

VIS MOOT EAST
WILLEM C. VIS
International Commercial
Arbitration Moot
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Memorandum for Respondent
MEDI-MACHINES, S.A.



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SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

On Behalf of Respondent:
Medi-Machines, S.A.
415 Industrial Place
Capitol City, Mediterraneo

Against Claimant:
Equapack, Inc.
345 Commercial Ave.
Oceanside, Equatoriana

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ABBREVIATION INDEX

7 th Cir.	United States Court of Appeals Seventh Circuit
&	and
AAA	American Arbitration Association
Art./Arts.	Article, Articles
Assoc.	Associates
BRG	Bundesgerichtshof (German Federal Supreme Court with seat in Karlsruhe)
Cl. Mem.	Memorandum for Claimant
CISG	United Nations Convention on Contracts for the International Sale of Goods
Ch.	Chapter
CLOUT	Case Law on UNCITRAL Texts
Corp.	Corporation
ed.	Edition, Editor
Ex.	Claimant's Exhibit
Ex. Rpt.	Expert Report
Exs.	Claimant's Exhibits
F.2d	Federal Reporter, Second Series (U.S.)
F.Supp.	Federal Supplement (U.S. law reporter)
HG	Handelsgericht (Austrian Commercial Court)
IBA	International Bar Association
ICC	International Chamber of Commerce

Id.	Idem (the same)
Inc.	Incorporated
Int'l	International
LCIA	London Court of International Arbitration
Lloyd's Rep.	Lloyd's Reporter
LG	Landgericht (German District Court)
Ltd.	Limited
Ltr.	Letter
Model Law	UNCITRAL Model Law on International Commercial Arbitration
NH	New Hampshire (U.S. state)
NAI	Netherlands Arbitration Institution
No.	Number
NY	New York (U.S. state)
OG	Oberlandesgericht (Court of Appeal)
OGH	Oberster Gerichtshof (Supreme Court of Austria)
OLG	Oberlandesgericht (German Regional Court of Appeal)
p.	page
pp.	pages
¶	Paragraph
¶¶	Paragraphs
%	Percent
Proc. Ord. 1	Procedural Order Number One
Proc. Ord. 2	Procedural Order Number Two

Proc. Ord. 3	Procedural Order Number Three
Rep.	Reporter
§	Section
§§	Sections
SIAC	Singapore International Arbitration Centre
SLR	Singapore Law Reports
Stat. of Cl.	Statement of Claim
Stat. of Def.	Statement of Defense
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States Reporter (Periodical, United States of America)
v.	<i>versus</i> (against)
Vol.	Volume
WL	Westlaw Database

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STATEMENT OF FACTS

This arbitration arises from a dispute over a contract formed between EQUAPACK, Inc. (EQUAPACK) and MEDI-MACHINES, S.A. (MEDI-MACHINES) for the sale of food packaging machines. (Stat. of Cl., ¶ 6). On 10 February 2003, EQUAPACK submitted a notice of arbitration to this tribunal. (Ltr. of 10.2.2003). The central issue in this dispute regards EQUAPACK's claim that the packaging machines delivered should have packaged salt without corroding and should have packaged food products at speeds of 180 bags per minute. (Stat. of Cl., ¶ 15).

EQUAPACK is a corporation that packages bulk goods for other companies. (Stat. of Cl., ¶ 1). In anticipation of a re-packaging contract with A2Z Inc., Donald Swan, EQUAPACK's works manager, requested information from MEDI-MACHINES regarding machines that could package a wide range of dry commodities, both coarse and fine products. (Ex. 1).

On 3 July 2002, Stefan Drake, a salesman at MEDI-MACHINES, replied by letter to Mr. Swan recommending two machines, a Model 14 and a Model 16 auger-feeder. (Ex. 2). Both machines could package a wide range of course and fine products, as requested by EQUAPACK. (Ex. 2). Mr. Drake's letter specified the price, quantity and shipping availability for both machines. (Ex. 2). On 12 July 2002, Mr. Swan sent a purchase order for six of the Model 14 auger-feeder machines. (Exs. 2 - 3). After MEDI-MACHINES received EQUAPACK's order, it packaged six Model 14 machines in preparation for ocean shipment. (Ex. 4).

On 23 July 2002, Mr. Swan telephoned Mr. Drake for the purpose of inquiring about the shipping status of the auger-feeders EQUAPACK ordered. (Ex. 5). In passing, Mr. Swan remarked that EQUAPACK "had everything in mind from large beans to salt to fine powder." (Stat. of Def., ¶ 6). The substance of the conversation, however, focused on when the Model 14 machines would be shipped. (Stat. of Cl., ¶ 6). Consequently, Mr. Drake was not alerted to the fact that the machines would be used to package salt. (Stat. of Def., ¶ 6).

EQUAPACK received the machines on 21 August 2002 and they were installed and fully operational as of 30 August 2002. (Stat. of Cl., ¶ 8). The machines came with an Operations Manual that indicated highly corrosive products were not to be used in the machines. (Proc. Ord. 3, ¶ 25). Over the following month EQUAPACK used all six machines for packaging a variety

of foodstuffs, and four of the machines were used to package salt. (Stat. of Cl., ¶ 8). The use of salt in the Model 14 machines caused corrosion. (Stat. of Cl., ¶ 8). At that point, EQUAPACK discontinued use of the machines. (Stat. of Cl., ¶ 8).

Mr. Swan telephoned Mr. Drake on 18 October 2002, to inform him of the problems with the machines. (Stat. of Cl., ¶ 9). Mr. Drake stated that the Model 14 machines were not capable of processing salt. (Ex. 7). Mr. Swan asserted that he had mentioned EQUAPACK would use the machines to package salt during their 23 July 2002 telephone conversation. (Stat. of Cl., ¶ 9). Mr. Drake responded that he did not recall any mention of salt. (Stat. of Cl., ¶ 9).

EQUAPACK claimed that the corrosion of the Model 14 machines was MEDI-MACHINES' responsibility, and that it was not informed by MEDI-MACHINES that salt was corrosive and not intended for use in the machines. (Ex. 6). By letter dated 19 October 2002, Mr. Swan insisted that MEDI-MACHINES pick up the machines and refund the purchase price. (Ex. 6). Mr. Drake responded by letter, dated 27 October 2002, reiterating that packaging salt is a special use. (Ex. 7). In an effort to resolve the dispute, Mr. Drake offered to sell Model 17 machines, which were designed to package salt, at a reduced price. (Ex. 7).

Recently, credible newspapers have reported that EQUAPACK is experiencing financial difficulties. (Proc. Ord. 3, ¶ 43). There is also evidence in the form of a report by the International Arbitration Committee of the International Commercial Law Association that an arbitration award in favor of MEDI-MACHINES would not be enforced in Equatoriana. (Ltr. of 1.09.2003). Consequently, MEDI-MACHINES has requested that EQUAPACK post security for its costs or in the alternative provide it with financial information, in order to ensure MEDI-MACHINES' ability to enforce a cost award in its favor. (Ltr. of 1.09.2003).

After commencing this arbitration proceeding, EQUAPACK entered into negotiations to sell its business. (Ltr. of 9.09.2003). Its potential purchasers are currently in the process of performing a due diligence review. (Ltr. of 9.09.2003). Counsel for EQUAPACK has stated that it will be necessary to divulge the fact of the arbitration and the details of the claim during the due diligence. (Ltr. of 17.09.2003). However, EQUAPACK agreed to arbitrate under the SIAC Rules. (Stat. of Cl., ¶ 13). SIAC Rule 34 states that all parties must treat all matters relating to the arbitration, including the existence of the proceedings, and the award as confidential. (SIAC Rule 34.6). Consequently, MEDI-MACHINES has asked this Tribunal to order EQUAPACK to refrain from its intended disclosures. (Ltr. of 17.09.2003).

DISCUSSION

I. THE MODEL 14 MACHINES CONFORMED TO THE CONTRACT BETWEEN EQUAPACK AND MEDI-MACHINES.

1. A contract was formed on 12 July 2002, when EQUAPACK ordered six Model 14 machines and effectively accepted MEDI-MACHINES offer to sell the six auger-feeder machines. (Exs. 2 - 3; CISG Art. 14, 18). The Model 14 machines MEDI-MACHINES delivered to EQUAPACK conformed to all express and implied contractual requirements. (Exs. 1 - 3).

A. The Model 14 machines were of the quantity, quality and description required by the contract.

2. The Model 14 auger-feeders met the requirements of CISG Article 35(1) as to the “quantity, quality and description required by the contract.” Article 35(1) dictates that requirements of a contract arise from the qualitative and quantitative description of the goods. (Schlechtriem, p. 276). Therefore, MEDI-MACHINES must provide machines that conform to its description of Model 14 auger-feeders in the 3 July 2002 letter and EQUAPACK’s request for packaging machines in the 24 June 2002 letter. (Bianca, p. 273; Exs. 1 - 2).

1. The contract did not expressly require Model 14 machines to package salt.

3. MEDI-MACHINES delivered Model 14 machines that fulfilled all the express requirements of the contract. (Exs. 1 - 2). EQUAPACK requested packaging machines that could package dry bulk commodities and a wide range of fine and coarse products, such as coffee, flour, beans and rice. (Ex. 1). Nowhere in EQUAPACK’s request is salt ever expressly mentioned. (Ex. 1). ICC 8213 is representative of several rulings on point. (ICC, No. 8213; *see also* ICC, No. 8247; LG Ellwanger, 21.08.1995; OLG München, 2.03.1994). In ICC 8213, the buyer claimed non-conformity of goods because billets delivered by the seller did not meet certain dimensional qualifications. (ICC, No. 8213). The arbitrator held that the seller delivered conforming billets because the contract did not expressly state the necessary dimensional conditions. (ICC, No. 8213; *see also* ICC, No. 8247; LG Ellwanger, 21.08.1995; OLG München, 2.03.1994). Similarly, the ability of Model 14 machines to package salt is not a requirement of the contract because there is no reference to salt anywhere in the contract. (Exs. 1 - 2).

2. The contract did not impliedly require Model 14 machines to package salt.

4. There is no implied requirement in the contract between EQUAPACK and MEDI-MACHINES for the Model 14 auger-feeders to package salt. (Exs. 1 – 2). In the 24 June 2002 letter, EQUAPACK requested packaging machines that could package dry bulk commodities and a wide range of fine and coarse products. (Ex. 1). EQUAPACK also provided an example of what constituted a wide range of products that it intended to package. (Ex. 1). The example in its entirety stated: coffee, flour, beans, and rice. (Ex. 1). It is not reasonable to infer that salt will also be packaged because the list only includes food products that are inactive with metal. (Ex. 1). Nothing in this list would make MEDI-MACHINES aware that EQUAPACK intended to package a corrosive product such as salt. (Ex. 1). In addition, a vast majority of packaging firms do not package salt. (Proc. Ord. 3, ¶ 27). This is probably due to the fact that packaging salt requires special machines made out of stainless steel. (Ex. Rpt.). Therefore, when EQUAPACK asserted it would be packaging a wide range of products, this did not imply salt because salt is not within the range of products that are usually packaged by packaging firms such as EQUAPACK. (Proc. Ord. 3, ¶ 27).

