EIGHTEENTH ANNUAL

WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

15 April to 21 April 2011

Vienna, Austria

MEMORANDUM FOR CLAIMANT

ON BEHALF OF CLAIMANT

Mediterraneo Trawler Supply SA
1 Harbour View Street
Capital City
Mediterraneo

AGAINST RESPONDENT

Equatoriana Fishing Ltd.
30 Seaview Terrace
Oceanside
Equatoriana

MASARYK UNIVERSITY

FACULTY OF LAW

Table of Contents

Table of Abbreviations

AA 1996	Arbitration Act 1996, England
AAA	American Arbitration Association
AG	Amtsgericht (German Local District Court)
ACICA	Australian Centre for International Commercial Arbitration
ACICA Rules	Arbitration Rules of the Australian Centre for International Commercial Arbitration
AP	Audiencia Provincial (Appelate Court)
Art./Arts.	Article / Articles
ASD	Amendment to the Statement of Defense
BG	Bundesgericht (Swiss Supreme Court)
BGH	Bundesgerichtshof (German Supreme Court)
B/L	Bill of Lading
CAM	Chamber of Arbitration of Milan
CAM Rules 1996	Arbitration Rules of the Chamber of Arbitration of Milan effective from 1 January 1996 to 31 December 2003
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

CEO	Chief Executive Officer
CDC	Codice di Procedura Civile, Italian Code of Civil Procedure
CIETAC	China International Economic & Trade Arbitration Commission
Cir.	Circuit (U.S. Court of Appeals)
CISG	United Nations Convention on Contracts for the International Sales of Goods, Vienna, 1980
CLOUT	Case Law on UNCITRAL Texts
CMCC	Copenhagen Maritime Commercial Court
Codex Alimentarius	Collection of standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards
DIS	German Institution of Arbitration
e.g.	*Exemplum gratia* (for example)
ed.	Edition
et al.	And others
FAO	Food and Agricultural Organization of United Nations
HG	Handelsgericht (Swiss Commercial Court)
i.e.	*Id est* (that is)
ICC	International Chamber of Commerce
Inc.	Incorporated
L/C	Letter of Credit
LCIA	The London Court of International Arbitration

LG	Landesgericht (German Provincial Court)
Ltd.	Limited
MHIA	Material Handling Industry of America
MT	Metric Tons
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
OG	Obergericht (Swiss Appelate Court)
OLG	Oberlandesgericht (German Provincial Court of Appeal)
p.	Page
par.	Paragraph
PECL	Principles of European Contract Law
PO x	Procedural Order Number x
RE x	Respondent's Exhibit Number x
RA	Request for Arbitration
RC	Regional Court
S.A.	Société Anonyme
SBG	Schweizerisches Bundesgericht (Swiss Federal Supreme Court)
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SD	Statement of Defense

SFP	Strengthening Fishery Products Health Conditions in ACP/OCT Countries.
UML	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States of America
v.	Versus
WIPO	World Intellectual Property Organization
WHO	World Health Organization

Table of Authorities

A. Treaties, Conventions, Laws

Cited as	Title	Cited in
AA 1996	Arbitration Act 1996, England.	*par. 76*
CDC	Codice di Procedura Civile, Italian Code of Civil Procedure.	*par. 22*
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980.	*Passim*
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.	*par. 1, 11, 43*
Reform of CDC	Italian legislative decree No. 40 of 2 February 2006 modifying Italian Code of Civil Procedure [Codice di Procedura Civile] which entered into force on 3 March 2006.	*par. 55*
UML	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006.	*Passim*

B. Rules

Cited as	Title	Cited in
ACICA Rules	Arbitration Rules of Australian Centre for International Commercial Arbitration.	*par. 67*
CAM Rules 1996	Arbitration Rules of the Chamber of Arbitration of Milan effective from 1 January 1996 to 31 December 2003.	*par. 50*
CAM Rules 2004	Arbitration Rules of the Chamber of Arbitration of Milan effective from 1 January 2004 to 31 December 2009.	*Passim*

CAM Rules 2010	Arbitration Rules of the Chamber of Arbitration of Milan effective since 1 January 2010.	*Passim*
ICC Rules	Rules of Arbitration of the International Chamber of Commerce effective since 1 January 1998.	*par. 34*
UNCITRAL Recommendation	Recommendation Regarding the Interpretation of Art. II, par. 2, and Art. VII, par. 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session.	*par. 11*

C. Standards

Cited as	Title	Cited in
Australian Department of Agriculture	Australian Department of Agriculture, Fisheries and Forestry. http://www.daff.gov.au/agriculture-food/codex/committees/fish.	*par. 108*
Fish practice	Code of Practice for Fish and Fishery Products (First Edition 2009, UN/WHO). In Codex Allimentarius.	*par. 112*
Foodmarket	Online marketplace FoodMarketExchange.com http://www.foodmarketexchange.com.	*par. 108*
Principles of Food Hygiene	Recommended International Code of Practice General Principles of Food Hygiene, CAC/RCP 1-1969, Rev. 4 (2003). In Codex Allimentarius.	*par. 112*
Frozen Squid Standards	Codex Standard for Quick Frozen Raw Squid. Codex STAN 191 – 1995 (FAO/WHO). In Codex Allimentarius.	*par. 111*

SFP Programme	Strengthening Fishery Products Health Conditions in ACP/OCT Countries. European Commission and the Group of African, Caribbean and Pacific States (ACP) co-financed programme. http://www.sfp-acp.eu/en.	*par. 108*
Standards on Handling	Recommended International Code of Practice for the Processing and Handling of Quick Frozen Foods CAC/RCP 8-1976 (FAO/WHO). In Codex Allimentarius.	*par. 111, 112, 113*
United States department of Agriculture	United States Department of Agriculture. http://www.fsis.usda.gov/codex_alimentarius/Codex_Committee_Fish/index.asp.	*par. 108*
Iberconsa	Iberconsa Grupo Ibérica de Congelados S.A. http://www.iberconsa.es/ingles/links.asp.	*par. 108*

D. Articles, Books, Commentaries

Cited as	Title	Cited in
Andersen	ANDERSEN, C. B. *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG*. Alphen aan den Rijn : Kluwer Law International BV, 2007.	*par. 105, 124*
Berger	BERGER, K. P. *International Economic Arbitration*. 1st ed. Deventer : Kluwer Law and Taxation Publishers, 1993.	*par. 25*
Besson, Poudret	BESSON, S., POUDRET, J.-F. *Comparative Law of International Arbitration*. Sweet & Maxwell, 2007.	*par. 56*
Bishop	BISHOP, D. R. *A Practical Guide for Drafting International Arbitration Clauses*. King & Spalding.	*par. 29*

Born	BORN, B.G. *International commercial arbitration*. Volume II, Kluwer Law International, 2009.	*par. 11, 22, 36*
CISG-AC Opinion No. 2	CISG Advisory Council Opinion No. 2. Examination of the Goods and Notice of Non-conformity. Article 38, 39. http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html.	*par. 124*
CISG-AC Opinion No. 5	CISG Advisory Council Opinion No. 5, The Buyer's Right to Avoid the Contract in Case of Non-conforming Goods or Documents, http://www.cisgac.com/UserFiles/File/CISG%20AC%20Opinion%205%20English.pdf.	*par. 130*
DiMatteo et al.	DIMATTEO, L. A., DHOOGE, L., GREENE, S., MAURER, V., PAGNATTARO, M. *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*. 34 Northwestern Journal of International Law and Business, 2004.	*par. 104*
Digest 38	*2008 UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods*. Digest of Article 38 Case Law, 1998.	*par. 110*
Felemegas	FELEMEGAS, J. *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*. Cambridge University Press, 2007.	*par. 85*
Felemegas2	FELEMEGAS, J. *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*. Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), 2000-2001.	*par. 106*

Ferrari, Flechtner, Brand	FERRARI, F., FLETCHNER, H., BRAND, R. A. (eds). *The Draft UNCITRAL Digest and Beyond: Cases, Analyses and Unresolved Issues in the U.N. Sales Conventio.* Sellier : München, 2004.	*par. 128*
Hague Conference 2010	DE LY, F., DI BROZOLO, L., FRIEDMAN, M. *THE HAGUE CONFERENCE (2010), International commercial arbitration: Confidentiality in International Commercial Arbitration*. International Law Association.	*par. 63*
Hwang, Chung	HWANG, M., CHUNG, K. *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration*. Journal of International Arbitration, 26 (5), Kluwer Law International, 2009.	*par. 72, 76*
Kaufmann-Kohler	KAUFMANN-KOHLER, G., STUCKI, B. *International Arbitration in Switzerland, Handbook for Practicioners.* Kluwer Law International, 2004.	*par. 14*
Keller, Siehr	KELLER, SIEHR. *Kaufrecht.* 3rd ed., 1995.	*par. 81*
Kouris	KOURIS, S. *Confidentiality: Is International Arbitration Loosing One of Its Major Benefits?* Journal of International Arbitration, 22 (2). Kluwer Law International, 2005.	*par. 71*
Kuoppala	KUOPPALA, S. *Examination of the Goods under the CISG and the Finnish Sale of Goods Act.* Faculty of Law of the University of Turku. Private Law Publication Series B:53.	*par. 104*
Leisinger	LEISINGER, B.K. *Fundamental Breach Considering Non-Conformity of the Goods*. Sellier : München, 2007.	*par. 128, 129*
Ligeti	LIGETI, K. *Confidentiality of Awards in International Commercial Arbitration, LL. M. Short Thesis*. Central European University : 2010.	*par. 67*

Lookofsky	LOOKOFSKY, J. *Understanding the CISG: a Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*. Kluwer Law International : Alphen aan den Rijn, 2008.	*par. 117, 123, 124, 141*
Magnus	MAGNUS. *The Remedy of Avoidance of Contract Under CISG – General Remarks and Special Cases. Journal of Law and Commerce*. 2005-06. http://www.uncitral.org/pdf/english/CISG25/Magnus.pdf.	*par. 142*
Moses	MOSES, M. *The Principles and Practice of International Commercial Arbitration*. 1st ed. New York : Cambridge University Press, 2008.	*par. 11*
Noussia	NOUSSIA, K. *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Positron under English, US, German and French Law*. Springer-Verlag Berlin Heidelberg : 2010.	*par. 58*
Poudret	POUDRET, J.-F., BESSON S. *Comparative Law of International Arbitration*. 2nd ed. London : Sweet & Maxwell Ltd., 2007.	*par. 34, 36*
Ritz	RITZ, P. *Privacy and Confidentiality on Parties in Arbitration under Swiss Law.* Journal of International Arbitration, 27 (3). Kluwer Law International, 2010.	*par. 63, 76, 78*
Rubino-Sammartano	RUBINO-SAMMARTANO, M. *International Arbitration Law and Practice*. 2nd ed. The Hague : Kluwer Law International, 2001.	*par. 44, 71*
Schlechtriem, Butler	SCHLECHTRIEM, P., BUTLER. *UN Law on International Sales*. Springer-Verlag Berlin Heidelberg, 2009.	*par. 82*
Schlechtriem, Schwenzer 2005	SCHWENZER, I., SCHLECHTRIEM, P. (Hrsg.). *Commentary on the UN Convention on the*	*par. 95, 96*

	International Sale of Goods (CISG). 2nd ed. Oxford University Press : Oxford 2005.	
Schlechtriem, Schwenzer 2010	SCHLECHTRIEM, P., SCHWENZER, I. *Commentary on the UN Convention on the International Sale of Goods (CISG)*. Oxford University Press : Oxford 2010.	*par. 6, 81, 84, 92, 104, 110, 117, 120, 122, 130, 146*
SiSU Information	*SiSU Information Structuring Universe, Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL.* http://www.jus.uio.no/.	*par. 132*
Tweeddale	TWEEDDALE, A., TWEEDDALE, K. *Arbitration of Commercial Disputes: International and English Law and Practice.* 1st ed. Oxford University Press : Oxford 2005.	*par. 22*
Veneziano	VENEZIANO. *Non Conformity of Goods in International Sales*. International Business Law Journal 39, 1997.	*par. 84*
Wiggers	WIGGERS, W. J. H. *International Commercial Source Materials*. Kluwer Law International, 2007.	*par. 17*

