

THIRTEENTH ANNUAL
WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT
6 TO 13 MARCH 2016

MEMORANDUM FOR CLAIMANT



LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

On Behalf of:

Kaihari Waina Ltd
12 Riesling Street
Oceanside
Equatoriana

CLAIMANT

Against:

Vino Veritas Ltd
56 Merlot Rd
St Fundus/Vuachoua
Mediterraneo

RESPONDENT

COUNSEL:

Lucie Antoine · Anna Böffgen · Benedict Butzmann ·
Mirella Goldstein · Nathaniel Kellerer · Luisa Störkmann



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LIST OF ABBREVIATIONS

€	Euro
%	per cent
§(§)	paragraph(s)
AC	Advisory Council
Art(s).	Article(s)
BGH	Bundesgerichtshof
CEO	Chief Executive Officer
CIETAC	China Economic and Trade Arbitration Commission
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
Cl.	CLAIMANT
cf.	confer
DAL	Danubian Arbitration Law
et al.	et alia/et aliae/et alii
et seq(q).	et sequentia (sequentes)
Exh.	exhibit
e.g.	exemplum gratia
h	hour
HG	Handelsgericht
IBA	International Bar Association
ibid.	ibidem



ICC	International Chamber of Commerce
i.e.	id est
LCIA	London Court of International Arbitration
Ltd	Limited
Mr.	Mister
Ms.	Miss
No.	Number
NYC	New York Convention
OGH	Oberster Gerichtshof
OLG	Oberlandesgericht
p.	page
PO 1/2	Procedural Order 1/2
Resp.	RESPONDENT
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	The UNIDROIT Principles of International Commercial Law
US	United States
US\$	United States Dollar
VIAC	Vienna International Arbitral Centre
v.	versus





STATEMENT OF FACTS

The parties to the arbitration are Kaihari Waina and Vino Veritas.

Kaihari Waina Ltd (hereinafter “**CLAIMANT**”), a wine merchant seated in Equatoriana, specialises in top quality wines for the collectors’ and luxury gastronomy markets.

Vino Veritas Ltd (hereinafter “**RESPONDENT**”), one of the top vineyards in Mediterraneo, is the only vineyard in the Vuachoua region that has won the Mediterranean gold medal for its Mata Weltin Diamond quality wine for the past five years in a row.

- | | |
|-------------------------|---|
| 22 April 2009 | CLAIMANT and RESPONDENT enter into a Framework Agreement creating a basis for their economic relationship. |
| 2013 | RESPONDENT begins to negotiate with SuperWines. |
| 3 November 2014 | RESPONDENT notifies its customers of a bad harvest. |
| 4 November 2014 | CLAIMANT places an order for 10,000 bottles of Mata Weltin Diamond quality 2014. |
| 25 November 2014 | Ms. Buharit (CLAIMANT’s Development Manager) and Mr. Weinbauer (RESPONDENT’s CEO) meet. Mr. Weinbauer promises to give CLAIMANT’s order a “favourable consideration”. |
| 1 December 2014 | RESPONDENT sends a letter to CLAIMANT, notifying it that the wine will be distributed on a pro-rata basis and that it can only deliver 4,500–5,000 bottles. |
| 2 December 2014 | RESPONDENT sells 5,500 bottles to SuperWines. CLAIMANT writes to RESPONDENT, insisting on the delivery of 10,000 bottles of Mata Weltin 2014. |
| 4 December 2014 | Mr. Weinbauer tries to terminate the contract with CLAIMANT. |
| 8 December 2014 | CLAIMANT files an injunction for interim relief in the High Court of Mediterraneo to prohibit RESPONDENT from selling the 10,000 bottles already sold to CLAIMANT. RESPONDENT does not participate in the proceeding. |
| 12 December 2014 | The High Court grants the interim relief. The order remains unchallenged by RESPONDENT. |
| 14 January 2015 | RESPONDENT’s attorney sends a letter to CLAIMANT’s attorney asking for clarification of the arbitration clause setting a deadline of two weeks for a response. RESPONDENT announces to otherwise start court |



- proceedings for a declaration of non-liability.
- 30 January 2015** RESPONDENT applies for a declaration of non-liability in the High Court of Mediterraneo.
- 23 April 2015** The application for a declaration of non-liability is denied.
- May 2015** RESPONDENT offers to deliver 4,500 bottles to CLAIMANT, if the latter accepts the offer within two weeks.
- 11 July 2015** The Statement of Claim is sent to the VIAC.



SUMMARY OF ARGUMENT

The trade of luxury wine is based on mutual trust and personal relationships. CLAIMANT and RESPONDENT had been involved in a fruitful business relationship for the past six years. The basis of their relationship was the parties' Framework Agreement. It allowed CLAIMANT to place orders for up to 10,000 bottles a year. In return, RESPONDENT was assured the sale of at least 7,500 bottles per year. However, once a win-win situation for both parties, the co-operation became a solo-operation.

Instead of complying with its contractual obligation to deliver, RESPONDENT allocated the bottles it had promised to CLAIMANT, to SuperWines CLAIMANT's biggest competitor, SuperWines. Furthermore, it tried to terminate the contract, with no respect for the parties' long-standing business relationship. Seeing no other options to protect its right to delivery, CLAIMANT filed an injunction for interim relief to have RESPONDENT prohibited from selling CLAIMANT's bottles to other customers. The injunction was granted and remained unchallenged by RESPONDENT. Trying to maneuver out of its contractual duties, RESPONDENT needlessly applied for a declaration of non-liability in the High Court of Mediterraneo. Lacking jurisdiction due to the parties' valid arbitration clause, the High Court dismissed RESPONDENT's action. Though successful in both proceedings, CLAIMANT incurred costs of US\$ 50,280 for the interim injunction and the defense against the non-liability proceeding. RESPONDENT should be ordered to pay for the costs as it caused them (**Issue I.**).

With this cost issue settled, the Tribunal can focus on the main issues. By breaching the contract, RESPONDENT could allocate 5,500 bottles of Mata Weltin 2014 to SuperWines. A premium paid by SuperWines made the breach highly profitable for RESPONDENT. While RESPONDENT profited from its breach of contract, CLAIMANT was left out to dry. Trying to satisfy its customers, CLAIMANT arranged for a substitute. Thereby, CLAIMANT incurred costs. Albeit, the substitute wine was of inferior quality to RESPONDENT's wine. Furthermore, CLAIMANT forfeited the profits it could have reaped by selling the Mata Weltin 2014 to its customers. While CLAIMANT lost profits, RESPONDENT gained profits. As RESPONDENT made its profits at the expense of CLAIMANT, it is appropriate to allocate these profits to CLAIMANT (**Issue II.**).

Ancillary to this substantive claim, RESPONDENT should produce documents enabling CLAIMANT to calculate the amount of its claim. The claim amounts to RESPONDENT's profits made with SuperWines. RESPONDENT's documents would lift the veil of uncertainty concerning this amount and allow CLAIMANT to substantiate its claim (**Issue III.**).



ARGUMENT

I. CLAIMANT IS ENTITLED TO REIMBURSEMENT OF ITS LITIGATION COSTS

- 1 In November 2014, CLAIMANT placed an order for 10,000 bottles of Mata Weltin 2014 with RESPONDENT (*Cl. Exh. No. 3*). RESPONDENT, however, refused to deliver more than 4,500 bottles (*ibid.*). This constitutes a breach of the parties' Framework Contract (*PO1 § 4*). RESPONDENT even threatened that no delivery would be made at all and tried to terminate the contract (*Cl. Exh. No. 7*). Consequently, CLAIMANT sought interim relief before the High Court of Mediterraneo, creating legal costs that amounted to US\$ 33,750. RESPONDENT refrained from challenging this order (*Statement of Claim, § 10*). Then, it started a proceeding for declaration of non-liability before the same court (*ibid. § 12*). This led to further legal costs of US\$ 16,530.
- 2 For the following reasons, the Tribunal should grant CLAIMANT's request for reimbursement of its litigation costs: First, the Tribunal is not bound by the High Court's decision regarding the allocation of costs (**A.**). Second, CLAIMANT has a right to the reimbursement of its costs under the CISG (**B.**). Third, these costs should be allocated to RESPONDENT under Art. 37(2) Vienna Rules (**C.**).

A. The Tribunal is Not Bound by the High Court's Decisions on Costs

- 3 The Tribunal is not bound by the High Court's decisions on costs, since these decisions concerned a different matter.
- 4 Following the standard way of allocating costs in Mediterraneo (*PO2 § 44*), the High Court decided in both proceedings that each party has to bear its own costs (*Cl. Exh. No. 8, 9*). While the High Court of Mediterraneo decided on the allocation of costs in a national proceeding under national law, the Tribunal's decision concerns claims for damages resulting from a breach of contract under international law (*cf. ROSELL, p. 125; see infra §§ 6 et seqq.*). Additionally, it decides on the allocation of costs for this arbitral proceeding under the Vienna Rules which is the procedural law agreed upon by the parties (*see infra §§ 56 et seqq.*). Therefore, the High Court and the Tribunal decide on different matters.
- 5 To conclude, the Tribunal is not bound by the High Court's decisions on costs, as the Tribunal decides on a different subject matter.

B. CLAIMANT Is Entitled to Its Litigation Costs Under the CISG

- 6 CLAIMANT can demand reimbursement of its litigation costs under the CISG.



