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MEMORANDUM FOR RESPONDENT

UNIVERSITY OF SAARLAND

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Case No. Vis Moot 13

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:

McHinery Equipment Suppliers Pty

The Tramshed

Breakers Lane

Westeria City 1423

Mediterraneo

(**CLAIMANT**)

AGAINST:

Oceania Printers S.A.

Tea Trader House

Old Times Square

Magreton

00178 Oceania

(**RESPONDENT**)

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SUBMISSIONS

1 CLAIMANT's claim is time-barred (First Issue).

2 RESPONDENT has not breached its obligations under the contract and the CISG to deliver conforming goods as required by the contract (Second Issue).

3 CLAIMANT is not entitled to $ 3,200,000 in damages (Third Issue).

FIRST ISSUE: CLAIMANT'S CLAIM IS TIME-BARRED

4 In determining that the claim is time-barred, RESPONDENT respectfully submits three premises for the scrutiny of the Tribunal: first, that the period of limitation began by 30 May 2002 or 1 July 2002 at the latest [(**I.**)]; second, that this period was of two years' length [(**II.**)]; and third, that the period had expired by the commencement of arbitral proceedings on 5 July 2005, thus time-barring the claim [(**III.**)].

I. Commencement of the period of limitation

A. The period of limitation began on 30 May 2002

5 CLAIMANT asserts the date of activation of the limitation period was at the turning over of the machine on 8 July 2002 *(para. 1, Claim)*. However, RESPONDENT counters that the date at which CLAIMANT should have been aware of the particulars of the flexoprint machine that CLAIMANT alleges to be non-conformant was 27 May 2002, the date of reception of the maker's manual (*Claimant's Exhibit No. 6*). The period of limitation could only have become active once the contract itself was effective, i.e. on the reception of the signed written contract by RESPONDENT on 30 May 2002 *(infra, para. 93f.)*.

6 Smit writes in his commentary on the UN Convention on the Limitation Period in the International Sale of Goods *("UN Limitation Convention") (Smit (1))* that the intention of Art. 10(1), which provides that the limitation period commences on delivery of goods, is that "the limitation period should not begin to run before the buyer has a chance to discover the lack of conformity". This Convention is inapplicable to the present dispute for reasons that follow (*infra, para. 18-20)*. Nevertheless the equitable principle remains that the period should not begin until the buyer is able to become aware of the lack of conformity. The buyer's actual knowledge of the non-conformity is of secondary

importance to his ability to acquire this knowledge, as the lazy buyer who does not inspect his goods will discover non-conformity later than the diligent buyer who immediately does so. To ensure fairness and certainty, the objective former standard of when the buyer was able to identify non-conformity must prevail over the subjective measure of when the buyer actually did so.

7 In the instant dispute, CLAIMANT potentially had access to the information that the machine would not print on 8 micrometer foil – the grounds upon which CLAIMANT bases the allegation of lack of conformity – with the actual delivery of the maker's manual enclosed with the contract, in which the 10 micrometer printing capabilities of the flexoprint machine are clearly indicated (*Respondent's Exhibit No. 1*). The turning over of the machine itself on 8 July 2002 in no way added to the sum of knowledge available to CLAIMANT since reception of the manual on 27 May 2002. As CLAIMANT's position was therefore not altered by the event of the turning over of the machine, this appears to be an illogical, if not arbitrary, interval at which to assign commencement of the limitation period.

8 CLAIMANT was thus able at any point within the five to six weeks before the turning over of the machine to read the manual, to identify its printing capabilities, and to bring to the attention of RESPONDENT its dissatisfaction with the machine; that CLAIMANT did not do so is only evidence of its inaction in not assuring that the machine was an appropriate purchase for its task. To accept CLAIMANT's submission that the prescriptive period began on 8 July 2002 would therefore be allowing CLAIMANT to rely on its own inaction to bring this action, which runs contrary to the principles of good faith.

9 In light of these considerations, RESPONDENT requests the Tribunal to recognize that the period of limitation began in fact on 30 May 2002.

B. In the alternative, the period of limitation began at the latest on 1 July 2002

10 Alternatively, if the Tribunal does not recognize CLAIMANT's duty to have read the manual, RESPONDENT contends that by 1 July 2002 at the latest, the date by which test-runs on the delivered machine had been completed, CLAIMANT should have been aware of the alleged non-conformity.

11 If printing on 8 micrometer foil was so essential to the contract as to constitute a "particular purpose" of the contract in the sense of Art. 35(2)(b), then common sense dictates that CLAIMANT should have tested the machine to ensure that this purpose could be fulfilled. A simple request to RESPONDENT's workmen would have sufficed: alternatively the foreman would have been able immediately to identify that 8 micrometer foil was too thin for the 10 micrometer printing capability, as he did so on 8 July 2002 *(Respondent's Exhibit No. 2)*, or a test-run itself would have produced this result.

12 The fact that neither CLAIMANT nor CLAIMANT's employees were present for the test-runs and demonstrations *(Procedural Order No. 2*) indicates that CLAIMANT was not exercising due prudence and responsibility to discover whether the machine conformed to its needs. As CLAIMANT may not be allowed to rely on its own lack of care, RESPONDENT therefore submits at this point at the very latest CLAIMANT was without doubt in the position to discover the alleged lack of conformity and the period of limitation must have started at least by 1 July 2002.

II. Length of the period of limitation

13 RESPONDENT contests CLAIMANT's assertion that there are fourteen available avenues to the Tribunal that unanimously lead to the application of a prescriptive period long enough that CLAIMANT's claim is not precluded *(para. 1, Claim)*. In fact, once repetition is excluded, CLAIMANT identifies just five discrete outcomes (periods of limitation in parentheses): (1) The application of the UN Limitation Convention *(4 years)*; (2) The application of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles") *(3 years)*; (3) The application of Danubian substantive law *(3 years)*; (4) The application of Oceanian substantive law (4 years); (5) The application of Mediterranean substantive law *(2 years)*.

14 RESPONDENT submits that the grounds for the first three outcomes are not present, as contrary to CLAIMANT's assertion, the parties made no implicit choice of law [(**A.**)], nor does the Tribunal have discretion to directly select an applicable substantive law [(**B.**)]. The correct methodology in the current dispute is to consider general principles of international arbitration [(**C.**)] and to either infer one choice of law rule from transnational principles [(**C.a.**)], or to apply the so-called "cumulative method" [(**C.b.**)]. Both of these methods point to the applicability of the law of the seller, i.e. of Mediterraneo, and of its 2-year period of limitation.

A. The parties' actions imply no further choice of law

15 RESPONDENT contests firstly the general assertion of CLAIMANT that the parties might have implicitly agreed upon a choice of law, and secondly CLAIMANT's subsequent

inferences that the parties might have chosen the UN Limitation Convention [(**a.**)], the UNIDROIT Principles [(**b.**)], the law of Illinois or that of Danubia [(**c.**)].

16 CLAIMANT acknowledges the parties' explicit choice of the CISG as the substantive law for use in any dispute and CIDRA as the procedural rules, and has correctly recognized that this internationalizes the contract *(para. 2, Claim)*. However, of themselves these explicit choices do not imply any choice of law relating to the period of limitation. On the contrary, the very fact that the parties expressly chose to designate the CISG in Paragraph 12 of their contract *(Claimant's Exhibit No. 7)* – when the CISG would have applied to the dispute regardless of this designation, as both Mediterraneo and Oceania are parties to the Convention – strongly suggests that the parties actively considered the issue of choice of law and did not wish to apply any other convention or international law system directly to any potential dispute that might arise. If the parties' intention had been to incorporate another body of law into their contract, with the above in mind it is highly probable that they would have agreed upon an express clause to accommodate this further choice.

17 Consequently, RESPONDENT recommends that the Tribunal recognizes that no implicit choice of law was agreed upon by the parties.

a. No implicit choice of the UN Limitation Convention was made

18 CLAIMANT states that the parties' choice of the CISG to govern their contract for sale implies that the parties would assent to the application of the UN Limitation Convention. This assertion is grounded in reference to one of the main purposes of the CISG, that recourse to rules of private international law are avoided by employing the CISG *(para. 3, 4, Claim)*. However simply because this constitutes "[o]ne of the main purposes" does not entail necessarily that in this specific case the purpose of the parties must have been to avoid recourse to private international law; there are numerous alternative reasons for the parties to have chosen the CISG. For instance, the parties might have chosen the CISG because its formulation provides seller and buyer with equal rights and obligations, or because its choice obviates the need to select an arbitral seat with an appropriate substantive law *(Magnus in Staudinger, Introduction to CISG para. 6, 8)*. In the absence of further evidence to support the inference of such an implicit choice of the parties, CLAIMANT's assertion can only be said to represent an unwarranted jump to an unwarranted conclusion.

19 Moreover, contrary to CLAIMANT's contention, the UN Limitation Convention is of limited value in relation to the CISG; fewer than half the states party to the CISG have ratified the UN Limitation Convention. This number dwindles even further when counting those who ratified the 1980 Amendment, which was tabled because of the introduction of the CISG, suggesting the Convention's significance in relation to the CISG is on the decline. As this direct connection between the two is the foundation of CLAIMANT's argument that choosing the former implies choosing the latter, its absence negates the persuasive capacity of such an argument.

