

TENTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2002 – 2003

MEMORANDUM

FOR
EQUAFILM CO.
-CLAIMANT-



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2002 – 2003

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WHITE PLAINS, NEW YORK
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DEUTSCHE INSTITUTION FÜR SCHIEDSGERICHTSBARKEIT
GERMAN INSTITUTION OF ARBITRATION

MOOT CASE NO. 10

LEGAL POSITION

ON BEHALF OF

EQUAFILM CO.

214 COMMERCIAL AVE.

OCEANSIDE

EQUATORIANA

(CLAIMANT)

AGAINST

MEDIPACK S. A.

395 INDUSTRIAL PLACE

CAPITOL CITY

MEDITERRANEO

(RESPONDENT)

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INDEX OF ABBREVIATIONS

AC	Appellate Court
Arb. Int'l.	Arbitration International
Art.	Article
Arts.	Articles
ASA Bulletin	Association suisse de l'arbitrage
Ass.	Association
B.V.	besloten vennootschappen met beperkte aansprakelijkheid (limited)
BB	Betriebs-Berater
Bd.	Band (Volume)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Decisions of the Swiss Federal Tribunal)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the German Federal Supreme Court in Civil Matters)
C. Supp.	Cummulative Supplement
c.f.	confer (compare)
CC	Cour de Cassation
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG Online	Case Law on CISG, Database University of Freiburg http://www.uni-freiburg.de/ipr1/cisg/title.htm
CLOUT	Case Law on UNCITRAL Texts http://www.uncitral.org/en-index.htm
Co.	Corporation

D.C.	District Court
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V. (German Institution of Arbitration)
DIS Rules	Arbitration Rules of the German Institution of Arbitration
Div	Division
e.g.	exemplum gratia (for example)
e.V.	Eingetragener Verein (registered association)
et seq.	et sequentes (and following)
F. 2d	Federal Reporter, Second Series
F. Supp	Federal Reporter Supplement
Fn.	Footnote
FS	Festschrift
GmbH	Gesellschaft mit beschränkter Haftung (limited)
i.e.	id est (that means)
I.L.M.	International Legal Materials published by the American Society of International Law
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
Inc.	Incorporation
IPRax	Praxis des Internationalen Privat- und Verfahrensrecht
IPRspr.	Rechtsprechung des internationalen Privatrechts (decisions of private international law)
JBl	Juristische Blätter
JZ	Juristenzeitung
LG	Landgericht (Regional Court, Germany)
Lloyd's Rep.	Lloyd's List Law Reports
Ltd.	Limited

Mealey's IAR	Mealey's International Arbitration Report
Mfg	Manufacturing
N.E.2d	North Eastern Reporter 2 nd series
NJW	Neue Juristische Wochenschrift
no.	Number
nos.	Numbers
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OGH	Oberster Gerichtshof (Supreme Court of Austria)
OLG	Oberlandesgericht (Court of Appeal, Germany)
p.	Page
pp.	Pages
Q.B.	Queen's Bench
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. arb.	Revue de l'arbitrage
RIW	Recht der internationalen Wirtschaft
S.A.	Sociedad Anónima
S.D.	Southern District
S.P.A.	Societa per azioni
SC	Supreme Court
Sec.	Section
Sec. Comm.	Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat
Temp. Int'l & Comp. L. J.	Temple International and Comparative law Journal
U.S.	United States
U.S.R.	United States Report
UN	United Nations
UNCITRAL	United Nations Commission on International Trade

UNICTRAL ML

Model Law of the United Nations

Commission on International Trade on

International Commercial Arbitration

UNILEX

International Case Law and Bibliography on

the UN Convention on Contracts for the

International Sale of Goods

v.

versus (against)

VJ

Vindobona Journal of International

Commercial Law and Arbitration

Vol.

Volume

YCA

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ZfRV

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UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, AS ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 21 JUNE 1985

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), OF 11 APRIL 19

STATEMENT OF FACTS

2 0 0 0

07 December EQUAFILM CO. (hereafter: CLAIMANT) sent a fax to MEDIPACK S.A. (hereafter: RESPONDENT) confirming the contract concluded in the telephone conversation of the same day.

15 December CLAIMANT signed a sales contract with RESPONDENT. It contained precise specifications of the purchased good, i.e. 200 tons of 1100 mm wide, 30 micron thick, opaque white Oriented Polypropylene film to ASTM Standard D2673-99 (hereafter: OPP), and the shipping and payment procedures. An arbitration agreement and a choice-of-law clause were contained in this contract. The unusually low discount of 8% was agreed upon.

2 0 0 1

03 April CLAIMANT and RESPONDENT agreed on another purchase of 1350 tons of OPP on the telephone. The terms were to be the same as in the contract of 15 December 2000. Shipment details and the list price were changed according to the individual circumstances. There was no explicit mention of the discount to be applied.

03 April RESPONDENT sent a fax to confirm the contract that had been concluded during the telephone conversation with CLAIMANT earlier that day. It contained precise specifications of the purchased good, 1350 tons of OPP for a list price of \$1900 per ton and referred to the contract of 15 December for payment, shipping and similar terms. No discount was mentioned.

03 April CLAIMANT confirmed the contract in a fax containing the specifications of the good, the list price and the 4% discount. It stated that all other provisions of the contract of 15 December 2000 were to apply to the new contract.

- 06 April** RESPONDENT contested the discount as set out in CLAIMANT's confirmation and demanded an 8% discount.
- 09 April** CLAIMANT sent a fax to RESPONDENT explaining why a 4% discount applied to their new contract and informing RESPONDENT that space had been booked for the first shipment.
- 10 April** RESPONDENT insisted on receiving an 8% discount and threatened to return to its old supplier of OPP for all future requirements if an 8% discount would not be given.
- 12 April** CLAIMANT again explained the applicability of a 4% discount and expressed its expectation to hear from RESPONDENT soon.
- 27 April** CLAIMANT informed RESPONDENT about the cancelled booking of the first shipment and the new cargo space booked for 5 May 2001.
- 02 May** RESPONDENT sent a fax declaring it no longer expected delivery from CLAIMANT and had already covered its needs from its former supplier since CLAIMANT had not altered the price.
- 2 0 0 2**
- 27 May** Mr. Bredow, Secretary General of the DIS, sent a fax to Mr. Langweiler, CLAIMANT's advocate, confirming that the Statement of Claim was received.
- 1 June** Mr Langweiler sent a fax to Mr Bredow including CLAIMANT's nomination of Dr. [...] (Arbitrator nominated by CLAIMANT, hereafter Dr [...]) as party-appointed arbitrator.
- 5 June** Mr. Bredow sent a fax to Mr Langweiler confirming CLAIMANT's nomination of an arbitrator and the payment of the DIS Administrative Fee and the Provisional Advance on arbitrator's cost.
- 5 June** Mr. Langweiler sent a fax to Medipack S.A. informing RESPONDENT that arbitral proceedings were initiated against it.
- 5 June** Mr. Bredow sent a fax to Dr. [...] informing him of his nomination as CLAIMANT's party-appointed arbitrator.

- 22 August** Dr. [...] sent a fax to Mr. Bredow informing him of the merger of Dr. [...]’s lawfirm with Multiland Associates and stating that he did not consider the merger to affect his impartiality and independence.
- 22 August** Mr. Bredow sent a fax to Mr. Langweiler and Mr. Comstock (RESPONDENT’s advocate) forwarding Dr. [...]’s fax of 7 August 2002 and inquiring to make a comment on the statement of Dr. [...]
- 2 September** Mr. Comstock sent a fax to Mr. Bredow requesting Dr. [...]’s withdrawal
- 2 September** Mr. Bredow sent a fax to Dr. [...] giving opportunity to comment on the statement of Dr. Comstock.
- 9 September** Dr. [...] sent a fax stating that he saw no reason to resign
- 10 September** Mr. Bredow sent a fax forwarding the document of 9 September to Dr. Comstock.
- 19 September** Dr. Comstock sent a fax to the Chairman of the Arbitral Tribunal expressing the challenge of Dr. [...].

INTRODUCTION

We respectfully make the following submissions on behalf of our client Equafilm Co., CLAIMANT, and respectfully request the Arbitral Tribunal to decide that:

- The laws applicable to the contract and this arbitration are the DIS Arbitration Rules, the UNCITRAL ML and the CISG [**First Issue**].
- There are no grounds for the challenge of Dr. [...] [**Second Issue**].
- The Arbitral Tribunal has jurisdiction to decide the dispute between CLAIMANT and RESPONDENT [**Third Issue**].
- A contract of sale was concluded between CLAIMANT and RESPONDENT and a discount of 4% agreed upon [**Fourth Issue**].
- RESPONDENT committed a breach of contract, and CLAIMANT lawfully declared the contract avoided [**Fifth Issue**].
- Therefore, CLAIMANT is entitled to damages in the amount of \$461,700 [**Sixth Issue**].
- Furthermore, CLAIMANT is entitled to interest on the damages caused by RESPONDENT [**Seventh Issue**].

FIRST ISSUE: THE DIS ARBITRATION RULES, THE UNCITRAL MODEL LAW, AND THE CISG APPLY TO THIS DISPUTE

- 1 The arbitration procedure is governed by the DIS Rules and the UNCITRAL ML [**A**] while the formation of the arbitration agreement is governed by the UNCITRAL ML and the law chosen for the main contract [**B**]. The sales contract between CLAIMANT and RESPONDENT is governed by the CISG [**C**].

A. The arbitration procedure is governed by the DIS Rules and the UNCITRAL ML

- 2 The arbitration between CLAIMANT and RESPONDENT is governed by the DIS Rules and the UNCITRAL ML which has been adopted in Danubia (*Procedural Order no. 2 at 7, 10*). Therefore, pursuant to Art. 1 (1), (2) UNCITRAL ML, the law governing international arbitration in Danubia is the UNCITRAL ML. The instant arbitration is an international one as described in Arts. 1 (1), (3) (a) UNCITRAL ML, because CLAIMANT and RESPONDENT have their place of business in Equatoria and Mediterraneo (*Statement of Claim nos. 1, 2, Statement of Defence nos. 1, 2*).

