

EIGHTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM

for

Vis Water Sports Co.

- RESPONDENT -



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LIST OF ABBREVIATIONS

§ / §§	section / sections
AcP	Archiv für die civilistische Praxis
AG	Amtsgericht (German District Court)
Am. J. Comp. L.	American Journal of Comparative Law
Art. / Artt.	article / articles
ASA	Association suisse de l'arbitrage
Aust. Bus. L. Rev.	Australian Business Law Review
BB	Der Betriebsberater
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the German Federal Court of Justice in civil matters)
Bus. Law.	The Business Lawyer
C.c.	Code Civil (France)
cf.	<i>confer</i> (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG-Online	Case Law on the UN Convention on Contracts for the International Sale of Goods (Internet database), edited by the Institute of Foreign and International Private Law (Dept. I), University of Freiburg, Germany
CLOUT	Case Law on UNCITRAL Texts (Internet database), edited by the UNCITRAL Secretariat
Colo. Law.	Colorado Lawyer
comp.	compare
Corp.	Corporation
Doc.	document
ed. / Ed. / Eds.	edition / editor / editors
e.g.	<i>exemplum gratia</i> (for example)
EKG	Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen of 17 July 1973
et seq.	<i>et sequentes</i> (and following)
EuZW	Europäische Zeitung für Wirtschaftsrecht
EWiR	Entscheidungen zum Wirtschaftsrecht
fn.	footnote
FOB	free on board (Incoterm)
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration (1 January 1998)
idem	same
i.e.	<i>id est</i> (that means)

infra	below
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
JB1	Juristische Blätter
J.D.I.	Journal Du Droit International
J.L. & Com.	The Journal of Law and Commerce
JZ	Juristische Zeitung
LG	Landgericht (German Regional Court)
L.Q.R.	The Law Quarterly Review
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
Nice Agreement	Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks
No.	Number
NJW	Neue Juristische Wochenschrift
OLG	Oberlandesgericht (Regional Court of Appeal)
O.R.	Official Records
p. / pp.	page / pages
Pace Int. L. Rev.	Pace International Law Review
para. / paras.	paragraph / paragraphs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der internationalen Wirtschaft
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. civ.	Rivista di diritto civile
RTD com.	Revue trimestrielle de droit commercial et économique
supra	above
UCC	Uniform Commercial Code (USA)
UFITA	Archiv für Urheber- und Medienrecht
ULIS	Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL EC	UNCITRAL Model Law on Electronic Commerce
UNCITRAL ICA	UNCITRAL Model Law on International Commercial Arbitration
UN-Doc.	UN-Documents
UNIDROIT	Institut International pour l'Unification du Droit Privé (International Institute for the Unification of Private Law)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (1994)
Uniform L. Rev.	Uniform Law Review

UNILEX	International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods (looseleaf & disk database), edited by Michael Joachim Bonell at the Center for Comparative and Foreign Law Studies, Irvington-on-Hudson, New York.
v.	<i>versus</i> (against)
Vol.	Volume
YBCA	Yearbook of Commercial Arbitration
ZEuP	Zeitung für europäisches Privatrecht
ZZP	Zeitschrift für Zivilprozeß

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STATEMENT OF FACTS

- 31 March 1999** Sports and More Sports, Inc. (hereinafter: Claimant) acknowledged via e-mail receipt of a message from Vis Water Sports Co. (hereinafter: Respondent), in which the latter had announced the enlargement of its web site. Claimant expressed its interest in establishing a business relationship and asked for Respondent's terms.
- 2 April 1999** Respondent replied to Claimant's e-mail and transmitted the terms asked for. It also referred to its General Conditions of Sale on its web site that were available by opening a link.
- 5 April 1999** Respondent received a purchase order via e-mail from Claimant. The latter ordered water sports equipment in the amount of list price \$100,000 FOB Capitol City less a 5% discount. Claimant referred to its General Conditions of Purchase that were attached in a separate document. Clause 14 of Claimant's conditions was a standard ICC arbitration clause.
- 6 April 1999** Respondent confirmed this purchase order and requested to establish a letter of credit in the amount of \$112,200. Respondent referred to its own General Conditions of Sale on its web site to be opened by a link. They contained a forum selection clause which provided any dispute to be settled by the Commercial Court in Capitol City, Equatoriana.
- 10 May 1999** Claimant's account was charged in the amount of \$102,200 for the first purchase order.
- 19 May 1999** The goods were delivered to Claimant.
- 27 May 1999** Claimant made a second purchase order for additional goods totaling list price \$500,000. This time Claimant referred to its General Conditions of Purchase that had been attached to its first purchase order.
- 28 May 1999** Respondent acknowledged receipt of Claimant's second purchase order and announced to treat the two purchase orders as one bargain. It actually did so by calculating a total of \$483,000 (list price minus granted 8% discount) including transport and insurance while subtracting \$3,000 which equals another 3% discount on the first purchase. Respondent promised to ship the goods by 20 June 1999.
- 25 June 1999** Claimant's account was charged for the second purchase order.
- 20 September 1999** Claimant received the first letter from Vis Fish Company of Danubia (hereinafter: Vis Fish) in which the latter claimed that the advertising campaign undertaken by Claimant and the sale of goods in Danubia bearing the Vis Water Sports name infringed its registered trademark "Vis" which covered all water-related products.
- 15 October 1999** In a second letter to Claimant, Vis Fish threatened legal action.
- 28 October 1999** Claimant received a letter from the law office of Howard & Heward which it had contacted in order to seek legal advice. In this letter, it was stated that the claim of Vis Fish for trademark infringement was unfounded and that litigation would eventually be dismissed.
- 3 November 1999** Claimant declared the contract avoided. Claimant stated that Respondent had violated its obligation under Art. 42 CISG to deliver goods free from any right or claim based on intellectual property.
- 10 November 1999** Respondent denied that there had been an effective avoidance of the contract.

RESPONDENT'S REQUEST

In response Memorandum for Claimant, dated 4 December 2000, we respectfully submit the following request on behalf of our client Vis Water Sports Co.:

May it accordingly please the honorable Tribunal,

1. to decline its jurisdiction due to the lack of an arbitration agreement [**Unit 1**];
2. to declare that Respondent did not violate its obligation under Art. 42 CISG, and that it thus did not commit a breach of contract [**Unit 2**];
3. to find that Claimant's notice did not meet the requirements set forth in Art. 43 (1) CISG [**Unit 3**];
4. to declare that Respondent's breach of contract, if one existed, did not amount to a fundamental breach [**Unit 4**];
5. to decline Claimant's demand for interest on the purchase price and damages [**Unit 5**];
6. to find that Claimant has to bear the arbitration costs [**Unit 6**].

In its Memorandum, Claimant contends that

- the arbitration clause contained in Claimant's General Conditions of Purchase prevails¹,
- Claimant and Respondent concluded two binding contracts by e-mail²,
- Respondent failed to deliver goods free from any right or claim of a third party based on industrial or other intellectual property as required by Art. 42 CISG³,
- a relevant right or claim based on industrial or intellectual property existed⁴,
- even an unfounded claim suffices to invoke Respondent's warranty provided by Art. 42 CISG⁵,
- the limitations of Respondent's warranty set forth in Art. 42 CISG are not relevant⁶,

¹ Memorandum for Claimant, p. 13.

² Memorandum for Claimant, p. 13.

³ Memorandum for Claimant, p. 17.

⁴ Memorandum for Claimant, p. 18.

⁵ Memorandum for Claimant, p. 18.

⁶ Memorandum for Claimant, p. 19.

- Respondent could not have been unaware of the claim and Claimant's ignorance should not affect the warranty provided by Art. 42 CISG⁷,
- Claimant notified Respondent within a reasonable time under Art. 43 CISG⁸,
- Respondent is not entitled to rely on Art. 43 (1) CISG since it should have known of Vis Fish's right⁹.
- Respondent committed a fundamental breach since the breach deprived Claimant of the latter's expectations¹⁰,
- Respondent could have foreseen the result of the breach as provided by Art. 25 CISG¹¹,
- Claimant was entitled to avoid the contract under Art. 49 CISG¹²,
- Claimant avoided the contract within a reasonable time¹³,
- Claimant is entitled to restitution and damages totaling \$631,700 according to Artt. 82 through 84 CISG¹⁴,
- Claimant has the right to claim interest on the purchase price and on the damages applying a rate at 7 %¹⁵,
- even if Claimant did not have the right to avoid the contract, Respondent would have to pay damages in accordance with Artt. 83 and 44 CISG¹⁶.

⁷ Memorandum for Claimant, p. 20.

⁸ Memorandum for Claimant, p. 21.

⁹ Memorandum for Claimant, p. 23.

¹⁰ Memorandum for Claimant, p. 24.

¹¹ Memorandum for Claimant, p. 25.

¹² Memorandum for Claimant, p. 23.

¹³ Memorandum for Claimant, p. 27.

¹⁴ Memorandum for Claimant, pp. 28 et seq.

¹⁵ Memorandum for Claimant, pp. 29 and 31.

¹⁶ Memorandum for Claimant, p. 31.

APPLICABLE LAW

Respondent agrees with Claimant's contention that the United Nations Convention on Contracts for the International Sale of Goods¹⁷ is applicable to the present case.

Although an arbitration agreement between Claimant and Respondent does not exist¹⁸ questions whether new claims are admissible¹⁹, and questions concerning the allocation of the arbitration costs²⁰ shall be governed by the ICC Rules of Arbitration.

Despite the fact that Claimant does not mention them in its Memorandum, the following legal sources are also applicable:

- 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since both Equatoriana and Danubia are parties to it²¹.
- UNCITRAL Model Law on International Commercial Arbitration which is subsidiarily applicable to questions concerning the arbitral proceedings, being the *lex fori* of Danubia²².

¹⁷ Memorandum for Claimant, pp. 13 et seq.

¹⁸ See infra, Unit 1.

¹⁹ These questions will be referred to below; cf. Unit 5.

²⁰ These questions will be referred to below; cf. Unit 6.

²¹ Request for Arbitration, para. 23.

²² Request for Arbitration, para. 23.

UNIT 1: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION.

The Arbitral Tribunal is respectfully requested to find that it has no jurisdiction and therefore does not have the competence to decide on the merits of the present case. However, Respondent acknowledges that the Tribunal has ‘Kompetenz-Kompetenz’ pursuant to Art. 6 (2) ICC Rules, i.e. competence to decide on its own jurisdiction.

It will be shown that no valid arbitration agreement between the parties exists. Claimant submits that two contracts were formed, both including Claimant’s arbitration clause¹. Respondent does not dispute that during their business relationship two agreements were reached. Yet, Counsel will show that Claimant’s arbitration clause is included in neither the first agreement (hereinafter: April agreement) [I] nor the second one (hereinafter: May agreement) [II]. Finally, an arbitration agreement would not have met the applicable formal requirements of the New York Convention and the UNCITRAL ICA [III].

I. The April agreement does not contain Claimant’s arbitration clause

During the negotiating process in April both parties referred to their general conditions which contained contradicting dispute settlement clauses². Indeed, Claimant’s remarks concerning the solution of the so-called ‘battle of the forms’³ might be of academic interest, but not at all relevant on the current facts. Counsel will show that Claimant’s arbitration clause was in any case excluded from the April agreement, regardless whether the Tribunal favors an application of the ‘last shot’ rule [1] or the ‘knock out’ rule [2]. Finally, Claimant’s argument that Respondent acted in ‘bad faith’ by imposing its forum selection clause⁴ does not affect the question at hand [3].

1. Claimant’s arbitration clause was terminated by Respondent’s ‘last shot’

In accordance with Art. 19 (1) CISG⁵, the ‘last shot’ theory⁶ provides that the conditions last referred to terminate the opposing conditions and establish a counter-offer instead⁷.

