Eighteenth Annual

Willem C. Vis International Commercial Arbitration Moot

15 – 21 April 2011

Vienna, Austria

MEMORANDUM FOR RESPONDENT

CLAIMANT

Mediterraneo Trawler Supply AS

1 Harbour View Street

Capital City

Mediterraneo

Tel. (0) 148-2010

Fax. (0) 148-2011

E-mail: office@trawler.me

RESPONDENT

Equatoriana Fishing Ltd

30 Seaview Terrace

Oceanside

Equatoriana

Tel. (0) 927-8515

Fax. (0) 927-8516

E-mail: enquiries@fish.eq

MGIMO-UNIVERSITY

(MOSCOW STATE INSTITUTE OF INTERNATIONAL RELATIONS)

FACULTY OF INTERNATIONAL LAW

Dmitry Andreev • Alina Dyumina • Natalia Kislyakova • Sergey Korolev

Svetlana Makurova • Bogdana Shtoma • Natalia Zakharova

TABLE OF CONTENTS

LIST OF ABBREVIATIONS..........IV

INDEX OF LEGAL SOURCES..........VII

INDEX OF AUTHORITIES..........X

INDEX OF CASES..........XXI

STATEMENT OF FACTS..........1

SUMMARY OF ARGUMENT..........3

ARGUMENT ON THE PROCEDURE..........4

I. TRIBUNAL SHOULD DISMISS THE CASE FOR LACK OF JURISDICTION..........4

A. The Arbitral Council was not entitled to appoint the President of the Tribunal under the arbitration clause..........4

1. The parties could derogate from the Milan Rules provisions authorizing the Arbitral Council to appoint the President..........5

2. Milan Rules provisions authorizing the Arbitral Council to appoint the President do not apply under Art. 2(1) of the Milan Rules..........6

3. The parties intended to exclude the appointment of the President by the Arbitral Council..........6

B. The Arbitral Council was not entitled to appoint the President of the Tribunal under the Milan Rules..........7

1. The Arbitral Council could not appoint the President under Art. 20(3) Milan Rules 7

2. The Arbitral Council could not appoint the President under Art. 14(4)(b) Milan Rules..........8

C. The Arbitral Council improperly refused to confirm Mr. Y as the President of the Tribunal..........9

1. The Arbitral Council should not have disregarded the will of the parties..........9

2. No objective doubts existed as to Mr. Y's impartiality or independence..........10

D. As a result, any future award may be set aside or refused enforcement..........11

II. CLAIMANT IS LIABLE FOR THE BREACH OF CONFIDENTIALITY DUTY. 12

A. The Tribunal has jurisdiction to decide on the confidentiality issue 12

B. Claimant failed to keep the arbitral proceedings confidential in violation of Art. 8(1) Milan Rules 2010 13

1. Art. 8(1) Milan Rules 2010 applies in the present case 13
2. Claimant's conduct qualifies for a breach of the confidentiality under Art. 8(1) Milan Rules 14
3. Claimant's breach is not excused by the "protection of rights" exception 15

C. Alternatively, Claimant breached the implied duty of confidentiality 16

D. The Tribunal should order Claimant to respect the confidentiality of the proceedings and the award 17

E. The Tribunal should declare Respondent entitled to recover damages resulting from the breach of confidentiality 19

ARGUMENT ON THE MERITS 20

III. THE DELIVERED GOODS WERE IN CONFORMITY WITH THE CONTRACT20

A. The squid conformed to its contractual description 20

B. The squid conformed to the sample provided to Claimant 21

C. Respondent was not bound to deliver the squid fit for use as bait 22

1. A reference to the sample excludes application of warranties of purpose 22
2. Claimant did not inform Respondent that it ordered the squid for bait 22

D. Respondent was not bound to deliver the squid fit for all its ordinary purposes. 24

E. Respondent is exempt from liability for the squid non-conformity 24

IV. CLAIMANT CANNOT RELY ON THE NON-CONFORMITY OF THE GOODS25

A. Claimant failed to undertake an adequate examination of the squid 25

1. Claimant did not select the squid for inspection at random 25
2. Claimant did not inspect a sufficient number of cartons 26
3. The examination could not be deferred until the arrival of the squid to Claimant's customers 27

B. Claimant did not notify Respondent of the non-conformity within a reasonable time after it ought to have discovered the squid undersize 28

1. The CISG does not provide for a fixed period for notification 28
2. The circumstances required Claimant to give the notice promptly 29
3. Claimant cited judicial decisions that were held in different circumstances 30

C. Claimant did not notify Respondent of the non-conformity within a reasonable time after it actually discovered the squid undersize 30

1. Claimant's message of 29 July 2008 did not specify the nature of the squid non-conformity 31
2. The parties did not suspend the period for sending the notice 32
3. Claimant's message of 16 August 2008 was a late notice 33

D. Respondent may refer to untimeliness of the notice 33

1. Respondent could not know that the squid size constituted non-conformity 33
2. Respondent disclosed the squid undersize to Claimant 34

V. CLAIMANT IS NOT ENTITLED TO RESTITUTION AND DAMAGES 35

REQUEST FOR RELIEF 35

CERTIFICATE OF AUTHENTICITY .... A

LIST OF ABBREVIATIONS

ABBREVIATION	EXPLANATION
§ / §§	section / sections
¶ / ¶¶	paragraph / paragraphs
&	and
$	Dollar
AC	Advisory Council
ACICA	Australian Centre for International Commercial Arbitration
Art. / Arts.	Article / Articles
A/S	Aktieselskab
AS	Anonim Sirketi
ASA	Association Suisse de l'Arbitrage
Assocs.	Associates
Aufl.	Auflage
BGer	Bundesgericht
BGH	Bundesgerichtshof
CAM	Chamber of Arbitration of Milan
Cir.	Circle
CISG	United Nations Convention on Contracts for the International Sale of Goods
civ.	civil
Cl.	Claimant
clar. / clars.	clarification / clarifications
Co.	Company
Comm.	Commercial
Conf.	Conference
Ct.	Court
DAL	Danubian Arbitration Law
e.g.	exempli gratiā (for example)

ed. / eds.	editor / editors
Est.	Establishment
et al.	et alia (and others)
EWCA	England and Wales Court of Appeal
Ex.	Exhibit
FAO	Food and Agriculture Organization
FRDC	Fisheries Research and Development Corporation
GmbH	Gesellschaft mit beschränkter Haftung
gr.	grams
HG	Handelsgericht
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est (that is)
ILA	International Law Association
Inc.	Incorporated
Ins.	Insurance
KG	Kantonsgericht
LCIA	London Court of International Arbitration
LG	Landgericht
Ltd	Limited
Memo.	Memorandum
No. / Nos.	Number / Numbers
NY	New York
OberG	Obergericht
OLG	Oberlandesgericht
p. / pp.	page / pages
PC	Privy Council

Proc.	Procedural
Prot.	Protocol
Rep.	Report
Req.	Request
Resp.	Respondent
SA	Société Anonyme
SIAC	Singapore International Arbitration Centre
SGHC	Singapore High Court
SL	Sociedad Limitada
S.p.A.	Società per Azioni
St.	Statement
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States
v./vs.	versus
VCNIA	Venice Chamber of National and International Arbitration
vol.	volume
WHO	World Health Organization
WIPO	World Intellectual Property Organization
Y.B.	Yearbook

INDEX OF LEGAL SOURCES

CITATION	CITED IN
ACICA Rules Arbitration Rules of the Australian Centre for International Commercial Arbitration (2005) Available at: http://www.acica.org.au/downloads/ACICA_Arbitration_Rules.pdf	77, 81
CISG United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) Available at: http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf	Passim
DAL UNCITRAL Model Law on International Commercial Arbitration (New York, 2006) Available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf	Passim
HKIAC Rules Administered Arbitration Rules of the Hong Kong International Arbitration Centre (2008) Available at: http://www.hkiac.org/documents/Arbitration/Arbitration%20Rules/AA%20Rules.pdf	81
IBA Rules International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2004) Available at: http://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918	56

CITATION	CITED IN
LCIA Rules Arbitration Rules of the London Court of International Arbitration (1998) Available at: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx	77
Milan Rules 2004 Arbitration Rules of the Chamber of Arbitration of Milan (2004) Available at: http://www.camera-arbitrale.it/Documenti/cam_arbitration-rules_2004.pdf	Passim
Milan Rules 2010 / Milan Rules Arbitration Rules of the Chamber of Arbitration of Milan (2010) Available at: http://www.camera-arbitrale.it/Documenti/cam_arbitration-rules_2010.pdf	Passim
NY Convention New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Available at: http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf	58
SIAC Rules Arbitration Rules of the Singapore International Arbitration Centre (2010) Available at: http://www.siac.org.sg/cms/images/stories/documents/rules/SIAC_Rules_2010-revised_150910_2.pdf	77, 81
Swiss Rules Swiss Rules of International Arbitration (2004) Available at: https://www.sccam.org/sa/download/SRIA_english.pdf	77

CITATION	CITED IN
UNCITRAL Notes UNCITRAL Notes on Organizing Arbitral Proceedings (1996) Available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf	81
VCNIA Rules of National and International Arbitration of the Venice Chamber of National and International Arbitration (2008) Available at: http://www.ve.camcom.it/en_conciliazione/pagina.phtml?pagina=en_01&explode=10.1	81
WIPO Rules Arbitration Rules of the World Intellectual Property Organization (2002) Available at: http://www.wipo.int/amc/en/arbitration/rules/	81

INDEX OF AUTHORITIES

CITATION	CITED IN
Andersen - Exceptions to Notification Rule Camilla Baasch Andersen, *Exceptions to the Notification Rule – Are They Uniformly Interpreted?*, 9 Vindobona Journal of International Commercial Law and Arbitration 1 (2005) Available at: http://www.cisg.law.pace.edu/cisg/biblio/andersen5.html	185, 196
Andersen - Reasonable Time Camilla Baasch Andersen, *Reasonable Time in Article 39(1) of the CISG - Is Article 39(1) Truly a Uniform Provision?*, in Pace (ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998* (The Hague: Kluwer Law International, 1999) Available at: http://www.cisg.law.pace.edu/cisg/biblio/andersen.html	169, 187189
Andersen - Duty to Examine Goods Camilla Baasch Andersen, *The Duty to Examine Goods under the Uniform International Sales Law - An Analysis of Article 38 CISG*, 18 European Business Law Review (2007)	160
Azzali Stefano Azzali, *Chamber of Arbitration of Milan (CAM)*, in Loukas Mistelis, Laurence Shore & Hans Smit, *World Arbitration Reporter*, 2nd edition, vol. 2 (New York: Juris Publishers, 2010)	79
Benedick Gilles Benedick, *Die Informationspflichten im UN-Kaufrecht (CISG) und ihr Verletzung: Unter Berücksichtigung des Zusammenspiels mit dem nationalen schweizerischen Recht* (München: Sellier European Law Publishers, 2008)	127

CITATION	CITED IN
Bianca/Bonell Cesare Massimo Bianca & Michael Joachim Bonell (eds.), *Bianca-Bonell Commentary on the International Sales Law* (Milan: Giuffrè, 1987) Available at: http://www.cisg.law.pace.edu/cisg/biblio/bib2.html	127
Blanke Gordon Blanke, *The Case for Supranational Arbitration - Ideas and Prospects*, 19 European Business Law Review 1 (2008)	25
Bond Stephen R. Bond, *Expert Report of Stephen Bond Esq. (in Esso/BHP v. Plowman)*, 11 Arbitration International 3 (1995)	91
Born Gary B. Born, *International Commercial Arbitration* (New York: Kluwer Law International, 2009)	49, 64, 66, 68, 77, 91, 93, 101, 104
Brown Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 American University International Law Review 4 (2001) Available at: http://www.auilr.org/pdf/16/16-4-2.pdf	109
Brunner Christoph Brunner, *UN-Kaufrecht - CISG. Kommentar zum Übereinkommen der vereinten Nationen über den internationalen Warenkauf von 1980* (Bern: Stämpfli, 2004)	165
Butler Allison E. Butler, *A Practical Guide to CISG: Negotiations through Litigation* (New York: Aspen Publishers, 2007) Available at: http://cisgw3.law.pace.edu/cisg/biblio/butler6.html	184

CITATION	CITED IN
Canadian Report R.A. Jones & C.C. Mullins, *Commercial Atlantic Salmon Catch for Western Newfoundland and Southern Labrador, Gulf Region: Annual Summaries 1974-1990 and Weekly Catches 1989-1990* (Canadian Data Report of Fishing and Aquatic Sciences No. 893, 1992) Available at: http://www.dfo-mpo.gc.ca/Library/140291.pdf	124
CISG-AC Opinion No. 2 CISG Advisory Council, *Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Art. 38&39* (Rapporteur: Prof. Eric E. Bergsten, Emeritus, Pace University School of Law, New York, 7 June 2004) Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html	163, 165
Codex Standard 165-1989 *Codex Standard For Quick Frozen Blocks of Fish Fillet, Minced Fish Flesh and Mixtures of Fillets and Minced Fish Flesh*, in Joint FAO/WHO Food Standards Program, *Codex Alimentarius* (Rome: FAO, 1989) Available at: http://www.seafood.nmfs.noaa.gov/NOAA%20Handbook25/CODEX%20Standards/Frozen_Blocks_Minced_Fillets.pdf	154
Coppo - New Rules Benedetta Coppo, *The New Arbitration Rules of the Chamber of Commerce of Milan*, in Cláudio Finkelsteinein, Jonathan B. Vita, Napoleão Casado Filho (eds.), *Arbitragem Internacional: UNIDROIT, CISG e Direito Brasileiro* (São Paulo: Quartier Latin, 2010) Available at: http://www.cisg.law.pace.edu/cisg/moot/Coppo.pdf	83
Coppo - 2010 Revision Benedetta Coppo, *The 2010 Revision of the Arbitration Rules of the Chamber of Commerce of Milan,* 14 Vindobona Journal 2 (2010) Available at: http://www.maa.net/uploads/VJ/11._Benetta_Coppo.pdf	55, 91

