THIRTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

6 TO 13 MARCH 2016

MEMORANDUM FOR RESPONDENT

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

On Behalf of:	**Against:**
Vino Veritas Ltd	Kaihari Waina Ltd
56 Merlot Rd	12 Riesling Street
St Fundus/Vuachoua	Oceanside
Mediterraneo	Equatoriana
RESPONDENT	**CLAIMANT**

COUNSEL:

Lucie Antoine · Anna Böffgen · Benedict Butzmann

Mirella Goldstein · Nathaniel Kellerer · Luisa Störkmann

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- Vienna Mediation Rules;
- Vienna Conciliation Rules
- Zivilprozessordnung (Germany)

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 Comission
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
Cl.	CLAIMANT
cf.	confer
DAL	Danubian Arbitration Law
ECHR	European Court of Human Rights
et al.	et alia/et aliae/et alii
et seq.	et sequentia (and following)
et seqq.	et sequentes
Exh.	exhibit
e.g.	example given
h	hour
HG	Handelsgericht
IBA	International Bar Association

ibid.	ibidem (the same)
ICC	International Chamber of Commerce
ICCPR	International Convenant on Civil and Procedural Rights
i.e.	id est
LCIA	London Court of International Arbitration
Ltd	Limited
Memo.	Memorandum
Mr.	Mister
Ms.	Miss
No.	Number
NYC	New York Convention
OGH	Oberster Gerichtshof
OLG	Oberlandesgericht
p.	page
PO 1/2	Procedural Order 1/2
Proc.	procedural
Resp.	RESPONDENT
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
UDHR	Universal Declaration of Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

UPICC	The UNIDROIT Principle of International Commercial Law
US	United States
US$	United States Dollar
U.N.	United Nations
VIAC	Vienna International Arbitral Centre
v.	versus

STATEMENT OF FACTS

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.

The parties' business relationship has lasted for the past six years.

22 April 2009	CLAIMANT and RESPONDENT enter into a Framework Agreement creating a basis for their economic relationship concerning the sale of Diamond Mata Weltin.
2013/early summer of 2014	RESPONDENT begins to negotiate with SuperWines.
3 November 2014	In a fax, RESPONDENT notifies its customers of a poor year in harvest and that it will be allocating available bottles on a pro-rata allocation.
4 November 2014	CLAIMANT places an order for 10,000 bottles of Mata Weltin Diamond quality 2014. It has never ordered such a high amount before.
25 November 2014	Ms. Buharit (CLAIMANT's Development Manager) and Mr. Weinbauer (RESPONDENT's CEO) meet and Mr. Weinbauer again informs CLAIMANT that RESPONDENT can only promise it 4,500-5,00 bottles.
1 December 2014	RESPONDENT sends a letter to CLAIMANT notifying it that it can only deliver 4,500-5,000 bottles.
2 December 2014	RESPONDENT concludes a contract with SuperWines for 4,500 bottles. CLAIMANT writes to RESPONDENT, insisting upon the delivery of 10,000 bottles of Mata Weltin 2014.
4 December 2014	Mr. Weinbauer terminates the contract with CLAIMANT due to its uncooperative behaviour.
8 December 2014	CLAIMANT files a needless injunction for interim relief in the High Court of Mediterraneo. Due to Mr. Weinbauer undergoing heart surgery, RESPONDENT neither participates in the proceeding, nor challenges the relief.

12 December 2014 The High Court grants the interim relief and decides that each party should bear its own costs respectively.

14 January 2015 Mr. Langweiler (RESPONDENT's attorney) sends a letter to Mr. Fasttrack (CLAIMANT's attorney) asking for clarification of the uncertain arbitration clause. RESPONDENT declares to otherwise start court proceedings for a declaration of non-liability.

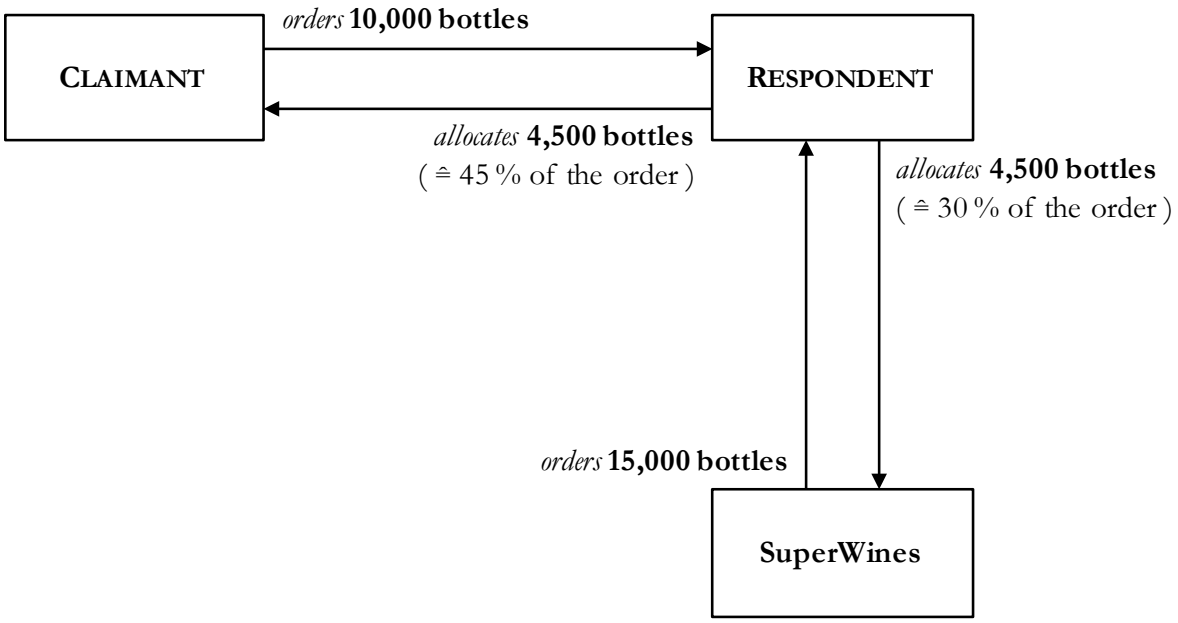
30 January 2015 RESPONDENT applies for a declaration of non-liability in the High Court of Mediterraneo.

23 April 2015 The request for a declaration of non-liability is denied and the court affirms the validity of the arbitration clause.

May 2015 RESPONDENT offers to deliver 4,500 bottles to CLAIMANT to facilitate an amicable solution.

11 July 2015 The Statement of Claim is sent to the VIAC.

16 August 2015 The Answer to Statement of Claim is submitted.



SUMMARY OF ARGUMENT

For the past six years, CLAIMANT and RESPONDENT had engaged in a successful business relationship. This relationship was built on the parties' Framework Agreement. In 2014, RESPONDENT suffered a particularly bad harvest and informed CLAIMANT that it would not be able to deliver the full amount of Diamond Mata Weltin 2014 CLAIMANT wanted. Although the parties' Framework Agreement was based on cooperation, CLAIMANT did not show understanding for the difficult situation RESPONDENT was in. Instead of cooperating to find a solution benefitting both parties, CLAIMANT insisted on full delivery. CLAIMANT bases its arguments on the assumption that it is of higher rank than RESPONDENT's other customers.

In its memorandum, CLAIMANT addresses its request for document production first. However, granting document production depends on the merit of its claim for RESPONDENT's profits. To facilitate understanding, RESPONDENT presents the issues in the following order: the claim for RESPONDENT's profits, the request for document production and the claim for litigation costs.

Although CLAIMANT alleges not to be able to calculate its losses, they can be quantified by the market price and the substitute arrangement CLAIMANT entered into. It is not necessary to base a damage claim on the profits from RESPONDENT's sale to SuperWines, especially as this sale bears no relation to RESPONDENT's diminished delivery to CLAIMANT. A claim for disgorgement of profits should not be granted, especially as this sale includes further profits (**Issue I**).

CLAIMANT is fishing for evidence to establish a claim without merit. It alleges not to be able to calculate the damages it incurred due to the diminished delivery. CLAIMANT requests the production of documents, concerning the negotiations between RESPONDENT and SuperWines. Hereby, CLAIMANT tries to evade a clause it suggested itself. This clause states explicitly that no discovery shall be allowed. Therefore, the production of the confidential documents should be denied (**Issue II**).

When RESPONDENT's former CEO, Mr. Weinbauer, tried to terminate the contract in response to CLAIMANT's uncooperative behavior, CLAIMANT overreacted and sought interim relief in the High Court of Mediterraneo without urgency. Due to this action, it incurred evitable legal costs. Seeking an amicable solution, RESPONDENT sent CLAIMANT a letter and to tried to clarify the unclear arbitration clause as a precautionary measure. This time, CLAIMANT did not react at all. Consequently, RESPONDENT went before the High Court of Mediterraneo. In both proceedings, the Court ordered each party to bear its own costs. CLAIMANT now tries to circumvent these decisions and claims reimbursement for the costs from RESPONDENT. However, CLAIMANT should pay its costs (**Issue III**).

ARGUMENT

I. CLAIMANT IS NOT ENTITLED TO RESPONDENT'S PROFITS

1 In its memorandum, CLAIMANT submits that it should be awarded a "gains-based remedy" under Art. 74 CISG (*Cl. Memo § 98*). It brings forward that its damages should be "measured according to the profits the Respondent made as a result of its breach" (*cf. ibid. § 98*). It refers to the method of damage-calculation based on the debtor's profits from its breach (*cf. SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 § 43*). It builds its claim on a number of cases (*Cl. Memo. §§ 100 et seqq.*). However, these cases support the general principle of disgorgement, but not the calculation of damages under the CISG CLAIMANT desires (*cf. Attorney General v. Blake (United Kingdom); Esso Petroleum v. Niad (United Kingdom); Adras v. Harlow (Israel); SCC Award, 5 April 2007*). Under the principle of disgorgement, the creditor is awarded the debtor's profits from its breach, irrespective of its own losses (*cf. SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 § 43*). Thus, CLAIMANT mixes two separate concepts and names it "gains-based remedy": damage calculation based on the debtor's profits and disgorgement. The two shall be treated separately.

2 First, the Tribunal does not have the power to and should not to grant disgorgement of profits (**A.**). Second, the Tribunal does not have the power to and should not calculate CLAIMANT's losses based on RESPONDENT's profits (**B.**).

A. The Tribunal Does Not Have the Power to and Should Not Grant Disgorgement of Profits

3 Contrary to what CLAIMANT submits (*Cl. Memo. §§ 99 et seqq.*), the Tribunal does not have the power to grant disgorgement under Art. 74 CISG (**1.**). Even if it had the power to grant disgorgement under Art. 74 CISG, it should not do so in the present case (**2.**).

