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MEMORANDUM FOR RESPONDENT

Ayano Saito	Emiko Tomita	Ikumi Koike	Issey Kosaka
Misato Ishikawa	Mirei Suda	Natsuko Tsuji	Shuichi Takenaka

MEIJI GAKUIN UNIVERSITY

FACULTY OF LAW

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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 10^{th} 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.

First Issue: The merger of Multiland Association and Dr….'s law firm gives rise to a judicial doubt of Dr….'s independence and impartiality

A. Under DIS rule 15, an arbitrator must be impartial and independent

There is a special relationship between Dr… and Claimant that give rise to a perception that Respondent's rights would be prejudiced. An arbitrator should be removed from a proceeding if "a reasonable person thinks that there was a real likelihood that the arbitrator could not or would not fairly determine the relevant issues in the arbitration." (ZASLOWSKY *citing* Koh Brothers, OM No. 600013, Singapore High Court, 2002).

According to DIS rule 16, an arbitrator may be challenged if circumstances exist that give rise to judicial doubts as to his impartiality and independence. Dr's….law firm's merger with Multiland Association creates a circumstance that gives rise to judicial doubts as to his impartiality and independence because if Claimant is successful in his claims against Respondent, the perception would be that Dr.'s presence on the tribunal influenced a favorable outcome for Claimant. (See generally, BRAND, 17 J.L. & Com. 301 (1998).

B. The Merger of the two firms creates an economic tie between Dr. and Claimant

Even if Dr… is impartial, a decision that results in an advantage for Claimant will give rise to the perception that Dr… ruled in favor of Claimant in order to maintain Claimant as a client for Multiland Associates. Multiland represents the Claimant, Equafilm. This representation means that when Dr's law firm merges with Multiland, there would be some economic tie with Claimant, since the merger is bound to be tainted with Claimant's money. The economic connection, then, is not as remote as Claimant asserts. Rather, it is intertwined, and therefore, direct.

According to Procedural order 19 , "Dr…'s share in the profits of the firm is in large part determined by the profit of the individual office, and in part determined by the profit of the total firm". Certainly, if Claimant wins an award in this arbitration, any future representation by the merged firm will recoup financial benefit arising from this award, since the firm does not have to inquire into the source of Claimant's financial assets.

If Equafilm wins this arbitration, the money received from this arbitration becomes part of Equafilm's assets. Multiland Association receives money from Equafilm. Thus any profits that Dr… receives as a result of the merger will stem, in part, from Equafilm. Having Equafilm as a client means that the profit of the total firm will increase, resulting in more profits for Dr…. Therefore, it is easy to see that there is an economic tie between Dr….and claimant. This Economic tie should be a compelling reason to challenge an arbitrator.

C. The award can be challenged in a Mediterraneo court because of Dr…'s perceived bias

Article 34 (2) of the Model Law provides that "a party may apply to have an award set aside if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced. " (Koh Brothers).

If this tribunal rules in Claimant's favor, the award may not be enforced in Respondent's home state of Mediterraneo. Respondent may bring a challenge to set aside the award on the basis that the award was prejudiced because of Dr's.. . relationship with the CLAIMANT. A review of the award would result in timely and costly re-litigation of the issues. Moreover, a challenge to the award on grounds of tribunal impropriety, will shed a bad light on the credibility of the arbitration process.

Mediterraneo, Equatoriana and Danubia are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (Procedural order No. 2,7) The New York Convention states the situation in which recognition and enforcement of the award may not be recognized. Under article II (e) of the NY Convention, if the party against whom a claim is invoked furnishes the competent authority, where the recognition and enforcement is sought, with proof that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the party against whom it is invoked, the award may not be recognized.

The award may be subject to review under the laws of Mediterraneo or Equatoriana because there is the underlying issue of whether the contract is subject to the laws of Equatoriana. In countries where the underlying contract is governed by domestic law, courts have assumed jurisdiction and control over the claim even if the arbitration clauses provided for arbitration in different forums. (Kerr in Arbitration International at 131-32). In ONGC v. Western, the Supreme Court of India assumed power over the arbitration because of a challenge to set aside the award in that case.

Also, in that case, the American party was enjoined from seeking enforcement of the award in the United States because the case was still pending in the Indian courts. (Kerr at 136). Because of the seeming impropriety caused by Dr…'s presence on this tribunal, there is a great possibility that if an award is invoked against Respondent, that the same result would occur.

Dr… should withdraw from the arbitration panel because he is not legally qualified to serve on the panel. The merger of Dr…'s law firm with Multiland Associates will result in an economic tie with Claimant. Because of this seeming impropriety, there is "good reason" to withdraw Dr…. from this arbitration proceeding.

Second Issue: This tribunal does not have jurisdiction to consider the dispute between Equafilm and Medipack

A. The German Institution of Arbitration does not have jurisdiction to hear the merits of the claim

There was no arbitration agreement because the contract at issue did not contain an arbitration clause. The UNCITRAL Model Law provides that an agreement to arbitration must be in writing. (Model Law, Article 7; see also, OS No. 601627 of 2001, Singapore High Court). Even if the arbitration clause from the previous contract became part of this contract, this contract was not concluded. Where a party does not sign a contract, or begin performance of an agreement, that party should not be held to agree to the terms of that agreement. (CHILEWICH AT 1240). In the *Chilewich* case, the court found that the arbitration clause from a previous contract applied because the breaching party had signed the Memorandum Agreement, and had begun to perform the agreement without objection to any of the terms.

