ALBERT LUDWIGS
UNIVERSITY OF FREIBURG

On behalf of (RESPONDENT)
Equatoriana Clothing
Manufacturing, Ltd.
286 Third Avenue
Oceanside, Equatoriana

Against (CLAIMANT)
Mediterraneo Exquisite
Supply, Co.
45 Commerce Road
Capital City, Mediterraneo

Memorandum for Respondent

LUKAS GERHARDINGER • ANSELM GRIPP • TILL MAIER-LOHMANN
MARCEL ROGG • ALIX SCHULZ • JAKOB STACHOW • HENRY SUNTHEIM

Freiburg • Germany

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Art.	Article
Arts.	Articles
BG	Bundesgericht [Swiss Federal Court of Justice]
BGH	Bundesgerichtshof [German Federal Court of Justice]
CEAC	Chinese European Arbitration Centre
cf.	Confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-online	Internet database on CISG decisions and materials, available at www.globalsaleslaw.org
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
ed.	Edition
Ed./Eds.	Editor/Editors
e.g.	Exempli gratia
et al	And others
et seq. / et seqq.	And the following
G	German version
HGB	Handelsgesetzbuch
i.e.	Id est [that is]
IBA	International Bar Association
Ibid	Ibidem [the same place]
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id	Idem [the same]
Infra	[See] beneath
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
LG	Landgericht [German Regional Court]
Ltd	Limited
Mr.	Mister
MünchKomm	Münchener Kommentar [Germany]
MünchKomm HGB	Münchener Kommentar zum Handelsgesetzbuch [Germany]
NJ	New Jersey
No.	Number

NY	New York
OGH	Oberster Gerichtshof [Austrian Supreme Court]
OLG	Oberlandesgericht [German Regional Court of Appeals]
p./pp.	Page/pages
para./paras.	Paragraph/ paragraphs
RIW	Recht der International Wirtschaft
S.A.	Société Anonyme
S.C.C.A.	Supreme Court of Canada
SCC	Stockholm Chamber of Commerce
supra	[See] above
UN	United Nations
UN-Doc.	UN-Documents
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States
USD	United States Dollar
v.	Versus
Vol.	Volume

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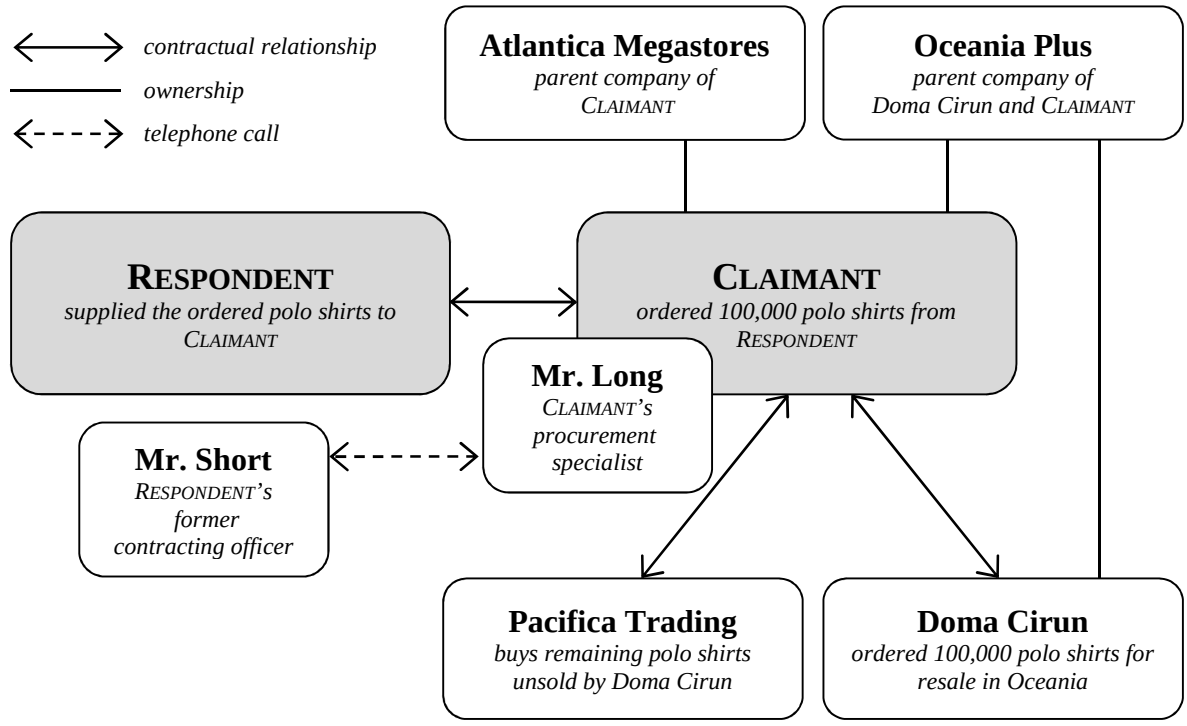
STATEMENT OF FACTS

The Parties to this arbitration are Mediterraneo Exquisite Supply, Co. (hereafter "CLAIMANT") and Equatoriana Clothing Manufacturing, Ltd. (hereafter "RESPONDENT").

CLAIMANT is a purchasing company registered and managed in the country of Mediterraneo. It is jointly owned by Oceania Plus Enterprises (hereafter "Oceania Plus") and Atlantica Megastores.

RESPONDENT is a manufacturer of clothing based in Equatoriana. It agreed to produce polo shirts for CLAIMANT.



Early January 2011

As one of several suppliers, RESPONDENT is contacted by CLAIMANT as to whether it would be able to handle an order of 100,000 polo shirts. CLAIMANT intends to resell them to its sister company Doma Cirun on a rush basis. RESPONDENT agrees to handle the order.

5 January 2011 CLAIMANT and RESPONDENT conclude a contract for the delivery of 100,000 polo shirts by 19 February 2011 (hereafter "the contract").

9 February 2011 A strike at RESPONDENT's supplier occurs. RESPONDENT's contracting officer at that time, Mr. Short, informs CLAIMANT's procurement specialist, Mr. Long, in a telephone call that RESPONDENT will not be able to deliver the polo shirts on 19 February 2011. Mr. Long accepts Mr. Short's offer to deliver the goods on 24 February 2011 and offers to prepare all necessary paper work.

24 February 2011 The polo shirts are delivered to the port of loading and promptly shipped to Doma Cirun's warehouse.

5 April 2011 - 8 April 2011 An Oceanian television channel broadcasts a documentary allegedly taken in one of RESPONDENT's production facilities showing children at the age of eight producing trousers. Although the documentary does not hint at a production of the polo shirts by the children, the documentary condemns Oceania Plus and Doma Cirun for dealing with RESPONDENT. Furthermore, an article in the Oceania Times outlines the Oceanian fight against child labor but does not relate to RESPONDENT. Enraged by the media, Oceanian citizens demonstrate at Doma Cirun stores and refuse to buy Doma Cirun's products.

8 April 2011 CLAIMANT declares the contract with RESPONDENT avoided.

20 April 2011 CLAIMANT sells the remaining polo shirts to Pacifica Trading.

1 July 2012 CLAIMANT initiates arbitration proceedings against RESPONDENT.

4 October 2012 Mr. Short is requested to appear at a hearing as a witness of RESPONDENT. However, his new employer, Jumpers Production, orders him not to appear. CLAIMANT submits to exclude his witness statement from evidence.

INTRODUCTION

1 CLAIMANT seeks to hold RESPONDENT liable for a series of unfortunate and unforeseeable events which were well beyond RESPONDENT's influence and control:

2 On the one hand, CLAIMANT blames RESPONDENT for its unsuccessful attempts to sell the polo shirts in Oceania. In doing so, CLAIMANT ignores that the polo shirts' quality was beyond any doubt. The true reason is that all of a sudden, the media in Oceania associated one of RESPONDENT's production sites with child labor. Even though the plant in question was not involved in the production of the polo shirts, the Oceanian customers allowed themselves to be guided by the allegations of the media frenzy. Consequently, sales in Oceania decreased and CLAIMANT's client, Doma Cirun, decided to take the polo shirts off the market. Nevertheless, CLAIMANT was able to sell its entire stock on to a different trader. While RESPONDENT regrets this incident, this does not change the fact that the polo shirts were produced and delivered in full conformity with the Parties' contract. Hence, CLAIMANT's requests to avoid the contract and claim damages must be dismissed [**Issue 4**].

3 On the other hand, CLAIMANT claims damages for an allegedly late delivery; an issue the Parties had settled long ago. Having been informed by RESPONDENT's contracting officer that an unforeseen strike would delay the delivery of the polo shirts, CLAIMANT'S procurement specialist orally agreed to defer the delivery date in the Parties' contract by five days. Now, CLAIMANT apparently no longer feels bound to its agreement and bases its attempt to retract from it on three arguments: First, CLAIMANT seeks to exclude the witness statement of RESPONDENT's contracting officer as the only piece of evidence available to RESPONDENT to prove that the delivery date was amended **[Issue 1]**. Second, CLAIMANT seeks to invalidate the oral agreement by relying on a writing requirement of its domestic law which was explicitly excluded by the choice of law clause of the Parties **[Issue 2]**. Third, in addition to its attempt to hide behind formalities, CLAIMANT does not shy away from pretending that it has forgotten about Mr. Long's oral agreement entirely **[Issue 3]**.