3 In accordance with Art. 20 (1) UNCITRAL ML, the parties agreed that the seat of the arbitration be Vindobona, Danubia (*Claimant's Exhibit no. 2; Statement of Claim at 14*). Pursuant to Art. 19 (1) UNCITRAL ML, the parties agreed on the DIS Rules to apply to the arbitral *PROCEDURE*. Those provisions of the ML that are not mandatory are therefore substituted by the respective DIS Rules.

B. The form requirements and the conclusion of the arbitration agreement are determined by the UNCITRAL ML and the same law as applicable to the main contract

4 The form requirements of the arbitration agreement are determined by the UNCITRAL ML and the NY Convention. All other aspects concerning an arbitration agreement's validity are governed by the law chosen for the arbitration agreement. In absence of a specific choice of law for the arbitration agreement the law chosen for the main contract generally extends to the arbitration agreement to achieve a certain degree of uniformity (*F D Court New York, U.S., 14.04.1992, Filanto v. Chilewich International, CLOUT Case no. 23; DICEY/MORRIS, p. 577; REDFERN/HUNTER, p. 78; BERNSTEIN/TACKABERRY/MARRIOTT/WOOD-PAULSSON, p. 561*).

5 CLAIMANT and RESPONDENT did not choose a special law to govern the arbitration agreement. Therefore, it can be assumed that the law governing their sales contract is extended to the formation of their arbitration agreement.

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

6 The sales contract between CLAIMANT and RESPONDENT is governed by the CISG. The parties validly chose the commercial law of Equatoriana to apply to the sales contract [II]. The commercial law of Equatoriana includes the CISG [III]. With the wording of their choice-of-law clause the parties did not exclude the CISG [III].

I. The parties validly chose the commercial law of Equatoriana to govern the sales contract

7 The parties validly chose the commercial law of Equatoriana to apply to the sales contract. Under Art. 28 (1) UNCITRAL ML and Sec. 23.1 DIS Rules the parties may choose the law applicable to their contractual relationship.

8 CLAIMANT and RESPONDENT had agreed upon a choice-of-law clause in favor of Equatorianian commercial law in their contract of 15 December 2000 (*Claimant's Exhibit no.*

2). By referring to this contract during their telephone conversation of 3 April 2001 the parties extended the choice-of-law clause to the contract of 3 April 2001. This extension was evidenced by RESPONDENT's fax from the same day stating, "...similar terms of the contract of 15 December 2000 are to apply" (*Claimant's Exhibit no. 3*) and CLAIMANT's confirmation stating "...all other provisions in [the] contract dated 15 December 2000 [are] to apply." (*Claimant's Exhibit no. 4*). Thereby the parties chose Equatorianian law.

II. The commercial law of Equatoriana embodies the CISG as an integral part

- 9 The commercial law of Equatoriana includes the CISG. International sales contracts governed by the law of a Contracting State are governed by the CISG pursuant to Art. 1 (1) CISG, unless the parties make a provision to the contrary according to Art. 6 CISG.
- 10 The instant contract is an international sales contract, since CLAIMANT and RESPONDENT have their seats of business in different countries, namely Equatoriana and Mediterraneo.
- 11 According to its Art. 1 (1) (b), the CISG is applicable if a conflict-of-laws rule designates the law of a Contracting State to be applicable (*ICC Award no. 7660/JK; SPANOGLE/WINSHIP, p. 51; SCHLECHTRIEM-FERRARI, Art. 1 at 71; WITZ/SALGER/LORENZ-LORENZ, p. 41 at 12*). Here, the validly concluded choice-of-law clause leads to Equatorianian commercial law. Since Equatoriana is a Contracting State (*Statement of Claim at 13; Procedural Order no. 1 at 7*), the CISG is part of its commercial law.

III. The CISG was not excluded by referring to the "commercial law of Equatoriana"

- 12 Contrary to RESPONDENT's allegation, the parties did not exclude the application of the CISG in their choice-of-law clause under Art. 6 CISG. An exclusion can be made expressly or impliedly (*LG München, Germany, 29.5.1995, IPRspr 1995, 294; SCHLECHTRIEM-FERRARI, Art. 6 at 18; STAUDINGER-MAGNUS, Art. 6 at 20; CZERWENKA, pp. 170 et seq. ; HONSELL-SIEHR, Art. 6 at 6; REDFERN/HUNTER, p. 129; WITZ/SALGER/LORENZ-LORENZ, p. 40 at 12; DIÉZ-PICAZO/DE LÉON, Art. 6, p. 94*). The choice-of-law clause does not contain an express exclusion. Neither may RESPONDENT allege that it leads to an implied exclusion of the CISG.
- 13 Implied exclusions are subject to strict requirements (*BGH, Germany, 04.12.1996, BGHZ 96, 313, 319; WITZ/SALGER/LORENZ-LORENZ, p.73 at 7, 12; REDFERN/HUNTER, p. 129*). It must be clear that an exclusion is intended (*OLG Berlin, Germany, 24 January 1994, RIW 1994, 683; BIANCA/BONELL-BONELL, p. 56 at 2.3.3; BONELL, dr. pratique com. int. 1981, 13; FERRARI, p.*

153; SCHLECHTRIEM-FERRARI, *Art. 6 at 18*; DIÉZ-PICAZO/DE LÉON, *Art. 6, p. 96*; BERNSTEIN/LOOKOFSKY, *p. 18 at 2-7*).

- 14 Generally, if parties refer to the domestic law of a Contracting State, they mean to include the CISG rather than to refer to unstandardized domestic law. (*BGH, Germany, 25.11.1998, NJW 1999, p. 1259, 1260*; *OLG Hamm, Germany, 9.6.1995, IPRax 1996, p. 269*; *BIANCA/BONELL-BONELL, p.56 at 2.3.3*; *HOLTHAUSEN, RIW 1989, p. 516*; *REITHMANN/MARTINY, p. 531 at 645*; *DIÉZ-PICAZO/DE LÉON, Art. 6, p. 100*).
- 15 Just the fact that the parties did not mention the CISG does not lead to an implied exclusion (*CA Grenoble, France, 26.04.1995, Marques Roque Joachin v. La Sarl Holding Manin Rivière, CLOUT Case no. 152*; *OLG Hamm, Germany, 9.6.1995, IPRax 1996, p. 269, 270*; *BGH, Germany, 04.12.1985, RIW 1986, pp. 214 et seq.*; *OLG Karlsruhe, Germany, RIW 1998, p. 235*; *BGH, Germany, 25.11.1998, NJW 1999, p. 1260*; *OGH, Austria, 12.02.1998, JBl. 1999, p. 54*; *DC NC of California, San José Division, U.S., 27.07.2001, Asante Technologies v. PMC-Sierra, 164 F.Supp. 2nd, 1142, 1150*; *STAUDINGER-MAGNUS, Art. 6 at 24*; *BIANCA/BONELL-BONELL, p. 56 at 2.3.3*; *PILTZ, RIW 1999, p. 898*; *SCHLECHTRIEM-FERRARI, Art. 6 at 22*; *LANDO, RabelsZ 1987, p. 84*; *PILTZ, p. 49 at 111*). In addition to that, it is internationally accepted that a choice-of-law clause worded as generally and broadly as “...subject to the commercial law of...” without any further specification, results in the application of the CISG (*ICC Court of Arbitration Paris, France, 23.08.1994; Award no. 7660/JK, UNILEX,E.1994-20*; *CA Grenoble, France, 26.04.1995, Marques Roque Joachin v. La Sarl Holding Manin Rivière, CLOUT Case no. 152*; *POSCH/PETZ, VJ 2002, pp. 6-7*).
- 16 Consequently, CLAIMANT and RESPONDENT did not have the intention to exclude the CISG with the wording “commercial law of Equatoriana”. For international sales contracts, the CISG is the “commercial law of Equatoriana”. This is supported by the fact that Equatoriana does not even have a separate commercial code (*Procedural Order no. 2 at 35*) that the parties could have referred to.
- 17 Therefore, by choosing to apply the “commercial law of Equatoriana”, the parties agreed on the CISG to govern the sales contract, and did not exclude it.

SECOND ISSUE: THERE ARE NO GROUNDS FOR THE CHALLENGE OF DR. [...]

- 18 There are no grounds for the challenge of Dr. [...] pursuant to Sec. 18.1 DIS Rules. Only a close relationship is sufficient to challenge Dr. [...] successfully [A]. Dr. [...] neither has a direct relationship with CLAIMANT [B], nor has he an indirect relationship with CLAIMANT [C] that could disqualify him as an arbitrator.

