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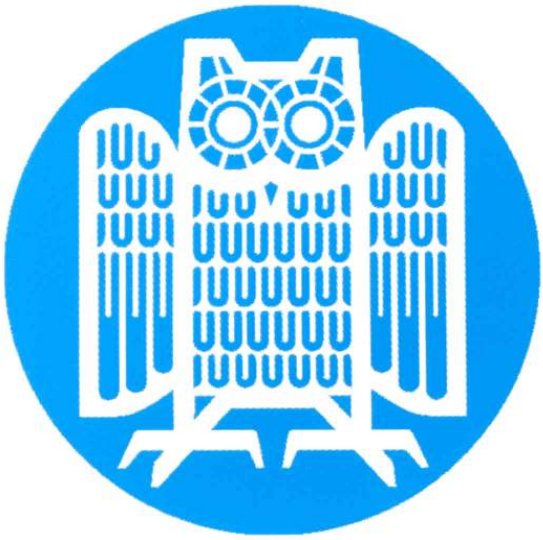
31 March to 5 April 2007

MEMORANDUM FOR CLAIMANT



On behalf of

Equatoriana Office Space Ltd
415 Central Business Centre
Oceanside
Equatoriana.

as CLAIMANT

Against

Mediterraneo Electrodynamics S.A
23 Sparkling Lane
Capitol City
Mediterraneo

as RESPONDENT

University of Saarland

SAARBRÜCKEN, GERMANY

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Table of Contents

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Index of Arbitral Awards

Statement of Facts and Submissions

1. Statement of Facts

(1) On 12 May 2005 Equatoriana Office Space Ltd. ("CLAIMANT"), a company incorporated and doing business in Equatoriana, concluded a contract ("the Contract") for the manufacture, sale, and delivery of fuse boards by Mediterraneo Electrodynamics S.A. ("RESPONDENT"), a company incorporated and doing business in Mediterraneo. Pursuant to the Contract, RESPONDENT was obliged to construct and to deliver the fuse boards at the price of USD 168,000. The fuse boards were to be installed at CLAIMANT's development, Mountain View Office Park ("Mountain View") in Equatoriana, which was then under construction.

(2) Engineering drawings which were explicitly incorporated into the Contract specify that the fuse boards were to be constructed using JP type fuses manufactured by Chat Electronics. A descriptive note to the drawings further requires the fuse boards to be "lockable to Equalec requirements" (Equalec being the monopoly supplier of electricity to the Mountain View area). The Contract contains a clause requiring any amendments to the Contract to be in writing ("the Writing Clause").

(3) The Contract further contains a clause drafted by CLAIMANT as clause 34 that provides for disputes arising from the Contract to be settled by arbitration ("the Arbitration Clause"). CLAIMANT's clause replaced an arbitration clause drafted by RESPONDENT. RESPONDENT gives evidence that it was not particularly concerned with the contents of the Arbitration Clause as drafted by CLAIMANT.

(4) In spring of 2005, RESPONDENT's inventory of Chat Electronics JP type fuses was exhausted; RESPONDENT was unable to procure further JP type fuses due to production difficulties at Chat Electronics. RESPONDENT was therefore unable to deliver fuse boards with JP type fuses by the contractual delivery date of 15 August 2005.

(5) On 14 July 2005, Mr Peter Stiles, RESPONDENT's Sales Manager, attempted to contact Mr Herbert Konkler, CLAIMANT's Purchasing Director, who was the person responsible for the Contract. Since Mr Konkler was on a business trip and unavailable, Mr Stiles was referred to Mr Steven Hart, a staff member in CLAIMANT's Purchasing Department. During this conversation Mr Hart was informed that RESPONDENT could

not deliver the fuse boards with JP type fuses in time. Mr Stiles recommended the use of JS type fuses instead.

(6) There are two significant differences between the JS and JP type fuses. Firstly, JS type fuses are 10 mm longer than JP type fuses. Secondly, in circuits rated for more than 400 amperes only JS type fuses can be used, whereas either type can be used for circuits rated for less than 400 amperes. The fuse boards for Mountain View were to be installed on circuits with ratings varying between 100 and 250 amperes.

(7) CLAIMANT was under time pressure because it was obliged to give occupancy to the lessees of Mountain View by 1 October 2005 or pay contractual penalties. In light of RESPONDENT's assurances that CLAIMANT would not suffer any damage by substituting JS for JP type fuses, Mr Hart agreed to Mr Stiles' recommendation to substitute JS type fuses.

(8) RESPONDENT never sent CLAIMANT any written confirmation of the phone call from 14 July 2005 or any other written request for amendment of the Contract. On 22 August 2005, the fuse boards were delivered directly to Mountain View. CLAIMANT paid the purchase price on 26 August 2005, after which the fuse boards were installed by a third-party construction contractor.

(9) Equalec, the electricity supplier, refused to connect to the fuse boards as delivered. It cited as a reason its policy (adopted in July 2003 *inter alia* for safety reasons) not to connect to circuits fused with JS type fuses unless the circuits were rated at more than 400 amperes.

(10) Mr Konkler, CLAIMANT's Purchasing Director, was informed on 8 September 2005 of Equalec's refusal to connect to the fuse boards with JS type fuses. In ensuing negotiations, RESPONDENT declared itself unable to deliver fuse boards conforming to the original contract specifications. As a result, CLAIMANT was forced to remove the non-conforming fuse boards and replace them with conforming fuse boards manufactured by a third party. In the process, it suffered substantial financial damages.

(11) CLAIMANT submitted its Notice of Arbitration and Statement of Claim to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ("CICA") on 15 August 2006. By this action, CLAIMANT seeks to

recover from RESPONDENT the damages it suffered by reason of RESPONDENT's breach of the Contract.

2. Submissions

(12) Pursuant to Procedural Order No. 1 para. 11, CLAIMANT submits as follows:

2.1. Jurisdiction

(13) This arbitral tribunal ("the Tribunal") has jurisdiction to decide this dispute. In particular, the Tribunal is validly constituted under the Arbitration Clause.

- The Arbitration Clause calls for institutional arbitration under the auspices of CICA and pursuant to its Rules of Arbitration ("the Romanian Rules"). The Tribunal is duly constituted under Romanian Rules and therefore has jurisdiction.
- In the alternative, even if the Arbitration Clause does not validly specify Romanian Rules, RESPONDENT is precluded from challenging the Tribunal's jurisdiction because such challenge is contrary to the principle of good faith.

2.2. Merits

(14) CLAIMANT has suffered loss in the amount of USD 200,000 by reason of RESPONDENT's breach of contract, and should be awarded this amount as damages.

- RESPONDENT delivered goods which were not in conformity with the description in the Contract.
- Furthermore, the Contract was not validly amended so as to allow RESPONDENT to deliver fuse boards with JS type fuses as conforming goods.
- In the alternative, even if the Contract was validly amended to allow substitution of JS type fuses, RESPONDENT delivered goods which were not fit for their particular purpose.
- CLAIMANT suffered loss as a consequence of RESPONDENT's breach of contract, and this loss was foreseeable to RESPONDENT.
- There is no reason in fact or in law that CLAIMANT should not be awarded damages in the amount of such loss. In particular, the fact that CLAIMANT did not pursue a possible remedy against Equalec is no bar to an award of damages.

Argument

I. THIS TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

(15) RESPONDENT's challenge to the Tribunal's jurisdiction is unfounded and should be rejected. The issue of jurisdiction is relevant as a matter of law. More practically, however, it will affect the enforceability of any award under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

(16) After a brief discussion of the legal framework in which the Tribunal must take its decision [I.1], the true meaning of the Arbitration Clause will be set out. It will be shown that interpretation of the Arbitration Clause necessarily leads to the conclusion that it calls for institutional arbitration administered by CICA and subject to the Romanian Rules [I.2]. In the alternative, even if the Arbitration Clause does not validly refer the parties to arbitration under the Romanian Rules, RESPONDENT's challenge to the Tribunal's jurisdiction is barred by good faith and should be rejected as inadmissible [I.3].

1. Legal framework

1.1. Applicable law

(17) It is undisputed that Danubia is the agreed seat of arbitration. The law of Danubia as the *lex arbitri* is applicable to questions relating to the validity and scope of the Arbitration Agreement [STATEMENT OF CLAIM PARA. 21; SCHUMACHER, P. 54; SCHWAB/WALTHER P. 383; REDFERN/HUNTER, PARAS. 2:89 TO 2:90.] The UNCITRAL Model Law on International Arbitration ("the Model Law") is applicable as part of the law of Danubia [STATEMENT OF CLAIM, PARA. 21].

(18) The Model Law does not provide answers to all of the questions which can arise when interpreting arbitration agreements. However, it provides a base-line of minimum standards on which the validity of arbitration agreements can be judged [*GUANGDONG AGRICULTURE COMPANY LTD. V. CONAGRA INTERNATIONAL (FAR EAST) LTD.* [1993] 1 HKLR 113, 116 (HONG KONG)]. On questions of the formation of the agreement, the general contract law of the place of arbitration applies. However, an internationally recognised principle of interpretation *in favorem validitatis* is generally applied to save ambiguous agreements even where this would not be possible under the domestic contract law of the place of arbitration [BERGER PARA. 20:61; *IN THE MATTER OF THE PETITION OF HZI RESEARCH CENTER, INC. V. SUN INSTRUMENTS JAPAN CO., INC.* 1995 WL 562181, US DISTRICT COURT S.D. N.Y (USA)].

1.2. Tribunal has jurisdiction to determine its own jurisdiction

(19) It is generally acknowledged that an arbitral tribunal has jurisdiction to determine its own jurisdiction [SEE REDFERN/HUNTER PARAS. 5:38 ET SEQQ.]. In particular, both the applicable law and relevant rules in this case recognise this principle [ART. 16(1) MODEL LAW, ART. 15(2) ROMANIAN RULES, ART. 21(1) UNCITRAL RULES OF ARBITRATION ("UNCITRAL RULES")]. Therefore, the Tribunal can rule on its jurisdiction regardless which rules apply.

