

# MOCK CASE

GOARB MADRID 2019

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## UNCONTESTED FACTS

1. Loyalty S.A. (“**Loyalty**”) is a *startup* company existing under the laws of Spain. Loyalty operates in the sector of development and marketing of software in Spain and Portugal and intends to expand its activities across Europe.
2. Loyalty was founded in 2015 by a group of young entrepreneurs – all creative computer engineers – (the “**Founding Partners**”), with a share capital of EUR 400.000.
3. RSK Capital Ventures N.V. (“**RSK**” or the “**Investor**”) is a joint-stock company established under the laws of The Netherlands. RSK is a company imbedded in the high-tech sector that holds many subsidiaries and interests in companies for the development of software for smartphones. RSK has sponsored very successful projects in Europe, such as Uber Eats or Deliveroo.
4. Loyalty’s star product is the **Loyalty App**: a smartphone app that unifies all the customer’s loyalty cards through which he or she can enjoy discounts on products from different shops, stores and restaurants. In essence, the Loyalty App is the digital substitute of the traditional plastic reward cards issued by companies as a marketing strategy to ensure the customer’s loyalty to a product by offering attractive discounts.
5. By 2016 the Founding Partners had completed a *beta* version of the Loyalty App. The group of ambitious engineers, however ingenious in the technical realm, lacked the necessary expertise regarding proficient business and marketing strategies. Accordingly, in order to continue developing their product and commercialize it, the Founding Partners sought a *business angel*, in other words, a strategic partner that could provide additional funding, an international marketing network and the necessary input to secure the success of the company. After several contacts with some private equity firms, the Founding Partners reached an agreement with RSK, an established high-tech company with the necessary consolidated experience.
6. RSK offered to invest EUR 4.000.000 in exchange for 40% of the share capital – implicitly establishing a market value of Loyalty at EUR 10.000.000.
7. RSK’s would offer the “critical mass” by providing the distribution of the Loyalty App across Europe, which would guarantee the sustainability of the company, but also insisted on having control over the timing and areas in which the distribution of the Loyalty App would occur. The timing for launching the Loyalty App into the market was essential: as RSK expressed to the Founding Partners during the negotiations:

*“... we can provide you with the optimal marketing strategy in order to secure the partnership with the major retail shops and restaurants ... as you all are aware of, in these network economies, being the first is crucial for the success of the project...”*
8. On 20 May 2016 the Founding Partners reached an agreement with RSK, which was formalized in the **Shareholders Agreement**, which provided for the following investment schedule:

<u>Date of Capital Increase</u>	<u>Shares issued</u>	<u>Capital Contribution of RSK</u>
Before 1 June 2016	66.667	EUR 1.000.000
Before 1 January 2017	66.667	EUR 1.000.000
Before 1 January 2018	66.667	EUR 1.000.000
Before 1 June 2019	66.667	EUR 1.000.000
<b>Total</b>		<b>EUR 4.000.000</b>

9. In compliance with the agreed investment schedule of clause 2.2, RSK made the first capital contribution of EUR 1.000.000 on 1 June 2016.
10. Throughout June and July 2016, Loyalty and RSK began working on the details regarding the Distribution Agreement that was to be signed between Loyalty and RSK or any of its subsidiaries as the legal framework governing the commercialization of the Loyalty App through RSK's European network. However, by 20 August 2016 – the deadline agreed upon by the Parties to conclude the Distribution Agreement – it had not been signed, and thereafter, never executed.
11. RSK informed Loyalty and the Founding Partners that some major stores had shown interest in the Loyalty App. In particular, RSK focused on a major online clothing store – Lolaz –, which showed special interest but had expressed its concerns regarding technical issues of the underlying software; more specifically, problems with the online payment getaway offered by the Loyalty App. RSK passed on to Loyalty the numerous technical modifications to the *beta* version of the Loyalty App that had been required by the interested store.
12. The engineers at Loyalty worked throughout the third quarter of 2016 in all the technical suggestions constantly made by Lolaz. Their estimate would be to have a fully operative version satisfactory to the stores by Black Friday and take advantage of the commercial boost this event could offer.
13. After more than 33 technical modification to the Loyalty App, Lolaz – always through RSK – asked additional modifications and requirements that resulted in a complete different *ad hoc* smartphone app designed exclusively to meet the online clothing store's specific needs. The new app was even renamed Lolaz Deals. With the new app, Lolaz clients could now order their purchases online and even return their products from their phone if not satisfied with them.
14. By the end of 2016 the sales of the Loyalty App amounted to EUR 250.000, half of the amount estimated in the Business Plan.
15. On 1 January 2017 RSK made the second capital contribution. However, it insisted to the Founding Partners and Loyalty that more technical improvements were required to properly market the Loyalty App:

*“Following the experience accrued throughout 2016 in offering the Loyalty App through our European network and making additional exhaustive marketing studies, it is patent that the online*

*payment getaway offered by the Loyalty App constitutes a hurdle when it comes to finalizing agreements with the major retail stores. We are confident that if you are able to improve this technical aspect, the app will be perceived as more attractive to our potential customers, and we will be able to reach our targets”.*

16. Despite the technical improvements made by the engineers at Loyalty, by June 2017 the sales results were still unsatisfactory, and reached about 40% of the estimate recorded in the Business Plan.

17. On 15 July 2017 the Founding Partners expressed their concerns in the following terms:

*“We are worried that RSK is not making the proper efforts in marketing the Loyalty App in line with the representations and commitments made. The Distribution Agreement with RSK’s partners has not even been signed, and we are deeply concerned of RSK’s true commitment with the Loyalty project ... we urge you to adopt the decisive actions required for the marketing of the Loyalty App.*

*If necessary, we suggest exploring other markets, such as the US, where online consuming habits are more established”.*

18. On 22 July 2017 RSK responded that:

*“As we have previously informed, until all technical problems of the app are solved, we cannot secure clients ... As you are aware of, for a year now, we have gathered from our network the technical input required for the app to be compatible with the retail stores’ and restaurants’ own marketing, in order for Loyalty to adapt the app to the client’s needs. Monetizing our efforts takes time, but we are confident that – with the information we have provided – the Loyalty App can be developed optimally to constitute a great asset for our potential clients...”.*

19. By September 2017 sales remained at approximately 40% of those expected in the Business Plan.

20. The Founding Partners grew impatient. Accordingly, they decided to start from scratch and started developing in parallel and on their own (through a new legal entity, Discounty S.A.) a completely new app – **Discounty App** – with a renewed online payment getaway and additional and novel features: users would not only accrue reward points for discounts, but the app also offered a convenient experience for the user. With Discounty App the user could, for instance, check the status of their reservation at a hotel room, flight tickets and make any desired modifications, track an order from an online store or restaurant, and even interact with other users to exchange reward points from different stores.

21. On 1 December 2017 – with the lift up the Christmas Holidays would bring – the Founding Partners launched on their own the Discounty App, which in Playstore is described as follows:

*“Discounty is a lifestyle app that makes your life easier: it takes the consumer experience to the next level, unifying all your customer needs in one app ...”.*

22. The next day RSK immediately expressed its outrage when it learned that the Founding Partners were behind the Discounty App:

*“We are absolutely disappointed to hear that the Founding Partners went behind our back, using the know-how and information gathered through RSK’s network, to develop a competing product that surely puts Loyalty out of business. Your manifest bad faith conduct while dealing with us can*

*only result in the dissolution of our partnership. RSK will make no further capital contributions to Loyalty or move forward with marketing, since it is obvious that you are making improper use of our input to advance your Discounty project”.*

23. On 7 December 2017 the Founding Partners answered:

*“We were very surprised by yesterday’s email. We wish to clarify that the Discounty App is a totally different product to the Loyalty App and does not engage in direct competition with it. The Discounty App is a lifetime experience app for the user, that provides many services that the Loyalty App does not contemplate. The reward scheme in the Discounty App is an ancillary feature that is not determinative of its success”.*

*The outstanding funding provided in the Shareholders Agreement is essential for Loyalty to continue with its operations. We expect RSK to abide by its commitments, continue to provide the financing agreed upon and continue the commercialization efforts for the Loyalty App”.*

24. RSK gave no response and did not make the payments corresponding to the third and fourth capital contributions to Loyalty S.A.

25. The Discounty App was a great success. By February 2018 the major retail stores, restaurants and hotels had entered into agreements with Discounty to jointly operate and market their products. No store wanted to be left out of the “consumer experience” offered by Discounty.

