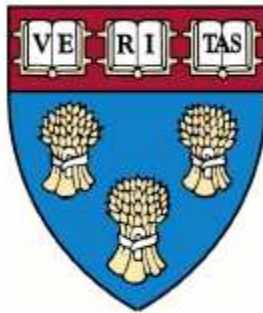


**EIGHTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA - APRIL 2011**

MEDITERRANEO TRAWLER SUPPLY AS, *CLAIMANT*
V.
EQUATORIANA FISHING LTD., *RESPONDENT*

MEMORANDUM FOR CLAIMANT



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ABBREVIATIONS

| | |
|--------------------|---|
| & | And |
| Ans. & St. of Def. | Answer and Statement of Defense |
| Arb. | Arbitration |
| Art./Arts. | Article/Articles |
| BGH | Bundesgerichtshof [Federal Supreme Court—Germany] |
| Cl. Rep. to Ans. | Claimant’s Reply to Answer |
| Cir. | Circuit |
| CISG | United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 |
| Cl. Ex. | CLAIMANT’S Exhibit |
| Co. | Company |
| Corp. | Corporation |
| Ct. | Court |
| Dist. | District |
| Ed. | Edition |
| ed./eds. | Editor / Editors |
| e.g. | exemplum gratii [for example] |
| Et seq. | etsequens [and the following] |
| F.Supp. | Federal Supplement [United States Federal District Court reporter] |
| Fed. | Federal |
| Ger. | Germany |
| GmbH | Gesellschaft mit beschränkter Haftung [Legal entity – Ger.] |
| ICC | International Chamber of Commerce |
| id. | idem [the same] |
| i.e. | id est [that is] |
| Inc. | Incorporated |
| Ltd. | Limited |
| No./Nos. | Number / Numbers |

| | |
|------------------------|--|
| NY Convention | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 7 June 1959 |
| ¶ / ¶¶ | Paragraph / paragraphs |
| Para./paras. | Paragraph / paragraphs |
| P./pp. | Page / pages |
| Procedural Order No. 2 | Clarifications given by the President of the Tribunal in Procedural Order No. 2 |
| R. Ex. | RESPONDENT's Exhibit |
| § | Section |
| U.K. | United Kingdom |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Model Law | UNCITRAL Model Law on International Commercial Arbitration of 1985 |
| UNIDROIT | International Institute for the Unification of Private Law |
| UNIDROIT Principles | UNIDROIT Principles of International Commercial Contracts of 2004 |
| US | United States of America |
| USD | United States Dollars |
| v. | Versus [against] |
| Vol. | Volume |

STATEMENT OF FACTS

CLAIMANT, Mediterraneo Trawler Supply AS is a company that resells squid and other products for human consumption and to long line trawlers for use as fishbait [*Cl. Ex. 10, p. 18*].

RESPONDENT, Equitoriana Fishing Ltd. both purchases and catches *illex danubecus* squid, which it sells for human consumption and for bait [*St. Cl., p. 4*]. It is well known in the fishing trade that the best size range for bait squid is between 100-150 grams [*Id.*]. Although CLAIMANT and RESPONDENT had not done business together in the past, RESPONDENT has a history of working in the market in Mediterraneo [*Procedural Order No. 3, para. 12*].

On 14 April 2008, in response to a shortage of squid from its usual suppliers, CLAIMANT contacted RESPONDENT to inquire about the availability and price of “appropriate product” to be resold to long line fleets [*Cl. Ex. 1, p. 10*]. On 17 May 2008, Mr. Weeg, a representative of RESPONDENT, showed CLAIMANT a carton of frozen squid and claimed that this sample was representative of the squid offered for purchase [*Cl. Ex. 10, p. 18*]. With the exception of a few squid, nearly all of the squid fell within the 100-150 gram range, with an average weight per piece of 130 grams [*Id.*]. CLAIMANT showed the sample to its customers, who found it satisfactory [*Id.*].

On 29 May 2008, CLAIMANT placed an order for 200 tons of squid from RESPONDENT, specifying that the quality be “as per sample inspected” [*Cl. Ex. 3, p. 11*]. The sales order also stated that the product be “certified fit for human consumption” to comply with Mediterraneo’s public health requirements [*Id.*]. That day, RESPONDENT replied with a sales confirmation, which stated that the quality of the product would be “as per sample received,” that the squid would be from the 2007/2008 catch, and adding an arbitration clause [*Cl. Ex. 4, p. 12*]. CLAIMANT acknowledged the addition of the arbitration clause in an email that day [*R. Ex. 2, p. 29*].

On 1 July 2008, RESPONDENT delivered the frozen squid [*Cl. Ex. 10, p. 19*]. As defrosting and inspecting the squid would destroy the product, CLAIMANT randomly defrosted and weighed individual squid from five cartons out of two containers, and found these to conform to the sample in size and quality. CLAIMANT then resold the squid to five long line vessels [*Id.*].

The squid RESPONDENT delivered were too small for the long line vessels to use as bait. On 29 July 2008, CLAIMANT'S informed RESPONDENT that all five vessels had found the squid inadequate: two were forced to return to port immediately to re-stock while three returned most of the bait purchased to CLAIMANT at the end of their fishing expedition [*Cl. Ex. 5, p. 13; Cl. Ex. 10, p. 19*]. CLAIMANT immediately had the remaining squid in its warehouse tested by an independent laboratory at RESPONDENT'S request [*Cl. Ex. 6, p. 14*]. On 16 August 2008 CLAIMANT forwarded the 12 August laboratory tests to RESPONDENT, which confirmed that while a percentage of squid from both the 2007 and 2008 catch fell within the desired weight range, 54.6% of the squid were undersized [*Cl. Ex. 7, 8, p. 15-16*].

CLAIMANT encouraged RESPONDENT to take back squid remaining in CLAIMANT'S possession but RESPONDENT did not. Consequently, CLAIMANT incurred the costs and inconvenience of storing the squid on behalf of RESPONDENT. CLAIMANT attempted to resell the squid both in Mediterraneo and abroad, but it was "essentially unsalable;" no other fishing vessels were willing to purchase it as bait, and the market for human consumption was already saturated [*Cl. Ex. 10, p. 19-20; Cl. Ex. 7, p. 15*]. After RESPONDENT'S repeated refusals to take back the squid, CLAIMANT had no choice but to have the product destroyed [*Cl. Ex. 10, p. 20*].

CLAIMANT referred this dispute for breach of contract to the Milan Chamber of Arbitration on 20 May 2010 [*St. Cl., p. 1*]. The inferior quality of the squid supplied by RESPONDENT have injured CLAIMANT'S reputation and caused it to lose several customers [*Cl. Ex. 10, p. 20*]. In an attempt to repair this damage to its business, on 24 May 2010, CLAIMANT made a statement to Commercial Fishing Today explaining the reason for the inferior quality of the squid to its customers and indicating that it had initiated arbitration proceedings against RESPONDENT [*R. Ex. 1, p. 28*].

SUMMARY OF ARGUMENT

Procedure

According to the well-established principle of *Kompetenz-Kompetenz*, an arbitral tribunal has the authority to determine its own jurisdiction. The Tribunal has jurisdiction over this dispute because the arbitral panel was properly constituted in accordance with the Milan Rules. The sales contract between Claimant and Respondent specifies that the Milan Arbitration Rules govern the arbitral procedure, including the composition of the Arbitral Tribunal. The Arbitral Council properly applied the Milan Rules in appointing the Arbitral Tribunal, in removing Mr. Y from the position of Chairman and in administratively appointing Mr. Z as replacement Chairman.

This Arbitral Tribunal has the authority to issue a valid and enforceable award under both the UNCITRAL Model Law and the New York Convention as it was properly constituted in accordance with the arbitration agreement, and as the composition of the Arbitral Tribunal safeguards the rights of the parties to a binding award by an independent and impartial authority. Consequently this Tribunal should resolve the dispute between Claimant and Respondent without further delay by issuing a valid and enforceable award.

Confidentiality

RESPONDENT cannot claim damages for an alleged breach of confidentiality as the Tribunal should not exercise jurisdiction over this claim, and Claimant did not breach the duty of confidentiality under Rule 8(1). The Tribunal should not exercise jurisdiction over RESPONDENT's counterclaim as it does not arise out of the contract with CLAIMANT. Even if it does, CLAIMANT's CEO Mr. Herbert Schwitz's statement to Commercial Fishing Today that CLAIMANT's lawyer had begun arbitration proceedings [*Res. Ex. 1, p. 28*], does not violate the text or purpose of Rule 8(1), and is in any event exempt by Rule 8(1)'s provision for protecting the rights of a party. Even if the Tribunal finds that CLAIMANT violated the rule, RESPONDENT cannot prove it suffered actual loss from the statements by CLAIMANT's CEO. Thus, the Tribunal cannot issue an order declaring CLAIMANT liable for future damages based on the duty of

confidentiality. Furthermore, the RESPONDENT does not meet the criteria necessary to obtain an injunction.

Merits

Claimant and Respondent formed a valid contract for the sale of squid falling predominantly in the weight range of 100-150 grams for use as long line fishing bait. RESPONDENT failed to deliver squid as required by the contract, as the squid did not conform to the quality and description expressly specified in the contract. Furthermore, the squid delivered by RESPONDENT were unsuitable for the ordinary purpose, as well as for the particular purpose. In addition, the squid were inconsistent with the sample provided to CLAIMANT. At the time of the conclusion of the contract CLAIMANT was not aware of any lack of conformity and thus Article 35(3) is not applicable. Finally, RESPONDENT'S actions constitute a fundamental breach of the contract under Art. 25 CISG.