In this case, RESPONDENT did not sign the agreement, nor had RESPONDENT begun performance. The first contract has no bearing on the second contract because if the contract was concluded, it would have been an independent agreement. It was not a supplement to the first contract because that contract was already performed. (ICCA – Russia, CASE NO. 304/1993 at http://cisgw3.law.pace.edu/cases/950303r2.html). In fact, as would be discussed later in this memorandum, RESPONDENT contends that the contract was never concluded.

Even if this Honorable Tribunal should find that the contract was concluded, the arbitration clause of the first contract is not applicable to the second contract. The parties did not agree on the arbitration clause when they talked about the second contract. In fact, they agreed to use similar terms of the contract of 15 December 2000. At that time, Respondent would have understood those ‘similar terms’ to include such things as price, quantity and delivery arrangements, not the choice of forum.

B. Even if the arbitration clause is included, it is not automatically effective because there is no merger clause

Even if the arbitral clause had been included in the second contract, it doesn’t become effective under the doctrine of separability as CLAIMANT asserts. It is a general rule that parties must agree to arbitration. Furthermore, the New York Convention requires that agreements to arbitrate must be in writing and signed by the parties. (NY CONVENTION, ARTICLE II (1) and (2)). Moreover, an “arbitral clause” does not automatically carry over to a subsequent contract unless the parties include a merger clause that states the finality and subsequent applicability of the terms of the contract, including the arbitration clause. (BRAND AND FLECHTNER at 7; see also, VISCASILLAS).

According to Flechtner and Brand, parties can discharge agreed terms by leaving them out of a written contract if they manifest their intention in a properly drafted merger clause. (ID). This same principle would apply to the inclusion of terms in a contract particularly when dealing with subsequent contractual relationships. Thus, CLAIMANT should have drafted a merger clause if it intended all terms of the contract, including choice of forum, to apply to subsequent contracts with RESPONDENT.

C. The Doctrine of separability does not apply here because the second contract did not contain an arbitration clause

Even if the second contract was concluded, the arbitration clause from the first contract does not apply because as previously stated, an arbitration clause does not automatically transfer to subsequent contracts. Under the doctrine of separability, an arbitration clause is treated separately from the validity of the contract. However, the question here does not concern the validity of the contract, but whether the parties agreed to arbitration by way of an arbitration clause for this particular dispute.

The contract of 15 December 2000 has already been performed. The only bearing that contract has on this present dispute is the references to price and delivery. There is no reference to a choice of forum. CLAIMANT vaguely stated that similar terms will apply. The language, 'similar terms' can refer to any element of contracting. 'Similar terms' does not adequately communicate to a party that he would have to appear in a forum, which he did not choose, to litigate any dispute arising under a contract.

D. In the alternative, even if the arbitration clause carried over to the second contract, the forum specified in the clause does not exist

Even if the arbitration clause carries over to the second contract, the arbitral clause provided in the contract of 15 December 2000 itself is not valid since that arbitral clause referred the parties to the German Arbitration Association. The German Arbitration Association does not exist. Where parties are submitting a dispute to arbitration, the place of arbitration must be definite, and agreed upon. (See UNCITRAL Model Law, Article 1(3) (b) (i).

In this case, there is no agreement to remit any dispute to DIS. Parties to a contract must agree to the choice of forum because this creates certainty and familiarity with the law of the forum. First, the arbitral clause has to be definite as to place of arbitration. And we cannot confirm that there was an accord between the parties as to the choice of forum. Although Claimant insists that this mistake is simply a mistranslation, it is doubtful whether Claimant really intended DIS to be the tribunal.

The 15 December transaction was the first time that RESPONDENT had done business with CLAIMANT. Therefore, under Article 8 CISG, it is unreasonable to assert that RESPONDENT should know what the CLAIMANT's intent was because under Article 9 CISG, there were no sufficient ''established practices between the parties'' to alert RESPONDENT to CLAIMANT's intention. (CASE 10 Ob 518/95 – AUSTRIA at http://cisgw3.law.pace.edu/cases/960206a3.html).

If Claimant intended to have the arbitration under the rules of the German Arbitration Association, he should have used the official English name of DIS. DIS rule has a model arbitral clause and recommend all parties follow the rules when drafting an arbitration clause. The language of the DIS rules clearly refers to the German Institution of Arbitration as the official name of DIS. Thus, Claimant could easily have known the correct English translation of the name of the organization.

DIS rule 1(1) also says that DIS will have a jurisdiction based on an agreement between the parties. According to this tribunal's own rules, parties must agree to the choice of forum. In the 15 December 2000 contract, the arbitration clause stated that ‘’any controversy arising out of or relating to "this contract" shall be determined by DIS.’’ This statement means that the agreement to arbitrate only applied to ‘’that contract."

The second contract does not ‘’arise out of a dispute’’ from the 15 December contract. In fact, the dispute arises from the second contract. The second contract did not contain an arbitration clause. DIS rules require the parties to have an arbitration agreement included in the document. Since there was no agreement to arbitrate included in the second contract, this tribunal does not have jurisdiction to decide this dispute.

