

MEMORANDUM FOR CLAIMANT



On behalf of

Mediterraneo Engineering Co.
415 Industrial Street
Capitol City, Mediterraneo
Telephone: (0) 148-2020
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("CLAIMANT")

Against

Equatoriana Super Pumps S.A.
58 Industrial Road
Oceanside, Equatoriana
Telephone: (0) 927 8415
Fax: (0) 927 8410

("RESPONDENT")

OSGOODE HALL LAW SCHOOL

**JILLIAN CARRINGTON, MARLENE COSTA, JILL DAVIS,
YOAV HAREL, ANDREA LINDEN, ZIAD RESLAN**



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**INDEX OF TERMS AND ABBREVIATIONS**

#	Number
ACICA	Australian Centre for International Commercial Arbitration
Art(s).	Article(s).
CISG	United Nations Convention on Contracts for the International Sales of Goods (1980)
Cl. Ex.	Cl. Ex.
e.g.	For example
e.d.	Edited
etc.	et cetera (= and so on)
ICC	International Chamber of Commerce
Mr.	Mister
No.	Number
Nos.	Numbers
para.	Paragraph
Pro. Ord.	Procedural Order
Res. Ex.	Respondent Exhibit
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
U.S.	United States of America
v.	Versus

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PECL

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UNCITRAL Model Law

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United Nations Commission on International Trade Law



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STATEMENT OF FACTS

CLAIMANT Mediterraneo Engineering Co. is a corporation headquartered in Capitol City, Mediterraneo that provides planning services for urban and rural development in Mediterraneo and six other countries. **RESPONDENT** Equatoriana Super Pumps S.A. is a corporation operating out of Oceanside, Equatoriana that manufactures irrigation pumps for projects in more than 50 countries.

On **4 May 2008** Claimant contacted Respondent regarding a contract tender published by Oceania Water Services (“Water Services”) for the renewal of an irrigation project in Oceania. The following day, **5 May 2008**, Respondent drew up a draft for the pumps, contingent on the award of the irrigation project to Claimant.

On **25 June 2008** Claimant’s bid on the irrigation project was accepted by Water Services. On **1 July 2008**, Respondent signed the contractual document which had previously been signed by Claimant, agreeing to the manufacture and delivery of pumps. The contract included a warranty regarding the compliance of the pumps with all regulations in Oceania and their delivery in Mediterraneo on or before **15 December 2008**. This date was emphasized as essential to the contract so as Claimant could then deliver the pumps to Water Services by the contractually stipulated date of **2 January 2008**.

On **1 August 2008**, the Oceania Office of Environmental Health adopted new regulations. In response, Respondent manufactured new P-52 pumps in compliance with the new regulations. Due to the delay that this caused, as well as a delay in shipping, the pumps did not arrive in Mediterraneo until **6 January 2009**. A day earlier, on **5 January 2009**, Water Services avoided its contract with Claimant due to Claimant’s failure to deliver the pumps by the mandated date. Consequently, Claimant avoided its contract with Respondent.



On **28 December 2008**, the regulations in Oceania were changed again, effective **1 January 2009**. The pumps manufactured by Respondent were non-compliant with the new regulations. The contract included a DES trade term requiring delivery prior to payment or transfer of ownership. Against this term, Respondent took payment on **22 November 2008**, upon departure of the shipment of pumps. Since **5 January 2008**, Claimant has made several attempts to receive reimbursement of the payment. In accordance with the CISG, Claimant has also stored and attempted to sell the pumps for Respondent since avoidance of contract.

The contract included a warranty, at paragraph 2:

Equatoriana Super Pumps warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania.

The contract included a dispute resolution clause in paragraph 18:

[a]ny dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by conciliation in accordance with the UNCITRAL Conciliation Rules. The parties will be represented by their Chief Executive Officer. The conciliation shall take place in Vindobona, Danubia and be administered by the Danubia Arbitration and Conciliation Center.

If the dispute has not been settled pursuant to the said conciliation procedure, the dispute shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Vindobona, Danubia. The language of the arbitration shall be English. The number of arbitrators shall be three.

Conciliation proceedings were held **28 to 30 May 2009** in Vindobona. As the proceedings were unsuccessful, the conciliator wrote to both parties and the Danubia Conciliation and Arbitration Centre on **4 June 2009** stating that efforts at conciliation were no longer justified. On **15 July 2009** Claimant issued a Notice of Action to commence arbitration proceedings.



I. PRE-CONDITIONS TO ARBITRATION PROVIDED IN THE CONTRACT WERE PROPERLY FULLFILLED

1. Respondent challenges the jurisdiction of the Tribunal on the grounds that Engineering did not comply with a prerequisite to arbitration, premised upon representation requirements in pre-arbitral conciliation proceedings. Engineering rejects this assertion for three reasons: (1.1) Engineering has fulfilled its pre-arbitral obligations; (1.2) Respondent waived its right of objection to jurisdiction; and (1.3) it is not in the interests of the parties to return to conciliation.

1.1 CLAIMANT FULLFILLED ITS PRE-ARBITRAL OBLIGATIONS

2. Where satisfaction of a multi-tiered dispute resolution process is challenged a two-prong test is applied [Figueres]: (1) Were the parties under an obligation to attempt an amicable resolution prior to arbitration? (2) If so, has this obligation been fulfilled? The first stage requires analysis of the dispute resolution clause; the second is factually determined.

(A) The intent of the parties was to ensure an attempt at amicable resolution

3. The dispute resolution clause indicates that parties intended to include conciliation as a pre-arbitral step. As stated in Clause 18 of the contract,

[a]ny dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by conciliation in accordance with the UNCITRAL Conciliation Rules. The parties will be represented by their Chief Executive Officer [Cl. Ex. 3].

4. Engineering recognizes that the parties were required to make an attempt to resolve their differences through conciliation as a prerequisite to arbitration and made efforts to uphold this obligation [Statement of Claim at para. 27]. The use of the term “shall” within Clause 18 demonstrates the parties’ obligation to initiate and attempt amicable resolution prior to arbitration [Aiton at para. 35; Black’s; ICC Case No. 9977].
5. Although drafted to ensure that the parties attempted conciliation, reaching an agreement was not mandatory. Furthermore, the parties were free to end conciliation at any time and for any purpose. As such, conciliation was a voluntary first tier. In



order for parties to be bound to conciliation, the terms of the clause must be “sufficiently detailed to be meaningfully enforced” [*Aiton* at para. 44; *Elizabeth Bay*]. As defined in *Aiton* [at para. 69], in a mandatory conciliation, “the process established by the clause must be certain” without “stages in the process where agreement is needed on some course of action before the process can proceed.” Otherwise, the clause will amount to an “agreement to agree” and “will not be enforceable due to this inherent uncertainty.”

6. Courts will not gap-fill [*Jones* at 194-5] or stay proceedings where the clause does not include a clear set of guidelines against which to measure a party’s best efforts to uphold that obligation [*Aiton*; File at 33; *Born* at 849]. Enforceability is to be decided on clear *indicia* of definitiveness [*Fluor* at 649]. Where parties fail to include time limits for resolution prior to arbitration or a specific number of conciliation sessions [*White* at 1382], the tier will not be enforced [e.g. *Aiton*; *ICC Case No. 6276*; *2006 Swiss Case*; *Fluor* at 649].
7. Along the same lines, the court in *Hooper Bailie* [at para. 208] held that “where either party is entitled to withdraw from the negotiations, at any time and for any reason [...] there can be thus no obligation to continue to negotiate.” The Supreme Federal Court of Switzerland applied similar reasoning, refusing to stay proceedings where the clause in question did not provide a time limit within which the proceeding should be initiated or terminated [*Boog* at 105].
8. Clause 18 does not provide time constraints for conciliation. As a result, the duration of conciliation is uncertain, with termination subject only to the UNCITRAL Conciliation Rules. Article 15(d) allows the parties to withdraw by written notice to the conciliator and the other party without any requirement to give reason. Although the Conciliation Rules could have been varied by the parties [Art. 1(2)], Art. 15(d) was not excluded or altered.
9. Inclusion of Art. 15(d) indicates that the parties intended to include an obligatory attempt at conciliation. However, this tier that could be exited at the will of either party or the conciliator. As a result, it is sufficient for the parties to make an effort. Engineering complied with that obligation by commencing and participating in



conciliation [Statement of Claim at para. 23] and therefore, should not be compelled to repeat this tier.

