

EIGHTEENTH ANNUAL

WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

15 April to 21 April 2011

Vienna, Austria

MEMORANDUM FOR RESPONDENT

ON BEHALF OF RESPONDENT

Equatoriana Fishing Ltd.

30 Seaview Terrace

Oceanside

Equatoriana

AGAINST CLAIMANT

Mediterraneo Trawler Supply AS

1 Harbour View Street

Capital City

Mediterraneo



MASARYK UNIVERSITY

FACULTY OF LAW

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Table of Abbreviations

AC	Appellate Court
ACICA	Australian Centre for International Commercial Arbitration
ACICA Rules	Arbitration Rules of the Australian Centre for International Commercial Arbitration
AG	Amtsgericht
AP	Audiencia Provincial
Art.	Article / Articles
BG	Bundesgericht
BGH	Bundesgerichtshof
B/L	Bill of Lading
CAM	Chamber of Arbitration of Milan
CAM Rules 2004	Arbitration Rules of the Chamber of Arbitration of Milan effective from 1 January 2004 to 31 December 2009
CAM Rules 2010	Arbitration Rules of the Chamber of Arbitration of Milan effective since 1 January 2010
CE x	Claimant's Exhibit Number x
CISG	United Nations Convention on Contracts for the International Sales of Goods, Vienna, 1980
CMCC	Copenhagen Maritime Commercial Court
DC	District Court
DIS	The German Institution of Arbitration

DIS Rules	Arbitration Rules of the German Institution of Arbitration
e.g.	exemplum gratia, for example
ed.	Edition
et al.	and others
FN	Footnote
German Rules	Arbitration Rules of the Chamber of Arbitration of Milan effective since 1 January 2010, German Version
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
i.e.	id est, that is
ICC	International Chamber of Commerce
ILA	International Law Association
Inc.	Incorporated
KLRCA	Kuala Lumpur Regional Centre for Arbitration
KLRCA Rules	Arbitration Rules of Kuala Lumpur Regional Centre for Arbitration
L/C	Letter of Credit
LG	Landgericht
Ltd.	Limited
MC	Memorandum for Claimant, Queen Mary

MR	Memorandum for Respondent
NYC	Convention on the recognition and enforcement of foreign arbitral awards 1958
OG	Obergericht
OLG	Oberlandesgericht
par.	Paragraph
PO x	Procedural Order Number x
RE x	Respondent's Exhibit Number x
RA	Request for Arbitration
RB	Rechtbank
S.A.	Société Anonyme
SCC	Stockholm Chamber of Commerce
SD	Statement of Defense
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of Singapore International Arbitration Centre
UML	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States of America
v.	Versus

Table of Authorities

Treaties, Conventions, Laws

Abbreviation	Citation	Cited in
<i>CISG</i>	United Nations Convention on Contracts for the International Sale of Goods, 1980.	<i>Passim</i>
<i>English Arbitration Act</i>	Arbitration Act 1996, England.	<i>par. 62</i>
<i>NYC</i>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.	<i>par. 24, 28</i>
<i>UML</i>	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006.	<i>Passim</i>

Rules

Abbreviation	Citation	Cited in
<i>ACICA Rules</i>	Arbitration Rules of Australian Centre for International Commercial Arbitration.	<i>par. 50</i>
<i>CAM Rules 2004</i>	Arbitration Rules of the Chamber of Arbitration of Milan effective from 1 January 2004 to 31 December 2009.	<i>par. 2, 3</i>
<i>CAM Rules 2010</i>	Arbitration Rules of the Chamber of Arbitration of Milan effective since 1 January 2010.	<i>Passim</i>
<i>HKIAC Rules</i>	Hong Kong International Arbitration Centre Administered Arbitration Rules effective since 1 September 2008.	<i>par. 50</i>
<i>IBA Guidelines</i>	IBA Guidelines on Conflicts of Interest in International Arbitration, 2004.	<i>par. 36, 37</i>

<i>ICC Rules</i>	Rules of Arbitration of the International Chamber of Commerce effective since 1 January 1998. <i>par. 11, 26</i>
<i>LCIA Rules</i>	Rules of the London Court of International Arbitration effective since 1 January 1998. <i>par. 26</i>
<i>SIAC Rules</i>	Arbitration Rules of the Singapore International Arbitration Centre, 4th edition effective since 1 July 2010. <i>par. 50</i>
WIPO Rules	World Intellectual Property Organization Arbitration Rules effective since effective since 1 October 2002. <i>par. 50</i>

Commentaries

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<i>Born</i>	GARY, G. B. <i>International Commercial Arbitration</i> . Volume II. Kluwer Law International, 2009.	<i>par. 78, 79</i>
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<i>Derains & Schwartz</i>	DERAINS, Y., SCHWARTZ, E. <i>A Guide to the ICC Rules of Arbitration</i> . 2 nd ed. The Hague : Kluwer Law International, 2005.	<i>par. 11</i>
<i>Ferrari, Flechtner, Brand</i>	FERRARI, F., FLETCHNER, H., BRAND, R.A. (eds), <i>The Draft UNCITRAL Digest and Beyond: Cases</i> ,	<i>par. 142</i>

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- Fouchard* FOUCHARD, P., GAILLARD, E., GOLDMAN, B., *par. 13, 33, 47*
SAVAGE, J. *International Commercial Arbitration*. 1st ed.
The Hague : Kluwer Law International, 1999.
- Leisinger* LEISINGER, B.K., *Fundamental Breach Considering par. 134, 135,*
Non-Conformity of the Goods, Sellier: München (2007).
- Mistelis* MISTELIS, L.A. *Confidentiality and Third Party par. 47*
Participation: UPS v. Canada and Methanex Corporation v.
United States. Arbitration International. Vol. 21, No. 2.
2005.
- Paulsson* PAULSSON, J. RAWDING, N. *The Trouble With par. 62*
Confidentiality. Arbitration International. Vol. 11, No.
3. LCIA 1995.
- Poudret* POUDRET, J.-F., BESSON S. *Comparative Law of par. 11*
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- Redfern* REDFERN, A. *Law and practice of international par. 27*
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Ltd., 2004.
- Rubino-Sammartano* RUBINO-SAMMARTANO, M. *International par. 13*
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- Schlechtriem & Schwenzler 2010* SCHLECHTRIEM, P., SSCHWENZER, I. *par. 89, 93, 123,*
Commentary on the UN Convention on the International Sale 136, 150
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(2010).

Thoma	THOMA, I. <i>Confidentiality in English Arbitration Law: Myths and Realities About Its Legal Nature</i> . Journal of International Arbitration 25(3). 2008.	par. 62
Tweeddale	TWEEDDALE, A., TWEEDDALE, K. <i>Arbitration of Commercial Disputes: International and English Law and Practice</i> . 1 st ed. Oxford University Press : Oxford 2005.	par. 18
Articles		
Abbreviation	Citation	Cited in
CISG-AC Opinion No.5.	CISG Advisory Council Opinion No. 5, <i>The buyer's right to avoid the contract in case of non-conforming goods or documents</i> , http://www.cisgac.com/UserFiles/File/CISG%20AC%20Opinion%205%20English.pdf	par. 136
Digest Art. 40	2008 UNCITRAL <i>Digest of case law on the United Nations Convention on the International Sale of Goods</i> : Digest of Article 40 case law.	par. 119
Fry, Greenberg	FRY, J., GREENBERG, S. <i>The Arbitral Tribunal Applications of Articles 7 – 12 of the ICC Rules in Recent Cases</i> , Published in: ICC International Bulletin Vol. 20 No. 2, 2009.	par. 40
ILA Conference 2010 on Confidentiality	DE LY, F., DI BROZOLO, L., FRIEDMAN, M. <i>THE HAGUE CONFERENCE (2010), International commercial arbitration: Confidentiality in International Commercial Arbitration</i> . International Law Association.	par. 48, 52, 57
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 Law, American Arbitration Association 2 (2002).
- SiSU Information* SiSU INFORMATION STRUCTURING par. 138
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<http://www.jus.uio.no>.
- Whitesell* WHITESELL, M. A., *Independence in ICC Arbitration: ICC Court Practice concerning Appointment, Confirmation, Challenge and Replacement of Arbitrators*. Published in :
 Special Supplement 2007 Independence of Arbitrators, 2008.

Squid Commerce

Abbreviation	Citation	Cited in
<i>Iberconsa</i>	One of Europe's leading companies in catching frozen seafood. Iberconsa S.A. http://www.iberconsa.es/ingles/index.asp .	<i>par. 110</i>
<i>Seafreeze</i>	Largest producer of seafrozen fish and squid to longline fleets on the U.S. East Coast. Seafreeze Ltd. http://www.seafreezeltd.com/ .	<i>par. 110</i>
<i>Foodmarket</i>	Online marketplace FoodMarketExchange.com http://www.foodmarketexchange.com .	<i>par. 110</i>

Cases

Abbreviation	Citation	Cited in
<i>Ali Shipping Case</i>	Ali Shipping Corp. v. Shipyard Trogir. [1991] 1 W.L.R. 314 (C.A.), UK.	<i>par. 66</i>
<i>AC Pontevedra</i> 19/12/2007	AC Pontevedra 19 December 2007, Spain.	<i>par. 124, 127</i>
<i>AG Riedlingen</i> 21/10/1994	AG Riedlingen 21 October 1994, Germany.	<i>par. 130</i>
<i>AP Barcelona</i> 12/9/2001	AP Barcelona 12 September 2001, Spain.	<i>par. 128</i>
<i>BGH Germany</i> 8/3/1995	Bundesgerichtshof, "Musels case", No. VIII ZR 159/94, 8 March 1995, Germany.	<i>par. 138</i>
<i>BGH Germany</i> 3/4/1996	Bundesgerichtshof, "Cobalt sulphate case", No. VIII ZR 51/95, 3 April 1996, Germany.	<i>par. 133, 136</i>
<i>BGH Germany</i> 3/11/1999	BGH, 3 November 1999, Germany.	<i>par. 123</i>

<i>Bleustein case</i>	Bleustein et autres v. Socié'té 'True North & Socié'té' FCB International, Rev. Arb. no. 1, 189 (2003) Paris Commercial Court.	<i>par. 47, 71</i>
<i>CMCC Denmark</i> <i>31/1/2002</i>	CMC Copenhagen 31 January 2002, Denmark.	<i>par. 110, 124</i>
<i>Cour d'appel de Colmar</i> <i>24/10/2000</i>	Cour d'appel de Colmar 24 October 2000, France.	<i>par. 123</i>
<i>DC Locarno Campagna</i> <i>27/4/1992</i>	DC Locarno Campagna 27 April 1992, Switzerland.	<i>par. 113, 115</i>
<i>Dolling-Baker Case</i>	Dolling-Baker v. Merrett & Another, 1 WLR 1205, 1990, UK.	<i>par. 62</i>
<i>Gas del Estado v. Ecofisa</i>	Gas del Estado v. Ecofisa and E.T.P.M., Cour d'Appel de Paris, 11 February 1988, France.	<i>par. 16</i>
<i>Emmott Case</i>	Emmott v. Michael Wilson & Partners. [2008] EWCA (Civ) 184 (C.A.). UK.	<i>par. 66</i>
<i>Encyclopaedia Universalis v. Encyclopaedia Britannica Inc</i>	Encyclopaedia Universalis v. Encyclopaedia Britannica Inc, U.S. Court of Appeals 2nd Circuit 04-0288-CV No., 31 March 2005, USA.	<i>par. 24</i>
<i>Hassneh Insurance Case</i>	Hassneh Insurance Co and Others v. Steuart J Mew. [1993] 2 Lloyd's Rep 243, 246.UK.	<i>par. 66</i>
<i>LG Frankfurt</i> <i>16/9/1991</i>	Landgericht Frankfurt, 16 September 1991, Germany.	<i>par. 142</i>
<i>Magellan v. Salzgitter</i>	Magellan International Corporation v. Salzgitter Handel GmbH. U.S. District Court, N.D. of Illinois.	<i>par. 86</i>

