

THIRTEENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On Behalf of:

Oceania Printers S.A.

Tea Trader House
Old Times Square
Magreton
00178 Oceania

CLAIMANT

Against:

**McHinery Equipment
Suppliers Pty**

The Tramshed
Breakers Lane
Westeria City 1423
Mediterraneo

RESPONDENT



COLUMBIA UNIVERSITY SCHOOL OF LAW

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LIST OF ABBREVIATIONS

¶ / ¶¶	paragraph / paragraphs
§/§§	Section/Sections
Arb.	Arbitration
Art. / Arts.	Article/Articles
Aus.	Austria
BGH	<i>Bundesgerichtshof</i> [Federal Supreme Court – Germany]
CIDRA	Chicago International Dispute Resolution Association
CIDRA Rules	Rules of the Chicago International Dispute Resolution Association
CIF/c/i/f	Cost, Insurance, and Freight (Incoterms)
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Ex.	Claimant’s Exhibit
Clar.	Clarification
cmt.	Comment
ed.	Edition
Ed. / eds.	Editor / Editors
e.g.	<i>Exemplum gratii</i> [for example]
Fin.	Finland
FN	Footnote
Fra.	France
Ger.	Germany
Hague Convention	Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 22 December 1986
HG	Handelsgericht [Commerce Court – Switzerland]

HGer	Hofgericht [District Court – Switzerland]
ICC	International Chamber of Commerce
Id.	idem [the same]
i.e.	id est [that is]
Incoterms 2000	ICC Publication No. 560
K	Thousand
Limitation Convention	New York Convention on the Limitation Period in the International Sale of Goods (1974)
Ltd.	Limited
LG	Landgericht [District Court – Germany]
m.	Million
No./nos.	Number/numbers
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OC	Oceania Confectionaries
OG	Oceanic Generics
OGH	Oberster Gerichtshof [Supreme Court – Austria]
Oceania’s Act	Conflicts of Law in the International Sale of Goods Act
OLG	Oberlandesgericht [Court of Appeal – Germany and Austria]
PECL	Principles of European Contract Law
Proc. Ord.	Procedural Order
Pty	Proprietary
Q.	Question
Re. Ex.	Respondent’s Exhibit
rem.	Remark
Restatement Conflicts	Restatement (Second) of Conflicts of Law (1971)

Restatement Contracts	Restatement (Second) of Contracts (1981)
Rome Convention	Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC)
RP	Reliable Printers
Rus.	Russia
S.A.	Société Anonyme
Switz.	Switzerland
µm	Micrometer
ULIS	Uniform Law on International Sales (1964)
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of 2004
U.S.A.	United States of America
\$	United States Dollars
v.	<i>versus</i>
Vol.	Volume

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27 International Legal Materials 117 (1963)
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STATEMENT OF FACTS

Oceania Printers, S.A. (“**Claimant**”) is a printing firm incorporated and based in Oceania [*Statement of Claim ¶1*]. Claimant hoped to become the first Oceania printing company to expand into printing for the confectionary industry. Its owner and President, Mr. Roland Butter, contacted Mr. Norman McHinery, President of McHinery Equipment Suppliers Pty (“**Respondent**”) to inquire about a refurbished flexoprint machine offered for sale on the McHinery website [*Cl. Ex. 1*]. In a letter dated **17 April 2002** [*Id.*], Claimant informed Respondent of its interest in printing foil, polyester, and paper wrappers for use in the confectionary industry and it specified, *inter alia*, that “typical ... foil for chocolate wrappers may be of 8 micrometer thickness.” Respondent replied on **25 April 2002**, announcing that it had “a secondhand flexoprint machine for your task” [*Cl. Ex. 2*]. Respondent’s letter specified that the machine in question was a 7 stand Magiprint Flexometix Mark 8 machine with a varnishing stand (“**the Machine**”), recently acquired from a user in Athens, Greece, and available for \$44,500 c/i/f Port Magreton. Respondent invited Claimant to inspect the Machine at the previous owner’s factory [*Id.*].

On **6-7 May 2002**, Claimant and Respondent inspected the Machine in Greece. By letter dated **10 May 2002**, Claimant expressed satisfaction with the Machine and informed Respondent that, on **9 May 2002**, Claimant had concluded a contract with Oceania Confectionaries (“**OC**” and “**the OC Contract**”) [*Cl. Ex. 3*]. This contract required Claimant to print wrappers for confectionary use made from various materials, including paper, plastic, and foils of varying thicknesses, including 8µm [*Cl. Ex. 1; Clar. Q. 21*]. Claimant was to deliver the goods, particularly the wrappers printed on 8µm foil, starting on **15 July 2002** [*Clar. Q. 21*]. Claimant informed Respondent that the OC Contract would yield profits of \$400,000 *per annum* for four years, subject to one renewal for another four years [*Cl. Ex. 3*]. Claimant also stated that the anticipated profits from the OC Contract were the only reason for its purchase of the Machine. Furthermore, speedy delivery and installation was necessary to dissuade Reliable Printers (“**RP**”), Claimant’s primary competitor in Oceania, from purchasing a similar machine and pursuing a contract with OC [*Id.*].

Respondent offered, by way of a letter dated **16 May 2002**, to send the Machine directly to Oceania and refurbish it on Claimant’s premises for \$42,000 [*Cl. Ex. 4*]. Claimant accepted these terms by letter on **21 May 2002** [*Cl. Ex. 5*]. Respondent sent a written contract (“**the Contract**”) by mail on **27 May 2002** and it assured Claimant that the Machine would allow it to “meet all the needs of your customers.” The letter also enclosed the Machine’s instruction manual and asked that Claimant

open a letter of credit at a bank of Claimant's choice to forward the purchase amount to Respondent [Cl. Ex. 6]. The parties signed the enclosed Contract on **30 May 2002** [Cl. Ex. 7].

Although the record does not set out the exact date of shipment of the Machine from Athens or of its arrival in Port Magreton, Oceania, the Machine was shipped, installed, and refurbished by Respondent's personnel by **1 July 2002** [Cl. Ex. 8]. The personnel tested the machine on a range of substrates, not including 8 μ m foil, and the Machine was handed over to Claimant on **8 July 2002** [Clar. Q. 15; Re. Ex. 2]. The same day, Claimant started using the Machine to print on 8 μ m foil to service the OC Contract, only to discover that the foil creased and the colors were out of register when printing on 8 μ m foil [Cl. Ex. 9]. Claimant immediately contacted Respondent's employees, who were still in Oceania, and demanded that they fix the Machine, so that it would print on the 8 μ m foil as soon as possible [Id.].

Over the next two weeks, Respondent's mechanics attempted to configure the Machine to print on 8 μ m foil [Id.]. On **1 August 2002**, Claimant reiterated to Respondent that the Machine would not print on 8 μ m foil and that Respondent's efforts to fix it had failed [Cl. Ex. 9]. Claimant stated that it was already two weeks past the date on which the OC Contract required it to supply printed wrappers to OC and that OC had threatened to cancel the contract if Claimant was not able to "start production promptly" [Id.]. By then, RP had purchased and installed its own, properly-functioning flexoprint machine. Claimant feared that it would lose the OC contract, telling Respondent that "[i]f your personnel are not able to bring the machine into full operation soon, we will expect you to cover all of our expenses and losses" [Id.].

Two weeks later, by letter dated **15 August 2002**, Claimant informed Respondent that all efforts to repair the Machine had been unsuccessful and that it had lost the OC Contract [Cl. Ex. 10]. There was no significant other use for the Machine, aside from a possible deal with Oceanic Generics ("**OG**") to print 10 μ m bubble pack containers starting in 2007 [Clar. Q. 20]. Since the Machine was "useless" at the time, Claimant gave notice of its intention to claim compensation from Respondent for the price of the Machine, the cost of preparatory work, stocks of printing materials wasted by Respondent's personnel in tests, and Claimant's significant loss of profits from Respondent's breach of the Contract ("**the Breach**") [Cl. Ex. 10]. Claimant sold the Machine on **14 October 2003** to Equatoriana Printers Ltd. for \$22,000 [Statement of Claim ¶ 13].

After two and a half years of fruitless attempts to reach an agreeable settlement [Statement of Claim ¶ 12], the parties submitted their dispute ("**the Claim**") to arbitration under the CIDRA Rules on **27 June 2005**, as provided in the Contract [Notice of Arbitration].

SUMMARY OF ARGUMENT

PART ONE: THE CLAIM WAS SUBMITTED WITHIN THE APPLICABLE LIMITATION PERIOD.

The Tribunal has jurisdiction to hear this dispute since it was submitted within the applicable limitation period. The Tribunal should apply Oceania's four-year limitation period as the law of the place most closely connected to the Contract. Oceania's law is the law most closely connected to the Contract since the Contract's formation, performance, and subject matter all occurred in Oceania and because Claimant is incorporated in and has its principal office in Oceania. In light of the circumstances as a whole, Oceania's law applies. In the alternative, the Tribunal should apply international principles setting a limitation period not less than three years. As a last resort, the Tribunal should apply the three-year limitation period of the *situs*. It should not apply Mediterraneo's two-year limitation period.

PART TWO: RESPONDENT BREACHED THE CONTRACT AND IS LIABLE TO CLAIMANT.

Respondent breached the Contract by delivering a non-conforming good. The Machine was not of the quality and description required by the Contract and was not fit for a particular purpose made known to Respondent. Claimant fulfilled its duties of properly inspecting and notifying Respondent of the non-conformity. Thus, Respondent is liable under Art. 36 CISG.

PART THREE: CLAIMANT IS ENTITLED TO DAMAGES IN THE AMOUNT OF \$3.2M IN LOST PROFITS.

Claimant is entitled to damages for the full extent of lost profits. Damages are the appropriate remedy and were foreseeable. Claimant took reasonable measures to mitigate the loss pursuant to Art. 77 CISG.

ARGUMENT

PART ONE: THE CLAIM WAS SUBMITTED WITHIN THE APPLICABLE LIMITATION PERIOD.

