

FOURTH ANNUAL
WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG, 19 – 25 MARCH 2007

MEMORANDUM FOR RESPONDENT



University
of Victoria
Faculty of Law

On Behalf of:

Equatoriana Office Space Ltd
415 Central Business Center
Oceanside
Equatoriana

CLAIMANT

Against:

Mediterraneo Electrodynamics S.A.
23 Sparkling Lane
Capitol City
Mediterraneo

RESPONDENT

ANDREW AGUILAR · EDITH CHENG
BURCIN ERGUN · LISA FANG · IHOR OSOBIK
UNIVERSITY OF VICTORIA BC CANADA

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CAISG	Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983)
CICA Rules	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania Rules of Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
ICC Rules	Arbitration Rules of the International Chamber of Commerce (1998)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, adopted by the General Assembly of the United Nations under Resolution 31/98 (1976)
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration (1985)

LIST OF ABBREVIATIONS

Answer	Respondent's Answer dated 4 September 2006
Art. / Artt.	article / articles
Commission the Contract	Equatoriana Electrical Regulatory Commission Contract dated 12 May 2005 between RESPONDENT and CLAIMANT
CIASG	Convention on Agency in the International Sale of Goods
CICA	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CICA Rules	Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CM	Claimant's Memorandum submitted by the <i>Federal Unisitry of Rio Grande Do Sul</i>
the Development ed.	Mountain View Office Park in the city of Mountain View edition
et al	Et alii / et alia (and other persons)
Equalec Policy	Equalec's policy of only connecting primary distribution fuse boards using J type fuses if circuits designed for 400 amperes or less used JP type fuses (as stated in the Equalec Letter)
Equalec Letter i.e.	Letter from Gregory Smith of Equalec, dated 15 September 2005 id est (that is)
ICC	International Chamber of Commerce
J.D.I.	Journal du droit international
Lloyd's Rep. Model Law	Lloyd's Reporter UNCITRAL Model Law on International Commercial Arbitration
No.	number
NOM Clause	No-oral modification clause
OGH	Oberster Gerichtshof (Austria)
OLG Frankfurt	Germany Appellate Court Frankfurt
p. / pp.	page / pages
Para. / paras.	paragraph / paragraphs
PO No.1	Procedural Order Number 1
PO No.2	Procedural Order Number 2
Q	Question
s./ss.	Section /Sections
the Telephone Conversation	Telephone Conversation 14 July 2005 between Mr. Hart and Mr. Stiles
USA	United States of America
Y.B.	Yearbook Commercial Arbitration
ZCC	Zurich Chamber of Commerce

STATEMENT OF FACTS

2004-2005: Equatoriana Office Space Ltd. (hereinafter CLAIMANT), a developer of residential and business properties, constructed Mountain View Office Park in the city of Mountain View, Equatoriana (hereinafter the Development).

2005 April The CLAIMANT received a quote from Switchboards, their usual supplier of electrical equipment, of \$180K for 5 primary distribution fuse boards for use in the Development.

22 April 2005: Mr. Herbert Konkler, purchasing director for the CLAIMANT, received a quote of \$168K from Mr. Peter Stiles, Sales Manager for Mediterraneo Electrodynamics S.A. (hereinafter RESPONDENT).

4 May 2005: The RESPONDENT received a purchasing order from the CLAIMANT.

12 May 2005: The RESPONDENT prepared a written contract. The CLAIMANT signed a contract with the RESPONDENT for 5 JP fuse boards at a price of \$168K to be delivered to the Development on 15 August 2005 (hereinafter the Contract). The Contract also contained an arbitration clause whereby all disputes would be “settled by the International Arbitration Rules used in Bucharest”.

14 July 2005: Mr. Stiles contacted the CLAIMANT and asked to speak with Mr. Konkler. Mr. Konkler was away on a business trip. Instead, Mr. Stiles was referred to Mr. Steven Hart, a staff member in the Purchasing Department (hereinafter the Telephone Conversation). Mr. Stiles informed Mr. Hart that Chat Electronics was temporarily unable to supply JP type fuses. The RESPONDENT indicated that they could procure JP fuses from another manufacturer or JS fuses from Chat Electronics for the same price. Mr. Hart asked Mr. Stiles for a recommendation and he indicated that both types fuses could be used up to 400 amperes. Mr. Stiles noted that the RESPONDENT could not proceed until a decision was made and that once the fuse boards are equipped for one type of fuse, it cannot be substituted for the other. Mr. Hart indicated a preference for Chat Electronic fuses. Mr. Stiles then indicated that the only way to receive Chat Electronic were to use JS fuses. Mr. Hart stated that they could not afford to wait for Chat

Electronics and told Mr. Stiles to go ahead with the production of the fuse boards using JS type fuses (*Stiles Witness Statement*).

22 August 2005: The RESPONDENT delivered JS fuse boards to the building site.

1 September 2005: The fuse boards were installed by General Construction Ltd. and Equalec was notified that the buildings were ready to be connected to the electrical grid.

8 September 2005: Equalec arrived at the building site and refused to lock the distribution fuse boards and to make the electrical connection because of the JS type fuses. Mr. Konkler telephoned to Equalec. Mr. Gregory Smith, Superintendent of Customer Service at Equalec, informed Mr. Konkler about their policy of only connecting to JP type fuses for 400 amperes or less.

9 September 2005: Mr. Konkler telephoned Mr. Stiles about the non-conformity of the fuse boards equipped with and manufactured for JS fuses. Mr. Konkler was aware of the Telephone Conversation but alleged that any amendment had to be in writing. Mr. Stiles indicated that JS and JP fuses were a minor change that could not be considered an amendment of the contract. Minor adjustments were made all the time in items that need to be specially fabricated. Mr. Konkler contacted Switchboards, who provided fuse boards with Chat Electronics JP type fuses within 3 weeks at \$180,000.

15 September 2005: The CLAIMANT received a letter from Mr. Smith. The letter explained Equalec's policy of only connecting to JP type fuses for 400 amperes or less as a safety measure.

September – October 2005: The CLAIMANT removed the JS fuse boards and replaced them with JP fuse boards purchased from Switchboards. The installation costs were US\$20,000.

ARGUMENTS

PART I: THE TRIBUNAL DOES NOT HAVE JURISDICTION TO DECIDE ON THE MERITS OF THE DISPUTE

1. The RESPONDENT contests the submission of the dispute to the Court of International Commercial Arbitration (“CICA”). The arbitration clause in section 34 of the Contract (“the Arbitration Clause”) does not provide the Tribunal with jurisdiction to rule on the merits of the dispute. Two concessions can be made to clarify the issue before the Tribunal. First, the RESPONDENT does not contest that the Arbitration Clause was validly incorporated into the contract. Second, the RESPONDENT agrees that that the Tribunal has competence to rule on its own jurisdiction. This power is provided by Article 16(1) of the Model Law, which is applicable as the law of the seat (Danubia).
2. The RESPONDENT’s participation in this arbitration is not an agreement to arbitrate under the CICA. The CLAIMANT suggests that the RESPONDENT consented to the Tribunal’s jurisdiction by nominating an arbitrator and preparing submissions in relation to the merits of the dispute (*CM paras. 16-17*). The Tribunal should not draw any inferences from the RESPONDENT’s participation as the RESPONDENT has challenged the jurisdiction of the Tribunal at every available opportunity. Further, the Presiding Arbitrator specifically assured counsel for the RESPONDENT that the Tribunal would consider whether it had jurisdiction to consider the merits of the dispute (*PO No. 1 para. 5*). The RESPONDENT’s submission on the merits of the dispute can not negatively impact its jurisdictional claim, as the parties mutually agreed on having only one hearing on both jurisdiction and merit in the interests of efficiency and cost (*PO No. 1 para. 10*).
3. The issue before the Tribunal is whether the phrase “the International Arbitration Rules used in Bucharest” in the Arbitration Clause refers to the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce of Commerce and Industry of Romania (“CICA Rules”). The RESPONDENT makes six primary submissions on the jurisdictional issue: the Arbitration Clause is ambiguous and should be considered a pathological clause **(A)**; arbitration clauses have been rejected for a lack of certainty **(B)**; the Arbitration Clause does not show an intent to submit to institutional arbitration **(C)**; without clear intent to use an arbitral institution the Tribunal cannot use gap filling to interpret the Arbitration Clause **(D)**; the parties’ common intention to arbitrate can only be given effect though ad hoc arbitration **(E)**; and interpretation of the Arbitration Clause does not lead to the CICA **(F)**.

A. THE ARBITRATION CLAUSE IS PATHOLOGICAL

4. The Arbitration Clause is pathological as it refers to a non-existing set of rules. There is no organization in Bucharest that has rules entitled “International Arbitration Rules.” The CLAIMANT argues that this is a reference to the CICA Rules. These rules, however, are simply entitled “Rules of Arbitration”. As the titles of these sets of rules differ significantly no reference can be drawn from the Arbitration Clause to the CICA through a literal interpretation. Further, while the CLAIMANT assumes that the Arbitration Clause refers to institutional arbitration there are no terms used in the Arbitration Clause which support this contention. The Arbitration Clause refers only to rules, it does not use terms such as “chamber of commerce”, “organization” or “institution” which would suggest the parties intended institutional over ad hoc arbitration.

B. ARBITRATION CLAUSES HAVE BEEN REJECTED FOR A LACK OF CERTAINTY

5. Arbitration clauses may have no effect if they are so uncertain that it is difficult to make sense of them, or if an institution cannot be identified with a sufficient degree of certainty (*Redfern/Hunter p.197; Fouchard et al. p.264*). The Vaud Cantonal Court in Nokia-Maillefer SA did not uphold an arbitration clause for uncertainty (*VCC 30.03/1993*). The Court found that the parties’ common intent could not be inferred from a clause stating “forum for jurisdiction of the (state) courts of the International Chamber of Commerce, Paris”.
6. There are a number of cases where arbitration clauses were not upheld because there was no clear reference to a particular arbitration institution. In a 1994 German decision the Court did not uphold an arbitration clause which provided for “the arbitration tribunal of the International Chamber of Commerce in Paris, seat in Zurich” (*OLG 15.11/1994*). The court found that the competent arbitral institution was neither “unambiguously determined nor unambiguously determinable”. A 1982 decision of the German Supreme Court refused to uphold a clause for “Hamburg Friendly Arbitration according to the Rules of the Commodity Trade Association of the Hamburg.”(*BGH 02.12/1982*). The court here said that the clause could be given meaning, but refused to do so as this interpretation would not be obvious to foreign parties to a contract. Similar to the 1994 German decision, the court held that the clause was neither clearly determined, nor clearly able to be determined.
7. Finally, in a 1997 decision, an American court did not uphold a clause for arbitration at “the Court of Arbitration at the Chamber of Commerce and Industry of Switzerland.”(*National Material v. Tang*) The court held that the clause was not sufficiently definite and that the court had “no authority to rewrite the contract by choosing which of those courts was intended by the arbitration agreement.”

