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International Commercial Arbitration Moot
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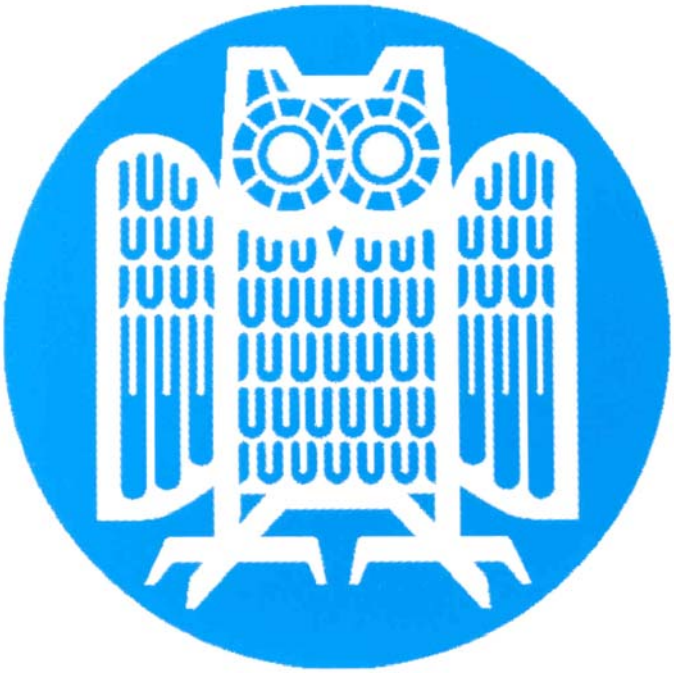
MEMORANDUM FOR CLAIMANT



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Case No. Vis Moot 13

MEMORANDUM FOR CLAIMANT

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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INDEX OF AUTHORITIES

Amissah, Ralph	The Autonomous Contract – Reflecting the borderless electronic commercial environment in contracting http://www.jus.uio.no/lm/the.autonomous.contract.07.10.1997.amissah/2#34 *(cited as: Amissah)*
Berger, Klaus Peter	International Economic Arbitration, Deventer, Boston 1993 www.tldb.de *(cited as: Berger)*
Bianca, Cesare Massimo / Bonell, Michael Joachim	Commentary on the International Sales Law, The 1980 Vienna Sales Convention, Milan 1987 *(cited as: commentator in Bianca/Bonell)*
Blase, Friedrich / Höttler, Philipp	Remarks on the Damages Provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC) http://www.cisg.law.pace.edu/cisg/biblio/blase3.html *(cited as: Blase/Höttler)*
Clarkson, C.M.V. / Hill, Jonathan	Jaffey on the Conflict of Laws, 2002 *(cited as: Clarkson/Hill)*
Craig / Park / Paulsson	International Chamber of Commerce Arbitration, 3rd Edition Oceana Publications Inc. Dobbs Ferry NY, 2000
Darkey, Joanne M.	A U.S. Court's Interpretation of Damage Provisions under the U.N. Convention on Contracts fort he International Sale of Goods: A Preliminary Step towards an International Jurisprudence of CISG or a missed opportunity? http://www.cisg.law.pace.edu/cisg/biblio/darkey2.html *(cited as: Darkey)*
Dicey / Morris	Conflict of Laws, 7th Edition, 1958 *(cited as: Dicey/Morris)*
Digest of Art. 35 Case Law	http://www.cisg.law.pace.edu/cisg/text/anno-art-35.html *(cited as: Digest of Art. 35 Case Law)*
Enderlein, Fritz / Maskow, Dietrich / Strohbach, Heinz	International Kaufrecht, Berlin: Haufe, 1991 *(cited as: Enderlein/Maskow/Strohbach)*
Ferrari, Franco	Comparative Ruminations on the Foreseeability of Damages in Contract Law http://www.cisg.law.pace.edu/cisg/biblio/ferrari9.html *(cited as: Ferrari)*

Garnett / Gabriel / Waincymer / Eppstein	A Practical Guide to International Commercial Arbitration, Oceana Publications, Inc. Dobbs Ferry NY, 2000
Gotanda, John Y.	Recovering Lost Profits in International Disputes http://www.cisg.law.pace.edu/cisg/biblio/gotanda2.html *(cited as: Gotanda)*
Hong-Lin Yu	Choice of Law for Arbitrators: Two Steps or Three, International Arbitration Law Review 2001, 4(5) 152-163 *(cited as: Hong-Lin Yu)*
Honnold, John O.	Uniform Law for International Sales under the 1980 United Nations Convention, 3rd edition, 1999 *(cited as: Honnold)*
Kazutake, Okuma	Confirmation, Annulment, Recognition and Enforcement of Arbitral Awards http://www.seinan-gu.ac.jp/jura/home04/pdf/3704/3704okuma.pdf *(cited as: Kazutake)*
Kolaski, Kenneth M., Esquire, CPA / Kuga, Mark, Ph.D	Measuring Commercial Damages via Lost Profits of Business Value: Are these Measures Redundant or Distinguishable? http://www.cisg.law.pace.edu/cisg/biblio/kolaski.html *(cited as: Kolaski/Kuga)*
McLachlan, Campbell	The Hague Convention And The Limits of the Choice of Law Process Law Quarterly Review 1986, 102 (Oct.), 591-627 *(cited as: McLachlan)*
Murphey, Arthur G, Jr	Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley http://www.cisg.law.pace.edu/cisg/biblio/murphey.html *(cited as: Murphey)*
Neels, Jan L.	Recent developments in private international law: 1993 - 2000 http://general.rau.ac.za/law/English/ipr/1993-2000.doc *(cited as: Neels)*
Oxford English Dictionary	http://www.oed.com *(cited as: Oxford English Dictionary)*
Rebmann Kurt / Säcker Franz Jürgen / Rixecker Roland	Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10: Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-38) Internationales Privatrecht, 3rd Edition, 1998 *(cited as: commentator in MüKo)*

Redfern, Alan / Hunter, Martin	Law and Practise of International Commercial Arbitration, London, 1986 *(cited as: Redfern/Hunter)*
Schlechtriem, Peter / Schwenzer, Ingeborg	Commentary on the UN Convention on the International Sale of Goods, 2nd Edition, 2005 *(cited as: Schlechtriem/Schwenzer)*
Stein, Friedrich / Jonas, Martin	Kommentar zur Zivilprozeßordnung, Band 9, 22nd Edition, München, 2002 *(cited as: commentator in Stein/Jonas)*
Soergel, Hans Th.	Kommentar zum Bürgerlichen Gesetzbuch, Band 10 Einführungsgesetz, Stuttgart, Berlin, Köln, 1996 *(cited as: commentator in Soergel)*
Staudinger, Julius von	Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen 13. Auflage, Berlin, 2005 *(cited as: commentator in Staudinger)*

INDEX OF CASES

Austria

Appellate Court Graz, 24 January 2002, 4 R 219/01k
http://cisgw3.law.pace.edu/cases/020124a3.html
(Cited as: 4 R 219/01k (Austria 2002))

Germany

Germany 8 March 1995 Supreme Court, VIII ZR 159/94
http://cisgw3.law.pace.edu/cases/950308g3.html
(Cited as: VIII ZR 159/94 (Germany 1995))

Germany 24 September 1998 District Court Regensburg, 6 O 107/98
http://cisgw3.law.pace.edu/cases/980924g1.html
(Cited as: 6 O 107/98 (Germany 1998))

Germany 8 January 1997 Appellate Court Köln, 27 U 58/96
http://cisgw3.law.pace.edu/cases/970108g1.html
(Cited as: 27 U 58/96 (Germany 1997))

Spain

Manipulados del Papel v. Sugem Europa
Spain 4 February 1997 Appellate Court Barcelona, RA 340/1997
http://cisgw3.law.pace.edu/cases/970204s4.html
(Cited as: RA 340/1997 (Spain 1997))

Switzerland

Switzerland 30 November 1998 Commercial Court Zürich, HG 930634/O
http://cisgw3.law.pace.edu/cases/981130s1.html
(Cited as: HG 930634/O (Switzerland 1998))

UK

Hadley v. Baxendale, 156 Eng. Rep. 145 (1854)
(Cited as: Hadley v. Baxendale)

Koufos v. C. Czarnikow, Ltd. [1969] 1 App. Cas. 350 [The Heron II]
(Cited as: The Heron II)

Victoria Laundry (Windsor), Ltd. v. Newman Industries [1949] 2 K.B., 528, 536 (C.A.)
(Cited as: Victoria Laundry)

Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH [2001] 1 WLR 1745
(Cited as: Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertangentur GmbH)

USA

Delchi Carrier SpA v. Rotorex Corporation, 1994 WL 495787
http://cisgw3.law.pace.edu/cases/940909u1.html
(Cited as: Delchi v. Rotorex)

Vitex Mfg. v. Caribtex Corp., 377 F.2d 795, 799 (3d Cir, 1967)
(Cited as: Vitex Mfg. v. Caribtex Corp.)

