

**Eighth Willem C. Vis International Commercial Arbitration Moot
2000-2001**

**Juridicum, University of Vienna
Vindobona, Danubia**

MEMORANDUM FOR THE RESPONDENT

On Behalf of:

Vis Water Sports Co.

395 Industrial Place
Capitol City
Equatoriana

RESPONDENT

Against:

Sports and More Sports, Inc.

214 Commercial Ave.
Oceanside
Danubia

CLAIMANT

T C BEIRNE SCHOOL OF LAW



THE UNIVERSITY OF QUEENSLAND

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LIST OF ABBREVIATIONS

| | |
|-------------------------------------|--|
| § | Paragraph |
| 2nd Cir. | Second Circuit |
| 9th Cir. | Ninth Circuit |
| AAA | American Arbitration Association |
| AAA International Arbitration Rules | American Arbitration Association International Arbitration Rules, 1 September 2000 |
| All ER | All England Reports |
| Arbitration Act 1996 (UK) | Arbitration Act 1996 (United Kingdom) |
| BGB | Bürgerliches Gesetzbuch (Germany) |
| BIP | Bundesgesetz für das Internationale Privatrecht (Switzerland) |
| Brussels Convention | Convention on the Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, Brussels |
| C.C.P.A. | Court of Customs and Patent Appeals |
| CISG | United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980 |
| Co. | Company |
| E-Comm Model Law | UNCITRAL Model Law on Electronic Commerce, 1996 |
| ECJ | European Court of Justice |
| ECR | Reports of Cases before the Court of Justice and the Court of First Instance |
| Ed. | Editor |
| Eds. | Editors |
| F.2d | Federal Reporter. Second Series |
| F.Supp. | Federal Supplement |
| HGB (Austria) | Handelsgesetzbuch (Austria) |
| HGB (Germany) | Handelsgesetzbuch (Germany) |
| ICC | International Chamber of Commerce |
| ICC Court | The International Court of Arbitration |
| ICC Rules | Rules of Arbitration of the International Chamber of Commerce, 1 January 1998 |
| Inc. | Incorporated |
| Lanham Act | Lanham (Trademark) Act, 15 United States Code |
| LCIA Rules | London Court of International Arbitration Rules, 1 January 1998 |
| Lloyd's Rep. | Lloyd's Reports |

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|----------------------------|--|
| MarkenG | Markengesetz (Germany) |
| Model Law | UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985 |
| New York Convention | Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 |
| Nice Agreement | Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks, Nice, 15 June 1957 |
| No. | Number |
| Nos. | Numbers |
| S.D.N.Y. | Southern District of New York |
| SPORTS | Sports and More Sports, Inc. |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property, Marrakesh, 15 April 1994 |
| UCC | Uniform Commercial Code (United States of America) |
| ULIS | Uniform Law on the International Sale of Goods |
| UNCITRAL Arbitration Rules | UNCITRAL Arbitration Rules, 15 December 1976 |
| UNIDROIT | International Institute for the Unification of Private Law |
| UNIDROIT Principles | UNIDROIT Principles of International Commercial Contracts, Rome, 1994 |
| URL | Uniform Resource Locator |
| U.S. | United States Supreme Court Reports |
| U.S. Dist. | United States District Court |
| USA | United States of America |
| v. | Versus |
| VIS FISH COMPANY | Vis Fish Company |
| VIS WATER SPORTS | Vis Water Sports Co. |
| ZPO | Zivilprozeßordnung (Germany) |

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STATEMENT OF PURPOSE

The Respondent, Vis Water Sports Co. (VIS WATER SPORTS), has prepared this Memorandum in compliance with the Arbitral Tribunal's Terms of Reference issued on 6 October 2000.

It is argued that:

- The Arbitral Tribunal has no jurisdiction because no arbitration agreement exists between VIS WATER SPORTS and the Claimant, Sports and More Sports, Inc. (SPORTS);
- VIS WATER SPORTS did not breach its obligation under Article 42 CISG and is exempt from liability under Article 43 CISG;
- SPORTS wrongfully avoided the contract with VIS WATER SPORTS;
- VIS WATER SPORTS is only liable to make net restitution of \$220,300 and is not liable to pay damages;
- VIS WATER SPORTS is only liable to pay interest at a rate of 3%; and that
- SPORTS should bear the costs of arbitration and VIS WATER SPORTS' legal costs.

In relation to each of these six issues, VIS WATER SPORTS summarises the arguments made by SPORTS in the Memorandum for the Claimant prepared by Universidade Federal do Rio Grande do Sul. These summaries are italicised and boxed. Where VIS WATER SPORTS refers to an issue which is not addressed in the Memorandum for the Claimant, the heading pertaining to that issue is followed by [NEW ARGUMENT].

1. THE ARBITRAL TRIBUNAL HAS NO JURISDICTION BECAUSE NO ARBITRATION AGREEMENT EXISTS BETWEEN VIS WATER SPORTS AND SPORTS

SPORTS argues that the correspondence between SPORTS and VIS WATER SPORTS constituted a 'battle of the forms' which resulted in a binding and enforceable arbitration agreement (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 7-9).

Pursuant to Article 6(2) Rules of Arbitration of the International Chamber of Commerce (ICC Rules), “any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.”¹ Therefore, the Arbitral Tribunal is authorised to determine the existence and validity of an arbitration agreement between VIS WATER SPORTS and SPORTS.²

1.1 NO ARBITRATION AGREEMENT EXISTS BETWEEN VIS WATER SPORTS AND SPORTS

An arbitration agreement may exist in the form of a clause in a contract.³ The existence of an arbitration agreement in this form is “governed by the same law, or rules of law, as the other provisions of the contract.”⁴ Article 1(1)(a) United Nations Convention on Contracts for the International Sale of Goods (CISG) provides that “This Convention applies to contracts of sale of goods between parties whose places of business are in different states ... when the States are Contracting States.” VIS WATER SPORTS and SPORTS contracted for the sale of sporting goods⁵ and have their places of business in Equatoriana and Danubia respectively,⁶ both of which are “Contracting States” within the meaning of Article 1(1)(a) CISG.⁷ Therefore, the existence of an arbitration agreement, in the form of a clause in a contract between VIS WATER SPORTS and SPORTS, is governed by the CISG.⁸

¹ Article 6(2) ICC Rules states that the Arbitral Tribunal shall only take such a decision if the ICC Court “is *prima facie* satisfied that an arbitration agreement under the [ICC] Rules may exist.” However, on 26 July 2000, the ICC Court notified the parties that this threshold had been satisfied, and that the current arbitration should proceed.

² This is a reflection of the general principle in international arbitration, usually referred to as ‘competence-competence’, that an arbitral tribunal is competent to rule on its own jurisdiction. Berger in CENTRAL, 28; Bucher in Lillich & Brower, 34; Bühring-Uhle, 62; Coe, 57-59; Craig, Park & Paulsson, 59; Derains & Schwartz, 99-102; Gaillard & Savage, 395-401; Holtzmann & Neuhaus, 478-487; Huleatt-James & Gould, 67; Park, 7; Redfern & Hunter, 264-267; Rosen, 608; Rubino-Sammartano, 329-330; van den Berg, 312; Article 15(1) AAA International Arbitration Rules; Section 30 Arbitration Act 1996 (UK); Article 186 VII 1 BIP; Article 23(1) LCIA Rules; Article 16(1) Model Law; Article 21(2) UNCITRAL Arbitration Rules; § 1040 I ZPO.

³ Berger in CENTRAL, 12; Born, 37; Gaillard & Savage, 222; Huleatt-James & Gould, 31; Redfern & Hunter, 4; Schmitthoff in Schmitthoff, 46; Article 7(1) Model Law. SPORTS has specifically claimed that the arbitration agreement exists in this form, rather than in the form of a separate agreement. Request for Arbitration, Nos. 17 & 18.

⁴ Redfern & Hunter, 157. See also Coe, 133-134; Holtzmann & Neuhaus, 259-260; Huleatt-James & Gould, 36; Lorenz (1960), 217; Mezger, 493; Piltz (2000), 556; *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.* 923 F.2d 245 (2nd Cir. 1991), 249-50; *Filanto, S.p.A. v. Chilewich International Corp.* 789 F.Supp. 1229 (S.D.N.Y. 1992), 1237; *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.* 956 F.Supp. 1131 (S.D.N.Y. 1997); Oberlandesgericht Braunschweig: 2 U 27/99 of 28 October 1999; Oberlandesgericht Hamburg: 14 U 76/77 of 22 September 1978.

⁵ Procedural Order No. 1, Clarification No. 46.

⁶ Terms of Reference, Nos. 2 & 3.

⁷ Request for Arbitration, No. 22.

⁸ SPORTS also applies the CISG in determining the existence of an arbitration agreement. Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 8-9.

The contractual relationship between VIS WATER SPORTS and SPORTS was based on e-mail correspondence between the two companies. SPORTS sent VIS WATER SPORTS two separate purchase orders,⁹ each of which was acknowledged by VIS WATER SPORTS.¹⁰ However, no arbitration agreement was concluded by either of these two exchanges of e-mail messages.

a) VIS WATER SPORTS and SPORTS did not conclude an arbitration agreement in respect of the first purchase order (No. 6839)

SPORTS' e-mail of 5 April 1999 included its first purchase order (No. 6839), and its General Conditions of Purchase (which contained an arbitration clause).¹¹ This e-mail constituted an offer in accordance with Article 14(1) CISG.¹² VIS WATER SPORTS' Sales Manager, Mr Singer, replied to this offer by e-mail on 6 April 1999, and referred to VIS WATER SPORTS' General Conditions of Sale (which contained a forum selection clause).¹³ Such an exchange of general conditions is commonly referred to as a 'battle of the forms'.¹⁴

The CISG resolves the 'battle of the forms' under Article 19 CISG.¹⁵ According to Article 19 CISG, a reply to an offer which purports to be an acceptance but which contains additional or different terms

⁹ SPORTS' first purchase order (No. 6839) was attached to its e-mail of 5 April 1999. Claimant's Exhibit No. 3. SPORTS' second purchase order (No. 6910) was attached to its e-mail of 27 May 1999. Claimant's Exhibit No. 5.

¹⁰ SPORTS' first purchase order (No. 6839) was acknowledged in VIS WATER SPORTS' e-mail of 6 April 1999. Claimant's Exhibit No. 4. SPORTS' second purchase order (No. 6910) was acknowledged in VIS WATER SPORTS' e-mail of 28 May 1999. Claimant's Exhibit No. 6.

¹¹ Claimant's Exhibit No. 3. The arbitration clause was Clause 14 of SPORTS' General Conditions of Purchase. It was the ICC standard arbitration clause with three additions: "All disputes arising out of or in connection with the present contract shall be finally settled under the [ICC Rules] by one or more arbitrators appointed in accordance with the said Rules. If the amount in dispute is more than \$400,000, there shall be three arbitrators. The arbitration shall take place in Vindobona, Danubia. The language of the arbitration shall be English." Request for Arbitration, No. 18.

¹² Article 14(1) CISG states that "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." SPORTS' first purchase order (No. 6839) of 5 April 1999 was "sufficiently definite" within the meaning of Article 14(1) CISG because it specified the quantity of goods, and fixed the list price of \$100,000. Claimant's Exhibit No. 3.

¹³ Claimant's Exhibit No. 4. The forum selection clause was Clause 23 of VIS WATER SPORTS' General Conditions of Sale. It stated that "Any dispute in regard to or arising out of this contract shall be submitted to the Commercial Court in Capitol City, Equatoriana." Answer to the Request for Arbitration, No. 13.

¹⁴ Dodge, 82-85; Drobniq, 124; Enderlein & Maskow, 99; Farnsworth in Bianca & Bonell, 178; Farnsworth (1990), 157; Gabriel (1994), 60; Gabriel (1997), 283-285; Honnold, 183; Karollus (1995), 61; Perales Viscasillas (1997), 337; Perales Viscasillas (1998), 103; Pierani; Schlechtriem in Schlechtriem (1998), 143-145; Schlechtriem in Schlechtriem (2000), 223; Schnyder & Straub in Honsell (1997), 197; Vergne, 234; *Butler Machine Tool Co. Ltd v. Ex-Cell-O-Co. Ltd.* [1979] 1 All ER 965, 966.

¹⁵ The 'battle of the forms' is exhaustively regulated by the CISG. Perales Viscasillas (1997), 340; *Société Les Verrieres de Saint Gobain, S.A. v. Martinswerk GmbH.* Cour de Cassation: J 96-11.984 of 16 July 1998; *Sté ISEA Industrie S.p.A./Compagnie d'Assurances Generali v. Lu S.A. et al.* Cour d'appel de Paris: 95-018179 of 13 December 1995. Indeed, a proposal at the Diplomatic Conference in Vienna to add a new Article 17 to the CISG to regulate the 'battle of the forms' was expressly rejected because the 'battle of the forms' was already comprehensively governed by the existing Draft Convention. Perales Viscasillas (1997), 341; First Committee Deliberations in Official Records, 288-289. In general, the CISG resolves the 'battle of the forms' in favour of the party that makes the last transmission of its general conditions. This approach is commonly referred to as the 'last shot' approach. Enderlein & Maskow, 99; Farnsworth (1990), 159-160; Honnold, 191; Schlechtriem in Schlechtriem (1998), 143-144; Schlechtriem in Schlechtriem (2000), 223; Schnyder & Straub in Honsell (1997), 197; von Mehren, 272-276.

relating to the settlement of disputes constitutes a counter-offer.¹⁶ A determination of whether Mr Singer's e-mail of 6 April 1999¹⁷ contained different terms relating to the settlement of disputes, must be made by the application of Article 8 CISG.¹⁸

Article 8(1) CISG provides that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." However, the subjective approach of Article 8(1) CISG requires proof of the actual intent of the parties.¹⁹ Where there is insufficient evidence of the parties' subjective intent, Article 8(2) CISG provides that "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."²⁰ Consequently, even if SPORTS maintains that it could not have been aware of VIS WATER SPORTS' intent, the understanding of a reasonable person in SPORTS' position is the applicable standard in interpreting Mr Singer's e-mail of 6 April 1999.²¹

Mr Singer used the words "I should like to remind you that our General Conditions of Sale, which *we include in all sales contracts*, are available at [URL omitted]. I suggest that you take a look at them [emphasis added]."²² Considering the explicit language used by VIS WATER SPORTS, a reasonable person in SPORTS' position must have understood that VIS WATER SPORTS intended any contract formed with SPORTS to include VIS WATER SPORTS' General Conditions of Sale. Since VIS WATER SPORTS' General Conditions of Sale included a forum selection clause, VIS WATER SPORTS' reply to SPORTS' offer contained a different term relating to the settlement of disputes. Therefore, according to Article 19 CISG, VIS WATER SPORTS' e-mail of 6 April 1999 constituted a

¹⁶ Article 19(1) CISG provides that "A reply to an offer which purports to be an acceptance but which contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." Article 19(2) CISG provides that a statement does not constitute a counter-offer unless it "materially" alters the terms of the offer. Article 19(3) CISG defines a material alteration to include "Additional or different terms relating ... to ... the settlement of disputes."