(B) The intent of the parties was to ensure representation by proper authority

10. In determining the contractual preconditions to arbitration, the Tribunal should turn to the intentions of the parties and purpose for including the clause. Clause 18 was designed to ensure that the representatives present at conciliation would have the authority to represent the interest of the parties. A recognized principle of international commercial arbitration is that each party should be represented at proceedings by an individual with sufficient authority to resolve disputes [Jones at 197; Redfern & Hunter at 331].
11. Interpretation of the term “represented by” is essential to determine whether Engineering’s obligation was fulfilled. Respondent asserts that, “Clause 18 clearly specifies that the representative of both parties is to be the Chief Executive Officer” [Statement of Defense at para. 8]. However, the clause in fact uses the language “will be represented by.” According to the rule of *contra proferentem*, ambiguity in a contract should be read against the party who drafted the terms [Feldman & Nimmer, 1.03[A][3]]. As Respondent drafted the clause, ambiguity in Clause 18 should not be read in the company’s favor [Pro. Ord. No. 2 at para. 27].
12. The statements made in the contract must be interpreted according to the intent of the parties [CISG, Art. 8(1)]. Liberal interpretation of an arbitration clause gives effect to the resolution goals of the parties with consideration for time and cost. A broad and effective construction of a clause is favoured by courts in light of the cost and time effectiveness of dispute resolution [United Group at para. 3; Fiona Trust; Thomson & Finn]. Interpretation of “will be represented by” as intended to include representatives vested with authority is aligned with this purpose.
13. Clause 18 does not necessitate the physical presence of the CEO. Black’s Law Dictionary defines the word “will” as a “wish, desire or choice.” The choice of this word is contrasted with the use of “shall,” which denotes an obligation, throughout the remainder of the contract. Therefore, it is clear that the parties chose to include a



term that would encourage, but not compel, the CEO of each company to be present at the conciliation.

14. The intentions of the parties as “rational businessmen” was to ensure that their representatives were vested with the authority of the CEO, such that conciliation could continue even if the CEO could not be in attendance [*Fiona Trust* at para. 13]. Engineering and Respondent are both serving clients in multiple countries [Statement of Claim at para. 2 & 4]. It is likely that the CEO of each company relies on other officers at times in order to ensure the effective management of each corporation. Thus, it is likely that the parties contemplated the likelihood of the CEO’s unavailability during conciliation. Further, there is no mention of the representative requiring specific knowledge of the dispute or any other factual or legal considerations, indicating that the authority to act on behalf of the corporation was the only prerequisite considered by the parties.

(C) Claimant fulfilled intended obligations

15. Engineering complied with preconditions to arbitration as intended in the contract. It submits that (1) all pre-arbitral obligations were fulfilled in accordance with proper conciliation procedure, and (2) that Holzer had authority to represent Engineering at conciliation proceedings.

(1) Claimant followed the proper conciliation procedure

16. Engineering consistently corresponded with Respondent to urge an amicable resolution and complied with the conciliation requirements to the best of its abilities. Engineering’s intention to reach an amicable resolution is apparent from its letters to Respondent [Cl. Ex. 13, 14, & 16], including that to initiate conciliation, and willingness to enter conciliation proceedings [Statement of Claim at para. 28]. Engineering’s costs in the conciliation proceeding and the greater expense and time required for arbitration provided an incentive for Engineering to have resolved the dispute through conciliation.
17. Although Clause 18 does not require the parties to reach an amicable resolution, whether the parties have been negotiating in good faith is an important consideration.



The only requirement consistently enforced on parties to a multi-tier dispute resolution clause is that they make a “reasonable attempt to reach an amicable resolution of their dispute” [Berger at 13], determined by their actions and intentions [*Hooper Bailie*; *ICC Case No. 6276*; *ICC Case No. 8462*]. In *ICC Case No. 6276*, the Tribunal looked to letters proposing dispute resolution and to the actions of the parties to determine that an effort to resolve the dispute amicably had been made. Engineering made several attempts to resolve the dispute before resorting to the arbitration clause in the contract [Cl. Ex. 13, 14 & 16]. In contrast to Engineering’s actions, where courts and tribunals have stayed proceedings, the party in question had refused to participate in the pre-arbitral tier entirely [e.g. *Hooper Bailie*].

(2) *William Holzer had authority to represent Engineering in Conciliation*

18. As per the intent of the parties, Engineering’s agent acted with the authority to represent the company in conciliation. The legal relationship existing between Engineering’s agent and Respondent entitled the agent to bind the company to any resolution achieved in the proceedings.
19. Under UNIDROIT 2004, the scope of an agent’s authority is “to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted” [Art. 2.2.2(2)]. The actual authority held by an agent includes that expressly given in writing or by oral agreement, granted by the principal [UNIDROIT, Art. 2.2.2(2); Reid at 19]. Whether an agent has acted within their actual authority is determined as matter of fact. If the action by the agent is authorized, it is regarded as binding for all relationships—between the principal and agent; the agent and third party; and the principal and third party [UNIDROIT, Art. 2.2.3(1); Reid at 19-20].
20. The authority of Holzer is evident. A deputy by its very nature is a person authorized to act as a substitute for another. Deputy Chief Executive Officers frequently carry parallel responsibilities to that of Chief Executive Officers and act as an understudy when CEOs are unavailable. Holzer’s duties are delegated by the CEO directly [Pro. Ord. No. 2 at para. 28]; specific details of his role at Engineering are not necessary to



understand the authority held by his position and ability to uphold the contractual obligations of Claimant.

21. Engineering affirms that Holzer had “full authority to represent Engineering in the conciliation,” a fact undisputed by Respondent [Reply to Answer at para. 1]. In fact, had Holzer and Stecker reached an agreement in conciliation, which Engineering then refused to uphold, Respondent could argue reliance on the authority of Holzer to bind Engineering to the agreement in accordance with the agency principle.
22. The authority of Engineering’s representative in conjunction with the company’s attempt at amicable resolution and participation in conciliation proceedings effectively fulfills the pre-arbitral requirements.

1.2 RESPONDENT WAIVED ITS RIGHT TO OBJECT TO JURISDICTION

23. The actions of Respondent negate any right to compel Engineering to return to conciliation. Even where “parties agree on a mandatory pre-arbitral tier, non-compliance does not invariably render its request for arbitration inadmissible. Instead, the Tribunal is requested to take into account the conduct of the parties.” Furthermore, “the principle of good faith should be applied rather strictly to a party challenging an arbitral tribunal’s jurisdiction...as such party is expected to have actively tried to implement the clause” [ASA Bulletin at para. 110-1].
24. Respondent’s lengthy inaction precludes it from objecting to the arbitration. In failing to object during proceedings or within a reasonable time thereafter, Respondent’s conduct implied waiver of the right to challenge. A party may waive its right to challenge an arbitrator’s jurisdiction in one of two ways—by express agreement or implied in its conduct [Born at 614, 2573 & 2795]. Article 4 of the UNCITRAL Model Law reads, “a party who knows that [...] any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay [...] shall be deemed to have waived his right to object.” This approach is supported by Model Law and non-Model Law states [Luttrell & Moens at 57; *ASM Shipping*] and similar provisions are found in Art. 31 of the ACICA Arbitration Rules.



25. Respondent failed to object to Holzer's presence within a reasonable period of time. Respondent only stated the objection within its Statement of Defense, dated 17 August 2009. Although falling within the time limit for filing, Respondent failed to raise its concern at conciliation or a reasonable time thereafter. Furthermore, at the time that Engineering submitted its Statement of Claim, there was no indication that Respondent intended to raise an objection.
26. The time Respondent waited is beyond a reasonable period to submit an objection regarding the conciliation to prevent arbitration from continuing. In previous cases where the clause in question contained a time limit for pre-arbitral proceedings, the duration was 5 to 30 days before the next tier would be triggered [*Aiton* at para. 8; *United Group* at para. 4; *ICC Case No. 9977*; *ICC Case No. 9984*]. Applicable case law and legislation suggest that not only did the lapse of time amount to a waiver to dispute the conciliation process, but a stall tactic designed to frustrate and delay the commencement of arbitral proceedings [Lewicki at 179].
27. Though Respondent alleges to have only become aware that Holzer was the Deputy CEO a week after the conciliation meeting, Stecker had the conference registration material in his possession throughout the conciliation [Pro. Ord. No. 2 at para. 29]. Thus, Respondent should, "with reasonable diligence have discovered the grounds for the objection" at the time of conciliation [*ASM Shipping*]. Furthermore, if Respondent "was truly committed to settle the controversy and considered the characteristics of the [Claimant]'s representative as an obstacle in doing so, it would be expected that [Respondent] should have raised such point at that time" [*ICC Case No. 9977*] or as soon as the objection was recognized [*Aaot*].
28. In order to uphold the ADR purposes of efficiency and cost-effectiveness, it is essential that Respondent raised its concerns regarding Holzer's authority immediately. As addressed in *ICC Case No. 9977*,
- if one of the parties considers in good faith that its counterpart is not authentically committed to foster the possibilities of settling the dispute, for instance, because of the quality of its representative, it is expected that the former would express so during the process...so that the counterpart might be able to put a prompt remedy to said objection.