ARGUMENT REGARDING THE ISSUE OF DELAY

ISSUE 1: THE ARBITRAL TRIBUNAL SHOULD CONSIDER THE WRITTEN WITNESS STATEMENT OF MR. SHORT

4 CLAIMANT and RESPONDENT are in dispute whether RESPONDENT's former contracting officer, Mr. Short, and CLAIMANT's procurement specialist, Mr. Long, orally amended the delivery date in the contract in a telephone conversation on 9 February 2011. CLAIMANT now contests this agreement by relying on Mr. Long as a witness. RESPONDENT introduced a witness statement of Mr. Short to prove that the contract was amended. When CLAIMANT requested Mr. Short to attend an oral hearing, it became apparent that Mr. Short would not be able to do so. This is due to an order of his new employer, Jumpers Production, obliging him to refrain from any further involvement in this matter [PROCEDURAL ORDER NO. 1, P. 48 PARA. 4]. Therefore, CLAIMANT requested the Arbitral Tribunal to ignore Mr. Short's witness statement, which is RESPONDENT's only piece of evidence [MEMORANDUM FOR CLAIMANT, P. 3 ET SEQQ. PARA. 1 ET SEQQ.].

5 Interestingly enough, Jumpers Production has recently entered business relations with CLAIMANT and fears that this new relation would be strained if Mr. Short appeared and testified [PROCEDURAL ORDER NO. 2, P. 55 PARA. 26]. RESPONDENT has tried to secure his testimony, however without success [PROCEDURAL ORDER NO. 1, P. 48 PARA. 4]. CLAIMANT, on the contrary, could have assured Jumpers Production that Mr. Short's appearance was in its own interest and thus could have facilitated his appearance. Yet, even though asked by RESPONDENT to take action, CLAIMANT remained idle [PROCEDURAL ORDER NO. 1, P. 48 PARA. 4].

6 The Parties agree that the issue at hand is governed by the Rules of the Chinese European Arbitration Centre (hereafter "CEAC Rules") [CF. MEMORANDUM FOR CLAIMANT, P. 4 PARA. 6] and the UNCITRAL Model Law on International Commercial Arbitration (hereafter "Model Law") as the *lex loci arbitri* [CF. STATEMENT OF CLAIM, P. 10 ET SEQ. PARA. 32]. In addition, RESPONDENT agrees with CLAIMANT [MEMORANDUM FOR CLAIMANT, P. 4 PARA. 4] that the Arbitral Tribunal may refer to the 2010 IBA Rules on the Taking of Evidence in International Arbitration (hereafter "IBA Rules") as a supplement.

7 Pursuant to Art. 27(4) CEAC Rules, the Tribunal has the power to decide on the admissibility of evidence. RESPONDENT will demonstrate that in contrast to CLAIMANT's request to exclude

it from the record, the witness statement should be considered under the *lex loci arbitri* [**A**] and, alternatively, under the IBA Rules [**B**].

A. Mr. Short's witness statement has to be considered under the *lex loci arbitri*

8 When exercising its discretion under Art. 27(4) CEAC Rules, the Arbitral Tribunal has to respect the mandatory rules of the *lex loci arbitri*. [CF. HOLTZMANN/NEUHAUS, P. 550; GUSY/HOSKING/SCHWARZ, P. 140; SCHMIDT-AHRENDTS/SCHMITT, P. 523; SHAUGHNESSY, P. 459]. A failure to recognize these mandatory procedural provisions may render the award annullable under Art. 34(a)(ii),(iii) Model Law or unenforceable pursuant to Art. V(1)(b), (d) New York Convention [CF. BG, 31 JAN 2012; CORTE DI APPELLO NAPOLI, 18 MAY 1982; PARK, P. 51; GREENBERG/LAUTENSCHLAGER, P. 202; MORRISSEY/GRAVES, P. 466;. BREKOULAKIS IN FERRARI/KRÖLL, P. 128; CHENG, P. 194; VOSER/SCHRAMM IN TORGGLER, P. 286 PARA. 33; MCILWRATH/SAVAGE, PARA. 6-023; LIONNET, P. 285]. One of these mandatory provisions is Art. 18 Model Law [COURT OF APPEAL, SINGAPORE, 9 MAY 2007; DIGEST, P. 97 PARA. 4; SACHS/LÖRCHER IN BÖCKSTIEGEL/KRÖLL/NACIMIENTO, P. 279 PARA. 1 ET SEQ.; WAINCYMER, P. 751; ROTH IN WEIGAND, P. 1228 PARA. 1].

9 Art. 18 Model Law requires that Mr. Short's witness statement is considered **[I]**. Contrary to CLAIMANT's allegations [MEMORANDUM FOR CLAIMANT, P. 3 PARA. 2 ET SEQ.], admitting the witness statement does not violate its rights under Art. 18 Model Law **[II]**.

I. Art. 18 Model Law requires the Arbitral Tribunal to consider Mr. Short's witness statement

10 Art. 18 Model Law demands that "*[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*". Excluding the statement would deprive RESPONDENT of its right to present its case [**1**]. Furthermore, this would be contrary to the principle of equal treatment [**2**].

1. Ignoring Mr. Short's witness statement would deprive RESPONDENT of its right to present its case

11 The right to present one's case requires that each party has the opportunity to state its case by producing all arguments and evidence in its support [CF. ICSID, 5 FEB 2002, PARA. 57; BG, 19 JUN 2006, PARA. 4; BG, 30 SEP 2003; COURT OF APPEAL, ENGLAND, 27 JUL 2007,

PARA. 22; COURT OF APPEAL, ENGLAND, 8 MAR 2006, PARA. 70; JERMINI, P. 605 PARA. 4; ZEKOS, P. 153; KAUFMANN-KOHLER/SCHULTZ, P. 32]. Consequently, a party should not be prevented from submitting evidence which may assist the arbitral tribunal in establishing the truth in relation to the relevant issues [CF. REDFERN/HUNTER, P. 131 PARA. 6-65]. If Mr. Short's statement was not considered, the Arbitral Tribunal would hinder RESPONDENT from producing evidence in support of its position and consequently deprive RESPONDENT of its right to present its case. In the present case, this is particularly true for two reasons.

12 First, disregarding the witness statement would deprive RESPONDENT of its only means of evidence. Without Mr. Short's testimony, RESPONDENT could not prove its case at all. Mr. Short and Mr. Long are the only people that were present during the telephone call. Yet, their account of the telephone conversation differs. Mr. Long alleges that the contract has not been amended and thus favours CLAIMANT's interpretation of the conversation [CLAIMANT's EXHIBIT NO. 2, P. 14 ET SEQ.]. In contrast, Mr. Short is convinced that the contract was amended which supports RESPONDENT's case [RESPONDENT's EXHIBIT NO. 1, P. 37 ET SEQ.]. Hence, Mr. Short is RESPONDENT's only means of evidence with regard to the issue of delay.

13 Second, by contacting Mr. Short, RESPONDENT has exhausted all means to secure his appearance. This is due to the fact that in the present case neither a Party nor an institution could compel Mr. Short to appear. An arbitral tribunal does not have coercive power by way of principle [CF. REDFERN/HUNTER, P. 319; GÉLINAS IN LÉVY/VEEDER, P. 34; HÓBER, P. 230 PARA. 6.126; OETIKER, P. 265; SCHÜTZE/KRATSCH IN TORGGLER, P. 207 PARA. 55]. However, usually national courts can be called upon to assist the tribunal in the taking of evidence and compel a witness to testify [CF. ART. 27 MODEL LAW; WEIGAND, P. 387 PARA. 13]. In the present case, also this option is not available: the Danubian courts have no jurisdiction in Equatoriana to compel Mr. Short to attend a hearing and Equatorianian law does not provide for court assistance to order the appearance of a witness [PROCEDURAL ORDER NO. 2, P. 56 PARA. 28]. Therefore, no institution can ensure that Mr. Short will testify orally.

14 Concluding, there is no chance that Mr. Short will be examined orally, for the reception of his oral testimony is outside of the Parties' and the institutions sphere of influence. In such an extraordinary situation, where Mr. Short's witness statement is the only piece of evidence for a Party, ignoring the statement would deprive RESPONDENT of the right to present its case.

2. Excluding Mr. Short's witness statement would infringe RESPONDENT's right to equal treatment

15 The principle of equality requires that both parties are given an equal opportunity to present their cases and that no party is placed at a clear disadvantage compared to the other party [SUPERIOR COURT CANADA, 22 SEP 1999; DERAINS/SCHWARTZ, P. 229; JERMINI, P. 606; FOUCHARD/GAILLARD/GOLDMAN, P. 744 PARA. 1363; CAIRNS IN VAN DEN BERG, P. 189]. Excluding one of the witness statements would lead to unequal treatment.

16 There are only two witnesses which can provide an insight into the true content of the telephone conversation. Both have submitted a written witness statement, each in favor of one party [CF. CLAIMANT's EXHIBIT NO. 2, P. 14 ET SEQ.; RESPONDENT'S EXHIBIT NO. 1, P. 37 ET SEQ.]. Each Party necessarily has to rely on one of them as its only piece of evidence. Thus, ignoring one of these statements would place the respective Party at a clear disadvantage compared to the other Party, for it would be completely unable to present its case. Therefore, ignoring Mr. Short's witness statement would be contrary to the principle of equal treatment.

17 Thus, the principle of equal treatment requires the Arbitral Tribunal to consider Mr. Short's written witness statement.

II. Considering Mr. Short's witness statement would not deprive CLAIMANT of its rights under Art. 18 Model Law

18 RESPONDENT agrees with CLAIMANT that Art. 18 Model Law encompasses the right to test and rebut the opponent's case [MEMORANDUM FOR CLAIMANT, P. 5 PARA. 10]. However, contrary to CLAIMANT's contentions [CF. MEMORANDUM FOR CLAIMANT, P. 5 PARA. 9 ET SEQQ.], this right is not violated if Mr. Short's statement was considered without the possibility to orally question him.

