MEMORANDUM FOR RESPONDENT

King’s College London

Against: Mediterraneo Trawler Supply SA, Mediterraneo

On Behalf of: Equatoriana Fishing Ltd., Equatoriana

CLAIMANT

RESPONDENT

TAYLOR BARTLETT • PATRYCJA BIENIEK • NICHOLAS KAZAZ
AYA MATAR • ROZEMARIJN VERNOOIJ • ABBIGAIL WEBB
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<td>IBA</td>
<td>International Bar Association</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>LG</td>
<td>Landgericht (District Court, Germany)</td>
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Ltd.  Limited
NE   North East
No.  Number
NY   New York
OED  Oxford English Dictionary
OLG  Oberlandesgericht (Provincial Court of Appeal)
OG   Oberster Gerichtshof (Supreme Court)
Pacta sunt servanda  ‘Agreement must be kept’
PO#  Procedural Order Number
PRC  People’s Republic of China
QB   Queen’s Bench
R.   Respondent
Supra  Above
Rep.  Reports
Sc.   Sales Confirmation
TGI  Tribunal De Grande Instance de Paris
UN   United Nations
UNCITRAL  United Nations Commission on International Trade Law
USA  United States of America
USD  United States Dollars
v.   versus (against)
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      (i) Under CAM Rules 2010 Mr. Y should be the presiding arbitrator .......................................................................................................................... 10

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         (a) CAM Rules 2010 are applicable to the present proceedings .................................................................................................................. 15

         (b) The duty of confidentiality under Art. 8.1 CAM Rules 2010 was in force when Claimant gave its interview ........................................................................................................ 16

         (c) Claimant breached the duty of confidentiality by disclosing the existence of the arbitration proceedings to Commercial Fishing Today ........................................................................................................ 16

         (d) Further or alternatively, Claimant breached the duty of confidentiality by disclosing the content of the arbitral proceedings in Commercial Fishing Today ........................................................................................................ 17

         (e) Claimant was not protecting its own rights when it gave the interview ........................................................................................................ 18

      (ii) Even if CAM Rules 2004 apply, Claimant has breached its implied duty of confidentiality under Danubian Law ........................................................................................................ 18

         (a) Claimant owes an implied duty of confidentiality under Danubian Law ........................................................................................................ 18

         (b) Claimant breached its implied duty of confidentiality .......................................................................................................................... 19

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<td></td>
<td><strong>Claimant</strong> Mediterranean Trawler Supply SA, a corporation organised under the laws of Mediterraneo, buys and sells fish products for both bait and human consumption.</td>
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<tr>
<td></td>
<td><strong>Respondent</strong> Equatoriana Fishing Ltd, a company organised under the laws of Equatoriana, is an international dealer of fish products for both bait and human consumption.</td>
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<tr>
<td>2007 Season</td>
<td>The squid catch from the Oceanian Islands was below normal and prices increased.</td>
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<tr>
<td>14 April 2008</td>
<td>Claimant knew of the inconsistent size of Danubian squid, but nonetheless wrote to Respondent inquiring about prices for Danubian squid.</td>
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<tr>
<td>17 May 2008</td>
<td>Respondent sent its representative, Mr. Weeg, to Claimant with a sample of unsized Danubian squid from the 2007 catch. During that time, Claimant did not mention the alleged purpose of the squid.</td>
</tr>
<tr>
<td>29 May 2008</td>
<td>Claimant was pleased with the sample shown and made an order. Claimant did not specify any size requirements, ordering unsized squid. Respondent inserted an arbitration clause and the term ‘2007/2008 Catch’. Claimant did not object.</td>
</tr>
<tr>
<td>1 July 2008</td>
<td>Respondent delivered the squid that conformed with all contractual terms. Claimant inspected the squid and did not raise any objections at that time.</td>
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<tr>
<td>29 July 2008</td>
<td>Almost one month later, Claimant wrote to Respondent complaining that the squid was ‘hardly usable for bait’, its alleged purpose.</td>
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<tr>
<td>3 August 2008</td>
<td>Respondent replied and requested testing of the squid.</td>
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<td>12 August 2008</td>
<td>The squid was tested by a certified testing agency and found to be of excellent quality and fit for human consumption.</td>
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<td>16 August 2008</td>
<td>Claimant wrote to Respondent asking it to reclaim the squid, on the unexpected grounds that it was not of a specific size.</td>
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<tr>
<td>18 August 2008</td>
<td>Respondent replied to Claimant, attaching the inspection report which confirmed that the squid was in complete conformity with the contract.</td>
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<td>20 May 2010</td>
<td>Almost two years after the sale and without any notice, Claimant commenced arbitration against Respondent and appointed Ms. Arbitrator 1, from Mediterraneo.</td>
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<td>22 May 2010</td>
<td>Claimant’s CEO gave an interview to Commercial Fishing Today, a trade newspaper distributed in forty-five countries.</td>
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<td>24 May 2010</td>
<td>Claimant’s interview was published. Thereby, the comment that ‘[Respondent] sold us squid for bait that was completely inappropriate and they knew it’ was widely circulated. Respondent’s outstanding reputation was attacked.</td>
</tr>
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<td>25 May 2010</td>
<td>Respondent received the Request for Arbitration.</td>
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24 June 2010 | Respondent filed its Answer to the Notice of Arbitration and a Statement of Defence. In accordance with the Arbitration Agreement, Respondent appointed Professor Arbitrator 2 from Equatoriana.

25 June 2010 | In accordance with the Arbitration Agreement, CAM requested Ms. Arbitrator 1 and Professor Arbitrator 2 to appoint a third, presiding, arbitrator. It specifically drew the arbitrators’ attention to the IBA Guidelines on Conflict of Interest.

15 July 2010 | Ms. Arbitrator 1 and Professor Arbitrator 2 jointly appointed Mr. Y as chairman of the Tribunal. In accordance with its Code of Ethics, CAM demanded Mr. Y to disclose any potential conflicts that could give rise to doubts on independence and impartiality in his Statement of Independence.

19 July 2010 | Mr. Y disclosed that he is a partner in a large law firm, Wise, Strong & Clever. Mr. Samuel Z, one of Claimant advisors, is also a partner in that firm. CAM forwarded the Parties Mr. Y’s Statement of Independence.

26 July 2010 | Claimant and Respondent waived their rights to object to Mr. Y’s appointment.

2 August 2010 | In breach of the Arbitration Agreement and of the Parties’ consent, CAM refused to confirm Mr. Y alleging that he did not comply with the independence requirements under its own rules. CAM then asked the party-appointed arbitrators to make a substitute appointment.

13 August 2010 | In a letter to CAM, the two party-appointed arbitrators stated that they knew Mr. Y very well and fully trusted him to conduct the arbitration with competence, impartiality, and independence and re-affirmed his appointment as chairman.

23 August 2010 | In spite of the party-appointed arbitrators' insistence and Mr. Y's full disclosure and adhesion to the terms of the Arbitration Agreement, CAM chose not to confirm him. In replacement of Mr. Y, CAM appointed Mr. Horace Z (‘Mr. Z’) as the third arbitrator.

10 September 2010 | CAM confirmed Mr. Z as Chairman of the Arbitral Tribunal against the Parties’ express will.

20 September 2010 | Ms. Arbitrator 1, Professor Arbitrator 2, and Mr. Z met and determined that the Tribunal was constituted.

24 September 2010 | Respondent filed an amendment of its Statement of Defence to reflect its objection to the intrusion and breach by CAM of the express terms of the Arbitration Agreement and subsequent will of the Parties.
SUMMARY OF ARGUMENTS

First: The Tribunal is requested to issue an interim order on confidentiality against Claimant not only because all of the conditions under Art. 22.2 CAM Rules and Danubian Law are met, but also because it is the only viable remedy available to Respondent to prevent further damage to its reputation. The order on confidentiality should cover both the proceedings and any eventual award.

Second: As the present Tribunal has not been constituted in accordance with the Arbitration Agreement or any applicable rules, Respondent requests the Tribunal to dismiss the arbitration for lack of jurisdiction.

Third: Respondent requests the Tribunal to find that Claimant was bound by a duty of confidentiality, either under the institutional rules or Danubian Law, that Claimant breached its duty and is liable for damages to be assessed at a later stage.

Fourth: Respondent did not breach the contract in any way. It delivered squid that met all of the contractual requirements under Art. 35(1) CISG. The delivered squid was in conformity with the sample as required by Art. 35(2)(c) CISG. Further, Claimant did not make its particular purpose for the squid known and thus Claimant cannot rely on Art. 35(2)(b). Regardless of whether a breach is found, Respondent is excluded from liability under Art. 35(3) CISG and because Claimant assumed the risk of receiving unsized squid.

Fifth: Claimant breached Art. 38 CISG because it failed to properly inspect the delivered squid. Even if the Tribunal finds that the inspection was proper, Claimant breached Art. 39 CISG because it failed to timely and specifically notify Respondent of the alleged non-conformity. Because of this breach, Claimant is not entitled to rely upon any alleged non-conformity in the delivered squid. Further, Art. 40 CISG does not excuse Claimant’s breach because Respondent could not have been aware of Claimant’s alleged size requirement.

Sixth: Claimant is not entitled to restitution of the purchase price it requests under Art. 50 CISG and in any event, it is cannot recover the purchase price under the CISG because there was not a fundamental breach. Further, any damages potentially awarded should be reduced as Claimant failed to mitigate loss. In fact, Claimant contributed to the loss because it failed to make a reasonable effort to sell the squid and after this failed to mitigate the loss.
PROCEDURAL REQUEST

I. THE TRIBUNAL SHOULD ORDER CLAIMANT TO RESPECT ITS DUTY OF CONFIDENTIALITY

1. On 22 May 2010, after Claimant commenced the arbitration proceedings, it gave an inflammatory interview to Commercial Fishing Today (‘CFT’), a widely distributed trade newspaper [Defence §4; R. Ex. 1; PO3 §17]. Not only did it reveal the existence of the proceedings, but it also made false statements regarding the content of the proceeding. This included an accusation that Respondent sold squid with the knowledge that it was ‘completely inappropriate’ for its purpose [R. Ex. 1]. The contents of the interview inevitably affected Respondent's reputation and caused Respondent irreparable harm [Defence §4 - 9; R. Ex. 1] and the same would be true if any subsequent award would be rendered public. Thus, in order to prevent Claimant from breaching its duties and causing any further damage, Respondent requests the Tribunal to issue an interim order on confidentiality covering both the proceedings and any eventual award before considering the issue of jurisdiction and merits. The Tribunal is entitled under the applicable law to issue an immediate interim order on confidentiality.

2. Claimant does not dispute that the Tribunal has power to issue interim orders before addressing jurisdictional and substantive claims [Cl. Mem. §45, 69]. This is a generally accepted practice in international arbitration [Born 1992; Shibata/Parra; ICSID ARB/02/18; ICSID ARB/05/22; Nicaragua v. US]. However, Claimant contends that the conditions for the Tribunal to exercise this power under the applicable law are not fulfilled in the present case [Cl. Mem. II].

3. The applicable laws and rules governing arbitral proceedings are found in the express terms of the arbitration agreement, the institutional rules chosen by the parties and the law of the seat of arbitration [Redfern/Hunter §3.04, 3.10]. The institutional rules incorporated by the Parties are the Rules of the Chamber of Arbitration of Milan (‘CAM Rules’) and Danubia was chosen as the seat of arbitration [Cl. Ex. 4; Defence §22]. Danubia has enacted the UNCITRAL Model Law on International Commercial Arbitration 1985 with 2006 amendments (‘Danubian Law’) [Defence §22; Req. Arb.]. As the Parties have not incorporated any specific requirements in their Arbitration Agreement regarding the Tribunal's power to issue interim orders, this power is governed by CAM Rules and Danubian Law. In the interest of brevity, CAM Rules 2010 will be referred to even though CAM Rules 2004 on interim orders are identical [CAMR 2004 Art. 25.2].

