Fourteenth ANNUAL

WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA ♦ AUSTRIA

30 MARCH – 5 APRIL 2007

MEMORANDUM FOR RESPONDENT

On Behalf of:	**Against:**
Mediterraneo Electrodynamics S.A	**Equatoriana Office Space Ltd**
23 Sparkling Lane Capitol City MEDITERRANEO	415 Central Business Centre Oceanside EQUATORIANA
RESPONDENT	**CLAIMANT**

MEIJI GAKUIN UNIVERSITY GRADUATE LAW SCHOOL

COUNSELS:
KEITA KATORI ♦ ANDREW KIRK ♦ IKUKO SATO

Table of Contents

Index of Abbreviations

€	Euro
&	And
%	Percent
ACICA	Australian Centre for International Commercial Arbitration
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)
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
Co.	Company
Court of Arbitration	Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
Ed.	Editor
e.g.	For example
FCA	Federal Court of Australia
ICC	International Chamber of Commerce
i.e.	That is (id est)
Inc.	Incorporated
KG	Kantonsgericht (District Court)
LG	Landgericht (District Court)
Ltd	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985
No.	Number
Nos.	Numbers

Para.	Paragraph
Paras.	Paragraphs
OG	Obergericht (Appellate Court)
OGH	Oberster Gerichtshof (Supreme Court)
OLG	Oberlandesgericht (Provincial Court of Appeal)
Romanian Court of Arbitration	Court of International Commercial Arbitration, attached to the Chamber of Commerce and Industry of Romania
Romanian Regulations	Regulations on the Organisation and Operation of the Court of international Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
Romanian Rules	Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania
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 PURPOSE

The Respondent, Mediterraneo Electrodynamics S.A. (**ELECTRODYNAMICS**), has prepared this memorandum in accordance with the Arbitral Tribunal's Procedural Order No. 1, issued on 6 October 2006.

Electrodynamics argue:

- The Arbitral Tribunal does not have jurisdiction to hear the dispute between Oceania Office Space (**OFFICE SPACE**) under the arbitration clause found in paragraph 34 of the contract of 12 May 2005;
- ELECTRODYNAMICS delivered distribution fuse boards that were in conformity with the Contract as originally written, and, in the alternative, the Contract was validly amended through the telephone conversation 14 July 2005 to permit JS type fuses to be used in the fuse boards;
- ELECTRODYNAMICS delivered distribution fuse boards that were fit for the particular purpose made known; and
- The failure of OFFICE SPACE to complain to the Equatoriana Electrical Regulatory Commission, of the refusal of Equalec to connect to the fuse boards, excuses any failure of ELECTRODYNAMICS to deliver goods conforming to the contract

In arguing these above claims, ELECTRODYNAMICS will illustrate the legal and factual basis, and will respond to the arguments presented by OFFICE SPACE in its Claimant memorandum.

STATEMENT OF FACTS

22 April 2005	The Claimant inquired into the purchase of 5 primary distribution fuse boards (hereinafter, 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(hereinafter CE) 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

PART ONE: TRIBUNAL DOES NOT HAVE JURISDICTION

1. In Procedural Order No. 1, the Arbitral Tribunal has requested that the parties address in their respective Memorandum the issue of whether this Tribunal has jurisdiction to hear the substantive elements of this dispute. Specifically, the Arbitral Tribunal seeks clarification whether there is a valid arbitration agreement in the contract between Equatoriana Office Space (OFFICE SPACE) and Mediterraneo Electrodynamics S.A. (ELECTRODYNAMICS), dated 12 May 2005 [Procedural Order No. 1, para. 11]. The arbitration clause states "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".

2. Electrodynamics concede (1) that the Arbitral Tribunal has authority to rule on its own jurisdiction, but argue that the Arbitral Tribunal does not have jurisdiction to hear this dispute because (2) the arbitration agreement is not sufficiently certain to confer institutional arbitration, and (3) there has been no ad hoc agreement to arbitrate.

1. [NEW ARGUMENT] ARBITRAL TRIBUNAL HAS AUTHORITY TO RULE ON ITS OWN JURISDICTION

3. The parties have agreed that the resolution of any dispute shall take place in Vindobona, Danubia [*Claimant Exhibit No. 1*]. The applicable law governing the conduct of arbitrations in Danubia is the UNCITRAL model law on International Commercial Arbitration [*Statement of Claim*, para. 21]. This law provides that "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" [*UNCITRAL model law* Art 16(1); cf. *Craig*, 59; *Redfern & Hunter*, 359; *D.G. Jewelry Inc. v. Cyberdam Canada Ltd*]. This authority to rule on its own jurisdiction is consistent with many other sets of arbitration rules [*AAA Rules* Art. 15.1; cf. *ACICA Rules* Art. 24.1; *Romanian Rules* Art. 15(2); *CIDRA Rules* Art. 20.1; *ICC Rules* Art 6.2; *SIAC Rules* Art. 26.1].

2. ARBITRATION AGREEMENT IS NOT SUFFICIENTLY CERTAIN TO CONFER INSTITUTIONAL ARBITRATION

4. Office Space has argued "there is no ambiguity in the arbitration clause that renders it null and void. The Arbitration clause shall be interpreted to confer the jurisdiction to the present arbitral tribunal" [*Claimant Memorandum*, para. 1.2.5].

