TENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF BASEL

FACULTY OF LAW

On behalf of	Against
Mediterraneo Exquisite Supply, Co.	Equatoriana Clothing Manufacturing, Ltd.
45 Commerce Road	286 Third Avenue
Capital City, Mediterraneo	Oceanside, Equatoriana
- CLAIMANT -	**- RESPONDENT -**

CHRISTOPH BURCKHARDT ◆ NICOLE FREY ◆ SOPHIE HOLDT ◆ MERET REHMANN

CHRISTIAN SCHLUMPF ◆ MADELEINE SCHREINER ◆ JAKOB STEINER ◆ ANDREA VOËLIN

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A.C.	Appeal Cases (United Kingdom)
a. M.	am Main
AppGer	Appellationsgericht (Swiss Court of Appeals)
Arb Int'l	Arbitration International
Art(s).	Article(s)
ASA Bull	Swiss Arbitration Association Bulletin
BGer	Bundesgericht (Swiss Supreme Court)
BGH	Bundesgerichtshof (German Supreme Court)
CA	Court of Appeals
Cam. Arb.	Camera arbitrale (Italian Court of Arbitration)
Cass. Com.	Cour de cassation, chambre civile, section commerciale (Commercial Chamber of the French Court of Cassation)
CC	Chamber of Commerce
CEAC	Chinese European Arbitration Center
CEAC Rules	Arbitration Rules of the Chinese European Arbitration Center
cf.	confer (compare)
CIETAC	Chinese International Economic & Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG-AC	CISG Advisory Council
CISG-online	CISG Database (http://www.cisg-online.ch)
Cl. Exh.	Claimant's Exhibit
Co.	Company
Corp.	Corporation
D.C.	District of Columbia
E.D. Pa.	Eastern District of Pennsylvania
ed(s).	editor(s)
et al.	*et alii/et aliae* (and others)
et seq.	*et sequens/et sequentes* (and the following)
FAS	Free Alongside Ship
Fordham Int'l L J	Fordham International Law Journal

HK	Handelskammer (Chamber of Commerce)
H.L.	House of Lords
i.e.	*id est* (that is)
IBA	International Bar Association
IBA Rules	IBA Guidelines on the Taking of Evidence in International Arbitration of 29 May 2010
ICC	International Chamber of Commerce
ICC Award	Arbitral Award of the ICC Court of Arbitration
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
ILO Convention	Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999
Inc.	Incorporated
Int. Ct. Russian CCI	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
Int'l Bus L J	International Business Law Journal
Int'l Rev L	International Review of Law
Int'l Trade & Bus L Rev	International Trade and Business Law Review
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
JCC	Journal of Corporate Citizenship
J Int'l Arb	Journal of International Arbitration
J L & Com	Journal of Law and Commerce
LG	Landgericht (German Regional Court)
LL.M.	Master of Laws
Ltd.	Limited
Mealey's Int'l Arb Rep	Mealey's International Arbitration Report
MünchKommBGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
MünchKommHGB	Münchener Kommentar zum Handelsgesetzbuch
No.	Number
NYC	1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

OGH	Oberster Gerichtshof (Austrian Supreme Court of Justice)
OLG	Oberlandesgericht (German Regional Court of Appeals)
p.	page
Pace Int'l L Rev	Pace International Law Review
para(s).	paragraph(s)
PICC	UNIDROIT Principles of International Commercial Contracts (2004)
PO	Procedural Order
RB	Rechtbank van Koophandel (Belgian Regional Court)
Rep.	Republic
Rsp. Exh.	Respondent's Exhibit
S.D. Fla.	Southern District of Florida
SoC	Statement of Claim
SoD	Statement of Defense
Sup. Ct. Poland	Supreme Court of Poland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985, with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States
U.S. Dist. Ct.	United States District Court
USD	United States Dollar
v.	versus
Vict U Well L Rev	Victoria University of Wellington Law Review
ZGer	Zivilgericht (Swiss Regional Court)

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STATEMENT OF FACTS

THE PARTIES

1 **CLAIMANT: Mediterraneo Exquisite Supply, Co.** (hereinafter "CLAIMANT") is registered and managed in the country of Mediterraneo. It is a subsidiary of Oceania Plus Enterprises on behalf of which it contracts with clothing manufacturers.

2 **RESPONDENT: Equatoriana Clothing Manufacturing, Ltd.** (hereinafter "RESPONDENT") is a manufacturer of polo shirts registered in Equatoriana.

3 **Oceania Plus Enterprises** (hereinafter "Oceania Plus") is one of CLAIMANT'S two parent companies. It is a large multinational group located in Oceania supplying leisure clothing. It is generally known for its high ethical standards and participates in the UN Global Compact, a prominent private initiative establishing ethical standards for the conduct of businesses.

4 **Doma Cirun** is a retail clothing chain registered in Oceania, owned by Oceania Plus. In the winter of 2011, its manufacturer of polo shirts went bankrupt and it contacted CLAIMANT to find a substitute manufacturer that could deliver the required polo shirts in time for the summer selling season 2012.

THE SALES CONTRACT

5 On **5 January 2011**, CLAIMANT entered into a sales contract (hereinafter the "Sales Contract") with RESPONDENT to order 100,000 polo shirts FAS INCOTERMS®2010 Oceanside, Equatoriana, for the price of USD 550,000. The contractual delivery date was **19 February 2011**. CLAIMANT informed RESPONDENT that this was the last possible day for delivery in order to get the goods to the retail stores of CLAIMANT'S customer Doma Cirun in time. To reinforce the importance of timely delivery, the parties agreed on an incentives clause providing for a deduction of the contract price of 1% per day late. CLAIMANT arranged for the shipping and issued a letter of credit in favor of RESPONDENT. The Sales Contract further provided that RESPONDENT would adhere to the policy of Oceania Plus and conform to the highest ethical standards in its business.

THE FACTS

6 On **7 January 2011**, CLAIMANT resold the polo shirts to be delivered by RESPONDENT to Doma Cirun. On **9 February 2011**, Mr. Tomas Short, RESPONDENT'S Contracting Officer, called Mr. Russell Long, CLAIMANT'S Procurement Specialist, to inform him that RESPONDENT could not deliver the polo shirts in time but only by **24 February 2011**, because of a strike at one of its suppliers. Mr. Long reiterated the importance of the delivery date, but

it became clear that timely delivery was impossible. Mr. Long undertook to make arrangements to allow for shipment on 24 February 2011.

7 On **20 March 2011**, five days late for the beginning of the summer selling season, the polo shirts arrived in the Doma Cirun retail stores in Oceania.

8 On **5 April 2011**, Channel 12 Television broadcasted a documentary showing children as young as eight working in appalling conditions in one of RESPONDENT'S production facilities. In reaction to this documentary, demonstrations erupted at Doma Cirun stores throughout Oceania and continued for the following two weeks. Following this broadcast, Oceania's leading newspaper published an investigative article concerning the use of child labor in the supply chains of leading firms. Consequently, the sales in the Doma Cirun stores dropped substantially and there were almost no sales of the polo shirts.

9 On **8 April 2011**, Doma Cirun notified CLAIMANT that it avoided their contract due to the use of child labor. CLAIMANT itself immediately avoided the Sales Contract with RESPONDENT and asked it to make arrangements for the disposal of the unsold stock. RESPONDENT refused to take back the polo shirts. Hence, CLAIMANT was forced to dispose of the polo shirts by itself and sold the remaining 99,000 polo shirts to Pacifica Trading Co.

10 On **15 September 2011**, Doma Cirun initiated arbitration proceedings against CLAIMANT resulting in a settlement agreement in the amount of USD 850,000. Furthermore, Oceania Plus held CLAIMANT liable for damages in the amount of USD 700,000 it had to pay to several investors. Consequently, on **1 July 2012** CLAIMANT submitted its application for arbitration against RESPONDENT.

THE APPLICABLE LAW

11 With regard to the arbitral procedure, in their arbitration clause the parties chose the Arbitration Rules of the Chinese European Arbitration Centre (hereinafter "CEAC Rules") and Danubia as seat of their arbitration. Danubia enacted the UNCITRAL Model Law on International Commercial Arbitration (hereinafter "UNCITRAL ML") with the 2006 amendments as *lex loci arbitri*.

12 With regard to the merits of the disputes, the parties chose the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG" or the "Convention") "*without regard to any national reservation*", supplemented by the UNIDROIT Principles of International Commercial law (hereinafter "PICC") and further by national law.

13 Additionally, all states involved are members to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "NYC").

SUMMARY OF ARGUMENTS

14 In the Sales Contract two requirements were of the essence: timely delivery and compliance with the highest ethical standards. Both requirements were emphasized in specific contract clauses. Both requirements were disregarded by RESPONDENT. The breach of these obligations entitled CLAIMANT to avoid the Sales Contract and to claim damages.

15 **The Tribunal is requested not to consider Mr. Short's witness statement (ISSUE I).** Based on Mr. Short's witness statement, RESPONDENT alleges that there was no delay in delivery as the Sales Contract was amended. Mr. Short however refuses to appear at the hearing without a valid reason. Thus, CLAIMANT is not able to assess his credibility. In accordance with international practice and in order to safeguard CLAIMANT'S procedural rights, the witness statement of Mr. Short should therefore not be considered.

16 **The parties did not agree on amending the contractual delivery date (ISSUE 2).** In RESPONDENT'S phone call to inform CLAIMANT of its delay in delivery, CLAIMANT never made specific reference to the Sales Contract, but only referred to arrangements necessary to take delivery of the polo shirts despite the delay. To assume that CLAIMANT thereby amended the delivery date, thus relinquishing its remedies for RESPONDENT'S late delivery, is unreasonable.

17 **The alleged amendment is invalid due to lack of writing as required by Mediterraneo's Art. 96 declaration of (ISSUE 3).** As a matter of public policy, the parties cannot exclude the Art. 96 declaration in their contract. Mediterraneo's Art. 96 declaration requires contractual amendments to be in writing. Yet, there is no agreement to amend the contractual delivery date in writing. In summary, the contractual delivery date was not amended and RESPONDENT's delay in delivery constituted a breach of contract.

