

Thirteenth Annual Willem C. Vis International Commercial Arbitration Moot  
Vindobona, Danubia, March 2006

Ref: CIDRA Arbitration case No. 2005-0013

**In the matter of:**

**Claimant**  
**Oceania Printers S.A.**  
Tea Trader House  
Old Times Square  
Magreton, 00178, Oceania

versus

**Respondent**  
**McHinery Equipment Suppliers, Pty.**  
The Tramshed  
Breakers Lane  
Westeria City 1423, Mediterraneo

**MEMORANDUM**

*for*

**RESPONDENT**



**National University of Mexico**

**~Counsel~**

Raúl Aldana, Diego Curiel, Daniela Gómez, Andrea Hernández, Daniela Hernández,  
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## List of Abbreviations

<b>CE</b>	Claimant `s Exhibit
<b>CIDRA</b>	Chicago International Disputes Resolution Association
<b>CIF</b>	Cost, Insurance, Fright
<b>CISG</b>	United Nation Conventions on International Sale of Goods
<b>FB</b>	Fundamental Breach
<b>ICC</b>	International Chamber of Commerce
<b>MES</b>	McHinery Equipment Suppliers Pty
<b>MFM</b>	Magiprint Flexometrix Mark 8 Machine
<b>µm</b>	Micrometer
<b>MOC</b>	Memorandum of Claimant
<b>NYC</b>	New York Convention for the Enforcement and Recognition of Foreign Awards
<b>OCP</b>	Oceania Printers
<b>PO</b>	Procedural Order
<b>PoL</b>	Period of Limitation
<b>RE</b>	Respondent's Exhibit
<b>Rome Convention</b>	Rome Convention on the Law Applicable to Contractual Obligations of 1980
<b>UNCITRAL</b>	United Nation Commission on International Trade Law
<b>UNIDROIT</b>	International Institute for the Unification of Private Law

## **I. THE RIGHT OF OCEANIA PRINTERS TO HAVE RECOURSE TO ABITRATION EXPIRED PRIOR TO THE COMMENCEMENT OF THESE PROCEEDINGS BY VIRTUE OF THE CONTROLLING STATUTE OF LIMITATIONS**

### **I.1 The limitation period applicable to the arbitral action is governed by the domestic law of Mediterraneo**

1 Given that the period of limitation's issue is not governed at all by the substantive law agreed upon by the parties [HONNOLD/Legislative History p.195], and as the Legislative History of CISG itself confirms with regard to issues excluded from the Convention, a conflict of laws' rule should be applied to determine the applicable *national law* to the dispute. [HONNOLD/ Legislative History p.255]. Accordingly, an analysis of the arbitration rules, the appropriate conflict of laws rule, and the applicable law is warranted for the Arbitral Tribunal to ascertain the most appropriate conflict of laws rule.

#### **I.1.1 Pursuant to Article 32 of the CIDRA Rules, the Arbitral Tribunal is required to determine the applicable conflict of laws rule**

2 As provided by article 32.1 of the CIDRA Rules, when confronted with a failure of designation of law by the parties, the arbitral tribunal shall apply "the law" as determined by the conflict of laws rules which it considers appropriate.

3 Due to the above-noted CISG's exclusion of the statute of limitation's issue, and even acknowledging that the first paragraph of article 32 might not seem *prima facie* applicable as the parties actually chose a proper law to govern their contractual relationship, it is submitted that the arbitrators must necessarily apply the standard provided by such rule, for it has been said that they are empowered to ascertain the substantive rule concerned pursuant to the conflict of laws rules they deem applicable, "whenever the applicable law chosen by the parties proves to be incomplete". [MISTELIS, GRIGERA NAON p. 424] Therefore, in the case at hand, it is clear that CISG's vacuum must be understood and interpreted as an absence of choice of law with regard to the issue of the applicable statute of limitations.

4 Further, when referring to “the law” in article 32 of CIDRA, as well as in Art. 28 of the UNCITRAL Model Law, this must be considered to be a “national law”. According to Blessing, the term “the law” in contrast with “rules of law”, which may mean general principles of law, usually makes reference to a particular national law [BLESSING p.40]. Likewise, it has been said that “strictly speaking, only a national law can provide the basis for party autonomy and determine the conditions and limits within which it can be exercised. [SANDROK p.319 ] This approach has been reflected in the European Convention of 1961, the Rome Convention of 1980 as well as in a number of institutional rules such as CIDRA., [Geneva Court of Justice case 1230 F.V. M.P.], [Case 62/1998 Russian Federation Chamber of Commerce and Industry].

5 Indeed, the legislative history of the UNCITRAL Model Law, referring to its article 28 paragraph 2, sets forth that “when the parties have not designated the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules which it considers applicable. [UNCITRAL Secretariat p.764].

6 As put by a leading commentator “some authors have argued, rather curiously, that the expression “rules of law” found in the UNCITRAL model law covers certain transnational rules, such as international conventions, but that it is not intended to enable the parties to submit their dispute to general principles of law or to “lex mercatoria”. [FOUCHARD]. Consequently, Claimant could not argue the application of article 10.2 of the UNIDROIT Principles. Rather, this Tribunal shall apply the conflict of laws’ rule which it deems more applicable to determine a national law to govern the period of limitations.

**I.1.2 The Tribunal should decide that the applicable conflict of laws rule should point to the law of Mediterraneo as that corresponding to the party “whose role is most characteristic to the contract”**

7 It is submitted that the conflict of laws’ rule that establishes whose role is most characteristic to the contract should be followed in order to determine the law controlling the period of limitation for arbitral actions, since it is the most accepted and neutral rule. [Rome Convention of 1980, HUNTER p. 279]

8 The principle of the most characteristic performance is embraced by a number of legal systems and is widely accepted in international commercial arbitration. An analysis will be made of the elements of the contractual relationship so as to establish the governing law with which the contract has the closest connection with a view to eliminating any ambiguity as to its doubtful application in this case, thus enabling the Arbitral Tribunal to apply it without apprehension. [WETTER p. 300]

9 Generally speaking, there are two main obligations in contracts, namely, payment and delivery, the latter being considered to be the obligation characteristic of the contract. With regard to a contract for the sale of goods, it is the party who undertakes delivery and not that who effects payment the one whose performance is most characteristic to the contract. [GOODE p. 1121] [ICC case No. 4237 cited by BORN at p.534]

10 Thereby, as put by a leading commentator, once it has been determined which party plays the role most characteristic, the contractual relationship should be governed by the law prevailing at the place of business or habitual residence of that particular party which has to perform the characteristic performance, this solution being reflected in the national laws as well as in the Rome Convention of 1980 in its article 4 and in civil law countries. [BLESSING p. 52]

11 In ICC case 7177, in determining the applicable law, the Tribunal resorted to the Rome Convention notwithstanding the fact that it entered into force in such countries the day after execution of the contract, because it was found to represent the general trend of modern international law. [GRIGERA p.233]

12 It follows that here, the solution based on the law of the place of business of the party whose role is most characteristic should be applied. Accordingly, as Mediterraneo is the country where Respondent, -whose role is most characteristic to the contract-, has its habitual residence and therefore its national law should determine the controlling period of limitations.

