Twenty-Third Annual Willem C. Vis International Commercial Arbitration Moot

ALBERT-LUDWIGS
UNIVERSITY OF FREIBURG

Memorandum for RESPONDENT

On behalf of	**Against**
Vino Veritas Ltd.	Kaihari Waina Ltd.
(RESPONDENT)	(CLAIMANT)

CHRISTIAN BERZDORF • ANNEMARIE BORK • LINUS DETHLOFF-WIELAND
JONATAN FLAIG • FELIX KARPP • PHILIPP KOEPSELL
LINDA KROPHOLLER • FREDERIKE REUTER

Freiburg • Germany

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AG	Amtsgericht (German District Court)
Apr	April
Art./Artt.	Article/Articles
BGer	Schweizerisches Bundesgericht (Swiss Federal Court)
BGH	Bundesgerichtshof (German Federal Court)
CA	Court of Appeal(s)/Cour d'Appel (France)
CEO	Chief Executive Officer
cf.	conferre (confer)
Cir	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	Advisory Council of the Vienna Convention on Contracts for the International Sale of Goods
CISG-online	Internet database on CISG decisions and materials, available at www.globalsaleslaw.org
Claimant	Memorandum for Claimant, University of Notre Dame Australia Sidney Law School
Co.	Company
Com.	Comment(s)
Corp.	Corporation
DC	District
Dec	December
ed.	Edition
e.g.	exempli gratia (for example)
emph. add.	emphasis added
et al.	et alii (and others)

et seq.	et sequens (and that which follows)
et seqq.	et sequentia (and those which follow)
EUR	Euro
EWHC	High Court of Justice of England and Wales
HCC	Hamburg Chamber of Commerce
HG	Handelsgericht (Swiss Commercial Court)
i.e.	id est (that is)
IBA	International Bar Association
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
Inc.	Incorporation
Jan	January
Jun	June
KG	Kantonsgericht (Swiss Regional Court)
LG	Landgericht (German Regional Court)
LLC	Limited Liability Company
Ltd.	Limited
Mar	March
Ms.	Miss
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments adopted in 2006
Mr.	Mister
Mrs.	Mistress
MüKo-BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch

	(Germany)
MüKo-HGB	Münchener Kommentar zum Handelsgesetzbuch (Germany)
n.	note
NAFTA	North American Free Trade Agreement
ND CAL	Northern District of California
NJ	New Jersey
No.	Number(s)
Nov	November
Oct	October
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeals)
Op.	Opinion
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PA	Pennsylvania
PCA	Permanent Court of Arbitration
PO	Procedural Order
s.	sentence
SA	Società Anonima
Sep	September
S.p.A.	Società per azioni
S.r.l.	Società a responsabilità limitata
STS	Tribunal Surpremo de España (Supreme Court of Spain)
supra	above
Trib	Tribunale (Italy)

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US/USA	United States of America
USD	United States Dollar
v.	versus
VIAC	Vienna International Arbitral Centre of the Austrian Federal Economic Chamber
Vienna Rules	Vienna International Arbitral Centre Rules of Arbitration
WD	Western District

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STATEMENT OF FACTS

The parties to this arbitration are Kaihari Waina Ltd. (hereafter "CLAIMANT") and Vino Veritas Ltd. (hereafter "RESPONDENT").

CLAIMANT is a merchant in the high-end wine business. It is a company based in Equatoriana.

RESPONDENT is one of the top vineyards in Mediterraneo. It produces a very renowned Mata Weltin wine.

22 April 2009	CLAIMANT and RESPONDENT (hereafter the "Parties") conclude a framework agreement (hereafter the "Framework Agreement"). Under the Framework Agreement CLAIMANT is obligated to buy a minimum of 7,500 bottles annually. RESPONDENT is obligated to sell up to 10,000 bottles if so ordered by CLAIMANT. In Art. 20 Framework Agreement, the Parties agree to settle all disputes by arbitration (hereafter the "Arbitration Agreeement").
30 January 2014	RESPONDENT's biggest customer, Vinexzell, is in financial difficulties. Mr Weinbauer, RESPONDENT's CEO, and Mr Barolo, the CEO of SuperWines, begin negotiations.
May 2014	The negotiations between RESPONDENT and SuperWines intensify. SuperWines is supposed to take over the 13,000 bottles which had been delivered to Vinexzell in the previous years.
August-September 2014	Heavy rains and high night temperatures lead to a great deal of rot in the grapes.
3 November 2014	The first reliable statements about quantity and quality of that year's harvest can be made. RESPONDENT informs its customers via fax about the drop in quantity and announces that the precise number of bottles available will be negotiated with each customer individually. The fax reaches CLAIMANT but is not printed out properly.
4 November 2014	CLAIMANT orders the maximum amount of 10,000 bottles.
25 November 2014	Ms. Buharit, CLAIMANT's development manager, meets Mr. Weinbauer to discuss further business opportunities. CLAIMANT's

order of 10,000 bottles is discussed but no firm commitment is made. SuperWines offers to buy 15,000 bottles.

1 December 2014 RESPONDENT informs CLAIMANT about the decision to allocate the available wine on a pro rata basis to all its customers. It offers to deliver 4,500-5,000 bottles to CLAIMANT. Counting the orders made in 2013, this represents a rate of more than 50%. RESPONDENT also offers SuperWines 4,500 bottles.

2 December 2014 CLAIMANT insists on the delivery of 10,000 bottles. SuperWines accepts the offer of 4,500 bottles.

4 December 2014 Mr Weinbauer terminates the contract with CLAIMANT.

8 December 2014 CLAIMANT seeks an interim injunction against RESPONDENT in the Mediterranean High Court in Capital City restraining RESPONDENT from delivering any number of bottles of Mata Weltin 2014 that would prevent it from supplying 10,000 bottles to CLAIMANT.

12 December 2014 The High Court grants the interim injunction. It decides that each party has to bear its own costs.

14 January 2015 RESPONDENT seeks clarity about the number of bottles available for its customers. It urges CLAIMANT to settle the dispute amicably and announces its intention to initiate declaratory proceedings if no settlement can be reached. It requests CLAIMANT to clarify the defective Arbitration Agreement.

30 January 2015 CLAIMANT has not yet reacted to RESPONDENT's letter. RESPONDENT files a declaration of non-liability in the High Court in Capital City.

2 February 2015 CLAIMANT enters into a substitute agreement for 5,500 bottles of Mata Weltin 2014 with Vignobilia Ltd., another high-end wine producer seated in Mediterraneo.

23 April 2015 The High Court of Mediterraneo decides that it lacks jurisdiction and that each party has to bear its own costs.

11 July 2015 CLAIMANT initiates arbitral proceedings at the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber.

INTRODUCTION

1 In 2014, heavy rains left fewer grapes to be picked than in previous years. CLAIMANT therefore decided to engage in cherry picking instead: it picks its own set of rules, its preferred method of calculation and the most comfortable way of proving its loss.

2 Handling the precarious situation as well as it could and acting in accordance with industry practice, RESPONDENT allocated the reduced quantity of bottles on a pro rata basis. Unlike all of RESPONDENT's other customers, CLAIMANT refused to accept this very common method of allocation. When an amicable solution could not immediately be reached, CLAIMANT sought an interim injunction in the Mediterranean High Court. Its uncooperative and defiant behaviour continued when the court ordered each party to bear its own costs. Not agreeing with this decision, CLAIMANT now tries to circumvent the High Court's order and to get its way under a different law in these arbitration proceedings.

3 CLAIMANT's picky behaviour became even more obvious when it did not answer RESPONDENT's request regarding the uncertainty of the Arbitration Agreement in respect of the appropriate forum to address. Having to decide on its own, RESPONDENT chose to bring the declaratory proceedings in the same court that CLAIMANT had previously selected for its application for an interim injunction. While CLAIMANT had no issue with addressing the state court when it served its own interests, it now accuses RESPONDENT of breaching the Arbitration Agreement when RESPONDENT chose to do the same. Once again, CLAIMANT tries to recover legal costs which it itself provoked by failing to communicate with RESPONDENT.

4 Further, CLAIMANT wants to pick its favourite method of calculating the loss it allegedly incurred. Without producing a shred of actual evidence itself, it demands that RESPONDENT disclose its profits as a basis for calculation. In making this request for document production, however, CLAIMANT suddenly is not selective at all: Despite the Parties' explicit agreement to exclude any discovery, CLAIMANT requests the production of 18 months of documents pertaining to RESPONDENT's contract with SuperWines.

5 The Tribunal is respectfully requested to dismiss CLAIMANT's request for document production, both pursuant to the Parties' agreement and under its discretion regarding the procedure **(ISSUE 1)**. Moreover, CLAIMANT can neither calculate its loss based on RESPONDENT's profits nor demand their disgorgement **(ISSUE 2)**. Regarding both the declaratory proceedings **(ISSUE 3)** and the proceedings for the interim injunction **(ISSUE 4),** CLAIMANT's legal costs cannot be reimbursed.

ARGUMENT ON THE PROFITS

ISSUE 1: THE TRIBUNAL SHOULD NOT GRANT CLAIMANT'S REQUEST FOR DOCUMENT PRODUCTION

6 Allegedly left with no other option but to refer to the profits RESPONDENT made in order to prove its loss [*Statement of Claim, p. 8 para. 28*], CLAIMANT requests the production of "*all documents from the period of 1 January 2014 – 14 July 2015 pertaining to communications between RESPONDENT and SuperWines in regard to the purchase of diamond Mata Weltin 2014 and any contractual documents, including documents relating to the negotiation of the said contract in regard to the purchase of diamond Mata Weltin 2014*" [*Statement of Claim, p. 7 para. 27; emph. add.*]. By requesting such extensive amounts of documents, CLAIMANT not only disregards the Parties' contractual agreement to exclude any kind of discovery but further tries to obtain business secrets from RESPONDENT.