Third Issue: The CISG cannot apply to the contract because there is a question of whether the contract is valid and Article 4(a) of the CISG is "not concerned with the validity of the contract"

A. The validity of the contract is exclusively in the sphere of domestic law

In this case, the law of Equatoriana will determine the whether the contract is valid. Although CLAIMANT contends that the CISG is part of the substantive law of Equatoriana, because the CISG is not concerned with the validity of the contract, which is a pertinent issue in this case, the CISG is not applicable to this dispute. (PETROCHILOS).

B. The parties implicitly excluded the contract from the sphere of the CISG

Moreover, because the parties explicitly agreed that the ''commercial law of Equatoriana shall apply to any disputes arising from the contract'', it is natural to conclude that the parties implicitly excluded the contract from the sphere of the CISG. The fundamental basis of contract… under the Convention is an agreement between the parties. (KELSO). Indeed, under Article 6 of the CISG, such exclusion is permissible. Article 6 allows parties to exclude the Convention's application entirely by choosing a law other than the Convention to govern their contract…. (BAILEY at 304).

In this case, although the parties specified that the law of a contracting state will apply, the fact that they specified that the commercial law will apply means that they intended that the domestic law of Equatoriana will apply and not the CISG. Generally parties must be held to the law that they chose to govern the agreement. (EEC Rome Convention on the Law Applicable to International Contracts, art 3 (1); see also Restatement (Second) Conflict of Laws, section 187). Furthermore, the law of the place of contracting determines the validity and effect of a promise with respect to the manner, time and locality, sufficiency of performance, or excuse for non-performance. (Restatement (First) of Conflict of Laws §332).

C. The domestic law of Equatoriana should apply because the contract was a CIF contract

Generally, the substantive law of a particular country governs the CIF terms in a contract. Thus, these mandatory norms of the domestic law will prevail over the rules of the Convention. (AUDIT; see also Article 4 (a) CISG). Professor Audit asserts ''the CISG removes from its scope those sales which are most closely regulated by domestic laws'' as well as the validity of the contract or any of its provisions or usage. (AUDIT at 175).

Although a CIF contract is usually interpreted according to the Incoterms guidelines, different countries interpret these terms differently. (GABRIEL, 3 Vindobona Journal of International Commercial Law and Arbitration (1999) 61-70). The CISG does not define shipping terms. Instead, the CISG leaves terms of the parties up the parties' agreement and intention. (CISG Article 8).

As Gabriel states, in the United States the domestic law defines shipping terms, thus a party to a contract with a United States party will draft the agreement carefully to avoid conflicts with the substantive law and the Incoterms. In this case, the parties agreed to the commercial law of Equatoriana because that country's law would be the driving force behind a CIF contract. Since the CISG does not define shipping terms, the CISG could not have been contemplated between the parties to be the applicable law.

D. The issues in this case concerns the substantive law of Equatoriana

Further, Article 1(1) (a) of the CISG should only apply where the parties have their relevant places of business in different states where the states are contracting states. Here, only Equatoriana is a contracting state. CLAIMANT contends that the CISG applies because the contract is inter alia, an international sale of goods. However, as Carolina Saf, suggests, Article 1 (1) (a) performs the task of a conflict rule and not that of substantive law. This interpretation means that the substantive law is the law of the contract, and the CISG will not apply if the issue at hand is essentially a domestic one with contractual and non-contractual aspects not covered by the CISG. (SAF).

In this case, the first issue concerns a contractual issue of validity of the contract, second, there is a non-contractual issue concerning the arbitration clause since under the doctrine of separability, the clause is not dependent upon the validity of the contract. Finally, the contract is a CIF contract, which is governed by domestic substantive law. The CISG does not define shipping terms. (See AUDIT at http:www/cisg.law.pace.edu/cisg/biblio/audit.html; see also, GABRIEL).

In addition, the question of interest is at issue in this case. The interest rate is a substantive law question, and the CISG omits the application of interest rates from its sphere. Therefore, in this particular case, it does not operate as the substantive commercial law of Equatoriana. At best, the CISG is a supplementary law to determine the parties' intent.

In this case, the intent is clear that the parties' intended the contract to be governed by the commercial law of Equatoriana, which is the municipal law of that state and not the CISG. (See AUDIT at http:www/cisg.law.pace.edu/cisg/biblio/audit.html). In addition, the CIF terms in the contract indicate that there is no ''reasonable link'' between the contract and the CISG because the substantive laws of Equatoriana will govern the export element of the goods, while the commercial law of Mediterraneo will govern the importations aspects. (GABRIEL). If the CISG is applied to govern the terms of this contract, it will run afoul of the laws of both countries. (AUDIT). The CISG will only apply in a situation where the parties have not chosen the applicable law.

In the alternative, article 1 (1) (b), according to Caroline Saf, is the substantive law of the CISG because it provides that the CISG will govern where the rules of private international law leads to the law of a contracting state. However, SAF asserts that Article 1 (1) (b) will only govern if the parties have not exercised their autonomy under Article 6 CISG. In this case, the parties have employed Article 6 by implicitly excluding the CISG. Therefore, the domestic commercial law of Equatoriana is the applicable law in this dispute.

Fourth Issue: Under CISG Article 14, the contract was not concluded by the telephone conversation of April 3 because the price was not determined

A. The telephone conversation between Respondent and Claimant on April 3 did not conclude a contract because both parties did not agree on a definite price

Under Article 14 CISG, a proposal for concluding a contract… must be sufficiently definite… if it expressly or implicitly fixes or makes provisions for determining the quantity and the price. According to Procedural Order No. 2, para. 34, both parties agree that there was no explicit mention of the discount to be applied. Even if Claimant had mentioned that the list price had increased to $1,900 per ton, this was not sufficient to inform RESPONDENT of the price.

