

# MEMORANDUM FOR CLAIMANT

ROMANIA MOOT 0014

**ON BEHALF OF:**

**Equitoriana Office Space Ltd.**

415 Central Business Centre

Oceanside

Equitoriana

(CLAIMANT)

**AGAINST:**

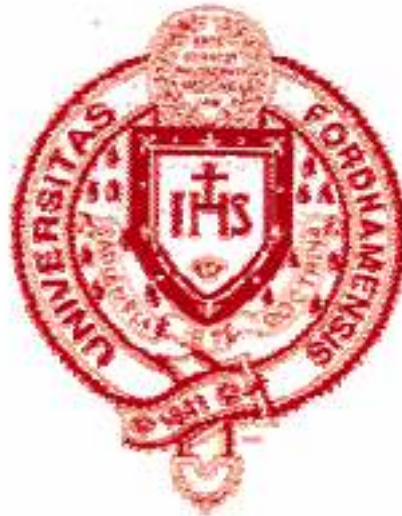
**Mediterraneo Electrodynamics S.A.**

23 Sparkling Lane

Capitol City

Mediterraneo

(RESPONDENT)



FORDHAM UNIVERSITY SCHOOL OF LAW

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ADRIENNE BARANOWICZ \* RYAN TRUMAN CLOUD \* DAVID P. COLE \* LEE J. GOLDBERG  
LAUREN A. MAYNE \* BRIAN P. MORGAN \* MATTHEW PARROTT \* MELISSA G. RASMUSSEN  
MOLLIE RICHARDSON \* JENNIFER SCHRAMM \* ERIN KEELY TUCKER \* DANIEL J. WEINER



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**LIST OF ABBREVIATIONS**

<b>¶ / ¶¶</b>	Paragraph/ Paragraphs
<b>§ / §§</b>	Section/ Sections
<b>Agency Convention</b>	Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983)
<b>Art. / Arts.</b>	Article / Articles
<b>Belg.</b>	Belgium
<b>Braz.</b>	Brazil
<b>Can.</b>	Canada
<b>CCIB</b>	Chamber of Commerce and Industry of Bucharest
<b>CCP</b>	Dutch Code of Civil Procedure
<b>Chi.</b>	China
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
<b>Cl. Ex.</b>	Claimant's Exhibit
<b>Clar.</b>	Clarification
<b>Ed.</b>	Edition
<b>Ed. / Eds.</b>	Editor / Editors
<b>et al.</b>	et alia [and others]
<b>e.g.</b>	exemplum gratti [for example]
<b>Eng.</b>	England
<b>Fr.</b>	France
<b>Ger.</b>	Germany



<b>H.K.</b>	Hong Kong
<b>ICC</b>	International Chamber of Commerce
<b>Id.</b>	idem [the same]
<b>Ind.</b>	India
<b>Inc.</b>	Incorporated
<b>i.e.</b>	id est [that is]
<b>Leb.</b>	Lebanon
<b>LG</b>	Landgericht [District Court- Germany]
<b>Ltd.</b>	Limited
<b>NCPC</b>	Nouveau Code de Procédure Civile [New Code of Civil Procedure]
<b>Neth.</b>	Netherlands
<b>No.</b>	Number
<b>NY Convention</b>	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
<b>OLG</b>	Oberlandesgericht [Court of Appeal- Germany and Austria]
<b>PIL</b>	Switzerland's Federal Code on Private International Law
<b>Proc. Ord.</b>	Procedural Order
<b>Q.</b>	Question
<b>RA-CAB</b>	Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
<b>Re. Ex.</b>	Respondent's Exhibit
<b>Sec. Comm.</b>	Secretariat Commentary to the CISG
<b>Swed.</b>	Sweden



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<b>Switz.</b>	Switzerland
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Model Law</b>	UNCITRAL Model Law on International Commercial Arbitration of 1985
<b>UNCITRAL Arbitration Rules</b>	UNCITRAL Arbitration Rules of 1976
<b>UNIDROIT</b>	International Institute for the Unification of Private Law
<b>UNIDROIT Principles</b>	UNIDROIT Principles of International Commercial Contracts of 2004
<b>U.S.A.</b>	United States of America
<b>\$</b>	United States Dollars
<b>v.</b>	versus
<b>Vol.</b>	Volume
<b>ZPO</b>	Zivilprozessordnung [German Code of Civil Procedure]



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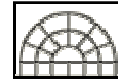
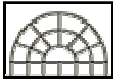
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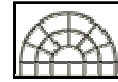
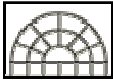
## STATEMENT OF FACTS

- **Spring 2005:** Equatoriana Office Space Ltd. (“CLAIMANT”), a developer of residential and business properties organized under the laws of Equatoriana, began constructing a multi-building commercial development in Mountain View, Equatoriana [*Statement of Claim* ¶¶ 1, 3]. CLAIMANT contracted to give occupancy to lessees by **1 October 2005** [*Re. Ex. 1*].
- **22 – 25 April 2005:** CLAIMANT telephoned Mediterraneo Electrodynamics S.A. (“RESPONDENT”), a company organized under the laws of Mediterraneo, which has fabricated and delivered electrical products to customers in Equatoriana [*Answer* ¶¶ 2-3, 8; *Re. Ex. 1*]. CLAIMANT sought to purchase five primary distribution fuse boards (“fuse boards”) to connect the Mountain View buildings to the local power supply [*Answer* ¶ 3]. Upon RESPONDENT’s request, CLAIMANT provided detailed design drawings (“the drawings”), specifying that the fuses within the fuse boards were “to be ‘Chat Electronics’ JP type”<sup>1</sup> and that the fuse boards were “to be lockable to Equalec requirements” [*Statement of Claim* ¶ 9]. Fuse boards must be locked by the local electrical supply distribution company, Equalec, in order to be connected to the power supply [*Statement of Claim* ¶ 8; *Clar. Q. 21*]. Equalec, the sole electrical supply distribution company in Mountain View, Equatoriana, requires that fuse boards rated at 400 amperes or below must not use JS type fuses [*Statement of Claim* ¶ 4; *Cl. Ex. 4*; *Clar. Q. 31*].<sup>2</sup> Also, the drawings called for fuses of different ratings, but all rated less than 400 amperes [*Statement of Claim* ¶ 9].<sup>3</sup> RESPONDENT “assured [CLAIMANT] that such fuse boards could be delivered” according to these specifications [*Answer* ¶ 3; *Re. Ex. 1*].
- **4 May 2005:** CLAIMANT sent RESPONDENT a purchase order for five fuse boards at a price of \$168,000 [*Answer* ¶ 3-4]. RESPONDENT drafted and sent CLAIMANT an unsigned contract reflecting the terms of the purchase order [*Answer* ¶ 4]. The unsigned contract included “an arbitration clause calling for arbitration at the Mediterraneo International Arbitral Center”

<sup>1</sup> Chat Electronics, a popular manufacturer of fuses, offers JP type fuses, as well as other types [*Re. Ex. 2*].

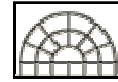
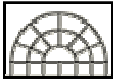
<sup>2</sup> Equalec disseminated this policy, explaining the requirement, throughout Equatoriana and the policy was available on Equalec’s website [*Statement of Claim* ¶ 4; *Cl. Ex. 4*; *Clar. Q. 31*].

<sup>3</sup> Chat Electronics JP fuses are available in ratings from 32 to 400 amperes [*Re. Ex. 2*].

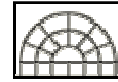
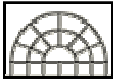


[*Answer ¶ 5*]. CLAIMANT substituted its standard arbitration clause into paragraph 34 of the contract (the “Arbitration Clause”), signed it, and promptly returned the contract to RESPONDENT [*Answer ¶ 3*].

- **12 May 2005:** RESPONDENT reviewed the revised contract, signed it without objection and sent a signed copy (the “Contract”) to CLAIMANT [*Answer ¶ 5; Re. Ex. 1*].
- **14 July 2005:** RESPONDENT telephoned CLAIMANT and asked to speak with Mr. Herbert Konkler, CLAIMANT’s Purchasing Director, who had negotiated the Contract [*Answer ¶ 7*]. As Mr. Konkler was absent on a business trip, CLAIMANT’s secretary offered to route the call to Mr. Steven Hart, an employee in CLAIMANT’s purchasing department [*Clar. Q. 18*]. Although Mr. Hart was aware of the Contract, he was not normally responsible for ordering electrical equipment [*Cl. Ex. 2*]. RESPONDENT explained to Mr. Hart that it had encountered difficulty procuring Chat Electronics JP type fuses, and suggested using different fuses [*Answer ¶ 7*]. Mr. Hart indicated that “he did not have an independent judgment on” how the parties should proceed [*Re. Ex. No. 1*]. Furthermore, Mr. Hart said that “he was not sure that [using different types of fuses] would be acceptable to Mr. Konkler or [CLAIMANT’s] technical staff” [*Re. Ex. 1*]. Nevertheless, RESPONDENT advised that any delay in constructing the fuse boards could result in late delivery [*Answer ¶ 7; Re. Ex. 1*]. Aware that CLAIMANT needed the buildings to be connected to the power supply by **1 October 2005**, Mr. Hart asked RESPONDENT for a recommendation on how to proceed [*Re. Ex. 1*]. RESPONDENT recommended using JS type fuses, stating that “either could be used . . . it really did not matter what type was used” [*Re. Ex. 1*]. “With the assurances that [RESPONDENT] had given . . . about the interchangeability of JP and JS fuses, it did not seem to be a very important decision . . . and [Mr. Hart] acknowledged that [RESPONDENT’s] recommendation was probably the best way to proceed” [*Cl. Ex. 2*].
- **14 July – 21 August 2005:** RESPONDENT failed to submit a written proposal for the substitution of JS type for JP type fuses to CLAIMANT and neglected to confirm the change with Mr. Konkler [*Statement of Claim ¶ 13*].



