

**EIGHTH ANNUAL
WILLEM C. VIS
INTERNATIONAL
COMMERCIAL ARBITRATION MOOT**

Vienna, Austria
April 6 to 12, 2001

THE PROBLEM

Organized by:

Institute of International Commercial Law
Pace University School of Law
78 North Broadway
White Plains, NY 10603
USA

6 June 2000

Secretariat
ICC International Court of Arbitration
38, Cours Albert 1er
75008 Paris
France

Dear Sirs:

We represent Sports and More Sports, Inc. It is engaged in a dispute with the Vis Water Sports Co. The contract between the parties included an ICC arbitration clause.

I enclose five copies of the Request for Arbitration with its supporting exhibits. I also enclose US \$2,500 as an advance payment on the administrative costs, as provided in Appendix III, article 1, of the ICC Arbitration Rules.

Sincerely,

(Signed) _____
Counsel for Sports and More Sports

Sports and More Sports, Inc.
Claimant

v.

Vis Water Sports Co.
Respondent

REQUEST FOR ARBITRATION

I. Parties

1. Sports and More Sports, Inc. (hereafter referred to as "Sports") is a corporation organized under the laws of Danubia. It has its principal office at 214 Commercial Ave., Oceanside, Danubia. The telephone number is 555-1212 and the fax number is 555-1214. Sports is the largest retail seller of athletic equipment of all types in the country of Danubia.

2. Vis Water Sports Co. is a corporation organized under the laws of Equatoriana. It has its principal office at 395 Industrial Place, Capitol City, Equatoriana. The telephone number is 483-5800 and the fax number is 483-5810. Vis is a manufacturer of equipment for water sports.

II. The Dispute

3. On 31 March 1999 Sports received in the mail an announcement from Vis Water Sports that they had opened a new web site on the Internet. The announcement invited the recipients to visit the site and gave the Uniform Resource Locator (URL). Mr. Samuel Hirst, the Purchasing Manager of Sports, did so that day. The web site showed the line of goods available from Vis Water Sports along with prices. Many of the items available from Vis Water Sports were attractive and at reasonable prices. Vis Water Sports was a company known to Sports by reputation, although there had never been any previous dealings between them. Since Vis Water Sports equipment had not previously been marketed in Danubia, Sports considered that a significant order should be placed with it.

4. The web site was organized in such a way that it would have been possible to place an order from the site. However, since there had been no prior relationship between the two firms and to see whether better terms than were offered directly on the web site might be available, negotiations were commenced by an e-mail message from Sports to Vis Water Sports on 31 March 1999. (Claimant's Exhibit No. 1) After a short exchange of e-mails, a contract for the purchase of water sports equipment in the amount of list price \$100,000 FOB Capitol City was entered into. (Claimant's Exhibits Nos. 2-4) There was a discount of 5 percent on the price to which was added

a further sum of \$7,000 for transportation from Equatoriana to Danubia, for a total delivered price of \$102,000.

5. The goods were delivered from Vis Water Sports on 19 May 1999. Sports saw immediately that they would sell well in Danubia and on 27 May 1999 Sports increased the size of its order by an additional list price of \$500,000, which was accepted by Vis on 28 May 1999. (Claimant's Exhibits Nos. 5 and 6). After a discount of 8 percent and transportation costs of \$26,000, Sports paid Vis a total of \$483,000 for the second purchase. When the Vis Water Sports equipment was first put on sale in the various Sports stores throughout Danubia, a significant advertising campaign was undertaken. The Vis Water Sports slogan "Like a fish in water" was prominently used.

6. On 20 September 1999 Sports received a letter from the Vis Fish Company stating that the trademark "Vis" was registered in Danubia by them and that the registration covered all water-related goods. (Claimant's Exhibit No. 7) They claimed that Sports was violating their trademark by selling goods under the trademark "Vis", by advertising the goods throughout Danubia under that name and by using the slogan "like a fish in water".

7. On 4 October 1999 Sports replied that it was not violating the trademark owned by the Vis Fish Company since it was inconceivable that anyone would confuse the athletic equipment Sports was selling under the name of "Vis" with the fish products being sold by the Vis Fish Company. (Claimant's Exhibit No. 8)

8. On 15 October 1999 Sports received a further letter from the Vis Fish Company insisting that it stop selling Vis Water Sports equipment. Sports was threatened with legal action if it failed to do so. (Claimant's Exhibit No. 9) Legal counsel specializing in trademark and other intellectual property matters informed Sports that in their opinion Sports was not violating the Vis Fish Company trademark. However, they also told Sports that the Vis Fish Company had aggressively defended its trademark in the past. They went on to say that, even though Sports could expect to recover its legal fees once the Vis Fish Company claim had been dismissed, the litigation would not be easy and would cause a certain amount of disruption to Sport's business. (Claimant's Exhibit No. 10) In order to avoid the anticipated disruption to its business, Sports decided that it would be better to accede to the demands of the Vis Fish Company and withdraw the goods from the market.

9. On 3 November 1999 Sports wrote Vis Water Sports informing it of the claim by the Vis Fish Company and, since it was not possible to continue selling the Vis Water Sports equipment without risk of legal action against it, Vis Water Sports had violated its obligation under article 42 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to deliver goods free from any right or claim of a third party based on intellectual property. (Claimant's Exhibit No. 12) Sports went on to say that it was avoiding the contract under article 49 of the CISG. Sports also referred to articles 81 to 84 of the CISG and stated that it would propose just how it would make restitution of the unsold Vis equipment and the amount of the price paid as soon as it had been able to gather the necessary information.

10. Since the Vis trademark was registered in Danubia for all water-related products, Vis Water Sports could not have been unaware of its existence when it sold the equipment to Sports.

11. Vis Water Sports replied on 10 November 1999 that it saw no basis for Sports to avoid the contract. As a result it refused to consider taking back the unsold water sports equipment or to refund any of the price that had been paid. (Claimant's Exhibit No. 13) Sports answered on 16 November 1999 that, if Vis Water Sports was able to clarify that sale of its equipment in Danubia would not lead to litigation arising out of claims of trademark infringement, Sports would reconsider its avoidance of the two contracts. (Claimant's Exhibit No. 14) Vis Water Sports has not done so.

12. Sports has withdrawn all of the unsold equipment from its stores and is currently storing it for the account of Vis Water Sports.

III. Amount Claimed

13. In accordance with article 81, CISG, avoidance of the contract releases both parties from their obligations under it, subject to any damages that may be due. Either party may claim restitution, in which case both parties are required to make restitution concurrently. Sports is prepared to deliver to Vis Water Sports the remaining unsold goods and the price paid for the goods that were sold in the normal course of business prior to the declaration of avoidance of the contract. Goods delivered under the contract in the amount of list price \$200,000 were sold by Sports prior to the avoidance of the contract, i.e., one-third of the contract amount of \$600,000. Therefore, the amount due from Vis Water Sports is as follows:

Restitution	
Reimbursement of purchase price \$600,000 list price	\$552,000
Less purchase price of goods sold by Sports	<u>184,000</u>
Net restitution of purchase price	368,000
Damages	
Shipping costs of goods purchased	33,000
Advertising	35,000
General selling and administrative expenses	
allocated to goods sold	40,000
Storage and miscellaneous expenses after avoidance to date	<u>4,000</u>
Total amount claimed	\$480,000

14. Sports claims for additional storage and other expenses from the date of submission of this Request for Arbitration until mutual restitution has been made.

15. Sports claims interest on the purchase price from the date paid by Sports to the date reimbursement of the price is made by Vis Water Sports as well as on the damages to the date paid by Vis Water Sports.

16. Sports claims for costs of arbitration, including legal costs, as provided in article 31 of the ICC Arbitration Rules.

IV. Contract and Arbitration Agreement

17. The original contract was concluded by the exchange of e-mail messages between Mr Hirst and Mr. Singer dated 5 and 6 April 1999. (Claimant's Exhibits Nos. 3 and

4). The contract included the Conditions of Purchase, attached to the e-mail message of 5 April 1999 from Mr. Hirst to Mr. Singer. (Claimant's Exhibit No. 3). The second contract was concluded by the exchange of e-mails of 27 and 28 May 1999. (Claimant's Exhibits Nos. 5 and 6). The Conditions of Purchase, which Vis Water Sports already had, were referred to in Mr. Hirst's message. (Claimant's Exhibit No. 5).