26. On 1 March 2018 Loyalty and the Founding Partners submitted a Request for Arbitration to the ICC Court of International Arbitration, demanding RSK to make the capital contributions outstanding as per the Shareholders Agreement.

27. By April 2018, Forbes US edition made a special issue on Discounty, estimating its value at EUR 150.000.000, and acknowledging its exponential growth. The article specified that:

*“Discounty dominates the market and is nowadays the primary app in the USA for users to channel their discounts with stores, restaurants and hotels ...”.*

*Simonne Wiezmann*  
BLACKSTONE LLP  
14 Capital Boulevard, 1201, Geneva, Switzerland  
Tel. +41 214 77 32; email: [s.wiezmann@blckst.com](mailto:s.wiezmann@blckst.com)

1 March 2018

By courier  
The Secretariat of the International Court of Arbitration  
International Chamber of Commerce  
33-43 Avenue du Président Wilson  
75116 Paris  
France

Dear Madam/Sir

On behalf of my clients, the **Founding Partners** and **Loyalty S.A.**, I hereby submit the enclosed Request for Arbitration pursuant to Article 4 of the 2017 Rules of Arbitration of the International Chamber of Commerce. A copy of the Power of Attorney authorizing me to represent the Founding Partners and Loyalty S.A in this arbitration is also enclosed.

The advance payment of US\$ 5,000 for administrative expenses (Article 4(4)(b) ICC Arbitration Rules and Article 1(1) of Appendix III) of the ICC Arbitration Rules has been made. The relevant bank confirmations are attached.

The contract giving rise to this arbitration provides that the seat of arbitration shall be Winterfell, Westeros, and that the arbitration will be conducted in English. The arbitration agreement provides for three arbitrators. The Founding Partners and Loyalty S.A. hereby nominate Dr. Arbitrator One and suggest that the ICC appoints the president of the arbitral tribunal.

Sincerely yours,

Simonne Weizmann

Attachments:  
Request for Arbitration with Exhibits  
Power of Attorney\*  
CV of Dr Arbitrator One\*  
Payment of Advances\*

**International Court of Arbitration of the  
International Chamber of Commerce**

**ICC CASE NO. 23501/MHM**

between

**Loyalty S.A. (Spain) and Founding Partners (Spain)**

*Claimants*

v.

**RSK Capital Ventures N.V.**  
(The Netherlands)

*Respondent*

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**REQUEST FOR ARBITRATION**

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**1 March 2018**

BLACKSTONE LLP  
14 Capital Boulevard  
1201, Geneva  
Switzerland

BLACKSTONE LLP  
Paseo Bonito, 25  
28028, Madrid  
Spain



## REQUEST FOR ARBITRATION

*[TO BE COMPLETED BY STUDENTS ON THE CLASS “HOW TO DRAFT A REQUEST FOR ARBITRATION”]*

Claims:

- Declare that RSK has an obligation to make the outstanding capital contribution of EUR 2.000.000 and that the Tribunal orders Respondent to make such contribution.
- Declare that Respondent has breached its commercialization obligations contained in clause 1.1. and Annex 2 of the Shareholders Agreement by failing to properly commercialize the Loyalty App, and in particular, by failing to reach the sales objectives fixed in the Business Plan.
- Order Respondent to pay Loyalty S.A. EUR 4.000.000 plus interests for damages derived from the breach of the commercialization obligations.

Enclosures: Exhibit C 1- Shareholder’s Agreement (Excerpts).

**EXHIBIT C 1**  
**SHAREHOLDERS AGREEMENT**  
(Excerpts)

**Clause 1: Object**

1.1. *The Founding Partners and Investor are entering into this Shareholders Agreement:*

[...]

*(d) to regulate the basic conditions of joint commercialization of the Company's services and products by the Investor and the Founding Partners, through the European network provided by the Investor".*

**Clause 2: Capital Increase**

2.1. *The current total share capital of the Company is EUR 400.000, divided into 400.000 company shares, each with a nominal value of EUR 1 [...]. In light of the funding needs of the Company for its future development, Loyalty S.A. will adopt four capital increases by issuing 266.668 company shares (the "Capital Increase"), according to the following investment structure:*

2.2. *The Investor will obtain a total of 266.668 company shares each with a nominal value of EUR 1 at a post-money valuation of EUR 10.000.000, fully diluted. To this effect, the Investor will pay in cash EUR 4.000.000 in four different instalments according to the following schedule:*

<u>Date of Capital Increase</u>	<u>Shares issued</u>	<u>Capital Contribution of RSK</u>
Before 1 June 2016	66.667	EUR 1.000.000
Before 1 January 2017	66.667	EUR 1.000.000
Before 1 January 2018	66.667	EUR 1.000.000
Before 1 June 2019	66.667	EUR 1.000.000
<b>Total</b>		<b>EUR 4.000.000</b>

2.3. *Without prejudice to the materialization of the capital contribution in successive capital increases, the Investors undertakes a sole obligation that is fulfilled upon completion of the full capital contribution of EUR 4.000.000.*

2.4. *The Investor assumes the firm, irrevocable and unconditional intention to disburse the capital contribution stated above, subject to the formal conditions for the adoption within the Company of the Capital Increases, which shall be allocated to meet, among others, the financial needs of the Company as expressed in the Business Plan attached to Annex 1 of this Shareholders Agreement".*

**Clause 11: Non-compete**

11.1. *The Founding Partners and the Investor agree that the capital contribution was determined on the basis that it would provide the Investor with the corresponding benefit and goodwill of the Company as it exists on the Closing Date. The Founding Partners acknowledge that it is proper for the Investor to have assurance that the value of the Company and its business will not be diminished by acts of the Company and the Founding Partners after the Closing Date. Accordingly, the Founding Partners covenant and agree that the Founding Partners shall not, provided that they hold shares in the Company, and one year thereafter:*

*(a) directly or indirectly, whether as an employee, officer, trustee, consultant, owner, partner, agent, advisor or otherwise, render services for any "competing organization" that does or seeks business*

(whether by soliciting customers of the Company, or otherwise) in any of the businesses engaged in by the Company or in which he or she worked or was involved at the Company”.

## Clause 15. Fundamental Breach

“15.1. The Shareholders Agreement will be terminated:

(a) By the consent of the Parties in writing; or

(b) At the choice of the non-breaching party, as a result of a breach by the other Shareholder, of any of the fundamental obligations established in this Shareholders Agreement [...]

15.2. If the Shareholders Agreement is terminated according to clause 15.1.b), the non-breaching party shall have the option to:

(i) Buy from the breaching party, who shall sell its shares at a price equal to their fair value, as determined by an Independent Expert, with a discount of 30%; or

(ii) Sell to the breaching party, who shall buy its shares at a price equal to their fair value, as determined by an Independent Expert, increased by 30%”.

## Clause 16. Liability

“16.1. The total amount of either Party’s liability (if any) to each other in respect of any breach of its obligations under this Shareholders Agreement shall be limited to the Capital Contribution, i.e. EUR 4.000.000, except in the case of actual fraud, intent, or wilful or grossly negligent misconduct.

[...]

“16.3. The Investor undertakes to indemnify the Founding Partners for any direct or indirect damage, or loss sustained for its failure to commercialize the product of the Company with due diligence and effectiveness, in line with the annual targets agreed”.

## Art 20: Arbitration

20. All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The seat of arbitration shall be Winterfell, Westeros and the language of the arbitration shall be English. The contract, including this clause, shall be governed by the 2016 UNIDROIT Principles.



