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INTRODUCTION

The Parties’ Dispute

The Procedural History

The Issues In Dispute, The Parties’ Position And Their Requests For Relief

The Decision Of The Tribunal

Further Steps In The Proceedings

Summary

Award

1 Introduction ................................................................. 231
2 The Parties’ Dispute .......................................................... 231
3 The Procedural History ....................................................... 234
4 The Issues In Dispute, The Parties’ Position And Their Requests For Relief ................................................................. 236
5 The Decision Of The Tribunal .............................................. 240
6 Further Steps In The Proceedings ........................................ 261
7 Summary ................................................................. 262
8 Award ........................................................................ 263

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** Students of Deakin University, Australia and Counsel for Deakin University in the 10th Vis (East) Moot in Hong Kong, 2012 / 2013.

*** Students of Deakin University, Australia and Counsel for Deakin University in the 20th Vis Moot in Vienna, 2012 / 2013.

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AUTHORS’ NOTES

In 2012/2013, the Deakin University School of Law competed in the Willem C. Vis International Commercial Arbitration Moot for the twentieth year, and the Vis (East) Moot for the tenth. In recognition of this anniversary, and inspired by the publication of The Danubia Files, the Deakin Law School has authored this mock partial award addressing the 2012/2013 Vis Moot problem.

The authors would like to thank and acknowledge their fellow 2012/2013 Vis Moot team members whose work helped contribute to the arguments put forward in this award – Vasudha Akula, Phoebe Blank, Devesh Khanna, Karthik Maganty, Seth Ryan and Chimène Vaughan. They would also like to particularly thank Eckart Brödermann, Christine Heeg, Thomas Weimann and the Chinese European Arbitration Centre for lending the use of the CEAC Rules to the Vis Moot – providing a fascinating basis for the 2012/2013 problem.

We hope you enjoy the analysis which follows, which we are sure will never fully settle the issues hotly contested in Hong Kong and Vienna in March 2013, but which we hope will nevertheless satisfy Mediterraneo Exquisite Supply Co, Equatoriana Clothing Manufacturing Ltd, and their representatives Mr. Fasttrack and Mr. Langweiler who (as we all know) after all these years are no strangers to arbitration or the CISG!
PARTIAL AWARD OF 30 SEPTEMBER 2013
ISSUED AT THE SEAT OF ARBITRATION, VINDOBONA, DANUBIA

BY

PROFESSOR PRESIDING ARBITRATOR

DR. ARBITRATOR 1
MS. ARBITRATOR 2

1 INTRODUCTION

This is a Partial Award issued in Vindobona, Danubia, in the dispute between Mediterraneo Exquisite Supply Co, Claimant, and Equatoriana Clothing Manufacturing Ltd, Respondent. It reflects the unanimous decision of the Tribunal and is rendered on 30 September 2013.

2 THE PARTIES’ DISPUTE

In this Partial Award, the Claimant is referred to as Mediterraneo Supply and the Respondent as Equatoriana Manufacturing. Mediterraneo Supply is a corporation registered in Mediterraneo, at 45 Commerce Road, Capital City, Mediterraneo and is represented by Mr. Horace Fasttrack, Advocate at the Court, of 75 Court Street in Capital City, Mediterraneo. Equatoriana Manufacturing is a corporation registered in Equatoriana, at 286 Third Avenue, Oceanside, Equatoriana and is represented by Mr. Joseph Langweiler, Lawyer, of 14 Capital Boulevard, Oceanside, Equatoriana. These proceedings concern a dispute arising out of a contract for the sale of polo shirts concluded on 5 January 2011.¹

This Tribunal has jurisdiction over the parties’ dispute because their contract contains, in Cl. 19, the following arbitration clause:

19. Arbitration. Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration administered by the Chinese European Arbitration Centre (CEAC) in accordance with the CEAC Hamburg Arbitration Rules.

(a) The number of arbitrators shall be three unless the amount in dispute is less than EUR 100,000 in which case the matter shall be decided by a sole arbitrator;

¹ Claimant’s Exhibit No. 1, pp. 12-3.
(b) The language to be used in the arbitral proceedings shall be English;

(c) The arbitration shall be held in Vindobona, Danubia. Hearings may take place in other locations.

(d) The arbitration shall be confidential;

(e) The parties agree that also the mere existence of an arbitral proceeding shall be kept confidential except to the extent disclosure is required by law, regulation or an order of a competent court;

(f) The arbitral tribunal shall apply the CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of the arbitration unless one of the parties requests the tribunal, within 4 weeks as of the constitution of the tribunal, to operate according to the CEAC Hamburg Arbitration Rules as in force at the conclusion of this contract.

This clause reflects in substance the model clause of the Chinese European Arbitration Centre. As is its duty, the Tribunal has conducted the proceedings in accordance with this clause subject to two exceptions:

1. Paragraph (f) provides for application of the CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of arbitration. These proceedings commenced on 6 July 2012; thus paragraph (f) would require application of the CEAC Rules effective September 2010. Following the parties’ agreement, it was determined that the CEAC Rules effective September 2012 would be applied instead, such agreement noted in the arbitral file at p. 10, n 1. This agreement means that the difficult questions that may result from temporal conflicts of arbitration rules do not arise in this case. All references in this Partial Award to the CEAC Rules are references to the Rules effective September 2012.

2. Paragraphs (d) and (e) require the confidentiality of these proceedings. However, after becoming apparent that these proceedings raise a number of issues of general importance particularly in the context of CEAC arbitration, the parties have agreed to waive their confidentiality rights and authorise the publication of this Partial Award in full. The Tribunal understands from correspondence with Professor Dr. Management of CEAC that it will make this Partial Award publicly available in due course.

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3 See CEAC Rules Art. 34(5).
As Danubia, the seat of arbitration, has adopted the Model Law with its 2006 amendments, the Model Law is the lex arbitri for these proceedings. The parties’ adoption of the CEAC Rules is an exercise of their power under Art. 19(1) Model Law and has therefore been respected at all times by the Tribunal. Art. 35(1) CEAC Rules grants party autonomy rights with respect to the governing rules of law, and the parties have exercised those rights through Cl. 20 of their contract which reads as follows:

20. **Applicable Law.** This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law.

This clause is a verbatim adoption of the model CEAC choice of law clause contained in paragraph [b] of Art. 35(1) CEAC Rules, with the exception of that model clause’s footnotes. This is recognised at footnote 2 in the parties’ contract⁴ which cross-references Art. 35 CEAC Rules.

Neither party disputes the applicability of the Model Law or the CEAC Rules, or the terms of the arbitration agreement and the choice of law clause.⁵ While a discrepancy does exist between the arbitration agreement as appearing in the contract and the Statement of Claim,⁶ and while Equatoriana Manufacturing originally accepted as correct the clause as recorded in the Statement of Claim,⁷ it is now clarified that the version appearing in Claimant’s Exhibit No. 1 is correct.⁸ There is however a significant area of disagreement as to the validity and effect of the choice of law clause.

Mediterraneo, Equatoriana and Danubia have all adopted the New York Convention. Furthermore, all tangible assets of Equatoriana Manufacturing are located in Equatoriana.⁹ Thus while not applicable in these proceedings per se, as the New York Convention will likely govern any enforcement proceedings following the rendering of this Partial Award, the Tribunal will be mindful of its provisions.

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⁴ Claimant’s Exhibit No. 1, p. 13.
⁵ See Statement of Defence, p. 36, para. 11.
⁷ Statement of Defence, p. 36, para. 11.
⁸ Procedural Order No. 2, p. 52, para. 10.
⁹ Procedural Order No. 2, p. 56, para. 28B.
3 THE PROCEDURAL HISTORY

These proceedings originate in the Application for Arbitration filed by Mr. Horace Fasttrack for Mediterraneo Supply on 1 July 2012. (The reference to 2 July 2012 in the CEAC letter at pp. 22 – 4 of the file appears to be a clerical error, though nothing turns on this point.) This Application comprised a Notice of Arbitration\(^\text{10}\) as well as a Statement of Claim\(^\text{11}\) that was accompanied by Claimant’s Exhibit Nos. 1 to 7. In accordance with Art. 3(2) \textit{CEAC Rules}, these proceedings are deemed to commence on 6 July 2012.\(^\text{12}\) These documents were transmitted to Equatoriana Manufacturing pursuant to a CEAC letter dated 12 July 2012, appearing at pp. 27 – 8 of the file, and on 4 August Equatoriana Manufacturing filed its Response and Statement of Defence\(^\text{13}\) accompanied by Respondent’s Exhibit No. 1.

CEAC confirmed this Tribunal’s full constitution by letter dated 6 September 2012 appearing at pp. 46 – 7 of the file. The Tribunal, consistuted by three members in accordance with paragraph (a) of the arbitration agreement, comprises:

1. Professor Presiding Arbitrator (Chairperson), of the firm Wise, Strong & Clever, 25 Court Street, Vindobona, Danubia.

2. Dr. Arbitrator 1, of 14 Advocate Way, Oceanside, Mediterraneo, appointed by Mediterraneo Supply.

3. Ms. Arbitrator 2, of 414 University Avenue, University City, Equatoriana, appointed by Equatoriana Manufacturing.

Unqualified Declarations of Independence and Impartiality were provided by all three members of the Tribunal, as noted at p. 45 of the file, pursuant to Art. 11 \textit{CEAC Rules}. The Tribunal notes that by way of subsequent disclosure, Professor Presiding Arbitrator had in 2011 / 2012 previously presided over a case (involving a different institution) where both Mr. Fasttrack and Mr. Langweiler represented (different) parties. No issue was taken to this point, and both parties expressly confirmed that no objection was taken to the Tribunal’s constitution or composition.\(^\text{14}\) The Tribunal notes in passing that Art. 3.1.3 \textit{IBA Guidelines on Conflicts of Interest in International Arbitration of 2004} foresee party appointment on two or more occasions as necessary to warrant disclosure, and even then only categorise that matter on the orange list.

