

THIRD ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

27 MARCH – 2 APRIL 2006

MEMORANDUM FOR CLAIMANT



LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

ON BEHALF OF:

Oceania Printers, S.A.
Tea Trader House, Old Times Square
Magreton, 00178
Oceania

CLAIMANT

AGAINST:

McHinery Equipment Suppliers, Pty.
The Tramshed, Breakers Lane
Westeria City, 1423
Mediterraneo

RESPONDENT

COUNSELS:

Lukas Elias Assmann · Peer Borries · Tobias Hoppe
Sabine Friederike von Oelffen · Charlotte Schaber · Caroline Siebenbrock gen. Hemker
Stefanie Caroline Vogt · Lena Walther · Anne-Christine Wieler · Natalie Verena Zag



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LIST OF ABBREVIATIONS

\$	Dollar(s)
%	per cent
&	and
§(§)	Section(s)
A.C.	Law Reports, Appeal Cases
AAA-AR	American Arbitration Association Arbitration Rules
AG	Aktiengesellschaft (German Incorporation)
All ER	All England Law Reports
Alt.	Alternative
AR	Arbitration Rules
Art(s).	Article(s)
ASA	Association Suisse de l'Arbitrage
BGH	Bundesgerichtshof (German Federal Supreme Court)
CA	Cour d'appel (French Court of Appeal)
CCI	Court of the Chamber of Commerce and Industry
CIDRA	Chicago International Dispute Resolution Association
CIDRA-AR	The Arbitration Rules of Chicago International Dispute Resolution Association
CIF	Cost Insurance Freight (INCOTERMS 2000)



CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
Co.	Company
Corp.	Corporation
Ed(s).	Editor(s)
ed.	edition
et al.	et alii (and others)
et seq.	et sequentes (and following)
Frankfurt a.M.	Frankfurt am Main
FTA	Flexographic Technical Association
GmbH	Gesellschaft mit begrenzter Haftung (German Limited Liability Company)
Hague Convention	Convention on the Law Applicable to the International Sale of Goods, The Hague 1986
HCC	Hamburg Chamber of Commerce
HG	Handelsgericht (Swiss Commercial Court)
i.e.	id est (that means)
ibid.	ibidem (the same)
ICARFCCI	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
ICC	International Chamber of Commerce and Industry



ICC-AR	Arbitration Rules of the International Chamber of Commerce Arbitration Rules
IDR	Journal of International Dispute Resolution
Inc.	Incorporated
INCOTERMS	International Commercial Terms
Int'l	International
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
IR	interest rate
Iran-U.S. C.T.R.	Iran-United States Claims Tribunal
LCIA	London Court of Arbitration
LCIA-AR	London Court of International Arbitration Rules
LG	Landgericht (German Regional Court)
Ltd.	Limited
MED-PIL	Private International Law Act of Mediterraneo
ML	UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985
Nat'l	National
No(s).	Number(s)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958



OC-Law	Substantive Law of Oceania
OC-PII	Oceania Conflict of Laws in the International Sale of Goods Act
OG	Obergericht (Swiss Appellate Court)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeal)
p(p).	page(s)
PECL	Principles of European Contract Law
Pty.	Proprietary
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rome Convention	Convention on the Law Applicable to Contractual Obligations, 1980
S.A.	Société Anonyme (French Corporation)/ Sociedad Anónima (Spanish Corporation)
S.a.r.l.	Société à responsabilité limitée (French Limited Liability Company)
S.p.A.	Società per azioni (Italian Corporation)
SCC	Stockholm Chamber of Commerce
SL	Sociedad de Responsabilidad Limitada (Spanish Limited)
SRIA	Swiss Rules of International Arbitration



U.S.	United States
U.S.A.	United States of America
UCC	Uniform Commercial Code
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	The UNIDROIT Principles of International Commercial Contracts
UN-Limitation Convention	United Nations Convention on the Limitation Period in the International Sale of Goods, New York, 14 June 1974
v.	versus
W.L.R.	Weekly Law Reports
WIPO-AR	World Intellectual Property Organisation
YCA	Yearbook of Commercial Arbitration
ZEuP	Zeitschrift für Europäisches Privatrecht



STATEMENT OF FACTS

- **17 April 2002:** Oceania Printers S.A., a company organised under the laws of Oceania, [hereinafter CLAIMANT] inquired by letter about the possibility of purchasing a flexoprinter machine. It emphasised its intent to establish a commanding lead on the flexoprinting market in Oceania and expressed its need for a machine capable of printing on aluminium foil “that may be of 8 micrometer thickness”.
- **25 April 2002:** McHinery Equipment Suppliers Pty., a company organised under the laws of Mediterraneo, [hereinafter RESPONDENT] replied that it had a second hand “7 stand Magiprint Flexometix Mark 8” machine available “for [CLAIMANT’S] task”.
- **5/6 May 2002:** The parties met in Athens and visited the premises of the previous owner of the flexoprinter machine. Conducting test runs was impossible, as the machine was no longer in use.
- **10 May 2002:** CLAIMANT informed RESPONDENT about its profitable contract with Oceania Confectionaries and emphasised its urgent need for delivery.
- **16 May 2002:** RESPONDENT affirmed its ability to deliver the machine promptly at the price of \$ 42,000 CIF Port Magreton, Oceania, costs for refurbishment included.
- **21 May 2002:** CLAIMANT agreed to RESPONDENT’S proposal.
- **27 May 2002:** RESPONDENT ensured CLAIMANT that the machine would satisfy “all the needs of [its] customers”, that it was “easy to operate” and “very reliable”.
- **30 May 2002:** CLAIMANT signed the contract document sent by RESPONDENT. It contained an arbitration agreement and a choice of law clause in favour of the CISG.
- **8 July 2002:** Installation, refurbishment and test runs of the machine were completed.
- **Soon after 8 July 2002:** When printing on 8 micrometer foil, the machine creased and tore it and multiple colour runs were out of register. CLAIMANT immediately gave notice of the machine’s non-conformity to RESPONDENT’S representative in Oceania. In the following months, RESPONDENT’S workmen unsuccessfully tried to fix the problem.
- **1 August 2002:** CLAIMANT reiterated the machine’s lack of conformity and informed RESPONDENT of the intent of Oceania Confectionaries to cancel the contract.
- **15 August 2002:** When RESPONDENT did not react, CLAIMANT sent a letter announcing its claim for damages out of the cancelled contract with Oceania Confectionaries.
- **15 August 2002 – 14 October 2004:** Attempts to reach a settlement were unsuccessful.
- **14 October 2003:** CLAIMANT sold the machine to Equatoriana Printers Ltd. for \$ 22,000.
- **27 June 2005:** CLAIMANT submitted its claim by mail to CIDRA and to RESPONDENT.



ARGUMENT

I. THE PERIOD OF LIMITATION HAS NOT EXPIRED PRIOR TO THE COMMENCEMENT OF THE ARBITRATION

1 In response to Procedural Order No. 1 § 14, Question 1, CLAIMANT submits that its claim is actionable as the limitation period applicable to the present dispute constitutes at least three years. The claim arises out of the contract concluded between CLAIMANT and RESPONDENT on 30 May 2002 providing for the delivery of one second hand 7 stand Magiprint Flexometix Mark 8 flexoprinter machine (*CLAIMANT's Exhibit No. 7*) [hereinafter Sales Contract]. Since the period of limitation commences when the event giving rise to the claim occurs (*Procedural Order No. 2 § 5*), it began to run earliest on 8 July 2002, when the lack of conformity of the machine in dispute was discovered (*RESPONDENT's Exhibit No. 2*). The limitation period generally ceases to expire with the commencement of the arbitration (*SCHROETER p. 109*). Pursuant to Article 3 (2) CIDRA-AR, the present proceedings commenced on 5 July 2005 when CLAIMANT's Statement of Claim was received by CIDRA (*Mr. Baugher's letter 7 July 2005*).

2 CLAIMANT's claim remains actionable, as the limitation period is at least three years. In case the Tribunal classifies the limitation as a matter of substantive law – as in the countries involved in the present dispute (*Procedural Order No. 2 § 4*) – the law applicable to the limitation is to be determined according to Article 32 CIDRA-AR. The limitation period constitutes at least three years pursuant to the law chosen by the parties **(A.)** and at least four years under the substantive law determined by the relevant conflict of law rules **(B.)**. The claim further remains actionable according to the law directly applicable **(C.)**, even if the Tribunal classifies the expiry of the limitation period as a matter of procedural law **(D.)**.

A. The Limitation Period Has Not Expired Under the Law Impliedly

Designated by the Parties Pursuant to Article 32 (1) 1st Alt. CIDRA-AR

3 According to Article 32 (1) 1st Alt. CIDRA-AR, the law primarily applicable is the one chosen by the parties, whereby implied choice suffices (*LEW p. 181; ICC 7110*).

4 The parties expressly subjected their contract to the United Nations Convention on Contracts for the International Sale of Goods [hereinafter CISG] (*CLAIMANT's Exhibit No. 7 § 5*), which contains no regulations concerning the period of limitation (*BOELE-WOELKI § 2.2*). This gap cannot be filled according to Article 7 (2) CISG (*OGH 24 October 1995 (Austria); OLG Hamburg 5 October 1998 (Germany)*). However, it should be filled by the United Nations Convention on the Limitation Period in the International Sale of Goods [hereinafter UN-

Limitation Convention] impliedly designated by the parties **(1.)**. Alternatively, they designated the application of general principles of law to govern the expiry of the limitation period **(2.)**. Both provide for a limitation period of at least three years.

1. The Parties Impliedly Designated the UN-Limitation Convention

5 The contractual agreement between the parties expresses their intent to be bound by the UN-Limitation Convention. Article 8 of this Convention provides for a limitation period of four years. The fact that the UN-Limitation Convention is neither in force in Mediterraneo nor in Oceania (*Procedural Order No. 2 § 1*) does not hinder the parties from choosing it (*MAGNUS p. 215*). The parties' implied choice of the UN-Limitation Convention is demonstrated by the international character of their agreement **(a)**, the explicit choice of the CISG **(b)**, and the intent to accomplish an all-embracing choice of law **(c)**.

(a) The UN-Limitation Convention Complies With the International Character of the Parties' Contract

6 The implied choice of the UN-Limitation Convention results from the parties' intention to be bound by regulations especially designed for international commercial contracts.

7 An agreement on international arbitration clearly expresses the parties' will to withhold their dispute from any national jurisdiction (*BÖCKSTIEGEL p. 452; BORN p. 2*). By agreeing to submit potential disputes arising from their contract to arbitration (*CLAIMANT's Exhibit No. 7 §§ 5, 6*), CLAIMANT and RESPONDENT raised their contract to an international context. They further agreed on the CIDRA-AR, which are especially designed to be of international character (*SCHROETER p. 106*). They expressly designated the CISG (*CLAIMANT's Exhibit No. 7 § 5*) – a convention of paramount importance in international commercial arbitration (*GIARDINA p. 459*) – even though it would have applied pursuant to Article 1 (1) (a) CISG without their agreement (*Statement of Claim § 14; Answer § 14*). Finally, they located the seat of the Tribunal in a neutral, third country, Danubia (*CLAIMANT's Exhibit No. 7 § 6*). All these stipulations demonstrate the parties' will to give their contract an international character.

8 Furthermore, the absence of an express choice in favour of a domestic body of law is a significant choice in a negative way (*BLESSING CONGRESS SERIES p. 396; ICC 7110*). It demonstrates the parties' dissent on whose national law shall be applicable, and the subsequent agreement to refrain from applying any such law – a choice which should be respected by the arbitrators (*ibid.*). CLAIMANT and RESPONDENT did not designate any domestic law to be applicable to their contract and thereby demonstrated their intent to be bound by international bodies of law, exclusively.