5. In addition, the contract did not impliedly obligate MEDI-MACHINES to deliver machines that packaged salt because the contract never referred to or incorporated by reference another source that mandated packaging salt. (Exs. 1 – 2). For instance, when a contract refers to a source such as INCOTERMS, this implies other obligations not expressly stated in the contract. In ICC 8213, referred to above, the arbitrator held that the billets conformed to the contract because the contract never referred to a source that included the dimensional qualifications. (ICC, No. 8213). Similarly, MEDI-MACHINES was not impliedly obligated to provide salt packaging machines because the contract does not reference other sources that require packaging salt. (Exs. 1 – 2).

6. In Claimant's Memorandum, Claimant incorrectly asserts that EQUAPACK's request for auger-feeders that had an ability to package flour impliedly requires MEDI-MACHINES to deliver salt packaging machines because "salt apparently resembles flour." (Ex. 1; Cl. Mem., ¶ 23). It is inconceivable that a contract requiring MEDI-MACHINES to deliver machines that can package flour would impliedly require machines to package salt. (Ex. 1). Salt is unrelated to flour because the two products have different textures, are not substitute goods, are used for different purposes in food preparation, are different types of food products, and must be

packaged by different kinds of machines because salt has corrosive properties, where flour does not.

3. There was no express requirement that the Model 14 machines package at average industry rates.

7. Expert engineer Eur.Ing. Franz van Heath-Robinson tested the Model 14 auger-feeders on three different types of food products. (Ex. Rpt.). As a result of his testing, the expert concluded that the Model 14 machines packaged finer food products, such as polished rice and ground coffee, at an average rate of 153 bags per minute. (Ex. Rpt.). In addition, the expert found that the Model 14 machines packaged coarse products, such as coffee beans, at a rate of 180 bags per minute. (Ex. Rpt.). According to the expert's report the average industry rate for both coarse and fine products is 180 bags per minute. (Ex. Rpt.).

8. The Model 14 machines MEDI-MACHINES provided were not defective because the contract did not expressly require the machines to package food at 180 bags per minute. (Exs. 1 – 2). In the contract, there is no reference to average industry rate, speed of machines, or 180 bags per minute. (Exs. 1 – 2). Even Claimant concedes “there is no express quality specification in the respect of packaging rate in the contract.” (Cl. Mem., ¶ 4). Under Article 35(1), it is impossible to impose a contractual obligation upon MEDI-MACHINES to deliver auger-feeders that package food at 180 bags per minute because the contract does not state an express requirement of 180 bags per minute or a requirement of average packaging rate. (CISG Art. 35(1); ICC, No. 8213).

4. There was no implied requirement that the Model 14 machines package at average industry rates.

9. The contract between MEDI-MACHINES and EQUAPACK did not impliedly obligate MEDI-MACHINES to deliver auger-feeders that packaged at 180 bags per minute. (Exs. 1 – 2). In the contract there is no reference to industry speeds or external sources with speed specifications. (Ex. 1). In the ICC case referred to above, the arbitrator held that the contract at issue did not imply an industry standard obligation because there was no mention in the contract of an inclusion standard or outside sources that specified a standard. (ICC, No. 8213).

10. MEDI-MACHINES' description of Model 14 machines as “one of our top products” and a machine that EQUAPACK “would be more than satisfied with” did not imply that the Model 14 auger-feeders would package food at 180 bags per minute. (Ex. 2). The popularity of Model 14 machines in the market place can be based on many factors, such as price, energy efficiency,

reliability, simplicity of use, compatibility with other products, and dimensions. Due to the multitude of factors, the assertion that the Model 14 machines were one of MEDI-MACHINES' top products cannot imply that its popularity was caused by the machines' packaging speed. Additionally, MEDI-MACHINES' customers can be completely satisfied with Model 14 machines even if they package at rates below the average industry rate. In fact, the expert engineer stated that the Model 14 machines can be "used in production line packaging" even though they package slower than 180 bags per minute. (Ex. Rpt.).

11. Claimant erroneously asserts that the contractual requirement for packaging speed is governed solely by the UNIDROIT principles, which require average quality of goods. (Cl. Mem., ¶ 5). Claimant states that the UNIDROIT principles should be relied on when determining the minimum quality of the goods MEDI-MACHINES must deliver because the packaging rate was never fully negotiated and the CISG is silent on the quality of goods that constitute non-conformity. (Cl. Mem., ¶ 5). Even though it is true that the UNIDROIT principles will apply when the CISG is silent, the CISG is not silent when parties to a contract do not specify the necessary contractual quality. (Ex. 2; CISG Art. 35(2)(a)). When the parties at issue do not negotiate quality requirements, Article 35(2)(a) governs the seller's responsibility for quality. (CISG Art. 35(2)(a); Honnold, p. 255; Bianca, p. 272; Schlechtriem, p. 278 – 279; Lookofsky, p. 44). According to Article 35(2)(a), the seller must meet the buyer's reasonable expectation of quality based on price and other circumstances. (Bianca, p. 272; Lookofsky, p. 44; *Beijing Light v. Conell*; NAI, 15.10.2002; Poikela, p. 38; Kritzer, p. 233; *Amran v. Tesa*). Therefore, the UNIDROIT principles requiring average quality of goods do not apply in this case because the CISG demands reasonable quality. (UNIDROIT Principles Art. 5.6; CISG Art. 35(2)(a); Bianca, p. 272; Lookofsky, p. 44; *Beijing Light v. Conell*; NAI, 15.10.2002; Poikela, p. 38; Kritzer, p. 233; *Amran v. Tesa*).

B. The Model 14 machines were fit for their ordinary use.

1. The ordinary use of Model 14 machines did not include packaging salt.

12. The Claimant describes Model 14 machines as packaging machines, which are used for the purpose of filling products into plastic bags and then sealing the bags. (Stat. of Cl. ¶ 3; Ex. 2). Under Article 35(2)(a) of the CISG, goods conform if they "are fit for the purposes for which goods of the same description would ordinarily be used." (CISG Art. 35(2)(a)). The Model 14

machines conformed because they filled weighed products into plastic bags and then sealed the bags. (Stat. of Cl., ¶ 8).

13. The ordinary use of packaging machines does not require Model 14 machines to package salt. Article 35(2)(a) does not require the Model 14 machines to fulfill purposes for which packaging machines are “sometimes, but not ordinarily used.” (Commentary Art. 33, ¶ 6). Some packaging machines package salt but the vast majority of packaging machines do not. (Proc. Ord. 3, ¶ 27). Therefore, the ordinary use of Model 14 machines does not encompass packaging salt because packaging machines only occasionally package salt. (CISG Art. 35(2)(a); Commentary Art. 33, ¶ 6; Proc. Ord. 3, ¶ 27).

2. A Model 14 machine’s ordinary use did not encompass packaging food products at 180 bags per minute.

14. The Model 14 machines’ packaging speed did not impair its ordinary purpose of packaging food into plastic bags. Although, the average industry rate for packaging coarse and fine food products is 180 bags per minute, the Model 14 machines packaged fine food products at an average rate of 153 bags per minute. (Ex. Rpt.). Under Article 35(2)(a), goods must meet the buyer’s expectation of reasonable quality, based on the contract description, price and other circumstances. (Commentary Art. 33, ¶ 6; Bianca, p. 272; Lookofsky, p. 44; *Beijing Light v. Conell*; NAI, 15.10.2002; Poikela, p. 38; Kritzer, p. 233; *Amran v. Tesa*). The Claimant’s reasonable expectation of the Model 14 machines’ quality was encompassed in its description of packaging machines. (Stat. of Cl., ¶ 3; Ex. 2). Regardless of the Model 14 machines’ speed, they still satisfy EQUAPACK’s reasonable expectation of filling products into plastic bags and sealing the bags, because speed only affects the length of time a machine must run in order to package food. According to the expert’s report, despite the lower rate of speed, the Model 14 machines could still be “used in production line packaging.” (Ex. Rpt.).

15. In a German case, the buyer claimed the fabric delivered to make dresses was defective because the fabric size could not be cut economically. (LG Regensburg, 24.09.1998). In the textile trade, it is customary for fabric to be sold in a size that can be economically cut. (LG Regensburg, 24.09.1998). The court calculated that in order to make dresses out of the uneconomical fabric it would cost the manufacturer two times the normal cost. (LG Regensburg, 24.09.1998). The court held that the fabric was not defective, even though it did not fulfill industry standards, because the fabric could still fulfill its ordinary purpose to produce dresses. (LG Regensburg, 24.09.1998). Correspondingly, Model 14 machines are not defective even

though they package fine products at speeds somewhat below the average industry rate because the auger-feeders can still be used to package food products. (Ex. Rpt.)

16. The Claimant erroneously asserts that goods fulfill their ordinary use based on an average quality test. (Cl. Mem., ¶ 7). Article 35 does not contain an express provision imposing on a seller a duty to deliver goods of average quality. (CISG Art. 35(2)(a); Bianca, p. 280). Some domestic legal systems have created various laws that attempt to supersede the CISG on the issue of implied quality standards. (Bianca, p. 281; Schlechtriem, p. 279; Poikela, p. 38). For example, in European and American courts there has emerged a rule that goods must be of average quality. (Schlechtriem, p. 279; NIA, 15.10.2002). In addition, English common law jurisdictions have created a merchantability quality criteria. (Schlechtriem, p. 279; NIA, 15.10.2002). However, applying any of these theories is inconsistent with the rules regarding interpreting the CISG. (CISG Art. 7(1)). According to Article 7(1), the CISG must be interpreted with regard to its international character and purpose, to promote uniformity in its application. (CISG Art. 7(1); Lookofsky, p. 17 – 18). A clause of the CISG cannot be interpreted based on the laws of a domestic legal system when they conflict with other domestic legal systems because this would not promote uniformity. (Lookofsky, p. 17 – 18; NIA, 15.10.2002). For example, the European average quality rule conflicts with the English merchantable quality rule. In addition, the CISG already requires the seller to meet the buyer's reasonable expectation of quality. (Bianca, p. 272; Lookofsky, p. 44; *Beijing Light v. Conell*; NAI, 15.10.2002; Poikela, p. 38; Kritzer, p. 233; *Amran v. Tesa*). Therefore, it is improper to employ Article 35(2)(a) by applying a domestic rule of average quality. (CISG Art. 35(2)(a); Lookofsky, p. 17 – 18; NIA, 15.10.2002; OLG Frankfurt, 20.04.1994).