20 RESPONDENT thus asks the Tribunal to conclude that grounds for applying the UN Limitation Convention in this dispute are not present.

b. No implicit choice of the UNIDROIT Principles could have been made; nevertheless their application would lead to the claim being time-barred

21 Irrespective of the "gap-filling role" of the UNIDROIT Principles to apply to "issues not resolved by the CISG" *(para. 7, Claim)*, an implicit choice by the parties on the UNIDROIT Principles' regulation for a three-year period of limitation would have been impossible, as Art. 10, in which this issue is regulated, was added to the first edition of the Principles in 2004 *(Bonell)*. The contract was concluded on 30 May 2002, two years previously, at which time Art. 10 did not exist and therefore could not have been the subject of an implicit choice of law.

22 A retrospective presumption of the parties' implicit intention to apply the UNIDROIT Principles is also to be discouraged. Ferrari writes in Schlechtriem/Schwenzer's commentary on the CISG that the CISG should not be applied to cases that arose from circumstances from the time before its enactment *(Schlechtriem/Schwenzer, Art. 1 para. 83)*. Since the UNIDROIT Principles supplement the CISG, a point brought forward by CLAIMANT *(para. 6f., Claim)*, by analogy the same ought to be true of these Principles.

23 RESPONDENT therefore requests Tribunal to recognize the inapplicability of the UNIDROIT Principles.

24 Nevertheless, even had the parties been in the position to impliedly decide upon the UNIDROIT Principles, Art. 10(2) states that the prescriptive period runs from the day after the day on which the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised. This is 31 May 2002 or 2 July 2002 *(supra, para. 3-12)*, and as arbitral proceedings commenced more than three years after this date, on 5 July 2005 *(infra, para. 67)*, the period of limitation would have elapsed even were the UNIDROIT Principles to be applicable, time-barring the claim.

c. No implicit choice of law can be inferred from the explicit choice of CIDRA as the rules of arbitration or of Danubia as seat of arbitration

25 CLAIMANT's submission that there may be an implicit choice of law inferred from an explicit choice of forum might once have held sway but is long since outdated and untenable in the context of modern international arbitration. The contemporary position is summed up by Derains: "In international arbitration, it is widely accepted that there is no lex fori." *(Greenberg).*

26 First, the Tribunal may reject the period of limitation derived from Illinois law outright. Where CLAIMANT is at pains to emphasize – and indeed rightfully – that the parties chose arbitration in a neutral state, Danubia, governed by the rules of a neutral body, CIDRA, and a neutral international substantive law, the CISG *(para. 3, Claim)*, the subsequent argument that the substantive law of Illinois as CIDRA's headquarters could be called upon, is hypocritical and contradictory and furthermore compromises party autonomy; under this analysis, choosing CIDRA for its neutral rules necessarily entails forcing upon the parties the substantive law of Illinois, a result which they may not desire.

27 Though there are more grounds to argue that the prescriptive period of Danubia, as the express choice of forum, may be applicable, such arguments are around forty years behind their time, and for good reason. After all, arbitration forums are often selected for matters of practical or geographical convenience rather than for any connection to the contract. For example, parties from the United States and Japan may choose Sweden as the seat of arbitration because of its approximate equidistance between the two nations. The implication that an implied choice of law may be based on the choice of forum alone may thus be unjust *(Engle).*

28 CLAIMANT brings no further evidence to suggest that exceptional grounds exist for the present case to run counter to modern practice, and for the Danubian limitation period to be applied. Certainly *SAIL v. Hind Metals Inc. (para. 10, Claim)* is of little application here; a crucial difference exists between that case and the present one which inhibits the drawing of an analogy between the two, namely that in *SAIL v. Hind Metals Inc.*, there was no express provision for a governing law within the contract, and here, the CISG has been chosen by the parties. Furthermore, though English law has traditionally viewed the period of limitation as a matter of procedure to fall under the procedural rules of the forum, in Mediterraneo, Oceania and Danubia, the period of limitation is considered to be an issue of substantive law and thus the same reasoning does not apply here.

29 As such, RESPONDENT submits that neither Illinois law nor Danubian law are to be applied by the Tribunal in the instant case.

30 Nevertheless, even if the Tribunal were exceptionally to recognize an implicit choice of Danubian law, the claim would remain time-barred for the same reasons cited for the 3-year limitation period that would apply under the UNIDROIT Principles *(supra, para. 24)*.

B. The Tribunal does not have discretion to directly select the law to apply

31 CLAIMANT submitted that if the parties failed to designate a law, Art. 32(1), second sentence allows the Tribunal to apply the substantive law it deems applicable, and may therefore choose the UN Limitation Convention or UNIDROIT Principles directly *(para. 16, Claim)*. RESPONDENT submits this is an incorrect analysis of the purpose of this clause and subsequently an incorrect interpretation of the Tribunal's options under the section.

32 Under CLAIMANT's interpretation of CIDRA Art. 32(1), second sentence, the Tribunal would be permitted to disregard the two-stage procedure of determining firstly the choice of law rule and subsequently the applicable substantive law. Evidently this would enable the Tribunal to act arbitrarily in determining the choice of law, severely undermining the central principle of party autonomy; such a result would be *contra legem*.

33 Though RESPONDENT recognizes that this direct choice method has been adopted by a number of modern national arbitration statutes, RESPONDENT submits that the better interpretation of the specific rule under CIDRA Art. 32(1), second sentence is that in the absence of a choice of law, the Tribunal is obliged to work out which choice of law rule is applicable *(Newman/Hill)*. Such a rule "gives the arbitrator flexibility where it counts, for he is given the freedom to choose the choice of law rule he likes best, but not the rule of substantive law he deems best suited to the occasion" *(Smit (2))*. This keeps the two-stage procedure intact, does not infringe upon party autonomy, checks the power of the Tribunal in constraining it to resort to a specific choice of law rule, and establishes certainty, predictability and foreseeability of the substantive law, which is the natural consequence of arbitrators' having first to choose a conflict of law rule *(Hußlein-Stich)*. Though CLAIMANT argues that this strict two-stage analysis "contravenes the flexibility of international arbitration", and cites the alleged little practical support for this interpretation *(para. 16, Claim)*, flexibility is already assured by the tribunal's power to determine the conflict of laws rules, which are themselves quite open.

34 Thus only the two-stage procedure corresponds with the intended purpose of Art. 32(1), second sentence, and CLAIMANT's submissions that the UN Convention or UNIDROIT Principles should be directly applied are to be discarded. Furthermore, for the reasons discussed above *(supra, para. 16-23)* neither would constitute an appropriate choice of law for the period of limitation even if the Tribunal were imbued with the discretion that CLAIMANT has alleged.

C. The Tribunal should consider general principles of international arbitration

35 RESPONDENT submits that the Tribunal has two alternatives for determining the substantive law from choice of law rules at its disposal: either the Tribunal may determine one choice of law rule from transnational principles, and apply the substantive law to which this points [(**a.**)]; or the Tribunal may consider simultaneously the national choice of law rules of those states connected with the dispute, and if these point unanimously to one system of law, to apply this substantive law ("the cumulative method") [(**b.**)]. Both these methods lead unequivocally to the law of the seller applying [(**c.**)].

a. The choice of law rule arising out of transnational principles is that the seller's law is to apply unless exceptional circumstances override this presumption; the seller's law applies here

36 RESPONDENT concurs that CLAIMANT is correct to identify that the contract is delocalized and thus detached from all domestic law *(para. 20, Claim)*; however, RESPONDENT contests CLAIMANT's method of determining transnational choice of law rules by directly applying international conventions, as in a delocalized dispute such as this one, the more efficient, more logical and more correct approach is for the Tribunal instead to look to derive one choice of law rule from the holistic consideration of the lex mercatoria, of which both case law and international conventions are integral parts. This is an approach often adopted in international arbitration and its use is exemplified in cases such as ICC Case No. 7071 and ICC Case No. 6149.

37 Though CLAIMANT has identified three relevant leading international conventions, the Rome Convention on the Law Applicable to Contractual Obligations ("Rome Convention"), the Hague Convention on the Law Applicable in International Sale of Goods ("Hague Convention"), and the Inter-American Convention on the Law Applicable to International Contracts ("Inter-American Convention") *(para. 21, Claim)*, none of the states principally involved in this dispute – Mediterraneo, Oceania, and the seat of

arbitration, Danubia – are parties to the aforementioned conventions, and none has the direct force of law. Furthermore, CLAIMANT's analysis of the rules under the first two of these conventions is inaccurate, and closer consideration of both and of case law is required to establish the general rule that may arise here.

aa. The rule derived from transnational principles

i. Under the Rome Convention

38 RESPONDENT highlights that central to the choice of law provisions in the Rome Convention under Art. 4 is the balance between the presumption that the seller's law shall apply in Art. 4(2) and the exception under Art. 4(5), which allows the law of another country to apply if there is an evident closer connection to that country. CLAIMANT has ignored the tension between these competing subsections despite the substantial judicial discussion that has ensued regarding its construal.

