Fourteenth ANNUAL

WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA ♦ AUSTRIA

MARCH – APRIL 2007

MEMORANDUM FOR CLAIMANT

MEIJI GAKUIN UNIVERSITY
明治学院大学

MEIJI GAKUIN UNIVERSITY

KEITA KATORI ◆ ANDREW KIRK
IKUKO SATO

Prof. Hajime Yoshino · Faculty of Law · Meiji Gakuin University · Tokyo - Japan

COURT OF INTERNATIONAL COMMERCIAL ARBITRATION ATTACHED TO THE CHAMBER OF COMMERCE AND INDUSTRY OF ROMANIA

Case No. Willem C. Vis Moot 14

BETWEEN:

Equatoriana Office Space Ltd
415 Central Business Centre
Oceanside
EQUATORIANA **CLAIMANT**

AND

Mediterraneo Electrodynamics S.A.
23 Sparkling Lane
Capitol City
MEDITERRANEO **RESPONDENT**

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&	And
%	Percent
AG	Amtsgericht (Petty District Court)
AP	Audiencia Provincial (Appellate Court)
Art.	Article
Arts.	Articles
BG	Bezirksgericht (District Court)
BGH	Bundesgerichtshof (Supreme Court)
CA	Cour d'appel (Appellate Court)
CICA	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
CISG	United Nations Convention on Contracts for the International Sale of Goods (11 April 1980)
CJ	Cour de Justice (Appellate Court)
CLR	Commonwealth Law Reports
CLOUT	Case law on UNCITRAL texts http://www.unitcitral.org/en-index.htm.
Co.	Company
Ed.	Editor
e.g.	For example
et al	Et alii (and others)
et seq.	Et sequentes (and those that follow)
FCA	Federal Court of Australia
HG	Handelsgericht (Commercial Court)
ICC	International Chamber of Commerce
i.e.	That is (id est)
Inc.	Incorporated
KG	Kantonsgericht (District Court)
LG	Landgericht (District Court)
Ltd	Limited

No.	Number
Nos.	Numbers
Para.	Paragraph
Paras.	Paragraphs
OG	Obergericht (Appellate Court)
OGH	Oberster Gerichtshof (Supreme Court)
OLG	Oberlandesgericht (Provincial Court of Appeal)
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UN	United Nations Organisation
UNCITRAL	United Nations Commission on the International Trade Law (21 June 1985)
UNIDROIT	International Institute for the Unification of Private Law (Institut International Pour L'Unification Du Droit Prive)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2004)
UNILEX	International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods http://www.unilex.info/
USA	United States of America
v.	against (versus)
Vol.	Volume

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STATEMENT OF JURISDICTION

The Tribunal has jurisdiction to consider the dispute between the Claimant and the Respondent

Equatoriana Office Space Ltd, (**Claimant**), whose principal place of business resides at 415 Central Business Centre, Oceanside, Equatoriana, refers the Honourable Tribunal to para. 34 of the contract between the Claimant and Mediterraneo Electrodynamics, (**Respondent**), whose place of business resides at 23 Sparkling Lane, Capitol City, Mediterraneo; and respectfully submits itself to the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CICA).

The relevant paragraph in the contract reads as follows:

"34. **Arbitration**. "All disputes arising out of or in connection with this Contract, or regarding its conclusion, execution or termination, shall be settled by the International Arbitration Rules used in Bucharest. The arbitral award shall be final and binding. The Arbitral Tribunal shall be composed of three arbitrators. The arbitration shall be in English language. It shall take place in Vindobona, Danubia."

