

KAIHARI WAINA (CLAIMANT)

v.

VINO VERITAS (RESPONDENT)

MEMORANDUM FOR CLAIMANT



Counsel for CLAIMANT

MAVARA AGHA
MICHAL HAIN
CLARE KELLY
LAN MEI
CHRISTIAN VANDERGEEST

HARVARD LAW SCHOOL
CAMBRIDGE, MASSACHUSETTS, USA

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TABLE OF ABBREVIATIONS

Art./Arts.	Article/Articles
BGH	Bundesgerichtshof
CH	Switzerland
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG AC	CISG Advisory Council
DE	Germany
EUR	Euro
Exhibit C	CLAIMANT’S Exhibit
Exhibit R	RESPONDENT’S Exhibit
fn.	Footnote
HCM	High Court of Mediterraneo
HG	Handelsgericht
<i>Ibid.</i>	<i>Ibidem</i> (Latin for “in the same place”)
LG	Landgericht
MX	Mexico
NL	Netherlands
NZ	New Zealand
OLG	Oberlandesgericht
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PO	Procedural Order
s./ss.	Section/Sections
SCC	Swedish Chamber of Commerce
SoC	Statement of Claim
UK	United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
US	United States
USD	US Dollar
VIAC	Vienna International Arbitration Centre

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<i>OLG Köln, 21 May 1996</i>	Oberlandesgericht Köln, 21 May 1996 Case Number: 22 U 4/96	59
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STATEMENT OF FACTS

- 1 Kaihari Waina Ltd (“CLAIMANT”), is a wine merchant specializing in top quality wines, based in Equatoriana. Vino Veritas Ltd (“RESPONDENT”, jointly with CLAIMANT, the “Parties”), is one of the highest quality vineyards in Mediterraneo and the only vineyard in the Vuachuo region that has won the Mediterraneo gold medal for its diamond Mata Weltin for the past five years in a row.
- 2 On 22 April 2009, the Parties concluded a Framework Agreement (“Contract”) which requires RESPONDENT to sell up to 10.000 bottles of diamond quality wine to CLAIMANT each year [*Exhibit C1, p. 9*]. The Contract was set for five years, with automatic renewal unless either party provides notice of termination before 1 January [*Ibid.*]. Article 20 of the Contract (“Arbitration Clause”) stipulates that disputes between CLAIMANT and RESPONDENT shall be decided by arbitration in Vindobona by the Vienna International Arbitration Tribunal, under its Rules (“VIAC”), and in accordance with international practice. The Contract is governed by the laws of Danubia, which incorporates the UN Convention on Contracts for the International Sale of Goods (“CISG”).
- 3 By letter dated 4 November 2014, CLAIMANT invoked its contractual right to order 10.000 bottles of Mata Weltin wine from RESPONDENT [*Exhibit C2, p. 10*]. On 25 November 2014, in breach of its contractual obligations, RESPONDENT sent CLAIMANT a letter stating that it would only deliver 4.500-5.000 bottles, allegedly due to a poor harvest, and offering a price of EUR 41,50 per bottle [*Exhibit C3, p. 11*].
- 4 However, RESPONDENT simultaneously offered 4.500 bottles of Mata Weltin wine to SuperWines, CLAIMANT’S biggest competitor and RESPONDENT’S newest customer [*PO 2, pp. 55–56, paras. 20–22*]. According to industry news sources, SuperWines paid a premium “market entry fee” to RESPONDENT [*PO 2, p. 56, para. 24*]. RESPONDENT eventually sold a total of 5.500 bottles to SuperWines of the wine it was contractually obligated to sell to CLAIMANT [*Ibid.*], despite having no contractual obligation to SuperWines do so [*PO 2, p. 56, para. 23*]. It did so knowing that this would require a reduction in the quantities of wine available to RESPONDENT’S pre-existing buyers [*PO 2, p. 56, para. 21*]. Without its decision to sell 5.500 bottles of Mata Weltin wine to SuperWines, RESPONDENT would have been able to comply with its contractual obligation to fulfill CLAIMANT’S order of 10.000 bottles [*PO 2, p. 56-57, para. 27*].
- 5 CLAIMANT replied to RESPONDENT’S letter by email on 2 December 2014, expressing its disappointment in RESPONDENT’S position, requesting performance of the Contract, and

accepting the price of EUR 41,50 [*Exhibit C6, p. 14*]. In response, RESPONDENT'S CEO sent a letter unjustifiably terminating the Contract and refusing to deliver any amount of wine to CLAIMANT [*Exhibit C7, p. 15*].

- 6 Consequently, CLAIMANT was forced to contact its customers to enquire whether they would be willing to accept Mata Weltin from any of the other producers in the region [*PO 2, p. 54, para 10*]. After receiving a number of affirmative responses, CLAIMANT was fortunately able to purchase 5.500 bottles of Mata Weltin from Vignobilia in February 2015 in order to fulfill its obligations to its customers [*Ibid., p. 54, para. 11*]. Despite CLAIMANT'S efforts to mitigate its loss, it estimates its lost profits are at least EUR 110.000.
- 7 In the meantime, however, to ensure that CLAIMANT could meet its legal obligations to its customers, who had ordered Mata Weltin wine before RESPONDENT'S breach, CLAIMANT sought and won an injunction in the High Court of Mediterraneo ("HCM") on 12 December 2014. The injunction prohibited RESPONDENT from selling any of the 10.000 bottles CLAIMANT had ordered to other customers [*Exhibit C8, p. 16*]. RESPONDENT did not contest this injunction [*Ibid.*], but in January 2015, initiated proceedings in the Courts of Mediterraneo seeking a declaration of non-liability for its default on the Contract. The court denied jurisdiction over the motion based on the Arbitration Clause in the Contract, but also stated in oral argument that it considered RESPONDENT to be in breach of its obligations under the Contract [*Exhibit C9, p. 17*]. Because of CLAIMANT'S lack of liquidity and the high cost of legal representation in Mediterraneo, CLAIMANT was forced to hire counsel on a contingency fee basis for these two proceedings and incurred litigation costs in the amount of USD 50.280 [*Exhibit C10, p. 17; Exhibit C11, p. 18*].
- 8 Following the failure of RESPONDENT'S action for a declaration of non-liability, CLAIMANT initiated the current arbitration by filing a Statement of Claim ("SoC") on 11 July 2015. The Arbitral Tribunal was constituted on 15 September 2015. In a telephone conference with the Tribunal on 1 October 2015, RESPONDENT committed to deliver 4.500 bottles to CLAIMANT by 1 November 2015. In response to the promise, CLAIMANT agreed to refrain from pursuing its right to specific performance of RESPONDENT'S obligation to deliver the remaining 5.500 bottles to CLAIMANT, and to limit its claim for damages for non-delivery and for legal fees incurred because of RESPONDENT'S breach of contract [*PO 2, p. 54, para. 12*].

SUMMARY OF ARGUMENTS

- 1 CLAIMANT and RESPONDENT negotiated and agreed to a contract for the sale of up to 10.000 bottles of wine. RESPONDENT breached the Contract and sought to profit by selling the bottles of wine it promised to CLAIMANT to its biggest competitor, SuperWines, for commercial gain. RESPONDENT'S breach forced CLAIMANT to seek an interim injunction in the HCM. In response, RESPONDENT sought a declaration of non-liability in the Courts of Mediterraneo in breach of the Contract's Arbitration Clause. CLAIMANT'S successful defense against that action led RESPONDENT to sell CLAIMANT 4.500 bottles. CLAIMANT agreed to forego its claim for specific performance and instead request only compensation for the legal costs it incurred in the two actions in Mediterranean courts and its lost profits from the non-delivery of 5.500 bottles.
- 2 First, the Tribunal has jurisdiction to hear this matter [I]. Second, the Tribunal has the power to order document production under the law that governs the Contract and international practice; the Parties gave the Tribunal this power by agreement. The Tribunal should exercise its power to order RESPONDENT to produce specific documents in relation to its negotiations with SuperWines because they are material and relevant to the dispute. These documents are vital to ascertain the quantum of CLAIMANT'S remedy. Accordingly, the Tribunal should preserve CLAIMANT'S right to be heard and order the production of the documents [II].
- 3 Third, the Tribunal should award CLAIMANT compensation for the legal costs it incurred in seeking the injunction and in defending against RESPONDENT'S action for declaratory relief. Litigation fees constitute legally recoverable losses. The injunction and the defense against the action for declaratory relief were necessary because RESPONDENT breached the Contract and because CLAIMANT had a duty to mitigate its losses. The legal fees thus constitute incidental losses for which the Tribunal should award CLAIMANT compensation [III].
- 4 Finally, RESPONDENT'S breach caused CLAIMANT to suffer lost profits. CLAIMANT is entitled to compensation for these losses. CLAIMANT'S lost profits are difficult to calculate precisely, but are most likely higher than RESPONDENT'S profits, and accordingly, CLAIMANT requests the Tribunal to award it RESPONDENT'S profits as a measure of its loss. Regardless, RESPONDENT should not be allowed to profit from breaching the Contract in bad faith. Accordingly, the Tribunal should require RESPONDENT to disgorge its profits in order to compensate CLAIMANT for its lost profits [IV].

ARGUMENTS

I. THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE.

1 The jurisdiction of the Tribunal to hear this dispute is unchallenged [*PO 1, p. 50, para. 2*].

II. THE ARBITRAL TRIBUNAL SHOULD ORDER RESPONDENT TO PRODUCE THE DOCUMENTS CLAIMANT REQUESTED.

- 2 In order to prove the damages rightfully due to CLAIMANT, CLAIMANT seeks the production of a narrow category of documents both relevant to the claims and material to the outcome of the dispute [*SoC, p. 7, para. 28; IBA Rules Art. 3(3)(b)*]. CLAIMANT has requested the Tribunal to order RESPONDENT to provide CLAIMANT with all documents from the period of 1 January 2013 – 14 July 2015 pertaining to communications between RESPONDENT and SuperWines in regard to the purchase of diamond Mata Weltin 2014 and “any contractual documents, including documents relating to the negotiation of the said contract between SuperWines and RESPONDENT in regard to the purchase of diamond Mata Weltin 2014, including the number of bottles purchased and the purchase price” [*SoC, p. 7, para. 28*].
- 3 In the Arbitration Clause, the Parties agreed that “no discovery shall be allowed” [*Exhibit C1, p. 9, Art. 20*]. By the term “discovery,” the Parties intended to exclude extensive discovery proceedings as conducted in the US, involving reaching requests for “all types of documents, depositions, and interrogatories” [*SoC, p. 8, para. 29; Born, p. 817*]. However, the Parties did not agree to outlaw document production in its entirety. This comports with the Tribunal’s duty to ensure that the Parties’ right to be heard is not infringed which would be the case if no document production were granted [*Ibid.*]. For these reasons, the Tribunal has the power to order RESPONDENT to produce the requested documents [A], and the Tribunal should exercise that power by ordering production. [B].