7 December 1999. USA.

<i>New Zealand mussels case</i>	Supreme Court, 8 March 1995, Germany.	<i>par. 101</i>
OG <i>Austria</i> 15/10/1998	OG Austria 15 October 1998, Austria.	<i>par. 128</i>
OG <i>Austria</i> 27/8/1999	OG Austria 27 August 1999, Austria.	<i>par. 107, 123, 125</i>
OG <i>Austria</i> 14/1/2002	OG Austria 14 January 2002, Austria.	<i>par. 128</i>
OG <i>Karlsruhe</i> 25/6/1996	OG Karlsruhe 25 June 1996, Germany.	<i>par. 113</i>
OG <i>Linz</i> 1/6/2005	OG Linz 1 June 2005, Austria.	<i>par. 128</i>
OG <i>Luzern</i> 8/1/1997	OG Luzern 8 January 1997, Switzerland.	<i>par. 108, 115</i>
OLG <i>Bamberg</i> 13/1/1999	Oberlandesgericht Bamberg, 13 January 1999, Germany.	<i>par. 142</i>
OLG <i>Dusseldorf</i> 8/1/1993	OLG Dusseldorf 8 January 1993, Germany.	<i>par. 128</i>
OLG <i>Koblenz</i> 11/9/1998	OLG Koblenz 11 September 1998, Germany.	<i>par. 130</i>
OLG <i>München</i> 2/3/1994	Oberlandesgericht München, 2 March 1994, Germany.	<i>par. 147</i>
OLG <i>Thüringer</i> 26/5/1998	OLG Thüringer 26 May 1998, Germany.	<i>par. 123</i>

RB <i>Roermond</i> 19/12/1991	RB Roermond 19 December 1991, Netherlands. <i>par. 124</i>
RB <i>Zwolle</i> 5/3/1997	RB Zwolle 5 March 1997, Netherlands. <i>par. 125, 127</i>
<i>Rederi v. Termarea</i>	Rederi Aktiebolaget Sally v S.r.l.. Termarea, Corte di Appelo, Florence, 13 April 1978, Italy. <i>par. 22, 24</i>
<i>Russell v. Russell</i> <i>SCC 5/6/1998</i>	Russell v. Russell (1880) 14 Ch D. 471 at 474. Stockholm Chamber of Commerce, 5 June 1998, Sweden. <i>par. 49</i> <i>par. 119</i>
<i>Skin care products case</i>	Helsinki Court of Appeal, 30 June 1998. Finland. <i>par. 102</i>
<i>SBG Switzerland</i> 28/10/1998	Schweizerisches Bundesgericht, "Meat case", No. 4C.179/1998/odi, 28 October 1998, Switzerland. <i>par. 136</i>

Arbitral Awards

Abbreviation	Citation	Cited in
<i>ICC Case No. 4695</i>	ICC Court of Arbitration, Award No. 4695, France.	<i>par. 26</i>
<i>ICC No. 9887</i>	ICC Court of Arbitration, Award No. 9887, France.	<i>par. 142, 143</i>

Statement of Facts

- RESPONDENT** Equatoriana Fishing Ltd. (hereafter as “**Respondent**”) organized under the laws of Equatoriana, owns a fishing fleet and catches and purchases squid of the species *illex danubecus*, which he sells for both bait and human consumption.
- CLAIMANT** Trawler Supply SA (hereafter as “**Claimant**”) organized under the laws of Mediterraneo, sells supplies including the sale of bait to the long-line fisheries and produces pelagic, wet salted and dry salted fish for human consumption.
- 14 APR 2008** Claimant enquired for suppliers of squid.
- 17 MAY 2008** Mr. Weeg presented to Claimant a sample of squid from 2007 catch which Respondent supplied to another firm in Mediterraneo.
- 29 MAY 2008** Claimant was satisfied with the sample and sent a purchase order for 200 MT of "*illex danubecus*". However, he did not provide for particular purpose of squid. On the same day, Respondent sent his counteroffer where he added an arbitration clause and a catch specification “2007/2008 Catch”. Claimant in his written reaction did not object to the counteroffer.
- 1 JUL 2008** Squid was delivered to the Capital City of Mediterraneo and subsequently examined by Claimant.
- 29 JUL 2008** Respondent received email letter from Claimant stating that several of his customers were not satisfied with the squid without any further specification of alleged dissatisfaction.
- 3 AUG 2008** Respondent suggested Claimant to have squid inspected by certified agency.
- 16 AUG 2008** Respondent received a report from TGT Laboratories, a certified testing agency, i. a. stating that squid was in excellent condition and fit for human consumption – the characteristics expressly demanded by Claimant.
- 20 MAY 2010** Claimant submitted a Request for Arbitration and appointed Ms Arbitrator 1 as his party-appointed arbitrator.
- 22 MAY 2010** Mr Herbert Schwitz, Claimant’s CEO, in ignorance of the duty of confidentiality stated by the CAM Rules 2010 provided interview to Commercial Fishing Today, a reputable trade newspaper distributed in forty five countries including Equatoriana and Mediterraneo. He disclosed information that on 20 May 2010, Claimant submitted a Request for

Arbitration against Respondent. In prejudicial way he commented the subject matter of arbitration and proclaimed Respondent responsible for his losses.

- 24 MAY 2010** Commercial Fishing Today published prejudicial article based on interview with Mr Schwitz harming Respondent's commercial reputation.
- 25 MAY 2010** Respondent received the Request for Arbitration from the CAM, one day after publication of the interview with Mr Schwitz.
- 24 JUN 2010** Respondent submitted a Statement of Defense and appointed Professor Arbitrator 2 as his party-appointed arbitrator.
- 15 JUL 2010** The co-arbitrators appointed Mr Malcolm Y as a chairman of the Tribunal.
- 19 JUL 2010** Mr Malcolm Y provided a statement in which he assured the Secretariat and the Parties about his independence and impartiality. He also informed about the fact that one of 150 lawyers in the firm had provided an advice to Claimant.
- 26, 27 JUL 2010** Respondent and Claimant expressed their will to have dispute resolved by Mr Malcolm Y despite his disclosure and therefore both Parties waived their right to object to him.
- 2 AUG 2010** The Arbitral Council of the Chamber of Arbitration did not confirm Mr Malcolm Y and invited the co-arbitrators to make an appointment of a substitute for Mr Malcolm Y.
- 13 AUG 2010** The co-arbitrators re-affirmed Mr Malcolm Y as a chairman of the Arbitral Tribunal without stating a substitution for him yet.
- 26 AUG 2010** The Arbitral Council of the CAM did not confirm Mr Malcolm Y as a chairman of the Tribunal and appointed Mr Horace Z as a chairman instead.
- 10 SEP 2010** The Secretariat of the Chamber of Arbitration declared none of the Parties filed any comments concerning Mr Horace Z's independence and confirmed Mr Horace Z as a chairman of the Tribunal.
- 20 SEP 2010** The Tribunal issued Procedural Order No. 1 whereby formal constitution was declared.
- 24 SEP 2010** Respondent submitted an Amendment to the Statement of Defense in which he contested jurisdiction of the Tribunal.

Summary of Arguments

1) The Tribunal should terminate the proceedings as it does not have jurisdiction to hear the dispute

The Parties entered into an arbitration agreement providing for a specific procedure of the constitution of arbitrators which was not complied with during the actual process of constitution. The members of Tribunal thus lack legal empowerment to resolve the dispute. The irregularity was objected in appropriate manner. Even if the Arbitral Council of the CAM could apply its standard rules to constitution of the Tribunal, it unacceptably exceeded the limits of its discretion when non-confirming Mr Malcolm Y despite Parties' will. It also breached its own rules when not providing Parties with the legal option to appoint a substitute for not confirmed first candidate. Respondent concludes that in either case, the present composition of the Tribunal is a ground for setting aside and non-enforcement of the future award, and that the proceedings should be therefore terminated.

2) Claimant breached the duty of confidentiality

Claimant breached the duty of confidentiality as existence of the arbitration must be kept confidential under the CAM Rules 2010 and contrary to the Claimant's allegation, the existence of the arbitration was not in public domain yet. Moreover, Claimant baselessly misconstrues "the legitimate rights exception" and even if the Tribunal finds the contrary, Claimant exceeded its narrow limits. Additionally, Respondent is entitled to claim an interim measure along with damages as both together are an appropriate remedy for Claimant's breach of the duty of confidentiality.

3) Respondent delivered squid in conformity with the contract

Respondent delivered squid in conformity with the contract description. In this respect, squid was specified in contractual terms, described as *"2007/2008 Catch. As per sample already received. Grade A. Iced on board and blast frozen immediately upon discharge. Fit for human consumption."* The size was never part of the contract. Moreover, the sample carton of squid, which was presented to Claimant, represented a run of the catch. That means squid was unsized and so was carton labeled. Claimant as an experienced firm in fish trade must have been aware of the fact that squid is sold either as run of the catch *"unsized"* or in relation to certain size *"sized"*. Accordingly Claimant must have known that 2008 catch, in the time of delivery, could not have been of desired size of 100-150 grams. Finally, as Claimant is also a wholesaler of fish products for food, by adding the requirement *fit for human consumption*, he obviously changed the purpose of delivery.

4) Claimant did not conduct adequate and professional inspection during primary examination and therefore, he did not notify on time

Claimant is obliged to undertake professional and thorough examination especially if he is an experienced person in specific area of trade. Therefore, he is required to discover all obvious defects during primary inspection. His failure to do so results in loss of the right to rely on remedies under the CISG. Moreover, all of Claimant's steps should have been undertaken with regard to the perishable nature of the squid.

5) Claimant is not entitled to the reimbursement of purchase price, price reduction or any other kind of reimbursement

Respondent did not fundamentally breach the sales contract. Claimant is not entitled to exercise the right to avoid the sales contract and moreover, he did not do it properly. Claimant is also not entitled to reduce the purchase price for the goods and gain any other kind of reimbursement from this sales contract. Due to previous deeds, Claimant's claims should be marked as inadmissible.

Arguments on jurisdiction

1. The arbitration proceedings are governed by the CAM Rules 2010 as the rules entered into force before the commencement of the proceedings [I]. The Parties entered into an arbitration agreement providing for a specific procedure of the constitution of arbitrators [II.A] which was not complied with during the actual process of constitution. Therefore, the Tribunal lacks legal empowerment to resolve the dispute [II.B]. The irregularity was objected in an appropriate manner [II.C]. Respondent concludes that the present composition of the Tribunal is a ground for setting aside and non-enforcement of the future award and that the proceedings should be therefore terminated [II.D]. Even if the Arbitration Council of the CAM could apply the CAM Rules 2010 to appointment and confirmation of arbitrators, it exceeded its discretion as it ignored Parties' will to have the dispute presided by Mr Malcolm Y [III.A]. Moreover, the Arbitral Council of the CAM had no legitimate reason for refusing Parties' demand for Mr Malcolm Y [III.B]. Finally, the Arbitral Council of the CAM did not give a proper chance to appoint second candidate as a substitute for unconfirmed Malcolm Y [III.C].

I. The CAM Rules 2010 govern the arbitral proceedings

2. Arbitration agreement between Claimant and Respondent was concluded with the rest of the sales contract in 2008 [MR, *par.* 80] and referred to CAM Rules. At the time of conclusion, the CAM Rules 2004 were in force. These were replaced by CAM Rules 2010 as of 1 January 2010.

3. The former CAM Rules 2004 [*Art.43 CAM Rules 2004*] as well as the current CAM Rules 2010 [*Art. 39 CAM Rules 2010*] state that the most up-to-dated version of rules is to be applied, if the proceedings are commenced after the new version has entered into force. The Request for Arbitration was submitted on 20 May 2010 [*RA*], 5 months after the CAM Rules 2010 entered into force.
4. Moreover, Claimant himself numerously referred to CAM Rules 2010, e.g. to Art. 6 and 9 [*Letter with RA referring clearly to CAM Rules 2010*] or to Art. 8 [*MC, e.g. par. 22, 23, 24, 25*], above all when he submitted the Request for Arbitration in compliance with the CAM Rules 2010. Therefore, Claimant undoubtedly agrees to the CAM Rules 2010 and the Tribunal should apply the CAM Rules 2010 on the proceedings.

