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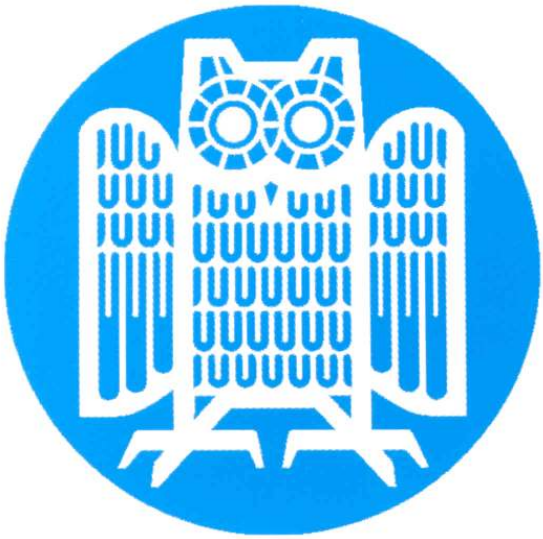
MEMORANDUM FOR RESPONDENT



In the matter of

Equatoriana Office Space Ltd **415 Central Business Centre** **Oceanside, Equatoriana**	**versus**	**Mediterraneo Electrodynamics S.A** **23 Sparkling Lane** **Capitol City, Mediterraneo**
as CLAIMANT		**as RESPONDENT**

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Statement of Facts and Submissions

1. Statement of Facts

(1) On 12 May 2005 Mediterraneo Electrodynamics S.A. ("RESPONDENT"), a company incorporated and doing business in Mediterraneo concluded a contract ("the Contract") for the manufacture, sale and delivery of five distribution fuse boards with Equatoriana Office Space Ltd. ("CLAIMANT"), a company incorporated and doing business in Equatoriana. 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"), which was then under construction.

(2) Engineering drawings are attached to the Contract. These contain two descriptive notes with technical instructions. The Contract stipulates that all amendments to the Contract are to be in writing ("the Writing Clause"). The Contract further contains a clause drafted by CLAIMANT as clause 34 providing for all disputes under the Contract to be submitted to arbitration ("the Arbitration Clause"). CLAIMANT's clause replaced an arbitration clause drafted by RESPONDENT.

(3) In spring of 2005, RESPONDENT's inventory of Chat Electronics JP type fuses was exhausted. Because RESPONDENT was aware of CLAIMANT's preference for Chat Electronics JP type fuses, Mr. Peter Stiles, RESPONDENT's Sales Manager, contacted CLAIMANT by telephone on 14 July 2005 to discuss the situation. Mr. Herbert Konkler, CLAIMANT's Purchasing Director, was on a business trip and unavailable. Therefore, Mr. Stiles was referred to Mr. Steven Hart, a staff member in CLAIMANT's Purchasing Department.

(4) During the conversation Mr. Hart was informed that RESPONDENT could not guarantee to deliver fuse boards equipped with Chat Electronics JP type fuses in time. Mr. Stiles offered Mr. Hart various options, and Mr. Hart decided to incorporate JS type fuses from Chat Electronics. JS and JP type fuses are functionally interchangeable for circuits rated at less than 400 amperes; the fuse boards for Mountain View were to be installed on circuits with ratings varying between 100 and 250 amperes.

(5) Delivery took place on 22 August 2005. CLAIMANT accepted the goods and paid the purchase price on 26 August 2005, after which the fuse boards were installed by a third-party construction contractor.

(6) On 8 September 2005, more than two weeks after delivery, CLAIMANT asked Equalec, the local electricity supplier, to connect the fuse boards to the electrical grid. Equalec refused to make the connection. It cited as a reason an internal policy not to connect to circuits fused with JS type fuses unless the circuits were rated at more than 400 amperes.

(7) As a result, CLAIMANT caused the fuse boards to be ripped out and replaced with fuse boards manufactured by a third party. CLAIMANT made no attempt to pursue an administrative remedy against Equalec before the Equatoriana Electrical Regulatory Commission ("the Commission"), despite the fact that the Commission had authorised the use of JS type fuses in fuse boards such as those under dispute.

(8) 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.

2. Submissions

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

» This arbitral tribunal ("the Tribunal") has no jurisdiction to decide this dispute.

» Alternatively, CLAIMANT has no claim for damages.

» Therefore, the Tribunal should dismiss this action.

Argument

I. Tribunal has no jurisdiction to decide this dispute

(10) RESPONDENT accepts CLAIMANT's submissions as to the applicability of the UNCITRAL Model Law ("the Model Law") and CLAIMANT's reliance on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") [CLAIMANT'S MEMORANDUM, PARAS. 4-5].

(11) On that legal basis, this Tribunal has no jurisdiction to determine this dispute. Within the Model Law context, jurisdiction can be conferred on an arbitral tribunal only by contractual agreement, and the parties have made no such agreement.

> Arbitration is fundamentally a creature of contract, characterised by consent. As a matter of law, no party should be forced to arbitrate its claims unless that party has agreed to do so [*E.I. DU PONT DE NEMOURS AND CO V. RHODIA FIBER AND RESIN INTERMEDIATES SAS* [2001] INT'L ARB. REP. 13, 15 ET SEQ, (US COURT OF APPEALS FOR THE 3RD CIRCUIT)].

(12) CLAIMANT argues at length that the parties entered into an arbitration agreement [CLAIMANT'S MEMORANDUM, PARAS. 6-8] and that this agreement demonstrates intent to submit their disputes to arbitration [CLAIMANT'S MEMORANDUM, PARAS. 10-11]. It is not disputed that a written arbitration clause exists and that the Contract was duly signed by both parties.

(13) Nonetheless, however, the Arbitration Clause does not provide a legal basis for this Tribunal's jurisdiction because it contains no valid agreement on institutional arbitration. It is fundamentally ambiguous and therefore void [1]. Even if the Arbitration Clause were held to be partially valid, this Tribunal still would not have jurisdiction under it. At best, the Arbitration Clause provides for *ad hoc* arbitration, and this Tribunal is not an *ad hoc* tribunal [2]. Alternatively, even if the parties agreed on institutional arbitration, the Arbitration Clause is rendered unenforceable by the ambiguity as to the applicable procedural rules [3]. Lastly, contrary to CLAIMANT's arguments, the Tribunal has no jurisdiction to find in favour of its own jurisdiction based solely on general considerations of "efficiency" [4].

1. No basis for Tribunal's jurisdiction in the Arbitration Clause

(14) The present Tribunal was constituted according to the rules and with the support of CICA, which is based in Bucharest. As will be shown, the parties never agreed to submit their disputes to an arbitral tribunal so constituted. The Arbitration Clause is

fundamentally ambiguous [1.1]. The ambiguity cannot be resolved even by benevolent interpretation [1.2]. Therefore, the Arbitration Clause is void and cannot form the basis of this Tribunal's jurisdiction [1.3].

1.1. The Arbitration Clause is fundamentally ambiguous

(15) The Arbitration Clause in para. 34 of the Contract provides (insofar as pertains to the identity and constitution of the arbitral tribunal) 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 Arbitration award shall be final and binding.

(16) CLAIMANT submits that this wording is sufficient to provide a legal basis for this arbitration [CLAIMANT'S MEMORANDUM, PARA. 17 ET SEQQ.], suggesting that the Arbitration Clause necessarily provides for arbitration under the auspices of CICA and applying that institution's Rules of Arbitration ("Romanian Rules"). For CLAIMANT's argument to be successful, two issues must be established. Firstly, it must be shown that the Arbitration Clause provides for the applicability of Romanian Rules. Secondly, it must be shown that this provision necessarily implies the involvement of CICA. CLAIMANT's submissions fail to establish either of these two propositions.

(17) The Arbitration Clause contains no agreement on arbitration under Romanian Rules [1.1.1]. Furthermore, it does not demonstrate any common intention of the parties to submit to an *institutional* arbitration at all, much less to an institutional arbitration under the auspices of CICA [1.1.2]. The Arbitration Clause is to be interpreted against CLAIMANT in light of the principle of construction *contra proferentem* [1.1.3].

1.1.1. No clear choice of Romanian Rules

(18) The Arbitration Clause refers to arbitration under "International Arbitration Rules used in Bucharest". CLAIMANT argues that these words are tantamount to an explicit choice of Romanian Rules [CLAIMANT'S MEMORANDUM, PARAS. 17-18]. This argument does not withstand scrutiny.

(19) As noted in RESPONDENT's Answer to the Statement of Claim [PARA. 15], Romanian Rules cannot be considered to be the rules referenced by the Arbitration Clause because Romanian Rules are entitled "Rules of Arbitration" and not "International Arbitration Rules". The words "International Arbitration Rules" are

capitalised in the Arbitration Clause. This indicates that they are to be understood as a name of a set of rules rather than merely as a descriptive designation.

(20) Furthermore, even if the words "International Arbitration Rules used in Bucharest" are to be understood as merely descriptive, they do not describe Romanian Rules. While Romanian Rules do have a connection with Bucharest, they are not international arbitration rules. Rather, their primary purpose and general tenor is directed to domestic arbitrations. Several factors support this conclusion:

(21) Firstly, only six of the eighty-one Articles of Romanian Rules make provision for international arbitrations [ARTS. 72-77 ROMANIAN RULES]. These six Articles are all drafted as exceptions to the default provisions of Romanian Rules, which are directed at Romanian parties.

(22) Secondly, even these exceptional provisions do not render Romanian Rules international rules. They do not set aside certain provisions of Romanian Rules that are entirely inappropriate to international arbitrations. Examples of such inappropriate provisions include the references to Romanian domestic law in Arts. 26(1), 30, and 54(2) Romanian Rules. Even more unsuitable is Art. 54^{1}(1) Romanian Rules, which provides that:

> The plea on the unconstitutionality of laws or ordinances can be raised at the request of either party or, ex officio, by the Arbitral Tribunal, under the terms of the law on the organization and operation of the Constitutional Court.