9 The intent of the parties must be understood as an implied reference to the UN-Limitation Convention, being the only internationally unified body of substantive law dealing with limitation (*BOELE-WOELKI* § 3; *DANCO* p. 25). The Convention was drafted by representatives from a multitude of major legal systems (*ENDERLEIN/MASKOW* p. 393; *FREYER* p. 13) and exclusively designed to enable the “harmonisation and unification of national rules governing prescription (limitation) in the international sale of goods” (*LIMITATION CONVENTION GA* § 4). Therefore, the Convention is well suited to international sales contracts and the needs of international commercial arbitration (*SONO IV. D*). The uniform four-year limitation period provided by the Convention leads to legal certainty and provides a justifiable compromise in compliance with the needs and interests of parties to an international contract (*ENDERLEIN/MASKOW* p. 411). Conclusively, the UN-Limitation Convention complies with the international character of the parties’ contract.

(b) The UN-Limitation Convention Best Complies With the Parties’ Choice of the CISG

10 In addition to the compliance of the UN-Limitation Convention with the international character of the Sales Contract, the parties’ implied choice of this Convention is further supported by its interrelation with the CISG. Both conventions were drafted by the United Nations Commission on International Trade Law [hereinafter UNCITRAL]. The UN-Limitation Convention was further amended to harmonise with the provisions of the CISG (*BERNSTEIN/LOOKOFSKY* p. 193; *LIMITATION CONVENTION AMENDMENT* p. 162). Moreover, the CISG and the amendments to the UN-Limitation Convention were adopted on 11 April 1980 by the same diplomatic conference (*KEGEL/SCHURIG* pp. 78, 83). Therefore, the UN-Limitation Convention is also referred to as the “sister convention” of the CISG (*SONO I. A* § 4). Various articles of the two conventions complement each other (*BOELE-WOELKI* § 5.1), such as Articles 4, 6, 7 UN-Limitation Convention and Articles 2, 3, 7 CISG (*ENDERLEIN/MASKOW* p. 394). For all these reasons, the UN-Limitation Convention is best suited to comply with the parties’ choice of the CISG.

(c) The UN-Limitation Convention Conforms to the Parties’ Intent to Accomplish an All-Embracing Choice of Law

11 By agreeing to the CISG, CLAIMANT and RESPONDENT intended to accomplish an all-embracing choice of law. The parties’ Sales Contract expresses their will to predetermine solutions for various potential matters that might arise out of their contractual relation. This is evidenced by their precaution in choosing arbitration rules, and – by designating Danubia as the arbitral forum – even the *lex arbitri* applicable to possible controversies (*CLAIMANT’s Exhibit*

No. 7 § 6). Thus, the designation of the CISG is to be understood as an expression of the parties' will to accomplish an all-embracing choice of substantive law. As the UN-Limitation Convention is the only limitation convention closely connected to the CISG (*see § 10 above*), the express choice of the CISG comprised an implied reference to the UN-Limitation Convention. Consequently, the parties chose the UN-Limitation Convention pursuant to Article 32 (1) 1st Alt. CIDRA-AR, providing for a limitation period of four years.

2. Alternatively, the Parties Impliedly Agreed to Be Bound by General Principles of Law

12 Should the Arbitral Tribunal find that the parties did not designate the UN-Limitation Convention, their contractual agreement is to be interpreted as a consent on the application of general legal principles to the matter of limitation pursuant to Article 32 (1) 1st Alt. CIDRA-AR.

13 Where a contract provides for international commercial arbitration and designates international bodies of law, the parties impliedly submitted potential gaps within their contract to general principles of trade law and international trade usages (*CARBONNEAU p. 597; ICC 8365*). By selecting the CISG and submitting eventual disputes to arbitration, CLAIMANT and RESPONDENT impliedly agreed on general principles of law. The application of those principles leads to a limitation period of at least three years.

14 The general legal principles on limitation periods can be derived from a comparison of international regulations (*CHUKWUMERIJE pp. 112, 113; MOSS p. 256*). The UNIDROIT Principles of International Commercial Contracts [hereinafter UNIDROIT Principles] and the Principles of European Contract Law [hereinafter PECL] provide for a three-year period of limitation (Article 10 (2) (1) UNIDROIT Principles, Article 14 (201) PECL). The UNIDROIT Principles – a collection of contract regulations accepted by various legal systems with regard to the needs of international trade (*BONELL COMPARATIVE LAW p. 440; BONELL UNIDROIT p. 154; HEUTGER p. 86*) – are often considered by tribunals as important sources for determining general principles of law (*Ad hoc Arbitration Buenos Aires 1997; ICC 8502; ICC 9479; ICC 100122; Russian CCI 1997; Russian CCI 1999; Russian CCI 2002*). Similarly, the PECL reflect the common approach to problems of contract law within Europe (*INTERNATIONAL CONTRACT ADVISER p. 16; RIEDL p. 76; ICC 10022*). Thus, these principles are instructive in establishing a general legal principle on the length of limitation periods.

15 Even the four-year limitation period provided by the UN-Limitation Convention (*see § 5 above*) reflects a general principle of law. First, such a period is considered appropriate to trade contracts in modern business practice (*UCC COMMENTARY p. 231*). Second, when drafting the UN-Limitation Convention, 23 out of 24 states suggested a limitation period between three and five years to be “most appropriate” for the Convention (*LIMITATION CONVENTION*



QUESTIONNAIRE § 4 Table A). Among those states, four of the ten leading export nations – Great Britain, Italy, Japan and the U.S.A. – can be found (<http://www.mapsofworld.com/world-top-ten/world-top-ten-exporting-countries-map.html>), reflecting the relevance of such a limitation period for international trade.

16 In conclusion, general principles of law require a minimum limitation period of three years for claims arising out of international sales contracts. Thus, CLAIMANT's action is not time-barred under the application of general principles of law, impliedly chosen by the parties.

B. The Limitation Period Has Not Expired Under the Law Determined by the Relevant Conflict of Law Rules Pursuant to Article 32 (1) 2nd Alt. CIDRA-AR

17 If the Tribunal should find that the parties did not accomplish an implied choice of law pursuant to Article 32 (1) 1st Alt. CIDRA-AR, the substantive law is to be determined according to the conflict of law rules “considered applicable” by the Tribunal pursuant to Article 32 (1) 2nd Alt. CIDRA-AR. According to Article 32 (3) CIDRA-AR, the Tribunal shall pay regard to the terms of the parties' contract and the relevant trade usages in order to comply with the parties' intentions and expectations (*VAN HOF p. 227*). CLAIMANT submits that the relevant conflict of law rules are provided by the Oceania Conflicts of Law in the International Sale of Goods Act [hereinafter OC-PIL] **(1)**. The application of the OC-PIL leads to a substantive law providing for a minimum limitation period of three years **(2)**.

1. The OC-PIL Constitutes the Applicable Conflict of Law Rules Under Article 32 (1) 2nd Alt. CIDRA-AR

18 Three main reasons militate in favour of the application of the OC-PIL. First, among the eligible conflict of law rules, the OC-PIL offers the most appropriate criteria for taking into account the particular circumstances of every individual case **(a)**. Second, the OC-PIL harmonises with the CISG **(b)**. Third, the OC-PIL is in line with international legislation **(c)**.

(a) The OC-PIL Offers the Most Appropriate Criteria for Taking Into Account the Circumstances of Every Individual Case

19 According to Article 32 (1) CIDRA-AR, the determination of the applicable conflict of law rules is at the Tribunal's discretion, whereby it must search for those rules most “appropriate to the case at hand” (*CROFF B. 5*). In the present case, four conflict of law rules are likely to be taken into particular consideration, among which the OC-PIL provides the best criteria for rendering an appropriate decision on the applicable law.



20 In Danubia, Article 28 (2) of the UNCITRAL Model Law on International Commercial Arbitration [hereinafter ML] (*adopted in Danubia without amendment, Moot Rules § 19*) is the relevant provision, as the choice of law rules applicable in domestic litigation do not apply to international commercial arbitration (*Procedural Order No. 2 § 6*). The wording of Article 28 (2) ML complies exactly with that of Article 32 (1) CIDRA-AR, and does therefore not serve to provide a more specific result. In Greece, the conflict of law provision relevant for the sale of goods merely stipulates that the law with the closest connection to the substance matter has to be applied (Article 25 Greek Civil Code). Article 14 of the Private International Law Act of Mediterraneo only invariably holds that the seller's law is applicable (*Answer § 23*).

21 In contrast, the OC-PIL – based on the 1986 Hague Convention on the Law Applicable to the International Sale of Goods [hereinafter Hague Convention] (*Procedural Order No. 1 § 7*) – provides variable results as to the applicable law depending on the circumstances of the particular case. Article 8 (1) OC-PIL – providing for the application of the seller's law – establishes a mere starting point to be deviated from if required by the circumstances of the particular case (*LANDO RABELSZ p. 69 with regard to Article 8 (3) Hague Convention*). Article 8 (2) OC-PIL allows for the application of the buyer's law, while Article 8 (3) OC-PIL permits the Tribunal to designate a law manifestly more closely connected to the contract in dispute. These various criteria – more flexible than a strict rule in favour of the seller's law and more precise than the vague principle of the closest connection – allow a determination of the substantive law under consideration of the circumstances of the single case. Thereby, the tribunal is able to localise the true centre of gravity of each contract (*LANDO RABELSZ p. 69*).

22 Consequently, the OC-PIL embodies flexible rules for the determination of the applicable substantive law and thus enables the Tribunal to pay regard to the particularities of every individual case.

(b) The OC-PIL Harmonises With the CISG

23 The application of the OC-PIL further enables a decision in harmony with the CISG, thereby allowing the Tribunal to decide in accordance with the terms of the contract, as provided by Article 32 (3) CIDRA-AR. Articles 1 to 15 of the Hague Convention were adopted by Oceania as private international law (*Procedural Order No. 1 § 7*). The preamble of the Hague Convention emphasises that its drafters took into account the provisions of the CISG. Parallelism to the CISG was considered desirable (*VON MEHREN p. 17*), as it represents a common ground of the world's legal community (*LANDO RABELSZ p. 80*). Thus, the OC-PIL is strongly interrelated with the CISG.

(c) The OC-PIL Is in Line With International Legislation

24 The flexible criteria contained in the choice of law rules of the OC-PIL are in line with the standard embodied in international conventions. The Hague Convention itself best represents the principles of international private law (*ICC 6527*). A similarly flexible approach is also reflected in the Convention on the Law Applicable to Contractual Obligations [hereinafter Rome Convention], which is in force in all Member States of the European Union (http://www.dti.gov.uk/ccp/topics1/guide/jurisdiction_rome.htm). Article 4 of this convention provides that contracts shall be governed by the law of the country with the closest connection to the substance matter. Likewise, Article 9 (2) of the Inter-American Convention on the Law Applicable to International Contracts states that “the Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties.” In conclusion, the OC-PIL enables the Tribunal to pay regard to recent international legislation and thus establishes the appropriate conflict of law rules pursuant to Article 32 (1) 2nd Alt. CIDRA-AR.

2. Article 8 OC-PIL Leads to a Limitation Period of at Least Four Years

25 Under the substantive law applicable pursuant to Article 8 OC-PIL, CLAIMANT’s action has not become time-barred. The parties’ contract is governed by the substantive law of Oceania [hereinafter OC-Law] – providing for a four-year period of limitation – pursuant to Article 8 (2) (b) OC-PIL **(a)** and Article 8 (3) OC-PIL **(b)**. Alternatively, Article 8 (3) OC-PIL leads to Greek substantive law, calling for a five-year period of limitation **(c)**.

