

HEINRICH HEINE

UNIVERSITY OF DÜSSELDORF

Germany



MEMORANDUM FOR CLAIMANT

On behalf of

Against

Kaihari Waina Ltd.

Vino Veritas Ltd.

Equatoriana

Mediterraneo

(CLAIMANT)

(RESPONDENT)

Mathias Bähr

Svenja Ehrmann

Miriam Haller

Jan Henrik Marklund

Dominique Kowoll

Laura Katharina Pauli

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS	V
INDEX OF AUTHORITIES	IX
INDEX OF CASES.....	XXXIII
INDEX OF ARBITRAL AWARDS.....	L
STATEMENT OF FACTS	1
INTRODUCTION	2
ARGUMENT	3
ISSUE 1: The Tribunal has the power and should order RESPONDENT to produce the documents requested by CLAIMANT	3
A. The Tribunal has the power to order RESPONDENT to produce the documents requested by CLAIMANT	3
I. Art. 29(1) VR empowers the Tribunal to order the production of documents on request of a party	3
II. The Parties' arbitration agreement does not exclude the Tribunal's power to order document production.....	4
1. The wording of Art. 20 FA shows that document production remains possible	5
a. <i>Discovery</i> and document production are not synonymous.....	5
b. The agreement to have efficient proceedings requires document production	6
2. All other circumstances of the case show that document production is possible	6
a. Mr. Weinbauer acknowledges that requests for particular documents are possible	7
b. The Parties' bad experiences induced them to exclude US-style <i>discovery</i>	7
3. The <i>contra proferentem</i> rule does not lead to a different interpretation	8
B. The Tribunal should order RESPONDENT to produce the requested documents	8
I. The Tribunal should use its discretion in accordance with the IBA Rules	8
1. The Parties agreed on the application of the IBA Rules in Art. 20 FA	8
2. Alternatively, the Tribunal should determine to apply the IBA Rules	9

II.	The requirements for document production under the IBA Rules are fulfilled	10
1.	CLAIMANT describes the category of requested documents in sufficient detail.....	10
2.	The requested documents are relevant to the case and material to its outcome.....	11
3.	The requested documents are not excluded for reasons of confidentiality	11
4.	The requested documents are not excluded for reasons of fairness or equality.....	12
III.	Without document production CLAIMANT’S right to be heard is violated	13
IV.	Without document production the enforceability of the award may be at risk.....	13
ISSUE 2: CLAIMANT is entitled to damages for its litigation costs.....		14
A.	CLAIMANT is entitled to damages for the litigation costs incurred in filing for interim relief.....	14
I.	The CISG applies to the submitted claim for damages.....	14
II.	RESPONDENT breached the contract between the Parties	14
III.	Litigation costs are recoverable under Art. 74 CISG.....	14
1.	The interpretation of Art. 74 CISG shows that litigation costs are recoverable under this provision.....	15
2.	RESPONDENT’S categorization in procedural and substantive issues does not hinder the recovery of litigation costs under Art. 74 CISG	16
a.	The categorization of litigation costs as a procedural or substantive issue is not expedient	16
b.	The CISG regulates procedural issues.....	17
c.	The awarding of litigation costs under Art. 74 CISG does not disregard the Mediterranean Court decision	17
3.	The recovery of litigation costs does not violate the right to equal treatment.....	18
IV.	RESPONDENT’S breach of contract caused CLAIMANT’S litigation costs	19
V.	CLAIMANT’S litigation costs were foreseeable to RESPONDENT.....	19
1.	Filing for interim relief in the High Court of Mediterraneo was foreseeable	19
2.	Hiring a law firm on a contingency fee basis and the amount of the incurred attorneys’ fees were foreseeable	20
VI.	CLAIMANT did not breach its duty to mitigate the damage	21

B. CLAIMANT is entitled to damages for the litigation costs incurred in its defense against RESPONDENT’S non-declaratory relief	21
I. The CISG applies to the arbitration agreement.....	22
II. RESPONDENT breached the arbitration agreement	22
1. Art. 20 FA contains a valid arbitration agreement.....	22
2. The arbitration agreement prohibits RESPONDENT from starting court proceedings..	24
III. RESPONDENT’S breach of contract caused CLAIMANT’S litigation costs	25
IV. CLAIMANT’S litigation costs were foreseeable to RESPONDENT.....	25
V. CLAIMANT did not breach its duty to mitigate the damage	25
ISSUE 3: CLAIMANT is entitled to RESPONDENT’S profit made by selling 5,500 bottles of Mata Weltin 2014 to SuperWines	25
A. Artt. 45(1)(b), 74 CISG grant CLAIMANT the requested damages.....	25
I. CLAIMANT can claim RESPONDENT’S profit as a damage under Art. 74 CISG	26
1. A disgorgement of RESPONDENT’S profit is not excluded under Art. 74 CISG	26
a. Art. 74 CISG includes a disgorgement of RESPONDENT’S profit due to the <i>maxim breach must not pay</i>	26
b. Art. 74 CISG includes a disgorgement of RESPONDENT’S profit due to the inclusion of punitive elements in awarding damages.....	28
2. Alternatively, CLAIMANT is entitled to damages calculated on the basis of RESPONDENT’S profit.....	28
a. CLAIMANT will suffer a loss of profit which is recoverable under the CISG.....	29
b. It is necessary to calculate CLAIMANT’S damage on the basis of RESPONDENT’S profit	29
c. Other calculation methods are inadequate in this Arbitration	30
d. CLAIMANT’S emergency purchase does not reduce its damage.....	31
II. RESPONDENT’S breach of contract caused the recoverable damage	31
III. The recoverable damage was foreseeable to RESPONDENT.....	32
B. Alternatively, CLAIMANT is entitled to claim the profit RESPONDENT made by selling 5,500 bottles to SuperWines	32
I. An analogy to Art. 84(2)(b) CISG has to be established	32

1. The regulatory gap is unintentional	33
2. The situation of the Parties and Art. 84(2)(b) CISG are comparable	33
II. The requirements of Art. 84(2)(b) CISG in its analogous application are fulfilled....	34
1. RESPONDENT received a benefit by selling 5,500 bottles to SuperWines	34
2. CLAIMANT has the right to avoid the contract pursuant to Art. 72(1) CISG	34
PRAYER FOR RELIEF.....	35
CERTIFICATE	LVII

INDEX OF ABBREVIATIONS

AC	Advisory Council
AR	Arbitration Rules
Art.	Article
Artt.	Articles
Assoc.	Association
BCCI	Bulgarian Chamber of Commerce and Industry
BGer	Bundesgericht (Swiss Federal Supreme Court)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BW	Burgerlijk Wetboek (Dutch Civil Code)
C-#	CLAIMANT'S Exhibit No. #
C.App.	Cour d'Appel (French Court of Appeal)
C.Cass.	Cour de Cassation (French Federal Supreme Court)
CCIG	Geneva Chamber of Commerce, Industry and Services
CEO	Chief Executive Officer
cf.	Confer
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
Co.	Company
COO	Chief Operating Officer

Corp.	Corporation
Dec	December
DIS	German Institution of Arbitration
Ed.	Editor
ed.	Edition
e.g.	Example given
et al.	Et altera (and others)
et seq.	Et sequens (and the following)
EUR	Euro
FA	Framework Agreement
Feb	February
fn.	Footnote
FS	Festschrift
HB	Handbook
HGB	Handelsgesetzbuch (German Commercial Code)
IBA	International Bar Association
IBA Rules	IBA Rules for the Taking of Evidence in International Arbitration
ICAC	International Commercial Arbitration Court at the Russian Federation Chamber of Commerce
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporation

Jan	January
Jul	July
Jun	June
KG	Kantonsgericht (Cantonal Court)
LCIA	London Court of International Arbitration
LG	Landgericht (German District Court)
Ltd.	Limited
Mar	March
MüKo	Münchener Kommentar
Ms.	Miss
Mr.	Mister
No.	Number
Nov	November
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards / New York Convention
Oct	October
OGH	Oberster Gerichtshof (Austrian Federal Supreme Court)
OLG	Oberlandesgericht (German Higher Regional Court)
p.	Page
para.	Paragraph
paras.	Paragraphs
PO	Procedural Order
pp.	Pages
Pte	Pass-Through Entity

R-#	RESPONDENT'S Exhibit No. #
SA	Sociedade Anônima (Join-Stock Company)
SC	Statement of Claim
SCC	Stockholm Chamber of Commerce
SD	Statement of Defense / Answer to the Statement of Claim
S.D.	Southern District
Sep	September
SN	Sąd Najwyższy (Polish Supreme Court)
v.	Versus
Vor.	Vorbemerkung (introductory notes)
US	United States of America
US \$	US-Dollar
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
VIAC	Vienna International Arbitral Centre
VR	Vienna Rules
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

INDEX OF AUTHORITIES

- Ashenfelter, Orley** Predicting the Quality and Prices of Bordeaux Wines, *in para. 104*
American Association of Wine Economics,
AAWE Working Paper No. 4
cited as:
Ashenfelter, AAWE No. 4
- Baasch Andersen, Camilla** A Practitioner's Guide to the CISG, New York (2010) *in para. 51*
Mazzotta, Francesco cited as:
G. *Baasch Andersen et al., Practitioner's Guide*
Zeller, Bruno *CISG, p.*
- Blackaby, Nigel** Redfern and Hunter on International Arbitration, 6th ed., Oxford (2015) *in para. 4*
Partasides, Constantine cited as:
Blackaby/Partasides, Redfern and Hunter, para.
- Bock, Anne-Florence** Gewinnherausgabeansprüche gemäß CISG, *in paras. 89, 92, 95*
in: Festschrift für Ingeborg Schwenzer zum
60. Geburtstag, Private Law, Bern (2011)
cited as:
Bock, in: FS Schwenzer, p.

- Born, Gary B.** International Commercial Arbitration, 2nd ed., Alphen aan den Rijn (2014) *in paras. 3, 11, 23, 28, 79, 80*
cited as:
Born, ICA, p.
- Bureau, Dominique** Observations – Cour d’appel de Versailles (12e Chamber) October 3, 1991 – Ltd. Capital Rice Co. V. SARL Michel Come, *in para. 79*
Revue de l’Arbitrage 1992, pp. 625-684
cited as:
Bureau, Observations – C.App. Versailles, Oct 3, 1991
- Buschtöns, Corinna** Damages under the CISG, Selected Problems, *in paras. 47, 51*
Minor dissertation for the Masters Degree in Commercial Law, School of Advanced Law of the University of Cape Town 2005
cited as:
Buschtöns, Damages CISG, p.
- C. Kläsener, Amy** Die Überarbeitung der IBA-Regeln zur Beweisaufnahme in der internationalen Schiedsgerichtsbarkeit, *in para. 23*
Dolgorukow, Alexander Zeitschrift für Schiedsverfahren 2010, pp. 302-310
cited as:
Kläsener/Dolgorukow, SchiedsVZ 2010, p.

- Cremades, Bernardo M.** Managing Discovery in International Arbitration, *in para. 10*
Dispute Resolution Journal 2003, pp. 72-77
cited as:
Cremades, DRJ 2003, p.
- Derains, Yves** Towards Greater Efficiency in Document Production Before Arbitral Tribunals – A Continental Viewpoint, *in para. 11*
Special Supplement 2006: Document Production in International Arbitration ICC Bulletin, pp. 83-90
cited as:
Derains, ICC Bull. 2006, p.
- Derains, Yves** Guide to the ICC Rules of Arbitration, *in paras. 75,*
Schwartz, Eric A. 2nd ed., The Hague (2005) *78, 79*
cited as:
Derains/Schwartz, Guide to ICC Rules, p.
- Diener, Keith William** Recovering Attorneys’ Fees under CISG: An Interpretation of Article 74, *in paras. 47,*
51
Nordic Journal of Commercial Law, Issue No. 1 2008, pp. 1-65
cited as:
Diener, NJCL 2008, p.

- DiMatteo, Larry A.** International Sales Law: A Global Challenge, Cambridge (2014) *in para. 53*
cited as:
DiMatteo, International Sales Law, p.
- Dixon, David B.** Que Lastima Zapata! Bad CISG Ruling on Attorneys' Fees Still Haunts U.S. Courts, *in paras. 46, 51, 58*
University of Miami Inter-American Law Review, Vol. 38 2006/07, pp. 405-429
cited as:
Dixon, UMIALR 2006/07, p.
- Duhl, Gregory** Conscious Ambiguity: Slaying Derberus in the Interpretation of Contractual Inconsistencies, *in para. 19*
University of Pittsburgh Law Review, Vol. 71:71 2010, pp. 71-116
cited as:
Duhl, Pittsburgh Law Rev., p.
- Eberl, Walter (Ed.)** Beweis im Schiedsverfahren, Baden-Baden (2015) *in para. 10*
cited as:
Author, in: Eberl, p., para.

- Elsing, Siegfried** Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds,

Zeitschrift für Schiedsverfahren 2011,
pp. 114-123

cited as:

Elsing, SchiedsVZ 2011, p. *in para. 10*
- Felemegas, John** An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals,

Pace International Law Review, Vol. 15 2003,
pp. 91-147

cited as:

Felemegas, PILR 2003, p. *in paras. 46, 58*
- Ferrari, Franco** Homeward Trend: What, Why and Why Not,

Internationales Handelsrecht 2009, pp. 8-24

cited as:

Ferrari, IHR 2009, p. *in paras. 51, 55*
- Form und UN-Kaufrecht, *in para. 53*

Internationales Handelsrecht 2004, pp. 1-6

cited as:

Ferrari, IHR 2004, p.

- Auslegung von Parteierklärungen und -verhalten nach UN-Kaufrecht, *in para. 6*
Internationales Handelsrecht 2003,
pp. 10-15
cited as:
Ferrari, IHR 2003, p.
- Ferrari, Franco** (Ed.) *in para. 69*
Kieninger, Eva-Maria
(Ed.)
Mankowski, Peter
(Ed.)
et al.
Internationales Vertragsrecht, 2nd ed., Munich (2012)
cited as:
Author, in: Ferrari et al., Art., para.
- Flambouras, Dionysios P.** *in para. 113*
Case Law of Greek Courts for the Vienna Convention (1980) for International Sale of Goods,
Nordic Journal of Commercial Law, Issue No. 2 2009, pp. 1-39
cited as:
Flambouras, NJCL 2009, p.
- Fouchard, Philippe**
Gaillard, Emmanuel
Savage, John *in paras. 78, 79*
International Commercial Arbitration, Paris (1999)
cited as:
Fouchard et al., ICA, p.

- Friedmann, Daniel** The Efficient Breach Fallacy, *in para. 94*

The Journal of Legal Studies, Vol. 18 No. 1
1989, pp. 1-24

cited as:

Friedmann, LS 1989, p.
- Gotanda, John** Calculation of damages under CISG Art. 74, *in paras. 37,*

CISG-Advisory Council Opinion No. 6, 2006 *46, 47, 51,*

cited as: *99*

Gotanda, CISG-AC Opinion No. 6, para.
- Götz, Andreas** Der Schutz von Betriebs- und Geschäftsge- *in para. 31*

heimnissen im Zivilverfahren, Tübingen
(2014)

cited as:

Götz, Zivilverfahren, p.
- Günther, Klaus** Einschränkungen der Erhebung von Doku- *in para. 31*

mentenbeweisen,

in: Festschrift für Otto Sandrock zum 70. Ge-
burtstag, Heidelberg (2000), pp. 341-356

cited as:

Günther, in: FS Sandrock, p.

- Habegger, Philipp** Document Production – An Overview of Swiss Court and Arbitration Practice, *in para. 29*
Special Supplement 2006: Document Production in International Arbitration ICC Bulletin, pp. 21-30
cited as:
Habegger, ICC Bull. 2006, p.
- Hachem, Pascal** Die Konturen des Prinzips *Pacta Sunt Servanda*, *in para. 92*
in: Festschrift für Ingeborg Schwenzer zum 60. Geburtstag, Private Law, Bern (2011)
cited as:
Hachem, in: FS Schwenzer, p.
- Hamilton, Virginia** Document Production in ICC Arbitration, *in para. 11*
Special Supplement 2006: Document Production in International Arbitration ICC Bulletin, pp. 63-75
cited as:
Hamilton, ICC Bull. 2006, p.

