

EIGHTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM

for

Sports and More Sports, Inc.

- CLAIMANT -



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List of Abbreviations

§ / §§	section / sections
AG	Amtsgericht (German District Court)
Am. J. Comp. L.	American Journal of Comparative Law
Art. / Artt.	article / articles
ASA	Association suisse de l'arbitrage
BG	Bundesgericht (Swiss Federal Court)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the German Federal Court of Justice in civil matters)
Bus. Law.	The Business Lawyer
cf.	<i>confer</i> (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG-Online	Case Law on the UN Convention on Contracts for the International Sale of Goods (Internet database), edited by the Institute of Foreign and International Private Law (Dept. I), University of Freiburg, Germany
CLOUT	Case Law on UNCITRAL Texts (Internet database), edited by the UNCITRAL Secretariat
comp.	compare
Corp.	Corporation
ed. / Ed.	Edition / Editor
e.g.	<i>exemplum gratia</i> (for example)
EKG	Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen of 17 July 1973
et seq.	<i>et sequentes</i> (and following)
EuZW	Europäische Zeitung für Wirtschaftsrecht
fn.	footnote
FOB	free on board (Incoterm)
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration
idem	same
infra	below
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
J.D.I.	Journal Du Droit International
LG	Landgericht (German Regional Court)

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
Nice Agreement	Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks
No.	number
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift - Rechtsprechungsreport
OGH	Oberster Gerichtshof (Austrian Supreme Court)
Ohio St. L.J.	Ohio State Law Journal
OLG	Oberlandesgericht (Regional Court of Appeal)
O.R.	Official Records
p. / pp.	page / pages
para. / paras.	paragraph / paragraphs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R.D.A.I.	Revue de Droit des Affaires Internationales
RIW	Recht der internationalen Wirtschaft
RTD com.	Revue trimestrielle de droit commercial et économique
supra	above
UCC	Uniform Commercial Code (USA)
ULIS	Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL EC	UNCITRAL Model Law on Electronic Commerce
UNCITRAL ICA	UNCITRAL Model Law on International Commercial Arbitration
UN-Doc.	UN-Documents
UNIDROIT	Institut International pour l'Unification du Droit Privé (International Institute for the Unification of Private Law)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (1994)
Uniform L. Rev.	Uniform Law Review
UNILEX	International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods (looseleaf & disk database), edited by Michael Joachim Bonell at the Center for Comparative and Foreign Law Studies, Irvington-on-Hudson, New York.
v.	<i>versus</i> (against)
Vol.	Volume

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Statement of Facts

- 5 April 1999** Sports and More Sports, Inc. (hereinafter: CLAIMANT) sent a purchase order via e-mail to Vis Water Sports Co. (hereinafter: RESPONDENT). It ordered water sports equipment in the amount of list price \$100,000 FOB Capitol City with a 5 percent discount. CLAIMANT referred to its attached General Conditions of Purchase containing clause 14 which was a standard ICC arbitration clause.
- 6 April 1999** RESPONDENT confirmed this purchase order and requested that a letter of credit be established in the amount of \$112,200. RESPONDENT referred to its own General Conditions of Purchase that were placed on its web site and available by opening a link. They contained a forum selecting clause selecting the Commercial Court in Capitol City, Equatoria as the forum for any dispute settlement.
- 10 May 1999** CLAIMANT's account was charged in the amount of \$102,000 for the first purchase order.
- 19 May 1999** The goods were delivered to CLAIMANT.
- 27 May 1999** CLAIMANT enlarged its initial purchase order to include additional goods totalling list price \$500,000. Again, CLAIMANT referred to its General Conditions of Purchase that were attached to its first purchase order.
- 28 May 1999** RESPONDENT accepted the enlargement of the purchase order and announced to treat the two purchase orders as one bargain. It actually did so by calculating a total of \$486,000 (list price minus 8 percent discount) including transport and insurance while subtracting \$3,000 which equals another 3 percent discount on the first purchase. RESPONDENT promised to ship the goods by 20 June 1999.
- 25 June 1999** CLAIMANT's account was charged for the second purchase order.
- 20 September 1999** CLAIMANT received the first letter from Vis Fish Company of Danubia (hereinafter: Vis Fish) in which it claimed that advertising for sale and the selling of goods in Danubia bearing the Vis Water Sports name infringed its registered trademark "Vis".
- 15 October 1999** In its second letter, Vis Fish threatened legal action. In Danubia the trademark covers all water-related goods and is registered in classes 22, 28 and 29 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (hereinafter: Nice Agreement).
- 28 October 1999** CLAIMANT received a letter from the law office of Howard & Heward in which it was stated that Vis Fish's claim of trademark infringement was unlikely to be upheld in court but that litigation would nevertheless not be easy.
- 3 November 1999** CLAIMANT notified RESPONDENT that the latter had violated its obligation under Art. 42 United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) to deliver goods free from any right or claim based on intellectual property. CLAIMANT therefore declared the contract avoided.
- 10 November 1999** RESPONDENT denied that there had been an effective avoidance of the contract.

CLAIMANT's Request

We respectfully submit the following request on behalf of our client SPORTS AND MORE SPORTS INC.:

May it accordingly please the honorable Tribunal to find that,

1. the Arbitral Tribunal has jurisdiction;
2. RESPONDENT failed to perform its obligation to deliver goods free from any claim of a third party based on intellectual property;
3. CLAIMANT has effectively avoided the contract;
4. CLAIMANT is entitled to comprehensive damages and interest thereon;
5. the new claims made by CLAIMANT (costs for letters of credit, loss of profit and costs for legal advice) fall within the limits of the Terms of Reference, Art. 19 ICC Rules of Arbitration (hereinafter: ICC Rules).

Should the Arbitral Tribunal decide that the new claims (costs for letters of credit, loss of profit and costs for legal advice) do not fall within the limits of the Terms of Reference, may it please the Tribunal to authorize the new claims pursuant to Art. 19 of the ICC Rules;

6. RESPONDENT has to bear the costs of the arbitration.

Applicable Law

Since the arbitration agreement between CLAIMANT and RESPONDENT was concluded by using a standard ICC arbitration clause, the arbitral proceedings will be governed by the ICC Rules¹.

The CISG is the law applicable to the contract by virtue of Art. 1 (1) (a) CISG since both Danubia and Equatoriana are parties to the Convention². Neither Danubia nor Equatoriana entered any reservations to the Convention³.

Since Vis Fish has asserted that there is an infringement of its trademark “Vis”, which is registered in Danubia, the Danubian Trademark Law is applicable to questions regarding national intellectual property rights due to the principle of territoriality. In addition, the application of the Trademark Law Treaty and the Nice Agreement to questions regarding the alleged trademark infringement is appropriate because both Danubia and Equatoriana are parties to these Conventions⁴.

As Vindobona, Danubia has been determined as the place of arbitration⁵, the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: UNCITRAL ICA) as *lex fori* is subsidiarily applicable to questions concerning the arbitral proceedings⁶. Moreover, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: New York Convention) is applicable to the present arbitration since both Danubia and Equatoriana are parties to it⁷.

Since the UNCITRAL Model Law on Electronic Commerce (hereinafter: UNCITRAL EC) has been adopted by both Danubia and Equatoriana⁸, it is appropriate to use it as a means of interpretation of formal requirements set forth by any Conventionp.

¹ Terms of Reference, para. 4; Answer to Request for Arbitration, para. 12; Request for Arbitration, para. 18.

² Request for Arbitration, para. 22.

³ Procedural Order No. 1, para. 1.

⁴ Procedural Order No. 1, para. 4.

⁵ Terms of Reference, para. 18; Answer to Request for Arbitration, para. 18; Request for Arbitration, para. 21.

⁶ Request for Arbitration, para. 23.

⁷ Request for Arbitration, para. 23.

⁸ Procedural Order No. 1, para. 2.

Unit 1: The Arbitral Tribunal has jurisdiction

The jurisdiction of the Arbitral Tribunal arises out of a valid arbitration agreement between CLAIMANT and RESPONDENT¹. CLAIMANT's General Conditions of Purchase contained a standard ICC arbitration clause with three additions in its clause 14². According to this clause, any dispute arising out of or in connection with the present contract shall be settled under the ICC Rules. It will be shown that, firstly, the CISG is the law applicable to the arbitration agreement [I], secondly, the parties agreed on CLAIMANT's general conditions including the arbitration clause [II], and finally, the agreement meets the formal requirements of the UNCITRAL ICA and the New York Convention [III].

I. The CISG is the law applicable to the arbitration agreement

As there has not been any choice of law³ regarding the arbitration agreement it is subject to the CISG which is the *lex contractus*, i.e. the law applicable to the entire contract. If the parties have not explicitly made a choice of law, an arbitration clause is governed by the same law as the other provisions of the contract⁴. An arbitration clause forms part of a contract in the same way as the other contractual provisions⁵. It would be impractical, even confusing, for parties who do not necessarily take into account a future dispute at the time of the agreement, to have two different laws governing the provisions of one contract⁶. Therefore,

¹ The Arbitral Tribunal's "Kompetenz-Kompetenz", i.e. its competence to decide on its own jurisdiction, is not challenged by either of the parties. Since CLAIMANT and RESPONDENT have agreed on clause 14 of CLAIMANT's general conditions, as will be shown below (see supra Unit 1 II.), and since even RESPONDENT acknowledges that there is a 'prima facie' arbitration clause, the Tribunal has the competence to decide on its own jurisdiction. This follows from Art. 6 (2) (1) of the ICC Rules.

² Terms of Reference, para. 4; Request for Arbitration, para. 18.

³ Procedural Order No. 1, para. 35.

⁴ Redfern/Hunter, 3rd ed., para. 3-36; 2nd ed., pp. 75, 76, 149, 150; Schlosser, para. 259; von Hülsen, p. 102; Hausmann, p. 365 para. 1; Schwab/Walter, p. 409 para. 9; Filanto S.p.A. v. Chilewich International Corp., UNILEX, E.1992-9, p. 128.

⁵ The CISG itself regards clauses for the settlement of disputes just as other contractual provisions as a part of the contract. Art. 81 (1) CISG, second sentence, as well as Art. 19 (3) CISG use explicitly the wording "settlement of dispute", which is to be understood as covering arbitration agreements, Schlechtriem/Schlechtriem, Art. 19 para. 8; Bianca/Bonell/Farnsworth, Art. 19 note 2.8.; Secretariat's Commentary, O.R., p. 24, Art. 17 note 13; Sono, p. 126 et seq., Farnsworth, *Formation of Contract*, p. 3-16; Loewe, Art. 19, p. 43; Redfern/Hunter, 2nd ed., p. 150, who point out that the arbitration clause is "embedded" in the contract. In Filanto S.p.A. v. Chilewich International Corp. (UNILEX, E.1992-9, p. 129) the Court held that "contracts and arbitration clauses included therein are considered to be 'severable', a rule [...] with respect to avoidance of contracts generally." This opinion is based on the outdated theory that avoidance causes the contract to cease to exist and has been replaced by a more modern view. The contract remains existent as a framework, only the contractual obligations are transformed into restitutionary obligations.