¹ See Memorandum for Claimant, pp. 13 and 15 et seq.

² Clause 23 of Respondent’s General Conditions of Sale was a forum selection clause; Answer to the Request for Arbitration, para. 13. Clause 14 of Claimant’s General Conditions of Purchase represented an arbitration clause; Request for Arbitration, para. 18.

³ Memorandum for Claimant, pp. 15 et seq.

⁴ Memorandum for Claimant, pp. 15 and 16.

⁵ Art. 19 (1) CISG provides: “A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.”

On 5 April 1999, Claimant sent an e-mail offering to buy goods in the amount of \$100,000 and enclosed its General Conditions of Purchase⁸. Respondent replied on 6 April 1999 referring to its General Conditions of Sale⁹. This answer constituted a counter-offer pursuant to Art. 19 (1), (3) CISG, which is also conceded by Claimant¹⁰. Due to this rejection, Claimant's arbitration clause was terminated, Art. 17 CISG. By establishing the first letter of credit Claimant accepted the counter-offer, Art. 18 (1) CISG.

Consequently, Claimant's arbitration clause was terminated by Respondent's 'last shot'.

2. Even if applying the 'knock out' rule, Claimant's arbitration clause was excluded

According to the 'knock out' rule, a contract is validly concluded in spite of any dissent concerning printed terms; these terms are excluded to the extent that they contradict each other¹¹. Following this theory, Respondent's e-mail of 6 April 1999 represented an acceptance. As in the immediate case the two dispute settlement clauses were contradictory to each other they have been 'knocked out'.

In conclusion, Claimant's arbitration clause has not been included in the April agreement.

3. Claimant's 'bad faith' argument does not affect this result

Claimant submits that Respondent was in bad faith since it allegedly was "*aware of the difference between the two clauses [...], yet decided not to inform Claimant of the difference*"¹². First of all, the allegation that Respondent was aware is not true. By contrast, neither Respondent nor Claimant have ever read each other's general conditions¹³. Moreover, even if Respondent had known of the contradictory standard terms, the alleged obligation to inform the contractual partner could not be established. Parties engaged in international trade are well aware of the possibility of contradictory clauses and therefore, each contracting side bears the risk of losing the 'battle of the forms' if it fails to read the other party's

⁶ In favor of the 'last shot' rule: Gabriel, Bus. Law. Vol. 49 (1994), pp. 1058 and 1061; Loewe, Art. 19, p. 44; Nicholas, L.Q.R. Vol. 105 (1989), p. 217; Wey, para. 1342.

⁷ Bianca/Bonell/Farnsworth, Art. 19 note 2.5.; Blodgett, Colo. Law. Vol. 18 (1989), p. 426; Dessemontet, Convention, pp. 54 et seq.; Draetta, Riv. dir. int. priv. proc. Vol. 22 (1986), p. 326; Enderlein/Maskow/Strohbach, Art. 19 note 10; Garro/Zuppi, Compraventa internacional, pp. 129 et seq.; Herber/Czerwenka, Art. 19 para. 18; Honsell/Schnyder/Straub, Art. 19 paras. 37 et seq.; Ludwig, p. 338; del Pilar Perales Viscasillas, Pace Int. L. Rev. Vol. 10 (1998), pp. 117 et seq. and 144 et seq.; Piltz, § 3 paras. 92 et seq.; Rudolph, Art. 19 para. 11.

⁸ Claimant's Exhibit No. 3.

⁹ Claimant's Exhibit No. 4.

¹⁰ Memorandum for Claimant, p. 14.

¹¹ Cf. Amtsgericht Kehl, CISG-Online Case No. 162; Schlechtriem, Kollidierende Geschäftsbedingungen, p. 47; Kühl/Hingst, UN-Kaufrecht, p. 56; Holthausen, RIW (1989), pp. 517 et seq.; Wilhelm, UN-Kaufrecht, p. 11; Detzer/Thamm, BB (1992), p. 2378.

¹² Memorandum for Claimant, p. 16.

¹³ Procedural Order No. 1, para. 40.

conditions¹⁴. Secondly, the principle of ‘good faith’ is only applicable when interpreting the Convention, not when interpreting the will and conduct of parties¹⁵.

Consequently, the April agreement does not include Claimant’s arbitration clause.

II. The May agreement does not include Claimant’s arbitration clause either

On 27 May 1999, Claimant informed Respondent that it wished to make another purchase for additional goods totaling a list price of \$500,000¹⁶. Respondent reacted to this offer on 28 May 1999¹⁷. It will be shown that this purported acceptance¹⁸ in fact constituted a counter-offer which rejected Claimant’s offer and thereby terminated the arbitration clause [1]. Moreover, due to the fact that Respondent had included its general conditions in all future contracts, Claimant’s arbitration clause was terminated [2]. In any event, Claimant’s mere referral to its General Conditions of Purchase without attaching them cannot be seen as sufficient to have validly included these conditions [3].

1. Respondent rejected Claimant’s offer and thereby terminated the arbitration clause

Claimant offered to make a second purchase regardless of the first one. Claimant interpreted Respondent’s reaction of 28 May 1999 as an acceptance¹⁹. This alleged acceptance in fact constituted a counter-offer. A reply represents a counter-offer if it materially alters the content of the offer, Art. 19 (1) CISG. Counsel will show that Respondent’s reply materially altered Claimant’s offer.

While Claimant aimed at establishing a separate sales contract, Respondent intended to merge both purchases into one²⁰. This intention is emphasised by establishing an overall price which includes granting an 8% discount for all goods²¹. This alteration of the discount (from 5% to 8%) led to an alteration of the purchase price of the first contract reducing it by \$3,000. Thereby, Respondent’s reply contained an offer to intervene in the contract that had already been performed. This intervention constituted a modification of the

¹⁴ This is recognised by e.g. Bundesgerichtshof, JZ (1977), p. 604; Müller/Otto, p. 81.

¹⁵ Farnsworth, Convention, p. 18; Honnold, Art. 7 para. 94, p. 100; Schlechtriem, UN-Kaufrecht, para. 44.

¹⁶ Claimant’s Exhibit No. 6.

¹⁷ Claimant’s Exhibit No. 6.

¹⁸ Memorandum for Claimant, p. 15.

¹⁹ Memorandum for Claimant, p. 15.

²⁰ Claimant’s Exhibit No. 6: “[...] we have treated your two purchase orders as one purchase.”

²¹ See Respondent’s calculation in Claimant’s Exhibit No. 6.

first contract²². A modification requires an agreement in accordance with Artt. 14 et seq. CISG²³. As Respondent's reply thus had necessarily to be accepted by Claimant it must be seen as a counter-offer.

Moreover, a reduction of price always represents a material alteration being expressly mentioned in Art. 19 (3) CISG. Thus, Respondent's reply constituted a counter-offer.

Claimant accepted by conduct this counter-offer establishing the second letter of credit²⁴, Art. 18 (1) CISG. As neither Respondent's counter-offer nor Claimant's acceptance expressly referred to standard terms again²⁵, the May agreement does not include an arbitration clause either.

2. Due to Respondent's 'all sales' clause, Claimant's arbitration clause was terminated

In its e-mail of 6 April 1999, Respondent stated that it intended to include its general conditions '*in all sales contracts*'²⁶. As Claimant was aware of this intention²⁷, Respondent did not have to refer to its conditions again²⁸, but reference had to be implied. Due to this implied reference, a 'battle of the forms' existed which resulted in an exclusion of Claimant's arbitration clause, regardless of the fact which rule was applied²⁹. Consequently, Claimant's arbitration clause has not become part of the May agreement.

3. Claimant's mere referral to its General Conditions of Purchase is insufficient to have validly included them

Claimant did not attach its conditions when making the second purchase order since it assumed that Respondent already possessed a copy of them³⁰. However, Counsel points out that Respondent relied on the invalidity and therefore on the preclusion of Claimant's conditions regarding the April agreement³¹. It thus was not obliged to keep them. Claimant's referral to assumingly unavailable conditions cannot be seen as sufficient to have validly included these conditions³². If Claimant invoked the very argument against

²² This is admissible under Art. 29 CISG.

²³ Oberlandesgericht Köln, RIW (1994), p. 973; Schlechtriem, EWiR (1994), p. 868; Schlechtriem/Schlechtriem, Art. 29 para. 2.

²⁴ Procedural Order No. 1, para. 48.

²⁵ Claimant accepted by conduct and thereby did not refer to its general conditions, Claimant's Exhibit No. 6.

²⁶ Claimant's Exhibit No. 4; Terms of Reference, para. 5.

²⁷ Memorandum for Claimant, p. 17.

²⁸ Comp. Berger, Schiedsgerichtsbarkeit, pp. 112 and 113; Oberlandesgericht München, EuZW (1991), p. 64.

²⁹ Cf. supra, Unit 1 I.1. and 2.

³⁰ Claimant's Exhibit No. 5.

³¹ See supra, Unit 1 I.1.

³² Cf. Bundesgerichtshof, RIW (1984), p. 647; Wackenhuth, pp. 458 and 459; Schlosser, Vol. I, note 348; Holtzmann/Neuhaus, p. 264.

Respondent, Counsel points out that the latter's general conditions are easily available at any time by opening a link on the web site or in its e-mails³³.

III. An arbitration agreement would not have met the applicable formal requirements

Claimant relies on Art. 11 UNCITRAL EC when examining the formal validity of the alleged sales contracts³⁴. It thereby fails to notice two aspects, the first of which is that it does not differentiate between the formal requirements for contracts and those for arbitration agreements. Secondly, Claimant relies on the wrong convention since the UNCITRAL EC does not deal with the validity of arbitration agreements. By contrast, the alleged agreement providing for arbitration in Danubia³⁵ has to meet the formal requirements of both the New York Convention and the UNCITRAL ICA³⁶.

As Counsel has shown above, Claimant's arbitration *clause* has not become part of either the April or the May agreement³⁷. Even if it had, an arbitration *agreement* was yet not validly reached. This is because the special requirements of the Art. II (2) New York Convention³⁸ as well as Art. 7 (2) UNCITRAL ICA³⁹ are not met. According to these provisions an arbitration agreement must be in writing, which can be generally achieved by an exchange of e-mails. However, in case of an arbitration clause being included in standard terms, which are contained in a separate document, a 'general reference' cannot suffice⁴⁰, but rather a 'specific reference' is required⁴¹. The purpose of this requirement is "*to ensure that a party is aware that he is agreeing to arbitration*"⁴² and thereby is derogating courts' jurisdiction, i.e. the due process of national law⁴³.

³³ Cf. Procedural Order No. 1, para. 37.

³⁴ Memorandum for Claimant, p. 15.

³⁵ Terms of Reference, para. 18; Answer to the Request for Arbitration, para. 18; Request for Arbitration, para. 21.

³⁶ Holtzmann/Neuhaus, pp. 260 and 262; Hußlein-Stich, p. 39.

³⁷ See supra, Unit 1 I. and II.

³⁸ Even though the Convention is on the enforcement and recognition of arbitral awards, an arbitration agreement has to meet the formal requirements of the New York Convention, see Schwab/Walter, pp. 383 and 405. Art. II (2) New York Convention provides: "*The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*"

³⁹ Art. 7 (2) UNCITRAL ICA provides: "*The Arbitration Agreement shall be in writing. An Agreement is in writing if it is contained in a document by parties or in an exchange of letters, telex, telegrams or other means of telecommunication that proved a record.*"

⁴⁰ If the reference clause in the contract is expressed in general terms only the requirements of the Conventions must be deemed not to be met; van den Berg pp. 216 and 217; Lindacher, p. 171. This is due to the fact that the party's calling for arbitration would not have been clearly expressed; Corte di Cassazione, YBCA IX (1984), p. 417; Queen's Bench Division (Admiralty Court), YBCA IV (1979), p. 325; Rubino-Sammartano, p. 122.

