notes. First, following Claimant’s argument (Cl. Memo., para. 36), both notes were aspects of the same underlying instruction that JP type fuses should be used to connect the fuse boards to the electrical
power grid. If the amendment addresses the first note, a reasonable person would assume that it necessarily covers the second note, too.

49. Furthermore, Claimant agreed to change one of the descriptions resulting in a contradiction with the second description in the contract. Without any clarifications or specifications of Claimant as to which note or description had the highest priority, it can reasonably be assumed that Respondent should follow the last contractual description. Finally, any other interpretation would lead to the result that Respondent cannot manufacture the goods in accordance with the contract as required by Article 35(1) CISG: If the amendment did not alter both notes, Respondent would breach the contract under Article 35(1) CISG regardless what type of goods it delivered. A reasonable person would have understood the amendment to cover both notes on the engineering drawings. Therefore, the goods conform to the amended contract pursuant to Article 35(1) CISG.

2. Article 35(2) CISG does not apply

50. Claimant argues that the fuse boards delivered by Respondent did not comply with the ordinary or particular purpose under Article 35(2) CISG (Cl. Memo., paras. 34, 35). This argument is irrelevant for the assessment of whether the fuse boards were in conformity with the amended contract. Any argument to the contrary is incompatible with the structure of Article 35 CISG.

51. The structure of Article 35 CISG prohibits assessing the conformity of the fuse boards in accordance with Article 35(2) CISG. Under the CISG, “the overriding source for the standard of conformity is the contract between the parties” (Secretariat Commentary, Art. 33, para. 4). While Article 35(1) CISG refers to the subjective agreement between the parties (Schlechtriem/Schwenzer, 4th ed., Art. 35, para. 6), Article 35(2) CISG sets forth an objective test for the conformity of the goods (Schlechtriem/Schwenzer, 2nd ed., Art. 35, para. 12). The latter can only be invoked in case the parties did not, or did not sufficiently agree upon a subjective description (Schlechtriem, p. 6-20; Staudinger/Magnus, Art. 35 CISG, para. 17). This is also expressed by the wording of Article 35(2) CISG that states “[e]xcept where otherwise agreed by the parties [...].” When the parties amended the contract, they explicitly agreed that the fuse boards had to be equipped with JS type fuses. This is a description within the meaning of Article 35(1)
CISG, which excludes the application of Article 35(2) CISG in its entirety. Therefore, Respondent did not have to comply with any particular purpose when manufacturing the fuse boards.

Conclusion

52. The contract between Claimant and Respondent was validly amended during the telephone conversation between Mr. Hart and Mr. Stiles. Hence, Respondent was entitled to supply JS instead of JP type fuses. Furthermore, Respondent was allowed to ignore the second note of the engineering drawings because this note is not a description under Article 35(1) CISG and it was superseded by the amendment. The conformity of the supplied goods cannot be assessed under Article 35(2) CISG because the application of this paragraph is excluded by the structure of Article 35 CISG.
III. RESPONDENT DID NOT BREACH THE ORIGINAL CONTRACT

53. Even if the Tribunal found that the contract was not validly amended, the fuse boards delivered by Respondent were in conformity with the original contract. Claimant states that the fuse boards neither meet the express description nor the purpose of the goods impliedly made known to Respondent (Cl. Memo., para. 42). However, the fuse boards delivered by Respondent complied with the requirements set forth by the parties under Article 35(1) CISG (A). If the Tribunal found the descriptions of the original contract insufficient to test the conformity of the goods, the fuse boards would also be fit for their ordinary purpose under Article 35(2)(a) CISG (B). Furthermore, the fuse boards did not have to be fit for any particular purpose as required by Article 35(2)(b) CISG (C).

