

ELEVENTH ANNUAL WILLEM C. VIS  
INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
2003 – 2004

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**MEMORANDUM**

FOR

EQUAPACK, INC.

- CLAIMANT -



BJÖRN BACHIRT  
FRANZISKA KLAUKE

ANDREAS HEINRICH  
CHRISTIAN SCHLEIFENBAUM

VERENA KAMPHAUSEN  
GREGOR SCHROLL

---

UNIVERSITY OF COLOGNE

UNIVERSITY OF COLOGNE  
LAW CENTRE FOR EUROPEAN AND INTERNATIONAL COOPERATION  
(R. I. Z.)

TEAM MEMBERS:

BJÖRN BACHIRT  
FRANZISKA KLAUKE

ANDREAS HEINRICH  
CHRISTIAN SCHLEIFENBAUM

VERENA KAMPHAUSEN  
GREGOR SCHROLL

ELEVENTH ANNUAL  
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COMMERCIAL ARBITRATION MOOT  
2003 – 2004

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW  
PACE UNIVERSITY SCHOOL OF LAW  
WHITE PLAINS, NEW YORK  
U.S.A.

THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE  
SIAC

**MOOT CASE NO. 11**

**LEGAL POSITION**

ON BEHALF OF

EQUAPACK, INC.

345 COMMERCIAL AVE.

OCEANSIDE

EQUATORIANA

(CLAIMANT)

AGAINST

MEDI-MACHINES, S.A.

415 INDUSTRIAL PLACE

CAPITOL CITY

MEDITERRANEO

(RESPONDENT)

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AC	Appellate Court
Arb. Int'l.	Arbitration International
A.R. Int. Arb.	American Review of International Arbitration
Art.	Article
Arts.	Articles
ASA Bulletin	Association suisse de l'arbitrage Bulletin
Bd.	Band (Volume)
BG	Bezirksgericht (District Court, Switzerland)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Decisions of the Swiss Federal Tribunal)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the German Federal Supreme Court in Civil Matters)
C. Supp.	Cummulative Supplement
c.f.	confer (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG Online	Case Law on CISG <a href="http://www.cisg-online.ch">http://www.cisg-online.ch</a>
CLOUT	Case Law on UNCITRAL Texts <a href="http://www.uncitral.org/en-index.htm">http://www.uncitral.org/en-index.htm</a>
Co.	Corporation
Comm. Ct.	Commercial Court
D.A.C.	Departmental Advisory Committee
D.C.	District Court
e.g.	exemplum gratia (for example)
et seq.	et sequentes (and following)

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Fn.	Footnote
FS	Festschrift
i.e.	id est (that means)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
Inc.	Incorporated
Int. A.L.R.	International Arbitration Law Review
IPrax	Praxis des Internationalen Privat- und Verfahrensrecht
LCIA	London Court of International Arbitration
LCIA Rules	Arbitration Rules of the London Court of International Arbitration
LG	Landgericht (Regional Court, Germany)
Lloyd's Rep.	Lloyd's List Law Reports
Ltd.	Limited
Mealey's IAR	Mealey's International Arbitration Report
NJW	Neue Juristische Wochenschrift
No.	Number
Nos.	Numbers
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OGH	Oberster Gerichtshof (Supreme Court of Austria)
OLG	Oberlandesgericht (Court of Appeal, Germany)
p.	Page
para.	paragraph
pp.	Pages
Q.B.D.	Queen's Bench Division
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der internationalen Wirtschaft

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S.A.	Sociedad Anónima
S.C.	Supreme Court
SchiedsVZ	Zeitschrift für Schiedsverfahrensrecht
Sec.	Section
Sec. Comm.	Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre
U.K.	United Kingdom
U.S.	United States
U.S.R.	United States Report
UN	United Nations
UNCITRAL	United Nations Commission on International Trade
UNCITRAL ML	Model Law of the United Nations Commission on International Trade on International Commercial Arbitration
UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods
v.	versus (against)
Vol.	Volume
YBCA	Yearbook of Commercial Arbitration

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UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS  
(CISG), OF 11 APRIL 1980

**STATEMENT OF FACTS****2002**

- 24 June** Mr. Swan, Works Manager of EQUAPACK INC. (hereafter: CLAIMANT) writes a letter to MEDI-MACHINES, S.A. (hereafter: RESPONDENT) inquiring into the possibility of purchasing several new machines to pack dry commodities into retail packages of 500 grams to one kilogram. CLAIMANT requires these machines to package a “wide range” of products including salt for a chain of retail food stores named A2Z.
- 3 July** In reply to this inquiry RESPONDENT offers six Model 14 auger-feeder dry stuff packaging machines at US\$ 65,000 per machine.
- 12 July** CLAIMANT orders six Model 14 dry stuff packaging machines which had to be capable of packaging salt.
- 23 July** Telephone conversation between CLAIMANT and RESPONDENT about the progress in shipping the machines. Furthermore, CLAIMANT informs RESPONDENT that the ordered machines would be used for packaging salt. RESPONDENT remains silent concerning the use of salt with the Model 14 machines.
- 24 July** RESPONDENT sends a fax to CLAIMANT stating that the machines are packed for shipment and will be picked up and loaded next Monday.
- 2 August** CLAIMANT’s account is debited. Payment for the purchase price is made by means of a letter of credit.
- 21 August** The six Model 14 machines are delivered.
- 18 October** Telephone conversation between CLAIMANT and RESPONDENT about the corrosion problem caused by packaging salt with the Model 14 machines. RESPONDENT states that the machines are not designed for packaging salt.
- 19 October** CLAIMANT sends a letter to RESPONDENT in which it declares the contract avoided and places the Model 14 machines at RESPONDENT’s disposal.

**27 October** RESPONDENT sends a letter to CLAIMANT and denies responsibility for the corrosion problem caused by packaging salt.

### **2003**

**10 February** Mr. Langweiler, CLAIMANT's attorney, sends a Notice of Arbitration to the registrar of the Singapore International Arbitration Centre, Mr. Ang Yong Tong, pursuant to Rule 3 of the SIAC Rules.

**24 February** Letter from SIAC to RESPONDENT in which SIAC demands payment as advance on costs for the arbitration. Three more letters were following on 6, 13 and 20 March.

**17 April** Mr. Fasttrack sends a letter to SIAC including Statement of Defense and Curriculum Vitae of the Arbitrator 2 appointed by RESPONDENT.

**18 June** In a conference between the two parties and the presiding arbitrator it was agreed that the Tribunal will appoint an expert engineer, Eur. Ing. Franz van Heath-Robinson, testify to the quality of the Model 14 machines.

**6 August** Report of expert engineer Mr. Heath-Robinson. He states that the Model 14 machines only achieve a production rate for fine goods from 130 to 135 bags per minute

**1 September** Mr. Fasttrack, on behalf of RESPONDENT, requests that the tribunal order CLAIMANT to provide security for RESPONDENT's legal costs in the amount of US\$20,000 pursuant to Art. 27.3 SIAC Rules.

**9 September** Mr. Langweiler rejects RESPONDENT's application to post security for costs. Furthermore, he informs the tribunal that Equatoriana Investors are going to take over CLAIMANT and that the due diligence is currently in process.

**17 September** Mr. Fasttrack sends a letter to the presiding arbitrator. He urges the tribunal to order CLAIMANT to refrain from divulging any aspect of the current arbitration, including its very existence. He is concerned that CLAIMANT would violate Rule 34.6 SIAC Rules.

**24 September** In his letter, Mr. Langweiler strongly opposes any notion that the tribunal has the authority under SIAC Rules to order confidentiality in regard to any aspect of the arbitration.

On behalf of our client Equapack, Inc., CLAIMANT, we respectfully make the following submissions and respectfully request the Arbitral Tribunal to hold that:

- The sales contract is governed by the CISG and the arbitration is governed by the SIAC Rules and the UNCITRAL ML [**First Issue**].
- RESPONDENT committed a breach of contract [**Second Issue**].
- This breach of contract was fundamental, and CLAIMANT lawfully declared the contract avoided [**Third Issue**].
- RESPONDENT's request for an order for security for costs according to Art. 27.3 SIAC Rules is to be denied [**Fourth Issue**].
- CLAIMANT is not obliged to refrain from disclosing any information concerning the arbitration to Equatoriana Investors during the due diligence investigation [**Fifth Issue**].
- Even if CLAIMANT were obliged to refrain from disclosure, the Tribunal may not order confidentiality [**Sixth Issue**].
- No consequences would arise if CLAIMANT were to violate an order for confidentiality [**Seventh Issue**].

**FIRST ISSUE: THE CISG APPLIES TO THE SALES CONTRACT AND THE ARBITRATION IS GOVERNED BY THE SIAC RULES AND THE UNCITRAL ML**

**1** A sales contract was concluded between CLAIMANT and RESPONDENT in the exchange of letters dated 3 July 2002 and 12 July 2002. This sales contract is governed by the CISG [**A.**]. The SIAC Rules and the UNCITRAL ML apply to this arbitration [**B.**].

**A. The sales contract between CLAIMANT and RESPONDENT is governed by the CISG according to Art. 1 (1) (a) CISG**

**2** The sales contract falls within the ambit of Art. 1 (1) (a) CISG and is therefore subject to the CISG. Equapack, Inc. has its place of business in Equatoriana. The place of business of Medi-Machines, S.A. is Mediterraneo (*Statement of Case at 1, 2; Statement of Defense at 1, 2*). Since both states are contracting states (*Procedural Order No. 3 at 2*), the CISG is applicable according to Art. 1 (1) (a) CISG.

**B. The SIAC Rules and the UNCITRAL ML apply to this arbitration**

**3** The arbitration procedure is governed by the SIAC Rules and the UNCITRAL ML. CLAIMANT and RESPONDENT agreed that possible arbitration proceedings should take

place in Danubia (*Statement of Case at 13*), which has adopted the UNCITRAL ML (*Statement of Case at 14*). Therefore the law governing international arbitration in Danubia is the UNCITRAL ML according to Art. 1 (1), (2) ML. In accordance with Art. 1 (1), (3) (a) ML this arbitration is international, because CLAIMANT and RESPONDENT have their seats in different countries (*Statement of Case at 1, 2; Statement of Defense at 1, 2*). The SIAC Rules were chosen by the parties in accordance with Art. 19 (1) ML.