I. THE TRIBUNAL MUST DETERMINE THE LAW GOVERNING THE APPLICABLE LIMITATION PERIOD.

1. The Tribunal has the authority, absent agreement, to determine the choice of law rules governing the Contract. “Failing any designation by the parties,” Danubian Arbitration Law authorizes the Tribunal to “apply the law determined by the conflict of laws rules which it considers applicable” [*Art. 28(2) Danubian Arb. Law*]. Similarly, the CIDRA Rules permit the Tribunal to “apply the law determined by the conflict of law rules which it considers applicable” when the parties fail to stipulate the applicable law [*Art. 32(4) CIDRA Rules*].
2. The parties’ chosen law does not govern the applicable limitation period. The Contract states that it “is subject to the United Nations Convention on Contracts for the International Sale of Goods” [*Cl. Ex. 7 ¶12*]. Respondent claims and Claimant agrees that the CISG does not determine the limitation period [*Proc. Ord. No. 1 ¶4*]. Moreover, the limitation period is not addressed in either the Danubian Arbitration Law¹ or the CIDRA Rules.
3. Although the Claim was submitted within three years of the Breach, Respondent alleges that the Tribunal does not have jurisdiction [*Answer ¶24*]. The limitation period began “when the event giving rise to the claim occur[ed]” [*Clar. Q. ¶5*]. The event giving rise to the Claim was Respondent’s delivery of non-conforming goods on 8 July 2002, when Respondent officially turned over the Machine to Claimant [*Re. Ex. 2*]. The arbitration commenced on the date agreed by the parties [*Art. 21 Danubian Arb. Law*], which was “the date on which the statement of claim [was] received by CIDRA” [*Art. 3(2) CIDRA Rules*]. Claimant initiated this arbitration less than three years later on 5 July 2005 when CIDRA received the Statement of Claim [*CIDRA Letter 7 July 2005*].
4. Respondent’s contention that the Claim is time-barred by Mediterraneo’s two-year limitation periods is erroneous because Mediterraneo’s limitation period does not apply [*Answer ¶28*]. The Tribunal

¹ Danubian Arbitration Law is identical to the UNCITRAL Model Law [*Statement of Claim ¶16; Answer ¶16*]. Danubian Arbitration Law is the *lex arbitri* applicable to the Claim because “the place of arbitration is in the territory of [Danubia]” and the parties “at the time of the conclusion [of their] arbitration agreement [had] their places of business in different States” [*Art. 1(3)(a) Danubian Arb. Law*].

should apply the four-year limitation period of Oceania as the law most closely connected to the Contract (II). Alternatively, the Tribunal should apply a limitation period consistent with international principles, which is not less than three years (III). Furthermore, the Tribunal could reasonably apply the three-year limitation of the arbitral *situs* (IV). In any event, the Tribunal should not apply the two-year limitation of Mediterraneo (V).

II. THE TRIBUNAL SHOULD APPLY OCEANIA'S LIMITATION PERIOD.

5. Oceania's limitation period applies because Oceania's law is the law most closely connected to the Contract. The Tribunal should apply the law of the place most closely connected to the Contract as this is the primary principle underlying modern choice of law rules (A). The Contract is most closely connected to Oceania and Oceania's law requires a four-year limitation period (B).

A. The Tribunal should apply the law of the place most closely connected to the Contract.

6. The Tribunal's choice of applicable conflict rules is not limited to domestic conflict rules. The term "applicable" in Art. 32 CIDRA Rules is not defined. Commentators and arbitrators interpret the term to allow the Tribunal to select conflict rules "from a national conflicts system, a relevant international convention, academic writing, or even a rule which the arbitrator for good or esoteric reasons consider[s] appropriate" [*Lev, Mistelis & Kröll* 431].
7. The Tribunal should apply the law of the place most closely connected to the Contract because the closest-connection rule is the prevailing choice of law rule. "There is general agreement that the contract should be submitted to the law of the country with which it has the closest connection" [*Contract Conflicts* 275]. This general agreement is reflected in the "most significant relationship" test of the Restatement (Second) Conflicts of Law [*Restatement Conflicts* §188(1)], the "most closely connected" provision of the Rome Convention [*Art. 4(1) Rome Convention*], and the "circumstances as a whole" condition of the Hague Convention [*Article 8(3) Hague Convention*]. Moreover, arbitral tribunals often have applied the closest-connection rule in international commercial arbitration [*Saudi Arabia v. Arabian American Oil Co.*]. For example, one ICC tribunal, noting that "[t]he decided international awards published so far show a preference for the conflict rule according to which the contract is governed by the law of the country with which it has the closest connection," used the closest-connection rule to resolve a dispute between Ghanaian and Syrian state entities [*ICC case No. 4237*].

B. The Contract is most closely connected to Oceania and Oceania’s law requires a four-year limitation period.

8. The nature of the Contract clearly demonstrates that it is most closely connected to Oceania. The closest-connection rule “considers all aspects of a case in light of the potentially applicable legal systems ... analyzing the contacts between the dispute and related legal systems” [*Danilowicz* 269-70]. All of the relevant contacts relate to Oceania. The Contract was formed (1), negotiated (2), required performance (3) and was performed in Oceania (4), the subject matter of the Contract was in Oceania (5), and one of the parties was incorporated and maintains its place of business in Oceania (6). In sum, the circumstances as a whole show that the Contract is most closely connected to Oceania (7).

1. The place of contracting was Oceania.

9. The Contract was formed in Oceania. A contract is formed at the place where it is accepted, “the last act necessary ... to give the contract binding effect” [*Restatement Conflicts* §188, *cm. e*]. “[C]onduct of the offeree indicating assent to an offer is an acceptance” [*Art. 18(1) CISG*]. Claimant accepted the Contract in Oceania on 30 May 2002 when Mr. Butter signed it [*Statement of Claim* ¶8; *Answer* ¶8]. A key contact, the law of the place of contract formation, *lex loci contractus*, automatically is applicable to contractual disputes in some countries [*Rubino-Sammartano* 431, *Redfern* 143].

2. The place of negotiation of the Contract was both Oceania and Mediterraneo.

10. Negotiation of the Contract occurred in both Oceania and Mediterraneo [*Statement of Claim* ¶¶3-8]. The location of negotiations is a significant contact as Oceania has a strong interest in commercial transactions conducted within its borders [*Restatement Conflicts* § 188 *cm. e*].

3. The contract required performance in Oceania.

11. Since the Contract required performance in Oceania, Oceania’s law applies. The Contract obliged Respondent to deliver and refurbish the Machine in Oceania [*Cl. Ex. 7* ¶¶1-2], the location of Claimant’s principal office [*Statement of Claim* ¶1]. The choice of law rules of the Hague Convention² provide for the automatic application of the law of the buyer where “the contract provides expressly that the seller must perform his obligation to deliver the goods in that State” [*Art. 8(2)(b) Hague*

² Oceania has adopted the Hague Convention as its choice of law rules for the international sale of goods [*Proc. Ord. 1* ¶7].

Convention; Proc. Ord. No. 1 ¶7. Although Respondent may contend that, by the term CIF, delivery took place in Greece, the term CIF has no effect on the contractual place of delivery but only indicates that “the risk of loss of or damage to the goods” passed to the buyer when the Machine was placed on board the ship [*Incoterms 2000*].

4. The place of performance was Oceania.

12. The law of the place of performance is of central importance in this dispute over the Contract’s proper performance. Because countries like Oceania are concerned with the performance of contracts within their borders, the place of performance historically has mandated automatic application of its law [*Slater v. Mexican National Railroad (U.S.A.) (“the only source of [the] obligation is the law of the place of the act”)*]. This *lex locus solutionis*, (“the law of the place of performance”) still is acknowledged in some countries [*Rubino-Sammartano 431*]. Indeed, “[w]hen both parties are to perform in the state, [the] state will have such a close relationship to the transaction that it will often be the state of the applicable law even with respect to issues that do not relate strictly to performance” [*Restatement Conflicts §188 cmt. e*].
13. Respondent’s performance occurred in Oceania. Respondent delivered, installed, and refurbished the Machine in Oceania [*Statement of Claim ¶¶9-11; Re. Ex. 2*]. Respondent conducted all of its work in Oceania: its workmen arrived in Oceania prior to 1 July 2002 and remained until 1 August 2002 [*Statement of Claim ¶¶9-11*].
14. Claimant’s performance also occurred in Oceania. Claimant communicated with Respondent from Oceania and agreed to post a letter of credit in Respondent’s favor [*Cl. Ex. 6*]. There is no evidence indicating that Claimant opened the required letter of credit at a first-class bank outside of Oceania [*Cl. Ex. 7 ¶3*].

5. The place of the subject matter of the Contract was Oceania.

15. At all relevant times the Machine was either in, or *en route* to, Oceania. The location of the Machine is an important contact because “when the thing ... is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the thing ... was located would be applied to determine many of the issues arising under the contract” [*Restatement §188 cmt. e*]. The Machine was delivered in Oceania and remained in Oceania during refurbishment [*Statement of Claim ¶¶1, 6*]. At no time

was the Machine in Mediterraneo [*Clar. Q.* ¶10]. Thus, Oceania’s law should apply because the subject matter of the contract was in Oceania.

6. The place of incorporation and business of the parties was both Oceania and Mediterraneo.

16. The parties are organized under and maintain their principal offices in their respective countries [*Statement of Claim* ¶¶1-2; *Answer* ¶¶1-2]. Claimant’s location in Oceania is notable because it is reasonable that Claimant should rely upon its law, not only because it conducts its business in Oceania, but especially because “[t]he fact that one of the parties ... does business in a particular state assumes greater importance when combined with other contacts” [*Restatement Conflicts* §188 *cm. e*].

7. The circumstances as a whole illustrate that the Contract is most closely connected to Oceania.

17. The circumstances as a whole indicate that Oceania’s law applies. The Contract formation, negotiation, contractually-required performance, actual performance, location of the Machine, and Claimant’s place of business were all in Oceania and illustrate that the Contract manifestly is connected more closely to Oceania’s law.
18. The Tribunal may apply choice of law rules codified in international treaties as well to reach the same conclusion. Although the choice of law rules of the Rome Convention presume that “the contract is most closely connected to the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, ... its central administration” [*Art. 4(2) Rome Convention*], this presumption “shall not apply ... if it appears from the *circumstances as a whole* that the contract is more closely connected with another country” [*Art. 4(5) Rome Convention (emphasis added)*]. Art. 4(5) requires the application of Oceania’s law since the circumstances as a whole show that the Contract is most closely connected to Oceania.
19. The new Hague Convention, designed specifically for determining the law applicable to contracts for the international sale of goods, requires Oceania’s four-year limitation period for two independent reasons. First, Oceania’s law applies because the Contract required performance in Oceania [*see supra* ¶7]. Second, Oceania’s law applies because “in light of the circumstances as a whole ... the contract is manifestly more closely connected with [Oceania’s] law” [*Art. 8(3) Hague Convention; Proc. Ord. No. 1* ¶7]. The circumstances as a whole illustrate that the Contract manifestly

is more closely connected to Oceania's law. Moreover, Article 8(4) Hague Convention does not bar the application of Oceania's law under Article 8(3) as the Tribunal's engagement in choice of law analysis hinges upon its determination that the limitation period is not regulated by the CISG. Thus, the Hague Convention requires the application of Oceania's law.

