FOURTEENTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2006 – 2007

MEMORANDUM

FOR

EQUATORIANA OFFICE SPACE LTD

- CLAIMANT -

TRIXIE BASTIAN

PHILLIPP BANJARI

JAN-HENNING BUSCHFELD

NORA KOVACOVA

UNIVERSITY OF COLOGNE

UNIVERSITY OF COLOGNE

CENTER FOR TRANSNATIONAL LAW

(CENTRAL)

TEAM MEMBERS:

TRIXIE BASTIAN
PHILLIPP BANJARI
JAN-HENNING BUSCHFELD
NORA KOVACOVA

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

EQUATORIANA OFFICE SPACE LTD
415 CENTRAL BUSINESS CENTRE
OCEANSIDE
EQUATORIANA (CLAIMANT)

AGAINST

MEDITERRANEO ELECTRODYNAMICS S.A.
23 SPARKLING LANE
CAPITOL CITY
MEDITERRANEO (RESPONDENT)

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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
Amp	Ampere
Arb. Int'l	Arbitration International
Art.	Article
Artt.	Articles
A.S.	Aksjeselskap (Norwegian Public Company)
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
BCCI	Bulgarian Chamber of Commerce and Industry
BG	Bundesgericht (Swiss Supreme Court)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BV	Besloten Vennootschap (Dutch Private Limited Company)
CCIG	Geneva Chamber of Commerce and Industry
CCIR	Chamber of Commerce and Industry of Romania
CCIRF	Chamber of Commerce and Industry of the Russian Federation
CCIR-Rules	Rules of Arbitration of the Court of International Commercial Arbitration attached to the 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
CISG-online	Case Law on CISG <http://www.cisg-online.ch>
Cl. Ex.	CLAIMANT's Exhibit
CLOUT	Case Law on UNCITRAL Texts <http://www.uncitral.org/en-index.htm>
Co.	Company

Court of Int'l Comm. Arbitration	Court of International Commercial Arbitration
CPR	International Institute for Conflict Prevention & Resolution
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institution of Arbitration)
e.g.	exemplum gratia (for example)
et seq.	et sequentes (and following)
Fn.	Footnote
GLG	Global Legal Group
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reporter
ICSID	International Centre for Settlement of Investment Disputes
IHR	Internationales Handelsrecht (German Law Journal)
Inc.	Incorporated
Int'l	International
Int'l Hb. on Comm. Arb.	International Handbook on Commercial Arbitration
Int'l Tax & Bus. Lawy.	International Tax & Business Lawyer
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (German Law Journal)
J.D.I	Journal du Droit International (French Law Journal)
J. Int'l Arb.	Journal of International Arbitration
JZ	Juristenzeitung (German Law Journal)
LCIA	London Court of International Arbitration
LG	Landgericht (German Regional Court)
Lloyd's Rep.	Lloyd's Law Reports
Ltd	Limited
MAL	Model Law of the United Nations Commission on International Trade Law on International Commercial Arbitration of 21 June 1985
NJW	Neue Juristische Wochenschrift (German Law Journal)
No.	Number

NOM-clause	No-oral-modification clause
Nos.	Numbers
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Court of Appeals)
p.	Page
para.	Paragraph
P.O.	Procedural Order
pp.	Pages
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (German Law Journal)
Resp. Ex.	RESPONDENT's Exhibit
RIW	Recht der Internationalen Wirtschaft (German Law Journal)
S.A.	Société anonyme (French Public Company)
S.A.S.	Société par Actions Simplifiée (French Simplified Joint Stock Company)
Sec.	Section
Stockholm Arb. Rep.	Stockholm Arbitration Report
St. of Cl.	Statement of Claim
St. of Def.	Statement of Defence
Suppl.	Supplement
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)

VIAC	Vienna International Arbitral Centre (International Arbitral Centre of the Austrian Federal Economic Chamber)
Vol.	Volume
YCA	Yearbook of Commercial Arbitration
ZCC	Zurich Chamber of Commerce

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29.06.1989 Award No. 452-39-2

YCA XVI (1991), p. 298 et seq.

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[CITED AS: *CISG*]

STATEMENT OF FACTS

In 2004 Equatoriana Office Space Ltd [*hereafter: CLAIMANT*] began to develop an office park in Equatoriana called Mountain View Office Park to lease to multiple commercial lessees. To ensure its electricity supply, Mr. Herbert Konkler, CLAIMANT's Purchasing Director, called Mediterraneo Electrodynamics S.A. [*hereafter: RESPONDENT*] on **22 April 2005** to ask whether it could fabricate five primary distribution fuse boards. Upon request, CLAIMANT submitted the engineering drawings prepared by its designers. Two notes on them read "Fuses to be 'Chat Electronics' JP type in accordance with BS 88" and "To be lockable to Equalec requirements". After receipt of the drawings, Mr. Peter Stiles, Sales Manager at RESPONDENT, assured that fuse boards in accordance with the drawings could be delivered and quoted a price of US$ 168,000. Subsequently, a written sales contract was concluded on **12 May 2005**. The engineering drawings had been expressly made part of the contract. On **14 July 2005** Mr. Stiles called CLAIMANT to give notice that RESPONDENT's inventory of Chat Electronics JP type fuses was exhausted and that they temporarily could not procure new fuses because of Chat Electronics' production difficulties. Since Mr. Konkler was on a business trip, he was referred to Mr. Hart, one of the staff in the Purchasing Department, who is not very well versed in the electrical aspect of the development. Mr. Stiles recommended the use of Chat Electronics JS type fuses instead of JP type fuses. Mr. Hart knew that the Mountain View project was under tight time pressure and followed Mr. Stiles' recommendation. Although Sec. 32 of the contract requires any amendments to the contract to be in writing, RESPONDENT did not send a proposal for a change in the contract specifications. One week after the agreed delivery date, RESPONDENT delivered distribution fuse boards with Chat Electronics JS type fuses to the construction site in Mountain View on **22 August 2005**, whereupon CLAIMANT paid the purchase price. On **8 September 2005**, one week after the fuse boards had been installed, CLAIMANT was informed that the local electrical distribution company, Equalec, had refused the connection as the JS type fuses were rated from 100 to 250 Amp. CLAIMANT was told that Equalec has a policy of connecting to JS type fuses only when the circuits are rated at more than 400 Amp. CLAIMANT immediately asked RESPONDENT whether it could deliver fuse boards with JP type fuses. Since it would take at least another two months and CLAIMANT had to give occupancy to its lessees on **1 October 2005**, it bought new fuse boards from Switchboards Ltd at a price of US$ 180,000. The additional installation costs amount to US$ 20,000.

In view of the above facts, we respectfully make the following submissions on behalf of our client Equatoriana Office Space Ltd, CLAIMANT, and request the Arbitral Tribunal to hold that:

- It has jurisdiction to consider the dispute under the CCIR-Rules as the designated arbitration rules in Sec. 34 of the contract concluded on 12 May 2005 **[First Issue]**.
- RESPONDENT did not deliver distribution fuse boards that were in conformity with the contract **[Second Issue]**.
- The fact that CLAIMANT did not complain to the commission does not excuse any failure of RESPONDENT to deliver goods conforming to the contract **[Third Issue]**.

FIRST ISSUE: THE ARBITRAL TRIBUNAL HAS JURISDICTION TO CONSIDER THE DISPUTE UNDER THE ARBITRATION CLAUSE FOUND IN THE CONTRACT OF 12 MAY 2005.

1 As the Arbitral Tribunal has the competence to rule on its own jurisdiction **(A.)**, it shall find that the Parties agreed on arbitration under the Rules of Arbitration of the Court of International Arbitration attached to the Chamber of Commerce and Industry of Romania [*hereafter: CCIR-Rules*] in Sec. 34 of the contract concluded on 12 May 2005 **(B.)**. Moreover, the principle of good faith as laid down in Art. 9(1) CCIR-Rules prevents RESPONDENT from challenging the jurisdiction of the Arbitral Tribunal **(C.)**.

A. The Arbitral Tribunal has authority to decide on its own jurisdiction.

2 The sales contract concluded between CLAIMANT and RESPONDENT on 12 May 2005 provides in Sec. 34 that arbitration "shall take place in Vindobona, Danubia" [*Cl. Ex. No. 1*]. Danubia has enacted the 1985 text of the UNCITRAL Model Law on International Commercial Arbitration [*hereafter: MAL*] without amendment [*St. of Cl. at 21*]. Since the arbitration is taking place in a country that has adopted the MAL, its provisions apply pursuant to Art. 1(2) MAL. According to Art. 16(1) MAL, the Arbitral Tribunal "may rule on its own jurisdiction". This provision is mandatory [*Holtzmann/Neuhaus, p. 480; Weigand – Roth, p. 1223 at 5*] and embodies the widely recognised principle of competence-competence [*Fung Sang Trading v. Kai Sun Sea Products & Food (Hong Kong 1991); ICC, Award No. 6268 (1990); Fouchard/Gaillard/Goldman, para. 660; Redfern/Hunter, para. 5-39; Calavros, p. 76*], which is also confirmed by Art. 15(2) CCIR-Rules. Therefore, the Arbitral Tribunal has the competence to rule on its own jurisdiction.

B. The Parties agreed on arbitration under the CCIR-Rules as the applicable arbitration rules in Sec. 34 of the contract concluded on 12 May 2005.

3 The Parties validly agreed on dispute settlement by arbitration in Sec. 34 of the contract **(I.)**. An interpretation of the reference to "International Arbitration Rules used in Bucharest" made in the arbitration clause reveals the Parties' clear intent to apply the CCIR-Rules **(II.)**. Consequently, the Parties did not opt for the UNCITRAL Arbitration Rules under Art. 72(2) CCIR-Rules **(III.)**.

I. CLAIMANT and RESPONDENT validly agreed on dispute settlement by arbitration in Sec. 34 of the contract.

4 Due to the contractual nature of arbitration, no party should be forced to arbitration without its assent [*E.I. Du Pont De Nemours and Co. v. Rhodia Fiber and Resin Intermediates S.A.S. (U.S. 2001*)]. Therefore, the parties' mutual consent to submit disputes to arbitration instead of litigation in state courts must be clearly determinable [*Canadian National Railway Co. v. Lovat Tunnel Equipment Inc.* (*Canada 1999)*; *Lew/Mistelis/Kröll, para. 8-1*]. CLAIMANT and RESPONDENT expressed such a clear consent by incorporating an arbitration clause into Sec. 34 of their contract reading "All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by the International Arbitration Rules used in Bucharest" [*Cl. Ex. No. 1*]. It further stipulates that the "arbitral award shall be final and binding". Thus, there can be no doubt as to the fact that the Parties intended to refer disputes between them to arbitration without recourse to the ordinary courts of law.

II. An interpretation of the terms "International Arbitration Rules used in Bucharest" reveals the Parties' intent to apply the CCIR-Rules.

5 The Tribunal has authority to determine the applicable arbitration rules by interpreting the wording of the arbitration clause in Sec. 34 of the contract **(1.)**. The terms "Rules used in Bucharest" have to be interpreted as the reference to the seat of the Court of International Commercial Arbitration [*hereafter: Court of Int'l Comm. Arbitration*] whose rules have to be applied to the proceedings **(2.)**. Notwithstanding its general labelling "Rules of Arbitration", the CCIR-Rules are international arbitration rules as required by the clause **(3.)**. Contrary to RESPONDENT's allegations the CCIR-Rules provide a complete and operable set of international arbitration rules **(4.)**.