⁶ Redfern/Hunter, 2nd ed., pp. 149, 150, according to whom an application of different laws to the main contract and arbitration agreement is likely to occur in the case of a submission agreement to refer an existing dispute to arbitration.

it is appropriate to subject all provisions to the same law. Thus, the CISG as *lex contractus* is the law applicable to the arbitration agreement.

II. The parties agreed on CLAIMANT's General Conditions of Purchase including the arbitration clause

It will be shown that CLAIMANT's General Conditions of Purchase, and thereby the arbitration clause, have become part of the contract by modification [1]. In any case, the arbitration clause has formed part of the second contract [2].

1. CLAIMANT's General Conditions of Purchase have become part of the contract by modification

In the period from 31 March 1999 until 28 May 1999 when establishing their business relations, the parties concluded two contracts. Counsel will show that in the first contract neither party included its general conditions since there was a battle of forms [a]. The second contract represented a modification of the first contract which resulted in an inclusion of CLAIMANT's conditions [b].

a) Neither party included its dispute settlement clause in the first contract due to a battle of forms

On 5 April 1999, CLAIMANT offered to buy goods in the amount of \$100,000⁷. This offer was accepted by RESPONDENT on 6 April 1999⁸. Both parties had referred to their general conditions which contained contradicting clauses regarding dispute settlement⁹. The CISG does not contain an express provision dealing with such "Battle of the forms"¹⁰. Counsel will show that in this case, a reasonable solution¹¹ can only be achieved by application of the knock-out rule¹².

Firstly, due to the lack of an express solution, the gap in the Convention has to be filled¹³ by relying on Art. 2.22 of the UNIDROIT Principles of International Commercial Contracts (hereinafter: UNIDROIT

⁷ CLAIMANT's Exhibit No. 3.

⁸ CLAIMANT's Exhibit No. 4.

⁹ Clause 14 of CLAIMANT's General Conditions of Purchase represented an arbitration clause, Request for Arbitration, para. 18. Clause 23 of RESPONDENT's General Conditions of Sale was a forum selection clause, Answer to Request for Arbitration, para. 13.

¹⁰ Schlechtriem/Schlechtriem, Art. 19 para. 20; Schlechtriem, *Kollidierende Geschäftsbedingungen*, p. 37; del Pilar Perales Viscasillas; Müller/Otto, p. 40.

¹¹ See Honnold, p. 192 para. 170.3, according to whom "*last shot' theories have been rightly criticized as casuistic and unfair. They do not reflect international consensus that justifies importing them into the Convention.*"

¹² According to the knock-out rule, a contract is validly concluded in spite of dissent concerning printed terms. These terms are excluded to the extent that they contradict each other. Terms that are common in substance become part of the contract.

¹³ Cf. Art. 7 (2) CISG which provides: "*Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based [...]*".

Principles)¹⁴. This is appropriate since the rules of formation of contract under the Convention do not offer a satisfactory solution of the problems in case of contradictory printed terms¹⁵. According to Art. 2.22 of the UNIDROIT Principles the contradictory clauses regarding dispute settlement are knocked out. Secondly, even assuming that the “Battle of the forms” should be solved pursuant to the rules of the Convention the knock-out rule is still applicable. In case of performance of a contract it is obvious that the parties have agreed on the essential terms and their mutual interest in performance prevails their interest in conclusion under each party’s terms. Therefore, in order to establish a solution which corresponds to the indicated parties’ will it is reasonable to find that Art. 19 CISG¹⁶ is tacitly derogated by the parties. This is admissible in accordance with the principle of the autonomy of the parties as provided for in Art. 6 CISG¹⁷. In the case at hand, RESPONDENT and CLAIMANT conducted the contract and thereby derogated Art. 19 CISG. This resulted in an exclusion of their contradictory dispute settlement clauses.

Consequently, neither dispute settlement clause has become part of the first contract.

b) The second contract represented a modification of the first contract which resulted in an inclusion of CLAIMANT’s conditions

On 28 May 1999 the second contract was concluded when RESPONDENT accepted¹⁸ CLAIMANT’s second purchase order which constituted the offer¹⁹. Since RESPONDENT did not refer to its general conditions²⁰ only CLAIMANT’s General Conditions of Purchase have been included in the second contract²¹.

¹⁴ Del Pilar Perales Viscasillas; Garro, p. 1169; cf. Preamble of the UNIDROIT Principles which provides that “[...] *They may be used to interpret or supplement international uniform law instruments. [...]*”, and Art. 2.22 UNIDROIT Principles which provides: “*Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.*”

¹⁵ Garro, pp. 1169 et seq., according to whom “[...] *unlike the CISG, the UNIDROIT Principles treat individually negotiated contractual terms differently than standardized terms.*”; comp. Art. 2.19 (1) UNIDROIT Principles, which provides: “*Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.20-2.22.*”; comp. Murray, p. 1309.

¹⁶ Art. 19 (1) CISG provides: “*A reply to an offer which purports to be an acceptance but which contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.*”

¹⁷ AG Kehl, NJW-RR (1996), p. 565; Schlechtriem/Slechtriem, Art. 19 para. 20; Schlechtriem, Kollidierende Geschäftsbedingungen, pp. 46, 57; Staudinger/Magnus, Art. 19 para. 25; Art. 6 CISG provides: “*The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.*”

¹⁸ CLAIMANT’s Exhibit No. 5.

¹⁹ CLAIMANT’s Exhibit No. 4.

²⁰ CLAIMANT’s Exhibit No. 6.

²¹ CLAIMANT’s referral to its conditions is sufficient since RESPONDENT already possessed a copy of them. This view is shared by van den Berg, Interpretation of the New York Convention, p. 39, according to whom “[...] *it is not necessary that the conditions are communicated to the other party for each transaction.*” Due to the fact that the attached file can be saved on RESPONDENT’s hard disk the information contained in the e-mail is accessible for RESPONDENT and usable for subsequent reference, anytime; comp. CLAIMANT’s Exhibit No. 5.

According to Art. 29 (1) CISG²² the second contract (hereinafter: ‘agreement of modification’) has to be seen as a modification of the first contract (hereinafter: ‘sales contract’). The sales contract was only enlarged by the agreement of modification because the quantity of goods²³, the price and the discount have been altered. RESPONDENT’s acceptance was to agree to merge both purchase orders into one bargain. This is emphasized by its behaviour of altering the terms of payment by calculating a single discount on the entire purchase²⁴. The fact that CLAIMANT made two purchase orders with different numbers is irrelevant because merchants need such usual formalities, e.g. for book-keeping.

The modification did not only alter the negotiated terms²⁵. It also led to an inclusion of CLAIMANT’s printed terms which contained the arbitration clause.

Even in case of assuming that RESPONDENT’s forum selection clause had been included in the first contract, the modification altered it. RESPONDENT’s acceptance of CLAIMANT’s offer to modify the sales contract without referring to its conditions is to be interpreted as a waiver to include them. Therefore, it accepted CLAIMANT’s conditions.

RESPONDENT’s remark that it included its general conditions in “*all sales contracts*”²⁶ does not effect this result. It cannot be tolerable that just one reference in the beginning of a business relationship, which might exists for a long time, guarantees to the promisor the inclusion of its terms and thereby substitutes a new reference whenever a new contract is concluded. The simple addition of a sentence or a phrase cannot permit RESPONDENT to succeed over CLAIMANT²⁷. Therefore, RESPONDENT’s remark is of no importance.

As has been shown, the second contract represented a modification of the first contract which resulted in an inclusion of CLAIMANT’s conditions.

²² Art. 29 (1) CISG provides: “A contract may be modified or terminated by the mere agreement of the parties.”

²³ Schlechtriem/Schlechtriem, Art. 29 para. 3.

²⁴ “[...] we have treated your two purchase orders as one purchase.”; comp. CLAIMANT’s Exhibit No. 6.

²⁵ A modification can alter standard terms as well, see Secretariat’s Commentary, O.R., p. 28, Art. 27 note 4, according to which “*article 2 (1) is applicable to the question as to whether the terms in a confirmation from or in an invoice sent by one party to the other after the conclusion of the contract modify the contract where those terms are additional or different from the terms of contract as it was concluded.*”

²⁶ CLAIMANT’s Exhibit No. 4; Terms of Reference, para. 5.

²⁷ Hyland, Draft, p. 1348, on Section 2-207 UCC: “[...] it is generally agreed that Seller should not be permitted to triumph merely by adding a sentence to a standard form.”

2. In any case, the arbitration clause has formed part of the second contract

Assuming, but not conceding that the Arbitral Tribunal finds the second contract was not a modification of the first contract, but a valid arbitration agreement still exists concerning the second contract as shown above²⁸. Concerning the first contract, neither dispute settlement clause has become part of it²⁹.

The second contract, which is submitted to the jurisdiction of the Arbitral Tribunal, contains five-sixths of the entire volume of goods. Therefore, it would be appropriate to submit both contracts to arbitration. Firstly, legal proceedings will be simplified if only one litigation takes place. Secondly, in that case, legal costs will be lower for each party³⁰. Thirdly, the Arbitral Tribunal will have more special knowledge of and a more detailed inside into the case at hand than any other court could possibly have. Fourthly, an experienced Tribunal will be able to grasp quickly the salient issues of fact or law in dispute³¹. This will grant a thorough procedure and offer a sensible award³². In light of these factors, and heeding the presumption in favour of arbitration, which is even stronger in the context of international commercial transactions³³, the entire case should be referred to arbitration.

III. Formal requirements of the UNCITRAL ICA and the New York Convention are met

CLAIMANT's arbitration clause meets the formal requirements of Art. 7 (2) UNCITRAL ICA³⁴. This provision sets forth that "*the arbitration agreement shall be in writing*". This requirement can be fulfilled by the use of diverse means of modern telecommunication that provide a record. In the case at hand, CLAIMANT's arbitration clause was attached to the e-mail dated 5 April 1999³⁵. Due to the fact that the attached file can be saved on RESPONDENT's hard disk as well as be printed, the information contained in the e-mail is accessible for RESPONDENT and usable for subsequent reference at anytime³⁶. Therefore, the formal requirements of the UNCITRAL ICA are met.

²⁸ See supra Unit 1 I. 1.

²⁹ See supra Unit 1 I. 1.

³⁰ Schwab/Walter, p. 5.

³¹ Redfern/Hunter, 3rd ed., para. 1-36.

³² Redfern/Hunter, 3rd ed., para. 1-36.

³³ Filanto S.p.A. v. Chilewich International Corp., UNILEX, E.1992-9, p. 131; Brand/Flechtner.

³⁴ Art. 7 (2) UNCITRAL ICA provides: "*The Arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document by parties or in an exchange of letters, telex, telegrams or other means of telecommunication that proved a record.*"

³⁵ "*For your reference I have attached our General Conditions of Purchase, which are part of our purchase order.*", see CLAIMANT's Exhibit No. 3.

³⁶ cf. Holtzmann/Neuhaus, p. 263.