III. IN THE ALTERNATIVE, THE TRIBUNAL SHOULD APPLY A LIMITATION PERIOD CONSISTENT WITH INTERNATIONAL PRINCIPLES.

A. The Limitation Period is Not Less than Three Years.

20. The Tribunal should apply the four-year limitation period in Art. 8(a) Limitation Convention (1). Alternatively, the Tribunal should apply the three-year limitation period in Art. 10.2, 2004 UNIDROIT Principles (2).

1. Under international principles, the limitation period is four years.

21. The Tribunal should apply the four-year limitation period in Art. 8(a) Limitation Convention.
22. When the law governing a contract is silent, tribunals enjoy discretion to disregard choice of law rules at odds with the needs and practices of international commerce. Arbitrators may instead apply established international principles to matters outside the scope of the applicable uniform law [*Juenger 268-274; Lowenfeld 90; Smit on Choice of Law 98*].
23. Even if a given treaty is not binding upon states, its principles are more persuasive "evidence of rules generally accepted among nations" than those of un-codified international principles [*Oppenheim 28 (stating that treaties are the source power that derives from custom)*]. Although Mediterraneo and Oceania are not parties to the Limitation Convention, the Convention is an international treaty and therefore "evidence of rules generally accepted among nations" regarding limitation periods [*Id.*].
24. It is well-established that "an arbitrator may apply a rule embodied in an international convention without reference to any national legal system" [*Danilowicz 275*]. Principles contained in transnational treaties such as the Limitation Convention are part of the *lex mercatoria*, a "set of general principles and customary rules ... elaborated in the framework of international trade, without particular reference to substantive national law" [*Goldman 16; Mustill 88*]. Even *lex mercatoria* skeptics urge arbitrators to apply transnational principles when most significant contacts are in

dispute or the domestic substantive law of one party is inconsistent with international norms [*Bonell in Special Supplement 81; Lowenfield 85*].

25. ICC tribunals frequently apply transnational principles to matters outside the scope of the law governing a transnational contract. In *Pabalk Ticaret*, the arbitrator noted that he was “faced with the difficulty of choosing a national law the application of which is sufficiently compelling. The Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legal system, be it Turkish or French, and to apply the international *lex mercatoria*.” [*ICC 3131 quoted in Pabalk Ticaret (Fra.); Varady 574-75*].
26. Although the question of limitation periods is not settled in the CISG, the Tribunal should apply a transnational standard that is compatible with the international character of the CISG and its goals of predictability and uniformity. In civil law countries, such as Austria, Germany, France, and Switzerland “it is taken for granted that a Code or any other legislation of a more general character must be considered as more than the sum of its individual provisions. In fact, it must be interpreted on the basis of the general principles which underlie its specific provisions” [*Bianca/Bonell 77*]. The canon of interpretation in Switzerland states that if neither the statute nor the customary law provides a solution “the judge shall decide according to the rule which he would establish as a legislature ... In doing so, he shall base himself on sound scholarship and tradition” [*Swiss Code Art. 1 in Bianca/Bonell 77*]. Art. 7(1) CISG provides that “in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”
27. Application of a domestic limitation period works directly against the goals of predictability and uniformity that are central to the CISG. Limitation periods applying to the domestic sale of goods vary from six months to thirty years and are not designed to accommodate the complexity of contracts for the international sale of goods [*Smit 2; Sono 1; see supra ¶24*]. Some limitation periods are too short for the practical requirements of international transactions and others are so long that they fail to provide fundamental protection from future litigation [*Sono 1*].
28. Because of the international character of transactions governed by the CISG, there is a presumption in Art. 7(1) CISG against applying domestic laws of the buyer, seller, or forum that are inconsistent with international principles [*Bonell in Special Supplement 33; Garro 1159*]. It is widely recognized that “recourse to domestic law also is a last resort to be used only if and to the extent that a solution can not be found ... by the application of general principles underlying the uniform law” [*Bonell in Special*

Supplement 33]. Domestic limitation periods are designed for national policy concerns. Indeed, municipal laws generally are “ill-adapted to the regulatory needs of ... international sales” [*Audit 173; Lew, Mistellis & Kroll 425*]. Recourse to transnational law in gap-filling avoids rules that are unfit for international contracts and allow parties to escape “peculiar formalities, brief cut-off periods, and some of the difficulties created by domestic laws” [*Lando 748*].

29. The Limitation Convention’s four-year prescription period is the transnational law most compatible with the international character and uniformity goals of the CISG. In fact, the Limitation Convention is sometimes referred to as the CISG’s sister convention [*Smit on Limitation 337; Sono 1; Winship 1071-1072*]. Like the CISG, its scope is limited to contracts for the international sales of goods [*Sono 1*]. The Protocol Amendment to the Convention on the Limitation Period in the International Sales of Goods was completed in 1980 with the express purpose to ensure compatibility with the CISG [*Id.*].
30. The Tribunal should apply the Limitation Convention’s four-year prescription period because it is the transnational source of principles most compatible with the CISG and because it was negotiated with respect to the specific needs of transactions for the international sales of goods.

2. In the alternative, under international principles a three-year statute of limitations applies.

31. If the Tribunal declines to apply the four-year limitation period codified in the Limitation Convention, it instead should apply the three-year limitation period of Art. 10.2, 2004 UNIDROIT Principles. Art. 10.2 provides that the limitation period begins “on the day after the obligee knows or ought to have known the facts as a result of which the obligee’s right can be exercised.”
32. Although not specifically designed to govern contracts for the international sale of goods, the UNIDROIT Principles still are more compatible with the international character of the CISG than domestic limitation periods [*see supra ¶24 (discussing a strong preference for international principles over domestic law); see supra ¶28 (discussing the international character of the CISG as defined in Art. 7(1)); Bonell on UNIDROIT 12-13; Schlechtriem position paper 3*].
33. The 2004 revision of the UNIDROIT Principles includes a three-year general limitation period, which indicates the importance of uniform limitation periods to international commerce. The 1994 UNIDROIT Principles were revised to include a limitation period because the “incompleteness of the UNIDROIT Principles became an issue in the sense that, though applicable, they could not provide a solution to the issue in point” [*Bonell on UNIDROIT 4*].

34. Like the Limitation Convention, the UNIDROIT Principles are part of the *lex mercatoria* and may be used to supplement the CISG at the discretion of arbitrators. In ICC Case No. 7110, a series of contracts between an English party and a Middle-Eastern government did not specify a choice of law but made reference to a reliance on ‘natural justice’. The claimant argued for the application of general principles of law. The respondent argued for the application of English law as most closely connected with the contract [*Id.*]. The tribunal found that the parties clearly had excluded the application of a national law [*Id.*]. Because they agreed to international commercial arbitration, the parties expressed their acquiescence to general legal rules and principles as reflected in the UNIDROIT Principles [*Id.*]. The arbitrators reasoned that the UNIDROIT Principles were a “statement of international legal principles applicable to international commercial contracts made by a distinguished group of experts” [*Lew on Lex Mercatoria and UNIDROIT* 92; ICC case no. 7710 in Mayer 112; see also Garro 1156; ICC Case No. 7375 in Mayer 110 (applying the UNIDROIT Principles as *lex mercatoria* to a contract between an U.S. manufacturer and American buyer that was silent as to the applicable law); ICC Case No. 8502 (referring to both the CISG and the UNIDROIT Principles as evidencing accepted practice under international law); ICC Case No. 8817 (stating that the UNIDROIT Principles are “perfectly suited” for resolving the dispute)].
35. Claimant therefore requests that the Tribunal apply the three-year limitation period articulated in Art. 10.2, 2004 UNIDROIT Principles. The four-year prescription period contained in the Limitation Convention would be preferable because its provisions were drafted with the specific purpose of complementing the CISG and with regard to the needs of international transactions for the sale of goods. However, should the Tribunal refuse to apply the Limitation Convention, the 2004 UNIDROIT principles also retain the international character of the transaction and avoid the pitfalls of recourse to domestic law.

B. The parties intended the application of international substantive law to the Contract.

36. Claimant and Respondent designated the CISG as the law governing the Contract. Absent this choice, the CISG would have applied by default [*Statement of Claim* ¶14]. Therefore, the parties positively incorporated the CISG, indicating a clear intent for the Contract to be consistently governed by transnational law.
37. The arbitrators should respect the intent of the parties to apply transnational law to the limitation period dispute. Because “international arbitrators owe a duty to the parties rather than the

sovereign...the parties' intent is the arbitrator's criteria. Consequently, the Tribunal's determination of the applicable law can be based on an analysis of the substantive rules rather than on the application of conflict of laws rules" [*Lew, Mistelis & Kroll* 425].

38. Two examples provide persuasive evidence that arbitral tribunals may apply the UNIDROIT Principles to an international contract upon a finding that the parties intended to be bound by transnational law. In the case of *TOPCO v. Calasiatic*, the arbitrator determined that "if it is appropriate for the Tribunal to declare that this arbitration ... is governed by international law, it is because – the parties wanting to remove the arbitration from any national sovereignty – one cannot assume that the institution of arbitration should escape the reach of all legal systems and be somehow suspended *in vacuo*" [*TOPCO* 9]. Similarly, arbitrators applied the broad international principles based on the parties' intent in *Valenciana v. Primary Coal Inc.* In *Valenciana*, the tribunal found that the absence of a choice of law clause in the contract was a deliberate tacit omission, indicating that the parties did not want domestic law to apply but preferred the application of "purely international law" [*Valenciana* 397].
39. Claimant urges the Tribunal to follow the examples of *TOPCO* and *Valenciana* and honor the parties' intent by applying the four-year prescription period codified in the Limitation Convention or, in the alternative, the three-year Limitation Period found in the UNIDROIT Principles.