International

ICC Award No. 3131 Turkish Pabalk Ticaret Limited Sirketi v Norsolor S.A.
XII Yearbook of Commercial Arbitration, 1983, pp. 109-111
(Cited as: ICC Award No. 3131)

ICC Award No. 3742
www.tldb.de
(Cited as: ICC Award No. 3742)

ICC Award No. 4132, YCA 1985, at 49, 52
www.tldb.de
(Cited as ICC Award No. 4132)

ICC Award No. 5717, ICC Bull. No. 2, 1990 at 22
www.tldb.de
(Cited as: ICC Award No.5717)

ICC Award No. 5865
1989, Journal du Droit International 1998, p. 1008
(Cited as ICC Award No. 5865)

ICC Award No. 6840
1992, Journal du droit international 1992-2, p.1030
(Cited as ICC Award No. 6840)

ICC Award No. 9117
http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13355&x=1
(Cited as: ICC Award No. 9117)

IRAN-U.S. C.T.R. 42, 4 1983, Iran-US Claims Tribunal, Harnischfeger Corp. v. MORT, 7 Iran-US. CTR 1984-90, 99
www.tldb.de
(Cited as: IRAN-U.S. C.T.R. 42, 4 1983)

STATEMENT OF FACTS

17 April 2002 Mr Roland Butter, owner and President of Oceania Printers S.A. ("CLAIMANT"), gave McHinery Equipment Suppliers Pty ("RESPONDENT") notice of interest by letter in purchasing a refurbished flexoprint machine to print coated and uncoated papers for wrapping, polyester and metallic foils, which might be "of 8 micrometer thickness".

25 April 2002 RESPONDENT replied by letter that it had a second hand 7 stand Magiprint Flexometix Mark 8 machine for sale for $ 44,500 c/i/f Port Magreton, Oceania and suggested that Mr Butter could inspect this in Athens, Greece.

05-06 May 2002 The machine was inspected by the parties in Athens, Greece.

09 May 2002 A contract was signed between CLAIMANT and the Confectioner (Oceania Confectionaries), which CLAIMANT had to be able to service by 15th July 2002.

10 May 2002 CLAIMANT wrote to RESPONDENT that the contract with the Confectioner was excellent and it was imperative to move fast on the purchase of the machine and explained its business relationship to the Oceania Confectionaries.

16 May 2002 RESPONDENT replied that it would ship the machine directly from Athens, Greece and that the refurbishing would be done in Oceania, when RESPONDENT's engineers would re-erect the machine on CLAIMANT's premises. Furthermore RESPONDENT proposed that it would reduce the price from $ 44,500 to $ 42,000.

21 May 2002 CLAIMANT ordered the machine.

27 May 2002 RESPONDENT replied and enclosed the written contract and a copy of the manufacturer's manual. In this letter RESPONDENT assured CLAIMANT that "with this machine you will be able to meet all the needs of your customers."

30 May 2002 CLAIMANT received the letter from 27th May 2002 with the written contract, which CLAIMANT signed and sent back.

01 July 2002 CLAIMANT gave RESPONDENT notice of the fact that the machine had arrived and had been installed and refurbished. Furthermore, CLAIMANT indicated the plan of starting production printing the week after.

08 July 2002 The installation, refurbishing and test runs of the machine had been completed.

15 July 2002 Mr Swain, foreman of RESPONDENT's crew, sent a confirming letter to RESPONDENT and reported that the 8 micrometer foil had not been printed on properly during the first production job that CLAIMANT had attempted.

01 August 2002 CLAIMANT wrote to RESPONDENT to indicate its needs. CLAIMANT reminded RESPONDENT of the contract with the Confectioner which required CLAIMANT to begin delivery to the Confectioner by 15th July 2002. Therefore, the Confectioner was threatening to cancel the contract if RESPONDENT was not able to start production promptly.

15 August 2002	CLAIMANT wrote to RESPONDENT that the mechanics had been unsuccessful, the Confectioner had cancelled the printing contcract of 09th May 2002 and had contracted with the competitor, Reliable Printers, whereby the machine was useless to the CLAIMANT. CLAIMANT stated further that it would hold RESPONDENT liable for all of the expenses it had incurred as well as the loss of profit that could have been expected from the printing it would have done with it.
10 September 2002	RESPONDENT wrote to CLAIMANT rejecting all claims arising out of the Magiprint Flexometix Mark 8 machine and offered to re-purchase this machine for $ 20,000.
14 October 2003	CLAIMANT sold the Magiprint Flexometix Mark 8 machine to Equatoriana Printers for $ 22,000.
5 July 2005	Arbitral proceedings begin.

SUBMISSIONS

1 The requirements to claim damages are present in this case.

2 RESPONDENT has failed to perform its obligations under the contract and the CISG, thereby allowing CLAIMANT to claim damages, pursuant to Art. 45(1)(b) CISG [(**A.**)].

3 RESPONDENT has failed to perform because it has failed to deliver conforming goods, pursuant to Art. 30 CISG as required by the contract. RESPONDENT has, in turn, failed to deliver conforming goods because it has failed to deliver goods that are of the description required by the contract, pursuant to Art. 35(1) CISG [(**I.**)].

4 Should the Tribunal find that there is no failure to perform under Art. 35(1) CISG, RESPONDENT has nevertheless failed to deliver conforming goods, and thus failed to perform, because it has failed to deliver goods fit for the purposes made known to it at the time of the conclusion of the contract, pursuant to Art. 35(2)(b) CISG [(**II.**)].

5 The damages claimed are $ 3,200,000 [(**B.**)].

6 RESPONDENT has caused damages to the amount of $ 1,600,000 due to loss of profit resulting from the cancellation of CLAIMANT's contract with the Confectioner [(**I.**)].

7 RESPONDENT has caused further damages to the amount of $ 1,600,000 due to loss of profit resulting from the cancellation of CLAIMANT's contract with the Confectioner resulting in the loss of renewal of the contract [(**II.**)].

8 CLAIMANT has complied with its duty to mitigate, pursuant to Art. 77 CISG, and RESPONDENT cannot rely on any limitation to avoid compensating CLAIMANT for the losses incurred [(**III.**)].

9 The claim for damages is actionable as the period of limitation has not expired [(**C.**)].

10 Danubian Obligation Law is the implied contractual choice of law of the parties and thus the three-year period of limitation of Danubia is applicable. The claim thus remains actionable [(**I.**)].

11 Should the Tribunal find that there is no implicit choice of law by the parties, its choice of law is to be guided by the transnational principle of the closest connection. As Oceania has the closest connection to the contract, its four-year period of limitation is applicable and the claim is in any event actionable [(**II.**)].

A. RESPONDENT has failed to deliver conforming goods

I. Failure to deliver conforming goods, pursuant to Art. 35(1) CISG

12 RESPONDENT has failed to deliver goods that are of the description required by the contract, according to Art. 35(1) CISG, because the contract was for a machine that could print on 8 micrometer foil [(**1.**)], and RESPONDENT delivered a machine that could not print on 8 micrometer foil [(**2.**)].

1. Contractual content

13 That the contract was for a machine that could print on 8 micrometer foil is evidenced by both the wording of the written contract [(**a.**)] and the negotiations and circumstances that surround the written contract [(**b.**)].

14 There is no dispute as to whether negotiations and circumstances surrounding a contract may be taken into account (Schlechtriem/Schwenzer, Introduction to Articles 14-24, para. 2).

a. A contractual agreement based on the wording of the written contract

15 The written contract (Claimant's Exhibit No. 7) states, "2. Machine is to be refurbished by seller on installation at buyer's premises;" the term "refurbish" meaning "to do up" (Oxford English Dictionary). However, a machine cannot merely be done up, a machine must be done up for someone, or something. RESPONDENT therefore is required to do up the machine for CLAIMANT, in order for CLAIMANT to be able to use it to print. However, in order for RESPONDENT "to do up" the machine in such a fashion, it must first know what CLAIMANT's printing needs are. RESPONDENT is thus required to do up the machine to the specifications of CLAIMANT, to do up the machine to be able to print on 8 micrometer foil.

16 For this reason, the wording of the written contract requires RESPONDENT to refurbish the machine to print on 8 micrometer foil.

17 Should the Tribunal find that such a term does not require RESPONDENT to refurbish the machine to the specifications of CLAIMANT, then the wording of the written contract may be removed from consideration altogether. The wording of the written contract contains no provision for the determination of printing capability, other than the use of the term "refurbish", i.e. there is no mention of either 8 micrometer or 10

micrometer foil, and thus cannot be relied upon for an accurate conclusion of printing utility.