5. Electrodynamics does not dispute that the contract provides an arbitration agreement which states for the application of the "International Arbitration Rules used in Bucharest" [*Claimant Exhibit No.1*, para. 34; cf. *Statement of Answer*, para. 14]. However, Electrodynamics maintains its original position that the language of the arbitration agreement is not sufficiently certain to refer to any existing set of rules of any arbitral organization in Bucharest [*Statement of Answer*, para 15]. A valid arbitration agreement must contain an intention to arbitrate, a place of arbitration, a set of arbitral rules and an arbitral institution to administer the arbitration [*Capper*, 62; cf. *Hill*, 31]. Electrodynamics argues that clause 34 of the contract does not grant jurisdiction to this tribunal because (2.1) there has been no clear designation of Arbitration Rules, and (2.2) there has been no designation of Arbitral Institute.

2.1 No designation of Arbitration Rules

6. Office Space has submitted that "the rules referred to in the arbitration clause are the international part of the rules of arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, located in Bucharest" [*Claimant Memorandum*, para. 1.2]

7. Electrodynamics response is that (a) Romanian Rules are not 'international arbitration rules', or (b) Romanian Rules are not the intended 'international arbitration rules used in Bucharest', and (c) in any event it is unclear what procedure should be followed.

(a) Romanian Rules are not 'International Arbitration Rules'

8. Office Space argues that "The specific modifications of otherwise applicable rules as provided in chapter VIII along with the other rules clearly constitutes the rules that can govern any international arbitration and can safely be referred to as international arbitration rules. Furthermore, about twenty percent of the total arbitration cases before this court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania are international commercial arbitration. This further confirms the international nature of the arbitration rules" [*Claimant Memorandum*, para. 1.2.2].

9. Electrodynamics argue that Romanian Rules are designed for both domestic and international arbitration and therefore cannot be regarded as international rules [Statement of Answer, para. 15]. The accurate classification of these rules is domestic rules which have an international element. Since the parties referred to a set of rules by stating 'international rules used in Bucharest' [Claimant Exhibit No.1, para. 32], it must be determined that the parties intended to use a set of rules which are predominantly international. The Romanian Rules do not meet this description. Moreover, the Romanian Court of Arbitration, to which these rules are attached deals with international cases on only a 20% basis [Procedural Order No.2, clara. 17; cf. Capitana, 1]. The Romanian Rules are not international rules, therefore, they could not have been the international rules intended by the parties.

(b) **Romanian Rules are not the intended 'International Arbitration Rules used in Bucharest'**

10. Office Space has submitted that "the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, located in Bucharest, is the only organization attached to the Chamber of Commerce and Industry of Romania in Bucharest that conducts international arbitration. Thus it is evidently clear that the rules in the arbitration clause refer to the rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania" [*Claimant Memorandum*, para. 1.2.1].

11. Office Space further submits that "UNCITRAL Rules have been used rarely, if ever, by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania…. so it will be wrong to assume that UNCITRAL rules were more likely to have been intended by the parties…" [*Claimant Memorandum*, para. 1.3.1]

12. Electrodynamics argue that the Romanian Rules are not the intended 'International Arbitration Rules used in Bucharest' even if this Tribunal determines that these rules are in fact international rules. Electrodynamics will directly respond to the submissions put forward by Office Space. Firstly, Electrodynamics argue Office Space has incorrectly assumed that the Court of International Commercial Arbitration of Romania is the Arbitral Institute applicable to this dispute and therefore incorrectly assumed that such an Institutes' rules automatically apply [See argument 2.2 below]. Secondly, Electrodynamics argues that the quantity in which the UNCITRAL used have been used is irrelevant in this dispute. Both Office Space and Electrodynamics have been involved in limited international arbitration matter, let alone international arbitration which involves 'International Arbitraiton Rules used in Bucharest'. Therefore, it cannot be expected that these parties were aware of the relatively limited previous usage of UNCITRAL Rules in Romania. The UNCITRAL Rules are purely international and have applicability in Bucharest. Therefore, given the parties limited description in the contract, the UNCITRAL Rules are the most applicable rules for this dispute since they best meet the definition of 'International Arbitration Rules'. Moreover, the UNCITRAL Rules were specifically drafted for international arbitration [*Statement of Answer*, para. 16].

(c) **It is unclear what procedures should be followed**

13. In its Statement of Answer Electrodynamics stated that even if Romanian Rules are the more likely 'International Arbitration Rules used in Bucharest' it is not clear what procedures should be followed in establishing the Arbitral Tribunal or conducting the arbitration since UNICITRAL Rules are available to the parties [*Statement of Answer*, para. 16; cf. *Romanian Rules* Art. 72(2)].

14. In response, Office Space has argued "the intention of the parties was to apply the rules of arbitration of the Court of International Commercial Arbitration (Romanian Rules) and not the UNCITRAL Rules, as there was no mention of the UNCITRAL Rules anywhere in the contract" [*Claimant Memorandum*, para. 1.3.1].

15. Electrodynamics concede that there was no mention of the UNCITRAL Rules anywhere in the contract, however, this fact is not particularly significant given the simplicity of the arbitration agreement [cf. *Claimant Exhibit No. 1*]. The inclusion of provisions allowing the designation of UNCITRAL Rules demonstrates the relative importance of the use of UNCITRAL Rules within International Arbitration in Romania. The writers of the Romanian Rules understand that in certain circumstances the use of UNCITRAL rules is more preferable [cf. *Romanian Rules* Art. 72]. Electrodynamics argues that the parties intended to make their dispute one with an international character. This fact is demonstrated by the choice of a neutral venue for arbitration and a set of rules unrelated to such a venue [cf. *Claimant Exhibit No. 1*, para. 32]. The most suitable set of rules to fulfill the international intention of the parties is the UNCITRAL Rules, especially given that the writers of the Romanian Rules have demonstrated the UNCITRAL Rules superior suitability in certain instances.