A. The Tribunal has the power to order RESPONDENT to produce documents.

- 4 Party autonomy is an important principle in determining the rules of procedure in international commercial arbitration [*Born, pp. 426-427*]. The principle of party autonomy is reflected in Article 20 of the Contract, which provides that that any dispute shall be conducted in accordance with VIAC Rules and “international practice” [*Exhibit C1, p.9*]. Additionally, the Arbitration Clause provides that Danubian law, which has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (“UNCITRAL Model Law”) [*PO 1, p. 51*], governs the Contract as *lex arbitri*. According to Art. 19(1) UNCITRAL Model Law, subject to provisions of that law, “the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”. Thus, as document production and discovery are both matters

of procedure [Born, Chapter 9], the Parties are free to agree on the procedure that the Tribunal must follow on these issues. The Parties agreed to incorporate the VIAC Rules and international practice, both of which permit document production [1]. The Parties also agreed to limit the Tribunal's power to order discovery, but not to extinguish its power to order document production [2].

1. The Parties' agreement to arbitrate under the VIAC Rules and in accordance with international practice evidences their agreement to permit limited document production

- 5 Under the Contract, the Parties agreed that all disputes would be decided in accordance with the VIAC Rules [Exhibit C1, p.9, Art. 20]. Pursuant to Article 29 of the VIAC Rules, the Tribunal may “on its own initiative collect evidence, question parties or witnesses, request the Parties to submit evidence, and call experts” if it considers it necessary [Vienna Rules Art. 29]. Thus, the Tribunal has the power to request RESPONDENT to submit evidence if the Tribunal considers it necessary.
- 6 The Parties also agreed that the arbitration is to be decided in “accordance with international practice” [Exhibit C1, p.9, Art. 20]. The IBA Rules for Taking of Evidence in International Evidence (“IBA Rules”) is an international soft law instrument intended to provide parties and arbitrators with an efficient, economical and fair process for the taking of evidence in international arbitration [IBA Rules, Foreword]. “Evidence” includes the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings [Ibid.]. The IBA Rules reflect procedures in use in different legal cultures [Ibid.]. According to a recent arbitration survey on soft law, the IBA Rules are highly relevant as a matter of international consensus, with 77% of survey respondents having used or seen it used in practice [2015 QMUL Arbitration Survey]. Commentators have noted that the IBA rules have had a considerable impact on the practice of taking evidence in international arbitration [Waincymer, p. 756]. Even where parties have not expressly adopted the IBA Rules, it is generally accepted that in international arbitration, the IBA Rules provide a useful point of reference for tribunals that are expected to develop their own *sui generis* procedure in accordance with international practice [Marghitola, p. 1]. Thus, the IBA Rules are used by tribunals and are seen as a “great contribution” [Schwarz/Konrad, p. 415], and the Tribunal may justifiably rely on the IBA Rules as evidence of international practice.
- 7 The IBA Rules reflect the harmonized principle shared among common law and civil law practitioners in international arbitration: limited document production is appropriate in international arbitration if the documents requested are of a narrow and specific requested

category, relevant to the case, and material to its outcome [*Ashford*, p. 7; *see below*, para. 27]. Further, expansive American style-discovery is generally considered inappropriate in international arbitration and requests should be carefully tailored to issues that are relevant and material to the determination of the case [*Ibid.*; *Born*, p. 810; *see below*, paras. 27 and 29].

- 8 Here, even though the Parties were unaware of the IBA Rules or their content at the time of drafting [*PO 2*, p. 60, para. 53], both the Equatoriana and Mediterraneo Code of Procedures contain provisions which are, in relation to their content, nearly identical to Articles 3 of the IBA Rules, which establishes the arbitral tribunal's authority to order a party "to produce documents" [*IBA Rules*, Art 3(10)].
- 9 Art 3(3) of the IBA Rules also explicitly contemplates the Tribunal requiring a party to disclose documents that are relevant to the case and material to the outcome (see below, para. 27. In the *Pressure Sensors* case, the tribunal recognized that some form of document production was necessary to achieve a level playing field between the parties [*Pressure Sensors Case (SCC)*, para. 177]. There, a buyer of sensor technology breached the confidentiality clause in its contract by copying the seller's source code [*Ibid.*, para. 168]. This breach enabled the buyer to gain an advantage in the pressure sensor market, but the seller could not quantify the losses it suffered [*Ibid.*, para. 170]. Importantly, the tribunal in *Pressure Sensors* held that document production was necessary because, "unless [the Buyer] produce[d] the sales documents there would be no way for [the Seller] to be able to quantify their losses" [*Ibid.*, para. 177]. The arbitrator/judge used the IBA Rules "to bridge the extremes and arrive at a set of rules that incorporate different approaches to this subject" [*Ibid.*]. This case is analogous to our case since the production of documents is relevant and material for CLAIMANT to quantify its losses (see below, **IV**). Consequently, the Tribunal should order RESPONDENT to produce the requested documents.
- 10 During the Parties' pre-contractual negotiations, RESPONDENT'S CEO agreed that RESPONDENT was interested in a "fast and informal dispute resolution process" with "no major costs involved" [*Exhibit C12*, p. 20]. These negotiations show that RESPONDENT also agreed limited document production was permissible.
- 11 By incorporating VIAC Rules and international practice, which both envision a limited form of document production, into the Arbitration Clause and agreeing to conduct any arbitration under the Contract in accordance with those rules and principles, the Parties agreed that a tribunal constituted pursuant to the Arbitration Clause would have the power to order

limited document production. As discussed below, although the Parties ruled out US style discovery, they did not ban document production altogether.

2. The discovery clause limits the Tribunal's power, but does not extinguish its power to order document production

- 12 The Parties are free to make special agreement clauses pursuant to UNCITRAL Article 19 as they did in this case. Under the Contract, the Parties made a special agreement that “no discovery shall be allowed” [*Exhibit C1, p. 9, Art. 20*]. This limitation on discovery narrows the Tribunal’s power to order document production but it does not extinguish it. As Commentator Born has suggested a discovery provision in a contract “often only begins debate about the scope of discovery that can be ordered” [*Born, p. 475*].
- 13 The Parties’ desire to adhere to the VIAC Rules and international practice (see above, paras. 5-6), which authorize the Tribunal to order document production, confirm that the Parties never intended to exclude document production as a whole; the most the Parties could have agreed to would be limiting this procedure. Taking the discovery clause to completely exclude document production without the Parties’ clear and unambiguous expression would be a misrepresentation of their intent as well as their party autonomy.
- 14 Here, the CISG governs the interpretation of the discovery clause, which does not equate to document production [a]. CLAIMANT intended for the discovery clause to exclude US-style discovery and RESPONDENT knew or could not have been unaware of this intent [b]. Even if RESPONDENT was unaware of this intention, a reasonable person would have been aware considering the relevant circumstances of the case [c].

a. The CISG governs the interpretation of the term “discovery” and discovery is different from document production.

- 15 Though generally the CISG is only applicable to the international sale of goods [*Art. 4 CISG*], in this case CISG governs the interpretation of the term “discovery”. The Parties have agreed that for all questions not regulated in the Danubian Arbitration Law, the CISG governs [*PO 2, p. 61, para. 63*]. Since the Danubian Arbitration Law is a verbatim adoption of the UNCITRAL Model Laws, which are silent on the issue of discovery, CISG governs the contract as a whole and the interpretation of the term “discovery”.
- 16 Under the CISG, interpretation should follow the intent of the parties. Here, the Parties intended “discovery” to refer to broad-based, fishing expeditions which are most commonly practiced in the United States. “Discovery” entails collecting all documents which could have some impact on the dispute [*Born, Chapter 9*]. The goal of discovery is to build a factual record and is not a specific way to establish claims [*Ibid.*]. The scope of discovery includes

the right to inspect and copy any documents which are relevant or may lead to relevant evidence [*US Federal Rules of Civil Procedure, Rule 34*].

- 17 Document production, on the contrary, does not equate to discovery. Document production is grounded in narrowly tailored requests for specific documents that are vital to the case. Commentators have suggested that US style discovery is not available in international arbitration, unless the parties have agreed to it [*Born, p. 485; Commentary on the IBA Rules, p. 152*]. Most scholars and practitioners only use the term “document production” and not “discovery” when discussing the power of the Tribunal in taking evidence in international arbitration [*Waincymer, p. 858*]. In fact, in international arbitration, the majority of scholars agree that while discovery proceedings are powerful fact-finding instruments, it will “slow down the procedure, lead to excessive costs” and will not be “in conformity with the presumed will of the parties” [*Kaufmann-Kobler, pp. 15-16*].

*b. CLAIMANT intended for the discovery clause to exclude US style discovery and
RESPONDENT knew or could not have been unaware of this intent*

- 18 Even if the Tribunal does not use the objective definition of “discovery”, it can understand discovery in light of the Parties’ intentions. According to CISG Article 8(1), “statements made by ... a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was” [*Art. 8(1) CISG*].
- 19 Both Parties explicitly expressed their intent through the language in the Contract that reflects their desire to exclude broad-based, US-style discovery. Due to RESPONDENT’S desire to avoid expensive, litigation-oriented discovery, the Parties chose to preclude US-style procedures that some practitioners attempt to import into practice. The discovery clause is preceded by a clause that captures this intent: “The proceedings shall be conducted in a fast and cost efficient way...” [*Exhibit C1, p.9, Art. 20*]. This explicit reference to speed and efficiency in the Contract reinforces the notion that discovery should be read in light of the Parties’ intent to exclude broad-based discovery based on these rationales.
- 20 The fact that the Parties chose to use the term “discovery” rather than “document production” further indicates their shared intent to prohibit US-style “discovery” rather than the type of document production that is common in international arbitration. By excluding discovery, the Parties were confirming that the arbitration would proceed in accordance with the principles of document production in international arbitration. Further, the Parties’ agreement to adhere to international practice shows their intent to exclude discovery as a US-centric practice. Moreover, the IBA Rules and VIAC Rules do not discuss discovery as a term, but do present views on the taking of evidence or document production.