- Hancock, Ginger**
Reed, Lucy
- Written Evidence and Discovery in International Arbitration: New Issues and Trends,
- Dossiers of the ICC Institute of World Business Law, Vol. 6 2009, pp. 339-353
- cited as:
- Hancock/Reed, ICC Dossier 2009, p.*
- in para. 10*
-
- Hartmann, Felix**
- Ersatzherausgabe und Gewinnhaftung beim internationalen Warenkauf,
- Internationales Handelsrecht 2009, pp. 189-201
- cited as:
- Hartmann, IHR 2009, p.*
- in paras. 115, 117, 122*
-
- Haugeneder, Florian**
Netal, Patrizia
- Handbook Vienna Rules, A Practitioner's Guide, Vienna (2014)
- cited as:
- Author, in: VIAC HB, Art., para.*
- in paras. 3, 4, 24*
-
- Honsell, Heinrich (Ed.)**
- Kommentar zum UN-Kaufrecht, 2nd ed., Heidelberg (2010)
- cited as:
- Author, in: Honsell, Art., para.*
- in paras. 45, 119*

- Huber, Peter**
Bach, Ivo
- Die Schadensmitverursachung im CISG – alles nichts oder?!,
in: FS für Ulrich Magnus zum 70. Geburtstag, Munich (2014), pp. 217-230
cited as:
Huber/Bach, in: FS Magnus, p.
- in para. 114*
- Huber, Peter**
Mullis, Alastair
- The CISG, A new textbook for students and practitioners, Munich (2007)
cited as:
Huber/Mullis, CISG, p.
- in paras. 61, 62, 69*
- Hwang, Michael**
Chin, Andrew
- Discovery in Court and Document Production in International Commercial Arbitration – Singapore,
Special Supplement 2006: Document Production in International Arbitration ICC Bulletin, pp. 33-41
cited as:
Hwang/Chin, ICC Bull. 2006, p.
- in para. 11*

- IBA Council** IBA Guidelines for Drafting International Arbitration Clauses, New York (2010), pp. 22-24 *in para. 23*
- available online:
- <http://www.ibanet.org/Document/Default.aspx?DocumentUid=D94438EB-2ED5-4CEA-9722-7A0C9281F2F2>
- cited as:
- IBA Guidelines, p., No.*
-
- IBA Working Party,
2010 IBA Rules of Evidence Review Subcommittee** Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, pp. 1-27 *in paras. 25, 34*
- available online:
- <http://webcache.googleusercontent.com/search?q=cache:XhHnvClbKVsJ:www.ibanet.org/Document/Default.aspx%3FDocumentUid%3D3DDD240932-0E08-40D4-9866-309A635487C0+&cd=1&hl=en&ct=clnk&gl=us&client=safari>
- cited as:
- Comm. IBA Rules, p.*
-
- Kaufmann-Kohler,
Gabrielle** Globalization of Arbitral Procedure, *in para. 37*
- Vanderbilt Journal of Transnational Law, Vol. 36 2003, pp. 1313-1333
- cited as:
- Kaufmann-Kohler, VJ 2003, p.*

- Kaufmann-Kohler,** Discovery in International Arbitration: How *in paras. 11,*
Gabrielle much is too much?, *25*
- Bärtsch,** Philippe Zeitschrift für Schiedsverfahren 2004,
pp. 14-21
cited as:
Kaufmann-Kohler/Bärtsch, SchiedsVZ 2004,
p.
- Keily,** Troy How Does the Cookie Crumble? Legal Costs *in paras. 47,*
under a Uniform Interpretation of the United *51*
Nations Convention on Contracts for the In-
ternational Sale of Goods,
Nordic Journal of Commercial Law, Issue
No.1 2003, pp. 1-23
cited as:
Keily, NJCL 2003, p.
- Kneisel,** Sebastian Verteidigungsstrategien gegen die Anordnung *in paras. 23,*
Lecking, Claudia der Document-Production / insbesondere nach *25, 29*
den IBA-Regeln zur Beweisaufnahme in der
internationalen Schiedsgerichtsbarkeit,
Zeitschrift für Schiedsverfahren 2013,
pp. 150-158
cited as:
Kneisel/Lecking, SchiedsVZ 2013, p.

- Korpela, Riku** Article 74 of the United States Convention on Contract for the International Sale of Goods, *in para. 46*
in: Review of the Convention on Contracts for the International Sale of Goods (CISG) 2004-2005, Munich (2006)
cited as:
Korpela, in: Review CISG, p.
- Kozłowska, Daria** The Revised UNCITRAL Arbitration Rules Seen *in para. 29*
through the Prism of Electronic Disclosure,
Journal of International Arbitration, Vol. 28 Issue 1
2011, pp. 51-65
cited as:
Kozłowska, JIA 2011, p.
- Kröll, Stefan** Die Entwicklung des Rechts der Schiedsgerichtsbarkeit in den Jahren 2003 und 2004, *in para. 75*
Neue Juristische Wochenzeitschrift 2005,
pp. 194-199
cited as:
Kröll, NJW 2005, p.

- Kröll, Stefan** (Ed.) UN-Convention on the International Sales of *in paras. 6,*
Mistelis, Loukas (Ed.) Goods (CISG), Munich (2011) *45, 53, 107,*
Viscasillas, Pilar Pera- cited as: *123, 124*
les (Ed.)
Author, in: Kröll et al., Art., para.
- Kronke, Herbert** (Ed.) Recognition and Enforcement of Foreign Ar- *in para. 38*
Naciniento, Patricia bitral Awards: A Global Commentary on the
(Ed.) New York Convention, Alphen aan den Rijn
et al. (2010), pp. 231-256
cited as:
Author, in: Comm. NYC, p.
- Lachmann, Jens-Peter** Handbuch für die Schiedsgerichtspraxis, *in para. 11*
3rd ed., Cologne (2008)
cited as:
Lachmann, HB, p., para.
- Lüpke, Tobias,** “Pre-Trial Discovery of Documents” und *in para. 10*
Müller, Robert § 142 ZPO – ein trojanisches Pferd im neuen
Zivilprozessrecht?,
Neue Zeitschrift für Insolvenz- und Sanie-
rungsrecht 2002, pp. 588-589
cited as:
Lüpke/Müller, NZI 2002, p.

- Macneil, Ian R.** Efficient Breach of Contract: Circles in the Sky, *in para. 94*

Virginia Law Review, Vol. 68 No. 5 1982,
pp. 947-969

cited as:

Macneil, VLR 1982, p.
- Magnus, Ulrich** General Principles of UN-Sales Law, *in para. 92*

Rabels Zeitschrift, Vol. 59 No. 3-4 1995,
pp. 469-494

cited as:

Magnus, RabelsZ 1995, p.
- Manner, Simon** Damages and Fixed Sums for a breach of Ar- *in para. 80*
Mosimann, Olivier bitration Agreements, pp. 1197-1211,
Luc

in: Festschrift für Ingeborg Schwenzer zum
60. Geburtstag, national – global – compara-
tive, Bern (2011)

cited as:

Manner/Mosimann, in: FS Schwenzer, p.
- Marghitola, Reto** Document Production in International Arbit- *in paras. 9,*
ration, Alphen aan den Rijn (2015) *10, 11, 23,*

cited as: *27, 30, 31,*

Marghitola, Doc. Prod., p. 34, 37

- Mcilwrath, Michael** International Arbitration and Mediation: Prac- *in para. 11*
Savage, John tical Guide, Alphen aan den Rijn (2010)
cited as:
Mcilwrath/Savage, Int. Arbitr., p., para.
- Meier, Anke** The Production of Electronically Stored Infor- *in para. 23*
mation in International Commercial Arbitra-
tion,
Zeitschrift für Schiedsverfahren 2008,
pp. 179-189
cited as:
Meier, SchiedsVZ 2008, p.
- Metzler, Elisabeth** The Arbitrator and the Arbitration Procedure, *in para. 10*
The Tension Between Document Disclosure
and Legal Privilege in International Commer-
cial Arbitration – An Austrian Perspective,
Austrian Yearbook on International Arbitra-
tion, Vienna (2015), pp. 231- 276
cited as:
Metzler, in: Austrian YB 2015, p.

- O'Malley, Nathan D.** The Procedural Rules governing the Production of Documentary Evidence in International Arbitration – As applied in Practice, *in para. 28*

The Law and Practice of International Courts and Tribunals 2009, pp. 27-90

cited as:

O'Malley, Law and Practice 2009, p.
- Piltz, Burghard** Neue Entwicklungen im UN-Kaufrecht, *in para. 46*

Neue Juristische Wochenzeitschrift 2015, pp. 2549-2554

cited as:

Piltz, NJW 2015, p.
- Rechtsverfolgungskosten als ersatzfähiger Schaden, *in paras. 49, 51, 52, 53, 55, 58, 59*

in: Festschrift für Ingeborg Schwenger zum 60. Geburtstag, national – global – comparative, Bern (2011), pp. 1387-1398

cited as:

Piltz, in: FS Schwenger, p.

- Pinkston, Jarred** The Arbitrator and the Arbitration Procedure *in para. 11*
– The Case for a Continental European Arbitral Institution to Limit Document Production,
Austrian Yearbook on International Arbitration, Vienna (2011), pp. 87-111

cited as:

Pinkston, in: Austrian YB 2011, p.
- Raeschke-Kessler, Hilmar** The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence, *in paras. 27, 30*

Arbitration International (2002), pp. 411-430

cited as:

Raeschke-Kessler, Arbitr. Int. 2002, p.
- Rauscher, Thomas** Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen, Buch 3, §§ 1025-1109, 4th ed., *in para. 80*
(Ed.)
Krüger, Wolfgang Munich (2013)
(Ed.)

cited as:

Author, in: MüKo-ZPO, §, para.

- Sachs, Klaus** Use of documents and document discovery: *in paras. 23,*
“Fishing Expeditions” versus transparency *29*
and burden of proof,
Zeitschrift für Schiedsverfahren 2003,
pp. 193-198
cited as:
Sachs, SchiedsVZ 2003, p.
- Säcker, Franz Jürgen** Münchener Kommentar zum Bürgerlichen *in paras. 6,*
(Ed.) Gesetzbuch, Buch 3, Schuldrecht – Besonde- *37, 123*
Rixecker, Roland (Ed.) rer Teil I, §§ 433-534 BGB, Finanzierungslea-
et al. sing, CISG, 7th ed., Munich (2016)
cited as:
Author, in: MüKo-BGB, Art., para.
- Saenger, Ingo** (Ed.) Zivilprozessordnung, Handkommentar, *in para. 49*
6th ed., Baden-Baden (2015)
cited as:
Author, in: Saenger, §, para.
- Saidov, Djakhongir** Contract Damages: Domestic and Interna- *in paras. 51,*
(Ed.) tional Perspectives, Oxford (2008) *92, 95, 100*
Cunnington, Ralph
(Ed.) cited as:
Author, in: Saidov/Cunnington, p.

- | | | |
|---|--|---|
| Salomon, Claudia,
Friedrich, Sandra | Obtaining and Submitting Evidence in International Arbitration in the United States,

The American Review of International Arbitration 2013, pp. 549-590

cited as:

<i>Salomon/Friedrich, Am. Rev. 2013, p.</i> | <i>in paras. 10, 11</i> |
| Schlechtriem, Peter | Verfahrenskosten als Schaden in Anwendung des UN-Kaufrechts,

Internationales Handelsrecht 2006, pp. 49-53

cited as:

<i>Schlechtriem, IHR 2006, p.</i> | <i>in para. 51</i> |
| Schlechtriem, Peter
Schwenzer, Ingeborg
(Ed.) | Kommentar zum Einheitlichen UN-Kaufrecht, 6th ed., Munich/Basel (2013)

cited as:

<i>Author, in: Schlechtriem/Schwenzer, Art., para.</i> | <i>in paras. 6, 19, 36, 53, 58, 61, 62, 68, 89, 90, 92, 94, 95, 99, 106, 113, 114, 116, 124</i> |
| Schwarz, Franz T.
Konrad, Christian W. | The Vienna Rules: A Commentary on International Arbitration in Austria, Alphen aan den Rijn (2009)

cited as:

<i>Schwarz/Konrad, Comm. VR, Art., para.</i> | <i>in para. 11</i> |

- Schwenzer, Ingeborg** Rechtsverfolgungskosten als Schaden?, *in paras. 46,*
in: Mélanges en l'honneur de Pierre Tercier, *49, 50, 51,*
Genève (2008), pp. 417-426 *55*

cited as:

Schwenzer, in: FS Tercier, p.
- Schwenzer, Ingeborg** Global Sales and Contract Law, Oxford *in para. 92*
Hachem, Pascal (2012)
Kee, Christopher cited as:

Schwenzer et al., Global Sales, p., para.
- Secretariat Commentary** Guide to CISG Article 74 *in para. 45*

available online:
[http://cisgw3.law.pace.edu/cisg/text/secomm/
secomm-74.html](http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-74.html)

cited as:

Sec. Comm., Art. 74, para.
- Shenton, D.W.** International Bar Association Supplementary *in para. 25*
Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration,

Yearbook Commercial Arbitration, Vol. 10
1985, pp. 145-151

cited as:

Shenton, in: YB 1985, p.

- Staudinger, Julius von** Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Wiener UN-Kaufrecht (CISG), 16th ed., Berlin (2013) *in para. 58*
- cited as:
- Author, in: Staudinger, Art., para.*
-
- Stimpfig, John** Fine wine prices ‘could rise 14 %’ this year, on: www.decanter.com *in para. 104*
- cited as:
- Stimpfig, Decanter*
-
- Stürmer, Philipp Heinrich** Die Vereinbarung von Verfahren privater Streitbeilegung, Köln (2008) *in para. 80*
- cited as:
- Stürmer, Private Streitbeilegung, p.*
-
- Veeder, V.V.** Document Production in England: Legislative Developments and Current Arbitral Practice, Special Supplement 2006: Document Production in International Arbitration ICC Bulletin, pp. 57-59 *in para. 29*
- cited as:
- Veeder, ICC Bull. 2006, p.*

- Wagner, Gerhard** Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, *in para. 90*
- in: Verhandlungen des 66. Deutschen Juristentages, Band I Gutachten, Munich (2006)
- cited as:
- Wagner, Gutachten, p.*
-
- Waincymer, Jeff** Procedure and Evidence in International Arbitration, Alphen aan den Rijn (2012) *in paras. 29, 30, 37*
- cited as:
- Waincymer, Evidence, p.*
-
- Walter, Gerhard** Neuere Rechtsprechung des Schweizer Bundesgerichts zur Schiedsgerichtsbarkeit, *in para. 75*
- Zeitschrift für Schiedsverfahren 2005, pp. 57-66
- cited as:
- Walter, SchiedsVZ 2005, p.*
-
- Welser, Irene**
De Berti, Giovanni Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices, *in para. 3, 11*
- Austrian Yearbook on International Arbitration, Vienna (2010), pp. 85-89
- cited as:
- Welser/De Berti, in: Austrian YB 2010, p.*

- Wirth, Markus** Weshalb Civil-Law-Schiedsrichter Common- *in para. 10*
Law-Verfahrensrecht anwenden,
Zeitschrift für Schiedsverfahren 2003,
pp. 9-15
cited as:
Wirth, SchiedsVZ 2003, p.
- Zeller, Bruno** Interpretation of Article 74 – Zapata Her- *in paras. 47,*
manos v. Hearthside Baking – Where next?, *49, 51, 55*
Nordic Journal of Commercial Law, Issue
No. 1 2004, pp. 1-10
cited as:
Zeller, NJCL 2004, p.
- Zuberbühler, Tobias** IBA Rules of Evidence Commentary on the *in paras. 24,*
Hofmann, Dieter IBA Rules on the Taking of Evidence in Inter- *25, 27, 31*
et al. (Ed.) national Arbitration, Zurich (2012)
cited as:
Zuberbühler et al., IBA, p., para.

INDEX OF CASES

Austria

Oberster Gerichtshof

in para. 123

June 28, 2005

Case No.: 5 Ob 45/05m

available online:

CISG-online 1047

<http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=1047>

cited as:

OGH, Jun 28, 2005

Oberster Gerichtshof

in para. 68

January 14, 2002

Case No.: 7 Ob 301/01t

available online:

CLOUT No. 541

<http://cisgw3.law.pace.edu/cases/020114a3.html>

cited as:

OGH, Jan 14, 2002

Oberster Gerichtshof

in para. 69

February 6, 1996

Case No.: 10 Ob 518/95

available online:

CLOUT No. 176

<http://cisgw3.law.pace.edu/cases/960206a3.html>

cited as:

OGH, Feb 6, 1996

Canada

Court of Appeal for British Columbia

in para. 90

Jostens Canada Ltd. v. Gibsons Studio Ltd. et al.

April 28, 1999

Case No.: V03357

available online:

<http://www.canlii.org/en/bc/bcca/doc/1999/1999bcca273/1999bcca273.html>

cited as:

Jostens Canada Ltd. v. Gibsons Studio Ltd.

France**Cour de Cassation***in paras. 75,*

Chambre civile 1

79

December 14, 1983

Case No.: 82-14089

available online:

[http://www.legifrance.gouv.fr/affichJuri-
Judi.do?idTexte=JURITEXT000007012734](http://www.legifrance.gouv.fr/affichJuri-Judi.do?idTexte=JURITEXT000007012734)

cited as:

*C.Cass., Dec 14, 1983***Cour d'Appel de Grenoble***in para. 75*

Chambre commerciale

January 24, 1996

available:

Revue de l'Arbitrage 1997, pp. 82-83

cited as:

*C.App. Grenoble, Jan 24, 1996***Cour d'Appel Grenoble***in para. 95*

February 22, 1995

Case No.: 93/3275

available online:

CLOUT No. 154

<http://cisgw3.law.pace.edu/cases/950222f1.html>

cited as:

C.App. Grenoble, Feb 22, 1995

Germany

Bundesgerichtshof

in para. 31

February 26, 2009

Case No.: I ZR 28/06

available:

NJW 2009, pp. 1420-1422

cited as:

BGH, Feb 26, 2009

Bundesgerichtshof

in para. 45

November 25, 1998

Case No.: VIII ZR 259/97

available online:

CISG-online 353

<http://globalsaleslaw.org/content/api/cisg/display.cfm?test=353>

cited as:

BGH, Nov 25, 1998

Bundesgerichtshof

in para. 19

December 11, 1996

Case No.: VIII ZR 154/95

available online:

CISG-online 225

[http://www.globalsaleslaw.org/content/api/cisg/
display.cfm?test=225](http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=225)

cited as:

BGH, Dec 11, 1996

Bundesgerichtshof

in para. 80

November 22, 1962

Case No.: VII ZR 264/61

available:

NJW 1963, pp. 243-244

cited as:

BGH, Nov 22, 1962

OLG München

in para. 45

March 5, 2008

Case No.: 7 U 4696/06

available online:

CISG-online 1686

<http://globalsaleslaw.org/content/api/cisg/display.cfm?test=1686>

cited as:

OLG München, Mar 5, 2008

OLG Frankfurt

in paras. 76,

79

October 24, 2006

Case No.: 26 Sch 6/06

available:

Zeitschrift für Schiedsverfahren 2007,
pp. 217-218

cited as:

OLG Frankfurt, Oct 24, 2006

OLG Oldenburg

in para. 84

June 20, 2005

Case No.: 9 SchH 2/O5

available:

Zeitschrift für Schiedsverfahren 2006,
pp. 223-224

cited as:

OLG Oldenburg, Jun 20, 2005

OLG Zweibrücken

in para. 37

March 31, 1998

Case No.: 8 0 1995/95

available online:

CISG-online 481

[http://www.globalsaleslaw.org/content/api/cisg/
display.cfm?test=481](http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=481)

cited as:

OLG Zweibrücken, Mar 31, 1998

OLG Düsseldorf

in para. 46

January 14, 1994

Case No.: 17 U 146/93

available online:

CLOUT No. 130

<http://cisgw3.law.pace.edu/cases/940114g1.html>

cited as:

OLG Düsseldorf, Jan 14, 1994

LG München I

in para. 46

May 18, 2009

Case No.: 28 O 20906/06

available:

Internationales Handelsrecht 2010, pp. 150-152

cited as:

LG München I, May 18, 2009

Greece

Polimeles Protodikio Athinon

in para. 113

2009

Case No.: 4505/2009

available online:

<http://cisgw3.law.pace.edu/cases/094505gr.html>

cited as:

Polimeles Protodikio Athinon, 2009

Poland

Sąd Najwyższy

in para. 114

May 11, 2007

Case No.: V CSK 456/06

available online:

CLOUT No. 110

<http://cisgw3.law.pace.edu/cases/070511p1.html>

cited as:

SN, May 11, 2007

Singapore

High Court Singapore

in para. 79

HKL Group Co. Ltd. v. Rizq International Holdings Pte Ltd.