A. THE GOODS DELIVERED WERE IN CONFORMITY WITH ARTICLE 35(1) CISG

54. Claimant argues that the fuse boards are not in conformity with the descriptions in the notes on the engineering drawings attached to the contract (Cl. Memo., para. 36). Yet, Respondent delivered fuse boards that conform to the quality and description in the contract as required by Article 35(1) CISG. The first note stated that the fuses should be “Chat Electronics JP type in accordance with BS 88” (St. of Claim, para. 9), while the second note required the fuse boards “[t]o be lockable to Equalec requirements” (Ibid.).

55. The fuse boards are in conformity with the first note, regardless of whether the fuse boards are equipped with JP or JS type fuses since the fuses are interchangeable. Claimant argues that the delivery of different goods should be a lack of conformity no matter how minute the deviation (Cl. Memo., para. 38). However, JP and JS type fuses are factually and functionally the same. Both fuse types meet the BS 88 standard as required by the note on the drawing (Cl. Memo., para. 34). JP and JS type fuses are fully interchangeable for ratings below 400 amperes. The JS type fuses used in Respondent’s fuse boards are of the appropriate rating as required by the circuits in which they were installed (Clarification No. 27). The mere fact that JS type fuses for ratings above 400 amperes exist does not render the fuse boards nonconforming in the sense of Article 35(1) CISG.
56. Additionally, Respondent did not have to manufacture goods in compliance with the second note. As stated above, the note “to be lockable to Equalec requirements” solely refers to the physical, outside dimension of the fuse boards (see para. 47 above). Therefore, the fuse boards are in conformity with the description of the contract as required by Article 35(1) CISG.

B. THE FUSE BOARDS ARE FIT FOR THE ORDINARY PURPOSE UNDER 35(2)(A) CISG

57. If the Tribunal finds that the description in the contract is not sufficient to determine the conformity of the fuse boards under Article 35(1), the conformity of the goods will have to be assessed in accordance with Article 35(2)(a) CISG. This article requires that the goods be “fit for the purposes for which goods of the same description would ordinarily be used.” Goods are fit for the ordinary use when they possess their normal qualities, i.e., the characteristics normally required from goods as described by the contract (Secretariat Commentary, Art. 33, para. 5; BGH, 8 March 2005, p. 8; Bianca/Bonell, p. 273; Enderlein/Maskow/Strohbach, Art. 35, para. 8). The ordinary purpose of distribution fuse boards is to connect a building to the power grid. The fuse boards delivered by Respondent were fit for this purpose because they could be used to connect the Mountain View development to the power grid. The fuse boards were also equipped with fuses that complied with the ordinary safety standard in Equatoriana set up by the Commission (Resp. Answer, para. 12). The fuse boards are thus fit for their ordinary purpose.

58. Claimant argues that pursuant to Article 35(2)(a) CISG a seller must ensure that the goods comply with the specific regulations and policies enforced at the place of intended use (Cl. Memo., para. 40). This argument lacks any legal basis. On the contrary, compliance with specific provisions of the buyer's country or the country of intended use is not an ordinary purpose of the goods (BGH, 8 March 1995 (GER); Medical Marketing (USA); OGH 25 January 2006 (AUS); Schlechtriem/Schwenzer, 2nd ed., Art. 35, para. 17). Hence, special provisions that are only enforced in Mountain View are not relevant for determining the conformity of the fuse boards under Article 35(2)(a) CISG.

59. Claimant relies on the note “to be lockable to Equalec requirements” as “special circumstances” (Cl. Memo., para. 41; Claimant refers to AC opinion No. 5 that deals with fundamental breach), which impose a duty on Respondent to inform itself about the
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policy. However, such a duty cannot be imposed under Article 35(2)(a) CISG. When the buyer wants the goods to comply with specific regulations, he has to make them known to the seller in accordance with Article 35(2)(b) CISG (Schlechtriem/Schwenzer, 4th ed., Art. 35, para. 17a; Staudinger/Magnus, Art. 35 CISG, para. 22; BGH, 8 March 1995 (GER)). Article 35(2)(b) CISG contains more prerequisites than merely pointing out a “special purpose”. Accordingly, an additional duty cannot be imposed on the seller unless all requirements in Article 35(2)(b) CISG are fulfilled. Therefore, any obligation on Respondent to fabricate the fuse boards in accordance with the second note does not depend on Article 35(2)(a) CISG, but on Article 35(2)(b) CISG.