**I.2 In the alternative, it is submitted that the *tronc commun* method should be followed as it affords certainty and foreseeability to the parties, and equally leads to the application of the law of Mediterraneo**

13 If this Arbitral Tribunal considers that “the role more characteristic to the contract” should not be regarded as the applicable conflict of law rule to resolve the absence of choice of law, it is submitted that the tribunal should apply the so-called *tronc commun* doctrine as it is the method “which can help to choose the proper law of a contract without undue hardship to any of the contracting parties” and which provides more certainty and foreseeability to them. [RUBINO-SAMARTANO p.59]

14 The *tronc commun* doctrine is generally utilized by national courts and arbitral tribunals alike to determine the common principles embodied in two or more different national laws in respect of a specific issue. It consists of filling the nonexistence of a particular choice of law by considering this lack of designation as a negative choice, which will in turn become a rule in itself by **excluding** the parts of their national laws which are different and become a positive choice with regard to the part of such laws which are common to them. It is suggested that the similarities of the national laws involved must be treated as the law chosen by the parties [HUNTER p. 107, RUBINO-SAMARTANO p. 61, ANCEL p. 65]

15 It has also been said that the *tronc commun* doctrine “is a proposal both ingenious and respectful of the spirit of arbitration, namely of the intent of the parties, and which, in a true ecumenical spirit, avoids the setting aside of the laws of the respective parties but retaining the part of each common to both of them”. [WERNER p. 89] In fact, as submitted by Professor Ancel, international arbitrators are, nowadays, in a better position to apply the *tronc commun* doctrine, since they are faced day by day with this problem of choosing the substantive law applicable to the merits of a dispute. It is clear that the *tronc commun* doctrine becomes a need when simpler solutions are not obtainable. [ANCEL p. 72]

16 This has been endorsed by numerous arbitration tribunals, for instance in ICC case No. 2886, with regard to a dispute between a Yugoslavian company and a German company, where the arbitrator concluded that in respect to a particular issue, both Yugoslavian and German law were applicable, any other law was to be excluded since there was no connection with the legal system

of any other country; therefore, the arbitrator based his decision on the merits both on Yugoslavian and on German law taking in account its similarities.

17 The arbitral tribunal took the same decision in the award rendered in ICC case No. 3327, where in a dispute between a Swiss company and a Swedish company, an arbitral tribunal sitting in France, compared the regulation related to fraud in Swiss law and in French law to conclude that the two systems had common rules as to the annulment of a contract on the ground of fraud. Consequently, the tribunal decided that the law applicable to the dispute will be the similarities between Swiss law and French law.

### **1.2.1 Based on the *tronc commun* doctrine, it is submitted that the law of the state of the seller must govern the statute of limitations**

18 The analysis necessary to determine the solution to the issue of the applicable law in respect to the issue of statute of limitations, following the *tronc commun* method, will take into consideration the laws of all the states connected with the dispute.

19 In the first case, the applicable conflict-of-laws rule in Danubia as the seat of arbitration, is that to be found in its law governing international commercial arbitration.

In this respect, the law of Danubia states that for international commercial arbitration conducted in Danubia, and neither party is from Danubia, the applicable choice of law rule must be that one established in the UNCITRAL Model Law on International Commercial Arbitration.

The UNCITRAL Model Law in its article 28.2 establishes that if the parties fail to choose the law applicable to the merits of the dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. In sum, the law of Danubia provides that when there is an absence of an applicable law, the solution is to apply the conflict of laws rules which the tribunal considers most applicable.

20 On the other hand, Mediterraneo's law provides that with regard to an issue not governed by an applicable law, the law of the state where the seller has his place of business must apply.

In this regard, it is established in article 14 of the Private International Law Act of Mediterraneo that the law applicable to an international sale of goods, including its formation and extinction by passage of the limitation period, shall be that of the seller. [P.O. No. 1]

Thus, the law of Mediterraneo, being the country of the seller, must govern issues not otherwise governed by the law designated by the parties. Consequently, in this case, the limitation period must be governed by the law of Mediterraneo.

21 Finally, pursuant to the law of Oceania, being the country of the buyer, also establishes that the law of the seller's country applies to all incidents of a contract of sale, including the period of limitation.

22 As supported in the record, article 1 through 15 of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 22 December 1986 have been adopted by Oceania as the Conflicts of Law in the International Sale of Goods Act. [P. O. No. 1]

23 Article 8.1 of the Hague Convention establishes that to the extent that the parties had not chosen the law applicable to a contract of sale, the contract must be ruled by the law of the State where the seller has his place of business at the time of the conclusion of the contract.

Hence, in this case the conflict of law rule established in Oceania's law conducts to the law of the seller, given that the state where the seller has his place of business at the time of the conclusion of the contract is Mediterraneo.

24 Summing up, based on *trunc commun* doctrine, it can be inferred that, first, the provisions in the law of Danubia do not establish the applicable choice of law. Moreover, the *trunc commun* doctrine ascertains that the similarities between the law of Oceania and the law of Mediterraneo in the provision related to the law applicable to a contractual relationship is the one of the State where the seller has his place of business. Therefore, the law applicable to the period of limitation issue is that of Mediterraneo.

**I.2.2 The exception contained in the law of Oceania, referring to the applicability of the law of the buyer to govern the statute of limitations, does not apply in this case**

25 If, and only if, this arbitral tribunal considers that the conflict-of-law rule applicable to the dispute is one that conducts to the law of the buyer, same solution would in any event point to the law of the seller.

26 For its part, the law of Oceania lays down that “when the parties had not chosen the law applicable to a contract of sale, the contract must be governed by the law of the State where the seller has his place of business at the time of the conclusion of the contract”. In addition, the same provision establishes that, however, the contract must be governed by the law of the State where the buyer has his place of business at the time of the conclusion of the contract granting that one of the three assumptions of the exemption arise.

27 The exception provided under the law of Oceania is not triggered since none of its three elements is present in this case.

28 The test for this exception requires any of the following to be met: a) negotiations were conducted, and the contract concluded by and in the presence of the parties, in Oceania; or b) the contract provides expressly that the seller must perform his obligation to deliver the goods in Oceania; or c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid. [P.O. No. 1]

29 In this regard, it is clear and evident that both hypotheses a) and c) do not affect our case, since the negotiations were conducted by e-mail and the contract concluded when Oceania Printers signed in Oceania; and, the contract was not concluded on terms determined by the buyer nor in response to an offer to bid.

30 We refute, however, the hypothesis established in prong b). In this respect, we must analyze whether the contract provides expressly that the seller must perform his obligation to deliver the goods in Oceania. In regard to this obligation, as it is evidenced in Claimants Exhibit No. 7, the contract drafted by McHinery Equipment sets out that the issue of delivery of the machine will be governed by the international commercial term CIF.

31 In this respect, article 9 of CISG establishes that “the parties are considered to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known”. This provision establishes the basis to allocate the use of the CIF term in the contractual relationship between McHinery Equipment and Oceania Printers, the parties remaining bound by any usage to which they have agreed. The aim of INCOTERMS is precisely to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade.

32 This trade term is used to allocate the cost of freight and insurance in addition to designating the point in time when the risk of loss passes to the purchaser. Moreover, it has to be made clear that in the CIF term, the place of delivery is the port of the State of the seller. Thus, this means that the seller’s obligation to deliver is performed when the goods pass the ship’s rail in the port of shipment.

33 According to this INCOTERM, “the seller is bound to pay the costs and freight necessary to deliver the goods to the named port of destination but the risk of loss or damage to the goods, as well as any supplementary costs due to events occurring after the time of delivery, are transmitted from the seller to the buyer”. [REYNOLDS p. 233] Likewise, according to CIF the seller also has the obligation to acquire marine insurance minimum cover against the buyer’s risk to loss or damage of the goods during the carriage.

34 Hence, the obligation of the seller is only to contract for main carriage and to procure insurance, the seller remaining responsible for the condition of the contract goods from the time they are handed over to the carrier until they are vessel-loaded. Further, if in CIF terminology the port of delivery mentioned immediately after the term will always be a port on the buyer’s side, this does not refer to the place where the obligation of delivery is performed, but rather to the place where the carrier must deliver the goods on the account of the buyer.

35 Following this reasoning, for instance, in an English case *Kwei Tek Chao v. British Traders and Shippers Ltd.*, the nature of the CIF contract was summarized as follows: “A C.I.F. contract puts a number of obligations upon the seller, some of which are in relation to the goods. So far as the goods are concerned, the seller must put on board at the port of shipment goods in conformity

with the contract description". It ensues that the obligation of the seller to deliver the goods terminates at the time the goods are "put on board" at the port of shipment.

36 Similarly, in ICC case No. 3779 between a Swiss seller and a Dutch buyer, the arbitrator found that, as the dispute of whey powder is a CIF sale, the seller had the obligation to deliver the goods to the carrier, the bill of lading confirming the delivery on board, and the risk passing to the buyer the moment the goods cross the ship's rail.