18 **RESPONDENT'S delay in delivery entitles CLAIMANT to USD 27,500 as agreed sum (ISSUE 4).** The agreed sum clause is valid. RESPONDENT is not exempted from liability under Art. 79 CISG as the strike at its supplier is encompassed by RESPONDENT'S procurement risk and it would have been able to reasonably procure substitute goods.

19 **RESPONDENT'S use of child labor entitled CLAIMANT to avoid the Sales Contract and to claim damages (ISSUE 5).** The Sales Contract required RESPONDENT to adhere to *"the highest ethical standards in the conduct of [its] business"*. Further, the polo shirts had to be fit for resale on the ethically sensitive market of Oceania. By using child labor, RESPONDENT breached both of its obligations. This breach was fundamental, as compliance with the highest ethical standards was of the essence and frustrated the purpose of the Sales Contract.

FIRST ISSUE: The Tribunal is requested not to consider Mr. Short's witness statement

20 CLAIMANT respectfully requests the Tribunal not to consider Mr. Short's witness statement because he refuses to appear for questioning at the hearing.

21 It is in dispute whether the delivery date of the Sales Contract was amended during a phone call between Mr. Short, a former employee of RESPONDENT, and Mr. Long, an employee of CLAIMANT [*SoC, p. 7, para. 13 et seq.; SoD, p. 36, paras. 7, 14*]. In his witness statement, Mr. Short describes the content of this phone call. RESPONDENT claims that in this conversation the parties agreed on amending the contractual delivery date [*SoD, p. 36, para. 14*]. Mr. Short and Mr. Long each submitted a witness statement with regard to this phone call [*Cl. Exh. 2, p. 14 et seq.; Rsp. Exh. 1, p. 37 et seq.*]. In order to question Mr. Short about his witness statement, CLAIMANT duly requested his attendance at the hearing [*PO 1, p. 48, para. 4*]. However, Mr. Short refuses to attend the hearing [*PO 1, p. 48, para. 4*].

22 Under these circumstances and in accordance with international practice, the witness statement of Mr. Short should be disregarded **(A)**. Taking Mr. Short's witness statement into consideration without CLAIMANT having the opportunity to question Mr. Short would violate CLAIMANT'S procedural rights **(B)**.

A. In accordance with international practice, Mr. Short's witness statement should be disregarded

23 Pursuant to Art. 17(1) CEAC Rules an arbitral tribunal is allowed to conduct the arbitration as it considers appropriate in matters where the CEAC Rules are silent. With regard to the taking of evidence, this discretion is further confirmed by Art. 27(4) CEAC Rules. According to this provision, the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. Mr. Presiding Arbitrator stated that the Tribunal intended to conduct the proceedings in line with international practice [*PO 2, p. 55, para. 24*]. CLAIMANT supports this intention.

24 The IBA Rules on the Taking of Evidence in International Arbitration (hereinafter "IBA Rules") are the appropriate means to conduct the evidentiary proceedings in line with international practice **(I)**. According to international practice as evidenced by the IBA Rules, Mr. Short's witness statement should be disregarded **(II)**.

I. The IBA Rules are the appropriate means to conduct the evidentiary proceedings in line with international practice

25 In exercising its discretion to conduct the arbitral procedure, the Tribunal is requested to give regard to the IBA Rules as persuasive guidelines. When referring to international practice in matters of evidentiary proceedings, arbitral tribunals regularly pay particular attention to the IBA Rules [*Glamis Gold v. United States, ICSID, 8 June 2009; Nobel Ventures v. Romania, ICSID, 12 October 2005; Railroad v. Rep. of Guatemala, ICSID, 15 October 2008*].

26 The IBA Rules are widely accepted in international arbitration as they contain an internationally recognized synthesis of common law and civil law practice regarding the presenting and obtaining of evidence [*CRAIG/PARK/PAULSSON, p. 425 et seq.; GREENBERG/KEE/WEERAMANTRY, para. 7.24*]. Even if the parties did not explicitly agree upon their applicability, they may serve as guidelines within the framework of the arbitral tribunal's discretion [*CRAIG/PARK/PAULSSON, p. 426; GREENBERG/KEE/WEERAMANTRY, para. 7.25; Weigand/WEIGAND/BAUMANN, para. 1.198; BÜHLER/DORGAN, p. 5*].

27 At hand, the Tribunal expressed its intention to conduct the proceedings in line with international practice and even invited the parties to make reference to the IBA Rules [*PO 1, p. 49, para. 10*]. Since CLAIMANT is seated in a common law country whereas RESPONDENT in a civil law country [*PO 2, p. 57, para. 36*], the application of the IBA Rules as a synthesis of both jurisdictions is an ideal compromise for both parties. Therefore, the IBA Rules are the appropriate means to conduct this evidentiary proceeding.

II. Mr. Short's witness statement should be disregarded according to international practice as evidenced by the IBA Rules

28 In accordance with international practice, Mr. Short's witness statement should be disregarded because he is not available for questioning at the hearing. In international arbitration, witness statements are generally admitted in the understanding that the witness will be available for questioning [*CRAIG/PARK/PAULSSON, p. 433; PIETROWSKI, p. 395; OETIKER, p. 257 et seq.; VON MEHREN/SALOMON, p. 288*]. Written witness statements alone are often not sufficient to assess the witness' credibility [*LÉVY, Testimonies, p. 127; SCHLAEPFER, p. 73*]. The credibility of a witness is of crucial importance for the outcome of a case because it affects the probative value given to his or her testimony by the arbitrators [*BERGER,*

para. 26-18; BÜHLER/DORGAN, p. 20]. The only way to assess a witness' credibility is to question him in front of the arbitral tribunal [*BÜHLER/DORGAN, p. 19*].

29 Accordingly, if a witness whose attendance has been requested does not appear for questioning, his or her witness statement has to be disregarded [*PETROCHILLOS, p. 222; DIMOLITSA, p. 18; LÉVY, Testimonies, p. 119; SCHNEIDER, p. 308*]. This very approach is reflected by Art. 4(7) IBA Rules stating that witness statements should be disregarded if the respective witness does not appear for questioning. An exception can only be made if the witness has a valid reason or the circumstances are exceptional.

30 In light of this practice, Mr. Short's witness statement should be disregarded because his credibility cannot be verified (**1**). Further, consideration of Mr. Short's witness statement can neither be justified by a valid reason for his absence (**2**) nor by any exceptional circumstances (**3**).

1. Mr. Short's witness statement should be disregarded as his credibility cannot be verified

31 Mr. Short's witness statement lacks credibility as it is doubtful whether Mr. Short has written the statement himself. Occasionally, witness statements are prepared by counsels and not by the witnesses themselves [*BÖCKSTIEGEL, p. 6; CRAIG/PARK/PAULSSON, p. 434; WAINCYMER, p. 899 et seq.; OETIKER, p. 256; SCHLAEPFER, p. 72 et seq.; VEEDER, Goff Lecture, p. 441*]. Thus, an arbitral tribunal cannot act on the assumption that a witness statement exclusively reflects the witness' own perception [*BHATIA/CANDLIN/GOTTI, p. 311 et seq.*; *HWANG/CHIN, p. 652 et seq.; VEEDER, Introduction, p. 7*]. Given the practice of some lawyers to influence the preparation of witness statements, it cannot be ruled out that a legal advisor of RESPONDENT at least assisted Mr. Short in drafting his witness statement. Therefore, without questioning him, it cannot be determined with certainty whether Mr. Short's witness statement exclusively reflects his own perception.

32 Even if Mr. Short did write the witness statement himself, his statement's credibility could not be guaranteed as Mr. Short was directly linked to RESPONDENT. An arbitral tribunal cannot and should not rely on the witness statement alone if the respective witness is in a special connection with a party and therefore has an interest in the outcome of the case [*REDFERN/HUNTER, para. 6.136*]. Such circumstances substantially reduce the credibility of a witness' statement [*REDFERN/HUNTER, para. 6.144; BÜHLER/DORGAN, p. 28; GÉLINAS, p. 31 et seq.*]. At the time when Mr. Short's witness statement was written, Mr. Short was not only

employed by RESPONDENT, but had already been working there for ten years [*PO 2, p. 55, para. 26; Rsp. Exh. 1, p. 37, para. 1*]. Such a long employment presupposes a relationship of mutual trust and loyalty between the employer and the employee.

33 What is more, as contracting officer responsible for the Sales Contract, Mr. Short was directly involved in the problems arising out of RESPONDENT'S delayed delivery. As an objective disclosure of the relevant facts might reveal mistakes on the part of Mr. Short, his witness statement should not be given much credibility. Summarizing, the credibility of Mr. Short cannot be evaluated merely on the basis of his witness statement.

34 For the mentioned reasons, Mr. Short has to be questioned in order to assess his credibility. Real trust in the credibility of a witness' statement is essentially established in the questioning of the respective witness [*BHATIA, p. 112*]. If a witness cannot be questioned, the arbitrators and the opposing party lose the opportunity to assess his or her credibility in a face-to-face situation [*BERGER, para. 26-18; SANDERS, p. 259; VON MEHREN/SALOMON, p. 287*]. In the case at hand, Mr. Short refuses to attend the hearing [*PO 1, p. 48, para. 4*]. As he cannot be questioned, the Tribunal and CLAIMANT cannot assess his credibility. Consequently, Mr. Short's witness statement should be disregarded.

2. There is no valid reason for Mr. Short's absence justifying the consideration of his witness statement

35 RESPONDENT is not able to bring forward a valid reason for Mr. Short's absence. While it is generally acknowledged that certain circumstances may justify the absence of a witness from a hearing, it is equally accepted that this can only be the case for objective reasons [*BORN, p. 1901; OETIKER, p. 259*]. This is also reflected in Art. 4(7) IBA Rules, which requires a "valid reason" for the witness' absence in order for an arbitral tribunal to consider a witness statement without questioning.

