

MOCK-CASE

**GOARB MADRID
2024 Edition**

IASC | INTERNATIONAL
ARBITRATION
SEMINARS &
COURSES

CONTENTS

Document	Page
Uncontested Facts	2
Request for Arbitration	6
Shareholders' Agreement	9
ICC Letter 3 March 2022	12
Answer to Request for Arbitration and Counterclaim	16
Reply to Counterclaim	20
ICC Letter 5 May 2022	23
ICC Letter 15 May 2022	24
ICC Letter 1 June 2022	25
Procedural Order No. 1	27

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 2017 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 card issued by companies as a marketing strategy to ensure the customer’s loyalty to a product by offering attractive discounts.
5. By late 2018 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. To continue developing and commercializing their product, 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, a well-established high-tech company with the necessary 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 2019 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 2019	66.667	EUR 1.000.000
Before 1 January 2020	66.667	EUR 1.000.000
Before 1 January 2021	66.667	EUR 1.000.000
Before 1 January 2022	66.667	EUR 1.000.000
Total		EUR 4.000.000

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 2019.
10. Throughout June and July 2019, 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 2019 – 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 requested by the interested store.
12. The engineers at Loyalty worked throughout the third quarter of 2019 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 modifications 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 2019, the sales of the Loyalty App amounted to EUR 250.000, half of the amount estimated in the Business Plan.
15. On 1 January 2020 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 2018 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 2020 – and despite the COVID-19 pandemic – the sales results were still unsatisfactory, and reached about 40% of the estimate recorded in the Business Plan.

17. On 15 July 2020 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. The COVID-19 pandemic is a perfect business opportunity, that is not being taken full advantage of”.

18. On 22 July 2020 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 marketing strategies of retail stores and restaurants, 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 December 2020 sales remained at approximately 40% of those expected in the Business Plan. Nevertheless, on 1 January 2021 RSK made the third capital contribution.

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 June 2021 – with the progressive easing of the restrictions related to the COVID-19 pandemic – 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 June 2021 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 payment corresponding to the fourth capital contribution to Loyalty S.A.
25. The Discounty App was a great success. By late 2021 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 2022 Loyalty and the Founding Partners submitted a Request for Arbitration to the ICC Court of International Arbitration, demanding RSK to make the final capital contribution outstanding as per the Shareholders Agreement.
27. By April 2022, 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 ...”.

Simmone Wiezmann
WHITESTREET LLP
14 Capital Boulevard, 1201, Geneva, Switzerland
Tel. +41 214 77 32; email: s.wiezmann@whst.com

1 March 2022

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 2021 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)(a) 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 Geneva, Switzerland. The arbitration agreement provides for three arbitrators. The Founding Partners and Loyalty S.A. hereby jointly nominate Dr. Arbitrator One and suggest that the ICC appoints the president of the arbitral tribunal.

Sincerely yours,

Simmone 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**

Case between

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

Claimants

v.

RSK Capital Ventures N.V.
(The Netherlands)

Respondent

REQUEST FOR ARBITRATION

1 March 2022

WHITESTREET LLP
14 Capital Boulevard
1201, Geneva
Switzerland

WHITESTREET LLP
Paseo Bonito, 25
28028, Madrid
Spain

REQUEST FOR ARBITRATION

[TO BE DISCUSSED DURING THE CLASS “STAGES OF INTERNATIONAL ARBITRATION PROCEEDINGS”]

Claims:

- Declare that RSK has an obligation to make the outstanding capital contribution of EUR 1.000.000 and that the Tribunal order 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 2019	66.667	EUR 1.000.000
Before 1 January 2020	66.667	EUR 1.000.000
Before 1 January 2021	66.667	EUR 1.000.000
Before 1 January 2022	66.667	EUR 1.000.000
Total		EUR 4.000.000

2.3. Without prejudice to the materialization of the capital contribution in successive capital increases, the Investor 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. Termination

“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.

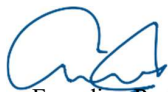
[...]

“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 Geneva, Switzerland. The contract, including this clause, shall be governed by the 2016 UNIDROIT Principles.

For Loyalty



Founding Partner 1
20 May 2019

For RSK



Arvin Van Rjik
20 May 2019

Annex 1: Business Plan

BUSINESS PLAN				
	2019	2020	2021	2022
Revenues	551.000	688.750	860.938	1.076.172
% Sales growth		25%	25%	25%
Operating Costs	165.300	206.625	258.281	322.852
Gross Profit	385.700	482.125	602.656	753.320
Other Expenditure	50.000	50.000	50.000	50.000
Earnings before tax	335.700	432.125	552.656	703.320
Income tax	100.710	129.638	165.797	210.996
Earnings after tax	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”.

3 March 2022

27501/GHM

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

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

By Email: s.wiezmann@whst.com

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

By FedEx

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 2022, it received a Request for Arbitration ("Request") from Loyalty S.A. and Founding Partners ("Claimants") represented by Ms. Simmons Wiezmann, that names it as Respondent.

Pursuant to Article 4(2) of the ICC Rules of Arbitration ("Rules"), this arbitration commenced on 1 March 2022.

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

2) ICC Case Connect

Your arbitration proceedings benefit from the International Court of Arbitration of the International Chamber of Commerce's Dispute Resolution Services case management digital platform. More information about ICC Case Connect is available at www.iccwbo.org/icc-caseconnect.

Throughout your arbitration proceedings, you will benefit from a dedicated case space to facilitate communications and document-sharing. Parties and arbitral tribunals are encouraged to make use of this centralised case environment, although they remain free to determine the extent to which they do so. ICC Case Connect will constitute the Secretariat's principal means of communication throughout the proceedings (Article 3(2)), therefore case users should envisage that some interaction with the platform will be necessary.