A. There has to be a close relationship in order to challenge an arbitrator pursuant to Sec. 18.1 DIS Rules

- 19 According to Sec. 18.1 DIS Rules, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality. In the present case the only reason for a challenge of Dr. [...] could be the alleged lack of independence.
- 20 Sec. 18.1 DIS Rules does not define the concept of independence. Since Sec. 18.1 DIS Rules is based on Art. 12 (2) UNCITRAL ML (*Introduction to DIS Arbitration Rules*), the authorities referring to the ML can be relied on. Independence requires that an arbitrator must be free from external control (*JENNINGS, MEALEY'S IAR, MAY 2001, B-1*). There should be no close relationship - financial, professional or personal - with a party or its counsel (*VAN HOF, p. 63 at 2.6.1; BISHOP/REED, Arb. Int'l. 1998, 398; REDFERN/HUNTER, p. 214; WEIGEND-ROTH, p. 1213 at 6*). In assessing this relationship, an objective perspective is to be adopted since both Sec. 18.1 DIS Rules and Art. 12 (2) UNCITRAL ML require justifiable doubts as to the arbitrator's impartiality. Consequently, the relationship has to be evaluated from a reasonable person's point of view.
- 21 Hence, it is of no importance whether RESPONDENT has doubts as to Dr. [...]’s independence, but whether doubts existed from a neutral perspective.
- 22 Though it is important that the panel is independent, the standard for independence must not be too lenient. Otherwise the parties would be unrightfully deprived of their right to an undisturbed arbitration procedure (*Oberlandesgericht Naumburg, Germany, 19.12.2001, 10 SchH 3/01*). As soon as an arbitral panel is appointed, every removal of an arbitrator from the tribunal provokes a delay in the arbitration proceedings and increases the cost for the parties. The same result would be caused by a successful challenge of Dr. [...] (*Procedural Order no. 2 at 2*). It then becomes more important to preserve the arbitral panel (*CA, United Kingdom, 15.05.2000, AT & T and another v. Saudi Cable, 2 Lloyd's Rep. 2000, pp. 127 et seq.*).
- 23 Determining what type of relationship is considered close enough to endanger an arbitrator's independence, the peculiarities of arbitration have to be taken into account. One of the paramount advantages of arbitration is the possibility for the parties to choose an arbitrator. This possibility is as important to the parties as to arbitration itself. Knowing that their interest is being fully considered by the tribunal in making its decision, both parties are more likely to accept the tribunal's decision (*HUßLEIN-STICH, p. 67*). This is ensured if a party appoints a person it trusts and whom it believes to be capable of being a good arbitrator, understanding its point of view (*CRAIG/PARK/PAULSSON, p. 196 at 12.04; BISHOP/REED, Arb. Int'l. 1998, 405;*

SMITH, Arb. Int'l. 1990, 340; REDFERN/HUNTER, p. 213 at 4-52; DERAINS/SCHWARTZ, p. 110). Therefore, no party can be obliged to randomly choose someone whose decision will be of vital importance to it. Consequently, a party-nominated arbitrator cannot be expected to be totally unknown to the party appointing him. It is in fact impossible to appoint someone without any prior contact (*Tribunal de Grande Instance de Paris, France, 28.10.1988, Société Drexel Burnham Lambert v. société Philipp Brothers, Rev. arb. 1990, pp. 497 et seq.; DERAINS/SCHWARTZ, p. 112).*

- 24 Moreover, in an arbitral tribunal consisting of an equal number of party-appointed arbitrators as in this case, the choice of an arbitrator by CLAIMANT is evened out by the choice of an arbitrator by RESPONDENT. Thus, the fairness of the proceedings is guaranteed.
- 25 Therefore, it is acceptable that a loose relationship between an arbitrator and a party exists. Only relationships which are either financially or personally close enough to affect or at least appear to affect the arbitrator's freedom of judgement and endanger the fairer solution of the dispute lead to sufficient doubt of the arbitrator's independence.

B. Dr. [...] has no direct relationship with CLAIMANT

- 26 Dr. [...] has no relationship with CLAIMANT that might cause any doubt as to his independence under Sec. 18.1 DIS Rules. Dr. [...] himself has never been in touch with CLAIMANT before the dispute in question. He never had a business or personal contact with our client. There was never an intense (*LACHMANN, p. 522*) or a direct and definite connection (*SC of Illinois, U.S., 18.09.1947, Giddens v. Board of Education of the City of Chicago, 398 Ill 157, 75 NE2d 286, 291; AC of Illinois, U.S., 16.12.1970, William B. Lucke v. G.B. Spiegel, 266 NE2d 505; HUßLEIN-STICH, p. 65; DOMKE, p. 320*) between CLAIMANT and Dr. [...]. Only Multiland Associates, the law firm that will merge with Dr. [...]’s law firm in the future, has represented CLAIMANT in the past.
- 27 CLAIMANT chose Dr. [...] because he has a good reputation in the field of the current arbitration (*Procedural Order no. 2 at 26*) and not because of any relationships between them. Dr. [...] does not have any personal relationship to either of the parties that might raise any justifiable doubts concerning his freedom of judgment.

C. Dr. [...] has no indirect relationship with CLAIMANT via Multiland Associates that is sufficient to disqualify him as an arbitrator

- 28 Dr. [...] will not be hindered to judge independently in this arbitration, because neither the relationship between Multiland Associates and CLAIMANT [I] nor the one between Dr. [...]

and the Faraway office of Multiland Associates [III], is sufficient to establish a close relationship between CLAIMANT and Dr. [...].

I. There is no close relationship between Multiland Associates and CLAIMANT

29 The relationship between Multiland Associates and CLAIMANT does not constitute a close relationship between Dr. [...] and CLAIMANT.

30 Firstly, a business contact in general can only be considered to cause dependence if it is current. Past contacts will not create grounds for challenge unless they are of such magnitude as to be likely to affect an arbitrator's judgment (*CRAIG/PARK/PAULSSON*, p. 231 at 13.05; *COUNCIL, ARBITRATION 1991*, p. 81). As CLAIMANT was only represented by Multiland Associates twice, there is no continuous business contact between them (*Procedural Order no. 2 at 18*). Thus, no link has been established between Multiland Associates and CLAIMANT that could raise a justifiable doubt to Dr. [...]'s ability to judge all the facts of this dispute objectively.

31 Moreover, there is no connection between the past representation of CLAIMANT by Multiland Associates and this arbitration (*Procedural Order no. 2 at 18*). Multiland Associates has not given any opinion on the issue in question. They have never dealt with this case at all. The independence of an arbitrator can only be endangered if the topic of the former representation and the present arbitration are the same (*HUßLEIN-STICH*, p. 65; *Tribunal de Première Instance de Genève, 7.1.1969, Compagnie Générale de Grande Pêche v. Oceanica di Michele La Forese, Napoleone Magno & Cie., Rev. arb. 1969*, p. 108). Thus, there is no justifiable doubt as to Dr [...]'s independence in regard to any alleged influence from Multiland Associates on Dr. [...].

II. There is no close relationship between Dr. [...] and the Faraway office of Multiland Associates

32 Additionally there is no relationship between Dr. [...] and Multiland Associates' Faraway office that could hinder Dr. [...] to judge independently.

33 Dr. [...]'s law firm is going to merge with the Multiland Associates office in Riverside, Equatoriana. That office has not only never represented CLAIMANT in the past, but has also never worked together with CLAIMANT before and has no particular expectations to represent CLAIMANT in the future (*Procedural Order no. 2, at 18, Letter of Dr. [...] dated 9 September 2002*). The only Multiland Associates office that has ever represented CLAIMANT, the office in Faraway City, Oceania, is not going to be part of the working

environment of Dr. [...] and thereby does not under any circumstances establish a connection between Dr. [...] and CLAIMANT. The Oceania office is located in a different country. The two different offices of Multiland Associates are not working together as a unit. Each one is completely independent from the other. They execute their business in different countries, which can be expected to have different legal systems posing obstacles to the exchange of personnel.

- 34 It would hardly be possible to find an independent arbitrator if strict standards regarding possible connections were to apply. Law firms have grown in size and geographical spread in recent years, hence it has become increasingly common for lawyers to discover a prior or existing link of some kind with one or more of the parties to an arbitration (*DERAINS/SCHWARTZ, p. 114*). With the ever growing and merging law firms and the limited number of arbitration experts, it becomes more and more unlikely to find a suitable person who has no connection whatsoever with either party.
- 35 Even though Dr. [...] is going to be a partner in the Multiland Associates law firm, he will receive his main income from his own office, but only small shares from any other office's profit (*Procedural Order no. 2 at 19*). Such a small part of his total income will not influence his judgment. It is much less important than his good reputation in this field (*Procedural order no. 2 at 26*), which he would risk if he did not judge independently.
- 36 The contact between Dr. [...] and Multiland Associates' Faraway office is not sufficient to establish a close relationship between Dr. [...] and CLAIMANT.
- 37 This result is supported by the "general standard" recently drafted by the "IBA Working Group on Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration" on the basis of Art. 12 (2) UNCITRAL ML. The situation where an arbitrator's law firm has acted before for one of the parties in a case not related to the dispute before the arbitral tribunal is included in the white list. This list enumerates specific situations where no appearance of a conflict of interest exists from an objective point of view (*Draft Joint Report, p. 25*). These draft standards have a highly persuasive authority since they were drafted by international arbitration practitioners from all major jurisdictions.

THIRD ISSUE: THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DECIDE THIS DISPUTE

- 38 The Arbitral Tribunal has jurisdiction to decide the dispute between CLAIMANT and RESPONDENT. It has the competence to rule on its own jurisdiction by virtue of Art. 16

UNCITRAL ML, which confirms the generally accepted principle of competence-competence (*SC of Hong Kong, High Court, 29.10.1991, Fung Sang Trading v. Kai Sun Sea Products & Food, YCA 1992, p. 286 at 296; ICC Award no. 6268, ARNALDEZ/DERAINS/HASCHER, p. 68 at 71; WEIGAND-ROTH, p. 1222 at 2; FOUCHARD/GAILLARD/GOLDMAN, p. 461 at 660; REDFERN/HUNTER, p. 264 at 5-33 et seq.; CALAVROS, p. 76*).

- 39** On 3 April 2001 CLAIMANT and RESPONDENT agreed on arbitration [A]. The arbitration agreement fulfills the form requirements of the UNCITRAL ML and the NY Convention [B]. Due to the doctrine of separability, the validity of this agreement is not affected by any alleged defects of the underlying contract [C]. Neither does the minor inaccuracy in designating the “German Institution of Arbitration” affect the validity of the arbitration agreement [D].