1. The Tribunal does not have the power to grant disgorgement

4 CLAIMANT bases its claim on Art. 74 CISG (*Cl. Memo. § 99*). However, this provision does not grant the Tribunal the power to order disgorgement. The history of Art. 74 CISG, its purpose, its wording and its context within the CISG have to be taken into account when interpreting this provision (*GEBAUER, p. 684*). First, the purpose and wording of Art. 74 CISG do not allow disgorgement (**a**). Second, disgorgement is not in line with the history of Art. 74 CISG (**b**). Third, the context of Art. 74 CISG speaks against disgorgement (**c**). Additionally, the cases CLAIMANT brought forward cannot be used to support disgorgement in the present case (**d**).

(a) Disgorgement is excluded by the purpose and wording of Art. 74 CISG

5 The compensatory purpose and wording of Art. 74 CISG exclude disgorgement.

6 The purpose of Art. 74 CISG is to compensate the aggrieved party for its losses (*SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 § 6*), but not to overcompensate it (*ibid. § 42*). The purpose of disgorgement, however, goes beyond compensation (*SCHMIDT-AHRENDTS, p. 93*). Disgorgement results in punishment of the debtor for his breach of contract. As Art. 74 CISG is not of punitive nature (*CISG-AC No. 6, § 9.5*), disgorgement is barred.

7 The wording of Art. 74 evinces its purpose. It calls for compensation of the "damages" suffered by the aggrieved party. Art. 74 CISG defines damages as a sum equal to the party's loss. Consequently, the amount of recoverable damages is determined by the loss of the aggrieved party (*SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 § 3, HARTMANN, p. 197; HONSELL, p. 361*). Disgorgement is not limited to the amount of losses. Rather, it aims at skimming off the gain made by the debtor (*SCHMIDT-AHRENDTS, p. 97*).

8 To conclude, a claim for disgorgement is not covered by purpose and wording of Art. 74 CISG.

(b) Disgorgement is contrary to the history of Art. 74 CISG

9 The history of Art. 74 CISG does not support an interpretation, which allows disgorgement of profits.

10 The Uniform Law on the International Sale of Goods (ULIS) is the predecessor of the CISG and its drafting basis (*FERRARI, p. 316*). The drafters of the ULIS deliberately excluded disgorgement (*HARTMANN, p. 192; RABEL, p. 370 fn 3.*). This decision was not challenged in the drafting process of the CISG. The convention was signed in 1980. Contrary to what CLAIMANT alleges (*Cl. Memo § 99*), the concept of disgorgement had already arisen at this point (*Wrotham Park v. Parkside Homes (United Kingdom); Moses v. Macferlan (United Kingdom); Bundesgericht 18 May 1917; § 281(1) (old version) Bürgerliches Gesetzbuch (Germany)*). Thus, the drafters of the CISG did not intend to amend the exclusion made in the ULIS (*HARTMANN, p. 192*).

11 To conclude, a historic interpretation does not support disgorgement under Art. 74 CISG.

(c) Disgorgement is exclusively covered by Art. 84(2)(b) CISG and not Art. 74 CISG

12 The context of Art. 74 CISG speaks against granting disgorgement under this provision.

13 The CISG contains only one provision allowing disgorgement of profits, namely Art. 84(2)(b) CISG. Art. 84(2)(b) CISG rules on the consequences of contract avoidance (*FOUNTOULAKIS in: Schlechtriem/Schwenzer, Art. 84 § 5*). The provision states that the buyer has to surrender benefits derived from the goods to the seller if restitution is impossible (*cf. Oberlandesgericht Karlsruhe, 14*

February 2008 (Germany)). Consequently, the buyer must surrender any gains he made with the goods to the seller. This provision deals with the situation of restitution of goods. Its legal consequences cannot be transferred to a situation of initial delivery (*BOLLENBERGER, p. 155*).

14 To conclude, profit disgorgement cannot be allowed under Art. 74 CISG, which does not cover disgorgement by its history, purpose, wording and context.

15 Therefore, Art. 74 CISG is not an adequate basis for CLAIMANT's disgorgement claim.

(d) Disgorgement cannot be based on the cases CLAIMANT cites

16 CLAIMANT brings forward cases in order to substantiate its claim (*Cl. Memo. §§ 100 et seqq.*). National court rulings may provide persuasive authority for the interpretation and application of the CISG under Art. 7(1) CISG (*Gerechtshof Den Haag, 22 April 2014 (Netherlands); MELIN, p. 390*). The extent of their authority depends on the rulings' reasoning (*ibid.*). Furthermore, the circumstances of the ruling and the present case need to be similar (*PERALES VISCASILLAS in: Kröll et al., Art. 7 § 41*). However, *Attorney-General v. Blake* (*i*), *Adras v. Harlow* (*ii*) and the *Pressure Sensors Case* (*iii*) are not comparable to the present scenario.

(i) The ruling in Attorney-General v. Blake should not be applied to the present arbitration

17 The English case *Attorney-General v. Blake (United Kingdom)* should not be considered in the present arbitration.

18 First, the case was not decided under the CISG, but under English national law. Second, the case does not deal with an issue arising from a sales contract. Rather, the case is about the former spy George Blake. Blake wrote a book about his life as a spy and double agent. He had signed a contract with the authorities, obligating him not to disclose any information about his work. *Attorney-General v. Blake* deals with the specific scenario of disclosing state secrets (*cf. WINTERTON, p. 50*). The contracting parties were a state and a private individual and not two private entities, such as CLAIMANT and RESPONDENT. Furthermore, the judges found Blake to have acted cynically – his actions may even have amounted to a crime (*MCCAMUS, p. 968*).

19 Since this case deals with a breach of contract by disclosure of information, it is not comparable to the present case. The Tribunal should not take its ruling into account.

(ii) The ruling in Adras v. Harlow should not be applied to the present arbitration

20 The ruling of *Adras v. Harlow (Israel)* is not a persuasive authority for this arbitration.

21 In this case, the Israeli Supreme Court found that disgorgement should be available to the creditor. At the time of the ruling, the CISG was not even in force, but its predecessor, the ULIS. However, the Israeli court did not grant disgorgement under the ULIS either, as it found the convention not to rule on this matter. Instead, it applied domestic law.

22 Furthermore, the ruling should not be seen as persuasive authority content-wise. In *Adras v. Harlow* the debtor had already reserved a specific batch of steel that was ready to be delivered to the creditor at any given moment. In the present case, the wine had not even been bottled yet (*Cl. Exh. No. 7*). Thus, the two cases cannot be compared.

23 Since the court did not apply the CISG and the case differs content-wise, *Adras v. Harlow* is not a persuasive authority for the present arbitration. The Tribunal should not take its ruling into account.

(iii) The ruling in the Pressure Sensors Case should not be applied to the present arbitration

24 The *Pressure Sensors Case* (*SCC Award, 5 April 2007*) features a scenario to be distinguished from the present one.

25 Contrary to what CLAIMANT submits (*Cl. Memo. ∫ 103*), the *Pressure Sensors Case* should not be taken into account in this arbitration. In this case, the Tribunal ordered disgorgement because the respondent breached a confidentiality clause. However, RESPONDENT did not breach a confidentiality clause. There was none.

26 Thus, the *Pressure Sensors Case* is not comparable to the present case. The Tribunal should not take its ruling into account.

27 None of the case law CLAIMANT cites is suited to assist the Tribunal.

28 In conclusion, the Tribunal does not have the power to grant disgorgment.

2. Granting Disgorgement Would Not Be Appropriate

29 Even if the Tribunal accepted CLAIMANT's line of argument and the requirements it sets forth, disgorgement could still not be awarded under these requirements.

30 CLAIMANT submits that disgorgement can be awarded when the following requirements are met: First, CLAIMANT must have had a legitimate interest in preventing RESPONDENT's actions (*Cl. Memo. ∫∫ 105 et seqq.*). Second, the breach of contract must have been deliberate (*ibid. ∫∫ 110 et seqq.*). Third, CLAIMANT's loss must be difficult to quantify (*ibid. ∫∫ 114 et seqq.*).

31 However, these are not the requirements set forth by Art. 74 CISG. CLAIMANT tries to derive them from various cases. These cases do not compare to the present case (*see supra §§ 16 et seqq.*). If, however, the Tribunal were to apply the requirements, they would not be met.

32 First, RESPONDENT did not benefit from its breach (**a**). Second, RESPONDENT's breach was not deliberate (**b**). Third, CLAIMANT's losses can be quantified based either on the substitute arrangement or the market price (**c**).

(a) RESPONDENT's benefits are not a consequence of its supposed breach

33 Following CLAIMANT's line of argument, it must have had a legitimate interest in preventing RESPONDENT from benefitting from its breach (*cf. Cl. Memo § 105*). However, RESPONDENT did not benefit from its supposed breach. RESPONDENT's profit from its sale to SuperWines bears no relation to the breach of contract.

34 Promising delivery to SuperWines was not the reason for RESPONDENT's non-delivery of 5,500 bottles to CLAIMANT. RESPONDENT would have been able to fulfill both CLAIMANT's and SuperWines' full orders (*PO2 § 27*). When RESPONDENT promised 5,500 bottles to SuperWines, CLAIMANT and SuperWines were the only two customers with binding orders (*ibid. § 29*). RESPONDENT had harvested grapes for a total of 65,497 bottles in 2014 (*ibid. § 49*). Thus, after promising 5,500 bottles of Mata Weltin 2014 to SuperWines, there were enough bottles left to fulfill CLAIMANT's entire order. RESPONDENT reserved 10,000 bottles of Mata Weltin 2014 for CLAIMANT when the interim injunction was granted (*ibid.*). Only upon learning that CLAIMANT had entered into a substitute arrangement for 5,500 bottles, did RESPONDENT conclude contracts for 5,500 bottles, leaving 4,500 bottles to CLAIMANT (*ibid.*). Thus, the profit RESPONDENT was able to generate from its sale to SuperWines is not related to the breach of contract CLAIMANT relies on.

35 Instead, the price SuperWines paid to RESPONDENT was a result of RESPONDENT's negotiation skills and the close friendship between Mr. Weinbauer and Mr. Barolo (*ibid. § 20*). It had nothing to do with CLAIMANT.

36 Consequently, RESPONDENT's benefits are not a consequence of the breach of contract. Thus, CLAIMANT did not need to prevent RESPONDENT from benefitting from the breach.