Founding Partner 1  
20 May 2016



Founding Partner 2  
20 May 2016

For Loyalty



Founding Partner 1  
20 May 2016

For RSK



Arvin Van Rjisk  
20 May 2016

## Annex 1: Business Plan

<b>BUSINESS PLAN</b>				
	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
<b>Revenues</b>	551.000	688.750	860.938	1.076.172
<b>% Sales growth</b>		25%	25%	25%
<b>Operating Costs</b>	165.300	206.625	258.281	322.852
<b>Gross Profit</b>	385.700	482.125	602.656	753.320
<b>Other Expenditure</b>	50.000	50.000	50.000	50.000
<b>Earnings before tax</b>	335.700	432.125	552.656	703.320
<b>Income tax</b>	100.710	129.638	165.797	210.996
<b>Earnings after tax</b>	234.990	302.488	386.859	492.324

## Annex 2: Distribution Contract

*“The Company and the Investor or any of the subsidiaries of the Investor at the Investor’s choice, are committed to signing within three months a Distribution Contract for the products and services of the Company by making use of the European distribution network of the Investor and its subsidiaries, under terms satisfactory to both Parties.*

*Without prejudice to the signature of the Distribution Agreement, the Parties acknowledge that at the date of signature of this Agreement, the collaboration between the Company and the Investor regarding marketing and commercialization of the Company’s products and services has been initiated”.*



INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

3 March 2018

**23501/MHM**

Loyalty S.A. (Spain) and Founding Partners (Spain) vs/ RSK Capital Venutres N.V. (The Netherlands)

Simone Wiezmann  
BLACKSTONE LLP  
14 Capital Boulevard, 1201, Geneva  
Switzerland

*By Email: [s.wiezmann@blckst.com](mailto:s.wiezmann@blckst.com)*

RSK N.V.  
5-6 Oostendamstraat, 3073  
Rotterdam,  
The Netherlands

*ByFedEx*

Dear Sirs,

The Secretariat of the International Court of Arbitration of the International Chamber of Commerce (“Secretariat”) draws your attention to the following:

**I – REQUEST FOR ARBITRATION (“REQUEST”)**

**1) Request**

The Secretariat notifies RSK N.V. that on 1 March 2018, it received a Request for Arbitration (“Request”) from Loyalty S.A. and Founding Partners (“Claimants”) represented by Ms. Simone Wiezmann, that names it as Respondent.

Pursuant to Article 4(2) of the ICC Rules of Arbitration (“Rules”), this arbitration commenced on 1 March 2018.

We enclose a copy of the Request and the documents annexed thereto (Article 4(5)).

**2) Answer to the Request**

Respondent’s Answer to the Request (“Answer”) is due within **30 days** from the day following receipt of this correspondence (Article 5(1)).

Please send us **5** copies of the Answer, together with an electronic version.

Respondent may apply for an extension of time for submitting its Answer by nominating an arbitrator (Article 5(2)). Such information will enable the International Court of Arbitration of the International Chamber of Commerce (“Court”) to take steps towards the constitution of the arbitral tribunal.

If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration will proceed notwithstanding such refusal or failure (Article 6(8)).

**3) Joinder of Additional Parties**

No Additional Party may be joined to this arbitration after the confirmation or appointment of any arbitrator, unless all parties including the Additional Party otherwise agree (Article 7(1)). Therefore, if

Respondent intends to join an Additional Party and seeks an extension of time for submitting its Answer, it must inform us in its request for such extension.

#### **4) Constitution of the Arbitral Tribunal**

The arbitration agreement provides for three arbitrators. Claimant has nominated Dr. Arbitrator One as co-arbitrator.

Respondent is required to nominate a co-arbitrator in its Answer or in any request for an extension of time for submitting its Answer (Article 12(4)). If it fails to nominate an arbitrator within **30 days** from the day following its receipt of this correspondence, the Court will appoint a co-arbitrator on its behalf (Article 12(4)).

The Court will appoint the president, unless the parties agree upon another procedure (e.g. the co-arbitrators nominating the president) (Article 12(5)).

#### **5) Place of Arbitration**

The arbitration agreement provides for Geneva, Switzerland as the place of arbitration.

#### **6) Language**

The arbitration agreement provides for English as the language of arbitration.

#### **7) Provisional Advance**

The Secretary General fixed a provisional advance of US\$ 100 000 to cover the costs of arbitration until the Terms of Reference are established (Article 37(1)), based on an amount in dispute quantified at US\$ 6 500 000 and three arbitrators.

#### **8) Efficient Conduct of the Arbitration**

The Rules require the parties and the arbitral tribunal to make every effort to conduct the arbitration in an expeditious and cost-effective manner having regard to the complexity and value of the dispute (Article 22(1)).

In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner (Article 38(5)).

### **II - GENERAL INFORMATION**

#### **1) Caption**

The caption and the reference of this case are indicated above. Please ensure that the caption is accurate and include the reference **23501/MHM** in all future correspondence in the arbitration.

#### **2) Reference to the Rules**

In all future correspondence, any capitalised term not otherwise defined will have the meaning ascribed to it in the Rules and references to Articles of the Rules generally will appear as: "(Article \*\*\*)".

### 3) Communications with the Secretariat

Please provide your fax number and/or email address as we may transmit notifications and communications by fax and/or email.

### 4) Amicable Settlement

Parties are free to settle their dispute amicably at any time during an arbitration. The parties may wish to consider conducting an amicable dispute resolution procedure pursuant to the ICC Mediation Rules, which, in addition to mediation, also allow for the use of other amicable settlement procedures. ICC can assist the parties in finding a suitable mediator. Further information is available from the ICC International Centre for ADR at +33 1 49 53 30 53 or [adr@iccwbo.org](mailto:adr@iccwbo.org) or [www.iccadr.org](http://www.iccadr.org).

### 5) Your Case Management Team

Ms. Counsel..... (direct dial number: +33 1 49 53 00 01)  
 Ms. Deputy Counsel ..... (direct dial number: +33 1 49 53 00 02)  
 Mr. Deputy Counsel..... (direct dial number: +33 1 49 53 00 03)  
 Ms. Deputy Counsel ..... (direct dial number: +33 1 49 53 00 04)  
 Ms. Assistant ..... (direct dial number: +33 1 49 53 00 05)  
 Ms. Assistant ..... (direct dial number: +33 1 49 53 00 06)  
 Mr. Assistant ..... (direct dial number: +33 1 49 53 00 07)

Fax number ..... +33 1 49 53 00 10  
 Email address ..... [ica100@iccwbo.org](mailto:ica100@iccwbo.org)

While maintaining strict neutrality, the Secretariat is at the parties' disposal regarding any questions they may have concerning the application of the Rules.

Finally, please find enclosed a note that highlights certain key features of ICC arbitration, as well as a Note on Administrative Issues. We invite you to visit our website at [www.iccarbitration.org](http://www.iccarbitration.org) to learn more about our Dispute Resolution services.

Yours faithfully,

Counsel  
 Secretariat of the ICC International Court of Arbitration

- encl.    - Application with documents annexed thereto\*  
           - Request for Arbitration with documents annexed thereto\*  
           - Note to the Parties in Proceedings under the 2012 Rules\*  
           - Note on Administrative Issues\*  
           - ICC Rules of Arbitration (*see also* [www.iccarbitration.org](http://www.iccarbitration.org))\*  
           - ICC Dispute Resolution Brochure (*see also* [www.iccarbitration.org](http://www.iccarbitration.org))\*  
           - Financial Table\*  
           - Payment Request for the provisional advance\*

(The Notes are available on the ICC electronic Dispute Resolution Library at:  
<http://www.iccdrl.com/practicenotes.aspx>.)

**International Court of Arbitration of the  
International Chamber of Commerce**

**ICC CASE No. 23501/MHM**

between

**Loyalty S.A. (Spain) and Founding Partners**

*Claimants*

v.

**RSK Capital Ventures N.V.**  
(The Netherlands)

*Respondent*

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**ANSWER TO REQUEST FOR ARBITRATION  
AND COUNTERCLAIM**

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**4 April 2018**

HUSSEMAN, WYTHOR & STERN LLP  
26 Capital Boulevard  
1201, Geneva  
Switzerland



## **Introduction**

1. In its Request for Arbitration, Claimants deliberately concealed crucial events that form the factual matrix underling the dispute between Loyalty S.A.'s Shareholders and misrepresented RSK's contractual commitments under the Shareholders Agreement.
2. Respondent and Counterclaimant in this arbitration will show that the Founding Partners acted with intentional bad faith in their dealings with RSK and took advantage of the partnership to advance a parallel project in detriment of Loyalty S.A., in clear breach of the Shareholders Agreement.

## **Nomination of Arbitrator and Jurisdiction of the Arbitral Tribunal**

3. Respondent nominates as its arbitrator in this case Ms. Dos. It recognizes the jurisdiction of the arbitral tribunal. Respondent agrees that the ICC appoints the president of the arbitral tribunal.

