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

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:
MEDITERRANEO EXQUISITE SUPPLY, CO.
45 COMMERCE ROAD
CAPITAL CITY
MEDITERRANEO

CLAIMANT

AGAINST:
EQUATORIANA CLOTHING MANUFACTURING, LTD.
286 THIRD AVENUE
OCEANSIDE
EQUATORIANA

RESPONDENT

COUNSEL
ASHISH KAMANI
CHIN JUN QI
KAM KAI QI
NG WAN-E, CHERYL
PRIYA GOBAL
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& And
¶ Paragraph
% Per cent
$ United States Dollar
Arb. Arbitration
Art. Article
the Contract Contract between CLAIMANT and RESPONDENT signed on 5 January 2011
CEO Chief Executive Officer
Cl. Memo Università Degli Studi Di Milano’s Claimant Memorandum
Cl. Ex. Claimant’s Exhibit
DC Doma Cirun
ed./eds. Editor/editors
Ed. Edition
IBA International Bar Association
Int. International
J. Journal
L/C Letter of Credit
No./Nos. Number/Numbers
the Parties CLAIMANT and RESPONDENT
OPE Oceania Plus Enterprises
Resp. Ex. Respondent’s Exhibit
SoC Statement of Claim
SoD Statement of Defence
UCC Uniform Commercial Code
UNGC United Nations Global Compact
STATEMENT OF FACTS

1. CLAIMANT is one of the subsidiaries of OPE and Atlantica Megastores, dealing with the procurement of clothing needed by various stores owned by its parent companies, including DC. After the previous manufacturer for DC’s “Yes Casual” polo shirts went bankrupt, CLAIMANT actively sought out suppliers who could produce stocks for the summer season in Oceania on a rush basis. It approached RESPONDENT, a clothing manufacturer, who was able to offer a significantly lower price than two other suppliers that CLAIMANT contacted [SoC ¶10]. It did so primarily for the sake of future business relations, even though the price offered barely covered production costs [P.O. No. 2 ¶6].

2. On that basis, CLAIMANT decided to contract with RESPONDENT for the purchase of 100,000 shirts on 5 January 2011. As this happened after close to a three-year hiatus in their commercial relationship [SoC ¶¶8&9], RESPONDENT was supposed to be subject to an additional audit prior to contracting to ensure that it still conformed to OPE’s policies. CLAIMANT nevertheless decided to enter into the Contract without conducting the audit, even though it apparently had doubts whether RESPONDENT could still comply with OPE’s policies which cover a broad range of ethical standards [P.O. No. 2 ¶2].

3. On 9 February 2011, Mr. Short, the Contracting Officer of RESPONDENT contacted Mr. Long, the Procurement Specialist of CLAIMANT, to inform him that RESPONDENT would only be able to deliver the shirts on 24 February 2011 instead of the contractually stipulated date of 19 February 2011. This was because RESPONDENT’S supplier was affected by an unexpected strike which reduced its production capacity by 50% [P.O. No. 2 ¶12]. In response to RESPONDENT’S difficulty, Mr. Long assured Mr. Short that he would “make sure that all the paper work reflected the new delivery date” [P.O. No. 1 ¶10.4]. Mr. Short understood this to include the written contract although he did not receive an amended contract. He did not expect to receive an amended contract as it was rare for the written contract to be amended for a minor change [Resp. Ex. No. 1].

4. CLAIMANT alleges that on 5 April 2011, a documentary revealed footage of children working in RESPONDENT’S production facilities [SoC ¶18]. RESPONDENT has no independent knowledge of this documentary. According to CLAIMANT, the release of this unverified documentary combined with a newspaper article in Oceania apparently led to
unexpected financial losses to OPE whose share price dropped and settled law suits with its investors. Regrettably, DC’s sales also lowered and it was apparently unable to sell the “Yes Casual” polo shirts [SoC ¶¶18-21]. These were due to the acute sensitivity of the consumer market in Oceania which was not made known to a manufacturer like RESPONDENT [SoD ¶8]. It therefore came as a surprise to RESPONDENT when CLAIMANT notified on 1 July 2012 that it wished to avoid the Contract and insisted that RESPONDENT take back the unsold shirts [Cl. Ex. No. 6]. However, RESPONDENT disputed any breach of the Contract and declined the return of the shirts [Cl. Ex. No. 7]. CLAIMANT then submitted an application for arbitration on 1 July 2012.

5. Mr. Fasttrack (CLAIMANT’s counsel) has requested that Mr. Short, who filed a statement on RESPONDENT’s behalf, should appear at an oral hearing for questioning. Mr. Langweiler (RESPONDENT’s counsel) attempted to convince Mr. Short to come forward. However, Mr. Short, who is now employed by Jumpers Production, is unwilling to go against his employer’s wishes and be involved in the legal dispute. This is complicated by the fact that Jumpers Production, a competitor of RESPONDENT, has recently succeeded in being listed as a supplier to OPE. In addition, Mr. Short, who is now the head of the purchase department of Jumper Production, has a very tight timetable and might not be available at the time of the hearing [P.O. No. 2 ¶26].

ARGUMENTS

I. THE TRIBUNAL MUST CONSIDER MR. SHORT’S STATEMENT.

6. The Tribunal must exercise its discretion to consider Mr. Short’s witness statement even though he would not be present at an evidentiary hearing. Under the Parties’ choice of arbitral law, the CEAC Rules, the Tribunal has a wide discretion to consider Mr. Short’s witness statement and to accord it appropriate weight [Art. 27(4) CEAC Rules].

7. RESPONDENT did not anticipate Mr. Short leaving its employment at the time his witness statement was made. Regrettably, RESPONDENT is now genuinely unable to obtain Mr. Short’s presence at the evidentiary hearing without his employer’s cooperation. [A] As the relevant arbitration rules allow the Tribunal to consider Mr. Short’s statement in his absence, [B] the Tribunal must consider his witness statement to ensure procedural fairness.
Contrary to CLAIMANT’s assertions, it is inappropriate to apply Art. 4.7 IBA Rules in this arbitration. Even if Art. 4.7 IBA Rules is applicable, its application would lead to the conclusion that Mr. Short’s witness statement must be considered.

A. **THE CEAC RULES AND THE MODEL LAW ALLOW MR. SHORT’S STATEMENT TO BE CONSIDERED WITHOUT FURTHER REQUIREMENTS.**

8. The CEAC Rules permit signed witness statements to be presented as evidence without also requiring the witnesses to be present at an evidentiary hearing [Art. 27.2 CEAC Rules]. This position is confirmed by the UNCITRAL travaux préparatoires, upon which the CEAC Rules are based. The state delegates at the 1976 negotiations decided that written witness statements should be accepted, even if the witness is absent, provided that the tribunal would have the discretion to determine the weight of the statement accordingly. Thus, the absence of a witness, together with the reasons for his/her absence, was merely intended as a factor to be considered when according weight to the written statement, and not a precondition [UNCITRAL travaux préparatoires ¶¶38-50]. This position has since been reflected in Arts. 27.2 and 27.4 UNCITRAL Rules which have been followed verbatim in Arts. 27.2 and 27.4 CEAC Rules.

9. In addition, nothing in the Model Law (the law of the seat of arbitration) suggests that witness statements must be accompanied by the appearance of the witness at an evidentiary hearing. In relation to expert witnesses, Art. 26(2) Model Law stipulates that an expert, after delivering his or her written or oral report, has to participate in an evidentiary hearing where such a hearing is requested by one party. However, there is no such requirement for other witnesses. The absence of such express provision implies that fact witnesses do not have to appear at an evidentiary hearing for their witness statements to be considered by a tribunal.

10. Thus, under both the CEAC Rules and Model Law, the Tribunal can consider Mr. Short’s witness statement even in his absence from an evidentiary hearing. In practice, arbitration tribunals are usually inclined to grant a party greater latitude in the presentation of facts [Born 1852; Redfern ¶6.89]. Even in the face of admissibility objections from the opposing party, a tribunal would still consider a witness statement, but would then calibrate its evidentiary weight as appropriate in the circumstances [Redfern ¶6.146]. The CEAC Rules
and Model Law support this practice. Accordingly, this Tribunal can and should consider Mr. Short’s witness statement and then accord it weight as appropriate in the circumstances.

**B. THE TRIBUNAL MUST CONSIDER MR. SHORT’S STATEMENT TO ENSURE PROCEDURAL FAIRNESS.**

11. The Tribunal not only has the authority to consider Mr. Short’s witness statement, but is also obliged to consider his statement in order to ensure procedural fairness in the arbitral proceedings. As CLAIMANT has rightly asserted, the Tribunal has a duty to ensure that each party’s due process rights are respected and enforced [Cl. Memo ¶¶128-129]. This duty to uphold procedural fairness requires the Tribunal to consider Mr. Short’s statement since [1] disregarding Mr. Short’s witness statement would violate RESPONDENT’s due process rights and yet, [2] considering Mr. Short’s witness statement would not prejudice CLAIMANT’s due process rights.