37 In such case that the obligation of the seller had been to deliver the machine in the port of the State of Oceania, the parties should had use the terms: Delivered Ex Ship (DES), Delivered Ex Quay (DEQ) or Delivered Duty Unpaid (DDU).

38 Furthermore, by virtue of C-terms contracts, it is agreed by the parties that the seller will be paid by presenting the agreed shipping documents to a bank under a documentary credit, as was the case here. Hence, it has been submitted that "it would be quite contrary to the central purpose of the documentary credit for the seller to bear further risks and costs after the moment when payment had been made under documentary credits or otherwise upon shipment and dispatch of the goods". [REYNOLDS p. 242]

39 It is then uncontested that since the term CIF was used in the contract between McHinery Equipment and Oceania Printers, the seller was not bound to deliver the machine in the State of the buyer, but only across the vessel's rail in the port of shipment. Hence, hypothesis b) does not apply to the present case, and consequently the exception to applying the seller's law is not met. Therefore, Mediterraneo's should govern the period of limitations.

### **I.3 Under the applicable period of limitations, Oceania Printers has no recourse to arbitration**

40 Taking into consideration that the general period of limitation in all three countries, Danubia, Oceania and Mediterraneo, begins to run when the event giving rise to the claim occurs, with respect to claims for breach of contract on the date on which the breach occurs, and with respect to claims for non-conformity of the goods on the date of delivery, the latter basically makes the

commencement of the general limitation period dependent on the obligee's actual or constructive knowledge of its claim. However, there are events that might suspend the running of the period but none of the possible reasons for suspending the running of the period have occurred. [P. O. No. 2]

41 As demonstrated above, under either "the role more characteristic" conflict of law rule or "the Tronc Commun" method, the period of limitation should be governed by the law of the Seller, being in the instant case, that of Mediterraneo. In this regard, the law of Mediterraneo establishes a two year limitation period.

42 Based on the fact that the alleged breach of contract occurred in July 2002, that is more than two years before the commencement of the arbitration in July 2005, the limitation period had already expired.

43 As a result, Oceania Printers cannot exercise its right to initiate arbitration proceedings against McHinery Equipment in regard to the contract signed on 30 May 2002 and consequently, this Tribunal lacks jurisdiction *ratione temporis* to adjudicate over this matter.

44 Even if the foregoing arguments are not sufficient for this Arbitral Tribunal to decide that the instant arbitral action is not time-barred, in any event, as will be submitted, McHinery Equipment did not incur in any breach of contract.

## **II. McHINERY EQUIPMENT DID NOT COMMIT ANY BREACH OF THE CONTRACT BY DELIVERING THE MAGIPRINT FLEXOMETRIX MARK 8 MACHINE**

45 Claimant holds that the machine delivered complied neither with the specifications set out in the contract nor with the specific purpose made known to our client, which constitutes a breach of contract due to non-conformity of the machine, pursuant to article 35 of CISG.

46 In response to Claimant's allegations, McHinery Equipment submits that it has fulfilled all its contractual obligations as the machine delivered was the one both parties had previously agreed upon. Even though Oceania Printers claims that printing on 8mm aluminum foil was an essential part of the contract, it was never established as a relevant characteristic of the Flexometix machine but only as a suggested reference. Therefore, Respondent cannot be deemed to have breached the contract.

### **II.1 McHinery Equipment fully complied with its contractual obligations.**

47 In conformity with the contract signed on 30 May 2002, McHinery Equipment agreed to sell and Oceania Printers agreed to purchase one second-hand 7 stand Magiprint Flexometix Mark 8 machine [C.E. No. 7].

48 The first paragraph of article 35 of CISG provides that "the seller must deliver goods which are of the quantity, quality and description required by the contract [...]". In accordance with this article the machine delivered was exactly the one requested by the buyer as it was of the quality and description required under the contract and therefore, in strict compliance with the terms of the contract.

49 This statement is supported by several recognized publicists who establish that the main source of parties' obligations derive from the contractual agreement [SCHLECHTRIEM/Seller Obligations p. 19, BIANCA p.272], which means that seller's obligations consists in delivering goods which conform to what is written in the contract. [LORD JUSTICE BRETT in SCHLECHTRIEM/Seller Obligations p.20, HENSCHHEL p.10]. Consequently, Respondent fulfilled

all its contractual obligations. [Russian Arbitration Award no. 97/2002; Switzerland Supreme Court Case No. 4C.245/2003].

50 It is noteworthy that McHinery's obligations were sufficiently clear under the contract and for this reason there is no need to interpret statements or previous negotiations made by the parties, it only becomes necessary in those cases in which the quality and description required by the contract are not expressly fixed [SCHLECHTRIEM/Seller Obligations p.20].

51 Moreover, it is to be noted that the maker's manual copy sent by McHinery for the Magiprint Flexometix Mark 8 machine [C.E No. 6] is ancillary to the contract as it was enclosed to it and contained the specifications of the machine. It can therefore be concluded that a machine's manual, "while it does not represent the good, it constitutes an ancillary document [...]" [SCHLECHTRIEM at p.16] The specification page in the manual in point, received by Claimant prior to the signing of the contract, "clearly specified that it could be used only on 10 micrometer and thicker foil". [RE No. 3]. It follows that it was the buyer's implied obligation to read these specifications before signing the contract [Russian Arbitration Case no. 56/2003]. Therefore, Claimant cannot argue that it was unaware of the minimum 10mm limitation.

52 Accordingly, as the machine delivered by our client is in compliance with the contract and its enclosing manual, Oceania Printers can not allege a breach of contract as the machine was of the quantity, quality and description required under article 35(1) of CISG.

**II.2 In the event that this Tribunal considers the contract in a broader sense, the machine delivered by the seller honors McHinery Equipment's obligations**

53 The machine delivered by McHinery is fit for the purpose made known to our client in accordance with article 35 (2)(b) which establishes that "the goods delivered must be fit for the particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract". In order to identify this particular purpose, it is necessary to make an interpretation of the contract pursuant to article 8 (2) and (3) CISG which provides that "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances". In order to determine the understanding that a reasonable person would have

had, “due consideration is to be given to all relevant circumstances of the case including the negotiations and any subsequent conduct”. [SCHLECTRIEM/Seller Obligations p.20, BIANCA p. 272, HENSCHHEL p. 6]

54 As part of those relevant circumstances, we refer to C.E No. 1, where the buyer manifests its interest in purchasing a machine capable of developing 3 different functions: “printing coated and uncoated papers for wrapping, polyester and also metallic foils for use in the confectionery market”. [C.E. No.1] He also suggested that typical plain and colored aluminum foil for chocolate wrappers “may be” of 8 micrometer thickness aluminum foil. Likewise, in previous negotiations during the trip to Athens, the buyer expressed his conformity with the machine as shown in the statement “The Magiprint Flexometix machine looked to be just what we need”. [C.E. No.3]

55 From its request and statements, it can be inferred that Claimant’s purpose was to acquire a machine to develop the referred tasks. Based on these needs, our client searched for a machine capable of developing these functions, and as a result McHinery Equipment offered Oceania Printers a second-hand 7 stand Magiprint Flexometix Mark 8 machine.

56 In order to interpret both the statements and the negotiations “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances” it is necessary to identify this reasonable person. It is submitted that this person is any seller which was a trader and not a producer and which was involved in the sale of a machine capable of printing wrappers for use in the confectionary market. This reasonable person would have had interpreted the statement of the buyer as a request for the purchase of a machine capable of performing the requested tasks based in the contract and the expressly intent made known by Oceania Printers.

57 Accordingly, the Arbitral Tribunal may conclude that our client delivered the proper machine, since Claimant’s statement that our client committed a breach of the contract is contradictory as, in the first place, Oceania Printers said the machine met their needs [CE No. 3], whereas the machine requested was in perfect conditions and fit to do everything which was requested by Claimant.