IV. IN THE ALTERNATIVE, THE TRIBUNAL SHOULD APPLY THE LIMITATION PERIOD OF THE SITUS.

40. By explicitly choosing to arbitrate in Vindobona, Danubia [*Cl. Ex. 7 ¶13*], the parties understood that Danubia's law, including its substantive law, could be used to resolve aspects of their dispute. Application of Danubia's substantive law is reasonable because "the provision [to arbitrate in Danubia] shows that the parties had this particular state in mind" and "arbitrators sitting in that state ... have a natural tendency to apply [that state's] local law" [*Restatement Conflicts* §218 *cmt. b*], especially since an award may be vacated "by a competent authority of the country in which ... that award was made" [*Art. V(1)(e) NY Convention*].
41. Although the traditional rule *qui indicem forum eligit ius* ("the choice of forum is the choice of law") has come under attack in recent years, it remains a valid choice of law rule [*Redfern* 143; *Born* 529; *Lew, Mistelis & Kröll* 415]. The frequent criticism that identification of the arbitration *situs* is difficult does not apply here since the parties chose the *situs* in the Contract [*Rubino-Sammartano* 422]. Since

Claimant and Respondent favored a neutral substantive law, the CISG, and a neutral forum, Danubia, the Tribunal should conclude that they preferred a neutral substantive law for aspects not governed by their chosen law. Application of Danubia's three-year limitation period provides a neutral alternative to the conflicting four-year and two-year limitation periods of the parties' respective countries [*Hay, Weintraub & Borchers* 501]. Additionally, selection of Danubia's three-year limitation period enhances predictability. Where the chosen substantive law of the contract is silent, to avoid defeating the "reasonable expectations of the parties" [*Len, Mistelis & Kröll* 424], a rule deferring to the substantive law of the *situs* will increase predictability.

V. THE TRIBUNAL SHOULD NOT APPLY MEDITERRANEO'S TWO-YEAR LIMITATION PERIOD.

42. Respondent's reliance upon Mediterraneo's two-year limitation is misplaced. Not only is a longer limitation period required under choice of law principles, international principles, and the law of the situs, but exclusive dependence on Mediterraneo's choice of law rule unjustifiably advances the policies of a single country (A) and deference to Mediterraneo's two-year limitation period in this dispute is unfair (B).

A. Application of Mediterraneo's choice of law rule unjustifiably advances the domestic policies of a single country.

43. Respondent's assertion that Mediterraneo's choice of law rule comports with the "prevailing" or "normal" rule for determining the applicable law is erroneous [*Answer* ¶23; *Proc. Ord. No. 1* ¶4]. Respondent urges a blanket choice of law rule that in contracts for the international sale of goods the applicable law always is the law of the seller's country, defined as the location of either the seller's principal place of business or central place of administration [*Answer* ¶22]. Respondent seeks support for its choice of law analysis by alleging that, pursuant Article 14 of the Private International Law Act of Mediterraneo, the seller's law always is applicable to the formation and extinction of a contract for the international sale of goods [*Answer* ¶23]. Presuming that Respondent has provided accurate and complete notice of Mediterraneo's choice of law rule to the Tribunal, both Mediterraneo's rule and Respondent's self-interested analysis of the "prevailing rule" directly conflict with the actual rules enunciated in international treaties and principles. As discussed *supra* §IIA, modern choice of law rules seek to apply the law most closely connected to the contract. The Rome Convention specifically states that any presumption in favor of the seller's law will be discarded "if it appears from the circumstances as a whole that the contract is more closely connected with another

country” [Art. 4(5) Rome Convention]. Likewise, the Hague Convention not only provides a number of exceptions where the buyer’s law applies, including when the contract requires delivery in the buyer’s country [see *supra* ¶11], but also requires the application of the law to which the contract “is manifestly more closely connected” [Art. 8 Hague Convention].

44. Exclusive reliance on Mediterraneo’s choice of law rule “relinquishes the power to determine the applicable law to the state,” which unjustifiably furthers one country’s interests and policies [Lew, *Mistelis & Kröll* 430-31]. “When the state’s interests and policies are of a fundamental nature, for example, when a personal status of a citizen is involved, the arbitrator is justified in yielding to the state,” but “when commercial matters are involved, there is no justification for an international arbitrator, who is appointed by the parties and does not represent a state, to further the state’s interests” [Danimowicz 264]. Mediterraneo’s choice of law rule results in the application of its two-year limitation period, a prescriptive period applicable to all of Mediterraneo’s domestic contracts for the sale of goods [Answer ¶24], which inexcusably subjects this transnational dispute to the policies of a single country.
45. Furthermore, Respondent’s “prevailing rule” for the applicable law in regard to the period of limitation [Proc. Ord. No. 1 ¶4] completely ignores the Limitation Convention and the UNIDROIT Principles. The principles fixed in these documents indicate that the prevailing view concerning limitation periods applicable to international commercial contracts should be at least three years, as discussed *supra* §III.A.

B. Application of Mediterraneo’s two-year limitation is unfair.

46. Any contention by Respondent that Mediterraneo’s two-year limitation period is a fair policy to avoid defending stale claims (*i.e.* claims too old to defend because of incomplete or inaccurate evidence) is frustrated by the Limitation Convention’s four-year limitation period, the three-year limitation period of the UNIDROIT Principles, and Respondent’s participation in settlement negotiations. The Limitation Convention was drafted specifically for the needs of contracts for the international sale of goods and it provides that a claim is not too stale to defend until after four years [Art. 8 Limitation Convention]. Similarly, the adoption of a three-year limitation period in the UNIDROIT Principles is persuasive evidence that a longer limitation period serves the interests of all parties to an international contract [Art. 10(2) UNIDROIT Principles (2004)]. Finally, Respondent’s supposed reliance on the two-year limitation period is insincere as Respondent has

negotiated settlement options with Claimant for the past two-and-a-half years [*Statement of Claim* ¶12].

47. Respondent drafted the Contract and therefore should bare the risk of not choosing the applicable limitation period. According to the legal principle *contra proferentem*, ambiguous contractual provisions are interpreted against the drafter [*Corbin Vol. 5 §24.27*]. Respondent chose the terms of this Contract [*Cl. Ex. 6*] and was in a position to avoid uncertainty regarding the limitation period [*Restatement (Second) Contracts §206 cmt. a*]. Claimant urges the Tribunal to allow this arbitration to proceed, as Respondent failed to state explicitly the law governing the limitation period in the Contract.

PART TWO: RESPONDENT BREACHED THE CONTRACT AND IS LIABLE TO CLAIMANT.

48. In the spring of 2002, Respondent contracted to sell, install, and refurbish a machine for Claimant to use in printing confectionary wrappers [*supra Statement of Facts*]. Because the Machine did not conform to the Contract (I), Respondent is liable to Claimant (II).

I. THE MACHINE DID NOT CONFORM TO THE CONTRACT.

49. The Machine did not conform to the Contract because it was not of the quality and description required by the Contract (A) and because it was not fit for a particular purpose made known to Respondent (B).

A. The Machine was not of the quality and description required by the Contract.

50. Under Art. 35(1) CISG, the seller must deliver goods which are of the “quantity, quality and description required by the contract.” In other words, the parties must comply with the terms of their contract [*Honnold 253; Lookofsky 87*]. The seller must respect the particularities of each sale and do all that is necessary to make the goods usable and conform to the parties’ agreement [*Neumayer 275-6*]. The agreement between the parties is the primary source for assessing conformity [*Henschel, citing UNCITRAL Secretariat Commentary, UNIDROIT Principle 7.1.1 and PECL Art. 8:101; see also Kritzer 282; Schwenger in Schlechtriem 1998 276*].
51. However, the contract’s description of the goods to be delivered is only the starting point to determine the parties’ intent. Art. 8 CISG governs the interpretation of contracts; it directs the Tribunal to look to all the statements made and conduct exhibited by the parties [*see also Bianca in*

Bianca/ Bonell 271; Lookofsky 54; Schwenger in Schlechtriem2005 413]. The CISG rejects the notion that the parties' intentions are limited to their expression in the contractual instrument ("the parol evidence rule") [*Schmidt-Kessel in Schlechtriem2005 125; Mitchell (U.S.A.); MCC/Ceramica Nuova (U.S.A.)*]. Art. 8 does not distinguish between the different types of "statements" made by the parties, but rather emphasizes the "understanding" that statements give rise to in the other party [*Honnold 254; Junge in Schlechtriem1998 70*]. To determine the seller's obligations, the Tribunal must look to the subjective understanding Respondent should have had (1) and the objective understanding a reasonable person would have had of Claimant's statements and conduct (2).

1. Respondent could not have been unaware of Claimant's intent.

52. To determine the intent of the parties, the Tribunal first must apply the subjective test of Art. 8(1) CISG: "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." Among the relevant factors in evaluating the parties' actual intentions are their negotiations (a) and subsequent conduct (b). Here, both indicate an agreement for a machine able to print on foil of 8µm thickness.

a. The parties' negotiations indicate an agreement for a Machine able to print on foil of 8µm thickness.

53. On 17 April 2002, Claimant wrote Respondent expressing interest in a second-hand, refurbished flexoprint machine, equipped with six colors and a varnishing stand [*Cl. Ex. 1*]. Claimant stated that it needed a machine which could print on coated and uncoated papers for wrapping, polyester, and also metallic foils for use in the confectionary market [*Id.*]. Specifically, Claimant stated that typical aluminum foil for chocolate wrappers "may be of 8µm thickness" [*Id.*]. Therefore, Respondent could not have been unaware that Claimant required a machine capable of printing on a variety of substrates, including 8µm foil.

54. Just over one week later, Respondent replied that it had a second-hand 7 stand Magiprint Flexometix Mark 8 machine "for your task" [*Cl. Ex. 2*]. As Art. 35(1) requires that the seller deliver conforming goods, it must deliver goods which conform to an express (contractual) guarantee such as this one [*Lookofsky 89*]. Respondent therefore warranted, and so bound itself, to deliver a machine that would satisfy Claimant's expressed needs, including the ability to print on 8µm foil. From this point on, Claimant could and did assume that an understanding had arisen between the

parties. Respondent's assertion that the Machine was suitable for Claimant's task could be taken to mean only that it met all the criteria Claimant had concisely and clearly listed in its letter of inquiry.