As RESPONDENT fundamentally breached the contract by delivering nonconforming squid, and CLAIMANT has satisfied its obligations of examination and to give proper notice, it is entitled to avoid the contract and claim restitution. Further, CLAIMANT is entitled to damages as it has taken reasonable steps to mitigate losses.

Relief

Thus, CLAIMANT respectfully asks this Tribunal to assert jurisdiction over this dispute and grant CLAIMANT the full amount of damages with costs and interest arising out of RESPONDENT'S breach of contract.

ARGUMENT

I. THIS TRIBUNAL HAS JURISDICTION TO HEAR THIS MATTER

1. According to the well-established principle of *Kompetenz-Kompetenz*, an arbitral tribunal has the authority to determine its own jurisdiction [*Várady, p. 121*]. Danubia, the seat of arbitration, has adopted the UNCITRAL Model Law [*St. Cl. ¶ 25*]. Under Art. 16(1) of the Model Law, “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement” [*UNCITRAL Model Law Art. 16(1)*].
2. As an initial matter, the Tribunal’s jurisdiction over this dispute arises from the enforceable arbitration agreement concluded between CLAIMANT and RESPONDENT. Under Option 1 of the UNCITRAL Model Law, a valid arbitration agreement exists where both parties have agreed upon an arbitration clause and reduced it to writing [*UNCITRAL Model Law Art. 7*]. RESPONDENT proposed the arbitration clause in its 28 May 2008 sales confirmation [*Cl. Ex. No. 4, p. 12*], which CLAIMANT accepted by acknowledging the clause the following day [*R. Ex. No. 2, p. 29*], and accepting the goods purchased on 1 July 2008 [*Stat. Cl. ¶ 17, p. 5*]. Further, RESPONDENT, by filing a counterclaim [*Letter from Langweiler, 24 June 2010, p. 23*], submitted itself to this arbitration. Therefore, even in the case the contract should not be held valid, the arbitration agreement is separable from the sales contract in accordance to Art. 16 of the UNCITRAL Model Law [*UNCITRAL Model Law, Art. 16*]. Finally, this international commercial dispute at issue is arbitrable under Art. II(1) of the New York Convention [*New York Convention, Art. II, 1; Born, p. 774*]. This Tribunal has the jurisdiction to hear all the claims presented in this case, as well as has the authority to issue procedural orders [*Infra*].

II. THIS TRIBUNAL WAS PROPERLY CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES AND THE RULES OF THE CHAMBER OF ARBITRATION OF MILAN (THE MILAN RULES) AND SHOULD THEREFORE PROCEED TO ISSUE A VALID AND ENFORCEABLE AWARD WITHOUT FURTHER DELAY.

3. The Tribunal has jurisdiction over this dispute because the arbitral panel was properly constituted in accordance with the Milan Rules [A]. Consequently this Tribunal should

resolve the dispute between CLAIMANT and RESPONDENT without further delay by issuing a valid and enforceable award [B].

A. The Arbitral Tribunal was properly constituted in accordance with the dispute settlement agreement and the Milan Rules

4. The sales contract between CLAIMANT and RESPONDENT specifies that the Milan Arbitration Rules govern the arbitral procedure, including the composition of the Arbitral Tribunal [1]. The Arbitral Council properly applied the Milan Rules in appointing the Arbitral Tribunal [2], in removing Mr. Y from the position of Chairman [3] and in administratively appointing Mr. Z as replacement Chairman [4]. Consequently this Tribunal has valid jurisdiction to hear the merits of this dispute.

1. THE MILAN RULES GOVERN THE PROCEDURE FOR THE APPOINTMENT OF ARBITRATORS IN THE DISPUTE BETWEEN CLAIMANT AND RESPONDENT

5. The dispute settlement provision provided in the 29 May 2008 sales contract states, “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” [*Cl. Ex. No. 4, p. 12*]. This statement clearly and unequivocally expresses the parties’ intention that the Milan Arbitration Rules govern the arbitration of any dispute between them. The Milan Rules specify, “The Rules shall apply where so provided by the arbitral clause or other agreement between the parties, however expressed” [*Milan Rules, Art. 1(1)*]. As commentator Born observes, “In agreeing to arbitrate in accordance with a particular set of institutional rules, the parties are deemed under all developed legal systems, to have consented to these principles” [*Born, p. 1753*]. The Milan Rules, in conjunction with the UNCITRAL Model law [*supra* ¶ 1], therefore govern the arbitral procedure [*Milan Rules, Art. 2(1)*].
6. By incorporating the Milan Rules, the parties expressed their intention to involve the Milan Chamber of Arbitration in the constitution of the Arbitral Tribunal. “The role of the [arbitral] institution consists above all in assisting the parties in the constitution of the arbitral tribunal” [*Poudret/Besson, p. 335*]. This is one of the chief reasons parties agree to arbitrate according to institutional rules [*Born, p. 1382*]. As the parties contemplated the delegation of this

authority to the Milan Chamber of Arbitration, and did not include any express derogations from the Milan Rules in the arbitration agreement, the Rules can be considered to apply fully.

2. THE ARBITRAL COUNCIL PROPERLY APPLIED THE MILAN RULES IN APPOINTING THE ARBITRAL TRIBUNAL

7. The Arbitral Council properly took the terms of the arbitration agreement into account in appointing the Arbitral Tribunal under the Milan Rules. Art. 14(1) of the Milan Rules states, “The arbitrators shall be appointed in accordance with the rules established by the parties in the arbitration agreement” [*Milan Rules, Art. 14(1)*]. On 25 June 2010, the Milan Chamber of Commerce notified two arbitrators, selected by each party pursuant to the arbitration clause [*Cl. Ex. No. 4, p. 12*], of their respective appointments [*Prot. No. 9410/3, 25 June 2010*]. On 15 July 2010, the two arbitrators selected Mr. Y as Chairman of the Arbitral Tribunal, and on the same day, the Secretariat acknowledged the appointment to Mr. Y by letter [*Letter from Arbitrator 1 on 15 July 2010, Prot. No. 9410/5*]. The Milan Secretariat therefore followed the appointment process specified by the parties, as permitted under Article 14(1) of the Milan Rules.

8. The parties intended the additional terms in the arbitration agreement relating to the selection of arbitrators to be limited to the appointment process under Art. 14 of the Milan Rules. The procedure for appointing arbitrators under Art. 14 is distinct from the provisions governing the arbitrators’ disclosure and confirmation (Art. 18), as well as their replacement (Art. 20). Whereas the text of Art. 14 explicitly defers to the parties’ own terms, and only furnishes a default appointment process as a fallback where no alternate agreement exists, Arts. 18 and 20 provide pre-set institutional procedures and do not invite parties to supply their own rules. Had the parties intended to depart from these pre-set procedures, the arbitration agreement would have explicitly derogated from Art. 18 or 20, or at least referred to the confirmation or replacement of arbitrators. The most reasonable interpretation of the agreement terms is therefore that they were intended simply follow the procedure stated in the Milan Rules, and not to derogate, even implicitly, from them.

3. THE ARBITRAL COUNCIL VALIDLY EXERCISED ITS AUTHORITY IN NOT CONFIRMING MR. Y AS CHAIRMAN OF THE ARBITRAL TRIBUNAL

9. Art. 18 of the Milan Rules requires that appointed arbitrators submit a statement of independence to the Secretariat and grants the Arbitral Council the authority to decide whether to confirm arbitrators whose independence or impartiality is in question. Art. 18(4) specifies, “[A]n arbitrator shall be confirmed by the Secretariat if he/she has filed a statement of independence without considerable qualifications and the parties file no comments thereto. In *any other case*, the Arbitral Council shall decide on the confirmation” (emphasis added) [*Milan Rules, Art. 18(4)*]. Thus the Arbitral Council has the authority to assess the risk to independence and impartiality posed by an arbitrator’s disclosures and to choose whether to confirm him, thereby limiting the likelihood of judicial review.

10. The vital importance of an arbitrator’s independence and impartiality is universally recognized throughout international arbitration [*Born, p. 1388*]. These principles prohibit an arbitrator from maintaining “close links” [*FGG, p. 1030*] or relationships “particularly of a financial nature” [*Poudret/Besson, p. 348*] with one of the parties to the arbitration. Courts have routinely refused to enforce awards in which relationships of economic dependence exist between an arbitrator and a party, for example where an arbitrator was hired as an employee of a party a day after the conclusion of the arbitration [*Duval, p. 411*] and where the arbitrator and a party entered into a joint business venture in [*Mumbach, 1996 p. 446*].

11. Mr. Y’s statement of independence revealed a close financial connection between Mr. Y and CLAIMANT, which raised serious concerns regarding Mr. Y’s independence. Mr. Y informed the Secretariat that he was a partner of Wise, Strong, & Clever, the same firm that is advising CLAIMANT in this dispute [*Letter from Malcolm Y, 19 July 2010*]. It is arguable that a reasonable person would have concluded that Mr. Y is financially dependent on CLAIMANT, and therefore would have been, or risked becoming, evidently partial to one party [*Apperson*].