(23) Such a referral can have no place in an international arbitration like the present one, in which no Romanian parties are involved and the dispute is subject to non-Romanian substantive and procedural law.

(24) Thirdly, CICA's practice demonstrates that Romanian Rules are predominantly domestic in character. Indeed, a full eighty percent of arbitrations conducted using Romanian Rules are domestic arbitrations [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 11].

(25) In light of these issues, CLAIMANT's argument that the phrase "International Arbitration Rules used in Bucharest" necessarily refers to Romanian Rules [CLAIMANT'S MEMORANDUM, PARAS. 17-18] is untenable. Romanian Rules cannot be deemed to be international arbitration rules within the meaning of the Arbitration Clause. Therefore, this Tribunal, which was constituted under Romanian Rules, cannot have jurisdiction to decide disputes arising out of or in connection with the Contract.

1.1.2. No clear choice of CICA as an institution

(26) After contending that the Arbitration Clause provides for the applicability of Romanian Rules, CLAIMANT goes on to argue that "by choosing the arbitration rules used in Bucharest, the parties have *implicitly designated* a local arbitral institution which uses International Arbitration Rules" [CLAIMANT'S MEMORANDUM, PARA. 17, EMPHASIS ADDED]. But the idea of an implicit designation of an arbitral institution is contrary to law and to the true meaning of the Arbitration Clause. As a matter of law, a provision in an arbitration agreement calling for institutional arbitration must be unambiguous [1.1.2.1]. But the wording of the Arbitration Clause is anything but unambiguous. Not only is it impossible to interpret these words as a clear choice of CICA: the clause fails to evidence a clear intention to submit disputes to institutional arbitration at all [1.1.2.2].

1.1.2.1. As a matter of law the intent to institutional arbitration must be unambiguous

(27) The choice between institutional and *ad hoc* proceedings is crucial for any arbitration and must therefore be particularly clear and unambiguous [REDFERN/HUNTER PARA. 1-97; SCHMITZ P. 594; MÜNCH IN MÜNCHENER KOMMENTAR ZUR ZPO § 1029, PARA. 49; BOND PP. 65, 67]. As its name suggests, *ad hoc* arbitration is highly flexible. Under the Model Law, *ad hoc* tribunals are vested with a wide discretion with regard to the conduct of the arbitration [ART. 19 MODEL LAW]. The only limits to the flexibility of an *ad hoc* arbitration are the arbitration agreement and the mandatory rules of the Model Law [REDFERN/HUNTER PARA. 1-104].

(28) Institutional arbitrations are fundamentally different. They are characterised by the involvement of an institution which will commonly have broad powers regarding the constitution of the tribunal and the conduct of the arbitration. The involvement of an arbitral institution changes the legal relationship between the parties and the arbitrators, and between the parties *inter se* [LACHMANN, PARA. 1473; SCHLOSSER IN STEIN/JONAS § 1025 PARA. 7]. If the arbitrators are appointed through an institution and accept their nomination they are contractually bound to the corresponding institution [SCHLOSSER IN STEIN/JONAS § 1025 PARA. 7]. The rules of this institution will apply to the whole proceedings.

(29) Generally, these rules give broad powers to the institution. The institution will not only administer the arbitration but will also intervene in the event of difficulties in constituting the arbitral panel. When a party fails to nominate its arbitrator or the arbitrators cannot agree on a presiding arbitrator, the institution will nominate the

arbitrator [E.G. ART. 25(1) ROMANIAN RULES; ART. 8(4) ICC RULES OF ARBITRATION]. The institution also frequently plays a central role in the event that one of the arbitrators is challenged. Some arbitration rules provide that the institution decides on the merits of the challenge [ART. 11(3) ICC ARBITRATION RULES, ART. 8 INTERNATIONAL DISPUTE RESOLUTION RULES] whereas other arbitration rules provide for a replacement of the arbitrator by the institution [ART. 28(2) ROMANIAN RULES].

(30) Furthermore, the chosen institution assesses the costs of the arbitration according to its Schedule of Fees [ART. 48(6) ROMANIAN RULES; ART. 31 ICC RULES ON ARBITRATION]. Fees and deposits are payable to the institution, which administers their distribution to the arbitrators. By contrast, in an *ad hoc* arbitration, the arbitral panel must reach an agreement with the parties as to the costs except where the applicable rules provide for the tribunal to fix the costs [E.G. ARTS. 38, 39 UNCITRAL RULES], and the arbitrators will have a direct claim against the parties for their fees.

(31) CLAIMANT's arguments fail to recognise these fundamental differences between institutional and *ad hoc* arbitration. The issues outlined above demonstrate that the choice of institutional arbitration is anything but a merely administrative choice. On the contrary, this choice changes the whole legal relationship between the parties and cedes wide-ranging powers to an otherwise uninvolved organisation. Such interference can only be justified on the basis of a clear and unambiguous agreement.

1.1.2.2. No clear choice on the facts

(32) There is nothing in the Arbitration Clause to suggest that the parties contemplated institutional arbitration at all. CLAIMANT appears to assume that a reference to a set of rules used in Bucharest is evidence that the parties intended to submit their disputes to institutional arbitration. This assumption is unwarranted. CLAIMANT's arguments appear to be based on the fact that arbitration agreements that name the rules of an institution are sometimes interpreted as an agreement to arbitration using that institution's procedure [LACHMANN, PARA. 1474]. But such an interpretive technique can have no application to a clause as vague as the Arbitration Clause. Rather, such a presumption is only justifiable where the parties have correctly and unambiguously designated the rules in question and where the name of the rules includes the name of the relevant institution. A good example of such a clear choice can be found in the model arbitration clause suggested by the ICC, which provides:

> All disputes arising out of or in connection with the present contract shall 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.

(33) When compared with this language, the ambiguity in the language of the Arbitration Clause at issue here is manifest. The Arbitration Clause refers only to Bucharest, not to the name of any institution. Any connection with CICA is purely coincidental. RESPONDENT cannot be said to have entered into a contractual relationship with CICA (with all the liabilities such a relationship would entail) on the basis of such an uncertain provision.

(34) CLAIMANT argues that "Both CLAIMANT and RESPONDENT had the intention of arbitrating disputes prior to entering into the contract as evidenced by the fact that both parties had standard arbitration clauses to apply to the contract" [CLAIMANT'S MEMORANDUM, PARA. 10]. It is true that RESPONDENT's initial draft of the Contract contained an arbitration clause. Thus the negotiating history of the Contract provides evidence that the parties intended to submit their disputes to arbitration. However, there is no evidence that the parties' intent was to submit their disputes to *institutional* arbitration. In particular, the fact that RESPONDENT's draft arbitration clause provided for institutional arbitration does not provide such evidence. It provided for arbitration at the Mediterraneo International Arbitration Center, an institution with which RESPONDENT was familiar [PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 15]. It cannot be inferred from this that RESPONDENT had a general intent to submit disputes to arbitration by an institution such as CICA, with which it had had no prior dealings.

(35) Furthermore, there are no other indications on the facts that RESPONDENT (or indeed CLAIMANT) intended to provide for arbitration administered by CICA. In particular, while the choice of Vindobona as the place of arbitration can be explained by reference to CLAIMANT's President's predilection for opera [RESPONDENT'S EXHIBIT NO. 1, P. 24], there is nothing on the facts which would give rise to a connection with CICA. There is no geographical connection with that institution; neither has there been any prior contact between either of the parties and CICA which might suggest that CICA's involvement was intended [PROCEDURAL ORDER NO. 2, CLARIFICATIONS NO. 14 AND 15]. Without such intent, however, the Arbitration Clause cannot be read as providing for arbitration under the auspices of CICA. Therefore, this Tribunal has no jurisdiction under the Arbitration Clause.

1.1.3. Construction of the Arbitration Clause *contra proferentem*

(36) The Arbitration Clause as contained in the final Contract was drafted by CLAIMANT. As a general rule, where there is doubt about the meaning of a contract term, an interpretation against the party who supplied it should be preferred ("*contra proferentem*") [CANARIS/GRIGOLEIT IN HARTKAMP/HESSELINK/HONDIUS/JOUSTRA/DU PERRON/VELDMAN § 206 RESTATEMENT OF CONTRACTS 2D AT 445, PAGE 461]. "[T]he party responsible for drafting the ambiguous or obscure text should not be entitled to rely on that ambiguity or obscurity" [FOUCHARD/GAILLARD/GOLDMAN PARA. 479]. On this basis alone, CLAIMANT's submissions are to be rejected.

1.2. The ambiguity can not be remedied by benevolent interpretation

(37) CLAIMANT contends that any ambiguity in the Arbitration Clause can be resolved by benevolent interpretation, relying on principles which are variously referred to as good faith, "efficiency", *effet utile*, and construction *in favorem validitatis*. But these principles do not assist CLAIMANT on the facts. CLAIMANT may be correct to assert that the policy of the law is to uphold arbitration clauses where this is possible [CLAIMANT'S MEMORANDUM, PARA. 21]. But even the most benevolent interpretation cannot supply an agreement where no common intention can be discerned from the wording of the clause [WILSKE/KRAPFL P. 3; MALEVILLE P. 72]. This Tribunal's competence to engage in purposive interpretation is not unlimited. Benevolent interpretation cannot save a clause which is so ambiguous that any attempt to give it meaning is inherently capricious. Therefore, CLAIMANT's contention that arbitration clauses are to be upheld wherever an intention to arbitrate can be discerned is wrong.