## **SECOND ISSUE: RESPONDENT COMMITTED A BREACH OF CONTRACT**

4 RESPONDENT committed a breach of contract by delivering Model 14 machines not capable of packaging salt. According to Art. 35 CISG the contract stipulated for machines suitable for packaging salt [A.]. Even if the parties did not contract for machines capable of processing salt, RESPONDENT breached the contract by failing to warn CLAIMANT not to use the machines with salt pursuant to Art. 45 (1) CISG [B.]. Irrespective of whether the machines had to be fit to package salt, the machines were below the average industry standard in speed and design, and therefore not in conformity with the contract according to Art. 35 (1) CISG [C.].

### **A. Since the contract provided for machines capable of packaging salt, RESPONDENT breached the contract by delivering machines not suitable to process salt**

5 In the contract the parties agreed that the Model 14 machines should be capable of packaging salt in accordance with Art. 35 (1) CISG [I.]. Even if this was not agreed between the parties, the machines had to be fit for this particular purpose pursuant to Art. 35 (2) (b) CISG [II.]. Alternatively, according to Art. 35 (2) (a) CISG the machines had to be fit for packaging salt since this is an ordinary use of food packaging machines [III.].

### **I. As packaging salt was an agreed quality of the machines, they were not in conformity with the contract pursuant to Art. 35 (1) CISG**

6 The parties agreed that the Model 14 machines should be suitable for packaging salt. In reply to CLAIMANT's inquiry dated 24 June 2002 (*Claimant's Exhibit No. 1*) RESPONDENT offered six Model 14 machines fit for a "wide range" of products in its letter dated 3 July 2002 (*Claimant's Exhibit No. 2*). According to Art. 14 CISG this offer was specifically addressed to Equapack, Inc. and it included the price and quantity of the offered machines. Pursuant to an interpretation of RESPONDENT's offer under Art. 8 (2) CISG, the machines had to be capable of packaging salt [1.]. Even if RESPONDENT intended to exclude salt, this

was irrelevant according to Art. 8 (1) CISG [2.]. CLAIMANT accepted RESPONDENT's offer in its letter dated 12 July 2002 (*Claimant's Exhibit No. 3*) [3.].

**1. According to Art. 8 (2) CISG RESPONDENT offered machines suitable for salt**

- 7 In its letter dated 3 July 2002 (*Claimant's Exhibit No. 2*) RESPONDENT offered Model 14 machines capable of packaging salt. This results from an interpretation of the letter according to Art. 8 (2) CISG, which provides for an interpretation according to the understanding that a reasonable person of the same kind as the other party – i.e. CLAIMANT – would have had in the same circumstances. RESPONDENT offered machines capable of packaging a “wide range of products” of fine and coarser quality. RESPONDENT did not make any exception from this range. Thus, a reasonable person had to understand that salt was included.
- 8 This is supported by CLAIMANT's inquiry (*Claimant's Exhibit No. 1*) which was the basis of RESPONDENT's offer. The inquiry is relevant according to Art. 8 (3) CISG which provides that negotiations need to be taken into account when interpreting the parties' statements (*AUDIT at 43; FERRARI/FLECHTNER/BRAND-FERRARI, p. 185*). In its inquiry CLAIMANT asked for machines suitable for “both fine goods, such as ground coffee or flour, and coarser goods such as beans or rice” (*Claimant's Exhibit No. 1*). This comprised all products within this range. Since salt is not as fine as “ground coffee or flour”, but is also not as coarse as “beans or rice”, salt was included in this range. CLAIMANT did not mention other criteria such as adhesiveness or temperature sensitivity. Thus, the grainity was the decisive criterion for the packaging capabilities of the machines.
- 9 The only additional criterion mentioned was “dry” since “dry bulk commodities” were to be packaged (*Claimant's Exhibit No. 1*). Salt is considered to be “dry stuff” (*Procedural Order No. 3 at 16*) and thus, also under this aspect, falls within the designated range of products.
- 10 CLAIMANT's and RESPONDENT's subsequent behavior confirms this result. According to Art. 8 (3) CISG the parties' subsequent behavior is to be taken into account in interpreting the parties' declarations (*WITZ/SALGER/LORENZ-WITZ, Art. 8 at 13; FERRARI IHR 2003, p. 14; BG St. Gallen, Switzerland, 03.07.1997 – 3PZ 97/18, UNILEX 1997-10.2; LG Hamburg, Germany, 26.09.1990, IPrax 1991, pp. 400 et seq.*). During the telephone conversation on 23 July 2003 (*Claimant's Exhibit No. 5*) CLAIMANT explicitly mentioned that salt would be processed with the machines. RESPONDENT did not react (*Claimant's Exhibit No. 5*) let alone object to the prospective use of the machines with salt. This conduct reveals the parties' common understanding that the machines had to be suitable for packaging salt.

**2. Even if it was RESPONDENT's intention to exclude salt from the machines packaging capabilities, this is irrelevant according to Art. 8 (1) CISG**

- 11** It is irrelevant whether it was RESPONDENT's intention to exclude packaging salt from the capabilities of the machines. Pursuant to Art. 8 (1) CISG, statements are only to be interpreted according to a party's intention if the other party – i.e. CLAIMANT – knew this intention or could not have been unaware of it.
- 12** First, CLAIMANT did not know RESPONDENT's intention. Secondly, CLAIMANT could not have been aware of RESPONDENT's intention as RESPONDENT did nothing to communicate it. RESPONDENT did not mention Model 17 machines that are specifically designed for packaging salt and did not reveal any details about the material of which the offered machines were made (*Claimant's Exhibit No. 2*). Therefore, CLAIMANT could not have known that processing salt required special variants of auger-feeders which had to be made of stainless steel (*Procedural Order No. 3 at 14*).
- 13** Furthermore, CLAIMANT had no reason to consult other sources of information like brochures or the Internet. By directly contacting RESPONDENT with its letter dated 24 June 2002 (*Claimant's Exhibit No. 1*) CLAIMANT sought personal consultation. That was the most reliable way of finding out which machines would be suitable for CLAIMANT's requirements. RESPONDENT itself did not refer to any additional sources of information like its website or literature (*Procedural Order No. 3 at 17*).
- 14** Thus, according to Art. 8 (1) CISG, CLAIMANT neither knew nor could have been aware of RESPONDENT's possible intention to exclude salt from the machines packaging capabilities. Hence, any such intention was irrelevant.

**3. CLAIMANT accepted this offer of machines capable of packaging salt**

- 15** CLAIMANT accepted this offer of machines capable of packaging salt in its letter dated 12 July 2002 (*Claimant's Exhibit No. 3*) without any modification. Therefore, an interpretation according to Art. 8 (1) CISG as well as according to Art. 8 (2) CISG leads to the result that the acceptance concerned six Model 14 machines capable of packaging salt.
- 16** Hence, in accordance with Arts. 18, 23 CISG the parties contracted for machines capable of packaging salt. The machines delivered on 21 August 2002 were not suitable for processing salt, as they showed serious signs of corrosion after such use (*Statement of Case at 8*). Consequently, they were not in conformity with the contract pursuant to Art. 35 (1) CISG.

**II. Alternatively, the Model 14 machines were not in conformity with the contract according to Art. 35 (2) (b) CISG, since they were not fit for the particular purpose of packaging salt**

17 Alternatively, the Model 14 machines had to be fit for packaging salt as this was a particular purpose of the machines made known to RESPONDENT pursuant to Art. 35 (2) (b) CISG. CLAIMANT at least implicitly informed RESPONDENT that the machines would be used with salt [1.]. As RESPONDENT, nevertheless, did not inform CLAIMANT not to use the machines with salt, CLAIMANT could legitimately rely on their capability of packaging salt. As the machines could not package salt they were not in conformity with the contract [2.].

**1. CLAIMANT's implicit information about the purpose of packaging salt was sufficient under Art. 35 (2) (b) CISG**

18 Even if the Tribunal finds that the parties did not agree on the capability of packaging salt in the sense of Art. 35 (1) CISG, the packaging of salt was a particular purpose of the machines made known to RESPONDENT according to Art. 35 (2) (b) CISG.

19 Under Art. 35 (2) (b) CISG it is sufficient that the seller has cause to recognize the purpose for which the goods will be used, e.g. due to an implicit statement of the buyer (*STAUDINGER-MAGNUS, Art. 35 at 28; KAROLLUS, p. 117; ENDERLEIN/MASKOW/STROHBACH, Art. 35 at 11; HYLAND, p. 320*). In the inquiry dated 24 June 2002 CLAIMANT asked for machines for packaging “dry stuff” that would be as fine as ground coffee or flour and as coarse as beans or rice (*Claimant's Exhibit No. 1*). Since salt is considered to be “dry stuff” (*Procedural Order No. 3 at 16*) within the designated range (*see supra 5 et seq.*), CLAIMANT thereby at least implicitly informed RESPONDENT that the machines were to be used to package salt.

**2. As RESPONDENT failed to indicate that the Model 14 machines were not fit for this particular purpose, it had to provide machines capable of packaging salt**

20 Despite the fact that packaging salt was a particular purpose of the machines at least impliedly made known to RESPONDENT according to Art. 35 (2) (b) CISG RESPONDENT did not mention that the machines were not suitable for salt. Therefore, CLAIMANT could reasonably rely on the suitability of the machines for packaging salt.

21 The seller is bound to inform the buyer if the goods are not suitable for the particular purpose (*SECRETARIAT'S COMMENTARY, Art. 33 at 9; STAUDINGER-MAGNUS, Art. 35 at 35; v. CAEMMERER/SCHLECHTRIEM-STUMPF, Art. 35 at 25; ŠARČEVIĆ/VOLKEN-ENDERLEIN, p. 156; NEUMAYER/MING, Art. 35 at 9; ACHILLES, Art. 35 at 9*). If the seller fails to give this

information and the buyer reasonably relies on the seller's skill and judgment, the goods have to be fit for this particular purpose (*STAUDINGER-MAGNUS, Art. 35 at 35*).