## **Statement of Facts**

4. RSK Capital Ventures N.V. – the Respondent and Counterclaimant – is a joint-stock company established under the laws of The Netherlands. RSK is a company imbedded in the high-tech sector. RSK holds many subsidiaries and interests in companies for the development of software for smartphones and has sponsored very successful projects in Europe such as Uber Eats or Deliveroo.
5. On 20 May 2016 RSK and the Founding Partners agreed to enter a Shareholders Agreement (Exhibit C-1) that would govern the manner in which RSK would invest and acquire 40% of Loyalty S.A. Additionally, the Agreement established the framework for cooperation between the shareholders in relation to the development and commercialization of Loyalty S.A.'s star product, the Loyalty App.
6. The Parties agreed on a joint cooperation for the development and commercialization of the Loyalty App as follows: RSK would provide its commercialization network – consisting of the major retail sotres and restaurants – and the Founding Partners would provide within Loyalty S.A. the technical aspects needed for the Loyalty App to be properly commercialized.
7. However, little after the partnership was established, the Founding Partners broke RSK's trust: they developed in parallel a new App, the Discounty App, undisputably using the know-how and network information gathered during their partnership with RSK, and effectively cut RSK out of the initial project.

## **Answer to Request for Arbitration**

8. Claimants' request that the Tribunal orders RSK to complete the capital contributions in Loyalty S.A. as scheduled in the Shareholders Agreement is meritless. The Founding Partners committed a fundamental breach consisting of the violation of the non-compete obligation in clause 11 of the Agreement.

9. Respondent, thus, raises the *exceptio non adimpleti contractus*: RSK's good faith commitment to invest in Loyalty S.A. was premised on the assumption that RSK and the Founding Partners, through Loyalty S.A., would jointly develop and commercialize the Loyalty App; and on the Founding Partners' commitment not to compete with a similar product as long as the partnership existed. The rationale behind the non-compete commitment was to avoid the misuse of RSK's know how and commercial network and the weakening of the joint project of the Loyalty App. Since the Founding Partners breached the non-compete clause, RSK was released from its obligation to advance the outstanding capital contributions.

## **Counterclaims**

### Non-compete breach

10. The Founding Partners manifestly breached the non-compete clause: they developed a competing product, taking advantage of the information gathered throughout their partnership with RSK. It is patent that the Discounty App is a reward app that has taken over Loyalty's prospective business.
11. The slightly disappointing results regarding the commercialization of the Loyalty App cannot be used as an excuse by the Founding Partners to develop a new project on their own. RSK's commitments in the Shareholders Agreement regarding commercialization were obligations of means, not of results. Furthermore, the Business Plan attached to the Shareholder's Agreement has no binding effect: RSK committed to make its diligent efforts to commercialize the Loyalty App, but no guarantee was made regarding the result of such effort. The reason why the targeted sales were not met was because the Loyalty App was not technically apt for the customers.
12. Respondent submits that the Founding Partner's breach of the non-compete clause is a fundamental breach, that entitles RSK to activate the buyout provision of clause 15 of the Shareholders Agreement.
13. Furthermore, the direct consequence of the Founding Partner's breach of the non-compete clause is that the value of Loyalty S.A. has been seriously impaired. Respondent requests the Arbitral Tribunal to order the Founding Partners to compensate RSK for its loss in the value of its shares in Loyalty S.A. in the amount of EUR 28.803.925, as assessed in the executive summary valuation attached.

### Buyout provision

14. Respondent requests the Arbitral Tribunal to apply clause 15.2 of the Shareholders Agreement, i.e.:
  - a. Order the Founding Partners to buy Respondent's shares in Loyalty S.A. at a price equal to its fair value increased by 30%; or
  - b. Order the Founding Partners to sell its shares in Loyalty S.A. to Respondent at a price equal to its fair value with a discount of 30%.

15. Attached to this Answer to RfA and Counterclaim is an executive summary of the valuation performed by Respondent's expert witness – Dr. Müller's – for the purpose of applying clause 15 and for assessing the compensation due to Respondent as a consequence of the Founding Partner's non-compete breach (Exhibit R-1).

16. Based on this valuation, Respondent is entitled to:

- Buy the Founding Partners' shares (400.000)<sup>3</sup> at a discount of 30%, i.e. EUR 3.890.590; or
- Sell its shares (133.334)<sup>4</sup> to the Founding Partners with an increase of 30%, i.e. EUR 2.408.460.

### **Statement of Relief Sought**

In light of the above, the Respondent requests the Arbitral Tribunal

- (i). to reject all claims raised by Claimants;
- (ii). to declare that the Founding Partners have breached the non-compete clause;
- (iii). To declare that Respondent is entitled to terminate the Shareholders Agreement for a fundamental breach, pursuant to clause 15.2;
- (iv). Order Claimant to buy Respondent's shares or sell its shares to Respondent pursuant to Clause 15.2;
- (v). Order compensation for damages and loss incurred as a consequence of the Founding Partners' breach of the non-compete clause, in the amount of EUR 28.803.925;
- (vi). Order the Founding Partners to bear all the costs of the arbitral proceedings.

HUSSEMAN, WYTHIER & STERN LLP  
26 Capital Boulevard  
1201, Geneva  
Switzerland

### **Annexes**

Exhibit R 1: Executive summary Dr. Müller Expert Report

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<sup>3</sup> The fair value of the Founding Partners's shares is EUR 557.985, since it holds 75% of the shares (400.000 of the 533.334 issued and subscribed).

<sup>4</sup> The fair value of Respondent's shares is EUR 1.852.662, since it holds 25% of the shares (133.334 of the 533.334 issued and subscribed).

## EXHIBIT R 1

### Dr. Klaus Müller Expert Report

1. My name is Klaus Müller, born 25 August 1956. I am an Executive Director at Financial Analysts Inc., a global financial consulting firm that provides expert financial services since 1985. I have over 30 years' experience in bringing economic and financial analysis to complex commercial and regulatory disputes, including loss of profits claims, pre- and post-acquisition disputes, insurance claims and restrictive trade practices.
2. I have been instructed by HUSSEMAN, WYETHER & STERN LLP to issue this financial expert report in the context of *ICC Case No. 23501/MHM*, with the object of assessing:
  - (i) the actual fair market value of Loyalty S.A.; and
  - (ii) the losses suffered by RSK as a consequence of the Founding Partner's breach of the non-compete clause of the Shareholders Agreement.
3. For the preparation of this report I have reviewed and relied upon the following documents and information:
  - The Business Plan attached to the Shareholders Agreement;
  - Loyalty S.A.'s financial statements for the years ending 2016 to 2019;
  - Industry reports and analysis;
  - Case background as described by us by the instructing lawyers.

#### **First Valuation: fair market value of Loyalty S.A.**

4. The first assessment is an *as is* valuation that reflects the actual fair market value of Loyalty S.A., for the purpose of applying clause 15.2 of the Shareholders Agreement.
5. To assess the *as is* value of Loyalty S.A. I adopt the Discounted Cash Flow (DCF) methodology: I forecast the cash flows of the company for a projected period of time (plus a terminal value) and calculate the Net Present Value of each cash flow applying a discount rate. As the basis for my cash flow projections I used the figures effectively realized from 2016 to 2019, with an average sales growth percentage of 6%, and project these figures from 2020 to 2023.
6. I make two additional assumptions for the model:
  - Loyalty's expansion into LATAM, USA and Russia. This assumption takes into account that Loyalty's novel product has not reached other areas in USA, LATAM or Russia, which reveal similar consumer habits as those in Europe.
  - The reduction in operating costs for the years 2021, 2022 and 2023 to 20%, 10% and 10% respectively.

7. To assess the terminal value, I apply a constant growth rate of 4%.
8. Finally, I bring the future cash flows to net present value at a discount rate of 8%.