(a) Article 8 (2) (b) OC-PIL Leads to the Substantive Law of Oceania

26 Article 8 (2) (b) OC-PIL leads to the application of Article 87 OC-Law – providing for a four-year period of limitation (*Procedural Order No. 1 § 5*). By agreeing on the Magiprint Flexometix Mark 8 “to be refurbished by the seller on installation at buyer’s premises” (*CLAIMANT’s Exhibit No. 7 § 3*), the parties located the place of delivery in terms of Article 8 (2) (b) OC-PIL in Oceania.

27 If a contract for the sale of technical equipment obliges the seller to guarantee the operability of the goods in the country of the buyer, the place of delivery is located in this country (*OLG München 3 December 1999 (Germany); Corte di Cassazione 10 March 2000 (Italy)*). At present, RESPONDENT’s obligation went much further than guaranteeing the operability of the machine. In addition, it included the refurbishment in Oceania (*CLAIMANT’s Exhibit No 7 § 3*), which often involves the use of new parts and is thus comparable to a partial manufacture

(<http://www.atiqs.net/englisch/flexodruckwerk.btm> (Home - Products - Printing machines - Rebuilt flexo print)). Consequently, the place of delivery was Oceania.

28 The place of delivery was not altered by the agreement on the price of “\$42,000 CIF Port Magreton, Oceania” (*CLAIMANT’s Exhibit No. 7 § 1*). At present, the CIF clause merely stipulated the cost of shipment without relocating the place of delivery. In a similar case, the CIF clause was only found to have an effect on the transfer of risk where the parties had not agreed otherwise (*Societe M.N. v. Koospol (Czech Republic)*). The parties had expressly agreed on the place of execution being in the country of the buyer. This led the tribunal to the decision that the risk did not pass until the goods arrived at the buyer’s premises (*ibid.*). Thus, the explicit agreement between CLAIMANT and RESPONDENT that the refurbishment was to be performed in Oceania partially suspended the meaning of the CIF clause. Thereafter, RESPONDENT bore the risk of loss until the machine reached CLAIMANT’s premises. Thus, the place of delivery in the sense of Article 8 (2) (b) OC-PIL was Oceania.

29 Conclusively, the limitation period is governed by Article 87 OC-Law, which provides for a four-year period of limitation.

(b) The Escape Clause in Article 8 (3) OC-PIL Leads to the OC-Law

30 Even if the Tribunal does not apply Article 8 (2) (b) OC-PIL, the limitation period has not expired pursuant to the law applicable according to Article 8 (3) OC-PIL. This provision is relevant pursuant to Article 8 (4) OC-PIL, as the matter of limitation is not governed by the CISG (*see § 4 above*). Article 8 (3) OC-PIL enables the judge to “correct rules that are unjust” (*ZHANG p. 192*) by setting forth the general principle of the closest connection (*LANDO RABELSZ p. 74*). Principally, this provision allows the application of any conceivable substantive law, including the law of the seller or the buyer (*PELICHET p. 154*). In the case at hand, Article 8 (3) OC-PIL leads to the OC-Law as the present contract is manifestly more closely connected with Oceania than with Mediterraneo. The machine had to be delivered directly to Oceania, whereas it has never been in Mediterraneo (*Procedural Order No. 2 § 10*). Furthermore, RESPONDENT was obliged to refurbish and install the machine in Oceania and sent its personnel to fulfil this duty. As all significant obligations under the contract had to be performed in Oceania, the escape clause of Article 8 (3) OC-PIL refers back to the substantive law of Oceania and a limitation period of four years.

(c) Alternatively, Article 8 (3) OC-PIL Leads to Greek Substantive Law

31 If the Tribunal should find that OC-Law is not applicable to the present dispute, Article 8 (3) OC-PIL leads to Greek substantive law, which provides a five-year limitation period

(Article 250 Greek Civil Code). Greece is closely connected to the Sales Contract as the parties met in Athens to conduct negotiations on 5 and 6 May 2002 (*Answer* § 5). This gave CLAIMANT the final impulse for its decision to purchase the machine (*CLAIMANT's Exhibit No. 3* §§ 1, 2). Furthermore, it was agreed that the Magiprint Flexometix Mark 8 was to be dismantled and “despatched directly from Greece” (*CLAIMANT's Exhibit No. 4* § 2). Thus, Greece is the only place where contractual duties were performed apart from those to be fulfilled in Oceania. Due to its close ties to the parties' contract Greek substantive law – providing for a limitation period of five years – is applicable pursuant to Article 8 (3) OC-PIL.

C. The Limitation Period Has Not Expired According to the Directly Applicable Substantive Law

32 CLAIMANT's claim remains actionable pursuant to the direct application of substantive law. The “direct approach” is in harmony with Article 32 (1) CIDRA-AR **(1.)** and leads to Danubian law with a limitation period of three years **(2.)**. Alternatively, the direct application of general principles of law leads to a minimum limitation period of three years **(3.)**.

1. The Direct Application of Substantive Law Complies With Article 32 (1) CIDRA-AR

33 Regardless of the wording contained in Article 32 (1) CIDRA-AR, the direct application of substantive law is in line with this provision.

34 The direct approach has been “widely accepted” in international arbitration (*DERAINS/SCHWARTZ p. 221; LALIVE p. 181; WORTMANN p. 98*), as the choice of substantive law over conflict of law rules is often “complicated” (*LEW p. 371; ICC 4237*) and “creates a sometimes cumbersome extra step in the arbitral process” (*BAKER/DAVIS p. 181*). In contrast, the “direct approach” allows an accelerated and cost-effective procedure (*LEW p. 371; LIONNET/LIONNET p. 78; WEIGAND p. 9*).

35 Tribunals have frequently applied substantive law directly, regardless of provisions similar to Article 32 (1) CIDRA-AR. ICC Tribunals considered it unnecessary to determine the applicable conflict of law rules (*ICC 3880; ICC 4132; ICC 4381; ICC 5835; ICC 7375; ICC 8261; ICC 8502*), although Article 13 (3) of the 1975 ICC Rules was identical to Article 32 (1) CIDRA-AR. Likewise, the Iran-U.S. Claims Tribunal applied the law it found most appropriate (*Anaconda-Iran v. Iran; Amoco International v. Iran*), although it was governed by a provision identical to Article 32 (1) CIDRA-AR (*BAKER/DAVIS p. 266*). The frequent use of this method underlines the practicability of the direct application of substantive law.

36 The direct approach is further supported by the rules of most arbitral institutions which avoid any reference to conflict of law rules altogether (*BLESSING p. 54*). To determine the applicable law by way of conflict rules is even considered old-fashioned and conservative (*BERGER p. 498*). For instance, Article 33 (1) SRIA – “a new and modern product” in arbitral practice (*PETER p. 15*) – does not contain recourse to rules of private international law. Similarly, Article 29 (1) AAA-AR, Article 23 (a) LCIA-AR and Article 59 WIPO-AR provide for the direct applicability of substantive law. In fact, the direct application was also introduced in Article 17 (1) of the modernised version of the ICC-AR in force since 1 January 1998, which was due to the increasing tendency of arbitrators to resort to the direct applicability method (*UNCTAD Arbitration Agreement p. 54*).

37 In conclusion, the direct application of substantive law is in conformity with Article 32 (1) CIDRA-AR, as it takes into account the terms of the parties’ contract as required by Article 32 (3) CIDRA-AR. By agreeing on international arbitration, the parties consented to a fast resolution of their disputes in accordance with the arbitral practice. Consequently, the direct application of substantive law is *intra legem* with Article 32 CIDRA-AR.

2. The Direct Application of the Substantive Law of Danubia Leads to a Three-Year Limitation Period

38 The direct approach leads to the substantive law of Danubia as the law at the seat of the arbitration. This law provides for a limitation period of three years (*Procedural Order No. 2 § 3*). The seat of the tribunal is not merely chosen out of geographic considerations, but in order to establish a territorial link between the arbitration itself and the law of the place in which the arbitration is legally situated (*REDFERN/HUNTER § 2-15*). Therefore, Danubia is of significant importance for the contractual relation between the parties.

39 Furthermore, the law in force at the seat of arbitration has frequently been designated to govern disputes between the parties (*Compagnie d’Armement v. Compagnie Tunisienne (England)*; *Miller and Partners v. Witworth (England)*; ICC 2391; ICC 2735; ICC 9950). It was even held that an arbitration clause is as “capable as any other clause of providing by implication for the law which is to be applied” (*LANDO ARB. INT. p. 105*; *Kwik Hoo Tong v. James Finlay (England)*). An agreement on the place of arbitration was even considered sufficient to constitute a choice of law in favour of the substantive law in force at this place (*Tzortzis v. Monark Line (England)*; *HCC Award of 21 June 1996*). Since CLAIMANT and RESPONDENT designated Danubia as the place of arbitration in their arbitration agreement, the direct approach leads to the substantive law of Danubia. The application of Danubian law is reasonable, as it serves the interests of the parties to have their dispute governed by a neutral law. Moreover, providing for a three-year limitation

period, Danubian law constitutes a just compromise between the limitation periods in Oceania (four years) and Mediterraneo (two years). Consequently, the period of limitation has not expired pursuant to the directly applicable substantive law of Danubia.

3. The Direct Application of General Principles of Law Leads to a Minimum Limitation Period of Three Years

40 Alternatively, CLAIMANT's claim remains actionable according to the direct application of general legal principles which provide for a minimum limitation period of three years.

41 The direct application of general legal principles to matters not covered by the contractual choice of law is commonly accepted among scholars and tribunals in international commercial arbitration (*BLESSING CONGRESS SERIES p. 400; CRAIG/PARK/PAULSSON p. 334; FOUCHARD/GAILLARD/GOLDMANN pp. 202, 892; Norsolor v. Pabalk Ticaret (Austria); Compañía Valenciana v. Primary Coal (France); ICC 7375; ICC 8261; ICC 8502; ICC 9479; Amoco International v. Iran; LCIA Award 1995; Schiedsgericht Berlin Award 1990*). Such an approach is necessary in order to regard the particularities of international trade (*BÖCKSTIEGEL pp. 456, 457*).

42 The law applied by the Tribunal should protect the parties' interest in a way that "any normal businessman would consider adequate and reasonable [...] and without any surprises that could result from the application of domestic laws of which they had no deeper knowledge" (*SCC 117*). Indeed, the parties have chosen the CIDRA-AR, which explicitly provide for the consideration of international trade usages when determining the applicable substantive law (Article 32 (3) CIDRA-AR). This choice can be best fulfilled by applying general principles of law, as they embody universally established legal trade standards (*ibid.; HOLTZMANN/NEUHAUS p. 787*).

43 Moreover, the direct application of general principles of law is supported by the CIF-clause in the parties' contract (*CLAIMANT's Exhibit No. 7 § 3*). By referring to the INCOTERMS, parties show their willingness to have their contract governed by international trade usages and customs (*ICC 8502*). Thus, CLAIMANT and RESPONDENT demonstrated their will to have their contract governed by internationally recognised principles of law. Indeed, general principles and trade usages are always directly applicable as long as they do not contravene the provisions of the governing law of the contract (*CHUKWUMERIJE p. 116*).

44 A limitation period of at least three years is in accordance with international standards and usages (*see § 14 above*) and a just compromise between the suggested periods of limitation (*see § 39 above*). In conclusion, the limitation period has not expired prior to the commencement of the arbitral proceedings pursuant to the direct application of general principles of law.

