

Eight Annual
WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

(In response to Memorandum for Claimant, University of Cádiz)

The Claimant:

SPORTS & MORE SPORTS, Inc.
214 Commercial Ave., Oceanside,
Danubia

The Respondent:

VIS WATER SPORTS, Co.
395 Industrial Place, Capitol City
Equatoriana

Attorneys for the Respondent

Edin Karakaš

Filip Sulic

Ivana Sverak

Luka Tadic-Colic



UNIVERSITY OF ZAGREB
FACULTY OF LAW

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ABBREVIATIONS

Answer	Answer to the Request for Arbitration
Art.	Article
Arts.	Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAEC	Danubian Act on Electronic Commerce
DAICA	Danubian Act on International Commercial Arbitration
DTL	Danubian Trademark Law
<i>e.g.</i>	<i>exempli gratia</i> (for example)
ed.	edition
<i>i.e.</i>	<i>id est</i> (that is)
IC	International class
ICs	International classes
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce
LG	<i>Landgericht</i>
MAL	UNCITRAL Model Law on International Commercial Arbitration
MECL	UNCITRAL Model Law on Electronic Commerce
n.	footnote

Nice Agreement	Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks
No.	Number
Nos.	Numbers
OLG	<i>Oberlandesgericht</i>
op.cit.	<i>opere citato</i> (in the work cited)
para.	paragraph
paras.	paragraphs
RIW	<i>Recht der internationalen Wirtschaft</i>
Request	Request for Arbitration
ULIS	Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
v.	<i>Versus</i>
Vis Fish	Vis Fish Company
Vol.	Volume
YCA	Yearbook Commercial Arbitration

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INTRODUCTION

The Respondent respectfully makes the following submissions:

Firstly, the Arbitral Tribunal has no jurisdiction to adjudicate this case (Issue 1).

Secondly, the Claimant was not entitled to avoid the contract (Issue 2).

Thirdly, the Claimant is not entitled to damages (Issue 3).

Fourthly, the Claimant should pay arbitration costs and legal fees (Issue 4).

Arguments in response to the arguments not made by the Claimant have been shaded.¹

I. APPLICABLE LAW

Under this title, the Respondent will briefly address the issue of the applicable law: the law applicable to the form of the arbitration agreement (**1.1.**), arbitration rules and the law applicable to the arbitration proceedings (**1.2.**), the law applicable to merits of the dispute (**1.3.**).

1.1. Law applicable to the form of the arbitration agreement

The Respondent submits that the law applicable to the form of the arbitration agreement is the law of Danubia as the law of the place of arbitration. Danubia has introduced the UNCITRAL Model Law on International Commercial Arbitration (MAL) in its domestic legal system.² On the assumption that the MAL has been enacted in a special act, the Respondent shall refer to it as the Danubian Act on International Commercial Arbitration (DAICA).³

Under Art. 35 of ICC Rules of Arbitration (ICC Rules), the Arbitral Tribunal shall make every effort to make sure that the Award is enforceable at law. Therefore, the Respondent submits that the relevant provisions of the NYC should also be taken into account in determining the formal validity of the arbitral clause.⁴

¹ Moot Rules, IV para. 2.

² Moot Rules, 'Dispute Settlement'.

³ The Respondent also assumes that each article of the DAICA matches the text of the MAL, including the numeration. Since commentaries on the DAICA are not available, the commentaries of the MAL have been used.

⁴ See J. van den Berg, 'The New York Arbitration Convention of 1958' Kluwer Law and Taxation Publishers, Deventer Boston 1981, 47-49. This has been accepted by arbitrators in a number of cases, e.g. *German (F.R.) Seller v. Dutch Buyer*, Tribunal of Hamburg Friendly Arbitration, 15 January 1976, YCA Vol. III (1978), 212; *Bulgarian State enterprise v. Italian enterprise*, Court of Arbitration at the Bulgarian Chamber of Commerce and Industry, 12 May 1971, YCA Vol. IV (1979), 191; *American (N.Y.) Seller v. Norwegian Buyer*, Netherlands Arbitration Institute, 15 September 1977, YCA Vol. VI (1981), 142. Also confirmed in *Bomar Oil N.V. (Neth.*

Danubia has enacted the UNCITRAL Model Law on Electronic Commerce (MECL). On the assumption that the MECL has been enacted in a special act, the Respondent shall refer to it as the Danubian Act on Electronic Commerce (DAEC).⁵

1.2. Arbitration rules and the law applicable to the arbitration proceedings

The parties have agreed on the applicability of the Moot Rules. Pursuant to the arbitral clause⁶, the parties have also agreed that the ICC Rules shall be applied to the questions not regulated by the Moot Rules. If there are questions not regulated by ICC Rules, the Respondent proposes the application of DAICA as *lex loci arbitri*, as the most suitable law for arbitral proceedings.⁷

1.3. Law applicable to the merits of the dispute

The parties are in agreement that the law applicable to the merits of the dispute will be the United Nations Convention on Contracts for the International Sale of Goods (CISG).

In respect of the existence of Vis Fish's intellectual property rights, which will be important for assessment of breach of contract, the applicable law is Danubian intellectual property law, by virtue of Art. 42(1) CISG. In the present case the Danubian Trademark Law (DTL) shall be applied.

Antiles) v. *Entreprise Tunisienne d'Activites Petrolieres-ETAP (Tunisia)*, *Cour d'appel* (Court of Appeal) Paris, 20 January 1987, YCA Vol. XIII (1988), 468-469.

⁵ The Respondent also assumes that each article of the DAEC matches the text of the MECL, including the numeration. Since commentaries on the DAEC are not available, the commentaries of the MECL have been used.

⁶ The Claimant's General Conditions of Purchase, Clause 14.

⁷ Art. 1(2) DAICA. See M. Rubino-Sammartano, 'International Arbitration Law', Kluwer Law and Taxation Publishers, Deventer 1990, 141; A. Redfern & M. Hunter, 'The Law and Practice of International Commercial Arbitration' (2nd ed.), Sweet & Maxwell, London 1991, 150; R. Hill, *On-line Arbitration*, 15 *Arbitration International* 2 (1999), 296. Confirmed in cases *Petrasol BV (Netherlands) v. Stolt Spur Inc. (Liberia)* by *Arrondissementrechtbank* (Court of First Instance), Rotterdam, 28 September 1995, YCA Vol. XXII (1997), 765; *Charterer (nationality not indicated) v. Shipowner (nationality not indicated)*, Court of First Instance of Athens, 1983, YCA Vol. XI (1986), 501; *Ludmila C. Shipping Co. Ltd. (Cyprus) v. Maderas G.L., S.A. (Spain)*, *Tribunal Supremo* (Supreme Court) Spain, 17 June 1983, YCA Vol. XI (1986), 526; *Insurance company (Sweden) v. Reinsurance company (Switzerland)* by the Supreme Court of Switzerland, 21 March 1995, YCA Vol. XXII (1997), 805; *Rocco Giuseppe e Figli s.n.c. (Italy) v. Federal Commerce and Navigation Ltd. (Canada)*, *Corte di cassazione* (Supreme Court), 15 December 1982, YCA Vol. X (1985), 465; *English company X v. Spanish company Y*, *Tribunal Supremo* (Supreme Court) Spain, 10 February 1984, YCA Vol. X (1985), 494-495.

ISSUE 1 - THE TRIBUNAL HAS NO JURISDICTION TO DECIDE OVER THE PRESENT DISPUTE

Under this title the Respondent will show that the Tribunal has no jurisdiction over the present dispute because the parties have not concluded an arbitration agreement.

The Respondent submits that the parties concluded two contracts of sale and that neither of them contained an arbitration clause (1.). If the honorable Tribunal holds that the parties concluded one contract of sale, the Respondent respectfully submits that this contract did not contain an agreement to arbitrate (2.).

1. TWO CONTRACTS OF SALE WERE CONCLUDED AND NEITHER OF THEM CONTAINED AN ARBITRATION CLAUSE

The Respondent submits that two contracts of sale were concluded between the parties. The first contract was concluded on 10 May 1999, and did not contain an arbitration clause (1.1.). The second contract was concluded on 25 July 1999, and did not contain an arbitration clause (1.2.).

According to Art. 7(2) DAICA, the arbitration agreement must be in writing.⁸ In the present case, arbitration agreement could only have been concluded through the exchange of documents. The Respondent will prove that the arbitration agreement was not concluded either through an exchange of documents of 5 and 6 April 1999 (for the first contract), or through an exchange of documents of 27 and 28 May (for the second contract).

1.1. The first contract of sale was concluded on 10 May 1999 and did not contain an arbitration clause

Pursuant to Art. 23 CISG, a contract is concluded by acceptance of an offer. However, a reply to an offer which contains material modifications is a rejection of the offer and constitutes a counteroffer.⁹ Art. 19(3) CISG expressly provides that an additional or different terms relating to the settlement of disputes are considered to alter the terms of the offer materially.