CITATION	CITED IN
Craig/Park/Paulsson W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (New York: Oceana, 2000)	71, 91
Derains/Schwarz Yves Derains & Eric Schwarz, *A Guide to the ICC Rules of Arbitration,* 2nd edition (The Hague: Kluwer International, 2005)	71
DiMatteo Larry A. DiMatteo et al., *International Sales Law: A Critical Analysis of CISG Jurisprudence* (New York: Cambridge University Press, 2005)	145, 160
Enderlein/Maskow Fritz Enderlein & Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods* (New York: Oceana, 1992) Available at: http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html	127
FAO Report A.S. Matcon, *Analysis of the Estonian Distant - Water Fisheries, Report Prepared for the Project "Rationalization of the Distant-Water Fishing Fleets"* (Rome: FAO, 1995) Available at: http://www.fao.org/docrep/field/373973.htm	124
Felemegas John Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, 2007)	118, 179
Ferrari Franco Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*, 20 Journal of Law and Commerce (Spring 2001) Available at: http://www.cisg.law.pace.edu/cisg/biblio/ferrari6.html	180

Citation	Cited in
Fisheries Monitoring Sandra O'Sullivan & Eddie Jebreen, *Fisheries Long Term Monitoring Program - Summary of Stout Whiting (Sillago Robusta) Survey Results: 1991–2006* (Brisbane: Primary Industries and Fisheries, 2007). Available at: http://www.dpi.qld.gov.au/documents/Fisheries_Sustainable Fishing/StoutWhiting-Summary-1991-2006.pdf	124
Flechtner Harry M. Flechtner, *Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice thereof under the United Nations Sales Convention*, 26 Boston University International Law Journal (2008) Available at: http://www.cisg.law.pace.edu/cisg/biblio/flechtner8.html	166
Fouchard/Gaillard/Goldman Emmanuel Gaillard & John Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (London: Kluwer Law, 1999)	25
FRDC Project M. Moran et al., *Minimising the cost of future stock monitoring, and assessment of the potential for increased yields from the oceanic snapper, Pagrus auratus, stock off Shark Bay* (FRDC Project No. 2000/138, 2005) Available at: http://www.environment.gov.au/coasts/fisheries/wa/snapper/pubs/submission-09-appendix3.pdf	124
Gaillard Emmanuel Gaillard, *Le principe de confidentialité de l'arbitrage commercial international*, 22 Receuil Dalloz Chron (1987)	91
Garro Alejandro M. Garro, *The Buyer's "Safety Valve" Under Article 40: What Is the Seller Supposed to Know and When*, 25 Journal of Law and Commerce 1 (2005/2006) Available at: http://www.cisg.law.pace.edu/cisg/biblio/garro4.html	195

CITATION	CITED IN
Girsberger Daniel Girsberger, *The Time Limits of Article 39 CISG*, 25 Journal of Law and Commerce 1 (2005/2006) Available at: http://www.cisg.law.pace.edu/cisg/biblio/girsberger.html	166
Henschel René Franz Henschel, *Conformity of Goods in International Sales Governed by CISG Article 35: Caveat venditor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules*, Nordic Journal of Commercial Law 1 (2004) Available at: http://www.cisg.law.pace.edu/cisg/biblio/henschel2.html	133
Herber/Czerwenka Rolf Herber & Beate Czerwenka, *Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* (München: Beck, 1991)	152
Honnold/Flechtner John O. Honnold & Harry M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th edition (The Hague: Kluwer Law International, 2009)	137
Honsell Heinrich Honsell (ed.), *Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)*, 2. Aufl. (Heidelberg: Springer-Verlag, 2010)	127, 179
Huber/Mullis Peter Huber & Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (München: Sellier European Law Publishers, 2007)	137, 148, 163, 179

CITATION	CITED IN
Hwang/Chung Michael Hwang & Katie Chung, *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration*, 26 Journal of International Arbitration 5 (2009) Available at: http://www.arbitration-icca.org/media/0/12641379548970/defining.pdf	81
ILA Report International Law Association, Committee on International Commercial Arbitration, *Confidentiality in International Commercial Arbitration* (2010) Available at: http://www.ila-hq.org/download.cfm/docid/536E81FE-3BC8-4144-A70672729D8A6AA8	81, 83, 94, 109
Kellerhals/Berger Franz Kellerhals & Bernhand Berger, *Erste Erfahrungen mit den Swiss Rules of International Arbitration*, 8 Anwaltsrevue 4 (2005) Available at: http://www.kellerhals.ch/en/people/pdf/FK1001%20Erste_Erfahrungen_mit_Swiss_Rules.pdf	75
Kouris Steven Kouris, *Confidentiality: Is International Arbitration Losing One of Its Major Benefits?*, 22 Journal of International Arbitration 2 (2005)	77
Kruisinga Sonja A. Kruisinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a Uniform Concept?* (Antwerp: Intersentia, 2004)	129, 148, 165, 179, 185
Kuoppala Sanna Kuoppala, *Examination of the Goods under the CISG and the Finnish Sale of Goods Act* (Turku, 2000) Available at: http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html	166, 179

CITATION	CITED IN
Lazareff Serge Lazareff, *Confidentiality and Arbitration: Theoretical and Philosophical Reflections*, ICC Bulletin Special Supplement, Publication No. 700 (2009)	94, 109
Legum Barton Legum, *Trends and Challenges in Investor-State Arbitration*, 19 Arbitration International 2 (2003)	93
Lew/Mistelis/Kröll Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003)	53, 64, 68
Ligeti Katalin Ligeti, *Confidentiality of Awards in International Commercial Arbitration* (Central European University, 2010) Available at: http://www.etd.ceu.hu/2010/ligeti_katalin.pdf	81
Lookofsky Joseph M. Lookofsky, *Understanding the CISG*, 3rd (worldwide) edition (The Hague: Wolters Kluwer, 2008)	166
Mistelis Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States*, 21 Arbitration International 2 (2005) Available at: http://academia.edu.documents.s3.amazonaws.com/1891063/Mistelis.pdf	93
Mistelis/Brekoulakis Loukas A. Mistelis & Stavros L. Brekoulakis (eds.), *Arbitrability: International & Comparative Perspectives* (The Hague: Kluwer Law International, 2009)	25

CITATION	CITED IN
Mustill/Boyd Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edition (London, 1989)	108
Müller Christoph Müller, *International Arbitration: A Guide to the Complete Swiss Case Law (Unreported and Reported)* (Zürich: Schulthess Juristische Medien, 2004)	68
Noussia Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Heidelberg: Springer-Verlag, 2010)	66
Poudret/Besson Jean-Francois Poudret, Sebastien Besson, Stephen Berti & Annette Ponti, *Comparative Law of International Arbitration*, 2nd edition (London: Sweet & Maxwell, 2007)	30
Pryles Michael Pryles, *Confidentiality*, in Lawrence W. Newman & Richard D. Hill, *Leading Arbitrators' Guide to International Arbitration*, 2nd edition (New York: Juris Publishing, 2008) Available at: http://www.arbitration-icca.org/media/0/12223892932650/confidentiality_chapter_for_leading_arbs__guide.pdf	91
Redfern/Hunter Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edition (London: Sweet & Maxwell, 2004)	25, 68
Rubino-Sammartano Mauro Rubino-Sammartano, *International Arbitration: Law and Practice*, 2nd edition (The Hague: Kluwer Law International, 2001)	68, 81, 109

CITATION	CITED IN
Schäfer/Verbist/Imhoos Erik Schäfer, Herman Verbist & Christophe Imhoos, *ICC Arbitration in Practice* (The Hague: Kluwer Law International, 2005)	37
Scherer - New Rules Matthias Scherer, *New Rules on International Arbitration in Switzerland*, 7 International Arbitration Law Review 4 (2004)	75, 76, 77
Scherer - IBA Matthias Scherer, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009*, 4 Dispute Resolution International 1 (May 2010)	55
Schlechtriem/Butler Peter Schlechtriem & Petra Butler, *UN Law on International Sales: The UN Convention on the International Sale of Goods* (Heidelberg: Springer, 2009)	129, 179
Schlechtriem/Schwenzer Ingeborg Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition (Oxford University Press, 2010)	118, 123, 145
Schwenzer - National Preconceptions Ingeborg Schwenzer, *National Preconceptions that Endanger Uniformity*, 19 Pace International Law Review 1 (Spring 2007) Available at: http://www.cisg.law.pace.edu/cisg/biblio/schwenzer3.html	165
Staudinger Julius von Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 2. Buch, Recht der Schuldverhältnisse: Wiener UN-Kaufrecht (CISG)*, 18. Aufl. (Berlin: Sellier European Law Publishers, 2005)	152

CITATION	CITED IN
Sukhbaatar Sumiya Sukhbaatar, *"Missing Information": Inquiry into the CISG* (June 2004) Available at: http://www.cisg.law.pace.edu/cisg/biblio/sukhbaatar.html	129
Thompson Danielle Alexis Thompson, *Buyer Beware: German Interpretation of the CISG Has Led to Results Unfavorable to Buyers*, 19 Journal of Law and Commerce (2000) Available at: http://cisgw3.law.pace.edu/cases/970625g1.html#ct	184
Tweeddale Andrew Tweeddale, *Confidentiality in Arbitration and the Public Interest Exception*, 21 Arbitration International 1 (2005)	93
UNCITRAL Secretariat UNCITRAL Secretariat, *Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods* (UN Doc. A/Conf. 97/5, 1979) Available at: http://www.uncitral.org/pdf/a_conf.97_5-ocred.pdf	163
Whitesell Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, ICC Bulletin Special Supplement, Publication No. 690 (2007)	50
Zeller Bruno Zeller, *Determining the Contractual Intent of the Parties under the CISG and the Common Law*, 4 European Journal of Law Reform 4 (2002) Available at: http://www.cisg.law.pace.edu/cisg/biblio/zeller8.html	118

INDEX OF CASES

CITATION	CITED IN
Austria	
Dansk Blumsterexport A/s v. Frick Blumenhandel Oberlandesgericht Innsbruck, *Dansk Blumsterexport A/s v. Frick Blumenhandel,* 4 R 161/94 (1 July 1994) Available at: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940701a3.html	173, 174
LG Salzburg, 2 February 2005 Landesgericht Salzburg, 6 Cg 42/04m (2 February 2005) Available at: http://cisgw3.law.pace.edu/cases/050202a3.html	180
Denmark	
Dr. S. Sergueev Handelsagentur v. DAT-SCHAUB A/S Sø og Handelsretten, *Dr. S. Sergueev Handelsagentur v. DAT-SCHAUB A/S*, H-0126-98 (31 January 2002) Available at: http://www.cisg.law.pace.edu/cases/020131d1.html	147
Finland	
Helsinki Court of Appeal, 30 June 1998 Helsinki Court of Appeal, S 96/1215 (30 June 1998) Available at: http://cisgw3.law.pace.edu/cases/980630f5.html	127
France	
Aita v. Ojjeh Cour d'appel de Paris, *Aita v. Ojjeh* (18 February 1986), 1986 Revue de l'Arbitrage 4	109
Bleustein et al v. Société True North et Société FCB International Tribunal de commerce de Paris, *Bleustein et autres v. Société True North et Société FCB International* (22 February 1999), 2003 Revue de l'Arbitrage 1	81, 95, 105, 109

CITATION	CITED IN
Gas del Estudo v. Ecofisa and E.T.P.M.	
Cour d'appel de Paris, *Gas del Estudo v. Ecofisa and E.T.P.M.* (11 February 1988), 1989 Revue de l'Arbitrage 4	59
Laiguede v. Ahsen Inox	
Cour de Cassation, *Laiguede v. Ahsen Inox* (10 May 1995), 1995 Revue de l'Arbitrage 4	59
Germany	
BGH, 8 March 1995	
Bundesgerichtshof, VIII ZR 159/94 (8 March 1995) Available at: http://cisgw3.law.pace.edu/cases/950308g3.html	133
BGH, 25 November 1998	
Bundesgerichtshof, VIII ZR 259/97 (25 November 1998) Available at: http://cisgw3.law.pace.edu/cases/981125g1.html	196
LG Bochum, 24 January 1996	
Landgericht Bochum, 13 O 142/95 (24 January 1996) Available at: http://cisgw3.law.pace.edu/cases/960124g1.html	182
LG Ellwangen, 21 August 1995	
Landgericht Ellwangen, 1 KfH O 32/95 (21 August 1995) Available at: http://www.cisg.law.pace.edu/cases/950821g2.html	186
LG München, 20 March 1995	
Landgerich München, 10 HKO 23750/94 (20 March 1995) Available at: http://cisgw3.law.pace.edu/cases/950320g1.html	185
LG Stuttgart, 15 October 2009	
Landgericht Stuttgart, 39 O 31/09 KfH (15 October 2009) Available at: http://cisgw3.law.pace.edu/cases/091015g1.html	179

CITATION	CITED IN
OLG Celle, 24 May 1995 Oberlandesgericht Celle, 20 U 76/94 (24 May 1995) Available at: http://cisgw3.law.pace.edu/cases/950524g1.html	129
OLG Düsseldorf, 12 March 1993 Oberlandesgericht Düsseldorf, 17 U 136/92 (12 March 1993) Available at: http://www.cisg.law.pace.edu/cases/930312g1.html	185
OLG Hamburg, 23 September 1982 Oberlandesgericht Hamburg, 6 U 4/81 (23 September 1982), [1983] Versicherungsrecht 299	76
OLG Karlsruhe, 25 June 1997 Oberlandesgericht Karlsruhe, 1 U 280/96 (25 June 1997) Available at: http://cisgw3.law.pace.edu/cases/970625g1.html	196
OLG Karlsruhe 8 February 2006 Oberlandesgericht Karlsruhe, 7 U 10/04 (8 February 2006) Available at: http://cisgw3.law.pace.edu/cases/060208g1.html	180
OLG Koblenz, 11 September 1998 Oberlandesgerich Koblenz, 2 U 580/96 (11 September 1998) Available at: http://cisgw3.law.pace.edu/cases/980911g1.html	196
OLG Köln, 12 January 2007 Oberlandesgericht Köln, 19 U 11/07 (12 January 2007) Available at: http://cisgw3.law.pace.edu/cases/070112g1.html	156
OLG München, 11 March 1998 Oberlandesgericht München, 7 U 4427/97 (11 March 1998) Available at: http://www.cisg.law.pace.edu/cases/980311g1.html	171
OLG Saarbrücken, 13 January 1993 Oberlandesgericht Saarbrücken, 1 U 69/92 (13 January 1993) Available at: http://www.cisg.law.pace.edu/cases/930113g1.html	160

