FOURTEENTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2006 – 2007

MEMORANDUM

FOR

MEDITERRANEO ELECTRODYNAMICS S.A.

- RESPONDENT -

TRIXIE BASTIAN
PHILLIPP BANJARI
JAN-HENNING BUSCHFELD
NORA KOVACOVA

UNIVERSITY OF COLOGNE

UNIVERSITY OF COLOGNE

CENTER FOR TRANSNATIONAL LAW

(CENTRAL)

TEAM MEMBERS:

TRIXIE BASTIAN
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FOURTEENTH ANNUAL

WILLEM C. VIS

INTERNATIONAL

COMMERCIAL ARBITRATION MOOT

2006 – 2007

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW

PACE UNIVERSITY SCHOOL OF LAW

WHITE PLAINS, NEW YORK

U.S.A.

MOOT CASE NO. 14

LEGAL POSITION

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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INDEX OF ABBREVIATIONS

AFEC	Austrian Federal Economic Chamber in Vienna
Agency Convention	Convention on Agency in the International Sale of Goods of 17 February 1983
Am. J. Comp. Law	American Journal of Comparative Law
Amp	Ampere
Art.	Article
Artt.	Articles
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
BG	Bundesgericht (Swiss Supreme Court)
BGH	Bundesgerichtshof (German Federal Supreme Court)
CAB-Rules	Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CAB-Tribunal	Tribunal constituted in accordance with the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CCIR	Chamber of Commerce and Industry of Romania
cf.	confer (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Ex.	CLAIMANT's Exhibit
Cl. Memo.	Memorandum for CLAIMANT
Co.	Company
Court of Arbitration	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)
ed.	Editor
eds.	Editors

e.g.	exemplum gratia (for example)
et seq.	et sequentes (and following)
Fn.	Footnote
HK	Handelskammer (Chamber of Commerce)
ICC	International Chamber of Commerce
ICC Bull.	ICC International Court of Arbitration Bulletin
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est (that means)
IHR	Internationales Handelsrecht (German Law Journal)
Inc.	Incorporated
Int. A.L.R.	International Arbitration Law Report
Int'l	International
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (German Law Journal)
J. Comp. Law	Journal of Comparative Law
J. Int'l Arb.	Journal of International Arbitration
J.L. & Comm.	Journal of Law and Commerce
JZ	Juristenzeitung (German Law Journal)
LCIA	London Court of International Arbitration
LG	Landgericht (German Regional Court)
Ltd	Limited
NAI	Netherlands Arbitration Institute
NJW	Neue Juristische Wochenschrift (German Law Journal)
No.	Number
Nos.	Numbers
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Court of Appeals)
p.	Page
para.	Paragraph
paras.	Paragraphs
PECL	Principles of European Contract Law
P.O.	Procedural Order

pp.	Pages
RCCP	Romanian Code of Civil Procedure
Resp. Ex.	RESPONDENT's Exhibit
RIW	Recht der Internationalen Wirtschaft (German Law Journal)
S.A.	Société anonyme (Public Company)
SCC	Stockholm Chamber of Commerce
Sec.	Section
Sec. Comm.	Secreteriat Commentary
St. of Cl.	Statement of Claim
St. of Def.	Statement of Defence
U.K.	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of 2004
UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods
U.S.	United States
v.	versus (against)
Vol.	Volume
YCA	Yearbook of Commercial Arbitration
ZCC	Zurich Chamber of Commerce

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[CITED AS: *CISG*]

On behalf of our client Mediterraneo Electrodynamics S.A., RESPONDENT, we respectfully make the following submissions and request the Arbitral Tribunal to hold that:

- The arbitration clause in Sec. 34 of the contract concluded on 12 May 2005 does not establish jurisdiction of the Tribunal to consider the dispute **[First Issue]**.
- RESPONDENT delivered fuse boards that were in conformity with the contract **[Second Issue]**.
- CLAIMANT's default to complain to the Equatoriana Regulatory Commission excuses any failure of RESPONDENT to deliver goods conforming to the contract **[Third Issue]**.

FIRST ISSUE: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION TO CONSIDER THE DISPUTE CONCERNING THE SALES CONTRACT.

1 The Arbitral Tribunal established in accordance with the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania [*hereafter: CAB-Rules*] has no jurisdiction since the arbitration clause in Sec. 34 of the contract contains no agreement to arbitrate before a tribunal established under these rules [*hereafter: CAB-Tribunal*] **(A.)**. If the Tribunal holds that the arbitration clause refers to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania [*hereafter: Court of Arbitration*], the CAB-Rules are still not applicable pursuant to Art. 72(2) CAB-Rules **(B.)**. The fact that RESPONDENT proceeded in accordance with the CAB-Rules does not prevent it from challenging the Tribunal's jurisdiction, Art. 54(1) CAB-Rules [*cf. Art. 16(2) 1st sentence UNCITRAL Model Law on International Commercial Arbitration; Art. 358[12] Romanian Code of Civil Procedure; BGH, III ZR 85/81 (Germany 1983)*].

A. The Arbitral Tribunal has no jurisdiction since the arbitration clause in Sec. 34 of the contract contains no agreement to arbitrate before a CAB-Tribunal.

2 No party shall be forced to arbitrate before a tribunal on which it has not agreed [*cf. Berger, Private Dispute Resolution, para. 20-50*]. Thus, a CAB-Tribunal has jurisdiction only if the parties involved agreed to arbitrate before this specific tribunal. Since the arbitration clause in Sec. 34 lacks the mandatory agreement to arbitrate before a CAB-Tribunal, the clause does not establish jurisdiction of this Arbitral Tribunal **(I.)**. Even if the Tribunal were to find that a mere will to arbitrate is sufficient to establish jurisdiction of an arbitral tribunal, the clause calls for ad hoc arbitration and does not confer jurisdiction on this Tribunal **(II.)**.

I. Due to the lack of a mandatory agreement to arbitrate before a CAB-Tribunal, the clause does not establish jurisdiction of the Arbitral Tribunal.

3 The agreement to arbitrate before a specific tribunal is mandatory to establish jurisdiction **(1.)**. The wording of the clause in Sec. 34 of the contract does neither contain an express nor an implied agreement to arbitrate before a CAB-Tribunal **(2.)**.

1. The agreement to arbitrate before a specific tribunal is mandatory to establish jurisdiction.

4 The arbitral agreement is the basic source of the powers of an arbitral tribunal [*Redfern/Hunter, para. 1-11*]. By agreeing to submit disputes to arbitration, a party relinquishes its courtroom rights, including that to subpoena witnesses and the possibility to appeal [*ICSID, Case No. ARB/81/1 (1983); First Options of Chicago v. Kaplan (U.S. 1995); Parsons & Whittemore Overseas v. Société Générale de l'Industrie du Papier (U.S. 1974)*]. Such a far-reaching waiver requires that an effective arbitration agreement exists beyond any doubt [*Nokia-Maillefer SA v. Mazzer (Switzerland 1993)*]. Therefore, a certain tribunal shall only have jurisdiction if the parties expressed their intent to confer jurisdiction on *that* specific tribunal or if an interpretation of the arbitration agreement clearly shows this intent.

2. The wording of the clause in Sec. 34 of the contract does neither contain an express nor an implied agreement to arbitrate before a CAB-Tribunal.

5 The Parties did not expressly agree to arbitrate before a CAB-Tribunal **(a.)**. Such an agreement can neither be established by means of interpretation as the terms of the arbitration clause are ambiguous **(b.)**.

a. The Parties did not expressly agree to arbitrate before a CAB-Tribunal.

6 The arbitration clause in Sec. 34 of the contract requires settlement of the dispute by "the International Arbitration Rules used in Bucharest" [*Cl. Ex. No. 1*]. Since there exists no set of arbitration rules with this title, the clause does neither contain any express indication in favour of the CAB-Rules nor does it identify the Court of Arbitration of the CCIR to administer the proceedings. Thus, the clause is pathological [*cf. Fouchard/Gaillard/Goldman, para. 484*] and lacks an express agreement between the Parties to arbitrate before this Tribunal.

b. Such an agreement cannot be established by means of interpretation as the terms of the arbitration clause are ambiguous.

7 Since the common intent of the Parties cannot be determined with certainty, RESPONDENT agrees with CLAIMANT's conclusion that the arbitration clause has to be interpreted [*Cl.*

Memo. at 7 et seq.]. If arbitration clauses suffer from imprecision, courts and legal doctrine apply the principle of *in favorem validitatis* in a way that an imprecision does not render the clause invalid *per se*. However, they suggest that the arbitration rules or the court entrusted with the administration must be unambiguously determinable by way of interpretation [*OLG Köln, 9 U 190/04 (Germany 2005); BGH, III ZR 85/81 (Germany 1982)*]. If the clause is not unambiguously determinable in favour of institutional arbitration, disputes shall be settled by state courts due to the presumption that domestic courts are generally competent to hear a case absent an arbitration agreement [*BG, 4P.67/2003 (Switzerland 2003); Compaignie tunisienne de navigation Cotunav v. société Comptoir commercial André (France 1991)*].

8 Due to the fact that the clause lacks any indication of an arbitral institution, an interpretation of the term "used in" does not unambiguously lead to institutional arbitration administered by the Court of Arbitration **(aa.)**. The reference to Bucharest is ambiguous since it can be interpreted as the place where the rules can generally be used or as the seat of the Arbitral Tribunal **(bb.)**. Contrary to CLAIMANT's assertions, the reference to "International Arbitration Rules" does not lead to the CAB-Rules as they are no complete set of exclusively *international* arbitration rules **(cc.)**. Additionally, due to the variety of equivalent possibilities to interpret the clause, CLAIMANT, as the drafter of the clause, bears the risk of its defectiveness according to the principle of *contra proferentem* **(dd.)**.

aa. An interpretation of the term "used in" does not unambiguously lead to institutional arbitration administered by the Court of Arbitration as the clause lacks an indication of an arbitral institution.

9 Disputes shall only be settled under the administration of an arbitral institution if it is clear that the parties opted for institutional arbitration rules [*Raeschke-Kessler/Berger, para. 75*]. A German Higher Court held that if an arbitration agreement does not specify the competent court of arbitration unambiguously – in that case two permanent courts of arbitration fell within the ambit of the wording of the arbitration agreement – the agreement is null and void [*BayObLG, 4Z SchH 13/99 (Germany 2000)*]. The wording of the clause at hand, "International Arbitration Rules used in Bucharest", does not even contain the name of any arbitral institution. It neither contains a synonym of the term "institution" such as "organisation", "association", "arbitrators at the Court of" nor any abbreviation of any arbitral institution. Further, there is no other indication in favour of institutional arbitration like the designation of the rules of an arbitration court, institution or even a chamber of commerce. It

is therefore not identifiable that the Parties wanted to refer their disputes to institutional arbitration.