E. Case law

Cited as	Citation	Cited in
Australia		
Esso Case	Esso Australia Resources Limited & Others v. Honorable Sidney James Plowman (The Minister for Energy and Minerals) & Others, Supreme Court of Victoria, Appeal Division, Case No. 7371 of 1992.	*par. 63, 67*

Canada

Schiff v. Naber	Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd. [1996] 28 B.L.R. (2d) 221 (Q.B.).	*par. 10*

Denmark

CMCC Copenhagen 31/1/2002	Copenhagen Maritime Commercial Court, 31 January 2002.	*par. 105*

Hong Kong

William v. Chu Kong	William Company v. Chu Kong Agency Co. Ltd. and Guangzhou Ocean Shipping Company. High Court of Hong Kong 17 February 1993.	*par. 10*

Finland

Skin care products case	Helsinki Court of Appeal, 30 June 1998.	*par. 91*

Germany

BGH Germany 8/3/1995	Bundesgerichtshof, "Mussels case", No. VIII ZR 159/94, 8 March 1995.	*par. 132*
BGH Germany 3/4/1996	Bundesgerichtshof, "Cobalt sulphate case", No. VIII ZR 51/95, 3 April 1996.	*par. 140*
BGH Germany 25/6/1997	Bundesgerichtshof, "Stainless steel wire case", No. VIII ZR 300/96, 25 June 1997.	*par. 141, 142*
LG Aachen 3/4/1990	Landgericht Aachen, 3 April 1990.	*par. 104*
LG Baden-Baden 14/8/1991	Landgericht Baden-Baden, 14 August 1991.	*par. 117*

LG Köln 13/9/2001	LG Köln, No. 2 O 135/01, 13 September 2001.	*par. 142*
AG Mayen 6/9/1994	Amtsgericht Mayen, 6 September 1994.	*par. 126*
OLG Celle 2/9/1998	Oberlandesgericht Celle, 2 September 1998.	*par. 148*
OLG Düsseldorf 10/2/1994	Oberlandesgericht Düsseldorf, 10 February 1994.	*par. 110*
OLG Hamburg, 23/9/ 1982	Oberlandesgericht Hamburg, 23 September 1982.	*par. 49*
OLG Karlsruhe 25/6/1997	Oberlandesgericht Karlsruhe, 25 June 1997.	*par. 124*
OLG Koblenz 21/11/2007	Oberlandesgericht Koblenz, "Shoes case", No. 1 U 486/07, 21 November 2007.	*par. 139*
OLG Köln 14/10/2002	OLG Köln, "Designer clothes case", No. 16 U 77/01, 14 October 2002.	*par. 142*
OLG Stuttgart 12/3/2001	OLG Stuttgart, No. 5 U 261/69, 12 March 2001.	*par. 139*

Netherlands

SC Netherlands 20/2/1998	Supreme Court Netherlands, 20 February 1998.	*par. 123*

Russia

Clout Case 148	Moscow City Court, 25 May 1995.	*par. 44*

Slovakia

RC Zilina 25/10/2007	Regional Court Žilina, 25 October 2007.	*par. 117*

Spain

AP Spain 12/9/2001	Audiencia Provincial de Barcelona, 12 September 2001.	*par. 124*
AP Spain 3/10/2002	Audiencia Provincial de Pontevedra, 3 October 2002.	*par. 124*

Switzerland

BG 14/4/1990	BG April 14, 1990, Bull. ASA 1994.	*par. 49*
Komplex v. Voest-Alpine Stahl	Komplex v. Voest-Alpine Stahl, Swiss Federal Tribunal, ASA Bul. 1994.	*par. 49, 56*
Roland Schmidt GmbH v. Textil-Werke Blumenegg AG	Supreme Court, Roland Schmidt GmbH v. Textil-Werke Blumenegg AG, 22 December 2000.	*par. 85*
SBG Switzerland 28/10/1998	Schweizerisches Bundesgericht, "Meat case", No. 4C.179/1998/odi, 28 October 1998.	*par. 130*

Sweden

Bulbank case	A.I. Trade Finance v Bulgarian Trade Bank; unreported, Supreme Court case 1881-99, 27 October 2000.	*par. 63*

United Kingdom

Ali Shipping Case	Ali Shipping Corp. v. Shipyard Trogir. [1991] 1 W.L.R. 314 (C.A.).	*par. 76, 77*
Drummond v. Van Ingen	England 1887 Drummond v Van Ingen Neutral Treatment Indicated 12 App Cas 284.	*par. 89*

Emmott Case	Emmott v. Michael Wilson & Partners. [2008] EWCA (Civ) 184 (C.A.).	*par. 77*
Hassneh Insurance Case	Hassneh Insurance Co and Others v. Steuart J Mew. [1993] 2 Lloyd's Rep 243, 246.	*par. 77*
Jacobs v. Bratavia	Jacobs v Bratavia & General Plantations Trust Ltd. [1924] 1 Ch. 287, 297 (Ch).	*par. 58*
JSC v. Ronly	JSC Zestafoni G Nikoladze Ferroalloy Plant v. Ronly Holdings Ltd [2004] APP.L.R. 02/16.	*par. 24*
Rustal Trading v. Gill and Duffus	Queen's Bench Division, Rustal Trading Ltd. v. Gill & Duffus S.A., 13 October 1999.	*par. 22*
United States of America		
AAOT Technostroyexport v. International Development	AAOT Foreign Economic Association Technostroyexport v. International Development and Trade Services Inc. U.S. Court of Appeals 2nd Cir. 23 March 1998.	*par. 44*
Delchi v. Rotorex	Federal Appellate Court, Delchi Carrier S.p.A v. Rotorex Corporation, 6 December 1995.	*par. 84*
ISEC v. Bridas	International Standard Electric Corporation v. Bridas Sociedad Anonima Petrolera, Indrustrial y Comercial. [1990] District Court.	*par. 44*
Magellan v. Salzgitter	Magellan International Corporation v. Salzgitter Handel GmbH. U.S. District Court, N.D. of Illinois. 7 December 1999.	*par. 6*
Medical Marketing International	District Court, E.D. Louisiana, United States May 17, 1999 Medical Marketing International,Inc v Internazionale Medico Scientifico No. CIV. A. 99-0380.	*par. 97*

USA v. Panhandle Eastern Corp	United States v. Panhandle Eastern Corp., 118 F.R.D. 346 (D. Del. 1988).	*par. 63*
Arbitral awards		
Agricultural products case	China 18 September 1996 CIETAC Arbitration proceeding.	*par. 87*
Case No. Vb/97142	Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 25 May 1999.	*par. 10*
ICC No. 5622 of 1992	ICC No. 5622 of 1992, (1997) 8 (1) ICC Ct Bull, 52.	*par. 49*

Statement of Facts

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.

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 it sells for both bait and human consumption.

14 APR 2008 Claimant contacted Respondent and showed interest in purchasing squid to be used as bait.

17 MAY 2008 Mr Weeg presented to Claimant a sample of squid labeled "*illex danubecus 2007*" which Respondent delivered to Claimant's competitors for bait.

29 MAY 2008 Claimant expressed his overall satisfaction with the sample, in particular with the appropriate size of squid presented, and sent a purchase order for 200 metric tons of "illex". On the same day, Respondent confirmed the purchase order and added an arbitration clause referring to CAM Rules. In reaction, Claimant sent an e-mail back noting that it was the first time he had seen an arbitration clause from any of his suppliers.

1 JUL 2008 Squid was delivered to the Capital City of Mediterraneo and subsequently examined by Claimant.

29 JUL 2008 Claimant was contacted by two of the fishing vessels and he was notified about the fact that squid is not useable as bait due to improper size. On the same day Claimant notified Respondent that squid is hardly useable as bait due to its improper size.

3 AUG 2008 Respondent demanded to have squid inspected by a certified testing agency.

12 AUG 2008 Report from the TGT Laboratories, certified testing agency, was sent to the Claimant.

16 AUG 2008 Claimant sent Respondent TGT report and emphasized that the squid was clearly undersized. Claimant informed Respondent that he is holding the squid at Respondent's disposition.

18 AUG 2008	Respondent denied any non-conformity of goods.
APR–MAY 2009	During the storage period squid had to be moved at least twice because of maintenance requirements.
20 MAY 2010	Claimant submitted a Request for Arbitration and appointed Ms. Arbitrator 1 as its party-appointed arbitrator.
22 MAY 2010	Mr Schwitz, Claimant's CEO, informed Commercial Fishing Today that Request of Arbitration against Respondent was filed with the CAM.
25 MAY 2010	Respondent received the Request for Arbitration from the CAM.
24 JUN 2010	Respondent submitted a Statement of Defense and appointed Professor Arbitrator 2 as its 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 qualified statement of independence.
2 AUG 2010	The Arbitral Council of the Chamber of Arbitration did not confirm Mr Malcolm Y and invited the co-arbitrators to make a substituted appointment of chairman of the Tribunal.
13 AUG 2010	The co-arbitrators re-appointed Mr Malcolm Y as a chairman of the Arbitral Tribunal.
26 AUG 2010	The Arbitral Council of the CAM did not confirm Mr Malcolm Y as a chairman of the Tribunal for the second time and appointed Mr Horace Z 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 Amendment to the Statement of Defense where he contested the jurisdiction of the Tribunal.

Summary of Arguments

I. Claimant and Respondent concluded a valid contract on the date of issuance of Letter of Credit

Respondent materially altered Claimant's offer, however Claimant accepted such counteroffer when he issued L/C. Therefore, according to the part II of CISG, the valid contract between Claimant and Respondent was concluded on the date of issuance of L/C.

II. The Tribunal has jurisdiction to hear the case

The Tribunal has jurisdiction and shall continue the arbitration as the Respondent failed to raise the jurisdictional objection in the manner prescribed by Art. 4 UML. Thus, the right to object shall be deemed to be waived. Furthermore, since the agreement of the Parties was to refer disputes to arbitration under the CAM Rules, the Parties therefore rely on the practice of the Arbitral Council of the CAM as to non-confirmation of arbitrators. It is to be stressed out that the Parties' waiver of the right to comment Mr Malcolm Y's statement of independence does not constitute a special agreement capable of derogation of the Arbitral Council's power to refuse confirmation of the arbitrator. Respondent's objection shall be therefore dismissed as unjustified.

III. Claimant did not breach duty of confidentiality implied by the CAM Rules

Core to the Claimant's contentions is firstly that the CAM Rules 2004 rather than the CAM Rules 2010 govern issue of confidentiality, as the former meets intent and reasonable expectations of the Parties and secondly that under the CAM Rules 2004 there is no duty of confidentiality for the Parties at all. Alternatively, Claimant did not breach duty of confidentiality imposed by the CAM Rules 2010 because the CAM Rules 2010 do not prevent the Parties from mere revealing of their case to the public. Moreover, Claimant was only protecting his legitimate rights what constitutes the recognized exception to duty of confidentiality.

IV. Respondent delivered squid which was not in conformity with the contract

Squid failed to meet the characteristics of sample. Under Art. 35(1) CISG, Claimant and Respondent expressly agreed in the contract that the goods must comply with the sample as reference for required quality. Delivered squid did not possess the size of sample which was characteristic of particular importance.

Squid delivered by Respondent did not conform with the contract also because it was not fit to be used as bait which was particular purpose made known to Respondent [*Art. 35(2)(b) CISG*].

Claimant relied upon the size of squid necessary for long-liners and this requirement was not modified by including "fit for human consumption" in the contract [*Art. 8 CISG*].