(b) RESPONDENT's breach was not deliberate, cynical or committed in bad faith

37 Following CLAIMANT's line of argument, the breach must have been deliberate to justify disgorgement (*Cl. Memo. § 110*). CLAIMANT bases this requirement on several cases (*ibid. §§ 100 et seqq.*). However, upon closer inspection of these cases, a higher threshold becomes evident:

The breach must be of a cynical nature and must be committed in bad faith (*Attorney General v. Blake (United Kingdom); Esso Petroleum v. Niad (United Kingdom); McCAMUS, p. 965*). While CLAIMANT acknowledges this threshold (*Cl. Memo. ∫ 102*), it does not elaborate further on this in its later submissions (*ibid. ∫∫ 110 et seqq.*).

38 RESPONDENT did not breach the contract deliberately. CLAIMANT submits that the breach was deliberate, as the sale to SuperWines hindered RESPONDENT from fulfilling its contractual obligation towards CLAIMANT (*ibid. ∫ 110*). This is not the case (*see supra ∫∫ 33 et seqq.*). Thus, following CLAIMANT's definition of "deliberate", the breach was not deliberate. Further, the breach was neither cynical (*i*) nor committed in bad faith (*ii*).

(i) RESPONDENT's breach was not cynical

39 A claim for disgorgement requires the debtor to have breached the contract cynically (*Attorney General v. Blake (United Kingdom); McCAMUS, p. 965; SIEMS, p. 56; CUNNINGTON, p. 585*).

40 However, RESPONDENT acted to the best of its knowledge and conscience. It was placed in a difficult situation by an impediment beyond its control – the weather – and did its best to be fair to all of its customers. Allocating bottles pro-rata in case of a bad harvest is in line with the normal practice in the wine industry (*PO2 ∫ 31*). CLAIMANT was the only customer, which refused to show understanding for RESPONDENT's predicament and insisted on full performance (*cf. Cl. Exh. No. 6*).

41 Hence, it was not RESPONDENT who acted cynically, but CLAIMANT.

(ii) RESPONDENT's breach was not committed in bad faith

42 RESPONDENT had already been in negotiations with SuperWines since May 2014 (*PO2 ∫ 21*), well before the summer's bad weather was predictable. SuperWines had ordered 15,000 bottles (*ibid. ∫ 22*) and should, in the future, receive 15,000 bottles every year (*ibid. ∫ 28*). RESPONDENT eventually offered 4,500 bottles to SuperWines, which is 30 % of the amount ordered by SuperWines (*Answer to Statement of Claim ∫ 15*). By contrast, CLAIMANT was offered more than 50 % of the bottles ordered in the previous year (*ibid., ∫ 14*) and 45 % of the bottles ordered in 2014.

43 Thus, RESPONDENT actually did its best to satisfy all of its customers and even privileged CLAIMANT. RESPONDENT's supposed breach of contract was anything but a breach in bad faith.

(c) It is possible to quantify CLAIMANT's loss

44 CLAIMANT puts forth that disgorgement may be granted instead of damages, if a loss is difficult to quantify (*Cl. Memo. § 114*).

45 Considering the cases CLAIMANT relies on (*ibid. §§ 100 et seqq.*), this requirement has to be narrowed down. Disgorgement should only be available, if all other remedies prove to be inadequate to compensate the creditor (*Attorney General v. Blake (United Kingdom); MCCAMUS, p. 963*). Mere difficulties in quantification are not enough (*SCHMIDT-AHRENDTS, p. 97*). Thus, as long as the calculation of damages is possible, disgorgement is barred.

46 CLAIMANT's damages can be calculated. CLAIMANT seems to overlook two ways of calculating damages under the CISG: They can be calculated on basis of CLAIMANT's substitute arrangement (*i*). Alternatively, the damages can be quantified on basis of the goods' market price (*ii*).

(i) CLAIMANT's damages can be calculated on basis of its substitute arrangement

47 It is possible to calculate CLAIMANT's damages on basis of its substitute arrangement.

48 Under Art. 75 CISG, damages resulting from non-performance can be calculated on basis of a substitute arrangement (*SCHWENZER in: Schlechtriem/Schwenzer, Art. 75 § 1*). The substitute has to be arranged after avoidance of the contract. It has to provide for goods of a comparable kind and quality (*ibid., §§ 2 et seqq.*)

49 CLAIMANT entered into a substitute arrangement after RESPONDENT declared the contract terminated (*Cl. Exh. No. 7*). It bought 5,500 bottles from Vignobilia Ltd., a high-end producer of wine (*PO2 § 11*). It paid € 42.20 per bottle for this wine (*ibid.*), which is € 0.70 more per bottle than the price of the Mata Weltin 2014 agreed upon with CLAIMANT. Thus, the substitute arrangement cost CLAIMANT an additional amount of € 3,850.

50 RESPONDENT does not contest that it would be difficult to calculate further loss or profit CLAIMANT incurred in consequence of the substitute arrangement (*cf. ibid. § 13*). However, as established above (*see supra § 45*), mere difficulties in calculation are not enough to justify disgorgement. Damages can and often have to be estimated (*SAIDOV/CUNNINGTON in: Saidov/Cunnington, p. 26*).

51 To conclude, CLAIMANT's damages can be calculated on basis of the substitute arrangement.

(ii) CLAIMANT's damages can be calculated on basis of the market price

52 Alternatively, the amount of CLAIMANT's damages can be quantified on basis of the goods' market price.

53 Art. 76 CISG is the second provision CLAIMANT apparently overlooks. The provision refers to the market price of the sold goods as a basis for calculating damages (*SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 § 22*).

54 CLAIMANT can calculate its damages based on the market price of Mata Weltin 2014. To assess the current market price, an expert has to be appointed. CLAIMANT alleges that this would be a very costly procedure (*Cl. Memo. § 116*). However, the parties deemed this a cost- and time-efficient method in Art. 4 of their Framework Agreement. They stipulated that, in case they disagreed on the price, an expert should be appointed to determine a "reasonable market price" (*Cl. Exh. No. 1*). The price of € 90 to € 100 is not an adequate basis to determine the market price, as it was achieved by a few specialized retailers selling the wine to individual customers (*PO2 § 14*).

55 To conclude, it is possible to quantify CLAIMANT's damages on basis of the market price.

56 The requirements for a disgorgement claim, which CLAIMANT put forth, are not met.

57 In conclusion, the Tribunal does not have the power to award disgorgement under Art. 74 CISG, as this would be incompatible with the history, wording, purpose and context of the provision. Even if awarding disgorgement was within the Tribunal's power, it should not be granted in the present case.

B. The Tribunal Does Not Have the Power to and Should Not Calculate CLAIMANT's Damages Based on RESPONDENT's Profits

58 CLAIMANT's second attempt to create its "gains-based remedy" uses RESPONDENT's profits as a calculation-basis for CLAIMANT's damages (*cf. Cl. Memo. § 98*). This attempt, however, is in vain. The Tribunal does not have the power to calculate CLAIMANT's damages based on RESPONDENT's profits (**1.**). Even if it did have the power, it is respectfully requested to refrain from this calculation method in the present case (**2.**).

1. The Tribunal does not have the power to calculate CLAIMANT's damages based on RESPONDENT's profits

59 CLAIMANT's damages cannot be calculated on basis of RESPONDENT's profits under Art. 74 CISG.

60 The basis for calculating damages under Art. 74 CISG is the creditor's loss (*SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 § 3; SCHMIDT-AHRENDTS, p. 97*). Art. 74 CISG aims to place the creditor into the position he would be in without the breach of contract (*Secretariat Commentary,*

Art. 74 § 4). Its concept is to compensate the creditor for the damages endured (*HARTMANN, p. 197*). Thus, the amount of damages recoverable under Art. 74 CISG depends on the amount of loss endured by the creditor – not on the amount of profits generated by the debtor. The debtor's profits cannot be used to quantify the creditor's damages as the amounts are not comparable. A retailer pays a different price than a final customer.

61 Consequently, the Tribunal does not have the power to calculate CLAIMANT's damages based on RESPONDENT's profits.

2. The Tribunal should not calculate CLAIMANT's damages based on RESPONDENT's profits

62 Even if the Tribunal had the power to use RESPONDENT's profits as basis for calculating CLAIMANT's damages, this calculation method should not be applied in the present case. The substitute arrangement or the market price suffice as a calculation basis (**a**). Furthermore, CLAIMANT would be overcompensated by RESPONDENT's profits (**b**).

(a) CLAIMANT's damages can be calculated without RESPONDENT's profits

63 Quantifying the creditor's damages by the debtor's profits is only adequate in case the damages cannot be calculated otherwise (*SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 § 43*). However, in the present case, CLAIMANT's damages can be quantified by the costs of the substitute arrangement (*see supra §§ 47 et seqq.*) as well as by the market price (*see supra §§ 52 et seqq.*).

64 Alternatively, CLAIMANT's documents could be used to quantify its damages. CLAIMANT's documents provide information about the recent years' profits from selling Diamond Mata Weltin. These profits permit an estimate of the profits CLAIMANT may have lost this year. CLAIMANT retains all its documents for five years (*Cl. Exh. No. 12*). Thus, all documents from its five-year-long business relationship with RESPONDENT are in CLAIMANT's possession.

65 Consequently, CLAIMANT's damages need not be calculated based on RESPONDENT's profits.

(b) CLAIMANT would be overcompensated by RESPONDENT's profits

66 CLAIMANT would be overcompensated if its damages were calculated based on RESPONDENT's profits.

67 Art. 74 CISG does not allow overcompensation (*see supra §§ 6, 60*). Thus, RESPONDENT's profits must not be used as calculation basis if they are higher than CLAIMANT's damages.

68 CLAIMANT incurred damages in form of lost profits. At the very most, it could have achieved a price of € 100 per bottle by selling the Mata Weltin to the final customer (*PO2 § 14*). Its net profit

amounts to the achieved price minus the € 41.50 per bottle paid to RESPONDENT minus the costs CLAIMANT incurred for shipping, packaging, storage, personnel and advertising.

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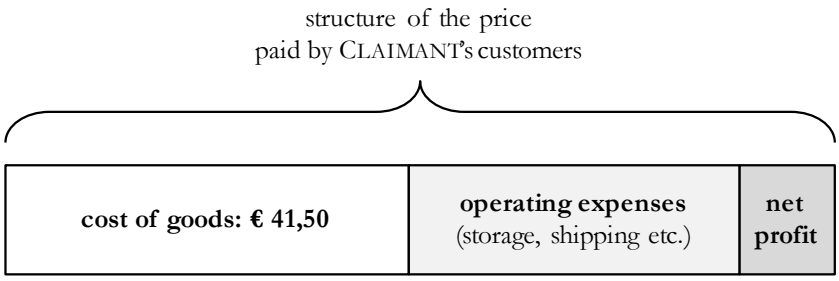

71 A distributor has a lower net profit margin than wineries (*cf. COLMAN*). A realistic net margin could amount to 14 % of the achieved price (*ibid.*). This is supported by the fact that CLAIMANT's annual revenue is around € 40,000,000, while its annual profit is € 1,200,000 (*PO2 ∫ 38*) – this amounts to only 3 %.

