

SEVENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2009-2010

MEMORANDUM FOR RESPONDENT

THE AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION



On Behalf of:

Equatoriana Super Pumps S.A.
58 Industrial Road
Oceanside, Equatoriana
RESPONDENT

Against:

Mediterraneo Engineering Co.
415 Industrial Street
Capitol City, Mediterraneo
CLAIMANT

STETSON UNIVERSITY COLLEGE OF LAW

SARAH ALEXANDRA COHEN • ERIK DETLEFSEN
SANDRA D. HARRELL • ANNA K. LIU • LUIS SANTOS



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§/§§	Section/Sections
¶/¶¶	Paragraph/Paragraphs
%	Percent
\$	United States Dollar(s)
&	And
2d.	Second
ACICA	Australian Centre for International Commercial Arbitration
Art./Arts.	Article/Articles
CEO	Chief Executive Officer
CISG	United Nations Convention for the International Sales of Goods (1980)
CISG Ad. Co. Op.	CISG Advisory Council Opinion
Cl. Ex./Cl. Exs.	Claimant's Exhibit/ Claimant's Exhibits
Co./Corp.	Corporation
Ed.	Edition
Eds.	Editors
E-mail	Electronic mail
First Regulation	1 August 2008 Regulation
ICC	International Chamber of Commerce
Id.	Idem
Intl.	International
Mem. Cl.	Memorandum for Claimant
Mr.	Mister



NE	North Eastern
No.	Number
NY	New York
Passim	Material used throughout
p./pp.	Page/Pages
Proc. Ord.	Procedural Order
Q.	Question
Rec.	Record
Resp. Ex./ Resp. Exs.	Respondent's Exhibit/ Respondent's Exhibits
Second Regulation	1 January 2009 Regulation
Stmt. Clm.	Engineering's Statement of Claim
Stmt. Def.	Super Pumps' Answer and Statement of Defense
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States
v.	Versus
Vol.	Volume



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INTRODUCTION

1. Respondent, Equatoriana Super Pumps S.A. (“Super Pumps”) entered into a contract with Mediterraneo Engineering Co. (“Claimant”) for the sale of pumps. Claimant planned to use the pumps for a project in Oceania under a separate contract with Oceania Water Services (“Water Services”).

2. Performance of the contract between Super Pumps and Claimant was plagued by two major environmental regulations, a military coup, and a shipping accident that shut down the delivery route. In response to the adoption of the first regulation, the parties modified their contract and pushed back the delivery date. As the parties continued to face obstacles in the course of performance, Super Pumps remained active by communicating with Claimant and taking steps to adjust to these unforeseen circumstances. Claimant did the opposite. Claimant repeatedly failed to communicate with Super Pumps and failed to take actions to mitigate its potential loss. Claimant’s inaction led to cancelation of its contract with Water Services. Consequently, Claimant canceled the contract with Super Pumps, even though Super Pumps delivered pumps that complied with the parties’ modified agreement.

3. Before commencing this arbitration, Claimant and Super Pumps engaged in conciliation. The parties agree that conciliation is a precondition to this Tribunal’s jurisdiction. However, Claimant did not follow the parties’ arbitration agreement. The contract specifically required the parties to be represented by their Chief Executive Officers (“CEO”) at the conciliation. In violation of this provision, Claimant sent its Deputy CEO to attend the conciliation and neglected to inform Super Pumps of this change. Now, Claimant requests that this Tribunal award it damages under its contract with Super Pumps even though Claimant failed to engage in conciliation in accordance with the contract.

4. This Tribunal should find that it lacks jurisdiction over the matter until the parties’ CEOs engage in conciliation. If this Tribunal decides it has jurisdiction, it should find that Super Pumps completed performance in compliance with the parties’ modified agreement when its pumps arrived in Mediterraneo.



STATEMENT OF FACTS

5. Super Pumps is a corporation organized under the laws of Equatoriana. It manufactures pumps for agricultural, municipal, and irrigation systems. On **4 May 2008**, Super Pumps received an inquiry about a potential purchase from Claimant—an urban and rural development planning services corporation organized under the laws of Mediterraneo. Claimant and Super Pumps completed a similar transaction in Patria in 2006. This time, Claimant was preparing a bid for an irrigation contract to be completed for Water Services—an Oceanian regional governmental entity. Water Services awarded Claimant the contract on **25 June 2008**. Claimant confirmed its order with Super Pumps in an e-mail, and cautioned that the irrigation contract with Water Services had strict performance times and that any delays may result in penalties. Super Pumps signed the contract on **1 July 2008** and agreed to manufacture pumps from its N series together with three P-52 pumps.

6. The contract required delivery by **15 December 2008** in Mediterraneo under the DES (Incoterms 2000) trade term. The contract stated, “pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania.” [*Cl. Ex. 3*]. This language was included at Claimant’s request, and was approved by Claimant.

7. The contract also contained a dispute resolution clause which required the parties to engage in conciliation in Danubia prior to arbitration. The clause specifically required that each party be represented by its Chief Executive Officer at the conciliation. Claimant admits that conciliation is a prerequisite to arbitration under the arbitration agreement. [*Mem. Cl. ¶ 4*]. If conciliation was not successful, only then could the parties commence arbitration in Danubia. The parties included this clause in their previous contract, but there had never been a need to invoke the clause.

8. On **1 August 2008**, the Oceania Office of Environmental Health unexpectedly adopted a regulation prohibiting the use of copper and steel products containing beryllium, if they were for indoor use and had moving parts. Knowing that the steel mined in Equatoriana contains beryllium, Claimant told Super Pumps that Super Pumps would need to find steel that complied with the new regulation. This regulation affected the P-52 pumps under the parties’ contract.

9. Super Pumps promptly replied in an e-mail to Claimant on **2 August 2008** and offered to procure new steel that would comply with Oceania law—noting that none of the 50 countries to which it shipped had a similar regulation. In its e-mail, Super Pumps was careful to indicate that the cost of the pumps would increase by \$30,000. Super Pumps made clear that procuring new steel “[would] delay the completion of the job by several weeks” and expressly indicated that it would not



be responsible for any delays. [*Cl. Ex. 6*]. Claimant did not object to either the increased price or the notice of delay, so Super Pumps proceeded in accordance with its **2 August 2008** e-mail.

10. Super Pumps completed manufacture of the pumps on **15 November 2008**. On **22 November 2008**, Super Pumps sent an e-mail informing Claimant that the pumps would arrive in Mediterraneo around **22 December 2008**. In an e-mail on **24 November 2008**, Claimant accepted the new delivery date, and again did not object to the increase in price. Upon departure of the Merry Queen, Super Pumps received payment under an established letter of credit, but Claimant neglected to pay the additional cost of \$30,000.

11. Unfortunately, on **28 November 2008**, a ship crashed in the Isthmus Canal. The crash damaged the locks causing the canal to close. Delays in the canal were a rare occurrence. The Merry Queen was scheduled to pass through the canal around **29 November 2008**. Super Pumps promptly notified Claimant of the closure. The only alternative route would require going around the continent, and the pumps would not have arrived any sooner. The canal reopened 10 days later. In an e-mail dated **12 December 2008**, Super Pumps notified Claimant that the Merry Queen finally passed through the canal the same day, which meant the pumps would arrive on **6 January 2009**. Again Claimant was unresponsive.

12. Incredibly, in addition to the unforeseen regulation and accident, on **1 December 2008**, a military regime took over the government of Oceania. The takeover was preceded by a month of rioting, but the parties were unaware of an impending political crisis when they concluded their contract. However, Claimant was aware the people of Oceania were nervous about the political situation. Because of Claimant's direct relationship with Oceania, Claimant was in a better position than Super Pumps to monitor the rising unrest.

13. Unexpectedly, while the pumps were in transit, the military regime adopted a decree on **28 December 2008**, banning the importation or manufacture of any beryllium-containing products. This new regulation was to be effective **1 January 2009**. In response to this new regulation, Water Services informed Claimant that partial delivery of the pumps by **2 January 2009** would help prevent cancelation of the contract. Trading Company of Mediterraneo ("Trading Company"), a regional supplier, had substitute pumps available for purchase. Claimant knew of Trading Company's existence, yet Claimant did not attempt to purchase substitute pumps. The only action Claimant took was to send an e-mail to Super Pumps. That e-mail informed Super Pumps of the new regulation. It acknowledged that due to the new regulation, there was great uncertainty of the consequences of delivery after **31 December 2008**. The e-mail also indicated that exceptions were



possible if an application was filed with and approved by the Military Council Office. But Claimant never applied for an exception.

14. On **5 January 2009**, the irrigation contract was canceled because the pumps had not yet arrived. In turn, Claimant canceled its contract with Super Pumps. As promised by Super Pumps, the pumps arrived the next day, **6 January 2009**. On **15 January 2009**, Claimant's counsel demanded return of the purchase price. Counsel for Super Pumps refused on **22 January 2009** because the pumps were delivered in compliance with the parties' agreement, and because Super Pumps had disclaimed liability for late delivery on **2 August 2008**.

15. On **18 March 2009**, Claimant's counsel proposed that the parties engage in conciliation as required by their contract. Claimant proposed the conciliation take place during the Conference on the Future of Irrigation ("Conference"). The Conference was to take place **28–30 May 2009** in Danubia. Although the contract required the parties' CEOs to conciliate, Claimant sent its Deputy CEO, Mr. Holzer, because its CEO was attending his daughter's wedding on **29 May 2009**.

16. Claimant never told Super Pumps that it was sending a representative other than its actual CEO. Despite conciliating for two days, Mr. Holzer never told Super Pumps' CEO he was not Claimant's actual CEO. The conciliation ended without an agreement. A week after the conciliation concluded, Super Pumps' CEO discovered that Claimant had sent its Deputy CEO while looking in the conference participant list for the contact information of a person he had met at the Conference.

17. On **20 July 2009**, Claimant commenced this arbitration. In Super Pumps' Answer and Statement of Defense, dated **17 August 2009**, Super Pumps objected to the arbitration because the precondition had not been met. At the conciliation, Claimant was not represented by its CEO, as required by the parties' agreement.

SUBMISSIONS

18. In response to this Tribunal's Procedural Orders and the Memorandum for Claimant, Counsel makes the following submissions on behalf of Super Pumps. For the reasons stated in this Memorandum, Super Pumps respectfully requests this Honorable Tribunal to declare that:

- (a) The precondition to arbitration was not properly fulfilled;
- (b) Super Pumps did not have an obligation to provide pumps conforming to regulations adopted after the conclusion of the contract;
- (c) Super Pumps did not breach the contract by delivering after 15 or 22 December 2008; and
- (d) Claimant failed to mitigate its loss.



ARGUMENTS

19. This Memorandum will respond to issues raised in the Procedural Orders and in the Memorandum for Claimant. Part One of this Memorandum will show that this Tribunal does not have jurisdiction because the precondition to arbitration was not fulfilled in accordance with the parties' agreement. Part Two of this Memorandum will show that Super Pumps did not have an obligation to provide pumps conforming to regulations adopted after the conclusion of the contract, that Super Pumps did not breach the contract when the pumps arrived on 6 January 2009, and that Claimant failed to mitigate the consequences of the canceled irrigation contract.