36 Only severe reasons such as death or serious illness constitute valid reasons which could justify considering a witness statement by way of exception [*BORN, p. 1901; LÉVY, Testimonies, p. 121; OETIKER, p. 259; ZUBERBÜHLER et al., Art. 4, para. 73*]. In other words, only circumstances similar to a *force majeure* situation, in which it is impossible for the witness to appear at the hearing constitute a valid reason [*LÉVY, Witness Statements, p. 102*]. At hand, RESPONDENT alleges that Mr. Short is not available for questioning because of a directive of his new employer, Jumpers Production, and his tight timetable [*PO 2, p. 55, para. 26*]. However, these excuses cannot be qualified as valid reasons.

37 First, RESPONDENT may not argue that the directive of Mr. Short's new employer constitutes a valid reason. Accepting a simple directive of the employer of a witness as a valid reason for his or her absence, would be an invite for potential abuse. Thus, the directive of Mr. Short's new employer does not reach the high threshold of a valid reason.

38 Second, also Mr. Short's alleged tight timetable is no valid reason. A tight timetable is not even close to a *force majeure* situation and therefore hardly an obstacle which would justify the absence of a witness [*Overseas v. RAKTA, U.S. CA, 23 December 1974*]. If working on a tight schedule was deemed sufficient to stay away from arbitral proceedings, almost no business person would ever appear for a questioning.

39 Concluding, Mr. Short's absence is not justified by a valid reason.

3. There are no exceptional circumstances justifying consideration of Mr. Short's witness statement by way of exception

40 In the present case, no exceptional circumstances justify consideration of Mr. Short's witness statement. In particular, RESPONDENT may not argue that the inability to summon Mr. Short by state court assistance does justify the consideration of his statement due to exceptional circumstances according to Art. 4(7) IBA Rules. Mr. Short's attendance cannot be compelled with state court assistance. This is due to the fact that Equatoriana does not provide for mandatory appearance of witnesses to testify in arbitral proceedings [*PO 2, p. 56, para. 28a*]. Yet, the inability to produce a witness before an arbitral tribunal is a risk inherent to any arbitral proceeding [*N.G. v. Washington Post, U.S. CA (D.C.), 20 January 1971; Overseas v. RAKTA, U.S. CA, 23 December 1974*]. Thus, by submitting their dispute to arbitration, the parties waived the possibility to compel the attendance of witnesses by assistance of Equatorianean courts. As Mr. Short is RESPONDENT'S witness, it is RESPONDENT who must bear this risk.

41 In summary, the inability to compel Mr. Short's attendance cannot justify consideration of the witness statement.

B. CLAIMANT'S procedural rights would be violated if the Tribunal considered Mr. Short's witness statement

42 CLAIMANT'S right to present its case and its right to be treated equally would be violated if the Tribunal considered Mr. Short's witness statement despite the fact that Mr. Short will not be available for questioning. Both rights constitute fundamental principles of due process and

belong to the "*Magna Carta of arbitral procedure*" [*UNCITRAL, ML Commentary, Art. 19, para. 1; BORN, p. 1765; BINDER, para. 5-004; KURKELA/TURUNEN, p. 187, Weigand/ROTH, para. 14.360;*]. Non-compliance with these rights would give grounds for setting aside an arbitral award in accordance with Art. 34(2)(a)(ii), (iv), (b) UNCITRAL ML and denying its enforcement of an award pursuant to Art. V(1)(b), (d), (2) NYC.

43 Considering Mr. Short's witness statement would violate CLAIMANT'S right to present its case **(I)** and its right to be treated equally **(II)**.

I. Taking into consideration Mr. Short's witness statement would violate CLAIMANT'S right to present its case

44 According to Art. 18 UNCITRAL ML and Art. 17(1) CEAC Rules, a party has the right to present its case. This right not only grants the opportunity of presenting the own case, but also the opportunity of dealing with the case of the opposing party [*KURKELA/TURUNEN, p. 187 et seq.; Weigand/WEIGAND/BAUMANN, para. 1.262 et seq.*]. This includes the right to question the opposing party's witnesses [*KURKELA/TURUNEN, p. 187 et seq.; WAINCYMER, p. 886; OETIKER, p. 257 et seq.*].

45 After having received Mr. Short's witness statement, CLAIMANT requested Mr. Short's attendance at the hearing in order to question him [*PO 1, p. 48, paras. 2, 4*]. However, Mr. Short refuses to attend the hearing [*PO 1, p. 48, para. 4*]. Hence, CLAIMANT is deprived of its right to question RESPONDENT'S witness. Considering Mr. Short's witness statement without CLAIMANT having the opportunity to question him would therefore violate CLAIMANT'S right to present its case.

II. Taking into consideration Mr. Short's witness statement would violate CLAIMANT'S right to be treated equally

46 Considering Mr. Short's witness statement without giving CLAIMANT an opportunity to question him would violate CLAIMANT'S right to be treated equally. Pursuant to Art. 18 UNCITRAL ML and Art. 17(1) CEAC Rules, the parties to the arbitration have to be treated equally. This right grants the parties the opportunity to equally present their case, including the right to deal with the opponent's case [*GIRSBERGER/VOSER, para. 973; Weigand/WEIGAND/BAUMANN, para. 1.262*]. In the present case, RESPONDENT will have the opportunity to question CLAIMANT'S witness Mr. Long in regard to his witness statement. In contrast, CLAIMANT will not be granted an opportunity to question Mr. Short. Unlike

RESPONDENT, CLAIMANT cannot deal with its opponent's case. Hence, considering Mr. Short's witness statement would result in an unequal treatment of CLAIMANT.

47 Moreover, even if RESPONDENT waived its right to question Mr. Long in order to restore equal treatment, considering Mr. Short's witness statement would still violate CLAIMANT'S right to be treated equally. In cases where witness statements are submitted, the written statements commonly substitute the direct examination of the party presenting the witness [*BORN, p. 1844 et seq.; GREENBERG/KEE/WEERAMANTRY, para. 7.146; MORRISSEY/GRAVES, p. 448; MOSES, p. 172 et seq.; MÜLLER, p. 65; WAINCYMER, p. 914*]. The direct examination is generally followed by the other party questioning this very witness [*BERGER/KELLERHALS, para. 1223; BORN, p. 1844; REDFERN/HUNTER, para. 6.215; VEEDER, Goff Lecture, p. 441*]. Equal treatment requires that where a party replaces the direct examination of its witness with a written witness statement, the opposing party must be given the right to examine this witness by way of questioning.

48 With regard to the present case, RESPONDENT could substitute its direct examination by submitting Mr. Short's witness statement and was thereby able to present its case. In contrast, CLAIMANT had no opportunity to deal with RESPONDENT'S case with regard to Mr. Short's witness statement. Consequently, taking Mr. Short's witness statement into consideration would in any case violate CLAIMANT'S right to be treated equally, even if RESPONDENT waived its right to question Mr. Long.

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49 **CONCLUSION OF THE FIRST ISSUE:** Mr. Short's absence at the hearing is not justified as neither the direction of his new employer nor his alleged tight timetable constitute valid reasons for his absence. Thus, in accordance with international practice as reflected in the IBA Rules, the witness statement of Mr. Short should not be taken into account. If the Tribunal nonetheless considered Mr. Short's witness statement, CLAIMANT'S right to present its case and its right to be treated equally would be violated.

SECOND ISSUE: The parties did not agree on amending the contractual delivery date

50 The Sales Contract called for the delivery of 100,000 polo shirts on 19 February 2011 [*Cl. Exh. 1, p. 12, clauses 1, 3*]. But RESPONDENT only delivered the polo shirts on 24 February 2011 [*SoC, p. 7, para. 17; Rsp. Exh. 1, p. 37, para. 3*]. It now attempts to justify its late delivery by alleging that the contractual delivery date was amended in a phone call between Mr. Short and Mr. Long on 9 February 2011 [*SoD, p. 36, para. 14*], albeit to no avail.

51 The exact content of the phone call remains unclear as neither Mr. Long nor Mr. Short remembers the wording of the entire conversation [*PO 2, p. 55, para. 27*]. The only records of the phone call are the witness statements of Mr. Short and Mr. Long. It is CLAIMANT'S primary submission that Mr. Short's witness statement should not be considered. Consequently, RESPONDENT failed to substantiate that there was an agreement to amend the contractual delivery date.

52 Even if the Tribunal were to consider Mr. Short's witness statement, a reasonable interpretation of the phone call leads to the conclusion that there was no amendment of the contractual delivery date. Pursuant to Art. 8(2) CISG, statements and other conduct 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. As will be shown, RESPONDENT merely called in order to inform CLAIMANT about the inevitable delay (**A**). In any case, CLAIMANT did not agree on amending the delivery date in the Sales Contract (**B**).

A. RESPONDENT merely called in order to inform CLAIMANT of the inevitable delay in delivery

53 A reasonable person in CLAIMANT'S situation would not have understood RESPONDENT'S statements during the phone call as a request for modification of the delivery date in the Sales Contract. Primarily, RESPONDENT does not even claim to have requested for amending the contractual delivery date. To the contrary, in Mr. Short's own words, he called Mr. Long "*to inform him of the necessary delay in delivery*" [*Rsp. Exh. 1, p. 37, para. 3*].

54 This statement is in line with RESPONDENT'S own interest and its duty to inform CLAIMANT on any changed circumstances with regard to the actual delivery date. As CLAIMANT was obliged to call for a shipping agreement according to Art. B(3)(a) of the agreed FAS INCOTERMS®2010 [*Cl. Exh. 1, p. 12, clause 2*], it had to rely on the shipping date as

provided by RESPONDENT. Furthermore, the parties agreed on a letter of credit as the means of payment [*Cl. Exh. 1, p. 12, clause 2*]. Since CLAIMANT decided to take delivery of the polo shirts despite the delay, it was obliged to issue an adjusted letter of credit. It reflects common practice that the beneficiary of a letter of credit can only receive payment if the delivery dates in the shipping agreement and the letter of credit correspond [*cf. Art. 6 lit. e Uniform Customs and Practice for Documentary Credits*]. Summarizing, CLAIMANT had to know the actual shipping date as provided by RESPONDENT, in order to call for a new shipping agreement and to accordingly adjust the letter of credit.

55 In conclusion, RESPONDENT'S conduct has to be interpreted as a mere communication regarding the delay of delivery and thus, cannot be interpreted as a request for modification of the delivery date.