II. The Tribunal does not have jurisdiction because it was not constituted in accordance with the Parties' agreement

5. The Parties entered into an arbitration agreement providing for a specific procedure of the constitution of arbitrators [*A*] which was not complied with during the actual process of constitution. Therefore, the Tribunal lacks legal empowerment to resolve the dispute [*B*]. The irregularity was objected in an appropriate manner [*C*]. Finally, Respondent concludes that the present composition of the Tribunal is a ground for setting aside and non-enforcement of the future award and that the proceedings should be therefore terminated [*D*].

A. The Parties agreed on a specific procedure to constitute the Tribunal

6. Art. 1(1) CAM Rules 2010 sets forth, that the rules shall be applied where parties to arbitration explicitly or implicitly provide so. Under Art. 2(1) CAM Rules 2010, the arbitral proceedings shall be governed, among others, by procedural rules agreed upon by parties provided they are consistent with the CAM Rules 2010.
7. In the arbitration clause, the Parties agreed that: “*All disputes arising out of or related to this contract shall be settled by arbitration under the Rules of the Chamber of Arbitration of Milan (the Rules), by three arbitrators.*” [*CE 4*]. The text of the clause reflects the wish of the Parties to have the proceedings administrated by CAM and in accordance with its Rules [*Art. 1(1) CAM Rules 2010*]. But the Parties also agreed that: “*Each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator.*” [*CE 4*].
8. The Tribunal should interpret the arbitration agreement as an expressed derogation from the CAM Rules, as it clearly demonstrates the Parties' will at the time of conclusion of the arbitration agreement, i.e. to set up their own mechanism of appointment of arbitrators. When entering into the arbitration agreement, the Parties deliberately derogated from the model clause. Both the

Parties and the co-arbitrators insisted on appointment of Mr Malcolm Y [*letter by co-arbitrators of 13 August 2010*] and did not comment on the appointment Mr Horace Z [*footnote of the letter by Secretariat of 31 August 2010*]. Claimant neglected to mention these facts in his memorandum [MC] even though the Parties and the co-arbitrators followed the agreed procedure to the letter. This conduct indicates that the Parties never intended to follow the CAM Rules 2010 in this respect but rather relied on the appointment procedure provided for in the arbitration clause.

9. The agreed procedure does not only derogate from the provisions of the CAM Rules 2010 concerning the appointment of arbitrators [*Art. 14 CAM Rules 2010*], but also from the provisions regarding confirmation of arbitrators [*Art. 18(4) CAM Rules 2010*] and substitute appointment performed by the Arbitral Council of the CAM [*Art. 20(3) CAM Rules 2010*]. It would be of no reasonable effect if the Parties agreed only on derogation from the appointment provisions [*Art. 14 CAM Rules 2010*]. The original intent sought by the Parties at the time of conclusion of the arbitration agreement provides for a simple but effective method of Tribunal's constitution. It refers to speedy appointment excluding any undesirable interference of the CAM Arbitral Council. What the Parties aimed for in the agreement was to strengthen their control over the Tribunal's composition. This arrangement can commonly be seen in other arbitrations as well [*Art. 9(1) UAR*].
10. Since the CAM Rules 2010 do not exclude the right of the Parties to derogate from their provisions as long as the derogation is “(...) *consistent with the Rules (...)*” [*Art. 2(1) CAM Rules 2010*], the Arbitral Council was supposed to respect an autonomous role of the parties in regard to constitution of the Tribunal.
11. This specific agreement of the Parties is consistent with the CAM Rules 2010. The consistency is to be interpreted as conforming with the mandatory provisions of the CAM Rules 2010 which secure the most basic principles of arbitration, such as the principle of equal treatment or due process. Therefore, the Parties may agree not only on the issues where the CAM Rules 2010 remain silent but practically on everything unless it conflicts with the mandatory provisions [*Poudret, p. 460, Derains & Schwarzs, p. 224*]. The latter is exactly the case of the Parties' agreement. Removing the confirmation power from the Arbitral Council of the CAM is most certainly not in conflict with any mandatory provision of the CAM Rules 2010. Derogations from the institutional rules concerning constitution of the Tribunal are common in arbitrations conducted under the ICC Rules [*Derains & Schwarzs, p. 142*].
12. The appointment mechanism contained in the arbitration clause was the only applicable rule for constitution of the Tribunal. Moreover, the provisions regarding appointment and confirmation

of arbitrators in part III CAM Rules 2010 should also have remained unexercised while the agreement of the Parties, which is consistent with the CAM Rules 2010, should have prevailed.

B. The constitution of the Tribunal did not comply with the Parties' agreement, therefore the present Tribunal lacks legal empowerment to resolve the dispute

13. In general, if parties to arbitration agree either implicitly or explicitly on special aspects of the procedure and derogate from the provisions of the arbitration rules, the arbitration institution shall apply the said agreement unless the arbitration rules expressly provide otherwise [*Fouchard, p. 464*]. It is because the arbitration rules cannot be treated as a binding offer to the public but rather as information on how the proceedings will be conducted [*Rubino-Sammartano, p. 368*]. Therefore, every agreement of the parties to arbitration ought to be respected by arbitral institutions and tribunals with priority over the arbitration rules.
14. In the present case, however, the Arbitral Council of the CAM completely ignored the specific wish of the Parties to apply different mechanism in regard to constitution of the Tribunal. The manifest disregard to the agreed rules was first shown when the Arbitral Council of the CAM decided not to confirm Mr Malcolm Y as chairman of the Tribunal [*letter by Secretariat of 2 August 2010*]. Ever since, the Arbitral Council of the CAM continued to deprive the Parties of the right to exercise the agreed procedure as it, again, refused to confirm Mr Malcolm Y [*letter by Secretariat of 26 August 2010*] even though prior to the dismissal, the co-arbitrators had insisted on his appointment [*letter by co-arbitrators of 13 August 2010*].
15. While the co-arbitrators attempted to appoint a chairman in accordance with the Parties' arbitration agreement, the Arbitral Council of the CAM interfered, applying Art. 20(3) CAM Rules 2010 in spite of having no legal empowerment for it. This resulted in an appointment [*letter by Secretariat of 26 August 2010*] and subsequent confirmation [*letter by Secretariat of 10 September 2010*] of a different presiding arbitrator than presumed by the mechanism contained in the agreement [*15 July 2010*]. Therefore, as the Arbitral Council of the CAM ignored the Parties' will, the present composition of the Tribunal is a result of continuous breach of the agreed procedure and the party autonomy principle as whole.
16. In general, where the agreed procedure of tribunal's constitution is ignored, and a different one is applied despite the parties' will, such arrangement results in a tribunal lacking the jurisdiction [*Gas del Estado v. Ecofisa*]. It is the parties who, through their agreement, legally empower the arbitrators to resolve the dispute. However, in case the arbitration institution applies different rules to constitution of the tribunal, the arbitrators do not possess the legal connection to the parties, and thus lack the jurisdiction to hear the case.

17. The arbitration agreement of the Parties is the only factor that gives birth to jurisdiction of the Tribunal to hear the case. Mr Horace Z, a person whose appointment was in conflict with the appointment procedure agreed upon by the Parties, is the reason why the Tribunal lacks the jurisdiction.

C. Respondent objected to the constitution of the Tribunal in an appropriate manner

18. When parties wish to contest Tribunals' jurisdiction they may rely on Art. 12 CAM Rules 2010, and plead lack of its jurisdiction in the first brief or at the first hearing following the claim to which it relates. A party objecting to the lack of jurisdiction shall also meet other requirements. First of all, the preceding conduct of the objecting party must comply with the principle *venire contra factum proprium*, i.e. no one may set himself in contradiction to his previous conduct [*Tweeddale*, p. 398]. Secondly, the objection must not be dilatory [*Tweeddale*, p. 694].
19. In the present case, Respondent is not precluded from raising the plea as he relied on Art. 12 CAM Rules 2010, and pleaded the irregularity in constitution of the Tribunal in his very first brief [*ASD*, par. 5, 6, 7] following the circumstances constituting lack of Tribunal's jurisdiction [*letter by Secretariat of 2 August 2010*].
20. Respondent may not be prevented from raising the objection as none of his conduct in the arbitration has so far indicated that CAM Rules 2010 are applicable to the constitution of the Tribunal. It is to be concluded that he has always deemed the arbitration agreement the primary rule relevant for appointment of the arbitrators, and always conducted himself consistently.
21. Claimant points out [*MC*, par. 17] that the Parties must have been informed about the applicability of the CAM Rules 2010 to the constitution of the Tribunal [*letter by co-arbitrators of 13 August 2010*]. Claimant's conclusion is far from being true. In the letter, the co-arbitrators did not refer to any consultations with the Parties. It should be therefore deemed that at the time of sending the letter, the Parties relied on the constitution mechanism contained in the arbitration agreement.
22. Moreover, Claimant presents an argument that the objection is dilatory as there would be no apparent detriment to both Parties if the present Tribunal continued the proceedings since all of the arbitrators were *prima facie* independent, impartial and competent [*MC*, par. 17]. Such argument should be dismissed as well. The mere fact that the disregard to the Parties' agreement occurred, and ultimately led to a different composition of the Tribunal, constitutes lack of the jurisdiction [*Rederi v. Termarea*] notwithstanding whether the arbitrators are biased or not. The swift character of the proceedings will be secured only if the Tribunal accepts the objection. If

the Tribunal does not do so, the arbitral award might be set aside or refused to be enforced [section E], and that will most certainly extend the dispute to an unbearable period of time.

23. The Tribunal should admit Respondent's objection concerning its constitution as he met the requirements set forth under Art. 12 CAM Rules 2010, always conducted in accordance with the arbitration agreement, and pleaded the irregularity in a non-dilatory manner.

D. Since the composition of the Tribunal is not in accordance with the Parties' agreement, the Tribunal faces imminent danger of its award being set aside or unenforced

24. An arbitral award rendered by tribunal whose composition is not in accordance with the parties' agreement will be set aside under Art. 34(2)(a)(iv) UML. The improper composition of the tribunal is a ground for refusal of enforcement under Art. V(1)(d) NYC [*Encyclopaedia Universalis v. Encyclopaedia Britannica*, *Rederi v. Termarea*]. If tribunal finds that it lacks jurisdiction to hear the case, it shall terminate the proceedings under 32(2)(c) UML.
25. The present composition of the Tribunal is not in accordance with the Parties' agreement as the Arbitral Council of the CAM completely ignored the appointing mechanism contained in the agreement. Instead, the same body later appointed and confirmed an arbitrator on its own – Mr Horace Z [letter by Secretariat of 26 August 2010].
26. Claimant argues that the Tribunal may not assert its jurisdiction just because the award will be not enforceable [MC, par. 20] and refers to the principle of “denial of justice”. It is true that when it comes to arbitration it was held that the requirement to comply with the rules of enforcement “is not relevant to the question of jurisdiction” [ICC Case No. 4695]. However, the arbitrators are still obliged to do their best to issue an enforceable arbitral award. The latter requirement is an implied duty arising out of every arbitration agreement and is respected by many arbitral institutions [Platte, Art. 35 ICC Rules, Art. 32.2 LCIA Rules]. Therefore, in situation, where the reason for contesting the enforceability is the same as the reason for challenging tribunal's jurisdiction, just like in the present case, the arbitrators should also take into account the enforceability when considering their own jurisdiction.
27. Furthermore, the Tribunal shall comply with the requirements imposed by the UML, which is the *lex arbitri* for arbitrations held in Danubia. It sets forth that arbitral awards rendered by the tribunal whose composition is not in accordance with the Parties' agreement, may be annulled under Art. 34(2)(a)(iv) UML. This provision grants Respondent a right to contest the arbitral award for a breach of the agreed procedure [Redfern, p. 418] which equals to the breach of the

party autonomy principle. There is no other way for the Tribunal to meet the *lex arbitri* requirement than to assert lack of its jurisdiction.