- **22 August 2005:** RESPONDENT delivered fuse boards containing Chat Electronics JS type fuses [*Answer ¶ 10*]. CLAIMANT performed a visual inspection of the fuse boards [*Clar. Q. 32*] and instructed its contractors to install them in the Mountain View buildings on **1 September 2005** [*Statement of Claim ¶ 14*]. CLAIMANT then notified Equalec that the buildings were ready to be connected to the local power supply [*Statement of Claim ¶ 14*].
- **8 September 2005:** Equalec inspected the fuse boards and discovered that they contained JS type fuses [*Statement of Claim ¶ 14*]. Equalec refused to connect the fuse boards to the power supply because, according to Equalec’s policy, JS fuses may not be used when fuse boards are rated at 400 amperes or below [*Statement of Claim ¶ 14; Cl. Ex. 4*].
- **9 September 2005:** Mr. Konkler telephoned RESPONDENT [*Cl. Ex. 3*]. Mr. Konkler notified RESPONDENT that the fuse boards containing JS type fuses were worthless to CLAIMANT because the fuse boards could not be connected to the power supply [*Cl. Ex. 3*]. CLAIMANT asked RESPONDENT to provide fuse boards with JP type fuses, as required by the Contract [*Cl. Ex. 3*]. RESPONDENT replied that it was unable to provide the fuse boards described in the Contract [*Cl. Ex. 3*]. Thus, CLAIMANT said it would hold RESPONDENT liable for the extra costs of securing fuse boards that met Equalec’s requirements [*Cl. Ex. 3*].
- **15 September 2005:** In order to connect the Mountain View buildings to the power supply, CLAIMANT secured replacement fuse boards fitted with JP type fuses from Equatoriana Switchboards Ltd. (“Switchboards”) [*Statement of Claim ¶ 18*].
- **15 August 2006:** CLAIMANT filed a Notice of Arbitration with the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania [*Notice of Claim*].



## **SUMMARY OF ARGUMENT**

### **PART ONE: THE TRIBUNAL HAS JURISDICTION TO DETERMINE THIS DISPUTE.**

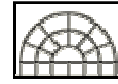
The Tribunal has jurisdiction to hear this dispute. CLAIMANT and RESPONDENT included a valid arbitration clause in the Contract pursuant to the CISG and the New York Convention. The Arbitration Clause is sufficiently definite to confer jurisdiction on the Tribunal.

### **PART TWO: RESPONDENT BREACHED THE CONTRACT BY DELIVERING NON-CONFORMING FUSE BOARDS.**

RESPONDENT breached the Contract by delivering fuse boards that did not conform to the contractual description of the goods. The parties did not modify the Contract to allow RESPONDENT to substitute JS type fuses for JP type fuses. CLAIMANT reasonably relied on RESPONDENT's skill and judgment to obtain fuse boards to connect to the local power supply, the particular purpose of the Contract. The fuse boards containing JS type fuses did not satisfy the particular purpose of the Contract. Thus, RESPONDENT is liable under Art. 35 CISG.

### **PART THREE: RESPONDENT IS LIABLE FOR CLAIMANT'S LOSS.**

RESPONDENT cannot escape liability under Art. 79 CISG. RESPONDENT may assert that an impediment excused its performance, but there was no impediment beyond RESPONDENT's control. RESPONDENT's breach of contract was not caused by an act or omission of CLAIMANT under Art. 80 CISG.



## ARGUMENT

### PART ONE: THE TRIBUNAL HAS JURISDICTION TO DETERMINE THIS DISPUTE.

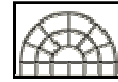
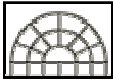
#### I. CLAIMANT AND RESPONDENT PROPERLY INCORPORATED THE ARBITRATION CLAUSE INTO THE CONTRACT ACCORDING TO THE CISG.

##### A. The CISG governs the Contract and its formation.

1. Art. 1(1)(b) of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) provides that the “Convention applies to contracts for the sale of goods between parties whose places of business are in different states . . . when the rules of private international law lead to the application of the law of a contracting state.” The Contract is for the sale of fuse boards [*Statement of Claim* ¶ 10] and CLAIMANT’s and RESPONDENT’s places of business are in different states, Equatoriana and Mediterraneo, respectively [*Statement of Claim* ¶ 1-2]. CLAIMANT and RESPONDENT agreed that the Contract shall be “subject to the law of Mediterraneo” [*Cl. Ex. 1* ¶ 33]. Mediterraneo is party to the CISG [*Statement of Claim* ¶ 19] and the CISG is positive law in Mediterraneo [*Clar. Q.* 7]. Danubia is also party to the CISG, and permits choice of law clauses, such as paragraph 33 of the Contract [*Clar. Q.* 4]. Consequently, the CISG is the *lex contractus* (the law governing the contract).
2. The CISG explicitly makes reference to the “settlement of disputes” in both Art. 19(3) and Art. 81(1). Thus, it is not necessary to look beyond the CISG to determine whether the parties properly included the Arbitration Clause. The CISG addresses the inclusion of arbitration clauses in contracts [*Farnsworth 16; Redfern 150*].

##### B. The Arbitration Clause submitted by CLAIMANT is binding.

1. The Parties properly incorporated the Arbitration Clause into the Contract.
3. CLAIMANT’s Arbitration Clause governs disputes arising out of the Contract because it was the last arbitration clause accepted by the parties [*Statement of Facts*]. When a reply purports to

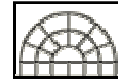


accept an offer, but in fact contains additions, limitations, or other modifications that materially alter the terms of the offer, the reply functions as a rejection of the offer and constitutes a counter-offer [*Art. 19(1) CISG; Sarcevic and Volken 111; see also Les Verrieres de Saint-Gobain (holding that buyer was bound by a forum selection clause that had been altered by seller's counter-offer)*].<sup>4</sup> Additional or different terms relating to the settlement of disputes are considered to materially alter the terms of the offer [*Art. 19(3) CISG; Sarcevic and Volken 111-113*]. Pursuant to Art. 19(3) CISG, CLAIMANT materially altered the offer by substituting the Arbitration Clause [*Answer ¶ 5*].

4. Additionally, CLAIMANT's counter-offer satisfied the criteria of an offer according to Art. 14(1) CISG because it was sufficiently definite, indicating the quality, quantity and price of the goods (five primary distribution fuse boards for \$168,000) [*Statement of Claim ¶ 10*].
5. RESPONDENT accepted the counter-offer. Pursuant to Art. 18 CISG, an offeree's conduct may demonstrate acceptance. The Secretariat Commentary to the CISG states: "[i]f the original offeror responds to [the counter-offer] by shipping the goods . . . a contract may eventually be formed by notice to the original offeree of the shipment . . . [and] the terms of the contract would be those of the counter-offer, including the additional or different term" [*Sec. Comm. to Art. 19 CISG, ¶ 15*]. RESPONDENT accepted CLAIMANT's counter-offer when RESPONDENT signed the Contract submitted by CLAIMANT. Furthermore, RESPONDENT returned a signed copy to CLAIMANT and subsequently shipped the fuse boards [*Answer ¶¶ 4-5*]. RESPONDENT had the opportunity to object if it did not intend to be bound by the Arbitration Clause [*Cl. Ex. 1*].
6. International tribunals have consistently held that performance of a contract including the altered terms submitted by the other party constitutes acceptance of a counter-offer. For example, an arbitral tribunal in Milan, applying Arts. 18 and 19 CISG, determined that an offeree accepted a

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<sup>4</sup> When there is a conflict in the contractual terms exchanged between offeror and offeree, the provisions of the contract most recently accepted will prevail. This concept is commonly referred to as the "last shot rule" [*Schlechtriem 1995 168; Farnsworth 178-79; Neumayer 524*].



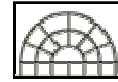
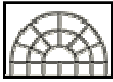
counter-offer when it performed the Contract and failed to object to material alterations contained in the offeror's reply [*ICC Case No. 8908*].

2. The Arbitration Clause satisfies the standards for validity under Art. II of the NY Convention.

7. CLAIMANT's and RESPONDENT's states, Equatoriana and Mediterraneo, respectively, as well as Danubia, are all party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention") [*Statement of Claim ¶ 21*]. Pursuant to Art. II(1) NY Convention, an arbitration agreement: (1) must be in writing, (2) the parties have to possess a defined legal relationship, and (3) the matter must be capable of settlement by arbitration [*NY Convention Art. II(1)* ("each Contracting State shall recognize an agreement in writing in which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration")]. The Arbitration Clause satisfies the Art. II(1) writing requirement<sup>5</sup> because the clause was included in the Contract and signed by each party [*Answer ¶ 4*]. A defined legal relationship arises when a contract contains an arbitration clause that applies to all disputes arising out of that contract [*OLG Hanseatisches, 15 Nov. 1995 (Ger.), Tweeddale 110*]. CLAIMANT and RESPONDENT consummated a defined legal relationship by entering into the Contract [*Cl. Ex. 1*]. Thus, the Arbitration Clause also constitutes a defined legal relationship within the meaning of Art. II(1). Lastly, CLAIMANT is seeking damages for losses it incurred as a result of RESPONDENT's breach of contract, a matter suitable for settlement by arbitration [*LG Heilbronn, 15 Sept. 1997 (Ger.); Beijing Light (Swed.); Delchi Carrier (U.S.A.)*]. Consequently, the Arbitration Clause meets the formal requirements of Art. II(1) NY Convention.
8. The Arbitration Clause included in the Contract also satisfies the minimum standard of validity according to Art. II(3) NY Convention. Art. II(3) states that the court of a contracting state shall refer the parties to arbitration unless the arbitration agreement is "null and void, inoperative or

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<sup>5</sup> Art. II(2) defines an "agreement in writing" as an "arbitral clause in a contract or an arbitration agreement, signed by the parties . . . ."