29. Raising the objection without delay would have provided Engineering with the opportunity to discuss the arbitration clause with Respondent and, if the parties agreed to a narrower interpretation of the clause, Engineering's CEO could have attended subsequent conciliation proceedings. Instead, by virtue of this conduct, Respondent waived its right to object to the arbitrator's jurisdiction.

1.3 IT IS NOT IN THE INTERESTS OF THE PARTIES TO RETURN TO CONCILIATION

30. Efficient business practice dictates that parties should not be compelled to return to conciliation. In support, Engineering submits that (A) successful conciliation is unlikely, and (B) returning to conciliation will delay dispute resolution.

(A) Successful conciliation is unlikely

31. Returning to conciliation will frustrate the primary purposes for including multi-tiered dispute resolution clauses and the intentions of the parties—to increase process efficiency and reduce cost [Jones at 188]. Arbitral tribunals refuse to force mediation where a party has failed to satisfy a burden of proof that this method of resolution has a reasonable likelihood of success [*Halsey*; *Hooper Bailie*; *Figueres*]. Although the purpose of enforcing the clause is to compel “participation in a process from which cooperation and consent [may] come” [*Hooper Bailie* at para. 206], where it is apparent that a cooperative resolution is unlikely, repeating “fruitless” proceedings is unnecessary [*ICC Case No. 8445*]. Furthermore, forcing an unwilling party to enter into the proceedings may offend the fundamental principle of freedom in negotiation in accordance with Art. 2.1.15 of the UNIDROIT Principles [Tochtermann at para. 711].

32. There is no reason to suspect that proceeding with arbitration will cause an injustice or disadvantage to Respondent. As Holzer acted with the same authority as the CEO, there is no indication that forcing Engineering's CEO to undertake conciliation will result in a compromise, nor that any new information will be gained by Respondent or conciliator by repeating the proceedings. As found in *Hooper Bailie* [at para. 205], the parties appear to have “taken up positions which effectively rule out the possibility of compromise and conciliation” [Pro. Ord. No. 2 at para. 32] having already attempted resolution by this method.

**(B) Returning to conciliation will delay dispute resolution**

33. Staying the arbitral proceedings will lead to further and unnecessary delay. Even where a tier is written as a condition precedent, courts and arbitral tribunals have not enforced this jurisdictional effect where a party attempts to delay arbitration by insisting on enforcement of this requirement [Born at 844]. A party is not permitted to “prolong resolution of a dispute by insisting on a term of the agreement that, reasonably construed, can only lead to further delay” and the courts will not assist the party in delaying proceedings [*Cumberland* at 4; Born at 843; *ICC Case No. 6149*; *ICC Case No. 8445*].
34. Even if parties were compelled to return to conciliation, they may terminate proceedings at will without participating in conciliation [Conciliation Rules, Art. 15(d)]. The parties will be forced to return to arbitration upon either party’s unilateral termination, having incurred additional costs for the repeated conciliation and delayed resolution of this issue. Further, this delay will prejudice Engineering, who has suffered a loss of USD \$1,534,550 [Statement of Claim at para. 20] and continues to store Respondent’s pumps at Engineering’s warehouse [Statement of Claim at para. 22].
35. It is imprudent to compel parties to return to conciliation where proceeding with arbitration will provide a timely and cost-effective resolution of the dispute. As conciliation is a purely voluntary process in which either party may terminate the proceedings at any time, the Tribunal should be reluctant to require the parties to engage in a “useless effort” [Wolrich at 3].

CONCLUSION ON JURISDICTION

36. Tribunal should exercise jurisdiction over the dispute as (1.1) Engineering fulfilled its pre-arbitral obligations; (1.2) Respondent waived its right to object to jurisdiction; and (1.3) It is not in the interest of the parties to return to conciliation.



II. RESPONDENT FAILED TO UPHOLD ITS OBLIGATION TO CONFORM TO REGULATIONS AT TIME OF USE

37. Respondent failed to uphold its obligation to supply pumps in conformity with the regulations in Oceania at the time of use as it explicitly warranted in the contract. Conformity of the goods at the time of use is the only meaningful interpretation that can be applied to the warranty clause [“Clause 2”; Cl. Ex. 3 at para. 2]. Engineering insisted upon this warranty in order to ensure that the pumps would be usable in its contract with Water Services [Pro. Ord. No. 2 at para. 9]. Respondent failed to provide pumps that could be used in Oceania.

2.1 RESPONDENT WAS OBLIGATED TO CONFORM TO REGULATIONS AT TIME OF USE

38. Within the contract, Engineering required Respondent to accept obligations regarding conformity with regulations in Oceania. Clause 2 states, “Super Pumps warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania.” Respondent’s assertion that it fulfilled its contractual obligations is rejected as (A) Respondent warranted regulatory compliance for time of use, and (B) Art. 35(2)(b) obligates Respondent to provide goods fit for particular purpose.

(A) Respondent warranted regulatory compliance at time of use

39. The warranty of regulatory compliance was directed to the time the pumps were to be used. When interpreting Clause 2, the intentions and understanding of a reasonable person in the same type of business and under the same circumstances are decisive [CISG, Art. 8(2); *MAP case*; *Barley case*]. Consideration is to be given to all relevant circumstances including the prior and subsequent conduct of the parties [CISG, Art. 8(3); *Caito Roger*]. As Art. 8 allocates the risk of unclear formulation in the contract to the party who drafted the warranty [*ICC No. 9187*], this risk should be borne by Respondent [Pro. Ord. No. 2 at para. 9]. In interpreting the meaning of Clause 2, the relevant understanding is that “by a person in the position of the offeree, and not necessarily that which was present in the offeror’s mind” [*Chia Ee Lin Evelyn* at para. 43]. Thus, it is appropriate to look to the intentions and understanding of Engineering when signing the contract.



40. It is necessary to interpret the intention of the parties as that of ensuring compliance at the time of use, to give real meaning to the terms of the contract. Clause 2 was specifically insisted upon by Engineering [Pro. Ord. No. 2 at para. 9] to ensure that the pumps would be usable upon delivery. Breach of this term by Respondent would have deprived Engineering of its expected benefit in this contract as well as in the Water Services contract. Failing to provide usable pumps for the IR 08-45Q contract would lead to termination of that contract and a loss of the US\$320,000 Engineering expected from that project, in addition to the cost of the pumps [Statement of Claim at para. 30]. As the sole purpose for contracting with Respondent was to supply pumps for project IR 08-45Q, being deprived of the use of the pumps amounts to substantial deprivation of the benefits expected under the contract with Respondent.
41. Any other interpretation or intention would make warranting compliance of the pumps useless. As such, it would be unreasonable for Respondent, a business with significant experience working with international clients [Statement of Claim at para. 4], to assume Engineering would agree to purchase goods that may be useless for its purposes.
42. Interpreting Clause 2 as warranting conformity at time of use fits with the purpose of buyer protection within CISG Art. 35, which is founded on the principle that the seller has a duty to deliver the goods required by the contract. The “characteristics of the goods are presumed to lie within the sphere of influence of the seller, and the seller is presumed to know more about the characteristics of the goods than the buyer” [Henschel at 3]. Although Engineering had a closer relationship with Water Services, it could not control or influence the pumps manufactured. Only Respondent could ensure that the pumps provided to Engineering were in fact compliant with the regulations in Oceania. For this reason, it was necessary that Engineering require Respondent to warrant that the pumps would be usable in Oceania for the Water Services project.
43. As per CISG Art. 8(3), the conduct of Engineering after the contract was signed indicates that compliance with regulations in Oceania at the time of use was both intended and of critical concern to Engineering. This intention was specifically



repeated to Respondent in Engineering's e-mail of 1 August 2008 [Cl. Ex. 5]. Furthermore, regardless of Respondent's e-mail of 2 August 2008 [Cl. Ex. 6], Respondent cannot disregard its warranty of compliance within the initial contract [Cl. Ex. 3 at para. 2].