February 19, 2013

Case No.: 972 of 2012

available online:

<http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15133-hkl-group-co-ltd-v-rizq-international-holdings-pte-ltd-2013-sghcr-5>

cited as:

HKL Group Co. Ltd. v. Rizq International Holding Pte Ltd.

Switzerland

Bundesgericht

in para. 80

September 30, 2013

Case No.: 4A_232/2013

available online:

<http://www.swissarbitrationdecisions.com/sites/default/files/30%20septembre%202013%204A%20232%202013.pdf>

cited as:

BGer, Sep 30, 2013

Bundesgericht

in para. 79

November 7, 2011

Case No.: 4A_246/2011

available online:

<http://www.swissarbitrationdecisions.com/sites/default/files/7%20novembre%202011%204A%20246%202011.pdf>

cited as:

BGer, Nov 7, 2011

Bundesgericht

in para. 123

May 18, 2009

Case No.: 4A_68/2009

available online:

CISG-online 1900

<http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=1900>

cited as:

BGer, May 18, 2009

Bundesgericht

in paras. 75,

July 8, 2003

79

Case No.: 4P.67/2003

available online:

http://www.polyreg.ch/bgeunpub/Jahr_2003/Entscheide_4P_2003/4P.67__2003.html

cited as:

BGer, Jul 8, 2003

Kantonsgericht Zug

in para. 61

December 14, 2009

Case No.: A2 2001 105

available online:

CISG-online 2026

<http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=2026>

cited as:

KG Zug, Dec 14, 2009

Kantonsgericht Waadt

in para. 79

March 30, 1993

available:

Association Suisse de l'Arbitrage Bulletin 1995,
Vol. 13 Issue 1, pp. 64-68

cited as:

KG Waadt, Mar 30, 1993

United Kingdom

House of Lords

in para. 90

Her Majesty's Attorney General v. Blake and
Another

July 27, 2000

Case No.: I AC 268

available online:

<http://www.bailii.org/uk/cases/UKHL/2000/45.html>

cited as:

Attorney-General v. Blake

High Court, Queen Bench's Division

in para. 78

Mangistaumunaigaz Oil Production Association
v. United World Trade Inc.

February 21, 1995

available:

Lloyd's Law Reports 1995, p. 617

cited as:

*Mangistaumunaigaz Oil Production Assoc. v.
United World Trade Inc.*

Court of Appeal

in para. 79

Star Shipping A.S. v. China National Foreign
Trade Transportation Corporation

May 20, 1993

available:

Lloyd's Law Reports 1993, pp. 445-453

cited as:

*Star Shipping A.S. v. China National Foreign
Trade Transportation Corp.*

**United States of
America**

US Supreme Court

in para. 90

Snepp v. United States of America

February 19, 1980

Case No.: 444 U.S. 507

available online:

<https://supreme.justia.com/cases/federal/us/444/507/case.html>

cited as:

Snepp v. United States

US Supreme Court

in paras. 78,

Laboratorios Grossman S.A. v. Forest Laboratories Inc.

79

December 19, 1968

Case No.: 31 A.D.2d 628

available online:

Westlaw

http://international.westlaw.com/find/default.wl?cite=31+A.D.2d+628&rs=WLIN15.07&utid=4&vr=2.0&rp=%2ffind%2fdefault.wl&sp=intlandes-000&fn=_top&mt=LawSchoolPractitioner&sv=Split

cited as:

Laboratorios Grossman S.A. v. Forest Laboratories Inc.

US Court of Appeals

in para. 19

Eighth Circuit

Terra Intern Inc. v. Mississippi Chemical Corp.

July 11, 1997

Case No.: 96-2140

available online:

Westlaw

http://international.westlaw.com/find/default.wl?cite=115+F.3d+540&rs=WLIN15.07&utid=4&vr=2.0&rp=%2ffind%2ffault.wl&sp=intlandes-000&fn=_top&mt=LawSchoolPractitioner&sv=Split

cited as:

Terra Intern Inc. v. Mississippi Chemical Corp.

US District Court

in para. 46

Southern District of New York

Stemcor USA Inc. v. Miracero S.A. de C.V.

September 30, 2014

Case No.: 14-cv-00921 (LAK)

available:

Internationales Handelsrecht 2015, pp. 66-68

cited as:

Stemcor USA Inc. v. Miracero S.A. de C.V.

US District Court

in para. 95

Southern District of New York

Guangxi Nanning Baiyang Food Co Ltd. v.

Long River International, Inc.

March 30, 2010

Case No.: 09 Civ. 3059 (TPG)

available online:

<http://cisgw3.law.pace.edu/cases/100330u1.html>

cited as:

Guangxi Nanning Baiyang Food Co. Ltd. v.

Long River International, Inc.

US District Court

in para. 75

District South Carolina

National Material Trading v. M/V Kaptan Cebi

March 13, 1997

Case No.: 2:95-3673-23

available online:

Westlaw

[http://international.westlaw.com/find/de-](http://international.westlaw.com/find/default.wl?cite=+1997+WL+915000&rs=WLIN15)

[fault.wl?cite=+1997+WL+915000&rs=WLIN15](http://international.westlaw.com/find/default.wl?cite=+1997+WL+915000&rs=WLIN15)

[.07&utid=4&vr=2.0&rp=%2ffind%2fdefault.wl](http://international.westlaw.com/find/default.wl?cite=+1997+WL+915000&rs=WLIN15)

[&sp=intlandes-000&fn=_top&mt=LawSchool-](http://international.westlaw.com/find/default.wl?cite=+1997+WL+915000&rs=WLIN15)

[Practitioner&sv=Split](http://international.westlaw.com/find/default.wl?cite=+1997+WL+915000&rs=WLIN15)

cited as:

National Material Trading v. M/V Kaptan Cebi

INDEX OF ARBITRAL AWARDS

Arbitration Institute of the Stockholm Chamber of Com- merce	Award No.: 107/1997 January 1, 1998 available online: CISG-online 1301 http://globalsaleslaw.org/content/api/cisg/display.cfm?test=1301 cited as: <i>SCC 107/1997</i>	<i>in paras. 45, 99</i>
Bulgarian Chamber of Commerce, Court of Arbitration	Award No.: 151/1984 December 3, 1984 available: Yearbook Commercial Arbitration, Vol. 15 1990, pp. 63 cited as: <i>BCCI 151/1984</i>	<i>in para. 79</i>
China International Economic and Trade Arbitration Commission	Award No.: CISG/2006/18 May 2006 available online: http://cisgw3.law.pace.edu/cases/060500c2.html cited as: <i>CIETAC CISG/2006/18</i>	<i>in para. 99</i>

**Geneva Chamber of
Commerce, Indus-
try and Services,
Court of Arbitration**

Award No.: 117/1997

in para. 78

November 29, 1996 (Interlocutory Award)

available:

Association Suisse de l'Arbitrage Bulletin,
Vol. 15 1997, pp. 534-548

cited as:

CCIG 117/1997

**International Cham-
ber of Commerce,
Court of Arbitration**

Award No.: 7626/1997

in para. 3

1997

available:

Gary Born Cases and Materials 2nd ed., p. 781
chapter 9, Alphen aan den Rijn (2015)

cited as:

ICC 7626/1997

Award No.: 7920/1993

in para. 78

1993 (Partial Award)

available:

Yearbook Commercial Arbitration, Vol. 23 1998,
pp. 80-85

cited as:

ICC 7920/1993

Award No.: 7170/1992

in para. 10

1992

available:

Dominique Hascher - Collection of Procedural
Decisions in ICC Arbitration 1993-1996 2nd ed.,
New York (1998) Kluwer Law, p. 57

cited as:

ICC 7170/1992

Award No.: 7585/1992

in para. 45

1992

available online:

CISG-online 105

<http://globalsaleslaw.org/content/api/cisg/display.cfm?test=105>

cited as:

ICC 7585/1992

Award No.: 7197/1992

in para. 45

1992

available online:

CISG-online 36

<http://globalsaleslaw.org/content/api/cisg/display.cfm?test=36>

cited as:

ICC 7197/1992

Award No.: 7170/1991

in para. 3

1991

available:

Dominique Hascher - Collection of Procedural
Decisions in ICC Arbitration 1993-1996 2nd ed.,
New York (1998) Kluwer Law, p. 29

cited as:

ICC 7170/1991

Award No.: ICC 5542/1988

in paras. 10,

1988

11

available:

Dominique Hascher - Collection of Procedural
Decisions in ICC Arbitration 1993-1996 2nd ed.,
New York (1998) Kluwer Law, p. 66

cited as:

ICC 5542/1988

Award No.: 1434/1975

in para. 79

1975

available:

Journal du Droit International 1976, pp. 978-989

cited as:

ICC 1434/1975

**International Centre
for Settlement of In-
vestment Disputes**

Award No. ICSID ARB/10/5

in para. 11

Tidewater INC v. Bolivian Republic of Vene-
zuela

March 29, 2011

available online:

[http://www.italaw.com/sites/default/files/case-docu-
ments/italaw4206_0.pdf](http://www.italaw.com/sites/default/files/case-docu-
ments/italaw4206_0.pdf)

cited as:

ICSID ARB/10/5 2011

Award No. ICSID ARB/01/12

in para. 11

Azurix Corp. v. Argentine Repub.

September 1, 2009

available online:

[http://www.italaw.com/documents/Azurix-An-
nulment.pdf](http://www.italaw.com/documents/Azurix-An-
nulment.pdf)

cited as:

ICSID ARB/01/12 2009

Award No. ICSID ARB(AF)/00/1

in para. 3

January 9, 2003

available online:

[http://www.italaw.com/sites/default/files/case-
documents/ita0009.pdf](http://www.italaw.com/sites/default/files/case-
documents/ita0009.pdf)

cited as:

ICSID ARB(AF)/00/1 2003

**NAFTA Investor
State Arbitration**

**International Thunderbird Gaming Corpora-
tion v. The United Mexican States**

in para. 28

July 31, 2003

Procedural Order No. 2

available online:

[http://opil.ouplaw.com/view/10.1093/law:iic/138-2003.case.1/IIC138\(2003\)D.pdf](http://opil.ouplaw.com/view/10.1093/law:iic/138-2003.case.1/IIC138(2003)D.pdf)

cited as:

*PO No. 2 of: Thunderbird v. Mexican States,
2003*

**Russian Federation
Chamber of Com-
merce and Industry,
International Com-
mercial Arbitration
Court**

Award No.: 155/1994

in para. 45

March 16, 1995

available online:

CISG-online 205

<http://globalsaleslaw.org/content/api/cisg/display.cfm?test=205>

cited as:

ICAC 155/1994

**Vienna Interna-
tional Arbitral Cen-
tre**

Award No.: SCH-4366

in para. 45

June 15, 1994

available online:

CISG-online 691

<http://globalsaleslaw.org/content/api/cisg/display.cfm?test=691>

cited as:

VIAC SCH-4366 1994

STATEMENT OF FACTS

The parties to this Arbitration are Kaihari Waina Ltd. (hereafter **CLAIMANT**) and Vino Veritas Ltd. (hereafter **RESPONDENT**). CLAIMANT is a wine merchant specialized in top quality wines for the collectors' and high end gastronomy markets. It is a reliable distributor of Mediterranean Mata Weltin wine (hereafter **Mata Weltin**). It is incorporated in Oceanside, Equatoriana. RESPONDENT is a medium sized vineyard that has won various prizes for its diamond Mata Weltin. It is incorporated in Vuachoua, Mediterraneo.

On April 22, 2009, CLAIMANT and RESPONDENT (hereafter **the Parties**) concluded a Framework Agreement (hereafter **FA**) about the sale and purchase of Mata Weltin. Pursuant to this agreement, RESPONDENT is obliged to provide between 7,500 and 10,000 bottles of Mata Weltin annually to CLAIMANT. Orders must be placed no later than December 20 each year. The FA contains an arbitration agreement, Art. 20 FA. The Parties agreed on hearing the dispute under the Vienna Rules, in force as of July 1, 2013 (hereafter **VR**). The Arbitration shall take place in Vindobona, Danubia. The contract is governed by the law of Danubia, including the CISG.

In the beginning of 2014, RESPONDENT started negotiations with SuperWines, an expanding international wine wholesaler. Simultaneously, CLAIMANT entered into several sales contracts with its high-end customers. Due to bad weather conditions **in summer 2014**, almost half of RESPONDENT'S Mata Weltin grapes rotted. RESPONDENT produced 65,000 instead of the usual 100,000 bottles. **In early November 2014**, CLAIMANT ordered 10,000 bottles of Mata Weltin 2014. **Later that month**, CLAIMANT'S development manager, Ms. Buharit, pointed out to RESPONDENT'S managing director, Mr. Weinbauer, that CLAIMANT was in need of the 10,000 bottles ensured by the FA. The same day, Mr. Barolo, CEO of SuperWines, ordered 15,000 bottles of Mata Weltin from RESPONDENT.

In the beginning of December 2014, Mr. Weinbauer announced that RESPONDENT would only deliver 4,500 – 5,000 bottles of Mata Weltin to CLAIMANT instead of the promised 10,000 bottles. CLAIMANT insisted on delivery of the promised 10,000 bottles. Nonetheless, RESPONDENT sold 5,500 bottles of Mata Weltin to SuperWines. At the same time, RESPONDENT wrongfully terminated the business relationship with CLAIMANT. In order to defend itself against this wrongful termination, CLAIMANT consulted LawFix, a Mediterranean law firm. CLAIMANT filed for interim relief in the High Court of Mediterraneo to prevent RESPONDENT from selling the promised 10,000 bottles to other customers. The interim relief was granted to ensure that RESPONDENT fulfills its contractual obligations towards CLAIMANT.

On January 30, 2015, RESPONDENT filed a petition for non-declaratory relief in the High Court of Mediterraneo to resell the bottles, promised to CLAIMANT, to SuperWines. CLAIMANT invoked the arbitration agreement. The High Court of Mediterraneo denied jurisdiction and dismissed RESPONDENT'S petition for non-declaratory relief **in April 2015**. To solve the problems created by RESPONDENT'S breach of contract, CLAIMANT has filed a request for arbitration with the *Vienna International Arbitral Centre* (hereafter **VIAC**) **in July 2015**.

INTRODUCTION

For almost six years, CLAIMANT and RESPONDENT shared a business relationship based on mutual trust and loyalty. CLAIMANT was committed to buy considerable amounts of Mata Weltin as it trusted RESPONDENT in full faith. CLAIMANT supported RESPONDENT'S vineyard by promoting its Mata Weltin to high-end customers in Equatoriana. Therefore, CLAIMANT'S high-end customers increased their orders.

CLAIMANT ordered 10.000 bottles Mata Weltin 2014 from RESPONDENT. CLAIMANT could never have anticipated RESPONDENT'S outrageous reaction caused by this justified order. Furthermore, CLAIMANT never imagined that RESPONDENT would disregard the business relationship between the Parties: Not only did RESPONDENT wrongfully terminate the Parties' business relationship, but it also refused to deliver to CLAIMANT. Instead, it sold the promised bottles to CLAIMANT'S competitor SuperWines. RESPONDENT was wooed by the premium SuperWines paid. RESPONDENT gave priority to its quick profit instead of honoring the long-lasting business relationship with CLAIMANT.

Due to RESPONDENT'S wrongful termination and its refusal to deliver, CLAIMANT had to secure its contractual rights by filing for an interim relief in the High Court of Mediterraneo. Moreover, CLAIMANT had to cope with the nuisance RESPONDENT created by filing for non-declaratory relief, in an attempt to circumvent its contractual obligations. Due to these proceedings, CLAIMANT incurred litigation costs. RESPONDENT must reimburse these costs (**Issue 2**).

In light of RESPONDENT'S disloyal behavior towards CLAIMANT, RESPONDENT should not obtain the profit made by selling the 5.500 bottles to SuperWines. Therefore, it is CLAIMANT that is entitled to RESPONDENT'S profit (**Issue 3**).

CLAIMANT does not dispose of further information regarding the profit RESPONDENT made by contracting with SuperWines. Thus, CLAIMANT is unable to specify the amount of its claim under Issue 3. Consequently, CLAIMANT needs all documents in RESPONDENT'S possession in relation to the sale of Mata Weltin 2014 to SuperWines (**Issue 1**).