1. RESPONDENT’s right to procedural fairness would be violated if the Tribunal disregards Mr. Short’s statement.

12. A fundamental aspect of procedural fairness is the right to be heard. Indeed, this mandatory right is so important that it is guaranteed in all arbitral rules [Petrochilos ¶4.85; Waincymer ¶12.2], including both Art. 17(1) CEAC Rules and Art. 18 Model Law which provide that each party must be afforded a reasonable opportunity to fully state its case. If the Tribunal disregards Mr. Short’s witness statement, RESPONDENT will be unfairly deprived of a fair opportunity to present its case. RESPONDENT’s due process rights would be violated.

13. Mr. Short’s witness statement is vital to the presentation of RESPONDENT’s case. Mr. Short is the key and also the only witness to the bulk of correspondence and interaction between CLAIMANT and RESPONDENT. Hence, without Mr. Short’s witness statement, RESPONDENT would be severely hampered in the presentation of its version of the facts. This violation of RESPONDENT’s right to be heard may open the award to challenges since it constitutes a ground for setting aside and refusing enforcement of the award under Art. 34(2)(a) Model Law and Art. V(1)(b) NY Convention respectively.
2. On the other hand, CLAIMANT’s right to procedural fairness would not be prejudiced if the Tribunal considers Mr. Short’s statement.

14. The right to be heard does not include a right to cross-examine witnesses [W v. D&E; Waincymer ¶12.2]. While “every party shall be given the possibility to understand, test and rebut its opponent’s case” [Cl. Memo ¶129], the Tribunal can allow for CLAIMANT to challenge Mr. Short’s witness statement, for instance, through the use of rebuttal witness statements [O’Malley ¶4.58]. This adequately preserves CLAIMANT’s due process rights since CLAIMANT can still present its case fully. The Tribunal can further evaluate Mr. Short’s statement by assessing its internal consistency [Waincymer 899] and the reasonableness of his opinion.

15. Therefore, procedural fairness would be better served if Mr. Short’s witness statement is considered. Considering Mr. Short’s witness statement further promotes a fair arbitration because Mr. Short’s witness statement is highly valuable in assisting the Tribunal in the fact-finding exercise. When both parties are allowed to present their subjective viewpoints, the Tribunal would be able to explore the issues from all angles and to reconstruct events more accurately. This aids the Tribunal in reaching a just and balanced determination of the facts [Kurkela/Turunen 38].

C. THE IBA RULES DO NOT APPLY IN THIS ARBITRATION.

16. CLAIMANT has urged the Tribunal to take reference from the IBA Rules [Cl. Memo ¶¶108-109]. However, [1] the Tribunal is neither bound to apply the IBA Rules, [2] nor is it appropriate for the Tribunal to refer to Art. 4.7 IBA Rules to settle the present issue.

1. The Tribunal is not bound to apply the IBA Rules.

17. The Parties never consented to the application of the IBA Rules. The Tribunal is not bound to apply other rules of evidence apart from the CEAC Rules, the governing arbitral law chosen by the Parties. Nothing in the CEAC Rules or UNCITRAL Rules requires or inclines the Tribunal to apply the IBA Rules.
2. The application of the Art. 4.7 IBA Rules is inappropriate in the context of this arbitration.

18. While RESPONDENT does not dispute CLAIMANT’s assertions that the IBA Rules can serve as useful guidelines, it must be stressed that a blind and wholesale application of the IBA Rules is improper. The flexibility of rules and procedures is particularly prized in international arbitration, and tribunals are reluctant to be bound by technical rules of evidence [Born 1852; Redfern ¶6.89]. The recommended procedures under the IBA Rules must be adjusted according to the needs of each arbitration. Where their application is inappropriate, the provisions of the IBA Rules can and should be disregarded by the tribunal [Webster 389].

19. The application of Art. 4.7 IBA Rules is inappropriate and the Tribunal should not refer to it. Although the IBA Rules strive to achieve a harmonisation of civil law and common law practices, in reality they comprise a patchwork of civil law and common law approaches. This means that some provisions are distinctly more inclined towards the common law approach and vice versa. Art. 4.7 IBA Rules, on which CLAIMANT seeks to rely, clearly favours the adversarial common law approach where cross-examination by the opposing counsel is the norm. In contrast, in civil law jurisdictions, written communications are favoured over oral arguments and examination [Pejovic 832; Elsing/Townsend 4; Weigand ¶1.266]. In the present arbitration where the arbitrators and Parties hail from different legal traditions, the application of a provision [Art. 4.7 IBA Rules] that has such a distinct common law character is inappropriate.

D. Even if the IBA Rules apply, Mr. Short’s statement must still be considered in his absence.

20. CLAIMANT alleges that Mr. Short’s witness statement should be disregarded under the IBA Rules. CLAIMANT’s proposition that it should be disregarded just because it fails to comply with formal requirements under Art. 4.5 IBA Rules [Cl. Memo ¶109] is unreasonable and inflexible. Such an extreme position ignores the fact that the Tribunal may still ask both Parties to further submit information listed under Art. 4.5 IBA Rules if it considers this necessary, and this would not prejudice either party. In any case, the Tribunal
is not bound to apply the IBA Rules in its entirety but may adapt them to suit the current proceedings [Commentary to IBA Rules 3].

21. CLAIMANT also argues that Mr. Short has no valid reason for his absence at the hearing [Cl. Memo ¶¶110-117]. However, applying Art. 4.7 IBA Rules, Mr. Short’s witness statement must still be considered in his absence because [1] he has a valid reason for not appearing, and [2] there are exceptional circumstances for admitting his witness statement in his absence. [3] Under Art. 8.2 IBA Rules, the Tribunal should also dispense with Mr. Short’s appearance since securing his appearance is unreasonably burdensome.

1. Mr. Short has a valid reason for not appearing at an evidentiary hearing.

22. Mr. Short is unable to attend the hearing because his current employer, Jumpers Production, had specifically prohibited him from appearing before the Tribunal [P.O. No. 1 ¶4]. Although the exact consequences of blatantly disregarding his employer’s wishes and the company’s general policy are unclear [Cl. Memo ¶112], it is undeniable that Mr. Short risks putting his career in jeopardy if he turns up at an evidentiary hearing.

23. Determining what constitutes a “valid reason” for the purposes of Art. 4.7 IBA Rules is largely based on the facts. The foreseeability of the impeding circumstance at the time of the making of the statement is a key consideration in this determination [O’Malley ¶4.56]. RESPONDENT could not have foreseen that Mr. Short would leave its employment in the short time between the making of the statement and the commencement of proceedings. It was also unexpected that Mr. Short’s new employer would be so staunchly against his participation in the proceedings.

24. Additionally, the threat of loss or harm to the witness and/or the witness’s family has been listed as a ground for excusing a witness’s from testifying in domestic law [Eijsvoogel 98, citing Art. 406 Brazilian Civil Procedure Code]. Another accepted ground is the fear of incrimination [Born 1900]. These accepted grounds highlight the principle that a witness cannot be expected to sacrifice his important personal interests to appear at an evidentiary hearing. Thus, Mr. Short’s fear of jeopardising his professional position qualifies as a valid reason for excusing his absence at the hearing.
2. There are exceptional circumstances for admitting Mr. Short’s statement in his absence.

25. Mr. Short’s statement should be considered even in his absence in view of the exceptional circumstances of the present case. The dearth of other evidence to support RESPONDENT’s case, the value of Mr. Short’s witness statement in assisting the Tribunal, and the interests of procedural fairness and justice all add up to form a compelling case for Tribunal to consider Mr. Short’s witness statement [see ¶11-15, supra].

3. Securing Mr. Short’s attendance at the hearing is unreasonably burdensome.

26. Neither the Tribunal nor RESPONDENT can directly compel Mr. Short to appear. The courts in Danubia have no jurisdiction to order a witness located in another country to appear at a hearing of an arbitral tribunal. Equatoriana’s law does not provide for the mandatory appearance of a witness to testify in an arbitral proceeding either in person or by video link [P. O. No. 2 ¶28].

27. While RESPONDENT has not spoken to Jumpers Production, it recognises that any attempt at negotiation will most likely be futile since Jumpers Production has adamantly refused to permit Mr. Short to attend the hearing if he were called [P.O. No. 1 ¶4]. Disregarding Mr. Short’s witness statement would unfairly penalise RESPONDENT for its helplessness.

28. The principle of good faith, a well-established principle in international arbitration [Born 1007-1020; O’Malley ¶7.44], underlies the application of the IBA Rules [Preamble ¶3, IBA Rules]. Accordingly, parties are required to participate cooperatively in all aspects of the arbitration proceedings in good faith [O’Malley ¶7.50; Born 1008]. On the special facts of this case, CLAIMANT is in a better position to secure the attendance of Mr. Short at an evidentiary hearing than RESPONDENT. Jumpers Production has recently succeeded in being listed by CLAIMANT as a potential supplier, and this new development has even been cited as a possible reason for Jumpers Production’s refusal to permit Mr. Short’s attendance [P.O. No. 2 ¶26]. Evidently, Jumpers Production is eager to maintain good relations with CLAIMANT, and is highly likely to accede to a request from CLAIMANT for Mr. Short to appear at an evidentiary hearing. Although CLAIMANT is evidently in an advantageous position to secure Mr. Short’s attendance at an evidentiary hearing, it has
flatly refused to offer its assistance [P.O. No. 1 ¶4] but instead is petitioning the Tribunal to disregard Mr. Short’s statement. This is a plain and barefaced demonstration of bad faith.