B. CLAIMANT did not agree on amending the delivery date in the Sales Contract

56 It is undisputed that CLAIMANT never made any specific reference to the Sales Contract [*Cl. Exh. 2, p. 14 et seq., para. 5; PO 2, p. 55, para. 27*]. RESPONDENT bases its allegation that CLAIMANT agreed to amend the contractual delivery date merely on Mr. Long stating to "*make sure that all of the paper work reflected the new delivery date*" [*SoD, p. 35, para. 7*]. This interpretation is unreasonable since an amendment of the contractual delivery date would only be disadvantageous for CLAIMANT. In determining the reasonable understanding of a statement according to Art. 8(2) CISG, Art. 8(3) CISG provides that due consideration is to be given to all relevant circumstances of the case including the negotiations and the subsequent conduct of the parties.

57 From the beginning of the negotiations, RESPONDENT knew that it was a *"rush job"* in order to have the goods in the stores of Doma Cirun and timely delivery of the polo shirts was of the essence [*Rsp. Exh. 1, p. 37, para. 4*]. RESPONDENT even acknowledges that the contractual delivery date was the last possible date in order to have the polo shirts in the stores in time for the start of the summer selling season [*SoD, p. 35, para. 3*]. During the phone call, CLAIMANT reiterated that a delay would cause serious problems [*Cl. Exh. 1, p. 14, para. 4*]. Thus, agreeing to a later delivery date would have been unreasonable.

58 Accordingly, Clause No. 10 of the Sales Contract was drafted specifically to cover the situation of a late delivery, allowing for a price reduction of 1% of each day of delay. The parties had thus envisaged the possibility of a late delivery and made provisions for this

situation. A reasonable person would have understood that in the wording and the spirit of the Sales Contract, every day counted. To assume that CLAIMANT intended to amend the essential delivery date and hereby relinquished its right for the agreed sum in the amount of USD 27,500 for no benefit in return would be only disadvantageous and thus unreasonable.

59 Moreover, that the parties did not agree to amend the contractual delivery date is also reconfirmed by their subsequent conduct. Immediately after the phone call, Mr. Long notified Doma Cirun of the delay on behalf of RESPONDENT [*SoC, p. 7, para. 16*] and thereby mentioned that he did not waive the contractual delivery date [*Cl. Exh. 3, p. 16, para. 4*].

60 Finally, the fact that CLAIMANT took delivery of the polo shirts despite their delay does not change this understanding. As RESPONDENT informed CLAIMANT about the delay only ten days before the contractual delivery date, CLAIMANT had no possibility to contract with another supplier and thus had to maintain the contract with RESPONDENT [*Cl. Exh. 2, p. 14, para. 5*]. Consequently, CLAIMANT had to take the necessary measures by duly updating the shipping agreement and the letter of credit with the new delivery date. CLAIMANT therefore "[*made*] *sure that all of the paper work reflected the new delivery date*".

61 Under these circumstances, CLAIMANT'S statement cannot reasonably be interpreted as an agreement to amend the contractual delivery date.

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62 **CONCLUSION OF THE SECOND ISSUE:** A reasonable interpretation of the phone call leads to the conclusion that RESPONDENT merely informed CLAIMANT of the inevitable delay in delivery. In any case, CLAIMANT did not agree on an amendment of the contractual delivery date, as such an amendment would only be disadvantageous for CLAIMANT. Consequently, the parties did not agree on amending the delivery date in the Sales Contract.

THIRD ISSUE: The alleged amendment of the Sales Contract lacks writing as required by Mediterraneo's Art. 96 CISG declaration

63 Even if the Tribunal were to find that Mr. Short and Mr. Long agreed to amend the contractual delivery date during their phone call, this agreement lacks writing and therefore does not bind the parties.

64 In Arts. 11, 29(1), the CISG generally provides freedom of form in regard to contractual agreements and amendments. However, Art. 12 CISG excludes freedom of form in cases where one party is located in a Member State which has made a declaration pursuant to Art. 96 CISG. This article allows a Member State whose national law requires contracts of sale to be in writing to make a declaration excluding freedom of form under Arts. 11, 29(1) CISG. In this respect, Mediterranean law requires sales contracts and their amendments to be in writing [*PO 2, p. 56, para. 34*]. In order to safeguard its writing requirement for international sales contracts, Mediterraneo made an Art. 96 declaration [*PO 2, p. 56, para. 34*].

65 The Tribunal is requested to give effect to this declaration by requiring any amendment of the Sales Contract to be in writing. Contrary to RESPONDENT'S submission [*SoD, p. 36, para. 14*], the parties cannot validly exclude the Art. 96 declaration of Mediterraneo **(A)**. The declaration requires contract amendments to be in writing **(B)**. The update of the shipping agreement and the letter of credit does not constitute a written amendment of the Sales Contract **(C)**.

A. The parties cannot validly exclude Mediterraneo's declaration made pursuant to Art. 96 CISG

66 The parties implemented the CEAC model choice of law clause into their contract providing for the application of the CISG "*without regard to any national reservation*" [*Cl. Exh. 1, p. 13, clause 20; cf. Art. 35(1)(b) CEAC Rules*]. However, due to the mandatory character of Art. 12 CISG, the parties cannot validly exclude Mediterraneo's Art. 96 declaration.

67 The substantive law chosen by the parties governs the validity of a choice of law clause [*LANDO, p. 44*]. In the present case, the parties chose the CISG as the applicable law. Art. 12 CISG excludes freedom of form in cases where one party is located in a declaring state [*SCHROETER, p. 14*]. Art. 12 sentence 2 CISG provides that "*[t]he parties may not*

derogate from or vary the effect of this article". Thus, Art. 12 CISG is – by virtue of its own wording – mandatory and the parties cannot validly exclude Mediterraneo's Art. 96 declaration.

68 RESPONDENT may not argue that the mandatory nature of Art. 12 CISG can be disregarded in international arbitration. Even though party autonomy is a fundamental principle in international arbitration, it is not without limits [*REDFERN/HUNTER, para. 3.128*]. In particular, arbitral tribunals should give due regard to fundamental state interests affected by the proceedings [*POUDRET/BESSON, para. 706*]. Specifically, the Tribunal should respect the mandatory nature of Art. 12 CISG for the following reasons.

69 First, Art. 12 CISG safeguards fundamental public policy interests. Already during the drafting process of the CISG, it was noted that Art. 12 CISG reflects the fact that formal requirements are an "*important element of public policy*" of certain states [*Statement by Mr. Ghestin, First Committee, Summary Records, 8th meeting; cf. WANG/BASCH ANDERSEN, para. 1.2*]. In states like China, writing requirements are rooted so deeply in culture and tradition that only recently the writing requirement could be repealed [*cf. YANG, para. 1.60, 1.63*]. Yet, China still abides by its form requirement with regard to international sales contracts and has not withdrawn its declaration. The Tribunal should respect these states' public policies.

70 Second, Art. 12 CISG represents a broad international consensus. 78 states have ratified the CISG, including Equatoriana and Mediterraneo [*SoC, p. 10, para. 32*], thereby consenting to the mandatory nature of Art. 12 CISG. These Member States were only able to find common ground through the compromise of Arts. 12, 96 CISG [*cf. WINSHIP, p. 4 et seq.; Kröll/Mistelis/Perales Viscasillas/PERALES VISCASILLAS, Art. 11, para. 2*]. To ensure the effectiveness of this compromise, Art. 12 CISG was made the sole exception from the parties' possibility to derogate from provisions of the CISG under Art. 6 CISG [*MünchKommBGB/WESTERMANN, Art. 6, para. 11*]. The Arbitral Tribunal should respect this consensus.

71 Third, disregarding the mandatory nature of Art. 12 CISG could run the risk of being set aside or could render the award unenforceable. Art. 12 CISG obliges all Member States to respect Art. 96 declarations as a matter of public international law [*Kröll/Mistelis/Perales Viscasillas/PERALES VISCASILLAS, Art. 12, para. 1*]. Consequently, any award allowing the parties to disregard Mediterraneo's Art. 96 declaration would run the risk

of being set aside under Art. 34(2)(b)(ii) UNCITRAL ML or could be unenforceable according to Art. V(2)(b) NYC.

72 These considerations have also been confirmed by case law. In an unpublished award in which the parties - exactly like the parties at hand - implemented the CEAC model choice of law clause into their contract the tribunal gave effect to an Art. 96 declaration "*as a matter of Public International Law*" [*BRÖDERMANN, p. 608*]. The Tribunal is invited to follow this decision as persuasive authority. In summary, Art. 12 CISG is of vital importance as it serves public policy interests.

73 In conclusion, the Tribunal should find that the parties cannot exclude the Art. 96 declaration of Mediterraneo.

B. Mediterraneo's Art. 96 CISG declaration requires the amendment of the Sales Contract to be in writing

74 Whenever one of the parties to the contract has its place of business in a state that made an Art. 96 declaration, the formal requirements of this state apply [*REHBINDER, p. 154 et seq.; REINHARD, Art. 12, para. 3; STOFFEL, p. 60*]. As confirmed by the Mediterranean Supreme Court, Mediterranean law submits all international sales contracts as well as their amendments to a writing requirement [*PO 2, p. 56, para. 34*; *SoC, p. 10, para. 32*]. The Tribunal should follow this interpretation that pursuant to Art. 96 CISG amendments of contracts have to be in writing for the following considerations.

75 The application of the formal requirements of the declaring state is in line with the intended purpose of Art. 11 and Arts. 12, 96 CISG. These provisions are the result of a conflict between states persisting on the application of writing requirements and those preferring freedom of form [*Schlechtriem/Schwenzer/SCHLECHTRIEM/SCHWENZER/HACHEM, Art. 96, para. 1*]. In the 1980 Diplomatic Conference in Vienna, it was recognized that some states consider the writing requirements for contracts and their amendments to be an important element of public policy [*Secretariat's Commentary, Art. 12, para. 1*]. To enable these states to give full effect to their public policy considerations, Art. 12 was implemented into the CISG. During the drafting process of this provision, it was stated that "*obviously, the aim of Art. 12 was to impose the written form when one of the parties had its place of business in a state which had made a reservation*" [*Statement by Mr. Vischer, First Committee, Summary Records, 8th Meeting, para. 50*].