ARGUMENT

ISSUE 1: The Tribunal has the power and should order RESPONDENT to produce the documents requested by CLAIMANT

- 1 CLAIMANT requests the Tribunal to order RESPONDENT to produce all documents in RESPONDENT'S possession relating to the sale of Mata Weltin 2014 to SuperWines from January 1, 2014 to July 14, 2015. CLAIMANT needs these documents to substantiate its claim under Issue 3. Contrary to RESPONDENT'S submission [*SD*, p. 28, para. 27], the Tribunal has the power to order RESPONDENT to produce the documents requested by CLAIMANT (**A.**). The Tribunal should use its discretion to order RESPONDENT to produce these documents (**B.**).

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

- 2 The jurisdiction of the Tribunal as well as the applicability of the Vienna Rules are uncontested [*PO No. 1*, pp. 50, 51, paras. 2, 5(3)]. Art. 29(1) VR empowers the Tribunal to order the production of documents on request of a party (**I.**). The arbitration agreement, contained in Art. 20 FA, does not exclude this power (**II.**).

I. Art. 29(1) VR empowers the Tribunal to order the production of documents on request of a party

- 3 RESPONDENT argues that the Tribunal has no power to grant CLAIMANT'S request because the VR do not mention document production [*SD*, p. 28, para. 27]. However, Art. 29(1) VR states that the Tribunal “*may on its own initiative collect evidence*”. The collection of evidence on a tribunal's initiative – e.g. in form of documents – is commonly acknowledged in international arbitration [*ICC 7626/1997*; *ICC 7170/1991*; *ICSID ARB(AF)/00/1 2003*; *Haugeneder/Netal*, in: *VIAC HB*, Art. 29, para. 4; *Welser/De Berti*, in: *Austrian YB 2010*, p. 86; cf. Art. 25(5) ICC; Art. 27.3 *UNCITRAL AR*; Art. 43(a) *ICSID Rules*; Art. 27(1) *DIS Rules*]. Even if arbitral rules are entirely silent on document production, a tribunal has the power to order document production since this power is “*inherent in an international arbitral tribunal's mandate*“ [*Born*, *ICA*, p. 2341].
- 4 Moreover, Art. 29(1) VR empowers the Tribunal to order document production based on a party's request [*Haugeneder/Netal*, in: *VIAC HB*, Art. 29, paras. 11, 12]. This is in line with the standards in international arbitration, where the possibility of document production based on a party's request is “*good practice*” [*Haugeneder/Netal*, in: *VIAC HB*, Art. 29, para. 12; cf. *Blackaby/Partasides, Redfern and Hunter*, para. 5.17]. In any case, the final decision to order document production is within a tribunal's discretion [*Blackaby/Partasides, Redfern and*

Hunter, para. 6.114]. Thus, Art. 29(1) VR empowers the Tribunal in general to order RESPONDENT to produce documents.

II. The Parties' arbitration agreement does not exclude the Tribunal's power to order document production

- 5 The Parties' arbitration agreement does not exclude the Tribunal's power to order document production. Pursuant to Art. 28(1) VR, the arbitral proceedings have to be conducted in accordance with the agreement of the parties. The Parties agreed that "*the proceedings shall be conducted in a fast and cost efficient way and [...] no discovery shall be allowed*" [Art. 20 FA, C-1, p. 9]. RESPONDENT submits that *discovery* is "*merely another word for document production*" [SD, p. 28, para. 27] and that the Parties consequently excluded the Tribunal's power to order document production. This submission is not convincing. The term *discovery* is not a synonym for document production as the following interpretation shows.
- 6 The interpretation of the Parties' arbitration agreement follows Art. 8 CISG. Since Art. 19(3) CISG foresees that an arbitration agreement falls within the scope of the CISG, Art. 8 CISG applies to an arbitration agreement as well [Gruber, in: MüKo-BGB, Art. 8, para. 6; Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, para. 5]. If the Tribunal does not decide to apply Art. 8 CISG, the general contract law of Danubia, which is a verbatim adoption of the UNIDROIT principles [PO No. 1, p. 51, para. 5(4)], applies. Both legal sources foresee comparable interpretation standards [Zuppi, in: Kröll et al., Art. 8, para. 30; cf. Artt. 4.1, 4.2, 4.3 of the UNIDROIT principles correspond with Art. 8 CISG]. Thus, it is of no consequence which source applies to this Arbitration. Hereafter, the interpretation follows Art. 8 CISG which is divided into three sections. Primarily, Art. 8(1) CISG, which requires the existence of a common intention of the Parties, has to be considered [Ferrari, IHR 2003, p. 11]. Since a common intention of the Parties relating to the understanding of *discovery* cannot be proven, the requirements of Art. 8(1) CISG are not fulfilled. Consequently, the interpretation of the arbitration agreement follows the understanding of a reasonable person of the same kind as the Parties, Art. 8(2) CISG. In order to determine the understanding of a reasonable person, all relevant circumstances of the case have to be considered, Art. 8(3) CISG.
- 7 The interpretation of the arbitration agreement (hereafter **Art. 20 FA**) according to Art. 8(2), (3) CISG demonstrates that the Parties did not exclude the Tribunal's power to order document production. First, the wording of Art. 20 FA shows that the Parties only excluded

US-style *discovery*; document production remains possible (1.). Then, all other relevant circumstances of the case underline this interpretation (2.). Finally, the *contra proferentem* rule does not lead to a different interpretation (3.).

1. The wording of Art. 20 FA shows that document production remains possible

8 The wording of Art. 20 FA shows that *discovery* and document production are not synonymous. Therefore, document production remains possible (a.). Moreover, Art. 20 FA does not exclude the Tribunal's power to order document production because an exclusion would contradict the Parties' agreement to have efficient proceedings (b.).

a. Discovery and document production are not synonymous

9 *Discovery* and document production are, unlike RESPONDENT'S submission, not synonymous. Considering the different scope of document production in international arbitration and US-style *discovery*, the terms have to be clearly separated [*Marghitola, Doc. Prod., p. 8*].

10 The term *discovery* has its origin in US procedure [*Hancock/Reed, ICC Dossier 2009, p. 340; Marghitola, Doc. Prod., p. 9; Salomon/Friedrich, Am. Rev. 2013, p. 551*]. *Discovery* is a pretrial stage in procedure used to find the ultimate truth [*Cremades, DRJ 2003, p. 74; Lüpke/Müller, NZI 2002, p. 588; Marghitola, Doc. Prod., p. 8; Metzler, in: Austrian YB 2015, p. 237; Risse/Haller, in: Eberl, p. 118, para. 8; Wirth, SchiedsVZ 2003, p. 10*]. To find this ultimate truth, *discovery* combines depositions, interrogatories, requests for admissions, and a broadly scoped production of documents [*cf. Rule 26 et seq. of the US Federal Rules of Civil Procedure; ICC 7170/1992; ICC 5542/1988; Elsing, SchiedsVZ 2011, p. 121*].

11 However, in international arbitration US-style *discovery* is not appropriate unless the parties have agreed on it [*ICC 5542/1988; ICSID ARB/10/5 2011; Kaufmann-Kohler/Bärtsch, SchiedsVZ 2004, p. 17; Schwarz/Konrad, Comm. VR, Art. 20, para. 239*]. The term preferably used for the taking of documentary evidence in international arbitration is document production [*Marghitola, Doc. Prod., p. 9; this term also using: Derains, ICC Bull. 2006, p. 83; Hamilton, ICC Bull. 2006, p. 63; Mcilwrath/Savage, Int. Arbitr., p. 289, para. 181; Pinkston, in: Austrian YB 2011, p. 90*]. In international arbitration, document production is restricted to the collection of specific categories of documents that are sufficiently determined [*Salomon/Friedrich, Am. Rev. 2013, p. 554; Welser/De Berti, Best Practices, p. 88*]. Hence, the scope of document production in international arbitration is much narrower than the scope of US-style *discovery* [*Born, ICA, p. 2320; Hwang/Chin, ICC Bull 2006, p. 40; Lachmann, HB, p. 53, para. 180*].

Salomon/Friedrich, Am. Rev. 2013, p. 553]. The exact scope of document production in international arbitration is determined by a tribunal's discretion [*ICSID ARB/01/12 2009; Born, ICA, p. 2320; Kaufmann-Kohler/Bärtsch, SchiedsVZ 2004, p. 17; Marghitola, Doc. Prod., p. 24*].

12 In view of these significantly different evidence-gathering techniques, a reasonable person of the same kind as the Parties (Art. 8(2), (3) CISG) would have understood that the Parties only excluded *discovery*, meaning a US litigation term. The Tribunal's power to order document production, as customary in international arbitration, is not excluded.

b. The agreement to have efficient proceedings requires document production

13 Moreover, the Parties agreed in Art. 20 FA that "*the proceedings shall be conducted in a fast and cost efficient way [...]*" [*C-1, p. 9*]. As document production is essential for efficient proceedings, an exclusion of document production would contradict this intention. If RESPONDENT does not produce the requested documents, it is *extremely difficult* for CLAIMANT to calculate the amount of its claim [*PO No. 2, p. 54, para. 13*]. Thus, the calculation would be extremely time consuming. However, this calculation method is not impossible [*PO No. 2, p. 54, para. 13*]. Consequently, RESPONDENT'S cooperation does not determine whether CLAIMANT is able to calculate the amount of its claim, but only how efficient. If RESPONDENT produces the requested documents, CLAIMANT will immediately be able to calculate the amount of its claim. This demonstrates the importance of document production for efficient proceedings.

14 RESPONDENT might submit that CLAIMANT cannot refer to efficiency while simultaneously rejecting RESPONDENT'S proposal to have fast-track proceedings in front of a single arbitrator under Art. 45 VR [*Mr. Fasttrack's letter, p. 35*]. However, CLAIMANT'S behavior is not contradictory. CLAIMANT would have agreed to fast-track proceedings under the condition that RESPONDENT either produces the requested documents or agrees on an arbitrator familiar with document production. RESPONDENT refused both of these conditions [*Mr. Fasttrack's letter, p. 35*]. RESPONDENT'S offer to have fast-track proceedings is only another attempt to deprive CLAIMANT of the opportunity to get access to documents that are crucial for this Arbitration. Thus, CLAIMANT could not agree on fast-track proceedings. In sum, a reasonable person (Art. 8(2), (3) CISG) would have understood that the Parties' agreement to have efficient proceedings requires document production.

2. All other circumstances of the case show that document production is possible

15 Moreover, in order to interpret Art. 20 FA all other relevant circumstances of the case beyond the wording need to be considered as well, Art. 8(2), (3) CISG. The statement of RESPONDENT'S

former managing director, Mr. Weinbauer, (a.) as well as the bad experiences of the Parties with US-style *discovery* (b.) show that document production remains possible.

a. Mr. Weinbauer acknowledges that requests for particular documents are possible

16 The conclusion that *discovery* and document production are two different terms [*supra Issue 1 A.II.1.a.*] is also underscored by a statement of RESPONDENT'S former managing director, Mr. Weinbauer. In his witness statement, Mr. Weinbauer states that he understood Art. 20 FA only to exclude requests which go "*beyond requests for particular documents*" [*R-1, p. 31*]. Hence, Mr. Weinbauer acknowledges that document production is possible to some extent under Art. 20 FA. If document production and *discovery* were synonymous, as submitted by RESPONDENT in its statement of defense [*SD, p. 28, para. 27*], even the form of document production Mr. Weinbauer had in mind would not be possible. Thus, RESPONDENT'S submission in its statement of defense contradicts the statement of its own managing director. Mr. Weinbauer's statement shows RESPONDENT'S understanding of the agreement at the time of entering into the contract. RESPONDENT'S subsequent submission in its statement of defense is irrelevant. Since the Parties concluded a valid contract that does not exclude document production, one party cannot unilaterally alter the contractual terms by a subsequent submission.

b. The Parties' bad experiences induced them to exclude US-style *discovery*

17 RESPONDENT submits that in "*international arbitration with no connection to the USA the American rules on discovery would anyway not be applicable, so that there was no need to exclude them*" [*SD, p. 28, para. 28*]. However, although US-style *discovery* only applies to international arbitration if the Parties have agreed on it [*supra Issue 1 A.II.1.a.*], the Parties' bad experiences induced them to exclude US-style *discovery*. The intention to definitely exclude *discovery* prevailed the actual necessity of an exclusion in international arbitration.

18 CLAIMANT as well as RESPONDENT had no experience with arbitration [*PO No. 2, p. 60, para. 53*]. The only experience they had were their bad experiences with extensive documentary evidence in court litigation [*C-12, p. 20; R-1, p. 31*]. RESPONDENT was involved in litigation in which it was asked to produce an enormous amount of documents relating to a period of six years [*R-1, p. 31*]. CLAIMANT'S intention to exclude *discovery* resulted from the bad experiences of a family member of its COO, Mr. Friedensreich. His brother had been involved in a case with extensive *discovery* in the US [*C-12, p. 20*]. In light of these bad experiences, the Parties intended to ensure that they would not have to face again broad requests for document production, as they are typical for *discovery*. It was therefore their main intention to exclude *discovery*

in each and every case, irrespective of the proceeding's forum (arbitration or litigation). Consequently, it is irrelevant whether US-style *discovery* is unusual in international arbitration.

3. The *contra proferentem* rule does not lead to a different interpretation

- 19 Since the *contra proferentem* rule does not apply to this Arbitration, RESPONDENT'S understanding that document production and *discovery* are synonymous [*SD*, p. 28, para. 27] is not decisive. The *contra proferentem* rule states that a contractual clause has to be interpreted against its drafter if it is impossible to determine a corresponding intention of the parties even after an interpretation according to Art. 8 CISG [*BGH*, Dec 11, 1996; *Schmidt-Kessel*, in: *Schlechtriem/Schwenzer*, Art. 8, para. 47]. The *contra proferentem* rule does not apply since the interpretation of Art. 20 FA shows that the Parties had the same intention [*supra Issue 1 A.II.1.,2.*]. Moreover, the *contra proferentem* rule does not apply if both parties are represented by an attorney and have the opportunity to review the agreement [*Terra Intern Inc. v. Mississippi Chemical Corp.*; *Duhl*, *Pittsburgh Law Rev.*, p. 96]. RESPONDENT received the draft the week before contract conclusion and reviewed it with its attorney [*R-1*, p. 31].
- 20 In view of these arguments, the interpretation of Art. 20 FA shows that the Parties did not intend to exclude the Tribunal's power to order document production. Therefore, the Tribunal has the power to order document production according to Artt. 29(1), 28(1) VR.

B. The Tribunal should order RESPONDENT to produce the requested documents

- 21 The Tribunal should grant CLAIMANT'S request for document production. Art. 29(1) VR empowers the Tribunal to order document production at its discretion. The Tribunal should use this discretion in accordance with the IBA Rules as they apply to this Arbitration (**I.**). The requirements of a request for document production under the IBA Rules are fulfilled in this Arbitration (**II.**). Furthermore, refusing CLAIMANT'S request would violate CLAIMANT'S right to be heard (**III.**). This may result in an unenforceable award (**IV.**).

I. The Tribunal should use its discretion in accordance with the IBA Rules

- 22 The IBA Rules govern the taking of evidence “*whenever the Parties have agreed [on them] or the Arbitral Tribunal has determined to apply the IBA Rules*”, Art. 1(1) IBA Rules. The Parties implicitly agreed on the application of the IBA Rules (**1.**). Even if the Tribunal rejects this submission, it should determine to apply the IBA Rules (**2.**).

1. The Parties agreed on the application of the IBA Rules in Art. 20 FA

- 23 Contrary to RESPONDENT'S allegation [*SD*, p. 28, para. 28], the Parties implicitly selected the IBA Rules in this Arbitration. This shows the interpretation of Art. 20 FA according to

Art. 8(2), (3) CISG. The Parties did not choose the VIAC Model Clause. Instead, they stated in Art. 20 FA that the proceedings shall be conducted “*in accordance with international practice*” [C-1, p. 9]. By using the wording international practice, the Parties wanted to ensure that commonly acknowledged standards that guarantee efficient proceedings in international arbitration apply to their own proceedings. For the taking of evidence, the IBA Rules are the commonly acknowledged standard that guarantees efficient proceedings in international arbitration [IBA Guidelines, p. 22, No. 55; Marghitola, Doc. Prod., p. 1; Meier, SchiedsVZ 2008, p. 185; Sachs, SchiedsVZ 2003, p. 196]. The IBA Rules occupy an outstanding position and have found wide acceptance in the arbitration community [Born, ICA, p. 2359; Kläsener/Dolgorukow, SchiedsVZ 2010, p. 302; Kneisel/Lecking, SchiedsVZ 2013, p. 151; Marghitola, Doc. Prod., p. 1]. Hence, the IBA Rules are international practice concerning the taking of evidence in international arbitration. Thus, the Parties’ reference to international practice is an implicit agreement to apply the IBA Rules.

2. Alternatively, the Tribunal should determine to apply the IBA Rules

- 24 Even if the Tribunal does not agree that the Parties selected the IBA Rules, the Tribunal should use its broad discretion, given by Art. 29(1) VR, to apply the IBA Rules, Art. 1(1) IBA Rules. The Tribunal should determine to apply the IBA Rules since the VR, like other arbitral rules (e.g. Art. 25(5) ICC Rules), do not regulate specific requirements for document production. Hence, the Tribunal should consult rules that offer specific requirements for document production as a guideline. The IBA Rules appropriately offer a set of specific requirements for document production in Art. 3(3) IBA Rules. Thus, applying the IBA Rules allows a tribunal to fill the gaps left open by arbitral rules [Zuberbühler et al., IBA, p. 4, para. 11]. The VIAC itself regards these requirements as helpful guidance [Haugeneder/Netal, in: VIAC HB, p. 172, para. 5]. Hence, applying the IBA Rules is the most appropriate way for the Tribunal to use its discretion.
- 25 Furthermore, the Tribunal should determine to apply the IBA Rules since they balance the Parties’ different legal backgrounds. Their application allows the Tribunal to respect the common law tradition of CLAIMANT’s home country, as well as the civil law tradition of RESPONDENT’s home country [PO No. 2, p. 62, para. 68]. Coming from countries with different legal traditions, the Parties’ expectations concerning the taking of evidence may differ widely. While in common law broad requests for documents are usual, document requests in civil law are narrower [Kaufmann-Kohler/Bärtsch, SchiedsVZ 2004, p. 14; Kneisel/Lecking, SchiedsVZ 2013, p. 150]. The IBA Rules bridge this gap between common and civil law procedure since they offer an

independent regulation for the taking of evidence which respects both legal backgrounds [Comm. IBA Rules, p. 1; Shenton, in: YB 1985, p. 150; Zuberbühler et al., IBA, p. 3, para. 8]. For these reasons, the Tribunal should use its discretion to apply the IBA Rules.

