Eighth Annual Willem C. Vis (East) International Commercial Arbitration Moot

# UNIVERSITY OF BASEL
## FACULTY OF LAW

# Memorandum for Respondent

On behalf of
Equatoriana Fishing Ltd.
30 Seaview Terrace
Oceanside, Equatoriana
- Respondent -

Against
Mediterraneo Trawler Supply AS
1 Harbour View Street
Capital City, Mediterraneo
- Claimant -

MICHAEL BURKHARDT • PATRIK GUBLER • NATHALIE HAJEK • FLORENCE JAEGER
TOMIE KELLER • MIRIAM LÜDI • PHILIPP RESSNIG • DANIEL RÜDIN

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| | |
|---|---|
| A.I. | Arbitration International |
| All E.R. | All England Law Reports |
| Am. Rev Int'l Arb. | American Review of International Arbitration |
| Arb. Int.'l | Arbitration International |
| Art./Arts. | article/articles |
| ASA Bull. | Association Suisse de l'Arbitrage Bulletin |
| BGer | Bundesgericht (Swiss Supreme Court) |
| BGH | Bundesgerichtshof (German Supreme Court) |
| CA | Cour d'appel (French Appellate Court) |
| C.C.E.L. | Canadian Cases on Employment Law |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CISG | United Nations Convention on Contracts for the International Sale of Goods (1980) |
| CISG-AC | CISG Advisory Council |
| CISG-online | CISG Database (http://www.cisg-online.ch) |
| CEO | Chief Executive Officer |
| Claimant | Mediterraneo Trawler Supply AS |
| Co. | Company |
| Corp. | Corporation |
| Ct. | Court |
| DIS | The German Institution of Arbitration (1998) |
| D.L.R. | Dominion Law Reports |
| Dr. | Doctor |
| eng. | English |
| F.3d | Federal Report 3rd |
| IBA Guidelines | International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2004) |
| ibid. | ibidem (the same) |
| Inc. | Incorporated |
| Ins. | Insurance |
| ICC | International Chamber of Commerce |
| ICCA | International Congress and Convention Association |

| | |
|---|---|
| ICSID | International Centre for Settlement of Investment Disputes |
| ITA | Institute for Transnational Arbitration |
| J Int'l Arb | Journal of International Arbitration |
| JL & Com | Journal of Law and Commerce |
| KTS | Zeitschrift für Insolvenzrecht: Konkurs, Treuhand, Sanierung |
| lex loci arbitri | law of the place where arbitration is taking place |
| LCIA | The London Court of International Arbitration |
| LG | Landgericht (German District Court) |
| LLC | Limited Liability Company |
| L.L.M. | Latin Legum Magister |
| Lloyd's Rep. | Lloyd's Law Reports |
| Ltd. | Limited |
| MA Rules | Arbitration Rules of the Chamber of Arbitration of Milan (2010) |
| Mr. | Mister |
| Ms. | Misses |
| MünchKommBGB | Münchener Kommentar zum Bürgerlichen Gesetzbuch |
| MünchKommHGB | Münchener Kommentar zum Handelsgesetzbuch |
| N.Y. App. Div. | New York Supreme Court, Appellate Divison |
| NY Convention | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1985) |
| No./Nos. | number/numbers |
| NOAA | National Oceanic and Atmospheric Administration |
| NMFS | National Marine Fisheries Service |
| OGH | Oberster Gerichtshof (Austrian Supreme Court) |
| OLG | Oberlandesgericht (German Regional Court of Appeals) |
| p./pp. | page/pages |
| para./paras. | paragraph/paragraphs |
| PECL | Principles of European Contract Law (1999) |
| PICL | UNIDROIT Principles of International Commercial Contracts (2004) |
| Prof. | Professor |
| Prot. | Protocol |
| QC | Queen's Counsel |
| RB | Arrondissementsrechtbank (Netherlands District Court) |

| | |
|---|---|
| Rev. Arb. | Revue de l'Arbitrage |
| Respondent | Equatoriana Fishing Ltd. |
| S.Ct. | Supreme Court |
| Temp. Int'l & Comp. L.J. | Temple International and Comparative Law Journal |
| Trib. Comm. | Tribunal de Commerce (French Commercial Court) |
| U.K. | United Kingdom |
| ultima ratio | last method |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL ML | UNCITRAL Model Law on International Commercial Arbitration (1985) |
| UNIDROIT | International Institute for the Unification of Private Law |
| U. Pitt. L. Rev. | University of Pittsburgh Law Review |
| U.S. | United States |
| U.S. Ct. App. | U.S. Court of Appeals |
| USD | United States Dollar |
| v. | versus |
| vide supra | see above |
| VUWLR | Victoria University of Wellington Law Review |
| WIPO | World Intellectual Property Organization |
| W.L.R. | Weekly Law Report (U.K.) |
| Y.B. Com. Arb. | Yearbook Commercial Arbitration |
| & | and |

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Rapporteur: Prof. Eric E. Bergsten

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## STATEMENT OF FACTS

- **14 April 2008:** Equatoriana Fishing Ltd. (hereinafter "RESPONDENT"), a corporation organized under the laws of Equatoriana, received a circular message from Mediterraneo Trawler Supply AS (hereinafter "CLAIMANT"), a corporation organized under the laws of Mediterraneo, asking for prices and availability of squid.
- **18 April 2008:** RESPONDENT proposed a sales representative visit CLAIMANT to discuss possible future business and bring a sample of the squid it would supply to another firm in Mediterraneo.
- **17 May 2008:** RESPONDENT'S sales representative brought one carton of unsized frozen squid labeled "illex danubecus 2007". He stated that the sample was representative of the squid being offered. After the sales representative's departure CLAIMANT examined the squid.
- **29 May 2008:** CLAIMANT ordered 200 metric tons of squid as per sample, adding that the squid must be certified fit for human consumption. RESPONDENT confirmed CLAIMANT'S order with the additional clause that the squid would be "2007/2008 Catch". RESPONDENT also added an arbitration clause. CLAIMANT acknowledged RESPONDENT'S sale confirmation without any objections or questions.
- **1 July 2008:** RESPONDENT delivered the squid in twelve containers. CLAIMANT weighed twenty cartons out of the first two containers. All of the selected cartons were labeled "illex danubecus 2007". CLAIMANT then defrosted and examined five cartons. This examination covered only 0.025 percent of the whole delivery. None of the cartons labeled "illex danubecus 2008" were even opened.
- **29 July 2008:** RESPONDENT was informed by CLAIMANT that two of its long-liner fishing customers reported that the squid were "hardly usable as bait". CLAIMANT did not indicate either the reason why the squid were hardly usable or how much squid this represented.
- **3 August 2008:** As CLAIMANT'S letter lacked these specifics, RESPONDENT requested the squid be inspected by a certified testing agency. TGT laboratories then examined the squid.
- **18 August 2008:** The TGT laboratories report confirmed RESPONDENT'S belief that the squid were in complete conformity with the contract. The squid were fit for human consumption as CLAIMANT had required in its order form. The report showed that the squid were from 2007 and 2008 catch as required by the contract. Since the squid were in conformity with the contract RESPONDENT rejected any responsibility for the difficulties CLAIMANT was experiencing with its customers.

- **20 May 2010:** Nearly two years after the initial complaint from its customers, CLAIMANT submitted a Request for Arbitration to the Chamber of Arbitration of Milan. Before this event, CLAIMANT refused to take responsibility for the squid, and eventually destroyed them.
- **22 May 2010:** Two days after CLAIMANT filed for arbitration, CLAIMANT'S CEO gave an interview to Commercial Fishing Today, a widely circulated trade newspaper. CLAIMANT accused RESPONDENT of deliberately delivering squid completely inappropriate for bait and stated that CLAIMANT'S lawyer started arbitration proceedings.
- **24 May 2010:** Commercial Fishing Today published the interview given by CLAIMANT'S CEO.
- **25 May 2010:** RESPONDENT received the Request for Arbitration. Thereafter, each party selected an arbitrator.
- **15 July 2010:** In accordance with the arbitration agreement the two party-appointed co-arbitrators jointly appointed Mr. Malcolm Y as chairman. Mr. Malcolm Y accepted this appointment and submitted his statement of independence. He wrote that he was independent and impartial, and disclosed the fact that he is partner in the same law firm as an attorney advising CLAIMANT.
- **26 July 2010:** Both parties, being fully informed, explicitly waived any objections to Mr. Malcolm Y's appointment.
- **2 August 2010:** Even though the parties consented to Mr. Malcolm Y, the Arbitral Council declined to confirm him.
- **13 August 2010:** The co-arbitrators affirmed that they know Mr. Malcolm Y and have complete trust in him to conduct the arbitration with competence, impartiality and independence. Since the parties agreed with Mr. Malcolm Y as chairman the co-arbitrators re-appointed him.
- **31 August 2010:** In spite of the re-affirmation by the co-arbitrators, the Arbitral Council again declined to confirm Mr. Malcolm Y and instead appointed Mr. Horace Z as chairman.
- **20 September 2010:** The Tribunal was constituted with Mr. Horace Z as chairman.
- **24 September 2010:** RESPONDENT objected to the jurisdiction of the Tribunal since the constitution had not been in accordance with the parties' clear intention laid out in the arbitration agreement. RESPONDENT now requests the Tribunal to dismiss this arbitration.

## SUMMARY OF ARGUMENTS

**FIRST ISSUE: The Tribunal lacks jurisdiction to decide the merits of the case.** RESPONDENT requests the Tribunal to dismiss the arbitration since its constitution was not in accordance with the parties' intent laid out in the arbitration agreement. Further, RESPONDENT objected timely to the Tribunal's jurisdiction. In any case, RESPONDENT retains its right to challenge an award. Should the arbitration proceed, RESPONDENT makes following submissions.

**SECOND ISSUE: RESPONDENT breached its duty of confidentiality.** Whether the duty of confidentiality arises out of Art. 8(1) Rules of the Chamber of Arbitration of Milan 2010 (hereinafter "MA Rules") or out of the arbitration agreement, CLAIMANT breached its duty of confidentiality by disclosing the fact of arbitration to the international newspaper Commercial Fishing Today. The Tribunal is therefore requested to order CLAIMANT to respect the obligation of confidentiality and hold it liable for any damages resulting from its breach of confidentiality.

**THIRD ISSUE: CLAIMANT delivered squid in conformity with the contract.** RESPONDENT fulfilled its contractual obligations under Art. 35 United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG") by delivering squid that conformed to the contractual requirements and the mutual agreements of the parties. Any subsequent problems CLAIMANT experienced with its own customers cannot be attributed to RESPONDENT after it had fulfilled all its obligations and delivered conforming squid.

**FOURTH ISSUE: CLAIMANT cannot rely on an alleged lack of conformity.** CLAIMANT failed to conduct a sufficient examination under Art. 38 CISG and to give timely and specified notice pursuant to Art. 39 CISG and therefore cannot rely on an alleged lack of conformity. Moreover, RESPONDENT is not barred from relying on Arts. 38 and 39 CISG because the requirements of Art. 40 CISG are not fulfilled in the present case.