12. Mr. Y’s assertion that he has had no contact with other members of his firm regarding this dispute before his appointment to the Arbitral Tribunal does not alleviate reasonable concerns regarding his independence or impartiality. The purpose of the independence

requirement is to “ensure that there are not connections, relations, or dealings between an arbitrator and the parties that would compromise the arbitrator’s ability to be impartial” over the course of the arbitration, not merely at the moment of appointment [*Born, 1474-75, see also Tecnimont*]. In the *Tecnimont* case, the Paris Court of Appeals refused to enforce a partial ICC award, finding that the presiding arbitrator failed his ongoing duty to disclose conflicts and remain impartial throughout the arbitral proceeding [*Tecnimont*]. As Mr. Y remains a partner in Wise, Strong and Clever, and as the firm continues to advise CLAIMANT, this inappropriately dependent relationship will place the integrity of the Tribunal at ongoing risk throughout the arbitration.

13. The parties’ letters waiving any objection to Mr. Y’s independence [*Letter from Langweiler 26 July 2010 and Fasttrack 26 July 2010, p. 47*], and the similar waiver by the party-appointed co-Arbitrators [*Letter from Arbitrator 1, p. 50*], acting as advocates of the parties, [*Kinkade*] do not affect the Arbitral Council’s authority to decide whether or not to confirm him. As noted, under Art. 18, the Arbitral Council reserves the right to decide whether to confirm any arbitrator who does not file an unqualified statement of independence. The IBA Guidelines list the situation of an arbitrator being a member of the same law firm as the counsel to one of the parties under the waivable red list [*2004 IBA Guidelines*]. Nevertheless, the IBA guidelines carry no independent legal force and are not incorporated in the Milan Rules or the rules of other leading arbitral institutions [*Born, pp. 1335-36*]. While the parties’ waivers may carry some persuasive value for the Arbitral Council, they do not affect the Arbitral Council’s authority.
14. As Mr. Y did not file an unqualified statement of independence, the Arbitral Council validly exercised its authority and did not appoint Mr. Y pursuant to decision 1607/1 on 30 July 2010 [*Prot. No. 9410/7*]. In so doing, the Arbitral Council fulfilled its obligation to ensure the integrity of the arbitral process. “International arbitration is an adjudicatory process, in which arbitrators make binding decisions disposing of the parties’ legal rights, subject to minimal appellate review. Given this, it is essential that the arbitrators be independent and impartial and that parties’ selections of arbitrators who fail to satisfy this basic standard be capable of being overridden” [*Born, pp. 1463-64*]. The Arbitral Council acted within its

authority to protect the parties' right to receive an enforceable fair, final, and binding award issued by a neutral authority [*Solvay*]. Furthermore, by following the Rules the Arbitral Council created "a presumption that the award will be confirmed" [*Andersons*, p. 328].

4. THE ARBITRAL COUNCIL PROPERLY REPLACED THE ARBITRATOR IT DID NOT CONFIRM BY ADMINISTRATIVELY APPOINTING MR. Z

15. The Secretariat validly applied the Milan Rules in requesting that the co-arbitrators make an alternative appointment to Mr. Y. Art. 20(1) of the Milan Rules mandates that "an arbitrator shall be replaced by another arbitrator where: [...] b. the arbitrator is not confirmed" [*Milan Rules*, Art. 20(1)]. When the Arbitral Council did not confirm Mr. Y, the Secretariat invited the arbitrators "to make a substituted appointment for the President of the Arbitral Tribunal" [*Prot. No. 9410/7*].
16. Under Art. 20(3) of the Milan Rules, the appointment of a "new arbitrator" is to be made by the "same authority" that selected the substituted arbitrator [*Milan Rules*, Art. 20(3)]. The arbitration agreement's provisions on the appointment of arbitrators are subject to Art. 15 of the Milan Rules. Art. 14(4)(b) states, "If the two fail to reach an agreement by the time indicated by the parties or set by the Secretariat, where the parties have not indicated it, the President [of the Arbitral Tribunal] shall be appointed by the Arbitral Council" [*Milan Rules*, Art. 14(4)(b)]. As the parties did not specify a time limit in their arbitration clause, in its 2 August 2010 letter, the Secretariat allowed the co-arbitrators to make a substituted appointment "until 13 August 2010" [*Prot. No. 9410/7*].
17. The co-arbitrators' letter of 13 August 2010, which merely reiterated the selection of Mr. Y as Chairman of the Arbitral Tribunal, cannot be considered a proper replacement for a non-confirmed arbitrator under Art. 20 of the Milan Rules. Art. 20(1) mandates replacement "by another arbitrator," Art. 20(3) refers to the replacement as a "new arbitrator" [*Milan Rules*, Art. 20(1), (3)], and the Secretariat's 2 August 2010 letter invited the co-arbitrators to make a "substituted appointment" [*Prot. No. 9410/7*]. The co-arbitrators could not reasonably have interpreted the Rules or the Secretariat's letter to allow Mr. Y to be selected as legally valid replacement of himself. Rather, the co-arbitrators chose to forgo nominating a replacement

and merely “decided to *re-affirm* our appointment of Mr. Malcolm Y” (emphasis added) [*Letter from Malcolm Y, 19 July 2010*].

18. The co-arbitrators therefore failed to submit an agreement on a valid replacement before the expiration of the 13 August 2010 deadline. Accordingly, on 23 August, pursuant to article Articles 14(4)(b) and 20(3), the Secretariat properly exercised its authority, and appointed Mr. Z as Chairman of the Arbitral Tribunal [*Prot. No. 9410/8*].
19. Even if the Tribunal finds that the co-arbitrators validly submitted Mr. Y as a replacement under Art. 20 of the Milan Rules, the Secretariat still acted within its authority by administratively appointing Mr. Z to serve as Chairman of the Arbitral Tribunal. Art. 20(3) provides, “If the replacing arbitrator must also be replaced, the new arbitrator shall be appointed by the Arbitral Council.” [*Milan Rules, Art. 20(3)*]. The Arbitral Council had already considered Mr. Y’s statement of independence and the parties’ waivers of objection and had deemed him an inappropriate risk to the tribunal’s independence and integrity. Further, the co-arbitrators provided no new information upon which the Arbitral Council could even base a change of opinion to confirm Mr. Y. The Arbitral Council was therefore justified in resorting to an administrative appointment of Horace Z as authorized in Art. 20(3).
20. As the Arbitral Council composed this Tribunal according to the agreement of the parties, which incorporate the Milan Rules, this Tribunal has valid jurisdiction to hear and rule on the merits of this dispute.

B. The Arbitral Tribunal should continue these proceedings without further delay and issue a valid and enforceable award

21. This Arbitral Tribunal has the authority to issue a valid and enforceable award as it was properly constituted in accordance with the arbitration agreement [1], and as the composition of the Arbitral Tribunal safeguards the rights of the parties to a binding award by an independent and impartial authority [2].

1. ANY AWARD RENDERED BY THIS TRIBUNAL IS VALID UNDER ART. 34(2)(A)(IV) OF THE UNCITRAL MODEL LAW AND ENFORCEABLE UNDER ART. V(1)(D) OF THE NEW YORK CONVENTION

22. The UNCITRAL Model Law, Art. 34(2) provides that arbitral awards “may be set aside by a court [...] only if: [...] the party making the application furnishes proof that: [...] the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties” [*UNCITRAL Model Law, Art. 34(2)(a)(iv)*]. Similarly, Art. V(1)(d) of the New York Convention allows a domestic court to refuse enforcement of an award if the party opposing enforcement demonstrates that “the composition of the arbitral tribunal was not in accordance with the agreement of the parties” [*NY Convention, Art. V(1)(d)*].
23. For the purposes of the Model Law and New York Convention, the agreement of the parties with respect to the appointment of arbitrators “include[s] the arbitration rules referred to in the arbitration agreement” [*Mistelis, p. 647*]. The arbitration agreement may incorporate institutional rules that place limits on the parties’ autonomy to choose arbitrators [*FGG, p. 458*]. In the *Philipp Brothers* case, for example, the Paris Court of Appeals refused to set aside an award where a party claimed the arbitral institution improperly prevented it from choosing an arbitrator from outside a list even though the institutional rules required selection from the list [*Philipp Brothers*]. The Court noted that the party’s objections “concerning the limitations on the list of arbitrators are unfounded because *Philipp Brothers* agreed to that Procedure by adhering to the arbitration Rules in the first place” [*Id.*].
24. The arbitration agreement between CLAIMANT and RESPONDENT incorporated the Milan Rules, which establish a procedure for the appointment and confirmation of the Arbitral Tribunal. As discussed above, the Secretariat and the Arbitral Council constituted the Arbitral Tribunal in accordance with those Rules [*See Section II, A*]. Therefore there are no grounds to set aside the award under Art. 34(2)(a)(iv) of the Model Law or to find the award unenforceable under Art. V(1)(d) of the New York Convention.