4. Art. 22 CAM Rules 2010 gives the Tribunal power to issue all urgent and provisional measures of protection, also of anticipatory nature, that are not barred by mandatory
provisions applicable to the proceedings. An interim order on confidentiality against Claimant would fulfil every requirement set out by Art. 22.2 CAM Rules as it is not barred by any mandatory provisions of Danubian Law [A] and would be an urgent and provisional measure of protection [B]. Since CAM Rules explicitly allow ‘all orders’, this would naturally include orders to protect confidentiality [C]. Finally, this order should include a reminder for Respondent of its express duty under Art. 8.1 to keep any eventual award confidential [D].

A. THE TRIBUNAL’S POWER TO ISSUE THE INTERIM ORDER ON CONFIDENTIALITY IS NOT BARRED BY ANY MANDATORY PROVISIONS OF DANUBIAN LAW

5. Where parties incorporate institutional rules in their arbitration agreement, these rules govern the proceedings except where mandatory rules of the law of the seat apply [Redfern/Hunter § 3.50]. Accordingly, the applicable mandatory rules have to be found in Danubian Law, and more specifically, in Art. 17 which regulates tribunals’ power to issue interim orders, ‘[u]nless otherwise agreed by the parties.’ Thus, parties are not only allowed to opt out of the conditions set out in Art. 17 but potentially to opt out of this power in its entirety, rendering this provision non-mandatory [Danubian Law Art. 17(1)]. In the present case, the Parties agreed otherwise by incorporating CAM Rules, specifically Art. 22.2.

B. AN INTERIM ORDER ON CONFIDENTIALITY PROTECTING RESPONDENT IS BOTH URGENT AND PROVISIONAL UNDER ART. 22.2 CAM RULES 2010

6. The two requirements imposed by CAM Rules 2010 relating to the Tribunal's power to issue interim orders are that the order is urgent [i] and provisional [ii].

(i) The interim order on confidentiality is urgent because Claimant’s prejudicial actions are likely to be repeated before the final award

7. A situation is urgent where action prejudicial to the rights of either party is likely to be taken before a final decision on jurisdiction and merits [ICSID No. ARB/02/18; ICSID No. ARB/05/22; Born 1986]. Claimant caused severe prejudice to Respondent by telling CFT that Respondent ‘sold squid […] that was completely inappropriate for bait and they knew it’ and had to be ‘forced to live up to its responsibilities’ [R. Ex. 1; PO3 § 17]. Not only is CFT an international fishing trade journal that is distributed to forty-five countries [R. Ex. 1], it is specifically distributed to both Mediterraneo and Equatoriana where the Parties’ business interests are principally based [PO3 § 17].

8. Claimant has fully disregarded its duty to keep both the existence and content of the arbitral proceedings confidential and is fiercely resisting this application for an interim order, the sole object of which is to enforce Claimant's duty of confidentiality [Cl. Mem. §44-74]. Claimant’s attitude thus shows that it is likely to repeat its prejudicial actions before the award is rendered. Moreover, as the Tribunal chose to merge jurisdiction and merits [PO2],
any postponement of addressing the interim order would give Claimant more time to act thereby increasing the risk of further prejudicial action and damage to Respondent. In the present case, Claimant’s comments were prejudicial and it is very likely that it will release further details on the arbitral proceedings before the final award is rendered.

(ii) An interim order on confidentiality is provisional in nature as it will lapse with the final award

9. An interim measure on confidentiality is provisional by definition as it ceases to be effective upon the issuance of the final award [Bucher/Tschanz §178; Yesilirmak 159-236; Hungarian Arbitration Act 1994 s. 26]. It is only in the award that the Tribunal would finally decide on both the definition of confidentiality and on the question of whether Claimant has breached its duty, thus entitling Respondent to damages, or not. An order would preclude Claimant from divulging any further information about the arbitral proceedings and the ensuing arbitral awards.

C. CAM RULES 2010 ALLOW FOR 'ALL' TYPES OF INTERIM ORDERS, INCLUDING AN INTERIM ORDER TO PREVENT A FURTHER BREACH BY CLAIMANT OF ITS DUTY OF CONFIDENTIALITY

10. Some institutional rules explicitly limit the possible interim orders to certain subject areas [ACICA Rule 28.1; English Arbitration Act s. 38], others exclude this power altogether [CIETAC Rules; Italian Code Art. 818; Argentine Code Art. 753]. However, the majority of arbitration rules allow tribunals a broad discretion to order 'any' type of interim order [ICC Art. 23.1; SCC Art. 32.1; AAA Rule 34(a); ICDR Art. 21]. Where a provision is drafted broadly, it grants a tribunal a discretionary power to issue any type of interim order [Lew/Mistelis §592]. In the present case, CAM Rules grant the Tribunal the power to issue ‘all orders’ [CAMR 2010 Art. 22.2]. This means the Tribunal is not limited in any way as to which interim orders it may issue, including an order on confidentiality.

11. In the event of doubt the Tribunal should not delay granting an interim order [ICSID No. ARB/06/11], as the benefit to Respondent outweighs any burden on Claimant. The order, while being provisional, will have a significant impact on Respondent’s future business. Conversely, the sole obligation on Claimant would be to refrain temporarily from divulging information about the arbitral proceedings and any eventual award from now on.

D. ANY EVENTUAL AWARD MUST BE KEPT CONFIDENTIAL UNDER THE EXPRESS DUTY OF CAM RULES 2004 AND 2010

12. Art. 8.1 CAM Rules 2010 explicitly states: ‘the parties…shall keep…the arbitral award confidential’ and Art. 8.2 CAM Rules 2004 states that the award may be published only with the prior written consent of the parties to the Chamber of Arbitration. Claimant’s assertion that the duty of confidentiality ‘only governs the proceedings itself’ gives rise to a risk that
Claimant will not keep the award confidential [Cl. Mem. §57]. Therefore, the Tribunal should issue an order reminding and requiring Claimant to keep any eventual award confidential.

**Conclusion on Issue I:** An interim order on confidentiality covering both proceedings and any eventual award should be issued against Claimant.

**ARGUMENT ON JURISDICTION**

**II. THE TRIBUNAL WAS CONSTITUTED IN BREACH OF THE ARBITRATION AGREEMENT AND LACKS JURISDICTION TO HEAR THE PRESENT CASE**

13. Claimant alleges that the Tribunal, as constituted, has jurisdiction to resolve the present dispute [Cl. Mem. §1]. Respondent respectfully requests the Tribunal to find that it has been constituted in breach of the Arbitration Agreement and therefore lacks jurisdiction to hear the present case [Amended Defence].

14. The present Tribunal has been constituted in breach of the specific appointment procedure adopted by the Parties in the Arbitration Agreement. The current chairman Mr. Z was appointed by an institution, CAM, instead of being nominated by the party-appointed arbitrators, as specified in the Arbitration Agreement [Cl. Ex. 4]. Since the composition of the Tribunal is not in accordance with the agreement of the Parties, the award rendered will be refused recognition and enforcement [Art. 36(iv) Danubian Law; Art. V(1)(d) New York Convention]. Claimant appointed Ms. Arbitrator 1 [Req. Arb. §28] and then Respondent appointed Professor Arbitrator 2 [Letter of 24 June 2010]. The decision of the two party appointed arbitrators yielded the appointment of Mr. Y as the presiding arbitrator [Letter of 15 July 2010]. However, CAM refused to confirm Mr. Y and appointed Mr. Z thereby breaching the party’s chosen appointment procedure [CAM 9410/7, 8].

15. Respondent does not contest that a tribunal has power to rule on its own jurisdiction under the principle of competence-competence [Fouchard/Gaillard/Goldman 397; Born 85; Holtzmann/Neubaus 478; Schwebel 2]. This includes the power to decide that it has no jurisdiction [Redfern/Hunter §5.114].

16. In order to ensure enforceability of the final award, Respondent requests the Tribunal to find that it does not have jurisdiction because the specific procedure of appointment adopted by the Parties in the Arbitration Agreement has not been respected [A]. Should the Tribunal find that CAM Rules prevail over the specific wording of the Arbitration Agreement, CAM breached Art. 14 of its rules [B]. Further, CAM did not have the authority under its rules, any other rules or procedural principles to replace Mr. Y [C]. Should the Tribunal find that CAM had the authority to replace Mr. Y as chairman, it should not have done so as Mr. Y is
both impartial and independent [D]. Finally, Respondent is not precluded from challenging the Tribunal’s jurisdiction as the time limit set out in Art. 19 CAM Rules does not apply to Respondent’s challenge [E]. In the interest of brevity, CAM Rules 2010 will be referred to even though CAM Rules 2004 on the appointment procedure are identical [Arts. 15 - 22 CAMR 2004].

A. CAM BREACHED THE SPECIFIC PROCEDURE OF APPOINTMENT ADOPTED BY THE PARTIES IN THE ARBITRATION AGREEMENT

17. Claimant alleges that the nature of institutional arbitration is ‘that once the arbitration came under CAM, CAM became responsible for the arbitration and CAM Rules became applicable to the proceedings in their entirety’ [Cl. Mem. §6]. Respondent does not dispute the principle that when parties incorporate institutional rules in their arbitration agreement, those rules will govern the proceedings [Redfern/Hunter §1.161]. However, any provisions specifically stated in an arbitration agreement supersede institutional rules [Encyclopaedia v Britannica].

18. Whenever the wording of the arbitration agreement concerning procedure of appointment of arbitrators is specific, it must be respected [US v Mexico]. In the present case, the Parties selected a specific appointment procedure: ‘each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator’ [Cl. Ex 4]. This is the international method of appointment because it is the most efficient means of ensuring neutrality, impartiality and independence of the third arbitrator [Redfern/Hunter §4.25]. Respondent inserted the Arbitration Agreement into the sales confirmation [Cl. Ex. 4] and Claimant explicitly acknowledged this agreement [R. Ex. 2]. This collaborative effort suggests that the Parties sought to establish ‘an effective machinery for the settlement of disputes’ [ICC No. 2321]. In fact, the Parties adopted this procedure because it is the most efficient way of appointing an impartial chairman. An arbitration agreement must be interpreted purposively with the consequences reasonably and legitimately envisaged by the parties [ICSID ARB/81/1; Fouchard/Gaillard/Goldman §475]. In the instant case, the arbitration clause is not ambiguous, therefore it is irrational to suggest that the Parties intended something different from what they explicitly said.

19. Moreover, arbitration is based on party autonomy [Redfern/Hunter §1.38]. It is undisputed that the only limits to party autonomy are the mandatory rules of the applicable law [Redfern/Hunter §3.50]. Art. 11.2 Danubian Law states that ‘[t]he parties are free to agree on a procedure of appointing the arbitrator or arbitrators’. This permissive language indicates that the provision is not mandatory [Model Law Note §7, 34]. Thus, full effect should be given to the Parties’ autonomy to specify the appointment procedure.