72 Assuming that one bottle of wine is sold for at most € 100 to the final customer (*ibid. ∫ 14*), CLAIMANT's net profit per bottle would be at most € 14. CLAIMANT would be overcompensated if this net profit was lower than RESPONDENT's profits. RESPONDENT's profits are at least as high as the premium paid by SuperWines (*ibid. ∫∫ 24, 66*). The premium paid by SuperWines is rumored to be about € 15-20 (*ibid. ∫ 24*). This is more than the imaginable € 14 net profit per bottle CLAIMANT may have obtained.

73 To conclude, RESPONDENT's profits are higher than CLAIMANT's damages. Thus, CLAIMANT would be overcompensated if RESPONDENT's profits were used as the basis for calculating CLAIMANT's damages.

74 To conclude, the Tribunal does not have the power to calculate CLAIMANT's damages based on RESPONDENT's profits, as this would be contrary to the compensatory purpose of Art. 74 CISG. Even if the Tribunal did have the power to use this calculation method, it should not do so in the present case. Other methods are available and CLAIMANT would be overcompensated.

Conclusion to the First Issue

CLAIMANT is not entitled to RESPONDENT's profits – neither by virtue of the principle of disgorgement nor by taking RESPONDENT's profits as a calculation basis.

II. CLAIMANT'S REQUEST FOR DOCUMENT PRODUCTION SHOULD BE DENIED

75 CLAIMANT seeks the production of documents from RESPONDENT to establish a claim without merit (*see supra §§ 1 et seqq.*). It filed a request to the Tribunal for a production order. This request should be denied.

76 CLAIMANT alleges that without production of the requested documents, fundamental procedural guarantees would be violated, namely the right to be heard and the right to fair treatment (*Cl. Memo. §§ 14 et seqq.*). Contrary to CLAIMANT's submission, fundamental procedural guarantees are observed (**A.**). CLAIMANT rightfully explains that both parties agreed to exclude broad discovery (*ibid.§§ 21 et seqq.*). It fails to prove that its request complies with this agreement. In fact, its request violates the parties' non-discovery clause (**B.**). CLAIMANT suggests to apply the IBA Rules and deems their prerequisites to be fulfilled (*ibid. §§ 31 et seqq.*). However, neither the application of the IBA Rules nor the Vienna Rules would allow the request to be granted (**C.**).

A. Fundamental Procedural Guarantees Are Observed

77 The denial of CLAIMANT's request for documents would not violate fundamental procedural guarantees under Art. 28(1) Vienna Rules and Art. 18 DAL. CLAIMANT would be deprived neither of its right to be heard (**1.**) nor of its right to fair treatment (**2.**).

1. CLAIMANT's right to be heard is not violated

78 Denying document production would still give effect to CLAIMANT's right to be heard. CLAIMANT would still be able to present its case (*i*). The cases brought forward by CLAIMANT evince this (*ii*).

(i) CLAIMANT can present its case

79 The right to be heard, as contained in Art. 28(1) Vienna Rules, requires that each party be given a reasonable opportunity to present its case (*SCHWARZ/KONRAD § 20-031*). This opportunity has to be ensured at every stage of the proceedings (*ibid.*). Thus, the right to be heard would be violated if a party was unable to make submissions on facts (*ibid.*; *HAUGENEDER/NETAL in: Handbook Vienna Rules Art. 28 § 17*). CLAIMANT alleges that it is unable to establish its damages on the basis of a specific calculation (*Cl. Memo. § 18*). This does not hold true.

80 CLAIMANT can quantify the amount of its damages on basis of the substitute arrangement or the market price (*see supra §§ 47 et seqq.*). Thus, CLAIMANT is able to present the relevant facts without the requested documents. As it bears the burden of proving its damages under Art. 74 CISG

(*cf. SCHWARTZ, § 4; FERRARI, Burden of Proof § II*), failure to prove these facts lies within CLAIMANT's responsibilities.

81 Production of the requested documents is not necessary for CLAIMANT to present its case.

(ii) This is supported by the cases CLAIMANT cites

82 CLAIMANT tries to distinguish the present situation from the cases *Karaha Bodas v. Perusahaan (United States)* and *Abu Dhabi Investment Authority v. Citigroup (United States)* (*Cl. Memo. § 19*). However, these cases can be compared to the case at hand and support RESPONDENT's point. In these cases, the courts refused to set aside an award because of alleged violations of the right to be heard. Denying document production was not considered a violation of the right to be heard.

83 *Karaha Bodas v. Perusahaan* and the present case are identical in regard to the following circumstances: In both cases, the requesting party is able to present substantial evidence without document production. In both cases, the documents are not needed, since the claim allegedly supported by the documents is without merit (*see supra §§ 1 et seqq.*).

84 *Abu Dhabi Investment Authority v. Citigroup* and the present case are identical in regard to the following circumstances: In both cases, the documents would support a claim without merit (*see supra §§ 1 et seqq*) and the requesting party could cross-examine witnesses. Mr. Barolo, SuperWines' CEO, could testify on the negotiations between RESPONDENT and SuperWines.

85 Due to these similarities, the Tribunal can take these cases into consideration and find that CLAIMANT's right to be heard is not violated.

86 Therefore, CLAIMANT's right to be heard is not violated if document production is denied.

2. CLAIMANT's right to fair treatment is not violated

87 If the Tribunal denies document production, the right to fair treatment as contained in Art. 28(1) Vienna Rules, Art. 18 DAL and the Art. V(1)(b) NYC is not violated. This principle requires equality of arms between the parties (*cf. O'MALLEY, § 9.116*). While RESPONDENT does have exclusive access to the documents concerning its communications with SuperWines, CLAIMANT does not need them (*see supra §§ 44 et seqq.*). Thus, CLAIMANT does not suffer any disadvantages without access to the documents.

88 CLAIMANT tries to compare the case at hand to the case *Yvon v. France (ECHR)*. The two cases, however, are not comparable. In *Yvon v. France*, the respondent enjoyed exclusive access to information needed by the other party. In the present case, RESPONDENT has exclusive access to the documents, but they are not needed for the claim (*see supra §§ 44 et seqq.*). Furthermore, *Yvon v. France* featured an extraordinary circumstance: One of the respondents was simultaneously an

expert appointed in the proceeding and, therefore, had more influence on the court than the claimant. Thus, the parties were not of equal rank from the outset. Document production had to be granted to restore equality. In the present case, the parties are of equal rank. Neither of the parties is simultaneously an expert or has more influence on the Tribunal's decision than the other. Thus, unlike in *Yvon v. France*, ordering document production is not justified.

89 Hence, if document production is denied, CLAIMANT's right to fair treatment is not violated.

90 In conclusion, if document production is denied, CLAIMANT's right to be heard and its right to fair treatment are observed. An award would not be in danger of annulment according to Art. 34(2)(a)(*ii*) DAL and unenforceability according to Art. V(1)(b) NYC.

B. CLAIMANT's Request Should Be Denied Due to the Parties' Agreement

91 In Art. 20 of the Framework Agreement, the parties stipulated that "no discovery shall be allowed" (*Cl. Exh. No. 1*). In light of the parties' agreement, the Tribunal is respectfully requested to find that it does not have the power to order production of the requested documents. The non-discovery clause is not to be interpreted according to CLAIMANT's intent (**1.**). A reasonable business person would understand the clause to exclude any document production (**2.**). In any case, CLAIMANT's request is a request for discovery (**2.**).

1. The non-discovery clause is not to be interpreted according to CLAIMANT'S intent

92 In the present case, CLAIMANT's intent is not of relevance for the interpretation of the non-discovery clause.

93 Under Art. 8(1) CISG, a party's statement can only be interpreted according the party's intent, if the other party was aware or could not have been unaware of this intent. Contractual agreements are statements under Art. 8(1) CISG (*SCHMIDT-KESSEL in: Schlechtriem/Schwenzer, Art. 8 § 3*).

94 CLAIMANT's alleged intent was to exclude "only broad document production" and "prevent[ing] extensive pre-trial document production" (*Cl. Memo. § 26*). It submits that RESPONDENT could not have been unaware of this intent and argues that RESPONDENT knew that the clause was taken over from contracts of a multinational company (*ibid.*). However, this does not indicate any information on CLAIMANT's intent as to the exclusion of document production. A multinational company does not necessarily intend to exclude only broad document production. CLAIMANT further submits that broad document production is commonly granted in other jurisdictions and that RESPONDENT could therefore have been aware of its intent (*ibid.*). However, the law on document production varies from jurisdiction to jurisdiction (*cf. TRITTMANN, p. 15*). Therefore,

this information does not clarify CLAIMANT's intent. Even if CLAIMANT's submissions indicated its intent to exclude broad document production, they would not indicate the intent to exclude broad document production only.

95 RESPONDENT could not have been aware of CLAIMANT's alleged intent. Therefore, the non-discovery clause is not to be interpreted according to CLAIMANT's intent under Art. 8(1) CISG.

2. A reasonable business person would have understood the clause to exclude any document production

96 A reasonable business person as defined by Art. 8(2) CISG would have understood the non-discovery clause as excluding any document production.

97 According to Art. 8(2) CISG, the interpretation is to be based on the understanding a reasonable person of the same kind in the same circumstances would have had. In the present case, this would be a business person in RESPONDENT's position.

98 As CLAIMANT submits, a business person might have consulted a lawyer (*Cl. Memo. § 29*). A lawyer would have interpreted the non-discovery clause by its wording (*SCHMIDT-KESSEL in: Schlechtriem/Schwenzer, Art. 8 § 20*). A lawyer would understand "discovery" as submitting materials potentially relevant to the dispute (*Cl. Memo. § 30; cf. BORN/RUTLEDGE (2009), p. 965 et seqq.; MARGHITOLA, § 5.05; FOUCHARD ET AL., p. 569; WARD ET AL., p. 270*). In line with CLAIMANT's definition, discovery includes broad document production (*Cl. Memo. § 30*). However, CLAIMANT's definition is not exhaustive. Discovery encompasses any production of documents (*RAESCHKE-KESSLER, p. 45*) – thus, also the production CLAIMANT requests.

99 Additionally, the non-discovery clause would lack effect if interpreted as excluding broad document production only. Pursuant to Art. 4.5 UPICC – which can be taken into account under Art. 7(1) CISG – a clause has to be interpreted so as to give effect to all the terms, rather than to deprive some of them of effect. As CLAIMANT alleges, broad document production is excluded in international arbitration anyway (*ibid.*). If the non-discovery clause excluded only broad document production, it would have no effect. CLAIMANT stresses the fact that the parties were legally advised (*Cl. Memo. § 29*). A legally advised business person would all the more not interpret a clause as non-effective.