76 In accordance with this aim, the U. S. District Court S. D. Florida held in *Zhejiang v. Microflock* that "*Article 12 of the CISG gives Contracting States the right to require that the parties' intention to be bound by an agreement be evidenced exclusively in writing, when a Contracting state makes an Art. 96 declaration*" [*Zhejiang v. Microflock, U.S. Dist. Ct. (S.D. Fla.), 19 May 2008*]. The direct application of the declaring state's domestic law to the question of form has been confirmed by several state courts and arbitral tribunals with regard to declarations made by Chile [*RB Hasselt, 2 May 1995*], by Russia [*Int. Ct. Russian CCI, 9 June 2004; High Arbitration Court of Russian Federation, 25 March 1997*] and by Argentina [*Cass. Com., 7 February 2012*].

77 RESPONDENT might try to argue that the law applicable to matters of form should be determined via the rules of private international law. This approach should be rejected. CLAIMANT is aware that there is case law supporting this view. Notably, these cases have been decided by state courts in countries recognizing the principle of freedom of form and should be therefore regarded with caution. Applying conflict of law rules that mostly point to the law of the seller's state [*FAWCETT/HARRIS/BRIDGE, para. 13.114*] would lead to the result that only the seller but not the buyer would be protected by formal requirements of its domestic law. This approach, however, would not only weaken the CISG's position as a stable and uniform codification [*FLECHTNER, p. 196*]. It also fails to recognize the compromise solution under Arts. 12, 96 CISG, granting states the possibility to effectively preserve their formal requirements in any case by way of declaration.

78 Taking into account the considerations set out above, the Tribunal should follow the interpretation of the Art. 96 CISG declaration by the Supreme Court of Mediterraneo. Hence, due to this declaration, any amendment of the Sales Contract had to be in writing to bind the parties.

C. The update of the shipping agreement and the letter of credit does not constitute a written amendment of the Sales Contract

79 The Sales Contract between CLAIMANT and RESPONDENT, the letter of credit between CLAIMANT and its bank, and the shipping agreement between CLAIMANT and the shipping company are three distinct contracts. They differ as to their contractual obligations as well as the contracting partners involved. Putting down in writing an agreement between two parties does not constitute a written agreement between one of these parties and a third party. It is

thus not possible to consider the update of the letter of credit and the shipping agreement as a written amendment of the Sales Contract.

80 **CONCLUSION OF THE THIRD ISSUE:** Due to the mandatory character of Art. 12 CISG, the parties could not validly exclude Mediterraneo's Art. 96 declaration. The declaration requires any amendment of contract to be in writing. Even if the Tribunal were to find that the parties agreed on a modification of the contractual delivery date, the agreement lacks the required form. The amendments of the shipping agreement and the letter of credit, however, do not lead to an amendment of the Sales Contract.

FOURTH ISSUE: RESPONDENT'S delay in delivery entitles CLAIMANT to the agreed sum in the amount of USD 27,500

81 RESPONDENT'S late delivery of the polo shirts primarily entitles CLAIMANT to USD 27,500 based on the agreed sum clause in the Sales Contract. CLAIMANT is further entitled to damages pursuant to Arts. 45(1)(b), 74 CISG; these however will be addressed at a later stage of the proceedings, as the issue of the quantum of damages shall not be discussed at this point [*PO 1, p. 49, para. 9*]. At this point, it will only be established that the agreed sum clause is valid.

82 The agreed sum as stated in Clause No. 10 of the Sales Contract, deals with the consequences of a deviation from the agreed delivery date. This clause reads as follows [*Cl. Exh. 1, p. 12, clause 10*]:

> *"10.* ***INCENTIVES*** *a) [...]*
> *b) For late delivery not exceeding 15 days, a deduction of 1% of the contract price per day late, to a maximum of 15%.*
> *c) For delivery more than 15 days late, a deduction of a further 2% of the contract price per day."*

83 According to this clause, RESPONDENT'S late delivery of five days entitles CLAIMANT to a deduction of 5% of the purchase price amounting to USD 27,500. It will be demonstrated that Clause No. 10 of the Sales Contract is valid **(A)**, and that RESPONDENT is not exempted from liability under Art. 79 CISG **(B)**.

A. The agreed sum clause in the Sales Contract is valid

84 According to Art. 4 sentence 2(a) CISG questions concerning validity are not regulated by the CISG. For matters not governed by the CISG, the parties agreed on applying the PICC [*Cl. Exh. 1, p. 13, clause 20*]. The choice of the PICC, as a body of anational law, is in line with Art. 28 UNICTRAL ML and Art. 35(1) CEAC Rules, both allowing to choose rules of law. It will be shown that the CISG permits the parties to include the agreed sum clause in the Sales Contract **(I)**, and that the agreed sum clause is valid according to Art. 7.4.13 PICC **(II)**.

I. The CISG permits the parties to include the agreed sum clause in the Sales Contract

85 The parties were allowed to include the agreed sum clause even though agreed sum clauses are not explicitly regulated by the CISG. According to Art. 6 CISG, the parties are permitted

to mutually modify or derogate from any of the provisions of the Convention subject to Art. 12 CISG [*Schlechtriem/Schwenzer/SCHWENZER/HACHEM, Art. 6, para. 28*]. As supported by doctrine and case law, the stipulation of an agreed sum clause constitutes a modification of the provisions on remedies and damages in line with Art. 6 CISG [*HACHEM, p. 42; MOHS/ZELLER, p. 1; Serbian CC, 15 July 2008*]. Hence, the CISG allows the parties to modify the respective provisions by including an agreed sum clause into the Sales Contract.

II. The agreed sum clause is valid according to Art. 7.4.13 PICC

86 RESPONDENT'S potential argument that Clause No. 10 is a penalty clause and therefore might be deemed unenforceable under certain common law jurisdictions holds no merit. It is correct that these jurisdictions only allow liquidated damages clauses whereas penalty clauses, that appear unconscionable compared to the actual loss, are deemed unenforceable [*Dunlop v. New Garage, (1915) A.C. 847 (H.L.)*]. In contrast thereto the PICC do not distinguish between liquidated damages and penalty clause, but uphold the validity of agreed sum clauses in general [*SCHWENZER/HACHEM/KEE, para. 44.270; Vogenauer/Kleinheisterkamp/MCKENDRICK, Art. 7.4.13, para. 2; Cam. Arb. Milano, 1 December 1996; Sup. Ct. Poland , 6 November 2003*]. Consequently, Art. 7.4.13(1) PICC permits the agreed sum clause regardless of dogmatic classification.

87 Moreover, Clause No. 10 is valid as it meets the requirements of Art. 7.4.13 PICC. According to Arts. 7.4.13(1), 7.1.1 PICC, the aggrieved party is entitled to a specified sum in case of late performance. An agreed sum is considered to be sufficiently specified where the contract sets out a formula which enables the amount of damages to be calculated [*Vogenauer/Kleinheisterkamp/MCKENDIRCK, Art. 7.4.13, para. 12*]. In that regard, it has been ruled that if the contract provided for an agreed sum in the amount of a percentage of the sales price, the sum was sufficiently specified [*CIETAC, 9 November 2005*]. Therefore, as Clause No. 10 determines a reduction of 1% of the contract price per day late, the amount was sufficiently specified. In conclusion, the agreed sum clause in the Sales Contract is valid according to Art. 7.4.13 PICC.

B. RESPONDENT is not exempted from liability due to its supplier's late delivery caused by a strike

88 RESPONDENT may not allege that the late delivery of its supplier is a reason for exemption from liability pursuant to Art. 79(1) CISG. The late delivery was caused by a strike at the

supplier's production facilities [*PO 2, p. 53, para. 12*]. RESPONDENT immediately investigated with other suppliers receiving offers twice as expensive as the one of the original supplier [*PO 2, p. 53, para. 13*]. It will be demonstrated that the requirements of Art. 79(1) CISG are not fulfilled **(I)**. In any case, the exemption under Art. 79(1) CISG does not extend to the agreed sum **(II)**.

I. The requirements of Art. 79(1) CISG are not met

89 According to Art. 79(1) CISG, a party is exempted from liability when a failure to perform was due to an impediment, which the party could not have foreseen at the time of the conclusion of the contract nor that the party could have overcome it. At hand, RESPONDENT did not deliver the polo shirts in time because its supplier had been affected by a strike [*PO 2, p. 53, para. 12*]. This delivery problem was not an impediment in the sense of Art. 79(1) CISG **(1)**. In any case, the delivery problems were foreseeable for RESPONDENT **(2)**. Moreover, RESPONDENT could have overcome the alleged impediment **(3)**.

1. The delivery problems of RESPONDENT'S supplier are not an impediment in the sense of Art. 79 (1) CISG

90 The delivery problems of RESPONDENT'S supplier resulting from a strike do not constitute an impediment in terms of Art. 79(1) CISG. It is not the rationale of Art. 79(1) CISG to change the contractual risk distribution [*LOOKOFSKY, p. 134; BGH, 24 March 1999*]. Under a contract of sale, the seller bears the procurement risk [*CISG-AC Opinion No. 7, para. 13; Kröll/Mistelis/Perales Viscasillas/ATAMER, Art. 79, para. 68 et seq.; ICC Award, 1 January 1995*]. The procurement risk includes delivery problems of suppliers in general [*Honsell/MAGNUS, Art. 79, para. 14*] and problems due to labor disputes in particular [*BRUNNER, Force Majeure, p. 169; Schlechtriem/Schwenzer/SCHWENZER, Art. 79, para. 24*]. From the very beginning of the negotiations, RESPONDENT promised that it could handle the order in time [*SoC, p. 6, para. 9*]. RESPONDENT thereby contractually assumed the risk of procuring the polo shirts. Consequently, RESPONDENT bears the risk to obtain the necessary goods in case of delivery problems of its supplier due to a labor dispute. Therefore, there was no impediment in the sense of Art. 79 CISG.

