REVISTA SEMESTRAL DE DIREITO EMPRESARIAL

Nº 9

Publicação do Departamento de Direito Comercial e do Trabalho da Faculdade de Direito da Universidade do Estado do Rio de Janeiro

Rio de Janeiro
julho / dezembro de 2012

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Publicação do Departamento de Direito Comercial e do Trabalho da Faculdade de Direito da Universidade do Estado do Rio de Janeiro (Prof. Alexandre Ferreira de Assumpção Alves, Prof. Eduardo Henrique Raymundo Von Adamovich, Prof. João Batista Berthier Leite Soares, Prof. José Carlos Vaz e Dias, Prof. José Gabriel Assis de Almeida, Prof. Leonardo da Silva Sant'Anna, Prof. Marcelo Leonardo Tavares; Prof. Mauricio Moreira Mendonça de Menezes, Prof. Rodrigo Lychowski, Prof. Sérgio Murilo Santos Campinho e Prof. Valter Shuenquener de Araújo).

Coordenação: Sérgio Murilo Santos Campinho e Mauricio Moreira Mendonça de Menezes.

ISSN 1983-5264

CIP-Brasil. Catalogação-na-fonte
Sindicato Nacional dos Editores de Livros, RJ.

Revista semestral de direito empresarial. — nº 9 (julho/dezembro 2012)
. — Rio de Janeiro: Renovar, 2007-.
v.

UERJ
Campinho Advogados
Bocater, Camargo, Costa e Silva Advogados Associados

Semestral
1. Direito — Periódicos brasileiros e estrangeiros.

94-1416. CDU — 236(104)

A PARTICIPAÇÃO DA UERJ NO 18TH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

PARTICIPATION OF UERJ IN THE 18TH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Isabel Miranda
Daniel Gruenbaum

Resumo: Entre 2010 e 2011, pela primeira vez, a Universidade do Estado do Rio de Janeiro (UERJ) formou uma equipe para participar do *Annual Willem C. Vis International Commercial Arbitration Moot*, mais especificamente, de sua 18ª edição. Já em seu primeiro esforço, a equipe recebeu menção honrosa por uma das peças elaboradas, o que fez da UERJ a primeira universidade latino-americana na história da competição a receber a honraria, junto com a Universidade de São Paulo (USP). Aqui, a equipe divide sua experiência no Vis Moot, bem como a peça pela qual foi agraciada.

Abstract: Between 2010 and 2011, for the first time, the University of the State of Rio de Janeiro (UERJ) formed a team in order to take part in the *Annual Willem C. Vis International Commercial Arbitration Moot* (18th edition).As a result, the team received an honorable mention for one of its written submissions, what made UERJ the first Latin-American university in the history of the competition to receive the honor, together with the University of São Paulo (USP).

Here, the team shares its Vis Moot experience, as well as the memorandum which received the prize.

Palavras-chave: Vis Moot. UERJ. Arbitragem comercial internacional.

Keywords: Vis Moot. UERJ. international commercial arbitration.

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O *Annual Willem C. Vis International Commercial Arbitration Moot* ("Vis Moot")[1] é a mais importante competição internacional universitária relativa à arbitragem comercial internacional e à Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias (1980) ("CISG"). Desde 1993, o Vis Moot reúne em Viena cada vez mais professores e advogados, que atuam como árbitros (julgadores) e *coaches* (treinadores das equipes), além de estudantes de graduação e pós-graduação em Direito do mundo inteiro, comumente referidos como *vismooties*, que atuam como advogados das partes.

A competição, que sempre envolve um caso fictício elaborado pela organização, ocorre em duas fases: na primeira fase, as equipes elaboram, como advogados, memorandos escritos tanto em favor do demandante quanto do demandado. Na segunda fase, as equipes se enfrentam nos debates orais, em Viena (Áustria), também na qualidade de advogados, ora do demandante, ora do demandado, quando são avaliadas por renomados profissionais. Todas as fases do Vis Moot são realizadas inteiramente em inglês.

Na 18ª edição (2010/2011), a competição contou com a participação de 254 universidades provenientes de 63 países, sendo 12

1 http://www.cisg.law.pace.edu/vis.html

universidades brasileiras. Nesse ano, a equipe da UERJ[2] – em sua primeira participação no Vis Moot – recebeu menção honrosa para o memorando do demandado (Prêmio *Werner Melis*). A importância do feito é enorme: juntamente com a equipe da USP, que também a recebeu nesse ano, foi a primeira vez na história da competição que uma universidade latino-americana foi agraciada com a prestigiosa menção.[3] Diante da relevância da conquista e do orgulho com o bem-sucedido trabalho da equipe da UERJ, pareceu-nos próprio compartilhar a peça ganhadora da menção honrosa.[4]

Sob a supervisão da Prof.ª Dra. Carmen Tiburcio, foram *coaches* da equipe que participou da 18ª edição (2010/2011) o Prof. Dr. Daniel Gruenbaum e a Prof.ª Me. Isabel Miranda e, como *vismooties* e principais responsáveis pela redação da peça, os estudantes Alice Kasznar Feghali, Bernard Potsch Moura, Felipe Gomes de Almeida, Julia Dias Carneiro da Cunha, Juliana Cesario Alvim Gomes, Marina Duque Leite e Nathalie Leite Gazzaneo.

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O caso hipotético da 18ª edição dizia respeito a contrato de compra e venda internacional de mercadoria celebrado por *Mediterraneo Trawler Supply SA* – companhia especializada na venda de suprimentos para frotas de pesca longínqua – e *Equatoriana Fishing Ltd*, companhia especializada em pescar lulas da espécie *illex danubecus* para uso como isca e alimento. O litígio entre as duas empresas, como tradicionalmente ocorre na competição, continha questões relativas ao processo arbitral e questões relativas ao mérito. As pri-

2 Informações atualizadas sobre a equipe da UERJ para o Vis Moot podem ser encontradas em http://vismootuerj.blogspot.com.br

3 http://www.cisg.law.pace.edu/cisg/moot/awards18.html

4 Elementos pré-textuais exigidos pelas regras da competição, como Listas de Referências e de Abreviaturas, não foram reproduzidos.

meiras versaram a existência ou não de confidencialidade no processo arbitral, a independência e imparcialidade do árbitro e os poderes da instituição arbitral, sob égide da Convenção de Nova York sobre Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras,[5] da Lei Modelo da UNCITRAL sobre Arbitragem Comercial Internacional[6] e do Regulamento da Câmara Arbitral de Milão.[7] Já as questões de mérito versaram a conformidade e qualidade da mercadoria entregue pelo vendedor, o dever de inspeção da mercadoria pelo comprador e a extensão das perdas e danos devidas, tudo sob égide da CISG.[8] A seguir, tais temas serão abordados com mais profundidade, sob a ótica da demandada, vendedora da mercadoria, *Equatoriana Fishing Ltd.*

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UNIVERSITY OF THE STATE OF RIO DE JANEIRO

EIGHTEENTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT; 15-21 APRIL 2011

MEMORANDUM FOR RESPONDENT; EQUATORIANA FISHING LTD.

Statement of Facts

Equatoriana Fishing Ltd (RESPONDENT) is a company mainly dedicated to catching and purchasing squid of the species *illex danubecus*, which it sells, domestically and for export, both for bait and human consumption. Mediterraneo Trawler Supply SA (CLAIMANT),

5 http://treaties.un.org/doc/Treaties/1959/06/19590607 09-35 PM/Ch_XXII_01p.pdf

6 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

7 http://www.camera-arbitrale.it/Documenti/cam_regolamento-arbitrale_2010.pdf

8 http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf

in its turn, is a specialist in selling supplies to long line fleet, and, over the years, it has imported squid to be resold as bait. CLAIMANT also produces fish products which it sells for human consumption. On **14 Apr. 2008**, CLAIMANT sent an e-mail to several suppliers of Danubian squid, among them RESPONDENT, to inquiry as to prices and availability of squid. On **18 Apr. 2008**, the sales representative for RESPONDENT (Mr. Weeg) replied the e-mail informing that he planned to visit CLAIMANT. On **17 May 2008**, Mr. Weeg went to CLAIMANT's premises and held out a sample representative of the squid being offered. On **29 May 2008**, CLAIMANT sent the Purchase Order to RESPONDENT. On the same date, RESPONDENT sent the Sale Confirmation to CLAIMANT, which included an arbitration agreement and the "2007/2008 Catch" clause relating to the squid's quality. On **01 Jul. 2008**, RESPONDENT delivered the squid, which was considered compliant by CLAIMANT. During the following week, CLAIMANT has selled a substantial quantity of the squid to five long-line fishing vessels. On **29 Jul. 2008**, CLAIMANT notified RESPONDENT that two of its clients had complained about the squid without giving sufficient details. On **03 Aug. 2008**, RESPONDENT replied requesting the squid be inspected by a certified testing agency. On **16 Aug. 2008**, CLAIMANT sent the TGT Report to RESPONDENT. From **Aug. 2008 to May 2009**, that means, for 9 months, CLAIMANT failed to resell the squid and had them eventually destroyed. On **20 May 2010**, CLAIMANT filed its Request for Arbitration and appointed Ms. Arbitrator 1 ("Ms. Arb1") as arbitrator. On **24 May 2010**, Commercial Fishing Today published an interview by Trawler Supply's Chief Executive Officer, accusing RESPONDENT of selling inappropriate squid. and informing that the parties' dispute would be settled by arbitration. On **25 May 2010**, RESPONDENT received the Request for Arbitration. On **24 Jun. 2010**, RESPONDENT filed its Statement of Defense and appointed Prof. Arbitrator 2 ("Prof. Arb2") as arbitrator. On **27 Jun. 2010**, Ms. Arb1 and Prof. Arb2 accepted their appointment and enclosed their Statement of Independence. On **09 Jul. 2010**, the Chamber confirmed the parties' appointments and asked the co-arbitrators to

jointly appoint the presiding arbitrator. On **15 Jul. 2010**, they appointed Mr. Malcolm Y as the president of the Tribunal. On **19 Jul. 2010**, Mr. Y accepted his appointment and presented a qualified Statement of Independence. On **26 Jul. 2010**, the Chamber forwarded Mr. Y's Statement of Independence to the parties, that expressly waived their right to object to Mr. Y's appointment on the same date. On **02 Aug. 2010**, the Chamber informed the decision of the Arbitral Council not to confirm Mr. Y as president of the Tribunal and asked the co-arbitrators to appoint a substitute. On **13 Aug. 2010**, Ms. Arb1 and Prof. Arb2 re-affirmed Mr. Y's appointment as president and requested the Arbitral Council to confirm him in this role. On **26 Aug. 2010**, the Chamber decided to appoint Mr. Horace Z as president instead. On **31 Aug. 2010**, the Chamber forwarded Mr. Z's Statement of Independence to the parties and co-arbitrators. On **10 Sept. 2010**, the Chamber confirmed Mr. Z as president and noted that the constitution of the Arbitration Tribunal should take place within 30 days. On **20 Sept. 2010**, the Tribunal was constituted through Procedural Order n. 1. On **24 Sept. 2010**, RESPONDENT challenged the jurisdiction of the Tribunal on the grounds that it had not been constituted in accordance with the arbitration agreement. On **01 Oct. 2010**, Procedural Order n. 2 was issued. On **29 Oct. 2010**, Procedural Order n. 3 was issued.

Summary of Arguments

[ISSUE I] In regard to the jurisdiction, the Tribunal was not properly constituted and has no jurisdiction over the merits of the case. Arbitral Council's refusal to confirm Mr. Malcolm Y violated the will of the parties, which was expressed in the arbitration agreement and later re-affirmed through their fully informed waiver to object Mr. Y's independency and impartiality. Moreover, Arbitral Council's appointment of a substitute arbitrator violated Art. 20(3) Milan Rules. Therefore, any future award could be set aside or denied enforcement under Artt. 34(2)(a)(v) ML and V(1)(d) NYC. **[ISSUE II]** CLAIMANT breached its duty of confidentiality under Art. 8 2010 Milan

Rules and as an inherent duty in international arbitration. Therefore, Tribunal must refrain CLAIMANT from disclosing arbitration information and condemn it for damages regarding the breach of confidentiality. In the merits, **[ISSUE III]** by delivering squid from the 2007/2008 catches, RESPONDENT neither breached the Contract nor violated the CISG. Even if RESPONDENT had an implied obligation to deliver squid per weight, the "2007/2008 Catch" clause was included in the final content of the Contract under Artt. 18 and 19 CISG. **[ISSUE IV]** Even if the goods were non-conforming, CLAIMANT failed to adequately examine the delivered squid and to properly and timely notice RESPONDENT of the alleged nonconformity. Therefore, CLAIMANT has forfeited its right to protection both under Artt. 38 and 39 CISG, and, thus, CLAIMANT is not entitled to claim full damages, under Art. 40. **[ISSUE V]** In any event, damages cannot be awarded to CLAIMANT, since it did not prove its losses nor their foreseeability by RESPONDENT. Also, CLAIMANT did not reasonably act in order to mitigate damages. Finally, RESPONDENT is entitled to recover its litigations costs.

Arguments In Regard To Jurisdiction Of The Tribunal

Issue I: The Tribunal was not constituted in accordance with the arbitration agreement.