⁴¹ For example, "including the arbitration clause" as demanded in the decision of the Queen's Bench Division (Admiralty Court), YBCA IV (1979), p. 325; Corte di Cassazione, YBCA I (1976), p. 191; Corte di Cassazione, YBCA III (1978), p. 279; van den Berg pp. 217 and 218; Schwab/Walter, p. 346; Schlosser, Vol. I, note 373.

⁴² Van den Berg p. 171.

⁴³ Rubino-Sammartano, p. 115 fn. 2; Huber, ASA Special Series No. 8, p. 82; Lindacher, p. 170; Müller/Otto, p. 96; Wackenhuth, p. 457.

On the facts given, neither Claimant's e-mail dated 5 April 1999⁴⁴ nor its e-mail dated 27 May 1999⁴⁵ contained a 'specific reference'. Claimant's standard terms were contained in an attachment to its e-mail of 5 April 1999, i.e. a separate document. Thus, a 'specific reference' would have been necessary. Claimant's statement "*I have attached our General Conditions of Purchase, which are part of our purchase order*"⁴⁶ only represented a 'general reference' and thus did not constitute the kind of reference required.

As a 'general reference' on its own is insufficient to incorporate an arbitration clause, *a fortiori* Claimant's reference in its e-mail of 27 May 1999⁴⁷ to such a reference does not suffice⁴⁸.

In addition, an arbitration agreement demands a 'separate meeting of minds' since it does not govern contractual rights and obligations, but rather procedural matters⁴⁹. This is expressed in the Conventions requiring an *exchange* of means of communications. Counsel puts forward that none of Respondent's e-mails contained its assent to enter into an arbitration agreement. Thus, a 'separate meeting of minds' is not existent.

Therefore, an arbitration agreement would not have met the formal requirements of Art. II (2) New York Convention and Art. 7 (2) UNCITRAL ICA.

Result: The Arbitral Tribunal is respectfully requested to find that it has no jurisdiction and therefore does not have the competence to decide on the merits of the present case.

UNIT 2: RESPONDENT DID NOT VIOLATE ITS OBLIGATION UNDER ART. 42 CISG, AND THUS DID NOT COMMIT A BREACH OF CONTRACT.

Claimant submits that "*Respondent failed to deliver goods which are free from any right or claim of a third party based on industrial or other intellectual property*"⁵⁰. Counsel will show that Respondent's goods were not encumbered with a claim by Vis Fish which is sufficient to invoke Art. 42 (1) (a) CISG [I].

⁴⁴ Claimant's Exhibit No. 3.

⁴⁵ Claimant's Exhibit No. 5.

⁴⁶ Claimant's Exhibit No. 3.

⁴⁷ Claimant's Exhibit No. 5.

⁴⁸ Schlösser, Vol. I, note 348; von Hülsen, p. 59; Huber, ASA Special Series No. 8., p. 81; Bucher, p. 54; Poudret, p. 531; Wackenhuth, p. 458.

⁴⁹ Rubino-Sammartano, p. 115; Bucher, p. 39; Lindacher, p. 170; Müller/Otto, p. 81; Schwab/Walter, pp. 62 et seq.

⁵⁰ Memorandum for Claimant, p. 17.

Moreover, Respondent did not have to be aware of potential claims resulting from the trademark “Vis” [II]. In any event, as Claimant could not have been unaware of the claim, Respondent’s liability is excluded [III].

I. Respondent’s goods were not encumbered with a claim sufficient to invoke Art. 42 CISG

Claimant alleges that “*a relevant [...] claim based on industrial or intellectual property existed*”⁵¹. Vis Fish’s claim is however unfounded and therefore insufficient to activate Art. 42 CISG [1]. Moreover, it will be shown that the claim is frivolous [2]. Contrary to Claimant’s assertion that “*a claim existed at the time of the conclusion of the contract*”⁵², the claim was not raised until after delivery and thus it is too late to qualify under Art. 42 (1) CISG [3].

1. The claim is unfounded

In contrast to Claimant’s statements⁵³, the purpose of Art. 42 CISG is to protect the buyer only from rightful claims⁵⁴. If this provision also included unfounded claims the seller could never rely on the performance of the contract. There is no legal reason to hold the seller liable for unfounded claims of a third party arisen in the sphere of the buyer⁵⁵. It is the latter’s usual risk of life to get involved in litigation due to unfounded claims⁵⁶. Moreover, a buyer willing to avoid the contract could easily convince as many third parties as it wished to maliciously raise claims on the goods⁵⁷. In that case, the seller would possibly be involved in countless legal disputes which would consume both time and money. This risk cannot be expected to be borne by the seller. Thus, unfounded claims do not meet the requirements of Art. 42 (1) CISG.

In the case at hand, the parties have always been in agreement that the claim by Vis Fish is unfounded⁵⁸, not that “*it appears to be founded*” as Claimant states in its Memorandum⁵⁹. The claim is consequently not sufficient to invoke Art. 42 (1) (a) CISG.

⁵¹ Memorandum for Claimant, p. 18.

⁵² Memorandum for Claimant, p. 17.

⁵³ Memorandum for Claimant, pp. 18 et seq.

⁵⁴ Bucher, pp. 30 et seq.; Wolff, p. 74; cf. discussion in YB III, Doc. A(4), A/CN.9/WG.2/WP.8 where it was suggested to include the term “valid” into the former Articles 52, 53. This proposal was finally dismissed because of the problem of which law should determine the validity of such claim.

⁵⁵ Bucher, pp. 30 and 31.

⁵⁶ Prager, p. 73.

⁵⁷ Schwerha, I.D.1.

⁵⁸ Terms of Reference, para. 8.

⁵⁹ Memorandum for Claimant, p. 18.

2. The claim has to be regarded as frivolous

Even if the Tribunal holds Respondent liable for unfounded claims, Counsel will show that Vis Fish's claim does still not suffice to invoke Art. 42 CISG since it is frivolous. It is generally agreed that Art. 42 (1) CISG is not applicable to cases in which the claim qualifies as frivolous⁶⁰. Contrary to Claimant's submission⁶¹, Vis Fish's claim must be seen as frivolous because the goods in dispute cannot lead to confusion at all⁶².

Indeed, Respondent is aware that partial identity of the brand-names exists since both companies employ the word "Vis". However, this fact is of no importance since the goods sold by each company are neither identical nor even similar because Respondent sells sports equipment while Vis Fish currently sells food products.

Claimant might theoretically invoke that the sports fishing equipment which Vis Fish had been selling until 1996⁶³ was similar to Respondent's goods. It could argue that similarity would be indicated by the fact that both sorts of goods fall within the same category of the Nice Agreement⁶⁴. However, Counsel points out that this classification is of no importance for the determination of similarity of goods, which is expressed by Art. 9 (2) Trademark Law Treaty⁶⁵.

Moreover, Claimant could submit that there would be similarity due to sports fishing equipment still being protected by Vis Fish's trademark. However, the owner of a broad trademark like the present one covering "all water-related products" can only bring action for trademark infringement regarding products it actually sells or at least intends to sell during the remaining period of registration⁶⁶. On the facts given, Vis Fish has not been selling sports fishing equipment since 1996⁶⁷. Moreover, Vis Fish cannot be expected to

⁶⁰ Secretariat's Commentary, O.R., p. 426, Art. 39 note 4; Bernstein/Lookofsky, p. 66; Wolff, pp.66 et seq. and 81; Herber/Czerwenka, Art. 41 para. 6; Enderlein/Maskow/Strohbach, Art. 41 note 4; Reinhart, Art. 41 para. 2; Staudinger/Magnus, Art. 41 para. 16; Witz/Salger/Lorenz/Salger, Art. 41 para. 7; Soergel/Lüderitz/Schüßler-Langeheine, Art. 41 para. 7.

⁶¹ Memorandum for Claimant, p. 18.

⁶² This criterion is in accordance with Art. 23 of the Danubian Trademark Law which provides that "*the owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.*".

⁶³ Procedural Order No. 1, para. 7.

⁶⁴ Both the sports fishing equipment and the Vis Water Sports products fall within class 28.

⁶⁵ Art. 9 (2) Trademark Law Treaty provides: "*Goods or services may not be considered as being similar to each other on the ground that [...] they appear in the same class of the Nice Classification.*"

⁶⁶ Procedural Order No. 1, para. 8.

⁶⁷ Procedural Order No. 1, para. 7.

resume retailing these products within the space of a year⁶⁸. If it succeeded in doing so, it would have accomplished a logistic masterpiece. Thus, the goods in dispute are not even similar.

Finally, the use of the goods in connection with the slogan “like a fish in water” cannot likely lead to confusion either. Claimant’s argument that the slogan “like a fish in water” could mislead the Danubian public can easily be refuted. Claimant purports that “*confusion will necessarily take place as the slogan strikes the consumer and is remembered as associated with Respondent’s products*”⁶⁹. Respondent uses the word “fish” as a stylistic device. This is emphasised by the word “like”. No-one hearing the slogan will automatically think of dead and cold fish being sold as food products. On the contrary, the slogan leads the consumer to think of life, vitality and swimming proficiency. Everyone desires to swim like a fish but refuses to be eaten as one. As confusion of food and sports equipment is unlikely to occur⁷⁰, Vis Fish’s claim has to be regarded as frivolous.

3. An application of Art. 42 (1) CISG is excluded since the claim was not raised at the time of delivery

Art. 42 CISG applies only if the alleged claim of a third party had been raised at the time of delivery⁷¹. In denying such a limitation the seller would find itself exposed to claims possibly raised years after the performance of the contract, since Art. 42 CISG does not provide a cut-off period⁷². In that case, safety of trade would be endangered. Presently, the claim arose on 21 September 1999⁷³ and therefore after the time of delivery.

Should the Tribunal find it relevant that the circumstances on which the claim is based existed at the time of delivery, Counsel puts forward that this opinion does not apply if an unfounded claim is in dispute. This is due to the fact that unfounded claims lack a legal basis, and this naturally applies at the time of delivery. As Vis Fish’s claim is unfounded, no relevant circumstances existed at this time.

In conclusion, an application of Art. 42 (1) CISG is excluded.

⁶⁸ Since the registration was renewed in 1992 for 10 more years, it will expire in 2002, which leaves one year for Vis Fish to enlarge its range of products from food to sports equipment; Procedural Order No. 1, para. 10.

⁶⁹ Memorandum for Claimant, p. 18.

⁷⁰ Even Claimant itself states that there is “*no likelihood that anyone would confuse athletic equipment, even that used for water sports, with the fish and fish products [...] The markets and the nature [of the goods] are simply too different*”, see Claimant’s Exhibit No. 8.

⁷¹ The wording of the first sentence of Art. 42 (1) CISG, that “*the seller must deliver goods [...]*” requires the claim to be in existence at the time of delivery; Enderlein, Rights and Obligations of the Seller, p. 179, according to whom the time of delivery is especially important in case of unjustified claims; Enderlein/Maskow/Strohbach, Art. 41 para. 5; Reinhart, Art. 41 para. 4; Heilmann, p. 667; Herber/Czerwenka, Art. 41 para. 8; Wolff, p. 65; Piltz, § 5 para. 96; cf. Dölle/Neumayer, Art. 52 EKG para. 8, to that opinion under ULIS with reference to the legislative history.

⁷² As e.g. provided by Art. 39 (2) CISG concerning defects in quality.

II. Respondent did not have to be aware of potential claims resulting from the trademark “Vis”

In its Memorandum Claimant purports that Respondent could not have been unaware of the claim since it neglected its duty to inquire⁷⁴. This assertion is based on Claimant’s subjective way of interpreting Art. 42 CISG, from which Claimant derives such a duty. However, Counsel will show that Respondent was not obliged to perform a trademark search [1]. Even assuming that this duty did exist and Respondent had complied, it could not have recognised a possible confusion between its goods and those of Vis Fish [2].

