Eighteenth Annual Willem C. Vis
International Commercial Arbitration Moot
Vienna 16 - 21 April 2011

Memorandum for Claimant

On behalf of:

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1 Harbour Street View
Capital City, Mediterraneo
Telephone: (0) 148-2010
Telefax: (0) 148-2011
E-Mail: office@trawler.me

Claimant

Versus:

Equatoriana Fishing Ltd
30 Seaview Terrace
Oceanside, Equatoriana
Telephone: (0) 927-8515
Telefax: (0) 927-8516
E-Mail: enquiries@fish.eq

Respondent

Lukas Fellmann • Anna-Lynn Fromer • Joséphine Marmy • Beat Schläpfer • Tanja Schmutz

University of Fribourg
UNIVERSITY OF Fribourg
SWITZERLAND
LAW FACULTY

TEAM MEMBERS:

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ANNA-LYNN FROMER
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BEAT SCHLÄPFER
TANJA SCHMUTZ
OLIVER WILLIAM (COACH)

EIGHTEENTH ANNUAL
WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, AUSTRIA
16 TO 21 APRIL 2011

ORGANISED BY:

ASSOCIATION FOR THE ORGANISATION AND PROMOTION OF THE
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
SCHIMMELGASSE 16/16
A-1030 VIENNA
AUSTRIA
CHAMBER OF ARBITRATION OF MILAN
VIA MERAVIDIA, 9/B
20123 MILAN
ITALY

MOOT CASE NO. 18

LEGAL POSITION

ON BEHALF OF

MEDITERRANEO TRAWLER SUPPLY SA
1 HARBOUR VIEW STREET
CAPITAL CITY, MEDITERRANEO
TELEPHONE (0) 148-2010
TELEFAX (0) 148-2011
E-MAIL: OFFICE@TRAWLER.ME (CLAIMANT)

VERSUS

EQUATORIANA FISHING LTD
30 SEAVIEW TERRACE
OCEANSIDE, EQUATORIANA
TELEPHONE (0) 927-8515
TELEFAX (0) 927-8516
E-MAIL: ENQUIRIES@FISH.EQ (RESPONDENT)
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<td>CAM</td>
<td>Chamber of Arbitration of Milan</td>
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<td>CCI</td>
<td><em>Chambre de Commerce Internationale</em> [International Chamber of Commerce]</td>
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<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>confer</td>
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<td>China International Economic and Trade Arbitration Commission</td>
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<td>e.g.</td>
<td><em>exemplum gratia</em> [for example]</td>
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<td>EC</td>
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<td>ed(s).</td>
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<td>et seq.</td>
<td><em>et sequens</em> [and the following]</td>
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<td>EU</td>
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<td>g</td>
<td>grams</td>
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<td>GmbH</td>
<td><em>Gesellschaft mit beschränkter Haftung</em> [Limited Liability Company]</td>
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<td>i.e.</td>
<td><em>id est</em> [that is]</td>
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<td>IBA</td>
<td>International Bar Association</td>
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<td>International Commercial Arbitration Court</td>
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<td>ICC</td>
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<td>Inc.</td>
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<td>UN</td>
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<td>United Nations Commission on International Trade Law</td>
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<td>USD</td>
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STATEMENT OF FACTS

1 Mediterraneo Trawler Supply SA (hereinafter CLAIMANT) is a corporation organized under the laws of Mediterraneo. It sells supplies to fishing fleet operating out of Mediterraneo. In particular, it sells bait to the long-line fisheries.

2 Equatoriana Fishing Ltd (hereinafter RESPONDENT) is a company organised under the laws of Equatoriana. It owns a fishing fleet operating in the Pacific Ocean. It also purchases products from other fisheries, which it sells along with its own products. In particular, it catches and purchases squid of the species illex danubecus, which it sells for both bait and human consumption.

3 On 14 April 2008, CLAIMANT sent a circular message to suppliers inviting them to offer squid for re-sale as bait to the Mediterranean long-liner fishing fleet. In response, a sales representative of RESPONDENT presented a sample box of squid to CLAIMANT on 17 May 2008. He indicated that the sample was representative of the squid being offered. CLAIMANT inspected the sample squid and found it to be very satisfactory.

4 On 29 May 2008, CLAIMANT ordered 200 MT of squid “as per sample inspected”. RESPONDENT confirmed this order the same day, whereupon CLAIMANT paid the purchase price. When the squid arrived on 1 July 2008, it was duly inspected by CLAIMANT. A substantial quantity was immediately sold to five long-line fishing vessels.

5 On 29 July 2008, CLAIMANT received notice from two long-line fishing vessels that the squid was “hardly useable as bait”. All five vessels returned most of the squid and two of them asked for reimbursement of the losses incurred.

6 The same day, CLAIMANT notified RESPONDENT of the reports from the long-line fishing vessels, upon which RESPONDENT requested independent testing. The assigned TGT Laboratories delivered their report on 12 August 2008, confirming that about 60% of the squid delivered by RESPONDENT was outside the size range of 100-150g and therefore unuseable as bait. RESPONDENT refused to take back the squid as requested by CLAIMANT, denying that it was obliged to supply squid within a certain size range. CLAIMANT attempted to sell the squid for RESPONDENT’s account by mandating Reliable Trading House. After CLAIMANT had stored the squid for RESPONDENT’s account for over a year, it eventually had to destroy the squid, lacking instructions from RESPONDENT that CLAIMANT repeatedly asked for.
On 20 May 2010, Claimant filed a request for arbitration at the Chamber of Arbitration of Milan (hereinafter CAM) in accordance with the arbitration agreement introduced by Respondent. The CAM confirmed the two party-appointed arbitrators (hereinafter co-arbitrators) on 9 July 2010. The two co-arbitrators appointed Mr Y as chairman. However, Mr Y could not be confirmed by the Arbitral Council (hereinafter Council) due to his lack of independence. The council then appointed Mr Z as chairman and confirmed him on 10 September 2010.

In parallel, on 22 May 2010, Claimant’s CEO Mr Schwitz gave an interview to the newspaper Commercial Fishing Today. In the interview, Mr Schwitz indicated that their lawyer had initiated arbitral proceedings. This has led Respondent to introduce a counter-claim in its Statement of Defence asserting that Claimant has breached its obligation of confidentiality and is liable for any eventual damages.

SUMMARY OF ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE. Respondent has no grounds to challenge the jurisdiction of the Tribunal based on irregular composition. Contrary to Respondent’s assertions, all three arbitrators were appointed and confirmed in accordance with the parties’ arbitration agreement. Therefore, any award rendered by the Tribunal would neither be set aside nor be denied enforcement. In any case, Respondent has waived its right to challenge the composition of the Tribunal since it failed to object in time.

II. CLAIMANT DID NOT VIOLATE ITS OBLIGATION OF CONFIDENTIALITY WHEN GIVING THE INTERVIEW. Claimant’s CEO did not violate his obligation of confidentiality when giving the interview. The information given by Claimant was not sufficient to amount to a breach of the obligation of confidentiality. Even if it were, Claimant was rightfully protecting its reputation. Moreover, at the time Claimant’s CEO gave the interview, the arbitral proceedings had not begun and therefore the obligation of confidentiality did not yet exist.

III. RESPONDENT BREACHED THE CONTRACT. Claimant and Respondent concluded a contract for the sale of squid falling almost exclusively in the size range of 100-150g. In spite of this obligation, approximately 60% of the squid delivered by Respondent was undersized and therefore hardly useable as bait. Consequently, Respondent breached the contract under Art. 35(1) CISG. The squid delivered was also not in conformity with the objective quality standards of Art. 35(2) CISG. In particular, the squid delivered was only fit for one of the usual purposes, i.e. the use for human consumption, but not the use as bait. Even more, the
use as bait was CLAIMANT’s only particular purpose for the purchase of the squid, which it expressly made known to RESPONDENT. Finally, it was neither in conformance with the sample furnished by RESPONDENT.

IV. CLAIMANT CAN RELY ON RESPONDENT’S BREACH OF CONTRACT. Since RESPONDENT knew that it would deliver undersized squid, it cannot invoke any negligence in CLAIMANT’s inspection and notification. Even if RESPONDENT could, CLAIMANT can still rely on RESPONDENT’s breach of contract since CLAIMANT duly and timely inspected the squid and gave sufficient notice of the non-conformity within the time available.

V. CLAIMANT RIGHFULLY AVOIDED THE CONTRACT. CLAIMANT had purchased the squid for re-sale as bait to the long-liner fishing fleet. Since the majority of the squid delivered was undersized, CLAIMANT was unable to sell the squid for bait. It was also not able to sell it for human consumption since the market was small and already saturated. CLAIMANT was therefore substantially deprived of what it was entitled to expect under the contract, which amounts to a fundamental breach of contract by RESPONDENT. This left CLAIMANT with no other remedy than avoidance of the contract. Consecutively, it duly and timely declared the contract avoided and was in the position to restore the squid at the time of avoidance.

VI. CLAIMANT PRESERVED THE SQUID AND MITIGATED FURTHER LOSSES. After having rightfully avoided the contract, CLAIMANT had the duty to preserve the squid for RESPONDENT’s account according to Art. 86 CISG. CLAIMANT fulfilled this duty by storing the squid in its cool house. Based on Art. 88 CISG, CLAIMANT tried to sell the squid for RESPONDENT’s account. After almost a year, the squid was no longer certain to be fit for human consumption. CLAIMANT therefore had to dispose of the squid in order to protect the rest of its products. Consequently, CLAIMANT complied with its obligation to mitigate further losses and is therefore entitled to claim full damages.

PROCEDURAL ISSUES

As a preliminary matter, CLAIMANT notes that neither of the parties disputes the existence of a valid and binding arbitration agreement [ArbReq N26; StaDef N22]. The parties' arbitration agreement provides for the application of the Arbitration Rules of the Chamber of Arbitration of Milan (hereinafter MR) and the place of arbitration, which is Danubia [ClaEx 4]. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (Danubian Law on International Commercial Arbitration, hereinafter DLICA) [ArbReq N25; StaDef N22]. CLAIMANT initiated arbitral proceedings due to the
unwillingness of RESPONDENT to assume responsibility for its failure to deliver squid of the quality required by the sales contract [ClaEx 10 N13, 17].

In the following it will be shown first, that the Tribunal, contrary to RESPONDENT’s assertions, is correctly composed and therefore has jurisdiction to hear the present case (I). It will be shown secondly, that CLAIMANT has not breached its obligation of confidentiality and is not liable for any possible damages (II).

I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

RESPONDENT challenges the jurisdiction of the Tribunal, alleging that the composition of the Tribunal does not respect the arbitration agreement [AmStaDef N7]. RESPONDENT is of the view that Mr Horace Z (hereinafter Mr Z) is not the legitimate chairman, as he was not appointed by the co-arbitrators [AmStaDef N5-7]. According to RESPONDENT, any award rendered by this Tribunal would be set aside or be denied enforcement [AmStaDef N7]. However, RESPONDENT’s view is erroneous and not to be followed.