19 First, contrary to CLAIMANT's allegations [MEMORANDUM FOR CLAIMANT, P. 4 ET SEQQ., PARA. 6 ET SEQQ.], the right to cross-examine a witness is not a necessary element of the right to present one's case [CF. ICSID, 1 MAR 2011, PARA. 258; BG, 19 JUN 2006, PARA. 6.3; JERMINI, PP. 606, 608]. The right to present one's case is so fundamental that the parties cannot derogate from it [HOLTZMANN/NEUHAUS, P. 550; SACHS/LÖRCHER IN BÖCKSTIEGEL/KRÖLL/NACIMIENTO P. 279 PARA. 3; DIGEST, P. 98 PARA. 4; GREENBERG/KEE/WEERAMANTRY, P. 306 PARA. 7.8]. Yet, it is also generally accepted that the

parties may agree to a documents-only procedure. In such proceedings a witness statement may serve as direct evidence even without cross-examination [CF. BORN, P. 1786; LACHMANN, P. 315 PARA. 915; LEW/MISTELIS/KRÖLL P. 174 PARAS. 8-36; MOSES, P. 160; WAINCYMER, P. 887]. If cross-examination was indeed a necessary part of the right to present one's case, the parties could not agree on documents-only proceedings. Consequently, the possibility to cross-examine a witness cannot be regarded as a necessary part of the right to present one's case. Hence, CLAIMANT is not deprived of the opportunity to present its case if it is not able to cross-examine Mr. Short.

20 Second, considering the witness statement without an oral examination would not violate CLAIMANT's right to test and rebut the opponent's case. As outlined above, this right does not necessarily provide the opportunity to orally examine a witness [SUPRA, PARA. 16]. It rather requires that each party can reply to the arguments of the opposing party, discuss their evidence and refute it by own evidence [CF. BG, 1 JUL 1991; BG, 30 SEP 2003]. CLAIMANT may well do so. It is already testing RESPONDENT's case by relying on the equally detailed witness statement of Mr. Long. Furthermore, under Art. 27(4) CEAC Rules, it is likely that the Arbitral Tribunal will find a credible oral depiction more convincing than a written statement [CF. CRAIG/PARK/PAULSSON, P. 433; VON MEHREN/SALOMON, P. 289]. Thus, even without an oral examination of Mr. Short, CLAIMANT may well test and rebut RESPONDENT's case.

21 In conclusion, considering Mr. Short's witness statement without an oral examination does not infringe CLAIMANT's right to present its case.

B. Alternatively, the Arbitral Tribunal should consider Mr. Short's witness statement under Art. 4(7) IBA Rules

22 Even if the Arbitral Tribunal were to find that Art. 18 Model Law does not necessarily demand to consider the witness statement, further guidance can be drawn from the IBA Rules. Contrary to CLAIMANT's argument [CF. MEMORANDUM FOR CLAIMANT, P. 6 PARA. 14], the Arbitral Tribunal is requested to find that Mr. Short's witness statement is to be considered pursuant to Art. 4(7) IBA Rules.

23 Art. 4(7) IBA rules states that "*if a witness whose appearance has been requested pursuant to Art. 8(1) fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing*

by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise". Mr. Short has valid reasons not to appear before the Arbitral Tribunal **[I**]. In any case, exceptional circumstances justify Mr. Short's absence [**II**].

I. Mr. Short has valid reasons not to appear before the Arbitral Tribunal

24 The IBA Rules themselves do not define the term "valid reason". CLAIMANT brings forward that "health problems" or other "extreme difficulties" might qualify as valid reasons [MEMORANDUM FOR CLAIMANT, P. 6 PARA. 14]. Other persuasive authority suggests that already less severe objective reasons, such as overly long travel distances should constitute valid reasons [IBA COMMENTARY, P. 103 PARA. 73].

25 Yet, regardless of the exact standard that is applied, it cannot be expected from a witness to intentionally disregard the clear order of its employer. The trust between employee and employer is severely damaged when the employee acts against the employer's order. In such cases, even a dismissal might be justified [CF. EXTEN-WRIGHT/CLARKE IN TELFORD, P. 377]. Mr. Short's new employer, Jumpers Production, has expressly asked Mr. Short not to appear before the Tribunal [PROCEDURAL ORDER NO. 1, P. 48 PARA. 4]. Hence, Mr. Short would have to intentionally act against the express order of his employer in order to attend the hearing. Consequently, Mr. Short had a valid reason not to appear before the Arbitral Tribunal and the written witness statement should be considered.

II. In any case, there are exceptional circumstances which require the statement to be considered

26 Regardless of the above, the exceptional circumstances of the case still require his witness statement to be admitted. The Parties agree [CF. MEMORANDUM FOR CLAIMANT, P. 6 PARA. 14 ET SEQ.] that in line with the interpretation of several ICSID awards, exceptional circumstances may exist where the non-appearance of a witness is outside the usual course of events [CF. ICSID, 29 JUN 2010; ICSID, 14 JUL 2010; ICSID, 30 JUL 2010; ICSID, 24 JAN 2003; SCC, 9 SEP 2003, PARA. 38]. Yet, the Arbitral Tribunal is not confined to this approach. Rather, the IBA Rules allow arbitral tribunals to consider all relevant circumstances of a given case in order to determine whether or not to admit a witness statement without an oral examination [IBA COMMENTARY, ART. 4 PARA. 76; BÜHLER/DORGAN, P. 17; CRAIG/PARK/PAULSSON, P. 433; VON MEHREN/SALOMON, P. 288; SCHLAEPFER IN

LÉVY/VEEDER, P. 69; CF. ICSID, 29 APR 1999, PARA. 77 ET SEQ.; ICSID, 17 JUL 2006, PARA. 29]. In the present case, such exceptional circumstances exist.

27 First, Mr. Short's reasons not to attend are outside the usual course of events. He does not attend the hearing due to the official firm policy of his new employer, Jumpers Production [PROCEDURAL ORDER NO. 2, P. 55 PARA. 26]. It was not foreseeable to anyone that Mr. Short's new employer would prohibit his appearance this strictly.

28 Second, it is outside the usual course of events that by no means the witness can be ordered to testify orally. As shown above, contrary to the principle laid down in Art. 27 Model Law, in the present case, no state court is competent to assist in this matter [SUPRA PARA 10].

29 Third, the correctness of Mr. Short's statement has not been expressly denied by Mr. Long in its relevant parts. Mr. Long does not deny that he had stated that he would "*make sure that all of the paper work reflected the new delivery date*" [PROCEDURAL ORDER NO. 2, P. 55 PARA. 27]. He is rather sure that a wording along this line had been used [PROCEDURAL ORDER NO. 2, P. 55, PARA. 27]. Thus, instead of simply ignoring Mr. Short's statement, the Arbitral Tribunal should examine and confront Mr. Long with Mr. Short's statement and verify Mr. Long's ability to recollect his own statements once called to testify.

30 Concluding, under these given circumstances and in light of fact that Mr. Short's witness statement is RESPONDENT's only piece of evidence, the present case has to be deemed as exceptional. Hence, the Arbitral Tribunal should find that the witness statement is admissible under Art. 4(7) IBA Rules and that it should be considered.

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31 **Result of Issue 1:** The Arbitral Tribunal should consider Mr. Short's witness statement in order to give both Parties an opportunity to present their cases and to be treated equally. This is required by Art. 18 Model Law and ensures the enforceability of an award. Alternatively, the Arbitral Tribunal should admit the witness statement under Art. 4(7) IBA Rules.

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ISSUE 2: THE PARTIES WERE ENTITLED TO AMEND THE CONTRACT ORALLY

32 CLAIMANT argues that the Parties were not entitled to orally amend the delivery date in the contract [MEMORANDUM FOR CLAIMANT, P. 9 ET SEQQ. PARA. 30 ET SEQQ.]. It bases its argument on the fact that Mediterraneo, the country of its seat, has made a reservation under Art. 96 of the United Nations Convention on Contracts for the International Sale of Goods (hereafter "CISG") [ID.] and that hence a writing requirements exists. However, CLAIMANT is mistaken.

33 Pursuant to Art. 35(1) CEAC Rules and Art. 28(1) Model Law, the Parties dispute shall be governed by "*the law or rules of law designated by the parties as applicable to the substance of the dispute*". In Clause 20 of their contract, the Parties agreed that the contract "*shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation […]*" [CLAIMANT'S EXHIBIT NO. 1, P. 13 PARA. 20; EMPHASIS ADDED]. Hence, the Parties agreed to apply the rules of the CISG which, in Arts. 11, 29(1), stipulate that contracts may be concluded and amended by the mere agreement of the parties (hereafter "freedom of form principle"). At the same time, the Parties declared the reservation made by Mediterraneo as irrelevant.

34 Disregarding the above, CLAIMANT argues that Mediterraneo's reservation was relevant as the Parties were not entitled to derogate from Arts. 12, 96 CISG and, hence, the Parties' choice of law was invalid [MEMORANDUM FOR CLAIMANT, P. 10 ET SEQ. PARA. 32 ET SEQQ.]. In response, it will be shown that the Parties were indeed entitled to amend the contract orally as they validly agreed to apply the rules of the CISG without regard to any national reservations [**A**]. Further, even if the Arbitral Tribunal were to find that Mediterraneo's reservation and Art. 12 CISG applied, the Parties were entitled to amend the contract orally in accordance with the applicable law of Equatoriana [**B**]. This result is enforceable because applying the freedom of form principle does in no way violate any overriding mandatory rules [**C**].

A. The Parties were entitled to amend the contract orally as they validly agreed to apply the rules of the CISG without regard to any national reservations

35 RESPONDENT agrees with CLAIMANT that once the CISG applies in its entirety, according to the express wording of Art. 12 CISG, parties are not entitled to derogate from Arts. 12, 96 CISG [CF. MEMORANDUM FOR CLAIMANT, P. 10 PARA. 32]. Yet, CLAIMANT puts

the cart before the horse. Pursuant to the Parties' choice of law clause, the CISG does not apply in its entirety. Instead, the Parties validly agreed to apply the rules of the CISG except the ones regarding national reservations, *i.e.* Arts. 12, 96 CISG.

