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# **MEMORANDUM FOR CLAIMANT**



**Humboldt-Universität zu Berlin**

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On behalf of:

**Equafilm Co.**

**214 Commercial Ave.**

**Oceanside, Equatoriana**

**- CLAIMANT -**

**v.**

**Medipack S.A.**

**395 Industrial Place**

**Capitol City, Mediterraneo**

**- RESPONDENT -**

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## Index of Abbreviations

ARG .....	<i>Argentina</i>
Art. ....	<i>Article</i>
Artt. ....	<i>Articles</i>
AUT .....	<i>Austria</i>
BGH .....	<i>Bundesgerichtshof, German Federal Court, Highest Appellate Court for Civil Matters [GER]</i>
BrandOLG .....	<i>Brandenburgisches Oberlandesgericht, Higher Appellate Court for the State of Brandenburg [GER]</i>
CAN .....	<i>Canada</i>
CCProc .....	<i>Code of Civil Procedure</i>
cf. ....	<i>confer</i>
CISG .....	<i>United Nations Convention on Contracts for the International Sale of Goods</i>
DIS .....	<i>Deutsche Institution für Schiedsgerichtsbarkeit e.V.</i>
e.g. ....	<i>exempli gratia; for example [Latin]</i>
ENG .....	<i>England</i>
et al. ....	<i>Et alii; and others [Latin]</i>
etc. ....	<i>et cetera; and so on [Latin]</i>
FRA .....	<i>France</i>
GER .....	<i>Germany</i>
GMAA .....	<i>German Maritime Arbitration Association</i>
i.e. ....	<i>id est; that is [Latin]</i>
Ibid. ....	<i>ibidem; in the same place [Latin]</i>
ICLQ .....	<i>International and Comparative Law Quarterly</i>
INCOTERMS .....	<i>International Commercial Terms</i>
ITA .....	<i>Italy</i>
JIA .....	<i>Journal of International Arbitration</i>
JLC .....	<i>Journal of Law and Commerce</i>
JudC .....	<i>Judicial Code</i>
KG Berlin .....	<i>Kammergericht Berlin, Higher Appellate Court for the State of Berlin [GER]</i>
NJW .....	<i>Neue Juristische Wochenschrift</i>

No. ....	<i>Number</i>
OLG .....	<i>Oberlandesgericht, Higher State Appellate Court [GER]</i>
p. ....	<i>page</i>
pp. ....	<i>pages</i>
SUI .....	<i>Switzerland</i>
supra .....	<i>above</i>
U.N. ....	<i>United Nations</i>
USA .....	<i>United States of America</i>
v. ....	<i>versus; against [Latin]</i>
Vol. ....	<i>Volume</i>
YCA .....	<i>Yearbook of Commercial Arbitration</i>

## **Facts**

Equafilm Co. (hereinafter referred to as CLAIMANT) is a company located in Equatoriana. It is a manufacturer of polypropylene film used for packaging food products. CLAIMANT is engaged in a dispute with Medipack S.A. (hereinafter referred to as RESPONDENT), a corporation specialised in manufacturing flexible packaging products which is located in Mediterraneo. On 3 April 2001 RESPONDENT ordered 1350 tons of 1100 mm wide, 30 micron thick, opaque white OPP (Oriented Polypropylene) film from CLAIMANT (Claimant's Exhibit No. 2). Both parties agreed that apart from some specific provisions the stipulations of a former contract dated 15 December 2000 are to be applied to this purchase. The said stipulations contain an arbitration clause. The clause rules that any dispute arising out of the contract or relating to it has to be settled finally by arbitration subject to the rules of the "German Arbitration Association" (Claimant's Exhibit No. 2). The arbitration agreement also stipulates that the place of arbitration should be Vindobona, Danubia (Claimant's Exhibit No. 2). RESPONDENT submits that a contract has not been concluded between the parties on 3 April 2001 and refused to take delivery of and pay for the OPP film. Furthermore, RESPONDENT contests the jurisdiction of the Tribunal and the impartiality of the arbitrator nominated by CLAIMANT.

## **In response to Procedural Order No. 1 of 4 October 2002 CLAIMANT respectfully requests the Tribunal:**

- to rule that it has jurisdiction in this case [Unit 1],
- to rule that the arbitrator Dr. ... nominated by CLAIMANT is impartial as well as independent and therefore permitted to remain part of the Tribunal [Unit 2],
- to rule that the law applicable to the contract and its formation is the CISG [Unit 3],
- to rule that a contract of sale which included a discount of 4 % was concluded during the telephone conversation between CLAIMANT and RESPONDENT on 3 April 2001 [Unit 4],
- to rule that CLAIMANT is entitled to receive damages of \$ 461,700 from RESPONDENT for breach of contract [Unit 5],
- to rule that CLAIMANT is entitled to interest on that sum from the date payment was due [Unit 6] and
- to rule that RESPONDENT has to bear all costs of arbitration [Unit 7].

In arguing these propositions CLAIMANT will demonstrate the legal and factual basis for its claim and will respond to RESPONDENT's Statement of Defence:

## **UNIT 1: Jurisdiction of the Arbitral Tribunal**

This Tribunal has jurisdiction for three reasons: First, the parties have concluded an arbitration agreement on 3 April 2001 [I.]. Second, this agreement is valid regardless of the validity of the main contract [II.]. Third, applying a reasonable interpretation the arbitration clause refers to the rules of the "Deutsche Institution für Schiedsgerichtsbarkeit e.V." (hereinafter: DIS) [III.]. Consequently, RESPONDENT's challenges to the jurisdiction of this Arbitral Tribunal have to be dismissed. 3

### **I. The parties agreed on an arbitration clause**

On 15 December 2000 CLAIMANT and RESPONDENT concluded a contract of sale for OPP film. This contract contained an arbitration clause [1.]. On 3 April 2001 both parties agreed on a second contract of sale for OPP film. An arbitration clause was incorporated in this contract by reference to the contract of 15 December 2000 [2.]. The reference fulfilled all form requirements [3.]. Therefore, any disputes with respect to the contract of 3 April 2001 come under arbitral jurisdiction. 4

#### **1. The contract of 15 December 2000 contained a valid arbitration clause**

Section 13 of the first contract included an arbitration clause (Claimant's Exhibit No. 2) stating that: 5

"Any controversy or claim between Equafilm Co. and Medipack S.A. arising out of or relating to this contract shall be determined by arbitration in accordance with the rules of the German Arbitration Association by a panel of three arbitrators with the place of arbitration being Vindobona, Danubia and the language of the arbitration English."

This arbitration clause was one of the conditions of sale used by CLAIMANT (cf. Procedural Order No. 2, # 30). It was mutually accepted when both parties signed the contract (cf. Claimant's Exhibit No. 2) and has never been challenged. Section 13 therefore became part of the contract of 15 December 2000.

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## **2. The arbitration clause was incorporated in the contract of 3 April 2001 by reference**

On 3 April 2001 CLAIMANT and RESPONDENT negotiated a second contract of sale of OPP film. In this contract the parties agreed to incorporate some stipulations of the first contract. This is indicated by the confirmation of RESPONDENT in which it is stated that “payment, shipping and similar terms of the contract of 15 December 2000 are to apply” (Claimant’s Exhibit No. 3). As the arbitration clause is one of these “similar terms” its incorporation can be inferred. However, even if Section 13 is not regarded as a “similar term” its incorporation is obvious by the subsequent correspondence between the parties. Replying to RESPONDENT’s confirmation CLAIMANT stated that “all other provisions” from the first contract were to apply (Claimant’s Exhibit No. 4). Later, in its reaction to CLAIMANT’s confirmation, RESPONDENT complained about “major errors in regard to the price” (Claimant’s Exhibit No. 5). However, there was no dispute about the incorporation of the arbitration clause. Moreover, RESPONDENT did not contest the incorporation itself (Statement of Defence, III. 10. to 13.). Consequently, RESPONDENT is barred from challenging the clause at present.