10 The solutions proposed by the cases cited by CLAIMANT [*Cl. Memo. at 18*] do not support the designation of an arbitral institution in the case at hand. In these cases the terms "international trade arbitration organization in Zurich" [*ZCC, Preliminary Award of 25.11.1994*], "in accordance with the ICC" [*Weige Wood Craft v. Taiwan Fuyuan (China 1996)*], "arbitrators of the Geneva Court of Justice" [*OLG Hamm, 29 Sch 1/05 (Germany 2005)*] and "International Commercial Arbitration Court at the Chamber of Commerce and Industry of the City of Moscow" [*OLG Köln, 9 Sch 12-04 (Germany 2004)*] provided sufficient grounds to assume that institutional arbitration was intended by the parties. In the absence of any comparable indication in favour of institutional arbitration the Parties cannot have referred to institutional arbitration. In a case before the Scotland Court of Session where the arbitral institution mentioned in the arbitration clause was even non-existing, the Court held that the arbitration clause was "void for uncertainty". Despite the parties' will to arbitrate it refused to settle "the case in favour of arbitration" [*Bruce v. Kordula and others (U.K. 2001)*]. Hence, contrary to CLAIMANT's assertion [*Cl. Memo. at 9 et seq.*], a clause cannot be considered valid merely because the parties wanted dispute resolution by arbitration [*cf. Fouchard/Gaillard/Goldman, para. 481; Cr.Cass. (Lebanon 1987)*].

11 Contrary to CLAIMANT's assertions, the clause does not call for institutional arbitration administered by the Court of Arbitration of the CCIR [*Cl. Memo. at 20 et seq.*]. The Court of Arbitration is not entrusted because the applicability of its rules cannot be determined by the implied terms theory. According to the implied terms theory the term to be implied has to be "reasonable and equitable" and so obvious for an "officious bystander" that it "goes without saying" [*Lewison, para. 5.06*]. Relying on this theory, CLAIMANT assumes that the Parties intended the clause to be read "International Arbitration Rules [*specifically*] used in Bucharest" [*Cl. Memo. at 20 et seq.*], taking for granted that the rules are used in Bucharest as a matter of practice and therefore have a uniquely Romanian character [*Cl. Memo. at 40*]. These prerequisites are fulfilled by the Romanian Arbitration Act found in Book IV of the Romanian Code of Civil Procedure [*hereafter: RCCP*] as well. Thus, regardless of the question whether the term "specifically" is the only possible term to be implied, the implication of this term does not justify the conclusion that institutional arbitration was intended by the Parties.

12 The fact that RESPONDENT's preformulated contract clause originally called for institutional arbitration does not support an interpretation of the clause in favour of

institutional arbitration. RESPONDENT preferred institutional arbitration if administrated by the "Mediterraneo Arbitral Center" [*St. of Def. at 5*], but it did not insist on institutional arbitration in any case. The choice of a dispute resolution mechanism was not an issue that RESPONDENT would have let interfere with its negotiations [*Resp. Ex. No. 1*]. RESPONDENT has had only three arbitrations during its four decades in business [*Resp. Ex. No. 1*], two of them were institutional, one was an ad hoc arbitration [*P.O. No. 2 at 15*]. Regarding its arbitration practice it can be assumed that RESPONDENT has not yet formed a clear preference for either ad hoc or institutional arbitrations. This can be deduced from the fact that, even though Mr. Stiles was surprised by the non-mentioning of an institution in the arbitration clause submitted by CLAIMANT, RESPONDENT did not notice that such lack might pose a problem but could simply have concluded that CLAIMANT did not want dispute resolution under the auspices of an arbitral institution.

bb. The reference to Bucharest is ambiguous since it can be interpreted as the place of hearings or as the seat of arbitration.

13 Contrary to CLAIMANT's assertions [*Cl. Memo. at 12 et seq.*], the reference to Bucharest is highly ambiguous. First, by reading the clause as "the International Arbitration Rules [*to be*] used in Bucharest" the reference to Bucharest can be understood as the indication of the place of the actual application of the rules, i.e. the place where the hearings are conducted. The fact that the Arbitral Tribunal scheduled the oral arguments in March in Hong Kong and in March/April in Vienna [*P.O. No. 1 at 4*] does not contradict the assumption that the Parties wanted Bucharest to be the place of hearings. Understanding Bucharest as the place of hearings would render the clause invalid. As there are various sets of "International Arbitration Rules" that can be used there, it is unclear which of them would be the applicable set of "International Arbitration Rules" [*cf. Cl. Memo. at 36*]. The German Federal Supreme Court held that an arbitration clause is invalid if two sets of arbitration rules can be considered to be the applicable rules [*BGH, III ZR 85/81 (Germany 1982)*]. However, in the case at hand there are even more rules to be taken into account: In particular, the Rules of Arbitration of the ICC, the LCIA Arbitration Rules and the International Arbitration Rules of the AAA are all sets of well known arbitration rules specifically drafted for the settlement of international commercial disputes. This uncertainty concerning the applicable rules would render the clause invalid.

14 Alternatively, the reference to Bucharest can be interpreted as the denomination of the seat of the Arbitral Tribunal. The place where the actual hearings take place must be distinguished

from the seat of the arbitration [*Lew/Mistelis/Kröll, para. 8-27*]. The use of the words "shall take place in Vindobona" contradicts the assumption that the seat of arbitration shall be located there: Contrary to the arbitration clause at hand, the model clause of the Court of Arbitration suggests the formulation "The place of arbitration is at…" [*http://arbitration.ccir.ro/arbclause.htm*] to determine the seat of the arbitral tribunal. Also other standard clauses propose formulations employing nouns instead of verbs, e.g. "The place of arbitration is…" [*www.dis-arb.de/scho/schiedsvereinbarung98-e.html*], "The place of arbitration shall be…" [*www.cidra.org/modelarb.html*] and "The seat, or legal place, of arbitration shall be…" [*www.lcia-arbitration.com*]. In the opposite, the use of verbs in the arbitration clause in Sec. 34 suggests an activity at the place like the conduct of hearings at that place.

15 If Vindobona was understood as the factual place of hearings, the reference to Bucharest could indicate the seat of arbitration, resulting in the application of the mandatory arbitration law of Bucharest, i.e. Book IV RCCP [*cf. Lew/Mistelis/Kröll, para. 8-24*]. Mr. Konkler's statement that the president of CLAIMANT seemed to be looking forward to conducting an arbitration in Vindobona in order to visit the opera [*Resp. Ex. No. 1*] underlines the Parties' intent to stipulate Vindobona as the place of hearings. The seat of arbitration is the "juridical seat" of the arbitration and thus not necessarily the place where the hearings are actually conducted [*Berger, Private Dispute Resolution at 16-66*]. Otherwise, if Vindobona was understood as the seat of arbitration, the Parties would have no reason to "visit" Vindobona.

cc. Contrary to CLAIMANT's assertions, the reference to "International Arbitration Rules" does not lead to the applicability of the CAB-Rules as they are no complete set of exclusively international arbitration rules.

16 The fact that the current dispute derives from an international commercial relationship and the fact that the entire denomination of "International Arbitration Rules" is capitalised suggests that the Parties intended a set of rules that is exclusively applicable to *international* arbitration and that is especially drafted for the use in international proceedings [*cf. Cl. Memo. at 34*]. Additionally, the use of a definite article ("*the* International Arbitration Rules") demonstrates that the rules designated by the Parties must be a specific set of international arbitration rules.

17 However, the only part of the CAB-Rules that is specifically drafted for international arbitrations is Chapter VIII, Art. 72 to 77 CAB-Rules. The preceding chapters of the CAB-Rules that form their preponderant part contain provisions which apply primarily to domestic arbitrations. They are simply complemented by Chapter VIII in case of an application to

international proceeding. Moreover, the title of the CAB-Rules, "Arbitration Rules" instead of "*International* Arbitration Rules", emphasizes that they are predominantly of domestic character. The CAB-Rules are not even frequently used in international proceedings before the Court of Arbitration. Only twenty percent of its cases are international [*P.O. No. 2 at 11*]. Therefore, the CAB-Rules cannot be "*the International* Arbitration Rules".

18 It is even less likely that the CAB-Rules are applicable since CLAIMANT, as the drafter of the arbitration clause, did not use the model clause recommended by the Court of Arbitration. This clause is reproduced on the official website of the CCIR [*http://arbitration.ccir.ro/arbclause.htm*] and could easily have been incorporated. It reads "All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by the *Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania* in accordance with the Rules of Arbitration of this Court". However, CLAIMANT deviated from the wording of the model clause. It did not refer to "Rules of Arbitration of this Court" but simply "the International Arbitration Rules". Hence, one can assume that CLAIMANT did not want the CAB-Rules to be applied.

dd. Additionally, due to the variety of equivalent possibilities to interpret the clause, CLAIMANT as the drafter the clause bears the risk of its defectiveness according to the principle of *contra proferentem*.

19 Even if the Tribunal doubts that the above reasons alone oust the jurisdiction of the CAB-Tribunal, the remaining ambiguity of the clause shall be construed *contra proferentem* – against the drafting party [*cf. CIETAC, Case No. 20000107 (2000); ICC, Award No. 8261 (1996); Bobux v. Raynor (New Zealand 2001); ICC, Partial Award in Case No. 7110 (1995); cf. Art. 4.6 UNIDROIT Principles; Art. 5:103 PECL; § 206 American Restatement 2nd; Bernstein/Lookofsky, p. 177; DiMatteo, p. 202*]. Whilst interpreting the arbitration clause in order to give effect to the Parties' real intention, it has to be taken for granted that a defective clause can only be upheld if a significant degree of certainty regarding the real intention of the Parties is achieved by way of interpretation [*cf. Fouchard/Gaillard/Goldman, paras. 479, 485*].

20 To impose on CLAIMANT the risks related to its inaccurate drafting of the arbitration clause is justified under the specific circumstances of the case at hand. The arbitration clause was not drafted as an inconsiderate "midnight clause" [*cf. Kröll, p. 255*], which would have made the appearance of mistakes more likely. Instead, CLAIMANT always uses this arbitration clause

and deliberately exchanged the arbitration clause in Sec. 34 of the contract [*St. of Def. at 5; Resp. Ex. No. 1*]. Still, neither the official name of the Court of Arbitration was mentioned, nor any abbreviation was used in the clause drafted by CLAIMANT. Moreover, the Court of Arbitration provides a standard clause which could have simply been adopted by CLAIMANT to unequivocally choose the Rules of Arbitration of that Court to govern the proceedings. However, CLAIMANT did not do so. Being the drafter of the clause, CLAIMANT had to ensure transparency to avoid uncertainty and ambiguity [*cf. Canaris/Grigoleit, p. 461*]. As it is now impossible by all means of interpretation to find a plain meaning of the arbitration clause beyond any doubt, CLAIMANT should not be entitled to rely on that obscurity [*cf. Fouchard/Gaillard/Goldman, para. 479; Iran-U.S. Claims Tribunal, Award No. 206-34-1 (1985)*] and to benefit in an unjustified way from its own negligence to designate any existing arbitration rules. By interpreting the clause in favour of CLAIMANT's assertions the ambiguity created solely by CLAIMANT would be awarded. Conversely, dissolving the Tribunal in favour of regular court proceedings would leave both Parties in an equal position with all ordinary procedural options and would not deprive CLAIMANT from its procedural rights.