1. The Tribunal has authority to determine the applicable arbitration rules by interpreting the wording of the arbitration clause in Sec. 34 of the contract.

6 RESPONDENT's objection to jurisdiction is merely limited to the determination of the applicable procedural rules [*St. of Def. at 15*]. According to the principle of party autonomy which is universally recognised as a basic feature of arbitration, parties are free to choose the applicable arbitration rules [*cf. Art. 19 MAL*; *Weigand – Weigand, p. 54 at 125*]. CLAIMANT and RESPONDENT agreed to have disputes "settled by the International Arbitration Rules used in Bucharest". Although Sec. 34 of the contract does not explicitly refer to any specific procedural rules or any arbitral institution, this inaccurate designation does not render the clause ineffective but enables the Arbitral Tribunal to determine by way of interpretation the institution whose arbitration rules have to be applied [*cf. CCIG, Interlocutory Award, Matter No. 117 (1996); CCIG, Interim Award of 27.08.1999); CCIR, Award No. 45 (2000); BGH, III ZR 85/81 (Germany 1982); OLG Hamm, 29 U 70/92 (Germany 1994)*].

7 To determine the applicable law to an arbitration agreement and thus to its interpretation, a range of different approaches have been adopted: (a) the law expressly or implied chosen by the parties, (b) the law at the place of arbitration, (c) the law governing the main contract and (d) the law of the forum in which enforcement of the arbitration agreement is sought [*Born/Koepp, pp. 62, 63*] In practice, there is little uniformity among arbitral tribunals and domestic courts in applying these alternatives [*Born, p. 95*]. In particular, there is an additional approach adopted by French courts to asses the validity of an arbitration agreement on the basis of the parties common intent without recourse to any national law apart from mandatory rules and international public policy [*Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors (France 1991); Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors (France 1993); Fouchard/Gaillard/Goldman, para. 437; Born/Koepp, p. 65*].

8 Whatever the applicable law may be, it is considered to be a world-wide fundamental requirement of justice that statements made by a party are to be interpreted according to the party's intent [*Rabel, p. 534; Bonell, Relevance of Courses of Dealing, p. 126*]. This basic principle can be found in Art. 4.1(1) UNIDROIT Principles of International Commercial Contracts or in Art. 8(1) CISG. Accordingly, to determine the Parties' intent the consequences which the Parties at the time of the conclusion of the contract reasonably and legitimately envisaged must be taken into account [*cf. ICSID, Case No. ARB/81/1 (1983); Fouchard/Gaillard/Goldman, para. 477*].

9 As laid down in Sec. 34 of the contract the Parties intended unequivocally to refer disputes to settlement by "final and binding" arbitration. Once the intention to arbitrate has been clearly established, the arbitration clause is to be interpreted widely [*Lucky-Goldstar Int'l Limited v. Ng Moo Kee Engineering Limited (Hong Kong 1993); HZI Research Center, Inc. v. Sun Instruments Japan Co., Inc. (U.S. 1995); Mangistaumunaigaz Oil Production v. United World Trade Inc (U.K. 1995); BG, 4P.67/2003 (Switzerland 2003); Fouchard/Gaillard/Goldman, para. 481*]. The principle of *in favorem validitatis* has led domestic courts and arbitral tribunals to interpret arbitration agreements positively in order to give effect to the clear intention of the parties [*ICC, Preliminary Award Case No. 2321 (1974); CCIG, Interlocutory Award, Matter No. 117 (1996); CCIG, Interim Award of 21.10.2002; CGB Marine Services Co. v. M/S Stolt Entente (U.S. 1990); Berger, Private Dispute Resolution, para. 20-62; Craig/Park/Paulsson, para. 5.01; Lew/Mistelis/Kröll, para. 7-71; Hochbaum, p. 34*]. According to the principle of effective interpretation one should "prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical" [*ZCC, Preliminary Award of 25.11.1994; Hoogovens Ijmuiden Vekoopkantoor v. M.V. Sea Cattleya (U.S. 1994); Redfern/Hunter, para. 3-40; Fouchard/Gaillard/Goldman, para. 478; see also Art. 4.5 UNIDROIT Principles*]. These interpretative approaches find global acceptance and are frequently used in international arbitration practice [*BCCI, Case No. 151/1984 (1984); Star Shipping A.S. v. China Nat. Foreign Trading Transp. Corp. (U.K. 1993); Tennessee Imports, Inc. v. Pier Paulo Filippi and Prix Italia (U.S. 1990); German Coffee Association, Final Award of 28.09.1992*; *BG, 4P.162/2003 (Switzerland 2004)*]. Therefore, the Arbitral Tribunal shall apply these general principles of interpretation.

2. The terms "Rules used in Bucharest" have to be interpreted as a reference to the seat of the Court of Int'l Comm. Arbitration whose rules have to be applied to the proceedings.

10 The arbitration clause in Sec. 34 of the contract calls for dispute settlement "by the International Arbitration Rules used in Bucharest" [*Cl. Ex. No. 1*]. Even though the Parties did not copy the model arbitration clause recommended by the CCIR word by word, an interpretation of the clause can only lead to the Court of Int'l Comm. Arbitration and the CCIR-Rules. This conclusion follows from the Parties' decision in favour of institutional arbitration rules **(a.)** and the fact that the Court of Int'l Comm. Arbitration is the only arbitral institution located in Bucharest **(b.)**.

a. CLAIMANT and RESPONDENT intended to settle all disputes arising out of or in connection with the contract under institutional arbitration rules.

11 If parties want to have recourse to institutional arbitration, they refer in their contract to a set of preformulated arbitration rules of a recognised arbitral institution [*Berger, Understanding Int'l Comm. Arb., p. 14*]. Even though CLAIMANT and RESPONDENT did not explicitly mention an arbitral institution, a review of the wording of Sec. 34 and all circumstances makes it evident that the Parties wanted to designate institutional arbitration rules.

12 The Parties' intent to apply a specific preformulated set of arbitration rules is demonstrated by the wording of the arbitration clause that disputes "shall be settled by *the* International Arbitration Rules". The use of a definite article illustrates the Parties' will to refer to an existing set of rules. Such standard provisions for the conduct of arbitral proceedings are generally drafted by arbitral centres or institutions which govern the proceedings when reference was made to them by the parties [*Rubino-Sammartano, para. 3.3*]. In contrast, ad hoc arbitration requires the parties to make their own arrangements for the proceedings [*Berger, Private Dispute Resolution, para. 16-32; Weigand, p. 17 at 33, p. 54 at 126*]. Although there exist sets of preformulated rules that are especially drafted for ad hoc arbitration, like the UNCITRAL Arbitration Rules or the CPR Rules for Non-Administered Arbitration [<*www.cpradr.org/pdfs/arb-rules2005.pdf*>], these are neither primarily designed to be "used" for arbitral proceedings "in Bucharest" nor do the drafting organisations have a specific link to Bucharest.

13 Further, the wording "settled *by*" refers to institutional arbitration. As a dispute can only be settled *according to* or *under* certain rules but not *by* rules, the expression "settled by" indicates an active role of a third party regarding the dispute resolution process. In this regard, a comparison of various model clauses reveals that in eastern European countries the wording "settled by" is regularly used in connection with an arbitral institution, e.g. the model clauses of the Courts of Arbitration attached to the Chambers of Commerce of Hungary, Moldova, Latvia, Bulgaria, Poland, the Russian Federation and Romania. Thus, the arbitration clause in Sec. 34 of the contract reflects and illustrates the institutional origin of the rules to which the Parties have referred. The significance of this aspect is corroborated by the fact that under the former socialist regime disputes between foreign enterprises and socialist companies were exclusively settled by permanent arbitration bodies [*CCIG, Case No. 193 (2002) with reference to Lebedev, Int'l Hb. on Comm. Arb., Suppl. 17 (January/1994), p. 1*]. Therefore, one must assume that the wording "settled by the International Arbitration Rules" which are to be used in a former socialist country refers to institutional arbitration rules.

14 In addition, RESPONDENT's original clause called for arbitration at the Mediterraneo International Arbitral Center [*Resp. Ex. No. 1*]. This shows RESPONDENT's intent to submit disputes to institutional arbitration. RESPONDENT's previous arbitral proceedings reflect a clear preference for institutional arbitration as well. Otherwise it would not have conducted two proceedings under the administration of the aforementioned institution [*P.O. No. 2 at 15*]. Notwithstanding its sole ad hoc arbitration [*P.O. No. 2 at 15*], RESPONDENT maintained its arbitration clause referring to institutional arbitration and continued to use that clause in its standard contract form. Obviously, its favoured dispute resolution mechanism is institutional arbitration.

b. Since the Court of Int'l Comm. Arbitration is the only arbitral institution located in Bucharest, its rules are designated in the arbitration clause.

15 The denomination of "Bucharest" in the arbitration clause reflects the Parties' decision to arbitrate with a specific connection to Bucharest. In combination with their option for institutional arbitration one can presume that the Parties intended to indicate the seat of the arbitral institution by making that reference.

16 There is no other way to construe the given reference to Bucharest. As the arbitration shall take place in Vindobona, Danubia [*Cl. Ex. No. 1*], the special connection to Bucharest cannot be taken to designate the place of arbitration. Nor can the specific link to Bucharest be interpreted as a reference to the place of hearings. It is generally accepted that hearings, meetings and deliberations may be held anywhere without shifting the place of arbitration [*Weigand – Weigand, p. 62 at 146*]. Since the venue of the arbitral proceedings is discretionary, it is no adequate criterion for the establishment of a particular link to Bucharest. Hence, the wording "used in Bucharest" must describe the seat of the arbitral institution.

17 This reference to a particular city where the alleged institution is seated enables the Tribunal to identify the chosen institution [*cf. Epoux Convert v. Société Droga (France 1983); Société Tuvomon v. Société Amaltex (France 1985); BCCI, Case No. 151/1984 (1984); CCIG, Interim Award of 21.10.2002*]. In cases of inaccurately drafted arbitration clauses, the common approach in international arbitration is to consider whether there is any other institution administering arbitrations at the place mentioned in the clause [*Newman/Hill, p. 99, describing the arbitral practice of the ICC; Magnusson, Stockholm Arb. Rep. 2002:2, p. 173*]. In Bucharest, there is *only one* arbitral institution, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania [*P.O. No. 2 at 10; CCIR, Award No. 45 (2000)*].

18 Further, the Parties' intent to designate the Court of Int'l Comm. Arbitration is demonstrated by the fact that the Parties stuck closely to the wording of its recommended model clause. The main part of the model clause is identical to the Parties' arbitration clause as it reads "All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution of termination, shall by settled by the [...]. The arbitral award shall be final and binding". Solely the exact quotation of the complete name of the Court of Int'l Comm. Arbitration and its rules was skipped. However, it is arbitration practice that parties rely on a standard clause, but deviate from the exact wording of the model clause, e.g. by the parties' ignorance of the proper name of the institution or the importance of identifying it clearly in the arbitration clause [*CCIG, Interim Award of 21.10.2002; OLG Dresden, 2 U 1010/94 (Germany 1994)*].