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

26 The Tribunal should order RESPONDENT to produce the requested documents since CLAIMANT'S request fulfills the requirements of Art. 3(3) IBA Rules which deals with document production. CLAIMANT describes the category of the requested documents in sufficient detail (1.). The requested documents are relevant to the case and material to its outcome (2.). Pursuant to Art. 3(2), (5) IBA Rules, a request for document production is excluded if one of the objections stated in Art. 9(2) IBA Rules applies. CLAIMANT'S request for document production is neither excluded for reasons of confidentiality (3.) nor for reasons of fairness and equality (4.).

1. CLAIMANT describes the category of requested documents in sufficient detail

27 CLAIMANT'S request for document production fulfills the requirements of Art. 3(3)(a)(ii) IBA Rules. Pursuant to Art. 3(3)(a)(ii) IBA Rules, a request for document production shall contain a sufficiently detailed description of a narrow and specific category of documents. To be sufficiently narrow and specific the request has to contain the presumed author and recipient, the presumed timeframe, and the presumed content [Marghitola, Doc. Prod., p. 39; Raeschke-Kessler, Arbitr. Int. 2002, p. 418; Zuberbühler et al., IBA, p. 51, para. 110]. Presumed author and recipient are RESPONDENT and SuperWines. The timeframe is January 1, 2014 until July 14, 2015. The presumed content is the sale of Mata Weltin 2014 to SuperWines, in particular the purchase price [SC, p. 7, para. 27].

28 RESPONDENT might submit that CLAIMANT'S request is too broad as CLAIMANT requests documents concerning a time frame of one and a half years. This argument is not convincing. Pursuant to the interpretation of the wording "narrow and specific" in *Thunderbird v. Mexican States* a request for document production has to be "[...] reasonably limited in time and subject matter in view of the nature of the claim [...]" [PO No. 2 of: *Thunderbird v. Mexican States*, 2003; cf. *Born*, ICA, p. 2361, fn. 215; *O'Malley*, Law and Practice 2009, p. 44]. In order to reasonably limit the category of requested documents, the requesting party only has to use the "best means at its disposal" [O'Malley, Law and Practice 2009, p. 45]. Considering the nature of the case and the best means at CLAIMANT'S disposal, CLAIMANT'S request is reasonably limited. RESPONDENT and SuperWines started negotiations in January 2014 [PO No. 2, p. 55, para. 20]. From then on, RESPONDENT and SuperWines could have agreed on information con-

cerning the purchase price. Further, CLAIMANT could not limit its request to one single document as there is no written contract between RESPONDENT and SuperWines [PO No. 2, p. 56, para. 23].

29 Finally, CLAIMANT'S request is far from being a *fishing expedition* which is prohibited under the IBA Rules [Habegger, ICC Bull. 2006, p. 29; Kneisel/Lecking, SchiedsVZ 2013, p. 152; Sachs, SchiedsVZ 2003, p. 194; Veeder, ICC Bull. 2006, p. 59]. A *fishing expedition* is a request for production of a very vaguely identified group of documents to find additional material in the adversary's evidence [Kozłowska, JIA 2011, p. 52; Waincymer, Evidence, pp. 861, 862]. CLAIMANT only requests documents to prove the amount of its claim. It does not seek to obtain any further information. Thus, CLAIMANT'S request is sufficiently narrow and specific.

2. The requested documents are relevant to the case and material to its outcome

30 Moreover, the information contained in the documents requested by CLAIMANT is relevant to the case and material to its outcome, Art 3(3)(b) IBA Rules. Documents are relevant and material if they are necessary for a complete consideration of the facts of the case [Marghitola, Doc. Prod., p. 52; Raeschke-Kessler, Arbitr. Int. 2002, p. 427; Waincymer, Evidence, pp. 858, 859]. CLAIMANT needs the documents to calculate the monetary amount of its claim. The monetary amount of CLAIMANT'S claim is based on the profit RESPONDENT made by selling CLAIMANT'S Mata Weltin 2014 to SuperWines. Since only the requested documents contain this information, CLAIMANT would be unable to substantiate its claim under Issue 3 without the documents. Thus, the requested documents are relevant to the case and material to its outcome.

3. The requested documents are not excluded for reasons of confidentiality

31 Pursuant to Art. 9(2)(e) IBA Rules, a tribunal shall exclude any document from production for “grounds of *commercial confidentiality* [...] that it determines to be *compelling*” [emphasis added]. Contrary to RESPONDENT'S submission [SD, p. 25, para. 1, p. 28, para. 26], the documents requested by CLAIMANT do not encompass confidential business information or business secrets. Business secrets are affected if “*the companies ‘crown jewels’ are at stake*” [Marghitola, Doc. Prod., p. 92]. This is especially the case if the requested party has an economic interest to keep the requested information secret [BGH, Feb 26, 2009; Götz, Zivilverfahren, pp. 19, 20], e.g. if the request concerns secret recipes, patents, or know-how [Günther, in: FS Sandrock, p. 348; Zuberbühler et al., IBA, p. 180, para. 43].

32 CLAIMANT only asks for information concerning the sale of Mata Weltin 2014 to SuperWines including the purchase price. The purchase price is no business secret in this Arbitration. RESPONDENT has no economic interest in keeping the price negotiated with SuperWines secret from CLAIMANT even though RESPONDENT is known to engage in individual pricing for each customer [PO No. 2, p. 61, para. 61]. Since the purchase price between RESPONDENT and SuperWines including the premium is probably higher than the price CLAIMANT paid [PO No. 2, p. 56, para. 24], knowing the purchase price will not strengthen CLAIMANT'S bargaining position. Further, the relationship between RESPONDENT and SuperWines was already public knowledge [C-4, p. 12]. There were rumors in the industry even about the exact premium (EUR 15-20) SuperWines paid to RESPONDENT [C-4, p. 12; PO No. 2, p. 56, para. 24]. This shows RESPONDENT'S lack of interest in confidentiality, also underlined by the absence of a formal confidentiality agreement with SuperWines [PO No. 2, p. 56, para. 25].

33 Even if the Tribunal finds that confidential business information might be disclosed in this Arbitration, Art. 9(2)(e) IBA Rules requires the Tribunal to determine whether confidentiality is a compelling ground for exclusion. Consequently, the Tribunal is requested to weigh CLAIMANT'S interest in fast and efficient proceedings against RESPONDENT'S interest in keeping back the documents. Even if the documents contain any further reaching information, CLAIMANT'S request is in line with the Parties' agreement to have efficient proceedings. Hence, it outweighs RESPONDENT'S little interest in keeping its purchase price to SuperWines confidential [C-4, p. 12; PO No. 2, p. 56, paras. 24, 25]. Thus, RESPONDENT'S confidentiality is not affected.

4. The requested documents are not excluded for reasons of fairness or equality

34 RESPONDENT cannot successfully submit that granting CLAIMANT'S request violates RESPONDENT'S right to equal treatment, Art. 9(2)(g) IBA Rules. RESPONDENT argues that the local law of CLAIMANT'S home country developed "*exceptions and privileges*" for business secrets that would free CLAIMANT from the obligation to produce documents [SD, p. 28, para. 30]. However, RESPONDENT'S right to equal treatment is not violated since the national exception in CLAIMANT'S home country has no influence on this Arbitration. The IBA Rules explicitly differentiate between confidentiality in Art. 9(2)(e) and privileges in Art. 9(2)(b). Under the IBA Rules, legal notions of national law only apply to privileges. However, business secrets being part of commercial confidentiality (Art. 9(2)(e) IBA Rules) are not considered as a privilege. Whether commercial confidentiality is affected, is solely within a tribunal's discretion [Comm. IBA Rules,

p. 26; *Marghitola, Doc. Prod.*, p. 90]. Consequently, legal notions of national law do not influence the Tribunal's decision. Thus, CLAIMANT will also be obliged to produce documents if RESPONDENT submits a similar request.

35 Moreover, RESPONDENT argues that its right to equal treatment is violated due to CLAIMANT'S data retention policy [*SD*, p. 28, para. 30]. This policy foresees a destruction of documents after five years of retention [*C-12*, p. 20; *PO No. 2*, p. 61, para. 60]. However, CLAIMANT only requests documents not older than two years. Since RESPONDENT could request documents that are two years old as well, its right to equal treatment is not violated. In sum, CLAIMANT'S request fulfills the requirements for document production under the IBA Rules.

III. Without document production CLAIMANT'S right to be heard is violated

36 RESPONDENT cannot convincingly submit that CLAIMANT'S request for document production contradicts the regulations of burden of proof under the CISG [*SD*, p. 28, para. 31]. This submission is incorrect since the taking of evidence in international arbitration is solely governed by procedural rules [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 66*].

37 On the contrary, CLAIMANT'S right to be heard would be violated if its request for document production is not granted. The refusal of document production particularly constitutes a violation of the party's right to be heard if the requesting party needs the documents to discharge its burden of proof [*Kaufmann-Kohler, VJ 2003*, p. 1327, fn. 66; *Marghitola, Doc. Prod.*, p. 202; *Waincymer, Evidence*, p. 836]. CLAIMANT bears the burden of proof for the amount of its claim since it is the party claiming damages under Art. 74 CISG [*OLG Zweibrücken, Mar 31, 1998*; *Gotanda, CISG-AC Opinion No. 6, para. 2.2*; *Huber, in: MüKo-BGB, Art. 74, para. 59*]. Therefore, a rejection of CLAIMANT'S request would constitute a violation of its right to be heard.

IV. Without document production the enforceability of the award may be at risk

38 Pursuant to Art. V(1)(b) NYC, the enforcement of an award may be refused if the defeated party was unable to present its case. A party is unable to present its case if it is not able to submit the most relevant information of the case [*Armer et al., in: Comm. NYC*, p. 247]. Thus, a party is unable to present its case if its right to be heard is violated. Without document production CLAIMANT'S right to be heard is violated [*supra Issue I B.III.*]. Thus, the enforceability of the award would be at risk, Art. V(1)(b) NYC. Additionally, Art. V(2)(b) NYC states that the enforceability of the award may be refused if the award would be contrary to public policy in the country where enforcement is sought. Since a violation of a party's right to be heard constitutes

a violation of public policy [*Otto/Elwan, in: Comm NYC, p. 386*], the enforceability of the award may also be refused due to Art. V(2)(b) NYC.

- 39 To conclude, the Tribunal has the power to and should order RESPONDENT to produce the documents requested by CLAIMANT.

ISSUE 2: CLAIMANT is entitled to damages for its litigation costs

- 40 The Tribunal is requested to find CLAIMANT entitled to damages for the litigation costs amounting to US \$ 50,280 incurred in its application for interim relief (A.) and its successful defense against the non-declaratory relief sought by RESPONDENT (B.) pursuant to Artt. 45(1)(b), 74 CISG.

A. CLAIMANT is entitled to damages for the litigation costs incurred in filing for interim relief

- 41 According to Artt. 45(1)(b), 74 CISG, CLAIMANT is entitled to damages for the litigation costs incurred in filing for the interim relief amounting to US \$ 33,750. The CISG applies to the pleaded damage claim (I.). RESPONDENT breached the contract, Art. 45(1) CISG (II.). Litigation costs are recoverable under Art. 74 CISG (III.). In addition, RESPONDENT'S breach of contract caused CLAIMANT'S litigation costs (IV.). Moreover, these litigation costs were foreseeable to RESPONDENT (V.). Finally, CLAIMANT did not breach its duty to mitigate the damage (VI.).

I. The CISG applies to the submitted claim for damages

- 42 Pursuant to Art. 1(1)(a) CISG, the CISG governs the damage claim at hand. The Parties' places of business, Mediterraneo and Equatoriana, are in different Contracting States of the CISG [*SC, p. 3, paras. 1, 2; PO No. 1, p. 51, para. 5(4)*]. Since RESPONDENT'S obligation to deliver Mata Weltin 2014 is undisputed [*PO No. 2, p. 60, para. 50*], it can be assumed at the present stage of this Arbitration that the Parties concluded a contract of sale of goods under Art. 1(1) CISG.

II. RESPONDENT breached the contract between the Parties

- 43 It is undisputed that RESPONDENT'S wrongful termination and its refusal to deliver constitute a breach of contract [*PO No. 1, p. 50, para. 4*].

III. Litigation costs are recoverable under Art. 74 CISG

- 44 Contrary to RESPONDENT'S submission [*SD, p. 29, para. 32*], the interpretation of Art. 74 CISG shows that litigation costs are recoverable under this provision (I.). RESPONDENT cannot argue against this interpretation that litigation costs are a procedural issue and therefore do not fall

under the scope of Art. 74 CISG (2.). Finally, the Parties' right to equal treatment is not violated if Art. 74 CISG covers litigation costs (3.).

1. The interpretation of Art. 74 CISG shows that litigation costs are recoverable under this provision

- 45 The wording of Art. 74 CISG requires that every loss suffered by a breach of contract needs to be compensated. The aggrieved party has to be placed in the same economic position as if the contract had been performed (principle of full compensation) [*VIAC SCH-4366 1994; Gotanda, in: Kröll et al., Art. 74, para. 1; Schönle/Th. Koller, in: Honsell, Art. 74, para. 41*]. The wording of Art. 74 CISG reads: “*Damages 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.*” Thereby, the following categories of damage are generally acknowledged under the CISG: Direct loss, e.g. costs of repair for defect goods [*Sec. Comm., Art. 74, para. 6*], incidental loss, e.g. costs for storing goods [*ICC 7197/1992; ICC 7585/1992; SCC 107/1997*], consequential loss, e.g. costs incurred by the aggrieved party's liability for third parties' claim [*BGH, Nov 25, 1998*] and loss of profit [*ICAC 155/1994; OLG München, Mar 5, 2008*].
- 46 In this Arbitration, CLAIMANT suffered an incidental loss by paying US \$ 33,750 to LawFix. An incidental loss is the loss that incurs in an attempt to avoid further costs [*Gotanda, CISG-AC Opinion No. 6, para. 4.1; Korpela, in: Review CISG, p. 108*]. CLAIMANT hired LawFix to secure RESPONDENT'S performance and thereby avoided further costs. If CLAIMANT had not filed for the interim relief, RESPONDENT would have sold the bottles of wine, owed to CLAIMANT, to SuperWines. In this case, CLAIMANT would have been unable to fulfill its obligations towards its customers [*SC, p. 5, para. 10*] and thus would have been liable for damages towards its customers. Consequently, CLAIMANT avoided the occurrence of recourse from RESPONDENT by hiring LawFix. Had RESPONDENT performed the contract, CLAIMANT would not have spent US \$ 33,750 on litigation costs. Therefore, CLAIMANT is only placed in the same economic position if it can recover its litigation costs. Hence, litigation costs are recoverable under Art. 74 CISG [*OLG Düsseldorf, Jan 14, 1994; LG München I, May 18, 2009; Stemcor USA Inc. v. Miracero S.A. de C.V.; Dixon, UMIALR 2006/07, p. 423; Felemegas, PILR 2003, p. 124; Gotanda, CISG-AC Opinion No. 6, para. 5.3; Piltz, NJW 2015, p. 2554; Schwenzler, in: FS Terrier, p. 423*].
- 47 RESPONDENT cannot argue against this interpretation that the representatives of the Contracting States would not have signed the CISG if they had known that litigation costs were recoverable under Art. 74 CISG [*SD, p. 29, para. 32*]. The representatives could have had explicitly rejected

litigation costs as a damage under Art. 74 CISG during the discussions of the draft of this provision [Keily, *NJCL* 2003, p. 14; Zeller, *NJCL* 2004, p. 6]. However, such a rejection was not recorded in the *travaux préparatoires*. Thus, the drafters of the CISG did not exclude litigation costs as a damage under Art. 74 CISG [Buschtöns, *Damages CISG*, pp. 17, 18; Diener, *NJCL* 2008, pp. 25-27; Gotanda, *CISG-AC Opinion No. 6*, para. 5.3].

2. RESPONDENT'S categorization in procedural and substantive issues does not hinder the recovery of litigation costs under Art. 74 CISG

48 RESPONDENT erroneously submits that litigation costs are a procedural issue and hence do not fall under the scope of Art. 74 CISG [SD, p. 29, para. 32]. However, the categorization of litigation costs as a procedural or substantive issue under the CISG is not expedient (a.). Even if the Tribunal finds that litigation costs are a procedural issue, Art. 74 CISG regulates procedural issues and therefore litigation costs as well (b.). Finally, the awarding of litigation costs under Art. 74 CISG does not disregard the Mediterranean Court decision that each party bears its own costs (c.).

a. The categorization of litigation costs as a procedural or substantive issue is not expedient

49 A strict categorization of litigation costs as a procedural or substantive issue is not expedient [Piltz, in: *FS Schwenzen*, p. 1992; Schwenzen, in: *FS Tercier*, p. 422; Zeller, *NJCL* 2004, p. 4]. First, already domestic law does not consistently categorize litigation costs. For instance, German law provisions categorize litigation costs as a procedural and substantive issue depending on their time of occurrence [Gierl, in: *Saenger*, Vor. §§ 91-107, paras. 12, 14]. A similar categorization applies in Switzerland [Schwenzen, in: *FS Tercier*, p. 424, fn. 33].

