TENTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA 2003

MEMORANDUM FOR CLAIMANT

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INDEX OF ABBREVIATIONS

AC	Appeal Court
AG	Amtsgericht (German District Court)
Art./Artt.	article / articles
App.	apperent
cf.	confer (compare)
CIF	Cost Insurance & freight
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Co.	Company
comp.	compare
Corp.	Corporation
DIS	German Institution of Arbitration
e.g.	exemplum gratia (for example)
et seq.	et sequentes (and following)
ed. / Ed.	Edition / Editor
F.O.B.	Free On Board
fn.	Footnote
F.Supp.	Federal Supplement
ICC	International Chamber of Commerce
idem	same
LG	Landgericht (District Court)
No.	number
p. / pp.	page / pages
para.	Paragraph
UCC	Uniform Commercial Code
ULIS	Uniform Law on the International Trade Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN Doc.	Un-Documents
UNILEX	International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods (looseleaf & disk datebase)edited By Micheal Joachim Bonell at the Center for Comparative and Foreign Law Studies, Irvington-on-Hudson, New york.

v.	Versus (against)
Vol.	Volume
YCA	Yearbook Commercial Arbitration

STATEMENT OF FACTS

November 2000 Mr. Herbert Storck, Sales Manager of Equafilm (Claimant), telephoned Mr. Reginald Black, Purchasing Manager of Medipack (Respondent), to discuss the possibility of furnishing Medipack with the Oriented Polypropylene (OPP) film

7 December 2000 Mr. Storck submitted a final offer in writing. Equafilm offered Medipack a discount of eight percent from its list price for the order that was anticipated. It was the lowest price Equafilm had ever given any customer for any purchase.

15 December 2000 Respondent accepted the offer, which was that Claimant sold 200 tons of 1100mm wide, 30micron thick, opaque white OPP (Oriental Polypropylene) film. The contract included the agreement, the quantities, list price ($1656), CIF charge, shipment, method of payment, choice of law and the way of an arbitration clause. As contracted, Claimant shipped the film from Ocean side to Capitol City Port in four equal shipments on or prior to the 10th of January, February, March and April 2001. Respondent paid for each installment within 30 days after shipment.

3 April 2001 Mr. Black (Respondent) telephoned to Mr. Stork (Claimant) to discuss a new order for 1350 tons of OPP to be delivered over a period of nine months. After the telephone conversation Mr. Black sent Mr. Storck by telefax a confirmation of its contents. The terms were to be the same as those in the contract of 15 December 2000, with adjustment for the dates of shipment and the fact that Equafilm's list price has risen to $1900.

That same day, Mr. Storck sent its own confirmation form in which the price set forth was $2,615,809 with a four percent discount from Equafilm's current list price of $1900 plus CIF charges.

6 April 2001 Mr. Black received the confirmation form from Claimant and he replied by telefax to Mr. Stork that the price should have reflected an eight percent discount. .

9 April 2001 Mr. Storck replied by telefax that the eight percent from Equafilm's discount price had been granted for the first purchase by Medipack, but that it had never been intended or agreed that such a discount would apply to all future orders.

10 April 2001 Medipack replied by telefax that unless Equafilm gave Medipack an eight percent discount, it would have to consider seriously returning to its previous supplier.

12 April 2001	Equafilm replied and reiterated that the discount of eight percent from list price was a one time discount.
27 April 2001	Medipack had not replied to the fax of 12 April 2001. Hence, Mr. Storck sent a new fax inquiring as to Medipack's intentions.
2 May 2001	Mr. Storck replied that since the price was not an eight percent discount Medipack had returned to Polyfilm GmbH, the previous supplier of polypropylene film.
23 May 2002	Joseph Langweiler the lawyer for claimant, referred the Respondent to the German Institution of Arbitration (DIS) with a notice of the commencement of arbitration under the English language version of the Arbitration Rules of the DIS.
27 May 2002	Mr. Jens Bredow, secretary of DIS, requested the DIS administrative fee and provisional advance on the arbitrators' costs pursuant to the DIS Rules by 23 August 2002.
8 July 2002	Dr…. was confirmed in office as chairman of the arbitral tribunal. Three arbitrators were also confirmed for the tribunal.
22 August 2002	Dr…. informed Mr. Bredow that his law firm had entered into an agreement to merge with the international law firm of Multiland Associates, which had represented Equafilm Co., the Claimant
2 September 2002	Mr. Comstock suggested to Mr. Bredow that Dr. .... should withdraw as arbitrator in this arbitration.
9 September 2002	Dr…… replied that the merger does not give rise to any justifiable doubts as to his impartiality and independence.
19 September 2002	Dr. Comstock insists that Dr… must be challenged in accordance with the provisions of Section 15 of the arbitration rules.

APPRICABLE LAW

German Arbitration Rule.

United Nations Convention on Contracts for the International Sale of Goods (CISG)

UNCITRAL Model Law.

Incoterms

Convention Recognition and Enforcement.

CLAIMANT'S REQUEST

Equafilm requests the Tribunal to find:

- Dr……can be served as an arbitrator.
- The Tribunal has jurisdiction to consider the dispute between Equafilm and Medipack;
- Equafilm and Medipack concluded a contract for the sale of 1,350 tons of polypropylene film during the telephone conversation between Mr. Black and Mr.Storck on 3 April 2001;
  he contract price for the goods was $2,615,809 CIF Oceanside to Capitol City Port, which included a four percent discount from Equafilm's then current list price;
- Medipack breached the contract by its telefax of 10April 2001 in which it announced that it would not take delivery of the contracted for goods except for a price of $2,359,800 plus CIF charges and 10 May 2001 in which it stated that it had contracted with Polyfilm GmbH for the polypropylene film that it had expected to purchase from Equafilm.

Consequently, Equafilm requests the Tribunal to order:

- Medipack to pay Equafilm the sum of $575,477.98 as damages, being the lost profit Equafilm would have earned on the contract;
- Medipack to pay interest at the prevailing market rate in Equatoriana on the said sum from the date payment was due, i.e., 30 days from the 10th day of May, June, July and August 2001 to the date of payment to Equafilm;
- Medipack to pay all costs of arbitration, including costs incurred by the parties.