20. Further, if the Parties’ intention of choosing their own arbitrators is not respected, then any
tribunal constituted in this form would lack jurisdiction to hear the case and any award rendered would be refused recognition and enforcement [Art. 36(iv) Danubian Law; Art. V(1)(d) NYC]. In *Encyclopaedia v Britannica*, the parties had contractually agreed that the two party-appointed arbitrators must attempt to choose a third arbitrator and that upon their failure to do so, the Court would make the appointment. The appellant side-stepped the requirement that the two party-appointed arbitrators must choose the third arbitrator and instead obtained an appointment of the third arbitrator by the Court. The Court of Appeal held that the appointment of the third arbitrator in breach of the arbitration agreement irremediably spoiled the arbitration process and refused recognition and enforcement of the award. [*Encyclopaedia v Britannica*]. Similarly, in the present case, the Arbitration Agreement requires the two party-appointed arbitrators to appoint the third arbitrator [*Cl. Ex. 4*]. As CAM breached this agreement, any award rendered by the Tribunal would be unenforceable.

**B. EVEN IF CAM RULES SUPERSEDE THE SPECIFIC PROCEDURE OF THE ARBITRATION AGREEMENT, CAM BREACHED ART. 14 OF ITS RULES**

21. Should the Tribunal find that CAM Rules prevail over the specific appointment procedure of the Arbitration Agreement, CAM breached its own rules by replacing Mr. Y Art. 14.1 CAM Rules 2010 states that: ‘The arbitrators shall be appointed in accordance with the procedures established by the parties in the arbitration agreement’. The appointment procedure adopted by the parties in the Arbitration Agreement states that ‘each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator’ [*Cl. Ex 4*]. This explicitly falls within Art. 14.4.b CAM Rules which allows the Parties to choose for the president to be appointed by party-appointed arbitrators jointly. Thus, CAM rules maximise the choice and influence of the parties in the appointment process. CAM’s decision to override the parties’ choice of Mr. Y was a severe infringement of its own explicit provisions.

22. The CAM institution provides parties that want to arbitrate under its auspices with a model clause [*CAM Website 1*], which does not include a specific appointment procedure [*CAMR 2010 p. 5*]. Art. 14.4.b CAM Rules states that ‘unless otherwise agreed by the parties’, the presiding arbitrator shall be appointed by the Arbitral Council. This article would have applied if the Parties had chosen to incorporate the model clause in their contract as it is proposed. Instead of adopting the model clause as it is, Respondent inserted a specific procedure to appoint the arbitrators [*Cl. Ex. 4*]. Thus, the Arbitral Council was not entitled to make the appointment.

23. Further, Claimant asserts that the institution which governs the proceedings (CAM), must make sure that final awards are enforceable [*Cl. Mem. §16*]. This coincides with Respondent’s claim that the Tribunal must include Mr. Y or else it would be in breach of the Arbitration
Agreement and any award rendered would not be granted recognition and enforcement [supra 14].

C. NEITHER CAM RULES NOR ANY OTHER RULES OR PROCEDURAL PRINCIPLES ENTITLED CAM TO REPLACE MR. Y

24. Under CAM Rules, Mr. Y should be the presiding arbitrator [i]. He complied with the Code of Ethics [ii] and due process was respected [iii].

(i) Under CAM Rules 2010 Mr. Y should be the presiding arbitrator

25. Whilst the CAM Rules 2010 grant the institution some power to refuse to confirm an appointment, the present case was not an appropriate time to exercise these powers. The rules give specific examples of when the refusal of appointment is appropriate, for instance where the parties cannot agree or fail to make an appointment [Art. 14.3, 14.4]. However, nothing in the rules allows intervention in the present situation.

26. Art. 16 CAM Rules 2010 states that the following persons cannot be appointed as arbitrators: ‘professional partners, employees and all who have an ongoing cooperative professional relationship with members of the board or members of the arbitral council unless the parties agreed otherwise.’ Art. 16 only refers to arbitrators in the same tribunal. Mr. Y and Mr. Samuel Z are Arbitrator and Counsel respectively. Even if the Tribunal nevertheless applied Art. 16 to Mr. Y, the Parties agreed otherwise. Both stated: ‘We know of Mr. Y’s reputation and are sure that he would be independent and impartial in chairing the arbitral tribunal’, and both explicitly waived their right to object to his appointment [Letter from Joseph Langweiler 26 July 2010; Letter from Horace Fasttrack 27 July 2010]. Thus, the restrictions of Art. 16 CAM Rules do not apply.

27. Further, Art. 18.2 CAM Rules 2010 imposes a duty of disclosure on the arbitrator. The arbitrator must disclose ‘any relationship with the parties, their counsel ... which may affect his/her impartiality or independence.’ Despite the fact that Mr. Y’s relationship with his partner Mr. Z would not have affected his impartiality or independence, Mr. Y nevertheless revealed all facts about this relationship CAM 9410/6. In a similar case, a respondent State challenged the President of an ad hoc annulment committee based on the fact that a partner in his law firm had given limited advice to one of the parties, which advice was continuing but nearing completion. This fact was disclosed by the President even though he had no personal involvement in the advice in question. The challenge was dismissed because: (a) the relationship in question was immediately and fully disclosed thus maintaining full transparency; (b) the arbitrator personally has had no lawyer-client relationship with the Claimants or its affiliates [ICSID No. ARB/97/3]. Similarly, in the present case, Mr. Y disclosed his relationship with Mr. Z and never had a lawyer-client association with Claimant.

28. In compliance with Art. 18.3 CAM Rules 2010, both Parties filed their comments on Mr. Y’s
statement of independence. Despite both Parties’ explicit waiver of objection to Mr. Y’s appointment [Letter from Joseph Langweiler 26 July 2010; Letter from Horace Fasttrack 27 July 2010], CAM decided to overlook the Parties’ agreement and did not confirm Mr. Y [CAM 9410/7]. Instead, CAM invited them to make a substituted appointment [CAM 9410/7]. In response to CAM’s actions, the two co-arbitrators wrote a joint letter re-appointing Mr. Y on the basis that they both ‘know him very well’ and have ‘complete trust in him to conduct the arbitration with competence, impartiality and with independence.’ [Letter 13 August 2010]. Rather than confirming Mr. Y, CAM once again disregarded the explicit intention and autonomy of the Parties and appointed Mr. Z to be the presiding arbitrator [CAM 9410/8].

29. Further, Claimant alleges that the re-appointment of Mr. Y by the party-nominated arbitrators is by definition a ‘failure’ to appoint the replacement of the presiding arbitrator and requires CAM’s interference under Art. 20.3 CAM Rules 2010 [Cl. Mem. §39]. Art. 20.3 CAM Rules 2010 states: ‘A new arbitrator shall be appointed by the same authority that appointed the substituted arbitrator. If a replacement arbitrator must also be substituted, the new arbitrator shall be appointed by the Arbitral Council.’ Even if the re-appointment of Mr. Y is considered a ‘replacement’ under Art. 20.3 CAM Rules, there is no reason for the CAM to intervene as this replacement does not constitute a failure. First, it gives effect to the unequivocal agreement of the Parties. Secondly, Mr. Y is an adequate choice of chairman. In conclusion, applying CAM Rules rigorously shows that CAM has breached its own rules when refusing to confirm Mr. Y as the chairman of the Tribunal and thereby breached the Arbitration Agreement.

(ii) Mr. Y complied with the Code of Ethics

30. CAM’s Code of Ethics imposes on an arbitrator a duty to disclose all circumstances and relationships that need to be disclosed in order not to keep anything hidden that might give rise to doubts on independence and impartiality [CAM Website 2]. The arbitrator who does not comply with the Code shall be replaced by the Chamber of Arbitration itself, which may also refuse to confirm him in subsequent proceedings because of this violation [Art. 13 Code of Ethics]. When CAM addressed the arbitrators to accept their mandate, it explicitly laid down the rules of the Code that need to be followed by any potential arbitrator [CAM 9410/3; CAM 9410/5]. Mr. Y followed the rules provided to him and disclosed all relevant details about his relationship with Claimant’s counsel [supra 27]. Thereby, Mr. Y complied with CAM’s Code of Ethics.

(iii) The requirements of due process were respected accordingly

31. Claimant alleges that ‘the enforcement of the award is one of the main reasons why due process must be maximised’ [Cl. Mem. §16]. Respondent does not object to this allegation. In
order to satisfy due process, certain procedural standards need to be observed. These procedural standards are designed to ensure that the arbitral tribunal is properly constituted, that the arbitral procedure is in accordance with the agreement of the parties, and that the parties are given proper notice of the proceedings, hearings, and awards [Hamilton/Vasquez Redfern/Hunter §10.47]. The principle of due process applies to all aspects of the arbitral proceedings. Its aim is to ensure that the parties are treated with equality and are given a fair hearing, with a full and proper opportunity to present their respective cases [Fouchard/Gaillard/Goldman 949]. It is not disputed that in the present case, both Claimant and Respondent were treated equally and were both duly notified of all procedural matters [CAM 9410/2, 3, 4, 6]. More importantly, due process was fully observed when Mr. Y was appointed by the party-nominated arbitrators: this appointment was according to the chosen appointment procedure in the Arbitration Agreement and gave both Parties equal opportunity to nominate the members of the Tribunal [Cl. Ex. 4]. Thus, due process in its widest interpretation was respected.

D. EVEN IF CAM HAD THE AUTHORITY TO REFUSE CONFIRMATION OF MR. Y AS CHAIRMAN, IT SHOULD NOT HAVE DONE SO BECAUSE MR. Y IS IMPARTIAL AND INDEPENDENT

32. The impartiality and independence of arbitrators is a hallmark of international commercial arbitration. This means that the arbitrators are free of external influences [Redfern/Hunter §4.79]. The IBA Guidelines on International Conflicts of Interest establish a common set of principles that address standards of disclosure upon appointment of arbitrators by reference to concrete situations. Although these guidelines are non-binding, they are almost invariably used by tribunals as guidance [Redfern/Hunter §4.89]. Importantly, CAM recognises and embraces them [Coppo 227]. Thus, the Tribunal should give them due consideration.

33. Claimant alleges that the test of impartiality and independence is an objective one [Cl. Mem. §22-23]. There is a subtle difference between the objective test as to whether the relevant facts would cause doubt in the mind of a reasonable third party, and the subjective test as to whether they might cause doubt in the mind of the parties involved in the specific case in question [Redfern/Hunter §4.83]. The Explanatory Notes to the IBA Guidelines state as follows: ‘...the Working Group in principle accepted, after much debate, a subjective approach to disclosure’ [IBA Guidelines Explanation 3]. This means that a prospective arbitrator should not accept an appointment if there is reason to believe that either party will genuinely feel that the person concerned is not independent, or not capable of approaching the issues impartially [Redfern/Hunter §4.138]. Since both parties waived their right to object to Mr. Y’s appointment [Letter from Joseph Langweiler 26 July 2010; Letter from Horace Fasttrack 27 July 2010], and both co-arbitrators expressed their trust in Mr. Y and declared that they
believe in him to conduct the arbitration impartially and independently [Letter 13 August 2010], the subjective test favours Mr. Y’s appointment over Mr. Z.

34. The IBA Guidelines include a non-exhaustive list of ‘circumstances’ under which independence and impartiality could be questioned, divided into four groups. The group entitled ‘Waivable Red List’ contains examples of situations that, while potentially leading to disqualification, may be accepted by express agreement of the parties to the dispute as not requiring disqualification [Redfern/Hunter §4.87]. One of the examples cited is if ‘the arbitrator is a lawyer in the same law firm as the counsel to one of the parties’ [IBA Guidelines 2.3.3]. Claimant argues that Mr. Y falls within this example of the ‘waivable red list’ of the IBA Guidelines. However, this is incorrect as Mr. Z, albeit being from the same law firm as Mr. Y, is not a ‘counsel’ to Claimant but a mere advisor. Even if the role of counsel and advisor were to be assimilated, after Mr. Y disclosed his relationship with an advisor of one of the parties, both Parties waived their rights to object to Mr. Y [supra 27]. Therefore, there is no reason for him not to be confirmed as even the IBA Guidelines have been complied with.