18. Clause 14 of the Conditions of Purchase attached to Claimant's Exhibit No. 3 was the International Chamber of Commerce standard arbitration clause with three additions:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. If the amount in dispute is more than \$400,000, there shall be three arbitrators. The arbitration shall take place in Vindobona, Danubia. The language of the arbitration shall be English.”

V. Arbitrators

19. Since the amount claimed by Sports is more than \$400,000, the arbitration clause provides that it should be settled by three arbitrators.

20. In accord with article 8(4) of the ICC Arbitration Rules, Sports nominates Dr. xxxxx xxxxx to be one of the arbitrators. His address is (omitted).

VI. Place of arbitration, applicable rules of law, language

21. The arbitration agreement provides that the place of arbitration should be Vindobona, Danubia. The arbitration agreement also provides that the language of the arbitration should be English.

22. Both Danubia and Equatoriana are party to the United Nations Convention on Contracts for the International Sale of Goods. Accordingly, article 1(1)(a) of the Convention provides that it is applicable to the contract.

23. Both Danubia and Equatoriana are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration.

Signed _____ 6 June 2000
Attorneys for Sports and More Sports, Inc.

Claimant's Exhibit No. 1

E-mail

From: Samuel Hirst

Date: 31 March 1999

To: Vis Water Sports

Subject: Inquiry as to terms of purchase

I am the Purchasing Manager of Sports and More Sports, the largest retailer of sporting equipment in the country of Danubia.

We have recently received your announcement of the enlargement of your web site and have taken a look at it. I congratulate you on an attractive and easy to navigate site.

We are continuously looking for new and additional sources of supply. We note that the Vis line of water sports equipment has not previously been sold in Danubia. If you were able to offer us sufficiently attractive terms, we would be interested in considering taking it on.

Sincerely yours,

Samuel Hirst

Purchasing Manager

Sports and More Sports, Inc.

214 Commercial Ave.

Oceanside, Danubia.

Tel 555-1212, fax 555-1214

Exhibit No. 2

E-mail

From: Jonathon Singer

Date: 2 April 1999

To: Samuel Hirst

Subject: Your inquiry as to terms of purchase

Attach: Price list

Thank you for your e-mail of 31 March 1999. We are well aware of the reputation of Sports and More Sports in Danubia as a respected and effective retailer of sporting goods.

You are correct in saying that the Vis line of water sports equipment has not previously been sold in Danubia. We have long desired to enter that market, but have not previously taken the steps necessary to do so. Your interest in our goods is, therefore, very welcome.

I am attaching to this message the list of goods available for export and the prices per item. You will note that these prices are FOB Capitol City. We will, of course, be willing to make transportation arrangements for your account. We would be willing to make a concession on the price of 5 percent for an order of \$100,000 and 8 percent for an order of \$500,000. Normally, shipment can be made within 30 days from the receipt of a firm order and a letter of credit for the invoice amount plus 10%. We can be more precise once we know the size of your order and the choice of goods that you have made.

Although it is our policy not to grant exclusive dealerships, we would make a limited exception if Sports and More Sports were to place an order for a minimum of \$1,000,000. In that case we would be willing to commit not to sell to any other sporting goods dealer in Danubia for a period of one year.

You will find our general conditions of sale on our web site [URL omitted].

I look forward to hearing from you.

Sincerely yours,

Jonathon Singer

Sales Manager

Vis Water Sports Co.

395 Industrial Place

Capitol City, Equatoriana

Tel: 483-5800, fax: 483-5810

Claimant's Exhibit No. 3

E-mail

From: Samuel Hirst

Date: 5 April 1999

To: Jonathon Singer

Subject: Purchase order

Attach: Purchase order No. 6839; Conditions of purchase (Not reproduced except for arbitration clause in Conditions of Purchase set out in Request for Arbitration.)

Dear Mr. Singer:

We have reviewed your e-mail and the attached price list. We find your offer attractive and we wish to make a moderate sized first order so as to be able to evaluate the market for the Vis brand of water sports equipment in Danubia. I am attaching to this message our purchase order No. 6839. You will notice that the total order is for list price \$100,000. With the 5 percent discount, our purchase total will be \$95,000.

We would ask you to let us know the firm shipping dates that we can expect. We would indeed ask you to arrange the shipping. As soon as you have an estimate of the shipping costs, we will establish the letter of credit that you asked for.

We look forward to a long and profitable relationship with Vis Water Sports.

For your reference I have attached our General Conditions of Purchase, which are part of our purchase order.

Sincerely yours,

Samuel Hirst

Purchasing Manager

Sports and More Sports, Inc.

214 Commercial Ave.

Oceanside, Danubia.

Tel 555-1212, fax 555-1214

Claimant's Exhibit No. 4

E-mail

From: Jonathon Singer

Date: 6 April 1999

To: Samuel Hirst

Subject: Your inquiry as to terms of purchase

Attach: Pro forma invoice (Not reproduced)

Thank you for your purchase order. We will be able to ship by 5 May 1999. The pro forma invoice that is attached includes \$7,000 for shipping and insurance, for a total of \$102,000. We would, therefore, request you to establish a letter of credit for \$112,200.

I should like to remind you that our General Conditions of Sale, which we include in all sales contracts, are available at [URL omitted]. I suggest that you take a look at them.

If you have any questions about your order or about any of the Vis Water Sports equipment, please feel free to ask.

Sincerely yours,

Jonathon Singer

Sales Manager

Vis Water Sports Co.

395 Industrial Place

Capitol City, Equatoriana

Tel: 483-5800, fax: 483-5810

Claimant's Exhibit No. 5

E-mail

From: Samuel Hirst

Date: 27 May 1999

To: Jonathon Singer

Subject: Purchase order

Attach: Purchase order No. 6910

Dear Mr. Singer:

The first shipment of equipment from Vis Water Sports Inc. has arrived and we are delighted with them. Therefore, we would like to make our initial purchase larger than anticipated. I am attaching our purchase order No. 6910 for additional goods totaling list price \$500,000. Since you already have a copy of our General Conditions of Purchase, I need not attach them to this order. As before, we will establish a letter of credit. Please inform me of shipping dates.

Sincerely yours,

Samuel Hirst

Purchasing Manager

Sports and More Sports, Inc.

214 Commercial Ave.

Oceanside, Danubia.

Tel 555-1212, fax 555-1214

Claimant's Exhibit No. 6

E-mail

From: Jonathon Singer

Date: 28 May 1999

To: Samuel Hirst

Subject: Your inquiry as to terms of purchase

I hereby acknowledge receipt of your purchase order No. 6910. Since you have re-ordered so quickly, even before you have had the opportunity to see how the Vis Water Sports equipment will sell, for purposes of establishing the appropriate discount, we have treated your two purchase orders as one purchase. That means you will effectively receive the 8 percent discount on your PO 6839 rather than the 5 percent discount previously calculated. Although our pro forma invoice will be sent separately, I will set out our calculation below.

PO 6839	\$100,000
PO 6910	<u>500,000</u>
Sub-total	600,000
Discount 8%	<u>48,000</u>
	552,000
Shipping 6839	7,000
Shipping 6910	<u>26,000</u>
Total	\$585,000
Paid on 6839	<u>102,000</u>
Due	\$483,000

Therefore, the total is \$483,000, including transport and insurance of \$26,000 on the current shipment. You can expect the goods to be shipped by 20 June 1999.

Sincerely yours,

Jonathon Singer

Sales Manager

Vis Water Sports Co.

395 Industrial Place

Capitol City, Equatoriana

Tel: 483-5800, fax: 483-5810

Claimant's Exhibit No. 7

Vis Fish Company
14 Water Street
Port City, Danubia

20 September 1999

Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside

Dear Sirs:

Your recent advertisements in all the major newspapers in Danubia that feature Vis Water Sports equipment and that use the slogan "like a fish in water" have come to our attention.