- 7 RESPONDENT's threat of non-delivery and its attempt to terminate the contract are a breach of contract (*POI* § 4). Additionally, RESPONDENT also breached the arbitration agreement by initiating state court proceedings. These breaches led to litigation costs of US\$ 50,280 for CLAIMANT. It may demand these damages according to Arts. 45(1)(b), 74 CISG. According to Art. 45(1)(b) CISG, a buyer may claim damages if the seller fails to perform any of its obligations under the contract. Under Art. 74 CISG, the incurred damages have to be a foreseeable consequence of the breach.
- 8 The CISG applies to the reimbursement of litigation costs (1.). CLAIMANT can demand reimbursement of its costs resulting from the interim relief proceeding (2.). CLAIMANT can also demand reimbursement of the costs incurred in the defense against RESPONDENT's proceeding for non-liability (3.).

1. The CISG is applicable regarding the reimbursement of litigation costs

- 9 Litigation costs are refundable under the CISG.
- 10 Art. 4 CISG stipulates that the Convention applies to the rights and obligations of the seller and buyer arising from the contract. This includes, *inter alia*, consequences for the breach of a contract (*SAENGER in: Ferrari et al., Art. 4* § 2).
- 11 CLAIMANT's costs for interim relief as well as its costs for the successful defense against RESPONDENT's proceeding for a declaration of non-liability followed RESPONDENT's breach of contract (*see infra* §§ 20 *et seqq.*). RESPONDENT claims that the reimbursement of litigation costs is a matter of procedural law only and therefore not subject to the CISG (*Answer to Statement of Claim*, § 32). The CISG has to be interpreted autonomously (*KEILY*, § 5.2; *DIENER*, p. 30). Therefore, national classifications of reimbursement of litigation costs cannot be decisive. Rather, the question of whether the CISG applies to the reimbursement of litigation costs must not depend on the classification of the costs as procedural or substantive (*ZELLER*, p. 7; *DIXON*, p. 425 *et seq.*; *FELEMEGAS*, 5(b)). It is only necessary that the litigation costs are a foreseeable consequence of a breach of contract.
- 12 Consequently, the CISG is applicable to the reimbursement of litigation costs.

2. In accordance with Arts. 45(1)(b), 74 CISG, CLAIMANT can demand the costs for interim relief

- 13 Under Arts. 45(1)(b), 74 CISG, RESPONDENT should be held liable for CLAIMANT's litigation costs in the amount of US\$ 33,750 incurred from the interim relief proceeding.
- 14 First, CLAIMANT's litigation costs are losses under Art. 74 CISG (a). Second, those costs were unavoidable, as RESPONDENT forced CLAIMANT to seek interim relief (b). Third, the amount of



the losses was foreseeable to RESPONDENT (c). Last, CLAIMANT fulfilled its obligation to mitigate its losses under Art. 77 CISG (d).

(a) CLAIMANT's sustained costs are losses under Art. 74 CISG

- 15 CLAIMANT's costs are losses under Art. 74 CISG.
- 16 A loss is every monetary disadvantage (*LIEBSTER in: FS Schwenzler, p. 1035; cf. BLACKS, "loss"*). Due to the inclusive – not exhaustive – character of Art. 74 CISG, this definition incorporates every type of loss (*OLG Düsseldorf, 14 January 1994 (Germany); FELEMEGAS, § 5(a)(ii)*).
- 17 Since CLAIMANT's litigation costs are a monetary disadvantage and therefore a "loss", CLAIMANT's litigation costs are recoverable under Art. 74 CISG.
- 18 In case the Tribunal were to find that CLAIMANT's expenses did not fall under the explicit wording of Art. 74 CISG, they nevertheless need to be allocated to RESPONDENT. Art. 74 CISG aims for full compensation of the parties (*VIAC Case No. SCH-4366 (1994); LOOKOFKY, § 6.32*). For full compensation, CLAIMANT needs to be reimbursed for its litigation costs under Art. 74 CISG.
- 19 To conclude, CLAIMANT needs to be reimbursed for its litigation costs, be it according to the explicit wording or the purpose of Art. 74 CISG.

(b) RESPONDENT's actions made interim relief necessary

- 20 As RESPONDENT refused to deliver the goods, it breached the contract in anticipation. With the associated threats, RESPONDENT forced CLAIMANT to seek interim relief, which created costs of US\$ 33,750. Under Art. 33(5) Vienna Rules, parties can seek interim relief before state courts. Therefore, CLAIMANT's course of action is not a violation of the arbitration agreement. In contrast, RESPONDENT was the one who breached the Framework Agreement. RESPONDENT threatened contractual non-compliance two times; these threats lead CLAIMANT to seek interim relief.
- 21 RESPONDENT's denial letter of 1 December 2014 constituted the first threat (i). Further, its termination letter of 4 December 2014 left CLAIMANT no chance but to seek interim relief (ii).

(i) *RESPONDENT threatened non-compliance in its letter of 1 December 2014*

- 22 On 1 December 2014, CLAIMANT received a letter declaring that it would not be supplied with 10,000 bottles from RESPONDENT. Instead, RESPONDENT would allocate the available quantities to its customers on a pro-rata basis (*Cl. Exh. No. 3*). This constitutes an anticipatory breach under Art. 71(1)(b) CISG.



- 23 Normally, CLAIMANT is the only customer to have placed orders at the beginning of December (PO2 § 15). Thus, it is the only customer RESPONDENT had a binding obligation to when the letter was sent. CLAIMANT should not have been subject to the pro-rata allocation at all, as RESPONDENT was obligated to deliver to CLAIMANT the 10,000 ordered bottles. Consequently, the announcement of the pro-rata allocation led CLAIMANT to believe that RESPONDENT had entered or was about to enter into binding contracts with other customers.
- 24 RESPONDENT argued that the wine is not bottled before May, making interim relief unnecessary (*Resp. Exh. No. 2*). However, the possibly time-consuming nature of an arbitral proceeding must be taken into account (*cf. LCLA Website; MEIER, p. 152*). Even the present arbitral proceeding will not end before April 2016 – more than eight months after the Statement of Claim was filed.
- 25 Furthermore, in some jurisdictions the signing of a contract already causes the transfer of property (*cf. SCHLECHTRIEM, p. 191; e. g. Art. 1538 Code Civil (France), Art. 1470 Codice Civile (Italy); Högsta domstolen, 26 February 1932 (Sweden)*). As CLAIMANT has no legal knowledge, it could not have foreseen which rules would govern the transfer of the property in the bottles.
- 26 In conclusion the possible duration of an arbitral proceeding and the uncertainty of the bottles' property status made interim relief urgent for CLAIMANT.

(ii) RESPONDENT sent a letter of termination on 4 December 2014

- 27 CLAIMANT's worries were proven to be justified, when RESPONDENT's termination letter arrived. In this letter, RESPONDENT made clear that there would be "no delivery of any bottle" of Mata Weltin 2014 (*Cl. Exh. No. 7*). Additionally, RESPONDENT stated that it considered the contract with CLAIMANT terminated (*Cl. Exh. No. 6*). In the understanding of any reasonable businessperson in the sense of Art. 8(2) CISG, CLAIMANT's chances on receiving any bottles were next to non-existent.
- 28 To conclude, the interim relief sought by CLAIMANT was a direct result of RESPONDENT's actions. These left no doubts about RESPONDENT's unwillingness to perform its contractual obligations. Therefore, the proceeding for interim relief was necessary.

(c) RESPONDENT could foresee the amount of CLAIMANT's damages

- 29 RESPONDENT could foresee CLAIMANT's damages, which amount to US\$ 33,750. Of this sum, US\$ 30,000 resulted from the contingency fee, the rest constituted LawFix's hourly rate.
- 30 Art. 74 CISG states that the breaching party must have foreseen the loss incurred by the other party as a possible result of its breach, at the time of the conclusion of the contract. Such foreseeable losses also encompass litigation costs (*FELEMEGAS, Fn. 21; FLECHTNER, p. 126; ICC Case No. 7585 (1992); CIETAC Award, 12 February 1999*). According to Art. 74 CISG, the



breaching party must only have been able to foresee the rough extent and type of the loss (*HG St. Gallen 3 December 2002 (Switzerland); OGH 14 January 2002 (Austria)*).

- 31 The type of loss was foreseeable to RESPONDENT. Mediterranean procedural law requires representation by a local attorney (*PO2 § 39*). RESPONDENT should have foreseen that CLAIMANT would litigate in case of a breach of contract, in order to safeguard its contractual rights. Interim measures offer effective protection of these rights (*cf. BUCY, p. 583*). RESPONDENT could also have foreseen that CLAIMANT might enter into a contingency fee based agreement, as these are common practice in Mediterraneo (*PO2 § 40*).
- 32 Furthermore, the extent of the damages was foreseeable to RESPONDENT. The amount of the contingency fee conformed reasonably to the Mediterranean standard (*cf. ibid. § 39*) and contingency fees are common practice in Mediterraneo (*ibid. § 40*). This is where RESPONDENT has its seat. Therefore it could foresee the amount of litigation costs.
- 33 In conclusion, RESPONDENT could have foreseen the approximate extent and type of CLAIMANT's litigation costs.