21 The interpretation *contra proferentem* is not affected by the fact that RESPONDENT did not inquire about the meaning of the clause before signing the contract [*Cl. Memo. at 29*]. Since the arbitration clause only becomes relevant if a dispute arises after signing the contract, the choice of dispute resolution mechanism was not an issue that RESPONDENT would let interfere with its precontractual negotiations [*Resp. Ex. No. 1*]. Additionally, the fact that CLAIMANT substituted exclusively this single clause of the contract form made RESPONDENT reasonably believe that CLAIMANT is experienced in the area of arbitration and that it would insert a well considered and thus valid clause [*cf. Cl. Memo. at 15, 30*]. CLAIMANT may not take any advantage of the high ambiguity of the clause. The Tribunal shall hold the arbitration clause invalid and refer the Parties to domestic courts.

II. Even if the Tribunal were to find that a mere will to arbitrate is sufficient to establish jurisdiction of an arbitral tribunal, the clause calls for ad hoc arbitration and does not lead to the jurisdiction of this Tribunal.

22 Even if the Tribunal finds that the clause, although it cannot be interpreted unambiguously, can be upheld on the sole ground that the Parties agreed on dispute settlement by arbitration, this would lead to the application of ad hoc arbitration rules. A Tribunal constituted under the institutional CAB-Rules would therefore not have jurisdiction.

23 In *Lucky-Goldstar International Ltd v. Ng Moo Kee Engineering Ltd (Hong Kong 1993)*, a case relied upon by CLAIMANT [*Cl. Memo. at 9*], the parties agreed on arbitration in a "3rd country, under the rule of the 3rd country and in accordance with the rules of procedure of the International Commercial Arbitration Association". The High Court of Hong Kong held that "the reference to an unspecified third country, to a non-existent organization and to non-existent rules did not render the arbitration agreement inoperative or incapable of being performed". Nevertheless, the Court held that the proceedings shall be considered as an ad hoc arbitration under the law of a 3rd country to be chosen. Under these circumstances the clause at hand leads to ad hoc arbitration under the arbitration law at the seat of arbitration [*cf. Lew/Mistelis/Kröll, para. 8-24*], be it the UNCITRAL Model Law on International Commercial Arbitration as the arbitration law in Danubia [*St. of Cl. at 21*] or be it Book IV RCCP as the arbitration law in Bucharest.

B. If the Tribunal were to find that the clause refers to the Court of Arbitration, the CAB-Rules are still not applicable pursuant to Art. 72(2) CAB-Rules.

24 In case the Court of Arbitration is entrusted with the administration of these proceedings, the CAB-Rules generally apply pursuant to Art. 5 CAB-Rules. However, it is possible to deviate from this procedure by opting for other rules of arbitral procedure under Art. 72(2) CAB-Rules. In such case, a tribunal established under the CAB-Rules would not have jurisdiction since the wrong set of rules would have been applied to its constitution. An award rendered by the CAB-Tribunal could therefore be vacated [*cf. Art. V(1)(d) NY Convention*].

25 The interpretation of the arbitration clause shows that the Parties opted for international arbitration rules. Since the CAB-Rules are no exclusively international arbitration rules [*see supra para. 16*], it can be assumed that the Parties wanted to deviate from the CAB-Rules according to Art. 72(2) CAB-Rules in order to designate arbitration rules specifically drafted for international arbitrations. Art. 72(2) CAB-Rules allows the choice of any rules. Contrary to CLAIMANT's assertions, the provision does not state that an express agreement is required to apply any other set of rules than the CAB-Rules [*Cl. Memo. at 24*]. Hence, it is sufficient if the rules preferred by the Parties can be determined by means of interpretation. If the Parties had intended the CAB-Rules to govern their arbitration, it would have been useless to explicitly refer to "*International* Arbitration Rules" due to the general automatism of Art. 5 CAB-Rules which leads to the application of the CAB-Rules. Hence, it cannot reasonably be concluded that the CAB-Rules were designated in the arbitration clause but another – exclusively international – set of rules.

26 The fact that the Parties wanted to deviate from the CAB-Rules pursuant to Art. 72(2) CAB-Rules is further emphasised by the CAB-Rules' genuine connection to the Romanian arbitration act. The Parties' definite designation of "*International* Arbitration Rules" illustrates their intent to make use of arbitration rules independent of any domestic law. As the Parties come from different countries and as the arbitration clause does neither show a connection to Mediterraneo nor to Equatoriana, it can be assumed that the Parties wanted to settle their disputes under arbitration rules independent of domestic law to grant neutrality of the proceedings to the greatest possible extent [*cf. Park, p. 513*]. According to Art. 1(2) CAB-Rules the rules are based on Book IV of the RCCP and they shall be complemented by the ordinary provisions of the RCCP pursuant to Art. 79 CAB-Rules. Hence, binding the Parties to the CAB-Rules contradicts their intent for proceedings independent from any national law.

27 It is likely that the rules designated by Art. 72(2) CAB-Rules shall be the UNCITRAL Arbitration Rules. Art. 72(2) 2nd sentence CAB-Rules explicitly mentions the UNCITRAL Arbitration Rules. It can be assumed that when creating the option to deviate in favour of "any other rules" the drafters of the CAB-Rules primarily beard these rules in mind. As the UNCITRAL Arbitration Rules are promoted by Art. 72(2) CAB-Rules, a reasonable person would conclude that under this provision the designation of the "International Arbitration Rules" leads to the UNCITRAL Arbitration Rules since they are the typical international arbitration rules, detached from any domestic law [*cf. Sanders, p. 175; Schütze, p. 677 at 2, 3; van Hof, p. 8; Rubino-Sammartano, para. 5.5*]. They are intended for a world-wide use regardless of legal or political systems [*Sanders, p. 173; Weigand, p. 319 at 16*]. Furthermore, the UNCITRAL Arbitration Rules themselves are precise enough to preclude the need for any subsidiary recourse to national laws [*Fouchard/Gaillard/Goldman, para. 201*]. Hence, the UNCITRAL Arbitration Rules provide an elaborate set of rules to govern the Parties' proceedings. They are indeed "International Arbitration Rules" and are therefore more likely the rules designated in the arbitration clause.

28 Contrary to CLAIMANT's assertions [*Cl. Memo. at 39*], the word "International" does very well form part of the official title of the UNCITRAL Arbitration Rules. The abbreviation UNCITRAL stands for the United Nations Commission on *International* Trade Law. Therefore, the "UNCITRAL Arbitration Rules" bear the title of its international drafting organisation in its name. Additionally, as the whole designation of "International Arbitration Rules used in Bucharest" is a misnomer, it is unlikely that a mere capitalisation can be taken to indicate the precise title of the applicable arbitration rules as argued by CLAIMANT. However, it can rather be taken as their characterisation. Even CLAIMANT admits that the

UNCITRAL Arbitration Rules are internationally reputed rules, meant to govern international commercial arbitrations [*Cl. Memo. at 39*]. They are therefore more likely to be the rules referred to in the arbitration clause under Art. 72(2) CAB-Rules.

29 The approach that Art. 72(2) CAB-Rules leads to the application of the UNCITRAL Arbitration Rules is not unusual. Some of the most prestigious centres agreed to act as an appointing authority for the purpose of the Rules, e.g. ICC, AAA and LCIA, and a number of institutions even apply the UNCITRAL Arbitration Rules to arbitrations they supervise as well, e.g. the Cairo Regional Centre for International Commercial Arbitration, the Hong Kong International Arbitration Centre, the Arbitration Institute of the Stockholm Chamber of Commerce and on an optional basis the Japan Commercial Arbitration Association [*Fouchard/Gaillard/Goldman, para. 202*]. Since the Court of Arbitration is fully prepared to administer arbitrations under the UNCITRAL Arbitration Rules [*P.O. No. 2 at 12*] there are substantial facts that support their application.

30 Hence, RESPONDENT respectfully submits that if the Tribunal should interpret the clause as reference to the Court of Arbitration, it shall further conclude that the Parties deviated from the CAB-Rules because they opted for international arbitration rules such as the UNCITRAL Arbitration Rules as permitted by Art. 72(2) CAB-Rules.

SECOND ISSUE: RESPONDENT DELIVERED DISTRIBUTION FUSE BOARDS THAT WERE IN CONFORMITY WITH THE CONTRACT.

31 In case the Tribunal were to find that it has jurisdiction, it shall hold that RESPONDENT performed in accordance with the contract as originally written by delivering distribution fuse boards equipped with JS type fuses, Art. 35(1),(2) CISG **(A.)**. Alternatively, if the Tribunal considers the installation of JS type fuses to be non-conforming with the contract as originally written, RESPONDENT still fulfilled its contractual obligations since the contract was validly modified **(B.)**.

A. RESPONDENT performed its obligations under the contract as originally written.

32 The five primary distribution fuse boards delivered by RESPONDENT are of the quality and description required by the sales contract of 12 May 2005 and the attached engineering drawings, Art. 35(1) CISG **(I.)**. In addition, the distribution fuse boards conform with the contract as there is no particular purpose expressed by CLAIMANT pursuant to Art. 35(2)(b) CISG **(II.)**. Finally, the distribution fuse boards were securely connectable to the electrical power grid and thus fit for their ordinary purpose according to Art. 35(2)(a) CISG **(III.)**.

I. The distribution fuse boards are of the quality and description required by the sales contract of 12 May 2005, Art. 35(1) CISG.

33 According to Art. 35(1) CISG, RESPONDENT had to deliver goods which are of the quality and description required by the contract. The distribution fuse boards meet the specifications since RESPONDENT was obliged by the contract and the attached engineering drawings to furnish the fuse boards with J type fuses **(1.)**. None of the descriptive notes on the engineering drawings constitutes an obligation as they are not part of the contract **(2.)**. Even if the Tribunal finds that RESPONDENT was bound by the first descriptive note, it still has fulfilled the contract since JP type and JS type fuses are interchangeable in function **(3.)**.

1. RESPONDENT was bound by the contract and the engineering drawings to built J type fuses into the distribution fuse boards.

34 Whether delivered goods are of the quality and description required by the contract depends on "what characteristics of the goods are laid down in the contract by means of [...] qualitative descriptions" [*Schlechtriem/Schwenzer – Schwenzer, Art. 35 at 6; Sec. Comm., Art. 33 at 4*]. In the contract of 12 May 2005, RESPONDENT merely agreed "to sell five primary distribution fuse boards". No technical specifications were given in the contract itself. However, in its initial inquiry of 22 April 2005, CLAIMANT requested five primary electrical distribution fuse boards furnished with J type fuses [*St. of Def. at 3*]. According to the engineering drawings submitted by CLAIMANT and expressly made part of the contract, each distribution fuse board had further to be equipped with 20 to 30 fuseways at 3 fuses with ratings from 100 to 250 Amp [*St. of Cl. at 5, 9*]. This is exactly what RESPONDENT delivered [*cf. P.O. No. 2 at 27*].

2. None of the descriptive notes on the engineering drawings constitutes an obligation because they are not part of the contract.