A. An arbitration agreement was concluded between the parties

- 40** In the telephone conversation confirmed by the faxes exchanged on 3 April 2001 (*Claimant’s Exhibits nos. 3, 4*), CLAIMANT and RESPONDENT agreed on dispute settlement by arbitration by referring to the arbitration agreement contained in their former contract dated 15 December 2000.

B. The arbitration agreement satisfies the form requirements provided in Art. 7 (2) UNCITRAL ML and Art. II (2) NY Convention

- 41** The arbitration agreement concluded between the parties on 3 April 2001 fulfills the form requirements of Art. 7 (2) UNCITRAL ML and Art. II (2) NY Convention. The parties confirmed their oral arbitration agreement in an exchange of faxes [I]. The general reference to the agreement in the contract of 15 December 2000 is sufficient [II].

I. The exchange of faxes between the parties fulfills the requirements of Art. 7 (2) UNCITRAL ML and Art. II (2) NY Convention

- 42** The exchange of faxes between CLAIMANT and RESPONDENT on 3 April 2001 fulfills the requirement for written form of Art. 7 (2) UNCITRAL ML and Art. II (2) NY Convention. RESPONDENT stated in its fax of 3 April 2001 that it was pleased to confirm the telephone conversation in which it was agreed that “similar terms of the contract of 15 December 2000 are to apply“ (*Claimant’s Exhibit no. 3*). Corresponding to this declaration, CLAIMANT wrote in its fax of 3 April 2001 that “[a]ll other provisions in contract dated 15 December 2000 [are] to apply“ (*Claimant’s Exhibit no. 4*). Thereby both parties extended the arbitration

agreement contained in the contract of 15 December 2000 (*Claimant's Exhibit no. 2*) to their new contract.

- 43 According to Art. II NY Convention and Art. 7 UNCITRAL ML it is sufficient that the arbitration agreement is contained in an exchange of letters or telegrams. That is the case here. Both faxes referred to the original contract of 15 December 2000 where the arbitration agreement is set out.

II. The general reference to the arbitration clause contained in the previous contract fulfills the formal requirement of Art. 7 (2) UNCITRAL ML and Art. II (2) NY Convention

- 44 The general reference made by the parties to their contract of 15 December 2000 satisfies Art. 7 (2) UNCITRAL ML and Art. II (2) of the NY Convention because it meets the purposes of those provisions [1.] which is not contested by RESPONDENT [2.].

1. The general reference meets the purposes of the form requirement

- 45 The general reference is sufficient to satisfy the written form obligation as it fulfills the purposes of the form requirement. Those purposes are to evidence the agreement in writing [a] as well as to ensure the parties' notification of the arbitration clause [b].

a. The general reference fulfills the evidence function

- 46 The arbitration agreement satisfies the requirement that the agreement be evidenced in writing (*CC, France, 25. 02. 1986, Sté Confex v. Ets. Dahan, YCA 1987, p. 484*). This is needed to clarify whether and with which content an agreement was concluded (*PALANDT-HEINRICHES, § 125 at 1*).
- 47 There is a written agreement in the document of 15 December 2000 that contains the arbitration clause. The reference made to it in the faxes of 3 April 2001 is in writing as well (*Claimant's Exhibits Nos. 3, 4*). By virtue of this complete written record, the existence of this arbitration agreement can easily be verified.

b. The general reference ensures the notification of the parties

- 48 The general reference to the contract of 15 December 2000 satisfies the notification function of the form requirements of Art. 7 (2) UNCITRAL ML and Art. II (2) NY Convention. These form requirements have to be interpreted broadly, as the drafters of the NY Convention, and the UNCITRAL ML, wanted to facilitate the resolution of disputes by means of arbitration in

the field of international trade (*CA Paris, France, 20.01.1987, Bomar Oil v. Entreprise Tunisienne d'Activités Pétrolières, YCA 1988, pp. 466, 469*). If parties are internationally experienced businessmen, they have to be aware of the fact that a general reference is made to all clauses of a document. Since arbitration is the standard means of dispute settlement in international trade (*BERGER, p. 154*) the parties also have to be aware of the arbitration clause included in these documents. (*CA Paris, France, 20.01.1987, Bomar Oil v. Entreprise Tunisienne d'Activités Pétrolières, YCA 1988, pp. 466, 468; upheld in CC, France, 09.11.1993, Bomar Oil v. Entreprise Tunisienne d'Activités Pétrolières, YCA 1995, pp. 660, 662; Tribunal Fédérale Basle, Switzerland, 07.02.1984, Tradax Export v. Amoco Iran Oil Company, YCA 1986, pp. 532, 533 at 10; CRAIG/PARK/PAULSSON, p. 74, § 5.09 at footnote 95*). As CLAIMANT and RESPONDENT are experienced businessmen they had to be aware that the general reference included the arbitration clause.

49 This is confirmed by case law and legal writing (*BGH, Germany, 12.02.1976, YCA 1977, pp. 242, 243; DC SD New York, U.S., 02.12.1977, Ferrara v. United Grain Growers, YCA 1979, pp. 331, 332; Corte di Cassazione, Italy, 07.10.1980, Getreide Import v. Fratelli Casillo, YCA 1982, pp. 342, 344; Hong Kong CA, Hong Kong, 24.11.1995, Tai Hing Cotton Mill v. Glencore Grain Rotterdam, YCA 1997, pp. 290, 291; VAN DEN BERG, YCA 1989, pp. 528, 552; FOUCHARD/GAILLARD/GOLDMAN, p. 272 at 492; BORN, p. 189 c.f.; CRAIG/PARK/PAULSSON, p. 74 at 5.09; HOLTZMANN/NEUHAUS, p. 264*). A general reference is also considered sufficient when it is made to a document that was drafted by third parties and unknown to at least one of the parties (*DC SD New York, U.S., 02.12.1977, Ferrara v. United Grain Growers, YCA 1979, pp. 331, 332*).

50 In the present case the parties were aware of the content of the arbitration clause. They had included it in the contract which was concluded only three months ago, i.e. on 15 December 2000. This document was not only signed by both parties. It was even signed by the very same representatives who made the general reference on 3 April 2001 (*Procedural Order no. 2 at 49*). RESPONDENT, therefore, may not allege that it was unaware of the existence of the arbitration clause. It could easily have inspected the document of 15 December 2000. RESPONDENT himself cited this document when he tried to rely on an 8% discount. Consequently, RESPONDENT had actual knowledge of the content of the document of 15 December 2000 and thereby was aware of the existence of the arbitration clause. Under these circumstances a general reference to an arbitration clause is always sufficient.

2. RESPONDENT did not object to the incorporation by general reference

51 Finally, the incorporation by general reference was not an issue disputed by RESPONDENT. On the contrary, it wrote (*Statement of Defense at 12*) that, “if a contract had been concluded, the arbitration clause would have been included, for whatever it was worth”. Thereby, RESPONDENT admitted that the form requirements for the arbitration clause were fulfilled. It only alleged the arbitration agreement to be invalid because of the defect in the sales contract claimed by it. But the alleged defect cannot affect the validity of the arbitration agreement.

C. The validity of the arbitration agreement is not affected by possible defects of the underlying contract

52 The valid arbitration agreement is not affected by any possible defects of the main contract. On the basis of the doctrine of separability, the arbitration agreement is a separate contract. It is an agreement independent from the sales contract into which it was integrated by reference [I.]. Hence, any defects in the formation of the sales contract do not affect the validity of the arbitration agreement [II.].

I. The arbitration agreement and sales contract are independent contracts

53 Pursuant to Art. 16 (1) (1) UNCITRAL ML, which is in force in Danubia, *supra Issue no. 1 at A*, the arbitration agreement and the underlying contract are separate contracts. The main contract governs the commercial obligations of the parties whereas the collateral arbitration contract contains the obligation to resolve any disputes arising out of or relating to the main contract by arbitration (*GOTTWALD, p. 21 at 9; HOLTZMANN/NEUHAUS, p. 480 at Art. 16; DICEY/MORRIS, p. 575; CA, United Kingdom, 18.12.1967, Dalmia Dairy Industries v National Bank of Pakistan, 2 Lloyd’s Rep.[1978], p. 223*). The arbitration agreement and the underlying sales contract are independent in their existence and, therefore, are to be evaluated separately (*RUSSEL, p. 57 at 2-061; CRAIG/PARK/PAULSSON, p. 48, at 5.04; BERGER, Arbitration Interactive, p. 103 at 7-50; FOUCHARD/GAILLARD/GOLDMAN, p.198 at 389 et seq; REDFERN/HUNTER, p.154 at 3-31 et seq; Corte Maria Nacional de Apelaciones en lo Commercial, Argentina, 26.09.1988, Enrique C. Wellbers v. Extraktionstechnik Gesellschaft für Anlagenbau, CLOUT Case no. 27; BORN, p. 43*).