2. Parties agreed on institutional arbitration under Romanian Rules

(20) The Tribunal's jurisdiction stems from the Arbitration Clause, which reads as follows:

> "34. **Arbitration**. All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by the International Arbitration Rules used in Bucharest. The arbitral award shall be final and binding.
>
> The Arbitral Tribunal shall be composed of three arbitrators.
>
> The arbitration shall be in the English language. It shall take place in Vindobona, Danubia."

(21) RESPONDENT argues that the phrase "International Arbitration Rules used in Bucharest" does not refer with sufficient clarity to CICA and is therefore a nullity [PROCEDURAL ORDER NO. 1, PARA. 4]. This argument is incorrect.

(22) There is a general principle of law that arbitration agreements are to be construed *in favorem validitatis* [I.2.1]. With regard to ambiguous arbitration clauses, this principle means that such clauses will be enforced as long as they meet two minimum standards. Firstly, the parties must have demonstrated a clear intent to remove their disputes from the jurisdiction of the state courts and submit them to arbitration. Secondly, the clause must not exhibit an irresolvable ambiguity. It will be shown that by the Arbitration Clause, the parties have demonstrated the requisite intent to arbitrate [I.2.2]. Furthermore, the Arbitration Clause gives rise to no irresolvable ambiguity, but rather clearly provides for institutional arbitration organised by CICA pursuant to Romanian Rules [I.2.3]. In particular, RESPONDENT's contention that the Arbitration Clause is ambiguous as to whether Romanian Rules or UNCITRAL Rules are applicable will be shown to be false [I.2.4]. Lastly, it will be shown that this analysis comports with the uniform approach of

courts in Model Law and other jurisdictions [I.2.5]. Therefore, because the Tribunal is duly constituted under Romanian Rules [I.2.6], it has jurisdiction to decide this dispute.

2.1. Construction in favorem validitatis

(23) Throughout the world, courts seek to give effect to parties' clearly expressed intention to submit their disputes to arbitration by enforcing ambiguous arbitration clauses. Courts apply rules of benevolent construction developed specifically for arbitration agreements [BERGER PARA. 20:62; WALTER, PP. 57, 58], and will only refuse to give effect to an ambiguous arbitration clause where it is entirely impossible to determine its meaning by (purposive) interpretation. As Steyn LJ of the English Court of Appeal noted in *Star Shipping AS v. China National Foreign Trade Transportation Corp.*:

> "The fact that a multiplicity of possible meanings of a contractual provision are [*sic*] put forward, and that there are difficulties of interpretation, does not justify a conclusion that the clause is meaningless" [[1993] 2 LLOYD'S REP. 445, 452 (ENGLAND). SEE ALSO BERGER PARAS. 20:62 ET SEQ.; SCHWAB/WALTHER P. 20].

(24) There is clear and overwhelming authority that if the parties have evidenced a clear intent to arbitrate, and the clause does not exhibit an irresolvable ambiguity, it will be upheld by the courts [BUNDESGERICHT 8 JULY 2003 (SWITZERLAND) P. 681; *GUANGDONG AGRICULTURE COMPANY LTD. V. CONAGRA INTERNATIONAL (FAR EAST) LTD.* [1993] 1 HKLR 113 PER BARNETT J AT 116 (HONG KONG); *LUCKY-GOLDSTAR INTERNATIONAL (H.K.) LIMITED V. NG MOO KEE ENGINEERING LIMITED* [1993] 2 HKLR 73 AT 75 (HONG KONG); *WARNES SA V. HARVIC INTERNATIONAL LTD.* 1993 WL 228028 PER SWEET J (US FEDERAL DISTRICT COURT SDNY); *KG BERLIN* 15 OCTOBER 1999 (GERMANY); WILSKE/KRAPFL P. 81; NIGGEMANN, P. 16].

2.2. Clear intent to arbitrate disputes

(25) There can be no doubt that the parties intended to submit their disputes to arbitration. The parties' intent to remove their disputes from the jurisdiction of the state courts appears clearly from the wording of the Arbitration Clause, which provides for a final and binding arbitral award. Moreover, the parties chose a place of arbitration and the number of arbitrators. Any uncertainty in the Arbitration Clause relates only to the applicable rules, not the intent to arbitrate itself.

2.3. No irresolvable ambiguity – Arbitration Clause can only refer to CICA

(26) The reference in the Arbitration Clause to "International Arbitration Rules used in Bucharest" must refer to international arbitration rules exhibiting a special connection with

Bucharest. This is the plain and natural meaning of the words used; this meaning is generally accepted to be the first point of reference when construing contractual terms [E.G. ANSON ON CONTRACT P. 160; HEINRICHS IN PALANDT § 133 PARA. 14; FARNSWORTH § 7.11]. Romanian Rules are the only rules exhibiting such a special connection to Bucharest; there is only one institution in Bucharest providing arbitration rules suitable for international arbitration [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 10].

(27) The fact that Romanian Rules are not called "International Arbitration Rules" does not preclude this interpretation. Contrary to RESPONDENT's contention [RESPONDENT'S ANSWER, PARA. 15], Romanian Rules are in fact international arbitration rules. They provide provisions tailored for international arbitrations that differ from those applicable to domestic arbitrations [CHAPTER VIII ROMANIAN RULES, ENTITLED "SPECIAL PROVISIONS REGARDING INTERNATIONAL COMMERCIAL ARBITRATION"]. The fact that Romanian Rules can be used for domestic arbitrations as well as for international arbitrations does not prevent them from being "International Arbitration Rules". Indeed, both the fact that CICA's name includes the word "International" and the fact that a full 20 percent of arbitrations conducted by CICA under Romanian Rules are international [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 11] demonstrates the international character of Romanian Rules.

(28) By choosing Romanian Rules, the parties chose an institutional arbitration administered by CICA. It is standard practice for the choice of an institution in an arbitration clause to be made by way of reference to the institution's rules. Thus the ICC Model Clause provides for disputes to "be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules" [LACHMANN PARA. 299; SEE ALSO THE MODEL CLAUSES SUGGESTED BY *INTER ALIA* THE AAA, IACAC, AND LCIA]. An analogous application of Art. 5 Romanian Rules leads to the same result.

(29) This conclusion is bolstered by the fact that both parties contemplated the use of institutional arbitration. RESPONDENT's own draft of the Contract provided for arbitration at the Mediterraneo International Arbitral Center, which appears to be an institution providing international arbitration services [RESPONDENT'S ANSWER PARA. 5]. Meanwhile, CLAIMANT's understanding of the Arbitration Clause as providing for institutional arbitration is conclusively demonstrated by the fact that CLAIMANT chose to submit its Request for Arbitration to CICA.

(30) In short, the Arbitration Clause can only refer to arbitration by CICA. The meaning of the Arbitration Clause is therefore clear. The Tribunal should give effect to it.

2.4. No ambiguity as to applicability of UNCITRAL Rules

(31) Since the parties intended to submit their disputes to institutional arbitration by CICA, there is a presumption that the arbitration will be pursuant to CICA's rules. However, RESPONDENT argues that the reference in Art. 72(2) Romanian Rules to the UNCITRAL Rules introduces an ambiguity as to which set of rules is referred to by the clause [RESPONDENT'S ANSWER PARA. 16]. This is not the case.

(32) The parties' intent to submit their disputes to institutional arbitration by CICA gives rise to a presumption that the arbitration will be pursuant to Romanian Rules [ART. 5 ROMANIAN RULES]. Although Art. 72(2) Romanian Rules refers to UNCITRAL Rules, it does not displace this presumption.

(33) Art. 72(2) Romanian Rules allows parties to opt out of the Romanian Rules in favour of UNCITRAL Rules. However, it does not set UNCITRAL Rules on an equal footing with Romanian Rules. Rather, a choice of UNCITRAL Rules pursuant to Art. 72(2) Romanian Rules must be explicit. Such an explicit choice is rare. Evidence for this can be seen in the practice of the Court, which rarely if ever conducts arbitrations under the UNCITRAL Rules [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 12].

(34) On the facts, the Arbitration Clause contains no explicit choice of UNCITRAL Rules. Indeed, there is nothing in the Arbitration Clause that could be said to displace the presumption in favour of Romanian Rules. In particular, the mere fact that the Arbitration Clause refers to "International Arbitration Rules" cannot be construed as a choice of UNICTRAL Rules. There is nothing in the phrase "International Arbitration Rules" that implies rules directed exclusively at international arbitrations. Rather, the phrase suggests rules that make specific provision for international arbitrations. The Romanian Rules make such provisions, not only in Chapter VIII (headed "Special Provisions regarding International Commercial Arbitration"), but throughout [E.G. ARTS. 2(1), 36(3) ROMANIAN RULES]. Furthermore, a full 20 percent of CICA arbitrations under Romanian Rules are international [PROCEDURAL ORDER NO. 2, CLARIFICATION NOS. 11 AND 12]. This underlines the practicability of the Romanian Rules for international arbitrations.

(35) It is therefore clear that the specification of "International Arbitration Rules used in Bucharest" can only refer to Romanian Rules, and not to UNCITRAL Rules.

2.5. Guidance from the case law

(36) The above analysis comports with the approach adopted in a plurality of jurisdictions. In order to best give effect to the parties' intentions to remove their disputes from the jurisdiction of the state courts and submit them to arbitration, courts throughout the world uniformly enforce ambiguously formulated arbitration agreements unless there is no possibility of determining their meaning through interpretation. In the following, examples of this approach are offered on which the Tribunal can orient itself.

(37) In a decision of 15 October 1999 [AZ: 28 SCH 17/99], the German *Kammergericht Berlin* upheld an arbitration clause referring to "the German Central Chamber of Commerce" although no such institution existed. It found that the parties could only have intended institutional arbitration under the auspices of the *Deutsche Institution für Schiedsgerichtsbarkeit* in Cologne since that was the only institution to which the clause could have referred. Likewise, the German *Oberlandesgericht Köln* upheld a reference to arbitration at the (non-existent) "Chamber of Commerce and Industry of the City of Moscow". It was held that there was only one institution which the parties could have meant, namely the Chamber of Commerce and Industry of the Russian Federation [OLG KÖLN 26 OCTOBER 2004 (GERMANY)]. Similarly, the German *Oberlandesgericht Hamm* upheld a reference to "the arbitrators of the Geneva Court of Justice" [OLG HAMM 27 SEPTEMBER 2005 (GERMANY)]. Finding that the Geneva Chamber of Commerce and Industry was the only institution offering arbitration in Geneva, the court held that the parties must have meant that institution. In light of this case law, Wilske and Krapfl argue that "arbitration practitioners can rely on courts to reject the objection to an invalid arbitration clause if the clause can be interpreted to retain its validity [WILSKE/KRAPFL P. 83].