2. THE ARBITRAL COUNCIL’S REPLACEMENT OF MR. Y WITH MR. Z ENHANCES THE ENFORCEABILITY OF ANY AWARD ISSUED BY THIS TRIBUNAL

25. Procedural fairness is critical to the enforcement of an award under the UNCITRAL Model Law and the NY Convention. Art. V(1)(b) of the New York Convention allows a court to refuse enforcement if the party against whom an award is invoked is “unable to present his case” [*New York Convention, Art. V(1)(b)*]. An award may therefore be denied effect “where the parties’ agreed procedures for constituting the tribunal violate mandatory due process guarantees” [*Born, p. 1370*]. An arbitrator’s lack of independence or impartiality compromises these due process rights and is grounds for denying enforcement under the New York Convention as well as other international arbitration conventions and any domestic due process laws in the country in which enforcement is sought [*Id., p. 1463*].
26. The constitution of the current Arbitral Tribunal poses no due process concerns. The Milan Chamber of Arbitration treated both parties equally throughout the appointment and constitution of the Tribunal. Neither party has raised any objection as to the impartiality or independence of any of the current Tribunal members, including Mr. Z.
27. The Council’s appointment of Mr. Z after the non-confirmation of Mr. Y ensures the procedural fairness of the appointment process, and consequently enables the Tribunal to render an enforceable award. Had the Arbitral Council permitted the appointment of Malcolm Y, RESPONDENT might have been able to challenge any resulting award on the grounds of procedural unfairness. The French Cour de Cassation, for example, held that when reviewing an award to assess the impartiality and independence of an arbitrator, a court must take into account “all circumstances which are of a nature as to affect the latter’s judgment and to awaken in the parties a reasonable doubt on these qualities” [*Rev. arb. 1999, p. 308 cited in Poudret/Besson, p. 374*]. An arbitrator employed by the same firm representing a party to the arbitration must awaken grave doubts in any reasonable observer. Although RESPONDENT claims to have waived its objections to Mr. Y’s impartiality in its submissions to the Milan Chamber of Arbitration, a court in Mediterraneo might set aside the waiver, finding that Mr. Y’s lack of independence the relationship between Mr. Y and CLAIMANT’S counsel is very close and the right to procedural fairness speaks strongly.

III. CLAIMANT HAS NOT VIOLATED ITS DUTY OF CONFIDENTIALITY AND IS THUS NOT LIABLE TO RESPONDENT FOR DAMAGES

28. Rule 8(1) of the Milan Rules provides that “the parties...shall keep the proceedings and the arbitral award confidential, except in the case it has to be used to protect one’s rights [Statement of Defense, para. 5, p. 24]. RESPONDENT cannot claim damages for an alleged breach of confidentiality as the Tribunal should not exercise jurisdiction over this claim, and Claimant did not breach the duty of confidentiality under Rule 8(1) [A]. Furthermore, the RESPONDENT does not meet the criteria necessary to obtain an injunction [B].

A. RESPONDENT is not entitled to any damages for an alleged breach of confidentiality

29. The Tribunal should not exercise jurisdiction over RESPONDENT’s counterclaim as it does not arise out of the contract with CLAIMANT [1]. Even if it does, CLAIMANT’S CEO Mr. Herbert Schwitz’s statement to Commercial Fishing Today that CLAIMANT’S lawyer had begun arbitration proceedings [Res. Ex. 1, p. 28], does not violate the text or purpose of Rule 8(1) [2], and is in any event exempt by Rule 8(1)’s provision for protecting the rights of a party [3]. Even if the Tribunal finds that CLAIMANT violated the rule, RESPONDENT cannot prove it suffered actual loss from the statements by CLAIMANT’S CEO [4]. Thus, the Tribunal cannot issue an order declaring CLAIMANT liable for future damages based on the duty of confidentiality.

1. THE TRIBUNAL SHOULD NOT EXERCISE JURISDICTION OVER THIS COUNTERCLAIM

30. RESPONDENT’S request for damages is in the nature of a counterclaim, and should not be considered in this arbitration [Proc. Order 1, para. 4]. A counterclaim must fall within the scope of the contract that contain the arbitration clause; otherwise it must be excluded [Redfern, p. 293]. Here, the arbitration clause the parties agreed to restricts the scope of arbitration to “all disputes arising out or of related to this contract” [Statement of Claims, para. 26; see also UNCITRAL Model Law Art. 7(Option 1), “‘Arbitration Agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen... in respect to a defined legal relationship.”]. The contract pertains only to the agreement

between the RESPONDENT and CLAIMANT for the sale of squid, and thus this counterclaim cannot be said to arise out of that contract.

2. CLAIMANT'S ACTIONS DO NOT VIOLATE THE TEXT OR PURPOSE OF ARTICLE 8(1) OF THE MILAN RULES

31. Even if the Tribunal does decide it has jurisdiction over this counterclaim, Mr. Schwitz's statement to Commercial Fishing Today did not violate Rule 8(1) of the Milan Chamber of Arbitration as the duty of confidentiality does not extend to the existence of the arbitration. The burden of proving that there is an obligation of confidentiality for any particular piece of information is on the party claiming that that piece of information is secret, which in this case is the RESPONDENT, and it cannot meet this burden [*Dessemontet*, p. 16].
32. CLAIMANT has not violated the text of Rule 8(1). The duty of confidentiality is separate from the concept of the privacy of the proceedings. [*Emmott*]. Privacy refers to keeping the process closed by precluding the public from the hearings. [*Noussia*, pp. 24-25]. Confidentiality, on the other hand, refers to the secrecy of information and is not automatically applied to every aspect of arbitration [*Id.*, pp. 24-26]. Many authorities have found confidentiality to apply most strongly to the documents and information used in the arbitral proceedings themselves. Under *Emmott*, the duty of confidentiality applies either to information which is inherently confidential in the documents produced or under an implied agreement between the parties that documents disclosed or generated for the arbitration can only be used in those proceedings. Commentators have also stated the duty of confidentiality applies with "varying degrees...to different aspects of the arbitral process" [*Born 2001*, p. 2283]. Such a duty thus applies only to the arbitral procedure, including "hearing transcripts, as well as written pleadings and submissions in the arbitration, evidence adduced in the arbitration, materials produced during disclosure and the arbitral award(s)" [*Id.*, pp. 2283-85, 2252].
33. None of these approaches supports the imposition of the duty of confidentiality on the mere existence of the arbitration [*Esso (no breach of confidentiality even for disclosure of documents to third parties as duty of confidentiality mainly concerns documents an*

arbitrator has ordered a party to produce)]. As CLAIMANT has not disclosed any information arising from the documents in the arbitral proceedings or the proceedings themselves, it therefore cannot be found to have violated the confidentiality rule.

34. This reading of Rule 8(1) is further supported by the basic purpose and principles behind confidentiality requirements in arbitration. Commentators have recognized that “[t]he primary purpose of the principle [of confidentiality] is the protection of business secrets” [*FGG, p. 188*]. Thus, the only type of proceedings for which there is no doubt that a duty of confidentiality applies are the hearings, where trade and business secrets are more likely to be revealed [*Poudret, pp. 371-72*]. Here, the mere statement that CLAIMANT has initiated proceedings does not even touch upon any of RESPONDENT’S business secrets, and thus violates none of RESPONDENT’S rights under the Milan Rules.
35. Finally, when the parties agreed to the arbitration clause, the version of the Milan Rules in force at the time were the 2004 Rules [*Statement of Claim, para. 15, (noting that the contract was concluded in 2008)*]. It was thus the 2004 Rules that the parties expressly adopted in the arbitration clause. Under Rule 8(1) of the 2004 Milan Rules, the duty of confidentiality extends only to the “Chamber of Arbitration, the Arbitral Tribunal, and the expert witnesses”. It would be especially unfair to extend this duty to CLAIMANT given the fact that the duty of confidentiality should not apply to statements about the mere existence of arbitration at all.

3. CLAIMANT’S STATEMENTS WERE MADE TO PROTECT ITS LEGAL RIGHTS AND ARE THUS EXEMPT UNDER RULE 8(1)

36. If CLAIMANT’S actions were covered by Rule 8(1), the second half of the rule exempts disclosure “in the case it has to be used to protect one’s rights”, which is precisely what CLAIMANT was attempting to do here [*Statement of Defense, para. 5, p. 24*]. Under any confidentiality regime, “parties may be excused for breaching [confidentiality rules]...where reasonably necessary to safeguard a legal right” [*Born, 2001, p. 2285; see also Hassneh*].
37. Despite Respondent’s conclusory statement that CLAIMANT can hardly claim that “it was protecting its rights,” CLAIMANT was attempting to do just that [*Statement of Defense, para. 6,*

p. 24]. Just as RESPONDENT makes clear that *it* has a right to protect *its* reputation, CLAIMANT has *the exact same right* [*Statement of Defense, para. 7, p. 25; see also Wälde, p. 203 (discussing right to reputation as a legal right in international business)*]. As a result of RESPONDENT's breach of contract, CLAIMANT has suffered severe loss of reputation amongst its customers and has in fact lost at least three of its long-liner customers [*Cl. Ex. 10, para. 18, p. 20*]. By making such a statement to Commercial Fishing Today, CLAIMANT was attempting to protect and salvage its reputation by making it clear not only that it was RESPONDENT's breach of contract that had caused the problems with the bait, but also that CLAIMANT was taking reasonable measures to rectify and resolve the issue. Thus, it was exactly CLAIMANT's right to reputation, which RESPONDENT so rigorously defends as a right under the confidentiality rules, which CLAIMANT was trying to protect [*Statement of Defense, para. 7, p. 25*]. Therefore, CLAIMANT's statements are exempt from Rule 8(1).

4. *EVEN IF THE TRIBUNAL FINDS THAT CLAIMANT HAS VIOLATED RULE 8(1), DAMAGES ARE NOT APPROPRIATE AS RESPONDENT HAS NOT SHOWN ACTUAL LOSS*

38. Damages for breaches of confidentiality are appropriate only when a party can show the unlawfulness of the disclosure and the existence of actual loss resulting from the disclosure [*FGG, p. 774; Bulbank*]. The disclosure was not unlawful under Rule 8(1) [*See supra, Sections III(A)(2),(3)*]. However, even if the Tribunal finds the disclosure unlawful, damages are not appropriate as RESPONDENT cannot prove actual loss.
39. RESPONDENT has contended without any evidence that "it is easily conceivable" that Mr. Schwitz's statements might lead to "monetary loss" to RESPONDENT [*Statement of Defense, para. 9, p. 25*]. However, in order to recover it must prove actual loss. There is no indication that a mere statement that arbitration has been initiated has or will cause any actual loss to RESPONDENT. Any such loss is also impossible to quantify, as RESPONDENT needs to be able to show that Mr. Schwitz's statements themselves led to a measureable amount of damages.
40. Since CLAIMANT has not breached the duty of confidentiality, and in any case RESPONDENT cannot prove actual loss or causation, the Tribunal has no basis to issue an interim order or

finding declaring CLAIMANT liable for damages resulting from the alleged breach. The Tribunal should not anticipate the merits of its decision in considering this counterclaim.