First Issue: Under the DIS Rules, there are no reasons to withdraw Dr….from this tribunal

Dr…..has the right to serve as an arbitrator in this tribunal. Section 15 DIS rule stipulates that "Each arbitrator must be impartial and independent." Section 18.1 DIS rule states that "An arbitrator may be challenged only if circumstance exist that give rise to justifiable doubts as to his impartiality or independence". Dr…. is impartial and independent enough to satisfy section 15. The objective of section 15 and 18 DIS rules is to ensure that a tribunal makes an impartial award. An arbitrator who is independent can make an impartial arbitral award. Therefore an arbitrator may be required some independence to hold impartial for making arbitral award [A]. As long as Dr….satisfies such independence, he should not be withdrawn from this tribunal. Furthermore, this tribunal consists of three arbitrators.[1] In this case, it's impossible to require complete independence of an arbitrator who has been chosen by a party towards that party [B]. Dr…'s law firm merged with Multiland Associates effective 1 January 2003.[2] The merger cannot be regarded as a violation of section 15 and doesn't constitute a circumstance which is bound by section 18 [C]. It's clear from Dr….'s disclosure of some facts that the merger doesn't give rise to a justifiable doubt. Therefore, Dr….independence may not be challenged.

[A] Dr……is impartial and independent enough to satisfy section 15 DIS rule.

Degree of "independence" Under section 15 DIS rule

As stated previously, section 15 DIS rule doesn't need complete independence. An arbitration process isn't like a litigation. It follows the principle of party autonomy. An arbitrator is chosen by a party, based on the party's confidence in the arbitrator. Consequently, the arbitrator will have some relationship with the party who has chosen him. Therefore an arbitrator can't be required to have complete independence from the party who chose him. If only one party of two has a right to choose an arbitrator, the arbitral tribunal should regard such a situation as a lack of impartiality. But if both parties are allowed to choose, then there is a greater potential for impartiality.[3] In addition, mere relationship between a party and an arbitrator doesn't mean that the arbitrator is not independent. Only if the relationship gives rise to justifiable doubts for an arbitrator's impartiality can he be regarded as not independent. Furthermore, an American court has held that bias of an arbitrator must be 'direct and definite; mere speculation is not enough.'[4] Therefore, if there isn't any definite relationship between an arbitrator and a party,

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[1] Claimant's Exhibit No.2 Contract concluded 15 December 2003.Arbitration clause 13
Procedural Order No.1. 1

[2] Procedural Order No.1. 4

[3] Astoria Medical Group v. Health Insurance Plan of Greater New York 11 N.Y. 2d 128 (132)=227 NYS 2d 401, 407=182 NE 2d 85 (89)- New York Court of Appeal.

[4] Giddens v. Board of Education of the City of Chicago 398 I I I 157=75 NE 2d 286, 291(1947); Shirley Silk Co. v. G.B.Spiegel a.o. 266 NE 2d 504.

the arbitrator should be regarded as independent. There are circumstances that can clearly give rise to justifiable doubts as to an arbitrator's independence or impartiality. If such circumstances exist, there can be reasons for a challenge to an arbitrator. Specifically, the self-interest of an arbitrator should be considered where there is an economic tie between an arbitrator and the party who chose the arbitrator. In addition, the subject matter of the dispute can be a reason for a challenge to an arbitrator.

An economic tie between a party and an arbitrator chosen by the party can be reason for challenge.[5] But if the relationship between the party and the arbitrator is not too close, he can't be withdrawn from a tribunal. [6]Dr….'s share in the profit of the firm is in large part determined by the profit of his own office and in part determined by the profit of the total firm.[7] Therefore, there is no economic ties between Dr….and claimant. Concerning subject matter, an arbitrator may be challenged when the award of the tribunal would influence the arbitrator's decision. However, for the same reason described above, Dr….. doesn't have a close relationship with the subject matter of this dispute. The subject matter of this dispute concerns an industry in which Dr…. has no direct involvement. Thus, the outcome of the arbitration and any awards would have no bearing on Dr. …'s impartiality or independent judgment.

[B] Strict independence is not necessary for an arbitrator chosen by a party for the tribunal which consist of three arbitrator

An arbitral tribunal that consists of three arbitrators would ensure a fair judgment. Therefore, strict independence is not required. The arbitral tribunal which consists of three arbitrators has two arbitrators selected by the parties. The chairman is selected by those two arbitrators, and has a different role from the others. This system ensures a fair judgment without strict independence of the arbitrators selected by the parties. The arbitrator selected by two arbitrators generally officiate as chairman of an arbitral tribunal in conformity with DIS rules, section 24.4. Under the DIS rules, the chairman can only make procedural rulings. Since the chairman can only rule on the procedural matters, any assertion made by Dr… doesn't directly affect the judgment.

In a case where the arbitral tribunal consists of three arbitrators, the arbitrators selected by both parties are not required to be strictly independent. This system would allow the parties to select the arbitrator who can be relied upon. For that reason, both parties have the possibility to have a relationship with the arbitrator nominated by each party. Therefore the relationship would be

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[5] AA Cook International Inc. v. Handelsmaatschappig a.o. Lloyd's Law Rep. 1985, 225.

[6] Wallis v. Carpenter (1866)95 Mass. 19. AA Cass. V. 18.2. 1974.

[7] Procedural Order No.2. 19

set off by the fact that both parties had an equal opportunity to chose the other arbitrator who would serve as chairman.

[C] Under Rule 16 DIS, Dr. Disclosed the Merger of the Two Firms

The merger of the law firms is not a valid reason to challenge the arbitrator. The law firm that has represented Claimant, and the law firm which Dr… is associated with are about to merge. However Dr… disclose his circumstances according to Rule 16 of DIS rules and declared that this fact doesn't affect his impartiality and independence as an arbitrator. Also as stated previously, Dr… and Claimant have only a weak economic connection. Therefore, the arbitral decision would not affect Dr… or the Law firm. Therefore there is no reason Dr… should be challenged as an arbitrator.