**FIFTH ISSUE: CLAIMANT was not entitled to declare the contract avoided.** The alleged breach did not amount to a fundamental breach of contract as required under the CISG in order to avoid the contract. Even assuming there was a fundamental breach, CLAIMANT failed to declare avoidance effectively.

**SIXTH ISSUE: CLAIMANT did not take all reasonable measures to mitigate the loss.** It was possible for CLAIMANT to take more effective measures, which could have been reasonably expected in the circumstances, and therefore CLAIMANT cannot claim the full amount of damages according to Art. 77 CISG.

# First Issue: The Tribunal lacks jurisdiction to decide the merits of the case

1 RESPONDENT requests the Tribunal to find that it does not have jurisdiction on the ground that the constitution of the Tribunal was not in accordance with the parties' intent laid out in the arbitration agreement. The parties selected the MA Rules and designated Vindobona, Danubia as the seat of the arbitration [*Claimant's Exhibit No. 4, p. 12*]. Art. 16(1) UNCITRAL Model Law on International Commercial Arbitration (hereinafter "UNCITRAL ML"), as the *lex loci arbitri*, grants the tribunal the necessary competence to decide on its own jurisdiction, which is a widely accepted doctrine [*BORN, p. 855; POUDRET/BESSON, para. 457; REDFERN/HUNTER, para. 5.99*].

2 In the case at hand, pursuant to the parties' arbitration agreement, each party appointed one co-arbitrator [*Request for Arbitration, para. 28, p. 7; Statement of Defense, para. 23, p. 27*] and the co-arbitrators then appointed Mr. Malcolm Y as chairman [*Letter from Ms. Arbitrator 1, p. 39*]. Even though the parties approved of Mr. Malcolm Y, the Arbitral Council decided not to confirm him. Contrary to the arbitration agreement, the Arbitral Council itself appointed Mr. Horace Z as the chairman [*Prot. No. 9410/7, p. 49; Prot. No. 9410/9, p. 57*]. CLAIMANT alleges that the Tribunal has jurisdiction [*Memorandum for Claimant, para. 1*]. Contrary to this allegation, it will be demonstrated that the Tribunal has no jurisdiction since it has not been properly constituted **(A)**. RESPONDENT timely objected to the Tribunal's jurisdiction **(B)**. Should the Tribunal not dismiss the arbitration, any potential award may be unenforceable **(C)**.

## A. The Tribunal has not been properly constituted and therefore has no jurisdiction

3 It will be demonstrated that the Arbitral Council's appointment of Mr. Horace Z violated the parties' arbitration agreement **(I)**. In addition, the Arbitral Council exceeded its discretion by not confirming Mr. Malcolm Y chairman **(II)**.

### I. The Arbitral Council's appointment of Mr. Horace Z violated the parties' arbitration agreement

4 Pursuant to Art. 14(1) MA Rules, the arbitrators shall be appointed in accordance with the procedures established by the parties in the arbitration agreement. To ensure that a particular appointment procedure will be used, the parties can state this particular method of selection in their arbitration agreement [*MOSES, p. 121; REDFERN/HUNTER, paras. 4.30, 4.36*]. In the present

case, the parties' arbitration agreement states in relevant part "[…] each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator […]" [*Claimant's Exhibit No. 4, p. 12*]. With this provision, the parties assured that the co-arbitrators, and only the co-arbitrators, are the appointing authority of the presiding arbitrator. However, the Arbitral Council appointed Mr. Horace Z as the presiding arbitrator of the Tribunal.

5 CLAIMANT alleges that the Arbitral Council's appointment of Mr. Horace Z complied with the MA Rules [*Memorandum for Claimant, para. 10*]. Contrary to this allegation, the Arbitral Council may only appoint the presiding arbitrator in the absence of an agreement by the parties pursuant to Art. 14(4) MA Rules. Thus, the arbitration agreement supersedes any other appointment procedure provided by the MA Rules. Since the parties have determined the appointment procedure of the chairman, the arbitration agreement applies exclusively. In order to comply with the arbitration agreement the presiding arbitrator must be appointed by the co-arbitrators. Any other arrangement violates the parties' agreement. As the Arbitral Council itself appointed Mr. Horace Z [*Prot. No. 9410/9, p. 57*], it violated the appointment procedure provided by the parties' arbitration agreement.

## II. The Arbitral Council exceeded its discretion by not confirming Mr. Malcolm Y as chairman

6 In accordance with the arbitration agreement, the two co-arbitrators appointed Mr. Malcolm Y as chairman of the Tribunal. However, the Arbitral Council did not confirm this appointment. It will be demonstrated that in the case at hand, the Arbitral Council's discretion to reject Mr. Malcolm Y was limited **(1)** and it exceeded this limited discretion by not confirming him **(2)**.

### 1. The Arbitral Council's discretion was limited

7 Mr. Malcolm Y provided a qualified statement of independence, disclosing the fact that he is as partner in the same law firm as an attorney advising CLAIMANT in the present matter [*Statement of Independence, p. 46*]. In the case of a qualified statement, the Arbitral Council decides whether or not to confirm the arbitrator according to Art. 18(4) MA Rules. However, it will be shown that the Arbitral Council's discretion was limited since Mr. Malcolm Y's disclosure did not produce justifiable doubts concerning his independence and impartiality **(a)**. In addition, both parties waived their right to object to Mr. Malcolm Y's appointment **(b)**. Furthermore, the co-arbitrators re-affirmed the appointment of Mr. Malcolm Y **(c)**.

**a. Mr. Malcolm Y's disclosure does not give rise to justifiable doubts concerning his independence and impartiality**

8 In line with CLAIMANT'S argument, it is a fundamental principle of international arbitration that every arbitrator must be and remain independent and impartial of the parties and the dispute [*Memorandum for Claimant, para. 11; Arts. 5, 6 Code of Ethics of Arbitrators MA Rules; BORN, pp. 1461, 1462; REDFERN/HUNTER, para. 4.72*]. A prospective arbitrator should disclose all the facts that could raise justifiable doubts regarding his independence and impartiality in order to avoid any risk of being declared in violation of this obligation [*BORN, p. 1543; REDFERN/HUNTER, para. 4.80*]. This is precisely what Mr. Malcolm Y did by disclosing his relation to an advisor of CLAIMANT [*Statement of Independence, p. 46*].

9 Finding a suitable person to serve as an arbitrator, with no connection whatsoever to either party is becoming increasingly difficult as law firms grow and merge. The choice of arbitrators is limited since the community of international arbitration practitioners is relatively small [*DERAINS/SCHWARZ, pp. 124, 125; LEW/MISTELIS/KRÖLL, para. 11-22*]. In cases similar to the present, courts have concluded that business relationships between an arbitrator and a party do not automatically affect the arbitrator's independence and impartiality [*Commonwealth Coatings. v. Continental Casualty, U.S. Supreme Court; Laker Airways v. FLS Aerospace, Queen's Bench Division; CA de Paris, 28 June 1991; POUDRET/BESSON, pp. 350, 351*]. CLAIMANT alleges that Mr. Malcolm Y cannot be independent because of his business relationship with CLAIMANT'S advisor [*Memorandum for Claimant, para. 15*]. This allegation must be rejected since Mr. Malcolm Y's disclosure does not give rise to justifiable doubts about his independence and impartiality for the following reasons.

10 First, Mr. Malcolm Y has earned a reputation as an independent and impartial chairman [*Letter from Mr. Langweiler, p. 47*]. Although Mr. Malcolm Y remains partner at Wise, Strong & Clever and retains an office at the firm, he devotes all of his professional time to serving as an arbitrator [*Letter from Ms. Arbitrator 1, p. 50*]. Further, he has not been involved in any client work of the firm for the past three years [*ibid.*].

11 Second, Mr. Malcolm Y and Mr. Samuel Z do not work together, or even in the same country. Wise, Strong & Clever is an international firm with approximately 150 lawyers in six offices. Whereas Mr. Samuel Z is a partner in the firm's office in Mediterraneo, Mr. Malcolm Y is a partner in the office in Danubia [*Statement of Independence, p. 46*]. Thus, there is no risk of daily interaction between the two.

12 Third, Mr. Malcolm Y had no contact with Mr. Samuel Z about the present dispute nor did he know of its existence until he was notified about him being under consideration as chairman of the Tribunal [*Statement of Independence, p. 46*]. Since no information or communication about

the case was exchanged, Mr. Malcolm Y could not be considered prejudiced due to his work at Wise, Strong & Clever.

13 Finally, Mr. Samuel Z is only an advisor to CLAIMANT in this matter [*Letter from Mr. Langweiler, p. 47*]. While Mr. Fasttrack, as CLAIMANT'S counsel, will be present at the hearings, Mr. Samuel Z will not be interacting with the Tribunal. Therefore, Mr. Samuel Z has no direct influence on the arbitration. Regarding all these facts, Mr. Malcolm Y being partner in the same law firm as one of CLAIMANT'S advisors does not give rise to justifiable doubts regarding his independence and impartiality.

**b. Both parties waived their right to object to Mr. Malcolm Y's appointment**

14 Pursuant to Art. 18(3) MA Rules, each party may file written comments regarding the statement of independence. The purpose of the arbitrator's duty to disclose any potential conflicts is to ensure that the parties can judge whether or not the arbitrator meets the necessary conditions of independence and impartiality [*IBA Guidelines, Explanation to General Standard 3(b), p. 11; FOUCHARD/GAILLARD/GOLDMANN, para. 1059*]. In order to determine which relationships to disclose, the Secretariat invites the arbitrators to consider the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (hereinafter "IBA Guidelines") [*Prot. No. 9410/3, p. 34*]. The IBA Guidelines are divided into waivable and non-waivable situations [*IBA Guidelines, pp. 20-25*].

15 Mr. Malcolm Y's business relationship is neither subject to the non-waivable nor the waivable list of the IBA Guidelines. However, while Mr. Samuel Z is not counsel to CLAIMANT, he is an advisor to CLAIMANT, and this situation could be considered to come within the provision 2.3.3. IBA Guidelines. This provision covers the situation where an arbitrator is a lawyer in the same law firm as the counsel to one of the parties. As a waivable provision, the IBA deems the connection innocuous enough that the parties may disregard it.

16 In the present case, both parties were sure that Mr. Malcolm Y would be independent and impartial as chairman, since they knew of his reputation [*Letter from Mr. Langweiler, p. 47*]. Therefore, the parties explicitly waived their right to object to Mr. Malcolm Y's appointment as chairman [*ibid.*]. Although the IBA Guidelines are a nonbinding set of principles, the Arbitral Council regularly considers these guidelines in its decisions [*ITA Monthly Report, July 2007*]. Summarizing, the parties validly waived any objections to Mr. Malcolm Y's appointment.

### c. The co-arbitrators re-affirmed the appointment of Mr. Malcolm Y

17 After the Arbitral Council did not confirm Mr. Malcolm Y, it invited the co-arbitrators to appoint a new chair to the Tribunal [*Prot. No. 9410/7, p. 49*]. The two co-arbitrators noted Mr. Malcolm Y's disclosure and discussed the Arbitral Council's non-confirmation. Initially, both co-arbitrators had appointed Mr. Malcolm Y because of his reputation as an arbitrator. There was no reason for them to believe that the disclosed relation to Mr. Samuel Z would have any effect on the attitude that Mr. Malcolm Y would take to the arbitration [*Letter from Ms. Arbitrator 1, p. 50*]. Therefore, they re-affirmed their complete trust in him to conduct the arbitration with competence, independence and impartiality [*Letter from Ms. Arbitrator 1, p. 50*].