\(^{10}\) CEAC Rules Art. 3(1).
\(^{11}\) CEAC Rules Art. 20.
\(^{12}\) See the CEAC letter on file at pp. 22-4.
\(^{13}\) CEAC Rules Arts. 4 and 21.
\(^{14}\) Procedural Order No. 2, p. 56, para. 32.
On 2 October 2012, the Tribunal, through a conference call, authorised Professor Presiding Arbitrator to make procedural decisions subject to the full Tribunal’s subsequent confirmation. On 4 October 2012, a conference call was then conducted between Professor Presiding Arbitrator, Mr. Fasttrack and Mr. Langweiler. Procedural Order No. 1 was then issued on 5 October 2012. It was agreed by the parties that issues of quantum and costs would not be addressed at this stage of the proceedings. Consistently with this agreement, this Partial Award resolves issues of liability only.

It was agreed on 4 October 2012, consistently with Art. 24 CEAC Rules, that detailed written submissions would be provided by Mediterraneo Supply on 6 December 2012 and Equatoriana Manufacturing in reply on 17 January 2013. These submissions were duly served. It was also agreed that further evidence would be gathered pursuant to a process involving the raising of questions on or before 25 October 2012. This further evidence is recorded in Procedural Order No. 2, issued by Professor Presiding Arbitrator on 1 November 2012. It was subsequently clarified that Procedural Order No. 2 contained a clerical error by containing two paragraphs [28]. While the Order was not revised, for the purposes of this Partial Award these paragraphs are referred to as paragraphs [28A] and [28B] for clarity.

Paragraph (c) of the arbitration agreement confirms (consistently with Art. 18(1) CEAC Rules) that hearings may take place outside Vindobona, Danubia. Oral hearings were conducted in these proceedings from 11 to 17 March 2013 in Hong Kong and then from 22 to 28 March 2013 in Vienna. At the conclusion of those hearings, after both parties expressing satisfaction of being accorded the procedural fairness required by Art. 18 Model Law and of adequately developing and putting their cases, the proceedings were declared closed pursuant to Art. 31(1) CEAC Rules.

This Partial Award is now rendered on 30 September 2013. Though Art. 31A(1) CEAC Rules imposes a nine month limit (in this case 6 June 2013) for the rendering of a final award, the parties have agreed to an extension of this timeframe for the purposes of both this Partial Award and the Final Award which will follow in due course.

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15 See CEAC Rules Art. 33(2).
16 Procedural Order No. 1, p. 49, para. 9.
17 Cf. CEAC Rules Art. 25.
18 Procedural Order No. 1, p. 50, para. 12.
19 Procedural Order No. 1, p. 50, para. 11.
20 See also CEAC Rules Art. 17(1).
4 THE ISSUES IN DISPUTE, THE PARTIES' POSITION AND THEIR REQUESTS FOR RELIEF

This dispute arises out of a contract between the parties dated 5 January 2011 concerning the sale of 100,000 polo shirts.\(^\text{21}\) These shirts were to conform to specifications set out in Annex 1 to the contract\(^\text{22}\) and there is no dispute in relation to these requirements\(^\text{23}\) such that Annex 1 was never tendered in evidence. The dispute instead concerns allegations of late delivery, and a further breach of contract arising from the alleged use of child labour by Equatoriana Manufacturing.

With respect to the alleged late delivery, the parties’ contract nominated a delivery date of 19 February 2011.\(^\text{24}\) Pursuant to the FAS Incoterm adopted (as understood according to Incoterms 2010), Oceanside, Equatoriana was the nominated place of delivery.\(^\text{25}\) Thus under the contract as it stood on 5 January 2011, Equatoriana Manufacturing was to deliver the goods at Oceanside, Equatoriana, ready for loading on 19 February 2011.\(^\text{26}\) No dispute arises up to this point. What is in dispute, is whether the contractual delivery date was orally amended to 24 February 2011 as a result of a telephone call which took place on 9 February 2011. This implicates three separate legal questions which must be resolved by this Partial Award:

1. The parties each tendered witness statements composed by their respective officers involved in the 9 February 2011 telephone conversation. Respondent’s Exhibit No. 1 is the witness statement of Mr. Tomas Short, who was unable to appear for questioning at the oral hearings. Mediterraneo Supply has argued (and Equatoriana Manufacturing has contested) that given his absence this witness statement should not be admitted into evidence.

2. Clause 20 of the parties’ contract purports to choose the CISG as a governing law, without regard to any national reservations, however the State of Mediterraneo has made a written form declaration pursuant to Art. 96 CISG. Mediterraneo Supply has argued that Cl. 20 does not displace the operation of Mediterranean written form requirements, and that as a matter of law no oral amendment could take place. Equatoriana Manufacturing disputes this point, arguing that freedom of form applies to any amendment which may have occurred.

\(^{21}\) Claimant’s Exhibit No. 1, pp. 12-3.
\(^{22}\) Claimant’s Exhibit No. 1, p. 12, Cl. 1.
\(^{23}\) Procedural Order No. 2, p. 52, para. 9.
\(^{24}\) Claimant’s Exhibit No. 1, p. 12, Cl. 2; FAS Incoterms 2010, Cl. A4 & B4.
\(^{25}\) Claimant’s Exhibit No. 1, p. 12, Cl. 2; FAS Incoterms 2010, Cl. A4 & B4.
\(^{26}\) Cf. Procedural Order No. 2, p. 53, para. 15.
3. On the basis that oral modifications are permissible at law, Equatoriana Manufacturing contends that an oral amendment to the delivery date did in fact occur. This is contested by Mediterraneo Supply, who ultimately claims $27,500 USD calculated in accordance with Cl. 10(b) of the parties’ contract$^{27}$ on the basis of Equatoriana Manufacturing breaching the original contractual delivery date.

The context to this telephone call (and the oral amendment issue) is that Mediterraneo Supply is in the business of procuring goods for distribution to other members of its corporate group$^{28}$ and had contracted with Equatoriana Manufacturing for 100,000 polo shirts after a previous third party contract to procure “Yes Casual” brand polo shirts for the related entity Doma Cirun went unperformed due to supplier bankruptcy.$^{29}$ The original contractual delivery date would have allowed Doma Cirun to have the replacement “Yes Casual” polo shirts ready for sale on 15 March 2011, the launch date of the summer selling season.$^{30}$ The 9 February 2011 telephone call was prompted by unexpected industrial action in Equatoriana Manufacturing’s supply chain causing one of its suppliers to fail in delivering necessary supplies on time.$^{31}$ The new delivery date discussed in the telephone call was 24 February 2011$^{32}$ and the shirts were delivered on that date,$^{33}$ arriving in Doma Cirun stores on 20 March 2011.$^{34}$ With respect to Mediterraneo Supply’s claim for late delivery, the parties are fundamentally at odds as to whether the telephone call reflected merely a practical adjustment to performance which remained in breach by five days$^{35}$ or an actual amendment to the contractual delivery date meaning performance was in fact timely.$^{36}$

Before departing from the allegation of late delivery, the Tribunal notes that Mediterraneo Supply’s claim (US$ 27,500) is relatively small compared to the total sum at stake in these proceedings. This matter was discussed at the conference call of 4 October 2012.$^{37}$ Notwithstanding both parties’ awareness that their legal fees and arbitration costs may exceed the damages claimed for delay,$^{38}$ it was agreed that full argument on all three delay-related issues should be heard.$^{39}$ Given this agreement$^{40}$

\begin{footnotes}
\footnote{Claimant’s Exhibit No. 1, p. 12.}
\footnote{Statement of Claim, p. 5, paras. 5 and 7; Cf. Statement of Defence, p. 35, para. 1.}
\footnote{Statement of Claim, p. 6, para. 8; Claimant’s Exhibit No. 2, p. 14, para. 1.}
\footnote{Statement of Claim, pp. 6-7, paras. 8–11; Claimant’s Exhibit No. 2, p. 14, paras. 1–3; see also Statement of Defence, p. 35, para. 6.}
\footnote{Claimant’s Exhibit No. 2, p. 14, para. 4; Procedural Order No. 2, p. 53, para. 12.}
\footnote{Statement of Claim, p. 7, para. 13.}
\footnote{Statement of Claim, p. 7, para. 17; Statement of Defence, p. 35, para. 8.}
\footnote{Statement of Claim, p. 8, para. 17.}
\footnote{Statement of Claim, p. 11, para. 33.}
\footnote{Statement of Defence, p. 36, para. 14.}
\footnote{Procedural Order No. 1, p. 48, para. 3.}
\footnote{See CEAC Schedule of Costs, para. 2; see also Annex to the CEAC Schedule of Costs.}
\footnote{Procedural Order No. 1, p. 48, para. 3.}
\end{footnotes}
and the parties’ mandatory rights to procedural fairness, both of which are considerations relevant to enforcement, the Tribunal reluctantly acceded to this request. This has undoubtedly added to the time taken and cost incurred in these proceedings, however given the fundamental importance of party autonomy in international commercial arbitration the decision was and is ultimately that of the parties.