35 CLAIMANT argues that RESPONDENT did not fulfil its contractual obligations as it was obliged to fabricate the fuse boards using Chat Electronics JP type fuses and to make them "lockable to Equalec requirements" [*Cl. Memo. at 47*]. CLAIMANT bases its assertions on an interpretation of two descriptive notes placed on the drawings. However, a precise reading of the contract demonstrates that they have not been made part of the contract. The contract expressly defines that "the engineering drawings submitted by Buyer are attached and made part of the contract" [*Cl. Ex. No. 1*]. "Drawings" can only mean the technical picturing of the fuses, fuseways and other components within the fuse boards. Contrary, descriptive notes are *per definitionem* words, not pictures. Therefore, they are of another nature than engineering

drawings. Moreover, CLAIMANT itself designates the notes as "descriptive notes" [*St. of Cl. at 9*]. This wording suggests a preference rather than an obligation. If an obligation was intended, CLAIMANT should have used stronger language and should have referred to the notes as "technical requirements" or something likewise. This understanding is not affected by the fact that RESPONDENT took care of the first descriptive note **(a.)**. Additionally, the second descriptive does not constitute a contractual obligation as it was not addressed to RESPONDENT **(b.)**.

a. Though RESPONDENT took the first descriptive note into consideration, it has not risen to a contractual obligation.

36 The first descriptive note on the engineering drawings which reads "Fuses to be **'**Chat Electronics' JP type in accordance with BS 88" can only be understood as a preference by CLAIMANT but not as a means to implement a contractual obligation on the part of RESPONDENT. According to Art. 8(2) CISG, which is the prevailing standard for interpretation under the CISG [*MCC-Marble Ceramic Center v. Ceramica Nuovo D'Agostino (U.S. 1998); Murray, J.L. & Com.; Ferrari/Flechtner/Brand – Ferrari, p. 178; Staudinger – Magnus, Art. 8 at 19*], statements made by a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*BG, 4C.296/2000/rnd (Switzerland 2000); Karollus, p. 37*]. In order to determine the understanding of a reasonable person due consideration is to be given to all relevant circumstances of the case, Art. 8(3) CISG [*Rudolph, Art. 8 at 10*]. In international sale of goods transactions, the relevant view is that of a specialist who is aware of the practice in his trade sector and the technical characteristics of the goods and their use [*Schlechtriem/Schwenzer – Junge, Art. 8 at 7*].

37 A reasonable person of the same kind as RESPONDENT would have understood the reference to JP type fuses from Chat Electronics as a mere expression of CLAIMANT's preference for using this type and brand of fuses. It was clear from the wording of the contract that only the engineering drawings form part of RESPONDENT's contractual obligations as it remains silent with regard to the notes. Thus, a reasonable person would not have expected the first note to be of any further relevance which is also in accordance with its wording. The note does not state that fuses "*have to be*" or "*must be*" Chat Electronics JP type rather than merely suggesting to use this kind of fuses. Additionally, it must be taken into account that CLAIMANT has not made any other reference to Chat Electronics JP type fuses besides the descriptive note. When CLAIMANT called on 22 April 2005, it generally asked for J type

fuses [*St. of Def. at 3*]. If the use of JP fuses had been of such importance, CLAIMANT would have made a clear reference to them already in its initial inquiry or in the contract.

38 Moreover, a reasonable person of the same kind as RESPONDENT would have concluded that the note is an expression of CLAIMANT's will to use fuses which meet the necessary quality and safety standard. There exist various manufacturers fabricating equivalent fuses but Chat Electronics has a reputation for being *one* of the better manufacturers of electrical equipment, including J type fuses [*P.O. No. 2 at 26*]. Additionally, JP fuses have been certified by the Equatoriana Electrical Regulatory Commission [*hereafter: Commission*] as they meet BS 88 which is the relevant safety standard in Equatoriana [*Resp. Ex. No. 1; St. of Def. at 12*]. Thus, the reference to Chat Electronics JP type fuses communicates merely that a type of fuse needs to be installed which is permitted to be used in Equatoriana and which is of good quality. Consequently, the contract did not call mandatorily for the fuse boards to be equipped with any exact type and brand of fuses.

39 As RESPONDENT knew of CLAIMANT's preferences by the first descriptive note, it called CLAIMANT on 14 July 2005 to inform about its inability to deliver JP type fuses due to Chat Electronics' production difficulties [*St. of Def. at 6*]. However, this telephone call does not suggest that RESPONDENT considered JP type fuses to be part of its contractual obligations. It was a simple inquiry to find out what CLAIMANT's subsidiary preference would be in this case.

b. As the second descriptive note was not addressed to RESPONDENT, it does not constitute a contractual obligation.

40 The second descriptive note reading "To be lockable to Equalec requirements" [*St. of Cl. at 9*] had not amounted to a contractual obligation as it was not directed to RESPONDENT. According to an interpretation of the second note under Art. 8(2) CISG, a reasonable person would have understood the note to be addressed to the personnel of CLAIMANT or the firm constructing Mountain View. First of all, CLAIMANT has never mentioned the name "Equalec" during the contract negotiations. It did neither announce that Equalec is the local electricity supplier. Therefore, RESPONDENT could not reasonably assume that Equalec is responsible for establishing the connection of the fuse boards to the electrical grid. Consequently, it could further not assume that "Equalec requirements" are the connecting conditions of that company. Such an understanding was especially unreasonable since the wording of the second note does not refer to the connection of the fuse boards but simply

states that they should be "lockable". Therefore, the second note does *prima facie* not concern the connection of the fuse boards but only their ability to be locked.

41 CLAIMANT admits that the second note indicates that the fuse boards should be lockable in a way that a padlock can be placed on the outside [*St. of Cl. at 9; Cl. Memo. at 80*]. There would even be witness testimony confirming this meaning [*P.O. No. 2 at 21*]. Since the fuse boards were only to be locked after their installation [*St. of Cl. at 5, 8*], the second note could not have been be directed to RESPONDENT as it was only in charge of the fabrication and delivery of the fuse boards and not of their installation. Consequently, a reasonable person would not have understood the note to be of relevance for any undertaking by RESPONDENT. It was rather directed to the personnel engaged with the installation of the fuse boards.

42 There have been no indications suggesting a different meaning of the term "lockable". Even if the second note were directly associated with the local electricity company, RESPONDENT, like any reasonable person, would only have concluded from the term that Equalec wants to prevent any unrestricted access to the boards by locking them. This is an obvious understanding since locking the boards serves security reasons [*St. of Cl. at 8*]. But in no case could a reasonable person have known of any additional unusual requirement Equalec might have. RESPONDENT had often delivered JS fuses of less than 400 Amp to customers in Equatoriana in the past and has never had problems with any of the supply companies [*St. of Def. at 12*]. Even CLAIMANT itself is surprised by Equalec's refusal as it knows that in several other developments in Equatoriana JS fuses had been used without complaint from the electrical supply companies [*Cl. Ex. No. 3*]. Therefore, a third person of the same kind as RESPONDENT could not have reasonably expected that Equalec had a policy of connecting exclusively to JP type fuses when circuits were designed for 400 Amp or less. An interpretation under the given circumstances according to Art. 8(2),(3) CISG leads to the conclusion that the second note was a self-evident expression of the requirement that the distribution fuse have to be locked. Since this can only be granted after their installation, the note cannot be construed as RESPONDENT's obligation.

3. Even if RESPONDENT was obliged to adhere to the first descriptive note, it still has fulfilled the contract since JP and JS type fuses are interchangeable in function.

43 Even if the Tribunal were to find that RESPONDENT was under duty to adhere to the first descriptive note, the fuse boards equipped with JS type fuses are still in conformity with the contract. The outstanding features demanded by the note are that the fuses have to be of good

quality ('Chat Electronics') and meet the BS 88 safety standard. These prerequisites are covered by JP as well as JS type fuses which are functionally equivalent. Simply the fixing centres of the JP type fuses are 82 mm in size whereas those of JS fuses are 92 mm [*St. of Cl. at 11*]. Both types of fuses have been certified by the Commission since they meet BS 88. Moreover, they have been certified in particular for the use in circuits rated at 400 Amp or less [*P.O. No. 2 at 28*]. Hence, there can be no doubts regarding the adequacy of JS type fuses.

44 As a result, the use of JS type fuses is merely a minor adjustment in the fabrication process that has no significant impact on the quality or the function of the fuse boards. Such minor adjustments have to be made all the time in the procurement of items that need to be specifically fabricated [*Resp. Ex. No. 1*]. Also, the prices for the fuse boards remained the same [*St. of Cl. at 11*]. Consequently, the use of JS type fuses did not result in a breach of contract as it does not affect the proper technical function of the fuse boards at all.

II. The distribution fuse boards further conform with the contract as there is no particular purpose expressed by CLAIMANT pursuant to Art. 35(2)(b) CISG.

45 CLAIMANT submits that the delivered distribution fuse boards do not fit their particular purpose of being compatible with Equalec's requirements pursuant to Art. 35(2)(b) CISG [*Cl. Memo. at 74 et seq.*]. However, CLAIMANT could not intend the fuse boards to comply with Equalec's connecting policy **(1.)**. Additionally, fitness for a particular use comes only into play if two conditions are met [*ICC, Partial Award No. 8213 (1995)*]: First, if the seller knows or has reason to know of the particular purpose **(2.)** and second, if the buyer has relied upon the seller's skill and judgment in providing the goods to meet that particular purpose **(3.)**.

1. CLAIMANT could not intend conformity with Equalec's requirements to be a particular purpose as it had not been aware of Equalec's policy.

46 The condition to conform with Equalec's requirements cannot constitute a particular purpose because this was not intended by CLAIMANT. To establish a particular purpose in this regard, it would be necessary to prove that the buyer supposed certain specific standards in the country of destination to be observed by the seller [*MünchKomm – Gruber, Art. 35 at 23*]. Here, CLAIMANT did not know of Equalec's requirements at all [*P.O. No. 2 at 25*]. Without its actual knowledge, CLAIMANT cannot have established the intent to require compatibility with these requirements to be a particular purpose. Hence, CLAIMANT's argument that it wanted the fuse boards and all components installed therein to meet Equalec's specific

technical requirements [*Cl. Memo. at 79 et seq.*] is unsustainable. Since there is no particular purpose *intended* by CLAIMANT under Art. 35(2)(b) CISG, the fuse boards conform with the contract.

2. Additionally, such particular purpose was not made known to RESPONDENT.

47 Even if the Tribunal concludes that compliance with Equalec's policy constitutes a particular purpose, RESPONDENT is still not liable under Art. 35(2)(b) CISG. According to this provision, a particular purpose must be made known – expressly or impliedly – to the seller at the time of the conclusion of the contract. At no time during the contract negotiations nor at the time the contract was signed did CLAIMANT directly refer to Equalec's policy. RESPONDENT could also not conclude otherwise that the fuse boards should comply with Equalec's connecting requirements. Neither the second note on the drawings was appropriate to make this particular purpose known to RESPONDENT **(a.)** nor did CLAIMANT communicate that purpose by stating the place of installation of the fuse boards **(b.)**.

a. The second note on the drawings was not appropriate to make the particular purpose known to RESPONDENT.