V. Claimant properly examined delivered frozen squid and notified Respondent within 4 days after he discovered the lack of conformity

Claimant has obligation to conduct an adequate and timely examination and to notify Respondent within a reasonable time in order to retain his right to rely on a lack of conformity. Accordingly, Claimant examined squid immediately after delivery. However, delivery was of vast amount and squid was in frozen form, thus, examination had to be reasonably reduced to inspection of randomly selected samples. Moreover, only defrosted squid could be examined, but once the sample was thawed, the squid was destroyed. Consequently, examination had to be reduced to few samples per thousands. Claimant fulfilled his obligation when he notified Respondent of lack of conformity within 4 days after he discovered it.

VI. Claimant avoided the contract because Respondent failed to deliver squid as per sample

Respondent's nonconforming delivery was fundamental breach of its contractual obligations. Claimant preserved his right to terminate the contract when he notified Respondent about the lack of nonconformity within reasonable time and he was able to make a restitution of the goods in the condition it was received. Therefore, Claimant rightfully avoided the contract under Art. 49(1)(a) CISG and is entitled to reimbursement of the purchase price paid for delivery of the goods.

VII. Claimant made the best efforts to mitigate the loss and damages thus he is entitled to full compensation

Claimant made the best efforts to mitigate the loss and damages resulting from the breach of contract when he tried to sell the squid for Respondent's account on local and foreign markets. Therefore, he is fully entitled to compensation of the loss of profit on the unsold squid and to reimbursement of all his expenses for storing the squid, expenses incurred in attempting to sell the squid for Respondent's account and expenses incurred in disposing of the squid.

Grounds for the arbitration

I. Parties entered into both contract of sale and arbitration agreement

1. The contract of sale between the Parties is governed by CISG [A]. The conclusion thereof was based on issuance of L/C which was the acceptance Respondent's counteroffer [B]. Accordingly, the Parties concluded a valid arbitration agreement meeting formal requirements under Art. 7(5) UML and Art. II NYC [C].

A. The contract between the Parties is governed by CISG

2. Mediterraneo as well as Equatoriana, i.e. countries in which the Parties have place of business, are the contracting states of the CISG [*RA, par. 24*], therefore, Art 1(1)(a) CISG is applicable. None of the countries has made declarations under Arts. 92 and 96 CISG [*PO 3, par. 1*]. Pursuant to the documents relevant to contract formation [*CE 1, 2, 3 and 4*], the Parties agreed on delivery of goods, transfer of the property in the goods, taking the goods and paying the purchase price as presumed by Arts. 30 and 53 CISG, and thus intended to conclude a contract of sale. No agreement as to exclusion of applicability of the CISG has been made. The CISG shall be therefore applied to determine Parties' substantial rights and duties arising out of the contract.

B. Contract of sale was concluded based on Respondent's counteroffer and Claimant's acceptance by the issuance of the L/C

3. Claimant sent to Respondent purchase order which constituted valid offer [*CE 3*]. Under Art. 14(1) CISG a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. The Claimant's purchase order made the terms of the contract clear and sufficiently definite with evident intention of the Claimant to be bound in case of acceptance. Therefore, Respondent received valid and effective offer.

4. Respondent replied on the Claimant's offer with his sale confirmation [*CE 4*]. 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*]. The acceptance must not include any material altering terms [*Art. 19(2) CISG*]. Settlement of dispute arrangement is explicitly included as a material terms alteration of the offer [*Arts. 19(3) CISG*].

5. Sale confirmation from 29 May 2008 added a material term alteration - dispute settlement clause and also a catch specification "*2007/2008 Catch*" to the original terms of the offer [*CE 4*], therefore Respondent's reply to an offer constituted counteroffer, not an acceptance.

6. Claimant accepted Respondent's counteroffer when he issued a L/C. 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/her intent where the other party knew or could not have been unaware what that intent was [*Art. 8(1) CISG*]. Issuance of L/C is the conduct indicating assent to an offer [*Magellan v. Salzgitter; Schlechtriem, Schwenzer 2010, p. 320*].

7. In the offer, Claimant included a payment method Irrevocable & confirmed L/C at 30 days from B/L date [*CE 3*] just as Respondent did in his counteroffer [*CE 4*]. Pursuant to this term, Claimant issued the L/C and paid the purchase price without any objections [*RA, par. 16*]. Claimant's acceptance of counter-offer is to be inferred from such an issuing of the L/C [*Art. 18(1) CISG*].

8. Respondent materially altered Claimant's offer, however Claimant accepted such counteroffer when he issued L/C. Therefore, the contract between Claimant and Respondent was concluded on the date of issuance of L/C.

C. Parties concluded a formally valid arbitration agreement

9. The dispute is to be governed by the UML which was adopted by Danubia, the country where, pursuant to the arbitration clause [*CE 4*], the Parties placed the seat of arbitration. Art. 7(5) of the UML's first option adopted by the UNCITRAL Commission in 2006 [*PO 3, par. 2*] provides that the requirement of written form is fulfilled when Respondent fails to deny existence of the alleged agreement.

10. It was Respondent who added the arbitration clause into the counter-offer [*CE 4*] which consequently became part of the contract. Claimant was aware of the binding nature of the clause as he filed his claim within the Secretariat of the CAM [*RA*]. Since Respondent has not denied the existence of the arbitration clause in his first brief [*SD*] as presumed by Art. 7(5) UML, he double-confirmed the original intent of both Parties to have any potential disputes resolved in arbitration, and the agreement to arbitrate shall be therefore deemed in writing [*Case No. Vb/97142, William v. Chu Kong, Schiff v. Naber*].

11. Such an arrangement complies with the strict requirement as to the written form of an arbitration clause set forth by Art. II NYC interpreted in the light of modern understanding of the NYC [*UNCITRAL Recommendation*]. Pursuant to these tendencies, the list of preconditions set in Art. II

NYC is not exhaustive, and the courts shall therefore consider less strict requirements imposed by *lex arbitri* [*UML*] also appropriate [*Moses, p. 23, Born, p. 599*].

12. In other words, the arbitration agreement is formally valid, and therefore the main prerequisite of the Tribunal's jurisdiction to hear the case is fulfilled.

Arguments on jurisdiction

13. Parties agreed on referring disputes to CAM administered arbitration [II.A]. The CAM Rules 2010 are generally applicable to the proceedings with exception of the issue of confidentiality [II.B]. Respondent's objection as to constitution of the Tribunal was not forwarded without undue delay after the alleged breach of the parties' agreement occurred. Such delay constitutes a waiver of the right to object under Art. 4 UML as it indicates dilatory tactics of Respondent [III]. Arbitral Council of the CAM performed all actions pursuant to the Parties' will presented in the arbitration agreement [IV.A] and letters of 26 and 27 July 2010 [IV.B]. The conduct of Arbitral Council of the CAM was correct when it refused to confirm Mr Malcolm Y [V.A]. As arbitrators failed to appoint an independent chairman, the Arbitral Council exercised its power to appoint a presiding arbitrator on its own in accordance with the CAM Rules 2010 [V.B]. Since the Tribunal was constituted in the manner provided by the Parties' agreement and the CAM Rules 2010, the grounds for annulment or non-enforcement of future arbitral awards are not given [VI].

II. Parties agreed on institutional arbitration administered by CAM under its Rules

A. Parties referred to institutional arbitration administered by the CAM

14. Incorporation of a reference to institutional rules in arbitration clause is an expressed will of the Parties to have a dispute administered by institution which created the set of rules [*Kaufmann-Kohler, p. 10*]. In the arbitration clause: "*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)* (...)" [*CE 4*], Parties had chosen CAM. There is no need to mention institution itself, because in accordance with general standard of world's arbitration institution, their model clauses always stipulate only the rules of the institution, never institution itself [*DIS arbitration clause, SCC arbitration clause, ICC arbitration clause, LCIA arbitration clause, AAA arbitration clause, etc*.].

15. Moreover, Parties' conduct, i.e. appointment of the arbitrators, sending Request for Arbitration dispatched 21 May 2010, Statement of Defense dispatched 24 June 2010, letters of trust

dispatched 26 and 27 July 2010, asserted the CAM's jurisdiction to proceed and administer the case.

B. The proceedings are held in accordance with CAM Rules 2010

16. Parties agreed on arbitration agreement in 2008 [*see par. 14*], therefore the reference to the CAM Rules made in their arbitration clause must be understood as reference to the CAM Rules 2004 as the CAM Rules 2010 did not even exist at that time.

17. The CAM is under Art. 43(2) CAM Rules 2004 empowered to amend or replace its rules by the new ones. Art. 43(3) CAM Rules 2004 provides applicability of the most recent provisions in proceedings commenced after the date when the new provisions entered into force. Such a provision is common in arbitration world as many arbitration centers provide in their rules similarly [*Art. 6a(1) ICC Arbitration Rules, LCIA Preamble, SCC Preamble, Art R-1 AAA Commercial Rules, Wiggers, p. 17, 59, 119*].

18. When Claimant commenced arbitration proceedings in May 2010, the CAM Rules 2010 have already entered into force. Therefore, the CAM Rules 2010 are generally applicable on the arbitration proceedings between Claimant and Respondent [*Art. 43(3) CAM Rules 2004, Art. 39(1) CAM Rules 2010*]. However, the CAM Rules 2004 still govern the issue of confidentiality as the Art. 8 CAM Rules 2010 establishing this duty between the Parties was surprising and unexpected and therefore shall not apply [*see par. 49 - 57*].

III. Respondent's objection as to the constitution of the Tribunal is irrelevant because he waived his right to object

19. Art. 12 CAM Rules 2010 sets time limit for pleading a jurisdictional objection. This provision has priority over the corresponding rule under Art. 16(2) UML as the CAM Rules 2010 are generally applicable [*see par. 16, 17, 18*]. Art. 4 UML provides that Parties must plead against procedural irregularities without undue delay.

20. In general, where lack of the tribunal's jurisdiction occurs a party may rely on Art. 12 CAM Rules 2010 and raise an objection either in the first brief or at the first hearing following the claim to which it relates. Otherwise, this right is considered to be waived.

21. However, if the circumstance, to which a party may object, arises during the proceedings after the party has already pleaded, he may no longer rely on the time requirements under Art. 12 CAM Rules 2010. That means the party may not wait until the first hearing indicated under Art. 12 CAM Rules 2010, especially when a tribunal has not yet determined whether the hearing is going to take place at all. Instead, the right to object is to be interpreted in the light of Art. 4 UML

which concerns procedural irregularities in general. This provision states that irregularities arising during the proceedings shall be objected without undue delay otherwise such right is deemed to be waived. That means, a party to arbitration is entitled to a subsequent plea against lack of jurisdiction of a tribunal but he must conform to the strict time requirement imposed by Art. 4 UML, and plead in time.

22. Timely objection is one of the ground principles of international commercial arbitration [*Tweeddale, p. 398, Born, p. 989, Rustal Trading v. Gill and Duffus, § 817(2) CDC*] as it prevents parties to arbitration from misusing dilatory tactics, and promotes expedition of the proceedings. It is unacceptable that *"(…) a party's continuing to take part in proceedings while at the same time keeping up his sleeve to challenge the award if he is dissatisfied with the outcome*" [*Rustal Trading v. Gill and Duffus*]. Every delay affects the overall sum of costs incurred in the arbitration [*Born, p. 672*] and may impair the probability of satisfying party's claim. It is therefore reasonable for the Parties to proceed with arbitration as swiftly as possible, and accordingly, point out any irregularities in due time.

23. Respondent's objection [*ASD, par. 7*] which is his second plea, however, certainly does not meet the requirement of swift reaction to the course of constitution of the Tribunal. Respondent argues that the Tribunal was "(…) *not constituted in accordance with the arbitration agreement.*" [*ASD, par. 7*]. If that was the case, Respondent should have objected a conflict with the Parties' agreement immediately after he received the letter notifying that the Arbitral Council of the CAM did not confirm Mr Malcolm Y in his function [*a letter from the Secretariat of 2 August 2010*].

