

GERMAN INSTITUTION OF ARBITRATION (DIS)

CASE NO. DIS-SV-B-MOOT 10

# MEMORANDUM FOR THE CLAIMANT

On behalf of:

Against:

**The Claimant**

**The Respondent**

Equafilm CO.  
214 Commercial Ave.  
Oceanside  
Equatoriana

Medipack SA  
395 Industrial Place  
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## **Index of Abbreviations etc.**

<b>AAA</b>	American Arbitration Association
<b>Art./Arts.</b>	Article/Articles
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
<b>CLOUT</b>	Case Law on UNCITRAL Texts (Internet database), edited by the UNCITRAL Secretariat <a href="http://www.uncitral.org/">http://www.uncitral.org/</a>
<b>Contra proferentem</b>	Against the author
<b>Convention, the</b>	see CISG
<b>DIS</b>	German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V)
<b>DIS Rules</b>	DIS Arbitration Rules 1998
<b>Ed./eds.</b>	Edition/editor/editions/editors
<b>E.g.</b>	Exempli gratia (for example)
<b>Essentialia negotii</b>	Terms without which the contract will have no sense
<b>Estoppel (principle of)</b>	The principle that a party cannot allege facts that it has previously countered
<b>Et seq.</b>	And following
<b>Ex post</b>	Subsequent
<b>Exh./Exhs.</b>	Exhibit/Exhibits
<b>Favor contractus</b>	The principle that contracts should be upheld
<b>IBA</b>	International Bar Association
<b>IBA Rules</b>	IBA Rules of Ethics for International Arbitrators
<b>ICC</b>	International Chamber of Commerce
<b>I.e.</b>	Id est (that is)
<b>In extenso</b>	All of

<b>In fine</b>	In the end of
<b>Infra</b>	Below
<b>Inter alia</b>	Among others
<b>Ipsa jure</b>	In and of the law
<b>Lex arbitri</b>	The procedural rules of the forum of the arbitration
<b>Lex specialis</b>	Law governing a particular field as opposed to a general law
<b>Lex specialis principle</b>	The principle that a lex specialis should be given preference over a general law
<b>LCIA</b>	London Court of International Arbitration
<b>MAL</b>	Model Law on International Commercial Arbitration as adopted by UNCITRAL on 21 June 1985
<b>No./Nos.</b>	Number/Numbers
<b>N.Y. Convention</b>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 – effective 7 June 1959
<b>OLG</b>	Oberlandesgericht
<b>P./pp.</b>	Page/pages
<b>Para./paras.</b>	Paragraph/paragraphs
<b>Pretium certum</b>	Definite price
<b>Sec./Secs.</b>	Section/Sections
<b>Supra</b>	Above
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNIDROIT Principles</b>	UNIDROIT Principles of International Commercial Contracts, Rome 1994
<b>UNILEX</b>	International case law and bibliography on the CISG and UNIDROIT Principles ( <a href="http://www.unilex.info/">http://www.unilex.info/</a> )



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## **I. The Claimant-nominated arbitrator, Dr. Arbitrator, is impartial and independent and should therefore remain in office**

### **I.1. The DIS Arbitration Rules and the UNCITRAL Model Law apply**

1. It will be established that the parties agreed on arbitration at the German Institution of Arbitration under the DIS Arbitration Rules (hereinafter the DIS Rules); infra 41 et seq. Therefore, the procedural law governing the question of impartiality and independence of Dr. Arbitrator is the DIS Rules. These rules are supplemented by the UNCITRAL Model Law on International Commercial Arbitration (hereinafter MAL) as *lex arbitri* since the arbitration takes place in Danubia, which has enacted MAL and the dispute concerns an international commercial transaction between a seller in Equatoriana, Equafilm Co. (hereinafter EQUAFILM) to a buyer in Mediterraneo Medipack SA. (hereinafter MEDIPACK); Arts. 1(1) and 1(2) MAL. The provisions of the DIS Rules and the MAL on the issue of impartiality and independence are identical. Thus, there is no conflict with the mandatory provision of Art. 12 MAL; Redfern & Hunter, p. 212.

### **I.2. EQUAFILM's prior relationship with Multiland Associates and Multiland Associates' merger with the law firm of Dr. Arbitrator do not give rise to justifiable doubts as to the impartiality or independence of Dr. Arbitrator**

2. In letter dated 2 September 2002, MEDIPACK raised doubts as to the impartiality and independence of Dr. Arbitrator. The challenge was based on Dr. Arbitrator's disclosure of a forthcoming merger between Multiland Associates and the law firm of which Dr. Arbitrator is a partner. By letters of 22 August 2002 and 2 September 2002 Dr. Arbitrator advised the German Institution of Arbitration (hereinafter DIS) that Multiland Associates' office in Faraway City, Oceania, had previously represented EQUAFILM in matters unrelated to the present dispute between EQUAFILM and MEDIPACK. The matters concerned EQUAFILM's purchase of another company and an intellectual property dispute. Upon acceptance to sit as arbitrator, Dr. Arbitrator was not aware of the connection between Multiland Associates' office in Oceania and EQUAFILM (Procedural Order No. 2, 17-18).
3. Each arbitrator must be and remain impartial and independent and may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence; Art. 12(2) MAL and Secs. 15 and 18.1 DIS Rules. Only doubts that are substantiated and justifiable in the eyes of a fair-minded and reasonable observer can meet the standard under

the DIS Rules and Art. 12(2) MAL. This objective test is confirmed by case law, scholarly writings and international rules of ethics for arbitrators; Challenge Decision of 11 January 1995, paras. 23-31, Laker Airways, judgement by the English High Court 20 April 1999, Fouchard et al., p. 571 and Art. 3.2 IBA Rules.

4. It is EQUAFILM's submission that nothing in the present case raises justifiable doubts as to the impartiality or independence of Dr. Arbitrator. The Tribunal should therefore dismiss MEDIPACK's challenge of Dr. Arbitrator.

**I.2.1. It would be unreasonably burdensome and impracticable if the merger in itself were to constitute partiality or dependence of Dr. Arbitrator**

5. The requirement of an arbitrator's impartiality and independence is indeed a universally accepted principle that is fundamental to the arbitral system. However, there are limits to the application of the principle. Apart from reflecting consideration to the parties' confidence in the arbitral system, it reflects consideration for the efficiency of the arbitral system and the parties' right to appoint the arbitrators.
6. Thus, the Tribunal should apply the requirement of impartiality and independence reasonably, weighing the interest of the parties' confidence in the proceedings against the efficiency of the proceedings. The Tribunal cannot be oblivious to the fact that in the past decade there has been a large increase in the number of international mergers between law firms. Indeed, it would be a considerable barrier to the efficiency of international commercial arbitration if mergers were to prevent lawyers from acting as arbitrators against companies that they have never represented, received payment from or even heard of merely due to the fact that in the past they had been clients of an associated firm or a firm with which the lawyer in question is associated.
7. The consensual nature of arbitration requires that both parties feel they may repose confidence in the arbitrators. However, the requirement of impartiality and independence was drafted to safeguard the integrity of the arbitral process. They are not a right of veto over the other party's choice of arbitrator.
8. Thus, having regard to the efficiency of international commercial arbitration the merger should not be allowed to constitute partiality or dependence of Dr. Arbitrator.

**I.2.2. Dr. Arbitrator is impartial, as he has acted loyally and complied with the duties under the DIS Rules and MAL and as Dr. Arbitrator does not have any knowledge which would cause him to have preconceptions in favour of EQUAFILM**

9. The concept of impartiality relates to the duty of an arbitrator to maintain an open mind and decide the case on the law and the evidence free from any preconceptions in favour of one of the parties or in relation to the issues in dispute; Art. 3.1 IBA Rules and Redfern & Hunter, p. 212.
10. As acknowledged by scholars it may be relevant to observe whether the arbitrator acts loyally and carefully during the proceedings in determining the impartiality of the arbitrator. This can be reflected through the arbitrator's observance of the duty of disclosure; Redfern & Hunter, pp. 218 et seq., Craig, Park, Paulsson, pp. 213 et seq., and e.g. AT&T, judgement by the English Court of Appeal 15 May 2000. The duty of disclosure is set forth in Sec. 16.3 DIS Rules.
11. Upon acceptance of the nomination on 21 June 2002, Dr. Arbitrator informed the DIS that he knew of no circumstances likely to give rise to doubts as to his impartiality or independence. At this time Dr. Arbitrator was aware of the merger discussions with Multiland Associates. It is unknown when the firms reached the final agreement to merge. Upon acceptance Dr. Arbitrator had no knowledge of the previous relationship between Multiland Associates and EQUAFILM and he did not learn about Multiland Associates' previous representation of EQUAFILM until 12 August 2002. An arbitrator should have the right to be reasonable in the extent of inquiries into conflicts; Eastwood, Sec. III(b). Under the facts in this case it would be unreasonable to impose a duty of inquiry on Dr. Arbitrator before there was a final agreement to merge. Dr. Arbitrator inquired on the nature of the previous representations and received this information on 20 August 2002. Two days later Dr. Arbitrator advised the parties and the DIS hereof (Procedural Order No. 2, 16-17). Dr. Arbitrator has therefore effectuated an immediate disclosure.
12. Further, Dr. Arbitrator has not given any legal advice to EQUAFILM concerning the disputed issues or discussed the current dispute with EQUAFILM. Neither has Multiland Associates. Multiland Associates has only dealt with entirely unrelated matters. Thus, Dr. Arbitrator is free from any preconceptions in relation to the issues in dispute.
13. Finally, in letter of 2 September 2002 MEDIPACK acknowledged Dr. Arbitrator's personal

integrity.