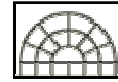
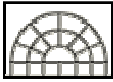
incapable of being performed.” An arbitration clause is considered to be inoperative when it can no longer be effective, such as when the parties have failed to comply with an agreed upon time limit [*Redfern 179*]. This differs from a case in which the arbitration is “incapable of being performed,” which refers to the practical aspects of the arbitral proceedings, such as if the clause called for an arbitrator to be appointed by an official whose post no longer exists [*Redfern 180; AMINOIL*]. The Arbitration Clause of the Contract suffers no such deformity [*Cl. Ex. 1*]. Thus, the Arbitration Clause is effective, capable of being performed, and validly concluded according to Art. II(3) NY Convention.

## II. ANY CHALLENGE TO THE TRIBUNAL’S JURISDICTION SHOULD BE REJECTED.

9. RESPONDENT contends that the Tribunal lacks jurisdiction to decide this dispute [*Answer ¶17; Proc. Ord. No. 1 ¶1*]. Therefore, the Tribunal must make a full inquiry into the basis for its jurisdiction [*Lew, Mistelis & Kröll 331; Christopher Brown (Eng.)*].

### A. The Tribunal has the power to decide whether it has jurisdiction according to the *competence-competence* doctrine.

10. The *competence-competence* doctrine dictates that the arbitral tribunal has authority to determine whether it has jurisdiction to evaluate the validity of the arbitration agreement [*Lew, Mistelis & Kröll 332-33*]. *Competence-competence* is a basic principle of international commercial arbitration [*UNCITRAL Model Law Art. 16(1); UNCITRAL Arbitration Rules § 15(2); RA-CAB Arts. 15(2), 16(2); see also, ICC Case No. 6515; ICC Case No. 6516; ICC Case No. 5294 (holding that despite the arbitration agreement’s unclear designation of the proceedings’ location, the tribunal was authorized to rule on its own jurisdiction); TOPCO*]. Arts. 15 and 16 of the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (“Romanian Rules”) incorporate the *competence-competence* doctrine by providing that the Tribunal “verifies its own authority to settle the dispute” and “rule[s] on the existence or validity of the arbitral agreement.” Thus, the Tribunal is competent to decide that it has jurisdiction and should look to the Contract to determine the procedural rules that apply to the current dispute.



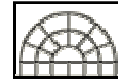
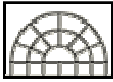
**B. The Arbitration Clause indicates that the Romanian Rules apply to this dispute.**

1. The Tribunal should respect the terms for which the parties contracted.

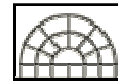
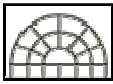
11. Tribunals review an arbitration clause with a presumption in favor of party autonomy and a desire to minimize the level of judicial intervention [*Quinette (Can.)*]. Furthermore, courts and tribunals consistently give effect to the parties' desire to arbitrate [*Lew, Mistelis & Kröll 150, 154; Mitsubishi (U.S.A.)*].
12. Party autonomy is a guiding principle in international commercial arbitration [*Redfern 6-03*] and dictates that parties to a contract are free to choose the substantive law and procedural rules that shall be applied in any dispute arising between them [*Lew, Mistelis & Kröll 124*]. Modern arbitration rules recognize the importance of party autonomy, permitting parties to bind themselves to the procedural rules governing the tribunal [*see, e.g., Model Law 19(1); Judicial Code Art. 1700 (Belg.); Arbitration Law Art. 2 (Braz.); Arbitration Act § 46(1) (Eng.); NCPC Art. 1496 (Fr.); ZPO Section 1051(1) (Ger.); Arbitration Ordinance 1996, § 28(1)(b) (Ind.); CCP Art. 1054(2) (Neth.); PIL Art. 187(1) (Switz.)*].

2. The parties chose to settle disputes arising out of the Contract according to the Romanian Rules, which confer jurisdiction on the Tribunal.

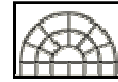
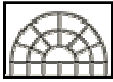
13. The Arbitration Clause calls for arbitration to proceed under the “International Arbitration Rules used in Bucharest” [*Cl. Ex. 1*]. The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (“Court of International Commercial Arbitration”) is the only institution in Bucharest that could properly settle disputes arising out of the Contract [*Clar. Q. 10*]. Thus, the only logical interpretation of the Arbitration Clause is that the parties intended to bring any contractual disputes before the Court of International Commercial Arbitration.



14. The Arbitration Clause cannot be construed to designate the Chamber of Commerce and Industry of Bucharest (“CCIB”). The CCIB does not hear international disputes [*Clar. Q. 10*]. The Contract is international in both form and substance; fuse boards were to be shipped from Mediterraneo to Equatoriana [*Cl. Ex. 1*]. Therefore, the CCIB would not be the proper forum to adjudicate this matter.
15. Furthermore, the Court of International Commercial Arbitration applies the Romanian Rules, and rarely conducts arbitrations under the UNCITRAL Arbitration Rules [*RA-CAB Art. 1(2); Clar. Q. 12*]. As the Court of International Commercial Arbitration is located in Bucharest and applies the Romanian Rules to arbitrations, the Arbitration Clause logically refers to the Romanian Rules.
16. A review of RESPONDENT’s conduct establishes that it was aware of the Arbitration Clause. Following the conclusion of the Contract, Mr. Stiles, the sales manager for RESPONDENT, asked Mr. Konkler to explain why he requested arbitration in Danubia [*Re. Ex. 1*]. Mr. Konkler explained that CLAIMANT routinely used this arbitration clause. If RESPONDENT had any reservations about the Arbitration Clause or its terms, RESPONDENT should have objected prior to the conclusion of the Contract.
  3. Even if the Tribunal considers the designation of rules to be vague, the Arbitration Clause binds the parties to arbitrate.
17. Should the Tribunal find that the Arbitration Clause is unclear as to which rules apply, the Clause is valid nonetheless. The Arbitration Clause expresses the clear intent of the parties to submit to arbitration. The parties agreed that the arbitral award would be final and binding, that the arbitral panel would be composed of three arbitrators, that the arbitration would be in English and take place in Vindobona, Danubia [*Cl. Ex. 1 ¶ 34*]. Tribunals should not find clauses void for uncertainty if they “show clearly that the parties intended to submit their disputes to arbitration” [*Lew, Mistelis & Kröll 156; see also Redfern 166*].



4. Tribunals consistently uphold arbitration agreements despite ambiguous language.
18. An arbitration agreement with ambiguous language will not necessarily be inoperative or unenforceable [*Tweeddale et al. 117*]. For example, tribunals uphold arbitration agreements if the intended institution or rules can be determined through a reference to a particular city or the type of dispute to be settled [*see, e.g., Société Tuvomon (enforcing an arbitration clause that referred to “Tribunal Chamber of Commerce” rather than using the formal designation “Paris Arbitration Center”); Epoux Convert (finding sufficient precision in arbitration clause referencing “Belgrade Chamber of Commerce” to indicate the “Foreign Trade Arbitration Court at the Economic Chamber of Yugoslavia”); see also CNIEC Henan (Chi.)*]. Arbitral tribunals will also uphold an agreement, despite the presence of ambiguous language, if the agreement can only be understood to be referring to one particular institution. In a Stockholm Chamber of Commerce proceeding, a handwritten clause in the contract called for any disputes arising out of the contract to be subject to “settlement by arbitration at Arbitration . . . domiciled in Stockholm, Sweden.” Because there was only one arbitral tribunal in Stockholm, the arbitration agreement was determined to be clear, unequivocal, and enforceable [*Case 41/1998 (Swed.)*]. Similarly, the German Coffee Association upheld its own jurisdiction on the basis of an arbitration clause which merely stipulated “arbitration: Hamburg, West Germany” [*Coffee Association (Ger.)*]. Although the arbitration clause did not indicate a specific institution, the tribunal found the clause to be valid since it was the only possible forum for this type of dispute in Hamburg [*Coffee Association (Ger.)*]. The Court of International Commercial Arbitration is the only tribunal in Bucharest appropriate to hear a dispute arising out of the Contract [*Clar. Q. 10; see also supra ¶¶13-14*].
19. Even when a contract misidentifies an arbitral institution or rules, so long as an institution or rules can be identified with a significant degree of certainty, the arbitration clause will be enforced [*Fouchard et al. 264; Lew, Mistelis & Kröll 156-57; see, e.g., ICC Case No. 4472*]. In a Swiss tribunal decision, an arbitration agreement stated that all disputes would be “submitted to international trade organization in Zurich, Switzerland . . .” [*ICC Case No. 5294*]. The tribunal found that the clause indicated an agreement to arbitrate in Zurich. Moreover, the tribunal

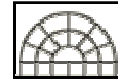


determined that the reference to the “international trade organization” could only refer to the Zurich Chamber of Commerce [*ICC Case No. 5294*]. Tribunals have enforced arbitration clauses with even less specificity, for example, a clause designating arbitration in a “third country, under the rule of the third country and in accordance with the rules of procedure of the International Commercial Association” [*Lucky-Goldstar (H.K.)*].