24. It must be reminded that Respondent pleaded the irregularity in a month and a half [*ASD*] after non-confirming Mr Malcolm Y for the first time. During this time period, the co-arbitrators once again attempted to appoint Mr Malcolm Y [*a letter from co-arbitrators of 13 August 2010*], however, without success [*a letter from Secretariat of 26 August 2010*]. The Arbitral Council of the CAM then appointed and subsequently confirmed Mr Horace Z [*a letter from Secretariat of 10 September 2010*]. It is evident that this time period involved a very dynamic stage of the proceedings. Furthermore, Respondent was well informed of all the steps undertaken by the Arbitral Council of the CAM as he must have received all of the abovementioned correspondence, and, thus, had numerous opportunities to communicate his dissatisfaction with the proceedings [*JSC v. Ronly*].

25. However, Respondent did not strike while the iron was still hot. Instead of that, Respondent waited until Claimant and the Tribunal made serious and costly arrangements for the proceedings. His conduct therefore endangers Claimant's good faith in swift and fair arbitration [*Berger, p. 354*] and jeopardizes the amount of costs incurred therein. Such a late attempt to contest the Tribunal's jurisdiction indicates Respondent's unacceptable dilatory tactics.

26. To sum up, Respondent could have noticed the alleged breach of the agreement and plead against it much earlier than he actually did. Since Respondent missed several opportunities to object to the constitution procedure, the Tribunal should deem his right to challenge the jurisdiction to be waived under Art. 4 UML.

IV. CAM administered proceeding fully in accordance with Parties will

A. Parties in arbitration agreement decided only on the special proceedings for appointment of the arbitrators

27. Parties are entitled to change the proceeding of appointment of the arbitrators in accordance with Art. 14(1) CAM Rules 2010 and also Art. 15(1) CAM Rules 2004. The ability to change the proceedings is restricted to Arts. 13 – 16 as articles dedicated to an appointment.

28. Arbitration agreement states: *"(...) shall be settled (…) by three arbitrators. Each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator (...)*".

29. Expressed statement in an arbitration clause referring specific issue [*Bishop, p. 17, 18*] or reference to the specific rules is the standard procedure how to derogate powers from institution. None of these was used for other topic than appointing a three-member tribunal.

30. Thus, even though arbitration agreement modified procedure of appointment, the issues concerning replacement of arbitrators [*Art. 20 CAM Rules 2010*], confirmation of arbitrators [*Art. 18(4) CAM Rules 2010*] and challenging of arbitrators [*Art. 19 CAM Rules 2010*] remained untouched. The Parties could in these issues rely on rules of the standard procedure [*see par. 18*] provided by the CAM.

B. Parties through letters of trust have not agreed on any special rule concerning derogation of power to confirm an arbitrator by CAM

31. Respondent may argue that letters of the Parties as of 26 July 2010 and 27 July 2010 constituted agreement changing rules in accordance with Art. 2(1) CAM Rules 2010. In these letters, Parties used an option to waive their rights to object to Mr Malcolm Y's appointment as a president of the Tribunal. In any case, the letters could not be considered as an agreement of the Parties on change of the procedural rules under Art. 2(1) CAM Rules 2010 or even as a direct appointment of Mr Malcolm Y as a president of the Tribunal. Such letters are only a helpful element in standard CAM decision making process.

32. Waiver contained in two separated letters constitutes two unilateral and independent declarations about arbitrator's impartiality, not a mutual agreement to change fundamental rules of procedure. The letters were sent on different days, by different persons, with no reference to other Party's

declaration or even awareness of such a declaration which proves a fact that Claimant and Respondent were not aware of each other's conduct not even thinking of making an agreement. Thus the Parties did not make a valid agreement under Art. 2(1) CAM Rules 2010.

33. To summarize, being in agreement does not mean making an agreement.

V. The Tribunal was duly constituted in accordance with CAM Rules 2010

A. CAM in accordance with CAM Rules 2010 executed its power not to confirm the arbitrator

34. Arbitration institutions generally exercise their right to control a composition of arbitral tribunals by power to confirm appointed arbitrators. Art. 9(1) and 9(2) ICC Rules, Art. 5(1) Swiss Rules allow institution to confirm (or not!) appointed arbitrators when they submitted qualified statement. LCIA Rules grant even more powers to courts when the courts can always refuse arbitrator whom they consider "not suitable" under Art. 5(5), 7(1), and 11(1) LCIA Rules [*Poudret, p. 335*]. Based on the abovementioned general practice, Arbitral Council behaved adequately.

35. Under the CAM Rules 2010, constitution of a tribunal is a process divided into two phases. First phase is an appointment of arbitrators governed by Arts. 13, 14, 15 and 16 CAM Rules 2010. The second phase is confirmation of the arbitrators by CAM governed by Art. 18(4) in connection with Arts. 19(4) and 20. This phase is, unless agreed otherwise [*see par. 27*], in competence of CAM and its institutional autonomy.

36. Thus under Art. 18(4) CAM Rules 2010, which is not mandatory, the Parties were given an option to waive the requirement that arbitrators are to be confirmed by CAM. The process is based on doctrine of party autonomy in arbitration [*Born, p. 1753 - 1755*] as is a usage also in other jurisdictions [*Poudret, p. 335*]. However, the Parties agreed only on the first phase - the appointment of the arbitrators under Art. 14(4)(b) CAM Rules 2010 [*see par. 27*].

37. That is why the Arbitral Council of the CAM is legally empowered to decide whether to confirm the appointed presiding arbitrator or to refuse him.

B. CAM executed legitimate powers when appointing the presiding arbitrator itself

38. Art. 18(4) CAM Rules 2010 empowers the Arbitral Council to decide on confirmation when qualified statement of independence is submitted by appointed arbitrator. In accordance with Art. 20(1)(b) CAM Rules 2010, in case of non-confirmation, a new appointment is required. When already appointed arbitrators fail for the second time to agree on the presiding arbitrator, the Arbitral Council appoints new one on its own.

39. For the first time, arbitrators failed to constitute the Tribunal when the Arbitral Council did not confirm Mr Malcolm Y [*the letter of 2 August 2010*]. Therefore, a replacement needed to be made and consequently, arbitrators failed to constitute the Tribunal for the second time when the replacement was made by re-appointment of Mr Malcolm Y. Reason for doing so was arbitrators' wrong presumption that the Parties agreed on him [*see par. 31, Letter of 13 August 2010*].

40. The CAM only used its powers given by the CAM Rules 2010, and after the second unsuccessful attempt to constitute the Arbitral Tribunal it appointed Mr Horace Z as a presiding arbitrator. The Parties as well as the confirmed arbitrators had not challenged Mr Horace Z.

41. Moreover, appointed arbitrators freely accepted the presiding arbitrator, constituted the legitimate Arbitral Tribunal and issued PO 1 signed in agreement by all the three Tribunal's members.

42. To conclude, Respondent's objection to wrong constitution of the Tribunal [*ASD, par. 2*] resulting from violation of the arbitration agreement is irrelevant and designed on purpose only to put the proceedings behind. Contrary to the allegation of the Respondent, the Arbitral Council´s conduct was fully in compliance with Arts. 18 and 20 of CAM Rules 2010.

VI. The objection raised by Respondent does not constitute grounds for either setting aside or refusal of enforcement of the arbitral award

43. Since the conduct of the Arbitral Council of the CAM has conformed with the arbitration agreement between the parties as well as with the CAM Rules 2010, the grounds for annulment of the future award under Art. 34(2)(a)(iv) UML and non-enforcement thereof under Art. V(1)(d) NYC are not fulfilled. The Tribunal may therefore proceed with the pleadings on the merits.

44. However, if Respondent relies on Art. 34(2)(a)(iv) UML and attempts to set the award aside, the courts of law will dismiss his legal action for two reasons. Firstly, Respondent's action seeking annulment due to the Tribunal's constitution is inadmissible as, under Art. 4 UML, Respondent waived his right to object, despite the several opportunities to plead the irregularity in time [*Rubino-Sammartano, p. 876, AAOT Technostroyexport v. International Development, ISEC v. Bridas, Clout Case 148*]. Thus, by not pleading against the irregularity without undue delay during the arbitral proceedings, Respondent precluded himself from further recourses at ordinary courts of law. Secondly, Respondent's objection is also unjustified since the constitution was not in conflict with the Parties' agreement, and the Arbitral Council of the CAM duly exercised its power to not confirm an arbitrator.

45. There are no legal impediments that prevent the Tribunal from rendering both interim and final award in the case at hand. Consequently, if the Tribunal accepts the objection despite the mentioned reasons, and declares lack of its jurisdiction, the courts of law will very likely set such an award aside.

46. It is because the award would be a result of a serious procedural error, i.e. accepting the jurisdictional objection despite its inadmissibility. Such circumstance is a ground for setting aside under Art. 34(2)(a)(iv) UML as the law applicable to the arbitration does not allow admission of such erroneous objections [*Art. 4 UML*].

47. The Tribunal has the jurisdiction, may continue the proceedings in current composition and render an award on merits notwithstanding the objection of the Respondent.

Arguments in regard to the duty of confidentiality

48. Claimant did not breach duty of confidentiality mainly for the following reasons. Firstly, the Parties are not bound by duty of confidentiality as the CAM Rules 2004 are to be applied on this issue [VII]. The new CAM Rules 2010 do not govern the issue of confidentiality because it radically and unexpectedly added duty of confidentiality for the Parties. Therefore, the CAM Rules 2004 rather than CAM Rules 2010 are applicable on this issue, as the former meets the intent and reasonable expectations of the Parties [VII.A]. Consequently, under the applicable CAM Rules 2004 there is no duty of confidentiality for the Parties [VII.B]. Furthermore, even if the Tribunal considers CAM Rules 2010 applicable, still Claimant did not breach duty of confidentiality [VIII], because CAM Rules 2010 do not prohibit Claimant from disclosing the commencement of the arbitration proceedings [VIII.A], and further, because Claimant was only protecting his legitimate rights which constitutes the recognized exception to duty of confidentiality [VIII.B].

VII. The Parties are not bound by duty of confidentiality under applicable CAM Rules 2004

A. CAM 2004 Rules rather than CAM 2010 Rules govern the issue of confidentiality, as the former meets the intent and reasonable expectations of the Parties

49. In case of change of arbitration rules incorporated into arbitration agreement by reference, the new provisions can only apply if the change is not substantial, unforeseeable or even surprising for the parties [*ICC No. 5622 of 1992 consequently upheld in setting-aside proceedings Komplex v. Voest-Alpine Stahl*]. The set of rules agreed upon by the parties is part of the arbitration agreement [*Art.*

2(e) UML] and therefore may not be changed without consent of the parties given either prior to or after the modifications. However, in the event of consent given prior to the modifications, parties cannot be presumed to have agreed to surprising or substantial modifications [*BG 14/4/1990, similarly OLG Hamburg, 23/9/1982*]. Contrary would mean denial of contractual nature of international arbitration.

50. The CAM Rules 1996 bound the parties to "*keep all information on the development and outcome of the arbitral proceedings confidential*" [*Art. 27(1) CAM Rules 1996*]. However, under the CAM Rules 2004, parties were excluded from provision stating duty of confidentiality [*Art. 8(1) CAM Rules 2004*]. Surprisingly, the CAM Rules 2010 restated that the parties should be bound by duty of confidentiality [*Art. 8(1) CAM Rules 2010*].

51. Apparently, by adopting the CAM Rules 2004, parties were removed from the provision stating duty of confidentiality. The CAM could not have expressed its point of view more clearly – as of 2004, the parties opting for CAM are not to be bound by duty of confidentiality. Subsequently, parties incorporating CAM Rules 2004 should have been aware of this essential change of CAM Rules 2004, under which there is no duty of confidentiality between Parties.

52. Consequently, the Parties concluding the arbitration agreement in the year 2008 [*see par. 3 - 12*] must have incorporated the CAM Rules 2004 into their arbitration agreement as the CAM Rules 2010 did not even exist at that time. Even though Respondent could not have been unaware that there was no duty of confidentiality under the CAM Rules 2004, he did not even try to agree otherwise. It is to be concluded that Claimant as well as Respondent did not intend to be bound by duty of confidentiality from the very beginning of their business relationship.