14. Therefore, Dr. Arbitrator's conduct in the proceedings and the fact that Dr. Arbitrator has no previous knowledge of the issues demonstrate that there exist no circumstances indicating that Dr. Arbitrator has any preconceptions in favour of EQUAFILM. Dr. Arbitrator is therefore impartial.

**I.2.3. Dr. Arbitrator is independent, as Multiland Associates' connection to EQUAFILM concerns past relations on matters unrelated to the present dispute and is indirect**

15. The requirement of independence revolves around the duty of an arbitrator to be free from direct relationship with the parties and from having a financial interest in the outcome of the dispute that is likely to affect the judgement of the arbitrator; Art. 3.1 IBA Rules, Redfern & Hunter pp. 214 et seq., Bishop & Reed, Secs. III(a) et seq., and Born, pp. 872 et seq.

*I.2.3.1. Multiland Associates' link with EQUAFILM is a past business relationship concerning only two matters entirely unrelated to this dispute*

16. Multiland Associates' Oceania office has represented EQUAFILM on two occasions as evidenced in letter dated 22 August 2002. These matters are closed and Multiland Associates does not currently represent EQUAFILM. The matters concerned an intellectual property dispute and a purchase of another company in Oceania. They are entirely dissimilar to the current dispute. Past business relationships should not as a starting point operate as a bar to acceptance of appointment. That is only the effect if they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgement; Art. 3.4 IBA Rules. Due to the insignificance and the nature of the representations they should not work as a barrier to Dr. Arbitrator's appointment; Bishop & Reed, Sec. III(c)(i).

*I.2.3.2. The connection to Dr. Arbitrator is remote and indirect, since neither Dr. Arbitrator nor his law firm has ever acted as counsel for EQUAFILM*

17. Dr. Arbitrator has never acted for EQUAFILM and there has been no previous connection between Dr. Arbitrator's law firm and EQUAFILM. Thus, Dr. Arbitrator does not personally have any knowledge of EQUAFILM's business or any relationship with EQUAFILM's personnel that could cause Dr. Arbitrator to be deemed dependent.
18. The only connection between Dr. Arbitrator and EQUAFILM is the forthcoming merger between the law firm of Dr. Arbitrator and Multiland Associates. However, it was Multiland

Associates' office situated in Faraway City, Oceania, an entirely different country, that acted for EQUAFILM. Thus, the connection between Dr. Arbitrator and EQUAFILM may be characterised as remote and indirect and cannot give rise to justifiable doubts; Born, p. 873.

19. Dr. Arbitrator will become a partner of the merged firm and will thus receive a share of the profits of the firm (Procedural Order No. 2, 19). Hypothetically, an arbitrator might have an interest in favouring a party in order to secure future work. However, in this case Dr. Arbitrator's share of the profits is primarily determined by the profits of the individual office and in part by the profits of the entire firm. Multiland Associates' office in Equatoriana will not represent EQUAFILM in the future. Thus, if Multiland Associates' Oceania office were to represent EQUAFILM in the future, any significant profit would remain with the Oceania office. Considering the size of Multiland Associates, any profit from EQUAFILM would be insignificant. Therefore, the partnership does not imply any financial interest of Dr. Arbitrator.
20. The merger of the law firms will make the combined firm a significant player in the market for any client. Thus, if an arbitrator's general interest in securing future work is given weight in all circumstances, any party would present a problem in relation to dependence. Such an application of the rules is not warranted.
21. Since the connection between Dr. Arbitrator and EQUAFILM is remote and indirect and Dr. Arbitrator has no financial interest in the outcome of the dispute, there are no justifiable doubts as to the independence of Dr. Arbitrator. In conclusion, Dr. Arbitrator is impartial and independent and should therefore remain in office.

## **II. The Tribunal has jurisdiction over the dispute**

22. None of the parties question the Tribunal's power to rule upon its own jurisdiction; Art. 16(1) MAL.
23. It is EQUAFILM's submission that on 3 April 2001 the parties agreed by reference to settle disputes by arbitration and the arbitration should be in accordance with the DIS Rules.

### **II.1. The parties concluded a binding and valid arbitration agreement on 15 December 2000, which was incorporated by reference in the contract of 3 April 2001**

24. Arbitration can only take place if the parties have agreed hereto, as the arbitration system is based on the free will of the parties. The parties' agreement to arbitrate any disputes is therefore an essential proof of mutual consent and must therefore be in writing; Art. 7(2)

MAL.

25. On 15 December 2000 EQUAFILM and MEDIPACK concluded a first contract, signed by both parties (Exh. No. 2). This contract contained an arbitration clause. As the parties signed the contract it fulfilled the “in writing” requirement in Art. 7(2) MAL. EQUAFILM’s arguments are therefore based on the assumption that a binding arbitration agreement was concluded in the contract of 15 December 2000.

**II.1.1. On 3 April 2001 a binding arbitration agreement was agreed upon, as the parties incorporated the arbitration agreement contained in the contract of 15 December 2000**

26. As stated in Art. 16 MAL the invalidity of the main contract shall not entail *ipso jure* the invalidity of the arbitration clause. The same is widely recognized to be true if the main contract is found to be non-existent; Huleatt-James & Gould, p. 68, and Fouchard et al., p. 211. Indeed that is important in the present matter, in which the parties demonstrated consent to arbitrate in their faxes of 3 April 2001 (Exhs. Nos. 3 and 4) regardless of the formation of the sales contract; *infra* 64 et seq.
27. Parties can incorporate an arbitration clause contained in one contract into another contract by reference. The reference must evidence a mutual consent between the parties to incorporate the arbitration clause contained in the original contract; Born, p. 190.
28. It is EQUAFILM’s submission that the two faxes exchanged on 3 April 2001 reveal the parties’ consent to incorporate the arbitration clause contained in their first contract of 15 December 2000 into their second contract.
29. Art. 7(2) MAL third sentence states that a reference to another document containing an arbitration agreement “must be such as to make that clause part of the contract”. This demand for clarity can be fulfilled by tacit acceptance in an exchange of faxes; Bomar Oil, judgement by Cour de Cassation, France of 9 November 1993.
30. Statements made by a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances; Art. 8(2) CISG. When EQUAFILM in its fax of 3 April 2001 made a reference to “all provisions in the contract of 15 December 2000”, it may reasonably be taken as an incorporating the arbitration agreement.

31. Mr. Black of MEDIPACK and Mr. Storck of EQUAFILM confirmed the agreement of 3 April 2001 by exchange of faxes (Exhs. Nos. 3 and 4). Both faxes explicitly referred to the terms of the 15 December 2000 contract. The initial fax from Mr. Black stated: "Payment, shipping and similar terms of the contract of 15 December 2000 are to apply". The responding fax from Mr. Storck stated to the same effect: "All other provisions in contract dated 15 December 2000 to apply".
32. It is submitted that MEDIPACK's wording "similar terms" includes a reference to the arbitration agreement term in the contract of 15 December 2001. MEDIPACK specified payment and shipping as applicable, but this does not exclude the arbitration clause, as the wording "similar" must relate to other provisions in the contract of 15 December 2000.
33. It is unknown why MEDIPACK worded its fax as it did. A reasonable answer could be that payment and shipping terms are less likely to change from contract to contract and the reference was made to emphasize that all terms that the parties did not need to vary from contract to contract applied to this new sale. As an arbitration agreement is such a permanent term, and thus covered by the reference to "similar terms", the fax must reasonably be interpreted as a reference to the arbitration clause.
34. MEDIPACK could easily have specified that the arbitration agreement did not apply if that was its wish. Instead it made a general reference to the contract of 15 December 2000, and by doing so it indicated its intent to be bound by the arbitration agreement. As MEDIPACK wrote the fax of 3 April 2001 any ambiguities must be held against it in accordance with the principle of *contra proferentem*; Art. 4(6) UNIDROIT Principles. For applicability of the UNIDROIT Principles as a supplemental interpretative tool in disputes relating to international contracts see Bonell, pp. 13 et seq.
35. If any uncertainty exists as to the incorporation of the arbitration clause EQUAFILM invites the Tribunal to interpret the clause in accordance with the principle of effective interpretation; Fouchard et al., pp. 258-259 and Redfern & Hunter, pp. 171 et seq. Under this principle, an interpretation that enables the clause to be effective should be preferred, as this best upholds the intentions of the parties to arbitrate disputes as already agreed in the signed agreement of 15 December 2000.
36. In conclusion, the parties' reference to the contract of 15 December 2000 incorporated the arbitration clause in that contract into the contract of 3 April 2001.