In addition, the requirements of Art. II (2) New York Convention are met³⁷. Since modern means of communication such as e-mails came up long after the New York Convention had been established, its draftsmen could naturally not take them into consideration. That is the reason why the wording of Art. II (2) New York Convention does not expressly refer to e-mails³⁸. However, the internet revolution, which introduced those modern means of communication to business life and commercial reality, gives rise to the need for an interpretation of Art. II (2) New York Convention³⁹.

In the case at hand, the UNCITRAL EC must be considered as it is useful for interpreting existing international conventions that create legal obstacles to the use of electronic commerce, e.g. the written form of contractual clauses⁴⁰. This is emphasized by the results of the 33rd session of the UNCITRAL Working Group on Arbitration which requested the Secretariat to prepare a draft instrument which would confirm that Art. II (2) of the New York Convention should be expansively interpreted in order to include electronic communications as defined by Art. 2 UNCITRAL EC⁴¹. This article explicitly contains electronic mails⁴². Additionally, Art. 7 (2) UNCITRAL ICA reflects the current interpretation of Art. II (2) New York Convention⁴³. This leads to the result that the formal requirements of Art. II (2) New York Convention are met.

Since CLAIMANT's arbitration clause has been validly included in the contract and fulfills all formal requirements, the Arbitral Tribunal has jurisdiction to decide on the merits of the present case.

Result: The Arbitral Tribunal has jurisdiction.

³⁷ This fact is important since an arbitral award may only be recognized and enforced when the requirements of the New York Convention are met. Art. II (2) New York Convention provides: "*The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*"

³⁸ Redfern/Hunter, 3rd ed., para. 3-09.

³⁹ United Nations Commission on International Trade Law Working Group on Arbitration, 33rd session 1999, A/CN.9/468, p. 5 para. 10.

⁴⁰ Guide to Enactment of the Model Law on Electronic Commerce, paras. 101-106.

⁴¹ United Nations Commission on International Trade Law Working Group of Arbitration, 33rd session, A/CN.9/468, p. 6 para. 13.

⁴² Art. 2 (a) UNCITRAL EC provides: "'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy." This view is also upheld by several Courts in countries that have adopted the New York Convention. Those Courts interpreted Art. II (2) New York Convention in a liberal manner, leading to the inclusion of telexes within this article, see OGH, *Juristische Blätter* (1974), p. 629.

⁴³ Van den Berg, Interpretation of the New York Convention, p. 43, cf. Holtzmann/Neuhaus, p. 263.

UNIT 2: RESPONDENT violated its obligation under Art. 42 (1) (a) CISG to deliver goods free from any claim of a third party based on intellectual property

It will be shown that RESPONDENT's goods were encumbered with a claim by Vis Fish within the meaning of Art. 42 (1) (a) CISG⁴⁴ [I]. RESPONDENT had the obligation to inquire about registered trademarks in Danubia, but failed to comply. Moreover, it will be shown that RESPONDENT could not have been unaware of the trademark "Vis" [II]. CLAIMANT had no obligation to inquire about registered trademarks and therefore did not have to be aware of the trademark "Vis". Since CLAIMANT did not conduct any research thus was not aware of this fact [III].

I. RESPONDENT's goods were encumbered with a claim by Vis Fish meeting the requirements of Art. 42 (1) (a) CISG

On 20 September 1999 Vis Fish claimed that the advertising campaign conducted by CLAIMANT and the selling of goods in Danubia bearing the brand-name "Vis Water Sports" infringed its registered trademark "Vis"⁴⁵. Trademarks fall within the term "intellectual property" referred to in Art. 42 CISG⁴⁶. It will be shown that the mere assertion by Vis Fish of the trademark infringement is sufficient to invoke Art. 42 (1) CISG [1], and that the claim cannot be seen as frivolous [2]. Art. 42 (1) CISG is neither excluded by the fact that the claim had not been raised at the time of delivery of the goods [3].

1. The mere assertion by a third party of a trademark infringement is sufficient to invoke Art. 42 (1) CISG

Art. 42 (1) CISG does not demand that the claim be actually justified⁴⁷. Furthermore, the mere assertion by a third party concerning the existence of a right or claim must be regarded as sufficient to invoke Art. 42 (1) CISG⁴⁸.

⁴⁴ Art. 42 (1) (a) CISG provides: "*The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial or other intellectual property: under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State;[...]*."

⁴⁵ CLAIMANT's Exhibit No. 7; Request for Arbitration, para. 6; Terms of Reference, para. 7.

⁴⁶ See Art. 1 (2) Paris Convention: "*The protection of industrial property has as its object [...] trademarks [...]*"; Art. 2 (viii) of the Convention of the World Intellectual Property Organization of 14 July 1967 (WIPO): "*all [...] rights resulting from intellectual activity in the industrial [...] fields*" - reference is expressly made to trademarks; see also Rauda/Etier, p. 35; Shinn, p. 116; Schlechtriem, *Pflichten des Verkäufers*, p. 121.

⁴⁷ Schlechtriem/Schwenzer, *Commentary*, Art. 42 para. 6; Staudinger/Magnus, *Art. 42 para. 13*; Wolff, p. 73; Schlechtriem, *Uniform Sales Law*, p. 72; Honnold, *Art. 42 para. 270*; Rauda/Etier, p. 38; Ackerman, p. 42-6.

⁴⁸ Karollus, p. 123; Enderlein/Maskow, *Commentary*, Art. 42 note 2.

Firstly, it would be unbearable for the buyer if it had to dispute with a third party about the existence of the latter's claim in future⁴⁹. Secondly, if the buyer had to do so, it would find itself in a difficult position: During the period of the dispute, maybe even litigation, the buyer would have to bear the risk of long-standing uncertainty concerning whether or not it has received encumbered goods⁵⁰. Should the result of the dispute be that the claim by the third party was unfounded, the buyer would have already suffered a certain disruption to its business due to the litigation⁵¹. If, by contrast, the claim was founded, the buyer would have to take steps against the seller, which is a time-consuming burden. Both cases would be of equal disadvantage to the buyer. Thirdly, if the dispute whether or not a right or claim by the third party existed, was brought to court the buyer would also have to face the burden of legal costs. That burden cannot be expected to be borne by the buyer as the aggrieved party, who, after all, is involved in the dispute due to a violation of the seller's obligations.

In conclusion, the mere assertion of a third party's claim is sufficient to invoke Art. 42 (1) CISG.

2. The claim cannot be seen as frivolous

Counsel will show that Vis Fish's claim must not be seen as frivolous. If a claim has a minimum of seriousness⁵² or is convincing⁵³ it is not to be considered as frivolous because it cannot be quickly and effectively disposed of⁵⁴. In the case at hand, the non-frivolity has to be determined under Art. 23 of the Danubian Trademark Law which provides that "*the owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion*"⁵⁵. Such partial identity of the signs results from the fact that Vis Fish had registered "Vis" without the addition "Fish"⁵⁶. That might cause the mistaken assumption that RESPONDENT's goods which bear the brand-name "Vis Water Sports" were

⁴⁹ Bernstein/Lookofsky, p. 66; Piltz, § 5 para. 104; Schlechtriem/Schwenzer, Art. 42 para. 6; Staudinger/Magnus, Art. 42 para. 13; Wolff, p. 73; Langenecker, p. 67.

⁵⁰ Schlechtriem/Schwenzer, Commentary, Art. 41 para. 12; Neumayer/Ming, Art. 41 para. 4; Schlechtriem, The seller's obligations, p. 6-32.

⁵¹ CLAIMANT's Exhibit No. 10: "You could expect that [...] the litigation would cause a certain amount of disruption to your business."

⁵² Vida, RTD com. (1994), p. 23; Herber/Czerwenka, Art. 41 para. 6; Niggemann, p. 92.

⁵³ Neumayer/Ming, Art. 41 note. 3; Zhang, p. 77; Prager, p. 72.

⁵⁴ Bernstein/Lookofsky, p. 66.

⁵⁵ Procedural Order No. 1, para. 5.

⁵⁶ Procedural Order No. 1, para. 9.

related to the goods of Vis Fish, for example that they would be an extension of the range of goods made by Vis Fish.

Moreover, confusion over the goods is possible due to their similarity since both RESPONDENT's goods and those of Vis Fish are connected with water and fish. The trademark of Vis Fish covering "*all water-related products*" is rather broad. Yet such a broad scope is permissible under Danubian Law as long as the categories are indicated in which the trademark is being used⁵⁷. The trademark does not lapse for products not being used until the expiration of the registration⁵⁸. Vis Fish sells only fish and other seafood products, but until 1996 it also sold sporting fishing equipment and fishing nets under the trademark "Vis"⁵⁹. Since the registration was renewed in 1992 for ten further years, it will last until 2002⁶⁰.

Furthermore, by selling and advertising the sports equipment under the brand-name of Vis Water Sports and by using RESPONDENT's slogan "*like a fish in water*"⁶¹, the ordinary purchaser in Danubia could naturally be led to believe that RESPONDENT's goods were the product of Vis Fish⁶².

It would be especially difficult, in view of partial identity of the brand-names, to ascertain a decision determining whether goods bearing RESPONDENT's trademark are likely to be connected with Vis Fish. The fact that the provisions of Art. 23 Danubian Trademark Law is likely to be fulfilled, demonstrates that litigation could not easily be dismissed. This conclusion is also confirmed by the report of the law office of Howard & Heward⁶³.

RESPONDENT could argue that there was no possibility of confusion because its goods do not fall within the same class of the Nice Agreement as those sold by Vis Fish⁶⁴. However, Counsel points out that the purpose of the classification under the Nice Agreement is to prevent two companies from registering identical trademarks within the same class. It is of no importance for the assessment of similarity of the goods, which is expressed by Art. 9 (2) Trademark Law Treaty⁶⁵.

⁵⁷ Procedural Order No. 1, para. 8.

⁵⁸ Procedural Order No. 1, para. 8.

⁵⁹ Procedural Order No. 1, para. 7.

⁶⁰ Procedural Order No. 1, para. 10.

⁶¹ Procedural Order No. 1, para. 22.

⁶² *Comp. Mishawaka Rubber & Whoolen Manufacturing Company v. S. S. Kresge Company*, 316 U.S. 204; Long/D'Amato, p. 224.

⁶³ CLAIMANT's Exhibit No. 10.

⁶⁴ RESPONDENT's goods fall within Class 28. The fish and seafood products of Vis Fish fall within Class 29.

⁶⁵ Art. 9 (2) (b) Trademark Law Treaty provides: "*Goods or services may not be considered as being dissimilar from each other on the ground that, in any registration or publication by the Office, they appear in different classes of the Nice Classifications.*"

Furthermore, the trademark is actually registered in class 28. Due to its renewal in 1992, this registration will be valid until 2002 as shown above.

In conclusion, the claim cannot be seen as frivolous.

3. An application of Art. 42 (1) CISG is not excluded by the fact that the claim had not been raised at the time of delivery

In contrast to the wording of the first sentence of Art. 42 (1) CISG⁶⁶ it is not relevant whether or not a claim exists at the time of delivery⁶⁷. As a rule, claims based on intellectual property are asserted after delivery, since trademark infringements can only occur in the course of sale⁶⁸. The decisive criterion has to be whether the circumstances resulting in the defect in title occurred before or after delivery⁶⁹. If Art. 42 CISG only included claims existent at the time of delivery the protection of the buyer concerning unfounded claims would be divested of any effect⁷⁰. In the case at hand the trademark registration⁷¹ as well as the similarity between the products shown above existed before the dates of delivery. They represent such circumstances which are likely to lead to the raising of a claim.