17. Even if an average quality test were to be applied, the Model 14 auger-feeders are of average quality. The Expert's conclusion that 180 bags per minute is average means that there are packaging machines in the market that pack slower and faster than 180 bags per minute. (Ex. Rpt.). The Model 14 machines package coarse products at the average industry rate of 180 bags per minute. (Ex. Rpt.). In addition, the Model 14 machines package fine products at an average rate of 153 bags per minute. (Ex. Rpt.). The rate for fine products is within 15% of the average industry rate and is probably comparable to many packaging machines in the market that fall below the average rate. (Ex. Rpt.). In a Netherlands arbitration, the arbitrators held that the goods the seller delivered would not achieve average quality if they were unacceptably low or

high. (NIA, 15.10.2002). Correspondingly, the Model 14 machines were of average quality because a speed of 15% below the average industry rate is not *unacceptably* low. Even the expert engineer stated that the Model 14 auger-feeders “could be used in production line packaging.” (Ex. Rpt.). Therefore, the Model 14 Machines were fit for ordinary use as required by the contract.

C. EQUAPACK never informed MEDI-MACHINES of an intention to package salt before conclusion of the contract.

18. On 12 July 2002, the contract was concluded when EQUAPACK ordered six Model 14 machines and effectively accepted MEDI-MACHINES’ offer to sell auger-feeders. (Exs. 2 - 3; CISG Art. 14 - 18; Cl. Mem., ¶ 1). After 12 July 2002, Mr. Swan mentioned salt to Mr. Drake in passing. (Stat. of Cl., ¶ 6). Mr. Swan’s remark was not sufficient to render Mr. Drake aware that EQUAPACK intended to use the Model 14 machines to package salt. Even if Mr. Drake had understood Mr. Swan’s mention of salt to mean that EQUAPACK intended to package salt, MEDI-MACHINES was not required to deliver machines that packaged salt because the contract was already concluded. (CISG Art. 25(2)(b)).

1. The contract was concluded when EQUAPACK ordered six Model 14 machines.

a. MEDI-MACHINES offered to sell six machines to EQUAPACK on 3 July 2002.

19. MEDI-MACHINES’ letter on 3 July 2002, represented an offer to sell packaging machines to EQUAPACK. (CISG Art. 14(1)). Pursuant to Article 14(1), a communication forms an offer if it is “sufficiently definite and indicates the intention . . . to be bound in case of acceptance. (CISG Art. 14(1); *Magellan Int’l Corp. v. Salzgitter Handel*). A “proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes . . . the quantity and price.” (CISG Art. 14(1)). The 3 July letter was sufficiently definite because it specified the goods and quantity, six Model 14 machines, along with indicating the price of \$65,000 per machine. (Ex. 2; OG, 20.03.1997; OLG Frankfurt, 30.08.2000). MEDI-MACHINES intended to sell the machines to EQUAPACK in case of acceptance. (Ex. 2).

b. EQUAPACK’s letter ordering six machines constituted acceptance.

20. By letter of 12 July 2002, EQUAPACK accepted MEDI-MACHINES’ offer to sell six Model 14 machines, and the contract was concluded when MEDI-MACHINES received the letter. (CISG Art. 18(1) - (2); Ex. 3). According to Article 18, a statement of conduct indicating assent to an offer is an acceptance, which does not become effective until it reaches the offeror.

(CISG Art. 18(1) - (2)). The 12 July 2002 letter constituted acceptance because it agreed to buy six Model 14 machines that MEDI-MACHINES had offered to sell. (Ex. 3). This letter reached MEDI-MACHINES and concluded the contract before Mr. Drake and Mr. Swan's telephone conversation on 23 July 2002. (CISG Art. 18(2); Ex. 5).

2. EQUAPACK never informed MEDI-MACHINES of an intention to package salt before the contract was concluded.

21. MEDI-MACHINES was not required to provide salt packaging machines because EQUAPACK never told MEDI-MACHINES of its intention to package salt before the contract was concluded. (Exs. 1-3). According to Article 35(2)(b) of the CISG, goods must meet any particular purpose expressly or impliedly made known to the seller at the time of conclusion of the contract. (CISG Art. 35(2)(b)). The only time EQUAPACK ever mentioned salt was during a 23 July 2002 telephone conversation, which took place after the contract was concluded. (Ex. 5). Therefore, the Model 14 machines were not defective under Article 35(2)(b), because when the contract was concluded MEDI-MACHINES had no knowledge of the buyer's special purpose of packaging salt. (CISG Art. 35(2)(b)).

3. EQUAPACK's mention of salt after the contract was concluded did not inform MEDI-MACHINES of an intention to package salt.

22. EQUAPACK may argue that MEDI-MACHINES had a good faith obligation under the CISG and international commercial law to stop the shipment of the Model 14 machines after the 23 July 2002 phone conversation. However, it was impossible for MEDI-MACHINES to stop the shipment of the Model 14 machines because the telephone conversation did not make MEDI-MACHINES aware of EQUAPACK's intention to package salt. After the machines had been packed for ocean shipment, EQUAPACK called MEDI-MACHINES for the purpose of inquiring about the machines' shipping status. (Stat. of Cl., ¶ 6). During the conversation, Mr. Drake focused on the issues relating to shipping the Model 14 auger-feeders because that was the conversation's objective. (Stat. of Def., ¶ 5). In a small part of this conversation, Mr. Swan casually remarked that A2Z wanted EQUAPACK to package everything "from large beans to salt to fine powder." (Stat. of Def., ¶ 6). However, this off-hand remark was not sufficient to render Mr. Drake aware that EQUAPACK intended to use the Model 14 machines to package salt. (Stat. of Def., ¶ 6).

23. It is clear that EQUAPACK's mention of salt was insufficient to convey its intentions because MEDI-MACHINES would be financially better off if it had sold the more expensive

Model 17 machines that packaged salt. (Ex. 7). MEDI-MACHINES is a corporation primarily interested in making profits. A United States court has found that it should be presumed that businesses never behave irrationally in relation to their profitability. (*American Nurses' Assoc. v. Illinois*). If MEDI-MACHINES had been aware of EQUAPACK's intentions, as Claimant declares, it would have been more profitable for MEDI-MACHINES to halt shipment of the Model 14 machines and negotiate a new contract for the sale of the considerably more expensive Model 17 machines. (Cl. Mem., ¶ 36; Ex. 7). It is not profitable for MEDI-MACHINES to ship machines it knew would not fulfill EQUAPACK's particular purpose and lead to future legal disputes.

4. EQUAPACK ignored MEDI-MACHINES' warning that the Model 14 machines could not package corrosive products.

24. EQUAPACK used the Model 14 machines to package salt despite MEDI-MACHINES' warning that the machines could not be used to package corrosive products. (Proc. Ord. 3, ¶ 25). The six Model 14 machines delivered to EQUAPACK included operation manuals that stated the machines were "not intended for use with highly corrosive products." (Proc. Ord. 3, ¶ 25). When EQUAPACK received this warning, it should not have packaged salt with the Model 14 machines because a reasonable person would know that salt is a highly corrosive product. It is well known that salt is highly corrosive to metal. For example, when salt is spread on roadways during the winter to melt ice, it corrodes the metal on cars. Moreover, salt in the ocean air also corrodes cars. Due to this general knowledge, EQUAPACK could not have been unaware of the corrosive nature of salt. Therefore, EQUAPACK should never have used the Model 14 machines to package salt.

II. EQUAPACK IS NOT ENTITLED TO AVOID THE CONTRACT BECAUSE THERE HAS BEEN NO FUNDAMENTAL BREACH.

25. EQUAPACK is not entitled to avoid the contract because a buyer may only declare the contract avoided if the failure by the seller to perform any of its obligations under the contract amounts to a fundamental breach of contract. (CISG Art. 49). Even if this Tribunal were to accept EQUAPACK's allegations of non-conformity, the non-conformity does not amount to a fundamental breach. Therefore, avoidance of the contract is not warranted. Failure of the seller to deliver conforming goods does not alone confer a right of avoidance. (Carter, p. 101). A fundamental breach is required because contract avoidance is considered a particularly drastic remedy, especially in the context of international commercial trade, which normally involves

large transaction costs. (Chengwei, Ch. 8.1; Lorenz, p. 2; Bianca, Art. 49, 1.1; Kazimierska, p. 80; Ziegel, p. 2). All of the approaches employed in determining whether the breach is fundamental attempt to support the underlying purpose of preserving the enforceability of the contract by limiting the remedy of avoidance. (Chengwei, Ch. 8.4)

26. A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party that it substantially deprives him of what he is entitled to expect under the contract. (CISG Art 25). In addition, there is no fundamental breach if the party in breach did not foresee, and a reasonable person in the same circumstance would not have foreseen the result. (CISG Art 25). There was no fundamental breach here because: 1) MEDI-MACHINES did not breach its contractual obligation, 2) EQUAPACK did not suffer a detriment caused by MEDI-MACHINES, 3) EQUAPACK was not substantially deprived of what it was entitled to expect, and 4) EQUAPACK's use of salt in the Model 14 machines was not foreseeable to MEDI-MACHINES. Because all four prongs of Article 25 must be satisfied, every one of the above contentions must be refuted in order for this Tribunal to determine that a fundamental breach occurred. (*See Koch*, p. 266). Alternatively, there has been no fundamental breach because MEDI-MACHINES made an offer to cure. (CISG Art. 48(1)).

A. MEDI-MACHINES did not breach its contractual obligations since the Model 14 machines conformed to the contract.

27. There was no non-conformity as EQUAPACK alleges. (Stat. of Cl., ¶ 15). The contract between MEDI-MACHINES and EQUAPACK required that the Model 14 machines be fit for purpose of packaging a wide range of fine and coarse goods. (Ex. 1). EQUAPACK never requested, and the contract does not require that the Model 14 machines package all dry bulk commodities. The Model 14 machines are capable of packaging ground coffee, flour, beans and rice. The only product they are not capable of packaging is salt. Although the machines are unable to package one type of product desired by EQUAPACK, they do package a very wide range, which is all that is required by the contract.

B. MEDI-MACHINES was not the cause of EQUAPACK's detriment.

28. Any detriment suffered by EQUAPACK was not caused by MEDI-MACHINES. The detriment was the result of EQUAPACK's inappropriate use of the machines to package salt. Any damage EQUAPACK is claiming is not a "detriment" in the context of Art. 25. A key aspect of fundamental breach is that the detriment "results from" the acts of the other party. (Graffi, p. 338). Detriment is not equal to damage under Article 74 because parties have a right

to claim damages even if the breach is not fundamental. (Graffi, p. 338-39; Babiak, p. 118; Schlechtriem, p. 177; Ziegel, p. 16). In order to constitute a detriment, Article 25 requires that the damages be causally connected to the acts of the seller. (CISG Art. 25). Therefore, MEDI-MACHINES did not cause detriment to EQUAPACK.