20. Arbitral agreements are likely to be enforced when tribunals discern both the parties’ intent to arbitrate as well as a reference to a valid arbitral institution or rules [*see supra ¶¶ 16-17*]. Tribunals generally invalidate arbitration agreements only when it is impossible to ascertain the parties’ intent from the contractual language [*Lew, Mistelis & Kröll 156*]. For example, tribunals have invalidated arbitration clauses that explicitly designated multiple arbitral institutions [*see, e.g., Bayerisches, 28 Feb. 2000 (Ger.) (refusing to enforce an arbitration clause that referred to two Chambers of Commerce, neither of which provided arbitration services); 27 April 1987 (Leb.) (rendering a clause invalid because arbitration was to take place at either “Chamber of Commerce in Bucharest or Arbitration Commission at the International Chamber of Commerce in Paris”)*].

5. The Tribunal should enforce the Arbitration Clause and apply the Romanian Rules.

21. The only reasonable interpretation of the Arbitration Clause is that the parties intended the application of the Romanian Rules. CLAIMANT and RESPONDENT explicitly expressed a desire to arbitrate any disputes arising out of the Contract. Thus, the Arbitration Clause is valid and the Romanian Rules are applicable to this dispute. Alternatively, an imprecise designation of the rules would not necessarily invalidate the Arbitration Clause in its entirety because tribunals commonly enforce imprecisely drafted arbitration clauses. There is nothing inherently unfair about the Romanian Rules. Moreover, both parties signed the Contract, expressing their intention to be bound by its terms. The Tribunal should enforce the Arbitration Clause and apply the Rules of Arbitration to the present dispute.



22. In enforcing the Arbitration Clause and applying the Romanian Rules, the Tribunal has jurisdiction over this dispute.

**C. The Tribunal should exercise jurisdiction to honor the parties' preferred method of dispute resolution.**

23. CLAIMANT and RESPONDENT expressed their desire to settle any disputes through arbitration in the Arbitration Clause. If the Tribunal were to find that it did not have jurisdiction to consider this dispute, the parties may be forced to resolve their dispute through litigation in a national court. In doing so, the parties would not be able to enjoy the advantages of arbitration, such as: reduced legal fees, confidentiality, technical expertise of arbitrators and economy of time. Additionally, arbitration is less adversarial than litigation and enhances the possibility of future business relations [*Tetley, 593*].

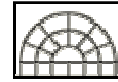
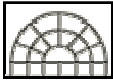
**PART TWO: RESPONDENT BREACHED THE CONTRACT BY DELIVERING NON-CONFORMING FUSE BOARDS**

24. RESPONDENT delivered fuse boards that did not conform to the Contract because (I) they were not of the description required by the Contract, and (II) they were not fit for the particular purpose of the Contract.

**I. PURSUANT TO ART. 35(1) CISG, RESPONDENT WAS OBLIGATED TO PROVIDE FUSE BOARDS CONFORMING TO THE DESCRIPTION IN THE CONTRACT.**

**A. RESPONDENT delivered fuse boards that did not conform to the contractual description of the goods.**

25. Art. 35(1) CISG requires the seller to deliver goods that conform to the description in the contract [*Bianca on Art. 35 in Bianca/Bonell 271; Lookofsky 89*] and restates the “familiar principle whereby the obligations of the parties to a CISG contract are, in the first instance, defined by their own agreement” [*Lookofsky 88*]. As scholars have noted, “[t]he description may be made by the buyer on his request of the goods. If the seller does not raise objections, the delivered goods must be as required by the buyer” [*Bianca on Art. 35 in Bianca/Bonell 272*].



Furthermore, “[t]he decisive factor for determining whether the goods conform to the contract is the contractual description of the goods” [*Schlechtriem, Uniform Sales Law 66*].

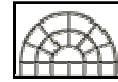
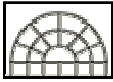
26. The Contract defined RESPONDENT’s obligations, requiring delivery of five fuse boards fitted with Chat Electronics JP type fuses [*Statement of Facts*]. RESPONDENT never objected to the Contract’s description of the fuse boards [*Id.*]. In fact, RESPONDENT reviewed the engineering drawings and “assured [CLAIMANT] that such fuse boards could be delivered” before signing the Contract [*Answer ¶ 3; Statement of Facts*]. RESPONDENT substantially deviated from the terms of the Contract by substituting JS type fuses. Therefore, the fuse boards were not of the description required by the Contract.
27. RESPONDENT’s substitution of JS type fuses changed the essence of the Contract. Fuses are an integral part of fuse boards [*Statement of Claim ¶ 6*] and come in a variety of types [*see, e.g., Re. Ex. 2*]. CLAIMANT contracted for JP type fuses based on the expert advice of a local electrical equipment supplier.<sup>6</sup> Thus, the change from JP type to JS type necessitated a modification of the Contract.

**B. The parties did not modify the Contract to allow RESPONDENT to substitute JS type fuses for JP type fuses.**

28. The parties did not modify the Contract to allow for JS type fuses instead of JP type fuses because (1) RESPONDENT did not modify the Contract in writing as required by paragraph 32 of the Contract and (2) Mr. Hart did not have authority to modify the Contract.

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<sup>6</sup> Switchboards advised CLAIMANT that JP type fuses were necessary for the Mountain View buildings’ fuse boards [*Clar. Q. 25*]. Switchboards was aware that Equalec had a policy “of connecting to primary distribution fuse boards using J type fuses only if circuits designed for 400 amperes or less used JP type fuses” [*Clar. Q. 25; Cl. Ex. 4*]. The fuse boards CLAIMANT needed for the Mountain View project were designed to J type circuits “of different ratings, but all were less than 400 amperes” [*Statement of Claim ¶ 9*]. Thus, Switchboards knew the Mountain View project’s fuse boards could only contain JP type fuses and advised CLAIMANT accordingly [*Statement of Claim ¶ 9; Clar. Q. 25*].



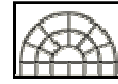
1. CLAIMANT may enforce paragraph 32 of the Contract, which required all modifications to be in writing.

- a. The CISG permits no oral modification clauses.

Pursuant to Art. 29(2) CISG, “[a] contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement.” Art. 29(2) CISG “entrenches the time honored principle that where parties have by agreement voluntarily restricted their ability to modify or terminate a contract by requiring formalities for such actions, that that agreement will be valid and enforceable” [*Eiselen* ¶ (b)]. Parties employ no oral modification (“NOM”) clauses “to protect themselves from an inadvertent or unwise oral adjustment and to prevent fraudulent or mistaken claims of modification of a written agreement” [*Hillman on Art. 29(2) 449*]. In general, “[r]ecognition of NOM clauses may also promote efficiency . . . . Parties who agree to a NOM clause believe that their gains in increased certainty and stability outweigh the increased costs of contractual modifications” [*Id.*]. Paragraph 32 of the Contract was a NOM clause; CLAIMANT and RESPONDENT agreed that “all amendments to the contract must be in writing” [*Cl. Ex. 1* ¶ 32].

- b. The Tribunal should enforce the NOM clause contained in the Contract.

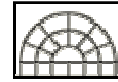
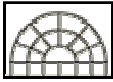
29. Paragraph 32 governed the interactions between the parties, including phone conversations. Thus, any attempt to modify the Contract arising out of the 14 July 2005 Conversation [*Statement of Facts*] had to be memorialized in writing.
30. The Tribunal should enforce paragraph 32, as intended by the CISG. Although Mr. Hart’s statements to Mr. Stiles may have been inadvertent or unwise, paragraph 32 of the Contract precluded these statements from constituting a valid contractual modification [*see Statement of Claim* ¶ 13 (“If there had been a written proposal for a change in the contract specifications, it would have been submitted to the engineer . . . [to determine] whether he approved the change”)]. Furthermore, paragraph 32 promoted efficiency by enabling CLAIMANT’s employees to discuss business matters with third parties, without the risk of modifying established contracts. Mr. Hart spoke with Mr. Stiles with the expectation “that



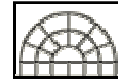
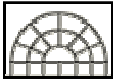
[RESPONDENT] would send a confirmation of the telephone call and a written request for an amendment to the contract specifications” [Cl. Ex. 2].

c. CLAIMANT should not be precluded from enforcing the NOM clause.