D. Should the Tribunal Classify the Expiry of the Limitation Period as a Matter of Procedural Law, CLAIMANT's Claim Would Remain Actionable

45 In case of procedural classification, CLAIMANT's claim remains actionable. Although limitation is considered a matter of substance in all countries involved in the present case (*Procedural Order No. 2 § 4*), the tribunal might also classify it as procedural (*SCHLOSSER § 742*). Especially in common law countries, limitation is considered an institute of procedural law (*GEIMER § 351; HAY p. 197; Schütze in SCHÜTZE/TSCHERNING/WAIS § 608*). In this case, the limitation would be governed by the procedural law applicable to the arbitral proceedings. However, neither the CIDRA-AR, nor the *lex arbitri* of Danubia contain regulations concerning the expiry of the limitation period. This would result in the lack of a limitation provision applicable to the present claim, violating basic principles of most legal systems (*KROPHOLLER p. 252*) and endangering the enforceability of a final award (Article V (2) (b) NYC, *in force in all countries involved in the dispute, Moot-Rules § 19*). To prevent such an unfavourable result, the Tribunal would have to fill the existing gap, for example by applying the respective provisions of the substantive law in a modified version (*KROPHOLLER p. 252; BGH 14 Dezember 1992 (Germany)*). In this case, the Tribunal would have to designate the applicable substantive law pursuant to Article 32 CIDRA-AR, leading to a substantive law providing for a limitation period of at least three years (*see §§ 3-44 above*). In conclusion, if the Tribunal considers the limitation period to be a matter of procedural law, CLAIMANT's action remains admissible.

CONCLUSION: The period of limitation has not expired prior to the commencement of the present arbitration. CLAIMANT's claim remains actionable under the substantive law designated by the parties, the law applicable pursuant to the relevant conflict of law rules, as well as the direct application of substantive law. Even in case of procedural classification of the matter of limitation, CLAIMANT's action is not time-barred.

II. RESPONDENT FAILED TO PERFORM ITS OBLIGATIONS UNDER THE CONTRACT AND THE CISG

46 In response to Procedural Order No. 1 § 14, Question 2, CLAIMANT submits that RESPONDENT failed to perform its obligations under Article 35 CISG. RESPONDENT delivered a 7 stand Magiprint Flexometix Mark 8 flexoprinter machine which, contrary to the contractual agreement, was incapable of printing on aluminium foil of 8 micrometer thickness. This flexoprinter machine was not of the quality and description required by the contract according to Article 35 (1) CISG (**A.**). In the alternative, the Magiprint Flexometix Mark 8 was

not fit for the particular purpose of the contract under Article 35 (2) (b) CISG **(B.)**. In any case, the machine was not suitable for the ordinary use in terms of Article 35 (2) (a) CISG **(C.)**. Within the scope of Article 35 (2) CISG, RESPONDENT cannot escape liability pursuant to Article 35 (3) CISG, as CLAIMANT could not have been aware of the lack of conformity when the contract was concluded **(D.)**.

A. The Magiprint Flexometix Mark 8 Was Not of the Quality and Description Required by the Contract Under Article 35 (1) CISG

47 According to Article 35 (1) CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract. RESPONDENT breached its obligation to deliver goods of the contractually agreed quality and description. Following the parties' consensus reached by 21 May 2002, the contract signed on 30 May 2002 provided for a flexoprinter machine capable of printing on 8 micrometer aluminium foil **(1.)**. The maker's manual did not alter the parties' agreement as it did not form part of the contract **(2.)**.

1. The Parties' Consensus Reached by 21 May 2002 Defined the Machine's Ability to Print on 8 Micrometer Aluminium Foil

48 The contract concluded between the parties on 30 May 2002 provided for delivery of "one second hand 7 stand Magiprint Flexometix Mark 8 flexoprinter machine" (*CLAIMANT's Exhibit No. 7*). The definition of the object of performance has to be interpreted in light of the parties' contractual negotiations according to their objective meaning pursuant to Articles 8 (2), (3) CISG (*BRUNNER Art. 8 § 3; KAROLLUS p. 49; Schmidt-Kessel in SCHLECHTRIEM/SCHWENZER Art. 8 § 19*). The given definition of the flexoprinter machine can thus only be understood as providing for a machine capable of printing on 8 micrometer aluminium foil.

49 In its letter dated 17 April 2002, CLAIMANT unambiguously clarified its need for a flexoprinter machine with which it could print on 8 micrometer aluminium foil (*CLAIMANT's Exhibit No. 1 § 2*). It inquired about a machine capable of printing on "coated and uncoated papers for wrapping, polyester and also metallic foils for use in the confectionery market and similar fields" (*ibid.*). In the following sentence, it pointed out that "typical aluminium foil [...] may be of 8 micrometer thickness" (*ibid., emphasis added*). The machine's compatibility with 8 micrometer aluminium foil was the only specification particularly emphasised by CLAIMANT regarding the thickness of the various substrates it intended to print on. Thereby, any reasonable person in RESPONDENT's position pursuant to Article 8 (2) CISG had to be aware of CLAIMANT's demand for a machine suitable for printing on 8 micrometer aluminium foil.



50 RESPONDENT's answer dated 25 April 2002 (*CLAIMANT's Exhibit No. 2*) constituted an acceptance to these specifications. Where a buyer describes the goods and the seller does not raise any objections, the goods must be delivered as required by the buyer (*Bianca in BLANCA/BONELL Art. 35 § 2.3*). RESPONDENT confirmed that it had a machine "for [CLAIMANT's] task" (*CLAIMANT's Exhibit No. 2*), without objecting to any of the characteristics required by CLAIMANT. RESPONDENT's website did not provide any technical specifications of the machine contradicting the required characteristics (*Procedural Order No. 2 § 8*). Hence, a reasonable person in CLAIMANT's position had no grounds upon which to doubt that RESPONDENT accepted its requirement of a machine capable of printing on 8 micrometer aluminium foil. Consequently, the parties reached an agreement in this regard.

51 With this agreement in mind, CLAIMANT focused on assuring itself that the previous owner had been satisfied with the flexoprinter machine when inspecting it in Athens on 5 and 6 May 2002 (*Procedural Order No. 2 § 13*). CLAIMANT did not deem it necessary to discuss issues that had already been agreed upon during the preceding negotiations. The previous owner stated that the machine "had worked well" and did not mention any technical limitations, especially not regarding the thickness of the material on which the machine could print (*ibid.*). As RESPONDENT made no objections at this point of time either, CLAIMANT reasonably concluded that "[t]he Magiprint Flexometix machine looked to be just what [it] need[ed]" (*CLAIMANT's Exhibit No. 3 § 2*). Thereby, it expressed its belief that the machine was of the specifications discussed in the foregoing communications.

52 When the negotiations regarding the quality and description of the flexoprinter machine were completed by 21 May 2002, CLAIMANT ordered a "refurbished Magiprint Flexometix Mark 8 flexoprinter machine as discussed" (*CLAIMANT's Exhibit No. 5 § 2*). In the only subsequent communication, RESPONDENT repeated this by referring to the "Magiprint Flexometix Mark 8 flexoprinter machine" (*CLAIMANT's Exhibit No. 6 §§ 1, 2*). As there was no further correspondence among the parties between 21 May and 30 May 2002, the consensus reached on 21 May 2002 remained unchanged. Therefore, the definition of the object of performance in the Sales Contract as "one second hand 7 stand Magiprint Flexometix Mark 8" referred to the machine's ability to print on 8 micrometer aluminium foil.

2. The Maker's Manual Did Not Form Part of the Contract

53 The maker's manual enclosed with RESPONDENT's letter dated 27 May 2002 and received by CLAIMANT on 30 May 2002 (*Answer § 8*) did not alter the consensus of the parties regarding quality and description of the machine as it did not form part of the contractual agreement. The Sales Contract did not contain any reference to the maker's manual (*CLAIMANT's Exhibit*

No. 7). Moreover, had RESPONDENT intended to alter the terms of the parties' agreement by sending the manual, its reference that a "copy of the maker's manual [...] is also enclosed" (*CLAIMANT's Exhibit No. 6 § 2*) was insufficient. First, RESPONDENT made clear that it considered any examination of the manual dispensable by stating "[e]ven though the machine is easy to operate and [...] very reliable, [CLAIMANT] will certainly wish to have a copy" (*ibid.*). Furthermore, RESPONDENT required the contract to be sent back to it "immediately" as its personnel was "already in Greece dismantling the machine" in order to prepare it for shipment to Oceania (*CLAIMANT's Exhibit No. 6 §§ 2, 4*). RESPONDENT had thus already begun to arrange the fulfilment of the contract. Consequently, it would have been unreasonable for CLAIMANT to assume that the manual was intended to become part of the contract. A reasonable person would rather have concluded that RESPONDENT sent the maker's manual only to comply with its contractual obligations, as manuals are considered part of the goods (*Karollus in HONSELL Art. 34 § 3; Gruber in MÜNCHENER KOMMENTAR Art. 34 § 3; PILTZ p. 127 § 77; Magnus in STAUDINGER Art. 34 § 7*) and must be delivered with them. Hence, CLAIMANT's presumption that RESPONDENT sent the maker's manual in order to fulfil its obligations under the contract was justified. In conclusion, by delivering a machine incapable of printing on 8 micrometer thickness, RESPONDENT breached its obligation to deliver a machine of the quality and description required by the Sales Contract pursuant to Article 35 (1) CISG.

B. The Magiprint Flexometix Mark 8 Was Not Fit for the Particular Purpose of the Contract According to Article 35 (2) (b) CISG

54 If the Tribunal should hold that a machine capable of printing on 8 micrometer aluminium foil did not become part of the contract through an express or implied agreement of the parties, CLAIMANT submits that RESPONDENT violated its obligation to deliver a machine fit for the particular purpose of the contract pursuant to Article 35 (2) (b) CISG. CLAIMANT made known its purpose to print on confectionery wrappers **(1.)** and could reasonably rely on RESPONDENT's skill and judgement to deliver a machine fit for this purpose **(2.)**.

1. CLAIMANT Made Known Its Purpose to Print on Confectionery Wrappers

55 In its original inquiry dated 17 April 2002, CLAIMANT adequately made known its particular intention to use the flexoprinter machine "for printing metallic foils for use in the confectionery market" (*CLAIMANT's Exhibit No. 1 § 2*). A particular purpose is sufficiently made known where the seller can understand it from the circumstances (*Schwenzer in*

SCHLECHTRIEM/SCHWENZER Art. 35 § 21; Magnus in STAUDINGER Art. 35 § 28). It is not necessary that the particular purpose becomes part of the contract (*KRUISINGA p. 32*), as long as the seller has been made aware of this purpose (*Salger in WITZ/SALGER/LORENZ Art. 35 § 10*). CLAIMANT specified its particular purpose by stating that it intended to print on “plain and coloured aluminum foil for chocolate wrappers” (*CLAIMANT’s Exhibit No. 1 § 2*). Fine chocolates are often wrapped in foils of 8 micrometer thickness (*Procedural Order No. 2 § 21*). Thus, the special purpose CLAIMANT communicated to RESPONDENT required a machine capable of printing on foil of 8 micrometer thickness.

56 Furthermore, CLAIMANT reiterated its purpose when it informed RESPONDENT about its contract with Oceania Confectionaries concluded on 9 May 2002 (*CLAIMANT’s Exhibit No. 3 § 3*) [hereinafter Printing Contract]. A company with the word “confectionaries” in its name can be considered as a confectioner, i.e. “manufacturer of [...] confections” (<http://www.m-w.com> - confectionary - 1 with reference to <http://www.m-w.com> - confectioner). As CLAIMANT left no doubt that it was only the contract with this company “[making] the flexoprint machine worthwhile” (*CLAIMANT’s Exhibit No. 3 § 4*), RESPONDENT had to be aware that CLAIMANT intended to use the machine for printing on the previously indicated materials for the confectionery market (*CLAIMANT’s Exhibit No. 1 § 2*).