C. THE ARBITRATION CLAUSE DOES NOT SHOW AN INTENT TO SUBMIT TO INSTITUTIONAL ARBITRATION

8. The RESPONDENT concedes that arbitration clauses that are not upheld under a strict literal interpretation will often be upheld based on the principle that they evidence a common intent to arbitrate (*Lew et al. p.155; Fouchard et al., p.263*). This approach is reflected in the good faith doctrine which states that interpretation should be based on the parties' common intent rather than a strict adherence to the terms used (*Fouchard et al. p.257*). While courts have moved away from strict interpretation of arbitration clauses, the modern approach is an intent-based interpretation rather than a general principle of *in favorem validitatis* (*Fouchard et al. p.261*).
9. The Arbitration Clause is evidence of an intent to arbitrate, but the clause does not manifest a clear intent to choose institutional arbitration or any particular arbitral institution. Specifically, there is no evidence that the CICA was ever mentioned. The original clause proposed by the RESPONDENT called for institutional arbitration under the Mediterraneo International Arbitral Center (*Answer para.5*). However, the CLAIMANT removed the reference to institutional arbitration by substituting the current Arbitration Clause. The RESPONDENT may have originally chosen institutional arbitration but only under a specific institute where it had arbitrated twice in the past (*PO No. 2 para.15*). Mr. Stiles stated that when he reviewed the Arbitration Clause drafted by the CLAIMANT, he specifically noticed that "no institution was mentioned" (*Stiles Witness Statement*).
10. The CLAIMANT in arguing for the application of the CICA Rules states that the Tribunal should respect the parties' autonomy and freedom to contract (*See CM para. 25-26*). It is the RESPONDENT's position that this autonomy must be respected, but in doing so the autonomy of both parties must be respected. The Tribunal should not create a common intent to choose a particular restrictive procedural framework where none exists in the arbitration clause. Redfern and Hunter state that the choice between ad hoc and institutional arbitration is one of the most important choices in the establishment of an arbitral tribunal (*Redfern/Hunter p.187*). It would be unreasonable to suggest the RESPONDENT intended to allow the CLAIMANT to have full discretion in deciding on procedural rules. An interpretation that would allow the CLAIMANT to define a completely ambiguous clause detracts from the RESPONDENT's freedom to contract.
11. The CLAIMANT contends that the RESPONDENT's conduct in negotiations and prior to the hearings lead to the "legitimate expectation that no impugnation of the [CICA's] jurisdiction would take place" (*CM para. 18*) and that challenging jurisdiction now would be inconsistent or unfair (*CM para. 19*). However, as the Arbitration Clause is ambiguous, the RESPONDENT never knew the CICA would have jurisdiction. The RESPONDENT only became aware of the

CLAIMANT's interpretation of the Arbitration Clause when it received the notice of arbitration. Further, as the CICA was never mentioned in any correspondence prior to the notice of arbitration, it cannot be inferred that the RESPONDENT's actions in any way led to reliance on a particular interpretation of the arbitration clause.

D. WITHOUT A CLEAR INTENTION TO USE AN ARBITRAL INSTITUTION GAP FILLING CANNOT BE USED

12. Courts have used deductive analysis or gap filling to identify an incorrectly referenced arbitral institute. Where there is a reference to a particular city with a well known local arbitral institute the institute may be identified by the institution's rules (*Lew et al. P157*). Also, a reference to a particular city, the type of dispute or industry sector involved can be used by courts to identify a particular institution (*Lew et al. P.156*).
13. While courts have used gap filling, a number of cases have identified three required elements: intent to arbitrate, a particular location, and a clear indication that institutional arbitration was chosen as opposed to ad hoc arbitration (*ZCC 25.11/1994; CCIG 21.10/2002; CCIG 27.08/1999*). These three requirements are incorporated into the arbitration law of China where a court failed to uphold a clause stating "Arbitration: ICC Rules, Shanghai" as there was no explicit designation of an arbitral institution (*Zublin v. Wuxi Woke*). In the case at hand, the parties have not shown any indication of whether ad hoc or institutional arbitration was chosen and therefore deductive analysis cannot effectively be applied.
14. The current situation must also be differentiated from the large body of case law where the parties agreed on a well known arbitral institute but misidentified the seat (*OLG 05.12/1994; ICC 5294/1988; ICC 3460/1980; ICC 4472/1980*). Deductive analysis in these cases are much more effective as the institution is identified and the courts can give meaning to the location referenced as the seat or law applicable to the substance of the dispute. The CLAIMANT highlights a number of ambiguous clauses that have been found to be valid, but they all clearly point to institutional arbitration (*CM para. 5*).
15. The only clause referenced by the CLAIMANT that does not clearly refer to institutional arbitration is from the case of *Arab-African Energy Corp v. Olieproducten (CM para. 5)*. However, this case does not deal with the validity of the arbitration clause. The parties in this case had already conducted a valid arbitration and the question before the court was whether the arbitration clause precluded appeal. The case report is not clear whether the arbitration clause was challenged or if the original arbitration was consensual.

E. THE PARTIES' COMMON INTENTION TO ARBITRATE CAN ONLY BE GIVEN EFFECT THROUGH AD HOC ARBITRATION

16. While the reference to “the International Arbitration Rules used in Bucharest” is ambiguous and cannot be given meaning, the wider arbitration clause shows an intent to arbitrate. To give meaning to this intent, an arbitration clause may be upheld where there is any way to link the clause to a *lex arbitri* or procedural law under which arbitrators could be appointed (*Fouchard et al. p.267; Craig et al. p.131*). While arbitral clauses may be upheld in these circumstances, commentators have held that arbitration clauses with this level of ambiguity should be interpreted to provide for ad hoc arbitration rather than institutional (*Fouchard et al. p.267; Craig et al. p.131*). While the entire arbitration clause may not fail in this case, if the common intent of the parties to arbitrate is to be given any meaning it would need to be under another forum.
17. One possibility, although the CLAIMANT has not argued along these lines, is to arbitrate under the arbitration provisions of the Model Law. The parties in the arbitration agreement have specified the number of arbitrators and the seat of arbitration. The Model Law has provisions for appointing arbitrators (*see Art. 11 Model Law*) and establishing procedural rules (*see Art. 19 Model Law*). If the Tribunal holds that it does not have jurisdiction, this does not necessarily mean the parties are only left with litigation to settle their dispute. An ad hoc tribunal under a mutually agreeable set of procedures could be established by consent, or a different arbitral tribunal could be instituted by the courts of Danubia. The intent of the parties to arbitrate could still be given meaning.

F. INTERPRETATION OF THE ARBITRATION CLAUSE DOES NOT LEAD TO THE CICA

18. The reference to Bucharest in the Arbitration Clause should be considered pathological as the CICA was not chosen **(1)**, even if it were chosen there would still be ambiguity in the procedural rules **(2)** and the arbitration clause must be interpreted *contra proferentem* **(3)**.

1) The CICA was not chosen

19. While the CICA is the only organization that conducts international arbitration in Bucharest it is not referenced in the Arbitration Clause. The arbitration clause refers specifically to the “*International Arbitration Rules used in Bucharest [emphasis added]*”. The CICA “Rules of Arbitration” are designed for both domestic and international arbitration. The CICA Rules are also connected to domestic law. Art. 1(2) states that the Rules are “drawn up in compliance with the provisions of the Code of Civil Procedure.” Provisions from this domestic procedural law are directly referenced in the CICA Rules three times (*see CICA Rules Art. 22, 54(2) and 69(c)*). The CICA Rules have a chapter on “special provisions regarding International Commercial

Arbitration,” but this section only has six provisions and primarily serves to modify other domestic arbitration rules (*CICA Rules, Chapter VIII*). Alone, it would provide little guidance in conducting an international arbitration.

20. The Court of International Commercial Arbitration has the term “international” in its title, but it is primarily a domestic arbitral center as 80% of the cases heard are domestic (*PO No.2 para. 11*). The international prestige of an institute is referenced as an important factor in many cases that have upheld ambiguous arbitration clauses (*OLG 05.12/1994; ICC 5294/1988; ZCC 25.11/1994*). The CICA would not be as well known to foreign businesses as a major institute like the ICC. It is unlikely that the RESPONDENT, with little arbitration experience, would agree to an unfamiliar arbitral institution like the CICA which focuses primarily on domestic arbitration.

2) Even if it were chosen there would still be ambiguity in the procedural rules

21. Even if the Tribunal drew a reference from the Arbitration Clause to the CICA there would still be ambiguity regarding which set of procedural rules were applicable. Under Art. 72(2) of CICA Rules, the parties are free to decide between applying the CICA Rules of Arbitration, or the UNCITRAL Arbitration Rules. It would be more likely that the UNCITRAL Arbitration Rules were chosen as they were drafted specifically for international commercial arbitration. The CLAIMANT argues that the UNCITRAL rules would not be applicable as the Arbitration Clause refers specifically to the rules used in Bucharest and the UNCITRAL rules have no special connection to any particular country (*CM para. 24*). However, choosing the CICA Rules which are simply entitled “Rules of Arbitration” and conducting arbitration under an institute that is primarily domestically focused, would give little meaning to the term “international” in the Arbitration Clause.
22. The decision to adopt either of these sets of rules is important as they differ in many respects, including control over declaring the hearing closed (*see Art. 29 UNCITRAL and Art. 58 CICA Rules*) and costs (*see Art. 38 UNCITRAL and Art. 48 CICA Rules*). Another difference between the two sets of rules is the grounds for recourse against the award. The UNCITRAL rules do not list any specific grounds and the CICA Rules in Art. 69 has an extensive list. While there are grounds for recourse against the award listed in Art. 34 of the Model Law, the Model Law provides fewer grounds for recourse than the CICA Rules.