¹⁷ Claimant's Exhibit No. 4.

¹⁸ According to Enderlein & Maskow, 61, "Article 8 [CISG] governs the interpretation of statements and the otherwise legally relevant conduct of the parties." See also Farnsworth in Bianca & Bonell, 97-98; Honnold, 61; Schlechtriem in Schlechtriem (1998), 113; Secretariat Commentary in Official Records, 18; Landgericht Heilbronn: 3 KfH 653/93 of 15 September 1997; Oberlandesgericht Zweibrücken: 8 U 46/97 of 31 March 1998; Oberster Gerichtshof: 10 Ob 518/95 of 6 February 1996. Indeed, a proposal in the Working Party that the incorporation of an offeror's general conditions should be expressly regulated was rejected on the ground that the existing Draft Convention already contained rules interpreting the content of the contract. IX YB, 81. Consequently, recourse to domestic law by the application of choice of law rules is excluded in this context. Drobniig, 125; Secretariat Commentary in Official Records, 261.

¹⁹ Enderlein & Maskow, 63; Farnsworth in Bianca & Bonell, 98; Honnold, 118; Schlechtriem (1986), 39.

²⁰ In practice, Article 8(2) CISG is applied more commonly than Article 8(1) CISG. Honnold, 118, states that "because of the practical barriers to proving identity between the intent of the two parties (particularly when they are involved in a controversy) most problems of interpretation will be governed by [Article 8(2) CISG]." Similarly, Farnsworth in Bianca & Bonell, 99, states that "the test of actual intent contained in [Article 8(1) CISG] will not often be applied in practice." See also Junge in Schlechtriem (2000), 143; Murray, VI; *M. Caiato Roger v. La Société française de factoring international factor France "S.F.F." (SA)*. Cour d'appel de Grenoble: 93/4126 of 13 September 1995.

²¹ Schlechtriem (1986), 39-40; Secretariat Commentary in Official Records, 261; Oberlandesgericht Saarbrücken: 1 U 69/92 of 13 January 1993.

²² Claimant's Exhibit No. 4.

counter-offer to incorporate VIS WATER SPORTS' General Conditions of Sale into the contract with SPORTS.²³

SPORTS argues that it never accepted VIS WATER SPORTS' counter-offer.²⁴ However, according to Article 18(1) CISG “a statement made by or *other conduct* of the offeree indicating assent [emphasis added]” to a counter-offer²⁵ is an acceptance of that counter-offer.²⁶ SPORTS' act of opening a letter of credit²⁷ was “conduct ... indicating assent” to VIS WATER SPORTS' counter-offer within the meaning of Article 18(1) CISG.²⁸ This terminated the ‘battle of the forms’²⁹ and concluded a contract for the delivery of the goods specified in SPORTS' first purchase order (No. 6839). This contract incorporated VIS WATER SPORTS' General Conditions of Sale, including the forum selection clause, and did not incorporate an arbitration clause. Consequently, VIS WATER SPORTS and SPORTS did not conclude an arbitration agreement in respect of the first purchase order (No. 6839).

b) VIS WATER SPORTS and SPORTS did not conclude an arbitration agreement in respect of the second purchase order (No. 6910)

SPORTS maintains that its second purchase order (No. 6910) of 27 May 1999 formed part of the original ‘battle of the forms’ between VIS WATER SPORTS and SPORTS.³⁰ However, the ‘battle of the forms’ was terminated when SPORTS accepted VIS WATER SPORTS' counter-offer by opening the first letter of credit.³¹ Consequently, SPORTS' second purchase order (No. 6910) operated as either an offer to modify the existing contract,³² or a separate offer to contract. In either case, the same provisions of the CISG apply to determine the terms of the offer.³³

²³ SPORTS acknowledges this. Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 8.

²⁴ Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 8.

²⁵ The same CISG provisions in respect of what constitutes acceptance apply to both offers and counter-offers. Enderlein & Maskow, 98; Karollus (1995), 61; Schlechtriem in Schlechtriem (1998), 142; Handelsgericht Zürich: HG 940513 of 10 July 1996; *Sociedad Cooperativa Epis-Centre v. La Palentina, S.A.* Tribunal Supremo: 3587/1996 of 17 February 1998.

²⁶ Enderlein & Maskow, 92; Farnsworth in Bianca & Bonell, 167; Honnold, 173; Murray, IV C; Schlechtriem in Schlechtriem (1998), 129; Secretariat Commentary in Official Records, 23; Oberlandesgericht München: 7 U 5460/94 of 8 March 1995.

²⁷ “The [bill] of exchange drawn under the [letter] of credit [was] paid by the opening bank, and the account of Sports and More Sports was charged, on 10 May 1999.” Procedural Order No. 1, Clarification No. 48. The letter of credit was necessarily opened prior to the date upon which it was drawn.

²⁸ Opening a letter of credit constitutes “other conduct” within the meaning of Article 18(1) CISG. Enderlein & Maskow, 92; Farnsworth in Bianca & Bonell, 166; Schlechtriem in Schlechtriem (1998), 129; Schlechtriem in Schlechtriem (2000), 206-207; Vergne, 241; *Enterprise Alain Veyron v. Société E. Ambrosio*. Cour d'appel de Grenoble: 93/1613 of 26 April 1995; Handelsgericht Zürich: HG 940513 of 10 July 1996; Oberlandesgericht Frankfurt: 5 U 209/94 of 23 May 1995; Oberster Gerichtshof: 10 Ob 518/95 of 6 February 1996.

²⁹ A ‘battle of the forms’ is concluded when one party accepts a counter-offer through conduct. Honnold, 190. This favours the party who, in the ‘battle of the forms’ fires the last shot. Enderlein & Maskow, 99.

³⁰ Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 8-9.

³¹ See 1.1 a) and specifically footnote 29.

³² Article 29(1) CISG specifically envisages that “A contract may be modified ... by the mere agreement of the parties.”

³³ Enderlein & Maskow, 123; Karollus (1995), 66; Schlechtriem (1991/92), 19; Schlechtriem in Schlechtriem (1998), 211; Schmidt-Kessel, 61; Landgericht Hamburg: 5 O 543/88 of 26 September 1990; Oberlandesgericht Köln: 22 U 202/93 of 22 February 1994.

i) SPORTS' General Conditions of Purchase were not terms of the offer contained in its second purchase order (No. 6910)

In his e-mail to VIS WATER SPORTS of 27 May 1999 which included SPORTS' second purchase order (No. 6910), Mr Hirst, Purchasing Manager of SPORTS, stated that "Since [VIS WATER SPORTS] already have a copy of our General Conditions of Purchase, I need not attach them to this order."³⁴ Under Articles 8(1) and 8(2) CISG, a party's statement will only incorporate general conditions into a contract where those general conditions are "a part of the offer from the point of view of the offeree."³⁵ Therefore, the offeror's language must be unequivocal to ensure that the offeree understands the general conditions to be part of the offer.³⁶ Furthermore, Article 8(3) CISG requires that, in determining the understanding of the offeree, "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

In their previous negotiations, both VIS WATER SPORTS and SPORTS evinced an intention to include their respective general conditions in the contract. In his e-mail of 5 April 1999, Mr Hirst, Purchasing Manager of SPORTS, stated that "For your reference I have attached our General Conditions of Purchase, which are part of our purchase order."³⁷ In its reply of 6 April 1999, VIS WATER SPORTS stated that "our General Conditions of Sale, which we include in all sales contracts, are available at [URL omitted]."³⁸ The phrases "are part of" and "include in" refer unequivocally to the incorporation of general conditions into the purchase order and contract respectively. In contrast, Mr Hirst's statement, in his e-mail of 27 May 1999, "Since you already have a copy of our General Conditions of Purchase, I need not attach them to this order,"³⁹ failed to express any intention to incorporate SPORTS' general conditions into the contract. In light of the explicit language used to incorporate general terms in the parties' first contract, Mr Hirst's statement in SPORTS' second purchase order (No. 6910) was ambiguous. VIS WATER SPORTS could not have understood,⁴⁰ nor would a reasonable person in the

³⁴ Claimant's Exhibit No. 5.

³⁵ Oberster Gerichtshof: 10 Ob 518/95 of 6 February 1996. See also Schlechtriem in Schlechtriem (1998), 113.

³⁶ In *Sté ISEA Industrie S.p.A./Compagnie d'Assurances Generali v. Lu S.A. et al.* Cour d'appel de Paris: 95-018179 of 13 December 1995, the Court held that in the absence of an *explicit* reference, the buyer could not be deemed to have accepted the conditions. See also *Wonderfil S.R.L. v. N.V. Depraetere Industries*. Rechtbank van Koophandel Kortrijk: 4143/96 of 6 October 1997. Honnold, 191, stresses the need to avoid ambiguous language by stipulating that "The generally accepted principle [is] that doubt is to be resolved against the person who created the ambiguity." This principle is similar to the *contra proferentum* rule, articulated in Article 4.6 UNIDROIT Principles, which states that "If contract terms supplied by one party are unclear, an interpretation against that party is preferred." Schlechtriem in Schlechtriem (1998), 113, states that "the need to take into account the understanding which a reasonable offeree of the same kind as the recipient of the offer would have in the same circumstances may ... prevent ... unclear standard clauses ... from being within the understanding of the recipient."

³⁷ Claimant's Exhibit No. 3.

³⁸ Claimant's Exhibit No. 4.

³⁹ Claimant's Exhibit No. 5.

⁴⁰ Article 8(1) CISG states that "For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."

position of VIS WATER SPORTS have understood,⁴¹ that SPORTS intended its statement to constitute an offer to incorporate its General Conditions of Purchase into a contract. Therefore, SPORTS' General Conditions of Purchase were not terms of SPORTS' offer contained in its second purchase order (No. 6910).

ii) The contract concluded between VIS WATER SPORTS and SPORTS with respect to SPORTS' second purchase order (No. 6910) did not contain an arbitration clause

SPORTS' second purchase order (No. 6910) was acknowledged by VIS WATER SPORTS in its e-mail of 28 May 1999,⁴² thereby concluding a contract.⁴³ However, regardless of whether SPORTS' second purchase order (No. 6910) was an offer to modify the existing contract, or operated as a separate offer to contract, SPORTS' General Conditions of Purchase (including the arbitration clause) were not a part of the offer contained in that purchase order.⁴⁴ Consequently, the arbitration clause contained in SPORTS' General Conditions of Purchase was never incorporated into the contract between VIS WATER SPORTS and SPORTS with respect to the second purchase order (No. 6910). Therefore, no arbitration agreement exists between VIS WATER SPORTS and SPORTS.

1.2 THE ALLEGED ARBITRATION AGREEMENT DOES NOT SATISFY THE "IN WRITING" REQUIREMENT OF ARTICLE 7(2) MODEL LAW [NEW ARGUMENT]

a) The Arbitration Agreement must satisfy Article 7(2) Model Law

Both Equatoriana and Danubia are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁴⁵ Article V(I)(a) New York Convention envisages that the recognition and enforcement of an arbitral award may be refused by domestic courts if the arbitration agreement does not comply with the law of the seat of arbitration.⁴⁶ The seat of arbitration is Danubia,⁴⁷ which has adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law).⁴⁸ Therefore, for the purposes of enforcement, it is necessary that the arbitration agreement complies with the Model Law, and in particular, the mandatory provisions of the Model Law.⁴⁹ Article 7(2) Model Law

⁴¹ Article 8(2) CISG states that "If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."

⁴² Claimant's Exhibit No. 6.

⁴³ Article 18(1) CISG provides that "A statement made by ... the offeree indicating assent to an offer is an acceptance." Mr Singer, Sales Manager of VIS WATER SPORTS, in his e-mail of 28 May 1999 stated that "I hereby acknowledge receipt of your purchase order No. 6910." Claimant's Exhibit No. 6.

⁴⁴ See 1.1 b) i).

⁴⁵ Request for Arbitration, No. 23.

⁴⁶ Huleatt-James & Gould, 17; Poznanski, 87.

⁴⁷ Terms of Reference, No. 18.

⁴⁸ Request for Arbitration, No. 23.

⁴⁹ Böckstiegel (1984), 225; Böckstiegel (1997), 25; Coe, 52; Fox, 1; Hill, 663; Hoellering, 25; Huleatt-James & Gould, 17; Lionnet, 7; Lookofsky, 563; McConaughy, 455; Redfern & Hunter, 81; van den Berg, 34-40.

is consistently identified by commentators as a mandatory provision.⁵⁰ Consequently, to be enforceable, any alleged arbitration agreement between VIS WATER SPORTS and SPORTS must comply with Article 7(2) Model Law.

b) The exchange of e-mails between VIS WATER SPORTS and SPORTS does not satisfy the “in writing” requirement of Article 7(2) Model Law

Article 7(2) Model Law provides that:

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Statements made by e-mail may constitute written statements for the purposes of Article 7(2) Model Law.⁵¹ However, Article 7(2) Model Law was drafted with the objective of excluding oral or tacit acceptance of an arbitration agreement or an alleged acceptance that did not reflect the fully informed consent of a party.⁵² This reflects the basic principle of international arbitration law that the jurisdiction of an arbitral tribunal is derived exclusively from the consent of the parties.⁵³ Consequently, Article 7(2) Model Law is only satisfied where each party has declared “in writing” its consent to arbitration.⁵⁴

⁵⁰ Coe, 128; Holtzmann & Neuhaus, 260; Huleatt-James & Gould, 31; Redfern & Hunter, 133-134; Szurski in Sanders (1984), 59.

⁵¹ Berger (1998), 49; Holtzmann & Neuhaus, 263; Mankowski, 215. See also Articles 2(a), 5 & 6 E-Comm Model Law; Graf von Bernstorff, 19.

⁵² Broches, 41; Holtzmann & Neuhaus, 260; van den Berg, 171; *Frey, Milota, Seitelberger and Vesely v. F. Cuccaro e Figli*. Corte di Appello di Napoli of 13 December 1974. Moreover, in the drafting of Article II(2) New York Convention, from which Article 7(2) Model Law derives, a proposal by the Dutch Delegation that a “confirmation in writing by one of the parties [which is kept] without contestation by the other party” be considered an arbitration agreement, was rejected. van den Berg, 196.