39 In the English Court of Appeal case of *Ennstone Building Products Ltd v. Stanger Ltd*, Keene LJ affirmed the point made by Morison J in the *Definitely Maybe (Touring) Ltd case*, to the effect that the wide construal of Art. 4(5) would render the presumption within Art. 4(2) "of no value", saying that consequently, the application of this presumption was to be deviated from only "where the evidence clearly shows that the contract is more closely connected with another country". In quoting this, Mann J in the English High Court added "the emphasis being on the word 'clearly'", continuing by saying "Otherwise, the presumption would be too easily robbed of the effect which it is obviously intended to have." The Dutch Supreme Court has taken much the same view, in deciding in *Société Nouvelle des Papéteries v. Machinefabriek* that Art. 4(2) should be interpreted restrictively and disregarded only "if, in the special circumstances of the case, the place of business of the party who is to effect the characteristic performance has no real significance as a connecting factor" *(Clarkson/Hill).*

40 Thus to respect the principles within the Rome Convention, the presumption in favour of the seller must be allowed to stand and may only be rebutted when the aforementioned special circumstances are present.

ii. Under the Hague Convention

41 RESPONDENT submits that CLAIMANT's interpretation of Art. 8 of the Hague Convention is equally flawed and confused.

42 After disregarding the first two paragraphs of Art. 8, which frame the circumstances in which the law of the seller or the law of the buyer respectively should apply, CLAIMANT then purports that the third paragraph represents the general rule *(para. 25, Claim)*, meanwhile failing perhaps to notice the qualifying phrase “By way of exception” which introduces that paragraph. The collation of the rules into one article denotes the hierarchy: the “primary rule” is that the law of the seller applies *(McLachlan)*, unless circumstances exist to negate this presumption in favour of the buyer, and only in exceptional and restricted circumstances does the closest connection test apply. These rules of conflict were deemed by arbitrators in ICC Case No. 6527 to be “considered as representative of the prevailing principles in the field”, even though neither Austria nor Turkey, the two countries involved in the dispute, had ratified the convention.

43 CLAIMANT is correct to conclude that Art. 8(2)(b) is inapplicable (para. 25, Claim), as no express provision within the contract determines that the seller must have performed his obligation to deliver the goods in the buyer’s country: neither the specification of the price as “$42,000 CIF Port Magreton, Oceania”, nor that of the refurbishment and installation at the buyer’s premises would suffice; mere transport clauses or implicit references to the place of performance do not suffice as additional extraordinary obligations of the seller and do not fulfill the requirements of Art. 8(2)(b).

44 With the Art. 8(2)(b) exception inapplicable, the rule arising out of the Hague Convention is thus similar to that of the Rome Convention: the law of the seller applies as the default law apart from in exceptional circumstances where a manifestly closer connection with the law of another country exists.

iii. Under the Inter-American Convention and out of the lex mercatoria

45 RESPONDENT concurs with CLAIMANT’s analysis that Art. 9 of the Inter-American Convention favours the closest connection test *(para. 26, Claim)*. However to repeat CLAIMANT’s quote from Art. 9 of the Inter-American Convention, the decision-maker is directed to “take into account the general principles of international commercial law recognized by international organizations” and thus in addition to this test, allowance must also be made for the lex mercatoria, which include the conventions already discussed as well as case law.

46 The case law stance is exemplified in ICC Case No. 4237; here, in a sale of goods dispute between parties from Syria and Ghana, the arbitrator reasserted the closest connection as that which determines the law governing a contract in the absence of a choice of law, stating that the closest connection is the country where the party who is to carry out the most characteristic performance has its head office, and that in contracts for the sale of goods on C & F conditions, the most characteristic performance has to be carried out by the seller.

47 Similarly, in ICC Case No. 5713 drew upon the terms of the Hague Convention on the law applicable to international sales of goods dated 15 June 1955, Art. 3 of which states that "a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence". In that case the arbitrator stated that the "general trend in conflicts of law is to apply the domestic law of the current residence of the debtor of the essential undertaking arising under the contract. That debtor in a sales contract is the Seller."

48 RESPONDENT submits that the foregoing sources allow the general choice of law rule to be inferred, that in the absence of an explicit or implicit choice of law, the law of the seller is presumed to apply unless exceptional circumstances exist to rebut this presumption where another state demonstrates a manifestly closer connection. RESPONDENT further submits that as CLAIMANT is unable to satisfy this latter requirement, the presumption stands and the law of the seller will apply here.

bb. No exceptional circumstances exist to prevail over the presumption that the law of the seller is to apply

49 To sustain an argument in support of the contract possessing a closer connection with Oceania, CLAIMANT must prove two requirements. First, that the exceptional evidence necessary to warrant the rebuttal of the presumption in favour of the seller, Potter LJ's "preponderance of contrary connecting factors" in *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd*, is present [(**i.**)]; second, that Mediterraneo as the place of business of the seller has no real significance to the contract [(**ii.**)]. RESPONDENT submits that CLAIMANT's evidence on both counts is distinctly underwhelming, and that consequently neither requirement is fulfilled. The presumption in favour of the seller's law is thus not rebutted.

i. The evidence suggesting Oceania has the closest connection to the contract is weak

50 CLAIMANT predicates the argument that Oceania possesses the closer connection to the contract primarily upon RESPONDENT's obligation to refurbish and install the machine on site in Oceania *(para. 23, 27, Claim)*, and secondly on the obligation to deliver in Oceania. Several objections may be raised to this analysis.

51 First, RESPONDENT submits that as the seller, RESPONDENT was under two contractual obligations: the primary obligation of the sale of the flexoprint machine and its delivery; and the ancillary obligation of its refurbishment which is merely a "general servicing that a dealer in second-hand equipment gives to the equipment before delivering it to its own customer". *(Procedural Order No. 2)* The sale here is the primary obligation as the substantive law of the CISG is applicable only to sale of goods cases, and therefore the *prima facie* position is that the characteristic performance lies with the seller and thus the seller's law should be applicable. To illustrate this point, the analogous French case of *Marques Roque Joachim v. La Sarl Holding Manin Riviere* involved a sale of goods contract which included the service of the dismantlement of a hangar, the price of which service amounted to 25% of the full contract price; nonetheless, this was not considered to be a preponderant part of its obligations. By analogy, the refurbishment in Oceania did not constitute the more important obligation and its capacity to eclipse the more significant obligation of sale is therefore questionable at best.

52 Second, case law suggests that the existence of a construction site is an insufficient basis to form a closer connection (VII ZR 408/97 (Germany 1999)). By analogy with the case at hand, the installation of the machine in Oceania cannot be said to necessarily indicate the closer connection lies with Oceania.

53 Third, even were the place of refurbishment in Oceania sufficient to ground the claim of a closest connection, it would be inequitable to enforce this result on RESPONDENT. The motive for changing the plans was that RESPONDENT was willing to speed up the process of sale and to lower the price for CLAIMANT by shipping the Flexoprint machine directly to Oceania. To allow CLAIMANT to rely upon the refurbishment of the machine in Oceania as grounds for alleging a closer connection of the contract with Oceania against RESPONDENT, when this change was indeed effected purely for CLAIMANT's benefit by RESPONDENT, would offend principles of good faith, and thereby contravene Art. 7(1) CISG, which is an unacceptable result.

54 Finally, the second reason cited by CLAIMANT, that Oceania as the place of delivery is an important factor in determining a closer connection *(para. 23, Claim)*, is ineffective: Magnus writes that place of delivery is generally now considered only a weak indicator of a closer connection *(Magnus)*, a view supported by Martiny *(Martiny/Dieter)*, who writes

that its role is only small. Besides, as argued above *(supra, para. 43)*, the contract only contained a mere transport clause and not an explicit extraordinary obligation of delivery.

55 With only two, impuissant connecting factors cited, the exceptional evidence that CLAIMANT would need to bring to overturn the presumption in favour of the seller is thus sorely lacking, and the dearth of such evidence strongly signifies that in this dispute the seller's law should indeed be applicable.

ii. The presumption in favour of the law of the seller is stronger

56 Even if CLAIMANT had provided sufficient evidence to suggest that Oceania had the numerous relevant connections to the contract necessary to found a closer connection, CLAIMANT would nevertheless need to prove that Mediterraneo had no connection to the contract. Yet in listing factors appropriate to determining the closest connection, CLAIMANT freely admits that Mediterraneo counts both as one of the places of contracting and one of "the places of incorporation" of the contract *(para. 31, Claim)*.

57 RESPONDENT submits that in addition to these two grounds, the justification of the presumption in favour of the seller as the party effecting the characteristic performance provides further evidence to acknowledge the connection to the contract. This justification is enunciated by McLachlan *(McLachlan)* who says that "the contract plays its economic and social role in the characteristic performer's state", and is reinforced by the report on the Rome Convention by Professor Mario Giuliano and Professor Paul Lagarde, that "It is the performance for which the payment is due… which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction."

58 The socio-economic role of the contract is played out in Mediterraneo: this was where the social role was performed, as it was RESPONDENT's team of engineers from Mediterraneo who had worked throughout, on dismantling the machine in Greece *(Claimant's Exhibit No. 6)* and on installing it and refurbishing it again in Oceania, and RESPONDENT was responsible for bearing the costs and obligation of transporting the machine. In practice, throughout the whole process of sale, the Mediterraneo headquarters would have been busy with the drawing up of plans, with the making of arrangements, with regular correspondence with its team, all of which connect the contract to Mediterraneo; during this time, at CLAIMANT's headquarters in Oceania, CLAIMANT was required to do nothing more than to wait for delivery, to observe the installation, and

to pay the purchase price, none of which would have particularly borne upon the tangible performance of the contract.