48 RESPONDENT could also not infer from the second descriptive note that it had to fabricate the fuse boards in conformity with Equalec's requirements. It is the buyer's responsibility to specify the particular purpose [*OLG Koblenz, 2 U 580/96 (Germany 1998)*]. Consequently, if the buyer intends the goods to be fit for a particular use, he has to inform the seller in a "crystal clear and recognisable" way [*cf. LG München, 5 HKO 3936/00 (Germany 2002)*]. He must have given sufficient indications on it, so that the seller could reasonably understand his obligations [*Staudinger – Magnus, Art. 35 at 26, 27*]. In this regard, the seller's actual knowledge is relevant to ensure that he can refuse to enter the contract if he is unable to procure adequate goods [*Sec. Comm., Art. 33 at 8*].

49 The only indication in favour of the existence of "Equalec requirements" is found in the second descriptive note. However, the wording of the note is not crystal clear and recognisable as to CLAIMANT's intention. There is no indication in favour of any requirement concerning the connection to the electricity supply. CLAIMANT should have referred to such requirements already throughout the negotiations. Moreover, it should have drafted the note in a precise way, e.g. by using the term: "Fuse boards have to meet the connecting conditions of Equalec, the local electrical distribution company". Since CLAIMANT submitted the engineering drawings and the two descriptive notes, it bears the risk of their misleading nature [*cf. Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 8 at 41*].

Hence, according to the principle of *contra proferentem*, CLAIMANT may not assert that it has explicitly communicated the purpose for which it required the goods [*Cl. Memo. at 79*]. Instead, the understanding of a reasonable person prevails. RESPONDENT reasonably understood the second note to be directed to the constructing personnel at Mountain View. RESPONDENT had no actual knowledge of Equalec's policy, otherwise it would not have recommended the use of Chat Electronics JS type fuses but rather the use of JP type fuses of a different manufacturer. It could not reasonably understand that CLAIMANT intended the fuse boards to meet Equalec's connecting requirements and could not estimate the risk to procure such goods. Consequently, the second note on the drawings was not appropriate to communicate any particular purpose of the fuse boards to be compatible with Equalec's policy.

b. By stating the place of installation of the fuse boards, CLAIMANT did not make a particular purpose known to RESPONDENT.

50 RESPONDENT's knowledge that the fuse boards were to be used in Mountain View does not oblige it to deliver distribution fuse boards meeting Equalec's requirements. The buyer bears the risk for the goods to be fit for use in his own country [*Staudinger – Magnus, Art. 35 at 22; BGH, VIII ZR 159/94 (Germany 1995)*]. It cannot be derived from the mere information of the country of destination that the seller is bound to observe the public law provisions of this country [*BGH, VIII ZR 159/94 (Germany 1995); Medical Marketing v. Internazionale Medico Scientifica (U.S. 1999); OGH, 2 Ob 100/00w (Austria 2000); Bianca/Bonell – Bianca, Art. 35 at 3.2; MünchKomm – Gruber, Art. 35 at 23*]. To impose on the seller the duty to fulfil public law standards in the buyer's state would displace the risks within a contractual relationship in an unjustified way. The seller cannot reasonably be expected to inquire from case to case about all relevant standards in the buyer's state [*cf. MünchKomm – Gruber, Art. 35 at 22; Audiencia Provinical de Granada (Spain 2000)*]. However, RESPONDENT even has fulfilled all requirements in this regard as the installed fuses are compatible with BS 88. Moreover, the connecting conditions of Equalec only constitute a private policy. Since a seller is generally not responsible for the obeyance of public law regulations in the buyer's state, RESPONDENT cannot be held liable for not knowing the policy of a private corporation.

51 In contrast to the case at hand, the cases in which the seller's knowledge of the country of use was held sufficient to express a particular purpose dealt with very obvious circumstances, e.g. if the buyer purchases pumps and expresses that these will be used in Sibiria. It is commonly known that the seller must take into account the frosty climate as it may effect their proper

function [*Honsell – Karollus, Art. 35 at 19; Schlechtriem/Schwenzer – Schwenzer, Art. 35 at 19*]. However, the mere indication of Mountain View as the place of installation of the fuse boards does not suggest the existence of Equalec's uncommon requirements. Especially, a reasonable seller would not have recognised their existence because they oppose the official certification by the Commission to use JS fuses in circuits with ratings of less than 400 Amp. There is even no other electrical company with a similar policy which would have given reason to expect such requirements. Hence, the fuse boards had to meet only the general description provided by CLAIMANT.

3. In any case, CLAIMANT did not reasonably rely on RESPONDENT's skill and judgment, Art. 35(2)(b) CISG.

52 Should the Tribunal come to the conclusion that compatibility with Equalec's requirements had been made known to RESPONDENT, it is still not liable under Art. 35(2)(b) CISG as CLAIMANT did not rely on RESPONDENT's skill and judgment **(a.)**. At least, such reliance was not reasonable under the circumstances **(b.)**.

a. CLAIMANT did not rely on RESPONDENT's skill and judgment.

53 Reliance by CLAIMANT on RESPONDENT's skill and judgment to fabricate fuse boards in accordance with Equalec's connecting conditions would have required that CLAIMANT knew about such conditions at the time of the conclusion of the contract. However, neither CLAIMANT's technical personnel nor Mr. Konkler knew of the policy [*P.O. No. 2 at 25; Cl. Ex. No. 3*]. As it is *per se* impossible that CLAIMANT relied on a fact that it was not aware of, it cannot invoke lack of conformity of the fuse boards under Art. 35(2)(b) CISG.

54 In addition, the buyer may not assert reliance if he takes part in the selection of the goods, influences the manufacturing process, provides precise specifications or insists on a particular brand [*Schlechtriem/Schwenzer – Schwenzer Art. 35 at 23; Staudinger – Magnus Art. 35 at 33; Hyland, Conformity of Goods, p. 321*]. RESPONDENT submits that it has never taken part in specifying the fuse boards. The engineering drawings submitted to RESPONDENT were prepared by CLAIMANT's designers [*St. of Cl. at 9*]. Hence, all technical details were provided by CLAIMANT itself. Even at a later time, when RESPONDENT called to inform about Chat Electronics' production difficulties, it was left to CLAIMANT to decide on the question how to proceed. Accordingly, Mr. Hart reiterated CLAIMANT's preference for Chat Electronics' equipment and stated to go ahead with JS type fuses of this brand. Since specification of the fuse boards was completely outside RESPONDENT's sphere of influence, there can be no actual reliance on the part of CLAIMANT.

b. Any reliance by CLAIMANT on RESPONDENT's skill and judgment was unreasonable under the circumstances.

55 Even if CLAIMANT relied on RESPONDENT's skill and judgment, such reliance was unreasonable under Art. 35(2)(b) CISG. Generally, the buyer may only rely on the seller if the latter is a specialist or expert in the manufacture or procurement of goods for the particular purpose intended by the buyer [*Schlechtriem/Schwenzer – Schwenzer, Art. 35 at 23; Heilmann, p. 181*]. RESPONDENT is a wholesaler of electrical equipment. Although it also fabricates certain types of electrical devices using standard parts available in the market, most of its business involves selling these parts individually [*Resp. Ex. No. 1*]. Hence, in response to CLAIMANT's allegations [*Cl. Memo. at 83*], RESPONDENT is not a specialist in the production of primary distribution fuse boards. Furthermore, it had not delivered any technical equipment to Mountain View in the past [*Cl. Ex. No. 3*]. Thus, it did not have any experience with the connection of electrical equipment under Equalec's requirements and cannot be considered an expert in this regard.

56 CLAIMANT could neither have reasonably expected RESPONDENT to know about Equalec's connecting conditions. Generally, it cannot be assumed that the seller is better informed about requirements in the buyer's state than the buyer himself [*Staudinger – Magnus, Art. 35 at 34*]. Rather the buyer can be expected to have such expert knowledge of the requirements in his own country [*BGH, VIII ZR 159/94 (Germany 1995)*]. In particular, CLAIMANT was closer to Equalec's policy since Equalec was its contracting partner and both have their place of business in Equatorian. Hence, CLAIMANT itself ought to have known about the policy. Additionally, the more exceptional a requirement in the buyer's state is, the less the buyer may rely on the seller's expertise [*Schlechtriem, IPRax 2001, p. 163*]. Since Equalec's policy is uncommon in the electrical industry [*P.O. No. 2 at 28*], there can be no reasonableness in CLAIMANT's reliance.

57 Furthermore, the buyer cannot rely where the buyer itself has more knowledge than the seller [*Honsell – Magnus, Art. 35 at 22*]. CLAIMANT had superior knowledge of the technical specifications of the distribution fuse boards since it provided all of them to RESPONDENT and insisted on a particular brand. Though the design drawings for Mountain View were based on Switchboards comments, it was at least CLAIMANT's engineering department which prepared them. Switchboards explicitly instructed CLAIMANT to use *only* JP fuses [*P.O. No. 2 at 25*]. Thus, CLAIMANT had adequate information about the electrical aspects of the development and could not rely on RESPONDENT's skill and judgment.

RESPONDENT had rather to rely on CLAIMANT's knowledge expressed by the design drawings.

58 Any reliance by CLAIMANT became unreasonable by the time of the telephone conversation of 14 July 2005 at the latest. Mr. Hart agreed on behalf of CLAIMANT to proceed with Chat Electronics JS type fuses [*Cl. Ex. No. 2*] even though CLAIMANT had to know of Equalec's policy. It must have been aware of the contradiction between its own instruction and Equalec's requirement for providing electrical service. Consequently, as it was at least unreasonable for CLAIMANT to rely on RESPONDENT's skill and judgment, the distribution fuse boards delivered by RESPONDENT conform with the contract according to Art. 35(2)(b) CISG.

III. The distribution fuse boards are fit for their ordinary purpose according to Art. 35(2)(a) CISG since they are securely connectable to the electrical power grid.

59 RESPONDENT delivered distribution fuse boards that comply with their ordinary purpose since they are safely connectable to the electricity supply. To assess conformity under Art. 35(2)(a) CISG, the "purposes for which goods of the same description would ordinarily be used" are relevant. This standard of quality is to be determined objectively and in the light of normal expectations [*Sec. Comm., Art. 33 at 5*]. Fitness for ordinary purpose does not even require the goods to comply with specialised *public* law provisions [*BGH, VIII ZR 159/94 (Germany 1995); Staudinger – Magnus, Art. 35 at 22*]. Hence, the ordinary purpose of distribution fuse boards cannot be determined according to the *private* connecting conditions of any local electricity company such as Equalec, but according to general requirements in the electrical supply market [*cf. NAI, Case No. 2319 (2002)*].

60 Primary distribution fuse boards are designed to be connected to the electrical grid to distribute the incoming electricity and to ensure safety in the electrical supply [*St. of Cl. at 5; cf. Bussmann, Introduction to Low Voltage Fuse Technology, pp. 2, 12*]. Since no other company in Equatoriana has a similar policy [*P.O. No. 2 at 23*], the fuse boards delivered by RESPONDENT would have been connected by any other electrical supplier in any other part of Equatoriana. In fact, RESPONDENT delivered fuse boards conforming to common requirements in the electrical supply market since the installed fuses meet BS 88. This safety standard is widely used outside the United Kingdom and specifically in Equatoriana [*P.O. No. 2 at 26, St. of Cl. at 9*]. Thus, even the relevant public safety standards have been respected by RESPONDENT. All fuses installed in the fuse boards were further of the appropriate ratings [*P.O. No. 2 at 27*]. As there are no technical reasons that could interfere

with their safety, a "long, continuous operation of the [distribution fuse boards] without failure" could be expected [*cf. SCC Institute, Separate Award of 05.06.1998*]. Therefore, the distribution fuse boards are securely connectable to the electrical power grid and fit for their ordinary purpose under Art. 35(2)(a) CISG.