- 21 Furthermore, RESPONDENT could not have been unaware that the aforementioned was CLAIMANT'S intent. RESPONDENT'S CEO even admitted that he understood the discovery clause to allow "requests for particular documents in very specific circumstances" [*Exhibit R1, p. 31*]. Thus, RESPONDENT should not be allowed to capitalize on the argument that they were unaware of the intent of the Parties in the discovery clause.
- 22 Further, pursuant to the canons for construing arbitration clauses, document exchange should not be excluded wholesale unless there is clear language to that effect. Unlike the Parties' express and unambiguous selection of the VIAC rules and their desire to adhere to international practice, the lack of express language on document exchange indicates that the Parties did not mean to exclude document exchange or production in its entirety. The burden of construing arbitration clauses is high and requires explicit, clear language that directly points to the intent of the Parties [*Born, p. 799*]. This principle underlying this points to the importance of a party's right to be heard in conducting proceedings and should guide the Tribunal in how to construe the discovery clause.

c. Even if RESPONDENT was unaware of CLAIMANT'S intention, a reasonable person would have been aware considering the relevant circumstances of the case.

- 23 When there is ambiguity between parties on the issue of interpreting intent, CISG Article 8(3) looks to the understanding a reasonable person would have had, giving due consideration to all relevant circumstances of the case, including the negotiations, any practices which the Parties have established between themselves, usages and any subsequent conduct of the Parties.
- 24 Here, negotiations between the two Parties demonstrate that discovery meant to only US-style discovery. RESPONDENT told CLAIMANT in a discussion during the contract drafting stage that it had recently been involved in litigation where the other party had asked for "large quantities of documents" [*Exhibit C12, p. 20*]. CLAIMANT reasonably believed that they were frustrated by the costs of this process and thus inferred that it was important to RESPONDENT that there should be "no major costs involved in dispute resolution" [*Id.*] Any reasonable party would interpret discovery that limits major costs to exclude US-style discovery, and the discovery clause should be read in light of these intentions.

B. The Tribunal should order RESPONDENT to produce documents.

- 25 CLAIMANT requests that the Tribunal order RESPONDENT to provide CLAIMANT with a narrowly tailored set of documents: all documents from the period of 1 January 2014 – 14 July 2015 pertaining to communications between RESPONDENT and SuperWines regarding the negotiations for and the purchase of diamond Mata Weltin 2014, including documents evidencing discussion of the number of bottles to be purchased and the purchase price [*SoC, p. 7, para 28*]. The IBA Rules reflect international practice and the Parties agreed to arbitrate in accordance with international practice; therefore, the IBA Rules should apply in substance (see above, para. 6). Pursuant to the IBA Rules Article 3(7)(i), the Tribunal may order a party to produce any requested documents that the requesting Party wishes to prove are relevant to the case and material to its outcome. The structure of the IBA Rules implies that the burden is on the requesting party to show these factors [*Waincymer, p. 858*].
- 26 The Tribunal should order RESPONDENT to produce the requested documents since the documents are relevant to the case and material to the outcome [1]. Further, such documents can be identified with reasonable specificity [2]. Finally, refusing the specifically requested documents would impair CLAIMANT’S opportunity to be heard [3].

1. The requested documents are relevant and material to determining the outcome of the dispute.

- 27 Relevance means that the document at issue should have some power to influence the substance or conduct of the case [*Waincymer, p. 859*]. Materiality is added as a further qualification to avoid wasteful duplication and the provision of unnecessary material [*Ibid.*]. If a document is material, it must be related to the claims and consideration must be given to the matters sought to be established by the document [*Ashford, p. 70*]. This means that the document “likely contributes to the clarification of the case” [*UNCITRAL Draft Guidelines, p. 17*]. Where a Tribunal is uncertain of the extent of the evidentiary record of both parties, it should err on the side of inclusion.
- 28 Here, the requested documents are relevant to the case and material to the outcome in that they contribute to CLAIMANT’S ability to calculate damages. Claimant is seeking documents related to the communications between SuperWines and Respondent that are relevant to determining the amount by which Respondent profited from selling to SuperWines. The requested documents about RESPONDENT’S negotiations with SuperWines are material in that they are the only documents available that demonstrate the amount Respondent profited in its relationship with SuperWines. In fact, CLAIMANT has no other way of determining its damages without this information since its damages include lost profits, which cannot be

properly calculated without fully understanding the business relationship between RESPONDENT and SuperWines (see below, **IV**).

2. The Tribunal should order RESPONDENT to produce the requested documents because they are sufficiently specific.

- 29 According to Article 3(3) of the IBA Rules, a request to produce documents should include a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist. Here, CLAIMANT requests documents limited to a specific relationship: between RESPONDENT and SuperWines. The documents are limited to a specific time frame: 1 January 2014 – 14 July 2015. They are further limited to a specific nature: documents relating to the negotiation of the said agreement. Moreover, CLAIMANT requests documents with proper justification: to calculate the damages it is claiming. The aforementioned results in a specifically tailored request for document production that differs from US, expansive, broad-ranging discovery.
- 30 Even RESPONDENT admits that they believed the discovery clause excluded the types of requests documents which go beyond “requests for particular documents in very specific circumstances” [*Exhibit R1, p. 31*]. The information that the CLAIMANT is asking RESPONDENT to produce does not go beyond particular documents. Documents requested pertaining to a narrow category are allowed under the IBA Rules and do not constitute the general discovery referred to by both parties

3. Refusing the specifically requested documents would impair CLAIMANT’S opportunity to be heard.

- 31 By not ordering RESPONDENT to produce documents, Tribunal will be depriving CLAIMANT of the opportunity to be heard, which is a fundamental principle in evidentiary law. If the CLAIMANT lacks documents indispensable to establish relevant facts for which it bears the burden of proof and such documents are demonstrably within the control of the RESPONDENT, a refusal to grant a production request will deprive the CLAIMANT from its opportunity to be heard. This would be contrary to the principle of procedural fairness enshrined in UNCITRAL Model Laws Article 18, VIAC Rules Article 28, and the Parties’ agreement that arbitration proceed in accordance with international practice.
- 32 In sum, the requested documents pertaining to the negotiations between SuperWines and the RESPONDENT are relevant and material to the outcome of the damages CLAIMANT seeks; further, they are sufficiently specific to meet the standards set out in international procedure. Denying CLAIMANT the opportunity to access such documents would be an infringement on CLAIMANT’S fundamental right to be heard [*SoC, p. 8*].

III. CLAIMANT IS ENTITLED TO RECOVER ITS LEGAL COSTS

- 33 The CISG defines damages as “loss, including loss of profit, suffered by the other part as a consequence of the breach” [Art. 74 CISG]. Article 74 reflects the principle of full compensation (*principe de la réparation intégrale*) which is, however, limited by the doctrines of foreseeability and mitigation [CISG AC, Op. 6, para 1.1]. Thus, the innocent party is to be fully compensated for all foreseeable loss it suffers as a result of the breach of contract provided that it adequately mitigates its losses. The Secretariat Commentary on the 1978 Draft of the Convention – the closest document to an Official Commentary on the CISG – makes clear that “the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed” [Secretariat Commentary, Art 70, para. 3].
- 34 Litigations costs constitute loss for the purposes of the CISG Article 74 because they are *incidental loss* [A]. The costs CLAIMANT incurred in applying for an interim injunction constitute incidental loss suffered as a consequence of the RESPONDENT’S breach of contract [B]. Similarly, the costs CLAIMANT incurred in defending RESPONDENT’S application for declaratory relief in breach of the Arbitration Clause are also recoverable losses [C]. CLAIMANT paid USD 50.280 in legal costs and the entire quantum is recoverable because the retention of a lawyer on a contingency fee basis was both reasonable and foreseeable [D]. In the alternative, the costs are recoverable under the procedural rules of the VIAC [E].

A. Litigation costs constitute loss for the purposes of Article 74

- 35 CLAIMANT’S legal costs are recoverable as incidental loss pursuant to Article 74 CISG, which provides that loss suffered as a consequence of a breach of contract is recoverable. The CLAIMANT’S legal costs constitute *incidental loss*, which are “expenses ... incurred in order to avoid any additional disadvantages” [Schwenzer, p. 1009]. The award of such expenses is supported by academic commentary, case law and principle.
- 36 Even though the recoverability of incidental loss is not explicitly mentioned in Article 74, “[i]n view of the principle of full compensation ... it is beyond debate” [Ibid.]. Thus, “[t]he aggrieved party is entitled to additional costs reasonably incurred as a result of the breach and of measures taken to mitigate the loss” [CISG AC, Op. 6, para 4]. This approach is also reflected in the case law. For instance, the German Bundesgerichtshof held that the costs of ascertaining, avoiding and mitigating damage are recoverable pursuant to Article 74 [BGH (DE), 25 June 1997]. Finally, the recoverability of such expenses is also dictated as a matter of principle. Pursuant to Article 77 CISG, the innocent party is under an obligation to take reasonable steps to mitigate its losses. If it fails to do so, “the party in breach may claim a

reduction in the damages in the amount by which the loss should have been mitigated” [*Art 77 CISG*]. It would thus be incoherent - and wrong as a matter of principle - to effectively leave the innocent party out of pocket for the expenses it incurred in complying with its duty to mitigate further losses.

- 37 CLAIMANT’S legal costs are incidental losses it suffered in its effort to mitigate losses as required by Article 77 CISG and their recoverability is therefore inextricably linked to the duty to mitigate. CLAIMANT’S pursuit of an interim injunction to maintain the status quo and prevent further loss, and its defense against RESPONDENT’S action for declaratory relief, an action which was in breach of the Contract’s Arbitration Clause, were reasonable measures taken to mitigate CLAIMANT’S loss. It follows that CLAIMANT’S costs are recoverable because they were the result of reasonable actions taken to avoid and mitigate its loss.
- 38 CLAIMANT recognizes that there exist cases which deny the recoverability of certain legal costs under the CISG. However, those cases are readily distinguishable from the facts of the present case. The *Zapata* case illustrates this point. A Mexican seller brought an action in a US Federal District Court against an American buyer and recovered damages for the buyer’s breach of contract. The seller also argued that this award of damages should include a reimbursement for its attorney’s fees. However, the United States does not have a so-called “loser pays” rule: each party covers its own costs. The US Court of Appeals (7th Cir.) reversed this decision and held that “[t]he Convention is about contracts, not about procedure” and the rules on allocating litigation costs “are usually not a part of a substantive body of law, such as contract law, but a part of procedural law” [*Zapata (US)*, p 388].
- 39 In arriving at this conclusion, the Court made no reference at all to CISG jurisprudence. Furthermore, the CISG Advisory Council has noted that the substance-procedure distinction is “outdated and unproductive” [*CISG AC Op. 6, para. 5.2*]. Regardless of the merits of the *Zapata* decision, however, its facts are very different from the present case. In *Zapata*, the claimant sought to recover the attorneys’ fees it incurred in the *Zapata* proceeding itself, but in the present case, CLAIMANT is seeking to recover the costs it incurred in separate actions that were the direct result of RESPONDENT’S breach of contract. CLAIMANT is not seeking the attorneys’ fees it is incurring in the proceeding before the Tribunal.
- 40 In other words, the court in *Zapata*, as the HCM in its order of 8 December 2014 [*Exhibit C8, p. 16*] and declaration of 30 January 2015 [*Exhibit C9, p. 17*], was addressing the award of *procedural costs* – i.e. the costs of the proceedings happening before it. The Tribunal is confronted with a different issue. The decisive difference is that in *Zapata*, as in other similar

cases addressing attorneys' fees under Art. 74, the innocent party sought reimbursement of legal fees incurred in the court proceedings themselves, i.e. *procedural costs*. In the present case, CLAIMANT seeks reimbursement of legal fees incurred in the separate court proceedings, not for those incurred during the arbitration, i.e. *incidental losses*.