- 22 RESPONDENT did not inform CLAIMANT that the Model 14 machines were not capable of packaging salt. RESPONDENT may not assert that it had informed CLAIMANT during the telephone call on 23 July 2002. First, there is no evidence that such information was given. Secondly, any such information during the telephone conversation would have been too late, as according to Art. 35 (2) (b) CISG the contractual requirements are determined at the time of the conclusion of the contract.
- 23 Therefore, CLAIMANT relied on the machines' capabilities. This reliance was also reasonable. It is reasonable for a buyer to rely on the seller's judgement, if the seller is a specialist or expert in the manufacture of goods (*SCHLECHTRIEM-SCHWENZER, Art. 35 at 23; NEUMAYER/MING, Art. 35, at 9*). In the present case, RESPONDENT was the manufacturer of the machines, known as a "premier manufacturer" (*Claimant's Exhibit No. 2*) enjoying a good reputation (*Claimant's Exhibit No. 5 para. 2*). Contrary to RESPONDENT, CLAIMANT had no substantial experience in the packaging of food. Only in 1997 CLAIMANT started packaging small quantities of food and never packaged salt (*Procedural Order No. 3 at 10*). CLAIMANT's reliance on RESPONDENT's skills and judgement was therefore reasonable.
- 24 Consequently, the machines had to be capable of packaging salt. Hence, the delivery of machines not suitable for this task was not in conformity with the contract according to Art. 35 (2) (b) CISG.

**III. Alternatively, the machines were not in conformity with the contract according to Art. 35 (2) (a) CISG, since the machines had to be fit for packaging salt as this is an ordinary use**

- 25 Even if packaging salt was not a particular purpose per Art. 35 (2) (b) CISG, the machines had to be capable of processing salt, since they had to be fit for ordinary use according to Art. 35 (2) (a) CISG. The machines were designed and sold as food packaging machines. Salt is a kind of food as many other kinds of food and is also contained in many foods. Even dry bulk commodities such as peanuts are packaged with salt. Hence, the ordinary use of the machines includes packaging salt as well.
- 26 If goods are not fit for all, but merely some of the purposes for which goods of that type are ordinarily used, the seller's performance is not in conformity with the contract (*SECRETARIAT'S COMMENTARY, O.R. p. 32 Art. 33 No. 5; SCHLECHTRIEM, Art. 35 at 14; STAUDINGER-MAGNUS, Art. 35 at 20; PILTZ, § 5, para. 39*).

27 Hence, the delivered Model 14 machines were contrary to the contract according to Art. 35 (2) (a) CISG.

28 In conclusion, RESPONDENT's performance was not in accordance with the contract since the delivered Model 14 machines were not capable of packaging salt as it was agreed according to Art. 35 (1) CISG. Alternatively, the machines were not in conformity with the contract as they were not fit for this known particular purpose, pursuant to Art. 35 (2) (b) CISG. Alternatively, the machines were not in conformity with the contract since they were not fit for the ordinary use of packaging salt according to Art. 35 (2) (a) CISG.

**B. Even if the contract did not provide for machines capable of packaging salt, RESPONDENT breached the contract by failing to warn CLAIMANT that the machines were not suitable for packaging salt**

29 Even if the contract did not provide for the delivery of machines capable of packaging salt, RESPONDENT breached its obligation to warn CLAIMANT that the machines were not suitable for packaging salt according to Art. 45 (1) CISG [I.]. RESPONDENT may not argue that CLAIMANT's intention to use the machines with salt was communicated too late to affect its responsibility [II.]. Also CLAIMANT could not be expected to know not to use the machines with salt [III.].

**I. RESPONDENT breached its obligation to warn CLAIMANT not to use the machines with salt according to Art. 45 (1) CISG**

30 Since RESPONDENT did not warn CLAIMANT not to use the machines with salt (*Claimant's Exhibit No. 5*), it breached the contract pursuant to Art. 45 (1) CISG. Under Art. 45 CISG a breach of contract occurs when the seller "fails to perform any of his obligations under the contract or this convention". CLAIMANT informed RESPONDENT about its intention of packaging salt, and RESPONDENT thereby was obliged to warn CLAIMANT not to use the machines with salt.

31 During the telephone conversation of 23 July 2002, CLAIMANT made the following statement to RESPONDENT: "It's a good thing we are getting such a versatile machine from you. A2Z wants us to get going on packaging their stuff. They have everything in mind from large beans to salt [...] and we are going to have to do it all." (*Statement of Defense at 6*). This language was sufficient to alert RESPONDENT that the Model 14 machines being delivered would be used to package salt. First, CLAIMANT stated that it would have to package salt for its customer A2Z. Secondly, CLAIMANT made it clear that the machines were intended to be

used for serving this contract. Additionally, CLAIMANT mentioned the versatility of the machines as an important feature directly in context with the packaging to be done for A2Z.

- 32 Under Art. 45 (1) CISG, an obligation is imposed on the seller to warn or to inform the buyer about restrictions of the sold goods (*SCHLECHTRIEM, Art. 45 at 3; STAUDINGER-MAGNUS, Art. 45 at 33; ACHILLES, Art. 45 at 2*). It is a general principle of international sales law that the parties are obliged to provide each other with information necessary to avoid any threat to the purpose of the contract (*SCHLECHTRIEM-FERRARI, Kommentar, Art. 7 at 54; AUDIT, p. 51, HONNOLD at 100*).
- 33 RESPONDENT was informed that the machines, although not designed for packaging salt, were intended to be used with salt and knew that this would cause severe damage. Therefore, RESPONDENT was obliged to warn CLAIMANT not to use the machines with salt. As it failed to do so, it breached an obligation arising out of the contract according to Art. 45 (1) CISG.

**II. RESPONDENT may not argue that CLAIMANT's intention to use the machines with salt was communicated too late to affect its responsibility**

- 34 RESPONDENT may not argue that CLAIMANT's intention to use the machines with salt was communicated too late, because the contract had already been concluded and the specific machines had been selected and packed for shipment (*Statement of Defense at 9*). An obligation to warn the buyer about any restrictions of the sold goods does not cease when the contract is concluded, as the parties remain obliged not to imperil the purpose of the contract (*STAUDINGER-MAGNUS, Art. 7 at 47; SCHLECHTRIEM/FERRARI, Kommentar, Art. 7 at 54*). The machines were not yet installed at CLAIMANT's place of business and were not in use at the time of the telephone conversation. Thus, the warning would have prevented damage to the machines and RESPONDENT was still subject to the obligation to warn CLAIMANT.

**III. CLAIMANT could not be expected to know not to use the machines with salt**

- 35 RESPONDENT may not assert that CLAIMANT was advised not to use the machines with salt. In the telephone conversation on 23 July 2002, CLAIMANT informed RESPONDENT about the prospective use of the machines with salt (*Claimant's Exhibit No. 5, para. 5; Statement of Defense at 6*). RESPONDENT remained silent (*see supra 30*) and therefore CLAIMANT legitimately relied on the suitability of the machines for packaging salt.
- 36 RESPONDENT may not argue that CLAIMANT's reliance was no longer legitimate after it had received the operations manual. The operations manual solely contained the general

information “not to use the machines with highly corrosive products” (*Procedural Order No. 3 at 25*). Salt was not explicitly mentioned. On the contrary, during the telephone conversation on 23 July 2002, salt was explicitly mentioned by CLAIMANT and RESPONDENT did not object. Thereby, CLAIMANT could draw the specific conclusion that salt could be used with the Model 14 machines. Consequently, CLAIMANT had no reason to consider salt to be a “highly corrosive product” in the sense of the operations manual.

37 Even without the prior telephone conversation, the result is the same. Without any substantial experience or information concerning the packaging of salt, CLAIMANT did not know and did not have to know that salt is “so corrosive that it would require special equipment to handle it” (*Procedural Order No. 3 at 14*). Neither did CLAIMANT need to know that salt was a “highly corrosive product” in the sense of the operations manual. This statement was too unspecific to give CLAIMANT reason to consider it to be relevant for packaging salt. A reasonable person would not assume that food, such as salt, can be “highly” corrosive. Only products that are generally considered dangerous, such as e.g. aggressive cleansers, would be qualified as a “highly corrosive product”.

38 As a conclusion, RESPONDENT’s failure to warn was not in conformity with its contractual obligations, according to Art. 45 (1) CISG.

**C. In addition, the Model 14 machines were below the average industry standard and therefore not in conformity with the contract, according to Art. 35 (1) CISG**

39 As the machines were below average industry standard quality, RESPONDENT breached the contract, according to Art. 35 (1) CISG. The parties contracted for the delivery of “top” auger-feeders for fine goods, and therefore the machines had to be of at least average industry standard quality.

40 In fact, the delivered Model 14 machines did not meet the average industry standard for packaging machines for fine goods. The industry standard for auger-feeder machines designed for fine goods such as ground coffee is a rate of 180 1kg bags per minute (*Expert’s report para. 4*). However, the delivered Model 14 machines only achieve a packaging rate of up to 135 1kg bags per minute for the same products (*Expert’s report para. 3*). This significantly lower performance is due to the fact that the average auger-feeders are equipped with highly polished and chromium plated product paths (*Expert’s report para. 4*). The delivered Model 14 machines did not have these highly polished and chromium plated product paths (*Expert’s report para. 4*).

- 41 As the industry speed standard has not changed in recent years (*Procedural Order No. 3 at 34*), RESPONDENT may not object that Model 14 was a discontinued model.
- 42 Neither may RESPONDENT object that the design and the performance of the entire Model 14 series were below the average industry standard. The parties contracted for the delivery of auger-feeder machines, which were designed especially for packaging fine goods (*Claimant's Exhibit No. 2 para. 2*). RESPONDENT, who describes itself as a "premier manufacturer" offered these auger-feeders as a "top product" (*Claimant's Exhibit No. 2*). By characterizing the Model 14 as a "top product" RESPONDENT placed it among the best available products. Therefore, at the very least the Model 14 machines had to achieve the average performance of available auger-feeders.
- 43 Since the quality of the delivered Model 14 machines was even below the average industry standard, RESPONDENT breached the contract, according to Art. 35 (1) CISG.

### **THIRD ISSUE: CLAIMANT LAWFULLY AVOIDED THE CONTRACT**

- 44 RESPONDENT committed a fundamental breach of contract under Art. 25 CISG [A.] and CLAIMANT lawfully declared the contract avoided under Arts. 49 (1) (a), 26 CISG [B.].

#### **A. RESPONDENT committed a fundamental breach of contract according to Art. 25 CISG**

- 45 RESPONDENT's performance constituted a fundamental breach with respect to the entire contract [I.]. In the alternative, RESPONDENT committed a fundamental breach with respect to the four destroyed machines [II.].