(38) Thus in 1982, the German Federal Supreme Court (*BGH*) considered an arbitration clause which referred to arbitration at an arbitral institution called *Hamburger freundschaftliche Arbitrage* but on the basis of the rules of another arbitral institution, the *Warenverein der Hamburger Börse*. The *BGH* declared the clause to be a nullity because it could be reasonably interpreted in different ways, and the court would not supply an agreement where the parties had not made one themselves [*BGH* 2 DECEMBER 1982 (GERMANY)]. Likewise, the Higher Regional Court of Hamm (*OLG Hamm*) held that an arbitration clause referring to the Arbitration Court of the International Chamber of Commerce domiciled at Zurich was void for uncertainty. The nullity of the clause stemmed from the fact that it was impossible to determine if the parties referred to the Arbitration Court of the Commercial Chamber of Zurich or to the

ICC [*OLG HAMM* 15 NOVEMBER 1994 (GERMANY); SEE ALSO *E.J.R. LOVELOCK LTD V EXPORTLES* [1968] 1 LLOYD'S REP. 163 (ENGLAND: COURT OF APPEAL)].

(39) CLAIMANT relies on a case decided by the *TGI Paris* to support its contentions [CLAIMANT'S MEMORANDUM, PARA. 22; TGI PARIS, ORD. RÉF, 10 APRIL 1990 (FRANCE)]. In that case, a clause referring to "Resolution of disputes: arbitration in Paris" was upheld. However, that case is not authority for CLAIMANT's proposition. It can be distinguished on its facts from the present case. The clause could only be upheld because French domestic law on international arbitration empowers French courts to name the arbitration panel where difficulties with the arbitration clause arise [ART. 1493 FRENCH CODE OF CIVIL PROCEDURE]. That is not the case under the Model Law, which is the law governing this arbitration [ABOVE PARA. (10)], and in any event the French jurisdiction is vested in the state courts and not the arbitral tribunal. Moreover, the case concerned an *ad hoc* arbitration and not an institutional arbitration.

(40) Outside the ambit of this particular provision of the French Code of Civil Procedure, even French courts will not uphold a completely ambiguous arbitration clause. The Court of Appeal of Grenoble (*CA Grenoble*) declared a clause void which referred to the "International Court of Justice of The Hague". Finding that no such institution existed, the court held that the reference could not be interpreted as a designation of the Permanent Court of Justice of the Hague as it did not mention UNCITRAL Rules. [*CA GRENOBLE* 24 JANUARY 1996 (FRANCE)]. Likewise the *TGI Paris* held that a clause designating on the one hand the "Portuguese Association of Transport Agents" and on the other hand "the French equivalent" was not a sufficient basis for an arbitration because a French equivalent did not exist [*TGI PARIS* 14 FEBRUARY 1985 (FRANCE), CITED IN MALEVILLE, P.73].

(41) As noted, the parties' intentions must be made particularly clear where they purport to submit their disputes to institutional arbitration and to entrust a specific institution with the conduct of the arbitration [ABOVE 1.1.2.1]. The intervention of a third party in the dispute settlement process can only be justified by such a clearly expressed intention. Where clear indices are missing as to whether the parties wanted institutional or *ad hoc* arbitration, even the principles of good faith and *effet utile* cannot fill the gap. The principle of party autonomy prevails: nobody should be forced into an arbitration he did not agree to [*E.I. DU PONT DE NEMOURS V. RHODIA FIBER AND RESIN INTERMEDIATES SAS* [2001] INT'L ARB. REP. 13, 15, SEQ, (US COURT OF APPEALS FOR THE 3RD CIRCUIT)].

(42) CLAIMANT correctly notes that there is an internationally recognised judicial policy of benevolent interpretation of arbitration agreements [CLAIMANT'S MEMORANDUM, PARAS. 15, 21, 22]. However, the decisions illustrating this policy are all clearly distinguishable from the case before the Tribunal. In all these cases, the parties referred clearly to institutional arbitration; only the designation of the institution itself was in dispute.

(43) The wording of the Arbitration Clause at issue here is different. It simply can not be determined from the wording of the Clause whether or not the parties wanted institutional arbitration at all, and there are no extraneous facts that would allow this Tribunal to infer such an intention.

(44) In *Mangistaumunaigaz Oil Production Association v United World Trade Inc.* [[1995] 1 LLOYD'S REP 617 (ENGLAND)] the clause provided for "Arbitration, if any, by ICC rules in London". On the particular facts of the case, it was clear that the clause referred to an ICC-administered arbitration. Rather, the question was whether the parties could be said to have agreed to arbitration at all in view of their use of the words "if any". Similarly, the Kammergericht Berlin (*KG Berlin*) upheld a clause referring to the *deutsche zentrale Handelskammer* (German Central Chamber of Commerce), a non-existent institution. In this case too it was completely clear that the parties wanted arbitration administered by an institution: only the designation of the institution was ambiguous [*KG BERLIN* 15 OCTOBER 1999 (GERMANY)].

(45) Where a reference to institutional arbitration is missing the arbitration clause cannot provide a sufficient basis for an institutional arbitral proceeding. The High Court of France (*Cour de Cassation*) annulled an arbitration award rendered by the Arbitral Maritime Chamber of Paris holding that a reference to institutional arbitration was missing in the arbitration clause [*COUR DE CASSATION* 14 DECEMBER 2000 (FRANCE)].

(46) Finally, reference should be made to two decisions of the High Court of Hong Kong in which ambiguous arbitration clauses were upheld. Although CLAIMANT has not submitted them for the Tribunal's consideration, the facts on which these decisions were based have a superficial similarity to the facts before the Tribunal, and the decisions might be argued in support of CLAIMANT's position. However, on closer analysis, even these decisions do not assist CLAIMANT.

(47) In *Lucky-Goldstar Ltd. v Ng Moo Kee Engineering Ltd.*, the arbitration clause provided: "Any […] dispute […] shall be arbitrated in the 3rd country, under the rule of the 3rd country and in accordance with the rules of procedure of the International

Arbitration Association". The named arbitration association did not exist. The court did not even attempt to construe the clause as agreement for institutional arbitration. Regarding the reference to a nonexistent institution, Kaplan J held that "[n]o useful purpose can be served by speculating as to what was actually intended by the use of these words" [[1993] 2 HKLR 113 (HONG KONG)].

(48) In *Guangdong Agriculture Company Ltd. v Conagra International (Far East) Ltd*. the relevant clause provided for arbitration "according to the rules of Hong Kong". Again, the High Court of Hong Kong did not even try to construe this vague provision as an agreement for institutional arbitration [[1993] 1 HKLR 113 (HONG KONG)].

(49) These cases show clearly that even where vague arbitration clauses are upheld by the courts, they will never be construed as an agreement for institutional arbitration unless there is a clear and unambiguous indication that the parties wanted such a proceeding. Such a clear indication is missing on the facts. In conclusion therefore, although a principle of benevolent construction of arbitration clauses exists, it cannot save this Arbitration Clause as an agreement for institutional arbitration.

1.3. The ambiguity renders the Arbitration Clause void

(50) An arbitration agreement that does not permit the determination of the competent arbitral tribunal is a nullity. As CLAIMANT correctly notes, in order to be valid, an arbitration agreement must meet the minimum requirements set out by the New York Convention and the Model Law [CLAIMANT'S MEMORANDUM, PARAS. 12 ET SEQQ.]. According to Art. 7 Model Law, 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 whether contractual or not". An agreement to submit a dispute to arbitration presupposes that the arbitral tribunal that is to be seised of the dispute is at least determinable [MÜNCH IN MÜNCHENER KOMMENTAR ZUR ZPO § 1029, PARA. 49; SCHWAB/WALTER P. 19, PARA. 1A; FOUCHARD/GAILLARD/GLODMANN PARA. 484; LACHMANN PARA. 301].

(51) As has been shown, the Arbitration Clause is so ambiguous as to make it impossible to determine what sort of tribunal it provides for. It is completely unclear if the parties wanted an *ad hoc* tribunal according to some special rules or if they wanted institutional arbitration administered by CICA. This ambiguity renders the clause void.

2. In any case the Arbitration Clause does not provide for arbitration by this Tribunal

(52) Even if the Tribunal holds that the arbitration clause is not wholly void, it is still not sufficient to found this Tribunal's jurisdiction. This is because, even if the Arbitration Clause provides for arbitration, it does not provide for institutional arbitration. Therefore, if the Arbitration Clause is to be accorded any effect at all, it must be as an agreement for *ad hoc* arbitration [2.1]. This Tribunal however is constituted as an institutional tribunal and cannot unilaterally reconstitute itself as an *ad hoc* tribunal [2.2]. Therefore, it is not the tribunal foreseen by the Arbitration Clause, and has no jurisdiction over this dispute.

2.1. If valid agreement, then for *ad hoc*

(53) As noted, the parties have made no agreement for arbitration under a particular institution. All they have done is to designate a non-existent set of rules. But while a reference to institutional rules can under certain circumstances constitute a reference to arbitration under an institution which uses these rules, this does not apply where the reference is to non-existent rules [ABOVE 1.1]. Therefore, if the Arbitration Clause is valid at all, it takes effect as an agreement for *ad hoc* arbitration [*GUANGDONG AGRICULTURE COMPANY LTD V CONAGRA INTERNATIONAL (FAR EAST) LTD* [1993] 1 HKLR 113 (HONG KONG); *LUCKY-GOLDSTAR INTERNATIONAL (H.K.) LIMITED V NG MOO KEE ENGINEERING LIMITED* [1993] 2 HKLR 73 (HONG KONG)].

2.2. This Tribunal is not an *ad hoc* tribunal

(54) CLAIMANT argues that regardless of whether or not the Arbitration Clause effectively provides for institutional arbitration under Romanian Rules, the Tribunal may nonetheless proceed as an *ad hoc* tribunal [CLAIMANT'S MEMORANDUM, PARA. 23]. This argument is legally untenable. A tribunal constituted under the auspices of an institution cannot act as an *ad hoc* tribunal.