According to the widely accepted principle of competence-competence established in Art. 16(1) DLICA, the Tribunal has authority to decide on its own jurisdiction [cf. Born, pp. 855-856; cf. Redfern/Hunter, N5-39]. Based on the parties' arbitration agreement, which is the primary source of the Tribunal's authority [Fouchard/Gaillard/Goldman, N650; Poudret/Besson, N457], the Tribunal should find that it has jurisdiction to hear the present case for the following reasons.

First, RESPONDENT’s choice of the CAM implies RESPONDENT’s acceptance that the CAM should administer the arbitration in compliance with the MR and its particular conditions (A). Secondly, the Tribunal was appointed and confirmed in accordance with the arbitration agreement (B). Thirdly, even if the Tribunal could be considered to be irregularly composed, any future award could still not be set aside nor could it be declared unenforceable (C). Finally, by not filing any written comments in due time, RESPONDENT has waived its right to object to the composition of the Tribunal (D).

A) RESPONDENT PROPOSED THE MILAN RULES AND THEREFORE MUST ACCEPT HOW THE CHAMBER OF ARBITRATION CONDUCTS THE PROCEEDINGS

The first sentence of the parties' arbitration agreement reads as follows: “All disputes out of or related to this contract shall be settled by arbitration under the Rules of the Chamber of Arbitration of Milan [...], by three arbitrators” [ClaEx 4].
The parties freely chose the CAM to administer the present case, thereby exercising their party autonomy [cf. Onyema, p. 27; cf. Berger, N16-22]. By incorporating the MR into the arbitration agreement, the parties irrevocably empower the CAM to organize and oversee the arbitration [Azzali/Coppo, p. 440; cf. Fouchard/Gaillard/Goldman, N1110; cf. Berger, N16-38]. The MR determine how the proceedings are to be conducted, specifying the competence of the Council, e.g. confirming the arbitrators, and limiting the freedom of the parties [cf. Chatterjee, p. 539; cf. Holtzmann/Neuhaus, p. 917].

It should be emphasised that RESPONDENT drafted the arbitration agreement proposing the CAM and its Rules [ClaEx 4]. CLAIMANT, on the other hand, was not familiar with arbitration clauses [RespEx 2]. In fact, CLAIMANT said “that [it was] the first time [it had] seen one from any of [its] suppliers” [RespEx 2]. CLAIMANT merely accepted the arbitration agreement without discussion [RespEx 2]. Assuming that RESPONDENT acted in a reasonable business-like way when drafting the arbitration agreement, it must have considered the rules of the institution it chose as well as its particular conditions [cf. Cicogna, p.186].

The fact that the CAM, among very few institutions, has its own Code of Ethics, shows the importance it attaches to the ethical standard of the arbitrators [Art. 1(1) Code of Ethics; Azzali/Coppo, p. 435; Cicogna, p. 180]. The Code of Ethics is incorporated in the MR and was therewith accepted by the parties [Fouchard/Gaillard/Goldman, N356]. The CAM is especially known for applying a strict policy in regard to the independence of the arbitrators, which is considered as a particular condition of the CAM [Sali, p. 6; Cicogna, p. 180; IBA Subcommittee, p. 36].

When unilaterally introducing the MR into the arbitration agreement, RESPONDENT accepted to abide by the MR and to submit itself to the powers which it delegated to the CAM. In addition, RESPONDENT has to bear the consequences of the CAM’s particular conditions, i.e. the strictness concerning the independence of the arbitrators.

**B) THE TRIBUNAL WAS APPOINTED AND CONFIRMED IN ACCORDANCE WITH THE ARBITRATION AGREEMENT**

According to RESPONDENT, the fact that the present chairman Mr Z was not appointed by the co-arbitrators violates the arbitration agreement and implies that the Tribunal is irregularly composed [AmStaDef N5-7]. However, RESPONDENT’s contention is erroneous and should not be taken into account.

RESPONDENT seems to be unaware that the parties can determine the method of appointment [Art. 14 MR], whereas they cannot determine the method of confirmation [Bühler/Webster,
N9-1; Poudret/Besson, N396; Schäfer/Verbist/Imhoos, p. 53; Coppo, p. 291]. Indeed, pursuant to the mandatory provisions of the MR, the power of confirming the arbitrators lies solely in the sphere of competence of the Council from which the parties cannot deviate [cf. Mcilwrath/Savage, N5-061].

27 In the following it shall be shown first, that the arbitrators were appointed in accordance with the method of appointment the parties had established (1), secondly, that the Council acted in accordance with its duty when refusing to confirm Mr Y (2) and finally, that the present chairman Mr Z was appointed and confirmed in accordance with the MR (3).

1) The arbitrators were appointed in accordance with the parties’ method of appointment

28 The arbitrators first have to be appointed [Fouchard/Gaillard/Goldman, N742; Redfern/Hunter, N4-22]. Art. 14 MR gives the parties the freedom to establish the method of appointment of the arbitrators [Coppo, p. 289; Cicogna, p. 178]. However, if the parties' method of appointment violates the mandatory provisions of the MR, it will not be taken into account by the CAM according to Art. 2(1) MR [Giovannini/Renna, p. 308; Coppo, p. 286; De Berti, p. 4; cf. Fouchard/Gaillard/Goldman, N777, 967].

29 The parties' method of appointment reads as follows: “Each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator” [ClaEx 4]. Since the parties' method of appointment does not violate any mandatory provisions of the MR, it is to be respected by the CAM.

30 CLAIMANT appointed Ms Arbitrator 1 and RESPONDENT appointed Professor Arbitrator 2 [Rec. pp. 3, 23]. Both arbitrators were subsequently confirmed by the Council of the CAM [Rec. p. 38]. The confirmed co-arbitrators then appointed Mr Malcolm Y (hereinafter Mr Y) as chairman [Rec. p. 39].

31 Contrary to RESPONDENT’s assertions, all the arbitrators were appointed entirely in accordance with the parties' method of appointment, thereby respecting the parties' arbitration agreement.

2) Mr Y could not have been confirmed as chairman due to his qualified statement of independence

32 Neither CLAIMANT nor RESPONDENT challenged the appointment of Mr Y upon receiving his statement of independence [Rec. p. 47]. The Council nevertheless refused to confirm Mr Y [Rec. p. 49].
According to Art. 18(3) MR, an appointed arbitrator is confirmed if two conditions are fulfilled: first, the parties must not have challenged the appointed arbitrator after having received his statement of independence and secondly, the arbitrator must not have filed a qualified statement of independence.

The aim of the Tribunal is to render an enforceable award, which explains why the Council must scrutinise the statement of independence of the arbitrators [Art. 6 Code of Ethics; Gottwald, p. 7]. The slightest of doubts regarding the independence of an arbitrator is enough to deny the enforcement of the award [Tecnimont case; Hitachi case; Automobile Manufacturer case; Casualty case; Cicogna, p. 177; Petrochilos, N4.68]. The Council therefore has the duty to refuse the confirmation of an arbitrator who discloses circumstances which could cast doubts concerning his independence. Moreover, the Council pays even more attention to the statement of independence of the chairman since he plays a fundamental role in deciding the case [cf. Böckstiegel, p. 24 N5].

In the present case, Mr Y indicated in his statement of independence that he was working in the same law firm as Mr Samuel, CLAIMANT’s adviser in the matter at hand [Rec. p. 46]. This exact situation is mentioned in the red list of the IBA Guidelines, which consider this conflict of interests to be serious [cf. 2.3.3 IBA Guidelines]. The Council of the CAM, taking into account the IBA Guidelines [Rec. p. 54], as well as its own Code of Ethics [Art. 13 Code of Ethics], rightfully considered that such a relation gave rise to justifiable doubts as to Mr Y’s independence.

Although the parties had not challenged Mr Y, he could not have been confirmed due to his qualified statement of independence. The Council therefore acted in accordance with its duties emanating from the MR.

3) **Mr Z was appointed and confirmed as chairman by the Council in accordance with the Milan Rules**

According to Art. 20(3) MR, if the Council refuses to confirm the chairman, the co-arbitrators have the possibility to appoint a substitute chairman. If he is also refused, the Council is then empowered to appoint a replacement chairman [Art. 20(3) MR].

In spite of the first refusal, the co-arbitrators reappointed Mr Y as substitute chairman [Rec. p. 51]. Since Mr Y was still not independent, the Council acted in consistency with its first decision when refusing Mr Y a second time [cf. Art. 6 Code of Ethics]. By re-appointing Mr Y, the co-arbitrators used the last of their two chances to appoint a chairman [cf. Art. 20(3)
MR]. The power to appoint a chairman was therewith conferred on the Council by virtue of Art. 20(3) MR. The MR provide such a procedure in order to assure an effective and expeditious constitution of the Tribunal, which is in the best interest of the parties [cf. Clay, N 795]. Indeed, prompt constitution of the Tribunal is necessary to treat the merits as quickly as possible [Cubic Defense System case; Clay, N795]. The Council complied with the MR and appointed Mr Z as the chairman of the Tribunal [Rec. p. 57]. Mr Z filed an unqualified statement of independence and neither of the parties objected to his appointment [Rec. p. 59]. The conditions of Art. 18(3) MR being fulfilled, the Council rightfully confirmed Mr Z as chairman of the Tribunal [Rec. p. 61].

The appointment and confirmation of Mr Z were therefore made in compliance with the MR.

C) THE PRESENT TRIBUNAL CAN RENDER AN ENFORCEABLE AWARD

 Irregular composition and lack of independence are grounds to set aside any future award pursuant to Art. 34(2)(a)(iv) DLICA [Panamanian case; Binder, N7-021]. Both are also grounds for denying enforcement pursuant to Art. V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter NY Convention) [Jarvin, pp. 731, 734]. As the grounds for denying enforcement under the NY Convention are substantially similar to those for setting aside an award under the DLICA, only non-enforcement based on the NY Convention will be treated in the following arguments [cf. Binder, N7-006; cf. Sanders, p. 127; cf. Dore, p. 123; cf. Broches, p. 188; cf. Holtzman/Neuhaus, p. 912].

As was shown above [supra N25-39], the Tribunal was rightly composed and therefore can render an enforceable award on the ground of an irregular composition. Even if the Tribunal would find that it was irregularly composed, this would not be sufficient ground to deny enforcement to any future award (1). As to the independence of the arbitrators, an award rendered by the Tribunal with the independent Mr Z would be enforceable. On the contrary, this would not be the case with Mr Y as chairman since he is not independent (2).

1) The alleged irregularity of the present Tribunal’s composition is not sufficient to deny enforcement to any future award

The goal of international arbitration is to have an award which will not be denied enforceability [ICC case No. 3896; Horvath, p. 135; Bühler/Webster, p. 155]. Only very few grounds exist to deny enforceability and they only apply when the core principles of arbitration have been violated [Paulsson, p. 108; Girsberger/Voser, N1191; Jarvin, p. 745;
Automobile Manufacturer case]. Even more, these few grounds have to be interpreted very narrowly [Airplane case; Redfern/Hunter, N10-35; Van den Berg, pp. 267-268; Paulsson, p. 108]. Such grounds are foreseen in the NY Convention, which both Mediterraneo and Equatoriana have signed [ArbReq N25].