53. Moreover, it was Respondent who demanded the arbitration clause and its wording [*CE 4, RE 2*], which referred to the CAM Rules 2004 stating no confidentiality for Parties. Notwithstanding this, now it is Respondent who is claiming that there was a "*flagrant violation*" of such an important and crucial duty of confidentiality [*SD, par. 7*], even though he himself did not consider this duty to be important enough to include it into the arbitration agreement.

54. In 2006, two years before conclusion of the arbitration agreement, there was a legislative reform of arbitration in Italy - country, where the most of CAM arbitrations are seated. Therefore it was clear that the CAM will have to react to this reform by updating its rules. In fact, the CAM Rules 2004 already counted with this update in its Provisional provisions [*Art. 43 CAM Rules 2004*], which was consequently implemented by adopting CAM Rules 2010, two years after conclusion of the arbitration agreement.

55. However, mentioned reform did not deal with issue of confidentiality in any respect [*Reform of CDC, Art. 806-836 CDC*]. At the same time, there was no other indication that CAM would so radically change this provision back, or it was at least not known to the Parties at the time of conclusion of the arbitration agreement. It is to be concluded that this substantial change was unexpected and surprising for the Parties.

56. Furthermore, Respondent is right that duty of confidentiality is essential to arbitration [*SD, par. 7*]. Therefore, restatement of such a duty must be considered to be essential change of the rules substantially affecting duties of the Parties, which therefore requires their consent [*Besson, Poudret, p. 80, Komplex v. Voest-Alpine Stahl*]. Importantly, Claimant has never consented to be bound by confidentiality, neither expressly nor by conduct. Otherwise he would not have provided the interview to the newspaper [*RE 1*].

57. In the end of the day, neither Claimant nor Respondent could have expected that the Provisional provision of the CAM 2004 [*Art. 43 CAM Rules 2004*] will serve to reestablish once removed duty of confidentiality. Therefore, adding duty of confidentiality for the Parties is to be deemed highly unexpected and surprising provision substantially affecting duties of the Parties and thus not effective. The CAM Rules 2004 are therefore applicable on issue of confidentiality.

B. There is no room for implied duty of confidentiality between the Parties under the CAM Rules 2004

58. General rule as to applicability of an implied term states that "the existence of an express term, per se, automatically excludes the possibility of implying any term dealing with the same matter as an express term" [*Noussia, p. 54, Jacobs v. Bratavia*].

59. The CAM Rules 2004 do not expressly state duty of confidentiality for parties even though it complexly deals with issue of confidentiality with respect to other subjects [*Art. 8 CAM Rules 2004*].

60. Firstly, the provisions of the CAM Rules are deemed to be part of the arbitration agreement [*Art. 2(e) UML*]. Therefore, what is expressly stated in the CAM Rules 2004 is considered to be expressly agreed on by the Parties.

61. Secondly, as is obvious from the wording of Art. 8 CAM Rules 2004, there is no expressly stated duty of confidentiality between the Parties. At the same time, neither the arbitration clause [*CE 4*] nor the UML deals with this issue. Therefore, there is no expressly stated duty of confidentiality between the Parties.

62. Thirdly, there is no room for an implied duty of confidentiality, as this matter is already complexly dealt with in the Art. 8 CAM Rules 2004 as part of the arbitration agreement [*Art. 2(e)*

UML]. Respondent can hardly argue that removing of the duty of confidentiality of the parties from this provision by CAM Rules 2004 created room to be theoretically filled by an implied duty of confidentiality. In fact, this express provision automatically, *per se*, excludes the possibility of implying duty of confidentiality.

63. In addition, the mere assumption of implied duty of confidentiality is highly questionable. Courts of many jurisdictions do not recognize the confidentiality as implied duty, e.g. USA [*USA v. Panhandle Eastern Corp*], Australia [*Esso case*] or Sweden [*Bulbank case*]. The same conclusion was repeatedly reached by scholars in relation to various jurisdictions [*Hague Conference 2010, p. 15, Ritz p. 236 and 238*].

64. To conclude, the CAM Rules 2004 as part of arbitration agreement is complexly dealing with issue of confidentiality, intentionally not binding parties by duty of confidentiality. There is, therefore, no room for implied duty of confidentiality, even if any existed. As the arbitration agreement itself as well as UML is silent in this regard, it is to be concluded that there is no duty of confidentiality between the Claimant and Respondent.

VIII. Even if the Tribunal considers CAM Rules 2010 applicable, still Claimant did not breach duty of confidentiality

65. Firstly, CAM Rules 2010 do not prohibit Claimant from disclosing the commencement of the arbitration proceedings [A]. Secondly, Claimant was only protecting his legitimate rights what constitutes the recognized exception to duty of confidentiality [B].

A. CAM Rules 2010 do not prohibit Claimant from disclosing the commencement of the arbitration proceedings

66. The CAM Rules 2010 provide that "*parties shall keep the proceedings and the arbitral award confidential*" [*Art. 8 CAM Rules 2010*]. This general provision does not expressly prohibit Parties from revealing information on the mere existence of the arbitration as Respondent indicates. Therefore, duty of confidentiality needs to be interpreted. Such an interpretation should be restrictive mainly for following reasons.

67. Firstly, duty of confidentiality is not generally understood so extensively that it prevents from mere revealing the existence of arbitration [*Ligeti, p. 8, Esso Case*]. Such a broad extent of duty of confidentiality is rather unusual and exceptional, and cannot be applied, unless expressly stated so, which is not the case of CAM Rules 2010. Respondent himself referred the confidentiality requirement as a generally recognized doctrine incorporated in many arbitration rules [*SD, par. 7*]. But he omitted to mention that almost none of these construes this duty so extensively so that

the parties are prohibited from informing on the commencement of the proceedings. In fact, there are only two exceptions which expressly treat the existence of arbitration as confidential. The first is the WIPO Arbitration and Mediation Centre, and the second is ACICA. However, WIPO is dealing with very special and sensitive disputes connected with intellectual property law and therefore should not be taken into account. The provisions of ACICA Rules regulating confidentiality [*Art. 18(2) ACICA Rules*] are result of the very peculiar development in Australia where confidentiality was completely denied by case-law [*Esso Case*]. In reaction, the ACICA adopted much broader duty of confidentiality than is commonly recognized, and is therefore an exception.

68. Secondly, the duty of confidentiality as an ambiguous provision [*Art. 8 CAM Rules 2010*] allows different interpretations. The Tribunal should interpret the provision in favor of Claimant, because it was the Respondent who firstly proposed the arbitration clause [*CE 4, RE 2*].

69. Moreover, Respondent goes with his over-extensive interpretation even further, as he alleges that wording "*shall keep the proceedings confidential*" [*Art. 8 CAM Rules 2010*] covers also the pre-proceedings stages. As the *lex arbitri* provides [*Art. 21 UML*], the proceedings began on 25 May 2010 by receipt of the Request for Arbitration by Respondent [*SD, par. 4]*. That means that there was still no duty to be breached as the arbitration was not even commenced at the time when Mr Schwitz was providing an interview with Commercial Fishing Today on 22 May 2010 [*SD, par. 4*].

70. To sum up, there are only two arbitration centers which expressly state that the existence of the arbitration is covered by confidentiality. CAM Rules 2010 do not expressly state such a broad extent of the duty of confidentiality, and therefore it would be unexpected and rather exceptional to interpret the provision so broadly. Therefore, Claimant did not breach duty of confidentiality as he informed about the situation which was not covered by the CAM Rules 2010. Regardless of all these facts, the Tribunal should bear in mind that there had still been no arbitration at the moment of providing the interview.

B. Claimant was only protecting his legitimate rights which constitutes the recognized exception to duty of confidentiality

71. Duty of confidentiality is not unlimited [*Rubino-Sammartano, p. 800*], and complete confidentiality cannot be applied in arbitration proceedings [*Kouris, p. 134*]. Under the CAM Rules 2010, there is an exception from the stated duty [*Art. 8 CAM Rules 2010*].

72. As the Italian version of the CAM Rules 2010 is decisive, Claimant admits that the expressed exception of confidentiality is restricted only to disclosing arbitral award [*Art. 8 CAM Rules 2010*]. However, confidentiality is the very special feature of the proceedings which is still in

development. Therefore also "(...) *all the existing statutory provisions and institutional rules providing for confidentiality are imperfect*" [*Hwang, Chung, p. 643*]. Based on this, CAM Rules 2010 must be interpreted to allow more exceptions from the duty. Moreover, if Claimant had waited for granting of the arbitral award it would have resulted in the situation that there will be no reputation to protect at all. The arbitral proceedings may take months or years, and he had been losing the customers in the moment when problem arose. Such a quick reaction was only advisable, and should be covered by the exception from confidentiality as well.

73. Respondent himself stated that "One of the several purposes of the confidentiality requirement in international commercial arbitration, (...) is to protect the reputation of the disputing parties." [*SD, par. 7*] Claimant agrees that reputation must be protected. In light of this, confidentiality cannot be interpreted in that manner that it would prevent Claimant from protecting his own reputation. Otherwise, the purpose of confidentiality claimed by Respondent would be denied. Claimant's own reputation was badly damaged by the breach of the contractual obligations by the Respondent himself when he did not deliver the goods in conformity with the contract [*CE 7*]. According to the witness statement of Mr Nils Korre, the sales representative of Claimant, the whole situation led to loss of reputation among Claimant's long-liner customers. "At least three of them had shifted to other suppliers after the problem with undersized bait had arisen" [*CE 10, par. 18*].

74. To protect his own reputation, creditors of the Claimant needed to be informed as well as his long-liner customers. Obviously, the reputation of Claimant had suffered extremely and he had to explain the exceptional situation. Commencement of the arbitration was the first step to gain his reputation back. Therefore he needed to assure the fishing world that the problem with the inappropriate bait was not caused by him.

75. Moreover, consequences of providing the very general information on commencement of arbitration will most certainly not cause any additional harm to Respondent. The existence of the dispute and its nature was already well-known in the branch as Commercial Fishing Today "*had previously reported on the existence of the dispute between Fishing and Trawler Supply*" [*PO 3, par. 17*].

76. As it is not possible to provide a comprehensive list of all the exceptions to confidentiality, it follows from this that the categories of exceptions are never closed [*Hwan, Chung, p. 643*]. The list of exceptions is not comprehensive, and further implied exceptions must be recognized. England is the country where the courts had the opportunity to rule on the issue of confidentiality and the implied exceptions at most [*Ritz, p. 224*]. In addition, English Arbitration Act is based on UML. The application of AA 1996 could therefore be very similar to the application of the UML in Danubia. The English courts stated that the obligation of confidentiality is not to be applied

whatever the circumstances are [*Ali Shipping Case, p. 7*]. The content of the obligation of confidentiality may depend on the context in which it arises and on the nature of the information at issue. In regard to this, Claimant disclosed no information which could do any harm to Respondent [*RE 1*].

77. The limits of the obligation of confidentiality are still in the process of development on a case-by-case basis [*Emmott Case, par. 61, 107*]. However, several exceptions to the broad rule of confidentiality are to be generally recognized [*Hassneh Insurance Case*]. Among them, confidentiality could be broken where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party [*Ali Shipping Case, p. 11*]. Although this exception has been held applicable only to disclosure of an award, the principle is understood to cover every action of the party in the arbitral proceedings [*Ali Shipping Case, p. 11*]. If these exceptions were applied to so severe interference into confidentiality as publication of the award is, disclosure of the information on existence of the arbitration made by Claimant must be covered by these exceptions as well.

78. Additionally, not only common law but also civil law jurisdictions recognize the exceptions to confidentiality. In Switzerland, "*Following exceptions are accepted: where it is reasonably necessary to protect the legitimate interests of an arbitrating party or where the interests of justice require disclosure.*" [*Ritz, p. 225*].