The breaches Mediterraneo Supply alleges concerning the use of child labour represent, by way of contrast, the bulk of its claim. These alleged breaches stem from three peculiar aspects of this case – the high ethical standards observed by (i) the Oceania Plus Enterprises group which includes Mediterraneo Supply and (ii) the Oceanian market in general, as well as (iii) the reflection of those ethical standards in contracts entered into by members of the Oceania Plus Enterprises corporate group.

Mediterraneo Supply had previously contracted with Equatoriana Manufacturing, in 2008. At that time, pursuant to group policy, Equatoriana Manufacturing was audited for compliance with Oceania Plus Enterprises’ ethical policy – suspicions of child labour use were raised though the evidence was not clear and after discussions the audit was approved. Given the rush basis of the present contract, no further audit was conducted on this occasion.

Shortly after the “Yes Casual” polo shirts became available for sale, on 5 April 2011, a television broadcast alleged the use of child labour at Equatoriana Manufacturing facilities, including the employment of children as young as eight working in appalling conditions. A subsequent newspaper article published on 8 April 2011 discussed generally the use of child labour in leading national and international firms with a focus on the technology and clothing industries. While the “Yes Casual” polo shirts were not the subject of the television broadcast and while there is no evidence

40 See Model Law Art. 19(1).
41 Model Law Art. 18; see also CEAC Rules Art. 17(1).
42 Model Law Arts. 34(2)(a)(ii) & (iv); New York Convention Arts. V(1)(b) & (d).
44 Statement of Claim, p. 6, para. 6.
45 Statement of Claim, p. 6, para. 20.
46 Statement of Claim, p. 6, para. 9.
47 Claimant’s Exhibit No. 2, p. 14, para. 2; Statement of Claim, p. 6, para. 9; Cf. Statement of Defence, p. 35, para. 3.
48 Statement of Claim, p. 8, para. 18; see Claimant’s Exhibit No. 5, p. 18, para. 1.
49 Claimant’s Exhibit No. 4, p. 17; Statement of Claim, p. 8, para. 19.
50 Procedural Order No. 2, p. 54, para. 17; Statement of Claim, p. 8, para. 18.
that the newspaper article specifically implicated Equatoriana Manufacturing and similarly did not implicate the polo shirts. Mediterraneo Supply alleges that severe consequences resulted. Doma Cirun avoided its contract with Mediterraneo Supply on 8 April 2011, and Mediterraneo Supply in turn purported to avoid its contract with Equatoriana Manufacturing.

Mediterraneo Supply contends that by using child labour, Equatoriana Manufacturing breached the parties’ contract in such a way as to justify its avoidance as well as a claim for damages and restitution. Its Statement of Claim alleged one breach of contract, namely lack of conformity with the “Yes Casual” shirts’ particular purpose, and this alleged breach appears to be the basis of its purported termination. During oral argument, a second breach of contract was alleged by Mediterraneo Supply, being breach of Cl. 12 as an express term of the parties’ contract. Though not raised in its Statement of Claim, this argument related to the same circumstances as the breach already alleged. Article 1 IBA Rules of Ethics for International Arbitrators establish a duty on the Tribunal to provide a ‘just and effective resolution of [the parties’] disputes’ and this instrument is binding on this Tribunal in the context of CEAC arbitration. Considering this duty of the Tribunal, its discretion over the conduct of the proceedings and its view that allowing the alternative claim would not be “inappropriate” within the meaning of Art. 22 CEAC Rules, the second alleged breach was entertained during oral argument and Equatoriana Manufacturing took no objection. Nonetheless, Equatoriana Manufacturing’s position was and is that it did not breach its obligations in any respect. It further and in the alternative disputes Mediterraneo Supply’s right to avoid.

51 See Claimant’s Exhibit No. 5, p. 18, para. 2.
52 Procedural Order No. 2, p. 54, para. 17.
53 Statement of Claim, pp. 8-10, paras. 20-1 and 26-9; Claimant’s Exhibit No. 5, p. 18, para. 3; Claimant’s Exhibit No. 6, p. 20, para. 2.
54 Claimant’s Exhibit No. 5, pp. 18-9, para. 4; Claimant’s Exhibit No. 6, p. 20, para. 3; Statement of Claim, p. 9, paras. 22-23; cf. Statement of Defence, p. 35, para. 9.
55 Statement of Claim, p. 11, paras. 34-6.
56 Statement of Claim, p. 11, para. 34.
57 Claimant’s Exhibit No. 6, p. 20, para. 3.
58 Claimant’s Exhibit No. 1, p. 12.
59 See Statement of Claim, p. 11, para. 34.
61 CEAC Rules Art. 17(1).
62 Claimant’s Exhibit No. 7, p. 21, para. 3; Statement of Claim, p. 9, para. 24; Statement of Defence, p. 36, para. 10.
63 Statement of Defence, p. 36, paras. 13 and 15.
64 Statement of Defence, p. 36, para. 13; Cf. para. 15.
At the time of Mediterraneo Supply’s purported avoidance, Equatoriana Manufacturing denied the use of child labour in the production of the “Yes Casual” polo shirts.\(^{65}\) This denial was repeated in its Statement of Defence.\(^{66}\) There was, and remains, no direct evidence before the Tribunal that (i) child labour was used by Equatoriana Manufacturing in the production of the “Yes Casual” polo shirts, (ii) child labour was used by Equatoriana Manufacturing in its broader operations at or around the time of the parties’ contract, or (iii) Equatoriana Manufacturing has ever used child labour in its operations. Pursuant to Art. 27(1) CEAC Rules, each party bears the burden of proving the facts upon which it relies. The only use of child labour actually established on the record is use by an Equatoriana Manufacturing supplier as disclosed in the 2008 audit.\(^{67}\) The child labour allegations were discussed during the 4 October 2012 conference call. At that time it was agreed, for the purposes of this arbitration, that (without admission) it would be assumed that Equatoriana Manufacturing had used child labour in at least one of its plants, but that no child labour had been used in the production of the “Yes Casual” polo shirts at issue in this dispute.\(^{68}\) This is the basis upon which the breach of contract issues relating to child labour have been considered by the Tribunal.

5 \textit{THE DECISION OF THE TRIBUNAL}

Four issues thus fall for determination by the Tribunal in this Partial Award:

1. What is the admissibility of Respondent’s Exhibit No. 1?

2. As a matter of law, are oral modifications to the parties’ contract permitted?

3. If such modifications are permitted, did an oral modification of the original delivery date in fact occur?

4. Was Equatoriana Manufacturing, on the basis of the child labour agreement, in breach of its obligations – and was Mediterraneo Supply entitled to avoid the contract?

These issues are now be addressed in turn.

\(^{65}\) Claimant’s Exhibit No. 7, p. 21, para. 2.
\(^{66}\) Statement of Defence, p. 36, para. 15.
\(^{67}\) Procedural Order No. 2, p. 51, para. 3.
\(^{68}\) Procedural Order No. 1, p. 49, para. 8.
5.1. **THE ADMISSIBILITY OF RESPONDENT’S EXHIBIT NO. 1 – THE WITNESS STATEMENT OF MR. TOMAS SHORT**

Equatoriana Manufacturing takes no issue as to the admissibility of Claimant’s Exhibit No. 2, being the witness statement of Mr. Russell Long. The parties’ evidentiary dispute centres around Respondent’s Exhibit No. 1 – the statement of Mr. Tomas Short. Mediterraneo Supply takes issue with this statement’s admissibility as Mr. Short was unable to appear for questioning at either oral hearing.\(^69\) While domestic legal systems differ in treating evidentiary issues as procedural or substantive in nature, they are squarely procedural in Model Law arbitrations.\(^70\) Nevertheless, during the 4 October 2012 conference call, Professor Presiding Arbitrator ruled that this issue should be argued before the full tribunal\(^71\) and that argument was duly heard. The matter now falls to be resolved in this Partial Award.

### 5.1.1. MEDITERRANEO SUPPLY’S POSITION

Mediterraneo Supply’s position during the 4 October 2012 conference call\(^72\) was that Mr. Short’s statement should be disregarded as he had indicated he would not attend the oral hearings. When those hearings took place in March 2013 Mr. Short (as expected) did not appear and Mediterraneo Supply maintains that his statement must be excluded. While some discussion took place during the oral hearings as to the possibility of admitting the statement and simply according it the evidentiary weight it deserves, Mr. Fasttrack’s instructions remain that Mediterraneo Supply seeks the statement’s exclusion and that is the basis upon which its case was presented.

Mediterraneo Supply contended that the *IBA Rules on the Taking of Evidence in International Arbitration of 2010* should be applied to resolve this issue. It noted the Tribunal’s procedural discretions with respect to witness examination and the admissibility of evidence\(^73\) as well as the Tribunal’s broad procedural discretion\(^74\) provide ample authority on general principles to exclude the statement. Mediterraneo Supply argued that notwithstanding they were not chosen by the parties,\(^75\) the *IBA Rules* should be utilised to resolve this issue for several reasons. Primarily, it emphasised that the provisions referred to above may give the Tribunal relevant

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\(^69\) Procedural Order No. 1, pp. 48-9, paras. 4-5.


\(^71\) Procedural Order No. 1, pp. 489, para. 5.

\(^72\) Procedural Order No. 1, pp. 489, para. 5.

\(^73\) *CEAC Rules* Arts. 27(4) and 28(2).

\(^74\) *Model Law* Art. 19(2).