CITATION	CITED IN
Israel	
Pamesa v. Mendelson Supreme Court, *Pamesa Ceramica v. Yisrael Mendelson Engineering Technical Supply Ltd*, CA 7833/06 (17 March 2009) Available at: http://cisgw3.law.pace.edu/cases/090317i5.html	175
Italy	
Officine Maraldi S.p.A. v. Intessa BCI S.p.A. et al. Tribunale di Forli, *Officine Maraldi S.p.A. v. Intessa BCI S.p.A. et al.* (16 February 2009) Available at: http://cisgw3.law.pace.edu/cases/090216i3.html	175
Netherlands	
Bevaplast v. Tetra Médical Gerechtshof Arnhem, *Bevaplast BV v. Tetra Médical SA*, 96/449 (17 June 1997) Available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=317&step=FullText	171
Fallini Stefano & Co. S.N.C. v. Foodik BV Arrondissementsrechtbank Roermond, *Fallini Stefano & Co. S.N.C. v. Foodik BV,* 900336 (19 December 1991) Available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=34&step=FullText	156
G.W.A. Bernards v. Carstenfelder Baumschulen Pflanzenhandel GmbH Gerechtshof Hertogenbosch, *G.W.A. Bernards v. Carstenfelder Baumschulen Pflanzenhandel GmbH*, C0500427/HE (2 January 2007) Available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=1437&step=FullText	175

CITATION	CITED IN
Gerechtshof Arnhem, 18 July 2006 Gerechtshof Arnhem, 2005/1005 (18 July 2006) Available at: http://cisgw3.law.pace.edu/cases/060718n1.html	175
Nurka Furs v. Nertsenfokkerij de Ruiter BV Gerechtshof's Hertogenbosch, *Nurka Furs v. Nertsenfokkerij de Ruiter BV*, C9700046/HE (15 December 1997) Available at: http://cisgw3.law.pace.edu/cases/971215n1.html	145, 156
Republic of Ghana v. Telekom Malaysia Berhad District Court of the Hague, *Republic of Ghana v. Telekom Malaysia Berhad*, HA/RK 2004.667 (18 October 2004) Available at: http://ita.law.uvic.ca/documents/TelekomMalaysiaChallengeDecision.pdf	54
Singapore	
Jurong Engineering v. Black & Veatch Singapore Singapore High Court, *Jurong Engineering Ltd v. Black & Veatch Singapore Pte Ltd* (26 November 2003) [2003] SGHC 292	71
Myanma Yaung Chi Oo Co Ltd v. Win Win Nu Singapore High Court, *Myanma Yaung Chi Oo Co Ltd v. Win Win Nu* (6 June 2003) [2003] SGHC 124 Available at: http://lwb.lawnet.com.sg/legal/lgl/rss/landmark/[2003]_SGHC_124.html	98
Spain	
Jabsheh Trading Est. v. Iberconsa Audiencia Provincial de la Pontevedra, sección 6ª, *Jabsheh Trading Est. v. Iberconsa*, 3036/2002 (3 October 2002) Available at: http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan24.htm	173

CITATION	CITED IN
Kingfisher Seafoods Limited v. Comercial Eloy Rocio Mar SL Audiencia Provincial de Pontevedra, sección 1ª, *Kingfisher Seafoods Limited v. Comercial Eloy Rocio Mar SL*, 681/2007 (19 December 2007) Available at: http://cisgw3.law.pace.edu/cases/071219s4.html	145, 175
Sweden	
A.I. Trade Finance v. Bulgarian Foreign Trade Bank Svea Court of Appeal, Division 16, *A.I. Trade Finance Inc v. Bulgarian Foreign Trade Bank Ltd* (30 March 1999), Y.B. Commercial Arbitration, vol. XXIV, 1999	109
Switzerland	
BGer Switzerland, 14 April 1990 Schweizerisches Bundesgericht, *Komplex v. Voest-Alpine Stahl* (14 June 1990), 1994 ASA Bulletin 230	30, 76
BGer Switzerland, 25 March 2004 Schweizerisches Bundesgericht, 4P.253/2003 (25 March 2004) Available at: http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=25.03.2004_4P.253/2003	74
HG Zürich, 30 November 1998 Handelsgericht Zürich, HG 930634/O (30 November 1998) Available at: http://www.cisg.law.pace.edu/cases/981130s1.html	185
KG Appenzell-Ausserhoden, 9 March 2006 Kantonsgericht Appenzell-Ausserhoden, ER3 05 231 (9 March 2006) Available at: http://www.cisg.law.pace.edu/cases/060309s1.html	175
OberG Luzern, 8 January 1997 Obergericht des Kantons Luzern, 11 95 123/357 (8 January 1997) Available at: http://cisgw3.law.pace.edu/cases/970108s1.html	155

CITATION	CITED IN
OberG Zug, 24 March 1998 Obergericht des Kantons Zug, OG 1996/2 (24 March 1998) Available at: http://www.cisg-online.ch/cisg/urteile/897.pdf	155, 173, 174
United Kingdom	
AEGIS v. European Reinsurance Company of Zurich *Associated Electric and Gas Insurance Service Ltd v. European Reinsurance Company of Zurich* [2003] UK PC 11 Available at: http://www.bailii.org/uk/cases/UKPC/2003/11.html	98
Ali Shipping Corp. v. Shipyard Trogir *Ali Shipping Corporation v. Shipyard Trogir* [1997] EWCA Civ 3054 (CA) Available at: http://www.bailii.org/ew/cases/EWCA/Civ/1997/3054.html	98
Emmott v. Michael Wilson & Partners *John Forster Emmott v. Michael Wilson and Partners Ltd* [2008] EWCA Civ 184 Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2008/184.html	97, 98
Hassneh Ins. Co. of Israel v. Mew *Hassneh Insurance Co of Israel v. Stewart J. Mew* [1993] 2 Lloyd's Rep. 243 (Comm. Ct.)	97, 98
Mantovani v. Carapelli *Mantovani v. Carapelli S.p.A.* [1980] 1 Lloyd's Rep. 375 (CA)	108
Sumukan Ltd v. Commonwealth Secretariat *Sumukan Ltd v. Commonwealth Secretariat No. 3* [2007] EWCA Civ. 1148 Available at: http://www.nadr.co.uk/articles/published/ArbitLRe/Sukaman%20v%20Commonwealth%203%202007.pdf	59

CITATION	CITED IN
<u>**United States of America**</u>	
Avis Rent A Car Sys., Inc. v. Garage Employees Union *Avis Rent A Car Sys., Inc. v. Garage Employees Union*, 791 F.2d 22 (2d Cir. 1986)	59
Bear Stearns & Co. v. N.H. Karol & Assocs., Ltd *Bear Stearns & Co. v. N.H. Karol & Assocs., Ltd*, 728 F.Supp. 499 (N.D. Ill. 1989)	59
Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223 (4th Cir. 1994)	59
Chicago Prime Packers, Inc. v. Northam Food Trading Co. *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, 320 F.Supp. 2d 702 (N.D. Ill. 2004) Available at: http://www.cisg.law.pace.edu/cases/040521u1.html	160
Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc. *Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85 (2nd Cir. 2005)	59
Pennzoil Exploration and Production Co. v. Ramco Energy Ltd *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd*, 139 F.3d 1061 (5th Cir. 1998) Available at: http://cases.justia.com/us-court-of-appeals/F3/139/1061/588216/	64
<u>**Chamber of Commerce and Industry of Budapest**</u>	
Budapest Arbitration No. Vb 94131 Arbitration Court of the Chamber of Commerce and Industry of Budapest, Vb 94131 (5 December 1995) Available at: http://www.cisg.law.pace.edu/cases/951205h1.html	169

CITATION	CITED IN
International Centre for Settlement of Investment Disputes	
Amco Asia Corp. v. Indonesia *Amco Asia Corporation v. the Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures (9 December 1983), [1986] XI Y.B. Commercial Arbitration 159	92
International Chamber of Commerce	
ICC Award No. 5622 Final Award in ICC Case No. 5622, 8 ICC Bulletin 52 (May 1997)	71
UNCITRAL Arbitration	
ICS Inspection and Control Services Limited v. Argentina *ICS Inspection and Control Services Limited v. The Republic of Argentina*, Decision on the Challenge to Mr. Stanimir A. Alexandrov (17 December 2009) Available at: http://ita.law.uvic.ca/documents/ICSArbitratorChallenge.pdf	54
National Grid P.L.C. v. Argentina *National Grid P.L.C. v. Argentine Republic*, Decision on the Challenge of Mr. Judd L. Kessler, UN7949 (3 December 2007) Available at: http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf	54
Vito G. Gallo v. Government of Canada *Vito G. Gallo v. Government of Canada*, Decision on the Challenge to Mr. J. Christopher Thomas, QC (14 October 2009) Available at: http://ita.law.uvic.ca/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf	54

STATEMENT OF FACTS

1 Mediterraneo Trawler Supply AS (hereinafter the "**Claimant**) is a Mediterranean corporation that sells supplies to fishing fleets and produces fish for human consumption. Equatoriana Fishing Ltd (hereinafter the "**Respondent**") is an Equatorianian company that sells sea products for both bait and human consumption.

2 On **14 April 2008** Claimant informed Respondent of its interest in purchasing squid for resale to long-liners to be used as bait *[Cl. Ex. No. 1, p. 9]*. Mr. Weeg, Respondent's representative, replied and on **17 May 2008** came to Claimant's offices with a sample carton of "illex danubecus 2007" *[Cl. Ex. No. 10, ¶6, p. 18]*.

3 On **29 May 2008** Claimant informed Mr. Frillstone, another Respondent's employee, that the samples were very satisfactory *[Cl. Ex. No. 2, p. 10]*. Claimant also attached a purchase order for 200 Metric Tons Illex "as per sample inspected" and "certified fit for human consumption" *[Cl. Ex. No. 3, p. 11]*. Respondent sent a sale confirmation, in which it indicated that the squid would be from the 2007/2008 catch and added a dispute settlement clause that called for arbitration in Danubia under the Milan Rules *[Cl. Ex. No. 4, p. 12]*. Claimant acknowledged the confirmation receipt without any objections *[Resp. Ex. No. 2, p. 29]*.

4 The squid arrived on **1 July 2008** in 12 containers. Claimant selected 20 cartons from the first 2 containers labelled "illex danubecus 2007" and weighed them. 5 of these cartons were later defrosted for visual inspection *[Cl. Ex. No. 10, ¶10, p. 19]*. Within the following week Claimant sold a substantial part of the squid to its customers.

5 On **29 July 2008** Claimant sent an e-mail message to Respondent, in which it stated that according to its customers the squid was hardly useable as bait *[Cl. Ex. No. 5, p. 13]*. On **3 August 2008** Respondent replied that it was surprised at the complaints about the squid and requested Claimant to have it inspected by a certified testing agency *[Cl. Ex. No. 6, p. 14]*.

6 The report from TGT laboratories showed that most of the squid marked "2008 catch" were below 100 grams and, thus, could not be used as bait *[Cl. Ex. No. 8, p. 16]*. On **16 August 2008** Claimant informed Respondent of the results and requested further instructions as to the squid disposition *[Cl. Ex. No. 7, p. 15]*. On **18 August 2008** Respondent noted that the contract neither provided for the squid size, nor indicated its purpose to be used as bait, and refused to take the squid back *[Cl. Ex. No. 9, p. 17]*.

7 Claimant sold some of the squid for human consumption through Reliable Trading House *[Cl. Ex. No. 10, ¶15, p. 20]*. The rest of the squid was destroyed.

8 On **20 May 2010** Claimant initiated arbitral proceedings against Respondent to recover the purchase price and damages. On **24 May 2010** a trade newspaper Commercial Fishing Today published an interview where Claimant's CEO disclosed the existence of the arbitral proceedings *[Resp. Ex. No. 1, p. 28]*. To protect its reputation, Respondent requested the Tribunal to order Claimant to respect confidentiality and to declare Claimant liable for any damage which may later be demonstrated resulting from the breach of confidentiality.

9 On **9 July 2010** the Arbitral Council confirmed the two arbitrators appointed by the parties *[Prot. No. 9410/4, p. 38]*. On **15 July 2010** the arbitrators appointed Mr. Malcolm Y as the presiding arbitrator. On **19 July 2010** Mr. Malcolm Y filed a statement of independence, in which he mentioned that he was a partner in a law firm, one of whose partners was advising Claimant in this matter. He also mentioned that he had no contact with this partner about the case and knew nothing about it. Both parties stated that they had no objections to the appointment of Mr. Malcolm Y. On **30 July 2010** the Arbitral Council did not confirm Mr. Malcolm Y and invited the arbitrators to make a substitute appointment *[Prot. No. 9410/7, p. 49]*.

10 On **13 August 2010** the arbitrators reconfirm Mr. Malcolm Y's appointment as the President. On **23 August 2010** the Arbitral Council refused to confirm Mr. Malcolm Y for the second time and appointed Mr. Horace Z instead *[Prot. No. 9410/9, p. 57]*. On **24 September 2010** Respondent filed an amendment to the Statement of Defense contesting the jurisdiction of the Tribunal on the ground that the Tribunal had not been constituted in accordance with the arbitration agreement *[Amendment to St. of Defense, p. 65]*.

11 In accordance with the Procedural Orders Nos. 1 & 2, the Tribunal decided that at the first stage of arbitration it would consider the challenge of jurisdiction, the breach of the confidentiality duty, the conformity of the goods and the adequacy of the notice of the non-conformity. The Tribunal also decided to consider the quantum of damages for the breach of confidentiality and any breach of the contract at a later stage of the proceedings *[Proc. Order Nos. 1 & 2, pp. 62, 66]*.

SUMMARY OF ARGUMENT

12 **I. The Tribunal should dismiss the case for the lack of jurisdiction.** The Arbitral Council was not entitled to appoint the President of the Tribunal either under the arbitration clause or under the Milan Rules. Further, the Arbitral Council's refusal to confirm Mr. Y as the President was contrary to the parties' will and lacked legal ground. As a result, the Tribunal was not constituted in accordance with the agreement of the parties, and any award it renders may be set aside or refused enforcement. Consequently, the Tribunal should dismiss the case for the lack of jurisdiction.

13 **II. Claimant is liable for the breach of the confidentiality duty.** If the Tribunal assumes jurisdiction over the case, it will also have jurisdiction to decide on the confidentiality issue. Claimant failed to keep the arbitral proceedings confidential in violation of Art. 8(1) Milan Rules 2010, or, alternatively, breached the implied duty of confidentiality. Furthermore, Claimant’s breach of confidentiality is not excused by the “protection of rights” exception. The Tribunal is requested to order Claimant to respect confidentiality of the proceedings and the award, as well as to hold Respondent entitled to damages resulting from the breach of confidentiality.

14 **III. The delivered goods were in conformity with the contract.** Respondent did not breach its obligations under Art. 35 CISG, because the squid conformed both to its contractual description and to the sample provided to Claimant. Furthermore, Respondent was not bound to deliver the squid either fit for use as bait or fit for all its ordinary purposes. In any case, Respondent is exempt from liability for the squid unfitness for bait since Claimant could not have been unaware of this non-conformity.