1. First and foremost, RESPONDENT clarifies that it does not contest the existence of a valid and binding arbitration agreement [*CM ¶5*]. Nor does it contest the jurisdiction of the Tribunal to rule on its own jurisdiction, in accordance with the principle of *Kompetenz-Kompetenz* [*CM ¶6*]. However, RESPONDENT does contest the jurisdiction of this Tribunal to rule on the dispute at hand. And it will demonstrate that **[1]** the method of appointment of arbitrators agreed by the parties is fully enforceable; **[2]** the refusal of the Chamber to confirm Mr. Malcolm Y as the presiding arbitrator was not justifiable; **[3]** the Tribunal was not constituted in accordance with the arbitration agreement; **[4]** RESPONDENT did not waive its right to object the Tri-

bunal's jurisdiction; and **[5]** any future award could be set aside or denied enforcement under Art. 34(2)(a)(iv) ML and Art. V(1)(d) NYC.

1. The method of appointment of arbitrators agreed by the parties is fully enforceable.

2. Even though the parties opted to settle any dispute under the Milan Rules, they expressly provided the method of appointment of arbitrators, establishing that each party would appoint one arbitrator and the two arbitrators would appoint the presiding arbitrator [*CEx4*]. Therefore, the provisions of the Milan Rules incorporated in the arbitration agreement [*Born I p.1122, Fouchard/Gaillard/Goldman p.180*] are complemented by the provisions established by the parties, creating the procedural rules of the arbitration.

3. Nevertheless, in a conflict between the Milan Rules and the provisions established by the parties in the arbitration agreement, the latter should prevail and the conflicting provisions of the Milan Rules should be deemed derogated by the parties. This conclusion is confirmed by Art. 14(1) Milan Rules, which states that the "*arbitrators shall be appointed in accordance with the procedures established by the parties in the arbitration agreement*", recognizing the priority of the procedures established by the parties in the arbitration agreement over the Rules. It is important to notice that said provision was already contained within the 2004 Milan Rules [*Art. 15(1)*], which demonstrates that it has been incorporated into the Chamber's practice for a long time.

4. As of Art. 2(2) Milan Rules, which CLAIMANT considers as an authorization for the Chamber to disregard parties' preferences [*CM ¶18*], it must be said that contractual provisions must always be interpreted as to guarantee their effectiveness [*ICC 4695*]. Since Art. 14(1) Milan Rules expressly recognizes that the method of appointment of arbitrators chosen by the parties takes priority over the rules,

the only possible conclusion is that the provisions regarding the constitution of the Tribunal are not mandatory.

5. Even in the absence of such a provision, the parties' freedom of choice is widely recognized as the primary source of international arbitration [*Poudret/Besson §§395, 915; van den Berg p.331*] and, as such, takes priority over the institutional rules.

2. The refusal to confirm Mr. Malcolm Y as the presiding arbitrator was not justifiable.

6. According to CLAIMANT [*CM ¶¶20-23*], the Arbitral Council's refusal to confirm Mr. Malcolm Y was necessary to fulfill Art. 18 Milan Rules and preserve the fairness of the arbitration. Nevertheless, the refusal to confirm Mr. Malcolm Y as president of the Tribunal was not justifiable, as **[3.1]** Mr. Malcolm Y's connection with CLAIMANT's adviser does not jeopardize his independence or impartiality; and **[3.2]** the parties were fully aware of the possible conflict of interests and expressly waived their right to object Mr. Malcolm Y appointment as the presiding arbitrator.

2.1. Mr. Malcolm Y's connection with CLAIMANT's adviser does not jeopardize his independence and impartiality.

7. Mr. Malcolm Y disclosed on his Statement of Independence that he was a partner of the same law firm as Mr. Samuel Z, who is advising CLAIMANT in this arbitration. He also informed that they worked on separate offices and that he had no connection whatsoever with the case, considering himself independent and impartial. Even though Mr. Samuel Z is not counsel to the CLAIMANT, this relationship could be considered to come within the provisions of the IBA Guidelines' red waivable list [*IBA Guidelines Part II item 2.3.3*]. Nevertheless, it should be noted that the IBA Guidelines are in no

way binding to the parties or the Chamber [*IBA Guidelines Introduction § 6*; see *CM ¶¶16-17*].

8. Also, the mere fact that the arbitrator and the counsel to one of the parties are members of the same law firm does not by itself render the first unfit to compose the Tribunal. It is necessary to verify the existence of a relevant professional or financial connection between the activities of the counsel and the arbitrator [*Ferrario p.423*]. For no other reason, on several occasions, the ICC has confirmed arbitrators that shared offices with counsels [*Whitesell item I(iii) cases 3 and 5*].

9. On the case at hand, not only did Mr. Malcolm Y and Mr. Samuel Z work on different offices, on different countries, but the potential arbitrator has not been involved with the client work of the firm for the past three years. Under those circumstances, it rests certain that Mr. Malcolm Y has no relevant professional or financial connection with CLAIMANT's adviser. In fact, it is doubtful if his situation could even be considered to come within the provisions of the IBA Guidelines' red waivable list. Since the only connection between the arbitrator and the law firm in the past three years seems to be the sharing of office space, it could be argued that his situation resembles item 3.3.3 of the IBA Guidelines' orange list.

2.2. The parties were fully aware of the possible conflict of interest and expressly waived their right to object Mr. Malcolm Y's appointment as the presiding arbitrator.

10. Despite the fact that Mr. Malcolm Y's relationship with CLAIMANT's adviser does not jeopardize his independence and impartially, he has fulfilled his obligation to reveal any possible conflict of interest [*IBA Guidelines General Standard 3*], and the parties, fully aware of the situation, reaffirmed their trust on his reputation and expressly waived their right to challenge his performance as presiding arbitrator. Therefore, the General Standard [*IBA Guidelines General*

Standard 4(c)] regarding the waiver by the parties of disclosed relationships provided for under the IBA Guidelines' red waivable list [see *¶¶7-9*] was properly fulfilled. In conclusion, the Arbitral Council could not disregard the parties' will.

3. The Tribunal was not constituted in accordance with the arbitration agreement.

11. As the parties made known their will that the president of the Tribunal was appointed by the co-arbitrators in the arbitration agreement and by means of their waiver to object Mr. Malcolm Y's independence and impartiality, **[4.1]** the Chamber must abide to the will of the parties and, as **[4.1.1] t**he arbitration agreement provided and the parties' waiver confirmed their will that the presiding arbitrator be the one appointed by the co-arbitrators, **[4.1.2]** the Chamber must not disregard the provisions established by the parties and, instead, apply derogated provisions of the Milan Rules. Moreover, **[4.2]** even if Art. 20(3) Milan Rules was applicable, the Arbitral Council did not respect its terms.

3.1. The Chamber must abide to the will of the parties.

3.1.1. The arbitration agreement provided and the parties' waiver confirmed their will that the presiding arbitrator be the one appointed by the co-arbitrators.

12. As established above [see *¶¶2-5*], the arbitration agreement clearly determines that the presiding arbitrator will be appointed by the co-arbitrators. CLAIMANT could have argued that the provision contained in the arbitration agreement is silent as to the confirmation and replacement of arbitrators. But the will of the parties is clear. The presiding arbitrator shall be jointly appointed by the party-

appointed arbitrators. Any other interpretation would deviate from the wording of the arbitration agreement. Therefore, the parties derogated the provisions of the Milan Rules regarding the confirmation and replacement of arbitrators and did not grant the Arbitral Council discretionary powers to deny confirmation or to appoint replacement arbitrators.

13. Moreover, the waiver presented by both parties, fully aware of Mr. Malcolm Y relationship with CLAIMANT [see *¶10*], certainly confirmed their will that Mr. Malcolm Y, and him only, would preside the Tribunal.

3.1.2. The Chamber must not disregard the provisions established by the parties and, instead, apply derogated provisions of the Milan Rules.

14. Since the Tribunal's jurisdiction is based on the arbitration agreement [*Redfern/Hunter/Blackaby/Partasides §1.58*], it is bound by its terms and forbidden to deviate from its provisions without consent of both parties [*Poudret/Besson §395; van den Berg p.331*]. As such, the adequacy of the constitution of the Tribunal, and the existence of jurisdiction, must be judged in accordance with the procedure agreed by the parties.

15. Several authors recognize that the appointment of the arbitrators, specially the President of the Tribunal, by arbitral institutions is not the ideal solution [*Rubino-Sammartano p.323; Clay p.345*]. Having diminished parties' influence as to the composition of the Tribunal, the arbitral institution has compromised one of the most essential advantages of arbitration, that is, the possibility to choose the person in charge of the solution of the controversy [*Derains §23;* see also *Lew/Mistelis/Kröll pp.223-225; Hascher p.79*].

16. Should the Chamber consider that the method of appointment of arbitrators selected by the parties violates mandatory provi-

sions of its rules, its only option would be to refuse to administer the arbitration [*Petrochilos p.170*]. And nothing more. Under no circumstances may the Chamber disregard the will of the parties and apply derogated provisions.

3.2. Even if Art. 20(3) Milan Rules is applicable, the Arbitral Council did not comply with its terms.

17. Although there is no doubt that Art. 20(3) Milan Rules regarding the appointment of replacement arbitrators is inapplicable [see *¶¶2-5*], it is imperative to question whether the Arbitral Council truly respected its terms when appointing Mr. Horace Z. Said article provides that "*a new arbitrator shall be appointed by the same authority that appointed the substituted arbitrator. If a replacement arbitrator must also be substituted, the new arbitrator shall be appointed by the Arbitral Council"* [*Art.14(3) Milan Rules*]. That is not what happened on the present case. The co-arbitrators only reaffirmed the appointment of Mr. Malcolm Y, instead of appointing an actual new arbitrator. Therefore, the Arbitral Council, before appointing an arbitrator itself, should, at least, had clarified that the co-arbitrators could not have appointed Mr. Malcolm Y once again and grant them the opportunity to appoint a new arbitrator, as provided at Art. 20(3) Milan Rules.

4. RESPONDENT did not waive its right to object to the Tribunal's jurisdiction.

18. CLAIMANT could have argued that RESPONDENT waived its right to object to the Tribunal's jurisdiction by failing to present the objection within the ten days granted to file written comments on Mr. Malcolm Y's Statement of Independence. But, as demonstrated below, RESPONDENT objected the Tribunal's jurisdiction within the provided time limit and without undue delay.

19. The arbitration agreement establishes that all disputes arising out of or related to the Contract shall be settled by arbitration under the Milan Rules [*CEx 4*]. Art. 12 Milan Rules provides that any objection to the jurisdiction of the Tribunal shall be raised in the first brief following the claim to which the objection relates, or will be deemed to have been waived. And RESPONDENT did exactly that. After being notified that the Arbitral Council had appointed and confirmed Mr. Horace Z as the presiding arbitrator, the first submission made by RESPONDENT was the objection on jurisdiction.

20. RESPONDENT had no obligation to submit the objection within the time limit to file written comments on the Statement of Independence. As provided in Art. 18 Milan Rules, the parties may comment on the independence and impartiality of the arbitrator. And nothing more. Since RESPONDENT does not challenge the qualifications of Mr. Horace Z, but the fact that he was not nominated in accordance with the arbitration agreement, there was no reason to present those written comments.

21. Moreover, written comments are not to be mistaken by briefs. The latter are abstracts of the pleadings and facts of the case [*Black's Law Dictionary p.192*]. Therefore, in accordance with Art. 12 Milan Rules, RESPONDENT could have presented the objection on jurisdiction on this very Memorandum. But RESPONDENT, acting in good faith and hoping to avoid unnecessary expenses and delays, submitted the objection on jurisdiction on 24 Sept. 2010, only two weeks after Mr. Horace Z's confirmation.

22. Therefore, RESPONDENT stated its objection without undue delay, in compliance with Art. 4 ML [*Várady p.12*]. On CRCICA 312/2002, the Tribunal decided that the submission of the objection within the first memorandum was perfectly acceptable and timely.

23. Likewise, CLAIMANT did not violate the so called "*waiver principle*" [*Várady p.8; Born I p.989; Holtzmann/Neuhaus p.196*], which prevents the parties from saving procedural objections for later use [*Várady p.22*]. The submission of the objection less than two

weeks after the notification of Mr. Horace Z confirmation in no way violates said principle [*Jarvin pp.736-738, 756*]. In fact, several courts consider that the waiver only takes place if the party has not raised the objection before the render of the award [*Wuzhou Port v. New Chemic; Supreme Court (Rus) 24 Nov. 1999*]. Especially considering that the constitution of the Tribunal in violation of the arbitration agreement could jeopardize the effectiveness of any future award [see *¶24*].

5. Any future award could be set aside or denied enforcement under Art. 34(2)(a)(iv) ML and Art. V(1)(d) NYC.

24. As the Tribunal was not constituted in accordance with the arbitration agreement, any future award it renders could be set aside in the courts of Danubia under Art. 34(2)(a)(iv) ML [*Binder §7-021*]. Or be denied enforcement under Art. V(1)(d) NYC [*Poudret/Besson §915; Born I p.1384-1386; Cargil Rice v. Empresa Nicaraguense*]. Considering those circumstances, continuing with the arbitration will provoke an unnecessary waste of time and resources, delaying the definitive solution of the controversy. Therefore, this arbitration must be dismissed for lack of jurisdiction.

Issue II: The Tribunal must refrain CLAIMANT from disclosing the existence of the arbitration and all details in connection to it and declare CLAIMANT liable for damage due to breach of confidentiality.