28. To conclude, if the manifest disregard to the arbitration agreement continues, and the Tribunal in present composition renders an award, Respondent will not hesitate to file an application to annul the award on the ground set forth in Art. 34(2)(a)(iv) UML. Since the composition of the Tribunal is not in accordance with the arbitration agreement, the court will be very likely to set it aside. Additionally, since the ground for non-enforcement under Art. V(1)(d) NYC is given, Respondent will take appropriate measures to seek refusal of enforcement. To avoid these consequences, the Tribunal should assert lack of its jurisdiction and terminate the arbitration proceedings in accordance under Art. 32(2)(c) UML.

III. Even if the CAM Rules 2010 were applicable, CAM exceeded its discretion when refusing to confirm Mr Malcolm Y

29. CAM manifestly ignored the will of Parties to have the dispute presided by Mr Malcolm Y [A]. Moreover, CAM acted arbitrary as it had none legitimate reason for refusing Parties' and co-arbitrators' demand for Mr Malcolm Y as a presiding arbitrator [B]. Finally, CAM did not give a proper chance to appoint second candidate as a substitute for unconfirmed Malcolm Y [C] and thus created the base for the base for setting aside or non-enforcement of final award.

A. CAM ignored clearly manifested will of Parties to have the dispute presided by Mr Malcolm Y

30. Party autonomy is a fundamental right of Parties expressed in Art. 2(1) CAM Rules 2010 and Art. 19 (1) UML: "(...) *the parties are free to decide on procedure to be followed by tribunal (...)*". The parties are free to agree on a procedure of appointing the arbitrator and other subject may interfere only if parties fail to reach such agreement. [Art. 11 (1) UML].
31. Moreover, even after arbitration agreement is concluded, and before arbitration is commenced, the parties are always free to modify their agreement in any way they deem fit, altering number of arbitrators, procedure of appointing etc. [Pryles, p. 3]. Therefore, party autonomy principle is breached when CAM does not respect Parties' expressed intentions. This behavior is simultaneously in a stern contradiction with the attitude of CAM itself, when new CAM Rules grant Parties possibility to derogate even the incompatibility rule [Art. 16 CAM Rules 2010] and allow them to remain absolutely free to jointly adopt the best criteria for their selection [Commentary to CAM Rules 2010].
32. In Letters of Trust [letters by Parties of 26 and 27 July 2010] Parties expressly and unambiguously allowed Mr Malcolm Y to preside in the arbitral proceedings when proclaimed their trust to him,

his impartiality and independence. Moreover, both Parties also waived their right to object Malcolm Y's appointment as a president of the Tribunal.

33. The statements of trust which provided the CAM with clear evidence of Parties' will cannot be understood otherwise than the agreement under Art. 11 (1) UML. Even if there were doubts about the Parties' agreement, the CAM should have looked for Parties true intention that always should prevail over formally declared intention. Such a conduct would be fully in accordance with good faith principle of interpretation [*Fouchard, p. 257*]. As the CAM did not demand any closer clarifications, it had to act in favor of Parties' intention.
34. It may be argued that CAM may have pursued protection of its own reputation [*MC par. 7*] by securing its awards to be enforceable. Nevertheless CAM is not entitled to prefer its own interest over the interest of the Parties. If CAM disagrees with clients' intention, the only thing it is allowed to do is to refuse the administration of the proceedings, which is a standard practice [*Bishop, p. 17*].
35. To conclude, even though Parties did not create a special procedure to constitute a tribunal, they clearly decided to use their right and modified aspects of appointing a presiding arbitrator. In letters of 26 and 27 of July the Parties clearly expressed their will to have dispute presided by Mr Malcolm Y. CAM refused to conduct in accordance with parties will, therefore violated their rights and constituted tribunal, which was not in accordance with Parties' will and in contrary to UML. This is why final award of present Tribunal will be set aside under Art. 34 (2)(a)(iv) and be unenforceable under Art. 36 (1)(a)(iii) UML and Art. V (1)(c) or (d).

B. CAM acted completely arbitrary, without any legitimate rationale when it did not confirm Malcolm Y as presiding arbitrator

36. CAM did not provide Parties with any binding criterion for an evaluation of arbitrators' impartiality and independence. The only complex and relevant codes of conduct are represented by IBA Rules. Not only the IBA Rules are contained in the official correspondence with appointed arbitrators, but also CAM presented IBA Rules as a standard base for evaluation impartiality and independence in commentaries on their institution and public conferences proclaimed through its representatives. The CAM itself acknowledged the relevance of IBA Guidelines at four conferences held between 2008 and 2009. The Chamber confirmed that the Council had taken into consideration the Guidelines when deciding on the arbitrators' independence. [*Commentary to CAM Rules 2010*].
37. Red List is a part of IBA Guidelines describing situations when it is appropriate (standard) to consider an arbitrator biased. However, the list contains sub-catalogue named "Waivable red list"

providing exceptions to this. Arbitrator may not be challenged by an objection to his impartiality, by parties or courts, when parties waive their right to object his impartiality and independence. The waivable red list contains a situation covering case at hand, "*The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.*" [Art. 2.3.3. IBA Guidelines].

38. Refuting Claimant's contention about Council's arbitrary discretion [MC, par.7] Respondent submits that he Parties relied on consideration of IBA, as admitted by CAM itself on 4 various occasions and reasonably believed that CAM will apply them in this case as well. Thus, when the Parties waived their right to object arbitrators' impartiality, they could have reasonably expected that their mutual decision, which was presented in official letters [letters by Parties of 26 and 27 July], will have a proper impact and Mr. Malcolm Y become a presiding arbitrator.
39. Moreover, Mr. Malcolm Y has not been an active member of the law firm for three years, so his connections to the law firm can be reasonably questioned. Also Mr Malcolm Y had not been in contact with Mr. Samuel Z yet. So there is neither formal nor substantial barrier.
40. To highlight the arbitrarily conduct of CAM, Tribunal may have a look into the standard practice of ICC which deals favorably even more disputable cases. ICC courts accept cases without fear of possible challenge or problematic enforceability when "*The respondent nominated arbitrator indicates that several offices of his law firm had an ongoing attorney-client relations with the respondent*" [Whitesell, III(1)(ii)(Case 3)] or cases when state appointed its own officer as an co-arbitrator whilst Claimant had no objection. Even when he had not waived his right to object [Fry, Greenberg, par. 44].
41. CAM conduct is obviously ignoring good arbitration practice, in contradiction with predictability of its decisions, ignoring Parties' official statements and therefore creating procedural irregularities that could be reason for setting aside a final award or be barrier in its enforcement. Respondent does not wish to have the final award endangered and thus objects to the composition of current Tribunal.

C. CAM breached its own CAM Rules 2010 and did not allow parties to appoint substitute for Mr. Malcolm Y

42. Parties agreed on procedure of appointing arbitrators [CE 4]. In case first candidate has to be replaced, Art. 20 (3) CAM Rules 2010 grants a right to appoint a substitute to the first candidate.
43. This fundamental procedural right of parties was breached. CAM did not only baselessly confirm Mr. Malcolm Y, before Parties presented their substitute candidate, but CAM appointed and confirmed a candidate on its own. Without any chance for the Parties to intervene in the appointment process.

44. Refuting Claimant's contention about Council's right to appoint presiding arbitrator [MC, par. 13] Respondent submits that CAM could not, by mistake or by other motives, consider as second appointment an effort of co-arbitrators to satisfy the Parties will by assuring CAM about Mr Malcolm Y' independence [letters by Ms. Arbitrator 1 of 13 August 2010]. CAM Rules 2010 expressly demand requirement, that substitute has to be another person [Art. 20 (1) CAM rules 2010]. Thus different from person substituted.
45. CAM thus precluded the Parties to have their own candidate appointed in accordance with the rules in the arbitration agreement [CE 4]. Violating the right CAM contradicted doctrine of party autonomy and also the binding rules applicable to arbitration proceedings [CAM Rules 2010]. Therefore, CAM created a legitimate base for setting aside under Art. 34 (2)(a)(iv) UML and be unenforceable under Art. 36 (1)(a)(iii) UML and Art. V (1)(c) or (d) NYC.

Arguments in regard to Claimant's breach of duty of confidentiality

46. Firstly, Claimant breached the duty of confidentiality when he disclosed the existence of the arbitration [IV]. Secondly, contrary to the Claimant's allegation, the existence of the arbitration was not in public domain yet and Claimant was therefore not excused from the duty of confidentiality [V]. Thirdly, Claimant's breach of confidentiality could not be covered by any exception because CAM Rules 2010 do not constitute the exception of protection of legitimate rights in the way Claimant alleges [VI]. Even if the Tribunal finds that "the legitimate rights exception" was applicable, Claimant exceeded its narrow limits [VII]. Finally, Respondent is allowed to claim injunction along with damages as an appropriate remedy [VIII].

IV. Claimant breached the duty of confidentiality as the existence of arbitral proceedings must be kept confidential under the CAM Rules 2010

47. Obligation to keep the existence of the arbitration confidential belongs to regular aspects of duty of confidentiality [Blenstein case, Fouchard, § 1412, Mistelis, p. 25]. Under the Art. 8(1) CAM Rules 2010, Claimant is expressly obliged to "*keep the proceedings confidential*". This provision is shaped very broadly [Commentary to CAM Rules 2010, p. 29] as the CAM considers the confidentiality to be one of the main features of international commercial arbitration [Commentary to CAM Rules 2010, p. 28].
48. Consequently, such a broadly shaped Art. 8(1) CAM Rules 2010 should cover any regular aspect of the duty of confidentiality. As the duty to preserve existence of arbitration confidential is a regular aspect of confidentiality, it must be covered by Art. 8(1) as well. This interpretation of Art. 8(1) CAM of the Rules 2010 has been confirmed by scholars from various jurisdictions [ILA Conference 2010 on Confidentiality, p. 12].

49. Moreover, such an interpretation is in full conformity with the purpose of the duty of confidentiality, which, among others, prevents third parties from being informed of any allegations made between the parties [Lazareff, p. 83]. “Revealing the mere existence of a dispute can be harmful and is liable to have immediate repercussions on the price of a company's shares” [Lazareff, p. 83]. The same has already been expressed very fittingly in a court decision more than 100 years ago: “confidentiality serves to keep quarrels of the parties from the public eyes and to avoid that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful” [Russell v. Russell]. The best way how to keep quarrels off the public is not to inform on the existence of the proceedings whatsoever.
50. Moreover, such an extent of confidentiality is not uncommon in the world of international commercial arbitration. Several arbitration institutions state in their rules explicitly that existence of the proceedings must be kept confidential [Art. 18(2) ACICA Rules, Art. 39(1) HKIAC Rules, Art. 34(3) SIAC Rules, 73(a) WIPO]. Others, similarly to CAM, state duty of confidentiality very generally in order not to exclude any regular aspect of confidentiality by incomplete enumeration of them [e.g. Art. 43(1) DIS Rules, Rule 9 KLRC Rules].
51. Claimant's CEO divulged information on existence of the present arbitration to Commercial Fishing Today on 22 May 2010 [SD, par. 4] and so disregarded the duty of confidentiality. Consequently, on 24 May 2010, an article containing information on commencement of the present arbitration was released by Commercial Fishing Today [RE 1], a newspaper specialized in the commercial fishing trade released in 45 countries [PO 3, par. 17].
52. What is more, Claimant's CEO provided the newspaper with information on cause of Claimant's action and other details, too, and so breached the duty of confidentiality in even more flagrant manner. The obligation to keep the existence of arbitration confidential comes hand in hand with “an obligation to maintain confidential all information concerning the details of the dispute and of the arbitration, such as the identity of the parties [or] the causes of action (...) [ILA Conference 2010 on Confidentiality, p. 13]. The article based on interview with Claimant's CEO informs that “problems arose out of the supply of undersized bait by Equatoriana Fishing” [RE 1] and that “squid provided by Equatoriana Fishing was completely inappropriate and they knew it” [RE 1]. In connection with information on commencement of arbitration, it is apparent from the article what the parties to arbitration are and what the cause of action is. Therefore, Claimant underestimates the seriousness of the situation when he assumes that he might have breached the duty of confidentiality “only” by divulging commencement of the arbitration [MC, par. 27, 42].
53. Claimant basically alleges that the duty of confidentiality stated in Art. 8(1) CAM Rules 2010 does not prevent him from divulgement of information on the existence of arbitration [MC, par.