36 Art. 35(1) CEAC Rules as well as Art. 28(1) Model Law explicitly grant the Parties the opportunity to choose *rules of law* as applicable to the substance of their dispute. Unlike in court proceedings, this encompasses the right to choose only certain provisions of a national law or even "rules" which do not constitute national law at all [HOLTZMANN/NEUHAUS, P. 768; MCNERNEY/ESPLUGUES, P. 54; BINDER, PARA. 6-004; CF. SCHROETER, P. 33]. This is due to the fact that in arbitration the parties' autonomy is almost unrestricted when choosing the law applicable to the merits of the dispute [LEW, P. 104; BINDER, PARA. 6-004; HEILMANN, P. 104].

37 For example, parties are entitled to choose certain parts of different national laws to govern different issues of their dispute (*dépeçage*) [UN-DOC. A/40/17, PARA. 234; BRIDGE, P. 18 PARA. 1.27; BARRINGTON IN CAMPBELL, P. 80]. Further, parties are also entitled to apply non-national laws such as the UNIDROIT principles or the *lex mercatoria* [REDFERN/HUNTER, P. 2 PARA. 1-02; LANDO, P. 400]. Finally, parties may even have their dispute decided *ex aequo et bono*, *i.e.* without the recourse to the otherwise applicable law [ART. 28(3) MODEL LAW; ART. 35(2) CEAC RULES; ICSID, 8 AUG 1980; CRAIG/PARK/PAULSSON, PP. 347 ET SEQQ. PARA. 18.01]. Therefore, parties can pick any rules of law they deem appropriate to their contract [LEW, PP. 104, 111; HOLTZMANN/NEUHAUS, P. 768; MCNERNEY/ESPLUGUES, P. 54; BINDER, PARA. 6-004; CF. SCHROETER, P. 33]. This freedom is only limited by overriding mandatory rules [BORN, P. 2163; LEW, P. 77; CHUKWUMERIJE, P. 109; GRIGERA NAÓN, P. 188; CF. GAILLARD, P. 787]. In the case at hand, however, there are no mandatory rules that limit the Parties' autonomy as to the choice of the applicable law [SEE INFRA PARA. 51]. Consequently, the Parties were entitled to choose the rules of the CISG without the provisions they deemed to be inappropriate and hence apply the rules of the CISG except for Arts. 12, 96.

38 Contrary to CLAIMANT's allegation, this choice of law is not "*avoiding the law which would otherwise be applicable*" [MEMORANDUM FOR CLAIMANT, P. 11 PARA. 36]. First, the CISG itself provides for Article 11 and the freedom of form as the rule and Articles 12 and 96 as the exception. Thus, by agreeing not to apply Articles 12 and 96, the Parties agreed to apply the CISG in its original form. Second, persuasive authority provides that choosing the CISG without Arts. 12, 96 is valid. The Parties' choice of law clause is identical to the choice of law

model clause provided by CEAC in its rules [CF. ART. 35(1)(B) CEAC RULES]. The clause was set out in the rules explicitly to render Arts. 12, 96 CISG inapplicable and ensure the smooth operation of the CISG [MOENS/SHARMA, P. 26; BRÖDERMANN/WEIMANN, P. 10; BRÖDERMANN/BENEYTO/MEYER/ZHAO, P. 20; BRÖDERMANN/HEEG-STELLDINGER, P. 42].

39 Hence, the Parties validly agreed on the rules of the CISG without Arts. 12, 96 CISG. As a result, the reservation of Mediterranean law is irrelevant for deciding the substance of the dispute and the Parties were entitled to amend the contract orally under Arts. 11, 29 CISG.

B. Alternatively, the Parties were entitled to amend the contract orally pursuant to the otherwise applicable law of Equatoriana

40 Even if the Arbitral Tribunal were to find that Arts. 12, 96 CISG were applicable, the Parties were entitled to amend the contract orally under Equatorianian law.

41 CLAIMANT alleges that the application of Arts. 12, 96 CISG automatically leads to the application of the form requirements of the reservation state, *i.e.* of Mediterraneo [MEMORANDUM FOR CLAIMANT, P. 11 ET SEQQ. PARA. 39 ET SEQQ]. This, however, is incorrect.

42 Arts. 12, 96 CISG merely exclude the freedom of form principle of Arts. 11, 29 CISG. They do not automatically lead to the application of the law of the reservation state, *i.e.* Mediterranean Law **[I]**. Instead, Arts. 12, 96 CISG result in the application of conflict of law rules which lead to the substantive law of Equatoriana **[II]**. Conflict of law rules lead to the substantive law of Equatoriana under which the Parties were entitled to amend the contract orally **[III]**.

I. Arts. 12, 96 CISG do not automatically lead to the application of the law of the reservation state, *i.e.* Mediterranean law

43 Contrary to CLAIMANT's allegation [MEMORANDUM FOR CLAIMANT, P. 11 ET SEQQ PARA. 39 ET SEQQ.], Arts. 12, 96 CISG themselves do not automatically result in the application of Mediterranean law as the law of the reservation state [PROCEDURAL ORDER NO. 2, P. 56 PARA. 34]. Instead, the effect of these articles is limited to the exclusion of the Convention's freedom of form principle.

44 First, the wording of Arts. 12, 96 CISG does not provide for the application of the form requirements of the reservation state. Whenever the CISG intends to directly provide for the application of a certain national law, it clearly says so, as demonstrated in Art. 28 CISG [SCHROETER, P. 23]. Arts. 12, 96 CISG, by contrast, merely state that "*[a]ny provision of article 11, article 29 or Part II of this Convention [...] [do] not apply*" [EMPHASIS ADDED]. Thus, it merely excludes Arts. 11, 29 CISG from applying. However, it does not provide for the application of the reservation state's substantive law.

45 Second, also the drafting history of Arts. 12 and 96 CISG reveals that they were not intended to result in the application of the form requirements of the reservation state. The drafters of the CISG discussed the proposal for an alternative wording of Arts. 12, 96 CISG which would indeed have provided for the application of the reservation state's form requirement. However, this proposal was expressly rejected [UN-DOC. A/CN.9/SR.8; UNCITRAL YEARBOOK VOL. IX, P. 45; FERRARI IN MÜNCHKOMM HGB, ART. 11 PARA. 11; RAJSKI IN BIANCA/BONELL, ART. 96 PARA. 1.2]. This indicates that Arts. 12, 96 CISG may not be interpreted as requiring the application of the reservation state's form requirements.

46 Third, the purpose of Arts. 12, 96 CISG contradicts an application of the reservation state's form requirements. The purpose of Arts. 12, 96 CISG was to find a compromise between the principle of freedom of form of the CISG and the domestic form requirements of some contracting States [WANG/ANDERSEN, P. 2; SCHLECHTRIEM, UN-KAUFRECHT, P. 60 PARA. 65; HERBER/CZERWENKA, ART. 96 PARA. 1; FERRARI IN MÜNCHKOMM HGB, ART. 12 PARA. 1; NEUMAYER/MING, ART. 12 PARA. 1; REINHART, ART. 12 PARA. 3]. Such purpose is sufficiently achieved with Arts. 12, 96 CISG leading only to the application of conflict of law rules. Otherwise, Arts. 12, 96 CISG by themselves would oblige all courts of all contracting states to apply the domestic form requirement of the reservation state. In this scenario, the reservation states would be in a more favorable position than they would be without the CISG [MELIS IN HONSELL, ART. 12 PARA. 4; SCHROETER, P. 24; SAENGER IN BAMBERGER/ROTH, ART. 12 PARA. 3; MAGNUS IN STAUDINGER, ART. 12 PARA. 1]. This cannot be seen as a compromise anymore and was therefore not intended by Arts. 12, 96 CISG.

47 Concluding, Arts. 12, 96 CISG only exclude the CISG's freedom of form principle but do not lead to the application of the law of the reservation state, *i.e.* Mediterranean law.

II. Instead, Arts. 12, 96 CISG result in the application of conflict of law rules

48 Since Arts. 12, 96 CISG themselves do not lead to the application of Mediterranean law, the applicable law needs to be determined by the application of Art. 7(2) CISG. According to this provision, "*matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law*". Art. 7(2) CISG leads to the application of conflict of law rules, since turning to the freedom of form principle of Art. 11 CISG, on which the CISG is based, would obviously undermine the purpose of Arts. 12, 96 CISG [US COURT OF APPEAL (3RD. CIR.), 21 JUL 2010; US DISTRICT COURT (NJ), 7 OCT 2008; HOGE RAAD, 7 NOV 1997; RECHTBANK ROTTERDAM, 12 JUL 2001; OGH, 22 OCT 2001; FOVÁROSI BIRÓSÁG BUDAPEST, 24 MAR 1992; LG INNSBRUCK, 6 FEB 2003; 2; HERBER/CZERWENKA, ART. 12 PARA. 4; ACHILLES, ART. 12 PARA. 2; ENDERLEIN/MASKOW/STOHBACH, ART. 12 PARA. 2. HONNOLD/FLECHTNER, P. 189 ET SEQ. PARA. 129; JAMETTI GREINER, P. 47; KAROLLUS, P. 80; VISCASILLAS IN KRÖLL/MISTELIS/VISCASILLAS, ART. 12 PARA. 8; MARTINY IN REITHMANN/MARTINY, PARA. 919; WEY, P. 177 PARA. 475; SCHLECHTRIEM/BUTLER, P. 63].

III. Conflict of law rules lead to the substantive law of Equatoriana under which the Parties were entitled to amend the contract orally

49 In this case, conflict of law rules lead to the application of the law of Equatoriana which does not require written form for an amendment to contracts [PROCEDURAL ORDER NO. 2, P. 56 PARA. 34]. Under Art. 28 Model Law and Art. 35 CEAC Rules, the Arbitral Tribunal shall apply the law chosen by the Parties or, in the absence of a choice, the conflict of law rules which the Arbitral Tribunal considers appropriate.