(B) Article 35(2)(b) obligates respondent to provide goods fit for particular purpose

44. Conformity with the special provisions is determined according to Art. 35(2)(b) where provisions regarding conformity, particularly conformity to public law in a third country, were agreed upon or made known to the seller [*New Zealand Mussels case*; *Frozen Pork Liver case*; *Officine Maraldi*; *Schlechtriem & Schwenzer*; *Henschel* at 9; *Kruisinga* at 52]. As such, Respondent was obligated to provide goods that were fit for the particular purpose made known by Engineering. The only exemption to this obligation is where the buyer did not or could not reasonably rely on the seller's skill and judgment.
45. Non-compliance with standards of use in another country constitutes non-conformity provided that: (1) buyer cannot possibly circumvent these standards, (2) the standards influence the usability of the goods, and (3) seller cannot have been unaware of the standards [*New Zealand Mussels case*]. (1) and (2) are supported by the record. The standards in question were regulations set by the government of a third country, which Engineering could not have influenced. Without regulatory compliance, the pumps delivered by Respondent could not be used. The third question requires analysis of the parties' relationship, conduct and communication.

(1) Engineering made Respondent aware of specific purpose

46. The onus on Engineering is to ensure that a "reasonable seller could have recognized the particular purpose from the circumstances" [*Schlechtriem & Schwenzer* at 19; *Kruisinga* at 32]. This onus is satisfied as Respondent had express knowledge that, (1) Engineering intended to use the pumps for a contract with Oceania Water Services, (2) that contract required use of the pumps within Oceania, (3) in order to be used, the pumps must be in compliance with all relevant regulations in Oceania [Statement of Claim at para. 5; Cl. Ex. 1; Cl. Ex. 3 at paras. 1-2].



47. In addition to drafting Clause 2 of the contract [Pro. Ord. No. 2 at para. 9], Respondent likely had knowledge of additional details of the Water Services tender and contract. Respondent worked with Engineering to create its bid and invested itself in the success of that bid in order to become Claimant's supplier for the contract [Statement of Claim at para. 6; Cl. Ex. 1 & 2]. This contract was also similar in nature to one that the parties had worked on together two years earlier [Statement of Claim at para. 5].
48. Based on its own knowledge of Engineering's contract with Oceania Water Services and the purpose for the pumps expressly made known by Engineering, Respondent is deemed to have known the essentiality of compliance with regulations in Oceania at the time the contract was signed on 25 June 2008. Due to this knowledge, Respondent is expected to have taken factors that influence the possibility of the pump's use in Oceania into consideration at the time of signing [*New Zealand Mussels case*].

(2) Engineering relied on Respondent's warranty

49. Respondent cannot rely on the exemption to Art. 35(2)(b). A warranty is defined as a commitment regarding the subject matter of the contract [Kritzer at 286]. Engineering reasonably relied on Respondent's express commitment to provide pumps conforming to "all" regulations in Oceania at the time of use [Clause 2].
50. By providing buyer protection, Art. 35 inherently predisposes the buyer to rely on the seller to provide goods in compliance with the contract. This reliance is necessary and unavoidable as the seller has full control and knowledge of the goods before they are transferred to the buyer [Henschel at 3]. As found by the Federal Supreme Court of Austria in *Frozen Pork Liver case* [at para. 3], where the buyer has sufficiently communicated a particular purpose under Art. 35(2)(b) to a seller, the buyer can reasonably expect that the seller will deliver goods that are fit for that purpose. Specifically, where the seller is aware that the goods are to be exported to a certain country, the buyer can expect that the goods will be exportable to that country [*Frozen Pork Liver case* at para. 3]. Thus, it was reasonable for Engineering to rely on Respondent's knowledge given its expertise and the company's role in tender preparation [Statement of Claim at para. 5].



51. Unless Respondent informed Engineering that reliance on Respondent was not reasonable, the exemption under Art. 35(2)(b) cannot apply. For example, a seller may specifically exclude itself from liability for conformity of goods, by including disclaimer clauses [Winship at 26-27]. The contract does not appear to have included any such disclaimer. Rather, by signing the contract containing Clause 2, Respondent acknowledged its responsibility to comply with the Oceania regulations and effectively waived its right to rely on the exemption in Art. 35(2)(b).
52. The fact that Engineering informed Respondent of the regulatory changes in Oceania does not revoke or reduce its reliance on Respondent. Engineering assisted Respondent, by ensuring that Respondent was aware of the changes in Oceania. This was the only influence that Engineering could have on the manufacture of the pumps in Equitoriana.
53. Respondent expressly warranted to provide pumps in compliance with all regulations in Oceania and had full knowledge of the particular purpose for the pumps. As a result, Engineering reasonably relied on Respondent to provide goods that could be used in the Water Services contract.

2.2 COMPLIANCE IS DETERMINED AT TIME OF DELIVERY UNDER ART. 36 AND DES TERM

54. Respondent was obligated to provide pumps in conformity with regulations in Oceania at the time the pumps were delivered in Mediterraneo. This obligation is supported by Art. 36(1) of the CISG in the context of the DES term agreed to by the parties.
55. Article 36 applies liability to the seller even if the non-conformity becomes apparent only after the buyer has taken possession of the goods. As the Austrian Supreme Court stated, Art. 36(1) of the CISG calls for the liability of the seller for “any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time” [*Auto case*]. It is, therefore, reasonable to impose liability where non-conformity was apparent even before Engineering took possession of the pumps.



56. The parties are permitted to have excluded or derogated from any of the provisions of the CISG, including those regarding the time at which risk passes from the seller to the buyer [CISG, Arts. 6 & 12]. The parties included a Delivery Ex Ship Incoterm in the contract. This D-term signifies that “the seller has to bear all costs and risks needed to bring goods to the place of destination,” indicating that risk transfers only when the ship arrives in the delivery port [*Incoterms* at 602]. One such risk is the possibility of regulatory change prior to the goods arrival. To avoid liability, Respondent could have included a C-term under which “the seller has to contract carriage, but without assuming the risk...or additional costs due to events occurring after shipment and dispatch” [*ICC Incoterms* at 602].
57. Individual terms of a contract should not be read in isolation, but rather in the context of the whole contract [*Cobalt Sulphate case*]. Respondent agreed to the inclusion of the DES term, which amounted to an assumption of responsibility for risks incurred until delivery was complete [Cl. Ex. 3]. Respondent also warranted conformity of the goods to “all” regulations of use in Oceania in Clause 2 [Cl. Ex. 3]. By assuming risks until arrival in Mediterraneo and warranting compliance with regulations, without restriction, Respondent agreed to accept liability if regulations changed within that period.
58. Respondent cannot submit that assuming responsibility for pump compliance until time of delivery was an unbearable burden and impossible to uphold. The warranty was freely agreed to by the parties and drafted by Respondent at Engineering’s insistence. Furthermore, Engineering paid over US\$1.2 million for pumps upon the expectation that Respondent was warranting conformity for use. If Respondent was unable to uphold this promise, it should have purchased third party insurance to cover this potential liability, or negotiated alternative terms. Had Clause 2 not been included, however, Engineering may have been unwilling to pay the negotiated price, as this was paid in expectation and reliance of Respondent’s warranty.
59. Although Respondent took payment on 22 November 2008 against the DES term [Statement of Claim at para. 13], the term conveyed that transfer of ownership of the pumps took place when the ship arrived at the dock [*ICC Incoterms 2000* at 25-26;



Kazimierska]. The second regulation change took place on 28 December 2008, prior to the ship's arrival in Mediterraneo, while the pumps were still in the legal possession of Respondent [Cl. Ex. 11]. Risk would have transferred to Engineering upon the ship's arrival on 6 January 2009, at which time the contract had already been avoided by Engineering [Cl. Ex. 13].

60. The parties explicitly included a DES term within the contract. This term should be held to determine that risk for non-conformity is allocated to Respondent.

2.3 IN THE ALTERNATIVE, RESPONDENT CANNOT EXCUSE NON-CONFORMITY

61. Respondent cannot excuse its failure to provide pumps that conform to the regulations in Oceania as (A) regulatory changes are foreseeable; (B) Respondent acknowledged liability; and (C) non-conformity is not excused due to canal delay.