29. CLAIMANT has asked the Tribunal to take a “lack of a cooperative attitude” into consideration when deciding the merits of the case and whether or not to draw adverse inferences [Cl. Memo ¶131]. Ironically, CLAIMANT has demonstrated an uncooperative attitude and bad faith in its conduct. The Tribunal should take such conduct into account when dealing with this procedural issue.

II. RESPONDENT IS NOT LIABLE FOR THE LATE DELIVERY OF THE POLO SHIRTS.

30. RESPONDENT cannot be held liable for the late delivery of the shirts as there was a valid modification of the delivery date in the Contract to 24 February 2011. Under Art. 29 CISG, an oral agreement is sufficient to effect a modification of a contract. In the present case, [A] there was an oral agreement to modify the delivery date in the Contract. [B] As the Parties had contracted to exclude Mediterraneo’s reservation under Art. 96 CISG, Art. 29 CISG applies and this oral agreement between the Parties validly modified the Contract.

A. THE PARTIES VERBALLY AGREED TO MODIFY THE DELIVERY DATE IN THE CONTRACT.

31. During the telephone conversation of 9 February 2011, [1] RESPONDENT had made a valid offer to modify the Contract [2] which was accepted by CLAIMANT. This is the understanding a reasonable person in RESPONDENT’s position would have had.

1. There was a valid offer to modify the Contract.

32. CLAIMANT’s assertion that this offer was invalid for failing to contain the minimum elements listed under Art. 14 CISG [Cl. Memo ¶80] is indefensible and does not accord with the practical application of the provision. In recognition of commercial realities, courts have construed the elements of Art. 14 CISG flexibly. Notably, courts have utilised the interpretative tools available under the CISG to ‘fill in’ missing elements, namely Arts. 8 and 9 CISG which allow the courts to take into account prior dealings and trade usages
[DiMatteo et al. 337]. For example, it was found that price and other elements could be impliedly fixed from previous established practice between the parties [Adamfi Video].

33. It was patently obvious that RESPONDENT’s offer of 9 February 2011 adopted the elements of the Contract that was previously concluded between the Parties as to goods, price and quantity, with the only changed variable being the delivery date. Those elements alleged to be missing by CLAIMANT were sufficiently definite by reference to the Contract. Thus, RESPONDENT’s offer was valid under the CISG.

2. This offer was accepted by CLAIMANT.

34. CLAIMANT’s representation to the effect that it would “make sure that all of the paperwork reflected the new delivery date” constituted an acceptance of RESPONDENT’s offer under Art. 18 CISG. Whether the above statement evinces an agreement to modify the delivery date in the Contract is determined according to the reasonable person standard, using the interpretation rules under Arts. 8 and 9 CISG. A reasonable person in RESPONDENT’s position would have understood from CLAIMANT’s statement that there was an agreement to modify the delivery date in the Contract.

35. A reasonable person would have understood the phrase “all the paperwork” as referring to the L/C, the shipping contract and the Contract itself, since “paperwork” is a term which applies generally to all paper documentation accompanying a transaction [Business Dictionary]. Accordingly, CLAIMANT’s statement was a representation that CLAIMANT would also amend the date in the Contract. Additionally, the statement demonstrated that CLAIMANT was going to take action to facilitate the implementation of the modified delivery date. This leads to the irresistible inference that CLAIMANT was agreeable to the contractual modification. A reasonable person would also believe that CLAIMANT granted an extension of the delivery time without further penalties because the delay was not due to RESPONDENT’s fault and it ought not to have been penalised.

36. Besides, CLAIMANT had given no indication that it wished to reserve its right to damages for late delivery in lieu of a modification of the Contract. Throughout the entire conversation, there was no reference to the penalty clause for late delivery in the Contract [Art. 10 of the Contract]. There was also no mention that the price stated in the L/C would
be amended to reflect a penalty for late delivery. The totality of the circumstances would have led a reasonable person in RESPONDENT’s position to apprehend that CLAIMANT had agreed to modify the delivery date in the Contract.

37. The fact that the modification of the delivery date would be for RESPONDENT’s sole benefit should not be an obstacle to finding that there was an oral agreement to modify the Contract. The common law doctrine of consideration is rendered irrelevant in international sales contracts by Art. 29 CISG [Secretariat Commentary at Art. 29 ¶2; Eiselen on UNIDROIT Principles]. Thus, an agreement to modify the contract need not be supported by “an act or promise given in exchange for the new promise” [Honnold 228], and even changes to a contract which favour only one side are valid under the CISG. [Schlechtriem 62; Viscasillas 169]. Accordingly, it would be wholly inappropriate to consider that the Parties could not possibly have agreed to a modification of the delivery date simply because such a modification would ostensibly only benefit CLAIMANT.

B. THIS ORAL AGREEMENT CONSTITUTED A VALID MODIFICATION OF THE CONTRACT.

38. Pursuant to Art. 20 of the Contract, [1] the Parties had effectively contracted to disregard Mediterraneo’s reservation under Art. 96 CISG. As a result, Art. 29 CISG applies to validate the oral agreement between the Parties. [2] Even if Mediterraneo’s reservation was considered, this does not automatically exclude the application of Art. 29 CISG. In fact, Art. 29 CISG continues to apply, and accordingly the oral agreement between the Parties sufficed to modify the Contract.

1. The Parties effectively contracted to disregard Mediterraneo’s reservation under Art. 96 CISG such that the ‘freedom of form’ provisions of the CISG apply.

   a. The phrase “without regard to any national reservation” applies to exclude Mediterraneo’s reservation under Art. 96 CISG.

39. In Art. 20 of the Contract, the Parties contracted to disregard “any national reservation”. On its face, this provision imposes a blanket exclusion covering all reservations, including Mediterraneo’s reservation under Art. 96 CISG. A proper construction of Art. 20 in accordance with the UNIDROIT Principles also leads to the result that Mediterraneo’s
reservation should be disregarded. Reference to the UNIDROIT Principles is warranted because Art. 8 CISG only expressly governs the interpretation of individual communications, whereas the UNIDROIT Principles cover the broader scope of contractual interpretation [Perillo ¶¶(a)&(i); Ziegel, Section II].

40. Art. 20 of the Contract is Option (b) of the Model Clause recommended in Art. 35 CEAC Rules. Both the footnote and the explanatory note to the Model Clause unambiguously explain that Option (b) is intended to “exclude the application of national reservations…under Art. 96 CISG with respect to the form of a contract.” As these notes are prominently displayed on the CEAC website as well as in the CEAC Rules themselves, the average user of the CEAC would have no excuse to misinterpret Option (b) as referring only to derogable national reservations made under Arts. 92, 94 and 95 CISG.

41. In incorporating Option (b) of the Model Clause as Art. 20 of the Contract, CLAIMANT must be taken to have read and understood the intended implications of Option (b) of the Model Clause. Furthermore, in reproducing Option (b) of the Model Clause verbatim, CLAIMANT must be taken to have endorsed the CEAC drafters’ intentions of excluding national reservations made under Art. 96 CISG.

42. This analysis is consistent with Art. 4.1 UNIDROIT Principles, which provides that “standard terms should be interpreted primarily in accordance with the reasonable expectations of their average users.” Art. 20 of the Contract is Option (b) of the Model Clause, and is therefore a “standard term” under the UNIDROIT Principles that was “prepared in advance for general and repeated use” [Art 2.1.19 UNIDROIT Principles].

43. Finally, in accordance with the rule of contra proferentem under Art. 4.6 UNIDROIT Principles, Art. 20 of the Contract must be construed against CLAIMANT because it had undertaken the responsibility and risk of clearly formulating the Contract. The controversy over whether Art. 20 of the Contract extends to Mediterraneo’s reservation under Art. 96 CISG must be resolved in favour of RESPONDENT. Hence, Art. 20 of the Contract must be taken to exclude Art. 96 reservations.
b. Art. 12 CISG does not preclude the Parties’ agreement to exclude Mediterraneo’s reservation under Art. 96 CISG.

44. CLAIMANT’s contention that Art. 12 CISG precludes the exclusion of reservations under Art. 96 CISG [Cl. Memo ¶¶93-95] is inaccurate. The Parties’ agreement to exclude Mediterraneo’s reservation should prevail over Art. 12 CISG. Party autonomy in the choice of law is a fundamental and sacrosanct principle in international commercial relations [Born 2152; Redfern ¶3.97] as choice of law provisions are essential for ensuring certainty and predictability in business transactions [Scherk]. Almost every established legal system now gives choice of law agreements “full effect in accordance with their terms” [Born 2153].

45. In particular, parties have the well-established freedom to exclude certain laws identified in the parties’ contract [Gaillard/Savage 800]. Art. 20 of the Contract is a provision requiring this Tribunal not to apply Mediterraneo’s reservation under Art. 96 CISG. As an expression of the parties’ fundamental freedom to choose the law applicable to their dispute, Art. 20 of the Contract must be given full effect. Having established that Art. 20 excludes all national reservations [see ¶¶39-43, supra], this Tribunal cannot take into account Mediterraneo’s declaration under Art. 96 CISG.