<b>AS IS Valuation</b>				
	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>
<b>Revenues</b>				
-Europe	310.666 €	329.306 €	349.064 €	370.008 €
-LATAM	15.533 €	16.776 €	18.118 €	19.567 €
-USA	31.067 €	33.552 €	36.236 €	39.135 €
-Russia	21.747 €	23.486 €	25.365 €	27.394 €
<b>Total Revenue</b>	<b>379.013 €</b>	<b>403.120 €</b>	<b>428.784 €</b>	<b>456.105 €</b>
<b>Operating Costs</b>	<b>113.704 €</b>	<b>65.861 €</b>	<b>34.906 €</b>	<b>37.001 €</b>
<b>Gross Profit</b>	<b>265.309 €</b>	<b>337.259 €</b>	<b>393.877 €</b>	<b>419.104 €</b>
<b>Other Expenditure</b>	<b>50.000 €</b>	<b>50.000 €</b>	<b>50.000 €</b>	<b>50.000 €</b>
<b>Earnings before tax</b>	<b>215.309 €</b>	<b>287.259 €</b>	<b>343.877 €</b>	<b>369.104 €</b>
<b>Income tax</b>	<b>64.593 €</b>	<b>86.178 €</b>	<b>103.163 €</b>	<b>110.731 €</b>
<b>Earnings after tax</b>	<b>150.716 €</b>	<b>201.081 €</b>	<b>240.714 €</b>	<b>258.373 €</b>
<b>Discounted NPV</b>	<b>139.552 €</b>	<b>172.395 €</b>	<b>191.087 €</b>	<b>189.912 €</b>
<b>Total</b>	<b>692.946 €</b>			
<b>Terminal value</b>	<b>6.717.701 €</b>			
<b>TOTAL NPV</b>	<b>7.410.647 €</b>			

9. In light of all of the above, my conclusion is that the actual fair market value of Loyalty S.A. is **EUR 7.410.647**.
10. As I have been informed by RSK, by virtue of the application of the Shareholders, in case of a contractual breach by the Founding Partners, RSK would be entitled to activate the buy-out clause. Based on my *as is* valuation, Respondent would be entitled to:
  - Buy the Founding Partners' shares (400.000)<sup>5</sup> at a discount of 30%, *i.e.* EUR 3.890.590; or
  - Sell its shares (133.334)<sup>6</sup> to the Founding Partners with an increase of 30%, *i.e.* EUR 2.408.460.

### **Second Valuation: losses suffered by RSK**

11. To calculate the loss suffered by RSK as a consequence of the Founding Partner's breach of the non-compete, the methodology applied is to subtract the value of RSK's shares

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<sup>5</sup> The fair value of the Founding Partners's shares is EUR 557.985, since it holds 75% of the shares (400.000 of the 533.334 issued and subscribed).

<sup>6</sup> The fair value of Respondent's shares is EUR 1.852.662, since it holds 25% of the shares (133.334 of the 533.334 issued and subscribed).

under a *but for* scenario (in which the Founding Partners do not breach the non-compete provision and Loyalty S.A. is able to commercialize the Loyalty App and be the first player in the European market) from the value of RSK's shares *as is* (as calculated in my First Valuation):

- The value of RSK's shares *as is*, as stated above, is EUR 1.852.662.
- The value of RSK's shares *but for*, is a combination of two valuations:

12. (i) My first valuation in the *but for* scenario is based on the realization of the figures provided for in the Business Plan, and assuming that Discounty App would not enter the market. For this I have projected Loyalty's cash flow following the Business Plan, into the years 2020-2023 (plus terminal value). I also included Loyalty's future cash flows derived from its expansion into other markets and the reduction of costs as applied in the *as is* scenario:

<b>BUT FOR Valuation</b>				
	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>
<b>Revenues</b>				
-Europe	1.345.215 €	1.681.519 €	2.101.898 €	2.627.373 €
-LATAM	67.261 €	73.987 €	81.385 €	89.524 €
-USA	134.521 €	145.283 €	156.906 €	169.458 €
-Russia	94.165 €	101.698 €	109.834 €	118.621 €
<b>Total Revenue</b>	<b>1.641.162 €</b>	<b>2.002.487 €</b>	<b>2.450.024 €</b>	<b>3.004.976 €</b>
<b>Operating Costs</b>	<b>492.349 €</b>	<b>336.304 €</b>	<b>210.190 €</b>	<b>262.737 €</b>
<b>Gross Profit</b>	<b>1.148.813 €</b>	<b>1.666.183 €</b>	<b>2.239.834 €</b>	<b>2.742.239 €</b>
<b>Other Expenditure</b>	<b>50.000 €</b>	<b>50.000 €</b>	<b>50.000 €</b>	<b>50.000 €</b>
<b>Earnings before tax</b>	<b>1.098.813 €</b>	<b>1.616.183 €</b>	<b>2.189.834 €</b>	<b>2.692.239 €</b>
<b>Income tax</b>	<b>329.644 €</b>	<b>484.855 €</b>	<b>656.950 €</b>	<b>807.672 €</b>
<b>Earnings after tax</b>	<b>769.169 €</b>	<b>1.131.328 €</b>	<b>1.532.884 €</b>	<b>1.884.567 €</b>
<b>Discounted NPV</b>	<b>712.194 €</b>	<b>969.932 €</b>	<b>1.216.852 €</b>	<b>1.385.213 €</b>
<b>Total</b>	<b>4.284.191 €</b>			
<b>Terminal value</b>	<b>48.998.744 €</b>			
<b>TOTAL NPV</b>	<b>53.282.935 €</b>			

13. My conclusions in this regard is that Loyalty S.A. would be worth – *but for* the Discounty App – **EUR 53.282.935**.
14. This valuation is a conservative one taking into account the proven success of the Discounty App.
15. (ii) That is why, additionally, I employ a second valuation using a comparator, for this *but for* scenario. The comparator in this case is Discounty, which is valued approximately at EUR 150.000.000. However, a discount to this valuation is necessary, because Discounty App is a more complex product than the Loyalty App, since it offers more

services to users. Making this discount and applying the necessary adjustments in the DCF model of the Discounty valuation, Loyalty would be worth **EUR 100.000.000**.

16. Combining the two *but for* valuations above, my conclusion is that Loyalty's fair market value *but for* would be **EUR 76.641.467**.
17. Accordingly, the 40% ownership of RSK in the Company<sup>7</sup> would be valued at **EUR 30.656.587**.
18. Therefore, the compensation required to indemnify RSK for the loss suffered, as a consequence of the non-compete breach, is **EUR 28.803.925**<sup>8</sup>.



Dr. Klaus Müller

Frankfurt, 1 April 2018

---

<sup>7</sup> Under the *but for* scenario, RSK would have made the full capital contribution committed under the Shareholders Agreement that would materialize in its ownership of 40% of the Company.

<sup>8</sup> The value of RSK's shares *but for* (EUR 30.656.587) minus the value of RSK's shares *as is* (EUR 1.852.662).

**International Court of Arbitration of the  
International Chamber of Commerce**

**ICC CASE NO. 23501/MHM**

between

**Loyalty S.A. (Spain) and Founding Partners (Spain)**

*Claimants*

v.

**RSK Capital Ventures N.V.**  
(The Netherlands)

*Respondent*

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**REPLY TO COUNTERCLAIM**

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**1 May 2018**

BLACKSTONE LLP  
14 Capital Boulevard  
1201, Geneva  
Switzerland

BLACKSTONE LLP  
Paseo Bonito, 25  
28028, Madrid  
Spain



## Introduction

1. In its Answer to the Request for Arbitration the Respondent makes unfounded claims alleging that the Founding Partners breached the non-compete clause of the Shareholders Agreement; and that such breach is of such a fundamental nature as to trigger the buy-out provision of clause 15 of the Agreement.
2. Claimants will demonstrate that these allegations have no factual, nor legal support and are solely a diversion put forward by RSK to avoid the capital contribution obligation it has towards Loyaly S.A.

## Reply to the Counterclaim

3. Claimant is forced to make certain corrections to the inaccurate set of facts contained in the Answer to RfA and Counterclaim.
4. Contrary to Respondent's assertion, the Founding Partners never developed a competing product with the Loyalty App. The Discounty App is a "lifestyle app" that offers much more than a loyalty program. The success of the Discounty App is explained by the fact that it offers customers a hands-on control over all phases of the consumer experience.
5. Alternatively, if the Arbitral Tribunal considers that the Discounty App meets the criteria to be regarded as a competing product, the Founding Partners will be released from their non-compete obligation, pursuant to the principle *exceptio non adimpleti contractus*: RSK failed to meet the target sales established by the Parties in the Annex to the Shareholders Agreement and this failure exempted the Founding Partners from abiding to the non-compete clause.

### Independent expert valuation

6. The Claimants object to the use of Respondent's expert report. The Parties agreed that, in case clause 15.2 would be applicable, the fair value of Loyalty S.A.'s shares would be "determined by an Independent Expert". Accordingly, the Founding Partners request the Arbitral Tribunal to appoint an Independent Expert pursuant to Art. 25(4) of the ICC Arbitration Rules:

*"The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at the hearing any such expert".*

7. First, the Founding Partners argue that no compensation is due, because Respondent has failed to prove an actual damage. Dr. Müller's report is full of unsubstantiated and unrealistic assumptions regarding the potential growth of Loyalty in the *but for* scenario. Neither has Respondent proven that there is a causal link between the success of the Discounty App and Loyalty's failure. Respondent's self-serving effect of the rule of the first player in network economies is exaggerated: many other sectors with apps based on network economies reveal healthy competition between several players (e.g. Uber, Cabify, iTaxi, Cab4you and Taxifi in the transport sector; UberEats, JustEat and Glovo, in the food delivery sector).