3) The arbitration clause must be interpreted contra proferentem

23. The CLAIMANT’s primary argument is that the arbitration clause must refer to the CICA as it is the only arbitration institution in Bucharest and that interpretation is the only way to give

- meaning to the Bucharest reference in the Arbitration Clause. This is in line with the principle of effective interpretation which states that when dealing with ambiguity the interpretation that gives meaning to the terms should be preferred (*Fouchard et al. p.258*). This principle, however, must be contrasted with that of *contra proferentem* which states that an ambiguous clause should be interpreted against the party that drafted it (*Fouchard et al. p.260; Art. 4.6 UNIDROIT Principles*).
24. This principle is based on the policy concern that a drafter of a clause should not be able to use ambiguity in that clause to their benefit (*Fouchard et al. p.260*). The CLAIMANT drafted an ambiguous arbitration clause and should not be able to determine whether the CICA Rules or the UNCITRAL rules apply after the dispute has arisen. This would reward the CLAIMANT, who easily could have used the model clause provided by on the CICA's website if it truly wanted to arbitrate under the auspices of that institution.
25. The CLAIMANT states that the "arbitration clause in the Contract is the Court's model clause" (*CM para. 7*). This is inaccurate. The model clause of the CICA provides for arbitration at "the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania according to its Rules of Arbitral Procedure." The clause uses the official name of the CICA which differs significantly from the phrase used in the contract, "the International Arbitration Rules used in Bucharest." This confusion may stem from the misquotation of the Redfern and Hunter text in *CM para 13*. The CLAIMANT quotes the text as stating "when the parties decide that any dispute will be submitted to arbitration under the rules of a particular arbitral institution, the model clause recommended by that institution *is* incorporated into the contract [emphasis added]." Redfern and Hunter actually state that "... the model clause recommended by that institution *should be* incorporated into the contract [emphasis added]." (*Redfern/Hunter p.195*). While these well respected commentators suggest that it would be beneficial to use the model clause of the institution, the party drafting the clause must include it itself.

PART II: THE FUSE BOARDS WERE IN CONFORMITY WITH THE CONTRACT

26. The fuse boards were in conformity with the Contract because they were the quality and description required by the Contract **(A)** and were fit for the particular purpose made known to the RESPONDENT **(B)**.

A. THE FUSE BOARDS WERE OF THE QUALITY AND DESCRIPTION REQUIRED BY THE CONTRACT

27. The fuse boards conformed to Art. 35(1) CISG because they were of the description required by the Contract. The Contract called for "five primary distribution boards". An application of Art. 8 CISG provides an argument contrary to the CLAIMANT's assertion that the requirement for JP fuses was part of the Contract (*CM para.31*). The CLAIMANT's subjective intent to have the fuse boards equipped with JP fuses and conforming to Equalec requirements were not made part of the Contract **(1)**. In fact, a reasonable person would not have interpreted the notes on the drawing as part of the Contract **(2)**. Furthermore, the parties' negotiations and subsequent conduct did not establish an intent to include JP fuses or conformity to Equalec requirements as a term of the Contract **(3)**. Even if an intent to include the notes was established, the failure of the fuses to conform to the Contract is not a breach because JS and JP fuses are equal in utility and value **(4)**.

1) CLAIMANT's subjective intent to have the fuse boards equipped with JP fuses and conforming to Equalec requirements was not made part of the Contract

28. The substance of the seller's obligations is determined by what the parties have agreed upon (*Schlechtriem in Bender s. 6.01*). However, the agreement of the parties is not limited to what the parties have stated in the contract, especially when there is ambiguity. Art. 8 CISG provides guidance in interpretation. Art. 8(1) states that statements made by a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. In interpreting that the notes on the engineering drawing are not a part of the contract, Art. 8 applies.
29. The Contract expressly stated that "Electrodynamics agrees to sell and Equatoriana agrees to purchase *five primary distribution fuse boards* at a total delivered price of US\$168,000 [emphasis added]" (*Contract Excerpts*). In addition, when initially contacting the RESPONDENT, the CLAIMANT had specifically inquired about 5 primary electrical distribution fuse boards for Mountain View (*Stiles Witness Statement*). In neither instance was the requirement for JP fuses explicitly made known to the RESPONDENT.
30. The phrase on the drawings "to be lockable to Equalec requirements" is directed to the CLAIMANT's personnel and the construction firm they have engaged to construct the Development. The phrase "lockable to Equalec requirements" indicated that Equalec would lock the fuse boards with a padlock to which it had key (*PO No.2 para.21*). This statement, therefore, provides no relevance to any undertaking or obligation by the RESPONDENT.

31. The Contract calls specifically for the sale of 5 primary distribution fuse boards. The notes are only briefly included in the drawings and the CLAIMANT did not expressly indicate an intention to or make any special effort to include these important terms into the main Contract provision for sale and purchase. Under these circumstances, it cannot be shown that the RESPONDENT was aware or could not have been unaware of the CLAIMANT's intent to make the two notes part of the Contract.
32. The CLAIMANT's reference to Art. 25 CISG (*CM para.36*) is not relevant to their argument that the requirement for JP fuses was part of the Contract, as Art. 25 is related to fundamental breach.

2) A reasonable person would not have interpreted the notes on the drawing as terms of the Contract

33. In the event that Art. 8(1) CISG does not apply and the RESPONDENT was unaware of the CLAIMANT's intent, Art. 8(2) CISG will apply (*Bianca/BB s. 2.4*). Art. 8(2) provides that statements made by a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the circumstances. The reasonable person referred to is the party to whom the statement was addressed and not the party making the statement (*UNCITRAL Secretariat 8 para.4*).
34. The CLAIMANT is a developer of residential and business properties and has developed a number of large commercial and residential developments in Equatoriana. The CLAIMANT has extensive experience dealing with distributors. If the CLAIMANT wanted the requirement of JS fuses or conformity to Equalec policies made part of the Contract, the CLAIMANT would have expressly negotiated for and specifically emphasized such terms. The CLAIMANT failed to do so. Due to the CLAIMANT's initial inquiry for 5 distribution fuse boards, the Contract provisions, and the circumstances outlined in (1), a reasonable person would not have interpreted the notes on the drawings as terms of the contract.

3) The parties' negotiations and subsequent conduct did not establish an intent to include JP fuses or conformity to Equalec requirements as a term of the Contract

35. Art. 8(3) CISG states that in determining the intent of a party, due consideration is to be given to all relevant circumstances of the case including the negotiations and any subsequent conduct of the parties (*Bianca/BB s. 2.6, UNCITRAL Secretariat 8 para.6*).
36. As indicated previously, both the CLAIMANT's initial telephone inquiry and the Contract indicated a sale and purchase for five primary distribution fuse boards. The CLAIMANT had

never expressly indicated or negotiated for JP fuses or conformity to Equalec requirements as a term of the contract.

37. The RESPONDENT's subsequent action also proves that there was no intent to include the notes as a term of the contract. The Contract provides in para.32 that "amendments to the contract must be in writing" (*Contract Excerpts*). However, after the Telephone Conversation, the RESPONDENT did not send any written notice in regards to the change of JP fuses to JS fuses. The RESPONDENT being an established fabricator and distributor of electrical equipment would not have neglected to comply with the terms of the Contract. The RESPONDENT did not provide written notice for amendment because the requirement for JP fuses was not considered a term of the Contract.
38. Subsequent to the Telephone Conversation, Mr. Stiles did not inform Mr. Konkler about the change in fuses. Mr. Konkler was not aware of the change in fuses until Equalec refused to connect the JS fuses (*Konkler Witness Statement*). This indicates that the CLAIMANT did not see JP fuses as an important term of the Contract.

4) Alternatively, JS and JP fuses are functionally identical and of the same value

39. Even if the requirement of JP fuses was considered a term of the Contract, the substitution of JP fuses with JS fuses was not a breach because JS and JP fuses are equal in value and utility. The failure of goods to conform to a contract is not considered a breach if the non-conforming goods are functionally identical and of the same value to the conforming goods (*Switzerland, 30.11/1998*).
40. In fact, on average, JS fuses with ratings between 100 to 250 amperes are more expensive than JP fuses with the same rating. JS and JP fuses are also functionally identical because JP and JS fuses are "essentially interchangeable from a functional point of view up to 400 amperes" (*Konkler Witness Statement*).
41. The CLAIMANT submits that JP and JS fuses are different because JP fuses can have a rating below 100 amperes and JS fuses can have a rating as high as 800 amperes (*CM para.37*). However, this is irrelevant to the Contract. The CLAIMANT only required fuses with ratings between 100 to 250 amperes (*PO No.2 para.27*) and all the JS fuses installed in the primary fuse boards were of the appropriate rating for the circuit in which they were installed (*PO No.2 para.27*). Both fuses are of similar quality. Both conformed to the BS 88 standard meeting the necessary minimum quality standards, and were manufactured by Chat Electronics (*PO No.2 para.26*).
42. Finally, the difference of the fixing center for JP and JS fuses did not affect the fuses' utility. The fuses' utility was only affected by Equalec's unlawful refusal to connect the JS fuse boards. The

RESPONDENT had no obligation to conform to Equalec's policy (*see B.1.i*). Furthermore, Equalec's policy, based on convenience to the company by reducing the amount of inventory that the service trucks were required to carry (*Konkler Witness Statement*), was contrary to its legal obligation under the Equatoriana Electric Service Regulatory Act (*see Part IV.A.2.ii*)

B. THE FUSE BOARDS WERE IN CONFORMITY WITH THE CONTRACT UNDER ART. 35(2)

43. The fuse boards were in conformity with the Contract under Art. 35(2) CISG. They were fit for purposes for which goods of the same description would be ordinarily used **(1)** since the RESPONDENT had no obligation to comply with Equalec's policy **(1.i)**. There was also no reasonable reliance on the RESPONDENT's skill and judgement **(2)**.