⁵³ Broches, 38; Coe, 55; Hill, 597; Lindacher in Lindacher, 168; Lorenz (1960), 196-197; Poznanski, 71; Redfern & Hunter, 271; Rogers & Launders, 77; Schlosser, 684; Stipanowich, 476-477; Toope, 9; van den Berg, 173, 210; Wackenhuth, 453-454; *Three Valleys Municipal Water District v. E.F. Hutton & Co.* 925 F.2d 1136 (9th Cir. 1991), 1142; *United Steelworkers of America v. Warrior & Gulf Navigation Co.* 363 U.S. 574 (1960), 582; *Volt Information Services v. Board of Trustees of Leland Stanford Junior University* 489 U.S. 468 (1989), 477. This conclusion is reinforced by Article 17 Brussels Convention, which requires the consent of the parties to abrogate from the general rules of jurisdiction. Schmidt, 175. The ECJ has held that in order to satisfy Article 17 Brussels Convention, it must be satisfied first, that the clause conferring the jurisdiction upon the court was in fact the subject of a consensus between the parties and second, that this consensus is clearly and precisely demonstrated. *Estasis Salotti di Colzani Aimò et Gianmario Colzani v. Rüwa Polstereimaschinen GmbH* (1976) ECR 1831, 1841; *Partenreederei ms Tilly Russ and Ernest Russ v. NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* (1984) ECR 2417, 2432; *Powell Duffryn plc v. Wolfgang Petereit* (1992-1993) ECR I-1745, I-1776. In order to guarantee compliance, the ECJ also established in those decisions that the requirements of Article 17 Brussels Convention must be interpreted narrowly. See also Kroppholler, 244; Moloney in Moloney & Robinson, 7; Nörenberg, 1084; Bundesgerichtshof: VIII ZR 185/92 of 9 March 1994; Oberlandesgericht Köln: 27 U 58/96 of 8 January 1997. Decisions relating to Article 17 Brussels Convention may be used to interpret Article II(2) New York Convention. Mankowski, 218; Schlosser, 690; van den Berg, 210; Wackenhuth, 454. Accordingly, such decisions are also relevant in interpreting Article 7(2) Model Law.

⁵⁴ Holtzmann & Neuhaus, 260.

i) The exchange of e-mails in respect of the first purchase order (No. 6839) does not satisfy the “in writing” requirement of Article 7(2) Model Law

Although SPORTS’ first purchase order (No. 6839) referred to its attached General Conditions of Purchase (which contained an arbitration clause),⁵⁵ VIS WATER SPORTS’ reply expressly referred to its own General Conditions of Sale (which included a forum selection clause).⁵⁶ Where each party sends its own general conditions, van den Berg emphasises that “if the arbitral clauses in both confirmations conflict with each other, there is no acceptance in writing for either clause, and Article II(2) New York Convention is not met in this case.”⁵⁷ Article 7(2) Model Law is derived from Article II(2) New York Convention,⁵⁸ and thus, the two provisions must be interpreted consistently.⁵⁹ Therefore, an exchange of inconsistent dispute resolution clauses does not constitute an “agreement in writing” under Article 7(2) Model Law. Since VIS WATER SPORTS’ forum selection clause is inconsistent with SPORTS’ arbitration clause, there is no written evidence of each party’s consent to arbitration as required by Article 7(2) Model Law.

ii) The exchange of e-mails in respect of the second purchase order (No. 6910) does not satisfy the “in writing” requirement of Article 7(2) Model Law

SPORTS’ purchase orders (Nos. 6839 and 6910) both referred to SPORTS’ General Conditions of Purchase which included the arbitration clause.⁶⁰ VIS WATER SPORTS, in its e-mail replying to SPORTS’ second purchase order (No. 6910),⁶¹ referred to both purchase orders (Nos. 6839 and 6910) but was silent with respect to SPORTS’ General Conditions of Purchase. Silence, without more, does not satisfy the “in writing” requirement of Article 7(2) Model Law.⁶²

⁵⁵ Claimant’s Exhibit No. 3; Request for Arbitration, No. 18.

⁵⁶ Claimant’s Exhibit No. 4.

⁵⁷ van den Berg, 206.

⁵⁸ Holtzmann & Neuhaus, 260. Article II(2) New York Convention states that “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.” Article II(2) New York Convention requires that the addressee gives a written acceptance of the order together with the arbitration agreement contained therein. Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft: SCH-4366 of 15 June 1994.

⁵⁹ Gaillard & Savage, 370, 376-377; Holtzmann & Neuhaus, 260-263; Sanders (1999), 101.

⁶⁰ Claimant’s Exhibits Nos. 3 & 5.

⁶¹ Claimant’s Exhibit No. 6.

⁶² Holtzmann & Neuhaus, 264, state that “the written consent of each party is the *sine qua non* of the writing requirement.” See also Nienaber in CENTRAL, 111; *Frey, Milota, Seitelberger and Vesely v. F. Cuccaro e Figli*. Corte di Appello di Napoli of 13 December 1974. Only two cases have decided that mere reference in subsequent correspondence between the contracting parties to a document containing an arbitration clause satisfies the “in writing” requirement of Article 7(2) Model Law. *William Company v. Chu Kong Agency Co. Ltd. and Guangzhou Ocean Shipping Company* (decided under Article 7(2) Model Law); *Bobbie Brooks Inc. v. Lanificio Walter Banci S.a.S.* Corte di Appello di Firenze of 8 October 1977 (decided under Article II(2) New York Convention). In each case, where one party proposed an arbitration clause, the other party specifically accepted the documents containing the arbitration clause but remained silent with respect to the incorporation of the clause into the contract. It appears from these cases that, in order to satisfy the “in writing” requirement of Article 7(2) Model Law, the other party’s silence with respect to arbitration itself must indicate that party’s consent to arbitration as a method of dispute resolution between the parties. In *Bobbie Brooks Inc. v. Lanificio Walter Banci S.a.S.* Corte di Appello di Firenze of 8 October 1977, invoices sent by the seller specifically referred to the identification numbers of three purchase orders which all provided for arbitration. Although these orders were unsigned, the Court held that the mere reference to the identification numbers of the purchase orders constituted an exchange of documents within the meaning of Article II(2) New

In addition, Redfern and Hunter state that, when ascertaining whether a party has consented to arbitration, “it is permissible to take extraneous evidence into account.”⁶³ In the parties’ previous dealings, VIS WATER SPORTS had rejected SPORTS’ General Conditions of Purchase, including the arbitration clause.⁶⁴ Taking into account this previous rejection, VIS WATER SPORTS’ silence with regard to SPORTS’ General Conditions of Purchase cannot be interpreted as signifying VIS WATER SPORTS’ consent to arbitration. Since there is no written evidence of VIS WATER SPORTS’ consent to arbitration, the mandatory “in writing” requirement of Article 7(2) Model Law is not fulfilled. Therefore, any alleged arbitration agreement between VIS WATER SPORTS and SPORTS is unenforceable.

2. VIS WATER SPORTS DID NOT BREACH ITS OBLIGATION UNDER ARTICLE 42 CISG AND IS EXEMPT FROM LIABILITY UNDER ARTICLE 43 CISG

SPORTS argues that:

1. *VIS WATER SPORTS breached its obligation under Article 42(1) CISG (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 9-15); and*
2. *VIS WATER SPORTS is not exempt from liability under Article 43(1) CISG (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 15-20).*

2.1 VIS WATER SPORTS DID NOT BREACH ITS OBLIGATION UNDER ARTICLE 42(1) CISG

Should the Arbitral Tribunal assume jurisdiction, VIS WATER SPORTS argues that it fulfilled its obligation under Article 42(1) CISG to deliver goods free from third party rights or claims. Article 42(1) CISG provides:

The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State.

a) VIS FISH COMPANY’S assertion of trademark infringement did not constitute a “right” or a “claim” within the meaning of Article 42(1) CISG

In its letter to SPORTS of 20 September 1999, VIS FISH COMPANY alleged that “Your advertisement and sale of goods bearing the name ‘Vis’ are ... in violation of our trademark.”⁶⁵ SPORTS argues that

York Convention, and thus formed a formally valid agreement to arbitrate. However, the facts of the present dispute can be contrasted with the findings in these cases, because VIS WATER SPORTS was not silent, but rather expressly rejected the incorporation of SPORTS’ General Conditions of Purchase.

⁶³ Redfern & Hunter, 143.

⁶⁴ In his e-mail to SPORTS of 6 April 1999, Mr Singer, Sales Manager of VIS WATER SPORTS, expressly stated that “I should like to remind you that our General Conditions of Sale, which we include in all sales contracts, are available at [URL omitted]. I suggest that you take a look at them.” Claimant’s Exhibit No. 4. Clause 23 of those general conditions was a forum selection clause. Answer to Request for Arbitration, No. 13.

⁶⁵ Claimant’s Exhibit No. 7.

VIS FISH COMPANY's trademark constitutes a "right" under Article 42(1) CISG.⁶⁶ However, a third party's assertion of trademark infringement will only constitute a "right" within the meaning of Article 42 CISG if that assertion would be upheld under the law of the country in which it is made.⁶⁷ Additionally, an assertion of trademark infringement will constitute a "claim" under Article 42(1) CISG only where there is "a minimum of seriousness" to the assertion.⁶⁸ This "minimum of seriousness" standard requires that the assertion has some legal merit.⁶⁹ SPORTS' legal representatives, Howard & Heward, have concluded that VIS FISH COMPANY's allegation "would ... be dismissed" under the law of Danubia.⁷⁰ Moreover, both VIS WATER SPORTS and SPORTS agree that VIS FISH COMPANY's assertion of trademark infringement is without legal basis.⁷¹ Since there is no legal merit to VIS FISH COMPANY's assertion of trademark infringement, it does not constitute a "right" or a "claim" within the meaning of Article 42(1) CISG.

b) VIS WATER SPORTS did not know, and could not have been aware, of VIS FISH COMPANY's claim at the time of the conclusion of the contract

The seller's liability under Article 42(1) CISG for a third party "right or claim" is limited to circumstances where the seller "knew or could not have been unaware" of that "right or claim."

i) VIS WATER SPORTS was under no legal obligation to research potential claims, and therefore could not have been aware of any "right or claim" of VIS FISH COMPANY

SPORTS argues that the phrase "could not have been unaware" in Article 42(1) CISG imposes a duty on the seller to research potential third party intellectual property claims.⁷² However, the phrase "could not

⁶⁶ Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 9.

⁶⁷ According to the Secretariat Commentary in Official Records, 36, "If the third party's claim is valid ... the third party has a *right* in or to the goods [emphasis added]." See also Black, 1324; Magnus in Honsell (1997), 444; Schwenzer in Schlechtriem (2000), 426.

⁶⁸ Piltz (1993), 86. See also Schwenzer in Schlechtriem (2000), 429, 438; Zhang, 86. Additionally, Schlechtriem (1986), 72, states that "Not every frivolous or even vexatious claim would be sufficient, but rather only substantiated claims." The deliberations of the Working Group reveal concern that the word "claim" without further qualification "might lead to abuse by the buyer in that he might hold the seller responsible for any third party's claim, however frivolous or vexatious." III YB, 90. Any other interpretation would lead to the seller being liable even for claims which only aim at damaging the buyer or which are made in bad faith. Schwerha, 457, states that "one should read into this provision [Article 42(1) CISG] that such claims should be made in good faith."

⁶⁹ Schwerha, 457, states that "Otherwise, a party could easily claim breach by convincing another party to make a claim on the goods, even though such claim was meritless."

⁷⁰ In his advice to SPORTS of 28 October 1999, Howard & Heward stated that "In our opinion the claim of the Vis Fish Company to trademark infringement is unfounded. We are of the opinion that any legal action that they might bring would eventually be dismissed." Claimant's Exhibit No. 10.

⁷¹ In his letter of 4 October 1999 to VIS FISH COMPANY, Mr Kent, President of SPORTS, stated that "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." Claimant's Exhibit No. 8. In his letter of 10 November 1999 to Mr Kent, President of SPORTS, Mr Singer, Sales Manager of VIS WATER SPORTS, stated that "As you yourself have indicated, even though the Vis Fish Company may have registered the trademark 'Vis' for all water-related products, their business is fish and similar products. Vis Water Sports equipment certainly does not violate that trademark." Claimant's Exhibit No. 13. See also Claimant's Exhibit No. 10.

⁷² Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 12.

have been unaware” must be read consistently with the language of the CISG as a whole.⁷³ The CISG specifically refers to two different standards of knowledge: “could not have been unaware” and “ought to have known.”⁷⁴ Honnold contrasts the two standards, and concludes that “ought to have known” imposes a duty to research, whereas “could not have been unaware” does not require research.⁷⁵ Consequently, the standard “could not have been unaware,” in the context of Article 42(1) CISG, does not impose a duty on the seller to research potential claims. Rather, this phrase establishes that the delivery of goods subject to a third party claim constitutes a breach of the seller’s obligations if the seller possessed information that must have alerted it to the potential claim.⁷⁶

VIS WATER SPORTS possessed no information that would have alerted it to VIS FISH COMPANY’s potential claim. VIS WATER SPORTS was not aware of the existence of VIS FISH COMPANY.⁷⁷ VIS FISH COMPANY was not listed on the Internet⁷⁸ and had marketed its products solely in Danubia,⁷⁹ a country in which VIS WATER SPORTS had not previously sold its goods.⁸⁰ Indeed, VIS WATER SPORTS had never attempted to enter the Danubian market.⁸¹ Consequently, VIS WATER SPORTS could not have been aware of VIS FISH COMPANY’s potential trademark infringement claim.

ii) Even if a legal obligation to research potential claims exists, VIS WATER SPORTS could not have been aware of any “right or claim” by VIS FISH COMPANY

Even if the phrase “could not have been unaware” in Article 42(1) CISG imposes an obligation on the seller to research potential claims, the seller is not liable for a claim which would not have been revealed by such research.⁸² Shinn agrees that “there is nothing ... that suggests that the phrase [“could not have been unaware”] places an affirmative obligation on the seller to research for information that is not

⁷³ Honnold, 270; Koch (1998), 193; Law Commission of New Zealand, 40.

⁷⁴ Articles 8(1), 35(3) and 40 CISG use the phrase “could not have been unaware”. Articles 2(a), 9(2), 38(3), 49(2)(b)(i), 68, 74 and 79(4) CISG use the phrase “ought to have known”.