C. EQUAPACK was not substantially deprived of what it was entitled to receive under the contract.

29. The contractual obligation between the parties was not explicit nor did it contain many specific terms. As a result the nature of the contractual obligation limits what EQUAPACK may expect. In addition, the consequences of MEDI-MACHINES' delivery of the Model 14 machines would not have had grave consequences for EQUAPACK had EQUAPACK not damaged them. The nature of the contractual obligation itself is the most important factor in determining whether any deviation is to be regarded as fundamental. (Koch, p. 214-15; Schlechtriem, p. 58; El-Saghir, 2(a)). Courts and scholars will also look at the gravity of the consequences of the breach in determining whether a breach was fundamental. (Koch, p. 217, 237).

1. The nature of the contractual obligation between the parties precludes EQUAPACK from claiming a fundamental breach.

30. There is no fundamental breach because neither the terms of the contract nor the parties' negotiations permit EQUAPACK to expect that the Model 14 machines could package salt. (Exs. 1, 3). A contractual obligation is violated only when the alleged non-performance is an essential term of the contract. (Koch, p. 256). As demonstrated in Part I above, the contract between MEDI-MACHINES and EQUAPACK did not have numerous explicit provisions describing the product to be purchased. The parties agreed that MEDI-MACHINES would sell EQUAPACK auger-feeder machines capable of packaging a wide range of dry bulk commodities into retail packages. (Exs. 1 - 2). The price and need for prompt delivery were also included in the contract. (Ex. 1). These are the only terms of the contract and negotiations that EQUAPACK may rely on. Moreover, the contract did not require the machines to perform at a particular speed. Despite what EQUAPACK may have subjectively desired the machines to do, under the contract terms, EQUAPACK was not deprived of anything it was entitled to expect. EQUAPACK may have desired machines that could package salt, but it did not convey this expectation at any point during the negotiation of the contract. (Exs. 1 - 3). In a situation similar to this, an Austrian Court denied a fundamental breach when flowers delivered by the seller did

not bloom throughout the summer. Because the buyer could not prove that the seller had made that a part of the contract, there was no fundamental breach. (OLG Innsbruck, 1.07.1994). In determining what a party is entitled to expect under the contract, it is not the personal and subjective interest of the injured party that matters, but the expectation that can be assessed by looking at the contract itself. (Babiak, p. 120; Lorenz, p. 5; Chengwei, Ch. 8.2.2.3).

2. The consequences of the alleged non-conformity were not sufficiently grave to amount to a fundamental breach.

31. EQUAPACK's current situation is not due to non-conformity of the Model 14 machines, but to EQUAPACK's misuse of them. In determining the substantiality of the detriment, the extent to which the detriment to the aggrieved party is the result of its own conduct should be taken into account. (Chengwei, Ch. 8.2.2.2). Only the consequences that are attributable to the non-conformity of the Model 14 machines should be taken into account, not the consequences of EQUAPACK's misuse of salt in the machines.

32. Therefore, even if this Tribunal would find that the Model 14 machines are non-conforming, the consequences to EQUAPACK would still be minor. In order to determine the severity of the consequences of the breach, courts and scholars consider 1) the loss suffered by the aggrieved party compared to the overall contract value, 2) whether the purpose of the contract was frustrated, and 3) whether damages would sufficiently compensate the aggrieved party. (Koch, p. 217-18, 237). The losses EQUAPACK suffered that can be attributed to any alleged non-conformity are only a small portion of the overall value of the contract. The Model 14 machines were suitable for the bulk of the purposes envisioned by EQUAPACK. Finally, an award of damages would have adequately protected EQUAPACK.

a. The losses suffered by EQUAPACK that can be attributed to the non-conformity are only a small portion of the overall value of the contract.

33. MEDI-MACHINES denies any responsibility for EQUAPACK's losses. However in the event that any liability were to be found, it would be minimal. The amount of EQUAPACK's loss that could possibly be attributed to non-conformity of the Model 14 machines would be limited to any value lost on the A2Z contract from its inability to package salt in the time it took to acquire the two new salt packaging machines. The Model 14 machines could have been used in packaging all of the other products required by EQUAPACK.

34. EQUAPACK incorrectly alleges that MEDI-MACHINES is responsible for the loss attributable to the increased cost of replacement machines. (Stat. of Cl., ¶ 18; Cl. Mem., ¶ 51).

Since EQUAPACK's contract with A2Z requires salt to be packaged, EQUAPACK's need to purchase two machines capable of packaging salt has nothing to do with its contract with MEDI-MACHINES. Non-conformity did not "force" EQUAPACK to purchase higher priced machines capable of packaging salt, as EQUAPACK's memorandum alleges. (Cl. Mem., ¶ 51). It was EQUAPACK's need to package salt that required the more expensive machines to be purchased. This purchase would have been necessary had EQUAPACK and MEDI-MACHINES never entered into a contract. It was certainly not forced upon EQUAPACK by MEDI-MACHINES. Moreover, the replacement costs for the purchase of regular auger feeder machines are losses caused by EQUAPACK's misuse of the machines and are not attributable to MEDI-MACHINES.

b. The Model 14 machines were suitable for the majority of EQUAPACK's intended purposes.

35. Since the machines could package all but one of the goods desired by EQUAPACK, the purpose of the contract was not frustrated, even if the machines were non-conforming. EQUAPACK asserted that the machines failed to package any product. (Cl. Mem., ¶ 47). This is simply not true. The Tribunal-appointed expert stated that the Model 14 machines he observed "could be used in production line packaging." (Ex. Rpt.). Two of the Model 14 machines were not corroded by salt and could still be used to package every other product packaged by EQUAPACK. (Stat. of Cl., ¶ 8). If a buyer can find another reasonable use for the goods then the breach is not fundamental. (Lorenz, § II; LG München, 27.02.2002; OLG Frankfurt, 18.01.1994; BRG, 3.04.1996).

36. In addition, EQUAPACK cannot claim that because the machines packaged some products below the industry average the purpose of the contract was frustrated. Because fifty percent of products are necessarily above the average and fifty percent are necessarily below the average, half of the auger feeder machines in the industry would be non-conforming in cases where the contract was silent on the issue of quality. EQUAPACK did not say it wanted particularly speedy processing machines. (Exs. 1 - 2). Its main concerns during negotiations were a low price and prompt delivery. (Exs. 1 - 2). The quality and speed of the machines were never even mentioned by EQUAPACK. (Exs. 1 - 2). If these issues were of particular importance to EQUAPACK, they should have been specifically negotiated before the conclusion of the contract. During negotiations, MEDI-MACHINES informed EQUAPACK that its machines were a top product and its customers have always been completely satisfied. (Ex. 2).

This appears to be a completely truthful statement, because MEDI-MACHINES had never had problems with customer complaints before. (Proc. Ord. 3, ¶ 15). However, there is no way this statement can be taken by EQUAPACK as some sort of assurance of industry average speed. EQUAPACK cannot now claim that the purpose of the contract has been frustrated based on average numbers in the industry that have no basis in the terms of the contract itself.

c. In the event that MEDI-MACHINES were to be found liable, an award of damages would adequately protect EQUAPACK.

37. EQUAPACK should not be permitted to avoid the contract when, if any defect in MEDI-MACHINES performance were to be found, an award of damages would be sufficient to protect EQUAPACK's interests. Contract termination is intended to be a rare remedy for drastic circumstances. (Chengwei, Ch. 8.1; Lorenz, p. 2; Bianca, Art. 49; Kazimierska, p. 80; Ziegel, p. 2). EQUAPACK's monetary loss does not warrant avoiding an entire contract. Avoidance often causes serious detriment to the allegedly breaching party whose expenses in preparing and tendering performance may not be recovered. (Chengwei, Ch. 7).

38. Unlike most situations that warrant avoidance of the contract, EQUAPACK's losses could be remedied by damages if MEDI-MACHINES were found liable. Those losses would be limited to any value EQUAPACK lost by its inability to package salt while awaiting the two replacement machines. This is not an exceptional case. There is no reason why damages would not suffice.

D. EQUAPACK's misuse of the Model 14 Machines was not foreseeable.

39. Because it was not foreseeable that EQUAPACK would misuse the machines, MEDI-MACHINES is not liable for a fundamental breach. Any detrimental effects must be reasonably foreseeable to the allegedly breaching party in order to constitute a fundamental breach. (Shen, p. 12). Courts and scholars have assessed foreseeability to the breaching party at both the time of contract conclusion or at any point up until the breach. (Lorenz, §II). MEDI-MACHINES was unaware at all relevant times that EQUAPACK would be using salt in the Model 14 machines.

40. EQUAPACK's need to package salt was not an express contract term. (Exs. 1 - 3). Therefore, at the time the contract was concluded on 12 July 2002 it was not foreseeable to EQUAPACK that salt would be used. When a contract does not clearly state the importance of an obligation, the conduct and the foreseeability to the breaching party is interpreted with more tolerance. (Graffi, p. 339). Additionally, EQUAPACK's intention to use salt was not

foreseeable at any point before the alleged breach. Mr. Drake of MEDI-MACHINES maintains that he was not aware of any mention of salt by EQUAPACK during the 23 July 2002 conversation. (Ex. 7). Neither party intended this conversation as additional negotiations of contract terms. Mr. Swan had called to ascertain the status of the order and the shipping arrangements. (Exs. 4 - 5). His mention of salt was casual, out of context, and insufficient to alert Mr. Drake that EQUAPACK intended to use the machines to package salt. Even if Mr. Drake heard the mention to salt, he had no reason to believe that EQUAPACK intended to use it in the Model 14 Machines. He could have believed that EQUAPACK already owned salt-packaging machines, since EQUAPACK had never mentioned salt before, and this conversation was not intended as a negotiation of contract terms.

41. In addition, a reasonable seller in MEDI-MACHINES' position would not have foreseen EQUAPACK's use of the machines to package salt. When evaluating whether a reasonable person of the same kind would foresee the event, business people in the same trade sector should be considered. (Schlechtriem, p. 179; Graffi, p. 339-40). The majority of firms in the industry that pack dry bulk products into retail sized packages do not pack salt. (Proc. Ord. 3, ¶ 27). The industry standard is to use stainless steel machines to package salt since it is well known that it is highly corrosive. (Stat. of Def., ¶ 4). MEDI-MACHINES has been in the packaging industry and has been supplying both types of machines for over thirty years. (Proc. Ord. 3, ¶ 10). The fact that they may not explicitly ask each customer if they will be using salt, but have never had a complaint of this type before, suggests a general knowledge about salt in the industry. (Proc. Ord. 3, ¶ 15).

E. There was no fundamental breach because MEDI-MACHINES' offer to resolve the dispute could be viewed as an offer to cure.