PART ONE: ARGUMENTS REGARDING THIS TRIBUNAL'S JURISDICTION

20. Super Pumps and Claimant entered into an arbitration agreement on 1 July 2008. [*Cl. Ex. 3*]. The agreement required the parties' CEOs to engage in conciliation prior to arbitration. Conciliation occurred on 28–30 May 2009. Claimant did not send its CEO to the conciliation. Instead, it sent its Deputy CEO, Mr. Holzer. At the time of the conciliation, Super Pumps was unaware Mr. Holzer was not Claimant's CEO. Although the conciliation was not conducted as required by the contract, Claimant requests this Tribunal to find that the precondition to arbitration was fulfilled. Claimant argues that the conciliation proceedings were valid because Mr. Holzer was authorized to act on behalf of the CEO. However, this Tribunal should not exercise jurisdiction because: **(I.)** the precondition to arbitration was not fulfilled in accordance with the parties' agreement; and **(II.)** if this Tribunal renders an award without following the parties chosen arbitral procedures, the award may be unenforceable.

I. THE PRECONDITION TO ARBITRATION WAS NOT SATISFIED

21. Danubian law governs challenges to this Tribunal's jurisdiction because the parties chose Danubia as the seat of arbitration. [*Redfern/Hunter, p. 83*]. Danubia has adopted the UNCITRAL Model Law on Conciliation ("Conciliation Model Law") and the UNCITRAL Model Law on Arbitration ("Arbitration Model Law"). [*Stmt. Clm. ¶ 25*]. The parties expressly agreed that the UNCITRAL Conciliation Rules ("Conciliation Rules") would govern their conciliation procedure and that the ACICA Arbitration Rules ("ACICA Rules") would govern this arbitration.

22. Under Article 13 of the Conciliation Model Law, parties can condition arbitration on the occurrence of conciliation proceedings, and the tribunal must give effect to this precondition to arbitration. It is uncontested that the parties consented to conciliation and that conciliation is a precondition to arbitration. [*Mem. Cl. ¶¶ 4, 7*]. However, Claimant violated the parties' unambiguous agreement by sending its Deputy CEO in place of its CEO. Because Claimant neither



obtained Super Pumps' consent to send its Deputy CEO, nor informed Super Pumps it would send the Deputy CEO, the conciliation was conducted in violation of the parties' express agreement.

23. This Tribunal should not exercise jurisdiction over this dispute because: **(A.)** the contract specifically required the parties to be represented by their CEOs at the conciliation; **(B.)** Claimant knew of this requirement and sent its Deputy CEO without seeking Super Pumps' consent and without informing Super Pumps of the change in representation; **(C.)** Super Pumps' objection was timely; and **(D.)** requiring the parties to return to conciliation with their CEOs is justified.

A. The Contract Specifically Required the Parties' CEOs to Be Present

24. The laws and rules governing these proceedings do not expressly address determination of the parties' intent. Therefore, in accordance with Article 2A(2) of the Arbitration Model Law and Article 2(2) of the Conciliation Model Law, this Tribunal has discretion to settle questions of the parties' intent with principles in conformity with these model laws. Article 8 of the CISG provides this Tribunal with a means for determining the parties' intent. The CISG is based on the same principles of international commercial dispute resolution as the UNCITRAL Model Laws. [*See Conciliation Model Law Guide to Enactment* ¶ 40; *CISG Art. 7(1)*; *Arbitration Model Law, Art. 2A(1)*]. It is also the law that governs the parties' underlying contract. [*Infra* ¶ 49]. Therefore, this Tribunal should look to Article 8 of the CISG to determine the parties' intent.

25. Under Article 8(1) of the CISG, contracts are to be interpreted according to the actual intent of the parties. [*CISG Ad. Co. Op. No. 3*]. When the subjective intent of a party is difficult to ascertain, the contract should be interpreted according to the understanding a reasonable person of the same kind as the other party would have had in the same circumstances. [*CISG Art. 8(2)*]. All relevant circumstances should be evaluated. [*CISG Art. 8(3)*; *Schlechtriem/Schwenzer, p. 112*].

26. The parties' contract specifically states, "[t]he parties will be represented by their Chief Executive Officer." [*Cl. Ex. 3*]. Claimant suggests that this Tribunal should look past this plain language and find that the agreement could be satisfied by any individual acting with the authority of the CEO. [*Mem. Cl. ¶ 13*]. However, the contract very specifically refers to a single individual—the Chief Executive Officer. Further, Claimant was familiar with this specific language. The contract was reviewed and signed by both parties, first by Claimant and then by Super Pumps. [*Stmt. Clm. ¶ 7*]. Also, this language had previously been used in a contract between the parties. [*Proc. Ord. 2, Q. 27*]. Thus, Claimant was fully aware of this specific requirement.



27. The CEO requirement is clear and unequivocal, and the Claimant could not have been unaware of its meaning. Therefore, this Tribunal may exercise jurisdiction over this dispute only after the parties' Chief Executive Officers meet for conciliation.

B. Claimant Violated the CEO Requirement by Sending Its Deputy CEO

28. Claimant attempts to justify its failure to send the agreed upon representative by claiming that Mr. Holzer's presence at conciliation was proper under general principles of agency. This argument should be dismissed because: **(1.)** Claimant's reliance on principles of agency is misplaced; and **(2.)** Claimant cannot blame Super Pumps for its own failure to adhere to the parties' agreement.

1. An agent of the CEO is not the actual CEO

29. Claimant contends that the Deputy CEO's presence was proper because he was an actual, or an apparent agent of the CEO, in accordance with the UNIDROIT Principles. [*Mem. Cl.* ¶¶ 12, 14, 16]. Agency principles define the legal relationship that exists between principals and their agents, and the contractual dealings agents have with third parties. [*Mechem, p. 13*]. An agent of the CEO may act on behalf of the CEO, but the agent does not actually become the Chief Executive Officer of the company. Here, it does not matter if the Deputy CEO, Mr. Holzer, was authorized by the Claimant's CEO or if it appeared as though he was authorized. [*Mem. Cl.* ¶¶ 15, 18]. Regardless of the agency relationship, Mr. Holzer is not the Claimant's CEO. Claimant's contention would require this Tribunal to read into the parties' agreement: "Chief Executive Officer, *or the CEO's duly authorized representative.*" If Claimant wanted the ability to designate another representative, it should have negotiated with Super Pumps to change the contract.

30. Furthermore, Claimant did not conform to the contract and neglected to inform Super Pumps that Claimant's CEO would not be present at the conciliation. Knowing that there was a CEO requirement, in March 2009, Claimant proposed that conciliation should take place two months later, in May 2009. [*Stmt. Clm.* ¶ 23]. However, Claimant's CEO could not attend the conciliation because of his daughter's wedding, so he sent the Deputy CEO, Mr. Holzer, in his place. [*Proc. Ord. 2, Q. 30*]. Although it is not clear in the record, it can be inferred that this wedding was planned in advance. Therefore, Claimant could have planned around the wedding or notified Super Pumps of the conflict. Claimant never told Super Pumps that its CEO would be absent, or that its Deputy CEO would be there instead. In contrast, Super Pumps abided by the parties' agreement and sent its CEO. [*Stmt. Def.* ¶ 7]. Given these circumstances, this Tribunal can infer that Super Pumps reasonably believed it was negotiating with Claimant's CEO because of Claimant's failure to inform Super Pumps of the change in representation.



31. Therefore, this Tribunal should not apply general principles of agency because, even if Mr. Holzer was authorized by Claimant, he was not the CEO. Claimant proposed a conciliation date its CEO could not make, and made no effort to communicate that conflict to Super Pumps.

2. Claimant cannot justify its contract violation

32. In its memorandum, Claimant improperly attempts to justify its contract violation by blaming Super Pumps for Claimant's own failure to send the correct representative. [*Mem. Cl.* § *A(III)(b)*]. First, Claimant argues that Article 6 of the Conciliation Rules does not require the parties to disclose the title of their representative, and therefore, Super Pumps bore the risk of not knowing Mr. Holzer's title. [*Id.* at ¶ 20]. Although Claimant's interpretation of Article 6 is correct, the parties varied the conciliation rules by expressly agreeing that they would be represented by their CEOs at the conciliation. Article 1(3) of the Conciliation Rules states that, "[t]he parties may agree to . . . vary any of these Rules at any time." The parties expressly chose to require their CEOs to be present at the conciliation. This specific clause in the parties' contract varied Article 6 of the Conciliation Rules and limited the parties' choice of representation to their individual CEOs.

33. Second, Claimant argues that, "[d]ue to [its] long-standing business relationship it was unreasonable for [Super Pumps] to not acknowledge the structure of [the Claimant's] company." [*Id.* at ¶ 21]. However, the parties had been involved in only one other project together, two years ago. [*Proc. Ord.* 2, *Q.* 27]. The parties' business relationship was not frequent; one project is simply not a "long-standing business relationship." Thus, it is unreasonable to infer that Super Pumps should have been aware of Claimant's corporate structure. Further, even if Super Pumps knew of Claimant's corporate structure, Claimant still did not satisfy the contractual precondition.

34. Third, Claimant argues that Super Pumps should have looked at the list of participants that was provided at the Conference to ascertain Mr. Holzer's title. [*Mem. Cl.* ¶ 22]. However, the conciliation and the Conference were two separate events. The conciliation occurred during the Conference because both companies would be present. [*Stmt. Clm.* ¶ 23]. The record does not state that the same individuals that were to attend the Conference would also attend the conciliation. Both Claimant and Super Pumps are sophisticated companies. [*Stmt. Clm.* ¶¶ 1-4]. Super Pumps should not have had to ensure that Claimant complied with a contract requirement by checking a list of participants for a conference that was separate from the conciliation.

35. Therefore, Claimant cannot blame Super Pumps for not knowing Mr. Holzer's title. Claimant knew of the specific CEO requirement and failed to inform Super Pumps that someone other than its CEO would represent it. Claimant should be held accountable for its failure to adhere



to the parties' agreement. Further, this Tribunal should not exercise its jurisdiction because Super Pumps' objection is timely.

C. Super Pumps' Objection Is Timely

36. Claimant argues that Super Pumps agreed to Mr. Holzer's presence because Super Pumps failed to object at the time of conciliation. [*Mem. Cl.* ¶ 26]. This argument is unreasonable for two reasons. First, unlike the ACICA Rules and the Arbitration Model Law, the Conciliation Rules and Conciliation Model Law do not contain provisions for filing objections. Second, Super Pumps could not have objected at the conciliation because it was unaware that Claimant was violating the parties' agreement. [*Stmt. Def.* ¶ 7]. Claimant did not disclose Mr. Holzer's title, and Super Pumps' CEO did not know Mr. Holzer's title until after the conciliation ended. [*Id.*]. Thus, even if Super Pumps had an obligation to object at the time of the conciliation, it could not have objected because it was unaware there was anything to object to—it objected when it was required to do so.