(d) CLAIMANT fulfilled the obligation of Art. 77 CISG to mitigate its losses

- 34 CLAIMANT mitigated its losses as obligated by Art. 77 CISG.
- 35 A party that relies on a breach of contract must mitigate its losses. It is necessary that a reasonable businessperson in the same situation would have taken the same actions (*OLG Koblenz, 24 February 2011 (Germany); OGH, 6 February 1996 (Austria); Tribunal of International Commercial Arbitration at the Russian Federation, 340/1999, 10 February 2000*).
- 36 CLAIMANT was obligated to find local legal representation (*see supra § 31*). CLAIMANT's dilemma was that the law firm had to be acclaimed and available on short notice, yet also adjusted to CLAIMANT's financial situation. It had to be acclaimed, as CLAIMANT was not litigating in its own country and an acclaimed firm was the most trustworthy option. These factors embody the interests a reasonable businessperson would have taken into account.
- 37 CLAIMANT came up with a sensible solution. After unsuccessfully trying to gain enough capital to afford representation by Mediterranean attorneys without a contingency fee, including third party funding (*Statement of Claim, § 13*), it contacted three law firms (*PO2 § 39*). Of the three, LawFix was the only one to meet CLAIMANT's interests. An acclaimed law firm, it was available on short notice (*ibid. § 39*) and the only one fitting CLAIMANT's financial situation. CLAIMANT's liquid capital was planned to be otherwise invested (*ibid. § 38*). By agreeing on a reasonable (*ibid. § 39*) tax-free (*cf. Cl. Exh. No. 11*) contingency fee, LawFix fit CLAIMANT's financial dilemma perfectly. CLAIMANT further mitigated its costs by hiring an associate of the firm at a rate of US\$ 150/h and not a partner at US\$ 350/h (*PO2 § 39*). Given the urgency, a reasonable businessperson



would have acted the same way. One would not expect a reasonable businessperson to change its business strategy to mitigate costs created by a third party.

38 To conclude, CLAIMANT complied with its duty to mitigate costs under Art. 77 CISG.

39 In light of the above, all requirements of Arts. 45(1)(b), 74 CISG are met and CLAIMANT should therefore be reimbursed for the costs incurred during the interim relief proceeding.

3. CLAIMANT can demand its expenses for the successful defense against RESPONDENT's non-liability proceeding under the CISG

40 CLAIMANT can demand the reimbursement of US\$ 33,750 resulting from the injunction for interim relief. Further, it is entitled to reimbursement of US\$ 16,530 resulting from its defense against RESPONDENT's non-liability proceeding under Arts. 45(1)(b), 74 CISG. RESPONDENT breached the agreement to arbitrate (a). Furthermore, CLAIMANT's amount of damages is justified under Arts. 74, 77 CISG (b).

(a) RESPONDENT breached the parties' agreement to arbitrate

41 First, the CISG is applicable to breaches of an arbitration agreement (i). Second, RESPONDENT initiated proceedings in the High Court of Mediterraneo and thereby breached the arbitration agreement (ii). Third, RESPONDENT cannot justify its breach (iii).

(i) The CISG governs damages for the breach of the arbitration agreement

42 As agreed on by the parties, the CISG applies to their agreement to arbitrate.

43 According to Art. 19(1) DAL the parties could agree that the CISG governs the arbitration agreement as far as not governed by the DAL (cf. PO2 § 63). By exercising party autonomy, the parties decided that the CISG applies (cf. BÖCKSTIEGEL, p. 1).

44 The CISG is applicable as far as not in conflict with its character (cf. PILTZ, § 2-128). Its characteristics are contract formation and contractual obligations (FERRARI in: *Schlechtriem/Schwenzer, Art. 4 § 3*) Rules of the CISG not exclusively tailored to a sales contract can therefore be applied to an arbitration agreement (cf. PILTZ, § 2-128). While the CISG does not rule on arbitrability, authority and capacity (SCHMIDT-AHRENDTS, *CISG and Arbitration*, p. 215), its remedies for a breach of contract can thus be applied to a breach of the arbitration agreement.

45 As a result, the CISG can be applied to breaches of the arbitration agreement.



(ii) *RESPONDENT's disregard of the obligation not to sue in state courts is a breach of contract*

- 46 By suing in state courts, RESPONDENT breached the arbitration agreement, which constitutes a breach of contract under Art. 45(1)(b) CISG.
- 47 Arbitration agreements are of contractual nature (*Steelworkers v. American Manufacturing (United States)*). They can include obligations (*ibid.*). The obligation not to sue in state courts is incorporated in arbitration agreements (*SCHLOSSER, p. 486; ICC Case No. 8887 (1997)*) and emerges from the principle of party autonomy (*BORN, p. 1272*). In any case, it can be inferred that parties seeking legal security incorporate an agreement not to litigate before state courts (*cf. PEIFFER, p. 336*).
- 48 Under Art. II(3) NYC, courts of member states of the NYC are obligated to refer parties accessing state courts irrespective of a valid arbitration agreement, to their chosen arbitral tribunal (*cf. REDFERN/HUNTER, § 2.13*). However, some courts set very high standards for the validity of arbitration agreements, while others do not comply with this duty (*cf. SACHS/PEIFFER, p. 717; SANDROCK, p. 112; KRÜGER p. 737*). Due to these national variations, it is of great importance to protect the arbitration agreement by prohibiting the parties from litigating before state courts (*SACHS/PEIFFER, p. 717*).
- 49 By suing in the High Court of Mediterraneo, RESPONDENT breached its obligation. CLAIMANT would be unprotected against counter-contractual litigation in national proceedings, if no obligation to refrain from litigating in state courts and no consequential remedy for the breach of such an obligation existed. Otherwise, a party could initiate litigation at the other parties' expense.
- 50 In conclusion, RESPONDENT can and should be held liable for damages stemming from the breach of contract under Art. 45(1)(b) CISG.

(iii) *RESPONDENT cannot justify its breach of contract*

- 51 RESPONDENT's breach was not justified.
- 52 RESPONDENT cannot justify its breach with the wording of the arbitration agreement. This agreement states that all disputes shall be resolved "in Vindobona by the International Arbitration Tribunal (VIAC)". The only international arbitration institution, which operates in Vindobona, is the VIAC (*PO2, § 55*). RESPONDENT could have foreseen that the parties had agreed to arbitrate under the VIAC and its rules.
- 53 RESPONDENT argues that it tried to resolve the matter by contacting CLAIMANT, who did not respond (*Answer to Statement of Claim, § 38*). It is, however, not CLAIMANT's duty to clarify the arbitration agreement. CLAIMANT had no previous experience in such matters (*PO2, § 53*). Instead, RESPONDENT had the possibility of contacting the VIAC itself. At a parties' request, the VIAC examines arbitration clauses and non-bindingly informs the parties whether it considers



them valid or not (*MARENKOV*, p. 328). Furthermore, according to Art. 18(1) CISG, RESPONDENT should not have construed CLAIMANT's silence to its letter as consent to RESPONDENT's breach of the arbitration agreement.

54 In conclusion, the breach was not justified.

(b) CLAIMANT can recover its expenses under Art. 74 CISG

55 RESPONDENT's breach of the arbitration agreement resulted in costs of US\$ 16,530 for CLAIMANT. RESPONDENT should have foreseen CLAIMANT's costs (*see supra* §§ 29 et seqq.). Moreover, CLAIMANT mitigated costs in accordance with Art. 77 CISG (*see supra* §§ 34 et seqq.).

C. In Any Case, the Costs Are to Be Allocated to RESPONDENT Under Art. 37(2) Vienna Rules

56 Even if the Tribunal were not to award CLAIMANT's litigation costs as damages under the CISG, it is respectfully requested to allocate the costs to RESPONDENT under its discretion as contained in Art. 37(2) Vienna Rules.

57 CLAIMANT's procedural costs fall under Art. 44(1.2) Vienna Rules (1.). Considering the circumstances, the Tribunal is respectfully requested to allocate the costs to RESPONDENT (2.).

1. CLAIMANT's costs can be allocated to RESPONDENT under the Vienna Rules

58 The costs recoverable under Art. 37(2) Vienna Rules are specified in Art. 44 Vienna Rules. According to Art. 44(1.2) Vienna Rules, reasonable expenses for the parties' legal representation fall within this interpretation of "costs". This includes costs for those national proceedings bearing a relation to the arbitration (*PETERS in: Handbook Vienna Rules, Art. 37 § 25*). Litigation costs for previous proceedings can be so interrelated to the costs made during and in the arbitral proceeding that they should be considered arbitration costs (*VAN HOF, p. 296*). It is within the Tribunal's discretion to decide whether expenses are related to the arbitral proceeding (*PETERS in: Handbook Vienna Rules, Art. 37 § 27; CARON/CAPLAN, p. 845*).

59 Both the interim relief proceeding (a) and the proceeding for declaration of non-liability (b) are closely related to the arbitration.

(a) The interim relief proceeding bears a close connection to the arbitration

60 CLAIMANT's injunction for interim relief is closely related to the arbitration.

61 An interim injunction seeks to provide fast, whilst only temporary, relief to an urgent matter resulting from a breach of contract (*FOURCHARD/GAILLARD/GOLDMAN, § 1330*). Due to its



preliminary nature, it does not replace a proceeding considering all legal issues at hand (*ibid.*, § ; *cf. VISHNEVSKAYA, p. 176*)

62 Thus, an arbitral proceeding dealing in depth with all relevant issues is not replaced by CLAIMANT's injunction for interim relief. On the contrary, the injunction only constituted a preliminary proceeding to this arbitral one. The very wording of "preliminary" means leading up to the main part (*Oxford Dictionaries, "preliminary"*). As the interim injunction leads up to the arbitration, it is related to it.

63 In conclusion, the two proceedings bear a close connection.

(b) The non-liability proceeding bears a close connection to the arbitration

64 The proceeding for a declaration of non-liability is also closely related to the arbitration.

65 When deciding on the matter, the High Court examined the validity of the arbitration agreement (*PO2 § 39*). If the agreement were valid, the Court would not decide whether RESPONDENT was liable or not. In fact, the High Court did decide that the arbitration agreement was valid and it therefore lacked jurisdiction (*Cl. Exh. No. 9; PO2 § 39*).