59 Moreover, Mediterraneo is where the economic role of the contract was to be played out; this is where the money was due to go and thus where its economic consequences would take effect. Oceania is neutral vis-à-vis the actual performance of the contract; it is only once the contract has been completed and fulfilled and the machine is ready for use that benefits begin to accrue in Oceania, not the refurbishment and installation of the machine per se. Lord Cullen argued a similar point in the Scots case of *Caledonia Subsea Ltd v. Microperi Srl*, in which commercial diving services were provided in Egypt by a Scottish company to an Italian subcontractor working for an Egyptian company. In that case, although performance took place almost entirely within Egypt, the characteristic performance was effected by the Scottish company and the contract was deemed to play its economic role in Scotland; Scottish law was thus applicable in the dispute. RESPONDENT contends that the present dispute should follow similar lines.

60 RESPONDENT therefore requests the Tribunal to recognize that a robust justification exists to reaffirm the strong presumption that as the characteristic performance of the contract belongs to the seller, and that therefore the law of his place of business, i.e. that of Mediterraneo, is to apply.

b. Alternatively, the cumulative method also points to the law of the seller applying

61 RESPONDENT contends that CLAIMANT's application of individual national choice of law rules is inappropriate in this dispute; as stated above, the parties' intention was to delocalize the contract and to submit the dispute to the national choice of law rule of one specific state would contradict this intention.

62 Nevertheless, one well-established method for determining choice of law rules in international arbitration is the so-called "cumulative method", by which arbitrators simultaneously consider all of the choice of law rules of all legal systems with which the dispute in question is connected. If the resulting consensus points to one system of substantive law, the arbitrators will apply this law to the merits of the dispute.

63 Four legal systems are connected to the instant dispute: Greece, Oceania, Mediterraneo and Danubia. RESPONDENT challenges CLAIMANT's assertion that Illinois is connected to the dispute *(para. 29, Claim)* for the reasons previously stated; RESPONDENT does not however challenge CLAIMANT's description of the choice of law rules of the remaining states, merely the results derived from applying such rules.

64 Applying the Rome Convention (Greece) and Hague Convention (Oceania) both lead to the seller's law as attested to in the foregoing argumentation, as does the conflict of laws rule of Mediterraneo under Art. 14 of its Private International Law Act; the conflict of laws rules of Danubia, which reflect the UNCITRAL Model Law, similarly point to the analysis given above that the seller's law applies if transnational principles are used to determine the choice of law rule the arbitral tribunal deems suitable.

65 As the conflict of laws rules of all four states connected to the present dispute thus point unanimously to the seller's law and therefore to the substantive law of Mediterraneo, the Tribunal may choose to adopt the cumulative method and apply the law of Mediterraneo to this dispute.

c. Both approaches result in the law of Mediterraneo applying to the dispute

66 RESPONDENT asks the Tribunal to conclude that Mediterraneo law is to be applied whether the Tribunal opts to derive the choice of law through transnational principles or to apply the cumulative method. Art. 14 of the Private International Law Act of Mediterraneo allows for a 2-year period of limitation for sales of good contracts and thus this is the relevant period of limitation for the dispute.

III. The period of limitation had expired before the commencement of arbitral proceedings

67 In determining the date of commencement of arbitral proceedings, RESPONDENT relies upon Art. 3(2) CIDRA, under which these begin once CIDRA receives the claim. In the case at hand this date is 5 July 2005. As the period of limitation must have begun by 1 July 2002 at the latest and have lasted for two years, by 5 July 2005 it had expired and the claim is thus time-barred and non-actionable.

68 CLAIMANT's final submission, that the two-year period should be tolled to account for the negotiations spanning two-and-a-half years *(para. 36, Claim)*, is unjustifiable on manifold accounts. First, there are no grounds for suspending the prescriptive period in this dispute *(Procedural Order No. 2)*. Second, such an approach would essentially defeat the very purpose of statutes of limitations. Third, neither Mediterraneo nor Oceania are subject to the laws of the European Union as neither are member states *(Procedural Order No. 2)*. Fourth, the Consumer Protection Directive would have no application in this case as both parties are businesspeople and do not fall within the ambit of the directive. The objection towards the two-year period having expired therefore falls.

SECOND ISSUE: RESPONDENT has not breached its obligations under the contract and the CISG.

69 RESPONDENT has not breached its obligations under the contract and the CISG to deliver conforming goods as required by the contract, according to Artt. 30, 35(1), (2)(b) CISG. RESPONDENT has delivered conforming goods on two counts: first, by having delivered goods which are of the description required by the contract, according to Art. 35(1) CISG [(**I.**)], in the alternative, by having delivered goods which are fit for any particular purpose expressly or impliedly made known to RESPONDENT at the time of the conclusion of the contract, according to Art. 35(2)(b) CISG [(**II.**)]. As such RESPONDENT has not breached its obligations under the contract and the CISG [(**III.**)].

I. RESPONDENT has delivered goods which are of the description required by the contract, according to Art. 35(1) CISG.

70 RESPONDENT contests CLAIMANT's submission that the capability to print on foil of 8 micrometer thickness was required by the contract *(para. 37, Claim)* because both the express and implied content of the contract *(Schlechtriem/Schwenzer, Introduction to Artt. 14–21, para. 2)* required a machine capable of printing on foil of 10 micrometer or greater thickness, which RESPONDENT duly delivered with the turning over of the machine on 1 July 2002 (*para. 9, Statement of Claim; para. 9, Answer).*

71 CLAIMANT does not contest that the express content of the contract made no reference to the requirement of printing on 8 micrometer foil. As such RESPONDENT submits that the technical specifications of the Magiprint Flexometix Mark 8 flexoprinter machine, as the object of sale, forms an express part of the contract [(**A.**)], and that this is further evidenced by the inclusion of the maker's manual [(**B.**)] and thus the contract was concluded 27 May 2002 [(**C.**)].

A. Technical specifications of the machine

72 Schwenzer states that Art. 35(1) CISG adopts "the concept of subjective defect" *(Schwenzer in Schlechtriem/Schwenzer, Art. 35, para. 6),* and provides that the first test when determining whether there has been a delivery of non-conforming goods is to look at what characteristics are laid down in the contract itself. The content of the contract

required a machine capable of printing on foil of 10 micrometer or greater thickness to be delivered because the written contract *(Claimant's Exhibit No. 7)* states that the object of sale is the Magiprint Flexometix Mark 8 flexoprinter machine. Such a machine has the technical specifications outlined in the maker's manual, which includes the capability to print on foil of 10 micrometer or greater thickness *(Respondent's Exhibit No. 1)*. Furthermore, throughout the correspondences between 25 April 2002 and 27 May 2002 *(Claimant's Exhibit Nos. 2 – 6)* the specified object of sale was also the Magiprint Flexometix Mark 8 flexoprinter machine, which as described above, has the technical specification of the capability to print on foil of 10 micrometer or greater thickness.

73 This is further supported by the notion that a seller is entitled to expect that a buyer concludes a contract "in full knowledge of the technical possibilities of the machinery and its equipment", which arises out of the Switzerland Federal Supreme Court Case of 22 December 2000 (*Roland Schmidt GmbH v. Textil-Werke Blumenegg AG*). In this case there was a dispute between a Swiss seller (defendant) and a German buyer (plaintiff) over the sale of a used rotary printing textile machine. The dispute concerned the stating of a printing length that was not possible with the machine's current technical make-up and whether this statement transformed the contract's content to include this different printing length; the Court held in the negative, as the printing length was not possible with the machine's current technical specifications and accompanying equipment. Therefore, the content of a contract regarding the quality of the goods is confined to the technical limits of the machinery.

B. Inclusion of maker's manual

74 CLAIMANT submits that a reasonable businessperson would not have understood the inclusion of the maker's manual as an assertion of a contractual term to form part of the sales contract (para. 47, Claim). RESPONDENT contests this, however, as the inclusion of the maker's manual with the written contract is comparable with the legally recognised situation of incorporating standard business terms and conditions into the contract. This requires RESPONDENT to have forwarded the standard business terms and conditions on to CLAIMANT (VIII ZR 60/01 (Germany 2001); 7 Ob 275/03x (Austria 2003)) and for a prudent tradesman "in the shoes of the recipient" (Schlechtriem/Schwenzer-Schlechtriem, Art.14, para 16; Magnus in: Staudinger, Art.14, para 41) to understand that is has been forwarded to him for this reason.

75 RESPONDENT contests CLAIMANT's submission that RESPONDENT's statements in the letter of 27 May 2002 (Claimant's Exhibit No. 6) preclude the finding that a reasonable business person would have understood the maker's manual formed part of the contract (para. 47, Claim) and submits that this is an erroneous and misrepresentative interpretation of RESPONDENT's statements. RESPONDENT evidences this because in the letter of 27 May 2002 (Claimant's Exhibit No. 6) RESPONDENT also stated, "you will certainly wish to have a copy" and in so doing draws significance to the maker's manual. Furthermore, any prudent businessman would have understood that all attachments sent in order to effect a sale need to be perused thoroughly and taken into account to ensure a machine suitable for CLAIMANT's needs was purchased, regardless of whether RESPONDENT draws specific attention to any discrepancies or not.