50 Furthermore, the categorization of litigation costs does not only differ in one domestic law system but also between the different national law systems [Schwenzen, in: *FS Tercier*, p. 422]. Thus, the categorization of litigation costs as a procedural or substantive issue varies from jurisdiction to jurisdiction. Assuming that RESPONDENT'S submission prevails and the CISG only covers substantive issues, the abovementioned differences among national laws would result in a divergent application of the CISG. Under this assumption, the application of the CISG would depend on the question of how national law categorizes litigation costs.

51 Therefore, the CISG prohibits such a diverging application of the CISG depending on national law [Baasch Andersen et al., *Practitioner's Guide CISG*, p. 1037; Buschtöns, *Damages CISG*, pp. 16, 17; Diener, *NJCL* 2008, pp. 31, 32; Piltz, in: *FS Schwenzen*, p. 1393; Schlechtriem, *IHR* 2006, p. 51]. Art. 7(1) CISG requires an interpretation of the CISG in accordance with its

international character and the need for a uniform application. Thus, the CISG should determine its scope of application autonomously from domestic law [*Dixon, UMIALR 2006/07, pp. 425, 426; Ferrari, IHR 2009, p. 9; Piltz, in: FS Schwenger, pp. 1390, 1391; Schwenger, in: FS Tercier, p. 422; Zeller, NJCL 2004, p. 7*]. Hence, the national categorization of litigation costs is not expedient to determine the scope of damages under Art. 74 CISG [*Buschtöns, Damages CISG, p. 16; Gotanda, CISG-AC Opinion No. 6, para. 5.2; Keily, NJCL 2003, p. 9; Schwenger, in: FS Tercier, p. 421; Schwenger/Hachem, in: Saidov/Cunnington, p. 104*]. Considering this, Art. 74 CISG applies – irrespective of the categorization of litigation costs in national law – if a foreseeable loss caused by a breach of contract exists [*Dixon, UMIALR 2006/07, pp. 425, 426; Schwenger, in: FS Tercier, p. 421*]. Hence, the autonomous interpretation of Art. 74 CISG [*supra Issue 2 A.III.1.*] prevails and litigation costs are recoverable.

b. The CISG regulates procedural issues

52 Even if the Tribunal categorizes litigation costs as a procedural issue, Art. 74 CISG covers these litigation costs [*Piltz, in: FS Schwenger, p. 1392*]. First, the CISG does not expressly restrict its scope of application to substantive issues [*Piltz, in: FS Schwenger, p. 1391*]. This is shown by Art. 4 CISG, which does not exclude procedural issues, but for example the validity of the contract and the effects on the property of the sold goods from the scope of the CISG.

53 Moreover, the CISG already contains procedural rules, e.g. Art. 11 sentence 2 CISG. This provision determines the permitted evidence to prove the existence of a contract. Thereby, it overrules national procedural regulations on evidence [*DiMatteo, International Sales Law, p. 290; Ferrari, IHR 2004, p. 4; Schmidt-Kessel, in: Schlechtriem/Schwenger, Art. 11, para. 12; Viscasillas, in: Kröll et al., Art. 11, para. 15*]. As the CISG regulates procedural issues in this provision, the CISG is not limited to substantive law [*Piltz, in: FS Schwenger, p. 1393*]. Hence, Art. 74 CISG covers litigation costs even if they are categorized as a procedural issue.

c. The awarding of litigation costs under Art. 74 CISG does not disregard the Mediterranean Court decision

54 In contrast to RESPONDENT'S submission [*SD, p. 29, para. 32*], the awarding of litigation costs as damages under Art. 74 CISG does not disregard the Mediterranean Court decision that each party bears its own costs. The Mediterranean Court only decided on the allocation of litigation costs incurred during the application for the interim relief [*C-8, p. 16*]. However, the Mediterranean Court did not decide whether these litigation costs can be claimed as damages in case of a breach of contract. Thus, the court only decided finally on the allocation of litigation costs in the proceeding, but not whether the allocated litigation costs are recoverable as damages.

55 Furthermore, RESPONDENT cannot successfully submit that the Mediterranean Court decision on the allocation of litigation costs has to be considered in this Arbitration. The CISG has to be interpreted autonomously from national law and any principles contained therein, Art. 7(1) CISG [*Ferrari, IHR 2009, p. 9; Piltz, in: FS Schwenger, p. 1393; Schwenger, in: FS Tercier, pp. 422, 423; Zeller, NJCL 2004, p. 7*]. The inclusion of domestic principles would lead to a non-uniform application of the CISG. This contradicts the intention and purpose of the CISG [*supra Issue 2 A.III.2.a.*]. Instead, the CISG should be interpreted in line with its general principles according to Art. 7(2) CISG. As mentioned above, the claim for damages under Art. 74 CISG is based on the principle of full compensation [*supra Issue 2 A.III.1.*].

56 To conclude, the allocation of litigation costs in national court proceedings only follows domestic procedural rules. Art. 74 CISG only allows the recovery of litigation costs in case of a breach of contract. In addition, the recovery of litigation costs under Art. 74 CISG takes the internationality of disputes arising under the CISG into account. The parties of international sales contracts come from countries with different rules on the allocation of litigation costs. The recovery of litigation costs under Art. 74 CISG balances these differences. Hence, CLAIMANT must be entitled to recover the incurred litigation costs under Art. 74 CISG.

3. The recovery of litigation costs does not violate the right to equal treatment

57 RESPONDENT cannot reject the recoverability of litigation costs due to a violation of the Parties' right to equal treatment. The right to equal treatment might be violated as the damage claim requires a breach of contract. Following RESPONDENT'S argument, only CLAIMANT could base its claim on a breach of contract, whereas RESPONDENT could not.

58 This argument is not persuasive. RESPONDENT could recover its litigation costs if CLAIMANT breaches the duty of cooperation. This duty obliges the parties not to endanger the contractual purpose [*Ferrari, in: Schlechtriem/Schwenger, Art. 7, para. 54*]. The contractual purpose is for example endangered if one of the Parties files an apparently unfounded claim [*c.f. Dixon, UMI-ALR 2006/07, p. 426; Felemegas, PILR 2003, pp. 126, 127; Magnus, in: Staudinger, Art. 74, para. 51*] or a claim with an absurdly high amount in controversy [*c.f. Piltz, in: FS Schwenger, pp. 1397, 1398*]. In these cases, RESPONDENT would be entitled to claim damages for its litigation costs under Art. 74 CISG. Hence, the Parties are not treated unequally.

59 Even if the Tribunal finds that RESPONDENT could not recover its litigation costs, the principle of equal treatment is not violated. According to Artt. 45, 61 CISG, the CISG only provides remedies in case of a breach of contract. Consequently, the requirement of a breach of contract

is indispensable for the recovery of litigation costs [*Piltz, in: FS Schwenger, pp. 1394, 1395*]. Hence, the legal positions of CLAIMANT and RESPONDENT are not comparable. While CLAIMANT can base its claim for damages on a breach of contract, RESPONDENT cannot. This justifies a different treatment of the Parties. Hence, the right to equal treatment is not violated.

60 In sum, CLAIMANT is entitled to recover its litigation costs under Art. 74 CISG.

IV. RESPONDENT'S breach of contract caused CLAIMANT'S litigation costs

61 The litigation costs were caused by RESPONDENT'S breach of contract since the loss would not have incurred but for RESPONDENT'S breach of contract. According to the *but-for* rule, the incurred damage must not incur but for the breach [*KG Zug, Dec 14, 2009; Huber/Mullis, CISG, p. 270; Schwenger, in: Schlechtriem/Schwenger, Art. 74, para. 40*]. CLAIMANT was forced to file for the interim relief due to RESPONDENT'S refusal to deliver and its termination of the contract [*C-6, p. 14*]. CLAIMANT justifiably feared that it would receive no wine at all. In this case, CLAIMANT would not have been able to fulfill its obligations towards its customers [*SC, p. 5, para. 10*]. When RESPONDENT refused CLAIMANT'S attempt to cooperate by insulting CLAIMANT as "*uncooperative and rude*" [*C-7, p. 15*], CLAIMANT was compelled to file for the interim relief to protect its interests. Thus, RESPONDENT'S breach of contract caused the litigation costs.

V. CLAIMANT'S litigation costs were foreseeable to RESPONDENT

62 The litigation costs were foreseeable to RESPONDENT. According to Art. 74 sentence 2 CISG, the foreseeability includes a subjective and objective standard. Therefore, a loss is foreseeable if the breaching party actually foresaw the loss or if a reasonable person under the same circumstances as the breaching party could foresee the loss as a possible consequence of a breach of contract [*Huber/Mullis, CISG, p. 272; Schlechtriem, in: Schlechtriem/Schwenger, Art. 74, para. 48*]. It was foreseeable that CLAIMANT would file for interim relief in the High Court of Mediterraneo (1.) and would therefore hire a law firm on a contingency fee basis (2.).

1. Filing for interim relief in the High Court of Mediterraneo was foreseeable

63 RESPONDENT submits that it was not foreseeable that CLAIMANT would file for interim relief in December as CLAIMANT'S delivery would not be threatened until the wine had been bottled in late April till May [*SD, p. 29, para. 34*]. However, RESPONDENT ignores that CLAIMANT already had binding pre-orders for 4,710 bottles [*PO No. 2, p. 53, paras. 6, 7*]. These pre-orders exceeded RESPONDENT'S offered delivery of 4,500 bottles [*C-3, p. 11*].

- 64 Even though RESPONDENT was not aware of the exact amount of binding pre-orders, it was adequately informed about CLAIMANT'S delivery obligations. When CLAIMANT placed its order on November 4, 2014, it highlighted that 10,000 bottles was the minimum amount CLAIMANT needed [C-2, p. 10]. Ms. Buharit stressed the importance of a complete delivery during her meeting with Mr. Weinbauer on November 25, 2014 [SC, p. 4, para. 8; C-5, p. 13]. Moreover, in its letter of December 2, 2014, CLAIMANT pointed out that the ordered bottles had already been promised to its customers [C-6, p. 14]. Therefore, RESPONDENT could already foresee in December that CLAIMANT would not be able to fulfill its obligations to its customers based on RESPONDENT'S offered amount of delivery. Thus, CLAIMANT already knew in December irrespective of the bottling date that it would become liable for damages towards its customers due to non-performance. To avoid this liability, a reasonable person would file for interim relief.
- 65 Additionally, CLAIMANT had to file the interim relief to prevent RESPONDENT from selling bottles to other customers because then RESPONDENT could not deliver the ordered bottles to CLAIMANT. This contradicts the established practice between the Parties that CLAIMANT always orders first [PO No. 2, p. 55, para. 15]. This practice would become meaningless if RESPONDENT could still resell the bottles. Thus, CLAIMANT had to file for interim relief already in December.
- 66 Finally, CLAIMANT was not obliged to file for interim relief in front of an arbitral tribunal since Art. 33(5) VR allows the filing for interim relief in front of a state court. Hence, RESPONDENT could foresee that CLAIMANT would file for interim relief in front of a state court.

2. Hiring a law firm on a contingency fee basis and the amount of the incurred attorneys' fees were foreseeable

- 67 RESPONDENT could foresee that CLAIMANT would hire a law firm on a contingency fee basis since such a fee agreement is allowed and common in Mediterraneo where RESPONDENT is based [PO No. 2, p. 58, para. 40]. CLAIMANT was forced to hire a local law firm as the representation by a local attorney is mandatory in Mediterraneo [PO No. 2, p. 58, para. 39]. Furthermore, RESPONDENT itself tried to hire an attorney on a contingency fee basis in the past [PO No. 2, p. 59, para. 42]. This shows that hiring an attorney on a contingency fee basis is not extraordinary for RESPONDENT. Hence, RESPONDENT contradicts itself by arguing that CLAIMANT is not allowed to hire an attorney on a contingency fee basis. Therefore, it was foreseeable that CLAIMANT would hire an attorney on a contingency fee basis.
- 68 Finally, also the amount of CLAIMANT'S attorneys' fees was foreseeable to RESPONDENT. The breaching party has to foresee the approximate amount of the other party's loss [OGH,

Jan 14, 2002; Schwenger, in: *Schlechtriem/Schwenger, Art. 74, para. 50*]. The average hourly fee of Mediterranean attorneys is about US \$ 350 [*PO No. 2, p. 58, para. 39*]. CLAIMANT agreed on an hourly fee of US \$ 150 [*C-11, p. 9*]. This fee is US \$ 200 lower than the average. Furthermore, RESPONDENT's attorneys' fee in the insolvency proceedings of LiquorLoja was about US \$ 300 [*PO No. 2, p. 59, para. 42*]. Thus, it is contradictory to argue that CLAIMANT's attorneys' fee of US \$ 150 – only half of RESPONDENT's hourly fee – is too high. Hence, RESPONDENT at least had to foresee the amount of CLAIMANT's attorneys' fees.

VI. CLAIMANT did not breach its duty to mitigate the damage

69 Contrary to RESPONDENT's submission [*SD, p. 29, para. 35*], CLAIMANT did not breach its duty to mitigate the damage because hiring LawFix were the only means to defend itself. Art. 77 CISG states that a party relying on a breach of contract has to take all reasonable measures to mitigate the loss. Reasonable measures are all measures which a reasonable person acting in good faith would take [*OGH, Feb 6, 1996; Huber/Mullis, CISG, p. 290; Saenger, in: Ferrari et al., Art. 77, para. 3*]. CLAIMANT had to hire LawFix as it was not able to hire a different law firm. LawFix was the only law firm in Mediterraneo willing to work on a contingency fee basis [*PO No. 2, p. 58, para. 39*]. CLAIMANT requested the work on a contingency fee basis due to its lack of liquidity as a medium sized company with limited resources [*SC, p. 5, para. 13*]. The unfavorable exchange rate and lack of a third party funding intensified CLAIMANT's liquidity problems [*SC, p. 5, para. 13*]. Hence, a contingency fee agreement was the only possibility for CLAIMANT to enforce its rights since the attorneys' fee would only be paid if CLAIMANT were the prevailing party. As CLAIMANT was obliged to hire a local attorney, it had only the option to hire LawFix or not filing for interim relief at all. A reasonable person would not waive its rights by not hiring any law firm. Thus, it was reasonable to hire LawFix.

70 In sum, CLAIMANT is entitled to damages amounting to US \$ 33,750 for the litigation costs incurred by filing for interim relief.

B. CLAIMANT is entitled to damages for the litigation costs incurred in its defense against RESPONDENT'S non-declaratory relief

71 RESPONDENT breached the arbitration agreement, contained in Art. 20 FA, by filing the non-declaratory relief in front of the High Court of Mediterraneo. CLAIMANT is entitled to damages for the litigation costs incurred in its defense against RESPONDENT's non-declaratory relief amounting to US \$ 16,275, pursuant to Artt. 45(1)(b), 74 CISG. The CISG applies to the arbitration agreement (I.). By starting court proceedings, RESPONDENT breached the arbitration

agreement, Art. 45(1) CISG (II.). RESPONDENT'S breach of contract caused CLAIMANT'S litigation costs (III.). These litigation costs were foreseeable to RESPONDENT (IV.) Finally, CLAIMANT did not breach its duty to mitigate the damage (V.).

I. The CISG applies to the arbitration agreement

72 The Parties agreed that the CISG applies if the Danubian Arbitration Law does not regulate the concerned issue [*PO No. 2, p. 61, para. 63*]. The Danubian Arbitration Law does not provide any remedies for the breach of an arbitration agreement. Thus, the CISG applies to the arbitration agreement, contained in Art. 20 FA, Art. 1(1)(a) CISG.

II. RESPONDENT breached the arbitration agreement

73 RESPONDENT breached the arbitration agreement, contained in Art. 20 FA, by starting court proceedings. At the time of filing the non-declaratory relief, there was a valid arbitration agreement (1.) that referred all disputes arising out of the Parties' contractual relationship to arbitration. Therefore, RESPONDENT was prohibited from starting court proceedings (2.).

1. Art. 20 FA contains a valid arbitration agreement

74 Contrary to RESPONDENT'S submission [*SD, p. 29, para. 38; R-2, p. 33*], the arbitration agreement in Art. 20 FA is valid even though it refers to the *International Arbitration Tribunal* instead of the *Vienna International Arbitral Centre*. Art. 20 FA reads: "*the dispute shall be decided by arbitration in Vindobona by the International Arbitration Tribunal (VIAC) under its International Arbitration Rules*" [*C-I, p. 9*].

75 If the arbitration agreement does not unambiguously determine the competent arbitral institution, it must be distinguished whether the arbitration agreement refers to a non-existent institution or to an erroneously designated institution. Only if the arbitration agreement refers to a non-existent institution, the arbitration agreement may be invalid [*C.App. Grenoble, Jan 24, 1996; National Material Trading v. M/V Kaptan Cebi; Derains/Schwartz, Guide to ICC Rules, p. 86*]. In contrast, in case of an erroneously designated institution the arbitration agreement is valid if the interpretation of the arbitration agreement determines the actually meant arbitral institution [*BGer, Jul 8, 2003; C.Cass., Dec 14, 1983; Kröll, NJW 2005, p. 194; Walter, SchiedsVZ 2005, p. 58*]. In this Arbitration, the reference to the "*International Arbitration Tribunal*" is simply an erroneous designation of the *Vienna International Arbitral Centre* and not a reference to a non-existent institution. Hence, the arbitration agreement in Art. 20 FA is valid. The following interpretation determines the actually meant arbitral institution, the *Vienna International Arbitral Centre*.