We should like you to know that "Vis" is registered in Danubia as a trademark covering all water-related products and it belongs to the Vis Fish Company. Your advertisement and sale of goods bearing the name "Vis" are, therefore, in violation of our trademark. The violation is particularly egregious because of the slogan associated with the Vis Water Sports equipment "like a fish in water". It evokes an obvious association between the use of the equipment and the fish that we sell under our trademark Vis, which means fish in the Dutch language.

We would ask you to promptly withdraw all advertisements that use our trademark "Vis" and to stop selling any goods under that name.

We would ask you to respond to this letter and to tell us the measures you have taken to be sure that you are no longer violating our rights to the "Vis" trademark.

Sincerely,

Kurt Streng
Managing Director

Claimant's Exhibit No. 8

Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside, Danubia

4 October 1999

Mr. Kurt Streng
Managing Director
Vis Fish Company
14 Water Street
Port City

Dear Mr. Streng:

I refer to your letter dated 20 September 1999 in which you claim that Sports and More Sports, Inc. is violating your registered trademark "Vis" by advertising and selling equipment in Danubia under the trademark "Vis Water Sports".

I must reject your demand that Sports and More Sports cease advertising and selling equipment under the "Vis Water Sports" brand. There is no likelihood that anyone would confuse athletic equipment, even that used for water sports, with the fish and fish products that I now understand are sold by your company. The markets and the nature of the products are simply too different.

May I suggest, however, that there might be possibilities for joint promotion of the Vis name. I would be pleased to be in contact with Vis Water Sports, Co. to inquire whether they might be interested. If you find this to be of interest, please let me know.

Sincerely,

Thomas Kent
President

Claimant's Exhibit No. 9

Vis Fish Company
14 Water Street
Port City, Danubia

15 October 1999

Mr. Thomas Kent, President
Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside

Dear Mr. Kent:

I was sorely disappointed in your letter dated 4 October 1999 in which you refused to cease advertising and selling water sports equipment under the brand name "Vis Water Sports".

There is no doubt that under the law of Danubia Sports and More Sports, Inc. is in violation of our registered trademark "Vis". In spite of your denial that there could be any confusion between the water sports equipment that you are selling and the fish and fish products that we sell under the "Vis" trademark, you suggested the possibilities of joint promotion of the "Vis" name.

If Sports and More Sports, Inc. does not cease advertising and selling goods under any name that incorporates our registered trademark "Vis" within one week from receipt of this letter, we shall be forced to take legal action. I trust that such an unpleasant step will not be necessary.

Sincerely,

Kurt Streng
Managing Director

Claimant's Exhibit No. 10

Howard & Heward
Advocates at the Court

28 October 1999

Mr. Thomas Kent, President
Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside

Dear Mr. Kent:

You have informed us that Sports and More Sports, Inc. has recently begun to purchase from the Vis Water Sports Co. of Equatoriana athletic equipment that carries the Vis Water Sports name. You have purchased this equipment for the purpose of sale in Danubia. You have also furnished a copy of correspondence with the Vis Fish Company in which that company has claimed to have registered the "Vis" trademark in Danubia and in which that company has claimed that advertisement and sale of "Vis Water Sports" equipment would be a violation of their trademark. The Vis Fish Company has threatened legal action if Sports and More Sports were not to cease selling "Vis Water Sports" equipment in Danubia. You have asked us whether the claim of the Vis Fish Company is well founded.

We have verified that the Vis Fish Company has registered the "Vis" name as a trademark. The registration claims the name for all water-related products. Nevertheless, from a search of the applicable registries it appears that the Vis Fish Company engages only in the business of selling fish, other water-related food products and their derivatives. There is no indication that the Vis Fish Company engages in any commercial activities that are in any way related to athletics or recreation.

In our opinion the claim of the Vis Fish Company to trade mark infringement is unfounded. We are of the opinion that any legal action that they might bring would eventually be dismissed. We must caution you, however, that the Vis Fish Company has aggressively defended its trademark in the past. The fact that they have registered the trademark for all water-related products is likely to mean that the litigation will not be easy. You could expect that even though, once successful, you could recover your legal costs from them, the litigation would cause a certain amount of disruption to your business.

If we can be of any further service to you in this matter, please feel free to contact me.

Sincerely,

Thomas Howard

Claimant's Exhibit No. 11

Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside, Danubia

3 November 1999

Mr. Kurt Streng
Managing Director
Vis Fish Company
14 Water Street
Port City

Dear Mr. Streng:

We are sorry that you have not accepted our suggestion that we might work together to promote the "Vis" brands for both your fish and fish products and the Vis Water Sports brand equipment. Although the two types of goods are so different that we continue to insist that there would be no confusion in the minds of consumers, we do believe that an effective promotion could be made.

However, since you have rejected our suggestion and have stated that you would institute legal action if we were not to cease advertising and selling the Vis Water Sports brand equipment, we have decided to rely on the other brands of water sports equipment that we have been selling successfully for the past several years.

Sincerely,

Thomas Kent
President

Claimant's Exhibit No. 12

Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside, Danubia

3 November 1999

Mr. Jonathon Singer
Sales Manager
Vis Water Sports Co.
395 Industrial Place
Capitol City, Equatoriana

Dear Mr. Singer:

This letter is to notify you that Vis Water Sports has violated its obligation under article 42 United Nations Convention on Contracts for the International Sale of Goods (CISG) to deliver goods free from any right or claim of a third party based on intellectual property. Therefore, Sports and More Sports, Inc. is hereby avoiding the contract for the purchase of water sports equipment from the Vis Water Sports Co. entered into by your e-mail acceptance of our purchase orders No. 6839 and 6910 as provided in article 49 CISG. We look forward to mutual restitution being made as provided in articles 82 to 84 of the Convention.

The trademark "Vis" has been registered in Danubia by the Vis Fish Company for all water-related products. By letters of 20 September 1999 and 15 October 1999 the Vis Fish Company has claimed that the advertising and selling of goods bearing the name Vis Water Sports in Danubia would violate their trademark and they have threatened legal action if we continued to do so. Legal counsel has advised us that, although in their opinion the claim of trade mark infringement would eventually be dismissed, the legal action would take a significant period of time and would be disruptive to our business. We are not in a position to contest any legal action that they might take in regard to what is, after all, your brand. Since we cannot continue to sell the Vis Water Sports equipment without the serious threat of legal action, we are withdrawing all the goods bearing the Vis Water Sports name from our stores and avoiding the contract.

I should like to assure you that this action on our part is in no way a reflection on your goods, with which we are quite satisfied and which have been well received by our clientele. If you are able to reach an understanding with the Vis Fish Company permitting the sale of your goods in Danubia, we would be pleased to consider placing further orders in the future.

As soon as we have been able to ascertain the amount of your goods that remain unsold and the additional costs that we have been forced to undertake in regard to your goods, we shall be in further communication with you about the means of mutual restitution. Until you give us instructions as to what we should do with the

goods, we will store them in our warehouses for your account. Let me express my disappointment at this turn of events.

Sincerely,

Thomas Kent
President

Claimant's Exhibit No. 13

Vis Water Sports Co.
395 Industrial Place
Capitol City, Equatoriana

10 November 1999

Mr. Thomas Kent, President
Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside

Dear Mr. Kent:

I hereby acknowledge receipt of your letter of 3 November 1999.

Vis Water Sports Co. does not accept your purported avoidance of the contracts entered into between our two companies on the basis of your purchase orders Nos. 6839 and 6910.

As you yourself have indicated, even though the Vis Fish Company may have registered the trademark "Vis" for all water-related products, their business is fish and similar products. Vis Water Sports equipment certainly does not violate that trademark. If you were to search the Internet you would find any number of companies in different countries and different lines of business that use the trademark "Vis", of which the Vis Fish Company is just one. We are obviously not all in violation of one another's trademark. Since the claim of the Vis Fish Company is manifestly unfounded, we see no basis for you to avoid the contract between us.

We will, of course, do all in our power to aid you in your defense against the assertion of trademark infringement. If, at the conclusion of any litigation that might take place, you were not able to recover your legal costs from the Vis Fish Company, we would stand ready to reimburse you for such reasonable costs as you had incurred.

We are sorry that this matter has occurred, but we are sure that it will soon be resolved. We look forward to a long and profitable relationship with you.