II. Possible defects in the formation of the sales contract do not affect the validity of the arbitration agreement

- 54** As a consequence of its independence, the arbitration clause is not affected by possible defects in the sales contract. According to Art.16 (1) (2) UNCITRAL ML, even a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Any defects of the sales contract do not affect the validity of the arbitration agreement. There might be cases where the arbitration agreement and the underlying contract suffer from the same flaw, e.g. defective agency or fraud in regard to both agreements (*SC, U.S., 12.06.1967, Prima Paint v. Flood & Conklin Mfg, 388 U.S. 395 (1967); HOLTZMANN/NEUHAUS, p.480 at Art.16; MUSTILL/BOYD, p. 109; RUBINO-SAMMARTANO, p. 225*) or the parties may not yet have reached an agreement, neither in regard to the main contract nor in regard to the arbitration agreement. In those cases, the arbitration agreement indubitably does not lead to a dispute resolution by arbitration, the arbitration agreement did not even come into existence.
- 55** The present arbitration, however, is a completely different case. CLAIMANT and RESPONDENT thought that they had come to an agreement on arbitration and on a contract of sale. It was only three days later when suddenly a dispute arose. This dispute only related to one single issue, namely the amount of the discount. This is clearly an issue of the sales contract and not of the arbitration agreement. A dispute unrelated to the arbitration agreement cannot lead to the consequence that the arbitration agreement was not validly concluded. This could only be argued if no arbitration agreement had been concluded at all, e.g. if the sales contract and the arbitration agreement were in the same document and one of the parties never even signed the document (*CA Paris, France, 12.07.1984, The Arab Republic of Egypt v. Southern Pacific Properties, 23 I.L.M. 1048; REDFERN/HUNTER, p. 156 at 3-34*). The existence or non-existence of the sales contract is of no importance whatsoever for the arbitration agreement if an arbitration agreement was concluded before (*RUSSEL, p. 57 at 2-061; REDFERN/HUNTER, p. 154 at 3-31; CRAIG/PARK/PAULSSON p. 515 at 28.07; FOUCHARD/GAILLARD/GOLDMAN, p. 198 at 389 et seq.*). This is the case here. The parties concluded an arbitration agreement that is not affected by a possible defect in the sales contract due to its independence.
- 56** Thus, even if the Tribunal finds that a contract of sale was not concluded, this does not lead to the invalidity of the arbitration agreement.

D. The minor inaccuracy in the designation of the “German Institution of Arbitration” does not affect the validity of the arbitration agreement

57 The validity of the arbitration agreement is not affected by the minor inaccuracy in designating the “German Institution of Arbitration” (DIS). Whenever an arbitration agreement suffers from such an inaccuracy, the arbitration agreement must be interpreted according to the parties’ intent. [I]. Pursuant to this interpretation, the institution the parties agreed upon is the “German Institution of Arbitration” [II].

I. The arbitration agreement has to be interpreted to determine the institution designated by the parties

58 CLAIMANT and RESPONDENT agreed on arbitration (*supra A*). As all other declarations of intent under the CISG, an arbitration clause has to be interpreted according to Art. 8 CISG to determine the intention of the parties. Irrespective of any misnaming of the institution, the clause is unambiguous in relation to the parties’ intend to go to arbitration. Once such an intention has been established, generally a strong “*in favorem validitatis*” approach is adopted in practice. Courts and tribunals have strived to give effect to the parties’ intention to arbitrate and interpret the clause in a generous way. (*QB Div (Commercial Code), United Kingdom, 21.02.1995, Mangistanmunaigaz Oil Production v. United World Trade,1 Lloyd’s Rep. [1995], p. 617; MUSTILL/BOYD, p. 107; HOCHBAUM, p. 34*) Thus they apply the principle “*in favorem validitatis*”. It serves to construe an arbitration agreement in a way that preserves its validity. (*DC SD New York, U.S., 03.05.1994, Hoogovens Ijmuiden Verkoopkantoor v. M.V. Sea Cattleya, 852 F.Supp. 6; Zurich Chamber of Commerce, Switzerland, 25.11.1994, Preliminary Award, YCA 1997, pp. 211, 216 et seq.; Chamber of Commerce of Geneva, Switzerland, 29.11.1996, Award no. 117, ASA Bulletin 1997, pp. 534, 537; Eisemann., p. 129 et seq.; BERGER Arbitration Interactive, p. 111 at 7-72; REDFERN/HUNTER, p.160 at 3-40; CRAIG/PARK/PAULSSON, p. 43 at 5.0101*). In application of this principle, the precise institution must be the DIS.

II. The institution the parties agreed upon is the DIS

59 CLAIMANT and RESPONDENT mentioned the “German Arbitration Association” in the arbitration clause (*Claimant’s Exhibits nos. 2, 3, 4*) and thereby showed their intention to settle disputes by institutional and not ad hoc arbitration.

60 Moreover, the parties agreed on the DIS to settle disputes arising out of their contractual relationship.

- 61 Firstly, CLAIMANT and RESPONDENT referred to a German arbitration institution in the arbitration clause by using the wording “**German** Arbitration Association”. Thus, they agreed that arbitration shall be conducted under the auspices of a German institution. The parties’ determination in this respect was unambiguous. This was not contested by RESPONDENT.
- 62 Secondly, this German institution referred to was the “German Institution of Arbitration”. CLAIMANT and RESPONDENT intended to submit any arising disputes to this institution by using the wording “German Arbitration Association”. In the judgment of 15 October 1999, decided by the Berlin Court of Appeal, the parties referred to the “German Central Chamber of Commerce“ in their arbitration agreement, which does not exist (*OLG Berlin, Germany, 15 October 1999, BB 37/2000 Beilage 8 zu Heft, p. 13 et seq.*). The court considered this wording to be a reference to the “German Institution of Arbitration“.
- 63 The facts in that case correspond to those in the present one with the only difference that the designation of the DIS in the cited case was even less precise. There, the parties had referred to a “chamber of commerce“, which the court found to be a designation of the DIS. CLAIMANT and RESPONDENT, on the contrary, explicitly referred to an “arbitration” institution. Moreover, they designated an “association“. The “German Institution of Arbitration“ is such an association even if this is not included in the official English name. The DIS standard arbitration clause and the original German name include the abbreviation “e.V.“, which means registered association.
- 64 Furthermore, the DIS is the leading arbitration institution in Germany and the only one fulfilling the function required by the parties, namely international commercial arbitration, that is generally available. The parties wanted to submit their arbitration to the rules of an institution conducting international arbitration. This is evidenced by the fact that CLAIMANT and RESPONDENT do business in different countries. From a functional perspective, the DIS Rules, which were drafted on the basis of the UNCITRAL ML, fulfill this requirement (*BERGER, Arbitration Interactive, p.112 et seq. at 7-73*). Thus, the international spirit of this uniform law is embodied in the DIS Rules (*Introduction to the Arbitration Rules of the German Institution of Arbitration*).
- 65 Consequently, for an international contract like the one concluded between CLAIMANT and RESPONDENT, international dispute settlement as performed by the DIS is favorable.
- 66 Even though there are certain other institutions conducting international arbitration in Germany, these are either specific commodity institutions, for instance the *International Council of Hides, Skins & Leather Traders’ Association* or the *Arbitration Court of the*

German Coffee Association, or for companies having their seat in Germany, for example the *Hamburg Friendly Arbitration*. These are not generally available arbitration institutions as required for the dispute between CLAIMANT and RESPONDENT.

- 67 Moreover, RESPONDENT never objected that the DIS is the only German institution executing international commercial arbitration (*Procedural Order no. 2 at 32, Statement of Claim at 15*).
- 68 The argument of RESPONDENT (*Statement of Defense at 11*), that the official English name of the institution would have been used if arbitration under the DIS Rules had been intended, is nonsensical. The parties did not designate the “German Institution of Arbitration” inaccurately on purpose. They only made a minor mistake, which cannot lead to the invalidity of the arbitration agreement. The parties did not intend to form an invalid arbitration clause. Neither was there any intention to designate a non-existing institution. Therefore, it was the actual intention of the parties to submit their arbitration to the DIS Rules.
- 69 It has been shown that a formally and substantially valid arbitration agreement has been concluded between the parties. It designated the “German Institution of Arbitration” (DIS) for dispute settlement. This arbitration agreement is separable from the underlying contract. Hence, the Tribunal has jurisdiction. Even if the Tribunal finds that the validity of the arbitration agreement is dependent on the validity of the underlying sales contract, the Tribunal has jurisdiction since the contract was concluded.

FOURTH ISSUE: THE PARTIES AGREED ON A CONTRACT OF SALE AND A 4% DISCOUNT

- 70 A contract of sale was concluded between CLAIMANT and RESPONDENT during the telephone conversation on 3 April 2001. Even without an agreement on the discount, all essential parts were agreed upon. [A]. Regardless whether the Tribunal finds the discount to be an essential part of the contract, there was an agreement on a 4% discount. [B]. No contradicting practice was established between the parties pursuant to Art. 9 (1) CISG [C].

A. The contract of 3 April 2001 was concluded during the telephone conversation according to Art. 23 CISG

- 71 CLAIMANT and RESPONDENT concluded a contract in accordance with Art. 23 CISG during the telephone conversation of 3 April 2001. This is evidenced by their subsequent exchange of fax messages. Pursuant to Art. 11 CISG, there are no form requirements to be met [I.]. The parties agreed on all essential terms according to Art. 14 CISG, namely goods,

quantity and price [II.]. The discount was not an essential part of the contract of 3 April 2001 [III.].

I. The contract was not subject to any form requirements

72 According to Art. 11 CISG, a contract of sale need not be concluded in or evidenced in writing and is not subject to any other requirement as to form. Consequently, Art. 11 CISG did not hinder a valid conclusion of the contract between CLAIMANT and RESPONDENT during the telephone conversation of 3 April 2001.

II. During the telephone conversation of 3 April 2001 all essential parts were stated and agreed upon

73 A contract was concluded between CLAIMANT and RESPONDENT during their telephone conversation. They agreed on the quantity (1,350 tons) of a specified good (*Oriented Polypropylene Film, hereafter referred to as "OPP"*) for the fixed price of \$1,900 per ton, being the essential parts of the contract according to Art. 14 CISG. This was sufficient to determine the price for the entire purchase, as it was \$1,900 times 1,350 tons equaling \$2,565,000. Evidence for this is found in the faxes the parties exchanged on 3 April 2001. The identical numbers stated in both faxes give evidence that the parties had agreed upon those figures (*Claimant's Exhibits nos. 3, 4*). CLAIMANT and RESPONDENT both quoted the list price of \$1,900 per ton for 1,350 tons. Thus, they were able to determine the purchase price. Furthermore, the faxes used the language "I am pleased to confirm" (*Claimant's Exhibit no. 3*) and "we hereby confirm" (*Claimant's Exhibit no. 4*) rather than "offer" or "acceptance", indicating that the parties were aware of the fact that a contract had been concluded during the telephone conversation. RESPONDENT itself stated in its fax of 3 April 2001 that an agreement had been reached during the telephone conversation (*Claimant's Exhibit no. 3*). By their agreement on all essential parts of the contract, the parties concluded a valid contract of sale during their telephone conversation.