19 Consequently, an interpretation of Sec. 34 of the contract must lead to the conclusion that the Parties entrusted the Court of Int'l Comm. Arbitration with the administration of the arbitral proceeding governed by the CCIR-Rules. This is also in conformity with Art. 5 CCIR-Rules which provides that parties agree *ipso facto* to the CCIR-Rules when the Court of Int'l Comm. Arbitration is entrusted with the organisation of the arbitration.

3. Notwithstanding its general labelling "Rules of Arbitration", the CCIR-Rules are international arbitration rules as required by the clause.

20 Sec. 34 of the contract provides for a dispute settlement "by the International Arbitration Rules". The general labelling of the CCIR-Rules as "Rules of Arbitration" does not deprive them from their international character as it is in correspondence with the labelling of the rules of major arbitral institutions **(a.)**. The international character of the CCIR-Rules is supported by the traditional purpose of the Court of Int'l Comm. Arbitration to administer international commercial disputes **(b.)**.

a. The mere labelling "Rules of Arbitration" does not exclude the application of the CCIR- Rules to international arbitrations.

21 The mere labelling of the CCIR-Rules does not prevent their application to international proceedings. Since the Court of Int'l Comm. Arbitration provides for one set of arbitration rules which covers both domestic and international arbitration, that set is entitled "Rules of Arbitration" rather than *International* Arbitration Rules. It is common practice that arbitration rules which are drafted particularly with regard to international proceedings are labeled simply "Rules of Arbitration". Two of the most prominent examples are the Rules of Arbitration of the ICC and the LCIA Arbitration Rules. Nevertheless, they do not loose their

international character. It is sufficient if the name of the institution clearly indicates that its rules are designated for international arbitration [*ICC, Award No. 5294 (1988); Hochbaum, p. 52*]. In this context, it can be taken for granted that an arbitration institution entitled "Court of *International* Commercial Arbitration" provides rules for international arbitral proceedings.

b. The international character of the CCIR-Rules is supported by the traditional purpose of the Court of Int'l Comm. Arbitration to administer international commercial disputes.

22 The Court of Int'l Comm. Arbitration provides exclusive services for the settlement of non-domestic commercial disputes and is located in Bucharest. It was originally created in 1953 for this particular purpose and therefore named "Court of *International* Commercial Arbitration" as under the former communist regime, commercial arbitration was limited to international disputes [*Capatina, p. 2*]. Since its reorganisation as a permanent non-corporate arbitration institution attached to the Chamber of Commerce and Industry of Romania it administers domestic arbitrations as well [*Decree Law No. 139 of 11 May 1990; see <http://arbitration.ccir.ro/Index.html>*], but is still concerned with the administration of international proceedings. Due to the Court's long-standing function to administer the settlement of foreign trade disputes, it is evident that its arbitration rules are tailor-made for this purpose. This is affirmed by Art. 2(1) of the Court's Regulations on the Organisation and Operation which characterises the Court's mission inter alia as the promotion of domestic as well as international commercial arbitrations. As part of the latter task, it also established international cooperations with similar institutions from other countries, such as the German Institution of Arbitration (DIS) and the Vienna International Arbitral Centre (VIAC) [*see <http://www.wko.at/arbitration/de/de_index.htm>*]. Obviously, not only the historical development but also the recent purpose of the Court of Int'l Comm. Arbitration reflects its international orientation. Accordingly, the CCIR-Rules are used in practice for the conduct of international proceedings before the Court of Int'l Comm. Arbitration in approximately twenty percent of all pending cases [*P.O. No. 2 at 11*]. This fact provides additional proof that they are fit and designed for international proceedings.

4. Contrary to RESPONDENT's allegations, the CCIR-Rules provide a complete and operable set of international arbitration rules.

23 One cannot object that the CCIR-Rules do not govern exhaustively all possible incidents that might occur in an arbitral proceeding. To some extent incompleteness requiring gap-filling is immanent to all legal systems [*Baron, Arb. Int'l, Vol. 15 No. 2 (1999), p. 123*]. Every decision

based on law bears therefore a certain degree of openness and unpredictability which renders them flexible and effective. Even the rules of any other arbitral institution are not be able to provide an exhaustive set of rules, but leave certain questions unanswered [*Stoecker, J. Int'l Arb., Vol. 7 No. 1 (1990), p. 116*]. In this regard, Art. 15(1) ICC Rules provides that where these rules are silent the proceedings shall be governed by any rules which the parties or, failing them, the arbitral tribunal may settle on. Though the CCIR-Rules do not contain a corresponding provision, they are pursuant to Art. 79 CCIR-Rules to be complemented by the provisions of the ordinary rules of the Romanian Code of Civil Procedure insofar as they regard the international character of the arbitration [*Babiuc/Capatina, ICC Bulletin, Special Suppl. (1994), p. 112*]. Hence, gaps in the applicable arbitration rules are to be filled by the arbitrators according to Art. 341(3) Romanian Code of Civil Procedure [*Capatina, p. 18*] provided that these rules do not contradict to mandatory rules of the MAL as the MAL is the applicable law at the place of arbitration, Vindobona. The discretion of the Tribunal to solve procedural questions that are not stipulated by the Parties is laid down in Art. 19 MAL as well [*cf. Explanatory Note, p. 21*].

24 The CCIR-Rules themselves stipulate that the Court of Int'l Comm. Arbitration shall organise the settlement of international commercial disputes by arbitration, if the parties concluded a written agreement in this respect, Art. 2(1) CCIR-Rules. Once the Court of Int'l Comm. Arbitration is entrusted with the organisation of an arbitration, the parties generally agree *ipso facto* to the CCIR-Rules pursuant to Art. 5 CCIR-Rules. Hence, the CCIR-Rules are declared applicable to international arbitrations. Additionally, the CCIR-Rules contain in Chapter VIII specific provisions which are entitled "Special Provisions regarding International Commercial Arbitration". This concept was adopted from the Romanian Code of Civil Procedure which also contains in Book IV a special chapter concerning international arbitration (Chapter X – "International Arbitration"). Pursuant to Art. 1(2) CCIR-Rules the CCIR-Rules are drafted in compliance with Book IV of the Romanian Code of Civil Procedure.

25 The distinction between domestic and international arbitration provisions does not conflict with the international character of the CCIR-Rules. As the reform of the law of commercial arbitration in Book IV of the Romanian Code of Civil Procedure in 1993 was broadly inspired by the MAL, the CCIR-Rules do not only comply with Book IV of the Romanian Code of Civil Procedure but are also partially based on the MAL [*Babiuc/Capatina, ICC Bulletin, Special Suppl. (1994), p. 109; GLG, International Arbitration 2006, para. 2.3*]. Therefore, they are drafted to be applied to international commercial arbitrations. This is likewise made

evident by the international proceedings which have been carried out effectively so far in accordance with the CCIR-Rules.

26 RESPONDENT admits that Chapter VIII, Artt. 72 to 77 CCIR-Rules, modifies only some of the otherwise applicable general provisions of the CCIR-Rules [*St. of Def. at 15*]. Hence, the settlement of international commercial disputes under the CCIR-Rules requires an interplay of the general and the subsequent special provisions [*cf. Babiuc/Capatina, ICC Bulletin, Special Suppl. (1994), p. 109*]. Therefore, any reasonable person would have understood the reference to "International Arbitration Rules" as designation of the CCIR-Rules in their entirety – general provisions with the modification of Chapter VIII. Therefore, RESPONDENT's allegation that the clause does not refer to a complete set of rules of any arbitral organisation in Bucharest [*St. of Def. at 15*] is not plausible.

III. The Parties did not opt for the UNCITRAL Arbitration Rules under Art. 72(2) CCIR-Rules.

27 Relying on Art. 72(2) CCIR-Rules, RESPONDENT argues that the arbitration clause "more likely" refers to the UNCITRAL Arbitration Rules [*St. of Def. at 16*]. However, since the arbitration clause refers to the CCIR-Rules, it cannot refer concurrently to the UNCITRAL Arbitration Rules.

28 According to Art. 72(2) CCIR-Rules parties are free to opt either for the CCIR-Rules or any other rules of arbitral procedure. RESPONDENT explains the likelihood of the applicability of the UNCITRAL Rules with the fact that these rules were specifically drafted for international commercial arbitrations. However, there are numerous arbitral institutions whose rules are also specifically drafted for international commercial arbitration such as the CCIR-Rules. It must be emphasised that when drafting the UNCITRAL Arbitration Rules a restriction to "international trade transactions" which was originally intended, was removed to perceive the broadest conceivable range of application [*Weigand – Trittman/Duve, p. 319 at 16*]. Furthermore, as the Rules could be modified by the parties, such a limitation would not have any legal effect and could not prevent the parties from using the UNCITRAL Rules for purely domestic transactions [*van Hof, p. 14 at para. 1.1.1; Sanders, p. 177 at 2.5*]. Thus, contrary to RESPONDENT's allegation, the application in international commercial disputes is not the exclusive characteristic of the UNCITRAL Arbitration Rules.

29 Due to the wide range of arbitration rules that are used in international proceedings, the denomination of "International Arbitration Rules" cannot reasonably be interpreted independent of the reference to "Bucharest" but has to be put into context with it. Hence, the

denomination "Bucharest" does not only refer to the Court of Int'l Comm. Arbitration but specifies at the same time the applicable procedural rules. Bearing this in mind, the UNCITRAL Arbitration Rules are not known as International Arbitration Rules typically used in Bucharest. They are rather known as arbitration rules specifically designed for world-wide use in ad hoc arbitrations. Consequently, the reference to international arbitration rules is not sufficient to conclude that the clause makes reference to the UNCITRAL Arbitration Rules.

30 Furthermore, the UNCITRAL Arbitration Rules do not provide for the administration by an arbitral institution [*Sanders, p. 176 at 2.2*] and thus are not the proper rules for the conduct of any institutional arbitration agreed upon by the Parties. The UNCITRAL Arbitration Rules call for the assistance of a third party only in few instances, e.g. the appointing authority under Artt. 6 to 8 UNCITRAL Arbitration Rules. Although this would be the president of the Court of Int'l Comm. Arbitration pursuant to Art. 72(2) CCIR-Rules, the only rules that are exclusively drafted for arbitrations under the auspices of the Court of Int'l Comm. Arbitration are still the CCIR-Rules. Even if it were possible to opt for any other rules, an explicit and unequivocal reference to that alternative set of rules would be necessary to apply these rules under the Court of Int'l Comm. Arbitration as they are not designed for that purpose. RESPONDENT's submissions do not provide any reasonable ground to assume such a clear reference.

31 Instead, it must be presumed that if the parties chose institutional arbitration rules, they want to take advantage of the administrative services offered by the institution under its rules. In this regard the statistics of the Court of Int'l Comm. Arbitration demonstrate that until today it had not happened that parties opted for the UNCITRAL Rules under Art. 72(2) CCIR-Rules [*P.O. No. 2 at 12; Capatina, p. 19*]. Choosing the UNCITRAL Arbitration Rules cannot have been the Parties' intent because otherwise, they would be deprived of the advantages that an administered proceeding under the proper rules of the arbitral institution offers. If CLAIMANT and RESPONDENT intended to have an ad hoc arbitration in accordance with the UNCITRAL Arbitration Rules, they could have made a direct reference to these rules which they did not. Hence, the arbitration clause in Sec. 34 of the contract does not refer in any way to the UNCITRAL Arbitration Rules. Consequently, it is not apparent that the Parties intended to make use of the option in Art. 72(2) CCIR-Rules.