100 Therefore, a reasonable business person under Art. 8(2) CISG would have interpreted the clause to exclude not only broad document production, but also "the limited document production available in international arbitration" (*Cl. Memo. § 30*).

101 In conclusion, CLAIMANT's request for document production is excluded by the non-discovery clause in Art. 20 of the Framework Agreement.

3. In any case, CLAIMANT's request would even be a request for broad document production

102 Even if the parties excluded broad document production only, CLAIMANT's request is a request for broad document production.

103 CLAIMANT requests the production of a large amount of documents. The number of documents is described as "*all documents (…) pertaining to communications between RESPONDENT and SuperWines"* and *"any contractual documents"*. The content matter is described as *"the purchase of diamond Mata Weltin 2014"*. Thereby, the requested documents are vaguely described and the types of documents are not limited to those bearing a strong connection to the relevant issue. The time frame is set *"from the period 1 January 2014-14 July 2015"*, thus over one and a half years (*Statement of Claim § 27*). It is not limited to a period proportional to the contention CLAIMANT seeks to prove. In comparison to CLAIMANT's goal of only proving a single number, this request is excessive.

104 Therefore, CLAIMANT requested broad document production, which is excluded by the parties' non-discovery clause in any case.

105 In light of the parties' agreement to exclude any document production, the Tribunal should deny CLAIMANT's request for document production, particularly as its request amounts to a request for broad document production.

C. CLAIMANT's Request Should Be Denied Under the Procedural Rules

106 Even if the Tribunal were to find that it had the power to order document production despite the parties' agreement, it should deny CLAIMANT's request.

107 CLAIMANT requests the Tribunal to apply the IBA Rules (*Cl. Memo. § 32*). It alleges that its request meets all requirements set forth in Art. 3(3) IBA Rules and that the requested documents are not protected by Art. 9(2) IBA Rules (*ibid. §§ 32 et seqq.*).

108 However, for the proceedings the parties agreed on the application of the Vienna Rules (*ibid. § 15; cf. PO1 §§ 5(3)*). Art. 29(1) Vienna Rules provides sufficient guidance for the taking of evidence. Under Art. 29(1) Vienna Rules, the Tribunal is respectfully requested to find that the documents are not necessary (**1.**). Therefore, the IBA Rules need not be applied in the case at hand (**2.**). Even if the Tribunal decided to apply the IBA Rules, their requirements would not be met (**3.**).

1. Under Art. 29(1) Vienna Rules, the Tribunal should find that the documents are not necessary

109 The Tribunal is respectfully requested to find that the documents are not necessary.

110 Art. 29(1) Vienna Rules gives the Tribunal discretion to determine the procedure applicable to the taking of evidence. This includes ordering document production (*HAUGENEDER/NETAL in: Handbook Vienna Rules, Art. 29 § 12; cf. MCILWRATH/SAVAGE, § 5-182*). The Tribunal may order the production of documents, if it considers them necessary for the proceedings (*ibid.*).

111 The documents requested by CLAIMANT are not necessary for the proceedings. Even if CLAIMANT were to learn the exact amount of RESPONDENT's profits, these profits are not CLAIMANT's damages under Art. 74 CISG (*see supra § 60*). Further, it can number possible damages with its own documents (*see supra § 64*).

112 Therefore, the documents are not necessary for the proceedings. The Tribunal is respectfully requested to deny CLAIMANT's request under Art. 29(1) Vienna Rules.

2. The IBA Rules should not be applied

113 The IBA Rules should not be applied.

114 Party autonomy is a pillar of arbitration (*BORN, p. 290; THADIKKARAN, p. 689*). The Tribunal is respectfully requested to adhere to the parties' agreement. The parties did not agree on the application of the IBA Rules (*cf. PO2 § 53*). However, they did agree on the application of the Vienna Rules, which provide rules for the taking of evidence (*See supra § 108*). If the parties had wanted to apply the IBA Rules, they could have agreed on their applicability. A direct application requires affirmative choice (*RUTLEDGE, p. 114 fn. 33*).

115 While CLAIMANT's submission that the application of IBA Rules represents best practice (*Cl. Memo. § 35*) may be true, their application is not necessary in the present case. The Vienna Rules offer sufficient guidance on the taking of evidence (*see supra §§ 109 et seqq.*).

116 Thus, the IBA Rules should not be applied.

3. Even if the Tribunal applied the IBA Rules, their requirements would not be met

117 CLAIMANT bases its arguments on Arts. 3(3), 9(2) IBA Rules (*Cl. Memo. §§ 37 et seqq.*). If the Tribunal were to apply the IBA Rules, it should nevertheless refrain from granting CLAIMANT's request. None of the requirements in Arts. 3(3), 9(2) IBA Rules are met: First, CLAIMANT's request lacks specificity (**a**.). Second, the requested documents are not relevant to the case or material to its outcome (**b.**). Third, the documents contain confidential information (**c.**). Lastly, the production of the requested documents would impose an unreasonable burden on RESPONDENT (**d.**).

(a) CLAIMANT's request does not pass the specificity test

118 Contrary to CLAIMANT's submission (*Cl. Memo. §§ 37 et seqq.*), the request for document production is not sufficiently specific.

119 According to Art. 3(3)(a) IBA Rules, the request for document production has to be sufficient to identify the documents. It has to pertain to a narrow and specific category of documents (*ZUBERBÜHLER ET AL., Art. 3 § 107; O'MALLEY, § 3.34; International Thunderbird Gaming v. The United Mexican States, Procedural Order No. 2 (NAFTA)*). Features of a narrow and specific request are a limited time frame, a strong connection to the relevant issue and a well-defined subject matter (*cf. O'MALLEY, § 3.34*). An example for a request meeting the requirements of Art. 3(3)(a) IBA Rules is found in *CME Czech Republic v. Czech Republic*. In this case, the claimant requested documents of a "broadcasting licence", encompassing 18 specifically described documents. It also requested six categories of documents, all defined by dates or file numbers. Moreover, it requested production of eleven specific documents identified by date and further description (*O'MALLEY, Procedural Rules, p. 45*).

120 In the present case, CLAIMANT's request (*cf. Statement of Claim § 27*) is vague as to the subject matter and the request refers to a time frame of one and a half years instead of referring to specific dates the documents originate from (*see supra § 119*).

121 Therefore, CLAIMANT'S request does not meet the requirements of Art. 3(3)(a) IBA Rules.

(b) CLAIMANT's request does not pass the relevance and materiality test

122 Contrary to CLAIMANT's submissions (*Cl. Memo. § 40 et seq.*), the requested documents are neither relevant to the case nor material to its outcome.

123 Art. 3(3)(b) IBA Rules requires a two-pronged test. The requested documents have to be relevant to the case and material to its outcome. To be considered relevant, a document must be likely to prove a fact from which legal conclusions can be drawn (*ZUBERBÜHLER ET AL., Art. 3 § 137*). A document is material, if a tribunal needs it to decide on the legal issues presented by the parties (*KAUFMANN-KOHLER/BÄRTSCH, p. 18*).

124 CLAIMANT only requests the documents to quantify RESPONDENT's profits. These profits, however, cannot be claimed as damages (*see supra §§ 1se seqq.*). In any case, the Tribunal could assess CLAIMANT's potential damage claim without the documents *(see supra §§ 47 et seqq.*).

125 Thus, the requested documents lack relevance as well as materiality. CLAIMANT's request does not meet the requirements of Art. 3(3)(b) IBA Rules.

(c) CLAIMANT's request does not pass the confidentiality test

126 The Tribunal is respectfully requested to find that the documents requested by CLAIMANT are confidential.

127 Under Art. 9(2)(e) IBA Rules, compelling grounds for confidentiality lead to an exclusion of documents. To assess whether the documents contain confidential information, their content would have to be revealed. However, this would be contradictory in case it turns out that the information is confidential. The protected secret must have high economic value or the requested party has to incur significant damage, if the secret were disclosed (*MARGHITOLA, § 5.11*).

128 SuperWines and RESPONDENT did not expressly or formally agree on confidentiality. However, they both assumed that the other side would not disclose any information (*PO2 § 25*). This shows that they had a common understanding that the information should be kept confidential. For this reason alone, any information, which could be contained in the documents, is confidential (*cf. RAESCHKE-KESSLER, p. 423*). In any case, the documents are protected, as documents concerning the price are likely to include price calculations. Pricing strategies are a typical business secret in the wine industry (*PO2 § 61*) and, therefore, commercially confidential.

129 If CLAIMANT figured out RESPONDENT's pricing strategy, the strategy would be in danger of being conveyed to other players in the wine business – whether accidentally or not. There is no guarantee for what a disgruntled business partner may come up with. As the wine business is based on personal relationships (*Resp. Exh. No. 1*), RESPONDENT does not sell its wine for the same price to all of its customers (*PO2 § 61*). With RESPONDENT's pricing strategy in mind, customers could influence negotiations to achieve the lowest price. Therefore, the requested documents contain information of high economic value and RESPONDENT would incur significant damage if they were disclosed.

130 As the requested documents are confidential in the sense of Art. 9(2)(e) IBA Rules, the Tribunal is respectfully requested to deny CLAIMANT's request for document production.

(d) CLAIMANT's request does not pass the reasonability test

131 CLAIMANT's request places an unreasonable burden on RESPONDENT.

132 According to Art. 9(2)(c) IBA Rules, documents can be excluded from production, if producing them would be unreasonably burdensome. Production is unreasonably burdensome, if the probative weight of the evidence is not proportional to the burden of producing it (*O'MALLEY § 9.67*).

133 CLAIMANT alleges that the documents are crucial for its claim (*Cl. Memo. § 46*). In fact, they have no evidentiary value, as CLAIMANT's damages have to be calculated according to CLAIMANT's losses (*see supra §§ 44 et seqq.*). CLAIMANT's losses cannot be found in RESPONDENT's documents.

134 Additionally, CLAIMANT requests a large amount of unspecified documents (*see supra § 119*). Going through them would be time and cost consuming for everyone involved. The process would be even more time and cost consuming, if RESPONDENT followed CLAIMANT's suggestion to redact all sensitive parts (*Cl. Memo. § 44*). Redacting the sensitive parts would require RESPONDENT's lawyers to go through all the documents and evaluate, which parts could be sensitive. This would be expensive (*cf. PO2 § 39*). The arbitration clause, which demands fast and cost efficient proceedings (*Cl. Exh. No. 1*), would thus be contravened. Even if the amount of the price paid by SuperWines had any evidentiary value, it could be verified more easily by other evidentiary means. Witness testimony for example could focus on the relevant issue instead of facing a pile of mostly irrelevant documents. Questioning witnesses is facilitated by the video conference option under Art. 8(1) The IBA Rules.