35. In addition, Claimant alleges that by refusing confirmation of Mr. Y as chairman, CAM was applying a higher standard of fairness than provided for under the IBA Guidelines [Cl. Mem. §34]. However, when contacting the arbitrators to accept their mandate CAM specifically referred to the IBA Guidelines [CAM 9410/3, 9410/5]. Therefore, it is impossible to claim that CAM intended to adopt a different standard.

36. Claimant alleges that it is ‘obvious’ how a party who is a partner in the same law firm as the chairman in the arbitration can use this to his advantage [Cl. Mem. §28]. Claimant does not substantiate this point by providing examples, but simply alludes to the ‘potential examples’ [Cl. Mem. §28]. Both lawyers would be bound by national codes of practice, and would risk being disbarred. This would certainly deter Mr. Samuel Z. Furthermore, the faith of the two co-arbitrators in Mr. Y and the fact that he was re-appointed on the basis that both co-arbitrators ‘know him very well’ and have ‘complete trust in him to conduct the arbitration with competence, impartiality and with independence’ ought to satisfy the Tribunal that this suspicion has no basis [Letter of 13 August 2010].

37. Respondent fears that Mr. Y may have access to the opposing party’s information which could affect Mr. Y’s impartiality as chairman [Cl. Mem. §26]. Respondent assures Claimant that a Chinese Wall is common in international law firms and will be implemented by Wise, Strong & Clever. A Chinese Wall is an information barrier implemented within a firm to separate and isolate persons who make investment decisions from persons who are privy to undisclosed material information which may influence those decisions. Therefore, Mr. Y may not have access to any information given by the party or else he would jeopardise his career.
E. RESPONDENT MAY CHALLENGE THE JURISDICTION OF THE TRIBUNAL AS THE TIME LIMIT SET OUT IN ART. 19 CAM RULES DOES NOT APPLY TO RESPONDENT'S CHALLENGE

38. Claimant insists that Respondent did not contest the jurisdiction of the tribunal within the time limit set by CAM Rules 2010 [Cl. Mem. §41]. Art. 19.1 states: ‘Each party may file a reasoned challenge against an arbitrator on any ground that casts a doubt on his/her independence or impartiality.’ Art. 19.2 continues ‘[t]he challenge shall be filed with the Secretariat within ten days from receipt of the statement of independence or from the date when the party becomes aware of the ground for the challenge.’ Respondent does not challenge Mr. Z on the ground that he is partial or dependant. If this was the case, then Claimant would be right to argue that it would be covered by Art. 19.2 [Cl. Mem. §34]. The reason behind contesting the jurisdiction of the present tribunal with Mr. Z as the presiding arbitrator is that this tribunal is in breach of the Arbitration Agreement. Therefore, this challenge does not fall within the scope of Art. 19 and is only subject to the time limit set out by Art. 12 CAM Rules 2010 which states that: ‘Any objection to the existence, the validity or the effectiveness of the arbitration agreement or lack of jurisdiction of the Arbitral Tribunal shall be raised in the first brief or at the first hearing following the claim to which the objection relates, or shall be deemed to be waived.’ Respondent has raised its objection to jurisdiction at the first opportunity available and more specifically four days after the Tribunal was constituted [PO1 §6; Amended Defence §7, 8].

Conclusion on Issue II: As the present Tribunal has not been constituted in accordance with the Arbitration Agreement or any applicable rules, the Tribunal lacks jurisdiction.

COUNTER-CLAIM ON JURISDICTION

III. CLAIMANT BREACHED ITS DUTY OF CONFIDENTIALITY UNDER CAM RULES AND RESPONDENT IS ENTITLED TO DAMAGES

39. Respondent strongly refutes Claimant’s assertion that the issue of damages is ‘entirely different’ from the substantive dispute because the claim regarding confidentiality does not concern it [Cl. Mem. §73-74]. Claimant’s argument is neither viable nor true as the question is whether Claimant is liable for actions it already committed in relation to the arbitral proceedings. This issue is preliminary to the merits of the dispute for which the arbitral tribunal has been constituted. If it were not for Claimant’s allegations regarding the sale of squid, Respondent would not be raising this challenge concerning Claimant’s breach of confidentiality. Thus, no reasonable party could argue that Respondent’s counter-claim on damages arising out of the breach of confidentiality should be dealt with separately: it is
intrinsically linked to the main dispute.

40. Claimant has misunderstood the legal principle enunciated by Gary Born that liability and damages are usually separated [Cl. Mem. §73-74; Born 1815]. It is usual for liability and quantum of damages to be separated, but it would be highly unusual for a Tribunal to separate a consideration of breach from liability for damages. If the Tribunal establishes liability for damages at this stage, this will act not only as a normal consequence of breach, but also as a deterrent against Claimant from causing any further damage to Respondent’s reputation [Fiona Trust Case, Redfern/Hunter §9.04]. Further, as the Tribunal has indicated that the claim for damages is to be treated as a counter-claim, it is not a new claim [PO1 §4].

41. Claimant alleges that it has not breached its duty of confidentiality under the allegedly applicable CAM Rules 2004 or under CAM Rules 2010 [Cl. Mem. §45, 56] and that even if it breached its duty it would not be liable for damages [Cl. Mem. §76, 77]. Should the presently constituted Tribunal find that it has jurisdiction, Respondent requests the Tribunal to find that Claimant breached its duty of confidentiality [A], and is liable for any resulting damage that can be demonstrated later [B].

A. CLAIMANT BREACHED ITS DUTY OF CONFIDENTIALITY BOTH UNDER CAM RULES AND DANUBIAN LAW

42. Claimant has breached its duty of confidentiality both under the applicable CAM Rules 2010 [i], and, even if CAM Rules 2004 applied, under the implied duty of confidentiality under Danubian Law [ii].

(i) Claimant breached its duty of confidentiality under CAM Rules 2010

43. CAM Rules 2010 state that the parties shall keep the proceedings and the arbitral award confidential except in the case where a disclosure is necessary to protect a party’s rights [CAMR 2010 Art. 8.1]. Although Claimant alleges that it has not breached its duty of confidentiality under these rules [Cl. Mem. §56], by making extensive inflammatory comments about both Respondent and the arbitration, Claimant violated the confidentiality provision under Art. 8.1 CAM Rules 2010 [Defence §4; R. Ex. 1]. Respondent submits that CAM Rules 2010 apply [a] and that the duty of confidentiality was in force when Claimant gave its interview [b]. Further, Claimant breached the duty by revealing the existence of the proceedings [c]; and even if the duty does not cover the existence of the proceedings, Claimant breached its duty by disclosing the content of the proceedings [d]. Furthermore, at no stage does Claimant argue that it was protecting its own rights when breaching its duty of confidentiality. This confirms Respondent’s position that these inflammatory comments were in no way protective of any rights whatsoever [e].

(a) CAM Rules 2010 are applicable to the present proceedings

44. Claimant’s assertion that CAM Rules 2004 apply is erroneous [Cl. Mem. §48]. CAM Rules
2010 apply to any arbitration proceedings commenced after the rules entered into force [Art. 39.2 CAMR 2010]. As the rules entered into force on 1 January 2010 [CAM Website 1] and the present arbitration was commenced by Claimant on 20 May 2010 [Req. Arb.] the requirement for the application of CAM Rules 2010 is fulfilled.

45. CAM Rules 2010 are in line with international practice where parties incorporate institutional rules in their most current form [Redfern/Hunter §1.161; Fouchard/Gaillard/Goldman 1110-1112] and accept any subsequent changes [Various Authors Choice Rules; Car & Cars Case; Balli Trading Case; Banco Central Case; Bunge v. Kruse; Mertens & Co. v. Veevoeder]. An experimented and large trading company such as Claimant must have known this practice at the time of signing the Arbitration Agreement. Claimant had the opportunity to specify the date of the CAM Rules in the Arbitration Agreement at the time of signing, but it chose not to do so [Cl. Ex. 4; R. Ex. 2]. As the clause does not specifically refer to any date, in accordance with international accepted practice and CAM Rules, the latest version of the rules should apply.

(b) The duty of confidentiality under Art. 8.1 CAM Rules 2010 was in force when Claimant gave its interview

46. As stated by Claimant itself, CAM Rules 2010 impose a full duty of confidentiality on the Parties [Cl. Mem. §50; CAMR 2010 Art. 8.1]. This duty covers, as admitted by the Claimant, the full arbitral proceedings [Cl. Mem. §57]. In institutional arbitration, proceedings are deemed to have commenced when the request for arbitration is accepted by the institutional secretariat and sent to the respondent [Poudret/Besson §568; ICC Art. 4.2; LCLA Art. 1.2; Swiss Rules Art. 3.2; English Arbitration Act (1996) s. 14(5); Redfern/Hunter §4.11]. This is no different under CAM Rules 2010, which specifically state that ‘any time-limit set by the Rules will run from the sending made by the Secretariat’ [CAMR 2010 Art. 9.3]. Claimant submitted its request on 20 May 2010 [Req. Arb.] and CAM sent its letter to Respondent on 21 May 2010 [CAM 9410/1]. Claimant gave its interview to CFT on 22 May 2010 [R. Ex. 1]. Therefore, proceedings had begun when Claimant gave its interview and the duty of confidentiality under CAM Rules was in force.

(c) Claimant breached the duty of confidentiality by disclosing the existence of the arbitration proceedings to Commercial Fishing Today

47. Claimant disclosed the existence of the arbitration to CFT on 22 May 2010 by stating that ‘on Thursday our lawyer started arbitration proceedings’ [R. Ex. 1]. Claimant asserts that the duty of confidentiality under CAM Rules 2010 only covers the content of proceedings because the rules do not specifically refer to the ‘existence’ of proceedings [Cl. Mem. §57]. However, Claimant does not substantiate this allegation with any authority. Further, the comparative analysis of other leading institutional rules indicates that the duty of confidentiality extends to the existence of proceedings where the rules use the word ‘proceedings’ in relation to a duty
[SLAC; HKIAC; WIPO; AAA; KLRCA; Pryles]. CAM has stressed the importance it attaches to the duty of confidentiality [Coppo 223]. This is also reflected in the mandatory language of Art. 8.1 stating that the proceedings ‘shall’ be kept confidential [CAMR 2010 Art. 8.1].

48. A principal purpose of arbitration is to settle disputes out of the sight of jealous competitors and the inquisitive media [Paulsson 303]. Parties expect this of the arbitral process [Paulsson 303]. While the present dispute was already public knowledge because it had been reported earlier by CFT [PO3 §17], the existence of the ‘arbitral’ proceedings was not known [PO3 §17; R. Ex. 1]. Claimant’s assertion that the dispute had been reported in CFT previously is irrelevant because the duty of confidentiality does not bind the newspaper [Cl. Mem. §61] but specifically binds Claimant [CAMR 2010 Art. 8.1]. Confirmation of the existence of arbitration by Claimant has greater authority than mere speculation by a newspaper. By revealing the existence of arbitral proceedings, Claimant has acted in direct contravention to one of the principal objectives of the arbitral process [R. Ex. 1].