55. At no point did Respondent ask for clarification as to Claimant's needs, nor did it ever indicate that it had not understood Claimant's needs. Where one party finds the other party's expressed intent vague or ambiguous, it should inquire as to its meaning [*Neumayer 114; Junge in Schlechtriem 1998 71*]. If Respondent ever had any doubt as to Claimant's needs, it should have asked for clarification. When a party receives an ambiguous declaration and does not attempt to clarify it, it must tolerate the consequences of its inaction, especially if it interprets the ambiguous statement differently than the declarant [*Neumayer 114; Schwenger in Schlechtriem 2005 421; see also Junge in Schlechtriem 1998 71 (describing a party's "duty to display the alertness and care normally displayed in business transactions")*]. Respondent never expressed any doubt as to Claimant's needs and never sought clarification, so it must bear the consequences of its inaction.

b. The parties' subsequent conduct does not establish a contrary intent.

56. Furthermore, the parties' subsequent conduct does not demonstrate a contrary intent. Under Art. 8(3) CISG, to determine the intentions of the parties, due consideration must also be given to their subsequent conduct. Acts that constitute "subsequent conduct" under Art. 8(3) include contract modification, termination, avoidance, or notice of defect. Here, Claimant's notification that the goods were non-conforming reflected its understanding that the Contract was for a machine able to print on 8 μ m foil. Similarly, the manual that Respondent sent mentioning the Machine's inability to print on foil substrate thinner than 10 μ m cannot be interpreted as a contract modification. The letter accompanying the manual specifically reaffirms the Machine's ability to meet Claimant's specified printing needs, established as covering a range of substrates including 8 μ m foil [*Cl. Ex. 6*].
57. Indeed, the Machine's instruction manual can have no practical bearing on the parties' obligations under the Contract. Respondent may emphasize the manual's specification that the Machine cannot print on aluminum foil thinner than 10 μ m. However, at the time Claimant received the manual, an understanding between the parties already had been reached, as described above *supra* ¶¶53-55. Respondent repeatedly assured Claimant that the specific Machine required by the Contract would respond to Claimant's stated needs, and another affirmation ("meet all the needs of [your] customers") was included in the letter accompanying the manual [*Cl. Ex. 6*]. Furthermore, the manual's 10 μ m specification was not obvious; it was limited to a single abbreviated reference near

the end [*Re. Ex. 1; Clar. Q. 19*]. Respondent does not present any evidence of other, more visible indications that the Machine could not print on 8µm thickness. Given the parties' negotiations, including Respondent's repeated assurances of conformity, Claimant had no reason to think that the manual would show the Machine's non-conformity.

2. A reasonable person would have understood Claimant's intent.

58. If Art. 8(1) does not apply, then the objective test of Art. 8(2) does [*Lookofsky 55; Honnold 116; Farnsworth in Bianca/Bonell 98*]. The offeror's intent should prevail if he can show that this would have been the understanding of a reasonable party in the offeree's position [*Farnsworth in Bianca/Bonell 98; Schmidt-Kassel in Schlechtriem2005 119-120; Junge in Schlechtriem1998 71-72*]. The Tribunal should not look to the reasonable party in the abstract, but rather to a reasonable party of the same kind with respect to background and skill as Claimant [*Farnsworth in Bianca/Bonell 98; Schmidt-Kassel in Schlechtriem2005 120; Tunc 551*]. An experienced and respected seller of machinery, including used flexoprint machines, would have been put on notice by Claimant's April 2002 letter that it was interested in a machine able to print on 8µm foil. Similarly, a reasonable party of the same kind as Claimant which receives such guarantees as the machine is ideal "for your task" and "will meet all the needs of your customers," would not imagine that a manual accompanying such guarantees would state the contrary. Claimant's intent should prevail.

B. The Machine was not fit for a particular purpose made known to Respondent.

59. Not only was the Machine not of the quality or description required by the Contract, it also was not fit for a particular purpose made known to Respondent. Under Art. 35(2)(b) CISG, goods do not conform with a contract unless they are "fit for any particular purpose expressly or impliedly made known to the seller at the time of conclusion of the contract." This means that the goods delivered should be able to fulfill any particular purpose, including those not expressly enumerated in the contract, as long as it was communicated to the seller [*Neumayer 278; Bianca in Bianca/Bonell 1987 275; Schwenger in Schlechtriem2005 421*]. Even if the goods otherwise conform to the letter of the contract, they will be considered non-conforming if they do not fulfill a particular purpose made known to the seller, especially if the seller has made express assurances that the goods are fit for this known purpose [*Schmitz-Werke (U.S.A.)*]. A breach of Article 35(2)(b) requires Claimant to show that it expressly or impliedly made the particular purpose known to the Respondent (1). Furthermore, the Claimant must have relied on Respondent's skill and judgment (2), and this

reliance must have been reasonable (3) [*Bianca in Bianca/Bonell* 274; *Schlechtriem in Galston/Smit* 6-20; *Lookofsky* 92; *Henschel m*; *Folsom* 88].

1. Claimant expressly made known to Respondent the particular purpose of printing on 8µm foil.

60. If the buyer expressly or implicitly communicates to the seller a particular purpose for the goods and the seller does not object, the seller must deliver goods fit for that purpose [*Sec. Comm. to Art. 35 CISG* ¶7; *Schwenzer in Schlechtriem2005* 421]. The particular purpose must be “made known” in such a way that the seller was able to take note of it [*Enderlein/Maskow* 144; *BGH 8 March 1995 (Ger)*]. During its very first contact with Respondent on 17 April 2002, Claimant informed Respondent that it was seeking a refurbished flexoprint machine [*Cl. Ex. 1*]. Claimant did not need just any flexoprint machine. As stated above *supra* ¶53, Claimant needed a flexoprint machine which could print on “metallic foils for use in the confectionary market and similar fields” [*Id.*]. As Claimant stated specifically, “typical plain and coloured aluminum foil for chocolate wrappers may be of 8µm thickness” [*Id.*]. In the following paragraph of the same letter, Claimant emphasized its need for a machine able to print, in particular, on various types of foil [*Id. (emphasis added)*]. Thus, Claimant’s 17 April 2002 letter to Respondent specifies Claimant’s need for a machine able to print on 8µm foil in a manner sufficient to put Respondent on notice.
61. Moreover, the purpose must be made known to the seller before the conclusion of the contract so that the seller can refuse to enter into the contract if it is unable to supply goods which meet that particular purpose [*Sec. Comm. to Art. 35, ¶8; Neumayer* 279; *Enderlein* 156; *Schwenzer in Schlechtriem2005* 422]. Claimant made the particular purpose known well before the conclusion of the Contract, in its very first letter to Respondent.
62. Once Respondent became aware of the purpose to which the goods would be put, Art. 35(2)(b) and the principle of fairness required him to conform to that purpose [*Enderlein/Maskow* 144; *Bianca in Bianca/Bonell* 275]. Respondent had a duty to notify Claimant of any objections [*Neumayer* 278-9; *Schwenzer in Schlechtriem2005* 422]. Since Respondent did not notify Claimant of any objections, it is bound by the particular purpose regardless of the language contained in the written contract [*Neumayer* 278-9, *citing Huber* 480; *Schwenzer in Schlechtriem2005* 421]. Therefore, Respondent was obliged to deliver a Machine capable of printing on 8µm foil.

2. Claimant relied on Respondent's skill and judgment.

63. After the buyer makes out a *prima facie* case by showing that it communicated a particular purpose to the seller, it falls on the seller to show that the buyer did not rely, or that it was unreasonable for it to rely, on the seller's expertise [*Honnold 257; Hyland/Freiburg 322*]. Claimant has demonstrated above that it clearly communicated to Respondent the particular purpose for which it needed the Machine. It now falls upon Respondent to show that Claimant did not reasonably rely on Respondent's skills. Respondent cannot meet this burden.
64. The crux of Art. 35(2)(b) CISG is the buyer's reliance on the seller to provide goods which satisfy the buyer's stated purpose [*Sec. Comm. to Art. 35, ¶ 7; Honnold 257; Schwenger in Schlechtriem2005 421*]. The seller need not be an expert in goods of the kind; to satisfy Art. 35(2)(b), the buyer need only to have relied on those skills of the seller which the buyer itself does not possess [*Neumayer 280; Schwenger in Schlechtriem2005 422*].
65. Claimant relied on Respondent's expertise. Although Claimant is a printing company, it has experience only with printing on various, non-specialized types of *paper* [*Clar. Q. 23 (emphasis added)*]. Mr. Butter had only general knowledge of printing machines and none of flexoprint machines [*Clar. Q. 13*]. The OC Contract represented a significant extension of Claimant's previous line of activities [*Clar. Q. 23*]. Also, at the time of contracting, there were no other flexoprint operators in Oceania [*Cl. Ex. 1*]. Respondent, on the other hand, is a seller of new and used industrial equipment of long standing and good reputation [*Cl. Statement of Claim 2; Clar. Q. 26*]. Five to ten percent of its total business is the sale of used flexoprint machines [*Clar. Q. 24*].
66. Even in borderline cases, where it seems the buyer and seller have equivalent knowledge of and experience with the goods in question, the seller is held to a higher standard and considered to know the goods better [*Neumayer 280*]. The Tribunal should find that Claimant relied on Respondent's expertise.

3. Claimant's reliance was reasonable.

67. The circumstances in which the buyer may not reasonably rely on the seller's skill and judgment must be examined and determined on a case-by-case basis [*Bianca in Bianca/Bonell 275; Schwenger in Schlechtriem2005 421*]. For instance, reliance would be unreasonable if the buyer selected goods by brand name, if the seller did not claim to have any particular knowledge in respect of the goods in question, or if such skill is not common in the seller's trade branch [*Bianca in Bianca/Bonell 27; Sec.*

Comm. to Art. 35, ¶ 9; Enderlein 145; Hyland/Freiburg 321; Schwenger in Schlechtriem 2005 422]. Because the CISG does not define the term “reasonableness,” the Tribunal must turn to other sources for guidance. Under the PECL, for instance, reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable [*PECL Art. 1:302; see also Henschel m; Kritzer 121*].