18 Furthermore, the co-arbitrators acknowledged that the parties had waived any objections to Mr. Malcolm Y's appointment [*vide supra, para. 16*]. Thus, the co-arbitrators requested the Arbitral Council to confirm Mr. Malcolm Y in this role [*Letter from Ms. Arbitrator 1, p. 51*] and give effect to the parties' will.

## 2. The Arbitral Council exceeded its limited discretion by not confirming Mr. Malcolm Y

19 The reason for overriding the parties' freedom to choose their "own" arbitrator is to ensure the integrity of the arbitral process [*BORN, p. 1463*]. It is essential that the arbitrator is independent and impartial and that the parties' choice of an arbitrator who fails to satisfy this basic standard can be overridden [*BORN, p. 1464*]. CLAIMANT argues that the Arbitral Council had the discretion to not confirm Mr. Malcolm Y despite the parties' waiver [*Memorandum for Claimant, para. 13*]. However, the Arbitral Council exceeded its discretion under Art. 18(4) MA Rules since there was neither a risk of a subsequent challenge of Mr. Malcolm Y nor a risk of an unenforceable award.

20 The parties' choice of a presiding arbitrator may be challenged because the chosen arbitrator lacks the requisite independence or impartiality [*BORN, p. 1463; POUDRET/BESSON, para. 415*]. However, if the arbitrator makes a disclosure and no objection is made, any subsequent challenge should be unsuccessful [*REDFERN/HUNTER, para. 4.80*]. Equally, an arbitrator's lack of independence or impartiality can be grounds for annulling or denying recognition of an award [*BORN, p. 1463*]. However, "an award will not be set aside if the circumstance alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection" [*Ghirardosi v. British Columbia, Supreme Court of Canada; Kiernan v. Piper Jaffray Companies, U.S. Ct. App.; LEW/MISTELIS/KRÖLL, para. 13-43*].

21 As shown above, both parties made a fully informed and explicit waiver of their right to object to Mr. Malcolm Y's appointment [*vide supra, para. 16*]. In particular RESPONDENT could have been potentially prejudiced since Mr. Malcolm Y's disclosure concerned his relation to an advisor of CLAIMANT. Nevertheless, RESPONDENT had full confidence in his ability to serve as chairman. Otherwise, it would not have expressly waived any rights to object to Mr. Malcolm Y. Thus, there was no danger of unenforceability of an award rendered by a Tribunal chaired by Mr. Malcolm Y, because there was no ground to set aside the award. Concluding, there was no necessity for the Arbitral Council to ensure the integrity of the arbitral process by rejecting Mr. Malcolm Y's appointment. Therefore, by not ultimately confirming Mr. Malcolm Y, the Arbitral Council exceeded its discretion.

## B. RESPONDENT timely objected to the Tribunal's jurisdiction

22 CLAIMANT unjustifiably accused RESPONDENT of attempting to evade or delay the arbitral proceedings [*Memorandum for Claimant, para. 19*]. According to Art. 12 MA Rules, any objection to the lack of jurisdiction of the arbitral tribunal may be raised up until the first hearing. An arbitral tribunal must be brought into existence before it can exercise any jurisdiction [*REDFERN/ HUNTER, para. 4.01*]. In the instant case, the Tribunal was constituted on 20 September 2010 [*Procedural Order No. 1, para. 2, p. 62*]. Four days later RESPONDENT objected to the lack of jurisdiction of the Tribunal [*Amendment Statement of Defense, para. 7, p. 65*]. Therefore, RESPONDENT objected right after the Tribunal's constitution.

23 CLAIMANT may raise the argument that RESPONDENT could have challenged Mr. Horace Z before the creation of the Tribunal. Pursuant to Art. 19(1) MA Rules a party may file a challenge against an arbitrator on the ground that there is doubt about his independence or impartiality. RESPONDENT however, had no doubts concerning Mr. Horace Z's independence or impartiality. Thus, it had no grounds to challenge Mr. Horace Z. In fact, RESPONDENT claims that the Tribunal had not been properly constituted since the appointment of Mr. Horace Z by the Arbitral Council violated the arbitration agreement. Accordingly, RESPONDENT had to await the Tribunal's constitution to object its jurisdiction. Concluding, RESPONDENT'S objection to the lack of jurisdiction four days after the Tribunal's constitution was timely.

## C. The present composition of the Tribunal endangers the enforceability of an award

24 CLAIMANT asserts that an award rendered by the present Tribunal will be enforceable [*Memorandum for Claimant, para. 20*]. However, an award made by an arbitral tribunal that had not been constituted in accordance with the parties' arbitration agreement will be set aside or not enforced by the courts [*CA de Paris, 11 February 1988; FOUCHARD/GAILLARD/GOLDMANN, para. 782*].

25 It is undisputed that the UNCITRAL ML and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "NY Convention") are applicable to the present case [*Request for Arbitration, para. 25, pp. 6, 7*]. Pursuant to Art. 34(2)(a)(iv) UNCITRAL ML, an arbitral award may be set aside if the composition of the arbitral tribunal was not in accordance with the agreement of the parties. Further, recognition and enforcement of the award may be refused if the composition of the arbitral tribunal was not in accordance with the agreement of the parties under Art. V(1)(d) NY Convention.

26 "There is the need to protect the rights of the parties appointing the arbitrators, and the confidence the parties place in them" [*FOUCHARD/GAILLARD/GOLDMANN, para. 743*]. "It is, above all, the quality of the arbitral tribunal that makes or breaks the arbitration and it is one of the unique distinguishing factors of arbitration as opposed to national judicial proceedings" [*REDFERN/HUNTER, para. 4.14*]. As shown above, the constitution of the Tribunal was not in accordance with the arbitration procedure determined by the parties [*vide supra, paras. 4, 5*]. Since the present composition of the Tribunal contravenes the intention of the parties, RESPONDENT retains its right to challenge an award.

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27 **CONCLUSION OF THE FIRST ISSUE:** RESPONDENT requests the Tribunal to dismiss the arbitration since its constitution was not in accordance with the parties' intent laid out in the arbitration agreement. Further, RESPONDENT objected timely to the Tribunal's jurisdiction. In any case, RESPONDENT retains its right to challenge an award.

28 RESPONDENT maintains that the Tribunal lacks jurisdiction, however, if the Tribunal proceeds with the arbitration, RESPONDENT makes the following submissions in response to CLAIMANT'S allegations.

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# Second Issue: The Tribunal has jurisdiction to issue an order of confidentiality and hold CLAIMANT liable for any damages resulting from its breach of confidentiality

29 Only two days after CLAIMANT filed for arbitration, CLAIMANT'S CEO gave an interview to Commercial Fishing Today, a trade newspaper distributed in forty-five countries [*Statement of Defense, para. 4, p. 24*]. In this interview, he accused RESPONDENT of deliberately delivering squid that were completely inappropriate for bait and revealed that CLAIMANT had initiated arbitration proceedings with RESPONDENT [*Respondent's Exhibit No. 1, p. 28; Statement of Defense, para. 4, p. 24*]. By disclosing the fact of arbitration to Commercial Fishing Today, CLAIMANT breached its duty of confidentiality **(A)**. The Tribunal is therefore requested to order CLAIMANT to respect the obligation of confidentiality **(B)**, and RESPONDENT is entitled to claim damages arising out of CLAIMANT'S breach of confidentiality **(C)**.

## A. CLAIMANT breached its duty of confidentiality

30 CLAIMANT did neither contest the application of Art. 8(1) MA Rules 2010 [*Memorandum for Claimant, para. 21*] nor the existence of an implied duty of confidentiality [*Memorandum for Claimant, para. 25*]. However, the Tribunal may have concerns regarding the applicability of Art. 8(1) MA Rules 2010. It will be demonstrated that CLAIMANT had to respect the duty of confidentiality under Art. 8(1) MA Rules 2010 **(I)** and even if such an express duty did not exist, CLAIMANT was bound by an implied duty of confidentiality **(II)**. In the following, it will be shown that by disclosing the fact of arbitration to Commercial Fishing Today, CLAIMANT breached its duty of confidentiality **(III)**, since the disclosure of the fact of arbitration was not justified **(IV)**.

### I. CLAIMANT had to respect the duty of confidentiality under Art. 8(1) MA Rules 2010

31 CLAIMANT may allege that an outdated version of Art. 8(1) MA Rules applies, which does not obligate the parties to keep the proceedings confidential. Art. 8(1) MA Rules 2010 states in relevant part that the parties shall keep the arbitration proceedings confidential. It will be demonstrated that Art. 8(1) MA Rules 2010 is applicable in the present case. On 29 May 2008, the parties consented in their arbitration agreement that the MA Rules shall govern the arbitral proceedings [*Claimant's Exhibit No. 4, p. 12*]. On 1 January 2010, the revised MA Rules entered

into force. In the absence of a parties' agreement, Art. 39(2) MA Rules 2010 states that the revised rules shall apply to arbitrations commenced after the date on which these rules entered into force. It is widely accepted that when the parties chose a set of rules to govern their contract without specifying a version, the rules in force at the time the arbitration commences apply [*ICC Award No. 5622 (1992); BGer, 14 June 1990; Mobil Oil Indonesia v. Asamera Oil, N.Y. App. Div*]. In the case at hand, the arbitration commenced in May 2010 [*Prot. No. 9410/1, p. 22*] and the parties' arbitration agreement contained no specification as to which version of the MA Rules should be applicable [*Claimant's Exhibit No. 4, p. 12*]. Therefore, the present arbitration is governed by the MA Rules 2010, which include the parties' duty of confidentiality in Art. 8(1).

32 CLAIMANT may assert that Art. 8(1) MA Rules 2010 is not applicable since it forces the parties to comply with a change to the duty of confidentiality. This assertion must be rejected for the following reasons. Revised provisions are applicable when they conform to the parties' expectations [*SHACKELFORD, p. 911*]. In the present case, the MA Rules 2004 already contained a confidentiality provision, which was revised to the extent that now the parties are explicitly named [*Art. 8(1) MA Rules 2004*]. However, at the time of the conclusion of the contract Art. 43(2) MA Rules 2004 expressly provided that the Arbitral Council may add to, amend and replace the rules and establish the date on which the new provisions shall enter into force. Thus, when CLAIMANT agreed to the arbitration clause, it could not have been unaware that Art. 8(1) MA Rules 2004 could be subject to change.

33 Further, most of the recent revisions of institutional arbitration rules have enhanced the confidentiality obligations on both parties [*BORN, p. 2281*]. In addition, many arbitration rules already contained such provisions at the time the contract was concluded [*Art. 30(1) LCIA Rules 1998; Art. 43(1) DIS Rules 1998; Arts. 73-75 WIPO Rules 2002; Arts. 43(1), 44(2) Swiss Rules 2004; Art. 33(2) CIETAC Rules 2005*]. Hence, applying Art. 8(1) MA Rules 2010 would not bind CLAIMANT to an unanticipated change to the arbitration rules.