25. RESPONDENT will demonstrate that CLAIMANT's interview consisted in a breach of confidentiality for the following reasons: First, **[1]** the parties had agreed that the proceedings were to be confidential when they chose to incorporate the Milan Rules to their arbitration agreement. In fact, **[1.1]** Art. 8 2010 Milan Rules contains a general provision that protects all matters related to the arbitration, including its own existence. Furthermore, **[1.2]** the fact that the news-

paper, which is not bound by the duty of confidentiality, had already made public the existence of a dispute between the parties does not give CLAIMANT the right to express publicly its own view of the case. Second, **[2]** CLAIMANT cannot justify its disclosure of confidential information based on a legal or statutory obligation. Alternatively, **[3]** CLAIMANT violated the inherent duty of confidentiality of international arbitration. Therefore, **[4]** the Tribunal has the authority to refrain CLAIMANT from disclosing any aspect of the current arbitration and to condemn it in damages.

1. Art. 8 2010 Milan Rules is applicable to the present arbitration.

26. The arbitration agreement states that "*all disputes arising out of or related to this contract shall be settled by arbitration under the Rules of the Chamber of Arbitration of Milan*" [*CEx4*]. Contrary to CLAIMANT's assertion that the 2004 Milan Rules should be applicable to the present arbitration [*CM ¶9*], RESPONDENT's understanding is that the parties agreed upon the version of the Milan Rules used by the institution at the time of the commencement of the arbitral proceedings. It is generally accepted in international arbitration that, whenever the parties do not agree to a specific version of arbitration rules provided for by an arbitral institution, their agreement is considered to refer to the rules in force at the time the arbitral proceedings start [*Greenberg/Mange p.208; Jurong Engineering v. Black & Veatch Singapore; China Agribusiness Development v. Balli Trading*].

27. The Chamber currently applies the version of the Milan Rules which has been in force since 1st Jan. 2010. That body of rules shall be applicable to "*arbitrations commenced after the date on which the Rules entered into force*" [*Art.39 2010 Milan Rules*] and when "*a reference in the agreement to the Chamber of Commerce of Milan shall be deemed to provide for the application of the Rules*" [*Art.1(1) 2010 Milan Rules*]. Since in the case at hand it is obvious that

these requisites are fulfilled, 2010 Milan Rules must be considered as the provisions governing this arbitration.

28. The principle mentioned above also reflects the practice of the ICC which updates its own rules from time to time [*Fouchard/Gaillard/Goldman p.175*]. In cases very similar to this one, it has been frequently decided that the newest version of the rules should be applied [*Offshore International v. Banco Central; Mobil Oil Indonesia v. Asamera Oil; ICC 5622* and *Komplex v. Voest-Alpine Stahl*]. Additionally, since the Milan Rules are a set of rules which presents predominantly procedural provisions, and not substantial or material provisions, the same general rule is applicable [see *Bunge SA v. Kruse*].

1.1. Art. 8 2010 Milan Rules contains a general provision that embodies the existence of the arbitral proceedings.

29. When the parties chose to incorporate the Milan Rules to their arbitration agreement, they wanted the arbitration to be conducted in private and that all matters related to the proceedings be kept confidential [*Art.8 2010 Milan Rules*]. Consequently, the proceedings are "*subject to unlimited confidentiality*" [*Trakman p.10*] including all facts related to the participants, the nature and extent of the dispute, as well as the existence of the arbitration [*Mistelis p.212; Fouchard/Gaillard/Goldman p.773; Bleustein v. True North*].

30. This conclusion was also achieved by the International Law Association when the members of the Committee had the opportunity to study the subject of confidentiality and analyze the arbitral rules of some of the most important arbitral institutions in the world, including the Milan Chamber:: "*the obligation to keep the existence of the arbitration confidential can probably be gleaned from other more general provisions, such as those imposing confidentiality as to the* () *'proceedings' (Milan Rules, Art. 8(1))* ()" [*Int. Law Assoc. p.12*].

31. Moreover, CLAIMANT's assertion that the duty of confidentiality was not in force because the proceedings had not yet commen-

ced [*CM ¶39*] is too formal an argument which cannot be taken into consideration. The duty of confidentiality must be analyzed in view of the reason why it is agreed by the parties: "*to prevent aggravation of the parties' dispute, to limit the collateral damage of a dispute and to focus the parties' energies on an amicable, business-like resolution of their disagreements*" [*Born I p.87*]. Therefore, it does not matter that the interview was given 3 days before the arbitration formally started because the reasoning behind this duty was violated anyway.

1.2. Commercial Fishing Today is not bound by the duty of confidentiality as CLAIMANT is.

32. CLAIMANT argues that it did not give any new information when Mr. Schwitz gave the interview to Commercial Fishing Today because information regarding parties' dispute had already been publicized by the same periodic [*CM ¶34*].

33. Art. 8 2010 Milan Rules determines that only parties, arbitrators, expert witnesses and the Chamber are subject to the duty of confidentiality. Thus, Commercial Fishing Today, as it does not participate in this arbitration, has not an obligation to keep information related to the proceedings away from the public. On the other hand, CLAIMANT is obliged to respect the confidentiality of the present arbitration. Hence, the fact that the newspaper had disclosed the information about the existence of a dispute between the parties does not give CLAIMANT the right to go further and make remarks on this arbitration and its details, which included detrimental remarks on RESPONDENT's conducts.

2. CLAIMANT did not have a legal or statutory obligation to disclosure the information to shareholders and the market.

34. Even though CLAIMANT did not raise this issue, it is important to note that the disclosure made by CLAIMANT cannot be jus-

tified by the existence of a legal or statutory obligation to inform the existence of the arbitral proceedings to shareholders and the market [*PO3 Q.15*].

35. Despite the fact that nowadays transparency seems to be a trace much appreciated when it comes to the organization and management of companies such as CLAIMANT, there is still the need to comply with a satisfactory balance between the duty of confidentiality and the expectations of transparency [*Fages p.7*]. In the case at hand, since there is no legal or statutory obligation imposed on CLAIMANT to disclose information concerning the proceedings, the duty of confidentiality must prevail over the need for transparency. Be how it may, any attempt taken by CLAIMANT to publicize its own view of the case must be repelled by the Tribunal, once this kind of unilateral initiatives "*often degenerate into selective communication of evidence or tendentious explanations*" [*Paulsson/Rawding p.304*] that can be harmful on the reputation of the parties [*Lazareff p.82*].

36. Moreover, if CLAIMANT's intention was to inform its shareholders of a dispute that could have a financial impact on the company, it could obviously have chosen a less prejudicial way to do it.

3. Alternatively, CLAIMANT violated the inherent duty of confidentiality of international arbitration.

37. Even in the absence of an explicit confidentiality agreement, such as in Art. 8 2010 Milan Rules, the duty of confidentiality would be imposed on CLAIMANT because it is an inherent duty of arbitration [*Aita v. Ojjeh; Hassneh Insurance Co. v. Mew; Ali Shipping v. Shipyard Trogir; Myanma Yaung v. Win; Bagner p.243; Dessemontet p.1;* see also for further references *Born II p.2250*] which means that "*a party shall not disclose any information about the arbitration*" [*Nakamura p.24*]. This duty includes, of course, the existence of the arbitral proceedings [*Fouchard/Gaillard/Goldman p.773*].

38. This implied obligation of confidentiality arises "*out of the nature of arbitration itself*" [*Dolling-Baker v. Merrett;* in this sense *Lazareff p.81*] and it is independent of the custom, usage or business efficacy [*Ali Shipping v. Shipyard Trogir*]. Besides, it is the most important advantage of arbitration for many parties which desire the secrecy inherent in business dealings established through the centuries [*Lazareff p.83*]. It also contributes to avoid publicity damage caused, for example, by an unfavorable award [*Weixia p.631; Stephen Bond in Esso v. Plowman*].

39. In such sense, confidentiality is often a relevant reason for choosing arbitration in contrast to litigation, as proved by empirical international studies [*Büring-Uhle pp.108, 343; Pryles p.501*; *Bagner p.243*].

40. Despite the existence of some exceptions to the confidentiality rule, such as a court order and the "interest of justice", none of them can be recognized in the case at hand. In *Esso v. Plowman* [*CM¶32*] the obligation of confidentiality was taken into account [*Toohey J. in Esso v. Plowman*] even if excluded by "public interest", which does not exist in this case. Furthermore, the existence of exceptions is not inconsistent with the existence of confidentiality obligations in international arbitral proceedings [*Born II p.2285*].

41. The decisions brought to attention by CLAIMANT can be distinguished by their facts [*CM ¶33*]. The present case does not involve the government acting in the public interest. To import the arguments used in them would not only disturb accepted principles of arbitration, but constitutes an entirely frivolous conduct.

42. Therefore "*arbitration is not a spectator sport*" [*Arb. Int'l Editorial*]. As consequence, the existence of the current arbitration could not and cannot be publicized by CLAIMANT.

4. As Consequence, the Tribunal has the authority to refrain claimant from disclosing any aspect of the current arbitration and to condemn it to pay damages.

43. Due to CLAIMANT's violation of the duty of confidentiality [see *¶¶26-33, 37-42*] the Tribunal **[4.1]** must order it to keep the confidentiality of the current arbitration and **[4.2]** must award RESPONDENT in damages due to losses caused by CLAIMANT's breach of confidentiality.

4.1. The Tribunal can order interim measures to refrain CLAIMANT from disclosing any aspect of the current arbitration.

44. Tribunal is invested with full powers to refrain CLAIMANT from disclosing any aspect of the current arbitration through interim measures. Not only does the principle of *Kompetenz-Kompetenz* allow the Tribunal to order interim measures [*Reisman/Craig/Park/Paulsson p.646; Born I p.856*], but also the agreement to arbitrate imposes arbitrators' ruling in such cases [*Donovan p.58; Underwriters at Lloyd's v. Argonaut*].

45. Interim measures seek to safeguard parties from serious injury caused by delays in litigation process [*Collins p.19, Born II p.1943; Pacific Reins v. Ohio Reins*]. In this case, RESPONDENT's reputation would be irreparably affected by a new breach of confidentiality because, even if the arbitration award is favorable to it, a pulverized market may keep a mistaken impression of its business conduct [see *¶35*]. In this arbitration CLAIMANT made some serious accusations, *e.g.*, the lack of good faith and poor quality of goods [*CM ¶¶45 et. seq.*] which must be kept from the public [*Trakman p.2*].

46. Furthermore, the aggravation of the dispute engendered by the possibility of a new breach of confidentiality is enough to justify interim measures [*Tokis Tokelés v. Ukraine; Nuclear Tests*]. In such

sense, RESPONDENT's claim comply with the requirements of ML [*Art.17A*] and international arbitration standards for provisional relief, although confidentiality obligations are unlikely to demand strong showings of these requirements [*Born II p.1981*].

47. Even in a "balancing of interest", it is clear that RESPONDENT's concern must prevail because without granting these measures, the Tribunal will jeopardize the fairness and effectiveness of the whole dispute [*Born II p.1943*] and RESPONDENT's legitimate interest as consequence. Besides, CLAIMANT's interest would not be seriously affected.

48. Both the Milan Rules [*Art.33(1)*] and the ML [*Art. 17(1)*; *Biwater v. Tanzania*] expressly authorize the Tribunal to order interim measures. Moreover, the NYC [*Art. II*] impliedly grants the Tribunal such power [*Born II p.1948*]. Besides, the 2006 ML revision expressly confirmed Tribunal's broad authority to grant provisional measures by excluding the requirement that it should be "*in respect of the subject matter of the dispute"* [*Born II p.1970; UNCITRAL Report 39*]. Furthermore, there is a general principle in international arbitration that grants tribunals the authority to order interim measures of protection [*Donovan p.66*].

49. As agreed by both parties and decided by the Tribunal [*POs 1; 2*], submissions on the issue of confidentiality is to be added in the parties' memoranda as well as in the oral hearings as subject of the current arbitration.

50. It is also important to notice that the previous conduct of CLAIMANT, which divulged the fact of the arbitration [*REx1*], must be taken into account by the Tribunal to order an interim measure with regarding to confidentiality protection [*Born II p.1985*].

51. These measures can be granted through interim measures, **[4.1.1]** by issuing a Procedural Order, a Partial Award or both **[4.1.2]** which are fully enforceable.

4.1.1. By issuing a Procedural Order, a Partial Award or both.

52. The Tribunal can grant provisional measures by issuing a procedural order or an award [*Born II p.2013; Yesilirmak p.195; Beechey/Kenny p.92; ICC 5804; ICC 7489*], according to its understanding. It can also provide "*immediate relief (via an order), as well maximally-enforceable relief (via an* [subsequent] *award)*" [*Born II p.2014*], enjoying the "best of both worlds". Despite the fact that the parties have the obligation to abide to Tribunal's orders [*Donovan p.*71], their effectiveness can be assured **[4.1.1.1]** by the Tribunal **[4.1.1.2]** or by National Court enforcement.

4.1.1.1 The Tribunal can provide its own sanctions for CLAIMANT's non-compliance.

53. Regardless of national court enforcement, the Tribunal can avail itself from its own remedies to have its determinations obeyed because "*any duty of confidentiality is meaningless if it can be violated without consequence*" [*Brown p.1017;* also *Lazareff p.90; Lew/Mistelis/Kröll p.649*]. In such sense, the Tribunal has the authority to order CLAIMANT to deliver property or funds [*Born II p.1967*], which would work as warranty and be transferred to RESPONDENT if CLAIMANT did not fully perform its order.