(55) By filing the Request for Arbitration with CICA, a contractual relationship arose between CLAIMANT and CICA. In the letter accompanying its Statement of Claim, CLAIMANT nominated Ms Arbitrator 1 [LETTER OF 15 AUGUST 2006, PAGE 3]. In so doing, CLAIMANT contractually submitted to CICA's management of the arbitration. This contractual relationship cannot be terminated by going on with the proceedings as an *ad hoc* arbitration. Rather, it will terminate only with a withdrawal of the claim or by an award by the Tribunal declaring its lack of jurisdiction. Without such a declaration the contractual relationship continues in force.

(56) Moreover the arbitrators themselves are contractually bound to the institution. Ms Arbitrator 1 and Prof. Arbitrator 2 were informed of their nomination by CICA and not by the parties directly [LETTER OF 21 AUGUST 2006, PAGE 16; LETTER OF 5 SEPTEMBER 2006, PAGE 30]. Such a nomination through the institution creates a specific contractual relationship between CICA and the arbitrators [SCHLOSSER IN STEIN/JONAS § 1025 PARA. 8]. This contract imposes on the arbitrators a duty to apply the rules of the nominating institution.

(57) Art. 32(2) Romanian Rules shows that the arbitrators depend on the institution through which they are nominated to administer the proceedings:

> Communication of request, documents, information related to the dispute shall be made by the Secretariat of the Court of Arbitration, without the arbitrators coming in direct contact to the parties.

(58) Thus, all procedural acts of the parties have to pass through the Secretariat of CICA; direct contact between the arbitrators and the parties is avoided.

(59) Art. 48(1) Romanian Rules furnishes another example of the close relationship between the arbitrators and the institution: "The arbitral expenses include (…) the arbitrators' fees". In accordance with this provision, CLAIMANT paid the fees for the arbitration to CICA. CICA in turn pays the arbitrators their fees; the arbitrators are not paid directly by the parties.

(60) This contractual relationship between the arbitral panel and CICA cannot be dissolved simply by continuing proceedings as an *ad hoc* tribunal, but only by an award declining the jurisdiction of the arbitral panel. This is implicit in Romanian Rules, which provide for proceedings to be wound up only by an arbitral award [ART. 56(1) ROMANIAN RULES].

(61) As the Arbitration Clause provides no basis for an institutional arbitration and the arbitration cannot proceed as an *ad hoc* arbitration, this Tribunal must decline its jurisdiction to decide on the dispute between CLAIMANT and RESPONDENT.

3. Ambiguity as to rules renders the Arbitration Clause unenforceable

(62) Even if the Tribunal holds that the Arbitration Clause provides for institutional arbitration administered by CICA, this clause would be inoperative. An arbitration agreement will be inoperative if an award rendered by a tribunal on the basis of the agreement would be unenforceable. Without certainty as to the applicable procedural

rules to be applied, an arbitral award will be unenforceable [3.1]. On the facts, however, it is entirely uncertain whether Romanian Rules or UNCITRAL Rules are applicable [3.2]. The differences between these two sets of rules are anything but *de minimis* [3.3].

3.1. Certainty as to applicable procedural rules is a prerequisite of enforceability

(63) Art. 8 Model Law and Art. 2 New York Convention provide that the parties shall be referred to arbitration unless a court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. In order to be enforceable, the award must comply with the requirements of the New York Convention and the UNCITRAL Model Law. Both statutes provide certain grounds for challenging an arbitral award [ART. 34 (2) A (IV) MODEL LAW, ART. 5(D) NEW YORK CONVENTION]. *Inter alia*, an award will be subject to challenge where the tribunal has not followed the procedure agreed by the parties. An implicit requirement of this ground of challenge is that the procedure to be followed is determinable. If there is a persistent uncertainty as to the rules to follow, the tribunal will be unable to render an enforceable award. Therefore an agreement which is irresolvably ambiguous as to the rules is unenforceable pursuant to Art. 5(d) New York Convention [REDFERN/HUNTER PARA. 3-71]. Any award rendered on the basis of such an agreement can be challenged by the losing party. Such an award would be of little value to the parties.

3.2. The Arbitration Clause is irresolvably ambiguous as to the rules

(64) Even assuming that the Arbitration Clause refers to CICA, it remains irresolvably ambiguous as to the rules to follow. If the parties agreed validly on arbitration by CICA, the Romanian Rules will apply. Under Romanian Rules, the parties to an international arbitration can choose between the procedure provided for by Romanian Rules and the procedure as foreseen by the UNCITRAL Rules [ART. 72 ROMANIAN RULES].

(65) According to the Arbitration Clause, "International Arbitration Rules used in Bucharest" shall apply. As already noted, the CICA's rules are simply called "Arbitration Rules" and not "International Arbitration Rules". The term "international" can have two different meanings in this context. On the one hand, it is possible that the parties only used this term because the institution is called the Court of *International* Commercial Arbitration. In this case, the word "international" could be seen as a mere error of drafting and thus be disregarded. On this analysis, Romanian Rules should apply.

(66) However, this is by no means a necessary conclusion. The choice of the term "international" could have had an eminent meaning for the parties. It is possible that the term was inserted to choose rules that are truly international. Only rules drafted especially for international disputes can be described as truly international. As shown above, Romanian Rules are in many ways inappropriate for international disputes. They contain provisions that are completely unusual in international arbitration [ABOVE 1.1.1]. The possibility to opt out of the Romanian Rules for international disputes underlines the non-international quality of the Rules. By contrast, UNCITRAL Rules are specifically designed for international arbitrations [SCHWAB/WALTER CHAPTER 41 PARA. 10]. On this analysis, UNCITRAL Rules would be applicable.

(67) It follows from the above that two possibilities of interpretation exist and neither of them is preferable. Therefore, there is a persistent ambiguity regarding the rules chosen by the parties. As this ambiguity can not be remedied by interpretation, any award rendered on the basis of the Arbitration Clause would be subject to challenge on the basis that the Tribunal failed to apply the agreed procedure. Contrary to CLAIMANT's contentions, Art. 19(2) Model Law does not grant the Tribunal authority to apply procedural rules of its own choosing. Art. 19(2) will apply only where the parties have made no agreement as to the applicable rules. Where, as on the facts, the parties have made an agreement but that agreement is ambiguous, Art. 19(2) does not empower the Tribunal to set aside that agreement in favour of its own preferred rules.

3.3. The differences between the sets of rules are not *de minimis*

(68) CLAIMANT contends that the ambiguity as to the rules is irrelevant on the basis that the differences between Romanian Rules and UNCITRAL Rules are *de minimis* [CLAIMANT'S MEMORANDUM, PARA. 25]. It is not disputed that there are points of similarity between the two sets of rules, e.g. with regard to the appointment of the arbitrators, the place of arbitration, the applicable law and the costs. But CLAIMANT's argument ignores a number of highly significant differences between the two sets of rules. As will be shown, the differences in approach to the conduct of proceedings are of such importance that the Tribunal cannot reasonably ignore the ambiguity created by the Arbitration Clause.

3.3.1. Differences as to the notifications

(69) Rules on notification and notices are of enormous significance for the conduct of proceedings. As a general rule, a time period will only begin to run if the relevant notification or notice has been effected in accordance with the applicable rules. This can

have an important impact on the proceedings, because provisions regarding default of the parties will only apply where the corresponding time period has run [ART. 50(1) ROMANIAN RULES, ARTS. 2(2) AND 28 UNCITRAL RULES]. Except for the request for arbitration, notifications and notices under Romanian Rules can be served not only by mail, but by e-mail or other electronic forms of communication [ART. 44(2) ROMANIAN RULES]. By contrast, UNCITRAL Rules require notices to be physically delivered to the addressee. Delivery by e-mail or any other form of electronic communication does not constitute valid notice [ART. 2(1) UNCITRAL RULES]. Additionally, Romanian Rules provide in some circumstances for unreasonably short periods of notice [ART 50(3^1) ROMANIAN RULES] which are not contemplated in UNCITRAL Rules. Procedural certainty is impossible if even the way notifications have to be made is uncertain.

3.3.2. Differences as to the conduct of the hearings

(70) UNCITRAL Rules and Romanian Rules exhibit some fundamental differences with regard to the conduct of hearings. Firstly, Romanian Rules do not provide for the possibility to conduct the proceedings on the basis of documents. By contrast, under UNCITRAL Rules the whole proceedings can be conducted on the basis of documents [ART. 15(2) UNCITRAL RULES].

(71) Moreover, the two sets of rules differ in important respects as to the collection of evidence. Under Romanian Rules the parties are obliged to request evidence in the Request for Arbitration, in the Answer or in the written statements submitted before the first hearing [ART. 54(2) ROMANIAN RULES]. A request for evidence submitted after this date will only be accepted under exceptional circumstances. No such rule exists under UNCITRAL Rules. On the contrary, according to Art. 29 UNCITRAL Rules the Tribunal has to inquire before closing the proceedings if the parties have any further evidence to offer. Moreover, the tribunal can require the production of additional evidence at any time. Under Romanian Rules, the tribunal has no such competence. Again, procedural certainty is impossible where it is not even clear up to which date evidence can be produced.

(72) CLAIMANT argues that both sets of rules could lead to a “fair and just” arbitral award [CLAIMANT’S MEMORANDUM, PARA. 27]. It is uncontested that a fair and just award can be rendered both under Romanian Rules and under UNCITRAL Rules. But this is not the point. The issue before the Tribunal is the ambiguity as to which of the two sets of rules has to be applied. In order to render an enforceable arbitral award the tribunal has to apply the rules agreed to by the parties in the arbitration clause. As has been

shown, it is impossible to determine on the facts which rules the parties intended. Furthermore the differences between the two sets of rules are so substantial that they cannot be ignored. Therefore the arbitration clause is inoperative even if the parties agreed on an arbitration administered by CICA.