18 In this case, the wording of the written contract may be disregarded in totality.

b. A contractual agreement based on the negotiations and circumstances that surround the contract

19 In this regard, a closer inspection of both of the declarations of intent is necessary, as there are numerous implied declarations of intent relating to the specifications of the machine. In the letter of 17th April 2002 (Claimant's Exhibit No. 1) CLAIMANT states, "Typical plain and coloured foil for chocolate wrapper may be of 8 micrometer thickness." According to Art. 8(1) CISG this statement is to be interpreted according to the intent of CLAIMANT where RESPONDENT knew or could not have been unaware of what that intent was. The intent of CLAIMANT was that the machine must be able to print on 8 micrometer foil; the use of "may" merely being polite business phraseology for stating a requirement. The term "may" can indeed mean the expression of an "obligation [or] (polite) command" (Oxford English Dictionary). In addition, CLAIMANT would not have even mentioned the term "8 micrometer thickness" at all, if this were not of any importance to it in any way. RESPONDENT unquestionably knew this intent, as in the letter of 25th April 2002 (Claimant's Exhibit No. 2) RESPONDENT states, "We have indeed a second hand flexoprint machine for your task." The use of the term "for your task" is in response to the aforementioned requirement of CLAIMANT, and thus confirms that RESPONDENT knew CLAIMANT's intent. In any event, the use of the term "for your task" requires RESPONDENT to provide a machine for the use of CLAIMANT. However, before RESPONDENT can provide such a machine, it must first know what the particular specifications of CLAIMANT's task are, as without such knowledge RESPONDENT cannot be said to be providing a machine for the task of CLAIMANT. As such, RESPONDENT must have known that CLAIMANT required a machine that could print on 8 micrometer foil, and was thus required to provide such a machine.

20 The intent of CLAIMANT was evidently to be delivered a machine that could print on 8 micrometer foil and RESPONDENT conclusively knew this.

21 Furthermore, in the letter of 21st May 2002 (Claimant's Exhibit No. 5) CLAIMANT states, "Please take this as our Order to supply the refurbished Flexometix Mark 8 flexoprinter machine as discussed." The use of the term "as discussed" means that all

the previous negotiations are to be taken into account by RESPONDENT, including the requirement for a machine that can print on 8 micrometer foil. In the letter of 27th May 2002 (Claimant's Exhibit No. 6) RESPONDENT states, "You can be assured that with this machine you will be able to meet all the needs of your customers." According to Art. 8(1) CISG this statement needs to be interpreted to discover the actual intent. According to Art. 8(3) CISG, in determining the intent of a party, due consideration is to be given to all relevant circumstances of the case including the negotiations of the parties. RESPONDENT's reference to meeting all the needs of CLAIMANT's customers is in response to CLAIMANT's stating that previous discussions need to be taken into account and, therefore, demonstrates RESPONDENT's knowledge in this regard. In any event, the aforementioned term requires RESPONDENT to know what the needs of CLAIMANT's customers are, in order to be able to meet them, which further demonstrates that RESPONDENT knew of CLAIMANT's intent.

22 It is therefore submitted that RESPONDENT clearly knew that the machine had to be able to print on 8 micrometer foil.

23 In addition, RESPONDENT cannot claim that the manual (Respondent's Exhibit No. 1) formed part of the contract, so as to rebut the interpretation of the contract for a machine capable of printing on 8 micrometer foil. This is because RESPONDENT included the manual for reference purposes only. In the letter of 27th May 2002 (Claimant's Exhibit No. 6) RESPONDENT states, "Even though the machine is easy to operate and is a very reliable machine, you will certainly wish to have a copy." According to Art. 8(1) CISG this statement needs to be interpreted in order to discover the actual intent. With this in mind, and according to Art. 8(2) CISG, statements made by a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Given the stress RESPONDENT placed on CLAIMANT's merely having a copy of the manual and not reading the manual, a reasonable person in the same position and circumstances as CLAIMANT would have understood this statement as meaning that the manual was not enclosed so as to form part of the contract, but as a reference manual for technical personnel should they require it in the future, if problems in usage should arise in relation to the machine. In any event, the fact that RESPONDENT stressed that the machine was "easy to operate" and "reliable" is neither indicative of nor conducive to CLAIMANT's reading of the manual. Thus, CLAIMANT, relying on previous discussions as mentioned by RESPONDENT, thought the machine would be able to print on 8 micrometer foil, and

that there was no need to inspect the manual beforehand because it was such a good machine.

24 In conclusion, the contract unquestionably required RESPONDENT to deliver a machine that could print on 8 micrometer foil.

2. Failure to deliver the machine required by the contract

25 RESPONDENT has failed to deliver a machine that could print on 8 micrometer foil. As the Commercial Court of Zürich in 1998 stated, "a lack of conformity does not rise to the level of a breach of contract if the goods are of equal value and their utility is not reduced" (HG 930634/O (Switzerland 1998)). The machine in the case at hand is not of equal utility to CLAIMANT because without the 8 micrometer capability CLAIMANT cannot service the contract with the Confectioner, and this was its purpose for the machine. This failure to deliver a machine capable of printing on 8 micrometer foil is not disputed by RESPONDENT.

26 As the contract required such a machine to be delivered and RESPONDENT failed to deliver it, RESPONDENT has, therefore, failed to meet its contractual duties.

II. Failure to deliver conforming goods, pursuant to Art. 35(2)(b) CISG

27 Should the Tribunal find that RESPONDENT has not failed to deliver conforming goods, as defined by the contractual provisions according to Art. 35(1) CISG, then RESPONDENT has failed to deliver goods fit for the purpose made known to it by CLAIMANT at the time of the conclusion of the contract, according to Art. 35(2)(b) CISG. As the Appellate Court of Barcelona in 1997 stated, the purpose refers "not only to the abstract purpose but also to the concrete intention as agreed or contracted to" (RA 340/1997 (Spain 1997)). This means that the purpose of printing on 8 micrometer thickness foil needs to be considered together with the actual intentions of the parties at the time of the conclusion of the contract, and throughout the negotiations to conclude the contract.

28 The requirements for such a claim are present in this case, i.e. RESPONDENT had knowledge of CLAIMANT's purposes [(**1.**)], CLAIMANT relied on RESPONDENT's skill or judgement [(**2.**)], it was not unreasonable for CLAIMANT to rely on RESPONDENT's skill or judgement [(**3.**)], RESPONDENT failed to deliver goods fit for any purpose made known to it by CLAIMANT [(**4.**)], and RESPONDENT cannot escape liability, according to Art. 35(3) CISG [(**5.**)].

1. Knowledge of CLAIMANT's purposes

29 RESPONDENT knew that the purpose of the machine was to print on 8 micrometer foil. It is enough that at the time of the conclusion of the contract RESPONDENT knew, "with sufficient clarity" (Digest of Art. 35 Case Law, para. 10), the particular purpose of the machine. However, this purpose need not be expressly emphasised – a mere indication is enough (Magnus in Staudinger, Art. 35, para. 26-30) – and no "affirmative agreement" is required (Digest of Art. 35 Case Law, para. 5). CLAIMANT has, in fact, given more than a mere indication and has expressly emphasised the purpose of the machine, i.e. the capability to print on foil of 8 micrometer thickness. In the letter of 17th April 2002 (Claimant's Exhibit No. 1), CLAIMANT states, "Typical plain and coloured aluminum foil for chocolate wrapper may be of 8 micrometer thickness." The mention of "8 micrometer" indicates CLAIMANT may have a contract that will require it to print on this particular foil thickness, otherwise there would be no reason for it mentioning this, and, as shown above, the term "may" does not exclude CLAIMANT's intent.

30 This made it quite clear to RESPONDENT, what the minimum requirements of the machine are.

31 Furthermore, CLAIMANT made the 'specific purpose' of the machine known to RESPONDENT, and not merely an abstract "particular aim" (Bianca in Bianca/Bonell, p. 268 - 283). CLAIMANT made numerous communications to RESPONDENT about the purpose of the machine, i.e. to print on confectionary foil; it did not just state the "particular aim" of servicing a contract. In any event, RESPONDENT knew that the 'specific purpose' of printing on confectionary foil was linked to the "particular aim" of servicing a contract, because CLAIMANT, in the course of its correspondence with RESPONDENT, linked the printing of confectionary wrappers of 8 micrometer thickness to being able to service the contract with the Confectioner. In the letter of 17th April 2002 (Claimant's Exhibit No. 1), CLAIMANT states, "We are interested in printing […] foils for use in the confectionary market," and in the letter of 25th April 2002 (Claimant's Exhibit No. 2), CLAIMANT states, "Typical […] foil for chocolate wrappers may be of 8 micrometer thickness." The connection is then, in turn, made by CLAIMANT himself, with the machine being required to service the contract with the Confectioner, as in the letter of 10th May 2002 (Claimant's Exhibit No. 3), CLAIMANT states, "We signed a contract with Oceania Confectionaries." The relationship between

purpose and aim is thus evidently shown, as CLAIMANT requires the machine to print on confectionary foil of 8 micrometer thickness in order to service the contract with the Confectioner.