68. Claimant had no reason not to rely on Respondent’s skill and judgment. Respondent is considered to be a knowledgeable and honest business partner [*Clar. Q. 26*]. Respondent regularly sells used flexoprint machines and thus is significantly more experienced with them than Claimant, which never had dealt with foil printing before [*Clar. Q. 23*]. Claimant did not have ready access to such machines because there were no other flexoprint operators in Oceania [*Cl. Ex. 1*]. Furthermore, at no point did Respondent express any doubt that the Machine satisfied Claimant’s needs. To the contrary, throughout the parties’ negotiations Respondent confidently assured Claimant that it had a machine “for its task” that would “satisfy all the needs of its customers” [*Cl. Ex. 1 and 6*]. Thus, it was reasonable for Claimant to trust that Respondent would supply it with a machine that would conform to Claimant’s stated particular purpose.
69. In sum, Claimant made known to Respondent the particular purpose to which it intended to put the Machine and Claimant then reasonably relied on Respondent’s expertise. Respondent breached its obligations by delivering a machine incapable of printing on 8µm foil. Respondent thus should be liable under Art. 36 CISG for delivering non-conforming goods.

II. RESPONDENT IS LIABLE UNDER ART. 36 CISG FOR THE NON-CONFORMITY OF THE MACHINE.

70. As stated above, the Machine did not conform to the Contract both because it did not meet the description required by the Contract and because it was not fit for a particular purpose made known to Respondent. Art. 36 CISG provides that the “seller is liable in accordance with the contract and this Convention for any non-conformity which exists at the time when the risk passes to the buyer, even though the non-conformity becomes apparent only after that time” [*see also Enderlein/Maskow 149*]. Because Respondent breached its contract with Claimant, it should be held liable. Furthermore, Claimant fulfilled its obligations to examine the goods (A) and to notify (B) Respondent of the non-conformity of the Machine.

A. Claimant properly inspected the Machine under Art. 38 CISG.

71. After taking delivery, a buyer “must examine goods, or cause them to be examined, within as short a period as is practicable under the circumstances” [Art. 38 CISG]. Claimant conducted an adequate inspection (1) within a reasonable time after delivery (2).

1. Claimant conducted an adequate examination of the Machine.

72. The buyer’s inspection must be reasonable under the circumstances. Reasonableness depends on the provisions of the contract, the type of goods, their quantity, the packaging, and the expertise of the parties [Bianca in Bianca/Bonell 297; DiMatteo 361; Enderlein 167]. Buyers are required to examine the goods carefully to discover any obvious nonconformities [DiMatteo 363; Schwenger in Schlechtriem2005 451]. Nevertheless, buyers of complex technological goods are not bound to undertake a thorough examination of every single part of the goods [Bianca in Bianca/Bonell 297; Schwenger in Schlechtriem2005 452]. Generally, apparent non-conformities have been held to consist of discrepancies in color, weight, and consistency [DiMatteo 361; HG 30 Nov. 1998 (Switz.)].

73. Here, Claimant’s examination of the Machine on 8 July 2002 immediately revealed that it could not print on 8µm foil [Cl. Statement of Claim 25, ¶10]. Claimant clearly conducted an adequate examination. It falls upon the buyer or a specialized and impartial control organization to examine the goods [Enderlein 166; Schwenger in Schlechtriem2005 450]. Thus, Respondent’s testing of the Machine plays no role in determining whether Claimant properly inspected the Machine.

2. Claimant examined the Machine within a reasonable time.

74. Claimant examined the Machine immediately upon receipt (a). It had no duty to inspect the Machine at an earlier time (b).

a. Claimant examined the Machine immediately upon receipt.

75. Claimant examined the Machine immediately upon receipt, as required by the CISG. When a contract involves the carriage of goods, Art. 38(2) CISG postpones the time for examination until after the goods have arrived at their final destination [see also Enderlein 168; Schlechtriem in Galston/Smit 68; Bianca in Bianca/Bonell 299; 29 Jan. 1998 (Finland)]. Respondent delivered the Machine in Oceania and Claimant began examination on 8 July 2002, the same day the Machine was turned over to Claimant.

76. The language of Art. 38(1) CISG does not establish a definite time within which inspection must take place; this period has been interpreted to vary depending on the circumstances of the case [*DiMatteo 359; Bianca in Bianca/Bonell 298; Garro1989 at Art. 29(1) CISG*]. The Tribunal should take into account the uniqueness of the goods involved, the method of delivery, and the familiarity of the buyer's employees with the goods [*DiMatteo 360; Shuttle Packaging (U.S.A.)*]. By any standard, Claimant's examination the day it received the Machine was "within as short a period as [was] practicable under the circumstances" [*Art. 38 CISG*].

b. Claimant had no pre-contractual duty to inspect the Machine.

77. The buyer has no duty to inspect the goods before the conclusion of the contract [*Neumayer 284; Enderlein 147; Amandruż 201; Honnold 259*]. Mr. Butter was not obliged, as he did, to fly to Greece on 6 and 7 May 2002 to see the Machine at the former owner's works [*Statement of Claim 5, ¶5*]. Claimant should not be punished for its diligent and conscientious effort to facilitate a suitable transaction with Respondent.

78. Knowledge of the Machine's non-conformity cannot be imputed to Claimant as a result of the pre-contractual inspection. Respondent may argue that it is not liable, since Claimant "knew or could not have been unaware" of the non-conformity [*Art. 35(3) CISG*]. In this case, Claimant neither knew, nor could have been aware, of the non-conformity of the goods. Therefore, the Art. 35(3) exception does not apply. A buyer who learns at the time of contract conclusion that the goods are non-conforming, but nevertheless agrees to take them, cannot later hold the seller liable; it must take them "as is" [*Lookofsky 94; Tribunal Cantonal, 28 June 1998 (Switz.)*]. Clearly, Claimant would not have purchased the Machine if it had known of the non-conformity.

79. Furthermore, the pre-contractual inspection did not make Claimant aware of the non-conformity. The CISG distinguishes facts that a party knew or "ought to have to known" and facts of which a party "could not have been unaware." Facts that a party "ought to have known" are those facts that would be disclosed by an investigation or inquiry, which the party was obliged to make [*Honnold 259; Enderlein/Maskow 147; Bianca in Bianca/Bonell 278*]. Facts of which a party "could not have been unaware," however, impose no duty to investigate [*Honnold 259*]. Any non-conformity in goods thus must be clearly recognizable and obvious to the average potential buyer, for the seller successfully to invoke Art. 35(3) CISG [*Enderlein/Maskow 147; Bianca in Bianca/Bonell 278; Doralt 109; Neumayer 285; Bergem/Rognlien 549; Stumpf nos 32 and 33 ad Art.35*]. For instance, a buyer could not

have been unaware of the non-conformity if the seller previously had sold goods of poor quality to the buyer which had accepted them without complaint or if the price reflects the low quality in the goods [*Enderlein/Maskow* 147; *Bianca in Bianca/Bonell* 279]. Here, neither previous transactions nor a low price could have indicated to Claimant a potential non-conformity.

80. Mr. Butter's visit to Athens, Greece on 6-7 May 2002 never was intended to constitute a formal inspection of the Machine [*see Statement of Claim* 5, ¶5]. It is customary in the printing industry to go to the seller's factory or to meet with the seller simply to get a better sense for what type of company it is and to make sure that it is not a "one-man band working out of [its] back bedroom" [*Printing World*, 28 Oct. 2004]. For this reason, Mr. Butter did not bring along a technical expert [*Clar. Q.* 13]. Since Mr. Butter had no particular knowledge of flexoprinters, he asked standard questions, such as whether the previous owners had found the Machine to work well [*Id.*]. He was assured that it did [*Id.*].
81. Mr. Butter's ability to inspect the Machine was limited further by the fact that he did not see the Machine in operation [*Clar. Q.* 12]. Even if operation had been possible, it would have been inconceivable for him to ask that the Machine test print on all types of materials for which Claimant hoped to use the Machine – materials ranging from coated to uncoated papers for wrapping, polyester, and aluminum foil of varying thicknesses. Furthermore, the Machine still had to be refurbished, so performing test runs would have served little purpose until refurbishment was completed. Once the Machine was delivered to Claimant, refurbishment and testing took several weeks. Thus, a full pre-contractual inspection by Claimant in May 2002 was not possible.
82. Lastly, even if the Tribunal finds that Claimant ought to have been aware of the non-conformity, Art. 35(3) CISG applies only to Art. 35(2) but does not affect Respondent's obligations under Art. 35(1) [*Art. 35(3); UNCITRAL Digest on Art. 35(3), FN 36; Honnold* 259; *Bianca in Bianca/Bonell* 280]. In other words, even if Respondent is excused from liability because Claimant could not have been unaware that the Machine was not fit for its particular purpose, Respondent remains liable because the Machine does not meet the quality and description of the Machine under the contract. Thus, even if Respondent contends under Art. 35(3) that Claimant could not have been unaware of the non-conformity, because it was disclosed in the manual for instance, this does not affect Respondent's obligations "required by the contract" to deliver a Machine able to print on 8µm foil.

B. Claimant notified Respondent of the non-conformity within a reasonable time.

83. In addition to examining the goods, the buyer must give notice to the seller “specifying the nature of the non-conformity within a reasonable time after it has discovered or ought to have discovered it” [*Art. 39 CISG*]. Claimant’s notification was both timely and sufficiently specific.
84. The period of “reasonable time” begins when the buyer has completed its examination of the goods [*Schwenzer in Schlechtriem*2005 469; *OLG 5 Dec. 2000 (Ger.)*]. As under Art. 38 CISG, what constitutes a “reasonable” delay depends on the case, with regard specifically to the size of buyer’s firm, the characteristic features and quantity of the goods and the efforts necessary for their examination [*OGH 14 Jan. 2002 (Aus.)*; *Bianca in Bianca/Bonell* 280]. Thus, a reasonable time may be only a few days or it may be one month [*Schwenzer in Schlechtriem*2005 467-8; *LG Saarbrücken, 2 Jul. 2002 (Ger.)*]. The buyer has the burden of proving that it notified seller of the non-conformity in a timely fashion [*DiMatteo* 364; *OLG Koblenz, 30 Jul. 1998 (Ger.)*]. In the present case, Claimant contacted Respondent on 8 July 2002 as soon as it discovered the non-conformity during its first attempt to use the Machine earlier that day. Claimant’s notification within a few hours of discovery of the non-conformity was thus clearly reasonable.
85. Furthermore, notice must be specific enough so as to enable the seller to understand the non-conformity without further inquiry [*Sono in Bianca/Bonell*; *Schwenzer in Schlechtriem*2005 462-3; *LG Saarbrücken, 2 Jul. 2002 (Ger.)*]. The notice also must be sent by a means of communication suitable under the circumstances and designed efficiently to reach the seller [*Schwenzer in Schlechtriem*2005 465]. Claimant expressly indicated that the Machine was not working since it could not print on 8µm foil; thus, notice was sufficiently specific to satisfy Art. 39. Claimant’s contacting Respondent initially by phone and later by its 1 August 2002 letter was appropriate [*Cl. Ex. 9*].
86. In sum, because Claimant properly examined and notified Respondent of the non-conformity of the Machine, Respondent is liable.