7 In regard to the Parties' agreement on the exclusion of discovery, the Tribunal is requested to find that firstly, it does not have the power to order document production **(A)** and secondly, that even if the Tribunal had the power to grant CLAIMANT's request, it should not do so **(B)**.

A. The Tribunal Does Not Have the Power to Order Document Production

8 Danubia, the place of this arbitration, has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006-amendments (hereafter Model Law) [*cf. PO 1, p. 51 para. 5(3)*]. Thus, the Model Law applies as *lex loci arbitri*. Under Art. 19(1) Model Law, the parties are free to agree upon the procedure to be followed by the tribunal. In Art. 20 Framework Agreement the Parties agreed to settle any dispute by arbitration. The Parties now agree that the Rules of Arbitration by the Vienna International Arbitral Centre (hereafter Vienna Rules) apply [*cf. PO 1, p. 50 para. 2*]. Under Art. 28(1) Vienna Rules, tribunals shall proceed in accordance with the agreement between the parties. The Parties agreed to exclude all kinds of document production in Art. 20 Framework Agreement. Therefore, the Tribunal may not base its power to order document production on the Arbitration Agreement **(I)**. Furthermore, the Tribunal's power to order document production does not derive from the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (hereafter the IBA Rules) as they are not applicable **(II)**. Hence, the Tribunal does not have the power to order document production.

I. The Tribunal May Not Base Its Power on the Arbitration Agreement

9 In the Arbitration Agreement the Parties agreed that "*[t]he proceedings shall be conducted in a fast and cost efficient way and the parties agree that no discovery shall be allowed*" (hereafter the

Discovery Clause) [*Exhibit C 1, p. 9 Art. 20*]. An interpretation of the Discovery Clause reveals that document production is excluded **(1)**. This interpretation is in line with the Parties' right to present its case **(2)**.

1. Interpreting the Discovery Clause Reveals That Document Production Is Excluded

10 The interpretation of the Discovery Clause is governed by the CISG. The Parties agreed that all questions in relation to the Arbitration Agreement not regulated in the Danubian Arbitration Law are governed by the CISG [*PO 1, p. 51 para. 5(3); PO 2, p. 61 para. 63*]. Since the Model Law does not contain a rule for the interpretation of agreements, the CISG applies. Interpreting the discovery clause under Art. 8 CISG reveals that it excludes all kinds of document production **(a)**. However, even if the Tribunal were to find that the discovery clause was ambiguous, the *contra proferentem* rule would still lead to an interpretation excluding document production **(b)**.

a) An Interpretation under Art. 8 CISG Reveals the Exclusion of Document Production

11 Under Art. 8(1) CISG, *"statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was"*. According to Art. 8(2) CISG, the hypothetical understanding of a reasonable third person of the same kind as the other party and in the same external circumstances is decisive when interpreting statements and other conduct of a party [*Bianca/Bonell/Farnsworth, Art. 8 para. 2.4*; *Reinhart, Art. 8, para. 3*]. The interpretation under Art. 8(1) CISG reveals that all kinds of document production are excluded **(aa)**. This complete exclusion of document production is further emphasised by the interpretation according to Art. 8(2) CISG **(bb)**.

aa) An Interpretation under Art. 8(1) CISG Shows the Parties' Intent to Exclude All Kinds of Document Production

12 In determining the intent of a party regard is to be had to the negotiations, Art. 8(3) CISG. At the time the Framework Agreement was concluded, RESPONDENT recently had made a bad experience with a document production request [*Exhibit R 1, p. 31*]. Mr. Weinbauer, RESPONDENT's CEO at that time, was informed that such requests are often granted, in particular in common law jurisdictions such as the one CLAIMANT originates from [*Exhibit R 1, p. 31*]. Consequently, Mr. Weinbauer wanted to avoid document requests which would force RESPONDENT to disclose business secrets to the market [*ibid.*]. As even the production of a single document bears the risk of having to disclose business secrets, it was essential for RESPONDENT to exclude all kinds of document requests [*ibid.*]. In light of this, Mr. Weinbauer explicitly

mentioned his happiness about the Discovery Clause in the meeting with CLAIMANT in which the contract was finalised [*Exhibit R 1, p. 31*]. Thus, CLAIMANT should have been aware of RESPONDENT's intent to exclude any kind of document production.

bb) The Complete Exclusion of Document Production Is Further Emphasised by the Interpretation According to Art. 8(2) CISG

13 Under Art. 8(2) CISG statements and other conduct of the parties are to be interpreted according to the understanding a reasonable third person of the same kind as the other party would have had in the same circumstances. Special weight is attached to the usual meaning of the words used by the parties [*OLG Dresden, 27 Dec 1999*; *HG Zürich, 24 Oct 2003; Staudinger/Magnus, Art. 8 para. 24*]. Taking into account the wording of the Discovery Clause, the missing link to the United States and the subsequent conduct of the Parties, a reasonable third person would interpret the Discovery Clause to exclude all kinds of document production.

14 Firstly, in the Arbitration Agreement the Parties agreed that "*no discovery*" shall be allowed. The use of the term "discovery" reveals the Parties' intent to exclude any kind of document production. CLAIMANT alleges that "discovery" is to be distinguished from "document production" [*Claimant, para. 25*]. However, "discovery" and "document production" are no distinct concepts but "document production" is an essential part of "discovery". In fact so essential that "discovery" and "document production" is often used interchangeably [*cf. Derains, p. 85; Tercier/Bersheda, p. 77; Marghitola, p. 8; Elsing, p. 121; Griffin, p. 20*].

15 Considering the Parties' background, a third person of the same kind as CLAIMANT cannot be expected to differ between these terms. Both Parties were inexperienced in arbitration [*cf. PO 2, p. 60 para. 53*]. Mrs. Kim Lee, who participated in the negotiations of the Framework Agreement on CLAIMANT's side, even had to look up the meaning of "arbitration" and "discovery" [*Exhibit C 12, p. 20*]. Hence, since even professionals in arbitration use "discovery" and "document production" interchangeably, a reasonable third person could not have expected the Parties to differ between these terms. Consequently, a reasonable third person would understand the Discovery Clause as an exclusion of all kinds of document production.

16 Secondly, the missing link to the US reveals the exclusion of all kinds of document production. Contrary to CLAIMANT's allegation [*Claimant, para. 32*], it would not have been sensible to exclude only US-style "pre-trial discovery". Neither the dispute nor the Parties have any connection to the United States. Further, US-style "pre-trial discovery" has no place in international arbitration [*Berger, para. 26-27; Raeschke-Kessler, p. 415; IBA Commentary, p. 7;*

Kaufmann-Kohler/Bärtsch, p. 17]. US-style "pre-trial discovery" is a separate phase prior to the actual hearings, in which a party can request almost any matter relevant to the case [*Craig, p. 14 et seq.; Kimmelman/MacGrath, p. 44; Berger, para. 26-21*]. This often expensive and time consuming procedure [*ICSID, 3 Jun 2003; Kimmelman/MacGrath, p. 43*], conflicts with the fundamental principle of arbitration to resolve disputes in a fast and cost efficient way [*Triebels/Zons, p. 28; Lionnet/Lionnet, p. 314*]. No tribunal would apply a procedure that contradicts a fundamental principle of arbitration. Therefore, a reasonable third person would not interpret the Discovery Clause as excluding only US-style "pre-trial discovery".

17 Thirdly, RESPONDENT's subsequent conduct reveals the exclusion of document production. In its letter of 14 January 2015, RESPONDENT offered to use the Vienna International Arbitral Centre standard clause with the addition that "*document disclosure*" is excluded [*Exhibit R 2, p. 33; emph. add.*]. This suggestion was made, because RESPONDENT considered the clause to be void for uncertainty [*Exhibit R 2, p. 33*]. Thus, what RESPONDENT attempted with its letter was to rectify the Arbitration Agreement by suggesting a valid clause of the same content. Thus, a reasonable third person would conclude from its synonymous use of "document disclosure" and "discovery" that the original clause was meant to exclude document production.

18 In conclusion, a reasonable third person would understand the Discovery Clause to exclude all kinds of document production.

b) Alternatively, the Discovery Clause Has to Be Interpreted *Contra Proferentem*

19 Even if the Tribunal were to find that the Discovery Clause did not exclude all kinds of document production, the Clause would have to be interpreted to CLAIMANT's disadvantage. According to the rule of *contra proferentem*, which applies under the CISG, the party that supplied the formulation of a certain term must bear the risk of the terms ambiguity [*Kröll et al./ Viscasillas, Art. 8 para. 24; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8 para. 49*]. The disagreement between the Parties on the meaning of the term "*discovery*" is evidence for possible ambiguity of the Discovery Clause. CLAIMANT admits that it introduced the Discovery Clause into the Arbitration Agreement [*Claimant, para. 33*]. Thus, if the Tribunal were to find that the Discovery Clause was ambiguous, it would have to be interpreted to CLAIMANT's disadvantage, leading to the exclusion of document production.