(38) Similar judicial generosity can be observed in England [*LOBB PARTNERSHIP LTD. V. AINTREE RACECOURSE CO LTD.* [2000] C.L.C. 431; *MANGISTAUMUNAIGOZ OIL V. UNITED WORLD TRADE INC.* [1995] 1 LLOYD'S REP 617 AT 621; REDFERN/HUNTER PARA. 3:67], Canada [*CANADIAN NATIONAL RAILWAY V. LOVAT TUNNEL EQUIPMENT INC* (1999) 174 D.L.R. (4TH) 385 AT 390 (ONTARIO COURT OF APPEAL); *DALIMPLEX LTD. V. JANICKI* (2003) 64 O.R. (3d) 1991, PARAS. 7-8 (ONTARIO COURT OF APPEAL)], Switzerland [BUNDESGERICHT 8 JULY 2003 (SWITZERLAND)], and US federal and state jurisdictions, [*WARNES SA V. HARVIC INTERNATIONAL LTD.* 1993 WL 228028 (US DISTRICT COURT

S.D. N.Y.); *J.M. DAVIDSON, INC. V. WEBSTER* 128 S.W.3D 223 AT 226, 47 TEX. SUP. CT. J. 196, TEX. SC (TEXAS SUPREME COURT); *ITT HARTFORD LIFE & ANNUITY INS. CO. V. AMERISHARE INVESTORS, INC.* 133 F.3D 664 (EIGHTH CIRCUIT COURT OF APPEALS)]. This approach is also practiced by the leading arbitral institutions [E.G. JARVIN IN NEWMAN/HILL, PP. 98-99 REGARDING THE PRACTICE OF THE ICC AND THE STOCKHOLM ARBITRATION INSTITUTE, DECISION OF THE ARBITRATION COURT ATTACHED TO THE CHAMBER FOR FOREIGN TRADE OF THE GDR IN *YUGOSLAV CO. V. PDR KOREA CO.* [1983] YCA 129, 131].

2.6. Tribunal is validly constituted under the Romanian Rules

(39) The constitution of the Tribunal complies with all requirements in the Romanian Rules, and in particular Chapter III thereof. Art. 21 et seqq. Romanian Rules provide for the composition procedure of the arbitral tribunal. The parties agreed on an arbitral tribunal composed of three arbitrators [CLAIMANT'S EXHIBIT NO. 1, CLAUSE 34]. Therefore Art. 23 Romanian Rules applies. According to this provision each of the parties shall appoint an arbitrator and the two arbitrators shall nominate a presiding arbitrator. On the facts, the two parties appointed their arbitrators [LETTER FROM LANGWEILER OF 15 AUGUST 2006 CONVEYING CLAIM, AND LETTER FROM FASTTRACK OF 4 SEPTEMBER 2006 CONVEYING ANSWER]. These two arbitrators appointed the Presiding Arbitrator in accordance with Art. 23 Romanian Rules [LETTER FROM CICA TO MS. ARBITRATOR 1 OF 8 SEPTEMBER 2006]. Hence the provisions of Arts. 21 et seqq. Romanian Rules (appointment of arbitrators) have been complied with. Therefore, pursuant to Art. 32(1) Romanian Rules, the tribunal is now "entitled to adjudicate the Request for Arbitration and other requests concerning the arbitral procedure".

3. Good faith bars RESPONDENT from challenging jurisdiction

(40) Further and in the alternative, RESPONDENT is barred from challenging the Tribunal's jurisdiction. The principle of procedural good faith can and does preclude RESPONDENT from challenging jurisdiction where such challenge would serve only to saddle the parties with unjustifiable costs and delay [I.3.1].

(41) Even if the choice of Romanian Rules is void for uncertainty, the Arbitration Clause will not be void as a whole [I.3.2]. Rather, it will take effect as a binding agreement for *ad hoc* arbitration [I.3.3]. The constitution of a tribunal under such an agreement would be regulated solely by the Model Law.

(42) An *ad hoc* tribunal so constituted would not differ in any material respect from this Tribunal. Therefore, RESPONDENT cannot be prejudiced by arbitration under the Tribunal as presently constituted; indeed, the success of RESPONDENT's jurisdictional challenge would cause only delay and additional costs without providing any material benefit to either party [I.3.4]. For this reason, RESPONDENT's jurisdictional challenge is contrary to good faith and inadmissible.

3.1. Jurisdictional challenge may be barred as contrary to good faith

(43) Parties in international arbitral proceedings, like parties in all dispute resolution proceedings, are bound by the principle of procedural good faith. Under this principle, parties are barred from exercising their formal legal rights solely to delay or disrupt the proceedings. In the Model Law, this principle finds expression in the explicit time limits for challenges to the jurisdiction of the arbitral tribunal [ART. 16(2) MODEL LAW AND SEE UNCITRAL EXPLANATORY NOTE PARA. 25 ("safeguards…to reduce the risk and effect of dilatory tactics")]. Even more specifically, Art. 9 Romanian Rules provides:

> "(1) The parties shall be bound to exercise their procedural rights bona fide and in accordance with the purpose they are granted. They shall co-operate with the Arbitral Tribunal for the appropriate progress of the arbitral proceedings and the settlement of the dispute in due time.
>
> (2) Any obstruction or undue delay of the dispute shall be considered a breach of the arbitral agreement."

(44) On this basis, it is submitted that the Tribunal is entitled to reject RESPONDENT's jurisdictional challenge if it finds that it is contrary to good faith.

3.2. Principle of partial invalidity

(45) RESPONDENT argues that the alleged unclarity of the choice of Romanian Rules renders the Arbitration Clause void as a whole [PROCEDURAL ORDER NO. 1 PARA. 4]. This contention is wrong as a matter of law and should be rejected. As a general rule, an arbitration clause will be valid even when one or more of its provisions are uncertain or void, so long as it contains the minimum required content [I.3.2.1]. If it does so, the uncertainty or unenforceability of a single provision will not invalidate the entire clause unless the void provision is central to the fabric of the whole agreement [I.3.2.2].

3.2.1. The Arbitration Clause contains the minimum required content

(46) Whether or not an arbitration clause satisfies the minimum requirements for validity can be determined with reference to Art. 7 Model Law and Art. 2(1) New York Convention. Art. 7 Model Law provides that an arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship". Therefore, an arbitration clause is *prima facie* valid if it clearly demonstrates the parties' intention to submit their disputes regarding a defined legal relationship to arbitration and exclude the jurisdiction of the state courts [*LUCKY-GOLDSTAR INTERNATIONAL LIMITED V. NG MOO KEE ENGINEERING LIMITED* [1993] 2 HKLR 73 PER KAPLAN J. (HONG KONG); MÜNCH IN MÜNCHENER KOMMENTAR ZUR ZPO § 1029 PARA. 40; BUNDESGERICHT 21 NOVEMBER 2003 (SWITZERLAND); WALTER, PP. 57-58].

(47) With the possible exception of the phrase "International Arbitration Rules used in Bucharest", there can be no argument that the wording of the Arbitration Clause is unclear. It submits "[a]ll disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination" to arbitration. It makes provision for the place of arbitration and the number of arbitrators. Thus the Arbitration Clause makes clear that the parties' primary intention was to submit disputes arising in the context of the manufacture and sale of fuse boards to arbitration. Moreover, the draft originally proffered by RESPONDENT provided for arbitration at the Mediterraneo International Arbitration Center [RESPONDENT'S EXHIBIT NO. 1], which appears to be an institution offering institutional arbitration services. Meanwhile, the Arbitration Clause as drafted by CLAIMANT admits of no doubt as to the intent to arbitrate *per se*.

(48) Likewise, there can be no doubt that the parties intended to remove such disputes from the jurisdiction of the state courts. The provision that "The arbitral award shall be final and binding" clearly demonstrates this intent.

(49) Thus there can be no doubt that the Arbitration Agreement fulfils the minimum content requirements of Art. 7 Model Law and Art. 2(1) New York Convention even if the choice of applicable rules is too uncertain to be enforced.

(50) This reading of Art. 7 Model Law and Art. 2(1) New York Convention has been accepted by courts throughout the world. In a decision of 21 November 2003, the Swiss *Bundesgericht* considered a clause which declared several incompatible sets of arbitration rules to be applicable. It was held that the parties´ intent to submit their disputes to

arbitration was demonstrated by the arbitration clause despite the fact that the agreement as to rules was incapable of performance. Therefore, the court found that only the choice of rules was of no effect; the arbitration agreement itself was valid [BUNDESGERICHT 21 NOVEMBER 2003 (SWITZERLAND)].

(51) In *Warnes S.A. v. Harvic International Ltd.,* the U.S. District Court for the Southern District of New York considered an arbitration agreement referring to a non-existent arbitration association. It was held that "an arbitration agreement on a non-existent arbitration forum is the equivalent of an agreement which does not specify a forum, since the parties had the intent to arbitrate, even in the absence of a properly designated forum" [1993 WL 228028].

(52) These authorities clearly demonstrate the general principle that uncertainty in an arbitration agreement does not cause the whole arbitration agreement to be void where the ambiguity does not affect the core of the agreement. On the facts, even if the phrase "International Arbitration Rules used in Bucharest" is ambiguous, the parties' intent to submit all their disputes in the context of the Contract to arbitration is not in doubt. Therefore the Arbitration Clause is valid unless the ambiguous provision was central to the whole agreement.

3.2.2. The choice of rules is not central to the parties' agreement

(53) Nullity of a single provision will only affect the whole Arbitration Clause if (exceptionally) this provision goes to the essence of the parties' agreement [OGH 19 FEBRUARY 2004 (AUSTRIA); SCHUMACHER P. 55]. On the facts, the choice of "International Arbitration Rules" was not essential to the parties' agreement.