1) The fuse boards were fit for purposes which goods of the same description would be ordinarily used

44. Art. 35(2)(a) CISG provides that goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used. The CLAIMANT submits that "the understanding of the contract description of the goods that should prevail is the one most common at the place where the buyer intends to use the goods" (*CM para.39*). However, it is not necessary to decide this question as it is the understanding of the parties in their agreement that should prevail (*Honnold et al. s. 225*). The intention of the parties should be interpreted on the basis of all relevant circumstances as provided in Art. 8 CISG (*Henschel s. 4.1*).
45. As the RESPONDENT has previously submitted, the Contract provided for the sale and purchase of 5 primary distribution boards. The parties' negotiations and subsequent conduct did not establish an intent to include JP fuses or conformity to Equalec requirements as a term of the Contract. Therefore, the ordinary purpose of the fuse boards is to connect to incoming electrical supply and regulate the flow of electricity. The fuse boards that the RESPONDENT delivered to the CLAIMANT were fit for this purpose because all of the JS fuses that were installed in the primary fuse boards delivered to the CLAIMANT were of the appropriate rating for the circuit in which they were installed (*PO No.2 para.27*). They conformed to the engineering drawings. The fuses met the necessary minimum quality BS 88 standards, complied with local regulatory requirements and were manufactured by Chat Electronics, which has a reputation for being one of the better manufacturers of J type fuses.
46. Where it is not possible to determine the norms that the buyer and seller intended to apply, the issue can be analyzed in terms of the policy as to who should bear the risk (*Henschel s. 4.1*). Based

on policy considerations, the RESPONDENT had no obligation to comply with Equalec Standards (i).

i) RESPONDENT had no obligation to comply with Equalec Standards

47. The CLAIMANT submits that the RESPONDENT is liable for non-conformity of the fuse boards because the RESPONDENT neglected Equalec's policy (*CM paras.90-102*). However, a seller cannot be responsible for non-conformity of goods with statutory requirements in the buyer's country even if the seller is aware of the country to which the goods are to be used (*Bianca/BB s.3.2, OLG Frankfurt, 08.03/1995*). The seller is not expected to be aware of such particular requirements (*Bianca/BB s.3.2; Schlechtriem et al p.418*). Even though the RESPONDENT knew that the fuse boards would be used in Equatoriana, the RESPONDENT had no obligation to comply with the statutory requirements.
48. In *OLG Frankfurt, 08.03/1995*, the buyer refused to pay for mussels delivered by the seller because they contained a higher cadmium level than advised by the German Federal Health Department. The Supreme Court indicated that the seller had no obligation to supply goods which conformed to the statutory requirements of the importing state especially since there was an uncertain legal situation in its own country. Therefore, the buyer could not trust that the seller has clear knowledge of the public law regulations. On the contrary, the buyer is the party that "can be expected to have such expert knowledge of the condition in his own country...and can be expected to inform the seller accordingly". This case is followed in *OGH 13.05/2002, BGH 02.3/2005*, and *Medical Marketing v. Internazionale Medico Scientifica*.
49. Where as the above cases deal with public law regulations, the parties are dealing with a company policy. If a seller has no obligation to comply with the buyer's state or importing states statutory requirements then it follows that a seller does not have a legal obligation to comply with company policies. Equalec's policy created uncertainty in regards to the standards required in Equatoriana because the policy was contrary to its legal obligation under the Equatoriana Electric Service Regulatory Act. This creates a greater ambiguity because Equalec is able to change its policy as the company sees fit. With this uncertainty, it is unreasonable for the CLAIMANT, a well-established developer of a number of commercial and residential developments in Equatoriana, to expect the RESPONDENT to have more knowledge about its own country's policies. This can be further justified on economic grounds, since the CLAIMANT can obtain the relevant information more effectively and cheaper than the seller can (*Henschel s.4.1*).
50. The CLAIMANT submits that a seller's liability to conform with foreign legal requirements arises when the buyer made clear it wanted goods fit to be used in its country (*CM para.48*).

However, the RESPONDENT had complied with the statutory legal requirements in Mountain View. Secondly, the CLAIMANT had not expressly made known Equalec's policy or agreed on this requirement. Thirdly, even though the RESPONDENT was aware that the fuse boards would be used in Mountain View, this is insufficient to bind the RESPONDENT to deliver goods conforming to the statutory requirements of that country, nevertheless company policies. Even the CLAIMANT was not aware of Equalec's policy, Mr. Konkler was confused as to why Equalec refused to connect JS fuses since "in several other developments in Equatoriana JS fuses had been used without complaint from the electrical supply companies" (*Konkler Witness Statement*). Finally, there is no liability as it will be proven that it was unreasonable for the buyer to rely on the seller's judgement.

2) There was no reasonable reliance on RESPONDENT's skill and judgement

51. Even if the particular purpose was made know to the RESPONDENT, the RESPONDENT is not liable because the CLAIMANT did not rely on the RESPONDENT's skill and judgement
- (i). If it is found that the CLAIMANT relied on the RESPONDENT's skill and judgement, RESPONDENT submits that it was unreasonable for the CLAIMANT to do so (ii).

i) CLAIMANT did not rely on RESPONDENT's skill and judgment

52. Art. 35(3) CISG provides that the seller is not liable for failing to deliver goods fit for a particular purpose if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgement" (*UNCITRAL Secretariat 35 para.7*). Where the buyer hands over specifications, describes the goods desired in highly technical specifications or insists on a particular brand, the buyer is considered not to have relied on the skill of the seller. (*Enderlin/Maskow para.13, UNCITRAL Secretariat 35 para.7*).

53. The CLAIMANT had made enquiries to its usual supplier of electrical equipment, Switchboards, and had their own designers prepare detailed engineering drawings. The drawings supplied to the RESPONDENT showed specific rating requirements for the distribution fuseways. All fuseways were to be less than 400 amperes. By consulting Switchboards and providing detailed drawings and rating specifications, the CLAIMANT did not rely on RESPONDENT's skill and judgement.

ii) Alternatively, it was unreasonable for CLAIMANT to rely on RESPONDENT's skill and judgement

54. CLAIMANT submits that, where the buyer and seller have equivalent knowledge of and experience with the goods in question, the seller is held to a higher standard and considered to know the goods better (*CM para.44*). However, the issue is not knowledge of the goods but

Equalec's policy. The CLAIMANT is established in Equatoriana and has constructed a number of large commercial and residential developments in its country. It is, therefore, unreasonable for the CLAIMANT to rely on the RESPONDENT's skill and judgement. On the contrary, the CLAIMANT is expected to have expert knowledge of the conditions in his own country (*OLG Frankfurt, 08.03/1995*).

PART III: THE CONTRACT WAS VALIDLY AMENDED

55. Contrary to the CLAIMANT's assertion, the change from JP to JS type fuses did not constitute an amendment to the Contract (*CM para.57*). The Contract called for 5 primary distribution fuse boards. The change from JP to JS type fuses fitted in the fuse boards was not a material change that required an amendment. JS and JP type fuses are functionally identical and both types can be used for up to 400 amperes. The RESPONDENT fulfilled its contractual obligations by delivering 5 distribution fuse boards. The only reason the CLAIMANT was not able to use the fuse boards was due to Equalec's recent policy to not use JS type fuses for 400 amperes or less. It was not the duty of the RESPONDENT to inform itself of Equalec's policy and it could not reasonably be expected to do so.
56. The change from JP to JS type fuses was a minor change that occurred in the course of carrying out the Contract and such minor changes are frequently conducted in items that need to be specifically fabricated (*Stiles Witness Statement*). Contrary to the CLAIMANT's assertion (*CM para.62*), by telephoning the CLAIMANT to discuss the changes the RESPONDENT did not imply that the change in fuse types was a major change to the contract. The observance of good faith in international trade (*Art. 7(1) CISG*) should facilitate open communication between the parties to a contract. The Telephone Conversation was an example of the daily collaboration and problem solving that happens during such a large transaction. Indeed, Mr. Hart himself did not think that the change was of enough importance to contact Mr. Konkler (*Hart Witness Statement*).
57. In the alternative, if the Tribunal should find that the change constituted a material change that required an amendment to the Contract, the RESPONDENT submits that Mr. Hart had authority to amend the contract (**A**) and that the resulting amendment was valid (**B**).

A. MR. HART HAD AUTHORITY TO AMEND THE CONTRACT

58. Issues of validity and the authority of an agent are outside of the scope of the CISG and are governed by domestic law pursuant to Art. 4, sentence 2(a) (*Germany 12.05/1995*). The CIASG is applicable to Hart's authority as an agent because Equatoriana has enacted Arts. 1 to 20 of the CIASG into its own domestic law (*PO No. 2, para.16*). According to Art. 2(1) CAISG, the CAISG applies where a purported agent (who has his place in a Contracting State) acts on behalf

of a principal in an international contract. Therefore, CAISG applies to the agency relationship between the CLAIMANT and Mr. Hart.

59. Mr. Hart had implied authority to act as an agent of the CLAIMANT **(1)** and the CLAIMANT's conduct caused the RESPONDENT to believe that Mr. Hart had authority **(2)**.

1) Mr. Hart had implied authority to act as agent

60. The CLAIMANT erred in asserting that Mr. Hart did not have authority to amend the Contract (*CM para.69*). It was reasonable for the RESPONDENT to assume that Mr. Hart had implied authority and that the CLAIMANT's actions ratified Mr. Hart's decisions.
61. Art. 9 CIASG states that the authorization of an agent may be express or implied. Furthermore, as per Art. 10, the authorization need not be evidenced by writing and is not subject to any other requirement as to form. It may be proven by any means.
62. The CLAIMANT is a corporation organized under the laws of Equatoriana. Corporations necessarily conduct their business through their various officers. Mr. Konkler was the employee responsible for the Contract. However, there are no facts to suggest that the RESPONDENT should have assumed Mr. Konkler was the only employee who had authority to act as agent on the project. There were other employees such as engineers of the CLAIMANT that had a say in drafting the Contract. When Mr. Stiles for the RESPONDENT contacted Office Space to discuss the changes, he was informed that Mr. Konkler was away and that he could speak to Mr. Hart, an employee in the purchasing department. Mr. Stiles discussed the options for carrying out the Contract with Mr. Hart and Mr. Hart gave his opinion. There was no reason for Mr. Stiles to believe that Mr. Hart was not competent in confirming such changes. While Mr. Hart may have had authority to sign contracts valued up to USD 250,000 there are no facts that indicate he is unable to make decisions on contracts that have already been signed. It is reasonable to assume that Mr. Hart would also have authority to amend contracts worth up to USD 250,000. Furthermore, it would be illogical to assume that Mr. Hart can bind the CLAIMANT for contracts worth a quarter of a million dollars yet not be able to give simple instructions such as the one at hand. Thus, Mr. Hart had authority to act on behalf of the CLAIMANT in amending the Contract.