## **II.2.1 Contrary to Oceania Printers' allegation, the fact that the machine could not print on 8mm aluminum foil does not constitute a breach of contract**

58 The relevant specifications which the buyer needs to have respected in order for its purpose to be complied with, it must be expressed both in a precise and clear form, so as to leave no doubt of its binding implications and made in a timely manner. According to Schlechtriem in order to recognize the intent expressed by a party, the language in which said intent is formulated is of considerable relevance [SCHLECHTRIEM p.24]. Thereby, it cannot be established by a statement such as "may be" that it was imperative for the buyer to print on this thickness and should only be taken as "a suggestion" of what typical thickness might have been and a reference for a typical plain and colored aluminum foil for chocolate wrappers [C.E No. 1]. In this regard, McHinery Equipment was not bound to deliver a machine capable of performing in 8mm thickness, given that the term "may be of 8mm" used by Oceania Printers can only be considered as a suggested reference. Furthermore, Claimant informed Respondent of the importance of printing on 8mm aluminum foil after the conclusion of the contract. The only time Claimant made reference to 8mm aluminum foil before the conclusion of the contract was on April 17, 2002 when it was simply mentioned that typical plain and colored aluminum foil for chocolate wrappers "may be" of 8mm thickness [C.E No. 1].

59 Furthermore, this reference should only be deemed as being part of an applicable range and not as a specification in itself, in line with the ruling of the Switzerland Supreme Court in case Roland Shmidt vs Textil-Werke Blumenegg AG. In the contract of this particular case, it was established that the parties agreed the sale of a: 1 piece rotary printing machine, brand stork, type RD IV Airflow A 640.000, Rapportausüstung 641mm- 1018mm (range of the specific case, not the commercial range).

60 The court held that the characteristics of the goods that were agreed and that are part of the contract needs to be established by interpretation of the parties' statements under CISG Art.8 so that the seller generally respond for all qualities which the buyer is entitled to expect from the goods under the contract. According to this objective interpretation the buyer was not entitled to expect that the machine would be able to print in both a length of 641mm and a length of 1018mm without installing additional holders. As this was only a range. "The buyer is an expert and knew that she was not offered a new machine, but one which was built 14 years ago and

consequently did not conform to the latest technical expectations. It was therefore up to buyer to inform himself about the operation and equipment of the machinery, an act that the buyer apparently embarked only after the contract had been concluded.” (Switzerland Supreme Court in case no. 4c.296/2000/rnd Roland Shmidt vs Textil-Werke Blumenegg AG.)

61 The court found that the seller was entitled to assume that the buyer realized that the remark regarding the equipment in question was meant to refer to the bounds of possible range length and not to a specific one. This led the court to decide that the machine sold was offered to the buyer in conformity with the specifications of the contract.

62 In the present case, the Arbitral Tribunal may conclude that printing on 8mm aluminum foil should be considered only as a suggested reference and not as an actual specification, thus leaving room for the possibility of selecting another thickness. As such, and taking into consideration that in the confectionary market the “industry standard” is not 8mm [P.O. 2 p.21 ], McHinery Equipment was not at fault for delivering a machine that is only capable of printing on 10mm and thicker foils.

63 To the contrary, as the buyer is not an expert and was about to service a contract worth USD\$400,000.00 with Oceania Confectioneries, it was his responsibility to advise McHinery Equipment of the specifications required to fulfill that contract. [C.E No.3]. [Barcelona case no. 553/ 2004].

64 In addition, Oceania Printers holds that printing on 8mm aluminum foil was its main purpose, however they made that clear until July 8, 2002 when the machine was already turned over to Mr. Butter and our client’ employees had already left the premises. When technicians returned to the plant Oceania claimed that printing on 8mm aluminum foil was imperative, but this was one month and 8 days after the signing of the contract, making it impossible for our client to have known of the relevance of this characteristic [R.E No.2].

65 According to Enderlein, the seller should be aware of the buyer’s particular purpose for the acquisition of the good at the time of the conclusion of the contract, instead of being informed of it later. [ENDERLEIN p.158]. Therefore McHinery Equipment was not obliged to deliver a machine

capable of printing on 8 mm aluminum foil, since he was not informed of this particular purpose before the conclusion of the contract.

66 It must be noted that when Mr. Butter traveled to Greece, he could have mentioned the importance of printing on 8mm aluminum foil, or when the first running test was made, he should have let our client's technicians know about the importance of running a test on 8mm aluminum foil but he did not, so that McHinery would not have been aware that this constituted a particular purpose. It must be noted that "[t]he intent of a party undertaking a legal act is decisive and it has an effect only when the other party is actually aware of it" [ENDERLEIN-MASKOW]. Consequently this was not a part of our client's obligations.

67 Based on all the foregoing, this Arbitral Tribunal must conclude that McHinery Equipment complied with all of its obligations under the contract. Even if the Flexometix machine was not capable of printing on 8mm aluminum foil, this fact can not be assessed as a breach for the non conformity of the delivered machine since this represented only a suggested reference, and our client was never aware of this particular purpose before the conclusion of the contract.

**II.2.2 Even if the Arbitral Tribunal decides that Oceania Printers allegation is sound, McHinery Equipment is excused from liability for delivering an allegedly non-conforming machine in accordance with article 35 (3) of CISG**

68 The general rule of law underlying Article 35 is the *caveat venditor* principle, which consists in the liability of the seller in case of non-conformity, however the exception of this principle must be found in its third paragraph [LOOKOFKY p.91-95, ENDERLEIN p.160, RABEL in HENSCHERL p.2-14], which provides that "the seller is not liable [...] for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity".

69 When the buyer has the opportunity to undertake any pre-contractual examination of the goods in order to assess their condition, he is considered to have agreed with seller's offer and has accepted the goods as he saw them, [BIANCA p. 278, HONNOLD p.260, HESCHERL p.2-10] thus bearing the risk of any unfitness for its particular purpose.

70 Our client, in consideration of Oceania Printer's needs, recommended Mr. Butter to examine the machine chosen before concluding the contract [C. E. No. 3]. In Greece, the machine was not in use by its previous owner [P.O. No. 2 par. 12], for this reason Claimant alleged that he did not know or could not have been aware of the non-conformity of the machine for its intended use. Even if Article 35 (3) CISG does not impose a duty to inspect the good throughout a special analysis or complex methods, [HONNOLD p.260, BIANCA p.279, HENSCHHEL p.11] it requires the buyer to make the normal examination in his trade branch [MASSIMO].

71 Given that just by observing the machine's outer surface it was not possible to determine whether it worked properly or fits for any particular purpose he was interested in, it would have been reasonable on seller's side to request that they turned it on or have inquired as to its capabilities (such as printing on 8mm thickness), this does not represent a major effort or the need of an expert but turns out to be sound under the circumstances. However, Claimant acted recklessly by not being knowledgeable about his own needs and did not show any interest whatsoever in the inspection of the machine and its suitability for his purpose.

72 Furthermore, it is unreasonable to think that Oceania Printers could argue that he has not aware of the alleged lack of conformity since Mr. McHinery forwarded the contract along with the machine's manual [C.E. No 6]. The manual specified not only the user's instructions but the technical specifications, i.e. the aluminum foil thickness in which it was designed to print. The buyer either knew or could not have been unaware of the lack of conformity, since he had all the necessary information at his disposal in order to be aware of such lack of conformity.

73 For this reason, if Oceania Printers had not acted with neglect, he would have been aware of its alleged lack of conformity before the conclusion of the contract.

74 Based on all the foregoing, the Arbitral Tribunal should determine that the incapability of the machine to print on 8mm aluminum foil does not constitute a breach under the contract since our client delivered a machine which was fit for buyer's purpose.

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**II.2.3 Oceania Printers did not make an adequate examination of the goods pursuant to article 38 of CISG and therefore it cannot benefit from this situation as it is partially responsible as a result of its negligence**

75 In accordance with article 38 (1) of CISG Oceania Printers' did not accomplish its obligation to inspect the goods in a proper manner, and in consequence he acted with negligence.