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## **3. The reference fulfilled all form requirements**

Finally, the reference to Section 13 of the first contract meets all form requirements. In order to constitute a valid arbitration clause the agreement must be in writing according to Article 7 (2) UNCITRAL Model Law on International Commercial Arbitration (hereinafter: Model Law). Regardless of the challenge of the application of the DIS Arbitration Rules, Section 24 (1) DIS Arbitration Rules refers to the Model Law, as this is the arbitration law of the place of arbitration, Danubia (Procedural Order No. 2, # 10). Therefore, Art. 7 (2) of the Model Law applies to this matter. However, if the DIS Rules were not the appropriate rules of arbitration in this case the Model Law would still be applicable as Mediterraneo, Equatoriana, Danubia and Germany have all adopted it. This makes its application inevitable in either way. According to Art. 7 (2) Model Law, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if “the contract is in writing and the reference is such as to make that clause part of the contract.”

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With regard to the first requirement, *written form* of the contract, it is sufficient that the contract is contained in an exchange of letters, telegrams or other reproducible

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documents, such as telefaxes, which provide a record of the agreement (Article 7 (2) 2<sup>nd</sup> sentence Model Law). In this case the contract agreed on by the parties during their telephone conversation on 3 April 2001 was confirmed by both CLAIMANT and RESPONDENT in two letters of confirmation (Claimant's Exhibits No. 3, 4). These letters provide a sufficient written record of the agreement, fulfilling the first form requirement. Regarding the second requirement, *reference* to another document, the incorporation of the arbitration clause in Section 13 has been shown above (*see* para 6). Finally, the contract of 15 December 2000 could be used as an object of reference as this document was also in writing. All form requirements were thereby met in full. For this reason, Section 13 became part of the contract of 3 April 2001.

## **II. The Jurisdiction of the Tribunal does not depend on the validity of the main contract**

RESPONDENT furthermore asserts that the validity of the arbitration clause depends on the existence of the contract of sale of 3 April 2001 (Statement of Defence, No. 12). This notion cannot prevail. According to the doctrine of separability the arbitration clause is independent of the main contract in which it is embedded (e.g. *Enrique C. Wellbers A.G. v. Extraktionstechnik Gesellschaft* [ARG], CLOUT No. 27; *ELF Aquitaine Iran v. National Iranian Oil Co.*, paras 15; *Rio Algom Ltd. v. Sammi Steel Co.* [CAN], CLOUT No. 18). The aforesaid is supported by the intent of the parties [1.] as well as by Article 16 (1) Model Law being the applicable procedural law [2.] and by international judicial practice [3.].

### **1. The intent of the parties**

In international arbitration the parties' intent at the time of conclusion of the contract is the predominant means of interpretation (*cf.* SANDERS, p. 58). Whenever possible the interpretation of arbitration clauses has to be construed in favour of arbitration (*cf.* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* [USA], 105 S.Ct. 3346 (1985); HOCHBAUM, p. 34; *cf. further complex clarification procedures* in Art. 4 European Convention on International Commercial Arbitration of 21.4.1961).

CLAIMANT and RESPONDENT inserted an arbitration clause into their contract (Claimant's Exhibit No. 2) to ensure that any arising dispute would be solved by arbitration. This intent is evident by the wording of Section 13. The clause explicitly distinguishes between any controversy "arising out of" and "relating to" the contract

(Claimant's Exhibit No. 2). The second alternative shows in particular that both parties wanted to ensure a broad applicability of the arbitration clause as the clause even covers disputes which did not evolve out of the contract but are nevertheless relevant to it. Therefore, all possible disputes between the parties concerning the contract have to be settled exclusively by arbitration. This also includes disputes concerning the existence of a valid contract. The doctrine of separability serves exactly this purpose. Thus, RESPONDENT's assertion is incompatible with the parties' original intention.

## **2. Article 16 (1) Model Law**

Second, in the dispute before the Tribunal the doctrine of separability is part of the applicable procedural law. Should the Tribunal have jurisdiction which can be assumed as long as it has not been refuted the DIS Arbitration Rules apply. These rules neither explicitly state the doctrine of separability, nor a "competence-competence" of the Arbitral Tribunal. Article 24 (1) DIS refers to "statutory provisions of arbitral procedure in force at the place of arbitration from which the parties may not derogate". In this respect the place of arbitration is Danubia which has adopted the UN Model Law (Procedural Order No. 2, # 10). Therefore, Art. 16 (1) Model Law applies as the appropriate procedural law. This article introduces the separability of the arbitration clause as a condition for the "competence-competence" of the arbitral tribunal. It states that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract." This is a mandatory rule because in Legal English the verb "shall" is a "word of command" and has "imperative or mandatory meaning" unless "no right or benefit to anyone depends on its being taken" (BLACK'S LAW DICTIONARY, p. 958). As Art. 16 (1) Model Law clearly declares a party's right to have a dispute about the validity of a contract resolved by an arbitral tribunal it may not be derogated. Consequently, the doctrine of separability also applies to this case.

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## **3. International judicial practice**

Finally, the doctrine of separability has received "great international acceptance" (SANDERS, p. 58). This is evident as the doctrine has been incorporated in several domestic legal systems (e.g. Dutch Arbitration Act 1986, CCProc., Art. 1053; Belgium, JudC, Art. 1697 para 2; Italian Arbitration Law of 1994, CCProc., Art. 808 para 4). The doctrine of separability is also generally accepted by courts, e.g. the French Supreme Court (*Société Navimpex Centrala Navala v. Société Wiking Trader* [FRA], Cass. Civ. 6.

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December 1988), the German Federal Court (*BGHZ* [GER] 53, p. 315) or the United States Supreme Court (*Prima Paint Co. v. Flood & Conklin Mfg. Co.* [USA], 388 U.S. 395 at 402 (1967)) and can therefore be considered a doctrine of high practical relevance in international commercial arbitration.

In conclusion, the intent of the parties, Art. 16 (1) Model Law and the general acceptance of the doctrine of separability make its application inevitable in this case. Therefore, the arbitration clause in Section 13 is independent of the contract of sale and legal challenges concerning the validity of the latter cannot affect the former.

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### **III. The Arbitration Clause in Section 13 of the contract refers to the Rules of the DIS**

The arbitration clause in Section 13 of the contract stipulates that any dispute arising has to be settled by arbitration according to the rules of the “German Arbitration Association” (Claimant’s Exhibit No. 2). RESPONDENT asserts that the clause refers to a non-existing institution which renders it ineffectual. Therefore, the current Tribunal would lack jurisdiction in this dispute (Statement of Defence, III. paras 10-11). This allegation cannot be sustained as an arbitration clause is valid whenever the institution of arbitration is clearly determinable [1.]. In the case at hand the disputed clause is clearly determinable [2.].

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#### **1. An arbitration clause is valid if it refers to a determinable institution of arbitration**

Generally, an arbitration clause must clearly name the court or institution of arbitration intended to be used by the parties (*BGH* [GER], NJW 1983, p. 1267; RAESCHKE-KESSELER, p. 19, No. 75, 76). RESPONDENT submits that the term “German Arbitration Association” does not correspond to the English translation of the DIS and that Section 13 of the contract therefore refers to the rules of a non-existing body. These allegations cannot prevail. As the literal wording of a clause is not the sole source of its interpretation an unclear definition does not in itself result in a lack of jurisdiction of the arbitral tribunal. Thus, the true meaning of the arbitration clause has to be construed by interpreting its intent.