2) CLAIMANT's conduct caused the RESPONDENT to believe Mr. Hart had authority

63. Contrary to the CLAIMANT's submission (*CM para.69*), even if Mr. Hart did not have implied authority, the conduct of the CLAIMANT **(i)** and Mr. Hart's actions **(ii)** led the RESPONDENT to reasonably believe that Mr. Hart had authority.

i) The CLAIMANT's conduct led the RESPONDENT to believe Mr. Hart had authority

64. The CLAIMANT refers to Art. 14(1) CAISG to support the claim that where the agent acts without authority, his acts do not bind the principal and third parties (*CM para.73*). This is an incomplete reading of Art. 14 as it does not take into consideration Art. 14(2). Art. 14(2) states that where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.
65. The Contract is between Office Space and Electrodynamics. While Mr. Stiles dealt with Mr. Konkler on previous occasions, there was no reason for Mr. Stiles to believe that Mr. Konkler was the only employee with authority to make decisions on matters concerning the Contract. When Mr. Konkler telephoned Office Space to discuss the recent developments, he was referred to speak with Mr. Hart as Mr. Konkler was not available. Mr. Hart is an employee in the CLAIMANT'S purchasing department. It is reasonable for Mr. Stiles to assume that Mr. Hart is able to discuss the Contract and that any decisions he makes will be binding. It should not be the RESPONDENT's duty to acquaint itself with the internal operations of the CLAIMANT. Furthermore, upon returning from his trip, Mr. Hart did not notify Mr. Konkler of the changes that he had approved. This was due to the fact that Mr. Hart did not think it was necessary to notify Mr. Konkler. As between the parties, the RESPONDENT should not be held responsible for the lack of internal communications of the CLAIMANT.
66. It would be against the policy interest of promoting good faith in trade if a company could claim that certain employees do not have authority as agents despite conducting business through those employees. The misunderstanding was due to inefficiencies within the CLAIMANT's operations and as between the two parties, the CLAIMANT should bear the cost of the resulting amendment.

ii) Hart led the RESPONDENT to believe that he had authority

67. The CLAIMANT asserts that Mr. Hart impliedly made known to the RESPONDENT his lack of authority by stating that he was not sure that changing the manufacturer type would be acceptable to Mr. Konkler (*CM para.72*). This reasoning does not follow for several reasons. First of all, Mr. Hart noted that he was not sure about changing the manufacturer as they prefer to use Chat Electronics. He did not make any statements with respect to lack of authority for changing the type of fuses. Secondly, although Mr. Hart stated that he did not have knowledge about the technical aspects of the Contract, he failed to state that he had no authority to make changes. In

fact, asking Mr. Stiles for a recommendation would support the view that he had authority to make a decision. Thirdly, he did not state that any changes would need to be confirmed by Mr. Konkler. Mr. Hart stated that the CLAIMANT cannot afford any delays in the Contract and that Mr. Konkler could not be contacted. These statements reasonably led the RESPONDENT to believe that Mr. Hart needed to make decisions on behalf of the CLAIMANT. Lastly, Mr. Stiles explicitly indicated the finality of the decision to Mr. Hart by stating that once a type of fuse is installed into the fuse boards, it cannot be replaced by another type of fuse. Mr. Hart did not raise any concerns. If the decision was provisional or subject to review, it would have been incumbent on Mr. Hart to notify Mr. Stiles as it was clear that the work would proceed immediately.

iii) CLAIMANT ratified the acts of Mr. Hart through its inaction

68. Art. 15 CIASG states that an act by an agent who acts without authority may be ratified by the principal. Furthermore, as per Art. 8, such ratification is subject to no requirements as to form. Upon his return from his trip, Mr. Stiles did not contact the RESPONDENT to discuss the amendments. In fact, the RESPONDENT did not hear from the CLAIMANT until the Contract was fully carried out and paid for in full. Such silence on the part of the CLAIMANT can constitute ratification of the amendments in certain circumstances. As the Contract and the modifications had an air of urgency which was confirmed by Mr. Hart during the Telephone Conversation, it would not be reasonable for the RESPONDENT to await further confirmation from the CLAIMANT to proceed with the production of the fuse boards. In fact, the main purpose in speaking to Mr. Hart and receiving confirmation was due to the urgency of the matter and could not await Mr. Konkler's return.

B. THE CONTRACT WAS VALIDLY AMENDED PURSUANT TO ART. 29(2)

69. Art. 29(2) CISG states that a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.
70. Thus, relying on the second sentence in Art. 29(2), the Contract *can* be orally amended **(1)**, Mr. Hart did amend the contract **(2)** and the CLAIMANT, through its conduct, is precluded from relying on the 'no oral modifications' clause in paragraph 32 of the Contract (hereinafter NOM clause) **(3)**.

1) The Contract can be orally amended

71. The CLAIMANT asserts that if there is a NOM clause in a contract, there is no reason to give effect to an attempted oral modification (*CM para.63*). However, there are situations where not enforcing a NOM clause is appropriate and Art. 29(2) CISG explicitly accounts for these.
72. The second sentence of Art. 29(2) provides that a party may be precluded by his conduct from asserting a NOM clause to the extent that the other party has relied on that conduct. The verbal formula of the paragraph provides judges and arbitrators a flexible framework within which to reach fair results when one party's behaviour is such that it would be unfair to allow him to insist on the requirement of writing (*Date-Bab/BB p.242*).
73. The RESPONDENT concedes that overriding a NOM clause will be an exception to the principle to give deference to the parties' agreement (*CM para.63*). However, there are several reasons why a NOM clause might be put aside in interpreting the contract. Following the NOM clause may actually impede contractual freedom rather than enhance it. The parties should be free to change their minds about any issue, including their agreed process of adjustment (*Hillman p.450*). Despite contrary intentions, parties often informally adjust their contracts in response to unforeseen changes in circumstances. (*Hillman p.450*). Such good faith agreements should be facilitated. One arbitral award stated: "This applies even if in an individually negotiated clause in their contract they provided that they would not give effect to an oral agreement to disregard the NOM clause" (*Austria 15.06/1994*).
74. Furthermore, the CLAIMANT cannot use the Contract to derogate from the reliance provision in Art. 29(2) by asserting the freedom of contract principle stated in Art. 6. If the opposite were true, Art. 29(2) would be rendered meaningless by Art. 6. Therefore, the parties should not be able to contract out of the reliance exception under Art 29(2) (*Honnold p.230*).
75. The CLAIMANT asserts that when the parties' relationship is informal and flexible, reliance on a NOM clause may be reasonable. Reliance on a "viciously" originated oral modification of a bargained contract is not reasonable (*CM para.65*). There are no facts to indicate that the NOM clause was a thoroughly bargained clause in the Contract. While the RESPONDENT did draft the Contract (*CM para.67*), it would not be possible to foresee all circumstances that may arise in the duration of the Contract. The fact that Chat Electronics was not able to supply its regularly stocked JP fuses was out of the contemplation of the parties (*Hart Witness Statement*) and required an urgent adjustment to the Contract. The Convention also aims to facilitate international transactions. Because speed and informality characterize such transactions, the drafters generally discarded formal requirements (*Hillman p.456*). The actions of the RESPONDENT represents a

good faith attempt at facilitating international trade where the CLAIMANT was duly consulted. Facilitating such good faith in trade is an underlying goal of the CISG (Art. 7(1)).

2) Mr. Hart orally amended the Contract

76. Mr. Hart's statements during the Telephone Conversation led the RESPONDENT to believe that the Contract had been amended **(i)** and the RESPONDENT relied on the amendment **(ii)**.

i) Hart's statements led the RESPONDENT to believe that the Contract had been amended

77. Mr. Stiles, acting for the RESPONDENT, telephoned the CLAIMANT to discuss a recent change in circumstances with respect to the procurement of JP type fuses. He spoke to Mr. Hart, an employee in the purchasing department of the CLAIMANT, and explained that waiting for Chat Electronics JP type fuses could take several months. Mr. Hart stated that it was not possible to wait and that Mr. Konkler could not be contacted (*Stiles Witness Statement*). After Mr. Stiles explained the differences in JP and JS fuses, Mr. Hart told Stiles that he was in agreement and that the RESPONDENT "should go ahead" with JS fuses (*Stiles witness statement*). This statement is clear and unequivocally directs the RESPONDENT to continue the Contract with JS fuses. Furthermore, Mr. Stiles explained to Mr. Hart that once one type of fuse is installed, it cannot be replaced by the other type. This statement put the CLAIMANT on notice that the decision he made was final and irreversible. Mr. Hart did not raise any concerns with this. These statements give rise to the conclusion that the Contract was orally amended effective immediately.

78. The CLAIMANT asserts that Mr. Stiles acted against reasonable commercial standards of fair dealing in inducing Mr. Hart to mistakenly believe that JS and JP fuses were identical (*CM para.80*) This statement is rebutted based on two grounds. First of all, as the CLAIMANT correctly points out (*CM para.81*), issues of validity and mistake lie outside the scope of the CISG through the operation of Art. 4. It is inconsistent for the CLAIMANT to state that the amendment was outside the scope of the CISG while at the same time arguing that Art. 29(2) CISG requires amendments to be in writing. Through Art. 29, the CISG directly addresses amendments and thus brings it within its scope. Secondly, Mr. Stiles did not act maliciously or mistakenly in stating that JS and JP fuses are functionally identical. His statements are in all respects factually correct in that both types of fuses are interchangeable for up to 400 amperes. The only reason JS fuses did not meet the CLAIMANT's needs was because of Equalec's idiosyncratic policy that Mr. Stiles was not aware of; nor was it his duty to be aware of such a policy. In fact, JS fuses were authorized for use in distribution fuse boards by the Commission (*Answer para.19*). Mr. Stiles disclosed the situation fully to the RESPONDENT and did not induce him into mistakenly amending the Contract.

79. Art. 29(2) effectively does away with the need for consideration in contract modification. Even changes which favour only one side are valid (*Schlechtriem p.47*). Despite this, there was no benefit to the RESPONDENT in amending the Contract from JP to JS type fuses. JS type fuses are more expensive than JP fuses; further supporting the fact that the RESPONDENT did not act in bad faith in proposing the amendment (*CE Catalogue*). Indeed, the RESPONDENT incurred greater costs as a result of the amendment and was simply motivated by a desire to complete the Contract.

ii) RESPONDENT reasonably relied on the amendment

80. The CLAIMANT, through its actions, implied that it was not relying on the NOM clause. The RESPONDENT acted in reliance to the CLAIMANT's conduct and thus, the CLAIMANT cannot now invoke the NOM clause. This provision is an expression of the general good faith principle that governs the Convention (*ICC, 9117/1998*).
81. That the parties must conduct themselves according to the standard of a 'reasonable person' must be regarded as a general principle of the Convention (*Schlechtriem p.39, Amran v. Tesa*). Thus, although the CLAIMANT does not assert this, the RESPONDENT's reliance on the amendment must be a reasonable one. What is reasonable can be appropriately determined by what is normal and acceptable in the relevant trade (*Art. 9 CISG, Honnold p.101*).
82. It was reasonable for the RESPONDENT to rely on the amendment both in terms of the specific situation and with respect to the practices of the trade. Mr. Hart acted as an agent of the RESPONDENT when he conceded to the change from JP to JS type fuses. Hart did not state that further confirmation would be required and emphasized that the matter was an urgent one. Furthermore, such minor changes are frequently done in custom fuse boards (*Stiles Witness Statement*).
83. The CLAIMANT asserts that a practice had been established between the CLAIMANT and the RESPONDENT and that all terms of the contract had been previously negotiated between Stiles and Konkler and thus, it was not reasonable for Stiles to rely on Hart's comments. This was the first time that the two parties had worked together on a project and no previous practice had been established. It was also the first time that a change needed to be made to the Contract. Furthermore, Mr. Stiles attempted to contact Mr. Konkler directly and was instead directed to Mr. Hart, noting that Mr. Konkler could not be reached. Mr. Stiles also noted that the RESPONDENT could not proceed under the Contract unless a response was given by the CLAIMANT (*Stiles Witness Statement*). Under these circumstances, it was reasonable for the RESPONDENT to rely on the communication between Hart and Stiles in amending the Contract.