B. Alternatively, if the Tribunal considers the installation of JS type fuses to be non-conforming with the contract as originally written, RESPONDENT still fulfilled its contractual obligations since the contract was validly modified.

61 Should the Tribunal find that the change in the type of fuses amounted to a modification of the contractual obligations, RESPONDENT submits that according to Art. 29(1) CISG a contract may be modified by the mere agreement of the parties. During the telephone conversation of 14 July 2005 the Parties mutually agreed on the change **(I.)**. CLAIMANT cannot assert lack of form since the writing requirement in Sec. 32 of the contract was obviated by RESPONDENT's reliance in CLAIMANT's conduct according to Art. 29(2) 2nd sentence CISG **(II.)**.

I. The telephone conversation on 14 July 2005 resulted in a mutual agreement between the Parties on the change from JP to JS type fuses.

62 When RESPONDENT faced Chat Electronics' production difficulties, it immediately called CLAIMANT on 14 July 2005 to inform about the situation. Mr. Hart to whom the call was referred obviously intended to give a firm and legally binding answer to RESPONDENT's inquiry by acknowledging the use of Chat Electronics JS fuses instead of JP fuses **(1.)**. Although he was not responsible for the particular contract, Mr. Hart had implied authority to amend the contract on behalf of CLAIMANT **(2.)**. Even if Mr. Hart exceeded the scope of his authority, this would have no legal consequences for RESPONDENT **(3.)**.

1. Mr. Hart obviously intended to give a legally binding answer by acknowledging the use of Chat Electronics JS type fuses.

63 During the telephone conversation on 14 July 2005, Mr. Stiles clearly explained to Mr. Hart the possible actions RESPONDENT could take with regard to Chat Electronics' production difficulties [*Resp. Ex. No. 1*]. Mr. Hart acknowledged RESPONDENT's suggestion and instructed RESPONDENT to proceed using JS type fuses. Since Mr. Hart said that he was "in agreement" and that they "should go ahead with JS fuses" [*Resp. Ex. No. 1*] there is no point in CLAIMANT's assertion that it did not intend to give a binding answer [*Cl. Memo. at 59*].

64 Mr. Hart indeed mentioned that he was not very well versed in the electrical aspect of the development but this did not prevent him from giving a firm answer. Obviously, he deemed himself entitled to decide on that issue, otherwise he would have refused to consider RESPONDENT's recommendations at all to avoid any violation of his competence. Since he communicated the time pressure of the Mountain View project [*Cl. Ex. No. 2; Resp. Ex. No. 1*], Mr. Hart must have been aware that RESPONDENT would immediately proceed with the fabrication of the fuse boards using JS type fuses after he had affirmed to go ahead on that basis. Therefore, one must conclude that Mr. Hart intended to give a binding answer.

2. Mr. Hart had implied authority to amend the contract on behalf of CLAIMANT pursuant to Art. 9(1) Agency Convention.

65 It has been explicitly communicated to RESPONDENT that Mr. Hart was a professional in CLAIMANT's procurement office [*P.O. No. 2 at 18*]. He was allowed to sign contracts up to US$ 250,000 [*P.O. No. 2 at 17*] and hence, the contract at hand fell within its financial scope of representation as it had only a value of US$ 168,000. Since he was allowed to enter into agreements up to this sum, it is not comprehensible why he should not be entitled to change an existent obligation up to this limit. Nevertheless, CLAIMANT contests Mr. Hart's authority to amend the contract as he had neither responsibility for the particular contract nor had he been given any additional authority for the time of Mr. Konkler's absence [*Cl. Memo. at 61*].

66 The CISG does not cover the Law of Agency [*Honsell – Siehr, Art. 4 at 7*]. In this regard, RESPONDENT considers the Convention on Agency in the International Sale of Goods [*hereafter: Agency Convention*] to be applicable since both Parties have their principal office in contracting states [*cf. P.O. No. 2 at 16*]. Art. 9(1) Agency Convention enables the authorisation of the agent by the principal not only to be express but also to be implied. To establish implied authority, the intent of the principal to confer authority on the agent needs to be inferred from his conduct or from other circumstances [*Šarčević, p. 462; Bonell, 32 Am. J. Comp. Law (1984), p. 732*].

67 During Mr. Konkler's business trip inquiries that would normally have been referred to Mr. Konkler were directed to Mr. Hart [*P.O. No. 2 at 17*]. For some of the time of his business trip it was not possible to contact Mr. Konkler and he had additionally left instructions to be only contacted in urgent matters [*Cl. Ex. No. 3*]. Apparently, Mr. Hart had not been given the instruction not to make any decisions with regard to the Mountain View project in case he would be asked to do so. If CLAIMANT had not wanted him to take any

steps in this regard, Mr. Konkler probably would have told Mr. Hart, e.g. to make a note if a call would come in and explain that he will pass it on to Mr. Konkler after his return. There had been even no formal directive stating that Mr. Konkler should be informed of all telephone calls or other transactions that had occurred during his absence [*P.O. No. 2 at 20*]. Therefore, Mr. Hart must have been entitled to make an independent decision during this time and to handle CLAIMANT's business in the absence of Mr. Konkler.

3. Even if Mr. Hart exceeded the scope of his authority, this would have no legal consequences for RESPONDENT.

68 Should the Tribunal find that Mr. Hart acted outside the scope of his authority by acknowledging the use of JS type fuses, his agreement would still be effective according to Art. 15(1) Agency Convention since CLAIMANT ratified the modification by remaining silent after the telephone conversation over a substantial period of time **(a.)**. In the alternative, CLAIMANT cannot invoke any lack of Mr. Hart's authority since CLAIMANT's conduct caused RESPONDENT reasonably to believe in his authority pursuant to Art. 14(2) Agency Convention **(b.)**.

a. CLAIMANT ratified the modification by remaining silent after the telephone conversation over a substantial period of time, Art. 15(1) Agency Convention.

69 CLAIMANT's conduct subsequent to the telephone conversation of 14 July 2005 must be understood as a ratification of the change in fuses and thus of Mr. Hart's agreement on the change pursuant to Art. 15(1) Agency Convention. According to this provision, the principal can ratify *ex post* the act by an agent who acts without authority or who acts outside the scope of his authority [*see Bonell, 32 Am. J. Comp. Law (1984), p. 741*]. Such ratification for which no formal requirement is provided can also be inferred from the mere conduct of the principal, Art. 15(8) Agency Convention.

70 After the telephone conversation, CLAIMANT had sufficient opportunities to complain about the use of JS type fuses. there would even have been time to substitute JP type fuses from a different manufacturer if RESPONDENT had been informed subsequent to Mr. Konkler's return from his business trip [*St. of Def. at 23*]. Instead, CLAIMANT remained silent and let RESPONDENT fabricate the fuse boards with Chat Electronics JS type fuses. CLAIMANT cannot invoke that Mr. Konkler had no knowledge of the substitution of the fuses since the internal exchange of information among its personnel lies exclusively in CLAIMANT's sphere. Especially, it could have been expected that Mr. Konkler would be informed by Mr. Hart after his return as he knew that Mr. Konkler personally handled the negotitations in

regard to the contract with RESPONDENT [*Cl. Ex. No. 2*]. Thus, CLAIMANT's failure to inform Mr. Konkler of the telephone call cannot have any consequences for RESPONDENT. At the latest by delivery of the fuse boards on 22 August 2005, it became apparent for CLAIMANT that all fuses installed in the distribution fuse boards were of JS type. If it failed to take notice of that fact, this can only be due to an improper inspection of the fuse boards although it was under duty to examine the boards pursuant to Art. 38(1) CISG. CLAIMANT was obviously satisfied with the fuse boards as it paid for them two days after delivery and had them installed in the Mountain View development on 1 September 2005. After all, CLAIMANT did not reject the delivered boards for another week but complained on 9 September 2005, nearly two months after Mr. Hart's acknowledgement to go ahead with JS type fuses. CLAIMANT's conduct allows only the conclusion that it was completely satisfied with the use of Chat Electronics JS type fuses. By remaining silent CLAIMANT accepted tacitly Mr. Hart's decision and thereby cured any possible defects of his authority. Consequently, according to Art. 15(1) Agency Convention, Mr. Hart's decision produces the same effects as if it had initially been carried out with authority.

b. In the alternative, CLAIMANT's conduct caused RESPONDENT reasonably and in good faith to believe in Mr. Hart's authority, Art. 14(2) Agency Convention.

71 Where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority and that the agent is acting within the scope of that authority, the principal cannot invoke the lack of authority of the agent against the third party, Art. 14(2) Agency Convention. CLAIMANT's conduct regarding the telephone conversation of 14 July 2005 was of such kind and thus made RESPONDENT believe in Mr. Hart's authority to decide on the change in fuses.

72 When RESPONDENT called CLAIMANT to speak to Mr. Konkler it was informed by the secretary that Mr. Konkler was not available and referred it to Mr. Hart [*P.O. No 2 at 18*]. Therefore, RESPONDENT could expect Mr. Hart to be the responsible person in the absence of Mr. Konkler, even more taking into account that he was explicitly introduced by the secretary as professional in the procurement office [*P.O. No. 2 at 18*]. If CLAIMANT wanted exclusively Mr. Konkler to handle all negotiations with RESPONDENT, it should have told its personnel so or even inform RESPONDENT directly that it would not be able to contact Mr. Konkler for a few days. In any case, Mr. Hart immediately should have made clear that he was not in a position to make any decisions and that RESPONDENT would have to wait for Mr. Konkler to come back. RESPONDENT could at least have expected that any

complaint against the outcome of the telephone conversation would quickly be communicated, at the latest after Mr. Konkler's return on 25 July 2005. Consequently, RESPONDENT's trust in Mr. Hart's authority was justified. Since RESPONDENT made its expectations in good faith, CLAIMANT is now barred from relying on any defect in Mr. Hart's authority according to Art. 14(2) Agency Convention.

II. CLAIMANT cannot assert that the amendment had to be in writing pursuant to Sec. 32 of the contract and Art. 29(2) CISG.

73 Pursuant to Art. 29(2) CISG, a contract which contains a provision requiring any modification to be in writing [*no oral modification clause; hereafter: NOM-clause*] cannot be modified otherwise. However, according to Art. 6 CISG parties are free to derogate from the provisions of the CISG. The clause in Sec. 32 of the contract requires "*amendments to* the contract" to be in writing. Already the wording shows that the Parties intended to vary from Art. 29(2) CISG as it indicates that only such amendments have to be documented that constitute *additional* obligations. If the Parties had intended to document *any* modification in the contract specifications, the clause would have called for "any *modification of* the contract to be in writing". Since the change from JS to JP type fuses does not constitute an additional obligation, Sec. 32 of the contract does not apply.