42. Upon learning of EQUAPACK's problems with corrosion of the Model 14 Machines on 18 October 2002, MEDI-MACHINES immediately responded to EQUAPACK on 27 October 2002 with an offer to resolve the dispute. (Exs. 7 - 8). MEDI-MACHINES offered to sell EQUAPACK its Model 17 packaging machines that were appropriate for EQUAPACK's salt packaging needs at a "substantial concession." (Ex. 7). MEDI-MACHINES made clear that it had no responsibility for what went wrong. (Ex. 7). Nonetheless, if this tribunal were to find any liability on MEDI-MACHINES part, Article 48 of the CISG provides that a seller may, even after the date of delivery, remedy any failure to perform his obligations. (CISG Art. 48). Several CISG scholars and courts will not find a breach of contract fundamental when there is an

offer to cure. (Schlechtriem, p. 183; Honnold, p. 296; Karollus, p. 494; Farnsworth, p. 88; OLG Koblenz, 31.01.1997). Even non-conformity of major significance does not constitute a fundamental breach when the seller is willing to make substitute delivery and such delivery would not cause buyer unreasonable inconvenience. (Koch, p. 252-53; Graffi, p. 344; HG Zurich, 16.04.1995). The purpose of Article 48 would be frustrated if the buyer were allowed to avoid the contract before giving the seller a chance to cure the defect. (Honnold, p. 296; Koch, p. 226-27).

43. MEDI-MACHINES was deprived of its right to cure any alleged defects. (Graffi, p. 344). MEDI-MACHINES' offer of the Model 17 MACHINES to EQUAPACK was a valid solution to EQUAPACK's inability to package salt. There has been no fundamental breach since MEDI-MACHINES' offer to resolve the dispute should be considered an offer to cure in the event that any non-conformity is found. MEDI-MACHINES demonstrated willingness to compromise and work with EQUAPACK. This is not a situation where avoidance of the contract is warranted.

III. EQUAPACK'S INABILITY TO MAKE RESTITUTION BARS ITS AVOIDANCE OF THE CONTRACT.

44. EQUAPACK has no right to avoid the contract because it is unable to return the Model 14 machines in substantially the same condition it received them. A party loses the right to declare the contract avoided if it is impossible to make restitution of the goods in substantially the same condition they were received. (CISG, Art. 82). Even if it was determined there was a fundamental breach, EQUAPACK loses its right to avoid the contract since several of the machines are severely corroded and cannot be returned to MEDI-MACHINES in substantially the same condition. (Stat. of Cl., ¶ 8). Furthermore, EQUAPACK does not qualify for any exception to this provision. (Enderlein, p. 346). First, EQUAPACK's inability to return the goods in the same condition is due to its own misuse of the machines. (CISG Art. 82(2)(a)). Second, the goods were not transformed in the normal course of EQUAPACK's business. (CISG Art. 82(2)(c)). Consequently, EQUAPACK has no right to declare the contract avoided.

A. EQUAPACK's inability to return the Model 14 Machines in substantially the same condition is due to its misuse of the machines.

45. The cause of the corrosion was EQUAPACK's use of salt in the machines despite warnings in the technical literature and on MEDI-MACHINES' website that they were not to be used with corrosive materials. (Proc. Ord. 3, ¶ 25; Ex. 7). EQUAPACK claims that since it had

never packaged salt before and did not know that it would corrode the machines, that it is not responsible for the corrosion. (Ex. 5). Even though EQUAPACK failed to visit MEDI-MACHINES' website, the Model 14 machines themselves included an operations manual that stated the machines were not intended for use with highly corrosive product. (Proc. Ord. 3, ¶ 25). This literature implicitly warned EQUAPACK that it should not have used salt in the machines. Even if EQUAPACK claims that it did not know salt was considered a highly corrosive product, this language in the literature should have put EQUAPACK on notice that there were products that the machines could not package. If EQUAPACK was unsure what products constituted highly corrosive products, it had a duty to enquire further. Therefore, it was EQUAPACK's negligence and its act of using the machines to package salt that caused the damage.

B. The machines were not transformed in the normal course of EQUAPACK's business.

46. EQUAPACK's normal course of business did not include packaging salt. Since 1997, EQUAPACK's business had been packaging small quantities of tea, coffee, rice, and sugar. (Proc. Ord. 3, ¶ 10). It was not within EQUAPACK's normal course of business to package a highly corrosive, special product like salt that the vast majority of firms that pack dry bulk products into retail packages do not pack. (Proc. Ord. 3, ¶ 27). It is well known that salt is highly corrosive and requires special machines to package it. (Stat. of Def., ¶ 4). EQUAPACK cannot claim that the machines were transformed in the normal course of its business. The goods were transformed by the salt because EQUAPACK was embarking into an area of the packaging industry without undertaking due diligence. EQUAPACK should have properly researched what was required before taking on a large contract that included goods it had never packaged before. When any company undertakes a new venture, the normal practice is to do research on what is necessary for the proper operation of the business. EQUAPACK should not be able to avoid its responsibility for misusing the machines by claiming it just did not know any better.

IV. EQUAPACK DID NOT GIVE ADEQUATE NOTICE OF AVOIDANCE.

47. EQUAPACK did not provide MEDI-MACHINES with effective notice of avoidance. A contract is avoided as a result of a fundamental breach only if the buyer declares the contract avoided by giving notice to the seller. (Schlechtriem, p. 425). EQUAPACK's 19 October 2002 letter did not sufficiently communicate its intention to avoid the contract. The letter indicated

that EQUAPACK could not use the machines due to corrosion, and expressed a need to purchase replacement machines. (Ex. 6). The letter states that corrosion is the basis for its inability to use the machines. It never mentions that only four of the machines are corroded, nor does it claim that any of the machines were too slow. The speed of the machines is not even mentioned in the letter. Notices of avoidance must meet a high standard of clarity in order to be effective. (Jacobs, p. 410).

48. EQUAPACK's letter was unclear as an avoidance and MEDI-MACHINES' response suggests that it did not interpret it as one. MEDI-MACHINES replied on 27 October 2002 with an offer to sell EQUAPACK Model 17 machines at a substantially lower price. (Ex. 7). This was a reasonable business response to a problem that had been raised. A reasonable person in MEDI-MACHINES' position would have understood the letter as raising the problem in search of a business solution. MEDI-MACHINES' offer to sell EQUAPACK additional machines clearly indicates it did not believe EQUAPACK had ended their business relationship. For an effective avoidance, the avoiding party must unmistakably inform the other party that the contractual relationship will be terminated. (OLG Frankfurt, 17.09.1991). Because no clear statement was made by EQUAPACK, the contract was not properly avoided.

V. IT IS APPROPRIATE FOR EQUAPACK TO POST SECURITY FOR COSTS OR TO PROVIDE MEDI-MACHINES WITH FINANCIAL INFORMATION.

49. EQUAPACK should be required to post security for costs or, in the alternative, to provide relevant financial information to MEDI-MACHINES. Pursuant to SIAC Rule 27.3, this Tribunal has the authority to order any party to provide security for the legal or other costs of any other party. (SIAC Rule 27.3). Because EQUAPACK acknowledges the Tribunal's authority to require security to be posted (Cl. Mem., ¶ 80), the Tribunal's authority to make such an order is not an issue in this arbitration.

50. Given the exceptional circumstances of the case (*see* ¶ 52 below), the Tribunal should exercise its authority to order EQUAPACK to post security or to provide adequate financial information. As EQUAPACK has recognized in Claimant's Memorandum, the Tribunal has the discretion to decide the appropriateness of ordering a party to post security for the other party's legal costs. (Cl. Mem., ¶ 80; Redfern & Hunter, § 7-31; Marchac, p. 129). Although it is often argued that security for costs is an unusual award (Redfern & Hunter, § 7-31), security for costs is a tradition that dates back to at least the 15th century. (Rubins, p. 312). Furthermore, security

for costs has become a necessity because this interim measure has the effect of minimizing conflict within the arbitration by reducing incentives for both parties to engage in obstructive or strategic behavior. (Rubins, p. 356; ICC, No. 6697).

51. Arbitral tribunals traditionally grant such orders on a case-by-case basis, considering the relevant facts in each case to determine the appropriateness of awarding security or requiring the revelation of confidential financial information. (Lynch, § II.(A.)(3)(j)). The conclusion drawn from consideration of the facts in this case is that EQUAPACK should be required to post security or to produce its confidential financial information.

A. The Tribunal should order EQUAPACK to post security for costs.

52. MEDI-MACHINES can show that security for its costs is merited because of the exceptional circumstances in this situation. (Wirth, § II.(2)(d)). In determining whether exceptional circumstances exist, a tribunal balances the probability of harm to the respondent versus to the claimant. (NIA, 12.12.1996; *Sarawak v. Sami Mousawi-Utama SDN BHD*). The purpose of posting security is to guard against the possibility that the claimant cannot or will not pay an order of costs in favor of the respondent. (Rawding, p. 71; Soo, p. 28; MR, 1995; *John Wink Ltd. v. Sico Inc.*; Goldstein, p.17; *Glencore Int'l AG v. Tianjin Buargong Mineral Products Co. Ltd.*). A respondent is particularly vulnerable because it is compelled to litigate in order to avoid a default judgment, even where there is evidence that the suit is frivolous and that the claimant does not have sufficient assets to pay respondent's costs. (Colbran, p. 85). Here, because MEDI-MACHINES' interest in securing a final award for its costs prevails over EQUAPACK's interest in unimpeded access to arbitral justice, EQUAPACK should be ordered to post security. (Zurich, No. 415). MEDI-MACHINES' interest prevails because first, EQUAPACK is experiencing financial difficulty that endangers the enforceability of a cost award. (Ltr. of 1.09.2003). Second, because the amount being requested for security is reasonable, EQUAPACK's financial difficulties in conjunction with the unenforceability of an award in Equatoriana and the fact that EQUAPACK is unlikely to be successful in this arbitration justify an interim order for security. Finally, the behavior of both parties and traditional arbitral practices indicates that an interim order for security is appropriate and reasonable under the circumstances.

1. EQUAPACK is suffering financial difficulties.

53. Because EQUAPACK's financial difficulties endanger the enforceability of a cost award, the Tribunal should order EQUAPACK to post security for costs. Security for costs should only

be ordered in exceptional circumstances, and a danger that a future cost award would not be enforceable due to insolvency of the claimant is an exceptional circumstance. (Wirth, § II (2)(d)). The financial health of a claimant is a major factor in the determination of whether or not to require the claimant to post security. (Rubins, p. 373; *KS Oriental Trading PTE Ltd v. Defmat Aerospace PTE Ltd.*). In fact, courts have seen impecuniousness as the primary basis for ordering security for costs, because there is an appreciable risk that a cost award will not be satisfied. (Rawding, p. 74; Rubins, p. 373; *Schokman v. Hogg; Holly Homes Ltd. v. Euchner; First Avenue Research Corp. v. Donar Chemicals Ltd.*). Even if the respondent must show more than a mere probability that the claimant will be unable to pay respondent's costs (Soo, p. 29; *Bomar Resources, Inc. v. Sierra Rutile Ltd.*), there is credible evidence from reputable newspapers that not only is EQUAPACK experiencing cash-flow problems, but that it has also been delinquent in paying its trade creditors and has sought additional financing. (Ltr. of 1.09.2003; Proc. Ord. 3, ¶ 43). This is evidence of significant financial trouble that establishes that it is highly probable that EQUAPACK will be unable to satisfy a cost award against itself.