(54) It cannot be seriously contended that the words "International Arbitration Rules used in Bucharest" are central to the parties' agreement. RESPONDENT was clearly unconcerned with the change of designated institution in the revised Arbitration Clause: as Mr Stiles stated, "I was not going to let it interfere with concluding the sale" [RESPONDENT'S EXHIBIT NO. 1]. This demonstrates clearly that RESPONDENT did not regard a choice of rules or institution as fundamental to the arbitration agreement. Likewise, CLAIMANT's preferred wording for the Arbitration Clause seems to have been affected more by the predilection of CLAIMANT's president for opera than by any objective considerations [RESPONDENT'S EXHIBIT NO. 1]. The parties' central intention was to submit their disputes to arbitration; although they attempted to make more detailed provisions

regarding the applicable rules, it is clear that they were not overly worried about the workability of such provisions. For this reason, even if the choice of Romanian Rules were invalid, this would not affect the validity of the Arbitration Clause *per se*.

3.3. If partial nullity, then *ad hoc* arbitration according to Model Law

(55) If the parties' choice of a set of rules is considered too uncertain to be enforceable, they cannot be deemed to have chosen a specific arbitral institution. Therefore the Arbitral Agreement would take effect as an agreement for an *ad hoc* arbitration. Since the parties *ex hypothesi* have not agreed on applicable procedural rules, the applicable arbitration statute will fill any gaps. As noted above, the applicable arbitration statute on the facts is the Model Law, which is the Danubia arbitration statute [SEE ABOVE PARAS. 17-18].

(56) The decision of the High Court of Hong Kong in *Guangdong Agriculture Company Limited v. Conagra International (Far East) Ltd.* dealt with a virtually identical arbitration clause to that before the Tribunal. The clause in question provided that "The Arbitration shall take place in Hong Kong and shall be executed in accordance with the rules of Hong Kong and the decision made by the adjusters shall be accepted as final and binding upon both parties". This provision was held to be void because "rules of Hong Kong" could have referred to one of several sets of arbitration rules. Yet the court upheld the clause as an agreement for *ad hoc* arbitration, noting that:

> "…taken as whole [*sic*] […], the parties plainly agreed to settle any dispute by arbitration. In my judgment that is all that is required in order to establish binding arbitration agreement. Should the parties be unable to agree upon […] the rules to be followed, the Model Law will assist them. […] Art. 19 [of the Model Law] provides for rules of procedure." [[1993] 1 HKLR 113 AT 116]

(57) This approach was followed by the English courts in *Swiss Bank Corporation v. Novorissiysk Shipping Co.*, where the Court found that a reference to a set of arbitration rules was too ambiguous to be enforced. This left only an agreement for 'Arbitration in London - English law to apply', which was held to be "a clause of sufficient definition to be enforced by the English Courts". The court therefore ordered an *ad hoc* arbitration under the default rules of the Arbitration Act 1996 [[1995] 1 LLOYD'S REP. 202 PER POTTER J AT 206].

(58) In light of these authorities, it is clear that if the choice of Romanian Rules is so uncertain as to be unenforceable, the Arbitration Clause as a whole will remain enforceable and will take effect as an agreement for *ad hoc* arbitration. What this means in practice is

that, if the Tribunal denies its own jurisdiction as requested by RESPONDENT, a new tribunal would need to be constituted under the provisions of the Model Law.

3.4. Arbitration by this Tribunal would not prejudice RESPONDENT

(59) Even if the Tribunal agrees with RESPONDENT with regard to the alleged ambiguity of the phrase "International Arbitration Rules used in Bucharest", it should nonetheless reject RESPONDENT's challenge to its jurisdiction. This is because a declaration of lack of jurisdiction by the Tribunal would lead only to the reconstitution of an *ad hoc* arbitral tribunal under the Model Law. But RESPONDENT has nothing to gain by such a reconstitution.

(60) A tribunal constituted under the Model Law would not differ in any material respect from this tribunal [I.3.4.1]. It would almost certainly apply rules of procedure substantially identical to those that this Tribunal would apply [I.3.4.2]. A reconstitution would merely cause unjustifiable cost and delay [I.3.4.3] without affecting the process or the outcome in any material way.

3.4.1. No material difference between the Tribunal and an *ad hoc* tribunal

(61) The constitution of an *ad hoc* tribunal would not differ in any material respect from the constitution of this Tribunal. The Romanian Rules provide that, if the parties have not agreed on the procedure for appointment of arbitrators, each party shall nominate one arbitrator and those two arbitrators shall nominate a presiding arbitrator [ARTS. 19(2), 22, 23 ROMANIAN RULES]. An identical provision can be found in the Model Law [ART. 11(3) MODEL LAW]. On the facts, the parties nominated arbitrators in precisely the same manner and with precisely the same scope of choice as they would have under an *ad hoc* constitution procedure. Thus the process of constitution of an *ad hoc* tribunal would be identical to the process by which this Tribunal was constituted. *A fortiori*, the constitution of the *ad hoc* tribunal would not be materially different from the constitution of this Tribunal.

3.4.2. *Ad hoc* tribunal would apply procedural rules substantially identical to Romanian Rules

(62) Under Art. 19(2) Model Law, an *ad hoc* arbitral tribunal has the sole competence to determine what rules of procedure it will apply to its proceedings. Thus it is entirely possible that an *ad hoc* tribunal would opt to apply Romanian Rules. If it were to do so, there would be no difference at all between arbitration proceedings under an *ad hoc* tribunal and proceedings under this Tribunal. But even if the *ad hoc* tribunal were to choose another

set of internationally recognised rules, this still would not have any material effect on the conduct of the arbitration. Romanian Rules contain procedural rules that are identical in all relevant respects to international standards.

(63) UNCITRAL Rules are the rules most commonly used for international *ad hoc* arbitrations [CARBONNEAU (2003) WITH REFERENCES]. Thus they serve as a useful benchmark for comparison with Romanian Rules, particularly insofar as RESPONDENT has suggested that Romanian Rules and UNCITRAL Rules "differ in many important respects" [RESPONDENT'S ANSWER PARA. 16].

(64) Romanian Rules do indeed contain a number of provisions that are not found in UNCITRAL Rules, particularly in regard to the appointment of arbitrators and the process for serving a Statement of Claim [SEE GENERALLY CHAPTERS III AND IV ROMANIAN RULES]. But these differing provisions are irrelevant at this stage of the proceedings. They provide for the intervention of CICA in the event of difficulties in the constitution of the arbitral tribunal or the initiation of proceedings. No such difficulties have arisen here, and no such difficulties can arise in the future given the bar on new pleadings pursuant to Art. 54^{2} Romanian Rules. Therefore the only provisions that are of relevance at this point are the provisions regarding the conduct of hearings.

(65) The provisions in Romanian Rules governing the conduct of hearings are contained in Chapter v. Romanian Rules. While this Chapter is not identical to the equivalent provisions in UNCITRAL Rules, Romanian Rules and UNCITRAL Rules regulate the issues in the same way. In the Hearings Section there is only one provision that differs substantially from the UNCITRAL Rules. Pursuant to Art. 54^{1} Romanian Rules, each of the parties and the Tribunal *ex officio* can raise the issue of the unconstitutionality of a provision of Romanian Law. If they do so, the question will be referred by the President of CICA to the Romanian Constitutional Court. However, this provision will not be of relevance in an international arbitration applying a substantive law other than the domestic law of Romania. The Constitutional Court of Romania can only decide on the compatibility of Romanian State Law with the Romanian Constitution. If in an international arbitration another substantive law is applicable, the Constitutional Court of Romania cannot decide on the question of unconstitutionality. In the present case the applicable substantive Law as to the Arbitration is the Law of Danubia and as to the merits the CISG and the Law of Mediterraneo [below II.1]. Therefore Art. 54^{1} is irrelevant for this dispute.

(66) One unique feature of arbitration proceedings under Romanian Rules is the requirement under Art. 114[1](4) Romanian Code of Civil Procedure that the parties nominate an address for service of documents in Romania [LETTER FROM CICA TO RESPONDENT, P. 16]. This is the only relevant aspect of an arbitration under Romanian Rules which differs from what would be considered normal in international arbitration. Yet it is clear that it has caused no problems in practice on the facts, as both CLAIMANT and RESPONDENT have nominated such an address without complaint [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 13].

3.4.3. *Ad hoc* tribunal would result in unjustifiable delay and costs

(67) The Tribunal is practically identical to an *ad hoc* tribunal constituted under the Arbitration Clause. Therefore, the additional delay and costs inherent in a denial of jurisdiction by this Tribunal followed by its reconstitution as an *ad hoc* tribunal must be considered unjustifiable. While the amount of time necessary for such a reconstitution cannot be accurately predicted, the additional costs of the process can be at least partially calculated. CLAIMANT has already paid the arbitration fee in the amount of EURO 14,362.25 [LETTER FROM CICA TO CLAIMANT DATED 18 AUGUST 2006, P. 15]. (This amount comprises the Administration Fee of EURO 5144.90 and three arbitrator's fees of EURO 3,072.45). Pursuant to Art. 4(4) of CICA's Schedules of Arbitral Fees and Expenses, only 75 percent of this fee is refundable in the event that the Tribunal renders an award stating its lack of jurisdiction. Thus a reconstitution of this Tribunal would result in CLAIMANT being EURO 3,590.56 out of pocket.

3.5. Conclusion: RESPONDENT is barred from challenging jurisdiction

(68) In summary, therefore, if RESPONDENT is successful in its jurisdictional challenge, this would result in the constitution of an *ad hoc* arbitral tribunal under the Model Law. Such a tribunal would be substantially identical to the present Tribunal. RESPONDENT has advanced no arguments as to why it would be prejudiced by an award on the merits by this Tribunal, and no such arguments are apparent on an objective analysis of the situation.