57 Moreover, RESPONDENT reassured CLAIMANT that the Magiprint Flexometix Mark 8 flexoprinter machine was suitable for this particular purpose. A seller, who assures its customer that the offered goods can be used for a particular purpose, commits a breach of contract pursuant to Article 35 (2) (b) CISG through a subsequent delivery of goods not suitable for this purpose (*Manipulados del Papel v. Sugem Europa (Spain)*). RESPONDENT once stated that it had a machine for CLAIMANT’s task (*see § 50 above*) which CLAIMANT had previously announced to be the printing of confectionery wrappers. Similarly, after having been informed of the Printing Contract, RESPONDENT confirmed that the machine enabled CLAIMANT to “meet all the needs of [its] customers” (*CLAIMANT’s Exhibit No. 6 § 1*). RESPONDENT thus knew of CLAIMANT’s particular purpose to print confectionery wrappers with the flexoprinter machine. By delivering a machine not suitable for that task to be performed on 8 micrometer aluminium foil, RESPONDENT breached its contractual obligations.

2. CLAIMANT Could Reasonably Rely on RESPONDENT’s Skill and Judgement

58 CLAIMANT could reasonably rely on RESPONDENT’s skill and judgement to deliver a machine fit for the particular purpose of printing on 8 micrometer aluminium foil. It can generally be expected that the seller is better informed about its goods than the buyer (*Magnus in STAUDINGER Art. 35 § 31*). This is particularly the case if the seller is the manufacturer of the

goods, and not only a trading agent who indicates that it has no special knowledge (*ENDERLEIN/MASKOW p. 146 § 14*).

59 RESPONDENT is an expert on the flexoprinting market. Not only does the supply of flexoprinters constitute up to 10 % of its business (*Procedural Order No. 2 § 24*), but it even offers machines that it refurbishes itself (*CLAIMANT's Exhibit No. 2; Procedural Order No. 2 § 14*). The refurbishment of flexoprinter machines requires special knowledge. For that purpose, RESPONDENT employs an experienced working crew (*CLAIMANT's Exhibit No. 4 § 2*). Its knowledge and experience thus characterise it as a manufacturer rather than a trading agent. This is also reflected by the company name “McHinery Equipment Suppliers, Pty” rather than “McHinery Equipment Traders, Pty”: “Supply” stands for “satisfy[ing] the needs or wishes” (<http://www.m-w.com> – *supply* [1, verb] – 2 c) of a customer in contrast to a pure “sale of goods” (<http://www.m-w.com> – *trade* [2, verb] – 2 a) as generally referred to with trade. Furthermore, RESPONDENT even advertises its skills on its website (*CLAIMANT's Exhibit No. 1 § 1*). Conclusively, RESPONDENT is an expert in the flexoprinting field.

60 Even if RESPONDENT possessed no expert knowledge, it failed to notify CLAIMANT of this fact. The buyer can generally assume that “the [seller carries] the analytic expertise necessary” unless the seller clearly notifies the buyer of its lack of knowledge (*HG Aargau 5 November 2002 (Switzerland)*). RESPONDENT, however, failed to make such a statement at any time prior to the conclusion of the contract.

61 CLAIMANT, in contrast, was inexperienced in the flexoprinting market, as it was a newcomer intending to enter the business in Oceania (*CLAIMANT's Exhibit No. 1 § 3*). On 17 April 2002, CLAIMANT informed RESPONDENT that it had a clear idea about the tasks for which it required the machine, but needed expert advice on the specific type of machine best suited for its purpose (*ibid.*). A reasonable person in RESPONDENT's position had to be aware that CLAIMANT was depending upon its advice regarding the type of machine that would comply with CLAIMANT's needs. In conclusion, CLAIMANT could reasonably rely on RESPONDENT's skill and judgement to deliver a flexoprinter machine capable of printing on aluminium foil of 8 micrometer thickness.

C. The Magiprint Flexometix Mark 8 Was Not Suitable for Its Ordinary Use Pursuant to Article 35 (2) (a) CISG

62 If the Tribunal should not follow the above argumentation, the machine lacked conformity in the sense of Article 35 (2) (a) CISG, requiring the goods to be fit for the purposes for which

goods of the same description would ordinarily be used. The machine failed to print properly on foil for confectionery wrappers (1.) and was further of low merchantable quality (2.).

1. The Magiprint Flexometix Mark 8 Failed to Fulfil Its Ordinary Purpose of Printing on 8 Micrometer Aluminium Foil for Confectionery Wrappers

63 Article 35 (2) (a) CISG provides an implied obligation with regard to the quality of the goods (*BERNSTEIN/LOOKOFSKY p. 83*). RESPONDENT failed to fulfil this obligation as the delivered machine was not capable of printing on 8 micrometer aluminium foil. Goods are not fit for their ordinary use when they lack specific ordinary characteristics or when they have defects which impede their material use (*ACHILLES p. 94; ENDERLEIN/MASKOW p. 144 § 8*).

64 A flexoprinter can ordinarily be used to print on 8 micrometer aluminium foil for confectionery wrappers. Flexoprinter machines are generally known for their capability of printing on a wide range of materials, constituting an advantage over many other printing techniques (*MEYER § 7.1; <http://en.wikipedia.org/wiki/Flexography>*). The latest market research undertaken by the Flexographic Technical Association (FTA) shows that among printing companies using flexoprinters, the printing of packaging materials plays a major role (<http://www.flexography.org/online/research/FTAResearchReport2.pdf>). Foil is one of the most frequently used materials in the flexoprinting business (*LEIFHEIT p. 9; MEYER § 1.4*). Indeed, 77 % of the sample audience stated that it also printed wrappers (<http://www.flexography.org/online/research/FTAResearchReport2.pdf>). The printing of wrappers for the confectionery industry is thus an ordinary use of flexoprinter machines. Furthermore, in the field of confectionery wrappers, the most common raw material is aluminium foil (http://www.alufoil.org/media/Alufoil_File_311.pdf). One of the major advantages and unique characteristics of aluminium is its very thin structure. Aluminium foil can reach a gauge of 6 (<http://www.alurec.at/spezialthemen10.html> § 10.2; *MEYER § 7.4.1*) or even 5 micrometers (http://www.alufoil.org/media/achenbach_extract.pdf p. 7). Thus, printing on 8 micrometer aluminium foil is both technically possible and ordinarily practised.

65 RESPONDENT had the duty to deliver a machine capable of all standard tasks, including the common task of printing various colours on aluminium foil of a thickness of 8 micrometers for confectionery wrappers. Whenever a good is only usable for a limited scope of its ordinary purposes, it is the seller's duty to inform the buyer and obtain its consent (*Schwenzer in SCHLECHTRIEM/SCHWENZER Art. 35 § 13; SECRETARIAT COMMENTARY Art. 35 § 5*). RESPONDENT's description of the contracted machine only provided for a "Magiprint Flexometix Mark 8 flexoprinter machine" (*CLAIMANT's Exhibit No. 2*). RESPONDENT did not indicate at any point in time before concluding the contract that the flexoprinter machine to

be delivered deviated from an ordinary flexoprinter machine. Hence, CLAIMANT could expect the delivered machine to fit the ordinary purpose of printing on 8 micrometer aluminium foil.

2. The Flexoprinter Machine Delivered by RESPONDENT Was Not of Merchantable Quality

66 When determining whether or not particular goods are fit for their ordinary purpose pursuant to Article 35 (2) (a) CISG, the merchantability of the goods and their resale value must be taken into account (*BRUNNER Art. 35 § 8; SECRETARIAT COMMENTARY Art. 35 § 5; ZIEGEL/SAMSON Art. 35 § 2 (3)*). Goods are unfit for the ordinary use when the defects – though not affecting the material use of the goods – considerably lessen their trade value (*Bianca in BLANCA/BONELL Art. 35 § 2.5.1*). The Magiprint Flexometix Mark 8 was not of merchantable quality, and thus not fit for its ordinary use.

67 Due to the influence of ecological and economic aspects, the thickness of aluminium foil used in the confectionery market has decreased by 30 % over the last years (http://aluinfo.de/pdf/gda_verpackung.pdf p. 17). This has resulted in a lower number of confectionery companies demanding comparatively thick printed foils. The trade and resale value of a machine unable to comply with the prevailing needs on the world market is conspicuously low. Given access to the information that the flexoprinter machine failed to print on aluminium foil for the confectionery industry, no reasonable buyer would have bought the machine without a significant abatement of the original price. The resale price therefore dropped to \$ 22,000 (*Statement of Claim § 13; Procedural Order No. 1 § 10*) – approximately 50 % of the \$ 42,000 paid by CLAIMANT three months earlier (*CLAIMANT's Exhibit No. 7 § 1*). This exceptionally low merchantability runs contrary to the ordinary purpose of Article 35 (2) (a) CISG.

D. RESPONDENT Cannot Invoke Article 35 (3) CISG, as CLAIMANT Could Not Have Been Aware of the Lack of Conformity

68 RESPONDENT cannot rely on Article 35 (3) CISG to exclude its liability for delivering a machine incapable of printing on 8 micrometer aluminium foil. According to this provision the seller is not liable for any lack of conformity under Article 35 (2) CISG that the buyer knew or could not have been unaware of at the time of contract conclusion.

69 There is little practical difference between facts that a party knew and facts of which it could not have been unaware (*HONNOLD § 229*), thus Article 35 (3) CISG constitutes only a “narrow limitation of the seller’s quality obligations” (*BERNSTEIN/LOOKOFSKY p. 86*). Article 35 (3) CISG requires more than gross negligence (*ACHILLES Art. 35 § 16; KRUISINGA p. 53; Schwenzger in*



SCHLECHTRIEM/SCHWENZER Art. 35 § 34) or at least gross negligence (*BRUNNER Art. 35 § 20; HERBER/CZERWENKA Art. 35 § 10; Magnus in STAUDINGER Art. 35 § 48*) on the part of the buyer.

70 CLAIMANT did not know and could not have been aware of the lack of conformity at the time of contract conclusion. Neither the inspection in Athens **(1.)**, nor the content of the maker's manual **(2.)** enabled CLAIMANT to gain imputable knowledge of the lack of conformity.

1. The Inspection in Athens Does Not Exempt RESPONDENT From Liability

71 RESPONDENT cannot invoke the inspection in Athens on 5 and 6 May 2002 in order to exempt itself from liability, as CLAIMANT did not gain imputable knowledge of the lack of conformity of the Magiprint Flexometix Mark 8 on this occasion.

72 The seller is liable for defects not reasonably discoverable by examining the goods (*Bianca in BIANCA/BONELL Art. 35 § 2.5.1*). It “cannot escape liability for lack of conformity merely by offering the buyer an opportunity to examine the goods” (*Schwenzler in SCHLECHTRIEM/SCHWENZER Art. 35 § 35*), as an examination does not necessarily lead to awareness of the specific non-conformity. Only in cases where the buyer inspected the goods in such a way that it should have known about the lack of conformity, Article 35 (3) CISG can be invoked (*Tribunal Cantonal de Vaud 28 October 1997 (Switzerland)*). As a counter-example, someone who buys a car cannot test the maximum speed as long as he does not have the ignition key and thus has to trust the information given by the seller in this regard. Similarly, CLAIMANT had no possibility to feed 8 micrometer foil into the machine, as it was no longer in use during the parties' stay in Greece (*Procedural Order No. 2 § 12*). Thus, CLAIMANT had to trust RESPONDENT's statement that the flexoprinter machine was fit for “[its] task” (*CLAIMANT's Exhibit No. 2*) to print on 8 micrometer aluminium foil.