2.2 No designation of Arbitral Institute

16. Assuming but not conceding that the parties did intend to use the Romanian Rules, Office Space, in order to establish that this Tribunal has jurisdiction, must still prove that the Court of International Commercial Arbitration is the intended Institute for this dispute.

17. Office Space argues "the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is the only organization attached to the Chamber of Commerce and Industry of Romania in Bucharest that conducts international arbitration" [Claimant Memorandum, para. 1.2.1].

18. Essentially, Office Space have argued that the reference to "International Arbitration rules used in Bucharest" gives rise to a presumption that the parties intended to use a Bucharest Arbitral Institute. Office Space then goes on to conclude that since the Court of International Commercial Arbitration is the only organization in Bucharest it is by default the applicable Arbitral Institute for this dispute.

19. Electrodynamics concedes that the Court of International Commercial Arbitration is the only organization in Romania conducting international commercial arbitration. However, Electrodynamics argue that (a) the reference to "international arbitration rules used in Bucharest" does not automatically indicate an intention to use a Bucharest Arbitral Institute, and (b) Court of International Commercial Arbitration of Romania is not the most suitable Institute, and (c) the parties have not agreed by conduct to use the Bucharest Institute.

(a) **[New Argument] Bucharest Arbitral Institute is not intended Institute**

20. Office Space has compared the facts of this case to that of 28 Sch 17/99 15 October 1999, whereby the court declared that a German Institute had jurisdiction despite the parties reference to arbitration under the rules of the "German Central Chamber of Commerce", an Institute which does not exist [*Claimant Memorandum*, para. 1.2.3]

21. Essentially, Office Space has argued that the geographical reference to Bucharest in the first part of cl. 34, namely "all disputes…… shall be settled by the International Arbitration Rules used in Bucharest", has sufficiently outlined the intention of the parties to have their dispute administered by a Bucharest Institute [*Claimant Memorandum*, para. 1.2.3].

22. Electrodynamics refers to the latter part of cl 34 which provides that the hearing "shall take place in Vindobona, Danubia". In the above mentioned case, there was no reference to any other geographical location throughout the arbitration agreement. The existence of this alternative geographical location for the hearing of this current dispute illustrates that Office Space and Electrodynamics intended to use a range of international avenues in resolving their disputes. It is Electrodynamics submission that the use of "the International Commercial Arbitration Rules used in Bucharest" was for neutrality of rules and not for choice of Institute.

(b) **[New Argument] Court of International Commercial Arbitration is not the most suitable Institute**

23. Having established that cl 34 of the contract does not automatically give rise to a Bucharest Arbitral Institute, this Tribunal must determine which Arbitral Institute is most suitable [*German Coffee Association* (1998); cf. *Laboratorios Grossman v Forest Laboratories* (1968)]. Essentially this Tribunal has two options: a Danubian based Institute or a Bucharest based Institute.

24. Electrodynamics argue that a Danubian based Institute is the more suitable Arbitral Institute for this dispute. This submission is based on the fact that the hearing will take place in Danubia [Claimant Exhibit No. 1] and therefore Danubia will be the place in which the parties are located. Such a factor gives the parties personal connection with the administering Arbitral Institute. In comparison, a Bucharest based Institute will not be administering the dispute from the place in which the parties are present. Consequently, the parties must participate in long distance communication which gives rise to the possibility of miscommunication and is the reason for this dispute.

25. It may be argued that a Danubian Arbitral Institute will not be equipped to apply Romanian laws. Whilst Equatoriana maintains that the UNCITRAL Rules are the application rules for this dispute, in the event of the Romanian Rules applying a Danubian based Institute would have no difficulty applying such rules as essentially they follow the same principles as the UNCITRAL Rules.

(c) **[New Argument] Parties have not agreed by conduct to use Bucharest Institute**

26. Electrodynamics concede that it complied with some of the procedures of the Court of International Commercial Arbitration of Romania in relation to time limits for certain requirements [*File*, 16-18; cf. *Procedural Order 2*, Clarification, 13]. However, Electrodynamics argue that its compliance is conditional on the basis of jurisdiction being determined [*Procedural Order No. 1*, para. 4]. Electrodynamics compliance has been in the pursuit of expediently determining that this Tribunal does not have jurisdiction.

Consequently, costs for such compliance will be sought under the applicable Arbitration Rules [*Romanian Rules* Art. 48].

3. [NEW ARGUMENT] THERE HAS BEEN NO AD HOC AGREEMENT TO ARBITRATE

27. Electrodynamics argues that there has been no ad hoc agreement to arbitrate. The basic elements of an ad hoc agreement to arbitrate include an intention to arbitrate, a set of arbitral rules and an appointing authority to provide assistance to the parties [*Born*, 12; cf. *Moens/ Gillies*, 573]. Assuming but not conceding that the Romanian Rules have been designated to this dispute, Office Space would still need to establish that an appointing authority has been agreed upon.