3) CLAIMANT is precluded from relying on the NOM clause through its conduct

84. The oral agreement to modify the contract notwithstanding a NOM provision can constitute reasonable conduct to preclude reliance on a NOM clause (*Murray s.VII*). The reliance inducing conduct will often be found in a declaration or consent to a modification made without observing the agreed requirements as to form (*Schlechtriem et al p.334*). The CLAIMANT asserts that there was never any such agreement to modify the NOM clause (*CM para.64*). The RESPONDENT rejects this view as Hart's comments to 'go ahead with JS fuses' implied an agreement to avoid the NOM clause in substituting JP fuses with JS fuses (*Stiles Witness Statement*). The example provided by the Secretariat Commentary supports this interpretation as in that case, A's contracting officer told B to make a slight modification and the Contract was amended despite the NOM clause (*UNCITRAL Secretariat 29 para.9*)
85. The CLAIMANT asserts that where there is no express agreement to modify a NOM clause, there must be further activities on the part of the CLAIMANT to give rise to the RESPONDENT's impression that the Contract was amended (*CM para.74*). The authority that supports the need for further activities, Enderlein, is however, alone in this view (see generally Art.29 in *Schlechtriem et al., Honnold*). If the tribunal should find that some additional conduct was needed to ratify the amendment, the CLAIMANT's conduct following the amendment further affirmed it. Mainly, the CLAIMANT failed to raise any objections to the amendment while the RESPONDENT was in the process of manufacturing the fuse boards. Had Mr. Konkler contacted Mr. Stiles upon returning from his trip, there would still have been time to substitute JP fuses from another manufacturer (*Answer para.23*). The RESPONDENT's honest reliance on this silence is evidenced by the fact that it proceeded to manufacture the fuse boards with JS fuses, which are more expensive than JP fuses, with no change in the contract price (*CE Catalogue*). Furthermore, during the Telephone Conversation, Mr. Hart did not indicate that any further conduct was needed to confirm the amendment.
86. Together with other circumstances, silence can indeed be interpreted as the acceptance of an offer (*Germany 22.02/1994*). If one party allows an employee to make or accept declarations modifying the contract, then it is the nature of that party's conduct and its reliance inducing effects that are decisive. Thus, a flexible approach is needed by the courts in analyzing the conduct that will be sufficient and the courts will enjoy considerable discretion (*Schlechtriem et al p.335*).
87. Mr. Konkler was away for the period of 10 to 25 July 2005. The CLAIMANT did not inform the RESPONDENT of its dissatisfaction with the fuse boards until 9 September 2005 - almost two months after the amendment. Mr. Stiles confirmed during the Telephone Conversation that the

RESPONDENT could not proceed until a decision was made. Thus, it was reasonable for the RESPONDENT to assume that this amount of time with no objections was sufficient conduct to confirm the amendment. A trader is undoubtedly obliged to protest immediately, or within a reasonable period of time, if he receives a communication to which he cannot agree (*Belgium 15.05/2002*). This is especially true where the CLAIMANT itself has noted the urgency of proceeding with the fabrication (*Stiles Witness Statement*).

88. Lastly, a party should be precluded from invoking the invalidity of a modification which has given rise to an act of performance to the extent that those acts can no longer be reversed without loss (*Schlechtriem et al. p.336, UNCITRAL Secretariat 29 para.9*). In this case, the RESPONDENT has fully performed the Contract and it cannot be reversed without incurring costs that equal the total value of the Contract. Thus, despite the fact that the CLAIMANT does not make such an argument, contacting the RESPONDENT after the fuse boards were manufactured and paid for was too late to assert a revocation of the oral amendment.

PART IV: RESPONDENT IS EXCUSED FROM ANY LIABILITY OR DAMAGES

89. The CLAIMANT alleges that the RESPONDENT is liable under Art. 36 CISG for delivering fuse boards that did not conform to the Contract (*CM para.108*). However, the RESPONDENT is exempt from such liability since the CLAIMANT's conduct caused the alleged non-performance. The CLAIMANT did not anticipate in *Claimant's Memorandum* the valid defences under Art. 80 and 77 CISG that are presented below.
90. The RESPONDENT is excused from liability and damages under Art. 80 CISG **(A)**. Alternatively, the RESPONDENT is not liable for damages because the CLAIMANT failed to meet its duty to mitigate under Art. 77 CISG **(B)**. In either case, the RESPONDENT is not liable for any damages as a result of its delivery of fuse boards equipped with JS fuses.
91. The CLAIMANT also asserts the RESPONDENT's liability for not delivering the fuse boards within the contracted time (*CM para.84-89*). However, this argument should be dismissed. First, it was not a disputed issue (*PO No.1 para.11*). Also, the damages claimed are allegedly caused by the RESPONDENT's delivery of non-conforming fuse board. Therefore, the alleged late delivery of 22 August 2005 has no relevance in this arbitration.

A. RESPONDENT IS EXCUSED FROM LIABILITY AND DAMAGES UNDER ART. 80

92. Should the Tribunal decide that the RESPONDENT is in breach for delivering fuse boards that did not conform with the Contract, the RESPONDENT is excused from any liability and

damages pursuant to Art. 80 CISG. The article provides that “a party may not rely on a failure of the other party to perform, to the extent that *such failure was caused by the first party’s act or omission*” [emphasis added]. The phrase “failure to perform” refers to *any breach of contract* (*Enderlein/Maskow Art. 80, s.2*). The phrase “a party may not rely on” means that the party *may not assert any claims* against the breach of contract (*Enderlein/Maskow Art. 80, 3.1*). Therefore, Art. 80 provides a comprehensive exemption of the non-performing party’s liability if the injured party caused the non-performance or breach (*Schlechtriem et al p. 839*).

93. The non-performing party is exempt from all liability and damages if the injured party has “impaired” the performance through an act or omission (*Schlechtriem Art. 80*). The CLAIMANT’s conduct caused the RESPONDENT’s non-performance in two ways: by instructing the RESPONDENT to use JS fuses in the fuse boards **(1)**, and by failing to the Equalec Policy **(2)**. Finding that the CLAIMANT caused the RESPONDENT’s non-performance in one or both situations would exempt the RESPONDENT from liability and damages under Art. 80 CISG.

1) CLAIMANT caused RESPONDENT to use JS fuses in the fuse boards

94. Should the Tribunal find that RESPONDENT delivered non-conforming fuse boards pursuant to Art. 35(1) CISG – i.e. “quality and description” (*see Part II. A*), the RESPONDENT is exempt from the liability resulting from the breach. The CLAIMANT’s instructions to the RESPONDENT to use JS fuses **(i)** caused the RESPONDENT’s failure to deliver non-conforming fuse boards **(ii)**.

i) CLAIMANT instructed RESPONDENT to use JS fuses

95. Article 80 CISG exempts all claims against a party for non-performance where the other party has “impaired his performance” through an act or omission (*Schlechtriem Art. 80*). Here, CLAIMANT instructed the RESPONDENT to use Chat Electronics JS fuses instead of JP fuses. Even if the Tribunal finds that a valid amendment to the Contract was not made to provide for JS fuses, the CLAIMANT asked the RESPONDENT to “go ahead with the JS fuses” on July 14 2005 (*Stiles Witness Statement*).

96. When Mr. Stiles informed the CLAIMANT on 14 July 2005 that Chat Electronics was not able to supply JP fuses, the CLAIMANT rejected Mr. Stiles’ first two recommendations: to wait for Chat Electronics to ship the JP fuses at a later date, or to use JP fuses from a different manufacturer. Instead, the CLAIMANT asked the RESPONDENT to equip the fuse boards with Chat Electronics JS fuses (*Stiles Witness Statement*). Under these instructions, the RESPONDENT fabricated the fuse boards with Chat Electronics JS fuses (*Stiles Witness Statement*).

97. The CLAIMANT's instructions would not have changed even if the RESPONDENT sent a written confirmation of the change. The decision to use Chat Electronics JS fuses is the best decision for four reasons. First, both JP and JS fuses meet the BS 88 safety standards and are functionally identical for the purposes of the Development (*Stiles Witness Statement; CE Catalogue*). Second, the CLAIMANT had a preference for Chat Electronics equipment coupled with the Development's production deadlines (*Hart Witness Statement*) made the solution to use Chat Electronics JS fuses the most logical one. Third, the decision did not seem like an important one to the CLAIMANT (*Hart Witness Statement*). Fourth, the CLAIMANT was not aware of the Equalec Policy either: Mr. Konkler was "surprised" when Equalec refused to connect fuse boards with JS fuses since "several other developments in Equatoriana JS fuses had been used without complaint from the electrical supply companies" (*Konkler Witness Statement*).

ii) CLAIMANT's instructions caused RESPONDENT to use JS fuses

98. When evaluating whether an act or omission *caused* another party's failure to perform, the causality must exist in its "logical sense", based on objective reasonableness (*Schlechtriem et al p.840*). There are two possible tests of causality. First, the *condition sine qua non* (the 'but-for' test) as used in Art. 74 CISG (*Schlechtriem et al p.840*). The test asks this fundamental question: would the alleged harm resulted *but for* the conduct of the first party? Alternatively, the "high probability" test questions whether the damage can be "imputed" to the injured party. The injured party is responsible for causing the breach "because it was highly probably that his behaviour would entail the failure to perform." (*Tallon/BB p.599; Enderlein/Maskow p.337*).
99. With the application of either causation test, the CLAIMANT's conduct logically and objectively caused RESPONDENT's failure to perform. In the application of either the "but-for" test or the "high probability test" but for the CLAIMANT's instructions, the RESPONDENT would not have proceeded with production: the RESPONDENT "needed to know" CLAIMANT's decision so they could "install the proper supports for the fuses" (*Stiles Witness Statement*). It is also "highly probable", if not certain, for RESPONDENT to proceed with manufacturing fuse boards with JS fuses after CLAIMANT decided that they "should go ahead with JS fuses." Therefore, the CLAIMANT's conduct caused the RESPONDENT to deliver the fuse boards equipped with JS fuses – the very fuse boards alleged to be in non-conformity with the Contract.