- 41 The *Zapata* court recognized this distinction when it opined that “certain pre-litigation legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as ‘incidental’ damages” [*Zapata (US)* p. 388]. “[P]re-litigation legal expenditures” covers proceedings that occurred before the arbitration, such as the costs CLAIMANT’S incurred to mitigate its loss. As such, they constitute recoverable incidental loss.
- 42 Similarly, the Swiss Commercial Court Aargau at least implicitly recognized this distinction in the *Garments* case [*HG Aargau (CH)*, 12 December 1997]. The claimant, a German seller of garments, sued the defendant for the purchase price. When the defendant did not pay, the claimant retained a German lawyer who sent the defendants a late payments?? notice. Subsequently, the claimant instructed a Swiss lawyer who filed an action in the Swiss court regarding the same dispute. The Swiss court found that the costs the claimant incurred in instructing the German lawyer were recoverable under Article 74 CISG. By contrast, the costs of the Swiss attorney were awarded under Swiss procedural law. The cost of retaining the German attorney in a separate proceeding was recoverable as incidental loss, as distinguished from the cost of retaining the Swiss attorney in the proceeding before the Swiss court, which was a procedural cost governed by Swiss procedural law.
- 43 Accordingly, the question of whether the legal costs constitute incidental loss is not *res judicata* simply because the HCM ruled on the award of *procedural costs* [*Exhibits C9, C10*]. The question before the Tribunal is a crucially different one: can costs for *previous* legal actions now be awarded as *damages* in a subsequent action under Article 74 CISG? Costs and damages are not synonymous; they are not calculated in the same manner and they call for differing evaluations. Yet, they are related to the extent that the former may at least form part of the latter.
- 44 Thus, the Tribunal is not re-addressing the issues to which the HCM had cast its mind. The current dispute is contractual in nature and arises from the legal framework provided by the CISG insofar as it pertains to the interpretation of Article 74. The HCM, in fact, explicitly ruled that it lacked jurisdiction to resolve the contractual dispute due to the existence of the Arbitration Clause [*Exhibit C9, p. 17*]. Therefore, the Tribunal is not called upon to upset or

review the finding of the HCM, but rather to include those costs in assessing the incidental loss suffered by the innocent party, CLAIMANT.

B. The costs of seeking the interim injunction are recoverable.

45 Pursuant to Art. 30 CISG, “the seller must deliver the goods”. It is indisputable that RESPONDENT breached its Contract with CLAIMANT by failing to sell and deliver to CLAIMANT 10.000 bottles of Mata Weltin as required under the Contract [PO 1, p. 50, para. 4]. When a seller breaches its obligations, the buyer may claim damages as provided in Articles 74 to 77 [Art. 45(1)(b) CISG]. CLAIMANT’S costs in seeking injunctive relief to prevent RESPONDENT from dissipating its assets constitute loss [1]. The application for an interim injunction was an exercise of CLAIMANT’S duty to mitigate [2], and the costs incurred were foreseeable [3]. It follows that CLAIMANT’S legal costs are recoverable.

1. CLAIMANT’S costs in seeking injunction constitute loss suffered as a consequence of RESPONDENT’S breach.

46 In light of RESPONDENT’S stipulated breach of the Contract, CLAIMANT was forced to seek an injunction to maintain the status quo pending the resolution of the Parties’ dispute. The costs CLAIMANT incurred in seeking injunctive relief are thus incidental loss caused by RESPONDENT’S breach.

47 Danubia, Mediterraneo and Equatoriana have adopted the UNCITRAL Model Law [PO 1, p. 51, para 5(3); PO 2, p. 61, para. 58]. Article 17J of the UNCITRAL Model Law provides that a court shall have the power to issue interim measures in relation to arbitration proceedings. This provision was added in 2006 “to put it beyond doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that a party to such an arbitration agreement is free to approach the court with a request to order interim measures” [UNCITRAL Model Law Case Digest 2012, p. 94]. An interim injunction is granted to “[m]aintain or restore the status quo pending determination of the dispute” [Art. 17 UNCITRAL Model Law (2006)].

48 Article 17A UNCITRAL Model Law (2006) lays down the conditions under which an interim measure may be granted: (a) the harm likely to result to the claimant must substantially outweigh the harm that is likely to result to the respondent, and (b) there is a reasonable possibility of success on the merits. Because the arbitration proceeds on the assumption RESPONDENT breached the contract, Article 17A(b) is not at issue. The *travaux préparatoires* suggest that the degree of harm suffered by the application if the interim measure was not granted should be balanced against the degree of harm suffered by the respondent if the measure was granted [A/CN.9/WG.II/WP.138, para. 16].

- 49 With both its ability to meet client demands for this vintage of wine and stellar reputation on the line, the potential harm to CLAIMANT substantially outweighed the harm that could be suffered by RESPONDENT. Contract by applying for an interim injunction in order to protect its interests and its reputation. CLAIMANT'S business model, which was built on the foundation of its excellent reputation, was the very reason the Parties entered into the Contract, a fact of which RESPONDENT was well aware [PO 2, p. 60, para. 52]. CLAIMANT was facing not just pecuniary liability to its customers, but was also irreparable damage to its reputation, which it had built up over years with its high-end customers.
- 50 On the other hand, any potential harm to RESPONDENT resulting from the interim injunction was of RESPONDENT'S own making. RESPONDENT could have satisfied SuperWines' and CLAIMANT'S orders if it had delivered fewer bottles to customers with whom it had not entered any contracts before 1 December 2014. Equally, taking into account the subsequent contracts, it would have been able to satisfy CLAIMANT'S orders and those of all of its other customers if it had not sold to SuperWines [PO 2, pp. 56-57, para. 27]. If RESPONDENT had complied with its contractual obligations rather than breached them willfully, CLAIMANT would not have been forced to bring an action for an interim injunction.
- 51 The Auckland High Court held that the purpose of court-ordered interim measures is to complement and facilitate the arbitration, not to forestall or to substitute for it [*Sensation Yachts (NZ)*]. Here, the purpose of the injunction was to prevent a dissipation of assets by RESPONDENT. Its purpose was therefore to facilitate the arbitration. This can be sharply contrasted to the purpose of RESPONDENT'S application for a declaration of non-liability which flouted the proceedings by breaching the Arbitration Clause (see below, paras. 73-75).
- 52 In consequence, the costs of obtaining the injunction constitute incidental loss recoverable pursuant to Article 74 CISG. The only reason CLAIMANT was forced to seek interim relief is that RESPONDENT willfully breached its Contract with CLAIMANT, thereby jeopardizing CLAIMANT'S reputation and its ability to fulfill its own contracts with its customers. The costs of obtaining the interim injunction resulted directly from RESPONDENT'S breach of contract and because they represent the costs incurred in a separate legal proceeding, they are incidental loss rather than procedural costs (see above, paras. 35-44).
- 53 Similar to the claimant in the *Garments* case (see above, para. 42), CLAIMANT is entitled to recover the legal costs it incurred in a separate legal proceeding that was the direct result of RESPONDENT'S breach. In the *Garments* case, the Swiss court held that damages include the costs of an appropriate pursuit of legal rights to the extent that the breach of contract

justified such a pursuit [*HG Aargau (CH)*, 12 December 1997, para. 3b]. CLAIMANT'S application for interim relief was just such "an appropriate pursuit of legal rights" justified in the face of RESPONDENT'S willful breach of contract. CLAIMANT is therefore entitled to recover the costs it incurred in the proceeding for injunctive relief under Article 74 CISG.

- 54 Moreover, a line of cases on debt collection is highly instructive because they, as the injunction in this case, pertain to the enforcement of a primary legal obligation arising under the contract. The application for an interim injunction is analogous a debt collection by a lawyer. Unpaid *sellers* resort to engaging a lawyer to collect the *buyer's* debt. Such sellers are enforcing a buyer's primary obligation to pay. The buyer's primary obligation is to pay the contract price [*Art. 53 CISG*]; the seller's primary obligation is to deliver the goods [*Art. 30 CISG*]. Once either party breaches its primary obligations, it comes under a secondary obligation to pay damages [*Arts. 45(b), 61(b) CISG*]. Such obligations are secondary because they only arise in the event of a breach of a primary obligation.
- 55 An injunction enforces a primary obligation: the court orders the defendant to do what the defendant was under a contractual obligation to do regardless of the court order. The injunction is thus the buyer's analogue of the seller's debt collection. When the seller enforces the buyer's obligation to pay, the buyer is only fulfilling a primary obligation the buyer had regardless of its breach (failure to pay). Similarly, the seller is under an obligation to deliver. When the buyer enforces this obligation, the seller is merely fulfilling an obligation it had regardless of its breach (failure to deliver). This parallel between debt collection and injunctions – both of which enforce primary obligations – is all the more important in light of the general principle of equality or reciprocity between the parties embodied in the CISG.
- 56 Consequently, case law on debt collection is directly in point. The costs of a reminder letter sent by an attorney to collect a debt have been held to be recoverable under Article 74 CISG by [*LG Berlin (DE)*, 21 March 2003; *OLG Düsseldorf*, 11 July 1996]. This was also the approach taken by German courts under the CISG's predecessor, the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) [*LG Essen (DE)*, 10 June 1980; *LG Konstanz (DE)*, 3 June 1983].
- 57 Debt collection in these cases, similarly to the sending of the late notice by the German lawyer in the *Garments* notice, was aimed at pursuing the innocent party's legal rights arising under an international contract of sale. On the facts of this case, CLAIMANT was similarly protecting its legal rights because there was a real risk of dissipation of assets by

RESPONDENT, who was about to dispose of the wine elsewhere in the absence of the interim injunction.