**II.1.3. The reference to the arbitration clause was “in writing” due to the parties’ explicit references to the contract of 15 December 2000 in the faxes of 3 April 2001**

37. According to Art. 7(2) MAL a reference in a contract to a document that contains an arbitration clause constitutes an arbitration agreement, provided that the contract referring to the document is in writing. This writing requirement is satisfied if the reference is “contained in ... an exchange of faxes which provide a record of the agreement”. The DIS Rules mention in the introductory note that the writing requirement is satisfied if the arbitration agreement is contained in faxes exchanged between the parties.
38. The parties exchanged faxes on 3 April 2001 that referred to the arbitration clause contained in the contract of 15 December 2000. As the faxes contained references to a written arbitration agreement, the in writing requirement of Art. 7(2) MAL has been met.
39. The arbitration agreement should also meet the writing requirement of Arts. II(1) and II(2) N.Y. Convention in order to be enforceable. The N.Y. Convention does not stipulate that the arbitration agreement must be contained in a single document, and hence does not exclude agreements incorporated by reference; Fouchard et al., p. 376.
40. Since the N.Y. Convention does not expressly require a signature with an exchange of letters, an exchange of faxes incorporating an arbitration agreement will also be valid if the authors of the faxes can be identified. As the names of the companies and the authors of the faxes are written in all of the relevant faxes this requirement has been met, and the arbitration agreement is valid and enforceable under the N.Y. Convention.

**II.2. The parties agreed on arbitration under the patronage of the DIS, as the DIS is the only available “German Arbitration Association” to conduct international commercial arbitration**

41. In the contract of 15 December 2000 EQUAFILM and MEDIPACK agreed that “Any controversy or claim...shall be determined by arbitration in accordance with the rules of the German Arbitration Association...” (Exh. No. 2).
42. EQUAFILM submits that the wording “German Arbitration Association” in the arbitration clause was a mistranslation of the German name Deutsche Institution für Schiedsgerichtsbarkeit (Statement of Claim Sec. III). MEDIPACK, on the contrary, has submitted that the parties’ arbitration clause should be rendered ineffective as the clause

designates a non-existing institution (Statement of Defence Sec. III).

43. It is EQUAFILM's submission that the Tribunal should give effect to the arbitration clause in the contract of 15 December 2000, as this was the intention of the parties. Furthermore, EQUAFILM submits that the institution designated to hear the dispute should be the DIS.

**II.2.1. The arbitration clause proves that the parties intended to solve any dispute by arbitration, and it should therefore be rendered effective**

44. Due to an unfortunate error the arbitration clause designates a non-existing arbitration institution. The wording thus gives rise to the question as to what forum of settlement EQUAFILM and MEDIPACK desired.
45. The contract of 15 December 2000 states that any controversy should be determined by arbitration. Not only does the clause designate arbitration as the forum of settlement, it specifically addresses the number of arbitrators, place and language of the arbitration. These circumstances show that it was indeed EQUAFILM's intention to resort to arbitration.
46. Even though the arbitration clause was drafted by EQUAFILM and not negotiated by the parties (Procedural Order No. 2, 30) the drafting of the clause with the wording "arbitration" in highlighted letters must have made it apparent to MEDIPACK that arbitration was to be the dispute settlement mechanism. By signing the contract of 15 December 2000, MEDIPACK accepted the terms offered by EQUAFILM. Furthermore, these terms were incorporated into the contract of 3 April 2001 by MEDIPACK's reference; supra 26 et seq. MEDIPACK thereby demonstrated its will and intention to let the dispute resolution mechanism be arbitration. Case law confirms this position in law; award of the International Chamber of Commerce, 1974, and award of the Zürich Chamber of Commerce 25 November 1994, para. 8, which held that by signing a contract with an arbitration clause, the parties had mutually agreed that any disputes should be resolved by arbitration and not litigation.
47. Sustaining MEDIPACK's submission would leave the parties with the only choice of court proceedings, thus depriving the clause of any meaning. This result would not be in accordance with the principle of effective interpretation, as rendering the clause ineffective would leave it useless; Fouchard et al., pp. 258-259, Redfern & Hunter, p. 171 et seq., and Born, p. 298.
48. Therefore, the Tribunal should render the clause effective by upholding arbitration as the dispute settlement mechanism agreed upon, as this would be in accordance with the parties'

intention and give meaning to the clause.

### **II.2.2. The institution should be the DIS, as the parties explicitly referred to arbitration under the auspices of a German arbitration institution**

49. The Tribunal must apply an interpretation of the parties' arbitration clause to determine whether the DIS Rules apply. If interpreted literally, a clause designating a non-existing arbitration institution would be rendered ineffective. However, case law and scholarly writings support that arbitral tribunals seek to establish the parties' intentions and if the institution can be identified with a significant degree of certainty, the clause will remain effective; e.g. award of the Italian Arbitration Association, 1993, Craig, Park, Paulsson, p. 85, Fouchard et al., pp. 264-266, and Rubino-Sammartano, pp. 214-217.
50. EQUAFILM and MEDIPACK agreed upon the non-existing "German Arbitration Association". In the following it will be demonstrated that the wording of the clause identifies the DIS with a significant degree of certainty and that arbitration under the DIS was the intention of the parties.
51. Using the word "Association" demonstrates that the parties opted for an arbitral institution, which typically offers administration and other services. If the parties were not allowed to settle the dispute by institutional arbitration, the only solution left would be an ad hoc arbitration. This would not be in accordance with the wording of the arbitration clause. The fact that the parties' arbitration clause was constructed identically to standard forms recommended and used by several arbitration institutions strongly supports the choice of institutional arbitration, cf. the wording of the model clauses suggested by UNCITRAL, ICC, AAA and LCIA.
52. By use of the word "German" EQUAFILM and MEDIPACK made it clear that any possible dispute should be settled under the auspices of a German organisation. This can only mean the DIS, as the DIS is currently the only institution in Germany which conducts international commercial arbitration. The German Maritime Arbitration Association is specialised in resolving disputes of a maritime nature and is therefore not suitable for a dispute concerning an international commercial sale of goods. The Arbitration Court at the Hamburg Chamber of Commerce provides for the settlement of commercial disputes. However, the procedural rules of this arbitral institution indicate that the service provided is primarily for conflicts between German parties. There are three reasons that support this: The language of the proceedings is

primarily German, the applicable procedural law is partly based on the provisions of the German Code of Civil Procedure, and a dismissed challenge of an arbitrator can be appealed to a German court, the Hanseatisches Oberlandesgericht Hamburg; Arts. 7, 15 and 17 of the procedural rules of that institution. These circumstances reflect a distinct German affiliation. The DIS Rules, on the other hand, are equally suitable for German and international arbitral proceedings, cf. the introductory note to the DIS Rules. The DIS is therefore the institution capable of providing the international service needed by the parties in Danubia. Award of the Zürich Chamber of Commerce 25 November 1994 held that a reference to “international trade arbitration organisation in Zürich, Switzerland” should correctly be construed as referring to the Zürich Chamber of Commerce, as this is the only institution in Zürich administering international commercial disputes.

### **II.2.3. “German Arbitration Association” was a mere mistranslation of the official name of the DIS**

53. As stated by EQUAFILM, the wording “German Arbitration Association” was a mere mistranslation of the official German name of the DIS. The mistranslation can only be a result of EQUAFILM’s ignorance of the official English name of the DIS. An incorrect expression should not be relevant if the true intentions of the parties are apparent. It is regrettable to make an error in an important clause such as the arbitration clause. Yet it is often experienced that parties do not pay full attention to the arbitration clause. Even though this is unwise, it is explainable as it is only natural for parties to avoid contemplating the risk of disputes. Having these circumstances in mind, the error made by EQUAFILM can be rectified.
54. The arbitration clause reflects that EQUAFILM and MEDIPACK agreed on institutional arbitration, which can only be the DIS and thereby the DIS Rules as the procedural rules. Choosing the DIS would be in accordance with the parties’ true intentions. Hence the Tribunal has jurisdiction over the dispute.

### **III. The CISG is the applicable law to the merits of any dispute arising from the contract of 3 April 2001**

55. The Tribunal shall decide the dispute in accordance with the rules chosen by the parties; Sec. 23.1 DIS Rules. The contract of 15 December 2000, which was incorporated into the 3 April 2001 contract by reference, states in provision 12: “Choice of Law. This contract is subject to the commercial law of Equatoriana”. Equatoriana has incorporated the CISG, which makes

the Convention the default applicable law in international sales of goods. As the contract between EQUAFILM and MEDIPACK governs an international sale of goods, EQUAFILM submits that EQUAFILM and MEDIPACK agreed on the CISG.