(A) Regulatory changes are foreseeable

62. Respondent "certainly falls in to the category of people who could have at the conclusion of the contract foreseen and expected the consequences for the contracting party" [*Proc. No. T-9/07*]. In light of Respondent's knowledge of Engineering's contract with Water Services and involvement in the formation of the tender offer, it is foreseeable that failure to provide pumps that could be used in that contract would deprive Engineering of the benefits of its contract with Respondent. Foreseeability of this deprivation is also apparent from the inclusion of Clause 2, as Engineering saw it necessary to include warranties as to the use of the pumps within Oceania.
63. Regulatory changes in Oceania were foreseeable and should have been considered by Respondent at the time the contract was signed. Regardless of country or whether a military regime is in power, government's frequently change regulatory requirements. Furthermore, regulations limiting the amount of beryllium workers inhale are applied in several other countries [Rahman et al.; US Labour]. As a business that regularly serves customers in 50 different countries [Statement of Claim at para. 4], regulatory changes are likely a common challenge for Respondent. Thus, where a contract contains a clause specifically addressing regulatory conformity, these changes should have been foreseeable by Respondent and considered at time of signing.

**(B) Respondent acknowledged liability**

64. Although Respondent contends to have fulfilled its contractual obligations with regard to conformity [Cl. Ex. 6], it assumed responsibility for changing pumps to conform to new regulations. Engineering neither acknowledged nor denied that compliance was met at any point. Silence cannot be construed as acceptance of Respondent's statement [CISG, Art. 18(1)]; furthermore, it does not amount to a release of Engineering's right to action for breach of contract. Engineering has maintained throughout contract performance and dispute resolution that Respondent agreed to comply with all regulations for use in Oceania. Respondent rightfully altered the pumps as required by contract after the first regulation change [Cl. Ex. 5] stating, "we need to accept that this is the current law in Oceania" [Cl. Ex. 6]. This statement affirms that Respondent acknowledged its obligation and recognized that it was bound to provide pumps conforming to the new regulations.

(C) Non-conformity is not excused due to canal delay

65. Respondent cannot rely on the canal delay to excuse its failure to provide pumps conforming to the second regulation change. Had Respondent delivered the pumps within the original, or even modified, delivery schedule, the pumps would have arrived prior to the regulation change. Thus, the pumps delivered would have been in conformity with the standards in Oceania at the time when the risk passed to Engineering. However, it is due to Respondent's failure to do so that the regulation change on 1 January 2009 affected compliance of the pumps. There will be "no excuse if an unforeseeable event impedes performance of the contract when the event would not have affected the contract if the party had not been late in performing" [Lando and Beale at 380].



III. RESPONDENT BREACHED ITS OBLIGATION TO DELIVER PUMPS BY THE CONTRACTED DELIVERY DATE

66. Engineering submits that Respondent breached its obligation to deliver the pumps by the contracted delivery date. This submission is supported by two arguments: (3.1) Respondent failed to meet the delivery date of 15 December 2008; (3.2) Respondent breached its obligation to deliver pumps by 22 December 2008; (3.3) Respondent is not exempted from the consequences of its breach.

3.1 RESPONDENT BREACHED ITS OBLIGATION TO DELIVER PUMPS BY 15 DECEMBER 2008

67. Respondent was contractually obligated to deliver the pumps in Mediterraneo by 15 December as, (A) the contract delivery date was 15 December 2008; (B) contract delivery date was not modified; (C) alternatively, risk allocation was not modified.

(A) Contract delivery date was 15 December 2008

68. The parties contracted for delivery on or before 15 December 2008 and intended to bind Respondent to delivery in accordance with this term. The nature of Respondent's obligation is understood in light of the CISG Art. 33(1)(a) states that the seller must deliver the goods "if a date is fixed by or determinable from the contract, on that date." Clause 1 expressly states that all pumps are to be delivered in a single shipment to be "effected by December 15 2008" [Cl. Ex. 3].

69. CISG Art. 11 stipulates that a contract need not be "evidenced by writing and is not subject to any other requirement as to form ... [i]t may be proved by any means, including witnesses." Furthermore, as noted above [*supra* at para. 39], Art. 8(3) states that the conduct of the parties both before and after contract signing should be considered in determining their intentions [Secretariat Commentary, Art. 11; CISG Advisory Council, CISG Opinion No. 3]. Inclusion of such communications surrounding conclusion of the contract was upheld by the Italian Appellate Court in *Italdecor*. The court held that "in taking into account clarifications between the parties in the days following the agreement, there is no doubt that the agreed time of delivery was a fundamental term" and that the contract turned on the availability of the goods at a certain date.



70. In determining Respondent's obligation, the Tribunal should considered the importance placed on the delivery term by the parties. Engineering made importance of the delivery date known to Respondent prior to the conclusion of the contract on 1 July 2008. In Engineering's pre-contract letter to Respondent on 25 June 2008, it emphasized the "importance of meeting the delivery date called for in the contract (which remains the same as that in the draft contract)" as Engineering's "contract with Water Services has strict performance times with substantial penalties attached to delays" [Cl. Ex. 2]. In turn, Respondent acknowledged its understanding of the "imperative nature of the delivery dates, which [Claimant] emphasize[d]" in its reply letter sent on 1 July 2008 [Res. Ex. 1].

(B) The date of delivery in the contract was not modified

71. Determination of whether the delivery date was extended is of crucial importance. Although Respondent treats the extension of the date of delivery as a foregone conclusion, this has not yet been determined. As the arbitral Tribunal itself notes, "though in Pro. Ord. No.1 the Chairman of the Tribunal mentioned the delivery date 'as extended to 22 December 2008,' the Tribunal has not determined that the contractual date of delivery had in fact been extended" [Pro. Ord. No. 2 at para. 10].
72. For delivery date to be extended to 22 December 2008, Clause 1 of the contract must have been modified. Though CISG Art. 29 permits a contract to "be modified... by [the] mere agreement of the parties," several requirements must be met to create a binding agreement. The existence of such an agreement requires application of Arts. 14 to 24 of the CISG, which address formation of a contract [Viscasillas at 171], set out the requirements for an offer and an acceptance of that offer leading to the formation of an agreement.
73. Respondent's letter of 22 November 2008 to Engineering stating that the pumps would arrive in Oceania "around 22 December" may be viewed as an offer by Respondent to modify the contract. Although this satisfies the requirement of a valid offer under CISG Art. 14, at no time did Engineering provide an acceptance of this offer. Thus, a binding agreement cannot have been created in accordance with the CISG and basis contract formation laws under common and civil jurisdictions.



74. Engineering's silence following Respondent's "offer" email of 22 November does not amount to acceptance of the proposed change in the delivery date. CISG Art. 18 provides that "silence or inactivity does not in itself amount to acceptance." Rather, acceptance requires a "statement" or "other conduct" by the recipient of the offer that indicates assent. As the German Court indicated in *Terry Cloth case*, in applying CISG Art. 18, "the usage of silence to a commercial letter as confirmation amounting to consent is unknown in international trade". Similarly, the Swiss Court in *Handelsgericht*, refused to accept that silence amounted to consent.
75. None of Engineering's subsequent words or actions indicated assent. Engineering's statement in response to Respondent's email of 22 November, which states that Claimant "realizes that there is little that can be done now... [and must] go along with [Respondent]" does not equate with consent. Instead, within that very email, Engineering reiterated the contracted date of delivery as 15 December 2008 by stating that "arrival on 22 December means...arrival a week later than contracted for" [Cl. Ex. 8]. Respondent, upon realizing that it would breach the delivery date contracted for, sent Engineering a letter to that effect. The mere fact that this letter was sent, in light of Engineering's subsequent response, cannot exonerate Respondent from its breach of contract.
76. Neither Engineering's words nor its conduct can be said to have modified the contract to extend the date of delivery or to have allowed extra time for fulfillment of the contract under CISG Art. 47(1). The date of delivery, thus, remained at all times as contracted for by the parties, 15 December 2008. Respondent's pumps did not arrive in Capital City, Mediterraneo until 6 January 2008 [Cl. Ex. 10]. Therefore, Respondent breached its obligation to deliver compliant pumps by the contract date.