32 RESPONDENT thus clearly knew that the purpose of the machine was to service the confectionary contract, which required the capacity to print on 8 micrometer thickness confectionary wrappers.

33 In addition, CLAIMANT made repeated indications to RESPONDENT about the contract with the Confectioner, which, as shown above, means there were repeated indications by CLAIMANT as to the requirement to print on 8 micrometer thick confectionary wrappers. A case heard by the District Court of Regensburg in 1998 (6 O 107/98 (Germany 1998)), concerned the delivery of a machine with the purpose to economically cut fabric to the specifications of the buyer. In this case the buyer did not give any indication, and it could not have been inferred from the circumstances, i.e. negotiations and previous discussions, that such a capability to economically cut fabric was required. Thus it was held that it is only where a buyer does not in any way indicate the purpose and where the seller is unable to infer the purpose from the circumstances, that the seller will not be held to have knowledge of claimant's purpose (6 O 107/98 (Germany 1998)). In the case at hand, however, there were continued indications throughout the time leading up to the signing of the contract, that demonstrated to RESPONDENT that the machine was to be used to service the contract with the Confectioner and needed to be able to print on confectionary wrappers of 8 micrometer thickness.

34 It was, consequently, unmistakably made known to RESPONDENT that the machine should have the capability to print on this particular thickness of confectionary foil.

35 The question whether RESPONDENT has to know the purpose of the machine or whether it merely has to be made known to it by CLAIMANT is a point of dispute under Art. 35(2)(b) CISG (Schlechtriem/Schwenzer, Art. 35, para. 20), however, evidence to support the proposition that RESPONDENT did actually know is given in this case. In the letter of 25th April 2002 (Claimant's Exhibit No. 2) RESPONDENT states, "We have indeed a second hand flexoprint machine for your task." The term "for your task" indicates that RESPONDENT knew what the task or purpose of the machine was, and therefore was providing the machine so that CLAIMANT would be able to service this task. In addition, in order for RESPONDENT to escape liability in this

instance it would have to make an objection to what was made known to it (Enderlein/Maskow/Strohbach). As mentioned above, RESPONDENT, in fact, made an affirmative agreement, and thus cannot rely on this.

36 It is therefore submitted that RESPONDENT knew of the purpose of the machine at the time of conclusion of the contract.

2. CLAIMANT relied on RESPONDENT's skill or judgement

37 CLAIMANT relied on RESPONDENT's judgement to pick a machine that could print on 8 micrometer foil. As stated in Question 8 (Procedural Order No. 2) RESPONDENT's website listed neither the specific machines nor their performance capabilities. As such, CLAIMANT merely stated his purpose and RESPONDENT suggested the particular machine; CLAIMANT was in no position to rely on any other judgement, including its own.

38 CLAIMANT, therefore, relied on RESPONDENT's judgement in selecting a machine that could print on the required thickness of foil.

3. It was not unreasonable for CLAIMANT to rely on RESPONDENT's skill or judgement

39 It was not unreasonable for CLAIMANT to rely on RESPONDENT's judgement in selecting a machine because, according to the German Supreme Court in 1995, exporters can be expected to "define and qualify in the contract the quality and characteristics of the goods they are to deliver" (VIII ZR 159/94 (Germany 1995)). In this case, as stated in Question 8 (Procedural Order No. 2), RESPONDENT included no list of machines on its website and thus no corresponding performance capabilities. This precluded CLAIMANT from making its own decision and allowed it to rely on the judgement of RESPONDENT.

40 It was therefore not unreasonable for CLAIMANT to accept, and rely on, the judgement of RESPONDENT in this regard.

41 Moreover, it was not unreasonable for CLAIMANT to rely on RESPONDENT's judgement in selecting a machine because RESPONDENT was the one who, in fact, picked the machine to fit the purpose of CLAIMANT. If a buyer states its purpose and a seller offers a machine, without the buyer specifying a machine, as in this case, then it is not unreasonable for CLAIMANT as buyer to rely on the judgement of RESPONDENT

as seller in selecting such a machine (Honnold, p.252 - 263). CLAIMANT, therefore, was in no position to exercise its own judgement.

42 CLAIMANT thus had to rely on RESPONDENT's judgement, and it could have in no way been unreasonable for it to do so.

43 Furthermore, CLAIMANT did not order the machine with detailed technical specifications that were inconsistent with its stated purpose. CLAIMANT, in fact, was not even able to do so, as it was not party to the specifications of the machine. In any event, RESPONDENT is under a duty to inform CLAIMANT of any inconsistency between purpose and capability (Honnold, p.252 - 263) and RESPONDENT did not do this until CLAIMANT itself became aware of such an inconsistency.

44 CLAIMANT, it is submitted, was not acting unreasonably to rely on RESPONDENT's judgement.

45 It is a point of dispute whether RESPONDENT needs to know affirmatively that CLAIMANT is relying on its judgement (Honnold, p.252 - 263). However, as RESPONDENT picked the machine and there was no accompanying technical information, RESPONDENT clearly knew CLAIMANT would have to rely on its judgement.

4. RESPONDENT failed to deliver goods fit for any purpose made known to it by CLAIMANT

46 RESPONDENT has failed to deliver goods that could print on 8 micrometer foil, 8 micrometer being a requirement made known to it by CLAIMANT at the time of the conclusion of the contract. As stated by the Appellate Court of Köln in 1997, the fact that the machine supplied was second hand, was irrelevant, the seller still had to deliver goods fit for the purposes known to it (27 U 58/96 (Germany 1997)). Also, as stated by the Appellate Court of Barcelona in 1997, the fact that the goods were in conformity with their technical characteristics was irrelevant; RESPONDENT "should have made it clear that it was not recommended for the use to which the [CLAIMANT] put it" (RA 340/1997 (Spain 1997)). RESPONDENT clearly did not do this and thus has failed to deliver conforming goods.

47 RESPONDENT therefore did not deliver a machine that could print on 8 micrometer foil. Although this was a purpose which was made known to RESPONDENT by CLAIMANT.

5. RESPONDENT cannot escape liability due to Art. 35(3) CISG

48 According to Art. 35(3) CISG, which only relates to Art. 35(2)(b) CISG and not Art. 35(1) CISG, RESPONDENT may escape liability if, at the time of the conclusion of the contract, CLAIMANT knew or could not have been unaware of the lack of conformity. CLAIMANT did not know of the lack of conformity because RESPONDENT in the letter of 25th April 2002 (Claimant's Exhibit No. 2) states, "We have indeed a second hand flexoprint machine for your task." The term "for your task" indicates to CLAIMANT that RESPONDENT knew what the purpose of the machine was.

49 Moreover, the sheer importance of the machine to CLAIMANT clearly demonstrates that it would not knowingly risk purchasing a machine that couldn't print on the required thickness of foil. In Question 18 (Procedural Order No. 2) it states, "Later that day [CLAIMANT] asked [RESPONDENT's employee] to do his best because he had contacted several sellers of such machines and it would not be possible for him to purchase and have delivered another machine that could print on 8 micrometer foil in time to service [the Confectioner's] contract." This indicates that having a functioning machine was paramount in the eyes of CLAIMANT, and the outlay for the machine was insignificant in the face of being able to print on the required thickness of foil. CLAIMANT knew that if it were to be delivered a machine that did not have the capability to print on 8 micrometer foil, it would result in the loss of the lucrative contract with the Confectioner, which, in turn, would then go to its Competitor.

50 It is thus conclusive that CLAIMANT did not know of any possibility of a lack of conformity.

51 It is further submitted that CLAIMANT could not have been aware of the lack of conformity with regard to a possible inspection of the machine in Greece. There was no obligation to inspect the machine in Greece, as required under Art. 38(1) CISG, because the contract involved the carriage of goods. It is known that the contract involved such a carriage because in the wording of the written contract (Claimant's Exhibit No. 7) the term "CIF" is stated, i.e. cost, insurance, freight. As such Art. 38(2) CISG is effective and allows the inspection of the goods to be deferred until after the goods have arrived at their destination.