Art. V(1)(d) NY Convention requires that the composition of the Tribunal be consistent with the parties' agreement. However, the fact that the composition of the Tribunal is not in accordance with the parties’ arbitration agreement is not always fatal for the enforcement of the award [Al Haddad case]. Since this article has to be interpreted very narrowly, case law considers a Tribunal to be irregularly composed if it is not the chosen institution that conducted the proceedings [China Nanhai case; Apex Digital case].

In the China Nanhai case, the composition of the Tribunal was not in accordance with the parties’ arbitration agreement. The parties agreed that the arbitrators had to be chosen from a specific list. However, the Tribunal was constituted wholly by arbitrators, names of whom did not appear on the list. The Supreme Court of Hong Kong nevertheless decided to enforce the award on the basis that the parties agreed to have “a CIETAC Arbitration and that is what they got” [China Nanhai case]. In the case at hand, RESPONDENT claims that only one arbitrator out of three is not in accordance with the arbitration agreement whereas in the China Nanhai case it was the whole Tribunal. As in the China Nanhai case, the proceedings are conducted by the institution chosen by the parties.

Since the institution chosen by the parties, i.e. the CAM, conducted the proceedings, the allegation of irregular composition of the Tribunal is void. Any future award rendered by the present Tribunal would be enforceable under Art. V(1)(d) NY Convention.

2) An award rendered by the present Tribunal with Mr Z would be enforceable whereas the non-independence of Mr Y would hinder enforceability

Irregularity in composition of the Tribunal is not the only ground to deny enforceability to an award based on Art. V(1)(d) NY Convention. Lack of independence of an arbitrator is a fundamental violation, which can lead to the non-enforceability of the future award according to Art. V(1)(d) NY Convention [Tecnimont case; Free Telecom case; Ghirardosi case; Coppo, p. 290; Petrochilos, N4-74].

Mr Z filed an unqualified statement of independence on which the parties did not file any written comments [Rec. p. 59]. On that basis, Mr Z was confirmed by the Council [Rec. p. 61]. Given that the CAM is very strict concerning the independence of the arbitrators, the fact that Mr Z was confirmed by the Council is further evidence of his independence besides his
unqualified statement of independence [supra N23]. Therefore, any award rendered by the present Tribunal with Mr Z as a chairman could not be denied enforceability based on a lack of independence of Mr Z.

RESPONDENT seems to believe that a Tribunal with Mr Y as chairman would have been able to render an enforceable award [AmStaDef N5-7]. This, however, is erroneous. An award rendered by such a Tribunal would not be enforceable. In fact, Mr Y filed a qualified statement of independence [Rec. p. 46]. As shown above [supra N34-36], the fact that Mr Y works in the same law firm as CLAIMANT’s adviser gives rise to serious doubts concerning his independence according to the red list in the IBA Guidelines [cf. 2.3.3 IBA Guidelines]. Any award rendered by a Tribunal with Mr Y as chairman would therefore be denied enforcement [cf. Art. V(1)(d) NY Convention; cf. IBA Subcommittee, p. 36].

Any future award rendered by the Tribunal with Mr Z as chairman would not be denied enforcement based on a lack of independence of Mr Z. On the contrary, an award rendered by a Tribunal with Mr Y as chairman would not be enforceable since Mr Y is not independent.

D) IN ANY CASE, RESPONDENT HAS WAIVED ITS RIGHT TO OBJECT TO THE COMPOSITION OF THE TRIBUNAL

The parties must object to the Tribunal’s composition in due time [Leopold case; Young Pecan case; Jarvin, p. 756; Redfern/Hunter, N4-76; Lew/Mistelis/Kröll, N25-74]. Since time is of essence in arbitration, it is important that the deadlines are strictly respected in order to ensure the efficiency of the arbitral procedure [Berger, p. 419; Redfern/Hunter, N8-66]. The deadline is set out in Art. 18(3) MR, which states that the parties may file written comments concerning the appointment of an arbitrator within 10 days from receipt of the statement of independence of an arbitrator. If the opposing party fails to do so, it thereby waives its right to object to the composition of the Tribunal [Panamanian case; ICAC case; Redfern/Hunter, N4-76, 77; Nacimiento, p. 291].

The unqualified statement of independence of Mr Z was sent to the parties on 31 August 2010 [Rec. p. 59]. The time limit began to run the next day, i.e. on 1 September 2010 [cf. Art. 7(3) MR]. RESPONDENT had until 10 September 2010 to file written comments regarding the appointment of Mr Z. RESPONDENT did not do so in these 10 days, despite the fact that the Secretariat of the CAM had made the parties aware of the deadline [Rec. p. 59]. Instead, RESPONDENT filed an amendment to its Statement of Defence on 24 September 2010, alleging that the Tribunal had not been composed in accordance with the arbitration agreement [AmStaDef N7]. RESPONDENT challenged the composition of the Tribunal 24 days after the
beginning of the deadline, despite the fact it had only 10 days to do so. Furthermore, if Respondent had needed more time to file comments, it would have had the possibility to request an extension of the deadline according to Art. 7(2) MR. However, Respondent did not do so.

Since the deadline to object to the appointment of the chairman has elapsed, Respondent has waived its right to object to the composition of the Tribunal according to Art. 18(3) MR. Respondent therefore cannot deny the competence of the present Tribunal to hear the case on the basis of an irregular composition.

Result of Issue I: The Tribunal has jurisdiction over the dispute. The future award can neither be set aside nor be declared unenforceable on the basis of an irregular composition of the Tribunal or a lack of independence of the chairman.

II. Claimant did not violate its obligation of confidentiality when giving the interview

Respondent filed a counter-claim in its Statement of Defence in which it alleges that Claimant breached its obligation of confidentiality pursuant to Art. 8(1) MR [StaDef N4-8]. Respondent’s allegation is based on the interview given by Claimant’s CEO, Mr Schwitz, and published by Commercial Fishing Today [RespEx 1]. Respondent asserts that Claimant’s CEO’s behaviour could result in a monetary loss and asks the Tribunal to declare Claimant liable for any eventual damages that may be proven [StaDef N9].

Respondent’s counter-claim is admissible but should be rejected for the following reasons: First, the information given by Claimant’s CEO cannot constitute a breach of its obligation of confidentiality (A). Secondly, Claimant was in any case rightfully protecting its reputation (B). Finally, it was impossible for Claimant to violate Art. 8 MR as the proceedings had not yet begun (C).

A) The information given by Claimant cannot constitute a breach of confidentiality

Respondent alleges that by giving the interview, Claimant’s CEO was breaching its obligation of confidentiality [StaDef N4]. However, it failed to make clear in what exactly the breach consisted [StaDef N4-9]. Respondent seems to believe that before the interview was given, the existence of a dispute between the parties was not known to the public [StaDef N4-9]. As will be shown, this information was already public knowledge.
The parties are under the obligation to keep the proceedings confidential pursuant to Art. 8(1) MR. However, there is no uniform concept of confidentiality in arbitration [Poudret/Besson, N368]. When assessing a breach of confidentiality, the circumstances at hand have to be considered [Bulbank case; Brown, p. 986; Noussia, p. 111]. According to the Bulbank case, certain aspects have to be taken into account, such as the nature of the information divulged, the damage caused by the publicising of the information, and the intent to harm the opposing party.

On 22 May 2010, CLAIMANT’s CEO, Mr Schwitz, gave an interview to the trade newspaper Commercial Fishing Today [RespEx 1], stating that:

“Equatoriana Fishing sold us squid for bait that was completely inappropriate and they knew it. Apparently the only way to get them to live up to their responsibility is to force them to do so. On Thursday our lawyer started arbitration proceedings. Our reputation in the Mediterraneo fishing world has suffered and they will have to make good our losses.”

In the present case, the nature of the information given has to be evaluated. Confidentiality is used to protect trade secrets disclosed during arbitration [Kaufmann-Kohler, p. 110; Redfern/Hunter, N3-15; Fouchard/Gaillard/Goldman, N384]. Nevertheless, the parties should not assume that the mere existence of arbitration would be kept confidential [Thomson/Finn, p. 6]. CLAIMANT’s CEO simply made the public aware that arbitration was in progress by stating that CLAIMANT’s “lawyer had started arbitration” [RespEx 1]. Since this was no disclosure of a trade secret, but only a statement informing about the mere existence of arbitration, CLAIMANT did not breach its obligation of confidentiality.

Furthermore, it is up to RESPONDENT to prove the causal link between the interview and any possible damages [cf. Bogdan Bodei, p. 487; cf. Redfern/Hunter, N6-67]. As mentioned [supra N56], the existence of the dispute between the parties had already been published by the very same newspaper in Equatoriana and Mediterraneo, as well as in 43 other countries [ProcOrd 3 Q17; StaDef N4]. No new information passed into public domain. This means that the interview of CLAIMANT’s CEO could not have had any possible repercussions on RESPONDENT’s interests. Since the information had already been made public, there is no causal link between any possible damages and the interview of CLAIMANT’s CEO.

By stating that “the only way to get [RESPONDENT] to live up to [its] responsibility is to force [RESPONDENT] to do so” [RespEx 1], CLAIMANT’s CEO justified the necessity of arbitration in a slightly brusque way. His directness can, however, not be interpreted as an intent to harm
RESPONDENT. Due to the delivery of bad bait and RESPONDENT’s refusal to assume its responsibility, CLAIMANT has suffered a loss of USD 479’450 [ArbReq N30]. Under such circumstances, CLAIMANT’s CEO was rightfully affronted, which he revealed during his interview. In the world of arbitration, i.e. of disputes, directness can certainly not be seen as a reason to pay damages.

63 In view of the above, it is to be concluded that CLAIMANT did not violate its obligation of confidentiality according to Art. 8(1) MR.

B) CLAIMANT COULD NOT HAVE BREACHED ITS OBLIGATION OF CONFIDENTIALITY SINCE IT WAS PROTECTING ITS REPUTATION

64 The obligation of confidentiality is not absolute [Noussia, p. 21; Thoma, p. 300]. Indeed, case law allows certain exceptions under which the disclosure of arbitration is not considered to be a breach of confidentiality [Ali Shipping case]. One of these exceptions is the disclosure of arbitration in order to protect a legitimate interest of an arbitrating party [Ali Shipping case; Rajoo; Neill, p. 290]. Reputation, being one of the most valuable assets a company possesses, is recognized as a key element for a company to achieve business objectives [Winkleman]. That, in fact, is the firmly held belief of 96% of the 650 CEOs asked on the occasion of a Yankelovich Survey [Yankelovich Survey]. Furthermore, the task of repairing a company’s reputation is considerable [Siva]. In light of the foregoing, companies have a legitimate interest in protecting their reputation, which therefore constitutes an exception to the obligation of confidentiality.