54. Because MEDI-MACHINES has shown that EQUAPACK is experiencing financial difficulty, the onus passes to EQUAPACK to show that it has sufficient assets to show some other reason why the arbitration should proceed without being required to post security. (*John Wink Ltd. v. Sico Inc.*). Despite EQUAPACK's arguments that the claims of its financial difficulties are unfounded, EQUAPACK has shown no evidence to contradict the stories in the newspaper. (Cl. Mem., ¶ 83). The only thing EQUAPACK cites that could meet this burden is the payment of its arbitration costs. However, EQUAPACK's payment of its arbitration costs does not guarantee that MEDI-MACHINES will be able to enforce a final cost award. (Ltr. of 11.03.2003; Ltr. of 1.09.2003). In fact, EQUAPACK itself admits that it is experiencing financial difficulties as it has suffered "significant ... financial consequences" in the amount of US \$537,650. (Ltr. of 24.09.2003; Stat. of Cl., ¶ 18). Thus, EQUAPACK cannot give MEDI-MACHINES a guarantee that a cost award will be satisfied. In similar situations, where the claimant was experiencing financial difficulties that resulted in concerns about the claimant's ability to satisfy a cost award against it, security was ordered. (NIA, 12.12.1996; *Oilex v. Mitsui; Regia v. Gulf; DJM Developments PTY Ltd. v. N. Territory of Australia; Sarawak v. Sami Mousawi-Utama SDN BHD*). This is true even where the order for security would impose hardship on the claimant. (*First Avenue Research Corp. v. Donar Chemicals Ltd.; Motun Ltd. v.*

Detroit Diesel-Allison Canada East). Consequently, the Tribunal should similarly order EQUAPACK to post security.

55. Furthermore, any financial difficulty that EQUAPACK is suffering was not caused by MEDI-MACHINES. As discussed in Part II of this response, MEDI-MACHINES did not breach its contract with EQUAPACK. Even if that were the case, the burden is on EQUAPACK to establish that MEDI-MACHINES' wrongful actions, and not EQUAPACK's misuse of the machines, have caused its present financial difficulty. (*See BPM Pty Ltd. v. HPM Pty. Ltd.*). Because EQUAPACK has shown no evidence that MEDI-MACHINES is to blame for EQUAPACK's difficult financial situation, EQUAPACK cannot use that excuse to avoid posting security. (*See BPM Pty Ltd. v. HPM Pty. Ltd.*).

2. The amount requested for security is reasonable, necessary, and not unduly burdensome.

56. The magnitude of the security being sought by MEDI-MACHINES is fair and appropriate. MEDI-MACHINES has only requested \$20,000 as security against an award of costs. (Ltr. of 1.09.2003). In ascertaining whether the amount being requested for security is reasonable, tribunals take into account the estimated length of the arbitration, the complexity of the matters before it, and the probable costs of the party making the request. (*Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.*). The \$20,000 that MEDI-MACHINES has requested for security includes the \$10,000 advance on costs MEDI-MACHINES has already paid to SIAC, while the remaining \$10,000 reflects MEDI-MACHINES' expected legal expenses for this arbitration. (Ltr. of 1.09.2003). According to SIAC rules, MEDI-MACHINES is entitled to request not only the institutional costs of the arbitration but also the costs of responding to EQUAPACK's claims. (*See SIAC Rule 30.1, 30.3*). Similarly, other arbitral tribunals have found costs for security which include both arbitration costs and the legal costs and expenses of a respondent were reasonable. (Zurich, No. 415). Thus, EQUAPACK is incorrect when it argues that MEDI-MACHINES can only recover the institutional fees. (Cl. Mem., ¶ 102).

57. In consideration of the expected length and complexity of this arbitration, US \$10,000 in legal fees is quite reasonable. After all, the parties have been involved in this arbitration since February of 2003, and will likely be involved in this process for over a year. (Ltr. of 10.02.2003). Thus, US \$10,000 in estimated legal costs is not only reasonable but is likely to be a low estimate.

58. Furthermore, because the amount requested will not prevent EQUAPACK from arbitrating its claim, EQUAPACK cannot argue that the amount is unreasonable or that it would be harmed if it were ordered to post security. Courts are wary of granting security for costs that have the effect of stifling a genuine claim. (Bowes, p. 1; *Sarawak v. Sami Mousawi-Utama SDN BHD*). However, in light of EQUAPACK's annual sales of \$8-10 million, the \$20,000 MEDI-MACHINES is requesting for security is *de minimis*. (Proc. Ord. 3, ¶ 44). The security being sought is only 0.25% of EQUAPACK's annual sales, which is not at all unreasonable. In *Karaha Bodas Co. LLC*, the court ordered security for costs to be posted because the amount sought was *de minimis* in comparison to the main claim and there was a possibility that there would be insufficient funds at the end of the suit to satisfy a cost award. (*Karaha Bodas v. Persusahaan*). EQUAPACK itself admits in Claimant's Memorandum that the amount MEDI-MACHINES is requesting is affordable because it represents only a small percentage of its annual sales. (Cl. Mem., ¶¶ 95, 105). Thus, EQUAPACK will not be prevented from arbitrating its claims if required to post security. In a similar case, where there was no evidence that an order for security for costs would stifle the claimant's claim, the court ordered the claimant to post security. (*Spargos Mining NL v. Fuller & Ors*). Accordingly, since EQUAPACK will not be prevented from arbitrating if required to post security, the probability that MEDI-MACHINES will be harmed because it may be unable to enforce a final arbitral award in Equatoriana far outweighs EQUAPACK's objections to posting security. Therefore, EQUAPACK should post security.

3. Equatorianan courts have not been enforcing arbitral awards under circumstances similar to those present in this case.

59. Evidence that Equatorianan courts have not been enforcing foreign arbitral awards justifies the Tribunal in granting MEDI-MACHINES' request for security. Because security for costs is intended to ensure that a claimant is not judgment proof, ordering security is particularly appropriate when there is concern about the enforceability of a final cost award. (Rubins, p. 313; Brawn, p. 193). As a result, in several international conventions, a connection is made between an order for security and a lack of possible enforcement abroad. (*See NIA, 12.07.1985*). The reason for this is that it is patently unfair to respondents who are compelled to arbitrate to forfeit any chance to recoup their costs merely because of a geographical accident. (Rubins, p. 359). Normally where all involved are parties to the New York Convention, enforceability has less relevance to the issues of security for costs because the New York Convention ensures an

award's enforceability. (*Karaha Bodas v. Persusahaan*; Redfern, p. 358). However, where a country's procedures make it difficult to enforce arbitration awards, enforceability is a very relevant issue. (Brawn, p. 194). Thus, the correct question to ask when determining whether to order security for a respondent's costs is not whether a claimant is a party to the New York Convention but instead whether the respondent can enforce an award where the claimant's assets are located. (Brawn, p. 194).

60. In this case, because there is a real likelihood that a cost award will not be enforceable in Equatoriana, where EQUAPACK's assets are located, the Tribunal should order EQUAPACK to post security in order to protect MEDI-MACHINES' right to recoup its arbitration costs. (*See* Ltr. of 1.09.2003). A report by the International Arbitration Committee of the International Commercial Law Association indicates "courts in Equatoriana have not been rigorous in their enforcement of foreign awards." (Ltr. of 1.09.2003). More significantly, the report states that Equatorianan courts have generally found means to avoid enforcing awards against firms from Equatoriana, when the firm is in financial difficulty. (Ltr. of 1.09.2003). Because all of EQUAPACK's assets are located in Equatoriana, MEDI-MACHINES can only enforce an award against EQUAPACK in Equatoriana. (Proc. Ord. 3, ¶ 48). As EQUAPACK is an Equatorianan company who is presently suffering financial difficulty, MEDI-MACHINES is justifiably concerned about the enforceability of an award in its favor in light of this evidence.

61. Because there are no other agreements between the parties relevant to enforcing arbitral awards, there is no assurance that an award in MEDI-MACHINES' favor would be enforceable. (Proc. Ord. 3, ¶ 5). In two analogous cases, where there was evidence that an award in favor of the respondent might be refused recognition in the country where the claimant's assets were located, the court ordered the claimant to post security. (MR, 1995; Brawn, p. 194). Consequently, the Tribunal should order EQUAPACK to post security for MEDI-MACHINES' costs because there is simply no assurance that an award would be enforceable in Equatoriana.

4. EQUAPACK's breach of contract claim is groundless.

62. Another reason for EQUAPACK to post security is that EQUAPACK is unlikely to be successful in this arbitration. As EQUAPACK recognized, an important consideration in granting security for costs is the merits of the claimant's case. (Cl. Mem., ¶¶ 89, 90; *Karaha Bodas v. Persusahaan*; *Creative Elegance SDN BHD v. Puay Kim Seng & Anor*). Where it can be shown that there is a high probability that the respondent will succeed, that factor can be

significant in determining costs and also has been a basis to order a claimant to post security. (Hsu, p. 110; *Faridah Begum bte Abdullah v. Dato Michael Chong; Tolstoy Miloslavsky v. UK*). As discussed in Part II of this memorandum, MEDI-MACHINES has not breached its contract with EQUAPACK. Consequently, EQUAPACK has no cause of action against MEDI-MACHINES, and its claims are groundless. Thus, MEDI-MACHINES is the party who is being harmed in this arbitration since it is being forced to expend time and money to answer EQUAPACK's groundless claims. An order for security is often used to deter groundless claims such as these. (Brawn, p. 194). Accordingly, the Respondent urges the Tribunal to grant MEDI-MACHINES' request and order EQUAPACK to post security.

5. Neither the behavior of EQUAPACK, nor that of MEDI-MACHINES is a basis to deny MEDI-MACHINES' request for security for its costs.

63. Consideration of the behavior of both EQUAPACK and MEDI-MACHINES justifies the Tribunal in ordering EQUAPACK to post security. Arbitrators look at the conduct of the both parties in an arbitration to determine the appropriateness of an award for security. (Rubins, p. 312). With respect to respondents, tribunals have held that a respondent must show good intentions in order for a request for security to be granted. (Rubins, p. 315, Hsu, p. 110). This is to prevent a request for security from being used as a delaying tactic. (Rubins, p. 315, Hsu, p. 110). A respondent paying his own portion of the fees shows bona fide intentions. (Rubins, p. 375, *BPM Pty Ltd. v. HPM Pty Ltd.*, p. 343). EQUAPACK agrees with this assertion. (Cl. Mem., ¶ 99). Thus, the fact that MEDI-MACHINES has paid its portion of the arbitration fees indicates that Tribunal should grant its request for security. (Ltr. of 26.03.2003).