1. No duty to inquire can be imposed on Respondent

The Convention uses three terms in order to differentiate between three types of knowledge: ‘knew’, ‘could not have been unaware’ and ‘ought to have known’⁷⁵. Whilst the wording of the last term indicates a duty to investigate, the term ‘could not have been unaware’ does not do so⁷⁶, but only lightens the burden of proving that the seller in fact ‘knew’⁷⁷. The term ‘could not have been unaware’ implies that the seller is only liable for claims that are obvious, i.e. before its eyes⁷⁸.

It is not appropriate that the interpretation of ‘could not have been unaware’ within Art. 42 CISG should be different from the interpretation of other provisions of the Convention that contain the same term, e.g. Art. 35 CISG. If the draftsmen of the Convention had aimed at establishing a duty to inquire within Art. 42 CISG they would have made use of the term ‘ought to have known’⁷⁹.

Claimant’s submission that Respondent was “*the initiator of the transaction*” because “*the first E-mail comes from Respondent*”, and that it was therefore the latter’s obligation “*to research any possible claims on the goods in question*”⁸⁰ must be disregarded. However, the party who sends the initial offer, the offeror, is to be seen as the initiator of a transaction. Respondent’s announcement dated 31 March 1999⁸¹, its web site⁸² as

⁷³ Claimant’s Exhibit No. 7.

⁷⁴ Memorandum for Claimant, p. 20.

⁷⁵ Honnold, Art. 42 para. 270, p. 350 and Art. 35 para. 229, p. 260; Prager, p. 163.

⁷⁶ Huber, RabelsZ Vol. 43 (1979), p. 503; Soergel/Lüderitz, Art. 42 para. 4; Honnold, Art. 42 para. 270, p. 350; Prager, p. 164; Ebenroth, JBl Vol. 108 (1986), p. 689; Su, p. 69; Welser, p. 109; Wolff, p. 75; ICC A/Conf.97/8/Add. 2, p. 19.

⁷⁷ Honnold, Art. 42 para. 270, p. 350 and Art. 35 para. 229, p. 260; Prager, p. 164; Schlechtriem/Schwenzer, Art. 35 para. 34.

⁷⁸ Honnold, Art. 35 para. 229, p. 260; Prager, p. 164; Wilhelm, UN-Kaufrecht, p. 18; Ebenroth, JBl Vol. 108 (1986), p. 689; Welser, p. 109; Wolff, p. 75.

⁷⁹ The ICC criticised the different interpretations within the Secretariat’s Commentary (Art. 40 note 6) calling attention to the fact that a duty to inquire is inappropriate regarding trade. Furthermore, if Art. 42 CISG intended to imply the very duty to inquire, this provision should contain the term ‘ought to have known’; ICC A/Conf.97/8/Add. 2, pp. 19 et seq. Since the draftsmen did not alter the wording of Art. 42 CISG it is obvious that they accepted the criticism and therefore did not want to establish a duty to inquire.

⁸⁰ Memorandum for Claimant, p. 21.

⁸¹ Claimant announced that it had opened a new web site on the Internet, Request for Arbitration, para. 3.

⁸² Request for Arbitration, paras. 3 et seq.

well as its e-mail dated 2 April 1999⁸³ merely represented invitations to make an offer⁸⁴, because Respondent did not want to be bound by these proposals. On the contrary, it was Claimant who offered to buy goods in its e-mail dated 5 April 1999⁸⁵. Claimant was therefore the initiator of the transaction. Consequently, in the immediate case, no duty to inquire can be imposed on Respondent.

As Respondent had no knowledge of Vis Fish's existence, let alone its trademark, the claim was not before Respondent's eyes. Thus, the latter is not liable under Art. 42 CISG.

2. Respondent could not recognise a possible confusion between the goods

Even if the Tribunal decided to impose a duty to investigate on Respondent, the latter could not have been aware of the claim. Indeed, Respondent would have found the registered trademark of Vis Fish, had it conducted research in Danubia. However, since Vis Fish and Respondent operate on different market sectors, the latter could not have recognised a risk of trademark infringement. As presented above⁸⁶, a confusion between the goods does not exist and can therefore not be recognisable to Respondent.

III. Claimant could not have been unaware of the claim, Art. 42 (2) (a) CISG

Assuming that Respondent ought to have known of the claim, it is exempted from liability according to Art. 42 (2) (a) CISG. It will be shown that Claimant was in any case obliged to conduct research [1]. Even without an obligation to inquire, Claimant could not have been unaware of Vis Fish's claim [2].

1. Claimant had to conduct research

Should Respondent be found to have a duty to inquire, it is unreasonable not to impose the same duty on Claimant. The fact that both paragraphs of Art. 42 CISG contain the term 'could not have been unaware' indicates that neither the seller nor the buyer shall be encumbered with an increase in duties but rather, that circumstances of each individual case have to be taken into consideration⁸⁷. Such a solution is in accordance with the general principle of the CISG which is to impose responsibility on the party who is in a better

⁸³ Claimant's Exhibit No. 2.

⁸⁴ Comp. Request for Arbitration, para. 3; A web site generally constitutes an 'invitatio ad offerendum'; Rehbinder/Schmaus, pp. 318 and 322; Schlechtriem/Schlechtriem, Commentary, Art. 14 para. 13.

⁸⁵ CLAIMANT'S Exhibit No. 3. This fact is not contested by Claimant; cf. Memorandum for Claimant, p. 13; Request for Arbitration, para. 17.

⁸⁶ See supra, Unit 2 I.2.

⁸⁷ Langenecker, p. 193; Dölle/Stumpf, Art. 36 EKG para. 5.

position to eliminate problems that would impede a successful completion of the contract, Art. 7 (1) CISG⁸⁸. Those authorities⁸⁹ that solely impose a duty to inquire on the seller argue that the latter is usually more familiar with its goods. However, in such cases as the present one, this argument is not convincing. Regarding non-technical property rights such as trademarks, both the retailer and the manufacturer have the same opportunity to investigate the situation⁹⁰. Therefore, it has to be determined which of the parties has better opportunities to perform a trademark search. As the trademark is registered in Danubia, Claimant is advantaged by being able to gain a better insight into the situation. It can be expected to be familiar with customs concerning registration and in particular with the language of the registry⁹¹.

Additionally, Claimant, who itself retails the products, has to ensure that its purchased goods are fit for sale. Regardless of its internal relationship to Respondent, it must take investigative steps as it would otherwise be liable to its customers in Danubia.

Claimant itself requires the initiator of business relationships to be obliged to inquire⁹². Consequently, being the initiator⁹³, it must impose such a duty on itself and thus had to conduct research.

2. Even if denying the obligation to inquire, Claimant could not have been unaware of Vis Fish's claim

Assuming that Claimant was not obliged to conduct research, Counsel points out that the existence of the trademark "Vis" was obvious to Claimant, which is sufficient to exclude Respondent's liability⁹⁴. A buyer may not ignore intellectual property rights which are well known or notorious⁹⁵ and those which he would have found had he kept his eyes open⁹⁶. Firstly, Vis Fish is well-known in Danubia⁹⁷ and the relevant personnel of Claimant did know the company⁹⁸. It can be expected that those members of staff had knowledge of the size and the status of Vis Fish. Therefore, they could have easily assumed that such an important business' brand-name would have been a registered trademark.

⁸⁸ Honnold, Art. 7 para. 100, p. 107; Schlechtriem/Ferrari, Art. 7 para. 54; Witz/Salger/Lorenz/Witz, Art. 7 para. 15; Staudinger/Magnus, Art. 7 para. 47.

⁸⁹ E.g. Schlechtriem/Schwenzer, Art. 42 para. 17.

⁹⁰ Langenecker, p. 203.

⁹¹ Langenecker, p. 204, who gives the example of a Japanese importer being able to inform itself more easily about registered trademarks in Japan than the German manufacturer.

⁹² Memorandum for Claimant, p. 21, referring to Heuzé, La réglementation française des contrats internationaux.

⁹³ See supra, Unit 2 II.1.

⁹⁴ Enderlein/Maskow/Strohbach, Art. 42 note 9; Herber/Czerwenka, Art. 42 para. 6; Piltz, § 5 para. 111; Prager, p. 174; Schlechtriem/Schwenzer, Art. 42 para. 17; Honsell/Magnus, Art. 42 para. 16.

⁹⁵ Zhang, p. 92; Schlechtriem/Schwenzer, Art. 42 para. 17, Langenecker, p. 212; Vida, RTD com. Vol. 47 (1994), pp. 30 et seq.

⁹⁶ Rauda/Etier, p. 56.

⁹⁷ Procedural Order No. 1, para. 16.

⁹⁸ Procedural Order No. 1, para. 18.

Secondly, the Danubian registry of trademarks is published in a journal⁹⁹. If Claimant had kept its eyes open it would have found the relevant information therein.

Finding that Respondent could have recognised a possible confusion between its goods and those of Vis Fish, the same has to be assumed for Claimant *a fortiori*. Even if Claimant did not have to conduct research it must have been aware of the trademark.

Therefore, the exception of Respondent's liability according to Art. 42 (2) (a) CISG is applicable to this case.

Result: Respondent did not violate its obligation under Art. 42 CISG, and thus did not commit a breach of contract.

UNIT 3: CLAIMANT LOST ITS RIGHT TO RELY ON ART. 42 (1) CISG SINCE ITS NOTICE OF VIS FISH'S CLAIM TO RESPONDENT DID NOT MEET THE REQUIREMENTS SET FORTH IN ART. 43 (1) CISG.

Claimant submits that Respondent is not entitled to rely on Art. 43 (1) CISG since it "*should have known of Vis Fish Company's right*"¹⁰⁰. However, Counsel will show that Claimant's assertions are incorrect. Claimant was obliged to notify Respondent of Vis Fish's claim [I]. The notice given did not fulfil the requirements of Art. 43 (1) CISG. Firstly, it did not meet the purpose of the provision, being of no use to Respondent [II]. Secondly, it was not given within a reasonable time [III]. Finally, since Claimant has no reasonable excuse for its failure to give the required notice it cannot rely on Art. 44 CISG [IV].

I. Respondent is entitled to rely on Art. 43 (1) CISG as it did not know of Vis Fish's claim

Claimant asserts that Respondent "*could not have been unaware*" of Vis Fish's claim, which shall be sufficient to invoke Art. 43 (2) CISG¹⁰¹. This view is untenable and must be dismissed for several reasons.

Firstly, Claimant ignores the distinction between the terms 'knew' and 'could not have been unaware' made by the Convention in several provisions¹⁰². The wording of Art. 43 (2) CISG clearly states that its exception of liability should only apply if the seller 'knew' of the claim, i.e. he had positive knowledge. If

⁹⁹ Procedural Order No. 1, para. 9.

¹⁰⁰ Memorandum for Claimant, p. 23.

¹⁰¹ Memorandum for Claimant, p. 23.

the terms ‘knew’ and ‘could not have been unaware’ were given the same meaning, the buyer’s obligation to notify the seller of a defect in title would always be excluded. This is because the requirements of the exception set forth in Art. 43 (2) CISG would always be met whenever Art. 42 (1) CISG was invoked.

Secondly, an analogy to Art. 40 CISG, as made by Claimant¹⁰³, is not admissible since such methods only allow gap-filling within the Convention¹⁰⁴. Regarding the knowledge of the seller in Art. 43 (2) CISG, the provision is definite and thus a gap does not exist. On the contrary, Claimant’s attempted analogy neglects the systematic of the CISG that in its Articles 39 and 43 distinguishes between the obligation of the buyer to notify the seller in cases of defects in quality and in title. Therefore, reliance on Art. 43 (1) CISG is only exempted if the seller had positive knowledge¹⁰⁵.

Since Respondent had no such knowledge it is entitled to rely on Art. 43 (1) CISG.