76 The mentioned article establishes a general rule for examination: “[t]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances”. It is relevant to note that according to Oceania Printers they were on a tight schedule to start printing or else they would lose the contract with Oceania Confectioneries. However, even under this circumstance, Claimant did not make an adequate examination. They expended \$25,000.00 dollars in printing tests, but omitted to request McHinery technicians to test the machine on 8mm foils, which is the cause of non-conformity and was allegedly its main interest.

77 Even if, for this particular case, the second paragraph of the same article also applies, which establishes that, “if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination”, Claimant is still not excused from not having examined the machine within a reasonable time. This second paragraph does not change the legal consequences of said article because the facts have the same effect as in the previous paragraph, since the partial examination was done in buyer's premises after delivery. Oceania Printers informed our client on July 1<sup>st</sup> that everything was fine [C.E. No. 8] and it was until the 1<sup>st</sup> of August, a month later, that they informed our client that the machine could not print in 8mm aluminum foil and that they were already 2 weeks behind schedule [C.E. No.9]. Due to their lack of expediency, Claimant was not able to ask for a machine that fitted their needs, since it would not have been possible to deliver by the date required by Oceania Confectioneries.

78 Based on the foregoing, Claimant did not examine the machine in a way that would alert both him and our client of the non-conformity in time to remedy. Oceania Printers learned that it was a non-conforming machine until they tried to print on the 8mm aluminum foils in order to comply with Oceania Confectioneries' contract. [R.E. No.2; Langericht Frankfurt 12/26 O 264/04; H.S v. NV C.] By then, Oceania Printers did not have any other options which would allow it to save its

commercial relationship with Oceania Confectioneries. As buyer is partially responsible as a result of his negligence, he could not benefit from this situation (as expressed in Lex Mercatoria Principle No. 1.7 - *Venire contra factum proprium*).

**II.3 Assuming, but not conceding, that McHinery Equipment committed a breach, same was not fundamental in the sense of Article 25 of CISG**

79 In case the Arbitral Tribunal considers our client committed a breach of contract, it must not be considered as fundamental according to article 25 of CISG. We will further analyze the two elements of the article necessary to prove that no fundamental breach has been committed by the seller.

80 The first element to take into consideration is whether the breach committed results in such detriment to the other party so as to substantially deprive him of what he was entitled to expect under the contract.

81 “When referring to the nature of the contractual obligations, strict compliance with the contract is essential” [KOCH Comm. Art. 25 p.7]. As Schlechtriem states, in determining when a breach substantially deprived the other party of what he was entitled to expect under the contract, the contractual obligations accepted by the buyer are the only ones to be considered [SCHLECTRIEM p. 60]. Under the contract, Respondent was requested to deliver a 7 stand Magiprint Flexometix Mark 8 machine. Claimant’s particular purpose made known to our client was to receive a machine capable of printing coated and uncoated papers for wrapping, polyester and also metallic foils. This was exactly what our client complied with by delivering the Flexometix machine, for this reason, we did not substantially deprive buyer of what he was entitled to expect. In the same vein, Professor Liu supports that it is not the personal interest of the aggrieved party that matters but the expectation that can be deemed by analyzing the contract itself. [LIU/FB p. 82]

82 In assessing the gravity of the consequences of the breach, we must consider the contract’s overall value and the loss suffered by the buyer [KOCH Comm. Art. 25 p.7, PERALES p. 28-33]. Oceania Printers make claim that we have caused him a substantial detriment, in first place by its

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monetary loss, second by losing an important client and third by missing the possibility of having a privilege position in the market. We counter these three contentions as follows:

A. Oceania Confectioneries argues that they had a monetary loss resulting from the rescission of his contract with Oceania Confectioneries that was a consequence of the breach purportedly committed by our client. This cannot be admissible on the ground of the widely accepted principle of *res inter alios acta* [Principle of Lex Mercatoria No. IV.5.3]. Further, the alleged breach did not cause any significant detriment to the buyer since he resold the machine to Equatoriana Confectioneries [Record of the Problem, p.6].

B. Pursuant to the longstanding general principle of *venire contra factum proprium* it is submitted that Claimant is prevented from alleging a detriment as a consequence of losing an important client given that he was the one responsible of that result by its own negligence.

C. Lastly, given that the machine was capable of fulfilling the three tasks requested, Oceania Printers could continue with its commercial activities as in the market there was the possibility for the employment of those tasks, nor printing on 8mm aluminum foil did not deprive Oceania Printers of getting an important position in the market in accordance to P.O. no.2 q. 32 which determines that, Oceanic Generics will probably need printed foil for the blister packs of medicine they will produce beginning in early 2007. Therefore this did not result into a detriment (gravity of the consequences of the breach) that substantially deprived the buyer of what he was entitled to expect under the contract.

83 The **second** constitutive element of article 25 CISG concerns the issue foreseeability. As will be explained as follows, it was unreasonable for McHinery to have foreseen a detriment by delivering the Magiprint Flexometix Mark 8 machine.

84 Even if Oceania Printers was substantially deprived of what he was entitled to expect under the contract, there is no fundamental breach because this result was not foreseeable by Respondent. To stress this, article 25 CISG in its second sentence clearly establishes “[...] unless the party in breach did not foresee and a reasonable person of the same kind in the same

circumstances would not have foreseen such a result". As such foreseeability must be considered a conditional element included in article 25 CISG.

85 McHinery Equipment will demonstrate unforeseeability in its defense by analyzing the two elements for the foreseeability test: first, that by himself in no way anticipated the substantial detriment caused and second, that no reasonable person in his place would have done so. Consequently, in determining "foreseeability", the subjective and objective perspective of the party in breach must be considered [KOCH p.229, WILL p. 219, LIU/FB p. 84-97, Comm. Art. 25 p. 96]. What is more, in accordance with Schlechtriem the conclusion of the contract is concerned as the relevant time for knowledge of foreseeability.[SCHLECHTRIEM p. 60 ]

86 It is to be mentioned that these subjective and objective elements are cumulative, not alternative, and only when both elements have been proved, the Arbitral Tribunal would regard that a breach is no fundamental. [LIU/FB p. 96]

87 When explaining the subjective test, "the whole spectrum" of situations, facts and events at the relevant time must be taken into account to determine if the party in breach, by himself, could not anticipate the substantial detriment caused [KOCH Com. Art. 25 p. 14 / WILL p. 218, LIU/FB p. 94]. McHinery Equipment, by himself, could not foresee that the purported fundamental breach would result in a substantial deprivation for Oceania Printers as the Flexometix sold by Respondent was not capable to print on 8mm aluminum foil and consequently buyer lost its contract with Oceania Confectioneries, based in the following facts.

88 First, in accordance with C. E. No.3, a letter signed on 10 May 2002, Respondent was informed only about three facts: the signed contract between buyer and Oceania Confectioneries, the profits that Claimant could expect from this and the fact that the mentioned contract made the machine worthwhile, but Respondent was never informed from Oceania Printers that printing on 8mm aluminum foil was crucial in order to fulfill with the mentioned third contract.

89 It was until 15 July 2002, one month and a half after the conclusion of the contract, that McHinery Equipment was notified that printing on 8mm aluminum foil was elemental for Oceania Printers when purchasing the machine [R.E. No. 2]. Finally, in accordance with C.E. No.10,

Oceania Printers informed to McHinery Equipment in a letter signed on 15 August 2002 that the contract between buyer and Oceania Confectioneries had been cancelled and that Oceania Printers was requesting from our client the profits that he expected from the cancelled contract.

90 Therefore, McHinery Equipment could not have foreseen the mentioned substantial detriment that Oceania Printers now argues, as Respondent could not have been aware that in case the Flexometix machine could not print on 8mm aluminum foil, Claimant would loose its contract with Oceania Confectioneries.

91 Based on an objective test, we should ask: would a reasonable person of the same kind in the same circumstances have foreseen such a result? In order to determine what a reasonable person could have foreseen, a hypothetical merchant (someone engaged in the same line of trade, exercising the same function, with the same skills and position) comes into play. Therefore, when objectively viewed, it is determined that the part in breach could or should have known of the substantial detriment [LIU/FB p. 2.1/ KOCH Com. Art.25 p.14, / SCHLECHTRIEM Com. Art. 25 p.60/ WILL p.218].