B. The Tribunal should not grant RESPONDENT's request for an injunction under the UNCITRAL Model Law on Arbitration

41. While the Tribunal has the authority to issue an injunction under the Milan Rules, RESPONDENT cannot meet the criteria to obtain such an interim measure under Art. 17 of the UNCITRAL Model Law on International Commercial Arbitration. Rule 22(2) of the Milan Chamber allows the Tribunal to issue “all urgent and provisional measures of protection” that are not explicitly barred, but give no guidance as to when these measures may be issued. However, the seat of the arbitration, Danubia, has adopted the UNCITRAL Model Law with the 2006 amendments [*Statement of Claim, para. 25, p. 6*]. Chapter IVA of the Model Law places a number of limitations on the availability of interim measures.
42. Chapter IVA, Article 17 of the 2006 UNCITRAL Model Law provides that interim measures can be obtained in four situations: to preserve or restore the status quo, to protect against current or imminent harm or prejudice to the arbitration process, to provide means of preserving assets to satisfy a later reward, or to preserve evidence. Only the provision on protection against harm or prejudice would be at issue in this dispute.
43. RESPONDENT cannot prove that an injunction would protect it against “current or imminent harm or prejudice to the arbitral process itself” [*UNCITRAL Model Law, Art. 17(2)(b)*]. First, RESPONDENT cannot and has not proved current or imminent harm [*See supra, Section III(A)(4)*]. Indeed, RESPONDENT admits that “[i]t is too early to tell whether the breach in confidentiality will result in . . . loss” [*Statement of Defense, para. 9, p. 25*]. An injunction against future breaches of confidentiality assumes probable breach by CLAIMANT. Such a hypothetical scenario is not only unlikely given CLAIMANT's good faith compliance with Rule 8(1) [*see supra, Sections III(A)(2), (3)*], but it certainly cannot give rise to current or imminent harm.

44. In addition, Article 17A of the Model Law requires RESPONDENT to prove that the harm the injunction would address would not be reparable by damages and that it is likely to succeed on the merits of the claim. It cannot do so. First, RESPONDENT has made no argument or showing that damages would not be adequate to address any harm from hypothetical, future breaches and indeed asks for damages to address its current claim of breach of confidentiality [*Statement of Defense, para. 24, p. 27*]. Second, whether or not RESPONDENT is likely to succeed on the merits of its confidentiality claim is precisely the issue, as CLAIMANT has not violated Rule 8(1) [*see supra Sections 2, 3*] and thus there is no showing that it is likely to do so in the future. It has not therefore shown that it is likely to succeed on the claim as the mere making of the claim cannot be a showing of likelihood. Thus, as RESPONDENT cannot satisfy the conditions of Art. 17A, it is not entitled to an injunction against CLAIMANT.

IV. THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) GOVERNS THE MERITS OF THIS DISPUTE

45. The arbitration agreement contained in the 29 May 2008 sales confirmation does not contain a choice of law provision [*Cl. Ex. No. 4, p. 12*]. CISG Art. (1)(a) states that the Convention applies where a contract for the sale of goods takes place between parties whose places of business are in different contracting states [*Art. 1(a) CISG*]. As this dispute has arisen between firms headquartered in Equatoriana and Mediterraneo, which are both signatories to the Convention, this Tribunal should exercise its authority under Art. 3(2) of the Milan Rules and apply the CISG to the merits of this dispute.

V. CLAIMANT AND RESPONDENT FORMED A VALID CONTRACT FOR THE SALE OF SQUID FALLING PREDOMINANTLY IN THE WEIGHT RANGE OF 100-150 GRAMS FOR USE AS LONG LINE FISHING BAIT

46. Formation of a contract requires an offer [*Art. 14 CISG*] and an acceptance [*Art. 15 CISG*]. Following an invitation to offer [*Cl. Ex. 1, p. 9*], CLAIMANT made an offer to purchase squid on 29 May 2008 [*Cl. Ex. 3, p. 11*]. Art.19 CISG states that a “reply to an offer which purports to be an acceptance but contains additions...is a rejection of the offer and constitutes a counter-offer” where the additions “alter the terms of the offer materially”. RESPONDENT thus made a counter-offer on 29 May 2008, by adding an arbitration clause and a statement

that the squid would be “2007/2008 Catch” [*Cl. Ex. 4, p. 12*]. Art. 19(3) lists the contractual provisions to which any modifications are presumed to be material [*Schlechtriem 1986, p. 54*] and includes terms relating to the settlement of disputes and to quality of the goods. Conduct of the offeree can constitute acceptance under Art. 18(1) and it is clear that CLAIMANT accepted this counter-offer on 1 July 2010 by paying for the squid and taking delivery on 1 July 2008 [*Request for Arbitration, paras. 16-17, p. 5*].

47. The contract required that RESPONDENT deliver Grade A frozen illex danubecus squid from the 2007/2008 Catch, “[f]it for human consumption” and “[a]s per sample already received” [*Cl. Ex. 4, p. 12*]. In addition to the express requirements, Art. 8(3) CISG requires that all relevant circumstances including conduct, statements and negotiations must be taken into account in determining the intent of the parties, or the understanding that a reasonable person would have had [*Honnold, p. 115; UNCITRAL Digest on Art. 8, para. 17*]. The email accompanying CLAIMANT’S order form on 29 May 2008 stated that “the samples shown to [CLAIMANT] fell almost exclusively in the range of 100/150 grams,” and that this was “particularly important, since that is the range that gives [CLAIMANT’S] customers the best results” [*Cl. Ex. 2, p. 10*]. Having regard to these circumstances, a reasonable third person with RESPONDENT’S knowledge would construe the contract to require the squid to weigh predominantly between 100 and 150 grams: this was highlighted as the most important feature of the sample. This is reinforced by the fact that CLAIMANT expressly stated that it was soliciting RESPONDENT for the purchase of squid to be resold as bait for a long-liner fishing fleet [*Cl. Ex. 1, p. 9*]; it is well known in the trade that this is optimal size range for squid used as bait [*Request for Arbitration, para. 14, p.5*]. RESPONDENT’S inclusion of the term stating that squid could be from either the 2007 or 2008 catch does not detract from the requirement that the squid weigh predominantly between 100 and 150 grams: 13% of the delivered squid from 2008, examined by TGT Laboratories, fell within this weight range [*Cl. Ex. 8, p. 16*] so it was clearly possible to provide squid from the 2008 catch which satisfied the contractual weight requirements.

VI. RESPONDENT DELIVERED SQUID THAT FAILED TO CONFORM TO THE REQUIREMENTS OF THE CONTRACT

48. RESPONDENT failed to deliver squid as required by the contract, as the squid did not conform to the quality and description expressly specified in the contract [A]. The squid delivered by RESPONDENT were unsuitable for the ordinary purpose [B], as well as for the particular purpose [C]. Furthermore, the squid were inconsistent with the sample provided to CLAIMANT [D]. At the time of the conclusion of the contract CLAIMANT was not aware of any lack of conformity and thus Article 35(3) is not applicable [E]. Finally, RESPONDENT'S actions constitute a fundamental breach of the contract under Art. 25 CISG [F].

A. The squid delivered by RESPONDENT do not conform to the quality and description expressly specified in the contract

49. Art. 35(1) CISG requires that a seller deliver goods which are of the quality and description expressly specified in the contract. The decisive factor for deciding whether goods conform to the contract is the contractual description of the goods [*Schlechtriem 1986, p. 66*]. Even minor differences in quality constitute a breach: the drafters rejected an Australian proposal to treat minor irregularities in quality and quantity as irrelevant [*Schlechtriem 1986, p. 67*]. If requirements are not stated expressly, one must refer to Art. 8 CISG [*Textile printing machine case; Veyron; UNCITRAL Digest, Art. 35, para. 4*]. The conduct of the parties must be considered [*Caito Roger*]. The understanding of a reasonable third person in the same type of business, under the same circumstances, is decisive [*Mono Ammonium Phosphate case; Schmidt-Kessel, Art. 8, para. 2*]. Due consideration is to be given to all relevant circumstances including the parties' negotiations [*Art. 8(3) CISG*].

50. RESPONDENT delivered squid of a different quality and description than that required by the contract. Although from the 2007/2008 Catch, the majority of the delivered squid as examined by TGT Laboratories weighed less than 100 grams, with 35 percent weighing less than 90 grams [*Cl. Ex. 8, p. 16*]. The squid thus failed to satisfy the contractual description and were of inferior quality, given that squid weighing between 100 and 150 grams are considered optimal as bait [*Request for Arbitration, para. 14, p. 5*]. This constitutes a breach of Art. 35(1).