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In international practice it is common that arbitration clauses have to be construed liberally in order to pay due respect to the intention of the parties to choose arbitration as their means of dispute resolution (*KG Berlin* [GER], Order of 15 October 1999 – 28 Sch 17, 99; HOCHBAUM, p. 34, e.g. *Rhône Méditerranée v. Achille Lauro et al.* [USA], 712 F.2d 1983, 50). Consequently, all circumstances have to be taken into consideration in order to find out if a clause is determinable. This also applies to questions regarding

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misnamed arbitration institutions or courts (cf. *ICC*, Arbitration Case No. 4472/1984, *Clunet* 1984, p. 946.; *ICC*, Arbitration Case No. 5103/1988, *Clunet* 1988, p. 1206). If any interpretation can be found in this test which favours arbitration that interpretation will be upheld (e.g. *ICC*, supra; *National Material Trading v. KAPTAN CEBI et al.* [USA], para 15-16; *Final Award* in case no. 41/92 of 1993 [ITA], para 1; *ICC*, Arbitration Case No. 2626/1977, *Clunet* 1978, p. 980; *KG Berlin* [GER], Order of 15 October 1999 – 28 Sch 17, 99). In a case before an U.S. American District Court, it was held that an arbitration clause referring to a non-existent “Japanese Arbitration Association” could be clearly determined among several arbitration institutions to refer to the appropriate “Japanese Commercial Arbitration Association” (*Hannex v. GMI* [USA], paras 13-15). In line with this liberal interpretation, it has even been held that it can be sufficient to agree on arbitration in general as long as the meaning of the arbitration clause can be clearly construed from the circumstances (*BrandOLG* [GER], 12.4.2001, 8 Sch 2001, 4 Z SchH 01/01).

Concerning the DIS itself the question of false declaration has already been decided 18 in a German case (*KG Berlin* [GER], Order of 15 October 1999 – 28 Sch 17, 99). In this case a Turkish and a Danish company had agreed on an arbitration clause which referred to the non-existing “Arbitration Rules of the German Central Chamber of Commerce”. While no institution by the stated name existed the *Kammergericht Berlin* held that the arbitration clause was still not void due to lack of specificity. “Upon proper interpretation the wording of the clause was understood to refer to the DIS only as this was clearly the intended German arbitration institution” (*Ibid.*). After all, an arbitration clause is void because of vagueness only if every attempt to decide on the intended court or institution fails.

## **2. The DIS is the institution of arbitration foreseen in Section 13 of the contract**

In this case, the DIS is the only institution of arbitration which falls within the ambit of the wording of Section 13. The aforesaid is the result of an interpretation of the clause. First, CLAIMANT and RESPONDENT mutually agreed to assign any arising dispute to arbitration. This is clear due to the fact that the parties agreed to submit their disputes to an “Arbitration Association” (Claimant’s Exhibit No. 2). Second, the parties also agreed on an institution located in Germany, as the original wording of the clause referred to a “German Arbitration Association” (Claimant’s Exhibit No. 2). Third, when interpreting ambiguous arbitration clauses, the choice of possible arbitration institutions is usually narrowed to 19

those which effectively administer arbitration and are appropriate to the disputed subject matter (*cf. Hannex v. GMI [USA]*, para 15).

Taking this into account the parties' intent to employ the DIS is obvious. The DIS is by far the largest and most important international institution of arbitration in Germany making it the most likely to be referred to as "the" German arbitration institution by foreign parties. Besides, there are a few other arbitration bodies in Germany, but none of these could have been reasonably intended by the parties, because they are less known than the DIS and deal with cases in other specific branches of business only. The only other institution which comes close to the wording of Section 13 is the "German Maritime Arbitration Association" (GMAA) in Hamburg. Despite the similarity of their names, the GMAA mainly deals with arbitration matters relating to Maritime Law (Section 1 of the GMAA's constitution). The mere fact that in the present case OPP film had to be transported by ship does not make it a matter of Maritime Law. That is evident as neither regulations concerning proper shipment, nor use of trade routes, harbour affairs or maritime customs were inflicted. Apart from that, the contract of sale never touched upon any rules of Maritime Law. Thus, the GMAA is not the appropriate institution for this case. Other arbitration institutions differ even more in name.

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As the native language of both, CLAIMANT and RESPONDENT, is not English (*cf. Procedural Order No. 2, # 1.*), mistranslations cannot be ruled out. In this respect, the declaration used in Section 13 can only be interpreted as such a mistranslation. This view is supported by the fact that the parties did not distinguish between any existing German institutions, but merely employed CLAIMANT's condition of sale (*Procedural Order No. 2, # 30*). Thus, it can be inferred that they were not even conscious that there were different institutions to choose from. All other stipulations regarding place, modus and language of arbitration were correctly addressed, however. Therefore, it would be unreasonable to conclude that the parties wanted to rule out the DIS in favour of another institution rather than to choose the "common" institution of arbitration for matters in international commerce. Finally, RESPONDENT did not try to clarify the translation of the chosen arbitration institution. If it had had any doubts concerning the chosen term it could have mentioned this in its letters of confirmation and the institution referred to could have been addressed more specifically. However, RESPONDENT did not do so. This leads to the conclusion that CLAIMANT as well as RESPONDENT did not realise the

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mistranslation and considered the arbitration clause to be without mistakes referring to the appropriate German arbitration institution for matters of international commerce.

Therefore, the content of the arbitration clause in Section 13 of the contract is clearly determinable. Consequently so that there is no reason to declare it void because of vagueness. Hence, the current Tribunal has jurisdiction over the case.

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## **UNIT 2: The Arbitrator Dr. ... nominated by CLAIMANT is impartial and independent**

RESPONDENT challenges the nomination of Dr. ... as an arbitrator in this dispute in accordance with the provisions of Section 18 (1) of the DIS rules (Letter of 19 September 2002). This Section states that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties. Whether Dr. ... has the necessary qualifications is not contested. Moreover, in this case the challenge cannot be successful because Dr. ... is impartial [I.] as well as independent [II.]. Furthermore, such a challenge is an abuse of law because it contradicts RESPONDENT's own opinion [III.].

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### **I. Impartiality**

Dr. ... is impartial. Impartiality refers to the lack of impermissible bias in the mind of the arbitrator towards a party or towards the subject matter in dispute (DONAHEY, JIA 1992, Vol. 4, p. 31). The test in this case is a subjective one and it is not directed at the mere appearance of bias but at its actual presence. The test for this actual bias is inferred from the facts and circumstances surrounding the arbitrator's exercise of the arbitral function (Ibid.). In this case Dr. ... has explicitly shown his impartiality on two occasions. First, by his information of the parties about the impending merger of his law firm [1.] and later by re-examining his position [2.].

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#### **1. Information by letter**

Until now Dr. ... has acted impartial and there is no reason to assume that this will not continue in the future. This is obvious due to the letter of 22 August 2002 in which Dr. ... informed all parties about the impending merger of his law firm as soon as he had sufficient information about it (Procedural Order No. 2, # 17). The immediate passing on of information shows that Dr. ... was concerned that a wrong impression might otherwise

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arise. This indicates an impartial state of mind. His behaviour therefore does not satisfy the test for partiality.

## **2. Reconsideration**

The impartiality of Dr. ... is also revealed by the fact that he carefully considered the matter again after RESPONDENT expressed concern about his impartiality and independence, even though there was no necessity for him to do so (Letter of 18 September 2002). Following careful consideration he concluded that there was no reason for him to resign. By this Dr. ... showed great understanding and empathy for RESPONDENT's position. He certainly was not partial in any way against RESPONDENT. If Dr. ... was biased there would have been no reason for him to reconsider his position and reply to RESPONDENT's unfounded allegations. It is obvious that Dr. ... was and is impartial.