37. As established in ¶ 21, the parties expressly chose the ACICA Rules to govern this arbitral proceeding, and the Arbitration Model Law applies as the law of the seat of arbitration. According to Article 31 of the ACICA Rules, “[a] party that knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without *promptly* stating its objection to such non-compliance, shall be deemed to have waived its right to object.” [*Emphasis added*]. Additionally, Article 4 of the Arbitration Model Law requires a party to object to any non-compliance of the arbitration agreement without undue delay. Super Pumps' objection was effective because it is in compliance with the ACICA Rules. Specifically, Article 24.3 of the ACICA Rules requires that objections to the arbitral tribunal's jurisdiction be raised no later than in the Statement of Defense. The Statement of Defense may be contained in the Respondent's Answer to Notice of Arbitration, which is due within 30 days of the Respondent receiving the Claimant's Notice of Arbitration. [*ACICA Art. 5.1, 22.1*].

38. Here, Super Pumps' Statement of Defense was contained in its Answer to Notice of Arbitration. [*Rec. p. 32*]. It responded to Claimant's Notice of Arbitration before the 30-day deadline and appropriately objected to this Tribunal's jurisdiction. [*Id.*; *Stmt. Def.* ¶ 8]. Therefore, Super Pumps' objection was done promptly and without undue delay in accordance with Article 31 and 24.3 of the ACICA Rules.

39. Super Pumps' objection to this Tribunal's jurisdiction is timely because Super Pumps objected as required under the relevant rules and law. Also, because the precondition to arbitration



was not fulfilled, this Tribunal should not exercise its jurisdiction, but instead, should postpone the arbitration proceeding until after the parties conciliate in accordance with their agreement.

D. Requiring the Parties to Conciliate Is Justified

40. In ¶ 27 of its memorandum, Claimant states that, because the conciliator terminated the conciliation in accordance with Article 15(b) of the Conciliation Rules and Article 11(b) of the Conciliation Model Law and no settlement agreement was reached, further efforts at conciliation are no longer justified. This assertion is incorrect. As required by Article 15(b) of the Conciliation Rules, the conciliator consulted the parties before terminating the proceeding, but at the time, Super Pumps was still unaware that Claimant was in violation of the parties' agreement. [*Proc. Ord. 2, Q. 32*]. This Tribunal can infer from Super Pumps' jurisdictional objection that it would prefer to conciliate with Claimant's CEO and resolve this dispute amicably.

41. Furthermore, not enforcing the parties' agreement would contradict the very nature of conciliation and hinder its success as an alternative form of dispute resolution. The UNCITRAL Conciliation Model Law Guide to Enactment and Use is intended to be used for interpreting the Conciliation Model Law, which, as established in ¶ 21, is binding on this Tribunal. The Guide indicates that conciliation is a process that is entirely consensual and relies heavily on the will of the parties. [*Conciliation Model Law Guide to Enactment ¶ 6*]. Therefore, it is crucial for courts and tribunals to recognize the flexibility of conciliation procedures and the parties' autonomy to adapt the process to their wishes. [*Id. at ¶ 9*]. These features have made conciliation successful, and it has become a preferred and promoted method of dispute resolution. [*Id. at ¶ 8*]. Thus, tribunals should be especially receptive of the parties' efforts to tailor the conciliation proceedings.

42. Super Pumps and Claimant tailored their conciliation proceedings by agreeing that they would be represented by their CEOs at the conciliation. Claimant did not adhere to this agreement and sent its Deputy CEO without Super Pumps' consent. If this Tribunal does not enforce the parties' agreement it will contravene the recommendations of the Conciliation Model Law Guide to Enactment and Use. Therefore, because the precondition to arbitration was not fulfilled and Super Pumps is willing to conciliate in accordance with the parties' agreement, a further attempt to conciliate is justified, and this Tribunal should decline jurisdiction.

43. The precondition to arbitration was not satisfied because Claimant violated its contractual obligation by not adhering to the parties' CEO requirement. Claimant is now attempting to escape accountability by placing the blame on Super Pumps when it was fully aware of the CEO requirement and unilaterally sent Mr. Holzer to the conciliation. Super Pumps is willing to attend



conciliation in accordance with the parties' agreement, and it would be in the best interests of the parties if they could amicably resolve their dispute without further delay.

44. Therefore, this Tribunal should decline jurisdiction and require the parties to conduct conciliation in accordance with their agreement. If this Tribunal instead declines to enforce this parties' agreement, it risks rendering an unenforceable award.

II. AN AWARD RENDERED BY THIS TRIBUNAL MAY BE UNENFORCEABLE

45. One of a tribunal's primary duties is to render an enforceable award. [*Redfern/Hunter*, p. 432]. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("NY Convention") is the means to ensure arbitral awards are recognized and enforced. However, under the NY Convention, the recognition and enforcement of an award may be refused if a party proves that "the arbitral procedure was not in accordance with the agreement of the parties." [*NY Convention, Art. V(1)(d); Born Vol. II, p. 2595*]. Specifically, if a tribunal renders an award before a precondition to arbitration has been satisfied, then the arbitral procedure was not conducted in accordance with the agreement of the parties. [*Born Vol. I, p. 243*].

46. An award rendered by this Tribunal may be unenforceable because the arbitral procedure would be conducted in violation of the parties' agreement. It is uncontested that the parties agreed to engage in conciliation as a precondition to arbitration. [*Cl. Ex. 3; Mem. Cl. ¶ 4*]. The parties' agreement specifically required them to be represented by their CEOs at the conciliation. This precondition to arbitration was not fulfilled because, without Super Pumps' knowledge, Claimant sent its Deputy CEO. Until the precondition to arbitration is fulfilled, the arbitral procedure cannot be conducted in accordance with the parties' agreement. Therefore, if this Tribunal proceeds, it risks rendering an unenforceable award.

47. The parties have not fulfilled their precondition to arbitration because their contract had specifically required that the parties be represented by their CEOs at the conciliation, and Claimant sent its Deputy CEO. Claimant knew of the CEO requirement, failed to comply, and failed to disclose its change in representatives to Super Pumps. Super Pumps is willing to attempt to amicably settle this dispute in conciliation, and the parties should be required to fulfill their conciliation obligation prior to proceeding with arbitration. Therefore, this Tribunal should find the precondition to arbitration was not properly fulfilled and should decline jurisdiction.



PART TWO: ARGUMENTS REGARDING THE MERITS

48. The CISG does not require parties to overcome extreme circumstances in order to perform on a contract. It does not require a party to predict the unpredictable. It does not require a party to see the unforeseeable. It does not require a party to know the unknown. Super Pumps and Claimant entered into a contract for the purchase of pumps on 1 July 2008. [*Cl. Ex. 3*]. The contract included a clause stating that the pumps “are in compliance with all relevant regulations” [*Id.*]. Super Pumps provided pumps in accordance with this clause. Super Pumps allowed the contract to be modified to satisfy Claimant’s 1 August 2008 request for beryllium-free P-52 pumps. [*Cl. Ex. 6*]. Super Pumps kept Claimant informed of the unforeseeable developments that occurred during the course of performance. [*Cl. Exs. 6–7, 9–10*]. Claimant did the opposite. It remained silent after receiving the new modified terms. [*Cl. Ex. 6*]. It remained silent after Super Pumps informed it of the unforeseeable delay at the Isthmus Canal. [*Cl. Ex. 9*]. It remained silent after Super Pumps notified it that delivery would take place on 6 January 2009. [*Cl. Ex. 10*]. And, it chose to do nothing to mitigate its loss. Therefore, this Tribunal should deny Claimant any recovery for damages or restitution because Super Pumps did everything required under the contract, while Claimant consistently remained inactive.

49. Super Pumps agrees with Claimant that the CISG governs the contract for the sale of goods in this case. [*Mem. Cl. ¶ 11*]. The CISG applies when parties enter into a contract for the sale of goods and their places of business are in different signatory states. [*CISG Art. 1(1)(a)*]. Both Equatoriana and Mediterraneo have signed and adopted the CISG, and the contract in dispute has no choice of law provision. [*Stmt. Clm. ¶ 24*]. Therefore, the CISG governs the formation of this contract and the rights and obligations of the parties. [*CISG Art. 4*]. In deciding the merits of this case, this Tribunal should find: **(I.)** Super Pumps did not have an obligation to provide pumps in conformity with regulations adopted after the conclusion of the contract; **(II.)** Super Pumps did not breach the contract by delivering after 15 or 22 December 2008; and **(III.)** Claimant failed to mitigate the consequences of the canceled irrigation contract.

I. SUPER PUMPS DID NOT HAVE AN OBLIGATION TO PROVIDE PUMPS THAT CONFORMED TO REGULATIONS ADOPTED AFTER THE CONCLUSION OF THE CONTRACT

50. This Tribunal should find that Super Pumps was not required to conform to regulations adopted after the conclusion of the contract. Super Pumps’ obligations were defined by the terms of the contract and the CISG. [*CISG Art. 30*]. In complying with the language of the contract and the CISG **(A.)** Super Pumps delivered pumps that conformed to Article 35 of the CISG. One



month after the conclusion of the contract, and before production of some of the pumps, **(B.)** the parties modified the terms of the original contract to comply with a new environmental regulation that required some of the pumps to be beryllium free. [*Cl. Exs. 5–6*]. Nonetheless, after the pumps were produced, packaged, in transit, and five days before the expiration of Claimant’s irrigation contract, a second environmental regulation was passed that required all pumps imported into and manufactured in Oceania to be beryllium free. [*Cl. Ex. 11*]. Unlike the first regulation, the parties did not modify the contract to include this second regulation. Therefore, under the agreed contractual terms **(C.)** Super Pumps was not required to conform to this second regulation.

A. The Delivered Pumps Conformed to Article 35 of the CISG

51. Article 35 of the CISG establishes the standard of conformity that determines “when goods are deemed to conform with the contract.” [*Schlechtriem/Schwenzer, p. 411*]. Here, Super Pumps complied with the required standards of conformity for three reasons: **(1.)** Super Pumps provided pumps that were of the quantity, quality, and description required by the contract and Article 35(1); **(2.)** Super Pumps provided pumps that were fit for the purpose for which pumps of the same description would ordinarily be used under Article 35(2)(a); and **(3.)** Super Pumps provided pumps that were fit for the particular purpose at the time the contract was concluded under Article 35(2)(b). Therefore, this Tribunal should find that in accordance with the original contract, Super Pumps did not have an obligation under Article 35 of the CISG to provide pumps in conformity with regulations passed after the contract was concluded.

1. The pumps conformed to the language of the warranty

52. Sellers have a duty to provide goods that are of the “quality, quantity and description” set forth in the contract. [*CISG Art. 35(1)*]. Super Pumps and Claimant concluded their contract on 1 July 2008. [*Cl. Ex. 3*]. The contract called for the sale of “pumps from its N series as described in Annex I together with three P-52 pumps.” [*Id.*]. Additionally, the contract included a warranty clause stating that “[t]he pumps shall meet the technical specifications set out in Annex I. Equatoriana Super Pumps warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania.” [*Id.*].