(d) Further or alternatively, Claimant breached the duty of confidentiality by disclosing the content of the arbitral proceedings in Commercial Fishing Today

49. Claimant disclosed the content of the proceedings by stating on the 22 May 2010 that ‘Equatoriana Fishing sold us squid for bait that was completely inappropriate and they knew it’ [R. Ex. 1]. This false comment was then exacerbated by a further defamatory statement that ‘apparently the only way to get them to live up to their responsibilities is to force them to do so’ [R. Ex. 1].

50. Claimant readily admits that the content of the proceedings including the hearing and arbitrators’ deliberations is subject to the duty of confidentiality under Art. 8.1 CAM Rules 2010 [Cl. Mem. §57, 59]. This duty covers the comments made by Claimant on 22 May 2010 because they explicitly reveal the contents of the proceedings to a large audience [Defence §4; PO3 §17]. Claimant attacked Respondent’s business practices by stating that they sold squid for bait that was ‘completely inappropriate’ [R. Ex. 1]. Two of the main issues before the Tribunal are whether the squid was sold for the purpose of bait and whether the contract has been fully complied with [PO1 §5]. In effect, the whole dispute centres around these issues. Unilateral disclosures are likely to provide a selective view of a dispute, often with tendentious explanations and selective evidence [Paulsson 304]. By disclosing these key issues Claimant has allowed the public to become a party to these proceedings without allowing them to hear both sides.

51. Claimant went even further by alleging that Respondent ‘knew’ that the squid was inappropriate [R. Ex. 1]. It effectively accused Respondent of being dishonest in its business dealings in front of the entire business community. Nothing in the facts or the extensive
exchange of correspondence between Claimant and Respondent indicates any knowledge on the part of Respondent of the alleged breach. To the contrary, even after Claimant accused Respondent of the breach, Respondent was adamant, stating that ‘the report confirms our belief that the squid were in complete conformity to the contract’ [Cl. Ex. 9].

52. Further, Claimant stated that ‘the only way to get them [Respondent] to live up to their responsibilities is to force them to do so’ [R. Ex. 1]. Claimant provided a biased and one-sided account failing to recognise Respondent’s extensive efforts to avoid escalating the dispute. For instance, Respondent replied within days to each accusing letter from Claimant [Cl. Ex. 5, 6, 7, 8]. The last email of 18 August 2008 from Respondent was answered two years later with a request for arbitration [Cl. Ex. 9; Req. Arb.]. Claimant did not leave any space for settlement or further negotiations.

(e) Claimant was not protecting its own rights when it gave the interview
53. Art. 8.1 CAM Rules 2010 allows an exception to the duty of confidentiality where a party breached this duty to protect its rights. Claimant does not argue that it was protecting its own rights when it made inflammatory comments to CFT [R. Ex. 1]. This was a judicious decision. Claimant could not have reasonably argued that its offensive and accusatory comments, such as ‘the only way to get [Respondent] to live up to its responsibilities is to force them to do so’ [R. Ex. 1], were protective.

54. In conclusion, Claimant breached its duty of confidentiality under Art. 8.1 CAM Rules 2010 by both disclosing the existence of the proceedings and details of the dispute.

(ii) Even if CAM Rules 2004 apply, Claimant has breached its implied duty of confidentiality under Danubian Law
55. Claimant alleges that CAM Rules 2004 are applicable to the present arbitral proceedings because ‘they were the only Rules [the Parties] knew at the…time [of signing the Arbitration Agreement]’ [Cl. Mem. §48, 51]. Should the Tribunal agree with this proposition, Respondent does not contest that in contrast to CAM Rules 2010, Art. 8.1 CAM Rules 2004 does not impose the duty of confidentiality on parties to arbitral proceedings [Cl. Mem. §50]. This, however, does not absolve Claimant of the duty of confidentiality implied under the applicable Danubian Law [a] and Claimant breached this duty by disclosing the existence and content of the proceedings [b].

(a) Claimant owes an implied duty of confidentiality under Danubian Law
56. According to Claimant, Art. 8.1 CAM Rules 2004 only extends the duty of confidentiality to ‘the Chamber of Arbitration, the Arbitral Tribunal and the expert witnesses’ [Cl. Mem. §50]. CAM Rules 2004 are indeed silent on parties’ duty of confidentiality. The default rule is that where an arbitration agreement and institutional rules are silent on a procedural issue, the law of the seat is determinative [Poudret/Besson 83]. The Tribunal should therefore look at the
provisions of the law of the seat, Danubian Law [Cl. Ex. 4].

57. Danubian law does not explicitly address the duty of confidentiality. Not only is this duty widely recognised [Redfern/Hunter §2.149; Born 2252-2253; Pryles 432; Dundas 466; Malaysian Newsprint v Bechtel], but other national laws, which similarly adopted the UNCITRAL Model Law, have been interpreted to impose an implied duty of confidentiality on the parties. For instance, the English Arbitration Act 1996, which is based on the UNCITRAL Model Law [Born 31], has been interpreted to impose an implied duty of confidentiality on the parties [Emmott v Wilson, Ali Shipping Case, Fortier 135]. Particularly, in Ali Shipping it was held that ‘confidentiality attaches to arbitration agreement as a matter of law’ [Fortier 134 citing Ali Shipping]. This implied duty covers both the existence [Emmott v Wilson 1380] as well as content of the proceedings [Pryles 454; Hwang/Chung 638]. In particular it extends to any information that emanates from the arbitral proceedings and ‘any documents prepared for and used in the arbitration’ [Emmott v Wilson 1379].

58. Claimant asserts that there is no implied duty of confidentiality under Danubian Law [Cl. Mem. §65] basing its claim on three cases: Esso v. Plowman, Bulbank Case and US v Panhandle [Cl. Mem. §63-65]. To fully understand the reasoning behind the Australian High Court’s decision in Esso v Plowman the greater public interest concerns need to be analysed. The case arose out of arbitrations between Esso and two public utilities each having an agreement relating to the supply of natural gas to the public. As illustrated in the decision itself, the main reason behind refusing an implied duty of confidentiality to the Parties was the public interest involved. The court famously stated: ‘Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the Public Utilities?’ [Esso v. Plowman 403]. In the same way, the 1988 decision by the district court of Delaware only demonstrates that ‘the interest of the government may contradict the principle of confidentiality in a given case [US v. Panhandle]. Yet, a dispute about the delivery of squid does not affect any public interest nor does it involve the government.

59. Further, the Bulbank Case, which was based on Esso v Plowman, is distinguishable from the facts of the present case as it was decided in the context of Swedish Law, which provides that a ‘duty of confidentiality is not to be implied into an arbitration agreement’ [Partasides]. To conclude, Claimant was bound by the implied duty of confidentiality under Danubian Law and the Tribunal should not follow the famously irregular decisions from the Swedish and Australian Courts. The Tribunal should exercise its full powers to decide on the matter of confidentiality [Model Law Note §36].

(b) Claimant breached its implied duty of confidentiality
60. By disclosing the existence of arbitral proceedings and giving explicit details on the nature of the dispute [R. Ex. 1] Claimant breached its duty of confidentiality [supra 47, 49, 53].

B. **THE TRIBUNAL SHOULD FIND THAT CLAIMANT IS LIABLE FOR DAMAGES ARISING FROM ITS BREACH OF CONFIDENTIALITY**

61. It has been established that Claimant was under a duty to keep the existence and the content of the proceedings confidential and that Claimant breached this duty [supra 47, 49-53]. Respondent solely requests the Tribunal to find that Claimant is liable for breach of this duty and as a result liable for any damages that may arise in the future because of this breach [Defence §24].

62. Respondent requests that the question of quantum be considered in subsequent proceedings and allow it to adduce evidence at a later stage up until the point at which an award on quantum is rendered. Determination of quantum often raises issues, which merit separate treatment after consideration of liability [Born 1816]. It is irrelevant that Respondent has been unable to demonstrate the quantum of damages in relation to Claimant’s breach of confidentiality [Cl. Mem. §75]. Respondent has been unable to show any loss because it is too early to assess the effect Claimant’s comments have had on its reputation [Contra Cl. Mem. §75; Defence §9]. In order for damages to be awarded, they must be proven to be certain and foreseeable [Derains/Kreindler 12, 14]. In Respondent’s case there was not just the mere disclosure by Claimant of the existence of proceedings, but also scurrilous attacks on its reputation before a widely distributed newspaper [supra 47, 49, 50]. Respondent had an outstanding reputation in the fisheries trade throughout the world [Defence §7]. It is reasonable to state that the effect of Claimant’s false accusations and more specifically its statement that ‘the only way to get [Respondent] to live up to [its] responsibilities is to force [it] to do so’ to a trade newspaper distributed in forty-five countries caused damage to Respondent’s reputation and will certainly result in monetary loss.

**Conclusion on Issue III**: Claimant was bound by a duty of confidentiality, breached its duty, and is liable for damages to be assessed at a later stage.

**ARGUMENTS ON MERITS**

**IV. RESPONDENT DID NOT BREACH THE CONTRACT**

63. In an effort to satisfy its customers wanting lower squid prices, Claimant sought to import squid from Danubia, where the squid was cheaper [Req. Arb. §9]. Claimant knew that Danubian squid was often undersized, but it took the risk and ordered it anyway [Req. Arb. §9, Cl. Ex. 10 §4, Cl. Ex. 2]. When contracting for the squid, Claimant failed to specify the
size it required, taking advantage of less expensive ‘unsized’ squid [Cl. Ex. 3, 4]. Claimant was very experienced in the fisheries trade and knew that unsized squid was cheaper than sized squid [PO3 §27]. As a result of its poor business judgement in contracting for unsized squid, some of the delivered squid was too small for Claimant’s alleged purposes and Claimant now seeks to shift the blame for this consequence to Respondent. The Tribunal is reminded that Claimant bears the burden of proving non-conformity [ICC No. 6653; OLG Austria 1/7/1994; France Case 2; BG Switz. 7/7/2004; Chicago Prime Packers].

64. Respondent delivered squid in accordance with all contractual terms in compliance with Art. 35(1) CISG [A]. In addition, the delivered squid conformed to the model or in any event the sample held out under Art. 35(2)(c) CISG [B]. Further, Claimant did not make known the particular purpose for the squid and may thus not rely on Art. 35(2)(b) CISG [C]. In addition, Respondent is exempted from liability under Art. 35(3) CISG and because Claimant assumed the risk of receiving unsized squid [D].

A. RESPONDENT DELIVERED SQUID IN ACCORDANCE WITH THE CONTRACT UNDER ART. 35(1) CISG

65. Art. 35(1) CISG requires the seller to deliver goods that are of the ‘quantity, quality, and description required by the contract’. The contract is the primary basis to assess the conformity of the goods [Honnold 224; Secretariat Commentary 33 §2]. In the present case, the size of the squid was never specified in the contract [i] and the terms ‘2007/2008 catch’ and ‘as per sample’, interpreted under Arts. 8 and 9 CISG, indicate that the parties contracted for unsized squid [ii].

(i) Size was never specified in the contract but ‘2007/2008 catch’ was
66. Claimant alleges that it contracted for squid sized between 100-150 grams [Cl. Mem. §98]. However, it failed to state this alleged requirement explicitly in its order form [Cl. Mem. §89, 98, 116, 117; Cl. Ex. 3]. Furthermore, Claimant argues that the year of the catch was ‘irrelevant’ [Cl. Mem. §117]. Yet, the sales confirmation explicitly stated ‘2007/2008 catch’ and Claimant accepted the sales confirmation form in its entirety [Cl. Ex. 4; R. Ex. 2]. Thus, Claimant cannot argue that a term that was never mentioned prevails over an explicit contractual term.