54. It is also well established that the Tribunal can draw adverse conclusions against CLAIMANT's non-compliance [*Lew p.25.; Schwartz p.59; Cook/Garcia p.226*] which may influence the decision on costs too [*Lew/Mistelis/Kröll p.653, 655*]. Besides, the Tribunal has authority to order financial penalties [*Schwartz p.45*].

55. Violation of the confidentiality agreement has even been considered a breach of contract able to generate the avoidance of the entire arbitration agreement [*Bulbank v. A.I. Trade Finance*; *Brown p.1016*].

56. Lastly, the Tribunal can award CLAIMANT in damages as will be shown below [see *¶¶61-63*].

4.1.1.2 Any kind of order issued by the Tribunal will be fully enforceable under the NYC.

57. Provisional measures are different from interlocutory decisions on subsidiary legal issues or procedural timetables because they are meant to be enforceable outside the arbitral proceedings [*Born II p.2023*]. The ML [*Art. 17H(1)*] expressly provides that an interim measure "*shall be recognized as binding and* () *enforced upon application to the competent court*". Moreover, regarding their enforcement, the NYC does not require any particular form of "award" [*Di Pietro p. 143*] and its ability to enforce provisional measures is not restricted to this [*Publicis v. True North*]. The finality must prevail over the name adopted [*Lew/Mistelis/Kröll p. 631; Brasoil v. GMRA*].

58. A decision issued by the Tribunal will be enforceable if it contains a final determination [*Lew/Mistelis/Kröll p.651*], which will be the case if the Tribunal grants RESPONDENT its claim.

59. NYC imposes a mandatory rule of recognition and enforcement of foreign arbitral awards [*Art.III*]. In the present case none of Art. V's exceptions apply.

60. It must be noted that Equatoriana, one of the jurisdictions where a decision could be enforced, is a Common Law jurisdiction and, as so, it has been deemed to protect the duty of confidentiality regardless of what national rules, institutional rules, international conventions and contracts may provide [*Brown p.1000*].

4.2. In any case, the Tribunal must condemn CLAIMANT in damages for its breach of confidentiality.

61. The Tribunal has the power to order a party to monetarily compensate another [*Redfern/Hunter/Blackaby/Partasides* p.*527; Lew/Mistelis/Kröll p.*651] although it does not exclude other types of relief [*Cook/Garcia p.285*].

62. Because of CLAIMANT's breach of confidentiality [see *¶¶26-33, 37-42*], RESPONDENT's reputation suffered (and might keep suffering) as a result of CLAIMANT's fallacious allegations. CLAIMANT violated RESPONDENT's legitimate interest acting against good faith in commercial field and against the UNIDROIT principles [*Art.2.1.16 UPICC*]. The harm resulting from CLAIMANT's unreasonable and illegitimate attitude can lead RESPONDENT to inestimable loss, however, susceptible of some compensation to be quantifiable by experts.

63. Alternatively, if the Tribunal considers damages unquantifiable, it must condemn CLAIMANT in exemplary damages [*Smit p.583*]. The Tribunal shall award symbolically the smallest monetary unity possible, as an emblematical evidence of repudiation of CLAIMANT's inadmissible conduct.

Arguments In Regard To The Merits Of The Claim

64. Under Art. 1(1)(a) CISG, the merits of the dispute are governed by the CISG as the parties have their places of business in different States, all of which are party to the CISG [*Req.Arb. §§ 1, 3, 24*].

ISSUE III. RESPONDENT delivered squid in conformity with the Contract and the CISG.

1. RESPONDENT supplied conforming squid for all the purposes of the Contract and the Convention.

65. Whereas **[1.1]** RESPONDENT supplied squid in conformity with the sample and the Contract under Artt. 35(2)(c) and 35(1) CISG; **[1.2]** Art. 35(2)(b) CISG does not apply to ascertain the alleged non-conformity of the squid in the sale at hand; and **[1.3]** RESPONDENT

also complied with Art. 35(2)(a) CISG; therefore RESPONDENT supplied conforming squid for all the purposes of the Contract and the Convention.

1.1. RESPONDENT supplied squid in conformity with the sample and the Contract under Artt. 35(2)(c) and 35(1).

66. Art. 35(2)(c) requires the seller to deliver goods possessing the qualities which it has held out to the buyer as a sample or model. By holding out the sample, the seller also warrants that the goods to be delivered will possess the qualities of the goods which it has held out as sample [*Schlechtriem/Schwenzer Art.35 §25*]. However, conformity with the sample should be judged in a reasonable — and not only literal — manner [*Commercial Court Hasselt (Belg) 14 Sept. 2005*].

67. During the negotiations, RESPONDENT held out to CLAIMANT a sample consisting of one frozen carton of squid. Squid can be sold either graded or ungraded. Graded squid are measured for size/weight. Ungraded squid are the run of the catch [*St.Def. §12*]. The carton held as sample was marked "illex danubecus 2007" [*REx1 §§10 and 12*] and in no way did it indicate that the squid range had to be from 100-150 g. By holding that sample marked with the year of the catch, RESPONDENT clearly intended to sell ungraded squid, that means "per catch" and not "per weight or size".

68. It should be appreciated that goods possess an infinite number of internal and external characteristics, and a sample may not always be illustrative of all these features [see *Hyland p.323*]. In this sense, it is not as plain as suggested by CLAIMANT [*CM ¶59*] that only because the sample held out weighed between 100-150 g. it was representative of the weight of all squid to be sold. In fact, the physical features of a sample are not necessarily the ones it is representative of and the parties are free to agree on the conformity of the goods by reference to non-physical or whole extrinsic characteristics [*Henschel*

Book p.162; see *District Court Arnhem (Neth) 17 Jul. 1997*], such as the age of the goods [*Maley p.103-104*].

69. Besides the fact that, during their negotiations, RESPONDENT held out to CLAIMANT a sample of ungraded squid, the "as per sample" clause was included in both the Purchase Order [*CEx3*] and Sales Confirmation [*CEx4*] exchanged between the parties, for the purposes of Art. 35(1). Therefore, the contractually required qualities for the squid were made by reference to the sample of ungraded squid earlier provided. Still, RESPONDENT was prudent enough to insert in its Sale Conformation [*CEx4*], besides the term "as per sample", the "2007/2008 Catch" clause, reinforcing its intention to supply ungraded squid.

70. Thus, at first sight, given that the sample held out by CLAIMANT as much as the Contract including the "as per sample" clause indicated for ungraded squid, RESPONDENT, by supplying squid per catch, acted in accordance with Artt. 35(2)(c) and 35(1) CISG.

71. In order to further clarify that the Contract actually required squid per catch and not per weight, one must refer to general rules for determining the content of the parties' agreement [*UNCITRAL Digest Art. 35 §4*]. Such general rules are to be found in **[1.1.1]** Artt. 8 and **[1.1.2]** 9 CISG [*Henschel §4.1.; Bianca/Bonell p.271; Honnold p. 255-256; Flechtner p.4*].

1.1.1. Under Art. 8 CISG, RESPONDENT had the duty to deliver squid per catch and not per weight.

72. Given that **[1.1.1.1]** CLAIMANT's statements and conducts could not clearly amount to the conclusion that it intended to buy squid per weight and that **[1.1.1.2]** a reasonable person of the same kind as CLAIMANT would have understood that the squid would be sold per catch, therefore, under Art. 8 CISG, RESPONDENT had the duty to deliver squid per catch and not per weight.

1.1.1.1. None of CLAIMANT's statements or conducts could clearly amount to the conclusion that it intended to buy squid per weight [Art. 8(1)].

73. Art. 8(1) states that "*statements and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*".

74. In the case at hand, CLAIMANT alleges that it clearly expressed that it wanted to buy squid to be used as bait [*CM ¶50*] and that it gave express specifications as to the required weight [*CM ¶51*]. However, the only documents in support of its position are (i) a circular message from Trawler Supply directed to several suppliers of Danubian squid [*CEx1*] and (ii) a cover letter sent to Fishing along with the Purchase Order [*CEx2*].

75. In spite of that, neither in its Purchase Order [*CEx3*] nor in its response to RESPONDENT's Sales Confirmation [*REx2*], CLAIMANT made contractual reference indicating the intention to buy squid from 100-150 g. In the absence of detailed description relating to the size of the goods and allowing only for minor deviation, RESPONDENT could not have been aware that the squid were to be purchased for a particular purpose [the same conclusion *a contrario senso CIETAC 23 October 1996;* see also *Vincze pp.570-571*].

76. The scarce pre-contractual references made by CLAIMANT [*CExs1and 2*] indicating its supposedly intentions as to the quality of the squid being sold were not sufficient to make RESPONDENT aware that CLAIMANT expected to buy squid per weight, and not per catch. Moreover, even recognizing that RESPONDENT knew the importance of the weight for the squid to be used as bait [*PO3 Q.26*], CLAIMANT's statements and conducts were not clear enough to make RESPONDENT conclude that the buyer unequivocally intended to buy squid per weight.

1.1.1.2. A reasonable person of the same kind as CLAIMANT would have understood that the squid would be sold per catch [Art. 8(2)].

77. Art. 8(2) sets forth that statement and conduct of a party are to be determined according to *"the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances"*. The understanding of a "*reasonable person of the same kind as the other party"* requires the interpreter to adopt the perspective of commercial men [*Schlechtriem/Schwenzer Art.9 §43*].

78. CLAIMANT is a firm with many years of experience in the fishing trade [*Req.Arb. §7*] and, therefore, a reasonable person of the same kind of CLAIMANT should have been aware (i) that the sale, according to the sample provided, was of ungraded/per catch squid and, moreover, (ii) that the catch would be that of "2007/2008", according to the clause included in the Sale Confirmation [*CEx4*].

79. Besides, considering that the Sale Confirmation was sufficiently definite in order to constitute an offer under Art. 14(1) CISG, a "*reasonable person of the same kind*" as CLAIMANT could not have unperceived the content of the "2007/2008 Catch" clause [*UNCITRAL Digest Art.8 §10; Supreme Court (Aus) 10 Nov. 1994;* see *¶¶109-116 below*].

80. In conclusion, CLAIMANT is an expert in the fishing trade and, thus, it was (or should have been) fully aware, by the sample provided, that it had been offered squid per catch. And furthermore, CLAIMANT concluded the contract with full knowledge of the fact the squid to be supplied would come from the "2007/2008 Catch" [*UNCITRAL Digest Art.8 §11; Federal Supreme Court (Swi) 22 Dec. 2000*].

1.1.2. Also, under Art. 9 CISG RESPONDENT had the duty to deliver squid per catch and not per weight.

81. Given that **[1.1.2.1]** in the international fishing trade, there is no indication of the existence of an usage to buy squid per weight

[1.1.2.2] parties neither agreed nor established between themselves any usage or practice relating to the sale of squid per weight, therefore, also under Art. 9 CISG, RESPONDENT had the duty to deliver squid per catch and not per weight.

1.1.2.1. In the international fishing trade, there is no indication of the existence of an usage to buy squid per weight [Art. 9(2)].

82. No evidence indicates the existence of an international usage in the fishing trade related to the sale of fishing products per weight. In fact, CLAIMANT's silence in this regard [*CM passim*] is symptomatic. On the contrary, it has been suggested, in at least one case, that there is an international usage determining that, unless otherwise agreed by the parties, frozen fishing products are to be sold should from the current catch [*Supreme Court (Aus) 27 Feb. 2003*].

1.1.2.2. Parties neither agreed nor established between themselves any usage or practice relating to the sale of squid per weight [Art. 9(1)].

83. Under Art. 9(1): "*parties are bound to any usage to which they have agreed*". In the case at hand, neither during the negotiations [*Art. 8(3) CISG*] nor in the Contract, was any usage concerning the sale of squid per weight agreed by parties.

84. Art. 9(1) also states that "*parties are bound by any practices which they have established between themselves*". Since the Convention does not define when practices become "established between the parties" [*UNCITRAL Digest Art. 9 §7*], regard should be had to what tribunals have been considering in this matter. Courts have considered that a practice is only biding between the parties if their relationship has last for some time and the practice has appeared in multiple contracts [*UNCITRAL Digest Art. 9 §7; Lower Court Duisburg (Ger) 13*

Apr. 2000; *District Court Nidwalden (Swi) 3 Dec. 1997*]. Neither of these requirements is met in the present business relationship, which was the very first between RESPONDENT and CLAIMANT after ten years [*PO3 Q.14*, *Req.Arb. §10*].

85. In conclusion, also under Art. 9(1), RESPONDENT was not obliged to sell squid per weight to CLAIMANT.

1.2. Art. 35(2)(b) CISG does not apply to ascertain the alleged nonconformity of the squid in the sale at hand.

86. Art. 35(2)(b) sets forth that, except where the parties have agreed otherwise, the goods must be "*fit for any particular purpose expressly or impliedly made known to the seller*", except where the circumstances show that "*the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment*". In the case at hand, **[1.2.1]** CLAIMANT did not adequately made known to RESPONDENT the particular purpose of the squid being purchased and **[1.2.2]** alternatively, CLAIMANT could not have reasonably relied on RESPONDENT's skill and knowledge in this respect. Therefore, Art. 35(2)(b) does not apply.