53. Claimant is correct when it states that Super Pumps was bound to deliver goods that conformed to the contract and Article 35(1) of the CISG. [*Mem. Cl. ¶ 35*]. However, Claimant is incorrect when it states that Super Pumps was obligated to provide pumps that conformed to the 1 August 2008 and 1 January 2009 regulations. [*Id.*]. Super Pumps’ primary obligation was to deliver pumps that were of the “quantity, quality and description required by the contract.” [*CISG Art.*



35(1)]. Super Pumps fulfilled this obligation. The pumps even complied with Claimant’s request to modify the contract and conformed with the 1 August 2008 regulation. [*Infra* ¶¶ 74–80]. This Tribunal should find that that the pumps conformed to the contract language as required by Article 35(1) for two reasons: **(a.)** the contract language is not prospective because the contract was written in present tense and a reasonable person would not interpret it as forward looking; and **(b.)** the canon of *contra proferentem* is not applicable because both parties drafted the warranty clause.

a. The contract language is not prospective

54. The contract language is the primary source of the parties’ rights and responsibilities. [*Schlechtriem/Schwenzer*, p. 83]. In accordance with Article 35(1) of the CISG, tribunals should look first to the plain language of the contract. [*Id.* at p. 413; *Honnold*, p. 225]. When interpreting the contract language, reference should be made to Article 8(3) of the CISG. [*Schlechtriem/Schwenzer*, p. 413]. Under Article 8(3), “[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case.”

55. Claimant contends that Super Pumps was obligated to provide pumps that conformed to all regulations, including regulations “prior or subsequent to the conclusion of the contract.” [*Mem. Cl.* ¶ 51]. However, the language of the contract states, “Super Pumps warrants that the pumps are in compliance with all relevant regulations” [*Cl. Ex.* 3]. This clause is written in present tense and was a statement made the date the contract was concluded, 1 July 2008. [*Id.*]. Contrary to Claimant’s assertion, it does not include subsequent regulations. [*Mem. Cl.* ¶ 51]. The parties were free to include any language regarding future regulations in the contract. However, neither party elected to do so. The present-tense language indicates that the parties did not intend to be bound by regulations passed after the conclusion of the contract.

56. Moreover, in accordance with Article 8(3) of the CISG, the parties’ conduct subsequent to the conclusion of the contract indicates that the parties did not intend for the contract language to be prospective. When Claimant notified Super Pumps of the 1 August 2009 regulation, it acknowledged “that the ore mined in Equatoriana has beryllium in it.” [*Cl. Ex.* 5]. Additionally, it acknowledged that Super Pumps would “have to find steel from some other source in producing” the P-52 pumps. [*Id.*]. Claimant did not refer to the contract when it asked for this change. Claimant did not demonstrate a belief that the contract language was prospective. Its affirmative steps of notifying Super Pumps of the change and asking Super Pumps to adapt to it indicates an understanding that Super Pumps was not aware or required to comply with this unforeseen regulations. Furthermore, Super Pumps’ reply to this e-mail stated that it had fulfilled its contractual



obligations in regard to regulations in place when the contract was concluded. [Cl. Ex. 6]. This indicates that Super Pumps and Claimant shared the belief that the contract language was not prospective. It would have been unreasonable for Super Pumps to agree to comply with a regulation that was nonexistent. Thus, the parties' conduct indicates that neither party intended for the contract language to be prospective.

57. Claimant incorrectly relies on the doctrine of promissory estoppel to argue that the language of the contract should not be limited to a present-tense interpretation. [Mem. Cl. ¶ 47]. Promissory estoppel is a theory that protects a promisee who has relied, to his detriment, on a promise even when other facets of enforceability are absent. [Blum/Bushaw, p. 241]. In the U.S., under promissory estoppel, “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” [Restatement of Contracts 2d, §90]. However, as established in ¶ 49, the parties' contract is governed by the CISG. Promissory estoppel is not a doctrine found in the CISG, and because it is not part of the CISG, promissory estoppel should not apply in this case.

58. However, even if this Tribunal finds promissory estoppel applicable, Super Pumps is still not liable. Using promissory estoppel, Claimant suggests that Super Pumps waived its right to rely on a limited warranty because Super Pumps' conduct induced Claimant to believe that Super Pumps would provide pumps conforming to the new regulations in Oceania. [Mem. Cl. ¶¶ 47, 49]. Claimant relies on a Canadian superior court case for support. [General Refractories Co. of Canada v. Venturedyne Ltd., Canada 2002]. In that case, the court found that the seller had waived the one-year limitation on its warranty because it promised to repair the product after the warranty period expired, and the other party had relied on that promise.

59. Unlike the seller in that case, Super Pumps did not promise Claimant that it would comply with regulations passed after the contract was concluded. Super Pumps did not deviate from the language of the contract. This is reflected in the 2 August 2008 e-mail in which Super Pumps offered new terms in order to comply with the 1 August 2008 regulation. [Cl. Ex. 6]. Super Pumps was clear when it stated, “[s]ince all of the pumps that we will be shipping to you were regulation-compliant for export to Oceania when the contract was signed, we will have fulfilled our contractual obligation in that regard.” [Id.]. It was willing to comply with the 1 August 2008 regulation, only if Claimant paid an additional \$30,000, and if it was released from its original delivery date. [Id.]. The conduct of the parties and the language of the 2 August 2008 e-mail are proof that Super Pumps did



not induce Claimant to believe that it would provide pumps in compliance with any new regulations in Oceania—they prove the opposite. Therefore, Super Pumps urges this Tribunal to find that the language of the contract is not prospective. To the extent the clause is not clear, however, the tribunal should not apply *contra proferentem* to construe the clause in Claimant’s favor.

b. *Contra proferentem* is not applicable

60. Under the internationally known canon of *contra proferentem*, any ambiguities in a contractual term are interpreted against the drafter. [UNIDROIT *Principles Art. 3.6*; *Sykes*, p. 67; *Schlechtriem/Schwenzer*, p. 133]. Yet, if both parties contributed to a clause, then *contra proferentem* does not apply. [*Sykes*, p. 67]. Here, the contract terms are clear. If this Tribunal finds ambiguity, however, the fact that both parties contributed to the clause makes *contra proferentem* inapplicable.

61. Claimant argues that Super Pumps was required to provide pumps that complied with the new regulations because it “arrange[d] the wording of the warranty.” [*Mem. Cl.* ¶ 50]. However, Claimant neglects the fact that Super Pumps and Claimant both worked on the warranty clause found in the contract. [*Proc. Ord. 2, Q. 9*]. Claimant requested the inclusion of the warranty in the contract. [*Id.*]. Super Pumps provided the language. [*Id.*]. Claimant then reviewed the language and deemed it satisfactory. [*Id.*]. Therefore, because both parties contributed to the creation of the warranty clause, this Tribunal should not construe ambiguities against Super Pumps.

62. The pumps provided by Super Pumps were of the quantity, quality, and description required by the contract because the contract language was not prospective. Also, Super Pumps was not the sole drafter of the warranty clause, so *contra proferentem* is inapplicable. Therefore, this Tribunal should find that Super pumps fulfilled its obligation under Article 35(1).

2. The pumps were fit for their ordinary purpose in Oceania

63. Although Claimant not challenge the pumps’ conformity to the ordinary purpose standard, a full analysis under Article 35 of the CISG merits some discussion of the ordinary purpose standard. Under Article 35(2)(a), goods are conforming if they “are fit for the purpose for which goods of the same description would ordinarily be used.” Generally, goods comply with this standard if they can be resold. [*Schlechtriem/Schwenzer*, p. 416]. Here, there is no indication that the pumps are defective and cannot be used in another project. Neither party argues that the pumps are not fit for their ordinary use or cannot be resold. In fact, as of July 2009, the pumps were still available for resale, indicating their fitness for future use. [*Stmt. Clm.* ¶ 22].

64. Additionally, some scholars argue that the goods must be fit for the ordinary use at the seller’s place of business. [*Honnold*, p. 225]. Other scholars argue that the goods must comply with



the ordinary use at the place of their intended use. [*Id.*]. In the *New Zealand Mussels Case*, the German Supreme Court ruled that generally a seller does not have an obligation under Art. 35(2)(a) or 35(2)(b) of the CISG to provide goods that conform with rules specific to the country of importation. [*New Zealand Mussels Case, Germany 1995*].

65. Here, Super Pumps acknowledges that, based on the language of the warranty clause, the pumps needed to be fit for their ordinary use in Oceania. [*Cl. Ex. 3*]. Nonetheless, as established in ¶¶ 54–55, Super Pumps was required only to provide pumps that fit the ordinary purpose for use at the time of the conclusion of the contract. The 1 August 2008 and the 1 January 2009 regulations were adopted after the conclusion of the contract. Although Super Pumps complied with the first regulation, it did so only because the parties modified their contract. [*Infra* ¶¶ 74–80]. The parties never modified their contract to include the 1 January 2009 regulation, and because this regulation was passed after the conclusion of the contract, Super Pumps was not required to conform to the ordinary purpose as of 1 January 2009.

66. Furthermore, there were no exceptions that made compliance with the 1 January 2009 regulation necessary. The *New Zealand Mussels Case* lists several exceptions in which a seller must conform to the buyer's public law requirements. These exceptions include: (1) when the same rules also exist in the seller's country; (2) when the buyer draws the seller's attention to their existence; and (3) when the seller knows of the rules due to special circumstances. First, no similar regulations existed in Equatoriana or any of the 50 countries to which Super Pumps had previously delivered pumps. [*Proc. Ord. 2, Q. 19; Cl. Ex. 6*]. Second, although Claimant brought the 1 January 2009 regulation to Super Pumps' attention, it did so after the pumps were in transit, and three days before the regulation would go into effect. [*Cl. Ex. 11*]. At the time of contracting in July 2008, Claimant could not draw Super Pumps' attention to the 1 January 2009 regulation because this regulation did not exist. Third, there were no special circumstances that made Super Pumps aware of the 1 January 2009 regulation until it was actually passed. The 1 August 2008 regulation gave no indication that the environmental requirements would become even stricter within four months. [*Cl. Ex. 4*]. Therefore, Super Pumps was not required to conform to the ordinary purpose as of 1 January 2009 since the regulation was adopted after the conclusion of the contract, and there were no exceptions that made it necessary for Super Pumps to comply.

67. Super Pumps provided pumps that were resalable and that could be used in another project. It was not required to comply with the 1 August 2008 or 1 January 2009 regulation because each was



adopted after the conclusion of the contract. Therefore, Super Pumps met its obligation under Article 35(2)(a) of the CISG by providing pumps that were fit for the ordinary purpose.

3. The pumps were fit for their particular purpose

68. Article 35(2)(b) of the CISG required Super Pumps to provide pumps that were “fit for any particular purpose expressly or impliedly made known to . . . [it] *at the time of the conclusion of the contract*, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment.” [*Emphasis added*]. The reason the conformity standard is judged at the time of contracting is so the seller can determine whether it is able to furnish the appropriate goods. [*Secretariat Commentary on Art. 35*].