C. The principle of good faith as laid down in Art. 9(1) CCIR-Rules prevents RESPONDENT from challenging the jurisdiction of the Arbitral Tribunal.

32 Although RESPONDENT raised its plea against the jurisdiction of the Arbitral Tribunal timely in its Statement of Defence according to Art. 54(1) CCIR-Rules, the principle of good faith prevents RESPONDENT from challenging the jurisdiction of the Arbitral Tribunal.

33 Art. 9(1) CCIR-Rules provides that each party shall exercise their procedural rights *bona fide* and in accordance with the purpose they are granted. Thus, Art. 9(1) CCIR-Rules expresses the parties' obligation to act in consistence with the fundamental requirement of good faith as a general principle of law accepted by all legal systems [*ICJ, Federal Republic of Germany v. Kingdoms of Denmark and the Netherlands (1969); ICC, Second Preliminary Award No. 1512 (1970); ICSID, Award in Case No. ARB/81/1 (1983)*]. Good faith includes the specific principle that a party cannot contradict itself to the detriment of another [*Fouchard/Gaillard/Goldman, para. 1462; Dickstein, 5/6 Int'l Tax & Bus. Lawy. 1987/88, p. 81; Bowden, pp. 127, 128*], which is embodied in the concept of estoppel in common law as well as the maxim of *non concedit venire contra factum proprium* in civil law and has also been adopted in arbitral case law [*ICJ, Federal Republic of Germany v. Kingdoms of Denmark and the Netherlands (1969); ICC, Second Preliminary Award No. 1512 (1970); ICSID, Case No. ARB/81/1 (1983); Iran-U.S. Claims Tribunal, Award No. 452-39-2 (1989); Gaillard/Fouchard/Goldman, para. 1462*].

34 By examining RESPONDENT's conduct in the present case, the Tribunal shall consider its attitude from the conclusion of the contract until the time when the dispute arose [*cf. Fouchard/Gaillard/Goldman, para. 477*]. When signing the contract, RESPONDENT had severe reservations towards the arbitration clause since no arbitral institution was mentioned [*Resp. Ex. No. 1*]. Nevertheless, RESPONDENT missed the opportunity to re-consult CLAIMANT as soon as it faced that inaccuracy. Instead, it did not object to the clause since it was not an issue RESPONDENT wanted "to let interfere with concluding the sale" [*Resp. Ex. No. 1*]. Even throughout a later telephone conversation with Mr. Konkler, Mr. Stiles on behalf of RESPONDENT only asked why a different arbitration clause had been inserted into the contract [*Resp. Ex. No. 1*] but did not express any protest. Consequently, RESPONDENT had enough opportunities to object to the clause. Its failure to do so has to be taken as tacit acceptance of the arbitration clause [*cf. Iran-U.S. Claims Tribunal, Award No. 452-39-2 (1989)*].

35 Considering this, it seems that RESPONDENT's only intention is to deprive CLAIMANT of the advantages of arbitration and to compel it to claim its rights before ordinary courts. This

would be against the common intention of both Parties as expressed in the arbitration agreement. RESPONDENT tries at least to obstruct the current proceedings by misusing the right granted in Art. 54(1) CCIR-Rules to the detriment of CLAIMANT. Therefore, the Tribunal shall find that RESPONDENT is precluded from challenging the Tribunal's jurisdiction as it acted in bad faith and decline to hear RESPONDENT's submissions in this matter.

SECOND ISSUE: RESPONDENT DID NOT DELIVER DISTRIBUTION FUSE BOARDS THAT WERE IN CONFORMITY WITH THE CONTRACT.

36 The five primary distribution fuse boards delivered by RESPONDENT were not equipped with JP type fuses and did therefore not conform to the contract as originally written, Art. 35 CISG **(A.)**. As the contract has not been amended to provide that JS type fuses should be installed into the fuse boards, the non-conformity of the delivered goods is upheld **(B.)**.

A. Since the distribution fuse boards delivered by RESPONDENT were not equipped with JP type fuses, they did not conform to the contract as originally written, Art. 35 CISG.

37 The sales contract between CLAIMANT and RESPONDENT is governed by the CISG **(I.)**. Both the contract and the attached engineering drawings including the descriptive notes form RESPONDENT's contractual obligations to deliver distribution fuse boards equipped with JP type fuses compatible with "Equalec requirements", Art. 35(1) CISG **(II.)**. Additionally, RESPONDENT failed to deliver fuse boards fit for the particular purpose of being connectable to the local electricity provider's power grid, Art. 35(2)(b), (3) CISG **(III.)**.

I. The sales contract between CLAIMANT and RESPONDENT is governed by the CISG.

38 On 12 May 2005, CLAIMANT and RESPONDENT validly concluded a sales contract for the delivery of five primary distribution fuse boards at a price of US$ 168,000 [*Cl. Ex. No. 1*]. This contract is subject to the CISG [*St. of Cl. at 19*]. Office Space Ltd has its place of business in Equatoriana, Mediterraneo Electrodynamics S.A. in Mediterraneo [*St. of Cl. at 1, 2*]. Mediterraneo is party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) without any declaration [*P.O. No. 2 at 6*], but Equatoriana is not [*St. of Cl. at 19*]. Pursuant to Art. 1(1)(b) CISG the Convention applies to a sales contract when the rules of private international law lead to the application of the law of a contracting state. Since an arbitral tribunal has no *lex fori* it is not bound to apply the conflict of law rules of the

country in which it has its seat [*Redfern/Hunter, para. 2-79*]. Instead, the conflict rules are to be taken from the law governing the arbitration [*Lew/Mistelis/Kröll, para. 17-39*]. In accordance with the generally recognised principle of party autonomy [*Redfern/Hunter, para. 2-24; Heuzé at 113, Fn. 126*], both Art. 73(1) CCIR-Rules and Art. 28(1) MAL stipulate that the merits of the case are governed by the law determined by the parties in their agreement. In Sec. 33 of their contract, the Parties validly opted for the law of Mediterraneo [*Cl. Ex. No. 1*] as a contracting state. Hence, the contract is governed by the CISG.

II. RESPONDENT failed to fulfil its contractual obligation to deliver distribution fuse boards equipped with JP type fuses compatible with "Equalec requirements" pursuant to Art. 35(1) CISG.

39 The contract itself calls for delivery of five distribution fuse boards in accordance with the engineering drawings **(1.)**. RESPONDENT is obliged to install Chat Electronics JP type fuses as required by the first descriptive note of the drawings **(2.)**. Due to an interpretation pursuant to Art. 8(2) CISG the second descriptive note constitutes RESPONDENT's obligation to ensure the ability of the fuse boards to be connectable to the electrical supply in accordance with Equalec's technical requirements **(3)**. Thus, the distribution fuse boards equipped with JS type fuses delivered by RESPONDENT were not in conformity with the contract **(4.)**.

1. The contract itself calls for delivery of five distribution fuse boards in accordance with the engineering drawings.

40 By signing the contract of 12 May 2005 RESPONDENT agreed to sell and CLAIMANT agreed to purchase five fuse boards at a total price of US$ 168,000 to be paid upon delivery. As distribution fuse boards always have to meet the specific requirements of each customer, CLAIMANT submitted detailed engineering drawings that were expressly made part of the contract [*Cl. Ex. No. 1*]. The drawings showed the construction of the fuse boards including the distribution fuseways for each tenant as well as the rating for each fuseway [*St. of Cl. at 9*]. Accordingly, each fuse board must contain 20 to 30 fuseways which have in turn to be connected to three fuses with ratings from 100 to 250 Amp [*St. of Cl. at 9; P.O. No. 2 at 27*]. The so fabricated fuse boards had to be delivered directly to the construction site of Mountain View on 15 August 2005.

2. RESPONDENT is obliged to deliver Chat Electronics JP type fuses as required by the first descriptive note of the drawings.

41 In its inquiry in April 2005 CLAIMANT asked generally about the possibility of procuring five primary distribution fuse boards equipped with J type fuses [*St. of Def. at 3*]. However, the first descriptive note placed on the engineering drawings clearly indicates CLAIMANT's need for JP type fuses as it reads "Fuses to be 'Chat Electronics' JP type in accordance with BS 88" [*St. of Cl. at 9*]. The drawings had been prepared by CLAIMANT's designers based upon the comments of its usual supplier Switchboards Ltd that had told CLAIMANT to only use JP type fuses for the Mountain View project [*St. of Cl. at 9*]. Even without Switchboards' comments CLAIMANT would have called for JP type fuses for ratings of less than 400 Amp [*P.O. No. 2 at 25*].

42 After RESPONDENT had received the drawings, it assured that such fuse boards could be delivered and quoted a firm purchase price [*Resp. Ex. No. 1*]. Subsequently, the drawings and thus the descriptive notes on them have been made part of the contract. Even RESPONDENT's subsequent conduct confirms acceptance of its obligation to furnish the fuse boards with JP fuses. If it had not felt bound by the first descriptive note, RESPONDENT would not have called on 14 July 2005 to ask for a change in the fuses due to its procurement difficulties [*St. of Def. at 7*]. As Mr. Stiles himself states, RESPONDENT needed JP fuses to "fulfil the contract" with CLAIMANT [*Resp. Ex. No. 1*].

3. The second note constitutes RESPONDENT's obligation to ensure the ability of the distribution fuse boards to be connectable to the electrical supply in accordance with "Equalec requirements".

43 Pursuant to Art. 8(2) CISG, the prevailing standard for interpretation under the CISG [*Staudinger – Magnus, Art. 8 at 19; Ferrari/Flechtner/Brand – Ferrari, p. 178 et. seq.*], statements made by a party are to be interpreted according to the understanding of a reasonable person in the same situation as the other party [*BG, 4C.296/2000/rnd (Switzerland 2000); J. T. Schuermans v. Boomsma Distilleerderij / Wijnkoperij BV (Netherlands 1997); Karollus, p. 37*]. The standard for interpretation has to be that of a reasonable participant in the same branch of international commercial trade [*Staudinger – Magnus, Art. 8 at 10; Ferrari, IHR 2003, p.12*]. Due consideration is to be given to all relevant circumstances of the case, Art. 8(3) CISG [*Rudolph, Art. 8 at 10; Honsell – Melis, Art. 8 at 10; Honnold, Art. 8 at 109; ICC, Award No. 8324 (1995); OGH, 2 Ob 547/93 (Austria 1994)*].

44 The second note reads "To be lockable to Equalec requirements" [*St. of Cl. at 9*]. These words indicate that Equalec would lock the fuse boards with a padlock to which it had the key [*P.O. No. 2 at 21*]. However, an expert's simple consideration of this practice reveals another aspect of its meaning: The fuse boards have to be constructed in a way that Equalec can connect them to the electrical current and finally, after having done so, establish control over them by locking them with a padlock. Subsequently, Equalec has exclusive access to them and is in charge of their management [*St. of Cl. at 7, 8*]. Consequently, Equalec only wants to bare this responsibility if its requirements concerning the connection to the grid are fulfilled.