34 In a case similar to the present, the *Swiss Supreme Court* held in *BGer 14 June 1990* that provisions aiming at improving the effectiveness of the arbitral proceedings apply. This practice is reasonable as it ensures the application of the most modern and therefore improved version of a set of arbitration rules [*GREENBERG/MANGE, p. 200*]. The aim of the 2010 revision of the MA Rules was to guarantee a more effective system of arbitration, for which reason an increased guarantee of confidentiality was included [*DE BERTI/MILLONE, p. 1*]. Therefore, the current confidentiality provision enhances the effectiveness of the arbitral proceedings.

35 In another case, where a court dealt with a temporal conflict of rules governing the proceedings, the *German Supreme Court* held that the current version of the rules apply where modifications made after the conclusion of the arbitration agreement do not thwart a party's

interest that would be worthy of protection [*BGH, 5 December 1985*]. Confidentiality is one of the key expectations of the parties when they select arbitration [*DENOIX DE SAINT MARC, p. 211; REDFERN/HUNTER, para. 2.145*]. It follows that a duty to respect the confidentiality cannot thwart legitimate interests of the parties. To the contrary, it further protects the legitimate interest of the parties. For the reasons stated above, Art. 8(1) MA Rules 2010 applies to this arbitration and therefore CLAIMANT must respect the duty of confidentiality.

## II. Even if Art. 8(1) MA Rules 2010 did not apply, CLAIMANT had to respect an implied duty of confidentiality

36 Courts have held that confidentiality is an implied obligation arising out of the parties' arbitration agreement [*Hassneh Ins. Co. of Israel v. Mew, Queen's Bench Divison; Dolling-Baker v. Merrett, U.K. Ct. App.; Ali Shipping v. Shipyard Trogir, U.K. Ct. App.; CA de Paris, 18 February 1986; Trib. Comm. de Paris, 22 February 1999*]. Following this practice, CLAIMANT itself acknowledged the existence of a general duty of confidentiality contained in the arbitration agreement [*Memorandum for Claimant, para. 25*].

37 Confidentiality is a fundamental and important advantage to arbitration [*FORTIER, p. 131; LEW/MISTELIS/KRÖLL, para. 1-27; MOSES, p. 3; REDFERN/HUNTER, para. 1.96*]. Furthermore, the general uniformly accepted privacy in arbitral proceedings [*GREENBERG/KEE/WEERAMANTRY, para. 7.215*] necessarily leads to confidentiality [*BORN, p. 2252; BOYD, pp. 266-268; LEW/MISTELIS/KRÖLL, para. 1-26; LIONNET/LIONNET, p. 456*]. Accordingly, it would be inconsistent to treat arbitral proceedings as private, but then permit the parties to publicize information to third parties [*BORN, p. 2252*]. In the present case, the parties agreed on arbitration [*Claimant's Exhibit No. 4, p. 12, Respondent's Exhibit No. 2, p. 29*]. Consequently, CLAIMANT is obligated to respect an implied duty of confidentiality.

## III. CLAIMANT breached its duty of confidentiality by disclosing the fact of arbitration

38 CLAIMANT purports that it did not breach its duty of confidentiality by disclosing the fact of arbitration in the interview given to Commercial Fishing Today [*Memorandum for Claimant, paras. 21, 26*]. However, whether the duty of confidentiality arises out of Art. 8(1) MA Rules 2010 or out of the arbitration agreement, the mere fact of arbitration is confidential. Pursuant to Art. 8(1) MA Rules 2010, the parties shall keep the proceedings confidential. The proceedings include all acts and events between the time of commencement and the entry of

judgment [*Black's Law Dictionary, p. 1241*]. Under this definition, the very existence of the arbitration is protected by the duty of confidentiality. CLAIMANT itself has stated that disclosure of this fact can significantly affect the value and viability of the operation of a company [*Memorandum for Claimant, para. 23; DENOIX DE SAINT MARC, p. 215*]. Scholars agree that the confidentiality of the arbitral proceedings can only be ensured if the mere fact of arbitration is not disclosed [*DESSEMONTET, p. 300; LEW/MISTELIS/KRÖLL, para. 1-26; LIONNET/LIONNET, p. 456*]. Accordingly, the implied duty of confidentiality must have the same scope as the express duty under Art. 8(1) MA Rules 2010.

39 In the present case, two days after CLAIMANT filed for arbitration, CLAIMANT'S CEO gave an interview to Commercial Fishing Today [*Respondent's Exhibit No. 1, p. 28*]. He accused RESPONDENT of deliberately delivering completely inappropriate squid and disclosed that CLAIMANT commenced arbitration proceedings against RESPONDENT [*Statement of Defense, para. 4, p. 24*].

40 Further, CLAIMANT may not successfully assert that it did not disclose confidential information based on the fact that Commercial Fishing Today had already previously reported on the existence of a dispute between CLAIMANT and RESPONDENT [*Respondent's Exhibit No. 1, p. 28*]. By disclosing the unknown fact of arbitration, CLAIMANT revealed a confidential development of the existing dispute. Concluding, by disclosing this confidential information to Commercial Fishing Today, CLAIMANT breached its duty of confidentiality.

## IV. CLAIMANT'S breach of confidentiality was not justified

41 Only for the purpose of protecting their own rights, are the parties allowed to disclose confidential information pursuant to Art. 8(1) MA Rules 2010. CLAIMANT alleges its disclosure was necessary to protect its rights since its reputation had suffered due to the asserted non-conformity of the squid delivered by RESPONDENT [*Memorandum for Claimant, para. 24*]. This allegation must be rejected. The disclosure of the confidential fact of arbitration did not protect CLAIMANT'S rights for the following reasons.

42 First, there was no present danger that required protection by disclosing the fact of arbitration. On 22 May 2010, the day the interview was given, RESPONDENT did nothing that could justify such a deliberate harm of its reputation. Any alleged loss of reputation would have occurred in 2008 when CLAIMANT experienced difficulty supplying its long-line costumers with bait. Therefore, two years later there was no justification for CLAIMANT'S disclosure.

43 Second, disclosure is only allowed where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party [*Ali Shipping v. Shipyard Trogir, U.K. Ct. App.*]. Examples

therefore are the obligation to disclose information on listed companies or during due diligence investigations [*DENOIX DE SAINT MARC, p. 211*]. Obviously, CLAIMANT had no obligations to disclose the mere fact of arbitration to Commercial Fishing Today. It was at the utmost responsible to the five fishing vessels in Mediterraneo to whom it sold the delivered squid. Thus, there were no legitimate interests to disclose such confidential information in a newspaper, which in addition is distributed in forty-five countries.

44 Finally, CLAIMANT is unable to repair its reputation by making such statements to Commercial Fishing Today. Concluding, CLAIMANT was not justified to breach its duty of confidentiality in order to protect its own rights.

## B. An order for CLAIMANT to respect the obligation of confidentiality is necessary

45 Contrary to CLAIMANT'S allegation that no order of confidentiality can be issued [*Memorandum for Claimant, para. 27*], Art. 22(2) MA Rules 2010 states that the Arbitral Tribunal may issue all urgent and provisional measures of protection, also of anticipatory nature, that are not barred by mandatory provisions applicable to the proceedings. In the present case, such an order is necessary and urgent. As shown above, despite an existing duty of confidentiality [*vide supra, paras. 31-37*], CLAIMANT disclosed confidential information [*vide supra, para. 39*]. Apparently, neither Art. 8(1) MA Rules 2010 nor an implied duty are sufficient to cause CLAIMANT to keep the arbitration confidential.

46 Further, Commercial Fishing Today reported that it would closely follow the progress of the dispute between the two prominent firms [*Respondent's Exhibit No. 1, p. 28*]. Thus, there is a serious risk that CLAIMANT will give future interviews, and thereby discloses more confidential information. For these reasons it is necessary, that the Tribunal issues an order for CLAIMANT to respect the obligation of confidentiality.

## C. RESPONDENT is entitled to claim damages for CLAIMANT'S breach of confidentiality

47 RESPONDENT'S request that the Tribunal find that CLAIMANT is liable for any damages resulting from its breach of confidentiality is in the nature of a counter-claim [*Procedural Order No. 1, para. 4, p. 62*]. Art. 10(1) MA Rules 2010 allows RESPONDENT to file a counter-claim in its Statement of Defense.

48 The arbitration agreement determines the scope of the Tribunal's jurisdiction and to what extent it can decide on a dispute [*Century Indemnity v. Certain Underwriters, U.S. Ct. App.; PRYLES/WAINCYMER, para. 439*]. In the present case, the arbitration agreement states that "all disputes arising out of or related to this contract shall be settled by arbitration under the MA Rules […]" [*Claimant's Exhibit No. 4, p. 12*]. Courts in almost all jurisdictions have come to the conclusion that the phrase "relating to" extends an arbitration clause to a broad range of disputes [*BGer, 15 March 1990; Pennzoil Exploration v. Ramco Energy, U.S. Ct. App.; Woolcock v. Bushert, Ct. App. Ontario*]. This formula includes any disputes that touch or have a factual relationship to the parties' contract [*BORN, p. 1093*]. In the instant case, any breach of the MA Rules is necessarily related to the contract, as they are part of the parties' obligations under the contract. Further, as the implied duty of confidentiality arises out of the parties' arbitration agreement [*vide supra, para. 36*], the necessary relation to the contract is at hand. Hence, CLAIMANT'S breach of its duty of confidentiality was related to the contract and therefore should be decided in the present arbitration.

49 CLAIMANT may allege that RESPONDENT was not able to provide a legal basis for the damages claim resulting from CLAIMANT'S breach of confidentiality. However, Art. 3(3) MA Rules 2010 gives the Tribunal the necessary discretion to apply the rules it deems most appropriate to the merits of the dispute. Since the parties' sales contract is governed by the CISG, its application might be the most appropriate to the counter-claim. It is widely accepted that damages to reputation are generally recoverable under Art. 74 CISG [*CISG-AC Opinion No. 6, para. 7.1; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 74 para. 34; Staudinger/MAGNUS, Art. 74 para. 27; Witz/Salger/Lorenz/WITZ, Art. 74 para. 14; HUBER/MULLIS, p. 270*]. Also outside the CISG it is recognized that damages of loss of reputation are generally recoverable [*Art. 9:501 PECL; Art. 7.4.2 PICC*]. Therefore, RESPONDENT is entitled to claim damages resulting from CLAIMANT'S breach of confidentiality, even though the determination of a legal basis has not yet been decided.

50 CLAIMANT alleges that RESPONDENT cannot claim damages since it has not determined the exact extent of the amount suffered [*Memorandum for Claimant, para. 26*]. However, simply because the loss of reputation cannot yet be calculated in monetary terms does not exclude RESPONDENT from being entitled to claim damages. In *ICSID (2008)* the Tribunal held that only because it is difficult or even impossible to substantiate the suffered damages in monetary terms does not make them less real and there is no reason why the injured party should not be compensated. In the present case, the Tribunal held that it will leave the consideration of the quantum of damages to later proceedings [*Procedural Order No. 1, para. 6, p. 62*]. Concluding, RESPONDENT is entitled to claim damages resulting from CLAIMANT'S breach of confidentiality.