64. Furthermore, EQUAPACK has unsuccessfully argued that MEDI-MACHINES' request for security is not bona fide because it was made late in the arbitral process. (Cl. Mem., ¶ 101). A request for security need only be brought promptly and without reasonable delay. (*Bott v. Sorley; Regia v. Gulf; Gray v. Webster*). In this case, as soon as MEDI-MACHINES became aware of EQUAPACK's financial difficulties, MEDI-MACHINES made its request. (Ltr. of 1.09.2003). MEDI-MACHINES only has access to EQUAPACK's financial information that is in the public domain. (Proc. Ord. 3, ¶ 43). Thus, MEDI-MACHINES' request was hampered by the lack of publicly available information. Consequently, the date of MEDI-MACHINES' request for security is not indicative of an intent to delay the proceedings. However, even if a request for security is late, it will generally not be denied on that basis alone. (*Bott v. Sorely*). Because EQUAPACK has not provided any other support for its assertion that the Tribunal

should refuse to grant MEDI-MACHINES' request for security, the Tribunal should grant MEDI-MACHINES' request.

65. In contrast, EQUAPACK's conduct causes concern that it does not have bona fide intentions. EQUAPACK has stated that it can afford to pay the amount requested for security. (Cl. Mem., ¶¶ 95, 105). Thus, EQUAPACK is wasting the time and resources of all those involved in this arbitration by objecting to posting security that it can afford to post and will not be harmed by posting. EQUAPACK's objections appear to be a stall tactic that is not indicative of bona fide intentions. (Rubins, p. 315; Hsu, p. 110). When there is evidence that a party is using its objections to delay the proceedings as there is here, the Tribunal should not heed those objections and should in fact require that party to post security. (*Jaffasweet Juices Ltd. v. Michael J. Firestone & Assoc.; Gray v. Webster*).

B. MEDI-MACHINES' request for financial information is reasonable and well-founded and as such should be granted.

66. MEDI-MACHINES' request for EQUAPACK's confidential financial information should be granted. MEDI-MACHINES requested financial information in order to provide an opportunity for EQUAPACK to establish its ability to satisfy a cost award. MEDI-MACHINES did not make this request to harass, delay or otherwise harm EQUAPACK. MEDI-MACHINES has a well-founded concern about EQUAPACK's ability to pay a cost award in favor of MEDI-MACHINES. MEDI-MACHINES did not initiate this arbitration and should not be penalized for seeking protection for costs it should not have to pay. The only way MEDI-MACHINES can protect itself from EQUAPACK's financial difficulties without an order for security is to ensure that EQUAPACK is financially stable. To do that, MEDI-MACHINES needs an accurate picture of EQUAPACK's financial situation. As EQUAPACK itself stated, to accurately ascertain EQUAPACK's financial situation, MEDI-MACHINES "should necessarily consider [EQUAPACK's] accounts." (Cl. Mem., ¶ 84). Such information is essential to verify EQUAPACK's claim that concerns about EQUAPACK's financial difficulties are unfounded. (Cl. Mem., ¶ 83). However, because EQUAPACK's financial condition is solely within EQUAPACK's own knowledge, only EQUAPACK can provide the financial information that will leave no doubt as to its ability to pay any future award in MEDI-MACHINES' favor. (*BPM Pty Ltd v. HPM Pty Ltd*). Thus, this information is relevant and necessary.

67. Furthermore, EQUAPACK will not be harmed by disclosure of its financial information. Like EQUAPACK, MEDI-MACHINES is bound by SIAC Rule 34.6 to treat all matters relating

to the proceeding as confidential. Therefore, there is no risk to EQUAPACK that this otherwise confidential information will become public knowledge, or that MEDI-MACHINES would misuse such information. Moreover, MEDI-MACHINES has not requested all of EQUAPACK's financial information. MEDI-MACHINES' request is tailored to addressing the issues put into doubt by credible news reports. (Proc. Ord. 3, ¶ 43; Ltr. of 1.09.2003). Therefore, it is reasonable to require EQUAPACK to give its relevant financial information to MEDI-MACHINES.

VI. EQUAPACK SHOULD BE REQUIRED TO KEEP THE EXISTENCE AND DETAILS OF THIS ARBITRATION PROCEEDING CONFIDENTIAL.

68. EQUAPACK agreed to arbitrate under the SIAC Rules of Arbitration. (Stat. of Cl., ¶ 13). Most arbitration rules, including the SIAC Rules, provide that confidentiality should be maintained absent an agreement between the parties to the contrary. (Brown, p. 973). There is no such agreement to the contrary in this case. The arbitral institution rules are authoritative, and SIAC Rule 34 specifically indicates that both the arbitrators and parties to the arbitration "must keep the existence and all matters relating to the arbitration confidential." (SIAC Rule 34.6). The scope of Rule 34 clearly includes the matters that EQUAPACK wishes to disclose during the due diligence review. Additionally, the due diligence proceeding does not materially affect EQUAPACK's financial or business situation. Consequently, EQUAPACK should not be allowed to divulge the existence or the details of this arbitration.

A. EQUAPACK is obligated to refrain from disclosure in providing due diligence to Equatoriana Investors.

69. On 10 February 2003, EQUAPACK initiated arbitration proceedings against MEDI-MACHINES. (Ltr. of 10.02.2003). In the same letter, EQUAPACK agreed to arbitrate under the SIAC Rules. (Ltr. of 10.02.2003). Currently, Equatoriana Investors is undertaking a due diligence review of EQUAPACK, during which EQUAPACK wishes to divulge "the fact of the arbitration and the details of the claim." (Ltr. of 17.09.2003). However, this disclosure would clearly violate not only the SIAC Rules but also confidentiality doctrines embodied in arbitrations. (SIAC Rule 34.6; Brown, p. 971).

70. The promise of confidentiality is one of the main reasons that parties like EQUAPACK choose to arbitrate. (Brown, p. 971). By signing the arbitration agreement, parties to an arbitration mutually agree not to disclose or use any documents prepared for and used in the arbitration, including notes of the evidence used in the arbitration. (Brown, p. 973; Fraser).

Therefore, EQUAPACK should not be allowed to divulge the details of the claim nor the existence of the arbitration during the due diligence proceeding.

1. The intended disclosure is within the scope of confidentiality required by SIAC Rule 34.6.

a. The existence and the details of this arbitration must remain confidential in accordance with SIAC Rule 34.6.

71. Though EQUAPACK argues that an obligation of confidentiality is not absolute and that the intended disclosure is not within the scope of confidentiality agreed to in this arbitration, the Rules of this arbitration directly contradict that statement. (Cl. Mem., p. 27; SIAC Rule 34.6). EQUAPACK's correspondence with this Tribunal indicates that it intends to divulge the fact of the arbitration. (Ltr. of 9.09.2003; Ltr. of 17.09.2003). SIAC Rule 34.6 specifically states "all matters related to the proceedings, including the existence of the proceedings, shall remain confidential." (SIAC Rule 34.6). Consequently, EQUAPACK will be in violation of the SIAC Rules if it mentions the existence of the arbitration during the due diligence review.

72. EQUAPACK also wishes to divulge details of the claim. (Ltr. of 17.09.2003). As the Claimant's Memorandum indicates, the term "proceedings" is reasonably interpreted to mean the existence of the arbitration, the documents produced, the evidence introduced during the arbitration, trade secrets, and the transcripts and minutes of the arbitration. (Cl. Mem., ¶ 106; Brown, pp. 1001-12; *Dolling-Baker v. Merrett*, p. 1213). Because it is likely that EQUAPACK will rely upon the letters sent between it and MEDI-MACHINES, the expert opinion, and Mr. Swan's affidavit in the arbitration hearings, none of that information may be disclosed during the due diligence process. According to the definition of "proceedings" from *Dolling-Baker v. Merrett*, EQUAPACK may not divulge any information that it uses or relies upon during the arbitration. (*Dolling-Baker v. Merrett*, p. 1213).

73. EQUAPACK, by initiating the arbitration, obligated itself to maintain confidentiality of the proceedings and the dispute. (Stat. of Cl., ¶ 13; Brown, p. 974; *Ali Shipping v. Shipyard Trogir*, p. 651). Courts have determined that the principal of confidentiality, inherent in every arbitration, and the parties' choices are to be strongly protected. (*Aita v. Ojjeh*, p. 583). In *Aita v. Ojjeh*, the court determined that the facts of the arbitration should remain confidential since "the very nature of arbitral proceedings [requires] ... the highest degree of discretion in the resolution of private disputes as the two parties had agreed." (*Aita v. Ojjeh*, p. 583). Consequently,

EQUAPACK's and MEDI-MACHINES' choice to arbitrate under the SIAC Rules of confidentiality as to all matters relating to the proceedings should be enforced.

74. Moreover, courts have determined that information touching on the explanation of any action of the arbitration dispute may be regarded as worthy of protection. (*Bulbank*, at A1-A2). It is also well recognized that businesses have reasons not to divulge the existence and substance of arbitral proceeding, since such disclosure could negatively impact their relationships with other contracting partners and customers. (Sarles, p. 6). This Tribunal should therefore award the highest degree of protection to this dispute and the parties' choice to arbitrate under the SIAC Rules by requiring EQUAPACK to refrain from disclosing information to the Equatoriana Investors.

b. Equatoriana Investors is not a party to this arbitration nor does the Investor group have an obligation of confidentiality to MEDI-MACHINES.

75. Equatoriana Investors is not a party to this arbitration and as such has no right to the information discussed or prepared in the arbitration. (*Hassneh Insurance Co. v. Mew*, p. 247). The court in *Hassneh Insurance Company of Israel v. Steuart J. Mew* stated that allowing disclosure of documents used or prepared in the arbitration to third parties "would be almost equivalent to opening the door of the arbitration room to that third party." (*Hassneh Insurance Co. v. Mew*, p. 247). This Tribunal should not allow EQUAPACK to disregard the SIAC Rules or create unhelpful precedent as to the obligation of confidentiality.

76. Though Equatoriana Investors has a duty to EQUAPACK not to divulge information acquired during the due diligence, it has no such duty to MEDI-MACHINES. (Proc. Ord. 3, ¶ 39). Without a duty, Equatoriana Investors would not be liable to MEDI-MACHINES for any harm caused by the disclosure. In fact, the only party that Equatoriana Investors would be liable to is EQUAPACK - the company that it is trying to purchase. (Proc. Ord. 3, ¶ 39). It is not likely EQUAPACK would sue its potential owner, and it is likely that any disclosure Equatoriana Investors made would only have a positive impact upon EQUAPACK's situation. Consequently, this Tribunal should not allow EQUAPACK to divulge the information when doing so exposes MEDI-MACHINES to potential harm in the marketplace – harm for which MEDI-MACHINES would have no remedy.