2. The interim injunction was an exercise of CLAIMANT'S duty to mitigate

- 58 According to Article 77 CISG, damages are reduced “in the amount by which the loss should have been mitigated.” CLAIMANT was thus under an obligation to mitigate its loss and sought the interim injunction to prevent RESPONDENT from dissipating its assets in pursuit of this obligation. It is uncontroversial that defaulting sellers are liable for consequential losses suffered by buyers. Very often, these “include the promisee’s liability to third parties as a result of the breach” [*Schwenzer, p. 1012*]. RESPONDENT would thus have been liable to compensate CLAIMANT for CLAIMANT’S liability to its customers had CLAIMANT not mitigated its loss by, among other things, seeking the interim injunction.
- 59 In a 1996 case, a German court held a seller liable to the buyer for the buyer’s losses suffered due to its own liability to a sub-buyer. Both parties were car dealers and such loss was hence foreseeable and recoverable [*OLG Köln, 21 May 1996*]. Here, as in that case, CLAIMANT stood to be liable to its customers as a result of RESPONDENT’S breach of contract. Obtaining an interim injunction mitigated CLAIMANT’S liability to its customers and by extension, RESPONDENT’S liability for those damages. CLAIMANT’S high-end customers were the very reason the Parties entered into the Contract (see above, paras. 35-44). Such losses could only have been prevented by seeking an interim injunction.
- 60 Failing to obtaining an interim injunction would have resulted in RESPONDENT’S liability for non-delivered wine to CLAIMANT’S customers. However, had CLAIMANT failed to seek the interim injunction, such loss would not have been recoverable because of Article 77 as such a failure would have amounted to a failure to mitigate. Thus, CLAIMANT was faced with a Catch-22 situation: incur costs in obtaining a preliminary injunction fulfilling its obligation to mitigate loss, or, suffer irrecoverable losses from breaching its own legal obligations to its customers whilst RESPONDENT dissipated its assets by failing to mitigate.
- 61 With 10.000 bottles of wine at stake, all of which are worth between EUR 90-100 [*PO 2, p. 55, para. 14*], it is clear that the reasonable course of action was to incur legal costs. They amounted to about 5% of the wines’ value (USD 50.280 as compared to roughly EUR 1.000.000). Unless CLAIMANT can recover costs of obtaining an injunction, the Tribunal would condemn CLAIMANT to have suffered financial harm in *either* case.
- 62 CLAIMANT sought the interim injunction to comply with its obligations under Article 77 and this was a reasonable step in light of the circumstances of the case, including the cost

difference between CLAIMANT’S legal costs and the value of the wines. CLAIMANT is therefore entitled to recover these costs.

3. The costs incurred were foreseeable.

- 63 Legal costs are a foreseeable consequence of any breach of contract; it is therefore difficult to limit such costs on foreseeability grounds [*Vanto*, p. 217]. A contract of sale is bilateral and reciprocal [*Butler*, p. 2]. This means that the innocent party’s right to be paid or have the goods delivered is the flipside of the guilty party’s obligation to pay or deliver the goods. Thus, where a contract is governed by the CISG, a party committing a breach ought to have foreseen that the other party would incur attorneys’ fees in pursuing its rights under the CISG [*Felemengas*, pp. 124-5].
- 64 An ICC arbitration case reinforces this point. The claimant in that case was awarded, *inter alia*, damages for storage, care and maintenance of certain non-delivered machinery as well as legal costs and costs of the arbitration. These costs were held to be “*usual* in situations of avoidance of a contract for breach of one party. They should therefore be considered as *foreseeable* [for the purposes of Article 74]” [*ICC Paris, 7585/1992 (emphasis added)*].
- 65 Legal representation is mandatory under the laws of Mediterraneo [*PO 2*, p. 58, para. 39]. Claimant sought interim relief from the courts in Respondent state as the most effective means to maintain the status quo, because no arbitral tribunal had yet been appointed [*PO 2*, p. 59, para 46]. Furthermore, because the interim injunction was urgent and necessary to stop RESPONDENT dissipating its assets and entering further contractual arrangements, CLAIMANT had no choice but to incur the costs of legal representation (see below, para. 84). In these circumstances, the costs incurred in retaining lawyers were plainly foreseeable and indeed unavoidable given RESPONDENT’S breach.

C. The costs of defending RESPONDENT’S application for declaratory relief are recoverable.

- 66 On 30 January 2015, RESPONDENT sought declaratory relief from HCM, seeking that court to rule that the contract had been validly terminated or RESPONDENT would at least be excused from having to deliver more than 4.500 bottles. This was essentially an application for the court to resolve the merits of the present dispute, as the court recognized when it dismissed RESPONDENT’S application because it violated the Arbitration Clause of the Contract [*Exhibit C9*, p. 17]. The costs of defending RESPONDENT’S application for declaratory relief are recoverable because they constitute loss suffered by CLAIMANT as a consequence of RESPONDENT’S breach of its legal obligations under the Arbitration Clause.

“It cannot be right that parties can ignore the existence of a freely negotiated exclusive jurisdiction clause and expect to get away with it” [*Tham*, p. 70].

- 67 As a preliminary matter, CLAIMANT notes that the question as to whether the CISG applies generally to arbitration clauses is not in issue: the Tribunal is concerned with whether an existing damages claim *in principle* covers the various heads of damages claimed, including damages arising out of RESPONDENT’S breach of the Arbitration Clause [*PO 1*, p. 50, para. 4]. Therefore, issues surrounding how the CISG might relate to the substantive and formal validity, arbitrability, capacity and authority of the clause itself are of no concern.
- 68 The costs of defending RESPONDENT’S application for declaratory relief are recoverable because they constitute loss suffered by CLAIMANT as a consequence of RESPONDENT’S flouting its obligations under the Arbitration Clause of the Contract. Arbitration clauses, like forum selection clauses, are part of the general contract [*Kröll*, p43] and breach of an arbitration clause, like any breach of contract, gives rise to damages. There is nothing in the CISG which prevents damages being claimed for losses suffered through costs in the non-contractual forum, nor are there any policy or comity reasons why such a claim cannot be made [*Merrett; Schmidt-Abrendts 2011*].
- 69 In this respect, the issue is governed by the CISG [*Walker; Filanto case (US); Chateau des Charmes Wines case (US)*]. The right to claim damages under CISG Article 45(1)(b) is an appropriate remedy where a party breaches a duty to participate in arbitration [*Koch*, p. 285]. Debate over whether that is the case has arisen in terms of the formal requirement under Article 7(2) of UNCITRAL Model Law of a written contract for valid arbitration agreements and Article 11 of CISG, which essentially frees parties from all formalities [*Walker*]. Even in that case, the majority of legal writers agree that CISG applies to arbitration agreements [*Koch*, p. 271, fn. 14]. The ambiguity does not arise here, where the arbitration clause was in writing.

1. RESPONDENT breached the Arbitration Clause

- 70 In the Contract, CLAIMANT and RESPONDENT agreed to arbitrate “all disputes” [*Exhibit C1, Art. 20*]. Parties who agree to arbitration give up their right of recourse to the courts of law [*Blackaby et al, para. 1.47*]. RESPONDENT breached its agreement to arbitrate by seeking declaratory relief from HCM to adjudicate the merits of the Parties’ dispute. RESPONDENT’S desire to seek a declaration of non-liability – i.e. that the contract had been validly terminated or RESPONDENT would at least be excused from having to deliver more than 4,500 bottles – is the type of dispute governed by the Arbitration Clause. [*Answer to SoC, p. 27, para 20*]. The

resolution of such disputes is the very object of the Arbitration Clause it agreed upon with CLAIMANT. In order to comply with its obligation to arbitrate, RESPONDENT should have sought relief in arbitration rather than litigation.

- 71 RESPONDENT alleges that the Arbitration Clause's designation of VIAC rules caused uncertainty as to the designation of the institution, because the Model Arbitration Clause was not used. It is clear, however, that this was a minor error in the Contract and that RESPONDENT was cognizant of this [*Exhibit R2, p. 33*]. Had RESPONDENT been genuinely concerned with the Arbitration Clause, the reasonable step would have been to consult with CLAIMANT or to initiate arbitration proceedings and request the Tribunal to rule on the matter of its jurisdiction as is common under the principle of *Kompetenz-Kompetenz* [*Blackaby et al, para. 1.54*]. It was not reasonable, even giving RESPONDENT the benefit of the doubt regarding its alleged confusion, for RESPONDENT to disregard the Arbitration Clause altogether and to institute litigation proceedings instead.
- 72 Alternatively, RESPONDENT should have asked HCM to rule on the validity of the Arbitration Clause. Indeed, it appears that RESPONDENT attempted to conceal the existence of the Arbitration Clause from the HCM, at least in its initial filings, as the existence of the Arbitration Clause was only referenced in a letter to CLAIMANT on 14 January 2015, which was *after* the RESPONDENT had filed its application for a declaration of non-liability in the first week of January [*Answer to SoC, p. X, paras. 20-21*]. It was CLAIMANT who then raised the existence of the arbitration before HCM in order to have the declaration refused. In light of RESPONDENT'S emphasis that there be an arbitration clause [*Exhibit C12, p. 20*], its violation of the obligation to arbitrate is a violation of the Contract itself and the obligation to adhere to the terms of the Contract in good faith (*Art. 7 CISG*).
- 73 There is an important difference between CLAIMANT'S application for an interim injunction on 8 December 2014, which was intended to maintain the status quo, and RESPONDENT'S request for a declaration of non-liability on 30 January 2015, which was essentially a request for a resolution of the Parties' dispute on the merits. At its core, this is a distinction between temporality and finality.
- 74 CLAIMANT sought *interim* injunctive relief to maintain the "status quo" by preventing RESPONDENT from breaching the Contract and thereby preventing irreparable damage to CLAIMANT'S business pending the resolution of the Parties' dispute through arbitration (see above, para. 46-51). CLAIMANT thus sought temporary relief to facilitate the arbitration. As the Auckland High Court, among others, has held, the purpose of court-ordered interim

measures is to complement and facilitate the arbitration, not to forestall or to substitute for it [*Sensation Yachts (NZ)*]. This is precisely the goal CLAIMANT sought to achieve in seeking interim injunctive relief and its purpose was therefore in compliance with and in furtherance of the Arbitration Clause.

- 75 This stands in sharp contrast to the purpose of RESPONDENT’S application for a declaration of non-liability, which breached the Arbitration Clause by seeking final resolution of the dispute on the merits. Respondent sought to dispense with the merits of a claim once and for all. Unlike CLAIMANT’S request for an interim injunction, RESPONDENT did not apply to the HCM with an eye to preserving the sanctity of the Arbitration Clause, but rather with an eye to undermining it. Had CLAIMANT not incurred the costs in defending against RESPONDENT’S action for declaratory relief, the effective power of the Arbitral Tribunal to decide on the present dispute would have been destroyed.
- 76 To the extent that there is any controversy regarding the recovery of damages based on the breach of an arbitration clause, those argument are largely based on an analogy to the consequences of a breach of a choice-of-law clause [*Sievi, p. 59*]. This analogy, however, is inaccurate because choice-of-law clauses are directed at the arbiter rather than the parties and requires the arbiter to apply a certain substantive law. On the other hand, arbitration and forum selection clauses are analogous in that both are private agreements purporting to preclude recourse to certain fora [*Tan, p. 630*] Arbitration clauses speak to the Parties and when there is a breach of an arbitration clause, it is the result solely of the action of a party, through the filing of a claim in a court [*Tan, p. 650*]. The distinction comes down to the significance of party action.