2. Since the supplier's delivery problems were foreseeable for RESPONDENT it had to bear the procurement risk

91 Even if the delivery problems of RESPONDENT'S supplier were considered an impediment, this impediment was foreseeable for RESPONDENT. Most of the potential impediments to the performance of a contract are reasonably foreseeable as they have occurred in the past [*Secretariat's Commentary, Art. 79, para. 5*]. Labor disputes in production facilities as well as the resulting bottlenecks are common incidents in the course of businesses around the world and thus foreseeable. Liability for such foreseeable impediments can only be excluded by contractually shifting the risk of this specific impediment [*MünchKommHGB/MANKOWSKI, Art. 79, para. 39*]. As the parties did not modify the statutory risk allocation, RESPONDENT has to bear the consequences of its supplier's foreseeable delivery problems.

3. RESPONDENT could have overcome the alleged impediment

92 Even if the delivery problems of RESPONDENT'S supplier were qualified as an unforeseeable impediment, RESPONDENT could have overcome it by procuring substitute polo shirts on the market. The seller bears the procurement risk up to the "limit of sacrifice" which is set high in international trade [*SCHWENZER, Force Majeure, p. 717*]. As price variations are inherent in international trade [*SCHWENZER, Force Majeure, p. 716; Publicker v. Union Carbide, U.S. Dist. Ct. (E.D. Pa.), 17 January 1975; RB Hasselt, 2 May 1995*], considerable losses or additional expenses have to be borne by the seller when procuring substitute goods [*MünchKommBGB/HUBER, Art. 79 CISG, para. 17; OLG Hamburg, 28 February 1997*]. As a general rule, it has been held that an increase in price of up to 100% can reasonably be overcome by the seller [*Schlechtriem/Schwenzer/SCHWENZER, Art. 79, para. 30*].

93 In the case at hand, RESPONDENT'S preliminary investigation into other suppliers yielded offers that were twice as expensive as the price of RESPONDENT'S original supplier [*PO 2, p. 53, para. 13*]. RESPONDENT was aware from the very beginning that the Sales Contract called for a "rush job" [*SoC, p. 6, para. 9*]. A rush job bears the risk of procuring substitute goods on a very short notice. Therefore, RESPONDENT had to reckon with higher market prices of substitute goods in case its supplier was unable to deliver. Thus, there are no circumstances that require deviating from the general rule that price fluctuations of 100% can be overcome. Hence, RESPONDENT could have reasonably been expected to obtain the goods for twice the

original price and thereby overcome the alleged impediment. In conclusion, the requirements of Art. 79(1) CISG are not met.

II. In any case, the exemption under Art. 79(1) CISG does not extend to the agreed sum

94 Agreed sum clauses are not covered by Art. 79 CISG. According to Art. 79(5) CISG, exemption from liability only extends to damages recoverable under the Convention. Since agreed sums are contractually stipulated and do not arise from rights under the Convention, they are not covered by Art. 79(1) CISG [*MünchKommHGB/MANKOWSKI, Art. 79, para. 14; PILTZ, p. 220, para. 4-246*]. This is also confirmed by the fact that a proposal at the Vienna Conference to extend this provision to agreed sums was rejected with the argument that contractual agreements should supersede [*First Committee, Summary Records, 28th Meeting, para. 45 et seq.*]. Therefore, it is established that Art. 79(1) CISG does not provide exemption from liability in case of an agreed sum clause.

95 The parties did not intend to extend the scope of Art. 79(1) CISG to the agreed sum. If the contract does not provide for circumstances under which the party in breach will be exempted from the agreed sum, no exemption under Art. 79(1) CISG is possible [*FLAMBOURAS, p. 281*]. In the case at hand, there are no indications to such an intention and agreement of the parties. Consequently, the exemption under Art. 79(1) CISG does not extend to the agreed sum.

96 Summarizing, RESPONDENT is not exempted from liability for the delayed delivery.

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97 **CONCLUSION OF THE FOURTH ISSUE**: CLAIMANT is entitled to USD 27,500 as the agreed sum clause of the Sales Contract is valid according to the applicable Art. 7.4.13 PICC. Furthermore, RESPONDENT is not exempted from liability under Art. 79(1) CISG as the requirements are not met. In any case, this provision does not extend to the agreed sum of the Sales Contract.

FIFTH ISSUE: RESPONDENT'S use of child labor entitled CLAIMANT to avoid the Sales Contract and to claim damages

98 CLAIMANT is entitled to avoid the Sales Contract and to claim the reimbursement of the purchase price of USD 550,000 pursuant to Arts. 49(1)(a), 81(2) CISG, because by using child labor RESPONDENT fundamentally breached the contract. This breach of contract further entitles CLAIMANT to damages in the amount of USD 1,550,000 under Arts. 45(1)(b), 74 CISG.

99 Under the present Sales Contract, the parties agreed on the delivery of polo shirts for the purpose of resale in Oceania [*Cl. Exh. 1, p. 12; PO 2, p. 53, para. 15*]. For this reason, RESPONDENT undertook to comply with "*the highest ethical standards in the conduct of [its] business*" [*Cl. Exh. 1, p. 12, clause 12*]. This is in line with the core of CLAIMANT'S business model to trade in ethically produced clothes. However, in violation of the contractual requirements, RESPONDENT had children working in one of its production facilities [*PO 1, p. 49, para. 8*]. There have been reports that these children were as young as eight and had to work under appalling conditions [*SoC, p. 8, para. 18*].

100 It will be demonstrated that CLAIMANT is entitled to avoid the Sales Contract and claim damages, since RESPONDENT breached the Sales Contract by using child labor **(A)** and this amounted to a fundamental breach **(B)**. Further, CLAIMANT declared avoidance within a reasonable time **(C)**.

A. RESPONDENT breached the Sales Contract by using child labor

101 RESPONDENT'S use of child labor in one of its production facilities constituted a breach of contract. Specifically, RESPONDENT breached the Sales Contract under Art. 35(1) CISG, as it did not deliver goods of the quality required under the contract **(I)** and as required by the international trade usage prohibiting child labor **(II)**. Furthermore, RESPONDENT also breached the Sales Contract under Art. 35(2)(b) CISG by delivering goods not fit for the particular purpose **(III)**.

I. RESPONDENT breached the Sales Contract as it did not deliver goods of the quality required under the contract

102 RESPONDENT delivered polo shirts which did not meet the quality required by the terms of the Sales Contract. Pursuant to Art. 35(1) CISG, the seller must deliver goods which are of the quality required by the contract. At hand, the parties included the following clause in the

Sales Contract [*Cl. Exh. 1, p. 12, clause 12*]:

> *"12.* ***POLICY*** *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."*

103 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. It will be shown that in the understanding of a reasonable person, Clause No. 12 prohibited RESPONDENT from using child labor **(1)**. Furthermore, the prohibition of child labor covered the entire production operation of RESPONDENT **(2)**.

1. Clause No. 12 of the Sales Contract prohibited child labor

104 The wording of Clause No. 12 forbids the use of child labor. Clause No. 12 required RESPONDENT to comply with "*the highest ethical standards*". The prohibition of child labor is a minimum ethical standard [*SCHWENZER/LEISINGER, p. 264*]. It is undisputed that children had to work in one of RESPONDENT'S production facilities [*PO 1, p. 49, para. 8*]. Reportedly, these children were as young as eight years and RESPONDENT had these children working under appalling conditions [*SoC, p. 8, para. 18*]. This already flies in the face of the most basic ethical standards. But RESPONDENT was not only obliged to comply with basic but with the *highest* ethical standards. This superlative highlights the incompatibility of child labor with the adherence to the highest ethical standards.

2. The prohibition of child labor covered the entire production operation of RESPONDENT

105 The Sales Contract called for goods from an ethically producing manufacturer entirely refraining from child labor. Clause No. 12 of the Sales Contract required all suppliers to comply with the highest ethical standards "*in the conduct of their business*". In opting for this broad wording, CLAIMANT did not limit the prohibition of child labor to the production of the polo shirts under this particular contract. Rather, Clause No. 12 generally reflects CLAIMANT'S business model which is to ensure that all of its contracting partners entirely refrain from using child labor for their entire production. Therefore, Clause No. 12 bans child labor not only with regard to the production of the polo shirts procured by CLAIMANT but to the whole production of RESPONDENT.

106 Furthermore, pursuant to Art. 8(3) CISG, in determining the understanding of a reasonable person, due consideration is to be given to all relevant circumstances of the case. At hand, CLAIMANT conducted audits of RESPONDENT in the past, specifically focusing on the prohibition of child labor [*SoC, p. 6, para. 9*]. This conduct further manifests CLAIMANT'S intent that all of its contracting partners comply with the highest ethical standards in the entirety of their production facilities.

107 Taking the above circumstances into account, a reasonable person would have interpreted the reference to "*the highest ethical standards in the conduct of [its] business*" to encompass the prohibition of child labor with regard to the whole production of RESPONDENT.

II. RESPONDENT breached the Sales Contract as it did not deliver goods as required by the international trade usage prohibiting child labor

108 The prohibition of child labor is an international trade usage and thereby became part of the Sales Contract. By not complying with this trade usage, RESPONDENT breached the Sales Contract under Art. 35(1) CISG. According to Art. 9(2) CISG, the parties are considered to have impliedly made a usage applicable to the contract if they knew or ought to have known about it and which in international trade is widely known to, and regularly observed by, parties in the particular trade concerned.

109 The prohibition of child labor is an established usage in the textile industry. The principles of general private initiatives such as the UN Global Compact can constitute trade usages [*SCHWENZER, Physical Features, p. 107*]. In particular, there can be "no doubt" that at the very least, minimum ethical standards including the prohibition of child labor are to be safeguarded through international trade usages [*SCHWENZER/LEISINGER, p. 264*].

110 The UN Global Compact, one of the most successful private initiatives with thousands of participating businesses in 145 states, requires "*the effective abolition of child labor*" [*UN Global Compact, Principle 5*]. The majority of the leading multinational players of the textile industry participate in the UN Global Compact and adhere to its principles [*UN Global Compact, Participants*], including CLAIMANT'S parent company, Oceania Plus [*SoC, p. 8, para. 19*]. Thus, these principles constitute a trade usage in the textile industry.