2) CLAIMANT's failure to dispute the Equalec Policy caused RESPONDENT's non-performance

100. Equalec adopted the policy of "connecting to primary distribution fuse boards using J type fuses only if circuits designed for 400 amperes or less used JP type fuses" (hereinafter Equalec Policy) (*Equalec Letter*). The CLAIMANT alleges that it was not supposed to complain to the

Commission about the Equalec Policy (*CM para.103*). The CLAIMANT supports this argument by erroneously asserting that the RESPONDENT was responsible for meeting Equalec requirements in addition to delivering fuse boards in conformity with the Contract (*CM para.104*). However, RESPONDENT is not obligated to know and comply with Equalec’s idiosyncratic requirements (see *Part II. B.1.i*). In addition, the RESPONDENT was only required to manufacture fuse boards that can be *physically* “lockable” by Equalec’s padlock; no additional requirements are required (*PO No.2 para.21, see Part II.A.1. para.30*).

101. Should the Tribunal find that RESPONDENT delivered non-conforming fuse boards pursuant to Art. 35(2) CISG – i.e. “not fit for purpose” (*Part II.B.*), the RESPONDENT is exempt from such liability pursuant to Art. 80. The RESPONDENT delivered fuse boards appropriate for their purpose **(i)**. Equalec’s policy and refusal to connect the fuse boards is unlawful **(ii)**. The CLAIMANT’s failure to exercise its legal right to complain to the Commission is as an “omission” under Art. 80 CISG **(iii)**. The CLAIMANT’s failure to complain to the Commission caused RESPONDENT’s non-performance **(iv)**.

i) RESPONDENT delivered fuse boards appropriate for their purpose

102. The JS fuses used in the fuse boards are both functionally and legally appropriate for their purpose. Since all the fuseways at the Development were less than 400 amperes (*Statement of Claim*), either JP or JS could be used (*Stiles Witness Statement; CE Catalogue*); they were “functionally identical” (*Part II.A.4*). In addition, both JP and JS fuses are certified by the Commission, as having met the BS 88 safety standard that is followed in Equatoriana (*Stiles Witness Statement; CE Catalogue*). Therefore, the fuse boards delivered by the RESPONDENT are functionally and legally appropriate for the CLAIMANT’s use in the Development.

ii) Equalec’s policy and refusal to connect the fuse boards is unlawful

103. The CLAIMANT correctly asserts that the Commission is not only the regulator of the electrical service in Equatoriana, but also responsible for certifying the safety of all equipment for the purpose of electrical connections under the *EESRA* Art. 14 and 15 (*CM para.103*). Equalec is legally obligated to provide electrical service that is “safe and adequate” (*EESRA Art. 14*) and is prohibited from imposing “undue or unjust requirements” while providing such services (*EESRA, Art.14*).
104. Although Mr. Gregory Smith (Equalec’s Superintendent of Customer Service at Equalec) asserts that the Equalec Policy was adopted in July 2003 for safety reasons (*Konkler Witness Statement; Equalec Letter*) and for reasons that would benefit the customer (*Konkler Witness Statement*), this was unsupported. First, Equalec never identified the alleged safety concern. Mr. Smith concedes

that JP and JS fuses are “essentially interchangeable” but never provided the safety concern resulting from higher rating JS fuses being used for lower rating circuits (*Konkler Witness Statement; Equalec Letter*). Furthermore, Mr. Smith never explained the safety concern for using JS fuses of *the same rating* as the circuit range. Second, the “customer-benefit reason” is more likely a tool to lower costs for Equalec – to reduce inventory carried on its service trucks. In addition, reducing the amount of inventory on the service trucks is lowering the “adequacy” of Equalec’s service to their customers, rather than increasing the benefit to them. This is in violation of *EESRA Art. 14*. The legitimacy of this reason is further undermined because it was not mentioned or explained letter *Equalec Letter* that Mr. Smith provided to the CLAIMANT.

105. Alternatively, even if the alleged safety concern is valid, the Equalec Policy would be “undue and unjust” in the circumstances. Since the JS fuses met the Commission’s safety standards, any additional standards set by Equalec would be “undue or unjust” and illegal. Since the Commission has the ultimate jurisdiction to “certify the safety of all equipment to which electrical connections have been requested” (*EESRA Art.15*), all safety standards for electrical equipment are set by the Commission. Therefore, Equalec cannot set additional safety standards in its provision of electrical services because they would be “undue or unjust requirements.”

106. Equalec refused to connect the fuse boards on 8 September was simply because the fuses were JS type. This was not because the JS fuses used were of a higher rating than the circuits in the Development (*Konkler Witness Statement*). In fact, the JS fuses used were of the “appropriate rating for the circuit in which they were installed” and complied with the Commission safety standards (*PO No.2 para.27*). There is no reason why JS fuses certified by the Commission under BS-88 safety standards of the appropriate ratings cannot be connected. Therefore, Equalec’s refusal to connect the CLAIMANT’s fuse boards is imposing an “undue or unjust requirement” on the fuse boards that would otherwise be legally safe and appropriate for its use in the Development. Therefore, Equalec failed to meet their legal obligations under *EESRA Art. 14* to provide “safe and adequate” electrical service without imposing any “undue or unjust requirements.”

iii) CLAIMANT’s failure to dispute the Equalec Policy constitutes an “omission”

107. An “omission” under Art. 80 CISG is the failure to act in a way that is “necessary and objectively suited to making performance possible” (*Schlechtriem et al p. 839*). A party is also responsible for “external events as to which [the party] bears the risk” (*Chengwei s.14.4.3*, supported in *Tallon/BB, p.597; Schlechtriem et al p.840*).

108. Equalec contracted with the CLAIMANT to provide electrical service. Therefore, Equalec’s unlawful refusal to connect the fuse boards qualifies as an “external event as to which

[CLAIMANT] bears the risk.” Therefore, the CLAIMANT is held responsible for Equalec’s conduct that caused the non-performance of the Contract.

109. Alternatively, the CLAIMANT’s refusal to complain to the Commission is the CLAIMANT’s *own* omission. The Equalec Policy and refusal to connect the fuse boards is in breach of the *EESRA* and of their contractual obligations to connect the otherwise safe and suitable fuse boards. Therefore, the CLAIMANT had a legal right to complain to the Commission about the Equalec Policy and Equalec’s conduct.
110. The CLAIMANT knew or ought to have known it had a legal right to complain to the Commission. Mr. Konkler already knew that the CLAIMANT’s other developments in Equatoriana used JS fuses without complaint from other electrical supply companies (*Konkler Witness Statement*). During their telephone conversation on 9 September 2005, Mr. Stiles reminded Mr. Konkler that both JP and JS fuses are BS 88 safety certified and are suitable for the Development’s circuits of less than 400 amperes. Furthermore, Mr. Stiles suggested that the CLAIMANT should insist “either to Equalec or to the Commission, that Equalec was required by law to connect the fuse boards that met the certification requirements” (*Stiles Witness Statement*).
111. CLAIMANT’s potential complaint to the Commission would have been “necessary and objectively” suitable to ensure the Contract’s performance. If the CLAIMANT made a complaint, the Commission would have most likely over-ruled the Equalec policy as unlawful. Then, the Commission would have caused Equalec to connect the Development’s fuse boards that were equipped with JS fuses. The RESPONDENT would no longer be liable for any damages once Equalec connected the fuse boards delivered by RESPONDENT.
112. The CLAIMANT alleges that it was not required to complain to the Commission because “it is impossible to determine how long a complaint to the Commission would take” (*CM para.105- 6*) and that it “did not have the time to argue with Equalec” (*Stiles Witness Statement*). However the reasonableness of the CLAIMANT’s omission must be considered in the circumstances. On 9 September 2005, Mr. Konkler could have made an inquiry with the Commission’s staff. The Commission may have caused Equalec to change its policy without any formal action by the Commission in one week’s time (*PO No.2 para.30*). This would still give the CLAIMANT enough time to fulfill its lessee obligations by 1 October (*Stiles Witness Statement*). Alternatively, contacting the Commission on 9 September would have at least given the CLAIMANT a better assessment of the time period required to make such an inquiry. Mr. Konkler could not have reasonably known that the CLAIMANT “did not have the time to argue.”

iv) CLAIMANT's omission caused RESPONDENT's non-performance

113. The CLAIMANT is responsible for numerous omissions: the CLAIMANT bears the risk of Equalec's refusal to connect, the CLAIMANT failed to exercise its legal right to complain to Equalec, and failed to make inquiries or complain to the Commission. The CLAIMANT's omissions caused the RESPONDENT's otherwise suitable fuse boards to be found "not fit for purpose" and thereby non-conforming with the Contract. The causal relationship can be found by applying either the "but-for" causation test or the "high probability" test (*see Part IV.A.1.ii*)
114. "But for" Equalec's unlawful refusal to connect the fuse boards, the suitable fuse boards provided by the RESPONDENT would have been used in the Development. "But for" the CLAIMANT's refusal to exercise its legal right to complain, the Equalec Policy would not have stood to prevent the connection of the fuse boards. Since the RESPONDENT's fuse boards were suitable for their purpose, and the Equalec Policy and Equalec's refusal to connect was unlawful, a complaint to Equalec or to the Commission would have resulted in a change of the Equalec Policy. In that case, the fuse boards equipped with JS fuses would have been duly connected. It would have prevented this dispute over RESPONDENT's liability for providing non-conforming fuse boards.
115. Alternatively, the lower standard "high probability" test can be applied. It is "highly probably" that the CLAIMANT's omissions entailed RESPONDENT's failure to perform. The RESPONDENT's fuse boards, although suitable, would only be found non-conforming because of Equalec's unlawful refusal to connect the fuse boards. Therefore, Equalec's refusal (which the CLAIMANT is responsible for) and the CLAIMANT's refusal to complain about the Equalec Policy is the objectively the largest factor to cause the RESPONDENT's failure to perform.
116. In *Motor v Auto Vertriebs*, the German appellate court refused the buyer's claim for damages arising out of non-delivery according to Art. 80 CISG. Although the seller was ready to deliver, the buyer "omitted to accept and collect" the goods even though the seller was ready for delivery (*IV. 3.*). The court stated: "it would be against the principles of good faith if the [buyer] were entitled to claim any rights...since the [buyer] itself first affected the non-performance" (*IV. 3.*). In this case, although the RESPONDENT delivered fuse boards that were suitable for their purpose, the CLAIMANT (and Equalec, whom the CLAIMANT bears the risk for) omitted to have the fuse boards connected and failed to complain when the connection was refused unlawfully. It would be against the principles of good faith to award the CLAIMANT any damages for non-performance it caused.