⁷⁵ Honnold, 295, states that ““Could not have been unaware” seems to set a standard close to actual knowledge, in contrast to “ought to have known” which can imply a duty to inquire. This acts as a limitation on the seller’s responsibility.” Similarly, the Law Commission of New Zealand, 40, states that ““Could not have been unaware” appears to be close to actual knowledge. It can be contrasted with “ought to have known” or “discovered” which is used in several other provisions of the Convention ... While the latter formula appears to impose a duty to investigate, the former may not.”

⁷⁶ This reasoning was adopted by the ICC representative in the Pre-Conference Proposals where he emphasised that it was not correct to assume that a seller could be aware of an intellectual property right or claim merely because it is published on a register. Pre-Conference Proposals in Official Records, 399. See also Honnold, 295; Shinn, 124.

⁷⁷ Procedural Order No. 1, Clarification No. 19.

⁷⁸ Procedural Order No. 1, Clarification No. 20.

⁷⁹ Procedural Order No. 1, Clarification No. 16.

⁸⁰ Claimant’s Exhibit No. 1; Procedural Order No. 1, Clarification No. 58.

⁸¹ Claimant’s Exhibit No. 2.

⁸² Enderlein & Maskow, 168; Schwerha, 450; Shinn, 127-128. Schwenzer in Schlechtriem (1998), 337, states that “Unfounded claims will ... only exceptionally result in the seller’s liability, because the seller will often lack the knowledge required by Article 42(1) CISG at the time of the conclusion of the contract.” See also Schwenzer in Schlechtriem (2000), 438.

readily discoverable in the circumstances.”⁸³ If VIS WATER SPORTS had conducted research in Danubia⁸⁴ it would not have discovered VIS FISH COMPANY’s potential claim.

VIS FISH COMPANY’s trademark infringement claim is based on the argument that the use of the ‘Vis’ name in conjunction with the slogan “like a fish in water” in relation to VIS WATER SPORTS’ sporting goods could result in confusion with VIS FISH COMPANY’s fish products.⁸⁵ However, any research of the Danubian trademark register conducted by VIS WATER SPORTS would have revealed that VIS FISH COMPANY only engages in the business of selling fish, other water-related food products and their derivatives.⁸⁶ Additionally, there was no indication on the register that VIS FISH COMPANY engaged in any commercial activities related to athletics or recreation.⁸⁷ In contrast, the only products marketed in Danubia under the name ‘Vis Water Sports’ are surfboards, wind surfboards, water skis, scuba diving equipment and water slides.⁸⁸ Since the types of products marketed by the two companies are so divergent, VIS WATER SPORTS could not have been aware that VIS FISH COMPANY would allege that its fish products could be confused with VIS WATER SPORTS’ sporting equipment.⁸⁹ Therefore, even if an obligation to research potential third party claims exists under Article 42(1) CISG, VIS WATER SPORTS could not have been aware of VIS FISH COMPANY’s “right or claim.”

⁸³ Shinn, 126.

⁸⁴ Any duty to research would be confined to the country of resale as contemplated by the parties. Date-Bah in Bianca & Bonell, 320; Enderlein & Maskow, 169; Schwenger in Schlechtriem (1998), 338-339.

⁸⁵ Claimant’s Exhibit No. 7.

⁸⁶ Claimant’s Exhibit No. 10.

⁸⁷ Claimant’s Exhibit No. 10. Danubian Trademark Law provides that the owner of a dormant trademark may only maintain an action for trademark infringement if it can show that it intends to use the trademark in the relevant class during the remaining period of registration. Procedural Order No. 1, Clarification No. 8. VIS FISH COMPANY has a registered trademark under Class 28 Nice Agreement in relation to sporting products. Procedural Order No. 1. Clarification No. 7. However, in fact, VIS FISH COMPANY has not marketed any goods under Class 28 Nice Agreement since January 1996. Procedural Order No. 1, Clarification No. 7.

⁸⁸ Procedural Order No. 1, Clarification No. 46.

⁸⁹ Article 23 Danubian Trademark Law 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* [emphasis added].” Procedural Order No. 1, Clarification No. 5. Article 23 Danubian Trademark Law is similar to § 1114 Lanham Act (USA), which provides that “Any person who ... use[s] in commerce any ... registered mark in connection with the sale ... of any goods or services on or in connection with which such use is *likely to cause confusion* shall be liable in a civil action [emphasis added].” Article 23 Danubian Trademark Law is also similar to § 14 II 2 MarkenG (Germany). In interpreting the phrase “likely to cause confusion” courts in the USA have considered two factors: first, the similarity between the marks, and second, the similarity between the goods. *Federated Food, Inc. v. Fort Howard Paper Co.* 554 F.2d 1098 (C.C.P.A. 1976). Courts in Germany have also considered these factors. Bundesgerichtshof: I ZR 143/98 of 21 September 2000; Bundesgerichtshof: I ZR 136/97 of 3 November 1999. In both jurisdictions, it is the average consumer’s perception that is determinative as to whether a similarity exists. Bundesgerichtshof: I ZR 223/97 of 13 January 2000; *The Dreyfus Fund, Inc. v. Royal Bank of Canada.* 525 F.Supp. 1108 (S.D.N.Y. 1981), 1119-1120; *Scarves by Vera, Inc. v. Todo Imports, Ltd.* 544 F.2d 1167 (2nd Cir. 1976), 1174-1175; *The Sports Authority, Inc. v. Prime Hospitality Corp.* 877 F.Supp. 124 (U.S. Dist. 1995), 129. See also *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH* (2000) ECR 6, 8. An average consumer would not have perceived any similarity between VIS WATER SPORTS’ sporting equipment and VIS FISH COMPANY’s fish products.

2.2 *VIS WATER SPORTS IS EXEMPT FROM LIABILITY UNDER ARTICLE 42(2)(a) CISG* [NEW ARGUMENT]

Even if the Tribunal determines that VIS WATER SPORTS breached Article 42(1) CISG, it is exempted from liability under Article 42(2)(a) CISG. Article 42(2)(a) CISG states that “The obligation of the seller [under Article 42(1) CISG] ... does not extend to cases where ... at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim.”

A buyer may not ignore well-known or obvious intellectual property rights or claims.⁹⁰ SPORTS could not have been unaware of the existence of VIS FISH COMPANY’s claim. VIS FISH COMPANY is a successful and well known business in Danubia⁹¹ and SPORTS actually knew that VIS FISH COMPANY was a seller of “fish and *other water-related products* [emphasis added].”⁹² These factors must have indicated to SPORTS that VIS FISH COMPANY might make an assertion of trademark infringement in respect of the ‘Vis’ trademark. In such a case, the buyer is under a duty to research the possibility of a claim.⁹³ If SPORTS had researched VIS FISH COMPANY’s intellectual property rights, it would have discovered that VIS FISH COMPANY had an extensive history of aggressively defending its trademark⁹⁴ against products significantly different⁹⁵ to its own goods.⁹⁵ As such, SPORTS “could not have been unaware” of VIS FISH COMPANY’s potential trademark infringement claim.

It is immaterial that research may have led SPORTS to conclude that VIS FISH COMPANY’s claim would have been unsuccessful. According to Kritzer, “Under Article 42(2)(a) [CISG], where the buyer has knowledge of a right, but based on an opinion of counsel or prior relevant activity of the proprietor of the right, believes the right to be invalid, unenforceable or historically unenforced, the Convention exempts the seller from an obligation if such right is raised or asserted.”⁹⁶ Therefore, since SPORTS “could not have been unaware” of VIS FISH COMPANY’s claim within the meaning of Article 42(2)(a) CISG, VIS WATER SPORTS is exempt from any liability under Article 42(1) CISG.

⁹⁰ Rauda & Etier, 57; Shinn, 127-128; Vida, 30-31. According to Rauda & Etier, 56, this precludes a buyer from practising an ‘ostrich’s policy’ by ignoring the existence of intellectual property rights. See also Enderlein & Maskow, 170; Schwenger in Schlechtriem (1998), 340; Schwenger in Schlechtriem (2000), 441; Vida, 30.

⁹¹ Procedural Order No. 1, Clarification No. 16.

⁹² Procedural Order No. 1, Clarification No. 18.

⁹³ Schwenger in Schlechtriem (1998), 340; Schwenger in Schlechtriem (2000), 441. This requirement is particularly relevant if the country in which the goods are to be sold is the buyer’s place of business, because the buyer potentially has unique knowledge of local intellectual property rights. Shinn, 125; Vida, 30-31. SPORTS was in a better position to undertake research in relation to any right of VIS FISH COMPANY. SPORTS is based in Capitol City, Danubia, where there is easy public access to the Danubian trademark register. Procedural Order No. 1, Clarification No. 9; Request for Arbitration, No. 1. In contrast, since the Danubian trademark register is not on the Internet, VIS WATER SPORTS could only have accessed the register through a Danubian lawyer or other professional specialist. Procedural Order No. 1, Clarification No. 9.

⁹⁴ Claimant’s Exhibit No. 10.

⁹⁵ VIS FISH COMPANY had previously defended its trademark against first, a company which manufactured stuffing material made from seaweed, and second, against a company which manufactured playground equipment. Procedural Order No. 1, Clarification No. 14.

⁹⁶ Kritzer, 358.

2.3 VIS WATER SPORTS IS EXEMPT FROM LIABILITY UNDER ARTICLE 43(1) CISG

Even if the Arbitral Tribunal determines that VIS WATER SPORTS breached its obligation under Article 42(1)(a) CISG, it is exempt from liability under Article 43(1) CISG. Article 43(1) CISG states that:

The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

Although SPORTS' notice of 3 November 1999⁹⁷ adequately specified the nature of VIS FISH COMPANY's right or claim,⁹⁸ SPORTS failed to fulfil its obligation under Article 43(1) CISG to give notice within a "reasonable time."

a) SPORTS gave notice of VIS FISH COMPANY's claim forty-five days after it became aware of the claim

SPORTS argues that it became aware of VIS FISH COMPANY's claim on 28 October 1999, when SPORTS was advised of VIS FISH COMPANY's litigious reputation by its legal representatives, Howard & Heward.⁹⁹ However, SPORTS received actual notice of the claim from VIS FISH COMPANY on 20 September 1999 when VIS FISH COMPANY stated that "Your advertisement and sale of goods bearing the name 'Vis' are in violation of our trademark."¹⁰⁰ Therefore, SPORTS became aware of VIS FISH COMPANY's claim on 20 September 1999. Forty-five days elapsed before SPORTS gave VIS WATER SPORTS notice of the claim on 3 November 1999.¹⁰¹

b) SPORTS' notice was not given within a "reasonable time"

The interpretation of the phrase "reasonable time" under Article 43(1) CISG is influenced heavily by the interpretation of the same phrase in Article 39(1) CISG.¹⁰² In the context of Article 39(1) CISG, courts and arbitral tribunals have consistently held that a period of more than eight days is not a "reasonable

⁹⁷ Claimant's Exhibit No. 12.

⁹⁸ According to Schwerha, 468, adequate specification of the right or claim includes reference to "the parties making the claim, the grounds for the claim ... and the goods against which the claim is made." See also Enderlein & Maskow, 171; Schwenger in Schlechtriem (1998), 345. In its letter to VIS WATER SPORTS of 3 November 1999, SPORTS stated that "The trademark 'Vis' has been registered in Danubia by the Vis Fish Company for all water-related products. By letters of 20 September 1999 and 15 October 1999 the Vis Fish Company has claimed that the advertising and selling of goods bearing the name Vis Water Sports in Danubia would violate their trademark and they have threatened legal action if we continued to do so." Claimant's Exhibit No. 12.

⁹⁹ Claimant's Exhibit No. 10; Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 17. SPORTS does not propose an argument in respect of when it "ought to have become aware" of the claim.

¹⁰⁰ Claimant's Exhibit No. 7.

¹⁰¹ Claimant's Exhibit No. 12.

¹⁰² Article 39(1) CISG states that "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it." Beldarrain, 10, states that "the notice requirement under Article 43(1) [CISG] is similar to the provisions contained in Article 39(1) [CISG]." See also Enderlein & Maskow, 170-171; Gabriel (1994), 127; Honnold, 298;

time” under Article 39(1) CISG.¹⁰³ On this basis, a “reasonable time” under Article 39(1) CISG has been interpreted as a period of approximately eight days.¹⁰⁴ This position derives support from Article 39(1) Uniform Law on the International Sale of Goods (ULIS), the predecessor to Article 39(1) CISG,¹⁰⁵ and is reflected in the domestic statutory laws of many countries.¹⁰⁶ Applying this eight day limit, SPORTS’ notice to VIS WATER SPORTS was not within a “reasonable time.”

Where “reasonable time” has been interpreted as exceeding a period of eight days, commentators and courts have stipulated that one month is the absolute limit of the “reasonable time” period.¹⁰⁷ According to Andersen, “in reported practice, there has been no evidence of any factors which have been pronounced as extending [the period of one month].”¹⁰⁸ Therefore, even extending “reasonable time” to

Schwenzer in Schlechtriem (1998), 344; Schwenzer in Schlechtriem (2000), 446; First Committee Deliberations in Official Records, 326; Secretariat Commentary in Official Records, 426; Sono in Bianca & Bonell, 322.

¹⁰³ Amtsgericht Augsburg: 11 C 4004/95 of 29 January 1996; Amtsgericht Kehl: 3 C 925/93 of 6 October 1995; Amtsgericht Riedlingen: 2 C 395/93 of 21 October 1994; Bundesgerichtshof: VIII ZR 159/94 of 8 March 1995; *Calzaturificio Moreo Juniro S.r.l. v. S.P.R. L.U. Philmar Diff.* Tribunal Commercial de Bruxelles: R.G. 1.205/93 of 5 October 1994; *Fallini Stefano & Co. S.N.C. v. Foodik BV.* Arrondissementsrechtbank Roermond: 900366 of 19 December 1991; *Gruppo IMAR S.p.A. v. Protech Horst.* Arrondissementsrechtbank Roermond: 920159 of 6 May 1993; Handelsgericht Zürich: HG 920670 of 26 April 1995; Hungarian Chamber of Commerce and Industry, Court of Arbitration Award of 5 December 1995; Landgericht Berlin: 99 O 29/93 of 16 September 1992; Landgericht Berlin: 99 O 123/92 of 30 September 1992; Landgericht Düsseldorf: 31 O 231/94 of 23 June 1994; Landgericht Köln: 86 O 119/93 of 11 November 1992; Landgericht Mönchengladbach: 7 O 80/91 of 22 May 1992; Oberlandesgericht Düsseldorf: 17 U 82/92 of 8 January 1993; Oberlandesgericht Düsseldorf: 17 U 136/92 of 12 March 1993; Oberlandesgericht Innsbruck: 4 R 161/94 of 1 July 1994; Oberlandesgericht Karlsruhe: 1 U 280/96 of 25 June 1997; Oberlandesgericht München: 7 U 3758/94 of 8 February 1995; Oberlandesgericht Saarbrücken: 1 U 69/92 of 13 January 1993; *Sport D’Hiver di Genevieve Culet v. Ets. Louyes et Fils.* Tribunale di Cuneo: 45/96 of 31 January 1996.