### **III.1. The choice-of-law clause must be understood as a reference to the CISG**

56. No evidence exists as to the exact intentions of the parties when they agreed on this provision. However, it can logically and reasonably be inferred that EQUAFILM intended the CISG to apply, and that any reasonable person under the same circumstances as MEDIPACK would also have this understanding.
57. CISG case law confirms that a reference in an international contract to the law of a contracting state must imply a reference to the CISG, as this is the law governing international sales of goods; e.g. Asante, judgement by U.S. District Court, California, 27 July 2001 and award of ICC, 23 August 1994. The domestic commercial law of Equatoriana applies to local commercial sales of goods. As the CISG is a part of Equatoriana law and applies to international commercial sales of goods, the CISG is *lex specialis* to the domestic sales law of Equatoriana. The *lex specialis* will be given precedence over the general law in Equatoriana (Procedural Order No. 2, 5).
58. Scholars argue that since the CISG applies by default, a choice-of-law clause should be interpreted in accordance with Art. 8 CISG; e.g. Lookofsky, p. 42. Under Art. 8(2) CISG statements made by the parties 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. When the parties agreed to arbitration in Danubia, they agreed on submitting any disputes to an international forum. In continuation thereof, the only logical measure would be to apply an international set of rules.
59. The word “commercial” in the clause does not change the abovementioned. The issue is not whether the sale is commercial or not. The term “commercial” can be understood as a reference to the CISG and to the domestic commercial law of Equatoriana. The word “commercial” is independent of the international or national character of the sale, and both possible sets of laws are commercial.
60. The wording of the clause must therefore be understood as a reaffirmation of the application of the international rules on commercial sales, i.e. the CISG.

### **III.2. The choice-of-law clause does not constitute an exclusion of the CISG in accordance with Art. 6 CISG**

61. The CISG is *lex specialis* to the domestic sales of goods law in this dispute. A deviation from the default law must be clear. The CISG pre-empts the State domestic law in cases where a national law is agreed upon, and the mere expression of a specific applicable national law in an arbitration clause does not constitute the exclusion of the Convention under Art. 6 CISG; *Asante* judgement by U.S. District Court, N.D., California of 27 July 2001 and *Enderlein & Maskow*, p. 49.
62. An effective agreement to apply domestic law would require that the relevant domestic code was named; *Lookofsky*, p. 29, note 97 and award of OLG Frankfurt on 30 August 2000. Nothing in the choice-of-law clause between EQUAFILM and MEDIPACK indicates any exclusion at all, and therefore the choice-of-law clause does not constitute an exclusion of the CISG.

### **III.3. The rules of private international law would lead to an application of the CISG**

63. The parties' agreement is the primary source when determining the correct applicable law. A tribunal should aim at finding the parties' real intentions at the time of drafting. Nevertheless, if the clause is deemed to be unenforceable, the CISG will be the applicable law by default, as the relevant choice-of-law rules of both *Equatoriana* and *Mediterraneo* provide that the law governing a contract of sale and its formation is that of the seller's country (Statement of Claim Sec. 13). As the seller is EQUAFILM located in *Equatoriana*, and *Equatoriana* has enacted the CISG, the Convention would apply by default; Art. 1(1)(b) CISG.

## **IV. A contract for the sale of 1350 tons OPP film was concluded on 3 April 2001 at a price of \$ 2,615,809**

64. The issues listed in Procedural Order No. 1 as issue-bullets 4 and 5 will, for the purpose of this Memorandum, be argued in the following order: IV.1: A contract was formed during the telephone conversation on 3 April 2001; IV.2: The price agreed upon was EQUAFILM's list price less four percent; IV.3: Even if no price was specifically agreed upon, the contract is still valid and binding; and IV.4: In case of a valid contract with no provisions governing the price, the price issue is governed by Art. 55 CISG.

### **IV.1. A contract was formed during the telephone conversation on 3 April 2001**

65. During the telephone conversation on 3 April 2001, it was agreed that MEDIPACK would

purchase 1,350 tons of OPP film (Exh. No. 3). There is no clear description of the conversation preceding the fax. As the parties made an oral agreement, there is no identifiable offer and acceptance. However, both parties have made written confirmations of the contract (Exhs. Nos. 3 and 4). Based on the sources of interpretation available, namely the faxes and other written statements, EQUAFILM submits that the parties agreed on the sale of goods on 3 April 2001; *infra* 66 et seq., that the agreement stipulated a means of calculating the price; *infra* 70 et seq., and that the disagreement on price does not invalidate the contract but is resolved by interpretation in accordance with CISG.

**IV.1.1. A binding contract was formed during the telephone conversation on 3 April 2001, as the parties agreed on a sale of 1,350 tons of OPP film**

66. It is generally acknowledged that a contract can be formed in ways other than through an exchange of offer and acceptance; Schlechtriem pp. 99-102.
67. In view of this, and in view of the fact that the parties shared the understanding that on 3 April 2001 a contract had been concluded, it seems impossible to counter the parties' understanding on the mere basis that no offer and acceptance is identifiable; Bianca & Bonell, p. 406 et seq., and Flechtner, p. 204.
68. On 3 April 2001 the parties did not only agree that a contract had been formed. They also agreed on a number of terms of that contract: Quality and quantity of the goods, time and place of delivery, payment mode and indeed all but the specific amount of the price, which is reflected in the faxes from both parties following the telephone conversation of 3 April 2001 (Exhs. Nos. 3 and 4).
69. However, a comparison of EQUAFILM's fax of 3 April 2001 with that of MEDIPACK of 6 April 2001 (Exh. No. 5) reveals that the parties had different understandings regarding the price of the goods. At the time of the conclusion of the contract on 3 April 2001 that was not clear to the parties. They both thought they were in agreement, but there was a latent dissent.

**IV.1.2. The price was agreed upon, as provisions for calculating the price on the basis of a list price less a discount were included in the fax of 7 December 2000, which was adhered to by reference in the contract of 3 April 2001**

70. The parties agreed on a system for calculating the price on 7 December 2000 (Exh. No. 1). It is suggested that this system, which was incorporated into the contract of 3 April 2001 by

reference, is an express indication of the price under Art. 14 CISG.

71. Most terms of the contract of 3 April 2001 were agreed on by reference to the parties' contract of 15 December 2000 (Exh. No. 2). However, as regards price the communications of 3 April 2001 contained express provisions, cf. MEDIPACK's fax of 3 April (Exh. No. 3): "Since your list price has risen to \$ 1,900 per ton in line with price movements in the industry, the discounted price we are to pay will be increased accordingly." EQUAFILM's fax of 3 April 2001 (Exh. No. 4) is in accordance with the terms expressed in the quoted sentence: The list price was \$ 1,900 per ton and MEDIPACK was to receive a discount from that list price.
72. The 15 December 2000 contract implemented the price system set forth in EQUAFILM's fax of 7 December 2000 (Exh. No. 1). That fax promised MEDIPACK a discounted price on future orders ("best price"). It also promised MEDIPACK an eight percent discount on the first order.
73. It is in the 7 December 2000 fax that the system of a list price less a discount is set forth. Therefore, the parties' common understanding of how to calculate the price, must be derived from the 7 December 2000 fax. In other words, the 3 April 2001 contract incorporated the 7 December 2000 fax with regard to price.
74. The latent dissent stems from the fact that the parties understand the 7 December 2000 fax differently. MEDIPACK interprets it as a promise of a permanent eight percent discount, whereas EQUAFILM submits that the fax must be understood as giving MEDIPACK an introductory discount of eight percent and, as regards future orders, promising MEDIPACK the most advantageous price offered by EQUAFILM at any given time to favoured customers.
75. MEDIPACK accepted the price system by paying the price agreed on and receiving the goods of the first order. An acceptance can be expressed via a conclusive conduct by the offeree; Lookofsky, p. 60 et seq.
76. It follows from the incorporation of the price system of 7 December 2000 that MEDIPACK agreed to pay EQUAFILM's list price less a certain discount. The system for calculating the price on the basis of a list price and a discount constitutes a set price under Art. 14 CISG; Secretariat Commentary to Art. 14 para. 14. Such price systems are common in international trade; Enderlein & Maskow, p. 210. Regardless of the disagreement on the price there was a price-fixing system, which can be interpreted in accordance with Art. 8 CISG. This will show

an operative price system that requires no reference to market price; *infra* 79 et seq.

#### **IV.1.3. The latent dissent does not invalidate the contract, as it is a question of contract interpretation under Art. 8 CISG**

77. It is true that from a strictly objective point of view there was no meeting of the minds on the price-terms of the contract. However, the content of an agreement depends on the meaning which should be given to the statements of the parties. In other words: When the parties have different understandings of the statements that form the contract, which meaning should be given preference? That is a question of interpretation of the statements, an issue governed by Art. 8 CISG.
78. Leading scholars support these views; e.g. Honnold, p. 69: “Domestic rules of validity – such as requirements of “good faith” [etc.] may become inapplicable when the contract is interpreted and applied in conformity with ... the Convention. In short, failure to turn first to rules of article 8 on construction of the contract ... would restrict the scope of uniform law in violation of the rule of Art. 7(1)...” Also Bianca & Bonell, pp. 99 et seq., advocate that in a case where it cannot be proven that the offeree knew or could not have been unaware of the meaning attached to a term by the offeror, “... under this paragraph [i.e. Art. 8(2)] the offeror’s intent will prevail if he can show that this would have been the understanding of a reasonable person of the same kind and in the same circumstances as the offeree”. It follows that the dissent on the understanding of the contract of 3 April 2001 is a matter governed by Art. 8(2) CISG. As the parties’ agreement contained a price system and the parties intended to form a contract, the contract was formed.