II DELIVERED FUSE BOARDS WERE IN CONFORMITY WITH CONTRACT AS ORIGINALLY WRITTEN

28. In Procedural Order No. 1, the Arbitral Tribunal has requested a discussion of whether Electrodynamics delivered distribution fuse boards that were in conformity with the contract as originally written. Electrodynamics argues that the delivered fuse boards were (1) of the quality and description required by the contract and (2) fit for their particular purpose. Furthermore, Electrodynamics argues (3) they have not violated the contractual delivery date.

1. DELIVERED FUSE BOARDS WERE OF THE QUALITY AND DESCRIPTION REQUIRED BY THE CONTRACT

29. Article 35(1) CISG provides that "the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract".

30. Office Space has argued that "the respondent is in complete violation of this clause of the CISG. As per the contract of 12 May 2005 the respondent was to deliver to the claimant five (05) fuse boards having JP Type fuses. The respondent instead delivered JS Type

fuses, which ultimately did not serve the purpose the claimant" [*Claimant Memorandum*, para. 2.2.2].

31. Electrodynamics response is that they are not in violation of this clause because (1.1) the descriptive notes were not made terms of the contract, and in any event (1.2) JS type fuses are of the quality and description required by descriptive notes.

1.1 Descriptive notes are not terms of the contract

32. Office Space has argued "Apart from being mentioned in the contract itself, the said drawings and the note appended thereto formed an integral part of the contract also, because the same provided for the specifications of the fuses to be used for the fabrication of the fuse boards" [*Claimant Memorandum*, para. 2.1.2].

33. Electrodynamics concedes that the engineering drawings were made part of the contract, but argues that the descriptive notes were merely for reference if desired by the supplier. Electrodynamics were contracted to supply five primary distribution fuse boards which meet the specifications required by the engineering drawings [*Claimant Exhibit No. 1*]. The descriptive notes were workings of another competitor. Office Space did not contract with Electrodynamics to fabricate five distribution fuse boards in accordance with how Switchboards would have fabricated them. Instead, it inquired with Electrodynamics how much the fabrication of five fuse boards would be, and in doing so accepted the manner in which Electrodynamics would choose to fabricate such boards if the quote was accepted. In essence, the contract involved the supply of a final product and the descriptive notes were merely one way of reaching that final product. The fact that Electrodynamics fabricated the fuse boards in a manner different to how its competitor, Switchboards, would have is a common occurrence in a competitive business industry. Since the descriptive notes were not terms of the contract and Electrodynamics have supplied five distribution fuse boards as requested, it must be held that there is no issue of non- conformity.

1.2 In any event, JS type fuses are of the quality and description required by descriptive notes

34. Office Space argues "The respondent may argue that both JP and JS type of fuses serve the same purpose. It is indeed true but only to a certain level. From a commercial point of view the ratings of a fuse become important as the fuses that are installed are sometimes the basis for capacity based charges" [*Claimant Memorandum*, para. 2.2.3].

35. Electrodynamics argues that the delivered fuse boards have complied with the quality and description required by the contract, even if the descriptive notes are made part of the contract. Firstly, 'to be Chat Electronic JP type fuses in accordance with BS 88' has three requirements, two of which are satisfied and the other has been in essence satisfied by the use of a comparable fuse. Electrodynamics have supplied Chat Electronic JS type fuse in accordance with BS 88. Given the similarities between JP and JS type fuses for ampere ratings below 400 Electrodynamics submits that the distribution fuse boards which have been fabricated meet the requirements of descriptive note one. Secondly, 'to be lockable to Equalecs requirements' means to be able to be locked by Equalec so as to ensure no vandalism or access to uncharged electricity. The note was not sufficiently definite to confer a direction that Electrodynamics must meet Equalec policy. Since the boards were physically capable of being locked, it must be held that they are lockable to Equalec requirements.

2. DELIVERED FUSE BOARDS ARE FIT FOR THEIR PARTICULAR PURPOSE

36. Article 35(2)(b) CISG relevantly provides "except where the parties have agreed otherwise, the goods do not conform with the contract unless they are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment".

37. Office Space has argued "the respondent has blatantly violated Article 35(2)(b), by not conforming to the contractual specification even after being aware of the specific purpose for which the fuses were required" [*Claimant Memorandum*, para. 2.2.3]

38. Electrodynamics argue that the delivered fuse boards are fit for their particular purpose because (2.1) Office Space has not made known its particular purpose, or (2.2) Office Space has unreasonably relied on Electrodynamics skill and judgment.

2.1 Office Space has not made known its particular purpose

39. Office Space argues "The respondent was abundantly aware of the specific purpose of the fuse boards. To reiterate the purpose of the fuse boards, it was required to be connected to the electrical grid by the electrical supply company in that area called Equalec" [*Claimant Memorandum*, para. 2.2.4]. It is further to be noted that the seller has to satisfy the requirements and standards, which prevail in the buyer's jurisdiction [*Claimant Memorandum*, para. 2.2.6].

40. In this regard, Office Space has argued that the particular purpose made known is the need to fabricate fuse boards which an Equalec electrical supply company will connect to the electrical grid. It has further argued that Electrodynamics, as seller, should have informed itself of Equalec's requirements.

41. Electrodynamics concede that it knew of the particular purpose of connecting the distribution fuse boards to the Mountain View development for the purpose of supplying safe electricity. However, Electrodynamics argues that Office Space did not make known any particular purpose of connecting the fuse boards in accordance with Equalec requirements. Electrodynamics argue that such reference to Equalec did not form part of the contract [see 1.1 above], or in any event, was not expressed in a manner that regards it as a particular purpose. Electrodynamics have supplied distribution fuse boards containing individual fuses that have met the ampere requirements of individual units. Since Electrodynamics have fabricated fuse boards fit for supplying safe electricity to the

individual units- the only particular purpose made known- it has not breached article 35(2)(b) CISG.