46. CLAIMANT has argued that the Parties’ choice of law clause has to be invalidated because it contradicts a mandatory rule of the chosen law [Cl. Memo ¶¶93-95]. However, the application of Art. 12 CISG as a mandatory rule of the Parties’ chosen law is precluded by operation of the validation principle. Under this principle, an exception to the parties’ choice of law may be implied if that chosen law would invalidate other material portions of the contract [Born 2167]. Given that the Parties have made the specific choice to disregard “any national reservation”, an exception to the Parties’ general choice of the CISG as the governing law applicable to the dispute must be implied in order to uphold this more specific agreement. The Parties must have intended for the Tribunal to disregard Mediterraneo’s reservation, treating it as if it had never been made so that Art. 12 CISG is never violated.

47. CLAIMANT may also argue that a choice of law clause may be invalidated for public policy reasons. However, public policy limitations, being narrow and exceptional, will not in most cases invalidate a choice of law agreement [Born 2161&2173]. English courts, for
example, have considered that there must be illegality or some “wholly offensive” factor before a court can be justified in deviating from the parties’ choice of law in favour of upholding the public policy of the forum state [DST v. RAKOIL]. The recognition of a contractual modification made in oral rather than written terms can hardly amount to a result that is so “wholly offensive” as to justify this Tribunal’s departure from the presumption of the validity of Art. 20 of the Contract.

2. Even if Mediterraneo’s reservation were taken into account, this reservation would not result in Mediterraneo’s requirement of writing being imposed.
   
a. The effect of an Art. 96 CISG reservation is that the law governing the formal validity of a contractual modification must be determined with reference to private international law.

48. Although Mediterraneo has made a reservation under Art. 96 CISG, it cannot apply automatically as Equatoriana has not likewise made a reservation under Art. 96 CISG. The effect of Mediterraneo’s reservation is that the question of whether a modification of a contract has to be in writing must be determined by a conflict of laws analysis. This is the “majority approach” that has gained international acceptance by numerous courts and tribunals [Tantalum Powder Case; Adamfi Video; Resolution No. 6134/01; Wooden Finger-Joints Case]. It has also been overwhelmingly accepted by most international commentators [Bridge; DiMatteo et al.; Ferrari (Draft UNCITRAL Digest) 213-214; Honnold 129; Gonzalez 438; Kröll/Mistelis/Viscasillas 1214; Kritzer; Lookofsky 174-175; Mather 166-167; Bianca/Bonell Art. 12 ¶2.3 & Art. 96 ¶2.2; Schlechtriem/Schwenzer 214, 1192-1193; Winship].

49. CLAIMANT’s position that a reservation made under Art. 96 CISG results in the reserving state’s requirement of writing being imposed automatically [Cl. Memo ¶97] has found very little approval in case law. This approach is also highly arbitrary as no arbitral award or court decision has expounded on the reasons for this interpretation [Schroeter 20]. It is also of great significance that a proposed formulation of Art. 96 CISG which would have more clearly imposed the declaring state’s formal requirements on all other contracting states was
rejected by the drafting committee of the Convention [Schroeter 34, citing Document A/CN.9/SR.8 (unpublished)].

50. The practical effect of the minority approach would be to saddle all CISG Contracting States with the onerous obligation of applying the mandatory laws of reserving States. This is entirely inconsistent with the approach in uniform private international law. Under most rules of private international law, courts and tribunals have no obligation to always apply such foreign mandatory laws, but only a discretion to consider foreign mandatory laws [Rome Convention; Hague Convention; IAC Convention]. The imposition of the mandatory laws of reserving states exceeds the “accepted degree of comity” for foreign mandatory rules and could not possibly have been intended [Schroeter]. In fact, this was the reason cited for the rejection of the minority approach by the drafters of the CISG.

51. Clearly then, the minority approach is unsupportable. The majority approach presents the correct interpretation of the effect of a reservation under Art. 96 CISG, and accordingly, a conflict of laws analysis must be applied to determine the applicable law governing the formal validity of a modification to the Contract.

b. Private international law should result in the ‘freedom of form’ rule in Art. 1.2 UNIDROIT Principles being applied.

52. The conflict of laws rules of Danubia, Oceania, Equatoriana and Mediterraneo all provide first and foremost for the Parties’ agreement on their choice of law to be given effect [P.O. No. 2 ¶33]. Art. 20 of the Contract represents the Parties’ agreement that the UNIDROIT Principles should apply to supplement any gaps in the CISG. Under Art. 1.2 UNIDROIT Principles, there are no formal requirements for contractual modifications and they may be “proved by any means”. Accordingly, an oral amendment in the present case is valid.

c. Mediterraneo’s requirement of writing is not a “mandatory rule” for the purposes of Art. 1.4 UNIDROIT Principles.

53. CLAIMANT’s position that the Tribunal should take account of Mediterraneo’s requirement as to form under the UNIDROIT Principles [Cl. Memo ¶¶99-102] is fallacious because the argument is premised upon the fact that Mediterraneo’s law is the applicable
national law under Art. 1.4 UNIDROIT Principles. Only the rules of the *applicable national law* may override the ‘freedom of form’ rule under Art. 1.2 UNIDROIT Principles [Comment to Art. 1.2 ¶3].

54. On the facts, the law of Equatoriana has the “closest connection” with the Contract and is therefore the applicable national law under the conflict of laws rules of Danubia, Oceania, Equatoriana and Mediterraneo. In determining the State with the “closest connection”, factors such as the place of conclusion of the contract and the place where the party making the characteristic performance has its place of business are of primary importance [P.O. No. 2 ¶33]. The Contract had been signed in Equatoriana during a visit of CLAIMANT’s CEO [P.O. No. 2 ¶7]. Crucially, the characteristic performance of the Contract, which is the production of 100,000 polo shirts, took place in Equatoriana, RESPONDENT’s place of business [SoC ¶3; SoD ¶1]. Therefore, a conflict of laws analysis would necessarily lead this Tribunal to the law of Equatoriana which has not made a reservation under Art. 96 CISG. Since the law of Equatoriana applies, the decisions of the Supreme Court of Mediterraneo in relation to formal contractual requirements [SoC ¶32] are irrelevant and do not bind this Tribunal. Consequently, Art. 11 CISG applies with the result that formal writing requirements need not be observed for contract modifications.

III. **EVEN IF THE DELIVERY DATE HAD NOT BEEN MODIFIED, RESPONDENT IS EXEMPT FROM LIABILITY UNDER ART. 79 CISG.**

55. Even if the delivery date in the Contract had not been validly modified to 24 February 2011, RESPONDENT is not liable for damages for late delivery under Art. 79 CISG. RESPONDENT’s production of shirts under the Contract was totally reliant on the supply of required material from a supplier. Hence, when its supplier’s own production capacity was curtailed by a strike, causing a delay in the delivery of the required material [P.O. No. 2 ¶12], RESPONDENT could no longer meet the delivery date in the Contract.

56. Therefore, RESPONDENT’s late delivery of the shirts was due to an impediment beyond its control. Consequently, [1] RESPONDENT is exempt from liability under Art. 79(1) CISG. In addition, [2] Art. 79(2) CISG is not applicable. Further, [3] RESPONDENT gave sufficient notice of the impediment to CLAIMANT pursuant to Art. 79(4) CISG.
1. **RESPONDENT** is exempt from liability under Art. 79(1) CISG.

57. **RESPONDENT** was unable to deliver the goods on 19 February 2011 owing to a strike that reduced its supplier’s production capacity to 50% [P.O No. 2 ¶12]. The strike resulted in **RESPONDENT** being denied timely access to required material for the production of the shirts. These events constitute [a] an impediment beyond **RESPONDENT**’s control. [b] **RESPONDENT** could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the Contract, and [c] could not reasonably be expected to have avoided or overcome the impediment or its consequences.

   a. **RESPONDENT**’s inability to deliver on time was due to an impediment beyond its control.

58. The causes of **RESPONDENT**’s late delivery of the shirts – the strike affecting the supplier and the subsequent delay in delivery of material for the production of the shirts – amount to an impediment beyond **RESPONDENT**’s sphere of control. Strikes have been accepted as impediments within the scope of Art. 79 CISG [ICC Case No. 9978; Berger 481], especially when they occur outside the seller’s business operations [Enderlein/Maskow, Art. 79 ¶4.2; Brunner 169; Schlechtriem/Schwenzer 1072-1073]. In this case, the strike was truly beyond **RESPONDENT**’s control as it was an external impediment affecting its supplier and had no connection with **RESPONDENT**’s intra-firm activities. **RESPONDENT** had absolutely no influence over the strike, nor had it any say over the supplier’s decision to default on its obligation to deliver material to **RESPONDENT** on time.

   b. **RESPONDENT** could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the Contract.

59. **RESPONDENT** could not have reasonably foreseen that a strike would affect the production capacity of its supplier and reduce it by such a large extent (50%) as to cause a delay in the delivery of its required material at the time of conclusion of the Contract. The test of whether an impediment is foreseeable is based on a standard of reasonableness,
taking into account the actual circumstances at the time of the conclusion of the Contract and trade practices [Schlechtriem/Schwenzer 1068].