(ii) Under Arts. 8 and 9 CISG, the terms ‘as per sample’ and ‘2007/2008 catch’ indicate that the parties contracted for unsized squid
67. Art. 8 CISG provides that any statement or other conduct made by a party must be interpreted with respect to the parties’ intent if the other party knew or could not have been unaware of the intent [Bernstein/Lookofsky 42; ICC 8324; OLG Austria 23/1/2006]. If this provision is inapplicable, according to Art. 8(2) CISG, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the
same kind as the other party would have had under the circumstances \([\textit{OG Austria } 20/04/1997; \textit{OLG Ger. } 30/08/2000]\). To establish both intent and understanding of the reasonable person, Art. 8(3) CISG provides that all the circumstances of the case must be taken into account, including pre-contractual negotiations \([\textit{Schlechtriem (2010) } 146]\).

68. Claimant argues that its intent has always been to use the squid only for bait and that the squid should therefore be of the 100-150 gram size \([\textit{Cl. Mem. } \S 100, 103]\). Respondent accepts that Claimant mentioned in the pre-contractual correspondence that the size of 100-150 grams was of particular importance to its customers \([\textit{Cl. Ex. 2}]\). However, when the sample was shown to Claimant, not only did it not mention that size mattered \([\textit{PO3 } \S 25}\), it also did not mention that the squid would be used for bait and thereby indirectly indicate that size mattered \([\textit{PO3 } \S 25}\). There was never any mention that the size of the sample was more important than the catch. Although Claimant subsequently informed Respondent in writing that it was ‘particularly pleased’ with the size of the sample \([\textit{Cl. Ex. 2}]\), such a vague communication does not indicate by any means that size was essential to the contract and that it should prevail. Moreover, Claimant agreed to the explicit term ‘2007/2008 catch’, and thereby further confirmed Respondent’s understanding that the contract was for unsized squid \([\textit{Cl. Ex. 4}; \textit{R. Ex. 2}]\).

69. With unsized squid, the catch is the only attribute giving any indication of the squid size. Since shipment was in June, Claimant, an experienced fish trader \([\textit{PO3 } \S 27}\), could not have been unaware of the fact that part of the squid contracted for must have been caught in the early season, and would thus be too small to be used as bait \([\textit{Cl. Ex. 10 } \S 9, \textit{PO3 } \S 27}\). Therefore, neither Respondent nor a reasonable person in the same circumstances could have been aware that Claimant’s wanted sized squid suitable for bait.

70. In the event of uncertainty, common trade usages prevail over basic rules of Art. 8 CISG \([\textit{Schlechtriem (2010) } 162]\). The role of trade usages is regulated in Art. 9(2) CISG, which requires that commonly known trade terms and usages that are regularly observed by comparable traders must be taken into account when interpreting the contract \([\textit{Schlechtriem (2010) } 190; \textit{OG Austria } 15/10/1998; \textit{OG Switz. } 21/12/1992]\), but do not have to be in the contract itself \([\textit{OLG Austria } 9/11/1995]\). When applying this rule, trade practices in the particular case must be taken into account \([\textit{Schlechtriem (2010) } 187-188]\). In the squid trade, unsized squid is commonly ordered by a reference only to the year of the catch \([\textit{Defence } \S 12]\). According to this common trade usage in the fish trade, the year of the catch indicates unsized squid. The fact that the sample was marked ‘2007 catch’ \([\textit{Defence } \S 10]\) indicated that the Parties were contracting for unsized squid. Moreover, the explicit contractual term ‘2007/2008 catch’ further confirms this interpretation.
71. Although Claimant alleges that its need for squid for bait can be ascertained by its name ‘Trawler Supply’ [Cl. Mem. §106], it has to be noted that Claimant sells fish products for both bait and human consumption. In fact, Claimant considers itself to have these two ‘principal’ lines of business [Cl. Ex. 10 §2]. Accordingly there is no way that Respondent could have known, simply by Claimant’s name, that Claimant wanted squid for bait.

72. As the size was never mentioned in the contract and all the relevant circumstances indicate that the Parties contracted for unsized squid, the Tribunal should come to the conclusion that Respondent delivered squid as required by the contract and has thereby complied with by Art. 35(1) CISG.

B. **RESPONDENT DELIVERED SQUID CONFORMING TO THE MODEL AND IN ANY EVENT TO THE SAMPLE HELD OUT UNDER ART. 35(2)(C) CISG**

73. Art. 35(2)(c) CISG provides that the goods do not conform to the contract unless they possess the qualities of goods which the seller has held out to the buyer as a sample or model. The squid shown to Claimant was technically a model and Respondent delivered squid conforming to it [i]. Should the Tribunal find the squid was held out as a sample, Respondent was not required to deliver squid that possessed every quality of the sample, but only the qualities indicated [ii]. Further, if the Tribunal finds that the qualities of the sample are in conflict with the terms of the contract, the parties intended the catch quality to be determinative [iii]. For these reasons, any duties under Art. 35(2)(c) CISG were fulfilled.

(i) **The squid shown to Claimant was legally a model and Respondent delivered squid conforming to it**

74. The terms ‘model’ and ‘sample’ have different legal meanings. A ‘model’ is something that is provided to the buyer so that he can examine the goods when they are not yet available [Schlechtriem (2010) 583]. In contrast, a sample is taken from the actual goods to be delivered [Schlechtriem (2010) 583]. In the case at hand, the sales confirmation form specified squid from the 2007/2008 catch [Cl. Ex. 4]. The squid shown by Mr. Weeg was of 2007 catch, and at the time of showing the 2008 squid was not yet available [Defence §10, 14]. Therefore, although the Parties colloquially referred to the squid shown by Mr. Weeg as a ‘sample’ it was legally a ‘model’.

75. A model may represent all or only some features of the goods to be provided [Schlechtriem (2010) 583]. In the case of a model, the contract needs to be interpreted in order to establish which qualities of the goods are illustrated by the model and have therefore been contractually agreed upon [Schlechtriem (2010) 583]. In the present case, as established above [supra 67, 68], the contract was for unsized squid of the ‘2007/2008 catch’. In contrast, the model squid was unsized squid of ‘2007 catch’. It follows that the size between 100-150
grams of the majority of the model squid was merely incidental and was not a quality illustrated by the model. Thus the model illustrated unsized squid and Respondent delivered squid in conformity with that model.

(ii) Should the Tribunal find that a sample was provided, Respondent was not required to deliver squid that possessed all of the qualities of the sample

76. In general, if a seller holds out goods to the buyer as a sample, he is bound to deliver goods which possess all of the qualities of that sample, provided that the parties did not agree otherwise [LG Ger. 27/2/2002; Skin Care Case, Delchi Carrier v. Roteres, Netherlands 14/10/1999; Di Matteo]. However, if the seller provided a sample and indicated that only certain characteristics are possessed by the goods, he will only be bound to deliver goods that conform to those indicated qualities [Bianca/Bonell 275; Secretariat Commentary Art. 35; Poikela 46]. Claimant asserts that Respondent was obliged to deliver squid complying with all of the qualities of the sample squid [Cl. Mem. §115]. In particular, it argues that when Respondent provided the sample it did not indicate that the delivered squid would deviate in any way from the sample [Cl. Mem. §116]. However, Respondent inserted the ‘2007/2008 catch’ term in the sales confirmation form [Cl. Ex. 4] and Claimant has never objected to it [Defence §15; Cl. Ex. 2]. If Claimant was not satisfied with receiving 2007/2008 catch, the time to object was on receipt of the sales confirmation.

77. Claimant is an experienced firm in fish trade and knows the seasons for harvesting the different species of squid and that squid grows larger as the season progresses [PO3 §27]. Moreover, since the shipment was made in June and the season began in April, it was clear to both Parties that the 2008 catch part of the shipment would necessarily be sourced during the first three months of the season meaning it would be young and small [Defence §15]. Thus, the insertion of the ‘2007/2008 catch’ term was an explicit indication to Claimant that the delivered squid would be smaller and that the size of the 2007 sample may not be complied with.

(iii) Even if the Tribunal finds that the qualities of the sample are in conflict with the terms of the contract, the parties intended the catch to be determinative

78. The sample carton was marked ‘illex danubecus 2007’ [Defence §10] and the sales confirmation classified the squid to be of the 2007/2008 catch [Cl. Ex. 4]. If the Tribunal finds that this gives rise to a conflict between the terms of the contract and the sample, the contract must be interpreted on the facts of the individual case in order to establish which qualities the parties intended to take priority [Schlechtriem (2005) 423; OG Austria 11/3/1999; Art. 8 CISG]. While Claimant accepts this principle [Cl. Mem. §117], it applies the principle falsely. It alleges that it should, as a rule, be assumed that qualities provided for under Art. 35(2)(c) CISG take priority because in that respect, the buyer places no reliance on the seller’s skill and judgment
79. In the present case, the situation is markedly different as the Tribunal must decide whether the explicit contractual description or the conflicting term implied by the sample prevails. In fact, in accordance with the principle of party autonomy, the parties can change or clarify some attributes of the sample goods by specific agreement [Leisinger 22]. If this is the case, any agreement on features that deviate from the provided sample become binding under Art. 35(1) CISG [Leisinger 22]. In the instant case, the parties subsequently agreed on the explicit term that the delivered squid would of the ‘2007/2008 catch’. This specific agreement deviated from the ‘2007 catch’ quality of the sample. Thus the ‘2007/2008 catch’ clause became binding under Art. 35(1) CISG and prevails over the term previously implied by the sample.

C. CLAIMANT DID NOT MAKE THE PARTICULAR PURPOSE FOR THE SQUID KNOWN, THUS CLAIMANT MAY NOT RELY ON ART. 35(2)(B) CISG

80. Art. 35(2)(b) CISG provides that if the particular purpose for the goods is made known to the seller, then the goods should be fit for this purpose, except where the buyer did not rely or it was unreasonable for him to rely on the seller’s skill and judgement. First, the particular purpose for the squid alleged by Claimant was not made known to Respondent [i]. Secondly, Claimant did not rely on Respondent’s skill and judgement [ii].

(i) Claimant failed to make its particular purpose made known

81. In order for a buyer to rely on Art. 35(2)(b) CISG, the buyer must make the particular purpose known to the seller. To determine whether the particular purpose was made known, the tribunal must ask whether a reasonable person would have understood the particular purpose under the circumstances [Schlechtriem (2010) 581]. When certain goods have several uses and even if both contracting parties are in the trade concerned, the buyer has to indicate which of the several possible usages it intends to make the particular purpose. Otherwise, the buyer cannot rely on non-conformity [NAI No. 2319].

82. In the present case, although Claimant initially inquired by email for a quotation for squid for bait, several subsequent circumstances indicate that Claimant’s particular purpose was human consumption. First, it failed to mention the purpose for bait when given the sample by Mr. Weeg. [Cl. Ex. 1]. Second, not only did Claimant fail to mention its particular purpose in the contract [Cl. Ex. 3, 4], it explicitly stated ‘certified fit for human consumption’ [Cl. Ex. 3]. It is notable that, under the heading ‘Quality’, the Parties described the squid in meticulous detail. The contract stated ‘as per sample already received, Grade A, iced on board and blast.
frozen immediately upon discharge, fit for human consumption’. Nowhere was bait mentioned in this detailed description. Therefore, in light of the terms ‘certified fit for human consumption’ and the fact that Claimant sold fish products for human consumption [Req. Arb. §2, 4], a reasonable person could have interpreted this to mean that Claimant wanted squid for human consumption and not for bait. Accordingly, Claimant cannot rely on non-conformity with the alleged particular purpose for bait.