69. Super Pumps agrees with Claimant’s assertion that Super Pumps knew that the particular purpose of the pumps was for use in the irrigation contract. [*Mem. Cl. ¶ 40*]. However, at the time of conclusion, no regulations in existence required the pumps to be beryllium free. More than a month passed after the contract was concluded before any regulation was adopted. [*Cl. Exs. 4, 11*]. Super Pumps agreed to provide pumps that would meet the particular purpose known at the time the contract was concluded. This is exactly what Super Pumps provided. It provided pumps that were fit for the particular purpose known on 1 July 2008.

70. Claimant argues that it relied on Super Pumps’ representation regarding the pumps and because of that reliance, Super Pumps is liable for a breach of warranty under Article 35(2)(b). [*Mem. Cl. ¶ 43*]. Claimant cites a U.S. district court case in support of its argument that the seller is liable for non-conforming goods if the buyer relied on seller’s judgment. [*Schmitz-Werke v. Rockland, U.S. 2002*]. However, in *Schmitz-Werke*, the circumstances were significantly different than those before this Tribunal. [*Id.*]. There, the parties entered into a contract for the purchase of fabric to be used for transfer printing. Problems arose during the transfer printing process, however, the seller reassured the buyer that the fabric could successfully be transfer printed. Relying on the seller’s assurances, the buyer bought more fabric. However, the final product was of low quality. The buyer was found to have reasonably relied on the seller’s assurances to continue to use the faulty fabric, and consequently, the seller was held liable. [*Id.*].

71. Here, the circumstances differ from those of *Schmitz-Werke*. First, unlike the seller in that case, Super Pumps never reassured Claimant of the pumps’ quality after the contract was concluded. Second, unlike the goods in that case, here, the pumps provided were not faulty or of a lower quality. Third, unlike the nonconformity in that case, here, any possible nonconformity was due to



unforeseen government regulations. Therefore, the reasoning of the *Schmitz-Werke* case does not apply to this case.

72. Claimant also argues that the parties' collaboration in the Patria project two years ago caused it to rely on Super Pumps' skills and judgment. [*Mem. Cl.* ¶ 44]. However, nothing in the record indicates that the circumstances surrounding that project were similar to the circumstances here. There are no facts that indicate whether any regulations were passed after the contract concluded. Rather, the only known similarity is that both were irrigation projects. [*Stmt. Clm.* ¶ 5]. Even if Claimant somehow relied on the parties' previous collaboration, the fact remains that the pumps were fit for their particular purpose known at the time the contract was concluded. Thus, the parties' collaboration in the Patria project does not impact the outcome of this case.

73. Super Pumps provided pumps that were of the quantity, quality, and description of the contract. The pumps were also fit for their ordinary and particular purpose. Therefore, this Tribunal should find that the delivered pumps conformed to the requirements of the contract in accordance with Article 35 of the CISG.

B. Acceptance of the First Regulation Was Based on a Modification

74. Contrary to Claimant's assertion that Super Pumps accepted the 1 August 2008 regulation in order to comply with the warranty clause in the contract, [*Mem. Cl.* ¶ 52], Super Pumps complied only because the contract was modified to include new terms. Under the CISG, "[a] contract may be modified or terminated by the mere agreement of the parties." [*CISG Art. 29(1)*]. It is well established that the agreement need not be explicit or supported by consideration. [*Honnold, pp. 201–202*]. Rather, modification can occur through conduct. [*CISG Art. 18(3); Honnold, p. 202*]. Further, in accordance with the CISG, no writing is required. [*CISG Art. 11; Schlechtriem, p. 329*]. Nonetheless, the formation rules found in Part II of the CISG apply to modifications. [*Schlechtriem, p. 329; Viscasillas*]. Thus, a reply to an offer that contains materially different terms constitutes a counteroffer. [*CISG Art. 19(1)–(2); Honnold, p. 250*].

75. Article 19(3) of the CISG states that changes to terms such as price, payment, quality, time of delivery, and liability are material alterations. For example, in a case decided by the German Court of Appeals, the seller requested a modification of the delivery date. The buyer agreed, but modified the requested delivery date. There, the court found that the buyer's reply to the seller's requested modification was a counteroffer because the new date was a materially different term. [*Automobiles Case, Germany 1995*].



76. In this case, on 1 August 2008, Claimant requested that the P-52 pumps be produced without beryllium. [*Cl. Ex. 5*]. Claimant acknowledged that Super Pumps would have to import new steel to satisfy this request. [*Id.*]. Claimant's request for beryllium-free P-52 pumps was a request to modify a material term of the contract because it changed the quality of the goods. On 2 August 2008, Super Pumps replied to this request. [*Cl. Ex. 6*]. Super Pumps' reply included an approximate \$30,000 increase in price and indicated that compliance with the terms of Claimant's offer would "delay the completion of the job by several weeks." [*Id.*]. Also, Super Pumps stated that it could not "be held responsible for the delay in shipping the pumps." [*Id.*]. Therefore, Super Pumps' reply was a counteroffer because it contained changes to the price, delivery date, and liability, which materially altered the Claimant's offer.

77. Super Pumps' counteroffer was accepted through Claimant's silence and conduct. Although silence alone is insufficient to constitute acceptance of the counteroffer, silence coupled with conduct constitutes acceptance. [*CISG Art. 18(1), 18(3); Honnold, p. 250*]. In a U.S. federal court case, the court held that an offeree who receives an offer and remains silent, knowing that the offeror has commenced performance, is deemed to have accepted the terms of the offer. There, the seller wrote a letter to the buyer indicating the terms of the contract. The buyer did not reply, but complied with the requirement of opening a letter of credit. The seller commenced performance. When a dispute arose, the buyer denied that it had accepted the offer. However, the court found that the buyer had accepted through its silence and conduct. [*Filanto v. Chilewich, U.S. 1992*]. Like the buyer in *Chilewich*, Claimant remained silent for over three months after receiving the counteroffer and allowed Super Pumps to continue performance.

78. A reasonable person in Super Pumps' position would have understood Claimant's conduct to constitute acceptance of the counteroffer. The statements and conduct of "a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstance." [*CISG Art. 8(2)*]. First, Claimant never asked Super Pumps to stop performance even though it knew that Super Pumps would have to import new steel and produce new P-52 pumps. [*Stmt. Clm. ¶ 11*].

79. Second, Claimant never objected to the terms of the counteroffer. Super Pumps' reply on 2 August 2008 stated that it had fulfilled its contractual obligations regarding the original contract. [*Cl. Ex. 6*]. Claimant did not object. Additionally, Super Pumps stated that it "cannot be held responsible for the delay in shipping the pumps." [*Id.*]. Again, Claimant did not object. In its reply, Super Pumps also stated that it "cannot be expected to absorb the extra expense caused by the



completely unforeseen change in regulations.” [*Id.*]. Like with the other terms, Claimant made no objection. Finally, Claimant never canceled its letter of credit and allowed Super Pumps to collect payment after it received the counteroffer. [*Stmt. Clm.* ¶ 13].

80. A reasonable person would have interpreted Claimant’s silence and conduct as acceptance of the modification. Therefore, this Tribunal should find that a modification took place, and that compliance with the 1 August 2008 regulation was due to a modification of the original contract terms.

C. Super Pumps Was Not Obligated to Comply with the Second Regulation

81. Claimant fails to acknowledge that Super Pumps was not contractually obligated to comply with the second regulation. The contract language stated, “the pumps are in compliance with all relevant regulations for *importation* into Mediterraneo and for *use* in Oceania.” [*Cl. Ex. 3, emphasis added*]. This language warranted compliance with only Mediterraneo’s importation rules—not Oceania’s importation rules. The 1 January 2009 regulation prohibited only “the *import* or manufacture of products containing . . . beryllium” in Oceania, not the use of those products. [*Cl. Ex. 11, emphasis added*]. The pumps complied with the regulations for use in Oceania. Super Pumps was required to import the pumps into Mediterraneo only, and Claimant was then obligated to deliver the pumps to Oceania for their use. Therefore, the 1 January 2009 regulation was not covered under the contractual language, and Super Pumps was not required to comply.

82. Claimant argues that Super Pumps’ behavior concerning the 1 August 2008 regulation bound it to comply with the second regulation. [*Mem. Cl.* ¶ 52]. However, the specific circumstances surrounding each regulation differed significantly. Claimant fails to acknowledge that the 1 August 2008 regulation took place prior to production of some of the pumps and five months prior to delivery. [*Cl. Exs. 6, 10*]. The second regulation, however, was passed after the pumps were produced, while the pumps were in transit to Mediterraneo, and a few days before the expiration of the irrigation contract. [*Cl. Ex. 11*]. Moreover, as stated above, Super Pumps’ compliance with the 1 August 2008 regulation was based on a change in price, delivery date, and liability. [*Supra* ¶ 76]. Hence, a modification of the contract agreed to by both parties. No such agreement or understanding occurred regarding the 1 January 2009 regulation.

83. Any further compliance with new regulations would have likely required further modification of the terms. However, no discussion of a modification took place regarding the 1 January 2009 regulation. Claimant’s e-mail on 28 December 2008 informed Super Pumps of the new regulation. [*Cl. Ex. 11*]. Unlike the 1 August 2008 notice of the first regulation, this notice did



not request for Super Pumps to comply with this new regulation. Additionally, Super Pumps did not respond to the 28 December 2008 notice, as it had done with the first regulation. [*Cl. Ex. 6*]. This behavior by the parties indicates their understanding that based on the circumstances of this case, compliance with the second regulation would be unreasonable.

84. Super Pumps urges this Tribunal to find it was not obligated to provide pumps in conformity with regulations passed after the conclusion of the contract. Super Pumps provided pumps that were fit for their ordinary and particular purpose, and of the quantity, quality, and description stated in the contract and in the subsequent modification. Therefore, Super Pumps delivered goods in compliance with the contract and with Article 35 of the CISG.

II. SUPER PUMPS WAS NOT IN BREACH BY DELIVERING AFTER 15 OR 22 DECEMBER 2008

85. There are several reasons why Super Pumps was not in breach by delivering after 15 or 22 December 2008. Although Claimant addresses some of these reasons, it failed to address all of them. The parties' original contract established 15 December 2008 as the delivery date. [*Cl. Ex. 3*]. However, **(A.)** the parties modified their contract through the 2 August 2008 e-mail, which extended the original delivery date by several weeks, making 6 January 2009 a proper date for delivery. Should this Tribunal find that the 2 August 2008 e-mail did not lead to a modification, alternatively, Super Pumps was still not in breach because **(B.)** Claimant accepted Super Pumps' requests to cure. Consequently, because Super Pumps was not in breach **(C.)** Claimant's avoidance was improper. Nonetheless, even if this Tribunal finds that a breach did occur **(D.)** Article 79 of the CISG exempts Super Pumps from liability.

A. The Original Delivery Date Was Modified

86. As established above, the parties modified the terms of their original contract through the 2 August 2008 counteroffer. [*Supra* ¶¶ 74–80]. Under the original contract, Super Pumps was to complete performance by 15 December 2008. [*Cl. Ex. 3*]. However, under the modified terms, completion of the job would be delayed by “several weeks.” [*Cl. Ex. 6*]. The word “several” means more than two. [*Webster*]. Super Pumps' delivery on 6 January 2009, three weeks after the original delivery date, falls within the scope of this definition. Claimant accepted these terms through its silence and conduct. [*Supra* ¶¶ 77–80].