24 - 28]. However, the only authority supporting this proclamation is Claimant himself. Claimant's sole argument does not even imply such a conclusion. Claimant merely proclaimed that the Art. 8(1) CAM Rules 2010 should be interpreted so that only "[the] information relating to the proceedings" falls under the duty [MC, par. 25]. In spite of the fact that it is just another unsupported proclamation, it also fails to imply Claimant's conclusion, because information that proceedings exist, what the parties to the arbitral proceedings are or what the cause of action is, certainly *relate* to the proceedings. To be complete, Claimant presents enumeration of some elements of confidentiality, expressly admitting that it is an open enumeration using words *for instance* [MC, par. 25]. It is not clear, how such an open, incomplete enumeration could exclude the obligation to keep the existence of the proceedings confidential. As Claimant did not show how he had reached his conclusion or who else, except of Claimant, is of similar opinion, the Tribunal should not take Claimant's argumentation into consideration.

54. To conclude, Claimant was obliged to keep the existence of the proceedings confidential under the Art. 8(1) of CAM Rules 2010. However, he failed to comply with this express provision and violated it manifestly when he divulged the existence of the present arbitration to international newspaper along with further details of the arbitration.

V. Contrary to the Claimant's allegation, existence of the arbitration was not in public domain yet and therefore Claimant is not excused from breach of the duty of confidentiality

55. Claimant tried to excuse himself from breaching the duty of confidentiality by proclamation that the information on existence of the present arbitration was already known to public [MC, heading of par. 28-29]. Consequently, Claimant concluded that he was no more under the obligation to keep it confidential.
56. However, Claimant failed to bring any supporting evidence that the information was already known to public. He solely referred to the fact that *the dispute* was already known to the public, which in itself is undisputed. But Claimant did not present any evidence that the public already knew *the arbitration* was taking place. A dispute is surely not the same as a dispute being resolved in arbitration. Disputes may be solved by number of other means and do not necessarily end up by arbitrations. Such a development is a new, previously unknown piece of information, which is subject to confidentiality. The newspaper article showed that the information was new as it started by words "[t]here is a new development (...)" [RE 1]. For these reasons, Claimant's excuse fails on facts.

57. Moreover, such an excuse fails on law too as Claimant omitted to support his legal opinion by proper argumentation or at least some authority. After all, that is not surprising as the authorities support the opposite point of view [*ILA Conference 2010 on Confidentiality*, p. 13].
58. At the end of the day, Claimant tried to excuse himself from breach of the duty of confidentiality, failing on fact due to lack of evidence as well as failing on law. Therefore, the Tribunal should not take Claimant's defense into account.

VI. Claimant baselessly misconstrues “the legitimate rights exception”

59. The Italian version of the CAM Rules 2010 is decisive [*CAM Rules 2010*, p. 2] and according to its wording, the exception is to be applied only on disclosure of the arbitral award. Respondent is aware that the English version of the CAM Rules 2010 could be confusing as it states that “(...) *shall keep the proceedings and the arbitral award confidential, except in the case it has to be used to protect one's rights.*” [*Art. 8(1) CAM Rules 2010*]. On the other hand, in the light of Italian version the exception is clearly stated in the English version as well as the word “*it*” could be connected only with the arbitral award [*Art. 8(1) CAM Rules 2010*]. Furthermore, the German version expresses the exception even more explicitly stating that “(...) *es sei denn, sie müssen zur Durchsetzung eines ihnen zustehenden Rechts vom Schiedsspruch Gebrauch machen*” [*Art. 8(1) German CAM Rules*]. Based on this, to better match other languages, the English version should be rather drafted as follows “(...) *shall keep the proceedings and the arbitral award confidential, except in the case the award has to be used for its enforcement.*”
60. Respondent is as well aware of other exceptions to the duty of confidentiality stated in the case law of the English courts [*MC*, par. 38]. However, these cases are not applicable to the case at hand for three reasons.
61. Firstly, Claimant did not prove or even show any connection between the mentioned case law and the dispute between Claimant and Respondent. Claimant only indicated that exceptions derived from the case law should apply as they are very similar to the exception stated in the CAM Rules 2010 [*MC*, par. 41]. In the light of the fact mentioned above [*MR*, par. 59], the exception stated in CAM Rules 2010 applies only to the disclosure of arbitral award. None of the examples given by Claimant provides that they could be applied also to the dispute at hand.
62. Secondly, English Arbitration Act does not even include the duty of confidentiality; therefore this duty had to be derived from the case law as an implied term [*Paulsson*, p. 309, *Thoma*, p. 305]. The very nature of the arbitration is that there must be some implied obligation on both parties not to disclose or use for any other purpose any documents, transcripts and notes or witness' evidence

[*Dolling-Baker Case*]. In contrary, CAM Rules 2010 include the express provision covering the duty of confidentiality as well as the exception.

63. Thirdly, Claimant himself admits that in the cases he mentioned circumstances warranted that the duty of confidentiality “(...) *should not apply because confidentiality must be based upon customary or business efficacy*” [MC, par. 40]. In the dispute between Claimant and Respondent, the duty of confidentiality is, on the other hand, expressly stated in the CAM Rules 2010. Case law provided by Claimant is therefore not applicable on the dispute at hand.
64. But even if the English case law is really to be used on the dispute between Claimant and Respondent, the Tribunal would have to take into consideration another English decision. In *Jacobs v. Batavia*, the court held that an express term automatically excludes any possibility of any implied term dealing with the same matter. Therefore, the existence of the express exception in Art. 8(1) CAM Rules 2010 would exclude the implied exceptions anyway.
65. To summarize, confidentiality of the proceedings should be observed as one of the fundamental principles of arbitration. CAM Rules 2010 provide the exception to that duty; but they restrict the exception only for the publication of the arbitral award. Claimant did not follow this condition when he divulged existence of the proceedings, Parties to the arbitration and cause of action. Claimant also fails to show why any other exception should be applied. Therefore, the Tribunal should once again discharge such a baseless defense.

VII. Even if the Tribunal finds that “the legitimate rights exception” was applicable, Claimant exceeded its narrow limits

66. The exception to the duty of confidentiality is not limitless but is construed narrowly [*Sarles, p. 6*] and Claimant should observe its limits. According to the very same case law Claimant himself is trying to apply [MC, par. 38 - 41], the disclosure will be allowed only “*when, and to the extent to which, it is reasonably necessary*” [*Ali Shipping Case, p. 11, Hassneh Insurance Case, Emmott Case*].
67. Claimant himself asserts that the purpose of the disclosure was “*to protect Claimant’s reputation in Mediterraneo*” [MC, par. 36]. In contrary to his intention, he disclosed the information about the arbitration in internationally issued newspaper being sold in 44 other countries [SD, par. 4]. Including Equatoriana [PO 3, par. 17]. While protecting his own reputation, Claimant should have at least tried to avoid “(...) *leaking information about the respondent’s potential liabilities to the respondent’s customers, creditors and contracting partners*” [*Sarles, p. 15*]. In contrary to this, Claimant chose the way which made confidential information on existence of the proceedings available practically to the whole fishing world. Such extent cannot be considered reasonably necessary.

68. Further, wording Claimant used to inform about the commencement of the proceedings could be hardly considered as a reasonably necessary way how to protect his own reputation. “*Apparently the only way to get them to live up to their responsibilities is to force them to do so.*” [RE 1]. By these strong words Claimant indicates that Respondent is an unreliable businessman who he has to be forced to fulfill his obligations. Indication that Claimant has unreliable suppliers can hardly help him to protect his reputation and therefore is in no way reasonably necessary.
69. Additionally, by providing the incomplete information explained only from Claimant’s point of view, he inspired baseless debates and exposed Respondent to the speculations of his customers. “*(...) limited disclosure could be more harmful than no disclosure at all, causing speculation and a pressure from the uninformed general public*” [UNCITRAL Report, p. 4].
70. To conclude, Claimant divulged confidential information not only in Mediterraneo as intended, but to the whole fishing world. Such conduct was not reasonably necessary and therefore Claimant failed to comply with the limited scope of the legitimate rights exception. Therefore, the Arbitral Tribunal should find that Claimant is not excused from the breach of the duty of confidentiality.

VIII. Respondent is entitled to claim an interim measure along with damages as both together are an appropriate remedy for Claimant’s breach confidentiality

71. In case of breach of the duty of confidentiality Respondent is entitled to claim both interim measure as well as damages [Lazareff, p. 89]. Whereas damages aim primarily to compensate the injury already made, purpose of interim measure is to prevent Claimant from further disregard of the duty. In a very similar case to the present one, in the *Bleustein case*, combination of these two remedies had been already adjudicated for breach of the duty of confidentiality. In that case, claimant as well breached the duty of confidentiality on the very beginning of the proceedings when he made public the existence of the arbitral proceedings along with other information on the proceedings.
72. Claimant does not dispute that damages can be asked [MC, par. 44 - 47], but he alleges that Respondent cannot claim interim measure next to damages. He disputes that criteria for issuance of the interim measure under UML are not met in general [MC, par. 44 - 47].
73. It is true that for granting an interim measure, there are requirements under the UML. These are, firstly, possibility of a serious injury caused to Respondent, secondly, the fact that injury is not adequately reparable by damages, thirdly, that such an injury it outweighs the harm potentially caused to Claimant [Art. 17A (1)(a) UML] and finally, that there is a probability of Respondent’s success on the merits [Art. 17A(1)(b) UML]. In the case in hand, Claimant expressly contends

only one of those requirements, alleging that “[t]he harm suffered by Respondent could adequately be reparable by damages” [MC, par. 46]. The other requirements remain undisputed. Whether contested or not, all of these are met in the present case.

74. Firstly, there is a probability of serious injury to Respondent. As already discussed, divulgement of confidential information to the public may give rise to very harmful public discussion which may easily result in an injury to Respondent’s reputation [MR, par. 49]. As Respondent has an outstanding reputation [SD, par. 7], it may be seriously injured if further confidential information will be leaked by Claimant.
75. Once harmed, reputation is to be restored only with great difficulties. Damages may compensate loss of value of shares, however, the outstanding reputation Respondent once had [SD, par. 7] will be difficult to re-achieve and it may take long time. Therefore, further breach of confidentiality is eligible to cause Respondent serious injury of his reputation “*not adequately reparable by damages*” [Art. 17A(1)(a) UML].
76. Even though Respondent asks damages for Claimant’s breach of the duty of confidentiality, the simple fact does not mean that damages will adequately compensate the harm Respondent may suffer. Damages rather remain the only thinkable compensation for lack of more suitable remedies. Therefore, Claimant is wrong when asserting that Respondent’s application for damages suggests that damages are able to adequately repair the injury [MC, par. 45].
77. To satisfy the last requirement under Art. 17A (1)(a) UML, the threat of serious injury to Respondent must outweigh injury potentially caused to Claimant by the interim measure. However, no harm to Claimant comes into consideration because the interim measure only re-affirms the duty of confidentiality which there already is under the Art. 8(1) CAM Rules. Therefore, Respondent submits that his application meets first criterion under 17A(1)(a) UML as there is a threat of a serious injury to his reputation which cannot be adequately compensated by damages and as the interim measure may cause no harm to Claimant.
78. Secondly, Respondent showed in previous sections that the claim for damages against Claimant is in no case unsupported but well-founded. To comply with the requirement of likelihood of success on merits, Respondent does not need to show that he will “*ultimately prevail on its claims in order to obtain interim measure*” [Born, p. 1989] but reasonable probability is fully sufficient. This reasonable probability is given as there is duty of confidentiality between the Parties. This duty Claimant breached when he divulged information on the existence of the proceedings and other information to Commercial Fishing Today. Therefore, Respondent submits that his application meets even the second criterion under 17A(1)(b) UML.