15 **IV. Claimant cannot rely on the non-conformity of the goods.** Claimant is precluded from relying on the squid non-conformity, since it failed to undertake an adequate inspection and notify Respondent of the non-conformity within a reasonable time after it ought to have discovered the squid undersize. Alternatively, Claimant failed to notify Respondent of the squid non-conformity within a reasonable time after it actually discovered their undersize. Conversely, Respondent acted in good faith and may refer to the untimeliness of the notice.

16 **V. Claimant is not entitled to restitution and damages.** As Respondent delivered conforming goods or Claimant cannot rely on their non-conformity, the claim for recovery of the purchase price and damages is without merit and should be dismissed.

ARGUMENT ON THE PROCEDURE

I. TRIBUNAL SHOULD DISMISS THE CASE FOR LACK OF JURISDICTION

17 Respondent originally included the arbitration clause in the contract *[Cl. Ex. No. 4, p. 12; Resp. Ex. No. 2, p. 29]* and has never disputed its existence or validity. However, notwithstanding a valid arbitration agreement, the Tribunal should dismiss the case for the lack of jurisdiction, since it has not been constituted in accordance with the agreement of the parties. First, the Arbitral Council was not entitled to appoint the President of the Tribunal under the arbitration clause **(A)**. Second, the Arbitral Council was not entitled to appoint the President of the Tribunal under the Milan Rules **(B)**. Third, the Arbitral Council improperly refused to confirm Mr. Y as the President of the Tribunal **(C)**. As a result of the improper constitution of the Tribunal, any future award may be set aside or refused enforcement **(D)**.

A. THE ARBITRAL COUNCIL WAS NOT ENTITLED TO APPOINT THE PRESIDENT OF THE TRIBUNAL UNDER THE ARBITRATION CLAUSE

18 The arbitration clause provides for arbitration under the Milan Rules by three arbitrators. With regard to the constitution of the tribunal, the arbitration clause requires that "*each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator*" *[Cl. Ex. No. 4, p. 12]*. In violation of the clear language of the arbitration clause, the President of the Tribunal, Mr. Z, was appointed by the Arbitral Council, rather than by the party-appointed arbitrators *[Prot. No. 9410/9 of 26 August 2010, p. 57]*.

19 In Claimant's understanding, by submitting that the Arbitral Tribunal has not been properly constituted, Respondent "*seems to argue that the parties have derogated from the rule in Art. 18(4)"* Milan Rules *[Cl. Memo., ¶8, p. 4]*. However, Claimant's anticipation of Respondent's argument is neither correct nor logical.

20 Article 18(4) Milan Rules regulates confirmation of the arbitrators, while in the arbitration clause the parties have stipulated a mechanism of their appointment. *Inter alia*, the parties have chosen the arbitrators as the only authority to appoint the President of the Tribunal *[Cl. Ex. No. 4, p. 12]*. It is therefore Respondent's argument that the parties have excluded application of any provision of the Milan Rules that would place the authority to appoint the President with the Arbitral Council.

1. The parties could derogate from the Milan Rules provisions authorizing the Arbitral Council to appoint the President

21 Claimant alleges that the parties cannot derogate from certain provisions of the Milan Rules due to the mandatory character of the latter *[Cl. Memo., ¶10, p. 4]*. In this allegation Claimant relies on Art. 2(2) Milan Rules which provides that "*[i]n any case, mandatory provisions that are applicable to the arbitral proceedings shall apply*". However, Art. 2(2) does not refer to the Milan Rules provisions and does not limit the parties' autonomy in derogation therefrom.

22 The wording of Art. 2(2) should be interpreted in the context of other articles which refer to applicable mandatory provisions. For example, Art. 22(2) entitles the Tribunal to issue all urgent provisional measures *"that are not barred by mandatory provisions applicable to the proceedings"*. Art. 25(2) also states that the Tribunal may evaluate the evidence *"with the exception of that which constitutes legal proof under mandatory provisions applicable to the proceedings or to the merits of the dispute"*.

23 These examples demonstrate that applicable "mandatory provisions" are certain rules of the law governing the procedure or, in certain instances, the merits of the dispute which apply regardless of the Milan Rules. Therefore, Art. 2(2) does not grant mandatory status to any of the Milan Rules provisions.

24 Claimant alleges that Art. 18(4) Milan Rules is mandatory and cannot be derogated from, since it "*aims to ensure the impartiality of the arbitrators and thus upholds the principle of equal treatment*" *[Cl. Memo., ¶12, p. 5]*. Although derogation from Art. 18(4) is not at issue *[see ¶¶19-20 above]*, had Claimant made a similar allegation in respect of the Milan Rules provisions concerning the right of the Arbitral Council to appoint arbitrators, such allegation would have been without merit.

25 Whereas it is undisputed that the principle of equal treatment of the parties embodied in Art. 18 DAL cannot be derogated from, it does not mean that every procedural rule related to the constitution of the tribunal is mandatory. Otherwise, party autonomy, which is the guiding principle in determining the procedure to be followed in an international commercial arbitration *[Redfern/Hunter, ¶6-03; Mistelis/Brekoulakis, p. 1; Fouchard/Gaillard/Goldman, p. 1; Blanke, p. 19]* would be violated.

26 Implementing the principle of party autonomy, Art. 11(2) DAL provides that *"[t]he parties are free to agree on a procedure of appointing the arbitrator or arbitrators"*.

Nothing in the DAL provisions restricts the power of the parties to limit the authority of the Arbitral Council to appoint the President.

27 Consequently, the parties could derogate from the Milan Rules provisions authorizing the Arbitral Council to appoint the President.

2. Milan Rules provisions authorizing the Arbitral Council to appoint the President do not apply under Art. 2(1) of the Milan Rules

28 Claimant could have argued that under Art. 2(1) Milan Rules the rules agreed by the parties apply only if consistent with the Milan Rules and, therefore, where the Milan Rules provisions authorize the Arbitral Council to appoint the President, they should apply regardless of the appointment mechanism stipulated in the arbitration clause.

29 In reply, Respondent argues that the hierarchy of rules should be determined pursuant to Art. 2(1) Milan Rules 2004, which provides that *"[t]he arbitral proceedings shall be governed by these Rules, subordinately by the rules agreed upon by the parties"*.

30 Respondent admits that the proceedings in the current case are generally subject to the Milan Rules 2010. However, as Claimant itself has acknowledged in its argument on the confidentiality issue *[Cl. Memo., ¶91, pp. 26-27]*, where changes to the arbitration rules are substantial, the version in force at the date of the conclusion of the arbitration agreement should apply *[Poudret/Besson, ¶110; BGer Switzerland, 14 April 1990]*.

31 The change in Art. 2(1) Milan Rules deprived the parties of the right to agree on any rules which may be deemed "inconsistent" with the Milan Rules. What is more, by virtue of the amended Art. 2(1) the parties have been allowed to agree on any rules to govern the arbitral proceedings only "*up to the constitution of the Arbitral Tribunal*". Such a limitation of the parties' autonomy constitutes a particularly substantial change and, therefore, is a ground for application of the 2004 version of Art. 2(1) Milan Rules instead of the 2010 one.

32 Consequently, the rules agreed by the parties have priority over the Milan Rules.

3. The parties intended to exclude the appointment of the President by the Arbitral Council

33 Claimant alleges that the appointment procedure stipulated by the parties in the arbitration clause "*is merely a deviation from the default rule envisaged by Art.*

14(4)(b)" and not a derogation from Art. 18(4) Milan Rules *[Cl. Memo., ¶14, p. 5]*. This allegation is, however, without merit.

34 Respondent admits that the appointment procedure in the arbitration clause complies with an option provided in Art. 14(4)(b) Milan Rules 2010 and a similar option in Art. 15(4)(b) Milan Rules 2004. However, the parties intended not only to use the option provided for initial appointment of the arbitrators, but also to make the agreed appointment mechanism universally applicable in all instances.

35 The intent of the parties to exclude the appointment of the President by the Arbitral Council manifests itself in the way the parties have modified the model arbitration clause. The parties took most of the model clause for the arbitral tribunal, save for the words "*if no agreement can be reached, the Chamber of Arbitration shall appoint the chairman*" *[compare Milan Rules 2004, p. 4 and Cl. Ex. No. 3, p. 12]*.

36 Consequently, by modifying the model arbitration clause and providing a specific appointment mechanism the parties intended to exclude the appointment of the President by the Arbitral Council.

B. THE ARBITRAL COUNCIL WAS NOT ENTITLED TO APPOINT THE PRESIDENT OF THE TRIBUNAL UNDER THE MILAN RULES

37 The Milan Rules, being expressly referred to by the parties in the arbitration clause *[Cl. Ex. No. 4, p. 12]*, can be considered as a part of the arbitration agreement *[Schäfer/Verbist/Imhoos, p. 164]*. Thus, even if the Tribunal were to decide that the Milan Rules govern the constitution of the Tribunal, the latter still was not constituted in accordance with the arbitration agreement, since the Arbitral Council could not appoint the President of the Tribunal under the Milan Rules.

38 Claimant alleges that the Arbitral Council was entitled to appoint the President pursuant to Art. 20(3) or, alternatively, pursuant to Art. 14(4)(b) Milan Rules *[Cl. Memo., ¶22, p. 8]*. However, neither of these articles authorized the Arbitral Council to appoint the President in the present case.

1. The Arbitral Council could not appoint the President under Art. 20(3) Milan Rules

39 Under Art. 20(1)(b) Milan Rules, *"[a]n arbitrator shall be replaced by another arbitrator where the arbitrator is not confirmed"*. Art. 20(3) provides that a new

arbitrator shall be appointed by the same authority that appointed a substituted arbitrator. Only if a replacement arbitrator must also be substituted can the Arbitral Council appoint a new arbitrator.

40 In the present case, after Mr. Y was not confirmed by the Arbitral Council, the arbitrators did not appoint a replacement President. Rather, they reaffirmed their appointment of Mr. Y *[Letter of 13 August, 2010, p. 51]*. Contrary to Claimant's allegation *[Cl. Memo., ¶23, p. 8]*, reaffirmation of the same person cannot be regarded as a replacement, since Art. 20 clearly provides that "*an arbitrator shall be replaced by another arbitrator*".

41 The arbitrators' express request to confirm Mr. Y as the President addressed to the Arbitral Council *[Letter of 13 August, 2010, p. 51]* further demonstrates that they only aimed to persuade the Arbitral Council to reconsider its previous decision concerning Mr. Y and had no intent to appoint a replacement President.

42 Consequently, since no replacement President had ever been appointed by the arbitrators, the Arbitral Council could not appoint the President under Art. 20(3).

2. The Arbitral Council could not appoint the President under Art. 14(4)(b) Milan Rules

43 Claimant alleges that, if Mr. Y's reaffirmation was not a replacement, "*the co-arbitrators failed to reach an agreement on a replacement arbitrator*", and the Arbitral Council was entitled to make the appointment under Art. 14(4)(b) *[Cl. Memo., ¶24, p. 9]*.

44 However, Art. 14 applies to the initial appointment of the arbitrators rather than to their replacement. As the Arbitral Council itself has clearly pointed out, it appointed Mr. Z as the President according to Art. 20(3) Milan Rules *[Prot. No. 9410/9 of 26 August 2010, p. 57]*.

45 Moreover, even if Art. 14 applied, it vests the Arbitral Council with the authority to appoint the President only if the arbitrators "*fail to reach an agreement*". In the present case, though, both arbitrators agreed on Mr. Y and appointed him as the President.

46 Consequently, the Arbitral Council did not have power to appoint the President under Art. 14(4)(b).

C. THE ARBITRAL COUNCIL IMPROPERLY REFUSED TO CONFIRM MR. Y AS THE PRESIDENT OF THE TRIBUNAL

47 Mr. Y, the President appointed by the arbitrators, was not confirmed by the Arbitral Council *[Prot. No. 9410/7 of 2 August 2010, p. 49]*. The Arbitral Council's refusal to confirm Mr. Y was contrary to the will of the parties, which it should not have disregarded **(1)**. Moreover, there was no ground for such refusal, since no objective doubts existed as to Mr. Y's independence or impartiality **(2)**.

1. The Arbitral Council should not have disregarded the will of the parties

48 Claimant alleges that since the Milan Rules are silent on how and according to which criteria the Arbitral Council has to render its decision on the confirmation of an arbitrator, it enjoys in this regard full discretion unlimited by the parties' opinions *[Cl. Memo., ¶20, p. 7]*.

49 However, the principle of party autonomy is *"a dominant characteristic of the selection of the arbitral tribunal" [Born, p. 1363]*. Accordingly, in deciding on Mr. Y's confirmation the Arbitral Council should have taken into account the parties' explicit waiver of the right to object to Mr. Y's appointment and of their expressed certainty that he *"would be independent and impartial in chairing the arbitral tribunal" [Resp. Letter of 26 July 2010, p. 47; Cl. Letter of 27 July 2010, p. 47]*.

50 Such approach is supported by the existing practice of the arbitral institutions which have the mechanism of the arbitrator's confirmation. For example, as Dr. Whitesell has pointed out, in the ICC cases where arbitrators file qualified statements of independence, *"[m]uch importance is of course attached to the absence of an objection when deciding whether or not to confirm the arbitrator" [Whitesell, p. 17]*. As an illustration, Dr. Whitesell has mentioned sixteen ICC cases where an arbitrator filed a qualified statement of independence, both parties participated in the proceedings but raised no objection, and the arbitrator was confirmed. The Court refused confirmation only in those cases where one of the parties was not participating in the proceedings and did not have the possibility to raise an objection *[Whitesell, p. 17-18, 22-23]*.

51 Following the ICC practice, a simple silence of the parties would be enough to ensure confirmation of Mr. Y. In the present case the parties went much further and expressly confirmed that they had no objections to Mr. Y's appointment as the President *[Resp. Letter of 26 July 2010, p. 47; Cl. Letter of 27 July 2010, p. 47]*. In such circumstances

the Arbitral Council's complete disregard of the opinion of the parties amounted to an abuse of discretion granted to it by Art. 18(4) Milan Rules.

2. No objective doubts existed as to Mr. Y's impartiality or independence

52 Alleging that the Arbitral Council exercised its discretion correctly, Claimant cites Art. 12(2) DAL, which provides that "[*a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence*" *[Cl. Memo., ¶21, p. 7]*. However, reference to this article is absolutely irrelevant in the present case.