73 Furthermore, the conversation with the previous owner in Athens did not provide any new information to CLAIMANT, as it merely dealt with general issues regarding its satisfaction with the flexoprinter (*Procedural Order No. 2 § 13*). CLAIMANT did not violate any of its obligations, by neither inquiring into the thickness of the materials the machine was suitable for, nor taking a technical expert to Greece, as Article 35 (3) CISG does not impose a duty to investigate on the buyer (*HONNOLD § 229; HUTTER p. 85; KRUISINGA p. 54*). Additionally, CLAIMANT had no reason to assume any misunderstandings with regard to the thickness of the materials to be processed, as RESPONDENT never objected to the requested thickness.

74 Conclusively, CLAIMANT did not know and could not have been aware of the lack of conformity of the flexoprinter machine after having seen it in Greece.



2. RESPONDENT Could Not Escape Liability by Sending the Makers' Manual

75 The delivery of the manual on 30 May 2002 cannot be invoked for the purpose of Article 35 (3) CISG, as it did not serve to disclose the lack of conformity. Within this provision, “could not have been unaware” is a standard for a lack of conformity that is “before the eyes of one who can see” (*HONNOLD* § 229; *also BRUNNER Art. 35 § 20; NEUMAYER/MING Art. 35 § 13*). The maker’s manual did not clarify the lack of conformity of the Magiprint Flexometix Mark 8 as it did not specify a minimum thickness of more than 8 micrometers for aluminium foil. Rather, it stated the “[s]ubstrate [l]imits of [p]erformance” for aluminium foil to be “> 10 micrometers” (*RESPONDENT’s Exhibit No. 1*), without clarifying whether this represented the upper or the lower limit. A limit describes the “prescribed maximum or minimum amount, quantity, or number” (<http://www.m-w.com> - *Limit [1, noun]* - 5). A single-number limit provides a value which is “exasperating or intolerable” (<http://www.m-w.com> - *Limit [1, noun]* - 7), whereas the context has to reveal whether this value constitutes the upper or lower limit. As the parties previously reached a consensus on the Magiprint Flexometix Mark 8 to be capable of printing on 8 micrometer aluminium foil, CLAIMANT reasonably inferred that the number given in the maker’s manual displayed the upper substrate limit. Consequently, the maker’s manual provided for a maximum thickness of 10 micrometer aluminium foil to be used with the machine, which was in accordance with the parties’ consensus. Thus, it did not clearly demonstrate the incapability of the Magiprint Flexometix Mark 8 to print on foil of 8 micrometer thickness and does not exclude RESPONDENT’s liability under Article 35 (2) CISG.

CONCLUSION: RESPONDENT failed to perform its obligations under the contract and the CISG. The delivered 7 stand Flexometix Mark 8 was not in conformity with the quality and description required by the contract pursuant to Article 35 (1) CISG, as it was unable to print on 8 micrometer aluminium foil. Alternatively, RESPONDENT failed to deliver a machine suiting the particular or the ordinary purpose of the contract under Articles 35 (2) CISG.

III. CLAIMANT’S CLAIM FOR LOST PROFITS AMOUNTS TO \$ 3,483,892.40

76 In response to Procedural Order No. 1 § 14, Question 3, CLAIMANT amends its claim for loss of profit and demands compensation in the amount of \$ 3,483,892.40. This amount is comprised of the loss of profit from the Printing Contract, the non-renewal of this contract, and the loss of chance to establish a commanding lead in the flexoprinting market of Oceania.

77 CLAIMANT submits that it is entitled to damages for loss of profit pursuant to Article 74 CISG **(A.)**. It further asserts that the proper calculation of damages amounts to \$ 3,483,892.40 **(B.)**. This amount is not to be reduced according to Article 77 CISG **(C.)**.

A. CLAIMANT Is Entitled to Damages for Loss of Profit Pursuant to Article 74 CISG

78 Article 74 CISG stipulates that damages for breach of contract “consist of a sum equal to the loss, including loss of profit, suffered [...] as a consequence of the breach”. The loss is compensable as long as the “party in breach foresaw or ought to have foreseen [it] at the time of the conclusion of the contract”. CLAIMANT is entitled to full compensation for its loss of profit according to Article 74 CISG.

79 First, RESPONDENT cannot allege that CLAIMANT has lost its right to claim damages pursuant to Article 39 (1) CISG **(1.)**. CLAIMANT must be compensated for lost profit out of the Printing Contract, including loss of investment income **(2.)**. CLAIMANT is further entitled to future loss of profit out of the non-renewal of the Printing Contract **(3.)**. Finally, CLAIMANT can claim compensation for lost profit resulting from the lost chance to establish a commanding lead on the flexoprinting market in Oceania **(4.)**.

1. CLAIMANT’s Right to Damages Is Not Excluded Pursuant to Article 39 (1) CISG

80 According to Article 39 (1) CISG, the buyer only loses its right to rely on a lack of conformity if it fails to give notice specifying the nature of the non-conformity within a reasonable time after it discovered or ought to have discovered it. CLAIMANT gave a proper notice of non-conformity on 8 July 2002, 15 July 2002 and latest by 1 August 2002 **(a)**. Alternatively, RESPONDENT waived its right to rely on the lack of a proper notice of non-conformity **(b)**.

(a) CLAIMANT Gave a Proper Notice of Non-Conformity Under Article 39 (1) CISG

81 A proper notice in the sense of Article 39 (1) CISG must give the seller the opportunity to comprehend the lack of conformity and to take appropriate measures (*KUOPPALA* § 4.3.1; *SECRETARIAT COMMENTARY Art. 37* § 4). When referring to machines and technical devices, it suffices that the buyer indicates the symptoms of the lack of conformity (*ACHILLES Art. 39* § 3; *FREIBURG p. 191*; *BGH 25 June 1997 (Germany)*; *BGH 3 November 1999 (Germany)*; *LG Erfurt 29 July 1998 (Germany)*; *Tribunale di Busto Arsizjo 13 December 2001 (Italy)*; *Hoge Raad 20 February 1998 (Netherlands)*). A reasonable time-limit for submitting the notice is widely

accepted to be one month after the lack of conformity is discovered (*Pelliculest v. Morton International (France)*; *Roger Caiato v. S.F.F. (France)*; BGH 8 March 1995 (*Germany*); BGH 3 November 1999 (*Germany*); OLG Stuttgart 21 August 1995 (*Germany*); LG Saarbrücken 2 July 2002 (*Germany*); OG Kanton Luzern 8 January 1997 (*Switzerland*)).

82 In CLAIMANT's phone call of 8 July 2002, Mr. Swain – RESPONDENT's principal representative in Oceania – was notified about the machine creasing and tearing the foil and colours running out of register (*RESPONDENT's Exhibit No. 2 § 2*). A phone call to a representative of the seller complies with the requirements of Article 39 (1) CISG (*BAASCH ANDERSEN II 1.2 § 2*; *KAROLLUS COMMENTARY Artt. 38-44 § 8*; *LG Frankfurt a. M. 9 December 1992 (Germany)*). As RESPONDENT's working crew immediately attempted to adjust the machine (*RESPONDENT's Exhibit No. 2 § 3*), Mr. Swain gained positive knowledge of the lack of conformity in the phone call with CLAIMANT and was subsequently able to take appropriate steps. Thus, the conversation of 8 July 2002 constituted a sufficiently specified notice of non-conformity and was submitted in due time.

83 Should the Tribunal find that Mr. Swain was not authorized, a proper notice of non-conformity was given when Mr. Swain forwarded CLAIMANT's notice to RESPONDENT on 15 July 2002 (*RESPONDENT's Exhibit No. 2*). An oral notice to an unauthorised addressee is valid, if it reaches an authorised addressee in time and is sufficiently specified (*LG Kassel 15 February 1996 (Germany)*; *LG Bielefeld 15 August 2003 (Germany)*). Mr. Swain forwarded to RESPONDENT all details given by CLAIMANT. Thus, the notice was sufficiently specified and timely submitted.

84 At the latest, CLAIMANT's letter to RESPONDENT of 1 August 2002 (*CLAIMANT's Exhibit No. 9*) constituted a valid notice. It expressly designated the nature of the machine's lack of conformity and was submitted within the time-frame of one month, hence within a reasonable time. Consequently, CLAIMANT gave a valid notice of non-conformity under Article 39 (1) CISG on 8 July 2002, 15 July 2002, or latest by 1 August 2002.

(b) Alternatively, RESPONDENT Waived Its Right to Rely on the Lack of a Proper Notice of Non-Conformity

85 Even if RESPONDENT alleges that CLAIMANT's notice of non-conformity was not valid, it waived its right to rely on Article 39 (1) CISG. Relying on this provision violates the principle of good faith contained in Article 7 CISG if it constitutes contradictory behaviour (*OLG Karlsruhe 25 June 1997 (Germany)*; *OLG München 15 September 2004 (Germany)*; *SCH 4366*). As soon as RESPONDENT was informed of the machine's inability to print on 8 micrometer foil, its workmen immediately began adjusting the machine (*CLAIMANT's Exhibit No. 9 § 2*).



RESPONDENT thereby gave CLAIMANT the impression that the machine would be fixed to comply with its contractual expectations. A seller who has performed steps to cure a lack of conformity has waived its right to rely on Article 39 (1) CISG (*BGH 25 June 1997 (Germany); OGH 5 July 2001 (Austria)*). A reliance on Article 39 (1) CISG would thus contradict RESPONDENT's previous behaviour.

86 Conclusively, CLAIMANT did not lose its right to claim compensation for loss of profit pursuant to Article 74 CISG.

2. CLAIMANT Is Entitled to Lost Profit out of the Printing Contract

87 CLAIMANT has the right to claim damages for the lost profit out of the Printing Contract, including loss of investment income. The loss was caused by RESPONDENT's behaviour **(a)** and foreseeable **(b)** pursuant to Article 74 CISG.

(a) The Lost Profits Were Caused by RESPONDENT's Breach of Contract

88 The loss of profit from the Printing Contract *(i)* as well as the loss of investment income *(ii)* resulted from RESPONDENT's breach of contract.

(i) The Lost Profit out of the Printing Contract Was Caused by RESPONDENT

89 The loss of profit out of the Printing Contract resulted exclusively from RESPONDENT's breach. Had RESPONDENT delivered the machine as required by the Sales Contract (*see §§ 47-67 above*), CLAIMANT would not have suffered a loss of profit. The Printing Contract was concluded for a duration of four years (*CLAIMANT's Exhibit No. 3 § 3*). There is no reason to doubt that CLAIMANT would have fulfilled the Printing Contract and gained the envisaged profit for its entire duration.

90 CLAIMANT would have properly fulfilled the Printing Contract as it has a good reputation in the printing business (*Procedural Order No. 2 § 26*). At the time of the conclusion of the Printing Contract, CLAIMANT had already successfully performed various printing orders in Oceania (*Procedural Order No. 2 § 23*) and was chosen by Oceania Confectionaries among all other printing firms in the country. Thus, there is no reason to doubt CLAIMANT's ability to comply with its obligations towards Oceania Confectionaries over the entire contractual period. Had RESPONDENT delivered a machine as required by the Sales Contract, Oceania Confectionaries would have had no reason to cancel the contract with CLAIMANT.