79. Claimant asserts that Respondent must prove urgency as well [MC, par. 44]. However, urgency is not even required under the UML [Born, p. 1986]. Whether required or not, urgency is given in the present case. In fact, Claimant has never showed willingness to obey the duty of confidentiality since publication of the existence of the present proceedings on the very beginning of the arbitration till today. Moreover, the respective article based purely on Claimant's allegations states that "*Commercial Fishing Today will follow closely the progress of this dispute between these two prominent firms*" [RE 1]. This suggests that Commercial Fishing Today will be eager to get new information about the dispute. Combined with Claimant's limitless understanding of the exception of protection of his reputation regardless the Respondent's [MC, par. 31 - 43 and reaction in MR, par. 59 - 70.], it is urgent to prevent Claimant from further disregard of confidentiality. Respondent cannot be forced to wait until final award because the danger of breach of the duty of confidentiality is already threatening. The rule of confidentiality must be urgently re-established, before any other information causing harm to Respondent leaks into public domain. Therefore, Respondent submits that his application meets even the criterion of urgency which is, however, not even demanded under UML.
80. To conclude, in case of breach of duty of confidentiality it is generally admitted to claim an interim measure along with damages. In the case in hand, another disclosure of confidential information is eligible to cause Respondent injury of his reputation not adequately reparable by damages. Moreover, Respondent cannot be sure that Claimant will preserve the duty of confidentiality as he breached it once already and does not seem to provide any guarantee whatsoever that it will not happen again. Furthermore, it is likely that Commercial Fishing Today will try to persuade Claimant to inform on further development as it expressly promised in the respective article. Therefore, the Tribunal should grant Respondent the interim measure independently on damages.

Arguments on merits

81. Contract of sale was validly concluded when Claimant accepted respondent's counteroffer by the issuance of L/C [IX]. Respondent as professional businessman honored his obligations under the contract and delivered squid in conformity with agreement of the Parties [X]. On the other hand, Claimant failed to conduct a proper examination and therefore, he failed to comply with requirements for notification of alleged non-conformity [XI]. Consequently, Claimant is not entitled to the reimbursement of purchase price, price reduction or any other kind of reimbursement [XII]. However, in case the Tribunal will find that there was a breach of contract, Claimant is not entitled to the full compensation of damages, as he did not use the best efforts to mitigate the loss and extra costs [XIII].

IX. Contract of sale was concluded when Claimant accepted Respondent's counteroffer by the issuance of L/C

82. Under the Part II. CISG the contract is based on an offer and an acceptance. A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer [Art. 19(1) CISG]. Quality and quantity of goods and settlement of dispute arrangement are explicitly included as material terms alteration of the offer [Art. 19(3) CISG].
83. Claimant sent to Respondent purchase order which constituted an offer [CE 3]. Respondent does not dispute this fact [MC, par. 50]. Respondent replied to the Claimant's offer with his so called "*Sale Confirmation*" from 29 May 2008 but it included the dispute settlement clause and a catch specification "*2007/2008 Catch*" [CE 4], which materially altered terms of Claimant's offer [Art. 19(3) CISG].
84. However, Claimant asserts that catch specification did not materially change the terms in purchase order [MC, par. 52], and that it is not part of the contract when he considers it as the mere postscript [MC, par. 59]. Respondent cannot agree with this Claimant's assumption. Catch specification is the crucial description of the quality of the ordered goods, all the more when Tribunal takes into consideration the fact that neither offer nor sale confirmation included any size specification. Moreover, Claimant states that "*as per sample*" description is pertaining to the weight and year of the catch [MC, par. 49], which clearly indicates that even Claimant considers catch specification as one of the important terms and thus as material terms modification.
85. Hence, considering the catch specification as the materially altering term together with the dispute settlement clause as another materially altering term, Respondent's reply to the offer constituted the counteroffer.
86. Claimant accepted Respondent's counteroffer when he issued a L/C [RA, par. 16]. Under Art. 18(1) CISG a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was [Art. 8(1) CISG]. Issuance of the L/C is the conduct indicating assent to an offer [Magellan v. Salzgitter; Schlechtriem, Schwenzler 2010, p. 320].
87. The contract between Parties was formed by Respondent's sale confirmation (counteroffer) and Claimant's acceptance by the L/C. Claimant's original offer is not part of the contract, because it was materially altered by Respondent's sale confirmation, which Claimant accepted by issuing the L/C. Claimant never objected to the material changes. Therefore, the stipulated terms of contract

should be derived from the Respondent's sale confirmation and not from the Claimant's purchase order.

X. Respondent honored his obligations and delivered squid in conformity with agreement of the Parties

88. Respondent delivered squid possessing all the characteristics described in the contract. There was no request for any particular size in the contract [A]. Respondent also delivered squid with all the relevant qualities of sample. Size was excluded from these characteristics from the very beginning [B]. Claimant was economically active in selling squid for human consumption. By introducing the requirement "*fit for human consumption*" together with accepting early 2008 squid as a subject of the contract Claimant led Respondent to only conclusion that squid was sold for purpose of human consumption [C]. Anyway, Claimant knew at the time of conclusion of the contract that most of 2008 squid cannot reach size of 100-150 grams. Despite his professional knowledge he agreed with 2008 squid, without raising any objection. As a result, responsibility for smaller size of 2008 squid shifted on him [D].

A. Claimant and Respondent have never agreed on the size of squid

89. Under Art. 35 CISG Respondent fulfills his obligations as a seller if he delivers squid which is of quantity, quality and description required by the contract [Art. 35(1) CISG]. Conformity of the squid must be assessed initially under Art. 35(1) CISG [Schlechtriem & Schwenzler 2010, p. 571], which gives the priority to the agreement of the parties. Objective criteria test in Art. 35(2) CISG applies only in so far as the contract does not contain any, or only insufficient, details of the requirements to be satisfied for the purposes of Art. 35(1) CISG [Schlechtriem & Schwenzler 2010, p. 575].
90. In this respect, squid was specified in contractual terms as "*2007/2008 Catch. As per sample already received. Grade A. Iced on board and blast frozen immediately upon discharge. Fit for human consumption.*" [CE 4]. The requirement for certain size was obviously not expressed in the contract terms [CE 4] as Claimant tries suggesting [MC, par. 54-56].
91. If certain size 100-150 grams was of crucial importance for Claimant's business [RA, par. 18], "*the only viable option*" [MC, par. 57], then Claimant failed to contain this special requirement into the contract. The size requirement does not even appear in Claimant's order form [CE 3], which pre-dates the conclusion of the contract. Moreover, terms "*fit for human consumption*" together with "*2007/2008 Catch*" [CE 4] indicates squid with no relation to size. Even though Claimant was familiar with these terms, he did not object [RE 2].

92. At the end of the day, Respondent delivered squid precisely as Claimant ordered [CE 4], i.e. 2007/2008 catch in excellent condition, fit for human consumption, all confirmed by TGT Report [CE 8]. Respondent fulfilled not some [MC, par. 50], but all of his obligations arising out of the contract.

B. Specific size of the squid is not required under the “fit for human consumption” characteristic and it cannot be derived from the sample held out

93. Under Art. 35(2)(c) CISG squid conforms to the contract as long as it possesses the qualities of squid which Respondent held out to Claimant as a sample. This applies only if the contract does not contain any, or only insufficient, details of the requirements to be satisfied for the purposes of Art. 35(1) CISG [Schlechtriem & Schwenzler 2010, p. 575]. Art. 35(2) CISG can be suspended by the parties will. This is a result of the expression "*except where the parties have agreed otherwise*" [Art. 35(2) CISG].
94. The sample carton of squid possessed number of different characteristics. Squid was land frozen [PO 3, par. 28], packaged in 10 kg cartons [CE 10, par. 7], squid was also in excellent condition [CE 10, par. 7], run of the catch 2007 [SD, par. 10, MC, par. 62]. Three of these characteristics were incorporated into contract [CE 4]. However, Parties specified the year of the catch as 2007/2008 [CE 4]. This was in compliance with Claimant's indication of purpose for human consumption [CE 3].
95. Claimant suggests that sample should be interpreted as well as warranting the size of 100-150 grams [MC, par. 54]. In contrast with other characteristics, the specific size range was never considered part of sample [Art. 35(2)(c) CISG]. Respondent's sales representative Mr. Weeg presented to Claimant the run of the catch 2007 and the carton was so labeled [SD, par 10, 12]. Claimant must have been aware that squid is sold either unsized or in relation to certain size as he is experienced in fishing trade [PO 3, par. 27]. As a result, relying upon certain size would be in sharp contrast with the actual sample shown to Claimant.
96. Claimant must have known that size of the squid relates to the time, when squid is harvested [PO 3, par. 27]. Claimant was aware that carton was labeled *illex danubecus* 2007 [PO 3, par. 32], which every reasonable person in place of Claimant [Art. 8(2) CISG] would understand as run of the catch of whole year 2007. However, Claimant still purported to order squid as per sample without any further size or season specification in the purchase order [CE 3]. Further, the price of the squid also must have been an indicator for conclusion, that squid was sold unsized [CE 4, SD, par. 12]. Claimant did not even ask for particular size in his answer to the counteroffer [RE 2], actually, he had not brought up this issue until his customers informed him [CE 7].

97. When assessing the conformity with characteristics of sample, it is necessary to determine whether the Parties have not agreed otherwise and in that case, contract specification takes priority [Art. 35(2) CISG]. In this respect, it is to say that Claimant ordered squid fit for human consumption [CE 3]. For such purpose squid does not need to fit any specific size range [CE 10, par. 4]. Consequently, by the end of May, Respondent offered to include 2008 catch to the contract [CE 4] and Claimant accepted it. Claimant, as every experienced firm in a fishing trade [PO 3, par. 27] knew that season for harvesting *illex danubecus* begins in April [SD, par. 13] and that squid grows larger as season progresses [PO 3, par. 27]. The 2008 squid could not have been grown enough [CE 8, par. 4] to reach the size suggested by Claimant [MC, par. 54]. By acknowledging squid 2008 [RE 2] as a part of the contract, Claimant confirmed that size is not to be considered relevant characteristic of sample. Claimant cannot reasonably expect delivery of squid within 100-150 grams when he admits that "*the size of the squid is irrevocably linked to its year of catch*" [MC, par. 57].
98. Respondent held out to Claimant unsized sample of squid, run of the catch, and so was the carton labeled. Moreover, Respondent later by requiring squid to be fit for human consumption and by accepting 2008 catch as subject matter of the contract [CE 4] agreed with Claimant on unsized squid. Therefore, conformity of squid cannot be assessed with any relation to size of squid which were in the sample carton.

C. Claimant was active in business of selling squid for human consumption. By requiring squid to be "fit for human consumption", he indicated such state of use

99. Under Art. 35(2)(b) CISG, squid conforms to the contract when it is fit for purpose expressly made known to Respondent.
100. Claimant ordered squid "*fit for human consumption*" [CE 3]. Claimant had a whole sale business in trading with fishing and other seafood for purpose of human consumption [CE 10, par. 2]. Respondent was aware that Claimant sells also squid for long-liners but by adding emphasis on fitness for human consumption, Claimant indicated the order of squid surveyed for his human consumption line of business. However, Claimant contends that fit for human consumption has never changed the purpose of ordered goods and this condition is required in Mediterraneo as public regulation relating to storage [CE 10, par. 8].
101. Generally, it is to say that Respondent cannot be expected to comply with public regulations of Claimant's country [New Zealand Mussels case]. Such regulations may be applied as a result of special conditions known to Respondent. Allegedly, special condition was met in this case, as squid was stored in one storage room with food products [RA, par. 15]. But it is to mention that

Claimant did not inform Respondent about these circumstances. Respondent himself could not have recognized it as Mr Weeg came to business premises only [PO 3, par. 25].