STATEMENT OF FACTS

22 April 2005	The Claimant inquired into the purchase of 5 primary distribution fuse boards (PDFB) from Respondent	RESPONDENT'S EXHIBIT NO 1
25 May 2005	Drawings for PDFB arrived at Respondent premises. Electrodynamics devised a quote of $168, 000 for 5 PDFB	RESPONDENT EXHIBIT NO 1
4-12 May 2005	Unsigned contract sent by Respondent to Claimant. Claimant adjusted contract and sent signed contract back to Respondent	RESPONDENT EXHIBIT NO 1
12 May 2005	Respondent signed adjusted contract and sent a copy to Claimant.	CLAIMANT EXHIBIT NO1
14 July 2005	Telephone conversation between Stiles and Hart discussing alternatives to Chat Electronics JP type fuses	CLAIMANT'S EXHIBIT NO 2
22 August 2005	PDFB with CE JS type fuses delivered by Respondent to building site	STATEMENT OF CLAIM @ 14
24 August 2005	Claimant transferred $168,000 to Respondent bank	ANSWER @ 10
1 September 1005	PDFB installed by General Constructions. Equalec notified buildings ready to be connected to electrical grid	RESPONDENT EXHIBIT NO 1
8 September 2005	Equalec refused to make electrical connection because JS type fuses were against its safety policy	CLAIMANT'S EXHIBIT NO 3
9 September 2005	Claimant informed Respondent of its non-conformity with contractual terms, namely that JP type fuses were not used	CLAIMANT'S EXHIBIT NO 3
9 September 2005	Claimant contracted with Switchboards for 5 PDFB using JP type fuses	CLAIMANT EXHIBIT NO 3
15 September 2005	Letter from Equalec to Claimant regarding Equalec safety policy	CLAIMANT'S EXHIBIT NO 4
15 August 2006	Letter from Claimant to CICA relaying intention to arbitrate against Respondent	CLAIMANT'S STATEMENT OF CLAIM

I PROCEDURAL ARGUMENTS

1. REFERENCE TO `INTERNATIONAL ARBITRATION RULES` IN THE CONTRACT REFERS TO CICACCIR RULES

1. The arbitration agreement between the parties states that all disputes shall be settled by the International Arbitration Rules used in Bucharest [Claimant Exhibit 1@34, p10]. This reference relates to the CICACCIR rules despite such rules being used for both domestic and international arbitration.

1.1 CICACCIR is only organization concerned with international arbitration in Bucharest

2.

1.2 CICACCIR rules were drafted for international arbitration

3. From 1947 until 1991, Romania was a communist state.[1] "Under the former communist regime, commercial arbitration was limited to international disputes"[2] and these were exclusively handled by the Chamber of the Romanian Chamber of Commerce and Industry.[3] Since Romania's emergence as a Republic with "a multiparty system, market economy and individual rights of free speech, religion and private ownership",[4] there has been a push within the government to adjust "Romania's international commercial arbitration to the generally accepted world standards of such institutions."[5] Important initial steps in this regard were to make the CICA (Romania) "a non-governmental public service institute and … an autonomous legal entity (Art. 9 1990 Decree)"[6], to grant to it autonomy against the Romanian

[1] **Key dates: 1945** — The Yalta Agreement makes Romania part of the Soviet system. **1947** — With Soviet troops on its territory, Romania enters the sphere of influence of the Soviet Union. The communists, who gradually took power, force King Michael to abdicate and proclaim Romania a People's Republic. In December 1989 a national uprising led to dictator Nicolae Ceausescu's overthrow. The 1991 Constitution established Romania as a republic with a multiparty system, market economy and individual rights of free speech, religion and private ownership. Source: the Romanian Tourist Office. Website: http://www.romaniatourism.com/history.html. Accessed Saturday 28 October.

[2] Capatina, Octavian, "Romania" in *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 26 (February/1998), p 1.

[3] Capatina, Octavian, "Romania" in *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 26 (February/1998), p 2

[4] Source: the Romanian Tourist Office. Website: http://www.romaniatourism.com/history.html. Accessed Saturday 28 October

[5] Florescu, Grigore, "The Evolution of Commercial Arbitration in Romania" *Journal of International Arbitration*, Vol. 10 No. 1 (1993), pp. 95 – 104, p96. NOTE: Florescu was at the time of writing General Counsel, Ministry of Justice of Romania, Bucarest.

[6] Capatina, Octavian, "Romania" in *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 26 (February/1998), p 1.