Consequently, an application of Art. 42 (1) CISG is not excluded since the circumstances leading to the claim already existed at the time of delivery.

II. RESPONDENT failed to inquire about registered trademarks in Danubia and could not have been unaware of the trademark “Vis”

Art. 42 (1) CISG constitutes an obligation for the seller to inquire about the legal situation as far as intellectual rights are concerned⁷². Therefore, the seller has to consult the registers in the countries contemplated⁷³. If such an obligation were denied, liability for third party claims based on intellectual property would be reduced to such an extent that it would be of hardly any practical importance at all⁷⁴. Such

⁶⁶ “[...] *must deliver goods* [...]”.

⁶⁷ Staudinger/Magnus, Art. 41 para. 19; Schwerha, p. 450; Honnold, Art. 41 para. 266, fn. 6; Rauda/Etier, p. 41.

⁶⁸ Rauda/Etier, p. 41; Schlechtriem/Schwenzer, Art. 42 para. 15.

⁶⁹ Schlechtriem/Schwenzer, Art. 42 para. 6; Art. 41 para. 15; Witz/Salger/Lorenz/Salger, Art. 41 para. 10.

⁷⁰ Enderlein, Rights and Obligations of the Seller, p. 179.

⁷¹ The trademark “Vis” was first registered in 1972, Procedural Order No. 1, para. 10.

⁷² Schlechtriem/Schwenzer, Art. 42 para. 14; Schlechtriem, Uniform Sales Law, p. 74; Vida, RTD com. (1994), p. 29; Neumayer/Ming, Art. 42 note 4; Audit, para. 117; Rauda/Etier, p. 44.

⁷³ Rauda/Etier, p. 46.

⁷⁴ Schlechtriem/Schwenzer, Commentary, Art. 42 para. 14; Enderlein/Maskow/Strohbach, Art. 42 note 4; Secretariat’s Commentary, O.R., p. 37, Art. 40 note 6; Herber/Czerwenka, Art. 42 para. 5; Vida, RTD com. (1994), p. 28; Audit, para. 117; Piltz, § 5 para. 109; Heilmann, p. 664; Neumayer/Ming, Art. 42 note 1; Heuzé, para. 316; Herber, UNCITRAL-Übereinkommen, p. 27; Staudinger/Magnus, Art. 42 para. 22; Reinhart, Art. 42 para. 4.

a duty also arises out of the principle of mutual respect of the parties as provided by Art. 8 (2) CISG. The inquiry therefore is a subordinate obligation⁷⁵.

However, RESPONDENT violated this obligation. It did not do any research concerning the trademark “Vis”⁷⁶. This trademark has been entered in a Danubian registry which can be consulted freely by the public⁷⁷. Moreover, the contents of the registry are published in a journal⁷⁸. Therefore, the registration would easily have been brought to the attention of RESPONDENT if it had inquired in an appropriate manner⁷⁹.

Furthermore, RESPONDENT had “*long desired to enter that [the Danubian] market*”⁸⁰ with its goods, before CLAIMANT showed interest in selling RESPONDENT’s products. This becomes evident by considering that it was RESPONDENT who established contact by approaching CLAIMANT with its advertisement. Therefore, it can be expected that RESPONDENT conducted research concerning the Danubian market. RESPONDENT’s remark that it “*had not previously taken the steps necessary to do so*”⁸¹ does not contrast with this expectation. The meaning of this remark can only be interpreted in such a way which shows that RESPONDENT had not previously established contact with potential buyers.

Moreover, being a manufacturer⁸², RESPONDENT should have been aware of its duty to investigate a market on potential rights by third parties that could impede the normal course of business. Particular attention must be paid to RESPONDENT’s market position since it has prior existing international business relationships with partners from seven other countries⁸³. Therefore, RESPONDENT should be well accustomed to international trade and the resulting obligations.

Consequently, RESPONDENT could not have been unaware of the registered trademark “Vis”.

⁷⁵ Rauda/Etier, p. 44; Vida, RTD com. (1994), pp. 28 and 29; Zhang, p. 90; Heuzé, para. 316.

⁷⁶ Procedural Order No. 1, para. 21.

⁷⁷ Procedural Order No. 1, para. 9.

⁷⁸ Procedural Order No. 1, para. 9.

⁷⁹ Procedural Order No. 1, para. 21.

⁸⁰ CLAIMANT’s Exhibit No. 2.

⁸¹ CLAIMANT’s Exhibit No. 2.

⁸² Request for Arbitration, para. 2.

⁸³ Procedural Order No. 1, para. 25.

III. CLAIMANT had no obligation to inquire about registered trademarks and therefore did not have to be aware of the trademark “Vis”

In contrast to the seller the buyer is not obliged to conduct research⁸⁴. CLAIMANT as a retailer⁸⁵ operates on a national level within its own branch. It cannot be part of its range of duties to investigate the local market, e.g. intellectual property registries, with regard to possible difficulties (in the case at hand the trademark “Vis”) for the seller⁸⁶.

If a duty to investigate was imposed on both the seller and the buyer, a liability according to Art. 42 CISG could hardly be established at all, because whenever the requirements of Art. 42 (1) CISG are given, the exception of Art. 42 (2) CISG must apply as well⁸⁷. Furthermore, it can be expected of a manufacturer of products of a certain brand to be more familiar with other brands of the same name than a retailer who sells many different brands. Thus, the term “could not have been unaware” as used in Art. 42 (2) (a) CISG concerns only those intellectual property rights that are obvious to the buyer⁸⁸.

Due to the fact CLAIMANT specializes in sports equipment⁸⁹ while Vis Fish sells fish products⁹⁰, there is no evident relation between the market territories of the two enterprises. The mere fact that the personnel of CLAIMANT did know Vis Fish⁹¹ cannot lead to the assumption that CLAIMANT was aware or ought to have been aware of the trademark itself or of any claim concerning trademark infringement. In particular, it could not know about a possible similarity of products since this is based on two facts CLAIMANT was not aware of. Firstly, CLAIMANT could not know that Vis Fish had registered only the word “Vis”, a fact that might have led to confusion. Secondly, the possibility of Vis Fish having a trademark registered regarding products that it had not been selling for four years⁹² is based on a complex legal situation, as presented above. Vis Fish was known to CLAIMANT only for its fish and other seafood products⁹³. Thus, since

⁸⁴ Schlechtriem/Schwenzer, Art. 42 para. 17; Staudinger/Magnus, Art. 42 para. 26; Enderlein, Rights and obligations of the Seller, p. 182; Herber/Czerwenka, Art. 42 para. 6; Enderlein/Maskow/Strohbach, Art. 42 note 9; Piltz, § 5 para. 111; Vida, RTD com. (1994), pp. 30 et seq.; Witz/Salger/Lorenz/Salger, Art. 42 para. 8.

⁸⁵ Request for Arbitration, para. 1.

⁸⁶ Enderlein/Maskow, Commentary, Art. 42 note 9; Piltz, § 5 para. 111.

⁸⁷ Rauda/Etier, p. 55; Piltz, § 5 para. 111.

⁸⁸ Rauda/Etier, p. 56; Zhang, p. 92; Shinn, p. 126; Bianca/Bonell/Bianca, Art. 35 note 2.8.1.; Enderlein/Maskow, Commentary, Art. 35 note 20.

⁸⁹ CLAIMANT’s Exhibit No. 1.

⁹⁰ CLAIMANT’s Exhibit No. 7.

⁹¹ Procedural Order No. 1, para. 18.

⁹² Vis Fish used to sell sporting fishing equipment and fishing nets until January 1996; see Procedural Order No. 1, para. 7.

⁹³ Procedural Order No. 1, para. 16.

CLAIMANT could not be familiar with the legal situation concerning trademarks, it was not recognizable to CLAIMANT that RESPONDENT's goods could possibly interfere with those of Vis Fish.

Consequently, the trademark infringement was not obvious to CLAIMANT. Since it did not have a duty to inquire about trademarks it did not have to be aware of the infringement. Therefore, the exemption of the seller's liability according to Art. 42 (2) (a) CISG is not applicable to this case.

UNIT 3: CLAIMANT did not lose its right to rely on Art. 42 (1) CISG since it gave notice to RESPONDENT of the claim by Vis Fish within a reasonable time as required by Art. 43 (1) CISG.

The CISG does not contain any rule concerning the assessment of a reasonable time. Therefore, the period has to be calculated by paying particular attention to the purpose of Art. 43 (1) CISG⁹⁴, which is to give reliable information about the existence of a defect in title. The party receiving this information has to be able to rely on it since it may have to take further steps in order to eliminate the defects⁹⁵. A certain period of contemplation by the buyer, in an attempt to contact third parties in order to research or clear up the situation, and for inquiry into the legal situation by consulting its lawyer must be granted within the definition of a reasonable time⁹⁶. In the case at hand, CLAIMANT contacted Vis Fish without hesitating in order to gain further information and clear up the situation. Reliance could first be established when Howard & Heward confirmed in their letter dated 28 October 1999⁹⁷ that the threat by Vis Fish had to be taken seriously since a registered trademark on "Vis" existed⁹⁸. CLAIMANT transmitted this information to RESPONDENT as soon as possible.

Moreover, the wording "reasonable time" may be determined by a comparison to the period for a notification of a defect in quality provided by Art. 39 CISG. Since the evaluation of a defect as to title (such as a claim by a third party based on intellectual property) is more complex than an evaluation on defects as to

⁹⁴ Art. 43 (1) CISG provides: "*The buyer loses the right to rely on the provisions of Article 41 or Article 42 if he does not give notice to the seller specifying the nature of the [...] claim of the third party within a reasonable time after he has become aware or ought to have become aware of the [...] claim.*"

⁹⁵ Karollus, p. 127; Reinhart, Art. 43 para 3; Enderlein/Maskow, Commentary, Art. 43 note 4.

⁹⁶ Neumayer/Ming, Art. 43, para. 1; Schlechtriem/Schwenzer, Art. 43 para. 3; Enderlein/Maskow/Strohbach, Art. 43 note 2; Enderlein, Rights and Obligations of the Seller, p. 184; Reinhart, Art. 43 para. 2; Bianca/Bonell/Sono, Art. 43 note 2.1.

⁹⁷ CLAIMANT's Exhibit No. 10.

⁹⁸ CLAIMANT's Exhibit No. 10.

quality, a longer time has to be provided⁹⁹. This is underlined by the fact that in many cases the legal situation proves to be rather complex and therefore legal advice must often be requested¹⁰⁰.