III. The discount was not an essential part of the sales contract of 3 April 2001

74 CLAIMANT and RESPONDENT did not make the discount an essential component of their contract concluded on 3 April 2001.

75 Firstly, the discount was not included in the price calculation of the contract of 3 April 2001. This is evidenced by the fact that the prices in the 3 April 2001 contract were calculated in an entirely different way from the contract of 15 December 2000. In their contract of 15

December 2000 the price was stated as \$1,656 per ton (*Claimant's Exhibit no. 2*), even though the list price was \$1,800 per ton (*Claimant's Exhibit no. 1*). Thus the price included the discount. In that first contract, the discount was an essential part of the price, for it had been incorporated into the price per ton formula itself. It was not possible to leave the discount out of the calculation.

- 76 On the contrary, in the second contract of 3 April 2001 both parties stated that the OPP was purchased at a price of \$1,900 per ton (*Claimant's Exhibit Nos. 3, 4*), being exactly the list price (*Claimant's Exhibit Nos. 3, 4*). If a discount had been incorporated into the price calculation, the price would have been either \$1,824 per ton with a 4% discount, or \$1,748 with an 8% discount; neither were stated.
- 77 Secondly, the discount was not even a topic of the telephone conversation between Mr. Storck and Mr. Black (*Procedural Order o. 2, at 34*). The fact that the parties left the discount out of any negotiations gives evidence that they did not consider the discount to be an essential component of the contract.
- 78 Hence, on 3 April 2001, a contract of sale for 1,350 tons of OPP at a price of \$1,900 has been concluded between RESPONDENT and CLAIMANT without regard to the discount rate.

B. The parties concluded an agreement for a 4% discount

- 79 Regardless whether the Tribunal finds the discount to be an essential part of the contract, CLAIMANT and RESPONDENT agreed on a 4% discount. RESPONDENT's understanding of CLAIMANT's declaration does not have to be interpreted in accordance with Art. 8 (1) CISG as CLAIMANT did not and did not have to know that RESPONDENT intended to agree to an 8% discount. Therefore CLAIMANT's declaration has to be interpreted pursuant to Art. 8 (2) CISG. Pursuant to Article 8 (2) CISG, RESPONDENT had to understand any declarations our client made during the telephone conversation as a reasonable person in the same position. In this case, this is someone familiar with the customs in this business and aware of the above-mentioned, previous correspondence.
- 80 Firstly, our client's saying "best price" is an expression that was used several times in its correspondence with RESPONDENT (*Claimant's Exhibit no. 1*). In the first fax of 7 December 2000 (*Claimant's Exhibit no. 1*) CLAIMANT wrote that a discount of 8% was not the usual best price, but an "unusually low" one and the highest discount "ever given to any customer". There CLAIMANT also stated that the "usual price for favored customers", i.e. their "best price", was a discount of 4% of the list price.

- 81** Secondly a person familiar with this business would have known that often an initial offer to win new customers is unusually low and special discounts are granted on special occasions, i.e. the initiation of a new long-term relationship (*Procedural Order no. 2 at 40*). Furthermore, this person would have understood that purchase as an encouragement to start a long-lasting relationship, not as the standard discount for all future transactions between the parties. When business dealings between CLAIMANT and RESPONDENT took place in December 2000, both parties intended to enter into a long-term relationship. CLAIMANT expressed that by offering a one-time, exceptional 8% discount (*Claimant's Exhibit no. 1*). It sold the OPP as an extraordinarily low-priced sample in order to convince RESPONDENT of the OPP's quality (*Claimant's Exhibit no. 8*).
- 82** RESPONDENT received no discount in the first contract with CLAIMANT in 1996, where no further business contacts were intended (*Procedural Order no. 2 at 43; Procedural Order no. 3 at 4*). A reasonable person in RESPONDENT's position had to know that an 8% discount would only be granted for a special reason, e.g. the beginning of a long-lasting business relationship.
- 83** Therefore RESPONDENT could not expect to receive an 8% discount as granted in the contract of 15 December 2000, but only a 4% discount. And hence, CLAIMANT could only understand RESPONDENT's assent to be given to the contract including a 4% discount

C. There was no established practice between the parties that contradicted the applicability of a 4% discount per Art. 9 (1) CISG

- 84** The parties had only entered into a business relationship recently. They had only concluded two contracts before the present one. There was no long-term business relationship that could have led to a usual practice between them. This cannot be enough to establish a business practice that would be binding on both parties (*SCHLECHTRIEM-JUNGE, Art. 9 at 7; ACHILLES Art. 9 at 2; HONSELL-MELIS Art.9 at; STAUDINGER-MAGNUS, Art. 9 at 13*). More important, in these two contracts, different discounts had been applied. The first contract was concluded without any discount at all while the second one was concluded with the 8% discount. Thus, RESPONDENT could not have expected to get an 8% discount without a specific agreement.

**FIFTH ISSUE: RESPONDENT COMMITTED A BREACH OF CONTRACT,
AND CLAIMANT LAWFULLY DECLARED THE CONTRACT
AVOIDED**

85 RESPONDENT committed an anticipatory breach of contract under Art. 72 CISG [A] that entitled CLAIMANT to declare the contract avoided [B].

**A. RESPONDENT committed an anticipatory breach of contract under Art. 72
CISG**

86 RESPONDENT breached the contract pursuant to Art. 72 CISG. RESPONDENT notified CLAIMANT on 10 April 2001 (*Claimant's Exhibit no. 7*) of its intention to refuse performance of the contract unless CLAIMANT changed the contractual terms granting an 8% rather than a 4% discount.

87 Therefore, it was clear prior to the date of performance, i.e. 10 May 2001, that RESPONDENT was going to commit a breach of contract [I.]. Even if the Tribunal finds that no breach was committed on 10 April 2001, it was committed by RESPONDENT's repeated and definite refusal of performance on 2 May 2001 (*Claimant's Exhibit no.10*) [II.]. That breach of contract was fundamental [III.]. Even if the Tribunal finds that a contract with an 8% discount was concluded, RESPONDENT breached the contract anticipatorily [IV.].

**I. On 10 April 2001 RESPONDENT committed an anticipatory breach of contract
under Art. 72 CISG**

88 RESPONDENT committed an anticipatory breach of contract under Art. 72 CISG. In its telefax dated 10 April 2001 RESPONDENT denied its contractual obligations. It notified CLAIMANT that in case an 8% discount was not granted, it would "consider seriously" returning to its former supplier of OPP for its "future requirements" (*Claimant's Exhibit no.7*). The "future requirements" included the OPP purchased in the contract of 3 April 2001 [1.]. According to Art. 8 CISG, this declaration had to be interpreted as a repudiation of the contract [2.].

**1. The "future requirements" included the OPP that would be supplied according to
the present contract**

89 According to Art. 8 (2) CISG, the "future requirements" mentioned in the fax of 10 April 2001 had to be understood as including the 1,350 tons of OPP that RESPONDENT had ordered from CLAIMANT. With this term RESPONDENT could only mean OPP it would

receive for processing after 10 April 2001 and not only the OPP to be purchased in “future contracts”. The OPP was supposed to be delivered in nine shipments from May 2001 through January 2002 (*Claimant’s Exhibit nos. 3, 4*). It covered RESPONDENT’s need for OPP for the following eight months and not only for the present.

- 90 An interpretation under Art. 8 (3) CISG that takes into account RESPONDENT’s subsequent behavior supports this understanding. On 10 April 2001 RESPONDENT stated that it “consider[ed] seriously” not purchasing the OPP from CLAIMANT for its “future requirements”. On 2 May 2001 RESPONDENT told CLAIMANT that it had purchased its OPP requirement of 1,350 tons from another supplier, as it had announced to do. Hence it was confirmed that the 1,350 tons were included in the earlier mentioned “future requirements”.

2. According to Art. 8 CISG RESPONDENT’s declaration had to be interpreted as a repudiation of the contract

- 91 According to Art. 8 (2) CISG, a reasonable person in CLAIMANT’s position would have interpreted RESPONDENT’s fax of 10 April 2001 as a repudiation of contract for two reasons.

- 92 Firstly, when RESPONDENT wrote that it “consider[ed] seriously” returning to its former supplier, it expressed that it did not feel bound by the contractual relationship it had entered into. Instead RESPONDENT alleged that it had the right to step back from it. When claiming incorrectly that it is entitled to withdraw from the contract, a party repudiates the contract (*F DC ND Illinois, U.S., 07.12.1999, Magellan International v. Salzgitter Handel, CLOUT Case no. 417; SCHLECHTRIEM-LESER/HORNUNG, Art. 72 at 28*).

- 93 Secondly, the wording of RESPONDENT’s fax indicated that it would only fulfill the contract under the condition that the terms of the contract would be altered in RESPONDENT’s favor. Such an unconditional demand constitutes a repudiation of contract (*HERBER/CZERWENKA, Art. 72 at 3; HONNOLD, Art.72 at A, STAUDINGER-MAGNUS, Art.72 at 11; PILTZ, p. 269 § 5 at 365*). This interpretation of RESPONDENT’s statement finds support in an interpretation pursuant to Art. 8 (3) CISG. RESPONDENT’s subsequent behavior indicates that the repudiation was indeed committed on 10 April 2001. In its fax dated 2 May 2001, RESPONDENT stated “I need not repeat what I already told you in my fax of 10 April 2001”. In the next sentence it informed CLAIMANT that it had already covered its need for OPP with its old supplier and, therefore, no longer expected delivery from CLAIMANT. RESPONDENT thereby confirmed that its declaration dated 10 April 2001 was rightly understood as an absolute demand for different terms than those contractually fixed. Such an

ultimatum for different terms as those agreed upon constitutes a denial of performance and, therefore, is a repudiation of contract.