⁸ The offer and the acceptance must be in writing. Therefore, the Claimant's allegations that the arbitration agreement was concluded by conduct cannot be accepted (Memorandum for the Claimant, para 2.1.c.). See A. Broches, 'Commentary on the UNCITRAL Model Law on International Commercial Arbitration', Kluwer Law and Taxation Publishers, Deventer 1990, 41 and H. M. Holtzman & J. E. Neuhaus, 'A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary', Kluwer Law and Taxation Publishers, Deventer Boston 1989, 261.

⁹ Art. 19(1) CISG.

The Claimant's offer of 5 April 1999¹⁰ included General Conditions of Purchase, which contained the arbitration clause. The Respondent, in its reply of 6 April 1999,¹¹ rejected the arbitration clause by offering the Claimant the Respondent's General Conditions of Sale with the jurisdiction selection clause. The reply materially altered the terms of the offer and constituted a counteroffer. Since the counteroffer was accepted when the Claimant paid the price on 10 May 1999¹², the contract of sale was concluded by conduct¹³. Thus, the first contract of sale was concluded on 10 May 1999 and it did not contain an agreement to arbitrate.

The Claimant argues in its Memorandum¹⁴ that the Respondent has not validly incorporated General Conditions of Sale in its reply to the Claimant's offer. The Claimant implied that the Respondent's incorporation of General Conditions of Sale was not clear. However, in its reply the Respondent stated: '*I should remind you that our General Conditions of Sale, which we include in all sales contracts, are available at [URL omitted]. I suggest you take a look at them.*'.

According to Art. 8(1) CISG, statements made by and other conduct of a party are to be interpreted according to its intent where the other party knew or could not have been unaware of what that intent was. Since the Claimant asserted that the intent of including the General Conditions of Sale was unclear to it, the Respondent submits that the standard of a reasonable person¹⁵, pursuant to Art. 8(2) CISG, should be applied. Accordingly, the Respondent submits that a reasonable person would understand that the phrase '*all sales contracts*' encompasses the present contract. In addition, since the reference to the General Conditions of Sale was made in reply to the offer, it can only be reasonably understood that the intent was to include them in the contract. Therefore, the Respondent submits that the incorporation of its General Conditions of Sale was clear and that they were included in the first contract of sale.

The fact that the Respondent's e-mail did not contain the attachment with its General Conditions of Sale, but rather a link, does not affect the conclusion that they were validly

¹⁰ E-mail of 5 April 1999; Claimant's Exhibit No. 3.

¹¹ E-mail of 6 April 1999; Claimant's Exhibit No. 4.

¹² Clarification No. 48.

¹³ Art. 18 CISG provides that conduct of the offeree indicating assent to the offer is an acceptance. '*[...] sellers offer to sell goods may be accepted by the buyer's payment of the price [...]*', Farnsworth in C. M. Bianca & M. J. Bonnell, 'Commentary on the International Sales Law: The 1980 Vienna Sales Convention', Giuffrè, Milan 1987, 166.

¹⁴ Claimant's Memorandum, I.2.c.

¹⁵ '*This rule stipulates that, in general, an objective standard has to be applied which is based on the view of a neutral, prudent person in the same situation.*', Magnus, *General Principles of UN Sales Law*, <http://joe.law.pace.edu/cisg/biblio/magnus.html>, visited on 8 February 2001.

incorporated.¹⁶ The Respondent's e-mail contained the hypertext link that was easy to open and led directly to its General Conditions of Sale. Owing to the fact that the Claimant could have read the Respondent's General Conditions of Sale without any difficulty, it should be held that their contents were made known to the Claimant.

Since the Respondent validly incorporated its General Conditions of Sale, whose contents could not have been unknown to the Claimant, it should be concluded that the General Conditions of Sale were a part of the Respondent's counteroffer and therefore included in the contract of sale.

1.2. The second contract of sale was concluded on 25 June 1999 and did not contain an arbitration clause

The Claimant in its e-mail of 27 May 1999¹⁷ offered to modify the first contract. The Claimant's words '*we would like to make our initial purchase larger than anticipated*' can only be understood as an offer to modify the first contract, *i.e.* to increase the quantity of the goods initially ordered. If the Claimant's intention was to conclude a new contract, it would have stated that it wanted to make a 'new' or a 'second' purchase.

The Respondent did not accept that offer for modification, but rather made an offer for the conclusion of a new contract of sale. It was reasonable to assume that the Claimant proposed modification of the first contract because it wanted to obtain the reduction of the price already paid.¹⁸ Since the same effect could be achieved by simply reducing the price in the second contract, the Respondent did not find it necessary to modify the original obligations. Due to the fact that the obligations from the first contract were performed, there was no reason to modify that contract.

In its offer for the conclusion of a new contract dated 28 May 1999¹⁹ the Respondent stated: '*for purposes of establishing appropriate discount, we have treated your two purchase orders as one purchase*'. This statement shows the Respondent's intention to conclude the second contract of sale. If there was only one contract of sale it would not be necessary to treat it '*as one purchase*' since it would itself be one purchase. In addition, by stating: '*That means that you will*

¹⁶ The hypertext link of such nature allows the user to read the text by using a pointing device (*e.g.* a mouse) and by clicking on the link. *See* Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), *Article 5 bis. Incorporation by reference*, 46-5, <http://www.uncitral.org/en-index.htm>, visited on 8 February 2001.

¹⁷ E-mail of 27 April 1999; Claimant's Exhibit No. 5.

¹⁸ The Respondent promised 5 percent discount if the order was to exceed \$100,000 and 8 percent for order larger than \$500,000. (Claimant's Exhibit No. 2).

¹⁹ E-mail of 28 April 1999, Claimant's Exhibit No. 6.

effectively receive 8 percent discount on your PO 6839 rather than the 5 percent discount previously calculated.', the Respondent also explicitly clarified the scope of such a treatment. It decided to treat the purchase orders as one purchase solely in order to do a favor to the Claimant by establishing a larger discount. Since the two purchase orders were treated as one solely for purposes of calculation and subsequent reduction of price, *a contrario* they were not treated as one in respect to any other provision of the contract.

Therefore, the Respondent rejected the Claimant's offer for modification of the first contract by proposing the conclusion of a new one. The Respondent's offer for the conclusion of the new contract was accepted by the Claimant when it paid the price on 25 June 1999.²⁰ Since the Respondent's offer did not include an arbitration clause, the arbitration clause was not made a part of the contract.

Since the arbitration clause was not concluded either as a part of the first or of the second contract of sale, the Respondent respectfully submits that the Tribunal lacks jurisdiction to adjudicate the present dispute.

2. *EVEN IF THERE WAS ONE CONTRACT OF SALE BETWEEN THE PARTIES, IT DID NOT CONTAIN AN ARBITRATION CLAUSE*

As stated earlier²¹, the Claimant's e-mail dated 27 May 1999 was an offer for the modification of the contract. If the Tribunal holds that the Respondent's e-mail dated 28 May 1999 was not an offer for the conclusion of the new contract of sale, the Respondent submits that it was a counteroffer for a modification of the contract.

The Claimant offered the modification that would change the provisions of the contract regarding the quantity of the goods, the price (by offering Purchase order 6910), and the dispute settlement clause (by offering its General Conditions of Purchase). When stating that *for the purposes of establishing the appropriate discount*', the Respondent stated that it would treat two purchase orders as one purchase. The Respondent's statement could only have meant that the two purchase orders were treated as one exclusively for the purposes of establishing a discount. To establish the appropriate discount, it was necessary only to reduce the price, and not to change the other terms of purchase, including the dispute settlement clause. The Respondent itself clarified

²⁰ Clarification No. 48.

²¹ *Supra* Issue 1, 1.2.

the effect of such treatment by stating *That means you will effectively receive the 8 percent discount on your PO 6839 rather than the 5 percent discount previously calculated.*, and by calculation set out below in the same e-mail.²²

The phrase contained in the e-mail of 28 May 1999 *'I hereby acknowledge the receipt of your purchase order 6910'*²³ does not constitute an acceptance of the offer.²⁴ This is only a confirmation of the receipt of the Purchase order 6910.²⁵ In addition, the correspondence between the parties shows the Respondent's practice to confirm the receipt of documents in such a way, without the intention to accept their contents²⁶ and the Claimant could not have been unaware of it. Thus, the expression *I hereby acknowledge...* cannot be understood as a synonym for acceptance.

If the Claimant were to allege that the Respondent by referring to the Purchase order 6910 incorporated an arbitration clause in the offer for a new contract, the Respondent submits that it explicitly referred only to the Purchase order 6910, as a price list, and not to the entire e-mail.

The Respondent submits that a body text of an e-mail and its attachments are not one document. This can be compared with the situation when the separate documents are sent together in the same envelope. A reference to one of those documents does not indicate a reference to all the documents. In addition, it was apparent that the Claimant treated the documents as separate. When sending its e-mails containing attachments, the Claimant referred to each documents separately. If the Claimant did not consider the attachments as separate documents, it would not have referred to each one of them. Purchase order 6910 was a document attached to the e-mail. The Respondent referred to the Purchase order 6910²⁷, not mentioning any of the other documents (body text of the e-mail and General Conditions of Purchase). *A contrario*, it did not want to include those other documents in the contract of sale. Since the Purchase order 6910 did not contain an arbitration clause, but only a price list, the arbitration clause was not a part of the offer. Therefore, the arbitration clause was not included in the contract of sale.