76 Though CLAIMANT has argued that the maker's manual arrived after the conclusion of the contract, and therefore its contents should be disregarded *(para. 40, Claim),* for reasons to be discussed the maker's manual was in fact delivered before the contract was concluded *(infra, para. 93-95)* and thus this objection fails. CLAIMANT has submitted that the delivery of the manufacturer's manual did not occur until after the sales contract was concluded, basing this upon an inference that the contract was concluded with reception of the letter of 21 May 2002. RESPONDENT however contends that this is an erroneous assertion and that the contract was concluded with the reception of the signed contract, on 27 May 2002, by which point the maker's manual was in possession of CLAIMANT and formed part of the contract.

a. The contract could not have been formed on 21 May 2002 as the letter of 16 May 2002 was not an offer

77 CLAIMANT argues that RESPONDENT's letter dated 16 May 2002 *(Claimant's Exhibit No. 4)* contains all the elements under Art. 14(1) CISG to constitute an offer, and was subsequently accepted by CLAIMANT on 21 May 2002. RESPONDENT contends that the letters prior to the letter of 27 May 2002 were merely pre-contractual negotiations; expressions of interest that are common in business and which do not have any legal character *(5 O 543/88 (Germany 1990)).*

78 However, should the Tribunal find that the letters require analysis to determine whether they are in fact legally binding proposals, RESPONDENT concurs that although the letter is addressed to a specific person and was indeed "sufficiently definite", the final element of intention to be bound is lacking and thus no legal offer was made by RESPONDENT in this correspondence.

79 The intention to be bound may be determined by an Art. 8 CISG analysis of RESPONDENT's proposal. Art. 8(3) CISG states, "In determining… the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." This is supported by case law *(3PZ 97/18 (Switzerland 1997))*. As CLAIMANT is a business, statements are thus to be interpreted according to the understanding the reasonable businessperson would have had, having due consideration for any relevant circumstances.

80 First, the language of the letter dated 16 May 2002 strongly suggests that the reasonable businessperson would not infer an intention the bound. The use of informal terms such as "Dear Roland" and "Your old pal" implies that RESPONDENT is still in informal negotiations with CLAIMANT and does not intend its statements to carry any legal weight. Moreover, the use of the conditional tense, in "The only way to get the machine to you would be for it to be despatched directly to you from Greece" and "[Its] engineers would re-erect [the machine] on [CLAIMANT's] premises" betrays an element of contingency in the statement of RESPONDENT and demonstrates its hesitance to enter into legal relations.

81 Second, CLAIMANT's actions in signing of the contract on 27 May 2002 further evidence that CLAIMANT did not understand the letter of 16 May 2002 to be effective as an offer; otherwise it would not have deemed further approval necessary.

82 Third, in the letter of 10 May 2002 *(Claimant's Exhibit No. 3)* CLAIMANT states, "We signed a contract with Oceania Confectionaries yesterday", indicating to RESPONDENT that it usually concludes transactions with the signing of a written document and implies this is a practice or custom that will apply between the two of them *(Schlechtriem, Internationales UN-Kaufrecht, p. 51)*.

83 As such a reasonable businessperson would not have understood that RESPONDENT intended to be bound by its proposal, having consideration for the practices established between the parties and their prior conduct. The letter of 16 May 2002 was therefore not an offer, and consequently could not have been accepted by CLAIMANT on 21 May 2002 to form a valid contract between the parties.

b. At the most, a preliminary agreement was made

84 Should the Tribunal find that the proposals of RESPONDENT indicated an intention to be bound, then at most a preliminary agreement was formed with the letter of 16 May 2002 and the letter of 21 May 2002 and as such the letter of 27 May 2002 and its attachments and the signing of the written contract created the main contract. Preliminary agreements are governed by the basic principle of freedom of contract *(Magnus in: Staudinger, Art.1 CISG, para 42; Ferrari in: Schlechtriem/Schwenzer, Art.1, para 21; Piltz, Internationales Kaufrecht, S. 26*) and are supported by case law *(8 HKO 24667/93 (Germany 1995))*. They arise when the parties want to bind themselves to contract at some time in the future, when the future document is of fixed form.

85 As described above, the fact that RESPONDENT sent a written contract and CLAIMANT signed it *(Claimant's Exhibit No. 7)* shows that their previous conduct was merely entering into pre-contractual relations and demonstrating they wished to contract at a later date, and as such the letter of 16 May 2002 *(Claimant's Exhibit No. 4)* could only be regarded as an offer to enter into a preliminary agreement and the letter of 21 May 2002 *(Claimant's Exhibit No. 5)* was an acceptance to enter into a preliminary agreement. Therefore, the letter of 27 May 2002 and its attachments and the signing of the written contract were a subsequent corresponding offer and acceptance to form the main contract.

c. The contract was formed on 27 May 2002, as this was the first corresponding offer and acceptance.

86 RESPONDENT contends that although the letter of 21 May 2002 indicates the goods, fixes the price, is sufficiently definite and contains an intention to be bound, and therefore constitutes a valid offer by CLAIMANT according to Art. 14(1) CISG, this offer was implicitly refuted by the counter-offer of RESPONDENT within the letter of 27 May 2002, and its attachments: the written contract and the maker's manual. CLAIMANT's two contentions, that the written contract was merely an agreement on a forum for dispute resolution and thus cannot change the terms of what had gone before, and that the written contract was merely a memorial of the sales contract, are both incorrect as they contravene principles within the CISG and disregard a substantial number of case law decisions. As such, RESPONDENT submits that the written contract and the maker's manual was a counter-offer [(**aa.**)], and the written contract was more than a memorialization of a previously made contract [(**bb.**)].

aa. The written contract was a counter-offer

87 The first contention, that the agreement upon the forum cannot change the terms, runs contrary to Art. 19(3) CISG. The general rule regarding counter-offers under Art. 19(1) CISG is that a reply to an offer containing additions, limitations or other modifications is a rejection of the offer coupled with a counter-offer. The further qualification under Art. 19(3) CISG specifies that additional or different terms relating to the quality of goods or settlement of disputes are considered to alter the terms of the offer materially.

88 Thus the inclusion of the arbitration clause in the written contract amounts to a material alteration because it relates to the settlement of disputes. This interpretation receives support from the United States Federal District Court [New York] Case of 14th April 1992 *(Filanto v. Chilwich)*, in which it was stated, "the Convention treats inclusion (or deletion) of an arbitration provision as "material"." *(92 Civ. 3253 (CLB) (United States 1992))*. This dispute, between an Italian seller (plaintiff) and an American buyer (defendant) over the sale of footwear (boots), concerned the inclusion of an arbitration clause in an acceptance and whether this transformed the acceptance into a counter-offer. The Court held in the affirmative.

89 A second material alteration took place when RESPONDENT sent the maker's manual; this document contained all the specifications of the machine, thus relating to the quality of the goods being sold, which centres on the very core of the agreement between the parties. The maker's manual effects a material alteration to the contract because it is CLAIMANT who believes that the contract requires a machine with the capability to print on foil of 8 micrometer thickness to be delivered and as such, in CLAIMANT's mind, this would be a material alteration to the quality of the goods involved. The two cases of the German Appellate Court [Frankfurt] Case of 31 March 1995 *(25 U 185/94 (Germany 1995))* and of the Austria Supreme Court Case of 20 March 1997, in which both courts held that a reply constitutes a counter-offer where material alterations to the quality of goods are present, add weight to this view.

bb. The written contract was more than a memorialization of a previous contract

90 The second contention, that the written contract is merely a memorial of a previously made agreement, does not take into account substantial case law on the issue of memorialization. The letter of 27 May 2002 and its attachments were an offer to modify the contract because they were more than a confirmation of the previous offer, which is made possible by Art.

29(1) CISG, which states, "A contract may be modified or terminated by the mere agreement of the parties."

91 The point was qualified in the United States State Appellate Court [Oregon] Case of 12 April 1995 *(GPL Treatment v. Louisiana-Pacific)*, a dispute between a Canadian seller (plaintiff) and an American buyer (defendant) over the sale of wood products (cedar shakes): "By requiring the buyer to take further action in order to signal acceptance (signing and returning a copy of the letter agreement), [the seller] indicated to the buyer… that the terms quoted were still subject to acceptance or rejection rather than representing a memorialization", and "*A true confirmation requires no response*" (emphasis supplied at source) *(9209-06143 CA A81171 (United States 1995))*. The dispute concerned an oral agreement and the subsequent sending of a written document and whether the purpose and instructions on this written document meant that it was more than a mere confirmation but instead transformed the terms of the contract to those that were contained in the written document. The Court held in the negative because the document itself was not called a contract and the instructions suggested it merely served as a memorialization of the oral agreement.

92 Therefore, if a later document is more than a confirmation of a previous offer they will be held to embody the new contract. The written contract *(Claimant's Exhibit No. 7)* was called a contract and required the signing of it in order to effect the agreement between the parties and the parties did in fact sign the document, and as such was not merely a confirmation of the previous offer. Therefore, the letter of 27 May 2002 and its attachments were an offer to modify the contract.

C. The signing of the written contract on 27 May 2002 was an acceptance of the offer of 27 May 2002; therefore the contract was concluded on 27 May 2002

93 The signing of the written contract was an acceptance because it indicated assent to the offer. Art. 18(1) CISG states, "A statement made by the offeree indicating assent to an offer is an acceptance." This is supported by case law *(5 U 209/94 (Germany 1995))*. In the written contract *(Claimant's Exhibit No. 7)* CLAIMANT gives its signature and in so doing confirms that it wishes to be bound to the contract, and as such indicates assent to the offer. Therefore, the signing of the written contract was an acceptance.

94 The contract was concluded with the reception of the signed contract because that was the time at which the acceptance of the offer became effective. Art. 23 CISG states, "A contract is concluded at the moment when an acceptance of an offer becomes effective".