\(^75\) Procedural Order No. 2, p. 55, para. 25.
evidentiary powers but do not specify how those powers are to be exercised; and that the *IBA Rules* ‘are designed to supplement the legal provisions and the institutional rules that apply to the conduct of the arbitration’. It noted that Art. 19(2) *Model Law* provides a legal basis for the Tribunal’s adoption of the *IBA Rules* in the absence of party agreement.

Mediterraneo Supply relied on Art. 4.7 *IBA Rules* to support the exclusion of Mr. Short’s statement. Article 4.7 *IBA Rules* provides that a witness statement must be disregarded if the witness is requested to provide oral testimony, fails to appear without a valid reason, and there are no exceptional circumstances justifying admitting the statement. Mediterraneo Supply argued that its request for examination during the 4 October 2012 conference call was a request within the meaning of Art. 8.1 *IBA Rules*; Mr. Short’s reasons for non-attendance are not “valid reasons”; nor are there “exceptional circumstances”. It supported this argument by reference to its mandatory rights to procedural fairness, arguing that admitting the statement without the opportunity to test it would contravene those standards. Mediterraneo Supply referred the Tribunal to Art. 27(1) *CEAC Rules* and emphasised that Equatoriana Manufacturing has the burden of proving the evidence it seeks to rely on. It argued that this must necessarily occur by way of admissible evidence.

5.1.2. EQUATORIANA MANUFACTURING’S POSITION

Equatoriana Manufacturing submitted, to the contrary, that the *IBA Rules* should not be applied by the Tribunal. It further submitted that whether or not they are so applied, Mr. Short’s witness statement should be admitted without supporting oral testimony.

Equatoriana Manufacturing referred the Tribunal to the IBA’s own Working Party which explained that ‘there is not a single best way to conduct all international arbitrations’; flexibility is especially important; the *IBA Rules* do not intend to limit that flexibility; and they should be used in the manner that best suits parties and tribunals. It submitted that the only procedural rules binding on the Tribunal are the *CEAC Rules*, chosen by the parties. Equatoriana Manufacturing took no issue with

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77 Procedural Order No. 1, p. 48, para. 4.


80 *Model Law* Art. 18; see also *CEAC Rules* Art. 17(1).

81 *Supra* fn 76, at pp. 3-4; see also *IBA Rules* Preamble 2.
Mediterraneo Supply’s analysis of Arts. 27(4) & 28(2) CEAC Rules per se, however argued that these provisions must be read against Art. 27(2) CEAC Rules which provide for the prima facie admissibility of witness statements ‘[u]nless otherwise directed by the arbitral tribunal’. To further support its contention against use of the IBA Rules, Equatoriana Manufacturing referred to the Preamble of the Rules themselves which note the “overriding principle”\(^{82}\) that parties are ‘entitled to know, reasonably in advance […] the evidence on which the other [p]arties rely’.\(^{83}\) Equatoriana Manufacturing argued that addition to the IBA Rules having no application in law, as a matter of policy they should also be disregarded as this case in no way implicates this overarching policy concern.

Equatoriana Manufacturing argued, contrary to Mediterraneo Supply’s position, that excluding Mr. Short’s statement would actually infringe its own due process rights. It emphasised that Mr. Short’s statement is its sole piece of evidence concerning the alleged oral amendment to the contractual delivery date. Thus it contended that the statement’s exclusion would leave the Tribunal to assess this merits issue solely on the basis of evidence adduced by Mediterraneo Supply with Equatoriana Manufacturing having no right of contradiction. On this basis, it argued that whether or not the IBA Rules are applied, Mr. Short’s statement should nevertheless be received into evidence. To further support this contention Equatoriana Manufacturing noted that (i) any oral testimony of Mr. Short would be unlikely to assist the Tribunal given that his statement largely comprises a retrospective opinion of how he interpreted the 9 February 2011 telephone conversation which cannot readily be proven or disproven as fact, and (ii) Mr. Short has left the employ of Equatoriana Manufacturing\(^{84}\) meaning it has no power to compel his attendance and furthermore the laws of both Danubia and Equatoriana do not provide for him to be summoned through either States’ courts.\(^{85}\)

### 5.1.3. THE TRIBUNAL’S FINDINGS AND DECISION

The due process implications of this issue, reinforced by Arts. 34(2)(a)(ii) & (iv) Model Law and Arts. V(1)(b) & (d) New York Convention, have required the Tribunal to carefully consider this evidentiary point. After closely reviewing the parties’ submissions, the Tribunal has decided that the witness statement of Mr. Short should be admitted into evidence.

The Tribunal acknowledges its evidentiary discretions under Arts. 27(4) & 28(2) CEAC Rules, however agrees with Equatoriana Manufacturing that Art. 27(2) CEAC

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\(^{82}\) Supra fn 76, at. p. 4.

\(^{83}\) IBA Rules Preamble 3.

\(^{84}\) Procedural Order No. 1, p. 48, para. 4; Procedural Order No. 2, p. 55, para. 26.

Rules provides for the prima facie admissibility of witness statements. Though frequently resorted to in international arbitration, there is no need to apply the IBA Rules as a gap-filling mechanism in this specific context. As the Tribunal will not apply the IBA Rules, it is unnecessary to decide whether Mr. Short’s reasons for non-attendance are “valid” or the circumstances “exceptional” within the meaning of Art. 4.7 IBA Rules.

The Tribunal notes the due process difficulties this issue ostensibly raises for each party. This Tribunal does have a duty to use its best efforts to render an enforceable award. However, the parties’ own choice of procedural rules provide for the prima facie admissibility of witness statements and in this case by following the parties’ “stipulated procedural norms” the Tribunal is best able to comply with its duty particularly given that party agreement is specifically referred to in Art. 34(2)(a)(iv) Model Law and Art. V(1)(d) New York Convention.

Though finding that Mr. Short’s witness statement is admissible, and despite the due process implications this issue raised, the Tribunal notes that (as will become clear in its analysis of Art. 8 CISG) this finding ultimately has little impact on the resolution of Mediterraneo Supply’s US$ 27,500 claim for alleged delay.

5.2. THE PERMISSIBILITY OF ORAL MODIFICATIONS TO THE PARTIES’ CONTRACT AT LAW

During the 4 October 2012 conference call, Mr. Fasttrack requested Professor Presiding Arbitrator to rule as a matter of law that any amendments to the parties’ contract required written form. This request was based on the State of Mediterraneo’s declaration under Art. 96 CISG which was made upon ratification and duly deposited, Art. 96 CISG implicating written form requirements for ‘a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention’.

Freedom of form is the default rule under the CISG. Parties to CISG contracts have the right to incorporate “no oral modification” clauses however the parties in this
case did not do so and there are no further established industry practices relating to such clauses or oral modifications in general. This issue is therefore entirely one as to the applicable law and its effect. While determination of the applicable substantive law in arbitration is a procedural issue and Professor Presiding Arbitrator was authorised on 2 October 2012 to make procedural determinations, this issue was considered outside the scope of that authorisation and thus must now be resolved in this Partial Award.

The parties’ choice of law clause adopts the CISG ‘without regard to any national reservation’. The parties disagree on whether those words displace the Art. 96 CISG declaration of the State of Mediterraneo, as well as the effect of the Art. 96 CISG declaration should it be found applicable.

5.2.1. MEDITERRANEO SUPPLY’S POSITION

Mediterraneo Supply did not advance what might have been the obvious argument, in light of Art. 12 CISG, that the effect of an Art. 96 CISG declaration cannot be derogated from. Indeed, at the oral hearings it acknowledged that a tribunal would rightly be hesitant in finding an institution’s model choice of law clause (formulated on the basis of extensive research and consultation) ineffective. Instead, its argument was far more nuanced – it submitted that Cl. 20 does not actually intend to exclude the operation of Mediterraneo’s Art. 96 CISG declaration. It then argued that, the declaration being applicable, any modification to the parties’ contract required written form.

Mediterraneo Supply contended first, that the reference to “national reservation” within the Art. 35(1) CEAC Rules, paragraph [b] model choice of law clause (adopted by the parties) refers to a now outdated reservation of the People’s Republic of China and does not purport to exclude the State of Mediterraneo’s official Art. 96 CISG declaration. It secondly contended that as a matter of public policy, where any party has its place of business in an Art. 96 CISG reservatory State, any contractual amendments require written form. It relied on the US District Court authority of Zhejiang Shaoxing Yongli Printing & Dyeing Co Ltd v Microflock Textile Group

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93 CISG Art. 29(2); see also CISG Art. 6.
94 Procedural Order No. 2, pp. 52-3, para. 11.
96 Procedural Order No. 1, p. 48, para. 1.
97 Procedural Order No. 1, p. 49, para. 6.
98 Claimant’s Exhibit No. 1, p. 13, Cl. 20.
In that case, a plaintiff was granted summary judgment on a claim for unpaid invoices under a US–China contract. Given the Chinese Art. 96 CISG declaration, it was held that as a matter of law any alleged contractual modifications were required to be evidenced in writing and no such evidence had been led. Mediterraneo Supply therefore argued that Art. 96 CISG’s effect here is to infer an obligation for the parties to comply with Mediterraneo’s form requirements. Those requirements are that all international sales contracts and any amendments to them must be in writing.

5.2.2. EQUATORIANA MANUFACTURING’S POSITION

Equatoriana Manufacturing’s primary submission was that Cl. 20 does exclude the Mediterranean Art. 96 CISG declaration. It argued that irrespective of the CEAC Rules’ history and their Sino–European context, Cl. 20 is clear and unambiguously expresses the intent to disregard any national reservations. Preamble D CEAC Rules confirms that those Rules may be used in arbitrations where neither party is from China. Thus the Art. 96 CISG declaration of Mediterraneo is within the scope of the reservations excluded by Cl. 20 and the writing requirements of that State do not apply. Equatoriana Manufacturing argued that to the extent Art. 12 CISG appears to preclude this result, Cl. 20 should be interpreted as choosing the CISG as “rules of law” rather than “law” per se in order to give effect to and validate the parties’ clear intent.