135 Therefore, producing the documents would impose an unreasonable burden on RESPONDENT. CLAIMANT's request does not meet the requirements of Art. 9(2)(c) IBA Rules.

136 To conclude, document production should be denied under the Vienna Rules, as the documents are not necessary. Even if the Tribunal found that the IBA Rules should be applied, their requirements would not be fulfilled. Thus, document production should not be ordered.

Conclusion to the Second Issue

The Tribunal is respectfully requested to deny CLAIMANT's request for document production. It lacks power to order document production by virtue of the parties' arbitration agreement. In any case, the requirements for document production would not be fulfilled.

III. CLAIMANT IS NOT ENTITLED TO THE REIMBURSEMENT OF ITS LITIGATION COSTS

137 CLAIMANT caused legal costs in two state court proceedings. After initiating an interim proceeding, CLAIMANT triggered RESPONDENT's application for a declaration of non-liability.

138 In both proceedings, the High Court of Mediterraneo decided that each party should bear its own costs (*Cl. Exh. No. 8, 9*). However, CLAIMANT is now demanding that RESPONDENT should bear CLAIMANT's costs (*Cl. Memo. § 48*). Contrary to CLAIMANT's allegation (*ibid. §§ 51 et seqq.*), the CISG is not applicable to the reimbursement of litigation costs. None of the applicable rules justify such a cost allocation (**A.**). Even if the CISG were applicable, RESPONDENT would have to bear neither the costs for the interim injunction (**B.**) nor the costs for the defense against the non-liability proceeding (**C.**).

A. CLAIMANT Must Bear Its Litigation Costs Under the Applicable Rules

139 CLAIMANT alleges that it can demand the reimbursement of its litigation costs under Art. 74 CISG (*Cl. Memo. §§ 48 et seqq.*). However, the CISG does not allocate litigation costs (**1.**). Not the CISG, but Mediterranean procedural law (**2.**) and the Vienna Rules (**3.**) can be applied.

1. The CISG does not allocate litigation costs

140 The reimbursement of litigation costs is not within the scope of the CISG. First, the drafters of the CISG intended to exclude the matter of reimbursing litigation costs (**a**). Second, awarding litigation costs under the CISG would contravene the Convention's principle of party equality (**b**). Third, the CISG does not provide remedies for rightfully brought actions (**c**).

(a) The CISG is not tailored to the reimbursement of litigation costs

141 The CISG lacks provisions on litigation costs (*cf. VANTO, p. 217; Zapata Hermanos v. Hearthside Baking (United States)*). In the U.N. Official Records, the drafters of the CISG did not consider litigation costs (*cf. FLECHTNER, p. 152*). A matter, which was not even considered while drafting a convention of such importance as the CISG, is not covered by this convention (*CISG-AC No. 6 § 5.3*). Furthermore, the convention was designed as a convention of substantive, not procedural law (*cf. Official Records p. 273; cf. Zapata Hermanos v. Hearthside Baking (United States); MCMAHON, p. 1003*).

142 CLAIMANT argues that the distinction between procedural and substantive matters is not in line with an autonomous interpretation of the CISG pursuant to Art. 7(1) CISG (*Cl. Memo. § 85*). For understanding the CISG, jurisdictions worldwide can be taken into account (*PERALES VISCASILLAS in: Kröll et al., Art. 7 § 48; cf. Gerechtshof Den Haag, 22 April 2014 (Netherlands)*). Most jurisdictions consider the allocation of litigation costs a procedural matter governed in their procedural codes (*cf. FLECHTNER, pp. 153 et seq.; Ch. 18:1, 18:8 Rättegångsbalken (Sweden); § 91(1) Zivilprozessordnung (Germany); Arts. 696, 695(7) Code de Procédure Civile (France); Art. 91 Codice di Procedure Civile (Italy); Rule 54(d) Federal Code of Civil Procedure (United States)*). As the majority of contracting states classifies litigation costs as procedural, the CISG as a convention on substantive law does not govern litigation costs.

143 As a result, the CISG is not tailored to the reimbursement of litigation costs.

(b) Awarding litigation costs under the CISG would lead to party inequality

144 CLAIMANT asserts that litigation costs should be awarded as damages under the principle of full compensation stemming from Art. 74 CISG (*Cl. Memo. § 50*). However, CLAIMANT's view is one-

sided since this would lead to unequal results (*Zapata Hermanos v. Hearthside Baking (United States); CISG-AC No. 6 § 5.4*).

145 Only a successful claimant would be able to recover its litigation costs, while a successful respondent would not have this possibility. The only basis imaginable for a claim would be Art. 74 CISG. A successful respondent, however, could not base its claim on this provision, as there is no breach of contract when the respondent is found to be in the right. A breach of contract, however, is required for the recovery of damages under Art. 74 CISG. Awarding litigation costs as damages under Art. 74 CISG would, therefore, create unequal recovery chances for the buyer and the seller (*cf. SCHWENZER in Schlechtriem/Schwenzer, Art. 74 § 29*). Such unequal recovery chances are contrary to the principle of equality as derived from Arts. 45, 61 CISG (*cf. PILTZ in: FS Schwenzer, p. 1394; CISG-AC No. 6 § 5.4*). Arts. 45, 61 CISG provide equal remedies to both parties (*cf. KEILY, § 6.2*). If only one party were allowed to recover its litigation costs under Art. 74 CISG, it would have a remedy the other party did not have.

146 In conclusion, litigation costs are not recoverable under the CISG, as this would create inequality between the parties.

(c) Filing a claim is not a breach of contract

147 Bringing an action before a state court is not a breach of contract under the CISG.

148 The CISG provides remedies for breaches of contract (*e. g. Arts. 45, 61, 74 CISG; PILTZ, § 5-539*). A party is in breach of a contract if it fails to duly perform its contractual obligations (*Art. 45 CISG*). Therefore, the CISG only knows liability for unlawful actions as breaches of contract, not however liability for a rightful action, such as bringing a claim before a court (*SACHS/PEIFFER, p. 718*). Bringing a claim before a court is not only a rightful action, but even a transnational procedural right every party is guaranteed (*cf. Art. 6(1) ECHR, Art. 8 UDHR, Art. 14(1) ICCPR*). The requirement of a breach of contract can thus never be fulfilled in case of bringing an action.

149 In conclusion, the CISG is not applicable to the reimbursement of litigation costs.

2. The applicable Mediterranean procedural law allocates the costs to CLAIMANT

150 The CISG does not allocate litigation costs (*see supra §§ 140 et seqq.*). Instead, Mediterranean procedural law applies to the allocation of CLAIMANT's costs in the proceedings before the Mediterranean High Court. Under Mediterranean Law, CLAIMANT bears its own costs (**a**). The High Court decided accordingly (*Cl. Exh. N. 8, 9*). This decision is binding (**b**).

(a) Mediterranean procedural law requires CLAIMANT to bear its own costs

151 Under Mediterranean law CLAIMANT must bear its costs.

152 The applicable procedural law before state courts is the *lex fori*, the law of the country in which the state court is seated (*GEIMER, §§ 20, 319*). The High Court of Mediterraneo is seated in Mediterraneo. Therefore, the applicable procedural law in the proceedings before the High Court is the procedural law of Mediterraneo. The procedural law of Mediterraneo provides specific rules on the allocation of procedural costs. According to these rules, each party has to bear its own costs (*Statement of Claim § 13*).

153 Therefore, under the applicable Mediterranean procedural law, CLAIMANT has to bear its litigation costs.

(b) The High Court's decisions are binding as a whole

154 The High Court of Mediterraneo granted the interim injunction and denied the declaration of non-liability. In both proceedings, it decided that under Mediterranean law each party should bear its own costs (*Cl. Exh. No. 8, 9*). These decisions are binding.

155 CLAIMANT sought interim relief before the High Court of Mediterraneo. To its favor, CLAIMANT invokes the High Court's decision, which prevented RESPONDENT from concluding contracts with other customers. It should equally respect the High Court's decision on cost allocation. Furthermore, CLAIMANT invokes the decision of the High Court referring the parties to arbitration. It should equally respect the cost allocation in this decision. CLAIMANT cannot cherry-pick the parts of the decisions it would like to be binding. If tribunals considered court decisions partially binding, this would create legal uncertainty.

156 In conclusion, the Tribunal should not deviate from the High Court's decisions that CLAIMANT bears its own costs.

3. The Vienna Rules require CLAIMANT to bear its own costs

157 The parties chose the Vienna Rules as the procedural rules for this arbitration. Since the state court proceedings are separate and independent from the arbitration proceedings, the Vienna Rules do not apply to the question of allocating the costs of the state court proceedings. Even if applied, the Vienna Rules would confirm the allocation of costs to CLAIMANT. Art. 37(2) Vienna Rules states that the Tribunal decides on the allocation of costs in the manner it deems appropriate. When exercising its discretion, the Tribunal may assess flexible factors (*SCHWARZ/KONRAD, p. 701; PETERS in: Handbook Vienna Rules, Art. 37 § 27*), such as allocation of risk and behavior of the parties.

158 CLAIMANT should bear its costs under Art. 37(2) Vienna Rules due to the following factors: First, CLAIMANT applied for interim relief at its own risk (**a**). Second, CLAIMANT behaved uncooperatively (**b**).

(a) CLAIMANT applied for interim relief at its own risk

159 The Tribunal is respectfully requested to take into account that Claimant filed its interim injunction at its own risk.

160 CLAIMANT received Mr. Weinbauer's letter on 4 December 2014 (*Cl. Exh. No. 7*) and prematurely applied for interim relief (*cf. ibid. No. 8*). CLAIMANT failed to see that there was no imminent threat, which would have made interim relief necessary under Mediterranean law (*cf. PO2 § 48*). Mr. Weinbauer's termination letter was very emotional, made clear by his extreme usage of exclamation points and by the sarcasm at the end of the letter (*Cl. Exh. No. 7*). CLAIMANT should have realized that this letter was not an imminent threat, but merely the outburst of a disappointed business partner. Due to their long lasting business relationship, CLAIMANT was familiar with Mr. Weinbauer's temper (*ibid. No. 12*). It knew that he tends to become very emotional (*ibid.*). Emotions rise during negotiations (*cf. FISHER, p. 62*). CLAIMANT should not have seen this as reason to file for interim relief.

161 At least, CLAIMANT should have informed itself about the applicable cost allocation in Mediterraneo. A party filing a claim with the assistance of a lawyer should be aware of the law governing the proceeding (*IBA Principles of Conduct, § 9.2*).

162 Thus, there was no imminent threat and CLAIMANT filed the interim injunction at its own risk.

(b) CLAIMANT behaved uncooperatively

163 CLAIMANT behaved uncooperatively while RESPONDENT did everything to behave cooperatively. The Tribunal is respectfully requested to take this into account when allocating costs.