87. Allowing Claimant to deny acceptance of the modified terms would conflict with the need to promote principles of good faith and efficiency in international trade. [*Honnold, pp. 99–100; Design of Radio Phone Case, Belgium, 2002* (stating that to facilitate international trade, a party must protest immediately or within a reasonable amount of time if it does not agree with the terms



included in an offer)]. Claimant received the counteroffer on 2 August 2008. [*Cl. Ex. 6*]. The pumps did not leave port until 22 November 2008. [*Cl. Ex. 7*]. Hence, Claimant had more than three months to reply to the counteroffer before the goods were shipped. During that time, Claimant could have raised concerns over the new terms, asked for a clarification of the delivery date, or rejected the modification. Yet, it chose to do nothing, allowing Super Pumps to perform.

88. If Claimant did not agree with the terms of the counteroffer, then it should have objected. Instead, Claimant allowed Super Pumps to deviate from its routine production and import beryllium-free steel to satisfy Claimant's request. [*Cl. Ex. 5*]. Claimant allowed Super Pumps to incur an additional \$30,000 worth of expenses. [*Cl. Ex. 6*]. Claimant allowed Super Pumps to put in more than three months of labor. Allowing Claimant to deny acceptance after Super Pumps produced and delivered pumps would be unjust, and inconsistent with the promotion of international trade. Therefore, Super Pumps urges this Tribunal to find that Claimant's silence coupled with its conduct constituted acceptance of the modification, thus, making delivery after 15 or 22 December 2008 proper.

B. Claimant Accepted Super Pumps' Requests to Cure

89. If this Tribunal finds that the 2 August 2008 counteroffer did not modify the contract, this Tribunal should find that Claimant accepted Super Pumps' subsequent requests to cure. Allowing a party to cure promotes efficiency in international trade. Under Article 48(1), a seller may "remedy . . . any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement." Notice by a seller indicating that it will cure any deficiency in performance within a specified period of time serves as a request to cure. [*CISG Art. 48(3); Huber/Mullis, p. 221*].

90. Super Pumps' e-mail on 22 November 2008 served as notice of a request to cure. The e-mail stated that the pumps would arrive in Mediterraneo "around 22 December." [*Cl. Ex. 7*]. On 24 November 2008, Claimant replied that it would "have to go along." [*Cl. Ex. 8*]. Claimant concedes that this reply was an acceptance of the 22 December 2008 delivery date. [*Mem. Cl. ¶ 58*].

91. Furthermore, Super Pumps' 12 December 2008 e-mail also served as a request to cure. [*Cl. Ex. 10*]. As stated above, "notice by the seller that [it] will perform within a specified period of time" serves as a request to cure. [*CISG Art. 48(3); Supra ¶ 89*]. Under Article 48(2), when a buyer fails to respond to a request within a reasonable amount of time, the seller has a right to perform within the time specified in the request. [*Huber/Mullis, p. 221*]. Unlike under Article 18(1) of the CISG, under Article 48(2) mere silence leads to acceptance. [*Id.*]. This rule protects sellers from



uncooperative buyers. [*Will, Art. 48*]. Additionally, unlike Article 48(1) of the CISG, under Article 48(2) “the silent buyer will be barred from invoking either unreasonable delay or inconvenience and may not avoid the contract nor reduce the price, he must accept performance.” [*Id.*].

92. Super Pumps provided Claimant notice of its intent to cure on 12 December 2008 when it stated that the new anticipated date of delivery was 6 January 2009. [*Cl. Ex. 10*]. Claimant had an opportunity to reject the offer, but it failed to reply to Super Pumps’ request. Once again, Claimant chose to remain silent. Under Article 48(2), Claimant’s silence led to acceptance of Super Pumps’ request to cure. This result is meant to protect sellers from “futile attempts at subsequent performance.” [*Schlechtriem/Schwenzler, p. 571*]. Therefore, Claimant’s silence gave Super Pumps the right to cure until 6 January 2009. If this Tribunal finds that no modification took place on 2 August 2008, Super Pumps urges this Tribunal to find that Claimant accepted Super Pumps’ 22 November 2008 and 12 December 2008 requests to cure, which made delivery after 15 or 22 December 2008 proper.

C. Claimant’s Avoidance Was Improper

93. Although this Tribunal has not requested a discussion of whether Claimant was entitled to avoid the contract, Claimant’s extensive focus on this question merits some response to its assertions. [*Proc. Ord. 2, Q. 6; Mem. Cl. ¶¶ 54–65, 76–78*]. Avoidance is a remedy of last resort under the CISG and should be exercised restrictively. [*Schwenzler, Mullis, p.339; Lookofsky*]. The only time a buyer may avoid a contract is when there has been a fundamental breach or a violation of a *Nachfrist* period. [*CISG Art. 49(1)(a)*]. Here, Claimant was not entitled to avoid the contract for three reasons: **(1.)** Super Pumps’ delivery after 15 or 22 December 2008 did not result in a fundamental breach; **(2.)** Super Pumps did not violate a *Nachfrist* period; and **(3.)** Super Pumps’ right to cure trumped Claimant’s right to avoid.

1. Delivery after 15 or 22 December did not result in a fundamental breach

94. Even if a breach did occur in this case, the breach was not fundamental. Tribunals should limit avoidance based on fundamental breach to “breaches that rip the fabric of the parties’ contractual relationship.” [*Honnold, p. 274*]. Claimant alleges that Super Pumps’ delivery after 15 or 22 December 2008 amounted to a fundamental breach. [*Mem. Cl. ¶ 59*]. However, delay in delivery does not automatically amount to a fundamental breach. [*Huber/Mullis, p. 225; Will, Art. 47*]. When determining if the action or inaction of one party reaches the level of fundamental breach, this Tribunal must consider: **(a.)** whether Claimant was substantially deprived of what it expected under



the contract; and **(b.)** whether Super Pumps or a reasonable person would have foreseen such a result. [*CISG Art. 25*].

a. Claimant was not substantially deprived of what it expected

95. To establish a fundamental breach, the claiming party must show that the breach substantially deprived it of what it expected under the contract. [*CISG Ad. Co. Op. No. 5; Morrissey/Graves, p. 224*]. The burden of proof to show a substantial deprivation is on the aggrieved party. [*UNCITRAL Digest, Art. 25; Honnold, p. 183*]. The tribunal must look at the objective expectations of the aggrieved party. [*Huber/Mullis, p. 215*].

96. The parties' conduct subsequent to contracting should have ended Claimant's expectation of delivery by 15 or 22 December 2008. Super Pumps' 2 August 2008 counteroffer stated that there would be a delay of several weeks. [*Cl. Ex. 6*]. "Several weeks" indicates a delay of at least three weeks. [*Supra ¶ 86*]. Additionally, Super Pumps' 2 August 2008 counteroffer stated, "we cannot be held responsible for the delay in shipping the pumps to you." [*Cl. Ex. 6*]. This language forecasted a delay in delivery prior to production and five months before delivery of the pumps. Thus, delivery could not have been expected prior to 15 or 22 December 2008.

97. Further, even if this Tribunal finds that the parties did not modify the contract through the 2 August 2008 counteroffer, Claimant accepted the 22 November 2008 and 12 December 2008 requests to cure. [*Supra ¶¶ 89–92*]. A party's right to cure is relevant in determining whether a breach was fundamental. [*Liu, Art. 25; Morrissey/Graves, p. 224*]. Therefore, Claimant's acceptance of the requests to cure eliminated any expectation of delivery on 15 or 22 December 2008.

98. Claimant proposes that, "even if [Super Pumps] had delivered the pumps to Claimant by 5 January 2009, the pumps would not have had the same value as for its previous intention, which was for use in the irrigation contract." [*Mem. Cl. ¶ 62*]. Claimant fails to provide any facts to support this conclusory proposition, and does not indicate the significance of the proposition. Nonetheless, prior to making this proposition, in ¶ 61 of its memorandum, Claimant cites to an Austrian appellate court decision in support of its statement. [*Powdered Tantulum Case, Austria 2005*]. Claimant asserts that the court found a fundamental breach because some of the goods were delivered after the buyer had avoided the contract and the market value for the goods had declined. However, Claimant's description of the case does not reflect the court's opinion. The court found that the seller had fundamentally breached the contract because it delivered nonconforming goods. The court made no connection between the decline in market price and the fundamental breach. In fact, the buyer



had actually accepted partial delivery after the decline in market price. Thus, the decline in value did not lead to a fundamental breach there, and this Tribunal should find the same here.

99. Taking into consideration the circumstances of this case, it would have been unreasonable to expect delivery to have taken place on 15 or 22 December 2008. Therefore, Claimant was not substantially deprived of what it expected under the contract.

b. Super Pumps did not foresee and could not have foreseen such detriment

100. A breach is not fundamental unless the breaching party foresaw, or a reasonable person under the same circumstances would have foreseen the detriment suffered by the aggrieved party. [*Schlechtriem/Schwenzler*, p. 287; *Honnold*, p. 276; *Graffi*, p. 338]. Foreseeability must be based on what the party knew at the time the contract was concluded. [*Schlechtriem/Schwenzler*, p. 291; *Huber/Mullis*, p. 216]. Here, it was not foreseeable for Super Pumps or any reasonable person to believe that a delay in delivery would lead to the cancelation of the irrigation contract.

101. Contrary to Claimant's assertion, Super Pumps could not have reasonably foreseen that a delay in delivery would have caused Claimant to lose the irrigation contract. [*Mem. Cl.* ¶¶ 63–65]. First, Claimant never indicated the possibility of such extreme consequences. Prior to signing the contract, Claimant's e-mail dated 25 June 2008 vaguely stated that late delivery would subject them to penalties and "would endanger [its] ability to meet at least some of the performance times." [*Cl. Ex. 2*]. This language fails to indicate that Water Services would have taken such extreme measures as canceling the irrigation contract because of a three-day delay in delivery. [*Cl. Ex. 12*]. In most circumstances, a slight delay in delivery does not constitute a fundamental breach. [*Liu, Art. 25; Shoes Case, Germany 2002*]. Thus, even if Super Pumps knew that Claimant needed the pumps to perform under the irrigation contract, it could not foresee that Water Services would cancel the irrigation contract because of a slight delay in delivery.

102. Second, Super Pumps could not have foreseen a consequence that Claimant itself did not foresee. On 28 December 2008, Claimant sent Super Pumps an e-mail in which it indicated that neither Claimant nor Horace Wilson, the procurement officer for Water Services, "had [any] idea what the consequences might be from the delay." [*Cl. Ex. 11*]. This e-mail was sent five days before the expiration of the irrigation contract. [*Cl. Ex. 12*]. If the parties involved in the irrigation contract could not foresee such consequence five days before its expiration, it would be unreasonable to expect Super Pumps to have foreseen cancelation when the contract was concluded five months before. [*Cl. Ex. 3*]. Therefore, Super Pumps' delayed delivery did not substantially deprive Claimant of its expectation under the contract and the results of the delay were



unforeseeable. Super Pumps urges this Tribunal to find that it did not fundamentally breach the contract.