20 Further, CLAIMANT may not argue that the negotiations between the Parties are a cause for joint responsibility for the possible ambiguity of the Discovery Clause. For joint responsibility, both parties must have expressly considered the formulation of the clause [*Sykes, p. 67 et seq.*]. The

formulation of the Discovery Clause was never discussed. Hence, there is no reason for joint responsibility. Consequently, in case of ambiguity, the Clause would have to be interpreted against CLAIMANT, thereby excluding all kinds of document production.

2. This Interpretation Is in Line with the Parties' Right to Present Its Case

21 Contrary to CLAIMANT's allegation [*Claimant, paras. 16, 40*], the right to present one's case is not violated if no document production is granted. Quite to the contrary, the right to present one's case does not include a guarantee that a party will be granted document production [*O'Malley, Evidence, para. 3.22; Born, p. 2180*]. Courts have rejected claims that a refusal to order document production violates the right to present one's case [*LaPine v. Kyocera, DC ND CAL, 22 May 2008; BGer, 27 Mar 2006; OLG Köln, 23 Apr 2004; Paris CA, 21 Jan 1997; Hyman v Pottberg's Executors, US CA (2nd Cir), 23 Jan 1939*]. In line with this, a sample clause proposed by a renowned arbitrator excludes document production completely [*Born, Drafting and Enforcing, p. 96*]. Thus, the right to present one's case is not violated by the exclusion of document production.

22 Therefore, the Parties' agreement excludes the Tribunal's power to order document production.

II. The Tribunal May Not Base Its Power on the IBA Rules

23 CLAIMANT argues that the IBA Rules empower the Tribunal to order document production [*Claimant, para. 11*]. However, the IBA Rules do not apply to this arbitration and can thus not empower the Tribunal. The Parties did not choose to apply the IBA Rules. Further, contrary to CLAIMANT's allegation, the IBA Rules neither apply due to the choice of law clause in the Arbitration Agreement **(1)** nor due to the choice of forum **(2)**. The IBA Rules can thus not empower the Tribunal to order document production.

1. The Parties' Choice of Law Does Not Lead to the Application of the IBA Rules

24 According to the choice of law clause, the Arbitration Agreement is governed in principle by the Model Law but in case of a gap by the CISG [*PO 2, p. 61 para. 63*]. CLAIMANT agrees that the CISG and the Model Law do not address document production [*Claimant, paras. 5, 10*]. Nevertheless, it argues that the mere choice of Danubian law, which adopted two international set of rules, *i.e.* the CISG and the Model Law, would lead to the application of a different international set of rules, *i.e.* the IBA Rules [*Claimant, para. 10*]. However, the choice of Danubian law fulfils its own purpose in determining the laws applicable to the merits and the arbitral proceedings. The mere fact that the Parties selected international rules does not suffice to assume the Parties' intent regarding the choice of another set of rules. Otherwise, the choice of an

international set of rules would lead to the application of any other set of rules, even if it stood in conflict with the other. Thus, the choice of law does not lead to the application of the IBA Rules.

25 Furthermore, Art. 7(2) CISG does not call for the application of the IBA Rules. Art. 7(2) CISG is only applicable to "*matters governed by the CISG which are not expressly settled in it*". CLAIMANT argues that because the CISG does not regulate the issue of document production the Tribunal is obliged to refer to Art. 7(2) CISG and "*fill the gap*" by applying the IBA Rules [*Claimant, para. 7*]. However, document production as a procedural request is not a matter the CISG as a law applying to sales contracts [*Artt. 4, 1 CISG*], seeks to govern. Hence, document production does not impose a gap that needs to be filled. Therefore, Art. 7(2) CISG does not call for the application of the IBA Rules.

26 Consequently, the Parties' choice of law does not lead to the application of the IBA Rules.

2. The Choice of Forum Does Not Lead to the Application of the IBA Rules

27 It is well established that the arbitration law of the forum of the arbitration applies to the arbitration [*Redfern/Hunter, para. 3.53; Born, p. 1531*]. The Parties chose to arbitrate in Vindobona, Danubia [*Exhibit C 1, p. 9*]. CLAIMANT points out that the Danubian Code of Procedure is nearly identical to Artt. 3, 9 IBA Rules, which would therefore call for the application of the IBA Rules [*Claimant, para. 23*]. However, not the national code of procedure but the provisions of the law governing the arbitration, the *lex arbitri*, are to be applied [*Born, p. 1599; Redfern/Hunter, paras. 3.51, 3.62*]. Hence, not the Danubian Code of Procedure but only the Model Law as the *lex arbitri* can govern the arbitration. The lacking agreement by the Parties to apply the IBA Rules cannot be substituted by another provision that might resemble the IBA Rules, particularly if it is not applicable itself. Thus, the choice of forum does not lead to the application of the IBA Rules.

28 The IBA Rules can therefore not empower the Tribunal to order document production.

29 Consequently, the Tribunal does not have the power to order document production.

B. Even If the Tribunal Were to Find That It Had the Power to Order Document Production, It Should Not Exercise This Power

30 Even if the Tribunal were to find that it generally had the power to order document production and were to follow CLAIMANT's line of argumentation [*Claimant, para. 8 et seqq.*] to apply the IBA Rules, the Tribunal should still deny CLAIMANT's request. Firstly, the Tribunal should deny CLAIMANT's request due to the allocation of the burden of proof **(I)**. Secondly, CLAIMANT's

request should not be granted as it does not meet the requirements of the IBA Rules **(II)**. Thirdly, denying CLAIMANT's request would not violate its right to present its case **(III)**.

I. CLAIMANT's Request Conflicts with the Allocation of the Burden of Proof

31 As both the Vienna Rules and the Model Law are silent on the issue of the burden of proof, regard is to be had to the CISG [*cf. PO 2, p. 61 para. 63*]. Under the CISG, each party has to prove the facts on which its claim is based [*HG Zürich, 26 Apr 1995; KG Wallis, 28 Jan 2009; Schlechtriem/Schwenzer/Schwenzer/Hachem, Art. 4 para. 25; Staudinger/Magnus, Art. 7 para. 57*]. Thus, CLAIMANT bears the burden of proving the lost profits it allegedly incurred.

32 Granting CLAIMANT's request would undermine this allocation of the burden of proof, as it would factually shift the burden of proof to RESPONDENT. The burden of proof is the necessity or duty of affirmatively proving a fact or facts in dispute [*Black's Law Dictionary, "Burden of Proof"*]. In turn, the burden of proof comprises the judge's power to draw negative inferences if a party does not comply with its burden of proof, regularly leading to a failure of its claim [*El-Ahdab/Bouchenaki, p. 78 et seq.*]. Similarly, tribunals have the power to draw adverse inferences if a party does not comply with an order to produce documents [*Hamstein Cumberland Music Group v. Williams, US CA (5th Cir), 10 May 2013*]. This is necessary as otherwise the possibility to order document production would be ineffective in practice [*El-Ahdab/Bouchenaki, p. 105*]. If CLAIMANT's order to produce documents were granted and RESPONDENT did not provide the documents, this would condition the Tribunal's power to draw negative consequences. Thereby, the risk of burden of proof would lie on RESPONDENT, as the failure to provide the documents would cause RESPONDENT's defeat but not CLAIMANT's claim being dismissed as unsubstantiated. Consequently, the inference would lead to a factual shift of the burden of proof [*Kolo, p. 73*]. Therefore, granting CLAIMANT's request would lead to a circumvention of the allocation of the burden of proof as established under the CISG.

II. CLAIMANT's Request Does Not Fulfil the Requirements of the IBA Rules

33 Art. 3(7) IBA Rules sets out the requirements for granting a request for document production. CLAIMANT's request fulfils none of these requirements: CLAIMANT does not request a narrow and specific category of documents in terms of Art. 3(3)(a)(ii) IBA Rules **(1)**; CLAIMANT's request is not material to the outcome of the case **(2)**. In any case, the documents should be excluded from the production as RESPONDENT rightfully objects on grounds of equality and confidentiality, according to Art. 9(2)(b),(e) IBA Rules **(3)**.

1. CLAIMANT's Request Is Not Narrow and Specific

34 Contrary to CLAIMANT's allegation [*Claimant, para. 17*], its request is not narrow and specific in the meaning of Art. 3(3)(a)(ii) IBA Rules. Requests for categories of documents are only granted if they are "*carefully tailored to produce relevant and material documents*" [*IBA Commentary, p. 9*]. Particularly, the request has to be "*reasonably limited in time and subject matter*" [*NAFTA, 26 Jan 2006; O'Malley, Document Production, p. 187*]. CLAIMANT's request is neither narrow nor specific for it is neither reasonably limited in time nor in subject matter.

35 Firstly, the request is not reasonably limited in time. CLAIMANT points out that its request pertains to documents in a specific period of time [*Claimant, para. 17*]. However, the mere indication of any period of time cannot suffice for the request to be reasonably limited. To determine the profits RESPONDENT made, CLAIMANT requests all documents from 1 January 2014 - 14 July 2015 [*cf. Statement of Claim, p. 7 para. 27*]. Even though no written contract was signed between RESPONDENT and SuperWines, it is known that before November 2014 no firm promise on the purchase of wine was made. Further, the price of the purchase was only discussed in the meeting on 1 December 2014 [*PO 2, p. 56 para. 22 et seqq.*]. Hence, the request for the documents from January 2014 - July 2015 is not necessary to receive the information CLAIMANT purportedly needs. It is recorded in a US court's decision that a tribunal rejected a request for all documents relating to a project within a period of nine month as unreasonably broad [*Karaha Bodas v. Perusahaam, US CA (5th Cir), 23 Mar 2004*]. In this case, CLAIMANT requests documents of a period of 18 month. Thus, its request is not reasonably limited in time.