¹⁰⁴ Magnus in Honsell (1997), 432; Piltz (2000), 558. Similarly, according to Enderlein & Maskow, 159, “the *reasonable time* is in any case a *short period* ... reasonable, in many cases, will mean *giving notice immediately*.” Landgericht Landshut: 54 O 644/94 of 5 April 1995; Oberlandesgericht Karlsruhe: 1 U 280/96 of 25 June 1997; Oberlandesgericht Koblenz: 2 U 580/96 of 11 September 1998; Oberlandesgericht München: 7 U 3758/94 of 8 February 1995.

¹⁰⁵ Article 39(1) ULIS states that “The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly* after he discovered the lack of conformity or ought to have discovered it [emphasis added].” Some commentators have interpreted the change in wording from “promptly” to “within a reasonable time” to indicate that the word “promptly” was too strict. However, Enderlein & Maskow, 159, state that “the reasonable time is in any case ... like [Article 39(1) ULIS]”. Therefore, it is possible to use the word “promptly” as analogous to the phrase “reasonable time.” Similarly, Andersen, 92, states that “the change in wording of Article 39(1) [CISG] would not seem overly significant.”

¹⁰⁶ Pursuant to Article 1495(1) Codice Civile (Italy), there exists a duty to notify of non-conformity strictly within eight days. Pursuant to Section 377 HGB (Germany) and Section 377 HGB (Austria), notice must be given “unverzüglich” (“without delay”). Article 1648 Code Civil (France) has been interpreted as allowing a buyer four months to give timely notice of non-conformity. However, this merely reflects the wording of Article 1648 Code Civil (France), which requires a buyer to give notice of non-conformity “dans un bref délai” (“with a brief delay”). Andersen, 135; Ghestin, 12-14.

¹⁰⁷ Andersen, 97; Schwenzer in Schlechtriem (1998), 315; Schwenzer in Schlechtriem (2000), 416; Amtsgericht Augsburg: 11 C 4004/95 of 29 January 1996; Bundesgerichtshof: VIII ZR 159/94 of 8 March 1995; *M. Caiato Roger v. La Société française de factoring international factor France “S.F.F.” (SA).* Cour d’appel de Grenoble: 93/4126 of 13 September 1995; Obergericht Kanton Luzern: 11 95 123/357 of 8 January 1997; Oberlandesgericht Köln: 18 U 121/96 of 21 August 1997; Oberlandesgericht Stuttgart: 5 U 195/94 of 21 August 1995. Indeed, a large number of courts and arbitral tribunals have held that a period of more than one month is not a “reasonable time” under Article 39(1) CISG. Amtsgericht Augsburg: 11 C 4004/95 of 29 January 1996; Amtsgericht Kehl: 3 C 925/93 of 6 October 1995; Bundesgerichtshof: VIII ZR 159/94 of 8 March 1995; *Calzaturificio Moreo Juniro S.r.l. v. S.P.R. L.U. Philmar Diff.* Tribunal Commercial de Bruxelles: R.G. 1.205/93 of 5 October 1994; *Fallini Stefano & Co. S.N.C. v. Foodik BV.* Arrondissementsrechtbank Roermond: 900366 of 19 December 1991; *Gruppo IMAR S.p.A. v. Protech Horst.* Arrondissementsrechtbank Roermond: 920159 of 6 May 1993; Handelsgericht Zürich: HG 920670 of 26 April 1995; Hungarian Chamber of Commerce and Industry, Court of Arbitration Award of 5 December 1995; Landgericht Berlin: 99 O 29/93 of 16 September 1992; Landgericht Berlin: 99 O 123/92 of 30 September 1992; Landgericht Düsseldorf: 31 O 231/94 of 23 June 1994; Oberlandesgericht München: 7 U 3758/94 of 8 February 1995; Oberlandesgericht Saarbrücken: 1 U 69/92 of 13 January 1993.

¹⁰⁸ Andersen, 157.

its absolute limit, SPORTS' notice to VIS WATER SPORTS, forty-five days after it became aware of the purported breach of contract, was not given within a "reasonable time."

SPORTS argues that the "reasonable time" period in Article 43(1) CISG may be extended in certain circumstances.¹⁰⁹ However, even if a period of one month is a flexible starting point, rather than the absolute limit of "reasonable time," there are no special circumstances in the present dispute that would justify an extension of the "reasonable time" period beyond one month. SPORTS' assertion that it required additional time to attempt to resolve the dispute directly with VIS FISH COMPANY¹¹⁰ is unfounded given that it waited two weeks before responding to VIS FISH COMPANY's initial notice of the trademark infringement claim.¹¹¹ Furthermore, any argument by SPORTS that additional time was required in order to seek legal advice is countered by the fact that, after receiving notice of VIS FISH COMPANY's claim on 20 September 1999,¹¹² SPORTS waited thirty-one days before approaching its legal representatives, Howard & Heward.¹¹³

Indeed, the circumstances of the present case indicate that a period of *less* than one month should be applied. According to Sono, "where the buyer is rejecting the goods [rather than claiming damages], a prompt communication to the seller is important."¹¹⁴ This provides the seller with an opportunity to dispose of the rejected goods.¹¹⁵ In notifying VIS WATER SPORTS of its breach of Article 42 CISG, SPORTS purported to reject the goods.¹¹⁶ Therefore, notice should have been given promptly. SPORTS' notice to VIS WATER SPORTS,¹¹⁷ after a delay of forty-five days, was outside even the most liberal interpretation of "reasonable time" under Article 43(1) CISG. Consequently, VIS WATER SPORTS is exempted from any liability under Article 42(1) CISG.

¹⁰⁹ Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 19-21.

¹¹⁰ Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 16.

¹¹¹ Mr Streng, Managing Director of VIS FISH COMPANY, in his letter of 20 September 1999, notified SPORTS of VIS FISH COMPANY's assertion of trademark infringement. Claimant's Exhibit No. 7. SPORTS replied to this letter two weeks later, on 4 October 1999. Claimant's Exhibit No. 8.

¹¹² Claimant's Exhibit No. 7.

¹¹³ SPORTS wrote to its legal representatives, Howard & Heward, on 21 October 1999. Procedural Order No. 1, Clarification No. 12.

¹¹⁴ Sono in Bianca & Bonell, 309. See also Andersen, 98; Ferrari (1995), 109-110; Schwenger in Schlechtriem (1998), 315.

¹¹⁵ Sono in Bianca & Bonell, 309; Landgericht Kassel: 11 O 4185/95 of 15 February 1996. This conclusion is also consistent with Article 7(1) CISG, which states that "In the interpretation of this Convention, regard is to be had to ... the observance of good faith in international trade." It would be contrary to the principle of good faith to allow a buyer to delay unreasonably in informing the seller of non-conformity.

¹¹⁶ Claimant's Exhibit No. 12.

¹¹⁷ Claimant's Exhibit No. 12.

3. SPORTS WRONGFULLY AVOIDED THE CONTRACT WITH VIS WATER SPORTS

SPORTS argues that it validly avoided the contract. SPORTS asserts that VIS WATER SPORTS' breach was fundamental on the grounds that:

1. *VIS WATER SPORTS' breach resulted in a detriment which substantially deprived SPORTS of what it was entitled to expect under the contract (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 21-24); and*
2. *VIS WATER SPORTS could have foreseen the detriment resulting from its alleged breach (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 21-24).*

Should the Arbitral Tribunal determine that VIS WATER SPORTS breached its contract with SPORTS, SPORTS wrongfully avoided that contract by its letter of 3 November 1999.¹¹⁸ Article 49(1)(a) CISG provides that “The buyer may declare the contract avoided ... if the failure by the seller to perform any of his obligations ... amounts to a fundamental breach of contract.” Article 25 CISG defines fundamental breach:

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.

3.1 VIS WATER SPORTS' BREACH DID NOT RESULT IN A DETRIMENT WHICH SUBSTANTIALLY DEPRIVED SPORTS OF WHAT IT WAS ENTITLED TO EXPECT UNDER THE CONTRACT

Pursuant to Article 25 CISG, a fundamental breach only exists if a party's breach of contract results in “such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.” SPORTS argues that “by receiving goods, which were not free from a third [party's] claim based on intellectual property rights, [SPORTS] was deprived of what it was entitled to expect under the contract.”¹¹⁹ However, the delivery of goods subject to a third party claim does not automatically constitute a “fundamental breach” under Article 25 CISG.¹²⁰ The Oberlandesgericht Frankfurt has recognised that “it is possible that there is no fundamental breach in cases in which the buyer eventually can make some use of the defective goods.”¹²¹ Similarly, Schlechtriem states that if a defect in title “does not directly and immediately impair the buyer's freedom of action ... damages for the buyer may be an adequate remedy.”¹²² Therefore, in order to establish a fundamental breach of contract, SPORTS must

¹¹⁸ In his letter to Mr Singer, Sales Manager of VIS WATER SPORTS, of 3 November 1999, Mr Kent, President of SPORTS stated that “Sports and More Sports, Inc. is hereby avoiding the contract for the purchase of water sports equipment from the Vis Water Sports Co. entered into by your e-mail acceptance of our purchase orders No. 6839 and 6910 as provided in article 49 CISG.” Claimant's Exhibit No. 12.

¹¹⁹ Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 22.

¹²⁰ Enderlein & Maskow, 115; Koch (1998), 332; Schlechtriem in Schlechtriem (1998), 183.

¹²¹ Oberlandesgericht Frankfurt: 5 U 15/93 of 18 January 1994 [translated from German]. See also Bundesgerichtsof: VIII ZR 51/95 of 3 April 1996; Huber in Schlechtriem (2000), 499, 538; Karollus (1997), 38; Koch (1996), 687; Piltz (1996), 448; Schlechtriem (1996), 597-598; Schlechtriem (1997), 132.

¹²² Schlechtriem in Schlechtriem (1998), 183.

demonstrate that VIS WATER SPORTS' breach directly and immediately impaired SPORTS' use of the goods.

SPORTS removed VIS WATER SPORTS' goods from the Danubian market on 3 November 1999,¹²³ and was therefore unable to use VIS WATER SPORTS' goods as envisaged under the contract.¹²⁴ However, the existence of VIS FISH COMPANY's claim neither legally obliged SPORTS to cease selling those goods, nor justified that course of action. Consequently, SPORTS' ability to resell VIS WATER SPORTS' goods was not impeded by VIS WATER SPORTS' delivery of goods subject to the third party claim. Rather, SPORTS' use of VIS WATER SPORTS' goods was impaired only because it voluntarily decided to cease selling.

a) SPORTS was under no legal obligation to remove VIS WATER SPORTS' goods from the market

In the absence of a court order to remove any infringing goods from the market, there was no legal imperative to cease selling VIS WATER SPORTS' products. On 3 November 1999, when SPORTS purported to avoid the contract, VIS FISH COMPANY had not initiated any legal action against SPORTS.¹²⁵ Even if VIS FISH COMPANY had subsequently instituted legal action, it is unlikely that a Danubian court would have required SPORTS to remove VIS WATER SPORTS' goods from the market.¹²⁶ Additionally, SPORTS had received advice from its legal representatives, Howard & Heward, that "any legal action that [VIS FISH COMPANY] might bring would eventually be dismissed."¹²⁷ On this basis, at the conclusion of any litigation, SPORTS would have been authorised to continue selling VIS WATER SPORTS' goods. Therefore, SPORTS was under no legal obligation to remove VIS WATER SPORTS' goods from the market.

b) There was no legal justification for SPORTS' decision to remove VIS WATER SPORTS' goods from the market

Article 25 CISG reflects the general principle of international commercial law, *favor contractus*.¹²⁸ Under this principle, parties to a contract have an obligation to preserve, where possible, the contract and

¹²³ Procedural Order No. 1, Clarification No. 13.

¹²⁴ SPORTS is the largest retail seller of athletic equipment in Danubia. Request for Arbitration, No. 1. Therefore, SPORTS had an expectation that it would be able to resell VIS WATER SPORTS' goods in Danubia.

¹²⁵ Claimant's Exhibit No. 12; Procedural Order No. 1, Clarification No. 15.

¹²⁶ While Danubian courts have the power to prohibit the sale of a product allegedly infringing a trademark, pending final resolution of the claim, such an order is rarely made. Procedural Order No. 1, Clarification No. 11.

¹²⁷ Claimant's Exhibit No. 10.

¹²⁸ Enderlein & Maskow, 112; Magnus (1997), 45. The principle of *favor contractus* is common in international trade law and is also an essential element of the UNIDROIT principles. Alpa, 317-318; Baron, III 1 a; Berger (1999), 162-163; Bonell, 129-135.

prevent its premature avoidance.¹²⁹ Hence, avoidance for “fundamental breach” within the meaning of Article 25 CISG “should only be allowed as a last resort in response to a breach so serious that the non-breaching party would have lost his interest in performing the contract.”¹³⁰ VIS WATER SPORTS’ delivery of goods subject to VIS FISH COMPANY’s claim did not deprive SPORTS of its interest in performing the contract. According to SPORTS’ own legal representatives, Howard & Heward, VIS FISH COMPANY’s claim of trademark infringement would not have been upheld under Danubian Law.¹³¹ Therefore, the solution most conducive to the continuing existence of the contract between VIS WATER SPORTS and SPORTS was for SPORTS to continue selling the goods and defend itself against the litigation. Additionally, any costs incurred by SPORTS as a result of the litigation would have been easily recoverable from VIS WATER SPORTS in a claim for damages.¹³²

Moreover, under the CISG, the contracting parties have an obligation to act in good faith.¹³³ The principle of good faith requires the non-defaulting party to mitigate its loss in the event of a breach of contract.¹³⁴ This obligation is breached where the contract is avoided unnecessarily because avoidance of a contract for the international sale of goods generally results in very high additional costs for both parties to the contract.¹³⁵ This is particularly the case “when rescission follows delivery, [as] the goods

¹²⁹ Audit, 51; Bonell, 81; Bonell in Bianca & Bonell, 81; Brandner, II A 2; Ferrari in Schlechtriem (2000), 153; Ferrari (1994), 223; Ferrari (1997), 464; Honnold in Schlechtriem (1987), 140; Karollus in Honsell (1997), 261; Kazimierska, III E 1; Kritzer, 416; Melis in Honsell (1997), 91; Plantard, 333; Povrzenic, 4 B; Rosenberg, 452; Will in Bianca & Bonell, 206; Bundesgerichtshof: VIII ZR 51/95 of 3 April 1996.