102. It was reasonable to think that food whole-seller is ordering squid for purpose of human consumption. For this purpose, no special size is necessary [CE 10, par. 4]. Respondent added year as of 2008 in his counteroffer and Claimant must have known that it was too early in the harvesting season [PO 3, par. 27]. Smaller size would not cause any problems in case of human consumption but would be unacceptable for baiting purpose. When Claimant acknowledged year 2008 as a subject matter of the contract [RE 2] it was reasonable to think that he intended to buy squid for purpose of human consumption and therefore, size is irrelevant. Claimant refers to early correspondence where he mentions the baiting purpose [CE 1] and size [CE 2], but his latter conduct leading to formation of the contract was in conflict with these. If he wanted to get squid for baiting purposes he failed to express his intent constantly and with sufficient clarity [Skin care products case].
103. Claimant required squid to be fit for human consumption. Indeed, Respondent concluded that Claimant, who is established in re-selling seafood, wanted the squid for the purpose of human consumption. To think otherwise, Claimant did not provide Respondent with necessary information. Claimant's acceptance of 2008 squid only confirmed the human consumption purpose.

D. Anyway, Claimant knew at the time of conclusion of the contract that 2008 squid cannot reach size of 100-150 grams. As a result, responsibility shifted on him

104. Art. 35(3) CISG relieves Respondent from liability to deliver squid conforming with sample [Art. 35(2)(c) CISG] and purpose [Art. 35(2)(a) and (b) CISG], when Claimant knew or could not have been unaware of such a lack in time of conclusion of contract.
105. Claimant must have been aware of possible consequences of having 2008 squid as the subject matter of the contract. Respondent was aware that contracted year of the catch 2008 is irrevocably linked to smaller size of the catch [MC, par. 57]. Despite knowing that it is too early for *illex danubecus* 2008 to reach the size 100-150 grams [PO 3, par. 27], Claimant acknowledged these contract terms [RE 2]. The only reasonable deduction is that at the time of conclusion of the contract Claimant must have known that squid that would be delivered would not be in conformity if it was intended for baiting.

XI. Claimant did not inspect squid properly during primary examination upon delivery and thus his notification of alleged non-conformity was not given on time

106. Claimant did not discover easy recognizable defect during primary inspection on 1 July 2008 as number of samples he inspected was irresponsibly small [A]. Squid is of perishable nature and therefore, short time periods both for examination and consequent notification should be applied [B]. Claimant's notice of lack of conformity was sent only after 28 days from primary inspection which ought to discover concerned non-conformity [C].

A. Claimant did not discover easy recognizable defect during primary inspection on 1 July 2008 as number of samples he inspected was irresponsibly small

107. Timely and professional examination must be taken to retain rights related to timely notification under Art. 39(1) CISG. This obligation should take place particularly when experienced parties are involved [*Kuoppalla FN 98*]. However, this obligation is limited by peculiarities of each individual case [*OG Austria 27/8/1999*]. Claimant argues that he was limited as to the extent of examination because of unreasonable expenses. He alleges that inspection of squid ends in its destruction as it is no more usable for its general or particular purpose as bait [*RA, par. 17, CE 10, par. 10*]. When carton is defrosted for examination, its content is destroyed.
108. Nevertheless, Claimant was not relieved from his obligation to conduct thorough and adequate examination even when the squid was to be destroyed. Where an examination may damage the substance of the goods, the buyer must check at least the weight, appearance, etc. [*OG Luzern 8/1/1997*].
109. Moreover, Claimant negligently failed to comply with his obligation of professional examination as he inspected only 2007 squid, when Parties contracted on delivery of 2007/2008 squid [*CE 4, PO 3, par. 32*]. In addition, both Parties agreed in contract that the cartons should be labeled "*all cartons with English labels*" [*CE 4*]. Moreover, all cartons delivered would be easily distinguished as each carton was labeled either 2007 or 2008 [*PO 3, par. 32*]. This leads, without any doubt, to conclusion that Respondent complied with his obligation to provide proper labeling of goods as agreed on.
110. However, Tribunal may still consider whether the used Latin description [*PO 3, par. 32*] complied with the express agreement of the Parties which required English labeling [*CE 3, CE 4*]. To clear this, in case related to frozen fish delivery it was stated that such Latin designation of fish products is common and considered as a custom in this area of trade. Therefore, the buyer could not deny delivered fish on such basis [*CMCC Denmark 31/1/2002*]. Such custom or practice may

also be applied in case involving squid. It is very common in this business to title squid with its Latin name [see *profiles of Seafreeze, Iberconsa, FoodMarket*] as there is no English equivalent for squid species in use.

111. Once we established the proper examination was possible, we must determine whether such examination was conducted professionally. Claimant could easily recognize the year of catch of the squid simply by following the labeling. Therefore, Claimant ought to have discovered the alleged non-conformity in size, the alleged easy recognizable defect, during primary examination (i) by examining an adequate number of samples (ii). Moreover, he could not rely on Art. 40 CISG (iii).

(i) Claimant ought to have discovered the non-conformity during primary examination

112. Defect in size is to be considered as an obvious defect. In case Claimant undertook thorough examination or at least spot check examination as a minimum requirement for inspection of frozen or numerous deliveries, he would have certainly revealed alleged non-conformities. Claimant submits that he examined goods externally [MC, *par. 76*], however, such statements are contradictory to his Request for Arbitration [RA, *par. 17*] and witness statement of Mr Nills Korre, Claimant's sales representative [CE 10, *par. 10*]. In both of these submissions Claimant admitted he had weighed only 20 cartons and he did not conduct spot check examination as required [Andersen]. Spot check examination is indeed important as the difference in weight of the squid relates to its size. If Claimant had properly examined the squid, at least by spot checking inspection, he would have noticed that the 2008 squid was smaller than the 2007 one.
113. Moreover, Claimant should not be relieved from his obligation by defense that he is not obliged to conduct examination, because goods were to be re-sold and consequently examined by his customers - the long liners [MC, *par. 88, 89*]. In Swiss decision [DC Locarno Campagna 27/4/1992], the court specifically pointed out that a buyer re-selling the goods must carry out his own thorough Art. 38-testing of the goods and not rely on customer complaints for the purpose of Art. 39(1) CISG. In the opinion of the court, as both parties were merchants, the buyer should have examined the goods upon delivery and, since the defect was apparent, it should have given immediate notice of the non-conformity, instead of doing so only following customer complaints [confirmed in German decision OG Karlsruhe 25/6/1996].
114. Additionally, Claimant only inspected cartons labeled "*illex danubecus 2007*" [PO 3, *par. 32*]. However, he must have known that part of the delivery consisted of squid "*illex danubecus 2008*", which was clearly labeled [PO 3, *par. 32*]. Therefore, he should have searched for the squid from year 2008 to comply with his obligation of proper examination. Respondent would certainly tell him where these were, if he only asked. However, Claimant remained silent and negligent.

Therefore, Claimant failed to conduct proper and professional examination of the squid delivered and he could not rely on customer's consequent examination as an excuse to his failure.

(ii) Number of samples taken and inspected by Claimant was not reasonable and adequate under any circumstances

115. In aforementioned decision, Swiss court also stated that samples must be taken even if the examined goods are destroyed in this process or cannot be used afterwards [*DC Locarno Campagna* 27/4/1992]. Indeed, the number of samples to be taken in such cases does not need to be high as in regular circumstances, but can be reduced to a few per thousand of the entire stock [*OG Luzern* 8/1/1997, *Schlechtriemé & Schwenger* 2010, p. 613]. However, Claimant failed even in this buyer-friendly test.
116. Firstly, Claimant reduced the number of samples taken for inspection to one sample per thousands of entire stock. It was precisely 5 cartons of squid per 20.000 cartons of entire delivery [*RA, par 17*]. Therefore, inspection of 1 sample per 4000 is definitely not in range expressed in Swiss decision.
117. Secondly, in this case, the delivery was worth \$320.000 and number of cartons was 20.000 (200 MT, 10 kg per carton). That means that value of each carton was \$16. Claimant defrosted and thoroughly examined 5 cartons. 5 cartons worth \$80. He alleges that examination of such amount is sufficient and he could not be reasonably expected to undertake more costly examination [*MC, par. 79*]. Further, Claimant in order to establish an impression of unreasonably expensive inspection argues that cost of time and facilities in conjunction with value of inspected squid is excessive. However, Claimant is an experienced salesman having 20 years' experience in squid trading business [*PO 3, par. 27, RA, par. 6*]. He certainly must have reckoned in the costs of any examination when negotiated this sales contract. Anything else would be a pure negligence.
118. In Claimant's point of view, expenses for examination of \$80 are sufficient, when delivery was of amount \$320.000. He asserts he could not afford to destroy squid worth more than 0,025% of purchase price by proper inspection. By any criteria, such view is against due business diligence.

(iii) Claimant cannot rely on Article 40 CISG because Respondent delivered squid according to the contract

119. The seller is not entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer [*Art. 40 CISG*]. Application of Art. 40 CISG results in a dramatic weakening of the position of the seller, therefore its application should be restricted to special or even exceptional

circumstances [*Digest Art. 40, SCC 5/6/1998*]. Further, this provision expresses a principle of fair trading which underlines many provisions of the CISG [*Digest Art. 40*].

120. Accordingly, when Respondent is fulfilling his obligation arising out of contract validly concluded by both Parties, it would be unreasonable, unfair and against principles of international commercial practice to assert that such conduct was in bad faith. Claimant's argumentation is illogical when applying such rule to this case. We cannot measure the Respondent's awareness or unawareness of non-conformity when he delivered what was agreed on in the contract. Such an argument is absurd.
121. Respondent delivered squid according to validly concluded contract, with no single term objected by Claimant, Respondent could not have been aware of any non-conformity and therefore, he could not have been held liable even under Art. 40 of the CISG.

XII. Squid is of perishable nature and therefore, short time periods for examination and consequent notification should be applied

122. The time period for examination should be as short as practicable [*Art. 38(1) CISG*]. Although Art. 38(1) CISG does not provide any consequences for its violation; it must be read in conjunction with Art. 39 CISG, since obligation to notify is inclusively tied to discovery of lack of conformity. Art. 39(1) CISG encompasses a fatal sanction for buyer in losing all rights related to the non-conformity of goods. Timely and proper examination is important, particularly as time period for notification relates to conducting such an examination. The interpretation of the length of such period varies depending on inspected goods.
123. Significant factor when considering time frame of inspection is durability of the goods, i.e. whether the goods are perishable or durable [*Schlechtriem & Schwenzger 2010, p. 615*]. The time limits for examinations may vary from days or hours for perishable goods [*OLG Thüringer 26/5/1998, RB Zwolle 5/3/1997*] to weeks, months or even years for durable goods [*BGH Germany 3/11/1999, Cour d'appel de Colmar 24/10/2000*]. When determining the length of the period, the Tribunal may also consider other factors, such as the experience of parties and the size of the buyer's business [*Schlechtriem & Schwenzger 2010, p. 615, OG Austria 27/8/1999*].
124. Squid as an organic product deteriorates very quickly and must be therefore considered as perishable goods. It is irrelevant if squid is delivered frozen or not [*CMCC Denmark 31/1/2002*]. This was confirmed in several cases dealing with frozen seafood [*AC Pontevedra 19/12/2007*], frozen fish [*RB Zwolle 5/3/1997*] or frozen cheese [*RB Roermond 19/12/1991*]. If the squid delivered to Claimant was for human consumption, as a perishable good, it should have been

treated with particular care even though the goods were frozen. That means Claimant should have inspected squid in as short period as practicable.