2. Super Pumps did not violate a *Nachfrist* period

103. Under the CISG, a buyer may provide a seller an additional period of time for performance. [CISG Art. 47(1)]. The additional period of time is referred to as a *Nachfrist* period. [Cf. *Morrissey/Graves*, p. 227]. The CISG specifies that a buyer may declare a contract avoided if the seller fails to deliver the goods within the *Nachfrist* period of time provided by the buyer. [CISG Art. 49(1)(b)]. Scholars maintain that a buyer may not avoid a contract based on a violation of a *Nachfrist* period unless the buyer provided adequate notice indicating a specific deadline for performance. [Honnold, p. 289; Will, Art. 47]. A clear expression that a final deadline is granted is required. [Will, Art. 47; Liu, Art. 47; UNCITRAL Digest, Art. 47]. A notice indicating a specific deadline must also “include a specific demand for performance.” [Schlechtriem/Schwenzler, p. 555; Will, Art. 47].

104. Claimant concludes that it was entitled to avoid the contract based on a violation of a *Nachfrist* period. [Mem. Cl. ¶ 78]. Claimant attempts to characterize the 22 December 2008 delivery date as the expiration of a *Nachfrist* period, but fails to provide any facts to support this premise. [Id.]. It was Super Pumps, not the Claimant, that provided the notice stating that the pumps should arrive in Mediterraneo “around 22 December.” [Cl. Ex. 7]. The only notice Claimant provided was a reply e-mail acknowledging that it had received Super Pumps’ notice and would accept delivery on 22 December 2008. [Cl. Ex. 8]. Because Claimant did not provide notice for a specific deadline or demand performance, no *Nachfrist* period was created. Therefore, Super Pumps did not violate a *Nachfrist* period by delivering after 22 December 2008.

3. Super Pumps’ right to cure trumped Claimant’s right to avoid

105. As established above, Super Pumps did not breach the contract by delivering after 15 or 22 December 2008 because the delivery date was modified. [Supra ¶¶ 74–80]. However, even if this Tribunal determines that no modification occurred and that a fundamental breach or a violation of a *Nachfrist* period did occur, Claimant was still not allowed to avoid the contract. When a buyer has commenced performance pursuant to Article 48(2) of the CISG, “[a] buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.” Consequently, “the seller’s right to cure takes precedence over the buyer’s right to avoid the contract.” [Huber/Mullis p. 251; *Inflatable Triumphal Arch Case, Switzerland 2002* (stating that a party cannot avoid a contract when the nonperforming party offers to cure under CISG Art. 48(2))]. As established above, Claimant accepted Super Pumps’ 12 December 2008 request to cure by 6 January



2009. [*Supra* ¶¶ 89–92]. Claimant was not allowed to seek any remedy that would hinder Super Pumps’ performance prior to that date. Claimant’s avoidance on 5 January 2009 was inconsistent with Super Pumps’ right to cure. [*Cl. Ex. 13*]. As a result, Claimant’s avoidance was improper.

106. This Tribunal should find that Claimant improperly avoided the contract. There was no fundamental breach, no violation of a *Nachfrist* period, and even if there was, avoidance was still improper. Therefore, Claimant is not entitled to restitution of the purchase price. [*CISG Art. 81(2)*] (indicating that a party is not entitled to restitution “of whatever the first party has supplied or paid under the contract,” unless they properly avoid the contract)].

D. Article 79 of the CISG Exempts Super Pumps from Paying Damages

107. If this Tribunal agrees with Claimant that Super Pumps breached the contract, it should also find Article 79 of the CISG exempts Super Pumps from liability. Article 79 exempts a party from paying damages when the failure to perform any of its obligations was due to an unexpected and unavoidable impediment beyond the party’s control. [*Honnold, p. 637*]. Super Pumps must establish four elements to be exempt under Article 79: first, that the failure to perform was due to an impediment; second, that the impediment was beyond its control; third, that Super Pumps could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and fourth, that Super Pumps could not have avoided or overcome the impediment or its consequences. [*CISG Art. 79*]. Here, Claimant does not contest that the cause of Super Pumps’ delay—the accident in the Isthmus Canal—was an impediment beyond Super Pumps’ control. [*Mem. Cl. ¶¶ 66–75*]. Claimant contests the (1.) expectancy of the impediment and (2.) Super Pumps’ ability to overcome the impediment. [*Id. at ¶¶ 66–72*].

1. Super Pumps could not have reasonably expected the impediment

108. When determining whether the impediment should have been expected, this Tribunal must look at what Super Pumps reasonably expected at the time the parties entered into the contract. [*CISG Art. 79; Schlechtriem/Schwenzer, p. 817; Schwenzler, Tallon*]. In ¶ 68 of its memorandum, Claimant states that “impediments such as wars, storms, fires, strikes, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future.” However, although the occurrence of an event in the past makes it generally foreseeable, this does not necessarily mean that the breaching party reasonably expected it at the time of contracting. [*Enderlein/Maskow, p. 322*]. Here, at the time of contracting, Super Pumps could not have reasonably expected that there would be a delay in the Isthmus Canal during delivery.



Although delays in the Isthmus Canal have occurred before, they are a rare occurrence. [*Proc. Ord. 2, Q. 13*]. This demonstrates the improbability of a 14 day delay in crossing the canal.

109. Oddly, Claimant argues that, because the 14 day delay in crossing the canal was temporary and prior to the delivery date, Super Pumps was still obligated under Article 79(3) to deliver by the contractual date. [*Mem. Cl. ¶¶ 74–75*]. However, the 14 day delay in crossing was the direct cause of the delay in delivery. “Temporary impediment means not only the circumstances which cause the obstacle but also the consequences which follow.” [*Liu, Art. 79*]. Furthermore, the rarity of delays in the Isthmus Canal also indicates the unlikely occurrence of an accident in the canal, especially one that would cause such extensive damage to the locks that it would take 10 days to repair. [*Stmt. Clm. ¶ 14*]. It would be unreasonable for a party to expect such a rare impediment at the time of contracting. Therefore, Super Pumps did not, and could not have expected an accident occurring in the Isthmus Canal when it entered into the contract.

2. Super Pumps could not have avoided or overcome the impediment

110. Under Article 79(1) of the CISG, a party is not exempt if it would have been possible and reasonable for it to avoid the impediment. However, a party is not required to prevent a broad spectrum of impediments, only the “possible avoidance of specific impairments.” [*Schlechtriem/Schwenzer, p. 818*].

111. Contrary to Claimant’s assertion, Super Pumps could not have reasonably avoided or overcome the accident in the Isthmus Canal. [*Mem. Cl. ¶ 72*]. The accident did not occur until six days after the pumps left port. [*Stmt. Clm. ¶¶ 12, 14*]. At that time, the only other delivery option available was to travel around the continent. [*Proc. Ord. 2, Q. 14*]. However, doing so was almost impossible and would not have caused delivery to take place any sooner. [*Id.*]. Such futile actions would have been unreasonable.

112. Claimant uses a 1932 New York court of appeals case to support its allegation that Super Pumps made no significant efforts to avoid the impediment. [*Canadian Industrial Alcohol Co. v. Dunbar Molasses, U.S. 1932; Mem. Cl. ¶ 71*]. In that case, the defendant raised the common law defense of impossibility after it breached the contract. The defendant claimed that it could not perform because its intended supplier did not produce a sufficient quantity of the goods to fulfill the contract. The court found the defense inapplicable because the seller had made no effort to secure a contract with the intended supplier or any other supplier. That case should have no bearing on this Tribunal for two reasons. First, unlike that case, here, the CISG governs the terms of the contract. [*Supra ¶ 49*]. Application of domestic law to a contract governed by the CISG would undermine the



Convention's objective "to promote uniformity in its application." [*CISG Art. 7(1)*]. Second, unlike the seller in that case, Super Pumps did all that was reasonable to perform. [*Supra* ¶¶ 85–92]. There was no feasible alternative other than waiting for the canal to clear. [*Proc. Ord. 2, Q. 14*]. Therefore, this Tribunal should not apply the reasoning of that case to the facts here.

113. Further, Claimant suggests that the DES Incoterm forecloses Super Pumps' ability to seek an exemption under Article 79. [*Mem. Cl. ¶ 73*]. Claimant fails to understand the implications of the DES Incoterm. In general, "Incoterms are international commercial terms that represent a set of agreements regarding the place of delivery, responsibility for carriage and insurance, and the transfer of risk of goods subject to an international sale." [*Morrissey/Graves, p. 148*]. Super Pumps agrees with Claimant's assertion that under the DES Incoterm, the seller bears the risk of loss during shipment. [*Mem. Cl. ¶ 73*]. However, the DES Incoterm governs only the delivery terms of the contract. Claimant's and Super Pumps' rights and obligations arising from the contract are governed by the CISG. [*CISG Art. 4; Supra ¶ 49*]. Consequently, the inclusion of the DES Incoterm in the parties' contract had no effect on Super Pumps' ability to seek an Article 79 exemption. Therefore, because the accident in the Isthmus Canal was an impediment beyond Super Pumps' control and could not have reasonably been expected or avoided by Super Pumps, this Tribunal should find that Article 79 of the CISG exempts Super Pumps from paying damages.

III. CLAIMANT FAILED TO MITIGATE ITS LOSS

114. Mitigation is "one of the most well-established general principles in arbitral case law." [*Liu, Art. 77*]. If this Tribunal finds that Super Pumps was in breach of its obligations to provide regulatory compliant pumps or to make timely delivery, then Claimant's damages should be limited in accordance with Article 77 of the CISG. Article 77 states that, "a party who relies on a breach of contract *must* take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit." [*Emphasis added*]. Failure to mitigate will allow the party in breach to "claim a reduction in the damages in the amount by which the loss should have been mitigated." [*CISG Art. 77; Treibacher Industrie v. Allegbeny Technologies, U.S. 2006*]. This may lead to, in appropriate cases, a reduction to zero. [*Huber/Mullis, p. 292; Vine Wax Case, Germany 1999*].

115. The aim of Article 77 is to encourage mitigation of loss. [*Knapp, pp. 565–566*]. Therefore, this obligation exists before the loss arises. [*Schlechtriem/Schwenzer, p. 788*]. Measures directed at mitigating loss are to be taken as soon as a party can foresee potential losses caused by the breach of contract. [*Enderlein/Maskow, p. 308; Knapp, pp. 565–566; Saidov*]. Accordingly, Claimant's position that it had "no choice but to wait for specific performance until midnight of 31 December 2008,"



[*Mem. Cl. ¶ 93*], contradicts Article 77 of the CISG. Claimant was obligated to take adequate preventive measures as early as possible to mitigate its loss.

116. Super Pumps acknowledges that the breaching party bears the burden of proving that the injured party failed to mitigate. [*Schlechtriem/Schwenzer, p. 793*]. Super Pumps satisfied this burden because Claimant failed to mitigate by: **(A.)** not making a cover purchase; **(B.)** not applying for a government exception; and **(C.)** not taking any other reasonable mitigation measures.