Equatoriana Manufacturing further argued that even if Mediterraneo’s Art. 96 CISG declaration applies, it does not automatically enliven that State’s writing requirements and oral modifications are nonetheless permitted. In support it relied on the US Third Circuit Court of Appeal authority of Forestal Guaraní SA v Daros International Inc. In that case a District Court decision automatically applying Argentinian written form requirements to a US–Argentina contract was vacated. It was held that the proper

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100 Procedural Order No. 2, p. 56, para. 34.
103 As to the difference – see supra fn 43, Born, at pp. 2143–4; see also supra fn 102, Moens and Sharma, at p. 154.
approach, once an Art. 96 CISG declaration is found applicable, is to treat form as an internal gap under Art. 7(2) CISG – and that given the CISG’s general principles do not assist, the forum’s private international law must be applied to identify the law governing form. Equatoriana Manufacturing conceded this analysis must be adapted to the arbitration context as this Tribunal does not have a forum thus the procedures for identifying the governing law specific to arbitration must be applied instead. Applying the closest connection test, Equatoriana Manufacturing argued that Equatorianian law applies. That law does not require written form and thus oral modifications to the contract may be made.

### 5.2.3. THE TRIBUNAL’S FINDING AND DECISION

Though Mediterraneo Supply’s claim for delay comprises only a fraction of its total claim in this arbitration, this issue has required careful consideration by the Tribunal. The applicability and effect of an Art. 96 CISG declaration raises significant issues in the context of CEAC arbitration where the Art. 35(1) CEAC Rules, paragraph [b] model choice of law clause has been adopted. The Tribunal has decided that as a matter of law, oral modifications to the parties’ contract are permitted. The Tribunal has found that (as submitted by Mediterraneo Supply) Cl. 20 does not intend to exclude Mediterraneo’s Art. 96 CISG declaration, but that (as submitted by Equatoriana Manufacturing) ultimately Equatorianian law governs the issue of form and imposes no writing requirements.

As a preliminary matter, the Tribunal notes that some discussion occurred at the oral hearings about the difference between a “declaration” (the terminology used in Art. 96 CISG) and a “reservation” (that used in Cl. 20). Consistently with the scholarly literature on Art. 96 CISG, the Tribunal considers these terms to be interchangeable and this difference in terminology is not material in resolving this issue.

The Tribunal’s starting point must be that Cl. 20 is a verbatim adoption of the model CEAC choice of law clause contained in paragraph [b] of Art. 35(1) CEAC Rules. This context is important in properly understanding the clause’s intent and effect. Authoritative insight is provided by Brödermann and Weimann who explain this

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107 Procedural Order No. 2, p. 56, para. 34.


model clause arose out of a German – Chinese dispute where confusion arose after the Chinese party attempted to avoid the outdated Chinese Art. 96 CISG declaration. That reservation reflected Chinese domestic contract law when first made but no longer does so given amendments now recognising freedom of form. Excluding the operation of this specific outdated Chinese Art. 96 CISG declaration is the clear intent of this clause. This intent is reinforced by further scholarly literature which emphasises that the model clauses ‘evidence […] the efforts to tailor CEAC to the China market’.  

As this dispute of course demonstrates, the CEAC Rules can be used in arbitrations not implicating Chinese interests. CEAC statistics disclose that of the first seven cases administered by CEAC, four did not involve Chinese parties (though did have an ‘indirect connection to China’). In this case, where Chinese interests and Chinese law are not in issue, there is much force in the view that the model choice of law clause (and thus Cl. 20) does not necessarily intend to exclude Mediterraneo’s Art. 96 CISG declaration. This is reinforced by Art. 12 CISG which operationalises an Art. 96 CISG declaration and may not itself be derogated from or varied. Thus the Tribunal considers, consistently with Mediterraneo Supply’s position, that Cl. 20 does not intend to and does not in fact exclude the operation of Mediterraneo’s Art. 96 CISG declaration.

However, the Tribunal also finds that this declaration does not have the effect that Mediterraneo Supply contends and does not automatically infer positive written form requirements. The practical effect of Arts. 12 & 96 CISG is to remove Contracting States’ obligations to respect freedom of form, but they do not positively impose written form requirements, leaving an Art. 7(2) CISG internal gap. As there are no relevant CISG general principles to rely upon, private international law must be applied to identify the law governing form. This approach is supported in the literature. The Tribunal recognises there is a division of opinion however finds this so-called majority position more persuasive, particularly as it is most consistent with a faithful application of Arts. 12 & 96 CISG’s text.

\[110\] Supra fn 60, Brödermann., at pp. 319-20; see also supra fn 101, at p. 143.  
\[111\] CEAC Rules Preamble D.  
\[112\] Supra fn 60, Brödermann., at p. 304.  
\[113\] See also CISG Art. 6.  
\[114\] See e.g. supra fn 106, at pp. 1192-3, para. 3.  
\[116\] Supra fn 115, Schroeter, , at p. 23; see also pp. 24-5.
The Tribunal agrees with Equatoriana Manufacturing that Equatorianian law governs form, does not impose any written form requirements, and thus oral modifications are permitted at law. While Equatoriana Manufacturing relied on the closest connection test as the applicable conflict of laws rule, this Tribunal prefers the cumulative approach, though the outcome is ultimately the same. The cumulative approach simultaneously applies the conflicts rules of all connected States and is preferred here as being the most predictable approach and thus most consistent with party expectation which is the guiding maxim of conflicts analyses. The Tribunal feels supported in using this approach, notwithstanding the absence of a doctrine of binding precedent in arbitration, given it is frequently applied, for example in ICC practice.

Absent agreement, all three of Mediterraneo, Equatoriana and Danubia apply the closest connection test with a number of factors, including the characteristic performer’s domicile and place of contract formation, being relevant. Though having the potential for application in arbitration, no State connected to this dispute has adopted the Rome I Regulation thus it does not assist the Tribunal’s analysis in this case.

The closest connection in this case lies with Equatoriana:

1. As seller, Equatoriana Manufacturing undertakes characteristic performance;
2. The contract was concluded in Equatoriana; and
3. Adoption of the FAS Incoterm meant that risk passed to Mediterraneo Supply upon delivery in Equatoriana.

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117 Procedural Order No. 2, p. 56, para. 34.
122 Procedural Order No. 2, p. 56, para. 34.
124 Procedural Order No. 2, p. 56, para. 33.
126 Procedural Order No. 2, p. 52, para. 7.
As Mediterranean, Equatorianian and Danubian conflicts rules each require the application of Equatorianian law, that law governs form requirements in this case. As it contains no written form requirements, the parties’ contract may be orally amended as a matter of law.

5.3. WAS THE PARTIES’ CONTRACT ORALLY AMENDED IN FACT?

The third issue to be resolved in this Partial Award, and the final issue pertaining to Mediterraneo Supply’s claim for delay, is whether an oral amendment occurred in fact. The parties have diametrically opposed views as to the implications of the 9 February 2011 telephone call on the original contractual delivery date. This point of substance must ultimately be resolved under the CISG.

5.3.1. MEDITERRANEO SUPPLY’S POSITION

Mediterraneo Supply contended that the original 19 February 2011 delivery date in Cl. 3 of the contract was not modified. It thus argues that as delivery occurred 5 days later on 24 February 2011, Equatoriana Manufacturing is in breach and an entitlement to US$ 27,500 accrues pursuant to the contract’s incentives provision in Cl. 10(b).

5.3.2. EQUATORIANA MANUFACTURING’S POSITION

Equatoriana Manufacturing contended that an amendment did occur during the 9 February 2011 telephone call. It argued that the circumstances of that conversation satisfy the CISG’s requirements for a valid contractual modification and that as it delivered the “Yes Casual” polo shirts on the amended delivery date, it was not in breach.

5.3.3. THE TRIBUNAL’S FINDINGS AND DECISION

Though the parties differ as to whether an amendment occurred, there is some common ground between them. Neither challenges Mr. Short or Mr. Long’s authority to modify the contract on behalf of their respective employers. Further, while neither witness remembers the exact wording used, both are sure that words along the lines of ‘make sure that all of the paper work reflected the new delivery date’ were used.

127 FAS Incoterms 2010, Cl. A5 & B5.
128 Procedural Order No. 2, p. 56, para. 34.
129 Procedural Order No. 1, p. 49, para. 7; Claimant’s Exhibit No. 2, pp. 14-5; Respondent’s Exhibit No. 1, pp. 37-8.
130 Claimant’s Exhibit No. 1, p. 12.
131 Procedural Order No. 2, p. 55, para. 27.
addition, both witnesses agree that Mr. Long never specifically mentioned the contract.\textsuperscript{132}

After considering both witness statements, the circumstances of case as a whole and the requirements of the \textit{CISG}, the Tribunal has decided that an amendment to the delivery date as alleged by Equatoriana Manufacturing did occur.

Art. 29(1) \textit{CISG} permits contractual amendments by “mere agreement” of the parties. No consideration is required,\textsuperscript{133} thus the lack of return promise for the alleged extension of time is irrelevant in this case. The sole criterion applicable is Art. 29(1) \textit{CISG}’s requirement of “mere agreement”. This in turn requires assessment of the parties’ intentions in accordance with Art. 8 \textit{CISG}.