II. Claimant’s notice did not meet the purpose of the provision since it was of no use to Respondent

The only purpose of the duty to give notice is to inform the addressee of a possible trademark infringement enabling him to take steps in order to ward off the claim¹⁰⁶. On 5 November 1999, Respondent received Claimant’s letter containing the information that Vis Fish was claiming a trademark infringement¹⁰⁷. As Claimant allegedly avoided the contract in the same letter¹⁰⁸, Respondent was not given any time to take appropriate steps in order to resolve the situation. Thus, Claimant’s notice of Vis Fish’s claim did not fulfil the purpose of a notice and therefore did not meet the requirements of Art. 43 CISG.

¹⁰² E.g. Artt. 40, 42 (1), 42 (2) (a) CISG.

¹⁰³ Claimant constructs an analogy to Art. 40 CISG. This provisions contains the term ‘could not have been unaware’; Memorandum for Claimant, p. 23.

¹⁰⁴ Schlechtriem/Ferrari, Art. 7 para. 47.

¹⁰⁵ Bianca/Bonell/Sono, Art. 43 note 2.3.; Schlechtriem, The Seller’s Obligations, p. 6-35; Schlechtriem/Schwenzer, Art. 43 para. 9; Witz/Salger/Lorenz/Salger, Art. 43 para. 8; Enderlein/Maskow/Strohbach, Art. 43 note 5; Honnold, Art. 43 para. 271, p. 299; Reinhart, Art. 43 para. 5; Honsell/Magnus, Art. 43 paras. 18 and 31; Herber/Czerwenka, Art. 43 para. 4; Gabriel, Practitioner’s Guide, Art. 43, p. 127; Achilles, Art. 43 para. 7.

¹⁰⁶ Schlechtriem/Schwenzer, Commentary, Art. 43 para. 2; Staudinger/Magnus, Art. 43 para. 12; Audit, note 115; Karollus, p. 127; Reinhart, Art. 43 para. 3; Enderlein/Maskow, Commentary, Art. 43 note 4; Enderlein, Rights and Obligations of the Seller, p. 184.

¹⁰⁷ Claimant’s notice in its letter of 3 November 1999 (Claimant’s Exhibit No. 11) arrived on the second business day, which is 5 November 1999; cf. Procedural Order No. 1, para. 31.

¹⁰⁸ Cf. Claimant’s Exhibit No. 11: “[...] *Vis Fish Company has claimed* [...]. *Since we cannot continue to sell the Vis Water Sports equipment* [...] *we are* [...] *avoiding the contract.*”

III. The notice was not given within a reasonable time

Claimant asserts that the period for giving notice started on 15 October 1999¹⁰⁹, the date of Vis Fish's second letter¹¹⁰. Yet, the relevant point of time must be determined to be 21 September 1999¹¹¹ since on this day, Claimant received the first letter of Vis Fish¹¹² complaining about trademark infringement [1]. Claimant's notice arrived on 5 November 1999. Counsel will demonstrate that a period of six weeks was unreasonable [2].

1. The period for giving notice started on 21 September 1999

Claimant alleges that the letter dated 15 October 1999 indicates the relevant point of time for fixing the beginning of the period for giving notice. It states that "*the buyer [is] not required to notify the seller of all requests made by third parties*"¹¹³ but is only required to notify the seller of all *claims* by a third party. Claimant requires that a 'claim' must irrevocably lead to legal action¹¹⁴. However, it fails to notice that the qualification as a 'claim' does not depend on whether or not legal action is threatened¹¹⁵. By contrast, any claim being sufficient to invoke Art. 42 CISG has to be given notice of¹¹⁶. The wording 'claim' must thus be defined equally within both Art. 42 and Art. 43 CISG. Claimant's argumentation in its Memorandum lacks this necessary consequence¹¹⁷ and therefore must be rejected. The only relevant criterion is whether or not a claim which is in accordance with Art. 42 CISG has been raised. Has this occurred, the buyer has knowledge of the claim¹¹⁸. In the case at hand, Vis Fish already complained about trademark infringement on 21 September 1999¹¹⁹. If the Tribunal decided that Vis Fish's claim fell under Art. 42 CISG, Vis Fish's first letter would indicate the relevant point of time.

Consequently, the period for giving notice started on 21 September 1999.

¹⁰⁹ Memorandum for Claimant, p. 22.

¹¹⁰ Claimant's Exhibit No. 9.

¹¹¹ Claimant received the letter dated 20 September 1999 on the following business day.

¹¹² Claimant's Exhibit No. 7.

¹¹³ Memorandum for Claimant, p. 22.

¹¹⁴ Memorandum for Claimant, p. 22.

¹¹⁵ Cf. discussion in YB III, Doc. A(4), A/CN.9/WG.2/WP.8 where the possibility of legal action was not mentioned as to the seriousness of a claim; Schlechtriem/Schwenzer, Commentary, Art. 41 para. 11; Audit, note 114; Wolff, pp. 67 and 80.

¹¹⁶ Bianca/Bonell/Sono, Art. 43 note 2.2.; Staudinger/Magnus, Art. 43 para. 7.

¹¹⁷ With regard to Art. 42 CISG, Claimant states that "*even [an] unfounded [claim] suffices to invoke Respondent's warranty*"; Memorandum for Claimant, p. 18. Concerning Art. 43 CISG, it demands the threat of legal action.

¹¹⁸ As required by Schlechtriem/Schwenzer, Art. 43 para. 4; Wolff, p. 113; Soergel/Lüderitz/Schubler-Langeheine, Art. 39 para. 5.

¹¹⁹ In this letter Vis Fish stated that "*the advertisement and the sale of goods bearing the name "Vis" are [...] in violation of [its] trademark [...]*", and asked Claimant "*to promptly withdraw all advertisements that use [the] trademark "Vis" and to stop selling any goods under that name*"; see Claimant's Exhibit No. 7.

2. A period of six weeks is unreasonable

Relying on 21 September 1999 it took Claimant six weeks to notify Respondent. The question whether or not a time-span is to be considered as reasonable must be answered with regard to the individual case¹²⁰. Notice has to be given as soon as it is possible to specify it to the degree required¹²¹. Presently, Vis Fish's first letter contained all necessary information¹²², and Claimant was even aware of the legal quality of Vis Fish's claim, i.e. that it was unfounded¹²³. Therefore, it neither had to wait for a second letter nor request legal advice, but could have given notice immediately after receiving the letter. As to the current facts, a time-span of six weeks was not reasonable.

In conclusion, Claimant did not give notice within a reasonable time.

IV. Since Claimant has no reasonable excuse for its failure to give notice it cannot rely on Art. 44 CISG

Claimant alleges that it would rely on Art 44 CISG in case it had failed to notify Respondent within a reasonable time. It purports that it is reasonably excused due to the fact that it had to seek legal advice¹²⁴. Yet, this argumentation is not convincing. As shown above, Claimant had no reason to consult its lawyers since it had already become aware of the situation¹²⁵. The breach of duty committed by Claimant is not excusable due to the fact that it remained silent for six weeks¹²⁶. Additionally, the lack of notification led to barring Respondent from the possibility of a quick and efficient disposal of Vis Fish's claim.

Consequently, Claimant has no reasonable excuse for its failure to give notice and therefore cannot rely on Art. 44 CISG.

¹²⁰ Bianca/Bonell/Song, Art. 43 note 2.1.; Schlechtriem/Schwenzer, Art. 43 para. 3; Enderlein/Maskow, Commentary, Art. 43 note 2; Reinhart, Art. 42 para. 2.

¹²¹ Witz/Salger/Lorenz/Salger, Art. 43 paras. 5 and 6; Herber/Czerwenka, Art. 43 para. 3; Schlechtriem/Schwenzer, Commentary, Art. 43 para. 3.

¹²² In this letter Vis Fish stated that it owned a trademark on "Vis" covering all water-related products, which was infringed by Claimant's advertisement and sale of Respondent's goods, especially by using the slogan "like a fish in water".

¹²³ In its letter to Vis Fish Claimant stated: "*There is no likelihood that anyone would confuse athletic equipment [...] with the fish and fish products that I now understand are sold by your company. The markets and the nature of the products are simply too different.*" Cf. Claimant's Exhibit No. 8.

¹²⁴ Memorandum for Claimant, p. 31.

¹²⁵ See supra, Unit 2 III.2.

¹²⁶ On this requirement, see Schlechtriem/Huber, Art. 44 para. 6.

UNIT 4: CLAIMANT DID NOT RIGHTFULLY AVOID THE CONTRACT.

In its Memorandum Claimant submits that Respondent committed a fundamental breach of contract and that it therefore was entitled to avoidance¹²⁷. By contrast, since Respondent's breach of contract was not fundamental pursuant to Art. 25 CISG, Claimant was not entitled to the remedy of avoidance under Art. 49 (1) (a) CISG [I]. Assuming that Claimant had the right to declare the contract avoided it would have lost that right pursuant to Art. 82 (1) CISG since it faces the impossibility to make restitution of all goods [II].

I. Respondent did not commit a fundamental breach of contract

Respondent's breach of contract was not fundamental because Claimant did not suffer a 'substantial detriment' as required by Art. 25 CISG¹²⁸ [1]. Moreover, Counsel will show that the result of the breach of contract was not foreseeable [2].

1. Claimant did not suffer a 'substantial detriment' as required by Art. 25 CISG

If a party is substantially deprived of what it is entitled to expect under the contract, it has suffered a 'substantial detriment', Art. 25 CISG. In the case at hand, such a 'substantial detriment' is not given since a serious defect as result of the breach did not occur to Claimant [a]. Moreover, the retail of the goods is still possible [b] and the defect is removable [c].

a) A serious defect as result of the breach did not occur

Claimant submits that "*if [the breach] influences the regular course of business of the injured party*" the latter suffers a 'substantial detriment'¹²⁹ because "*the injured party has no further interest in the performance of the contract*"¹³⁰. Thereby, Claimant does not seem to realise that Art. 25 CISG requires a serious detriment as result of a breach¹³¹. Higher requirements are necessary to protect the principle that avoidance of contract

¹²⁷ Memorandum for Claimant, pp. 24 et seq.

¹²⁸ Art. 25 CISG provides: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

¹²⁹ Memorandum for Claimant, p. 25; Claimant cites the Secretariat's Commentary, O.R., p. 416, which does not contain any similar statement.

¹³⁰ Memorandum for Claimant, p. 25; Claimant refers to Bianca/Bonell, p. 601, who in fact do not support this view.

¹³¹ Bundesgerichtshof, BGHZ Vol. 132, pp. 298 et seq.; Schlechtriem, Rechtsprechung, pp. 422 et seq.; idem, Pflichten des Verkäufers, p. 106; Schlechtriem/Huber, Art. 49 para. 2; Staudinger/Magnus, Art. 49 para. 4; Honnold, Art. 49 para. 304, p. 329, Lookofsky, p.70.

is the ‘ultima-ratio’ remedy under the Convention¹³². This principle aims to preserve the contractual relationship¹³³ and to prevent economic waste in trade, in particular since an avoidance of an international commercial contract causes additional risks¹³⁴ and costs for reshipment and insurance¹³⁵.

In addition, if one followed Claimant’s argumentation, the remedy of avoidance would always be granted to the buyer whenever Art. 42 CISG was fulfilled. In that case, Art. 25 CISG would be divested of any effect.

Furthermore, avoidance of contract may solely be exercised if other remedies, e.g. damages, cannot redress the problem¹³⁶. In the case at hand, if Claimant had eliminated the defect it would have suffered loss for only a certain period of time which could have been sufficiently compensated by damages.