65 CLAIMANT has been selling bait to fishing fleet for more than 20 years and is known for supplying squid of high quality [ArbReq N6]. CLAIMANT’s reputation concerning the quality of its products is excellent [ProcOrd 3 Q13]. However, CLAIMANT’s customers, after having received RESPONDENT’s undersized squid, were dissatisfied to the extent that some of them changed supplier, thus leading to a reduction of CLAIMANT’s customer base [ClaEx 10 N18]. By giving this interview, CLAIMANT’s CEO wanted to explain to their customers that the reason for the delivery of bad bait was solely the fault of RESPONDENT. Furthermore, CLAIMANT’s CEO wanted to clarify that the matter was being resolved, in the hope that the customers would regain trust in CLAIMANT’s products.

66 By giving the interview, CLAIMANT’s CEO was protecting CLAIMANT’s reputation, having as his sole aim the survival of the company. CLAIMANT has therefore not breached its obligation of confidentiality and is not liable for any possible damages.
C) CLAIMANT’S STATEMENT COULD NOT HAVE CONSTITUTED A BREACH OF CONFIDENTIALITY AS THE PROCEEDINGS HAD NOT YET Begun

The Italian version of the Milan Rules is the official and binding version of the text [Milan Rules, Introductory note, p. 2; Coppo, p. 285]. Art. 8(1) MR defines the obligation of confidentiality and reads as follows:

“La Camera Arbitrale, le parti, il Tribunale Arbitrale e i consulenti tecnici sono tenuti a osservare la riservatezza del procedimento e del lodo, fatta salva la necessità di avvalersi di quest'ultimo per la tutela di un proprio diritto.”

According to Art. 8(1) MR, the obligation of confidentiality becomes applicable once “Il Procedimento”, i.e. the proceedings, has begun. “Il Procedimento” is the title of Part IV of the MR. This part starts with Art. 21 MR, which regulates the constitution of the Tribunal. Therefore, the constitution of the Tribunal marks the beginning of “Il Procedimento”. In comparison, under the ICC Rules [Art. 4(2) ICC Rules], the proceedings begin with the receipt of the request of arbitration. The MR, however, regulate the matter differently. In fact, the request for arbitration is treated under Part II of the MR [Art. 9 MR] which is entitled “La Fase Iniziale”. It is to be noted that in Part II the word “Il Procedimento” does not appear.

CLAIMANT’s CEO gave his interview on 22 May 2010 [StaDef N4], which was published on 24 May 2010 [RespEx 1]. The Tribunal was constituted on 20 September 2010 [ProcOrd 1 N1, 2], whereas CLAIMANT’s interview was published nearly 4 months before the constitution of the Tribunal [RespEx 1]. Since the Tribunal had not been constituted, “Il Procedimento” had not yet begun.

At the time of the interview, the Tribunal had not yet been constituted. The obligation of confidentiality did therefore not yet exist, making it impossible for CLAIMANT to have breached the obligation of confidentiality according to Art. 8(1) MR.

Result of Issue II: CLAIMANT did not breach its obligation of confidentiality according to Art. 8(1) MR.

SUBSTANTIVE ISSUES

As a preliminary matter, CLAIMANT notes that the United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) is applicable to the present international sales contract [ArbReq N24], which RESPONDENT does not dispute [StaDef N22]. The Convention applies “to contracts of sale of goods between parties whose places of
business are in different States” [Art. 1(1)(a) CISG]. CLAIMANT and RESPONDENT are seated respectively in Mediterraneo and Equatoriana, which are both signatory states to the CISG [ArbReq N24]. There is no choice of law clause in the present contract excluding the application of the CISG [ArbReq N24; StaDef N22].

The sales contract obliged RESPONDENT to deliver squid falling almost exclusively in the size range of 100-150g. RESPONDENT breached the contract by delivering undersized squid according to Art. 35(1) CISG and violated its obligations under Art. 35(2) CISG (III). CLAIMANT can rely on the breach since RESPONDENT knew of the lack and is therefore not allowed to claim any negligence on CLAIMANT’s behalf. In any case, CLAIMANT duly and timely notified the lack of conformity to RESPONDENT (IV). RESPONDENT’s non-conforming delivery amounted to a fundamental breach of contract and entitled CLAIMANT to avoid the contract (V). After avoidance, CLAIMANT duly preserved the squid for RESPONDENT’s account and mitigated further losses (VI).

III. RESPONDENT BREACHED THE CONTRACT

CLAIMANT and RESPONDENT concluded a sales contract under which RESPONDENT was obliged to deliver squid falling almost exclusively in the size range of 100-150g. RESPONDENT, however, failed to comply with this requirement and thereby breached the contract under Art. 35(1) CISG (A). Alternatively, the objective quality standards encompassed in Art. 35(2) CISG required RESPONDENT to deliver squid falling almost exclusively in this size range. RESPONDENT is liable for delivering squid in contravention of these standards (B).

A) THE SQUID DID NOT CONFORM TO THE CONTRACT UNDER ART. 35(1) CISG

RESPONDENT agrees that a contract was concluded [StaDef N14]. RESPONDENT, however, denies that squid of a certain size had to be delivered [StaDef N14]. Interpretation of the parties’ statements and conduct reveals that CLAIMANT and RESPONDENT concluded a contract for the sale of squid falling almost exclusively in the size range of 100-150g (1). RESPONDENT failed to deliver squid in conformity with the contract (2).

1) CLAIMANT and RESPONDENT contracted for squid falling almost exclusively in the size range of 100-150g as established by the specific size requirement

During the course of the contractual negotiations, invitation to offer, offer, counter-offer and acceptance were exchanged between the parties [ClaEx 1-4; RespEx 2]. RESPONDENT answered CLAIMANT’s invitation to offer and furnished a sample of the squid sold by

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RESPONDENT, which CLAIMANT examined [ClaEx 1; ArbReq N12-13; StaDef N10]. By sending the order form on 29 May 2008, CLAIMANT submitted an offer to purchase squid “as per sample” [ClaEx 3]. RESPONDENT answered this offer by sending the sales confirmation, which contained a dispute settlement clause [ClaEx 4]. By force of Art. 19(3) CISG, such a reply, containing a dispute settlement clause, amounts to a counter-offer. The same day, CLAIMANT accepted RESPONDENT’s counter-offer [RespEx 2]. A contract was thereby concluded between the parties, which RESPONDENT does not dispute [StaDef N10-18].

The parties, however, disagree about the content of the contract [ArbReq N14-15; StaDef N14-18]. In particular, two quality requirements are disputed: size and fitness for human consumption. CLAIMANT clearly asked for squid within a certain size range and certified fit for human consumption [ClaEx 2, 3]. RESPONDENT, however, alleges that only fitness for human consumption was required, without regard to size [ClaEx 9].

In order to determine which quality the contract required, it needs to be interpreted [Schmidt-Kessel, Art. 8 N1]. According to Art. 8(1) CISG, a party’s statements and conduct have to be interpreted according to the intent of that party. The party’s intent, however, is only relevant if the other party knew or could not have been unaware of that intent. Otherwise, the understanding of a reasonable person is decisive for the interpretation of that statement or conduct according to Art. 8(2) CISG. When determining both the intent of the party or the understanding of a reasonable person, due consideration has to be given to all relevant circumstances, such as the negotiations, according to Art. 8(3) CISG.

The content of the contract is reflected by the sales confirmation since it constituted the counter-offer, which was ultimately accepted [ClaEx 4; RespEx 2]. Under the heading “quality”, the sales confirmation required squid “as per sample already received” [ClaEx 4, emphasis added]. In order to determine what the expression “as per sample” means, the negotiations have to be considered.

The pre-contractual negotiations: CLAIMANT sent a circular message to different sellers looking to purchase “squid for re-sale to the long-liner fishing fleet […] to be used as bait” [ClaEx 1]. When RESPONDENT answered this invitation to offer, CLAIMANT rightfully assumed that RESPONDENT expressed the intention to contract for the sale of squid to be used as bait [ArbReq N12]. This assumption was confirmed when RESPONDENT furnished a very satisfactory sample [ClaEx 2; ArbReq N14; ClaEx 10 N7]. As CLAIMANT knew, RESPONDENT obtained the sample from one of CLAIMANT’s competitors in Mediterraneo [ArbReq N12; ClaEx 10 N6; StaDef N10], to which RESPONDENT sells squid exclusively for bait [ProcOrd 3
Q24]. CLAIMANT therefore rightfully believed that RESPONDENT, by delivering a box of sample squid fit to be used as bait, showed the intent to contract for such squid.

82 The meaning of “as per sample”: After having inspected the sample provided by RESPONDENT, CLAIMANT submitted an offer to contract for the purchase of squid by sending the order form [ClaEx 3]. Therein, it requested squid “as per sample inspected” [ClaEx 3]. In the accompanying e-mail to the order form, CLAIMANT specified what it meant with the expression “as per sample inspected” [ClaEx 2, 3]. It stated that it was “particularly pleased that the samples shown to us [CLAIMANT] fell almost exclusively in the range of 100/150 grams” [ClaEx 2]. With this formulation, CLAIMANT introduced a specific size requirement for the squid to be delivered. This standard does not require 100% of the squid to fall within the size range, but allows that a very few pieces per box fall outside the size range [ArbReq N14]. This standard is slightly more permissive than a 100% scrutiny, but still requires a very high percentage to fall in the size range of 100-150g [ClaEx 10 N5]. CLAIMANT stated that the specific size requirement was “particularly important, since [it] gives our [CLAIMANT’s] customers the best results” [ClaEx 2]. CLAIMANT’s intent to purchase squid in conformity with the specific size requirement was thereby clearly communicated to RESPONDENT, which could consequently not have been unaware of it.

83 RESPONDENT repeated in its sales confirmation that the quality of the squid will be “as per sample” [ClaEx 4]. CLAIMANT therefore trusted that RESPONDENT intended to adopt the specific size requirement set by the sample and expressed by CLAIMANT in its accompanying e-mail.

84 The meaning of “2007/2008 Catch”: RESPONDENT, however, claims in its Statement of Defence that by having introduced “2007/2008 Catch” in the sales confirmation, the contract was for “unsized” squid [StaDef N14]. “Unsized” means squid from the run of the catch, whereas “sized” squid would involve mechanical or visual selection of the squid based on its size [StaDef N12]. Despite the repetition of “as per sample” in the sales confirmation, RESPONDENT claims that “there was no promise that the squid would weigh 100-150 grams” [StaDef N14].

85 However, RESPONDENT’s interpretation of “2007/2008 Catch” is erroneous. The indication “2007/2008 Catch” informs about when the squid was caught. This is important since frozen squid stays durable for a certain time, but ultimately becomes unuseable [ProcOrd 3 Q30]. The indication of the year of the catch is used exclusively for sanitary reasons and does not imply anything about the size of the squid. Therefore, CLAIMANT could not have been aware
of RESPONDENT’s intent to change the specific size requirement by introducing “2007/2008 Catch” into the sales confirmation.