31. Even where a NOM clause is included in a contract, “a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct” [Art. 29(2) CISG]. If one contractual party conducts itself in such a way that the other contractual party modifies its performance in reliance, foregoing compliance with a NOM clause in the process, the first party cannot assert the NOM clause against the party that has modified its performance [Hillman on Art. 29(2) 458].
32. RESPONDENT claims that it “relied on Mr. Hart’s decision that [RESPONDENT] should fabricate the distribution fuse boards using Chat Electronics JS fuses” [Answer ¶ 23]. As a result, RESPONDENT seeks to invoke Art. 29(2) CISG in order to preclude CLAIMANT from enforcing the NOM clause contained in the Contract [Answer ¶ 25(b)].
33. However, RESPONDENT’s argument is misplaced: (i) Mr. Hart’s statements did not constitute conduct that should preclude CLAIMANT from enforcing the NOM clause, and (ii) RESPONDENT’s reliance on Mr. Hart’s statements was unreasonable.
  - i. Mr. Hart’s statements do not preclude CLAIMANT from enforcing the NOM clause.
34. Although Art. 29(2) CISG contemplates situations in which a party’s conduct may preclude it from enforcing a NOM clause, “[t]he kind of conduct that will lead to such preclusion is not specified. The verbal formula used in the paragraph would thus seem to provide judges and arbitrators a flexible framework within which to reach fair results when one party’s behaviour is such that it would be unfair to allow him to insist on the requirement of writing” [Date-Bah on Art. 29 in Bianca/Bonell 241-42].



35. The Tribunal should look to Art. 8 CISG to interpret Mr. Hart’s conduct. Art. 8 CISG “contains rules for the interpretation of the statements and conduct of the parties” [*Farnsworth on Art. 8 in Bianca/Bonnell* 94]. Art. 8(1) CISG requires that a party’s statements and conduct be interpreted according to that party’s intent. When a party’s intent cannot be determined, Art. 8(2) CISG requires that statements and conduct be interpreted under a reasonableness standard [*Id.* 97-98]. Since the parties disagree about whether Mr. Hart intended to orally modify the Contract [*Statement of Claim* ¶ 17], Mr. Hart’s statements should “be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances” [*Art. 8(2) CISG*].
36. Despite Mr. Hart’s insistence that “he was not very well-versed in the electrical aspect of the development” [*Re. Ex. 1*], Mr. Stiles pressed Mr. Hart to make a critical decision regarding a technical aspect of the fuse boards. Mr. Hart indicated that he was not sure whether Mr. Stiles’ proposal to use non-Chat Electronics JP type fuses would be acceptable to Mr. Konkler [*Re. Ex. 1*]. Furthermore, Mr. Hart merely “acknowledged that Mr. Stiles’ recommendation [to substitute JS type fuses for JP type fuses] was probably the best way to proceed” [*Cl. Ex. 2*]. Considering Mr. Stiles’ assurances about the interchangeability of the fuses [*Statement of Claim* ¶ 12; *Statement of Facts*], a reasonable business person would not interpret Mr. Hart’s conduct as modifying the Contract.
- ii. RESPONDENT’s reliance on Mr. Hart’s statements was unreasonable.
37. RESPONDENT’s reliance on Mr. Hart’s conduct should be evaluated according to a reasonableness standard. The language of Art. 29(2) CISG does not explicitly require that a party’s reliance be reasonable. However, “[t]he duty to act reasonably may be the [CISG’s] most pervasive general principle” [*Hillman on Uniformity* §1(B)]. The rule that parties “must conduct themselves according to the standard of the ‘reasonable person,’ which is expressly described in a number of provisions and, therefore, according to Art. 7(2), must be regarded as a general principle of the [CISG]” [*Schlechtriem, Uniform Sales Law* 38].



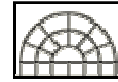
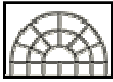
38. The Tribunal may also consider the UNIDROIT Principles of International Commercial Contracts of 2004 (“UNIDROIT Principles”), which endorse the doctrine of reasonable reliance.<sup>7</sup> Art. 2.1.18 UNIDROIT Principles states that a party should be precluded from enforcing a NOM clause only when “the other party has *reasonably* acted in reliance” on the first party’s conduct [*emphasis added*].
39. RESPONDENT’s reliance on Mr. Hart’s statements was unreasonable. RESPONDENT knew that Mr. Hart was unfamiliar with the technical specifications of fuses and only generally aware of the Contract [*Statement of Facts*]. Mr. Hart said he was unsure whether Mr. Konkler would authorize fuses not specified in the Contract. RESPONDENT should have complied with the parties’ agreement as to how modifications should be made: “Amendments to the contract must be in writing” [*Cl. Ex. 1 ¶ 32; see, e.g., ICC (Zurich) Case No. 9117 (stating that a “written modification clause . . . make[s] it almost impossible that [a party] could rely on any verbal promises or assurances . . . which are not at the same time also reflected in an amendment or a supplement to the contract”*)]. Considering Mr. Hart’s inexperience and the parties’ inclusion of the NOM clause, RESPONDENT’s reliance was unreasonable.
40. The record is silent as to whether the parties had previously contracted with each other. Accordingly, there is no indication of a pattern or course of dealing between the parties that could have established an accepted practice of waiving the NOM clause by oral modification [*see Enderlein/Maskow 123*]. Therefore, the NOM clause is valid and enforceable and RESPONDENT’S reliance on the 14 July 2005 Conversation was unreasonable in light of all relevant circumstances.

2. Mr. Hart lacked the authority to modify the Contract.

41. CLAIMANT is not bound by the conduct of Mr. Hart because he lacked authority to modify the Contract. The CISG does not address agency principles [*Bonell on Art. 7 in Bianca/Bonell 75*;

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<sup>7</sup> The UNIDROIT principles have been identified as “a restatement of the commercial contract law of the world” and “could be employed as a supplement for decisions under . . . CISG” [*Perillo 283*]. Moreover, the UNIDROIT principles are “widely applied by international commercial tribunals” [*Lando 381*] and “express a *communis opinio* and consensus” [*Viscasillas 2005 177*].

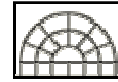
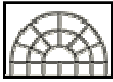


*AG Alsfeld, 12 May 1995 (Ger.)*]. When the CISG does not address an area of law, Art. 7(2) CISG indicates that the issue should be decided “in conformity with the law applicable by virtue of the rules of private international law.” Both Equatoriana and Mediterraneo are parties to the Convention on Agency in the International Sale of Goods (“Agency Convention”) [*Clar. Q. 16*]. Art. 1(1) Agency Convention states that an agent is a person who “has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party.” Mr. Hart has authority to sign contracts on behalf of the CLAIMANT and is therefore its agent [*Clar. Q. 17*]. Correspondingly, the Agency Convention governs whether Mr. Hart had authority to bind CLAIMANT.

42. Under the Agency Convention, an agent may bind the principal to an agreement with a third party in two ways: (1) the agent has actual authority delegated by the principal [*Art. 12 Agency Convention*]; or (2) the agent acts with apparent authority [*Art. 14 Agency Convention*]. Mr. Hart (a) likely did not have actual authority, and (b) did not have apparent authority to bind CLAIMANT to a modification of the Contract.

a. Mr. Hart likely did not have actual authority.

43. CLAIMANT did not delegate actual authority to Mr. Hart to modify the Contract with RESPONDENT. Mr. Hart “had no responsibility for the Contract with [RESPONDENT and] . . . he had not been given any additional authority to that which he had when Mr. Konkler was present” [*Clar. Q. 17*]. While Mr. Hart had the authority to sign contracts worth up to \$250,000 [*Id.*], the record is silent as to whether he was authorized to modify contracts negotiated by the Purchasing Director, Mr. Konkler. Considering Mr. Hart “did not have much experience with ordering the electrical equipment for” CLAIMANT, Mr. Hart likely did not have authority to modify the Contract [*Cl. Ex. 2*].

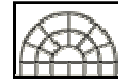
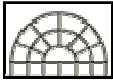


b. Mr. Hart did not have apparent authority.

44. The Agency Convention provides an exception to the requirement of actual authority. Where a principal, by his conduct, causes a third party to reasonably believe that the agent has authority to bind the principal, apparent authority is said to exist [*Art. 14(2) Agency Convention*].
45. Mr. Hart did not have apparent authority to modify the Contract. CLAIMANT authorized Mr. Hart to accept phone calls during Mr. Konkler's absence [*Clar. Q. 18*]. Answering a phone call did not imply that Mr. Hart had authority to act on behalf of Mr. Konkler. In fact, Mr. Hart indicated that "he was not sure [whether certain modifications] would be acceptable to Mr. Konkler" during the 14 July 2005 Conversation [*Statement of Facts*], suggesting that he could not make decisions on behalf of Mr. Konkler [*Re. Ex. 1*]. Thus, RESPONDENT could not have reasonably believed that Mr. Hart had authority to modify the Contract negotiated by Mr. Konkler.

**C. Recognizing the 14 July 2005 Conversation as a valid oral modification would violate the spirit of the CISG.**

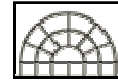
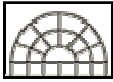
46. The Tribunal should recognize the "need to promote uniformity in [the CISG's] application and the observance of good faith in international trade" [*Art. 7(1) CISG*]. The CISG sanctions the use of NOM clauses [*Art. 29(2) CISG*]. The Tribunal would hinder uniform application of the law that governs the Contract if it finds that the 14 July 2005 Conversation constituted a modification of the Contract.
47. If Tribunals allow similar statements to those made by Mr. Hart to override NOM clauses, parties will be forced to contemplate and contract around all possible methods for modifying their contracts. Such a practice would increase contracting costs. Furthermore, parties that could not afford to bargain for detailed modification clauses would be subject to predatory oral modification practices by their contractual partners, which would contravene "the mandate of Art. 7(1) [CISG] that, 'regard is to be had to...the need to promote...the observance of good



faith in international trade” [Honnold 231]. Accordingly, the Tribunal should enforce the NOM clause and declare that the Contract was not validly modified.