1.2.1. CLAIMANT did not adequately made known to RESPONDENT the particular purpose of the squid being purchased.

87. CLAIMANT alleges that it made known to RESPONDENT the particular purpose for which it wished the squid [*CM ¶¶62-64*]. However, the only document in support of this statement was a circular message from CLAIMANT directed to several suppliers of Danubian squid [*CEx1*]. This document — which neither was addressed specifically to RESPONDENT nor was sufficiently definite in indicating the CLAIMANT's intention for the purposes of Art. 14(1) CISG — contained the expression "*squidto be used as bait*". However, during

the subsequent negotiations of the parties — which included not only the exchange of the Order Forms but also a personal visiting of one of REPONDENT's sale representatives in the CLAIMANT's offices — in no other moment did CLAIMANT mention this particular purpose again.

88. This sole reference to the supposed particular purpose of the squid was made even before the beginning of the negotiations between the parties, and did not entail enough information as to be considered an adequate means to make RESPONDENT aware of the particular purpose intended by CLAIMANT. In fact, the less information that is available to the seller and the less specific it is, the weaker is the content of the seller's duty [see *Maley pp.243-244;* see also *Huber/Mullis p.138; ICC 8213*].

89. Under these conditions, it seems that CLAIMANT's complaints arise more out of its failure to indicate its own unique requirements to the seller than out of the nonconformity of the squid itself [*Gillette/Ferrari p. 5*]**.** As Gillette and Ferrari suggest "*a buyer who is so idiosyncratic that a reasonable seller would not have anticipated his needs may himself possess the superior information about characteristics that make the transaction exceptional*" [see *¶92* below].

90. Therefore, CLAIMANT's allegation that the squid was nonconforming under Art. 35(2)(b) should not even be heard [*District Court Regensburg (Ger) 24 Sep. 1998*].

1.2.2. Alternatively, CLAIMANT could not reasonably rely on RESPONDENT's skill and knowledge in this respect.

91. The buyer's reliance on the seller's skill and judgment is not justified if the seller, recognizing the possibility that the goods selected by the buyer may not be fit for the purposes for which they could have been intended, informs the buyer of that possibility, but, even so, the buyer insists on the same goods [see *Schlech-*

triem/Schwenzer Art.35 §24; Enderlein/Maskow pp.156-157; *Teija §5.3.1*.].

92. In the case at hand, in order to avoid any misinterpretation of the buyer regarding the sale as per the sample of ungraded squid being concluded, RESPONDENT included the "2007/2008 Catch" clause in the Sale Confirmation. Therefore if, despite the seller's disclosure, the buyer went ahead and purchased the goods, then it is clear that he did not rely on the seller's skill and judgment, and, thus, RESPONDENT is not liable under Art. 35(2)(b).

1.3. Further, RESPONDENT also complied with Art. 35(2)(a) CISG.

93. Art. 35(2)(a) states that except where the parties have agreed otherwise, the goods must be "*fit for the purpose for which goods of the same description would ordinarily be used*". This subparagraph is especially relevant for the cases, such as the one at hand, where the goods are ordered by denotation of their general description without any indication to the seller as to the buyer's particular purpose under Art. 35(2)(b) [*Lookofsky p.90*].

94. By supplying squid from the 2007/2008 catches, RESPONDENT did not breach its obligations under Art. 35(2)(a), because **[1.3.1]** the squid delivered was resalable both **[1.3.1.1]** for bait and **[1.3.1.2]** for human consumption.

1.3.1. The squid delivered was resalable.

95. For goods to be fit for ordinary purposes, they must be resalable in the ordinary course of business [*Secretariat Commentary on article 33 of 1978 Draft §4; Teija §5.2.1.; Lookofsky p.90*].

96. The Purchase Order [*CEx3*] and the Sale Confirmation [*CEx4*] equally provided, as to the qualities of the squid, that it should

be "as per sample". As already demonstrated [*¶¶67-69* above], the sample provided was representative of ungraded squid, which meant that the goods would be delivered per catch, and not per weight. In RESPONDENT's market, as much as in CLAIMANT's, ungraded squid, depending on the period of the year when they were caught, can ordinarily be used for bait or for human consumption. This is not a disputed question in the case at hand. The squid delivered, which were partially within the range of 100-150 g. and partially bellow that range, could have actually been resold by CLAIMANT respectively **[1.3.1.1]** as bait and for **[1.3.1.2]** human consumption.

1.3.1.1. For bait.

97. An exact computation of the TGT Report's results [*CEx8*] shows that (i) 6% of the 48 cartons marked "2007 Catch" analyzed plus (ii) 87 % of the 72 cartons marked "2008 catch analyzed, results about (iii) 65,52 cartons of undersized squid out of the total of 120 cartons analyzed. It means that only 54,6% of the squid analyzed weighed less than 100-150 grams. Therefore, CLAIMANT could still re-sale for bait the other 55,4% of supplied squid within the range of 100-150 g.

98. Furthermore, 54,6% of supposed non-conforming squid does not lead to a fundamental breach of the contract by RESPONDENT [see *Graffi p. 342;* see generally *Gillette/Ferrari p. 7*], opposed to what was stated by CLAIMANT [*CM ¶¶97-113*]. In fact, "ordinary" does not mean "perfect" [*Lookofsky, pp.90-91;* see also *Supreme Court (Ger) 8 Mar. 1995*]. In this sense, it is clear that squid delivered could be used as bait, even though it would not offer an optimum result.

1.3.1.2. For human consumption.

99. The 55,4% of the supplied squid under 100-150 g. [*¶97* above] was further perfectly resalable for human consumption. How-

ever, CLAIMANT alleges [*Req.Arb. §20; CM ¶124*] that (i) the squid could not be sold for human consumption locally, since Mediterraneo's market for squid for human consumption was small and was already saturated [*Req.Arb. §20*]; and (ii) the attempts it made to sell the squid outside Mediterraneo were unsuccessful.

100. At first, it should be noted that the fitness for ordinary use must be ascertained according to the seller's, and not the buyer's, place of business [*Bianca/Bonell p.273; Teija §5.2.1.1*]. Thus as long as the squid below the range of 100-150 g. could normally be resold in the seller's own State for human consumption, the seller's obligations under Article 35(2)(a) should be deemed fulfilled.[*Flechtner p.6*].

101. Furthermore, CLAIMANT had the burden to resale the squid [*Artt. 88(2) and Artt.86(1) CISG*] or, alternatively, to prove that it was impossible or unreasonable for it to resale the squid, in or outside Mediterraneo, under Art. 79(1) [*UNCITRAL Digest Art.79 §20; Appellate Court Zweibrücken (Ger) 2 Feb. 2004*].

102. And finally, since CLAIMANT could not prove that it was unreasonable for it to have sold for human consumption the part of squid not fit for bait elsewhere, there was not a fundamental breach of the Contract at all [see *Teija §5.7.1.*], as opposed to what CLAIMANT alleged [*CM ¶¶97-113*].

2. Even if RESPONDENT had an implied obligation to deliver squid per weight, the "2007/2008 Catch" clause was an immaterial modification included in the contract under Art. 19 CISG.

103. Art. 19(2) establishes that "*a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance*" [*Art.19(2) CISG 1st part*].

104. RESPONDENT's Sales Confirmation [*CEx4*], purporting to be an acceptance to the CLAIMANT's offer [*Purchase Order: CEx3*],

modified it, adding a new clause in respect to the quality of the squid. Besides repeating the standard term "as per sample" already referred to by CLAIMANT in its Purchase Order, RESPONDENT added the expression "2007/2008 Catch" its Sales Confirmation.

105. It should be noted, however, that the inclusion of the "2007/2008 Catch" clause did not materially alter the seller's obligation to deliver ungraded squid, which was already clear from the negotiations between the parties in regard to the sample of ungraded squid provided [cf. *¶¶67-69* above]. The inclusion of the "2007/2008 Catch" clause was only intended to further clarify the meaning of the "as per sample" clause, in order to avoid CLAIMANT to misinterpret its content. So, even if referring to the quality of the goods, this clause did not fall in the hypothesis of "*material modifications*" provided for in Art.19(3) CISG. In fact, although Art.19(3)'s list sounds as if any deviations concerning one of the mentioned terms [e.g. quality, price, payment, quantity, delivery, liability, settlement of disputes] are definitely and finally material, it has been affirmed that this provision constitutes only a rule of interpretation [*Supreme Court (Aus) 20 Mar. 1997*], thus Art 19(3) gives a certain discretion to qualify deviations with regard to even *essentialia negotü* as immaterial [see *Appellate Court Paris (Fra) 22 Apr. 1992 for a case where changes concerning the price were regarded as immaterial*; see also *Magnus pp.188-190*].

106. Moreover, since CLAIMANT neither "*objected orally*" the inclusion of the "2007/2008 Catch" clause nor *"dispatched a notice to that effect*", RESPONDENT's Sale Confirmation constituted an acceptance to the CLAIMANT's Purchase Order.

107. Further, Art. 19(2) establishes that, when such immaterial modifications are not objected by the other party "*the terms of the contract are the terms of the offer with the modifications contained in the acceptance*" *Art.19(2) CISG 2nd part*].

108. In short, although **[2.1]** CLAIMANT knew or could not have been unaware about the inclusion of the "2007/2008 Catch" clause, **[2.2]** CLAIMANT did not object it; and even paid the lower

price equivalent to ungraded squid. Therefore, the final content of the Contract should be understood as including the "2007/2008 Catch" clause and, thus, RESPONDENT did not breach the Contract under Art. 35(1).

2.1. CLAIMANT knew and could not have been unaware about the inclusion of the "2007/2008 Catch" clause purported by RESPONDENT in its Sale Confirmation [Art. 8 CISG].

109. CLAIMANT is an experienced fishing firm. It has sold squid for bait to Mediterranean long-liners for more than 20 years [*Req.Arb. §6*], and, thus, CLAIMANT cannot be exempted from being fully aware of the season for harvesting squid. In fact, CLAIMANT has even recognized that for *illex danubecus* – the species of squid required– the fishing season is relatively short [*Req.Arb. §8*]. Actually, the season for harvesting *illex danubecus* is from April to September. In the first part of the season, squid is generally smaller than 100-150 g.. In the middle part of the season, form mid-June to mid-August, most of the squid will have reached the range of 100-150 g. And, by the end of the season, they are expected to be bigger than that [*St.Def. §13*].

110. When Mr. Weeg visited CLAIMANT on May 2008 [*St.Def. §12*], the 2008 season for harvesting had not yet started, thus the sample he brought was from 2007 – and was marked as so [*REx1 §§10 and 12*]. By the weight of the individual squid running between 100 to 150 g. [*St.Def. §12*], as shown by the analysis CLAIMANT made on the sample [*Req.Arb. §14*], the catch period of the sample left by Mr. Weeg was mid-June to mid-August 2007 [*St.Def. §12*], and CLAIMANT could not have been unaware of this fact.

111. Still when CLAIMANT has placed its order, by the end of May 2008 [*CEx3*], RESPONDENT had already largely exhausted its supply of the whole 2007 catch and was just starting to receive squid stock form the early part of the 2008 April season [*St.Def. §14*]. Even knowing that CLAIMANT should be fully aware about these harves-

ting circumstances, RESPONDENT was prudent enough to insert in its Sale Conformation [*CEx4*], besides the term "as per sample", the "2007/2008 Catch" clause, so as to make it perfectly clear that the Contract was for ungraded – and not for "per weight" — squid, in conformity with the sample held out [*St.Def. §14*].

112. Further, CLAIMANT was certainly aware of the contents of the Sale Confirmation as shown by the message from Mr. Korre (CLAIMANT's purchasing manager)[*REx2*], whose acts and directly bound RESPONDENT for the purposes of the CAISG [*Art.1(1); Art.12*]. If CLAIMANT was not satisfied with receiving squid from the 2007/2008 catch, that means, ungraded squid, the time to oppose to that was on receipt of the Sale Confirmation [*St.Def.§14*]. If the weight of the squid was so important to CLAIMANT, why did it not refuse the inclusion of the "2007/2008 Catch" clause at the same moment it accepted the inclusion of the Arbitration Agreement, also added in the Sales Confimation? If CLAIMANT realized the inclusion of the Arbitration Agreement [*CEx2*], how can it be expected not to have known about the inclusion of the "2007/2008Catch" clause?

113. The shipment of the supplied squid was made in June 2008 [*St.Def. §14*]. Since the 2008 season had begun in April and thus was in its earliest part, CLAIMANT, as an experienced participant in the fishing trade, must have been fully aware that part of the squid requested would be either heavier than 150g (from the end part of the 2007 season) or lighter than 100g (from the early part of the 2008 season), as was the case [*St.Def. §16*].

114. Even if one considers that CLAIMANT, in fact, did not realize the inclusion of the "2007/2008 Catch" clause, this lack of attention from CLAIMANT should be considered as a "violation of due care" or a "gross negligence" [see *Schlechtriem/Schwenzer art. 8 §16-17*]. The inexcusable CLAIMANT's carelessness in not reading the Sales Confirmation is not protected by the CISG [*Viscasillas §E.1.*].

115. Besides, as an expert in the fishing trade, it was (or should also have been) fully aware that ungraded squid are less ex-

pensive than graded ones [*St.Def. §12*]. Graded squid have to be graded for size, which requires a process of selection either mechanically or by sight [*St.Def. §12*]. These inputs increase production costs, so CLAIMANT should expect that graded squid would command a higher price than ungraded ones [*Gillette/Ferrari pp. 9-10*]. CLAIMANT alleges that the Contract was for "100-150 g" squid [*CM ¶53*] and not for squid from the "2007/2008 catches". However, CLAIMANT inserted in its Purchase Order [*CEx3*] and paid for the goods the price of USD 1,600/MT [*Req.Arb. §§9, 11*], which was in all likelihood equivalent to ungraded squid [cf. *CIETAC 22 March 1995*].