Courts,[7] for Romania to join major international conventions on international commercial arbitration[8], to include in its lists of approved arbitrators foreigners as well as Romanians, and to extend the scope of arbitration to cover domestic disputes (although these are, for the most part, handled by local or territorial Chambers of Commerce rather than the CICA (Romania)).[9]

4. Today, the CICA (Romania) remains the "major permanent institution for international arbitration in Romania"[10], and "deals *principally* with international arbitration"[11]. It has its own procedural rules of arbitration, entitled "Rules of Arbitration". Given this history, it would be illogical to characterize the Romanian Rules as not drafted with international commercial arbitration firmly in mind.

5. *The weakness of this argument is that 80% of today's cases are domestic [Pro Order 2@11, p43]

1.3 Need another reason why reference to 'International Arbitration Rules used in Bucharest' relates to CICACCIR rules eg prima facie reading or alternatively look to see if any other hybrid sets of rules exist for other arbitral institutes

1.4 Bucharest is seat of arbitration and therefore its rules should be used (this is very weak argument)

6. Electrodynamics have chosen to focus on the fact that the arbitral clause fails to cite an official set of arbitration rules, such as the CICACCIR rules or the UNCITRAL rules. Yet restricting the construction of this clause to the words 'International Arbitration Rules' is unwarranted given their inherent ambiguity. It should be noted that the clause states that any dispute "shall be settled by the International Arbitration Rules *used in Bucharest*"[12]. Instead

[7] This is consistent with the 'delocalisation' theory of international commercial arbitration. Proponents of this theory "point out that the state in which an arbitration takes place is often selected for a wide variety of reasons and that it is inappropriate that the laws of that state should have any bearing on the conduct of the arbitration. All that should be required is compliance with the norms of international public policy." Capper, Phillip, *International Arbitration: A Handbook* (3rd ed) 2004, Lovells, London, p 13.

[8] It joined the New York Convention of 1958, the European Convention on International Commercial Arbitration concluded in Geneva in 1961, & the ICSID Convention concluded in Washington in 1965.

[9] Capatina, Octavian, "Romania" in *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 26 (February/1998), p 1.

[10] Capatina, Octavian, "Romania" in *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 26 (February/1998), p 2

[11] Capatina, Octavian, "Romania" in *International Handbook on Commercial Arbitration*, J. Paulsson (ed.), Suppl. 26 (February/1998), p 1.

[12] Emphasis added.

of focusing on the exact set of rules intended, it seems more appropriate to note that the parties intended Bucharest to be the seat of the arbitration.

7. As Capper states, "arbitrations cannot be conducted in a legal vacuum"[13]. There need to be procedural rules governing an arbitration, and "[a]n obvious mechanism … is a court of the state (the 'seat') in which the arbitration is taking place – it alone has the power to enforce its decisions, such a court will apply its own law."[14] Thus the seat of an arbitration is of central significance because it represents a choice of applicable law: "the accepted view is that an arbitration must juridically be rooted in a particular jurisdiction (known as the 'seat' of the arbitration) and must be conducted in accordance with the arbitration law of that jurisdiction. This does not mean that meetings and hearings conducted by the arbitral tribunal cannot physically take place outside the seat, but simply that the juridical root of the arbitration provides the legal framework applicable to the arbitration."[15]

8. In attempting to ascertain the seat of arbitration, Capper notes that the most important principle of construction is that of party autonomy: "the freedom of the parties to choose what they want for their arbitration."[16] In other words, they are free to choose the seat of their arbitration. In the current case, the reference to the arbitration rules of Bucharest may be construed as nominating Bucharest as the seat of the arbitration. Since the CICA (Romania) is the major permanent court of international arbitration in Bucharest, and indeed Romania as a whole, it would appear to be the court implied by the arbitral agreement. Although the arbitration clause does later refer to Vindabona – "The arbitration shall be in the English language. It shall take place in Vindobona, Danubia" – this can be understood as referring to the conduct of the arbitration: the tribunal shall meet in Vindabona, Danubia, and not the seat of arbitration. This accords with Article 34 of the Romanian Rules: "The parties, in agreement with the president of the *Court* may … decide to sit in some other locale"[17] and Art 74 which provides