While, strictly, a “mere agreement” under Art. 29(1) \textit{CISG} requires identification of an Art. 14 \textit{CISG} offer and an Art. 18 \textit{CISG} acceptance,\textsuperscript{134} the Tribunal does not find this analytical approach helpful. It prefers to take a commercially practical perspective\textsuperscript{135} and consider what is really at issue, namely whether in accordance with Art. 8 \textit{CISG} the parties demonstrated an intent to modify the delivery date. Though mindful of its duty to apply the law,\textsuperscript{136} the Tribunal is satisfied that if such an intention can be found then a relevant Art. 14 \textit{CISG} offer and Art. 18 \textit{CISG} acceptance must necessarily exist.

Art. 8 \textit{CISG} adopts two separate tests for determining intent – a subjective test under Art. 8(1) \textit{CISG} and failing that an objective test under Art. 8(2) \textit{CISG}. Both involve consideration of “all relevant circumstances”.\textsuperscript{137} Art. 8(1) \textit{CISG} is of no assistance in this case – it cannot be said that either party “knew or could not have been unaware” of the other’s intent. Art. 8(1) \textit{CISG} requires a subjective meeting of the minds\textsuperscript{138} which is manifestly lacking in this case.\textsuperscript{139} Art. 8(1) \textit{CISG} does not apply, thus as foreshadowed above the parties’ witness statements are of little relevance in resolving this issue – both speak to the subjective intentions of Mr. Long and Mr. Short and the

\textsuperscript{132} Procedural Order No. 2, p. 55, para. 27.
\textsuperscript{134} \textit{Ibid.}, at p. 472, para. 2.
\textsuperscript{135} Cf. \textit{Supra} fn 85, Waincymer, at pp. 89-90.
\textsuperscript{136} \textit{Supra} fn 43, Bom, at pp. 1625-7.
\textsuperscript{137} \textit{CISG} Art. 8(3).
\textsuperscript{139} See Claimant’s Exhibit No. 2, pp. 14-5, paras. 4 and 5; Respondent’s Exhibit No. 1, p. 37, para. 4; Cf. Procedural Order No. 2, p. 55, para. 27.
applicable provision which is Art. 8(2) CISG instead focusses on the objective circumstances of the case.

In accordance with Procedural Order No. 2\textsuperscript{140} the Tribunal has proceeded on the basis that Mr. Long used words to the effect that he would ‘make sure that all of the paper work reflected the new delivery date’. These words are the Tribunal’s starting point.\textsuperscript{141} What would they mean to a reasonable business person? To Mr. Short, the only relevant paperwork was the contract and letter of credit, while for Mr. Long it also included Mediterraneo Supply’s shipping contract with TransOcean.\textsuperscript{142} The word “all”, in its ordinary meaning, signifies both more than one item and also every item relevant to the parties. Though not conclusive, this analysis supports Equatoriana Manufacturing’s contention that an amendment occurred.

Art. 8(3) CISG directs this Tribunal to consider “all relevant circumstances” which include the parties’ negotiations. It is thus relevant, and is also uncontested, that timely delivery was emphasised by Mediterraneo Supply and its importance understood by Equatoriana Manufacturing.\textsuperscript{143} The “Yes Casual” line was to feature in a major Doma Cirun advertising campaign.\textsuperscript{144} Coupled with the contractual incentives provision in Cl. 10(b) which penalised lateness in daily increments but rewarded early delivery only on a weekly basis, these circumstances support a conclusion that objectively the parties (or at least Mediterraneo Supply) would not have intended to modify the delivery date. However, once again this consideration is not conclusive.

What is most telling is an objective assessment of the parties’ subsequent conduct.\textsuperscript{145} Following the 9 February 2011 telephone call, Equatoriana Manufacturing delivered the “Yes Casual” polo shirts on 24 February 2011, those shirts were shipped to Mediterraneo Supply and the letter of credit was paid.\textsuperscript{146} The record contains no explicit reference to the amount paid, however on the basis that the Statement of Claim\textsuperscript{147} seeks US$ 27,500 for late delivery and US$ 550,000 reimbursement of the purchase price, the Tribunal is prepared to infer\textsuperscript{148} that the full contractual purchase price was paid. Clause 10(b) of the contract, upon which Mediterraneo Supply now relies, permits it to make “a deduction” from the purchase price. During oral

\textsuperscript{140} Procedural Order No. 2, p. 55, para. 27.
\textsuperscript{141} Supra fn 138, at p. 153, para. 13.
\textsuperscript{142} See generally Procedural Order No. 2, p. 56, para. 30.
\textsuperscript{143} Claimant’s Exhibit No. 2, p. 14, para. 3; Respondent’s Exhibit No. 1, p. 37, para. 4; see also Statement of Claim, p. 7, para. 11; Statement of Defence, p. 35, para. 6.
\textsuperscript{144} Statement of Claim, p. 7, para. 11; Statement of Defence, p. 35, para. 6; Claimant’s Exhibit No. 3, p. 16, para. 1.
\textsuperscript{145} CISG Art. 8(3).
\textsuperscript{146} Respondent’s Exhibit No. 2, p. 37, para. 5.
\textsuperscript{147} Statement of Claim, p. 11, para. 37.
\textsuperscript{148} See CEAC Rules Art. 27(4); see also Model Law Art. 19(2).
submissions some argument was directed at whether this clause actually confers an affirmative right to liquidated damages (as opposed to a deduction at the time of payment only) and also whether the delay claim is prejudiced by the fact that it was first clearly asserted only in the Statement of Claim. For present purposes, both points can be put to one side – though the Tribunal notes in passing that pursuant to Art. 10.2(1) UNIDROIT Principles 2010, chosen by the parties in Cl. 20 of the contract, a three-year limitation period applies given that prescription is not settled by the CISG. What is most important here is that at the time of delivery, Mediterraneo Supply’s conduct is consistent with an intention to modify during the 9 February 2011 telephone call given that it did not exercise its express right of deduction. This is supported by the Domu Cirun letter in evidence which indicated it would claim damages for delay from Mediterraneo Supply which was never followed up by a similar communication from Mediterraneo Supply to Equatoriana Manufacturing, though the Tribunal notes that strictly only subsequent conduct of “the parties” is relevant under Art. 8(3) CISG.

After considering all of the circumstances, and having particular regard to the parties’ subsequent conduct, the Tribunal considers that pursuant to Art. 8(2) CISG an intention to modify the delivery date from 19 February 2011 to 24 February 2011 is established and a “mere agreement” under Art. 29(1) CISG was reached. As Equatoriana Manufacturing delivered the “Yes Casual” polo shirts on that day at Oceanside, Equatoriana in accordance with the FAS Incoterm adopted in Cl. 2, it is not in breach for delay. By way of interim conclusion, concerning the first three issues resolved in this Partial Award, Mediterraneo Supply is not entitled to the US$ 27,500 claimed on account of delay.

5.4. DOES THE CHILD LABOUR AGREEMENT EVIDENCE A BREACH OF CONTRACT, AND WAS MEDITERRANEO SUPPLY ENTITLED TO AVOID?

The Tribunal turns now to the breaches of contract alleged by Mediterraneo Supply concerning the use of child labour. As explained in Part 4, this issue has been approached on the basis of the parties’ agreement reached during the 4 October 2012

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149 Statement of Claim, p. 11, para. 33 – on 1 July 2012; Cf. Claimant’s Exhibit No. 6, p. 20, para. 4 – on 8 April 2011.
151 Claimant’s Exhibit No. 3, p. 16, para. 3.
conference call. The Tribunal must decide whether those facts as agreed constitute a breach of contract justifying Mediterraneo Supply’s purported avoidance.\(^{152}\)

The two distinct breaches of contract alleged by Mediterraneo Supply were outlined in Part 4. Mediterraneo Supply contended that either breach would be fundamental and entitle it to avoid. Equatoriana Manufacturing denied it breached either obligation, and in the alternative denied that any breach would be fundamental, thus Mediterraneo Supply at the very least was not entitled to avoid.

**5.4.1. THE FIRST ALLEGED BREACH – THE “YES CASUAL” POLO SHIRTS AND THEIR FITNESS FOR THEIR PARTICULAR PURPOSE**

The first breach alleged by Mediterraneo Supply is founded on Art. 35(2)(b) CISG and a failure of the “Yes Casual” polo shirts to conform to their particular purpose. Article 35(2)(b) CISG reads:

\[
(2) \text{Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:}
\]

\[
(b) \text{are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment.}
\]

Mediterraneo Supply argued that the particular purpose of the shirts was resale in Oceania.\(^{153}\) During oral argument, it clarified that this should be understood as resale in Oceania, being an ethically-conscious consumer market. It contended that this purpose was impliedly made known to Equatoriana Manufacturing. Mediterraneo Supply asserted that as the media coverage of the child labour allegations tarnished Equatoriana Supply’s operations as a whole,\(^ {154}\) and given the Oceanian consumer market’s reaction to the allegations,\(^ {155}\) the “Yes Casual” polo shirts were not fit for that particular purpose. In support of this core contention, Mediterraneo Supply relied on the German Federal Court of Justice decision in the *New Zealand Mussels Case*\(^ {156}\) which held that a seller must conform to statutory provisions in a buyer’s State if also

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\(^{152}\) Procedural Order No. 1, p. 49, para. 8.

\(^{153}\) Statement of Claim, p. 11, para. 34.

\(^{154}\) See Statement of Claim, p. 8, paras. 18-9; Claimant’s Exhibit No. 4, p. 17; see also Procedural Order No. 2, p. 54, para. 19.