42. The basis of Office Space claim, and the reason why Equalec did not connect the fuse boards, is that if an individual fuse is replaced within the fuse boards, it is possible for a mistake to be made and a fuse of ampere rating up to 800 ampere be substituted. This 'possible future mistake' by another organisation cannot be enough to render Electrodynamics acts a breach of a particular purpose made known.

2.2 In any event, Office Space has unreasonably relied on Electrodynamics skill and judgment

43. Office Space has argued "the Claimant relied upon the Respondent's skill and judgment as it is a professional in this field and undeniably posses more knowledge than the claimant with regards to the technicalities" [*Claimant Memorandum*, para. 2.2.5].

44. Electrodynamics argues that Office Space have (a) not relied on Electrodynamics skill and judgment, or alternatively (b) such reliance was unreasonable.

(a) Office Space have not relied on Electrodynamics skill and judgment

45. As a developer of residential and business development, Office Space has constructed a number of large commercial and residential developments in the country of Equatoriana. Electrodynamics inquired with Electrodynamics as to the fabrication of five primary distribution fuse boards [*Claiment Exhibit No. 1*, para. 32; cf. *Respondent Exhibit No. 1*] and included two descriptive notes which contained extensive specifications. These specifications included brand name and type of fuses to be used in the desired end result. This illustrates that either Office Space was aware of the specifications involved in fabricating distribution fuse boards or that it had already received advice and thus should not have been in a position to need to rely on Electrodynamics.

(b) In the alternative, Office Space have unreasonably relied on Electrodynamics skill and judgment

46. Office Space initially contacted Switchboards to receive information regarding the potential fabrication of five primary distribution fuse boards. The information it received from Switchboards contained a direction that 'only JP type fuses should be used in the fuse

boards for the Mountain View project' [Procedural Order No. 2, clara. 25]. Although Switchboards made no reason for its comments, Office Space had the potential to contact Switchboards and inquire as to this direction [Procedural Order No. 2, clara. 24].

47. Moreover, Electrodynamics does not have its place of business in Equatoriana, unlike Office Space [Statement of Answer, para. 2]. Equalec sent a notice of its policy to all who were known to be involved in the electrical work in the area. Since Electrodynamics was not notified of such a policy it demonstrates that even Equalec, the company in which Electrodynamics was supposedly able to exercise skill and judgement over, did not know of Electrodynamics involvement and thus its skill and judgment [Procedural Order No. 2, clara. 24].

3. DELIVERY DATE HAS NOT BEEN BREACHED

48. Article 33(a) CISG provides that if a date is fixed or determinable from the contract, the seller must deliver on that date.

49. Office Space has argued the respondent had to deliver the specified goods as per the contractual date which was 15th August 2005. The respondent in fact delivered the said goods on the 22nd of August 2005, which was in clear violation of Article 33 of the CISG.

50. Electrodynamics admits that it delivered the goods one week after the contractually agreed date of delivery. However, Electrodynamics submit that the circumstances of the 14 July telephone conversation indicated its delay in procuring JP type fuses and impliedly illustrated its intended delay. Since Office Space did not reiterate its need to have delivery on 15th August, but instead merely reinforced its need to service its Mountain View obligations which had a deadline of October 1, it is argued that this implied late delivery was accepted. In any event, if the Arbitral Tribunal finds that this delivery date was in fact not changed, then damages are payable to Office Space, as opposed to having a right to cancel the contract. The CISG requires a fundamental breach in order to cancel the contract [Bernstein/ Lookofsky, 87]. Article 25 of the CISG defines a fundamental breach as a foreseeable substantial detriment. Since there is six weeks between the contractual delivery date and the day in which Office Space was required the service its Mountain View

contract, it is unreasonable to suggest that a one week delay would amount to foreseeable significant detriment.

51. In conclusion, Electrodynamics have argued that the delivered distribution fuse boards conformed to the contract as originally written because the fuse boards were in conformity with both the contract and the particular purpose made known. Furthermore, the late delivery amounts to damages payable and not cancellation of the contract.

III CONTRACT WAS VALIDLY AMENDED TO PROVIDE FOR DELIVERY OF JS TYPE FUSES

52. In Procedural Order No. 1, the Arbitral Tribunal has requested the respective Memorandum discuss whether the contract was validly amended to provide for the use of JS type fuses to be used in the fabricator of the distribution fuse boards. Electrodynamics argue that there has been a valid amendment to the contract as (1) Office Space is bound by Mr Hart's conduct, (2) the contract has been amended orally, and (3) this oral amendment is not limited by clause 32 of the contract since Electrodynamics have reasonably relied on the conduct of Office Space.

1. OFFICE SPACE IS BOUND BY MR HART'S CONDUCT

53. Office Spaces argues that "Mr Hart had no authority whatsoever with regards to the contract much less an authority to conduct any amendment or modification of it. Mr Hart was a procurement professional who had no implied or ostensible authority over the contract between the Claimant and Respondent" [*Claimant Memorandum*, para. 3.2.1].