91 Furthermore, no grounds allow the assumption that CLAIMANT's fulfilment of the contract over the entire four years would have been hindered by arising economic difficulties. CLAIMANT is – almost four years after RESPONDENT's breach – still in business, despite the

high loss of profit from the contract with Oceania Confectionaries and its useless expenditures for the acquisition of the Magiprint Flexometix Mark 8 (*Statement of Claim* § 25). The ability to maintain its business under these circumstances demonstrates CLAIMANT's competence to operate economically. If RESPONDENT had fulfilled its obligations under the Sales Contract, CLAIMANT would consequently have been capable of serving the Printing Contract over the entire four-year period.

(ii) *The Loss of Investment Income Was Caused by RESPONDENT*

92 CLAIMANT suffered loss of profit because it was unable to reinvest the benefit out of the Printing Contract. The loss of investment opportunity is an inherent part of full compensation and thus recoverable under Article 74 CISG (*Witz in WITZ/SALGER/LORENZ Art. 78 § 12; ICC 6527*). If RESPONDENT had complied with its contractual obligations towards CLAIMANT, the latter could have reinvested the profit earned out of the Printing Contract. Thus, RESPONDENT's breach of contract resulted in loss of investment profit for CLAIMANT.

93 CLAIMANT's loss of investment does not constitute pre- or post- award interest, which is not to be discussed at present (*Procedural Order No. 1 § 15*). Rather, damages for loss of investment have to be distinguished from interest claims under Article 78 CISG (*Magnus in HONSELL Art. 78 § 10*). While Article 78 CISG establishes a presumption on the minimum interests recoverable due to late payment (*Bacher in SCHLECHTRIEM/SCHWENZER Art. 78 § 42*), loss of investment income constitutes compensable damages under Article 74 CISG as long as the requirements of this provision are fulfilled (*ibid. § 41*). Damages for lost investment further include compound interest, which is not recoverable under Article 78 CISG (*ACHILLES Art. 78 § 4*) but under Article 74 CISG (*BERGER p. 135; BRUNNER Art. 78 § 15*). Consequently, CLAIMANT's loss of investment income is compensable under Article 74 CISG.

(b) The Lost Profits Were Foreseeable for RESPONDENT

94 RESPONDENT could foresee the loss suffered by CLAIMANT. Foreseeability is determined according to what a reasonable obligor would expect to happen under the circumstances (*ACHILLES p. 225 § 10; BRUNNER Art. 74 § 12; BGH 24 October 1979 (Germany) § 3.2*). The party in breach objectively has to be in a position to foresee the loss (*Knapp in BLANCA/BONELL Art. 74 § 2.8; LIU § 14.2.2; ENDERLEIN/MASKOW Art. 74 § 10*). This is the case where the seller knows that the buyer needs the goods to satisfy its contract with a third party (*Weber in BUCHER p. 195 § 1; SCHLECHTRIEM Art. 74 § 11; BGH 24 October 1979 (Germany); Schweizerisches Bundesgericht 28 October 1998 (Switzerland)*). RESPONDENT knew from



CLAIMANT's letter that it needed the machine in order to serve the Printing Contract (*CLAIMANT's Exhibit No. 3 § 3*). Thus, at the time of the conclusion of the Sales Contract, RESPONDENT was well aware that any non-compliance with its contractual obligations towards CLAIMANT would result in a frustration of the profit CLAIMANT expected out of the Printing Contract.

95 RESPONDENT could also foresee the loss of chance to invest the profit out of the Printing Contract. In economic practice, companies regularly reinvest their earnings (*Lüderitz/Dettmeier in SOERGEL Art. 74 § 22*). As a reasonable businessman, RESPONDENT had to be aware that its non-fulfilment of the Sales Contract would result in a loss of profit out of lost investment opportunity. Consequently, the loss of profit suffered by CLAIMANT as a result of the non-fulfilment of the Printing Contract was foreseeable to RESPONDENT.

3. CLAIMANT Is Entitled to Future Loss of Profit From the Non-Renewal of the Printing Contract

96 RESPONDENT's breach of the Sales Contract further caused CLAIMANT's deprivation of the expected profit from the renewal of the Printing Contract **(a)**. This loss was foreseeable to RESPONDENT **(b)**.

(a) The Future Loss of Profit Was Caused by RESPONDENT's Breach of Contract

97 Due to RESPONDENT's non-compliance with the Sales Contract, CLAIMANT suffered future loss of profit it would have earned from the renewal of the Printing Contract. A future loss of profit is recoverable where the profit would have been made with sufficient certainty, had the contract been properly performed (*NEUMAYER/MING Art. 74 § 1; Stoll/Gruber in SCHLECHTRIEM/SCHWENZER Art. 74 § 22*). Had RESPONDENT complied with its contractual obligations, the Printing Contract would have been prolonged.

98 The Printing Contract was subject to renewal at the end of the first four-year period (*CLAIMANT's Exhibit No. 3 § 3*), and thus dependent upon CLAIMANT's successful fulfilment. As shown above (*see §§ 89-91 above*), CLAIMANT would have been able to fulfil the Printing Contract, had RESPONDENT delivered a machine in conformity with the Sales Contract. Oceania Confectionaries would have been satisfied with CLAIMANT's performance, and would have had no reason to abstain from prolonging the Printing Contract. Not only would the search for a new provider have been time and money-consuming, but, in 2006 – when the contract was to be prolonged – there would not have been another company in Oceania capable of fulfilling Oceania Confectionaries' needs. Reliable Printers would not have purchased a flexoprint machine, as it was “only the Oceania Confectionaries account” that made the purchase of such a

machine “worthwhile” (*CLAIMANT’s Exhibit No. 3 § 4*). In fact, the Oceania market has not provided any additional accounts for flexoprinting services so far and will not do so until 2007 (*Procedural Order No. 2 § 32*). At the time of the renewal of the Printing Contract, CLAIMANT would thus not have had to face any business competition.

99 Consequently, there is no reason to doubt that CLAIMANT would currently be in the same position as Reliable Printers, which can expect prolongation of its contract with Oceania Confectionaries (*ibid.*). CLAIMANT’s loss of profit from the prolongation of the Printing Contract was therefore caused by RESPONDENT’s breach of the Sales Contract.

(b) The Future Loss of Profit Was Foreseeable for RESPONDENT

100 RESPONDENT could foresee CLAIMANT’s loss of profit out of the non-prolongation of the Printing Contract. A merchant can be expected to have expert knowledge (*Knapp in BLANCA/BONELL Art. 74 § 2.11; HONSELL Art. 74 § 24; MURPHEY VII e*), and must therefore be aware that the failure to comply with a contract can result in its non-prolongation (*LG Kassel 21 September 1995 (Germany)*). In this case, the buyer informed the seller during contractual negotiations that the goods would be needed for the fulfilment of a third contract and that it expected this contract to be renewed (*ibid.*). Even applying a strict standard of foreseeability, the court held that the seller’s knowledge sufficed to foresee the damages for loss of profit out of the non-prolongation of the buyer’s contract (*ibid.*). As RESPONDENT was well aware that “unless something unexpected happen[ed]” the Printing Contract was to be renewed (*CLAIMANT’s Exhibit No. 3 § 3*), it ought to have foreseen the loss of profit out of the non-prolongation of this contract. Moreover, potential heavy losses are foreseeable where the party in breach was informed about their exact amount (*SECRETARIAT COMMENTARY Art. 74 § 8; SUTTON § III B 1; OGH 14 January 2002 (Austria)*). Since RESPONDENT knew the exact amount of the Printing Contract’s annual profit of \$ 400,000 and the expected duration of eight years (*CLAIMANT’s Exhibit No. 3 § 3*), it ought to have foreseen the damages for the future loss.

4. CLAIMANT Is Entitled to Damages for the Lost Chance to Establish a Commanding Lead in Oceania

101 CLAIMANT is entitled to damages for the lost chance of establishing a commanding lead in the flexoprinting market in Oceania, as this loss also resulted out of RESPONDENT’s breach of contract. Under Article 74 CISG, a loss of chance is recoverable if the chance itself has been manifested in the contract (*Stoll in SCHLECHTRIEM Art. 74 § 24; STOLL § 32; Witz in WITZ/SALGER/LORENZ Art. 74 § 15*). CLAIMANT’s intent to develop a commanding lead on the flexoprinting market in Oceania was introduced at the outset of the contractual negotiations



(CLAIMANT's Exhibit No. 1 § 3) and reiterated it thereafter (CLAIMANT's Exhibit No. 3 § 4). Furthermore, RESPONDENT was informed that “only the Oceania Confectionaries account” made the acquisition of a flexoprinter “worthwhile” (CLAIMANT's Exhibit No. 3 § 4). Thus, the fulfilment of the Printing Contract was tantamount to the establishment of the commanding lead and thereby became inherent to the parties' agreement. CLAIMANT's loss of chance is thus recoverable under Article 74 CISG.

102 Additionally, CLAIMANT would have been able to establish the expected commanding lead. As the first company in its country to possess a flexoprinter machine, CLAIMANT would have gained an advantage over potential market competitors (CLAIMANT's Exhibit No. 1 § 3). By securing the contract with Oceania Confectionaries, other companies in Oceania – even Reliable Printers – would have refrained from entering the flexoprinting market altogether (CLAIMANT's Exhibit No. 3 § 4). Domestic competition would thus have been next to inexistent, whereas international competition would not have stood a chance due to the significantly higher price of importing printed products compared to domestic production (CLAIMANT's Exhibit No. 1 § 3).

103 Through the fulfilment of the Printing Contract, CLAIMANT would have gained invaluable experience and insider-knowledge, followed by a good reputation and business contacts to other potential customers. Thereby, it would have been able to comfortably secure and subsequently expand its market lead. Its advantage over potential newcomers in the flexoprinting field in Oceania in terms of capacity and experience would have been highly significant by 2007. There is almost no doubt that CLAIMANT – next to being established as the regular supplier of Oceania Confectionaries – would also have secured the second most profitable account in Oceania flexoprinting with Oceania Generics (Procedural Order No. 2 § 20).

104 In conclusion, RESPONDENT's breach of contract prevented CLAIMANT from establishing a commanding lead on the flexoprinting market in Oceania.

B. The Proper Calculation of Damages Amounts to \$ 3,483,892.40

105 Pursuant to the principle of full compensation embodied in Article 74 CISG, a party who has been aggrieved by a breach of contract must be placed in the same position as though the contract had been properly performed (*Weber in BUCHER p.192 § 3; GOTANDA VI; LIU § 13.2; SAIDOV § I 1; OGH 6 February 1996 (Austria)*). This includes the expectation interest (*OGH 14 January 2002 (Austria)*), determined by the ensuing profit that would have been made in case of ordinary performance (*ICC 8445*).



106 CLAIMANT submits that its lost profit out of the Printing Contract – including loss of investment income – amounts to \$ 1,883,892.40 **(1.)**. Its damages from the non-renewal of the Printing Contract constitute \$ 1,600,000 **(2.)**. If the Tribunal finds that this amount is to be discounted **(3.)**, CLAIMANT is nevertheless entitled to the full amount of lost profit, as it suffered additional damages from the lost chance to establish a commanding lead **(4.)**.

1. Damages for Loss of Profit out of the Printing Contract Amount to \$ 1,883,892.40

107 The damages for lost profit out of the Printing Contract amount to \$ 1,883,892.40. This sum is composed of four annual incomes of \$ 400,000 (*CLAIMANT’s Exhibit No. 3 § 3*) – the accuracy of this amount is accepted at this stage of the arbitration (*Procedural Order No. 2 § 29*) – and damages of \$ 283,892.40 for lost investment income. In Oceania, the official discount rate has fluctuated around 3 %, the prime lending rate around 6 %, and the average return on investment around 11 % over the last five years (*Procedural Order No. 2 § 33*).