Sincerely,

Mr. Jonathon Singer
Sales Manager
Vis Water Sports Co.
395 Industrial Place
Capitol City, Equatoriana

Claimant's Exhibit No. 14

Sports and More Sports, Inc.
214 Commercial Ave.
Oceanside, Danubia

16 November 1999

Mr. Jonathon Singer
Sales Manager
Vis Water Sports Co.
395 Industrial Place
Capitol City, Equatoriana

Dear Mr. Singer:

I understand your reaction to our letter of 3 November 1999 by which we have avoided the contracts entered into between us. We at Sports and More Sports are also disappointed not to be able to continue selling the Vis Water Sports equipment.

We also appreciate your offer to give whatever help is in the power of the Vis Water Sports Co. in a defense we might undertake against the claim of trademark infringement, including a guarantee of our "reasonable" legal costs in the matter. Your offer, however, shows that you misunderstand the fundamental basis of our decision to avoid the contract. We are in the business of selling athletic equipment at retail. We are not in the business of defending against claims of trademark infringement. Any litigation brought by the Vis Fish Company would be disruptive to our business to some degree. While we appreciate the quality of the Vis Water Sports equipment, it is not unique. We are able to sell similar equipment from other suppliers to our customers without facing the threat of trademark infringement.

If you are able to clarify that sale of your equipment in Danubia will not lead to litigation arising out of claims of trademark infringement, we would be more than happy to consider rescinding our avoidance of the contracts and to making further purchases in the future. In the meantime, however, we must insist that we have avoided the contracts that we entered into with you. As a result, I again ask you to give instructions as to what should be done with the goods that have not yet been sold. As soon as possible we will send to you a detailed accounting of the amounts due between us so as to be able to effect the mutual restitution.

Sincerely,

Thomas Kent
President



International Chamber of Commerce

The world business organization

International Court of Arbitration

Cour internationale d'arbitrage

Letter to Claimant acknowledging receipt of the Request for Arbitration

Address ***

*By fax *** & Mail*

Our Ref.: 410/HGN/EP

Case N°: Moot No. 8

9 June 2000

Dear *****,

We wish to acknowledge receipt of 5 copies of your Request for Arbitration dated 6 June 2000 and 5 copies of its exhibits submitted by you in the dispute between:

Sports and More Sports, Inc.

- and -

-

Vis Water Sports Co.

This Request for Arbitration was received by us on 9 June 2000 and has been assigned the following reference: Moot No. 8..

The Counsel in the Secretariat of the ICC International Court of Arbitration who is in charge of the file is:

*** (direct dial number 33 1 49 53 ** **)

The Assistant-Counsel are:

*** (direct dial number 33 1 49 53 ** **)

*** (direct dial number 33 1 49 53 ** **)

The Secretaries are:

*** (direct dial number 33 1 49 53 ** **)

*** (direct dial number 33 1 49 53 ** **)

Mr./Ms. *** will soon write to you concerning the notification of the Request for Arbitration and other relevant information.

Thank you for your payment of the non-refundable advance on administrative expenses of US\$ 2 500.

Sincerely yours,

Horacio A. Grigera Naón
Secretary General
ICC International Court of Arbitration

Encl.: - 1998 ICC Rules of Arbitration
- International Court of Arbitration Brochure



International Chamber of Commerce

The world business organization

International Court of Arbitration

Cour internationale d'arbitrage

Letter notifying Request for Arbitration to Respondent

9 June 2000

Moot No. 8

Sports and More Sports, Inc. (Danubia) v/ Vis Water Sports Co. (Equatoriana)

Counsel in charge of the file: ***

(Direct dial: 33 1 49 53 ** *)**
(Direct fax: 33 1 49 53 ** *)**

Mr. ***
Vis Water Sports Co.
395 Industrial Place
Capitol City, Equatoriana

Fax: *****

Dear Mr. ***,

The Secretariat hereby notifies you that it has received a Request for Arbitration (the "Request") from

Sports and More Sports, Inc.
represented by

in which you have been named as Respondent.

This Request has been filed under reference Moot No. 8. Please state the complete reference in all future correspondence.

We enclose a copy of the Request along with its exhibits, which was received today.

Pursuant to Article 5(1) of the ICC Rules of Arbitration (the "Rules"), you are required to submit your Answer to the Request (the "Answer") within **30 days** from the day following the date of receipt of this letter. Please send the Secretariat 5 copies of your Answer.

In accordance with Article 5(2) of the Rules, Respondent may apply to the Secretariat for an extension of the time for the filing of its Answer, provided the application for such an extension contains Respondent's comments concerning the number of arbitrators and their choice and, where appropriate, the nomination of an arbitrator. In any event, the ICC International Court of Arbitration (the "Court") has the power, pursuant to Article 6(3) of the Rules, to set the procedure in motion in the absence of an Answer on your part.

.../...

Constitution of the Arbitral Tribunal

The arbitration clause to which reference has been made provides for a three-member Arbitral Tribunal and Claimant has nominated Dr. *** as an arbitrator. The Secretariat will invite Dr. *** to complete a Declaration of Acceptance and Statement of Independence, copies of which will be forwarded to the parties in due course

In compliance with Article 8(4) of the Rules, you are hereby requested to nominate an arbitrator within **30 days** of receipt of the present letter, failing which such appointment shall be made by the Court.

In this regard, please note that Article 7(1) of the Rules provides that every arbitrator must be and remain independent of the parties involved in the arbitration. Accordingly, you must confirm that any arbitrator nominated by you is independent. In addition, the Secretariat will invite any such prospective arbitrator to complete a Declaration of Acceptance and Statement of Independence.

Please also be advised that pursuant to Article 8(4) of the Rules, the third arbitrator, who will act as Chairman of the Arbitral Tribunal, shall be appointed by the Court unless the parties have agreed upon another procedure.

If you foresee being represented by counsel in this matter, please inform the Secretariat of the name and address of such counsel.

For any information about this file, please do not hesitate to contact :

- the undersigned, ***, Counsel.....(extension ***)
- ***, Assistant Counsel.....(extension ***)
- ***, Assistant Counsel.....(extension ***)
- ***, Secretary(extension ***)
- ***, Secretary(extension ***)

Finally, while maintaining strict neutrality, the Secretariat is at the disposal of the parties with regard to any information they may require concerning the application of the Rules.

Yours sincerely,

Counsel

Secretariat of the ICC International Court of Arbitration

- Encl.: - Request for Arbitration with Exhibits
 - 1998 version of the ICC Rules of Arbitration
 - International Court of Arbitration Brochure
 - Copy of the Secretariat's letter of today to Claimant

c.c.: Claimant



International Chamber of Commerce

The world business organization

International Court of Arbitration

Cour internationale d'arbitrage

Letter informing Claimant of the notification of Request to Respondent

9 June 2000

Moot No. 8

Sports and More Sports, Inc. (Danubia) v/ Vis Water Sports Co (Equatoriana)

Counsel in charge of the file: ***

(Direct dial: 33 1 49 53 ** ***)
(Direct fax: 33 1 49 53 ** ***)

Mr. ***
Address ***

Fax: *****

Dear Mr. ***,

Further to the Secretary General's letter to you of today, we gratefully acknowledge receipt of your payment of US\$ 2 500. We confirm that your Request for Arbitration (the "Request") has been assigned the reference *****/***. Please state the complete reference in all future correspondence.

We are sending a copy of your Request to Respondent and asking it to respond in accordance with the requirements of Article 5 of the ICC Rules of Arbitration (the "Rules").

Constitution of the Arbitral Tribunal

The Secretariat notes that in accordance with the arbitration clause referred to in the Request, which provides for a three-member Arbitral Tribunal, you have nominated Dr. *** as an arbitrator.

In this regard, please be advised that Article 7(1) of the Rules provides that every arbitrator must be and remain independent of the parties involved in the arbitration. Accordingly, please confirm to us that Dr. *** is independent. In addition, the Secretariat will invite the prospective arbitrator to complete a Declaration of Acceptance and Statement of Independence, copies of which will be forwarded to the parties in due course.

Please also note that pursuant to Article 8(4) of the Rules, the third arbitrator, who will act as Chairman of the Arbitral Tribunal shall be appointed by the Court unless the parties have agreed upon another procedure.

.../...