If RESPONDENT had wanted to deviate from the specific size requirement with the expression “2007/2008 Catch”, it should not have repeated “as per sample”. In fact, RESPONDENT’s interpretation would lead to a contradiction: “as per sample” refers to the fact that, as was shown, the squid would fulfil a specific size requirement, whereas “2007/2008 Catch”, according to RESPONDENT, means unsized squid and excludes any size requirement. RESPONDENT’s interpretation of “2007/2008 Catch” is therefore not to be followed.

Finally, the fact that CLAIMANT did not order sized squid could not have meant that RESPONDENT was allowed to ignore the specific size requirement. Sized squid would have provided for a 100% scrutiny, but is more expensive [StaDef N12]. The more permissive specific size requirement can be fulfilled by several other means: by catching unsized squid within the right period of the year, i.e. when the squid has grown to the size needed [StaDef N13], by buying appropriate squid from other fisheries, which RESPONDENT does on a regular basis [StaDef N2; ArbReq N4], or by using a fishing net with a certain opening of mesh in order to catch only squid of a larger size [cf. EU Fish Conservation Regulation]. Since all this belongs to RESPONDENT’s area of expertise [StaDef N2; ArbReq N4], CLAIMANT saw no need to embark in any detailed instructions as to the method used to obtain appropriate squid.

In conclusion, CLAIMANT did not know and could not have been aware of any intent of RESPONDENT to deviate from the specific size requirement with the introduction of the expression “2007/2008 Catch” in the sales confirmation. RESPONDENT’s intent is therefore irrelevant for the interpretation of the sales confirmation according to Art. 8(1) CISG. Instead, the understanding of a reasonable person in CLAIMANT’s circumstances is decisive to determine which quality had to be delivered under the contract pursuant to Art. 8(2) CISG.

The sales confirmation under the reasonable person standard: With regard to the negotiations [supra N81-88], a reasonable person would have understood the reproduction of the expression “as per sample” in the sales confirmation to mean the specific size requirement established by the order form and its accompanying e-mail. CLAIMANT therefore rightfully assumed that RESPONDENT offered squid falling almost exclusively in the size range of 100-150g, according to the specific size requirement.

The meaning of “fit for human consumption”: RESPONDENT alleges that it had to deliver squid fit for human consumption and not squid falling almost exclusively in a certain size range [ClaEx 9]. However, as was proven above, this is wrong. CLAIMANT rightfully assumed
that RESPONDENT promised squid fulfilling the specific size requirement. The fitness for human consumption was an additional quality requirement, which had to be fulfilled by RESPONDENT as well. It was needed to comply with a health regulation in Mediterraneo [ArbReq N15; infra N104].

In conclusion, CLAIMANT and RESPONDENT concluded a contract for the sale of squid. The contract provided for squid falling almost exclusively in the size range of 100-150g pursuant to the specific size requirement. Furthermore, the squid had to be fit for human consumption.

2) RESPONDENT failed to deliver squid in conformity with the specific size requirement

Art. 35(1) CISG obliges the seller to deliver goods which are of the quality required by the contract [Schwenzer, Art. 35 N6; Huber/Mullis, pp. 130 et seq.]. Any “deviation from the contractual description of the goods amounts to a breach of contract” [Huber/Mullis, p. 132].

The quality required under the contract was squid “as per sample”, which meant squid falling almost exclusively in the range of 100-150g [supra N82-83, 89] The squid delivered, however, clearly surpassed the tolerance of a few pieces per box outside the size range. In fact, approximately 60% of the entire quantity of squid fell outside the size range of 100-150g [ArbReq N18]. More specifically, the delivery consisted of squid caught in 2007 and 2008, with the vast majority being from 2008 [ClaEx 8]. The TGT laboratories found that 94% of the squid from 2007 was within the range of 100-150g [ClaEx 8]. However, from the bigger 2008 share, only 13% was within the range of 100-150g and the squid was therefore almost exclusively too light-weighted [ClaEx 8].

Considering the above, RESPONDENT failed to deliver squid falling almost exclusively in the required size range and thereby breached the contract according to Art. 35(1) CISG.

B) THE SQUID DID NOT CONFORM TO THE OBJECTIVE QUALITY STANDARDS OF ART. 35(2) CISG

If the Tribunal should decide that the contract does not sufficiently specify the quality of the squid, the objective quality standards of Art. 35(2) CISG become the relevant standards for the quality of the squid.

As will be shown, both the usual [Art. 35(2)(a) CISG] and particular purpose [Art. 35(2)(b) CISG], as well as the sample [Art. 35(2)(c) CISG], required RESPONDENT to deliver squid fit for the use as bait. RESPONDENT, however, failed to deliver squid fit for all the usual purposes (1) and for the particular purpose made known to RESPONDENT (2). Also, the squid was not in
conformity with the sample furnished (3). Furthermore, RESPONDENT is liable for not having delivered squid in conformity with the objective quality standards required by the CISG (4).

1) RESPONDENT failed to deliver squid fit for all its usual purposes

Art. 35(2)(a) CISG requires the goods to be fit for all the purposes an ordinary buyer would use them for [Magnus/Honsell, Art. 35 N13]. The seller must inform the buyer if the goods are only fit for some of the ordinary purposes, otherwise the seller is in breach of Art. 35(2)(a) CISG [Schwenzer, Art. 35 N13].

Squid is ordinarily used both as bait and for human consumption [StaDef N2; ArbReq N4]. RESPONDENT delivered squid fit for human consumption, but unfit to be used as bait [ArbReq N18; ClaEx 8]. Such a restriction to the usual purposes was never mentioned by RESPONDENT.

Therefore, RESPONDENT failed to deliver squid which was fit for all the usual purposes and consequently breached the contract according to Art. 35(2)(a) CISG.

2) RESPONDENT failed to deliver squid fit for the only particular purpose made known

Art. 35(2)(b) CISG obliges the buyer to make known any particular purpose for which the goods will be used. The particular purpose does not have to be contractually agreed upon, but the buyer needs to make the seller aware of it [Schwenzer, Art. 35 N21; Kruisinga, p. 32].

CLAIMANT made known the particular purpose in its circular message, requesting offers for “squid for re-sale to the long-liner fishing fleet […] to be used as bait” [ClaEx 1, emphasis added]. RESPONDENT was therefore aware of the particular purpose.

However, the seller is only responsible for the fitness for the particular purpose if the buyer reasonably relied on the seller’s skill and judgement [Art. 35(2)(b) CISG; Gabriel, p. 106]. The buyer is entitled to do so if the seller is knowledgeable in the business concerned [Neumann, N9; Kruisinga, pp. 32-33; Krätzschmar, p. 58; Schwenzer, Art. 35 N24]. Whether or not the buyer has any knowledge is irrelevant [Krätzschmar, p. 58; Neumann, N9], since it is the seller who promises to deliver goods of a certain kind. The seller therefore becomes responsible to execute the task with its full skill and judgement. The seller should not be able to relieve himself of this responsibility based on the buyer’s level of knowledge. If this were the case, it would lead to an unjustified disadvantage of the knowledgeable buyer.

RESPONDENT was an experienced seller in the business, since it “owns a fishing fleet” which “catches squid of the species illex danubicus” [StaDef N2]. It knew that only squid within a certain size was fit to be used as bait for long-line fishing [ProcOrd 3 Q26]. It further has experience in supplying squid to be used as bait to firms in Mediterraneo [ProcOrd 3 Q12].
Consequently, RESPONDENT is to be qualified as knowledgeable. CLAIMANT therefore reasonably relied on RESPONDENT’s skill and judgement to obtain appropriate Danubian squid.

RESPONDENT wrongly alleges that not solely the use as bait, but also the use for human consumption was a particular purpose made known [ClaEx 9]. CLAIMANT, however, only communicated one particular purpose, i.e. the use as bait [ClaEx 1]. CLAIMANT required squid to be “certified fit for human consumption” [ClaEx 3] for health reasons. It thereby added a quality requirement to the contract, but did in no way change the particular purpose. RESPONDENT itself states in its Statement of Defence that the certification for human consumption was an “additional requirement” [StaDef N17] and thereby implies that it is not a particular purpose. CLAIMANT needed this certification to comply with a health regulation in Mediterraneo which demands fitness for human consumption for all goods stored in the same cool house, including those to be used as bait [ArbReq N15; ClaEx 10 N8]. The same health regulation exists in Equatoriana [ProcOrd 3 Q22] and in many other countries [ArbReq N15]. Since RESPONDENT sells both products for human consumption and to be used as bait [StaDef N2; ArbReq N4], it too was not allowed to store goods fit and goods unfit for human consumption in the same cool house. Thus, RESPONDENT must have known that CLAIMANT’s request for squid “certified fit for human consumption” [ClaEx 3] did not express its intent to sell it for human consumption, but served to ensure compliance with the regulation.

In conclusion, RESPONDENT was made aware that the squid was purchased for the sole particular purpose to be used as bait. CLAIMANT could reasonably rely on RESPONDENT’s skill and judgement. However, RESPONDENT delivered squid “hardly useable as bait” [ClaEx 5], as confirmed by the TGT report [ClaEx 8], and thereby breached the contract according to Art. 35(2)(b) CISG.

3) RESPONDENT failed to deliver squid in conformity with the model it furnished

By force of Art. 35(2)(c) CISG “goods provided as sample or model […] become the agreed standard for the substance of the contract” [Schwenzer, Art. 35 N25]. In the present case, the parties talk about the exchange of a “sample” [ClaEx 3, 4]. However, it needs to be determined whether, legally, the box supplied was a sample or a model. “While a sample is taken from the goods to be delivered, a model is supplied to the buyer for its examination where the goods themselves are not available” [Schwenzer, Art. 35 N25]. The “sample” was taken from one of RESPONDENT’s customers in Mediterraneo [StaDef N10; ArbReq N12; ClaEx 10 N6]. It was therefore not taken from the squid to be delivered, but from squid which
had already been sold to another customer of RESPONDENT. The “sample” consequently has to be qualified legally as a model.

“A model may represent all, many, or only individual features [...] of the goods.” [Schwenzer, Art. 35 N25]. As mentioned, the model was furnished to CLAIMANT in order to discuss the purchase of large quantities of squid to be used as bait [ClaEx 1; StaDef N10]. RESPONDENT chose to deliver a model taken from the stock of a customer that purchases squid solely for the use as bait [ProcOrd 3 Q24]. It gave assurances that the model squid would be “representative of the squid being offered” [ArbReq N13]. Thereby, RESPONDENT indicated that the squid would be representative for the features important for the use as bait. Size is the central feature of squid to be used as bait [ArbReq N14; ClaEx 10 N4]. Therefore, the model squid was representative for the size of the squid to be delivered.