(69) For this reason, even if the Tribunal is inclined to agree with RESPONDENT's interpretation of the Arbitration Clause, it should nonetheless find that RESPONDENT's challenge to its jurisdiction is a mere delaying tactic; its success would have no material

effect on the conduct of the arbitration. The Tribunal should therefore hold that the jurisdictional challenge is barred as being contrary to good faith.

4. Conclusion: Tribunal has jurisdiction to decide this dispute

(70) In view of the overriding objective of giving effect to the parties' clearly expressed desire to submit their disputes to arbitration, and having regard to the principle of good faith, the Tribunal should find that it is validly constituted under the Romanian Rules. Even if the Tribunal sees itself unable to make such a finding, it should find in the alternative that RESPONDENT's challenge to the Tribunal's jurisdiction is barred as contrary to good faith. On this basis, the Tribunal should then proceed to consider and give an award on the merits of the dispute before it.

II. CLAIMANT IS ENTITLED TO DAMAGES FOR BREACH OF CONTRACT

(71) RESPONDENT is in breach of the Contract. Following a brief discussion of the substantive law applicable to this dispute [II.1], this Section sets out the reasons why the Tribunal should award CLAIMANT damages for that breach.

(72) RESPONDENT failed to perform its obligations under the Contract pursuant to Art. 35 CISG. It delivered five primary distribution fuse boards equipped with JS type fuses. The Contract provided for fuse boards with JP type fuses. Therefore, RESPONDENT delivered goods that were not of the description required by the Contract within the meaning of Art. 35(1) CISG [II.2.1].

(73) Contrary to RESPONDENT's contention, the Contract was not validly amended in such a way as to permit RESPONDENT to supply fuse boards with JS type fuses instead of JP type fuses [II.2.2]. The Contract specifically provided in clause 32 (the Writing Clause) that any amendment to the Contract had to be in writing, and this requirement was not complied with [II.2.2.1]. Furthermore, the Writing Clause was not circumvented [II.2.2.2]. Additionally, the Contract could not have been amended by CLAIMANT's employee Mr Hart because he had no authority to bind CLAIMANT [II.2.2.3]. Lastly, CLAIMANT is not precluded from asserting the Writing Clause within the meaning of Art. 29(2) CISG [II.2.2.4].

(74) Even if the Contract was validly amended, the delivered goods were not fit for the particular purpose of being connected to Equalec's grid [II.2.3]. Further, CLAIMANT was not barred from rejecting the goods through acceptance [II.2.4].

(75) Pursuant to Arts. 45(1)(b), 74 CISG, CLAIMANT is entitled to claim damages. The loss suffered by CLAIMANT is a consequence of RESPONDENT's breach of contract [II.3.1] and the damages caused were foreseeable to RESPONDENT at the time of the conclusion of the Contract [II.3.2]. CLAIMANT is therefore entitled to recover its losses.

(76) Finally, RESPONDENT's breach of contract is not excused by CLAIMANT's failure to complain to the Equatoriana Electrical Regulatory Commission ("the Commission") about the refusal of Equalec to connect the fuse boards with the electrical grid [II.3.3].

1. Applicable law

(77) The 1980 Convention on the International Sale of Goods (CISG) applies to the substance of this case. This is true although only Mediterraneo is party to the CISG and Equatoriana is not [STATEMENT OF CLAIM PARA. 19]. The Contract contains a choice of law clause in its clause 33 providing for Mediterranean law to be the law governing the Contract [CLAIMANT'S EXHIBIT NO. 1]. In accordance with Art. 28(1) Model Law and Art. 73(1) Romanian Rules as well as the law of Danubia [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 2] the parties were allowed to introduce such a choice of law clause into the Contract and thereby bind the Tribunal to this chosen law. The CISG has been incorporated into Mediterranean law and is therefore positive law in Mediterraneo [CF. PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 7]. The parties´ agreement to submit the Contract to the law of a contracting state is considered to be equivalent to an implied choice of the CISG [BONELL/LIGUORI, SECTION 3.2 WITH FURTHER REFERENCES]. Therefore, CISG is applicable.

2. RESPONDENT is in breach of contract

2.1. The delivered fuse boards are not of the description required by the Contract

(78) Art. 35(1) CISG requires the seller to deliver goods that meet the specifications of the contract in terms of description, quality, quantity and packaging. RESPONDENT failed to perform its obligation to deliver goods of the contractually agreed description. The Contract specified the use of JP type fuses in the fuse boards [II.2.1.1]. Because RESPONDENT delivered fuse boards with JS type fuses, the CISG requirement of strict compliance is not satisfied [II.2.1.2].

2.1.1. The Contract specified JP type fuses

(79) In the Contract, RESPONDENT agreed expressly to sell "five primary distribution fuse boards at a total delivered price of USD 168,000" [CLAIMANT'S EXHIBIT NO. 1]. RESPONDENT quoted this price for the goods on the basis of engineering drawings prepared by CLAIMANT's engineers which contained specific requirements for the fuse boards, and in particular specified the fuse type. Since the fuseways were all rated at less than 400 amperes, one descriptive note on the drawings read: "Fuses to be Chat Electronics JP Type in accordance with BS 88". These drawings were attached and made part of the Contract [CLAIMANT'S EXHIBIT NO.1]. Therefore, the specification of JP type fuses is part of the contract description of the fuse boards, and RESPONDENT was obliged to construct the fuse boards in accordance with these specifications.

2.1.2. Requirement of strict compliance not satisfied

(80) JS type fuses can be used in a broader range of circuits than JP type fuses, as they work also in circuits rated higher than 400 amperes [RESPONDENT'S EXHIBIT NO.2]. It might be argued that JS type fuses are therefore "better" and that CLAIMANT cannot complain that the fuse boards were manufactured with better components than specified. That is not the case. RESPONDENT was obliged to comply strictly with the contract description and failed to do so.

(81) Under CISG, contractual performance must strictly comply with the contract specifications. It is generally accepted that any divergence, however slight, from the description specified by the contract, whether in description, quality, or quantity, constitutes nonconformity. The only exception is where a trade usage exists that allows a seller to deliver substantially compliant goods [MAGNUS IN HONSELL, ART. 35 PARA. 6 ET SEQQ; SCHWENZER IN SCHLECHTRIEM/SCHWENZER (2004), ART. 35 PARA. 9 ET SEQQ.; BIANCA IN BIANCA/BONELL, ART. 35 PARA. 2.4; MORALES MORENO IN PICAZO-DIEZ/DE LEON, ART. 35 VIII; CIETAC ARBITRATION AWARD, 7 APRIL 1999; OGH 21 MARCH 2000 (AUSTRIA); BGH 3 APRIL 1996 (GERMANY)]. On the facts, the delivered fuse boards were not in strict compliance with the contract description.

(82) RESPONDENT seems to suggest that a trade usage exists that modifies the requirement of strict compliance. This is incorrect.

(83) Such a trade usage would allow RESPONDENT to unilaterally substitute JS for JP type fuses without amendment to the Contract. In the telephone conversation between Mr Konkler and Mr Stiles on 9 August 2005, Mr Stiles claims that he told Mr Konkler:

> "A change from JP to JS type fuses is such a minor change that it could hardly be called an amendment of the contract that calls for writing. This kind of minor adjustment is made all the time in items that need to be specially fabricated." [RESPONDENT'S EXHIBIT NO 1, PARA. 13]

(84) The alleged practice of making "minor adjustments" will only be legally relevant if it constitutes a trade usage within the meaning of Art. 9(2) CISG. A trade usage is an established method of doing business that gives rise to an expectation that it will be observed in a particular transaction.

(85) There is no evidence on the facts that any such trade usage exists in such a way as to be binding on the parties within the meaning of Art. 9(2) CISG. Furthermore,

RESPONDENT is precluded by its actions from claiming a trade usage, having expressly requested CLAIMANT's permission to make the change to JS type fuses on 14 July 2005. This indicates that CLAIMANT would not initially be aware of any such a usage (and could therefore not be bound by it). Moreover, by contacting CLAIMANT and asking permission to make the swap, RESPONDENT concedes by its actions that the change is more than a minor alteration.

(86) The delivery of JS type fuses instead of JP type fuses therefore amounts to delivery of non-conforming goods under Art. 35(1) CISG.

2.2. The Contract was not validly amended

(87) Contrary to RESPONDENT's contention, the Contract was not validly amended to allow for the delivery of JS type fuses. In particular, the oral agreement made in the telephone call between Mr Stiles (RESPONDENT's Sales Manager) and Mr Hart (CLAIMANT's employee) on 14 July 2005 did not amend the Contract.

(88) The Writing Clause in the Contract prevents the parties from making oral amendments, and no written amendment was made by the parties [II.2.2.1]. Furthermore, the oral agreement could not circumvent the Writing Clause so as to amend the Contract in spite of it [II.2.2.2]. Even if the Tribunal should find that the oral agreement could amend the Contract notwithstanding the Writing Clause, the agreement does not bind CLAIMANT because Mr Hart had no authority to amend the Contract on behalf of CLAIMANT [II.2.2.3]. Finally, CLAIMANT is not precluded from asserting the Writing Clause by Art. 29(2) CISG [II.2.2.4].

2.2.1. RESPONDENT did not comply with the Writing Clause

(89) By clause 32 of the Contract, the parties agreed that "Amendments to the contract must be in writing". On the facts, the parties have not amended the Contract in writing. RESPONDENT made no written request for an amendment to provide for the substitution of JS type fuses [CLAIMANT'S EXHIBIT NO. 2, PARA. 4]. Indeed, CLAIMANT received no written communication of any sort from RESPONDENT that could have constituted a written amendment within the meaning of the Writing Clause. The contractual specification of JP type fuses therefore remains in force.

2.2.2. Oral agreement did not circumvent the Writing Clause

(90) The oral agreement between Mr Stiles and Mr Hart did not and could not circumvent the Writing Clause. According to Art. 29(2) CISG, a contract may be modified or terminated by the mere agreement of the parties. If, however, a written contract contains a provision that any modification or termination of the contract must be in writing, then the parties cannot modify or terminate the contract otherwise than in writing [MAGNUS IN FERRARI/FLECHTNER/BRAND, ART. 29 PARA. 6; DATE-BAH IN BIANCA/BONELL, ART. 29 PARA. 2.3; SONO IN SARCEVIC/VOLKEN, P. 130]. Given the clear language of the Writing Clause, Art. 29(2) CISG is applicable. Thus the Contract was not validly amended by oral agreement to allow for the delivery of JS type fuses.