45 A reasonable person with RESPONDENT's knowledge and experience would have understood this note in the same way. RESPONDENT is a fabricator and distributor of electrical equipment [*Resp. Ex. No. 1*]. As an expert in this business, RESPONDENT ought to become attentive if confronted with the term "Equalec requirements". The third party's name, Equalec, bears in its name both, "*Equa*toriana" and "e*lec*tric". Firstly, a reasonable third person with RESPONDENT's expert knowledge would have concluded that Equalec is the local electric provider [*cf. St. of Cl. at 7*] since fuse boards were ordered to supply the development with electricity. Secondly, one would reasonably understand that the combination of the words "Equalec" and "requirements" refer to certain mandatory technical standards. The Equatoriana Electric Service Regulatory Act [*hereafter: Regulatory Act*] was attached to RESPONDENT's Statement of Defence [*Resp. Ex. No. 4*]. Since RESPONDENT has operated in Equatoriana before [*Cl. Ex. No. 2*] it must have already been aware of its content when concluding the contract. Art. 14 2nd sentence says that every electric corporation is allowed to state requirements for providing electrical services as long as they are not undue or unjust. Therefore, a reasonable person in RESPONDENT's position would have taken into account that those electric standards may differ broadly.

46 RESPONDENT was assigned to construct the fuse boards in accordance with the engineering drawings. Since it has accepted the first note on the drawings as a part of the contract, a reasonable person in RESPONDENT's situation would not have just assumed that another note was exclusively directed to CLAIMANT's personnel for constructing Mountain View [*St. of Def. at 25*]. CLAIMANT did not advise RESPONDENT to leave the second note unnoticed. Its ignorance is not only unreasonable but reckless. As an expert, RESPONDENT should know that for security reasons it is of utmost importance to construct electrical equipment with great accuracy. Any information on the drawings, that form the instruction for the engineering of the fuse boards, must not simply be ignored. Under these circumstances a reasonable person would have re-consulted CLAIMANT about the meaning of the second.

47 Additionally, a reasonable person would have understood the second note as a part of the engineering drawings. Much like the first note, it was not attached to the drawings in a separate document. It was placed directly on the drawings. The drawings and the descriptive notes represent one document, referred to as "engineering drawings" in the contract of 12 May 2005. Consequently, a reasonable person of the same kind as RESPONDENT would have understood the second descriptive note on the engineering drawings as part of the contract, Art. 8(2) CISG. Hence, an interpretation according to the understanding of a reasonable person reveals RESPONDENT's obligation according to the second descriptive note to deliver fuse boards connectable to the electricity supply in accordance with Equalec requirements.

4. The distribution fuse boards equipped with JS type fuses delivered by RESPONDENT were not in conformity with the contract.

48 RESPONDENT failed to deliver fuse boards equipped with Chat Electronics JP type fuses that are connectable to the electricity supply meeting Equalec's requirements. Hence, the delivered Chat Electronics JS type fuses were not of the quality and description required by the contract under Art. 35(1) CISG. Moreover, RESPONDENT delivered one week later than stipulated in the contract. Instead of 15 August 2005 the fuse boards arrived on 22 August 2005.

III. Additionally, RESPONDENT failed to deliver fuse boards fit for the particular purpose according to Art. 35(2)(b), (3) CISG.

49 Pursuant to Art. 35(2)(b) CISG goods do not conform with the contract if they are not fit for any particular purpose made known to seller. In the case at hand, RESPONDENT had to deliver fuse boards fit for the particular purpose of being connectable to the local electricity supply **(1.)**, but failed to do so as Equalec refused to connect **(2.)**. CLAIMANT reasonably relied on RESPONDENT's skill and judgment in accordance with Art. 35(2)(b) CISG **(3.)**. Finally, RESPONDENT is not excluded from its liability pursuant to Art. 35(3) CISG **(4.)**.

1. RESPONDENT's obligation under Art. 35(2)(b) CISG was to deliver fuse boards connectable to the local electricity supply.

50 The particular purpose of the fuse boards was to provide the facility for Equalec to make its connection to the electrical power grid [*St. of Cl. at 26*]. Equalec has a monopoly on the provision of electricity in Mountain View [*P.O. No. 2 at 31*]. Therefore to construct fuse boards connectable to the electricity supply also means to fulfil Equalec's requirements. Since

July 2003 Equalec has the policy of connecting to circuits designed for 400 Amp or less only if primary fuse boards are equipped with JP fuses [*Cl. Ex. No. 4*]. In the Mountain View project, all circuit were designed for 100 to 250 Amp [*P.O. No. 2 at 27*]. Consequently, the particular purpose required RESPONDENT to install JP fuses.

51 The need for goods to conform with public law regulations in the buyer's state - or also just in a certain region of the buyer's state [*Schlechtriem, IPRax 1996, p. 16*] - can generally arise to a particular purpose under Art. 35(2)(b) CISG [*Schlechtriem/Schwenzer – Schwenzer, Art. 35 at 19, Herber/Czerwenka, Art. 35 at 5; Bianca/Bonell – Bianca, Art. 35 at 3.2*]. In the case at hand no public law regulations are at stake, but regulations of a local electrical supplier. However, it makes no difference if the provisions are public or private norms or requirements of a dominating private corporation, in this case Equalec [*P.O. No. 2 at 22*]. Whether regulations have been arranged as public or as private, often appears to be by chance [*Schlechtriem, IPRax 1996, p. 13*]. Such artificial distinctions cannot be decisive since the focus of such regulations lies on their practical effects on the suitability of the goods for their particular purpose [*MünchKomm – Gruber, Art. 35 at 18; Schlechtriem, IPRax 1996, p. 13*]. Therefore, the compliance of the fuse boards with Equalec's requirements is a particular purpose in the sense of Art. 35(2)(b) CISG.

52 It is sufficient if the particular purpose has been made known to seller in a way that he could take notice. It is not necessary for it to be contractually agreed upon [*Staudinger – Magnus, Art. 35 at 28; MünchKomm – Gruber, Art. 35 at 4*]. For making the particular purpose of meeting public or private law standards in the buyer's state known to seller pursuant to Art. 35(2)(b) CISG, it is sufficient if the state of use of the goods is mentioned in the contract [*Staudinger – Magnus, Art. 35 at 27; Achilles, Art. 35 at 7; Schlechtriem, IPRax 2001, p. 162*]. In any case the seller can be held responsible for the conformity of the goods with public law standards if the buyer had made clear that he wanted the goods to be fit for the use in a certain country [*Bianca/Bonell – Bianca, Art. 35 at 3.2; BGH, VIII ZR 159/94 (Germany 1996); OGH, 2 0b 100/00w (Austria 2000); MünchKomm – Gruber, Art. 35 at 22*]. RESPONDENT knew that the fuse boards had to be delivered to the building site of the Mountain View Office Park [*Cl. Ex. No. 1*], hence that they had to be fit for the use in a particular region of Equatoriana. CLAIMANT also referred RESPONDENT to Equalec's requirements. The second descriptive note on the engineering drawings that have been sent to RESPONDENT even before the conclusion of the contract [*Resp. Ex. No. 1*] reads "To be lockable to Equalec requirements". It was placed directly on the engineering drawings [*Cl. Ex. No. 1*]. Hence, CLAIMANT drew RESPONDENT's attention to the possibility that the

local provider might have specific requirements that need to be observed to grant connection to the electricity supply by Equalec. It is not necessary to explain the requirements in question to the seller in particular [*Schlechtriem, IPRax 1996, p. 15*]. Thus, the particular purpose of the fuse boards of being connectable to the electricity supply meeting Equalec's requirements had been explicitly made known to RESPONDENT at the time of conclusion of the contract.

53 Consequently, the ability of the fuse boards to be connectable to Equalec's electrical supply and thus, as a result of Equalec's requirements, the instalment of JP fuses has arisen to REPONDENT's contractual obligation pursuant to Art. 35(2)(b) CISG.

2. As Equalec refused to connect the distribution fuse boards equipped with JS type fuses to the electrical grid, RESPONDENT failed to perform its obligation.

54 Equalec refused to connect the fuse boards to the electrical supply. The circuits of the Mountain View development are designed for less than 400 Amp, but the fuse boards were equipped with JS fuses. To comply with Equalec's requirements, JP fuses would have had to be installed. Consequently, RESPONDENT breached its obligation under Art. 35(2)(b) CISG by delivering fuse boards equipped with JS fuses. RESPONDENT's allegations that Equalec's requirement is against the law does not affect its breach: It does not matter if the requirements to be fulfilled according to Art. 35(2)(b) CISG are in accordance with the law or not since only the factual effects of those regulations on the fitness of the goods are decisive [*Schlechtriem, IPRax 1996, p. 13; MünchKomm – Gruber, Art. 35 at 18*].

3. CLAIMANT reasonably relied on RESPONDENT's skill and judgement according to Art. 35(2)(b) CISG.

55 Whether the seller can be held responsible for the conformity of the goods with a public – or private [*see supra at 51*] - law standard in the state of use of the goods, depends on the knowledge and expectations of the parties in the specific case [*Herber/Czerwenka, Art. 35 at 5; Bianca/Bonell - Bianca, Art. 35 at 3.2*].

56 In contrast to CLAIMANT, RESPONDENT is an expert in the electrical branch. RESPONDENT is a fabricator and distributor of electrical equipment [*St. of Def. at 10; Resp. Ex. No. 1*]. CLAIMANT's reliance on RESPONDENT's skill and judgment had already been confirmed by RESPONDENT's conduct during the negotiations. RESPONDENT had explicitly asked for the engineering drawings, before stating the price for the fuse boards [*Resp. Ex. No. 1*]. After having seen them, RESPONDENT did not inquire to CLAIMANT about any unclarities, but assured that such fuse boards could be delivered [*St. of Def. at 2*]. This conduct made CLAIMANT believe that RESPONDENT had understood all the details

of the engineering drawings. If RESPONDENT had not been sure about any specifications, an inquiry at CLAIMANT's could have been expected. Consequently, CLAIMANT reasonably relied on RESPONDENT's skill and judgement according to Art. 35(2)(b) CISG.

57 RESPONDENT has delivered to Equatoriana before [*Cl. Ex. No. 2*]. Consequently, CLAIMANT could expect RESPONDENT to know that electrical supply companies in Equatoriana do have own requirements for connecting to the grid. Even if Equalec's requirements differ from those known to RESPONDENT, CLAIMANT could rely on RESPONDENT to inquire about them. They were easily available on Equalec's website [*Cl. Ex. No. 4*].

4. RESPONDENT is not excluded from its liability for the fact that the distribution fuse boards do not fulfil the particular purpose, Art. 35(3) CISG.

58 According to Art. 35(2)(b) CISG the fuse boards had to be connectable to Equalec's electrical supply, which they were not due to installation of JS fuses. Since for Art. 35(3) CISG the time of the conclusion of the contract is decisive, the buyer's knowledge is practically impossible in cases where the seller delivers a wrong amount of goods or goods that deviate from the contractual agreement or the buyer's exclusive selection [*MünchKomm – Gruber, Art. 35 at 34*]. At the time of the conclusion of the contract CLAIMANT neither knew about Equalec's policy [*P.O. No. 2 at 25*] nor could CLAIMANT possibly have known about the equipment of the fuse boards with JS fuses which caused Equalec to refuse the connection to the grid. Consequently, RESPONDENT is liable for its failure to deliver fuse boards connectable to Eualec's electrical supply according to Art. 35(3) CISG.