## **II. RESPONDENT DELIVERED FUSE BOARDS THAT DID NOT SATISFY THE PARTICULAR PURPOSE OF THE CONTRACT.**

48. Even if the Tribunal finds that the 14 July 2005 Conversation modified the language of the Contract to permit JS type fuses in place of JP type fuses, the Conversation did not alter the particular purpose of the Contract.
- A. The fuse boards were nonconforming because they were unfit for the particular purpose made known to RESPONDENT.**
49. Art. 35(2)(b) CISG provides that goods are non-conforming if they are unfit for the particular purpose made known to the seller at the time of the conclusion of the contract [*Bianca on Art. 35 in Bianca/Bonell 274*]. The onus is on the buyer to make its particular purpose known to the seller [*Schlechtriem, Uniform Sales Law 66*]. The particular purpose need not “be an express part of the contract; it is sufficient that this purpose has been made known to the seller” [*Enderlein 156*]. When the seller is made aware of the particular purpose for which the goods will be used prior to the conclusion of the contract, the seller has an implied obligation under Art. 35(2)(b) CISG to provide goods fit for that purpose [*Lookofsky 92*].
50. The particular purpose of the Contract was to obtain fuse boards that Equalec would connect to the local power supply. CLAIMANT informed RESPONDENT of the particular purpose by specifying in the drawings that the fuse boards needed “to be lockable to Equalec requirements” [*Statement of Claim ¶ 9; Statement of Facts*]. Although “there would be testimony that the phrase meant that Equalec would lock the fuse boards with a padlock to which it had a key” [*Clar. Q. 21*], locking fuse boards is the final step in the electrical connection process [*Statement of Claim ¶ 8*]. Thus CLAIMANT notified RESPONDENT that the fuse boards were to be connected to the power supply by Equalec and that Equalec had specific requirements for locking fuse boards.



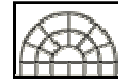
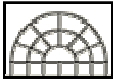
1. RESPONDENT knew or could not have been unaware that the particular purpose of the Contract was to obtain fuse boards that Equalec would connect to the local power supply.

51. Scholars agree that “[t]he obligation of fitness for a particular purpose arises only if buyer makes the particular purpose known to seller (expressly or impliedly) at or before the 'conclusion of the contract'” [*Lookofsky 92; see also Folsom 88*]. Furthermore, Art. 8 CISG dictates that the interpretation of “[t]he intent of a party or the understanding of a reasonable person depends on all of the facts and circumstances including . . . negotiations, established practices between the parties, usages, and any subsequent conduct” [*Schlechtriem, Uniform Sales Law 38*].

52. During the parties’ negotiations over the terms of the Contract, RESPONDENT reviewed the drawings, which referenced Equalec requirements [*Statement of Facts*]. Furthermore, RESPONDENT was a skilled fabricator of electrical equipment to the trade [*Answer ¶ 2*] and had delivered goods to Equatoriana in the past [*Answer ¶ 12*]. Thus, at the time the Contract was concluded, RESPONDENT knew or could not have been unaware that CLAIMANT intended to install the fuse boards in the Mountain View project buildings and have Equalec connect and lock them.

2. RESPONDENT was obligated to provide fuse boards that complied with Equalec requirements.

53. Equalec is the only supplier of electricity in Mountain View [*Clar. Q. 22*]. Although Equalec is a private company [*Clar. Q. 22*], it has a monopoly on the provision of electric power in Mountain View [*Clar. Q. 31*]. Equalec’s requirements for connecting fuse boards are regulated by the Equatoriana Electrical Regulatory Commission (“EERC”) [*Clar. Qs. 28-9*]. Under the Equatoriana Electric Service Regulatory Act, electricity providers may establish service requirements, as Equalec did, so long as they are not “undue or unjust” [*Re. Ex. 4*]. Equalec’s policy, which was implemented for safety and efficiency reasons [*Cl. Ex. 4*], has neither been challenged nor found to be undue or unjust [*Clar. Q. 29*].

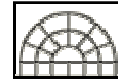
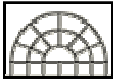


54. RESPONDENT knew where the fuse boards were to be used [*Cl. Ex. 1*], had shipped electrical products to Equatoriana in the past [*Answer ¶ 12*], and reviewed the design drawings referencing Equalec [*Re. Ex. 1*]. RESPONDENT merely had to visit Equalec’s website to determine what Equalec’s requirements were [*Clar. Q. 24; Cl. Ex. 4*]. Additionally, RESPONDENT could have ascertained that Equalec was the sole electricity supply distribution company in Mountain View [*Clar. Q. 31*] and should have ensured that the fuse boards complied with Equalec’s requirements.

**B. CLAIMANT reasonably relied on RESPONDENT’s skill and judgment to provide fuse boards that satisfied the particular purpose of the Contract.**

55. When a buyer provides a seller with technical specifications, “[i]f the goods are not fit for the particular purpose which the buyer has in mind, the seller should advise him accordingly” [*Enderlein 156*]. As long as the seller advises the buyer that the technical specifications will not satisfy the buyer’s particular purpose, “the seller will not be responsible [for nonconformity] if the buyer insists on his order and shows that he does not rely on the seller’s judgment” [*Id. 157*]. The buyer’s reliance on the seller’s skill and judgment must be reasonable [*Lookofsky 92; see also Folsom 88*]. “The circumstances in which the buyer may not rely on the seller’s skill and judgment cannot be specified in advance but must be ascertained case by case. In general, however, it can be said that it is unreasonable for the buyer to rely on a skill or judgment capacity that is not common in the seller’s trade branch” [*Bianca on Art. 35 in Bianca/Bonell 274-5*]. Additionally, reliance is not reasonable “when the seller is not the manufacturer of the goods but only a trading agent who indicates that he has no special knowledge” [*Enderlein/Maskow 145*].

56. Because RESPONDENT had previously provided goods to customers in Equatoriana, it was reasonable for CLAIMANT to rely on RESPONDENT’s skill and judgment [*Re. Ex. 1*]. Fuse boards are fabricated to meet the specific requirements of each customer [*Statement of Claim ¶ 9*]. RESPONDENT “fabricate[s] certain types of electrical equipment using standard parts that [it] otherwise would sell individually” [*Re. Ex. 1*]. RESPONDENT considered CLAIMANT’S request to “fabricate five primary distribution fuse boards for a project they were building in



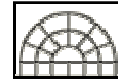
Mountain View” and warranted that it “would certainly be able to do it” [*Re. Ex. 1*]. Additionally, when RESPONDENT could not satisfy the Contract, RESPONDENT assured CLAIMANT that “it did not matter which type [of fuse] was used” [*Re. Ex. 1*]. Throughout its relationship with CLAIMANT, RESPONDENT never asked for clarifications regarding any terms of the Contract, furthering CLAIMANT’s reliance on RESPONDENT’s skill and judgment. Despite its assurances, RESPONDENT did not perform any due diligence to ensure that it could deliver fuse boards fit for the particular purpose. RESPONDENT’s failure to ascertain whether the fuse boards conformed to the particular purpose of the Contract led to the invalid substitution of JS type fuses.

**C. RESPONDENT is not excused under Art. 35(3) CISG.**

57. Art. 35(3) CISG absolves the buyer of liability for delivering nonconforming goods “if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.” Moreover, knowledge of a defect “gained at the time of delivery or inspection of the goods will not affect seller’s obligation” [*Folsom 88*].
58. CLAIMANT contracted for fuse boards satisfying its particular purpose. CLAIMANT could not have known or been aware that RESPONDENT would be unable to provide fuse boards conforming to both the plain language and particular purpose of the Contract. Therefore, CLAIMANT’S eventual discovery of the non-conformity does not relieve RESPONDENT of its obligation to provide conforming fuse boards.

**D. *Caveat venditor* – the principle underlying the CISG.**

59. “Art. 35 [CISG] is founded on the basic principle that the seller has a duty to deliver the goods required by the contract. . . . [T]he characteristics of the goods are presumed to lie within the *sphere of influence* of the seller, and the seller is presumed to know more about the characteristics of the goods than the buyer who has paid for the goods and is therefore entitled to receive his part of the bargain (*quid pro quo*). In this respect the starting position of the Convention is *caveat venditor* [(seller beware)], which has been the general tendency in the law



on the sale of goods since the end of the nineteenth century” [Henschel 3]. Additionally, fairness requires that the seller provide the goods contracted for [Enderlein/Maskow 144]. Indeed, it would seem that *caveat venditor* has become the supplementary CISG rule [Lookofsky 89].

60. CLAIMANT contracted with RESPONDENT to provide fuse boards that would satisfy the purpose of being connected to the local power supply through Equalec. The fuse boards contracted for would have satisfied that purpose. RESPONDENT was required to provide fuse boards with the characteristics contained in the Contract. RESPONDENT did not fulfill its contractual obligations when it substituted JP type fuses for JS type fuses. This substitution laid only within RESPONDENT’s sphere of influence and is the reason why the fuse boards did not satisfy the particular purpose of the Contract.