On the contrary, the features which are not relevant for the fitness for use as bait are not represented by the model [cf. Schwenzer, Art. 35 N25]. Such a feature is the year of the catch since it has no impact on the fitness for the use as bait. The labelling “2007” of the model box did therefore not imply that only squid from 2007 could be delivered. Consequently, the model delivered is not in contradiction with what had been agreed on in the contract, i.e. that squid from 2007 and 2008 can be delivered.

When CLAIMANT inspected the model, it found the model squid to be very satisfactory [ClaEx 2; ArbReq N14; ClaEx 10 N7]. In fact, the model squid “fell almost exclusively in the range of 100/150 grams” [ClaEx 2]. Since the model is representative for the size, RESPONDENT thereby warranted to deliver squid falling almost exclusively in this range. RESPONDENT, however, alleges that the model delivered was unsized [StaDef N12]. It argues that the indication of the year of catch on the model box implied that it contained unsized squid [StaDef N12]. However, this is erroneous. The indication of the year of catch serves as an indication of when the squid was caught and is required for sanitary reasons [supra N85]. It does not imply anything about the size of the squid.

The seller is in breach of its obligations under Art. 35(2)(c) CISG if the goods delivered do not possess the representative features of the model [Huber/Mullis, p. 139]. RESPONDENT delivered 60% undersized squid [ArbReq N18], which clearly surpassed the tolerance of a few pieces outside the size range of 100-150g.

In consequence, the squid delivered was not in conformity with the model presented to CLAIMANT and therefore RESPONDENT breached the contract according to Art. 35(2)(c) CISG.
4) **Respondent** is liable for having failed to deliver squid in conformity with the objective quality standards

112 **Respondent** is attempting to exempt itself from its liability for having delivered non-conforming squid by rejecting “any responsibility for the difficulties [Claimant is] experiencing” [ClaEx 9].

113 The seller is not liable for delivering goods in breach of the objective quality standards imposed by Art. 35(2) CISG if he can rely on the exemption clause of Art. 35(3) CISG. This clause provides that the seller is exempted from liability if the buyer knew or could not have been unaware of the lack of conformity at the time of the conclusion of the contract [Brunner, Art. 35 N20; Freiburg, p. 97]. The seller carries the burden of proof for the buyer’s knowledge [Schwenzer, Art. 35 N55].

114 In concluding the contract, Claimant reasonably believed Respondent would deliver squid within the required size range [supra N89]. Respondent never informed Claimant that the delivered squid would be undersized. As shown above, Respondent wrongly alleges that the introduction of the expression “2007/2008 Catch” in the sales confirmation indicated that the squid would be unsized and therefore undersized for Claimant’s purposes [StaDef N12; supra N84-88] Therefore, Claimant could not have been aware of the possible lack of conformity, i.e. that the squid would be undersized.

115 In any case, Respondent failed to prove that Claimant was aware or that a reasonable person would have been aware of the delivery of deficient squid [StaDef N10-18].

116 Respondent can therefore not exempt itself from liability for the lack of conformity of the squid with the objective quality standards of Art. 35(2)(a) to (c) CISG.

117 **Result of Issue III: The squid delivered by Respondent did neither conform to the contract nor to the objective quality standards of Art. 35(2) CISG, for which Respondent is liable.**

IV. **Claimant can rely on Respondent’s breach of contract**

118 Respondent argues that Claimant’s inspection and notice pursuant to Art. 38 and 39 CISG were inadequate [StaDef N19-21]. However, a seller cannot rely on the buyer’s breach of said provisions if the seller knew or could not have been unaware of the lack of conformity of the goods according to Art. 40 CISG. This was the case here (A). However, even if Respondent could rely on Art. 38 and 39 CISG, the provisions were not breached by Claimant since it gave timely notice upon discovery of the hidden defect (B). In any case, if the Tribunal would
find that the defect were to be considered obvious, CLAIMANT still notified RESPONDENT within the legally designated period of time after delivery of the squid (C). The notification was specific enough for RESPONDENT to understand (D).

A) **RESPONDENT KNOWINGLY DELIVERED UNDERSIZED SQUID AND THEREFORE CANNOT INVOKE ANY NEGLIGENCE IN CLAIMANT’S INSPECTION AND NOTIFICATION**

119 In its Statement of Defence, RESPONDENT draws on Art. 38 and 39 CISG in order to prevent CLAIMANT from relying on the lack of conformity of the squid [StaDef N19-21]. However, according to Art. 40 CISG, the seller cannot rely on Art. 38 and 39 CISG if he knew or could not have been unaware of the non-conformity of his goods, but did not inform the buyer about it [Foil case; Schwenzer/Fountoulakis, p. 329; Schlechtriem, N156; Kruisinga, p. 64]. Consequently, the buyer remains entitled to rely on the non-conformity of the goods even if he did not comply with Art. 38 and 39 CISG [Brunner, Art. 40 N1].

120 RESPONDENT knew that it had contracted for squid in compliance with the *specific size requirement* [supra N83, 88]. It, however, clearly stated that it intentionally delivered unsized squid [StaDef N14]. Since RESPONDENT was short on compliant 2007 stock, it delivered large portions of squid caught in 2008 [StaDef N14, 16], even though it knew that “in the early part of the [fishing] season the squid are still young and tend to be small” [StaDef N13]. As was previously shown [supra N87], RESPONDENT would have had several ways to comply with the *specific size requirement* despite the fact that it was low on 2007 stock, which it made no use of. Consequently, RESPONDENT knew that it would deliver undersized squid and that it would thereby breach the contract.

121 For the seller to be able to exclude the consequences of Art. 40 CISG, he must have informed the buyer that the goods might be defective [Schwenzer, Art. 40 N7]. RESPONDENT is wrong when arguing that by introducing “2007/2008 Catch” in its sales confirmation, it had informed CLAIMANT that it would not deliver squid within a certain size range [ClaEx 4; StaDef N14]. As shown above [supra N85], the indication of the year of catch does not imply anything about the size of the squid. Consequently, it could not reasonably have been expected that CLAIMANT understand this sole indication to be a disclosure about the non-conformity.

122 RESPONDENT knew it would deliver undersized squid which could not be used as bait. Nevertheless, RESPONDENT did not inform CLAIMANT about this fact. Therefore RESPONDENT cannot in good faith demand from CLAIMANT to fulfil its obligation to give timely notice of non-conformity.
B) **EVEN IF RESPONDENT COULD Invoke NEGLIGENCE, CLAIMANT COULD STILL RELY ON RESPONDENT’S BREACH OF CONTRACT SINCE THE HIDDEN DEFECT WAS TIMELY NOTIFIED**

123 **RESPONDENT** alleges that **CLAIMANT**’s inspection was inadequate and that, as a result, **CLAIMANT**’s notification was given too late [StaDef N19-21]. Even if **RESPONDENT** could rely on such a breach of Art. 38 and 39 CISG, **CLAIMANT** fulfilled its duties under said provisions.

124 Art. 38 CISG imposes the duty on the buyer to inspect the goods within a certain time after delivery. Only obvious defects are expected to be discovered, while hidden defects may remain undiscovered despite due inspection [Salger, Art. 38 N8]. According to Art. 39 CISG, obvious defects must be notified upon inspection [Enderlein/Maskow/Strohbach, Art. 38 N1], while hidden defects can still be notified upon discovery [Schwenzer, Art. 39 N20]. As will be shown **first**, **CLAIMANT** conducted an adequate inspection and therefore did not have to discover the hidden defect when inspecting. **Secondly**, **CLAIMANT**’s notice was therefore timely given upon discovery of the non-conformity.

125 **First**, Art. 38(1) CISG requires the buyer to conduct an inspection of the goods, however not one “which would reveal every possible defect” [Secretariat’s Commentary, N3; cf. Bernstein/Lookofsky, p. 62]. In case of large quantities, the buyer only has to inspect a representative part of the goods [Brunner, Art. 38 N13; Kruisinga, p. 68]. If the goods have to be defrosted for examination and therefore become unuseable, the inspection nevertheless has to be carried out [Mozzarella case], but the share to be examined is further reduced to a very small percentage [Schwenzer, Art. 38 N14]. In fact, in a Swiss case concerning frozen meat, an inspection of less than 0.1% of the meat was considered to be adequate and representative testing [Frozen Meat case].

126 **RESPONDENT** alleges that **CLAIMANT** did not randomly select the boxes for inspection and that the examination was therefore inadequate [StaDef N20]. **CLAIMANT** took them from the two containers that arrived first at its premises [ArbReq N17]. All containers arrived on the same vessel and were delivered to **CLAIMANT** by truck [ProcOrd 3 Q31]. The order of arrival of the containers was purely coincidental and therefore, it amounted to a random selection to take the boxes from the first two containers to arrive.

127 On the day of delivery, **CLAIMANT** weighed 20 cartons of squid for examination and afterwards defrosted 5 of them to examine the quality of the squid [ArbReq N17]. Since defrosted squid can only be used for fishmeal, which is of very little value [ArbReq N17;
ClaEx 10 N10], CLAIMANT only examined 0.04% of the squid. As the Frozen Meat case showed, such a percentage is considered to be adequate.

When due inspection has been carried out and no evidence of lack of conformity has been detected, the buyer does not need to undertake any further examination [Magnus/Honsell, Art. 38 N16]. In the case at hand, no further examination had to be carried out since all the squid examined fulfilled the requirement of the contract [ArbReq N17].

129 Secondly, according to Art. 39(1) CISG, any lack of conformity of the goods delivered has to be notified within a reasonable time after the buyer has discovered it. A hidden defect can therefore be claimed upon discovery any time after the inspection [Brunner, Art. 38 N2].

130 On 29 July 2008, the fishing vessels discovered that most of the squid was not useable as bait and reported it to CLAIMANT [ArbReq N18; ClaEx 10 N12]. The same day, CLAIMANT gave notice of non-conformity [ClaEx 5]. This is a reasonable period of time, given that courts have granted an average of one month for notification [Mussels case; for more cases see infra N135].

131 In conclusion, CLAIMANT duly inspected the squid and timely notified RESPONDENT when the lack of conformity was detected.

C) IN ANY CASE, CLAIMANT GAVE NOTICE WITHIN THE TOTAL PERIOD OF TIME AVAILABLE

132 As stated, CLAIMANT carried out an adequate inspection of the squid delivered [supra N125-128]. It did not have to discover the hidden defect. However, if despite the above mentioned, the Tribunal would consider the defect to be obvious, the notification was still given in time.

133 Obvious defects should be discovered upon proper inspection of the goods [Magnus/Staudinger, Art. 38 N14; OG Luzern case]. If they are not discovered, the inspection is considered to be inadequate. Inadequate inspection in itself, however, does not deprive the buyer of any of his rights so long as the notice of non-conformity has been given to the seller in time [Cable case; Porcelain Tableware case].