#### **I. RESPONDENT committed a fundamental breach with respect to the entire contract**

- 46 RESPONDENT fundamentally breached the contract by the delivery of Model 14 machines not in conformity with the contract due to their incapability to process salt [1.]. Alternatively, RESPONDENT fundamentally breached the contract by its failure to warn CLAIMANT not to use the machines with salt [2.]. Irrespective of whether the machines had to be capable of packaging salt or not, delivering machines substantially below the average industry standard in performance and design was a fundamental breach [3.]. RESPONDENT has or should have foreseen that its defective performance constituted a fundamental breach of contract [4.].

**1. RESPONDENT committed a fundamental breach of contract by delivering Model 14 machines not in conformity with the contract due to their incapability of processing salt**

- 47** RESPONDENT committed a breach of contract by delivering Model 14 machines not capable of packaging salt (*see supra 5 et seq.*). This breach was fundamental according to Art. 25 CISG, since it substantially deprived CLAIMANT of what it could reasonably expect under the sales contract.
- 48** In particular this is the case, when the buyer cannot reasonably be expected to retain the goods (*BGH, Germany, 03.04.1996, VIII ZR 51/95, CLOUT case no. 171; OLG Frankfurt a.M., Germany, 18.01.1994; KOCH, Review, p. 221*) because of a substantial deviation from the agreed quality or a frustration of the purpose in view of which the contract was entered into (*PILTZ, NJW 1996, p. 2768 et seq.; BUTLER, IHR Vol. 5 2003, p. 208 et seq.; HONSELL-KAROLLUS, Art. 25 at 21; NEUMAYER/MING, Art. 25 at 3; ENDERLEIN/MASKOW, Art. 25 at 3.4*).
- 49** In the present case, the machines, contrary to the contract, were not capable of packaging salt. However, the main purpose of CLAIMANT's contract with RESPONDENT was to serve the contract with A2Z (*Claimant's Exhibit No. 3*). This contract with A2Z included the packaging of salt. Therefore, the incapability of the machines to process salt resulted in a frustration of the purpose of the contract.
- 50** In addition, four of the six machines were destroyed by corrosion which affected such a large part of the machinery that it would not be feasible to repair or replace the corroded parts (*Procedural Order No. 3 at 29*). These machines are of no further use, since they threatened to contaminate any food processed through them (*Statement of Case at 8*). However, packaging foodstuffs with the machines was the purpose of the contract. The destruction of the four machines entirely frustrated this purpose and therefore constitutes a fundamental breach of the contract.
- 51** RESPONDENT may not assert that this fundamental breach of contract is limited to the four destroyed machines. It is sufficient that the defective performance represents an important part of the seller's obligation to constitute a fundamental breach of the entire contract (*ICC Arbitration no. 7531/1994, CLOUT Case no. 304*). Since 2/3 of the delivered machines are ruined, RESPONDENT failed to fulfil a preponderant part of its duty. Furthermore, the six machines were purchased as an indivisible unit. First, RESPONDENT made it a condition for the conclusion of the sales contract that CLAIMANT ordered a minimum of six machines (*Claimant's Exhibit No. 2*). Secondly, CLAIMANT needed six machines to fulfil the contract with A2Z (*Procedural Order No. 3 at 35*).

**2. Alternatively, RESPONDENT committed a fundamental breach of contract by not warning CLAIMANT that the machines were not capable of packaging salt**

52 In case the Tribunal finds that the parties did not contract for machines capable of packaging salt, RESPONDENT nevertheless committed a fundamental breach by its failure to warn CLAIMANT not to use the machines for the packaging of salt (*c.f. supra 29 et seq.*).

53 It is a fundamental breach of contract not to provide the buyer with the necessary information to handle or operate the sold goods if this renders the goods unusable (*ICC Award No. 8128/1995, UNILEX Case No. 1995-34*). Due to RESPONDENT's failure to inform CLAIMANT about the incapability of the machines to process salt, CLAIMANT used the machines with salt which led to their destruction. For the reasons mentioned above (*see supra 47 et seq.*) this fundamental breach concerned the entire contract.

**3. Additionally, RESPONDENT committed a fundamental breach by delivering machines substantially below the average industry standard in performance and design**

54 In addition, CLAIMANT suffered a substantial detriment by the delivery of machines below average industry standard irrespective of the machines' incapability to process salt.

55 The delivered Model 14 machines attained a production rate of just 130 to 135 bags per minute for fine goods (*Expert's report para. 3*). This was only up to 75 % of the 180 bags of an average industry standard machine. Thus, the total production rate of the machines was equivalent to only 4.5 standard auger-feeder machines. However, CLAIMANT needed six fully functioning machines to serve its contract with A2Z (*Procedural Order No. 3 at 35*).

56 Therefore, to satisfy its needs CLAIMANT would have to purchase two additional Model 14 machines. However, this is not acceptable. First, there are no more Model 14 machines available, since RESPONDENT had sold its last Model 14 machines to CLAIMANT (*Procedural Order No. 3 at 33*). Thus, CLAIMANT would have to purchase replacement machines from another source. Yet, for practical reasons, e.g. training of CLAIMANT's personnel on different models, this would complicate the production process.

57 Secondly, the space on CLAIMANT's production site is limited and CLAIMANT is not able to provide space for the additional machines (*Claimant's Exhibit No. 6*). Hence, CLAIMANT was neither able to fulfil its contract with A2Z using the slower Model 14 machines nor was it able to purchase and operate additional machines. CLAIMANT thereby substantially was deprived of what it expected under the present contract.

**4. RESPONDENT has or should have foreseen that its defective performance would constitute a fundamental breach of contract under Art. 25 CISG**

58 RESPONDENT has or should have foreseen that its defective performance would constitute a fundamental breach of contract under Art. 25 CISG. The foreseeability is determined by the knowledge a reasonable person of the same kind and under the same circumstances would have had (*SCHLECHTRIEM, Art. 25 at 11; BIANCA/BONELL-WILL, Art. 25 at 2.2; ACHILLES, Art. 25 at 14; STAUDINGER-MAGNUS, Art. 25 at 15*). A reasonable person in RESPONDENT's position would have foreseen that by the delivery of Model 14 machines not capable of packaging salt and working significantly below the average industry standard, CLAIMANT would be substantially deprived of what it could reasonably expect under the present contract, in particular that it would not be able to fulfil its contract with A2Z. Alternatively, a reasonable person in RESPONDENT's position would have foreseen that a failure to warn CLAIMANT not to use the machines with salt would lead to the ruin of the delivered machines.

**II. In the alternative, RESPONDENT committed a fundamental breach with respect to the four destroyed machines**

59 Even if the Tribunal finds that the breach of contract committed by RESPONDENT was not fundamental with respect to the entire contract, it was at least fundamental regarding the four ruined machines, according to Art. 25 CISG. These four destroyed machines were of no further use for CLAIMANT, since they could not package foodstuffs anymore. Hence, CLAIMANT was entirely deprived of what it expected from the purchased machines (*see supra 47 et seq.*). Therefore, RESPONDENT's breach of contract was at least fundamental with respect to the four ruined machines.

**B. CLAIMANT validly declared the contract avoided according to Arts. 49 (1) (a), 25, 26 CISG**

60 In its letter dated 19 October 2002 (*Statement of Case at 10; Claimant's Exhibit No. 6*) CLAIMANT lawfully declared avoidance of the contract [I.]. CLAIMANT did not lose its right to declare the contract avoided according to Arts. 80, 82 CISG [II.].

**I. In its letter dated 19 October 2002 CLAIMANT lawfully declared avoidance of the contract**

61 RESPONDENT's fundamental breach of contract entitled CLAIMANT to declare the contract avoided under Art. 49 (1) (a) CISG [1.]. In its letter dated 19 October 2002 CLAIMANT declared the contract avoided [2.].

**1. The fundamental breach committed by RESPONDENT entitled CLAIMANT to declare the contract avoided under Art. 49 (1) (a) CISG**

62 RESPONDENT committed a fundamental breach of contract by delivering non-conforming Model 14 auger-feeder machines (*see supra 44 - 58*), alternatively by violating its obligation to warn CLAIMANT (*see supra 52 et seq.*). Consequently, CLAIMANT was entitled to declare the contract avoided pursuant to Arts. 45 (1) (a), 49 (1) (a), 25, 26 CISG.

**2. CLAIMANT declared the contract avoided in its letter dated 19 October 2002**

63 CLAIMANT declared the contract avoided in its letter dated 19 October 2002. CLAIMANT placed the machines at RESPONDENT's disposal and demanded the reimbursement of the purchase price (*Claimant's Exhibit No. 6*). This declaration exactly corresponded to the legal consequences of an avoidance enumerated in Art. 81 (2) CISG. Pursuant to an interpretation under Art. 8 CISG this constituted a declaration of avoidance in the sense of Arts. 49 (1) (a), 26 CISG. The use of the word "avoidance" was not necessary, since it is sufficient that the declaring party expresses that it does not want to be bound by the contract any longer (*OLG Frankfurt, Germany, 17.09.1991, RIW 1991, p. 950 et seq.; STAUDINGER-MAGNUS, Art. 26 at 7; HERBER/CZERWENKA, Art. 49 at 11; HONSELL-KAROLLUS, Art. 26 at 12*).

**II. CLAIMANT did not lose its right to declare the contract avoided when the machines corroded according to Arts. 80, 82 CISG**

64 CLAIMANT did not lose its right to avoid the contract, as it merely used the machines in conformity with the contract pursuant to Art. 82 CISG [1.]. Even if the packaging of salt was contrary to the terms of the contract, CLAIMANT did not lose its right to avoid the contract according to Art. 80 CISG [2.].

**1. Since the corrosion was the result of the contractual use of the machines, it did not affect CLAIMANT's right to declare the contract avoided according to Art. 82 (2) (c) CISG**

65 Art. 82 (1) CISG does not bar CLAIMANT from avoiding the contract. According to this article, the buyer loses the right to avoid the contract if it is impossible for him to make restitution of the goods substantially in the condition in which he received them, unless he merely uses them with the contract pursuant to Art. 82 (2) (c) CISG. Four of the Model 14 auger-feeder machines have been substantially damaged after delivery. However this was only due to packaging salt with the machines, i.e. the contractual use (*see supra 5 et seq.*). Hence, CLAIMANT did not lose its right to declare the contract avoided pursuant to Art. 82 (2) (c) CISG.