#### **IV.2. The price agreed upon was \$ 2,615,809, equal to EQUAFILM’s list price less four percent plus CIF charges**

##### **IV.2.1. A reasonable understanding of the letter of 7 December 2000 reflects that the eight percent discount was an introductory offer, and that the price to be paid for future orders would depend on the discount offered to other favoured customers**

79. There was no mutual subjective understanding of the price term between the parties, when the contract of 3 April 2001 was negotiated. However, Art. 8(2) CISG protects a party's reasonable reliance on statements of another party. It is suggested that a reasonable person would have known that a variable discount, and not a fixed one of eight percent, would apply to future deliveries from EQUAFILM to MEDIPACK and thus to the order of 3 April 2001.

80. In accordance with Art. 8(2) CISG "...statements made by and other 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". The statements by EQUAFILM are subject to the understanding of a reasonable person. The statements made by EQUAFILM during the telephone conversation on 7 December 2000, were accepted by MEDIPACK (Exh. No. 1) and adhered to by both parties on 3 April 2001. This will be examined below in light of Art. 8(2) CISG.
81. The 7 December 2000 fax (Exh. No. 1) specifically stresses that the first order in a number of respects is unique. A written contract is made to confirm the deal, a special discount is offered and the price is unusually low. Structurally Exh. No. 1 can be divided into two sections:
82. The first section, starting with the words "I wish to express...", is concerned with the framework of a long-term relationship. In the context of dealing with the long-term relationship, it is promised that MEDIPACK will always be offered EQUAFILM's "best price". A variable discount equal to the largest discount offered to other favoured customers is thus promised to apply to future orders.
83. The second section starts with the words "To recapitulate our..." and is concerned with the delivery of the first order for 200 tons OPP film, cf. "...recapitulate our telephone conversation.... You are placing a first order....". The eight percent discount is placed in the second section, and therefore concerned specifically with the first order. It follows that it can only be reasonably understood as a promise of an unusually high one-time discount.
84. This is supported by the principle of interpretation reflected in Art. 4.4 UNIDROIT Principles, which states that contract terms are to be read as an integral part of their general context. Thus, the structure of the contract may well provide a guideline to the understanding of specific terms.
85. It is undisputed that the discount normally given by EQUAFILM to favoured customers is four percent. Hence, if MEDIPACK receives an eight percent permanent discount, EQUAFILM would accept an unending reduction of its gross margin by four percent on all orders from MEDIPACK. Such an understanding is unreasonable as this would be a departure from a long practice by EQUAFILM. That practice was communicated to MEDIPACK from the very beginning of the negotiations, cf. the words "in fact this is the best price we have ever given any customer" (Exh. No. 1).

86. A reasonable person would have realized that the size of the discount would be subject to changes. Thus EQUAFILM could not be expected to incur a permanent reduction of its gross margin by four percent compared to the gross margin obtained from other favoured customers, as that would indeed be unusual business conduct.
87. A reasonable understanding of the statements made by EQUAFILM on 7 December 2000, having regard to the express wording, the structure of the statement and the contextual use of the two different discounts leads to the conclusion that the list price would vary, that an eight percent discount was an introductory offer, and that a variable discount would apply to future orders.

**IV.2.2. The list price less four percent equals the parties' agreement that MEDIPACK would receive EQUAFILM's "best price" at any time, which is not a promise of a permanent eight percent discount**

88. It is submitted that granting an eight percent discount does not imply that a smaller discount cannot apply to future orders, since a reasonable understanding of the term "best price" is merely a reference to the "best price" given to any favoured customer at the specific time of an order, not to the best price ever granted a customer.
89. It has already been established that the eight percent discount offered on the first order, was not to apply to all future orders. The term "best price" does not explicitly encompass a promise of a fixed eight percent discount on all coming orders from MEDIPACK.
90. It is further submitted that the reasoning supra 79 et seq. relating to the division of the 7 December 2000 fax (Exh. No. 1) into two sections is that the system in the first section was intended to govern the price for future orders. This entails that MEDIPACK would at any time obtain as good a price as any other customer of EQUAFILM.
91. It is pointless for EQUAFILM to promise its "best price" if an eight percent discount was to apply at all times. It has to be borne in mind that the term "best price" may indeed result in a discount larger than eight percent, if that is what other customers of EQUAFILM get. The term thus need not always be a disadvantage to MEDIPACK, in that it could amount to a price even more favourable than that of the first order. It follows that there is nothing unreasonable in the understanding that the discount is variable, and it cannot be claimed that MEDIPACK would have been unwise in accepting it.

92. In order for the term “best price” to have full effect, the eight percent discount offered on the first order can not be held to apply to all future orders, as this interpretation would deprive the promise of a “best price” of its intended effect. The principle that “Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect” is set out in Art. 4.5 UNIDROIT Principles.
93. In conclusion, as EQUAFILM’s list price less four percent, is the current best price offered to any customer, that price applies to the contract of 3 April 2001 in accordance with the parties’ agreement.

**IV.2.4. Should the Tribunal reject EQUAFILM’s interpretation of the price, MEDIPACK’s inactivity in relation to EQUAFILM’s fax of 12 April 2001 prevents MEDIPACK from asserting a different understanding of the price terms due to the principle of good faith and fair dealing**

94. MEDIPACK’s fax of 10 April 2001 (Exh. No. 7) contains the following statement on the company’s position on the existence and terms of the contract of 3 April 2001: “If you do not intend to keep your commitment to us to give us an eight percent discount from your list price, we will have to consider seriously returning to Polyfilm GmbH for our future requirements of polypropylene film”. That statement contains two ambiguities: Firstly, the terms “consider seriously” express that the consequence outlined is but one possible among a choice; it does not state that consequence as the necessary one in case EQUAFILM should maintain its understanding of the price. Secondly, the terms “future requirements” could be understood as meaning future requirements beyond what was to be fulfilled under the 3 April 2001 contract. These two ambiguities constitute that EQUAFILM had reason to understand the 10 April 2001 fax, not as denying or avoiding the 3 April 2001 contract, but as a threat toward possible future orders.
95. Upon receipt of EQUAFILM’s fax of 12 April 2001, MEDIPACK could not be ignorant of the fact that EQUAFILM presumed the contract to be valid and binding on the terms explained in that fax. The fax followed a rapid exchange of faxes and urged MEDIPACK to communicate its position. Notwithstanding this MEDIPACK remained silent for three weeks between 10 April and 2 May 2001.
96. Between contracting parties there exists a duty of care. This duty is a variation of the principle of good faith and fair dealing; Art. 7(1) CISG and Art. 1.7 UNIDROIT Principles. The duty of

care has also found an expression in the demand by Art. 39 CISG that notice of avoidance be given within a reasonable time. In the case at hand the due care is intensified by the fact that the period when MEDIPACK was silent, was the time frame in which EQUAFILM was to perform its obligations pursuant to the contract, as well as by the fact that the debated issues were as fundamental as price and existence of the contract.

97. Since MEDIPACK created the ambiguity arising out of the 10 April 2001 fax; since MEDIPACK was aware of EQUAFILM's understanding of the contract expressed in the 12 April 2001 fax; and since EQUAFILM expressly urged a clarifying response, MEDIPACK had a duty to make its position known to EQUAFILM. In abstaining from this MEDIPACK failed to comply with its contractual duty of care. The consequence is that MEDIPACK loses its right to claim its divergent understanding of the contract and its terms, and that EQUAFILM's understanding stands as the parties' agreement.

**IV.3. Even if the agreed price cannot be determined through contract interpretation, the contract is still valid and binding since the parties intended to conclude a contract and Art. 55 CISG works to fill the price gap**

98. It has been claimed by MEDIPACK that no binding contract of sale was ever concluded on 3 April 2001 due to an alleged lack of agreement on the price. EQUAFILM has already suggested that a price was indeed agreed upon. In the alternative, EQUAFILM submits that even if the Tribunal holds that the suggested price system of the first contract cannot be adapted with sufficient certainty to the second contract, that contract is still valid and binding. The submission that Art. 14 CISG bars certain open-priced contracts from being considered valid is contested, on the premises that Art. 14 CISG is not concerned with the validity of the contract but merely the offer in a strict sense. Furthermore, it will be suggested that Art. 55 CISG solves the price-issue, by empowering the Tribunal the competence to fix the price at a perceived market price subject to the discretion of the Tribunal.

**IV.3.1. The phraseology of the CISG allows for a contract without a fixed price**

99. Although it is acknowledged that the interrelation between Arts. 14 and 55 CISG is not coherent, the wording of the Convention provides two indicators that point to the permissibility of a contract with no price clause in the case at hand.