60. The strike affecting the supplier was not reasonably foreseeable. Impediments that are reasonably foreseeable at time of conclusion of a contract are those involving the normal risk of commercial activity such as fluctuations in world market prices [Frozen Raspberries Case; Steel Ropes Case], especially if such trends are discernible from experience [Steel Bars Case], or those that are considered “ordinary occurrences” [Raw Materials]. A strike does not fall within any of these categories. In particular, under UCC §2-615, a clause of similar operation to Art. 79 CISG, strikes are not considered foreseeable risks [Spivack].

61. Additionally, the decision made by the management of the supplier in allocating the remaining 50% production capacity was not reasonably foreseeable at the time of the conclusion of the Contract. The supplier’s management decisions are entirely outside RESPONDENT’s expected field of knowledge. It was not foreseeable that the supplier’s management would choose not to fulfil its obligation to deliver the required materials on time to RESPONDENT.

c. RESPONDENT could not reasonably be expected to have avoided or overcome the impediment or its consequences.

62. Impediments within the meaning of Art. 79 CISG need not render performance impossible; it is sufficient that performance is made exceedingly more onerous [Honnold 628; Lindström]. RESPONDENT is not expected to go beyond the limits of reasonableness to avoid the impediment or overcome its consequences. In the circumstances, RESPONDENT could not reasonably be expected to have avoided the strike or the subsequent delay in delivery of required material because there was no indication that a strike would befall RESPONDENT’s supplier at the time of conclusion of the Contract [Enderlein/Maskow ¶6.1].

63. Neither could RESPONDENT reasonably be expected to have overcome the consequences of the strike and the delay in delivery of supplies. RESPONDENT diligently investigated with other possible suppliers immediately after being notified of the impediment. However, contracting with the other suppliers would have been twice as expensive as the offer by the
original supplier and even then, none of them was willing to guarantee the necessary delivery date [P.O. No. 2 ¶13].

64. It is unreasonable to expect RESPONDENT to have contracted with the other suppliers for twice the original amount. This goes beyond the “limit of sacrifice” within which a seller can reasonably be expected to perform [CISG-AC Opinion No. 7 ¶38; Kröll/Mistelis/Viscasillas 1090; Schlechtriem/Schwenzer 1076]. The seller is exempt from liability if the cost increase to overcome the impediment is excessive [Brunner 322]. Generally, the threshold increase of at least 100% of the cost of performance is deemed a fundamental change [Brunner 428; Enderlein/Markow, Art. 79 CISG ¶6.3; Publicker Industries] which grants a party exemption from liability. Contracting with the new suppliers would have entailed an excessive 100% increase of the original price for the required material.

65. Furthermore, the degree of likelihood that the measures in question will in fact overcome the impediment or its consequences is relevant [Brunner 322]. It is of considerable importance that none of the new suppliers was willing to guarantee the required delivery date [P.O. No. 2 ¶13]. The exorbitant asking price from the new suppliers, coupled with the uncertainty of securing supplies, would have placed an unusual and substantial risk upon RESPONDENT [Brunner 337], making it highly unreasonable to expect RESPONDENT to have contracted with the new suppliers.

2. Art. 79(2) CISG does not apply because RESPONDENT’s supplier should not be considered a third person engaged to perform the whole or part of the Contract.

66. A seller’s suppliers are generally not considered independent third parties under Art. 79(2) CISG [Secretariat Commentary, Art. 65(2) (draft counterpart of Art. 79 CISG) ¶12; CISG-AC, Opinion No. 7 ¶¶18, 21&22; UNCITRAL Report ¶449; Schlechtriem/Schwenzer 1078-1079; Kröll/Mistelis/Viscasillas 1082; Modular Walls Partition Case]. While suppliers of required materials create pre-conditions for the promisor’s performance, they are not entrusted with performance of any part of the contract [Schlechtriem/Schwenzer 1078-1079; Kröll/Mistelis/Viscasillas 1082].
Accordingly, RESPONDENT’s supplier is not a third party as understood under Art. 79(2) CISG. As a result, only Art. 79(1) CISG is relevant for proving RESPONDENT’s entitlement to exemption from liability for late delivery and RESPONDENT does not have to show that it is also exempt from liability under Art. 79(2) CISG.

3. RESPONDENT gave sufficient notice of the impediment to CLAIMANT pursuant to Art. 79(4) CISG.

RESPONDENT was notified of the supplier’s failure to deliver the required material on time in the evening of 8 February 2011, the day of the strike [P.O. No. 2 ¶12]. RESPONDENT informed CLAIMANT of the likelihood of late delivery the next day on the 9 February 2011 [SoC ¶13]. Therefore, RESPONDENT gave notice within a reasonable time after RESPONDENT knew of the impediment.

IV. IN ANY EVENT, CLAIMANT IS PROHIBITED BY ITS OWN COURSE OF CONDUCT FROM ENFORCING THE ORIGINAL DELIVERY DATE IN THE CONTRACT.

Even if Art. 79 CISG does not operate to exempt RESPONDENT from liability, the doctrine of estoppel applies to prevent CLAIMANT from advancing a claim of late delivery. The doctrine of estoppel in common law, also known as ‘reliance’, is a general principle underlying the CISG [Rolled Metal Sheets Case; Viscasillas 176]. Since Art. 7(2) CISG permits recourse to general principles discerned from the text of the Convention, estoppel is relevant to this issue of late delivery. Estoppel under the CISG, as embodied in Arts. 16(2)(b) and 29(2) CISG, is based on the concept of ‘reasonable reliance’ [Schlechtriem/Schwenzer Art 29; Honnold 204; DiMatteo 75]. This means that where a party has led an innocent party to rely on its representations or conduct, and it would be unjust for the party to go back on its representations, that party would be estopped from enforcing its legal rights [DiMatteo 75].

CLAIMANT has by its conduct represented that it would not enforce the original delivery date [see ¶¶35-37, supra]. Further, CLAIMANT did not seek to claim the penalty for late delivery during the entire period of 24 February 2011 to 8 April 2011. It was only after DC raised complaints in respect of the goods that CLAIMANT decided to pursue a claim for
late delivery as well. Having maintained its silence for an extended period of time, it would be unjust for CLAIMANT to now advance a claim for late delivery as an afterthought to a claim for a completely unrelated allegation of breach. Had RESPONDENT known that CLAIMANT would pursue a claim in late delivery, RESPONDENT would have done its risk analysis differently — it could have reconsidered its options for suppliers of raw materials, or even whether it would continue to undertake its obligations under the Contract and shoulder the penalty for late delivery. It could also have sought to recover damages from its supplier.

V. RESPONDENT HAS NOT BREACHED ITS CONTRACTUAL OBLIGATIONS.

71. RESPONDENT deeply regrets and in no way seeks to justify any use of child labour in its production facilities. However, the fact of the matter is that the Contract never imposed a prohibition of child labour whether expressly or impliedly. Accordingly, RESPONDENT has not breached its obligations under [A] Art. 12 of the Contract and [B] Art. 35 CISG.

A. RESPONDENT HAS NOT BREACHED ART. 12 OF THE CONTRACT.

72. CLAIMANT has asserted that RESPONDENT’s use of child labour was a breach of the Contract because it “did not comply with the policy requirement provided by Art. 12 of the Contract” [Cl. Memo ¶16]. This assertion is completely untenable. [1] First, Art. 12 of the Contract failed to create an enforceable obligation. [2] Even if Art. 12 of the Contract created a binding prohibition, it related only to the manufacturing of the shirts required under the Contract.


73. Pursuant to Art. 8(2) CISG, contractual terms must be given an interpretation based on what a reasonable person of the same kind as RESPONDENT would have understood. This objective test forms the heart of interpretation under the CISG [Schlechtriem/Schwenzer 155]. Art. 12 of the Contract failed to create an enforceable prohibition on the use of child labour in any part of RESPONDENT’s business operations because [a] the language of Art. 12 of the Contract is non-obligatory in nature, and [b] the conduct of CLAIMANT would have led a reasonable person to understand that Art. 12 did not impose an enforceable obligation.
a. The language of Art. 12 of the Contract is non-obligatory.

74. First, Art. 12 of the Contract is framed in entirely aspirational language. This is exemplified in the use of the superlative, “highest”. The choice of the phrase “it is expected that…” over stronger language like “suppliers are required” further reinforces the notion that Art. 12 of the Contract did not create any binding obligation. The word “expected” means that CLAIMANT only “anticipated” [OED, “expected”] compliance with OPE’s policy and standards, with no further connotation that penalties would be imposed for any deviation from those standards. An alternative word like “required”, for instance, would clearly communicate that the standards are “necessary” or “obligatory” [OED, “required”].

75. Second, it is well-established trade practice in the garment industry [Art. 9(2) CISG] that companies seeking to impose a binding obligation on a contracting party would use more forceful and explicit language than that used in Art. 12 of the Contract. There is a preponderance of contractual terms stringently and unambiguously providing that companies “follow a strict zero tolerance policy” [Puma] or “will not tolerate” [Walmart] or “specifically prohibits” [DKNY] or “does not accept” [H&M] the use of child labour or any other unethical business conduct by their suppliers. Even the mildest of contractual terms used by the major players in the garment industry provide that suppliers “must not” [Liz Claiborne] or “shall not” [GAP; Zara; SA 8000] engage in unethical business conduct such as the use of child labour. Language that falls short of such unequivocally binding stipulations, such as that in Art. 12 of the Contract, is insufficient to impose a binding obligation on a supplier.