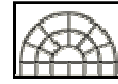
**PART THREE: RESPONDENT IS LIABLE FOR CLAIMANT’S LOSS.**

**I. RESPONDENT IS LIABLE EVEN THOUGH THE NONCONFORMITY OF THE FUSE BOARDS BECAME APPARENT ONLY AFTER EQUALEC REFUSED TO LOCK AND CONNECT THEM.**

61. Art. 36 CISG states: “[t]he seller is liable . . . for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.” In Art. 36 CISG liability cases, “the buyer must prove that the lack of conformity already existed at the time of passing of the risk” [Enderlein 161]. Pursuant to Art. 69(1) CISG,<sup>8</sup> risk passed to CLAIMANT at the time of delivery [Statement of Facts].
62. The parties do not dispute that the fuse boards contained JS type fuses at the time of delivery [Answer ¶¶ 10-11; Re. Ex. 1; Statement of Facts]. The fuse boards fitted with JS type fuses did not conform to the particular purpose of the Contract, to be connected to the power supply by Equalec, “[b]ecause the fuses [contained therein] were JS type” [Statement of Claim ¶ 14]. Thus, “Equalec refused to make the electrical connection” [Statement of Claim ¶ 14; Statement

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<sup>8</sup> Since the Contract did not require carriage of goods, Arts. 67 and 68 CISG do not govern the passage of risk.



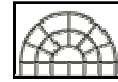
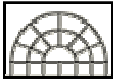
*of Facts*]. As such, the lack of conformity existed when RESPONDENT delivered the fuse boards.

63. CLAIMANT fulfilled its duty to examine the fuse boards “within as short a period as [was] practicable in the circumstances” [*Art. 38(1) CISG*]. The CISG Advisory Council notes: “[i]n [certain] cases, such as complicated machinery, it may not be commercially practicable to examine the goods except for externally visible damage or other non-conformity until, for example, they can be used in the way intended” [*CISG Advisory Council Opinion No. 2*]. Scholars explain that “the seller is liable regardless of when the lack of conformity becomes apparent” [*Schlechtriem on Seller’s Obligations 6-23*]; moreover, “[t]he fact that the defects show themselves later is not important, because what becomes apparent is a condition already affecting the goods” [*Bianca on Art. 36 in Bianca/Bonell 284*].
64. Whereas “[n]o inspection as to whether [the fuse boards] would function properly could be done until they were connected to the electrical supply” [*Clar. Q. 32*], CLAIMANT conducted a “visual inspection” of them [*Id.*; *Statement of Facts*]. Satisfied the fuse boards had not been damaged during their transport, CLAIMANT directed its Contractor to install the fuse boards and arranged for Equalec to connect and lock them [*Clar. Q. 32*; *Statement of Claim ¶ 14*; *Statement of Facts*]. Only after Equalec refused to lock the fuse boards could CLAIMANT discover that the fuse boards could not be used for their intended purpose. Thus, RESPONDENT should not be excused from liability merely because CLAIMANT did not immediately discover the nonconformity.

## **II. RESPONDENT IS NOT EXEMPT FROM LIABILITY DUE TO AN ART. 79 CISG IMPEDIMENT.**

### **A. The possibility of CLAIMANT complaining about Equalec’s policy does not excuse RESPONDENT from liability.**

65. RESPONDENT asserts that “[CLAIMANT] had the possibility of complaining to the [EERC] that Equalec was under a legal obligation to connect to the distribution fuse boards containing JS type fuses and to request [the EERC] to order [Equalec] to do so” [*Answer ¶ 25(d)*]. However,

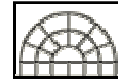
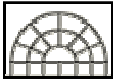


an assertion that CLAIMANT's alleged failure to complain to the EERC excuses RESPONDENT's liability is without merit.

66. The CISG only provides for exemptions to liability due to unforeseen impediments beyond the breaching party's control [*Art. 79 CISG*], rendering the general common law doctrine of excuse inapplicable to the present case [*see Nicholas 5(3)-(4)*] (“[*CISG Art. 79*] is obviously not the language of the common law”); *Lookofsky 162* (criticizing the assumption that “excuse’ should be subsumed within the Article 79”)]. Nor does the CISG tie liability to fault [*Schlechtriem, Uniform Sales Law 100*] (“It was decided early on not to let exemptions turn on the question of fault”); *see also Maskow 664* (“Interpretations which try to make clear that the fault principle is implemented in the CISG do not correspond to reality”)]. Thus, unless RESPONDENT asserts that CLAIMANT's alleged failure to complain to the EERC was an impediment beyond its control,<sup>9</sup> criticism of CLAIMANT's post-breach conduct, or a suggestion that RESPONDENT can blame someone else for its breach, is misplaced.
67. Furthermore, RESPONDENT's assertion that CLAIMANT had the possibility of complaining to the EERC is factually incorrect. Under the circumstances, it was impractical to complain to the EERC because the process could have taken up to two years [*Clar. Q. 30*]. CLAIMANT had only three weeks to mitigate its damages,<sup>10</sup> which was its duty pursuant to Art. 77 CISG. “Without a connection to the electricity supply, [CLAIMANT] faced the likelihood that it would not be able to give access to the buildings at Mountain View to its lessees . . . [by 1 October 2005, as specified] in the lease agreements” [*Statement of Claim ¶ 16*]. In order to avoid lost profits, which RESPONDENT would also have been liable for, CLAIMANT quickly secured fuse boards that satisfied Equalec's requirements [*Statement of Claim ¶ 18*]. Since it was “impossible to determine” how long the complaint process would have lasted, CLAIMANT could not have realistically complained to the EERC [*Clar. Q. 30*].

<sup>9</sup> See Part Three II.B.i, *infra*, for an analysis of why this assertion also fails.

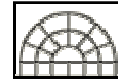
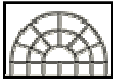
<sup>10</sup> In fact, this narrow timeframe within which CLAIMANT had to act was due in large part to RESPONDENT's week-late delivery of the fuse boards, on 22 August 2005, which delayed the appointment with Equalec until 8 September 2005 [*Statement of Claim ¶ 14*].



68. Lastly, the record does not support the suggestion “that Equalec was under a legal obligation to connect to the distribution fuse boards containing JS type fuses” [*Answer* ¶ 25(d)]. Although Equalec’s policy may have been unique [*Clar. Q. 23*], the EERC had not rejected the safety-conscious policy. Rather, Equatoriana law states that electricity providers “shall provide electric service that is safe and adequate . . . [and t]here shall be no undue or unjust requirements for providing such service” [*Re. Ex. 4*]. Considering the safety concerns motivating Equalec’s requirements [*see Statement of Claim* ¶ 15; *Cl. Ex. 4*], a court would likely uphold the policy. In the interest of efficiency, CLAIMANT acted under the assumption that Equalec’s policy was valid and legal, and accordingly secured fuse boards that complied with Equalec’s policy [*Statement of Claim* ¶ 18].

**B. An Art. 79 CISG exemption is not warranted in this case.**

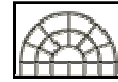
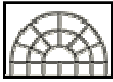
69. The Tribunal should decide that Art. 79 CISG does not apply to cases of breach by delivery of nonconforming goods under Art. 35 CISG. Scholars disagree on this point [*compare, Honnold 1987 430 (suggesting that the word 'impediment' implies that nonperformance consists of nondelivery but not defective performance); with Tallon on Art. 79 in Bianca/Bonell 576 (explaining that “the obligation to deliver conforming goods also comes within the scope of Article 79”)*]. The UNCITRAL Working Group, draftsmen of the CISG, adopted the word impediment “as denoting . . . an external barrier to performance, rather than an aspect of that performance” [*Nicholas 5(10)*]. Accordingly, the Tribunal should apply the definition of impediment that best reflects the “intention of the draftsmen,” and conclude that RESPONDENT’s delivery of JS type fuses (nonconforming goods) constitutes an external barrier to performance and prevents the application of an Art. 79 CISG exemption [*Id.*]. The language of Art. 79(1) CISG was left intentionally vague because “[i]t is not practicable to enumerate the circumstances that will excuse [every] failure to perform” [*see Bund 381-82 (noting that the language of Art. 79(1) CISG represents a compromise between countries’ differing approaches; see also Schlechtriem, Uniform Sales Law 100 (“Though the circumstances permitting exemption cannot generally be equated simply with ‘force majeure,’ efforts were made to define them narrowly”)*]].



70. Even if the Tribunal considers Art. 79 CISG to be applicable to cases of breach by delivery of nonconforming goods [Art. 35 CISG], there is no impediment in the present case that falls within the scope of Art. 79. To fall within Art. 79(1),<sup>11</sup> the party claiming exemption must prove that the failure to perform his contractual obligations was “due to an impediment beyond his control.” In addition, the party must prove either: (i) that he could not reasonably have been expected to take the impediment into account at the time of conclusion of the contract; or (ii) that he could not reasonably have been expected to avoid or overcome the impediment or its consequences [Art. 79(1) CISG; see also *Nicholas 5(3)*].
71. Although RESPONDENT may proffer four theories for an exemption from liability, the facts of this dispute do not reveal any recognizable impediment beyond RESPONDENT’s control which RESPONDENT could not have avoided, overcome, or reasonably have been expected to take into account at the time of contracting.
1. CLAIMANT’s alleged failure to complain to the EERC about Equalec’s policy was not an impediment beyond RESPONDENT’s control.
72. CLAIMANT’s alleged failure to complain to the EERC did not impede RESPONDENT’s performance. “There is no express requirement that buyer inform seller of buyer’s reliance [on the seller’s skill or judgment], but only of the particular purpose [of the contract]. More importantly, there is no requirement that buyer inform seller of any of the difficulties which buyer may know are involved in designating or designing goods to accomplish this particular use” [Folsom 88; *Sec. Comm. to Art. 35 CISG Commentary*; see also *supra* ¶¶ 57-58].
73. A complaint to the EERC would have merely confirmed whether the fuse boards complied with the particular purpose of the Contract. CLAIMANT’s alleged failure to complain does not exempt RESPONDENT from liability; RESPONDENT had the legal and contractual obligation

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<sup>11</sup> Arts. 79(2)-(4) CISG are inapplicable to this case for obvious reasons: RESPONDENT did not engage a third party to perform a whole or part of the Contract [Art. 79(2)] and the facts do not indicate that any alleged impediment ceased to exist [Art. 79(3)]. Additionally, CLAIMANT is not now challenging RESPONDENT’s notice of the alleged impediments [Art. 79(4)].