36 Secondly, the request is not sufficiently limited in subject matter. CLAIMANT requests "*all documents pertaining to*" the communication and any contractual documents, including documents relating to negotiations between RESPONDENT and SuperWines in regard to the purchase of diamond Mata Weltin 2014 [*Statement of Claim, p. 7 para. 27*]. Requests for "*all documents relating to…*" have regularly been considered to be too broad and vague [*ICSID, 15 Oct 2008; Hanotiau, p. 117; Veeder, p. 59*]. While no written contract between RESPONDENT and SuperWines exists [*PO 2, p. 56 para. 23*], CLAIMANT is not willing to limit its request to contractual documents but asks for "*all documents*" instead. Thus, its request is not sufficiently specific in subject matter.

37 Consequently, CLAIMANT's request does not meet the requirement of Art. 3(3)(a)(ii) IBA Rules.

2. CLAIMANT's Request Is Not Material to the Outcome of the Case

38 According to Art. 3(7) IBA Rules the documents requested must be relevant to the case and material to its outcome. CLAIMANT argues that the documents requested are relevant to the

case [*Claimant, para. 12*]. However, irrespective of whether the documents are relevant to the case it is insufficient for the documents to be relevant to a disputed issue. Instead, the requested documents must be material to the resolution of the case [*Born, p. 2362; Ashford, p. 3-38; O'Malley, Evidence, para. 3.76*]. A document is material when it influences the tribunal's determination of issues in dispute [*Waincymer, p. 859; Yoon/Richardson, p. 139*]. The issue in dispute is whether CLAIMANT can demand the loss it allegedly suffered [*PO 1, p. 51 para. 5*]. However, in order to calculate this loss, CLAIMANT can rely not only on the price at which it sold Vignobilia's wine but also on the price at which it resold the 4,500 bottles RESPONDENT delivered this year [*cf. PO 2, p. 54 para. 13*]. As CLAIMANT can prove its alleged loss with its own contracts, there is no need to rely on the documents it requests of RESPONDENT in order to determine the issue in dispute. Hence, the documents CLAIMANT requests are not material to the outcome of the case.

3. The Documents Requested Should Be Excluded on Grounds of Equality and Confidentiality under Art. 9(2) IBA Rules

39 Firstly, RESPONDENT rightfully objects to CLAIMANT's request for document production on grounds of privilege according to Art. 9(2)(b) IBA Rules. Granting CLAIMANT's request would lead to an unequal treatment of the Parties and frustrate the Parties' expectations. An order for the production of documents requested by CLAIMANT invoked against RESPONDENT would be enforceable in Mediterraneo whereas a comparable order against CLAIMANT would not be enforceable in Equatoriana due to privileges [*Answer to Statement of Claim, p. 28 para. 30*]. Particularly, due to the local law in Equatoriana, CLAIMANT could avoid any kind of document production under the pretence of business secrecy [*cf. ibid.*]. This would lead to an unequal treatment of the Parties. In order to resolve this concern of equality, the "*most favourite nation approach*" is applied, according to which the more protective standard of privilege is granted to both parties [*cf. Tevendale/Cartwright-Finch, p. 834; Sindler/Wüstemann, p. 624 et seq.*]. This approach does justice to the legitimate expectations of the parties and provides for "*equality of arms*" [*Reiser, p. 677; Rubinstein/Guerrina, p. 598 et seq.*]. Therefore, the Tribunal should extend the privilege applicable under Equatorianan Law to RESPONDENT. Hence, RESPONDENT rightfully objects to CLAIMANT's request for document production in accordance with Art. 9(2)(b) IBA Rules.

40 Secondly, CLAIMANT's request for document production violates RESPONDENT's commercial confidentiality in accordance with Art. 9(2)(e) IBA Rules. Both price calculations and agreements with customers constitute such confidential information [*Zuberbühler, p. 180*]. RESPONDENT's pricing policy is driven by factors as loyalty and long-term strategies [*PO 2, p. 61 para. 61*]. Its pricing policy is thus not solely influenced by the market value of the wine. Disclosing exact

numbers could seriously hurt RESPONDENT's negotiation position with other customers. Furthermore, RESPONDENT accepted SuperWines as a new customer, in order to use SuperWines' distribution network in some emerging markets where its wine had so far not been sold [*PO 2, p. 57 para. 28*]. The communication and contractual documents requested would give CLAIMANT insight to RESPONDENT's strategies.

41 Additionally, it is to be considered to which extent the commercial confidentiality of third parties is affected [*Science Research Council v. Nasse, House of Lords, 1 Nov 1979*]. Both RESPONDENT and SuperWines expected that no detail of their contract would be disclosed [*PO 2, p. 56 para. 25*]. While there was no formal confidentiality agreement [*ibid.*], disclosing market strategies such as SuperWines' distribution network in emerging market to SuperWines' biggest competitor would oppose its business interests. Thus, the production of the requested documents would not only be harmful to RESPONDENT but also to SuperWines. Consequently, the Tribunal should exclude document production on grounds of commercial confidentiality under Art. 9(2)(e) IBA Rules.

42 Therefore, considering both the equality and the commercial confidentiality, the Tribunal should deny document production.

43 In conclusion, the requirements of the IBA Rules are not fulfilled.

III. Rejecting CLAIMANT's Request Would Not Violate CLAIMANT's Right to Be Heard

44 CLAIMANT alleges that if the Tribunal were not to grant CLAIMANT's request, its right to present its case would be violated [*Claimant, para. 38*]. Yet, CLAIMANT can present its case without RESPONDENT's documents. It can indeed calculate its allegedly incurred loss based on its own contracts [*cf. PO 2, p. 53 para. 2*]. Using the price at which it resold the 4,500 bottles of Mata Weltin 2014 that RESPONDENT already delivered, CLAIMANT could determine the amount of loss it allegedly suffered. Therefore, denying CLAIMANT's request for document production would not violate its right to present its case.

CONCLUSION OF THE FIRST ISSUE

45 The Tribunal does not have the power to order the production of the requested documents. Neither the Arbitration Agreement, nor the IBA Rules empower the Tribunal to do so. Even if the Tribunal were to find that it had the power, it should not order document production. Firstly, granting CLAIMANT's request would circumvent the allocation of the burden of proof. Secondly, under the IBA Rules CLAIMANT's request cannot be granted. Lastly, denying the request does not violate CLAIMANT's right to present its case.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO CLAIM THE PROFITS RESPONDENT MADE BY SELLING 5,500 BOTTLES TO SUPERWINES

46 Heavy rains caused RESPONDENT the worst harvest of the last 10 years [*PO 2, p. 57 para. 32*]. Nevertheless, CLAIMANT ordered the full amount of 10,000 bottles available for order under the Framework Agreement [*Exhibit C 2, p. 10*]. Unlike RESPONDENT's other customers, CLAIMANT persistently refused to accept less than the ordered amount in complete disregard of the bad harvest [*Exhibit C 6, p. 14*]. CLAIMANT now alleges that not the bad harvest but a contract with SuperWines caused the non-delivery of the bottles in dispute [*Claimant, para. 115*]. This does not hold true: Almost one year earlier, in January 2014, RESPONDENT and SuperWines started negotiating the sale of Mata Weltin 2014 [*PO 2, p. 55 para. 20*]. RESPONDENT originally intended to sell 13,000 bottles to SuperWines to replace Vinexzell, another customer whose financial health was questionable [*PO 2, p. 56 para. 21*]. After Vinexzell had recovered, SuperWines ordered 15,000 bottles on 25 November 2014 [*PO 2, p. 56 para. 22*]. One week later, RESPONDENT instead sold a mere 4,500 bottles to SuperWines [*PO 2, p. 56 para. 22*] subsequently followed up by another 1,000 bottles [*ibid.*]. SuperWines paid a high price to enter the wine market [*PO 2, p. 56 para. 22*]. CLAIMANT is not entitled to the profits RESPONDENT made in its deal with SuperWines. It bases its claim either on disgorgement of profits or a gain-based calculation of damages [*Claimant*, *para. 133*]. However, neither of these approaches is feasible under the CISG **(A)**. Even if the Tribunal were to find that disgorgement of profits **(B)** or a gain-based calculation of damages **(C)** were feasible under the CISG, the requirements would not be met.

A. Neither Disgorgement of Profits Nor a Gain-Based Calculation of Damages Is Feasible under Art. 74 CISG

47 CLAIMANT claims RESPONDENT's profits both under a gain-based calculation of damages and disgorgement of profits [*Claimant, para. 133*]. Disgorgement of profits requires the surrender of profits earned by the breaching party to the aggrieved party [*Jaffey, p. 431*]. A gain-based calculation of damages allows the aggrieved party to refer to the profits the seller made with a third party to calculate its own damages [*ibid.*]. Disgorgement of profits is based on the notion that a breach of contract must not pay [*cf. Bock, p. 183*]. In contrast, a gain-based calculation is supposed to replace a concrete calculation of loss where it is otherwise too difficult [*Schwenzer/Hachem/Kee, para. 44.250*]. Art. 74 CISG neither includes the possibility of disgorgement of profits **(I)** nor of a gain-based calculation of damages **(II)**.