50 RESPONDENT submits that in the case at hand, the Parties' choice of law does not provide the applicable law. The CISG does not provide for a meaningful result, as it ends up in a circular argument. The Parties' alternative choice of the UNIDROIT Principles for International Commercial Contracts (hereinafter "PICC") [CF. CLAIMANT'S EXHIBIT NO. 1, P. 13 PARA. 20] in turn is not pertinent as the Parties agreed on the PICC only for matters "*not governed by the CISG*". Since the CISG governs the matter of form, the PICC are not applicable.

51 Consequently, the Arbitral Tribunal is free to apply the conflict of law rules which it determines to be appropriate. It should apply the commonly accepted principle of the closest connection [ICC, 23 OCT 1979; ICC, 17 FEB 1984; BERGER, P. 503; DE BOER, P. 195; FRICK,

P. 60; CF. RAUSCHER, PARA. 303; VON BAR/MANKOWSKI, P. 616 PARA. 108]. This would be appropriate, as this approach is also shared by all four countries involved in the arbitral process, namely Danubia, Oceania, Equatoriana and Mediterraneo [PROCEDURAL ORDER NO. 2, P. 56 PARA. 33]. In determining the country with the closest connection, different factors are to be considered, including the place of conclusion of the contract and the place where the party which makes the characteristic performance has its place of business [ID.; FOUCHARD/GAILLARD/GOLDMAN, P. 224 PARA. 426; WELLER, P. 432; EECHOUD, P. 32].

52 In the case at hand, the contract was signed in Equatoriana [PROCEDURAL ORDER NO. 2, P. 52 PARA. 7]. Furthermore, the place of business of RESPONDENT, which produced and delivered the polo shirts and therefore made the characteristic performance, is in Equatoriana. Hence, the closest connection test leads to Equatorianian substantive law.

53 As a result, Equatorianian law as to form governs the formal validity of the Parties' amendment. Since it does not require written form for amendments of contracts [PROCEDURAL ORDER NO. 2, P. 56 PARA. 34], the Parties were entitled to amend the contract orally even if Mediterraneo's reservation were to take effect.

C. Irrespective of which approach the Arbitral Tribunal will follow, applying the freedom of form principles does not violate any overriding mandatory law

54 Contrary to CLAIMANT's allegation [MEMORANDUM FOR CLAIMANT, P. 16 PARA. 59], the application of the freedom of form principle does not violate any overriding mandatory rules and, hence, is not barred by them. While it is undisputed that certain rules may override the Parties' choice or the otherwise applicable law, the nature and prerequisites of these rules remain disputed [BLESSING, P. 57]. Yet, all of them seek to protect the political, social or economic organization of the State [LEW, P. 532 PARA. 402; CF. SOUBEARAND, P. 2; CF. KAPPUS, P. 160]. Hence, such overriding rules of law are usually considered to be competition law, securities regulation, blockade or boycott law, currency control or anti-trust-law [US SUPREME COURT, 17 JUN 1974; HOCHSTRASSER, P. 68; MAYER/SHEPPARD/NASSAR, PARAS. 27, 29 ET SEQ.; BRINER, P. 65; HELLNER, P. 263; BANIASSADI, P. 63].

55 First, the Mediterranean reservation does not constitute overriding mandatory law. National form requirements are not of an importance that can be compared to the ones above [GOODE, P. 1111]. This is true especially for Mediterraneo where this requirement does not exist for each and every contract but only for *international* sales contracts [PROCEDURAL ORDER NO. 2,

P. 56 PARA. 34]. Furthermore, the mere fact that the Supreme Court of Mediterraneo has ruled that the writing requirement applies [STATEMENT OF CLAIM, P. 10 PARA. 32] does not render the form requirement an overriding mandatory rule that could prevent the application of the freedom of form principle.

56 Second, the Parties' choice of law clause is not limited by overriding mandatory rules of the forum state or any potential enforcement state. Neither Danubian law, as *lex loci arbitri*, nor Equatorianian law, as the law of the country in which an award is likely to be enforced, have mandatory provisions regarding the matter of form [PROCEDURAL ORDER NO. 2, P. 56 PARA. 34].

57 Therefore, the application of the freedom of form principle does not violate any overriding mandatory provision.

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58 **Result of Issue 2**: The Parties were entitled to amend the contract orally as they validly agreed to apply the rules of the CISG without regard to any national reservations. Even if the Arbitral Tribunal were to find that the CISG applied including Mediterraneo's reservation, the Parties would have been entitled to amend the contract orally under the law of Equatoriana. This result is enforceable because applying the freedom of form principle does not violate any overriding mandatory rules.

ISSUE 3: THE PARTIES AGREED TO AMEND THE CONTRACT ORALLY

59 On 9 February 2011, RESPONDENT's contracting officer, Mr. Short, informed CLAIMANT's procurement specialist, Mr. Long, by telephone that RESPONDENT would not be able to meet the contractually determined delivery date of 19 February 2011 [STATEMENT OF CLAIM, P. 7 PARA. 13]. However, Mr. Short offered to deliver the polo shirts by 24 February 2011. Mr. Long then agreed to a delivery on this new date by promising to "*make sure that all of the paper work reflected the new delivery date*" [RESPONDENT'S EXHIBIT NO. 1, P. 37]. CLAIMANT contends that Mr. Long's statement can only be understood as the fixing an additional period in terms of Art. 47 CISG [CF. MEMORANDUM FOR CLAIMANT, P. 20 PARA. 75]. However, it is not CLAIMANT's understanding which is decisive.

60 Pursuant to Art. 8(2) CISG, "*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 same circumstances*". When determining the understanding of a reasonable third person, due consideration is to be given to all relevant circumstances of the case as well as to subsequent conduct of the parties pursuant to Art. 8(3) CISG.

An interpretation of Mr. Long's statement in line with Art. 8(2) CISG reveals that Mr. Long agreed to amend the delivery date in the contract **[A]**. Consequently, Mr. Long's statement cannot be interpreted as the fixing of an additional period for RESPONDENT to perform according to Art. 47 CISG **[B]**.

A. An interpretation under Art. 8(2) CISG reveals that Mr. Long agreed to amend the delivery date in the contract

61 When interpreting a statement in accordance with the understanding of a reasonable third person in terms of Art. 8(2) CISG the wording of the statement [OLG DRESDEN, 27 DEC 1999; KRITZER, ART. 8 PARA. 5; JANSSEN/MEYER, P. 5] as well as the context in which the statement was made are of importance [ENDERLEIN/MASKOW/STROHBACH, ART. 8 PARA. 2.1; MULLIS IN HUBER/MULLIS, P. 71; LOOKOFSKY, P. 54].

62 Both the wording of Mr. Long's statement **[I]** and the context in which it was made **[II]** would guide a reasonable third person to understand that Mr. Long agreed to amend the delivery date in the contract. Similarly, CLAIMANT's subsequent conduct indicates that the delivery date in the contract had been amended **[III]**.

I. The wording of Mr. Long's statement reveals that Mr. Long agreed to amend the delivery date in the contract

63 Mr. Long stated he would "*make sure that all of the paper work reflected the new delivery date*" [RESPONDENT'S EXHIBIT NO. 1, P. 37]. In the case at hand, there are three documents reflecting the delivery date: the shipping contract, the letter of credit and the sales contract itself [CF. STATEMENT OF CLAIM, P. 7 PARAS. 11 ET SEQ.; RESPONDENT'S EXHIBIT NO. 1, P. 37]. Mr. Long made no reference to a specific document but agreed to change the delivery date in "*all of the paperwork*" [RESPONDENT'S EXHIBIT NO. 1, P. 37, EMPHASIS ADDED]. Therefore, a reasonable third person would have understood Mr. Long's statement as a promise to amend the delivery date in all three documents including the sales contract.

II. The context of Mr. Long's statement indicates that Mr. Long agreed to amend the delivery date in the contract

64 Given that the delay in delivery was not due to RESPONDENT's own failure, but caused by a strike in the production site of one of its suppliers [CF. PROCEDURAL ORDER NO. 2, P. 53 PARA. 12], the amendment of the contract was reasonable for CLAIMANT from an economic perspective. RESPONDENT was one of only three companies that could have fulfilled CLAIMANT's order of the polo shirts within this tight time frame [STATEMENT OF CLAIM, P. 6 PARA. 9]. If CLAIMANT had held RESPONDENT liable for circumstances outside RESPONDENT's sphere of influence, it would have run the risk that in a comparable scenario none of the three companies would be willing to contract with CLAIMANT. Thus, it was reasonable for CLAIMANT to amend the contract in order to maintain potential suppliers.

III. CLAIMANT's subsequent conduct reveals that Mr. Long agreed to amend the contract

65 CLAIMANT's conduct following the telephone conversation on 9 February 2011 demonstrates that the Parties agreed to amend the delivery date in the contract.

66 First, the purchase price in the amended letter of credit still amounted to the original USD 550,000 [CF. RESPONDENT'S EXHIBIT NO. 1, P. 37] and was duly paid. This indicates that RESPONDENT had delivered the polo shirts in time and, thus, that the contractually determined delivery date had been amended to 24 February 2011. Mr. Long undisputedly agreed to amend the letter of credit so that it "*reflected*" the new delivery date [CLAIMANT'S EXHIBIT

NO. 2, P. 15]. If CLAIMANT was in fact right and the contract had not been amended, the purchase price should have been reduced to USD 522,500 pursuant to Clause 10 of the contract. This clause links the purchase price to the delivery date: for each day late in delivery, the purchase price is supposed to be reduced by 1 % [CLAIMANT'S EXHIBIT NO. 1, P. 12 PARA. 10]. As the purchase price still correlated with the payment for a timely delivery, a reasonable third person would have understood that the delivery date in the contract had been amended to 24 February 2011.