76. Ultimately, according to the contra proferentum rule, the risk of the ambiguity in Art. 12 of the Contract must be borne by the party responsible for the formulation of the term and “an interpretation against that party is preferred” [Art. 4.6 UNIDROIT Principles]. Art. 12 is a standard term supplied by CLAIMANT [P.O. No. 2 ¶]. If a prohibition of child labour in any part of its suppliers’ operations was genuinely important to CLAIMANT, it should have taken the effort to properly articulate such a requirement. Having neglected to do so, CLAIMANT cannot now accuse RESPONDENT of breaching the Contract.
b. The conduct of RESPONDENT would have led a reasonable person to understand that Art. 12 of the Contract was not mandatory in nature.

77. A reasonable person of the same kind as RESPONDENT would be a reasonable supplier in the garment industry. A reasonable supplier could not have understood that Art. 12 of the Contract created a binding obligation merely from the audit conducted by CLAIMANT in relation to their 2008 Contract. If anything, the fact that CLAIMANT failed to conduct an audit prior to the present Contract despite lingering doubts as to RESPONDENT’s continuing compliance with OPE’s policy suggests that CLAIMANT did not require RESPONDENT to observe strict compliance with OPE’s policy and ethical standards. Furthermore, if compliance with OPE’s policy was of any importance, CLAIMANT would have highlighted that requirement to RESPONDENT. On the contrary, while CLAIMANT harped on the price of the shirts and delivery date of the Contract, no mention was made of compliance with OPE’s policy. This silence, together with the exhortatory tone of Art. 12 of the Contract, would have led a reasonable supplier to understand that Art. 12 was not an enforceable obligation.

78. It is relevant to note that CLAIMANT also failed to audit Gold Service even though Gold Service Clothing’s change of ownership since the last audit in 2007 [P.O. No. 2 ¶22] necessitated an additional audit before CLAIMANT engaged it as its substitute supplier. Instead, CLAIMANT contracted with Gold Services Clothing on the strength of mere “assurances” that the latter would be ethical. This clearly shows that CLAIMANT was haphazard in auditing and ensuring its suppliers’ compliance with OPE’s policy.

79. Contrary to CLAIMANT’s allegations [Cl. Memo ¶23], RESPONDENT had no independent knowledge of OPE’s participation in the United Nations Global Compact (UNGC) [SoD ¶8]. This information was only made public on 8 April 2011 – months after the Contract had been concluded. In the absence of such knowledge, a reasonable supplier would not have understood the significance of upholding OPE’s ethical policy and thus would not have construed Art. 12 of the Contract as a mandatory term.

80. It is also crucial that many companies in the garment industry require their suppliers to make a separate written commitment to agree and abide by codes of conduct which explicitly prohibit child labour [The Apparel Industry and Codes of Conduct 61-62; DKNY;
YSL; Gucci; Balenciaga; Alexander McQueen]. This forms part of international trade practice under Art. 9(2) CISG. Notably, Mercantile Stores Company explained that it required its suppliers to sign its child labour policy in a stand-alone certification “because it did not want that policy to be lost within a larger contract” [The Apparel Industry and Codes of Conduct 61]. It follows that a reasonable merchant in the garment industry would have expected a binding obligation to refrain from the use of child labour to be imposed through a separate written undertaking, and not simply through a standard clause in a sales contract such as Art. 12 of the Contract.

81. Had CLAIMANT intended to create an enforceable prohibition on the use of child labour in any part of its supplier’s operations, it should have endeavoured to communicate its expectations to RESPONDENT. Having failed to articulate or demonstrate its requirements under the Contract, CLAIMANT cannot now accuse RESPONDENT of a breach.

2. Even if Art. 12 of the Contract created a contractual obligation, RESPONDENT did not breach this obligation.

82. Art. 12 of the Contract, given its most generous interpretation, can only be interpreted to impose a prohibition on child labour in the manufacturing of the delivered shirts. This prohibition does not extend to the entirety of RESPONDENT’s operations. The expectation that RESPONDENT would observe the “highest ethical standards” in the “conduct of its business” must be construed narrowly to apply only to the conduct of its business with CLAIMANT. Thus, RESPONDENT’S use of child labour in production facilities unrelated to the manufacturing of the shirts could not have constituted a breach of this provision.

83. This reading is supported by the policy of OPE, which focuses on ethical standards to be complied with in “the production of the goods by the counterparty and its suppliers” [P.O. No. 2 ¶4]. For this Contract, the goods contracted for were the shirts. Therefore, a reasonable person’s understanding of Art. 12 of the Contract cannot be that the ethical standards extend to RESPONDENT’s operations unrelated to production of the shirts.

84. This interpretation is also in line with the rule of contra proferentum enshrined in Art. 4.6 UNIDROIT Principles (see ¶76, supra). If CLAIMANT had intended for Art. 12 of the Contract to govern the entirety of RESPONDENT’s business operations, the onus was on CLAIMANT to make this explicit through the language of Art. 12 of the Contract.
85. Additionally, it is highly improbable that a commercial party would submit the entirety of its business to the oversight of an unrelated company (OPE) through a single-transaction contract for the delivery of 100,000 shirts, especially where such party is not in an exclusive supplier relationship with the unrelated company. Even companies with strict compliance programs such as JCPenney, Talbots and Kmart confine a prohibition on child labour to the production of the specific merchandise they contracted for [The Apparel Industry and Codes of Conduct 62]. A reasonable supplier in the garment industry would not have expected a standard clause such as Art. 12 of the Contract to bind its entire operations.

86. If Art. 12 of the Contract is “of a character that the other party could not have reasonably expected”, it is not effective unless it had been expressly accepted by RESPONDENT [UNIDROIT Principles, Art. 2.1.20(1)]. As a result, CLAIMANT would have had the special responsibility of specifically highlighting such an unusually onerous contractual term to RESPONDENT. RESPONDENT must also have expressly accepted the term [UNIDROIT Principles, Art. 2.1.20, Comment 4; Eiselen]. Requiring a party to make the other party “specifically aware of any unusual or surprising clauses” is also in line with the good faith requirement under Art. 7 CISG [Eiselen 8]. Since CLAIMANT had not drawn RESPONDENT’s attention to Art. 12 of the Contract, this provision cannot be construed as imposing a prohibition on child labour over the whole of RESPONDENT’s operations.

3. In any event, it cannot be conclusively shown that RESPONDENT breached an alleged obligation under Art. 12 of the Contract.

87. Even if Art. 12 of the Contract imposed a prohibition on child labour over the entirety of RESPONDENT’s business operations, CLAIMANT has not discharged its burden of proof in establishing a breach with a reasonable degree of certainty on the available evidence. This burden will only be satisfied where there is evidence showing that RESPONDENT had used child labour after the conclusion of the Contract. Although it has been assumed that RESPONDENT did indeed use child labour in at least one of its production plants, it has not been ascertained if this was carried out after the conclusion of the Contract [P.O. No. 1 ¶8]. It is not clear when the footage showing children allegedly working for RESPONDENT in one of its production facilities was taken [SoC ¶18]. Given the lack of solid evidence that
RESPONDENT had used child labour after the conclusion of the Contract, it cannot be conclusively proven that RESPONDENT had indeed breached Art. 12 of the Contract.

88. Additionally, RESPONDENT has not conceded that it had hired children as young as eight to work in appalling conditions. Apart from the fact that RESPONDENT used child labour in at least one of its plants, no further details of this use have been assumed by Parties [P.O. No. 1 ¶8]. These specific details were only shown in the documentary on 5 April 2011 [SoC ¶18], the reliability of which has not been established. It would not be the first time a documentary has released a false or fictitious footage of child labour being used in a clothing workshop [Primark Documentary]. Indeed, RESPONDENT submits that it has no knowledge of any camera crews taking any kind of pictures in its production facilities [Cl. Ex. No. 7]. CLAIMANT’s arguments based on these specific conditions violating “mandatory transnational public policy” and the ILO Convention [Cl. Memo ¶¶13-14] are therefore not based on facts that have been agreed upon by the Parties and are unproven.

B. RESPONDENT DELIVERED SHIRTS THAT CONFORM UNDER THE CONTRACT.

89. The Contract stipulated for the delivery of 100,000 polo shirts that “carried the label ‘Yes Casual’ on the inside collar” and which matched the specifications set out in Annex 1 of the Contract [Art. 1 of the Contract]. RESPONDENT duly delivered shirts that complied with those contractual requirements [P.O. No. 2 ¶9]. In so doing, it discharged its obligation under Art. 35 CISG to deliver goods that [1] conformed under Art. 35(2) CISG and [2] Art. 35(1) CISG.