**2. Even if the packaging of salt was contrary to the terms of the contract, this does not affect CLAIMANT's right to avoid the contract according to Art. 80 CISG**

66 Even if the packaging of salt was contrary to the contract, CLAIMANT was still entitled to avoid the contract. The only reason why CLAIMANT used the machines for this purpose was that it did not know about the damaging consequences. Therefore, the destruction of the machines was caused by RESPONDENT's failure of its obligation to warn CLAIMANT not to package salt with these machines (*see supra 29 et seq.*). Thus, according to Art. 80 CISG, RESPONDENT may not rely on CLAIMANT's inability to return the Model 14 machines in the condition in which they were received.

**FOURTH ISSUE: THE REQUEST FOR AN ORDER FOR SECURITY FOR COSTS ACCORDING TO ART. 27.3 SIAC RULES IS TO BE DENIED**

67 The Tribunal should reject the request for security for costs under Art. 27.3 SIAC Rules. Like any other interim relief the order is subject to a careful balancing of the parties' interests [A.]. In the present case the balancing of interests requires the denial of the request for security for costs [B.]. In addition, since it seems to be RESPONDENT's intention to abuse the measure, its request for security for costs has to be denied [C.].

**A. An order for security for costs pursuant to Art. 27.3 SIAC Rules is subject to a careful balancing of the parties' interests like any other interim relief**

- 68 An order for security for costs according to Art. 27.3 SIAC Rules is “an interim measure to provide security for the enforcement of an eventual award” (*CRAIG/PARK/PAULSSON*, p. 467; 37. *Uncitral-Session on Art. 17 Model Law* p.43).
- 69 Irrespective of the specific wording of the provision dealing with interim relief, it is generally accepted that they are only to be granted under limited circumstances (*LEW/MISTELIS/KRÖLL*, p. 601). This results from the fact that any type of interim relief besides “increasing the duration and costs of the arbitration” (*MUSTILL/BOYD*, p. 372) has a number of negative consequences: When granting interim relief in general and security for costs in particular the tribunal unavoidably prejudices the parties' positions before having considered all relevant facts of the case (*ICC Award no. 8113, ICC Bulletin, Vol. 11 no. 1 2000, p. 67; ICSID, 13.11.2000, Case no. ARB/97/7, p. 19, Maffezini v. Kingdom of Spain*). Furthermore, especially orders for security for costs tend to endanger the overriding principle of equal treatment in arbitration since it places a unilateral burden on one party. Consequently, granting interim measure always requires a “careful balancing of the parties' interests with respect to the requested relief” (*NAI case no. 1694, XXIII YBCA 1998, p. 104; DELVOLVE*, p. 13; *BERGER*, p. 336).
- 70 This principle also applies to Art. 27.3 SIAC Rules. Consequently, although its wording does not seem to impose any further requirements, an order for security for costs under Art. 27.3 SIAC Rules is subject to the balancing of the parties' interests. Thus, to justify an order the requesting party has to demonstrate that its harm, if the request is rejected, substantially outweighs the harm that will result to the party opposing the measure, if it is granted (37 *UNCITRAL Report of the Working Group*, p. 44).

**B. In the present case the balancing of interests requires the denial of the request for an order for security for costs**

- 71 The balancing of the interests of CLAIMANT and RESPONDENT requires the denial of the request. An order for security for costs would place a unilateral burden on CLAIMANT [I.]. This burden could only be justified by a considerable threat to the enforcement of an award on costs, which is not apparent [II.].

**I. An order for security for costs would be a unilateral burden placed on CLAIMANT**

- 72 An order for security for costs pursuant to Art. 27.3 SIAC Rules places a burden on CLAIMANT since it is obliged to provide additional security. In the present case RESPONDENT has an interest in ensuring that its legal costs will be reimbursed. On the other hand, CLAIMANT has an interest in not being unnecessarily subject to the costs and potential embarrassment involved in obtaining a bank guarantee. An order for security for costs respects only RESPONDENT's interest and may therefore cause a violation of the overriding principle of the parties' equal treatment in arbitration.
- 73 The right to equal treatment is manifested in Art. 18 UNCITRAL ML and constitutes the most basic principle in arbitration. It is considered as "the heart of the law's regulation of arbitral proceedings" (*HOLTZMANN/NEUHAUS, p. 550*).
- 74 This principle inter alia requires that the advance on costs is equally shared among the parties. It guarantees that CLAIMANT and RESPONDENT were equally burdened in the beginning of the proceedings. In contrast, an order for security for costs burdens CLAIMANT unilaterally and therefore endangers the principle of equality. For this reason, an order for security for costs is rarely granted (*LEW/MISTELIS/KRÖLL, p. 601*). It would "take provident care of the interests of the requesting party only" (*SANDROCK, p. 25*). Due to the overriding principle of the parties' equality, only a considerable threat to the enforcement of an award may justify a party's request for this measure. Such a threat may only be assumed in case of financial inability to honor an award on costs or an unforeseeable non-enforceability of the award (*BÜHLER/JARVIN IN WEIGAND, p. 256; MUSTILL/BOYD, p. 336*).

**II. To outweigh the unilateral burden a considerable threat to the award's enforcement is required, which is not apparent in the present case**

- 75 The required threat to the enforcement of the award is not apparent. CLAIMANT will honor an eventual award on costs voluntarily [1.]. Even if CLAIMANT refused to comply with the award, it would be enforced by Equatorianian courts [2.]. RESPONDENT may not rely on the alleged reluctance of Equatorianian courts to enforce arbitral awards since it was able to assess this risk before signing the arbitration agreement [3.]. Furthermore, CLAIMANT has the financial means to honor any possible award on costs [4.]. Even if CLAIMANT's financial situation were to constitute a threat to enforcement, it would not justify an order for security for costs since it is due to RESPONDENT's defective performance [5.].

**1. CLAIMANT will honor an award on costs voluntarily**

76 CLAIMANT has assured RESPONDENT that it will honor all burdens resulting from a potential award on costs without hesitancy (*Letter Langweiler, 9 September 2003, para. 3*). There is no indication that CLAIMANT might deviate from the international practice that parties to arbitration fulfill the awards voluntarily.

77 According to several surveys concerning the enforcement of arbitral awards, the figure of enforcement voluntarily or by the courts is 98 % (*KERR, p. 129*). Moreover, the consequences resulting from a non-fulfillment of an award may have serious effects on the company's future. The failure of a party to honor its obligation to pay an award can lead to blacklisting, boycotting and other damages to the party's reputation in its particular branch of international trade (*SARCEVIC, p. 177, 191 et seq.*). Consequently there is no doubt that the award will be voluntarily honored by CLAIMANT.

**2. Even if CLAIMANT refused to comply with the award, it would be enforceable, since Equatoriana and Danubia are signatory states of the NY Convention**

78 Even if CLAIMANT refused to comply with the award, there would be no threat to enforcement since Equatoriana and Danubia are signatory states of the NY Convention (*Statement of Case, para. 14*). This fact in itself guarantees enforceability of a possible award on costs in RESPONDENT's favor. Article III NY Convention is unambiguous in providing that "each contracting state shall recognize arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on".

79 Hence, RESPONDENT may not argue that an award on costs will not be enforced in Equatoriana.

**3. RESPONDENT cannot rely on the alleged reluctance of Equatorianian courts to enforce arbitral awards since it was able to assess this risk before signing the arbitration agreement**

80 RESPONDENT's allegation that awards are in fact not enforced in Equatoriana is not sufficient to justify an order for security for costs. RESPONDENT has failed to show on a prima facie basis that there is a risk of non-enforcement in this signatory state of the NY Convention. A mere report on enforcement does not provide the necessary prima facie evidence (*ICC case 8786, p. 83*).

81 Even if the Tribunal should assume that there is sufficient evidence that Equatorianian courts were reluctant to enforce arbitral awards, RESPONDENT may not rely on this. The parties

are able to gain information about a prospective award's enforceability before they conclude an arbitration agreement (*KARRER, p. 346*). Both parties are in a position to investigate relevant circumstances and to estimate all risks the agreement contains, in particular the legal situation in the opponent's place of business (*ICC Award no 7047/1997, ICC Bulletin Vol. 8 No. 1 1997, pp. 61 - 63*).

82 Thus, even if there were a threat to enforcement in Equatoriana, RESPONDENT must have been aware of this potential threat to enforcement from CLAIMANT having its place of business in Equatoriana. Hence, RESPONDENT may not rely on any such threat to enforcement.

**4. CLAIMANT is able to satisfy the financial obligations of a possible award on costs**

83 There is no credible evidence confirming the allegation that CLAIMANT is unable to comply with a potential award on costs [a.]. Even if there were credible evidence that CLAIMANT suffered from financial difficulties, only additional circumstances could justify an order for security for costs [b.]. Moreover, CLAIMANT will receive additional financial resources since it is likely that it will have been purchased by the time the Tribunal would issue an award [c.].

**a. There is no credible evidence confirming the allegation that CLAIMANT would be unable to comply with a potential award on costs**

84 To justify an order for security for costs, there has to be credible testimony that the company will be unable to pay the costs of the defendant if successful in his defense (*HSU, p. 111 et seq.*). In light of the serious financial burden placed on CLAIMANT, RESPONDENT has to prove *prima facie* that CLAIMANT is unable to fulfill its potential financial obligations (*BERGER, p. 336*). Information exclusively based on newspaper articles (*Letter Fasttrack, dated 1 September 2003, para. 4*) cannot be regarded as reliable evidence in order to substantiate an alleged prospective non-payment. RESPONDENT therefore does not provide credible evidence sufficient to justify an order for security for costs.

**b. Even if there were credible evidence to this effect, CLAIMANT suffering from financial difficulties would not be sufficient to grant security for costs**

85 Even if there were credible evidence to the effect that CLAIMANT suffers from financial difficulties, this would not justify an order for security for costs.

86 If an order for security for costs is based on financial difficulties of the opponent, the tribunal must clearly distinguish between insolvency and cash-flow problems (*WAGNER, p. 207*).

While insolvency may be an indication for a complete lack of any financial means and thus justifies an order for security for costs, cash-flow problems do not constitute a basis for an order for security for costs. A temporary lack of means cannot by itself be sufficient to grant security for costs in arbitration (*WALLER, KERR L.JJ. in Bank Mellat vs. Helliniki Techniki, Q. B. 291/LORD WOOLF in Coppée Lavalin vs. Ken- Ren; Bingham L.J./Leggatt J. in Thune and Roll vs. London Properties Limited and Others*).