79. From the above mentioned it is clear that there is a consonance within the arbitration community about the exceptions from duty of confidentiality. Moreover, they are applied in common law as well as civil law jurisdictions. The Claimant's behavior when he only disclosed information about commencement of the arbitration is to be included under such an exception. Namely under the situation when he was only attempting to protect his own rights.

Arguments on Merits

IX. Respondent failed to deliver squid conforming with the sample previously provided which was usable for baiting

80. Claimant and Respondent agreed on the delivery of squid as per sample [IX.A] and that characteristics of sample including the size were particularly important [IX.B]. Squid also did not conform with the contract because it was not fit for baiting – the particular purpose of the contract [IX.C]. Requirement of being "fit for human consumption" did not modify the contract [IX.D]. Respondent was liable for non conformity and any exemption does not apply [X].

A. Parties clearly agreed on the delivery of the squid "as per sample" provided by Respondent

81. Under Art. 35(1) CISG, Respondent must deliver goods of the quality, quantity and description required by the contract. Art. 35(1) CISG is applicable as a primary rule [*Schlechtriem, Schwenzer 2010, p. 571*]. The Parties agreed on the quality of squid *"As per sample"* [*CE 3, CE 4*]. The importance of what Parties have agreed upon needs to be emphasized [*Art. 7.1.1.(a) UNIDROIT principles, Art. 8:101 PECL*].Claimant and Respondent agreed in the contract that the goods must comply with the sample as reference for required quality [*Lambskin coat case*, *Keller, Siehr, p. 191*].

82. Squid must possess qualities of sample held out by Respondent, even when it is not required in the contract [*Art. 35(1) CISG*] as the presumption in Art. 35(2)(c) CISG applies. Under Art. 35(2)(c) CISG squid does not conform with the contract unless it possesses the qualities of sample held out by Respondent. Objective criteria test in Art. 35(2) CISG works as an interpretation tool if the intention of parties cannot be ascertained from the contract itself [*Schlechtriem, Butler, p.117*].

83. The quality as per sample was required by the contract [*CE 4*], but even if it was not specified in the wording of contract, conformity of squid is still to be assessed in relation to the qualities of the sample expressly provided by Respondent.

B. Delivered squid did not possess the size of sample which was of particular importance to Claimant

84. When Respondent provides sample to Claimant, he warrants that the delivered goods will possess the qualities of the goods, which he has held out as a sample [*Delchi v. Rotorex*, *Schlechtriem, Schwenzer 2010, p. 583*]. Sample is considered as a specific description of the goods [*Veneziano, p. 45*]. The sample of squid was shown to Claimant by Mr Weeg, the sales representative of Respondent, on 17 May 2008 [*CE 10, par. 6, SD, par. 10*]. The sample presented was, with the exception of a very few pieces, within the range of 100-150 grams [*SD, par. 13*].

85. The size of the squid must be understood as a determining characteristic of the sample. Under CISG, the specific content of the contract is based on the interpretation of the agreement between the parties [*Felemegas, p.* 168, *Roland Schmidt GmbH v. Textil-Werke Blumenegg AG*]. To determine the intent of the parties to the contract or general understanding reasonable person would have had [*Art. 8(3) CISG*], due consideration must be given to all relevant circumstances including the negotiations. Claimant, when negotiating the contract, showed clearly his intent to buy squid of particular size. Email which pre-dated conclusion of the contract from Claimant to Respondent reads, that Claimant was *"particularly pleased that the samples shown to us fell almost*

exclusively in the range of 100-150 grams. This is particularly important, since that is the range that gives our customers the best results." [*CE 2*].

86. The particular importance for Claimant's customers [*CE 2*] needs to be read in connection with previous correspondence [*CE 1*], where Claimant showed his interest in purchasing squid to be used as bait for long-liners. While size is unimportant for squid for food, it is of crucial importance for squid to be used as bait by long-liners [*CE 10, par. 4*]. Respondent, an experienced businessman in fishing trade, knew that for baiting, the size of squid is a decisive factor [*PO 3, par. 26*]. Therefore, the sample agreed in the contract mainly relates to the size of the sample.

87. Even though year of the catch changed during the contractation process, the Parties never denied sale by sample [*CE 3, CE 4*]. Thus, Claimant was entitled to expect that the quality of the squid would be no worse than that of the sample [*Agricultural products case*].

88. Respondent argues [*SD, par. 12*] that the sample did not relate to size, because the carton with the sample was labeled *"illex danubecus 2007"* [*SD, par. 10*]. Claimant was unaware of Respondent's internal labeling system and such a special understanding of the label [*Art. 8(1) CISG*]. Claimant has to emphasize that there was no contractual relationship between him and Respondent in last 10 years, thereby no binding usage could have been established between them [*Art. 9(1) CISG*]. Unless information concerning Respondent's labeling system was provided by Respondent, no reasonable person in the place of Claimant [*Art. 8(2) CISG*] could interpret *"illex danubecus 2007"* differently than stating year of the catch.

89. The squid delivered by Respondent did not possess all the qualities of the sample. "*The sample speaks for itself*" [*Drummond v. Van Ingen*]. The most of the squid fell within the range of 100-150 grams. Average size of squid in sample was 130 grams. Claimant emphasized that the size of the squid was of particular importance. All in all, Claimant reasonably relied upon the size of the sample held out by Respondent.

C. Additionally, squid did not conform with the contract because it was not fit for baiting which was particular purpose known to Respondent

90. Respondent is responsible for fitness of squid to be used as bait, which was purpose expressly or impliedly made known to him, Claimant relied on Respondent's skill and judgment, and it was reasonable for him to do so [*Art. 35(2)(b) CISG*].

91. Respondent knew Claimant needed the squid for baiting at the time of conclusion of contract. Claimant expressly informed Respondent that he is interested in "*purchasing squid for re-sale to the*

long liner fishing fleet to be used as bait"[*CE 1*]. This notification was sufficiently clear [*Skin care products case*].

92. The purpose does not need to be agreed upon [*Schlechtriem, Schwenzer 2010, p. 581*]. Art. 35(2)(b) CISG requires mere knowledge. Claimant emphasized to Respondent the importance of the size 100-150 grams for his customers [*CE 2*]. Respondent knew this size is particularly important for long-liners to be used as bait [*PO 3, par. 26*], all the more when 95 per cent of Respondent's supply to Meditarreneo is squid for long-liners [*PO 3, par. 12*].

93. Claimant relied upon Respondent's skill and judgment about selecting the appropriate squid, which would be fit for baiting because Respondent was an experienced company in fishing trade [*PO 3, par. 26*] and he knew the squid ordered by Claimant was solely for long-liners [*CE 1*].

D. Claimant did not modify requirements "as per sample" and "baiting purpose" by adding "fit for human consumption" condition because Respondent must have been aware that such condition refers to storage requirements applicable in Claimant's country

94. Requirement "fit for human consumption" [*CE 4*] must be interpreted pursuant to Claimant's intent where Respondent knew or could not have been unaware what that intent was [*Art. 8(1) CISG*].

95. Respondent was obliged to know the public laws of Meditarreneo concerning storage of fish products as this public law standard relevant for storage is an important part of Claimant's re-sale business [*CE 1*]. Even though Respondent cannot be generally expected to know all the public law requirements in the Claimant's country [*Schlechtriem, Schwenzer 2005, p. 420*], in the case at hand, an exception is to be applied for following reasons.

96. Firstly, if Respondent was aware of the particular purpose of squid, then he was also responsible for observance of public law standards [*Schlechtriem, Schwenzer 2005, p 421*]. There was a public law standard in Meditarreneo that all fish products stored together with food that will be consumed must be fit for human consumption [*SD, par. 15*]

97. Secondly, Respondent is obliged to deliver squid in conformity with public law standards existing in export state as well [*Mussels case*, *Medical Marketing International*]. Respondent knew or must have known such public law standards because the same provisions exist in Equatoriana, his own country [*PO 3, par. 22*].

98. Respondent must have known that the including of the term "human consumption" was to ensure the compliance with the public law standards. This meaning is the only possible one under all relevant circumstances [*Art. 8(3) CISG*]. Claimant explicitly pointed out that he wants squid

for long-liners [*CE 1*] as well as the particular size necessary for long-liners [*CE 2*]. Respondent could not reasonably submit that unlikely possibility that Claimant changed his mind so suddenly in completely different way occurred and instead of 200 MT of squid for long-liners he ordered 200 MT for food.

X. Claimant could not have been aware that Respondent delivered squid not conforming with contract, Respondent is still liable as an exemption is not applicable

99. Under Art. 35(3) CISG seller is not liable if the buyer knew or could not have been unaware of lack of conformity at the time of conclusion of the contract. Art. 35(3) CISG constitutes an exemption to Art. 35(2) CISG.

100. The quality of squid as per sample [*CE 4*] was expressly agreed in the contract [*Art. 35(1) CISG*], Art. 35(3) CISG is thus inapplicable.

101. Even if the size of the squid was assessed under Art. 35(2) CISG, the exemption in Art. 35(3) CISG would not still apply to Claimant. Claimant could not know that Respondent delivered squid of improper size only because he ordered squid in the beginning of the harvesting season. The squid in contract was described as "*2007/2008 Catch*" [*CE 4*]. This description, including years 2007 and 2008, is wide enough for Respondent to provide any combination of 2007 squid and 2008 squid. It was possible to deliver both 2008 squid and 2007 squid within the range between 100-150 grams [*CE 8, par. 4*]. Thus, Claimant relied on Respondent professional skill that he would select proper squid.

102. Respondent is liable for non-conformity of the squid as there are no grounds for invoking exemption under Art. 35(3) CISG. Claimant could not have been aware that Respondent delivered the squid lacking conformity with contract, otherwise Claimant would never had ordered 200 MT of squid he could not use.

XI. Claimant conformed with his obligation to conduct an adequate and timely examination of goods by inspecting a portion of the frozen squid at the day of delivery and notified Respondent of non-conformity in just 4 days after he discovered the lack of conformity

103. Claimant examined delivered squid immediately after the delivery [A] and such an examination was proper and sufficient, particularly in circumstances of this delivery [B]. Consequently,

Claimant preserved rights arising out of the delivery of nonconforming goods as he informed Respondent about the nature of lack of conformity within just 4 day after nonconformity was discovered [C].

A. Claimant examined delivered squid immediately after the delivery, i.e. within as short a period as is practicable under circumstances

104. The buyer must examine the squid, or cause them to be examined, within as short a period as is practicable in the circumstances [*Art. 38(1) CISG*]. This as short as practicable period is interpreted flexibly, in view of the extreme diversity of goods that might be the subject matter of international contracts [*Kuoppala, par. 3.4.1*]. Accordingly, this period may vary from hours and days [*LG Aachen 3/4/1990, OG Luzern 8/1/1997*], to several weeks [*OLG Köln 21/8/1997*]. When determining the duration of the period, the circumstances of the individual case and the parties' reasonable opportunities must be considered. Such circumstances might be, for example, where the goods are situated at the time of delivery, and the type and method of packaging used [*Schlechtriem, Schwenzer 2010, p. 615*]. Further, if the contract provides for carriage of the goods the period to examine the goods does not begin to run until their arrival at their destination [*Art. 38(2) CISG, Schlechtriem, Schwenzer 2010, p. 618,* DiMatteo et al.].

105. Claimant and Respondent concluded a contract involving transportation of the goods. Parties incorporated this obligation into delivery term CIF [*CE 3, CE 4*]. Accordingly, Claimant's duty to examine the squid has not begun to run before their arrival at port in Capital City, Mediterraneo on 1 July 2008. Claimant examined squid right upon the delivery [*RA, par. 15, CE 10, par. 10*]. When examination is conducted on the day of delivery, it satisfies any period set by interpretation of Art. 38 CISG [CMCC *Copenhagen 31/1/2002, Andersen*]. Therefore, Claimant complied with duty to examine squid within as short a period as is practicable.