51 **CONCLUSION OF THE SECOND ISSUE:** Whether the duty of confidentiality arises out of Art. 8(1) MA Rules 2010 or out of the arbitration agreement, CLAIMANT breached it by disclosing the fact of arbitration to Commercial Fishing Today. The Tribunal is therefore requested to order CLAIMANT to respect the obligation of confidentiality and to hold it liable for any damages resulting from its breach of confidentiality.

## Third Issue: RESPONDENT delivered squid in conformity with the contract according to Art. 35 CISG

52 CLAIMANT alleges that RESPONDENT breached the contract by delivering squid not in conformity under Art. 35 CISG [*Memorandum for Claimant, para. 39*]. However, this allegation must be rejected since RESPONDENT delivered squid in conformity with the contract according to Art. 35(1) CISG **(A)**. Alternatively, RESPONDENT's delivery conformed to the contract pursuant to Art. 35(2) CISG **(B)**. Even if the Tribunal concluded that a lack of conformity exists, RESPONDENT is not liable for this lack of conformity pursuant to Art. 35(3) CISG **(C)**.

### A. RESPONDENT delivered squid in conformity with the contract according to Art. 35(1) CISG

53 Pursuant to Art. 35(1) CISG, the seller must deliver goods that are of the quality and description required by the contract. CLAIMANT purports that the contract called for squid weighing between 100 to 150 grams [*Memorandum for Claimant, para. 43*]. However, it will be demonstrated that this alleged weight requirement was never agreed upon **(I)**. Even if the Tribunal was to find that there was a weight requirement, it did not apply to the squid from 2008 since the contract called for unsized squid **(II)**.

## I. The specific weight range of 100 to 150 grams was not required by the contract

54 Contrary to CLAIMANT'S allegation, it failed to stipulate a weight requirement in the contract. At no time did CLAIMANT state that the squid must weigh between 100 to 150 grams in order to satisfy the contract. Rather, CLAIMANT only mentioned that it was "pleased" that the squid RESPONDENT offered were mostly within 100 to 150 grams in a letter accompanying the order form [*Claimant's Exhibit No. 2, p. 10*]. The wording of this letter is not sufficiently definite or clear to elevate the weight range to a contractual requirement. Being pleased with a particular feature is not the same as requiring it.

55 Moreover, CLAIMANT provided RESPONDENT with a detailed order form [*Claimant's Exhibit No. 3, p. 11*]. A requirement as important as this particular weight range could have easily been included. If CLAIMANT wanted to ensure that the squid were within the alleged weight range, it was necessary to include such a requirement in its order form. Concluding, the contract did not call for squid being within 100 to 150 grams.

## II. Even if there was a weight requirement, it did not apply to the squid from 2008 since the contract called for unsized squid

56 Even if the Tribunal infers a weight requirement from CLAIMANT'S accompanying letter, then it must be noted that the letter was written prior to the sale confirmation. It was not until the sale confirmation that the parties agreed on the squid being additionally from 2008 [*Claimant's Exhibit No. 4, p. 12*].

57 It is undisputed that the delivered squid caught in 2007 weighed between 100 to 150 grams [*Claimant's Exhibit No. 8, p. 16*], therefore the only squid on which CLAIMANT bases its allegation are the squid from 2008. However, since the contract called for unsized squid **(1)** the squid caught in 2008 did not have to be within 100 to 150 grams **(2)**.

### 1. The contract called for unsized squid

58 Unsized squid are run of the catch [*Statement of Defense, para. 12, p. 25*]. They are not sized mechanically or by sight [*ibid.*]. A delivery of unsized squid contains squid that differ in their weight. An interpretation of the contract in accordance with Art. 8 CISG determines whether a particular feature of the goods is agreed upon by the parties [*BGer, 22 December 2000; CISG-AC Opinion No. 3, para. 2.1; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 7; HUBER/MULLIS, p. 131; LEISINGER, pp. 6, 7*]. The parties agreed on unsized squid. Squid are either sized or run of

the catch. In the present case, the parties agreed on "2007/2008 Catch" [*Claimant's Exhibit No. 4, p. 12*]. The term "Catch" indicates that the squid from both the 2007 and 2008 catch were to be delivered run of the catch [*Statement of Defense, para. 12, p. 25*], accordingly unsized.

59 Art. 8(3) CISG provides that all relevant circumstances of the case including the negotiations of the parties are to be considered. For the following reasons the contract called for unsized squid.

60 First, RESPONDENT'S sales representative offered CLAIMANT unsized squid. CLAIMANT realized that the offered squid were unsized. In its email accompanying the order it stated that the squid "fell almost exclusively in the range of 100 to 150 grams" [*Claimant's Exhibit No. 2, p. 10*]. Therefore, it acknowledged that the squid were run of the catch and varied in size.

61 Second, the contract price corresponded to unsized squid. The same sales representative quoted a price of the unsized squid it offered [*Claimant's Exhibit No. 10, para. 8, p. 18*]. Since sized squid are more expensive than unsized squid [*Statement of Defense, para. 12, p. 25*] this price could only refer to unsized squid. CLAIMANT quoted the same price in its order form [*Claimant's Exhibit No. 10, para. 8, pp. 18, 19*]. CLAIMANT has been buying squid for resale for over twenty years and must certainly be aware that there is a difference between the price of sized and unsized squid. The price therefore established that the contract called for unsized squid.

62 Third, at no point did CLAIMANT ever clearly articulate that the contract required sized squid. Because RESPONDENT offered unsized squid, it was necessary for CLAIMANT to clearly indicate that it would only accept sized squid, if the weight were of the utmost importance for it. CLAIMANT is now trying to retroactively insert a requirement for squid to be delivered sized, however, this must have been done at the time of contracting. A reasonable trader would have included an explicit requirement for squid to be sized if it knew only a particular weight range would satisfy its customers. CLAIMANT did not include such a clause or make any such communication to RESPONDENT. Therefore, the squid were not to be delivered sized. Considering all these facts, the contract called for unsized squid.

### 2. Consequently, the 2008 squid did not have to weigh between 100 to 150 grams

63 Different stages of the squid harvest season have an influence on the weight of the squid. The season for harvesting Danubian squid is from April to September. Squid from early in the season usually run between 70 and 90 grams, from the middle of the season they run between 100 to 150 grams and at the end of the season they can be as large as 200 grams [*Statement of Defense, para. 13, p. 25*]. The contract was concluded in May 2008, only one month after the harvest season had begun [*Claimant's Exhibit No. 4, p. 12*]. Therefore, the squid from 2008 could

only be from the early part of the season, running below 100 grams. CLAIMANT, as an experienced participant in the fish trade [*Procedural Order No. 3, para. 27, p. 72*], must have realized that the squid from 2008 could not meet its alleged weight requirement, yet it made no comment or inquiry upon seeing the 2008 term in the contract.

64 Concluding, since the contract called for unsized squid, only the squid from 2007 could have met the weight range of 100 to 150 grams. Therefore, RESPONDENT delivered squid in conformity with the quality and description required by the contract pursuant to Art. 35(1) CISG.

## B. Alternatively, RESPONDENT'S delivery conformed to the contract pursuant to Art. 35(2) CISG

65 RESPONDENT delivered goods fit for the particular purpose made known to it **(I)**. Alternatively, it delivered squid fit for the ordinary use **(II)**. Due to the discrepancy between the sample and the contractual description, the latter prevails **(III)**.

### I. RESPONDENT delivered goods fit for the particular purpose made known to it

66 It will be demonstrated that RESPONDENT delivered squid fit for human consumption **(1)**. Even if the particular purpose was bait, CLAIMANT could not reasonably rely on RESPONDENT'S skill and judgment **(2)**.

#### 1. The delivered squid were fit for human consumption as the particular purpose

67 According to Art. 35(2)(b) CISG, goods conform to the contract when they are fit for any particular purpose expressly or impliedly made known to the seller at the time the contract was concluded. CLAIMANT alleges that the delivered squid had to be resalable as bait as this was the particular purpose made known to RESPONDENT [*Memorandum for Claimant, para. 49*]. However, this allegation must be rejected since RESPONDENT could only reasonably conclude that the particular purpose of the squid was resale for human consumption.

68 CLAIMANT contacted RESPONDENT to inquire as to the price and availability of squid and indicated for the first and last time throughout the negotiations that the squid would be used as bait [*Claimant's Exhibit No. 1, p. 9*]. After the visit from RESPONDENT'S sales representative, CLAIMANT placed its order. Contrary to the statement in its inquiry, CLAIMANT did not order squid for bait, instead it ordered 200 metric tons of squid that must be fit for human

consumption [*Claimant's Exhibit No. 3, p. 11*]. Therefore, RESPONDENT reasonably assumed that CLAIMANT intended to resell the squid for human consumption.

69 CLAIMANT purports that RESPONDENT had to be aware of an ulterior motive, other than to be consumed as seafood, for requiring the squid being fit for human consumption [*Memorandum for Claimant, para. 44; Claimant's Exhibit No. 10, para. 8, p. 19*]. Contrary to this allegation, CLAIMANT did not communicate its motive for inserting the "certified fit for human consumption" requirement. Common health regulations require any squid being stored in the same cool house as food must be certified fit for human consumption. While RESPONDENT may certainly have been aware of such health regulations [*Procedural Order No. 3, para. 22, p. 71*], awareness cannot lead to the presumption that this regulation would be an issue for CLAIMANT. Especially since CLAIMANT never mentioned that it stores all its fish products in the same cool house.

70 Furthermore, not all of the participants in the Mediterranean fish trade store their fish products for bait and for human consumption in the same cool house. It is clear from the record that at least one of CLAIMANT'S competitors stores squid and other bait in a separate cool house from where it stores products to be sold for human consumption [*Procedural Order No. 3, para. 24, p. 71*]. As no uniform practice exists, RESPONDENT could not have been aware of CLAIMANT'S storing practice.

71 Summarizing, the only particular purpose made known to RESPONDENT was the use for human consumption. RESPONDENT's entire delivery was fit for human consumption [*Claimant's Exhibit No. 8, p. 16*]. Concluding, RESPONDENT delivered squid fit for the particular purpose.

## 2. Even if the particular purpose of the squid was bait, CLAIMANT could not reasonably rely on RESPONDENT'S skill and judgment

72 According to Art. 35(2)(b) CISG, the goods must be fit for the particular purpose made known, except where the circumstances show that the buyer could not reasonably rely on the seller's skill and judgment. This is the case, where the buyer itself has more knowledge than the seller concerning the procurement of the goods for the intended purpose [*Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 24; BENEDICK, para. 303; LEISINGER, p. 17; PILTZ, para. 4-42*]. Even if the particular purpose was bait, CLAIMANT could not reasonably rely on RESPONDENT'S skill and judgment.

73 On the one hand, RESPONDENT sells, along with other fish products, Danubian squid for both bait and human consumption [*Statement of Defense, para. 2, p. 24*]. On the other hand, CLAIMANT is in the business of supplying long-liners for over twenty years [*Request for Arbitration,*

*para. 6, p. 4*]. It has tried different types of squid from different areas around the world and knows exactly which squid is reliable to meet its customers' requirements [*Request for Arbitration, para. 7, p. 4*]. Consequently, CLAIMANT is more knowledgeable than RESPONDENT about the business of re-selling squid as bait to the long-line fishing fleet in Mediterraneo.