67 Second, CLAIMANT did not claim remedies for a delay in delivery for more than one year. It was not until July 2012 that CLAIMANT suddenly claimed a deduction of the purchase price due to a delay in delivery [CF. STATEMENT OF CLAIM, P. 3]. After such a long period and in light of the fact that CLAIMANT never reserved its rights with regard to the delivery, a reasonable third person would have assumed that RESPONDENT had sufficiently fulfilled its contractual obligations. Hence, a reasonable third person would have drawn the conclusion that the contractual delivery date had been amended.

68 Summarizing, with regard to the circumstances under which Mr. Long's statement was made and to CLAIMANT's conduct following the telephone conversation, a reasonable third person would have concluded that the Parties agreed to amend the contract.

B. CLAIMANT did not fix an additional period for performance in terms of Art. 47 CISG

69 Contrary to CLAIMANT's allegation [CF. MEMORANDUM FOR CLAIMANT, P. 20 PARA. 75], Mr. Long's statement cannot be understood as the fixing of an additional period in terms of Art. 47 CISG.

70 First, CLAIMANT's confirmation of the new delivery date was not explicit enough to qualify as a demand for performance in terms of Art. 47 CISG. In order to constitute a valid basis for a serious remedy such as the avoidance of a contract, the buyer must warn the seller that a definite deadline to perform has been fixed [DIPALMA, P. 30; HONNOLD, ART. 47 PARA. 289; WILL IN BIANCA/BONELL, ART. 47 PARA. 2.1.3.1.]. The notice has to be expressed so clearly that any reasonable seller would understand that the new date is his final chance to deliver [WILL IN BIANCA/BONELL, ART. 47 PARA. 2.1.3.1.; HONNOLD, ART. 47 PARA. 289]. CLAIMANT, by contrast, did not give RESPONDENT a warning or notice of any kind, but merely confirmed the new delivery date [CF. CLAIMANT'S EXHIBIT NO. 2, P. 14]. This confirmation

was not explicit enough to be understood as the fixing of an additional period in terms of Art. 47 CISG.

71 Second, CLAIMANT could not have fixed an additional period for RESPONDENT to perform on 9 February 2011. The buyer may effectively fix an additional period of time for delivery only if the contractually determined delivery date has already passed [MÜLLER-CHEN IN SCHLECHTRIEM/SCHWENZER, ART. 47 PARA. 11; HERBER/CZERWENKA, ART. 47 PARA. 5]. On 9 February 2011, *i.e.* ten days before the original delivery date, CLAIMANT thus could not have fixed an additional period for RESPONDENT to perform.

72 Concluding, a reasonable third person in the same circumstances as RESPONDENT would have understood that Mr. Long did not fix an additional period for RESPONDENT to perform in terms of Art. 47 CISG.

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73 **Result of Issue 3**: The Arbitral Tribunal is respectfully requested to find that Mr. Long agreed to amend the contractual delivery date due to his wording, the circumstances in which he made his statement and CLAIMANT's later conduct. Consequently, Mr. Long cannot be understood as having fixed an additional period for RESPONDENT to perform in terms of Art. 47 CISG.

ARGUMENT REGARDING THE ISSUE OF CHILD LABOR

ISSUE 4: CLAIMANT IS NOT ENTITLED TO AVOID THE CONTRACT AND CLAIM DAMAGES

74 The polo shirts delivered by RESPONDENT were in perfect condition. Yet, CLAIMANT attempts to avoid the contract by alleging that the polo shirts were not saleable on the Oceanian market [MEMORANDUM FOR CLAIMANT, P. 22 ET SEQQ. PARA. 87 ET SEQQ.]. It relies on media coverage in Oceania which accused RESPONDENT of using child labor in a production site which was not even involved in the production of the contractually owed polo shirts [CF. STATEMENT OF CLAIM, P. 8 PARA. 18 ET SEQQ.]. CLAIMANT, however, is neither entitled to avoid the contract pursuant to Art. 49(1)(a) CISG nor to claim damages under Art. 45(1)(b) CISG since the delivered goods were in conformity with Art. 35 CISG [**A**]. In any case, the breach of contract could not be considered as fundamental in terms of Art. 25 CISG [**B**].

A. The use of child labor in a plant which was not involved in the production of the polo shirts does not constitute a breach of contract pursuant to Art. 35 CISG

75 Contrary to CLAIMANT's allegations [CF. MEMORANDUM FOR CLAIMANT, P. 23 ET SEQQ. PARA. 88 ET SEQQ.], RESPONDENT breached the contract neither under Art. 35(1) CISG [**I**] nor under Art. 35(2)(b) CISG [**II**].

I. RESPONDENT did not breach the contract pursuant to Art. 35(1) CISG

76 CLAIMANT contends that RESPONDENT violated Clause 12 of the contract by employing children and thus failed to deliver goods conforming to the quality required by the contract pursuant to Art. 35(1) CISG [MEMORANDUM FOR CLAIMANT, P. 25 PARA. 99 ET SEQQ.]. Clause 12 states that "*[it] is expected that all suppliers to Oceania Plus Enterprises or one of its subsidiaries will adhere to the policy of Oceania Plus Enterprises that they will conform to the highest ethical standards in the conduct of their business*" [CLAIMANT'S EXHIBIT NO. 1, P. 12 PARA. 12].

77 RESPONDENT did not breach the contract pursuant to Art. 35(1) CISG since Clause 12 does not constitute a contractual obligation for RESPONDENT [**1**]. Even if Clause 12 were to be interpreted as a contractual obligation, the use of child labor in a plant not involved in the

production of the goods does not constitute a breach since Clause 12 applies only to the production of the contractually owed polo shirts [**2**]. In any case, the use of child labor does not constitute a physical defect and hence cannot cause non-conformity of the polo shirts under Art. 35(1) CISG [**3**].

1. Clause 12 does not impose a contractual obligation on RESPONDENT

78 Contrary to CLAIMANT's allegations [CF. MEMORANDUM FOR CLAIMANT, P. 23 ET SEQ. PARA. 92 ET SEQQ.], Clause 12 does not constitute a contractual obligation for RESPONDENT either by itself [**a**], or in connection with the policy of Oceania Plus [**b**].

a) Clause 12 itself does not impose any contractual obligation on RESPONDENT

79 CLAIMANT alleges that already Clause 12 itself obliged RESPONDENT to conform to "*the highest ethical standards*" [CF. ID.]. However, an interpretation under Art. 8(2) CISG reveals that Clause 12 does not state a contractual obligation.

80 First, the wording of Clause 12 indicates that this clause is merely a value proposition. A value proposition is an expression of the company's core beliefs which are used to connect and identify with customers [OXFORD DICTIONARY/VALUE PROPOSITION]. Obligations under a contract are usually expressed with *shall* or *is to be* [TIERSMA, P. 104 ET SEQQ., ROSSINI, P. 15; BROWN/RICE, P. 42]. Accordingly, the Parties' contract strictly uses explicit expressions such as *shall* and *is to be* to distinguish contractual obligations [CF. CLAIMANT'S EXHIBIT NO. 1, P. 12 ET SEQ.]. Yet, suppliers to CLAIMANT are merely "*expected*" to adhere to Oceania Plus' policy.

81 Second, Clause 12 is too vague to impose an obligation on RESPONDENT. However, to secure legal certainty, the content of an obligation must be ascertainable [OGH, 10 NOV 1994; SCHROETER IN SCHLECHTRIEM/SCHWENZER (G), ART. 14 PARA. 10; BRUNNER, ART. 14 PARA. 4]. Clause 12 expects all suppliers to CLAIMANT to adhere to "*the highest ethical standards*". Ethical standards, however, are not a universal set of standards that apply to any sales contract [CF. SCHLECHTRIEM, NON-MATERIAL DAMAGES, P. 97 ET SEQ.]. Different cultures have different principles and values [PITTA/FUNG/ISBERG, P. 241; BAKER, P. 12; ATLAS, P. 1]. Hence, Clause 12 does not sufficiently define which conduct of CLAIMANT's suppliers does or does not comply with Oceania Plus' policy. Consequently, any conduct of

RESPONDENT could be construed as a breach of Clause 12 and an assumption of a breach of contract would thus be arbitrary.

82 In conclusion, both the wording and the circumstances reveal that Clause 12 is intended only to communicate Oceania Plus' values. Therefore, a reasonable person in terms of Art. 8(2) CISG would not have understood Clause 12 as a contractual obligation.

b) Clause 12 does not impose a contractual obligation on RESPONDENT in connection with the policy of Oceania Plus

83 CLAIMANT further relies on the one page policy of Oceania Plus and asserts that Clause 12 incorporated this document into the contract [CF. MEMORANDUM FOR CLAIMANT, P. 24 PARA. 94 ET SEQ.]. The policy of Oceania Plus are standard terms since they are to be used in all contracts with CLAIMANT [PROCEDURAL ORDER NO. 2, P. 52 PARA. 4]. However, the policy never became part of the Parties' contract:

84 First, in order to be validly incorporated, standard terms have to be handed over before the conclusion of the contract [LG TRIER, 8 JAN 2004; PILTZ, STANDARD TERMS, P. 234]. CLAIMANT, however, did not hand over its policy to RESPONDENT before they concluded their contract on the production of the polo shirts [CF. PROCEDURAL ORDER NO. 2, P. 52 PARA. 4].

85 Second, CLAIMANT may not argue that RESPONDENT had to be aware of the content of its policy due to their earlier business relations. Even in long standing business relations, a party cannot reasonably expect the counterparty to still be aware of its standard terms if their last incorporation into a contract dates back more than two years [SCHROETER IN SCHLECHTRIEM/SCHWENZER, ART. 14 PARA. 52]. Before the present contract, concluded in 2011, the last contract between CLAIMANT and RESPONDENT was signed in 2008. Hence, the last incorporation of the standard terms dates back three years. Therefore, even if the Parties' business relation qualified as a long standing business relation, RESPONDENT could still not be reasonably expected to know Oceania Plus' policy. Thus, Oceania Plus' policy by no means included into the contract.