Art. 18(2) CISG states, "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror." As supported by case law *(92-000 863 (France 1992))*, the acceptance became effective when the indication of assent, the signature, reached RESPONDENT. The acceptance reached respondent when the signed contract reached RESPONDENT, on 30th May 2002 and therefore this was the time the contract was concluded.

95 Therefore, the letter of 27 May 2002 and its attachments and the signing of the written contract were the first corresponding offer and acceptance to form the contract.

II. In the alternative, RESPONDENT has delivered goods which are fit for any particular purpose expressly or impliedly made known to RESPONDENT at the time of the conclusion of the contract, according to Art. 35(2)(b) CISG.

96 CLAIMANT submits in the letter of 16 April 2002 it expressly makes its purpose of printing on foil of 8 micrometer thickness known to RESPONDENT. However, RESPONDENT contests this assertion, as CLAIMANT did not place enough emphasis on the capability to print on foil of 8 micrometer thickness [(**A.**)]. CLAIMANT further submits that in the letter of 25 April 2002 RESPONDENT does not ask for further clarification but in fact offers assurances regarding the machine's capabilities. However, RESPONDENT contends that it is under no duty to correct CLAIMANT's mistakes [(**B.**)]. Furthermore, the circumstances show that it was unreasonable for CLAIMANT to rely on RESPONDENT's skill or judgement in delivering goods which are fit for any purpose expressly or impliedly made known to RESPONDENT at the time of the conclusion of the contract, according to Art. 35(2)(b) CISG [(**C.**)]. Moreover, RESPONDENT is not liable for any lack of conformity of the goods because at the time of the conclusion of the contract CLAIMANT knew or could not have been unaware of such lack of conformity, according to Art. 35(3) CISG [(**D.**)].

A. CLAIMANT did not place enough emphasis on the capability to print on foil of 8 micrometer thickness

97 CLAIMANT submits that in the letter of 16 April 2002 its purpose of printing on foil of 8 micrometer thickness was expressly made known to RESPONDENT for the following reasons; first, it made no reference to any other foil thickness *(para. 38, 39 Claim)*, second, it did not give any indication that a machine incapable of printing on foil of 8 micrometer thickness would be acceptable *(para. 38 Claim)*, third, RESPONDENT could not have reasonably interpreted the letter as expressing anything else *(para. 39 Claim)*. RESPONDENT contests these arguments for the following reasons:

98 First, there is only one mention of the requirement of the capability to print on foil of 8 micrometer thickness which defied the recognition of this capacity as a "particular purpose".

99 Second, the noncommittal and vague nature of that one reference, in which CLAIMANT used the conditional auxiliary verb "may be", weakens CLAIMANT's argument of its importance.

100 Third, the mention of the capability to print on foil of 8 micrometer thickness is extremely far removed from the other uses of the machine, by four causal steps, because other more general uses of the machine were expressed: the printer needs to be able to print on paper, polyester and metallic foil (step 1); the metallic foils are to be used in the confectionary market as well as similar fields (step 2); the confectionary market includes other confectionary other than chocolate (step 3); and chocolate wrappers merely "may be" of 8 micrometer thickness, implying that the typical foil "may be" of another thickness (step 4).

101 Fourth, the fact that the capacity to print on foil of 8 micrometer thickness "could not be called an industry standard" *(Answer to Question 20 (Procedural Order No. 2))* means that it would not even be anticipated by RESPONDENT that such a capacity was required for the machine.

102 Fifth, as "the contract with Oceania Confectionaries called for some of the printing to be done on 10 micrometer foil" *(Answer to Question 20 (Procedural Order No. 2))*, this means that CLAIMANT would not have been satisfied with a machine which was only capable of printing on foil of 8 micrometer thickness, as this too would have lead to the inability to service the contract with the Confectioner.

103 From the aforementioned arguments, the interpretation of the letter of 17 April 2002 put forward by CLAIMANT is unfounded and unreasonable, and as such RESPONDENT's assertion that not enough emphasis was placed on the capability print on foil of 8 micrometer thickness is correct.

B. RESPONDENT is under no duty to correct CLAIMANT's mistakes.

104 CLAIMANT submits that, first, RESPONDENT should have asked for elaboration on CLAIMANT's needs *(para. 39, Claim)*, second, RESPONDENT should have indicated it could not meet such needs *(para. 39, Claim)*, third, RESPONDENT should not have

offered the assurance that the machine was "for [CLAIMANT's] task" *(para. 39, Claim)*. RESPONDENT contends that CLAIMANT's submissions are flawed due to the subsequent argumentation.

105 First, RESPONDENT is under no duty to ask for elaboration because this is analogous to the legally recognised principle that there is "no…explicit duty [to inform]", especially so if "the buyer selected the goods by brand name" *(Sukhbaatar, Missing Information)*. RESPONDENT submits that CLAIMANT did indeed specify the machine by brand name, ordering in the letter of 21 May 2002 *(Claimant's Exhibit No. 5)*, a "Magiprint Flexometix Mark 8 flexoprinter machine" and as such it is assumed CLAIMANT has ordered the machine with knowledge of the machine's technical characteristics.

106 Second, CLAIMANT is an established business and should be competent as such; meaning CLAIMANT should not rely on RESPONDENT to furnish supplementary information. As a business, CLAIMANT should use its own business acumen, and as argued above RESPONDENT has met any needs expressly stipulated *(para. 30, 32, Answer)*.

107 Third, the reason for RESPONDENT's assurance is clear; RESPONDENT was providing a machine in accordance with its technical characteristics suitable for printing generally; the capability to print on foil of 8 micrometer thickness itself not being a 'task'.

108 Fourth, CLAIMANT's submission does not take into account CLAIMANT's earlier expression of satisfaction in the letter of 10 May 2002 (*Claimant's Exhibit No. 3)*, where CLAIMANT states the machine "looked to be just what we needed". This, in fact, demonstrates to RESPONDENT that CLAIMANT was certain that this is the particular machine that it wished to purchase, a machine possessing the capability to print on foil of 10 micrometer or greater thickness. Therefore, the content of the contract required a machine capable of printing on foil of 10 micrometer or greater thickness to be delivered.

C. The circumstances show that it was unreasonable for CLAIMANT to rely on RESPONDENT's skill or judgement in delivering goods which are fit for any purpose expressly or impliedly made known to RESPONDENT at the time of the conclusion of the contract, according to Art. 35(2)(b) CISG.

109 The Tribunal is requested to find RESPONDENT did not hold out any skill or judgement to be relied upon, and CLAIMANT inspected the machine in Greece.

110 RESPONDENT rejects the assertion that CLAIMANT relied reasonably upon RESPONDENT's skill and judgment, and each of the premises supporting this assertion *(para. 48, Claim)*. First, that RESPONDENT held out any skill or judgement to be relied upon; second, that the CLAIMANT had no access to the manual; third, that the CLAIMANT's visit to Greece did not provide it with the necessary specific information; and fourth, that as there was no pre-contractual obligation to inspect, CLAIMANT must have relied upon RESPONDENT's judgment.

111 To the first point, RESPONDENT did not at any point hold out any knowledge or skill to be relied upon, because it had no specific knowledge about flexoprinter machines. "[RESPONDENT] is a seller of new and used industrial equipment generally" *(Answer to Question 8 (Procedural Order No. 2))* and "[RESPONDENT] sells a wide range of new and used industrial equipment. It does not sell any new flexoprint machines. Sales of used flexoprint machines constitute five to ten percent of its total business" *(Answer to Question 23 (Procedural Order No. 2))*. Evidently RESPONDENT's skill lies in the supply of equipment generally, flexoprinters being but a small part of this, and that RESPONDENT as the seller merely held out information from the manufacturer, i.e. the maker's manual.

112 To the second submission, at the time of the Greece trip, RESPONDENT did indeed have access to the machine's maker's manual, which would have revealed the alleged non-conformity, but even though it was available for CLAIMANT's inspection, CLAIMANT did not request to see the manual *(Answer to Question 13 (Procedural Order No.2))*. Had CLAIMANT but asked for the maker's manual it would have, as CLAIMANT admits, revealed the non-conformity and CLAIMANT would have known as early as 6 May 2002 that the machine was not suitable for its use.

113 To the third point, RESPONDENT submits that it gave CLAIMANT the opportunity to inspect the goods in Greece, and if CLAIMANT had not wanted to use this visit for the purpose for which it was intended, CLAIMANT should have refused to attend. CLAIMANT's submission that "[it] was assured that the machine worked well" for its previous owners is a misrepresentation of the facts; "The question [regarding the previous owner's satisfaction] had been phrased in a general way and the answer had also been phrased in a general way. [CLAIMANT] had not enquired specifically whether the previous owner had printed on 8 micrometer foil" *(Answer to Question 13 (Procedural Order No. 2))*. This shows that if CLAIMANT had been a more prudent businessperson and asked a more exact question it would have discovered that the machine was incapable of printing on foil of 8 micrometer thickness.

114 Moreover regarding the Greece trip, CLAIMANT submits that while it possesses a general knowledge of printing machines, it was not particularly familiar with flexoprint machines, and was not accompanied by a technical expert. This is no ground for claiming RESPONDENT should have provided more information; RESPONDENT too had no specific knowledge of flexoprinter machines, and it was the purpose of CLAIMANT's trip to either employ some sort of technical expertise, whether its own or one of its employees or enquire of anyone present of any technical expertise. CLAIMANT did not use this excellent opportunity in Greece to inspect the machine properly.