¹³⁰ Bundesgerichtshof: VIII ZR 51/95 of 3 April 1996 [translated from German]. See also Benicke, 329; Brandner, II A 2; Enderlein & Maskow, 112; Holthausen, 102; Honnold, 206-207; Honsell (2000), V 3, V 5 a; Karollus (1997), 38; Karollus in Honsell (1997), 263-264; Koch (1998), 245; Magnus (1995), 483; Schlechtriem (1996), 597-598; Schlechtriem in Schlechtriem (1998), 174; Schlechtriem in Schlechtriem (2000), 259-260; Sono in Flechtner, 210-211; Stoffel, C 3; Will in Bianca & Bonell, 206, 211; Schweizerisches Bundesgericht: 4C.179/1998/odi of 28 October 1998.

¹³¹ Claimant’s Exhibit No. 10.

¹³² Article 45(1) CISG provides that “If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may ... claim damages as provided in Articles 74 to 77 [CISG].” Article 74 CISG provides that “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.” Loss under Article 74 CISG would include detriments flowing from a breach of Article 42 CISG. Enderlein & Maskow, 166; Honnold, 289. If SPORTS was found to have wilfully infringed VIS FISH COMPANY’s trademark, and financial penalties were imposed under Article 61 TRIPS, VIS WATER SPORTS would also have been liable in damages for those financial penalties.

¹³³ Article 7(1) CISG states that “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” Although good faith is expressed as an interpretative tool, Article 7(1) also imposes an obligation on the contracting parties to act in good faith. Enderlein & Maskow, 56-57; Kastely, 619-620; Keily, 36-39; Klein, 122; Koneru, 139-140; ICC Arbitration Case No. 7331 of 1994; *Melody BV v. Loffredo, h.o.d.n. Olympic*. Gerechtshof ’s-Hertogenbosch: 856/91 of 26 February 1992.

¹³⁴ Stoll in Schlechtriem (2000), 737, states that “The duty to mitigate loss is ... an expression of the principle of good faith [translated from German].” See also Bonell in Bianca & Bonell, 85; Magnus in Honsell (1997), 974; Magnus (1997), 45-46. Specifically, Article 77 CISG requires a non-breaching party to “take such measures as are reasonable in the circumstances to mitigate the loss ... resulting from the breach.” The duty to mitigate loss also constitutes a usage in international commerce. ICC Arbitration Case No. 2103 of 1972; ICC Arbitration Case No. 3344 of 1981. The general duty to mitigate losses is also recognised in Article 7.4.8 UNIDROIT Principles, which states that “the non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps.” Bonelli in Bonelli & Bonelli, 315-316. Moreover, the duty to mitigate will be breached where there has been an anticipatory breach. Secretariat Commentary in Official Records, 61.

¹³⁵ Benicke, 329; Honnold, 206; Karollus (1997), 38; Lorenz (1998), II C.

will have to be stored and then disposed of, generally at great expense and loss.”¹³⁶ By electing to remove the goods from the market, avoid the contract, and store the goods pending restitution, SPORTS failed to recover its purchase price and shipping costs and incurred substantial storage and other miscellaneous costs.¹³⁷ In contrast, if SPORTS had upheld the contract and continued retailing VIS WATER SPORTS’ products, VIS WATER SPORTS would have supported SPORTS throughout any litigation against VIS FISH COMPANY,¹³⁸ and would have been liable for any damages incurred by SPORTS as a result of the continued retail of the goods.¹³⁹ Thus, SPORTS’ removal of VIS WATER SPORTS’ goods from the market was a breach of its obligation under the principle of *favor contractus*, and of its obligation to mitigate its loss under the principle of good faith.

SPORTS was under no legal obligation to remove VIS WATER SPORTS’ goods from the Danubian market. Nor was there any legal justification for its decision to take that action. SPORTS was only impeded in its use of VIS WATER SPORTS’ goods by its own voluntary decision to cease selling those goods.¹⁴⁰ As such, any breach by VIS WATER SPORTS of Article 42 CISG did not *result* in “such a detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract” within the meaning of Article 25 CISG.

3.2 ANY DETRIMENT WAS NOT FORESEEN BY VIS WATER SPORTS AND WAS NOT FORESEEABLE BY A REASONABLE PERSON IN VIS WATER SPORTS’ POSITION

Under Article 25 CISG, a party will not have fundamentally breached a contract where “[it] did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.” Even if SPORTS did suffer a detriment that substantially deprived it of what it was entitled to expect under the contract, that detriment was neither foreseen by VIS WATER SPORTS nor foreseeable by a reasonable person in VIS WATER SPORTS’ position.

VIS WATER SPORTS had no knowledge of VIS FISH COMPANY prior to 31 March 1999¹⁴¹ and was unaware of the possibility that VIS FISH COMPANY would make an assertion of trademark

¹³⁶ Audit in Carbonneau, 150. See also Honnold, 206.

¹³⁷ Request for Arbitration, No. 13.

¹³⁸ Claimant’s Exhibit No. 13. Note that a breach will only substantially deprive the non-breaching party of what it was entitled to expect under the contract where the breach cannot be adequately compensated in damages. Honnold, 206; Koch (1998), 351; Schlechtriem in Schlechtriem (1998), 183; Schlechtriem in Schlechtriem (2000), 266-267. Benicke, 329, states that “The relation between performance and counter-performance however is not substantially disturbed when the buyer can dispose of the goods in a reasonable way and receives compensation in damages or a reduction of the price for the detriment suffered because of the failure to receive a delivery complying with the contract [translated from German].” See also Koch (1995), 98; Koch (1998), 221; Landgericht Oldenburg: 12 O 3010 of 6 July 1994; Oberlandesgericht Frankfurt: 5 U 15/93 of 18 January 1994; Oberlandesgericht Oldenburg: 11 U 64/94 1 February 1995.

¹³⁹ See footnote 132.

¹⁴⁰ Claimant’s Exhibit No. 12.

¹⁴¹ Procedural Order No. 1, Clarification No. 19.

infringement.¹⁴² Consequently, VIS WATER SPORTS did not foresee the potential detriment associated with VIS FISH COMPANY's intellectual property claim. Furthermore, SPORTS' alleged detriment was not foreseeable by a reasonable person within the meaning of Article 25 CISG. According to Will, a reasonable person is a "hypothetical merchant ... engaged in the same line of trade, exercising the same function" as the party in breach.¹⁴³ SPORTS was neither under a legal obligation, nor justified in its decision, to remove VIS WATER SPORTS' goods from the market.¹⁴⁴ Consequently, a reasonable merchant in the position of VIS WATER SPORTS could not have foreseen that SPORTS would take that course of action. Since SPORTS' alleged detriment was neither foreseen nor foreseeable, VIS WATER SPORTS did not fundamentally breach the contract.

3.3 IN LIGHT OF VIS WATER SPORTS' OFFER TO CURE, THERE WAS NO FUNDAMENTAL BREACH OF CONTRACT [NEW ARGUMENT]

In determining the existence of a fundamental breach, "regard must be had not only to the gravity of the breach, but also to the willingness of the seller to cure the defect."¹⁴⁵ Consequently, even if the Arbitral Tribunal finds that VIS WATER SPORTS' purported breach of contract resulted in a detriment to SPORTS within the meaning of Article 25 CISG, VIS WATER SPORTS' breach was not fundamental because it made an offer to cure in accordance with Article 48(1) CISG. Article 48(1) CISG provides that:

Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

a) An offer to cure is relevant in determining whether VIS WATER SPORTS' breach is fundamental

Although the buyer's right to avoid the contract will often prevail over the seller's right to offer to cure,¹⁴⁶ Will emphasises that "the seller's right to cure should be protected if ... where cure is feasible, the buyer hastily declares the contract avoided before the seller has an opportunity to cure the defect."¹⁴⁷

¹⁴² See 2.1 b).

¹⁴³ Will in Bianca & Bonell, 219. See also Lorenz (1998), III B; Schlechtriem in Schlechtriem (1998), 179. The point in time at which the detriment must be foreseeable is the time of the conclusion of the contract. Enderlein & Maskow, 116; Holthausen, 105; Koch (1998), 321; Schlechtriem in Schlechtriem (1998), 180; Schlechtriem in Schlechtriem (2000), 263. This conclusion is reinforced by the fact that Article 10 ULIS (the predecessor to Article 25 CISG) expressly stated that foreseeability was to be determined "at the time of the conclusion of the contract." Will in Bianca & Bonell, 220.

¹⁴⁴ See 3.1.

¹⁴⁵ Oberlandesgericht Koblenz: 2 U 31/96 of 31 January 1997 [translated from German].

¹⁴⁶ This interpretation is apparent from the wording of Article 48(1) CISG, which is expressed to be "subject to Article 49 [CISG]."

¹⁴⁷ Will in Bianca & Bonell, 349. Gabriel (1994), 139, refers to § 2-508 UCC in stating that "both the CISG and the UCC protect the seller's right to cure from surprise rejection by the buyer." Schlechtriem in Schlechtriem (1998), 183, states that "there is initially no fundamental breach of contract in cases in which it can be expected of the seller to ... remove a defect in title within a time which is reasonable." Ziegel in Galston & Smit, 9-23, argues that "Conceivably, a tribunal could find that

Any other interpretation “puts the seller at the buyer’s mercy and allows the buyer to speculate without observing his duty to mitigate losses.”¹⁴⁸ This would render the seller’s right to cure “futile.”¹⁴⁹ Consequently, where a serious offer to cure is foreseeable, whether a breach is fundamental must be determined in light of the seller’s offer to cure.¹⁵⁰

SPORTS foresaw the possibility that VIS WATER SPORTS would make a serious offer to cure. It was aware that there was no basis for VIS FISH COMPANY’s claim.¹⁵¹ This was confirmed by SPORTS’ legal representatives, Howard & Heward, who advised SPORTS that “the claim of the Vis Fish Company ... is unfounded.”¹⁵² Moreover, SPORTS specifically contemplated the possibility that VIS WATER SPORTS was able to cure the purported breach. In his letter to VIS WATER SPORTS of 3 November 1999, Mr Kent, President of SPORTS, stated that “If you are able to reach an understanding with the Vis Fish Company permitting the sale of your goods in Danubia, we would be pleased to consider placing further orders in the future.”¹⁵³ This statement indicates that SPORTS foresaw a possible offer to cure from VIS WATER SPORTS. Therefore, whether VIS WATER SPORTS’ breach was fundamental must be determined in light of its offer to cure.

b) VIS WATER SPORTS’ proposed cure satisfied the requirements of Article 48(1) CISG

Where the seller’s proposed cure satisfies the requirements of Article 48(1) CISG, there will be no fundamental breach.¹⁵⁴ Article 48(1) CISG provides that a cure must be “without *unreasonable delay* and without causing the buyer *unreasonable inconvenience* or *uncertainty of reimbursement* by the seller of expenses advanced by the buyer [emphasis added].” In its letter to SPORTS of 10 November 1999, VIS WATER SPORTS stated that “We will ... do all in our power to aid you in your defense against the assertion of trademark infringement. If, at the conclusion of any litigation that might take place, you were not able to recover your legal costs from the Vis Fish Company, we would stand ready to reimburse you

the injured party was acting in ‘bad faith’ if he precipitously exercised his right of avoidance for the very purpose of denying the breaching party an opportunity to cure.”

¹⁴⁸ Will in Bianca & Bonell, 349.

¹⁴⁹ Honnold, 210.

¹⁵⁰ Honnold, 210. It is clear from the Secretariat Commentary in Official Records, 41, that “in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time.” This conclusion is reinforced by the general principle of *favor contractus* which underlies the CISG. See footnote 129. This principle suggests that a contract should not be avoided where there remains a possibility to keep the contract on foot through an offer to cure. Kazimerska, III F 1; Speidel, 138.

¹⁵¹ In his letter to VIS FISH COMPANY of 4 October 1999, Mr Kent, President of SPORTS, stated that “There is no likelihood that anyone would confuse athletic equipment, even that used for water sports, with the fish and fish products that I now understand are sold by your company. The markets and the nature of the products are simply too different.” Claimant’s Exhibit No. 8.

¹⁵² Claimant’s Exhibit No. 10.

¹⁵³ Claimant’s Exhibit No. 12.

¹⁵⁴ Honnold, 210.

for such reasonable costs as you had incurred.”¹⁵⁵ This proposed cure satisfies the three requirements of Article 48(1) CISG.

First, if VIS FISH COMPANY commenced litigation, VIS WATER SPORTS’ offer to “do all in [its] power to aid in [SPORTS’] defense against the assertion of trademark infringement”¹⁵⁶ would have been effective without “unreasonable delay.” Second, the offer to cure would not have caused “unreasonable inconvenience” to SPORTS. The phrase “unreasonable inconvenience” refers to effects of the cure, and not to effects of the breach.¹⁵⁷ Although SPORTS might have suffered some disruption to business,¹⁵⁸ that disruption was an effect of VIS WATER SPORTS’ purported breach under Article 42(1) CISG and not an effect of VIS WATER SPORTS’ proposed cure. Therefore, any alleged “disruption to business” would not have constituted an “unreasonable inconvenience” under Article 48(1) CISG. Furthermore, Kritzer states that “Article 48(1) [CISG] recognises that the buyer may have to incur certain expenses in order for the seller to remedy his failure to perform. This in itself does not give the buyer a reason to refuse to allow the seller to remedy his failure to perform.”¹⁵⁹ Consequently, although SPORTS may have incurred legal costs if VIS FISH COMPANY had commenced litigation, these costs would not have been an “unreasonable inconvenience” within the meaning of Article 48(1) CISG. In any case, VIS WATER SPORTS expressly stated its willingness to reimburse SPORTS for any such costs.¹⁶⁰ Third, the offer to cure did not cause any “uncertainty of reimbursement.” According to Will, the phrase “uncertainty of reimbursement” is concerned with “any serious doubt as to the ability or ... willingness of the seller to reimburse expenditures when due.”¹⁶¹ VIS WATER SPORTS is an established company,¹⁶² and it demonstrated its unequivocal intention to reimburse SPORTS when it stated that “we would stand ready to reimburse you for such reasonable costs as you had incurred.”¹⁶³ Therefore, VIS WATER SPORTS’ proposed cure satisfied the requirements of Article 48(1) CISG. In light of VIS WATER SPORTS’ offer to cure, there was no fundamental breach.¹⁶⁴

¹⁵⁵ Claimant’s Exhibit No. 13.