52 For this reason, CLAIMANT did not know and could not have been aware of such a lack of conformity.

53 Furthermore, the visit in Greece did not enable CLAIMANT to gauge the particular specifications of the machine with the naked eye. Question 13 (Procedural Order No. 2) states, "Mr Butter was generally knowledgeable about printing machines, but not especially about flexoprint machines" and that "he did not have a technical expert with him". This makes it clear, that there was no way for him of telling with the naked eye that the machine would not print on 8 micrometer foil.

54 This fact excludes any possible knowledge of a future lack of conformity.

55 CLAIMANT was also not aware of the lack of conformity, notwithstanding the instruction manual being enclosed with the contract. The manual did not form part of the contract because there is no indication of its importance within the contract itself and in the letter of 27th May 2002 (Claimant's Exhibit No. 6) RESPONDENT states, "Even though the machine is easy to operate and is a very reliable machine, you will certainly wish to have a copy." This indicates that the manual will only need to be referred to if something goes wrong with it or if, later, some alteration needs to be made to it.

56 It is thus submitted that RESPONDENT cannot escape liability due to Art. 35(3) CISG.

B. CLAIMANT is entitled to claim damages for loss of profit amounting to $ 3,200,000.

57 In order to calculate the loss of profit, CLAIMANT is to be placed in the same position it would have been in, had the breach not occurred, pursuant to Art. 74 CISG. CLAIMANT, in the letter of 10th May 2002 (Claimant's Exhibit No. 3), states that the contract signed with the Confectioner is "excellent", with an expected profit of $ 400,000 a year. In the same letter, CLAIMANT states that the contract will run for four years, subject to renewal at the end of that period. The claim is based on the expected annual profit multiplied by the length of the contract in years. This calculation, as stated in Question 29 (Procedural Order No. 2), is not disputed by RESPONDENT.

I. CLAIMANT may claim $ 1,600,000 as a result of the cancellation of the initial contract

58 CLAIMANT is entitled to claim damages amounting to $ 1,600,000 for loss of profit from RESPONDENT, pursuant to Artt. 45(1)(b), 74 CISG, because the loss is a consequence of RESPONDENT's breach [(**1.**)], the damages caused were foreseeable to RESPONDENT at the time of the conclusion of the contract [(**2.**)], and CLAIMANT, as

the wronged party, is entitled to recover its losses (Schlechtriem/Schwenzer, Art. 74, para. 25, 26) [(**3.**)].

1. CLAIMANT's loss of profit is a consequence of RESPONDENT's breach

59 The damages incurred from RESPONDENT's breach amount to "consequential damages", because CLAIMANT's obligation to a third party is affected (Schlechtriem/Schwenzer, Art. 74, para. 13, 21), and, according to Art. 74 CISG, this satisfies the requirement that there is to be causality, whether direct or indirect, between the breach of contract on RESPONDENT's side and the loss of profit (Schlechtriem/Schwenzer, Art. 74, para. 23). Given that the date of servicing the contract, 15th July 2002 (Claimant's Exhibit No. 3), with the Confectioner has elapsed before CLAIMANT could act upon it, due to the breach of duty on RESPONDENT's part, the Confectioner cancelled the contract on 15th August 2002 (Claimant's Exhibit No. 10).

60 This confirms that the loss is a direct consequence of the breach of contract.

2. The damages were foreseeable to RESPONDENT at the time of the conclusion of the contract

61 RESPONDENT knew that CLAIMANT had an important contract with the Confectioner at the time of the conclusion of the contract, and thus the losses were foreseeable in relation to such. Art. 74 CISG states that a party may claim for damages up to the amount that was foreseen or ought to have been foreseen at the time of the conclusion of the contract, in the light of the facts and matters he knew or ought to have known (Schlechtriem/Schwenzer, Art. 74, para. 43, 44). The practical application of this doctrine is shown in Delchi v. Rotorex, where the Italian corporation, Delchi, was awarded damages for the loss of profit arising from a reduced sale of air conditioners in a dispute with the New Yorker Corporation, Rotorex. The rationale for this decision lies in the adoption by the courts of a more liberal approach towards awarding damages (Darkey). RESPONDENT, in the case at hand, clearly had the relevant foresight because it knew the importance the contract with the Confectioner had to CLAIMANT. RESPONDENT's attention was particularly drawn to the fact that CLAIMANT signed a contract with the Confectioner, which had to be serviced by 15th July, given that CLAIMANT submitted detailed information about the contract. In the letter of 10th May 2002 (Claimant's Exhibit No. 3), CLAIMANT states, "it is an excellent contract from

which we can expect to earn a profit of $ 400,000 a year," and which "runs for four years subject to renewal." CLAIMANT also emphasised that "unless something unexpected happens, we can anticipate a long period of handsome profits." The wording used by CLAIMANT is thus sufficiently explanatory for RESPONDENT to comprehend the situation. Moreover, in the letter of 17th April 2002 (Claimant's Exhibit No. 1), CLAIMANT states, "we believe the machine you supply will enable us to develop a commanding lead," and in the letter of 10th May 2002 (Claimant's Exhibit No. 3) CLAIMANT states, "the market in Oceania is very small and it is only the Oceania Confectionaries account that makes the flexoprint machine worthwhile." Hence, RESPONDENT indubitably knew that the contract with the Confectioner was paramount to the delivery of an appropriate machine.

62 RESPONDENT thus knew that the losses were foreseeable, as the link between the contract and the profits was made to it with irrefutable clarity.

63 Furthermore, Mr McHinery as RESPONDENT, in his position as a businessman, undoubtedly understood that the failure to deliver the appropriate goods risked CLAIMANT's contract with the Confectioner. RESPONDENT was further alerted to this issue, in particular in the letter of 1st August 2002 (Claimant's Exhibit No. 9), where CLAIMANT states, "[the Confectioner is] threatening to cancel the contract." The RESPONDENT unquestionably knew, therefore that by not providing an appropriate machine to CLAIMANT to service the contract with the Confectioner, CLAIMANT would lose this contract.

64 This demonstrates that RESPONDENT was given enough insight into CLAIMANT's intentions to foresee the consequence of its failure to honour the contract.

65 Furthermore, as clearly shown by the chronology of events, RESPONDENT could foresee such a loss of profit at the time of the conclusion of the contract. In the letter of the 10th May 2002 (Claimant's Exhibit No. 3), CLAIMANT states that it had one day previously signed a contract with the Confectioner, and the contract between CLAIMANT and RESPONDENT was signed on 30th May 2002 (Claimant's Exhibit No. 7).

66 RESPONDENT therefore clearly had the relevant foresight at the time of conclusion of the contract.

3. CLAIMANT is entitled to recover the losses

67 According to Art. 74 CISG a party who has suffered loss due to the breach of another party is permitted to claim damages for that party's breach. As outlined above, RESPONDENT's breach caused foreseeable damages to CLAIMANT, and thus it is able to recover the damages for its loss of profit.

68 In the light of this, the Tribunal should find RESPONDENT liable to pay damages in the amount of $ 1,600,000 to CLAIMANT.

II. $ 1,600,000 from the renewal of the initial contract

69 CLAIMANT is entitled to claim further damages amounting to $ 1,600,000 for loss of profit from RESPONDENT, due to the loss of the renewal of the contract with the Confectioner, pursuant to Artt. 45(1)(b), 74 CISG, because the loss is a consequence of RESPONDENT's breach [(**1.**)], the damages caused were foreseeable to RESPONDENT at the time of the conclusionof the contract [(**2.**)], and CLAIMANT, as the wronged party, is entitled to recover its losses (Schlechtriem/Schwenzer, Art. 74, para. 25, 26) [(**3.**)].

70 It is commonly acknowledged that loss of profit as well as lost chances are to be compensated (Blase/Höttler).

1. CLAIMANT's loss of profit is a consequence of RESPONDENT's breach

71 The fact that CLAIMANT lost the possibility of renewing a contract with the Confectioner is a direct result of RESPONDENT's breach of duty. Had RESPONDENT fulfilled the terms of the contract with CLAIMANT, CLAIMANT would have been able to service the contract and consequently would have been in the position to have it renewed.

72 The evidence demonstrates that the contract would have been renewed. Firstly, the renewal was mentioned at the very beginning of the negotiations, which expresses that the Confectioner had already contemplated it seriously enough to communicate it to CLAIMANT at the time of signing the contract. The Confectioner thereby set a standard of performance to CLAIMANT, who, had the contract been serviced well, would have been offered the renewal. Secondly, there is no evidence to suggest that the contract would not have been serviced well. On the contrary, in the letter of 27th May 2002 (Claimant's Exhibit No. 6), RESPONDENT states, "with this machine you will be

able to meet all the needs of your customers." This signifies the quality the machine would print, had it been able to print on the required 8 micrometer foil. Furthermore, in the same letter RESPONDENT states that the machine is "very reliable." This too suggests that the machine would be able to print quality foil wrappers. Moreover, if the printing on 8 micrometer foil had succeeded, as stated in the letter of 10th May 2002 (Claimant's Exhibit No. 3) CLAIMANT would have established a "commanding lead." The fact that the market for this particular type of printing was, as stated in the same letter, "very small," means that CLAIMANT could have become specialised quickly and become efficient, and thereby increased the quality of its production.