Second Issue: This tribunal has jurisdiction to consider the dispute between Equafilm and Medipack

The German Institution of arbitration (hereafter referred as DIS) shall determine the procedure by its own rule according to Section 24 of DIS. Claimant and Respondent had an agreement to remit the dispute to DIS in clause 13 of their contract of 15th December 2000[8]Therefore the scope provided in 1(1) of DIS[9] applies to this dispute. Also, this clause naturally applies to the next contract of 3rd April 2001. Although Respondent insists that the arbitration agreement is invalid because of the invalidity of the main contract, whether the main contract is valid or not doesn't affect the arbitration agreement. Since the validity of the arbitration agreement can be considered separately. from this matter, it can be regarded that, there is an agreement and remitting the dispute to DIS was based on the common intention of the parties. Therefore DIS has jurisdiction.

[A] Claimant and Respondent had a binding agreement

Respondent insists that there was no arbitration agreement because the organization by the name of the German Arbitration Association indicated in the arbitral clause of the contract of 15th December 2000 doesn't exist[10]. However, this doesn't invalidate the arbitral agreement since it is clearly a simple mistranslation of DIS. Claimant didn't compel Respondent to agree to this arbitral clause. However, since Respondent didn't object to the clause, Respondent is bound by the clause. Therefore it can be interpreted that Claimant and Respondent had intended that any controversy or claim shall be determined by DIS.

1. A mistake of expression doesn't automatically invalidate the arbitral agreement

Even if the expression on the document was wrong, it doesn't affect the arbitral agreement directly. As long as the intent of the parties as to arbitration is clear, a simple mistake of expression should not invalidate the arbitration clause [a]. It is clear that the name of German Arbitration Association is mistranslation of DIS because there is only one available organization in German [b].

a) Even if the name indicated on the document was wrong, it should be interpreted according to the parties' intent

The arbitration agreement illustrates the intention that any conflict between the parties will be decided by a third party and that the parties will submit to arbitration in case of a dispute arising from the contract. Therefore, even if there is an obscure expression, or a

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8 Claimant's Exhibit No. 2

9 DIS rule 1(1)provide that DIS has jurisdiction pursuant to an agreement concluded between the parties

10 Statement of defense 11

misunderstanding of names, it ought to be interpreted according to whether the party knew or could not have been unaware what that intent was. It is general principles of law so-called falsa demonstratio non nocet[11]. Moreover, there is a leading case where there is a mistake in the arbitral agreement, such as mistakes of names, or a non-existing organization, the tribunal should validate the arbitral agreement by determining the parties' intent[12]. In this case, it ought to be considered that the arbitration agreement was concluded with the name of DIS in spite of the name indicated in the document, according to the intention of the parties.

b) It is clear that Claimant intended that DIS was the Organization.

If the German Arbitration Association indicate existed, naturally Respondent would understand that to be the organization which claimant intended. However, the German Arbitration Association doesn't exist. It is clearly a mistake. When Respondent predicted what Claimant intended to, it should have known that the organization was DIS. Since DIS is the only arbitration institution in Germany generally available for international disputes[13], Respondent could not have been unaware that the German Arbitration Association written on the document really meant the DIS.

2. Claimant did not compel Respondent to agree to this arbitral clause

If Claimant compelled Respondent to agree to this contract so that it can gain ascendancy over Respondent, then the contract is invalid. However, the place of arbitration place is not the place of business of Claimant. This arbitral tribunal, then, would not give any advantages to Claimant over Respondent. Since Respondent wouldn't be in a disadvantaged position, jurisdiction by DIS is proper.

3. There was assent of Agreement between Claimant and Respondent

Respondent signed the contract although it was clear that the name of the arbitral organization indicated in the first contract was wrong [a]. Even if Respondent didn't pay attention to the arbitral clause, it would not be able to claim the invalidity of the arbitration agreement just for that reason and it should be deemed that there was an intent to agree to arbitration [b].

a) Respondent should have objected to arbitration in a reasonable time

According to the DIS rule, if an objection is not made "in good time", the document including the arbitration agreement delivered from the other party is considered to be part of the contract[14]. This provision means only that if the arbitration agreement is contained in a

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11 Principles of European Contract Law(PECL)5:101(1)・UNIDROIT article4.2・CISG article8

12 Laboratorios Grossman v. Forest Laboratories, Inc.,31 A.D. 2d. 628(1968)

13 Statement of claim 15

14 DIS rule 1031(2)

document different from that of the contract, will the requirement for an objection "in good time" be satisfied. However the "in good time" language must be satisfied where the arbitral clause is incorporated into a part of the contract. Respondent should have confirmed that the clause when the first contract that included this arbitral agreement was concluded. Respondent was in the position where it could easily have recognized the mistake at that time [aa]. In addition since this disputed arbitral agreement is the same one in the first contract, Respondent cannot insist that the clause is invalid now [ab].

aa) Respondent should have made it Clear that it misunderstood the clause in the contract

Respondent a company engaged in international business. Therefore, Respondent is knowledgeable about international trade. If there is a clause that Respondent couldn't understand in the contract, it should have inquired to its meaning. Claimant and Respondent do business with each other in the English language, which is neither of their native language. In this case, it is natural to think there is a possibility to mistranslate. If it is doubtful, a trading partner should object, and make the matter clear. Although it was possible for Respondent to object, it chose not to do anything. In stead, it signed the contract. Under the rule of good faith[15], there is an obligation to pay attention to what is expected generally on the transaction. If Respondent have paid attention, at the time of conclusion of the contract, it could easily have known about the discrepancy.

ab) Respondent can't object about the contents of a contract that is already terminated

The contract of 15th December 2000 including the arbitral agreement has already terminated[16]. That contract has already been performed by the parties. Since there is no assertion that circumstances have changed, Respondent should have inquired about the clause during the first contract. This new contract has taken on the same terms as the first contract. Therefore the time to object to the clause was at the time of the first contract. Because there were no objections made during the first contract, it is implied that all the terms were agreed to by both parties. Under the doctrine of Estoppel, the terms included in the terminated contract cannot be objected to now.