I. Art. 74 CISG Does Not Include the Possibility of Disgorgement of Profits

48 Contrary to CLAIMANT's allegation [*Claimant, para. 132 et seq.*], disgorgement of profits is not possible under Art. 74 CISG [*Honnold/Flechtner, para. 403; Staudinger/Magnus, Art. 74 para. 18; MüKo-HGB/Mankowski, Art. 74 para. 9; Honsell, p. 361*].

49 Firstly, disgorgement of profits is not compatible with the wording of Art. 74 CISG. According to that provision, damages are "*a sum equal to the loss* […] *suffered by the other party*" [*emph. add.*]. The wording reveals that when determining damages under Art. 74 CISG, regard is to be had to the loss on the side of the aggrieved party. Any profitable consequences on the side of the breaching party are not relevant [*Schmidt-Ahrendts, p. 97*]. In contrast, disgorgement merely relates to the profits of the breaching party, regardless of a loss the aggrieved party possibly suffered [*ibid.*]. Hence, the wording of Art. 74 CISG does not allow for disgorgement of profits.

50 Secondly, disgorgement contradicts the compensatory purpose of Art. 74 CISG. This purpose is to fully compensate the aggrieved party for the loss suffered [*VIAC, 15 Jun 1994; Trib Padova, 25 Feb 2004; CISG-AC 6, Op. 1; Soergel/Lüdernitz/Dettmeier, Art. 74 para. 2*]. According to the principle of full compensation, the aggrieved party is to be placed in the same position it would have been in but for the breach [*Helsinki CA, 26 Oct 2000; Kröll et al./Gotanda, Art. 74 para. 1; Herber/Czerwenka, Art. 74 para. 4; Secretariat Commentary, p. 59*]. However, when the profits of the breaching party are disgorged to the aggrieved party, there is no connection between the loss suffered and the breaching party's gains. The aggrieved party would hence not be placed in the same position it would have been in but for the breach. Thus, disgorgement is not compensatory [*Weinrieb, p. 55*], which contradicts the purpose of Art. 74 CISG.

51 Rather than compensation, disgorgement would resemble punitive damages. Punitive damages aim at the punishment of a party for outrageous behaviour but not at compensation and may thus not be awarded under Art. 74 CISG [*Poitiers CA, 26 Feb 2009, CISG-AC 6, Op. 9B; Enderlein/Maskow, Art. 74 para. 4*]. The term "*a breach of contract must not pay*" is often invoked when endorsing disgorgement of profits under the CISG [*cf. Schlechtriem/Schwenzer/Schwenzer, Art. 74 para. 43; Bock, p. 183*]. This expression is remarkably similar to the reasoning of punitive damages that "*tort shall not pay*" [*cf. Rookes v. Barnard, House of Lords, 21 Jan 1964; Hondius, p. 3*]. The dissenting judge Lord Hobhouse also recognised this in the well-known English Case *Blake* [*Attorney General v. Blake, House of Lords, 27 Jul 2000*], stating that disgorgement of profits was of an "*essentially punitive nature*" [*ibid.*]. Disgorging the profits of the breaching party to the aggrieved party would punish the breaching party. Thus, disgorgement would resemble punitive damages, and hence be incompatible with the compensatory nature of Art. 74 CISG.

52 Thirdly, CLAIMANT may not argue that an analogy to Art. 84(2)(b) CISG leads to disgorgement. Pursuant to this norm, if a contract was avoided and the buyer cannot return the goods, it must "*account to the seller for all benefits which he has derived from the goods*". CLAIMANT might argue that this is a general principle of the CISG in terms of Art. 7(2) CISG that could be used to fill in an internal gap [*cf. Hartmann, p. 189 et seqq.*]. Under Art. 7(2) CISG, questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles of the CISG. However, Art. 74 CISG *et seqq.* regulate damages exhaustively [*MüKo-BGB/Huber, Art. 74 para. 1; Ferrari et al./Saenger, Art. 74 para. 1*], so that no internal gap exists. The brief but powerful wording in Art. 74 CISG is deliberately limited to compensation [*Jun, p. 1080*]. Thus, an analogy to Art. 84(2)(b) CISG does not support disgorgement.

53 Fourthly, contrary to what CLAIMANT might argue, the performance principle does not require disgorgement under the CISG. Under this principle, the law of damages is considered to function as an enforcement of contractual obligations [*CISG-AC 10, Com. 4.3.4*]. CLAIMANT might argue that disgorgement was needed where a party profits from a breach in disregard of the aggrieved party's performance interest [*cf. Schlechtriem/Schwenzer/Schwenzer, Art. 74 para. 43*]. However, the performance principle is neither undisputed nor absolute. Opposed to the very broad performance principle, under the principle of economic benefits, damages are seen as being merely directed at restoring economic disadvantages [*CISG-AC 6, Com. 1.1*]. Art. 28 CISG also shows that specific performance is no absolute principle, as it depends on the court's forum. Full compensation is an undisputed fundamental principle of the CISG [*see supra, para. 50 et seq.*]. Hence, where the performance principle and the principle of full compensation are opposed, the latter must prevail. The principle of full compensation proscribes disgorgement [*ibid.*]. Thus, the performance principle does not lead to disgorgement.

54 Lastly and unlike CLAIMANT's argument [*Statement of Claim, p. 7 para. 26*], the principle of good faith within the CISG does not require disgorgement. Based on Art. 7(1) CISG, good faith is a purely interpretive principle [*Sim, III.B.1c.*]. Thus, it cannot create new remedies containing rights and obligations for the parties [*Zeller, Good Faith, p. 237; Schlechtriem/Schwenzer/Schwenzer/Hachem, Art. 7 para. 19*]. Thus, the principle of good faith cannot create disgorgement under the CISG.

55 In conclusion, Art. 74 CISG does not include the possibility of disgorgement of profits.

II. Art. 74 CISG Does Not Grant a Gain-Based Calculation of Damages

56 Contrary to CLAIMANT's allegation [*Claimant, para. 131*], if a party profits from its breach of contract, the aggrieved party's damages cannot be calculated on the basis of the seller's gain.

57 Firstly, the wording of Art. 74 CISG prohibits a gain-based calculation. The provision is directed at the aggrieved party's loss. The presumption that the seller's profits indicate the buyer's loss gain does not hold true. Even if two parties operate on one market, a party's ability to profit does not indicate that other parties could act as profitably. Business success depends on a company's experience, its standing in the market and a good personal network. Such conditions may differ strongly from company to company influencing their success. Thus, the seller's profits do not indicate the buyer's gain, so that the wording of Art. 74 CISG prohibits a gain-based calculation.

58 Secondly, the prohibition of overcompensation under Art. 74 CISG contradicts a gain-based calculation of damages. Art. 74 CISG aims to put the aggrieved party in the same situation it would be in but for the breach, thereby proscribing the possibility of overcompensation [*OLG Koblenz, 24 Feb 2012; CISG-AC 6, Op. 9; Zeller, Damages, p. 115; DiMatteo, p. 263*]. CLAIMANT asserts that where a party can otherwise not be compensated, a gain-based calculation is a *"sufficient flexible manner"* of calculating damages [*Claimant, para. 131*]. In fact, this method is far too flexible. The seller's profits do not necessarily have any relation to the aggrieved party's actual loss [*Wilson, p. 57*]. Thus, the aggrieved party could be overcompensated, instead of putting it in the same situation it would be in but for the breach [*Staudinger/Magnus, Art. 74 para. 18*]. Hence, a gain-based calculation is not compatible with the strict prohibition of overcompensation.

59 Thirdly, the systematic interpretation of the CISG contradicts a gain-based calculation. An abstract calculation with the market price is only allowed under Art. 76 CISG if the contract was avoided [*OLG Hamburg, 26 Nov 1999*; *Ferrari et al./Saenger, Art. 74 para. 4*]. Thereby, Art. 74 CISG regulates exhaustively the possibility of abstract calculation under the CISG. In contrast, Art. 74 CISG asks for a concrete calculation [*OLG Celle, 2 Sep 1998; HCC, 21 Jun 1996*; *Bamberger/Roth/Saenger, Art. 74 para. 4*]. Thus, the systematic interpretation of the CISG contradicts gain-based calculation under Art. 74 CISG.

60 In conclusion, CLAIMANT may neither rely on disgorgement of profits nor on a gain-based calculation of damages since neither method is provided for by Art. 74 CISG.

B. Alternatively, the Requirements of Disgorgement of Profits Are Not Met

61 Even if the Tribunal were to find that a disgorgement was possible under the CISG, the requirements would not be fulfilled. If ever, disgorgement of profits can only apply if a seller sells the same goods twice and achieves higher profits by delivering to the second buyer [*Schwenzer/Hachem, p. 101*]. RESPONDENT did not sell SuperWines the same bottles promised to CLAIMANT. When RESPONDENT and SuperWines started to negotiate, the harvest

was expected to be excellent in amount and quality [*PO 2, p. 56 para 21*]. Even when supplying SuperWines, RESPONDENT could still have delivered 10,000 bottles to CLAIMANT [*PO 2, p. 56 para. 27*]. Thus, no connection to RESPONDENT's refusal to deliver more than 4,500 bottles to CLAIMANT exists. RESPONDENT did not sell the bottles promised to CLAIMANT to SuperWines. Therefore, the requirements of disgorgement are not met.