66 In conclusion, the two proceedings bear a close connection.

2. The Tribunal should allocate the costs to RESPONDENT

67 The Tribunal is respectfully requested to find that RESPONDENT should reimburse CLAIMANT for its litigation costs. First, RESPONDENT applied for the declaration at its own risk (a). Second, RESPONDENT's uncooperative behavior should be taken into account (b). Last, RESPONDENT should bear the costs as it will lose in the merits of the case (c).

(a) RESPONDENT applied for the declaration of non-liability at its own risk

68 RESPONDENT acted at its own risk when applying for the declaration of non-liability. The Tribunal is respectfully requested to bear this in mind when deciding on the allocation of the resulting costs.

69 RESPONDENT did not make enough of an effort to clarify the arbitration agreement before filing a claim with a state court. CLAIMANT does not deny that it received a letter asking for clarification (*cf. PO § 57*). However, RESPONDENT could simply have asked the VIAC, the competent authority in this situation, for clarification of the clause (*see supra § 53*).

70 RESPONDENT should have realized that, at least, there was an agreement to arbitrate (*Art. 20 Framework Agreement; cf. MOSES, p. 33*). Nevertheless, it initiated the proceedings for a declaration of non-liability before the High Court of Mediterraneo. It thereby speculated for the chance that the High Court would find it not liable. However, it also took the risk that the High Court would



dismiss its action on grounds of a valid arbitration agreement. This risk also included the risk of bearing the costs. If RESPONDENT were eased of this risk by not having to bear the resulting costs, it could one-sidedly damage CLAIMANT by filing pointless claims.

71 To conclude, RESPONDENT acted at its own risk when filing the claim.

(b) RESPONDENT showed itself uncooperative

72 RESPONDENT's uncooperative conduct should be taken into account when deciding on the allocation of costs.

73 When exercising its discretion, the Arbitral Tribunal may consider the parties' conduct (*PETERS in: Handbook Vienna Rules, Art. 37 § 28*).

74 Cooperation is an important feature of the parties' business relation according to Arts. 2, 3 Framework Agreement (*Cl. Exh. No. 1*). RESPONDENT, however, caused CLAIMANT considerable confusion by behaving ambiguously (*ibid. No. 5*). It did not inform CLAIMANT soon enough on the amount of bottles available. Furthermore, the conduct of RESPONDENT's CEO was unprofessional. In his letter of 4 December 2014, Mr. Weinbauer brusquely informed CLAIMANT that no delivery of Mata Weltin 2014 would be made (*ibid. No. 7*). At the same time, he accused CLAIMANT of "rude" behavior in that letter (*ibid.*).

75 The Arbitral Tribunal is respectfully requested to consider RESPONDENT's uncooperative behavior when making its decision on the allocation of costs.

(c) RESPONDENT will lose the merits of the case

76 RESPONDENT will have to pay the claimed damages (*see infra §§ 80 et seqq.*).

77 While exercising its discretion on the allocation of costs, the Tribunal may take into account the outcome of the proceedings (*PETERS in: Handbook Vienna Rules, Art. 37 § 28*). The party losing on the merits should bear the costs of the proceeding. This principle is recognized by various international arbitration rules like Art. 42(1) UNCITRAL Arbitration Rules, Art. 40(1) UNCITRAL Ad Hoc Rules, Art. 28.4 LCIA Rules, Art. 43(5), 44 SCC Rules as well as most national procedural codes (*cf. EISENBERG/MILLER, p. 329; HODGES ET AL., p. 101*).

78 CLAIMANT succeeded in both proceedings before the High Court of Mediterraneo. Bearing the costs of these proceedings would be an unjustified burden when enforcing its rights (*cf. BÜHLER, p. 268*). The two proceedings and the current arbitration were only necessary due to RESPONDENT's breaches of contract. CLAIMANT will have had to win three proceedings to make RESPONDENT comply with its contractual obligations. RESPONDENT should therefore bear the costs for the avoidable proceedings it caused. This would deter RESPONDENT from not fulfilling its obligations in the future.



79 To conclude, as RESPONDENT will lose on the merits of the case, it should reimburse CLAIMANT's litigation costs. RESPONDENT's uncooperative and risky behavior supports this finding.

Conclusion to the First Issue

CLAIMANT is entitled to the reimbursement of litigation costs for both its application for interim relief (US\$ 33,750) and its successful defense against RESPONDENT's application for declaratory relief (US\$ 16,530). It can claim the costs either as damages under the CISG or as procedural costs under the Vienna Rules.

II. CLAIMANT IS ENTITLED TO RESPONDENT'S PROFITS

80 Art. 2 of the Framework Agreement obligated RESPONDENT to deliver up to 10,000 bottles of Mata Weltin wine to CLAIMANT upon request (*Cl. Exh. No. 1*). On 4 November 2014, CLAIMANT ordered 10,000 bottles of Mata Weltin 2014 (*ibid. No. 2*). However, RESPONDENT was willing to deliver only 4,500 bottles (*ibid. No. 3*). If RESPONDENT had delivered 5,500 bottles to CLAIMANT, RESPONDENT would have generated the profit X.

81 Instead, RESPONDENT sold 5,500 bottles of Mata Weltin 2014 more profitably to SuperWines. Thereby, it generated the profit Y. Thus, by selling 5,500 bottles to SuperWines instead of CLAIMANT, RESPONDENT generated a profit in the amount of Y-X. Y-X is the premium SuperWines paid to RESPONDENT. CLAIMANT is entitled to damages in this amount under Arts. 45(1)(b) 74 CISG (**A.**). If CLAIMANT were not entitled to RESPONDENT's profits as damages, CLAIMANT has the right to RESPONDENT's profits under Art. 7(2) CISG – even if these exceeded CLAIMANT's losses (**B.**).

A. RESPONDENT'S Profits Should Be Awarded to CLAIMANT as Damages Under Arts. 45(1)(b), 74 CISG

82 CLAIMANT is entitled to RESPONDENT's profits from its sale to SuperWines as damages pursuant to Arts. 45(1)(b), 74 CISG. By refusing to deliver the full amount of 10,000 bottles RESPONDENT breached the contract (*PO1 § 4*). As a consequence, CLAIMANT incurred foreseeable damages (**1.**) As these damages cannot be calculated to an exact amount, the Tribunal is respectfully requested to award CLAIMANT its damages on the basis of RESPONDENT's profits (**2.**).



1. RESPONDENT's refusal to deliver caused CLAIMANT considerable damages under Art. 74 CISG

83 By refusing to deliver the 5,500 bottles Mata Weltin 2014, RESPONDENT caused CLAIMANT considerable damages recoverable under Art. 74 CISG. First, CLAIMANT's substitute arrangement led to costs (a). Second, CLAIMANT incurred loss of profit (b). RESPONDENT could have foreseen these losses (c).

(a) CLAIMANT incurred costs for its substitute arrangement

84 CLAIMANT incurred damages as a result of its substitute arrangement.

85 According to Art. 74 CISG, a party is entitled to damages resulting from a breach of contract.

86 As consequence of RESPONDENT's breach, CLAIMANT had to arrange for 5,500 substitute bottles, paying an additional € 0.70 per bottle (PO2 § 11). Accordingly, CLAIMANT incurred damages in the amount of € 3,850. However, the substitute wine did not have the same quality as RESPONDENT's prize-winning Mata Weltin 2014 (*ibid.* § 13). There is no other vineyard in the Vuachoua region that has won the Mediterranean gold medal for its diamond Mata Weltin in each of the last five years (*Statement of Claim*, § 2). There is no equal substitute.

87 In conclusion, CLAIMANT incurred damages in the amount of € 3,850 for an inadequate substitute arrangement. This amount is only a small percentage of the total amount of CLAIMANT's damages.

(b) CLAIMANT incurred present and future loss of profits

88 As a consequence of RESPONDENT's breach of contract, CLAIMANT lost profits (i) and will lose future profits as it is not able to sell Mata Weltin 2014 to its customers (ii).

(i) CLAIMANT incurred present loss of profit

89 CLAIMANT lost profits by not having the Mata Weltin 2014 at its disposal.

90 Under the wording of Art. 74 CISG, damages include loss of profit. Loss of profit is the profit a buyer could have realized by reselling the goods to its customers (*SCHWENZER in: Schlechtriem/Schwenzler, Art. 74 § 36*).

91 The demand for Mata Weltin 2014 was high. By the time RESPONDENT had informed CLAIMANT that it would not deliver the goods, CLAIMANT had already received pre-orders for 6,500 bottles (PO2 § 7). This number of bottles was 20% higher than in the previous year (*ibid.* § 8). CLAIMANT had binding pre-orders for 800 bottles of wine. Regarding these orders, customers were willing to pay a premium of up to 50% on the price of the previous year (*ibid.* § 7). CLAIMANT had to disappoint its customers without binding pre-orders, selling them only a mixture of the Mata



Weltin 2014 and the substitute wine (*ibid.* § 13). Taking into account the extraordinary quality of the prize winning Mata Weltin 2014 (*ibid.*), it is most likely that the diminished availability had a negative impact on the demand of CLAIMANT's customers (*ibid.* § 10).

92 In conclusion, CLAIMANT lost an uncertain amount of profits as a consequence of RESPONDENT's breach.

(ii) CLAIMANT incurred future loss of profits

93 CLAIMANT will lose profits in the future.

94 Future lost profits are recoverable under Art. 74 CISG (CISG-AC Op. No. 6 § 3.19; GOTANDA in: Kröll et al., Art. 74 § 28).

95 For CLAIMANT certainty of supply is crucial (*Statement of Claim*, § 4). The majority of CLAIMANT's customers want a quasi-guaranteed supply of Mata Weltin Wine (*ibid.*). From their point of view, CLAIMANT excuses its reduced capacity with a bad harvest, while CLAIMANT's competitor SuperWines has more bottles available though being a newcomer to the collectors' market.