1. The delivered shirts conform under Art. 35(2) CISG.

90. CLAIMANT’s assertion that the shirts did not conform under Art. 35(2)(b) [Cl. Memo ¶¶32-35] is misguided because [a] the shirts were fit for their particular purpose of sale in Oceania and, in the alternative, [b] it was unreasonable for CLAIMANT to rely on RESPONDENT’s skill and judgment.
a. The shirts were fit for their particular purpose of sale in Oceania.

91. RESPONDENT recognises that the shirts under the Contract were not as well-received by consumers in Oceania as desired. Nevertheless, unlike what CLAIMANT has asserted, the shirts were still fit for sale in Oceania. A product’s “fitness” for sale does not equate with its appeal to target consumers. “Fitness” for sale only relates to whether the product could be sold or used in the relevant market. In the present case, 1,000 “Yes Casual” shirts were still sold in the Doma Cirun stores prior to the release of the documentary and investigative article on 5 April 2011 and 8 April 2011 respectively [P.O. No. 2 ¶31]. This demonstrates that the shirts were saleable in Oceania. The subsequent diminished appeal of the shirts resulting from the unverified allegations in the documentary and investigative article does not detract from the fact that the shirts were fit for sale in Oceania. RESPONDENT cannot be held responsible for the effect of extraneous elements on the sale of shirts.

92. While RESPONDENT agrees with CLAIMANT that public law standards must be complied with, these standards concern only the specific goods imported into the country. Case authorities only go as far as to hold that the goods themselves are to comply with the public law requirements [New Zealand Mussels Case; Wine Case (France); Spanish Paprika Case; Wine Case (Germany); Movable Room Units Case]. It has been established that the shirts themselves were not produced using child labour. Therefore, the shirts were fit for sale in Oceania since they complied with the country’s public law requirements.

93. Where “religious considerations, cultural traditions or climatic issues” should also be considered in addition to public law regulations, it is because the usability of the goods has been restricted or affected [Kruisinga; Kröll/Mistelis/Viscasillas 510]. It follows then that the mere fact that the goods might not be attractive to consumers cannot be a valid consideration since this is not a restriction on the usability of the goods. The current legal position is reasonable because the risk of a good being unmarketable should have been assumed by the buyer at the point of contracting; no seller would be able to guarantee that its goods would be appealing to consumers due to the vagaries of consumer preferences.

94. CLAIMANT’s argument that there is non-conformity as long as “a suspicion emerged among consumers that the goods had been produced using socially unsustainable methods” [Cl. Memo ¶33] is erroneous and commercially insensible. Such a high threshold is unduly
burdensome on suppliers who not only must produce the goods using acceptable methods, but also painstakingly allay the consumers’ doubts which could be based on unverifiable sources. It is unreasonable to hold sellers accountable for mere suspicions which may subsequently render their goods unusable and thereby non-conforming as such suspicions are beyond their spheres of control [Schlechtriem on Vine Wax Case].

b. Alternatively, it was unreasonable for CLAIMANT to rely on RESPONDENT’s skill and judgment as to the shirts’ fitness for sale in Oceania.

95. Even if the shirts’ low volume of sales was tantamount to their unfitness for their particular purpose, Art. 35(2)(b) CISG was not breached as CLAIMANT could not reasonably have relied on RESPONDENT’s skill and judgment as to the shirts’ fitness for sale in Oceania. As demonstrated by the exaggerated reaction to the unverified documentary, the market conditions in Oceania are of unusual hypersensitivity to the ‘ethical’ quality of goods. RESPONDENT could not have known or prepared for that peculiar characteristic. Although RESPONDENT has had three contracts with third parties in which the goods were destined for Oceania [P.O. No. 2 ¶15], this would not have alerted RESPONDENT to the particular sensitivity of the consumers in Oceania. Such knowledge would only be known by a supplier with frequent and consistent contact with sale contracts to Oceania or a local representation in the country. The ‘ethical’ reputation of Oceania by itself cannot be a ground to impute such specialised knowledge of market conditions on RESPONDENT. Clearly then, RESPONDENT lacked the requisite knowledge to judge the fitness for sale of the goods in Oceania so no reliance on its skill and judgment can be justified.

96. In contrast, CLAIMANT had access to such knowledge. There can be no reliance on the seller’s skill and knowledge if the buyer has superior knowledge as to the fitness of goods for a particular purpose [Kröll/Mistelis/Viscasillas 521-522; Schlechtriem/Schwenzer 582]. CLAIMANT is better informed about the peculiar market conditions in Oceania because its parent company, OPE, is located in Oceania and it has at least one manager from the board of directors of OPE [P.O. No. 2 ¶1] who would be able to enlighten CLAIMANT on the requirements of contracts dealing with goods destined for Oceania. Since CLAIMANT
obviously had superior knowledge of the market conditions in Oceania, CLAIMANT cannot reasonably claim that it relied on RESPONDENT’s skill and judgment.

2. The delivered shirts also conform under Art. 35(1) CISG.

97. Under Art. 35(1) CISG, sellers also have the duty to provide shirts conforming with the “quantity, quality and description required by the contract”. A possible CLAIMANT’s argument that a prohibition of child labour in Art. 12 of the Contract could relate to non-conformity of the quality or description of the goods would have been untenable.

98. First, Art. 12 of the Contract does not create a binding obligation [see ¶¶73-81, supra]. Even if that term effectively imposed an obligation not to use child labour, however, such a stipulation would have related only to RESPONDENT’s general business conduct rather than the quality or description of the polo shirts. Several companies like JCPenney and Talbots have linked such ethical standards to a specific obligation to supply goods certified to have been manufactured in compliance with ethical standards and without the use of illegal child labour [The Apparel Industry and Codes of Conduct 62]. In its current form, the purported obligation created by Art. 12 of the Contract does not prescribe requirements in respect of the goods, but instead refers to the conduct of RESPONDENT’s business. Therefore, Art. 12 of the Contract does not relate directly and sufficiently to the quality or description of the goods and an Art. 35(1) CISG breach cannot be made out.

VI. THE TRIBUNAL’S FINDING THAT RESPONDENT DID NOT BREACH ITS CONTRACTUAL OBLIGATIONS WILL NOT VIOLATE PUBLIC POLICY.

99. CLAIMANT is further relying on public policy to advance its claim for avoidance of the Contract. CLAIMANT has argued that an award that refuses avoidance of the Contract would be subject to being set aside for being contrary to public policy [Cl. Memo ¶36]. However, CLAIMANT is mistaken about the application of Art. 34(2)(b)(ii) Model Law and Art. V(2)(b) NY Convention. These provisions provide for the setting aside of an award only where the recognition or enforcement of the award would perpetuate a result that is contrary to public policy [ILA Report, Recommendations 3(b)&4]. A finding that RESPONDENT did not breach the Contract by this Tribunal would by no means endorse or
encourage the use of child labour. Thus, an award denying avoidance of the Contract would not be liable to setting aside on grounds of public policy.

100. It cannot be overemphasised that no child labour was used in the production of the shirts forming the subject of the Contract. Hence, RESPONDENT’s performance of the Contract cannot be faulted on any public policy grounds. The use of child labour in RESPONDENT’s other production facilities, however misguided, has no connection with the Contract.

101. An award in favour of RESPONDENT would be a mere recognition that RESPONDENT’s use of child labour in production processes wholly divorced from the Contract cannot be tantamount to a breach of its obligations under this Contract. Should the Tribunal find that RESPONDENT was not in breach of its obligations under the Contract, public policy cannot and should not form a standalone ground for the Tribunal to avoid the Contract.

VII. CLAIMANT WRONGFULLY AVOIDED THE CONTRACT BECAUSE EVEN IF THERE WAS A BREACH OF CONTRACT, IT DID NOT AMOUNT TO A FUNDAMENTAL BREACH UNDER ART. 25 CISG.

102. Assuming RESPONDENT breached the Contract, CLAIMANT must further demonstrate that this breach amounted to a fundamental breach within the meaning of Art. 25 CISG before CLAIMANT is entitled to avoid the Contract. The threshold for establishing a fundamental breach is a high one since avoidance under the CISG is a remedy of last resort [Zeller 59; Magnus 423; Cobalt Sulphate Case].

103. As has been addressed earlier, CLAIMANT has alleged that RESPONDENT has breached Art. 12 of the Contract and Art. 35(2)(b) CISG. In response, RESPONDENT submits that even if CLAIMANT succeeds in establishing the alleged breaches, neither of these breaches rose to the level of a fundamental breach because [A] CLAIMANT did not suffered substantial deprivation of its expectations under the Contract. In the alternative, [B] RESPONDENT did not foresee and a reasonable person in RESPONDENT’s position would not have foreseen the consequences of the alleged breach.
A. CLAIMANT has not suffered substantial deprivation of its expectations under the Contract.

104. Under Art. 25 CISG, CLAIMANT is required to show that it has suffered such detriment as to substantially deprive it of what it was entitled to expect under the Contract. CLAIMANT has listed a multitude of factors for determining whether a breach is fundamental. Out of these factors, it seems CLAIMANT is mainly seeking to establish a fundamental breach on the grounds that it has been deprived of an essential interest under the Contract [Cl. Memo ¶¶43-44], the delivered goods were not fit for the purpose for which they were purchased [Cl. Memo ¶¶45&48], and that damages are insufficient as a remedy [Cl. Memo ¶¶45&47].