115 To the fourth point, CLAIMANT's submission does not take into account the principle of good faith on which the CISG is based; RESPONDENT invited CLAIMANT to inspect the machine to ensure the purchase was suitable and CLAIMANT now holds that it does not have the obligation to do so. It also compels a return to the question of the purpose of CLAIMANT's trip, especially given that no test-runs were carried out; a simple question from CLAIMANT would have revealed the alleged non-conformity, but CLAIMANT did not exercise proper care in not doing so. Furthermore, a test-run would not have made any difference; as shown by CLAIMANT's behaviour when the test-runs were being performed after delivery, CLAIMANT took no interest and was not present. Therefore, it was unreasonable for CLAIMANT to rely on RESPONDENT's skill or judgement.

D. RESPONDENT is not liable for any lack of conformity of the goods because at the time of the conclusion of the contract CLAIMANT knew or could not have been unaware of such lack of conformity, according to Art. 35(3) CISG.

116 CLAIMANT has failed to note that RESPONDENT may invoke Art. 35(3) CISG, which absolves the seller of liability where the buyer knew or could not have been unaware of the lack of conformity raised at the time of conclusion of the contract. Thus even in the circumstance that the Tribunal were to find RESPONDENT in breach of its obligations under Art. 35(2)(b) CISG, RESPONDENT cannot be held liable for the breach as CLAIMANT could not have been unaware of the lack of conformity by 30 May 2002, the date of conclusion of the contract.

117 The wording of the phrase "could not have been unaware" is said to "significantly narrow" the buyer's protection afforded by Art. 35(2) CISG *(Honnold, Honnold Text),* and covers those deficiencies that are "objective and clearly recognizable" and "obvious to the average buyer" *(Welser, UNCITRAL-Kaufrecht)* and deficiencies the buyer should "reasonably expect" (*Bianca, Commentary)*. Insofar as a buyer must undertake an "examination that is normal in his branch of trade according to the circumstances" *(Bianca, International Sales Law)* or "normal and usual in the relevant trade" *(Henschel, Conformity of Goods)*, the paragraph imposes a duty to investigate. A buyer who examines the goods, even though not necessarily finding any deficiencies, will be denied the ability to claim for non-conformity if he "could not have been unaware" of the lack of conformity *(Lookofsky, UN Convention)*. The seller is only responsible, therefore, for hidden defects that need an "unusual examination" to be detected *(Bianca, International Sales Law)*.

118 RESPONDENT submits that the deficiency for the purpose of Art. 35(3) was not hidden and did not need an "unusual examination", and that on an inspection of the goods which is normal in the trade, CLAIMANT should have easily identified the lack of conformity before conclusion of the contract on inspection in Greece or from the maker's manual. Accordingly, the Tribunal cannot find that CLAIMANT was not unaware; RESPONDENT can call upon the protection of Art. 35(3) CISG and is not to be held liable.

119 First, CLAIMANT's inspection of the machine in Greece on 5 and 6 May 2002, before the conclusion of the contract on 30 May 2002, was its opportunity to discover the lack of conformity, and indeed represented its purpose in making this trip. If the Tribunal has accepted the centrality of the capability to print on 8 micrometers to the contract, then CLAIMANT's mere general enquiry to the previous owners regarding the quality of the machine *(Procedural Order No. 2)*, and its failure to ask about printing upon 8 micrometer foil, implies that CLAIMANT did not undertake an examination normal in its branch of trade, and subsequently fell beneath its reasonable standard of care in ensuring the machine was fit for this purpose. To pose a simple, specific enquiry is the best way any person in the trade would discover such information and this is not what CLAIMANT did, even though it would have been reasonable to expect that CLAIMANT would, especially as observation of printing was not possible as the previous owners no longer used it *(Procedural Order No. 2)*.

120 Second, CLAIMANT received the maker's manual containing the 10 micrometer specification before the conclusion of the contract *(supra, para. 93-95)*, and in the normal course of trade, a maker's manual defines the description of goods in sales contracts and represents one of the most reliable starting points from which to determine whether a particular good is suitable for purchase. Once again, if the centrality of the 8 micrometer printing capability is affirmed by the Tribunal, it must also be recognized that CLAIMANT would reasonably have checked the manual for this specification, which take up two pages of the manual with the specifications for aluminium foil double lined bordered. The fact of the 10 micrometer printing capability is therefore in no way hidden and thus CLAIMANT cannot be considered to be unaware of the lack of conformity.

121 On these two grounds, RESPONDENT submits that CLAIMANT could not have been unaware of the lack of conformity before the conclusion of the contract on 30 May 2002. As such, even if the Tribunal concludes that RESPONDENT breached its obligations under Art. 35(2)(b) CISG, RESPONDENT is not to be held liable for any breach.

III. RESPONDENT has not breached its obligations under the contract and the CISG.

122 As RESPONDENT delivered goods that are of the description required by the contract, in that they were fit for any purpose expressly or impliedly made known to RESPONDENT at the time of the conclusion of the contract, the circumstances show that it was unreasonable for CLAIMANT to rely on RESPONDENT's skill or judgement, RESPONDENT is not liable for any lack of conformity of the goods because at the time of the conclusion of the contract CLAIMANT knew or could not have been unaware of such lack of conformity at the time of the conclusion of the contract, RESPONDENT has not breached its obligations under the contract and the CISG.

THIRD ISSUE: DAMAGES

123 Pursuant to Artt. 45(1)(b), 74 CISG, CLAIMANT can only claim for damages if RESPONDENT has failed to perform its obligations under the contract or the CISG *(UNCITRAL Digest, Art. 74, para. 1,2, Schlechtriem / Schwenzer Art. 45, para. 1,2 and Art. 74, para. 1,2*). As clearly demonstrated in Issue 2, RESPONDENT has indeed performed, and thus RESPONDENT submits CLAIMANT should not be awarded the sum of $ 3,200,000 [(**I.**)]. Even if the Tribunal does recognize the award of damages, RESPONDENT submits they be reduced [(**II.**)]

I. CLAIMANT is not entitled to $ 3,200,000 in damages

124 RESPONDENT does contest every element of the calculation made by CLAIMANT *(Statement of Answer, para. 28, 29)*, and submits the Tribunal should not follow CLAIMANT's request to award the sum of $ 3,200,000 as one amount, but should consider the claim in two separate amounts of $ 1,600,000, both of which fail: an award for

$ 1,600,000 resulting from the cancellation of the initial contract with the Confectioner [(**A.**)] and $ 1,600,000 resulting from the loss of chance to renew the initial contract with the Confectioner [(**B.**)].

A. CLAIMANT should not be awarded the $ 1,600,000 resulting from the cancellation of the initial contract with the Confectioner

125 CLAIMANT is not entitled to damages to the amount of $ 1,600,000 because there is no evident connection between the alleged lack of conformity of the machine and the contract with the Confectioner, which CLAIMANT should have brought to RESPONDENT's attention before the conclusion of the contract. CLAIMANT's lost profit is therefore not a consequence of RESPONDENT's alleged breach and CLAIMANT should thus not be awarded $ 1,600,000 in damages.

126 RESPONDENT's knowledge of the contract between CLAIMANT and the Confectioner was not sufficient to determine the relevant connection between the alleged lack of conformity of the machine and the contract with the Confectioner *(UNCITRAL Digest, Art. 74, para. 29, 33).*

127 The contract with the Confectioner was first mentioned by CLAIMANT *(in Claimant's Exhibit No.3)* on 10 May 2002. The information given included the name of the company, "Oceania Confectionaries", the date of servicing and the expected profit as well as the expected duration of the contract. The object of the contract, i.e. the task the machine had to fulfil was however never mentioned expressly and RESPONDENT could have taken various interpretations of the information available, as any other business would have done. In effect, the printing standard of 8 micrometers and the contract with the Confectioner were never mentioned together. Similarly, in ICC award No. 406/1998 of 6 June 2000, a buyer seeking damages for lost profits relating to another contract with a third party, was denied the damages sought because he failed to inform the seller of the terms and conditions of the other contract.

128 RESPONDENT therefore cannot be expected to make a link between the vague and one-off mention of printing on 8 micrometer in previous correspondence *(Claimant's Exhibit No.1)* "typical plain and coloured aluminium foil for chocolate wrappers may be of 8 micrometer thickness" and the object of the contract with the Confectioner. Furthermore, 8 micrometer foil "could not be called an industry standard" *(Question 21 of Procedural Order No.2)* and some of the contract with the Confectioner "called for some printing to be done on 10 micrometer foil". There is thus enough evidence to refute a connection between the alleged non-conformity of the machine and the contract with the Confectioner.

129 CLAIMANT should have thus informed RESPONDENT of the link between the machine and the contract with the Confectioner *(UNCITRAL Digest, Art. 74, para. 29, 33)*. The 8 micrometer requisite should have ultimately been included in the contract as explained in the second issue. Considering that RESPONDENT is not specialised in the sale of flexoprint machines (*Question 24 of Procedural Order No.2)* and that it was the first time that it entered into a contract with CLAIMANT *(Question 25 of Procedural Order No.2)*, RESPONDENT could not have relied on its specialisation or previous agreements with CLAIMANT to infer CLAIMANT's purpose for buying the machine in relation to the Confectioner. Thus, if the contract with the Confectioner was important to CLAIMANT as can be assumed from the wording in the letter of 10 May 2002 *(Claimant's Exhibit No.3)*, RESPONDENT should have been made aware of the essential requirement to print on 8 micrometer foil.