(C) Alternatively, allocation of risks was not modified

77. Even if the contract delivery date is deemed to have been modified, allocation of risk under the contract was not. Respondent argues that in modifying the contract delivery date, risks of late delivery were passed to Engineering. In support, Respondent relies on its own statement to Engineering on 5 January 2008, that Claimant "be held responsible for the delay in shipping the pumps". However, a unilateral statement by



a party to a contract cannot lead to contract modification. As the Federal District Court of Delaware in *Solae* stated, “nothing in the [CISG] suggests that the failure to object to a party’s unilateral attempt to alter materially the terms of an otherwise valid agreement is an ‘agreement’ within the terms of Article 29.”

78. Respondent cannot unilaterally remove the DES term included in the contract. As stated above [*supra* at para. 56], the DES term expressly provides that Respondent is to “bear all the costs and risks involved in bringing the goods to the named port of destination” [Gabriel at 68]. Respondent’s statement on 22 November is an attempt to remove this term of the contract, which cannot be done without agreement by Engineering [CISG Arts. 18, 19 & 29]. As no such agreement was provided by Engineering, the DES stands and Respondent was responsible for risk until delivery in Mediterraneo.

3.2 RESPONDENT BREACHED ITS OBLIGATION TO DELIVER PUMPS BY 22 DECEMBER 2008

79. The agreement stated that the pumps were to be delivered by 15 December 2008. Engineering allowed Respondent a reasonable additional time to perform its obligations under the agreement, by extending the delivery date to 22 December 2008. Respondent breached its obligation to deliver the pumps by this extended date.

(A) Engineering allowed reasonable additional time for performance

80. Engineering acted in accordance with the *Nachfrist* period and provided Respondent with a reasonable extension for delivery of the pumps. Article 47(1) states, “the buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.” This additional period of performance, known as *Nachfrist*, is a concept adopted from civil law [Bianca & Bonell at 342]. Although Engineering exercised its right under the CISG to grant a *Nachfrist* period, this should not be interpreted as having modified the parties’ original agreement. After all, “the *Nachfrist* option is a right of an aggrieved party, rather than an option to create a supplemental agreement” [Duncan at 1385]. Furthermore, by allowing this period of time “the buyer is not deprived thereby of any right he may have to claim damages for delay in performance” [CISG, Art. 47(2)].



81. In *Valero Marketing*, the U.S. Federal Court of Appeal dealt with a similar issue and interpreted an extension in delivery date in that case as a supplemental agreement, rather than *Nachfrist*. However, in *Valero Marketing*, the court found that the parties had returned to the bargaining table, negotiating through the same third party they used in their original agreement and agreeing to a reduction in price in exchange for delay. While the buyer claimed that the agreement was a “take it or leave it” proposition, the court held that the buyer did assent to this agreement. In the dispute before this tribunal, the parties did not return to the bargaining table—there were no negotiations between the parties and no agreement in writing as with the original agreement. Furthermore, Engineering’s concession to Respondent that “we will have to go along with you” does not meet the court’s standard of clear consent to agreement.
82. Engineering did not have the opportunity, as the buyer in *Valero Marketing* did, to refuse the delay in delivery. The pumps were already on the ship when it agreed to the extension. Thus, this really is a case of a “take it or leave it” proposition. Moreover, Engineering reinforced the original agreement date when granting the *Nachfrist* period, by stating that delivery would be a week later than contracted for [Cl. Ex. 8]. Engineering submits that upon these facts, the extension in this case is more appropriately interpreted as a *Nachfrist* period, and Engineering should therefore be entitled to maintain all rights it has to claim damages for delay in performance [CISG, Art. 47(2)].
83. By fixing a *Nachfrist* period, Engineering acted in the spirit of reasonableness and cooperation between the parties—general principles of the CISG [see, for example, Honnold at 342, 424 & 436.4; Schlechtriem 1986 at 22; *Arb. Proc. 105/2005*]. Engineering recognizes “the importance of cooperation in carrying out the interlocking steps of an international sales transaction,” [Honnold at 342] and provided that needed cooperation by agreeing to the *Nachfrist* period. Engineering further recognizes “the rule that the parties must conduct themselves according to the standard of the ‘reasonable person’...” [Schlechtriem 1986 at 22] and, thus, agreed it was reasonable and fair in the circumstances to allow for a short delay, specifically noting that a week delay in the delivery of pumps would normally be of little



importance [Cl. Ex. 8]. However, Engineering did emphasize the unique circumstances present and stressed that the schedule for moving the pumps would be very tight and that it was imperative that they meet the new schedule [Cl. Ex. 8]. Respondent therefore had an obligation to deliver by 22 December 2008 at the latest.

(B) Respondent failed to deliver pumps within additional time period

84. The purpose of Art. 47 is to “permit flexibility for parties to a contract and facilitate reasonable performance” [Duncan at 1385]. Engineering allowed for a period of time of reasonable length in the hope that Respondent would deliver the pumps by 22 December 2008. This extended date would allow Engineering to meet the delivery dates in its agreement with Oceania Water Services. However, Respondent failed to deliver the pumps within the *Nachfrist* period, which Engineering submits ended on 22 December 2008. At any point after this additional (and reasonable) period, Engineering was entitled to avoid the contract pursuant to Art. 49(1)(b) of the CISG [see also Schlechtriem 2006 at 77; Ziegel at 9-7].

85. Engineering notified Respondent of its intention to avoid the contract, on 5 January 2009, specifically referencing Respondent’s failure to deliver the pumps by the contract deadline [Cl. Ex. 13]. Engineering submits that it properly avoided the contract with Respondent pursuant to Art. 49(1)(b) and is entitled to damages resulting from Respondent’s breach of its contractual obligation.

3.3 RESPONDENT IS NOT EXEMPTED FROM THE CONSEQUENCES OF ITS BREACH

86. Regardless of whether the delivery date is considered to be 15 December 2008 or 22 December 2008, Respondent failed to meet the delivery date. However, Respondent seeks an exemption from the consequences of its breach under Art. 79 of the CISG, claiming that “the delay in transiting the Isthmus Canal was an impediment beyond the control of Super Pumps” [Statement of Defence at para. 12].

87. Respondent’s claim for relief must fail, as (A) Respondent expressly assumed the risks associated with on-time delivery to Capitol City, Mediterraneo; and (B) in the alternative, even if Respondent is allowed the possibility of exemption from the



consequences of breaching its on-time delivery obligation, Respondent cannot satisfy the four-part test for exemption under Art. 79(1) of the CISG (2).

(A) Respondent expressly assumed risks associated with on-time delivery

88. Respondent expressly assumed the risks associated with delivering the pumps in Mediterraneo and bears responsibility for all risks regardless of fault or foreseeability. Clause 1 states that delivery of the pumps in Mediterraneo will occur under the DES term, under which Respondent will “bear all the costs and risks involved in bringing the goods to the named port of destination” [*Incoterms 2000*].
89. Respondent is bound to assume responsibility for all risks and the consequence thereof. This allocation of risk is strongly supported by authorities and the case law [Digest Art. 79 at note 9]. For example, in the German *Chinese Goods case*, the Tribunal stated that with respect to Art. 79, “[o]nly the apportionment of the risk in the contract is relevant” [at para. 12]. The Tribunal in the Hungarian *Caviar case* went further, stating that with respect to delivery, “the damage caused by *force majeure* has to be borne by the party where the risk is at the moment the *force majeure* occurs” [at para. 9].
90. If Respondent did not intend to take responsibility for shipping risks, it should have included a waiver of liability clause within the contract. As explained by Schlechtriem 2006, if a party wishes to exclude certain impediments from its overall liability, the excluded impediments must be specified in the contract [at 101]. As no such waiver was included and, a DES term specifically allocating liability to Respondent was contained, within the contract, Engineering reasonably relied on Respondent to undertake responsibility for shipping risks. Furthermore, as provided above [*supra* at para. 58], payment of \$1.2 million for the pumps was conditional upon this allocation of risk and Engineering’s assumption that Respondent would be able to undertake this responsibility and any liability that could arise.
91. In the case at hand, the purported *force majeure* is the damage/delay at the Isthmus Canal, a delay that occurred during delivery, when risk was expressly held by Respondent. Furthermore, Engineering and Respondent did not exclude any type of



impediment or “*force majeure*” from the overall liability for delivery risk that was undertaken by Respondent. Therefore, Respondent must be held liable for the consequences of late delivery due to delay at the Isthmus Canal. Finding otherwise would defeat the entire purpose of the DES terms and the express allocation of risks between Engineering and Respondent.