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## **II. Independence**

Furthermore, Dr. ... is also independent. The quality of independence is based on the relationship between the arbitrator and the parties and is indicated by prior personal, social or business contact between them (TUPMAN, ICLQ 1989, pp. 26, 29). The closer the relationship between these spheres the less independent the arbitrator is considered to be. (DONAHEY, JIA 1992, Vol. 4, p. 31). At issue, Dr. ... informed the Secretary General of the German Institute of Arbitration about the merger of his law firm with Multiland Associates (Letter of 22 August 2002). He also reported former advocacy for CLAIMANT in several matters unrelated to this dispute conducted by the office of Multiland Associates in Faraway City, Oceania (Ibid.). Moreover, he stated that there was no expectation that the Riverside, Equatoriana office would ever represent them in the future (Letter of 9 September 2002), which is shown by the facts (Procedural Order No. 2, #18).

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Dr. ... is not dependent on either party to the dispute. Guidelines to determine dependency are International Rules of Ethics [1.], as well as precedents on this matter [2.]. Furthermore, the circumstances of the nomination show that CLAIMANT did not intend Dr. ... to be dependent. [3.].

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### **1. Rules of Ethics of the International Bar Association**

The International Bar Association Rules of Ethics for International Arbitrators (hereinafter: IBA Code) can be used as a guideline as to what has to be termed "dependency". It states in Art. 3 (1) that "dependence arises from relationships between an arbitrator and one of

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the parties, or with someone closely connected with one of the parties". In this case Dr. ... never had a relationship with CLAIMANT, nor is it likely that he will have one since the Riverside, Equatoriana office of Multiland Associates is not expected to represent them in the future. The only relationship that could be found is the upcoming merger of his law firm with a firm, of which an office in another country has represented CLAIMANT in unrelated matters in the past (Procedural Order No. 2, # 18). Such a relationship of Multiland Associates cannot be considered a close link, though.

Other relationships mentioned in the IBA Code that could lead to the appearance of dependency include having a material interest in the outcome of the dispute, taking a position in relation to the dispute beforehand (Art. 3 (2)), or sustaining current business relationships (Art. 3 (3)). These criteria do not apply to this case, since neither Dr. ..., nor Multiland Associates will receive any gain from the outcome of the dispute, nor take a position in respect of it, nor sustain a current business relationship as the relationship has been in the past. While one might think that Dr. ... benefits from his position in the Arbitration Tribunal, because he is receiving a fee for his work, it must be pointed out that this is paid regardless of the outcome of the dispute according to Section 40 of the DIS Arbitration Rules. He receives this fee no matter which party will succeed. 30

Although past business relationships may be considered a bar to acceptance of appointment, this is only the case if they are of such magnitude or nature as to be likely to affect the prospective arbitrator's judgement (Art. 3 (4) IBA Code). In this respect past advocacy of unrelated nature was not of such importance that it could have had significant impact on a large law firm like Multiland Associates (*cf.* Procedural Order No.2, # 18 and 22). 31

Finally, Art. 3 (5) IBA Code states that social or professional relationships of a continuous and substantial nature could be seen as an obstacle to the appointment of Dr. ... . However, Dr. ... never had relationships of this kind. On the other hand, Multiland Associates' advocacy for CLAIMANT was not of such a nature since it was only occasional and marginal for a large law firm. In conclusion, there is no suggestion of dependency according to the IBA Code. 32

## 2. Precedents

There are also no precedents that would support a dependency of Dr. ... . In fact, most precedents on this matter rather support CLAIMANT's view. It was held that only a lawyer who acted as an arbitrator and who in the past had acted as solicitor for one of the 33

parties in related actions will generally be considered to be dependent (*Ghiradosi v. Minister of Highways for British Columbia* [CAN], S.C.R. 367 (1966)). In this case the situation is quite different, as Dr. ... has never worked for CLAIMANT and Multiland Associates only represented CLAIMANT in unrelated matters.

The ICC rules of arbitration are similar in respect to the test of independence (Article 7 (1) ICC rules of arbitration states that 'Every arbitrator must be and remain independent of the parties involved in the arbitration'). In a case that was decided under these rules it was held that the fact that an arbitrator had been working as a partner in a law firm years ago, which represented one party to the arbitration, was not relevant to the extent as to prevent him from being an arbitrator (CALVO, JIA 1998, Vol. 4, pp. 64, 68). The facts in the case of Dr. ... are similar, if not even more convincing. Dr. ... never worked for Multiland Associates, and Multiland Associates does not currently represent one of the parties at arbitration. There is a precedent in which the ICC court refused to confirm a candidate whose law firm was concurrently acting for the party which proposed his name (Ibid.). Cases of this nature can be distinguished by the obvious fact, that Multiland Associates has only represented CLAIMANT in the past and not in the present.

Therefore, it is evident that the relationship between Multiland Associates and CLAIMANT is not strong enough to qualify the lawyers of Multiland Associates as being dependent. In any case, such relationships would not affect the independence of Dr. ... since he had not worked for Multiland Associates at the time when Multiland Associates had represented CLAIMANT or at any other time beforehand.

### **3. Circumstances of nomination**

Furthermore CLAIMANT did not intend Dr. ... to be dependent when nominating him. Dr. ... was nominated by CLAIMANT on 1 June 2002 (Letter of 1 June 2002). He accepted this nomination on 21 June 2002 (Letter of 21 June 2002). Neither Dr. ... nor CLAIMANT knew about the impending merger of Dr. ...'s law firm with Multiland Associates. Dr. ... was even unaware of the fact that Multiland Associates had represented CLAIMANT in the past until 12 August 2002 (Procedural Order No. 2, # 17). Moreover, Dr. ... was only nominated because he is a person with high reputation in the field of arbitration (Procedural Order No. 2, # 26). This confirms that no dependency was intended at any point.

### III. Contradicting behaviour

Furthermore, the challenge to Dr. ... is contradicting RESPONDENT's own previous behaviour. This constitutes an abuse of law, since RESPONDENT itself does not have any objections concerning the impartiality and independence of Dr. ... . This is evident in the letter of RESPONDENT, which was posted on 2 September 2002. In this letter Dr. Comstock expressed that he did not have any doubt about the personal integrity of Dr. ... . It can be concluded that he therefore does not believe that Dr. ... is biased.

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In similar cases, in which the integrity of the challenged arbitrator was affirmed by statements of the challenging party, courts valued statements such as those by Dr. Comstock so highly that they completely dismissed the complaints about a lack of impartiality and independence (*K/S Norjal A/S v. Hyundai Heavy Industries Co. Ltd.* [ENG] (1991) 1 Lloyd's Rep. 260, affirmed (1991) 1 Lloyd's Rep. 564 1991 (C.A.)). In one instance it had been common ground throughout the proceedings that a challenged arbitrator's integrity was of the highest and that he was in no way personally interested or actually biased. Nevertheless he was challenged because his company was a subsidiary of a business partner of the nominating party. The court held the claims to be so unreasonable that it took the unusual step of ordering the complainant to pay all his and the respondent's legal costs, not merely the portion recoverable under the ordinary tariff as between parties. (*Bremer Handelsgesellschaft mbH v. Ets. Soules et Cie and Scott* [CAN] (1985) 2 Lloyd's Law Rep. 199). Consequently, it is obvious that the challenge to Dr. ... is an abuse of law as it contradicts RESPONDENT's own behaviour.

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In conclusion, the challenge of RESPONDENT against the appointment of Dr. ... as arbitrator on the grounds of partiality and dependence is not founded on actual facts. Neither is there bias, nor even an appearance of bias. The facts on which RESPONDENT bases its claim concerning dependency or partiality were only revealed by Dr. ... to avoid any doubt in his impartiality and independence. RESPONDENT's letter of 2 September 2002 showed that RESPONDENT does not question the integrity of Dr. ... . RESPONDENT's challenge contradicts its earlier behaviour and therefore the challenge is an abuse of law.