Following the present notification of the Request by courier, all persons indicated by Claimant as representing Respondent will receive an ICC Case Connect platform notification inviting them to access their dedicated case space.

You are encouraged to connect to ICC Case Connect promptly. You are encouraged to submit the Answer, or any request for an extension of time to submit the Answer, directly via ICC Case Connect within the time limit provided for under the Rules.

Contact your case management team and the dedicated ICC Case Connect helpdesk (caseconnect@iccwbo.org) for assistance and technical support. Once you have received the email notification inviting you to access your case space, you will be able to explore ICC Case Connect.

3) 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)).

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)).

4) 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)), or the arbitral tribunal finds it appropriate under (Article 7(5)). 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.

5) 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)).

6) Place of Arbitration

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

7) Language

The arbitration agreement does not provide for the language of arbitration. Claimants have submitted the Request in English. Respondent is asked to comment on the language of the arbitration.

8) 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.

9) 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 **27501/GHM** 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 or 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

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 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 2021 Rules
 - Note on Administrative Issues
 - ICC Rules of Arbitration (*see also* www.iccarbitration.org)
 - ICC Dispute Resolution Brochure (*see also* 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.iccdri.com/practicenotes.aspx>*.)*

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

ICC CASE No. 27501/GHM

between

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

Claimants

v.

RSK Capital Ventures N.V.
(The Netherlands)

Respondent

**ANSWER TO REQUEST FOR ARBITRATION
AND COUNTERCLAIM**

4 April 2022

HUSSEMAN, WYTHIER & 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 underlying 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 2019 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 stores 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, indisputably 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 contribution 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 contribution.

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 [TO BE DISCUSSED IN THE DAMAGES CALCULATION CLASS].

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. Based on Respondent's valuation, Respondent is entitled to:

[TO BE DISCUSSED DURING THE DAMAGES CALCULATION CLASS]

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 *[TO BE DISCUSSED IN THE DAMAGES CALCULATION CLASS]*;
- (vi). Order the Founding Partners to bear all the costs of the arbitral proceedings.

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

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

ICC CASE No. 27501/GHM

between

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

Claimants

v.

RSK Capital Ventures N.V.
(The Netherlands)

Respondent

REPLY TO COUNTERCLAIM

29 April 2022

WHITESTREET LLP
14 Capital Boulevard
1201, Geneva
Switzerland

WHITESTREET LLP
Paseo Bonito, 25
28028, Madrid
Spain

Introduction

1. In its Answer to the Request for Arbitration and Counterclaim 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 Request for Arbitration 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 by the non-compete clause.

Independent expert valuation

6. 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(3) 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. Neither has Respondent proven that there is a causal link between the success of the Discounty App and Loyalty's failure.

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.

WHITESTREET LLP
14 Capital Boulevard
1201, Geneva
Switzerland

WHITESTREET LLP
Paseo Bonito, 25
28028, Madrid
Spain

5 May 2022

27501/GHM

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

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

By Email: s.wiezmann@whtst.com

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

By Email: robert.wyther@hws.com

Dear Sirs,

The Secretariat acknowledges receipt of the Reply to the Counterclaim dated 29 April 2022, a copy of which is enclosed (Article 5(6)).

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 [...] (i.e. US\$ 6 000 000 for the principal claims and [...] for the counterclaims).

Yours faithfully,

Counsel
Secretariat of the ICC International Court of Arbitration

encl. - Reply to Counterclaim
 - Financial Table

15 May 2022

27501/GHM

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

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

By Email: s.wiezmann@whtst.com

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

By Email: 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

1 June 2022

27501/GHM

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

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

By Email: s.wiezmann@whtst.com

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

By Email: robert.wyther@hws.com

Ms. Sabina Stark
40 Floral Road
Tudor
Ruritania

By Email hadh@gmail.com

Dr. Arbitrator One
1045 City Boulevard
Oceanside, Equatoriana

By Email arbone@one.com

Ms. Arbitrator Dos
45 City Town
Seeshore
Mediterraneo

By Email dosd@gmail.com

Dear Mesdames and Sirs,

The Secretariat draws your attention to the following:

I – DECISIONS BY THE COURT

On 25 May 2022, 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. Sabina Stark as president of the arbitral tribunal upon the Ruritania 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. Sabina Stark and her Statement of Acceptance, Availability, Impartiality and Independence.

II – 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

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

ICC CASE No. 27501/GHM

between

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

Claimants

v.

RSK Capital Ventures N.V.
(The Netherlands)

Respondent

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

The Arbitral Tribunal

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

15 July 2022

Whereas

1. This arbitration arises between Loyalty S.A. and the Founding Partners [**“Claimants”**] and RSK Capital Ventures N.V. [**“Respondent”**]. Claimants and Respondent will be jointly referred to as the **“Parties”**.
2. This first Procedural Order [**“PO1”**] 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 January 2021 [**“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 2022.
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. Applicable law

9. The Parties agreed that the applicable law to the Shareholders' Agreement is the UNIDROIT Principles 2016.

E. Language of the arbitration

10. The Parties have agreed that the language of the arbitration shall be English.

F. Appointment of an Independent Expert

11. 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.
12. After hearing the Respondent on this petition, the Tribunal has decided to appoint Dr. Petra Lewandowski as a financial expert, whose CV is attached to the present PO1.

For the Arbitral Tribunal
Sabina Stark
President of the Tribunal

15 July 2022