PART III: CLAIMANT IS ENTITLED TO DAMAGES IN THE AMOUNT OF \$3.2M IN LOST PROFITS.

87. Claimant seeks damages for the loss of profits under a supply contract with OC pursuant to Articles 45(1)(b) and 74 CISG. That contract was cancelled after Claimant was unable to meet the contract terms, as Respondent supplied Claimant with the non-conforming Machine. The contract with OC had a term of 4 years and was subject to one renewal at the end of that term. Since Claimant

anticipated a profit of \$400K per year from the contract, Claimant seeks \$3.2M (= 8 x 400K)³ in damages (I). Claimant took all reasonable measures to mitigate the loss pursuant to Art. 77 CISG (II).

88. The other damages claimed – i.e. the difference between the \$42K purchase price for the Machine and its \$22K resale price; Claimant’s cost of preparing its plant for the installation of the Machine; interest on the lost-profits sum; and all costs of arbitration [*Statement of Claim* ¶25] – are not disputed [*Proc. Ord. No. 1* ¶15].

I. CLAIMANT IS ENTITLED TO DAMAGES FOR THE FULL EXTENT OF LOST PROFITS.

89. An award of damages is the appropriate remedy for Respondent’s breach of contract, which occurred over two years ago (A). Under Art. 74 CISG, Claimant may recover a sum equal to the loss in profits that it incurred as a result of the Breach, meaning 8 years of lost profits, or \$3.2M (B). This amount does not exceed the loss that Respondent foresaw or ought to have foreseen at the time of the conclusion of the Contract (C).

A. Damages are the appropriate remedy for the Breach.

90. Claimant is entitled to damages regardless of whether other remedies were available at the time of the Breach [*Art. 45(2) CISG: “The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies”*; see also *Secretariat Commentary Art. 45* ¶5; *Will in Bianca/Bonell 45* ¶2.12; *Liu 13.1*; *Enderlein/Maskow Art. 45* ¶7; *Digest 699*; *Zeller 67*; *OGH 28 Apr. 2000 (Aus.) (the aggrieved party may claim damages under Article 74 even if it also could claim other remedies under Art. 75 or 76)*; *LG Baden-Baden, 14 Aug. 1999 (Ger.) (the claim for damages not precluded by partial avoidance of contract)*]. In the present case, damages are appropriate for four reasons. First, the breach automatically gave rise to a claim of damages (1). Second, damages would compensate Claimant for the harm it endured as a consequence of the breach and damages are the only available remedy for a breach that occurred over two years ago (2). Third, even if another remedy were available, there is no risk of over-compensating by awarding damages (3).

³ Claimant recognizes that the appropriate damages award should be discounted to present value [*for information on inflation and interest rates, see Clar. Q. 33*]. The Tribunal’s instruction not to address claims of interest precludes an adequate discussion of the discount rate. Claimant will address this point at a later hearing.

1. Under the CISG a breach of contract necessarily gives rise to a claim of damages.

91. Respondent owes damages under Art. 45(1)(b) CISG because Art. 45(1) CISG is a rule of general guarantee liability, under which it is irrelevant whether there was a specific contractual warranty of performance [*“If the seller fails to perform any of his obligations under the contract, the buyer may ... claim damages as provided in articles 74 to 77”*; Honnold ¶276; Staudinger 528; Müller-Chen in Schlechtriem2005 528; Achilles 135; Torsello in Ferrari 80; BGH 24 Mar. 1999 (Ger.) (seller owes damages because a clause limiting liability was not properly incorporated into contract); OGH 6 Feb. 1996 (Aus.) (seller owes damages on basis of strict liability, but since buyer covered, no damages awarded)]. Respondent breached the contract by delivering a non-conforming machine [*supra Part Two*]. Since liability for breach includes situations where harm ensued through the delivery of non-conforming goods [OLG Hamm, 9 June 1995 (Ger.)], Claimant is entitled to damages as a matter of course.

2. Lost profits are required to make Claimant whole.

92. Respondent owes damages under Art. 45(1)(b) because the basic philosophy behind damages is to make the injured party whole again following a breach of contract [*Secretariat Art. 70 rem. 3; Honnold ¶403; Bernstein 139; Lookofsky2004 119; Delchi Carrier (U.S.A.) (damages are “designed to place the aggrieved party in as good a position as if the other party had properly performed the contract”*); OGH 14 Jan. 2002 (Aus.)]. Claimant was injured by the Breach (it lost substantial profits) when OC cancelled its supply contract because Claimant was unable to service it with the Respondent’s non-conforming machine [Cl. Ex. 10]. Damages are appropriate because they would compensate Claimant’s economic loss.
93. Damages are the only appropriate remedy two years after the Breach. Under Art. 45(1), the only remedy not limited in time is damages [Piltz 181]. The Breach occurred on 8 July 2002, over two years before the claim was brought [Statement of Facts]. Since the other remedies provided by Art. 45(1) – the right to require performance, avoidance of the contract, and price reduction, as foreseen by Art. 46 thru Art. 52 CISG – no longer are exercisable, awarding damages is the sole appropriate remedy.

3. An award of damages presents no risk of over-compensation.

94. Respondent owes damages under Art. 45(1)(b) because damages comprise the loss that is not compensated for by the other selected remedies [Herber/Czerwenka 208; Achilles 137; Piltz 258; Westermann 2428; Schlechtriem2004 511]. Claimant neither exercised any other remedy, nor did it ask

for the award of another remedy. Since Claimant has attained restitution by no other remedy, the Tribunal should award damages.

B. Damages should include Claimant's loss of profits resulting from the Breach.

95. Respondent must fully compensate the disadvantage suffered by Claimant as a consequence of the Breach [*Art. 74 CISG, sentence 1: "damages for breach of contract by one party consist of a sum equal to the loss...suffered by the other party as a consequence of the breach"; Achilles 222; Piltz 289; Neumayer/Ming 483; Liu 13.2; Staudinger 724; OGH 14 Jan. 2002 (Aus.) and OGH 9 Mar. 2000 (Aus.) (the CISG is based on the principle of full reparation of harm); Delchi Carrier (U.S.A.) (awarding lost profits plus other expenses); Arbitral Tribunal Vienna 15 June 1994*]. In the present case, full compensation covers lost profits under the cancelled OC Contract and the renewal thereof.
96. Respondent owes damages for the profits that Claimant lost as a consequence of the Breach. Claimant is entitled to an award of lost profits because Art. 74 expressly includes lost profits as part of the calculation of the disadvantage suffered [*Art. 74, sentence 1: "damages for breach of contract ... consists of a sum equal to the loss, including loss of profit, suffered by the other party ..."; Magnus 484; Helsinki Court of Appeals 26 Oct. 2000 (Fin.); HGer Zürich, 5 Feb. 1997 (Switz.); Delchi Carrier (U.S.A.); OLG Hamburg, 1999 (Ger.); TICA Russia 406/1998 (Rus.) (aggrieved buyer entitled in principle to recover for lost profit from sale with sub-buyer)*]. Claimant lost profits when OC cancelled a contract Claimant had planned to fulfill with the Machine. Specifically, on 9 May 2002 Claimant signed a contract with OC, which required Claimant to provide printed confectionary foil by 15 July 2002 [*Cl. Ex. 3*]. OC let Claimant know that it was "particularly interested" in prompt delivery of 8µm confectionary foil [*Clar. Q.21*]. Claimant ordered the Machine specifically for the purpose of printing on 8µm foil [*see supra Part Two §IB*]. In other words, prompt delivery was an essential term of the OC Contract, violation of which was grounds for avoidance under 49 CISG [*Schlechtriem1998 416*]. Since the Machine was incapable of printing on such foil, Claimant was unable to supply the goods required by OC by the deadline [*Cl. Ex. 10*]. OC subsequently cancelled the supply contract [*Id.*] and Claimant lost the profits it expected to earn from the OC Contract. Since Art. 74 entitles Claimant to recover lost profits, the Tribunal should award Claimant the profits it lost under the cancelled OC Contract.
97. Claimant is entitled to damages representing eight years of profits, since Claimant may claim restitution for all loss suffered "in consequence of" the Breach [*Lookofsky1989 268; Bernstein 141;*

Neumayer/Ming 486, 492; *BGH* 25 Nov. 1998 (Ger.); *LG Heidelberg*, 2 Oct. 1996 (Ger.); *OLG Köln*, 1996 (Ger.); *OGH* 28 Apr. 2000 (Aus.); *Delchi Carrier* (U.S.A.)). But for Respondent's Breach, RP would not have purchased its own flexoprint machine and RP would not have received the OC contract. But for the Breach, Claimant would have earned \$400K per year for four years under the OC Contract and the same amount under the anticipated OC Contract renewal [*Cl. Ex. 3*]. Renewal was a matter of course, which is evidenced both by the terms of Claimant's contract with OC [*Cl. Ex. 3: "The contract runs for four years subject to renewal at the end of that period"*] and the fact that OC bargained for the same contract terms with RP [*Clar. Q. 32*]. Furthermore, there is no evidence that the Machine would not have lasted through the eight years of the Contract [*Clar. Q. 31*]. The Tribunal should award \$3.2M in damages for lost profits.

C. The damages sought do not exceed the amount that Respondent foresaw or ought to have foreseen.

98. Respondent is liable for the full amount of harm suffered by Claimant. Respondent is liable for damages only to the extent that Claimant's loss was foreseeable to Respondent or a reasonable person in Respondent's position at the time of the conclusion of the contract, "in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract" [*Art. 74 CISG, sentence 2; see also: Faust* 10; *Neumayer/Ming* 490; *Torsello in Ferrari* 79; *Gruber in Schlechtriem* 2005 765; *Piltz* 291; *Liu* 14.2.1; *Karaha Bodas Co.*; *OGH* 14 Jan. 2002 (Aus.); *BGH* 24 Oct. 1979 (Ger.) (*applying ULIS Art. 82*)]. Respondent owes the full \$3.2M because a reasonable person in Respondent's position could have foreseen the type of harm Claimant suffered. In light of the facts known to Respondent, the type of foreseeable harm included Claimant's eight-year loss (1). Respondent is liable for full damages regardless of whether the actual dollar amount of harm was foreseeable (2).