4. Jurisdiction cannot be founded on "efficiency"

(73) Contrary to CLAIMANT's contentions, the Tribunal is not entitled to find in favour of its own jurisdiction on the basis of general considerations of "efficiency" or good faith [4.1]. Furthermore, RESPONDENT is not precluded from challenging the Tribunal's jurisdiction by the doctrine of good faith [4.2].

4.1. "Efficiency" or good faith cannot replace an agreement

(74) CLAIMANT contends that the doctrines of *effet utile* (which CLAIMANT translates as "efficiency") and good faith allow the Tribunal to conduct these proceedings despite the ambiguity of the Arbitration Clause [CLAIMANT'S MEMORANDUM, PARA. 24]. This contention is wrong in law. The doctrines of efficiency and good faith are rules of construction [FOUCHARD/GAILLARD/GOLDMANN PARA. 476]. They can never by themselves confer jurisdiction on an arbitral tribunal.

(75) Arbitration is a creature of contract and can only be founded on the will of the parties. [*E.I. DU PONT DE NEMOURS V. RHODIA FIBER AND RESIN INTERMEDIATES SAS* [2001] INT'L ARB. REP. 13, 15, SEQ, (US COURT OF APPEALS FOR THE 3RD CIRCUIT)]. A clear intention as to the arbitral tribunal thus goes to the heart of the concept of arbitration. If no relevant intention can be discerned from the arbitration agreement, the Tribunal cannot simply invent one with reference to nebulous notions of efficiency. Equally, efficiency is not in itself a basis on which the Tribunal can found its jurisdiction. CLAIMANT's suggestion that the Tribunal should continue these proceedings because the process is "under way at a competent institution with appropriate and applicable rules" [CLAIMANT'S MEMORANDUM, PARA. 24] is wrong as a matter of law. The mere fact that an institution's rules render it able to administer an arbitration is no basis for a tribunal's jurisdiction.

(76) In a 1994 decision, the German Federal Supreme Court (*BGH*) considered the effect of the disappearance of the arbitration institution of the German Democratic Republic following the fall of the Berlin Wall. This institution's duties had been assumed by a non-identical institution called the *Vereinigung zur Förderung der Schiedsgerichtsbarkeit*, which used a different set of rules. The *BGH* held that the arbitration agreement was unenforceable, noting that:

> It is fundamental to the concept of arbitral procedure expressed in § 1033 Code of Civil Procedure that the arbitral tribunal receives its legitimacy only from the common intention of the contracting parties. Therefore, the fact that the *Vereinigung zur Förderung der Schiedsgerichtsbarkeit* can offer a largely equivalent service through its Arbitration Court B. can have no relevance [*BGH* 20 JANUARY 1994 (GERMANY), RESPONDENT'S TRANSLATION].

(77) This approach shows the importance of party autonomy in arbitration law. Party autonomy is the foundation of arbitration and can therefore never be supplanted by mere considerations of efficiency.

4.2. Good faith does not preclude jurisdictional challenge

(78) Where no true intention to arbitrate under the constituted tribunal exists, each party is entitled to challenge jurisdiction. If no valid arbitration agreement exists, a party cannot be forced into an arbitration to which it has never agreed. Therefore, a jurisdictional challenge is never an act of bad faith *per se* [FOUCHARD/GAILLARD/GOLDMANN § 2 PARA. 44]. Bad faith can only bar a party from challenging jurisdiction in exceptional circumstances. Thus only the existence of additional circumstances can establish bad faith.

(79) On the facts, no such additional circumstances exist. Rather, RESPONDENT immediately challenged jurisdiction in its Statement of Defence. It never acted in a manner which would suggest that it recognised the validity of the Arbitration Clause. As a result, the challenge of the Tribunal's jurisdiction is not contrary to good faith. RESPONDENT is therefore entitled to challenge the jurisdiction of this tribunal.

5. Conclusion

(80) In conclusion, this Tribunal has no jurisdiction to grant an award on the merits of this dispute. The Arbitration Clause is void for uncertainty because it exhibits no clear and common intention of the parties to submit their disputes to an institutional arbitration subject to Romanian Rules. Even if the Arbitration Clause is partially valid, it is inoperative within the meaning of the New York Convention and therefore unenforceable. Furthermore, the Tribunal cannot seek a basis for its jurisdiction outside the Arbitration Clause. In particular, it cannot proceed with the arbitration as an *ad hoc* tribunal; nor can it base a finding of jurisdiction on general considerations of efficiency. Therefore, the Tribunal should render an award denying its own jurisdiction.

II. CLAIMANT has no claim in damages

(81) If the Tribunal finds that it has jurisdiction, it should dismiss CLAIMANT's action as unfounded. The delivered goods were in conformity with the Contract pursuant to Art. 35(1) CISG [1]. Further and in the alternative, RESPONDENT is not in breach of Art. 35(2)(b) CISG [2]. In any event, RESPONDENT is not liable in damages as it could not have foreseen the loss suffered by CLAIMANT, and CLAIMANT failed to mitigate its loss [3].

1. The delivered goods were in conformity with the Contract

(82) RESPONDENT fulfilled its obligations under the Contract and the CISG in delivering five primary distribution fuse boards as required by the Contract pursuant to Art. 35(1) CISG. Contrary to CLAIMANT's assertions, the Contract does not specify a certain fuse type within the meaning of Art. 35(1) CISG [1.1]. Even if the Tribunal were to find that JP type fuses were originally specified in the Contract, the Contract was validly amended on 14 July 2005 [1.2].

1.1. The fuse type has not been specified in the Contract

(83) Contrary to CLAIMANT's arguments [CLAIMANT'S MEMORANDUM, PARA. 43], neither the Contract of 12 May 2005, nor the engineering drawings attached to the Contract obliged RESPONDENT to deliver a specific fuse type within the meaning of Art. 35(1) CISG. The Contract does not require a specific fuse type to be used in the fuse boards [1.1.1]. Rather, the attached engineering drawings represent only technical instructions [1.1.2]. Furthermore, the descriptive notes in the drawings must be interpreted *contra proferentem* as against CLAIMANT. When so interpreted, the descriptive notes do not impose on RESPONDENT an obligation to supply fuses of a certain type [1.1.3].

1.1.1. No particular fuse type was agreed upon in the Contract

(84) Art. 35(1) CISG obliges the seller to "deliver goods which are of the quantity, quality and description required by the contract". However, the Contract does not require delivery of fuse boards containing fuses of a specified type. On 22 April 2005, CLAIMANT requested the production of "five primary distribution fuse boards" [RESPONDENT'S EXHIBIT NO. 1, PARA. 2] without specifying any fuse type. Further, the Contract of 12 May 2005 only mentioned the sale and delivery of "five primary distribution fuse boards" in its wording; it did not provide for the sale and delivery of five primary distribution fuse boards equipped with Chat Electronics JP type fuses. The

description of the contract goods for the purposes of Art. 35(1) CISG made by CLAIMANT extends only to the sale and delivery of five primary distribution fuse boards.

1.1.2. The engineering drawings represent only technical instructions

(85) The engineering drawings attached to the Contract can only be understood as additional technical guidelines for the construction of the fuse boards. Such instructions have no legal relevance for the goods' specification within the meaning of Art. 35(1) CISG. The drawings show several distribution fuseways and their specific ratings in detail [STATEMENT OF CLAIM, PARA. 9]. There is nothing in the record that indicates that the content of these drawings was intended to constitute a contractual obligation in the context of Art. 35(1) CISG. In determining what the terms of the Contract are, it is necessary to consider how a reasonable person of the same kind as RESPONDENT could have and would have evaluated the legal significance of the attached engineering drawings [FERRARI IN FERRARI/FLECHTNER/BRAND, P. 179 ET SEQQ.; FARNSWORTH IN BIANCA/BONELL, ART. 8, PARA. 2.4; OGH 10 NOVEMBER 1994 (AUSTRIA); BG ST. GALLEN 3 JULY 1997 (SWITZERLAND)].

(86) Art. 8(2) CISG provides that statements and conduct of 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". Art. 8(3) provides further that in determining the understanding a reasonable person would have had, "due consideration […] is to be given to all relevant circumstances of the case".

(87) Although one note on the drawings indicated that the fuses were to be Chat Electronics JP type, only the phrase "in accordance with BS 88" can be significant in this context, since it declares the *technical* requirement the fuse type has to meet. BS 88 is a British Standard for electrical installations used widely outside the United Kingdom and specifically in Equatoriana [STATEMENT OF CLAIM, PARA. 9]. The parties' negotiations and CLAIMANT's conduct exhibit no evidence that the mere naming of a certain manufacturer's fuse type on technical drawings should impose a duty on RESPONDENT to supply fuses of that type. CLAIMANT did not express any intention in this respect either.

1.1.3. Unclear statements must be interpreted *contra proferentem*

(88) Even if CLAIMANT intended to specify Chat Electronics JP fuse type as a contractual obligation within the meaning of Art. 35(1) CISG, this intention was not sufficiently definite. The consequential ambiguity must be interpreted *contra*

proferentem. Thus CLAIMANT, as the party who supplied the particular statement, bears the risk of its ambiguity [SCHMIDT-KESSEL IN SCHLECHTRIEM/SCHWENZER (2004), ART. 8, PARA. 47; CIETAC ARBITRATION AWARD 7 JANUARY 2000 (CHINA)]. The fact that CLAIMANT did not make any effort to advise RESPONDENT clearly about its intention to purchase only Chat Electronics JP type fuses must therefore be interpreted to CLAIMANT's detriment.