86 Summarizing, neither Clause 12 nor the policy of Oceania Plus imposed a contractual obligation on RESPONDENT to abstain from the use of child labor.

2. Alternatively, Clause 12 applies only to the production of the polo shirts

87 Even if the Arbitral Tribunal were to find that Clause 12 obliged RESPONDENT to refrain from the use of child labor, such obligation prohibited RESPONDENT from using child labor only in the production of the contractually owed goods, but not, as CLAIMANT alleges, in its entire business [CF. MEMORANDUM FOR CLAIMANT, P. 24 ET SEQ. PARA. 96 ET SEQQ.]. CLAIMANT asserts that Clause 12 is to be understood as applying to RESPONDENT's entire business since it expects all suppliers of CLAIMANT to conform to the highest ethical standards "*in the conduct of their business*" [ID.]. An interpretation of Clause 12, however, reveals that it applies only to the production of the polo shirts:

88 First, assuming that Clause 12 was designed to incorporate Oceania Plus' policy into CLAIMANT's contracts [CF. MEMORANDUM FOR CLAIMANT, P. 24 PARA. 94], the obligations imposed by Clause 12 could not be more severe than those imposed by the policy itself. This policy contains standards which are "*to be complied with <u>in the production of the goods</u>*" [PROCEDURAL ORDER NO. 2, P. 52 PARA. 4; EMPHASIS ADDED]. Hence, the policy and thus Clause 12 set standards only to the manufacturing process of the contractually owed goods, but not beyond it.

89 Second, it would be unreasonable to interpret Clause 12 as applying to RESPONDENT's entire business as this would create incalculable liability risks. If read as CLAIMANT's asserts [CF. MEMORANDUM FOR CLAIMANT, P. 24 ET SEQ. PARA. 96 ET SEQQ.], RESPONDENT could be held liabl as soon as somewhere in the course of its entire business, even in its suppliers' businesses, *unethical* methods would be used. Since it is impossible for a company to control each and every one of its suppliers, the liability risks would be incalculable. Therefore, a reasonable person in RESPONDENT's shoes would not have interpreted Clause 12 as reaching beyond the production of the polo shirts.

90 In any case, Clause 12 does not apply to RESPONDENT's entire business due to the principle of *contra proferentem*. According to this principle, ambiguous clauses are to be construed against the party that imposed its inclusion in the contract [OLG FRANKFURT, 31 MAR 1995; OLG CELLE, 24 MAY 1995; HONNOLD/FLECHTNER, ART. 8 PARA. 107.1; SCHLECHTRIEM IN SCHLECHTRIEM/SCHWENZER, ART. 8 PARA. 49]. Since CLAIMANT introduced Clause 12 in the contract [CF. PROCEDURAL ORDER NO. 2, P. 52 PARA. 4], it bears the risk of ambiguity. Clause 12 does not explicitly state that it applies to RESPONDENT's entire business but is at best unclear. Hence, the principle of *contra proferentem* requires it to be understood as encompassing only the production of the polo shirts.

91 In conclusion, even if Clause 12 obliged RESPONDENT to refrain from the use of child labor, this obligation prohibits RESPONDENT to use child labor only in the production of the contractually owed polo shirts.

3. In any case, the use of child labor does not constitute a physical defect and thus cannot cause non-conformity of the contract under Art. 35(1) CISG

92 Even if Clause 12 obliged RESPONDENT not to use child labor in any of its production facilities, the use of child labor still does not constitute a breach of contract pursuant to Art. 35(1) CISG.

93 Art. 35 CISG is designed to establish which requirements the seller has to meet in order to fulfil its obligation in relation to the physical conformity of the goods [BENICKE IN MÜNCHKOMM HGB, ART. 35 PARA. 1; SAENGER IN BAMBERGER/ROTH, ART. 35 PARA. 2; MAGNUS IN STAUDINGER, ART. 35 PARA. 1; GRUNEWALD, P. 139; MAGNUS IN HONSELL, ART. 35 PARA. 3]. Hence, only physical and tangible defects can cause non-conformity of the goods under Art. 35(1) CISG.

94 Arts. 38, 39 CISG confirm this interpretation. Pursuant to these provisions, the buyer may not rely on a lack of conformity if it did not examine the goods properly and thus did not give notice to the seller of the non-conformity in due time. Arts. 38, 39 CISG thereby presuppose that by examining the goods any potential non-conformity can be detected [CF. GRUNEWALD, P. 139]; else examining the goods would be a futile exercise for the buyer. By means of an examination, however, only features that are tangible and *attached* to the goods can be detected. Thus, Arts. 38, 39 CISG confirm that only physical and tangible quality features can be part of the quality in terms of Art. 35(1) CISG.

95 However, the use of child labor in a plant which was not involved in the production of the goods is by no means a physical or tangible characteristic of the polo shirts. Consequently, it cannot constitute a quality feature in terms of Art. 35(1) CISG.

96 Summarizing, since the quality of the polo shirts conforms to the quality required by the contract RESPONDENT did not breach the contract pursuant to Art. 35(1) CISG.

II. RESPONDENT did not breach the contract under to Art. 35(2)(b) CISG

97 CLAIMANT further alleges that the use of child labor in one of RESPONDENT's production facilities constituted a breach of contract pursuant to Art. 35(2)(b) CISG as the polo shirts were unsalable in Oceania [MEMORANDUM FOR CLAIMANT, P. 25 ET SEQQ.

PARA. 103 ET SEQQ.]. According to Art. 35(2)(b) CISG, the goods do not conform to the contract if they are not "*fit for any particular purpose […] made known to the seller at the time of the conclusion of the contract, except where the circumstances show that […] it was unreasonable for the buyer to rely on the seller's skill and judgement*".

98 RESPONDENT, however, did not breach the contract pursuant to Art. 35(2)(b) CISG since Art. 35(2)(b) CISG does not apply in the case at hand [**1**]. Alternatively, CLAIMANT could not have relied on RESPONDENT's skill and judgment to know the Oceanian consumer conviction [**2**].

1. Art. 35(2)(b) CISG is not applicable

99 Only where the parties did not sufficiently determine the quantity, quality and description required in the contract, Art. 35(2)(b) CISG applies [SCHWENZER IN SCHLECHTRIEM/SCHWENZER, ART. 35 PARA. 12; BENICKE IN MÜNCHKOMM HGB, ART. 35 PARA. 7; FERRARI IN FERRARI/KIENINGER/MANKOWSKI, ART. 35 PARA. 11]. According to Clause 1 of the contract, the Parties agreed that "*the quality, size and colors [of the polo shirts] are to be as described in Annex 1*" [CLAIMANT'S EXHIBIT NO. 1, P. 12 PARA. 1]. Annex 1 of the contract described in detail the physical quality of the polo shirts [PROCEDURAL ORDER NO. 2, P. 52 PARA. 9]. Therefore, CLAIMANT cannot base its case on Art. 35(2)(b) CISG.

2. CLAIMANT could not rely on RESPONDENT's skill and judgment to know the Oeanian consumer conviction

100 In case the Arbitral Tribunal decided that Art. 35(2)(b) CISG was in fact applicable, the use of child labor in one of RESPONDENT's plants still would not amount to a breach of contract pursuant to Art. 35(2)(b) CISG. Even if one were to assume that due to the highly ethical consumer conviction in Oceania the polo shirts were unfit for their particular purpose of resale in Oceania in that country, CLAIMANT could not reasonably rely on RESPONDENT's skill and judgment to know of this particular conviction in Oceania.

101 CLAIMANT transfers the standards developed for public law requirements to the present scenario [CF. MEMORANDUM FOR CLAIMANT, P. 28 PARA. 116]. However, whereas public law requirements can be easily looked up, a consumer conviction cannot be ascertained by reasonable efforts. Therefore, the Arbitral Tribunal should apply even stricter standards in the

case at hand and thus find that RESPONDENT could by no means be expected to know of the consumer conviction in Oceania.

102 Nevertheless, even if the Arbitral Tribunal were to find that consumer convictions and public law regulations were comparable, CLAIMANT could not reasonably rely on RESPONDENT's skill and judgment. It is commonly acknowledged that the seller cannot be expected to know the public law requirements of the destination country [BGH, 2 MAR 2005; OGH, 27 FEB 2003; OGH, 19 APR 2007; AUDIENCIA PROVINCIAL DE GRANADA, 2 MAR 2000; FEDERAL DISTRICT COURT (LOUISIANA), 17 MAY 1999; STUMPF IN CAEMMERER/SCHLECHTRIEM, ART. 35 PARA. 26 ET SEQ.; ENDERLEIN/MASKOW, P. 144]. Only in three cases, the buyer may rely on the seller's skill and judgment to know the regulations: if the buyer has made the seller aware of these regulations, if the seller has regularly been selling goods to the destination country or if the public law regulations are the same in both relevant countries [BGH, 8 MAR 1995; OGH, 13 APR 2000; High Court of New Zealand, 30 Jul 2010; HENSCHEL, P. 201]. Applying these standards to the Oceanian consumer conviction, CLAIMANT could not reasonably rely on RESPONDENT to know of this conviction, as none of said exceptions apply:

103 First, CLAIMANT never informed RESPONDENT about the specific consumer conviction in Oceania. It was merely understood that the polo shirts were destined for sale in Oceania [PROCEDURAL ORDER NO. 2, P. 53 PARA. 15].