(B) Respondent cannot satisfy four-part test for exemption under Article 79(1)

92. Respondent is liable for the consequences of late delivery, irrespective of the nature of such delay. If examination of the nature of the delay is undertaken—to further cement Respondent’s liability or because deemed necessary—the conditions for exemption from liability under Art. 79(1) cannot be satisfied. According to authorities such as Bianca & Bonell, the non-performing party (NPP) must prove all elements of a four-part test: (i) the delay was caused by an impediment that prevents performance; (ii) the impediment was beyond NPP’s control; (iii) NPP could not reasonably be expected to have taken the impediment into account at the time contract was concluded; and (iv) NPP could not reasonably be expected to have avoided or overcome the impediment or its consequences [see Bianca & Bonell; Digest Art. 79; Lookofsky. See also Southerington]. Failure to satisfy even one of these conditions will disqualify Respondent.
93. In applying this test, Respondent fails the third and fourth conditions as, (1) Respondent should reasonably have taken the risk of delay due to canal damage into account, and (2) Respondent could reasonably have avoided or overcome the delay and its consequences.

(1) Respondent should reasonably have taken risk of delay into account

94. Earlier analysis established that Respondent was responsible for delivery of the pumps in Mediterraneo and, therefore, bore the risk of delivery delays. As a merchant selling pumps to buyers in over 50 countries, Respondent can reasonably be expected to take into account a broad range of potential impediments. In general, merchants who routinely engage in international sales must anticipate a broad range of circumstances relating to delivery [Spivack at 774]. Here, the type of impediment is a



damaged canal and resulting unavailability of that canal. Looking to early cases concerning the Suez Canal, closure of a canal has been found to be reasonably foreseeable [*Suez cases 1, 2 & 3*]. Moreover, these cases dealt with nationalization of a canal, an event far more remote than damage due to accident.

95. Respondent should reasonably have taken into account the risk of delay at the Isthmus Canal when accepting liability for delivery risk, and when planning/implementing delivery of the pumps. At the time the contract was concluded, Respondent knew that delivery delays due to problems with the Isthmus Canal had occurred before [Pro. Ord. No. 2 at para. 13]. Thus, Respondent failed to satisfy the third requirement of the test for exemption under Art. 79(1).

(2) Respondent could reasonably have avoided or overcome the delay and its consequences

96. On 1 August 2008, Engineering informed Respondent that P-52 pumps containing beryllium would violate Oceania regulations [Cl. Ex. 5]. Respondent immediately recognized that completion of the P-52 pumps would be delayed by several weeks [Cl. Ex. 6]. As established above, Respondent expressly assumed responsibility for delivery and the associated risks under the Contract. As a consequence, Respondent is liable for delivery delays, and must satisfy the onus of considering and avoiding or overcoming any potential delay. Furthermore, as manufacturer, Respondent was in the best position to anticipate the new completion date for P-52 pumps. As arranger of delivery from its home country and hirer of the freight forwarder [Cl. Ex. No. 9], Respondent was in the best position to do so.
97. Respondent could have arranged for all the field pumps to depart Equatoriana by ship on 30 October 2008 as originally planned [Pro. Ord. No. 2 at para. 11]. At this time, there was no indication that regulatory compliance of the field pumps would be an issue. Thus, this arrangement would have ensured delivery of a substantial portion of the total number of required pumps by the contracted delivery date of 15 December 2008. Respondent suggests that the Irrigation Contract “would probably not have been cancelled” if Engineering had delivered “even a few” contract-compliant pumps on time [Statement of Defence at para. 13]. In accordance with this reasoning, if Respondent provided the field pumps in a separate shipment, Engineering could have



performed a significant portion of the Irrigation Contract within the applicable deadline. Therefore, by its own admission, Respondent could reasonably have avoided or overcome the delivery delay and its consequences by delivering the pumps to Engineering in two shipments.

IV. ENGINEERING DID NOT FAIL TO MITIGATE THE CONSEQUENCES OF THE CANCELLATION OF IRRIGATION CONTRACT IR 08-45Q

98. For Respondent to prevail under Art. 77 it must identify reasonable measures that Engineering was able to take to mitigate its loss. Respondent's solitary proposal – of purchasing some replacement pumps from Trading Company of Mediterraneo is not reasonable. This suggestion is largely speculative and fails to account for time constraints. Beyond Respondent's proposed mitigation measure, no other reasonable mitigation measures were available to Engineering. Therefore, Engineering could not mitigate its losses from the contract and did not fail in its duty to do so under CISG Art. 77.

4.1 RESPONDENT'S PROPOSED MITIGATION MEASURES WERE NOT REASONABLE

99. Where parties apply Art. 77, it has been held as a general rule that "it should be for the party which is liable in damages to prove that the other party has failed to mitigate the loss" [Huber at 230 citing *Propane case*, *Tomato Concentrate case*, *Frozen Bacon case & Arb. Proc. 406/1998*; *Treibacher*]. The Supreme Court of Canada in *Red Deer College* similarly held that the burden of proof to establish that the plaintiff ought to have mitigated is on the party in breach. Furthermore, tribunals have held that a party in breach may not argue that the buyer did not mitigate in general terms. Rather the party in breach has a positive duty to offer concrete examples of reasonable measures that should have been taken by the buyer in order for it to prevail under a CISG Art. 77 argument [*ICC Case 9187*].

100. Respondent provided only one proposal to Engineering and it was made only after the parties had already entered into arbitration [Statement of Defense at para. 13]. Respondent states that "there were slightly used pumps for sale ... that would have conformed to the requirements of the irrigation contract and that could have been delivered to Oceania prior to midnight of 31 December 2008". According to



Respondent “those pumps would have comprised about one-quarter of the number of field pumps called for by the irrigation contract ... [and] the adverse consequences to [Claimant] arising out of the [contract] cancellation ... would have been minimized and perhaps largely eliminated” [Statement of Defense at para. 13]. However, this suggested mitigation measure is speculative and fails to account for the severe time constraints that Engineering was operating under.

(A) Proposal to buy alternative pumps was too speculative

101. In arguing for its proposed mitigation measure, Respondent relies on the statement of Horace Wilson of Oceania Water Services: “it would help if there could be at least partial delivery of pumps that would conform to the contract by 2 January” [Res. Ex. 2]. However, Wilson’s statement offers no assurance that partial delivery of pumps would have averted the contract’s cancellation. Further, Respondent’s suggested supplier of pumps, James Fisher, stated that he would have been able to deliver within 36 hours [Res. Ex. 3], but the pumps were “slightly used” [Statement of Defence at para. 13]. Water Services, however, “anticipated that the pumps would be newly manufactured” [Pro. Ord. No. 2 at para. 25]. Therefore, Water Services could reject delivery because pumps were slightly used, adding further uncertainty to this mitigation measure.

102. Also, the pumps ordered by the Engineering were assessed by Respondent as having a “purchase price of US\$1,214,550” [Statement of Claim at para. 20]. Acquiring one fourth of those pumps through the Trading Company of Mediterraneo, as Respondent suggests, would cost upwards of US\$350,000 (that being a quarter of the full purchase price). Therefore, Respondent’s proposal would require Engineering to expend US\$350,000 in addition to the US\$1,214,550 it had already expended, for a measure that would only have “helped”, on the assumption that the used-pumps would be acceptable to Water Services.

(B) Time necessary to purchase alternative pumps was not available

103. “On 28 December 2008 the military regime [in Oceania] passed a decree on environmental matters effective 1 January 2009” [Statement of Claim at para. 16]. According to this decree, “import or manufacture of products containing any amount



of [...] beryllium” into Oceania was prohibited [Cl. Ex. 11]. Apart from the three P-52 pumps, all other pumps supplied by Respondent did not comply with the Oceanian decree [Cl. Ex. 13]. Therefore, in order to comply with the decree, Engineering would have had to find another source to supply all other pumps specified in the contract with Respondent, within four days.

104. The nature of the four days in question must be stressed. These four days started December 28 and included January 1. While it is admitted that there were no holidays in Mediterraneo between 28 December and 31 December 2008 [Pro. Ord. No. 2 at para. 18], Engineering submits that it is reasonable to assume that the first of January was a national holiday in either all, or at least some of the countries of the parties to this dispute [see Aveni at 28, where he states that “the first day of January is a holiday celebrated worldwide”]. Therefore, Engineering had only three days to attempt to find compliant replacement pumps. It took Respondent from 1 July 2008 to January 6 2009 to produce and ship regulatory deficient pumps to Engineering, [Cl. Ex. 3; Cl. Ex. 10]. Therefore, any expectation of Engineering to find replacement pumps within three days of the enactment of the decree is not reasonable.