54. Electrodynamics argue that Office Space is bound by Mr Harts conduct as (1.1) the applicable agency law is the Convention on Agency in the International Sale of Goods, and (1.2) Office Space's conduct has caused Electrodynamics to reasonably and in good faith believe that Mr Hart had authority to amend the contract.

1.1 [NEW ARGUMENT] Applicable agency law is Convention on Agency in the International Sale of Goods

55. Convention on Agency in the International Sale of Goods (CAISG) Article 2(1) states that this Convention applies when the principal and 3rd party have their places of business in different states. In this context, Office Space is located in Equatoriana, whilst Electrodynamics is located in Mediterraneo [*Statement of Claim*, para. 1-2; *Statement of Answer*, para. 1-2]. The other requirement for application of the CAISG in this context is that the rules of private international law have lead to the adoption of the CAISG [CAISG Article 2(1)(b)]. Since the CISG has no agency provision, the law governing this issue is found in the applicable domestic legislation. The parties have designated the law of Mediterraneo to this contract [*Claimant Exhibit No. 1*, para. 33]. Mediterraneo is a party to the CAISG [*Procedural Order No. 2*, para. 16]. Furthermore, since Mediterraneo is a Monist State, the application of treaties is automatic. Therefore, the rules of private international law have lead to the adoption of the CAISG.

56. Moreover, the CAISG will also apply "where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods of a third party" [Article 1(1) CAISG]. Mr Hart has worked with Office Space for two years [Claimant Exhibit No. 1, para. 1] and is a procurement professional with authority to sign contracts for up to $250,000 [Procedural Order No. 2, clara. 17]. Therefore, it cannot be argued that he was not an agent of Office Space. It is to be noted that the CAISG is not limited to the entering of contracts, but also includes any alteration to them. CAISG Article 1(2) "governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance". Therefore, the CAISG is the governing law in relation to the conduct of Mr Hart and whether they are binding on Office Space.

1.2 Electrodynamics reasonably and in good faith believed that Mr Hart had authority

57. CAISG Article 14(1) provides "where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other". However, Article 14(2) states "unless the conduct of the principal causes the third party

reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority". Electrodynamics argues that it reasonably and in good faith believed that Mr Hart had authority to act on behalf of Office Space and from his conduct was acting within that scope of authority.

58. Article 14 CAISG is compliment by Article 2.2.5 of the UNIDROIT Principles which provides that this notion of apparent authority "is an application of the general principle of good faith and… is especially important if the principal is not an individual but an organization". The justification for specific emphasis of this apparent authority concept on organizations is because 3rd parties often find it difficult to determine whom within the organization has authority [UNIDROIT Principles, 83].

59. Mr Hart is a procurement officer in the purchasing department of Office Space. On 14th July 2005 he formed an oral agreement with Electrodynamics. His role as procurement officer grants him authority to sign contracts up to $250,000. Given his usual role and lack of declaration otherwise, it was reasonable for Electrodynamics to rely on Mr Hart's apparent authority. Moreover, it was Office Space who directed Mr Stiles call to Mr Hart when he phoned to amend the contract; this further enhanced the impression that Mr Hart has authority to act on behalf of Office Space. Therefore, Office Space is bound by the conduct of Mr Hart.

2. [NEW ARGUMENT] THE CONTRACT HAS BEEN AMENDED ORALLY

60. On 14 July 2005, Electrodynamics contacted Office Space to explain that they were temporarily unable to obtain Chat Electronics JP type fuses. Therefore, they were unable to fabricate the distribution fuse board with JP type fuses by the agreed delivery date [Statement of Claim, para. 11]. The purpose of this telephone call was to avoid a breach of contract for non- delivery. Electrodynamics suggested to Office Space that they can fabricate the fuse boards with substitute fuses, or alternatively, the delivery date will have to be delayed [Respondent Exhibit No. 1, para. 7]. The substitute fuses suggested by Electrodynamics included either an alternative brand of JP type fuse or Chat Electronics JS type fuse [Statement of Claim, para. 11]. Office Space dismissed the possibility of an

extension of the delivery date, since their development 'was under tight time pressures' [Statement of Claim, para. 12].

61. In relation to the second alternative presented by Electrodynamics, regarding the possibility of using alternative fuses, Office Space expressed a liking for Chat Electronic brand fuses [Statement of Claim, para. 12]. Consequently, Electrodynamics stated "the only way to receive the distribution fuse boards from us with Chat Electronic fuses was to use JS rather than JP type fuses" [Respondent Exhibit No. 1, para. 10]. Office Space agreed by acknowledging "Mr Stiles' recommendation was probably the best way to proceed" [Claimant Exhibit No. 2, para. 4; cf. Respondent Exhibit No. 1, para. 10].

62. Article 29(1) CISG states "A contract may be modified or terminated by the mere agreement of the parties". This provision allows an amendment to a contract to be in any form [Schlectriem, 211; cf. Lookofsky, 82; 5 O 543 (1988) District Court Hamburg]. Furthermore, this provision does not require consideration any consideration on the part of the party which benefits from the amendment [Honnold, 229; cf. Lookofsky, 82, Enderlein and Maskow, 123]. Therefore, the oral amendment made on 14 July 2005 is valid under Article 29(1) CISG..

63. The validity of this oral amendment is not affected by Articles 12 and 96 of the CISG. Such articles allow a Contracting State, whose legislation requires contracts of sale to be concluded in or evidenced in writing, to at any time make a declaration that any provision that allows modification or termination to be made in any form does not apply. If such requirements have been met then a contract may only be amended in written form. Electrodynamics is the only party whose place of business is in a contracting state [Statement of Claim, para. 19]. Since the laws of Mediterraneo have not provided for an article 96 declaration, an oral amendment to the contract is not prohibited.