In the previous contract, Claimant had promised that Respondent will always receive “the best price.” The mere mention that the price had increased does not mean that this is the “best price” as agreed between the parties. The CISG “regards the definition of the subject of the service, its quantity and its price to be an essential element of a bid.” (AMATO, quoting Pratt Whitney v. Malev; see also, Gabuardi). The implication is that under the CISG, an offer is not sufficiently definite unless it includes a price term. (FARNSWORTH).

B. Under Article 18 CISG, Respondent did not accept the offer because the subsequent conduct indicated that CLAIMANT’s offer was not accepted

The subsequent conduct by Respondent after the telephone conversation illustrates that Respondent did not accept Claimant’s offer of April 3, 2001. Article 18(1) CISG allows acceptance to be determined by a party’s conduct. Additionally, Article 2.6.3 of the UNIDROIT principles requires conduct of the offeree to indicate assent. (HARJANI at 75). Conduct will be largely determined by the parties' prior course of dealings according to Article 8(1) CISG. In this case, the only prior dealing between the parties is limited to the first contract.

For that contract, Respondent performed his obligations solely on the fact that he received Claimant’s best price of 8% discount. For the second contract, the price is a matter in dispute. Therefore, if Respondent only performs if the price is settled, it is reasonable to conclude that his conduct after the telephone conversation, namely a dispute about the price, means that he did not accept Claimant’s offer.

An offer is an empowerment to the offeree to create a contract in accordance with the terms of the offer by accepting it. (SONO). Under the objective standard of Article 8(1), it is clear that Respondent’s intention was to accept the offer only if the price was identical to that of the first country, namely an eight percent discount.

The telephone conversation of April 3 was an oral offer by Claimant to Respondent. Under Article 18 (2) of the CISG, the rule is that an oral offer must be accepted immediately… unless the parties agree to accept by performance under Article 18 (3) CISG. Here, there is no indication that the parties agreed to acceptance by performance.

C. Under Article 19(1) CISG, the contract was not concluded because Respondent's letter of 6 April 2001 was a counter offer that was not accepted by the Claimant

RESPONDENT's letter of 6 April 2001 to Mr. Storck was a counter-offer. Article 19(1) of the CISG states that a reply to an offer that contains additions, limitations, or other modifications is not an acceptance. Rather, such a reply constitutes a counter-offer under the CISG. Moreover, paragraph 2 of article 19 provides that a reply to an offer that materially alters the terms of that offer is not an offer, unless the offeror does not object to those terms. If the offeror objects, then the reply is a counter-offer. (VISCASILLAS, see also case no. 2 U 35/78, OLG Hamm, 18 October 1982, Germany).

In this case, Respondent's letter of 6 April was a counter-offer under article 19(1) because it contained the different term of price. Under article 19(2), Claimant objected to those terms in his reply to Respondent's telefax of 6 April 2001. Therefore, under article 19(2), the contract was not concluded. Further, article 19(3) of the CISG provides that additional or different terms such as price are considered to alter the terms of the offer materially. Because there is a dispute on this material term, under the CISG the contract was not concluded.

D. Under Article 55 CISG, the price cannot be implied because the contract was not validly concluded under Article 14 (1) because of the missing price term

Under Article 55 CISG, the price term cannot be implied because the contract was not validly concluded as required under Article 14 (1). As a threshold issue, a valid contract must previously have been concluded for Article 55 to fill in the open price term. (FARNSWORTH). Because Respondent's counter-offer was rejected by Claimant, the contract was never concluded. Thus, Article 55 cannot be used to as a solution to the missing price term because whether a valid contract was concluded is the overriding issue in this dispute.

Under the CISG, a contract can only be concluded if the exchange of different communications does not "materially alter" the terms of the offer, and where the offeror does not object. A missing price, then, would not prevent the formation of a contract only if both parties consider the term a minor mismatch. (GARRO at 84). When Articles 14 and 55 are read together, the requirements set forth in Article 14 are conditions precedent to the employment of Article 55. The telefaxes exchanged by both parties on April 3, 6, and 9 2001 indicate that price was a material term of the contract. Since no agreement was ever reached between the parties regarding the price, the contract was not validly concluded.

Fifth Issue: If a contract of sale was concluded, the price term was an eight percent discount

A. Under Article 8 CISG, the price must be interpreted according to the parties' prior negotiations

Even if this tribunal finds that the contract was concluded, on 3 April 2001, RESPONENT maintains that the price was an 8% discount from Claimant's current list price because that was the price expressly stated in the first contract. (Claimant Exhibit No.1) Article 8 of the CISG mandates that in interpreting contract terms, the prior negotiations must be taken into consideration. In the first contract, CLAIMANT skillfully negotiated an 8% discount price in order to induce RESPONDENT as a long-time customer. (see Procedural Order, No. 2, para 37).

RESPONDENT accepted this offer for the simple business reason that this price was economically feasible. Most likely, RESPONDENT would have taken this price into account for future business planning. RESPONDENT thus relied on CLAIMANT's offer of an 8% discount price. As CLAIMANT acknowledges, the large order conferred on RESPONDENT the label of "best customer." Thus, RESPONDENT reasonably believed that this special treatment would apply to all future orders.