*IV.3.1.1. The wording of Art. 14 CISG allows for the interpretation that valid contracts may be formed without express price terms, as the sentence can be seen as non-exhaustive*

100. For a statement to constitute an offer Art. 14 CISG requires that it be sufficiently definite. The 2<sup>nd</sup> sentence of Art. 14 CISG is a list of possible ways for an offer to be sufficiently definite. It does, however, not state that these are the only ways for an offer to be sufficiently definite. In fact, it would seem that if an exclusion of offers containing no price had been intended, the provision would be unequivocal to that effect. It is generally accepted in scholarly writings and case law that the primary parameter for the validity of an offer under the CISG is the intention to be bound, and the intention to be bound may be deduced from circumstances and/or the action of the offeror, as opposed to explicit oral or written statements; Sono, p. 119, Enderlein & Maskow, p. 83, Judgement by Bezirksgericht St. Gallen, 3 July 1997, and Handelsgericht St Gallen, 5 December 1995. The requirement that price, quantity and goods be specified may reasonably be seen as a test of the intent to be bound that may be applied, but that cannot be regarded as an exhaustive source of ways to determine the intent to be bound; judgement of Handelsgericht des Kantons Aargau, 26 September 1997.
101. Art. 14 CISG may even be insufficient as to specificity. If parties to a contract have established a usage, which requires an offer to contain provisions other than terms on price, quantity and goods; Schlechtriem, p. 105. Conversely, the parties may derogate from Art. 14 CISG in accordance with Art. 6 CISG, by making, for instance, the sheer indication of a quantum a binding offer; Schlechtriem, p.106. Art. 14 CISG does not establish a regime rendering all offers not meeting the requirements of specificity completely meaningless or unenforceable.
102. Art. 4(a) CISG establishes that the convention does not govern the issue of “the validity of the contract or of any of its provisions or of any usage”. To regard the implications of Art. 14 CISG to be that an entire contract may become invalid due to lack of a price term, would be incoherent with Art. 4(a) CISG. It is undisputed that there is room for express departures from Art. 4(a) CISG, cf. the wording “except as otherwise expressly provided in this Convention”. However, it is hard to see derogation in the wording of Art. 14 CISG, in that it is on the contrary particularly concerned with the substance of an offer, cf. the wording “A proposal for concluding...constitutes an offer if it...”.

*IV.3.1.2. The wording of Art. 55 CISG supports that a contract can be formed without a fixed price, as this possibility is explicitly governed by the wording*

103. The wording “Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price”, “... in the absence of any indication to the contrary,...” implies that a price not specifically stated in a contract, may be deduced from the circumstances of the negotiations, a contextual reading of unclear provisions for determining the price etc., which means that a price may be fixed subsequently, by interpretation of the contract.
104. These indications in the Convention text are structurally meaningless, if open price terms cannot exist under the CISG.

**IV.3.2. The commercial function and the legislative history of Art. 14 CISG suggest that the provision was meant to govern the offer, not the contract as a whole**

105. Usually lengthy dealings on terms, wording, placement of risk, adjustments for changes in the market etc. precede the signature of a contract. In the wake of such a process, even the most rigorous of lawyers will be hard pressed in extracting the “offer” and the “acceptance” of a specific term. It is in the light of this fact that Art. 8(3) CISG applies a pragmatic approach to contract interpretation, and Art. 18 CISG in fine allows for all forms of conclusive acts to amount to an acceptance. In short, contracts may be formed in many other ways than through classic offer and acceptance, and CISG encompasses this; Schlechtriem, pp. 99 et seq. In view hereof, Art. 14 CISG must be subject to a liberal interpretation. These settings are to be kept in mind when examining the contract of 3 April 2001.
106. A central source of understanding the interrelation between Arts. 14 and 55 CISG is the two-part compromise between delegates at the 1980 Diplomatic Conference, at which the CISG was signed.
107. In the original Working Group Draft of Art. 55 CISG, the opening phrase was “When a contract has been concluded”; Honnold, p. 154. However this wording was amended by UNCITRAL in 1977, when the current wording “If a contract has been validly concluded...” (underlined here) was adopted. The formal reason given for the revision of the wording by the Commission was “The Committee decided to introduce an express statement into the article to make it clear that it only applied to agreements which were considered valid by the applicable law” (underlined here); UNCITRAL YB, para. 340. “Applicable law” meant

“applicable national law”. The reference must be read in the light of Art. 7(2) CISG, as the national law applicable by virtue of rules of private international law; UNCITRAL YB, para. 328. It was held that national rules of (in)validity of contract may apply, and that a contract invalid due to such rules is not governed by Art. 55 CISG. The contrary understanding is eminent: Art. 55 CISG does not suggest that a contract may be invalid due to provisions of the CISG, including Art. 14 CISG.

**IV.3.3. Formation of contract is a matter governed and settled by the CISG. Equatoriana law disallowing open-price terms does not apply by virtue of private international law**

108. It is vital to note that the above-mentioned references to national rules of invalidity do not entail that any and all national rules of formal validity apply by virtue of the rules of private international law.
109. The cardinal rationale of the two-part compromise was to satisfy some delegates’ fear that their national *essentialia negotii* maxim of *pretium certum* would be infringed. Thus initially the word “validly” in Art. 55 CISG retained an opening for such national maxims. However this opening was based on the premise that most delegates assumed their governments would make a Part II CISG-reservation under Art. 92 CISG, excluding, *inter alia*, Art. 14 CISG, and thus the incoherence between Arts. 14 and 55 CISG; Schlechtriem, p. 109. Equatoriana has not made any reservations under the CISG (Procedural Order No. 2, 4). Thus, Part II CISG on contract formation applies in its entirety.
110. Undisputedly, should national rules apply, it would be Equatoriana law. It is settled that the seller’s law applies by virtue of the rules of private international law of both Equatoriana and Mediterraneo, and EQUAFILM, the seller, is from Equatoriana.
111. Arguments against open price terms hinge on conceptions of *essentialia negotii* that may have national significance due to cultural inheritance and ways of trade. In the light of the overriding principle of uniformity, those principles must be employed cautiously. They are not geared to govern the international contracts for sale in the third millennium, and to support MEDIPACK’s assertion of such principles undermines the purpose of the Convention.
112. It is widely agreed that the rules of validity excluded from the Convention by Art. 4(a) CISG are not positive requirements, but rather factors invalidating the contract such as error, mistake, fraud, duress, illegality etc.; Galston & Smit, § 1.02 and Lookofsky, pp. 22 et seq. On the other hand, as already demonstrated, the question of open-price terms is a matter governed

by Art. 14 CISG. This entails that countries adhering to Part II of the CISG cannot simultaneously assert national *pretium certum maxims*; Schlechtriem, p. 461. In conclusion, no Equatoriana rule disallowing open-price terms can apply via the rules of private international law.

**IV.3.4. It serves the general purpose and principles of the CISG that the contract retains its validity even when the price terms are ambiguous.**

113. The parties intended to form a contract on 3 April 2001. However, MEDIPACK is subsequently alleging that it would not have formed the contract if it had known EQUAFILM's understanding of the price system of 7 December 2001. If the Tribunal holds that the price system cannot be interpreted in favour of a certain understanding, EQUAFILM submits that general principles of international trade require that the contract is still held to be valid, and Art. 55 CISG settles the price.
114. The principle of *favor contractus* is a principle overriding the Convention; "the heart of the Sales Convention is the contract of sale"; Koneru, p. 4. The reason for upholding the *favor contractus* principle in the case at hand is the following: Holding that a contract was formed protects the legitimate reliance of EQUAFILM on the statement by MEDIPACK that a contract was formed (Exh. No. 3). The trust in the ability to rely on other parties' statements as binding is pivotal for the trust in, and willingness to engage in, international contracts. Therefore, the interests of international trade are best served by holding that a contract was indeed formed on 3 April 2001.
115. This is specifically important since the invalidity of the contract brings it outside the Convention regime. In denying the contract of 3 April 2001 existence, the only source of resolving the economic aftermath is by virtue of rules of private international law, deferring the question to Equatoriana law of contracts. That would run counter to the interests of international trade, since the international business community works best when uniform rules known to all govern international commercial transactions. Recourse to domestic legal solutions undermines the goal of uniformity in the application of CISG, and is in direct contravention of Art. 7(1) CISG.
116. Further, if holding that the disagreement on price implies the consequence that no contract was formed, the detriment suffered from the mutual misunderstanding is put entirely on EQUAFILM's shoulders. On the contrary, by finding that a contract was formed and that the

price issue should be solved by employing Art. 55 CISG, the balanced and equitable solution provided by that provision is reached in accordance with Art. 7(1) CISG.

117. In conclusion the wording, structure, legislative history, real life application, overriding principles and goals of the CISG point to the possibility of contracts with open price terms. The specific circumstances, where each party was of the opinion that a contract had been formed, point in the same direction. The intentions of the parties prevail according to art. 6 CISG.
118. If the Tribunal holds that the contract of 3 April 2001 is ambiguous and does not provide the price, the most balanced solution and the one most in line with the interests of international trade would be reached by finding that the contract is still valid.

**IV.4. In case of a valid contract with insufficient provisions governing the price it should still be found that the price of the contract was \$ 2,615,809**

**IV.4.1. In case of a valid contract with insufficient provisions governing the price, the price issue is governed by Art. 55 CISG**

119. Art. 55 CISG contains the scheme for determining price where it cannot be deduced from the contract or the circumstances. Should the Tribunal find that the fax of 7 December 2000 (Exh. No. 1) is too ambiguous to work as the basis for a definite determination of the price, Art. 55 CISG is the relevant provision to apply.
120. The parties have agreed on the following concerning price: The price was to be calculated on the basis of EQUAFILM's list price of \$ 1,900 less a discount. The discount was understood to be either four or eight percent.
121. Even when using Art. 55 CISG as a gap-filling mechanism to find the price, the agreed provisions must be adhered to. Otherwise, the parties' intentions would be violated and thereby the principle of party autonomy – a principle which is among the most important and basic in the Convention; e.g. Schlechtriem, p. 103, n. 41. In other words, in this case Art. 55 CISG is to be put to work within the framework of the above three provisions. This was also the result reached by the Oberster Gerichtshof, Austria, 10 November 1994. The opinion of the Court of Appeals, in which an agreement of price between “35-65 German marks” was considered a range within which Art. 55 CISG should function.