²² E-mail of 28 April 1999, Claimant's Exhibit No. 6.

²³ E-mail of 28 April 1999, Claimant's Exhibit No. 6.

²⁴ *'[...] a mere acknowledgement of receipt of the offer [...] is not enough'*, Farnsworth in Bianca & Bonnel, op. cit. n. 13, 166.

²⁵ *'Mere confirmation of receipt of the offer [...] does not express an intention to accept it'*, Schlechtriem in P. Schlechtriem, 'Commentary on the UN Convention on the International Sale of Goods', Clarendon Press, Oxford 1998, 127.

²⁶ *'Thank you for your e-mail of 31 March 1999.'* (Claimant's Exhibit No. 2); *'Thank you for your purchase order.'* (Claimant's Exhibit No. 4).

²⁷ E-mail of 28 April 1999, Claimant's Exhibit No. 6.

In accordance with the above mentioned arguments, the Respondent submits that the reply altered the terms of the Claimant's offer. In conclusion, if the Tribunal holds that the Claimant's e-mail was an offer for the modification of the contract, the Respondent's email was not an acceptance of the offer, but rather a counteroffer which included the Purchase order 6910, but not an arbitration clause.

Since there is no arbitration agreement between the Claimant and the Respondent, the Respondent denies the jurisdiction of the Tribunal to adjudicate the present dispute. Since there is no need to discuss the merits of the case, the Respondent respectfully requests the Tribunal to render a preliminary award on its jurisdiction.²⁸

Should the Tribunal decide as a preliminary question that it has jurisdiction, the Respondent shall, pursuant to Art. 16(3) DAICA, request within 30 days from the Danubian court that it finally decides the issue of jurisdiction.

ISSUE 2 - THE CLAIMANT WAS NOT ENTITLED TO AVOID THE CONTRACTS

If the honorable Tribunal decides to consider the argumentation on the merits of the case before it renders its award on jurisdiction, the Respondent respectfully asks it to find that the Claimant was not entitled to avoid the contracts of sale.

As stated earlier²⁹, the Respondent submits that two contracts of sale were concluded between the parties. However, since the alleged breach affected both contracts in an equal way, the Respondent shall discuss the issue of avoidance of both contracts simultaneously, as if there was only one contract of sale.

The Respondent submits that the Claimant's declaration of avoidance was not valid because the conditions for avoidance required by Art. 49(1) CISG were not met (1). If the Tribunal holds otherwise, the Respondent submits that the Claimant has lost its right to declare the contract

²⁸ Art. 16(3) DAICA. See also W. L. Craig, W. W. Park & J. Paulson, 'International Commercial Arbitration: International Chamber of Commerce Arbitration', Oceana Publications, Inc., New York, 1997, 321.

²⁹ *Supra*, Issue I.

avoided due to the impossibility to make restitution of the goods substantially in the condition in which it received them, *i.e.* to make full restitution pursuant to Art. 82(1) CISG (2.).³⁰

1. CONDITIONS FOR AVOIDANCE WERE NOT MET

Pursuant to Art. 49(1)(a) CISG, the Claimant is entitled to declare the contract avoided only if the Respondent has committed a fundamental breach of contract.

The Respondent respectfully submits that it did not commit a breach of contract (1.1.), and even if it did, the Claimant cannot rely on it (1.2.). If the Tribunal holds that the breach was committed, it was not fundamental (1.3.).

1.1. The Respondent did not commit a breach of contract

The Claimant alleges that the Respondent committed a breach of contract by delivering goods which were not free from third party claims based on intellectual property, as required by Art. 42 CISG.³¹ The Respondent respectfully submits that a breach was not committed, since Vis Fish's claim was of frivolous character (1.1.1.). Furthermore, even if the Tribunal holds that the claim was not frivolous, the Respondent did not know nor could it have been aware of the claim (1.1.2.).

1.1.1. Vis Fish's claim was frivolous

A breach of contract under Art. 42 CISG exists when the seller delivers goods which are encumbered by third party rights based on industrial or other intellectual property or when a third party claims that its right has been violated.³² The claim cannot represent a breach of contract pursuant to Art. 42 CISG, if it is frivolous.³³ A claim is considered frivolous if it is manifestly unfounded³⁴, *i.e.* if it displays 'lack of merit on its face'³⁵.

³⁰ Although Art. 82 prescribes a factual prerequisite for the avoidance, the Respondent will first address the issue of existence of the breach of contract since this issue is a prerequisite for both the avoidance and damages.

³¹ Claimant's Memorandum, II.A.

³² Right of a third party exists in cases where the claim for the trademark infringement, if brought, would be upheld by the courts. It suffices that a buyer learns of the third party's right anyhow, without claim being actually brought up. The claim exists if the third party merely alleges the infringement of its intellectual property right. See J. J. Schwercha IV, *Warranties against Infringement in the Sale of Goods: A Comparison of U.C.C. § 2-312(3) and Article 42 of the U.N. Convention on Contracts for the International Sale of Goods*, <http://joe.law.pace.edu/cisg/biblio/schwercha.html>, visited on 8 February 2001.

³³ This opinion is supported by the legal doctrine; see Schwenger in Schlechtriem, *op. cit.* n. 25, 329; 'a certain amount of seriousness of the third party in the pursuit of their claim is required' [original in German], R. Herber & B. Czerwenka, 'Internationales Kaufrecht - Kommentar zum Übereinkommen der Vereinten Nationen vom 11 April 1980 über Verträge über den internationalen Warenkauf', Verlag C.H. Beck, München 1991, 196; J. von

It is not the argument of the Claimant that Vis Fish has a right, but rather that Vis Fish's claim is such as to trigger the application of Art. 42 CISG. The Respondent submits that the goods were delivered free from third party claims within the meaning of Art. 42 CISG, because Vis Fish's claim was frivolous. The claim was frivolous because it was evident that the Vis Fish's right was not violated (a), and that legal actions for trademark infringement were not undertaken (b).

(a) **It was evident that Vis Fish's right was not violated.** Pursuant to Danubian Trademark law (DTL)³⁶, the prerequisites for trademark infringement are that identical or similar signs are used for identical or similar goods (i) and that a likelihood of confusion³⁷ results from that use (ii). The Respondent submits that it was evident that those prerequisites were not fulfilled in the case at hand.

(i) The Respondent submits that the first prerequisite was not met since the products for which the signs were being used were completely different. Vis Fish's trademark could be protected only for products within the categories (ICs) which were indicated at the time of registration. Notwithstanding the fact that Vis Fish's trademark was registered for 'all water related' products, it covered only the goods belonging to ICs 22, 28 and 29³⁸ of the Nice Agreement³⁹. Since part of the goods which were delivered by the Respondent⁴⁰ were not covered by the trademark registration, the trademark could not have been violated regarding those products. The remaining items of the delivered goods were in the ICs protected by Vis Fish, but that fact is of itself insufficient to represent a violation of a trademark. DTL prescribes an additional requirement for trademark infringement action: the petitioner must have been effectively using the trademark for those specific products and must prove its intent to use it again during the remaining period of registration.⁴¹ Since it is a fact of the case that Vis Fish never used

Staudinger, 'Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener UN Kaufrecht', Sellier – de Gruyter, Berlin 1994, 339; Schlechtriem in N. M. Galston & H. Smit, 'International Sales: The United Nations Convention on Contracts for the International Sale of Goods', Mathew Bender, New York 1984, 6-31; A. Vida, *Garantie du vendeur et propriété industrielle: les 'viceas juridiques' dans la vente internationale de marchandises (Convention de Vienne)*, Revue trimestrelle de droit commercial et de droit économique, (1994), 23.

³⁴ 'prétension manifestement injustifiés', Vida, op. cit. n. 33, 23.

³⁵ Schlechtriem in Galston & Smit, op. cit. n. 33, 6-32.

³⁶ The application of Danubian substantive law for the issue of intellectual property rights was explained *supra*, Issue 1, 1.3.

³⁷ Art. 23 DTL, reproduced in Clarification No. 6.

³⁸ According to Clarification No. 7, those are the ICs for which the trademark was registered.

³⁹ Nice Agreement is a part of Danubian law, according to Clarification No. 4.

⁴⁰ Namely water slides for installation by a pool and other items of similar nature; Clarification No. 46.

⁴¹ Clarification No. 8.

its trademark for any of the products delivered to the Claimant⁴², the trademark cannot be protected in regard to those products. Even if it were the case, the intent to use the trademark for those products again during the remaining period of registration would still have to be proven. There is no indication in the facts of the case that such an intent existed, nor that it could be proven. Hence, the products for which the signs were used cannot be considered as identical or similar.