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### **Unit 3: The United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to the disputed contract and its formation**

Usually the United Nations Convention on Contracts for the International Sale of Goods (CISG) is applicable to a contract when both parties have their seat of business in Contracting States. In this case, however, Art. 1 (1) (a) CISG is not applicable as Mediterraneo is not a party to the CISG (Procedural Order No. 2, # 3). Still, the CISG is applicable to the disputed contract pursuant to Art. 1 (1) (b) CISG. According to this provision, the CISG applies to contracts of sale of goods between parties who have their places of business in different states when the rules of private international law lead to the application of the law of a Contracting State. The applicability of Art. 1 (1) (b) CISG concludes from the fact that the contract comes within the material and regional scope of Art. 1 (1) CISG [I.], the choice of law by the contracting parties is one of the rules of conflict referred to in Art. 1 (1) (b) CISG [II.], and the stipulations of the contract concerning the choice of law lead to the application of the law of Equatoriana, a Contracting State [III.].

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#### **I. The Convention is applicable to the contract consistent with Art. 1 (1) CISG**

In accordance with Art. 1 (1) CISG the Convention only applies to contracts of sale of goods between parties whose places of business are in different States. The disputed contract concerns the sale of OPP film, which is indisputably a sale of goods in the context of the provision. Moreover, CLAIMANT and RESPONDENT have their places of business in Equatoriana and Mediterraneo respectively and hence in different states. Exemptions stated in Artt. 1 (2), 2, and 3 (2) CISG are not pertinent to this case. Consequently, the CISG is applicable to the contract concerning material aspects (*rationes materiae*) and internationality.

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#### **II. The contractual choice of law by the parties is a rule of conflict as required by Art. 1 (1) (b) CISG**

Furthermore, Art. 1 (1) (b) regulates that the rules of private international law have to lead to the application of the law of a Contracting State in order for the CISG to apply. One of these rules of conflict referred to in Art. 1 (1) (b) CISG is party autonomy in contract, so called *lex contractus* (cf. ICC 8324/1995, ICC 6653/1993). Party autonomy in this case is

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reflected by the choice of law clause but also by the stipulations of the entire contract. Hence, according to Section 23 (1) DIS Arbitration Rules the Arbitral Tribunal shall first focus on the parties' choice of law when deciding on the appropriate law to govern the contract.

### **III. Interpretation of the stipulations of the contract lead to the application of the CISG**

The contract at issue contains an agreement to let the commercial law of Equatoriana govern the contract. This is submitted by CLAIMANT and not contested by RESPONDENT (*cf.* Statement of Claim, para 12; Statement of Defence, para 14). As Equatoriana is a Party to the CISG (Statement of Claim, para 13) this is an agreement on the law of a Contracting State leading to the application of the CISG in accordance with Art. 1 (1) (b) CISG [1.]. An exclusion of the CISG can neither be derived from the choice of law clause [2.], nor from other stipulations of the contract [3.].

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#### **1. Agreement on the law of Equatoriana leads to application of the CISG**

The contract at issue contains an explicit agreement to let the “commercial law of Equatoriana” govern the contract. This clause needs to be construed according to Art. 8 CISG, which provides that the conduct of each party has to be interpreted according to its intent where the respective other party knew or could not have been unaware what that intent was.

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The term “commercial” has no particular meaning here, as there is no separate “commercial law” in the Equatorianian legal system (Procedural Order No. 2, # 35). Consequently, it is reasonable to assume that both parties in this context declared their intentions to employ all relevant Equatorianian regulations that cover commercial transactions such as the one at hand. This way the parties do not need to rely on a specific code or certain common law principles. This assumption appears sensible as Equatoriana is considered to be a “mixed jurisdiction” which combines elements of civil and common law jurisdictions (Procedural Order No. 2, # 6). When choosing the “commercial law” the parties agreed to rely on all Equatorianian provisions covering a contract like the one at issue.

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Furthermore, CLAIMANT and RESPONDENT chose the law of Equatoriana, a Contracting State to the CISG. The governance of the CISG as part of the Equatorianian

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legal system is not limited by any reservations under Arts. 92, 95 or 96 CISG (Procedural Order No. 2, # 4). Regarding Art. 1 (1) (b) CISG the CISG must be applied.

## **2. The choice of law clause cannot be construed as an exclusion of the Convention by virtue of Art. 6 CISG**

RESPONDENT nevertheless challenges the compulsory application of the CISG to this contract. It argues that the express designation of Equatorianian law by the parties has to be construed as an express reference to those provisions of Equatorianian law which are applied to domestic trade matters (Statement of Defence, paras 14, 16). However, this reasoning is not sustainable. The only possibility for the choice of law clause to lead to Equatorianian law regarding domestic trade and not to the CISG is that the same choice of law clause is also an exclusion of the CISG. For that purpose, Art. 6 CISG states that parties may exclude the application of the Convention, thereby allowing parties to “opt-out” of the CISG.

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Evidently, the parties did not expressly exclude the usage of CISG anywhere in the contract at hand. An alleged exclusion of the CISG could have only been made tacit. A case of tacit exclusion occurs when parties declare that a different sales law is to govern the contract even though the CISG would regularly apply, as it does in the current case. The choice of law of a Contracting State with no reference to the CISG, however, is not to be considered an exclusion of the CISG per se (SCHLECHTRIEM, Art. 6 para 22). Legislative history shows that suggestions by Canada and Belgium to allow such exclusions were rejected during the drafting of the CISG. These suggestions included inserting the phrase “the application of this Convention shall be excluded if the parties have stated that their contract is subject to a specific national law.” (U.N. Doc. A/CONF.97/C.1/L.41, Off. Rec., p. 86). It thus becomes apparent that the drafters of the CISG were against the possibility of excluding the CISG by pointing to a certain legal system.

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Therefore, it must be presumed that the parties did indeed intend the application of the Convention by expressly choosing the law of a Contracting State without further qualifying such choice. This presumption is widely accepted in domestic case law concerning matters of international trade (*Oberster Gerichtshof* [AUT], 22 October 2001, *U.S. Federal District Court (California)* [USA], 27 July 2001, *Tribunale di Vigevano* [ITA], 12 July 2000, *BGH* [GER], 23 July 1997, *OLG Hamm* [GER], 9 June 1995, *OLG München* [GER], 8 February 1995). The *U.S. Federal District Court* in California decided on a case in which a California based corporation dealt with a Canadian corporation. The

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parties agreed that the applicable law should be the law of the state shown on the buyer's address, in this case Californian law. The court ruled that "in the absence of clear language indicating that both contracting parties intended to opt out of the CISG, the court rejects the contention that the choice of law provision precludes the application of the CISG" (*U.S. Federal District Court in California* [USA], 27 July 2001, CISG). In the case at hand there is no indication, let alone a clear one, that the parties wanted to opt out of the CISG.

Also, in a similar case concerning an Italian seller and a German buyer, both parties based their contract and even court pleadings on the Italian Civil Code. Still, the *Tribunale di Vigevano*, judging the case, held that "the mere reference to domestic law in the parties' pleadings is not itself sufficient to exclude the CISG. To this effect parties must first of all be aware that CISG would be applicable and moreover intend to exclude it" (*Tribunale di Vigevano* [ITA], 12 July 2000). In the current issue, neither CLAIMANT, nor RESPONDENT seem to have been aware during their trade negotiations that CISG is indeed applicable to their contract. Therefore, there is no sign of an intention by either party to exclude this applicability of the CISG. Finally, the Austrian *Oberster Gerichtshof* decided a case involving an Hungarian seller and an Austrian buyer as well as a choice of law clause in favour of Austrian Law. Holding that the CISG is applicable to the contract, the court stated that "the choice of law without an explicit declaration that the Convention be excluded does not constitute an implicit exclusion because the CISG is a part of the chosen law. It is therefore intended in the referral and takes precedence over the non-unified law which would otherwise be applicable" (*Oberster Gerichtshof* [AUT], 22 October 2001). This case resembles the situation of the case at hand and therefore acts as a recent precedent for the current issue.