Even if Claimant insists that the second contract does not expressly or implicitly fix the price, under Article 55 CISG, at the time that the contract was concluded the price generally charged, as the parties agreed was eight percent. Because of the agreement of the two parties, the price generally charged at the time of the conclusion of the contract should be interpreted as an eight percent discount. This interpretation is supported by Article 8 CISG. Article 8 CISG is used for the interpretation of the behavior of both parties to the international sales contract. (VISSER at 5).

Under Article 8(1) CISG, CLAIMANT's statements at the time of the first contract led RESPONDENT to believe that he intended to keep RESPONDENT as a customer by offering the "best price" of eight percent discount. Because of CLAIMANT's statements, RESPONDENT could not have been aware the eight percent discount was a one-time offer. Therefore, under the subjective approach of Article 8 (1), the evaluation must be on what RESPONDENT knew or could not have been unaware, based on CLAIMANT's statements.

The statements made by CLAIMANT would satisfy the objective approach standard of Article 8 (2) CISG because any reasonable person in RESPONDENT's position would have understood that the eight percent discount would apply to current and future orders. (VISSER).

Claimant's letter to Respondent in the first contract in 7 December 2000 stated "you will always receive our best price, and you will receive a discount of eight percent from our list price, which is an unusually low price." In addition, CLAIMANT stated that the eight percent was "the best price we have ever given any customer for any purchase." This statement demonstrates that the "best price" is eight percent discount. Indeed, the language "always" conveyed to RESPONDENT that every time an order is placed, Respondent would receive the eight percent discount.

B. Under Article 9 of CISG, the parties are bound by any usage to which they have agreed and by any practices, which they have established between themselves

During the negotiations of the second contract, the parties agreed that the terms of the first contract would carry over to the second contract. Thus, the price should be interpreted as eight percent discount because that was the price term in the first contract. Under Article 55, a missing price term should be interpreted as that generally charged at the time of the conclusion of the contract. The term "generally charged" should be interpreted as the price fixed by the parties.

Sixth Issue: Respondent did not breach its obligations under CISG article 60 (a)

A. CLAIMANT is in breach of the condition that would have enabled RESPONDENT to perform the contract

According to the language of the telefax of April 10 2001, RESPONDENT told the CLAIMANT that it would consider going back to its previous supplier, Polyfilm Gmbh, if Claimant did not agree to an eight percent discount. This language means that Respondent intended that Claimant should renegotiate the contract price. Respondent did not say definitively that it would not purchase the film from CLAIMANT. Rather, RESPONDENT merely said that it will consider returning to the previous supplier, if the eight percent discount price was not reinstated. When CLAIMANT refused to honor its own promise as to price, CLAIMANT left RESPONDENT no recourse, but to return to its previous supplier. The eight percent price was a condition that CLAIMANT breached.

B. Under the CIF terms of the contract, RESPONDENT is not in breach because the goods were never shipped

According to the ICC Incoterms, under a CIF contract, the risk passes to the buyer after the goods are shipped. (ICC Incoterms, 2000). Therefore, under the CIF terms, a contract will only be breached if the goods are shipped and the buyer refuses to take delivery. Article 60 (a) of the CISG obligates a buyer to take delivery of the goods. However, in this case, no goods were shipped. Therefore, RESPONDENT cannot breach the contract because there was nothing to take delivery of.

C. Under Article 7 CISG, Claimant breached its good faith obligation when it stated that the price was subject to a four percent, instead of an eight percent discount

In the first contract, Claimant clearly stated that Respondent would receive an eight percent discount. In fact, Claimant said that eight percent is the best price for any customer and that Respondent will always receive the best price. Therefore, Respondent believed that the best price was eight percent discount.

However, it appears that Claimant was not honest in its dealings with Respondent because as soon as Respondent placed its first order, Claimant decided to change the price. This action means that Claimant is acting in bad faith if it only said eight percent so that Respondent will place more orders. To avoid a construction of bad faith, CLAIMANT should have clearly stated that the eight percent was a one-time price.

The CISG requires that parties deal honestly and fairly in contract. Article 7 also requires that parties do everything possible to ensure uniformity and certainty in international trade. Respondent was certain that the price was eight percent discount. But when Claimant suddenly changed the price all certainty disappeared.

Seventh Issue: Respondent is not liable to pay damages under the contract

A. Under Article 62 CISG, Claimant resorted to an inconsistent remedy under the contract

Under Article 62 CISG, the buyer must pay the price or take delivery of the goods only if the seller has not resorted to a remedy that is inconsistent with this requirement. This contract was a CIF contract. A CIF contract obligates a seller to deliver the goods according to the contract. If a seller does not deliver the goods, he is in breach of contract. (Biddell Brothers; ICC Incoterms 1990).

Under article 30 CISG, CLAIMANT is required to deliver the goods and hand over any documents relating to them to transfer the property in the goods to the buyer. This means that the seller had an obligation to deliver the goods called for in the contract. If the seller delivers the goods, then the buyer is obligated to accept the goods and pay the price according to article 53 CISG. However, in this case, CLAIMANT informed RESPONDENT that it had cancelled the shipment of the goods. Therefore, no goods were shipped. Thus, RESPONDENT is not obligated to pay the price or take delivery for undelivered goods.