92 According to the foregoing, any reasonable person, that is a trader and not a producer, who sells second hand Flexoprint machines, which constitute five to ten percent of its total business, and who benefits from a good business reputation [P.O. No.2 p. 24, 26] could not have foreseen the substantial detriment resulting from the delivery of a 8mm machine intended for confectionary uses, when such thickness (8mm aluminum foil) is not the standard used in the confectionary market [PO No. 2 p. 21] and was merely a suggested reference given by buyer. McHinery Equipment was never informed that this reference was an exact good description to be met in order to comply with the contract entered into with a 3<sup>rd</sup> party [C.E. No. 1]. Furthermore, in repeated occasions buyer expressed his conformity in respect to the machine.

93 For all the above mentioned, the detrimental consequences resultant from delivering the Magiprint Flexometix Mark 8 Machine would not have been foreseeable by any reasonable person in the same circumstances as the seller.

94 Therefore, as shown above the breach was not fundamental as it did not result in such detriment to the other party so as to substantially deprive him of what he was entitled to expect under the contract and it was unreasonable for McHinery to have foreseen a substantial detriment by delivering the Magiprint Flexometix Mark 8 machine.

### **III. SHOULD THE TRIBUNAL CONSIDER THAT A BREACH EXISTS, THE AMOUNT OF DAMAGES CLAIMED BY OCEANIA PRINTERS IS NOT CORRECTLY CALCULATED**

95 As demonstrated throughout the previous paragraphs, our client honored all the seller's contractual obligations and did not commit any breach of contract. However, if and only if, the tribunal considers that McHinery Equipment has not correctly fulfilled its obligations under the contract, Claimant is entitled to seek damages. On the other hand, even if our client is found liable to compensate claimant, it is submitted that the amount claimed by Oceania Printers is over-calculated.

#### **III.1 To the extent that the tribunal finds that a Respondent's breach exists, McHinery Equipment recognizes only an amount of USD\$20,000 refundable to Oceania Printers**

96 Even if respondent had not disputed some expenses [Procedural Order No.1], subject to adequate evidence, article 5 of the CIDRA Rules allows amendments to the Answer to the Statement of Claim in the course of the arbitral proceedings [CIDRA Arbitration Rules]. Pursuant to the foregoing provision, some of these expenses are hereby refuted since the acceptance of these damages run counter to applicable provisions of CISG. Through the next paragraphs it will be shown that the only amount undisputed will be the sum of USD\$20,000, being the difference between the original price of the machine and the \$22,000 received when claimant sold to Equatoriana Printers Ltd. the machine. Therefore, our client refuses to pay the amount of the cost of the adjustment of the plant, the cost of materials resulting from the testing of the machine but above all refuses to refund to Oceania Printers the USD\$3,200,000 being the amount of the four years contract with Oceania Confectioneries plus the possible renewal.

#### **III.1.1. Respondent refuses to pay the sum of USD\$50,000 being the cost of the adjustment of the Oceania Printer's plant for the installation of the machine**

97 In the Statement of Claim, Oceania Printers argues that if McHinery Equipment is found liable for damages, a sum that should be included in the final amount is the USD\$50,000 “being the cost to Oceania Printers of preparing its plant for the installation of the Magiprint Flexometix Mark 8 machine” [Statement of Claim, p.8]. According to this, this amount is related to the lack of conformity of the good and this is the reason why this amount should be included. To incorporate an amount as damages, this expense must not only be related but actually it must have been caused by the breach committed by the party [SCHLECHTRIEM, p.393; LIU/FB]. This relationship between the breach and the loss suffered, known as causality [KNAPP, p.540], must be proved by Oceania Printers in order to claim that the cause of the loss in the amount of USD\$50,000 was the breach committed by Respondent.

98 According to the Statement of Claim, McHinery Equipment’s breach consisted in the lack of conformity of the delivered machine since it was not able to print on 8 micrometer-thickness aluminum foils. From this, it is clear that if the tribunal decides that the breach of the party exists, the causality between the breach and the adaptation of the Oceania Printers’ plant cannot be found. Since this kind of machinery normally needs a wide space to be put into use, Oceania Printers would have needed this adaptation for any kind of Flexoprinter machine delivered. Hence, as the breach of Respondent allegedly arises out of the inability of the machine to print on 8 micrometer foils and Oceania Printers would have needed this adaptation for any Flexoprinter machine without importance if it was conforming or not, the link between the breach and the loss of this amount clearly does not come into being.

99 Thus, as this link of causality between the possible breach by McHinery Equipment and the expense for the adaptation of the plant for the machine is nonexistent, in the instant case the sum of the USD\$50,000 should not be included in the possible amount of damages awarded to Oceania Printers.

100 Moreover, not only the factor of causality is missing for the inclusion of the sum into the final amount awarded but as it is clear that causation and foreseeability are closely inter-related [LIU/FB] this loss was neither caused by the breach, nor foreseeable to our client.

101 Admittedly, our client was aware that an adaptation could have been possibly needed for the

use of the Magiprint Flexometix Machine Mark 8 if the plant intended for its use had no capacity to work with machines of such considerable dimensions. However, what was not foreseeable to our client was the cost of the adaptation of the Oceania Printers' plant or if this adaptation was really needed for this particular plant since it could be possible that the Oceania Printers' plant already had sufficient capacity to receive a printer of such characteristics. It is also uncontested that Oceania Printers never informed Respondent of the need of these adaptations to the plant, or the costs of the adaptation.

102 Taking into account that Oceania Printers failed to inform Respondent of the need for the plant's adaptation, and our client could not have been totally sure about the need for this expense and the amount of same, it is only sound that this sum cannot be included in the proper quantum of damages for it was not foreseeable to our client at the time of the conclusion of the contract [Delchi Carrier v. Rotorex].

**III.1.2. The sum of USD\$25,000 resulting from the cost of materials disbursed by McHinery Equipment in testing the machine, should not be refunded by Respondent since it is a run-of-the mill expense aimed at securing the correct operation of the machine**

103 An additional amount claimed by Oceania Printers to this arbitral tribunal are the USD\$25,000 being the cost of materials expended to test the Magiprint Flexometix Machines. These expenses include the cost of all the materials used by the personnel of McHinery Equipment in the final test run on 1<sup>st</sup> July when the final adjustments were made to the machine.

104 Article 38 of CISG establishes the duty to inspect the sold good. The first paragraph of the article states that "the buyer must examine the goods, or cause them to be examined". Given that the above-mentioned provision imposes on the buyer the duty to complete the examination after the good has arrived to its final destination [SCHLECHTRIEM, p.69] and that according to Professor Bianca it is irrelevant whether said examination is carried out by the buyer's employees or by any other person [BIANCA, p.297], it follows that the final test run by McHinery Equipment's personnel on July 1, must be considered as the examination performed on the account of the buyer.

105 It stands to reason that in carrying out a routine examination, some material should have been used to verify that the machine was able to correctly perform the tasks on the adequate materials and that the machine could work properly. According to this, it should be understood that Oceania Printers agreed on the 1<sup>st</sup> July to give costly materials to the personnel of Machinery Equipment for testing the machine and now Claimant considers these materials so pricey as to be included into the calculation of damages, seeking the refund of the USD\$25,000 when it previously accepted this expenditure.

106 Accordingly, given that article 38 establishes that the duty to inspect the good must be carried out by the buyer and that Mr. Butter accepted the use of the materials for the testing of the machine and the only reasonable way to inspect the machine was the use of the papers and materials on the machine, this tribunal should find that this expense must be borne by the buyer and therefore, it should not be included in the amount claimed as damages [CIETAC, 8 March 1996].