Consequently, as Respondent’s breach hardly influenced the regular course of business, a serious defect as result of the breach did not occur.

b) The retail of the goods was still possible

Claimant declares that ‘*the use of [the] goods is impeded*’ since it ‘*cannot sell the goods*’¹³⁷. On the contrary, Claimant was still able to sell the goods in Danubia even after Vis Fish’s claim had arisen. This is because the claim is unfounded and would be unlikely to be upheld in litigation¹³⁸. It could also be reasonably expected of Claimant to have sold the sports equipment in another country¹³⁹. At least, Claimant could have undertaken a so-called ‘bargain basement sale’¹⁴⁰.

Assuming Claimant argued that ‘*litigation would cause a certain amount of disruption to [its] business*’¹⁴¹ this assertion would not lead to an impossibility to sell the goods either. Since Claimant could refer the matter to its legal counsel the whole process would take place outside the regular course of

¹³² Bundesgerichtshof, BGHZ Vol. 132, pp. 298 et seq., according to which “*avoidance of the contract has to be the last possibility for the creditor*”; von Caemmerer, *Wesentliche Vertragsverletzung*, p. 50; Staudinger/Magnus, Art. 49 para. 4; Schlechtriem/Huber, Art. 49 para. 2; Honnold, Art. 49 para. 304, p. 329; Honsell/Schnyder/Straub, Art. 49 para. 2.

¹³³ According to Art. 7 (2) CISG, it is even an ‘intern’ principle of the Convention to prefer solutions which protect contractual relations rather than solutions which terminate contractual relations, the so-called *favor contractus*, see Schlechtriem, *Pflichten des Verkäufers*, p. 106; Schlechtriem/Ferrari, Art. 7 para. 54; Audit, note 55; Ferrari, *Uniform L. Rev.* (1997), p. 464; Heuzé, note 95; Honnold, *Uniform Words*, p. 140; Plantard, *J.D.I.* (1988), p. 333; Rosenberg, *Aust. Bus. L. Rev.* Vol. 20 (1993), p. 452; Bianca/Bonell/Bonell, Art. 7 note 2.3.2.2.; Kazimierska, VII. B.

¹³⁴ Schlechtriem, *Rechtsprechung*, p. 422; Michida, *Am. J. Comp. L.* Vol. 27 (1979), p. 280; Lorenz.

¹³⁵ von Caemmerer, *Wesentliche Vertragsverletzung*, p. 50, who points out that this principle follows the tendency given by the use of contracts under printed terms; Schlechtriem, *Rechtsprechung*, p. 422, stating that this principle is also reasonable according to the economic analysis of law; Lorenz; Enderlein/Maskow/Strohbach, Art. 25 note 3; Michida, *Am. J. Comp. L.* Vol. 27 (1979), p. 281; Honnold, Art. 25 para. 181.2, p. 206.

¹³⁶ Honnold, Art. 49 para. 304, p. 329; Schlechtriem, *Rechtsprechung*, p. 422; Schlechtriem/Schlechtriem, *Commentary*, Art. 25 para. 20; Schlechtriem/Huber, *Commentary*, Art. 49 para. 2, Benicke, *IPRax* (1997), p. 329.

¹³⁷ Memorandum for Claimant, p. 25.

¹³⁸ Terms of Reference, para. 8; Claimant’s Exhibit No. 10.

¹³⁹ Procedural Order No. 1, para. 57. This possibility excludes a ‘substantial detriment’ according to Bundesgerichtshof, BGHZ Vol. 132, pp. 298 et seq; Oberlandesgericht Frankfurt a.M., *RIW* (1994), p. 240; Lorenz.

¹⁴⁰ Schlechtriem, *IPRax* (1999), p. 389.

Claimant's business and therefore would not disturb it. Claimant could theoretically refer to the negative coverage of the litigation in the media and the loss of 'good will'. However, those arguments are not convincing in the context with a defect in title. Only in cases where goods are encumbered with a defect in quality, e.g. food contamination by bacteria, negative media would bring disruption to the buyer's business and its 'good will'. In the present case, Claimant would not suffer a negative effect resulting from a litigation concerning a defect in title. On the contrary, due to the coverage in the media an additional advertising effect would help Claimant to become even better known. Taking into consideration Counsel's arguments, retail of the goods was still possible.

c) Claimant was able to remove the defect

It has been shown that Vis Fish's claim is unfounded¹⁴². Since it was easily dismissible and therefore removable, the breach of contract cannot amount to a fundamental one¹⁴³.

Claimant might theoretically invoke that the breach was fundamental because Respondent could not comply with its duty to eliminate the defect due to the Danubian procedural law¹⁴⁴. However, Counsel points out that in such a case it could be reasonably expected of Claimant to eliminate the defect in question itself¹⁴⁵.

Moreover, Claimant would not even have suffered any "monetary harm"¹⁴⁶ since Respondent offered to pay for all costs arising out of litigation¹⁴⁷. Thus, the defect in question was removable for Claimant.

Consequently, Claimant did not suffer a 'substantial detriment' as required by Art. 25 CISG.

2. The result of the breach of contract was not foreseeable

Claimant submits that "Respondent could have foreseen the result of the breach" and that Respondent would have the burden of proving the opposite¹⁴⁸. Thereby, Claimant's allegations are based on the assumption that lack of 'foreseeability' is a somewhat subjective ground for excusing the party in breach. Unfortunately, Claimant seems to confuse the term 'foreseeability' with the term 'could not have been

¹⁴¹ Claimant argues on this issue but in the wrong legal context, namely in context with Art. 42 CISG; see Memorandum for Claimant, p. 18, fn. 20.

¹⁴² See supra, Unit 2 I.1.

¹⁴³ Cf. Bundesgerichtshof, BGHZ Vol. 132, pp. 298 et seq., according to which even incurable defects do not necessarily amount to a fundamental breach. This view is shared by Schlechtriem, IPRax (1999), p. 389.

¹⁴⁴ Procedural Order No. 1, para. 26.

¹⁴⁵ Botzenhardt, p. 264; Honsell/Schnyder/Straub, Art. 49 para. 23.

¹⁴⁶ As declared by Claimant (Memorandum for Claimant, p. 25) citing: Secretariat's Commentary, O.R., p. 416.

unaware' of Art. 42 CISG when it refers to the foreseeability of the third party's claim based on intellectual property¹⁴⁹. However, the exemption from liability in Art. 25 CISG requires that the contract-breaking party did not foresee and that it was objectively unforeseeable that the obligation in question was important. A breach of such an obligation would thus amount to a fundamental one. On these facts, Respondent could not have been expected to reasonably foresee that a breach resulting from the mere assertion of a claim by a third party might be fundamentally substantial to Claimant. Therefore, the result of the breach of contract was not foreseeable.

Summing up the above arguments, Respondent did not commit a fundamental breach of contract.

II. Claimant lost the right to declare the contract avoided by virtue of Art. 82 (1) CISG

According to this provision *'the buyer loses the right to declare the contract avoided [...] if it is impossible for him to make restitution of the goods'*. The exception in Art. 82 (2) (c) CISG provides that paragraph 1 does not apply *'if the goods were sold in the normal course of business'*. However, this exception would only be applicable if the contract-avoiding party sold the goods *'before [it] discovered or ought to have discovered the lack of conformity'*¹⁵⁰. In the case at hand, Claimant, who is not able to make restitution of one-third of the goods, knew of the defect in title from the day it received the first letter of Vis Fish¹⁵¹. Despite this knowledge, Claimant continued retailing the goods for over a month¹⁵². Even if the Tribunal followed Claimant's view, stating that it *'knew about the breach upon the reception of the [second] letter dated October 15, 1999'*¹⁵³ the latter had been selling Respondent's goods in bad faith for at least 18 days. Therefore, Claimant cannot rely on Art. 82 (2) (c) CISG. Thus, Art. 82 (1) CISG is applicable to the instant case. Consequently, Claimant lost the right to declare the contract avoided.

Result: Claimant did not rightfully avoid the contract.

¹⁴⁷ Respondent offered that it *"will aid [Claimant] in [its] defense against the assertion of trademark infringement"* and that it stood *"ready to reimburse [Claimant] for such reasonable costs as [the latter] had incurred"*, Claimant's Exhibit No. 13.

¹⁴⁸ Memorandum for Claimant, pp. 25 et seq.

¹⁴⁹ Memorandum for Claimant, p. 26.

¹⁵⁰ Cf. Schlechtriem/Leser/Hornung, Art. 82 para. 17; Staudinger/Magnus, Art. 82 para. 25; Herber/Czerwenka, Art. 82 para. 10; Witz/Salger/Lorenz/Salger, Art. 82 para. 7; Secretariat's Commentary, O.R., p. 448, Art. 67 note 4; Honsell/Weber, Art. 84 para. 24.

¹⁵¹ In this letter it was stated that *"'Vis' [was] registered in Danubia as a trademark [that] belongs to the Vis Fish Company"* and that the *"advertisement and sale of goods bearing the name 'Vis' [were] in violation of [this] trademark"*; Claimant's Exhibit No. 7.

¹⁵² Claimant received Vis Fish's letter on 21 September 1999; Claimant's Exhibit No. 7. It continued retail until 3 November 1999; Procedural Order No. 1, para 13.

¹⁵³ Memorandum for Claimant, p. 27.

UNIT 5: THE COUNTER-CLAIM RAISED BY RESPONDENT IS FOUNDED WHILE CLAIMANT IS NOT ENTITLED TO DAMAGES.

Claimant's assertion that it is entitled to restitution and damages amounting to \$631,700¹⁵⁴ is incorrect. Instead, Respondent raised a counter-claim for restitution of the unsold goods and reimbursement of the benefits derived from the goods sold according to Artt. 81 (2), 84 (2) (b) CISG [I]. By contrast, Claimant's demand regarding interest on the purchase price and damages is unfounded [II].

I. Respondent's counter-claim entitles it to restitution of the unsold goods and to benefits derived from the goods sold

Due to the fact that Claimant has already retailed one-third of the goods¹⁵⁵ restitution in total has become impossible. According to Art. 81 (2) CISG¹⁵⁶, Respondent is entitled to the remaining two-thirds of the goods which have not been retailed.

Moreover, Art. 84 (2) CISG provides that, concerning the goods sold, *"the buyer must account to the seller for all benefits which he has derived from the goods [...]"*. Therefore, Claimant has to reimburse the price it received from retailing the goods and this amounts to a 'gross benefit' of \$342,700¹⁵⁷. As stated by Claimant¹⁵⁸, but not as yet included in its calculation¹⁵⁹, the costs occurred within the course of sale have to be deducted from the 'gross benefit'. On the current facts, these costs include those for shipping as well as those for advertising and general administration. Deducting them from the 'gross benefit' leads to a total of \$280,033¹⁶⁰, Claimant's 'net benefit'. This sum has to be granted to Respondent as the benefits derived from the goods sold.

¹⁵⁴ Claimant's calculation: \$200,000 (list price of purchase of the goods sold) is deducted from \$600,000 (list price of purchase of both shipments) equaling \$400,000. From this sum is deducted \$32,000 (the 8% discount) and \$147,700 (the 70% mark up on goods sold) equaling \$220,300. The addition of \$295,400 (damages for loss of profit), \$33,000 (shipping costs), \$35,000 (advertising costs), \$40,000 (general administrative costs of the sold goods) and \$4,000 (storage costs) equals the sum of \$631,700.

¹⁵⁵ See Claimant's Request for Arbitration, para. 13.

¹⁵⁶ Art. 81 (2) CISG provides: *"A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently."*

¹⁵⁷ Claimant's retail price has to be calculated by taking the price of the delivered goods, shipping costs included (\$184,000 + \$11,000 = \$195,000) and adding a retail mark-up of 70% (\$147,700).

¹⁵⁸ Memorandum for Claimant, p. 31: *"The gross profit [...] does not include general administrative and selling expenses. [...] Respondent should therefore receive only the net profit."*

¹⁵⁹ Cf. Memorandum for Claimant, p. 32.