74 Even if the Tribunal found that CLAIMANT and RESPONDENT are equally knowledgeable, CLAIMANT still could not reasonably rely on RESPONDENT'S skill and judgment. Courts and scholars have agreed that where the seller and the buyer are both knowledgeable, the buyer cannot rely on the seller's skill and judgment [*LG Coburg, 12 December 2006; BRUNNER, Art. 35 para. 15; Honsell/MAGNUS, Art. 35 para. 22; Staudigner/MAGNUS, Art. 35 para. 32; BENEDICK, para. 305; HUBER, p. 481*]. CLAIMANT and RESPONDENT are both experienced participants in the fish trade [*Procedural Order No. 3, paras. 26, 27, p. 72*]. No indications exist that RESPONDENT is more knowledgeable. In any case, it was unreasonable for CLAIMANT to rely on RESPONDENT'S skill and judgment.

## II. Alternatively, RESPONDENT delivered squid fit for the ordinary use

75 Pursuant to Art. 35(2)(a) CISG, the goods do not conform to the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used. Squid is usually used for both bait and human consumption [*Statement of Defense, para. 2, p. 24*]. In the present case, the squid were fit for all ordinary uses [*Claimant's Exhibit No. 8, p. 16*].

76 CLAIMANT asserts that the squid were not in conformity with the contract under Art. 35(2)(a) CISG [*Memorandum for Claimant, para. 48*]. However, this assertion must be rejected for the following reasons. A particular weight range of the squid is not a prerequisite for the ordinary use as bait. To the contrary, for long-line fishing squid needs to fall within the particular weight range of 100 to 150 grams [*Claimant's Exhibit No. 10, para. 5, p. 18*]. Due to the specific weight requirement, squid used as bait for long-line fishing must be considered as a particular purpose and not as the ordinary use. The seller is only responsible for the fitness of the goods for a purpose other than the purpose for which they ordinarily be used, if that purpose had been expressly or impliedly made known to him [*Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 19*]. As shown above, CLAIMANT explicitly ordered squid being fit for human consumption and not fit for the use as bait for long-line fishing [*vide supra, para. 68*].

77 Even if the Tribunal found that bait for long-line fishing is one of the ordinary uses of squid, RESPONDENT communicated to CLAIMANT that part of the squid would not be usable as bait for long-line fishing. If the goods are not fit for all, but merely some of the purposes for which goods of that type are ordinarily used, the seller must inform the buyer of that fact

[*SECRETARIAT'S COMMENTARY, Art. 33 No. 5; BRUNNER, Art. 35 para. 8; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 13; BENEDICK, para. 278; HEILMANN, p. 186*]. In order to avoid any uncertainties RESPONDENT specified in the sales confirmation that the squid would be from the "2007/2008 Catch". When it acknowledged the sale confirmation [*Respondent's Exhibit No. 2, p. 29*], CLAIMANT, as an experienced participant in the fish trade, could not have been unaware that the squid delivered from early season 2008 would not fall within the particular weight range of 100 to 150 grams [*vide supra, para. 63*]. Thus, CLAIMANT knew that part of the squid was not usable as bait. Concluding, RESPONDENT'S entire delivery conformed to the contract.

## III. Due to the conflict between the sample and the contractual description, the latter prevails

78 CLAIMANT alleges that the delivered squid were not in conformity with the sample provided by RESPONDENT [*Memorandum for Claimant, para. 50*]. This allegation must be rejected due to a conflict between the sample and the contractual description of the squid pursuant to Art. 35(1) CISG.

79 In case of conflict between the contractual prescription of the goods pursuant to Art. 35(1) CISG and the sample, the contractual prescription prevails [*NEUMAYER/MING, Art. 35 para. 10*]. The sample consisted of unsized squid running between 100 to 150 grams [*Claimant's Exhibit No. 2, p. 10; Statement of Defense, para. 12, p. 25*]. The contract did not require the squid being within a certain weight range [*vide supra, paras. 54, 55*]. Since there is a difference between the sample and the contractual prescription of the goods at hand, the contractual prescription prevails.

80 Furthermore, such a conflict can be resolved by considering the true intent of the parties [*Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 26; Staudinger/MAGNUS, Art. 35 para. 39; BENEDICK, para. 312; HEILMANN, p. 186; HONNOLD/FLECHTNER, para. 231*]. If the sample had been shown before the parties agreed to the contractual description, the latter tends to correspond to the parties' intent [*MünchKommBGB/GRUBER, Art. 35 para. 28*]. In the case at hand, on 17 May 2008 RESPONDENT provided CLAIMANT with a sample of squid [*Claimant's Exhibit No. 10, para. 6, p. 18*]. On 29 May 2008 the parties agreed to the contractual description [*Claimant's Exhibit No. 4, p. 12*]. Concluding, as the contractual description corresponds to the parties' intent, it must prevail.

## C. Even if the Tribunal concluded that a lack of conformity exists, RESPONDENT is not liable for this lack of conformity

81 Art. 35(3) CISG provides that the seller is not liable under Art. 35(2) CISG 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 a lack of conformity. The particular lack of conformity that ought to have been apparent to the buyer is to be determined by having regard to the buyer's position [*Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 35*]. As shown above, CLAIMANT knew that the squid were to be delivered unsized [*vide supra, paras. 58-62*]. Therefore, the squid caught in 2008 would certainly not fall within the required weight range to be useable as bait for long-line fishing and would not fall within the weight range of the sample [*vide supra, paras. 63, 64*]. CLAIMANT, as an experienced participant in the fish trade with more than two decades of experience [*Procedural Order No. 3, para. 27, p. 72; Request for Arbitration, para. 6, p. 4*] could not have been unaware of the alleged lack of conformity, namely the weight of the 2008 squid. Thus, RESPONDENT is not liable for this lack of conformity.

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**CONCLUSION OF THE THIRD ISSUE:** RESPONDENT fulfilled its contractual obligations under Art. 35 CISG by delivering squid that conformed to the contractual requirements and the mutual agreements of the parties. Any subsequent problems CLAIMANT experienced with its own customers cannot be attributed to RESPONDENT after it had delivered conforming squid.

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# Fourth Issue: CLAIMANT failed to fulfill its obligations under Arts. 38 and 39 CISG and therefore cannot rely on an alleged lack of conformity

82 Regardless of whether an alleged lack of conformity is at hand, CLAIMANT cannot rely thereon since it neither notified RESPONDENT within a reasonable time nor with the necessary specificity about the alleged lack of conformity **(A)**. Moreover, RESPONDENT can rely on the provisions of Arts. 38 and 39 CISG because the requirements of Art. 40 CISG are not fulfilled in the present case **(B)**.

# A. CLAIMANT failed to give timely and specified notice pursuant to Art. 39 CISG

83 According to Art. 39 CISG, the buyer loses the right to rely on a lack of conformity if he does not give the seller specified notice within a reasonable time after he ought to have discovered it. It will be demonstrated that CLAIMANT'S notification about the alleged lack of conformity was not within a reasonable time **(I)** and lacked the necessary specificity **(II)**.

## I. CLAIMANT did not notify RESPONDENT within a reasonable time

84 The reasonable period to give notice started when CLAIMANT examined the goods on 1 July 2008 **(1)**. CLAIMANT'S notice on 29 July 2008 was not within a reasonable time **(2)**.

### 1. The period to notify RESPONDENT began on 1 July 2008 when CLAIMANT examined the squid

85 The time to give notice of a lack of conformity begins to run when the buyer ought to have discovered it [*CISG-AC Opinion No. 2, para. 4.1; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 38 para. 3; HUBER/MULLIS, p. 159*]. If CLAIMANT had conducted a sufficient examination it would have been possible to discover the weight of the 2008 catch on the same day as the delivery. Pursuant to Art. 38(1) CISG, the buyer must examine the goods within as short a period as is practicable in the circumstances. He must thereby take all the circumstances into account in order to disclose recognizable defects [*HERBER/CZERWENKA, Art. 38 para. 5; NEUMAYER/MING Art. 38 para. 2; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 38 para. 13; Staudinger/MAGNUS, Art. 38 para. 28; HEUZÉ, para. 301*]. It will be demonstrated that CLAIMANT did not take all necessary circumstances into account when examining the delivery, and therefore did not discover the alleged lack of conformity.

86 Under Art. 38 CISG, delivery of large quantity requires the buyer to conduct a representative random test of the goods [*Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 38 para. 14; Staudinger/MAGNUS, Art. 38 para. 30; HEILMANN, pp. 292, 293; HUBER/MULLIS, p. 151*]. This means the examination must not be superficial or summary [*HEILMANN, p. 292*]. Even if the examination requires defrosting the goods and rendering them unfit for use, the number of random samples must still amount to a very small percentage of the whole amount [*Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 38 para. 14; Staudinger/MAGNUS, Art. 38 para. 30*]. CLAIMANT rightfully argues that it was not practicable to defrost all of the squid [*Memorandum for Claimant, para. 70*], but nonetheless its inspection still had to be representative.

87 In the case at hand, CLAIMANT weighed only twenty cartons out of a total amount of 20'000 cartons [*Request for Arbitration, para. 17, p. 5; Claimant's Exhibit No. 4, p. 12*]. It should be noted that simply weighing the cartons in no way affected the usability of the squid. Further, CLAIMANT only defrosted five of those cartons in order to individually inspect the squid [*Request for Arbitration, para. 17, p. 5*]. In other words, CLAIMANT only inspected fifty kilograms of squid out of 200'000 kilograms, a mere 0.025 percent of the whole delivery. By all means, this does not amount to a very small percentage.

88 Even if the Tribunal found that this amount was sufficient, the samples were not representative. In order to conduct a representative test, it would be necessary to take cartons from different containers. Sixty percent of the shipment was 2008 catch [*Claimant's Exhibit No. 8, p. 16*], CLAIMANT knew from the sale confirmation that the shipment consisted of 2007 and 2008 labeled cartons [*Claimant's Exhibit No. 4, p. 12*]. Yet, it only selected cartons out of the first two containers [*Claimant's Exhibit No. 10, para. 10, p. 19*]. The cartons were all labeled 2007 [*Procedural Order No. 3, para. 32, p. 73*]. Since CLAIMANT did not select its samples out of different containers and failed to examine any of the 2008 labeled cartons, it did not conduct a representative random test.

89 Moreover, the examination must be even more thorough if there is a risk of ultimately large consequential losses [*LG Aschaffenburg, 20 April 2006; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 38 para. 13; KUOPPALA, para. 3.3.1*]. In the present case, CLAIMANT knew that the long-liners are often far out at sea, and that a return to port to re-stock the vessels with appropriate goods would result in consequential losses [*Request for Arbitration, para. 10, p. 5*]. Therefore, it should have conducted a much more thorough examination to ensure that all of the squid had the necessary size.

90 For all these reasons, CLAIMANT conducted an insufficient examination of the squid pursuant to Art. 38 CISG and ought to have known about the alleged lack of conformity. Concluding, the period to give notice started on 1 July 2008 when CLAIMANT examined the squid.