B. Claimant conducted examination of 20.000 cartons of delivered frozen squid, which amounts to proper and sufficient examination, particularly in circumstances of this delivery

106. The CISG itself does not expressly state how the examination should be conducted. On the other hand, CISG offers procedures to fill in gaps in its wording [*Art. 7(2) CISG*]. Such a process would apply only when there is no express agreement of the parties [*Art. 6 CISG*], no usage between them [*Art. 9(1) CISG*], or no usage applicable in the trade the parties are involved in [*Article 9(2) CISG*]. Gaps must be filled, whenever possible, within the Convention itself; a solution that complies with the aim of Article 7(1), *i.e.* the promotion of the Convention's uniform application [*Felemegas2, Art. 7*].

107. Firstly, there was no agreement concerning methods of examination between Parties [*CE 4*] and also there was no such a usage established between them [*PO 3, par.14*].

108. Secondly, when there are commercial usages in certain area of trade, they should be taken into account. These usages may often have a form of a codex or of international standards recorded in a written form. Joint effort of FAO and WHO resulted in adopting of The Codex Alimentarius, the collection of internationally adopted food standards presented in a uniform manner. Such Standards may be considered as an expression of certain commercial usages in international trade as they are quoted by online exchange markets, e.g. FoodMarket, or by international fishery programs, e.g. SFP Programme. FAO pages are also quoted on websites of fishing companies involved in illex squid trade, e.g. Iberconsa. At last, these standards are also recognized by governmental bodies [*Australian Department of Agriculture, United States Department of Agriculture*].

109. Most importantly, in the Claimant's country, health regulations require that fish products must comply with food and bait standards [*RA, par. 15, PO 3, par. 22*]. Respondent could not have been unaware of the existence of these storing requirements [*see par. 96, 97*]. Therefore, to comply with such regulations, even the squid for bait must be handled in the same manner as the squid for human consumption. Since the regulations are a requirement for storage, the Claimant is bound by their wording until the goods are discharged from his warehouses. By that time the squid must be treated as a food.

110. Thirdly, in the absence of a commercial usage or an agreement between the parties, the buyer must examine the goods in an appropriate manner which takes into account their nature, quantity, packaging, and all other circumstances [*Schlechtriem, Schwenzer 2010, p. 612, OG Austria 27/8/1999*]. When applying these criteria, courts further ruled both the objective and the subjective peculiarities of the individual case have to be taken into account. These are, for instance, the buyer's specific operational and personal conditions, the characteristics of the goods, or the quantity delivered [*OG Austria 27/8/1999, OLG Düsseldorf 10/2/1994, Digest 38*].

111. On 1 July 2008 Claimant received delivery containing 20.000 cartons of blast frozen Grade A squid which ought to be fit for human consumption [*RA, par. 17, CE 4*]. Blast frozen refers to the freezing process when squid is quickly frozen to temperatures below -18 °C, this allows keeping the squid of desired quality [*Frozen Squid Standards 2.2, Standards on Handling 4.3*]. Therefore, any handling or manipulation with delivery shall be in a manner avoiding critical temperature abuse situations that may jeopardize goods safety [*Standards on Handling 4.7*]. Generally, examination shall not degrade quality level of squid and, furthermore, it shall take into

account the specific fact that the squid must be fit for human consumption. Such circumstances limited Claimant as to the possible methods of the examination (i) and to its extent (ii).

(i) Claimant was limited in variety of the inspection methods due to specific packaging and due to frozen state of delivered squid

112. The Parties contracted for packaging of squid *"10 kg poly-lined block per master carton"*. Nothing further [*CE 4*]. Master carton is utilized as a larger uniform shipping carton for smaller packages or cartons, and it serves to lessen material handling time and adds protection during shipping to the smaller items [*MHIA*]. Cartons were packed on pallets and palletized in such a manner that to get to the content they had to be broken out [*CE 10, par. 9, 10*]. It corresponds with the purpose of packaging to protect the squid from dehydration or deterioration [P*rinciples of Food Hygiene]* and to protect it against microbial and other contamination that could adversely affect safety and quality [*Standards on Handling 4.7, Fish practice 15.2*]*,* which may subsequently make storage with food units impossible under Mediterraneo health law. Claimant is aware of the importance of the packaging.

113. When squids are delivered frozen, they must be kept below certain temperature, thus, Claimant's options to examine the squid are limited. Examination, handling or re-packing of the squid bears a risk of thermal variations, which give rise to possible deterioration of quality of the squid. Therefore, loading into and unloading from vehicles and loading into and unloading from cold stores should be as fast as practicable and the methods used should minimize product temperature increase [*Standards on Handling 4.7*].

114. However, Claimant insists that as a professional salesman he is not obliged to carry out an inspection of majority of delivery when this inspection destroys original packaging and may destroy the goods [*OG Luzern 8/1/1997*]. Especially, when a packaging is of significant importance for preservation of the squid. This right belongs only to end-customers.

115. Moreover, it is of substantial importance for Claimant to keep pallets in one piece. Adequate packaging allows easy handling with large quantities of goods and comfortable transportation. In addition, the squid is being stored in warehouses on the pallets and customers, the long liners, store the squid onboard also on the pallets [*CE 10, par.9*].

116. Claimant sells supplies to fishing fleets, including squid for bait [*RA, par. 2, CE 10, par. 2*]. Claimant is not a fishing company, contrary to Respondent, he operates only as a wholesaler ordering squids and re-selling them after. Accordingly, his task is to store the squid in adequate conditions and transport them upon order. Specifically, he has to conform to the common health regulation, requiring the squid to be fit for human consumption, in order to be stored together

with food [*RA, par. 15*]. The main purpose of packaging is to avoid deterioration, to preserve goods during transportation, and to allow easy handling with goods. Under such circumstances, Claimant could not be expected to take more samples of squid, if he was to avoid compromising the integrity of goods in transportation possibilities.

(ii) Claimant was limited also in extent of the inspection, as the inspection process inevitably resulted in the uselessness of the squid

117. The parties agreed on delivery of 200 MT of the squid, packed in cartons of 10 kg each [*CE 3, CE 4*], hence, the delivery was of amount 20 000 cartons. In case where large quantities have been delivered, the buyer is not required to examine all goods, but may restrict examination to representative, random tests [*Schlechtriem, Schwenzer 2010, p. 613*]. In case concerning the amount of 500-700 pieces of clothing, Slovakian court ruled it would be unreasonable to expect the buyer to examine all the goods at the time of the delivery [*RC Zilina 25/10/2007*]. Accordingly, German court held that the purchaser of packaged goods could not be expected to open and inspect for possible defects all packages upon their receipt and then to pack them back [*LG Baden-Baden 14/8/1991, Lookofsky p. 93*]. Further, in case where an examination may damage the substance of the squid, the number of samples to be examined can be reduced to a few per thousand of entire stock [*OG Luzern 8/1/1997*].

118. Accordingly, Claimant for inspection randomly selected 20 cartons of squid from two containers which arrived first [*CE 10, par. 10*]. However, there was no need to open and decompose content of all of the containers and jeopardize its content. In this case the delivery did not consist out of twelve containers of different goods, but of 200 MT of the squid randomly loaded into twelve containers.

119. Further, in case when the labeling would have shown the location of cartons with 2008 squid, Claimant, as a professional tradesman with excellent reputation [*PO 3, par. 13, 27*], would not hesitate to conduct examination of these cartons. However, it could not be reasonable expected from Claimant to carry out examination to unlimited extent. Therefore, each of 20 cartons was weighed to confirm the agreed weight of 10 kg. After that, 50 kg of squid was selected, defrosted and visually inspected. That means that around 400 individual squids were inspected (the average weight was circa 125 grams). The only way to inspect squid was to defrost them [*PO 3, par. 33*]. However, once defrosted, the squid was not anymore fit for use as bait [*RA, par. 17*].

120. Indeed, the size of the squid could be measured only after unfreezing process [*PO 3, par. 33*]. As inspection showed, the squid was of promised quality [*RA, par. 17*]. One of Claimant's customers required the squid as soon as possible after delivery and, moreover, the substantial quantity of the

squid had to be moved within next week to five other customers, hence, it was impossible for Claimant to examine more samples [*CE 10, par. 10, 11*]. Therefore, Claimant lacked a reasonable opportunity to examine the goods because of an on-sale, such situation should be considered under Article 38(1) CISG, not as re-dispatch under Article 38(3) CISG, both with respect to the method of the examination and especially regarding the reasonable period of time required for such an examination [*OG Luzern 8/1/1997, Schlechtriem, Schwenzer 2010, p. 619*].

121. Claimant conducted adequate examination when he examined sufficient number of samples, few per thousands, of frozen and well packed squid for re-sale, particularly when such examination destroyed the inspected squid and packaging of whole pallet. Further thorough inspection would destroy much more pallets and even more squid.

C. Claimant preserved rights connected with the delivery of nonconforming goods as he informed Respondent about the nature of lack of conformity within just 4 day after nonconformity was discovered, i.e. he acted within reasonable time after he had the possibility to discover the defect

122. The buyer is obliged to give notice of non-conformity of the goods within reasonable time after he has discovered it or ought to have discovered it in order to keep his right to rely on a lack of conformity [*Art. 39(1) CISG*]. When determining a reasonable period, all the circumstances of the specific case must be taken into account [*Schlechtriem, Schwenzer 2010, p. 632*].

123. As it was stated above, it was impossible to recognize the size of the squid without defrosting it. Claimant conducted reasonable examination and still could not discover the lack of conformity; such a defect should be considered as hidden. Subsequently, the duty of Claimant to notify is postponed to time when he acquired knowledge about the lack of conformity [*Lookofsky, p.93*].

124. Claimant received message from his customers, informing him about non-conforming squid on 29 July 2008 [*CE 7*], hence, the period to give notice of lack of conformity started to run from this day. Claimant notified Respondent about an existence of non-conformity on the very same day, thus, he gave notice in accordance with Art. 39(1) CISG [*Lookofsky, p. 93*, *SC Netherlands 20/2/1998*]. Pursuant to any interpretation of the abovementioned provision the notice was given within reasonable time [*AP Spain 12/9/2001, AP Spain 3/10/2002, OLG Kalrsruhe 25/6/1997, Andersen, CISG-AC Opinion No. 2*].

125. Further, on 3 August 2008 Respondent answered to this notice by email asking Claimant to have the squid inspected by certified agency [*CE 6*]. Accordingly to this proposal Claimant ordered certified agency TGT Laboratories to conduct the inspection. It should be considered as an

agreement between parties on the joint progress towards solution of the situation [*AG Mayen 6/9/1994*].

126. Finally, Claimant received report from TGT Laboratories on 12 August 2008 and sent it to Respondent on 16 August 2008. Therefore, the time spent on notification of the lack of conformity was 4 days which satisfied requirement of reasonable time under Art. 39(1) CISG.

XII. Claimant properly exercised his rights to avoid fundamentally breached sales contract when he notified Respondent of the return of goods within just 4 days after he discovered the breach

127. Firstly, Respondent committed fundamental breach of contract [A]. Secondly, Claimant maintained the right to avoid the contract due to ability to restitute the goods in delivered condition and quality [B]. Thirdly, Claimant properly exercised his right to avoid the contract when he notified Respondent about fundamental breach during reasonable time [C].

A. Respondent committed a fundamental breach when he did not deliver the squid in accordance with the sample provided and specific purpose communicated

128. Breach of contract is fundamental if results in such detriment to Claimant that substantially deprives 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*]. Fundamental breach justifies Claimant to avoid the contract under Art. 49(1) CISG [*Ferrari, Flechtner, Brand, p. 628*]. There are several requirements, which prove the fundamentality of Respondent's breach, such as detriment, foreseeability and entitlement of Claimant to expect goods under contract [*Leisinger, p. 38*].