53 To start with, it applies to the challenge of arbitrators, not their confirmation. Even if it could be applied by analogy to confirmation of the arbitrators, it does not provide any instruction for an arbitral tribunal considering a challenge. The "justifiable doubts" criterion established in Art. 12(2) DAL is a necessary threshold for a party to challenge an arbitrator, not for an arbitral institution to uphold the challenge *[Lew/Mistelis/Kröll, ¶13-5]*.

54 The criteria for an arbitrator to be disqualified or not to be confirmed are not established in the Milan Rules or the DAL. In accordance with the international arbitral practice, the most common ground for non-confirmation or disqualification is the objective conflict of interest in the eyes of a reasonable person *[see, e.g., National Grid P.L.C. v. Argentina; Vito G Gallo v. Government of Canada; ICS Inspection and Control Services Limited v. Argentina; Republic of Ghana v. Telekom Malaysia Berhad]*.

55 The IBA Guidelines describe a substantial number of situations where the parties may have justifiable doubts (the Orange List) and where an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts (the Red List). As CAM has acknowledged, the Arbitral Council takes into consideration the IBA Guidelines when deciding on the arbitrators' independence, in particular when the facts of the case correspond to one of the situations described in the Guidelines *[Coppo – 2010 Revision, p. 291; Scherer - IBA, p. 35-36]*.

56 This situation in the present case perfectly matched Art. 3.2.1 of the IBA Orange List, whereby "*[t]he arbitrator's law firm is currently rendering services to one of the parties ... without the involvement of the arbitrator*". As Mr. Y noted in his Statement of Independence, one of the partners from his law firm advises Claimant *[Letter of 19 July 2010, p. 46]*. The party-appointed arbitrators confirmed that, although Mr. Y

remains a partner at this law firm, for the last three years he has not been involved in the client work of the firm *[Letter of 13 August, 2010, p. 50]*.

57 Therefore, the Arbitral Council refused to confirm Mr. Y without any ground - in the absence of any doubts as to his impartiality both in the eyes of the parties and in the eyes of a reasonable third person.

D. AS A RESULT, ANY FUTURE AWARD MAY BE SET ASIDE OR REFUSED ENFORCEMENT

58 Under Art. 34(2)(iv) DAL, *"the composition of the arbitral tribunal... not in accordance with the agreement of the parties"* constitutes a ground for a court to set aside the award. A similar provision is contemplated by Art. V(1)(d) NY Convention as a ground for the award to be refused enforcement.

59 Improper appointment of the President falls under these provisions. The issue of how the third arbitrator was to be appointed "*is more than a trivial matter of form*" *[Gas del Estudo v. Ecofisa and E.T.P.M.]*. In a number of cases failure of the parties or the arbitral institution to comply strictly with the contractual appointment mechanism led to annulment or non-enforcement of the awards *[Sumukan Ltd v. Commonwealth Secretariat; Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos; Avis Rent A Car Sys., Inc. v. Garage Employees Union]*. In particular, awards were annulled where a different appointing authority than the one agreed by parties selected an arbitrator *[Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.; Gas del Estudo v. Ecofisa and E.T.P.M.; Laiguede v. Ahsen Inox; Bear Stearns & Co. v. N.H. Karol & Assocs., Ltd]*.

60 As it was demonstrated above, the current President of the Tribunal was not properly appointed. Meanwhile, the President appointed by the arbitrators in accordance with the arbitration agreement was not confirmed by the Arbitral Council without proper ground and contrary to the will of the parties.

61 In such circumstances any award rendered by the Tribunal in the current composition may be subject to setting aside or non-enforcement. Consequently, the Tribunal is requested to dismiss the case.

62 **Conclusion: Since the Arbitral Council was not entitled either to refuse confirmation of Mr. Y or to appoint Mr. Z as President of the Tribunal the Tribunal should dismiss the case for the lack of jurisdiction.**

II. CLAIMANT IS LIABLE FOR THE BREACH OF CONFIDENTIALITY DUTY

63 Were the Tribunal to assert jurisdiction over the dispute, it should hold Claimant liable for the breach of confidentiality of the arbitral proceedings. Whereas it is within the Tribunal's jurisdiction to decide on the confidentiality issue **(A)**, Claimant failed to keep the arbitral proceedings confidential in violation of Art. 8(1) Milan Rules 2010 **(B)** or, alternatively, breached the implied duty of confidentiality **(C)**. In these circumstances the Tribunal should order Claimant to respect confidentiality of the arbitral proceedings and the award **(D)** and find Respondent entitled to recover damages resulting from the breach of confidentiality **(E)**.

A. THE TRIBUNAL HAS JURISDICTION TO DECIDE ON THE CONFIDENTIALITY ISSUE

64 The arbitration clause provides for resolution of *"[a]ll disputes arising out of or related to this contract… by arbitration" [Cl. Ex. No. 4, p. 12]*. The collocation "related to" in the arbitration clause demonstrates the intention of the parties to vest the Tribunal with the most extensive jurisdiction possible *[Born, p. 1094; Lew/Mistelis/Kröll, ¶8-14; Pennzoil Exploration and Production Co. v. Ramco Energy Ltd]*.

65 Claimant alleges that the dispute concerning confidentiality of the proceedings falls outside the scope of the arbitration agreement, since it neither "arises out of" nor is "related to" the contract *[Cl. Memo., ¶81-84, p. 24-25]*. In reply, Respondent argues that the language of the arbitration clause covers the confidentiality dispute, since the obligation to keep the arbitral proceedings confidential is a part of the contract.

66 Confidentiality obligation is imposed on the parties by virtue of Art. 8 Milan Rules 2010. Since the parties have incorporated the Milan Rules into the arbitration agreement by reference *[Cl. Ex. No. 4, p. 12]*, any issue governed therein shall be deemed to be a part of the arbitration agreement *[Noussia, ¶8.3.2; Born, p. 704]*. Were the Tribunal to find that Milan Rules 2004 apply to the confidentiality issue, the parties' duty to keep the proceedings confidential would nevertheless be implied in the arbitration agreement *[see ¶¶90-95 below]*. Accordingly, obligation to keep the proceedings confidential is contained in the arbitration agreement.

67 Claimant alleges that a dispute arising out of the arbitration agreement cannot be considered by the Tribunal, since the arbitration agreement is, *"by virtue of the doctrine of separability, a contract separate from the main contract" [Cl. Memo., ¶83, pp. 24-25]*. However, Claimant's reference to the separability doctrine is incorrect.

68 The separability doctrine deals with the validity of the underlying contract and its effect on the arbitration agreement, and *vice versa [Lew/Mistelis/Kröll, ¶6-9; Redfern/Hunter, ¶3-60]*. It does not extend to determination of the scope of the arbitration clause *[see, e.g., Rubino-Sammartano, p. 229; Born, pp. 353-354; Müller, p. 45]*.

69 Thus, for the purpose of determining the scope of the Tribunal's jurisdiction the arbitration agreement constitutes a part of the main contract. Consequently, a dispute concerning the confidentiality issue "arises out" and is "related to" the contract.

B. CLAIMANT FAILED TO KEEP THE ARBITRAL PROCEEDINGS CONFIDENTIAL IN VIOLATION OF ART. 8(1) MILAN RULES 2010

70 Respondent argues that Claimant failed to preserve confidentiality of the arbitral proceedings in violation of Art. 8(1) Milan Rules. Contrary to Claimant's allegations *[Cl. Memo., ¶90, p. 26; ¶¶102-108, pp. 30-32]*, Art. 8(1) Milan Rules 2010 applies in the present case **(1),** and Claimant's conduct qualifies for a breach thereof **(2)**. Moreover, Claimant is not subject to the "protection of rights" exception **(3)**.

1. Art. 8(1) Milan Rules 2010 applies in the present case

71 It is universally recognized that arbitral procedure shall generally be governed by the arbitration rules in force at the date of commencement of the proceedings *[Craig/Park/Paulsson, p. 142; Derains/Schwarz, p. 73; ICC Award No. 5622; Jurong Engineering v. Black & Veatch Singapore]*. The same approach is reflected in the Milan Rules *[Art. 43(3) Milan Rules 2004; Art. 39 Milan Rules 2010]*.

72 Claimant admits that the proceedings in the present case started after 1 January 2010 and hence are governed by Milan Rules 2010. Meanwhile, it argues that confidentiality issue is still governed by Art. 8(1) Milan Rules 2004, alleging that the change in this Article was substantial and contrary to parties' intent *[Cl. Memo., ¶90, p. 26]*. However, both allegations are without merit.

73 First, the change in Art. 8(1) introduced in 2010 does not contradict the parties' intent. The parties entered into the contract in 2008 *[Cl. Ex. No. 4, p. 12]*. Under Art. 43(2) Milan Rules 2004 then in force, the Arbitral Council was empowered to amend or replace the Rules. By virtue of Art. 43(3) Milan Rules 2004 such new provisions were to be applied to all proceedings commenced after their entry into force.

74 The parties incorporated the Milan Rules in the arbitration agreement without a reference to the particular version and, thus, gave their consent to the possible changes in the procedure *[see, e.g., BGer Switzerland, 25 March 2004]*.

75 In addition, Art. 39 Milan Rules 2010 provides for the application of the Milan Rules 2010 to arbitrations commenced after their entry into force *"[u]nless otherwise agreed by the parties*". Instead of entering into an additional agreement in this regard, the parties proceeded with arbitration under the Milan Rules 2010. Thus, they implicitly consented to the application of the Milan Rules 2010 *[see, e.g., Kellerhals/Berger, p. 161; Scherer – New Rules, pp. 121-122]*, including the new version of Art. 8. Therefore, the change in Art. 8 cannot be regarded as contradicting the parties' intent.

76 Second, contrary to Claimant's allegation, the change in the confidentiality provision of the Milan Rules 2010 was not substantial. To result in the application of an older version, a revision shall be fundamental *[Scherer – New Rules, p. 121]*, such as modification of the procedure for challenge of arbitrators, exclusion of any setting aside proceedings *[BGer Switzerland, 14 April 1990]* or shift from a sole arbitrator to a three-member panel *[OLG Hamburg, 23 September 1982]*. However, in the case at hand the revision cannot be deemed fundamental, since an implied duty of confidentiality existed under the Milan Rules 2004 as well *[see ¶¶90-95 below]*.

77 Furthermore, for an old version of the arbitration rules to apply, the revision must also be completely unexpected by the parties *[Scherer – New Rules, p. 121]*. However, the revision of Art. 8 Milan Rules does not meet this requirement either, since in the recent years many leading international arbitration centers have revised their rules to provide specifically for confidentiality *[Born, p. 2281; Kouris, p. 136; Art. 34.6 SIAC Rules in 1997; Art. 30 LCIA Rules in 1998; Art. 43 Swiss Rules in 2004; Art. 18 ACICA Rules in 2005]*.

78 Consequently, it is Art. 8(1) Milan Rules 2010 that governs the issue of confidentiality in the present case.

2. Claimant's conduct qualifies for a breach of the confidentiality under Art. 8(1) Milan Rules

79 The Request for Arbitration was filed on 20 May 2010 *[Prot. No. 9410/1, p. 22]*, which meant the commencement of arbitral proceedings under the Milan Rules *[Azzali, p. 7]*. On 22 May 2010 Claimant's CEO reported the initiation of arbitration in an interview to

a widely distributed trade newspaper *[St. of Defense, ¶4, p. 24; Resp. Ex. No. 1, p. 28]*. Thus, Claimant violated confidentiality of the arbitral proceedings two days after the proceedings commenced.

80 Claimant alleges that its CEO did not disclose any confidential information in the interview, since the existence of the dispute between the parties had been previously reported in the media *[Cl. Memo., ¶106, p. 31]*. However, Claimant's CEO did not only mention the dispute between the parties; he disclosed the existence of the arbitral proceedings *[Resp. Ex. No. 1, p. 28]*.

81 Unlike the existence of a dispute, the fact of the initiated arbitration is protected by the confidentiality obligation *[Ligeti, p. 7; Hwang/Chung, p. 610; Rubino-Sammartano, p. 800; UNCITRAL Notes, ¶32; ILA Report, p. 13]*. This view has found support in the case law *[Bleustein et al v. Société True North et Société FCB International]* and in a number of arbitration rules expressly providing for confidentiality of the existence of arbitral proceedings *[see, e.g., Art. 18.2 ACICA Rules; Art. 35.3 SIAC Rules; Art. 36.1 VCNIA Rules; Art. 39.1 HKIAC Rules; Art. 73(a) WIPO Rules]*.

82 Further, Claimant alleges that the procedural confidentiality obligation under Art. 8(1) Milan Rules only covers the parties' briefs and documents resulting from the arbitral proceedings *[Cl. Memo., ¶104, p. 31]*.

83 This allegation is without merit, since Art. 8(1) Milan Rules does not specify the information that shall be kept confidential. Quite to the contrary, it is broadly formulated so as to cover any issue relating to the proceedings *[Coppo - New Rules, p. 28]*. Confirming this interpretation, a group of experts of the International Law Association have recognized that the broad wording of Art. 8(1) Milan Rules extends the duty of confidentiality to the existence of arbitration *[ILA Report, p. 13]*.

84 Consequently, while Art. 8(1) Milan Rules obliges the parties to keep confidential the existence of the arbitration, Claimant breached this obligation.

3. Claimant's breach is not excused by the "protection of rights" exception

85 Claimant alleges that the disclosure of the initiation of the arbitral proceedings was necessary to preserve its business reputation and is thus excused by the "protection of rights" exception under Art. 8(1) Milan Rules *[Cl. Memo., ¶107, p. 32]*. However, this

exception only concerns the use of the arbitral award for protection of one's rights and does not apply in the present case.

86 As per Art. 8(1) Milan Rules *"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"*. The word *"it"* grammatically refers to *"the arbitral award"* and not to *"the arbitral proceedings"*.

87 The Italian version of the Rules, which shall prevail in case of uncertainty *[Milan Rules, p. 2]*, is clear in this regard. It provides for an exception from the duty of confidentiality where it is necessary to make use of *"quest'ultimo"* (the latter), which unequivocally refers to *"il lodo"* (the arbitral award).

88 Therefore, it is only the use of the arbitral award that may fall under the "protection of rights" exception under the Milan Rules. In the present case, no award has yet been rendered by the Tribunal, thus there are no grounds for application of this exception.

89 Consequently, the "protection of rights" exception under Art. 8(1) Milan Rules cannot excuse Claimant's breach of confidentiality of the arbitral proceedings.