¹⁵⁶ Claimant’s Exhibit No. 13.

¹⁵⁷ Secretariat Commentary in Official Records, 430. Huber in Schlechtriem (2000), 522, and Schnyder & Straub in Honsell (1997), 541, refer to examples where, as a consequence of the subsequent performance, the buyer is subject to an unreasonable inconvenience. A similar principle is found in § 634 II BGB. Schlechtriem in Flechtner, 251-252.

¹⁵⁸ Claimant’s Exhibit No. 12.

¹⁵⁹ Kritzer, 405. See also Enderlein & Maskow, 187; Huber in Schlechtriem (1998), 406.

¹⁶⁰ VIS WATER SPORTS stated that “we would stand ready to reimburse you for such reasonable costs as you had incurred.” Claimant’s Exhibit No. 13.

¹⁶¹ Will in Bianca Bonell, 353. See also Huber in Schlechtriem (1998), 406, who states that “if there is *a well-founded doubt as to the seller’s willingness or ability to reimburse the costs* ... the seller has a right to cure ... only if he provides security for those costs [emphasis added].” By implication, in any situation where no well-founded doubt exists, there exists no “uncertainty of reimbursement.”

¹⁶² VIS WATER SPORTS is well-known in Equatoriana. It has exported goods since 1995, and has therefore existed for a period of at least five years. Procedural Order No. 1, Clarification No. 25.

¹⁶³ Claimant’s Exhibit No 13.

¹⁶⁴ In order to avoid the contract, SPORTS was also required to comply with Articles 26 and 49(2)(b)(i) CISG. Article 26 CISG states that “a declaration of avoidance is effective only if made by notice to the other party.” SPORTS’ notice of avoidance of 3 November 1999 satisfied the form requirements of Article 26 CISG. Article 49(2)(b)(i) CISG states that “in

4. VIS WATER SPORTS IS ONLY LIABLE TO MAKE NET RESTITUTION OF \$220,300 AND IS NOT LIABLE TO PAY DAMAGES

SPORTS argues that:

1. *VIS WATER SPORTS is liable to make restitution and is not entitled to the profits derived from the sale of the goods (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 24-26); and*
2. *VIS WATER SPORTS is liable to pay damages (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 26).*

4.1 VIS WATER SPORTS IS ONLY LIABLE TO MAKE NET RESTITUTION OF \$220,300

If the Arbitral Tribunal determines that SPORTS validly avoided the contract pursuant to Article 49(1)(a) CISG, SPORTS' claim for restitution of \$368,000 in respect of the unsold goods must be set off against VIS WATER SPORTS' entitlement to the \$147,700 profit that SPORTS earned on the goods sold. Therefore, VIS WATER SPORTS is only liable to make net restitution of \$220,300.

a) VIS WATER SPORTS is liable to make restitution of \$368,000 in respect of the unsold goods

According to Article 81(2) CISG, avoidance of the contract entitles "a party who has performed the contract either wholly or in part [to] claim restitution from the other party of whatever the first party has supplied or paid under the contract." Therefore, if the Arbitral Tribunal determines that SPORTS validly avoided the contract, VIS WATER SPORTS is liable to make restitution of \$368,000¹⁶⁵ to SPORTS in exchange for the return of the two-thirds of the goods that remain unsold.

b) SPORTS is liable to make restitution of the \$147,700 profit on the goods sold

SPORTS is unable to make restitution of the one-third of the goods that have already been sold.¹⁶⁶ Where it is impossible for a buyer to make restitution of part of the goods, Article 84(2)(b) CISG provides that "The buyer must account to the seller for all benefits which he has derived from the goods." Schlechtriem states that "Article 84 [CISG] obligates the parties to return all benefits of possession

cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so ... in respect of any breach other than late delivery, within a reasonable time ... after he knew or ought to have known of the breach." SPORTS gave notice of avoidance within the same period as it gave notice of VIS FISH COMPANY's claim under Article 43(1) CISG. Assuming that the Arbitral Tribunal has already found that notice under Article 43(1) CISG was made within a "reasonable time" (without which finding the Arbitral Tribunal would not consider the issue of avoidance), notice under Article 49(2)(b)(i) CISG was also given within a reasonable time.

¹⁶⁵ SPORTS paid a total of \$552,000 (exclusive of shipping costs) for all the goods purchased from VIS WATER SPORTS, excluding shipping costs. Claimant's Exhibit No. 6. One-third of those goods were sold by VIS WATER SPORTS. Request for Arbitration, No. 13. Therefore, the value of the unsold goods is two-thirds of \$552,000, which equals \$368,000.

¹⁶⁶ Request for Arbitration, No. 13. However, this does not preclude the parties from undertaking restitution. Although Article 82(1) CISG states that "The buyer loses the right to declare the contract avoided ... if it is impossible for him to make restitution of the goods substantially in the condition in which he received them," Article 82(2)(c) CISG states that Article 82(1) CISG does not apply where the "goods or part of the goods have been sold in the normal course of business." Leser in Schlechtriem (1998), 636; Leser & Hornung in Schlechtriem (2000), 814.

(profits and advantages of use).¹⁶⁷ Therefore, SPORTS is liable to make restitution of the \$147,700 profit¹⁶⁸ that it earned on the resale of VIS WATER SPORTS' goods.

SPORTS claims that "It wouldn't be fair to ... reward ... the seller who breaches the contract."¹⁶⁹ However, the purpose of Article 84(2) CISG is to facilitate an equalisation of benefits, not to punish a party for its breach.¹⁷⁰ According to the Secretariat Commentary, "It is *irrelevant* which party's failure gave rise to the avoidance of the contract or who demanded restitution [emphasis added]."¹⁷¹ Therefore, SPORTS is liable to make restitution of its profit of \$147,700. Consequently, VIS WATER SPORTS' liability to make restitution of \$368,000 must be reduced by \$147,700,¹⁷² leaving it with a net liability of \$220,300.¹⁷³

4.2 VIS WATER SPORTS IS NOT LIABLE TO PAY DAMAGES

Pursuant to Article 74 CISG,¹⁷⁴ SPORTS claims that VIS WATER SPORTS is liable to pay liquidated damages of \$112,000 plus unliquidated damages.¹⁷⁵ This amount comprises damages for advertising expenses (\$35,000), shipping costs (\$11,000 attributable to the goods sold, and \$22,000 attributable to the unsold goods), storage and miscellaneous expenses (liquidated damages¹⁷⁶ of \$4,000 prior to the claim, plus unliquidated damages¹⁷⁷), and allocated general selling and administrative expenses (\$40,000).¹⁷⁸ None of these claims for damages can be supported at law.

¹⁶⁷ Schlechtriem (1986), 107. See also Honnold, 517; Leser in Schlechtriem (1998), 662; Leser & Hornung in Schlechtriem (2000), 827; Neumayer & Ming, 557-558; Tallon in Bianca & Bonell, 612; Oberlandesgericht Oldenburg: 11 U 64/94 of 1 February 1995. In fact, SPORTS relied on Oberlandesgericht Oldenburg: 11 U 64/94 of 1 February 1995 to argue that Article 84(2)(b) CISG does not require the buyer to account to the seller for the profits derived from the sale of the goods. Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 26. However, the Court only denied the seller's claim for profits because it was not clear that the buyer would receive any benefit from its customers.

¹⁶⁸ The normal retail mark-up on VIS WATER SPORTS products is 70 percent of the delivered purchase cost. The delivered purchase cost of the goods sold was \$211,000. Therefore, VIS WATER SPORTS estimates that the profit earned by SPORTS on the goods sold was 70 percent of \$211,000, which equals \$147,700. Answer to the Request for Arbitration, No. 10; Procedural Order No. 1, Clarification No. 51.

¹⁶⁹ Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 25.

¹⁷⁰ Tallon in Bianca & Bonell, 611, states that "The restitution is not designed to penalize the buyer; it aims at restoring the former state of things, i.e. that which existed prior to the conclusion of the contract."

¹⁷¹ Secretariat Commentary in Official Records, 58. See also Enderlein & Maskow, 349; Gabriel (1994), 256-257; Leser in Schlechtreim (1998), 656.

¹⁷² Article 81(2) CISG states that "if both parties are bound to make restitution, they must do so concurrently." Enderlein & Maskow, 344; Honnold, 507; Leser in Schlechtriem (1998), 641; Magnus (1997), 47; Tallon in Bianca & Bonell, 605. Therefore, although the CISG does not expressly provide a right of set-off, according to Leser in Schlechtriem (1998), 641, it is possible to imply such a right of into Article 81 CISG because the "set-off of monetary claims under a contract of sale is a direct extension of the principle of concurrent restitution." See also Magnus (1997), 47.

¹⁷³ \$368,000 - \$147,700 = \$220,300.

¹⁷⁴ Article 74 CISG states that "Damages for breach of contract by one party consist of a sum equal to the loss ... suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

¹⁷⁵ Request for Arbitration, No. 13.

¹⁷⁶ A liquidated claim exists if the amount "is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." Black, 930.

¹⁷⁷ An unliquidated claim exists if the amount of damages has not been finally determined. Black, 1537.

¹⁷⁸ Request for Arbitration, No. 13.

a) VIS WATER SPORTS is not liable to pay damages for advertising expenses of \$35,000, or for shipping costs of \$11,000

Under Article 74 CISG, a party is only liable to pay damages if the other party suffers a “loss.” SPORTS’ advertising expenses of \$35,000 are attributable to “general newspaper advertisements for [SPORTS’] stores and did not constitute expenses that would not otherwise have been incurred.”¹⁷⁹ As such, the advertising expenses cannot be classified as a “loss” within the meaning of Article 74 CISG. SPORTS’ stores derived the benefit of increased market exposure, regardless of the availability of specific VIS WATER SPORTS products.¹⁸⁰ Consequently, VIS WATER SPORTS is not liable for SPORTS’ advertising expenses.

Similarly, SPORTS’ shipping costs attributable to the goods sold (\$11,000¹⁸¹) do not constitute a “loss” within the meaning of Article 74 CISG. The shipping costs were incorporated into SPORTS’ purchase price,¹⁸² and were fully recovered through the sale of the goods. This remains true even if SPORTS is liable to make restitution of its profit on the goods sold, because SPORTS’ profit excluded shipping costs.¹⁸³ Thus, VIS WATER SPORTS is not liable to pay damages in respect of the shipping costs attributable to the goods sold.

b) VIS WATER SPORTS is not liable to pay damages for allocated general selling and administrative expenses of \$40,000

Article 74 CISG also provides that a party is only liable to pay damages if the loss is suffered as a “*consequence* of the breach [emphasis added].” Although SPORTS did incur general selling and administrative expenses, it is unable to identify any “specific additional expenses associated with the purchase or sale of the Vis Water Sports’ goods that could be isolated other than the cost of the letters of credit.”¹⁸⁴ The absence of a causal nexus between the expenses and the sale of VIS WATER SPORTS’ goods dictates that no loss was suffered by SPORTS as a “consequence of [VIS WATER SPORTS’]

¹⁷⁹ Procedural Order No. 1, Clarification No. 49.

¹⁸⁰ This conclusion is reinforced by the principle that “the liability to pay damages ... must not result in a profit for the promisee.” Stoll in Schlechtriem (1998), 566. This principle is reflected in the absence of a clause providing for punitive damages in the CISG. Farnsworth (1979), 248; Roßmeier, 408; Schönle in Honsell (1997), 934; Sutton, 744. If VIS WATER SPORTS was liable to pay damages for the advertising expenses, SPORTS would effectively derive a profit, because it would derive a windfall from the free increased market exposure.

¹⁸¹ SPORTS incurred shipping costs totalling \$33,000. SPORTS paid \$7,000 in shipping costs on 10 May 1999, and a further \$26,000 in shipping costs on 25 June, 1999. Claimant’s Exhibits Nos. 4 & 6; Procedural Order No. 1, Clarification No. 45. SPORTS sold one-third of the goods delivered. Request for Arbitration, No. 13. Therefore, the shipping costs attributable to the goods sold equal \$11,000 (one-third of \$33,000).

¹⁸² Claimant’s Exhibit No. 6.

¹⁸³ Profit is defined as “the gross proceeds of a business transaction less the costs of the transaction.” Black, 1211. Therefore, SPORTS’ profit derived from the sale of VIS WATER SPORTS’ goods is calculated by deducting the shipping costs and other costs associated with the transaction from the resale price of the goods. Since SPORTS is only liable to make restitution of the *profits* derived from the resale of VIS WATER SPORTS’ goods, SPORTS will retain the proceeds of sale covering its costs, including the shipping costs. This interpretation is reinforced by the method adopted for calculating SPORTS’ profit, being 70% of *delivered* purchase cost. Answer to the Request for Arbitration, No. 10; Procedural Order No. 1, Clarification No. 51. This definition of profit indicates that costs of delivery must have been incorporated in the cost, rather than the profit, associated with the transaction.

breach.” Therefore, VIS WATER SPORTS is not liable to pay damages in respect of the allocated general selling and administrative expenses.¹⁸⁵

c) VIS WATER SPORTS is not liable to pay damages for shipping costs of \$22,000, liquidated damages for storage and miscellaneous expenses of \$4,000, or unliquidated damages for storage and miscellaneous expenses

Article 77 CISG states that:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss ... 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.

According to Article 77 CISG, a buyer may not claim damages in respect of losses which would have been avoided had it taken “such measures as are reasonable in the circumstances to mitigate the loss.”¹⁸⁶ VIS FISH COMPANY’s claim is unfounded.¹⁸⁷ Consequently, SPORTS had no reason to remove VIS WATER SPORTS’ goods from the market.¹⁸⁸ If SPORTS had continued to sell the goods, it would have fully recovered the shipping costs of \$22,000¹⁸⁹ attributable to the unsold goods and avoided any storage and miscellaneous expenses associated with removing the goods from the shelves. Therefore, because SPORTS breached its obligation to mitigate losses under Article 77 CISG, VIS WATER SPORTS is not liable to pay damages for shipping costs attributable to the unsold goods, nor is it liable to pay damages for storage and miscellaneous expenses.¹⁹⁰

¹⁸⁴ Procedural Order No. 1, Clarification No. 49.

¹⁸⁵ Although SPORTS may claim the cost of the letters of credit (\$620), it would have to amend its claim to do so. Article 19 ICC Rules states that “After the Terms of Reference have been signed or approved by the [ICC] Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorised to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.” Article 19 ICC Rules would also restrict the ability of SPORTS to bring any other additional claim, such as for the costs associated with the legal opinion delivered by SPORTS’ legal representatives, Howard & Heward, or for lost profits.