74 Contrary to CLAIMANT's assertion [*St. of Cl. at 25*], an oral modification of a contract including a NOM-clause can be effective pursuant to Art. 29(2) 2nd sentence CISG. This provision is an expression of the general good faith principle that governs the Convention pursuant Art. 7(1) CISG [*AFEC, Award No. SCH-4318 (1994); Ferrari/Flechtner/Brand, p. 613*]. A party is precluded from asserting the writing requirement at a later point in time to the extent that the other party has relied on the first party's conduct [*Sec. Comm., Art. 27 at 8*]. In order to induce reliance, a party must have conducted in a way that it was reasonable for the other party to rely upon the oral modification of the contract in the circumstances [*Sec. Comm., Art. 27 at 9; Cl. Memo. at 57*]. By assessing RESPONDENT's reliance, all circumstances stated above [*see supra paras. 63 to 72*] are relevant and must be taken into account: In the telephone conversation on 14 July 2005 Mr. Hart clearly appeared to be giving a binding answer and seemed to be authorised to do so. Furthermore, he did not ask RESPONDENT to send a written proposal for a change throughout the entire telephone call [*P.O. No. 2 at 19*]. Subsequent to this call, CLAIMANT kept silent regarding the substitution of the fuses until Equalec's refusal to connect to the fuse boards on 8 September 2005. Hence, if CLAIMANT wanted to have the change documented in writing, there had been sufficient

time to ask RESPONDENT for a written confirmation. However, since CLAIMANT never asked for a confirmation, it obviously agreed to renounce the writing requirement.

75 CLAIMANT argues that the NOM-clause in Sec. 32 of the contract had been inserted by RESPONDENT and thus, it could not base its reliance on any oral agreement as it must have been aware of this clause [*Cl. Memo. at 59*]. In the present case though, a decision regarding the fuses needed to be made as soon as possible. Mr. Hart was aware of this fact since he knew that the Mountain View project was under tight time pressure [*Cl. Ex. No. 2*]. Therefore he thought it best to give an immediate answer to RESPONDENT's inquiry without explicitly insisting on the writing requirement [*Cl. Ex. No. 2; St. of Cl. at 12*]. Further, CLAIMANT argues that Mr. Hart had not given any indications that CLAIMANT wanted to derogate from the writing requirement [*Cl. Memo. at 59*]. But from the view of a reasonable person that is exactly what Mr. Hart did. He did never say that he needed a written proposal for a change first to inform CLAIMANT's technical department before giving a firm answer. In the opposite, he acknowledged RESPONDENT's recommendation to proceed with JS type fuses and thus he agreed to alter the contract specifications. CLAIMANT must take full responsibility for this reliance-inducing conduct and cannot invoke lack of form according to Art. 29(2) 2nd sentence CISG. Consequently, if the change from JP to JS type fuses were considered to be a modification of the contract, the Parties had validly agreed on that change.

THIRD ISSUE: CLAIMANT's DEFAULT IN COMPLAINING TO THE COMMISSION EXCUSES ANY FAILURE OF RESPONDENT TO DELIVER GOODS CONFORMING TO THE CONTRACT.

76 Should the Tribunal come to the conclusion that there is any failure of RESPONDENT to deliver goods conforming to the contract, RESPONDENT is excused from its liability due to CLAIMANT's failure to complain to the Equatoriana Electrical Regulatory Commission [*hereafter: Commission*]. CLAIMANT was not only under duty to complain to the Commission in order to mitigate its loss according to Art. 77 CISG **(A.)**, but its failure to do so also bars it from relying on the alleged non-conformity of the fuse boards, Art. 80 CISG **(B.)**. Finally, RESPONDENT is relieved from liability as CLAIMANT's failure to complain constitutes an impediment beyond RESPONDENT's control under Art. 79(1) CISG **(C.)**.

A. CLAIMANT failed to fulfil its obligation to complain to the Commission in order to mitigate its loss according to Art. 77 CISG.

77 CLAIMANT was under duty to complain to the Commission as a complaint was a reasonable measure to mitigate its damages under the given circumstances **(I.)**. By doing so, it would have avoided the loss of US$ 200,000 to its full extent. Hence, CLAIMANT is not entitled to recover damages at all **(II.)**.

I. A complaint to the Commission was a reasonable measure of mitigation under the given circumstances.

78 Pursuant to Art. 77 CISG, a party who relies on a breach of contract must take measures that are reasonable under the particular circumstances to mitigate the loss. Potential measures are those that could be expected to be undertaken by a reasonable person acting in good faith who is in the same position as the aggrieved party [*OGH, 10 Ob 518/95 (Austria 1996); OGH, 7 Ob 301/01t (Austria 2002); Staudinger – Magnus, Art. 77 at 10; Soergel – Lüderitz/ Dettmeier, Art. 77 at 4*]. A prudent person in the same situation as CLAIMANT would have tried to complain to the Commission since Equalec's policy to use only JP type fuses in circuits designed for 400 Amp or less violates the Equatoriana Electric Service Regulatory Act [*hereafter: Regulatory Act*] **(1.)**. Hence, a complaint would have caused Equalec in due time to connect the fuse boards to the electrical grid **(2.)**. Even if a complaint had not resulted in a timely connection by Equalec, CLAIMANT cannot rely on this circumstance **(3.)**.

1. Equalec's policy constitutes an "undue and unjust requirement" for providing electrical service and is therefore in violation of the Regulatory Act.

79 Equalec's refusal to connect to the delivered fuse boards was made without any substantial reason. Thus, a complaint to the Commission would have been a prospective measure to mitigate CLAIMANT's loss. According to Art. 14 Regulatory Act, "every electric corporation shall provide electric service that is safe and adequate" without "undue or unjust requirements". Whether electrical equipment to which connection has been requested meets the necessary safety standards is determined by the Commission, Art. 15 Regulatory Act.

80 The use of JS type fuses in circuits inferior to 400 Amp has explicitly been certified by the Commission [*P.O. No. 2 at 28*]. Hence, there is already an official certification qualifying the connection of the delivered fuse boards to the electricity supply as safe. Refusal to connect to such safe equipment must be considered an undue and unjust requirement in providing electrical service, especially as the exclusive use of JP type fuses in circuits of 400 Amp or less does not improve their safety at all **(a.)**. Moreover, the policy must be considered undue

since Equalec set it up to enhance solely its own convenience in servicing distribution fuse boards **(b.)**.

a. The exclusive use of JP type fuses in circuits of 400 Amp or less is not a reasonable safety measure as it does not prevent the installation of improperly rated fuses.

81 Equalec justifies its policy with safety reasons as it is based on the concern that JS fuses of more than 400 Amp might be installed where circuits are designed for a lower capacity [*Cl. Ex. Nos. 3, 4*]. While servicing several fuse boards, Equalec discovered that JS fuses of 500 Amp had been installed where the circuits called for fuses of 250 and 355 Amp [*Cl. Ex. No. 4*]. In contrast to JP type fuses which are generally available up to 400 Amp, JS type fuses can sustain ratings up to 800 Amp [*Resp. Ex. No. 2*]. Since the external dimensions of JP type and JS type fuses are slightly different, Equalec obviously wants their differently sized fixing centres to prevent installation of higher rated JS type fuses. However, this policy does not prevent that JP fuses of 400 Amp are installed when circuits only call for 100 or 250 Amp, as it is with respect to the Mountain View development, which makes overloads still possible. Hence, the policy is not plausible in itself and is not "upwards from the safety standards certified by the Commission" [*Cl. Memo. at 97*]. It is not surprising that no other electric corporation has a similar policy [*P.O. No. 2 at 23*]. This shows that even other experts in the electricity supply business consider there to be no need for policies forbidding the use of JS type fuses for ratings below 400 Amp.

82 An additional and certainly more important reason to question Equalec's policy is the fact that other manufacturers than Chat Electronics offer JP type fuses which are rated higher than 400 Amp. For example, Lawson Fuses Ltd offers J type fuses with 82 mm fixing centres (JPU) in ratings of 450, 500, 560 and 630 Amp [*see <www.lawson-fuses.co.uk>*]. Since Equalec's connection conditions do not demand for the use of a particular brand, the threshold of 400 Amp cannot even prevent that JP fuses of higher ratings are installed. Therefore, its policy does not have any appreciable effect on the safety of distribution fuse boards. It only monopolises the use of JP type fuses in electricity supply and distribution systems and must be deemed an undue and unjust requirement.

b. Equalec set up its policy only for its own convenience in servicing fuse boards.

83 By analysing Equalec's arguments regarding its policy [*Cl. Ex. No. 4*], it seems that the actual reason for it was not a safety reason but rather its own convenience in servicing distribution fuse boards. First, Equalec wanted to reduce the amount of inventory that the service trucks have to carry [*Cl. Ex. No. 3*], although it is hardly conceivable why this is supposed to be a

benefit to its customers. Secondly, it appears that Equalec adopted the policy to exempt itself from liability for employee deviance. Though Equalec contends that it was unclear who had installed the improperly rated fuses [*Cl. Ex. No. 4*], at last Equalec is responsible for the safety of the maintained distribution fuse boards. After locking the boards, Equalec has exclusive access to them to prevent users from installing fuses of a higher rating than the circuits were designed for [*St. of Cl. at 8*]. Since only Equalec can change the fuses, it can be presumed that its own personnel had mounted the improper fuses. Even if those might already have been installed during the manufacturing process, Equalec failed to offer any evidence that would support such an assumption. By refusing to establish the electrical connection, it seems that Equalec simply attempts to avoid service failures of its personnel for which it can be hold liable. This is at least to the disadvantage of Equalec's customers. They are forced to use a specific type of fuse, although there are other types which fulfil the required safety standards as well. Already for that reason, Equalec's policy has to be considered an undue and unjust requirement for providing electrical service in the sense of Art. 14 Regulatory Act.

2. Consequently, a complaint would have caused Equalec to connect the fuse boards to the electrical grid in due time.

84 Since Equalec's policy violates higher ranked public law, i.e. the Regulatory Act, it can be anticipated that the Commission will reverse the policy if it is brought to its attention. It is improbable that the Commission would deviate from its previous decision to certify the use of JS type fuses by affirming Equalec's connection requirements, especially as all fuses installed in the fuse boards delivered by RESPONDENT were of the appropriate rating [*P.O. No. 2 at 27*]. With respect to the clear legal situation, already an informal inquiry of the Commission at Equalec would have caused it to change its requirements with the utmost probability. In any event, it would be more favourable to Equalec to immediately cease its policy than to risk a formal action. If CLAIMANT had insisted on a connection to the Commission with reference to its time pressure and the unlawfulness of the policy, the latter might have been changed already in one week [*P.O. No. 2 at 30*]. Under these circumstances, CLAIMANT unjustly asserts that it could not be expected to take a course of action that was likely to result in loss by failing to give occupancy to its lessees [*Cl. Memo. at 112*]. Therefore, a complaint would not have entailed unreasonable expenditures, but would have been an adequate and preventive measure of mitigation.