On the other hand, if CLAIMANT had performed its obligations according to the CIF Incoterm, then RESPONDENT would have been obligated to pay the price according to the terms of the contract and as required by article 54 CISG. CLAIMANT asserts that RESPONDENT did not ''do everything reasonable to take delivery of the goods.'' Under article 54 CISG, RESPONDENT would have had to secure a letter of credit or any payment formalities according to the contract terms. However, CLAIMANT informed RESPONDENT that it had cancelled the shipment. This communication indicated that CLAIMANT was no longer interested in negotiations with RESPONDENT. RESPONDENT, then, was not required to take any steps to enable payment to be made.

B. Under article 80 CISG, RESPONDENT's failure to perform is a direct result of CLAIMANT's acts when CLAIMANT revoked its promise to charge RESPONDENT an 8% discount on the price

Respondent properly avoided the contract when CLAIMANT refused to comply with the agreed upon price referring to the contract terms of 15 December 2000. Under Article 80 CISG, CLAIMANT may not rely on RESPONDENT's failure to perform because the failure was caused by CLAIMANT's breach of his promise regarding the price. When Claimant acted in bad faith concerning the price by insisting that the price was four percent discount, Respondent believed that Claimant was not operating on a good faith basis. Therefore, Respondent did not see a reason to keep negotiating with a party who was obviously acting in bad faith.

C. Under Article 71(3) CISG, RESPONDENT properly suspended his performance because CLAIMANT did not provide adequate assurance that he would perform the contract as agreed

CLAIMANT asserted that he would not comply with the agreement of an eight percent discount price. RESPONDENT, then, was substantially deprived of what he was entitled to expect under the contract. Thus, CLAIMANT committed a fundamental breach of contract under article 25. RESPONDENT stood to incur exorbitant expenses, which it had not prepared for according to the terms of the agreement. Thus under article 72 CISG, RESPONDENT was well within its rights to avoid the contract because it was clear to him that CLAIMANT will commit a fundamental breach of contract.

Accordingly, honoring the requirements of article 72 (2) CISG, RESPONDENT gave CLAIMANT a last clear chance to keep his promise on the eight percent discount price by way of the telefax on May10 2001. (VISCASILLAS). However, CLAIMANT refused to honor the agreement, and bluntly refused to restore the contract price to eight percent discount.

D. Respondent failure to perform did not amount to a fundamental breach under Article 25

Article 25 of the CISG lays out the situation in which a breach will be subject to a remedy. Occurrence of a fundamental breach permits a "declaration of avoidance." (ERAUW and FLECHTNER in SARCEVIC and VOLKEN, 40). Under article 25 CISG, a breach of contract is fundamental if it results in a detriment that substantially deprives the other party of what he is entitled to expect under the contract.

Under article 25, the test turns on whether the results were foreseeable by the party in breach. This means that if the breach is so fundamental, a reasonable person should be able to foresee that detrimental results would ensue. In this case, it is questionable whether RESPONDENT breached the contract let alone committed a fundamental breach. RESPONDENT would certainly have breached the contract by failure to take delivery of the goods. But the goods were never delivered. Even if the goods were delivered, the question still stands as to whether the breach would have been fundamental.

E. Respondent should not pay any damages because it could not foresee the loss of profit damages that Claimant asserts

Under Article 74 CISG, a party in breach must foresee the consequences of a breach at the time of the conclusion of the contract. Even if RESPONDENT breached the contract, he should not be liable for damages to CLAIMANT because RESPONDENT could not foresee the loss of profit damages that CLAIMANT asserts. In the majority of legal systems, recovery of damages for unforeseeable losses is found in the majority of legal systems. (KIRBY at 225). The 22% gross profit margin loss that CLAIMANT desires is merely speculation.

Claimant has requested $575,477.98 as damages for loss of profit. This is an unduly large sum of money, which CLAIMANT should have the burden of showing this tribunal that this sum is a concrete calculation of is losses. (SCHLECTREIM). Because CLAIMANT is unable to show the specific damages that resulted from the alleged breach, this Tribunal cannot award this sum to CLAIMANT because to do so would be to make an award for punitive damages prohibited by the CISG. (KIRBY, citing ENDERLEIN & MASKOW). As stated in an article by Amy Kirby, the CISG adopts the common law provision of efficient breach in commercial contracts.

Under the *Hadley v. Baxendale* test, on which CLAIMANT relies, only foreseeable, compensatory damages may be imposed on a breaching party in a contract action. (Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. Ch. 1854; see also FARNSWORTH in 27 American J. Comp. L. (1979)). In this case, it appears that CLAIMANT's desire is to punish RESPONDENT for exercising his economic choice to seek out the best deal in a contract without having to incur adverse consequences. (KIRBY at 215).

Generally, damages must be actual and concrete, not vague generalizations of speculative losses. Under article 74 CISG, the operative word is foreseeability. (SCHLECTRIEM). According to Professor Schlectriem, the test of foreseeability requires that one party to a contract notifies the other party that a breach may lead to special losses, and explicitly make these damage known to the other party. In addition, article 7.4.2 of the Unidroit principles provide that the harm from breach ''includes both any loss which the injured party suffered and any gain of which it was deprived."