96 When comparing CLAIMANT to SuperWines, customers will draw negative conclusions from CLAIMANT's reduced capacity of Mata Weltin Wine. To ensure their supply, some customers are likely to drift to other distributors, especially SuperWines (*cf. SCHARNBACHER/KIEFER*, p. 15).

97 In conclusion, CLAIMANT incurred future loss of profits.

(c) CLAIMANT's damages were foreseeable pursuant to Art. 74 CISG

98 Pursuant to Art. 74 CISG, CLAIMANT's losses were foreseeable.

99 Art. 74 CISG requires the losses sustained by one party to be foreseeable to the breaching party at the time of the contract conclusion. Future lost profits should be foreseen especially in sensitive markets (*cf. BGH*, 24 October 1979 (Germany)).

100 RESPONDENT could have foreseen that CLAIMANT would not be able to supply its customers if it breached the contract. It could, therefore, have foreseen CLAIMANT's lost profits. Further, RESPONDENT knew CLAIMANT's business model (PO2 § 52). It was aware that CLAIMANT's customers relied on an outstanding quality of wine (*cf. ibid.*). It could foresee that the clientele of collectors would not forget this incident and that this would result in future damages. It could have foreseen that CLAIMANT would try to satisfy its customers by making substitute arrangements.

101 Therefore, the incurred damages were foreseeable under Art. 74 CISG.

2. CLAIMANT's damages are to be calculated based on RESPONDENT's profits



102 CLAIMANT's damages should be calculated based on RESPONDENT's profits from its sale to SuperWines. The damages cannot be calculated based on the substitute arrangement (*Art. 75 CISG*) or the market price (*Art. 76 CISG*) (a). Rather, it is within the Tribunal's discretion to decide on the assessment of damages (b). The Tribunal is respectfully requested to find that CLAIMANT's damages should be calculated based on the amount of RESPONDENT's profits from its sale to SuperWines (c).

(a) The calculation methods set forth in Arts. 75, 76 CISG cannot be used

103 Under Art. 75 CISG, damages are calculated on the basis of substitute arrangement. Under Art. 76 CISG, they are calculated on the basis of the market price of the goods. These methods of calculating damages are not appropriate in the present case.

104 First, the damages cannot be calculated by the substitute, as the substitute wine is not adequate (*see supra §§ 84 et seqq.*).

105 Second, the damages cannot be calculated by the market price. The market price of goods is determined by the average price within a group of comparable goods (*SCHWENZER in: Schlechtriem/Schwenzler, Art. 76 § 4*). There is no wine comparable to RESPONDENT's Mata Weltin 2014 of Diamond Quality (*PO2 § 13; Statement of Claim, § 2*). Therefore, the group of comparable goods would only consist of RESPONDENT's Mata Weltin 2014.

106 The determination of the goods' price needs to be based on objective considerations (*cf. CISG-AC Op.No. 8, § 4.3.1*). The price of Mata Weltin is not based on objective considerations. It is formed by personal relationships (*PO2 § 61*). In particular, the price of € 90–100 is not a representative market price, but the price individual customers paid for a few bottles (*ibid. § 14*). It was based on personal relations (*see supra § 106*). If the € 90–100 were assumed a representative market price, this would still leave a difference of € 55,000 between the top and bottom end of the range, making an exact calculation impossible.

107 In conclusion, the damages cannot be calculated based on Arts. 75, 76 CISG.

(b) The Tribunal has discretion in the assessment of damages

108 It is within the Tribunal's discretion to decide on the assessment of damages.

109 Art. 74 CISG aims to compensate the aggrieved party for non-performance (*CISG-AC Op. No. 6 § 3*). Due to this purpose, Art. 74 CISG allows for a flexible calculation of the damages suffered (*Secretariat Commentary, Art. 74 § 4; SCHMIDT-AHRENDTS, p. 92; cf. Rechtbank van Koophandel, Kortrijk, 4 June 2004 (Belgium)*). The national contract laws of Equatoriana, Mediterraneo and Danubia, confirm such flexibility. They are a verbatim adoption of the UNIDROIT Principles (*PO1 § 4*). National provisions may be taken into account when interpreting the CISG



(SCHWENZER/HACHEM *in: Schlechtriem/Schwenzler, Art. 7 § 42; cf. Gerechtshof Den Haag, 22 April 2014 (Netherlands)*). According to Art. 7.4.3(3) UNIDROIT Principles, the court has discretion over the assessment of damages in case the amount of damages cannot be calculated otherwise (MCKENDRICK *in: Vogenauer, Art. 7.4.3(3) § 5*). Such discretion is also confirmed by international practice (*see e.g. ICC Case No. 10422 (2001); ICC Case No. 9950 (2001); ICC Case No. 5835(2006); Arbitral Tribunal of the City of Panama, 24 February 2001; Centro de Arbitraje de México, 30 November 2006*).

110 In conclusion, the Tribunal has discretion to calculate the damages in a manner best suited to the case.

(c) The Tribunal should use RESPONDENT's profits as basis of CLAIMANT's damages

111 RESPONDENT's profits from its sale to SuperWines should be used as the basis for calculating CLAIMANT's damages. CLAIMANT's lost chance to bargain with the goods was as valuable as RESPONDENT's profits (*i*). Moreover, RESPONDENT's profits constitute a minimum of CLAIMANT's loss (*ii*).

(i) CLAIMANT's lost chance to bargain was as valuable as RESPONDENT's profits

112 Losses recoverable under Art. 74 CISG include the buyer's chance to bargain with the goods (SCHMIDT-AHRENDTS, *p. 99*). The value of the buyer's chance is determined by the profits it could have gained considering what it could have done with the goods (*ibid.*). It can be assumed that the buyer could have made the same profit with the goods as the seller did (SCHWENZER/HACHEM *in: Saidov/Cunnington, p. 101*).

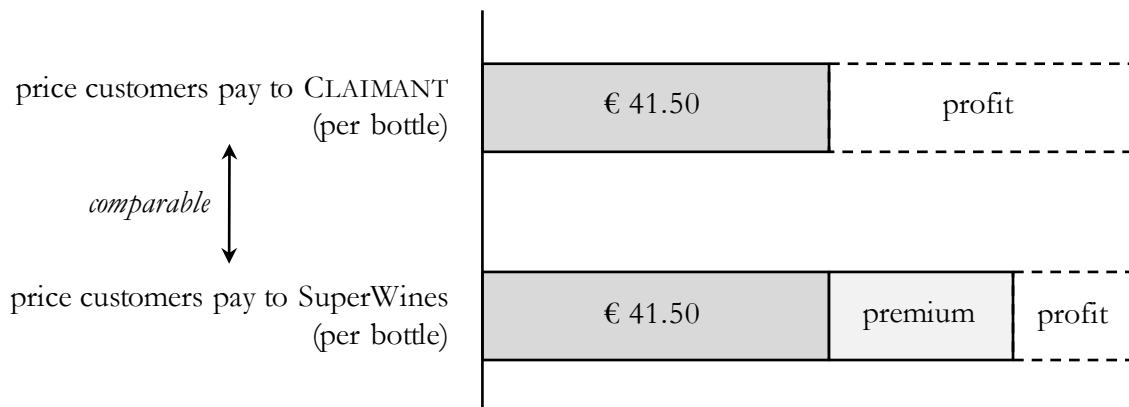
113 RESPONDENT made profit from selling the 5,500 bottles of Mata Weltin to SuperWines (*see supra § 81*). Consequently, CLAIMANT can be assumed to have made the same profit. SuperWines would have paid anyone the price it paid RESPONDENT, as it was eager to enter the market (*cf. PO2 § 24*). It would have even paid the price to CLAIMANT.

114 In conclusion, CLAIMANT's lost chance to bargain with the goods amounts to RESPONDENT's profits.

(ii) CLAIMANT's losses exceed RESPONDENT's profits

115 CLAIMANT's losses can be calculated based on RESPONDENT's profits with SuperWines. RESPONDENT's profits are the premium paid by SuperWines. By reselling the wine, SuperWines would have achieved a price higher than the premium it paid to RESPONDENT. CLAIMANT's business is comparable to that of SuperWines (*aa*). This is why CLAIMANT could have generated

the same price for the Mata Weltin 2014 as SuperWines. Therefore, CLAIMANT's lost profits are at least as high as the premium paid by SuperWines (*bb*).



116

(*aa*) The businesses of CLAIMANT and SuperWines are comparable

117 CLAIMANT's business is comparable to that of SuperWines for the following reasons. Both CLAIMANT and SuperWines are wine retailers and among RESPONDENT's biggest customers. They both place orders for a similar amount of bottles (*PO2* §§ 24, 28; *Statement of Claim*, § 14). SuperWines wanted to enter the collectors' market for high-end wines using a business model similar to CLAIMANT's (*PO2* § 26). As a consequence, their customer base is the same, consisting mostly of collectors and connoisseurs (*ibid.* § 35). This means that a considerable amount of CLAIMANT's and SuperWines' wine is sold directly to the final consumer, placing both businesses at the same stage of distribution.

118 Accordingly, CLAIMANT and SuperWines run similar enterprises. Thus, CLAIMANT would have been able to generate the same price as SuperWines.

(*bb*) CLAIMANT's lost profits are at least as high as the premium paid by SuperWines

119 SuperWines wanted to enter the market as soon as possible (*PO2* § 24). To achieve this goal, it paid RESPONDENT a premium, which amounted to € 15–20 per bottle according to rumors (*ibid.*). Mr. Barolo's strategy of paying premiums for high-end wines had failed once before (*Cl. Exh. No. 4*). Therefore, he can be assumed not to make the same mistake again, thus selling the bottles at a higher price than the one paid to RESPONDENT.