73 The Confectioner would have thus done everything to renew the contract with CLAIMANT due to its performance in the initial contract.

2. The damages were foreseeable to RESPONDENT at the time of the conclusion of the contract

74 In order to establish RESPONDENT's foresight in regard to the loss of profit caused by the loss of renewal of the contract with the Confectioner, an analysis of the interpretations of the CISG is required. In the application of Art. 74 CISG, there has been much dispute between commentators, and courts and tribunals alike, about the meaning of foreseeability. There have been differing opinions regarding the notion of 'contemplation' and 'foreseeability', as shown in the British cases of Hadley v Baxendale, Victoria Laundry and The Heron II. However, the CISG opts for the application of 'foreseeability', which is coherent with the US approach (Murphey).

75 Regardless of 'contemplation' or 'foreseeability', in the case at hand RESPONDENT foresaw the losses incurred as a result of CLAIMANT not being able to renew the initial contract with the Confectioner, in that the losses were more than just objectively foreseeable, but also subjectively foreseeable.

76 However, there too is much debate over the level of foreseeability to be applied. The CISG itself states the level of foreseeability as being merely "possible." The UNIDROIT Principles of International Commercial Contracts (UPICC) have also been used for the interpretation of the standard of foreseeability (Schlechtriem/Schwenzer, Art. 74, para. 6), and state the level of foreseeability as being "likely". On the other hand, it has also been concluded that the level of foreseeability of future losses is what is "reasonable" to occur (Blase/Höttler; Gotanda). A further, and final, interpretation is that the level of foreseeability is what is "sufficiently probable" (Knapp in

Bianca/Bonell, Art. 74). In the present case, it is submitted that RESPONDENT was well aware of the damages to be incurred by CLAIMANT, should it fail to deliver the appropriate goods. RESPONDENT, in the letter of 10th May 2002 (Claimant's Exhibit No. 3) was told of the renewal clause. This, in itself, is enough to satisfy the highest level of foreseeability, i.e. "sufficiently probable"; RESPONDENT was evidently made aware of the renewal and thus it cannot be denied that it foresaw this.

77 Moreover, from the point of view of Mr McHinery as RESPONDENT, in his capacity as a businessman, any chance of CLAIMANT securing a renewal of a contract should certainly not have been disregarded, especially as businesses do not base their expected profits solely on the short term but also take into account any ongoing contracts into the long term. As stated in Questions 23 and 26 (Procedural Order No. 2) CLAIMANT is an established printing business with generally good reputation, as such it is able to extrapolate its future performance (Kolaski/Kuga). Similarly, RESPONDENT, through access to various technological equipment and new accounting methods, is also more easily able to foresee and assess future profits (Murphey, note 172 on Vitex Mfg. v. Caribtex Corp.,), and the profits of other businesses. RESPONDENT thus knew that the option of renewal of CLAIMANT's contract had to be taken seriously and had foresight of the loss of profit incurred.

78 Conclusively, it was foreseen as sufficiently probable by RESPONDENT, at the time of the conclusion of the contract, that CLAIMANT would suffer the losses it did.

3. CLAIMANT is entitled to recover the loss

79 As demonstrated above, it was RESPONDENT's breach that caused CLAIMANT to lose the chance of renewal of the confectionary contract, and this loss was a sufficiently probable foreseeable consequence of RESPONDENT's act.

80 Thus the Tribunal should find in favour of CLAIMANT and award damages to the sum of $ 1,600,000.

III. CLAIMANT complied with its duty to mitigate the losses

81 In light of the evidence given, CLAIMANT has complied with its duty to mitigate its losses, including the loss of profit, imposed by Art. 77 CISG, as can reasonably be expected (Knapp in Bianca/Bonell, Art. 77), because it could not have found an alternative use to the machine by securing another contract [(**1.**)], but nevertheless mitigated its losses by selling the machine to a third company [(**2.**)].

82 Furthermore, RESPONDENT cannot argue that CLAIMANT had both to find an alternative use of the machine by securing another contract and to sell the machine, because the former precludes the latter.

1. CLAIMANT could not have used the machine for another purpose by securing another contract

83 CLAIMANT was not able to use the machine for any contracts similar to the contract with the Confectioner, as the machine was incapable of printing on 8 micrometer foil. As stated in Question 21 (Procedural Order No. 2), the contract with the Confectioner was contingent on being able to print specific materials because the Confectioner was "particularly interested in prompt delivery of 8 micrometer foil."

84 As CLAIMANT clearly could not have serviced any comparable contracts, it did not fail to mitigate its losses in this regard.

85 CLAIMANT consequently explored the possibility of different types of contract. However, in the letter of 15th August 2002 (Claimant's Exhibit No. 10), CLAIMANT states, "that leaves us with almost no business for that machine you sold us." This, compounded with the fact that, as stated in the letter of 10th May 2002 (Claimant's Exhibit No. 3), where CLAIMANT states, "the market in Oceania is very small," means CLAIMANT had no real opportunities to service an alternative contract. This is further evinced by the letter of the 15th August 2002 (Claimant's Exhibit No. 10), where CLAIMANT states, "the machine is useless to us." All of this evidence unambiguously demonstrates that the options presented to CLAIMANT were immaterial.

86 CLAIMANT could thus not have fulfilled its obligation to mitigate its losses by making a substitute transaction (Schlechtriem/Schwenzer, Art. 74, para. 9) at that time.

87 The opportunities to secure a worthwhile contract were limited for CLAIMANT. This is emphasised in Question 20 (Procedural Order No. 2), where it is stated that any profit made through the alternative use of the machine in Oceania in 2002 would "not have exceeded $ 10,000 rendering a gross profit of perhaps $ 2,000 before depreciation of the machine." The expected profit from the contract between CLAIMANT and the Confectioner was $ 400,000, so the potential profit of using the machine for these alternative purposes would have amounted to a mere 2.5% of the lost profit. The profit of $ 2,000 thus represents an insignificant sum in comparison to the value of the initial contract, and explains why CLAIMANT chose instead to sell the machine.

88 Based on this calculation, the printer would not have been suited for any other purpose worth taking into account, and CLAIMANT could not be held to have failed to mitigate.

89 The possibility for CLAIMANT to contract with Oceanic Generics, making an estimated annual profit of $ 300,000 in 2007, was unfounded and does not represent an actual possibility to mitigate damages. As stated in Question 20 (Procedural Order No. 2), "There had been rumours," the company named 'Oceanic Generics' does not even exist. Furthermore, this cannot be taken to indicate that CLAIMANT was at fault in not securing the contract with Oceanic Generics because by 2007 other companies could have entered the market. As stated in Question 32 (Procedural Order No. 2), the Competitor could have contracted with Oceanic Generics itself, because the contract between the Competitor and the Confectioner only runs until Summer 2006.

90 In light of the foregoing, CLAIMANT cannot be held to have failed to mitigate, due to the mere inference of rumour, and, in any event, the Competitor could have contracted with Oceanic Generics.

2. CLAIMANT mitigated the loss by selling the machine

91 CLAIMANT mitigated its loss because it sold the machine, instead of keeping it and allowing it to depreciate in value. The machine was bought for $ 42,000 and sold for $ 22,000, which, although sold for a lesser amount, fulfils the obligation to mitigate. The issue of reselling goods under their value was examined by Appellate Court Graz (4 R 219/01k (Austria 2002)), involving a dispute over the sale of an excavator. It was specifically stated, that selling a good under its value does not represent a failure to mitigate losses. In any event, RESPONDENT cannot argue that CLAIMANT sold the machine under its purchase price because, as stated in the letter of 10th September 2002 (Respondent's Exhibit No. 3), RESPONDENT only offered $ 20,000 for the repurchase of the machine.

92 CLAIMANT thus mitigated its losses by reselling the machine to the Third Party.

93 Moreover, it must be stated that the $ 2,000 in expected profits through the alternative use of the machine, as shown above, were recouped by the resale of the machine (Knapp in Bianca/Bonell, Art. 77).

C. The period of limitation has not expired and the claim is actionable

I. The three-year period of limitation of Danubia is applicable

1. Danubian Obligation Law is the implied contractual choice of the parties

94 The Tribunal is requested to find that as Danubia is the explicit contractual choice of seat of arbitration, Danubian Law is the implicit choice of law of the parties in respect of the period of limitation. In line with Danubian Obligation Law a three-year period of limitation is thus applicable.