F. Article 74 of the CISG limits damages to compensatory contractual damages, not unforeseeable consequential damages

Under article 74, RESPONDENT would have had to pay damages only if CLAIMANT had incurred expenses by performing. Performance by the CLAIMANT would have meant that the CLAIMANT paid to ship the goods as required under the CIF Incoterms. However, the goods were never shipped, and CLAIMANT has not asserted that it incurred any costs or penalties for canceling shipment of the goods. If CLAIMANT had incurred expenses for canceling the shipment, then under the CISG, RESPONDENT may be liable for consequential damages. Yet, under the law of damages, RESPONDENT would have had to know the special conditions that would require him to pay consequential damages. (COKINOS at http:www.constlaw.org/papers/cokinos.html)

Consequential damages are losses other than the value of the other party's performance. Under contract law, these damages would have to incidental and caused by the breach and should be the type of damages that are reasonably within the contemplation of the parties at the conclusion of the contract. (COKINOS). Consequential damages would issue in any form, including loss of profit, as long as the foreseeability and certainty requirements are met. (COKINOS).

Lost profits may be recoverable as consequential damages if the facts of a loss are established. (see COCKINOS citing *Westech Engineering Inc. v. Clearwater Constructors Inc*. 835 S.W. 2d 190 (Tex. App. 1992). To recover lost collateral profits, the plaintiff must produce evidence from which the trier of fact may reasonably infer that some profit would have been made, as well as evidence from which the trier of fact may reasonably estimate the amount of the loss. (*Davis v. Small Business Inv. Co. of Houston*, 535 S.W. 2d 740, 743 (Tex. Civ. App, 1976).

In this case, Claimant speculates that he stands to lose 22% of the Gross Margin only after he decides to pursue claims against RESPONDENT. During contract negotiations, there is no evidence that CLAIMANT made these losses known to respondent or even hinted at the consequences of a breach. Even in the last communication to RESPONDENT, CLAIMANT made no mention of a loss of profit.

CLAIMANT should have provided a penalty clause in the contract to alert RESPONDENT to the consequences for loss of profit in the event of a breach. As Bernard Audit illustrates, the party who is not prepared to run the risks of a voluntary breach at common law may take advantage by entering into ad hoc clauses such as a penalty clause with the other contracting party. (See AUDIT). In this case, neither the CISG nor the Unidroit principles require that CLAIMANT be awarded damages for speculative loss of profits. Because of the high costs of this contract, CLAIMANT should have made these dangers known to RESPONDENT. (SUTTON).

G. Claimant did not try to mitigate its damages as required by Article 77 CISG

CLAIMANT did not take measures as are reasonable in the circumstance to mitigate a loss that is required under article 77 CISG. Therefore, Respondent should not pay any damages. In this case, Claimant brought this claim one year after Respondent sent the fax on 2 May 2001 indicating that he would return to his previous supplier. Before bringing this claim, CLAIMANT did not take measures for mitigating the loss.

Claimant contends that he was allowing a RESPONDENT a reasonable period of time to perform the contract. However, according to the record in this case, Respondent indicated that he would purchase his requirements from his previous supplier because that arrangement was more economically beneficial to Respondent. This affirmative statement to Claimant proves that Respondent would not purchase any film from him unless the Claimant could honor the ”best price” of 8% as they had agreed.

The logical response to RESPONDENT’s actions would have been for CLAIMANT to do what was most feasible to mitigate his losses. Article 77 mandates CLAIMANT to take reasonable measures to mitigate the loss, including loss of profit. (FARNSWORTH at http:www.cisg.law.pace.edu/cisg/biblio/farns.html, see also, RESTATEMENT (Second) of CONTRACTS section 336).

Furthermore, CLAIMANT cancelled the first Shipment in May. Therefore, Claimant must have known that Respondent would not purchase any goods in the future unless that 8% discount price was reinstated. Respondent had provided the required nachtfrist notice to CLAIMANT according to CISG, article 49 (1)(b) and CISG, article 26. (HONNOLD in Cases on Commercial Law, Farnsworth, Honnold et. al. Foundation Press, 1993)). Thus, Claimant had ample time to realize that Respondent did not intend to purchase the goods.

After RESPONDENT provided CLAIMANT with a nachtfrist notice, then RESPONDENT’s actions are in accordance with article 81 CISG to avoid the contract. By this time, both parties had mutually terminated the contract. Following facts similar to this case, a German court found that a buyer’s refusal to accept delivery and the seller’s letter expressing regret at the buyer’s decision resulted in a mutually terminated contract. (case No. 20 U 76/94, 1st instance LG Luneberg

1 July 1994.

If in CLAIMANT's mind, Respondent's exercise of his right to return to a more economically beneficial relationship, was a breach of contract, Claimant should have exercised his rights sooner by taking measures to mitigate his losses, as he is required to do under the law. (ALPA and GIAMPIERI). But Claimant neglected to do anything, such as reselling the goods. (R.E. Davis Chemical Corp. v. Diasonics, Inc. 826 F. 2d 678, 7th Cir. 1987). According to Professor Farnsworth, the most common step to be taken in avoidance of loss under a contract… is a substitute sale or ''resale'' to another buyer in case of breach by the buyer…. (FARNSWORTH). Instead, Claimant is asking this Tribunal to impose punitive damages on Respondent for doing what was the most economically beneficial for his business operations. (See e.g. ALPA and GIAMPIERI *citing* Cooter and Ulen in Law and Economics, 1988, p. 290-291).