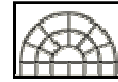
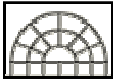


to ensure that the fuse boards complied with the particular purpose of the Contract [Art. 35(2)(b) CISG; see supra ¶¶ 57-58].

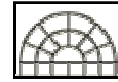
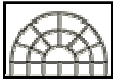
74. Additionally, assuming *arguendo* that CLAIMANT's alleged failure to complain constitutes an impediment beyond RESPONDENT's control, RESPONDENT could reasonably be expected to have avoided CLAIMANT's alleged failure or the consequences thereof [Art. 79(1) CISG]. RESPONDENT undertook the obligation to deliver fuse boards that Equalec would connect to the power supply. Correspondingly, it is not unreasonable to expect RESPONDENT to have taken measures to ensure that the fuse boards complied with this purpose. For example, RESPONDENT could have secured Chat Electronic JP type fuses from another supplier, or even directly contacted Equalec or the EERC to contest Equalec's policy. Lastly, it is reasonable to expect RESPONDENT to have taken such measures because RESPONDENT was obligated to provide fuse boards conforming to the particular purpose of the Contract [Sec. Comm. to Art. 35 CISG Commentary; see also ¶¶ 57-58].

2 The exhaustion of RESPONDENT's supply of Chat Electronics JP type fuses was not an impediment beyond RESPONDENT's control.

75. Fundamental to CISG principles is the rule that “[a] CISG obligor . . . should always be deemed 'in control' of his/her own business and financial condition in general, [and] internal 'excuses' connected with business operations (poor quality control, etc.) or financial management would never be held 'beyond' that party's control” [Lookofsky/Flechtner 205]. A CISG Art. 79 exemption “will apply only in those very few cases when the seller could neither choose nor control his auxiliary suppliers and it was not possible to procure, produce or repair the goods in any other manner” [Schlechtriem, *Uniform Sales Law* 103; see also *Schiedsgericht, 21 Mar. 1996 (Ger.) (declaring a non-performing seller's supplier's financial difficulties not to be a valid Art. 79 CISG impediment)*]. “[I]ncreased procurement and production costs do not constitute exempting impediments” [Schlechtriem, *Uniform Sales Law* 101].



76. RESPONDENT assumed the inherent market risk associated with its suppliers and supplies when it contracted with CLAIMANT. Moreover, the Contract merely specified Chat Electronics JP type fuses, but did not restrict the source from which RESPONDENT could obtain the fuses. Provided Switchboards was capable of supplying Chat Electronics JP type fuses [*Clar. Q. 33*], RESPONDENT should have similarly been able to procure Chat Electronics JP type fuses even if it would have increased RESPONDENT's costs.
3. RESPONDENT's unawareness of Equalec's policy was not an impediment beyond RESPONDENT's control.
77. An assertion by RESPONDENT that its unawareness of Equalec's policy was an impediment beyond its control is merely a suggestion that it was not culpable for its breach. "If the seller's state of mind can constitute an impediment, Art. 79 is simply a statement of fault liability with the burden of proof reversed" [*Nicholas 5(13)*]. The CISG does not sanction an attempt to excuse liability based on lack of fault [*see Part Three II.A.2, supra*]. In the context of international sales contracts, the seller has a duty to inform itself of the contractual language [*See ¶¶ 57-58*].
78. RESPONDENT cannot construe its ignorance as an impediment beyond its control because RESPONDENT was on notice of Equalec's "requirements" and was free to seek clarification [*Statement of Facts*]. Furthermore, not only was the phrase "lockable to Equalec requirements" included in the Contract, Equalec's policy was publicly available on its website [*Clar. Q. 24*].
4. Equalec's refusal to connect to the fuse boards was not an unforeseen impediment.
79. Assuming *arguendo* that Equalec's refusal to connect was an impediment beyond RESPONDENT's control, RESPONDENT could have reasonably been expected to avoid, overcome or take the impediment into account at the time of the Contract's conclusion [*Art. 79(1) CISG*]. "Because nearly all potential impediments to performance – even wars, fires, embargoes and terrorism . . . are increasingly 'foreseeable' in the modern commercial

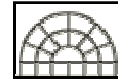


environment, this is often the most difficult Art. 79 element to prove” *[Lookofsky/Flechtner 205]*.

80. CLAIMANT explicitly informed RESPONDENT that the fuse boards were “to be lockable to Equalec requirements” *[Statement of Claim ¶ 9]*; RESPONDENT knew the fuse boards were to be used in Mountain View, Equatoriana *[Cl. Ex. 1; Answer ¶ 3]*; RESPONDENT was an experienced seller of electrical equipment *[Answer ¶ 2]*, having previously delivered goods to other Equatoriana customers *[Answer ¶ 8]*; Equalec was the only supplier of electricity in Mountain View, Equatoriana *[Clar. Q. 31]*, and information about Equalec’s policy was available on Equalec’s website *[Clar. Q. 24]*. Consequently, Equalec’s refusal to connect to fuse boards deviating from the Contract’s specifications was foreseeable and not an impediment beyond RESPONDENT’s control.
81. Surely RESPONDENT could reasonably be expected to have accounted for the possibility of a recalcitrant electric supplier when it agreed to fabricate fuse boards, the functionality of which depend on satisfying requirements of third-party electricity suppliers *[Statement of Claim ¶¶ 7-8]*. Thus Equalec’s refusal to connect the fuse boards does not exempt RESPONDENT from liability for CLAIMANT’s damages.

**III. RESPONDENT’S FAILURE TO DELIVER FUSE BOARDS CONFORMING TO THE CONTRACT WAS NOT CAUSED BY AN ACT OR OMISSION BY CLAIMANT.**

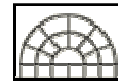
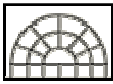
82. An assertion that “[CLAIMANT] may not rely on [RESPONDENT’s] failure . . . to perform, to the extent that such failure was caused by [CLAIMANT’s] act or omission,” pursuant to Art. 80 CISG, must also fail.
83. RESPONDENT is an experienced “fabricator and distributor of electrical equipment to the trade” *[Answer ¶ 2]*. RESPONDENT promised to build custom-made fuse boards according to the specifications supplied by CLAIMANT *[Answer ¶ 6]*. Furthermore, RESPONDENT assured CLAIMANT that RESPONDENT could supply the fuse boards according to the drawings *[Statement of Claim ¶ 9; Answer ¶ 3; Statement of Facts]*.



84. CLAIMANT was not obligated to tell RESPONDENT about Equalec's policy as a buyer need not "inform seller of buyer's reliance, but only of the particular purpose. More importantly, there is no requirement that the buyer inform the seller of any of the difficulties which the buyer may know are involved in designating or designing goods to accomplish this particular use" [*Folsom 88; see also Part Three II.B.i ¶ 79, supra*].
85. Finally, even if the Tribunal finds that CLAIMANT modified the Contract to allow for JS fuses, such conduct does not preclude CLAIMANT from relying on RESPONDENT's failure to perform because the modification did not concern the particular purpose of the Contract [*See Part Two II, supra*]. Regardless of the type of fuse ultimately supplied, RESPONDENT was explicitly notified that Equalec had requirements and that the fuse boards must meet them [*Statement of Claim ¶ 9; Statement of Facts*]. CLAIMANT neither misled RESPONDENT in any way nor acted contrary to its obligations.

**IV. RESPONDENT IS LIABLE FOR THE COST OF PURCHASING AND INSTALLING REPLACEMENT FUSE BOARDS.**

86. CLAIMANT seeks \$200,000 in damages. In accordance with Procedural Order No. 2, the issue of damages shall not be discussed.



**PRAYER FOR RELIEF**

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

- Find that the tribunal has jurisdiction to consider this dispute under the Arbitration Clause in the Contract
- Find that RESPONDENT delivered fuse boards that did not conform to the Contract.
- Find that RESPONDENT delivered fuse boards that did not satisfy the particular purpose of the Contract.
- Find that the parties did not modify the Contract.
- Find that RESPONDENT is not excused from liability.

(signed)

/s/ Adrienne Baranowicz  
Adrienne Baranowicz

/s/ Ryan Truman Cloud  
Ryan Truman Cloud

/s/ David P. Cole  
David P. Cole

/s/ Lee J. Goldberg  
Lee J. Goldberg

/s/ Lauren A. Mayne  
Lauren A. Mayne

/s/ Brian P. Morgan  
Brian P. Morgan

/s/ Matthew Parrott  
Matthew Parrott

/s/ Melissa G. Rasmussen  
Melissa G. Rasmussen

/s/ Mollie Richardson  
Mollie Richardson

/s/ Jennifer Schramm  
Jennifer Schramm

/s/ Erin Keely Tucker  
Erin Keely Tucker

/s/ Daniel J. Weiner  
Daniel J. Weiner

7 December 2006