8. In any case, the parties fixed a cap on liability on EUR 4.000.000. Respondent has failed to prove that the Founding Partners acted with fraud, intent or negligence, and therefore, the cap cannot be lifted.

### **Statement of Relief Sought**

In light of the above, the Respondent requests the Arbitral Tribunal

- (i). To reject all counterclaims raised by Respondent;
- (ii). To order the Respondent to bear all the costs of the arbitral proceedings.

BLACKSTONE LLP  
14 Capital Boulevard  
1201, Geneva  
Switzerland

BLACKSTONE LLP  
Paseo Bonito, 25  
28028, Madrid  
Spain



INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

5 May 2018

**23501/MHM**

Loyalty S.A. (Spain) and Founding Partners (Spain) vs/ RSK Capital Venutres N.V. (The Netherlands)

Simonne Wiezmann  
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14 Capital Boulevard, 1201, Geneva  
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*By Email: [s.wiezmann@blckst.com](mailto:s.wiezmann@blckst.com)*

Robert Wyther  
HUSSEMAN, WYTHYER & STERN LLP  
26 Capital Boulevard  
1201, Geneva  
Switzerland

*By Email: [robert.wyther@hws.com](mailto:robert.wyther@hws.com)*

Dear Sirs,

The Secretariat acknowledges receipt of the Reply to the Counterclaim dated 1 May 2018, a copy of which is enclosed (Articles 7(4) and 5(4)).

**Constitution of the Arbitral Tribunal**

We will invite the prospective co-arbitrators to complete a Statement of Acceptance, Availability, Impartiality and Independence, which we will send to all parties.

Furthermore, we note that the parties have agreed that the Court appoints the president of the arbitral tribunal.

**Amount in Dispute**

The amount in dispute is estimated at **EUR 38 694 515** (*i.e.* US\$ 6 000 000 for the principal claims and EUR 32.694.515 for the counterclaims).

Yours faithfully,

Counsel  
Secretariat of the ICC International Court of Arbitration  
encl. - Reply to Counterclaim  
- Financial Table\*



INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

15 May 2018

**23501/MHM**

Loyalty S.A. (Spain) and Founding Partners (Spain) vs/ RSK Capital Venutres N.V. (The Netherlands)

Simmons Wiezmann  
BLACKSTONE LLP  
14 Capital Boulevard, 1201, Geneva  
Switzerland

*By Email: [s.wiezmann@blckst.com](mailto:s.wiezmann@blckst.com)*

Robert Wyther  
HUSSEMAN, WYTHYER & STERN LLP  
26 Capital Boulevard  
1201, Geneva  
Switzerland

*By Email: [robert.wyther@hws.com](mailto:robert.wyther@hws.com)*

Dear Sirs,

The Secretariat encloses a copy of the Statement of Acceptance, Availability, Impartiality and Independence ("Statement"), as well as the *curriculum vitae* of:

- Dr. Arbitrator One jointly nominated by Claimants, and
- Ms. Arbitrator Dos nominated by Respondent as co-arbitrator.

Yours faithfully,

Counsel  
Secretariat of the ICC International Court of Arbitration

encl. Statements and *Curriculum Vitae*\* of Dr. Arbitrator One and of Ms. Dos



**2017 RULES - ICC ARBITRATOR STATEMENT ACCEPTANCE, AVAILABILITY, IMPARTIALITY AND INDEPENDENCE**

Family Name(s): **One**

Given Name(s): **Arbitrator**

Please tick all relevant boxes.

**(iii). 1. ACCEPTANCE**

**Acceptance**

**I agree** to serve as arbitrator under and in accordance with the 2012 ICC Rules of Arbitration ("**Rules**"). I confirm that I am familiar with the Rules. I accept that my fees and expenses will be fixed exclusively by the ICC Court (Article 2(4) of Appendix III to the Rules).

**Non-Acceptance**

**I decline** to serve as arbitrator in this case. (If you tick here, simply date and sign the form without completing any other sections.)

**(iv). 2. AVAILABILITY**

**I confirm**, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules, subject to any extensions granted by the Court pursuant to Articles 23(2) and 30 of the Rules. I understand that it is important to complete the arbitration as promptly as reasonably practicable and that the ICC Court will consider the duration and conduct of the proceedings when fixing my fees (Article 2(2) of Appendix III to the Rules). My current professional engagements are as below for the information of the ICC Court and the parties.

Principal professional activity: Lawyer (e.g. lawyer, arbitrator, academic):

Number of currently pending cases in which I am involved (i.e. arbitrations and activities pending now, not previous experience; additional details you wish to make known to the ICC Court and to the parties in relation to these matters can be provided on a separate sheet):

	As tribunal chair / sole arbitrator	As co-arbitrator	As counsel
Arbitrations	1	5	3
Court litigation	Not applicable	Not applicable	

Furthermore, I am aware of commitments which might preclude me from devoting time to this arbitration during the following periods (please provide details regarding such periods below or on a separate sheet):

Hearing dates scheduled: May 15-19, 2019

**(v). 3. INDEPENDENCE and IMPARTIALITY** (Tick one box and provide details below and/or, if necessary, on a separate sheet)

In deciding which box to tick, you should take into account, having regard to Article 11(2) of the Rules, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

**Nothing to disclose:** I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

**Acceptance with disclosure:** I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

Date: 7 May 2018

Signature: [signature of Dr. One]

**Disclaimer:** The information requested in this form will be considered by the ICC for its Dispute Resolution Services, and will be stored in case management database systems. Pursuant to the French Law on "Informatique et Libertés" of 6 January 1978, particularly Articles 32 and 40, you may access this information and ask for rectification by writing to the Court's Secretariat.



**2017 RULES - ICC ARBITRATOR STATEMENT ACCEPTANCE, AVAILABILITY, IMPARTIALITY AND INDEPENDENCE**

**Family Name(s): Dos**

**Given Name(s): Arbitrator**

Please tick all relevant boxes.

**(vi). 1. ACCEPTANCE**

**Acceptance**

**I agree** to serve as arbitrator under and in accordance with the 2012 ICC Rules of Arbitration (“**Rules**”). I confirm that I am familiar with the Rules. I accept that my fees and expenses will be fixed exclusively by the ICC Court (Article 2(4) of Appendix III to the Rules).

**Non-Acceptance**

**I decline** to serve as arbitrator in this case. (If you tick here, simply date and sign the form without completing any other sections.)

**(vii). 2. AVAILABILITY**

**I confirm**, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules, subject to any extensions granted by the Court pursuant to Articles 23(2) and 30 of the Rules. I understand that it is important to complete the arbitration as promptly as reasonably practicable and that the ICC Court will consider the duration and conduct of the proceedings when fixing my fees (Article 2(2) of Appendix III to the Rules). My current professional engagements are as below for the information of the ICC Court and the parties.

Principal professional activity: Lawyer (e.g. lawyer, arbitrator, academic):

Number of currently pending cases in which I am involved (i.e. arbitrations and activities pending now, not previous experience; additional details you wish to make known to the ICC Court and to the parties in relation to these matters can be provided on a separate sheet):

	As tribunal chair / sole arbitrator	As co-arbitrator	As counsel
Arbitrations	3	2	4
Court litigation	Not applicable	Not applicable	

Furthermore, I am aware of commitments which might preclude me from devoting time to this arbitration during the following periods (please provide details regarding such periods below or on a separate sheet):

Hearing dates scheduled: Feb 13-24, 2019

**(viii). 3. INDEPENDENCE and IMPARTIALITY** (Tick one box and provide details below and/or, if necessary, on a separate sheet)

In deciding which box to tick, you should take into account, having regard to Article 11(2) of the Rules, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

**Nothing to disclose:** I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

**Acceptance with disclosure:** I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

Date: 6 May 2018

Signature: [signature of Ms. Dos]

**Disclaimer:** The information requested in this form will be considered by the ICC for its Dispute Resolution Services, and will be stored in case management database systems. Pursuant to the French Law on "Informatique et Libertés" of 6 January 1978, particularly Articles 32 and 40, you may access this information and ask for rectification by writing to the Court's Secretariat.



INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

1 June 2018

**23501/MHM**

Loyalty S.A. (Spain) and Founding Partners (Spain) vs/ RSK Capital Venutres N.V. (The Netherlands)

Simonne Wiezmann  
BLACKSTONE LLP  
14 Capital Boulevard, 1201, Geneva  
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Ms. Sansa Stark  
40 Floral Road  
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By FedEx & email [hadh@gmail.com](mailto:hadh@gmail.com)

Dr. Arbitrator One  
1045 City Boulevard  
Oceanside, Equatoriana

By FedEx & email [arbone@one.com](mailto:arbone@one.com)

Ms. Arbitrator Dos  
45 City Town  
Seeshore  
Mediterraneo

By FedEx & email [dosd@gmail.com](mailto:dosd@gmail.com)

Dear Madame and Sirs,

The Secretariat draws your attention to the following:

**I – DECISIONS BY THE COURT**

On 25 May 2018, the Court:

- confirmed Dr. Arbitrator One as co-arbitrator upon Claimants' nomination (Article 13(1));
- confirmed Ms. Dos as co-arbitrator upon Respondent's nomination (Article 13(1));
- appointed Ms. Sansa Stark as president of the arbitral tribunal upon the Winterfell National Committee's proposal (Article 13(3)).
- fixed the advance on costs at US\$ 500 000, subject to later readjustments (Article 37(2)/37(4)).

Enclosed for your information, are a copy of the *curriculum vitae*, of Ms. Sansa Star and her Statement of Acceptance, Availability, Impartiality and Independence.

**II - ADVANCE ON COSTS**

The advance on costs is intended to cover the arbitral tribunal's fees and expenses, as well as the ICC administrative expenses (Article 37 and Article 1(4) of Appendix III to the Rules).

The Court fixed an advance on costs based on an amount in dispute which is now estimated at **US\$ 30 700 000**, and three Arbitrators. Depending on the evolution of the arbitration, the Court may readjust the advance on costs.

The parties are invited to pay the advance on costs as follows (Article 36), within **30 days** from the day following receipt of this correspondence:

Claimants	US\$ 100 000 (US\$ 200 000 less US\$ 100 000 already paid)
Respondent	US\$ 300 000

**III – TRANSMISSION OF THE FILE TO THE ARBITRAL TRIBUNAL**

As the provisional advance has been fully paid, we are transmitting the file to the arbitral tribunal today (Article 16).

**1) Efficient Conduct of the Arbitration**

The arbitral tribunal and the parties must make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute (Article 22(1)). We draw your attention to Appendix IV of the Rules, which contains suggested case management techniques.

We enclose a Note to the Arbitral Tribunal on the Conduct of Arbitration which sets forth the time limits under the Rules that you must observe and relevant information concerning the conduct of the proceedings.

**2) Communications**

As from now, the parties should correspond directly with the arbitral tribunal and send copies of their correspondence to the other parties and to us. Please provide us with copies of all your correspondence with the parties in electronic form only.

Yours faithfully,  
Counsel  
Secretariat of the ICC International Court of Arbitration

- encl.     - List of Documents and documents mentioned therein\*  
          - Case Information\*  
          - Financial Table\*  
          - Payment Request\*  
          - Note to the Arbitral Tribunal on the Conduct of Arbitration\*  
          - Note on Administrative Issues\*  
          - ICC Award Checklist\*  
          - *Curriculum vitae* of fellow arbitrators\*

(The Notes are available on the ICC electronic Dispute Resolution Library at:  
<http://www.iccdri.com/practicenotes.aspx>.)





**2012 RULES - ICC ARBITRATOR STATEMENT ACCEPTANCE, AVAILABILITY, IMPARTIALITY AND INDEPENDENCE**

**Family Name(s): Stark**

**Given Name(s): Sansa**

Please tick all relevant boxes.

**(ix). 1. ACCEPTANCE**

**Acceptance**

**I agree** to serve as arbitrator under and in accordance with the 2012 ICC Rules of Arbitration (“**Rules**”). I confirm that I am familiar with the Rules. I accept that my fees and expenses will be fixed exclusively by the ICC Court (Article 2(4) of Appendix III to the Rules).

**Non-Acceptance**

**I decline** to serve as arbitrator in this case. (If you tick here, simply date and sign the form without completing any other sections.)

**(x). 2. AVAILABILITY**

**I confirm**, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules, subject to any extensions granted by the Court pursuant to Articles 23(2) and 30 of the Rules. I understand that it is important to complete the arbitration as promptly as reasonably practicable and that the ICC Court will consider the duration and conduct of the proceedings when fixing my fees (Article 2(2) of Appendix III to the Rules). My current professional engagements are as below for the information of the ICC Court and the parties.

Principal professional activity: Lawyer (e.g. lawyer, arbitrator, academic):

Number of currently pending cases in which I am involved (i.e. arbitrations and activities pending now, not previous experience; additional details you wish to make known to the ICC Court and to the parties in relation to these matters can be provided on a separate sheet):

	As tribunal chair / sole arbitrator	As co-arbitrator	As counsel
Arbitrations	2	5	
Court litigation	Not applicable	Not applicable	

Furthermore, I am aware of commitments which might preclude me from devoting time to this arbitration during the following periods (please provide details regarding such periods below or on a separate sheet):

Hearing dates scheduled: March 15-26, 2019

**(xi). 3. INDEPENDENCE and IMPARTIALITY** (Tick one box and provide details below and/or, if necessary, on a separate sheet)

In deciding which box to tick, you should take into account, having regard to Article 11(2) of the Rules, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

**Nothing to disclose:** I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

**Acceptance with disclosure:** I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

Date: 20 May 2018

Signature: [signature of Ms. Sansa Stark]

**Disclaimer:** The information requested in this form will be considered by the ICC for its Dispute Resolution Services, and will be stored in case management database systems. Pursuant to the French Law on "Informatique et Libertés" of 6 January 1978, particularly Articles 32 and 40, you may access this information and ask for rectification by writing to the Court's Secretariat.

**International Court of Arbitration of the  
International Chamber of Commerce**

**ICC CASE NO. 23501/MHM**

between

**Loyalty S.A. (Spain) and Founding Partners (Spain)**

*Claimants*

v.

**RSK Capital Ventures N.V.**  
(The Netherlands)

*Respondent*

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**PROCEDURAL ORDER N° 1**  
**Procedural Timetable and Conduct of the  
Arbitration**

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The Arbitral Tribunal

Sansa Stark (President)  
Arbitrator One (Co-arbitrator)  
Arbitrator Dos (Co-arbitrator)

15 July 2018

## Whereas

1. This arbitration arises between Loyalty S.A. and the Founding Partners [**“Claimants”**] and RSK Capital Ventures N.V. [**“Respondent”**]. Claimant and Respondent will be jointly referred to as the **“Parties”**.
2. This first Procedural Order [**“PO”**] sets out the procedural rules which shall apply to this arbitration, in addition to those set out in the Rules of Arbitration of the International Chamber of Commerce in force as from 1 March 2017 [**“ICC Rules”**].
3. These rules have been discussed between the Parties and the Arbitral Tribunal at the initial procedural conference call held on 5 July 2018.
4. The following PO incorporates all issues on which agreement was reached and where agreement was not possible, the Tribunal’s decision:

### **Procedural Order No. 1**

#### A. Terms of Reference

5. At the initial procedural conference call, the Arbitral Tribunal and the Parties discussed, agreed and signed the Terms of Reference.

#### B. Procedural Timetable

6. The arbitration shall proceed in accordance with the Procedural Timetable attached hereto as Annex I, except if the Tribunal, at the reasonable request of any Party or on its own initiative, decides that, for good cause, this Procedural Timetable has to be amended.

#### C. Written Submissions

7. The Parties have agreed to have three rounds of simultaneous written submissions:
  - Claimants will file a Statement of Claim and Respondent shall file a Statement of Counterclaim;
  - Claimant will file a Statement of Defence to the Counterclaim and Respondent will file a Statement of Defence to the Claim;
  - Claimant will file a Statement of Reply on the Claim and Respondent a Reply on Counterclaim.
8. In their submissions the Parties shall set forth the facts, the legal argumentation and the relief sought, they shall include as attachments all documents in their possession, custody or control on which they wish to rely, and shall identify fact and expert witnesses each Party wishes to present.