C. In Any Case, the Requirements for a Gain-Based Calculation Are Not Fulfilled

62 Even if the Tribunal were to find that a gain-based calculation was possible under Art. 74 CISG, the requirements would not be fulfilled. Firstly, CLAIMANT cannot rely on a gain-based calculation of damages **(I)**. Secondly, CLAIMANT did not suffer the claimed loss **(II)**. Thirdly, RESPONDENT's profits do not indicate CLAIMANT's loss **(III)**.

I. CLAIMANT Cannot Rely on a Gain-Based Calculation of Damages

63 A gain-based calculation of damages is only permissible by way of exception in situations where a concrete calculation is too difficult [*Schwenzer/Hachem/Kee, para. 44.250*]. An example would be the case where a seller violates contractually agreed ethical standards of production. The buyer might realise this only after it has resold the goods for the price they would have had were the ethical standards met. In that case, the loss suffered due to the breach of contract would be hardly calculable [*ibid.*]. At hand, no such exceptional situation exists. Despite certain difficulties, CLAIMANT can calculate the concrete loss it claims to have suffered [*PO 2, p. 54 para. 13*]. Thus, CLAIMANT may not rely on a gain-based calculation.

II. CLAIMANT Did Not Suffer the Claimed Loss

64 Even if the Tribunal were to find that a gain-based calculation should be applied, CLAIMANT has neither suffered a loss of profits **(1)** nor may it claim a loss of a chance **(2)**.

1. CLAIMANT Did Not Suffer a Loss of Profits

65 Any increase in assets prevented by the breach may be claimed as loss of profits [*Schlechtriem/Schwenzer/Schwenzer, Art. 74 para. 36*]. CLAIMANT claims that it has suffered lost profits by not being able to sell the 5,500 bottles of Mata Weltin not delivered by RESPONDENT [*Statement of Claim, p. 7 para. 26*]. The contrary holds true: CLAIMANT did not suffer a loss of profits as it made a substitute arrangement **(a)**. Further, CLAIMANT would not have been able to sell the total amount of 15,500 bottles to its customers **(b)**.

a) CLAIMANT Did Not Suffer a Loss of Profits as It Made a Substitute Arrangement

66 Contrary to CLAIMANT's allegation [*Claimant, para. 120*], CLAIMANT did not suffer a loss of profits. With regard to lost profits, the aggrieved party can mitigate its loss by buying substitute goods for resale [*CISG-AC 6, Com. 8.1*]. The difference between the original price and the substitute transaction is then recoverable as damages under Art. 74 CISG [*ibid.*]. Except for avoidance of contract, the requirements are identical to those in Art. 75 CISG [*ibid.*]. Substitute goods must be suited to satisfy the aggrieved party's original performance interest [*Achilles, Art. 75 para. 3; Schlechtriem/Schwenzer/Schwenzer, Art. 75 para. 2*]. In addition, no further lost profits can be claimed if a cover purchase offers the aggrieved party the same opportunity to profit as the original transaction would have [*LG München, 6 Apr 2000; CISG-AC 8, Com. 3.2*].

67 On 2 February 2015, CLAIMANT bought 5,500 bottles of Mata Weltin 2014 from Vignobilia [*PO 2, p. 54 para. 11*]. This equals the amount it did not receive from RESPONDENT. Vignobilia is another high-end vineyard from Mediterraneo [*ibid.*]. With EUR 42,20 per bottle [*ibid.*], the price was similar to the EUR 41,50 CLAIMANT paid to RESPONDENT [*PO 2, p. 55 para. 14*]. Just like RESPONDENT's, Vignobilia's wine is of outstanding quality and received resounding reviews in early February 2015 [*PO 2, p. 55 para. 13*]. Thus, both wine purchases are identical in amount, year and region, as well as comparable in quality and price. Hence, the cover transaction satisfies CLAIMANT's original performance interest. Moreover, most of CLAIMANT's customers consented to buy a mixture of RESPONDENT's and Vignobilia's wine [*PO 2, p. 54 para. 10*]. CLAIMANT may even benefit from the substitute arrangement [*PO 2, p. 54 para. 13*]. Thus, the substitute arrangement provides CLAIMANT with the same opportunity to profit.

68 Consequently, CLAIMANT did not suffer lost profits.

b) CLAIMANT Would Not Have Been Able to Sell 15,500 Bottles to Its Customers

69 CLAIMANT alleges that it lost sales volume, *i.e.* that it could sell all of the 15,500 bottles it would have received if both RESPONDENT and Vignobilia had delivered [*Claimant, para. 120*]. If the aggrieved party is a reseller and may sell the goods to multiple customers, a cover purchase does not compensate the party, as it actually would have resold both the goods it did not receive and the substitute goods [*CISG-AC 6, Com. 3.20; Kröll et al./Gotanda, Art. 74 para. 56*]. However, CLAIMANT would not have sold the full amount of 15,500 bottles to its customers.

70 Until 2014, RESPONDENT was CLAIMANT's only supplier of top quality Mata Weltin from Mediterraneo [*PO 2, p. 54 para. 11*]. In 2014, CLAIMANT sold no more than 8,000 bottles of Mata Weltin to its customers [*cf. Answer to Statement of Claim, p. 26 para. 8*]. In 2014, CLAIMANT received

20% more pre-orders than in 2013 [*PO 2, p. 54 para. 8*]. At the time of these pre-orders, CLAIMANT's customers knew about the bad harvest and expected a high demand [*PO 2, p. 54 para. 8*]. Hence, the 20% increase of pre-orders is suitable to represent the interest CLAIMANT's customers had in receiving Mata Weltin 2014. Even if the total amount of bottles CLAIMANT could sell in 2015 were 20% higher than in 2014, this would only amount to a total of 9,600 bottles. Hence, CLAIMANT would not have been able to sell 15,500 bottles of Mata Weltin 2014. Therefore, CLAIMANT did not suffer a loss of sales volume.

2. CLAIMANT Cannot Claim a Loss of a Chance

71 CLAIMANT alleges to have suffered a loss of a chance because it could not sell the bottles to SuperWines [*Claimant, para. 117*]. However, the claimed loss is not one of a chance but a loss of profits. The former is separated from the latter by the existence of some fortuitous event or contingency between the performance and the promisee's realisation of gain [*CISG-AC 6, Com. 3.15*]. At hand, no such event exists. Hence, it actually claims a loss of profits. Alternatively, CLAIMANT could not rely on the loss, as a loss of chance is not recoverable under Art. 74 CISG **(a)**. In any case, CLAIMANT could not have sold 5,500 bottles to SuperWines **(b)**.

a) CLAIMANT Cannot Rely on a Loss of a Chance

72 A loss of a chance is generally not recoverable under Art. 74 CISG [*KG Zug, 14 Dec 2009; HG Zürich, 10 Feb 1999; Brunner/Schmidt-Ahrendts/Czarnecki, Art. 74 para. 19; Neumayer/Ming, Art. 74 para. 1*]. An exception can be made if the primary purpose of the transaction is to give the buyer a chance for profit, like the sale of a racehorse [*Schlechtriem/Schwenzer 2nd ed./Stoll/Gruber, Art. 74 para. 22 n. 98, CISG-AC 6, Com. 3.16*]. The transaction at hand is not meant to make the fruition of a resale profit dependent on chance. Thus, CLAIMANT cannot rely on a loss of a chance.

b) In Any Case, SuperWines Would Not Have Bought the Bottles from CLAIMANT

73 Buying bottles from CLAIMANT would have been contrary to SuperWines' interests. It attempted to order from RESPONDENT for at least two years [*PO 2, p. 56 para. 24*]. RESPONDENT as a wine producer is well suited as a supplier in its distribution system. CLAIMANT, as a reseller, sells at higher prices than RESPONDENT. Buying wine from CLAIMANT and having to pay a higher price than to RESPONDENT, would not have been profitable for SuperWines. Further, SuperWines is CLAIMANT's biggest competitor [*PO 2, p. 56 para. 26*]. Contracting with CLAIMANT would have weakened its own market position. Thus, it would not have bought bottles from CLAIMANT.

74 In conclusion, CLAIMANT cannot claim a loss of a chance.

III. RESPONDENT's Profits Do Not Indicate CLAIMANT's Loss

75 If a gain-based calculation of damages is applied, it is presumed that the profits made by the party in breach indicate the loss of profits of the aggrieved party [*Schwenzer/Hachem, p. 101*]. This applies if the aggrieved party is in the same situation as the breaching party and therefore could have used the goods just as profitably [*Schwenzer/Hachem/Kee, para. 44.251; Schmidt-Ahrendts, p. 99*]. However, this method should not be applied if the party in breach can show that the aggrieved party could not have used the goods as profitably as the breaching party [*Schmidt-Ahrendts, p. 99.*]. RESPONDENT's profits do not indicate CLAIMANT's loss for various reasons.

76 Firstly, there is no indication of loss in the high-end wine business. The indication that the aggrieved party could make the same profits as the party in breach is based on the presumption that two businessmen generally have the same marketing possibilities [*ibid.*]. However, in the high-end wine business, dealings are founded on trust and long-lasting relationships [*Exhibit C 7, p. 15; PO 2, p. 61 para. 61*]. Business success is dependent on a good personal network. As an example, RESPONDENT fixes different prices for every customer dependent on their relationship [*PO 2, p. 61 para. 61*]. Hence, this system does not grant each businessman the same possibilities. Thus, there is no indication of loss in the high-end wine business.