1. In light of the facts and matters known at the time of contracting, a reasonable person in Respondent's position could have foreseen the type of harm suffered by Claimant.

99. Respondent owes full damages because, as a seller, it assumed the risk of harm to Claimant when it decided to proceed with the contract despite learning about Claimant's potential loss of profit during the negotiations [*Herber/Czerwenka* 333; *Bernstein* 140; *Schiedsgericht HK Hamburg* (Ger.)]. From the outset, Claimant informed Respondent about the purpose of the purchase, namely to be able to print "coated and uncoated papers for wrapping, polyester and also metallic foils for use in the confectionery market and similar fields" [*Cl. Ex. 1*]. The foil for chocolate wrappers might be "of

8[μm] thickness” [Id.]. Claimant thereby hoped to supply the hitherto under-supplied Oceania market [Cl. Ex. 3]. During negotiations, Claimant also let Respondent know of the possible consequences it would suffer in the event of a breach. Claimant drew Respondent’s attention to the prospect that a competitor, RP, was “also considering the purchase of a flexoprint machine” [Id.] and could step in to wrest away the OC Contract “if they had any possibility of getting it” [Id.]. In such event, Claimant would have little or no use for the Machine because “the market in Oceania is very small” [Id.]. Claimant notified Respondent of the possibility of a substantial loss of profits if RP were to take Claimant’s place as the supplier for OC, and it therefore emphasized that “it is imperative that we move fast on this” [Id.]. Since a reasonable person in Respondent’s position could have understood, based on the correspondence, the potential risk that Claimant would lose eight years’ worth of profits in the event of a breach, Respondent should be found to have assumed that risk when it contracted with Claimant.

2. Respondent must pay full damages regardless of whether the actual dollar amount of damages was foreseeable at the time of contracting.

100. Respondent owes full damages because the foreseeability test requires only that the obligor reasonably could have estimated the extent of the risk he was assuming, but not the exact dollar amount of damages [Koller as cited in Faust 12; Piltz 291]. Based on the correspondence with Claimant, Respondent had a clear idea of how much profit Claimant feared it might lose [Cl. Ex. 3 (“we can expect to earn a profit of \$400,000 a year”)]. For this reason, Claimant is entitled to the full dollar amount it lost under the cancelled OC Contract and its renewal, which equals a total of \$3.2M.

II. CLAIMANT TOOK REASONABLE MEASURES TO MITIGATE THE LOSS PURSUANT TO ART. 77 CISG.

101. Claimant fully met its obligation to mitigate. Parties to a contract are obligated to take measures to mitigate damages pursuant to Art. 77 CISG [Digest 805; ICC Award 8817]. It requires only “such measures as are reasonable in the circumstances” [(emphasis added) Achilles 77/4; see also: Schlechtriem2004 731]. The aggrieved party is not required to take all potential measures that might have mitigated losses, but only those “under the particular circumstances ... [that] could be expected ... [of] a person acting in good faith” [Schlechtriem2005 588]. If the injured party failed to do so, damages are reduced in “the amount by which the loss should have been mitigated if ... [it] had taken reasonable measures to avert or to lessen it” [Bianca/Bonell 562].

102. Upon discovering the non-conformity, Claimant promptly took reasonable measures to mitigate the loss by attempting substitution (A) and repair (B). No other measures were then reasonable in light of the Claimant's limited experience, resources, time and market opportunities (C). Contrary to Respondent's argument, the prospective OG plant does not justify decreasing recovery (D).

A. Claimant made a reasonable effort to find a substitute machine.

103. Upon discovering the non-conformity on 8 July 2002, Claimant contacted several sellers in a reasonable attempt to cover by substitute transaction. This is a typical example of mitigation [*Schlechtriem*2004 732; *Arbitral Tribunal Vienna, 15 June 1994*; *OLG Hamburg, 1997*; *OLG Düsseldorf, 1995*; *OLG Celle, 1998*]. It was not possible, however, for any seller to provide a suitable machine in time to service the OC Contract [*Clar. Q. 18*], excusing Claimant's failure to substitute [*Schiedsgericht HK Hamburg (Ger.)*]. Given OC's particular interest in 8µm foil [*Clar. Q. 21*], Claimant justifiably anticipated immediate cancellation by OC upon failure to perform and it attempted repair instead.

104. Finding another machine by even a reasonable date after the deadline was unlikely given the substantial time, expense, and risk involved. Mitigation does not require any efforts that are excessive or involve unreasonable expense or risk [*Bianca/Bonell 560*; *Knapp 543*; *Schlechtriem*2005 588]. Before Claimant could even begin production with a substitute, Claimant had to take four steps: remove the Machine, although it had little familiarity with how the machine worked or was assembled; search and negotiate for a new machine; secure the necessary financing and payment; and wait for delivery, installation, refurbishment, and testing of a replacement machine. Claimant's experience with Respondent included one month for refurbishment and one week for testing [*Cl. Ex. 8*]. RP also had to make arrangements well in advance for a machine [*Clar. Q. 22*]. Given Claimant's already significant investment of time and money [*Clar. Q. 23*] and the very small size of the Oceania market [*Cl. Ex. 3*], Claimant could not reasonably have risked much further effort. Even if a machine could have been found that was immediately available, it likely would have been to no avail. In these circumstances, Claimant was compelled to request repair.

B. Claimant's request for remedial repair was a reasonable effort to mitigate.

105. On the same day the non-conformity was discovered, Claimant promptly and clearly notified Respondent of the non-conformity and requested remedial repair [*Re. Ex. 2*]. Reliance on repair was reasonable in the circumstances for three reasons. First, a substitute transaction was not viable [*see ¶103*]. Second, repair seemed the fastest option as only one week remained till the OC Contract

deadline and Respondent's work crew was nearby and readily available [Re. Ex. 2]. Third, Claimant had good reason to believe repair would be effective because of Respondent's superior knowledge of flexoprinters and particularly skilled personnel [Cl. Ex. 8 and 9].

C. No other measures were reasonable for Claimant to take in the circumstances.

106. For three reasons, no other measures were reasonable for Claimant to take in the circumstances. First, "ingenuity, experience, and financial resources" are critical to understanding the circumstances [Bernstein/Lookofsky 103, supra note 3]. Claimant was constrained by unfamiliarity with the Machine and the kind of printing involved [Clar. Q. 23]. Second, with only one week left until the deadline and the threat of cancellation, Claimant justifiably felt pressured [Re. Ex. 2]. Lastly, other uses of the Machine were severely limited given the small size of the Oceania market at the time of the Contract [Cl. Ex. 3].
107. Even if significant alternative uses for the Machine existed, they do not justify decreasing recovery because Claimant reasonably could have accommodated both other uses and the OC Contract. Claimant had reasonable motive and capacity to accommodate additional uses for several reasons, including: Claimant's significant business expansion plans [Clar. Q. 23]; the fact that flexography is the "the world's fastest growing print technology" [Gillispie-Johnson 1]; the surplus capacity in the printing industry across the world [Thompson 2]; the Machine's advanced technical design [Cl. Ex. 2] and likely high output rate; the ease of increasing productivity by running "presses at consistently higher speeds" [Burgos 1]; and the possibility of expanded production through additional workers and shifts.

D. The opening of the prospective OG plant does not justify decreasing recovery.

108. Contrary to what Respondent's may argue, the rumor of the prospective opening of an OG plant does not justify decreasing recovery. At the time of the Breach, rumors were too speculative to form a reasonable basis for mitigation. Even if the opening was sufficiently foreseeable to be relevant to damages, it in fact justifies increasing recovery because Claimant could reasonably have serviced both OC and OG contracts.
109. Rumors of the OG plant were not a reasonable basis for mitigation. Mitigation requires Claimant to make a reasonable effort in good faith, but not to exhaust all possibilities [see ¶104]. A large foreign pharmaceutical company is now expected to open the OG plant in Oceania by early 2007, significantly expanding the demand for foil printing [Clar. Q. 20]. In 2002, however, there were only

vague rumors that the plant might be built [*Id.*]. The OG parent company was based in neither Oceania nor Mediterraneo [*Id.*]. There is no indication in the record that either party was aware of the plant, OG, or the potential of pharmaceutical printing. The OG plant simply was not a possibility for either party at the time. Even if it were, neither party reasonably could have based its actions on the mere possibility of the opening of a pharmaceutical plant in five years.

110. Notwithstanding the above, if Respondent attempts to argue that Claimant failed to mitigate because it did not pursue the OG contract, not only should the Tribunal find Respondent wrong, but it should increase the amount of damages paid to Claimant because nothing in the facts shows that Claimant could not have serviced contracts with both OC and OG. The Breach caused Claimant to lose contractual opportunities with both companies, warranting recovery for both portions of lost profits, pursuant to Art. 74 [*see Part Three, § I*]. The OG contract is estimated to be worth \$300K per year [*Clar. Q. 20*].
111. Claimant fully met its obligation to mitigate.

PRAYER FOR RELIEF

In light of the above submissions, Counsel respectfully request that the Tribunal:

- Find that the Claim was submitted within the applicable limitation period and that it therefore has jurisdiction to consider the dispute between Oceania Printers S.A. and McHinery Equipment Suppliers Pty;
- Find that the delivered goods did not conform to the Contract;
- Find that Respondent is liable for damages;
- Find that Claimant took reasonable measures to mitigate its loss and that damages therefore should not be reduced;
- Grant Claimant's request for an award of damages for all lost profits, including lost profits under the renewal of the OC Contract.

(signed)

/s/ Zuzana Blazek

Zuzana Blazek

/s/ Joseph R. Brubaker

Joseph R. Brubaker

/s/ Lorraine de Germiny

Lorraine de Germiny

/s/ Gary Li

Gary Li

/s/ Christina Cathey Schütz

Christina Cathey Schütz

/s/ Amanda Lee Wetzel

Amanda Lee Wetzel

8 December 2005