¹⁶⁰ Costs for general administration (\$40,000), one-third of the shipping costs (\$11,000) and one-third of the advertising costs (\$11,667) have to be deducted from the gross profit (\$342,700). This equals \$280,033.

II. Claimant's demand for interest on the purchase price and damages is unfounded

The Tribunal is requested to find that Claimant's assessment of the interest rate on the purchase price lacks a legal basis and that instead, an interest rate of 4% maximum is appropriate [1]. Furthermore, Claimant demands damages amounting to a total of \$411,400¹⁶¹ relying on Art. 74 CISG. Counsel will show that Claimant is neither entitled to damages for loss of profit [2] nor to those for wasted expenditure [3].

1. Claimant's assessment of the interest rate on the purchase price is incorrect

Claimant may ask for the purchase price, amounting to \$552,000 (list price less 8% discount), and interest thereon pursuant to Art. 84 (1) CISG. However, Counsel will show that an interest rate of 4% maximum is applicable.

Claimant suggests that the short-term commercial lending rate of Equatoriana at 7% should be applied¹⁶². Yet, this submission must be disregarded since it is based on the UNIDROIT Principles of which an application is barred by Art. 7 (2) CISG¹⁶³. According to this provision, 'internal gaps' should be settled in accordance with the internal principles of the Convention while 'external gaps' have to be filled by the subsidiary domestic law. As the UNIDROIT Principles represent 'external principles', their application is '*de lege lata*' impossible¹⁶⁴. The question which rate of interest should be applied represents an 'external gap' and it is to be answered by the rules of the subsidiary domestic law¹⁶⁵. As a rule, any private international law refers to the legal rate of the subsidiary domestic law¹⁶⁶. Thus, the legal rates on unpaid judgments should be applied¹⁶⁷.

¹⁶¹ Memorandum for Claimant, p. 32.

¹⁶² Memorandum for Claimant, p. 29.

¹⁶³ Art. 7 (2) CISG provides: "*Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*"

¹⁶⁴ Schlechtriem/Ferrari, Art. 7 para. 62; Ferrari, JZ (1998), p. 16.

¹⁶⁵ ICC Award No. 7153 (1992), J.D.I. (1992), p. 1007; Oberlandesgericht München, CISG-Online Case No. 310; Oberlandesgericht Koblenz, CISG-Online Case No. 256; Oberlandesgericht Rostock, CISG-Online Case No. 209; Oberlandesgericht Düsseldorf, CISG-Online Case No. 115; Oberlandesgericht Frankfurt a.M., RIW (1994), p. 241; Schlechtriem/Ferrari, Art. 7 para. 42; Diedrich, RIW (1995), pp. 358 et seq.; Behr, J.L. & Com. Vol. 17 (1998), pp. 296 et seq.; Bianca/Bonell/Nicholas, Art. 78 note 2.1.; Enderlein/Maskow/Strohbach, Art. 78 note 2.2; Herber/Czerwenka, Art. 78 para. 6; Karollus, p. 227; Kindler, RIW (1991), p. 305; Magnus, RabelsZ Vol. 53 (1989), p. 140; Piltz, § 5 para. 412; Reinhart, IPRax (1991), pp. 377 et seq.; Schlechtriem, Einheitliches UN-Kaufrecht, p. 94; idem, Uniform Sales Law, p. 100; idem, UN-Kaufrecht, para. 46; Soergel/Lüderitz, Art. 78 para. 3; Staudinger/Magnus, Art. 78 para. 12; Stoll, Internationalprivatrechtliche Fragen, p. 510; Weber, Vertragsverletzungsfolgen, p. 208; Scheifele, p. 108.

¹⁶⁶ Cf. Schlechtriem/Bacher, Art. 78 para. 34.

¹⁶⁷ Cf. Schlechtriem/Eberstein/Bacher, Commentary, Art. 78 para. 31, according to whom other (usual) rates should only be applied in cases where legal rates cannot be discerned. Cf. ICC Award No. 7153/92, J.D.I. (1992), p. 1007, in which the Tribunal applied the *usual rate* of Czechoslovakia because the new Czechoslovakian Commercial Code does not *expressly* determine an interest rate.

Moreover, in contrast to Claimant's suggestion¹⁶⁸, the rate of Danubia as the creditor's country is the relevant one. Claimant's 'restitutionary approach'¹⁶⁹ has to be replaced by a 'damages approach'¹⁷⁰. This approach reflects the purpose of granting interest in a better way, which is to cover the buyer's potential loss incurred by borrowing credit. Claimant itself concedes that "*the most appropriate rate should be based on the loss suffered by the aggrieved buyer, rather than on a restitutionary approach to prevent unjust enrichment by the seller*"¹⁷¹. Following the 'damages approach', the legal rate on unpaid judgments of Danubia at 4% is the relevant one.

Therefore, the Tribunal is requested to apply this very rate.

2. Claimant is not entitled to damages for loss of profit

Claimant's entitlement to damages for loss of profit in the amount claimed is precluded for various reasons: Firstly, damages for loss of profit represent a new claim which is not admissible under Art. 19 ICC Rules [a]. Secondly, granting damages for loss of profit contradicts the restitutionary principle [b]. Thirdly, entitling Claimant to both damages for loss of profit and interest is incompatible [c]. Fourthly, a damages claim is impeded as Claimant violated its duty under Art. 77 CISG to mitigate loss [d]. Alternatively, Respondent could not have foreseen Claimant's loss of profit [e]. At least, Claimant has to deduct its hypothetical costs for general administration in the amount of \$80,000 from its alleged damages for loss of profit [f]. Finally, should the Tribunal grant damages for loss of profit to Claimant, a rate of interest at 4% should be applied [g].

a) The new claim is not admissible under Art. 19 ICC Rules

Claimant itself does not contest that claiming damages for loss of profit has to be judged according to Art. 19 ICC Rules due to representing a new claim¹⁷². This provision requires that new claims must either fall within the limits of the Terms of Reference or must be authorized by the Tribunal¹⁷³.

¹⁶⁸ Memorandum for Claimant, p. 29.

¹⁶⁹ The 'restitutionary approach' refers to the seller, who was able to use the sum received and to work with it, but who is not entitled to that benefit after avoidance of the contract.

¹⁷⁰ The 'damages approach' refers to the buyer who suffered a loss which should be compensated.

¹⁷¹ Memorandum for Claimant, p. 31, in context of Art. 78 CISG citing Honnold, para. 451.2, according to whom this approach is applicable to Art. 84 (1) CISG as well. There is no interference with the provisions concerning restitution as the principle of Art. 81 (2) CISG merely refers to payment respectively goods, rather than to interest. Claimant also refers to "*the reasons exposed above*", i.e. Art. 84 (1) CISG. Due to that inconsequence in its argumentation, Claimant itself does not seem to be sure which approach to follow.

¹⁷² On page 28 of its Memorandum, Claimant gives the impression that the element of damages for loss of profit falls "*within the limits of the Terms of Reference*". However, the wording "*loss of profit*" does not even occur in the Terms of Reference. Claimant itself concedes this by requesting "*the Tribunal to accept this claim in application of the exception contained in Article 19 of the ICC*

The new claim for damages for loss of profit does not fall within the limits of the Terms of Reference. This is because the term ‘loss of profit’ is neither expressly nor tacitly mentioned therein. Claimant itself concedes that it failed to claim damages for loss of profit stating that it “*is aware of the fact that the claim based on this loss of profit has not been invoked in its Request for Arbitration, and thus, according to Article 19 of the ICC Arbitration Rules, would not be accepted as an argument within the scope of the present arbitration.*”¹⁷⁴ In the Terms of Reference, Claimant does not even refer to Art. 74 CISG, the provision on which it bases the new claim in its Memorandum¹⁷⁵. The mere fact that Art. 74 CISG is implied by mentioning the recovery of “*additional damages*”¹⁷⁶ does not suffice. Claimant herewith only means such damages which “*will accrue from the date of its Request for Arbitration until mutual restitution is made*”¹⁷⁷. Damages for loss of profit are not included therein.

Moreover, contrary to Claimant’s request¹⁷⁸, an authorization of the new claim should not be made. The purpose of Art. 19 ICC is to ensure that the arbitral proceedings will not subsequently be disrupted by the need to consider new matters¹⁷⁹. In case of an authorization, Respondent will invoke that Claimant was obliged to mitigate loss, Art. 77 CISG, a provision which must always be considered in connection with Art. 74 CISG. As a precaution, Counsel will put forward arguments on this issue below in its Memorandum¹⁸⁰. If the Tribunal finds that further evidence will be necessary concerning Claimant’s obligation under Art. 77 CISG, Counsel stresses that this will result in a reopening of the evidentiary portion of the present proceedings. The efficiency of the arbitration will thus be unduly interfered with. However, the purpose of Art. 19 ICC Rules is to prevent such inefficiency.

Regardless of any possible evasion of Art. 19 ICC Rules, Claimant asks for authorization because in its view an inequitable solution has been achieved¹⁸¹. However, this demand has to be rejected since the situation is, in fact, equitable. Making restitution leads to the result that the seller must reimburse interest,

Arbitration Rules”; Memorandum for Claimant, p. 30. This shows that the claim for recovering its damages for loss of profit does not undisputedly fall within the limits of the Terms of Reference.

¹⁷³ Derains/Schwartz, p. 249.

¹⁷⁴ Memorandum for Claimant, p. 30.

¹⁷⁵ Memorandum for Claimant, p. 29.

¹⁷⁶ Terms of Reference, para. 12.

¹⁷⁷ Terms of Reference, para. 12.

¹⁷⁸ Memorandum for Claimant, p. 30.

¹⁷⁹ Derains/Schwartz, p. 248.

¹⁸⁰ See *infra*, Unit 5 II.1.d).

¹⁸¹ Memorandum for Claimant, p. 30.

and the buyer must account for all benefits that he has derived from the goods. Claimant is thus not disadvantaged if it gives benefits to Respondent. After all, it is entitled to interest in a considerable amount.

Therefore, an evasion of Art. 19 ICC Rules for the sake of balancing an allegedly inequitable solution is not even necessary, let alone allowable.

Consequently, Claimant's new claim is not admissible under Art. 19 ICC Rules.

b) Granting damages for loss of profit contradicts the restitutionary principle

Claimant asserts that it is entitled to damages for the benefits which it would theoretically have gained by selling the remaining two-thirds of the goods¹⁸². However, had Claimant actually realised these benefits it would have to reimburse them according to Art. 84 (2) (b) CISG within the course of restitution. Respondent therefore relies on its right to offset regarding claims under the Convention¹⁸³. Counsel points out that it would be contradictory to the restitutionary principle if Claimant were granted a sum which it would have to reimburse as soon as it received it. This result is in harmony with the principle of contemporaneous performance¹⁸⁴ giving rise to a right of retention¹⁸⁵. Accordance is also established with the well-known 'dolo petit'-principle in international trade laid down in Art. 7 (1) CISG¹⁸⁶.

Consequently, damages for loss of profit are precluded due to contradicting the restitutionary principle.

c) Entitling Claimant to both damages for loss of profit and interest is incompatible

If one imagined that Claimant were given damages for loss of profit an unjust situation would be achieved: Claimant would get profit for the unsold goods plus interest on the purchase price. As shown above, Claimant is entitled to interest on the purchase price. If in addition, Claimant were granted damages for loss of profit, it would be in a better economic position than had proper performance occurred. Claimant would gain two benefits out of one sum. Yet, such result is against economic and legal reality¹⁸⁷. One can understand damages for loss of profit to be only a special way of interest. It would be a case of 'double recovery' if both interest and damages for loss of profit were granted to Claimant. It thus has to choose

¹⁸² Memorandum for Claimant, p. 29.