111 RESPONDENT ought to have known about this trade usage, because it is an international supplier for textile companies. Moreover, it already contracted with CLAIMANT in the past, a subsidiary of Oceania Plus, which participates in the UN Global Compact [*PO 2, p. 53, para. 15*] and is widely known for its ethical standards [*SoC, p. 6, para. 6*]. As the

prohibition of child labor is an international trade usage and RESPONDENT ought to have known about it, it became part of the Sales Contract pursuant to Art. 9(2) CISG. By using child labor, RESPONDENT breached its obligation to deliver goods as required by the international trade usage applicable to the contract.

III. RESPONDENT breached the Sales Contract by delivering goods not fit for the particular purpose

112 RESPONDENT delivered goods not fit for the particular purpose of the Sales Contract which was the resale of the polo shirts in Oceania. Pursuant to Art. 35(2)(b) CISG, the seller has to deliver goods fit for the particular purpose made known to him or her at the time of conclusion of the contract, except where the circumstances show that the buyer could not rely on the seller's skill and judgment. It will be demonstrated that first, RESPONDENT made known to CLAIMANT that the particular purpose of the polo shirts was their resale in Oceania **(1)**. Second, the polo shirts were not fit for this purpose **(2)**. Third, CLAIMANT could reasonably rely on RESPONDENT'S skill and judgment to know that the market in Oceania requires goods from manufacturers entirely refraining from child labor **(3)**. Finally, RESPONDENT cannot rely on Art. 35(3) CISG in order to avoid liability for the lack of conformity of the delivered polo shirts **(4)**.

1. The particular purpose of resale in Oceania was made known to RESPONDENT

113 Pursuant to Art. 35(2)(b) CISG, the purpose has to be made known to the seller at the time of the conclusion of the contract. It is undisputed that RESPONDENT knew at the time of the conclusion of the Sales Contract that the particular purpose of the contract was to resell the polo shirts in Oceania [*PO 2, p. 53, para. 15*].

2. The polo shirts were not fit for the particular purpose of resale in Oceania

114 After RESPONDENT'S use of child labor was exposed, the polo shirts could no longer be sold [*Cl. Exh. 5, p. 18, para. 3*]. The consumers did not buy the polo shirts, even though the television broadcast and the newspaper article in question had not alleged that the polo shirts themselves have been produced with child labor [*PO 2, p. 54, para. 17*]. What is more, for two weeks at the stores of Doma Cirun, there were countrywide demonstrations [*SoC, p. 8, para. 20*]. The fact that the brand name of the polo shirts was associated with child labor was sufficient to make the polo shirts impossible to sell. Thus, goods deriving from a manufacturer using child labor in its production cannot be sold to Oceania's ethically

conscious consumers. In conclusion, as RESPONDENT used child labor in its production, the polo shirts were not fit for the particular purpose of resale in Oceania.

3. CLAIMANT reasonably relied on RESPONDENT'S skill and judgment to know that the market in Oceania requires goods deriving from an ethically producing manufacturer

115 According to Art. 35(2)(b) CISG, the seller has to deliver goods fit for the particular purpose, except where the circumstances show that the buyer could not rely on the seller's skill and judgment. In the case at hand, CLAIMANT could reasonably rely on RESPONDENT knowing that Oceania is a market very sensitive to ethical standards, for the following reasons.

116 First, RESPONDENT repeatedly sold goods destined for resale in Oceania [*PO 2, p. 53, para. 15*]. With regard to public law standards, it has been established in doctrine and case law that a buyer may expect a seller to know these standards of a country it regularly exports goods to [*Kröll/Mistelis/Perales Viscasillas/KRÖLL, Art. 35, para. 126; Schlechtriem/Schwenzer/SCHWENZER, Art. 35, para. 17; BGH, 8 March 1995; Cour d'appel Grenoble, 13 September 1995; LG Ellwangen, 21 August 1995*]. Where ideological convictions similarly prevent the sale of the goods, no distinction is to be drawn to public law standards [*SCHLECHTRIEM, Uniform Sales Law, para. IV.1*]. As RESPONDENT repeatedly sold goods destined for resale in Oceania, it could not have been unaware of the ethical standards prevailing in Oceania.

117 Second, in Oceania the same standards apply as in RESPONDENT'S country. It is also established that the seller has to know the standards of the country of resale if the seller's own country imposes the same standards [*Schlechtriem/Schwenzer/SCHWENZER, Art. 35, para. 17; BGH, 8 March 1995; BGH, 2 March 2005; OGH, 25 January 2006*]. At hand, both RESPONDENT'S country and Oceania are member states of the ILO Convention [*SoC, p. 11, para. 32; SoD, p. 36, para. 12*]. According to Art. 3(d) of the ILO Convention, child labor hazardous to the children's health is banned as one of the worst forms of child labor. In this respect, studies show that particularly child labor in the textile industry poses serious risks for the health of children [*FASSA, p. 28 et seq.*]. Therefore, RESPONDENT'S use of child labor is prohibited under the ILO Convention. Thus, RESPONDENT had to know that employing eight-year-old children in its textile production entirely frustrated the purpose of reselling the polo shirts in a member state of the ILO Convention like Oceania. Concluding, CLAIMANT could assume that RESPONDENT knew of the ethical standards prevailing in Oceania.

118 As RESPONDENT knew that the consumers in Oceania are sensitive to ethical matters, CLAIMANT could also reasonably rely on RESPONDENT'S skill and judgment to know that Oceania's market requires goods produced by manufacturers entirely refraining from child labor. RESPONDENT had to be aware that ethically conscious consumers condemn the practice of child labor as such.

119 In conclusion, CLAIMANT could reasonably rely on RESPONDENT'S skill and judgment to know that consumers in Oceania are sensitive to ethical matters, and thus the market requires goods produced by manufacturers entirely refraining from child labor.

4. RESPONDENT cannot rely on Art. 35(3) CISG in order to avoid liability under Art. 35 (2)(b) CISG

120 CLAIMANT did not know about the lack of conformity of the polo shirts at the time of the conclusion of the Sales Contract. According to Art. 35(3) CISG, the seller is not liable under Art. 35(2)(b) CISG for any lack of conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of the lack of conformity. The threshold for an exemption from liability of the seller is set out high. The buyer has to be aware only of obvious facts [*Huber/Mullis/MULLIS, p. 142; HONNOLD/FLECHTNER, p. 339; Schlechtriem/ Schwenzer/SCHWENZER, Art. 35, para. 35; Staudinger/MAGNUS, Art. 35, para. 46*].

121 In the case at hand, the non-conformity of the polo shirts was not obvious for CLAIMANT. Although CLAIMANT is not required to do so, it conducts audits of its suppliers every 4 years [*PO 2, p. 51, para. 2*]. Three years before the conclusion of the Sales Contract, in 2008, CLAIMANT conducted an audit of RESPONDENT giving rise to some concerns about the use of child labor [*SoC, p. 6, para. 9*]. However, upon CLAIMANT'S insistence, RESPONDENT intervened and the manager responsible for the plant that gave rise to concerns was dismissed [*PO 2, p. 51, para. 3*]. CLAIMANT approved the audit only after the items of concern were resolved [*SoC, p. 6, para. 9*]. Therefore, CLAIMANT could reasonably assume that RESPONDENT stopped using child labor. That this was not the case, was not at all obvious to CLAIMANT.

122 Furthermore, RESPONDENT cannot convincingly argue that CLAIMANT was aware of the lack of conformity due to an allegedly low price of the polo shirts. RESPONDENT'S price was approximately 10% lower than the price of two other companies, but still covered its production costs [*PO 2, p. 52, para. 6*]. Additionally, RESPONDENT made clear that the price offered was meant to attract further contracts with CLAIMANT [*PO 2, p. 52, para. 6*].

Therefore, it was not obvious to CLAIMANT that RESPONDENT would violate ethical standards as any violation of such standards would have destroyed the prospect of future business relationships.

123 In summary, RESPONDENT breached the Sales Contract by using child labor, thereby leading to the polo shirts' non-conformity pursuant to Arts. 35(1), 35(2)(b) CISG.

B. RESPONDENT'S use of child labor amounted to a fundamental breach

124 Pursuant to Art. 25 CISG, a breach of contract is considered fundamental if it results in such detriment to the other party as substantially to deprive it of what it is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind would not have foreseen such a result.

125 It will be shown that RESPONDENT'S use of child labor substantially deprived CLAIMANT of what it was entitled to expect under the Sales Contract **(I)**. Furthermore, RESPONDENT could foresee the resulting detriment **(II)**.

I. CLAIMANT was substantially deprived of what it was entitled to expect under the Sales Contract

126 RESPONDENT'S breach of contract made it impossible to sell the polo shirts in Oceania and led to further severe consequences, thereby substantially depriving CLAIMANT of what it was entitled to expect under the Sales Contract. In this respect, regard primarily is to be given to the terms of the contract, *i.e.* whether the parties stipulate what they consider to be of the essence of the contract [*Honsell/GSELL, Art. 25, para. 13; CISG-AC Opinion No. 5, para. 4.2; SCHWENZER, Avoidance, p. 437*]. Furthermore, the purpose for which the goods were bought must be considered [*CISG-AC Opinion No. 5, para. 4.3; SCHWENZER, Avoidance, p. 437*].

127 CLAIMANT was substantially deprived of what it was entitled to expect under the Sales Contract, because compliance with the highest ethical standards was of the essence of the Sales Contract **(1)** and the breach frustrated the intended purpose of the Sales Contract **(2)**. Furthermore, RESPONDENT may not argue that the breach was not fundamental because the polo shirts were finally resold **(3)**.