C. ALTERNATIVELY, CLAIMANT BREACHED THE IMPLIED DUTY OF CONFIDENTIALITY

90 Were the Tribunal to find that the confidentiality issue is governed by the Milan Rules 2004, which do not expressly oblige the parties to keep the proceedings confidential, Claimant still breached the implied duty of confidentiality.

91 Confidentiality is considered as one of the core characteristics and major advantages of arbitration as a means of dispute resolution *[Coppo - 2010 Revision, p. 287; Born, p. 189; Pryles, p. 415; Craig/Park/Paulsson, ¶16.06]*, while the duty to preserve it is implied from the mere existence of an agreement to arbitrate *[Born, 2280; Bond, p. 273; Gaillard, p. 153]*.

92 Claimant's allegation that the implied duty of confidentiality in unsettled in international practice is only based on an ICSID case *Amco Asia Corp. v. Indonesia* and a few court decisions in the USA, Sweden and Australia *[Cl. Memo., ¶98, p. 28]*. All of these cases are not representative of the world arbitral practice.

93 First, confidentiality has different dimensions in the context of international investment and trade disputes, since in investor-state arbitration emphasis is shifted from

confidentiality to transparency *[Mistelis, p. 212; Born, p. 2273; Legum, p. 143; Tweeddale, p. 62]*.

94 Second, the three jurisdictions referred to by Claimant almost exclusively represent the negative approach to the implied confidentiality *[see, e.g., ILA Report, pp. 23-27; Lazareff, pp. 86-87]*. While there is no indication in the case file that Danubia has adopted this approach, it does not apply in the present case.

95 Therefore, the confidentiality obligation is imposed on the parties, albeit implicitly, even if the Milan Rules 2004 apply. What is more, it reasonably covers the existence of the arbitration between the parties *[Bleustein et al v. Société True North et Société FCB International]*. Hence, in the case at hand, Claimant violated the implied confidentiality duty *[see ¶¶79-80 above]*.

96 Claimant further claims excuse under a "protection of rights" exception in the context of implied confidentiality *[Cl. Memo., ¶109, pp. 32-33]*. However, the requirements for the application of this exception are not met in the present case.

97 First, the disclosure must be *"reasonably necessary for the protection of the legitimate interests of an arbitrating party" [Emmott v. Michael Wilson & Partners; Hassneh Ins. Co. of Israel v. Mew]*. Claimant's CEO could justify Claimant before the customers without disclosing the existence of arbitration in violation of his duty of confidentiality.

98 Second, all the reported relevant cases concerning the "protection of rights" exception to the implied confidentiality duty concerned the use of confidential materials in court or in other arbitral proceedings *[Emmott v. Michael Wilson & Partners; Ali Shipping Corp. v. Shipyard Trogir; AEGIS v. European Reinsurance Company of Zurich; Hassneh Ins. Co. of Israel v. Mew; Myanma Yaung Chi Oo Co Ltd v. Win Win Nu]*. This is not the case here.

99 Consequently, if the Tribunal were to find Milan Rules 2004 applicable to the confidentiality issue, Claimant should be held liable for the breach of the implied confidentiality obligation and is not subject to any exception thereto.

D. The Tribunal should order Claimant to respect the confidentiality of the proceedings and the award

100 Since the Tribunal has jurisdiction over the confidentiality issue, and Claimant breached the confidentiality duty, Respondent requests the Tribunal to issue an order for Claimant

to respect the confidentiality of the arbitral proceedings and any ensuing award in the form of a provisional measure of protection *[Statement of Defense, ¶¶8, 24, pp. 25, 27]*.

101 In accordance with Art. 22(2) Milan Rules and Art. 17 DAL the Tribunal is vested with the power to issue interim measures which it deems necessary for protective purposes, in particular, to maintain or restore the *status quo* pending determination of the dispute *[Art. 17(2)(a) DAL]*. Such orders may be directed, *inter alia*, towards forbidding public statements which are potentially in breach of confidentiality obligations *[Born, p. 1999]*.

102 Claimant might have argued that the provisional measure cannot be granted, since Art. 17A(1)(a) DAL requires that *"[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered"*, while Respondent has already requested the Tribunal to find Claimant liable for damages *[St. of Defense, ¶24, p. 27]*. Such allegation, however, would be incorrect.

103 First, Respondent's request concerns the damages which may result from the breach that already occurred, whereas Art. 17A DAL deals with the harm which *"is likely to result if the measure is not ordered"*, *i.e.* the harm related to a potential future breach of confidentiality.

104 Second, while Respondent considers it possible to demonstrate damages which may result from the publication of Claimant's CEO's interview, it should be admitted that, generally, damages are seldom a satisfactory remedy for breach of such confidentiality obligations, because of difficulties in establishing causation and directness *[Born, p. 2008]*. It is therefore appropriate for tribunals to issue provisional measures ordering compliance with confidentiality obligations, particularly with regard to obligations to maintain the confidentiality of the arbitral process itself *[Born, p. 2008]*.

105 Claimant alleges that probability of a future infringement has to be demonstrated in order for such measure to be granted *[Cl. Memo., ¶101 p. 30]*. No such requirement, however, can be found either in the Milan Rules or the DAL. Furthermore, case law on this issue demonstrates that a breach of confidentiality itself means that future infringement is possible *[see, e.g., Bleustein et al v. Société True North et Société FCB International]*.

106 Consequently, in the present case there is a sufficient ground for the Tribunal to order Claimant to respect the confidentiality of the arbitral proceedings and the award.

E. THE TRIBUNAL SHOULD DECLARE RESPONDENT ENTITLED TO RECOVER DAMAGES RESULTING FROM THE BREACH OF CONFIDENTIALITY

107 Respondent requests the Tribunal to declare Claimant liable for any damages that may be provable resulting from the breach of confidentiality of the arbitral proceedings *[St. of Defense, ¶24, p. 27]*.

108 Claimant alleges that the Tribunal cannot award damages for the breach of the confidentiality obligation, because it is procedural by nature *[Cl. Memo., ¶115, p. 34]*. However, a breach of a procedural obligation can give rise to a claim for damages *[see, e.g., Mantovani v. Carapelli; Mustill/Boyd, p. 524]*.

109 In particular, in respect of a breach of confidentiality of the proceedings, both case law *[Aita v. Ojjeh; Bleustein et al v. Société True North et Société FCB International; A.I. Trade Finance v. Bulgarian Foreign Trade Bank]* and the doctrine *[Rubino-Sammartano, p. 806; Brown, p. 1016; ILA Report, p. 20; Lazareff, p. 88]* have recognized damages as a remedy available to the aggrieved party.

110 Claimant further alleges that Respondent's counterclaim cannot be heard by the Tribunal, since the value of the counterclaim has not been stated, as required by Art. 10(2)(c) Milan Rules *[Cl. Memo., ¶112, p. 33]*. However, the value of the counterclaim cannot be technically determined at this stage, since the harm which may be caused is of continuing nature. Moreover, as mentioned above in ¶104 above, the establishment of causation between the breach of confidentiality and damages can be difficult. The collection of necessary evidence may be very burdensome. Meanwhile, as demonstrated above, Claimant disputes the very possibility to award damages for the breach of confidentiality *[see ¶108 above]*.

111 For these reasons Respondent has filed a counterclaim requesting the Tribunal to acknowledge Claimant's liability for the breach of confidentiality as well as Respondent's respective right to recover any damages which may arise thereof.

112 Since under Art. 27 Milan Rules the Tribunal is free to decide on the admissibility of new claims, taking into account all circumstances, the Tribunal is requested to admit Respondent's counterclaim at the current stage of the proceedings.

113 **Conclusion: Claimant breached the confidentiality of the arbitral proceedings and the Tribunal should order Claimant to respect confidentiality of the proceedings and the award and hold Respondent entitled to damages resulting from the breach.**

ARGUMENT ON THE MERITS

III. THE DELIVERED GOODS WERE IN CONFORMITY WITH THE CONTRACT

114 Claimant asserts that Respondent breached its obligations under Art. 35 CISG *[Cl. Memo., ¶¶27-44, pp. 9-14]*. In response to this contention, Respondent submits that it fulfilled the obligations under Art. 35 CISG and delivered the goods in conformity with the contract.

115 The delivered squid conformed both to its contractual description **(A)** and to the sample provided to Claimant **(B)**. Moreover, Respondent was not bound to deliver the squid either fit for use as bait **(C)** or fit for all its ordinary purposes **(D)**. Finally, even if the Tribunal considers that the squid had to be fit for use as bait, Respondent is exempt from liability for this non-conformity **(E)**.

A. THE SQUID CONFORMED TO ITS CONTRACTUAL DESCRIPTION

116 The contract provided for the delivery of Landfrozen Whole Round Illex from 2007/2008 catch as per sample already received *[Cl. Ex. No. 4, p. 12]*. The sample carton received by Claimant contained unsized squid taken from the run of the catch *[see ¶¶123-125 below]*. Indeed, Respondent delivered the squid that absolutely conformed to these contractual requirements.

117 Claimant now argues that the squid size was also specified in the contract, because Claimant indicated in the accompanying message that it was particularly pleased that the sample fell almost exclusively in the range of 100/150 grams *[Cl. Memo, ¶30, p. 10]*. This allegation is, nevertheless, erroneous.

118 Claimant correctly notes that in the interpretation of the contract due consideration is to be given to all relevant circumstances of the case, including the negotiations *[Art. 8(3) CISG]*. However, this rule is only designed to assist in interpreting the unclear terms of the contract between the parties *[Zeller, p. 630; Stanivucovic in Felemegas, Art. 8, ¶c]*. In no way should a party's declarations made during negotiations outweigh the relevant provisions of the contract *[Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8, ¶4]*.

119 Claimant's purchase order provided for the delivery of unsized squid ("as per sample inspected") and indicated its purpose that did not require the particular size ("fit for human consumption") *[Cl. Ex. No. 3, p. 11]*. Meanwhile, in the accompanying message Claimant only mentioned its pleasure that the sample squid was of certain size and that

this size would give its customers the best results *[Cl. Ex. No. 2, p. 10]*. A reasonable person would have considered this phrase just as a positive feedback on Respondent's goods and not as a part of the purchase order.

120 Moreover, Claimant as an experienced fish trader knew that the sizes of 2007 and 2008 squid would be different *[Proc. Order No. 3, clar. 27, p. 72]*. At the same time, Claimant did not object to "2007/2008 catch" clause which Respondent inserted into the contract *[Cl. Ex No. 4, p. 12; Resp. Ex. No. 2, p. 29]*.

121 While Claimant correctly notes that some of 2008 squid were within the range of 100-150 grams *[Cl. Memo., ¶32, p. 11]*, it nevertheless disregards the fact that their average size was below this level *[Cl. Ex. No. 8, p. 16]*. Previously, Claimant concentrated its attention solely on the average size of the squid, overlooking its margin limits *[Cl. Ex No. 10, ¶7, p. 18; Req. for Arbitration, ¶14, p. 5]*. Hence, a reasonable person in Claimant's position would have understood that the squid from 2007 and 2008 catch cannot be of a similar size range.

122 Consequently, reasonable interpretation of the contract shows that Respondent did not have to provide the squid of certain size and, therefore, delivered conforming goods.

B. THE SQUID CONFORMED TO THE SAMPLE PROVIDED TO CLAIMANT

123 Claimant also alleges that the squid did not conform to the sample under Art. 35(2)(c) CISG because they were not of the same size as the squid from the sample carton *[Cl. Memo., ¶¶34-37, p. 11-12]*. Respondent agrees with Claimant that a sample is a warranty that the goods possess all the qualities of the sample *[Cl. Memo., ¶36, pp. 11-12; Schwenzer in Schlechtriem/Schwenzer, Art. 35, ¶25]*. However, the sample squid provided to Claimant was taken from the run of the catch and did not have any size parameters.

124 Contrary to Claimant's assertions *[Cl. Memo., ¶36, p. 12]*, it is well-known in the trade that fish products are sold either sized (graded) or unsized (ungraded) *[FAO Report; Canadian Report, p. 9; St. of Defense, ¶12, p. 25]*. Fish products assorted to their weight are specifically labelled; conversely, when the fish is ungraded, fishers do not mark it as such *[Fisheries Monitoring, p. 3; FRDC Project, p. 38]*. This comes from the fact that the graded fish is more expensive than the ungraded one *[FAO Report; St. of Defense, ¶12, p. 25]*. As an experienced trader, Claimant should have known these standards.

125 The sample squid did not have any marks indicating its assortment according to the weight (i.e. "illex 100-150 gr."). The label merely indicated that the squid were caught in 2007 *[Proc. Order No. 3, clar. 32, p. 73]*. Consequently, the squid did not have to be of a certain size and did conform to the sample.

C. RESPONDENT WAS NOT BOUND TO DELIVER THE SQUID FIT FOR USE AS BAIT

126 Furthermore, Claimant asserts that the squid was not fit for its particular purpose according to Art. 35(2)(b) CISG *[Cl. Memo., ¶¶38-41, p. 12-13]*. However, Respondent was not obliged to deliver the squid fit for bait, since a reference to the sample excludes application of warranties of purpose set out in Art. 35 CISG **(1)** or, alternatively, Claimant did not duly inform Respondent that it intended to use the squid as bait **(2)**.

1. Reference to the sample excludes application of warranties of purpose

127 It is widely recognized that if the parties agree on a sale by sample, the seller does not have to deliver the goods which are fit for their ordinary or particular purposes *[Bianca in Bianca/Bonell, Art. 35, ¶2.6.1; Enderlein/Maskow, Art. 35, ¶16; Magnus in Honsell, Art. 35, ¶24; Benedick, ¶¶314, 324]*. The rationale is that a sample is by itself a sufficient description of the goods and there is no need to supplement it by any implied warranties of purpose *[Helsinki Court of Appeal, 30 June 1998]*.

128 As the contract provided for the delivery of the squid "as per sample" *[Cl. Ex. No. 4, p. 12]*, the squid was sufficiently described by the sample provided to Claimant. Hence, Respondent did not have to comply with the implied warranties of ordinary or particular purpose of the goods provided in Art. 35 CISG.

2. Claimant did not inform Respondent that it ordered the squid for bait

129 Alternatively, contrary to its contentions *[Cl. Memo., ¶39, p. 12]*, Claimant failed to adequately inform Respondent of its intention to use the squid for bait. Art. 35(2)(b) CISG mandates the seller to deliver the goods fit for their particular purpose only if the purpose is "*expressly or impliedly made known to the seller at the time of the conclusion of the contract*". The buyer is deemed to have communicated the particular purpose only if a reasonable person could have derived it from the circumstances *[Kruisinga, p. 32; Schlechtriem/Butler, p. 138]*. Otherwise, the buyer will bear the consequences of his unclear language *[Sukhbaatar, ¶3.A.1; see also OLG Celle, 24 May 1995]*.