[13] Capper, Phillip, *International Arbitration: A Handbook* (3rd ed) 2004, Lovells, London, p14.
[14] Capper, Phillip, *International Arbitration: A Handbook* (3rd ed) 2004, Lovells, London p 14
[15] Capper, Phillip, *International Arbitration: A Handbook* (3rd ed) 2004, Lovells, London, pp27-28
"Law and Practice of International Arbitration" by Alan Redfern and Martin Hunter (Sweet and Maxwell, 1999) at page 129.
[16] Capper, Phillip, *International Arbitration: A Handbook* (3rd ed) 2004, Lovells, London, p15
[17] See also Article 74: "By the arbitral agreement referring to international commercial arbitration, the parties may establish that the place of arbitration be in Romania or in a different country."

9. In conclusion, the CICACCIR rules should be used because these rules were created for international arbitration, ……. And because Bucharest is the seat of arbitration.

2. CICACCIR RULES SHOULD BE UNAMENDED

10. Having established that the CICACCIR rules are the applicable rules for this arbitration the Tribunal must determine whether any articles within these rules need clarifying. It is claimant's argument that these rules should be applied in full and thus do not need clarifying.

2.1 Art 72(2) does not need to be addressed when contracting

11. Article 72(2) reads as follows: "The parties shall be free to decide either for these Rules, or for other rules of arbitral procedure. In case the parties have opted for the UNCITRAL (United Nations Commission for International Trade Law) Rules of Arbitration, the arbitrator Appointing Authority shall be the president of the *Court of Arbitration*."

12. Respondent has argued that since Article 72(2) provides that the parties are free to decide to use the UNCITRAL Arbitration Rules, and yet the arbitration clause fails to specify the arbitral rules to be followed, it is unclear as to whether the Romanian Rules or the UNCITRAL Arbitration Rules were intended. Thus, it is not clear what procedures should be followed in establishing the arbitral tribunal or in conducting the arbitration

13. Claimant argues that failure to specify under an article such as 72(2) does not result in invalidity of arbitration agreement because this article is not mandatory, but instead provides a choice to the parties. *An argument along the following lines: the default position is surely the Romanian Rules. Find some authorities favouring the default position over nullity.*

14. Art 74 Arbitration Rules provides that 'By the arbitral agreement referring to international commercial arbitration, the parties may establish that the place of arbitration be in Romania or in a different country'. Ie parties chosen to exercise Art 74 and choose Danubia as place (still keep Romania as seat) but if they hadn't (and lets assume that 'international commercial arbitration rules used in Bucharest is clearly identifiable) then would one party be able to randomly say 'since they haven't exercised Art 74 there is too much uncertainty about place for it to be in Romania'? I think that the Tribunal would find that Art 74 is not mandatory but instead optional and the same goes for Art 72(2)

2.2 There is only minor difference between CICACCIR rules and UNCITRAL

15. In any event, there is no major differences between the two sets of rules

A detailed comparison of the two sets of rules reveal few differences. This is unsurprising considering that the Romanian Rules were drawn up in compliance with the provisions of Book IV of the Code of Civil Procedure,[18] which were in turn "partly inspired by the UNCITRAL Model Law".[19]

16. Two possible methods of comparison:

17. Find a book that says what the key elements of arbitral rules are then limit the comparison to these points.

18. Do a very detailed comparison. Use the headings of the UNCITRAL Model Law and find corresponding provisions in the Romanian Rules. This is tedious but probably the best approach. It was the approach utilized by Mark Blessing in his article: "The Major Western and Soviet Arbitration Rules: A comparison of the Rules of UNCITRAL, UNCITRAL Model Law, LCIA, ICC, AAA and the Rules of the USSR Chamber of Commerce and Industry" Journal of International Arbitration, Vol. 6 No. 3 (1989), pp. 8 – 76

3. AWARD GIVEN UNDER CICACCIR RULES IS ENFORCEABLE

19. Refer to UNCITRAL model law and New York Convention to see when/ when not award is enforceable

[18] Article 1(2) Romanian Rules.