95 Pursuant to Clause 13 of the contract (Claimant's Exhibit No. 7), the parties chose as applicable arbitration rules the ones provided by CIDRA. Art. 32 of these rules deals with the problem of which law the arbitral tribunal should apply. This problem is also dealt with in Art. 28 of the UNCITRAL Model Law which has been adopted by Danubia, the arbitration law of which is applicable to the arbitration at hand; the question might thus be raised as to which of the two regulations on the applicable law should be the starting point for the decision on the applicable law. However, the Tribunal is not required to decide whether Art. 32 of CIDRA prevails over Art. 28 UNCITRAL Model Law, as the rule chosen by the parties or whether Art. 28 UNCITRAL Model Law prevails over Art. 32 CIDRA as ius cogens (coercive law) of the arbitration law of Danubia, since Art. 32 CIDRA contains exactly the same rules as Art. 28 UNCITRAL model law. Both Art. 28 UNCITRAL model law and Art. 32 CIDRA provide in their first alternative that principally the arbitral tribunal is to apply the law designated by the parties as applicable to the substance of the dispute.

96 An explicit choice of law need not be made, however, where an implicit choice of law is inferable from the contract and therefore from the parties' intentions. In Conflict of Laws (Dicey/Morris), the authors enunciate this principle, that inferred intention determines the proper law of the contract where the parties' intention "is to be inferred from the terms and nature of the contract, and from the general circumstances of the case"; in Staudinger (Magnus in Staudinger, Art. 28, para. 51), Magnus writes that the legal venue and arbitration clauses are important indications for an implicit choice of law; and Hong-Lin Yu (Hon-Lin Yu) points to the provisions of the highly influential Rome Convention, under which Art. 3(1) allows arbitrators to decide that the parties have made a choice of law even if this is not expressly stated in the contract. Such an implicit choice of law is present in this case.

97 The explicit stipulation of Danubia as seat of arbitration in Clause 13 of the contract (Claimant's Exhibit No. 7) allows the specific maxim qui eligit arbitrum, eligit ius to be derived from the general maxim qui iudicem forum elegit ius ("He who chose the forum, chose the law") (Schlosser in Stein/Jonas, §1051, para. 2, 5; Martiny in MüKo, Art. 28; Art. 27, para. 44). Given the national court is governed by the law of the country in which it sits, the arbitral tribunal may be governed by the law of the country in which it sits.

98 The standard objection to the application of this maxim, that the parties would not wish the dispute to be governed by the substantive law of the otherwise unconnected third party legal system of the seat of arbitration, is inapplicable in this specific dispute. The CISG governs the bulk of the substantive issues; the law of the seat of arbitration is to apply here only to those few remaining issues not regulated thereunder. Especially as the specific remaining issue of the prescription period is considered under several influential legal systems to be one of procedure (Neels) – which is usually subject to the procedural law of the forum – there are strong grounds for the parties to have called upon Danubian law to govern such an issue.

99 Furthermore, looking specifically to the Danubian prescription period, its length of three years (Question 3, Procedural Order No. 2) is easily identifiable as the fair and neutral "middle ground" between those of Mediterraneo as RESPONDENT's national law (of 2 years) and of Oceania as CLAIMANT's national law (of 4 years).

100 Thus CLAIMANT submits that for the foregoing reasons, the application of the Danubian prescription period to this dispute is inferable from the contract and from the parties' intentions.

101 Importantly, this implicit choice of law will be binding upon the Tribunal in accordance specifically with Art. 32 CIDRA and generally with the cornerstone principle in international arbitration of party autonomy (Gotanda). Thus should the Tribunal recognize the parties' implicit choice of Danubian Obligation Law, the Tribunal will be bound to apply the three year prescription period.

2. The claim is actionable with the application of the three-year Danubian period of limitation

102 According to Art. 3(2) CIDRA, arbitral proceedings are deemed to commence with the reception of the statement of claim by CIDRA. According to CIDRA's letter

acknowledging the receipt of claim, CIDRA received the statement of claim on 5 July 2005. The breach of contract took place with the turning over of the defective goods to CLAIMANT on 8 July 2002. Therefore on 5 July 2005 the three year period of prescription beginning with 8 July 2002 had not elapsed. The Tribunal is requested to find therefore that the claim remains actionable.

II. The four-year period of limitation of Oceania is applicable in the alternative

103 There is an alternative presenting itself within Art. 32 CIDRA, once again conform to Art. 28(2) UNCITRAL, which is available to the Tribunal if the Tribunal does not recognize the parties' implicit choice of Danubian Obligation Law. If the Tribunal instead concludes that the parties have both explicitly and implicitly failed to designate the applicable prescription period, then in accordance with the second alternative of Art. 32 CIDRA, it shall determine the choice of law rules which will indicate this applicable period.

1. The transnational principle of the closest connection determines the choice of law

104 CLAIMANT submits that the appropriate choice of law rule arises out of consideration of international principles such as the lex mercatoria, which is an autonomous set of rules and practices accepted by the international business community to regulate their transactions (Amissah). In the 1979 case of Turkish Pabalk Ticaret Limited Sirketi v. Norsolor S.A. (ICC Award No. 3131) a Viennese arbitral tribunal considering a dispute between Turkish and French parties held that the application of the lex mercatoria is the appropriate law in international arbitration, not the application of national legislation. This practice was confirmed when the award was upheld by the Supreme Court of Austria in 1982 (Austrian Supreme Court, 8. Oct. 520/82; cited by Kazutake).

105 Consequently the Tribunal is requested to disregard the choice of law rules of any national legal systems (e.g. of CLAIMANT or RESPONDENT) in favour of applying the transnational principles within the lex mercatoria, which better conform to the parties' legitimate expectations that international dispute resolution shall be subject to international norms.

106 The prevailing principle arising from the lex mercatoria in relation to sales of goods contracts is that the law of the country which has the closest connection to the contract

shall be applied. This is the "centre of gravity" test recognized by almost all legal systems (Berger). The principle is enshrined within national legislation such as §1051 ZPO (German Civil Procedure Rules), Art. 3112. Civil Code Québec, and Art. 126 Chinese CL, Art. 117 Swiss Private International Law; within international conventions, such as Art. 4 (1) of the Rome Convention on the Law Applicable on Contractual Relations and Art. 8 (3) of the Hague Convention on the Law applicable to Contracts for the International Sale of Goods; and within case law, with prominent examples in ICC Award No. 3742, ICC Award No. 5717 , ICC Award No. 9117 and IRAN-U.S. C.T.R. 42, 4 1983. The governing law should be the law of the country in which the localizing elements are most densely grouped, because its interests and policy are most likely to be affected by the contract (Clarkson/Hill, p. 219).

2. Oceania has the closest connection to the contract

107 CLAIMANT and RESPONDENT are both in acknowledgement of the prevailing rule to determine whether the country of the buyer or the seller has the closest connection in sales of goods contracts, i.e. that the law of the country of residence of the party whose performance is characteristic of the contract is to apply. CLAIMANT however submits that the grounds to apply this prevailing rule here are lacking [(**a.**)] and that in fact the present case represents the paradigmatic example of the contrary presumption in which the holistic prevailing circumstances attest to the contract's being more closely connected with another country [(**b.**)]. As the circumstances reveal Oceania to have the closer connection, CLAIMANT requests the Tribunal to find the Obligation Law of Oceania as that which should provide the prescription period.

a. The presumption brought forward by RESPONDENT is inapplicable

108 McLachlan identifies two principal grounds upon which the aforementioned presumption in favour of the seller's law may be based: firstly, that "the contract plays its economic and social role in the characteristic performer's state" (606); secondly, that the choice of law rule is the search for the "system of law of which the contract itself forms a part, and that the characteristic performer's obligations with which the contract will be mostly concerned and which are most likely to give rise to disputes as to interpretation and the content of obligations" (606).

109 Neither of these two grounds are supported by the facts of the present case, and consequently there is no basis upon which the presumption in favour of the seller can

be supported. In negation of the first justification, the state in which the contract played its economic and social role was that of Oceania and not that of the characteristic performer, i.e. Mediterraneo, as Oceania was where the machine was to be installed and refurbished (Claimant's Exhibit No. 7). In negation of the second, CLAIMANT reminds the Tribunal that the parties did indeed agree upon the substantive law of the CISG to govern the principal content of obligations and that it is the CISG which constitutes the system of law of which the contract itself forms a part.