130 Neither the purchase order nor the accompanying message contained any indications that Claimant intended to use the squid as bait *[Cl. Exs. Nos. 2 & 3, pp. 10-11]*. Conversely, the purchase order clearly provided in the Quality clause that the squid was to be certified fit for human consumption *[Cl. Ex. No. 3, p. 11]*.

131 Claimant mentioned its intention to purchase squid for resale to fishing fleet only in its first inquiry, which was sent more than 1,5 months before the purchase order *[Cl. Ex. No. 1, p. 9]*. At that moment Claimant led negotiations with Mr. Weeg, a sales representative of Respondent *[Cl. Ex. No. 10, ¶6, p. 18]*.

132 Mr. Weeg was fully authorized to act on behalf of Respondent in a sale of squid *[Proc. Order No. 3, clar. 18, p. 71]*. Nevertheless, for some reason Claimant chose to send the purchase order to another Respondent's employee, Mr. Frillstone, while it chose not to reiterate the purpose of the squid to him *[Cl. Ex. No. 2, p. 10]*. As a result, Mr. Frillstone was not familiar with the details of the previous negotiations and, seeing the words "fit for human consumption" in the purchase order, he in good faith considered that Claimant ordered the squid for fishmeal and not for bait.

133 Claimant may not also argue that Respondent should have known that the squid needed to be "certified fit for human consumption" only to comply with the relevant Mediterranean regulations *[Cl. Memo., ¶40, p. 13]*. Claimant did not indicate this motive in the purchase order. Meanwhile, the public law regulations existing in the buyer's state lie outside the seller's competence *[Henschel, ¶4.1(a); BGH, 8 March 1995]*.

134 Indeed, Respondent never encountered regulations that required certification of bait products for human consumption if they were stored together with the fish for human consumption. Respondent's client in Mediterraneo stored these products separately and thus did not require such certification *[Proc. Order No. 3, clar. 24, p. 71]*. While a similar regulation existed in Equatoriana, the case file does not contain any evidence that Respondent stored the squid for bait in Equatoriana and together with the sea products for human consumption. In fact, the contract indirectly shows that Respondent did not store the squid in Equatoriana, since it had been caught in Danubia and dispatched from Oceania *[Cl. Ex. No. 4, p. 12]*.

135 Consequently, Respondent could not reasonably infer Claimant's intention to use the squid as bait and did not have to deliver the goods fit for that purpose.

D. RESPONDENT WAS NOT BOUND TO DELIVER THE SQUID FIT FOR ALL ITS ORDINARY PURPOSES

136 Finally, Claimant asserts that Respondent breached Art. 35(2)(a) CISG because the squid was not suitable for its ordinary use *[Cl. Memo., ¶42, p. 13]*. However, Respondent did not have to deliver the squid fit for all its ordinary purposes.

137 First, as it was mentioned above in ¶¶127-128, the parties made a reference to the sample, thereby excluding the warranty of ordinary purpose. Second, Claimant informed Respondent of the specific purpose of the squid - human consumption *[see ¶130 above]*. Meanwhile, indication of a particular purpose of goods also excludes application of Art. 35(2)(a) CISG *[Honnold/Flechtner, §231; Huber/Mullis, p. 135]*.

138 Therefore, Respondent was not obliged to provide the goods fit for all its ordinary purposes and did not breach Art. 35(2)(a) CISG.

E. RESPONDENT IS EXEMPT FROM LIABILITY FOR THE SQUID NON-CONFORMITY

139 Should the Tribunal consider that the squid had to be fit for use as bait, Respondent is still exempt from liability for this non-conformity. Contrary to Claimant's allegations *[Cl. Memo., ¶¶43-44, p. 14]*, Respondent may rely on Art. 35(3) CISG since at the time of the conclusion of the contract Claimant could not have been unaware that the squid would not be suitable for bait.

140 The sale confirmation that Respondent sent to Claimant indicated that the squid would be taken from both 2007 and 2008 catch *[Cl. Ex. No. 4, p. 12]*. As it was demonstrated above, the average size of 2008 squid was below 100 grams and as such could not be used by long-liners *[see ¶121 above]*. Moreover, Respondent removed the word "certified" from the warranty of fitness of the squid for human consumption, showing Claimant its own understanding of the clause. After receiving this confirmation, Claimant could not but understand that Respondent was planning to supply unsized squid, not fit for use as bait. As a result, Respondent should be exempt from liability for the squid non-conformity.

141 **Conclusion: Respondent delivered the goods that conformed to the contract and did not breach its obligations under Art. 35 CISG.**

IV. CLAIMANT CANNOT RELY ON THE NON-CONFORMITY OF THE GOODS

142 Even if the Tribunal considers that Respondent delivered non-conforming goods, then contrary to Claimant's assertions *[Cl. Memo., ¶¶50-68, pp. 16-20]* Respondent submits that Claimant is precluded from relying on this non-conformity.

143 First, Claimant failed to undertake an adequate examination of the squid **(A)**. Second, Claimant did not notify Respondent of the squid non-conformity within a reasonable time after it ought to have discovered the squid undersize **(B)**, or after it actually discovered it **(C).** Finally, Respondent may refer to untimeliness of the notice **(D)**.

A. CLAIMANT FAILED TO UNDERTAKE AN ADEQUATE EXAMINATION OF THE SQUID

144 According to Art. 38(1) CISG, "*[t]he buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances*". Claimant asserts that by weighing 20 of 20,000 cartons of the squid and defrosting 5 of them for visual inspection, it undertook an appropriate examination of the goods *[Cl. Memo., ¶¶56-61, pp. 16-17]*. However, the circumstances of the case show that this examination was inadequate, since Claimant did not select the squid for inspection at random **(1)** or did not inspect a sufficient number of cartons **(2)**. In addition, the examination could not be deferred until the squid arrived to Claimant's customers **(3)**.

1. Claimant did not select the squid for inspection at random

145 When the buyer receives a huge amount of frozen goods, it may examine only a part of these goods, provided that it inspects them at random *[Schwenzer in Schlechtriem/Schwenzer, Art. 38, ¶14; Nurka Furs v. Nertsenfokkerij de Ruiter BV; Kingfisher Seafoods Limited v. Comercial Eloy Rocio Mar SL]*. In determining, whether the examination was done at random, such factors as labelling, weight and date of production selected for inspection are relevant *[DiMatteo, p. 82]*.

146 Claimant chose to check the size of the squid only from the cartons labelled "illex danubecus 2007" and disregarded those labelled "illex danubecus 2008" *[Proc. Order No. 3, clar. 32, p. 73]*. At the same time, the sample carton received by Claimant was labelled "illex danubecus 2007". Bearing in mind their different labelling, it was reasonable for Claimant to inspect at least several cartons of "illex danubecus 2008", especially in light of the fact that these squid were caught at the beginning of the season and could be relatively small *[Proc. Order No. 3, clar. 27, p. 72]*. After all, it was

Claimant who requested Respondent to label the squid cartons *[Cl. Ex. No. 3, p. 11]*. As labelling facilitates the goods inspection, it was, therefore, unreasonable for Claimant to disregard it when examining the squid.

147 In a similar case the court dismissed the buyer's claim because he did not pay attention to the production dates stamped on the boxes and, therefore, failed to make an adequate examination of the frozen mackerel *[Dr. S. Sergueev Handelsagentur v. DAT-SCHAUB A/S]*.

148 The argument that it was reasonable for Claimant to assume that the delivery was either sized in its entirety, or not at all *[Cl. Memo., ¶59, p. 18]*, is also ungrounded. A buyer may not make any assumptions when examining the goods, since the very purpose of the examination is to obtain an objective confirmation that the delivered goods conform to the contract *[Huber/Mullis, p. 149; Kruisinga, pp. 63-64]*.

149 An example of the adequate random examination is contained in the Report of the TGT Laboratories *[Cl. Ex. No. 8, p. 16]*. Unlike Claimant, this laboratory took the cartons from each of the 12 containers, and, most importantly, selected a roughly equal quantity of 2007 and 2008 squid (48 and 72 cartons respectively) for inspection.

150 Consequently, Claimant failed to undertake a random examination of the goods.

2. Claimant did not inspect a sufficient number of cartons

151 Moreover, contrary to its assertions *[Cl. Memo., ¶56, p. 17]*, Claimant failed to inspect a sufficient number of cartons to undertake an adequate examination of the squid.

152 First, Claimant actually inspected only 5 cartons of the squid. As Claimant itself admits, it was important that the squid did not show any signs of decay and was of the proper size *[Cl. Memo., ¶57, p. 17]*. The examination must be of such nature as to reveal identifiable defects, taking all the circumstances into account *[Magnus in Staudinger, Art. 38, ¶28; Herber/Czerwenka, Art. 38, ¶5]*.

153 Under the contract, the squid was iced on board, blast landfrozen and packed in poly-lined block per master carton *[Cl. Ex. No. 4, p. 12]*. The size and the quality of the squid could therefore be checked only by defrosting the carton *[Proc. Order No. 3, clar. 33, p. 73]*. Consequently, it was of no use for Claimant to weigh the cartons (which also contained a proportion of ice), and it actually examined only 5 cartons of the squid by defrosting them.

154 Second, the number of the cartons inspected by Claimant did not satisfy the fish trade examination standards of FAO and WHO. If the buyer receives from 3,201 to 35,000 blocks of fish products, it has to choose at least 20 of them for examination *[Codex Standard 165-1989, ¶7-1]*. Claimant received 20,000 cartons of squid *[Cl. Ex. No. 4, p. 12]* and, thus, had to defrost at least 20 of them.

155 This approach is also confirmed by the case cited by Claimant, in which the court found that the examination of a few samples per mille of the sterile plastic bags was sufficient *[OberG Luzern, 8 January 1997]*. Meanwhile, Claimant's reliance on the *Frozen meat case* is unfounded, since in this case the buyer defrosted substantially more items (30-40 cartons) and the court found that the inspection of 0,1% (or 20 cartons in our case) of goods was enough *[OberG Zug, 24 March 1998]*.

156 Third, Claimant may not argue that it did not have to defrost more than 5 cartons of squid as they become essentially worthless after defrost *[Cl. Memo., ¶56, p. 17]*. As it is widely recognized, the buyer is not relieved from its obligation to examine the goods if as a result of such inspection the goods become unfit for use *[OLG Köln, 12 January 2007; Nurka Furs v. Nertsenfokkerij de Ruiter BV; Fallini Stefano & Co. S.N.C. v. Foodik BV]*.

157 The defrosted squid was unfit for bait but could still be used for fishmeal *[Cl. Ex. No. 10, ¶10, p. 19]*. Thus, Claimant could sell the squid, for instance, with the assistance of Reliable Trade House, through which it managed to sell 20 metric tones later *[Cl. Ex. No. 10, ¶15, p. 20]*. Last but not least, should Claimant have defrosted 20 squid cartons (weighing 200 kg), it would have lost no more than US$320 *[Cl. Ex. No. 4, p. 12]*, which cannot be compared with the losses Claimant now seeks to recover *[Req. for Arbitration, ¶30, p. 8; Cl. Memo., p. 35]*.

158 Consequently, Claimant inspected an insufficient number of cartons.

3. The examination could not be deferred until the arrival of the squid to Claimant's customers

159 Claimant might have argued that the examination of the squid was deferred until their arrival to its customers *[not addressed in Cl. Memo.]*. However, according to Art. 38(3) CISG, the examination may be deferred until after the goods have arrived at the new destination only *"if the goods are redirected in transit or re-dispatched by the buyer without a reasonable opportunity for examination by him*".

160 Art. 38(3) CISG does not apply if the buyer takes possession of the goods before they are redirected *[Andersen - Duty to Examine Goods, p. 811; OLG Saarbrücken, 13 January 1993]*. This provision is only intended for cases in which the buyer is a mere stopover *[DiMatteo p. 81]* or does not own any facilities or trucks *[Chicago Prime Packers, Inc. v. Northam Food Trading Co.]*.

161 Claimant took possession of the squid as soon as they arrived in Mediterraneo. The containers were delivered by truck to Claimant's premises, where it had a reasonable opportunity to undertake a full inspection of the squid *[Proc. Order No. 3, clar. 31, p. 72]*. Claimant forwarded the squid to its customers only on the following week *[Cl. Ex. No. 10, ¶11, p. 19]*.

162 Consequently, Claimant could not defer the inspection of the squid under Art. 38(3) CISG and failed to undertake its adequate examination.

B. CLAIMANT DID NOT NOTIFY RESPONDENT OF THE NON-CONFORMITY WITHIN A REASONABLE TIME AFTER IT OUGHT TO HAVE DISCOVERED THE SQUID UNDERSIZE

163 Art. 39(1) CISG provides that "*[t]he buyer loses the right to rely on the lack of conformity if he does not give notice... within a reasonable time after he... ought to have discovered it*". The buyer "ought to have discovered" a non-conformity of the goods when an examination would have revealed the non-conformity *[CISG-AC Opinion No. 2, Art. 39, ¶1; UNCITRAL Secretariat, Art.36(38), ¶2; Huber/Mullis, p. 149]*. As Claimant did not undertake an adequate inspection of the squid *[see ¶¶144-162 above]*, the period for sending the notice to Respondent started to run on 1 July 2008.

164 Claimant now alleges that it sent a timely notice to Respondent on 29 July 2008, because it is allegedly widely accepted that the notice should be given within one month after discovery of the defects *[Cl. Memo., ¶62, p. 18]*. However, this assertion is incorrect. First, the CISG does not specify a fixed period for notification **(1)**. Second, the circumstances of the case required Claimant to give the notice promptly **(2)**. Finally, in support of its position, Claimant cited judicial decisions that were held in substantially different circumstances **(3)**.

1. The CISG does not provide for a fixed period for notification

165 As it is universally acknowledged, the reasonable time for giving notice varies depending on the circumstances *[Kruisinga, p. 76; Brunner, Art. 39, ¶12; Schwenzer -*

National Preconceptions, p. 109]. Thus, contrary to Claimant's assertions *[Cl. Memo., ¶62, pp. 18-19]*, no fixed period (whether 14 days, one month or otherwise) should be considered as reasonable in the abstract without taking into account the circumstances of the case *[CISG-AC Opinion No. 2, Art. 39, ¶3]*.