87 Moreover, even in insolvency cases, additional exceptional circumstances are required to establish a party's potential inability to honor an award (*GURRY*). Thus in *Coppée-Lavalin v. Ken-Ren Fertilizers (Lloyd's Rep. Vol. 2 1994, p. 110)* security for costs was only granted because the insolvent party was not able to pay the advance on costs, which was paid by a third party.

88 First, there is no indication that CLAIMANT may be insolvent. To the contrary, its financial difficulties constitute merely temporary cash-flow problems. Moreover, CLAIMANT has financed the advance on costs exclusively from the company's funds without any support from a third party. Since there are no circumstances that would justify an order for security for costs even if CLAIMANT were insolvent, there are even less grounds to grant an order for security for costs and it is therefore to be denied.

**c. Moreover, CLAIMANT will receive additional funds since it is likely that it will have been purchased by the time the Tribunal would have issued an award**

89 RESPONDENT relies on a report on alleged current cash-flow problems of CLAIMANT. However, CLAIMANT's assets must be evaluated at the time of the enforcement of the award. By that time, it is likely that CLAIMANT will have been purchased by Equatoriana Investors, who is currently conducting a due diligence investigation on CLAIMANT. Since Equatoriana Investors is one of the largest financial firms in Equatoriana (*Letter Langweiler, dated 09 September 2003*), it cannot be argued that RESPONDENT's costs would not be reimbursed if the award on costs should be issued in its favor.

**5. Even if the Tribunal should consider CLAIMANT's financial situation as severe enough this could not justify an order for security for costs, since RESPONDENT contributed to CLAIMANT's situation by its defective performance**

90 In the present case, RESPONDENT itself contributed to the aggravation of CLAIMANT's financial situation. The machines purchased from RESPONDENT cannot be used to perform the contract with A2Z (*see supra 47 et seq.*). CLAIMANT therefore had to finance adequate

new machinery, second shipment expenses and suffered a loss in revenue (*Statement of Case*, p. 5). This additional financial burden substantially contributed to CLAIMANT's present financial difficulties (*Letter Langweiler, dated 24 September 2003*). In requesting security for costs RESPONDENT relies on CLAIMANT's financial problems which resulted from its own misconduct. However, an order for security for costs is in any case not to be granted if "its effect is to deny the opponent's access to arbitration for reasons not attributable to him" (*KARRER, p. 348; BERGER, p. 336; LEW/MISTELIS/KRÖLL at 23-54*). In the present case the lack of means is not only not attributable to CLAIMANT but was caused by RESPONDENT itself. An order according to Art. 27.3 SIAC Rules would amount to a denial of justice, enabling RESPONDENT to evade any legal consequences.

**C. In addition, since it seems to be RESPONDENT's intention to abuse the order for security for costs, its request has to be denied**

- 91** There are various indications leading to the assumption that RESPONDENT tries to abuse the measure. Due to the consensual character of arbitration and the principle of fair trial, a party's request for an interim measure must not be abused to delay or obstruct the proceedings (*BERGER, p. 29*). The tribunal therefore has to identify and reject applications which are for dilatory, tactical or offensive purposes rather than in pursuit of a legitimate interest (*LEW/MISTELIS/KRÖLL at 23-14*).
- 92** In the present case, RESPONDENT's conduct gives rise to the impression that it abuses the request for security for costs to prevent CLAIMANT from entering arbitration. Since there is no provision of legal aid in arbitral proceedings in contrast to litigation before domestic courts (*WAGNER, p. 206*), the proceedings are to be financed exclusively from the parties' funds. Therefore an order for security for costs as an additional financial burden is suitable to deny financially weak parties the access to arbitration.
- 93** It seems that from the beginning of the arbitral proceedings RESPONDENT's intention has been to impede the arbitration and to delay the proceedings. The fact that RESPONDENT only paid the registration fee after being requested three times points to this intention (*Letter from SIAC dated 24 February, 6 March, 20 March 2003*).
- 94** The tribunal has to ensure that an order for security for costs "is not used as an instrument of oppression" (*O'REILLY, p. 84*). Therefore, in view of RESPONDENT's reluctant attitude towards these proceedings, its motion for security for costs is to be rejected.

**FIFTH ISSUE: CLAIMANT IS NOT PROHIBITED FROM DISCLOSING ANY INFORMATION REGARDING THE ARBITRATION TO EQUATORIANA INVESTORS**

95 CLAIMANT is not prohibited from disclosing any information regarding the arbitration between CLAIMANT and RESPONDENT to Equatoriana Investors. Such disclosure is in accordance with the wording of Art. 34.6 (d) SIAC Rules [A.], as well as with the general purpose of the exceptions from confidentiality listed in Art. 34.6 (a)–(e) SIAC Rules [B.]. There is no generally accepted mandatory principle of implied confidentiality in international commercial arbitration that would require a limitation of Art. 34.6 (d) SIAC Rules [C.].

**A. CLAIMANT’s disclosure is in accordance with the wording of Art. 34.6 (d) SIAC Rules**

96 CLAIMANT’s disclosure of the arbitration in the context of the due diligence investigation conducted by Equatoriana Investors on CLAIMANT is in accordance with the wording of Art. 34.6 (d) SIAC Rules. This article provides that a confidential arbitration procedure may be disclosed, “in compliance with the provisions of the laws of any state which is binding on the party making the disclosure”.

97 In the present case Equatorianian law requires that any aspects which affect a company’s financial situation during a due diligence process must be disclosed. It has been an established practice of the Supreme Court of Equatoriana that during a due diligence review the company being purchased must divulge all matters that materially affect either its financial or business situation (*Letter Langweiler, 24 September 2003; Procedural Order No. 3 at 38*). Equatoriana has a common law legal system, which is based on that of England (*Procedural Order No. 3 at 3*). In common law legal systems, the rules of law derive from statutory provisions as well as from judicial precedent of court decisions (*SMITH/BAILEY, p. 414*). The doctrine of precedent requires that in sufficiently similar cases, courts may not deviate from earlier decisions of superior courts (*LYALL, p. 28*). Pursuant thereto, the Equatorianian Supreme Court decisions on duties during due diligence investigations are prevailing rules of law in Equatoriana. The fact that these decisions did not involve arbitral proceedings (*Procedural Order No. 3 at 38*) is irrelevant. It is sufficient that the Supreme Court recognizes any legal duty to disclose any financially relevant facts in due diligence proceedings at all.

98 Thus, the Supreme Court judgments are within the scope of the term ‘law’ in Art. 34.6 (d) SIAC Rules. CLAIMANT as an Equatorianian company is obliged to act in accordance with

the national law. Consequently, the disclosure of the arbitration to its investor is in accordance with the wording of Art. 34.6 (d) SIAC Rules.

**B. Additionally, CLAIMANT's disclosure is in accordance with the general purpose of all the exceptions listed in Art. 34.6 (a)-(e) SIAC Rules**

99 CLAIMANT's disclosure to Equatoriana Investors in the context of the due diligence review is in line with the general purpose of the exceptions listed in Art. 34.6 (a)-(e) SIAC Rules. This purpose is to allow disclosure whenever there is a conflict between the duty of confidentiality and a duty of disclosure [I.]. This interpretation is supported by the LCIA Rules, on which the SIAC Rules are based and which also make this principle obvious [II.].

**I. The underlying purpose of the exceptions in Art. 34.6 (a)-(e) SIAC Rules is to allow disclosure whenever there is a conflict between the duty of confidentiality and a duty of disclosure**

100 CLAIMANT's disclosure is in line with the general purpose of the exceptions to confidentiality listed in Art. 34.6 (a)-(e) SIAC Rules. These exceptions all concern cases where confidentiality conflicts with a duty to disclose information about the arbitration. Their purpose is to resolve conflicts between the duty of confidentiality and the duty of disclosure irrespective of their origin in favor of the latter.

101 This is particularly evidenced by Art. 34.6 (e) SIAC Rules. It states that even non-binding but customarily observed requirements for disclosure are sufficient to relieve a party of the duty of confidentiality. This means that not only legal requirements but also non-mandatory rules allow a party to disclose the necessary information about a pending arbitration. RESPONDENT agreed to the SIAC Rules, and thus also to these exceptions to confidentiality.

102 CLAIMANT is not only subject to a customarily observed duty of disclosure but in fact to a mandatory legal obligation (*see supra* 97) and thus is entitled to disclose the arbitration to Equatoriana Investors.

**II. This interpretation of Art. 34.6 (a)-(e) SIAC Rules is in line with the LCIA Rules, on which the SIAC Rules are based**

103 The interpretation of Art. 34.6 (a)-(e) SIAC Rules to allow disclosure if required by legal duty is supported by the LCIA Rules, which are at the origin of the SIAC Rules (*Introduction to Rules on SIAC web site*). Art. 30 LCIA Rules provides a number of exceptions to confidentiality stating inter alia that "disclosure may be required of a party by legal duty".

Since there is no specification as to the nature of the legal duty referred to in this article, any legal duty to disclose is sufficient. The LCIA Rules as a reference for an interpretation of the SIAC Rules therefore establish that any legal duty to disclose facts of arbitration prevails over the duty of confidentiality.

**104** CLAIMANT's disclosure to Equatoriana Investors is in fact a legal duty under Equatorian law and therefore prevails over the duty of confidentiality according to Art. 34.6 (d) SIAC Rules.

### **C. There is no justification to limit the scope of Art. 34.6 (d) SIAC Rules**

**105** Neither the UNCITRAL ML as the applicable arbitration law [I.] nor international arbitration practice [II.] contain any mandatory provisions that would require a deviation from Art. 34.6 (d) SIAC Rules.

#### **I. The UNCITRAL ML does not provide for confidentiality**

**106** The UNCITRAL ML applies to this arbitration (*see supra* 3). It does not contain any mandatory provision on confidentiality in arbitration proceedings. Quite to the contrary, it does not even refer to the question of confidentiality. As a consequence, there is no mandatory provision in the applicable arbitration law prohibiting disclosure under the present circumstances.