(89) In conclusion, a reasonable person of the same kind as RESPONDENT and acting in the same circumstances could only have understood the attachment of the technical drawings as an attachment of mere technical guidance for the construction of the fuse boards. The drawings were not to be understood as a specification of the goods themselves within the meaning of Art. 35(1) CISG.

1.2. The Contract has been amended

(90) Further and in the alternative, if the Tribunal should come to the conclusion that JP type fuses were specified in the Contract, it is submitted that the Contract has been amended to provide for JS type fuses. This amendment was made during the telephone conversation between Mr. Hart (Procurement Professional for CLAIMANT) and Mr. Stiles (RESPONDENT's Sales Manager) on 14 July 2005. It is submitted that Mr. Hart had authority to conclude this amendment of the Contract with Mr. Stiles [1.2.1]. Even though the amendment was made orally, CLAIMANT is bound by it as CLAIMANT is precluded by its conduct from relying on the formal requirement of the Writing Clause [1.2.2].

1.2.1. Mr. Hart had authority to amend the Contract

(91) CLAIMANT's suggestion that Mr. Hart had no authority to amend the Contract is unfounded [CLAIMANT'S MEMORANDUM, PARAS. 50 ET SEQQ]. Mr. Hart had initial general authority to deal with the Contract and to amend it [1.2.1.1]. Alternatively, Mr. Hart had apparent authority [1.2.1.2]. Even if the Tribunal should come to the conclusion that Mr. Hart had no actual or apparent authority or acted outside the scope of his authority, CLAIMANT ratified Mr. Hart's action and thereby bound itself to the amendment of the Contract [1.2.1.3].

(92) The question of agency is not dealt with by the CISG and therefore falls to be determined 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].

1.2.1.1. Mr. Hart had initial general authority

(93) Art. 12 of the Agency Convention provides that the acts of an agent directly bind the principal wherever the agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent.

(94) Mr. Hart, as Procurement Professional, had initial general authority expressly given to him by CLAIMANT relating to contracts up to USD 250,000 [PROCEDURAL ORDER NO. 2, CLARIFICATION 17]. As the value of the Contract – USD 168,000 – lies below this limit, Mr. Hart had general actual authority to amend the Contract.

1.2.1.2. Alternatively, Mr. Hart had apparent authority

(95) Alternatively, CLAIMANT is bound by Mr. Hart's agreement with Mr. Stiles by way of apparent authority pursuant to Art. 14(2) Agency Convention. The provision is applicable 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. Where these two conditions are fulfilled, the principal will be liable as if the apparent agent had authority [BONELL, PAGE 740].

(96) The conditions are fulfilled on the facts. CLAIMANT, being the principal, conducted himself in a way that gave rise to the appearance that its employee Mr. Hart had authority concerning the Contract. This appearance was created in particular by the fact that Mr. Stiles was transferred to Mr. Hart when he called CLAIMANT on 14 July 2005 with regard to the Contract. Furthermore, CLAIMANT gave no indication to Mr. Stiles that Mr. Hart's authority was in any way limited. Mr. Stiles could therefore reasonably assume that Mr. Hart was in charge during Mr. Konkler's absence and that Mr. Hart was authorised to amend the Contract.

(97) In such circumstances, the onus is on the principal to ensure that an authorised individual is available to deal with questions relating to a contract. In other words, it was Mr. Konkler's responsibility to ensure either that he was reachable during his business trip or that another member of his staff was sufficiently well informed about the Contract to be able to take decisions relating to it. Since Mr. Konkler failed to do so,

he must bear the risk that decisions were taken and agreements were reached that he might not have concurred with had he been informed.

1.2.1.3. CLAIMANT is bound through ratification

(98) Even if the Tribunal should hold that Mr. Hart had neither actual nor apparent authority, CLAIMANT is bound by the oral agreement on the change of specifications between Mr. Hart and Mr. Stiles by way of ratification.

(99) 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].

(100) CLAIMANT's ratification of Mr. Hart's agreement can be seen in the fact that CLAIMANT did not complain about the delivered goods on receipt. CLAIMANT states that nonconformity was not made known to it [CLAIMANT'S MEMORANDUM, PARA. 53]. However, RESPONDENT was under no duty to make CLAIMANT aware of the alleged non-conformity: the buyer has to notify the seller if it discovers nonconformity [ART. 39(1) CISG]. It is true that the goods could not be inspected until installation as to if they would work properly. However, a general inspection as to whether the goods conformed to the Contract could have been carried out [PROCEDURAL ORDER NO. 2, CLARIFICATION 32]. CLAIMANT could have detected any irregularities in the context of such an inspection. Thus it can be inferred from the fact that CLAIMANT did not complain that the fuse boards were completely satisfactory. Furthermore, ratification can be seen in the fact that CLAIMANT rendered payment for the delivered fuse boards equipped with JS type fuses on 26 August 2005.

(101) In conclusion, since Mr. Hart had actual or alternatively apparent authority to agree to an amendment of the Contract and since CLAIMANT ratified this oral amendment with Mr. Stiles, CLAIMANT is bound by the agreed amendment. Therefore, the delivery of fuse boards incorporating JS type fuses is not in breach of the Contract.

1.2.2. CLAIMANT is precluded from asserting the Writing Clause

(102) CLAIMANT contends in its Memorandum, that "a successful estoppel" [CLAIMANT'S MEMORANDUM, PARA. 49] cannot be made because of the lack of reasonable reliance [CLAIMANT'S MEMORANDUM, PARA. 55] and a lack of conduct to rely on [CLAIMANT MEMORANDUM, PARA. 57]. It is respectfully submitted that RESPONDENT is

not claiming an estoppel: estoppel is not a principle known to the CISG. Furthermore, RESPONDENT may invoke Art. 29(2) CISG as the requirements of that provision have been made out.

(103) The first sentence of Art. 29(2) CISG states that a written contract with provisions requiring subsequent modifications to be in writing cannot be modified by oral agreement. On the facts, the parties included such a provision (the Writing Clause) in clause 32 of the Contract. Due to this clause, the oral amendment agreed by Mr. Hart and Mr. Stiles might have been prima facie ineffective in modifying the Contract. However, the second sentence of Art. 29(2) CISG provides that a party may be precluded by its conduct from asserting a provision such as a writing clause to the extent that the other party relied on that conduct.

(104) It is submitted that the second sentence of Art. 29(2) CISG is applicable on the facts. CLAIMANT is precluded by its conduct from asserting the Writing Clause because RESPONDENT relied on CLAIMANT's conduct [1.2.2.1] and this reliance was reasonable under the circumstances [1.2.2.2].

1.2.2.1. CLAIMANT's conduct was relied upon by RESPONDENT

(105) Mr. Hart's act of orally agreeing to a modification of the original Contract was conduct within the meaning of Art. 29(2) CISG, and RESPONDENT relied on that conduct. Despite CLAIMANT's contention to the contrary [CLAIMANT'S MEMORANDUM, PARA. 55], it is widely accepted that "reliance inducing conduct may and will often be found in a declaration or consent to a modification" [SCHLECHTRIEM IN SCHLECHTRIEM/SCHWENZER (2005) ART. 29 PARA. 10; SEE ALSO HONNOLD § 204].

(106) The case of *Chateau des Charmes*, which CLAIMANT cites in support of its arguments [CLAIMANT'S MEMORANDUM, PARA. 55], is distinguishable on its facts. That case dealt with Art. 29(1) CISG and the question of whether an agreement can be reached unilaterally. It did not deal with Art. 29(2) CISG and the question of conduct and reliance [*CHATEAU DES CHARMES WINES LTD. V. SABATÉ USA INC., SABATÉ S.A.*, 5 MAY 2003 FEDERAL APPELLATE COURT [9TH CIRCUIT] 328 F.3D 528 (USA)]. On the facts before the Tribunal, there has been no unilateral attempt of one party to conclude an amendment as in *Chateau des Charmes*. Rather, an agreement was reached by Mr. Hart and Mr. Stiles to substitute JS type fuses for JP type fuses. This agreement constitutes an amendment of the Contract [RESPONDENT'S EXHIBIT NO. 1 PARA. 4]. Mr. Hart's consent to the modification is clear conduct that could be relied upon.

(107) CLAIMANT also suggests that Mr. Hart's alleged lack of authority made his conduct incapable of giving rise to an inducement to reliance [CLAIMANT'S MEMORANDUM, PARA. 57]. Even if Mr. Hart lacked authority, CLAIMANT's argument is incorrect in law. The capacity of an employee to make representations that can be relied upon is conceptually distinct from that employee's capacity to act as an agent and bind its principal through its actions. Even an unauthorised employee can induce a third party into reliance:

> If one party allows an employee, who does not have a power of representation, to make or accept declarations modifying the contract, then it is in the nature of that party's conduct and its reliance-inducing effects that are decisive [SCHLECHTRIEM IN SCHLECHTRIEM/SCHWENZER (2005) ART. 29 PARA. 10].

(108) Given this flexible approach, Mr. Hart's agreement to the modifications is to be understood as conduct which could be reasonably relied upon.

(109) It is further necessary that RESPONDENT actually relied upon CLAIMANT's conduct [DATE-BAH IN BIANCA/BONELL, ART. 29, PARA. 2.6]. RESPONDENT has so relied. This reliance is demonstrated by the fact that RESPONDENT immediately after the amendment of the Contract started producing the distribution fuse boards using JS type fuses in accordance with the oral agreement [RESPONDENT'S EXHIBIT NO. 1 P. 25].