- 76 First, the Parties meant the *Vienna International Arbitral Centre* using the abbreviation VIAC. The use of the common abbreviation determines the competent arbitral institution [*OLG Frankfurt, Oct 24, 2006*]. VIAC is the common abbreviation as the *Vienna International Arbitral Centre* abbreviates itself as VIAC in its letterhead [*VIAC's letter to the CLAIMANT, p. 21*] and on its own homepage (<http://www.viac.eu/de>). Furthermore, the *Vienna International Arbitral Centre* is commonly known in the arbitration community as VIAC. Another arbitral institution using the abbreviation VIAC is the *Vietnam International Arbitral Centre*. RESPONDENT might argue that the *Vietnam International Arbitration Centre* also abbreviates itself as VIAC. However, the Parties agreed that the arbitral proceedings take place in Vindobona. In Vindobona, only the *Vienna International Arbitral Centre* operates [*PO No. 2, p. 60, para. 55*]. The *Vietnam International Arbitration Centre* does not. Therefore, the wording of the arbitration agreement shows that the Parties could only have meant the *Vienna International Arbitral Centre*.
- 77 Additionally, since the Parties are seated in different countries, their arbitration is international. Thus, only an international arbitral institution is able to hear the case at hand. The VIAC is the only international arbitral institution out of the five arbitral institutions operating in Vindobona [*PO No. 2, p. 60, para. 55*]. Thus, it is obvious that the Parties could only have meant the VIAC as the competent arbitral institution.
- 78 Moreover, the interpretation of the arbitration agreement should not be restricted to the wording but rather consider the parties' intention [*CCIG 117/1997; ICC 7920/1993; Mangistau-munaigaz Oil Production Assoc. v. United World Trade Inc.; Laboratorios Grossman S.A. v. Forest Laboratories Inc.; Fouchard et al., ICA, pp. 259, 260*]. It can be assumed that parties coming from different nations without any connection to the place of arbitration or to the arbitral institution intend to choose an institution which mainly operates in international instead of domestic arbitration [*ICC 7920/1993; Derains/Schwartz, Guide to ICC Rules, p. 86*]. There is no indication that either CLAIMANT, incorporated in Equatoriana, nor RESPONDENT, incorporated in Mediterraneo, had any connection to Vindobona as the place of arbitration or to the VIAC. Thus, it can be assumed that the Parties chose Vindobona and the *Vienna International Arbitral Centre* as a neutral forum to solve their disputes.
- 79 Finally, the interpretation of the arbitration agreement has to respect the Parties' general intention to arbitrate. Therefore, the interpretation should favor the validity of the arbitration agreement according to the doctrine *effet utile* [*ICC 1434/1975; HKL Group Co. Ltd. v. Rizq International Holdings Pte Ltd.; BGer, Nov 7, 2011; Star Shipping A.S. v. China National Foreign Trade Transportation Corp.; OLG Frankfurt, Oct 24, 2006; KG Waadt, Mar 30, 1993; Born,*

ICA, p. 1322; *Fouchard et al.*, *ICA*, pp. 257, 258]. Thus, the arbitration agreement should be given full effect if no other arbitral institution exists which the parties could have meant alternatively [*BCCI 151/1984*; *BGer*, Jul 8, 2003; *C.Cass.*, Dec 14, 1983; *Laboratorios Grossman S.A. v. Forest Laboratories Inc.*; *Bureau*, *Observations – C.App. Versailles*, Oct 3, 1991; *Derains/Schwartz*, *Guide to ICC Rules*, p. 86]. In this Arbitration, the interpretation of the arbitration agreement clearly shows the Parties' intention to choose the *Vienna International Arbitral Centre*. Hence, the arbitration agreement in Art. 20 FA is valid.

2. The arbitration agreement prohibits RESPONDENT from starting court proceedings

- 80 The arbitration agreement applies to RESPONDENT'S file for non-declaratory relief as the valid arbitration agreement refers all disputes arising out of the Parties' contractual relationship to arbitration. RESPONDENT was prohibited from filing for non-declaratory relief in front of a state court due to the duty of loyalty. This duty obliges the parties to refrain from any measures which endanger the purpose of the arbitration agreement; this especially includes the avoidance of state court proceedings [*BGer*, Sep 30, 2013; *BGH*, Nov 22, 1962; *Born*, *ICA*, p. 1271; *Manner/Mosimann*, in: *FS Schwenzler*, p. 1201; *Münch*, in: *MüKo-ZPO*, § 1029, para. 117; *Stürmer*, *Private Streitbeilegung*, p. 11]. RESPONDENT started proceedings in the High Court of Mediteraneo even though a valid arbitration agreement exists. Thereby, RESPONDENT endangered the purpose of the arbitration agreement. Thus, RESPONDENT breached the duty of loyalty contained in the arbitration agreement and thereby the arbitration agreement.
- 81 RESPONDENT cannot deny its breach of the arbitration agreement by submitting that CLAIMANT did not answer RESPONDENT'S request to clarify the competent arbitral institution [*SD*, p. 29, para. 38]. First, RESPONDENT'S request was too broad to reply to it within ten days. RESPONDENT not only demanded a clarification of the competent arbitral institution but also required CLAIMANT to waive its right for document production [*R-2*, p. 33]. It is impossible to answer RESPONDENT'S request within ten days simply because the question of document production is highly disputed between the Parties. Therefore, an answer to this request was only possible after obtaining legal advice. Furthermore, CLAIMANT was very busy searching for a substitute delivery at the time of RESPONDENT'S request. Due to RESPONDENT'S refusal to deliver, CLAIMANT had to enter into time-consuming negotiations with its customers and other suppliers [*PO No. 2*, p. 61, para. 57]. Thus, CLAIMANT was hindered to answer only because of RESPONDENT'S wrongdoing. Therefore, RESPONDENT could not expect that CLAIMANT would answer the request within ten days.

III. RESPONDENT'S breach of contract caused CLAIMANT'S litigation costs

82 If RESPONDENT had not breached the arbitration agreement by starting court proceedings, CLAIMANT would not have hired an attorney to invoke the arbitration agreement in the court proceedings. Thus, RESPONDENT'S breach of contract caused CLAIMANT'S litigation costs.

IV. CLAIMANT'S litigation costs were foreseeable to RESPONDENT

83 As the Parties concluded a valid arbitration agreement, RESPONDENT ought to have foreseen that if it started state court proceedings, CLAIMANT would defend itself.

V. CLAIMANT did not breach its duty to mitigate the damage

84 RESPONDENT submits that CLAIMANT breached its duty to mitigate the damage because CLAIMANT did not reply to RESPONDENT'S request to clarify the competent arbitral institution [*SD, p. 29, para. 38; R-2, p. 33*]. Thereby, RESPONDENT tries to transfer its own obligation to determine the competent arbitral institution to CLAIMANT. However, this submission is not persuasive. International merchants are expected to seek clarification of the arbitration agreement without requesting the other party to clarify [*OLG Oldenburg, Jun 20, 2005*]. RESPONDENT could clarify the competent arbitral institution on its own. In its request, RESPONDENT states that it understood the arbitration agreement in favor of the VIAC [*R-2, p. 33*]. Thus, RESPONDENT had clarified the arbitration agreement without requesting CLAIMANT to do so. Hence, CLAIMANT did not breach its duty to mitigate the damage.

85 CLAIMANT is entitled to damages amounting to US \$ 16,275 for the litigation costs incurred in its defense against RESPONDENT'S non-declaratory relief.

ISSUE 3: CLAIMANT is entitled to RESPONDENT'S profit made by selling 5,500 bottles of Mata Weltin 2014 to SuperWines

86 The Tribunal is requested to find that Artt. 45(1)(b), 74 CISG grant CLAIMANT damages estimated to be not below EUR 110,000 (**A.**). Alternatively, the analogous application of Art. 84(2)(b) CISG allows CLAIMANT to claim RESPONDENT'S profit made by selling 5,500 bottles of Mata Weltin 2014 to SuperWines (**B.**).

A. Artt. 45(1)(b), 74 CISG grant CLAIMANT the requested damages

87 The CISG applies as the Parties concluded a contract of sale of goods [*supra Issue 2 A.I.*]. RESPONDENT breached this contract, Art. 45(1)(b) CISG [*PO No. 1, p. 50, para. 4*]. CLAIMANT can claim RESPONDENT'S profit as a damage under Art. 74 CISG (**I.**). RESPONDENT'S breach of contract caused CLAIMANT'S damage (**II.**) which was foreseeable to RESPONDENT (**III.**).

I. CLAIMANT can claim RESPONDENT'S profit as a damage under Art. 74 CISG

88 The scope of damages under Art. 74 CISG includes a disgorgement of profits. Thus, CLAIMANT can claim restitution of RESPONDENT'S profit made by selling 5,500 bottles of Mata Weltin 2014 to SuperWines under Art. 74 CISG (1.). Even if the Tribunal finds that the scope of damages under Art. 74 CISG cannot be interpreted to include a disgorgement of profits, CLAIMANT is entitled to damages calculated on the basis of RESPONDENT'S profit (2.).

1. A disgorgement of RESPONDENT'S profit is not excluded under Art. 74 CISG

89 RESPONDENT cannot successfully argue that Art. 74 CISG excludes a disgorgement of profits [SD, p. 30, para. 39]. RESPONDENT declares that Art. 74 CISG only mentions that “damages [...] consist[ing] of a sum equal to the loss” are recoverable and thus the wording of Art. 74 CISG can only include economic losses the aggrieved party suffered. However, damages cannot be reduced to the economic loss the aggrieved party suffered since this is merely a civil law interpretation of damages [Bock, in: FS Schwenger, p. 187]. This restrictive civil law interpretation contradicts the internationality of the CISG and its purpose: Being a uniform convention for international sale disputes [Ferrari, in: Schlechtriem/Schwenger, Preamble, para. 7].

90 The preamble of the CISG states that “the different [...] legal systems” shall be taken into account. Common law countries understand the scope of damages in a broader sense, including a disgorgement of profits [Attorney-General v. Blake; Snapp v. United States; Jostens Canada Ltd. v. Gibsons Studio Ltd.]. A restrictive civil law interpretation of the scope of damages under Art. 74 CISG would therefore disregard common law views. Moreover, civil law jurisdictions are developing towards an inclusion of a disgorgement of profits under damages [Wagner, Gutachten, pp. A83-A97; cf. 6:104 BW which allows a calculation of damages on the basis of the damaging party's profit]. Thus, an interpretation of the scope of damages under Art. 74 CISG from a mere civil law view is not appropriate. The CISG has to be interpreted autonomously from national jurisdictions [Ferrari, in: Schlechtriem/Schwenger, Art. 7, para. 9].

91 Interpreting the scope of damages autonomously, Art. 74 CISG includes a disgorgement of profits. Due to the maxim that a party must not profit from its breach of contract (a.) and the inclusion of punitive elements in awarding damages (b.), CLAIMANT is entitled to claim RESPONDENT'S profit as damages.

a. Art. 74 CISG includes a disgorgement of RESPONDENT'S profit due to the maxim breach must not pay

92 A disgorgement of RESPONDENT'S profit is necessary since RESPONDENT must not profit from breaching the contract. The CISG does not allow a party to profit from its breach of contract as

the CISG adheres to the maxim *breach must not pay* [Bock, in: *FS Schwenger*, p. 183; Hachem, in: *FS Schwenger*, pp. 663, 664; Schwenger, in: *Schlechtriem/Schwenger*, Art. 74, para. 43; Schwenger et al., *Global Sales*, pp. 581, 582, paras. 44.15-44.17; Schwenger/Hachem, in: *Saidov/Cunnington*, p. 101]. This maxim states that a breach of contract must not result in an advantage for the obligor and a disadvantage for the obligee [Bock, in: *FS Schwenger*, p. 186; Schwenger, in: *Schlechtriem/Schwenger*, Art. 74, para. 43]. The CISG must not motivate a party to breach a contract in order to gain a financial benefit [Bock, in: *FS Schwenger*, p. 186; Schwenger, in: *Schlechtriem/Schwenger*, Art. 74, para. 43]. If a party were allowed to profit from a breach, this would contradict the *performance principle* [Schwenger/Hachem, in: *Saidov/Cunnington*, p. 101; cf. Schwenger et al., *Global Sales*, p. 584, para. 44.27], embedded in Artt. 30, 53 CISG [Magnus, *RabelsZ* 1995, p. 480].

- 93 RESPONDENT gained a profit by breaching the contract. By contracting with CLAIMANT, RESPONDENT obligated itself to deliver 10,000 bottles of Mata Weltin 2014 to CLAIMANT [C-2, p. 10; PO No. 2, p. 60, para. 50]. Even though RESPONDENT only had 65,497 bottles at its disposal, it decided to deliver 5,500 bottles to SuperWines [SD, p. 26, paras. 12, 15]. Therefore, RESPONDENT was unable to deliver 10,000 bottles to CLAIMANT [PO No. 2, p. 56, para. 27]. RESPONDENT was attracted by the purchase price including a premium of EUR 15-20 SuperWines was willing to pay [PO No. 2, p. 56, para. 24; SC, p. 4, para. 7]. SuperWines paid a higher purchase price than CLAIMANT [SC, p. 4, para. 7]. Hence, RESPONDENT profited from breaching the contract with CLAIMANT by delivering wine, promised to CLAIMANT, to SuperWines [PO No. 1, p. 50, para. 4].
- 94 RESPONDENT might argue that such breach should be allowed according to the *efficient breach* theory. This theory states that a party which profits from breaching a contract should be allowed to keep these profits as long as it pays damages [Macneil, *VLR* 1982, pp. 948, 949]. As this theory motivates the parties to breach a contract in order to gain a higher profit [Friedmann, *LS* 1989, p. 23], it significantly devaluates the *performance principle*. From an economic point of view, it would not be reasonable for the breaching party to perform, if it gains a higher profit by breaching the contract. It also contradicts the maxim *breach must not pay* since the party that breached the contract would gain a profit from the breach [cf. Schwenger, in: *Schlechtriem/Schwenger*, Art. 74, para. 43, fn. 137]. It is even questionable whether the *efficient breach* theory has any legal value in the CISG as it evaluates the situation only from an economic and not a legal perspective [cf. Friedmann, *LS* 1989, p. 23]. Thus, this theory must be rejected. CLAIMANT is entitled to a disgorgement of RESPONDENT'S profit under Art. 74 CISG.

b. Art. 74 CISG includes a disgorgement of RESPONDENT'S profit due to the inclusion of punitive elements in awarding damages

- 95 A disgorgement of RESPONDENT'S profit is necessary as RESPONDENT has to be penalized for its breach of contract by the use of punitive elements. Punitive elements have to be included in awarding damages under the CISG [*C.App. Grenoble, Feb 22, 1995; Guangxi Nanning Baiyang Food Co. Ltd. v. Long River International, Inc.; Schwenger, in: Schlechtriem/Schwenger, Art. 74, para. 8*] since “*the aggrieved party is, structurally, left undercompensated*” [*Schwenger/Hachem, in: Saidov/Cunnington, p. 103*]. This is because the aggrieved party generally bears high risks in the assessment of damages [*Schwenger/Hachem, in Saidov/Cunnington, p. 103*], e.g. the burden of proof [*Bock, in: FS Schwenger, p. 180*]. As the aggrieved party is already disadvantaged from the outset, punitive elements have to be included to guarantee a full compensation of the aggrieved party, at least if the damaging party willfully acts against the contractual purpose [*cf. Schwenger/Hachem, in: Saidov/Cunnington, p. 103*].
- 96 RESPONDENT acted against the contractual purpose. RESPONDENT immediately declared the Parties' contract terminated as misunderstandings arose instead of finding an amicable solution as agreed upon in Art. 20 FA. It acted against the contractual purpose by not performing [*C-7, p. 15*]. RESPONDENT delivered goods, owed to CLAIMANT, to SuperWines [*SC, p. 4, para. 7*]. RESPONDENT knew about the large number of pre-orders CLAIMANT had to fulfill [*SD, p. 26, para. 9*]. It knew that CLAIMANT would become liable for damages towards its customers. Moreover, CLAIMANT and RESPONDENT shared a long-lasting and trustful relationship [*SC, p. 4, para. 7*]. Such relationships are especially honored in the wine business [*C-7, p. 15*]. To sufficiently punish RESPONDENT for its wrongdoing CLAIMANT has to be entitled to a disgorgement of RESPONDENT'S profit, gained by its breach.
- 97 To conclude, the scope of damages under Art. 74 CISG includes a disgorgement of profits due to the maxim *breach must not pay* and the inclusion of punitive elements. CLAIMANT is entitled to a disgorgement of RESPONDENT'S profit gained by willfully breaching the contract.

2. Alternatively, CLAIMANT is entitled to damages calculated on the basis of RESPONDENT'S profit

- 98 Even if the Tribunal follows RESPONDENT'S submission, that the scope of damages under Art. 74 CISG has to be interpreted narrowly, CLAIMANT is entitled to damages. RESPONDENT'S breach of contract led to a loss of profit for CLAIMANT which is recoverable as a damage under Art. 74 CISG (a.). The monetary extent of CLAIMANT'S damage has to be calculated on the

basis of RESPONDENT'S profit made by selling 5,500 bottles of Mata Weltin 2014 to SuperWines (b.). Other calculation methods are inadequate (c.). Moreover, CLAIMANT'S emergency purchase does not reduce its damage (d.).

a. CLAIMANT will suffer a loss of profit which is recoverable under the CISG

99 CLAIMANT will suffer a loss of profit that is recoverable under the CISG. The wording of Art. 74 CISG, "including loss of profit", states that losses of profit are recoverable [SCC 107/1997]. This includes anticipated losses as well [CIETAC CISG/2006/18; Gotanda, CISG-AC Opinion No. 6, para. 3.19; Schwenger, in: Schlechtriem/Schwenger, Art. 74, para. 36]. RESPONDENT promised CLAIMANT to deliver 10,000 bottles of Mata Weltin 2014 [C-2, p. 10; PO No. 1, p. 50, para. 4]. Instead, RESPONDENT will only deliver 4,500 bottles to CLAIMANT [C-3, p. 11]. CLAIMANT relied on reselling the ordered 10,000 bottles of RESPONDENT'S wine [C-2, p. 10]. It had already received and accepted pre-orders for 4,710 bottles when RESPONDENT declared that it would not deliver the promised amount [PO No. 2, p. 53, paras. 6, 7]. Consequently, CLAIMANT will suffer a loss of profit.

b. It is necessary to calculate CLAIMANT'S damage on the basis of RESPONDENT'S profit

100 CLAIMANT'S damage needs to be calculated on the basis of the profit RESPONDENT made by contracting with SuperWines. This is necessary as the profit made by the damaging party is a reasonable method for estimating of the profit the aggrieved party could have made [Schwenger/Hachem, in: Saidov/Cunnington, p. 101]. The profit the damaging party makes from a breach of contract is evidence of what profit can be achieved under the current market conditions [Schwenger/Hachem, in: Saidov/Cunnington, p. 101]. RESPONDENT achieved its profit by selling Mata Weltin 2014 under the current market conditions. It was currently possible to obtain such profit.