#### **II. There is no mandatory principle in international arbitration that would require a different interpretation from Art. 34.6 (d) SIAC Rules**

**107** A number of jurisdictions deny that a duty of confidentiality is inherent in arbitration [1.]. In those jurisdictions, which regard confidentiality as inherent in arbitration, CLAIMANT's disclosure would fall within the scope of recognized exceptions [2.].

##### **1. A number of jurisdictions deny that a duty of confidentiality is inherent in arbitration**

**108** Recent court decisions confirm that there is no binding principle of confidentiality in international commercial arbitration that would call for a different interpretation of the SIAC Rules. In 1995 the High Court of Australia clearly found confidentiality not to be an essential feature of arbitration (*S.C. Australia, Australia, 07.05.1995, Esso/BHP v. Plowman, A.I. Vol. 11 No. 3, p. 245*). In particular it is not an implication of the arbitration agreement that the proceedings and documents must be kept confidential (*D.C. of Delaware, United States, 15.06.1988, US v. Panhandle Eastern Corporation, 118 F.R.D. p. 346; Swedish S.C., Sweden,*

27.10.2000, Case No. T 1881-99, *Bulgarian Foreign Trade Bank v. A.I. Trade Finance Inc.*, 15 *Mealey's IAR* 2000). Even in cases where the parties expressly agreed on confidentiality, a party may disclose information if it is under a duty at common law or statute to do so (*Judge Brennan in Esso v. Plowman A.I. Vol. 11 No. 3, p. 251*).

- 109** In this case, CLAIMANT is in fact obliged by Equatorian common law to disclose the arbitration (*see supra* 98). Therefore according to the “Esso” judgment even an explicit contractual agreement on confidentiality could not prevent CLAIMANT from disclosing information to its investor (*see supra* 108). Consequently there is no reason to deviate from Art. 34.6 SIAC Rules.
- 110** The Swedish Supreme Court still went further stating that even making the arbitration public does not constitute a breach of confidentiality, since a duty of confidentiality does not exist (*BAGNER, Mealey's IAR December 2000, at 54*). In the instant case, however, CLAIMANT would disclose information concerning the arbitration only to Equatoriana Investors, who is planning to invest in CLAIMANT and is therefore conducting a due diligence review on CLAIMANT. In the context of this due diligence procedure, CLAIMANT is obliged by law to disclose the arbitration to Equatoriana Investors (*see supra* 97), who, in turn, is subject to a duty of confidentiality arising out of the due diligence investigation (*Procedural Order No. 3 at 39*). Thus, CLAIMANT acts well within the boundaries of the modern perception of confidentiality.

**2. In those jurisdictions which regard confidentiality as inherent in arbitration, CLAIMANT's disclosure falls within the scope of recognized exceptions**

- 111** Most of those jurisdictions, which regard confidentiality as inherent in arbitration do not have statutory provisions concerning confidentiality (*LEW/MISTELIS/KRÖLL at 24-101*). Therefore, the determination of the scope of confidentiality and its necessary exceptions was left to the courts (*GILL/GEARING, p. 8*). The courts have acknowledged far reaching exceptions to the duty of confidentiality stating that “there is no breach of the duty of confidentiality in disclosing information about the arbitration where there is a legitimate reason to do so” (*QBD Comm. Ct, 5.6.2003, Moscow City Council v Bankers Trust Co., EWHC 2003, 1377; Colman J. in Hassneh Insurance Company of Israel v. Stuart J. Mew, [1993] 2 Lloyd's Rep. 243 [249]*).
- 112** In particular, disclosure of information about the arbitration is not prohibited if a party is required by law or a regulatory body to disclose information about ongoing arbitration

proceedings (*Court of Appeal, United Kingdom, 19.12.1997, Ali Shipping Corporation v. Shipyard Trogir, Lloyd's Rep. 1998, pp. 643-655; UNCITRAL Doc. A/CN.9/460, para. 67*).

- 113** Since CLAIMANT is required by Equatorianian law to divulge information about this arbitration to Equatoriana Investors (*see supra* 97), it would be permitted to disclose even in these jurisdictions. This shows that even in a jurisdiction where confidentiality is considered an essential feature of arbitration, CLAIMANT's legal obligation of disclosure would be sufficient to entitle CLAIMANT to divulge information about the arbitration.
- 114** As demonstrated, international arbitration practice proves that regardless of whether a perception of implied confidentiality exists or not, under the present circumstances CLAIMANT's disclosure would always be justified. Therefore, there is no obligatory principle that would require a different interpretation of Art. 34.6 (d) SIAC Rules.
- 115** Consequently, CLAIMANT is not prohibited from disclosing any fact concerning the arbitration according to Art. 34.6 (d) SIAC Rules.

**SIXTH ISSUE: EVEN IF CLAIMANT WERE OBLIGED TO REFRAIN FROM DISCLOSURE, THE TRIBUNAL MAY NOT ORDER CONFIDENTIALITY**

- 116** The Arbitral Tribunal has no authority to order confidentiality, because no such power was granted [A.]. Even if the Tribunal had the power to issue an order of confidentiality, it should refrain from doing so, since it is not necessary to protect RESPONDENT's interests [B.].

**A. The Arbitral Tribunal is not authorized to issue an order of confidentiality**

- 117** The Arbitral Tribunal is not authorized to issue an order of confidentiality. Neither did the parties agree to confer such power onto the Tribunal [I.], nor was such power vested in the Tribunal by the SIAC Rules [II.], or by the UNCITRAL ML [III.].

**I. The Tribunal is not authorized to issue an order of confidentiality, since the arbitration agreement does not provide for such authority**

- 118** The arbitration agreement does not grant the Tribunal the power to order confidentiality. Since the Tribunal derives its power from the arbitration agreement, it is bound by the wording of that agreement when deciding on its authority concerning the particular dispute (*JARVIN in LEW, Contemporary Problems, p. 53*). In the present case, the arbitration agreement contained in the contract (*Claimant's Exhibit No. 2*) does not explicitly address the issue of

confidentiality at all. However, only if confidentiality is expressly agreed upon, does the Tribunal have the requisite authority to order it (*SMIT*, p. 237).

- 119 Since the parties neither concluded a separate agreement on confidentiality (*Procedural Order No. 3 at 37*), nor addressed the issue of confidentiality in the arbitration agreement itself, the Tribunal may not derive the power to order confidentiality from the arbitration agreement.

## **II. The SIAC Rules do not authorise the Tribunal to order confidentiality**

- 120 The SIAC Rules do not give the Tribunal the power to order confidentiality. Art. 25 SIAC Rules specifically enumerates the orders the Tribunal is authorized to issue. Hence, Art. 25 SIAC Rules clearly limits the scope of the Tribunal's power to issue procedural orders. Since an order for confidentiality is not mentioned, it is not within the power of the Tribunal under the SIAC Rules.
- 121 Neither may the Tribunal order confidentiality under the general provisions to order interim measures provided for in Art. 25 (j) SIAC Rules, because an order for confidentiality does not qualify as an interim measure.
- 122 First, in the current case the effect of ordering CLAIMANT to keep the proceedings confidential would not be temporary. Yet, the goal of an interim measure is to achieve a temporary solution to the dispute with regard to the final award (*BERGER*, p. 343; *REDFERN/HUNTER*, p. 307). However, CLAIMANT's disclosure is only necessary during the course of due diligence review. This due diligence investigation will most likely be finished before the arbitration proceedings are concluded (*Letter Langweiler*, 9 September 2003). Therefore, the effect of a confidentiality order would be final for CLAIMANT.
- 123 Secondly, this order of confidentiality would not qualify as an interim measure, because it is not associated with the subject matter of the dispute. Orders of confidentiality must be made in respect to the subject matter of the dispute (*BERGER*, p. 338; *BORN*, p. 921; *HUßLEIN-STICH at 101*; *HOLTZMANN/NEUHAUS at 532*; *REDFERN/HUNTER*, p. 358). In the present case the subject matter in dispute is the quality of the six Model 14 machines (*Statement of Case at 17 et seq.*). The disclosure of information in connection with a due diligence review is not related to this question. The final award in this arbitration will only concern the avoidance of the contract and reimbursement of additional costs (*Statement of Case at 17 et seq.*). This dispute does not concern intellectual property rights, licenses or any other matter to that extent, for which a confidentiality order might actually concern the subject matter in dispute and therefore qualify as an interim measure of protection (*see LEW, Forum 1994*).

124 Thus, confidentiality in the present case is neither a temporary relief, nor is it related to the subject matter in dispute. Consequently, an order of confidentiality does not qualify as an interim measure and therefore can not be ordered under Art. 25 (j) SIAC Rules.

## **II. The UNCITRAL ML does not give the Tribunal the power to order confidentiality**

125 The UNCITRAL ML, which is the applicable arbitration law (*see supra 3*), does not explicitly authorize the Tribunal to order confidentiality as a procedural order. Neither may the Tribunal issue an order for confidentiality as an interim measure, because such a measure would be final (*see supra 122*) and would not be associated with the subject matter of the dispute (*see supra 123*). The requirements for interim measures under Art. 17 UNCITRAL ML are even stricter than those of Art. 25 (j) SIAC Rules. Art. 17 UNCITRAL ML expressly requires an interim measure to be in connection with the subject matter of the dispute.

126 Since there is no other source from which the Tribunal could draw its power to issue an order on confidentiality, only a court in Danubia, which is the seat of the Arbitral Tribunal (*Statement of Case at 13*), is competent to issue an order of confidentiality.

## **B. Even if the Tribunal were authorized, it should refrain from ordering confidentiality**

127 Even if the Tribunal did have the power to issue an order of confidentiality, it should refrain from doing so, since RESPONDENT's interest in this order does not justify the harm caused to CLAIMANT [I.]. Furthermore the Tribunal should dismiss RESPONDENT's request for an order of confidentiality, because it seems to be primarily raised to delay the proceedings [II.].

## **I. RESPONDENT's interest in an order of confidentiality does not justify the harm caused to CLAIMANT**

128 Ordering CLAIMANT to refrain from disclosing the arbitration to its investor would mean a severe disadvantage to CLAIMANT. It is internationally recognized that the tribunal should base its decision whether to order an interim measure on a reasonable balancing of the parties' interests and show the utmost caution when making these decisions (*DELVOLVE, p. 13; c.f. supra 68 et seq.*).