¹⁸³ Cf. Magnus, RabelsZ Vol. 59 (1995), p. 485; Schlechtriem, Restitution, p. 404; Schlechtriem/Leser/Hornung, Art. 81 para. 16; Enderlein/Maskow/Strohbach, Art. 84 note 1; Piltz, § 5 para. 291; Staudinger/Magnus, Art. 4 para. 46 and Art. 81 para. 15.

¹⁸⁴ Magnus, RabelsZ Vol. 59 (1995), pp. 485 and 486.

¹⁸⁵ Magnus, RabelsZ Vol. 59 (1995), p. 486.

¹⁸⁶ Canon law: "dolo agit qui petit quod statim redditurus est"; cf. ICC Award No. 8128, J.D.I. (1996), p. 1027; Kern, ZEuP (2000), p. 849; Audit, notes 53 and 55; Bonell, Riv. dir. civ. (1986), pp. 237 et seq.; Frigge, p. 74; Keinath, p. 239; Herber/Czerwenka, Art. 7 para. 11.

¹⁸⁷ Cf. Treitel, p. 77: "The [...] consequence of the principle that damages are compensatory is that an award of damages should not enrich the plaintiff: he cannot recover more than his loss".

between both items. Otherwise, avoidance would not only be a remedy for breach of contract but also an exceptional possibility of investment.

Therefore, granting damages for loss of profit as well as interest on the purchase price is incompatible.

d) Claimant violated its duty to mitigate loss under Art. 77 CISG

Counsel invokes that Claimant was obliged to mitigate its loss as required by Art. 77 CISG¹⁸⁸. It will be shown that Claimant was even able to completely preclude any loss by taking appropriate measures.

Firstly, Claimant was obliged to continue retailing as this was still possible in Danubia. Regarding this opportunity Counsel refers to its above arguments¹⁸⁹. In any event, Claimant should have waited for an injunction impeding further sale.

Secondly, Counsel again refers to Claimant's possibility to sell the goods in another country in order to mitigate its loss¹⁹⁰.

Thirdly, since the claim was unfounded and could have easily been dismissed it was incumbent on Claimant to eliminate this defect in order to ward off Vis Fish's claim¹⁹¹. It failed to do so.

Fourthly, even if Claimant were allowed to cease selling Respondent's goods it was still left an option to mitigate its loss. Art. 77 CISG implies the obligation for the aggrieved buyer to purchase goods in replacement¹⁹². In its declaration of avoidance, Claimant announced that it "*was able to sell similar equipment from other suppliers*"¹⁹³. Had it sold those substitutes it would have gained as much profit as when retailing Respondent's goods. Thus, it would not have suffered any damages for loss of profit.

Consequently, since Claimant was able to prevent its loss, its damage claim must be completely denied.

¹⁸⁸ Art. 77 CISG provides: "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."

¹⁸⁹ See supra, Unit 4 I.1.

¹⁹⁰ See supra, Unit 4 I.1.

¹⁹¹ Botzenhardt, p. 264; Honsell/Schnyder/Straub, Art. 49 para. 23; cf. Bundesgerichtshof, BGHZ Vol. 132, pp. 298 et seq., according to which even incurable defects do not necessarily amount to a fundamental breach. This view is shared by Schlechtriem, IPRax (1999), p. 389.

¹⁹² Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich, Award No. 4366, RIW (1995), p. 591; Oberlandesgericht Hamburg, CISG-Online Case No. 261; Secretariat's Commentary, O.R., p. 451, Art. 73, note 4; Schlechtriem/Stoll, Art. 77 para. 10; Bianca/Bonell/Knapp, Art. 77, note 2.2.; Farnsworth, Am. J. Comp. L. Vol. 27 (1979), p. 251; von Caemmerer, AcP Vol. 178 (1978), p. 147; Faust, p. 38; Kranz, p. 175; Herber/Czerwenka, Art. 77 para. 6; Honsell/Magnus, Art. 77 para. 8; Enderlein/Maskow/Strohbach, Art. 77 note 2; Neumayer/Ming, Art. 77 para. 3; Piltz, § 5 para. 462; Schlechtriem, Gemeinsame Bestimmungen, p. 169; Soergel/Lüderitz, Art. 77 para. 4; Staudinger/Magnus, Art. 77 para. 11; Audit, note 173; Mertens/Rehbinder, Art. 82 EKG para. 17.

¹⁹³ See Claimant's Exhibit No. 14.

e) Alternatively, Respondent could not have foreseen Claimant's loss of profit, Art. 74 sentence 2 CISG

If the Tribunal considers that the obligation to mitigate loss was not sufficiently evidenced Counsel points out that Respondent could not have foreseen Claimant's loss of profit at all. A reasonable merchant would have recognised possibilities of mitigation¹⁹⁴ and would eventually have taken appropriate measures to realise these opportunities. Claimant did not do so, but Respondent could have relied on it being such a reasonable merchant. Therefore, Respondent could not have foreseen Claimant's loss of profit. Claimant still bears the burden of proof regarding the foreseeability.

f) Claimant has to deduct its hypothetical costs for general administration

Assuming the Tribunal grants damages for loss of profit to Claimant, Counsel puts forward that the calculation of the actual loss is incorrect.

Damages for loss of profit have to be determined by calculating the hypothetical revenues to be derived from unmade sales, minus the hypothetical variable costs that would have been made, but were not incurred¹⁹⁵. In its calculations, Claimant does not deduct potential costs, namely the costs for general administration, which would have been incurred. Since Claimant's assessment of the costs for general administration (\$40,000) is solely allocated to the goods sold, the sum must be doubled in order to represent the hypothetical costs regarding the unsold goods equalling \$80,000. Therefore, this sum must be deducted from Claimant's alleged damages for loss of profit.

g) If damages for loss of profit were granted to Claimant, an interest rate of 4% should be applied

If the Tribunal awards any damages to Claimant Counsel points out that Art. 78 CISG provides that interest can only be granted on "any [...] sum that is in arrears". As the amount of damages is not certain on the current facts a liquidated sum as required¹⁹⁶ does not exist. Thus, interest may not be recovered as of the day of the award.

As already stated above¹⁹⁷, the legal rate on unpaid judgments of the creditor's country¹⁹⁸, i.e. Danubia, at 4% is the only interest rate to be applied.

¹⁹⁴ von Caemmerer, AcP Vol. 178 (1978), p. 147; Kranz, p. 175, according to whom 'foreseeability' must be denied if a purchase of goods in replacement was not performable; Faust, p. 38.

¹⁹⁵ Delchi Carrier, S.p.A. v. Rotorex Corp., UNILEX, E.1995-31, p. 535.

¹⁹⁶ Honnold, Art. 78 para. 422, p. 472; Staudinger/Magnus, Art. 78 para. 8.

¹⁹⁷ See supra, Unit 5 I.1.

¹⁹⁸ Landgericht Frankfurt a.M., RIW (1991), p. 954; Landgericht Stuttgart, RIW (1989), p. 985; Honnold, Art. 78 para. 421, pp. 525 et seq.; Neumayer, RIW (1994), p. 106; Honsell/Magnus, Art. 78 para. 1; Berger, RabelsZ Vol. 61 (1997), p. 339,

3. Claimant is not entitled to damages for wasted expenditure

Claimant demands damages for general selling and administrative expenses relating to the goods sold, and costs for advertising and shipping¹⁹⁹. However, its assessment is wrong. A claim for recovering wasted expenditure, i.e. expenditure supposed to be balanced by retailing goods, which is impeded, may only occur if those goods are not fit for retail. Since Claimant demands to be granted damages for costs that already have been or still can be balanced by retailing, wasted expenditure should not be mentioned. Counsel will show that Claimant cannot claim damages for those costs relating to the goods sold that have already amortized in the course of retail [a]. Furthermore, it cannot request damages for costs relating to the unsold goods [b]. Finally, if damages for wasted expenditure were granted to Claimant, an interest rate at 4% should be applied [c].

a) No damages must be granted for the costs relating to the goods sold

Firstly, Claimant asserts that it has “*the right to claim the proportion of general selling and administrative expenses relating to the goods sold*”²⁰⁰. However, these general costs cannot be claimed as a loss, since they were allocated only to the goods sold and thus were fully covered by the retail price which Claimant took from its customers. As Respondent has deducted them from its claim for benefits derived from the goods sold²⁰¹, these costs do not represent a loss for Claimant, and thus may not be claimed.

Secondly, for the same reason, one-third of the costs for shipping and for advertising have been balanced by retailing and may not be claimed.

b) No damages must be granted for costs relating to the unsold goods either

By claiming the remaining two-thirds of the advertising costs in addition to damages for loss of profit, Claimant makes a ‘double recovery’²⁰² since the latter claim includes any costs that have actually incurred. These costs have thus been balanced by this claim. Therefore, Claimant may not claim them as an additional element of damages.

Claimant also concedes this proceeding while committing a mistake in subsumption, Memorandum for Claimant, p. 31; cf. supra, Unit 5 II.1, fn. 171.

¹⁹⁹ Memorandum for Claimant, pp. 30 and 32.

²⁰⁰ Memorandum for Claimant, p. 30.

²⁰¹ See supra, Unit 5 I.

²⁰² The possibility of ‘double recovery’ must be excluded; see e.g. Schlechtriem, Restitution, p. 736.

Counsel puts forward that Claimant also violated its obligation to mitigate loss regarding wasted expenditure arising from Art. 77 CISG²⁰³.

c) If damages for wasted expenditure were granted to Claimant, an interest rate of 4% should be applied

As already stated above, interest may only be granted from the issue of the award, and the legal rate on unpaid judgments of Danubia at 4% has to be applied²⁰⁴.

Result: The counter-claim raised by Respondent is founded while Claimant is not entitled to damages.

UNIT 6: THE ARBITRAL TRIBUNAL SHOULD FIND CLAIMANT BEARING THE ARBITRATION COSTS IS APPROPRIATE PURSUANT TO ART. 31 (3) OF THE ICC RULES

Art. 31 (3) of the ICC Rules provides that *‘the final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties’*. The costs of arbitration include the reasonable legal costs incurred by the parties for the arbitration²⁰⁵. In the case at hand, Respondent did not cause any points of dispute or violate any duty. Moreover, the arbitration costs were the result of Claimant’s behavior: It did not react reasonably when Vis Fish claimed for trademark infringement, but it immediately declared the contract avoided. Claimant ignored that it was in fact bound by the contract. The disruption of a successful completion of the contract was therefore caused by Claimant and not by Respondent. Claimant initiated the arbitration in spite of having failed to hold on to the contract. It is thus appropriate to find that Claimant should bear the arbitration costs.

May it please the Tribunal to allocate the arbitration costs to Claimant.

²⁰³ Counsel refers to its above arguments; supra, Unit 5 II.2.d).

²⁰⁴ See supra, Unit 5 II.2.g).

²⁰⁵ Art. 31 (1) ICC Rules provides: *“The costs of the arbitration shall include [...] the reasonable legal and other costs incurred by the parties for the arbitration.”* Typically, the legal costs include such items as the fees and expenses of legal counsel, see Derains/Schwartz, p. 337.

CONCLUSION

In response to the Memorandum for Claimant, dated 4 December 2000, Counsel respectfully submits the above arguments on behalf of our client Vis Water Sports Co.:

May it accordingly please the honorable Tribunal,

firstly, to decline its jurisdiction due to the lack of an arbitration agreement;

secondly, to declare that Respondent did not violate its obligation under Art. 42 CISG, and that it thus did not commit a breach of contract;

thirdly, to find that Claimant's notice did not meet the requirements set forth in Art. 43 (1) CISG;

fourthly, to declare that Respondent's breach of contract, if one existed, did not amount to a fundamental breach;

fifthly, to decline Claimant's demand for interest on the purchase price and damages;

finally, to find that Claimant should bear the entire arbitration costs.

Freiburg im Breisgau, 9 February 2001

Inken Baumgartner

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Ivo Bach

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Florian Mohs