130 If the Tribunal chooses to agree with CLAIMANT about RESPONDENT's failure to comply with the contract, it will nevertheless have to take into consideration the missing link between the alleged lack of conformity of the machine and the contract with the Confectioner, and should thus not award $ 1,600,000 to CLAIMANT for the lost profits relating to the initial contract with the Confectioner.

B. CLAIMANT should not be awarded the $ 1,600,000 resulting from the loss of chance to renew the initial contract with the Confectioner

131 CLAIMANT contends that the lost chance to renew the initial contract is "provable with sufficient evidence" *(para. 56 of Claim)* and that CLAIMANT should thus be awarded damages accordingly. It however appears that the damages incurred are not a direct consequence of RESPONDENT's alleged breach and that there is no evidence that the initial contract with the Confectioner was to be renewed. CLAIMANT should consequently not be awarded $ 1,600,000 in damages.

132 Similar to the claim based on the lost profit resulting from the cancellation of the initial contract with the Confectioner *(supra, para. 125-130)*, the connection between the alleged lack of conformity of the machine and the contract to be serviced was not evident at the time of the conclusion of the contract.

133 CLAIMANT bases its argument on the "very high probability" *(para. 56, Claim)* of renewal of the contract with the Confectioner. Even though CLAIMANT is not required to prove it with absolute certainty *(Chaplin v. Hicks)* it nevertheless bears the burden of proving "all the material facts relative to the assessment of damages which are susceptible of proof" *(Wood, Eastwalsh Homes Ltd. v. Anatal Development Ltd.)*. On the issue of the certainty of future profits, the Court in the case of Pan-Asia found that where possible future gains were too uncertain, the value of the lost chance was to be reduced by discounting the value of the chance by the improbability of its occurrence. In the case at hand, nothing purports to show that the contract with the Confectioner was likely to be renewed.

134 First, if the renewal were certain, CLAIMANT and the Confectioner could have concluded a contract for 8 years at once. It seems that the four-year period of the initial contract can be described as a "test period" after which, had the contract been performed well, the Confectioner could have chosen to renew it. At the time being however, this seems to be an open question. Furthermore, as the principle of party autonomy is central to the CISG *(Schlechtriem / Schwenzer, Art. 7, para. 30)*, had the parties wanted to conclude a contract for 8 years, they would have done so.

135 Second, the mention of the increasing competition *(Questions 20 and 32 of Procedural Order No.2)* indicates that other businesses would have sought to secure the contract with the Confectioner and it can reasonably be questioned whether CLAIMANT at that point in time would have been in a "commanding lead" as claimed in its letter of 17 April 2002 (*Claimant's Exhibit No.1)*. Besides, there is no indication that CLAIMANT's purchase of the machine would have prevented another buyer from purchasing a similar machine and thus again does not rule out the possibility of the Confectioner contracting with another business *(Question 32 of Procedural Order No.2*). The possibility of another business securing the Confectioner's contract is further supported by evidence of the rapid purchase of the machine by Reliable Printers *(Question 22 of Procedural Order No.2)* who had "entered in a preliminary agreement to purchase a machine [with a view to secure the contract with the Confectionaries]".

136 Third, RESPONDENT opposes CLAIMANT's view on the life expectancy of the machine and the business reputation of its firm and submits that neither the life expectancy of the machine *(Question 31 of Procedural Order No. 2)* nor the generally "good" *(Question 26 of Procedural Order No.2)* business reputation of the firm indicates a strong likelihood of

renewal. Indeed, the average life expectancy of the machine does not give a right to assume that it would have been useful on the market for a long period. To justify such an assertion, factors such as technological developments or market demand for printing on foil would have to be taken into account. Furthermore, using the reputation of CLAIMANT on the market to justify a possibility of renewal is flawed since "good" does not equal "excellent" or "highly regarded", it merely gives the minimum standard expected from a company on the market.

137 Finally, it also appears that the use of the phrase "unless something unexpected happens" *(Claimant's Exhibit No.3)* introduces a notion of uncertainty to the renewal of the contract by anticipating the possibility of an obstacle to the renewal.

138 RESPONDENT asks the Tribunal to find that CLAIMANT should not be awarded $ 1,600,000 in damages for the renewal of the initial contract because of the missing link between the alleged lack of conformity and the contract with the Confectioner and due to the lack of certainty as to the possibility of renewal of the contract.

II. Even if the Tribunal does recognize the award of damages, RESPONDENT submits they be reduced

139 In the event of the Tribunal finding that either one of the claims or both claims are justified, RESPONDENT asks the Tribunal to reduce the amount of damages to be awarded according to their present value by applying the prime lending rate to first class borrowers [(**A.**)] and due to the CLAIMANT's failure to mitigate its losses in accordance with Art. 77 CISG [(**B.**)].

A. Any damages resulting from the loss of chance to renew the initial contract should be discounted to their present value taking into account the prime lending rate to first class borrowers

140 By asking to be awarded $ 1,600,000 CLAIMANT would be in a better position at the outcome of the proceedings than had it been paid an annual sum of $ 400,000 for the renewed contract with the Confectioner, because receiving the lump sum earlier would be more financially advantageous than receiving the sum in instalments. Because the law governing arbitration is based on the principle of "restitution", which means "restoration to the original position" *(Oxford English Dictionary of Law, p. 431, Schlechtriem /Schwenzer, Art. 74, para. 1),* this principle would be contravened if CLAIMANT were put in a better position than he would have stood in had the contract with the Confectioner been fulfilled.

141 As opposed to CLAIMANT's submission, the Tribunal should not take into account the inflation rate of 2% *(Question 33 of Procedural Order No.2)* because doing so would result in placing CLAIMANT in a better position than that created by the contractual agreement with the Confectioner.

142 RESPONDENT therefore respectfully asks the Tribunal to apply the prime lending rate to first class borrowers of 6% *(Question 33 of Procedural Order No.2)*. Under normal conditions, if CLAIMANT wanted to have the said sum at its disposal at once, it should have resorted to the bank and negotiated a loan. By applying the lending rate of 6%, CLAIMANT would thus be placed in the position of the borrower and RESPONDENT of lender.

143 Any damages awarded by the Tribunal should therefore be reduced by 6%.

B. Any damages to be awarded to CLAIMANT should be reduced because CLAIMANT failed to mitigate its losses pursuant to Art. 77 CISG

144 CLAIMANT has failed to fulfil its duty under Art. 77 CISG to take adequate measures to mitigate its losses *(UNCITRAL Digest, Art. 77, para. 1, Schlechtriem / Schwenzer, Art. 77, para. 3)*. In the case at hand, CLAIMANT could have mitigated its losses in two ways: first, by buying another machine; or second, by searching for another contract.

145 First, CLAIMANT could have bought another machine. On 1 August 2002 (*Claimant's Exhibit No.9)* CLAIMANT discovered that the machine could not fulfil the specific printing jobs desired and stated that the date of servicing for the contract, 15 July, with the Confectioner had elapsed two weeks earlier. CLAIMANT further emphasised "they [the Confectioner] are threatening to cancel the contract if we are not able to start production promptly." The cancellation of the contract by the Confectioner, mentioned by CLAIMANT in its letter of 15 August 2002 *(Claimant's Exhibit No.10)*, was thus highly predictable to CLAIMANT. Between the date of servicing and the cancellation of the contract a whole month has elapsed during which CLAIMANT could have bought another machine as Reliable Printers did *(Claimant's Exhibit No. 9, Question 22 of Procedural Order No. 2)*. In actual fact, Reliable Printers acquired the machine rapidly which has since been "working well" *(Claimant's Exhibit No. 9)*; this presents enough evidence to conclude that CLAIMANT could have bought another machine. Moreover, the price of acquiring a new machine seems minimal with regard to the anticipated profit expected by CLAIMANT from its contract with the Confectioner.

146 Second, CLAIMANT could have searched for another contract. On 1 July 2002, after the refurbishment of the machine had been completed, CLAIMANT declared, "So far, so good" and added, "we plan on starting production next week" *(Claimant's Exhibit No.8)*. Similarly, according to the letter of RESPONDENT's foreman on 15 July 2002, "The machine worked perfectly" *(Respondent's Exhibit No.2)*. It can thus be reasonably said that the machine was perfectly suited to print on other materials so alternative contracts could have been sought. This was discussed in ICC case No. 476 *(award No. 406/1998 of 6 June 2000)* where it was held that the buyer had failed to mitigate his losses by failing to find a substitute transaction and the damages awarded were subsequently reduced for the buyer's omission to do so.

147 Another possibility of securing an alternative contract is given by Oceanic Generics whose production of generic pharmaceuticals called for printing on 10 micrometer foil *(Question 20 of Procedural Order No.2)*. CLAIMANT could have thus entered into a contract with Oceanic Generics.

148 CLAIMANT could have also looked for a contract on an international level as exemplified by the case of 3 U 246/97 (Germany 1998) where the claimant only looked for a substitute transaction in three Länder (federal states) and was held not to have complied with its duty to mitigate its losses because of the possibility on the international market.

149 RESPONDENT thus submits that CLAIMANT failed to mitigate its losses and consequently asks the Tribunal to reduce the damages to be awarded.

REQUEST FOR RELIEF

150 RESPONDENT respectfully requests the Tribunal to find CLAIMANT's claim is time-barred, RESPONDENT has not breached its obligations under the contract and the CISG to deliver conforming goods as required by the contract and CLAIMANT is not entitled to $ 3,200,000 in damages.