International commercial arbitration cases in which the contract provided for the application of the law of a Contracting State to the Convention were decided similarly (*cf. ICC 6653/1993; ICC 9187/1999*). The tribunals applied the Convention despite the defendant's assertion that the application of non-uniform, internal provisions of the said State was intended (PETROCHILOS, footnote 59). Summarising the case law on this matter, both domestic courts as well as international arbitral tribunals went beyond assertions made by one party and in the Italian case even beyond the pleadings of both parties which relied on the laws of a Contracting State concerning domestic trade. The courts have always applied the CISG because an exclusion by the parties was not evident or clear

enough. The courts repeatedly rejected assertions which called for an exclusion based on the choice of law of a Contracting State without expressly excluding CISG.

Moreover, according to legal authorities, an effective agreement to apply Equatorianian law with reference to domestic matters would also require additional information such as naming the relevant code (*cf.* HONSELL/HONSELL, Art. 6 paras 5, 7). In this case the parties only referred to the “commercial” laws which indisputably includes the CISG. As the more specific law governing international trade matters, the Convention thus derogates the more general commercial or trade laws of Equatoriana. The term “commercial” is too vague as to what code or law is specifically meant, as it includes the commercial law concerning domestic and international matters. Therefore, due to its ambiguous wording, this clause cannot lead to an exclusion of the CISG as the CISG is itself Equatorianian law (*cf.* *OLG Frankfurt am Main* [GER], 30 August 2000). In conclusion, the choice of law clause in this case cannot be construed as an exclusion of the CISG by virtue of Art. 6 CISG.

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### **3. No exclusions can be ascertained from the remaining contract**

The fact that the CISG is not derogated by choosing choice of law clause does not completely rule out the possibility of the parties’ intention to exclude the CISG. This is, however, not significant for the current arbitration as an implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear. It is the “opting out” rather than the “opting in” system which the CISG drafters retained (CURRAN, p. 184). Therefore, the CISG has to be applied if it cannot be established with sufficient clarity that an exclusion of the Convention was intended, taking into account the criteria provided by Art. 8 CISG for the interpretation of a party’s statements and other conduct (*cf.* POSCH, Art. 6 para 7). As Art. 6 CISG is not meant to be an easy escape clause from the Convention (KONERU, p. 146), such an intention must be determined objectively according to Art. 8 CISG (SCHLECHTRIEM, Art. 6 para 18). Definite indications could be an agreement on a specific provision of domestic law of central importance (*cf.* SCHLECHTRIEM, Art. 6 para 21) or the incorporation of standard business terms clearly drawn up on the basis of a particular domestic legal system (SCHLECHTRIEM, Art. 6 para 30). In the case at hand, no such intent indicative of the Equatorianian law concerning domestic matters can be found. In summary, an exclusion cannot be drawn from the contract and hence the applicability of CISG via the law of Equatoriana pursuant to Art. 1 (1) (b) CISG pertains.

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**Unit 4: A contract of sale with a discount of 4 % was concluded during the telephone conversation between CLAIMANT and RESPONDENT on 3 April 2001**

The telephone conversation on 3 April 2001 led to the formation of a contract, which can be proven by the parties' written communication following the conversation [I.]. The contract fulfils the requirements of Art. 14 CISG, including the quantity and the type of goods to be sold. Moreover, it stipulates a price, which includes a 4% discount [II.]. Furthermore, the subsequent behaviour of RESPONDENT cannot invalidate the contract [III.].

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**I. Written communication shows that a contract was concluded during the telephone conversation on 3 April 2001**

Contrary to RESPONDENT's assertion that a contract had not come into existence (Statement of Defence, para 18), a contract between the parties was concluded during the telephone conversation on 3 April 2001. This is shown by the written communication of both CLAIMANT and RESPONDENT.

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First, CLAIMANT confirmed in its letter dated 3 April 2001 that it had received RESPONDENT's order for 1350 tons of OPP film (Claimant's Exhibit No. 4). In its subsequent letter of 9 April 2001 CLAIMANT informs RESPONDENT that it has booked space for shipment of the first quantity (Claimant's Exhibit No. 6). This shows that in CLAIMANT's view a contract had come into existence.

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Moreover, also RESPONDENT confirmed that a contract had been concluded during the telephone conversation. In its fax dated 3 April 2001 RESPONDENT writes that it is pleased to "confirm" that "it was agreed" that RESPONDENT would buy 1350 tons of OPP film (Claimant's Exhibit No. 3). This view is emphasised once more by RESPONDENT's fax of 6 April 2001 in which it explicitly mentions "our contract" (Claimant's Exhibit No. 5). This is not contradicted by RESPONDENT's declaration that it would have a purchase order sent to CLAIMANT within the week following the telephone conversation (Claimant's Exhibit No. 3). The function of the purchase order would have been simply to regularise the documentation of what had already been agreed on (Procedural Order No. 2, # 44). Consequently, the purchase order of RESPONDENT is merely a formalisation of a contract, which had already been concluded.

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These letters show the parties' understanding of what had been said during the conversation (Procedural Order No. 2, # 34) and prove that both parties believed that a contract had been concluded during the telephone conversation. The fact that it was concluded orally does not hinder its formation. According to Art. 11 CISG a contract of sale is not subject to any requirements as to form.

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## **II. The parties agreed on a price which included a 4% discount off the list price**

In order to conclude a contract the price has to be fixed expressly or implicitly (Art. 14 (1) 2<sup>nd</sup> sentence CISG). The parties fixed the price by referring to a "discounted price" [1.]. This reference has to be understood as a 4% discount [2.].

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### **1. During the conversation of 3 April 2001 the parties referred to a discounted price**

The parties fixed a price for RESPONDENT's order by referring to a "discounted price". This is shown by RESPONDENT's fax of 3 April 2001 (Claimant's Exhibit No. 3) in which the list price is mentioned and in which RESPONDENT states that it is to pay the "discounted price". It reveals that the parties did not only mention the rising of the list price to a sum of \$ 1.900 per ton during their telephone conversation but also agreed on a "discounted price". This intent is mirrored by CLAIMANT's letter of the same day (Claimant's Exhibit No. 4), in which it mentioned "a discount of four percent". When viewed together, both letters show that there was an agreement – either expressly mentioned or silently understood – that RESPONDENT would not pay the list price but a "discounted price".

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### **2. Interpretation of the reference shows that a 4% discount had to be understood by the recipient**

RESPONDENT claims that there was a disagreement between the parties as to whether the discount amounts to 4% or 8%. However, interpretation according to the rules of the CISG shows that the reference to the discounted price meant a discount of 4%. The interpretation of statements under the Convention is governed by Art. 8 CISG. It first takes into consideration the intent of the party making the statement (Art. 8 (1) CISG) and secondly all relevant circumstances (Art. 8 (2) CISG). In the case at hand, however, interpretation can neither rely on RESPONDENT's intent [a.], nor on the contract of 15 December 2000 [b.], but has to be based on CLAIMANT's letter of 7 December 2000 [c.].