116. If it is certain that, as stated by CLAIMANT [*CM ¶68*], *"even a very negligent buyer deserves more protection than a fraudulent seller*", it is even more certain that a fraudulent buyer cannot be protected to the detriment of an honest seller.

2.2. CLAIMANT did not object the inclusion of this clause [Art. 19(2) CISG] and even paid the lower price equivalent to ungraded squid [Art. 18(1) CISG].

117. According to Art. 19(2) immaterial modifications brought in the acceptance – as was the case of the "2007/2008 Catch" clause – become part of the Contract, unless they are objected by the other party [see also *UPICC Art. 2.1.11(2)*]. Acceptance by conduct, in its turn, is expressly allowed under Art. 18(1) CISG, which states: "*conduct of the offeree indicating assent to an offer is an acceptance*" [see also *UPICC Art. 2.1.6.(1)* and *PECL 2.204(1)*]. Further, Art. 8(3) CISG sets forth that "*in determining the intent of a party due consideration is to be given to any subsequent conduct of the parties*". CLAIMANT not only did not object the "2007/2008 Catch" clause [¶*106* above], but also performed the Contract by paying the lower price for ungraded squid. Thus, CLAIMANT should be deemed to have assented to buy squid from the "2007/2008 Catch" [*Federal District Court New York (USA) 14 Apr. 1992*].

118. It could be argued that the inclusion of the "2007/2008 Catch" clause was a material modification to the Purchase Order, and thus, under Art.19(2) and (3), required, more than the lack of objection, an express acceptance by CLAIMANT in order to be considered binding between the parties. Even if that was true, the added clause would still be rendered accepted by CLAIMANT, because its subsequent conduct, consisting in paying the lower price equivalent to "2007/2008 caught" squid, leads to an "acceptance by conduct" or "implicit acceptance" of that clause [*Appelate Court Koblenz (Ger) 4 Oct. 2002; Appellate Court (Arg) 14 Oct. 1993*].

119. In fact, when the reply to an offer form has additional or different terms that materially alter the offer, it will be regarded as a rejection and a counter-offer. Such a counter-offer may be accepted by acts of performance. Where there is such a counter-offer and acceptance by acts of performance, in the classic sense of Articles 14 and 18 CISG, the terms of the contract will be those of the counter-offer [*Viscasillas §E.2.; Federal District Court Pennsylvania (USA) 25 Jul. 2008;* see also *Farnsworth pp.177-180; Sukurs pp.1483-1499* commenting *Federal District Court Illinois (USA) 7 Dec. 1999*].

120. Thus, when CLAIMANT paid for ungraded squid, it accepted, by its conduct, RESPONDENT's Sales Confirmation, including the "2007/2008 Catch" clause.

3. In any case, under Art. 35(3) CISG, CLAIMANT knew or could not have been unaware of the potential lack of conformity when accepted the Contract without objecting the inclusion of the "2007/2008 Catch" clause. Thus, RESPONDENT is not liable for the alleged nonconformity.

121. Art. 35(3) emphasizes that "*the seller is not liablefor any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity*". Although this provision makes only direct reference

to exemption of liability under subparagraphs (a) to (d) of Art. 35, it has been argued that "description" required by the contract under Art. 35(1) could also be incorporated into para. 3 by way of analogy [*Enderlein/Maskow pp.159-160*]. It is also remarkable that the legislative history of Art. 35(3) evolved so as to cover also the cases of sale by sample, earlier excluded under Art. 36 ULIS [*Bianca/Bonnel p.279; Henschel §4.2.*].

122. Even if the "2007/2008 Catch" clause was not considered included in the Contract, two circumstances of the case show that CLAIMANT knew or could not have been unaware that it was entering in a sale of squid per catch, and not per weight: (i) CLAIMANT could not have been unaware about the inclusion of the "2007/2008 Catch" clause in the Sale Confirmation; and (ii) CLAIMANT was or should have been fully aware that ungraded squid are less expensive than graded.

123. (i) As demonstrated in ¶¶*112-113* above, CLAIMANT could not have been unaware of the inclusion of the "2007/2008 Catch" clause in the Sale Confirmation. In fact, this document was sent by RESPONDENT upon receipt of CLAIMANT's Purchase Order. Even if it was argued that the clause was not included in the final content of the Contract, it was just before CLAIMANT's eyes and could not have escaped its mind for the purposes of Art. 35(3) [*Honnold p.259*]. For the application of this provision, it is sufficient that the alleged defects of the goods result indirectly from their description [*Bianca/Bonnel p.279*] or that the seller's offer impliedly related to the effective state of the goods to be delivered [*Bianca/Bonell p.277*], what was the case upon the inclusion of the "2007/2008 Catch" clause along with the "as per sample" one.

124. (ii) As demonstrated in *¶114* above, CLAIMANT paid for the goods the price of USD 1,600/MT [*Req.Arb. §§9, 11*], which was in all likelihood equivalent to ungraded squid. When the sum actually paid corresponds to goods of a lower quality — or which involve lower production costs —, then it is presumable that the buyer should

reasonably have deduced that the goods to be delivered did not conform with the Convention standards [*Bianca/Bonnel p.279; Teija §5.6.*]. Price differentials may indicate that nominally similar goods are, in fact, not substitutes at all [*Gillette/Ferrari pp.12*-13] and, from the price, buyer may infer whether he can expect the quality of the goods to be brought up to the level supposedly expressed in the Contract [*Hensbel §4.2.*].

125. Therefore, in the opposite of what it has argued[*CM ¶¶68-72*], under Art. 35(3) CISG, CLAIMANT knew or could not have been unaware of the potential lack of conformity when confirmed the Contract without objecting the inclusion of the "2007/2008 Catch" clause. Thus, RESPONDENT is not liable for the alleged nonconformity.

Issue IV. Alternatively, even if goods were considered non-conforming, CLAIMANT would still not be entitled to claim full damages, since Art. 40 CISG is not applicable and CLAIMANT has forfeited its right of protection under Artt. 38 and 39 CISG.

126. It has been proven above that the goods delivered were conforming to the Contract. Nonetheless, even assuming that goods were non-conforming, RESPONDENT shall demonstrate that **[1]** Art. 40 CISG is not applicable to the present case and that **[2]** RESPONDENT is not entitled to claim full damages because it has not fulfilled requirements under Artt. 38 and 39 CISG.

1. Even if goods are considered to be non-conforming, Art. 40 CISG is not applicable.

127. According to Art.40 CISG, "*the seller is not entitled to rely on the provisions of articles 38 and 39 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". Because Art. 40 CISG has a very strong effect, it should only be applied in very extraordinary or exceptional circumstances so that the provisions of Artt. 38 and 39 CISG "*do not become illusory*" [*SCCA 5 June 1998; Garro p. 255*]. In this sense, RESPONDENT shall prove that Art. 40 CISG is not applicable because **[1.1]** the alleged nonconformity relates to facts made known to CLAIMANT and **[1.2]** RESPONDENT was not aware of the nonconformity.

1.1. RESPONDENT disclosed the alleged nonconformity to CLAIMANT before the conclusion of the Contract.

128. Art.40 CISG only relieves the buyer from obligations under Artt. 38 and 39 if the seller has failed to disclose the nonconformity or related facts to the buyer [*Garro p.253*]. This provision is in symmetry with Art. 35(3), which relieves seller of his liability for any lack of conformity when buyer had actual or imputed knowledge of the nonconformity until the conclusion of the Contract [*Garro p. 255*].

129. Applicability of Art.40 is, thus, out of question in the present case, since RESPONDENT explicitly informed CLAIMANT that it was selling squid per catch by introducing the "2007/2008 Catch" clause in the Sales Confirmation [*CEx4*]. By doing so, RESPONDENT clearly disclosed to CLAIMANT that the squid would vary in weight and that there were no determined proportions of squid per weight [cf. *¶¶122-123*].

1.2. Besides, CLAIMANT failed to prove that RESPONDENT knew or ought to have known that the alleged nonconformity constituted a nonconformity to CLAIMANT.

130. In its memorandum **[1.2.1]** CLAIMANT failed to prove that RESPONDENT knew or could not be unaware that the discrepan-

cy in weight constituted a nonconformity to CLAIMANT, **[1.2.2]** awareness which must not be presumed from the facts without evidence to substantiate it.

1.2.1. RESPONDENT did not reach the requisite state of awareness under Art. 40 CISG.

131. In cases where the seller alleges unawareness of the supposed defect that would constitute a nonconformity to the buyer, the buyer undertakes the burden to prove seller's knowledge of the buyer's subjective perspective on the defect at stake [*Andersen p.32-33; Kuoppala §4.8*]. In a similar case [*Appellate Court (Ger) 25 June 1997*], in which the seller has delivered a different type of product than the one ordered, the Court stated that "*it was insufficient that the seller had knowledge of the glue glazing. The buyer had to prove that the seller knew this would constitute a lack of conformity (art.40 CISG).*"

132. CLAIMANT did not prove RESPONDENT's knowledge that delivering a certain portion of the squid under the range of 100-150 g would be considered a defect under the Contract or the CISG [*CM Passim*]. On the other hand, RESPONDENT demonstrates its good faith by proving that it did not reach the requisite state of awareness under Art. 40 CISG. This is so because, from what was established in *¶72-85* above, according to the negotiations and the Contract, RESPONDENT could not have known that CLAIMANT required only squid ranging from 100-150 g; and that squid under this weight would be non-conforming.

1.2.2. RESPONDENT's knowledge of the nonconformity shall not be inferred without proof to substantiate it.

133. It is a fact that RESPONDENT knew it was delivering a portion of the squid under the 100-150 g range, but, as stated above,

under the CISG it is not enough that the seller knows of the facts related to the nonconformity. Under Art. 40, seller's simple knowledge of the facts that lead to a nonconformity of goods does not necessarily imply the knowledge of the nonconformity itself [*Appellate Court, (Ger), 25 June 1997*].

134. In a recent and exceptional case [*SCCA 5 June 1998*], because the facts showed that *"it was more likely than not that the seller is conscious of the facts that relate to the non-conformity*", the burden of proof shifted to the seller to prove that he did not reach the requisite state of awareness. Even if this was the case, and RESPONDENT were to undertake the burden of proof, it has already proven (in *¶132* above) that it could not and did not know that the alleged underweight squid constituted a nonconformity to CLAIMANT.

135. In a similar case [*Appellate Court, (Ger) 25 June 1997*], the seller was able to prove his good faith and discard any presumption on his awareness by demonstrating that the type of goods (glue) delivered was not *"obviously inappropriate"* and by proving to have used that glue previously without producing ill effects. Similarly, in the case at hand, RESPONDENT has proven that (i) the delivered squid is not obviously inappropriate and may be used by CLAIMANT to achieve its goals [cf. *¶¶99-102*] and (ii) that in the fishing market there is no necessary usage to buy squid per weight and RESPONDENT has not had problems with clients that have received squid from it [cf. *¶82 and PO3, Q16*].

136. Despite the academic controversies that arise when trying to establishing the required degree of seller's awareness under Art. 40 CISG [*Andersen p.27*], there is general consensus that the main objective of this provision is to protect the buyer from fraudulent or ill-faithed sellers [*Andersen p.27; Witz p.16; SCCA 5 June 1998*]. It is obviously clear that bad faith or fraud may not be imputed to RESPONDENT. A seller that has included a clear statement in the Sales Confirmation regarding the quality of the goods to be delivered, such as the "2007/2008 Catch" clause [*CEx4*] and that has cautiously stamped the

year of catch on each carton of squid delivered [*PO3 Q32*], is most certainly not acting in bad faith.

137. In conclusion, because RESPONDENT disclosed the alleged nonconformity to CLAIMANT before the conclusion of the Contract and RESPONDENT has demonstrated that it was not and could not have been aware that this constituted a nonconformity to CLAIMANT, Art. 40 CISG is not applicable. Thus, CLAIMANT must have had fulfilled inspection and notice requirements under Artt.38 and 39 in order to claim full damages.

2. Because CLAIMANT's examination and notice did not fulfill time and method requirements under the CISG, it is not entitled to rely on the nonconformity to claim full damages.

138. The requirements set forth in Artt. 38(1) and 39(1) CISG intend to enable the parties to promptly clarify whether the goods delivered were in accordance with the Contract and give the seller an opportunity to take measures to defend himself from claims of damages and test the goods to confirm whether the claim is consistent [*Schlechtriem/Schwenzer Art.38 § 4; Kuoppala § 2.4.2.2*]. The longer the buyer takes, the harder it becomes for the seller to implement these measures. In this sense, behind these provisions there is an intention to avoid that the seller suffers any harm if he is not notified within a reasonable time after the buyer discovered or ought to have discovered the defects [*Kuoppala §2.4.2.1*].

139. These two articles must be read together. The buyer's duty to examine the goods [*Art. 38(1)*] justifies his obligation to notify the seller [*Art. 39(1)*] [*Schlecthriem/Schwenzer Art. 38 §4*]. A failure to properly examine the goods may lead the buyer to not discovering the defects when he ought to have done so, making him incapable of accomplishing his obligation to promptly notify the seller of the lack of conformity, which will lead to the loss of any remedies he was entitled based on the lack of conformity [*Idem*].