(ii) The likelihood of confusion, as the second requirement prescribed by the DTL, was also not fulfilled. The nature of the goods at issue⁴³, different parts of the market and different categories of consumers to which they aspire, make the likelihood of confusion among the customers improbable. Neither does the slogan which was used in the promotion (*'like a fish in water'*) contribute to the likelihood of confusion, since it does not invoke any obvious associations with food products sold by Vis Fish.

Therefore, it is evident that none of the prerequisites of the DTL were met in the case at hand. Since the Claimant conducts its business in Danubia, and should be therefore familiar with the prerequisites of DTL, it should have known that they were not met. That could have been easily concluded from Vis Fish's first letter, in which Vis Fish explicitly stated that it sells only fish products. In addition, that fact was also known to the Claimant's personnel prior to that letter,⁴⁴ and was only confirmed by the letter from the Claimant's advocates⁴⁵ specialized in intellectual property law.

Since Vis Fish's claim was based on a right that evidently was not violated, that claim was manifestly unfounded.

(b) Legal actions were not undertaken by Vis Fish. The conduct of Vis Fish suggests that it did not have the intention to initiate legal actions against the Claimant. Vis Fish has threatened with legal action four weeks after it had requested the Claimant to cease selling the goods. If Vis Fish considered its claim seriously, it would not have waited so long to express this threat. In addition, Vis Fish stated that legal actions would be initiated within the week from that letter dated 15 October 1999.⁴⁶ However, no action was taken, despite the fact that the Claimant

⁴² Clarification No. 7. It effectively uses its trademark only for certain products belonging to IC 29. From the IC 28, in which belong the products delivered by the Respondent, it has only used the trademark for fishing equipment. Fishing equipment is however not among the delivered goods, pursuant to Clarification No. 46.

⁴³ The goods that were delivered to the Claimant were sports equipment, and the goods that were sold by Vis Fish were only food products.

⁴⁴ Clarification No. 18.

⁴⁵ The letter dated 28 October 1999; Claimant's Exhibit No. 10.

⁴⁶ Vis Fish's letter of 15 October 1999; Claimant's Exhibit No. 9.

withdrew the goods more than two weeks after the threat was made. These submissions should be considered in light of Vis Fish's previous '*aggressive defense*' of its trademark. That fact suggests that Vis Fish would carry out its threats, as it has done on two previous cases⁴⁷, when litigation was commenced.

Since it was evident that Vis Fish's right was not violated and that legal action was not taken, Vis Fish's claim was frivolous and therefore its existence was not a breach of contract.

1.1.2. The Respondent did not know nor could have been aware of Vis Fish's claim

Pursuant to Art. 42 CISG, a breach of contract is committed only if the Respondent at the time of the conclusion of the contract knew or could not have been unaware of the existence of the claim.

It is a fact of the case that the claim was first brought in Vis Fish's first letter, received on 22 September 1999.⁴⁸ Since the claim did not exist at the time of the conclusion of the contract, the Respondent could not have been aware of its existence.

Even if the Tribunal holds that under Art. 42 CISG the mere awareness of the foundations of the claim suffices, the Respondent submits that it did not know nor could it have been aware of the existence of Vis Fish's registered trademark, which was a basis for the claim.

The expression '*could not have been unaware*' does not impose the obligation to investigate the situation regarding intellectual property rights in Danubia on the Respondent, as was suggested by the Claimant.⁴⁹ If the intention of that Article was to impose such an obligation, the expression '*ought to have known*'⁵⁰ would have been used instead.⁵¹ This interpretation is also confirmed by French and Spanish versions of the CISG, which use the expressions equivalent to '*could not ignore the existence of the right or claim*'.⁵² The wording of Art. 42 does not suggest

⁴⁷ One of those cases was similar to this one, since it concerned the playground equipment; Clarification No. 14.

⁴⁸ Vis Fish's letter of 20 September 1999; Claimant's Exhibit 7.

⁴⁹ Danubia is the country in which the goods were supposed to be used.

⁵⁰ '*The facts one "ought to have known" include those facts that would be disclosed by an investigation or inquiry that the party should make. But an obligation based on facts of which one "could not have been unaware" does not impose a duty to investigate – these are the facts that are before the eyes of one who can see.*', J. O. Honnold, 'Uniform Law for International Sales under the 1980 United Nations Convention' (2nd ed.), Kluwer Law and Taxation Publishers, Deventer 1991, 308.

⁵¹ '*"Could not have been unaware" seems to set a standard close to actual knowledge, in contrast to "ought to have known" which can imply a duty to inquire.*', Honnold, op. cit. n. 50, 350.

⁵² '*[...] qu'il connaissait ou ne pouvait ignorer au moment de la conclusion du contrat, [...]*' (French); '*[...] que conociera o no hubiera podido ignorar en el momento de la celebración del contrato, [...]*' (Spanish).

the Respondent's obligation to investigate, but rather that it cannot disregard the obvious indications of the existence of the claim.

It follows from the facts of the case⁵³ that at the time of the conclusion of the contract the Respondent had no actual knowledge of the existence of the Vis Fish's registered mark. In addition, there were no obvious indications which the Respondent ignored, and consequently failed to become aware of the existence of Vis Fish's claim.

If the Tribunal holds that Art. 42 requires the obligation to investigate, the Respondent submits that even if it made the required investigation, it still could not have concluded that the claim would be raised. Through the investigation the Respondent would have learned that Vis Fish has registered its trademark, but also that the goods it intended to sell to the Claimant would not violate that trademark. The Respondent was entitled to assume that any claim which eventually might be raised would be manifestly unfounded and could not have concluded that there were any obstacles to the contract of sale concerning the intellectual property rights. Therefore, there were no reasons for the Respondent not to proceed with the conclusion of the contract.

Hence, the Respondent did not know, nor was it supposed to be aware of the Vis Fish's claim, and did not commit a breach of contract.

From the arguments submitted above it follows that the Respondent did not commit a breach of contract pursuant to Art. 42, and thus the Claimant was not entitled to avoid the contract.

1.2. Even if the breach was committed, the Claimant has lost the right to rely on it because it failed to give notice within a reasonable time

If the honorable Tribunal holds that Vis Fish's claim was not frivolous and that the Respondent was supposed to be aware of it, the Respondent respectfully submits that the Claimant failed to notify it of the existence of the claim within a reasonable time, as required by Art. 43 CISG, and thus lost the right to rely on the breach.⁵⁴

⁵³ Clarification No. 19 and later submissions of the Respondent, *e.g.* Claimant's Exhibit No. 13.

⁵⁴ The problems regarding notice requirements and interpretation of the standard of reasonable time are in legal doctrine mainly dealt with regard to conformity of the goods (Art. 39) and only rarely in regard to third party claims, and there are no Court decisions on Art. 43 known to the Respondent. It is necessary to analogously use these sources in the interpretation of Art. 43. This should pose no particular problems, since the standards in both

Art. 43 CISG provides that the notice of the existence of third party claim must be given within a reasonable time after the buyer became aware or ought to have become aware of the claim.

A determination of whether notice is given timely includes two separate issues. The first is to determine the moment when the buyer became aware or ought to have become aware of the claim **(a)**. The second is to determine whether the length of the period of notification was reasonable **(b)**.⁵⁵

(a) Pursuant to Art. 43, the period of notification started when the Claimant merely became aware that the claim existed.⁵⁶ It is a fact of the case that the Vis Fish's claim was asserted on 22 September 1999, when the Claimant became aware of it upon the receipt of Vis Fish's first letter. That letter contained the request for withdrawing the goods from sale. The Claimant was clearly asked to stop the further sale and advertising of the goods and to inform Vis Fish about the measures taken in order to do so. Therefore, that letter could not have been reasonably interpreted as a mere suggestion, as was submitted by the Claimant⁵⁷. From that letter the Claimant should have reasonably concluded that, if it failed to meet the stated requests, the legal actions could be initiated.

Furthermore, the Claimant has learned from that letter that the Vis Fish's claim was unfounded. As was stated above, it was evident for the Claimant that there has been no violation of Vis Fish's right, since the letter explicitly stated that Vis Fish engages only in selling food products. Therefore, the facts disclosed to the Claimant in that letter were the same facts which the Respondent should have learned if the Tribunal holds that it had the obligation to investigate the Danubian intellectual property registries. Consequently, if the Tribunal holds that the Respondent was supposed to be aware of the Vis Fish's claim on the grounds of those facts, it is the Respondent's submission that the Claimant should have from the same facts concluded that the claim within the sense of Art. 42 exists and that the notification is due.

articles are basically the same; *See* Staudinger, op. cit. n. 33, 351; F. Enderlein, D. Maskow & H. Strohbach, 'Internationales Kaufrecht - Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention', Haufe, Berlin 1991, 143.

⁵⁵ The criterion of reasonableness should be determined objectively; *see* Magnus, op. cit. n. 15.