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**a) CLAIMANT's ignorance of RESPONDENT's intent precludes the application of Art. 8 (1) CISG**

Art. 8 CISG emphasises the reasonable understanding of the parties and their predominant intent. According to Art. 8 (1) CISG a statement is to be interpreted with regard to the intent of the party making it. This is to overcome the interpretation of Art. 14 (1) CISG as a technical barrier to the parties' understanding (MURRAY, p. 11). RESPONDENT may have expected an 8% discount when it made the offer. Since it is evident that CLAIMANT did not know of this intent and since the wording of Art. 8 (1) CISG does not require CLAIMANT to investigate it, either (*cf.* WITZ/SALGER/LORENZ-WITZ, Art. 8 para 5), this question can be left unanswered. CLAIMANT's lack of knowledge of RESPONDENT's expectation precludes the application of Art 8 (1) CISG when interpreting the reference to the "discounted price".

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**b) The contract of 15 December 2000 cannot be taken into account when interpreting the term 'discounted price'**

Since Art. 8 (1) CISG is not applicable, the statement has to be interpreted according to the understanding of a reasonable person (Art. 8 (2) CISG). To determine that understanding all relevant circumstances have to be taken into account (Art. 8 (3) CISG). Such circumstances include any usages in the trade, any practice established between the parties and negotiations leading up to the statement (*Ibid.*).

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Concerning the packaging material business, there is no trade practice or usage regarding discounted prices (Procedural Order No. 2, # 40). Moreover, since it is only the second purchase between the parties there is no established practice between them. The purchase of 1996 cannot be taken into account since neither party seems to be aware of it. A one-time repetition is not sufficient to establish a practice between parties (WITZ/SALGER/LORENZ-WITZ, Art. 9 para 17). Therefore preceding negotiations such as the contract of 15 December 2000 and the letter of 7 December 2000 have to be taken into account for determining the reasonable understanding.

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RESPONDENT cannot rely on the contract signed on 15 December 2000 (Claimant's Exhibit No. 2) when claiming that an 8% discount had to be understood. The contract was mentioned during the telephone conversation since there was an agreement that the new purchase should follow along the lines of that contract (Claimant's Exhibits No. 3 and 4). While it is true that in this contract the price reflected an 8% discount the

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letters of both RESPONDENT and CLAIMANT show that the contract of 15 December 2000 should only be taken into account for general terms concerning the execution of the contract. RESPONDENT restricts the application of that contract to “payment, shipment and similar terms” (Claimant’s Exhibit No. 3). CLAIMANT speaks of “all other provisions” (Claimant’s Exhibit No. 4). Both letters show that the significant terms which include the amount, the dates of shipping and the price have changed. Since the applicable discount is inseparably linked with the price it is also a material issue. Therefore, a reasonable person has to infer that the discount of the contract of 15 December 2000 cannot be applied automatically to the contract at hand.

**c) The reasonable understanding of the reference has to be determined with regard to the letter of 7 December 2000**

As the contract of 15 December 2000 cannot answer the question of a reasonable understanding of the reference to the “discounted price”, the letter of 7 December 2000 (Claimant’s Exhibit No. 1) has to be taken into account. The letter is the culmination of the negotiations preceding the contract of 15 December 2000. In this letter CLAIMANT’s pricing policy was outlined. CLAIMANT made these explanations in explicit reference to future contracts. This was indicated when CLAIMANT expressed its expectation that the two parties would enter into a long-term relationship (Claimant’s Exhibit No. 1, 1<sup>st</sup> Sentence).

With this prospective relationship in mind CLAIMANT promises RESPONDENT in the first paragraph of the letter that it will always receive CLAIMANT’s best price and that this price is consistently among the lowest in the industry. This general statement is substantiated in the second paragraph, when CLAIMANT states that the discount for favoured customers is a discount of 4%. The amicable opening of the letter shows that CLAIMANT already perceives RESPONDENT as a favoured customer to which such a discount will apply.

CLAIMANT also states that RESPONDENT will receive an 8% discount on its first order. However, CLAIMANT makes it unmistakably clear that such a discount is unusually high and that the normal best price for favoured customers includes a 4% discount. Thus 4% is the rule while 8% is merely an exception. Knowing this, a reference to a “discounted price” – reasonably understood as it is required by Art. 8 (2) CISG – can only mean a discount of 4% unless otherwise stated. Therefore, the reference to a

“discounted price” during the telephone conversation can reasonably only be understood as including a 4% discount.

### **III. RESPONDENT’s subsequent behaviour cannot invalidate the contract.**

As shown above, a contract was concluded between RESPONDENT and CLAIMANT including a 4% discount. RESPONDENT’s letter of 10 April 2001, in which it is stated that RESPONDENT would return to Polyfilm GmbH if CLAIMANT would not grant an 8% discount, may be interpreted as an attempt to invalidate the contract on the grounds of error. The CISG is not concerned with the validity of contracts. (BIANCA/BONELL-FARNSWORTH, Art. 8, 3.4). The question of the validity has to be answered according to national law (SCHLECHTRIEM, Art. 14 para 4). In this case this would be the law of Equatoriana (*see* above para 43). However, failure to agree on the price is not considered to be grounds for invalidity under the law of Equatoriana (Procedural Order No. 2, # 36). Therefore, RESPONDENT’s subsequent behaviour cannot invalidate the contract, either.

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## **Unit 5: CLAIMANT is entitled to receive damages of \$ 461,700 from RESPONDENT for breach of contract**

By not taking delivery RESPONDENT breached the contract with CLAIMANT [I.]. According to Art. 61 (1) (b) CISG, CLAIMANT is therefore entitled to receive damages of \$ 461,700 [II.].

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### **I. RESPONDENT breached the contract by its faxes of 10 April and 2 May 2002.**

RESPONDENT was obliged to pay the price and take delivery according to Art. 53 CISG and failed to perform its obligation [1.]. The performance of this obligation could not be suspended by RESPONDENT according to Art. 71 (1) (b) CISG [2.].

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#### **1. RESPONDENT failed to perform its obligation**

On 3 April 2001 a contract of sale was concluded between CLAIMANT and RESPONDENT (*see* above paras 54-68). Both parties agreed to deliver 1350 tons of OPP film. The monthly shipments were to take place on or before the 10<sup>th</sup> of May 2001 until 10<sup>th</sup> of January 2002. Each payment was due 30 days after notification by CLAIMANT of delivery to the port of shipment (Claimant’s Exhibits No. 2, 3).

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According to Art. 53 CISG RESPONDENT was therefore obliged to pay the price and take delivery. RESPONDENT’s obligation to take delivery is specified in

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Art 60 CISG. Under this Article RESPONDENT had to undertake all reasonable acts in order to enable CLAIMANT to make delivery. The preparatory activities which are required are those which have an influence on the delivery itself (BIANCA/BONELL-MASKOW, Art. 60, 2.3). In the fax of 9 April 2001, CLAIMANT clearly indicated that it booked space for shipment during the period of 25-28 April 2001 (Claimant's Exhibit No. 6). This proves that it was ready and willing to make delivery within the agreed time or even earlier, if convenient for RESPONDENT. CLAIMANT therefore could reasonably anticipate RESPONDENT's declaration to take delivery as a necessary preparatory activity that influences the delivery. But instead of accepting or naming a date for delivery RESPONDENT stated in its fax from 10 April 2001 that it would return to Polyfilm GmbH if CLAIMANT does not grant an 8% discount (Claimant's Exhibit No. 7). As the contract was concluded with a discount of 4%, (*see* para 68) this indicated that RESPONDENT would reject delivery if CLAIMANT had shipped on 25-28 April 2001. In the fax of 2 May 2001, RESPONDENT stated that it signed a contract with Polyfilm GmbH for the polypropylene film that it had expected to purchase from CLAIMANT (Claimant's Exhibit No. 10). At least this statement constitutes a definite refusal to take delivery.