125. Moreover, when dealing with perishable goods, even if one of the parties is inexperienced and its business is of a small size, the short period for examination should be applied anyway. [*RB Zwolle 5/3/1997, RB Roermond 19/12/1991*]. However, in case at hand Claimant is an experienced wholesaler who is being in business for about 20 years. A reasonable examination, which must be timely and professional, must definitely have been conducted [*OG Austria 27/8/1999*].
126. In case at hand, facts show that Claimant is experienced and well known wholesaler of squid, who obviously did not comply with his obligation to conduct timely and professional examination.

XIII.Claimant's notice of lack of conformity was sent only after 28 days from primary inspection which ought to discover concerned non-conformity

127. The buyer loses the right to rely on lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has or ought to have discovered it [*Art. 39(1) CISG*]. With respect to the notice of non-conformity, the courts held that one of the elements to be taken into account in determining whether the buyer has given timely notice is the perishable nature of the goods. In cases involving perishable goods in frozen state, the period for notice is particularly short, not exceeding 14 days [*AC Pontevedra 19/12/2007, RB Zwolle 5/3/1997, RB Roermond 19/12/1991*].
128. Consequently, Claimant should notify Respondent about the lack of conformity within time period starting on the day, when goods were firstly examined. Such time period should be no longer than 14 days, unless extraordinary circumstances exist [*OG Linz 1/6/2005, OG Austria 14/1/2002, OG Austria 15/10/1998, AP Barcelona 12/9/2001, OLG Dusseldorf 8/1/1993*]. No such extraordinary circumstances appeared in case at hand.
129. Period for giving notice has started on the day of delivery, in case at hand on the day when examination was conducted. In addition, regard must be also given to the remedies the buyer is invoking. If the buyer wishes to retain the goods and merely claim damages or a price reduction, the period can be calculated more generously than if he does not wish to keep the goods [*Kuoppalla FN 183*]. Claimant demanded damages and further he refused to keep the goods. The Tribunal should therefore compress notification period to just a few days.
130. Claimant gave the first notice of non-conformity on 29 July 2008, only after 28 days. Such a long period is unreasonable and far too long [*AG Riedlingen 21/10/1994, OLG Koblenz 11/9/1998*].

Subsequently, Claimant did not send notification on time and, further, he did not provide sufficient description of lack of conformity required under the CISG.

131. As frozen squid belongs to perishable goods, strict time periods should be applied. Therefore, Claimant was obliged to conduct the examination and give notice of non-conformity within a few days after the delivery of squid on 1 July 2008.

XIV. Claimant is not entitled to the reimbursement of purchase price, price reduction or any other kind of reimbursement

132. Firstly, Respondent did not commit fundamental breach of contract [A]. Secondly, Claimant is not allowed to avoid the sales contract. Even if he could avoid the contract, he did not do it properly [B]. Thirdly, Claimant is not entitled to enforce any other remedies because Respondent did not breach the contract at all [C].

A. Respondent did not fundamentally breach the sales contract

133. Breach of contract is fundamental if it results in such detriment to Claimant as substantially to deprive him of what Claimant is entitled to expect under the contract, unless Respondent did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result [*Art. 25 CISG*]. Simple breach of contract does not entitle the aggrieved party to avoid the contract. Avoidance of the contract is a remedy of last resort which should not be granted easily [*BGH Germany 3/4/1996*]. The right to avoid the contract shall be granted reluctantly and one should not be too quick to accept a breach of contract as fundamental [*Magnus, p. 425*].
134. There are several requirements which prove the fundamentality of the breach, such as detriment, foreseeability and entitlement of aggrieved party to expect goods under contract [*Leisinger, p. 38*].
135. The first requirement is a detriment which can be material or immaterial [*Leisinger, p. 38*]. Respondent delivered goods which were pursuant to all terms included in the contract and CISG [*MR, Contract formation, Conformity of the goods*]. Therefore, Claimant did not suffer any kind of detriment.
136. Secondly, to consider Respondent's conduct as a fundamental breach, Claimant should have been substantially deprived of what he is entitled to expect under the contract [*Schlechtriem & Schwenzger 2010, p. 406*]. Whether this is the case it has to be determined from an objective point of view, however, in light of the purpose of the contract which Claimant and Respondent have fixed [*SBG Switzerland 28/10/1998*]. Several courts held a breach to be fundamental when parties had explicitly agreed on certain central features of the goods [*CISG-AC Opinion No.5 par. 4.2*].

Claimant has to prove that the fundamental breach deprived him substantially of what he was entitled to expect under the contract [BGH *Germany* 3/4/1996].

137. Respondent delivered the squid of the quantity, quality and description required by the contract [MR, *Conformity of the goods*]. Parties agreed on squid for human consumption [CE 4]. The proper delivery was confirmed in a report from certified laboratory, the TGT report [CE 8]. In the light of the facts, it is obvious that Claimant's expectations were met.
138. Thirdly, last requirement is foreseeability which is divided to subjective and objective perspective [Art. 25 CISG]. The subjective perspective is constituted if Respondent could have foreseen that the breach of contract would have resulted in a substantial deprivation to Claimant. The objective perspective observes the potential conduct of a reasonable merchant of the same kind in the circumstances of Respondent. These two elements are cumulative [SiSU *Information par. 8.2.3.*]. Foreseeability is dedicated to the time of conclusion of contract [BGH *Germany* 8/3/1995].
139. Respondent could not have foreseen the substantial deprivation of Claimant even in case Respondent breached the contract. Claimant produces fish products for human consumption [RA, *par. 2*]. At the time of the contract conclusion, Respondent could not have assumed that squid fit for human consumption could not have been used as food. Moreover, other fishing fleets than traditional Claimant's customers could use delivered squid. Therefore, Respondent could not foresee that Claimant would not be able to use squid at all.
140. The objective perspective of foreseeability is not also fulfilled. Reasonable merchant in the same position as Respondent ought not to know that Claimant would not be able to use squid at all.
141. To conclude, Respondent did not fundamentally breach the contract under Art. 25 CISG. Respondent delivered goods and did not cause any detriment to Claimant. Even if there was any detriment, Claimant received squid as he ordered it. Respondent and any other reasonable person could not foresee any deprivation on the Claimant's side at the moment of the contract conclusion, because he was able to sell any squid fit for human consumption either as food or to different fishing vessels.

B. Claimant is not entitled to exercise the right to avoid the sales contract and moreover, he did not do it properly

142. Buyer may declare the contract avoided if the seller fundamentally breached the contract [Art. 49(1)a CISG, *Ferrari, Flechtner, Brand, p. 628*]. The CISG does not permit automatic termination of a contract [Magnus, *p. 426*]. If party intends to terminate the contract, it does so by declaration of avoidance [Art. 26 CISG]. The declaration must be effected by notice to the other party [OLG *Bamberg* 13/1/1999, ICC No. 9887]. The notice must express with sufficient clarity that the party

will not be bound by the contract any longer and considers the contract terminated [*LG Frankfurt 16/9/1991*].

143. It is, however, disputed whether the CISG allows also an implicit declaration of avoidance and whether mere conduct can constitute such implicit declaration. Thus far, cases of that kind appear to be rare and there is no constant case law supporting the rule allowing it [*Magnus, p. 427*]. The fundamental breach should be construed narrowly in order to prevent an excessive use of the avoidance of contract [*ICC No. 9887*].
144. Claimant did not exercise his right to avoid the contract under Art. 49 CISG because he was not allowed to do so. Respondent did not commit fundamental breach of contract under Art. 25 CISG [*see part VII.A*].
145. Claimant did not send any declaration of avoidance which is one of the necessary conditions to properly avoid the contract. He only communicated to Respondent that he was not satisfied with the delivered squid and asked Respondent what he should have done with the squid [*CE 7*]. But nothing in this email can be interpreted as an explicit expression of Claimant's will to not be bound by the contract any longer and considered the contract terminated.
146. To sum up, Claimant did not meet any of necessary requirements such as to prove fundamental breach caused by Respondent or sending declaration of avoidance on the ground of it. In the light of it, Claimant could not and, moreover, did not exercise the right to avoid the contract.

C. Claimant is not entitled to reduce the purchase price for the goods and to gain any other kind of reimbursement from this sales contract

147. If the goods do not conform with the contract, buyer may reduce the price in the same proportion as the value that the goods actually delivered had. This fact is assessed at the time of the delivery [*Art. 50 CISG*]. Possible price reduction requires that Claimant expresses his intention to reduce the price [*OLG München 2/3/1994*]. Claimant loses the right to rely on a lack of conformity of the goods if he does not give notice to Respondent specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it [*Art. 39(1) CISG*].
148. Claimant breached his duty to properly examine the goods after delivery. This fact resulted from the insufficient amount of inspected goods [*Art. 38(1) CISG*]. Claimant did not fulfill the condition implied from Art. 39(1) CISG. He did not notice Respondent about the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it [*MR, Inspection*].

149. Claimant did not properly examine the goods after delivery and did not notify Respondent about non-conformity of the goods. Based on this, Claimant is not entitled to reduce the purchase price or any other kind of remedy.

XV. Even if the Tribunal decides that the contract was breached, Claimant is not entitled to the full compensation of damages, as he did not use the best efforts to mitigate the loss and extra costs

150. A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach [*Art. 77 CISG*]. To mitigate the loss, Art. 77 CISG requires the party entitled to compensation to take such reasonable measures that could be expected under the circumstances from a party acting in good faith. The reference point must be the conduct of a prudent person entitled to damages who is in the same position as an aggrieved party [*Schlechtriem & Schwenzger 2010, p. 788*].
151. Claimant did not take such measures to mitigate the loss. Even though squid was delivered for human consumption, it could have been resold for bait, at least partially. The TGT report clearly showed that more than 40 percent of the delivered squid (all “2007 catch” cartons) was in an appropriate size for baiting [*CE 8*]. Despite this, Claimant did not try to sell the cartons with 2007 catch to fishing vessels other than his regular customers. This would have been even more appropriate with regard to the fact that in 2007, the squid catch from the Oceanian Islands was below normal and accordingly prices increased [*RA, par. 9*]. Consequently, there must have been increased demand for squid.
152. Claimant states that he attempted to sell the squid for human consumption in Mediterraneo market as well as outside Mediterraneo [*RA, par. 20*]. In this context it should be stressed out that Claimant did not present any evidence that he tried to sell the squid to be used as fish meal. It is obvious that even with a heavy discount this way of sale would have reduced the damages on the squid and Claimant should have definitely undertaken this step before destroying the squid.
153. To sum up, Claimant failed to prove that he took sufficient measures to mitigate the loss and therefore he should bear the consequences under Art. 77 CISG.

Relief Requested

Respondent respectfully requests the Tribunal

- to find that the present Tribunal has no jurisdiction to hear the dispute as its composition is not in accordance with the Parties’ agreement, or

- to find that the Arbitral Council of the CAM illegally exceeded the limits of its discretion to non-confirm arbitrators, and that the Tribunal therefore has no jurisdiction to hear the case, and
- to terminate the proceedings under Art. 32(2)(c) UML.

In case the Tribunal determines that it has jurisdiction to resolve the dispute, Respondent respectfully requests the Tribunal

- in regard to Claimant’s duty of confidentiality:
 - to find that Claimant breached the duty of confidentiality when he divulged the very confidential information on the existence of the arbitration in newspaper being sold in 45 countries, and therefore is liable for any damage that can later be demonstrated;
 - to render an interim measure ordering Claimant to respect the confidentiality of the arbitral proceedings and the award;
- in regard to merits of the dispute:
 - to find that Respondent delivered squid which was fit for human consumption and thus in conformity with the relevant contract condition ;
 - to find that Claimant did not conduct an adequate and timely examination of squid and that he lost his right to rely upon the alleged lack of conformity of the goods under Art. 39(1) CISG;

Consequently, Respondent respectfully requests the Tribunal to relieve him from any damages and monetary claims including interest and costs of arbitration required by Claimant.

Respectfully submitted on 20 January 2011 by

Ondřej Bartoň

Lukáš Bögöš

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On behalf of Equatoriana Fishing Ltd., Respondent.