B. The goods were unsuitable for the ordinary use to which the goods would be put in Mediterraneo

51. Should the Tribunal find that CLAIMANT did not make the purpose of the goods clear to RESPONDENT, RESPONDENT also violated Art. 35(2)(a) CISG, as the goods were unsuitable for their ordinary use. Article 35(2)(a) states that goods must be fit for the purposes for which goods of the same description would ordinarily be used. It has been recognized that the buyer's country is relevant to determinations of ordinary use; "if the seller knows where the goods are intended to be used, then he will usually be expected to have taken the factors that influence the possibility of their use in that country into consideration" [*Mussels case*]. RESPONDENT clearly knew that the squid was to be used in Mediterraneo. CLAIMANT is a Mediterraneo-based corporation and the original correspondence from CLAIMANT clearly stated that it was looking to resell the squid to long-liner fishing fleets in Mediterraneo [*Cl. Ex. 1, para. 1, p. 9*]. Given that 95% of the squid sold by RESPONDENT to Mediterraneo in the past few years was for use as bait [*Procedural Order No. 3, para 12*], this can be considered the ordinary purpose for squid in Mediterraneo. The goods were not suitable for this purpose, as the undersized squid were useless as bait [*Request for Arbitration, para. 18, p. 6*].
52. Even if the Tribunal finds that bait is not the sole ordinary purpose of squid in Mediterraneo, use as bait is nevertheless clearly one of the ordinary purposes, alongside human consumption. Sellers have an obligation to "furnish goods which are fit for *all* the purposes for which goods of the same description are ordinarily used" (emphasis added) [*Secretariat Commentary to CISG Art. 35, para. 5*]. Further it has been recognized that "if the goods available to the seller are fit for only some of the purposes for which such goods are ordinarily used, he must ask the buyer the particular purposes for which these goods are intended so that he can refuse the order if necessary" [*Id*]. RESPONDENT is an experienced firm in the fish trade and it knew that the size of the bait would be important for long-line fishing [*Procedural Order No. 3, para. 26*]. RESPONDENT did not clarify that the squid would not be fit for all ordinary uses. If RESPONDENT succeeds in demonstrating that it was not aware of the particular purpose, then it must necessarily have failed this duty to ask what the purpose of the squid was. Therefore, RESPONDENT has breached Art. 35(2)(a).

C. The goods were unsuitable for the particular purpose

53. Under Art. 35(2)(b), goods do not conform to the contract unless they are “fit for the purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where circumstances show that the buyer did not rely, or it was unreasonable for him to rely, on the seller’s skills and judgments.” During the pre-contractual negotiations, CLAIMANT made known to RESPONDENT the purpose and necessary qualities of the squid, and the squid provided by RESPONDENT were not fit for this purpose [1] [*Cl. Ex. 1, p. 9; Cl. Ex. 2, p. 10*]. CLAIMANT reasonably relied on the RESPONDENT’S skills and judgment as an expert in the particular species of squid [2].

1. THE PURPOSE OF THE GOODS WAS MADE EXPRESSLY AND IMPLIEDLY KNOWN TO RESPONDENT AND THE GOODS WERE NOT FIT FOR THIS PURPOSE

54. Art. 35(2)(b) is consistently interpreted as allowing a buyer to establish a breach if it is shown that the seller knows of the buyer’s purpose at the time of the conclusion of the contract [*Honnold, p. 257; Marques Roque; Rheinland Versicherungen*]. Where the seller is made aware of the particular purpose of the goods prior to the conclusion of the contract, the seller impliedly assumes an obligation that the goods will be fit for such a purpose by entering into the contract, so long as the buyer relies on the seller’s skills and judgments [*Lookofsky, p. 92*].

55. An implied purpose is sufficient to establish liability under Art. 35(2)(b) [*Schlechtriem 1986, p.66; Globes case*]. To ascertain whether a buyer has made the seller expressly or impliedly aware of a particular purpose for which the goods are to be used, the buyer’s intent during the formation of the contract is relevant [*Bianca, p. 274; MCC-Marble*]. Article 35(2)(b) applies where a buyer displays an intention to use the goods for a particular aim [*Id.*]. Intent is determined by a reasonable person standard, giving due consideration to relevant circumstances, practices between the parties, and industry usage [*Art. 8(3) CISG*].

56. Being involved in the fishing supply market [*Procedural Order No. 3, para. 12*], RESPONDENT should have reasonably inferred that, due to the short supply of the Oceanian squid normally used for bait, CLAIMANT and similar suppliers would seek out a new, short-term supply of bait squid. Further, a prerequisite to selling the goods does not establish the purpose for which the goods are to be sold; it only establishes one out of many requirements the goods must meet in order to conform. It was clear to RESPONDENT that the reference to human consumption merely established a prerequisite. If a seller knows where the goods are intended to be used, then a seller should take into account factors that influence the possibility of the use of the goods in a specific country [*Schlechtriem 2001, IV, 1*]. It has also been suggested that if the seller regularly exports to the buyer's country, the seller may be expected to comply with public regulations [*Spanish Paprika case*]. Given that the storage regulation existed in Equatoriana as well as Mediterraneo, it is unreasonable for RESPONDENT to claim that it interpreted this requirement as an indication of purpose.
57. RESPONDENT thus knew the particular purpose of the goods and yet, as noted in ¶ 53 failed to deliver goods suitable for that purpose, violating Art. 35(2)(b). If the goods are not suitable for the particular purpose indicated to the seller, then the seller should advise the buyer accordingly [*Enderlein, p. 156; Schlechtriem/Schwenzer, p. 581*]. Such a solution is mandated by the guiding arbitral principle of fairness [*Bianca, p. 274*]. RESPONDENT failed to inform CLAIMANT that the goods would not be suitable for the communicated purchase and thus did not disclaim liability under Art. 35(2)(b).

2. CLAIMANT REASONABLY RELIED ON RESPONDENT'S SKILL AND JUDGMENT.

58. CLAIMANT relied on the skill and judgment of RESPONDENT in purchasing the *illex danubecus* squid. When the purpose for which the buyer intends to use the goods is apparent, or made known to the seller, the buyer generally relies on the seller's skills and judgments in order to have goods fit for such a purpose [*Bianca, p. 274*]. Such reliance occurs when the seller is an expert or professional in the field in which the buyer intends to use the goods. Reliance can be maintained even if the buyer possesses knowledge in the same field as the seller [*Schlechtriem/Schwenzer 2010, p. 582; Neumann, para. 9*]. Here, RESPONDENT is a professional and an expert in the field of squid bait and was experienced with this particular

species of squid [*Request for Arbitration, para. 4, p. 4; Procedural Order No. 3, para. 26*]. CLAIMANT’S reliance is reasonable because RESPONDENT typically utilizes skills and judgments in selecting squid throughout its normal course of business. CLAIMANT, conversely, had never used this species of squid before [*Request for Arbitration, para. 10, p. 5*]. Therefore, an asymmetry of knowledge in RESPONDENT’S favor occurred; in keeping with the principles of equity and fairness, the CISG will balance this asymmetry by referring to the CLAIMANT intent to use *illex danubecus* squid as long-line bait [*Art. 8(1) CISG*].

59. This reliance imposed a duty on RESPONDENT to either inform CLAIMANT if the squid would not be suitable for the intended purpose, or to provide squid that would be suitable for the specified purpose. RESPONDENT did neither and thus violated Art. 35(2)(b).

D. The squid delivered by RESPONDENT were inconsistent with the sample provided to CLAIMANT

60. The contract required that the goods be delivered “[a]s per sample” [*Cl. Ex. 3, p. 11; Cl. Ex. 4, p. 12*]. Even if the Tribunal finds that the phrase “as per sample” did not result in an explicit contractual requirement as to quality, Art. 35(2)(c) implies that goods must “possess the qualities of goods which the seller has held out to the buyer as a sample or model.” Para. 2(c) thus articulates the contractual understandings that are given effect when Art. 35(1) is interpreted in light of Art. 8 [*Honnold, p. 258*]. Commentator Bianca notes that a sample “is a factual description and, therefore, a contractual way to determine the kind and quality of the goods the buyer is entitled to” [*Bianca/Bonell, p.275*]. Delivery of goods of inferior quality constitutes a breach of Art. 35 [*Heliotropin case*].

61. In addition to the requirement in the purchase order and the sale confirmation [*Cl. Ex. 3, p. 11; Cl. Ex. 4, p. 12*], Mr. Weeg, RESPONDENT’S agent, stated that the sample was representative of the squid being offered [*Request for Arbitration, para. 13, p. 5; Proc. Ord. 3, para. 18, p. 3*]. The sample was comprised of squid weighing almost exclusively between 100 and 150 grams [*Cl. Ex. 10, para. 7, p. 18*]. Yet, as noted above, the squid delivered by RESPONDENT on 1 July 2008 did not conform in size [*See ¶ 50*]. It has been recognized that the size of goods is relevant for the purpose of assessing quality [*Christmas Tree case*], and it

is clear that the squid were of inferior quality to the sample because of their smaller size [See ¶ 51].

62. RESPONDENT failed to indicate that the goods would differ from the sample. [*Request for Arbitration, para. 13, p. 5*]. Commentators Enderlein and Maskow note that a seller is not bound to the sample if he has stated that the goods will differ from the sample [*Enderlein/Maskow, p. 145*]. However, it is clear that if a seller wishes to deliver goods that do not conform to a sample, he must demonstrate this intent [*Bianca/Bonell, p. 275*]. RESPONDENT failed to expressly or impliedly communicate the requisite intent to absolve itself of liability. As a consequence, RESPONDENT has breached Art. 35(2)(c).