129. The first requirement is a detriment which has to be understood in a very broad sense. It can be material or immaterial [*Leisinger, p. 38*]. Claimant suffered detriment of both kinds. First, monetary loss in the amount of USD 479 450 was his material detriment [*RA, par. 30*]. This sum contains e.g. the paid purchase price, damages for the loss of profit on the unsold squid, the extra expenses of storing the squid, expenses incurred in attempting to sell the squid for Respondent's account and expenses incurred in disposing of the squid [*RA, par. 30*]. Second, Claimant lost reputation among his customers, at least three of them shifted to other suppliers [*CE 10, par.* 18]. This constitutes the nonmonetary detriment.

130. Secondly, Claimant is substantially deprived of what he is entitled to expect under the contract if he loses his interest in the contract [*Schlechtriem, Schwenzer 2010, p. 406*]. Such a substantial deprivation 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, such as thickness of the goods [*CISG-AC Opinion No.5, par. 4.2*].

131. Claimant expected squid delivered in range from 100-150 grams which could have been used for baiting, however the average weight of delivered squid was far below what Claimant contracted for [*CE 8*]. Claimant concluded the contract to gain profit and to improve his reputation as reliable seller of squid for baiting. Success of this business transaction might have resulted in strengthening his position on this market [*CE 10, par. 11*]. Squid delivered was useless as bait therefore Claimant's expectations were not met at all.

132. Thirdly, last requirement is foreseeability which is divided to subjective and objective perspective [*Art. 25 CISG*]. The subjective perspective is constituted whether the party in breach foresaw that the breach of contract would result in a substantial deprivation of the opposite party. The objective perspective observes the potential conduct of a reasonable merchant of the same kind under the same circumstances. These two elements are cumulative [*SiSU Information, par. 8.2.3.*]. Foreseeability is regarded to court practice dedicated to the time of conclusion of contract [*BGH Germany 8/3/1995*].

133. The subjective perspective of foreseeability is obvious from the matter of fact that Respondent knew that Claimant expected squid for baiting. Moreover, Claimant emphasized the importance of squid size for Claimant's customers from the very beginning of contractual negotiations [*CE 1*]. Respondent had to know that delivery of nonconforming goods will implicate extra costs at Claimant's side [*PO 3, par. 26*].

134. The objective perspective of foreseeability is also obvious. Every experienced seller of squid for baiting is well aware that the best squid is in range from 100-150 grams [*PO 3, par. 26*]. And reasonable merchant, as Respondent is, ought to know that this nonconformity of smaller or larger squid can worsen the Claimant's position on the market [*RA, par. 4*]. Respondent is experienced in the fish trade which had to lead him to knowledge about the importance to meet Claimant's expectations expressed in sales contract [*PO 3, par. 26*].

135. To conclude, Respondent fundamentally breached the contract under Art. 25 CISG. Respondent delivered nonconforming squid which could not be used as bait. Therefore, Claimant could not have resold this squid for long-liners which was the sole purpose of this sale contract. Respondent must be held liable for this fundamental breach because he knew and as an

experienced businessman in fishing trade ought to have known that underweight squid would most definitely frustrate Claimant's business expectations.

B. Claimant did not lose the right to declare contract avoided, as he was able to make the restitution of goods substantially in condition and quality delivered by Respondent

136. Claimant's right to avoid the contract is preserved when Claimant is able to make restitution of the goods substantially in the condition in which it was received. Claimant will not lose his right to declare the contract avoided if the impossibility of making proper restitution is due to the use he has made of goods in the normal course of business [*Art. 82(2)(c) CISG*] or where the inability originates as a result of the examination of the goods [*Art. 82(2)(b) CISG*].

137. Claimant performed the examination of the goods in a proper way on the deliver day on 1 July 2008 [*see par. 105, 121*]. Claimant conducted proper examination which caused that only marginal amount of squid perished. Consequently, Claimant was able to restitute the goods substantially in the condition in which it was delivered by Respondent. In any time, Claimant was ready to return the goods [*CE 7*] with exception of squid perished while he was performing his legal obligation to examine goods [*Art. 82(2)(b) CISG*].

138. Claimant fulfilled all requirements under CISG as to the restitution of goods and therefore preserved his right to terminate the contract under Art. 49(1)(a) CISG.

C. Claimant exercised the avoidance of the sales contract properly when he notified Respondent about the substantial breach and possible return of goods within 4 days once he discovered the breach

139. As Respondent already delivered the goods, Claimant could exercise right of avoidance only during a reasonable time thereafter [*Art. 49(2) CISG*]. Claimant does not lose his right to rely on the lack of conformity of the goods as he informs Respondent about the lack of conformity, specifying its nature within a reasonable time after discovery [*OLG Koblenz 21/11/2007*]. This reasonable time could not be long. Nine days since discovery of the nonconformity of the goods are considered as the reasonable time and allow Claimant to validly terminate the contract [*OLG Stuttgart 12/3/2001*].

140. If Respondent fundamentally breaches the contract, CISG grants the remedy to avoid the contract [*Art. 49(1)(a) CISG*]. This remedy applies when Claimant can no longer be expected to continue in the contract [*BGH Germany 3/4/1996*].

141. If party intends to terminate the contract, it does so by declaration of avoidance [*Art. 26 CISG*]. Notice of avoidance must be communicated to the other party by appropriate means of

communication [*Lookofsky, p. 115*]. Today, even e-mail will do. Notice of nonconformity of the goods and notice of avoidance can be combined and expressed in one declaration [*BGH Germany 25/6/1997*].

142. The notice need not to be expressly mentioned although the term of avoidance or termination must indicate that the contract is to be terminated [*Magnus, p. 427*]. It is sufficient that Claimant clearly indicated that he no longer wants to be bound by the contract. This requirement is met by buyer's e-mail stating that he placed the goods at seller's disposal. It is regarded as a sufficiently clear declaration of avoidance [*OLG Köln 14/10/2002 upholding LG Köln 13/9/2001*]. Similarly, Claimant effectively gave the notice of avoidance of the contract by declaring that he could not use the defective goods and that he places them at the disposal of Respondent [*BGH Germany 25/6/1997*].

143. Claimant avoided the contract on 16 August 2008 by e-mail sent to Respondent [*CE 7*]. In that e-mail Claimant notified Respondent of nonconformity. More importantly, Claimant asked him what he should do with the goods, which he would be holding at Respondent's disposal. Claimant also informed Respondent he would try to sell the squid on Respondent's account [*CE 7*]. Such a conduct cannot be interpreted otherwise than avoidance of the contract.

144. Respondent can hardly argue that Claimant did not avoid the contract within reasonable time. Claimant discovered the full extent of hidden defects once he obtained TGT report on 12 August 2008. Moreover, such a report was expressly demanded by Respondent. Therefore, Claimant avoided the contract in the timely manner as he did so in only 4 days after he discovered the full nature of nonconformity [*CE 7, CE 8*].

145. To sum up, Claimant clearly indicated his intend to avoid the contract in form of email on 16 August 2008, he did so within reasonable time and therefore he exercised his right to avoid the contract rightfully. Consequently, Claimant is entitled to reimbursement of purchase price paid for delivery of the goods.

XIII. Claimant is entitled to the full compensation of damages, as he used best efforts to mitigate the loss and extra costs which arose from the breach of contract and which Claimant had to bear

146. 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 in the

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. The injured party is not obliged to undertake measures which involve extraordinary, unreasonable costs [*Schlechtriem, Schwenzer 2010, p. 788*].

147. Claimant informed Respondent promptly after receipt of the TGT Laboratories report about the nonconforming squid, about avoidance of sales contract and more importantly about the fact Claimant was holding the squid at Respondent's disposition [*CE 7*]. Moreover, Claimant offered help to re-sale the squid for Respondent's account. Even though Respondent remained silent, Claimant still tried to sell the squid [*RA, par. 20, CE 10, par. 15*]. However, Claimant's usual business activities do not concern selling squid for human consumption [*CE 10, par. 15*], thus lack of appropriate contacts together with small market in Mediterraneo resulted in impossibility to sell the squid even at a heavy discount [*CE 10, par. 15*]. In the end Claimant addressed the Reliable Trading House and asked him to sell the squid in any foreign market. Reliable Trading House was able to sell about 20 MT [*CE 10, par. 15*]. Even such a professional re-sale entity as the Reliable Trading House is was able to sell only 10% of the squid.

148. Since the discovery that delivered squid was not in conformity to the contract, Claimant took sufficient measures to mitigate the loss by effort to sell the nonconforming squid, even on any foreign market via Reliable Trading House [*RA, par. 20, OLG Celle 2/9/1998*].

149. Respondent was informed about the whole situation with the nonconforming squid; he rejected any responsibility and refused to take the squid back [*CE 9, CE 10, par. 16*]. Although, Claimant made every possible effort to encourage him to do so [*RA, par. 23*]. Therefore, Claimant had to store the squid in his refrigerated warehouses while he was trying to sell it. As a consequence one store room could not be completely emptied out what prevented Claimant from normal maintenance shut-down during the off-peak period [*CE 10, par. 16*]. This brought along another expenses on Claimant's account. Finally, the squid had to be destroyed because it was reaching a point where it was no longer certain to be fit for human consumption [*PO 3, par. 30*]. Claimant could not sell it and Respondent was refusing to take it back [*CE 9, CE 10, par. 16*]. Furthermore, by emptying the warehouse Claimant also mitigated damages arising out of the expenses for storage.

150. There were no indications that nonconforming squid was delivered as the proper examination did not discover any problems. Claimant could not therefore take any measures to mitigate the loss of profit due to the lack of time to do that, together with financial and technical impossibilities to ensure replacement purchases.

151. To conclude, Claimant made every possible effort to sell the nonconforming squid on local and foreign markets through Reliable Trading House. Eventually he destroyed the squid because it was reaching time of expiry and consequently was no longer fit for human consumption, as well as to mitigate Claimant's expenses to store the squid. Considering the specificity of the fishing trade Claimant took all possible measures to mitigate the loss resulting from the breach of contract and therefore he is fully entitled to compensation of the loss of profit on the unsold squid and reimbursement of all his expenses for storing the squid, expenses incurred in attempting to sell the squid for Respondent's account and expenses incurred in disposing of the squid.

Relief Requested

1. **Claimant respectfully requests the Arbitral Tribunal to exercise its right under Art. 33(1) CAM Rules 2010 and issue an interim award whereby it finds that:**
   i) the Tribunal has jurisdiction over the dispute between Claimant and Respondent.
2. **Claimant respectfully requests the Arbitral Tribunal to find in the final award that:**
   i) Claimant did not violate the Rules in regard to the confidentiality of the arbitral proceedings;
   ii) Claimant is not liable for any damage that can later be demanded by Respondent resulting from the breach of confidentiality;
   iii) Respondent committed a breach of the contract under Art. 25 CISG when he delivered the Goods which were not in conformity with the contract;
   iv) Claimant did conduct an adequate examination of the shipment of squid;
   v) Claimant has lawfully exercised the consequent right to avoid the contract.
3. **Consequently, Claimant respectfully requests the Arbitral Tribunal to order Respondent to pay Claimant:**
   i) a total sum of USD 479.450 consisting of:
      (1) the net amount of USD 297,000 (the purchase price reduced by the price of the squid retained by the Claimant's customers);
      (2) damages in the amount of USD 119,250 for the loss of profit on the unsold squid;
      (3) damages of USD 44,750 for the extra expenses of storing the squid;

(4) damages of USD 12,450 for the expenses incurred in attempting to sell the squid for Respondent's account;

(5) damages of USD 6,000 for the expenses incurred in disposing of the squid;

(6) interest on the said sums; and

(7) all the costs of arbitration including costs incurred by the Parties.

Respectfully submitted on 9 December 2010 by

Ondřej Bartoň	Lukáš Bögöš	Martin Fajt	Andrea Halfarová
Ladislav Henáč	Jarmila Tornová	Matúš Tutko	Ondřej Šváb

On the behalf of Mediterraneo Trawler Supply SA, Claimant.