(91) It cannot be argued that the parties have derogated from the provisions of Art. 29(2) CISG within the meaning of Art. 6 CISG. Art. 6 CISG requires at least an implied derogation that results clearly from the common intention of the parties [KAROLLUS IN HONSELL, ART. 29 PARA. 15; GRUBER IN MÜNCHENER KOMMENTAR ZUM CISG, ART. 29 PARA. 8; RECHTBANK VAN KOOPHANDEL, *HASSELT*, 18 OCTOBER 1995 (BELGIUM); ICC ARBITRATION AWARD 7660/JK, 23 AUGUST 1994 (FRANCE); LG STUTTGART 13 AUGUST 1991 (GERMANY)]. On the facts, there is no evidence that either Mr Hart or Mr Stiles expressed any intention to derogate from Art. 29(2) CISG during their telephone call.

(92) Furthermore, RESPONDENT cannot argue that the oral agreement in the telephone call impliedly amended the writing clause. Oral agreements cannot overrule a written form requirement offhand. Otherwise, the sense and purpose of the first sentence of Art. 29(2) CISG would be totally avoided since such a possibility contradicts the parties' intentions of including a writing clause [MAGNUS IN FERRARI/FLECHTNER/BRAND ART. 29, P. 610; DATE-BAH IN BIANCA/BONELL ART. 29, 2.3 ET SEQQ.; SCHLECHTRIEM IN SCHLECHTRIEM/SCHWENZER (2004) ART. 29 PARA. 5 ET SEQQ.; RUDOLPH, ART. 29 PARA. 1; *NV A.R. V. NV I.*, HOF VAN BEROEP, 15 MAY 2002 (BELGIUM); *LG BADEN-BADEN* DECISION OF 3 DECEMBER 1982 (GERMANY); ICC ARBITRATION AWARD 9117, MARCH 1998 (SWITZERLAND); SEE ALSO PAROLE EVIDENCE RULE: *JACOBS V. BATAVIA AND GENERAL PLANTATIONS TRUST* [1924] 1 CH. 287 AT P. 454].

(93) Admittedly, German law recognises an exception to this rule in the event that the writing clause is part of pre-drafted general terms and conditions [BGH 29 JUNE 1983 (GERMANY); SIMILAR: BGH 20 OCTOBER 1994 (GERMANY); OLG DÜSSELDORF 1 JUNE 2006 (GERMANY)]. In such cases, the parties' agreement to modify the contract orally prevails over the writing clause due to the fact that general terms and conditions are not individually negotiated by

the parties. However, even if this principle were to apply under the CISG (and there is no authority suggesting that it does), it would not be applicable on the facts since the Writing Clause was not contained in pre-formulated terms and conditions.

(94) In conclusion, therefore, the Writing Clause was not circumvented by the oral agreement made between Mr Stiles and Mr Hart.

2.2.3. Mr Hart had no authority to amend the Contract

(95) Even if the Tribunal should find that the Contract could have been validly amended during the telephone conversation between Mr Stiles and Mr Hart, such an amendment would not bind CLAIMANT. Mr Hart had no actual authority to amend the Contract [II.2.2.3.1]. Nor did Mr Hart have apparent authority to do so [II.2.2.3.2]. Finally, CLAIMANT did not ratify the alleged amendment [II.2.2.3.3].

(96) The question of agency is not covered by the CISG and is therefore dealt with on the basis of the applicable domestic law [CF. ART. 4 CISG; OGH 22 OCTOBER 2001 (AUSTRIA); TRIBUNAL CANTONAL VALAIS 19 SEPTEMBER 2005 (SWITZERLAND)]. The applicable domestic law is the 1983 Geneva Convention on Agency in the International Sale of Goods ("the Agency Convention") [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 16].

2.2.3.1. Mr Hart had no actual authority

(97) Art. 14(1) of the Agency Convention provides that, where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal. In agreeing to the substitution of JS type fuses, Mr Hart acted without authority. CLAIMANT is therefore not bound by his agreement with Mr Stiles.

(98) Mr Hart, as procurement professional, had authority to sign contracts up to USD 250,000 [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 17]. He would therefore be in principle authorised to conclude contracts like the Contract. However, Mr Hart had no authority with regard to the Contract because that transaction was being dealt with exclusively by Mr Konkler [CLAIMANT'S EXHIBIT NO. 3]. This exclusivity can be seen in the fact that Mr Hart did not receive authority for the project during Mr Konkler´s absence. It was important to CLAIMANT that only Mr Konkler dealt with this Contract. Mr Hart was only supposed to deal with general inquiries, and not with more important issues such as amending the Contract [CF. PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 17]. Mr Hart was therefore not given actual authority to deal with this particular issue [FOR AN EXAMPLE OF

SUBJECT-MATTER RESTRICTIONS ON AN EMPLOYEE'S ACTUAL AUTHORITY, SEE *BUTWICK V. GRANT* [1924] 2 K.B. 483 (CA)].

2.2.3.2. Mr Hart had no apparent authority

(99) CLAIMANT is not bound by Mr Hart's agreement with Mr Stiles by way of apparent authority pursuant to Art. 14(2) Agency Convention. Under this provision, a principal can be bound by the actions of an agent without authority if two conditions are fulfilled. Firstly, the principal must have conducted himself in a manner which gives rise to the appearance that the agent has authority. Secondly, a third party must rely on that appearance reasonably and in good faith. If these two conditions are fulfilled, the principal will be liable as if the apparent agent actually had authority [BONELL, PAGE 740; COMPARABLE SOLUTION ON NATIONAL LEVEL, CF. FOR GERMAN LAW RG 16 JANUARY 1923, FOR ENGLISH LAW *BRITISH BANK OF THE MIDDLE EAST V. SUN LIFE ASSURANCE CO OF CANADA* [1983] 2 LLOYD'S REP. 9].

(100) Neither of these two conditions is fulfilled on the facts. CLAIMANT's actions have not given rise to the appearance that Mr Hart had authority to amend the Contract. In particular, the simple fact that the secretary referred Mr Stiles to Mr Hart did not create that appearance. But even if CLAIMANT's actions did give rise to such an appearance, RESPONDENT could not reasonably rely on it. When speaking to Mr Hart, Mr Stiles observed that Mr Hart was not particularly knowledgeable about the area they discussed; he even realised that it was not the area in which Mr Hart usually worked [RESPONDENT ANSWER PARA. 8]. Furthermore, Mr Stiles had so far negotiated exclusively with Mr Konkler. Mr Stiles states that Mr Hart was not sure if a change from JP to JS Type fuses would be acceptable to Mr Konkler, and recalls Mr Hart saying that he had no independent judgement on the whole matter [RESPONDENT'S EXHIBIT NO. 1]. This indicates that Mr Stiles suspected that Mr Hart was not responsible for the project and that Mr Konkler was the only person authorised to make decisions concerning the Contract.

(101) In summary, Mr Hart had no apparent authority to amend the Contract so as to bind CLAIMANT.

2.2.3.3. CLAIMANT did not ratify the alleged amendment

(102) According to Art. 15(1) Agency Convention, the principal may ratify an act by an agent who acted without authority or who acted outside the scope of his authority. Such a ratification causes the agent's unauthorised act to have the same effect as if it had been committed with authority [ART. 15(1)(2) AGENCY CONVENTION]. CLAIMANT however refused to ratify the amendment of the Contract [CF. STATEMENT OF CLAIM PARA. 17].

(103) In conclusion, since Mr Hart had neither actual nor apparent authority to agree to an amendment of the Contract, and since CLAIMANT did not ratify his oral agreement with Mr Stiles, CLAIMANT is not bound by that agreement. The contract has therefore not been amended.

2.2.4. CLAIMANT is not precluded from asserting the Writing Clause

(104) RESPONDENT argues that CLAIMANT is precluded by its conduct from asserting the Writing Clause within the meaning of the second sentence of Art. 29(2) CISG. This contention is wrong.

(105) The second sentence of Art. 29(2) CISG provides that a writing clause cannot be invoked by a party who by its conduct aroused the impression of not relying on the clause while the other party relied upon that conduct [SEE MAGNUS IN FERRARI/FLECHTNER/BRAND ART. 29, P. 610; BGH 2 JUNE 1976 (GERMANY); ARBITRATION AWARD 107/2002, 16 FEBRUARY 2004 (RUSSIA); CIETAC ARBITRATION AWARD, 16 DECEMBER 1997 (CHINA); *GRAVES IMPORT COMPANY LTD. & ITALIAN TRADING COMPANY V. CHILEWICH INTERNATIONAL CORP.* 1994 U.S. DIST. LEXIS 13393 (S.D.N.Y. 21 SEPTEMBER 1994) (USA)]. RESPONDENT argues that CLAIMANT's conduct indicated that it was not relying on the Writing Clause, and states in para. 23 of its Answer that there can be "no question that [RESPONDENT] relied on Mr Hart's decision".

(106) On the facts, no conduct by CLAIMANT precludes it from asserting the Writing Clause. The only conduct that comes into question is Mr Hart's telephone call with Mr Stiles. As noted above, Mr Hart was acting outside his authority in agreeing to the substitution of JS type fuses. But even if Mr Hart had authority to bind CLAIMANT, his actions were not intended to be inconsistent with the Writing Clause. This is demonstrated by the fact that he expected to receive a written request for an amendment from RESPONDENT, which he intended to circulate among all involved parties for approval [CLAIMANT'S EXHIBIT NO. 2].

(107) This expectation was not unjustified for several reasons. Firstly, even though both parties were under tight time pressures, any written confirmation via fax or e-mail could have been processed in a short period of time. The fact that RESPONDENT could sign and return a copy of the Contract to CLAIMANT on the same day [RESPONDENT'S ANSWER, PARA. 4] indicates that RESPONDENT was in a position to communicate quickly and effectively with CLAIMANT in written form. Therefore, it cannot be argued that a written request for an amendment would have taken too much time. Even more telling is the fact

that RESPONDENT itself drafted the entire Contract with the exception of the Arbitration Clause. It therefore must have been aware of the requirements of the Writing Clause, and would have been obligated to clear up any uncertainty with regard to the status of the oral agreement concluded in the telephone call between Mr Hart and Mr Stiles. In view of this fact, it does not lie in RESPONDENT's mouth to argue that CLAIMANT is precluded from asserting the Writing Clause.