122. Art. 55 CISG enunciates the rule that in the absence of an agreed price, the price of the contract shall be the price generally charged for the contracted type of goods at the time of the conclusion of the contract. Therefore, the price to be paid by MEDIPACK is the price generally charged in the market of OPP film around 3 April 2001 with respect of the provisions agreed upon by the parties.

**IV.4.2. The price generally charged for OPP film around 3 April 2001 was no less than \$ 1,824 per ton, equalling EQUAFILM's list price of \$ 1,900 less four percent**

123. It remains undisputed that EQUAFILM's list price is among the lowest in the industry, cf. e.g. the fax of 7 December 2000 (Exh. No. 1) and the fax of 12 April 2001 (Exh. No. 8). It must therefore be accepted for the purposes of this arbitration. Further, the discount practice of EQUAFILM is much like that in the OPP industry (Procedural Order No. 2, 40).

124. Therefore, the price generally charged in the OPP market at the time of conclusion of the contract was no less than \$ 1,824 per ton, equal to a total contract price of \$ 2,462,400 plus CIF charges.

**V. MEDIPACK breached the contract**

125. According to the contract of 3 April 2001, MEDIPACK purchased 1,350 tons of OPP film from EQUAFILM. The goods were to be delivered by shipment in nine monthly instalments from May 2001 through January 2002. The first shipment was to take place on or before 10 May 2001. In the faxes of 10 April 2001 (Exh. No. 7) and 2 May 2001 (Exh. No. 10) MEDIPACK announced that it would not accept the four percent discount offered by EQUAFILM and had therefore returned to its previous supplier Polyfilm GmbH for the order it had already placed with EQUAFILM. It is relevant to establish whether a breach was committed on 10 April 2001 or 2 May 2001 in relation to the accrual of interest on damages. This is discussed *infra* 156 et seq.

126. EQUAFILM submits that MEDIPACK committed a fundamental breach of contract because it disputed the existence of the contract and failed to take delivery of the OPP film and pay for the goods as required under Art. 53 CISG.

127. MEDIPACK stated that the order it had expected to purchase from EQUAFILM had been placed with a different supplier. This confirms that MEDIPACK had no intention of performing its obligations under the contract. This lack of intention must be considered a

declaration of non-performance; Honnold, p. 438. Such a wrongful repudiation of the contract prior to the date of performance constitutes an anticipatory breach according to Art. 72(1) CISG; Ramberg, p. 158. Since the contract involves an instalment sale, and there could be no doubt from the wording of MEDIPACK's fax that it did not intend to take delivery of any of the remaining instalments, the repudiation covers all nine instalments.

128. A declaration of non-performance implies that the contract is no longer standing and entails that none of the parties are going to perform. EQUAFILM is not obliged to give notice of avoidance of the contract, since MEDIPACK's refusal to perform was express and definite; judgement by OLG Bamberg, 13 January 1999.

## **VI. EQUAFILM is entitled to \$ 461,700 in damages**

129. Under Art. 74 CISG EQUAFILM is entitled to claim damages for any loss suffered due to the breach committed by MEDIPACK. EQUAFILM would have earned a profit from the sale of OPP film had MEDIPACK performed in accordance with the contract. Thus, EQUAFILM submits that it should be put in the same financial position as it would have experienced if the anticipatory breach had not been committed; Schlechtriem, p. 553.
130. The calculation of damages is based on the assumption that the Tribunal considers the contracted discount to be four percent. If any other price is determined as the contract price all amounts in the following sections change accordingly.

### **VI.1. The damages amount to \$ 461,700 which equals the lost profit suffered by EQUAFILM as a consequence of the breach**

131. EQUAFILM has reviewed the amount of damages. The amount previously claimed (\$ 575,477.98; Statement of Claim para. 18) was calculated of the contract price, which included CIF costs without regard to the fact that CIF costs were never incurred. The lost profit should be calculated on the basis of the agreed price, which consists of the list price less the four percent discount, as the difference between the contract price and the costs of manufacturing; judgement by Oberster Gerichtshof, 28 April 2000.
132. The following equation demonstrates the loss suffered by EQUAFILM:

The contracted price for OPP film was \$ 1,900 pr. ton less 4 % discount. 1,350 tons were to be delivered:

$$(\$ 1,900 - 4 \% \text{ discount}) \times 1,350 \text{ tons} = \underline{\$ 2,462,400}$$

EQUAFILM's profit of the list price was 22%. The cost price for 1,350 tons was thus:

$$(\$ 1,900 - 22 \%) \times 1,350 \text{ tons} = \underline{\$ 2,000,700}$$

The loss of profit suffered by EQUAFILM is found by subtracting the cost price from the contracted price:

$$\$ 2,462,400 - \$ 2,000,700 = \underline{\$ 461,700}$$

133. The total loss of profits for the entire agreement of 1,350 tons therefore amounts to \$ 461,700, which is the sum EQUAFILM requests as damages under Art. 74 CISG.

#### **VI.2. The loss was foreseeable as a possible consequence of the breach**

134. Art. 74 CISG explicitly includes loss of profit as part of the damages, only limited by the principle of foreseeability. In determining whether or not a breach was foreseeable, the facts and circumstances at the time when the contract was concluded are relevant. The breaching party should at the time of the conclusion of the contract have foreseen the loss as a possible consequence of the breach; award of Arbitration Institute of the Stockholm Chamber of Commerce, 1998.
135. EQUAFILM's calculation of the loss of profits is made on the basis of a list price, a gross margin and a discount. EQUAFILM had a gross margin of 22 percent, which is considered reasonable for the purpose of this arbitration (Procedural Order No. 1).
136. In the fax of 3 April 2001 MEDIPACK acknowledged that the list price was \$ 1,900. Thus, the list price was foreseeable. Lost profits are calculated on the basis of a gross margin. To the buyer, this is not generally a known amount. A reasonable gross margin must therefore be considered foreseeable to the buyer. Foreseeability of a certain sum of money equal to the loss is not required, but instead the possibility of a loss as a consequence of the breach; Enderlein & Maskow, p. 301. As stated supra 79 et seq. EQUAFILM submits that the contract included a four percent discount.
137. The extent of the loss is only considered relevant if it considerably exceeds what was foreseeable; Schlechtriem, p. 569. The difference between four and eight percent does not constitute a considerable extension of what was foreseeable when looking at the total sales price, and the total gross margin of 22 percent is within the normal range of gross margins in

the industry (Procedural Order No. 2, 55).

138. In conclusion, MEDIPACK is obliged to pay the claimed damages to EQUAFILM, since they were a foreseeable consequence of the breach to MEDIPACK, at the time when the contract was concluded.

### **VI.3. EQUAFILM could not have mitigated its loss by making a substitute sale**

139. The order EQUAFILM was to deliver to MEDIPACK would have been supplied from stock (Procedural Order No. 2, 53). EQUAFILM had the capacity to produce the expected quantities for MEDIPACK. A substitute transaction was not possible, since a delivery to a different buyer would have been possible concurrent with the delivery to MEDIPACK. There would be no connection between the goods allegedly “resold” and the goods contracted for in the avoided contract; Saidov, Sec. I.4(d). Consequently, EQUAFILM would have suffered a loss of profits regardless of whether the OPP film was sold to a different buyer; judgement by Oberster Gerichtshof, 28 April 2000.

## **VII. EQUAFILM is entitled to interest in accordance with Art. 78 CISG**

### **VII.1. EQUAFILM respectfully expands its claims with regard to the interest payment period and to interest on damages of all payments**

140. The DIS Rules do not contain provisions regarding the possibility of adding or extending claims. A party may supplement his claim during the course of the arbitral proceedings, unless the parties have otherwise agreed or the arbitral Tribunal considers it inappropriate having regard to any possible delay; Art. 23(2) MAL.
141. Firstly, EQUAFILM extends its claims to include interest on all payments under the contract. EQUAFILM only claimed interest on the first four instalments in the Statement of Claim.
142. Secondly, EQUAFILM claims interest from 10 April 2001 when the damages became in arrears as opposed to the dates when payments under the contract were due.
143. The changes EQUAFILM seeks to include in its claim do not involve materially new claims that require further documentation of facts. The extension of the claim should thus not involve any delay of the process, and hence fulfils the criteria set forth in Art. 23(2) MAL.