140. In this sense, RESPONDENT shall demonstrate that, because **[2.1]** CLAIMANT failed to fulfill the examination time and method requirements under Art. 38(1) and, consequently, **[2.2]** did not accomplish time and content requirements for notifying RESPONDENT under Art. 39(1), CLAIMANT is not entitled to rely on any remedy based on the lack of conformity.

2.1. CLAIMANT did not fulfill time and method requirements under Art. 38(1) CISG.

141. The examination is not a legal obligation imposed on the buyer, but a burden he undertakes to observe in his own interest [*Schechtriem/Schwenzer Art.38 §5*]. Art. 38 is important for claiming damages because it will fix the time when the buyer "*ought to have discovered*" the defect, which is when the "*reasonable time*" for notifying the lack of conformity starts to run under Art. 39(1) [*Kuoppala §2.4.1; Opinion n.2 §Art. 39, 1*].

142. In this sense, RESPONDENT shall demonstrate that **[2.1.1]** CLAIMANT was responsible for carrying out the examination, not its customers. **[2.1.2]** The First Examination conducted by CLAIMANT was prompt, but the method applied was unreasonable under the CISG. **[2.1.3]** Because of its failure to examine properly and discover the nonconformity when it ought to have, CLAIMANT had to conduct a Second Examination, which was untimely despite being reasonable in regards to method.

2.1.1. Because examination was not to be carried out by CLAIMANT's customers, it was not differed in time.

143. CLAIMANT [*CM ¶87*] loosely affirms that in cases in which goods are to be re-sold, the examination is regularly conducted by the subpurchasor. In this manner, RESPONDENT shall demonstra-

te that even though goods were to be re-sold, **[2.1.1.1]** CLAIMANT is responsible for its customer's inspection; and **[2.1.1.2]** CLAIMANT should have reasonably examined the goods before re-sale.

2.1.1.1. Even if inspection was to be carried out by CLAIMANT's customers, RESPONDENT is not liable.

144. The examination will only be carried out by the buyer's customer in special circumstances, such as when it would be unreasonable to open the package [*Bianca/Bonell Art. 38 §3.1*], which is the case in the "*canned food case*" [*Court of Appeal (Fin) 12 Nov. 1997*] cited by CLAIMANT in support of its argument. This is clearly not CLAIMANT's situation since all the circumstances of the present case allowed CLAIMANT — who even claims to have done so — to perform a reasonable inspection of the goods before reselling them.

145. Even if is the examination was to be carried out by the subpuchasers, these exceptional cases are to be solved under the rules of Art. 38(1), which requires goods to be inspected as prompt as is reasonable under the circumstances [*Bianca/Bonell Art. 38 §3.1*]. If the new buyer fails to examine the goods promptly, he loses the right to rely on the nonconformity and the first buyer also loses that right toward the first seller [*Bianca/Bonell Art.38 §2.2 and §3.1; Kuoppala §3.4.3;* see *Apellate Court (Ger) 8 Feb. 1995*].

146. Thus, even if it is understood that the subpurchasors were in charge of the examination, CLAIMANT has not demonstrated that its clients have performed a reasonable and prompt examination of the goods. By the contrary, it only states that its clients noticed the defects when they, already at sea, started using the squid, after they had had access to the squid for at least some time [*CEx10 §11*]. In this manner, CLAIMANT was responsible for its customers' acts and omissions and has lost its right to rely on the alleged lack of conformity towards RESPONDENT.

2.1.1.2. Even if it was the case of redispatch, time limit for inspection was not differed under Art. 38(3) CISG.

147. There is no doubt that, in the present circumstances, CLAIMANT clearly acted as a retailer, i.e., a *"person engaged in making sales to ultimate consumers"* [*Black's Law Dictionary p.1315*]. It should thus be noted that the redispatch exception does not encompass the mere resale of goods without additional carriage, such as in the retail trade [*Schechtriem/Schwenzer Art.38 §23; Bianca/Bonell Art.38 §2.7*].

148. Even if it was a case of redispatch, the beginning of the period for examination of the goods would only have been differed if the buyer had no reasonable opportunity to examine them before resale [*Schechtriem/Schwenzer Art. 38 §25*]. Of course, reasonableness will depend on a series of circumstances, especially packaging [*Idem*]. In the case at hand, however, the way goods were packed was obviously not an obstacle for inspection, as CLAIMANT has demonstrated by narrating the steps it took to examine the delivery [*CEx10*].

149. Case law confirms such an approach. In one case [*Apellate Court (Ger) 13 Jan. 1993*], although the goods (doors) were resold by the buyer, the exemption under Art. 38(3) would only have applied if "*the buyer had either acted as a pure intermediary or if the goods had been directly delivered to the ultimate consumer*" [*Kuoppala §3.4.3*]. As the buyer had stored the goods in its warehouse before reselling them, the Court understood that prompt examination was necessary. Further, the Court considered that examination was neither impossible nor unreasonable even considering that the doors were wrapped in piles on pallets and that the wrapping had to be open to allow proper inspection. In the famous *"maggots-in-mozzarella"* case [*District Court (Neth) 19 Dec. 1991*], the court declared that the buyer could not solely rely on the complaints of his customers, but should have noticed the maggots in frozen mozzarella sooner by inspecting a defrosted sample of the cheese.

150. According to CLAIMANT's own narrative, goods were received at the port and were examined in the same day (even though being packed in pallets and frozen together), and part of the squid was re-sold and moved to its customers on the following week [*CEx10*]. From this, we must conclude that (i) CLAIMANT had roughly one week to examine the whole delivery; (ii) CLAIMANT agrees that this period of time is enough to carry out a reasonable examination under the CISG; (iii) a part of the delivery was in its stock since the delivery until May 2009 and could have also been examined at any time.

151. In conclusion, because CLAIMANT had all the necessary conditions of time and expertise to examine the squid, CLAIMANT itself should have carried out the examination under the time limit set by Art. 38(1) CISG.

2.1.2. The First Examination conducted by CLAIMANT was prompt, but the method applied was unreasonable under the CISG.

152. Goods must be inspected "*within as short period as practicable in the circumstances*" [*Art.38(1) CISG*]. This is not, however, an issue, since CLAIMANT has proven [*CEx10*] that it examined the squid immediately upon receipt.

153. In regards to method of examination, when there is no express provision in the Contract, no well known trade usage or practices, which is the case, the examination under the CISG is required to be the one which is reasonable in all circumstances [*Bianca/Bonell p.297; Schlechtriem/Schwenzer Art. 38 §13; Court of Appeal (Fin), 12 Nov. 1997*]. This means not only the ones considered relevant by CLAIMANT, but all circumstances objectively relevant to the case.

154. In *CM ¶¶83-90*, CLAIMANT tries to persuade this Tribunal that the alleged First Examination was in accordance with the

CISG. RESPONDENT will hereby demonstrate that the examination was not reasonable under the circumstances. Had it been like the standard analysis later carried out by the TGT Laboratories, it would have shown the variations in the squid's weight.

155. Given that the circumstances relevant to the case are **(i)** the expertise of the parties, **(ii)** the provisions of the contract; **(iii)** the nature of the goods and their packaging and **(iv)** their quantity, the reasonable method of examination would consist of selecting random and representative samples of the squid and testing them to find any discrepancy, especially in quality and weight, which were the relevant characteristics to CLAIMANT.

156. In this sense, the buyer's expertise (i) is relevant in the sense that when the buyer has the required experience, he must carry out a "*thorough and expert examination*" [*DiMatteo p.363; Schechtriem/Schwenzer Art. 38 §13*]. In respect to thoroughness, the buyer has the duty to examine the goods to discover any apparent nonconformity [*DiMatteo p.363*]. Despite lack of consensus on the concept of latent defects, courts have agreed discrepancies in weight to be an apparent nonconformity identifiable through reasonable examination [*Commercial Court (Swi) 30 Nov 1998*].

157. CLAIMANT is a well experienced squid buyer [cf. *¶109*] and, therefore, CLAIMANT had the required knowledge to conduct a reasonable examination, or it could have hired an expert such as TGT Laboratories to examine it on its behalf. Not doing so, CLAIMANT undertook the duty to proceed the examination with an expert's care.

158. Also, CLAIMANT seems to have ignored the provisions of the contract (i) during the inspection. As demonstrated in *¶¶121-124* above, CLAIMANT was or should have been perfectly aware that the squid delivered was caught in 2007 and also in 2008. In this manner, CLAIMANT, who is a very experienced squid buyer, should have proceeded the examination keeping in mind that there was going to be squid from two different seasons in the containers. Each of the 20,000 cartons had been stamped with the catch year; some cartons were

labeled "2007" and others "2008" [*PO3 Q32*]. CLAIMANT even stocked some squid in its warehouse and moved other cartons to its clients [*CEx10 §9-11*]. It must have seen the stamps on the cartons, but CLAIMANT only examined cartons marked "2007" [*PO3 Q32*].

159. CLAIMANT may never have bought squid from Danubia before [*Req.Arb. §10*], but CLAIMANT knows the trade and, specially, is aware that the *illex dannubecus* season begins in April and that, consequently, squid caught in the beginning of the cycle is smaller [*PO3 Q27*]. Therefore, CLAIMANT knew squid caught in 2008 would tend to be smaller than the ones caught in 2007. Nonetheless, CLAIMANT deliberately decided to examine the cartons marked "2007" but ignored the ones marked "2008". This is definitely not the standard diligence expected from an experienced buyer who orders 200 MT of squid and is interested in squid optimum size as bait.

160. Concerning nature and packaging (iii), when the examined goods cannot be reused afterwards, inspection should be carried out by randomly testing samples [*Schlechtriem/Schwenzer 38 §14*; *Maritime Commercial Court (Den) 31 Jan. 2002*]. In regards to quantity (iv), when goods are delivered in large quantities, the examination can be restricted to "*representative and random tests*" [*Schlechtriem/Schwenzer Art.38 §14; Provincial Court of Appeal (Ger) 13 Jan. 1993; Commercial Court (Swi) 30 Nov. 1998*]. In these cases, the risk of large consequential losses should also make the buyer take a more careful examination in observation of his own interests [*Kuoppala §3.3.1*].

161. Compared to the CISG guidelines listed above concerning sampling and testing, it is obvious that CLAIMANT's inspection was not reasonable for several reasons. First, it failed to fulfill two basic requirements that assure representativeness to the sample obtained: **(a)** randomness and **(b)** proportionality.

162. Regarding randomness (a), selecting cartons from only two (2) out of the twelve (12) containers is not sufficiently random. CLAIMANT should have picked cartons from more containers in or-

der to obtain a panoramic view of the whole delivery. TGT Laboratories, for instance, when asked to "*to examine a randomly selected sample*" from the squid stored by CLAIMANT, picked cartons from each of the twelve (12) storage units [*CEx8*].

163. If freshness had been an important characteristic to CLAIMANT, it would have been extremely unwise to test the squid in only 1/6 of the containers since the other containers could have been stored in worst conditions resulting in deteriorated squid in more than half of the delivery. Even though all the containers arrived along the same day [*CEx10; PO3 Q.31*], it seems CLAIMANT thought it unnecessary to examine the other containers. And its lack of care has now shown its drastic consequences. It is thus clear that selecting cartons from just the first two containers was neither random nor professional and, therefore, not at all reasonable.

164. Also, (b) the amount of squid selected as sample was not proportional to the magnitude of the delivery. CLAIMANT weighed twenty (20) cartons and found them to have the required weight [*CEx10*]. But this is irrelevant because when different sized squids are packed together, weighing the carton without knowing how many squids are inside will not confirm the weight of each individual squid. CLAIMANT only defrosted and individually weighted the squid in 5 of these cartons. Thus, the sample of squid that CLAIMANT really weighed was of 0,025% (50kg/200MT) of the whole delivery. This is obviously too little to assure any representativeness of the sample. The TGT Laboratories, in the other hand, examined the squid in 120 cartons (1,200kg/200MT), that is 0,6% of the delivery, and was therefore able to discover the alleged nonconformity.

165. Carrying out a reasonable examination such as the one being outlined in the previous paragraphs is not setting too heavy a burden on CLAIMANT. If it is possible to promptly examine the goods without the need of complex or technological analysis, the examination cannot be regarded as too onerous on the buyer [*Kuoppala §3.3.1*]. What must not stand, under risk of creating a paradox, is to

have TGT Laboratories' inspection and CLAIMANT's inspection, both, being held as reasonable. There is at least something of unreasonable with any inspection when it results in the conclusion that 100% of the goods are conforming when, in fact, around 60% (more than a half) would not have conformed [*CEx8*].

2.1.3. The Second Examination was reasonable but completely untimely.

166. Because of its failure to examine properly and discover the nonconformity when it ought to have, CLAIMANT was required by RESPONDENT to conduct a second examination, which, despite being reasonable, was completely untimely. There is no doubt that the examination carried out by TGT Laboratories was reasonable. The laboratory is a certified agency which conducted a standard inspection of the squid [*PO3 Q35*] and, consequently, was able to ascertain the average quantity of squid under the 100-150 g. range.

167. Concerning the time limit, squid is a perishable good and it is a well known practice to examine perishables immediately [*Di-Matteo p.361; Schlechtriem/Schwenzer Art.38 §15*], even when they are frozen [*Federal District Court (USA) 21 May 2004; District Court (Neth) 19 Dec. 1991*].

168. However, Second Examination came too late: 42 days after delivery. It was only carried out by TGT Laboratories on 12 Aug. 2008 [*CEx8*], after RESPONDENT had been notified of the alleged nonconformity and, due to the vagueness of First Notice, required CLAIMANT to obtain an expert's analysis. In fact, Second Examination only happened after the First Notice of nonconformity, which in its turn, was untimely [cf. *¶179-181* below].