In the case of a defect in quality a period of about one month is to be seen as reasonable in accordance with Art. 39 CISG¹⁰¹. Many other domestic laws give period which exceed six weeks, in order to notify the party in breach of a defect in quality. The US-Law¹⁰² provides a time-span of several months to give notice of a defect in quality¹⁰³. French Courts grant two or three years, in accordance with Art. 1648 of the French Code Civil¹⁰⁴. In order to find a consensus with those law systems that provide a rather short time¹⁰⁵, a period of about a month must be seen as a reasonable time for a notification of a defect as to quality¹⁰⁶.

Since the time for notification of defect in title has to be longer than in case of a defect in quality, a period of about six weeks has to be considered reasonable.

Result: CLAIMANT gave a specified notice of the claim within a reasonable time.

Unit 4: As a consequence of RESPONDENT's failure to perform its obligation under Art. 42 CISG CLAIMANT has effectively avoided the contract pursuant to Art. 49 (1) (a) CISG

It will be shown that RESPONDENT's failure to perform its obligation amounted to a fundamental breach of contract [I] and that CLAIMANT has rightfully declared the contract avoided [II]. The fact that CLAIMANT had already sold parts of the goods did not exclude its right of avoidance, Art. 82 (2) (c) CISG [III].

⁹⁹ Reinhart, Art. 43 para. 2; Bianca/Bonell/Sono, Art. 43 note 2.1.; Enderlein/Maskow, Commentary, Art. 43 note 2.

¹⁰⁰ Gerny, p. 211.

¹⁰¹ Su, p. 56; Schlechtriem/Schwenzer, Art. 39 para. 17; OLG München, CISG-Online 310; OLG Stuttgart, RIW (1995), p. 944.

¹⁰² Comp. Section 2-607 (3) (a) UCC.

¹⁰³ Morrow v. New Moon Homes, Inc., 19 UCC, p. 10-11; Nobility Homes of Texas, Inc. v. Shivers, 22 UCC, p. 629; Western Equip. Co. v. Sheridan Ivon Works, Inc., 28 UCC, p. 356; Cf. White/Summers, Chapter 11-10, pp. 554 et seq.

¹⁰⁴ Savie v. Logabax, Paris 5^e chambre, juris-data No. 670 ("two years"); Pitney Bowes France v. Albin, Pairs 8^e chambre, juris-data No. 153 ("three years").

¹⁰⁵ Such as the English and the German law; cf. Reitz, Am. J. Comp. L. (1988), p. 440.

¹⁰⁶ Su, p. 56; Schlechtriem/Schwenzer, Art. 39 para. 17; BGH NJW (1995), p. 2101; OLG München, CISG-Online 310; OLG Stuttgart, RIW (1995), p. 944.

I. RESPONDENT's failure to perform its obligations amounted to a fundamental breach of contract

According to Art. 25 CISG, a breach of contract is fundamental “[...] if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract [...]”. The substance of a detriment depends on the importance of the breached obligation in the particular contract¹⁰⁷.

In the case at hand, CLAIMANT was entitled to expect purchasing goods fit for retail in Danubia¹⁰⁸. But since Vis Fish is claiming for infringement of its registered trademark “Vis” it has become impossible to continue selling RESPONDENT's goods in this country without the risk of legal action and damages claims against it¹⁰⁹. CLAIMANT cannot be expected to bear the burden of such possible damages claims and the risk of a prohibition of sale ordered by a Danubian court pending final resolution of the claim¹¹⁰. Litigation would also cause a certain amount of disruption in CLAIMANT's business¹¹¹ with respect to the negative coverage of the litigation in the media and the loss of good will. RESPONDENT finally lacks the possibility of remedying of the defect in title since it was shown that the claim of Vis Fish is not easily and quickly dismissible¹¹², and since CLAIMANT could not have required RESPONDENT to participate in the litigation¹¹³.

Moreover, CLAIMANT cannot be expected to sell RESPONDENT's goods in another country. Since it has never sold outside of Danubia, it has no experience in selling either at wholesale or for export. As a result it would not have an easy way to find a buyer outside Danubia¹¹⁴. The expenditures arising out of retail in another country would be excessive and are therefore to be seen as unreasonable¹¹⁵. RESPONDENT's breach of contract by delivering goods that are not free from the claim of Vis Fish is of such great weight that CLAIMANT lost its interest in the performance of the contract. Thus, the detriments are substantial to CLAIMANT.

¹⁰⁷ v. Caemmerer, *Wesentliche Vertragsverletzung*, p. 51; Botzenhardt, p. 166; Enderlein/Maskow, *Commentary*, Art. 25 note 3; Benicke, *IPRax* (1997), p. 329; Reithmann/Martiny, para. 659; Schlechtriem/Schlechtriem, *Commentary*, Art. 25 para. 2; BG, UNILEX.E.1998-18.1, p. 864.2; cf. OLG Frankfurt a.M., CLOUT Case No. 2, according to which the breach of the ancillary duty of preserving exclusivity constituted a fundamental breach of the contract under Art. 25 CISG.

¹⁰⁸ See Procedural Order No. 1, para. 56.

¹⁰⁹ See CLAIMANT's Request for Arbitration, para. 9; CLAIMANT's Exhibit Nos. 7 and 9.

¹¹⁰ See Procedural Order No. 1, para. 11; comp. Achilles, Art. 25 para. 7.

¹¹¹ See CLAIMANT's Exhibit No. 10.

¹¹² See supra Unit 2 I. 2.

¹¹³ See Procedural Order No. 1, para. 26.

¹¹⁴ See Procedural Order No. 1, paras. 56 and 57.

¹¹⁵ See Decision of the German Federal Court, BGHZ 132, p. 302; Honsell/Schnyder/Straub, Art. 49 para. 28; Herber/Czerwenka, Art. 25 para. 7.

The exemption from liability in Art. 25 CISG providing that the breach is fundamental “[...] *unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*” does not apply in the case at hand.

It would have been clear for a reasonable business partner who is experienced in the same international practices as RESPONDENT¹¹⁶ that if goods fit for retail were not obtained, the buyer would have no interest in the contract. The particular importance of the obligation to deliver goods free from a third party’s claim has been clearly put beyond doubt since CLAIMANT as a retailer would not have concluded a contract without the inclusion of that obligation. Thus, a reasonable business partner would have foreseen that this defect in title would lead to the impossibility of retailing the goods. It is well aware of its clients’ intention to retail the products and of the detriments that arise from defects that prevent further sale. In such a case the “foreseeability” cannot be relevant¹¹⁷.

Consequently, RESPONDENT’s failure to perform its obligation amounted to a fundamental breach of contract.

II. CLAIMANT has rightfully declared the contract avoided

Art. 26 CISG provides that “*a declaration of avoidance of the contract is effective only if made by notice to the other party*”. In its letter of 3 November 1999, CLAIMANT stated that “*since [it] cannot continue to sell the [RESPONDENT’s] equipment without the serious threat of legal action, [it is] withdrawing all the goods bearing the [RESPONDENT’s] name from [its] stores and [is] avoiding the contract*”¹¹⁸. This declaration was unconditional¹¹⁹ and referred to the modified sales contract¹²⁰. Assuming that the Arbitral Tribunal finds that two separate contracts existed, Counsel stresses that CLAIMANT then avoided both the first and the second sales contract.

The fact that CLAIMANT stated in its letter of 16 November 1999 that it was considering rescinding its avoidance of the contract¹²¹ has no effect on the validity of the declaration of avoidance from

¹¹⁶ Procedural Order No. 1, para. 25.

¹¹⁷ Schlechtriem/Schlechtriem, Commentary, Art. 25 para. 14; Achilles, Art. 25 para. 15; Enderlein/Maskow, Commentary, Art. 25 note 3.4.

¹¹⁸ CLAIMANT’s Exhibit No. 12.

¹¹⁹ As demanded by Bianca/Bonell/Date-Bah, Art. 26 note 2.4.; Soergel/Lüderitz, Art. 24 EKG para. 4; Heilmann, p. 505; Leser, Vertragsaufhebung und Rückabwicklung, p. 232; Schlechtriem/Leser, Commentary, Art. 26 para. 6.

¹²⁰ Comp. supra Unit 1 II. 1.

¹²¹ CLAIMANT’s Exhibit No. 14.

3 November 1999. Since a declaration of avoidance is irrevocable, only the first declaration can be of importance. In any event, the statement of 16 November 1999 does not amount to a revocation. Rather, CLAIMANT acted out of politeness in order to keep up the business relationship with RESPONDENT since it was still interested in making future purchases. Assuming, but not conceding, that the Arbitral Tribunal does not follow this argumentation, this letter could only be seen as a potestative condition¹²². It was only made in the case RESPONDENT was “able to clarify that sale of [its] equipment in Danubia will not lead to litigation arising out of claims of trademark infringement”¹²³. However, since it was shown that Vis Fish’s claim is not easily and quickly dismissible¹²⁴ the condition has not occurred. CLAIMANT’s will to avoid the contract is also emphasized by the fact that it still wishes to get “instructions as to what should be done with the goods”¹²⁵.

Consequently, CLAIMANT has rightfully declared the contract avoided.

III. CLAIMANT has not lost the right to declare the contract avoided as provided in Art. 82 (2) (c) CISG

In general the buyer loses the right to declare the contract avoided according to Art. 82 (1) CISG if it is impossible for him to make restitution. However, Art. 82 CISG also includes exceptions to this general rule. In the case at hand, the exception of Art. 82 (2) (c) CISG applies providing that restitution of part of the goods is possible if they “have been sold in the normal course of business before he discovered or ought to have discovered the lack of conformity”. CLAIMANT has sold the goods as required under Art. 82 (2) (c) CISG.

CLAIMANT was first able to discover the lack of conformity of RESPONDENT’s goods when it received legal advice on 1 November 1999¹²⁶. After that, it took CLAIMANT only two days to withdraw the goods¹²⁷, which is to be seen as a reasonable time-span. CLAIMANT could not be expected to withdraw RESPONDENT’s goods any faster. Firstly, the letter of the lawyer’s office of Howard & Heward contained

¹²² Krebs, p. 28; ICC Court of Arbitration, Paris, Case No. 8128/1995.

¹²³ CLAIMANT’s Exhibit No. 14.

¹²⁴ See supra Unit 2 I. 2.

¹²⁵ CLAIMANT’s Exhibit No. 14.

¹²⁶ Howard & Heward sent their letter on 28 October 1999. According to the Procedural Order No. 1, para. 31, it took two business days until CLAIMANT obtained the letter. Since 30 October 1999 was a Saturday, CLAIMANT actually received the letter on Monday, 3 November 1999.

¹²⁷ This is the period between 1 and 3 November 1999, the latter being the date, by which CLAIMANT ceased selling RESPONDENT’s goods; see Procedural Order No. 1, para. 30.

no advice concerning any immediate action¹²⁸ so that CLAIMANT had to contemplate the situation, again. Secondly, CLAIMANT was not selling at wholesale¹²⁹ and due to the fact that it has more than one store¹³⁰, the time-span of two days for the administrative effort without disrupting its own normal course of business is reasonable. It is RESPONDENT who gained benefit from these two days because CLAIMANT was able to continue retailing.

Therefore, CLAIMANT has not lost its right to declare the contract avoided the contract as provided in Art. 82 (2) (c) CISG.