[19] *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard and J. Savage (eds.)(1999), Part 1, Chapter 2, paragraph 166, p82. Their supporting reference: Victor Babiuc and Octavian Capatina, *International Commercial Arbitration in Romania, in* ICC BULLETIN, SPECIAL SUPPLEMENT, INTERNATIONAL COMMERCIAL ARBITRATION IN EUROPE 109 (1994); *Romania*, XX Y.B. COM. ARB. 592 (1995) ← this article not on Kluwer.

II SUBSTANTIVE ARGUMENTS

1. TERMS OF CONTRACT REQUIRED CE JP TYPE FUSES

20. The terms of the written contract required CE JP type fuses (1.1) and these terms were not altered by the telephone conversation on 14 July (1.2)

1.1 Written contract required CE JP type fuses which is a material obligation imposed on MES

21. MES contracted to sell to the claimant 5 PDFB for $168,000 [SoC 23, p8]. Attached to this contract is a range of engineer drawings [Claimant Exhibit No, 1, p10]. Such drawings contain two notes. The first note stipulates that "Fuses to be "Chat Electronics" JP type in accordance with BS 88" [Statement of Claim @ 9, p5]. These words indicate that the PDFB were to be fabricated using JP type fuses.

22. Schlectriem in his text outlines that in determining whether a term of the contract is material one must look to the individual factual circumstances surrounding the contract.[20] Since there is substantial difference between the two types of fuses, for instance the size of JP type fuse is 82mm whilst the JS type fuse is 92mm, it constitutes a material aspect of the contract. Under Art 19(3) CISG a change to a material element of the contract requires a valid amendment to the contract. Therefore, if respondent wished to change the requirement of using JP type fuses, it is required to have validly amended the contract.

1.2 Contract was not validly amended by 14 July telephone conversation

23. The telephone conversation on 14 July did not change the terms of the contract because there was no substantial agreement to change terms (a), incorrect individuals were engaged in the conversation (b), or in the alternative, any contractual changes must be made in writing (c).

(a) Contract required changes to be made in writing

24. Article 32 of the contract provides that any amendment to the K had to be in writing [Cl Ex 1 @32, p10]

25. As the proposed change was submitted by MES and given the Art32 of contract 'in writing' requirement, EOS expected MES to send written notification of proposed change. However, Electrodynamics never submitted a proposal in writing for change to the contract specifications [SoC 13, p6]

[20] Schlectriem text p140

26. If there had of been a written proposal for a change in the contract specifications, it would have been submitted to the engineer who had prepared the engineering drawings as to whether he approved the changes [SoC 13, p6 + Cl Ex 2, p11]

27. The provision of CISG art. 29 envisaged the type of modifications frequently arising in performance of commercial contracts would include technical modifications in specifications, as in the situation at hand (Kritzer (ed), *International Contract Manual*, p234).[21] Thus, this requirement of written approval for any material contractual changes is supported by business practice, which sees most changes made in writing. Thus, the lack of written documentation outlining this proposed change to contract indicates that the contract was in fact not amended.

(b) Conversation not intended to change terms of Contract

28. EOS has not conducted itself in such a manner that MES could reasonably rely on such conduct to warrant a change in the contract under 2nd sentence of Art 29(2) CISG.

29. The conversation was merely the relaying of current circumstances. It did not impose any binding agreement……..

30. The words 'probably the best way to proceed' [SoC@12, p6] does not mean 'the way we want you to proceed'……..

(c) Incorrect individuals were engaged in the conversation

31. Stiles rang up to speak to Konkler. He must reasonably assume that the conversation with Hart was not going to be binding since he knew that Hart was not the best person to be speaking to

32. Hart was authorized to sign contracts for up to US$250,000, so if price only is taken into account then Hart is not an incorrect person to negotiate with. However, we can show that Stiles knew that Konkler was best person to speak to and thus conversation with Hart should not have been regarded by Stiles as binding

33. *Danger is that secretary told Mr Stiles that he could speak to Mr Hart, a professional in the procurement office

[21] *Text of Secretariat Commentary on article 27 of the 1978 draft* in- Albert H. Kritzer (ed) *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Vol 1, 1989/94? Kluwer Law and Taxation Publishers: Deventer).