134 Art. 39(1) CISG provides that notice has to be given after the buyer has or ought to have discovered the defect. An obvious defect ought to be discovered before the end of the time available for inspection [Magnus/Staudinger, Art. 38 N14]. Only then, the time available for notification starts to run [Magnus/Honsell, Art. 39 N 16; Brunner, Art. 39 N14]. The two periods therefore have to be cumulated in order to determine when the notice has to be given at the latest [Porcelain Tableware case; Brunner, Art. 39 N14]. Only a notice given after the expiration of both periods can lead to the very dire consequence of Art. 39(1) CISG, namely
that the buyer loses his right to rely on the non-conformity of the goods [Brunner, Art. 39 N14].

International case law gives a guideline for the determination of the total time for inspection and notification:

- **Average time for inspection of the goods: days to a few weeks.** German courts allow a period of days to a few weeks [Chemise case; T-Shirts case; Container case; Furniture case; Pallets case]. Swiss courts grant an average of 2 weeks for inspection [Stove case; Cable case].

- **Average time for notification of non-conformity: 4 weeks.** German courts orientate themselves at an average of 4 weeks for notification [Mussels case; T-Shirts case; Machine case; Aluminium Hydroxid case; Metal Sheets case]. Swiss courts also generally grant 4 weeks [Laundry Machines case; Stove case; Visiting Cards case; OG Luzern case]. A French court has granted a notification period of 4 weeks as well [Cheese case]. American courts have given at least one month [TeeVee Tunes vs. Gerhard Schubert; Shuttle Packaging Systems vs. Jacob Tsonakis].

- **The total period of time available for inspection and notification: 4 to 6 weeks.** In total, courts therefore grant a cumulated average of 4 to 6 weeks for inspection and notification.

This general average needs to be adjusted to the circumstances of the individual case [Shuttle Packaging Systems vs. Jacob Tsonakis; Model railway case; Kruisinga, p. 88]. CLAIMANT gave notice of the non-conformity on 29 July 2008 [ClaEx 5], exactly 4 weeks from the time of delivery of the squid on 1 July 2008 [ArbReq N17]. Notice was therefore given within the established period of 4 to 6 weeks, which seems adequate insofar as there are several reasons mitigating for a period as long as 4 weeks or more. First, CLAIMANT bought a large quantity of squid. Therefore, more time has to be granted than in case of small quantities [cf. Magnus/Staudinger, Art. 39 N43; cf. OG Luzern case]. Secondly, squid is a durable good. Even though squid is in principle perishable, it becomes durable for a certain time by freezing it [cf. Frozen Meat case]. Whereas lacks of conformity of perishable goods need to be notified promptly since the goods are subject to fast deterioration, there is not the same necessity to act quickly when the goods do not deteriorate in a matter of days or weeks [Magnus/Staudinger, Art. 39 N43; Cable case; Schwenzer, Art. 39 N16].

As was stated, CLAIMANT gave notice of non-conformity within exactly 4 weeks after the delivery of the squid. Regarding all the circumstances, this is a reasonable period of time.
D) CLAIMANT’S NOTICE OF NON-CONFORMITY WAS SPECIFIC ENOUGH FOR RESPONDENT TO UNDERSTAND THAT THE SQUID WAS UNDERSIZED

138 The notice of non-conformity has to be specific enough for the seller to understand what the non-conformity comprises [Schwenzer, Art. 39 N6]. This requirement of specifying the nature of defects should however not be exaggerated [Kruisinga, p. 93; Huber/Mullis, p. 158].

139 CLAIMANT stated in its e-mail that the squid “was hardly useable as bait” [ClaEx 5]. In light of the negotiations between the parties [supra N81-83], it was clear that CLAIMANT referred to the size of the squid being too small since size is the central feature of squid to be used as bait [ClaEx 10 N4]. In addition, RESPONDENT admittedly knew already before receiving this e-mail that its squid was undersized since most of it was caught early in 2008 [StaDef N13, 14; supra N120]. The notice was therefore specific enough for RESPONDENT to understand what the squid’s defect was.

140 Even if the Tribunal would consider the notice not to be specific enough for a layman to understand, RESPONDENT should still have understood the notice. An experienced seller is able to understand relatively imprecise statements [Achilles, Art. 39 N3]. In the fishing business, it is well-known that squid’s fitness for bait depends mainly on size [ArbReq N14; ClaEx 10 N4; ProcOrd 3 Q26]. Since RESPONDENT is an experienced firm in the fishing business [ProcOrd 3 Q26], it can reasonably be expected to have understood CLAIMANT’s message stating that the squid was “hardly useable as bait” [ClaEx 5] to mean that it was undersized.

141 Moreover, if the experienced seller does not understand the statements contained in the notice, he is expected to ask for clarification [Schwenzer, Art. 39 N7]. This is particularly true in the age of e-mail where further inquiry can easily be made [Kruisinga, p. 93; Schwenzer, Art. 39 N7]. Should RESPONDENT, as an experienced seller, have been in doubt about such a statement’s meaning, it should have asked for clarification, particularly by using e-mail. RESPONDENT asked for a certified testing agency’s opinion, but not for clarification about CLAIMANT’s notice [ClaEx 6]. Apparently, RESPONDENT did not see any need to ask for clarification.

142 CLAIMANT’s notification was therefore specific enough for RESPONDENT to understand.

143 Result of Issue IV: RESPONDENT knew it was delivering undersized squid and therefore cannot prevent CLAIMANT from relying on the breach of contract. Even if it could, CLAIMANT notified RESPONDENT of the non-conformity within the time available.
V. CLAIMANT RIGHTFULLY AVOIDED THE CONTRACT

144 After the breach of contract by RESPONDENT had become apparent, CLAIMANT needed to decide on an appropriate remedy for the breach of contract. The possible remedies are: claiming damages [Art. 45(1)(b) and 74 CISG], price reduction [Art. 50 CISG], substitute delivery [Art. 46(2) CISG], repair [Art. 46(3) CISG] and avoidance of contract [Art. 49 CISG]. Avoidance of contract should be a remedy of last resort, which is applied only if no alternative remedy can adequately compensate the buyer for what he was entitled to expect under the contract [Brunner, Art. 49 N2; Müller-Chen, Art. 49 N7].

145 All other remedies than avoidance of the contract would have entailed that CLAIMANT retained the squid and continued to bear the risk. This could not have been expected in the circumstances of the present case. CLAIMANT was neither able to sell the squid to be used as bait [ArbReq N19; ClaEx10 N14], nor was it able to sell the squid for human consumption since this market is small and was already saturated in Mediterraneo [ArbReq N20; ClaEx 10 N15]. Not even a specialised retailer such as Reliable Trading House, mandated by CLAIMANT, was able to market the squid [ClaEx 10 N15]. Given that CLAIMANT bought the squid to resell it, it would have been unreasonable to expect CLAIMANT to retain the squid since it was practically unsaleable for all purposes. Therefore, avoidance of the contract was the only mean to remedy RESPONDENT’s breach of contract.

146 As will be shown, CLAIMANT rightfully avoided the contract in order to remedy RESPONDENT’s breach of contract. First, RESPONDENT’s delivery of non-conforming squid amounted to a fundamental breach of contract according to Art. 25 CISG (A). Secondly, CLAIMANT duly and timely declared the contract avoided according to Art. 49(2)(b)(i) CISG (B). Thirdly, CLAIMANT was in the position to restore the squid in substantially unchanged condition at the time of the avoidance of the contract, according to Art. 82 CISG (C).

A) RESPONDENT FUNDAMENTALLY BREACHED THE CONTRACT

147 The buyer is only entitled to avoid the contract based on fundamental breach according to Art. 25 CISG [Torsello, p. 53] if three elements are fulfilled: first, breach of contract, second, fundamentality of the breach of contract and third, foreseeability of the fundamental breach of contract [Botzenhardt, p. 182]. As to the first element, RESPONDENT’s breach of contract under Art. 35 CISG has already been shown [supra N75-117]. As to the second element, RESPONDENT delivered squid hardly useable for its intended purpose, i.e. the re-sale for use as bait. CLAIMANT was therefore substantially deprived of what it was entitled to expect under
the contract (1). As to the *third element*, RESPONDENT is not in the position to claim the foreseeability requirement (2).

1) **RESPONDENT substantially deprived CLAIMANT of what it was entitled to expect under the contract**

According to Art. 25 CISG, there is a fundamental breach if the buyer is substantially deprived of what he is entitled to expect under the contract [Brunner, Art. 25 N8; Conrad, p. 47; Neumayer/Ming, p. 212]. Courts have found the existence of a fundamental breach where delivery was made “in derogation from the agreed central features of the goods” [Schwenzer, *Avoidance*, p. 437, emphasis added; cf. *Roll Aluminium case*; cf. *Food Shaper case*; cf. *Apple Juice case*]. In fact, the contract not only creates obligations, but may also determine the importance of each obligation and thereby the importance of the detriment suffered in case of non-conformity with the obligation concerned [Schroeter, Art. 25 N28].

When ordering squid, CLAIMANT made clear to RESPONDENT that the size of the squid was a *central feature*, without which CLAIMANT would not want to be bound to the contract [supra N82-83]. However, of the squid delivered by RESPONDENT, 60% was undersized [ArbReq N18]. Therefore, the central feature of the contract was not fulfilled.

As was shown above [supra N145], CLAIMANT was only able to sell an insignificant amount of squid for bait or human consumption [ArbReq N19, 20; ClaEx 10 N14, 15]. Even Reliable Trading House, a specialised seller, was only able to sell a negligible part of it [ClaEx 10 N15]. Since CLAIMANT had purchased the squid for re-sale as bait, it was deprived of what it was entitled to expect under the contract when the squid proved to be virtually unsaleable. Over all, from a total purchase price of USD 320‘000, CLAIMANT’s customers retained a quantity of only USD 23‘000 in value, amounting to 7% of the purchase price [ArbReq N30]. The fundamental character of the breach becomes ultimately clear when considering that squid in value of approximately 93% of the purchase price had to be destroyed.

CLAIMANT was substantially deprived of what it was entitled to expect under the contract, since it was virtually impossible to re-sell the undersized squid. CLAIMANT has lost every interest in maintaining the contract since RESPONDENT violated its central feature.

2) **RESPONDENT is not protected by the foreseeability requirement**

The foreseeability rule aims to protect the seller from the avoidance of the contract by the buyer, if the seller could not have foreseen the fundamental character of the detriment he caused to the buyer [Schroeter, Art. 25 N26]. It is the *fundamental degree* of the detriment
which a certain breach of contract causes that needs to be foreseeable, not that said breach would occur in the case [Brunner, Art. 25 N9]. By stressing the importance of an obligation in the contract or the negotiations, the buyer makes clear that every breach of such an obligation amounts in itself to a substantial detriment [Schroeter, Art. 25 N28 et seq.]. The seller can therefore not claim the foreseeability requirement to prevent avoidance of the contract if he breached an important obligation.

As stated above [supra N149], the importance of the specific size requirement was expressed both in negotiations and contract and must have been apparent to RESPONDENT. It could foresee that the delivery of squid outside the size range would make CLAIMANT lose every interest in maintaining the contract, since CLAIMANT would be deprived of what it expressly contracted for [supra N149-151].