1.2.2.2. RESPONDENT's reliance on CLAIMANT's conduct was reasonable

(110) Art. 29(2) CISG requires that one party's conduct must have caused the other party's reasonable reliance. CLAIMANT, in its Memorandum, suggests that the mere existence of the Writing Clause renders it unreasonable for a party to rely on any oral agreement which alters the original Contract [CLAIMANT'S MEMORANDUM, PARAS. 55 ET SEQ.]. Such an argument is contrary to the express purpose of Art. 29(2) CISG, which is to allow certain oral modifications despite writing clauses to the contrary [GRUBER IN MÜNCHENER KOMMENTAR ZUM BGB ART 29(2) PARA 1]. To say that an oral modification can never be reasonably relied upon if there is a Writing Clause would render Art. 29(2) CISG pointless.

(111) CLAIMANT also contends that Mr. Hart's "absence of specialised knowledge" [CLAIMANT'S MEMORANDUM, PARA. 57] made RESPONDENT's reliance on the agreement reached unreasonable. The reasonableness of the reliance must however be assessed under the circumstances of the individual case [SCHLECHTRIEM IN SCHLECHTRIEM/SCHWENZER (2005) ART. 29 PARA. 10].

(112) RESPONDENT may well be more knowledgeable about electrical equipment than CLAIMANT. This is presumably why RESPONDENT was asked by CLAIMANT to build the fuse boards. Although RESPONDENT was more knowledgeable than CLAIMANT and made recommendations to CLAIMANT, it telephoned CLAIMANT on 14 July 2005 to take instructions as to what should be supplied under the Contract. Despite being the experts, RESPONDENT was working under CLAIMANT's direction, which required that they act on, and in reliance of, what was agreed upon and what they were instructed to do.

(113) In this instance, following the oral agreement RESPONDENT subsequently fitted JS type fuses instead of JP type fuses in the fuse boards. Not only is this clear reliance on the oral agreement, but moreover, RESPONDENT acted to its detriment in relying on the agreement. JS type fuses are generally more expensive than JP type fuses [RESPONDENT'S EXHIBIT NO. 2], and thus the production of fuse boards incorporating JS type fuses was more expensive for RESPONDENT.

(114) Reliance on CLAIMANT's conduct was entirely reasonable and in accordance with Art. 29(2) CISG. CLAIMANT is therefore precluded from invoking the Writing Clause.

2. RESPONDENT is not in breach of Art. 35(2)(b) CISG

(115) It is argued by CLAIMANT that a particular purpose for the goods was made known to RESPONDENT and that the goods furnished on the Contract were not conforming to this particular purpose within the meaning of Art. 35(2)(b) CISG [CLAIMANT'S MEMORANDUM, PARAS. 58 ET SEQQ.]. For a claim based on Art. 35(2)(b) CISG to be successful, a particular purpose must be expressly or impliedly made known to the seller, and a buyer must reasonably rely on the seller's skill and judgement. Given the amendment to the Contract, CLAIMANT's Art. 35(2)(b) claim is self-contradictory and must fail [2.1]. In any event, no particular purpose was made known to RESPONDENT [2.2].

2.1. Given the amendment to the Contract, an Art. 35(2)(b) CISG claim must fail

(116) Since the Contract was validly amended to specify JS type fuses instead of JP type fuses, it is argued that a claim under Art. 35(2)(b) CISG must fail. Even if the particular purpose for the goods was specified, such a specification would be read in conjunction with the requirement to supply JS type fuses under the amended Contract.

(117) Following the amendment of the Contract, RESPONDENT supplied JS fuses as instructed despite suggesting that JP type fuses from a different manufacturer be used [RESPONDENT'S EXHIBIT NO. 1, PARA. 4]. Even if CLAIMANT is correct that the purpose of the fuse boards was to comply with Equalec's connection policy (which RESPONDENT does not concede: see below 2.2), the amendment to JS type fuses agreed to by CLAIMANT is in conflict with that purpose. Therefore, RESPONDENT cannot be held responsible for failing to supply goods fit for a specific purpose because it delivered what was contracted for in good faith [SCHWENZER IN SCHLECHTRIEM/SCHWENZER (2005) ART. 35 PARA. 23].

2.2. No specific purpose was made known

(118) CLAIMANT never made a specific purpose of the goods known to RESPONDENT. In particular, it was never communicated to RESPONDENT that the fuse boards must comply with the Equalec connection policy.

(119) CLAIMANT contends that RESPONDENT was instructed to supply fuses that complied with the requirements of Equalec, the local electricity supplier [CLAIMANT'S EXHIBIT NO. 4, PARA. 3]. RESPONDENT is said to be in breach because it supplied allegedly non-conforming JS type fuses. CLAIMANT argues that the descriptive note on the drawing reading "to be lockable to Equalec requirements" [STATEMENT OF CLAIM, PARA. 9] amounts to a specification that the fuse boards should meet Equalec's requirements for connecting the distribution fuse boards to the local electrical power grid. This analysis is flawed in several respects:

(120) Firstly, it is submitted that the engineering drawings for the fuse boards attached to the Contract were technical instructions with no legal relevance as to the terms of the Contract. This argument has already been extensively given in the context of Art. 35(1) CISG [SEE ABOVE 1.1.2].

(121) Secondly, even if the Tribunal was to find that the engineering drawings themselves were capable of forming terms of the Contract, the descriptive note makes no reference to the goods' purpose [2.2.1]. Rather, the descriptive note makes reference to the securing of the fuse boards [2.2.2].

2.2.1. The descriptive note makes no reference to the Equalec Connection Policy

(122) As a matter of law, naming a destination for the goods does not amount to specifying a purpose that places the seller under an obligation [*GH ARNHEM* 27 APRIL 1999 (NETHERLANDS)]. This point of view also constitutes the accepted academic position:

> The seller cannot be expected to be aware of the particular requirements in the buyer's state or the state in which the goods will be used. Nor can an obligation on the seller to observe the statutory requirements of the country of destination be inferred from the mere fact that the buyer informed him of that destination. It is, rather, for the buyer to ascertain the special provision under public law applying in the state of use and make them part of the contract [SCHWENZER IN SCHLECHTRIEM/SCHWENZER (2005) ART. 35 PARA. 17].

(123) On the facts, the descriptive note informing the reader that the fuse boards are to be "lockable to Equalec requirements" [STATEMENT OF CLAIM, PARA. 9] only indirectly indicates the destination of the fuse boards as being Equalec's area of operations in Equatoriana. The descriptive note makes no reference to any specific provisions such as the Equalec connection policy that would have to be complied with [CLAIMANT'S EXHIBIT NO. 4, PARA. 3].

(124) Given that CLAIMANT was told by Switchboards Ltd. that only JP fuses should be used [PROCEDURAL ORDER NO. 2, PARA. 25], the onus was on CLAIMANT to communicate this requirement to RESPONDENT. This position is supported by the decision of the *GH Arnhem*, where the seller knew that the goods had to be exported *inter alia* to Germany [*GH ARNEM* 27 APRIL 1999 (NETHERLANDS)]. The Court stated that it would have been up to the buyer to inform the seller that the goods in question had to fulfil specific German industrial standards.

(125) The Contract only requires that the fuse boards should be 'lockable' to Equalec requirements. [PROCEDURAL ORDER NO. 1; STATEMENT OF CLAIM, P. 5]. The term 'lockable' is best understood as meaning that Equalec could lock the fuse boards with a padlock [C.F. PROCEDURAL ORDER NO. 2, PARA. 21]. It does not refer to the connection to the electricity grid. Given that no mention was made of the connection policy, and given that the adjective used in the descriptive note was 'lockable' and not 'connectable', it is obvious that the note specifying that the fuse boards must be 'lockable' could not be understood as meaning that the fuse boards must comply with the Equalec connection policy.

2.2.2. A particular purpose for the goods cannot be inferred from the note

(126) It is trite law that the first step in construing contract terms is to look for the ordinary and natural meaning of the words used. In the circumstances at issue here, an ordinary and natural meaning of the words "lockable to Equalec requirements" exists. That interpretation should be preferred by the Tribunal. As CLAIMANT clarifies in its Statement of Claim:

> Following normal procedures, the primary distribution fuse boards were to be locked by Equalec with a small padlock so that it had exclusive access to them. Locking the primary distribution fuse boards serves several purposes. The most obvious is that it prevents users from having access to unmetered electrical supplies. [STATEMENT OF CLAIM PARA. 8].

(127) Thus the ordinary and natural meaning of the phrase "lockable to Equalec requirements" in the Contract is that the fuse boards should accommodate a fastening mechanism so that they can be secured by Equalec using one of its own locks. Given this obvious justification behind the straightforward interpretation of "lockable to Equalec requirements", no specific purpose for the goods expressly stating that the fuse boards must comply with the Equalec's connection policy can be made out from the descriptive note.

(128) In conclusion, therefore, CLAIMANT's attempt to found a claim in damages on a breach of Art. 35(2)(b) CISG must fail because no relevant specific purpose for the goods was communicated to RESPONDENT.

3. CLAIMANT is not entitled to claim damages

(129) Even if the Tribunal should find that RESPONDENT was in breach of the Contract, CLAIMANT is not entitled to recover its damages since the loss was not foreseeable to RESPONDENT [3.1]. Furthermore, CLAIMANT failed completely to mitigate its loss [3.2].

3.1. The loss was not foreseeable under Art. 74(2) CISG

(130) RESPONDENT – like any other reasonable merchant [C.F. MURPHEY PARA. VII E; SAIDOV PARA. I 2(A); LIU, ART. 74, PARA. 14.2.4] in the same situation – could not have foreseen the loss resulting of Equalec's refusal to connect JS type fuses at the time the Contract was concluded. CLAIMANT never pointed out the risk of that particular type of loss. CLAIMANT has not drawn RESPONDENT's attention to the possibility of Equalec refusing to connect the fuse boards. RESPONDENT was never given the opportunity either to decline or to accept the liability for this risk after acknowledging the possibility of non-connection.