169. In a similar case [*District Appeal Court (Neth) 15 Dec. 1997*], the court decided that notice given three weeks after the goods were sent to the third party for processing as not timely because at that moment the goods had already undergone processing. In the

present case, once the squid had already been defrosted and used by CLAIMANT's customers, it is obvious that the Second Examination cannot be considered timely.

170. In conclusion, because the discrepancy in weight is an apparent defect that would normally be discovered by a reasonable inspection, and that, in the light of the circumstances, CLAIMANT could have carried out such inspection right after delivery, the time limit for notice to be given under Art. 39(1) CISG began to run right after the goods were delivered to CLAIMANT.

3. Even if examination had been reasonable and timely, the notices of nonconformity were not in accordance with CISG time and content requirements.

171. The purpose of the notice obligation under the CISG is to place the seller in a position where he can, by understanding the lack of conformity, take the adequate measures to protect his own interests and avoid more damages, such as securing evidence and preparing for delivery of substitute goods [*Muñoz §V, 2, A; Schlechtriem/Schwenzer Art.39 §6*]. However, in the case at hand, CLAIMANT sent RESPONDENT two notices of nonconformity, one in 29 Jul. 2008 ("First Notice") and the other in 16 Aug. 2008 ("Second Notice"). RESPONDENT shall demonstrate that because **[3.1]** the First Notice did not fulfill content requirements under the CISG and **[3.2]** the Second Notice did not substantiate the First or, alternatively, **[3.3]** both notices were untimely, CLAIMANT has lost all its remedies under the CISG.

3.1. First Notice does not constitute a notice under the CISG in terms of content.

172. Under Art. 39(1) CISG, the notice must specify the nature of the nonconformity, meaning that a notice framed in general terms

is unacceptable [*Kuoppala §4.3.1; Schlechtriem/Schwenzer Art.39 §6*]. In this sense, expressions such as "*there's been a complaint*" [*District Court (Ger), 2 Jul. 2002*] or *"[the goods] caused some problems"* [*District Court (Ita) 12 Jul. 2000*] are not sufficient under the CISG. An experienced buyer, specially, will be expected to present a precise description of the defects, framed in professional terms, so as to avoid doubts [*Commercial Court (Swi.) 21 Sept. 1998*; *Kuoppala §4.3.1*].

173. In the First Notice, CLAIMANT stated that "*squid was hardly useable as bait*" [*CEx5*]. A quick analysis of this statement in the light of the circumstances shall lead us to conclude that (i) "*hardly*" is a term used by laypersons, it is not technical, nor precise; (ii) CLAIMANT did not specify the nature of the problem that made squid not useable as bait (this is a symptom); (iii) CLAIMANT"s experience in the field confirms its awareness of a variety of defects that could make the squid not useable as bait such as lack in quality, lack in freshness, size discrepancies; and (iv) this statement lacked in precision and generated doubts. Thus, it did not fulfill the purpose of Art. 39(1) CISG.

174. Specification of defects will depend not only upon the information available to the buyer, but also on that which the buyer should have obtained [*Muñoz §V, 2, A*]. Thus, CLAIMANT should have stated the nature of the nonconformity, not its symptoms. Only in very exceptional situations, such as defects related to complex machinery, will the buyer be allowed to identify only the symptoms of the lack of conformity [*Muñoz §V, 2, A; Supreme Court (Ger) 3 Nov. 1999*]. This is most definitely not the case because (i) CLAIMANT, by performing a reasonable examination of the goods, would easily discover the defects [see *¶156*]; (ii) CLAIMANT still had some squid stored in its warehouse that could have been examined [*CEx10 §11 – says they moved a substantial quantity but not all the squid*]; and (iii) CLAIMANT could have inquired its customers for more details regarding the nonconformity and they would have been able to inform the weight discrepancy.

175. Courts have suggested that the notice must be specific enough for the seller to identify the asserted defect without further investigation [*District Court (Ger), 2 Jul. 2002*]. After receiving such a vague notice (on 29 Jul. 2008), RESPONDENT asked CLAIMANT, on 3 Aug. 2008, that the squid be inspected by a certified testing agency [*CEx6*]. It shall be kept in mind that in no moment did CLAIMANT inform that it had carried out an inspection of the goods or that they were inappropriate. The first information RESPONDENT received after almost 2 months from the last communication between the parties [*PO3 Q23*] was that "*squid was hardly useable as bait*". Therefore, RESPONDENT requested that the squid be examined so as to understand the nature of the alleged defects. In this manner, RESPONDENT acted with the diligence that is required from the seller, which is expected to make inquiries on the nonconformity when buyer is non-specific [*Lookofsky Guide p.89*].

3.2. Even if First Notice had been substantiated by the Second Notice, notification of nonconformity still lacked in content.

176. On 16 August 2008, CLAIMANT sent to RESPONDENT what CLAIMANT calls the Second Notice of nonconformity [*CEx7*], in which CLAIMANT presents the TGT Laboratories' Report regarding the Second Examination [*CEx8*]. In its e-mail, the only statement CLAIMANT makes in relation to the nature of the goods and the TGT Report is that "*the results are self-explanatory and show clearly that what we got was not squid within the range of 100-150 grams.*"

177. Given such a vague affirmation, RESPONDENT must ask how can a notice of nonconformity state that a scientific analysis is self-explanatory when the report only outlines factual – and satisfactory – results and does not interpret the Contract or the parties' intentions? The Report is definitely very clear and lists, briefly, the following findings: (i) the squid delivered was in excellent conditions; (ii) the squid was fit for human consumption; (iii) a portion of the squid

was caught in 2007 and another portion in 2008; and (iv) the squid varied in weight. When this information is compared to the provisions agreed in the Contract [see *CEx4 and ¶¶65-85* and *103-120*], it is impossible to figure out what is the self-explanatory nonconformity identified by CLAIMANT, since all the findings confirm that the goods were in strict conformity with the Contract.

178. If the Report is read in connection with the affirmation that "*what we got was not squid within the range of 100-150 grams*", one might conclude that CLAIMANT is wrong, for CLAIMANT did receive, and the Report confirms it, about 54% of the squid strictly between the range of 100-150 g. The idea that the nonconformity relates to the fact that the squid delivered was not entirely within the range of 100-150 g cannot, under any interpretation, be inferred from CLAIMANT's statement and, much less, when compared with what was agreed in the Contract. Again, CLAIMANT's notice was vague and nontechnical. Therefore, the Second Notice does not complement the First Notice because it does not specify the nature of the nonconformity and, thus, both notices are not in accordance with the CISG.

3.3. Even if they were content sufficient, both notices were untimely.

179. Even assuming that the First and the Second Notices were sufficient in terms of content, they were both untimely. Under Art. 39(1) the buyer must give the notice of nonconformity within a reasonable time after he discovered or ought to have discovered it. In this sense, RESPONDENT has demonstrated [see *¶170* above] that the time period for CLAIMANT to give notice started to run right after the goods were delivered, on 01 Jul. 2008.

180. Determining the reasonableness of the period for notice will depend on the circumstances of the case and primarily, on the nature of the goods [*Schechtriem/Schwenzer Art.39 §16*]. In the case of perishables, such as squid, the term reasonable under Art. 39(1)

means immediate or very rapid notice [*Muñoz §V, 2, B*; *District Court (Neth) 19 Dec. 1991; Federal District Court (USA) 21 May 2004*].

181. Specially in the case of perishables, goods are normally to be examined at the time of delivery, when the buyer should determine promptly whether the goods are defective, and thus notice to the seller will follow shortly after the goods are received [*District Court (Ita) 12 Jul 2000*]. Thus, CLAIMANT's First and Second notices, sent 29 and 46 days after delivery, respectively, were definitely not timely under the CISG.

182. In conclusion, because CLAIMANT has not fulfilled neither content nor time requirements under Art. 39 CISG, it has forfeited its right to claim full damages or any other remedy under the CISG based on the nonconformity.

Issue V. CLAIMANT Is Not Entitled To Damages.

183. CLAIMANT is not entitled to damages since there was not a contractual breach [see *¶¶65-85* and *103-120*]. In any event, **[1]** it bears the burden of proving its damages, which are limited to the amount of alleged non-conforming squid. Moreover, **[2]** CLAIMANT did not prove the foreseeability of damages, which actually were not foreseeable by RESPONDENT. Furthermore, **[3]** CLAIMANT did not reasonably act in order to mitigate its damages. Additionally, **[4]** RESPONDENT is entitled to litigation damages.

1. CLAIMANT bears the burden of proving its damages, which are limited to the amount of alleged non-conforming squid.

184. Even if there was a contractual breach, CLAIMANT did not prove its damages [*CM ¶114*]. As it is widely known, the party which pleads compensation bears the burden of proving its damages [*UNCITRAL Digest Art. 74 §35*]. In the case at hand, CLAIMANT did not

seriously prove its loss of profit nor the incidental damages. Therefore, no compensation should be awarded. In addition, eventual compensation should be restricted to loss related to the amount of alleged non-conforming squid delivered.

2. CLAIMANT did not prove the foreseeability of damages, which in any event were not foreseeable by RESPONDENT.

185. CLAIMANT bears the burden to prove the foreseeability of the damage [*Saidov p.120*]. Hence, since there is no proof that RESPONDENT could have foreseen the loss supposedly suffered by CLAIMANT, the Tribunal should not award it damages [*Appellate Court Bamberg (Ger) 13 Jan. 1999;* see also *Bianca/Bonnel p.539-540*].

186. Under Art. 74 CISG, foreseeability should be determined under RESPONDENT's particular circumstances [*Saidov p.123*]. Bearing in mind that RESPONDENT knew that CLAIMANT runs business both in fish and seafood for human consumption [*CEx10*] and that squid delivered was fit to human consumption [*CEx8*], the delivery of squid – even if it is to be considered non-conforming – would not presumably cause damage to CLAIMANT, since it could be sold as seafood.

3. In any event, CLAIMANT did not reasonably act in order to mitigate its damages.

187. As recognized by CLAIMANT itself [*CM ¶122*], in order to fulfill Art. 77 CISG requirement the aggrieved party must take all reasonable measures in order to mitigate losses. Indeed, CLAIMANT's efforts to sell the squid [*CEx.10 §*15; *CM ¶*124] did not meet the requirements of Art. 77, since CLAIMANT did not try to resell the theem for human consumption even at a lower price [*Schlechtriem/Schwenzer*

Art.74 §8]. CLAIMANT knew that its internal market of squid for human consumption was saturated [*CEx10 §15*] and therefore had to have offered squid at an even lower price than it did [*Req.Arb. §20; CEx10 §15*]. Moreover, CLAIMANT had expertise in seafood market [see *¶¶91-92*] and it is hardly acceptable that it efforts to sell the squid could not achieve substantial results. Since CLAIMANT measures to sell the squid were ineffective [*Schlechtriem/Schwenzer Art,.77 §5*], the plea of compensation of USD 12,450 for the expenses incurred in attempting to sell the squid should also be rejected.

188. Furthermore, knowing that RESPONDENT would not take the squid back [*CEx9*], CLAIMANT should have immediately resold or, failing to do so, destroyed the squid. CLAIMANT, on the contrary, unreasonably stored them for over 6 months [*Req.Arb. §21*]. This measure should be considered entirely ineffective to mitigate losses and thus not reimbursable [*Schlechtriem/Schwenzer Art. 77 § 11*].

189. In conclusion, CLAIMANT did not reasonable mitigate its damages. Therefore, the Tribunal should not award it full compensation.

4. RESPONDENT is entitled to litigation damages.

190. Given that there was no contractual breach [*¶¶64-125*], and that, in any event, CLAIMANT had no right to compensation [*¶¶126-189*], RESPONDENT is entitled to the reimbursement of all the costs it incurred due to the arbitration. Moreover, the amount to be reimbursed is not limited to the costs of the proceedings listed under Art. 36(4) Milan Rules. Art. 30(2)(g) Milan Rules expressly provides that the arbitral award shall allocate not only the costs of the proceedings but the legal costs of the parties. Therefore, the award shall also cover the reimbursement of RESPONDENT's legal fees and expenses.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders and the CLAIMANT's Memorandum, and for the reasons stated in this brief, RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal was not properly constituted and has no jurisdiction over the merits of the case **(Issue I)**;

2. CLAIMANT has breached the confidentiality of the arbitral proceedings through Mr. Herbert Schwitz's interview to Commercial Fishing Today and must be condemned in damages **(Issue II)**;

3. The Tribunal has the authority to refrain CLAIMANT from disclosing any aspect of the current arbitration **(Issue II)**;

4. RESPONDENT has delivered squid in conformity with the Contract and the CISG **(Issue III)**;

5. CLAIMANT failed to properly examine and timely notice the alleged nonconformity of the squid **(Issue IV)**;

6. CLAIMANT neither proved the existence or the foreseeability of damages nor acted in order to mitigate the alleged damages and therefore CLAIMANT's claims should be dismissed **(Issue V)**; and

7. RESPONDENT is entitled to the reimbursement of all its costs in the arbitration **(Issue V)**.

Rio de Janeiro, 20 January 2011.

Alice Kasznar Feghali; Bernard Potsch Moura; Felipe Gomes de Almeida; Julia Dias Carneiro da Cunha; Juliana Cesario Alvim Gomes; Marina Duque Leite; Nathalie Leite Gazzaneo