2. RESPONDENT BREACHED ITS OBLIGATIONS

34. The claimant submits that the goods did not conform to the manner required by the contract under Art 35(1) CISG. This article states that the seller must deliver goods which are of the quantity, quality and description required by the contract. Since the contract required the delivery of JP type fuses, the respondent has breached its contractual obligations in delivering PDFB comprised of JS type fuse.

35. If the arbitral tribunal determines that the respondent has not breached its contractual obligations in supplying PDFB's with CE JS type fuse specifications, the Claimant submits that Respondent has breached its obligations in three further ways. Firstly, the goods are not fit for ordinary purpose (2.1). Secondly, the goods failed to meet the particular purpose made known to respondent (2.2). Thirdly, the goods do not possess the quality of sample model provided (2.3).

2.1 Goods are not fit for ordinary purpose under Art 35(2)(a)

36. Office Space submits that the JS type fuses which Electrodynamics supplied were not fit for the purposes for which goods of the same description would ordinarily be used.

37. It has been established within the CISG that both parties may contract out of their obligations under the CISG[22]. However, in this example there was no clear agreement between the parties that Electrodynamics had the authority to substitute the goods requested by the contract for any alternatives. Therefore, Electrodynamics had an obligation to supply either the originally requested JP type fuses, or a substitute fuse which is fit for the purpose for which JP type fuses would ordinarily be used (Article 35(2)(a) of the CISG).

38. Office Space will argue that the JS type fuses which were supplied by Electrodynamics were not suitable for the purposes of the contract, as Equalec refused to connect them to the power grid. If the ordinary purpose of any fuse is to administer the connection between the power grid and the property, then the JS type fuses cannot be said to be capable of fulfilling their purpose under the contract. Therefore, Electrodynamics the seller, is presumed to be liable and will have the onus of proving that it is not responsible for the losses sustained by Office Space.[23]

[22] Printer case - CLOUT No. 229
[23] Refrigeration case (http://cisgw3.law.pace.edu/cases/960515f1.html)

39. While Office Space may concede that the JS type fuses supplied by Electrodynamics were of an appropriate quality it is the description of the fuses which does fit the purposes of the contract. While the JS type fuses may have been capable of administering the electricity (and were not defective like in the case of Thermo King v. Cigna Insurance Company of Europe[24]) the description of the JS type fuses did not meet Equalec's standards and therefore were unsuitable.

40. Therefore, Office Space argues that the JS type fuses supplied by Electrodynamics were not fit for the purposes for which goods of the same description would ordinarily be used and thus Electrodynamics is in breach.

2.2 Goods are not fit for the particular purpose made known under Art 35 (2)(b)

41. Goods did not conform to the particular purpose expressly (a) or implicitly (b) made known to the seller as required by Art 35(2)(b) CISG

(a) Goods not fit for particular purpose expressly made known

42. MES knew that the particular purpose of the PDFB was to provide the facility for Equalec to make its connection to the electrical power grid. The PDFB delivered were not fit for this purpose [SoC 26, p8].

43. The case involving New Zealand mussels containing a high amount of cadmium has established that a seller is not required to be fully aware of every law and regulation of the buying country[25]. To counter any arguments that stem from this case, Office Space will argue that the JS type fuses supplied were not fit for the purpose expressly made known to Electrodynamics at the time of contract.

44. The contract between Office Space and Electrodynamics contained a term which specifically stated that the engineering drawings were to be made part of the contract. These engineering drawings contained comments from the engineers that JP type fuses were to be used, and that the fuse boards were to be lockable to Equalec's requirements. Therefore, Office Space will argue that the requirement of JP type fuses and the construction of the fuse boards to Equalec's standards had been made terms of the contract.