3. Even if a complaint had not resulted in a timely connection by Equalec, CLAIMANT cannot rely on this circumstance.

85 Should the Tribunal find that a complaint would not have resulted in a connection by Equalec in due time, CLAIMANT cannot rely on that consideration since it aggravated its own time pressure in an unreasonable manner. When the fuse boards were delivered to the building site on 22 August 2005, there still remained more than five weeks until the opening date of Mountain View. Therefore, the fact that CLAIMANT did not install the fuse boards immediately, but only ten days after delivery on 1 September 2005 [*St. of Cl. at 14*] and that another week passed until connection was tried by Equalec on 8 September 2005 [*St. of Cl. at 14*], cannot have any impact on RESPONDENT. The Tribunal shall find that CLAIMANT is to be treated as though it had informed RESPONDENT of the non-conformity at the moment of delivery of the fuse boards which would have allowed CLAIMANT an extra time of more than two weeks for a complaint. Additionally, CLAIMANT did not only know about the use of JS type fuses already at the time of the telephone conversation of 14 July 2005, but it also was within its own sphere to have knowledge of Equalec's policy. Therefore, CLAIMANT could have contacted Equalec, RESPONDENT and the Commission by that time, two and a half months before opening Mountain View, to reach a unanimous solution.

86 RESPONDENT explicitly draw CLAIMANT's attention to the possibility of approaching the Commission to get the delivered fuse boards connected to the local electricity supply. It told CLAIMANT that Equalec was required by law to connect to the fuses boards and asked why it had not insisted, either to Equalec or to the Commission, on the connection [*St. of Def. at 12; Resp. Ex. No. 1*]. It turned out that CLAIMANT did not even try to contact the Commission. In fact, CLAIMANT refused categorically to take any steps in this direction [*Ibid.*] and was not even willing to invest a few minutes into a telephone call. A reasonable person would at least have consulted experts at the Commission before deciding how to proceed. In any event, while initiating a complaint, CLAIMANT would still have had the opportunity to negotiate with other manufacturers to care for the unlikely event that a complaint would not lead to a prompt and successful outcome. CLAIMANT missed the opportunity to undertake this promising attempt to mitigate its losses to the detriment of RESPONDENT. It would contradict the principle to act in good faith under Art. 77 CISG [*cf. Saidov, para. II.4.b*] if CLAIMANT were excused due to circumstances that have been caused by itself. Therefore, CLAIMANT is barred from stating that a connection would not have been established in due time.

II. CLAIMANT cannot recover damages at all since a complaint would have mitigated the loss of US$ 200,000 to its full extent.

87 A complaint would have made Equalec cease its policy and to connect the fuse boards equipped with JS type fuses to the electricity supply. Thereby, a complaint would have mitigated CLAIMANT's loss in its entirety by superseding the purchase and installation of replacement fuse boards. Since loss which could have been avoided entirely by taking measures of mitigation cannot be recovered at all [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 77 at 1*], CLAIMANT is not entitled to recover any damages.

B. CLAIMANT is barred from relying on the non-conformity of the fuse boards delivered by RESPONDENT according to Art. 80 CISG.

88 Art. 80 CISG applies to CLAIMANT's failure to complain **(I.)** and releases RESPONDENT from any liability since its failure to perform was caused by CLAIMANT **(II.)**. Even if the Tribunal finds that both CLAIMANT and RESPONDENT have partly caused the breach of contract, RESPONDENT is still exempted **(III.)**.

I. As any conduct of a party is sufficient to activate Art. 80 CISG, the provision applies to CLAIMANT's omission to complain.

89 Contrary to CLAIMANT's assertion [*Cl. Memo. at 96*], an omission to act in the sense of Art. 80 CISG does not need to constitute a breach of a contractual obligation [*Achilles, Art. 80 at 2; Staudinger – Magnus, Art. 80 at 9; Herber/Czerwenka, Art. 80 at 3; Schäfer, para. 2.a*]. This is also in accordance with the wording of the provision as it does not require the promisee's act or omission to be a breach of contract. The equitable rule of Art. 80 CISG provides a special instance of the general principle of good faith [*OLG Karlsruhe, 1 U 280/96 (Germany 1997); Butler, para. 1*]. To act in good faith, the promisee is required not to obstruct performance by the promisor but rather to cooperate [*BGH, VIII ZR 60/01 (Germany 2001)*]. Consequently, to grant broad observance to the good faith principle, any conduct has to fall within the scope of Art. 80 CISG. Therefore, CLAIMANT's duties to act are not restricted to result from the sales contract or prior negotiations [*Cl. Memo. at 96*], but also its failure to complain to the Commission constitutes an omission in the sense of Art. 80 CISG.

II. RESPONDENT is exempted from any liability since its failure to perform was caused by CLAIMANT's omission to take action against Equalec's policy.

90 Under Art. 80 CISG, RESPONDENT is exempted from all legal consequences arising from the breach of contract as its failure to perform has been caused by CLAIMANT's own

omission to approach the Commission. An omission is relevant if a hypothetic act was necessary in the interest of the promissee and objectively suited to make performance possible [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 80 at 3*]. Even indirect causation is sufficient where a risk has been realised which falls within the promisee's sphere of control [*Honsell – Magnus, Art. 80 at 12*].

91 Without the need to comply with Equalec's policy, CLAIMANT would have had no further reason to insist on JP type fuses to be installed in the fuse boards. First, JP and JS type fuses have the same function to be used in electricity supply networks and are certified for this purpose. Second, RESPONDENT has often supplied JS fuses to customers in Equatoriana without any problems [*Resp. Ex. No. 1*]. Without Equalec's policy, the slight difference in fixing centres would be more than ever irrelevant. Since RESPONDENT used the same brand, Chat Electronics, the JS type fuses built in the fuse boards are of the same quality as the equivalent JP type fuses. Thus they are in correspondance with CLAIMANT's preference for that brand. Therefore, CLAIMANT could not have required RESPONDENT to equip the fuse boards with JP type fuses. It would have rather been obliged by the principle of good faith to accept JS type fuses, especially as CLAIMANT itself induced RESPONDENT to use this type of fuses by the telephone conversation of 14 July 2005 and its subsequent silence. RESPONDENT would have been exempted from its obligation to deliver JP type fuses and could have fulfilled the contract by delivering JS type fuses. Thereby, CLAIMANT's omitted action against Equalec's policy indirectly caused RESPONDENT's breach of contract and was objectively suited to avoid it.

92 A complaint to the Commission was furthermore in CLAIMANT's own interest as it would have prevented its loss of US$ 200,000 to the full extent. Due to its own conduct, it was in any case under duty to try a complaint first before purchasing replacement fuse boards to act in good faith. Hence, a risk has materialised which falls squarely within CLAIMANT's sphere of control and for which CLAIMANT has to take responsability. As a consequence, RESPONDENT is exempted from its liability for the non-conformity of the delivered fuse boards.

III. Even if the Tribunal finds that both CLAIMANT and RESPONDENT have partly caused the breach of contract, RESPONDENT is still exempted pursuant to Art. 80 CISG.

93 If the Tribunal considers RESPONDENT's breach of contract not solely caused by CLAIMANT's omission, it shall further find that RESPONDENT is still exempted since

Art. 80 CISG applies also to cases of joint causation [*HK Hamburg, Partial Award of 21.03.1996; Bianca/Bonell – Tallon, Art. 80 at 2.4.; Neumayer/Ming, Art. 80 at 3; Staudinger – Magnus, Art. 80 at 14, 15; Rathjen, RIW 1999, p. 565*]. At least, CLAIMANT has relevantly contributed to RESPONDENT's non-performance by refusing to complain to the Commission. When assessing the weight of the contribution, the Tribunal shall consider CLAIMANT's omission to complain leading to the actual loss as well as the absence of negligence on the part of RESPONDENT [*cf. Schlechtriem/Schwenzer – Stoll/Gruber, Art. 80 at 10*] as it could not reasonably have foreseen Equalec's connecting policy at all [*cf. Cl. Memo. at 101*]. Therefore, we leave it to the Tribunal's discretion to find an appropriate allocation of the Parties' liability.

C. RESPONDENT is relieved from liability because CLAIMANT's failure to complain constitutes an impediment beyond RESPONDENT's control under Art. 79(1) CISG.

94 CLAIMANT's failure to complain constitutes an unforeseeable impediment beyond RESPONDENT's control in the sense of Art. 79(1) CISG. Contrary to CLAIMANT's assertions [*Cl. Memo. at 103*], exemption under Art. 79 CISG is not only possible in cases of non-delivery, but also in cases where one of the parties to the contract has not properly performed one of his contractual duties [*OLG Zweibrücken, 8 U 46/97 (Germany 1998*); *Schlechtriem, commentary on case BGH, VIII ZR 121/98 (Germany 1999), para. 1; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79 at 5, 6; Rathjen, RIW 1999, p. 562; Staudinger – Magnus, Art. 79 at 25*]. In general, the promisor is automatically exempted from its liability under Art. 79 CISG when the requirements of Art. 80 CISG are met [*Witz/Salger/Lorenz – Salger, Art. 80 at 4*]. In particular, CLAIMANT's failure to complain falls within the scope of Art. 79(1) CISG as any event that renders proper performance impossible from an objective point of view depending upon the circumstances of each individual case constitutes an impediment in the sense of Art. 79(1) CISG [*cf. Magnus, p. 14; Flambouras, p. 267*].

95 Furthermore, CLAIMANT's omission to complain was beyond RESPONDENT's control as it arises outside its sphere of responsability. The promisor's typical sphere of control is that within which it is objectively possible for the promisor to secure performance of the contract by adopting reasonable measures of organisation and appropriate control [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79 at 14*]. It is liable, e.g. for mistakes or illness of its employees [*Magnus, p. 15; further examples in Flambouras, p. 267*]. These mentioned circumstances fall within RESPONDENT's obligation to organise its business in an orderly

manner. In contrary, RESPONDENT had no influence on whether CLAIMANT initiates proceedings before the Commission or not. Therefore, CLAIMANT's omission to complain is an objective circumstance external to RESPONDENT. It is further required that the promisor could not have reasonably foreseen that an impediment to performance would occur [*Flambouras, p. 270, 271*]. It was not foreseeable that CLAIMANT would not make use of sensible steps such as a complaint to the Commission if necessary and easily to do. Finally, it was also not possible for RESPONDENT to overcome the impediment as CLAIMANT clearly refused to complain to the Commission [*St. of Def. at 13*]. If CLAIMANT had complained to the Commission, this would have enabled RESPONDENT to fulfil the contract since Equalec would have been forced to supply Mountain View with electricity. Consequently, RESPONDENT is exempted from its liability under Art. 79(1) CISG.

REQUEST FOR RELIEF

In view of the above made submissions and on behalf of RESPONDENT, we respectfully ask the Tribunal to hold that:

- The Tribunal has no jurisdiction to consider the dispute under the Arbitration Clause in Sec. 34 of the contract concluded on 12 May 2005 **[First Issue]**.
- RESPONDENT delivered distribution fuse boards that were in conformity with the contract **[Second Issue]**.
- Any failure of RESPONDENT to deliver goods conforming to the contract is excused by CLAIMANT's default in complaining to the Commission **[Third Issue]**.

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Cologne, 25 January 2007