2. Even if Respondent overlooked or didn't pay attention to the arbitral clause, it can't claim about the invalidity of arbitration agreement

A leading case has held that an arbitration agreement was valid where Respondent had misunderstood an arbitration clause in the contract written by Claimant.[17] According to this

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15 Principles of European Contract Law(PECL)1:201(1)・UNIDROIT article1.7・CISG article 7

16 Statement of claim 4

17 Tennesse Imports, Inc. v. Filippi, 745 F. Supp 1314 at 1328 (M.D. Tenn. 1990)

legal practice, this arbitration agreement also would be affirmed. At first, this contract has not been generated after a long "battle of the forms". Also, this clause was not hidden between a long lot of clauses, it is deemed to be fixed especially where there is a relationship between the parties. Respondent could have been easily aware of the clause since the contract was not a long form contract, and the arbitral clause was the last clause written just above of signature. And Respondent had a chance to think about it many times. Even if Respondent looked over it, it is his fault. It doesn't make sense to claim the invalidity of the arbitration agreement.

[B] The arbitral clause naturally applies to the next contract of 3rd April 2001

The parties agreed to apply the same term as that of the first contract during the telephone conversation on 3rd April 2001. The forms are usually required to have an arbitration agreement[18]. Since this arbitral clause is from the contract which the parties have already performed, no written form is required to apply to the next contract. Legal practice affirmed it[19]. Moreover, the fact that both parties intended to apply the same term including the arbitral clause is confirmed by the exchange of confirmations the same day[20]. Also, Respondent stated that if the contract had been concluded, the arbitration clause would have been included[21].

[C] Whether the main contract is valid or not doesn't affect the validity of the arbitration agreement

The arbitration agreement is considered to be separate from the main contract under the separability doctrine. Even if there is a question of the validity of the contract, whether the arbitration agreement was concluded effectively can be decided separately. It is the common legal practice[22]of courts to think about the arbitration clause separately in order to resolve the dispute quickly. One of the merits of arbitration is fast resolution of dispute compared to litigation. This doctrine protects the parties from prolonging the dispute. A fast resolution of the dispute is important for the parties. Therefore this doctrine should be affirmed.

[D] There is an effective agreement according to the common intent between the parties

When there is a dispute of international arbitration agreement between the parties, it is usually resolved based on a particular country's law. However there are many cases judged from good and justice[23]. In this case, it is easily available to judge with it. It should be judged by the

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[18] cf. DIS rule 1031(1)

[19] Becker Autoradio U.S.A., Inc. v. Becker Autoradio-werk GmbH etc. 585 F. 2d, 39 (3rd Cir. 1978)

[20] Claimant's Exhibit No. 3、Claimant's Exhibit No. 4

[21] Statement of Respondent no. 12

[22] Prima Paint v. Flood&Conklin,388 U.S.395(1967)・Fritz Scherk v. Alberto-Culver C. 417 U.S. 506; 94S. Ct. 2449(1974) ・Hermansson v. AV Asfalt-belaggningar, NJA 1976, p125・UNCITRALarticle16・AAA rule Section2 article 15

[23] Rev.arb., 1984 p. 1039
Clunet, 1987, p. 1102

general principles of law, international trade custom and the common intent between the parties without particular applicable law.
The dispute is usually resolved using the general principles of law, customs of international trade, and the parties' intent.

Conclusion : The parties agreed to submit this dispute to DIS. The arbitration agreement was concluded effectively. Hence, DIS has jurisdiction to hear the claim of this dispute.

Third Issue: The tribunal should apply to CISG for alleged contract and its formation

The CISG is the law applicable to this arbitral tribunal since this dispute is within the sphere provided in article 1 (1) (b) of CISG. Furthermore according to the contract between the parties of 15 December 2000, the law of Equatoriana, a contracting state under the CISG, is applicable. Therefore this arbitral tribunal must apply the CISG as the law applicable to the contract.

[A] This dispute is in the sphere of the CISG

Under Article 1 (1) (a) of the CISG, "when contracts of sale of goods was concluded between parties whose place of business are in different state, and the States are Contracting states, the CISG applies to the contract. Also, under Article 1 (1) (b), if the rules of private international law lead to the application of the law of a Contracting State, the CISG will apply. In this case, Claimant and Respondent have their place of business in different states and Claimant is a party to the CISG. Although article 1 (1) (a) is not applied because Mediterraneo is not a party to that convention[24], Article 1 (1) (b) can be applied. Since the rules of private international law of both Equatoriana and Mediterraneo provide that the law governing a contract of sale is that of seller.[25] The seller is Equafilm which is from Equatoriana, a contracting state. Also, Equatoriana has not made a reservation under article 95 CISG.[26]

[B] The law of Equatoriana lead to the application of the CISG

There was a choice of law clause referring to the commercial law of Equatoriana[27] in the contract concluded between the parties on 15 December 2000 [1]. Equatoriana is a party to the convention and CISG is applied to the international dispute, not the domestic law of Equatoriana [2].

1. The commercial law of Equatoriana is the CISG

Claimant and Respondent concluded a contract on 15 December 2000[28] which is undisputed. In the choice of law clause of this contract. When Claimant and Respondent spoke on the telephone about a new contract on 3 April 2001, they agreed to apply the same terms of the contract of 15 December 2000. It is confirmed by two letters exchanged on the same day.[29] Therefore the choice of law clause, is also applied to the contract of 3 April 2001 that is in

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[24] Procedural order No.2 no.5
[25] Procedural order No.1 no.13
[26] Statement of Claim para.13
[27] Claimant's exhibit No.2
[28] Statement of claim no.4
[29] Claimant's Exhibit No.2

dispute. According to the rules of DIS, the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable law[30], and the terms of the contract and shall take into account the usages of trade applicable to the transaction.[31] Since the commercial law of Equatoriana was chosen by the parties, it is applicable to this dispute. Also since Respondent insists on applying the domestic law of Equatoriana[32], it should not have any objection to the application of the CISG.