B. As the contract has not been amended to allow for JS type fuses to be installed into the fuse boards, the non-conformity of the delivered goods is upheld.

59 The conclusion of an agreement on an amendment is governed by the same rules as the conclusion of the contract [*LG Hamburg, 5 O 543/88 (Germany 1990)*]. First, there has been no substantive agreement between the Parties on the change from JP to JS type fuses **(I.)**. Second, any agreement to amend the contract would be invalid as it has not been documented according to Sec. 32 of the contract **(II.)**.

I. There has been no substantive agreement between the Parties on the change from JP type to JS type fuses.

There has been no substantive agreement between the Parties as Mr. Hart had no authority to alter the contract on behalf of CLAIMANT **(1.)** and as Mr. Hart did not want to give a binding

statement during the telephone conversation with Mr. Stiles on a change from JP type to JS type fuses **(2.)**.

1. Mr. Hart had no authority to alter the contract on behalf of CLAIMANT.

60 Mr. Hart had no responsibility for the contract with RESPONDENT [*P.O. No. 2 at 17*]. Thus, he was not empowered to act as a representative on behalf of CLAIMANT regarding a change of the Parties' contract according to Art. 9 Convention on Agency in the International Sale of Goods [*hereafter: Agency Convention*]. The Agency Convention is applicable pursuant to Art. 2(1)(a) since CLAIMANT and RESPONDENT have their places of business in different contracting states, Equatoriana and Mediterraneo [*P.O. No. 2 at 16*]. Any legally authoritative acts by Mr. Hart opposite RESPONDENT would not have had any binding effects on CLAIMANT, Art. 14(1) Agency Convention. According to Art. 14(2) Agency Convention any relevant behaviour of Mr. Hart could have had a binding effect on CLAIMANT only by way of exception if CLAIMANT had made RESPONDENT reasonably believe that Mr. Hart was empowered to act as a representative. However, CLAIMANT never behaved in a way or mentioned anything that could have caused RESPONDENT to belief that Mr. Hart was empowered for any questions concerning the contract. The fact that Mr. Stiles was referred to Mr. Hart when he called on 14 July 2005 cannot have made RESPODENT believe that Mr. Hart was responsible. Latter expressly told Mr. Stiles during their conversation that he was not well versed in the technical aspects of the Mountain View Project [*Resp. Ex. No. 1*]. Moreover, Mr. Konkler himself had handled the negotiations regarding the contract [*Cl. Ex. No. 2*], so RESPONDENT cannot have assumed that any employee in CLAIMANT's Purchasing Department was empowered to decide about the specifications in that business.

61 According to Art. 16(1) Agency Convention an agent who acts without authority or subsequent ratification shall pay the third party compensation of its loss caused by its reliance. Even though Mr. Hart's personal liability is not object of these proceedings, it shall be remarked that latter cannot have caused any reliance during the telephone conference as he expressly said that he was not in particular knowledge of the aspects of the project [*Resp. Ex. No. 1*].

2. Moreover, there has been no agreement as Mr. Hart did not intend to give a binding statement.

62 The telephone conversation did not lead to an agreement on an amendment to the contract between Mr. Hart and Mr. Stiles, but rather to a unilateral decision of Mr. Stiles to use JS fuses. Throughout the conversation Mr. Stiles made proposals on how to proceed.

CLAIMANT could wait until Chat Electronics would continue shipping, or use JP fuses of another manufacturer or use Chat Electronics JS type fuses. However, only one proposal was suitable in the eyes of Mr. Hart, as Mr. Stiles could have anticipated: The first proposal was not suitable because of CLAIMANT's time pressure. Mr. Hart obviously did not know that Switchboards had advised to only use JP fuses in the distribution fuse boards [*P.O. No. 2 at 25*]. The only thing Mr. Hart knew about ordering electrical equipment was that CLAIMANT generally preferred the use of Chat Electronics' goods [*Cl. Ex. No. 2*]. Consequently, he did not take the second proposal into account. Mr. Stiles recommended the use of Chat Electronics JS type fuses. He explained to Mr. Hart that it would not matter which fuses were installed since the only difference between JP and JS type fuses was the size of the fixing centres.

63 However, Mr Stiles did not use his superior knowledge to properly explain to Mr. Hart that the decision on the type of fuses is irreversible. Even though he explained the differences in size and support, he called it a "slight difference", stating that only if circuits designed for 400 Amp or more it would make a difference. Consequently, Mr. Hart understood Mr. Stiles' explanation as "assurance" of the "interchangeability of JP type and JS type fuses". Hence, Mr. Hart considered his answer not to be "a very important decision" [*Cl. Ex. No. 2*]. The fact that Mr. Stiles did not express its superior knowledge on the interchangeability to Mr. Hart is supported by Mr. Stiles' witness statement: He recalls any explanation he gave to Mr. Hart. However, clarifying his recollection by explaining "That means that once one type is installed it cannot be replaced by the other one." [*Resp. Ex. No. 1*], he reveals that he presumably meant, but did not communicate this information.

64 Mr. Stiles could and should have known that Mr. Hart had significantly inferior knowledge on the electrical aspects. Therefore, he could not have expected Mr. Hart to comprehend that the difference in size and support of the fuses impede their interchangeability. Mr. Hart clearly said he was "not very well versed in the electrical aspect of the development", so that he did not have an "independent judgment on it" [*Resp. Ex. No. 1*]. Hence, Mr. Hart made its inferior knowledge very clear to Mr. Stiles. In turn, Mr. Stiles ought to have known that his recommendation is decisive and that he diligently had to explain the impact of the decision.

65 Throughout that conversation, Mr. Stiles nothing less than pushed Mr. Hart to give a prompt answer concerning the handling of RESPONDENT's difficulties procuring Chat Electronics JP type fuses. Mr. Hart reiterated that CLAIMANT was under time pressure any way, as it had to give occupancy to the lessees of Mountain View on 1 October 2005 [*Resp. Ex. No. 1*]. Mr. Stiles increased that pressure by insisting on a prompt answer [*St. of Cl. at 11*]. Mr. Stiles

and Mr. Hart did not come to a joint decision. As Mr. Stiles himself mentioned CLAIMANT's preference for Chat Electronics equipment [*cf. Cl. Ex. No. 2*], its recommendation seemed to be reasonable and plausible. Thus, Mr. Hart was encouraged to give an immediate answer and replied that Mr. Stile's "recommendation was probably the best way to proceed" [*Cl. Ex. No. 2*]. Mr. Hart's conditional formulation reveals its uncertainty and that he lacked the intent to be legally bound by its statement. Since he knew that every change has to be in writing and needs to be approved by CLAIMANT's engineers first [*Cl. Ex. No. 2; St. of Cl. at 12, 13*], he anticipated a written request for a change in the specifications that could be handed to the technical department. Hence, he was aware that no binding answer could be given before the engineers had agreed to the change. Mr. Stiles could and should have been aware that Mr. Hart completely relied on his superior knowledge in this situation.

66 The whole telephone conversation gave the impression of being just an informal inquiry, not a formal negotiation regarding the amendment to the contract. The decision for the use of Chat Electronics JS type fuses cannot be considered a mutual but a unilateral one.

II. Additionally, any such agreement on an amendment to the contract would be invalid as it has not been documented according to Sec. 32 of the contract.

Sec. 32 of the contract constitutes a writing requirement for any amendments to the contract in accordance with Art. 29(2) 1st sentence CISG **(1.)**. The change from JP type to JS type fuses constitutes an amendment in the sense of Sec. 32 of the contract but has not been documented in the case at hand **(2.)**. CLAIMANT is not precluded by its conduct from asserting the writing requirement pursuant to Art. 29(2) 2nd sentence CISG **(3.)**.

1. Sec. 32 of the contract constitutes a writing requirement for any amendments to the contract in accordance with Art. 29(2) 1st sentence CISG.

67 According to Art. 29(2) 1st sentence CISG a contract in writing which contains a provision requiring any modification to be in writing may not be otherwise modified [*Graves Import Company Ltd v. Chilewich International Corp. (U.S. 1994); Honsell – Karollus, Art. 29 at 13*]. Although it is generally possible to restrict the scope of application of a contractually agreed writing requirement according to Art. 6 CISG [*Honsell – Karollus, Art. 29 at 15; Schlechtriem/Schwenzer – Schlechtriem, Art. 29 at 5*] the purpose underlying the first sentence of Art. 29(2) CISG is to preserve the protection from an inadvertent or unwise oral adjustment which the parties have chosen [*Hillman, p. 450*]. To maintain this purpose only the express and serious indication of such an intention should be regarded as derogation from

Art. 29(2) 1st sentence CISG [*Schlechtriem/Schwenzer – Schlechtriem, Art. 29 at 5; Geldsetzer, p. 152 et seq.*].

68 The use of the word "amendment" instead of "modification" as laid down in Art. 29(2) CISG is no such serious indication for the Parties' will to derogate from Art. 29(2) 2nd sentence CISG to imply that only severe modifications should be in writing. The term "amendment" in the clause of the contract indicates that any modification should be in writing since an "amendment to something" is "a minor change or addition to a document" [*Oxford Advanced Learner's Dictionary*]. In legal doctrine the term "amendment" is also used for the word "modification" in Art. 29(2) CISG [*Schlechtriem/Schwenzer – Schlechtriem, Art. 29 at 5*].

69 The individual and technical development of such tailor-made fuse boards [*St. of Cl. at 9*] leaves no room for allegations that the Parties wanted to restrict the scope of application of their contractually agreed writing requirement according to Art. 6 CISG: The fuse boards ordered by CLAIMANT were part of its entire development in Mountain View. In regard to its entire planning, CLAIMANT needs to take every modification into account. Also for security reasons the documentation of every modification in the construction of electrical equipment seems to be reasonable. Under usual circumstances such documents would be handed to the engineering department which would draw the attention to any problems concerning the change [*Cl. Ex. No. 2*]. Hence, the NOM-clause in the contract can secure that even the smallest modification can be discussed with the engineering department and is in agreement with the parties.

70 The documentation of any - not only severe - modifications is also in RESPONDENT's interest. RESPONDENT prepared the contract and included the clause calling for amendments to be in writing [*Resp. Ex. No. 1*]. RESPONDENT generally prefers to contract for any transaction of more than US$ 20,000 on the basis of a signed contract rather than the exchange of documents [*St. of Def. at 4*]. This indicates RESPONDENT's inclination for exact documentation of agreements in regard to the contract. Especially in the case at hand, where CLAIMANT and RESPONDENT have concluded a contract of US$ 168,000, it must have been RESPONDENT's higher interest to be able to proof its obligations. Thus, Sec. 32 of the contract provides a writing-requirement in the sense of Art. 29(2) CISG.

2. An alteration to JS type fuses amounts to an amendment in the sense of Sec. 32 of the contract but has not been documented in the case at hand.