E. CLAIMANT WAS NOT AWARE OF ANY LACK OF CONFORMITY WHEN THE CONTRACT WAS CONCLUDED AND THUS ARTICLE 35(3) CISG IS NOT APPLICABLE

63. Article 35(3) CISG states that the seller is not liable for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such a lack of conformity. It should be noted that CLAIMANT would not have been aware that the squid would be of a smaller size than desired, negating liability under Art. 35(1) and (2).

64. First, Art. 35(3) should not apply to liability under Art. 35(1). The text of Art. 35(3) refers only to liability “under subparagraphs (a) to (d) of the preceding paragraph,” i.e. Art. 35(2) [*Neumann, para. 49*]. At the time of the CISG’s drafting, the Norwegian proposal to include section (1) within the scope of Art. 35(3) was rejected [*Schlechtriem/Schwenzer 1998, p. 428*]. It is important to keep a clear distinction between conformity according to Convention criteria and contractual provisions, and extending section (3) analogously to section (1) is thus unjustified [*Bianca/Bonell, p. 279*]. As a consequence, RESPONDENT’s liability under Art. 35(1) for failure to comply with the contractual quality and description should not be avoided on the basis of Art. 35(3).

65. Second, even if Art. 35(3) is applicable to Art. 35(1), the requirements of Art. 35(3) – that the buyer knew or could not have been aware of the lack of conformity - are not satisfied. As a

consequence, RESPONDENT remains liable under both Art. 35(1) and Art. 35(2). There is no evidence that CLAIMANT would have known that the squid would not predominantly weigh more than 100 grams, even if most of the squid were at the lower end of the 100 to 150 gram range. CLAIMANT had not purchased squid from Danubia in the past [*Request for Arbitration, para. 10, p. 5*] and therefore would not have been familiar with the specific weights of the squid from Danubia at each stage of the season. As a consequence, there is no evidence that CLAIMANT knew of, or could not have been aware of, the lack of conformity with the contract.

F. RESPONDENT’S ACTIONS CONSTITUTE A FUNDAMENTAL BREACH OF THE CONTRACT UNDER ART. 25 CISG

66. RESPONDENT’S failure to deliver conforming goods constitutes a fundamental breach of the contract. Art. 25 CISG states that “a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.” The determination of whether the injury is substantial must be made in the light of the circumstances of each case, such as the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party [*Secretariat Commentary to CISG Art. 23, para. 3*].

67. It is recognized that a lack of conformity of an important part of the goods supplied amounts to a fundamental breach [*Scaffold Fittings case*]. Furthermore, a violation of the qualitative requirements is fundamental when the nonconformity considerably impedes the fitness for use of the goods [*Enderlein/Maskow, p.114; Liu*] Courts have held that a party has been substantially deprived of what he is entitled to expect where nonconforming goods cannot be repaired, used or resold with reasonable effort [*Marques Roche; Wine case; Shoes case; Sport Clothing case*]. In this case, an important part of the goods did not conform and these nonconforming goods could not be repaired, used or resold; they were returned by the long-line fishing vessels [*Request for Arbitration, para. 18*]. According to the expert report

prepared by TGT Laboratories, 54.6% did not meet the quality agreed to by both parties in the contract [*Cl. Ex. 8, p. 16*]. In addition, CLAIMANT’S serious attempts to sell the squid, both within and outside Mediterraneo, were largely unsuccessful [*Request for Arbitration, para. 20*]. These events have caused substantial harm to CLAIMANT. Specifically, CLAIMANT has incurred significant losses of profit and considerable costs in storing and attempting to sell the squid [*Request for Arbitration, para. 30, p. 8*]. Furthermore, a reasonable person in RESPONDENT’S position would have foreseen that squid as delivered by RESPONDENT would not be usable as bait and would cause significant harm to CLAIMANT, as it did. Thus, RESPONDENT has committed a fundamental breach.

VII. CLAIMANT IS ENTITLED TO AVOID THE CONTRACT AND TO RECEIVE FULL DAMAGES

68. RESPONDENT fundamentally breached the contract by delivering nonconforming squid. As CLAIMANT has satisfied its obligations of examination and to give proper notice [A], it is entitled to avoid the contract and claim restitution [B]. Further, CLAIMANT is entitled to damages as it has taken reasonable steps to mitigate losses [C].

A. CLAIMANT Has Satisfied Its Obligations of Examination and Notice

69. Art. 38(1) CISG places an obligation on the buyer to “examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.” Article 39(1) requires that a buyer give notice of lack of conformity of the goods to the seller “within a reasonable time after he discovered or ought to have discovered it.” CLAIMANT has satisfied the buyer’s duties of examination and notice of lack of conformity delineated in Articles 38 and 39. Under Article 38(3), CLAIMANT deferred examination until the goods arrived at their new destination and thereafter caused them to be examined within as short a period as was practicable in the circumstances [1]. CLAIMANT gave notice of lack of conformity on the day that it learned of the lack of conformity, thus satisfying Article 39(1) [2]. Alternatively, if the Tribunal finds that CLAIMANT ought to have known of the lack of conformity prior to re-dispatch, it nevertheless gave notice within a reasonable time [3].

1. CLAIMANT EXAMINED THE GOODS IN CONFORMITY WITH THE REQUIREMENTS OF CISG ARTICLE 38(3)

70. Consistent with the requirements of CISG Art. 38(3), CLAIMANT properly deferred examination until the goods arrived at their new destination [a] and thereafter caused them to be examined within as short a period as was practicable under the circumstances [b].

a. CLAIMANT properly deferred examination of the goods under Art. 38(3) CISG until they had arrived at their final destination.

71. While Article 38(1) CISG states that a buyer must have goods examined within as short a period as is practicable in the circumstances, Article 38(3) provides for derogation from this general rule in circumstances in which the buyer resells the goods to a third party. In cases of resale, the buyer must not have had a reasonable opportunity for examination (i); and at the time of the conclusion of the contract the seller must have known or ought to have known of the possibility of the redirection or re-dispatch (ii) [Art. 38(3) CISG]. If both conditions are satisfied, “examination may be deferred until after the goods have arrived at their new destination” [Id.].

i. CLAIMANT did not have a reasonable opportunity to examine the goods upon initial delivery

72. Courts have regularly looked to the nature of the goods, among other criteria, when determining what is reasonable “in the circumstances” [Secretariat Commentary to CISG Article 38, para. 3]. Here, the nature of the goods was such that CLAIMANT did not have a reasonable opportunity for examination prior to re-dispatch.

73. Frozen goods, such as the frozen squid in this case, pose a unique problem for examination. If CLAIMANT were to defrost [Proc. Ord. 3, para. 33, p. 5] and inspect squid from each container, the product would be utterly useless for the purpose for which it was purchased, namely sale to the long-line fishing vessels for bait [Cl. Ex. 10, para. 10, p. 19].

74. Although CLAIMANT inspected squid from twenty cartons from the first two containers to arrive at its location on 1 July 2008 [Cl. Ex. 10, paras. 9-10, p. 19], it was unable to execute a

full inspection until the goods arrived at the location of re-dispatch. CLAIMANT has therefore fulfilled the first condition of Art. 38(1), as it did not have a reasonable opportunity for examination upon delivery of the goods.

ii. RESPONDENT knew that the goods sold to CLAIMANT would be re-dispatched to third party customers

75. Art. 38(3) CISG requires that a seller “knew or ought to have known of the possibility of” redirection or re-dispatch. Thus, the burden is low; the seller must have either actual or constructive knowledge not of *actual* resale, but merely *possible* resale. RESPONDENT clearly meets this threshold requirement by having actual knowledge of intended resale. In an e-mail dated 14 April 2008, CLAIMANT stated that it wished to purchase “squid for resale to the long-liner fishing fleet based in Mediterraneo” [*Cl. Ex. 1, p. 9*].

b. CLAIMANT caused the goods to be examined within as short a time as was practicable under the circumstances

76. Courts traditionally look to the nature of the goods in determining the proper time period for examination of goods under Article 38(1) [*Secretariat Commentary to CISG Article 38, para. 3*]. The fact that the squid needed to remain frozen [*Cl. Ex. 10, para. 10, p. 19*] is because of the nature of the goods. Thus, it was not practicable under the circumstances for CLAIMANT to exhaustively examine the squid at any time prior to its defrosting and use by the long-liner fleets. In a case involving frozen stockfish, a Spanish appellate court found that one full month for examination of goods was reasonable [*Frozen Stockfish case*]. CLAIMANT learned of the lack of conformity on 29 July 2008 [*Cl. Ex. 5, p. 13*] and had the goods examined shortly thereafter. The inspection was completed on 12 August 2008 (fourteen days after) [*Cl. Ex. 8, p. 16*]. Given the circumstances, CLAIMANT caused the frozen squid to be examined in as short a period as was practicable.

2. CLAIMANT GAVE SPECIFIC NOTICE OF LACK OF CONFORMITY WITHIN A REASONABLE TIME AFTER IT DISCOVERED THAT THE GOODS DID NOT CONFORM.

77. The CISG Advisory Council affirmatively stated in its second opinion on “Examination of the Goods and Notice of Non-Conformity- Articles 38 and 39” that, unless the lack of

conformity was directly evident without examination of goods, there exist two distinct time periods after the delivery of the goods: the examination period under Art. 38 and the notice period under Art. 39 [*Schwenzer, pp. 363-64*].