## **VII.2. MEDIPACK must pay interest on damages**

144. Pursuant to Art. 78 CISG a party is entitled to interest if the other party “fails to pay the price or any other sum that is in arrears”. The article provides for pre-award interest on payments to be made between the parties to an agreement under the CISG; judgement by U.S. District Court, 9 September 1994.
145. Interest covers the potential costs that EQUAFILM incurred for not having the money at its disposal. To award interest gives the defaulting party an incentive to pay damages immediately since there will be no advantage in postponing payment. Conversely, if no interest would accrue from the moment of breach, any defaulting party would be inclined to obstruct the settlement and avoid payment since it would gain liquidity at no cost. This would promote bad faith and disrupt the possibility of settling disputes between merchants.
146. EQUAFILM submits that Art. 78 CISG should be interpreted as to include damages since the wording “any other sum” does not contain any limitation but seems to include any sums to be paid under the contract. Even if damages are not expressly mentioned in Art. 78 CISG it is the general understanding of the provision that the reference to “any other sum” includes damages; Schlechtriem, p. 594 and award of Schiedsgericht der Börse für Landwirtschaftliche Produkte, 10 December 1997.
147. The obligation to pay interest is a separate obligation from the obligation to pay damages and there is no need to show a specific “interest loss” in order to be entitled to interest; Schlechtriem, p. 592. In fact, interest must be paid on sums that are due even if a party cannot be held responsible for the delay of payment pursuant to Art. 79 CISG. This difference between damages and interest suggests that computation of interest under Art. 78 CISG shall not be considered an integral part of calculation of damages under Art. 74 CISG. Hence, interest accrues regardless of whether any specific “interest loss” is incurred on any amount in arrears.

### **VII.2.1. It is immaterial whether the damages represented a liquidated sum**

148. Scholars discuss whether it is a prerequisite to the accrual of interest that the principal represents a liquidated sum, i.e. that the amount has been made certain before accrual begins.
149. The damages claimed seek solely to compensate EQUAFILM for its loss of profits. It was possible to determine the amount of damages on 10 April 2001, since all factors for

calculating the damages were available at that date. EQUAFILM submits that it is irrelevant whether the lost profits were “liquidated sums”. Neither the text of the Convention nor policy reasons support the view that only liquidated sums should be subject to interest; Lookofsky, p. 149, Schlechtriem, p. 593 and Thiele, Sec. III(B)(6).

#### **VII.2.2. The sums were in arrears on the date of the breach**

150. Interest begins to accrue when a sum is in arrears; Art. 78 CISG. Thus, it must be determined when the damages were in arrears. EQUAFILM submits that the damages claimed from MEDIPACK were in arrears from the day the breach was committed.
151. It is a general principle that when an anticipatory breach is committed, remedies become available at once without regard to whether performance of the defaulting part has become due; Treitel, p. 379.
152. From the day of the breach MEDIPACK was no longer obliged to make the payments stipulated in the contract but was obliged to pay damages instead. The damages are naturally strongly tied to the price set forth in the contract, but are nevertheless distinctly different. Damages seek to restore the financial situation the aggrieved party would have had if the contract had been duly performed. The damages are unaffected by the dates for payments stipulated in the contract. These payments were connected to the delivery of the nine instalments, but since the instalments were no longer to be made due to the avoidance of the contract, there was no longer any reciprocity between the parties’ duties. EQUAFILM being the non-breaching party has a right to end all financial matters between the parties and prepare itself for other business without having to wait for future payments to come due.
153. It has been suggested that the purpose of Art. 78 CISG is best served when interest on damages can be recovered from the time when the breach of contract occurs. Regardless of whether the purpose of Art. 78 CISG is to prevent unjust enrichment or protect and indemnify the creditor both purposes are best served when interest begins to accrue from the time of the breach of contract; Thiele, Sec. III(B)(5). The result is supported by case law, e.g. judgement by Corte di Appello di Milano, 11 December 1998. Consequently, damages are due at the moment the contract is breached and the initial loss is incurred.
154. Following the conclusion that the accrual of interest begins to accrue on the date of the breach it must be determined exactly when the breach occurred. The relevant dates are 10 April 2001 or 2 May 2001 when MEDIPACK communicated its intention to repudiate the contract.

*VII.2.2.1. The breach was committed on 10 April 2001 since this was the date when MEDIPACK no longer considered itself bound by the contract*

155. Subsequent to the conclusion of the contract on 3 April 2001, the parties exchanged faxes regarding the agreed discount.
156. On 10 April 2001 MEDIPACK wrote to EQUAFILM that if it would not commit itself to the eight percent discount, MEDIPACK would consider returning to its previous supplier for future requirements of OPP film. At that time no deliveries had been made and EQUAFILM could therefore reasonably doubt whether MEDIPACK would take delivery as agreed, as the letter contained a threat to repudiate if EQUAFILM did not accept an eight percent discount. The fact that MEDIPACK wrote “future requirements” made it uncertain whether the threat applied to the nine deliveries already agreed upon, or constituted a threat to future contracts. Subsequent communication between the parties evidenced that MEDIPACK intended to repudiate this particular contract if the price was not reduced even if the wording was not clear on the subject. This follows from MEDIPACK’s fax of 2 May 2001 where the purchasing manager Mr. Black states, with reference to the fax of 10 April 2001, that “I need not repeat what I already told you” referring to his repudiation in the previous fax.
157. EQUAFILM submits that the breach was committed on 10 April 2001 as this was the date when MEDIPACK intended to breach and gave notice thereof. It is irrelevant that EQUAFILM did not understand the real purpose of the letter due to the ambiguous wording.
158. In interpreting the intention of MEDIPACK on 10 April 2001 regard may be had to its subsequent conduct; Art. 8(3) CISG.
159. The fax of 2 May 2001 revealed that MEDIPACK intended to repudiate the contract on 10 April 2001. According to Art. 8(3) CISG regard must be had to this fact when interpreting the fax of 10 April 2001. The *ex post* interpretation of the fax of 10 April 2001 thus establishes that MEDIPACK breached the contract on this date.

*VII.2.2.2. The ambiguous wording of the 10 April 2001 fax should not be allowed to benefit MEDIPACK*

160. It has been established that MEDIPACK intended to repudiate the contract on 10 April 2001. EQUAFILM submits that its own delusion of this intended repudiation does not bar it from regarding the breach as committed on 10 April 2001. To reach a different result would imply

that MEDIPACK obtains an advantage solely because of the equivocal wording of the 10 April 2001 fax. Furthermore, MEDIPACK does not act in good faith if it does not abide by its intention of the fax dated 10 April 2001. According to the CISG a party to an international commercial contract is bound to act in good faith; judgement by Cour d'Appel de Grenoble, Chambre Commerciale, 22 February 1995. The requirement is unequivocally stated in Art. 1.7(1) UNIDROIT Principles, according to which the parties must "act in good faith and fair dealing in international trade". Hence, MEDIPACK must abide by the statement given on 10 April 2001, as it would be contrary to the principle of good faith to deny its own intention and statements.

161. Furthermore, MEDIPACK should be precluded from relying on the ambiguities of the fax when the intention to repudiate has been established. It would be contrary to the estoppel principle if MEDIPACK would be allowed to contest its intention to deny the existence of a contract on 10 April 2001 when it so stated on 2 May 2001. The estoppel principle is a recognized general principle under the CISG; Arbitral Award of Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, 15 June 1994, and Schlechtriem, p. 67.

*VII.2.2.3. In any event a breach was committed on 2 May 2001 as MEDIPACK stated unequivocally that it would not perform the contract*

162. If the Tribunal does not consider 10 April 2001 as the date of the breach, EQUAFILM submits that damages fell due on 2 May 2001 when it was made clear to EQUAFILM that the contract was annulled by MEDIPACK. EQUAFILM was able to exercise the remedies for breach as it had knowledge of MEDIPACK's breach and it was no longer possible for MEDIPACK to withdraw the repudiation of the contract.

### **VII.3. Interest shall accrue from the date of the breach and until payment is made**

#### **VII.3.1. Interest should accrue from 10 April 2001**

163. It has been established that damages are in arrears from the date when a breach is committed. According to Art. 78 CISG interest accrues on any sum in arrears. As EQUAFILM has submitted that MEDIPACK committed its breach on 10 April 2001, interest should accrue from this date until payment is made; Lookofsky, p. 149.

**VII.3.2. In the alternative, three possible dates exist as to the beginning of accrual of interest**

164. Should the Tribunal find that a breach was not committed on 10 April 2001, but rather on 2 May 2001, EQUAFILM submits that interest should accrue from this date until payment is made.
165. Alternatively, interest should accrue from the dates when the payments should have been made. MEDIPACK was obliged to pay the agreed amount for each instalment in connection to its delivery. It was agreed that: "Payment is due 30 days after notification by EQUAFILM of delivery to the port for shipment." If the Tribunal does not decide that interest will accrue at least from the dates when payments would have been due, MEDIPACK will earn a gain since it will be cost free for it to withhold payments. EQUAFILM will incur an equivalent loss.
166. Finally and in the last alternative, interest should begin to accrue from the beginning of the arbitration proceedings, as EQUAFILM has, from this date, taken the appropriate steps to secure payment of the damages. The claim for damages and EQUAFILM's reasons for claiming damages were set forth. From that date damages represented a liquidated sum. Under any circumstances interest should begin to accrue from the date of the award.

Copenhagen, 12 December 2002

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