104 Second, RESPONDENT does not export to Oceania on a regular basis. RESPONDENT has never exported goods to Oceania itself [PROCEDURAL ORDER NO. 2, P. 53 PARA. 15]. It has supplied goods destined for Oceania only in three previous contracts [ID.]. Hence, RESPONDENT does not export to Oceania on a regular basis [CF. HUTTER, 46 ET SEQ.].

105 Third, the consumer convictions in Equatoriana and Oceania are not comparable. There are no indications that the public in Equatoriana would have reacted in a comparably sensitive way to the allegation of child labor as the public in Oceania did. Rather, the use of child labor is not uncommon in Equatoriana's region [CF. STATEMENT OF DEFENSE, P. 35 PARA 3]. Thus, the consumer convictions in both countries cannot be deemed the same.

106 Concluding, CLAIMANT could not expect RESPONDENT to be aware of the consumer conviction in Oceania. Therefore, CLAIMANT could not reasonably rely on RESPONDENT's skill and judgment and RESPONDENT thus did not breach the contract under Art. 35(2)(b) CISG.

B. In any case, RESPONDENT's breach of contract is not fundamental in terms of Art. 25 CISG

107 Even if the Arbitral Tribunal were to find that the use of child labor constituted a breach of contract, CLAIMANT may not avoid the contract pursuant to Art. 49(1) CISG. An aggrieved party is entitled to avoid the contract only if the breach is fundamental in terms of Art. 25 CISG. According to Art. 25 CISG, a breach of contract is fundamental "*if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*".

108 The use of child labor in one of RESPONDENT's plants, however, does not substantially deprive CLAIMANT of what it was entitled to expect under the contract **[I]**. Alternatively, RESPONDENT could not have foreseen the consequences of its use of child labor **[II]**.

I. RESPONDENT's use of child labor does not substantially deprive CLAIMANT of what it was entitled to expect under the contract

109 Contrary to CLAIMANT's allegations [CF. MEMORANDUM FOR CLAIMANT, P. 31 ET SEQQ. PARA. 134 ET SEQQ.], RESPONDENT's employment of children does not substantially deprive CLAIMANT of what it was entitled to expect under the contract. The avoidance of the contract constitutes a remedy of last resort [BGH, 3 Apr 1996; BG, 15 Sep 2000; HUBER, P. 17 ET SEQ.; KREBS, P. 20 ET SEQ.]. Therefore, the aggrieved party is substantially deprived of what it was entitled to expected under the contract only if it cannot be reasonably expected to continue with the contract [BJÖRKLUND IN KRÖLL/MISTELLIS/VISCASILLAS, ART. 25 PARA. 15; MAGNUS, P. 424; FERRARI, FUNDAMENTAL BREACH, P. 507]. This, however, cannot be assumed in the case at hand:

110 First, CLAIMANT's behavior prior to the conclusion of the contract reveals that it did not attach substantial importance to RESPONDENT adhering to ethical standards under the given circumstances. Since 2008, CLAIMANT has not contracted with RESPONDENT because of suspicions that RESPONDENT might be connected to child labor [PROCEDURAL ORDER NO. 2, P. 52 PARA. 5]. Therefore, CLAIMANT would have most likely not contracted with RESPONDENT without an additional audit if it had not been for the rush order [PROCEDURAL ORDER NO. 2, P. 51 PARA. 2]. Similarly, CLAIMANT chose RESPONDENT over two other

suppliers because RESPONDENT offered the cheapest price. This reveals that money and timely delivery of the polo shirts were of greater importance to CLAIMANT than RESPONDENT's compliance with its ethical standards.

111 Second, since the CISG applies to commercial contracts only [CF. ART. 2(A) CISG], salability of the goods is the core objective of each contract governed by the Convention. Hence, a buyer is not deprived of what it was entitled to expect under the contract if it is able to resell the goods without incurring any unreasonable differences, even at a give a way price [BGH, 3 APR 1996; BG, 28 OCT 1998; OLG KÖLN, 14 OCT 2002; OLG STUTTGART, 12 MAR 2001; SCHROETER IN SCHLECHTRIEM/SCHWENZER, ART. 25 PARA. 52; GRUBER IN MÜNCHKOMM, ART. 25 PARA. 23; FERRARI IN FERRARI/KIENINGER/MANKOWSKI, ART. 25 PARA. 18]. In the present case, CLAIMANT was able to resell the polo shirts at almost no loss to Pacifica Trading [CF. STATEMENT OF CLAIM P. 9 PARA. 24]. While no-one needs to resell goods if it is unreasonably burdensome [CF. SCHROETER IN SCHLECHTRIEM/SCHWENZER, ART. 25 PARA. 54; BRIDGE, P. 568 PARA. 12.25], this excuse is not available to CLAIMANT. In its regular course of business CLAIMANT is a wholesaler of clothes [CF. STATEMENT OF CLAIM, P. 6 PARA. 7]. Its field of function may in principle be restricted to the sale within the Oceania Plus group [PROCEDURAL ORDER NO. 2, P. 51 PARA. 1]. However, CLAIMANT could have resold the polo shirts to Oceania Plus' retailer in Pacifica where child labor is not a major issue [PROCEDURAL ORDER NO. 2, P. 54 PARA. 20]. Furthermore, the mere fact that CLAIMANT did resell the polo shirts at a later stage [STATEMENT OF CLAIM, P. 9 PARA. 24] reveals that it was not unreasonable burdensome for it to resell the polo shirts to Pacifica Trading.

112 Therefore, the Arbitral Tribunal is respectfully requested to find that the use of child labor did not substantially deprive CLAIMANT of what it was entitled to expect under the contract.

II. In any case, a reasonable person in RESPONDENT's shoes could not have foreseen the consequences of the use of child labor in one of RESPONDENT's plants

113 According to Art. 25 CISG, a breach cannot be seen as fundamental if "*the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*". Contrary to what CLAIMANT alleges [CF. MEMORANDUM FOR CLAIMANT, P. 34 ET SEQ. PARA. 153 ET SEQQ.], a reasonable person in RESPONDENT's shoes could not have foreseen that the use of child labor in one of RESPONDENT's plants deprives CLAIMANT of what it was entitled to expect under the contract.

114 First, under the given circumstances, a reasonable person in RESPONDENT's could not have been aware of the substantial importance CLAIMANT attached to the adherence to Clause 12. Unlike in 2008, CLAIMANT neither conducted an audit of RESPONDENT's business [PROCEDURAL ORDER NO. 2, P. 51 PARA. 2] nor did it hand out Oceania Plus' policy to RESPONDENT [CF. PROCEDURAL ORDER NO. 2, P. 52 PARA. 4]. Further, while the policy was extensively discussed between the Parties in 2008, the issue of ethical standards was not addresses at all in the present case [CF. ID.]. Hence, a reasonable third person would not have understood the adherence to ethical standards as fundamental to CLAIMANT.

115 Second, a reasonable third person could not have foreseen that the Oceanian consumers would boycott the polo shirts as a consequence of the two media reports [CF. STATEMENT OF CLAIM, P. 8 PARA. 20]. A number of 175 states have ratified the International Labour Organization's Convention on the worst forms of child labor [LIST OF RATIFICATIONS]. Hence, most countries are dedicated to the fight against child labor. Nonetheless, several other clothing retailers have been accused of using suppliers engaging in child labor without causing comparable reactions in the public [CF. THE OBSERVER, ADIDAS; THE GUARDIAN, GAP; THE INDEPENDENT, WALMART; STATISTA/ADIDAS.COM; STATISTA/GAP.COM; STATISTA/WALMART.COM].

116 Summarizing, RESPONDENT could not have foreseen that the use of child labor in one of its production sites deprived CLAIMANT of what it was entitled to expect under the contract. Therefore, even if the Arbitral Tribunal were to find that RESPONDENT breached the contract by employing children in of its plant, this breach is not fundamental in terms of Art. 25 CISG. Consequently, CLAIMANT is not entitled to avoid the contract pursuant to Art. 49(1)(a) CISG.

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117 **Result of Issue 4**: RESPONDENT's use of child labor in a plant not involved in the production of the polo shirts does not constitute a breach of contract pursuant to Art. 35 CISG. Alternatively, RESPONDENT's breach of contract cannot be considered fundamental in terms of Art. 25 CISG. Consequently, CLAIMANT is neither entitled to avoid the contract pursuant to Art. 49(1)(a) CISG nor to claim damages under Art. 74 CISG.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to declare that:

- The witness statement of Mr. Short is admissible and will be considered by the Arbitral Tribunal **[Issue 1]**.
- An oral amendment is valid under the rules and laws governing the contract **[Issue 2]**.
- Mr. Long's statement reveals that the Parties agreed to amend the delivery date in the Contract **[Issue 3]**.
- RESPONDENT delivered goods that were in full conformity with the contract. Consequently, CLAIMANT is not entitled to avoid the contract and claim damages **[Issue 4]**.

On these grounds the Arbitral Tribunal is respectfully requested to dismiss all of CLAIMANT's claims and declare that CLAIMANT shall bear the costs of this arbitration pursuant to Art. 42(1) CEAC Rules.

Freiburg im Breisgau, 17 January 2013

Lukas Gerhardinger • Anselm Gripp

Till Maier-Lohmann • Marcel Rogg • Alix Schulz

Jakob Stachow • Henry Suntheim

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Our university is competing in both Vis East Moot and Vienna Vis Moot. We submit two separately prepared, different Memoranda.

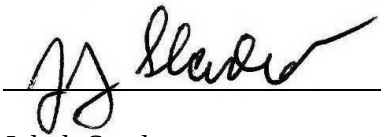
Lukas Gerhardinger

Anselm Gripp

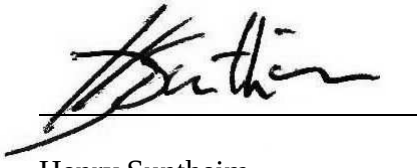
Till Maier-Lohmann

Marcel Rogg

Alix Schulz



Jakob Stachow



Henry Suntheim