2. CISG is applied to this dispute, not the domestic law

According to the law of Equatoriana, the convention is considered to enter the domestic law and the convention is prior to the domestic law of Equatoriana when the subject area is narrow[33] [a]. In addition there is no indication that the parties intended to exclude the convention from the contract [b].

a) CISG is prior to the domestic law of Equatoriana

Equatoriana has incorporated the convention to its domestic law. CISG is a part of the commercial law of Equatoriana. In a dispute for the sale of goods, the CISG would be given precedence since the international sale of goods is a narrower subject in contrast to all sales of goods. Thus, there are two laws of sale in Equatoriana and the CISG is the law governing the international sale of goods.

b) The parties must indicate an intention to exclude the convention

Article 6 of the CISG has a provision that allows parties to exclude its application. The choice of law clause is not deemed to be an indication of an intention to exclude the convention and apply the domestic law. This is a prevailing legal practice of courts.[34]

Hence, although the parties chose the commercial law of Equatoriana in this case, it is not considered to be an exclusion of the CISG. The predominant view in international legal writings also states that, if the parties chose the law of a contracting state, it is understood as a reference to the corresponding national law.[35] Therefore, since the parties have not declared

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[30] DIS rule 23.1
[31] DIS rule 23.4
[32] Statement of defendant no.15
[33] Procedural order No.2 no.5
[34] 00.00.1993 ICC Court of Arbitration – Paris, 15.16.1994 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien (Vienna), Austria, ICC Court of Arbitration – Paris. OLG Dusseldorf,8,1,1993,IPRax 1993,412 ,CLOUT 3,Case 48

International Schiedsgerricht der Bundeskammer der gewerblichen, Wirtschaft-Wien,15,6,1994,CLOUT 7,Case 93 und 15,6,1994,CLOUT 7,Case94

[35] M.J.BONELL in BIANCA-BONELL, Commentary on the International Sales Law, 1987, 56 ff. R. HERBER in v. CAEMMERER-SCHLECHTRIEM, Kommentar zum Einheitlichen UN-Kaufrecht 1990,

the exclusion of the CISG, Respondent cannot avoid the application of the CISG.

Anm. 38 on Art. 1 and Anm. 16 on Article 5; with reservations, R. LOEWE, Internationales Kaufrecht, 24ff

Fourth Issue: A contract of sale was concluded during the telephone conversation on 3 April

[A] The contract was concluded during the telephone conversation on 3 April 2001 because under the CISG, conclusion of a contract is not subject to any requirement as to form.[36] In addition, the offer was definite as to price and the offer was valid.

A contract could be concluded without the formality of a writing Formal requirements are required in some countries For example in the United States, the U.C.C requires a formality for contracts with a price of $500 or more.[37] However, in this case, the CISG is the applicable law, and according to Article 11 no formalities are required. CISG, Art 11 states that "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses. Only if a country makes a declaration under Article 96 to exclude an article of the CISG from their law would a formality of writing be required. There was no declaration made by the country in question that Article 11 would not apply to contracts. Thus, the contract is valid.

In this case, all the communications about the negotiation of contract were sent by fax with original sent by mail.[38]Respondent sent Mr.storck by telefax a confirmation of the contract that had been concluded between the two firms during the telephone conversation.[39] This telefax was merely to conclude what was already a valid oral contract. At the conclusion of the telephone conversation, both parties had already concluded their contrast. Consequently, the contract was concluded without a writing.[40] Under Article 23 CISG, once there is an offer with an acceptance, the contract is concluded and becomes effective.

[B] Under Article 14 CISG, the offer was definite

Respondent claims that 8% discount should be reflected on all orders. However, Claimant insists that the 8% discount on the Polypropylene was granted only for the first purchase by Medipack, It had never intended or agreed that such a discount would apply to all future orders. Under Article 14 CISG, a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and price.

1. The requirement of definiteness under Article 14 states is not strict requirement

First of all, the definiteness about the price in Art14 is not a strict requirement. Namely, if the goods are indicated, the price can be implied. For example, we can recognize "definiteness" as

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[36] CISG, Article 11
[37] U.C.C-Art2
[38] Procedural order No2, 48
[39] Statement of claim para5
[40] Claimant's Exhibit No6

to price where the contract contains a reference to list, catalogue, or market price. Under Article 55 CISG, it is presupposed that a contract is valid where the terms of the price is not requirement of the offer. And the contract can be concluded validly if the requirement of the offer is met except the requirement of price. Thus, the provision in Article 14 cannot be interpreted strictly. For example, the Austria Supreme Court[41] has upheld a decision to the effect. The Austria Supreme Court has agreed that an offer with a price range between DM 35 and DM65 did not affect the valid conclusion of the contract . From this case, we can interpret that the criteria of definiteness as to price is not a strict requirement.

In addition, the Supreme Court of Hungary on 25 September 1992 [42]held that no contract between the parties had been formed under Article 55 of CISG. In that case, the Court held that factors such as jet engines, which have no market price, cannot be used to determine the price terms of an offer for a product. If the parties can foresee the market price, or if there is market price, under Article 55 of CISG these are factors that can be used to determine the price term of an offer for a product. In this case, Respondent recognized the market price of the film, and the negotiations were held with reference to the Claimant's list. From the list, Respondent could have foreseen the terms of the price .Under Articles 14 and 55,CISG Claimant's reference list was sufficient to allow Respondent to foresee a definite price.

2. There was an intention to be bound because of acceptance the offer

Under Article 8 section 3 CISG, the parties' intention to be bound by the offer can be decided from their negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of parties. In general, the parties' intention can be presumed where the contents of the contract were detailed. Even if the contents of the contract were not detailed in this case, the surrounding circumstances showed that the parties intended to be bound.