2. The intended disclosure does not fall within any exception provided by SIAC Rule 34.6.

77. There is a recognized obligation of confidentiality that applies to parties because of the private nature of arbitration. (Brown, pp. 998-1001; Redfern, p. 27). Though SIAC Rule 34.6 does provide a number of exceptions to the obligation of confidentiality, none of the exceptions apply to the intended disclosures. (SIAC Rule 34.6). EQUAPACK argues that the exception in Rule 34.6(d) specifically applies to this case. However, the exception does not apply because the provision of Equatorianan law is not mandatory. In the alternative, even if SIAC Rule 34.6(d) applies to this situation, the arbitration does not materially affect EQUAPACK's business or financial situation. Lastly, EQUAPACK has brought forth no information or evidence to prove that the sale of its company to Equatoriana Investors is guaranteed or that Equatoriana Investors is its sole potential purchaser. If the Tribunal were to allow EQUAPACK to disclose information from this arbitration proceeding to Equatoriana Investors, it is possible that many other potential purchasers could also receive information that the SIAC Rules deem confidential.

a. SIAC Rule 34.6(d) does not apply because the provision of Equatorianan law is not mandatory.

78. EQUAPACK is incorrect in arguing that the provisions of Equatorianan law are mandatory in this situation. (Cl. Mem., ¶ 115). Though EQUAPACK argues that the decisions of Equatoriana courts are binding, the provisions are not based on any statutory provision. (Proc. Ord. 3, ¶ 38). More importantly, the decisions from the Equatorianan courts did not involve arbitrations. (Proc. Ord. 3, ¶ 38). Nothing in EQUAPACK's letter of 24 September 2003 indicate that the Equatoriana courts intended its decisions to be applied to arbitrations so as to subrogate the duty of confidentiality. Consequently, nothing presented by EQUAPACK indicates Equatorianan courts have ever required a party under a binding obligation of confidentiality to disclose information that is the subject of the arbitration proceeding. This Tribunal should not allow EQUAPACK to disclose information subject to allegedly "mandatory" law because it has not established that such law is in fact mandatory and binding.

b. In the alternative, the arbitration matters do not materially affect EQUAPACK's business or financial situation.

79. The facts and details of EQUAPACK's dispute with MEDI-MACHINES do not materially affect EQUAPACK's business or financial situation. However, divulgence of the facts of this dispute would materially affect MEDI-MACHINES' business or financial situation. The law of Equatoriana that EQUAPACK claims is mandatory states that "a party being

purchased must divulge all matters that materially affect either its financial or its business situation.” (Ltr. of 24.09.2003). “Material” is defined as essential and of great consequence. (Black’s Law Dictionary).

80. The information from the arbitration proceeding is neither essential nor of great consequence to the financial or business situation of EQUAPACK. EQUAPACK seeks damages in the amount of US\$537,650. (Stat. of Cl., ¶ 18). As this Memorandum demonstrates, EQUAPACK is not likely to win this arbitration. The most that losing this arbitration will cost EQUAPACK is \$20,000. (Ltr. of 1.09.2003). For a company that has annual sales between US\$8,000,000 and \$10,000,000, the potential loss of US\$20,000 is unlikely to upset Equatoriana Investors. (Proc. Ord. 3, ¶ 44). In addition, Equatoriana Investors is not likely to be dissuaded from purchasing EQUAPACK on the mere chance that it may lose US\$20,000. Even if EQUAPACK did win this arbitration, it is not likely that Equatoriana Investors will pursue legal action against EQUAPACK for providing a half-million more dollars in capital. Thus, the details and existence of this arbitral proceeding do not *materially* affect the business or financial situation of EQUAPACK. The outcome of this arbitration is most likely irrelevant to Equatoriana Investors’ determination to purchase a company that it has, thus far, deemed a worthy asset.

c. Since the sale to Equatoriana Investors is not final, it is possible that many other potential investors will be privy to this confidential arbitration information.

81. As EQUAPACK states, “the spirit of [SIAC Rule 34.6(d)]’s] exception...is to protect parties’ legitimate business practices.” (Cl. Mem., ¶ 115). The spirit of the exception, however, should not protect illegitimate business practices. Nothing indicates that the sale of EQUAPACK to Equatoriana Investors is assuredly going to occur. EQUAPACK has presented no evidence that this sale is near completion and, in fact, it is still possible that the sale may be cancelled. (Proc. Ord. 3, ¶ 42). It is highly likely that if EQUAPACK is not sold to Equatoriana Investors, EQUAPACK will pursue a sale with a number of other companies. Therefore, if the rule of confidentiality is not observed, there is a possibility that not only will Equatoriana Investors learn of the existence and details of this arbitration, but so will many other businesses. This action would cause a great detriment to MEDI-MACHINES’ reputation and ability to defend itself in the marketplace. This Tribunal should not allow EQUAPACK to circumvent its obligation of confidentiality just to search for other investors when doing so harms MEDI-

MACHINES' reputation and ability to function in the packaging industry. This Tribunal should be wary of permitting a party to circumvent its obligations and divulge confidential information to a potential plethora of third parties.

B. It is well within this Tribunal's scope of authority to order EQUAPACK to refrain from divulging the existence and details of the arbitration proceeding.

82. EQUAPACK incorrectly argues that this Tribunal lacks authority to order it to maintain confidentiality. (Cl. Mem., ¶ 119). Under the SIAC Rules, this Tribunal has the authority to issue an order of confidentiality. (SIAC Rule 17). Furthermore, such an order is necessary in this case in order to protect MEDI-MACHINES from great harm and detriment. Lastly, an order of confidentiality is binding and enforceable under the New York Convention. (Webster, p. 8).

1. An order of confidentiality is not a matter of exclusive court jurisdiction.

83. Under SIAC Rule 17, this Tribunal "in the absence of procedural rules agreed by the parties... shall have the widest discretion allowed under such law as may be applicable to ensure just, expeditious, economical, and final determination of the dispute." (SIAC Rule 17). Neither the contract nor the arbitration agreement between EQUAPACK and MEDI-MACHINES indicate any special procedural rules or changes in SIAC Rules. Orders requiring confidentiality are considered to be interim measures. (Marchac, p. 132). Specifically, arbitrators may order a party "to refrain from any publicity relating to the subject matter of the dispute, to avoid damaging consequences regarding trade secrets and other proprietary information" and may order parties to restrain or compel particular acts. (Reiner, p. 864; Werbicki, p. 64).

84. MEDI-MACHINES has requested that this Tribunal order EQUAPACK to honor its obligation of confidentiality. (Ltr. of 17.09.2003). Such an order is contemplated by SIAC Rule 25(j), which allows this Tribunal to make orders for any interim measure it deems fit. That rule, and the established precedent that orders of confidentiality are within the scope of arbitral panels, give this Tribunal the exact authority EQUAPACK argues it lacks. (Cl. Mem., ¶ 119). This Tribunal has the explicit authority to enter an interim measure requiring confidentiality. (SIAC Rule 25(j)). Therefore, this Tribunal should require EQUAPACK to refrain from disclosing the details and existence of this arbitration.

2. An interim measure requiring MEDI-MACHINES to remain confidential is binding and appropriate.

85. An interim measure requiring confidentiality issued by Tribunal is binding under the New York Convention. (Webster, p. 8). Though EQUAPACK may argue that an order of confidentiality is not binding under the New York Convention, this is not true. It has been

determined that the content of a decision, and not its title, determines finality and persuasiveness of a decision under the New York Convention. (Webster, p. 8; Van der Berg, p. 58). Thus though the New York Convention only references “awards,” it does not mean that an order, decision, opinion, or ruling that is final as to an issue is not final under the Convention. (Webster, p. 8). In this case, an order requiring confidentiality is final as to the issue of EQUAPACK’s ability to disclosure the details of the arbitration. (Webster, p. 8; *see Publicis Communication v. True North Communications, Inc.* holding interim measure final as required for the New York Convention). As such, regardless of the name of the confidentiality order, it is final and enforceable in Equatoriana under the New York Convention. (Stat. of Cl., ¶ 14).

86. Furthermore, in order to avoid great harm and detriment to MEDI-MACHINES, EQUAPACK must be stopped from divulging the confidential information related to this proceeding. Since the courts of Equatoriana have a propensity for failing to recognize enforcement of foreign awards against firms from Equatoriana, were EQUAPACK to lose this arbitration, MEDI-MACHINES would most likely be without remedy for the harm that EQUAPACK has caused. (Ltr. of 1.09.2003). As such, it is imperative that this Tribunal stops EQUAPACK before further harm can occur. An order of confidentiality from this Tribunal is necessary and, as a binding order, may be the only remedy MEDI-MACHINES has. For the reasons stated above, MEDI-MACHINES believes that an order of confidentiality is imperative in order to protect its reputation and ability to function in the industry. Since such orders are enforceable and final under the New York Convention, MEDI-MACHINES respectfully requests that this Tribunal require EQUAPACK to refrain from divulging the existence and/or details of this arbitration proceeding in its due diligence with Equatoriana Investors. (Webster, p. 8).

3. This Tribunal has the ability to enforce the confidentiality order if EQUAPACK fails to comply.

87. The ability of parties to an arbitration to keep the existence and details of the arbitration proceedings confidential is the primary reason why parties agree to arbitrate their disputes. (Brown, p. 971). In fact, obligations of confidentiality are meaningless if they can be violated on the whims of the parties. (Brown, p. 1017). Arbitration would lose its most valuable attribute if arbitral tribunals do not possess the ability to enforce confidentiality obligations. Fortunately, arbitral tribunals have a number of ways to force a party to comply with Tribunal orders. Specific to an order of confidentiality, if a party bound by that order fails to comply, the arbitral tribunal may order sanctions, exemplary damages or dismiss the arbitration claim. (Smit, p. 582;

Baldwin, p. 458). Since confidentiality is an integral part of arbitration, MEDI-MACHINES respectfully requests that if EQUAPACK violates its obligation of confidentiality, this Tribunal sanction it as it deems appropriate and as it has the authority to do under SIAC Rule 17.

CONCLUSION

In conclusion, MEDI-MACHINES respectfully requests that the Tribunal find the following:

First, that the Model 14 packaging machines were in conformity with the contract.

Second, that any lack of conformity of the Model 14 machines did not constitute a fundamental breach.

Third, that the letter of October 19, 2002 (Claimant's Exhibit No. 6) from Mr. Swan to Mr. Drake did not constitute proper declaration of avoidance of the contract.

Fourth, that EQUAPACK should be required to post security for costs.

Fifth, that EQUAPACK must refrain from disclosure to its potential purchaser, Equatoriana Investors, in accordance with SIAC Rule 34.6.

Sixth, that MEDI-MACHINES is entitled to costs.

Respectfully Submitted,

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