¹⁸⁶ Ghestin, 26; Magnus in Honsell (1997), 974; Roßmeier, 411; Tallon in Bianca & Bonell, 605; Secretariat Commentary in Official Records, 57; Oberlandesgericht Köln: 18 U 121/97 of 21 August 1997.

¹⁸⁷ SPORTS’ legal representatives, Howard & Heward, stated that “In our opinion the claim of the Vis Fish Company to trademark infringement is unfounded.” Claimant’s Exhibit No. 10.

¹⁸⁸ See 3.1.

¹⁸⁹ SPORTS incurred shipping costs totalling \$33,000. SPORTS paid \$7,000 in shipping costs on 10 May 1999, and a further \$26,000 in shipping costs on 25 June, 1999. Claimant’s Exhibits Nos. 4 & 6; Procedural Order No. 1, Clarification No. 45. SPORTS sold one-third of the goods delivered. Request for Arbitration, No. 13. Therefore, the shipping costs attributable to the goods remaining unsold equal \$22,000 (two-thirds of \$33,000).

¹⁹⁰ Article 86(1) CISG provides that a buyer “must take such steps to preserve [the goods it intends to reject] as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.” However, SPORTS has made no claim pursuant to Article 86 CISG, and to do so would require an amendment of its claim under Article 19 ICC Rules.

5. VIS WATER SPORTS IS ONLY LIABLE TO PAY INTEREST AT A RATE OF 3%

SPORTS argues that VIS WATER SPORTS is liable to pay interest on the purchase price and on the damages (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 26).

5.1 VIS WATER SPORTS IS ONLY LIABLE TO PAY INTEREST ON THE NET PRICE

According to Article 84(1) CISG, “If the seller is bound to refund the price, he must also pay interest on it.” If the Arbitral Tribunal determines that VIS WATER SPORTS is liable to make restitution of \$220,300, VIS WATER SPORTS is also liable to pay interest on that net price.¹⁹¹ Interest is to be paid from the date on which the price was paid,¹⁹² which in this case occurred in two instalments. In relation to the 10 May 1999 instalment,¹⁹³ VIS WATER SPORTS is liable to make net restitution of \$12,075.¹⁹⁴ In relation to the 25 June 1999 instalment,¹⁹⁵ VIS WATER SPORTS is liable to make net restitution of \$208,225.¹⁹⁶ Therefore, VIS WATER SPORTS is liable to pay interest on \$12,075 from 10 May 1999, and on \$208,225 from 25 June 1999.

5.2 VIS WATER SPORTS IS LIABLE TO PAY INTEREST ON ANY LIQUIDATED DAMAGES, BUT IS ONLY LIABLE TO PAY INTEREST ON ANY UNLIQUIDATED DAMAGES FROM THE DATE ON WHICH THEY BECOME LIQUIDATED

If the Arbitral Tribunal determines that VIS WATER SPORTS is liable to pay damages, Article 78 CISG provides that “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it.” Liquidated damages are a “sum in arrears” on which interest is payable from the date of

¹⁹¹ Pursuant to Article 84(1) CISG, SPORTS is entitled to interest on the price of \$368,000. However, SPORTS is also liable to pay \$147,700 to VIS WATER SPORTS. This constitutes a “sum in arrears”, and pursuant to Article 78 CISG, VIS WATER SPORTS is therefore entitled to interest on that sum in arrears. Therefore, because interest is payable on both sums, it is appropriate to offset SPORTS’ entitlement to \$368,000 by VIS WATER SPORTS’ entitlement to \$147,700 for the purposes of calculating the net amount in respect of which VIS WATER SPORTS is liable to pay interest.

¹⁹² Enderlein & Maskow, 349; Leser in Schlechtriem (1998), 659; Leser & Hornung in Schlechtriem (2000), 821; Magnus (1997), 51; Neumayer & Ming, 555-556; Weber in Honsell (1997), 1024; Secretariat Commentary in Official Records, 58; ICC Arbitration Case No. 6653 of 1993; ICC Arbitration Case No. 7531 of 1994; ICC Arbitration Case No. 7585 of 1992; Schiedsgericht Hamburger Freundschaftliche Arbitrage of 29 December 1998; *Société Thyssen Stahlunion GmbH v. Société Maaden General Foreign Trade Organisation for Metal and Building Materials*. Cour d’appel de Paris of 6 April 1995.

¹⁹³ Procedural Order No. 1, Clarification No. 48.

¹⁹⁴ SPORTS paid a first instalment of \$95,000 (\$102,000 less shipping costs of \$7,000). Claimant’s Exhibit No. 4. SPORTS sold goods from that delivery valued at \$46,000 (list price of \$50,000 less a discount of 8%). Procedural Order No. 1, Clarification No. 45. Therefore, the value of the unsold goods is \$95,000 - \$46,000 = \$49,000. However, SPORTS earned a profit on the goods sold of 70% of the delivered purchase cost. Answer to the Request for Arbitration, No. 10; Procedural Order No. 1, Clarification No. 51. The goods sold had a delivered purchase cost of \$52,750 (list price of \$50,000 plus one-twelfth of the total shipping costs ie $\$33,000 \div 12 = \$2,750$). The profit on the goods sold was therefore 70% of \$52,750 = \$36,925. Therefore, VIS WATER SPORTS’ net liability in relation to the first instalment is \$49,000 - \$36,925 = \$12,075.

¹⁹⁵ Procedural Order No. 1, Clarification No. 48.

¹⁹⁶ SPORTS paid a second instalment of \$457,000 (\$483,000 less shipping costs of \$26,000). Claimant’s Exhibit No. 6. SPORTS sold goods from that delivery valued at \$138,000 (list price of \$150,000 less a discount of 8%). Procedural Order No. 1, Clarification No. 45. Therefore, the value of the unsold goods is \$457,000 - \$138,000 = \$319,000. However, SPORTS earned a profit on the goods sold of 70% of the delivered purchase cost. Answer to the Request for Arbitration, No. 10; Procedural Order No. 1, Clarification No. 51. The goods sold had a delivered purchase cost of \$158,250 (list price of \$150,000 plus one-quarter of the total shipping costs ie $\$33,000 \div 4 = \$8,250$). The profit on the goods sold was therefore 70% of \$158,250 = \$110,775. Therefore, VIS WATER SPORTS’ net liability in relation to the first instalment is \$319,000 - \$110,775 = \$208,225.

the breach.¹⁹⁷ However, unliquidated damages are not a “sum in arrears” until they become liquidated on the date of judgement.¹⁹⁸ According to Enderlein and Maskow, “[unliquidated claims] become due when they have been liquidated vis-a-vis the other party.”¹⁹⁹ Therefore, although interest is payable on the liquidated damages from the date of the breach, no interest is payable on the unliquidated storage and miscellaneous expenses until the date of the judgement.

5.3 THE APPLICABLE RATE OF INTEREST IS 3% [NEW ARGUMENT]

Neither Article 84(1) CISG nor Article 78 CISG specify the applicable rate of interest.²⁰⁰ This issue must therefore be determined according to the mechanism provided in Article 7(2) CISG.²⁰¹ Article 7(2) CISG states that “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.”²⁰²

The general principle underlying the interest provisions of the CISG is the principle of full compensation.²⁰³ This principle requires that the injured party should be fully compensated for its potential need to borrow funds in its own country.²⁰⁴ The best approximation of the injured party’s

¹⁹⁷ Darkey, 148; Enderlein & Maskow, 313-314; Honnold, 468-469; Nicholas in Bianca & Bonell, 571; Schneider, 230; Sutton, 750; Thiele, 7.

¹⁹⁸ According to Nicholas in Bianca & Bonell, 571, “the word “sum” suggests a liquidated sum.” This conclusion is reinforced by the fact that Article 83 ULIS only entitled the seller to interest on the price, a liquidated sum. Schneider, 230. The unequivocal nature of this conclusion indicates that there is no need to refer to Article 7(1) CISG to interpret Article 78 CISG. Article 7(1) CISG states that “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.” However, even if Article 7(1) CISG is used to interpret Article 78 CISG, the same conclusion is reached. In France, Switzerland, Germany and Italy, the injured party is only entitled to interest on a certain sum of money. § 288 BGB (Germany); Article 1153 Code Civil (France); Article 1224 Codice Civile (Italy); Article 104 Schweizerisches Obligationenrecht (Switzerland). See also Gotanda, 42. It is also a general common law rule that interest is payable only on liquidated damages. Knoll, 298; Rothschild, 196.

¹⁹⁹ Enderlein & Maskow, 314.

²⁰⁰ In relation to this issue, Article 78 CISG and Article 84(1) CISG may be considered together. Honnold, 516-517; Sutton, 751; Tallon in Bianca & Bonell, 611-612.

²⁰¹ Corney, 56; Corterier, 39; Darkey, 150; Honnold, 467-468; Kizery, 1293; Koneru, 125; Perales Viscasillas (1996), 405; Rosett, 298-299; Roßmeier, 413; Thiele, 26; van Alstine, 766; Zoccolillo, 38, 42; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft: SCH-4318 of 15 June 1994; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft: SCH-4366 of 15 June 1994.

²⁰² Article 7(2) CISG only permits reference to the rules of private international law in the absence of general principles. Accordingly, Zoccolillo, 28-29, states that it is clear from the text of Article 7(2) CISG that “the principles on which [the CISG] is based have priority over any reference to ... private international law.” See also Corterier, 34; Darkey, 150; Ferrari (1999), 88; Garro, 1155; Koneru, 106; Rosett, 299; Thiele, 23. Indeed, a proposal by the United Kingdom delegation that domestic law should govern interest rates was clearly rejected. Action by First Committee in Official Records, 137-138. Therefore, any attempt to determine the applicable rate of interest primarily by reference to private international law is incorrect. Corterier, 34; Kizery, 1284; Koneru, 125; Thiele, 26; Zoccolillo, 38. This conclusion is consistent with Article 7(1) CISG, which states that “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.” Honnold, 468; Kizery, 1282; Perales Viscasillas (1996), 405; Thiele, 25-26; van Alstine, 766; Zoccolillo, 41-42.

²⁰³ Darkey, 150; Honnold, 467, 516; Kizery, 1294; Koneru, 125-126; Roßmeier, 412; Thiele, 31; van Alstine, 766; Zoccolillo, 30; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft: SCH-4318 of 15 June 1994.

²⁰⁴ van Alstine, 766; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft: SCH-4318 of 15 June 1994; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft: SCH-4366 of 15 June 1994. This conclusion is supported by reference to the history of the drafting of Article 78 CISG. Article 58 of the Working Group’s Draft Convention in 1976 entitled the seller to interest at a rate applicable in the country of the seller’s principal place of business. By analogy, it is appropriate to interpret Article 78 CISG, which entitles any injured party to interest, as providing for interest at a rate applicable in the country of the injured party’s principal place of business. Darkey, 149; Nicolas in Bianca & Bonell, 570; Sutton, 749-750. Similarly, Article 81(1) ULIS stated that “where the seller is under an obligation to refund the

borrowing costs is the official discount rate in the country of its principal place of business.²⁰⁵ Thus, because SPORTS is the injured party, it is entitled to interest at the official discount rate in the country of its principal place of business, Danubia, which is 3%.²⁰⁶

6. SPORTS SHOULD BEAR THE COSTS OF ARBITRATION AND VIS WATER SPORTS' LEGAL COSTS

SPORTS argues that VIS WATER SPORTS should bear the costs of arbitration (Memorandum for the Claimant, Universidade Federal do Rio Grande do Sul, 27).

The allocation of costs is a procedural matter to be determined by reference to the ICC Rules.²⁰⁷ Article 31(1) ICC Rules states that “The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative costs fixed by the court ... and the reasonable legal and other costs incurred by the parties for the arbitration.” According to Article 31(3) ICC Rules, “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.” It is a general principle of international commercial arbitration that costs are borne by the unsuccessful party.²⁰⁸ Accordingly, a decision by the Arbitral Tribunal in favour of VIS WATER SPORTS should be followed by a decision that SPORTS bears the costs of arbitration and VIS WATER SPORTS' legal costs.

VIS WATER SPORTS commends the arguments presented in this Memorandum to this Arbitral Tribunal's discretion to achieve a just and fair resolution of this dispute.

price he shall also be liable for the interest thereon ... as from the date of payment,” and Article 83 ULIS stipulates that the rate of interest is a “rate ... in the country where he [the seller] has his place of business.” By analogy, it is appropriate to interpret Article 78 CISG, which entitles any injured party to interest, as providing for interest at a rate applicable in the country of the injured party's place of business. Schneider, 230.

²⁰⁵ In the United States, the discount rate is defined by the Federal Reserve, 5, as “the interest rate charged commercial banks and other depository institutions when they borrow reserves from a regional Federal Reserve bank.” As a rate of interest set by a country's central bank, the discount rate is therefore reflective of borrowing costs in the country. There is considerable support for using a discount rate or a rate derived directly from the discount rate. According to Article 83 ULIS, the applicable rate of interest was “a rate equal to the official discount rate in the country where he [the seller] has his place of business or, if he has no place of business, his habitual residence, plus 1%.” Nicolas in Bianca Bonell, 569; Schneider, 230. Additionally, the domestic laws of some countries provide for interest to be paid at a rate derived from the discount rate. In Great Britain, the statutory rate of interest is the relevant discount rate plus 1%. In Switzerland, Article 104 Schweizerisches Obligationenrecht provides that the statutory rate of interest is a usual bank discount rate. Eberstein & Bacher in Schlechtriem (1998), 598-599.

²⁰⁶ Procedural Order No. 1, Clarification No. 54.

²⁰⁷ Clause 14 of SPORTS' General Conditions of Purchase was the ICC standard arbitration clause with three additions. Request for Arbitration, No. 18. VIS WATER SPORTS acknowledges that the ICC Rules govern the current proceedings. Answer to the Request for Arbitration, No. 11.

²⁰⁸ Berger in CENTRAL, 35; Derains & Schwartz, 342; Gaillard & Savage, 686; Redfern & Hunter, 407; Section 61(2) Arbitration Act 1996 (UK); Article 28(4) LCIA Rules; Article 40 UNCITRAL Arbitration Rules; *Channel Island Ferries Ltd. v. Cenargo Navigation Ltd.* [1994] 2 Lloyd's Rep. 161; ICC Arbitration Case No. 7585 of 1992; *Schluß-Schiedspruch der Handelskammer Hamburg* of 21 June 1996.