C. THE FUSE BOARDS DID NOT HAVE TO COMPLY WITH ARTICLE 35(2)(B) CISG

60. The goods delivered by Respondent did not have to comply with any particular purpose under Article 35(2)(b) CISG because the requirements of this article are not met. Article 35(2)(b) CISG requires goods to be fit for a particular purpose that was made known to the seller, where the buyer reasonably relied on the seller’s skill and judgment to make the goods fit for the communicated purpose. Where a particular purpose was made known to the seller, the goods must comply with the requirements of that purpose (Bianca/Bonell, p. 275; Hyland, p. 319; Piltz, para. 235).

61. Although Claimant mentions the term “particular purpose” (Cl. Memo., para. 35), it fails to identify what this particular purpose is. Claimant refers to the note “lockable to Equalec requirements” as a “special circumstance” obliging Respondent to manufacture the fuse boards in accordance with Equalec’s policy (Cl. Memo., para. 41). From this reference, it can be inferred that Claimant considers compliance with Equalec requirements to be the particular purpose of the goods. However, this purpose is irrelevant for the conformity of the fuse boards because Claimant neither communicated this particular purpose to Respondent (1), nor could have reasonably relied on Respondent’s skill and judgment to make the goods fit for this particular purpose (2).
1. **A particular purpose was not made known to Respondent**

62. Claimant failed to communicate any particular purpose to Respondent. The particular purpose must expressly or impliedly be conveyed to the seller in order to be “made known” under Article 35(2)(b) CISG (Schlechtriem/Schwenzer, Art. 35, para. 21; Bianca/Bonell, p. 274). This means that the buyer has to make his expectations sufficiently clear to the seller (Staudinger/Magnus, Art. 35 CISG, para. 26).

63. Claimant did not convey a particular purpose sufficiently clear to Respondent by the note “to be lockable to Equalec requirements”. As stated above, the term “lockable to Equalec requirements” does not refer to connectivity requirements in Equalec’s policy (see para. 47 above).

64. Moreover, Equalec is a private entity (Clarification No. 22) and the particular purpose that the fuse boards shall comply with its policy was not made known to Respondent. For private regulations to be made known, the premises are higher than for coercive public law regulations (BGH, 8 March 1995, “one cannot make such an assumption, especially since the standards do not have legal character”). Respondent was familiar with the public law requirements for providing electrical services set forth by the Commission from its previous business dealings in Equatoriana. But without any directions from Claimant, Respondent could not have known that private regulations are applicable and that these regulations set higher standards than the public law requirements. Since Claimant did not clarify its expectations regarding the connectivity to Equalec requirements, Respondent did not have to fabricate the fuse boards to comply with these requirements.

65. Further, it does not suffice to establish the compliance with specific regulations by merely naming the place of intended use (BGH, 8 March 1995; Schlechtriem/Schwenzer, 4th ed., Art. 35, para. 17). Claimant cannot have expected that Respondent would fabricate the goods in accordance with Equalec’s policy solely because Respondent knew that the fuse boards were to be used in Mountain View.

66. Moreover, Claimant’s argument that Respondent could have informed itself about the content of the requirements because they were made available on Equalec’s website (Cl. Memo., para. 41) ignores the fact that Respondent did not have any reason to check the web page. Claimant designed the fuse boards (St. of. Claim, para. 9), whereas
Respondent merely assembled them. Respondent had no cause to inquire whether the designer of the fuse boards had performed their task properly. Therefore, Respondent could not have been expected to be aware of Equalec’s policy, only because it was easily accessible on Equalec’s website. In consequence, any particular purpose to manufacture the fuse boards to be connectable to Equalec requirements was not made known to Respondent.