164 RESPONDENT informed CLAIMANT of the shortage in goods twice (*cf. PO2 § 18; Cl. Exh. No. 5*).

165 On 3 November 2015 it sent all its customers a fax informing them of the shortage in bottles. CLAIMANT's fax machine was broken (*ibid.*). This is not RESPONDENT's fault. Under Art. 27 CISG, CLAIMANT is responsible for ensuring that it has a working fax machine (*cf. SCHROETER in: Schlechtriem/Schwenzer Art. 24 § 23; GRUBER in: Westermann Art. 24 § 13; EISELEN, p. 29*). Otherwise, it should not list a fax number in its letter (*cf. Cl. Exh. No. 2, 6*). On 25 November 2015 RESPONDENT personally informed CLAIMANT of the shortage (*ibid. No. 3*). In this meeting, Mr. Weinbauer stated that he would give CLAIMANT's order a "favorable consideration" (*ibid. No. 5*). CLAIMANT purports to have understood this remark as a promise to deliver 10,000 bottles

(*Statement of Claim § 8*). However, CLAIMANT's understanding is unreasonable. In both its fax and the meeting on 25 November 2015, RESPONDENT informed CLAIMANT that it could only deliver 4,500-5,000 bottles (*Cl. Exh. No. 5*). CLAIMANT could not have interpreted "favorable consideration" as meaning anything other than the consideration of promising CLAIMANT this amount.

166 However, CLAIMANT insisted on 10,000 bottles, even after it was informed of RESPONDENT's predicament caused by the bad harvest. It showed itself unwilling to negotiate a compromise, which would meet not only its own needs, but also RESPONDENT's. In contrast, other customers of RESPONDENT were willing to cooperate (*ibid.No. 7*). SuperWines, for instance, had ordered 15,000 bottles and was informed that only 4,500 could be guaranteed (*PO2 § 22*). It immediately accepted the amount of bottles RESPONDENT was able to deliver. CLAIMANT is unwilling to compromise, insisting to be of higher rank than RESPONDENT's other customers. It alleges that the written nature of its contract with RESPONDENT justifies a higher rank (*Cl. Memo. § 58*). However, Art. 11 CISG stipulates the freedom of form principle. Therefore, CLAIMANT's written contract with RESPONDENT ranks on the same level as RESPONDENT's oral contracts with other customers (*cf. FERRARI in: Schmidt, Art. 11 § 1*).

167 In conclusion, CLAIMANT was obliged to – but did not – cooperate to find a solution benefiting both parties.

168 Due to the factors of non-cooperation and risk-allocation, the Tribunal is respectfully requested to allocate the costs to CLAIMANT under Art. 37(2) Vienna Rules. While the CISG is not applicable, CLAIMANT should bear its costs under the procedural rules – those of Mediterraneo as well as the Vienna Rules.

B. Even Under the CISG, CLAIMANT Would Bear Its Costs for the Interim Injunction

169 CLAIMANT took RESPONDENT's emotionally motivated letter as reason to seek an interim injunction in the High Court of Mediterraneo. CLAIMANT alleges that it can demand the reimbursement of its incurred costs under Art. 74 CISG (*Cl. Memo. §§ 50 et seqq.*). Even if the CISG were applicable, the requirements for a damage claim under Art. 74 CISG would not be met. These are consequential loss, foreseeability and mitigation. Seeking interim relief was not a necessary consequence of the breach of contract (**1.**). Furthermore, the litigation costs were neither foreseeable to RESPONDENT (**2.**), nor has CLAIMANT fulfilled its obligation under Art. 77 CISG to mitigate these costs (**3.**).

1. CLAIMANT did not need to seek interim relief

170 CLAIMANT alleges that seeking interim relief was a necessary consequence of RESPONDENT's breach of contract (*Cl. Memo. ∫ 54*). This is not the case. First, there was no imminent threat to CLAIMANT's delivery (**a**). Second, CLAIMANT should have sought an amicable solution pursuant to Art. 20 of the Framework Agreement (**b**).

(a) CLAIMANT's delivery was not jeopardized

171 CLAIMANT sought to hinder RESPONDENT from entering into contracts with other customers and to preserve the 10,000 bottles CLAIMANT was entitled to (*Cl. Memo. ∫ 54*). CLAIMANT submits that it was necessary to protect its rights by interim relief (*ibid.*).

172 According to CLAIMANT, interim relief was necessary as RESPONDENT's behavior posed an imminent threat to the delivery of bottles to CLAIMANT (*ibid.*). However, the wine would not have been bottled until May or June 2015 (*PO2 ∫ 42*). Bottles, which do not exist, cannot be delivered to a third party. The lack of an imminent threat is evidenced by the majority view under Mediterranean law. Under the majority view, the existing risk would not have met the threshold for granting interim relief (*ibid. ∫ 48*).

173 To conclude, it was not necessary for CLAIMANT to seek interim relief.

(b) CLAIMANT should have sought an amicable solution

174 Pursuant to Art. 20 of the Framework Agreement, all disputes are to be settled amicably between the parties. Additionally, most disputes in the high-end wine production are solved amicably (*PO2 ∫ 33*). Amicable dispute resolution would entail negotiations, conciliation or mediation (*cf. REDFERN/HUNTER (2004), ∫ I-76*).

175 CLAIMANT could have made an effort to negotiate with RESPONDENT privately to resolve the dispute. It could have contacted RESPONDENT after receiving the termination letter, via telephone, fax, or e-mail. However, CLAIMANT made no attempt to work together with RESPONDENT. Instead, CLAIMANT immediately filed for interim relief. In line with the promise to cooperate, it should have worked together with RESPONDENT to find a solution.

176 If CLAIMANT had wanted a more formal procedure than private negotiations, another option would have been conciliation or mediation. The VIAC, chosen by the parties as their arbitral institution, offers mediation and conciliation mechanisms (*Vienna Mediation Rules; Vienna Conciliation Rules*). Such proceedings are supported by a conciliator or mediator, who facilitates the resolution of the parties' dispute (*cf. Art. 9(2) Vienna Mediation Rules; No. (3), (7) Vienna Conciliation Rules*).

177 CLAIMANT submits that filing an interim injunction does not violate an arbitration agreement (*Cl. Memo. ∫ 70*). In this specific case, however, by going against the amicable basis of the Framework Agreement, CLAIMANT breached its obligations.

178 In conclusion, CLAIMANT should have sought an amicable solution to the dispute.

2. RESPONDENT could not have foreseen to be held liable for a contingency fee

179 RESPONDENT could not have foreseen that CLAIMANT would hold it liable for its contingency fee.

180 Art. 74 CISG requires a party in breach to have been able to foresee the loss as a possible consequence of its breach at the time of the contract conclusion. It must also have been able to foresee that it would be held liable for the loss (*SCHWENZER in: Schlechtriem/Schwenzer, Art. 74 ∫ 45*).

181 CLAIMANT has argued that RESPONDENT could have foreseen the loss in form of the contingency fee CLAIMANT paid to its lawyers (*Cl. Memo. ∫∫ 57 et seqq.*). This argument does not hold. RESPONDENT might have been able to foresee CLAIMANT's litigation costs in form of a contingency fee, as contingency fees are common practice in Mediterraneo (*ibid. ∫ 60*). However, RESPONDENT relied on the application of the American Rule of cost allocation. According to this rule, each party bears its own litigation costs. This rule applies in Mediterraneo (*PO2 ∫ 44*), where RESPONDENT has its seat and where the proceeding took place. In contrast, in Equatoriana, where costs are allocated according to the outcome of the proceeding, contingency fees are prohibited (*ibid. ∫ 40*). This is known as the English rule (*ibid. ∫ 43*). The English Rule and the prohibition of contingency fees play together to avoid extensive contingency fee agreements to the detriment of third parties (*cf. PAINTER, p. 627*). Accordingly, contingency fees are only accepted when each party has to pay its own costs (*LEUBSDORF, p. 16; KIRSTEIN/RICKMAN, p. 3*). Thus, RESPONDENT could have expected CLAIMANT to pay for its own contingency fee.

182 In conclusion, RESPONDENT could not have foreseen to be held liable for CLAIMANT's contingency fee.

3. CLAIMANT did not mitigate its costs

183 CLAIMANT should have mitigated its costs as required by Art. 77 CISG.

184 CLAIMANT could afford to pay a law firm without a contingency fee (**a**). Furthermore, CLAIMANT did not exhaust its options to choose its law firm under economic considerations (**b**).

(a) CLAIMANT could afford to pay a law firm without the contingency fee

185 Contrary to its allegations, CLAIMANT was able to pay a law firm without agreeing on the contingency fee.

186 CLAIMANT has alleged that it was unable to secure Mediterranean legal counsel without a contingency fee arrangement due to its financial constraints (*Cl. Memo. ∫ 64*). However, CLAIMANT was able to pay US$ 50,280 to LawFix (*PO2 ∫ 41*) although its liquid assets may have been bound by an investment (*ibid. ∫ 38*). Even a law firm charging twenty times the amount of LawFix's hourly rate would have been less expensive than the contingency fee CLAIMANT paid. The average Mediterranean law firm charges US$ 350 per hour (*ibid. ∫ 39*), LawFix's hourly rate was US$ 150 (*Cl. Exh. No. 11*). LawFix spent 7.5 hours on CLAIMANT's case. The difference between these different prices (US$ 200) multiplied with these 7.5 hours attributed to the case amounts to US$ 1,500. This is twenty times less than the contingency fee of US$ 30,000 paid by CLAIMANT.

187 Furthermore, even though CLAIMANT tried to obtain third party funding unsuccessfully (*Statement of Claim ∫ 13*), this was not the only option to gain capital to afford another law firm. Considering CLAIMANT's annual revenue of US$ 40,000,000 (*PO2 ∫ 38*), it could have taken out a loan from a bank or liquidated assets.

188 Therefore, CLAIMANT's could have afforded legal advice without the contingency fee arrangement.

(b) CLAIMANT did not choose its law firm under economic considerations

189 In its effort to obtain legal advice, CLAIMANT contacted only two law firms other than LawFix (*PO2 ∫ 39*).

190 The reference point for sufficient mitigation is a reasonable business person in the same position in the same circumstances (*Cl. Memo ∫ 62; cf. Oberlandesgericht Koblenz, 24 February 2011 (Germany); Oberster Gerichtshof, 6 February 1996 (Austria)*).

191 If none of three contacted law firms meet its demands, a reasonable business person would contact further law firms. CLAIMANT has stated that the duty to mitigate does not require taking excessive or extraordinary measures (*Cl. Memo. ∫ 64*). Contacting more than three law firms does not, however, require excessive or extraordinary measures. CLAIMANT could have written a single e-mail containing its proposal and could have sent it to multiple recipients. Thereby, it could have found other, more cost-efficient law firms, rather than choosing the first somewhat convenient option.