120 Additionally, the price for Mata Weltin 2014 increased during the year of 2015 (*PO2* § 14), as the supply was low (*ibid.* §§ 8, 14) and the demand was high (*ibid.* § 8). On the one hand, RESPONDENT had won various prizes for its Mata Weltin (*Statement of Claim*, § 5). On the other hand, a reduced quantity was available due to the poor harvest (*ibid.* § 6).



- 121 CLAIMANT purchased its bottles at € 41.50 (*Cl. Exh. No. 3; PO2 § 14*). SuperWines, however, paid a premium, which was about € 15–20 higher than the price paid by CLAIMANT. SuperWines was able to sell the bottles at a similar price as CLAIMANT and still profited.
- 122 This leads to the following conclusion: CLAIMANT would have gained at least the amount of the premium SuperWines paid to RESPONDENT.
- 123 In conclusion, CLAIMANT should be awarded RESPONDENT's profits from its sale to SuperWines as damages according to Art. 74 CISG.

B. CLAIMANT Should Be Awarded RESPONDENT's Profits Under Art. 7(2) CISG

- 124 If RESPONDENT's profits were to be higher than CLAIMANT's losses, they could not be awarded as damages under Art. 74 CISG. This article forbids overcompensation (*HUBER in: Westermann, Art. 74 § 19; MANKOWSKI in: Schmidt, Art. 74 § 12*). However, these profits need to be allocated to CLAIMANT under the principle of disgorgement, even if this includes further profits. According to the principle of disgorgement, a debtor profiting from a breach of contract, must surrender its profits to the buyer (*cf. SCHLECHTRIEM/WITZ, p. 64; FERRARI, p. 193*).
- 125 As the CISG does not explicitly govern this matter, such a claim is to be based on Art. 7(2) CISG in connection with Arts. 84(2)(b), 88(3) CISG (1.) All requirements for such a claim are met in the present case (2.).

1. The principle of disgorgement arises from several legal bases under Art. 7 CISG

- 126 Different provisions of the CISG imply the principle of disgorgement (a). This principle should be applied all the more in cases the breach of contract would be profitable (b).

(a) The CISG implies the principle of disgorgement

- 127 The CISG contains an internal gap regarding disgorgement of profits made by breaching a contract. This internal gap should be filled in accordance with Art. 7(2) CISG
- 128 The CISG governs the rights of the buyer and seller arising from the contract (*Art. 4 CISG*). This also encompasses remedies for breach of contract (*PILTZ, § 5-539*). These remedies also include the claim for disgorgement of profits (*HARTMANN, p. 190*). As this claim is not explicitly encompassed in the CISG, it has an internal gap. This gap should be filled according to the general principles of the CISG (*cf. FERRARI in: Schlechtriem/Schwenger, Art. 7 § 43*). When filling



such a gap, provisions of the CISG need to be considered (*cf. Hilaturas Miel v. Iraq (United States); OGH, 29 June 1999 (Austria)*).

129 In the present case, Arts. 84(2)(b), 88(3) CISG provide orientation. The concept of Art. 84(2)(b) CISG is applicable to the present case (*i*). Furthermore, the present case is comparable to a self-help sale according to Art. 88(3) CISG (*ii*). In support, several national legal systems know the idea of disgorgement (*iii*).

(i) The principle of disgorgement is contained in Art. 84(2)(b) CISG

130 The principle of profit disgorgement is contained in Art. 84(2)(b) CISG.

131 The provision rules that the buyer must surrender the goods after contract avoidance (*FOUNTOULAKIS in: Schlechtriem/Schwenzler, Art. 84 § 5*). If the buyer is not able to surrender the goods themselves, he must surrender any benefits made with the goods (*ibid. § 34*). Thereby, the buyer is placed in the economic position he was in when the contract was concluded (*cf. FERRARI in: Ferrari et al., Art. 84 § 15*). This is accomplished by protecting the claim for restitution with the principle of disgorgement (*FOUNTOULAKIS in: Schlechtriem/Schwenzler, Art. 84 § 35 et seqq.*).

132 If a secondary claim is protected by the principle of disgorgement, the original claim for performance must all the more be subject to this principle (*HARTMANN, p. 193*). Thereby, the economic position the sales contract placed the buyer in is protected. If the seller has made a profit by selling goods originally intended for the buyer, he must surrender the benefits made by that sale. There is no necessity for the benefits to stem from the owed goods exactly. A general economic relation suffices (*HELMS, p. 316*).

133 Therefore, Art. 84(2)(b) CISG speaks for the principles of disgorgement.

(ii) The present case is comparable to Art. 88(3) CISG

134 The present case is comparable to the situation governed by Art. 88(3) CISG.

135 Art. 88 CISG regulates the seller's right to a self-help sale. According to Art. 88(3) CISG, the seller has to surrender the profits of this sale to the buyer (*BACHER in: Schlechtriem/Schwenzler, Art. 88 § 17*). A situation that would justify a self-help sale is the buyer not accepting the goods. In this case, the buyer is in violation of the contract. He is however still entitled to demand the profit the seller has made due to the self-help sale.

136 In the case at hand, RESPONDENT breached the contract by not delivering the full amount of the wine promised. The sale of 5,500 bottles to SuperWines enabled RESPONDENT to profit from breaching the contract.

137 Both in the general case of a self-help sale and the current case, one party is able to perform a sale, which would not have been possible if it had fulfilled its contractual obligations. This results



in the party generating profit. If a buyer is entitled to the profits although he himself breached the contract, he must all the more be entitled to the profits in case the seller breached the contract.

138 Therefore, the present case can be compared to Art. 88(3) CISG.

(iii) Several legal systems support the principle of disgorgement

139 National legal systems support the understanding of the CISG in favor of the principle of disgorgement.

140 Although the CISG has to be interpreted autonomously, principles of national legal system can be taken into account (*PERALES VISCASILLAS in: Kröll et al., Art. 7 § 48; cf. Gerechtshof Den Haag, 22 April 2014 (Netherlands)*).

141 Common law as well as civil law jurisdictions know the idea of profit disgorgement, among them drafting states of the CISG. Common law countries, such as the United Kingdom (*Attorney General v. Blake; Esso Petroleum v. Niad*), the United States (*Snepp v. United States*) and Canada (*FRIDMAN, p. 698; NTI v. Canada (Attorney General)*) allow claims for disgorgement. Codes of civil law jurisdictions comprise the principle of disgorgement, e. g. Germany (§ 285 BGB), France (*Art. 1303 Code Civil*), Italy (*Art. 1259 Codice Civile*), the Netherlands (*Art. 6:104 Dutch Civil Code*) and Austria (§ 1447 ABGB).

142 Therefore, the established understanding of the CISG is supported by several legal systems.

(b) A party in breach of contract must not profit from the breach

143 In cases when the debtor violated good faith, the principle of disgorgement must be applied all the more.

144 Arts. 7(1), 29(2), 40, 49(2), 68(3) CISG (*ZELLER, Good Faith, Part 2*) include the principle of good faith. The rule that a breach of contract must not pay off is also a manifestation of the principle of good faith (*SCHWENZER in: Schlechtriem/Schwenger, Art. 74 § 43; cf. SCHWENZER/HACHEM in: Saidov/Cunnington, p. 101*). In this notion, a party deriving profit from its breach of contract must not be allowed to keep the profit (*ibid.*). This sets an incentive not to breach contracts (*SCHMIDT-AHRENDTS, p. 93*).

145 Arts. 84(2)(b), 88(3) CISG relate to situations in which the debtor does not act in bad faith. Therefore, in a situation in which the debtor does act in bad faith, a claim for disgorgement must be granted all the more.

2. The requirements of CLAIMANT's disgorgement claim are met



146 In a combination of the developed views (*see supra* §§ 126 *et seqq.*), there are three requirements to be met.

147 First, RESPONDENT gained a profit (a). Second, RESPONDENT was in breach of contractual obligations (b). Third, RESPONDENT's profits are economically related to the owed 5,500 bottles (c). In addition, RESPONDENT acted in bad faith (d).

(a) RESPONDENT profited from selling the 5,500 bottles of wine

148 RESPONDENT profited from the sale of 5,500 bottles to SuperWines. SuperWines paid a higher price for the goods than CLAIMANT would have paid (*PO2* § 24). Thus, RESPONDENT profited more from this sale to SuperWines than it would have done from the sale to CLAIMANT.

(b) RESPONDENT breached the contract

149 RESPONDENT breached the contract (*PO1* § 4). Art. 2 of the Framework Agreement obligates RESPONDENT to sell up to 10,000 bottles per year to CLAIMANT (*Cl. Exh. No. 1*). Though obligated and able to do so, RESPONDENT refused to deliver the ordered amount to CLAIMANT (*PO2* § 27).

(c) RESPONDENT's profits are economically related to the 5,500 bottles owed to CLAIMANT

150 RESPONDENT's profits bear an economic relation the 5,500 bottles originally owed to CLAIMANT.

151 Ms. Buharit and Mr. Weinbauer met on 25 November 2014. Mr. Weinbauer left Ms. Buharit and therefore CLAIMANT with the impression that CLAIMANT's order would be given a "favorable consideration" (*Cl. Exh. No. 5; Answer to Statement of Claim, § 1*).