A. Claimant Failed to Mitigate by Not Making a Cover Purchase

117. Claimant failed to mitigate its loss by not attempting to purchase substitute pumps from another supplier. Article 77 of the CISG may “oblige the party affected or threatened by a breach to make a substitute transaction in order to prevent or mitigate loss.” [*Schlechtriem/Schwenzer, p. 791*]. This is especially true if the “substitute transaction would avoid consequential losses following the non or defective performance of the contract.” [*Id.*]. Scholars consider a cover purchase to be a reasonable form of mitigation. [*Liu, Art. 77; Knapp, p. 559*]. Courts and arbitral tribunals agree with this principle. The German Court of Appeals, applying Article 77 of the CISG, found that a buyer had failed to mitigate its loss by not seeking substitute goods outside of its region. [*Vacuum Cleaner Case, Germany 1998*]. Similarly, in another case, a Russian arbitral tribunal found that a buyer failed to mitigate its loss by not purchasing substitute goods in an effort to meet its contractual obligation to a third party. [*Tax Case, Russia 2006*].

118. Here, Claimant did not attempt to purchase substitute goods from suppliers in or outside of the region. There was at least one other supplier in the region. [*Resp. Ex. 3*]. That supplier, Trading Company, had some of the necessary pumps ready for purchase as of 12 November 2008. [*Id.*]. Claimant was aware of Super Pumps’ delay in delivery as early as 28 November 2008. [*Cl. Ex. 9*]. On 28 November 2008, an accident occurred in the Isthmus Canal and it was not known how long repairs would take. [*Id.*]. This gave Claimant over five weeks to purchase pumps from another supplier and avoid cancellation of the irrigation contract. Super Pumps once again confirmed the delay in delivery on 12 December 2008. [*Cl. Ex. 10*]. On 12 December 2008, the Merry Queen finally transited the canal. [*Id.*]. As a result of the delay, the pumps were expected to arrive on 6 January 2009. [*Id.*]. Even if the duty to mitigate began on this date, Claimant had three weeks to make a cover purchase. However, Claimant chose to do nothing to mitigate its loss.

119. Contrary to Claimant’s assertion, purchasing substitute goods would have been a reasonable form of mitigation. [*Mem. Cl. ¶ 94*]. A measure is reasonable under the circumstances, if it could be expected to be taken by a person acting in good faith, or if it is adequate and preventive with respect



to the loss. [*Liu, Art. 77; Opie; Saidon*]. A substitute transaction was reasonable for several reasons. First, the irrigation contract expired on 2 January 2009. [*Cl. Ex. 12*]. Claimant was uncertain whether Super Pumps could perform by the deadline as early as 28 November 2008, when the accident closed the canal. [*Cl. Ex. 9*]. This five-week time frame made a cover purchase a reasonable mitigation measure. Additionally, Claimant was certain Super Pumps could not meet the deadline established in the contract as early as 12 December 2008. [*Cl. Ex. 10*]. This gave Claimant three weeks to make a cover purchase. Second, because Claimant negotiated the irrigation contract, it was in a better position to understand what the consequences of failure to deliver by 2 January 2009 would be. Third, Mr. Haycock and Claimant’s other personnel were aware of the existence of the Trading Company. [*Proc. Ord. 2, Q. 23*]. Finally, Water Services’ procurement officer, Horace Wilson, told Claimant that delivery of some of the pumps would be helpful. [*Resp. Ex. 2*]. Thus, a substitute cover transaction was reasonable.

120. Additionally, Claimant’s contention that a substitute purchase would have been “next to impossible” is incorrect. [*Mem. Cl. ¶ 94*]. Claimant only needed to conduct an Internet search to find substitute pumps. Trading Company advertised some of the necessary pumps on its website. [*Resp. Ex. 3*]. It could have loaded and delivered substitute pumps into Oceania within 36 hours. [*Id.*]. Therefore, purchasing substitute goods would have been possible and reasonable.

121. In ¶ 95 of its memorandum, Claimant argues that partial delivery would have been unreasonable. However, partial delivery would have likely stopped Water Services from canceling the irrigation contract. Horace Wilson stated, “it would help if there could be at least partial delivery of pumps that would conform to the contract by 2 January.” [*Resp. Ex. 2*]. The Military Council required cancelation of foreign contracts that were in breach. [*Cl. Ex. 12*]. Delivery of some pumps by 2 January 2009 would have amounted to partial performance of the irrigation contract, which may have avoided a breach with Water Services. [*Resp. Ex. 2*]. However, Claimant risked losing the irrigation contract through inaction instead of finding a solution. Claimant made no inquiries, let alone any attempt to make a cover transaction. Claimant’s inaction should lead this Tribunal to find that Claimant failed to mitigate its loss by not purchasing substitute goods.

122. Mitigation can sometimes be a source of additional loss. [*Liu, Art. 77*]. However, Claimant is incorrect to argue that a cover transaction would unduly magnify its burden. [*Mem. Cl. ¶ 96*]. Claimant overlooked the fact that mitigation expenses are to be reimbursed even if it increases the total loss, provided that the mitigation measures and expenses were reasonable. [*Enderlein/Maskow, p. 308*]. This is true even if the mitigation measures were taken in vain. [*Id.; Liu, Art. 77*]. As



described above, a cover transaction with Trading Company would have been a reasonable mitigation measure. [*Supra* ¶ 119]. Therefore, Claimant’s expenses associated with this cover transaction would not have unduly magnified Claimant’s burden because Claimant had the financial resources to make this purchase. [*Proc. Ord. 2, Q. 26*]. Furthermore, Super Pumps would have had to reimburse Claimant for its reasonable mitigation expenses. Therefore, a cover transaction would not have unduly magnified Claimant’s burden.

123. Further, Claimant alleges that it “could not have bought substitute pumps without first avoiding the contract.” [*Mem. Cl. ¶ 93*]. This argument is invalid because a cover purchase could be made to substitute or complement a breaching party’s performance. [*Huber/Mullis, p. 291*]. “The party who is true to the contract cannot sit and wait for the other party to breach the contract, but must become active in order to minimize the loss or to prevent it at all.” [*Knapp, pp. 565–566*]. Moreover, making avoidance a precondition to a cover purchase would contradict the aim of Article 77, which is to encourage mitigation. Therefore, this Tribunal should avoid such a result by finding that Claimant failed to mitigate its loss by not making a cover purchase.

B. Claimant Failed to Mitigate by Not Applying for a Government Exception

124. Claimant further failed to mitigate by not applying for a government exception. As required by the CISG, “[a] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss.” [*CISG Art. 77*]. All factors of the transaction and the “nature and purpose of the contract” must be considered. [*Liu, Art. 77*].

125. Here, a reasonable party in Claimant’s position would have applied to the Military Council Office (“Office”) for an exception. Claimant argues that an application for an exception would not safeguard the irrigation contract from cancellation. [*Mem. Cl. ¶ 98*]. While the Office did not open until 2 March 2009, the record indicates it was possible to file an application before then because 73 requests were pending when the Office opened. [*Proc. Ord. 2, Q. 20*]. Arguably, if Claimant had applied for an exception, an application may have postponed or altogether avoided cancellation of the irrigation contract. Therefore, Claimant should have filed an application with the Office before the contract was canceled, but by doing nothing, Claimant ensured its cancellation.

126. Additionally, as conceded by Claimant, the Office has granted 27 of the 73 exceptions requested. [*Proc. Ord. 2, Q. 20; Mem. Cl. ¶ 98*]. Therefore, nearly 40% of the applications have been granted. Article 77 of the CISG does not require a party to take successful mitigation measures, but only reasonable ones. Again, applying for an exception would have been more reasonable than doing nothing to reduce its loss.



127. Further, among the many mitigation measures that could have been taken, because of the nature and purpose of this contract, seeking an exception could have been the simplest and most effective way to mitigate. The contract between the parties in this case required delivery of specific types of pumps. [Cl. Ex. 6]. Claimant received the specific pumps ordered. [Cl. Ex. 14]. All Claimant needed was an exception from the regulation to be able to make use of the pumps. Therefore, seeking an exception would have been the easiest and most reasonable way to mitigate.

C. Claimant Failed to Take Other Reasonable Mitigation Measures

128. In addition to making a cover purchase and applying for a government exception, other reasonable mitigation measures were available to Claimant. Claimant could have discussed its options with Super Pumps. However, Claimant took no action after it learned of the accident on 28 November 2008. [Cl. Ex. 9]. It took no action on 12 December 2008 when it learned that the Merry Queen would not arrive until 6 January 2009. [Cl. Ex. 10]. Yet again, it took no action on 28 December 2008 when it learned of the 1 January 2009 regulation. [Cl. Ex. 11].

129. Additionally, Claimant could have proposed a reduction in price to Water Services. In *ICC Case No. 8740*, the tribunal found that a buyer had acted reasonably when it sought to mitigate its loss by proposing a 10% discount to the sub-buyer on late delivered goods. [*ICC Case No. 8740*]. Here, Claimant could have tried to work with Water Services to come up with a solution. For example, Claimant could have negotiated with Water Services to arrange a discount on the irrigation contract in exchange for the pumps' late arrival. However, Claimant chose to do nothing.

130. Claimant could have reasonably entered into a cover purchase, but it chose not to do so. Claimant could have reasonably applied for a government exception, but it chose not to do so. Claimant could have sought other reasonable solutions, but again, it chose not to do so. Therefore, because Claimant chose not to take any measures to mitigate its loss, this Tribunal should reduce any damages Claimant suffered by the amount of loss that it should have mitigated.

131. This Tribunal is empowered to avoid the inequitable remedies sought by a party who failed to act responsibly. Allowing Claimant to recover damages caused by its own failure would discourage parties from attempting to meet their contractual obligations when circumstances beyond the scope of their original contract arise. Communication is an essential principle found throughout the CISG. Claimant's failure to communicate led Super Pumps to continue performance in good faith. It would be unjust to transfer liability to the party that did everything possible to conform to the contract, even when uncontrollable and unforeseeable circumstances arose, while the other party simply ignored its duties until the damage was irreparable.



REQUEST FOR RELIEF

132. In response to the Tribunal’s Procedural Orders, Counsel makes the above submissions on behalf of the Respondent, Equatoriana Super Pumps. For the reasons stated in this memorandum, Super Pumps respectfully requests this Tribunal find that:

- (1) It does not have jurisdiction to hear this case because the precondition to arbitration was not fulfilled in accordance with the parties’ agreement;
- (2) Even if this Tribunal finds that it has jurisdiction, Super Pumps did not have an obligation to provide pumps conforming to regulations adopted after the conclusion of the contract;
- (3) Super Pumps did not breach the contract by delivering after 15 or 22 December 2008; and
- (4) Claimant failed to mitigate the consequences of the canceled irrigation contract.

14 January 2010: (signed)

/S/ Sarah Alexandra Cohen

/S/ Erik Detlefsen

/S/ Sandra D. Harrell

/S/ Anna K. Liu

/S/ Luis Santos