Without RESPONDENT's indication of acceptance CLAIMANT could not reasonably be expected to ship the OPP film. If CLAIMANT had shipped the goods it would have suffered additional damages in form of CIF charges because CLAIMANT would have had to pay these costs according to the INCOTERMS 1990 to the carrier. Thus, RESPONDENT did not perform its obligation to indicate acceptance of delivery as part of the required preparatory activities.

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## **2. RESPONDENT did not have the right under Art. 71 (1) (b) CISG to suspend the performance of its obligation**

Moreover, RESPONDENT's non-performance cannot be justified under Art. 71 (1) (b) CISG. RESPONDENT may only have suspended its obligation to take delivery if it had become apparent that CLAIMANT would not have delivered the goods as a result of its conduct in preparing to perform. As such a non-performance of an obligation would take place in the future, a prognosis of the probability of the breach of contract is necessary. (SCHLECHTRIEM, Art. 71 para 17). Judged by normal business standards the probability of the anticipated non-performance has to amount to a virtual certainty (BIANCA/BONELL-BENNETT, Art. 71, 3.3).

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CLAIMANT did not deliver the goods. However, as CLAIMANT booked space for shipment initially during the period of 25-28 April 2001 (Claimant's Exhibit No. 6) and the second time for 5 May 2001 (Claimant's Exhibit No. 9), it becomes apparent that CLAIMANT was in fact willing to perform its obligation to deliver the goods and to transfer property in the goods at any time. Therefore non-performance by CLAIMANT was improbable.

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On the contrary, the conduct of RESPONDENT, through its faxes and the statement that it concluded a contract with another firm, made it certain that it would not take delivery. So it was actually not RESPONDENT, who had the right to suspend taking delivery, but rather CLAIMANT who under Art. 71 (1) (b) CISG had the right to suspend the delivery of the goods. The fact that the goods have not been delivered does therefore not constitute a breach of contract. As a breach of contract by CLAIMANT was neither given, nor probable, RESPONDENT did not have the right under Art. 71 (1) (b) CISG to suspend the performance of its obligation to take delivery.

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## **II. Claimant is entitled to claim \$ 461,700 from RESPONDENT**

Due to the breach CLAIMANT is entitled to claim damages according to Art. 61 (1) (b) CISG [1.]. RESPONDENT is liable for the failure to take delivery and therefore cannot be exempted under Art. 79 (1) CISG [2.]. According to Art. 74 CISG damages amount to \$ 461,700 [3.].

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### **1. Claimant is entitled to claim damages according to Article 61 (1) (b) CISG.**

Under Art. 61 (1) (b) CISG damages are available for loss resulting from any objective failure of the buyer to fulfil its obligation. Fault or lack of good faith do not have to be proven (*cf.* BIANCA/BONELL-KNAPP, Art 61, 2.10). As RESPONDENT objectively failed to perform its obligation to take delivery under Art. 60 (a) CISG (*see* above paras 73-74), CLAIMANT is under Art. 61 (1) (b) entitled to claim damages as provided in Artt. 74-77 CISG.

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### **2. RESPONDENT cannot be exempted according to Article 79 (1) CISG.**

Furthermore, RESPONDENT cannot be exempted from paying damages by Art. 79 (1) CISG. For an exemption to be granted according to Art. 79 CISG, the non-performance of the contract must be due to an impediment beyond RESPONDENT's control. The reason for not having taken delivery is RESPONDENT's misjudgement of having concluded a contract with an 8% discount. This is not an impediment. An impediment is an objective

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external circumstance, i.e. outside the influence of the defaulting party (SCHLECHTRIEM, Art. 79, para 17). Therefore, RESPONDENT is liable for failure to perform its obligation to take delivery.

### **3. According to Art. 74 CISG the damages amount to \$ 461,700**

As a consequence of the breach of contract by RESPONDENT, CLAIMANT is entitled to claim \$ 461,700 as loss of profit according to Art. 74 CISG. This sum is the result of the following calculation: As CLAIMANT's gross margin on the manufacture of OPP film for the contract is twenty-two percent (22%) of the list price and the price per ton is \$ 1,900, the profit before discount would be \$ 418 per ton ( $1,900 \times 22\%$ ). However, because a 4% discount was granted by CLAIMANT, the profit in this case would have been \$ 342 per ton ( $1,900 \times (22\% - 4\%)$ ). RESPONDENT ordered 1350 tons of OPP film, so that the profit of CLAIMANT would have been \$ 461,700 ( $1350 \text{ tons} \times \$ 342$ ).

This loss must be foreseeable at the time of the conclusion of the contract which is the case whenever the party in breach foresaw or ought to have foreseen the loss (cf. BIANCA/BONNELL-KNAPP, Art. 74, 2.7) RESPONDENT did not know directly that CLAIMANT had a gross margin of 22%. However, RESPONDENT knew that CLAIMANT must have had a sufficient gross margin (Procedural Order No. 2, # 55). Moreover, in the light of the fact that a gross margin of 22% is what reasonably can be expected in the industry (Ibid.), RESPONDENT ought to have foreseen the loss. Therefore, RESPONDENT has to pay the sum of \$ 461,700 as damages.

## **UNIT 6: CLAIMANT is entitled to interest from the date payment was due**

Interest is due on the amount awarded as damages [I.] and is payable not only on liquidated debts but also from the moment payment was due [II.].

### **I. Interest is due on the amount awarded as damages**

If one party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it according to Art. 78 CISG, without prejudice to any claim for damages recoverable under Art. 74 CISG. RESPONDENT is obliged to pay damages of \$ 461,700. As interest is also due on an amount awarded as damages (*Handelsgericht Zürich* [SUI], 5. February 1997, Unilex E.1997-4.1.; HONSELL-KAROLLUS, Art. 78 para 5; HERBER/CZERWENKA, Art. 78 para 3; SOERGEL-LÜDERITZ, Art. 78 para 2), CLAIMANT is entitled to interest on \$ 461,700.

## II. Interest is payable from the moment payment was due

Interest on damages is payable from the moment payment of damages was due and not from the moment the amount has been liquidated, i.e. made certain by award. Payment of damages was due from the moment when the damages occurred, i.e. when the other party would have made profit (*Handelsgericht Zürich* [SUI], 5. February 1997, Unilex E.1997-4.1; HERBER/CZERWENKA, Art. 78 para 3).

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The parties agreed that shipment had to take place over a nine-month period of time on or before the 10<sup>th</sup> of May 2001 until 10<sup>th</sup> January 2002 (Claimant's Exhibit No. 3) with each shipment to be of approximately 150 tons (Procedural Order No. 2, # 58). Payment was due 30 days after shipment (Claimant's Exhibits No. 2, 3). CLAIMANT would have made a profit of \$ 51,300 (\$ 461,700 divided by 9) each time. Consequently, interest is payable on \$ 51,300 within 30 days from 10<sup>th</sup> of May 2001, 10<sup>th</sup> of June, 10<sup>th</sup> of July and 10<sup>th</sup> of August 2001.

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## **UNIT 7: RESPONDENT has to pay all costs of arbitration according to Section 35 DIS Arbitration Rules**

Finally, CLAIMANT respectfully requests the Tribunal to award that RESPONDENT has to bear all costs of arbitration. According to Section 35 (1) of the DIS Arbitration Rules, the Arbitral Tribunal has to decide which party has to bear the costs unless otherwise agreed by the parties. Under Section 35 (2) DIS Arbitration Rules, all costs of the arbitration procedure including those costs incurred by the parties have usually to be borne by the unsuccessful party. Claimant therefore proposes to compel RESPONDENT to bear all of these costs. If the Tribunal decides partly in favour of RESPONDENT, CLAIMANT, however, proposes to apportion the costs of arbitration according to each parties' level of fault.

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