### **III.2 The Oceania Confectioneries' contract cannot be included in the amount of damages claimed by Oceania Printers**

107 Even if there are some damages that have been previously accepted, it will be proven that the Oceania Confectioneries' contract should not be taken into account in the final amount of damages claimed by Oceania Printers. In effect, the arbitral clause included into the contract excludes this matter from the Tribunal's jurisdiction based on the principle of "privity of contract", which prevents an arbitral tribunal from ruling upon a matter arising from a contract other than the one containing the arbitration agreement. In addition to this, for the inclusion of the renewal of the contract, article 74 of CISG establishes two limits for the recovery of damages, the first one is the causal link between the breach of contract and the loss [KNAPP, p.540; Cantonal Court Apenzell Auserhoden, 10 March 2003] and the second one is the foreseeability of the damage by the breaching party at the time of the conclusion of the contract. In this part of the memorandum it will be proved that under the facts of the present case both of these limitations for the claim of damages are present and for this reason our client is not entitled to pay, neither for the loss of the existent Oceania Confectioneries' contract, nor for its remote renewal.

### **III.2.1. The Oceania Confectioneries' contract should not be considered as a loss of profits resulting from the possible breach of contract on the part of Respondent**

108 On 10 May 2002 on a letter sent to the McHinery Equipment's president, Mr. Butter, president of Oceania Printers, mentioned a four year contract signed the day before with Oceania Confectioneries with a possible amount of profits of USD\$400,000 a year, subject to a possible renewal at the end of the period [C.E. No.3]. This was the one and only occasion where this contract was mentioned during all the commercial process and negotiations. In addition to this, it was not until the flexoprinter Machine turned to be a different good, from the one agreed to by the parties, that Mr. Butter mentioned it again to claim the USD\$400,000 per year as a loss of profits caused by a non conformity of the machine [C.E. No.9].

#### ***III.2.1.1. Pursuant to the wording of the arbitration clause in the contract at issue, the tribunal only has jurisdiction to rule upon issues arising thereof between seller and buyer***

109 As previously mentioned, it is necessary to prove that the loss of the Oceania Confectioneries' contract was related to the breach committed by respondent to include it in the total damages claimed. To decide over the insertion of the possible profits from the Oceania Confectioneries' contract into the claim, the Tribunal shall first scrutinize cautiously the arbitration clause contained in the contract between Claimant and Respondent [C.E.No.7] to determine whether it is empowered to rule over a claim arising out of a contract other than that one embodying the arbitral clause.

110 In an arbitral proceeding the parties are not obliged to solve all the issues of their dispute by the arbitral Tribunal [FOUCHARD, p.297]. From the wording of the arbitration clause contained in the main contract the Tribunal should find that they can only resolve the issues "between Seller and Buyer arising out of or relating to this contract" [C.E.No.7], this meaning that the arbitral Tribunal is not competent to decide over a claim arising from a third contract, unrelated to the one in issue here.

111 In closing, if the Tribunal determines that the arbitration agreement is sufficiently narrow so as to leave this matter out of its scope, the contested issue should thus be taken before a competent national court or arbitral tribunal [CIETAC, 28 May 1999].

**III.2.1.2. If, and only if, the Tribunal considers that the arbitration clause does not limit its jurisdiction to rule over this the Oceania Confectioneries' contract claim, the principle of "privity of contract" should then apply since the Convention does not govern claims arising from a third contract**

112 In case the Tribunal decides, after a thorough examination of the arbitration clause, that it has jurisdiction to rule over the Oceania Confectioneries' contract claim, the Tribunal should then turn to article 4 of CISG. This article states that "the Convention only governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract". From its wording, it is uncontestable that a claim for the loss arising out of a separate contract should be considered to fall outside of the scope of the Convention.

113 In support of the above, the High Court of Cologne decided that "the amplitude of the agreement can only be established by the terms in which the contract was made" and also found that there are claims that can fall out of the scope of the CISG as stated by article 4 [Oberlandesgericht Köln 16u1/01].

114 When this situation occurs, article 7(2) of CISG comes into play. In essence, this paragraph establishes that when the narrow scope of the Convention leaves some issues not expressly settled, a "potential powerful tool" shall be used, referring to general principles on which the Convention is based [LOOKOFSKY, p.52].

115 In the same vein, Honnold explains that some issues are not covered by the CISG. In those situations, questions that are not governed by both conventions shall be resolved via general principles of law [HONNOLD, p.102].

116 Furthermore, an additional reason why the arbitral Tribunal should refer to general principles rather than to a domestic law has to do with the fact that the latter would lead to a choice of law system [ZIEGEL] that would significantly complicate this Tribunal's task and could affect the neutrality and impartiality of the award.

117 Since this matter is not governed by the Convention and in these cases the solution given by such Convention is to submit to the general principles for the gap filling, the general principle

which should be applied is known as “*res inter alios acta*” or as is also known in the common law “privity of contract”. Under this well-established principle, when a contract between two parties contains an arbitration clause and one of the parties enters into a contract with a third party, the arbitral Tribunal which has to decide issues arising under the main contract does not have jurisdiction to decide issues arising under the third contract [HANOTIAU, p.323].

118 In furtherance of the above, in the dispute between a Singapore seller and a Belgian buyer, the Belgian Tribunal of Appeals ruled that any claim, including the award of damages, “shall arise from the same contract which is in dispute”. Moreover the claim shall be brought by one of the parties from the main contract and not from a third party, even if the action is presented by a party with a stretch relation with one of the parties [1997/AR/2235]. Likewise, in an arbitration taking place in Luxembourg between a Panamanian shipping company and a Liberian Shipping company, the Tribunal declined jurisdiction over claims arising from a third contract by stating that it had no “jurisdiction over any issue relating to the interpretation or application of the Freight Agreement (second contract) as such, no more than it permits the Tribunal to pass judgment over the relationship of the US Company (third party) and defendant under that contract” [ICC case no. 6829of 1992]. In reaching its decision, the Tribunal took into consideration the judgment rendered by the *Chambres réunies de la Cour de Cassation* of 12 July 1991, which held that a contract cannot have any effect beyond its own parties. The same line of reasoning was followed in a dispute between a Polish foreign trade company and a UK employer where it was stated that “the arbitral tribunal, at the hearing on 5 May 1987, reminded the parties that the Court of Arbitration is competent only to assess relationships arising from the contract between claimant and defendant within the framework of the arbitral clause contained in §7 of this contract. The competence of the Court does not include relationships between the subcontractor and a third party” [Case no. 69/86-05/1987].

119 For all the above-mentioned considerations, it is respectfully submitted that this Arbitral Tribunal must find that Claimant’s claim with regard to loss of profits resulting from the cancellation of the latter’s independent contract with Oceania Confectioneries, falls outside the scope of its jurisdiction and consequently, adjudication of the claim in point should be left to the competent instance [KSTP-FM, LLC v. Specialized Communications, Inc and Adtonics Signs Ltd]. Moreover, as Respondent is not privy to the contract entered into between Claimant and Oceania

Confectioneries, it cannot be held liable for any loss arising out of that contract [Caterpillar v. Usinor Industeel].

**III.2.2 If, and only if, the arbitral tribunal considers that the Oceania Confectioneries' contract should be included in the amount of damages claimed, the four-year renewal must not be integrated into the total amount of damages**

120 Along the preceding paragraphs, sound arguments have been put forward to persuade this arbitral tribunal that the Oceania Confectioneries' contract must not be included in the quantum of damages claimed by Oceania Printers. However, if and only if, the tribunal considers otherwise, it is submitted that the inclusion of the renewal period also claimed by Oceania Printers into the total amount would be excessive. On the facts of this case, the renewal in question should be considered only as a chance of profits [ZELLER, p. 129] which was not sufficiently viable as the buyer situation as well as the possible market future factors and other important elements to be taken into account clearly show this. Moreover, not only the renewal period should be considered as a weak chance of profits but this possible loss for Oceania Printers was not foreseeable for our client, an extra reason to exclude this claim from the final quantum awarded by the tribunal.

***III.2.2.1 The inclusion of the renewal would result on an unfair enrichment of the Claimant since this contract shall be considered only as a weak chance of profits and their award would run against CISG's principles***

121 One of the most important principles to be observed when awarding damages is the one that states that an award of damages should never enrich the plaintiff, this meaning that the plaintiff cannot recover more than his loss if the total amount alleged is conceded [LIU]. This principle is particularly relevant when awarding possible loss of profits since the inclusion of a potential third contract or a chance of profits that was not sure it would be obtained by plaintiff would result in the undue enrichment of the party. This principle exists for the reason that it would be clearly unfair that the plaintiff could obtain a greater benefit with the claim of damages than with the correct performance of the contract.