105. Nonetheless, CLAIMANT’s allegations are inaccurate and fail to prove the existence of a fundamental breach. RESPONDENT submits that CLAIMANT cannot claim fundamental breach of the Contract since [1] CLAIMANT was not deprived of its essential expectations under the Contract, [2] CLAIMANT could still make reasonable use of the goods, and [3] damages are an adequate remedy for any loss resulting from the alleged breaches.

1. CLAIMANT was not deprived of its essential expectations under the Contract.

106. CLAIMANT has asserted that a fundamental breach will result where there is deprivation of the essential expectations under a contract [Cl. Memo ¶43]. CLAIMANT’s main priority in contracting with RESPONDENT was to expeditiously procure polo shirts at a low price – this expectation was met when RESPONDENT duly delivered shirts conforming to all the specifications in the Contract. The alleged breach of the Contract was due to RESPONDENT’s incidental use of child labour in its other production facilities unconnected with the production of the shirts. Nonetheless, compliance with OPE’s ethical standards was never an essential expectation under the Contract.

107. A party’s expectations under a contract are to be discerned from the terms of the contract and other circumstances preceding the contract, such as the contractual negotiations [Enderlein/Maskow 112; Ferrari 497]. It is also crucial to objectively establish what the parties themselves have made important in their contract [Magnus 426; Meat Case].

108. On the facts, it is evident that CLAIMANT’s essential expectations under the Contract were to procure polo shirts at a competitive price and in a short time frame. CLAIMANT openly
admits that it was specifically tasked to find a manufacturer which could handle the order on a rush basis [SoC ¶9]. In particular, CLAIMANT’s overriding interest was to procure the shirts at the lowest price possible. CLAIMANT had the option of contracting with other suppliers which could also meet the requested delivery date and presumably did not appear to have raised doubts regarding their ethical conduct. Yet, CLAIMANT chose to contract with RESPONDENT as it was enticed by the extremely low price offered by RESPONDENT [SoC ¶10].

109. On the other hand, the terms of the Contract itself and CLAIMANT’S actions in connection with the Contract strongly suggest that adherence to strict ethical standards was not an essential expectation under the Contract. The Contract did not require strict compliance with OPE’s policy and ethical standards [see ¶¶73-81, supra]. Furthermore, CLAIMANT’s lackadaisical conduct in enforcing OPE’s policy is a clear indicator that compliance with strict ethical standards was not expected of RESPONDENT.

110. RESPONDENT was not under a duty to uphold strict ethical standards, nor was compliance with those standards of “special interest” under the Contract. Accordingly, CLAIMANT’s contention that the violation of ethical standards would amount to a fundamental breach cannot stand [Cl. Memo ¶44].

111. In addition, RESPONDENT was not aware or was given a reason to be aware that compliance with Art. 12 of the Contract was “so essential that CLAIMANT would have refused the Contract if he had known of such future breach” [Egyptian Cotton Case]. RESPONDENT could not have anticipated that inadvertent employment of children in its other facilities which have no nexus to the performance to the Contract would deter CLAIMANT from contracting with them [see ¶¶117-121, infra].

2. CLAIMANT could reasonably use the goods for resale.

112. RESPONDENT maintains that the shirts were fit for sale in Oceania [see ¶¶91-94, supra]. In any case, CLAIMANT could resell the shirts elsewhere to another buyer, which it subsequently did. It is an established principle that where a party can make reasonable use of the goods, in particular to resell them, the court will not find a fundamental breach and will simply award damages for any loss suffered [Cobalt Sulphate Case, Shoes Case, Model
Locomotives Case]. Thus, as the polo shirts are not “totally” [Schlechtriem/Schwenzer 427] or “practically” [Café Inventory Case] useless, CLAIMANT cannot avoid the contract and must instead be restricted to claims for damages and the right of price reduction.

113. CLAIMANT managed to successfully resell the shirts to Pacifica Trading at a mere 15% loss. Since the delivered shirts were still of reasonable use to CLAIMANT, CLAIMANT should at best be awarded damages for breach instead of invoking such a drastic measure as avoidance [SoC ¶24].

114. CLAIMANT may argue that reselling the shirts would harm the reputation of DC and OPE, but this concern is unfounded. Even though the shirts carried the label “Yes Casual” on the inside collar, there was the simple solution of snipping off the label to extinguish any association with the brand. It was also possible to resell the shirts to other markets where the “Yes Casual” brand is not recognised. There would have been no ramifications on the reputation of DC or OPE since the branding would be inconsequential in such markets.

3. Damages are an adequate remedy for any loss resulting from the alleged breach.

115. CLAIMANT has argued that it should be permitted to avoid the contract as any continuing association with RESPONDENT will put its reputation at risk [Cl. Memo ¶45]. This is a gross exaggeration. RESPONDENT submits that avoidance of the Contract is not at all necessary and damages can adequately compensate CLAIMANT for any loss resulting from the alleged breach.

116. In order to sever any association with RESPONDENT, CLAIMANT only needs to remove RESPONDENT from its list of suppliers. The Contract does not create a long-term relationship between CLAIMANT and RESPONDENT; it only regulates a single transaction which has been duly performed and completed. Furthermore, to ensure a clean break of ties with RESPONDENT in the eyes of the public, CLAIMANT could also issue a public statement declaring that no further contracts will be performed with RESPONDENT and that RESPONDENT will be removed from their list of suitable suppliers, pending a determination of RESPONDENT’s compliance with OPE’s policy. In fact, this is a strategy commonly employed by companies facing similar situations to preserve their reputation.
For instance, Nike issued such a public statement when news broke that its supplier used child labour in the stitching of its soccer balls [Clark in The Guardian].

**B. ALTERNATIVELY, THE CONSEQUENCES OF THE ALLEGED BREACH WERE NOT FORESEEABLE.**

117. There was no fundamental breach of the Contract as RESPONDENT did not foresee and a reasonable person of the same kind as RESPONDENT would not have foreseen the consequences of the alleged breach [Art. 25 CISG]. A reasonable person “of the same kind” as RESPONDENT would be a merchant dealing in the same trade sector as RESPONDENT [Graffi 339]. In light of the available knowledge that could be imputed to RESPONDENT or a reasonable manufacturer in the apparel industry, CLAIMANT’s assertion of fundamental breach must fail as the result of the alleged breach was unforeseeable.

118. It bears emphasising that CLAIMANT is seeking to recover massive sums for the extensive reputational and financial losses that purportedly stemmed from the alleged breach [Cl. Memo ¶47]. This colossal sum is an “unusual” and “excessive” amount. In the event that the nature of the CLAIMANT’S liability to third parties is “unusual, excessive, or unjustified”, it is probable that losses flowing from the breach are unforeseeable [Saidov 108].

119. The question of whether RESPONDENT actually foresaw the consequences of the breach must be evaluated by reference to RESPONDENT’s “knowledge of the facts surrounding the transaction” [Babiak 120; Will ¶2.2.2.1]. Since RESPONDENT was not aware of the ultra-sensitivity to ethical standards of the market in Oceania [see ¶¶, supra], it could not possibly have foreseen that the use of child labour in plants completely unrelated to the manufacturing of the shirts could have led to an overblown reaction such that the reputation and share prices of OPE and DC were negatively affected. In particular, it would be extremely unreasonable to expect RESPONDENT to be cognisant of the entity “Children Protection Fund of Oceania”, or that it is a major investor in OPE. As such, CLAIMANT’s liability to the Children Protection Fund of Oceania could not have been foreseeable to RESPONDENT.

120. Additionally, a reasonable manufacturer in the apparel industry would also not have foreseen such acute sensitivity of the market in Oceania that the violation of ethical
standards would engender such widespread repercussions. While the “Yes Casual” brand is well-known to manufacturers of clothing in Equatoriana, there is no indication that the brand is recognised as an “ethical” brand.

121. CLAIMANT has argued that because prohibition of child labour has become a “widely accepted principle in international public law and business practice” [Cl. Memo ¶52], a reasonable person must therefore foresee such consequences. While RESPONDENT acknowledges that child labour has indeed received greater attention in international public law, that does not necessarily or automatically suggest that a reasonable person would have foreseen such exaggerated consequences from the use of child labour. To date, there is little or no evidence that major fashion brands have faced immense financial losses due to their association with suppliers that have employed child labour.

VIII. REQUEST FOR RELIEF

122. RESPONDENT respectfully requests the Tribunal to find that:

   a. Mr. Short’s witness statement must be considered;

   b. RESPONDENT was not liable for the late delivery of the polo shirts;

   c. RESPONDENT had complied with its obligations under the Contract;

   d. Even if RESPONDENT had breached the Contract, it does not amount to a fundamental breach under Art. 25 CISG and therefore, CLAIMANT wrongfully avoided the Contract;

   e. CLAIMANT is not entitled to the damages, costs and interests that it seeks.

Respectfully signed and submitted by counsel on 17 January 2013,

/s/             /s/             /s/
Ashish Kamani  Chin Jun Qi  Kam Kai Qi
/s/             /s/             /s/
Ng Wan-E, Cheryl Priya Gobal