⁵⁶ 'The buyer may not carelessly neglect rights or claims of third parties of which he receives knowledge.', Enderlein in P. Šarcevic & P. Volken (eds.), *International Sale of Goods: Dubrovnik Lectures*, Oceana Publications, Inc., New York 1986, 184; similar Enderlein et al., op. cit. n. 54, 143; *The knowledge of the legal defect exists when the third party notifies its right or claim.* [original in German], Staudinger, op. cit. n. 33, 353; Herber & Czerwenka, op. cit. n. 33, 200.

⁵⁷ Claimant's Memorandum, IV.A.

The Respondent submits that Vis Fish's second letter received on 18 October 1999⁵⁸, which contained an express threat of legal action, only confirmed the facts which were already known to the Claimant from the Vis Fish's first letter.

Furthermore, no additional facts relevant for the assessment of the claim were made known to the Claimant in the letter from its advocates, which was received on 1 November 1999⁵⁹. The letter only confirmed the unfounded nature of the claim, and the possibility of the litigation. In addition, the advocates' warning of the Vis Fish's previous aggressive trademark defense was of no consequence in regard to the seriousness of the claim. The aggressive defense could not alter the fact that the claim was unfounded, or make it more serious than it was. The opinion that the litigation would represent a '*certain amount of disruption*' to the Claimant's business could also have been known to the Claimant upon the receipt of the Vis Fish's first letter.

Therefore, the Claimant did not learn any additional facts relevant for the assessment of the nature of the claim after receipt of Vis Fish's first letter. All the facts from which it learned about the existence of the claim within the meaning of Art. 42 were known to it on 22 September 1999, and the Respondent submits that is the moment in which the Claimant ought to have become aware of the claim.

(b) Art. 43 requires that the notification should be made within the reasonable time after the moment of the discovery of the defect. Although the CISG does not require prompt notification, this does not mean that the notification can be unreasonably delayed. The length of the period for notification should be interpreted so as to include the minimum time reasonably needed to perform the notification,⁶⁰ since the primary purpose of that requirement is the protection of the seller.⁶¹

It is a fact of the case that the Claimant sent the notice to the Respondent only on 3 November 1999.⁶² The period of 49 days used for notification was beyond reasonable time. The Claimant could have easily made the notification earlier, and there were no circumstances which would justify such a delay in notification.

⁵⁸ The letter was dated 15 October 1999, and thus arrived on 18 October 1999; Claimant's Exhibit No. 9;

⁵⁹ The letter of 28 October 1999; Claimant's Exhibit No. 10;

⁶⁰ This reasoning was confirmed by German LG Kassel, 11 O 4185/95, 15 February 1996 which held: '*In international trade the protection of seller's interests through the requirement of notification is favored by notification which should be as prompt, complete and accurate as possible.*' [original in German].

⁶¹ See C. B. Andersen, *Reasonable Time in Article 39(1) of the CISG – Is Article 39(1) Truly a Uniform Provision?*, <http://joe.law.pace.edu/cisg/biblio/andersen.html>, visited on 8 February 2001.

⁶² Clarification No. 13.

Subsidiarily, if the Tribunal holds that the Claimant ought to have been aware of the existence of Vis Fish's claim on 18 October 1999, when the second Vis Fish's letter was received, the Respondent submits that the notice was still not given timely. That letter contained an express threat of legal action, and it should have been a definite indication of Vis Fish's intent which was later merely confirmed in the advocates' letter, as was stated above. 22 days used for notification cannot be considered reasonable, particularly since it included the time used for obtaining the legal advice. The Claimant should have notified the Respondent regardless of the legal advice, since the Claimant had no duty to investigate the situation regarding the claim.⁶³ In addition, since in the case at hand the remedy of avoidance has been sought, the reasonable time for notification ought to have been shorter.⁶⁴

The Respondent submits that even if the Claimant ought to have become aware of the claim only on 1 November 1999, upon the receipt of advocates' letter, the notification was still not made within the reasonable time. As was submitted above, due to the chosen remedy, notification ought to have been performed more quickly than in the normal circumstances.

The Claimant sent the notice on 3 November 1999. Due to the Claimant's inappropriate choice of means of communication it was received only on 8 November 1999.⁶⁵ The Respondent submits that the Claimant should bear the risk for this delay in notification. Art. 27 does not require the notice of the existence of third party claim to be made in any particular form.⁶⁶ The Respondent submits that in the light of the circumstances of the case at hand,⁶⁷ the Claimant should have used e-mail to notify the Respondent.⁶⁸ All the previous communications between the parties have been conducted by e-mail, and there was no reason not to use it for notification of the existence of the claim. The Claimant chose to use a regular letter for notification of the claim.

⁶³ *The buyer need not perform an inquiry whether third party claims might be raised*, Enderlein et al., op. cit. n. 54, 143.

⁶⁴ See Ferrari, F: *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, <http://joe.law.pace.edu/cisg/biblio/ferrari.html>, visited on 8 February 2001; Schwenger in Schlechtriem, op. cit. n. 25, 315; Staudinger, op. cit. n. 33, 326; Sono in Bianca & Bonnel, op. cit. n. 13, 309; Honnold, op. cit. n. 50, 336; Andersen, op. cit. n. 61.

⁶⁵ According to Clarification No. 31, international letters arrive on third business day.

⁶⁶ Magnus, op. cit. n. 15; Ferrari op. cit. n. 64; Schwenger in Schlechtriem, op. cit. n. 25, 313; Schlechtriem, Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG, <http://joe.law.pace.edu/cisg/biblio/schlect.html>, visited on 8 February 2001. This reasoning is supported by German LG Frankfurt am Main, 3/3 O 37/92, 9.12.1992; also by Oberster Gerichtshof, 2 Ob 191/98, 15.10.1998.

⁶⁷ See P. Schlechtriem, *Internationales UN-Kaufrecht: Ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf*, J. C. B. Mohr (Paul Siebeck), Tübingen 1996, 67.

⁶⁸ The reasonable time must be considered in the light of each individual situation. Cf. Schwenger in Schlechtriem, op. cit. n. 25, 314; Schwerha, op. cit. n. 32; Andersen, op. cit. n. 61.

Since the use of a letter is appropriate only in circumstances when the delivery of the letter can be made swiftly,⁶⁹ which is not so in the case at hand,⁷⁰ the use of a letter was not a proper choice. Therefore the Claimant chose inappropriate means of communication, and should bear the risk for the delay of five days.

Since 5 days out of 7 were wasted because of an error by the Claimant, the Respondent submits that the notification made within the 7 days was not reasonable under the circumstances.

In conclusion, notice of the existence of Vis Fish's claim was not given within a reasonable time, and the Claimant therefore cannot rely on the breach of contract.

Consequently, the first condition for avoidance required by Art. 49 CISG, the existence of the Respondent's breach of contract was not fulfilled.

1.3. Even if the Tribunal holds that a breach was committed, it was not fundamental

Art. 49(1)(a) CISG provides that the Claimant is entitled to avoid the contract only if the Respondent's breach was fundamental. The Respondent submits that the breach was not fundamental because the conditions required by CISG were not met, *i.e.* the breach did not result in a detriment to the Claimant so as substantially to deprive it of what it was entitled to expect under the contract, as required by Art. 25 CISG.⁷¹

The main criterion for determining the nature of the breach is whether the injured party has lost its interest in the further existence of the contract.⁷² Since the parties have not intended to include any particular interests in their contract,⁷³ then only the general interests following from

⁶⁹ According to Schwenzer in Schlechtriem, op. cit. n. 25, 313, the use of ordinary post for notification can be justified only in special circumstances. See also Herber & Czerwenka, op. cit. n. 33, 185, who state that in the international trade notifications ought to be made by means of telex, telegram and telefax.

⁷⁰ It normally takes 3 business days for the international letter to arrive; Clarification No. 31.

⁷¹ '[...]The breach is fundamental when the contractual interests of the injured party have been impaired substantially in an objective sense.' [original in German], Staudinger, op. cit. n. 33, 216; Similar also Schlechtriem in Schlechtriem, op. cit. n. 25, 175; Enderlein et al., op. cit. n. 54, 101; Herber & Czerwenka, op. cit. n. 33, 130; Honnold, op. cit. n. 50, 256.

⁷² See B. Botzenhardt, 'Die Auslegung des Begriffs der wesentlichen Vertragsverletzung im UN-Kaufrecht', Peter Lang, Frankfurt am Main 1998, 196; Staudinger, op. cit. n. 33, 217; Herber & Czerwenka, op. cit. n. 33, 131; Enderlein et al., op. cit. n. 54, 102; A. Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, <http://joe.law.pace.edu/cisg/biblio/kazimierska.html>, visited on 8 February 2001.