3. ELECTRODYNAMICS HAVE REASONABLY RELIED ON THE CONDUCT OF OFFICE SPACE

64. Article 29(2) CISG provides that "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement."

65. Office Space has argued "It is certainly not open for the respondent to aver that the contract was amended pursuant to the telephonic conversation of 14th July 2005 between Mr. Peter Stiles and Mr. Steven Hart" as "clause 32 of the contract…. clearly suggests that any kind of modification or amendment to the contract must be effected in writing" [*Claimant Memorandum*, para. 3.1].

66. Electrodynamics concedes that the contract contemplated amendment to be in written form [Claiment Exhibit No. 1, para. 32; cf. Schlectriem, 213; Date-Bah in Bianca & Bonell, para. 242; Lookofsky, 84; Butler, 61]. However, Article 29(2) CISG goes on to provide "a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct".

67. In relation to this second part of Article 29(2) Office Space has argued "the respondent cannot even take recourse of the last part of Article 29(2)….. as Mr Hart, being one of the parties to the alleged agreement of modification of the contract, was not even competent to do so as he had no authority or responsibility towards the contract" [*Claimant Memorandum*, para. 3.2.3].

68. It is to be noted that the second part of Article 29(2) CISG is not unique. It derives from the '*nemo suum venire contra factum proprium*' principle of Roman law, '*Mibrauchseinwand*' principles of German law and the doctrine of waiver and estoppel of Anglo- American law [Schlectriem, 214; cf. Enderlein & Maskow, 125; Lookofsky, 84]. Essentially, this clause ensures that the notion of reasonableness and good faith are upheld in the CISG. Electrodynamics argues that they are not liable for a breach of contract since (3.1) Office Spaces making of an oral amendment constitutes conduct, and (3.2) this conduct has been reasonably relied upon.

3.1 Making an oral amendment constitutes conduct under Article 29(2) CISG

69. A clause in a contract which dictates that all amendments must be made in writing is referred to as a 'no oral modification' clause [Viscasillas, 170; cf. Hillman, 449]. An oral

amendment to a contract which contains a 'no oral modification' clause becomes binding only at the time of reliance [Schlectriem, 215; cf. Secretariat Commentary to Art 29; Honnold, 231; Date-Bah in Bianca & Bonell, 243; Hillman, 452]. Essentially, the conduct required for the purposes of article 29(2) CISG can be found in the party's "declaration or consent to a modification made without observing the agreed requirements as to form" [Schlectriem, 215; cf. Honnold, 231].

70. The following illustration of a buyer being prohibited from asserting a 'no oral modification' clause is provided by Honnold: A seller contracts with a buyer to supply 1000 units of a product according to specifications outlined in a contract which also contains a no oral modification clause. Before production, the parties agree through a telephone conversation to alter the terms of the contract. Upon delivery of the product, in accordance with the newly agreed specifications, the buyer cannot refuse delivery on the basis of the no oral modification clause because the seller has relied on the buyer's conduct in agreeing to alter the specifications [Honnold, 231, § 204].

71. In this dispute, the contract between Electrodynamics and Office called for the fabrication of five distribution fuse boards with Chat Electronic JP fuses [Claimant Exhibit No. 1; Statement of Claim, para. 9]. Clause 32 of the contract contained a no oral modification clause [Claimant Exhibit No. 1]. Before fabrication, Electrodynamics contacted Office Space and the parties agreed to amend the terms of the contract. Therefore, when Electrodynamics delivered the fuse boards, in accordance with the newly agreed specifications, Office Space cannot claim non- conformance on the basis of the no oral modification clause because Electrodynamics has relied on Office Space's conduct in agreeing to alter the specifications [Respondent Exhibit No. 1, para. 10]. Therefore, Office Space oral amendment is conduct for the purposes of article 29(2) CISG. If the tribunal determines that Electrodynamics has reasonably relied on this conduct then it must be held that Electrodynamics has conformed to the terms of the contract.

3.2 Electrodynamics have reasonably relied upon the conduct of Office Space

72. Office Space have argued that Mr Hart, who formed the oral amendment on behalf of Office Space, made it clear that "he was not very well versed in the electrical aspect of the

development" [Respondent Exhibit No. 1, para. 8]. Mr Hart claims that he thought Electrodynamics "would send a confirmation of the telephone call and a written request for an amendment to the contract specifications" [Claimant Exhibit No. 2, para. 4]. Mr Hart goes further to state that if such written request was sent it "would have been circulated to all interested persons, which would have included the engineering department where the drawings of the fuse boards had been prepared. They would have immediately drawn our attention to any problems they saw with the change" [Claimant Exhibit No. 2, para. 4]. Essentially, Mr Hart claims that he did not expect his conduct to be relied upon and that the fact that it was relied upon made such reliance unreasonable [cf. Claimant Exhibit No. 2].

73. In response to Mr Hart's claim that made it aware he was not very well versed in the electrical aspect of the development, it must be shown that he admits that he was "generally aware of what was involved" in the contract with Electrodynamics [Claimant Exhibit No. 2, para. 1]. Further illustration of his awareness with regard to this contract is shown in two further statements he told Mr Stiles. Firstly, Mr Hart stated "that Office Space was under tight time pressures" on the Mountain View development, and secondly, "that Office Space preferred using equipment from Chat Electronics products wherever possible" [Statement of Claim, para. 12].