2. No reasonable reliance on Respondent’s skill and judgment

67. Even if the Tribunal finds that the particular purpose was made known to Respondent, it was unreasonable for Claimant to rely on Respondent’s knowledge. The one-sided expectation of the buyer is only safeguarded if the circumstances of the case show that the buyer relies, and could reasonably do so, on the seller’s skill and judgment (Staudinger/Magnus, Art. 35 CISG, para. 31). In the case at hand, Claimant could not reasonably rely on Respondent’s knowledge to manufacture fuse boards in accordance with the alleged particular purpose.

68. The alleged particular purpose was that the fuse boards should be compatible with technical requirements of a private corporation located in the same country as Claimant. However, a buyer cannot rely on the seller’s skill and judgment with regard to specific regulations that the seller could not have known (Schlechtriem/Schwenzer, 4th ed., Art. 35, para. 17a). Rather, it is the buyer that can be expected to have such expert knowledge of the regulations in his own country (BGH, 8 March 1995). Although Respondent previously had done business in Equatoriania (Resp. Answer, para. 12), and Respondent was never notified of Equalec’s policy (Clarification No. 24). Respondent could thus not have known that there are special requirements of a private entity to be observed. Consequently, it would have been Claimant’s obligation to inform Respondent about the content of Equalec’s policy.

69. Finally, reasonable reliance is not justified if the buyer has knowledge superior to that of the seller (Schlechtriem/Schwenzer, 4th ed., Art. 35, para. 23). In general, the seller can not be assumed to have superior knowledge with regard to regulations in the buyer’s country (Staudinger/Magnus, Art. 35 CISG, para. 34). From this rule it can be concluded that Claimant ought to have had better knowledge of the regulations in Equatoriana than
Respondent. For these reasons, Claimant could not have reasonably relied on Respondent’s skill and judgment to manufacture the fuse boards in conformity with Equalec’s requirements.

70. The goods delivered by Respondent did not have to comply with any particular purpose under Article 35(2)(b) CISG. A particular purpose was neither made known to Respondent, nor could Claimant reasonably have relied on Respondent’s skill and judgment. It is not sufficient to just mention the term “lockable to Equalec requirements” to impose an additional duty on Respondent. As the requirements of Article 35(2)(b) CISG are not met, Claimant may not argue that compliance with Equalec policy was the particular purpose of the fuse boards.

Conclusion

71. The fuse boards delivered by Respondent conform to the contract as required by Article 35(1) CISG. The use of JS instead of JP type fuses is irrelevant because both fuse types are interchangeable. Additionally, the note stating that the fuses had “to be lockable to Equalec requirements” does not constitute a description in the sense of Article 35(1) CISG and cannot be considered when assessing the conformity of the goods. Contrary to Claimant’s allegation, the goods were fit for any ordinary purpose under Article 35(2)(a) CISG. Furthermore, the term “lockable to Equalec requirements” is not an ordinary purpose and therefore irrelevant under this provision. Finally, the fuse boards did not have to conform to any particular purpose in accordance with Article 35(2)(b) CISG because any particular purpose was not made known to Respondent, and, in addition, Claimant could not have reasonably relied on Respondent’s skill and judgment to conform the fuse boards to a particular purpose.
IV. FUNDAMENTAL BREACH AND AVOIDANCE

72. Claimant deals with the question of avoidance and fundamental breach of the contract (Cl. Memo., paras 52-63). As stated in Procedural Order No. 2, the scope of the memoranda shall be limited to the questions mentioned in Procedural Order No. 1, para. 11. Neither avoidance, nor the related issue of fundamental breach is mentioned therein. Respondent will therefore not respond to these issues raised by Claimant.
V. ANY FAILURE OF RESPONDENT IS EXCUSED

73. Even if the Tribunal found that Respondent breached the contract, Respondent’s failure to deliver conforming goods would be excused because Claimant failed to fulfill its obligation to mitigate pursuant to Article 77 CISG (A). Additionally, Respondent’s liability is excused under Article 80 CISG (B).