⁷³ The interests of which the injured party was deprived due to the breach committed by the other party represent a subjective criterion considered in determination of the fundamental character of the breach. See Botzenhardt, op. cit. n. 72, 196; Enderlein et al., op. cit. n. 54, 102; Staudinger, op. cit. n. 33, 217; Schlechtriem in Schlechtriem, op. cit. n. 25, 177. On the contrary, the objective criterion protects the party which committed the

the contract, namely the possibility to use the purchased goods, should be taken into consideration.⁷⁴ Furthermore, the Respondent submits that third party claims based on intellectual property amount to fundamental breach only if the use of the goods is prevented or disrupted.⁷⁵

The Claimant alleged that the forthcoming litigation resulting from Vis Fish's claim represented a detriment required by Art. 25. The Respondent submits that such litigation would not result in any detriment to the Claimant. That detriment could consist of either (i) suspension of further sale of the goods, (ii) costs of litigation, or (iii) negative influence on its business.

(i) Litigation would not have resulted in the suspension of further sale of the goods. Such a suspension would have occurred only if an interim measure would have been granted. However, that is highly improbable to occur in the case at hand. Since it is clear that Vis Fish's claim is unfounded, granting an interim measure would be inappropriate under the circumstances of the case. Moreover, the Danubian courts have been inclined to grant interim measures in cases of similar nature.⁷⁶ Therefore, it is highly improbable that an interim measure would have been granted in this case. Without an interim measure the sale of goods could not be suspended, and thus the Claimant would not be deprived of its contractual interest.⁷⁷

Furthermore, the Respondent submits that even if an interim measure would be granted, the disruption to the Claimant would not be such as to substantially deprive the Claimant of its interests. Since the Vis Fish's trademark was not violated,⁷⁸ an interim measure, if granted, would only temporarily suspend the Claimant's sale of goods. After the rejection of Vis Fish's claim, an interim measure would be set aside and the Claimant would again be entitled to sell the goods.

(ii) The costs of litigation cannot be viewed as substantially to deprive the Claimant of its interests. Avoidance of the contract would be too severe a remedy, since those costs could be

breach, by providing that the interests of the injured party must originate in the contract. See Enderlein et al., op. cit. n. 54, 102; Staudinger, op. cit. n. 33, 217; Herber & Czerwenka, op. cit. n. 33, 131.

⁷⁴ *'In the absence of the parties statements, the goal of the contract is relevant, i.e. how it is in objective sense impaired..'* [original in German], Staudinger, op. cit. n. 33, 217.

⁷⁵ P. Schlechtriem, 'Uniform Sales Law-The UN Convention on Contracts for International Sale of Goods', <http://joe.law.pace.edu/cisg/biblio/slechchtriem.html>, visited on 8 February 2001; Enderlein in Šarcevic & Volken, op. cit. n. 56, 176; *'where a legal defect does not directly and immediately impair the buyer's freedom of action and it is possible to redeem the encumbered right [...] damages for the buyer may be an adequate remedy'*, Schlechtriem in Schlechtriem, op. cit. n. 25, 183.

⁷⁶ Clarification No. 11.

⁷⁷ When the buyer can make use of the goods there is no fundamental breach. This was confirmed by the German OLG Frankfurt am Main, 5 U 15/93, 18 January 1994.

⁷⁸ *Supra*, Issue 2, 2.1.1.

easily refunded from the Respondent in the form of damages, as the Respondent itself offered in its letter dated 10 November 1999.⁷⁹

(iii) Allegations that the Claimant's reputation among its customers would be injured should be rejected. The Respondent submits that customers are usually unaware of intellectual property litigations. If they were aware of any such litigation, there is no indication that this would negatively influence their demand for the Respondent's products.⁸⁰

In addition, the Respondent submits that in the case at hand litigation is an improbable outcome, as was submitted above. It is a fact of the case that Vis Fish threatened to commence the legal actions against the Claimant in its letter dated 15 October 1999, if the further sale of the goods was not stopped within one week. The Claimant, however, decided to withdraw the goods more than two weeks later, and legal action was still not brought. If Vis Fish intended to commence the legal action, it would have probably done so within one week as it threatened in its letter, especially considering the history of its aggressive defense.⁸¹

Therefore, the conditions required by Art. 25 CISG for the existence of the fundamental breach were not fulfilled, and consequently, the Claimant was not entitled to avoid the contract pursuant to Art.49(1)(a) CISG.

2. *THE CLAIMANT HAS LOST THE RIGHT TO DECLARE THE CONTRACT AVOIDED DUE TO THE IMPOSSIBILITY TO MAKE FULL RESTITUTION*

The Respondent respectfully submits that even if the conditions for avoidance required by Art. 49(1)(a) were met, the Claimant was not entitled to declare the contract avoided, since it was impossible for it to make the restitution of the goods substantially in the condition in which it received them, as required by Art. 82(1) CISG (**2.1**). The Respondent will also show that the Claimant could not assert that it sold the goods in the normal course of business before it discovered the defect within the meaning of Art. 82(2)(c) (**2.2**).

2.1. The Claimant could not make the full restitution of the goods

Pursuant to Art. 82(1), the Claimant may declare the contract avoided only if it is able to make the restitution of the goods substantially in the condition in which it received them. The

⁷⁹ Respondent's letter of 10 November 1999; Claimant's Exhibit No. 13.

⁸⁰ It is even more likely that the demand would be increased.

⁸¹ Vis Fish has not previously hesitated to commence legal actions. The fact that they haven't done it in the case at hand supports the probability that the litigation would not be started.

expression ‘*substantially in the condition*’ also refers to the quantity of the goods.⁸² The relevant time for the possibility of making the restitution is the moment in which the declaration of avoidance is given.⁸³

It is a fact of the case that at the moment when the Claimant made the declaration of avoidance⁸⁴, it had already sold one third of the goods⁸⁵, \$50,000 from the first contract and \$150,000 from the second contract.⁸⁶ Therefore, it was not able to make a full restitution of the goods and was precluded from avoiding the contract.

2.2. The Claimant had not sold the goods in the normal course of business before it discovered the defect

Pursuant to Art. 82(2)(c) CISG, the buyer does not lose the right to declare the contract avoided, if the goods or part of the goods have been sold in the normal course of business before the buyer discovered or ought to have discovered the defect. If the Claimant were to assert that this exception from the general rule should be applied,⁸⁷ the Respondent submits that the Claimant is not entitled to rely on the exception because it continued selling the goods after it discovered or ought to have discovered the defect. Pursuant to Art. 82(2)(c), the Respondent was entitled to sell the goods only until it discovered the existence of Vis Fish’s claim,⁸⁸ for which it alleged that represents a reason for the avoidance.⁸⁹

Arguments presented when discussing the issue of reasonable time⁹⁰ are to be applied accordingly to determine the moment when the Claimant should have ceased selling the goods.

⁸² ‘*The right to avoid the contract expires when the goods cannot be returned any more*’ [original in German], Enderlein et al., op. cit. n. 54, 270; Staudinger, op. cit. n. 33, 649. This was confirmed in the decisions of OLG Düsseldorf, 6 U 119/93, 10 February 1994, and Rb. Rotterdam, 95/3590, 21 November 1996. In both cases the courts held that the buyer was not entitled to avoid the contract because it had sold a part of the goods.

⁸³ ‘[...] *if the buyer wants to avoid the contract properly, the restitution must be possible to him in the moment when he declares the contract avoided*’ [original in German], Staudinger, op. cit. n. 33, 650; See also Leser in Schlechtriem, op. cit. n. 25, 644; Enderlein et al., op. cit. n. 54, 271.

⁸⁴ The declaration of avoidance was made in the letter to the Respondent dated 3 November 1999 (Claimant’s Exhibit No. 12).

⁸⁵ Request, para. 13.

⁸⁶ Clarification No. 45.

⁸⁷ If the Claimant were to assert the application of this exception, the burden of proof would rest on it. See Staudinger, op. cit. n. 33, 654.

⁸⁸ ‘*exceptions in Art. 82(2)(c) produce their effects only until the lack of conformity is discovered and the buyer thus becomes aware of the possibility of avoidance*’, Leser in Schlechtriem, op. cit. n. 33, 650; Schlechtriem, op. cit. n. 67, 186.

⁸⁹ ‘[...] *by using, converting or reselling the goods the buyer will be deemed to have accepted the goods.*’, J. Ziegel. & C. Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, <http://joe.law.pace.edu/cisg/wais/db/articles/english2.html>, visited on 8 February 2001.

⁹⁰ *Supra* Issue 2, 1.2

Accordingly, the Respondent submits that the Claimant should have ceased selling the goods on 22 September 1999, or at least on 18 October 1999. Since it is a fact of the case that the Claimant stopped selling the goods only on 3 November 1999,⁹¹ Art. 82(2)(c) cannot be applied.

Even if the Tribunal holds that it was on 1 November 1999 when the Claimant ought to have discovered Vis Fish's claim, the Claimant still did not cease selling the goods. Unlike the provisions for notification of the defect or the declaration of avoidance, Art. 82(2)(c) does not provide the Claimant with reasonable time for stopping the further sale. Therefore, the delay of two days in stopping the sale was not allowed pursuant to Art. 82(2)(c).

Hence, should the Claimant assert that the exception from Art. 82(2)(c) should be applied, these assertions should be rejected, since the goods were sold after the Claimant discovered or ought to have discovered the Vis Fish's claim.