Provisional Advance

Please note that in accordance with Article 30(1) of the Rules and Article 1(2) of Appendix III, the Secretary General has fixed a provisional advance of **US\$ 18 000** to be paid by Claimant to cover the costs of the arbitration until the Terms of Reference have been drawn up. This provisional advance must be paid before the file can be transmitted to the Arbitral Tribunal once constituted. Said advance has been fixed by reference to the information presently in the possession of the Secretariat, and on the basis of an amount in dispute quantified at US\$ 480 000 and taking into account that there shall be three arbitrators.

You are thus invited to pay **US\$ 15 500** (i.e. US\$ 18 000 less US\$ 2 500) already paid) within **30 days** from the day following the date of receipt of this letter, by bank check in favor of the International Chamber of Commerce or by transfer to our account N° *** at Bank ***.

Please include the reference Moot No. 8 on your payment for its prompt and accurate crediting.

Finally, while maintaining strict neutrality, the Secretariat is at the disposal of the parties with regard to any information they may require concerning the application of the Rules.

Yours sincerely,

Counsel

Secretariat of the ICC International Court of Arbitration

Encl.: - Copy of the Secretariat's letter of today to Respondent
- Copy of the Secretariat's letter of today to Dr. *** (arbitrator proposed)

Letter to the arbitrator proposed by Claimant

9 June 2000

Moot No. 8

Sports and More Sports, Inc. (Danubia) v/ Vis Water Sports Co (Equatoriana)

Dear Dr. ***,

We are pleased to inform you that you have been nominated by Claimant for confirmation as arbitrator in the above-referenced case. We are writing to inquire whether you accept this nomination.

Please note, in particular, that under Article 7(1) of the ICC Rules of Arbitration (the "Rules"), every arbitrator must be and remain independent of the parties involved in the arbitration. Accordingly, you must complete and return the enclosed Declaration of Acceptance and Statement of Independence. We will also be required to provide the parties and the Court with a copy of your *curriculum vitae* (a blank form copy of which is enclosed).

Please also note that the Rules contain strict time-limits for the conduct of the arbitral proceedings (see Articles 18(2) and 24(1)). Prior to accepting your appointment, you should therefore be satisfied, to the extent reasonably possible, that you will be in a position to devote the time and effort necessary to conduct the arbitration in accordance with the requirements of the Rules. In this connection, your attention is also drawn to Article 7(5) of the Rules.

Furthermore, we wish to emphasize that the arbitral mission demands of the arbitrator the utmost respect for the confidential nature of the proceedings.

With regard to remuneration, we urge you to familiarize yourself with the relevant provisions of the Rules and the scale of arbitrator's fees contained in Appendix III thereto. Please note, in particular, that the arbitrator's fees are fixed exclusively by the Court and that separate fee arrangements between the parties and the arbitrators are not permitted. Arbitral fees are moreover fixed only at the end of the proceedings, although advances and reimbursement of expenses may be granted upon the completion of concrete steps in the arbitration.

.../...

In determining the level of the arbitrator's fees, the Court considers the factors set forth in Article 2(2) of Appendix III to the Rules. We must emphasize in this regard that your usual hourly rate or the usual systems of remuneration in your profession in your country are not taken into consideration by the Court in determining fees.

When the Arbitral Tribunal is composed of three members, unless the arbitrators inform us in writing that they have agreed to a different allocation, the Court normally fixes the fees of the arbitrators so that the Chairman receives 40% of the total fees and each coarbitrator receives 30%. However, the Court may decide upon a different allocation based on the circumstances of the case.

In order that the constitution of the Arbitral Tribunal in this case not be delayed, we would appreciate it if you would inform us within **10 days** from the day following the date of receipt of the present letter whether you accept your nomination. If so, you should also ensure that we have received within that period the documents requested above.

For your information, the counsel of the parties in this matter are:

- for the Claimant: Sports and More Sports, Inc

- for the Respondent: Vis Water Sports Co.

Should you have any questions with regard to the above, please do not hesitate to contact:

- the undersigned, **, Counsel.....(direct dial number 33 1 49 53 ** **)
- ***, Assistant Counsel.....(direct dial number 33 1 49 53 ** **)
- ***, Assistant Counsel.....(direct dial number 33 1 49 53 ** **)
- ***, Secretary(direct dial number 33 1 49 53 ** **)
- ***, Secretary(direct dial number 33 1 49 53 ** **)

Yours sincerely,

*/Counsel

Secretariat of the ICC International Court of Arbitration

Encl.: 1998 version of the ICC Rules of Arbitration
Blank Declaration of Acceptance and Statement of Independence
Blank *curriculum vitae*

c.c.: parties

Sports and More Sports, Inc.
Claimant

v.

Vis Water Sports Co.
Respondent

ANSWER TO THE REQUEST FOR ARBITRATION

I. Name and address of Respondent

1. Vis Water Sports Co., the Respondent, is a corporation organized under the laws of Equatoriana. It has its principal office at 395 Industrial Place, Capitol City, Equatoriana. The telephone number is 483-5800 and the fax number is 483-5810. Vis is a manufacturer of equipment for water sports.

II. Nature of the Dispute

2. Vis Water Sports accepts the statements of Sports and More Sports, Inc. as to the circumstances under which the contract for the sale of water sports equipment from Vis Water Sports to Sports and More Sports pursuant to the purchase orders nos. 6839 and 6910 took place. (Request paras. 3-5, Claimant's Exhibits Nos. 1-6)

3. Vis Water Sports does not dispute that the Vis Fish Company had registered the "Vis" trademark in Danubia in connection with its fish business and that it had asserted that Sports and More Sports was infringing the "Vis" trademark by advertising and selling Vis Water Sports equipment. (Claimant's Exhibits Nos. 7 and 9) Vis Water Sports agrees with Sports and More Sports, as set out in its letter of 4 October 1999 to the Vis Fish Company (Claimant's Exhibit No. 8), and more particularly in the letter of 28 October 1999 from the law firm of Howard and Heward to Sports and More Sports (Claimant's Exhibit No. 10) that "the claim of the Vis Fish Company to trade mark infringement is unfounded."

4. As a result, Vis Water Sports denies that it has breached its obligations under article 42, United Nations Convention on Contracts for the International Sale of Goods. The water sports equipment that it sold to Sports and More Sports under the Vis Water Sports trademark were free from any right or claim of a third person.

5. Furthermore, even if it is the case that the Vis Fish Company had registered the trademark “Vis” for all water-related products, that by itself would not be sufficient to establish that Vis Water Sports knew or should have known that the Vis Fish Company would attempt to assert a claim in regard to athletic equipment, a field in which they have never engaged. A search of the Internet will show that the name “Vis” is used by many companies in many different fields of business. They are not all infringing each other’s trade mark, so long as the businesses are separate and there is no confusion between them.

6. Sports and More Sports first became aware that the Vis Fish Company was attempting to assert a trademark infringement claim when Sports received the letter from the Vis Fish Company dated 20 September 1999. (Claimant’s Exhibit No. 7) It first notified Vis Water Sports about this assertion of trademark infringement six weeks later in its letter of 3 November 1999. The primary purpose of that letter was not, however, to inform Vis Water Sports about the assertion of trademark infringement, but to assert that it was avoiding the contract of sale between it and Vis Water Sports. (Claimant’s Exhibit No. 12) The notification to Vis Water Sports of the assertion of trademark infringement was not made within a reasonable time. Therefore, Sports and More Sports is not permitted to rely upon it.

7. Sports and More Sports asserted that it had avoided the contract under article 49, United Nations Convention on Contracts for the International Sale of Goods. In order to avoid the contract, it would be necessary for there to have been a fundamental breach of contract on the part of Vis Water Sports. Even if one takes the assertions of Sports and More Sports at face value, they do not amount to fundamental breach of the contract. Therefore, the asserted avoidance of the contract by the letter of 3 November 1999 (Claimant’s Exhibit No. 12) did not occur.

III. Comments on the Relief Sought

8. Sports and More Sports has claimed relief on the basis of articles 81 to 84, United Nations Convention on Contracts for the International Sale of Goods. Since there was no effective avoidance of the contract, no relief under those provisions is due.