(ii) As Claimant has equal skill and judgement in the fish trade, it could not have relied upon Respondent’s skill and judgment

83. An additional requirement for Art. 35(2)(b) is that the buyer could have relied on the seller’s skill and judgement in choosing appropriate goods [Art. 35(2)(b) CISG]. Where both parties have equal professional skill and judgement, or when the seller is more knowledgeable, such reliance will be nullified [Magnus Art. 35 §22; Henschel 236; Schlechtriem (2010) §23; OLG Ger. 11/09/1998]. There can be no reliance if the buyer has the same ability to estimate the usability of the goods as the seller, namely Art. 35(2)(b) CISG only applies where the seller is more knowledgeable than the buyer [LG Ger. 12/12/2006]. In the present case, both Claimant and Respondent were experts in the buying and selling of fish products [PO3 §26, 27]. Therefore, the Tribunal should find that Claimant could not have relied on Respondent’s skill and judgement.

D. EVEN IF TRIBUNAL FINDS THAT RESPONDENT IS IN BREACH, IT IS EXCLUDED FROM LIABILITY

84. Should the Tribunal find that Respondent breached either the particular purpose or the sample provisions, Respondent is excluded from liability under Art. 35(3) CISG [i]. Additionally, Claimant assumed the risk of this transaction, and should therefore be held accountable for its poor business decision [ii].

(i) Respondent is exempted from liability under Art. 35(3) CISG

85. A seller is not liable for a lack of conformity if the buyer knew or could not have been unaware of the lack of conformity [-Art. 35(3) CISG]. This provision relates to the sample and particular purpose arguments, as found in Art. 35(2)(a)-(c) [Schlechtriem (2010) 586]. As shown in paragraphs [supra 67, 74], Claimant could not have been unaware for a number of enumerated reasons that the squid contracted for would not be of the 100-150 gram size range. Most importantly, in light of a June shipment, Claimant was aware that some of the squid contracted for was caught in the early season, and therefore would be smaller [Cl. Ex. 10 §9, PO3 §27]. Thus, Claimant could not have been unaware of the lack of conformity of the squid with its alleged particular purpose or its interpretation of the sample.

(ii) Respondent is excluded from liability because Claimant assumed the risk of receiving unsized squid

86. ‘A party that foresees or discerns a circumstance and fails to protect itself accordingly
through agreement bears the risk of such circumstance’ [Schlechtriem (2010) 163]. As shown in paragraphs [supra 67, 74], Claimant foresaw the risk that the Danubian squid might be undersized. Claimant failed to protect itself by including a term specifying the desired size in the purchase order [Cl. Ex. 3]. Claimant further failed to protect itself by not objecting to the 2007/2008 catch term on the sales confirmation which implied that the squid would be unsized [Cl. Ex. 4]. Thus, Claimant assumed the risk that the squid would be unsized and Respondent is excluded from liability.

**Conclusion on Issue IV:** Respondent is not liable for breach of contract under Art. 35 CISG.

**V. UNDER ARTS. 38 AND 39 CISG, RESPONDENT IS NOT LIABLE FOR THE ALLEGED LACK OF CONFORMITY AS CLAIMANT FAILED TO PROPERLY AND TIMELY INSPECT AND NOTIFY RESPONDENT**

87. Claimant received the squid it ordered on 1 July 2008 but waited until 29 July 2008 to send a vague message merely writing that the squid was ‘hardly usable as bait’ [Cl. Ex. 10 §9, Cl. Ex. 5]. Respondent was only fully informed of the true nature of the alleged non-conformity on 16 August 2008, 46 days after the squid was delivered [Cl. Ex. 7]. By this time, the long-liners had already left port and there was nothing Respondent could do to remedy any potential non-conformity.

88. Arts. 38 and 39 CISG impose a duty upon a buyer to examine delivered goods within as short a period of time as is reasonable and to then notify seller if any deformities exist [Schlechtriem (2010) 608, 624]. The main principle behind these articles is to facilitate a seller’s ability to cure any alleged defects [Versicherungen v. Atlarex; LG Ger. 29/07/1998]. The Tribunal should reject Claimant’s arguments because it prevented the main principle of Arts. 38 and 39 CISG to be fulfilled. First, Claimant failed to conduct a proper inspection of the delivered squid [A]. Even if Claimant is found to have properly conducted an inspection, it failed to specifically and timely notify Respondent of the alleged non-conformity [B]. After Claimant’s unreasonable delay and attempted notification, Respondent fulfilled its duty to ask for more clarification [C]. Respondent was unaware of any alleged non-conformities in the delivered squid and therefore Art. 40 CISG is inapplicable [D].

**A. CLAIMANT FAILED TO CONDUCT A PROPER INSPECTION OF THE DELIVERED SQUID**

89. Claimant alleges that it conducted a reasonable inspection even though it failed to discover the defects upon its inspection [Cl. Mem. §121]. It bases this assertion on the fact that the squid was frozen and arrived in large quantities [Cl. Mem. §124, 125]. However, such
characteristics are considered typical in the frozen fish business [PO3 §27]. It would be unreasonable to allow Claimant to rely on these characteristics in order to avoid its duty to inspect especially since Claimant admitted that it was in a rush to send squid to the long-liners [Cl. Ex. 10 §10]. This rush was the real reason for Claimant’s failure to conduct a proper inspection.

90. Art. 38 CISG requires that the buyer conduct a reasonable inspection of the goods upon delivery and such inspection should be thorough and professional [UNCITRAL Digest Art. 38; OG Austria 27/08/1999]. Where goods are delivered in large quantities, the buyer may choose to take a representative sample of the lot to meet the thorough and professional inspection requirements [Cl. Mem. §125; Schlechtriem (2010) 613; Bianca/Bonell 297; OG Switz; 24/03/1998]. Where the buyer is experienced in the trade, he must carry out a thorough and expert examination [Schlechtriem (2010) 612; OLG 11/03/1998]. While the squid arrived in a large total quantity, the squid was packaged in twelve containers and in small boxes that were clearly labelled either 2007 or 2008 catch [Cl. Ex. 10 §10; PO3 §32]. Claimant only inspected the first two containers and failed to inspect the last ten to arrive [PO3 §31]. It only conducted an inspection of the boxes marked 2007 catch and failed to inspect any box marked 2008 even though the contract stated that the squid would be from both 2007 and 2008 catches [PO3 §32; Cl. Ex. 4]. In contrast, TGT Laboratories took a sample of 120 cartons, ten from each container [Cl. Ex. §8]. Respondent submits that this is representative sampling. In contrast, Claimant’s haphazard and selective inspection was neither thorough, expert, nor representative of the entire lot.

91. Thus, Claimant cannot argue that it conducted a reasonable examination by taking the required representative sampling. Further, Claimant misinterprets the requirement as it argues that it would have reasonably discovered the defect only by sampling a large percentage of the squid [Cl. Mem. §125]. Conversely, it would have been possible to take a representative sampling of the entire delivery of squid by merely inspecting a few boxes from each container just as TGT Laboratories did.

92. Claimant further argues that the alleged non-conformity is hidden and therefore it could not have discovered the defect upon a reasonable examination [Cl. Mem. §127]. However, a hidden defect is one that can only be detected upon the product’s use [Elastic Clothing Case]. In the instant case, the size of the squid was not hidden as it would have been easily discernable if a reasonable examination had occurred. The process of defrosting and weighing any box marked 2008 would have revealed the alleged non-conformity, just as the same process revealed that the 2007 marked boxes were compliant with the desired attributes [Cl. Ex. 10 §10; Cl. Ex. 8]. Accordingly, Claimant’s allegation that the alleged non-conformity
was hidden is unfounded.

**B. EVEN IF CLAIMANT IS FOUND TO HAVE PROPERLY CONDUCTED AN INSPECTION, IT FAILED TO SPECIFICALLY AND TIMELY NOTIFY RESPONDENT OF THE ALLEGED NON-CONFORMITY**

93. The buyer loses the right to rely on a lack of conformity if it fails to give timely and specific notice [Art. 39 CISG]. If the buyer fails to conduct a reasonable inspection and there is a lack of conformity that could have been discovered, the notice period in Art. 39 CISG commences from the time the buyer ought to have discovered the defect [Advisory Council Opinion 2]. The notice must be prompt and specific [Schlechtriem (2010) 624, 630]. Claimant waited too long to give notice and such notice was not specific [i]. While Claimant sent an e-mail specifying the alleged non-conformity, its reply arrived too late to constitute proper notification [ii].

(i) **Claimant waited too long to give notice and such notice was not specific**

94. Notice must be sufficiently timely and specific to allow the seller to cure defects and particularly to prepare for the delivery of substitute goods [Schlechtriem (2010) 624-625]. Prompt notice is required, especially where a buyer chooses to reject the goods [Schlechtriem (2010) 630]. At the earliest, Claimant sent an e-mail purporting to notify Respondent 28 days after delivery, two weeks after the long-liners had left port and inspected the squid themselves [Cl. Ex. 5]. Thus, Claimant rejected the squid 28 days after delivery, but failed to provide prompt notice [Req. Arb. §27]. As a result of this delay, it was impossible to provide any replacement squid because the long-liners had already used other bait or purchased squid from other sources [Cl. Ex. 10 §12]. Therefore, Claimant breached the underlying principle of Art. 39 CISG that a seller should have the opportunity to cure alleged defects.

95. A professional buyer is obliged to notify the seller using sophisticated terms such as size and appearance of the goods rather than stating that the goods are merely inferior [OLG Ger. 3/06/1998]. However, Claimant, a professional fish dealer, argues that the words ‘hardly usable as bait’ were sufficient to put Respondent on notice of the specificity of the defect [Cl. Mem. §135]. These words did not put Respondent on notice of any defects because this phrase does not identify Claimant’s position that the squid was too small but merely speaks to an alleged ‘inferior’ quality. The use of such a vague phrase left Respondent second-guessing Claimant’s meaning and position, contrary to the requirement of specificity.

(ii) **While Claimant sent an e-mail specifying the alleged non-conformity, its reply arrived too late to constitute proper notification**

96. Claimant sent a follow-up e-mail 18 days after its first insufficient e-mail specifying further details of the alleged non-conformity [Cl. Ex. 7, 8]. This was 46 days after it discovered the alleged defect [Cl. Ex. 7]. Although Claimant does not argue that the second communication constituted proper notice, and should the Tribunal consider this issue, the second e-mail was
sent too late to meet the time requirement under Art. 39 CISG. One month is a ‘generous’
period of time for notification [BG Ger. 8/03/1995]. Thus, a period of 46 days is excessive.
Such a delay was unreasonable as it did not allow Respondent to prepare for the delivery of
substitute goods.

C. RESPONDENT FULFILLED ITS DUTY TO ASK FOR CLARIFICATION AFTER THE FIRST VAGUE E-MAIL

97. Claimant further argues that seller has the duty to ask for clarification if notice is insufficient
[Cl. Mem. §137]. While this is true, Respondent fulfilled this duty. It sent a follow up email
requesting more information three days after the first untimely and unspecific e-mail was sent
[Cl. Ex. 6]. Respondent was attempting to do everything in its power to determine what the
problem was and to remedy the situation if possible.