101 Furthermore, CLAIMANT'S damage needs to be calculated on the basis of RESPONDENT'S profit because RESPONDENT acted against the maxim *breach must not pay*. This maxim requires that a party may not profit from a breach of contract in order to discourage parties from breaching a contract [*supra* Issue 3 A.I.1.a.]. RESPONDENT breached the contract to gain a larger profit in form of the purchase price, including a premium, SuperWines paid [PO No. 2, p. 56, para. 24]. Thereby, RESPONDENT benefited from breaching the contract. Hence, CLAIMANT'S damage needs to be calculated based on RESPONDENT'S profit.

102 Finally, CLAIMANT'S damage needs to be calculated on the basis of RESPONDENT'S profit due to the inclusion of punitive elements. Punitive elements have to be included as the aggrieved

party is structurally undercompensated under the CISG and RESPONDENT acted against the contractual purpose [*supra Issue 3 A.I.1.b.*]. To adequately consider punitive elements, the Tribunal has to calculate CLAIMANT'S damage on the basis of RESPONDENT'S profit.

103 RESPONDENT might submit that CLAIMANT'S damage needs to be calculated precisely. A precise calculation of CLAIMANT'S actual damage is “*extremely difficult*” [*PO No. 2, p. 54, para. 13*]. The parties agreed on “*fast and cost efficient*” proceedings in Art. 20 FA. It would contradict the Parties' intention if the arbitral proceedings would be overly lengthened. This applies even more since CLAIMANT can validly calculate its damage in a different manner as shown above. As CLAIMANT bears the burden of proof, CLAIMANT is entitled to choose between valid calculation methods [*supra Issue 1 B.III.*]. CLAIMANT chooses to calculate its damage on the basis of RESPONDENT'S profit.

c. Other calculation methods are inadequate in this Arbitration

104 Even if RESPONDENT argues that CLAIMANT should use its average profit from the last years as basis for the calculation of its damage, this is not adequate. Wine is a good that annually varies highly in price, sometimes more than ten percent [*Ashenfelter, AAWE No. 4; Stimpfig, Decanter*]. CLAIMANT was able to ask for higher prices than in the previous years [*PO No. 2, p. 55, para. 14*] as “*CLAIMANT'S customers were afraid that [...] the demand for the 2014 vintage might be much higher than the number of bottles available*” [*PO No. 2, p. 54, para. 8*]. Thus, profits from the years before are inadequate to calculate this year's profit.

105 RESPONDENT also might submit that CLAIMANT'S damage should be calculated on the basis of the actual profit CLAIMANT made by selling the mixture of RESPONDENT'S and Vignobilia's Mata Weltin 2014. Yet, this method is also inadequate. Due to RESPONDENT'S breach of contract, CLAIMANT had to sell a mixture of wines from Vignobilia and RESPONDENT [*PO No. 2, p. 54, paras. 10, 11*]. CLAIMANT agreed expressly to sell RESPONDENT'S Mata Weltin 2014 to its customers [*PO No. 2, p. 54, para. 9*]. RESPONDENT itself states that top class wines are not comparable to any other product as they are “*a personal statement*” [*SD, p. 27, para. 17*]. RESPONDENT'S wine derives from different vines than Vignobilia's. Moreover, RESPONDENT is a more experienced vineyard than Vignobilia. While Vignobilia is producing top quality Mata Weltin for the first time [*PO No. 2, p. 54, para. 11*], RESPONDENT has won the Mediterranean gold medal for its Mata Weltin for the past five years [*SC, p. 4, para. 2*]. The mixture of brands of wine, CLAIMANT sold to its customers, is not comparable to the unique Mata Weltin 2014 from RESPONDENT. Thus, this method is inadequate to calculate CLAIMANT'S damage.

d. CLAIMANT'S emergency purchase does not reduce its damage

106 Applying the calculation method submitted by CLAIMANT, RESPONDENT might argue that CLAIMANT has to reduce the claimed damage by any profit CLAIMANT made due to the emergency purchase, buying wine from Vignobilia [*PO No. 2, p. 54, para. 11*]. However, a party only has to account for gains it made due to the breach of the damaging party if the *performance principle* is not contradicted [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 42*]. The performance principle requires – aside from performance – that the party, which acted against this principle, does not benefit from its act [*cf. Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 43*]. If CLAIMANT has to account any gain it made by its emergency purchase to its damage, this will contradict the *performance principle*. RESPONDENT violated the *performance principle* by not performing its obligations to CLAIMANT. If RESPONDENT has to pay less damages, it would benefit from this act. Therefore, it contradicts the performance principle if CLAIMANT has to account any gain it made from its emergency purchase to its damage. Thus, CLAIMANT should not have to account any gain it made by the emergency purchase to its damage.

107 In addition, there is no causal connection between RESPONDENT'S breach and CLAIMANT'S emergency purchase. The aggrieved party only has to account for gains that result in substance from the other party's breach [*Gotanda, in: Kröll et al., Art. 74, para. 33*]. CLAIMANT only undertook the emergency purchase to protect itself from becoming liable for damages towards its customers. This was CLAIMANT'S independent decision and did not directly result from the breach of contract. The purchase was not meant to cover up the non-delivery of RESPONDENT'S Mata Weltin 2014 as Vignobilia's wine is not comparable to RESPONDENT'S [*supra Issue 3 A.I.2.c.*]. Thus, there is no causal connection between RESPONDENT'S breach and CLAIMANT'S emergency purchase. Hence, CLAIMANT does not have to reduce the claimed damages by the profit it made due to the emergency purchase.

108 In summary, CLAIMANT can claim damages calculated on basis of RESPONDENT'S profit. CLAIMANT estimates its damage to be not below EUR 110,000 [*SC, p. 7, para. 26*]. It reserves itself the right to specify the amount, once the requested documents have been produced

II. RESPONDENT'S breach of contract caused the recoverable damage

109 The breach of contract caused a damage, recoverable under Art. 74 CISG. RESPONDENT'S profit was caused by RESPONDENT'S breach of contract. Without this breach of contract, RESPONDENT would not have delivered wine to SuperWines [*SD, p. 26, para. 12; PO No. 2, p. 56, para. 27*] and would not have profited from the breach. Hence, RESPONDENT'S breach of contract caused the received profit which is recoverable as a damage under the CISG [*supra Issue 3 A.I.*].

III. The recoverable damage was foreseeable to RESPONDENT

110 Art. 74 CISG limits damages to a foreseeable damage. A damage is foreseeable if the breaching party actually foresaw the damage or a reasonable person under the same circumstances as the breaching party could foresee the damage as a possible consequence of a breach of contract [*supra Issue 2 A.V.*]. RESPONDENT foresaw that it would profit from its breach of contract. At the time RESPONDENT concluded the contract with SuperWines, it knew that it would gain a financial profit from this contract because SuperWines was willing to pay a purchase price including a premium [*PO No. 2, p. 56, para. 24*]. This profit is recoverable as a damage under the CISG [*supra Issue 3 A.I.*]. Hence, RESPONDENT foresaw the recoverable damage.

111 In sum, Artt. 45(1)(b), 74 CISG grant CLAIMANT the right to claim damages estimated to be not below EUR 110,000.

B. Alternatively, CLAIMANT is entitled to claim the profit RESPONDENT made by selling 5,500 bottles to SuperWines

112 Even if the Tribunal rejects the argument above, CLAIMANT is entitled to claim the profit RESPONDENT made by selling Mata Weltin 2014 to SuperWines by an analogous application of Art. 84(2)(b) CISG.

113 Art. 84(2)(b) CISG only governs claims arising out of unjust enrichment in relation to the restitution of goods after avoidance of the contract [*Polimeles Protodikio Athinon, 2009; Ferrari, in: Ferrari, Art. 84, para. 10; Fountoulakis, in: Schlechtriem/Schwenzer, Art. 84, para. 23*]. In this Arbitration, CLAIMANT claims RESPONDENT'S profit as an unjust enrichment before any avoidance of the contract occurred. Art. 84(2)(b) CISG does not govern this specific case as it only governs issues of unjust enrichment after avoidance. As Art. 84(2)(b) CISG governs one situation of unjust enrichment, it can be concluded that the CISG governs claims of unjust enrichment arising from a contract of sale of goods as a whole [*Ferrari, in: Schlechtriem/Schwenzer, Art. 7, para. 52; Flambouras, NJCL 2009, p. 11*]. The CISG applies to solve the present case. However, the present case is not expressly governed by any Article of the CISG. This existing gap has to be filled by an analogy to Art. 84(2)(b) CISG (I.). Moreover, the requirements of the analogous application of Art. 84(2)(b) CISG are fulfilled (II.).

I. An analogy to Art. 84(2)(b) CISG has to be established

114 The CISG allows the establishment of analogies as this is in line with the general principle that any gaps inherent to the CISG shall be settled from within the CISG, Art. 7(2) CISG [*SN, May 11, 2007; Ferrari, in: Schlechtriem/Schwenzer, Art. 7, para. 47*]. Forming an analogy requires an unintentional regulatory gap concerning matters governed by the CISG as well as

comparable interests from the arising situation to an article in the CISG [*Huber/Bach, in: FS Magnus, p. 223*]. The drafters of the CISG did not intend this regulatory gap (1.). The interests of the case at hand and the case governed by Art. 84(2)(b) CISG are comparable (2.).

1. The regulatory gap is unintentional

115 The regulatory gap is unintentional. Apart from Art. 84(2) CISG, unjust enrichment claims were not discussed during the draft of the CISG [*Hartmann, IHR 2009, p. 192*] even though the CISG applies to them. Hence, the drafters of the CISG missed to regulate certain categories of unjust enrichment. Therewith, they did not assess issues of unjust enrichment outside of the scope of Art. 84(2) CISG. Consequently, the drafters of the CISG were not aware of the gap and it was left open unintentionally.

2. The situation of the Parties and Art. 84(2)(b) CISG are comparable

116 The interests of the Parties in the case at hand and the case governed by Art. 84(2)(b) CISG are comparable. Art. 84(2)(b) CISG states: “*The buyer must account to the seller for all benefits which he has derived from the goods if it is impossible for him to make restitution of all [...] goods [...], but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.*” The rationale of Art. 84(2)(b) CISG requires the buyer to pass all benefits, which he has derived from the goods or part of them, to the seller [*Fountoulakis, in: Schlechtriem/Schwenzer, Art. 84, para. 5*]. Art. 84(2)(b) CISG seeks to restore the economic situation that would exist without the seller’s performance under the contract [*Fountoulakis, in: Schlechtriem/Schwenzer, Art. 84, para. 5*]. This means, the situation that would exist if the buyer had fully returned the originally purchased item after avoidance. Art. 84(2)(b) CISG governs the situation that the buyer sold the purchased goods to a third person instead of performing, hereby making it impossible for itself to perform [*Fountoulakis, in: Schlechtriem/Schwenzer, Art. 84, para. 34*]. Consequently, the buyer did not fulfill its obligation after the avoidance of the contract, e.g. to pass the concrete purchase item back to the seller. Instead, the seller is compensated with the profit the buyer made by selling the purchase item to a third person.

117 In this Arbitration, RESPONDENT gained a profit by selling goods, dedicated to CLAIMANT, to SuperWines. Therefore, it was impossible for RESPONDENT to sell CLAIMANT the ordered amount of wine [*PO No. 2, p. 56, para. 27*]. The only distinction from the situation mentioned above is that RESPONDENT will not perform entirely [*PO No. 1, p. 50, para. 4*]. Still, this cannot lead to a different result in the evaluation of the case. Art. 84(2)(b) CISG protects the claim for restitution of the parties after performance. The same has to apply before performance, in order

to protect the claim for performance of the parties [*Hartmann, IHR 2009, p. 193*]. Hence, the present case is comparable to the interests in Art. 84(2)(b) CISG.

II. The requirements of Art. 84(2)(b) CISG in its analogous application are fulfilled

118 Moreover, the requirements of an analogous application of Art. 84(2)(b) CISG are fulfilled. The profit RESPONDENT made constitutes a benefit under Art. 84(2)(b) CISG (1.) and CLAIMANT has the right to avoid the contract pursuant to Art. 72(1) CISG (2.).

1. RESPONDENT received a benefit by selling 5,500 bottles to SuperWines

119 The profit RESPONDENT gained by selling 5,500 bottles to SuperWines constitutes a benefit as RESPONDENT thereby obtained an economic advantage [*SD, p. 26, para. 1*]. A benefit is any enrichment [*Ferrari, in: Ferrari, Art. 84, para. 11; Weber, in: Honsell, Art. 84, para. 13*].

120 RESPONDENT received a payment for selling 5,500 bottles to SuperWines [*SD, p. 26, para. 15*]. RESPONDENT unnecessarily submits that the premium SuperWines paid is not linked to CLAIMANT [*SD, p. 30, para. 39*]. However, the premium was already included in the total purchase price SuperWines paid [*PO No. 2, p. 56, para. 24*]. The premium and the basic purchase price constitute the total purchase price. Due to this total purchase price, RESPONDENT was able to generate a positive return from its sale after deduction of its expenses [*PO No. 1, p. 51, para. 5(1)(c.)*]. This positive return, or profit, is an enrichment since RESPONDENT is in a better economic position than before. Hence, RESPONDENT gained a benefit.

121 In the analogous application of Art. 84(2)(b) CISG the benefit must derive from the goods already dedicated to CLAIMANT. RESPONDENT only had 65,000 bottles of Mata Weltin 2014 at its disposal. CLAIMANT bought 10,000 of these bottles. As this Arbitration shows, RESPONDENT is not able to perform towards CLAIMANT while selling 5,500 bottles of Mata Weltin 2014 to SuperWines. Hence, the bottles sold to SuperWines are the ones promised to CLAIMANT. Thus, the total purchase price paid by SuperWines constitutes a benefit RESPONDENT gained.

2. CLAIMANT has the right to avoid the contract pursuant to Art. 72(1) CISG

122 Art. 84(2)(b) CISG applies if the contract is avoided by one of the parties. Such avoidance did not occur in this Arbitration. Analogous to Art. 84(2)(b) CISG, only the requirements of an avoidance need to be fulfilled [*cf. Hartmann, IHR 2009, p. 193*]. CLAIMANT can avoid the contract pursuant to Art. 72(1) CISG as RESPONDENT threatened to fundamentally breach the contract by not performing its contractual obligations [*C-7, p. 15*].

123 Art. 72(1) CISG states that if prior to the date of performance it is clear that one party will commit a fundamental breach of contract, the other party may declare it avoided. A breach is

fundamental if it results in such detriment to the other party that it is substantially deprived of what it is entitled to under the contract [*BGer, May 18, 2009; OGH, Jun 28, 2005*], e.g. if a party fails to perform its entire obligations [*Björklund, in: Kröll et al., Art. 25, para. 28; Gruber, in: MüKo-BGB, Art. 25, para. 9*]. RESPONDENT would not perform its contractual obligations as declared by not delivering the promised bottles of Mata Weltin 2014 to CLAIMANT [*C-7, p. 15*].

124 RESPONDENT'S date of performance was presumably November 1, 2015 [*SC, p. 5, para. 15*].

Mr. Weinbauer states in his letter of December 4, 2014 that RESPONDENT will not perform: "*I consider our relationship terminated. [There] will be no delivery of any bottle of the 2014 harvest to you even if we have to drink them ourselves [...]*" [*C-7, p. 15*]. Furthermore, it is foreseeable to RESPONDENT that CLAIMANT has the right to avoid the contract in case of non-performance. The standard for foreseeability is a reasonable person of the same kind in the same circumstances as the avoiding party [*Björklund, in: Kröll et al., Art. 25, para. 20; Schroeter, in: Schlechtriem/Schwenger, Art. 25, para. 27*]. A reasonable person would foresee that RESPONDENT'S non-compliance with contractual obligations would result in a detriment of the other party. Thus, CLAIMANT had the right to avoid the contract with RESPONDENT, Art. 72(1)CISG.

125 To conclude, CLAIMANT is entitled to the profit RESPONDENT made by selling 5,500 bottles of Mata Weltin 2014 to SuperWines analogous to Art. 84(2)(b) CISG.

PRAYER FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to order RESPONDENT

(a) to produce all documents from the period of January 1, 2014 until July 14, 2015 concerning the communication between RESPONDENT and SuperWines in regard to the purchase of diamond Mata Weltin 2014;

(b) to pay damages amounting to US \$ 50,280 for the litigation costs incurred in its application for interim relief and in its successful defense against the proceedings in the High Court of Capital City, Mediterraneo;

(c) to compensate CLAIMANT for its loss of profit due to the non-delivery of 5,500 bottles of wine. CLAIMANT estimates this damage at present to be not below EUR 110,000.

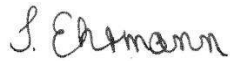
CERTIFICATE

Düsseldorf, December 10, 2015

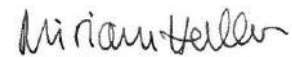
We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.



Mathias Bähr



Svenja Ehrmann



Miriam Haller



Jan Henrik Marklund



Dominique Kowoll



Laura Katharina Pauli