110 Consequently, CLAIMANT asks the Tribunal to conclude that as the principles underpinning the presumption in favour of the seller are inapplicable in this instance, the presumption itself must also fall.

b. The contrary presumption of the closest connection arising from the prevailing circumstances is applicable

111 CLAIMANT submits that in place of the presumption brought forward by the Respondent, the Tribunal is to apply the contrary presumption in favour of the buyer, that where the contract is demonstrably more closely connected with a country other than that of the seller, the law of this country should apply. Magnus (Magnus in Staudinger, Art. 28 EGBGB, para. 35) states in relation to the German closest connection test, there is the consensus that by the determination of the closest connection the circumstances as a whole are to be considered, not only one isolated fact. In the present instance CLAIMANT advocates that the "isolated fact" is in fact the characteristic performance, whereas the contractual obligation of the respondent to deliver in Oceania [(**aa.**)] and the installation, the refurbishment, the test runs and demonstration of the set-up [(**bb.**)] constitute the circumstances as a whole. Therefore, as Oceania has the closest connection to the contract, the Obligation Law of Oceania is applicable.

aa. The contractual obligation to deliver to Oceania is an expression of the closest connection

112 CLAIMANT tenders that RESPONDENT was under an obligation to deliver the machine to Oceania going beyond the mere transport of goods, and that this represents an influential factor in determining the centre of gravity. This obligation is, or at least has become, integral and not merely incidental to the contract, and its performance

took place in the country of the buyer; the material evidence for this assertion is threefold.

113 Firstly, the contract itself in Clauses 1 and 2 (Claimant's Exhibit No. 7) denotes that the obligation of delivery at Port Magreton, Oceania (Clause 1) was to be augmented by the refurbishment by seller on installation at the buyer's premises (Clause 2). The preeminence of these conditions is strong evidence that the substance of the contract exceeded purely the sale and transport of the goods. Secondly, the reduction of the purchase price by virtue of the change in delivery destination to Oceania is testament to the notion that this alteration was fundamental to the contract. Thirdly, the circumstances further allow the inference to be drawn that as RESPONDENT's personnel were required to demonstrate how to set up the machine (Questions 15 and 16, Procedural Order No. 2) once in Oceania, RESPONDENT's obligation exceeded that of an obligation purely to transport.

114 In the 1991 arbitral award of ICC Award No. 6840, the Senegal buyer did not fulfil his obligation to take delivery of material at Dakar and to pay the price to the Egypt seller. The arbitrator did not apply the law of the seller's country but instead looked at the centre of gravity, resolving that the localizing elements such as the place of delivery were concentrated in the buyer's country, and that therefore the law of this country was applicable.

115 The aforestated arguments attest that this dispute follows similar lines, and CLAIMANT requests the Tribunal to recognize in line with the reasoning of this arbitral award that the explicit obligation of delivery of RESPONDENT in the country of the buyer should be a weighty consideration in the application of the centre of gravity test to be performed.

116 Whilst CLAIMANT recognizes that the place of performance of an obligation is no longer an autonomous ground upon which to establish the applicable law (as according to ICC Award No. 5865), this by no means detracts from the importance of the place of performance in establishing the closest connection of a contract with a national law (Hofmann in Soergel, Art. 28 EGBGB, para. 102, 128; Redfern/Hunter, p.94; Clarkson/Hill, p. 219).

bb. The closest connection derives from an interpretation of the circumstances as a whole

117 Magnus (Magnus in Staudinger, Art. 28 EGBGB, para. 132) writes that the presumption in favour of the seller may be rebutted, if special activities – e.g. installation, construction, attendance, training, etc. – are to be performed in the country of the buyer. CLAIMANT submits that the installation and construction [(**i.**)] and the training in the demonstration of technical know-how [(**ii.**)] indeed represent such "special activities", and that the aggregate of these factors further attest to CLAIMANT's submission that the substantial place of performance was Oceania.

i. Installation, refurbishment, test-runs

118 In the 2001 English case of Definitely Maybe (Touring) Ltd v. Marek Lieberberg Konzertagentur GmbH, the court held that, in rebutting the presumption within Art. 4(2) of the Rome Convention and applying the alternative within Art. 4(5), from the circumstances as a whole the closest connection lay with the defendant concert organizer's country of Germany. Even though the substantive obligation under the contract was for Oasis to perform two concerts, and therefore lay with the claimant whose company was based in England, Morison J considered that "Apart from the location of the claimants and the group, and the place of payment, there is no other connection between England and the contract." Therefore the judge concluded that the centre of gravity of the dispute lay in Germany.

119 CLAIMANT submits that the current dispute mirrors the pertinent aspects of the Definitely Maybe case. Art. 4(2) and 4(5) of the Rome Convention are representative of the transnational principle of the closest connection as outlined above and thus the reasoning behind that case is applicable in the present instance. Foremost is the parallel between the respondent's substantive obligation in the Definitely Maybe case and of RESPONDENT's in this contract. Apart from the location of RESPONDENT in Mediterraneo and the place of payment, which according to Clause 3 of the contract is Mediterraneo Overseas Commerce Bank, there is no other connection between Mediterraneo and the contract. The machine was never present in Mediterraneo (Question 10, Procedural Order No. 2), having been dismantled in Greece and from there having been shipped directly to Oceania (Claimant’s Exhibit No. 4 and 5). The main work to fulfil the contract took place at CLAIMANT’s premises in Oceania, as

pursuant to Clause 2 of the contract, the machine was "to be refurbished by Seller on installation at Buyer's premises" (Claimant's Exhibit No. 7). Furthermore, RESPONDENT's personnel performed test-runs on the machine on CLAIMANT's premises in Oceania (Claimant's Exhibit No. 8; Question 15, Procedural Order No. 2), and remained in Oceania for a period of six weeks in 2002 from July until mid-August to refurbish and adjust the machine.

ii. Technical know-how

120 The initial demonstration of use of the machine to CLAIMANT's personnel in Oceania adds further weight to the contention of CLAIMANT that the closest connection lies with Oceania, as the supply of technical know-how is relevant evidence in determining where contractual obligations have been fulfilled.

121 In the 1985 case ICC Award No. 4132, the dispute, between an Italian supplier and a Korean buyer, was resolved by the arbitrator by reference to the centre of gravity test to determine the governing law. The agreement had been executed partly in Italy and partly in Korea, and the arbitrator stated that although the contract was a "Supply and Purchase Agreement" , it had also been agreed that the Korean buyer had the right to call upon the supplier's "technical know-how […], on an exclusive base in the Republic of Korea". The arbitrator held that "Taking these special elements of the Agreement into account, […] the Agreement is for a large part to be performed in Korea and that for that reason Korean private law should prevail as the law governing the Agreement."

122 By analogy in the present case, RESPONDENT's sharing its know-how with CLAIMANT is further testament to the contract's closer connection with Oceania, as RESPONDENT's personnel demonstrated how to set up the machine to CLAIMANT's personnel on CLAIMANT's premises (Question 16, Procedural Order No. 2).

123 In light of all of these considerations, CLAIMANT submits that the result arising from the centre of gravity test is that Oceania has the closer connection to the contract. Therefore the Tribunal is requested to apply the Obligation Law of Danubia.

3. The four-year period of limitation has not been overstepped

124 According to Art. 87 of the Obligation Law of Danubia, the period of limitation for sales of goods contracts is four years. As stated above under the three-year prescription

period, arbitral proceedings began on 5 July 2005 on the reception of the statement of claim by CIDRA and the breach of contract took place on 8 July 2002. As the former date falls within four years of the latter, so the four year period of prescription has not been overstepped. The Tribunal is thereby requested to hold that under this circumstance the claim is similarly actionable.

D. Final Submissions

125 Subsequent to the foregoing argumentation, CLAIMANT submits that RESPONDENT has failed to perform its obligations under the contract and the CISG, that the damages resulting from this failure to perform amount to $ 3,200,000, and that the claim remains actionable.

126 RESPONDENT has failed to perform due to its failure to deliver conforming goods pursuant to Art. 35 CISG. RESPONDENT has failed to deliver both goods that are of the description required by the contract pursuant to Art. 35(1) CISG and goods fit for the purposes made known to him at the time of the conclusion of the contract pursuant to Art. 35(2)(b) CISG.

127 CLAIMANT can rely on Art. 74 CISG to claim damages to the amount of $ 3,200,000. This resulted from the loss of profit due to the cancellation of the CLAIMANT's initial contract with the Confectioner and the subsequent loss of chance of a renewal. CLAIMANT has mitigated its losses pursuant to Art. 77 CISG.

128 The claim remains actionable irrespective of whether the Tribunal recognizes the implicit contractual choice of law of Danubian Obligation Law, under which the period of limitation is three years; in the alternative, the choice of law rules point to Oceanian Obligation Law with its four-year period of limitation. As less than three years has elapsed since the breach, the claim remains actionable under either alternative.