In this case, the offer indicated the goods and the quantity of 1350tons.In addition, Respondent sent Mr. Storck by telefax a confirmation of the contract concluded between the two firms during the telephone conversation 3 April 2001.[43] From the facts mentioned above, it can be interpreted that the parties intended to be bound by the offer if it was accepted during the telephone conversation. Thus, Respondent's offer was valid and Claimant's acceptance to that offer was equally valid Consequently, the contract was effectively concluded by telephone 3 April 2001.

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41 The Austria Supreme Court 10.Novemver 1994

42 The Supreme Court of Hungary: Case number :G.F.I 31 349/1992/9

43 Statement of claim para5

Fifth Issue: The price should be included four percent discount

The price included four percent discount. Where a price is not determined in a contract, the price should be interpreted according to the market price for the product at issue. In this case, both parties should be aware of the market price for the product because both parties are merchants who are aware of the price for the goods at issue. Therefore, under Article 8 CISG, the price term should be interpreted according to the parties' knowledge. Since Respondent could not have been unaware that the price in the first contract was only a one time offer by Medipack to show its appreciation for Respondent's order, the proper interpretation for the second contract should be interpreted that Medipack intended to apply a four percent discount.

[A] The Price Should be interpreted at the market price of four percent

While the contract has been validly concluded, there is still a disagreement over the price between Claimant and Respondent. Therefore we need to look to Article 55 CISG to determine the correct price for the contract. According to Article 55, where a contract has been validly concluded, but does not expressly or implicitly fix or make provision for determining the price, the price is that which is generally charged for such goods sold under comparable circumstances in the trade concerned, in the absence of any indication to the contrary."

1. To follow the precedence and a generally accepted rule, this rule suggests a market price

In this case, the market price appears to be even higher than the price that would result from a four percent discount. As stated by Respondent, the list price for Polypropylene film is $1,900 per ton.[44] This price, then, is the normal price in the industry. In fact, this is the same list price that GmbH charges for the product.[45] Additionally, GMBH's discount practice much like that of Claimant. An eight percent discount is offered on only for few special occasions such as a first time customer. The Four percent discount price would be the normal price after the initial order.[46] This pricing method is customary in the industry. Under Article 9 CISG, Respondent should have been aware of this practice by Claimant. In fact, Claimant informed Respondent of this practice.[47] Moreover, Respondent admits that it purchased its requirement of film from Claimant because of the advantageous price of eight percent discount. Thus, Respondent knew that this eight percent could not be the normal price in the industry.

2. There was no special agreement that could be regarded as "any indication to the

[44] Claimant's Exhibit No.10
[45] Procedural Order No.2-50
[46] Procedural Order No.2-40
[47] Claimant's Exhibit No.1

contrary"

Although Claimant stated that "you will always receive our best price" in the letter of 7th December 2000, this letter of intent doesn't bind anything legally because the "best price" doesn't necessarily mean an eight percent discount. Rather, it means a price that would be financially beneficial to Claimant. Since Claimant had indicated in the letter of 15th December 2000 that it had given four percent discount price for favored customers, it is clear the "best price" would be around four percent, and not eight percent. What this means is that once Respondent became a regular customer, it would also be required to pay a four percent discount as Claimant's other customers.

[B] Under Article 8 CISG, it would be proper to be interpreted that the Respondent intended to apply four percent discount

1. Under Article 8(1) CISG, Equafilm could not have been aware what Respondent intended as the discount price

According to Article 8(1) CISG, "statements made by and other conduct of a party is to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." When Respondent made the offer to Claimant in the second contract the obvious intent of Respondent was a discount price of eight percent. While Claimant interpreted it as a four percent discount, according to article 8 CISG, Respondent should have understood Claimant's intent. The parties' intention can be determined from the fact that they were arguing on the exchanged faxes about the price after the conclusion of the contract. These prior dealings and the negotiations, along with industry knowledge should have made Respondent aware that the price for subsequent orders would be at a four percent discount.

2. Under Article 8 (2) (3) CISG, interpretation must be made according to the understanding of a reasonable person in the same or relevant circumstances

The CISG provides that the interpretation of an agreement should be based on the conventional wisdom in business. Claimant indicated in the first letter of 7th December 2000 that eight percent discount is the best price that it has ever given any customer for any purchase.[48] In this case, considering that this was the first time Respondent was dealing with Claimant, it is enough to read that the special eight percent discount was a limited time offer that was good only for the first purchase by Respondent.[49] Claimant never intended or agreed that such a special discount would apply to all future orders. Clearly, a reasonable person would not think that this price will apply for all future orders. Moreover as stated previously, the price of Polypropylene film in the industry is $1,900 less four percent. Thus, a reasonable person in the

[48] Claimant's Exhibit No.2
[49] Claimant's Exhibit No.6, Claimant's Exhibit No.8

industry of which Respondent is a part, would interpret the price as a four percent discount.

It should be interpreted according to the understanding of the reasonable receiver as well. Pursuant to leading case, In cases as the doubt has arisen as to definite interpretation on the contractual description, understanding of reasonable recipient should be preceded.[50] The parties shared its responsibilities with respect to the origin of the misunderstanding in order to protect the reasonable recipient.. The Respondent should have mentioned clearly as to the condition of the discount price particularly when he offered the new contract.[51] As had been mentioned, the interpretation of claimant who is recipient has based on reasonable opinion. Consequently with respect to the interpretation of the discount price, the understanding of the Claimant precedes the understanding of Respondent, Therefore it is valid to be decided pursuant to four percent discount price.

[50]Award in case No.3779 of 1981. (Arbitrator/Prof. Jacques H. Herbots (Belgium) parties/Claimant; Swiss seller, Respondent; Dutch buyer) "Shared responsibilities with respect to the origin of the misunderstanding."

[51] Claimant's Exhibit No.3

Sixth Issue: Medipack S.A. was in breach of its obligations under the contract

Medipack breached its obligations of payment the price for the goods and taking delivery of them according to the telefaxes of 10 April 2000 and 2 May 2000. When these telefaxes reached claimant, the time for performance was not due. Thus, the telefaxes represent an anticipatory breach of contract [A]. Especially, under CIF terms, since claimant was unable to perform the contract, it suffered substantial damages [B]. And since respondent did not perform "in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery", under Article 60 CISG, he breached its obligations [C].