### 2. CLAIMANT'S notice on 29 July 2008 was not within a reasonable time

91 Notice must be given within a reasonable time after the buyer ought to have discovered the lack of conformity [*HERBER/CZERWENKA, Art. 39 para. 9; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 39 paras. 15, 19*]. CLAIMANT failed to prove that a period of twenty-eight days should be considered reasonable [*Memorandum for Claimant, para. 73*]. When determining what a reasonable time is, it must be taken into account whether the goods are perishable or durable.

92 Durable goods can be used repeatedly over a long period, such as automobiles and personal computers [*Black's Law Dictionary, p. 714*]. Frozen squid cannot be regarded as a durable good since they can neither be used repeatedly nor over a long period of time. They need constant care to stay in the same condition. In the present case, the squid had to be destroyed approximately one year after the delivery because they had started to deteriorate even with the constant upkeep [*Procedural Order No. 3, para. 30, p. 72; Request for Arbitration, para. 23, p. 6*]. Thus, squid must be considered perishable goods.

93 In the case of perishable goods, notice must be given within hours, or at most within few days [*OGH, 30 June 1998; RB Breda, 16 January 2009; RB Zutphen, 27 February 2008; BRUNNER Art. 39 para. 13; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 39 paras. 16, 17; Staudinger/MAGNUS, Art. 39 para. 43*]. CLAIMANT notified RESPONDENT twenty-eight days after it ought to have discovered the weight of the squid caught in 2008. Under no standard can this period be regarded as a reasonable time to give notice about a lack of conformity when dealing with perishable goods.

94 Even under the standard for durable goods, CLAIMANT'S notice was still not within a reasonable time. CLAIMANT may allege that a notice period of one month should be considered reasonable. However, a period of one month to give notice must be rejected, as it is not universally accepted [*GIRSBERGER, p. 247*]. Courts and scholarly writings agree that a period of fourteen days or even less is considered reasonable to give notice of any lack of conformity [*ICC Award No. 9083 (1999); OGH, 14 January 2002; OGH, 27 August 1999; LG Tübingen, 19 June 2003; Honsell/MAGNUS, Art. 39 para. 22; REINHART, Art. 39 para. 5; Staudinger/MAGNUS, Art. 39 para. 49; KAROLLUS, pp. 27, 28*]. Accordingly, CLAIMANT'S notice was filed at least two weeks after a reasonable time had past. Overall, CLAIMANT did not notify RESPONDENT about the alleged lack of conformity within a reasonable time after it ought to have discovered it.

## II. CLAIMANT'S notice lacked the necessary specificity

95 The notice concerning the lack of conformity must indicate the will to object as well as exactly specify the nature of the lack [*OGH, 14 January 2002; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 39 para. 6; Soergel/LÜDERITZ/SCHÜßLER-LANGEHEINE, Art. 39 paras. 8, 9; HUBER/MULLIS, p. 157*]. Neither quite general terms nor general expressions of dissatisfaction are sufficient to describe any lack of conformity [*BRUNNER Art. 39 para. 6; HERBER/CZERWENKA, Art. 39 para. 7; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 39 para. 7; Staudinger/MAGNUS, Art. 39 para. 21*].

96 In the instant case, CLAIMANT failed to refer to the size of the squid in its email to RESPONDENT dated 29 July 2008 [*Claimant's Exhibit No. 5, p. 13*]. CLAIMANT only stated that two fishing vessels "reported that the squid was hardly usable as bait" [*ibid.*]. The expression "hardly usable as bait" must be considered too general as it does not specify the alleged lack of conformity.

97 Further, since CLAIMANT wrote about only two fishing vessels reporting problems with the squid, RESPONDENT could not assume that there were irregularities with the whole delivery of 200 metric tons. RESPONDENT could therefore not be expected to understand any will to object from CLAIMANT'S email.

98 Additionally, an even more precise notification can be expected if the buyer is an expert [*MünchKommHGB/BENICKE, Art. 39 para. 2; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 39 para. 7*]. Since CLAIMANT is an expert in the fish trade [*Procedural Order No. 3, para. 27, p. 72*], its specification should have been even more precise. Concluding, CLAIMANT'S notice lacked the required specificity.

## B. RESPONDENT is not barred from relying on Arts. 38 and 39 CISG

99 CLAIMANT may allege that Art. 40 CISG applies to the present case to bar RESPONDENT from relying on Arts. 38 and 39 CISG. This argument must be rejected. According to Art. 40 CISG, the seller cannot rely on Arts. 38 and 39 CISG if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. However, liability is already excluded under Art. 35 CISG, if the seller disclosed the defects to the buyer at the time of the conclusion of the contract [*MünchKommBGB/GRUBER, Art. 40 para. 9; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 40 para. 7*]. In the case at hand, RESPONDENT disclosed all the facts that it was aware of at the time of the conclusion of the contract. Accordingly, CLAIMANT had the same knowledge of the facts relating to the squid as RESPONDENT. Concluding, the requirements of Art. 40 CISG are not fulfilled and therefore RESPONDENT is not barred from relying on Arts. 38 and 39 CISG.

100 **CONCLUSION OF THE FOURTH ISSUE:** CLAIMANT failed to conduct a proper examination under Art. 38 CISG and give timely and specified notice pursuant to Art. 39 CISG and therefore cannot rely on a lack of conformity. Moreover, RESPONDENT is not barred from relying on Arts. 38 and 39 CISG because the requirements of Art. 40 CISG are not fulfilled in the present case.

# Fifth Issue: CLAIMANT was not entitled to declare the contract avoided

101 Contrary to CLAIMANT'S allegation [*Memorandum for Claimant, para. 53*], it had no lawful right to avoid the contract because no fundamental breach occurred in the present case **(A)**. Further, CLAIMANT failed to declare avoidance effectively **(B)**.

## A. No fundamental breach occurred in the present case

102 CLAIMANT'S assertion that RESPONDENT committed a fundamental breach of contract must be rejected [*Memorandum for Claimant, para. 34*]. Pursuant to Art. 49(1)(a) CISG, the buyer may only declare the contract avoided if the failure by the seller to perform any of his obligations under the contract amounts to a fundamental breach.

103 This notion of the fundamental breach has two distinct aspects, delineated in Art. 25 CISG. First, a breach of contract is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract. Second, a breach is fundamental unless the seller and a reasonable third party did not foresee such a result. In the case at hand, CLAIMANT was not substantially deprived of what it had expected under the contract **(I)**. Even if the breach of contract resulted in such detriment to CLAIMANT, the alleged detriment would not have been foreseeable **(II)**.

### I. CLAIMANT was not substantially deprived of what it had expected under the contract

104 CLAIMANT alleges that it was substantially deprived of what it had expected under the contract [*Memorandum for Claimant, para. 57*]. In order to determine if a party is substantially

deprived of what it was entitled to expect, one must look to the contract. When agreeing on certain features of the goods it is up to the parties to make sufficiently clear that the agreed features are so important to them, that non-conformity would amount to a fundamental breach of the contract, entitling the innocent party to avoid [*CISG-AC Opinion No. 5, para. 4.2; Schlechtriem/Schwenzer/SCHROETER (eng.), Art. 25 paras. 21, 44; LEISINGER, p. 42*]. CLAIMANT cannot argue that it sufficiently stipulated the importance of the squid being suitable as bait by mentioning it solely in the circular message sent to several Danubian squid suppliers, including RESPONDENT [*Claimant's Exhibit No. 1, p. 9*]. The word "bait" as well as any indication of a desired weight is absent from both the order form and the sale confirmation [*Claimant's Exhibit Nos. 3, 4, pp. 11, 12*]. Thus, the alleged breach did not substantially deprive CLAIMANT of what it had expected because CLAIMANT did not attach any specific importance to the weight range and its use as bait, nor would the circumstances lead a reasonable person to understand such a requirement.

105 Even if it was to be considered that the squid's suitability as bait were essential, CLAIMANT was not substantially deprived of what it could have expected under the contract since the delivered squid were resalable as bait **(1)** and for human consumption **(2)**.

### 1. The delivered squid were resalable as bait

106 CLAIMANT claims that the squid provided by RESPONDENT were too small to serve as bait [*Memorandum for Claimant, para. 58*]. The record clearly shows that the squid labeled "2007 Catch" were the proper size to function as bait [*Claimant's Exhibit No. 8, p. 16; Request for Arbitration, para. 18, p. 6*]. This corresponds to approximately forty percent of the whole delivery [*ibid.*]. Therefore, CLAIMANT could resell this part of the squid to the long-liners in Mediterraneo as intended. CLAIMANT alleges that although this part of the squid was of an appropriate size for bait it was not possible for him to resell it to the long-liners [*Request for Arbitration, para. 19, p. 6*]. CLAIMANT states that once the word was out in the Mediterranean market that the Danubian squid it offered were undersized, the long-liners refused to purchase it [*Claimant's Exhibit No. 10, para. 14, p. 19*]. However, even if it was difficult to resell the squid domestically, it was possible to resell abroad.

107 A fundamental breach may not be given if resale can reasonably be expected from the individual buyer in his normal course of business [*BGer, 28 October 1998; BGH, 3 April 1996; OLG Stuttgart, 12 March 2001; CISG-AC Opinion No. 5, para. 4.3; HUBER/MULLIS, pp. 228, 229; KOCH, p. 222; SCHWENZER, VUWLR 2005, p. 802*]. CLAIMANT has over twenty years experience reselling bait [*Request for Arbitration, para. 6, p. 4*]. Nevertheless, it did not even try to resell the squid as bait in markets outside Mediterraneo. Since CLAIMANT'S normal course of business is

the resale of squid for the use as bait, it would be reasonable for CLAIMANT to try to resell the squid as bait in foreign markets. Concluding, at least forty percent of the delivered squid were resalable as bait for long-liners.

### 2. The delivered squid were resalable for human consumption

108 Even if the Tribunal found that it was not possible for CLAIMANT to resell the delivered squid as bait, it will be demonstrated that, contrary to CLAIMANT'S allegation [*Memorandum for Claimant, para. 59*], the entire delivery of the squid was resalable for human consumption. It is agreed amongst courts and scholars that avoidance of the contract should be limited to cases where the buyer can make no use of the goods [*OLG Hamburg, 25 January 2008; OLG Düsseldorf, 23 January 2004; Schlechtriem/Schwenzer/SCHROETER (eng.), Art. 25 para. 50; Staudinger/MAGNUS, Art. 25 para. 26; HUBER/MULLIS, p. 231*]. The threshold of fundamental breach is therefore high, avoidance is the *ultima ratio* [*BGer, 28 October 1998; BGH, 3 April 1996; Schlechtriem/Schwenzer/SCHROETER (eng.), Art. 25 para. 51*]. In the case of resale, the goods must be resalable in the buyer's normal course of business [*CISG-AC Opinion No. 5, para. 4.3; LEISINGER, p. 45*].