71 RESPONDENT has installed JS fuses, although the contract of 12 May 2005 called for JP fuses. This change in the type of fuses amounts to an amendment to the contract, which according to Sec. 32 of the contract had to be in writing.

72 First, there is an important factual difference between JP and JS fuses. Their size differs: JP fuses have a length of 82 mm, JS fuses of 92 mm. That is why they need different sizes of supports, which have to be installed in the fuse boards [*Cl. Ex. No. 2*]. As RESPONDENT itself explains, once one type has been installed it cannot be replaced by the other type [*Resp. Ex. No. 1*]. The consequences of a random change can be seen in the case at hand: Because RESPONDENT had installed JS instead of JP fuses, the entire distribution fuse boards need to be replaced. The extra-costs for the replacement of the fuse boards are US$ 20,000 [*Cl. Ex. No. 3*].

73 Secondly, JP and JS fuses differ in regard to commercial aspects since the type of fuses might have an impact on the cost of servicing the fuse boards. Even though the purchase price for the fuse boards remained the same [*St. of Cl. at 11*], there would be price differences if fuses had to be replaced. E.g. if a JP type fuse designed for a rating as high as 100 Amp blows, the replacement cost is US$ 34.20 whereas the replacement cost of a JS type fuse for the same rating is US$ 37.05 [*Cl. Ex. No. 2*].

74 The fact that RESPONDENT called CLAIMANT on 14 July 2005 to discuss the change from JP to JS fuses proofs that RESPONDENT indeed interpreted the change as an amendment to the contract according to Sec. 32: If Mr. Stiles had really considered the change as a "minor adjustment made all the times in items that need to be specially fabricated" [*Resp. Ex. No. 1*] there would not have been the necessity to call CLAIMANT. Since RESPONDENT never sent any written proposal for the change to the contract specification [*Cl. Ex. No. 2*] the writing requirement of Sec. 32 is not fulfilled.

3. CLAIMANT is not precluded by its conduct from relying on the writing requirement pursuant to Art. 29(2) 2nd sentence CISG.

75 According to Art. 29(2) 2nd sentence CISG a party may be precluded by its conduct from asserting a NOM-clause in a contract to the extent that the other party has relied on that conduct. However, the wording of the clause, as well as its purpose for the fabrication of the fuse boards, indicate that the Parties wanted to abrogate the reliance exception in Art. 29(2) 2nd sentence CISG according to Art. 6 CISG **(a.)**. Even if the Tribunal finds that the

provision has not been abrogated, CLAIMANT is not precluded pursuant to Art. 29(2) 2nd sentence CISG **(b.)**.

a. CLAIMANT and RESPONDENT have validly abrogated the reliance exception in Art. 29(2) 2nd sentence CISG according to Art. 6 CISG.

76 Art. 29(2) 2nd sentence can generally be abrogated according to Art. 6 CISG [*Honsell – Karollus, Art. 29 at 25; Witz/Salger/Lorenz – Salger, Art. 29 at 18; Schlechtriem/Schwenzer – Schlechtriem, Art. 29 at 10a*]. However, the wording of Sec. 32 of the contract, as well as its underlying purpose, indicate that the Parties did not want to deviate from that provision in cases where one Party has conducted in a way that might have caused reliance on a modification on the other side.

77 Sec. 32 reads "Amendments to the contract must be in writing". A reasonable third person pursuant to Art. 8(2) CISG would interpret the use of the term "must" as an indication for the Parties' intent to exclude any exception from the writing requirement. Also the underlying purpose of that provision confirms this strict application. Not only CLAIMANT's purchasing department but also the technical department would be affected by a change in the technical specifications. The purchasing department would hand the written documentation to the electrical personal that would point to any problems they saw with the change. This information chain would be interrupted in cases where the change has not been documented – be it by mistake or because RESPONDENT asserts to have relied on the other Party's conduct. It can reasonably be assumed that RESPONDENT also supports the strict application of formal requirements and therefore the application of Sec.32 without any exceptions. RESPONDENT generally emphasis to agree on any contracts of over US$ 20,000 on the basis of a signed contract rather than the exchange of documents [*St. of Def. at 4*]. The value of the contract at hand is much higher - US$ 168,000. Consequently, it can be assumed that when RESPONDENT drafted the NOM-clause [*St. of Def. at 4*], it also intended to assure a strict application without exception even in cases of reliance-inducing conduct on one side. Consequently, a strict application of the writing-requirement in Sec. 32 of the contract seems reasonable. Therefore, in the case at hand Art. 29(2) 2nd sentence CISG has been validly abrogated according to Art.6 CISG.

b. Even if the Tribunal finds that the reliance exception has not been abrogated, CLAIMANT's conduct was not suitable to cause RESPONDENT's reliance pursuant to Art. 29(2) 2nd sentence CISG.

78 According to Art. 29(2) 2nd sentence CISG a valid agreement between the parties is necessary in order to modify or terminate a contract [*Honsell – Karollus, Art. 29 at 18; cf. Chateau des Charmes Wines Ltd v. Sabate USA (U.S. 2003)*]. Between CLAIMANT and RESPONDENT no such agreement on the change from JP to JS fuses has been concluded. If the Tribunal finds that an agreement exists or the validity of an agreement is not required by Art. 29(2) 2nd sentence CISG, CLAIMANT could still assert the writing requirement in Sec. 32 of the contract since its conduct was not suitable to cause RESPONDENT's reliance.

79 Art. 29(2) 2nd sentence CISG is an expression of the general good faith principle stated in Art. 7(1) CISG, which also includes the notion of "venire contra factum proprium" [*AFEC Award No. SCH-4318 (1994); Witz/Salger/Lorenz – Salger, Art. 29 at 16; Eiselen,, at h.*]. Not every conduct can cause reliance on the other party's side. Art. 29(2) 2nd sentence CISG only protects reasonable reliance [*Honsell – Karollus, Art. 29 at 20; Bianca/Bonell – Date-Bah, Art. 29 at 2.4; MünchKomm – Gruber, Art. 29 at 13*]. Since RESPONDENT included the NOM-clause and suggested the modification of the contract, a stricter standard should be applied in this regard. There have to be specific circumstances that would legitimate RESPONDENT to rely on an oral modification, such as a long-standing business relationship [*Rudolph, Art. 29 at 10*]. In the case at hand, no such circumstances can be seen.

80 The telephone conference on 14 July 2005 was not suitable to cause any reliance on a change to JS fuses. Mr. Stiles, on behalf of RESPONDENT, could and should have known that Mr. Hart was not responsible for the Mountain View project. Mr. Stiles told Mr. Hart that he was "not particularly knowledgeable about the electrical equipment of the development" [*St. of Def. at 7*]. Mr. Hart even asked Mr. Stiles for a recommendation, which, as well as Mr. Hart's precise words, shows that he was not involved in the electrical aspects. Consequently, the telephone conference may not have caused Mr. Stiles' impression that Mr. Hart's statements represent judgements of the responsible persons at CLAIMANT's. Furthermore, Mr. Stiles knew that Mr. Konkler himself had handled the negotiations in regard to the contract. Consequently, it must have occurred to Mr. Stiles that it is not reasonable to just rely on a statement of any other employee at CLAIMANT's. Mr. Konkler's personal handling of the negotiations indicates the importance of the contract to him. The high value of the contract, US$ 168,000, underlines its significance. In respect of that value, the requirements regarding

a conduct that can cause reliance on a non-written change in its specifications should be appropriate.

81 CLAIMANT's insistence on the writing requirement cannot have surprised RESPONDENT. RESPONDENT had prepared the contract including the NOM-clause [*St. of Def. at 5*] Since the author of such declarations is in the position to prevent any misunderstandings concerning the meaning of a formulation [*Witz/Salger/Lorenz – Witz, Art. 8 at 8*] RESPONDENT ought to have communicated its opinion throughout the telephone conversation that to its understanding the change from JP to JS fuses does not constitute an amendment to the contract and no written request for an amendment could be expected. As RESPONDENT did not communicate this, it could not rely on CLAIMANT's conduct. Also on the grounds of Art. 9(2) CISG, the NOM-clause cannot have been surprising to RESPONDENT as such clauses are general trade usage [*ICC, Award No. 9117 (1998)*].

82 The fact that CLAIMANT did not re-consult RESPONDENT after the telephone conversation was not suitable to cause RESPONDENT's reliance on an oral modification either. CLAIMANT's silence was a result of Mr. Stiles' incorrect presentation of the change as "a minor adjustment". If Mr. Stiles had correctly communicated the change as an irreversible modification and thus as an urgent matter, there would have been a reason for Mr. Hart to contact Mr. Konkler [*Cl. Ex. No. 3*]. Latter could have re-consulted RESPONDENT.

83 Also CLAIMANT's payment on 24 August 2005 cannot have caused RESPONDENT's reliance on a consent regarding the use of JS type instead of JP type fuses. First, CLAIMANT's payment was simply an automatism to fulfil its contractual duty to pay "upon delivery". Secondly, in the scope of Art. 29(2) 2nd sentence CISG a party's reliance on the other party's conduct is only relevant if the first party has adjusted to the modification of the contract as a result of the other party's conduct [*Schlechtriem/Schwenzer – Schlechtriem, Art. 29 at 10; Brunner, Art. 29 at 3, Sec. Comm., Art. 27 at 4*]. By the time CLAIMANT paid for the fuse boards, the engineering of the JS fuses had already been performed. Thus, RESPONDENT has not installed JS fuses as a result of CLAIMANT's payment.

THIRD ISSUE: THE FACT THAT CLAIMANT DID NOT COMPLAIN TO THE EQUATORIANA ELECTRICAL REGULATORY COMMISSION DOES NOT EXCUSE THE DELIVERY OF NON-CONFORMING GOODS.

84 CLAIMANT did not fail to mitigate its loss pursuant to Art. 77 CISG since a complaint to the Equatoriana Electrical Regulatory Commission was no reasonable measure in the

circumstances **(A.)**. As it was unreasonable for CLAIMANT to complain to the Commission, RESPONDENT is not exempted from its liability **(B.)**.

A. CLAIMANT did not fail to mitigate its loss pursuant to Art. 77 CISG since a complaint to the Commission was no reasonable measure in the circumstances.

85 Caused by RESPONDENT's failure to deliver conforming goods, CLAIMANT is entitled to claim damages under Artt. 45(1)(b), 74 CISG in the amount of US$ 200,000 **(I.)**. CLAIMANT's right to recover damages is not affected by Art. 77 CISG **(II.)**. In any event, a complaint to the Commission would not have mitigated the loss as there were no indications for a timely decision by the Commission against Equalec's policy **(III.)**.

I. Due to RESPONDENT's failure to perform, CLAIMANT is entitled to claim damages under Artt. 45(1)(b), 74 CISG in the amount of US$ 200,000.

86 As a result of RESPONDENT's failure to perform conforming to the contract, Equalec refused to connect the delivered and installed JS fuse boards to the electricity supply. Lacking electricity, CLAIMANT could not satisfy its contractual commitments to its tenants [*St. of Cl. at 30*]. To avoid significant financial losses of rental income and losses due to the penalty clauses in several of the lease contracts [*St. of Cl. at 16*], CLAIMANT had to buy and install replacement fuse boards with Chat Electronics JP type fuses from Equatoriana Switchboards Ltd at a total price of US$ 200,000. RESPONDENT could foresee the loss suffered by CLAIMANT since RESPONDENT should have known at the time of the conclusion of the contract on 12 May 2005 that CLAIMANT would have to obtain and install substitute fuse boards from another manufacturer if it cannot timely procure conforming boards [*cf. BGH, VIII ZR 210/78 (Germany 1979)*].