77 Secondly, the Parties' market positions are not comparable. CLAIMANT is a wine merchant [*Statement of Claim, p. 3 para. 1*], whereas RESPONDENT is a producer [*Statement of Claim, p. 4 para. 2*]. In these different positions the Parties have different customers, prices, profit margins and marketing opportunities. Thus, the Parties' market positions are not comparable.

78 Thirdly, only RESPONDENT could make these profits. The premium SuperWines paid is not related to the wine itself but is supposed to help SuperWines enter the high-end market and prove itself as a trustworthy supplier in times of bad harvests [*PO 2, p. 56 para. 24*]. For this, it needs a wine producer like RESPONDENT. SuperWines would not have bought the bottles from CLAIMANT [*see supra, para. 73*]. Thus, only RESPONDENT could make the profits.

79 In conclusion, RESPONDENT's profits do not indicate CLAIMANT's loss.

CONCLUSION OF THE SECOND ISSUE

80 CLAIMANT is not entitled to the profits RESPONDENT made by selling 5,500 bottles to SuperWines. The CISG neither allows disgorgement of profits nor a gain-based calculation of damages. Even if it the Tribunal were to find that it provides for these methods, CLAIMANT would not be entitled to damages, since it did not suffer the loss it claims and the further prerequisites of a gain-based calculation of damages are not fulfilled

ARGUMENT ON THE LEGAL COSTS

ISSUE 3: CLAIMANT IS NOT ENTITLED TO DAMAGES FOR THE LEGAL COSTS INCURRED IN THE HIGH COURT PROCEEDINGS

81 On 1 December 2014, RESPONDENT informed its customers that the unexpected drop in quantity of the 2014 harvest only allowed for a pro rata allocation [*Exhibit C 3, p. 11*]. Nevertheless, CLAIMANT insisted on the delivery of 10,000 bottles and even sought an interim injunction in this regard on 8 December 2014. Facing this kind of pressure, RESPONDENT needed certainty as to its legal situation and as to the number of bottles available for its contracts with other customers. In contrast to CLAIMANT, RESPONDENT acted in line with the wine industry practice and tried to find an amicable solution not only once but twice [*Answer to Statement of Claim, p. 27 para. 20 et seq.*]. However, CLAIMANT refused any compromise in the first meeting in January and even failed to answer at all to RESPONDENT's second approach via letter of 14 January 2015 [*cf. Exhibit R 2, p. 33*]. In this letter, RESPONDENT requested CLAIMANT to clarify the Arbitration Agreement. Yet, CLAIMANT decided to do nothing and left RESPONDENT in the dark about the competent forum to address. Hence, RESPONDENT was left with no other option but to refer to the High Court to seek declaratory relief [*Exhibit C 9, p. 17*]. On 23 April 2015, the High Court rejected RESPONDENT's claim and ruled that each party bears its own costs [*ibid.*]. Even though CLAIMANT had already unsuccessfully requested reimbursement of its legal costs in the High Court proceedings [*PO 2, p. 59 para. 44*], it now again claims these costs from RESPONDENT. However, CLAIMANT is not entitled to reimbursement of its legal costs.

82 Firstly, the Tribunal is not entitled to award damages for the legal costs due to the effect of *res judicata* **(A)**. Secondly, even if the Tribunal were entitled to award damages for legal costs incurred in the High Court proceedings, the requirements to award damages under the CISG would not be met **(B)**. Thirdly, and contrary to CLAIMANT's allegation [*Claimant, para. 61 et seq.*], its legal costs cannot be awarded as damages based on international practice either **(C)**. Fourthly, CLAIMANT cannot claim its legal costs under Artt. 37, 44(1) Vienna Rules **(D)**.

A. The Effect of *Res Judicata* Bars the Tribunal from Deciding on the Legal Costs

83 Contrary to CLAIMANT's assertion [*Claimant, para. 66*], the Tribunal is bound by the decision of the High Court on the costs of the declaratory proceedings and thus is not entitled to award damages for CLAIMANT's legal costs. The effect of *res judicata* prevents the re-deciding of a dispute that has finally been adjudged by a judicial court [*ICC, 6363/1991; ICC, 4126/1984; Schaffstein, para. 810; ILA Interim Report, p. 2*]. This effect might arise between a state court and a

tribunal [*ILA Interim Report, p. 3*] and has been acknowledged by tribunals as a doctrine in international law [*ICSID, 2 Jun 2000; ICSID, 10 May 1988; Trail Smelter, 11 Mar 1941; PCA, 14 Oct 1902*]. As part of the operative section, decisions on the allocation of costs at the end of a proceeding are final and binding [*BGer, 10 Nov 2010; Koch, p. 233*]. In particular, the effect of *res judicata* occurs where national rules do not grant the reimbursement of attorney's fees. Otherwise the decision of national legislation would be undermined [*ICC, 6998/1994; ICC, 4367/1986; Jäger, p. 123*]. In order for a decision to qualify as *res judicata*, the requirements of the triple identity test, i.e. identity of the subject matter, identity of the cause of action and identity of the parties must be met [*ILA Final Report, p. 76*].

84 Firstly and contrary to CLAIMANT's allegation [*Claimant, para. 65*], the subject matter of the claim is identical to the claim decided by the High Court. Two subject matters are identical if the relief sought, respectively, is the same [*ILA Interim Report, p. 7*]. In the proceeding before the High Court, CLAIMANT sought an order that would oblige RESPONDENT to pay CLAIMANT's legal costs [*PO 2, p. 59 para. 44*]. In this arbitration, CLAIMANT also requests that RESPONDENT has to pay CLAIMANT's legal costs which incurred in the proceeding before the High Court. Thus, the reliefs sought by CLAIMANT are identical. CLAIMANT may not argue that there is no *res judicata* effect due to a substance-procedure-distinction. Whether the subject matter is of substantive or procedural nature is irrelevant. Various tribunals have confirmed that a decision on legal costs rendered by a state court held under national rules is binding and thus bars a tribunal from deciding on the reimbursement of these costs [*SCC, 29 Mar 2005; ICC, 6998/1994; ICC, 4367/1984; Reiner, p. 282 et seq.; Jäger, p. 123*]. Otherwise, the Tribunal would circumvent the national rules on allocation of costs and the High Court's decision based upon them. In conclusion, the subject matters in this arbitration and the High Court proceeding are identical.

85 Secondly, the cause of action is identical. Cause of action is defined as all facts and circumstances, arising from a single event and relying on the same evidence, which are necessary to give rise to a right to relief [*ILA Interim Report, p. 7*]. CLAIMANT's claim is based on the same facts and circumstances as the prior state court proceeding. It does not bring up further evidence. Thus, the cause of action is identical.

86 Thirdly, the parties to both proceedings are the same, CLAIMANT and RESPONDENT. Thus, the requirements of the triple identity test are met.

87 In conclusion, the court's decision on the costs of the declaratory proceedings is final and binding. Due to the effect of *res judicata,* the Tribunal is thus not entitled to award damages for the legal costs incurred in CLAIMANT's defence in the High Court proceedings.

B. Even If the Tribunal Were Entitled to Award Damages for the Legal Costs, the Requirements to Award Damages under the CISG Would Not Be Met

88 Contrary to CLAIMANT's assertions [*Claimant, para. 73*], the requirements to award damages for a breach of the Arbitration Agreement are not met. Artt. 45(1)(b), 74 CISG set the requirements under which the Tribunal can award damages for a breach of an arbitration agreement. However, RESPONDENT did not breach the Arbitration Agreement **(I)**. Alternatively, RESPONDENT is exempt from liability under Art. 80 CISG **(II)**. In any case, CLAIMANT's legal costs do not constitute a reimbursable loss in terms of Art. 74 CISG **(III)**.

I. RESPONDENT Did Not Breach the Arbitration Agreement

89 CLAIMANT alleges that by seeking declaratory relief in the High Court of Mediterraneo RESPONDENT breached the Arbitration Agreement [*Claimant, para. 57*]. Flaws in the arbitration agreement and the obstructive behaviour of one of the parties can make it impossible to constitute the arbitral tribunal [*Fouchard/Gaillard/Goldman, para. 633*]. In such situation, bringing a claim to the state courts despite the existence of an arbitration agreement does not constitute a breach [*ibid.*]. This is in line with the Vienna Rules. The Deputy Secretary General of the Vienna International Arbitral Centre stated that a claimant being faced with a pathological clause can file an action on the merits in a national court [*Fremuth-Wolf, p. 6*]. At hand, flaws in the Arbitration Agreement and the uncooperative behaviour of CLAIMANT made it impossible to constitute the Arbitral Tribunal.

90 Firstly, the Arbitration Agreement is pathological. Pathological arbitration agreements contain inconsistencies or uncertainties concerning major elements of the clause [*Eisemann, p. 129; Scalbert/Marville, p. 117; Davis, p. 365*]. In particular, an arbitration agreement providing for inaccurate or non-existing arbitral institutions is pathological [*Fouchard/Gaillard/Goldman, para. 484; Davis, p. 367*]. The Arbitration Agreement states that all disputes "*shall be decided by arbitration in Vindobona by the International Arbitration Tribunal (VIAC)"* [*Exhibit C 1, p. 9*]. However, no arbitral institution with the name "*International Arbitration Tribunal*" exists. The uncertainty with regard to the institution is neither rectified by the inclusion of "*Vindobona*" as the chosen seat of arbitration nor by the use of the abbreviation "*VIAC*". The chosen seat of arbitration is not necessarily identical with the seat of the arbitral institution [*OLG Dresden, 5 Dec 1994*]. Hence, CLAIMANT may not argue that by referring to Vindobona the Parties agreed on the Vienna International Arbitral Centre. Further, using the abbreviation "*VIAC*" does not specify the intended arbitral institution. The Vietnam International Arbitration Centre is also abbreviated with VIAC. It would have been also possible to hold an international arbitration administrated by

the Vietnam International Arbitration Centre in Vindobona. Thus, the arbitration agreement provides for a non-existing arbitral institution and is therefore pathological.