78. The reasonable time period to give notice under Art. 39(1) begins at the moment the buyer has discovered or ought to have discovered the lack of conformity [*Schwenzer, 364*]. Although there is little consensus among national courts on what constitutes a reasonable time for giving notice [*Schwenzer, p. 354*], several countries have agreed on a “noble month” provision for reasonableness [*Girsberger, p. 246*]. The “noble month” concept, first developed by the German Bundesgerichtshof, has been relied on by German and Swiss courts, and has influenced other national courts as well [*Id.*]. However, the “noble month” is to be used merely as a starting point; courts should take into account the particular circumstances of the case, including “the nature of the goods, the nature of the defect, the situation of the parties and relevant trade usages” [*Schwenzer, p. 364*]. Other continental European countries are even more lenient than the German and Swiss courts; one month is almost always found to be reasonable, with the period extending upward to several months or even two years [*Schwenzer, p. 362*].
79. It is not sufficient that a buyer notify a seller of lack of conformity within a reasonable time; the notice must also have specific content in order to allow the seller to react appropriately to the buyer’s claim [*Ferrari, pp. 234-35*]. CLAIMANT gave notice to RESPONDENT on 29 July 2008, the day it learned of nonconformity from the long-liner fleets, stating that the squid was “hardly useable as bait” [*Cl. Ex. 5, p. 13*]. CLAIMANT, acting in good faith, kept RESPONDENT apprised of the situation from the beginning. By even the strictest of standards, notice given the same day of discovery of the nonconformity is reasonable. As RESPONDENT was fully aware of the lack of conformity, it cannot claim any exception under Art. 40 CISG.
80. The Tribunal may find that CLAIMANT’S initial e-mail notification to RESPONDENT on 29 July 2008 [*Cl. Ex. 5, p. 13*] was not specific enough. However, specific notice was given to RESPONDENT on 16 August 2008 [*Cl. Ex. 7, p. 15*], four days after examination of the squid

was completed [*Cl. Ex. 8, p. 16*]. Giving specific notice within four days after the discovery of the specific lack of conformity constitutes a reasonable time.

81. CLAIMANT had no knowledge that the 2008 containers would differ in size and thus was under no obligation to inspect the 2008 containers as well prior to resale. RESPONDENT is the party which had an affirmative obligation to deliver goods in conformity with the contract. The purpose underlying Arts. 38 and 39 CISG is not to shift that responsibility to CLAIMANT to ensure that each individual item delivered conforms with the contract; rather, the purpose is to allow RESPONDENT to react in a reasonable time frame and to prevent losses. CLAIMANT has acted in conformity with these purposes and satisfied the requirements of Arts. 38 and 39 by examining the first two containers and providing notice to RESPONDENT as soon as it learned of nonconformity.

3. *ALTERNATIVELY, IF THE TRIBUNAL FINDS THAT CLAIMANT OUGHT TO HAVE KNOWN OF THE LACK OF CONFORMITY PRIOR TO RESALE, CLAIMANT NEVERTHELESS GAVE PROPER NOTICE WITHIN A REASONABLE TIME AS REQUIRED UNDER CISG ARTICLE 39*

82. If the Tribunal finds that CLAIMANT ought to have discovered the lack of conformity prior to 29 July 2008, the date at which it actually learned of the lack of conformity, it must perform an individualized inquiry into whether CLAIMANT did or did not give notice within a reasonable time. As noted above [*See supra*, ¶ 87] the Advisory Council opinion stresses that the reasonable time for giving notice depends on the particular circumstances of the case, including the nature of the defect, the nature of the goods, and the situation of the parties [*Schwenzer, 364*].

83. In a case involving latent defects in grinding machines which could not be discovered upon delivery or examination by the buyer, the German Bundesgerichtshof left undecided the question of whether latent defects cause the Art. 39 notice time period to be delayed until actual discovery of the defects, or whether the Art. 39 time period commences at a time when the defect could have been discovered [*Machine for Producing Hygenic [sic] Tissues case*]. In any event, the court allowed the buyer three weeks for examination under Art. 38 (one week to decide whether to hire an expert and two weeks for the expert to examine and

prepare a report) and four weeks to give notice under Art. 39, for a total of seven weeks [*Id.*]. The nature of the defect in the instant case is similar to that in the *Machine for Producing Hygienic [sic] Tissues case*; the defects were latent and not easily discoverable. The quality of frozen squid varied significantly from one container to the next, and it was not possible to test every container prior to using of the squid for bait.

84. Accordingly, as previously noted, the nature of the goods in this case made it impossible for CLAIMANT to discover the defects upon preliminary examination [*See supra*, ¶ 76]. The goods would have been useless to CLAIMANT’S customers if every container had been examined in search of defects. The difficulty in examining the goods and the need to engage an expert to inspect them require that additional time be allotted for examination of the goods. In an analogous case, the Spanish court allowed a full month for examination of the goods by an expert [*Frozen Stockfish Case*].

85. The situation of the parties also requires that more time be allotted for examination of the goods and notice to RESPONDENT. “The calculation of the period should also reflect whether the buyer requires time in order to give detailed scrutiny to its own customers’ complaints” [*Schwenger, p.365*]. CLAIMANT resold the goods to several third party customers who became the ultimate consumers of the goods. CLAIMANT therefore should be given latitude in examination because it was required to assess the complaints of its own customers. Due to the circumstances surrounding the transaction, CLAIMANT’S notice to RESPONDENT within 6.5 weeks of delivery should be deemed reasonable.

B. CLAIMANT is entitled to avoid the contract and claim restitution of the purchase price

86. Art. 49 CISG states that a buyer may declare a contract avoided in the case of a fundamental breach, provided he makes the declaration within a reasonable time after he knew or ought to have known of the breach. The notice must clearly express that the buyer now treats the contract as at an end [*UNCITRAL Digest on Art. 49, para. 3*]. In the case of nonconforming goods, “ought to have known” is interpreted in the light of the time allotted for examination and will therefore come close to “as short a period as is practicable in the circumstances”

under Art. 38 [*Bianca/Bonell*, p.364; *Honnold*, p.330]. RESPONDENT has committed a fundamental breach [*See supra*, ¶ VI(F)]. CLAIMANT declared the contract avoided on 16 August 2008, asking RESPONDENT what it wished to do with the product “which we will be holding at your disposition” [*Cl. Ex. 7*, p.15]. This was sufficiently soon for the purposes of Art. 38 [*See supra*, Section VII(A)(1)(b)(2)], and was within a reasonable time period given that the goods had been resold by CLAIMANT and had to be examined by a certified testing agency. As a consequence, the contract is avoided. CLAIMANT is thus entitled to restitution of the purchase price, less USD 23,000 for the squid retained by its customers under Art. 81 CISG. CLAIMANT is entitled to restitution even if it cannot now restore the squid to RESPONDENT. Art. 82(2)(a) recognizes that inability to make restitution of the goods will not prevent restitution of the purchase price where this is not due to the buyer’s act or omission. CLAIMANT made every effort to return to squid to RESPONDENT, storing it for over nine months [*Request for Arbitration*, para. 20-23, p. 6] and urging RESPONDENT to take it back [*Cl. Ex. 10*, p. 20].

C. CLAIMANT is entitled to compensatory damages for the loss caused by RESPONDENT’S breach of contract

87. CLAIMANT is also entitled to damages under Art. 74 CISG. Art. 81 recognizes that avoidance does not prevent the award of damages. Art. 74 CISG provides that damages consist of the loss suffered as a consequence of the breach of contract. Loss must be reasonably foreseeable by RESPONDENT at the time of the contract [*Schlechtriem 1986*, p. 96]. CLAIMANT suffered a loss of profit on the unsold squid as well as expenses in (i) storing the squid, (ii) attempting to sell the squid on RESPONDENT’S account, and (iii) disposing of the squid [*Request for Arbitration*, paras. 18-23, p.6]. These losses were all foreseeable consequences of breach at the time of the contract.

88. Pursuant to Article 77 CISG, the party that relies on a breach is obligated to take all steps reasonable in the circumstances to mitigate the loss. However, the duty to mitigate merely encompasses a reasonable attempt at mitigation, or taking steps, which “are in good faith” [*Tetracycline case*]. The obligation to mitigate does not extend to excessive measures involving extraordinary or unreasonable costs [*Bianca/Bonell*, p. 560].

89. CLAIMANT undertook all measures that can be reasonably expected of it. In particular, CLAIMANT informed RESPONDENT of all relevant matters at all times, made an effort to resell the squid on Respondent's account, and stored the goods at its own cost until it became unreasonable to do so [*Request for Arbitration, paras. 20-23, p. 6*]. Therefore, CLAIMANT has satisfied its obligation to take all reasonable measures to mitigate its loss and is entitled to full damages due to RESPONDENT's breach of contract, as well as restitution, calculated at USD 479,450 [*Request for Arbitration, para. 30, p. 8*].

REQUEST FOR RELIEF

For the reasons stated above, CLAIMANT respectfully requests that the Tribunal find that:

- (1) The Tribunal was validly constituted and has jurisdiction over this matter.
- (2) CLAIMANT did not breach any duty of confidentiality, and RESPONDENT is not entitled to an injunction or damages.
- (3) RESPONDENT fundamentally breached its contract with CLAIMANT;
- (4) CLAIMANT has satisfied its obligations of examination and notice and is therefore entitled to damages in the amount of USD 479,000 plus interest and to the costs of arbitration.

(signed)

/s/ Joanne Box

/s/ Tarik Elhussein

/s/ Catherine Gordley

/s/ Michael Jacobson

/s/ Jessica Moyer

/s/ Michael Springer

/s/ Mark Stadnyk

/s/ Yujing Yue