152 Later that day, RESPONDENT held a meeting with SuperWines' CEO, Mr. Barolo. As a result of the negotiations, SuperWines and RESPONDENT agreed on a sale of 5,500 bottles of Mata Weltin 2014. On 1 December 2014, RESPONDENT informed CLAIMANT that it would only be able to deliver 4,500–5,000 bottles (*Cl. Exh. No. 3*). Eventually, CLAIMANT received 4,500 bottles (*PO2* § 14). This quantity constitutes the 10,000 bottles originally ordered minus the 5,500 bottles sold to SuperWines. Therefore, RESPONDENT's profits were a result of its sale to SuperWines, which received the exact amount of bottles that CLAIMANT was not delivered.

153 As a result, RESPONDENT's profits are economically related to the 5,550 bottles of Mata Weltin 2014.

(d) RESPONDENT violated good faith

154 A claim for disgorgement is all the more justified in this case, as RESPONDENT violated good faith.



- 155 CLAIMANT and RESPONDENT's business relationship of the past six years has been one of trust (*Cl. Exh. No. 1*). As RESPONDENT has pointed out, trust is very important in the high-end wine market (*Cl. Exh. No. 7; Answer to Statement of Claim, §§ 12, 17*). Therefore, it is notable that it was RESPONDENT, who abused CLAIMANT's trust and did not cooperate. Cooperation is an important facet of the principle of good faith (*BGH, 31 October 2001; SAENGER in: Ferrari et al., Art. 30 § 6*).
- 156 According to RESPONDENT, the diminished harvest made it impossible to deliver to every customer the usual amount of bottles (*Statement of Claim, § 21*). To satisfy long-term customers, RESPONDENT decided on a pro-rata allocation of the available bottles (*Cl. Exh. No. 3*). However, instead of allocating the available bottles on a pro rata basis, RESPONDENT contracted with a new customer. This customer was SuperWines, CLAIMANT's biggest competitor. RESPONDENT was aware of this fact (*PO2 § 26*). By the sale to SuperWines, RESPONDENT made a profit at CLAIMANT's expense.
- 157 Thus, RESPONDENT not only breached the contract. Its breach showed dishonesty and indifference to existing contractual obligations.
- 158 In conclusion, CLAIMANT is entitled to disgorge RESPONDENT's profits under the principle of disgorgement, even if this includes further profits.

Conclusion to the Second Issue

CLAIMANT is entitled to the profits RESPONDENT made from its sale to SuperWines. The profits are recoverable as damages under Arts. 45(1)(b), 74 CISG. Alternatively, the profits are recoverable by virtue of the principle of disgorgement under Art. 7(2) CISG. This is true even if the profits are higher than CLAIMANT's losses.

III. THE TRIBUNAL HAS THE POWER TO AND SHOULD ORDER THE PRODUCTION OF THE REQUESTED DOCUMENTS

- 159 CLAIMANT is entitled to RESPONDENT's profits made from its sale of 5,500 bottles to SuperWines (*see supra §§ 80 et seqq.*). The amount of these profits is unknown to CLAIMANT. Therefore, CLAIMANT requested RESPONDENT to provide the clarifying documents (*Statement of Claim, § 3*). Refusing this request, RESPONDENT invoked a clause in the parties' arbitration agreement, allegedly excluding document production. The clause, however, states that no "discovery" shall be allowed (*Cl. Exh. No. 1*).



160 Contrary to RESPONDENT's submission, the Tribunal has the power to order document production (A.). The Tribunal is respectfully requested to use this power and order document production (B.).

A. The Tribunal Has the Power to Order Document Production

161 The Tribunal is empowered to order RESPONDENT to provide the relevant documents, as the parties did not exclude document production (1.). Further, it is within the Tribunal's discretion to order document production according to Art. 29 Vienna Rules (2.).

1. The parties did not exclude document production

162 The parties did not exclude document production through the discovery clause in Art. 20 of the Framework Agreement. Following an interpretation under Art. 8 CISG, the parties did not exclude document production (a). If their agreement excluded document production, this agreement would be invalid, as it would violate CLAIMANT's right to be heard (b).

(a) The discovery clause interpreted under Art. 8 CISG does not exclude document production

163 The CISG applies to the interpretation of arbitration agreements, as the parties agreed on its applicability (PO2 § 63). In addition, it is widely recognized that the CISG applies to the interpretation of arbitration agreements (OLG Stuttgart, 15 May 2006 (Germany); Schiedsgericht der Handelskammer Hamburg, 21 June 1996; VOROBAY, p. 144).

164 Following an interpretation under Art. 8 CISG, the clause does not exclude document production. CLAIMANT did not intend to exclude document production and RESPONDENT could not have been unaware of this intent under Art. 8(1) CISG (i). In any case, a reasonable businessperson under Art. 8(2) CISG would have understood the clause not to exclude document production (ii).

(i) RESPONDENT must have been aware of CLAIMANT's intent not to exclude document production

165 CLAIMANT did not intend to exclude document production. RESPONDENT could not have been unaware of this intent.

166 Under Art. 8(1) CISG, contract clauses have to be interpreted according to the intent of the party, which introduced the clause. In determining the intent of the party, consideration is to be given to all relevant circumstances as mentioned by Art. 8(3) CISG.

167 In the present case, CLAIMANT introduced the discovery clause. Therefore, the clause is to be interpreted according to CLAIMANT's intent as far as RESPONDENT could not have been unaware



of this intent. CLAIMANT intended the clause to exclude discovery (*Cl. Exh. No. 12; Statement of Claim, § 29*), which is different from document production. Discovery requires the production of a broad range of materials of all kinds in order to obtain information before the trial. Discovery is often granted in common law countries, e.g. the United States (*BORN/RUTLEDGE, p. 965 et seq.; MARGHITOLA, § 2.03; WARD ET AL., p. 270*). However, CLAIMANT is asking for the production of specific decisive documents (*Statement of Claim, § 27*). In international arbitration, this is referred to as document production (*MARGHITOLA, § 2.03; cf. REDFERN/HUNTER (2009), § 6-71*).

168 From CLAIMANT's perspective, the exclusion of discovery was necessary, as its country, Equatoriana, had allowed for discovery in 2009, when the Framework Agreement was concluded (*cf. PO2 § 59*).

169 RESPONDENT was aware of CLAIMANT's intent: RESPONDENT's then-CEO Mr. Weinbauer understood the clause to exclude document production going beyond requests for particular documents in specific cases (*Resp. Exh. No. 1*). Thus, he knew CLAIMANT did not want to exclude every kind of documentary evidence. RESPONDENT had recently been involved in litigation, where the opposing party had demanded discovery of documents from a period of six years (*ibid.*). This request was denied, as the law of Mediterraneo only allows the production of specific documents (*ibid.*). Subsequently, its lawyer warned RESPONDENT that requests for discovery are often granted in "common law countries" (*ibid.*). Accordingly, RESPONDENT was aware of the difference between discovery and the production of specific documents and was pleased when CLAIMANT inserted a clause, excluding such discovery (*ibid.*).

170 In conclusion, RESPONDENT could not have been unaware of CLAIMANT's intent to only exclude discovery, but not the production of specified documents.

(ii) *A reasonable businessperson would have understood that CLAIMANT did not want to exclude document production*

171 Even if the Tribunal came to the conclusion that RESPONDENT could not have been aware of CLAIMANT's intent, a reasonable person in terms of Art. 8(2) CISG would have understood the clause to exclude discovery only.

172 Art. 8(2) CISG requires the test whether a reasonable person in the same circumstances would have had the same understanding of the clause.

173 A reasonable person in RESPONDENT's position would have looked up terms it was not familiar with. The easiest way to look up terms is by using an internet search engine (*cf. VIAC Case No. SCH-5180 (2001)*). Since discovery is not usual in international arbitration (*cf. REDFERN/HUNTER, § 1-119*), even a lawyer might have done so.



174 Further, a reasonable businessperson would have considered the purpose of the clause. This is also an interpretation standard under Art. 4.3 UNIDROIT Principles, which the Tribunal may consult under Art. 7(2) CISG (*see supra* § 109). The purpose of the clause was to ensure legal certainty. CLAIMANT intended to avoid discovery as provided by Mediterranean law in 2009, the year of the contract conclusion (*cf. PO2* § 59). With this in mind, a reasonable businessperson would have understood the purpose of the clause to create legal certainty by excluding discovery.

175 Combining wording and purpose of the discovery clause, a reasonable businessperson would have understood the clause to not exclude document production, but discovery.

(b) If the parties had agreed on excluding document production, such exclusion would violate the right to be heard under Art. 18 DAL

176 If the parties had excluded document production in their Framework Agreement, this agreement would violate CLAIMANT's right to be heard under Art. 18 DAL. It would therefore be invalid.

177 The parties may not conclude agreements, which prevent a party from exercising its right to be heard, as contained in Art. 18 DAL (*HOLTZMANN/NEUHAUS, p. 582; cf. HAUGENEDER/NETAL in: Handbook Vienna Rules Art. 28 § 8*). According to the right to be heard, the Tribunal should grant the parties the chance to make submissions on facts (*ibid.* § 17). It has to deal with the parties' pleas in depth (*ibid.* Art. 28 § 20). If the clause excluded document production, CLAIMANT would be deprived of its chance to number the amount of its claim. The Tribunal could therefore only consider whether the claim itself existed, but not its amount.

178 To conclude, if the parties had agreed on the exclusion of document production, the clause would be invalid, as it would violate CLAIMANT's right to be heard.

2. By default, it is within the Tribunal's discretion to order document production

179 In absence of a valid clause excluding document production, the default rule of Art. 29(1) Vienna Rules applies. According to Art. 29(1) Vienna Rules, the Tribunal has the discretion to collect evidence. It is free to determine the procedure applicable to the taking of evidence in order to establish the relevant facts of the case (*HAUGENEDER/NETAL in: Handbook Vienna Rules, Art. 29 § 4; SCHWARZ/KONRAD, Art. 29 § 4; MCILWRATH/SAVAGE, § 5-182*). It can do so at request of a party or on its own initiative.