129 On the one hand, Equatoriana Investors is currently conducting a due diligence investigation on CLAIMANT, who is therefore obliged by Equatorianian law to divulge all matters that materially affect its financial or business situation (*see supra 97*). A pending arbitration procedure with possible damages to pay or to earn is obviously an important matter for the

financial situation of a company, especially for one with financial difficulties. Refraining from disclosure would break Equatorian law (*see supra* 98).

- 130** The non-disclosure of the arbitration may put at risk the entire acquisition of CLAIMANT by Equatoriana Investors. Violating the duty to disclose information may amount to a misrepresentation that may entail legal sanctions such as avoidance of the entire contract or the obligation to pay damages. This is for example codified in Art. 3.8 UNIDROIT Principles, which are the common core of international commercial contract law. Thus, the order of confidentiality may adversely affect the future of CLAIMANT's entire enterprise.
- 131** In contrast, RESPONDENT's interest in keeping the arbitration proceedings confidential is marginal. For RESPONDENT only one single sales contract is concerned that would only be disclosed to one specific legal entity, whereas CLAIMANT's company future is at stake. The information received by Equatoriana Investors would only be used for a single business transaction between CLAIMANT and Equatoriana Investors. Unlike in other cases where disclosure was also granted (*S.C., 27.10.2000, Sweden, Case No. T 1881-99, Bulgarian Foreign Trade Bank v. A.I. Trade Finance Inc.; Esso/BHP v. Plowman, A.I. Vol. 11 No. 3, p. 245*), the information disclosed to Equatoriana Investors would never be made public, because the investor itself has a duty of confidentiality while conducting the due diligence investigation (*Procedural Order No. 3 at 39; see supra 110*). Since the knowledge about the arbitration proceedings would be limited to Equatoriana Investors, it is not evident that this disclosure would affect RESPONDENT's interests at all.

## **II. RESPONDENT apparently tries to abuse the measure contrary to its designated purpose**

- 132** RESPONDENT's request seems to be raised primarily to delay the proceedings and therefore has to be rejected. RESPONDENT apparently tries to abuse the measure contrary to its designated purpose. Requests for interim measures are sometimes misused as an offensive weapon intended to exert undue pressure on the other party or as a means of delaying and obstructing the proceedings (*BERGER, p. 336; BÖSCH, p. 9; LEW, ICC Bulletin, p. 23*).
- 133** RESPONDENT's conduct reveals a contradiction to its earlier behavior. On the one hand, RESPONDENT alleges that CLAIMANT has financial difficulties and tries to rely on this fact for its request for security for costs, stating that it is afraid that CLAIMANT might not be able to pay a possible award (*Letter Fastrack, 1 September 2003*). On the other hand, its request for a confidentiality order leads to an obstacle to the successful outcome of the due diligence proceedings. Thereby the purchase of CLAIMANT is endangered, although this

purchase would dissipate any possible concerns with regard to CLAIMANT's financial means.

- 134** Additionally, it seems that from the outset of the arbitral proceedings, RESPONDENT's intention has been to delay the proceedings and therefore to prevent CLAIMANT from enforcing its rights (*see supra* 93). For all the above reasons the Tribunal should dismiss RESPONDENT's motion for an order of confidentiality.

**SEVENTH ISSUE: NO CONSEQUENCES WOULD ARISE IF CLAIMANT VIOLATED AN ORDER OF CONFIDENTIALITY**

- 135** There would be no consequences of any violation of an order of confidentiality. Such a violation neither affects the validity of an arbitration agreement [A.], nor could the Tribunal draw any negative inferences in the final award [B.]. Additionally, the Tribunal does not have the authority to order punitive action against CLAIMANT [C.]. Furthermore such an interim measure is not enforceable [D.].

**A. Violation of a possible confidentiality order would not affect the validity of the arbitration agreement**

- 136** If the Tribunal ordered CLAIMANT to keep the present arbitration confidential and CLAIMANT were to violate that order, the violation would not affect the validity of the arbitration agreement. Because of the far-reaching consequences of the cancellation of an arbitration agreement, such right of cancellation must be given a very limited scope (*S.C., 27.10.2000, Sweden, Case No. T 1881-99, Bulgarian Foreign Trade Bank v. A.I. Trade Finance Inc.*).
- 137** In the present case, a cancellation of the arbitration agreement would be highly unreasonable, because in this case the dispute would have to be settled by litigation before a public state court. This means that not only Equatoriana Investors would be informed about the dispute, since litigation would be open to the public. This would be the exact opposite of what RESPONDENT is trying to achieve.

**B. The Tribunal may not draw any negative inferences in the final award**

- 138** It is often suggested that a party not complying with the tribunal's orders be sanctioned by negative inferences, which the tribunal draws in its final award (*LEW/MISTELIS/KRÖLL at 23-83; CRAIG/PARK/PAULSSON at 26-05; BORN, p. 972*). In this case, however, the Tribunal may not draw any negative inferences in the final award on the merits or the allocation of costs.

This is due to the fact that CLAIMANT's non-compliance with a procedural order of confidentiality would not negatively influence the proceedings on the subject matter. Since the issue of confidentiality under the present circumstances is not related to the subject matter of the case (*see supra 123 et seq.*), it cannot have any effect on the final award. Apart from the subject matter of the dispute, disclosure would not financially affect any party to the arbitration. Therefore, the Arbitral Tribunal may not be influenced by CLAIMANT's disclosure in its final decision. CLAIMANT's disclosure should also not influence the Tribunal's decision on the costs of arbitration.

- 139** An emerging trend for the tribunal's decision on the allocation of costs is to take into account the opposing parties' attitude during the proceedings. Thus if a party employs delaying tactics that result in additional costs to the arbitration, these can be reflected in the allocation of costs by the tribunal (*LEW/MISTELIS/KRÖLL, p. 654; BERGER, Understanding p. 35*). CLAIMANT's disclosure of the dispute would not delay the proceedings or increase the costs of the arbitration. Quite to the contrary, the only party, whose intention appears to be to delay the proceedings, is RESPONDENT (*see supra 132*). Hence, if increased costs occur at all, they should not be allocated to CLAIMANT.

### **C. The Tribunal has no authority to order punitive action against CLAIMANT**

- 140** The Arbitral Tribunal has no coercive power (*LEW/MISTELIS/KRÖLL at 23-83; BERGER, p. 341*). For example an order for penalty payments would have punitive character and therefore is not in accordance with the character of arbitration (*REDFERN/HUNTER, p. 366; BERGER, p. 341*). The parties do not incur any duty of confidentiality sanctioned by liabilities and damages. No such obligation is inherent in arbitral proceedings, nor can it be deemed to derive from the arbitration agreement itself (*S.C., 27.10.2000, Sweden, Case No. T 1881-99, Bulgarian Foreign Trade Bank v. A.I. Trade Finance Inc.*). Penalties for non-compliance with an interim measure are only possible if the parties have either agreed on them, or they are specifically allowed by the applicable law (*LEW/MISTELIS/KRÖLL, p. 610; REDFERN/HUNTER, p. 367*).
- 141** In the present case the parties neither expressly conferred such power onto the Tribunal nor does the UNCITRAL ML so provide.

### **D. An order for confidentiality would not be enforceable**

- 142** Arbitral tribunals lack the power to enforce their interim awards themselves (*BORN, pp. 971 et seq.; LEW/MISTELIS/KRÖLL at 23-82*). Because of the contractual nature of arbitral proceedings, the tribunal's authority depends on a party's willingness to comply with the tribunal's orders.

Hence, only a competent court can force a recalcitrant party to comply with an interim measure (*FOUCHARD/GAILLARD/GOLDMAN*, p. 720).

- 143** Court assistance for enforcement of these orders within the country where the arbitration has its seat is only possible in those jurisdictions where the arbitration law contains special provisions for enforcement of arbitral interim relief (*SANDERS at V.10; BORN*, p. 922; *BERGER*, p. 344).
- 144** The UNCITRAL ML as Danubia's arbitration law (*see supra 3*) does not include any special provisions for the enforcement of interim awards or any other interim measures. Arts. 35, 36 ML are not applicable since they only refer to a final award (*BERGER*, p. 344).
- 145** Such an interim measure would neither be enforceable under the NY Convention. The NY Convention governs the enforcement of any award resulting from this arbitration in Danubia, Equatoriana or Mediterraneo, because they are signatory states of the NY Convention. (*Statement of Case at 14*).
- 146** The NY Convention is based on the assumption that the award, being sought to be enforced, contains a binding and final decision which may no longer be revised by the tribunal within the arbitral proceedings (*LEW/MISTELIS/KRÖLL at 26-38 et seq.; VON HOFFMANN in: SARCEVIC*, p. 236). Arbitral interim measures do not constitute final and binding awards since the Tribunal may always change or repeal its order at any time (*CRAIG/PARK/PAULSEN at 26.05; Resort Condominiums International Inc. v. Bolwell*, XX YBCA 628 (1995); *Publicis Communication and Publicis S.A. V. True North Communications Inc.*, 206 F 3d 725, XXV YBCA 1152 (2000) (7<sup>th</sup> Cir., 14 March, 2000)). For this reason they do not fall within the scope of the enforcement system of the NY Convention.
- 147** As a result there would not be any consequences if CLAIMANT violated an order of confidentiality.

**CONCLUSION**

In response to the Tribunal's Procedural Orders No. 1 dated 20 June 2003, No. 2 dated 3 October 2003, No. 3 dated 4 November 2003 and RESPONDENT's Statement of Defense, dated 17 April 2003, we respectfully make the above submissions on behalf of our client, Equapack Inc.. For the reasons stated in this Memorandum for CLAIMANT and for additional reasons which will be detailed in the further proceedings, we respectfully request the Tribunal to declare that:

- The sales contract is governed by the CISG and the arbitration is governed by the SIAC Rules and the UNCITRAL ML.
- RESPONDENT committed a breach of contract.
- This breach of contract was fundamental, and CLAIMANT lawfully declared the contract avoided.
- RESPONDENT's request for an order for security for costs according to Art. 27.3 SIAC Rules is to be denied.
- CLAIMANT is not obliged to refrain from disclosing any information concerning the arbitration to Equatoriana Investors during the due diligence investigation.
- Even if CLAIMANT were obliged to refrain from disclosure, the Tribunal may not order confidentiality.
- No consequences would arise if CLAIMANT were to violate an order for confidentiality.

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

For Equapack, Inc.

(signed) \_\_\_\_\_, 11 December 2003

**ATTORNEYS**