[24] Refrigeration case as above
[25] Mussels case – (http://cisgw3.law.pace.edu/cases/940420g1.html)

45. This would mean that Office Space expressly stated to Electrodynamics that the purpose of the fuses within the fuse boards was to be connected to Equalec's power grid and suggests the use of JP type fuses.

46. Therefore, any arguments that come from the "mussel's case" would be irrelevant as unlike that case, the seller had express knowledge that there were certain conditions that must be met with the supply of goods. These conditions were not met, as Equalec refused to connect the fuses to the grid and therefore the goods did not conform with the contract.

47. Possibly discuss why exceptions to art 35 (2)(b) don't apply (ie because buyer, claimant, entitled to rely on skill and judgment)??????

(b) Goods are not fit for the particular purpose impliedly made known

48. While Electrodynamics may argue that the purpose of the goods were not expressly made known, Office Space will argue that at the very least the purpose was impliedly made known at the time of contract.

49. The engineering drawings that had been made part of the contract contained notes which came from Office Space's normal supplier, Switchboards. These comments specifically stated that Equalec had certain requirements in order for the fuse boards to be 'lockable'. This would imply to any reasonable seller that there were special conditions within the buyer's country that should be researched before substituting the requested goods.

50. The fact that Electrodynamic's did not research these special conditions does not excuse it's ignorance. The essential element is that Office Space implied that there were some set of conditions that may not be familiar in the seller's country that should be researched. By obviously implying these special circumstances in the notes on the engineering drawings, Office Space has effectively prevented Electrodynamics from arguing along the lines of the "mussel's case". Therefore, the JS fuses supplied by Electrodynamics did not conform with the contract as they were not fit for the purposes (i.e. to be connected to the Equalec power grid) impliedly made known to the seller at the time of contract.

2.3 Goods do not possess the quality of the sample model provided

51. Office Space will also argue that as the engineering drawings were to be made part of the contract, Electrodynamics agreed to supply goods which conformed to the same quality of these drawings (which constitute a sample model).

52. Under the CISG Article 35 (3), the goods supplied by the seller do not conform with the contract unless they possess the quality of goods which the seller has held out to the buyer as a sample model. However, it is also necessary for the seller to supply goods which are of the same standard of any model held out by the buyer if both parties agreed to this term[26].

53. Because both parties agreed that the fuse boards were to be constructed following the plans supplied by Office Space, and these plans specified that JP fuses were to be used, Office Space will argue that the JS type fuses supplied are of an inferior quality and cannot be accepted.

54. In conclusion, the CISG has established that goods conform to the contract if they are of the same type, quantity, quality and packaging as required in the contract. Article 35 establishes a number of methods to argue whether or not goods supplied conform with a contract or not. While Electrodynamics may have believed that the JS fuses supplied were a valid substitute for JP type fuses, they were incorrect and as a result Office Space suffered a loss. As well as this, but any arguments that Electrodynamics were not required to be fully aware of the laws in the buyer's country are irrelevant as Office Space either expressly or impliedly made Electrodynamics aware that there were special requirements imposed by Equalec which must be met. Therefore, Office Space argues that Electrodynamic's did not supply goods which conformed to the contract and therefore have committed a fundamental breach.

3. CLAIMANT SEEKS DAMAGES IN THE ORDER OF $200,000 + INTEREST + COSTS

55. Art 45(1) CISG provides that "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may…. Claim damages as provided in articles 74 to 77". The claimant submits that the respondent's breach is fundamental (3.1), that it reasonably mitigated its losses (3.2), and that damages are calculated accurately (3.3).