2. CLAIMANT is entitled to be compensated for RESPONDENT’S breach of the Arbitration Clause in the same manner as any other breach of contract

- 77 Breach of an arbitration agreement contained in a contract is *a fortiori* a breach of the contract and ought therefore to warrant the same remedies as an ordinary breach of contract [*Jager, p. 156*]. Attorneys’ fees incurred in separate legal actions that were the direct result of a party’s breach of contract are recoverable as damages under Article 74 (see above, para. 35-44). Consequently, CLAIMANT is entitled to recover the legal costs it incurred in defending against RESPONDENT’S breach of the Arbitration Clause.
- 78 Article 7(2) CISG provides that “[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

- 79 The practice of court and tribunals in many jurisdictions, as well as academic commentary, evinces that awarding damages for the breach of an arbitration clause conforms to both the general principles on which CISG is based as well as the rules of private international law. The principle underlying this is *pacta sunt servanda*: the Arbitration Clause amounts to a contractual promise and by seeking a declaration of non-liability, RESPONDENT failed to comply with that contractual promise [*Sievi*, p. 58]. Indeed it would lead to an anomaly if courts did not award damages for the breach of an arbitration agreement given that they ordinarily grant damages for breaches of contractual clauses. The onus is therefore on RESPONDENT to convince the Tribunal why damages should not be awarded for this breach [*Tan*, p. 637]. As RESPONDENT cannot meet this burden, CLAIMANT is entitled to recover the costs it incurred in defending against RESPONDENT’S breach of the Arbitration Clause.
- 80 The leading decision in the United Kingdom is instructive for present purposes. The UK court held that, where a party brings a suit in a foreign jurisdiction in breach of contract, “justice requires that he [the non-breaching party] should receive the damages which he has suffered by reason of the breach” [*Union Discount case (UK)*]. The damages recovered were litigation costs incurred in defending proceedings, brought in breach of an arbitration clause, in a New York court. The latter court, as HCM did in our case, had awarded costs in line with the ‘American rule’ that each party bears its own costs. As one commentator opines, “[t]here is an intuitive rightness” about this decision [*Briggs*, p. 452].
- 81 Moreover, CLAIMANT was under an obligation to mitigate its damages under Article 77 of the CISG (see above, para. 58-62) and defending against RESPONDENT’S proceeding for declaratory relief was a mitigative measure. As Rosell notes, “[i]f the party seeking monetary relief has done nothing to challenge the court proceeding, the arbitration CLAIMANT exposes itself to the argument that it has failed to mitigate its damages” [*Rosell*, p. 124]. As argued above, the innocent party should be compensated by the guilty party for the costs incurred in mitigating possible losses (see above, paras 58-60).
- 82 Finally, the legal costs CLAIMANT incurred in defending against RESPONDENT’S action for declaratory relief are recoverable because they were foreseeable and reasonable. In fact, there can be no question as to the foreseeability of these legal costs. RESPONDENT must have foreseen that its baseless application for declaratory relief, which constituted a breach of the Arbitration Clause, would force CLAIMANT to incur legal expenses in defending against RESPONDENT’S breach. CLAIMANT had no choice but to defend the proceedings because of the very nature of a declaratory judgment on the merits, which would have constituted a final resolution of the present dispute. Even if this were not the case, as RESPONDENT knows,

CLAIMANT is a limited liability company (“Kaihari Waina Ltd”), and so it also had a duty to its shareholders to defend the litigation. Importantly, RESPONDENT cannot claim that it could not have foreseen CLAIMANT’S costs incurred for obtaining legal representation, because the court in which RESPONDENT chose to pursue its claim imposes mandatory representation of each party by a lawyer [PO 2, p. 58, para. 39]. RESPONDENT has made its bed; it now has to lie in it.

D. Finally, the entire quantum of damages is recoverable

- 83 Claimant’s retention of a lawyer *on a contingency fee basis* was reasonable and foreseeable, and as such, the entire quantum of Claimant’s legal costs is recoverable.
- 84 It was reasonable and foreseeable that CLAIMANT would obtain legal representation. In fact, under the law of Mediterraneo, it was compulsory for CLAIMANT to retain legal representation [PO 2, p. 58, para. 40]. Confronted with RESPONDENT’S breach, CLAIMANT had to protect its interests under the Contract by seeking of an interim injunction in Mediterraneo, RESPONDENT’S place of business. Similarly, CLAIMANT had to defend against RESPONDENT’S baseless application for declaratory relief so as to mitigate its losses. Because the laws of Mediterraneo provide that retaining a lawyer in both instances was mandatory, CLAIMANT had no choice but to retain a lawyer.
- 85 Given that Claimant had to retain a lawyer, it was both reasonable and foreseeable that Claimant would enter into a contingency fee arrangement. As RESPONDENT is aware, CLAIMANT is merely a mid-sized Equatorianean business. It did not have sufficient liquid capital at its disposal to pay Mediterranean legal fees, which are high compared to Equatorianean legal fees [SoC, p. 5, para. 13] The contingency fee arrangement was foreseeable because the retention of a lawyer was unavoidable and CLAIMANT’S financial situation gave it no choice but to engage attorneys on a contingency fee basis.
- 86 Conditional and contingency fee arrangements are permitted under Danubian and Mediterranean law. The Arbitration Clause provides that the Contract is governed by the law of Danubia [Exhibit 1, Art. 20]. Thus, CLAIMANT had the right under the law applicable to the Contract to retain a lawyer on a contingency fee basis. Mediterraneo, in which the actions were heard, also allows contingency fee arrangements. Indeed, in Mediterraneo, “contingency fees are fairly common” [PO 2, p. 58, para. 40]. As a Mediterraneo company, RESPONDENT knows this and cannot claim that it was unforeseeable or unreasonable for CLAIMANT to hire lawyers on a contingency fee basis.

- 87 The contingency fee pales in comparison to the monetary value of the claim. The delivery of 10.000 bottles of wine was at stake. The price per bottle was EUR 41,50. Thus, the merchandise that RESPONDENT was under an obligation to deliver had a total value of EUR 415.000. Moreover, diamond Mata Weltin was selling for EUR 90-100 per bottle [PO 2, p. 55, para. 14]. Thus, the loss of profits would have been enormous, EUR 485.000-585.000. In light of the loss the CLAIMANT was facing, the contingency fee of USD 45.000 was reasonable and proportionate.
- 88 Moreover, LawFix, CLAIMANT’S counsel, was the only firm willing to agree to contingency-fee based remuneration, which was the only way CLAIMANT could afford legal representation; two other firms in Mediterraneo were not willing to work on this basis [PO, p. 58, para. 39]. Even if, as RESPONDENT alleges, the quantum of the contingency fee was higher than other firms’, LawFix was the only firm CLAIMANT could hire and compared to the amount in controversy of almost half a million euro, USD 45.000 for legal representation is both reasonable and foreseeable. CLAIMANT is thus entitled to the entire quantum of damages it seeks.

E. Alternatively, legal costs are recoverable pursuant to the VIAC.

- 89 If the recovery of legal costs is a matter for the procedural rules of the forum, Article 44 VIAC, which deals with “Composition and calculation of procedural costs”, provides that procedural costs are comprised of, inter alia, “the party’s costs, i.e. the reasonable expenses of the parties for their legal representation” [Art. 44.1.2 VIAC] and “other expenses related to the arbitration, in particular those listed in Article 43 paragraph 1” [Art. 44.1.3 VIAC]. CLAIMANT’S legal costs constitute procedural costs within the meaning of Article 44 and are therefore within the category of costs the Tribunal may award under the VIAC Rules. The Tribunal has wide discretion to award costs as damages [1] and should use this discretion to compensate CLAIMANT for the legal costs it incurred as a result of RESPONDENT’S breaches of the Contract in bad faith [2]. Furthermore, these costs were both reasonable and foreseeable [3].

1. The Tribunal has wide discretion to award costs as damages

- 90 Whilst VIAC Articles 43 and 44 address advances on costs in the arbitration rather than awards of costs incurred in separate proceedings following the Tribunal’s decision on the merits, the VIAC Rules recognize in these provisions the principle that legal costs are generally recoverable. The Tribunal has wide discretion in awarding damages and the Tribunal should exercise this discretion to award CLAIMANT the costs it incurred as a direct result of RESPONDENT’S unlawful actions. Most institutional rules tend to provide general

directions on the apportionment of costs, but they rarely give much guidance as to how they should be assessed or allocated [Rosell, pp. 114-15]. A recent ICC Report concludes that “various institutional rules and guidelines ... provide that the tribunal may also take into account the conduct of the parties” [ICC Report, p. 24]. For example, Article 37.5 of the 2012 ICC Rules empowers a tribunal to consider pre-arbitral behavior. The Report explicitly mentions that “parallel court proceedings in breach of an arbitration agreement” are a relevant consideration [Ibid., p. 25].

2. RESPONDENT’S bad faith justifies the Tribunal’s exercise of discretion to order compensation for Claimant’s legal costs

- 91 By starting court proceedings in the Courts of Mediterraneo seeking a declaration of non-liability, RESPONDENT acted in bad faith in breach of the Arbitration Clause. This led to a significant increase in the ‘arbitration costs’ incurred by CLAIMANT. In Danubia, the law of which generally governs this dispute [Exhibit C1, Art. 20, p. 9], costs are normally allocated on the basis of the outcome of the case, i.e. “costs follow the event” [PO 2, p. 59, para. 43]. This stands in distinction to the each-part-bears-its-own costs rule in Mediterraneo. Therefore, had RESPONDENT not forced CLAIMANT to retain lawyers in Mediterraneo by twice breaching the Framework Agreement, CLAIMANT would not have borne the cost of retaining lawyers.
- 92 An award of costs against RESPONDENT should be used as a method of sanctioning its bad faith. A costs order is commonly recognized as one of the few means a tribunal has to discourage and punish a party’s wasteful procedural tactics during an arbitration. [Blackaby et al, para 9.96] Here, the Tribunal should utilize the costs order under Article 44 VIAC to penalize RESPONDENT for its flouting of the Arbitration Clause.
- 93 There have been a number of judgments under ICSID on the issue of costs and it is submitted that these are persuasive, albeit not binding. Under ICSID, unlike the practice under UNCITRAL and in Danubia, it is common practice in arbitrations for the parties to bear their own costs. However, in spite of this common practice, tribunals regularly take into account factors such as bad faith or abuse of process in the allocation of costs. ICSID tribunals have taken in account procedural bad faith in the award of damages; one example is the *Liberian Eastern Timber* case [Liberian Eastern Timber case (ICSID)]. Dilatory measures by one party have also lead arbitral tribunals to impose the full payment of the costs of the proceedings on one of the Parties. In another case, one party’s conduct which protracted the proceedings led the Tribunal to note that were the claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be

said that they were being made whole [*ADC Affiliate case (ICSID)*] Thus, even under the ICSID system which ordinarily does not award costs, this practice is displaced where there is evidence of a party's bad faith. Similarly, RESPONDENT'S bad faith in the present case should persuade the Tribunal to award CLAIMANT the costs it incurred as a result of RESPONDENT'S wrongdoing.