2.3. Alternatively, JS type fuses are not fit for their particular purpose

(108) Even if the Tribunal should come to the conclusion that RESPONDENT is not in breach of its obligations under the Contract pursuant to Art. 35(1) CISG and / or that the Contract was validly amended, RESPONDENT is nonetheless liable because it breached its obligation under Art. 35(2)(b) CISG. CLAIMANT made the particular purpose of the goods known to RESPONDENT [II.2.3.1] and could reasonably rely on RESPONDENT's skill and judgment [II.2.3.2]. Furthermore, the fact that the particular purpose was defined by reference to a standard whose legality is in question can have no effect on RESPONDENT's duties [II.2.3.3]. Because the goods were not fit for their particular purpose, the delivery is in breach of contract.

2.3.1. Particular purpose was made known to RESPONDENT

(109) Art. 35(2)(b) CISG makes a seller of goods liable where such goods are not fit for a particular purpose expressly or implicitly made known to the seller at the time of the conclusion of the contract. A specific purpose for the goods is expressly made known to RESPONDENT in the Contract. A descriptive note on the Contract's technical drawings requires the fuse boards to be "lockable to Equalec's requirements" [STATEMENT OF CLAIM, PARA. 9]. This can only mean that the fuse boards supplied by RESPONDENT must comply with the Equalec requirements for connecting the distribution fuse boards to the electricity supply. This contractually agreed upon specification satisfies the Art. 35(2)(b) CISG requirements of making the specific purpose of the goods known.

(110) Liability under Art. 35(2)(b) CISG requires the use of the goods to be explicitly specified [NETHERLANDS ARBITRATION INSTITUTE, CASE NO. 2319, 15 OCTOBER 2002]. Taken in the context of the transaction as a whole, the specification that the fuse boards be "lockable to Equalec's requirements" is sufficient for that purpose. Clearly, the general purpose of the fuse boards was to allow CLAIMANT to have the Mountain View development connected to the electrical grid. The phrase "lockable to Equalec requirements" put RESPONDENT

on notice as to who the supplier of electricity for the Mountain View site was, and that the requirements of that supplier had to be complied with. In other words, it notified RESPONDENT that the particular purpose of the goods was to be connected to Equalec's grid. Therefore, RESPONDENT is liable for breach of contract for failing to deliver goods fit for that particular purpose. If RESPONDENT had wished to avoid such liability, it was open to it to raise an objection to the specification and request an open-ended term that did not require compliance with Equalec requirements [SCHWENZER IN SCHLECHTRIEM/SCHWENZER (2005) ART. 35 PARA. 21].

(111) Even if RESPONDENT was not actually aware of the particular purpose of the goods, it may be deemed to have been made aware of that purpose within the meaning of Art. 35(2)(b) [LG ELLWANGEN 21 AUGUST 1995 (GERMANY)]. RESPONDENT will be treated as if the intended use was made known to it as long as it would have been possible for a reasonable seller to recognise the particular purpose from the circumstances [SCHWENZER IN SCHLECHTRIEM/SCHWENZER (2005) ART. 35 PARA. 21].

(112) Confronted with a specification such as "lockable to Equalec requirements", a reasonable seller would have checked what those requirements were. As the requirements were publicly available on the Equalec website [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 24], it is submitted that RESPONDENT has constructive knowledge of the requirements. Constructive knowledge suffices for Art. 35(2)(b) CISG [LG ELLWANGEN 21 AUGUST 1995 (GERMANY)]. A reasonable seller is expected to 'define' and 'qualify' the quality and characteristics of the goods he has to deliver [BGH 8 MARCH 1995 (GERMANY)]. Given this, it would have been reasonable to expect the seller (RESPONDENT) to check Equalec's website and ascertain the requirements it was expected to comply with.

2.3.2. CLAIMANT reasonably relied on RESPONDENT's skill and judgement

(113) Liability under Art. 35(2)(b) CISG further requires that the buyer could reasonably rely on the seller's skill and judgment. CLAIMANT through its employee Mr Hart reasonably relied on RESPONDENT's skill and judgement. CLAIMANT as a building developer cannot be expected to be as knowledgeable about electrical installations as RESPONDENT, which is a specialist manufacturer of such installations. This disparity in knowledge and CLAIMANT's reliance on RESPONDENT's expertise is evidenced by the discussion between Mr Hart and Mr Stiles. Mr Hart said that he was "not particularly knowledgeable" about the electrical equipment, and asked Mr Stiles for a recommendation. Mr Stiles assured Mr Hart that, given the installation in which the fuse boards would be

used, "either JP or JS fuses could be used." Moreover, he pointed out that RESPONDENT "had delivered both JP and JS fuses to customers in Equatoriana in the past." [RESPONDENT'S ANSWER PARA. 8]

(114) Given this disparity in expertise, CLAIMANT's reliance was entirely reasonable [MAGNUS IN HONSELL, ART. 35 PARA. 22]. Mr Stiles was the Sales Manager of Electrodynamics S.A. (RESPONDENT), a corporation specialising in the fabrication and distribution of electrical equipment [RESPONDENT'S ANSWER, PARA. 2]. Furthermore, RESPONDENT urged CLAIMANT to make a quick decision since the fuse boards had to be equipped with supports for fuses of the proper size [RESPONDENT'S ANSWER PARA. 7]. CLAIMANT, having no experience in this sector, reasonably relied on RESPONDENT's judgement.

2.3.3. Potential illegality of Equalec requirements is irrelevant

(115) RESPONDENT might argue that Equalec's standards were illegal and that RESPONDENT cannot therefore be expected to comply with them. This would not be correct. Even if Equalec's standards are illegal, RESPONDENT's failure to comply with the requirement that the fuse boards be "lockable to Equalec's requirements" would still amount to a breach of contract. If the Equalec standards were found to be unreasonably high and therefore illegal, it would not mean that private contracting parties could not validly agree to perform the contract to those high standards. The further question of illegality, namely whether CLAIMANT's failure to lodge a complaint with the Commission excuses RESPONDENT from liability for delivering nonconforming goods, will be dealt with in the following [BELOW: II.3.3].

2.4. CLAIMANT has not accepted the goods

(116) RESPONDENT has not raised the issue of acceptance of goods in its Answer. Nonetheless, it should be noted for the sake of completeness that CLAIMANT is not barred from rejecting the non-conforming goods by reason of acceptance. In particular, despite the fact that CLAIMANT has both taken delivery and paid for and installed the fuse boards, it is not barred from claiming damages for breach of contract from RESPONDENT.

(117) Unlike some common law systems [E.G ENGLISH SALE OF GOODS ACT S35], CISG does not recognise a concept of acceptance of goods that precludes a buyer from rejecting a defective delivery. Art. 39(1) CISG provides that "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to

have discovered it." CISG contains no other grounds on which a buyer can lose the rights that arise on delivery of non-conforming goods. In particular, CISG offers no legal basis for an argument that a buyer can be precluded from claiming damages by accepting the goods.

(118) It is not disputed before the Tribunal that CLAIMANT notified RESPONDENT in a manner complying with Art. 39(1) CISG [PROCEDURAL ORDER NO. 1, PARA 12]. Therefore, CLAIMANT retains all rights which arise from RESPONDENT's breach of contract.

3. CLAIMANT is entitled to recover its loss amounting to USD 200,000

(119) CLAIMANT may claim damages amounting to USD 200,000 under Arts. 45(1)(b), 74 CISG. The loss was caused by RESPONDENT's breach of contract [II.3.1] and was foreseeable at the time of the conclusion of the contract [II.3.2]. Additionally, the fact that CLAIMANT did not pursue a remedy against Equalec before the Commission does not excuse RESPONDENT's failure to deliver conforming goods [II.3.3].

3.1. RESPONDENT's breach of contract caused CLAIMANT loss

(120) CLAIMANT's loss resulted from RESPONDENT's breach of contract. It is standard practice to award damages to an aggrieved party who had made reasonable expenditures as a consequence of a contract that has been breached [UNCITRAL DIGEST OF ART. 74 CASE LAW, PARA. 20; *DELCHI CARRIER S.P.A. V. ROTOREX CORP.* US DISTRICT COURT N.D. N.Y., 9 SEPTEMBER 1994; OLG HAMM 9 JUNE 1995 (GERMANY)]. Here, the loss consists of the expenses incurred through the substitute transaction with Equatoriana Switchboards Ltd. and through the removal and replacement of the defective fuse boards.

(121) Where loss is suffered as a result of a breach of contract, the aggrieved party may claim damages for the loss from the party in breach under Art. 74 CISG. It is usually enough if one party's conduct directly or indirectly leads to another party's loss (*conditio sine qua non*, "but-for" rule) [GRUBER AND STOLL IN SCHLECHTRIEM/SCHWENZER (2004) ART. 74, PARA. 23; SCHÖNE IN HONSELL, ART. 74, PARAS. 20, 21].

(122) In the case at hand, the loss caused by RESPONDENT's breach amounts to "consequential damages" because the reason why CLAIMANT suffered the loss lies in the delivery of non-conforming goods. Had RESPONDENT delivered what was promised under the Contract, namely fuse boards with JP type fuses, CLAIMANT would not have had to buy and install substitute fuse boards from Equatoriana Switchboards Ltd. Therefore, the loss would not have been incurred.

(123) The general principle is that CLAIMANT is entitled to damages to compensate for the full loss. It should be placed in the same economic position it would have been if the party in breach had complied with the terms of his contract [*DELCHI CARRIER S.P.A. V. ROTOREX CORP.* (US CIRCUIT COURT OF APPEALS) (USA), 6 DECEMBER 1995; ARBITRAL TRIBUNAL VIENNA 15 JUNE 1994 (AUSTRIA); SECRETARIAT COMMENTARY ART. 74]; SUTTON, SECT. III, PARA. B I]. On the facts, CLAIMANT will only be fully compensated if it is awarded USD 200,000, comprised of the cost of the substitute goods and of the cost of replacing the fuse boards [STATEMENT OF CLAIM, PARA. 31].