A. RESPONDENT’S LIABILITY IS EXCUSED UNDER ARTICLE 77 CISG

74. Contrary to Claimant’s allegations, Respondent’s liability is excused according to Article 77 CISG. Claimant states that a complaint to the Commission would have caused Claimant unreasonable inconvenience and delay, and that Claimant, therefore, could not have been expected to mitigate losses (Cl. Memo., para. 66). Article 77 CISG states that the aggrieved party has to take reasonable measures to prevent all avoidable damages. Otherwise the liability of the party in breach will be reduced in the amount by which the loss could have been mitigated.

75. Article 77 CISG embodies the principle of good faith because avoidable damages should not be compensated. Under Article 77 CISG, losses which could have been prevented entirely by taking reasonable measures cannot be recovered at all (Schlechtriem/Schwenzer, 2nd ed., Art. 77, para. 1; Enderlein/ MASKOW/ STROHbach, Art. 77, para. 5; Kranz, p. 228; Neumayer/ Ming, Art. 77, para. 1). Reasonable measures are any measures taken in good faith by a person in the same situation as the party threatened by the breach (Schlechtriem/Schwenzer, 4th ed., Art. 77, para. 7). Consequently, if the aggrieved party has the opportunity to prevent damage from arising, this party must take reasonable measures to prevent the loss.

76. Claimant as an entity seated in Equatoriana had the opportunity to file a complaint to the Commission without spending an excessive amount of time and effort. It would have been reasonable for Claimant to complain to the Commission. The Commission would have compelled Equalec to change its policy and connect the fuse boards because Equalec’s policy violates Article 14 Service Act (1). Subsequently, Claimant could have opened Mountain View on time and would not have suffered any damages (2).
1. The Commission would have compelled Equalec to change its policy

77. Claimant asserts that Equalec’s policy does not violate Article 14 Service Act because the policy was never brought to the attention of the Commission (Cl. Memo., para. 62). This fact in itself does not prove that Equalec requirements are legal. Rather, the regulations of electrical supply companies have to comply with Article 14 Service Act. This article stipulates that every electric corporation shall provide electric service that is safe and that there shall be no undue or unjust requirements for providing such services (Resp. Ex. No. 4).

78. Equalec requirements are undue and unjust because they set a higher standard than the safety regulations of the Commission. Claimant suggests that Equalec’s restriction with regard to the use of JS type fuses is an additional safety measure (St. of Claim, para. 15). However, Article 15 Service Act provides that the Commission is the only facility to certify the safety of electrical equipment (Resp. Ex. No. 4). Compliance with the standards of the Commission is sufficient to ensure safety. Any additional safety requirements are, therefore, unnecessary restrictions. The Commission certified all fuses that meet the BS 88 standard as safe and both JP and JS type fuses meet the BS 88 standard (Resp. Answer, para. 12). Thus, Equalec’s additional safety measures are undue and unjust under the Safety Act and would have been changed by the Commission if Claimant had challenged it.

79. Even if the Tribunal finds that electric supply companies in general can set higher standards than the Commission for safety reasons, the fact remains that Equalec’s standard is not justified. Contrary to Claimant’s allegation (St. of Claim, para. 15), Equalec’s policy is undue and unjust because it does not provide any increase in safety. Equalec’s main concern is that circuits should not be equipped with fuses of higher ratings than required by the particular circuit (Cl. Ex. No. 4). Yet, this aim is not achieved by restricting the fuse types used below 400 amperes to JP type fuses. JP type fuses are available in ratings from 32 to 400 amperes (Resp. Ex. No. 2). The restriction to use only JP type fuses for ratings below 400 amperes, therefore, does not prevent that fuses with higher ratings are installed where the circuits require ratings below 400 amperes. Equalec’s objective could only be obtained by locking the fuse boards properly and
checking the fuses regularly. Equalec’s policy does not ensure any safety benefit. It is an unnecessary restriction to the use of different fuse types and thus undue and unjust. Therefore, the Commission would have ordered Equalec to change the policy and connect the fuse boards if Claimant had complained to the Commission.