108 The calculation of lost investment must be based on the income a “successful claimant” would have earned by investing in its country (*Starrett Housing v. Iran*). According to this objective standard, CLAIMANT would have achieved a minimum of 11 % return by investing the profit out of the Printing Contract. Being successful means to achieve more than average. As an experienced business man (*Procedural Order No. 2 § 26*), CLAIMANT would have invested in the most profitable project available and thereby gained a minimum return rate of 11 %.

109 Furthermore, profits from investment are reinvested the following year and therefore include compound interest. Where an aggrieved party demonstrates that it would have earned profit on a compound basis, such interest has to be awarded (*GOTANDA Compound Interest VI*). Awards on a compound basis are necessary to achieve adequate compensation in view of “modern economic reality” and “equity” (*Starrett Housing v. Iran*). As CLAIMANT would have reinvested its profits out of investment, it also suffered loss of profit out of compound interest.

110 This leads to the following calculation for lost profit:

Investing Year	Invested Amount	IR*	Profit from Investment	Expected Profit
2003-2004	\$ 400,000.00	11 %	\$ 44,000.00	\$ 444,000.00
2004-2005	\$ 844,000.00	11 %	\$ 92,840.00	\$ 936,840.00
2005-2006	\$ 1,336,840.00	11 %	\$ 147,052.40	\$ 1,483,892.40
2006-2007	-	-	-	\$ 1,883,892.40
Total Profit from Investment			\$ 283,892.40	

*Interest Rate

111 CLAIMANT would have invested the first payment of \$ 400,000 with an average return rate. At the end of the first year it would have achieved an investment income of \$ 44,000. In the

second year, CLAIMANT would have invested last year's profit as well as the second payment from the Printing Contract, thus \$ 844,000. By the end of this year, CLAIMANT would have earned \$ 92,840. In the third year, the invested amount would have been \$ 1,336,840 with a profit of \$ 147,052.40. For the fourth payment, CLAIMANT suffered no lost investment income, since it will not earn the sum of \$ 400,000 until May 2006 – approximately the point of time when the arbitral award will be rendered. Conclusively, the total lost profit from investment amounts to \$ 283,892.40. In case the award is rendered later than May 2006, CLAIMANT would suffer additional damages for pre-award interests. Those damages are recoverable under Article 78 CISG, but are not to be discussed at this stage of proceedings (*Procedural Order No. 1 § 15*).

112 To summarise, CLAIMANT is entitled to damages for loss of profit for the Printing Contract in the amount of \$ 1,883,892.40.

2. Damages for the Non-Prolongation of the Printing Contract Amount to \$ 1,600,000

113 CLAIMANT's lost profit out of the non-prolongation of the Printing Contract amounts to \$ 1,600,000. These damages are not to be discounted, even though the profit would be gained upon receiving the arbitral award and thus earlier than expected under the Printing Contract.

114 First, a reduction of damages cannot be properly calculated because it would be based on immensely speculative figures. The relevant interest rate for the calculation would have to be predicted for the period between 2006 and 2010. Future interest rates are hardly assessable, as the estimation depends on many unpredictable factors in the development of the economy (<http://en.wikipedia.org/wiki/Inflation>). Accordingly, the future development would be a mere speculation.

115 Even a period of deflation might occur as illustrated by the development of Japan's economy between 1999 and 2004, where the value of money increased (<http://www.cia.gov/cia/publications/factbook/rankorder/2092rank.html>; http://en.wikipedia.org/wiki/Economy_of_Japan). Similarly, Hong Kong has been experiencing a long period of deflation following the Asian financial crisis in late 1997 (http://en.wikipedia.org/wiki/Deflation_%28economics%29). If a period of deflation occurred in Oceania, CLAIMANT would have to be awarded a higher amount of damages in order to be fully compensated since at the time of the award, the granted sum would be less valuable than in the future. Due to uncertainty of economic development it is reasonable to grant a sum of \$ 1,600,000 without any reduction.

116 Second, even basing the calculation on a fixed rate – as for example the interest rate for government bonds – is not without risk. For example, in 2002, Argentina could not pay back any of its government bonds (*ECONOMIST* p. 26). It would be unjustified if CLAIMANT had to bear



the risk of wrong calculation of damages as it properly fulfilled its obligation whereas RESPONDENT breached the contract.

117 Conclusively, it is reasonable to refrain from reducing the damages. Hence, the Arbitral Tribunal should grant the suffered loss of profit in the full amount of \$ 1,600,000.

3. A Discount of the Damages Would Lead to a Maximum Reduction by \$ 113,160.64

118 Should the Arbitral Tribunal find that damages for the non-prolongation of the Printing Contract are to be discounted, the only reasonable reduction rate would be the return rate on government bonds. To avoid high interest payments, governments assimilate the return rate on government bonds to the official discount rate. The official discount rate, being 3 % in Oceania (*Procedural Order No. 2 § 33*), equals the return on government bonds, for which the State is liable rather than a private person or company. Therefore, this solution implies the lowest risk. Furthermore, uniformity is achieved by basing the interest calculation on the rate of return on government bonds, “which are available to all investors at substantially the same rates” (*Sylvania Technical Systems v. Iran*). The reduction of CLAIMANT’s loss of profit should thus not exceed the 3 % return rate on government bonds in Oceania. This leads to the following calculation:

Contract Year	Intermediate Sum	IR*	Discount	Discounted Profit
8th (2009-2010)	\$ 400,000.00	3 %	- \$ 11,650.49	\$ 388,349.51
7th (2008-2009)	\$ 788,349.51	3 %	- \$ 22,961.64	\$ 765,387.88
6th (2007-2008)	\$ 1,165,387.88	3 %	- \$ 33,943.34	\$ 1,131,444.54
5th (2006-2007)	\$ 1,531,444.54	3 %	- \$ 44,605.18	\$ 1,486,839.36
Total Discount			- \$ 113,160.64	

* Interest Rate

119 In every year, the profit would be discounted at 3 %. Therefore, the investment of the last year of the Printing Contract at an interest rate of 3 % has to amount to \$ 400,000. The following equation is applicable: $discounted\ profit \times 1.03\ (103\ \%) = intermediate\ sum$. By this equation, the discounted profit for every year can be calculated. The total discount for the second contract with Oceania Confectionaries would thus constitute \$ 113,160.64, leading to lost profit in the amount of \$ 1,486,839.36.

4. Damages for Loss of Chance to Establish a Commanding Lead Exceed Any Discount Made to CLAIMANT’s Damages Out of the Printing Contracts

120 The value of a good reputation and leading market position is determined under consideration of future prospective contracts and their worths (*BRUNNER Art. 74 § 21*). Where the exact amount of damages is not determinable, an estimation must be made (*BRUNNER*



Art. 74 § 57; Weber in BUCHER p. 195; Magnus in STAUDINGER Art. 74 § 27). As the only capable supplier of a large printing account in Oceania, CLAIMANT would have contracted with Oceania Generics in early 2007 (*see § 103 above*) and received an annual profit of \$ 300,000 (*Procedural Order No. 2 § 20*). CLAIMANT also intended to offer flexoprinting services for other materials besides aluminium foil, such as polyester, coated and uncoated paper (*CLAIMANT's Exhibit No. 1 § 2*). This would have enabled it to conclude a multitude of contracts of different purposes and volumes.

121 Whereas CLAIMANT reserves the right to amend its claim in a post-hearing memorandum based on an expert-survey, a current calculation of damages is impossible due to the lack of specific figures. However, in the interest of settling the dispute between the parties in the most amicable and efficient way possible, CLAIMANT is willing to abstain from making further amendments to its claim, so long as it is granted the full amount in lost profits from the Printing Contract and its renewal. The loss of only one future order like that of Oceania Generics with an annual profit of \$ 300,000 (*Procedural Order No. 2 § 20*) exceeds any discount made to the present claim for lost profit. Should the Tribunal be of the opinion that damages are to be discounted (*see §§ 118-119 above*), CLAIMANT nevertheless respectfully requests that the total amount of damages be awarded.

C. CLAIMANT Did Not Fail to Mitigate Its Loss Under Article 77 CISG

122 Any damages awarded to CLAIMANT cannot be reduced under Article 77 CISG as it did not fail to mitigate its loss.

123 First, CLAIMANT could not have bought a substitute flexoprinter without first avoiding the contract with RESPONDENT. The duty to mitigate the loss by means of a cover purchase cannot be inferred unless the contract was previously avoided, because a cover purchase under Article 75 CISG rescinds the injured party's primary right to performance for the secondary right to damages (*ACHILLES Art. 77 § 4; Gruber in MÜNCHENER KOMMENTAR Art. 77 § 9; Witz in WITZ/SALGER/LORENZ Art. 77 § 4; OLG Braunschweig 28 October 1999 (Germany); OLG Düsseldorf 14 January 1994 (Germany)*). Avoidance of the contract is only reasonable where the injured party could foresee that the other party would fail to perform its obligations (*Knapp in BLANCA/BONELL § 3.9*). CLAIMANT could not foresee RESPONDENT's breach of contract before 10 September 2002. Until 15 August 2002, there was a good chance that RESPONDENT would fulfil its contractual obligations, as its personnel worked on the flexoprinter in order to adjust it to print on 8 micrometer foil (*CLAIMANT's Exhibit No. 10*). Even after 15 August 2002, RESPONDENT remained silent until 10 September 2002, before



stating that the machine would not be suitable for fulfilling CLAIMANT's contractual expectations (*RESPONDENT's Exhibit No. 3*). Hence, CLAIMANT had no choice but to wait for specific performance until 10 September 2002. Even if it could foresee a breach of contract by 15 August 2002, a cover purchase was not possible "in time to service the Oceania Confectionaries' contract" (*Procedural Order No. 2 § 18*), as it was to be fulfilled by 15 July 2002 (*CLAIMANT's Exhibit No. 9*) and had been terminated before 15 August 2002 (*CLAIMANT's Exhibit No. 10*). Consequently, CLAIMANT had no chance to mitigate the loss by making a cover purchase.

124 Second, even if CLAIMANT could foresee the breach of contract before RESPONDENT's workmen, the purchase of printed aluminium foil to satisfy the contract with Oceania Confectionaries was not reasonable. CLAIMANT's first doubts as to the machine's suitability arose on 1 August 2002 (*CLAIMANT's Exhibit No. 9*), two weeks before Oceania Confectionaries terminated the contract. CLAIMANT would not have been able to find a substitute supplier capable of printing on 8 micrometer foil, supply the foil (it could not expect the plant to have large quantities in stock) and print, package and transport the foil back to Oceania in a matter of two weeks. The delivery of printed aluminium foil to Oceania Confectionaries until 15 August 2002 was therefore next to impossible.

125 Consequently, neither the purchase of a substitute flexoprinter, nor that of printed aluminium foil would have been reasonable measures for CLAIMANT to mitigate the loss. Therefore, the damage cannot be reduced according to Article 77 CISG.

CONCLUSION: The proper calculation of damages for lost profit amounts to \$ 3,483,892.40. The damages comprise \$ 1,883,892.40 for the lost profit out of the Printing Contract and \$ 1,600,000 for its non-prolongation. Damages shall not be reduced, as any discount to the lost profit is outweighed by CLAIMANT's lost chance to establish a commanding lead.



REQUEST FOR RELIEF

In light of the above made submissions, Counsel for CLAIMANT respectfully requests the Honourable Tribunal to find:

- The period of limitation has not expired prior to the commencement of the present arbitration **(I.)**.
- The 7 stand Magiprint Flexometix Mark 8 flexoprint machine delivered by RESPONDENT was not in conformity with the contract according to Article 35 CISG **(II)**.
- The appropriate calculation of the lost profit suffered by CLAIMANT as a consequence of RESPONDENT's breach amounts to \$ 3,483,892.40 **(III.)**.