\(^{155}\) Statement of Claim, pp. 8-9, paras. 20-1.

\(^{156}\) *New Zealand Mussels Case* VIII ZR 154 /94, 8 March 1995.
applicable in its own State. The relevant statutory provisions relied upon were those contained in the Convention on the Worst Forms of Child Labour to which both Mediterraneo and Equatoriana are signatory.\textsuperscript{157}

Equatoriana Manufacturing denied breaching Art. 35(2)(b) \textit{CISG}. It did not make affirmative submissions concerning the making known of a particular purpose; it did not concede that point but instead noted that Mediterraneo Supply bears the burden of proof on that issue.\textsuperscript{158} Its core submission was that no obligation under Art. 35(2)(b) \textit{CISG} was imposed given a lack of reliance, or alternatively unreasonable reliance, on its skill and judgment. In this regard it relied on Mediterraneo Supply’s failure to follow Oceania Plus Enterprises audit policy.\textsuperscript{159} In essence, Equatoriana Manufacturing submitted that Mediterraneo Supply made a judgment call, and must now accept the consequences of that judgment call.

The Tribunal has decided that Equatoriana Manufacturing did not breach Art. 35(2)(b) \textit{CISG}. While the sale of goods in specific markets may be a relevant particular purpose under the \textit{CISG}\textsuperscript{160} and while it was most likely made known to Equatoriana Manufacturing that these goods were to be sold in Oceania,\textsuperscript{161} Mediterraneo Supply cannot overcome the obstacle that the “Yes Casual” polo shirts were not themselves manufactured using child labour.\textsuperscript{162} The parties’ agreement concerning child labour does not extend that far.\textsuperscript{163} Article 35(2)(b) \textit{CISG} requires that the \textit{goods} to be fit for their particular purpose, and the “Yes Casual” polo shirts were themselves perfectly fit for sale. Article 35(2)(b) \textit{CISG} says nothing about qualitative obligations to be imposed on \textit{suppliers} and the practices they adopt. If any such obligations exist, they must be found in the express terms of the parties’ contract.

\textsuperscript{157} Statement of Claim, p. 11, para. 32; Statement of Defence, p. 36, para. 12.
\textsuperscript{159} See generally Statement of Claim, p. 6, para. 9 & p. 11, para. 34; Claimant’s Exhibit No. 2, p. 14, paras. 2-3; Statement of Defence, p. 35, para. 3; Procedural Order No. 2, pp. 51-2, paragraphs 2-5.
\textsuperscript{161} Cf. Procedural Order No. 2, pp. 53-4, paras. 15-6.
\textsuperscript{162} Procedural Order No. 2, p. 54, para. 17; see also Claimant’s Exhibit No. 5, p. 18, para. 1; Claimant’s Exhibit No. 7, p. 21, para. 1.
\textsuperscript{163} Procedural Order No. 1, p. 49, para. 8.
5.4.2. THE SECOND ALLEGED BREACH – THE “YES CASUAL” POLO SHIRTS AND CL. 12 OF THE PARTIES’ CONTRACT

This brings the Tribunal to Mediterraneo Supply’s alternative argument, that Equatoriana Manufacturing breached Cl. 12. That clause reads:

12. Policy. It is expected that all suppliers to Oceania Plus Enterprises or one of its subsidiaries will adhere to the policy of Oceania Plus Enterprises that they will conform to the highest ethical standards in the conduct of their business.

Mediterraneo Supply argued that despite no use of child labour occurring with respect to the “Yes Casual” polo shirts, the plain wording of this clause is sufficiently broad to capture child labour use in Equatoriana Manufacturing’s general operations. It argued that if a narrow reading of Cl. 12 was intended, narrow wording would have been used – perhaps along the lines of ‘in the manufacture of the polo shirts the subject of this contract’. This was not the case and Mediterraneo Supply argued that Equatoriana Manufacturing breached Cl. 12 as an express term of the contract.

Equatoriana Manufacturing contended that a narrow reading of Cl. 12, confining its operation to production of the specific “Yes Casual” polo shirts, was appropriate. It relied on the contractual context, commercial practicality considerations as well as the contra proferentum rule, and emphasised to the Tribunal:

1. Cl. 1 clearly establishes the sale of “Yes Casual” polo shirts as the subject-matter of the contract. This context informs how the “business” in Cl. 12 should be understood, ie. the business between the parties in relation to this contract.

2. The parties’ contract is a private arrangement with a commercial purpose, and is not a public policy instrument directed at eliminating child labour. The parties would not have intended Equatoriana Manufacturing be bound by a clause as onerous as Mediterraneo Supply’s reading of Cl. 12 suggests. It is not commercially practicable to treat Equatoriana Manufacturing as having agreed to a clause that would, for example, hold it responsible for the conduct of independent suppliers carried out in the performance of unrelated contracts.

3. Though sometimes associated with the common law,\(^{164}\) the contra proferentum rule is a general principle under Art. 7(2) CISG.\(^{165}\) Clause 12 is a standard term of

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\(^{165}\) Supra fn 138, at p. 170, para. 49; see, e.g., The Furniture Case, Court of Appeal of Oldenburg (Germany), 11 U 64 / 94, 1 February 1995 (3(b)).
Mediterraneo Supply, 166 its ambiguity must be construed against Mediterraneo Supply, and it should therefore be read narrowly and confined to the “Yes Casual” polo shirts as Equatoriana Manufacturing contends.

The Tribunal has decided that a breach of Cl. 12 is made out. The “highest ethical standards” referred to unquestionably prohibit the use of child labour; that is in fact a minimum ethical standard. 167 Whilst the Convention on the Worst Forms of Child Labour does not categorically and literally prohibit all child labour (only, as suggested, the worst forms) and while there is no agreement on the kind of child labour employed in this case, this is immaterial – this Tribunal is interpreting and applying Cl. 12 and not the terms of that Convention. Furthermore, the extension of Cl. 12 to Equatoriana Manufacturing’s business as a whole is a necessary implication of the wording used. The Tribunal recognises this clause is onerous, though this construction is reasonable in a market where ‘reputation does indeed translate into financial value’ 168 and despite the clause being onerous, it is what Equatoriana Supply agreed to. Clause 12 is broad, but not ambiguous, and thus the contra proferentum rule cannot apply. 169 The parties’ agreement concerning child labour evidences a breach of Cl. 12 as contended by Mediterraneo Supply.

5.4.3. WAS EQUATORIANA MANUFACTURING’S BREACH OF CL. 12 A FUNDAMENTAL BREACH ENTITLING MEDITERRANEO SUPPLY TO AVOID?

By letter dated 8 April 2011, 170 Mediterraneo Supply purported to avoid the parties’ contract. For this avoidance to be justified, Art. 49(1)(a) CISG requires that Mediterraneo Supply show Equatoriana Manufacturing to be in fundamental breach of contract as defined in Art. 25 CISG. No issue of Nachfrist arises and in any event this is not a case of non-delivery; 171 thus fundamental breach is the only possible justification for Mediterraneo Supply’s avoidance and if it cannot establish this, it is itself in fundamental breach of contract. 172

Fundamental breach is defined by Art. 25 CISG as requiring the satisfaction of two limbs. That provision reads as follows:

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166 Procedural Order No. 2, p. 52, para. 4.
167 Supra fn 160, Schwenzer, and Leisinger”, at p. 264.
168 Ibid, at p. 250.
169 Supra fn 138, at p. 170, para. 49.
170 Claimant’s Exhibit No. 6, p. 20, para. 3.
171 See CISG Arts. 47 & 49(1)(b).
A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, 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.

Mediterraneo Supply and Equatoriana Manufacturing are at odds with respect to both Art. 25 *CISG* limbs. Mediterraneo Supply contended that it placed sufficient importance on Cl. 12 such that any breach would involve a substantial deprivation of its expectations and qualify as fundamental. It supported this contention by referring to five factors:

1. The existence of the Oceania Plus Enterprises group audit policy, which Equatoriana Manufacturing was subject to in 2007 / 2008.
2. That during this audit the Oceania Plus Enterprises group policy document was handed to Equatoriana Manufacturing.
3. That during this audit the policy document was “extensively discussed”.
4. That the Oceania Plus Enterprises group is well known for its high ethical standards which feature prominently on its website and other external communications.
5. That ethical compliance is even embedded within the Oceania Plus Enterprises group’s corporate structure, though overlapping membership of subsidiary supervisory boards.

It also submitted that Art. 25 *CISG*’s foreseeability limb sets only a low threshold and is satisfied as the deprivation of its contractual expectations is self-evident from a reasonable person’s reading of the clear words of Cl. 12. It was not necessary for Equatoriana Manufacturing to specifically foresee the television broadcast, newspaper article, or particular damage Mediterraneo Supply suffered.