Since the Claimant was not able to make restitution of the goods substantially in the condition in which it received them, it was not entitled to declare the contract avoided.

ISSUE 3 – RESTITUTION AND DAMAGES

The Respondent submits that there was no effective avoidance of the contract. Therefore, the relief sought by the Claimant on the basis of Articles 81 to 84 CISG is not due and the Claimant is not entitled to claim damages.

However, should the Tribunal hold that the contract has been avoided, in the following paragraph the Respondent will address the issues of restitution and damages.

1. THE PARTIES ARE BOUND TO PERFORM CONCURRENT RESTITUTION

Pursuant to Art. 81(2) CISG the parties are bound to make restitution of whatever they paid or supplied under the contract. The restitution has to be performed concurrently, regardless of the responsibility for the breach.⁹²

⁹¹ Clarification No. 13.

⁹² 'The Convention does not confine the obligation to make restitution to the party in breach; under paragraph 2, each party is entitled to restitution.', Honnold, op. cit. n. 50., 563; 'Restitution is intended to eradicate some of

In the present case, this means that the Respondent must return the contractual price and the Claimant must return the goods. Due to the fact that one third of the goods was resold by the Claimant, it would return two thirds of the goods and compensate the one third by cash payment. Therefore, the Respondent must reimburse the Claimant the balance of \$386,000 and the Claimant must return to the Respondent the remaining two thirds of the goods.

In addition, the Claimant has to return the benefit which was achieved by reselling the goods. Pursuant to Art. 84(2) CISG, the buyer must account to the seller for all the benefits which he has derived from the goods or part of them, if it is impossible to make restitution of a part of the goods. From the wording of Art. 84 CISG⁹³, it follows that the seller's right to receive benefits derived from the goods is equivalent to the buyer's right to interest on the contractual price.

It is a fact of the case that the Claimant resold one third of the goods and therewith achieved its usual resale profit. According to the Clarifications⁹⁴, the normal retail mark-up is 70%, *i.e.* by reselling one third of the goods, the Claimant achieved the amount totaling \$147,700. This sum is the benefit derived from the goods and should be reimbursed to the Respondent.

The Respondent submits that the Claimant is entitled to interest - benefit of the money (approximately \$18,000⁹⁵) and that the Respondent is entitled to the resale profit⁹⁶ - benefit of the goods (\$147,700⁹⁷).

the consequences of the contract, namely the supply of the goods or the making of payment, which marks clear contrast to the purpose of the damages', Leser in Schlechtriem, op. cit. n. 25, 640; See also Tallon in Bianca & Bonell, op. cit. n. 13, 604. Provisions of Art. 81 are subject to Art. 74, subject to which the aggrieved party may seek for indemnification; however, restitution is common to the party in breach and to the injured party.

⁹³ Honnold, op. cit. n. 50, 573 states that it would be better for the seller if the buyer resold the goods at a higher price and (p.566.) stresses that the buyer must also reimburse the reselling price. Leser in Schlechtriem, op. cit. n. 25, 661 agrees with that opinion and notes that if there was avoidance, the buyer '*must pay to the seller the value of all the benefits he has derived from the transaction or resale of the goods*'. When dealing with equalization by *commodum ex negotiatione*, the same author entitles the seller on gross sum received as benefit of resale, but if the seller reimburse expenses invested in resale. In the case at hand, the Claimant has requested damages and tried to maintain benefit, what is pursuant to Leser incompatible, because the buyer would be put in a more favorable position, *i.e.* it would beside the interests gain the profit. See also Tallon in Bianca & Bonell, op. cit. n. 13, 612 and Staudinger op. cit. n. 33, 653 who states: '*Pursuant to Art. 84 the buyer must account to the seller for all the benefits including the resale price.*' [original in German].

⁹⁴ Clarification No. 51.

⁹⁵ This amount is calculated from the date of payment (Art. 84(1) CISG), up to February 2001, with 3% Danubian interests rate. For interest rates. See Issue 3, 5.

⁹⁶ In its Memorandum (Claimant's Memorandum, V.) the Claimant confirmed that the Respondent is entitled to the benefit of resale. When calculating the amount of this benefit (\$20,800), the Claimant subtracted expenses invested in the resale (\$108,000) from gross profit (70% of \$184,000 = \$128,800). In this calculation the Claimant did not include storage and misc. expenses (\$4,000). The Respondent submits that in any case storage and misc. expenses cannot be included, since they are only allocated to the unsold goods. The amount of benefit was inaccurately calculated, due to the fact that the Claimant used the benefit of resale of one third of the goods to cover up the expenses for all the goods.

The Respondent is prepared to reimburse the expenses⁹⁸ that the Claimant incurred whilst reselling the goods.

Pursuant to Art. 78 CISG, if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it. In accordance with this provision, the Respondent submits that it is entitled to interest on the amount of the benefit of resale. Since the Claimant must reimburse the benefit on the day of avoidance (3 November 1999), the Respondent's counterclaim for the benefit is \$147,700 and for interest on this amount up to February 2001, being \$7,385⁹⁹.

Therefore, the concurrent restitution consists of the following:

	Obligations performed	Restitution	Balance
Claimant	\$600,000 – 8% discount = \$552,000	2/3 goods + \$184,000 (value of resold goods) + \$147,700 (benefit of resale) + \$7,385 (interests on benefit) TOTAL: \$339,085	2/3 goods
Respondent	Goods worth \$600,000	\$552,000 (contractual price) + \$18,000 (interest on contractual price) TOTAL: \$570,000	\$570,000 – \$339,085 = \$230,915

Thus, the Respondent has to pay \$230,915 to the Claimant and the Claimant has to return two thirds of the goods to the Respondent.

2. *THE CLAIMANT IS ENTITLED TO DAMAGES IN THE AMOUNT OF \$37,620*

The Claimant has requested damages in the amount of \$112,000.¹⁰⁰ The breakdown of the demanded sum is as follows:

⁹⁷ \$200,000 (price) + 11,000 (freight for one third of the goods) = \$211,000; 70% of \$211,000 is \$147,700. *See* Terms of reference, para. 13., Answer to the Request, para. 10. and Clarification No. 51.

⁹⁸ Leser in Schlechtriem, op. cit. n. 25, 662 mentions complexity of benefit reimbursement when it is achieved by resale. Therein are denoted expenses that buyer would had while reselling. Those expenses encounter one third of shipping, advertising, selling and administrative expenses the Claimant required as damages in Request, III. (*Amount Claimed*), para. 13 and Claimant's Memorandum, V. (*Claims and damages*).

⁹⁹ This amount is calculated under interests rate of 4%, for the period of 15 months. For applicable interest rates *See* below Issue 3, 5.

¹⁰⁰ The provision of Art. 74 CISG entitles the aggrieved party to ask for loss of profit. However, in the present case the Claimant did not ask for loss of profit. The Respondent submits that under Art. 19 ICC Rules, after signing Terms of Reference no additional claims can be submitted. (*See* Craig/Park/Paulsson, op. cit. n. 28, 254:

Damages requested by the Claimant	
Storage and misc. expenses	\$4,000
Shipping costs	\$33,000
Advertising expenses	\$35,000
General selling and administrative expenses	\$40,000
Total	\$112,000

The Respondent has no objections as to the payment of storage and misc. expenses in the amount of \$4,000, and to shipping costs in the amount of \$33,000. However, the Claimant is not entitled to advertising expenses (a) and general selling and administrative expenses (b).

(a) The Claimant is not entitled to advertising expenses

Pursuant to Art. 74 CISG the aggrieved party is entitled to damages which are the consequence of the breach.

The Respondent submits that the advertising expenses are not a consequence of the breach. They constitute expenses that would have occurred if other goods had been advertised in their place. According to the Clarifications, the Claimant's advertising of the goods bearing 'Vis Water Sports' name was in general newspaper advertisements for the stores and did not constitute expenses that would not otherwise have occurred.¹⁰¹ Due to this fact it should be concluded that the money invested in advertising was not an additional expense, *i.e.* it was not connected to the goods bearing 'Vis Water Sports' name. Therefore, it cannot be sought as damages.

However, if the honorable Tribunal finds that advertising costs were allocated to the goods bearing 'Vis Water Sports' name, the Respondent submits that the Claimant is still not entitled to the whole amount requested (\$35,000). According to the Clarifications¹⁰² the advertising also included the promotion of the Claimant's stores, *i.e.* one part of the amount requested as the advertising costs was allocated to the promotion of the Claimant's stores. Hence, the Tribunal should reduce the Claimant's request in proportion to the amount allocated to the promotion of the Claimant's stores.

'This provision is designated to prevent a party from adding new claims during the course of the proceedings and so delaying the proceedings, hindering the preparation of a defense in an orderly way, or adding a new cause of action which attaches a totally new monetary dimension to the dispute.') Terms of reference defined the exact sum of the monetary claim (\$480,000). (Terms of reference, para. 12.; *The total monetary claim as presently constituted is for \$480,000. Sports and More Sports also asks for additional damages that will accrue from the date of its Request for Arbitration until mutual restitution is made'.*) Since a request for loss of profit was not raised in Terms of Reference, the Claimant cannot bring it up as a new claim.