117. The CLAIMANT caused the alleged non-performance by instructing the RESPONDENT to use JS fuses, or alternatively, by failing to dispute the Equalec Policy. Therefore, Art. 80 applies to exempt the RESPONDENT for any all liability arising out of the alleged non-performance.

B. CLAIMANT FAILED TO MEET ITS DUTY TO MITIGATE DAMAGES

118. Alternatively, should the Tribunal find the RESPONDENT liable for breach of contract under Art. 35 and 36 CISG, the RESPONDENT is not liable for damages because the CLAIMANT failed to meet its duty to mitigate under Art 77 CISG. Art.77 CISG imposes a duty on the injured party to “take such measures as are reasonable in circumstances to mitigate” the loss resulting from the breach of contract. Failure to do so leads to a reduction in damages “in the amount by which the loss should have been mitigated.” This duty is imposed even where the injured party did not contribute to the breach of contract or its effects (*Chengwei, s.14.5.1*). Therefore, the CLAIMANT, must meet its duty to mitigate if it intends to claim damages for breach of contract. However, under the circumstances, the CLAIMANT failed to take reasonable mitigating measures **(1)**. As a result, the RESPONDENT’s liability for damages should be reduced to \$0 **(2)**.

1) CLAIMANT failed to take reasonable mitigating measures

119. The CLAIMANT’s attempted mitigation efforts do not meet the standard of “reasonableness” **(i)**. The CLAIMANT failed to mitigate by its failure to dispute the Equalec Policy **(ii)**.

i) CLAIMANT’s attempted mitigation efforts were unreasonable

120. Since Art.77 CISG requires the CLAIMANT to take “reasonable measures” to mitigate the loss, it is not necessary to take measures that exceed reasonable expectations in the circumstances (*Knapp/BB s.2.3; Enderlein/Maskow p.308*). Art. 77 also requires reasonable efforts to minimize the loss caused by the breach (*Zeller, s.III*), while not resulting in any unnecessary losses (*Zeller, s.II; Switzerland 3.12/2002*). Mitigation measures are reasonable “if it could have been expected as bona fide [good faith] conduct from a reasonable person in the position of the complainant under the same circumstances” (*OGH 6.2/1996; OGH 14.1/2002; Schlechtriem et al p.790*).

121. When the CLAIMANT learned on 8 September 2005 that Equalec refused to connect the fuse boards, Mr. Konkler failed to act in a bona fide manner that a “reasonable person” in his circumstances would have acted. Mr. Konkler first contacted Mr. Smith on 8 September, who informed him of Equalec’s Policy. On 9 September, Mr. Konkler contacted the RESPONDENT and asserted that they would “buy new fuse boards from someone else” and hold the RESPONDENT responsible (*Konkler Witness Statement*). Although Mr. Konkler knew that JS fuses had been used in several other Equatoriana developments, he did not question Mr. Smith

about the legitimacy of the Equalec Policy. The RESPONDENT reminded the CLAIMANT of its legal right to insist that Equalec is under legal obligation to connect the fuse boards equipped with JS fuses (*A.2.iii., para.110*). Even so, the CLAIMANT refused to complain to either Equalec or the Commission about the Equalec Policy. In fact, Mr. Konkler didn't even wait for Mr. Smith's letter on the policy. The new fuse boards were ordered from Equatoriana Switchboards Ltd later that day on 9 September. Mr. Smith's letter didn't arrive until "about a week later" (*Konkler Witness Statement*).

122. It has been held that an aggrieved buyer's efforts to purchase substitute goods from a third party upon notice of the seller's non-delivery or non-conformity are reasonably sufficient mitigating efforts (*Delchi Carrier v Rotorex; Nova Tool v London Industries*). However, none these cases possess the unique situation of this case. Here, the RESPONDENT's alleged non-conformity is the result of a third party's (Equalec) unlawful conduct (*A.2.ii.; A.2.iii., para.113-17*), to which the CLAIMANT had the legal right to dispute (*A.2.iii., para.110*). If the CLAIMANT disputed the Equalec Policy, the fuse boards delivered by the RESPONDENT would have been dutifully connected by Equalec (*A.2.iv*); and the cost of obtaining and installing the new fuse boards would have been avoided. Therefore, the CLAIMANT's refusal to complain to the Commission about the Equalec Policy amounts to a refusal to mitigate. Under the circumstances, it would be not be reasonable to find that the CLAIMANT met its duty to mitigate.

ii) CLAIMANT should have disputed the Equalec Policy

123. The CLAIMANT's conduct resulted in unnecessary losses, and failed to minimize the loss resulting from the breach. The cost of obtaining and installing the new fuse boards amount to the damages claimed by the CLAIMANT - \$200,000. That amount is even higher than the price of the current Contract (\$168, 000). These damages could have been avoided if the CLAIMANT did not refuse to dispute the Equalec Policy. The legal right to dispute the policy rests in the hands of the CLAIMANT's, not the RESPONDENT's.
124. "If the injured party was in a position to take more effective measures and could be reasonably expected to do so in the circumstance," but chose not to, the party would be have failed its duty to mitigate (*Knapp/BB; p.560*). Similarly, the CLAIMANT failed its duty to mitigate by not taking the reasonable and more effective measures that it was in position to do – to dispute the Equalec Policy. By failing to do so, it effectively failed to reasonably minimize the loss.
125. Were the CLAIMANT to allege that it could not have reasonably disputed the Equalec Policy under the extreme time pressures and threat of breaching its contracts with various lessees, the CLAIMANT lacks the evidence to prove this. The CLAIMANT never indicates the number of lessees that would begin occupancy on 1 October 2005 (*Stiles Witness Statement*). Although it is

briefly mentioned that “substantial damages” would result – the CLAIMANT never provides the actual amount. It is unclear whether if these “substantial damages” could have exceeded the claimed damages of \$200, 000.

126. In addition to complaining to the Commission, the CLAIMANT had other options available. A reasonable person in the CLAIMANT’s circumstances would have at least made further inquiries with Equalec. Mr. Smith was simply the Superintendent of the Customer Services Department. The CLAIMANT should have inquired further with a personnel that is directly responsible for the Equalec Policy. Had the CLAIMANT then insisted Equalec was under legal and contractual obligations to connect the fuse boards, Equalec may have fulfilled their obligation to connect CLAIMANT’s fuse boards. This would have avoided the cost of obtaining new fuse boards.
127. Also, a reasonable person in the CLAIMANT’s circumstance would have at least contacted the Commission on 9 September 2005 to inquire into the possibility of filing a complaint. Only then would the CLAIMANT have been in a position to reasonably assess the actions that would minimize the loss as a result of breach: i) formally complaining to the Commission’s decision or ii) ordering new fuse boards from Equatoriana Switchboards.
128. The CLAIMANT had several different options that would have caused Equalec to connect the fuse boards. However, the CLAIMANT chose none of these options. Instead, the CLAIMANT made a rash decision on 9 September 2005 to purchase new fuse boards. This became an unnecessary loss as a result of from the CLAIMANT’s alleged effort to mitigate. Here, the CLAIMANT’s “efforts” failed to meet the CLAIMANT’s mitigation duty because they were not made reasonably to avoid and minimize the losses.

2) RESPONDENT’S liability for damages should be reduced to \$0

129. The RESPONDENT’S liability for damages should be reduced to \$0 because the CLAIMANT failed to meet its duty to mitigate: **(i)** the CLAIMANT did not disprove its failure to mitigate under Art. 77, **(ii)** all claimed damages were avoidable if the CLAIMANT met its duty **(ii)**.

i) CLAIMANT did not disprove its failure to mitigate under Art. 77 CISG

130. Although the RESPONDENT bears the burden of proof of by invoking the defence of mitigation under Art. 77, the CISG does not require a high standard for the RESPONDENT. The party in breach and liable for damages bears the burden of only proving that the “conditions for the availability of the defence exist” (*Schlechtriem et al p.793*). Therefore, the RESPONDENT is only required for proving the existence of “conditions for the availability of the defence.” The CLAIMANT must offer proof of the negative if it wishes to assert that it met its duty to

mitigate. The CLAIMANT did not present *any* arguments under Art. 77. The RESPONDENT's argument should be upheld to find that the CLAIMANT failed to meet its duty to mitigate.

ii) All damages were avoidable if CLAIMANT disputed the Equalec Policy

131. The CLAIMANT failed to prevent avoidable loss by not disputing the Equalec Policy. As a result, the damages claimed must be reduced by the entire amount of the avoidable loss (*Schlechtriem et al. p.792*). Art. 77 does not stipulate that the valuation of “avoidable loss” must be entirely certain; it needs only to be “reasonable”. However, were the CLAIMANT to argue that a certainty requirement is required under Art.77, the RESPONDENT should only be required to prove the certainty of the avoidable damages to *reasonable* level (*Gotanda, s.IV(C)*).
132. It is reasonable that the entire cost of obtaining and installing the new fuse boards are avoidable. The fuse boards delivered by RESPONDENT were suitable for their purpose *but for* the existence of the Equalec Policy (*A.2.i*). Furthermore, Equalec's policy and refusal to connect the fuse boards were both unlawful (*A.2.ii*). Therefore, if the CLAIMANT took reasonable measures to complain to either Equalec or the Commission about the policy, Equalec would have fulfilled its legal obligation to connect the fuse boards (*A.2.iv*). Therefore, the entire amount of damages claimed (\$200, 000), for purchasing and installing the new fuse boards, could have been avoided.
133. Therefore, the RESPONDENT respectfully requests the Tribunal to find that Art. 80 CISG exempts all liability and damages. Alternatively, because the CLAIMANT failed to mitigate under Art. 77 CISG, all damages claimed by the CLAIMANT should be reduced to \$0.

PRAYER FOR RELIEF

1. In light of the submissions made above, Counsel for RESPONDENT respectfully requests the Honourable Tribunal to find:
 - The Tribunal does not have jurisdiction over the dispute **(I)**
 - The fuse boards were in conformity with the Contract **(II)** because
 - The fuse boards were of the quality and description required by the Contract **(A)**
 - The fuse boards were fit for the particular purpose made known to the RESPONDENT **(B)**
 - The Contract was validly amended **(IV)** because:
 - Mr. Hart had authority to amend the Contract **(A)**
 - The resulting amendment was valid pursuant to Art. 29(2) CISG **(B)**
 - The RESPONDENT is excused from any liability or damages **(IV)**
 - Art. 80 CISG excuses the RESPONDENT from any liability from alleged breach of contract **(A)**
 - Alternatively, the CLAIMANT failed to mitigate under Art. 77 CISG, thereby reducing any damages claimed to \$0 **(B)**