3.1 Respondent's breach is fundamental and was communicated diligently by Claimant

56. Non- conformance amounts to fundamental breach [Art 25 CISG] allowing the claimant to avoid [Art 49 CISG]. On 9 September 2005 the claimant rightfully declared the contract

[26] Marble case – (http://cisgw3.law.pace.edu/cases/951109a3.html)

avoided under Art 49 CISG. While Art. 26 CISG stipulates that "notice" of the avoidance is to be made to the other party, the notice does not have to satisfy any formal requirements [*Schlechtriem-Huber, Art. 49 para. 29; Honsell-Karollus, Art. 26, para. 10; Herber/Czerwenka, Art. 26 para. 3, Art. 49 para. 11; Bianca/Bonell-Date-Bah, Art. 26 para. 3.1., -Will, Art. 49 para. 2.1.1.; Piltz, § 5 para. 272*]. Respondent was notified of breach within the time required by CISG Articles 38 & 39 [SoC 27, p8].

3.2 Claimant reasonably mitigated its losses

57. Article 77 CISG stipulates that a party claiming damages must reasonably mitigate the loss caused by the breach [*Enderlein & Maskow, 308*; cf. *ICC Award No.8817*; *OLG Celle 246/97*; *Knapp in Bianca & Bonell, 560*; *Honnold, 456*]. This mitigation requirement is also supported by *Article 7.4.8 of t*he UNIDROIT Principles.

58. This Tribunal must determine what constitutes reasonable action in this circumstance. Since neither the CISG nor the UNIDROIT Principles discuss what constitutes reasonable conduct, the claimant submits that a reference to the Principles of European Contract Law should be considered by this Tribunal.

59. Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account.[27] Measures taken by the party not in breach is not exhaustive.[28]

60. Claimant submits that it took reasonable steps in not complaining to commission (a), and instead diligently pursued other supply options (b).

(a) Failure to complain to Equatoriana Electrical Commission is not a failure to mitigate

61. A party is not liable for a failure to mitigate if it can be proven that the failure was due to an obstruction outside its control, ability to influence and that it could not reasonably be expected to have taken the obstruction into account at the time of the conclusion of the sales contract or

1.1. [27]Definition of reasonableness recited in the PECL - *PECL Article 1:302 (complete and revised version 1998)*

[28] Saidov notes that there are a wide range of measures which might be undertaken to mitigate damages under Art. 77: *see* Saidov, D., 'Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods' December 2001, at Part 4(b); available at <http://cisgw3.law.pace.edu/cisg/biblio/saidov.html#iv>.

to have avoided or overcome it or its consequences (Art. 79 CISG).[29] Office Space submits that their ability to influence Equatoriana Electrical Regulatory Commission on this matter would have most likely been ineffective. The fuses were meant to be a certain standard and simply did not meet this standard.

62. The Claimant's failure to complain to the Equatoriana Electrical Regulatory Commission does not excuse the respondent's failure to deliver goods conforming to the contract. Procedure for complaining to Commission could take anywhere between 1 week to 2 years for Equalec to finally adjust policy, if in they even do [Pro Order 2@30, p46]. Given this estimated length of time in which to achieve a remedy, such a mitigation method is simply not within business reasonableness.

(b) Claimant acted reasonably in securing another PDFB

63. Without a connection to the electricity supply, EOS faced the likelihood that it would not be able to give access to the buildings at Mountain View to its lessees on the dates specified in the lease agreements [SoC 16, p7]. EOS was threatened with significant financial losses from the loss of rental income and from the penalty clauses in several of the lease contracts [SoC 16, p7]

64. In order to save time and be able to open Mountain View for occupancy by its lessees on the scheduled date, EOS ripped out PDFB and bought replacements with CE JP type fuses from Switchboards at total price of $180,000 [SoC 18, p7]. The additional installation costs were $20,000 [SoC 18, p7].

3.3 Damages are calculated accurately

65. In conclusion, according to Art 74 CISG "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach". Claimant seeks damages of $200,000 which is comprised of $180,000 for replacement of PDFB with CE JP type fuses and a $20,000 additional installation cost. Damages are also sought for interest & costs of arbitration [SoC 31, p9].

[29] Switzerland 3 December 2002 Commercial Court St. Gallen (*Sizing machine case*) < http://cisgw3.law.pace.edu/cisg/text/e-text-73.html>