9. On the assumption that the avoidance was proper, Sports and More Sports has claimed as damages the general selling and administrative costs of the goods sold by it prior to its asserted avoidance of the contract. Since they refer to these costs as “allocated” costs, it appears that they are applying to this contract the average of their general selling and administrative costs. The damages they would have a right to claim would be the additional costs incurred by them in regard to the goods purchased from Vis Water Sports, and not an allocated share of costs that would include their general overhead.

10. If Sports and More Sports had the right to avoid the contract, and they had sold goods in the normal course of business, they would have to account for the benefit they had derived from the goods. Article 84 United Nations Convention on Contracts for the International Sale of Goods. Since they state that they have sold goods to the extent of one-third of that which they purchased from Vis Water Sports, their delivered cost including transportation and freight would be \$211,000. The normal retail mark-up on Vis Water Sports products is 70 percent of delivered purchase cost.

Therefore, an estimated gross profit on the sales by Sports and More Sports of \$147,700 is claimed as an off-set on their claim.

11. Vis Water Sports claims from Sports and More Sports the costs of arbitration, including legal costs as provided in the ICC Arbitration Rules, article 31.

IV. Lack of arbitration clause

12. Vis Water Sports contests the jurisdiction of the arbitral tribunal for lack of agreement on an arbitration clause. We acknowledge that the clause set out in the Request for Arbitration, paragraph 18, appears as clause 14 of the Sports and More Sports General Conditions of Purchase. We also acknowledge that a copy of the General Conditions were attached to the e-mail message of 5 April 1999 from Mr. Hirst to Mr. Singer by which Sports and More Sports transmitted to Vis Water Sports its purchase order no. 6839. Therefore, we acknowledge that there is a prima facie arbitration clause and we do not request the ICC Court to reject the Request for Arbitration as provided in the ICC Arbitration Rules, article 6(2). We do request the arbitral tribunal that is to be established to decide that the arbitration clause in Sports and More Sports General Conditions of Purchase was not agreed to by Vis Water Sports and is not applicable to the dispute.

13. The reply from Mr. Singer of Vis Water Sports to Mr. Hirst of Sports and More Sports acknowledging the purchase order dated 6 April 1999 stated “I should like to remind you that our General Conditions of Sale, which we include in all sales contracts, are available at [URL omitted]. I suggest that you take a look at them.” (Claimant’s Exhibit No. 4) These words are a clear statement that any contract of sale concluded by Vis Water Sports must include those General Conditions. The General Conditions of Sale that were on the web site referred to included a forum selection clause in its clause 23. This forum selection clause provided:

“Any dispute in regard to or arising out of this contract shall be submitted to the Commercial Court in Capitol City, Equatoriana.”

14. According to article 19 of the United Nations Convention on Contracts for the International Sale of Goods, when the reply to an offer contains an additional or different term relating to the settlement of disputes, the reply constitutes a rejection of the offer and constitutes a counter-offer. Therefore, the effective offer in the contract was made by Vis Water Sports and contained its forum selection clause calling for disputes to be settled in the Commercial Court in Capitol City, Equatoriana.

15. Both parties treated the two shipments as a single contract or, at least, as two closely related contracts. Therefore, the forum selection clause agreed upon by the parties in regard to the shipment requested by purchase order no. 6839 also was applicable to the shipment requested by purchase order no. 6910.

V. Arbitrators

16. The arbitration clause in the General Conditions of Purchase clause 14 calls for an arbitral tribunal of three for any dispute of more than \$400,000. While a dispute of

that size does not merit a tribunal of three and only increases the costs, we do not dispute it.

17. We nominate as one of the members of the tribunal Ms. XXXX XXXX. Her address is (omitted).

VI. Place of arbitration, rules of law and language

18. The arbitration clause provides that the place of arbitration will be Vindobona, Danubia and the language of the arbitration will be English. We do not contest either.

19. We also have no comments to make on the rules of law applicable to the dispute as set out in the Request for Arbitration, paragraphs 20 and 21.

Signed _____ 10 July 2000
Attorneys for Vis Water Sports

Letter to the parties notifying Respondent's Answer

13 July 2000

Moot No. 8

Sports and More Sports, Inc. (Danubia) v/ Vis Water Sports Co. (Equatoriana)

Counsel in charge of the file: ***

(Direct dial: 33 1 49 53 ** ***)
(Direct fax: 33 1 49 53 ** ***)

Mr. ***
Address ***

Fax: *****

Mr. ***
Address ***

Fax: *****

Dear Madams/Sirs,

The Secretariat hereby acknowledges receipt of Respondent's Answer dated 10 July 2000.

In accordance with Article 5(4) of the Rules, a copy of said Answer is enclosed for Claimant's information.

We note that Respondent shall be represented in this matter by *** of *** in Equatoriana. Accordingly, all future correspondence addressed to Respondent shall henceforth be sent solely to *** .

Constitution of the Arbitral Tribunal

The Secretariat notes that in accordance with the arbitration clause referred to in the Request, which provides for a three-member Arbitral Tribunal, you have nominated Ms. *** as an arbitrator. By separate letter of today, we are sending Ms. *** the necessary forms to be completed before his/her confirmation as an arbitrator.

Article 6(2) of the Rules

We note that Respondent has set forth jurisdictional objections, indicating that the arbitration clause in the General Conditions of Purchase did not become part of the contract between the parties. Claimant is hereby invited to provide its comments on Respondent's jurisdictional objections **by 20 July 2000**. Thereafter, the Court will be invited to examine the setting in motion of this matter, in accordance with Article 6(2) of the Rules.

.../...

Provisional advance

As the provisional advance has been fully paid, in accordance with Article 13 of the Rules, the file shall be transmitted to the Arbitral Tribunal once fully constituted.

Yours sincerely,

/*Counsel

Secretariat of the ICC International Court of Arbitration

Encl.: (for Claimant) copy of Respondent's Answer

19 July 2000

Secretariat of the ICC International Court of Arbitration
38, Cours Albert 1er
75008 Paris, France

Re: Moot No. 8
Sports and More Sports, Inc. v. Vis Water Sports Co.

Dear ****,

I refer to your letter of 13 July 2000 notifying to me the Respondent's answer in the above referenced case. You have indicated that Claimant, Sports and More Sports, Inc. should provide its comments on Respondent's jurisdictional objections by 20 July 2000.

As is noted in the Request for Arbitration, paragraphs 17 and 18, the Claimant's General Conditions of Purchase were attached the e-mail message sent by Mr. Hirst of Sports and More Sports, Inc. to Mr. Singer of Vis Water Sports Co. dated 5 April 1999. (Claimant's Exhibit No. 3). The message stated that the General Conditions of Purchase were part of the purchase order no. 6839. When it came time to send the e-mail message conveying purchase order no. 6910, it was obvious that Vis Water Sports Co. already had the General Conditions of Purchase, so they were not attached. However, the body of the e-mail message referred to them, clearly indicating that they were part of that purchase order as well.

The ICC Arbitration Clause was clause 14 of those General Conditions of Purchase, which part of both contracts of purchase.

The Respondent claims that its General Conditions of Sale, which contain the forum selection clause providing for litigation in the Commercial Court in Capitol City, Equatoriana, superseded the General Conditions of Purchase. However, while the e-mail message of 6 April 1999 from Mr. Singer to Mr. Hirst accepting our purchase order no. 6839 stated that they included those General Conditions of Sale in all their sales contracts, there were no words in that message to state that they were including the General Conditions of Sale in this contract. (Claimant's Exhibit No. 4)

Moreover, even if one were to find that their General Conditions of Sale were applicable to the first contract, they would not be applicable to the second contract formed by the exchange of messages on 27 and 28 May 1999. (Claimant's Exhibits Nos. 5 and 6) They were not even mentioned by Vis Water Sports Inc., much less made a part of the contract.

Consequently, Sports and More Sports, Inc. would request the Court, and subsequently the Arbitral Tribunal, to find that the Arbitral Tribunal has jurisdiction in this dispute.

Sincerely,

(Signed)
Counsel for Sports and More Sports, Inc.