- 94 As a conclusion, it was clear as early as on 10 April 2001 that RESPONDENT would neither fulfill its contractual obligation to take delivery according to Art. 60 CISG nor its obligation to pay the price according to Art. 54 CISG. This repudiation of contract constitutes a breach (*SCHLECHTRIEM-LESER/HORNUNG Art. 72 at 26; HONNOLD p. 438 at 396*). Since shipment was due on 10 May 2001, RESPONDENT committed an anticipatory breach. Pursuant to Art.72 CISG, the breach provided a basis for immediate avoidance by CLAIMANT.

II. If the Tribunal finds that no anticipatory breach under Art.72 CISG was committed on 10 April 2001, it was committed on 2 May 2001

- 95 In its fax dated 2 May 2001, RESPONDENT notified CLAIMANT that it had “placed an order with Polyfilm GmbH for the [OPP] that [it] had expected to purchase from [CLAIMANT]” (*Claimant’s Exhibit no. 10*). With these words, RESPONDENT denied ultimately and beyond the need for interpretation any contractual duties. Such earnest and definite refusal to fulfill contractual obligations made by one party is equivalent in nature and consequence to a breach committed when performance is due and therefore constitutes an anticipatory breach under Art. 72 CISG (*OLG Celle, Germany, 24.5.1995, CLOUT Case no. 136; SCHLECHTRIEM-LESER/HORNUNG, Art. 72 at 26; STAUDINGER-MAGNUS, Art. 72 at 11; ACHILLES Art. 72 at 2; SCHLECHTRIEM, JZ 1988 pp. 1037, 1045; PILTZ, §5 at 364*). Therefore, RESPONDENT committed an anticipatory breach of the contract under Art. 72 CISG at the latest on 2 May 2001.

III. RESPONDENT’s anticipatory breach of the contract was fundamental

- 96 RESPONDENT’s breach was fundamental as defined by Art. 25 CISG [1.]. Its consequences were, as a direct result of RESPONDENT’s behavior, foreseeable [2.].

1. RESPONDENT’s threat not to perform fundamentally violated CLAIMANT’s interest in the contract

- 97 RESPONDENT fundamentally violated the contract because it threatened not to comply with any of his contractual duties. Pursuant to Art. 25 CISG, a breach of contract is fundamental if the other party suffers such a detriment as substantially to deprive it of what it could reasonably expect under the contract. RESPONDENT denied all contractual obligations and,

hence, deprived CLAIMANT of anything it could reasonably have expected under the contract. RESPONDENT's behaviour, therefore, constituted a fundamental breach of the contract.

2. RESPONDENT has or should have foreseen that its denial constituted a fundamental breach under Art. 25 CISG

98 The foreseeability is determined by the knowledge a reasonable person of the same kind and under the same circumstances would have had (*SCHLECHTRIEM KOMMENTAR-SCHLECHTRIEM Art. 25 at 11; BIANCA/BONELL-WILL, Art. 25 at 2.2; ACHILLES, Art. 25 at 14; STAUDINGER-MAGNUS Art. 25 at 15*). Such a person would have foreseen that a refusal to perform a contract constitutes a fundamental breach.

IV. Even if the Tribunal finds that an 8% discount was agreed upon, RESPONDENT breached the contract anticipatorily

99 Alternatively, even in case the Tribunal finds that an 8% discount was contractually agreed upon, RESPONDENT had no right to avoid the contract [1.]. Therefore, RESPONDENT violated the contract anticipatorily when refusing performance in its fax dated 2 May 2001 [2.].

1. Since RESPONDENT may not assert that CLAIMANT breached the contract fundamentally RESPONDENT had no right to avoid the contract

100 RESPONDENT had no right to avoid the contract. RESPONDENT's refusal to take delivery of the OPP (*Claimant's Exhibit at 10*) was not justified in accordance with Art. 49 CISG. This provision requires a fundamental breach of contract by the seller as defined in Art. 25 CISG. However, CLAIMANT did not breach the contract at all [a.]. Alternatively, if the Tribunal finds that CLAIMANT did breach the contract, that breach was not fundamental [b.].

a. CLAIMANT did not breach the contract

101 CLAIMANT did not breach the contract because it did not violate its contractual obligation arising out of Art. 30 CISG. In accordance with Art. 30 CISG, the seller must deliver the goods. RESPONDENT's refusal to take delivery caused CLAIMANT to prudently hold back the OPP (*Claimant's Exhibit no. 9*). Therefore, RESPONDENT cannot assert that CLAIMANT refused to fulfill his contractual obligation to deliver the goods. On the contrary,

CLAIMANT notified RESPONDENT several times that it was ready for shipment of the OPP, and already had booked cargo space (*Claimant's Exhibit no. 6, 9*).

102 However, CLAIMANT could not deliver, as it was clear that RESPONDENT would not take delivery of the OPP (*Claimant's Exhibit no. 10*). CLAIMANT, therefore, did all it could to fulfill its contractual obligations.

b. Even if the Tribunal finds that CLAIMANT did breach the contract, the breach was not fundamental

103 Even if the Tribunal finds that CLAIMANT breached the contract, this breach was not fundamental. Under Art. 25 CISG a breach is only fundamental if it results in such detriment as to substantially deprive the other party of what it is entitled to expect under the contract.

By insisting on a 4% discount, CLAIMANT did not deprive RESPONDENT of its foremost interest in the implementation of the contract.

104 Firstly, RESPONDENT was not substantially deprived of its financial interest in the contract. The difference between an 8% and a 4% discount cannot be assumed to be substantial. Determination whether the injury is substantial must be made under consideration of the monetary value of the contract and the monetary harm resulting from the breach (*SPAGNOLE/WINSHIP, p. 253; BABIAK, TEMP. INT'L & COMP. L. J. 1992, pp. 113-124*). With regard to the total volume of the transaction, i.e. \$2,615,809, the amount of \$102,600, i.e. the 4% discount in question, is of minor economic importance. The comparison between both sums demonstrates that charging the higher price does not lead to a substantial impairment of the parties' obligations. In financial terms, RESPONDENT would have substantially received what it was entitled to expect under the contract.

105 Secondly, RESPONDENT was not deprived of its material interest in the contract. CLAIMANT was always ready to fulfill its obligation to deliver the OPP and did not make its performance dependent on an alteration of contractual terms in its favor, i.e. RESPONDENT's acceptance of a 4% discount. Thus, RESPONDENT would have received what it could have expected under the contract. Yet, to invoke Art. 25 CISG, the violated parties' interest affected by the breach of contract must be so fundamental that the implementation of the contract is useless for the injured party (*STAUDINGER-MAGNUS, Art. 25 at 13; HERBER/CZERWENKA, Art. 25 at 8; HONSELL-KAROLLUS, Art. 25 at 17; FOX, p. 207*). As demonstrated, this is not the case here. Consequently, RESPONDENT was obliged to take the delivery offered by CLAIMANT. Avoidance is the *ultima ratio* remedy provided by the CISG and shall be used as the ultimate reaction only (*BGH, Germany, 03.04.1996, BGH VIII,*

BGHZ 132, pp. 290, 298; PILTZ, p.228 § 5 at 194; SCHLECHTRIEM KOMMENTAR-HUBER, Art. 49 at 2). Avoidance shall be executed merely if no other remedy provided by the CISG will lead to satisfactory results (*HEUZÉ, p. 327; FOX, p.210*). For instance, since CLAIMANT had to initiate performance by delivery, RESPONDENT could have taken the first delivery and withheld payment of the appropriate part of the price. It would have been up to CLAIMANT to undertake the steps it considered necessary and bear the respective risks.

- 106** Thirdly, RESPONDENT may not argue that CLAIMANT breached the contract intentionally, thereby undermining RESPONDENT's confidence in a faithful implementation. As CLAIMANT was convinced of the fact that a 4% discount had been agreed upon, it did not intentionally breach the contract but acted in good faith instead. It maintained the intention to perform the contract in accordance with the terms CLAIMANT thought to be concluded.
- 107** Finally, RESPONDENT's alleged avoidance did not serve its interest but exclusively harmed our client. After its repudiation of the contract, RESPONDENT purchased from its old supplier on the same terms it had agreed upon with CLAIMANT. Hence, RESPONDENT was in the same position as before. CLAIMANT, on the other hand, suffered a considerable loss. Therefore, avoidance, being the final and most drastic remedy, could not be relied upon by RESPONDENT.
- 108** Even under the assumption of an 8% discount, CLAIMANT did not breach the contract fundamentally.

2. RESPONDENT violated the contract anticipatorily under Art. 72 CISG with its fax dated 2 May 2001

- 109** Even if an 8% discount was agreed upon, RESPONDENT's fax dated 2 May 2001 constituted an anticipatory breach under Art. 72 CISG. As illustrated above, CLAIMANT's behavior did not violate the contract fundamentally and, therefore, gave no justification for RESPONDENT's avoidance of the contract. An unjustified avoidance always constitutes a refusal to perform the contract for the purposes of Art. 72 CISG (*SCHLECHTRIEM KOMMENTAR-HUBER, Art. 49 at 66*).
- 110** Therefore, an anticipatory breach was committed by RESPONDENT's notification dated 2 May 2001 (*Claimant's Exhibit no.10*) by stating that its need for OPP was already covered by another supplier.

B. CLAIMANT validly avoided the contract

111 RESPONDENT's anticipatory breach of contract under Art. 72 CISG entitled CLAIMANT to immediately declare the contract avoided [I.]. CLAIMANT declared the contract avoided in accordance with the respective rules [II.].