74. Mr Hart engaged in a conversation with Mr Stiles regarding the impact on the fuse boards if JP type fuses were substituted with JS type fuses. Given Mr Hart previous statements coupled with his willingness to engage in a impact-of-decision orientated discussion, Electrodynamics reasonably believed they were dealing with someone competent to discuss and modify the contract. Moreover, Mr Hart has admitted that "it was not possible to reach Mr Konkler that week, I thought it best to give an immediate answer" [Claimant Exhibit No. 2, para. 4]. This admission illustrates that he thought it was important to give Electrodynamics a direction to undertake post the telephone conversation. He clearly intended for his comment "probably the best way to proceed" to mean "the way we want you to proceed from now on" [Claimant Exhibit No.2, para 4]. If Mr Hart wanted this direction to be provisional he did not make it clear to Electrodynamics. Furthermore, his lack of action after the telephone conversation makes it reasonable for Electrodynamics to rely on this conduct. As such, Electrodynamics proceeded to manufacture the distribution fuse boards with JS type fuses.

75. A tribunal must override a no oral modification clause to the extent that "is necessary to protect the other party's reliance" [Schlectriem, 216]. Electrodynamics argues that this Tribunal should override clause 32 of the contract between Office Space and Electrodynamics because Electrodynamics have reasonably relied on Office Space's conduct.

76. In conclusion, the telephone 14 July 2005 conversation between Mr Stiles and Mr Hart is binding on Office Space and such a phone conversation lead to an oral amendment of the contract to provide for fabrication of the distribution fuse boards using JS type fuses. Office Space may not rely on clause 32 of the contract which involves a no oral modification clause because Electrodynamics have reasonably relied on the conduct of Office Space in making the oral amendment. Therefore, Electrodynamics have supplied distribution fuse boards in accordance with the contract as adjusted on 14 July 2005 and there can be no issue of non- conformity.

IV CLAIMANT FAILURE TO COMPLAIN EXEMPTS ANY NON-CONFORMITY

77. Office Space has argued that "The alleged failure on part of the claimant to inform the Equatoriana Electrical Regulatory Authority about the policy followed by Equalec being contrary to law serves no justification, much less a valid justification for the Respondent to evade its obligations to be performed under the Contract" [*Claimant Memorandum*, para. 4.1.2].

78. Electrodynamics argues that Office Spaces failure to complain exempts the non-conformity because (1) the failure to complain is related to the performance of the contract, and (2) a complaint to the Commission was the most reasonable mitigation measure.

1. CLAIMANT'S FAILURE TO COMPLAIN IS RELATED TO THE RESPONDENT'S OBLIGATIONS UNDER THE CONTRACT

79. Office Space argues that "the determination of policy followed by Equalec is not the specific subject matter of the Arbitration. The question to be arbitrated upon is with regards to the obligation of the seller to meet the requirements of the Contract" [*Claimant Memorandum*, para. 4.1.1].

80. Electrodynamics argue that the failure to complain is related to the performance of the contract since "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission" [Article 80 CISG]. In essence, Electrodynamics argue that Office Space had a legal right to have fuse boards with JS fuses connected to the electrical supply. It should have complained to the Equatoriana Electrical Regulatory Commission to have them order Equalec to do so [Statement of Answer, para. 20].

81. The contract required distribution fuse boards capable of supplying electricity to the tenants of the Mountain View development [Statement of Answer, para. 3]. If the Commission had ordered Equalec to connect such fuse boards to the Mountain View electrical supply then the purpose of the contract would have been achieved, and there would be no issue of non- conformity. Therefore, Equalec's policy is the subject of this arbitration. Specifically, this Arbitral Tribunal must determine whether a complaint to the Commission was the most reasonable mitigation method.

2. COMPLAINT TO COMMISSION WAS MOST REASONABLE MITIGATION MEASURE, WHICH WAS TO BE DONE BY CLAIMANT

82. CISG Article 77 provides "a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated".

83. Office Space argues "a complaint to the Equatoriana Electric Commission… would not have solved the purpose. The Claimant was under severe time pressure as the building had to be leased out on or before the due date… commission demanding Equalec to change its policy would have taken anywhere from two weeks to a month" [Claimant Memorandum, para. 4.1.6].

84. Electrodynamics argues that the most reasonable mitigation method would have seen Office Space make a complaint to the Commission. There is nothing to restrict Office Space making both a complaint as well as inquiring with alternative distribution fuse board fabricators. If the commission complaint yielded a quick result then Office Space could then cancel its alternative arrangements, paying only marginal amounts for the efforts expelled by its arranged supplier. Alternatively, if the alternative fuse boards had already been fabricated before the complaint had yielded a result then such a complaint could be cancelled with no harm being done. It is Electrodynamics position that Office Space has merely taken a measure to ensure it service its 3rd party contacts on time, without taking reasonable measures to limit the losses stemming from this current contract. Therefore, Office Space should be held liable for a failure to mitigate.

85. In conclusion, Electrodynamics have argued that it supplied distribution fuse boards in accordance with the contract as originally written, or alternatively, the contract was amended to provide for the use of JS type fuses. In any event, Office Space' failure to reasonably mitigate its loss relieves Electrodynamics of any non- conformity in its entirety or in part.