87 RESPONDENT can particularly not invoke that it could not possibly foresee the loss as it could not have known or anticipated any requirement that Equalec might have contrary to the law [*St. of Def. at 25*]. The party in breach will be considered as having known the facts enabling it to foresee the possible consequences of the breach whenever the other party has drawn its attention to these facts [*Bianca/Bonell – Knapp, Art. 74 at 2.12*]. CLAIMANT made explicitly reference to "Equalec requirements". These are published on Equalec's website and are easily available for everyone [*Cl. Ex. No. 4*].

II. CLAIMANT's right to recover damages is not affected by Art. 77 CISG.

88 According to Art. 77 CISG a party who relies on a breach of contract must take such measures that are reasonable in the circumstances to mitigate the loss. In this regard, the

conduct of a reasonable person in the same situation is decisive [*Staudinger – Magnus, Art.* 77 *at 10*]. Under Art. 77 CISG the promissee only needs to take such measures as can be expected according to the principle of good faith [*Witz/Salger/Lorenz – Witz, Art. 77 at 9*]. Leaving CLAIMANT with the obligation to accept the delivered fuse boards with JS fuses, cannot be expected under this principle. If Equalec connects to the fuse boards as a result of CLAIMANT's complaint to the Commission, there would be no damage for CLAIMANT at first sight. However, CLAIMANT would have to bear the risk that one of Equalec's apprehensions might come true, e.g. the overheating as a result of the installation of improper JS fuses when servicing the fuse boards. To compensate any damages CLAIMANT would have to turn to Equalec and thus bear its risk of insolvency. It would contradict the principle of good faith to – in applying Art. 77 CISG – impose on CLAIMANT the obligation to bear these risks and therefore literally penalise it.

III. In any event, a complaint to the Commission would not have mitigated the loss as there were no indications for a timely decision by the Commission against Equalec's policy.

89 As Equalec's policy is in accordance with the Equatoriana Electric Service Regulatory Act, a complaint would not have been successful **(1.)**. In any event, a definite decision by the Commission could not reasonably be expected to be in time **(2.)**.

1. As Equalec's policy is in accordance with the Regulatory Act, a complaint would not have been successful.

90 A reasonable person in the same situation as CLAIMANT would have relied on the legitimacy of Equalec's policy. As it had already been established in summer 2003 [*Cl. Ex. No. 4*], it has not been brought to the attention of the Commission [*P.O. No. 2 at 29*]. Apparently, all companies selling electrical equipment to the trade or otherwise involved in the electrical work within Equalec's service area find the policy appropriate and in compliance with the Regulatory Act. Art. 14 2nd sentence Regulatory Act only prohibits "undue" or "unjust" requirements for providing electric service. Art. 14 1st sentence of the Regulatory Act requires every electric corporation to provide electric service that is safe and adequate to any legal or physical person. Equalec's requirements have been set up to enhance their customer's safety by preventing that improper fuses are installed. Where circuits are designed for 400 Amp or less, Equalec wants to prevent that fuses of a higher rating are installed. In case of overload or short circuit, installation of fuses with a improper rating causes the current to rise to a value far above of what is safe for the rest of the system to

carry. The consequence is usually overheating which can lead to fire or even explosion [*Bussmann, Low Voltage Fuse Technology, p. 2*]. Additionally, the installation of fuses with a proper rating is important with regard to commercial aspects as the rating of the installed fuses is sometimes a basis for capacity-based charges [*St. of Cl. at 8*]. Equalec's policy is not only consistent with Art. 14 Regulatory Act but is rather a concretion of the safety requirements in Art. 14 1st sentence Regulatory Act. In fact, Equalec had negative experiences in the past with the use of JS fuses in circuits designed for ratings of 400 Amp or less [*Cl. Ex. No. 4*]. Consequently, a reasonable person in CLAIMANT's situation would not have seriously taken the success of a complaint into account.

2. Moreover, a definite decision by the Commission could not reasonably be expected to be in time.

91 CLAIMANT was under tight time pressure to keep the deadline of 1 October 2005 for the Mountain View project. Since the impossibility to connect was discovered by Equalec on 8 September 2005, there were no more than three weeks left until opening of Mountain View. Therefore, CLAIMANT could not sustain any further delays. CLAIMANT had to find an adequate and definite solution to grant the electricity supply of Mountain View in time.

92 A complaint was not appropriate because it was unforeseeable how long a complaint procedure would take [*P.O. No. 2 at 30*]. Due to the reasonableness of Equalec's policy it seems improbable that it would have changed its policy upon a telephonic inquiry of the Commission without formal action. Nevertheless, already such an informal inquiry could take up to two months or more [*P.O. No. 2 at 30*]. Under a full investigation by the Commission, the entire procedure could even take two years or longer [*P.O. No. 2 at 30*]. As long as such proceedings would be pending, CLAIMANT would be kept from purchasing replacement fuse boards or, in doing so, risk being left with the costs. In the end, CLAIMANT faced the risk of missing all options to get Mountain View supplied with electricity in time. With respect to the given circumstances, it could not be expected from CLAIMANT to initiate any steps against Equalec's policy since it was completely unpredictable how long a complaint to the Commission would take and what would be the outcome.

B. As it was unreasonable for CLAIMANT to complain to the Commission, RESPONDENT is not exempted from its liability.

93 Although CLAIMANT did not complain to the Commission, it is neither precluded from relying on RESPONDENT's failure to perform in conformity with the contract under Art. 80 CISG **(I.)** nor is RESPONDENT exempted from its liability under Art. 79 CISG **(II.)**.

I. The fact that CLAIMANT did not complain to the Commission does not preclude it from relying on RESPONDENT's failure to deliver conforming goods pursuant to Art. 80 CISG.

94 Art. 80 CISG only applies if the party relying on the breach of contract predominantly contributed to the other party's non-performance [*Staudinger – Magnus, Art. 80 at 14*]. However, in the case at hand, RESPONDENT's failure to perform its obligations under Art. 35(1) CISG was solely caused by its own conduct **(1.)**. Even if the Tribunal was to find that Art. 80 CISG applies, the fact that CLAIMANT did not complain to the Commission does not constitute an omission in the sense of Art. 80 CISG **(2.)**.

1. Art. 80 CISG is not applicable since solely RESPONDENT's own conduct has caused its failure to perform its obligations under Art. 35(1) CISG.

95 RESPONDENT was obliged to deliver fuse boards equipped with JP fuses that are connectable by Equalec to the incoming electrical supply. If RESPONDENT had fulfilled its obligations, the question of complaint would not have arisen. Supplementary, RESPONDENT had mismanaged its stocks and has to bear the responsibility for it. In case of purchase of generic goods, parties generally intend that the seller bears the risk of procuring the goods [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79 at 18; Staudinger – Magnus, Art. 79 at 22*]. Even though the fuse boards are to be fabricated in accordance with the engineering drawings, the fuses themselves are only owed by their description. Signing the contract RESPONDENT committed itself to procure the five distribution fuse boards equipped with Chat Electronics JP type fuses on 15 August 2005. By doing so, it declared to assume the procurement risk for that type of fuses. In spring 2005 RESPONDENT's inventory of JP fuses was exhausted and Chat Electronics announced production difficulties [*St. of Def. at 6*]. However, it is commonly acknowledged that the seller is not exempted due to his supplier letting him down [*cf. Staudinger – Magnus, Art. 79 at 22; CCIRF, Case No. 155/1994 (1995); ICC Case No. 8128 (1995)*]. Therefore, RESPONDENT's allegation that Chat Electronics JP type fuses are normally carried in its inventory and that they can normally be obtained on short notice from Chat Electronics [*Resp. Ex. No. 1*] is irrelevant. RESPONDENT's failure to perform is independent of the success of a complaint to the Commission since the result would not affect RESPONDENT's obligation to deliver fuse boards equipped with JP fuses. Thus, as its failure to perform is solely attributable to RESPONDENT's own conduct, Art. 80 CISG does not apply.

2. If the Tribunal was to find that Art. 80 CISG applies, the fact that CLAIMANT did not complain to the Commission does not constitute a relevant omission.

96 Art. 80 CISG presumes that one party's failure to perform was caused by the other party's act or omission. An omission in the sense of Art. 80 CISG is only relevant if the hypothetical act had made the performance possible with the utmost probability [*Staudinger – Magnus, Art. 80 at 12*]. The mere objective suitability of the act does not constitute sufficient causation under the CISG [*Staudinger – Magnus, Art. 74 at 28; Honsell – Schönle, Art. 74 at 21*].A complaint to the Commission would not have caused Equalec to connect with the utmost probability since Equalec's requirements are reasonable and not contrary to the Regulatory Act. Therefore, it is unlikely that a complaint would have caused Equalec to connect the fuse boards to the electricity supply. Even with regard to the compatibility of the fuse boards as demanded by the second descriptive note under Art. 35(1) CISG, RESPONDENT's breach of contract was inevitable.

II. RESPONDENT is not exempted from its liability under Art. 79 CISG since the fact that CLAIMANT did not complain to the Commission does not constitute an impediment.

97 However one might estimate the questions whether Art. 79 CISG covers cases where the conduct of the promissee is at stake [*Achilles, Art. 80 at 1; Soergel/Lüderitz – Dettmeier, pre Art. 79 at 2, see also Art. 80 at 1*; *Staudinger – Magnus, Art. 79 at 7; Rathjen, RIW 1999, p. 565*] or whether the provision applies to cases of delivery of an aliud [*Honnold at 427; Bianca/Bonell – Tallon, Art. 79 at 2.6.1., 2.6.2.; Bianca/Ponzanelli, Art. 79 at 4; Bartels/Motomura, RabelsZ 43 (1979), 649, 663*] the fact that CLAIMANT did not complain to the Commission does in any event not constitute an impediment beyond RESPONDENT's control in the sense of Art. 79(1) CISG. Impediments in this regard are merely events that are objectively uncontrollable and unforeseeable at the time of the conclusion of the contract. [*Achilles, Art. 80 at 1*]. Only objective circumstances external to the seller such as war, natural catastrophes, import bans and epidemics are impediments beyond a party's control [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79 at 14*]. The fact that CLAIMANT did not complain to the Commission does not constitute such an objective and inevitable impediment. The question whether a party complains to a third one is a subjective matter since it depends on human conduct and is therefore controllable.

REQUEST FOR RELIEF

In view of CLAIMANT's submissions we respectfully ask the Tribunal to hold that:

- It has jurisdiction to consider the dispute under the CCIR-Rules as the designated arbitration rules in Sec. 34 of the contract concluded on 12 May 2005 **[First Issue]**.
- RESPONDENT did not deliver distribution fuse boards that were in conformity with the contract **[Second Issue]**.
- The Fact that CLAIMANT did not complain to the commission does not excuse any failure of RESPONDENT to deliver goods conforming to the contract **[Third Issue]**.

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