I. CLAIMANT was entitled to declare the contract avoided

112 Any fundamental breach of contract entitles the violated party to declare the contract avoided under Art. 64 CISG. Since RESPONDENT committed an anticipatory and fundamental breach by the denial of its contractual obligations in its fax dated 10 April 2001, alternatively 2 May 2001, CLAIMANT was entitled to declare the contract avoided prior to the date of performance under Art. 72 CISG. Therefore, CLAIMANT was entitled to declare the contract avoided under Art. 64 CISG.

II. CLAIMANT declared the contract avoided in accordance with the respective rules

113 CLAIMANT avoidance came into effect as soon as the DIS forwarded the Statement of Claim to RESPONDENT on 5 June 2002. Avoidance can be declared and damages claimed in one document [1.]. CLAIMANT avoided the contract in time [2.]. The conditions for claiming damages under Art. 61 (1) (b) CISG were thereby met [3.].

1. Avoidance can be declared and damages claimed in one document

114 CLAIMANT was allowed to declare the contract avoided and claim damages in one document. The respective notice must be unambiguous in that the violated party intends to eliminate the contract (*SCHLECHTRIEM KOMMENTAR-HUBER, Art. 49 at 29; ACHILLES, Art. 49 at 6; Secretariat Commentary, Art. 24 at 3*). Avoidance is unequivocally declared when incorporated in a statement of claim. (*OGH, Austria, 28.04.2000, 1 Ob 292/99v*). Since our client claimed lost profit, it expressed its intention to eliminate the contract. As soon as the DIS forwarded the Statement of Claim dated 23 May 2002 to RESPONDENT on 5 June 2002 (*Letter DIS – Medipack dated 5 June 2002*), avoidance was therefore declared.

2. CLAIMANT avoided the contract in time

115 CLAIMANT avoided the contract timely. The declaration of avoidance is generally not bound to any time frame (*OGH, Austria, 28.04.2000, 1 Ob 292/99v, unpublished; BIANCA/BONELL, Art. 74 at 3, 4; PILTZ, p. 275 § 5 at 389; STAUDINGER-MAGNUS, Art. 49 at 30*). The only

exception to this principle is Art. 64 (2) CISG, which addresses the situation in which the buyer has already paid the price. As RESPONDENT did not pay the price, Art. 64 (2) CISG is not applicable. Hence, CLAIMANT could rightfully declare avoidance on 23 May 2002.

3. CLAIMANT is entitled to damages under Art. 61 (1) (b) CISG

116 Due to RESPONDENT's fundamental breach of the contract, the prerequisites of Art. 72 CISG are met. Thereby, the requirements of Art. 64 CISG are fulfilled as well. By virtue of Art. 64 (1) (a) CISG, CLAIMANT is entitled to declare the contract avoided. Damages are to be claimed under Art. 61 (1) (b) CISG.

SIXTH ISSUE: CLAIMANT IS ENTITLED TO DAMAGES IN THE AMOUNT OF \$461,700

117 CLAIMANT is entitled to damages per Art. 61 (1) (b) CISG since RESPONDENT committed a fundamental breach of the contract dated 3 April 2001. Art. 74 CISG defines the extend of damages a injured party may claim. This provision provides reparation for lost profit. Under Art. 74 CISG our client may claim lost profit in the amount of \$461,700 **[A]**. CLAIMANT acted in accordance with any obligation to mitigate loss under Art. 77 CISG **[B]**.

A. CLAIMANT is entitled to damages in the amount of \$461,700 representing the lost profit

118 Our client can claim lost profit in the amount of \$461,700 under Art. 74 CISG **[I]**. If the Tribunal finds that an 8% discount was agreed upon, the lost profit from the OPP purchase is only equal to \$359,100 **[II]**.

I. CLAIMANT is entitled to lost profit in the amount of \$461,700

119 Pursuant to Art. 74 CISG, CLAIMANT can claim an amount of \$461,700 as lost profit from the OPP purchase. A party that can claim damages under Art. 74 CISG is entitled to lost profit. CLAIMANT suffered lost profit in the amount of \$461,700. CLAIMANT's gross margin on the manufacture of OPP is 22% of the list price (*Statement of Claim at 11; Procedural Order no.1 at 11*). For this particular purchase, this 22% has to be decreased by 4%, representing the discount, for a total profit of 18%. The purchase defined the amount of OPP as 1,350 tons at a list price of \$1,900, resulting in a total price of \$2,565,000. Therefore, 18% of this amount is the profit of \$461,700 that CLAIMANT would have made if RESPONDENT had performed the contract.

120 Whether or not CLAIMANT resold the OPP that was intended for RESPONDENT is irrelevant to its claim. CLAIMANT had the excess capacity to produce the OPP in addition to its production for other customers. Therefore, if RESPONDENT had not breached the contract, CLAIMANT would have made the sale to RESPONDENT and the sale to the party who purchased the goods intended for RESPONDENT. In such a situation, lost profit is the appropriate remedy in order to give CLAIMANT the “benefit of the bargain” (*Procedural Order no. 2 at 53 et seq.*).

II. Alternatively, if the Tribunal finds that an 8% discount was agreed upon, CLAIMANT is entitled to lost profit in the amount of \$359,100

121 Should the Tribunal decide that an 8% discount had been agreed upon, the lost profit claimed under Art. 74 CISG is as a consequence reduced by another 4% of the gross margin. The amount claimed is then equal to \$359,100.

B. CLAIMANT fulfilled any obligation to mitigate loss under Art. 77 CISG

122 CLAIMANT acted in accordance with its obligation to mitigate loss under Art. 77 CISG by not delivering the first, already booked, shipment. Since RESPONDENT had not answered CLAIMANT’s fax in which it insisted on performance, CLAIMANT, by not delivering the OPP, prevented RESPONDENT from receiving twice the amount of OPP needed for its production.

SEVENTH ISSUE: CLAIMANT IS ENTITLED TO INTEREST ON THE DAMAGES CAUSED BY RESPONDENT

123 According to Art. 78 CISG, CLAIMANT is entitled to interest on any sum that is in arrears, the damages caused by RESPONDENT. It is possible to claim interest on damages [A]. Damages were in arrears since they originated [B]. CLAIMANT did not have to give any notice [C]. Damages do not have to be liquidated in order to claim interest [D].

A. Interest can be claimed on damages

124 Interest can be charged on damages (*SCHLECHTRIEM KOMMENTAR-BACHER, Art. 78 at 14; HERBER/CZERWENKA, Art. 78 at 2; ACHILLES, Art. 78 at 3; HONSELL-MAGNUS, Art. 78 at 5*). Art. 78 CISG states that a party is entitled to interest on any sum when it is in arrears. It is generally accepted that Art. 78 CISG applies to damages since a claim for damages is always

a claim for a sum (*DC N.D. New York, U.S., 09.09.94 Delchi Carrier v. Rotorex, UNILEX E.1994-22; LG Landshut, Germany, 05.04.1995, UNILEX 1995-12, Schiedsgericht der Börse für Landwirtschaftliche Produkte in Wien, Austria, ZfRV 1998, pp. 211*). Here that sum is equal to the total lost profit unrightfully caused by RESPONDENT's breach of contract in the amount of \$461,700. If the Tribunal finds that an 8% discount was agreed upon, the lost profit is equal to \$359,100.

B. Damages were in arrears since they originated

125 Damages were caused by RESPONDENT's breach of contract. Damages are due from the very moment of the breach of contractual obligations (*SCHLECHTRIEM KOMMENTAR-BACHER, Art. 78 at 14; STAUDINGER-MAGNUS, Art. 78 at 10; HONSELL-MAGNUS, Art. 78 at 9*). Therefore, interest is due from the moment RESPONDENT breached the contract, 10 April 2001, or alternatively, 2 May 2001.

C. CLAIMANT did not have to give formal notice

126 CLAIMANT rightfully claims interest without giving separate notice before filing the statement of claim. Art. 78 CISG does not require any formal notice by the creditor before claiming interest (*SCHLECHTRIEM KOMMENTAR-BACHER, Art. 78 at 17; PILTZ, p. 280 §5 at 410*).

D. Damages do not have to be liquidated in order to claim interest

127 CLAIMANT is entitled to interest on the damages, regardless whether they are liquidated or not. Art. 78 CISG applies to both liquidated and unliquidated sums. (*SCHLECHTRIEM KOMMENTAR-BACHER, Art. 78 at 15; HONNOLD, pp. 468 et seq. at 422; WITZ/SALGER/LORENZ-WITZ, Art. 78 at 5; HERBER/CZERWENKA, Art. 78 at 3*). Hence CLAIMANT is entitled to interest on the damages of \$461,700, or alternatively \$359,100.

CONCLUSION

In response to the Tribunal's Procedural Orders no. 1, dated 4 October 2002, no. 2, dated 5 November 2002, and no. 3, dated 11 November 2002 and RESPONDENT's Statement of Defense, dated 7 August 2002, we respectfully make the above submissions on behalf of our client, Equafilm Co.. For the reasons stated in this Memorandum for CLAIMANT and for additional reasons which will be detailed in the further proceedings, we respectfully request the Tribunal to declare that:

- The laws applicable to the contract and this arbitration are the DIS Arbitration Rules, the UNCITRAL ML and the CISG.
- There are no grounds for the challenge of Dr. [...].
- The Arbitral Tribunal has jurisdiction to decide on the dispute between CLAIMANT and RESPONDENT.
- A contract of sale was concluded between CLAIMANT and RESPONDENT and a discount of 4% agreed upon.
- RESPONDENT committed a breach of contract, and CLAIMANT lawfully declared the contract avoided.
- Therefore, CLAIMANT is entitled to damages in the amount of \$461,700.
- Furthermore, CLAIMANT is entitled to interest on the damages caused by RESPONDENT.

If RESPONDENT should make further submissions on these issues, CLAIMANT would comment on these matters in detail.

For Equafilm Co.

(signed) _____, 12 December 2002

ATTORNEYS