3. The costs were reasonable and proportionate.

- 94 The ICC Report concludes that “[a]s to proportionality of the amount of costs, the amount of the monetary claim and value of any property that is the subject matter of the dispute is usually important” [*ICC Report, p. 21*]. In this dispute, the costs claimed were barely 5% of the value of the goods at issue (see above para. 61). The same arguments that pertain to the recoverability of the contingency fee arrangement when the legal basis of recoverability is Article 74 CISG (see above, paras. 83-88) apply here. The legal basis for recoverability should not make a difference to the fact-sensitive inquiry as to the cost's reasonableness, which CLAIMANT has established.

IV. CLAIMANT IS ENTITLED TO RESPONDENT'S PROFITS FROM ITS SALE TO SUPERWINES.

- 95 The arbitration proceeds on the assumption that RESPONDENT breached the Contract [*PO 1, p. 50, para. 4*]. Accordingly, CLAIMANT is entitled to compensation for its lost profits under Article 74 of the CISG [**A**]. CLAIMANT'S lost profits are most likely higher than the premium SuperWines paid to RESPONDENT and can be calculated as RESPONDENT'S profits [**B**]. Regardless, RESPONDENT may not profit from its willful breach of contract and should be required to disgorge its profits [**C**].

A. RESPONDENT'S breach of contract entitles CLAIMANT to compensation for its lost profits under Article 74 of the CISG.

- 96 RESPONDENT'S failure to perform its contractual obligation to deliver wine to CLAIMANT grants CLAIMANT the right to damages under the CISG [*Art. 45(1) CISG; see above, para. 69*]. CLAIMANT can thus claim damages pursuant to Article 74, because CLAIMANT mitigated its losses as required by Article 77, and RESPONDENT'S breach is not exempt from liability under Article 79 of the CISG.
- 97 Under Article 74 of the CISG, “[d]amages for breach of contract by one party consist of a sum equal to the loss, *including loss of profit*, suffered by the other party as a consequence of the breach” (emphasis added). The explicit reference to “lost profits” is made to reinforce the notion that the aggrieved party is entitled to net gains prevented as a result of the breach

[*CISG AC Op. 6, paras. 3.10 and 3.14*]. The Tribunal must therefore award CLAIMANT compensation for the profits it lost as a result of RESPONDENT'S non-delivery.

- 98** CLAIMANT complied with its obligation to mitigate under Article 77 of the CISG, which requires an aggrieved party to take reasonable measures to mitigate the losses it suffered from a breach. CLAIMANT did just that by actively arranging for a substitute transaction. Upon learning of RESPONDENT'S breach, CLAIMANT promptly enquired whether its customers would be willing to accept a substitute product [*PO 2, p. 54, para. 10*]. Receiving affirmation from a number of customers, CLAIMANT purchased 5.500 bottles of Mata Weltin from Vignobilia, substituting for the number of bottles RESPONDENT failed to deliver [*PO 2, p. 54, para. 11*]. Had CLAIMANT not taken these actions, it would have incurred far greater losses than it did here, losing out on the opportunity to sell 5.500 bottles of wine.
- 99** RESPONDENT'S deliberate breach of contract means that it is not exempt from liability under Article 79 of the CISG. Article 79 exempts a party from liability if the breach was caused by an "impediment beyond his control" that he could not reasonably have been expected to have taken into account or avoided. This is a high standard, and "[t]he obligor is always responsible for impediments when he could have prevented them" [*Schlectrium, p.100*]. Even where the impediment is not foreseeable, the obligor "must take reasonable measures to avoid or overcome the impediment or its consequences" [*Ibid.*].
- 100** Article 79 of the CISG has been interpreted to require proof of a "factual obstacle" beyond the breaching party's control in order to exempt the breaching party from liability for its failure to perform its contractual obligations. In a 1998 Dutch case, a seller refused to deliver contractually promised milk powder to the buyer due to import restrictions that potentially implicated the milk powder products [*Malaysia Dairy case (NL), para. 2*]. The tribunal held that these circumstances did not exempt the respondent from liability under Article 79, because there was no "factual obstacle" beyond the seller's control that prevented the delivery [*Ibid., para. 4.13*]. At worst, there was a risk that the milk powder would be destroyed if found to violate import restrictions [*Ibid.*]. Similarly, RESPONDENT faced no "factual obstacle" to performance, because the 2014 harvest produced 65.000 bottles [*Answer to SoC, para. 9, p. 26*], enough to fill CLAIMANT'S order of 10.000 bottles. RESPONDENT was under no contractual obligation to sell to SuperWines [*PO 2, pp. 56-57, paras. 23 and 29*] and knew that selling 5.500 bottles to SuperWines would require a reduction in the quantities of wine available to its other buyers [*PO 2, para. 21, p. 56*], but *chose* to sell to SuperWines regardless.

101 RESPONDENT could have avoided breaching the Contract with CLAIMANT in two ways. First, it could have declined to continue negotiations with SuperWines. RESPONDENT did not have a signed contract with SuperWines pursuant to which RESPONDENT would have been obligated to sell SuperWines any wine at all [PO 2, para. 23, p. 56]. Second, RESPONDENT could have chosen to deliver fewer bottles to its other customers. At the time of breach, RESPONDENT had no firm contractual commitments to sell to any other buyers [PO 2, para. 29, p. 57]. Those other wine merchants only began concluding firm contracts in January 2015 [*Id.*], more than two months after CLAIMANT requested the 10.000 bottles it was entitled to under the Contract [*Exhibit C2, p. 10*]. By delivering less wine to other customers, RESPONDENT could have upheld its Contract with CLAIMANT and still delivered 5.500 bottles to SuperWines [PO 2, para. 27, p. 56-57]. CLAIMANT is thus entitled to full compensation for its lost profits under Article 74 of the CISG.

B. CLAIMANT should be granted RESPONDENT’S profits from its impermissible sale to SuperWines as a measure of its lost profits.

102 CLAIMANT has the burden of proving that it suffered a loss, along with the burden of proving the extent of the damages [CISG AC Op. 6, para. 2]. Notably, no provision of the CISG, including Article 74, requires a claimant to prove the amount of loss by a specified degree of certainty [*Ibid.*, para. 2.1]. Commentators merely note that the extent of loss need not be proved with mathematical precision [*Ibid.*]. However, commentators suggest that the *fact* of loss should be proved with reasonable certainty [*Ibid.*]. CISG Article 7(2) dictates that any questions not explicitly answered in the CISG are “to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with ... the rules of private international law”. The first clause of Article 7(2) thus requires conformity with the principle of reasonableness, which is prevalent throughout the CISG as a “general criterion” [Bonnell, s. 2.3.2.2]. The second clause of Article 7(2) directs us to the rules of private international law, including the UNIDROIT Principles [CISG AC Op. 6, para. 2.7], which require the occurrence of harm to be proved with a “reasonable degree of certainty” [Art. 7.4.3(1) UNIDROIT]. Some tribunals have looked for the standard outside the CISG, in the procedural laws of the forum [Schwartz, p. 6]. Here, each relevant jurisdiction, including the chosen forum of Danubia, has adopted verbatim the UNIDROIT Principles [PO 1, para. 5(4), p. 51].

103 In this case, CLAIMANT can prove with reasonable certainty that it suffered a loss. As a result of RESPONDENT’S stipulated breach of contract, CLAIMANT never received 5.500 bottles of diamond quality Mata Weltin wine which it had promised to sell to its customers. CLAIMANT

had a reputation as a reliable source of high-end wines and has a track record of sales [PO 2, p. 54, para. 8]. CLAIMANT'S inability to fulfill its contractual obligations damages its reputation and caused it loss of profits resulting from the inability to sell the 5.500 bottles of RESPONDENT'S wine. As observed by one tribunal, where the claimant is buying an existing product and has a track record of sales, there is no reason to doubt that it would have been able to make the sales [*Mexican squash case (MX)*, para. 171].

104 CLAIMANT'S lost profits include the difference between the profits it expected from selling RESPONDENT'S award-winning diamond Mata Weltin and the profits it will make from selling Vignobilia wine instead. While the precise amount of CLAIMANT'S lost profits is extremely difficult to determine [PO 2, p. 54, para. 13], they are highly likely to be greater than RESPONDENT'S extra profits from its sale of the 5.500 bottles to SuperWines, beyond the profit it would have made had it sold the same bottles to CLAIMANT ("the SuperWines Profits") [PO 2, p. 55, para. 17]. CLAIMANT therefore requests the Tribunal to award it the SuperWines profits as a measure of CLAIMANT'S damages.

105 Article 74 CISG allows tribunals significant leeway in calculating and awarding damages. The Secretariat Commentary noted that "[t]he court or arbitral tribunal must calculate [the innocent party's] loss in the manner which is best suited to the circumstances" [para. 4]. Article 7.4.3(3) of the UNIDROIT Principles similarly establishes that "[w]here the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court". Thus, lost profits "can be determined on the basis of a mere discretion" [*Saidov 2002*, p. 370], which includes the freedom to consider fairness in awarding damages [*Saidov 2006*, p. 76] and to consider gain-based damages, or the profits the breaching party realized from the breach [*Schmidt-Abrendts 2012*, p. 98].

106 The Tribunal should exercise its discretion to award CLAIMANT the SuperWines Profits in compensation for its lost profits under Article 74. Awarding gain-based damages is necessary because CLAIMANT'S losses are difficult to quantify precisely [1]. The SuperWines Profits also reflect what CLAIMANT could have earned by selling those bottles in the high-end wine market [2]. Finally, awarding these profits conforms to the purposes of Article 74 [3].

1. Gain-based damages are necessary in this case because of the difficulty in determining CLAIMANT'S lost profits with certainty.

107 The profits earned by the breaching party are an appropriate measure of the aggrieved party's lost profits when such loss cannot easily be quantified [*Schwenzer*, p. 1017]. Where a party is not in a position to prove its loss with certainty, "focus on the party's loss is *not adequate*" to compensate the aggrieved party [*Saidov 2008*, p. 34 (*original emphasis*)]. In such a situation, it is

appropriate to “rely on gains made by the breaching party to implement the compensatory purposes of damages” [*Ibid.*].