192 In conclusion, CLAIMANT did not exhaust its options to find cost-efficient legal services. Thus, CLAIMANT did not mitigate its losses from the interim proceeding.

193 In conclusion, none of the requirements for a damage claim under Art. 74 CISG are fulfilled.

C. Even Under the CISG, CLAIMANT Would Bear Its Costs for the Declaration of Non-Liability

194 After the interim injunction was granted, RESPONDENT sent a letter informing CLAIMANT of its plan to seek a declaration of non-liability (*Resp. Exh. No. 2*). It gave CLAIMANT the chance to prevent this action by responding to the letter and clarifying the arbitration clause in the parties' Framework Agreement (*ibid.*). However, CLAIMANT failed to react. Following this, RESPONDENT sought declaratory relief. In defense to RESPONDENT's action, CLAIMANT incurred legal costs of US$ 16,530. It now demands these costs from RESPONDENT.

195 Although CLAIMANT cites Art. 74 CISG as a legal basis, its claim is without merit. Even if the CISG were applicable, the requirements for a claim under Art. 74 CISG would not be fulfilled: RESPONDENT's application for declaratory relief before the High Court of Mediterraneo is not a breach of contract (**1.**). Furthermore, CLAIMANT's incurred costs were not foreseeable to RESPONDENT (**2.**). Lastly, CLAIMANT did not mitigate its expenses sufficiently (**3.**).

1. RESPONDENT's application for declaratory relief is not a breach of contract

196 Contrary to what CLAIMANT alleges (*Cl. Memo. §§ 80 et seqq.*), RESPONDENT was in line with the parties' agreement when it sought declaratory relief before the High Court of Mediterraneo. The arbitration agreement does not establish an obligation to refrain from starting court proceedings (**a**). Even if there had been such an obligation in the first place, CLAIMANT consented to lift the obligation not to go before state courts (**b**).

(a) RESPONDENT was not obligated to refrain from court proceedings

197 CLAIMANT repeatedly submits that RESPONDENT was obligated to refrain from starting court proceedings (*Cl. Memo. §§ 73, 75, 78, 94*). However, at no point does CLAIMANT substantiate this submission. On the contrary, CLAIMANT has stated that a party challenging the arbitration agreement should have sought a court order compelling the other party to arbitrate (*ibid. § 94*). Thereby, CLAIMANT admits that involving a state court is not a breach of the arbitration agreement.

198 By agreeing on arbitration, parties waive their right to be heard by a state court (*VOIT in: Musielak/Voit, para. 1032 § 5*). To ensure that this waiver is valid, however, a state court can examine the arbitration clause (*cf. SANDROCK, p. 815*). It can be assumed that parties want to retain this possibility of examination (*ibid.*).

199 By accepting the arbitration clause introduced by CLAIMANT (*Resp. Exh. No. 1; PO2 § 53*), RESPONDENT did not waive its right to have the clause examined by a state court. If the parties had wanted to create an obligation not to sue in state courts, they could have expressly stipulated this in the arbitration agreement (*VON BODUNGEN/PÖRNBACHER, p. 149; WAGNER p. 259*). Such an obligation cannot not be derived from the parties' hypothetical will. Both parties had no experience in arbitration (*PO2 § 53*). Accordingly, it can be assumed that they did not want to create an obligation not to litigate before state courts. Rather, it can be assumed that the parties wanted to retain the possibility of having a state court examine the arbitration clause. In the present case, RESPONDENT made use of this option. By considering the arbitration clause valid, the High Court of Mediterraneo put the arbitration on a sound basis.

200 To conclude, RESPONDENT was not obligated to refrain from starting the proceeding before the High Court of Mediterraneo.

(b) CLAIMANT showed consent to lift the obligation not to go before state courts

201 Even if the arbitration agreement had obligated RESPONDENT not to go to court in the first place, CLAIMANT showed its consent to lift this obligation. CLAIMANT did not answer RESPONDENT's letter of 14 January 2014. If CLAIMANT had reacted to RESPONDENT's letter, RESPONDENT would not have started the proceedings before the Mediterranean High Court (*Answer to Statement of Claim § 22*). CLAIMANT was obligated to react by the promise to cooperate contained in Arts. 2, 3, 20 of the Framework Agreement (*i*). Furthermore, considering the parties' established business practice, CLAIMANT could have been expected to answer within the given time-frame (*ii*).

(i) CLAIMANT was obligated to react to RESPONDENT's letter under the Framework Agreement

202 The Framework Agreement obligated CLAIMANT to react to RESPONDENT's letter of 14 January 2014.

203 Art. 20 of the Framework Agreement emphasizes that disputes shall be settled amicably and in good faith (*Cl. Exh. No. 1*). In addition, Arts. 2, 3 of the Framework Agreement obligate the parties to work in support of each other and refrain from disruptive behavior (*ibid.*). Amicable behavior and good faith entail the duty to cooperate and to communicate (*Bundesgerichtshof, 31 October 2001 (Germany); SAENGER in: Ferrari et al., Art. 30 § 6*).

204 By ignoring RESPONDENT's letter, CLAIMANT violated its duties to cooperate. Clarifying the content of the arbitration clause would have benefited both sides (*see supra § 199*). For the sake of cooperation, CLAIMANT could at least have informed RESPONDENT that it did no agree with RESPONDENT's course of action. Instead, CLAIMANT chose not to answer a long-standing

business partner, arguing that it did not want to forgo any options (*PO2 § 57*). RESPONDENT's phone number and its e-mail address are clearly visible on its letterhead (*Resp. Exh. No. 2*). A phone call of a few minutes on CLAIMANT's part would have sufficed, if writing an e-mail was too time-consuming.

205 Thus, CLAIMANT was obligated to react to RESPONDENT's letter.

(ii) CLAIMANT was expected to answer RESPONDENT in line with the parties' business practice

206 CLAIMANT was expected to answer RESPONDENT within the set time frame under the parties' business practice.

207 CLAIMANT should have answered RESPONDENT within a time period of two weeks. CLAIMANT submits that its silence to RESPONDENT's letter does not constitute acceptance of the action RESPONDENT had announced (*Cl. Memo. §§ 75, 94*). In its opinion, two weeks were too short a time frame to answer (*ibid. §§ 96, 97*).

208 According to Art. 18(1) CISG, silence or inactivity in itself does not amount to acceptance. To amount to acceptance, there have to be further circumstances giving silence the meaning of acceptance (*SCHROETER in: Schlechtriem/Schwenzer, Art. 18 § 9; FERRARI in: Kröll et al., Art. 18 § 10*).

209 The following circumstance gives CLAIMANT's silence the meaning of acceptance. In the recent past, CLAIMANT always answered within a few days when RESPONDENT's proposals were not agreeable to CLAIMANT (*cf. passim Cl. Exh. No. 1-11*). It could have been expected to react to a matter of such importance as the validity of an arbitration a letter within two weeks. Accordingly, the time period was reasonable. RESPONDENT even waited two more days before filing its action (*Resp. Exh. No. 2; Cl. Exh. No. 9*). In addition, the arbitration clause was unclear, as the institution mentioned does not exist (*cf. PO § 55*). Therefore, it was also in CLAIMANT's interest to clarify the arbitration clause (*see supra § 199*).

210 CLAIMANT relies on the case *Argonaut v. Reinsurance of New York* (*Cl. Memo. § 96*). Apart from the fact that the court applied different procedural and substantive law, the scenario in that case is not comparable to the one at hand. In *Argonaut v. Reinsurance of New York*, the arbitration clause was clear (*Argonaut v. Reinsurance of New York (United States)*). Nevertheless, the respondent approached the claimant to refrain from arbitration and turn to litigation instead (*ibid.*). The time period to answer was 30 days. It was held reasonable that the claimant did not answer. In the present case, however, it was unreasonable of CLAIMANT not to answer. The arbitration clause is unclear (*see supra § 209*). RESPONDENT tried to clarify the content of the ambiguous arbitration

clause (*Resp. Exh. No. 2; Answer to Statement of Claim § 36*). Thus, the case and, therefore, the time period approved in *Argonaut v. Reinsurance of New York* cannot be compared to the present case.

211 In conclusion, CLAIMANT's silence to RESPONDENT's letter amounted to acceptance.

212 Thus, CLAIMANT impliedly consented to RESPONDENT's action. Even if the arbitration agreement prohibited state court proceedings in the first place, such an obligation was lifted.

2. CLAIMANT's expenses were not foreseeable to RESPONDENT

213 RESPONDENT could not foresee CLAIMANT's expenses.

214 CLAIMANT defines that a loss is foreseeable under Art. 74 CISG, if "an innocent party incurs legal costs defending or striking out a claim brought in a foreign court in breach of the arbitration agreement" (*Cl. Memo. § 88*). However, two factors in CLAIMANT's definition are not met in the present case. First, CLAIMANT is not an innocent party, as it provoked RESPONDENT's action (*see supra §§ 202 et seqq.*).

215 Furthermore, CLAIMANT argues that its legal costs in form of the contingency fee agreement were foreseeable (*Cl. Memo. § 88*). However, a contingency fee is only foreseeable in connection with the rule that each party bears its own costs (*see supra §§ 179 et seqq.*).

216 Hence, CLAIMANT's litigation costs were not foreseeable to RESPONDENT.

3. CLAIMANT did not mitigate its losses sufficiently

217 CLAIMANT did not fulfill its duty to mitigate its losses pursuant to Art. 77 CISG.

218 Just as in its costs for interim relief, CLAIMANT did not mitigate, but increased its litigation costs in the non-liability proceeding. First, it engaged LawFix after contacting only two other law firms (*see supra §§ 189 et seqq.*). Second, it was able to pay a contingency fee for the amount of which it could have afforded other law firms without such arrangements (*see supra §§ 185 et seqq.*).

219 Therefore, CLAIMANT did not sufficiently mitigate its costs.

220 To conclude, the requirements of Art. 74 CISG are not met. CLAIMANT is not entitled to reimbursement of the costs for its defense against the non-liability proceeding.

Conclusion of the Third Issue

CLAIMANT is not entitled to the reimbursement of its litigation costs for neither its application for interim relief, nor its defense against the non-liability proceedings.

REQUEST FOR RELIEF

In light of the submissions made above, RESPONDENT respectfully requests the Tribunal to find that:

I. CLAIMANT is not entitled to RESPONDENT's profits.

II. The documents requested by CLAIMANT should not be produced.

III. CLAIMANT is not entitled to reimbursement of its 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.

Lucie Antoine

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Benedict Butzmann

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Nathaniel Kellerer

Luisa Störkmann