Result: As a consequence of RESPONDENT's failure to perform its obligation under Art. 42 CISG CLAIMANT has effectively avoided the contract pursuant to Art. 49 (1) (a) CISG.

Unit 5: CLAIMANT can rely on Art. 74 CISG to recover damages of \$611,400 and is entitled to interest thereon according to Art. 78 CISG

Pursuant to Art. 74 CISG¹³¹ CLAIMANT can recover damages of \$611,400 and interest thereon by virtue of Art. 78 CISG [I]. Since new claims are included in this sum, Counsel will respond on possible pleas as a precaution [II]. Even if Counsel's response were rejected, CLAIMANT could still rely on Art. 74 CISG to recover damages in the smaller amount of \$417,333 [III].

I. CLAIMANT can recover damages of \$611,400 and interest thereon

RESPONDENT committed a breach of contract [1]. Since this breach was fundamental and therefore serious, Counsel will show that CLAIMANT is entitled to restitution and damages which leads to a comprehensive damages claim [2]. The amount of damage sustained is \$611,400 [3]. These damages were foreseeable to RESPONDENT [4]. CLAIMANT did not violate its obligation to mitigate losses pursuant to Art. 77 CISG [5]. Finally, CLAIMANT is entitled to interest according to Art. 78 CISG [6].

¹²⁸ Comp. CLAIMANT's Exhibit No. 10.

¹²⁹ Procedural Order No. 1, para. 57.

¹³⁰ CLAIMANT's Exhibit No. 12: "[...] we are withdrawing all the goods [...] from our stores [...]".

¹³¹ Art. 74 CISG provides: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

1. RESPONDENT caused a breach of contract

As shown above¹³², RESPONDENT did not perform its obligation under Art. 42 (1) CISG to deliver goods free from a claim by a third party. That violation resulted in a breach of contract that is sufficient to exercise the remedy as provided by Art. 74 CISG¹³³.

2. RESPONDENT's serious breach of contract leads to a comprehensive damages claim

Since this breach of contract was serious CLAIMANT was entitled to avoidance according to Art. 49 CISG¹³⁴. It did, in fact, exercise this right in its letter from 3 November 1999¹³⁵. Consequently, CLAIMANT can rely not only on damages according to Art. 74 CISG but also on restitution pursuant to Artt. 81 et seq. CISG¹³⁶. Under the CISG both remedies may be exercised concurrently¹³⁷. The combination of remedies is permissible and even recommended by Art. 45 (2) CISG in cases in which restitution seems inadequate¹³⁸. This combination gives rise to a comprehensive damages claim¹³⁹. In the case at hand, CLAIMANT's losses cannot be fully compensated by the application of the rules of restitution only. Furthermore, the comprehensive damages claim enjoys priority and therefore prevails the provisions on restitution¹⁴⁰. Nevertheless, the rules concerning the restitution of impaired goods must also be applied when calculating damages¹⁴¹.

Thus, RESPONDENT's fundamental breach of contract leads to a comprehensive damages claim.

¹³² See supra Unit 2.

¹³³ Reinhart, Art. 74 para. 2; Bianca/Bonell/Knapp, Art. 74 note 2.4.; Enderlein/Maskow, Commentary, Art. 74 note 1; Leser, Strukturen von Schadensersatz und Vertragsaufhebung, p. 469; Schlechtriem/Stoll, Art. 74 para. 7.

¹³⁴ See supra Unit 4.

¹³⁵ CLAIMANT's Exhibit No. 12; see supra Unit 4.

¹³⁶ Leser, Strukturen von Schadensersatz und Vertragsaufhebung, p. 469.

¹³⁷ Schlechtriem/Stoll, Art. 74 para. 3; Huber, p. 216; Furmston, Am. J. Comp. L. Vol. 40, p. 673; Honnold, Art. 81 para. 441; Hamburg Chamber of Commerce, ICCA Yearbook XXII (1997), p. 37 para. 4.

¹³⁸ Schlechtriem/Leser, Intro to Artt. 81-84 para. 18; idem., Art. 84 paras. 12, 21, 23; according to the Secretariat's Commentary, O.R., p. 59, Art. 70 note 4, "the [...] arbitral tribunal must calculate [that] loss in a manner which is best suited to the circumstances."

¹³⁹ Schlechtriem/Stoll, Art. 74 para. 3, Hamburg Chamber of Commerce, ICCA Yearbook XXII (1997), p. 37 para. 7, according to which "one uniform right to damages comes into existence".

¹⁴⁰ Schlechtriem/Stoll, Art. 74 para. 3; cf. Leser, Vertragsaufhebung und Rückabwicklung, pp. 251 et seq.; idem, Strukturen von Schadensersatz und Vertragsaufhebung, p. 470; Hamburg Chamber of Commerce, ICCA Yearbook XXII (1997), p. 38 para. 7, according to which the "uniform right to damages [...] prevails over the consequences of the termination of a contract provided for in Arts. 81-84 CISG."

¹⁴¹ Schlechtriem/Leser, Intro to Arts 81-84 para. 18; Leser, Vertragsaufhebung und Rückabwicklung, pp. 251 et seq.

3. Measurement of damages totals \$611,400

In the following analysis, a mode of calculating the comprehensive damages will be laid down. Following the principle of the CISG, the aggrieved party has to be put into as good a pecuniary position as that in would be in if the contract had been duly performed¹⁴².

Consequently, CLAIMANT is entitled to the amount of \$795,400 which includes restitutionary elements as well as elements of losses [a]. On the contrary, RESPONDENT may ask for restitution of the unsold goods and for a monetary substitute for the sold goods (\$184,000) [b]. RESPONDENT's further counterclaim (\$147,700) in addition to this sum is unfounded [c].

a) CLAIMANT is entitled to the amount of \$795,400

In order to grant full compensation to CLAIMANT, it is not only necessary to consider existing claims¹⁴³ [(1)-(4)] but also to include new claims¹⁴⁴ [(5)-(7)].

(1) Purchase price (\$552,000)

In light of the principle contained in Art. 81 (2) CISG, full reimbursement of the purchase price which amounts to \$552,000 (\$600,000 list price minus 8 % discount) has to be granted to CLAIMANT. RESPONDENT's counterclaims will be discussed further below¹⁴⁵.

(2) Two-thirds of the shipping costs (\$22,000)

The aggrieved party is entitled to damages regarding the assets which existed when the contract was concluded, so called wasted expenditures¹⁴⁶. CLAIMANT may recover two-thirds of the shipping costs. These costs would also have been incurred to CLAIMANT in the case of proper performance. However, the shipping costs would have been covered by the retail price which would have been paid by CLAIMANT's customers. Thus, two-thirds of the shipping costs represent wasted expenditures and are therefore awardable

¹⁴² Treitel, Remedies for breach of contract, p. 82; Secretariat's Commentary, O.R., p. 449, Art. 70 note 3; Schlechtriem/Stoll, Art. 74 para 2; Honsell/Schönle, Art. 74 para. 14; Staudinger/Magnus, Art. 74 paras. 16 and 26; Bianca/Bonell/Knapp, Art. 74 note 3.1.; Vilius, p. 247; Honnold, Art. 74 para. 403; Gabriel, Art. 74, p. 230; Sutton, Measuring Damages, Ohio St. L.J. Vol. 50 (1989), p. 741; Farnsworth, Am. J. Comp. L. Vol. 27 (1979), p. 247; Delchi Carrier, S.p.A. v. Rotorex Corp., (2nd Cir. 1995), UNILEX,E.1995-31, p. 535; OGH, UNILEX,E.1996-3.1, pp. 548.1 et seq.

¹⁴³ Comp. CLAIMANT's Request for Arbitration, paras. 13-16.

¹⁴⁴ Comp. CLAIMANT's Request.

¹⁴⁵ See infra Unit 5 I.2.b.

¹⁴⁶ Ryffel, p. 48; Secretariat's Commentary, O.R., p. 449, Art. 70 Example 70 A and B; Schlechtriem, UN-Kaufrecht, para. 308; Schlechtriem/Leser/Hornung, Art. 84 para. 20c; Magnus, Schadenskonzept des CISG, p. 28; Ziegel, p. 9-37.

damages. CLAIMANT cannot and does not claim the remaining one-third of the shipping costs since they have already been compensated by retailing.

Consequently, CLAIMANT is entitled to shipping costs in the amount of \$22,000.

(3) Two-thirds of the advertising costs (\$23,333)

CLAIMANT can recover two-thirds of the advertising costs. They represent wasted expenditures as well as the shipping costs and consequently are awardable in the amount of \$23,333.

(4) Storage costs (\$4,000)

The storage costs are awardable under Art. 74 CISG because they were the result of RESPONDENT's failure to tender performance. CLAIMANT is still obliged to take steps in order to preserve the goods as provided for in Art. 86 (1) CISG, but RESPONDENT has to bear the expenses of this preservation, Art. 86 (1) sentence 2 CISG¹⁴⁷. As stated in CLAIMANT's letter of 3 November 1999 the unsold goods have been stored in a warehouse¹⁴⁸. Consequently, CLAIMANT is entitled to the storage costs amounting to \$4,000 from the date of avoidance until the date of CLAIMANT's Request for Arbitration. Additionally, it can claim costs that accrue from this date until mutual restitution is made.

(5) Two-thirds of costs for letters of credit (\$413)

CLAIMANT can recover two-thirds of the costs for letters of credit. They represent wasted expenditures as well as the costs for shipping and advertising¹⁴⁹, and therefore are awardable.

(6) Loss of profit (\$191,654) corresponding to goods unsold

The claims concerning costs for shipping, advertising and letters of credit do not impede a claim for loss of profit, since such a claim does not compensate for costs actually incurred that led to no sales¹⁵⁰ (i.e. wasted expenditure). Therefore, awarding damages for loss of profit creates no double recovery but rather guarantees the purpose of granting the injured party damages "*equal to the loss including loss of profit*" as provided by Art. 74 CISG¹⁵¹.

¹⁴⁷ Reinhart, Art. 81 para. 6; Bianca/Bonell/Tallon, Art. 81 note 2.6.; Schlechtriem/Bacher, Art. 86 para. 22; Corvaglia, note 5.7., p. 37; Piltz, § 4 para. 273; Staudinger/Magnus, Art. 86 para. 13; LG Landshut, CISG-Online 193.

¹⁴⁸ CLAIMANT's Exhibit No. 12.

¹⁴⁹ See supra Unit 4 I. 2. a. (2), (3).

¹⁵⁰ Delchi Carrier, S.p.A. v. Rotorex Corp., (2nd Cir. 1995), UNILEX,E.1995-31, p. 535.

¹⁵¹ Delchi Carrier, S.p.A. v. Rotorex Corp., (2nd Cir. 1995), UNILEX,E.1995-31, p. 535.

The following calculation leads to the profit of the unsold goods which has to be compensated as “loss of profit”. In order to determine the loss of profit in the case at hand, retail mark-up must to be decreased by two-thirds of the costs for advertising and letters of credit and by the hypothetical general selling and administrative costs (hereinafter: general costs).