International Chamber of Commerce

The world business organization

International Court of Arbitration

Cour internationale d'arbitrage

Letter to the parties notifying the Court's decisions

26 July 2000

Moot No. 8

Sports and More Sports, Inc. (Danubia) v/ Vis Water Sports Co. (Equatoriana)

Counsel in charge of the file: ***

(Direct dial: 33 1 49 53 ** ***)
(Direct fax: 33 1 49 53 ** ***)

Mr. ***
Address ***

Fax: *****

Mr. ***
Address ***

Fax: *****

Dear Madams/Sirs,

Please be advised that the International Court of Arbitration, at its session of 26 July 2000, took the following decisions in this matter. The Court:

1. decided that this matter shall proceed in accordance with Article 6(2) of the ICC Rules;
2. took the necessary steps for the appointment of the Chairman of the Arbitral Tribunal;
3. fixed the advance on costs at US\$ 80 000, subject to later readjustments.

Pursuant to Articles 30(2) of the Rules and Article 1(4) of Appendix III, the advance on costs is fixed to cover the fees of the Arbitral Tribunal, the out-of-pocket expenses, if any, and the ICC administrative expenses. In the present matter, the advance on costs has been fixed on the basis of the information available to the Court to date, and is based on an amount in dispute quantified at US\$ 480 000 and taking into account that there shall be a three-member Arbitral Tribunal.

Depending on the evolution of the matter, the Court may readjust the advance on costs at a later date.

In conformity with Article 30(3) of the Rules, the parties shall be invited to pay within **30 days** from the day following the date of transmission of the file to the Arbitral Tribunal, the advance on costs in the following manner:

.../...

-
- Claimant: US\$ 22 000 (US\$ 40 000 less US\$ 18 000 already paid)
- Respondent: US\$ 40 000

We remind the parties that as the provisional advance has been fully paid, in accordance with Article 13 of the Rules, the file shall be transmitted to the Arbitral Tribunal once fully constituted.

Yours sincerely,

/*

/*Counsel

Secretariat of the ICC International Court of Arbitration

c.c.: Coarbitrators



International Chamber of Commerce

The world business organization

International Court of Arbitration

Cour internationale d'arbitrage

Letter to the Arbitral Tribunal for transmission of the file

9 August 2000

Moot No. 8

Sports and More Sports, Inc. (Danubia) v/ Vis Water Sports Co. (Equatoriana)

Counsel in charge of the file: ***

(Direct dial: 33 1 49 53 ** **)
(Direct fax: 33 1 49 53 ** **)

Mr. ***
Address ***

Fax: *****

Mr. ***
Address ***

Fax: *****

Mr. ***
Address ***

Fax: *****

Dear Madams/Sirs,

In accordance with Article 13 of the ICC Rules, the Secretariat herewith forwards to you the file in the above-referenced case. The file consists of the documents on the attached list. [Not attached]

The Secretariat takes this opportunity to draw your attention to the following points:

I. Constitution of the Arbitral Tribunal:

On 9 August 2000, the Court appointed *** as Chairman of the Arbitral Tribunal upon proposal of the Mediterraneo National Committee.

On 20 July 2000, the Secretary General, pursuant to Article 9(2) of the Rules, confirmed Dr. *** as coarbitrator upon the proposal of Claimant and Ms. *** as coarbitrator upon the proposal of Respondent.

II. Names and addresses of the parties to the proceedings:

- Claimant:
Sports and More Sports, Inc

Represented by:

- Respondent:
Vis Water Sports Co.

Represented by:

.../...

III. Place of Arbitration:

Vindobona (Danubia) is the place of arbitration.

IV. Financial Status of the File:

Based on the information in the Secretariat's possession, the Secretary General fixed the provisional advance at US\$ 18 000, which is intended to cover the costs of this arbitration until the Terms of Reference have been drawn up, in accordance with Article 30(1).

The provisional advance has been fully paid by Claimant.

The Court, at its session of 26 July 2000, fixed the advance on costs at US\$ 80 000, subject to later readjustments. To date, the advance on costs has been paid by the parties in the following manner:

- Claimant: US\$ 18 000
- Respondent: -----

As indicated in Article 30(2) of the Rules and Article 1(4) of Appendix III, the advance on costs covers the fees of the Arbitral Tribunal, the reimbursable expenses and the ICC administrative expenses.

Depending on the evolution of the matter, the Court may readjust the advance on costs at a later date.

The amount in dispute is presently quantified at US\$ 480 000.

The Secretariat encourages the Arbitral Tribunal to state the amount in dispute in the Terms of Reference as precisely as possible. Furthermore, during the course of the proceedings, the Arbitral Tribunal should inform the Secretariat of any change in the amount in dispute in order to permit the Court to consider whether any adjustment of the advance on costs is appropriate.

V. Procedure:

Your first task is to establish the Terms of Reference and the provisional timetable, in accordance with Article 18 of the Rules. In this regard, we draw your attention to the time-limit of **two months** within which the Terms of Reference must be transmitted to the Court.

The Court attaches particular importance to the rapid resolution of arbitrations conducted under its Rules. You should therefore make every effort to finalize the Terms of Reference within the period provided for in the Rules. Although extensions of time may be granted by the Court, avoidable delay in the completion of the Terms of Reference may be taken into account by the Court in fixing the arbitrators' fees (see Article 2(2) of Appendix III). Moreover, Article 12(2) of the Rules provides that an arbitrator shall be replaced when the Court decides that he is not fulfilling his functions within the prescribed time-limits.

.../...

You are also advised that:

- (i) when drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having consulted with the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and communicate it to the Court and the parties (see Article 18(4) of the Rules);
- (ii) pursuant to Article 24(1) of the Rules, the time-limit within which the Arbitral Tribunal must render its final Award is six months, running from the date of the last signature of the Terms of Reference, or in case of application of Article 18(3) of the Rules, from the date of the Secretariat's notification to the Arbitral Tribunal of the Court's approval of the Terms of Reference;
- (iii) although the Rules permit this time-limit to be extended by the Court if necessary, we would like to emphasize the importance of conducting the arbitration proceedings as rapidly as may be reasonably possible in the circumstances; and
- (iv) when the Arbitral Tribunal shall have declared the proceedings closed according to Article 22(1) of the Rules, it should indicate to the Secretariat an approximate date by which the draft Award shall be submitted to the Court for approval (see Article 22(2) of the Rules.)

VI. Payment of fees and reimbursement of expenses:

When the Arbitral Tribunal is composed of three members, unless the arbitrators inform us in writing that they have agreed to a different allocation, the Court normally fixes the fees of the arbitrators so that the Chairman receives 40% of the total fees and each coarbitrator receives 30%. However, the Court may decide upon a different allocation based on the circumstances of the case.

Please find enclosed a note concerning the reimbursement of arbitrators' expenses.

We also draw your attention to Article 2(9) of Appendix III of the Rules, which states that the amounts paid to the arbitrators do not include any possible value-added taxes (VAT), and that the recovery of any such taxes payable by the arbitrators in respect of their fees is a matter solely between the arbitrators and the parties.

VII. Correspondence:

The parties should henceforth correspond directly with the Arbitral Tribunal and send copies of their correspondence to the other party and to the Secretariat. The Arbitral Tribunal is invited to send a copy of all its correspondence with the parties to the Secretariat.

IX. Article 6(2) of the Rules:

At its session of 26 July 2000 the Court, being *prima facie* satisfied that an arbitration agreement under the Rules may exist, decided that this arbitration shall proceed. This decision being administrative in nature, the Arbitral Tribunal must still decide on its own jurisdiction pursuant to Article 6(2) of the Rules.

.../...

Yours sincerely,

/***

/*Counsel

Secretariat of the ICC International Court of Arbitration

Encl.: - Copy of the Secretariat's letter of today to the parties
- List of Documents and documents mentioned therein
- Note regarding Personal and Arbitral Tribunal Expenses
- *Curriculum vitae* of your fellow arbitrators

c.c.: parties

ICC, International Court of Arbitration

Moot No. 8

Sports and More Sports, Inc.
Claimant

v.

Vis Water Sports Co.
Respondent

TERMS OF REFERENCE

1. These Terms of Reference are prepared pursuant to ICC Arbitration Rules, Article 18.

I. Parties

2. Sports and More Sports, Inc. (hereafter referred to as “Sports”) is a corporation organized under the laws of Danubia. It has its principal office at 214 Commercial Ave., Oceanside, Danubia. The telephone number is 555-1212, the fax number is 555-1214 and e-mail sports@sportsandmoresports.da. Sports is the largest retail seller of athletic equipment of all types in the country of Danubia.