2. Claimant would not have suffered damages

80. Had Claimant complained to the Commission, Claimant could have opened Mountain View in time without suffering any losses. Although a whole investigation by the Commission might take up to two years, Equalec would have changed its policy after an informal inquiry by the Commission. This process could have taken as little as one week (Clarification No. 30). There are no compelling reasons for Equalec to maintain its regulations and Equalec would not suffer losses as the result of a modification of its policy. Additionally, Equalec would agree to change its policy to avoid a full investigation by the Commission. The case would quickly have resulted in a modification of Equalec’s policy and connection of the fuse boards delivered by Respondent.

81. Claimant did not comply with its obligation to mitigate. Claimant was in the situation to complain to the Commission and should have done so. The complaint would have been successful and the fuse boards would have been connected to the electrical grid on time. As Claimant could have prevented damages from occurring, but failed to do so, Respondent’s liability is excused pursuant to Article 77 CISG.

B. Respondent’s liability is excused under Article 80 CISG

82. Even if the Tribunal finds that Claimant did not have to complain to the Commission, Respondent’s liability is excused under Article 80 CISG because Claimant caused Respondent to deliver nonconforming goods.

83. Article 80 CISG provides that “a party may not rely on the other party’s failure to perform if such failure was caused by the first party’s act or omission.” This article limits the otherwise strict liability under the CISG because it would contradict the principle of good faith if a party was able to take advantage of the other party’s breach, although the
former party caused that breach (*Schlechtriem/Schwenzer, 4th ed., Art. 35, para. 1*). Under Article 80 CISG, an act or omission of a promisee, which cause a promisor’s failure to perform, include the violation of the promisee’s own obligations, *e.g.*, when a promisee gives inadequate or inaccurate specifications and this leads to the manufacturing of non-conforming goods (*Bianca/Bonell, p. 596*).

**84.** Claimant gave an inadequate specification because Claimant neither communicated Equalec requirements as a description, nor as a particular purpose of the fuse boards (*see paras. 46, 63 above*). Additionally, Claimant’s specification was inadequate because Claimant wanted the fuse boards to comply with three different standards: BS 88, a well-known international standard; the requirements set forth by the Commission, public law regulations with which Respondent was familiar from previous business; and finally Equalec requirements, a policy set up by a private corporation. Claimant never stated that Equalec requirements would be the most important standard to follow, which is contrary to the hierarchy of these standards a reasonable person would otherwise expect. Claimant added to this inaccuracy by agreeing to “go ahead” and use JS type fuses. Claimant may not now rely on any failure by Respondent to deliver nonconforming goods because Claimant caused this failure by providing inadequate and inaccurate specifications.

**Conclusion**

**85.** Even if the Tribunal finds the fuse boards not to be in conformity with the contract, Respondent is nevertheless not liable for any damages of Claimant because Claimant failed to properly fulfill its obligation to mitigate as required by Article 77 CISG. Additionally, Respondent’s failure is excused under Article 80 CISG because the nonconformity of the fuse boards was caused by Claimant.
MEMORANDUM FOR RESPONDENT

REQUEST FOR RELIEF

Respondent respectfully requests the Tribunal to find that:

1. This Tribunal does not have jurisdiction to decide the dispute on the merits;

2. The contract was validly amended and Respondent delivered conforming goods under this amendment;

3. Respondent delivered conforming goods under the original contract;

4. Any failure by Respondent to deliver the conforming goods is excused by Claimant’s failure to complain to the Commission.