D. RESPONDENT WAS NOT AWARE OF THE SIZE REQUIREMENT AND THEREFORE ART. 40 CISG CANNOT APPLY

98. Claimant argues that Respondent cannot rely upon Arts. 38 and 39 CISG if the non-
conformity relates to facts of which it knew or of which it could not have been unaware [Cl.
Mem. §142]. The main argument presented is that Respondent consciously disregarded
apparent facts that were of evident relevance to the non-conformity [Cl. Mem. §142].
However, as has been proven above, Respondent was not aware that the squid should be of a
certain size to be used solely as bait [supra 82]. In addition to this unsubstantiated allegation,
Claimant argues that Respondent delivered 2008 catch squid which Respondent knew was
too small [Cl. Mem. §144]. It concludes that Respondent should have waited months until the
entire 2008 catch was of appropriate size for Claimant’s alleged use [Cl. Mem. §144].
However, this would have been contrary to the specific contractual requirement that delivery
must be ‘prompt’ found both on the order form and sales confirmation [Cl. Ex. 3, 4].

99. Finally, Claimant arbitrarily alleges that Respondent did not act in good faith by delivering
2008 catch squid [Cl. Mem. §144]. Respondent strongly refutes this allegation because in order
to prove bad faith under the CISG, a more than gross negligence standard is often applied
[Huber/Mullis 164]. This standard was described as ‘a conscious disregard of facts that meet
the eyes and are of evident relevance to the non-conformity’ [Huber/Mullis 165]. Far from
being grossly negligent, Respondent acted in good faith by respecting the explicit contractual
terms and by delivering both 2007 and 2008 catch squid promptly as required by the contract
[Cl. Ex. 4].

Conclusion on Issue V: Claimant failed to properly inspect and notify Respondent of the
alleged non-conformity in breach of Arts. 38 and 39 CISG.
VI. SHOULD THE TRIBUNAL FIND A BREACH OF CONTRACT, NO REMEDY IS AVAILABLE TO CLAIMANT

100. Claimant requests the Tribunal to award it reimbursement of the entire purchase price reduced by the value of the squid sold [Cl. Mem. §175-179]. It further requests damages for loss of profit, preservation costs and costs incurred to sell the residual squid [Cl. Mem. §155]. Even if the Tribunal finds that Respondent breached the contract, Claimant is not entitled to the remedies it has requested. First, Claimant is not entitled to restitution of the purchase price in the requested amount [A]. Further, any damages awarded to Claimant should be reduced as it failed to adequately mitigate the loss [B].

A. CLAIMANT IS NOT ENTITLED TO RESTITUTION OF THE PURCHASE PRICE IN THE REQUESTED AMOUNT

101. Claimant specifically cannot recover the entire purchase price under Art. 50 CISG [i]. In any event, Claimant is not entitled to the entire purchase price under the CISG as there was no fundamental breach [ii].

(i) Claimant cannot recover the entire purchase price under Art. 50 CISG

102. Art. 50 CISG allows the buyer a proportionate reduction of the price calculated by comparing the value of non-conforming goods with the value that conforming goods would have had at the time of delivery [Sivesand 59; Lin; Will 371-372]. Claimant incorrectly applied Art. 50 CISG in two ways. Firstly, the party relying on this provision bears the burden of proving the amount and extent of non-conformity [Lin]. Claimant merely stated that all of the goods were ‘without any value’ due to the fact that goods were not marketable in Claimant’s location [Cl. Mem. §176-177]. However, the delivered squid had resale value. The entire 2007 catch squid could have been sold for bait as it was of the appropriate size for this purpose [Req. Arb. §18; Cl. Ex. 8]. Further, the smaller squid could have been sold for other purposes such as human consumption or at least as fishmeal [Cl. Ex. 8; Cl. Ex. 10 §10].

103. In an effort to support its allegation that the squid was worthless, Claimant relies on the defective coffeemakers case [Cl. Mem. §176; Coffee Maker Case]. In that case, the coffeemakers were found not to be resalable because they could not be resold for any purpose other than to make coffee. As the squid could have been sold for all the above mentioned purposes, Claimant cannot rely on the Coffee Maker Case.

104. In addition, Art. 51 CISG provides that, if only part of the goods delivered is in conformity with the contract, the proportionate reduction in price under Art. 50 CISG applies only in respect to the part of the goods which does not conform. Claimant misunderstood the application of this article and attempted to apply the price reduction to the entire delivery including the 40% of the conforming goods [Cl. Mem. §176, 177]. Even if
the Tribunal decides that 60% of the allegedly non-conforming squid was completely worthless, applying Arts. 50 and 51 CISG, Claimant could request at most a 60% reduction in the purchase price. However, Claimant is asking for $297,000 which is a 93% reduction in the purchase price [Req. Arb. §30; Cl. Mem. §175]. Accordingly, Claimant is not entitled to its requested reduction in purchase price under Art. 50 CISG.

(ii) **Claimant is not entitled to the entire purchase price under any other provision of the CISG as there was no fundamental breach**

105. A request for the full purchase price is a restitutionary remedy [Secretariat Commentary Art. 81]. Under the CISG, restitution requires avoidance of the contract [Art. 81 CISG]. To avoid the contract, a party must prove a fundamental breach [Art. 49(1)(a) CISG]. Additionally, in situations where only a part of the goods are nonconforming, as in this case, the ‘buyer may declare the contract avoided in its entirety only if the failure to make delivery . . . in conformity with the contract amounts to a fundamental breach’ [Art. 51(2) CISG emphasis added]. In order to show a fundamental breach, the breach must result ‘in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract’ [Art. 25 CISG]. Art. 25 CISG must be interpreted in a narrow manner and when a tribunal is in doubt, it should find that there was no breach [DiMatteo et al 412]. In the present case, Claimant did not even address fundamental breach. Even if it had done so, the breach in the present case did not amount to a fundamental breach.

106. A fundamental breach requires that the detriment must be serious [Schlechtriem (2005) 282; Peacock; Hong Kong Fir Case; Graffi 339-340; Huber/Mullis 33]. Thus, a buyer is not entitled to avoid the contract unless the goods are worthless and the goods cannot be used for any other purpose [Giustoma v. Perfect Circle; OLG Ger. 17/9/1991; Schlechtriem (2005) 282; BGH Ger. 03/04/1996]. In the present case, Claimant submits that it is entitled to nearly the full purchase price because the delivered squid was ‘without any value’. [Cl. Mem. §176-177]. However, as demonstrated above [supra 102] the goods did have a resale value. Therefore, if the Tribunal finds that there was a breach of contract, this breach did not amount to a fundamental breach. Accordingly, Claimant is not entitled to restitution in the form of the purchase price.

**B. ANY DAMAGES POTENTIALLY AWARDED SHOULD BE REDUCED AS CLAIMANT FAILED TO MITIGATE LOSS**

107. Claimant asserts that it took reasonable steps to mitigate loss [Cl. Mem. §164-174]. In particular, it submits that it acted reasonably by selling 10% of the residual squid in foreign markets, by preserving the goods, and by ultimately disposing of the squid [Cl. Mem. §172-174]. In order for an aggrieved party to be entitled to full damages it should take reasonable measures in the circumstances to mitigate loss [Opie §3; Zeller §II]. This should be evaluated
from the perspective of a reasonable person acting in good faith [Buschhöns 25; Schlechtriem (2010) 1043; Poehl/Petz 23; OG Austria 6/2/1996]. In order to adequately mitigate loss, practical and positive steps must be taken by the aggrieved party [Russia 6/6/2000; HG Switz 03/12/2002]. Thus, the aggrieved party cannot wait passively for the loss to increase and then sue for damages [Riznik §1.3; ICC No. 8817]. In the present case, Claimant failed to make a reasonable effort sell the 2007 catch squid that was suitable for bait (i). It also failed to make a reasonable effort to sell the squid in foreign markets (ii). Further, Claimant made no efforts to sell the squid for any purpose other than for bait (iii).

(i) Claimant failed to make a reasonable effort to sell for bait the cartons labelled 2007 catch which was of the appropriate size for bait.

108. Claimant submits that the long-liners became aware that it was dealing in undersized squid and it could therefore not resell the portion of the squid that was suitable for bait [Cl. Mem. §173]. However, the laboratory test showed that 94% of the 2007 catch squid was within the size range of 100-150 grams [Cl. Ex. 8], which is ideal for bait. Two percent were between 90-100 grams and four percent were between 150-180 grams [Cl. Ex. 8]. Claimant confirms that some product below the 100-150 range is acceptable as is some product as high as 200 grams [Req. Arb. §14]. Accordingly the 2007 catch was suitable for bait. By simply sending a copy of the laboratory test to its customers, Claimant could have shown that the 2007 catch squid was suitable for bait. By doing this, Claimant would have easily overcome its alleged loss of reputation. Therefore, it cannot rely on this as a ground for not selling the 2007 catch squid.

109. The underlying idea of Art. 77 CISG is that a party cannot recover for damages or losses that could reasonably have been avoided [Schlechtriem (2005) 787; Secretariat Commentary Art. 73; Enderlein/Maskow 309; Hang Tat v. Rizhao]. Had Claimant sold the 2007 catch squid, it would not have incurred any costs for preservation or disposal of this portion of the squid. Because Claimant could have reasonably avoided these mitigation costs, it is not entitled to requests them as damages.

(ii) Claimant should have made reasonable efforts to sell the squid in foreign markets

110. Although Claimant asserts that the market was small and saturated and thus it was unable to sell the squid domestically [Cl. Ex. 10], Claimant should have made reasonably efforts to sell it in the international market. Claimant contacted Reliable Trading House, which sold only 10% of the delivered squid [Cl. Ex. 10]. Claimant made no further attempts to resell the residual squid [Cl. Ex. 10]. A party is required to make efforts to mitigate when the costs for such efforts are in proportion to the benefit of the cure [OGH Austria 14/01/2002]. In the present case, the mitigation costs to sell the squid would have been a fraction of the potential
benefit from such sale [Req. Arb. §30]. Therefore, Claimant should have contacted a further intermediary reseller. A failure to sell goods in foreign markets may amount to a failure to mitigate [OLG Ger. 02/09/1996]. As Claimant did not make reasonable efforts to sell in foreign markets, the Tribunal should find that Claimant failed to undertake reasonable mitigation.

(iii) Claimant failed to sell the squid for any other purpose than for bait
111. A party trying to sell the goods should assess whether the goods can be sold for purposes other than those contracted for [French Case]. One of the possible commercial uses of squid is fishmeal [Cl. Ex. 10 §10]. Claimant made no effort whatsoever to sell the squid for this purpose. If Claimant had attempted to do so, it would have made some profits and thereby reduced damages.

112. Moreover, Claimant increased the losses by leaving the squid to deteriorate in its warehouse. As a result it paid $6000 for the disposal of the squid [Req. Arb. §30]. As these costs could have been avoided by selling the squid for fishmeal, the requested damages should be further reduced by this amount.

Conclusion on Issue VI: Claimant cannot recover the purchase price it requested and claimed damages should be reduced because it failed to mitigate as required under Art. 77 CISG.

REQUEST FOR RELIEF

Respondent respectfully requests the Tribunal to:

- Order Claimant to respect the confidentiality of the arbitral proceedings and the award;
- Find that the Tribunal has not been constituted in accordance with the arbitration agreement.

In the alternative, Respondent respectfully requests the Tribunal to:

- Find that Claimant is liable for any damage that can later be demonstrated resulting from its breach of the confidentiality of the proceedings;
- Find that the shipment of squid to Claimant was in conformity with the contract;
- Find that Claimant neither conducted an adequate examination of delivered squid nor properly notified Respondent and thus Claimant has lost its right to rely upon the alleged lack of conformity of the goods; and
- Award Respondent costs in the arbitration.