¹⁰¹ Clarification No. 49.

(b) The Claimant is entitled to general selling and administrative costs only in the amount of \$620

The Claimant asserts that the Respondent is bound to compensate the Claimant's general selling and administrative costs in proportion to the value of the contract (\$40,000¹⁰³). According to the Clarifications¹⁰⁴, the only additional selling and administrative expense associated with the purchase or resale of the goods that could be isolated is the cost of the letters of credit totaling \$620.

The Respondent submits that the difference between \$40,000 requested and \$620 specified (\$39,380¹⁰⁵), does not represent damages within the meaning of Art. 74 because these expenses were not allocated specifically to the Respondent's goods.¹⁰⁶

Therefore, the Respondent submits that the Claimant is entitled to selling and administrative expenses in the amount of \$620.

Damages admitted by the respondent	
Storage and misc. expenses	\$4,000
Shipping costs	\$33,000
Advertising	\$0
General selling and administrative expenses	\$620
Total	\$37,620

Thus, if the Respondent is entitled to the benefit of the resale, the Claimant is entitled to damages in the amount of \$37,620. The total amount payable to the Claimant is \$37,620 (damages) + \$230,915 (balance payable on the basis of restitution including the benefit of the resale) = **\$268,535**.

3. IF THE TRIBUNAL HOLDS THAT THE RESPONDENT IS NOT ENTITLED TO THE BENEFIT OF THE RESALE, THE CLAIMANT IS ENTITLED TO DAMAGES IN THE AMOUNT OF \$22,000

Pursuant to Art. 74 CISG, damages for breach of contract by one party consist of a sum equal to the loss. If the Tribunal holds that the Claimant is entitled to the benefit of the resale, the

¹⁰² Clarification No. 49.

¹⁰³ Clarification No.49. *'The \$40,000 of general selling and administrative costs allocated to the Vis Water Sports goods sold was calculated by dividing the total amount of such costs by the total sales and applying that percentage to the amount of Vis Water Sports goods sold.'*

¹⁰⁴ Clarification No. 49.

¹⁰⁵ \$40,000 - \$620 = \$39,380.

¹⁰⁶ Answer, para. 9.

costs allocated to the resold goods should be borne by the Claimant. Those expenses would then be financed from the retail mark-up.

Consequently, the Claimant would be entitled to only two thirds of the shipping costs and general selling and administrative costs (i.e. \$22,000 and \$26,667 respectively).

The Claimant is obliged to bear the advertising costs in their entirety. It is reasonable to assume that the Claimant used advertising promotion for the goods up to the time of withdrawing the unsold goods from the Claimant's stores. These expenses were used to resell the goods and are covered by the benefit of resale, *i.e.* they are calculated in the retail mark-up.

Damages admitted by the Respondent, if the Respondent is not entitled to the benefit of resale	
Storage and misc. expenses	\$4,000
Shipping costs	\$22,000
Advertising	\$0
General selling and administrative expenses	\$414
Total	\$26,414

Thus, if the Respondent is entitled to the benefit of the resale, the Claimant is entitled to damages in the amount of \$26,414. The total amount payable to the Claimant is \$26,414 (damages) + \$386,000 (balance payable on the basis of restitution without the benefit of the resale) = **\$412,414**.

4. IN CALCULATING DAMAGES, THE TRIBUNAL SHOULD TAKE INTO ACCOUNT THE CLAIMANT'S OBLIGATION TO MITIGATE THE LOSS

The Respondent submits that any damages owed to the Claimant should be reduced in proportion to the Claimant's failure to mitigate the loss. Under Art. 77 CISG, the party which relies on a breach of contract and seeks remedies provided under the Convention, must take such measures as are reasonable in the circumstances to mitigate the loss, including the loss of profit,¹⁰⁷ resulting from the breach.

¹⁰⁷ The Respondent submits that loss of profit cannot be demanded because the Claimant did not mitigate the loss according to its obligation under Art. 77. If the Claimant would try to prove that it inevitably suffered the loss, what is a prerequisite of seeking it from the Respondent, the Respondent submits that the Claimant could have easily purchased substitute goods from other suppliers.

The Claimant could have taken measures to mitigate the loss by acquiring substitute goods.¹⁰⁸ It could have advertised substitute goods instead of the Respondent's goods and thereby reduced the advertising expenses relating to the Respondent's goods. It could have also reallocated general selling and administrative expenses to the substitute goods.

Therefore, any damages payable to the Claimant should be reduced in proportion to the Claimant's failure to reduce the advertising expenses and general selling and administrative expenses..

5. APPLICABLE INTEREST RATES

According to the facts of the case, the Claimant is a retailer¹⁰⁹ in Danubia and does not perform its business outside Danubia¹¹⁰. The Respondent submits that if the contract had not been concluded between the parties, the money from this claim would have been invested in Danubia. Both the Respondent and the Claimant agree that Danubian interest rates should be applied to the Respondent's obligations towards the Claimant. The Respondent submits that the interest rate that should be applied is the Danubian official discount rate of 3%.

Since the Respondent has its place of business in Equatoriana, the Equatorianian interest rates should be applied to the Respondent's counterclaim for the benefit of the resale.

The Respondent submits that the interest rate that should be applied is the Equatorianian official discount rate of 4%.

ISSUE 4 - THE CLAIMANT SHOULD PAY ARBITRATION COSTS AND LEGAL FEES

Under Art. 31(3) ICC Rules, the arbitrators have the discretion to determine in which proportion the costs of the arbitration shall be borne by the parties. The Respondent submits that the Tribunal

¹⁰⁸ In the email of 16 November 1999, the Claimant stated '*We are able to sell similar equipment from other suppliers to our customers.*' (Claimant's Exhibit 14). If the Claimant had done so, it would have recovered the difference between the prices under Art. 75 CISG.

¹⁰⁹ In Claimant's Exhibit No. 1 the Claimant stated that it is '*The largest retailer of sporting equipment in the country of Danubia*'.

¹¹⁰ Clarification No. 56.

should decide that all the costs as well as legal fees related to this arbitration should be borne by the Claimant, since its unfounded claim gave rise to the arbitration.¹¹¹

In view of the argumentation set out herein, the Respondent submits that the issues raised before this Tribunal should be decided as follows:

- ◆ The Arbitral Tribunal lacks jurisdiction to adjudicate the dispute between the Respondent and the Claimant;
- ◆ The Claimant was not entitled to avoid the contracts;
- ◆ The Claimant is not entitled to damages;
- ◆ The Claimant should pay arbitration costs and legal fees.

Attorneys for the Respondent:

Edin Karakaš

Filip Sulic

Ivana Sverak

Luka Tadic-Colic

¹¹¹ It appears that the practice of ICC tribunals has been to award costs in proportion to the relative success of the parties. This approach has been expressly accepted in the majority of other arbitration rules: Art. 28(4) London Court of International Arbitration Rules; Art. 59 Rules of the Chinese International Economic and Trade Arbitration Commission; Art. 40 UNCITRAL Arbitration Rules; Art. 35(2) Rules of the German Institute of Arbitration; Art. 60 Rules of the Netherlands Institute of Arbitration; Art. 36 Rules of the Chamber of Commerce and Industry of Geneva; Art. 3 Appendix to the Rules of the Permanent Arbitration Court at the Croatian Chamber of Economy.

FACTS OF THE CASE

- 31.03.1999. Claimant requires specifications of respondents purchase conditions (CE1)
- 02.04.1999. Respondent answers, includes price list, and refers him on his GCS (CE2)
- 05.04.1999. Claimant makes purchase order (No. 6839, 100 000\$) including their GCP (CE3)
- 06.04.1999. Respondent sends pro forma invoice, with reference on GCS on internet (CE4)
- 27.05.1999. Claimant makes new purchase order (No. 6910, 500 000 \$), referring respondent on previously sent GCP (CE5)
- 28.05.1999. Respondent acknowledges reception of the purchase order no. 6910 and sends new calculation of price, applicable to both purchase orders (CE6)
- 20.09.1999. Vis Fish notifies claimant about infringement of their trademark (CE7)
- 04.10.1999. Claimant denies trademark infringement, offering joined promotion (CE8)
- 15.10.1999. Vis Fish threatens by legal action (CE9)
- 21.10.1999. Claimant requests legal advice from Howard & Heward (CL12)
- 28.10.1999. Advocate informs claimant about their legal position vis a vis Vis Fish (CE10)
- 03.11.1999. Claimant informs Vis Fish that they will stop selling Vis products (CE11), and actually does so (CL13)
Claimant notifies respondent about the avoidance of the contract (CE12)
- 10.11.1999. Respondent rejects avoidance and offers help (CE13)
- 16.11.1999. Claimant confirms previous requests (CE14)
- 06.06.2000. Claimant makes Request for arbitration