1. Compliance with the highest ethical standards was of the essence of the Sales Contract

128 CLAIMANT made clear that complying with the highest ethical standards was of special importance for it. In the contract, the parties can provide which features of the goods are of

the essence [*Schlechtriem/Schwenzer/SCHROETER, Art. 25, para. 12; CISG-AC Opinion No. 5, para. 4.2; CA Helsinki, 30 June 1998*]. By expressly stipulating the requirement of adhering to ethical standards in a contract, the parties make it sufficiently clear that compliance therewith is of the essence to the buyer [*SCHWENZER, Physical Features, p. 109*]. At hand, the parties had included a policy clause requiring RESPONDENT to apply ethical standards in the Sales Contract [*Cl. Exh. 1, p. 12, clause 12*]. Moreover, the parties did not only agree to simply comply with ethical standards, but to comply with the *highest* ethical standards [*Cl. Exh. 1, p. 12, clause 12*]. Thus, the fundamental importance of compliance with this clause was even emphasized.

129 Furthermore, it has been ruled that if an important issue in the particular industry and a question of public debate is expressly regulated by the parties in the contract, this requirement of the goods is of the essence [*ZGer Basel-Stadt, 1 March 2002; affirmed AppGer Basel-Stadt, 22 August 2003*]. The problem of child labor is an important issue in the textile industry, as the major companies in the textile industry adhere to the UN Global Compact [*vide supra para. 110*]. It also attracts public debate, because as evidenced at hand, the business community and civic organizations in Oceania strongly supported the leading role Oceania took with regard to the abolition of child labor [*SoC, p. 8, para. 19*]. In addition, there were demonstrations at Doma Cirun stores throughout the country and even the Prime Minister called on Oceania Plus to take urgent action, when the use of child labor by RESPONDENT was revealed [*SoC, p. 8, para. 20 et seq.*]. Finally, the parties included the compliance with highest ethical standards into the Sales Contract. Concluding, in the present case the prohibition of child labor was of the essence.

2. The breach of contract by RESPONDENT frustrated the intended purpose of the Sales Contract

130 In any case, CLAIMANT was still substantially deprived of what it expected under the Sales Contract, as the purpose for which CLAIMANT bought the polo shirts was frustrated. In order to determine a fundamental breach, not only the terms of the contract, but especially the purpose for which the goods are bought is decisive [*Honsell/GSELL, Art. 25, para. 16; CISG-AC Opinion No. 5, para. 4.3*]. The purpose of the polo shirts was to sell them to Doma Cirun for resale in Oceania in accordance with CLAIMANT'S ethical business model.

131 The compliance with highest ethical standards is a core element of CLAIMANT'S business model as its customers rely on its adherence thereof. Any suspicious facts on the non-

compliance with that policy may lead to a considerable loss of its credibility and trust on the part of its customers. As RESPONDENT used child labor in its production, the polo shirts contradicted the core of CLAIMANT'S business model and could not be sold in Oceania [*Cl. Exh. 5, p. 18, para. 3*].

132 Accordingly, RESPONDENT'S breach of contract led to a massive negative impact illustrated by the severe consequences that CLAIMANT had to suffer. After RESPONDENT'S use of child labor was made public, CLAIMANT'S parent company Oceania Plus' and Doma Cirun's reputation had been damaged severely. This led to a dramatic sales' drop up to 50% at Doma Cirun stores and to a drop of 25% of Oceania Plus' share price [*SoC, p. 8 et seq., para. 20 et seq.*]. Doma Cirun and Oceania Plus shifted the consequences of its losses to CLAIMANT by suing it shortly thereafter [*Cl. Exh. 5, p. 18; SoC, p. 9, paras. 26 et seq.; SoC, p. 10, para. 29*]. In addition to that, even the Prime Minister of Oceania called Oceania Plus to take urgent action with regard to the child labor issue [*SoC, p. 8, para. 21*].

133 In conclusion, the fact that the polo shirts could not be sold in Oceania due to RESPONDENT'S use of child labor and further severe consequences, show that the purpose of the Sales Contract was frustrated in its entirety.

3. The resale of the polo shirts to Pacifica Trading Co. does not change the fundamental nature of RESPONDENT'S breach

134 After CLAIMANT declared the Sales Contract avoided, RESPONDENT categorically refused to take back the shirts [*PO 2, p. 54, para. 21*]. As a consequence, CLAIMANT started looking for ways to dispose of the polo shirts, and informed RESPONDENT of its intention to sell them on RESPONDENT'S account [*PO 2, p. 54, para. 21*]. It eventually was able to sell the polo shirts to Pacifica Trading Co. [*SoC, p. 9, para. 24*]. This resale however does not change the fundamental nature of RESPONDENT'S breach of contract.

135 Even if the defective goods are resold, a breach still is fundamental where this resale cannot reasonably be expected from the respective buyer in the normal course of its business [*Ferrari et al./FERRARI, Art. 25 CISG, para. 18; CISG-AC-Opinion No. 5, para. 4.3; BGer, 28 October 1998; OLG Köln, 14 October 2002; OLG Stuttgart, 12 March 2001*]. In particular, where the specific use of the goods is resale on a market sensitive with regard to child labor, the buyer does not have to try to resell the goods on less sensitive markets [*cf. LEISINGER, p. 96*]. CLAIMANT'S business model is the trade in ethically produced clothes. Selling to Pacifica, a market indifferent to ethical standards [*PO 2, p. 54, para. 20*], was therefore

outside of CLAIMANT'S normal course of business and could not be reasonably expected from CLAIMANT.

136 Nevertheless, when RESPONDENT categorically refused to take back the polo shirts, CLAIMANT had to act appropriately and resell the polo shirts. In this situation CLAIMANT was caught between a rock and a hard place. Selling the polo shirts would contradict CLAIMANT'S ethical business model, while keeping the polo shirts would result in ever increasing storage costs. In light of CLAIMANT'S obligation to mitigate its losses under Art. 77 CISG, there was only one economically reasonable solution. To mitigate its losses, CLAIMANT had to deviate from its business model and conduct a self-help sale by selling the polo shirts. Hence, under these circumstances, CLAIMANT'S resale of the polo shirts was appropriate and does not change the fundamental nature of RESPONDENT'S breach of contract.

137 This result is also confirmed by case law. In a case decided by the *OLG Hamburg* on *26 November 1999*, the seller refused to take back defective jeans after the buyer had declared avoidance of the contract. The buyer reacted by conducting a self-help sale, selling the jeans to a country with significantly lower quality standards. The court held that despite the resale of the defective jeans the breach was still fundamental.

138 Accordingly, the Tribunal is requested to find that the resale of the polo shirts to Pacifica Trading Co. does not change the fundamental nature of RESPONDENT'S breach of contract.

II. RESPONDENT could have foreseen the substantial detriment to CLAIMANT

139 A substantial detriment resulting from a breach of contract is foreseeable where the parties agreed that compliance with the contract terms is essential [*SCHWENZER, Avoidance, p. 437*]. The requirement to comply with the ethical policy is expressly stated in Clause No. 12 of the Sales Contract. Therefore, it was discernible from the Sales Contract that compliance therewith was of the essence. Additionally, if the parties act accordingly, there is no room for the seller to argue that she or he did not foresee the detriment to the buyer [*CISG-AC Opinion No. 5, para. 4.2*]. RESPONDENT knew from the audit conducted by CLAIMANT in 2008 and the following discussions with CLAIMANT that compliance with the ethical policy, especially in regard to child labor, was fundamental [*SoC, p. 6, para. 9*].

140 Moreover, the substantiality of the detriment is foreseeable if the other party foresaw the circumstances leading to the special importance of the contractual duty [*BOTZENHARDT, p. 232*]. RESPONDENT knew of the purpose of resale in Oceania [*PO 2, p. 53, para. 15*]. Being an internationally operating manufacturer in the textile industry and having delivered several

times to Oceania before [*PO 2, p. 53, para. 15*], it must have been aware that adherence to ethical standards concerning resale in this country was of special importance [*vide supra, para. 115 et seq.*].

141 Hence, RESPONDENT could have foreseen the substantial detriment to CLAIMANT.

C. CLAIMANT declared avoidance within a reasonable time

142 Art. 49(2)(b)(i) CISG requires that the buyer must declare the contract avoided within a reasonable time after he knew or ought to have known of the breach. CLAIMANT informed RESPONDENT of the avoidance on 8 April 2011 [*Cl. Exh. 6, p. 20, para. 3*]. This was three days after RESPONDENT'S use of child labor was disclosed by Channel 12 Television [*SoC, p. 8, para. 18*] and immediately after CLAIMANT received the notice of avoidance from Doma Cirun [*Cl. Exh. 5, p. 18, para. 4*]. As CLAIMANT declared avoidance within three days after it became aware of the breach, the declaration was made in a timely manner.

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143 **CONCLUSION OF THE FIFTH ISSUE**: CLAIMANT made clear that compliance with the highest ethical standards in the conduct of its business is of the essence of the Sales Contract. It was reported that RESPONDENT had children as young as eight years working under appalling conditions. RESPONDENT therefore not only breached the contract but substantially deprived CLAIMANT of what it was entitled to expect under the contract. In conclusion, CLAIMANT is entitled to avoid the contract and claim reimbursement of the purchase price of USD 550,000 as well as damages in the amount of USD 1,550,000.

REQUEST FOR RELIEF

In the light of the above submissions, Counsel for CLAIMANT respectfully requests the Tribunal:

1. to not consider Mr. Short's witness statement
2. to find that the parties did not agree to amend the contractual delivery date
3. to find that any alleged amendment of the Sales Contract lacks writing as required by Mediterraneo's Art. 96 declaration
4. to find that RESPONDENT'S delay in delivery entitles CLAIMANT to the agreed sum in the amount of USD 27,500 and further damages
5. to find that RESPONDENT'S use of child labor entitled CLAIMANT to avoid the Sales Contract and to claim damages.

Based on these findings, the Tribunal is requested to grant CLAIMANT a total sum of USD 2,127,500, consisting of:

a. USD 27,500 as agreed sum for late delivery of the polo shirts
b. USD 550,000 as reimbursement of the purchase price
c. USD 1,550,000 as damages for settlements with Doma Cirun and Oceania Plus.

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.

Basel, 6 December 2012

(signed)
Christoph Burckhardt

(signed)
Nicole Frey

(signed)
Sophie Holdt

(signed)
Meret Rehmann

(signed)
Christian Schlumpf

(signed)
Madeleine Schreiner

(signed)
Jakob Steiner

(signed)
Andrea Voëlin