109 CLAIMANT cannot successfully allege that it was unreasonable to expect it to resell the squid for human consumption since CLAIMANT operates a wholesale business in fish and other seafood for human consumption [*Claimant's Exhibit No. 10, para. 2, p. 18; Request for Arbitration, para. 2, p. 4*]. A wholesaler has broad access to relevant markets and therefore has many opportunities to resell the goods [*CISG-AC Opinion No. 5, para. 4.3*]. In the present case, CLAIMANT could have resold the squid as seafood since the whole delivery of squid was fit for this purpose [*Claimant's Exhibit No. 8, p. 16*]. Nevertheless, CLAIMANT only turned to a single reseller, Reliable Trading House [*Claimant's Exhibit No. 10, para. 15, p. 20*]. As a wholesaler, CLAIMANT was required to put more effort in trying to resale the squid for human consumption in other markets by turning to more than just one trading house. Concluding, RESPONDENT'S delivery did not substantially deprive CLAIMANT of what it could have expected under the contract since the squid were resalable for human consumption.

## II. The alleged detriment would not have been foreseeable

110 According to Art. 25 CISG, a breach of contract cannot be regarded as fundamental if the party in breach, and a reasonable person of the same kind in the same circumstances, would not have foreseen such a result. The foreseeability pertains to the detriment caused by the breach of contract, and not by the breach itself [*Schlechtriem/Schwenzer/SCHROETER (eng.), Art. 25 para. 26; Staudinger/MAGNUS, Art. 25 para. 14; HUBER/MULLIS, p. 216*]. In the case at hand, it will be

demonstrated that, contrary to CLAIMANT'S assertion [*Memorandum for Claimant, para. 60*], RESPONDENT as well as a reasonable person could not have foreseen that the delivered squid caught in 2007 would not be resalable as bait **(1)**. Moreover, it was not foreseeable that the squid would not be resalable for human consumption **(2)**.

## 1. It was not foreseeable that the squid caught in 2007 would not be resalable for bait

111 TGT laboratories reported that the squid caught in 2007 were within the necessary weight range to satisfy CLAIMANT'S long-line customers [*Claimant's Exhibit No. 8, p. 16*]. CLAIMANT is an experienced participant in the fish trade [*Procedural Order No. 3, para. 27, p. 72*] and operates in the business of selling squid for bait to fishing fleets [*Request for Arbitration, para. 2, p. 4*]. Therefore, neither RESPONDENT nor a reasonable person in the same circumstances could have assumed that CLAIMANT would not be able to resell any of the squid caught in 2007 as bait.

## 2. In addition, it was not foreseeable that the delivered squid would not be resalable for human consumption

112 The foreseeability of a detriment must be given at the time the contract was concluded [*Schlechtriem/Schwenzer/SCHROETER (eng.), Art. 25 para. 33*]. In the order form CLAIMANT required the squid to be fit for human consumption [*Claimant's Exhibit No. 3, p. 11*]. Thus, as already established, RESPONDENT reasonably assumed that CLAIMANT wanted to resell the squid for that purpose [*vide supra, paras. 67-71*]. RESPONDENT could not have foreseen that someone ordering squid being fit for human consumption would not have appropriate contacts to sell the squid for this purpose.

113 Furthermore, RESPONDENT knew that CLAIMANT is an experienced participant in the fish trade and sells fish products for human consumption [*Statement of Defense, para. 18, p. 26*]. When such a buyer orders 200 metric tons of squid, there are no reasons to assume that he does not have the necessary resources and possibility to resell the ordered goods.

114 CLAIMANT may argue that the market for squid for human consumption in Mediterraneo is small and was already saturated. However, it is not for RESPONDENT to know the particular market conditions of any of its customers. For these reasons, neither RESPONDENT nor a reasonable person of the same kind in the same circumstances would have foreseen that CLAIMANT was not able to resell the ordered squid for human consumption.

## B. Even if there was a fundamental breach of contract, CLAIMANT failed to declare avoidance effectively

115 A buyer can only avoid the contract if he makes a declaration pursuant to Art. 26 CISG [*Schlechtriem/Schwenzer/MÜLLER-CHEN (eng.), Art. 49 para. 23*]. It will be demonstrated that CLAIMANT did not declare avoidance effectively because it did not clearly communicate its will to avoid the contract **(I)** and the notice was not given within a reasonable time **(II)**.

### I. CLAIMANT did not clearly communicate its will to avoid the contract

116 CLAIMANT purports that it expressly declared the contract avoided [*Memorandum for Claimant, para. 62*]. It is generally accepted that the declaration of avoidance must comply with a high standard of clarity and certainty [*MünchKommBGB/GRUBER, Art. 26 para. 5; Schlechtriem/Schwenzer/FOUNTOULAKIS (eng.), Art. 26 para. 6*]. That means that the wording of the declaration must unambiguously state that the buyer is no longer willing to perform the contract because of the seller's breach [*Schlechtriem/Schwenzer/MÜLLER-CHEN (eng.), Art. 49 para. 24*], and thus specify the reason for the avoidance [*BABIAK, p. 135; JACOBS, p. 410*]. In the present case, CLAIMANT stated that the TGT laboratories report would show that it did not get squid within the weight range of 100 to 150 grams [*Claimant's Exhibit No. 7, p. 15*]. To the contrary, the TGT laboratories report shows that forty percent of the squid were within this weight range [*Request for Arbitration, para. 18, p. 6*]. Thus, CLAIMANT'S declaration did not express any reason why CLAIMANT was no longer willing to perform the contract and therefore did not meet the high standards of a declaration of avoidance. Concluding, CLAIMANT failed to specify the reason for its will to avoid the contract.

### II. CLAIMANT'S declaration to avoid the contract was not within a reasonable time

117 According to Art. 49(2)(b)(i) CISG, the buyer must declare avoidance within a reasonable time, which begins to run after he knew or ought to have known about the breach of contract. In cases where the buyer fails to examine the goods, pursuant to Art. 38 CISG, knowledge is considered to exist at the time the examination should have been conducted [*Schlechtriem/Schwenzer/MÜLLER-CHEN (eng.), Art. 49 para. 34*]. In the present case, CLAIMANT examined the squid on the same day of the delivery [*Request for Arbitration, para. 17, p. 5*]. However, as already discussed above, the examination was insufficient to meet the requirements of Art. 38 CISG. Therefore, it should be deemed that CLAIMANT had knowledge of the alleged breach on the same

day as the squid were delivered. Accordingly, the period to declare avoidance began to run on 1 July 2008. Unless exceptional circumstances extend the "reasonable time" period, a declaration of avoidance should be made more or less immediately [*ENDERLEIN/MASKOW/STROHBACH, Art. 49 para. 7; Soergel/LÜDERITZ/SCHÜßLER-LANGEHEINE, Art. 49, para. 12*]. The buyer loses his right to avoid the contract independent of any fundamental breach if the declaration was not given within a reasonable time [*Schlechtriem/Schwenzer/MÜLLER-CHEN (eng.), Art. 49 paras. 3, 33*]. CLAIMANT notified RESPONDENT more than one and a half month later on 16 August 2008 [*Claimant's Exhibit No. 7, p. 15*]. Contrary to CLAIMANT'S argument [*Memorandum for Claimant, para. 64*], this time period cannot be regarded as reasonable since it was neither immediate nor were there any indications for exceptional circumstances. Therefore, CLAIMANT lost its right to avoid the contract because its declaration of avoidance was not within a reasonable time.

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118 **CONCLUSION OF THE FIFTH ISSUE:** The alleged breach did not amount to a fundamental breach of contract as required under the CISG in order to avoid the contract. Even assuming there was a fundamental breach, CLAIMANT failed to declare avoidance effectively.

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## Sixth Issue: CLAIMANT did not take all reasonable measures to mitigate the loss

119 Even if the Tribunal found that there is a breach of contract, CLAIMANT is not entitled to full recovery because it did not take all reasonable measures to mitigate the loss as required by Art. 77 CISG. According to Art. 77 CISG, a party relying on a breach of contract must take measures that are reasonable in the circumstances to mitigate the loss. CLAIMANT may argue that a party must neither take measures that are excessive or risky, nor must the measures be successful to comply with its duty to mitigate. However, if it was possible for the injured party to take more effective measures and could be reasonably expected to do so in the circumstances, he cannot claim the full amount of damages [*Bianca/Bonell/KNAPP, Art. 77 para. 2.4*]. CLAIMANT errs in its finding that its attempt to resell the goods constituted the most reasonable mitigation efforts and that its inability to resell the squid has no bearing on the adequacy of its mitigation [*Memorandum for Claimant, para. 77*]. CLAIMANT cannot argue that resale of the squid for human consumption was not possible due to the small and already occupied market in Mediterraneo [*Memorandum for Claimant, para. 78*]. In contrast to CLAIMANT'S allegation [*ibid.*], it runs a

wholesale business in fish and other seafood for human consumption [*Claimant's Exhibit No. 10, para. 2, p. 18*]. There is a vastly large market for squid for human consumption. For example, in Japan it accounts for almost 500,000 metric tons over the course of a year [*Japan's Squid Market, p. 23*]. CLAIMANT'S attempt to resell the squid did not constitute the reasonable measures required by Art. 77 CISG, as it ignored major markets when trying to sell the squid.

120 Further, when CLAIMANT contacted Reliable Trading House, they were able to sell ten percent of the delivered squid [*Claimant's Exhibit No. 10, para. 15, p. 20; Memorandum for Claimant, para. 78*]. Given the success of Reliable Trading House, it would have been reasonable if CLAIMANT had contacted more trading companies in order to further mitigate its loss.

121 At the time when the squid became unfit for human consumption, CLAIMANT had it destroyed [*Procedural Order No. 3, para. 30, p. 72*]. Instead of wasting USD 6,000 for the disposal of the squid [*Request for Arbitration, para. 30, p. 8*], CLAIMANT should have sold it for the use as fishmeal. Even though fishmeal has little value [*Claimant's Exhibit No. 10, para. 10, p. 19*], this measure would have been reasonable and effective in order to mitigate CLAIMANT'S loss.

122 Summarizing, CLAIMANT did not take all reasonable measures to mitigate its loss and therefore cannot claim the full amount of damages.

## PRAYER FOR RELIEF

In light of the submissions above, RESPONDENT respectfully requests the honorable Tribunal to find that:

- The Tribunal lacks jurisdiction to decide the merits of the case **(FIRST ISSUE)**

Alternatively that:

- The Tribunal has jurisdiction to issue an order of confidentiality and hold CLAIMANT liable for any damages resulting from its breach of confidentiality **(SECOND ISSUE)**
- RESPONDENT delivered squid in conformity with the contract according to Art. 35 CISG **(THIRD ISSUE)**
- CLAIMANT failed to fulfill its obligations pursuant to Arts. 38 and 39 CISG and therefore cannot rely on an alleged lack of conformity **(FOURTH ISSUE)**
- CLAIMANT was not entitled to declare the contract avoided **(FIFTH ISSUE)**
- CLAIMANT did not take all reasonable measures to mitigate the loss **(SIXTH ISSUE)**

## CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Basel, 20 January 2011

| | |
|---|---|
| (signed) | (signed) |
| Michael Burkhardt | Patrik Gubler |
| (signed) | (signed) |
| Nathalie Hajek | Florence Jaeger |
| (signed) | (signed) |
| Tomie Keller | Miriam Lüdi |
| (signed) | (signed) |
| Philipp Ressnig | Daniel Rüdin |