166 In turn, Claimant's reliance on the "noble month" theory is based purely on domestic factors. This notion was developed solely by the courts of one region and seems out of tune with both the letter and the spirit of the flexible Convention rules *[Lookofsky, p. 87; Kuoppala, ¶4.4.1.4; Flechtner, p. 17; Girsberger p. 247]*, as well as inconsistent with the international character of the CISG *[Art. 7(1) CISG]*.

167 Hence, no fixed period of time shall be taken into account when determining whether Claimant sent the notice timely.

2. The circumstances required Claimant to give the notice promptly

168 Indeed, the circumstances of the case show that the notice should have reasonably been given on the day of the examination, or at least within 1-2 weeks afterwards.

169 First, the parties consistently followed a speedy method of communication *[Andersen - Reasonable Time, ¶VI.3; Budapest Arbitration No. Vb 94131]*. Both Claimant and Respondent used solely e-mail messages in their negotiations. Within one day (29 May 2008) Claimant sent the purchase order to Respondent *[Cl. Ex. No. 3, p. 11]*, received the sale confirmation *[Cl. Ex. No. 4, p. 12]* and replied to it *[Resp. Ex. No. 2, p. 29]*. Moreover, when Claimant actually received complaints from its customers, it immediately sent Respondent a message on these problems *[Cl. Ex. No. 5, p. 13]*. It was therefore easy and reasonable for Claimant to send the notice on defects on the same day when it inspected the squid.

170 Second, the squid was non-conforming solely because Respondent misunderstood Claimant's intentions and Respondent was not against curing the defects. The normal time for delivery of the squid was about 4 weeks *[Proc. Order No. 3, clar. 36, p. 73]*. If Claimant had sent the notice on the squid non-conformity immediately after its inspection, Respondent might have cured the defects by delivering substitute squid of appropriate size. In this case, Claimant would already have the conforming squid in stock by the end of July and would not have incurred severe losses.

171 Finally, Claimant was bound to send an immediate notice of non-conformity since it was an experienced firm in the fish trade and was able to compose the appropriate message promptly *[OLG München, 11 March 1998; Bevaplast v. Tetra Médical]*.

172 Consequently, the circumstances of the case show that Claimant should have given the notice promptly after the squid inspection, or at least within 1-2 weeks afterwards.

3. Claimant cited judicial decisions that were held in different circumstances

173 In support of a longer period for giving notice, Claimant cited *Frozen meat case*, *Jabsheh Trading Est. v. Iberconsa* and *Dansk Blumsterexport A/s v. Frick Blumenhandel [Cl. Memo., ¶68, p. 20]*. Again, the circumstances of these cases were not similar to the circumstances of the present dispute.

174 In *Jabsheh Trading Est. v. Iberconsa* the court considered the notice made after 2 months as timely since the parties specifically agreed on this period in the Examination & Notification clause. Meanwhile, in *Dansk Blumsterexport A/s v. Frick Blumenhandel*, the court held that the period for notice could be given within 1,5 months simply because during this period the buyer was on vacation. As a matter of fact, in *Frozen meat case* the buyer notified the seller within 7 days after it learnt of the defects, while a period of a month was permitted only for the examination of the goods that were withheld by the Egyptian government during this time *[OberG Zug, 24 March 1998]*.

175 On the contrary, recent judicial practice on Art. 39 CISG shows that if a buyer does not have any specific reasons for a delay, it must give notice of non-conformity promptly after it learned about the defects *[see, e.g., Kingfisher Seafoods Limited v. Comercial Eloy Rocio Mar SL; G.W.A. Bernards v. Carstenfelder Baumschulen Pflanzenhandel GmbH; Pamesa v. Mendelson; Officine Maraldi S.p.A. v. Intessa BCI S.p.A. et al.; Gerechtshof Arnhem, 18 July 2006; KG Appenzell-Ausserhoden, 9 March 2006]*.

176 For these reasons, Claimant should have informed Respondent of the non-conformity within several days after it examined the squid and, accordingly, Claimant failed to give the notice within a reasonable time.

C. CLAIMANT DID NOT NOTIFY RESPONDENT OF THE NON-CONFORMITY WITHIN A REASONABLE TIME AFTER IT ACTUALLY DISCOVERED THE SQUID UNDERSIZE

177 Even if the Tribunal decides that Claimant undertook a proper examination of the squid and could not discover its undersize at that moment, Claimant still failed to notify

Respondent within a reasonable time after it actually discovered the squid undersize. First, Claimant's message of 29 July 2008 failed to specify the nature of the squid non-conformity **(1)**. Second, the parties did not suspend the period for sending notice until the results of the expert examination **(2)**. As a result, Claimant's message of 16 August 2008 was a late notice **(3)**.

1. Claimant's message of 29 July 2008 did not specify the nature of the squid non-conformity

178 Contrary to Claimant's assertions *[Cl. Memo., ¶¶64-65, p. 19]*, the e-mail message of 29 July 2008 was not sufficiently specific to constitute a valid notice of non-conformity.

179 According to Art. 39(1) CISG, the notice shall indicate the nature of the lack of conformity. It means that the notice must describe in detail the symptoms that rendered the goods non-conforming *[Magnus in Honsell, Art. 39, ¶9; Schlechtriem/Butler, ¶155; Andersen in Felemegas, ¶VII; LG Stuttgart, 15 October 2009]*, as well as give all the information on the defects that is available to the buyer at that time *[Huber/Mullis, p. 158; Kuoppala, ¶5.2.2.1; Kruisinga, ¶5.2]*.

180 Meanwhile, a general description of the defects is insufficient to constitute a valid notice *[Ferrari, p. 212]*. For instance, in *Hungarian wheat case* the court did not consider the buyer's letter informing the seller that sub-purchaser of the wheat had refused to accept them as a proper notice *[OLG Karlsruhe, 8 February 2006]*. In another case the buyer's statements that "the goods could not have been put into operation", "were of another type" and "neither ready to be used nor insurable" were found insufficiently specific to constitute a notice under Art. 39 CISG *[LG Salzburg, 2 February 2005]*.

181 Similarly, in the e-mail message of 29 July 2008 Claimant only stated that according to its customers' complaints, "the squid was hardly useable as bait" *[Cl. Ex. No. 5, p. 13]*. This statement did not indicate the nature of non-conformity, since the squid could have been unfit for bait as a result of its decay or substandard freezing *[Proc. Order No. 3, clars. 19, 28 & 29, pp. 71-72]*. Moreover, as Claimant itself acknowledges, it was already aware that the customers' complaints concerned the squid undersize when sending this message *[Cl. Ex. No. 10, ¶12, p. 19]*. Still, Claimant chose not to inform Respondent on this fact.

182 Finally, Claimant may not argue that Respondent as an expert in the fisheries trade should have concluded that the problems related to the squid size *[Cl. Memo., ¶65, p. 19]*. The experience of the seller does not relieve the buyer from the duty to give a detailed notice on defects of the goods. In a similar case the buyer notified the seller that the delivered truffles were "soft". The court found this notice to be improper even though most professional truffle-vendors would know that softness implied a probable worm-infestation *[LG Bochum, 24 January 1996]*.

183 Consequently, Claimant's message of 29 July 2008 failed to specify the nature of non-conformity and did not constitute a valid notice.

2. The parties did not suspend the period for sending the notice

184 Claimant may not also assert that by arranging an expert examination of the squid the parties suspended the notification until the results of the examination became available *[Cl. Memo., ¶66, p. 19]*. If the parties desire to derogate from the general rules on notice set out in Art. 39 CISG, they should explicitly state in the contract that they are opting-out from these provisions *[Thompson, p. 263; see also Butler, §8.06(B)]*.

185 According to the CISG case law, the fact that the seller agrees on an additional examination of the goods does not change the duration of the period for giving notice *[Kruisinga, p. 107; Andersen - Exceptions to Notification Rule, p. 23]*. For instance, in *Rancid bacon case*, the court rendered the notice untimely although the buyer claimed that the notice was delayed as a result of the seller's request to perform a veterinary examination of the bacon *[LG München, 20 March 1995]*. Other courts also found that the seller who lets itself into the examination of the goods may nevertheless rely on the untimeliness of the notice *[HG Zürich, 30 November 1998; OLG Düsseldorf, 12 March 1993]*.

186 Meanwhile, *Spanish paprika case* cited by Claimant is irrelevant since therein the seller accepted the notice of non-conformity, recollected the goods, and the court did not investigate whether this notice was timely at all *[LG Ellwangen, 21 August 1995]*.

187 Since Claimant's message of 29 July 2008 failed to specify the nature of the squid non-conformity *[see ¶¶178-183 above]*, Respondent had to request Claimant to inspect it in a certified agency *[Cl. Ex. No. 7, p. 15]*. Respondent had never received any complaints about the squid it sold before and was deeply surprised to hear them *[Proc. Order No. 3, clar. 16, p. 70]*. In that respect, Respondent was entitled to "cover his bases" and

receive further information on the defects without "shooting himself in the foot" and loosing the right to rely on the untimeliness of the notice *[Andersen - Reasonable Time, ¶1.3.3.1]*.

188 Hence, the parties did not suspend the period for sending the notice.

3. Claimant's message of 16 August 2008 was a late notice

189 Finally, countering Claimant's argument *[Cl. Memo., ¶68, p. 20]*, Respondent submits that Claimant's message of 16 August 2008 was a late notice of non-conformity.

190 Claimant discovered the non-conformity on 29 July 2008 *[Cl. Ex. No. 5, p. 13]* and the notification period constituted 18 days. As it was demonstrated in ¶¶168-172 above, the circumstances of the case required a prompt notice on defects (i.e. within a few days). Thus, this notice was not given within a reasonable time.

191 In any case, Claimant received the results of the squid examination on 12 August 2008 *[Cl. Ex. No. 8, p. 16]*. In the meanwhile, Claimant informed Respondent of the results only on 16 August 2008, which was Saturday *[Cl. Ex. No. 7, p. 15]*. As a consequence, Respondent could receive and reply to this notice only on 18 August 2008 *[Cl. Ex. No. 9, p. 17]*.

192 In light of these facts, Claimant's message of 16 August 2008 cannot by any means constitute a timely notice of non-conformity.

D. RESPONDENT MAY REFER TO UNTIMELINESS OF THE NOTICE

193 Claimant also asserts that Respondent is precluded from relying on Art. 39 CISG pursuant to Art. 40 CISG *[Cl. Memo., ¶¶51-52, p. 16]*. However, this Article states that "*[t]he seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer*".

194 Accordingly, Respondent may rely on the untimeliness of the Claimant's notice, since Respondent could not know that the size of the squid constituted non-conformity **(1)** or, alternatively, disclosed the squid undersize to Claimant **(2).**

1. Respondent could not know that the squid size constituted non-conformity

195 Art. 40 CISG represents a fundamental principle of good faith and fair dealing and should be interpreted as not allowing a seller to abuse its rights under Arts. 38 & 39 of

the Convention *[Garro, p. 253]*. Thus, contrary to Claimant's assertions *[Cl. Memo., ¶51, p. 16]*, it is not sufficient that Respondent was aware of the squid size, but rather that their small size rendered the squid non-conforming.

196 This approach has been consistently applied in the judicial practice *[Andersen - Exceptions to Notification Rule, p. 27]*. In *Chemical substance case* the court refused to apply Art. 40 CISG since the seller did not know that the dryblend had to be resistant to low temperatures under the contract *[OLG Koblenz, 11 September 1998]*. In another case the buyer failed to invoke Art. 40 CISG since it was unable to prove the seller's knowledge that the adhesive coating would render the protective foil non-conforming *[OLG Karlsruhe, 25 June 1997, upheld in this part by BGH, 25 November 1998]*.

197 As it was demonstrated above in ¶¶129-135 and not contested here by Claimant, Respondent was not acting in bad faith and could not know that the squid size would cause any problems to Claimant. In fact, it was sincerely surprised to hear any complaints about its production *[Cl. Ex. No. 6, p. 14]*. Hence, Respondent did not breach the principle of fair dealing and may refer to untimeliness of the Claimant's notice.

2. **Respondent disclosed the squid undersize to Claimant**

198 Alternatively, Claimant disclosed the fact that the squid was undersized to Claimant. As it was mentioned above in ¶140, Respondent indicated in the purchase order that the squid would be from both 2007 and 2008 catch and only "fit for human consumption". Moreover, the squid cartons themselves were labelled as 2007 and 2008 illex *[Proc. Order No. 3, clar. 32, p. 73]*. This information was sufficient for a reasonable person to suspect that the squid might fail to conform with the purchase order, taking into account that Claimant knew the seasons for harvesting the different species of squid and that the squid grew larger as the season progressed *[Proc. Order No. 3, clar. 27, p. 72]*.

199 For this reason, Respondent in good faith disclosed all the information on the squid to Claimant and is entitled to rely on the untimeliness of the notice.

200 **Conclusion: Claimant may not rely on the non-conformity of the goods since it failed to adequately inspect the squid and give a timely notice of non-conformity, while Respondent acted in good faith and may refer to untimeliness of the notice.**

V. CLAIMANT IS NOT ENTITLED TO RESTITUTION AND DAMAGES

201 Under to Art. 45 CISG, the buyer may exercise its right to avoid the contract and claim restitution and damages only "*if the seller fails to perform any of his obligations under the contract or this Convention*". As it was demonstrated above, Respondent did not breach its obligation to deliver the goods in conformity with the contract, or, alternatively, Claimant cannot rely on their non-conformity. As a result, Claimant was not entitled to declare the contract avoided under Art. 49 CISG or to seek recovery of the loss incurred.

202 **Conclusion: the claim for reimbursement of the purchase price and damages is without merit and should be dismissed.**

REQUEST FOR RELIEF

203 In light of the above submissions, Respondent respectfully requests the Tribunal to find:

- that the Tribunal should dismiss the claim for lack of jurisdiction **(I)**;
- that Claimant is liable for the breach of the duty of confidentiality **(II)**;
- that the delivered goods were in conformity with the contract **(III)**;
- that Claimant cannot rely on the non-conformity of the goods **(IV)**; and
- that Claimant is not entitled to restitution and damages **(V)**.

CERTIFICATE OF AUTHENTICITY

We hereby confirm that no person other than the student members of MGIMO-University team listed below has participated in the writing of this Memorandum for Respondent:

Dmitry Andreev	Alina Dyumina	Natalia Kislyakova	Sergey Korolev
Svetlana Makurova	Bogdana Shtoma	Natalia Zakharova	

Respectfully submitted on 20 January 2011

by MGIMO-University team.
E-mail: mgimoteam@googlegroups.com
Web: http://vis.cisg.ru