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174 Statement of Claim, p. 6, para. 9.
175 Procedural Order No. 2, p. 52, para. 4.
176 Procedural Order No. 2, p. 52, para. 4.
177 Statement of Claim, p. 6, para. 6.
179 Cf. Supra fn 173, at p. 412, para. 28; *The Cobalt Sulphate Case*, Federal Court of Justice (Germany), VIII ZR 51/95, 3 April 1996 (II(2)(cc)).
Equatoriana Manufacturing emphasised that it was entitled to succeed on this point should either limb of Art. 25 CISG be found lacking. It nevertheless argued that both limbs failed. With respect to the alleged deprivation of Mediterraneo Supply’s expectations, Equatoriana Manufacturing pointed to four instances of conduct it said were inconsistent with the alleged importance of Cl. 12:

1. Mediterraneo Supply decided to contract with Equatoriana Manufacturing despite three key pieces of knowledge – the 2007 / 2008 audit concerns,\textsuperscript{180} that despite contrary media coverage, the termination of the plant manager’s employment at Equatoriana Manufacturing’s supplier was due to its intervention following those child labour concerns,\textsuperscript{181} and that other suppliers existed for whom Mediterraneo Supply had no specific concerns relating to ethical compliance.\textsuperscript{182}

2. Evidence filed in these proceedings by Mediterraneo Supply itself discloses that Equatoriana Manufacturing was chosen over those other suppliers on the basis of differentials\textsuperscript{183} in price.\textsuperscript{184}

3. Mediterraneo Supply re-sold the “Yes Casual” polo shirts to Pacifica Trading Co\textsuperscript{185} as an alleged mitigatory measure; despite the fact that in its view the polo shirts were tainted by the use of child labour; furthermore when this re-sale transaction occurred, Equatoriana Manufacturing was not specifically advised.\textsuperscript{186}

4. Finally, when Mediterraneo Supply undertook a substitute purchase of polo shirts from Gold Service Clothing,\textsuperscript{187} it once again failed to follow Oceania Plus Enterprises group policy concerning the conduct of audits, even after the consequences of such a failure with respect to the present transaction.\textsuperscript{188}

Equatoriana Manufacturing also contended that the foreseeability limb of Art. 25 CISG must fail and in this regard emphasised that under the CISG avoidance is a remedy of last resort.\textsuperscript{189} It argued that on the basis of past transactions as evidenced in

\textsuperscript{180} Statement of Claim, p. 6, para. 9.
\textsuperscript{181} Procedural Order No. 2, p. 51, para. 3.
\textsuperscript{182} Statement of Claim, p. 6, para. 10.
\textsuperscript{183} See Procedural Order No. 2, p. 52, para. 6.
\textsuperscript{184} Statement of Claim, p. 6, para. 10; Claimant’s Exhibit No. 2, p. 14, para. 3; see also Procedural Order No. 2, p. 52, para. 5.
\textsuperscript{185} Statement of Claim, p. 9, para. 24.
\textsuperscript{186} Procedural Order No. 2, p. 54.
\textsuperscript{187} Statement of Claim, p. 9, para. 25.
\textsuperscript{188} Procedural Order No. 2, p. 55, para. 22.
the record, it lacked the Oceanian market knowledge as well as specific experience with Cl. 12 that would be required to make out foreseeability. Equatoriana Manufacturing had sold goods into the Oceanian market on three previous occasions but not to Mediterraneo Supply. Further, most previous supplies of clothing to Mediterraneo Supply were for on-sale to Atlantica Megastore subsidiaries. While the record is not explicit, the Tribunal was invited to draw the inference that Cl. 12 was a standard term only in contracts involving the Oceania Plus Enterprises group, and not Atlantica Megastores. This inference was said to be supported by the Statement of Claim, Procedural Order No. and the terms of Cl. 12 itself. Equatoriana Manufacturing argued that both subjectively and objectively, it lacked the foreseeability of deprivation that Art. 25 CISG requires.

This issue was extremely contested in the parties’ written submissions as well as at the oral hearings, and has significant consequences for the resolution of this dispute. It has thus required careful consideration by the Tribunal. The Tribunal has decided that while a breach of Cl. 12 is made out, that breach was not fundamental as defined in Art. 25 CISG.

The Tribunal finds that the language of Cl. 12 is equivocal; the word “expected” can be both contrasted to other terms in the contract which use more definite language (eg. “agrees to sell” in Cl. 1) but also mirrors the language used in Art. 25 CISG. However, overall, the Tribunal agrees with Equatoriana Manufacturing’s contention that insufficient importance was placed on Cl. 12 such that breach of that clause would substantially deprive Mediterraneo Supply of its contractual expectations. In particular, the Tribunal relies on Mediterraneo Supply’s re-sale of the “Yes Casual” polo shirts to Pacifica Trading Co. An important factor in assessing fundamental breach is whether a buyer can put goods to “another reasonable use”. This re-sale was ostensibly a mitigatory measure, yet Mediterraneo Supply is (again) only required to take “reasonable” steps in mitigation and it is not reasonable to re-sell goods where doing so might damage a buyer’s reputation. Furthermore, it is doubtful whether Mediterraneo Supply even had a relevant mitigation duty here pursuant to

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190 Procedural Order No. 2, p. 53, para. 15.
191 Procedural Order No. 2, p. 52, para. 15.
193 CEAC Rules Art. 27(4); see also Model Law Art. 19(2).
194 Statement of Claim, p. 6, paras. 6 and 9.
195 Procedural Order No. 2, pp. 51-3, paras. 2, 4 and 15.
196 The Cobalt Sulphate Case, Federal Court of Justice (Germany), VIII ZR 5195, 3 April 1996 (II(2)(dd)).
197 CISG Art. 77.
198 Supra fn 160, Schwenzer, Conformity of the Goods”, at p. 110.
Art. 77 *CISG* given that re-sale of the shirts was an effort to recoup the purchase price; recovery of the purchase price is at law a matter of restitution rather than a matter of damages that must be mitigated. The fact that Mediterraneo Supply was willing to re-sell what it considered to be tainted goods, when on either view of the mitigation question it was not required to do, is particularly illustrative of the lack of importance it placed on Cl. 12. That is not to say that Cl. 12 was not breached; as indicated above the Tribunal considers that a breach of Cl. 12 did occur. However, given the first limb of Art. 25 *CISG* fails, that breach was not fundamental. Because a fundamental breach requires satisfaction of both Art. 25 *CISG* limbs, it is not necessary for this Tribunal to reach a conclusion on the matter of foreseeability.

As Equatoriana Manufacturing’s breach of Cl. 12 was not fundamental as defined in Art. 25 *CISG*, Mediterraneo Supply was not entitled to avoid the contract pursuant to Art. 49(1)(a) *CISG*. As Mediterraneo Supply was not entitled to avoid, its purported avoidance placed Mediterraneo Supply itself in fundamental breach of contract.

### 6 FURTHER STEPS IN THE PROCEEDINGS

This Partial Award, pursuant to the parties’ agreement, has considered issues of liability only and does not determine issues of *quantum*, interest or costs. The Tribunal retains jurisdiction over those matters and they are to be resolved by way of a Final Award after further submissions of the parties. In particular, the Tribunal notes (without expressing a view) that the parties’ respective successes on different issues in this Partial Award may possibly justify departure from the “in principle” rule in Art. 42(1) *CEAC Rules* that costs follow the event. Should the parties reach settlement on these outstanding issues in the interim, the Tribunal (in accordance with Art. 36(1) *CEAC Rules*) would consider whether that settlement should be formalised in a consent award.

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199 See *CISG* Art. 81(2).
200 Cf. *Supra* fn 172, at p. 767, para. 46.
201 Procedural Order No. 1, p. 49, para. 9.

*(2013) 17 VJ 229 - 264*
SUMMARY

To summarise the Tribunal’s findings and decisions reached in this dispute so far:

1. The witness statement of Mr. Tomas Short is admissible evidence in these proceedings.

2. As a matter of law, oral amendments to the parties’ contract were permitted.

3. As a matter of fact, an oral amendment to the delivery date in the parties’ contract did occur.

4. As the contractual delivery date was amended from 19 February 2011 to 24 February 2011 and Equatoriana Manufacturing delivered on 24 February 2011, no breach of the obligation to deliver on time occurred.

5. Mediterraneo Supply is therefore not entitled to the US$ 27,500 claimed under Cl. 10(b) of the contract.

6. Equatoriana Manufacturing did not deliver goods in breach of the Art. 35(2)(b) CISG fitness for particular purpose term.

7. Equatoriana Manufacturing did deliver goods in breach of Cl. 12 of the parties’ contract.

8. That breach was not fundamental.

9. Mediterraneo Supply was therefore not entitled to avoid the contract.

10. By purporting to avoid the contract when it was not entitled to do so, Mediterraneo Supply itself was in fundamental breach of contract.

These findings and decisions are based on the reasons set out and explained in full in Part 5 of this Partial Award.
8 AWARD

Having considered Mediterraneo Supply and Equatoriana Manufacturing’s submissions concerning the four issues disputed at this stage of the proceedings, in light of the evidence before this Tribunal and in light of the applicable law, the Tribunal hereby renders the following Partial Award:

1. Mediterraneo Supply’s claim for US$ 27,500 on account of delay is dismissed.

2. Mediterraneo Supply’s claim for breach of contract relating to Art. 35(2)(b) CISG is dismissed.

3. Mediterraneo Supply has established Equatoriana Manufacturing’s liability for damages on account of breaching Cl. 12 of the contract, the quantum of such liability to be determined at a later stage in these proceedings.

4. Those of Mediterraneo Supply’s claims which are contingent upon a finding of valid avoidance are dismissed.

5. The Tribunal retains jurisdiction to determine the quantum of damages referred to in item 3, as well as the parties’ claims for interest and costs, by way of a Final Award to be rendered in due course.

This Partial Award, with respect to these matters, is final and binding on the parties. The Tribunal extends its sincere appreciation to both parties and their counsel for the professional spirit in which these proceedings have been conducted.

[Signed]

Professor Presiding Arbitrator

[Signed]

Dr. Arbitrator 1

[Signed]

Ms. Arbitrator 2
Date: 30 September 2013

Place of Arbitration: Vindobona, Danubia