(131) It was thus never agreed that RESPONDENT was willing to bear the additional risk for a refusal to connect [CF. HG ZÜRICH 10 FEBRUARY 1999 (SWITZERLAND); *BGH* 24 OCTOBER 1979 (GERMANY); SIMILAR LIU, PARA. 14.2.4; SUTTON, PARA. III B 1; ENDERLEIN/MASKOV, P.300; LOOKOFSKY, PARA. 6, III D; HILLMAN, PARA. 1 D; STOLL/GRUBER IN SCHLECHTRIEM, ART.74, PARA. 38].

(132) Additionally, RESPONDENT was not under a duty to find out Equalec's requirements from its website. This is true despite CLAIMANT's alleged reliance on RESPONDENT's professional position. Firstly, it must be taken into consideration that RESPONDENT has delivered JS type fuses to be used in circuits rated at less than 400 amperes to Equatoriana over the past years without difficulties [RESPONDENT'S EXHIBIT NO. 1]. Secondly, unlike other firms, RESPONDENT has not been notified of Equalec's policy [RESPONDENT'S EXHIBIT NO. 1; PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 24]. Equalec is the only electrical provider with a policy that refuses to connect fuse boards equipped with JS type fuses in circuits with ratings of less than 400 amperes [PROCEDURAL ORDER NO. 2 CLARIFICATION NO. 23]. Its policy was only known to firms that regularly operated in the Equalec service area [RESPONDENT'S EXHIBIT NO. 1]. Therefore, it cannot be said that it was a policy widely known to all businesses involved in the electrical business throughout Equatoriana. Knowledge of Equalec's standards was not widespread and the policy was an unusual if not extraordinary one. Additionally, the JS type fuses have been certified by the Commission as meeting the BS 88 standard [RESPONDENT'S EXHIBIT NO.1; RESPONDENT'S ANSWER PARA. 12]. RESPONDENT therefore had no reason to research Equalec's website for a special policy.

(133) In conclusion, RESPONDENT as well as any other merchant in the same situation could not have foreseen CLAIMANT's loss resulted from Equalec's refusal to connect the fuse boards. The claim in damages therefore fails.

3.2. CLAIMANT failed to mitigate the loss

(134) Even if the Tribunal should find that RESPONDENT was in breach of the Contract and the damages were foreseeable, CLAIMANT is not entitled to recover its loss because it failed to mitigate the loss under Art. 77 CISG. Due to the illegality of Equalec's policy [3.2.1], CLAIMANT should have complained to the Commission and thus prevented the loss from taking place [3.2.2].

3.2.1. Equalec's policy was illegal due to non-conformity with Art. 14 Regulatory Act

(135) Under Art. 77 CISG, the aggrieved party can recover its loss only when it has taken all reasonable measures to prevent the loss from occurring or to mitigate the extent of the loss [STOLL/GRUBER IN SCHLECHTRIEM/SCHWENZER (2005) ART. 77, PARA. 1; *DOWNS INVESTMENTS PTY LTD V. PERWAJA STEEL SDN BHD* [2002] 2 QD R 462 (QUEENSLAND COURT OF APPEAL, AUSTRALIA); *BUNDESGERICHT*, 15 SEPTEMBER 2000 (SWITZERLAND)]. The standard is that of a prudent person acting in good faith who is in the same position as the aggrieved party [STOLL/GRUBER IN SCHLECHTRIEM/SCHWENZER (2005) ART. 77, PARA. 7].

Such a person under these circumstances would have complained to the Commission to avoid the loss. The legal basis of the complaint is Art. 14 of Equatoriana Electric Service Regulatory Act, which prohibits the electric supply companies from setting undue or unjust requirements for providing such service [RESPONDENT'S EXHIBIT NO. 4]. Equalec's policy of not connecting primary distribution fuse boards using JS type fuses when the circuits were rated at less than 400 amperes amounts to an undue and unjust requirement.

(136) Equalec brought out two reasons to justify its policy. The first was purportedly safety-oriented: the policy was intended to avoid the possibility of mixing up JP and JS type fuses [CLAIMANT'S EXHIBIT NO. 3, PARA. 3]. This reason is hardly persuasive. As a matter of fact, the primary distribution fuse boards were to be locked by Equalec with a small padlock so that it had exclusive access to them [STATEMENT OF CLAIM, PARA. 8]. The personnel of a professional electrical supply company, being the only people who have access to the fuses, can be expected to have the necessary electrical skills to deal with them safely. In particular, it seems absurd to suggest that such trained personnel would confuse JP with JS type fuses, especially when bearing the fact in mind that the external dimensions of JP and JS type fuses are different. Fixing centres for JP type fuses were 82 mm; the fixing centres for JS type fuses were 92 mm [STATEMENT OF CLAIM, PARA. 11]. This difference in fixing centres was exactly the reason why RESPONDENT called CLAIMANT for prompt decision on 14 July, 2005, since it needed to build proper supports for the chosen fuse type.

(137) Furthermore, even if Equalec's personnel would mix the fuses up and thus cause loss, the loss would be attributable to Equalec rather than to its customers. It is Equalec's responsibility to choose suitable personnel to avoid mixing up fuses; it is both undue and unjust to offload this responsibility on power customers by restricting the range of acceptable fuses.

(138) An additional reason brought out by Equalec was the so-called "benefit to their customers to reduce the amount of inventory that the service trucks were required to carry, thereby assuring that the trucks would have the proper fuses immediately available on those rare occasions when a fuse blew" [CLAIMANT'S EXHIBIT NO. 3, PARA. 3]. Taking into account that fuses rarely blow, it can be reasonably expected that a service truck carrying several JP as well as JS type fuses would be able to replace blown fuses. It is unreasonable, and therefore undue and unjust, to allege that the efficiency for repairing would be lowered if JS type fuses were stocked.

(139) It is Equalec's responsibility to repair fuses on time, regardless of whether JP or JS type fuses were used, since both JP and JS type fuses met the requirements of the Commission, which had certified all fuses that met the BS 88 standard [ANSWER, PARA. 12]. Equalec's second reason is thus a purely internal consideration that should have no bearing on its customers' choice of fuses.

(140) Since electric supply companies are usually monopolists and might misuse their dominating market power to prejudice their customers unjustifiably and thus contravene the basic legal principles of equality and private autonomy, legislators frequently make efforts to prohibit the misuse of power from occurring: Art. 14 Equatoriana Electric Service Regulatory Act is an example of such a regulation. Misuse can occur either in the form of unfair contract clauses or in the form of undue or unjust requirements for customers. Besides the analysis made above, a secondary criterion to determine whether a policy can be justified in front of the Commission is the range of use of the policy. As a matter of fact, Equalec's policy was adopted by no other electric supply companies in Equatoriana. Both CLAIMANT and RESPONDENT had used JS type fuses for circuits rated less than 400 amperes without any complaint from other electricity supply companies in Equatoriana [CLAIMANT'S EXHIBIT NO.3; ANSWER, PARA. 13, PROCEDURAL ORDER NO. 2, PARA. 23]. Equalec's policy therefore constitutes "undue or unjust requirement", and a complaint to the Commission would have been justified.

3.2.2. CLAIMANT could have avoided the loss by complaining to the Commission

(141) The obligation to mitigate damages exists not only when a loss has already occurred, but also before a loss arises [STOLL/GRUBER IN SCHLECHTRIEM/SCHWENZER (2005) ART. 77, PARA. 3]. This means that even before CLAIMANT concluded the substitute transaction and replaced the primary fuse boards, it was obliged to seek methods to avoid the loss from occurring. A reasonable option would have been to complain to the Commission. It is true that where a full investigation is required, the procedure can take two years or longer [PROCEDURAL ORDER NO. 2, PARA. 30]. But it is by no means clear that a full investigation would have been required on the facts. From the point of view of an objective prudent person under the same circumstances, one can reasonably hope for timely success in complaining to the Commission.

(142) Firstly, as analysed above, the illegality of Equalec's policy was obvious. Secondly, experience shows that proceedings before the Commission can be concluded within a short period of time. It is possible that the start of an inquiry from the staff of the Commission would have caused Equalec to change its policy without formal action

by the Commission. If that were the case, the entire process could take as short as one week. [PROCEDURAL ORDER NO. 2, PARA. 30]. Thirdly, CLAIMANT had enough time to try to avoid the loss. It received the goods on 22 August 2005 [STATEMENT OF CLAIMANT, PARA. 14]. Since CLAIMANT only had to give occupancy to its lessees before 1 October 2005 [RESPONDENT'S EXHIBIT NO.1, PARA. 8], there were still six weeks for CLAIMANT to try to avoid the loss.

(143) Even though the complaint might not result in a change of Equalec's policy in time, it does not justify CLAIMANT's complete failure to attempt to avoid the total loss from taking place. As long as the measure was reasonable, the loss resulting from not having taken this measure falls into the aggrieved party's risk sphere.

(144) The injured party's failure to prevent avoidable loss does not lead to the loss being shared, but rather to the loss being excluded entirely to the extent that the loss was avoidable [STOLL/GRUBER IN SCHLECHTRIEM/SCHWENZER, ART. 77, PARA. 12]. In the case at hand, CLAIMANT's failure to complain to the Commission leads to the loss being excluded from the compensation.

4. Conclusion

(145) In conclusion, CLAIMANT is not entitled to damages as its claim is unfounded. RESPONDENT delivered five fuse boards that were in conformity with the Contract as originally written. Alternatively, the Contract was validly amended to provide that JS type fuses could be used. RESPONDENT is also not in breach of Art. 35(2)(b) CISG. CLAIMANT's failure to complain to the Commission furthermore excuses any alleged failure of RESPONDENT to deliver conforming goods.

III. REQUEST FOR RELIEF

On the basis of the above, RESPONDENT respectfully requests this Tribunal to find:

» that the Tribunal has no jurisdiction to decide the dispute; and/or

» that CLAIMANT has no claim for damages.