D. Request for Documents

9. Each Party may request the other Party to produce any document which is relevant and material for solving the dispute and is in the possession, power, custody or control of the other Party [**Document**]. The Parties shall use an *Armesto Schedule* format.
10. The Tribunal will decide on each request for document production after giving the opportunity to the counterparty to comment on them.
11. Documents to be produced shall only be delivered to the counterparty and not be copied to the Tribunal. The Party in receipt of such Document may submit any such Documents as evidence in its subsequent Written Submission, if it so wishes.
12. In addition, the Tribunal may of its own motion order a Party to produce documents at any time.
13. Allegations of facts made by the Parties in their submissions can be considered to be correct and precise unless the opposite is proven by the documents submitted as exhibits. The information contained in these contemporaneous documents prevails in case of divergence. Speculations as to the motivation for a certain behavior of the other party should be treated as speculations though the underlying facts can be assumed to be true.

E. Applicable law

14. The Tribunal and the Parties are aware that Westeros has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006-amendments [the "**Model Law**"]. Westeros has adopted Option I of Article 7 of the Model Law.
15. The Parties agreed that the applicable law to the Shareholders Agreement is the UNIDROIT Principles 2016.

F. Appointment of an Independent Expert

16. In its Reply to the Counterclaim, Claimants request the Arbitral Tribunal to appoint a financial independent expert pursuant to Art. 25(4) of the ICC Rules and Art. 15.2 of the Shareholders Agreement.
17. After hearing the Respondent on this petition, the Tribunal has decided to appoint Dr. Petra Lewandowski as a financial expert. The CV of Dr. Lewandowski is attached to this PO.



For the Arbitral Tribunal  
Sansa Stark  
President of the Tribunal

15 July 2018

**ICC Case No. 23501/MHM: Loyalty S.A. (Spain) and Founding Partners (Spain) v. RSK  
Capital Ventures N.V. (The Netherlands)**

**Procedural Order No. 1 – Annex I**

**Procedural Timetable**

	<b>Procedural action</b>	<b>Party required to act</b>	<b>Deadline</b>
<b>First Submission</b>			
	Statement of Claim and Statement of Counterclaim	Both Parties	30 September 2019
<b>Document Production</b>			
	Request Document Production	Both Parties	15 October 2019
	Response Document Production	Both Parties	30 October 2019
	Decision on Document Production	Tribunal	15 November 2019
	Production of Documents	Both Parties	1 December 2019
<b>Second Submission</b>			
	Statement of Defence to Claim and Statement of Defence to Counterclaim	Both Parties	30 January 2019
<b>Third Submission</b>			
	Statement of Reply to Claim and Statement of Reply to Counterclaim	Both Parties	1 March 2019
	Final Hearing	All	6 July 2019
	Post-Hearing Submissions	Both Parties	The Tribunal will determine at the end of the Hearing if Post-Hearing Submissions are necessary
	Statement on costs	Both Parties	The Tribunal will determine at the end of the Hearing the date for the Parties to submit the statement of costs

Date: 15 July 2018

## **Financial Expert Report**

**Dr. Petra Lewandowski**

1. My name is Dr. Petra Lewandowski, born 21 June 1949. I am Financial Analyst Director at TFO, a global financial consulting firm that provides expert financial services since 1967. I have over 30 years' experience in valuation of companies in the context of M&A and private equity operations and pre- and post- M&A disputes.
2. I have been instructed by the Arbitral Tribunal in *ICC Case No. 23501/MHM* to issue an expert report on the actual fair market value of the company Loyalty S.A.
3. For the purpose of finalizing this report, I have relied in the following information:
  - Financial statements of Loyalty S.A. for the years ending 2016 to 2019;
  - Industry reports and analysis;
  - Dr. Müller's Expert Report.

### **The as is valuation**

4. My first consideration in assessing the value of Loyalty S.A. is that the company cannot longer be considered a start up. The initial period of 3-4 years from the creation of the start up company is the fundamental period, in which its potential, if any, is tested. The documents in the record show that Loyalty S.A. has not been able to materialize the exponential growth it was expected from the Founding Partners and RSK by 2016.
5. This is the reason why any projections or expectations contained in the Business Plan and Shareholders Agreement (attaching an implicit value of EUR 10.000.000) are irrelevant for an as is valuation in 2019, with the information we have now in hand.
6. My valuation, thus, is solely based on the track record of Loyalty in the past three years. I have projected the future cash flows until 2023, following the pattern observed:
  - A growth rate in revenue of 2%. This is because Loyalty now competes in the market with the well-established Discounty. It is true that there is room for growth in the market. However, given the relative low costs of the industry, the entry of new app designers and high levels of competition is expected.
  - Operating costs at 30% of revenue;
  - I have not included any projections regarding an expansion to other geographical areas, since there is no information or data that can justify its inclusion. Furthermore, Loyalty lacks the network connections it did had in Europe, and thus, it is unlikely to transpose the potential growth (if any) that is expected in Europe to other areas.

<b>AS IS Valuation</b>				
	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>
<b>Revenues</b>	298.943 €	304.922 €	311.020 €	317.241 €
<b>% Sales growth</b>		2%	2%	2%
<b>Operating Costs</b>	89.683 €	91.477 €	93.306 €	95.172 €
<b>Gross Profit</b>	209.260 €	213.445 €	217.714 €	222.068 €
<b>Other Expenditure</b>	50.000 €	50.000 €	50.000 €	50.000 €
<b>Earnings before tax</b>	159.260 €	163.445 €	167.714 €	172.068 €
<b>Income tax</b>	47.778 €	49.034 €	50.314 €	51.621 €
<b>Earnings after tax</b>	111.482 €	114.412 €	117.400 €	120.448 €
<b>Discounted NPV</b>	103.224 €	98.090 €	93.196 €	88.533 €
<b>Total</b>	383.042 €			
<b>Terminal value</b>	3.131.645 €			
<b>TOTAL NPV</b>	<b>3.514.687 €</b>			

7. In light of all of the above, my conclusion is that Loyalty's fair market value is **EUR 3.514.687**.
8. Based on this valuation, if clause 15.2 of the Shareholders Agreement is applicable, the non-breaching party is only entitled to:
- Buy the Founding Partners' shares (400.000)<sup>9</sup> at a discount of 30%, *i.e.* EUR 1.845.211; or
  - Sell its shares (133.334)<sup>10</sup> to Claimant with an increase of 30%, *i.e.* EUR 1.142.273.



Dr. Petra Lewandowski

Geneva, 1 January 2019

<sup>9</sup> The fair value of Claimant's shares is EUR 2.636.015, since it holds 75% of the shares (400.000 of the 533.334 issued and subscribed).

<sup>10</sup> The fair value of Respondent's shares is EUR 878.672, since it holds 25% of the shares (133.334 of the 533.334 issued and subscribed).

**International Court of Arbitration of the  
International Chamber of Commerce**

**ICC CASE NO. 23501/MHM**

between

**Loyalty S.A. (Spain) and Founding Partners (Spain)**

*Claimants*

v.

**RSK Capital Ventures N.V.**  
(The Netherlands)

*Respondent*

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**PROCEDURAL ORDER N° 4**  
**Organization of the Hearing**

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The Arbitral Tribunal

Sansa Stark (President)  
Arbitrator One (Co-arbitrator)  
Arbitrator Dos (Co-arbitrator)

15 May 2019



## Whereas

1. On 6 May 2019 the Tribunal held a conference call with the Parties to discuss the details regarding the Hearing to be held on 6 July 2019. The following Procedural Order No. 4 reflects the agreements reached between the Parties.

### Procedural Order No. 4

2. The Parties shall address in their oral submissions the following issues:
  - **Whether RSK has an obligation to make the two outstanding capital contributions of EUR 2.000.000;**
  - **Whether the Founding Partners breached the non-compete clause and the legal/binding nature of the Business Plan;**
  - **In case RSK is entitled to terminate the Shareholders Agreement, the procedure to determine the fair value of Loyalty's shares for the purpose of applying clause 15.2;**
  - **The compensation for the breaches adduced and whether the cap on liability is applicable.**
3. At the end of their presentations, the Parties shall re-state their Request for Relief.
4. As agreed by the Parties and the Tribunal, the evidence that may be relied on in the hearing to substantiate their positions will be limited to (i) facts and assertions contained in the Mock Case (with no admission being made by either of the Parties as to correctness of the inferences from facts asserted by the other Party in its respective submissions); and (ii) publicly available information.

For the Arbitral Tribunal



Sansa Stark  
President of the Tribunal