105. Respondent concludes that the “slightly-used pumps” available for sale would have been deliverable to Oceania prior to midnight of 31 December 2008 [Statement of Defense at para. 13]. In coming to this conclusion, Respondent relies on Fisher’s statement that “the [available] pumps could have been loaded on a truck and delivered to Oceania within 36 hours.” However, as stated above, Engineering had three days in total to procure replacement pumps and arrange to have them delivered before December 31. By way of concrete example, when Engineering was awarded Irrigation Contract IR 08-08-45Q it promptly notified Respondent on June 25, 2008 [Cl. Ex. 2]. However, it was not until July 1, 2008, a full six days later, that Respondent returned the signed contract [Res. Ex. 1]. Thus, while Respondent itself required six days to simply return a signed contract, it expected Engineering to find replacement decree-compliant pumps, negotiate a contract for these pumps and have them delivered all within three days. Therefore, Engineering submits that Respondent’s proposed mitigation measure is not reasonable as it fails to account for the strict timeline that Engineering was operating under.



106. Finally, the Witness Statement of Fisher is dated August 10, 2009 [Res. Ex. 3]. Therefore, Respondent had a considerable amount of time to find the potential mitigation measure that it now argues Engineering should have followed in the last three days of December. With only three days to find, negotiate a contract for and secure delivery of replacement pumps, Engineering did not have the same time advantage to find a solution. Similarly, the German Dresden Appellate Court in the *Stolen Automobile case* found that a party in breach may not propose an after-the-fact mitigation measure that was not feasible or apparent at the time of breach as a course that the non-breaching party should have followed. Therefore, Respondent's suggested measure amounts to a hindsight proposal that was not apparent at the relevant time and, thus, Engineering cannot be held to it.
107. In conclusion, Respondent's only proposed mitigation measure was speculative, failed to account for the strict timeline imposed by the military regime and presented what amounted to be a hindsight solution that was not apparent at the relevant time. Therefore, Respondent's proposed mitigation measure was not reasonable.

4.2 NO REASONABLE MITIGATION MEASURES WERE AVAILABLE

108. Engineering submits that there were no reasonable mitigation measures available in the circumstances. Alternative pumps could not be purchased due to the time constraints, an application for an exception to be made by the Military Counsel would have been unlikely to succeed, and despite any measures Engineering could have taken, the irrigation contract would have been cancelled in any event.

(A) Alternative pumps could not be purchased due to time constraints

109. As stated above, Engineering submits that it was not reasonable to find, inspect and purchase alternative pumps given the extreme time constraints it was under. According to the PECL definition of reasonableness, "in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account" [PECL, Art. 1:302; see also Schlechtriem 1986 at para. II (1); CISG, Art. 9]. The purchase of multiple, large, industrial pumps is not something that one does in a matter of hours. The sales cycle for industrial equipment is more appropriately



measured in months. Engineering first contacted Respondent in May 2008 [Statement of Claim at para. 5], but did not sign the contract for sale of pumps until 1 July 2008 [Cl. Ex. 3]. It is also worth noting that these two firms had collaborated on a similar project two years earlier [Statement of Claim at para. 5]. Therefore, it is clear the purchase of these industrial pumps takes a long time, as it took the parties two months to reach an agreement, even when they had collaborated on a project previously.

110. The Witness Statement of Fisher further supports the assertion that the sales cycle for industrial pumps is properly measured in months, not days. Fisher states that they purchased the used pumps on 12 November 2009 and the pumps were finally sold on 22 April 2009 [Res. Ex. 3]. Using these examples as a baseline, one can conclude that the purchase of industrial pumps takes between 2-5 months. Thus, taking into account the usages and practices of the trades and professions involved, it was unreasonable for Respondent to expect Engineering to purchase used pumps, from a firm with which it had never done business, in less than 48 hours to meet delivery by midnight on December 31st.

(B) Exemption application to the Military Regime would have been unlikely to succeed

111. Engineering submits that an application for an exception to the military regime's environmental decree of 28 December 2008 would have been unlikely to succeed. While an office was established on 2 March 2009 to consider these applications, and 27 of the 73 original requests were granted [Pro. Ord. No. 2 at para. 20], Engineering submits that its application would not have been granted because its contract with Water Services had already been cancelled.
112. On 28 December 2008, the military regime in Oceania called for cancellation of "projects involving a foreign supplier of goods and services that had in any measure breached a term of the contract" [Statement of Claim at para. 18]. Engineering's contract with Water Services was cancelled as a result [Statement of Claim at para. 19]. It was possible for individual exceptions to be made to these contract cancellations with the approval of the Military Council [Statement of Claim at para. 18]. However, it is unlikely one of these exceptions would have been made for



Engineering. When the irrigation contract was cancelled, Water Services was not aware at the time that the pumps, other than the P-52 would have violated the environmental decree [Statement of Claim at para.19]. If the contract was cancelled due to a short delay in delivery—a relatively minor breach, with no penalty attached to it [Pro. Ord. No. 2 at para. 22]—an exception would likely not have been granted when the majority of the pumps were prohibited from use in Oceania.

113. Further, the first decisions regarding exceptions to the environmental decree were issued on 16 April 2009. It is unreasonable to suggest that Claimant should not have accepted delivery of the pumps and waited this long to learn of whether an exception would be granted. Engineering weighed the chances that an office would be created promptly and that it would be granted an exception [Pro. Ord. No. 2 at para. 21] against option of avoiding the contract with Respondent and concluded that refusing delivery of the pumps was the most reasonable option.

(C) Irrigation contract would have been cancelled in any event

114. Engineering submits that despite any mitigation measures it may have taken, the irrigation contract would have been cancelled, as the field pumps shipped by Respondent were no longer regulatory compliant. It is accepted that “the burden of proof for the fact that a loss could have been avoided lies with the party owing damages” [ICC case 9187 at para. 33; see also, *Treibacher*; *Red Deer College*]. Engineering submits that Respondent cannot prove that a loss could have been avoided, nor to what extent. Even in the unlikely case that delivery of one-quarter of the pumps prevented the cancellation of the irrigation contract, it would likely have been cancelled in any event. The lack of compliance, when the rest of the pumps were delivered to Oceania the next day, would have been sufficient for cancellation under the environmental decree of 28 December 2008. Therefore Engineering submits it was acting in good faith and as a reasonable person would in similar circumstances by not purchasing additional pumps to mitigate its loss.



CONCLUSION ON SUBSTANTIVE ISSUES

115. The Tribunal should find that (II) Respondent failed to uphold its obligation to conform to regulations at time of use since: (2.1) Respondent was obligated to conform to regulations at time of use, (2.2) compliance is determined at time of delivery under Art. 36 and DES term, and (2.3) in the alternative, respondent cannot excuse non-conformity.
116. Furthermore, the Tribunal should hold that (III) Respondent breached its obligation to deliver pumps by the contracted delivery date because (3.1) Respondent was obligated to deliver pumps by the 15 December 2008, (3.2) in the alternative, Respondent was obligated to deliver pumps by the 22 December 2008, and (3.3) Respondent is not exempt from consequences of its breach.
117. Lastly, the Tribunal should find that (IV) Engineering did not fail to mitigate the consequences of the cancellation of the irrigation contract IR 08-45Q since (4.1) Respondent's proposed mitigation measures were not reasonable, and (4.2) no reasonable mitigation measures were available.

**RELIEF REQUESTED**

118. CLAIMANT respectfully requests that the Arbitral Tribunal find that:
- All pre-conditions to arbitration provided in the Contract were property fulfilled;
 - Respondent failed to uphold its obligation to conform to regulations at the time of use;
 - Respondent breached its obligation to deliver pumps by the contracted delivery date; and
 - Engineering did not fail to mitigate the consequences of the cancellation of irrigation contract IR 08-45Q.
119. Consequently, CLAIMANT respectfully requests the Arbitral Tribunal to order Equatoriana Super Pumps S.A.:
- to reimburse Mediterraneo Engineering Co. the purchase price of the pumps in the amount of US\$1,214,550;
 - to pay damages in the amount of US\$320,000;
 - to pay interest on the said sums; and
 - to pay the costs of arbitration.

FOR MEDITERRANEO ENGINEERING CO.,

(signed) _____, 3 December 2009

JILLIAN CARRINGTON
MARLENE COSTA
JILL DAVIS
YOAV HAREL
ANDREA LINDEN
ZIAD RESLAN