180 In conclusion, the Tribunal has the power to order document production under Art. 29(1) Vienna Rules.

B. The Tribunal should order document production



181 The Tribunal is respectfully requested to make use of its power and order document production.
182 Though the parties did not agree on the IBA Rules, the Tribunal may use them as guidelines for
the taking of evidence (*HASCHER*, p. 10). Their application represents best practice (*ICC Case*
No. 13225; *BERNARDINI in: Draetta/Luzzatto*, § 3.5; *LUNDBLAD*, p. 9 *et seq.*; *WIRTH*, p. 9). In the
present case, the IBA Rules are ideally suited, as they provide common ground between civil law
and common law jurisdictions (*GRIFFIN*, p. 21; *IBA Working Party*, p. 21). RESPONDENT is from a
civil law country, while CLAIMANT is from a common law country (*PO2* § 68). Therefore, the IBA
Rules take into account the parties' different legal backgrounds.
183 The requirements for document production under the IBA Rules are fulfilled (1.). In any case,
document production should be granted to ensure the enforceability of the Tribunal's award (2.).

1. The requirements for document production under the IBA Rules are fulfilled

184 CLAIMANT's request meets the requirements for document production under Art. 3(3) IBA Rules.
The requested documents are reasonably specific (a). They are also relevant and material to the
outcome of the case (b). RESPONDENT cannot object to the request on grounds of evidentiary
privileges (c).

(a) The request is reasonably specific under Art. 3(3)(a) IBA Rules

185 CLAIMANT's request for documents is reasonably specific.
186 Under Art. 3(3) IBA Rules, the request has to be sufficient to identify the documents
(*ZUBERBÜHLER ET AL.*, Art. 3 § 107). It must name the author as well as the presumed content of
the documents and the time period they originate from (*RAESCHKE-KESSLER*, p. 418).
187 In its request, CLAIMANT requested the communications between RESPONDENT and SuperWines
(*cf. Statement of Claim*, § 27), which consist of e-mails, memoranda and minutes of the parties (*PO2*
§ 23). It further specified its request by only demanding documents from a certain period of time,
i.e. January 2014 to July 2015 (*ibid.*). The documents relate only to the purchase of Mata Weltin
2014. The documents should, in particular, contain the amount of bottles SuperWines bought
and the purchase price.
188 Consequently, CLAIMANT specified the documents enough to identify them.

**(b) The requested documents are relevant to the case and material to its outcome under
Art. 3(3)(b) IBA Rules**

189 The documents CLAIMANT has requested are relevant and material to the case.
190 Whether the documents are relevant, is to be evaluated from CLAIMANT's perspective: The
documents must be of legal relevance to the parties to prepare the proceeding (*MARGHITOLA*,



§ 5.06; KAUFMANN-KOHLER/BÄRTSCH, p. 13). A material document is a document, which is required for the review of all legal issues (*ibid.*, p. 18).

191 From CLAIMANT's perspective, the requested documents are relevant to the outcome of the case. The requested documents would allow CLAIMANT to determine the amount of its claim. RESPONDENT argues that CLAIMANT could calculate its damages by its own documents (*Answer to Statement of Claim*, § 31). However, it is impossible for CLAIMANT to calculate its damages to an exact amount. Therefore, it is entitled to calculate its damages on basis of RESPONDENT's profits. It can only number the profits by using RESPONDENT's documents concerning negotiations with SuperWines. No written contract exists (PO2 § 23). Therefore, the documents are material, as they are required for the consideration of the amount of the claim.

192 In conclusion, the documents are of relevance and materiality to the case and its outcome.

(c) The documents are not protected by the evidentiary privileges in Art. 9(2) IBA Rules

193 The documents are not protected by the evidentiary privileges listed in Art. 9(2)(a)-(g) IBA Rules. Contrary to RESPONDENT's allegations (*Answer to Statement of Claim*, §§ 31, 26, 30), they are, in particular, not protected by the following privileges. They are not protected on grounds of relevance and materiality (*see supra* §§ 189 *et seqq.*). Furthermore, they contain neither technically, nor commercially confidential information (*i*). Finally, considerations of procedural economy and equality of the parties do not rule out the production of the documents (*ii*).

(i) The documents are not commercially or technically confidential (Art. 9(2)(e) IBA Rules)

194 The documents are not confidential in terms of Art. 9(2)(e) IBA Rules.

195 First, the requested documents are not technically confidential. They do not contain technically relevant know-how such as formulas or models (*cf. MARGHITOLA*, § 5.11.). SuperWines is RESPONDENT's client and a distributor of wines, not a vineyard. Therefore, it is improbable that the documents pertaining to sales negotiations include technical secrets.

196 Second, the documents are not commercially confidential. RESPONDENT fears exposing business secrets to CLAIMANT (*Statement of Claim*, § 1, 26). According to Art. 8(2)(2.2) Vienna Rules, RESPONDENT had the duty to specify its objection (*cf. RECHBERGER/PITKOWITZ in: Handbook Vienna Rules*, Art. 8 § 9). However, RESPONDENT did not fulfill this obligation, so that one must presume that RESPONDENT meant typical business secrets. Pricing strategies are the only typical secrets in the wine industry (PO2 § 61). Such strategies would not be made known to business partners, but are exclusively an internal matter of the company. The requested documents would thus only reveal the price, but not the intention behind setting the price. Even if it were possible for CLAIMANT to guess RESPONDENT's pricing strategies, factors contributing to the price are



known anyway. These factors are made up of personal loyalty, profit orientation and long term positioning strategies (PO2 § 61). It is also evident how these factors played a role in the sale to SuperWines: The relationship with SuperWines is one of personal loyalty. There is a deeply rooted friendship between Mr. Weinbauer and Mr. Barolo since Mr. Barolo's time at LiquorLoja Ltd (PO2 § 20). Furthermore, RESPONDENT negotiating a premium, proves its profit orientation (Cl. Exh. No. 4). Lastly, the negotiations between RESPONDENT and SuperWines signified the onset of a new strategy (PO2 § 61). Thus, production of the documents would not reveal anything new.

197 In conclusion, there are no secrets contained within the requested documents. RESPONDENT's objection to document production is not justified under Art. 9(2)(e) IBA Rules. At any rate, a confidentiality agreement could be drawn up between the parties or sensitive parts could be redacted.

(ii) *The documents are not to be excluded due to considerations of procedural economy or equality of the parties (Art. 9(2)(g) IBA Rules)*

198 Considerations of procedural economy and equality of the parties do not justify an exclusion of document production under Art. 9(2)(g) IBA Rules.

199 First, calling in witnesses is not as effective and reliable a method of evidence taking as document production (cf. SCHWARZ/KONRAD, Art. 20 § 244; cf. DE BERTI/WELSER, p. 90; cf. LOFTUS/PICKRELL, p. 722 et seq.). Thus, document production fosters procedural economy rather than obstructing it.

200 Second, considerations of equal treatment of the parties do not stand in the way of requesting the documents. RESPONDENT alleges that it would be treated unequally if CLAIMANT's request were granted (Answer to Statement of Claim, § 30). However, since RESPONDENT has not requested any documents to be produced, there is no ground for a violation of equal treatment (cf. Trustees of Rotoaria Forest Trust v. Attorney General (New Zealand); BORN, p. 2174 et seq.). If RESPONDENT wanted to obtain documents, it would only have to request them.

201 To conclude, document production should not be excluded under Art. 9(2)(g) IBA Rules.

2. The Tribunal should order document production to ensure an enforceable and unchallengeable award

202 The Tribunal should order document production in order to ensure the enforceability of the award.

203 According to Art. V(1)(b) NYC, an award may be refused enforcement, if a party's right to be heard was infringed. According to Art. 34(2)(a)(ii) DAL, an arbitral award may be set aside if a



party was unable to present its case. The right to present its case encompasses the opportunity to present facts on all of the “essential building blocks” for the tribunal’s conclusion (*OAO Northern Shipping v. Remolcadores de Marin*, 27 July 2007 (*United Kingdom*)).

- 204 In the present case, CLAIMANT is entitled to RESPONDENT’s profits (*see supra* §§ 80 *et seqq.*). It is beyond CLAIMANT’s power to calculate these profits. However, the question of the amount of a claim is as important as the question whether such a claim exists. If RESPONDENT were not ordered to produce the requested documents, the amount of the claim could not be numbered. Accordingly, CLAIMANT would not be able to present facts on an important building block of the Tribunal’s decision. Its right to present its case would be infringed. As a result, the Tribunal’s award would not be enforceable and might be set aside.
- 205 In conclusion, the Tribunal should order document production to ensure the enforceability and endurance of the award.

Conclusion to the Third Issue

The non-discovery clause does not prevent the Tribunal from ordering document production. It should order RESPONDENT to produce the documents requested by CLAIMANT under Arts. 28, 29 Vienna Rules.



REQUEST FOR RELIEF

In light of the submissions made above, CLAIMANT respectfully request the Tribunal to find that:

- I.** CLAIMANT is entitled to RESPONDENT's profits.
- II.** RESPONDENT should produce the documents requested by CLAIMANT.
- III.** RESPONDENT should bear CLAIMANT's litigation costs of the proceedings in the High Court of Mediterraneo.



We hereby confirm that this Memorandum was written only by the persons who signed below.
We also confirm that we did not receive any assistance during the writing process from any person who is not a member of this team.

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