Since CLAIMANT would have taken a 70 percent retail mark-up on the unsold goods¹⁵², the sum calculated by RESPONDENT concerning the sold goods needs to be doubled in order to represent the mark-up of the unsold goods: this equals \$295,400. From this sum, two-thirds of the advertising costs (\$23,333) and two-thirds of the costs for the letters of credit (\$413) have to be deducted. As RESPONDENT’s calculations of the retail mark-up is based on CLAIMANT’s delivered costs (purchase price plus shipping costs) the shipping costs do not form part of the retail mark-up and therefore do not have to be deducted. Finally, since the general costs of \$40,000 are only allocated to the goods sold, they have to be doubled in order to represent the hypothetical general costs related to the unsold goods (\$80,000) and then to be deducted. This calculation¹⁵³ leads to a profit of \$191,654 which CLAIMANT has lost as a result of the breach of contract, i.e. CLAIMANT’s “loss of profit”.

Consequently, CLAIMANT is entitled to damages equalling “loss of profit” in the amount of \$191,654.

(7) Costs for legal advice (\$2,000)

CLAIMANT’s expenditure for legal advice has to be compensated as the latter was necessary in order to verify and specify the assertion of trademark infringement¹⁵⁴. As shown above¹⁵⁵, it was originally RESPONDENT’s obligation to inquire about registered trademarks. Such an obligation can also indicate the necessity to obtain legal advice. Since it was CLAIMANT who acted in accordance with this obligation¹⁵⁶, it is only reasonable to make RESPONDENT bear those costs¹⁵⁷.

Consequently, CLAIMANT is entitled to the costs for legal advice according to Art. 74 CISG.

¹⁵² The same retail mark-up, CLAIMANT took on the sold goods; see Procedural order No. 1, para. 51; Terms of Reference, para. 13; Answer to the Request for Arbitration, para. 10.

¹⁵³ $\$147,700 * 2 = \$295,400$; $\$295,400 - \$23,333 - \$413 - \$80,000 = \$191,654$.

¹⁵⁴ See supra Unit 3.

¹⁵⁵ See supra Unit 2 II.

¹⁵⁶ See Procedural Order No. 1, para. 12; CLAIMANT’s Exhibit No. 10.

¹⁵⁷ OLG Düsseldorf, NJW-RR (1997), p. 823; Staudinger/Magnus, Art. 74 para. 51.

b) RESPONDENT may ask for restitution of the unsold goods and for a monetary substitute for the sold goods (\$184,000)

Counsel does not dispute RESPONDENT's entitlement to restitution for the unsold goods and one-third of the full purchase price as substitute for the sold goods.

c) RESPONDENT's further counterclaim (\$147,700) in addition to this sum is unfounded

RESPONDENT's assertion that it is entitled to a further sum of \$147,700¹⁵⁸ must be disregarded because pursuant to Art. 84 (2) (b) CISG. Counsel will show that any further claim exceeding the sum granted above is unfounded. Hence, RESPONDENT cannot claim the gross benefit [(1)]. Moreover, the net benefit is to be deducted as well [(2)]. Alternatively, if the Arbitral Tribunal decides to grant any sum exceeding the purchase price, CLAIMANT can reclaim it according to Art. 74 CISG [(3)].

(1) RESPONDENT cannot claim the gross benefit

CLAIMANT is not obliged to restore the gross benefit received¹⁵⁹. It is entitled to deduct all costs that it incurred by retailing one-third of the goods, i.e. costs that are associated with the amount of goods sold¹⁶⁰.

Firstly, one-third of the advertising costs (\$11,667) has to be taken into account and must be deducted.

Secondly, one-third of the costs for letters of credit (\$207) has to be deducted since CLAIMANT paid a fee in order to establish these letters of credit.

Thirdly, the general costs allocated to goods sold (\$40,000) must be deducted from gross profit as well so that RESPONDENT's entitlement to a specific amount can be correctly calculated. RESPONDENT asserts that CLAIMANT can only claim expenses that are additional to those that would have been incurred even without its - i.e. RESPONDENT's - goods¹⁶¹. In other words, RESPONDENT argues that it did not cause the costs in question. This assertion must be rejected. RESPONDENT's breach of contract and CLAIMANT's general costs are causally connected. 'Legal' cause exists if several actions can be ignored alternatively, not cumulatively, but for which the achievements would be lost¹⁶². In the case at hand, if all contributions of CLAIMANT's business partners were cumulatively ignored, CLAIMANT would not have any

¹⁵⁸ See Terms of Reference, para. 13; Answer to the Request for Arbitration, para. 10.

¹⁵⁹ Schlechtriem/Leser, Art. 84 paras. 20 and 28; Leser, Vertragsaufhebung und Rückabwicklung, p. 250; Neumayer/Ming, Art. 84 note 3; Herber/Czerwenka, Art. 84 para. 5; Reinhart, Art. 84 para. 7; Hornung, p. 351; comp. Dölle/Weitnauer, Art. 81 EKG para. 9; Weber, Vertragsverletzungsfolgen, p. 189.

¹⁶⁰ Schlechtriem/Leser/Hornung, Art. 84 para. 27; Honsell/Weber, Art. 84 para. 21; Neumayer/Ming, Art. 84 note 3; Dölle/Weitnauer, Art. 81 EKG para. 9.

¹⁶¹ See Terms of Reference, para. 14; Answer to the Request for Arbitration, para. 9.

administrative costs. Consequently, the costs are caused by RESPONDENT's goods. Thus, CLAIMANT is entitled to damages that represent an allocation to the contract of the overhead of the firm¹⁶³. Moreover, CLAIMANT's calculation of the general costs is correct¹⁶⁴.

Consequently, CLAIMANT is entitled to subtract the general costs of \$40,000.

(2) The net benefit is to be deducted

The net benefit (\$95,826)¹⁶⁵ derived from the goods sold corresponding to one-third of CLAIMANT's loss of profit does not have to be taken into account and therefore can be deducted¹⁶⁶. Otherwise, RESPONDENT would be placed in a better position than it would have been in, had performance occurred. Such a result would be repugnant to the principle of restitution that neither party should retain any benefit¹⁶⁷. Consequently, CLAIMANT may subtract the net benefit of \$95,826.

Due to CLAIMANT's right in accordance with Art. 84 (2) CISG to deduct the sums referred to above, RESPONDENT's counterclaim of \$147,700 in addition to the purchase price of \$184,000 for the goods sold is unfounded.

(3) Alternatively, if the Arbitral Tribunal decides to grant any sum exceeding the purchase price, CLAIMANT can reclaim it according to Art. 74 CISG

In case of a decision to grant RESPONDENT benefits to an extent which includes any of the sums that Counsel deducted above, the Tribunal would place the contract-breaking party in a better and, by contrast, the aggrieved party in a worse economic position than that it would have been in if the contract had been duly performed. Pursuant to Art. 74 CISG CLAIMANT may reclaim exactly the amount that it would have had to restore in order to achieve a fair result.

Consequently, after having taken into RESPONDENT's counterclaim (\$184,000) and deducted it from the sum CLAIMANT is entitled to (\$795,400), the calculation of comprehensive damages results in an amount of \$611,400.

¹⁶² Comp. German tort law on this causality problem: Münchener Kommentar/Mertens, § 823 BGB paras. 15 et seq.; cf. English tort law: Markesinis/Deakin, p. 186.

¹⁶³ Secretariat's Commentary, O.R., p. 449, Art. 70 note 5; Bianca/Bonell/Knapp, Art. 74 note 3.11.

¹⁶⁴ CLAIMANT calculated the administrative costs allocated to the Vis Water Sports goods sold by dividing the total amount of such costs by the total sales and applying that percentage to the amount of Vis Water Sports goods sold; see Procedural Order No.1, para. 49.

¹⁶⁵ Gross benefit (\$147,700) minus one-third of the advertising costs (\$11,667) minus one-third of the costs for letters of credit (\$207) minus general costs (\$40,000) equals the net benefit in the amount of \$95,826.

¹⁶⁶ Honsell/Weber, Art. 84 para. 21.

¹⁶⁷ Schlechtriem/Leser, Intro to Artt. 81-84 para. 13.

4. The damages were foreseeable to RESPONDENT

According to Art. 74 CISG the amount of \$611,400 must be classified as a foreseeable loss.

A loss has to be qualified as foreseeable if the risk which was foreseeable when the contract was concluded, has actually materialized and has led to a loss¹⁶⁸. Thus, losses are recoverable if the promisor knows of the relevant circumstances¹⁶⁹. The existence of a trademark will always bear the risk of interruption in selling the goods in order to avoid infringing the trademark. This leads to an inability of gaining any more profit on the goods. RESPONDENT was aware that an encumbrance and a resulting cessation of sale would bear the risk that, firstly, costs in connection with retail might not be balanced, that, secondly, CLAIMANT might suffer loss of profit and that, finally, new costs might arise out of the encumbrance (storage and legal advice).

Consequently, the damages were foreseeable to RESPONDENT.

5. CLAIMANT did not violate its obligation to mitigate losses pursuant to Art. 77 CISG

As a precaution, Counsel points out that CLAIMANT did not violate its obligation to mitigate losses. Up to the present point of time, RESPONDENT's statement of facts is not sufficient to invoke Art. 77 CISG since RESPONDENT bears the burden of proof¹⁷⁰. If RESPONDENT should make further amendments on this issue, Counsel would comment on this matter in detail.

6. CLAIMANT is entitled to interest at the rate of 7% from 3 November 1999 onwards

According to Art. 78 CISG CLAIMANT is entitled to interest from the date the damages have become due (3 November 1999) [a] at the rate of 7%, the short-term commercial lending rate of Equatoriana [b].

a) CLAIMANT is entitled to interest from 3 November 1999, the date the damages have become due

Art. 78 CISG grants interest on any sum in arrears. It is submitted that although Art. 78 CISG does not expressly mention interest on damages the wording „any other sum" includes due damages¹⁷¹.

¹⁶⁸ Schlechtriem/Stoll, Art. 74 para. 37; Secretariat's Commentary, O.R., p. 449, Art. 70 note 8; Stoll, Schadensersatzpflicht, pp. 261 et seq.; Kranz, p. 212; Honsell/Schönle, Art. 74 paras. 22 et seq.; Achilles, Art. 74 para. 10; Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

¹⁶⁹ Schlechtriem/Stoll, Art. 74 para. 40; Achilles, Art. 74 para. 10; Bianca/Bonell/Knapp, Art. 74 note 2.8.; Stoll, Schadensersatzpflicht, pp. 262 et seq.

¹⁷⁰ Schlechtriem/Stoll, Art. 77 para. 12; Herber/Czerwenka, Art. 77 para. 8; Hutter, p. 198; cf. LG Heidelberg, in: Schlechtriem/Magnus, Art. 88 EKG para. 2.

¹⁷¹ Schlechtriem/Eberstein/Bacher, Commentary, Art. 78 para. 15; Herber/Czerwenka, Art. 78 para. 2; Karollus, p. 227; Honsell/Magnus, Art. 78 para. 5; Enderlein/Maskow/Strohbach, Art. 78 para. 4.2; Schlechtriem, UN-Kaufrecht, para. 319.