122 In the instant case, if the Tribunal decides to consider the renewal of the Oceania Confectioneries' contract into the final quantity, Oceania Printers would be unfairly favored. It is

important to note that this renewal was, as established before, merely a chance of profit and it was by all means uncertain whether this profit would accrue. For Professor Zeller, a chance of profits, such as a renewal of a contract, can only be included into a damages award if this chance is sufficiently strong. To determine the certainty of the possibility two main elements should be taken into account, the necessary experience into the subject matter to assure the renewal and the existence of other companies in the market that could have obtained this new contract in the place of the plaintiff [ZELLER, p.130; Amman Aviation Pty. Ltd v. Commonwealth].

123 While it is true that Oceania Printers had already obtained the contract with Oceania Confectioneries, the renewal however was a right under the contract that they could clearly not be positive to secure. With a view to incorporating the equitable principle of avoiding unjust enrichment, the Tribunal should incorporate the renewal of the contract into the total amount only if it is clear that from the experience and from the market conditions Oceania Printers was the only company that could obtain this renewal. On the facts, it is assumed that Oceania Printers did not have sufficient experience to be confident on obtaining of the period of renewal, this becomes clearer since the company had problems to perform the first period of the contract, thus making foreseeable that many other problems could have still arisen during the first period of the contract. Accordingly, it is irrefutable that Oceania Printers is not an expert in the printing of confectionery wrappers and in four years the company could have had many other issues with the correct performance losing for this situation the renewal period.

124 Furthermore, the second element of major importance to be taken into account is the competition prevailing in the market at the time of the conclusion of the renewal. From the wording of point 32 of P.O.No.2, it is reasonable to assume that at the time of the renewal of the Oceania Confectioneries contract, Oceania Printers would not be the only company capable of printing aluminum foils needed in the confectionery market. In support of the foregoing, regard is to be paid to the fact that even at the time of the conclusion of the contract, Oceania Printers faced competition in the market since Reliable Printers “had entered into a preliminary agreement to purchase an appropriate machine” in the event that a problem could arise from the contract with Oceania Printers [P.O. No.2, p.22].

125 Finally, an additional element for consideration by the tribunal is the four-year length of the

commercial relationship. Presumably, over this period many issues could have arisen resulting in the loss of the renewal of the contract or even the cancellation of the main contract as it actually occurred. This is an extra reason why the Tribunal should consider as very questionable this renewal since for many situations Oceania Printers cannot assert that they would obtain the benefits of the renewal of the contract. This is why for all the above mentioned arguments if the Tribunal considers the renewal of the contract into the final calculation of damages, producing an unjust enrichment inuring to Claimant, which result by all means is to be avoided.

***III.2.2.2 This four-year renewal was not foreseeable to respondent at the time of the conclusion of the contract and consequently, it must not be included in the final amount claimed***

126 The principle of avoidance of unfair enrichment is not the only one limiting the award of excessive damages, as article 74 of the CISG “will have to be read down somewhat to prevent the injured party being saddled with extravagant damage claims” [ZIEGEL, p.] The principal restriction contained in article 74 of the Convention, the one that establishes the basis for the calculation of damages, is the foreseeability rule. The article establishes that the damages awarded “may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known”. The two important elements into the foreseeability rule are the knowledge of the breaching party of the circumstances and the terms of the contract [SAIDOV].

127 Based on the above and in the light of the facts of the case, our client was not aware at the time of the conclusion of the contract of the elements contained neither in the second contract with Oceania Confectioneries, nor, by consequence, in the possible renewal agreement. The only occasion that Mr. Butter mentioned this contract, and its possible renewal, was through the letter of 10<sup>th</sup> may 2002 before the conclusion of the contract with McHinery Equipment. In this letter, the president of Oceania Printers never mentioned the conditions needed by the Confectioneries’ company for the correct performance of the contract and even omitted informing McHinery Equipment of the lapse of time considered for the renewal of the contract. [C.E. No.3]. It was not until the Statement of Claim that they requested the payment of the possible profits of the first four years of the contract and also for a period of renewal of four more years when Claimant never made clear if the length of the period of renewal.

128 For all the foregoing reasons, it is submitted that our client could not have foreseen neither the possible renewal, nor the amount of this possible loss. Damages cannot be claimed when the plaintiff cannot prove that that the seller knew or could not have been unaware of the conditions contained in the contract between the buyer and a third party [ZELLER, p.132]. For this reason, Oceania Printers is deprived of his right to include the contract with Oceania Confectioneries into the final quantum of damages.

**III.3 If, notwithstanding the foregoing, the Tribunal considers that the loss arising out of the Oceania Confectioneries' contract can, as a matter of law, be taken into account in the quantum of damages to be awarded, then the latter must by all means be less than the USD\$3,295,000 sought by Claimant**

129 The first aspect the Tribunal should take into account is that the reason why loss of profits are refunded to the injured party is because the Tribunal considers that Claimant's situation shall be the same as if the breach had not occurred [LIU; KNAPP, p.546]. If the contract would have been correctly performed Oceania Printers would have possibly obtained the profits from the Oceania Confectioneries' contract, but in this case Claimant would have never seek for the refund of the amounts resulting from the resale of the machine, the adaptation of the plant and the cost of the materials used to prove the machine. For this situation, if the Tribunal decides to concede the Oceania Confectioneries' loss of profits the other three amounts should therefore be excluded. If these amounts are also conceded this would constitute a double payment of damages and this would result in an obviously unfair situation, this point of view was followed by an US Court of Appeal in the case Rotorex Corp. v. Delchi Carrier S.p.A. [Case No. 95-7182, 95-7186].

130 Moreover, an additional matter that shall be considered by this tribunal is the fact that Oceania Printers did not inform of the conditions in which his contract with Oceania Confectioneries was agreed. For this situation, it was impossible for Respondent to foresee all the loss of profits that could have been produced by an incorrect performance of the contract [Bundesgericht 4C.179/1998/odi]. The same idea was followed by Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry [case 406/1998], which took the decision to reduce the damages amount from 50 per cent to 10 per cent since this same situation occurred.

131 According to article 77 of CISG the party relying in a breach of contract is obliged to take all the measures to mitigate the loss, including loss of profits that allegedly resulted from the breach. Failing to do so, “the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated” [case 54/1999]. In the present case, Claimant had the opportunity to fulfill a part of the contract with Oceania Confectioneries since the contract “called for some of the printing to be done on 10 micrometer foil” [P.O. No.2, p.21], and this was one of the tasks which the received machine could perfectly perform. If Claimant would had tried to perform the parts of the contract that he was able to, this measure should had been considered as a mitigation of loss, however since this measure was not taken the tribunal should reduce the USD\$400,000 per year of the contract in the proportion of this amount consisted on printing on 10 micrometer foil [Tribunal of international Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry. 406/1998].

132 Finally, as stated by Victor Knapp in his commentary of the article 74 of CISG, when awarding loss of profits in a damages demand the tribunal should take into consideration all the circumstances of the contract [KNAPP, p.543]. For this situation, the Tribunal shall keep in mind that the USD\$400,000 is not a net worth but a brute one since in this amount the necessary expenses that must be made to obtain this benefit are not included. The raw materials, the costs resulting from the working of the plant as it could be light, water or others are compulsory expenses that Oceania Printers would have done resulting in a net worth evidently minor than USD\$400,000 alleged. Supporting this, experts in the printer industry admit that the normal net worth in this kind of contracts is about 40% of the brute worth.

133 Summing up, if and only if, the Tribunal awards all the concepts of damages claimed, the final amount can not total USD\$3,295,000, but rather, this quantum should be considerably reduced at the discretion of the Tribunal taking into account all the circumstances surrounding this case.

Respectfully submitted,

(signed)

Counsel on behalf of McHinery Equipment