This type of punishment is prohibited under the CISG, and is in direct conflict with the provisions of the CISG to promote good faith and uniformity in international trade, not to punish commercial entities for doing that which is in the best interest of business. (KIRBY). Therefore, Respondent should not pay damages for any losses that could have been avoided if Claimant had tried to mitigate its losses.

Eighth Issue: Respondent should not pay any interests because Respondent does not have a payment obligation

A. Under Article 54 CISG, Respondent is not required to take any formal steps because the Claimant cancelled delivery of the goods

Under a CIF contract, the buyer must pay the price when the goods are delivered. Delivery of the goods may be by actual delivery or symbolic delivery. Symbolic delivery is evidenced by a bill of lading, and operates to transfer title of property in the goods to the buyer. (E. Clemens Horst Co., v. Biddell Brothers, A.C. 18 (H.L.). However, in this case neither actual nor symbolic delivery took place. Under CISG, article 54, the buyer is required to take steps to facilitate delivery of the goods, including paying the price.

The required steps under a CIF contract is that the buyer has to acquire a letter of credit to allow payment to the seller. (Biddell Brothers). In this case, CLAIMANT cancelled the shipment, and RESPONDENT properly avoided the contract because of CLAIMANT's failure to honor the contract price. Thus, there was no need for RESPONDENT to obtain a letter of credit.

B. Under Article 58 CISG, Claimant did not place the goods or documents at Respondent's disposal

On May 23, 2002, Respondent informed Claimant that he would return to his previous supplier to purchase the film. RESPONDENT, then had given the required nachfrist notice to provide CLAIMANT with certainty that he would not purchase the goods unless the price was eight percent discount. As long as a nachfrist notice is given, the CISG requirement for certainty in dealings is met. (KIMBEL AT 301). Even before this communication, Claimant had cancelled the first shipment under the contract. Thus, there was no need for CLAIMANT to prepare documents for RESPONDENT.

Further, the obligation to pay the price under Article 58 CISG is dependent on whether the parties had fixed an additional time for performance. (SCHLECTREIM). RESPONDENT did not fix a time for performance. Since the contract was already avoided, and no goods were delivered, there is no obligation to pay the price under Article 58.

C. Under article 78 CISG, Respondent should not pay any interests because the goods were not delivered

Under article 78 CISG, a party must pay interest if that party fails to pay the price. Failure to pay the price is a precondition for the requirement to pay interest. (see SCHLECTRIEM). According to Professor Shlechtriem, article 78 also deals with sums in arrears. Thus the payment of interest is independent from any other claims. (SCHLECTRIEM at p. 592). These arrears may include transportation costs for the goods.

In this case, the goods were not delivered. Thus, CLAIMANT did not incur any transportation costs. CLAIMANT cancelled the shipment of the goods. Under the CIF terms, CLAIMANT would have incurred transportation costs if the goods were shipped. Unless CLAIMANT can show that he incurred cancellation costs for transportation, he should not be entitled to any interests for failure to pay the price for sums that are in arrears.

D. Claimant is not entitled to interest because his claim is not for a sum certain

If CLAIMANT is awarded interest on his claim, he would be unjustly enriched because RESPONDENT does not owe a sum that is in arrears as previously stated. (see e.g. KONERU at www.cisg.law.pace.edu/cisg/biblio/koneru.html, see generally, DARKEY). To prevent unjust enrichment, CLAIMANT should only be compensated for actual losses. (SAIDOV). In this case, CLAIMANT has not shown any evidence that he incurred actual losses because of RESPONDENT's actions. If the CLAIMANT is allowed to recoup interests on a speculative claim, such an award will pervert the goals of article 7 CISG, which is to promote certainty and uniformity in international trade.

The goal of article 7 is to provide both buyers and sellers with adequate certainty of results and consequences under an international contract. Article 7 mandates full compensation where a party is aggrieved. In addition, the UNIDROIT Principles obligates parties in international contract to act in good faith. (POWERS). If CLAIMANT had suffered credit costs, then he would be fully compensated. (KONERU). Since CLAIMANT cannot show that he incurred expenses such as credit costs or transportation costs because of the agreement, then he is not allowed interest under article 78 CISG.

Conclusion

RESPONDENT prays that this Honorable Tribunal find the following:

1. The presence of Dr…. on this tribunal runs counter to the DIS rules.
2. This tribunal does not have jurisdiction to hear this claim because RESPONDENT did not agree to arbitration in the second contract.
3. If the tribunal finds that it has jurisdiction, the CISG is not the applicable law because the validity of the contract is at issue and Article 4 (a) of the CISG excludes questions concerning validity from its sphere.
4. A contract of sale was not concluded during the telephone conversation on 3 April, 2001
5. If a contract of sale was concluded, the price should be interpreted as an eight percent discount.
6. If a contract of sale was concluded, RESPONDENT did not breach its obligations under the contract. In the alternative, RESPONDENT properly suspended performance because of CLAIMANT's failure to honor the conditions of the contract.
7. If a contract of sale of concluded, RESPONDENT is not liable for the damages asserted by CLAIMANT because the claimed damages were not foreseeable, and are also speculative.
8. In the event that damages are invoked against RESPONDENT, this Tribunal should not confer interest charges upon RESPONDENT because the damage amount is not for a sum certain.

Based upon the foregoing, RESPONDENT prays that this Tribunal dismiss all eight counts of CLAIMANT's complaint.

Respectfully Submitted
Meiji Gakuin University, Tokyo
Counsel for RESPONDENT