Since the CISG contains no express rules dealing with the time when a sum other than the price falls in arrears, it must be assumed that it becomes due as soon as the loss arises¹⁷², which must be determined up to the day CLAIMANT ceased retailing RESPONDENT's goods. Consequently, CLAIMANT is entitled to interest from 3 November 1999¹⁷³.

If the Tribunal does not find it appropriate that interest should accrue from the date above, interest should accrue from the beginning of the Arbitration proceedings, as then CLAIMANT has taken the appropriate steps to secure payment of the damages. In any event interest should accrue from the date of the award given.

b) The short-term commercial lending rate of Equatoriana at the rate of 7% is applicable

Since the CISG does not stipulate any rate of interest¹⁷⁴, it is appropriate to apply Art. 7.4.9 (2) of the UNIDROIT Principles¹⁷⁵. It provides that the rate of interest shall be the average bank short-term lending rate to prime borrowers¹⁷⁶. This choice is in line with the principle of abstract calculation of damages which provides that it must be determined irrespective of the actual use of the sum¹⁷⁷.

The question which country's short term lending rate must apply is governed by the CISG itself. Art. 78 CISG serves two different purposes¹⁷⁸. Firstly, it aims at encouraging voluntary performance and avoiding a delay in payment on behalf of the party in breach¹⁷⁹. The fact that debtor had to pay higher rates by taking a loan in its home-country is likely to induce a delay of payments due. This risk must be eliminated by applying the rate of debtor's country. Moreover, as the comprehensive damages contains restitutionary principles, Art. 78 CISG must be seen in the light of Art. 84 CISG. Therefore, it is the possible benefit gained by the party in breach that must be removed¹⁸⁰, which also leads to the rate of the debtor's country.

¹⁷² Schlechtriem/Bacher, Art. 78 para. 15; Honsell/Magnus, Art. 78 paras. 8 and 9; Herber/Czerwenka, Art. 78 para. 3.

¹⁷³ 3 November 1999 is the day of CLAIMANT's cessation of retail; see Procedural Order No. 1, para. 13.

¹⁷⁴ Gabriel, p. 237; Berger, RabelsZ Vol. 61 (1997), p. 332; Piltz, § 5 para. 411; Schlechtriem/Bacher, Art. 78 para. 26; Magnus, RabelsZ Vol. 59 (1995), p. 490; Lookofsky, § 2-11, p. 21.

¹⁷⁵ ICC Award No. 8128 (1995), J.D.I. 4, 1996, p. 1027; comp. generally for the function of the UNIDROIT Principles as expression of the general principles under Art. 7 (2) CISG: Bonell, The UNIDROIT Principles and CISG, Uniform L. Rev. (1996), p. 35.

¹⁷⁶ Art. 7.4.9 (2) UNIDROIT Principles: "*The rate of interest shall be the average bank short-term lending rate to prime borrowers [...]*".

¹⁷⁷ Schlechtriem/Leser/Hornung, Art. 84 para. 13; Reinhart, Art. 78 para. 2.

¹⁷⁸ Honnold, para. 421, p. 523; Neumayer, RIW (1994), p. 106.

¹⁷⁹ Neumayer/Ming, Art. 78 note 2; Neumayer, RIW (1994), p. 106; Heuzé, note 448; Kindler, p. 110; Witz/Salger/Lorenz/Witz, Art. 78 para. 9; Honnold, Art. 78 para. 421, p. 523.

¹⁸⁰ Schlechtriem/Leser/Hornung, Art. 84 para. 13; Secretariat's Commentary, O.R., p. 448, Art. 69 note 2; Witz/Salger/Lorenz/Witz, Art. 78 para. 9; Schlechtriem, Uniform Sales Law, p. 107, FN. 449.

Secondly, granting interest shall compensate additional losses suffered by the aggrieved party inflicted by delay in payment¹⁸¹. This would lead to the interest rate of the creditor's country. In order to serve both purposes the higher of both rates in question must apply since otherwise one purpose would not be done justice to. In the case at hand the rate of Equatoriana (7%) is higher than the one of Danubia (5%). Thus, it is appropriate to rely on the interest rate of Equatoriana, which is determined at 7%.

Consequently, CLAIMANT is entitled to interest on damages at a rate of 7% from 20 September 1999 onwards.

Result: CLAIMANT can recover damages of \$611,400 and interest thereon.

II. Assuming that the Arbitral Tribunal or RESPONDENT invokes Art. 19 of the ICC Rules, Counsel submits as a precaution the following argument on this procedural issue

CLAIMANT hereby makes new claims¹⁸² concerning loss of profit (\$191,654) costs incurred by establishing the letters of credit (\$413) and by taking legal advice (\$2,000)¹⁸³.

As a precaution, it will be shown that these new claims fall within the limits of the Terms of Reference [1]. Alternatively, if the Arbitral Tribunal does not share Counsel's view, the latter would like to ask to authorization of these new claims [2].

1. The new claims fall within the limits of the Terms of Reference

The Terms of Reference do not imply an impediment for the parties to add to, to complete, or even to correct their legal opinion¹⁸⁴. It is acknowledged that a new claim must be seen as within the limits if it is based on the same facts and legal grounds as the claims stated in the Terms of Reference¹⁸⁵.

Both the new and the existing claims result from RESPONDENT's fundamental breach of contract¹⁸⁶. They represent an extension of the original relief sought. Moreover, all damages can be calculated on the known economic dates. They are therefore based on the same facts.

¹⁸¹ Honnold, Art. 78 para. 421, pp. 525 et seq.; Honsell/Magnus, Art. 78 para. 1; Staudinger/Magnus, Art. 78 para. 1.

¹⁸² See supra Unit 5 I.2.a. (5) – (7).

¹⁸³ See Procedural Order No. 1, paras. 49 and 50.

¹⁸⁴ Sandrock, RIW (1987), p. 660.

¹⁸⁵ Derain/Schwartz, p. 250; cf. Awards in ICC Case No. 4462 (1985), ICCA Yearbook XVI (1991), pp. 71 et seq.; ICC Case No. 6618 (1991) ICC CT. Bull, Vol. 8, No. 2 (1997); ICC Case No. 6309 (1991), ICC Arbitral Awards 1991-1995, p. 401.

¹⁸⁶ see supra Unit 5 I.3.

Furthermore, the new claims are enforceable under Art. 74 CISG, which are already implied in the Terms of Reference so as to award damages for wasted expenditure to CLAIMANT¹⁸⁷. Hence, they simply represent new items of damages in addition to the damages of costs of shipping and advertising. Thus, these new claims are based on the same legal grounds as the existing ones. Consequently, the requirements set forth by Art. 19 ICC Rules are met by the new claims, which therefore fall within the limits of the Terms of Reference.

Finally, RESPONDENT does not have any interest in contesting CLAIMANT's right to make new claims according to Art. 19 ICC Rules, due to the negative consequences this would have. CLAIMANT will rely on its new claims in any case. In the event that the right to make these new claims is successfully contested on behalf of RESPONDENT, CLAIMANT will have to institute additional proceedings in order to be able to enforce these claims. Since RESPONDENT already has to bear the costs for the present arbitration as will be shown below¹⁸⁸, it would also have to bear those of a second arbitration. RESPONDENT neither wishes financial charges as such nor another litigation which would be inevitable if it decided to contest CLAIMANT's right to make new claims.

2. Alternatively, the Arbitral Tribunal is requested for authorization of new claims according to Art. 19 of the ICC Rules

Assuming that the Arbitral Tribunal decides that the new claims do not fall within the limits of the Terms of Reference, may it please the Tribunal to authorize the new claims pursuant to Art. 19 of the ICC Rules.

The proceedings are at a stage where an introduction of new claims is admissible. Since the new claims do not require a reopening of the evidentiary portion of the proceedings and thus do not unduly interfere with their efficiency¹⁸⁹, an acknowledgement of the new claims seems desirable.

III. In case of non-authorization, CLAIMANT can still rely on Art. 74 CISG to recover its damages of \$417,333

If the Arbitral Tribunal decided not to authorize the new claims, the entitlement to comprehensive damages pursuant to Art. 74 CISG would remain unaffected. It is merely the damage measurement that is

¹⁸⁷ Comp. Request for Arbitration, para. 13, wherein “damages” were expressly listed. In addition to that, it was stated in the Terms of Reference that the total monetary amount “*as presently constituted*” is for \$480,000. Therefore, further enlargement of sum claimed is admissible.

¹⁸⁸ Unit 5 IV.

¹⁸⁹ comp. Derains/Schwartz, p. 249.

altered. In that case, Counsel would deduct the new claims in the amount of \$194,067¹⁹⁰ from the total of \$611,400 resulting in a decrease of awardable loss to \$417,333. Furthermore, CLAIMANT is entitled to interest on this sum at the rate of 7% from 3 November 1999 onwards according to Art. 78 CISG¹⁹¹.

Consequently, CLAIMANT can still rely on Art. 74 CISG to recover its damages of \$417,333 and interest thereon.

Result: CLAIMANT can rely on Art. 74 CISG to recover damages of \$611,400 and is entitled to interest thereon according to Art. 78 CISG.

Unit 6: The Arbitral Tribunal should find RESPONDENT bearing the arbitration costs is appropriate pursuant to Art. 31 (3) of the ICC Rules

Art. 31 (3) of the ICC Rules provides that *‘the final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties’*. The costs of arbitration include the reasonable legal costs incurred by the parties for the arbitration¹⁹². In the case at hand, CLAIMANT did not cause any points of dispute or violate any duty. Moreover, the arbitration costs were the result of RESPONDENT’s failure to tender performance under its contractual obligations. Therefore, RESPONDENT bearing the arbitration costs is appropriate.

May it accordingly please the honorable Tribunal to allocate the arbitration costs to RESPONDENT.

¹⁹⁰ Costs for letters of credit (\$413) plus loss of profit (\$191,654) plus costs for legal advice (\$2000) totals \$194,067.

¹⁹¹ See Unit 4, I.6.

¹⁹² Art. 31 (1) ICC Rules provides: *‘The costs of the arbitration shall include [...] the reasonable legal and other costs incurred by the parties for the arbitration.’* Typically, the legal costs include such items as the fees and expenses of legal counsel; see Derains/Schwarz, p. 337.

Conclusion

In conclusion, Counsel respectfully submits the above arguments on behalf of Sports and More Sports, Inc.

May it accordingly please the honorable Tribunal:

firstly, to find that it has jurisdiction on the merits of the present case;

secondly, to determine that RESPONDENT violated its obligation to deliver goods free from any claim of a third party based on intellectual property pursuant to Art. 42 (1) CISG;

thirdly, to find that CLAIMANT has effectively declared the contract avoided according to Art. 49 CISG;

fourthly, to declare that CLAIMANT is entitled to comprehensive damages totaling \$611,400 pursuant to Art. 74 CISG, and interest thereon;

fifthly, to determine that RESPONDENT has to pay the arbitration costs.

Freiburg im Breisgau, 1 December 2000

Inken Baumgartner

Hanna Eggert

Simon Manner

Ivo Bach

Rolf Eicke

Florian Mohs