3.2. The damages caused were foreseeable to RESPONDENT

(124) Art. 74 CISG states that a party may claim 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. RESPONDENT ought to have foreseen the loss suffered by CLAIMANT, taking into account the content of the Contract, the availability of Equalec's policy and RESPONDENT's professional status.

(125) Had RESPONDENT paid more attention to the content of the Contract, it would have noted that the fuse boards were required to meet Equalec's requirements. This should have led it to ask what Equalec's requirements were. Had it done so, it would have discovered that Equalec would not connect to fuse boards with JS type fuses on circuits of this description. The risk of loss to CLAIMANT from Equalec's refusal to connect was obvious.

(126) The CISG uses an objective standard to judge what the party in breach has to foresee or ought to have foreseen under the contract. The question is whether a reasonable person in the position of the party in breach at the time the contract was concluded could have foreseen the loss as a probable consequence [OGH 14 JANUARY 2002 (AUSTRIA); BGH 24 OCTOBER 1979 (GERMANY) PARA. 3.2; ENDERLEIN/MASKOV ART. 74 PARA. 10; LIU PARA. 14.2.2; KNAPP IN BIANCA/BONELL ART. 74 PARA. 2.8]. In the light of this objective standard, knowledge will be imputed to the party in breach if it can be objectively considered that such knowledge is based on the experience of the party as a "merchant" [LIU, PARA. 14.2.4; MURPHEY PARA. VII E; SAIDOV PARA. I 2(a)].

(127) A reasonable person in the position of a professional electricity equipment fabricator and distributor, i.e. a merchant, would have paid special attention to the technical details easily available on Equalec's website. Such a reasonable person would thereby have

discovered Equalec's policy and foreseen that delivery of fuse boards with JS fuses could cause loss to CLAIMANT. Consequently, the loss suffered by CLAIMANT as a result of the delivery of nonconforming distribution fuse boards was foreseeable to RESPONDENT.

3.3. CLAIMANT's failure to complain to Commission does not excuse RESPONDENT

(128) RESPONDENT appears to argue that CLAIMANT is precluded from seeking an award of damages because CLAIMANT has not pursued its remedy against Equalec [RESPONDENT'S ANSWER PARA. 20]. This argument is wrong and should be rejected.

(129) RESPONDENT's argument seems run as follows: CLAIMANT has not pursued an action against Equalec before the Equatoriana Electrical Regulatory Commission. This constitutes a failure by CLAIMANT to mitigate its loss. Therefore, RESPONDENT is excused of liability for its breach of contract. Admittedly, this does not appear from the exact wording of RESPONDENT's Answer, which states only that CLAIMANT's failure to pursue Equalec "can have no legal consequences" for RESPONDENT [RESPONDENT'S ANSWER PARA 25(d)]. However, this is the question as phrased by the Tribunal in para. 11 of Procedural Order No. 1.

(130) RESPONDENT is correct that CISG places parties under an obligation to mitigate their loss. Art. 77 CISG sets forth the principle of prevention applied in several legal systems. Under this principle the party not in breach cannot simply wait passively for the loss to be incurred and then sue for damages. Such a party is obliged to take adequate preventative measures to avoid loss [SAIDOV II 4(a); KNAPP IN BIANCA/BONELL, ART. 77, PARA. 2.1; OPIE PARA. III]. However, this principle does not apply on the facts. Firstly, the alleged illegality of Equalec's policy is far from certain [II.3.3.1]. Secondly, even if Equalec's policy was determined to be illegal, CLAIMANT would have suffered substantial damages by pursuing a remedy through the Commission [II.3.3.2]. Thirdly, CLAIMANT's alleged right of action against Equalec does not preclude it from seeking damages for breach of contract from RESPONDENT [II.3.3.3].

3.3.1. Equalec's policy is not manifestly illegal

(131) RESPONDENT contends that Equalec "could not by law refuse to connect to distribution fuse boards using JS type fuses" [RESPONDENT'S ANSWER PARA. 19]. Presumably in support of this contention, RESPONDENT submits Arts. 14 and 15 of the Equatoriana Electric Service Regulatory Act [RESPONDENT'S EXHIBIT NO. 4]. Nothing in the

wording of these provisions gives CLAIMANT an unequivocal right to have Equalec connect to fuse boards containing JS fuses. CLAIMANT would only have such a right if the requirement to use only JP type fuses on circuits of less than 400 amperes was "undue or unjust" within the meaning of Art. 14 Equatoriana Electric Service Regulatory Act. No evidence has been forwarded to suggest that such a requirement is either undue or unjust. Indeed, as Equalec's letter to CLAIMANT demonstrates [CLAIMANT'S EXHIBIT NO. 4], Equalec based its policy on rational considerations of safety and good business practice. As such, the likelihood of success of any action against Equalec before the Commission is highly uncertain.

(132) This being the case, and with regard to CLAIMANT's obligation to provide occupancy to its lessees on a very short timeframe, RESPONDENT cannot argue that CLAIMANT was under a duty to postpone its right of action against RESPONDENT on such a weak legal basis.

3.3.2. Time restraints made an action against Equalec unreasonable

(133) The time restraints under which CLAIMANT was working would have rendered an enforcement action against Equalec pointless in any event. CLAIMANT could not have launched a complaint against Equalec before receiving the written explanation of its policy on 15 September 2005 [CLAIMANT'S EXHIBIT NO. 4]. Yet CLAIMANT was under a duty to deliver occupancy of Mountain View to its lessees by 1 October 2005 [RESPONDENT'S EXHIBIT NO. 1]. Although the record suggests that there might have been some prospect of movement by Equalec within a week after proceedings with the Commission were initiated [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 30], this is clearly a "best case scenario". It is made unlikely by the fact that Equalec had defended their position and justified their policy in writing on 15 September 2005 [CLAIMANT'S EXHIBIT NO. 4].

(134) After filing a complaint, giving Equalec time to respond, allowing the Commission to start their inquiry and giving the Commission time to make a decision, it would be somewhat optimistic for CLAIMANT to expect a settlement of the complaint in its favour, and a subsequent electrical connection, in less than 15 days. Far more likely is that the proceedings would have taken longer, in particular given the unclear legal position with regard to Equalec's duty to CLAIMANT [SEE ABOVE PARAS. 127-128].

(135) Given the uncertainty of the result, pursuing an action through the Commission would have represented a substantial business risk to CLAIMANT. RESPONDENT cannot

therefore argue that CLAIMANT was under a duty to take that course. CLAIMANT was running the risk to suffer a larger sum of loss resulting from the loss of rental income and from the penalty clauses in several lease contracts.

(136) According to the Statement of Claim, the Mountain View Project contains a large number of lease contracts. CLAIMANT required five distribution fuse boards, each distribution fuse board has 20 to 30 fuseways, and each fuse way is for one lessee [STATEMENT OF CLAIM, PARA. 5]. Thus the number of lease contracts could be as high as 100 to 150. The loss of rental income as well as contractual penalties could therefore easily exceed the cost of a substitute transaction and replacement of the installed JS type fuses.

(137) Substitute transactions must be taken into consideration, especially where they would avoid consequential losses following the non- or defective performance of the contract [SAIDOV, PARA. II 4(B); ICC ARBITRATION CASE NO. 8574 OF SEPTEMBER 1996; ICC ARBITRATION CASE NO. 6281 OF 26 AUGUST 1989; OLG CELLE 2 SEPTEMBER 1998 (GERMANY)]. Under the circumstances, it was reasonable for CLAIMANT to source replacement fuse boards to allow the development to be ready for occupancy on 1 October 2005.

3.3.3. CLAIMANT had a choice as to who it wished to sue

(138) Moreover, CLAIMANT has a right of election as to whom to sue. CLAIMANT had a choice of pursuing a claim against either the source of the alleged illegality (Equalec) or against the entity in breach of contract (RESPONDENT). The basic principle of election (*quod approbo non reprobo*) states that it is no defence to argue that CLAIMANT could have remedied his loss against a third party (Equalec) where CLAIMANT has made an election as to who it wishes to sue. Indeed, the common law doctrine goes further than the above general principle and would preclude CLAIMANT from pursuing an action against Equalec at all since it has elected to sue RESPONDENT [*CLARKSON-BOOKER V. ANDJEL* [1964] 2 Q.B. 775 (ENGLAND)]. By submitting its Statement of Claim, CLAIMANT has elected to pursue RESPONDENT; the existence of a supplementary right of action against Equalec does not affect its rights against RESPONDENT.

4. Conclusion: CLAIMANT is entitled to damages for breach of contract

(139) RESPONDENT breached its obligations under the Contract as it did not deliver goods conforming to the original contract description. The Contract was not amended so as to allow the use of JS type fuses in the fuse boards. Even if the oral agreement between Mr Stiles and Mr Hart amounted to a purported amendment of the Contract, CLAIMANT

would not be bound because Mr Hart had no authority to amend the Contract. In the alternative, RESPONDENT delivered goods that were not fit for their particular purpose.

(140) RESPONDENT's breach caused foreseeable loss to CLAIMANT. CLAIMANT is therefore entitled to recover damages in the amount of its loss. CLAIMANT's rights are not affected by the existence of an alleged right of action against Equalec. Therefore, the Tribunal should find RESPONDENT liable to pay damages in the amount of USD 200,000 to CLAIMANT.

III. REQUEST FOR RELIEF

(141) On the basis of the above, CLAIMANT respectfully requests this Tribunal to find as follows:

» FIRST: That the Tribunal has jurisdiction to decide this dispute, either because the Tribunal finds that the Arbitration Clause validly refers to arbitration under Romanian Rules or because RESPONDENT's challenge to the Tribunal's jurisdiction is barred as contrary to good faith.

» SECOND: That CLAIMANT is entitled to recover damages in the amount of USD 200,000 from RESPONDENT for breach of contract.