- 108** International tribunals have put applied these principles in practice. In the *Pressure Sensors* case (see above, para. 9), the aggrieved party’s losses were also difficult to quantify. The buyer’s breach of contract in that case gave the buyer an advantage in the market, but the seller could not quantify the losses it suffered [*Ibid.*, para. 170]. Because he found damages difficult to calculate, the sole arbitrator instead awarded seller the profits that the buyer made as a result of its breach of contract as a measure of damages [*Ibid.*, paras. 174-83].
- 109** Like the seller’s losses in the *Pressure sensor* case, the exact losses CLAIMANT will incur as a result of RESPONDENT’S breach are difficult to determine with absolute certainty [*PO 2, p. 54, para. 13*]. While CLAIMANT is able to estimate its losses on the basis of existing contracts with customers, it will be “extremely difficult” to calculate the actual loss from having to supply its customers with wine from Vignobilia instead of from RESPONDENT [*PO 2, p. 54, para. 13*].
- 110** Furthermore, CLAIMANT suffered harm to both its business reputation amongst its customers and to its position within the high-end wine market. CLAIMANT prides itself on its business reputation as a reliable merchant of high-end and collectors’ wines [*SoC, p. 4, para. 1*]. While CLAIMANT mitigated its damages by selling a substitute wine, its clients nonetheless did not receive the gold-winning, diamond quality Mata Weltin wine they ordered and on that basis might decline to contract with CLAIMANT in the future, or refuse to pay CLAIMANT a premium comparable to past agreements.
- 111** RESPONDENT’S breach of contract promoted SuperWines’ position in the market [*PO 2, p. 56, para. 26*]. Not only was SuperWines already CLAIMANT’S biggest competitor, it intended to enter the market by copying CLAIMANT’S business model [*Ibid.*]. In the same way as the sole arbitrator in the *Pressure Sensor* case, the Tribunal should look to RESPONDENT’S profits from its breach of contract as a measure of damages to award to CLAIMANT.
- 112** Furthermore, although CLAIMANT believes its lost profits to be higher than the SuperWines profits, it merely requests the SuperWines profits as a measure of its compensation in the interests of efficiency. Commentator Schwenger notes that while the text of the CISG limits recovery to lost profits, “full compensation of the aggrieved party is hardly ever achieved, since all risks in awarding and assessing damages rest with the aggrieved party ... [T]he aggrieved party is, structurally, left undercompensated” [*Schwenger and Hachem, p. 102*]. This

case would be a particularly extreme example, in which the costs of ascertaining CLAIMANT'S lost profits would ultimately leave CLAIMANT vastly undercompensated.

113 This situation thus favors disgorgement of profits. While CLAIMANT knows the qualitative value of RESPONDENT'S breach, CLAIMANT faces "high evidentiary costs if she cannot sufficiently establish this value in court; similarly, she may have only an approximate knowledge of the promisor's profits (or opportunity costs of performance) but may be able to verify important aspects of them at low cost" [*Brooks, fn. 37*]. The documentary evidence necessary to establish the precise amount of the SuperWines profits is negligible (see above, para. 25) in comparison to the evidence CLAIMANT would require to prove its lost profits with certainty. The Tribunal should therefore award CLAIMANT the profits RESPONDENT gained by virtue of its breach.

2. The SuperWines profits reflect the CLAIMANT's lost profits.

114 RESPONDENT'S SuperWines Profits reflect the amount of profit CLAIMANT could have earned had it been able to sell the wine itself. Schmidt-Ahrendt explains that one way to measure loss is the value of the goods of which the aggrieved party has been deprived [*Schmidt-Ahrendt 2012, pp. 98-99*]. He observes that in situations in which the seller breaches the contract by selling to a third party, the buyer's profits could have been at least as high as the seller's if the buyer had been able to sell the goods to the third party itself [*Ibid.*]. To state it another way, "the profits realized by the seller should be accepted as evidence of the value of the goods at the hypothetical time of delivery" [*Ibid., p. 99*].

115 In the present case, CLAIMANT could have resold the 5.500 bottles to SuperWines or another buyer for a higher price to make at least the same profit that RESPONDENT did by selling to SuperWines. Indeed, it is very likely that that CLAIMANT'S lost profits are at least as high as RESPONDENT'S SuperWines Profits [*PO 2, p. 55, para. 17*]. CLAIMANT should therefore be awarded RESPONDENT'S SuperWines profits for the value of the 5.500 bottles that RESPONDENT denied it in breach of its Contract.

3. The purposes of Article 74 allow the Tribunal to award gain-based damages.

116 Compensating an aggrieved party by disgorging the breaching party of its profits fulfills the purposes of Article 74 of the CISG of affording an aggrieved party full compensation, *pacta sunt servanda*, good faith, and uniformity [*Schmidt-Ahrendts 2012, p. 93-94*]. First, as one commentator noted, "[t]he broader and primary goal of the Convention is to compensate the aggrieved party fully" [*Koneru, p. 128*]. Where losses are difficult to determine, gain-based

damages allow for a method by which to determine appropriate compensation for the breach victim [*Saidov 2008, p. 34*].

117 Second, the principle of *pacta sunt servanda* (“agreements must be kept”) mandates the disgorgement of profits as a measure of damages in certain situations. *Pacta sunt servanda* assumes that when entering into a transaction, a seller also promises the buyer the economic benefits of the transaction [*Schmidt-Abrendts 2012, p. 96-97*]. The seller’s breach of contract thus means that the seller owes the buyer the economic benefits it derived from the breach [*Id.*].

118 Third, the principle of good faith favors the use of disgorgement damages as a deterrent to breaches of contract and as an incentive to respect their contractual obligations [*Schmidt-Abrendts 2012, p. 94-95*]. Fourth, the application of Article 74 to the remedy of disgorgement would promote uniformity in international sales of goods dispute resolution [*Ibid., p. 95*]. It would remove the uncertainty about the ability to claim disgorgement in different forums. [*Ibid.*].

C. Regardless, RESPONDENT should not be allowed to profit from breaching its Contract with CLAIMANT and should be required to disgorge its profits from the sale to SuperWines in damages.

119 Even if the Tribunal declines to award the SuperWines Profits as a measure of CLAIMANT’S losses under Article 74, it should still require RESPONDENT to disgorge its profits because RESPONDENT should not be permitted to benefit from its willful breach of contract.

120 While CISG doctrine and cases contain little discussion of the question of disgorgement of wrongfully gained profits [*Schmidt-Abrendts 2012, p. 90*], the principles underlying the CISG support the notion that a party should not be permitted to keep gains it does not rightfully possess. “Article 84 obligates the Parties to return all benefits of possession (profits and advantages of use)” [*Schlectrium, p. 106*]. Lookofsky explains that “[t]he Convention adopts a corollary to the restitutionary principle which is generally accepted in domestic systems of law: to avoid unjust enrichment, a party who is required to make restitution must also account for benefits received” [*Lookofsky, p. 169*]. Allowing RESPONDENT to profit from its deliberate breach of contract would therefore contravene the spirit of the CISG.

121 Furthermore, commentators agree that a breaching party must not be permitted to benefit from its wrongdoing. Schwenger emphasizes that “the general idea that a breach of contract must not pay has to be upheld under the Convention [CISG]” [*Schwenger, p. 1017*]. She explains that the profits a breaching party obtains from his breach can be considered when

assessing damages and that “penal elements can also play a role despite the fact that the Convention does not allow awarding punitive damages” [*Ibid* p. 1001].

- 122** One court described the equitable justifications for disgorgement: “When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract . . . [T]he plaintiff’s interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.” [*Blake case (UK)*]. In that case, a former spy for the British government wrote and sold a book about his work with the secret service. The governmental interest in the spy’s performance of his duty to maintain state secrets required the disgorgement of profits.
- 123** More specifically, when, as here, a seller breaches the contract to sell to a third party at a higher price than it would have sold to the original buyer, “targeting the profits of the promisor is possible and necessary” [*Schwenzer, p. 1017*]. In fact, the “performance principle demands that the profits [a party has obtained by virtue of its breach] be disgorged” [*Ibid.*].
- 124** Other scholars have observed that the purpose of contract law is to “reverse this breach” when a party breaches a contract [*Siems, p. 51*]. In a typical situation, a tribunal will award damages to the breach victim, even if the breaching party did not gain profits from the breach [*Ibid.*]. Disgorgement is not different, except that the roles are reversed—the tribunal awards damages to the breach victim CLAIMANT regardless of the victim’s loss, precisely because RESPONDENT’S profit was caused by the breach [*Ibid.*].
- 125** In one German case, the defendant purchased a truck, knowing the sale to be invalid, and then resold it for a profit [*Scalise, p. 735, citing BGH (DE) 24 October 1979*]. The court ordered the defendant to disgorge his profits from the sale in damages as a result of his bad faith [*Ibid., p. 736*]. Here, RESPONDENT should also be required to disgorge the profits it received by breaching the Contract in bad faith.
- 126** RESPONDENT acted out of bad faith by completing the contract with SuperWines despite knowing that it would reduce the number of bottles of wine available to its other customers [*PO 2, para. 21*]. RESPONDENT received information on 4 November 2014 that CLAIMANT was ordering 10,000 bottles under the Contract. [*Exhibit C2*]. In spite of this knowledge, RESPONDENT offered to sell SuperWines 4,500 bottles almost a month after, on 25 November 2014. [*PO 2, p. 56, para. 22*]. RESPONDENT eventually sold SuperWines 5,500 bottles of wine—the same amount it did not deliver to CLAIMANT.

127 RESPONDENT deliberately violated its Contract with CLAIMANT to initiate a business relationship with CLAIMANT’S biggest competitor. It would be manifestly unjust to allow RESPONDENT to retain the profits from that impermissible transaction by exploiting the fact that CLAIMANT’S lost profits are difficult to ascertain precisely. In this situation, disgorgement places both RESPONDENT and CLAIMANT closest to the position they would have been in without the breach—RESPONDENT is no worse off than if it had performed the contract [*PO 2, p. 62, para. 66*] and CLAIMANT is compensated for its losses.

REQUEST FOR RELIEF

On the basis of the foregoing submissions, CLAIMANT respectfully requests that the Tribunal:

- (1) Order RESPONDENT to produce the documents requested by CLAIMANT;
- (2) Award CLAIMANT damages in the amount of USD 50.280 for litigation costs;
- (3) Award CLAIMANT damages in the amount of RESPONDENT’S SuperWines profits.

Vindobona, Danubia

10 December 2015

Respectfully submitted,

Mavara Agha

Michal Hain

Clare Kelly

Lan Mei

Christian Vandergeest