[A] Before the performance of date, Respondent is clearly anticipatory breach of the contract

Generally, a contract is breached if it is repudiated before the date of performance.[52] A failure to perform indicates that the promisor does not intend to perform its obligation. Under Article 71 and 72 of the CISG, the telefaxes indicates Respondent's unwillingness to perform.[53] Thus, the only recourse for Claimant was to declare the contract avoided. Under the CISG, this constitutes an anticipatory breach on the part of Respondent.

Respondent indicated the intention to avoid of performance according to these telefaxes on 10 April 2001 [1] and 2 May 2001 [2].

1. On the 10 April 2001, Respondent indicated to reject taking delivery of the goods

The telefax of 10 April 2001 that respondent sent after the contract was concluded, informed claimant that if the discount charge is not eight percent, respondent will have to consider seriously returning to Polyfilm GmbH for their future requirements of polypropylene film.[54] This remark demonstrates that respondent did not intend to take delivery of the goods if it is not eight percent discount charges from claimant's list price. Therefore, although the contract between claimant and respondent was concluded effectively, respondent's actions indicate an intention that it wished to avoid taking delivery of the goods. Furthermore, on the telefax of 2 May 2001, respondent told claimant " I need not repeat what I already told you". This remark demonstrates that when respondent sent the telefax to claimant on 10 April 2001, respondent already intended to avoid taking delivery of the goods.

2. On 2 May 2001, Respondent clearly indicated to reject taking delivery of the goods

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[52] According to UCC, Japan Civil Law,
[53] Claimant Exhibit No, 7
[54] Claimant Exhibit No, 10

On the telefax of 2 May 2001, respondent clearly told claimant that respondent concluded the other contract with Polyfilm GmbH.[55] Since respondent gave first notice to claimant the other contract with Polyfilm GmbH, the remark demonstrates that respondent did not take delivery of the goods from claimant. That is to say, since respondent does not take delivery of the goods, he did not pay the price. Respondent's letter to Claimant that he intended to purchase the goods elsewhere clearly indicates anticipatory repudiation.

[B] Under CIF terms, it becomes anticipatory breach of the contract

In the case of carriage and delivery of the goods under the CIF terms, [56] seller must arrange of shipment.[57] And where the seller can not decide whether the buyer takes delivery of the goods or not and if the buyer does not take delivery of the goods since the seller arranged for shipment, the seller will suffer damages for costs of shipping. Under Article 77 CISG, where a party incurs damages, and the other party relying on the breach does not take any action to mitigate these damages, that party must pay the cost in the amount of the loss suffered.

If the arrangement for shipment is under F.O.B. terms, the buyer must make all arrangements for carriage or delivery of the goods.[58] If the buyer told the seller that the buyer will not arrange for shipment, the buyer becomes in breach of its obligations to take delivery of the goods and the seller can avoid to suffer those damages. However, these obligations are different under a CIF contract. The CIF contract presents a more risky situation for the seller because the seller is obligated to make all the shipping arrangements. So the seller runs the risk of nonperformance from the buyer. In this case, the buyer refused to take delivery of the goods. So even if the seller performs, he won't be able to get any returns for his performance. In this case, Respondent's refusal to take delivery of the goods prevented claimant from performing. Since Respondent informed Claimant that it would purchase the film elsewhere, Claimant also had to suspend its performance by canceling the shipment. Thus, because Claimant was unable to perform because of Respondent's actions, Respondent actions result in an anticipatory breach.

[C] Respondent did not "in doing all the acts which could reasonably"

Respondent did not perform "in doing all the acts which could reasonably" be expected to take delivery

On the telefax of 9 April 2001, claimant gave a notice that it had booked space for shipment, but respondent did not reply about that on the telefax of 12 April 2001. After respondent received the telefax of 12 April 2001, he needed to give a notice to the seller that he would not

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[55] Claimant Exhibit No, 4

[56] CIF terms according to general provisions of Incoterms 2000, Procedural Order No 2; no,51

[57] F.O.B terms according to general provisions of Incoterms 2000, Procedural Order No 2; no,51

[58] # 7: Manchester Pipeline Corp. v. Peoples Natural Gas Co., Nos. 86-1666, 86-2720, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 862 F.2d 1439; 1988 U.S. App.

take delivery of the goods. Respondent's failure to give notice to claimant illustrates a lack of good faith under Article 7 CISG. Under Article 7 CISG Respondent should have done all the acts that it could reasonably be expected to do to minimize harm to Claimant. Under Article 7 CISG, good faith, requires the parties to do everything possible under a contract to ensure uniformity and certainty in international trade.

Conclusion: The telefaxes of 10 April 2001 and 2 May 2001 from respondent to claimant were in breach of its obligations to take delivery of the goods and to pay the price for the goods. Therefore, Medipack was in breach of its obligations under the contract according to Article 53 CISG.

Seventh Issue: Under the CISG, Respondent must pay damages for breach of the contract

Respondent has to pay $577,477.98 as the compensation for damage

This amount of damage is the "lost profit" that Claimant should get on the contract. Since the contract was concluded, the buyer should have accepted the goods.[59] However there was no indication that Respondent accepted the goods. Because Respondent did not accept the goods, he is in breach of the contract [60] [A]. Thus, Respondent's refusal to accept the goods lead to the damage of Claimant [B]. Therefore it is possible for Claimant to require the compensation for damage against Respondent [C]. Certainly, Respondent should not request an unlimited amount of damages. However, Respondent should pay the amount of damages that Claimant requires. [D]

[A] Respondent was in breach of the contract of 3 April because he defaulted on his obligations

Claimant and Respondent concluded the contract. Both parties had an obligation to each other in accordance with the contract. However, there was no evidence that Respondent took delivery of the goods. On the Claimant side, he was ready to deliver the goods.[61] Under Article 53 CISG, the buyer must pay the price of the goods and take delivery of them as required by the contract. Respondent's failure to take delivery of the goods is a breach of duty of Respondent.[62]

[B] Claimant was damaged by Respondent's breach of the contract

Equafilm's gross margin on the manufacture of polypropylene film of the contract quality is 22%.[63] If Respondent received the goods and paid for it in accordance with the contract, Equafilm would have gotten this margin. Since however the contract was breached, Claimant's was deprived of the opportunity for assigning the gross margin for this contract. Respondent could have foreseen that Claimant would lose profits if he breached the contract. Therefore, Claimant was damaged of the gross margin of 22% of the contracted costs because of Respondent's breach of contract.