RESPONDENT can therefore not defend itself with the foreseeability rule to prevent avoidance of the contract.

B) CLAIMANT DULY AND TIMELY DECLARED THE CONTRACT AVOIDED

Art. 49(2)(b)(i) CISG provides a reasonable period of time for the buyer to declare the contract avoided [Torsello, p. 59; Magnus/Staudinger, Art. 49 N31]. CLAIMANT’s declaration of avoidance was sufficiently clear to convey the intention to avoid the contract (1) and was effective since it was given within a reasonable period of time (2).

1) CLAIMANT expressed its intention to avoid the contract

To be effective, the notice does not have to contain the word “avoidance” as such [Honnold/Fletcher, Art. 26 N187.2; Huber/Mullis, p. 21]. However, the intent of the buyer to avoid the contract must be recognisable [Honnold/Fletcher, Art. 26 N187.2; Piltz, p. 247]. The German Supreme Court has found the declaration that the goods are unusable and at the seller’s disposal to be sufficient to declare a contract avoided [Stainless Wire case].

On 16 August 2008, CLAIMANT sent an e-mail to RESPONDENT, asking “what would you [RESPONDENT] like us [CLAIMANT] to do with the product, which we [CLAIMANT] will be holding at your [RESPONDENT’s] disposition?” [ClaEx 7]. By stating that it was holding the squid at RESPONDENT’s disposition, CLAIMANT clearly expressed its wish to avoid the contract, taking into account that it had no use for the delivered squid [supra N145]. The request for instructions further shows that CLAIMANT held RESPONDENT in charge of the squid.
The content of CLAIMANT’s notice was therefore sufficient to serve as a declaration of avoidance of the contract.

2) CLAIMANT declared the contract avoided in due time

Art. 49(2)(b)(i) CISG provides a reasonable period of time for the buyer to declare the contract avoided, starting when the buyer knew or ought to have known of the non-conformity [Brunner, Art. 26 N3; Torsello, p. 59]. If the seller has initiated inspection of the goods upon the notice of non-conformity, the additional time for declaration of avoidance does not begin to run until the arrival of the results of such an inspection [Müller-Chen, Art. 49 N32; Achilles, Art. 49 N11].

In response to the notice of non-conformity given by CLAIMANT, RESPONDENT requested independent inspection which was subsequently conducted by the TGT laboratories [ClaEx 6]. The results of the inspection arrived on 12 August 2008 [ClaEx 8]. CLAIMANT sent the declaration of avoidance to RESPONDENT on 16 August 2008 [ClaEx 7]. The deadline starting upon receipt of the inspection report, only 4 days had passed before CLAIMANT declared the contract avoided. This period of time seems reasonable since CLAIMANT had to review the results from the TGT report and deliberate whether it wanted to uphold or avoid the contract. The Turku Court of Appeal decided that the party can take up to a few months to declare avoidance of the contract [Forestry Equipment case].

CLAIMANT’s declaration of avoidance within 4 days was therefore timely given.

C) CLAIMANT was able to restore the squid in substantially unchanged condition

According to Art. 82 CISG, the buyer has to be in the position to return the goods to the seller in substantially unchanged condition if he wishes to avoid the contract [Torsello, p. 58; Weber, p. 180]. The relevant moment is the dispatch of the declaration of avoidance [Shoes case; Fountoulakis, Art. 82 N9; Salger, Art. 82 N3]. Slight changes to the goods, for instance due to the testing or the fact that they were already sold to customers, do not deprive the buyer of the possibility to return the goods [Fountoulakis, Art. 82 N6 et seq.]. The disposal of the goods after avoidance of the contract does not affect the obligations under Art. 82 CISG [infra N172-176].

When CLAIMANT dispatched the declaration of avoidance on 16 August 2008 [ClaEx 7], the squid was still stored in the cool house [ClaEx 10 N16; ArbReq N20-22; ClaEx 7]. Only a
minor share was destroyed in the course of the testing and some squid had been sold [ArbReq N17, 18].

Therefore, most of the squid could have been returned to RESPONDENT in a substantially unchanged condition at the time of avoidance of the contract. CLAIMANT thereby complied with its obligations under Art. 82 CISG and is consequently entitled to avoid the contract.

Result of Issue V: CLAIMANT is entitled to avoid the contract based on RESPONDENT’s fundamental breach of contract.

VI. CLAIMANT PRESERVED THE SQUID AND MITIGATED FURTHER LOSSES

After due avoidance of the contract, new duties arise for the buyer, i.e. the preservation of the goods and mitigation of further losses [Bernstein/Lookofsky, p. 94]. CLAIMANT duly preserved the squid for RESPONDENT’s account (A). CLAIMANT further mitigated losses when it eventually disposed of the squid (B).

A) CLAIMANT DULY PRESERVED THE SQUID AFTER AVOIDANCE OF THE CONTRACT

According to Art. 86 CISG, a buyer who exercises his right to reject the goods must take reasonable steps to preserve them [Rudolph, Art. 86 N4; Jentsch, p. 85; Bernstein/Lookofsky, p. 94]. In order to preserve frozen goods, they need to be stored in a cool house.

Since RESPONDENT refused to take back the squid [ClaEx 10 N16; ArbReq N23], CLAIMANT kept it stored in its cool house [ArbReq N20-22; ClaEx 10 N16; ClaEx 7]. CLAIMANT thereby fulfilled its obligation to preserve the squid.

According to Art. 88 CISG, the buyer has a right to try to sell the goods for the seller’s account if the seller causes unreasonable delay in taking back the goods [Brunner, Art. 88 N1 et seq.; Schwenzer/Fountoulakis, p. 607; Schlechtriem/Butler, N342]. Before selling the goods, the buyer has to notify the seller of his intention. [Brunner, Art. 88 N1 et seq.; Schwenzer/Fountoulakis, p. 607; Schlechtriem/Butler, N342].

CLAIMANT announced that it will “look to sell the squid for [RESPONDENT’s] account” [ClaEx 7] when avoiding the contract on 16 August 2008, anticipating the case that RESPONDENT would delay in taking the squid back. When RESPONDENT declared that it rejected any responsibility [ClaEx 9; ClaEx 10 N17], there was no reason for CLAIMANT to wait any longer before attempting to sell the squid because RESPONDENT thereby implied that it would not take back the squid. In light of this, CLAIMANT was entitled to sell the squid for RESPONDENT’s account based on Art. 88 CISG. CLAIMANT did so by mandating Reliable Trading House which did not have much success [ClaEx 10 N15].
Consequently, CLAIMANT complied with its obligation to preserve the squid by storing it for RESPONDENT’s account. In light of RESPONDENT’s refusal to take back the squid and due notice given, CLAIMANT was entitled to try to sell the squid for RESPONDENT’s account.

B) CLAIMANT COMPLIED WITH ITS OBLIGATION TO MITIGATE LOSSES

Art. 77 CISG embodies the principle that the party which claims damages has to take reasonable measures in order to mitigate further losses [Schwenzer, Art. 77 N7; Huber/Mullis, p. 289].

When complying with Art. 86 and 88 CISG [supra N167-171], CLAIMANT simultaneously fulfilled its obligation under Art. 77 CISG. Namely, CLAIMANT stored the squid for RESPONDENT’s account [supra N168]. Since RESPONDENT refused to take back the squid and gave no other instructions, CLAIMANT attempted to sell the squid in compliance with its right under Art. 88 CISG in order to mitigate losses [supra N170].

Moreover, CLAIMANT mitigated further losses when disposing of the squid. After RESPONDENT repeatedly refused to take back the squid [ArbReq N23; ClaEx 10 N16], CLAIMANT had no other option than disposing of the squid for three reasons. First, with the passing of time, the squid deteriorated to the point “where it was no longer certain to be fit for human consumption” [ProcOrd 3 Q30]. According to the health regulation in Mediterraneo, all fish products stored in the same location have to be certified fit for human consumption [ArbReq N15; ClaEx 10 N8]. Since the squid was no longer certain to fulfil the requirements of the regulation, the risk that the rest of the stock would get contaminated arose. In order to protect the rest of its stock, CLAIMANT had to dispose of the deteriorating squid. Secondly, CLAIMANT waited for a reasonable time before disposing of the squid, giving RESPONDENT time to take it back. In fact, almost a year had passed since the avoidance of the contract on 16 August 2008 [ArbReq N22]. After all this time, CLAIMANT could not be expected to keep the squid for RESPONDENT any longer. Thirdly, the squid caused difficulties, using space in the cool house [ClaEx 10 N16; ArbReq N22]. By disposing of the squid, CLAIMANT prevented future difficulties. Considering all this, CLAIMANT mitigated further losses when disposing of the squid.

As to any other reasonable means to mitigate losses, the burden of proof for the non-fulfilment of this obligation rests on the seller [Herber/Czerwenka, Art. 77 N8]. RESPONDENT, however, has not proven the need for any other actions [StaDef N24].

In light of the aforementioned, CLAIMANT complied with its obligation under Art. 77 CISG to mitigate losses and is therefore entitled to claim the various damages it suffered as a result of
RESPONDENT’S breach of contract [ArbReq N30]. Art. 74 CISG embodies the principle of full compensation [Schlechtriem, N300]. The deprived party is to be placed in the same financial position as it would have been if the contract had been properly fulfilled [Schwenzer/Fountoulakis, p. 517; Huber/Mullis, p. 268; Brunner, Art. 74 N5]. Consequently, RESPONDENT has to pay full damages and reimburse the purchase price paid by CLAIMANT, totalling USD 479'450 plus interest [ArbReq N30].

Result of Issue VI: CLAIMANT fulfilled its duty to preserve the squid. The attempts to sell the squid did in no way contravene its obligation to preserve the squid under Art. 86 CISG. CLAIMANT mitigated further losses when it eventually disposed of the squid. CLAIMANT is therefore entitled to claim full damages.

REQUEST FOR RELIEF

In the light of the above submissions, Counsel for CLAIMANT respectfully requests the Tribunal to find that:

- It has jurisdiction to hear the present case (I);
- CLAIMANT did not violate its obligation of confidentiality and therefore, RESPONDENT’s counter claim has to be rejected (II);
- RESPONDENT breached the contract by delivering undersized squid (III);
- RESPONDENT cannot invoke any negligence in CLAIMANT’s inspection and notification; CLAIMANT can rely on the breach of contract after due and timely inspection and notification of the non-conformity (IV);
- CLAIMANT was entitled to avoid the contract based on fundamental breach (V);
- CLAIMANT fulfilled its duty to preserve the squid after avoidance of the contract and mitigated further losses (VI);
- CLAIMANT is entitled to claim full damages in the amount of USD 479’450 plus interest on the said sum and the costs of arbitration.
CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

__________________  __________________  __________________
Lukas Fellmann       Anna-Lynn Fromer    Joséphine Marmy

__________________  __________________
Beat Schläpfer       Tanja Schmutz

Fribourg, 9 December 2010