3. Vis Water Sports Co. is a corporation organized under the laws of Equatoriana. It has its principal office at 395 Industrial Place, Capitol City, Equatoriana. The telephone number is 483-5800, the fax number is 483-5810 and e-mail info@watersports.com.eq. Vis is a manufacturer of equipment for water sports.

II. Claims of the Parties

Jurisdiction

4. Vis Water Sports contests the jurisdiction of the Arbitral Tribunal. It acknowledges that there was a standard ICC arbitration clause (with three additions) in the General Conditions of Purchase attached to the e-mail message dated 5 April 1999 conveying purchase order no. 6839. (Claimant’s Exhibit No. 3) However, it claims that the message from Mr. Singer dated 6 April 1999 in reply operated as a rejection of the offer from Sports and More Sports and constituted a counter-offer by Vis Water Sports. In particular, it claims that its General Conditions of Sale, to which Mr. Singer referred and gave the URL, contained a forum selection clause selecting the Commercial Court in Capitol City, Equatoriana as the forum for any dispute settlement. (Claimant’s Exhibit No. 4)

5. Vis Water Sports claims that its forum selection clause relates to both shipments of goods, the shipment pursuant to purchase order no. 6839 and that pursuant to purchase order no. 6910.

6. Sports and More Sports relies on the arbitration clause in its General Conditions of Purchase attached to its e-mail message of 5 April 1999 conveying purchase order no. 6839. (Claimant's Exhibit No. 3) Although they were not attached to the e-mail message of 27 May 1999 conveying purchase order no. 6910 "Since you already have a copy of our General Conditions of Purchase", Sports and More Sports claims that the arbitration clause applies to that shipment as well. (Claimant's Exhibit No. 5)

Article 42, United Nations Convention on Contracts for the International Sale of Goods

7. Sports and More Sports claims that Vis Water Sports failed to deliver goods that were free from the claim of a third party based on intellectual property, as required by article 42, United Nations Convention on Contracts for the International Sale of Goods. It cites in this respect the letters from Vis Fish Company dated 20 September 1999 and 15 October 1999 in which it is claimed that the advertising for sale and the selling of goods in Danubia bearing the Vis Water Sports name infringed on their registered trademark "Vis".

8. Vis Water Sports disputes that it has delivered goods that were not free from a right or claim of a third party based on intellectual property. There is agreement between the parties that the assertions of the Vis Fish Company of trademark infringement are unlikely to be upheld in litigation in Danubia. The parties disagree whether the threat of litigation by a third party for trademark infringement, even though the claimed infringement is not likely to be upheld, is sufficient to invoke article 42.

9. There is no claim that Vis Water Sports had ever heard of the Vis Fish Company prior to the letter from Sports and More Sports dated 3 November 1999. (Claimant's Exhibit No. 12) They disagree whether Vis Water Sports "could not have been unaware" of the fact that the Vis Fish Company had registered in Danubia the trademark "Vis" for all water-related goods and that this might lead to a claim of trademark infringement.

Article 43, United Nations Convention on Contracts for the International Sale of Goods

10. Sports and More Sports first learned of the assertion of trademark infringement by the Vis Fish Company when it received the letter from them dated 20 September 1999. (Claimant's Exhibit No. 7) It did not notify Vis Water Sports of the assertion of trademark infringement until it sent its letter to them avoiding the contract. That letter was dated 3 November 1999, approximately six weeks later. (Claimant's Exhibit No. 12) Vis Water Sports claims that that was more than the reasonable time allowed under article 43 and that as a result Sports and More Sports has lost any right it may have had under article 42.

Article 49, United Nations Convention on Contracts for the International Sale of Goods

11. Sports and More Sports claims to have avoided the contract or contracts between it and Vis Water Sports by its letter of 3 November 1999 in accord with article 49, United Nations Convention on Contracts for the International Sale of Goods. (Claimant's Exhibit No. 12) Vis Water Sports contests that there was an effective avoidance of the contract on two grounds. The first is that Sports and More Sports cannot rely on any alleged failure by Vis Water Sports under article 42 for the reasons given above. The second is that, even if there was a failure to deliver goods free from the claim of a third person based on intellectual property, there was no fundamental breach of contract as required by article 49.

Articles 82-84, United Nations Convention on Contracts for the International Sale of Goods

12. Sports and More Sports claims for mutual restitution and damages pursuant to articles 82 to 84, United Nations Convention on Contracts for the International Sale of Goods. The total monetary claim as presently constituted is for \$480,000. Sports and More Sports also asks for additional damages that will accrue from the date of its Request for Arbitration until mutual restitution is made. It also asks for interest on the purchase price to be reimbursed and for costs of arbitration.

13. Vis Water Sports does not contest the right of Sports and More Sports to claim restitution, if it is found to have had a right to avoid the contract. However, it claims the right to receive the benefit that Vis Water Sports had from all goods delivered under the contract of which Sports and More Sports is unable to make restitution. It understands that to mean that Sports and More Sports must pay to Vis Water Sports the difference between the cost to it of the goods it sold at retail and the retail price it received. Vis Water Sports states that the average retail markup on its goods is 70 percent of the delivered cost of the goods. It calculates the benefit to which it would be entitled to be \$147,700.

14. Vis Water Sports disagrees with the method of determining the general selling and administrative expenses that would constitute part of the damages claimed by Sports and More Sports. It asserts that Sports and More Sports can claim only those expenses that were additional to those that would have been incurred even without the Vis Water Sports goods, i.e., that Sports and More Sports cannot claim for an allocated share of the average of their general selling and administrative costs. Allocation of average costs would lead to the reimbursement of expenditures that were not caused by the contract with Vis Water Sports or its avoidance, claims Vis Water Sports.

15. Sports and More Sports claims for interest on the purchase price from the date paid by Sports to the date reimbursement of the price is made by Vis Water Sports as well as on the damages to the date paid by Vis Water Sports. Vis Water Sports has made no comments on this claim.

16. Both Sports and More Sports and Vis Water Sports claim for the costs of arbitration, including the legal costs.

III Names and Addresses of the Arbitrators

17. XXX, Chairman

(Address omitted)

Dr. XXX
(Address omitted)

Ms. XXX
(Address omitted)

IV. Place of Arbitration, Language, Procedural Rules

18. The parties have agreed that the place of arbitration shall be Vindobona, Danubia. The arbitration shall be conducted in English.

19. The parties have agreed that, pursuant to ICC Arbitration Rules, Article 15, the Arbitral Tribunal shall have the power to decide on the rules of procedure to be followed where the ICC Arbitration Rules themselves are silent. The parties have agreed that the Arbitral Tribunal should consult the IBA Rules on the Taking of Evidence in International Commercial Arbitration currently in force for guidance.

(Signed _____)
Counsel for Claimant, Sports and More Sports, Inc.

(Signed _____)
Counsel for Respondent, Vis Water Sports Co

(Signed _____)
Member of the Tribunal

(Signed _____)
Member of the Tribunal

(Signed _____)
President of the Tribunal

6 October 2000

ICC, International Court of Arbitration

Moot No. 8

Sports and More Sports, Inc.
Claimant

v.

Vis Water Sports Co.
Respondent

PROVISIONAL TIMETABLE

At the joint request of the Parties, they and the Arbitral Tribunal have agreed on the following provisional timetable for the first stages of the arbitration. The Parties and the Tribunal are fully conscious that this will not allow a final Award to be rendered within six months of the signing of the Terms of Reference, as called for by ICC Arbitration Rules, Article 24.

Requests for clarification are due	27 October 2000
Answers to requests for clarification will be distributed	3 November 2000
Submission of Memorandum for Claimant	4 December 2000
Submission of Memorandum for Respondent	12 February 2001
Oral argument on legal issues	7 –12 April 2001

The Parties have agreed to meet the evening of 6 April 2001 prior to the commencement of oral argument for a general introduction to one another. They are also aware of the festivities organized the evening of 5 April 2001 by the Moot Alumni Association and have agreed to attempt to be present.