[C] Claimant can request the compensation for damage according to Article 61 (1) (b)

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[59] It was proven at Issue4.
[60] It was proven at Issue6.
[61] Claimant's Exhibit No.9.
[62] It was proven at Issue6.
[63] Statement of Claim, para,18.

CISG

Article 61(1) (b) CISG provides that the seller may claim the damages provided for in Articles 74 to 77. This provision permits the seller to exercise this right if the buyer fails to perform its obligations under the contract. In fact, as soon as the contract was concluded, Respondent insists the price of 8% discount and indicated that he returned to previous supplier. In addition, Claimant informed him by fax of the cancellation for the booking.[64] In fact, Claimant returned to Polyfilm GmbH.[65] Therefore, Respondent did not take delivery of the goods, which Claimant prepared for delivery. It is clear that Respondent did not intend to receive the goods. Respondent's failure to take delivery of the goods illustrates his failure to perform under the contract and according to the rules of the Convention. Therefore, Claimant has the right to require compensation for damages.

[D] Claimant can request $575,477.98 as the damage according to Article 74 CISG

Claimant can require loss of profit for breach of the contract by Respondent [1]. Article 74 CISG states the limitation for damages where the breaching party could foresee the consequences of the breach at the time of the conclusion of the contract. Here, it is reasonable to conclude that Respondent could have foreseen the consequences of a breach at the time the contract was concluded [2].

1. Claimant can request loss of profit as the contracted price under Article 74 CISG

Under Article 74 CISG, the amount for damages is the amount of loss.[66] Claimant was deprived of the opportunity to substitute the price of the transaction. The gross margin of 22% is loss of profit. Therefore, Claimant's request of 22% gross margin for Respondent's bleach of the contract is reasonable.

2. Respondent foresaw the Claimant's damage

Article 74 CISG states the limitation for damages. If the breaching party could have foreseen the consequences of the breach, it must pay the price of equal to the loss plus loss of profit.[67] The underlying idea of foresees is that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement.[68] In this regard, Respondent foresaw the damage of the gross margin of the goods. In addition, when the contract was concluded, Respondent foresaw the Claimant's damage.[69] Medipack is

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[64] Claimant's Exhibit No.9.
[65] Claimant' Exhibit No.10.
[66] *Peter Schlechtriem,* para, 392
[67] Supreme Court *Bundesgerichtshof* 24 October 1979
[68] *Peter Schlechtriem para,394*
[69] *Peter Schlechtriem para,393*

experienced in the purchasing of the goods in the contract. Therefore, it would have known that the existence of a gross margin would yield a profit [70] Therefore, the 22% of gross margin, which is the loss profit does not exceed the scope of the compensation for damage under the CISG.

Conclusion: Respondent has to pay $575,477.98 as the compensation for damages for Claimant's loss because of Respondent's breach of the contract. In addition, Claimant can request the damage for loss of profit according to Article 74 CISG. Since Respondent could have foreseen the Claimant's loss of profit, the amount does not exceed $575,477.98.

Claimant also requests Medipack to pay all cost of arbitration, including costs
Claimant requests DIS administrative fee and Provisional Advance on arbitrator's costs.

[70] Procedural Order No.2.

Eighth Issue: The Tribunal should charge interest of damages to Respondent

Respondent is liable to pay interest for delay according to article 78 CISG. The contract was concluded on 3 April 2001. Naturally, Respondent had an obligation to pay the price. However Respondent has not complied with his obligation to pay the price. Therefore Claimant request Respondent to pay interest for four months payment for the delay.

[A] Claimant request Respondent to pay interest for four months payment

Respondent have to pay the interest, since it did not perform its obligation although the contract was concluded. Respondent has a one-sided declaration that it had placed an order with Polyfilm GmbH for Polypropylene film.[71] Respondent has not offered to terminate the contract. Therefore, Claimant did not have any reason to terminate the contract. Thus, Claimant could not claim for damages at the time of the declaration by Respondent.

[B] Under Article 63 CISG, Claimant provided Respondent with an additional period of time to perform its bligationos

When Respondent declared that it would purchase the film from another supplier, Claimant needed to fix an additional period of reasonable length for performance by Respondent of his obligations under article 63 CISG. Since Respondent did not declare an intention to terminate the contract at that time, Claimant needed to determine whether Respondent intended to perform its obligations. Considering that this contract is over nine months, when Claimant decided to bring a claim against Respondent in September, Claimant had already given Respondent more than half of the extra time required for performance. By this time, Claimant understood that Respondent did not intend to perform. Since during that period Claimant could not resort to any remedies, Respondent properly had an obligation to make payment during that period.

Even after that, Claimant had continued to negotiate with Respondent.[72] However Respondent refused to negotiate. Finally after one year, Claimant asserted its rights to bring the matter before the arbitral tribunal. Since Claimant recognized that Respondent would not take delivery when September, the time when the fifth delivery was supposed to be made, had passed, Claimant requested Respondent to pay interest for delay of payment for four months. Thus, the payment which was supposed to be made until the fifth delivery was that of May, June, July and August. Therefore since Respondent failed to pay the price for four months, interest should be charged on for this period.

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[71] Claimant's Exhibit No,10.
[72] Procedural Order No,2.

[C] Interest should be paid from the date on which each payment was due

Respondent is liable to pay interest on said sum from the date payment was due, 30 days from the 10th day of May, June, July and August 2001 to the date of payment to Claimant.