91 Secondly, CLAIMANT's obstructive behaviour made it impossible to constitute the Arbitral Tribunal. On 14 January 2015, RESPONDENT sent a letter, requesting CLAIMANT to cure the pathological Arbitration Agreement and clarify the forum in which an action had to be brought [*Exhibit R 2, p. 33*]. It also informed CLAIMANT that it would start court proceedings in case CLAIMANT refused to do so [*ibid.*]. However, CLAIMANT decided to not cooperate and never clarified the Arbitration Agreement [*PO 2, p. 61 para. 57*]. CLAIMANT's uncooperative behaviour made it thus impossible to constitute the Tribunal when RESPONDENT intended to seek for declaratory relief.

92 In conclusion, RESPONDENT did not breach the Arbitration Agreement.

II. Alternatively, RESPONDENT Is Exempt from Liability under Art. 80 CISG

93 Even if the Tribunal were to find that the initiation of the declaratory proceedings constituted a breach of the Arbitration Agreement, RESPONDENT is not liable for it. Instead, CLAIMANT caused this breach by deciding not to reply to RESPONDENT's letter. Pursuant to Art. 80 CISG "*a party may not rely on a failure of the other party to perform to the extent that such failure was caused by the first party's act or omission*". For an omission to be relevant, the obligee has to be under a duty to act or cooperate [*Kröll et al./Atamer, Art. 80 para. 6; Müko-HGB/Mankowski, Art. 80 para. 4*]. This duty may arise from the contract, any usage or practices established between the parties or from the principle of good faith [*ibid.*].

94 CLAIMANT was under an obligation to act with regard to the Arbitration Agreement. In the Arbitration Agreement the Parties explicitly agreed to settle disputes amicably and in good faith. Settling disputes amicably is industry practice in the high-end wine business [*PO 2, p. 57 para. 33*] and corresponds with the Parties' successful and long lasting business relationship [*cf. Statement of Claim, p. 4 para. 3*]. Moreover, the Parties agreed in their Arbitration Agreement to conduct proceedings in a fast and cost efficient way. Considering this, CLAIMANT was obliged to cooperate with RESPONDENT. Contrary to CLAIMANT's assertion [*Claimant, para. 68*], RESPONDENT tried to overcome the uncertainty by asking CLAIMANT to cure the pathological Arbitration Agreement and clarify the competent forum to settle disputes [*Exhibit R 2, p. 33*]. To provide for a fast and efficient solution, RESPONDENT even made an offer to rectify the pathological Arbitration Agreement by agreeing on a standard clause with the addition that document disclosure is excluded [*ibid.*]. However, CLAIMANT decided to do nothing and did not

cooperate [*PO 2, p. 61 para. 57*]. Breaching its obligation to settle disputes amicably, CLAIMANT intentionally did not react to the specific request and refused to eliminate the ambiguity [*PO 2, p. 61 para. 57*]. Had it clarified the Arbitration Agreement, RESPONDENT would not have addressed the state court but the Vienna International Arbitral Centre. Thus, CLAIMANT caused RESPONDENT's breach of Arbitration Agreement.

95 Hence, RESPONDENT is exempt from liability under Art. 80 CISG and CLAIMANT may not rely on an alleged breach of the Arbitration Agreement by RESPONDENT.

III. Alternatively, CLAIMANT's Legal Costs Are Not Reimbursable under the CISG

96 Firstly, the legal costs are no loss reimbursable under the CISG **(1)**. Secondly, CLAIMANT's loss was not foreseeable **(2)**. Thirdly, CLAIMANT violated its duty to mitigate the loss **(3)**.

1. CLAIMANT's Legal Costs Are No Loss Reimbursable under the CISG

97 Contrary to CLAIMANT's allegation [*Claimant, para. 88 et seqq.*], legal costs are not reimbursable under the CISG. Firstly, Art. 74 CISG does not allow for the reimbursement of attorney's fees **(a)**. Secondly, CLAIMANT may not rely on exceptional court decisions **(b)**.

a) Art. 74 CISG Does Not Allow the Reimbursement of Attorney's Fees

98 Litigation costs do not constitute a reimbursable loss under Art. 74 CISG [*San Lucio v. Import & Storage, DC NJ, 15 Apr 2009; Norfolk v. Power Source, DC WD PA, 25 Jul 2008; Huber/Mullis, p. 278; Honnold/Flechtner, Art. 74 para. 408; Vanto, p. 221; Gotanda, p. 133; CISG-AC 6, Com. 5.1; Keily, para. 186*]. In this regard, a guiding decision was made in 2002: in *Zapata v. Hearthside* a Court of Appeals denied the reimbursement of attorney's fees under Art. 74 CISG. The decision is broadly accepted and its reasoning should be applied to the present case.

99 Firstly, reimbursing attorney's fees under Art. 74 CISG contradicts the purpose of the CISG. Its drafters did not intend to include attorney's fees. Formal documents reveal that this question never arose during the drafting of the treaty [*cf. Honnold, Document History*]. Pursuant to Art. 1 CISG, the CISG applies to sales contracts and deals with substantive matters. However, the question of reimbursing attorney's fees is rather a procedural matter [*Zapata v. Hearthside, US CA (7th Cir), 19 Nov 2002; Trib Vigevano, 12 Jul 2000; Flechtner, p. 147; Flechtner/Lookofsky, Viva Zapata, p. 94; Jäger, p. 162*]. The drafters themselves stated that it is "*inappropriate for the Convention*" to deal with procedural issues [*Honnold, Document History, p. 177 et seq.; Lookofsky/Flechtner, Attorney's Fees, p. 7*].

100 Secondly, reimbursing legal costs under Art. 74 CISG would lead to anomalies as it would favour successful claimants over successful defendants [*Jäger, p. 162; Schechtriem/Schwenzer/Schwenzer, Art. 74, para. 29; Schwenzer, p. 423; Vanto, p. 221; Gotanda, p. 130; CISG-AC 6, Com. 5.4*]. Art. 74 CISG requires a breach of contract as basis for a damage claim. While this requirement is no obstacle for a successful claimant, it would leave a successful defendant without the possibility to recover its legal fees under Art. 74 CISG as the claiming party did not breach the contract but only sued the defendant [*ibid.*; *Zapata v. Hearthside, US CA (7th Cir), 19 Nov 2002*]. Thus, applying Art. 74 CISG would lead to anomalies. CLAIMANT alleges that such anomalies would also occur at a domestic level [*Claimant, para. 95*]. However, the Convention was established to accommodate diverging sales laws [*Gabriel, p. 4; Malloy, p. 683; Schlechtriem, p. 469; Schlechtriem/Schwenzer/Schwenzer/Hachem, Preamble para. 9*]. Thus, anomalies of the domestic law have no influence on the applicability of the CISG. Anomalies under the CISG, however, are fatal, as its purpose is to overcome diverging laws and dissolve disputes under a uniform law. Unequal treatment would hinder the required uniformity [*Gotanda, p. 112*]. Hence, occurring anomalies hinder the application of Art. 74 CISG in the case of reimbursing attorney's fees.

101 Thirdly, contrary to CLAIMANT's allegation [*Claimant, para. 91*], it cannot rely on the principle of full compensation. CLAIMANT alleges that the principle of full compensation requires a broad interpretation of Art. 74 CISG and thus the inclusion of attorney's fees [*Claimant, para. 91*]. However, another principle underlying the CISG, the principle of equality, prohibits such a plain reading [*Gotanda, p. 130; Keily, para. 152; Schwenzer, p. 423*]. It prevails over the principle of full compensation [*CISG-AC 6, Com. 5.4; Schwenzer, p. 423; Felemegas, para. 60; Keily, para. 159*]. Applying Art. 74 CISG to the reimbursement of attorney's fees would undermine the principle of equality, as hereby anomalies would be created [*see supra, para. 100*]. Hence, the principle of full compensation does not lead to the recoverability of attorney's fees under Art. 74 CISG.

102 In conclusion, legal fees do not constitute a recoverable loss within the meaning of Art. 74 CISG.

b) CLAIMANT Cannot Rely on Exceptional Court Decisions

103 CLAIMANT might argue that some courts apply Art. 74 CISG to recover attorney's fees [*OLG Düsseldorf, 11 Jul 1996; 14 Jan 1994; AG Augsburg, 29 Jan 1996; AG Alsfeld, 12 May 1995*]. However, the courts only awarded damages limited to pre-litigation costs [*Flechtner, p. 133; Schlechtriem/Schwenzer/Schwenzer, Art. 74 para. 30*]. They comprise costs which are not allocated in the respective proceeding. As the state court decided on the incurred legal costs of the Parties [*Exhibit C 8, p. 16*], they do not depict pre-trial costs. Thus, CLAIMANT cannot rely on these court decisions. In other cases [*ICC, 7585/1992; AG Viechtach, 11 Apr 2002; LG Berlin,*

21 Mar 2003], it was not clarified whether the decision was based on Art. 74 CISG or procedural law [*Gotanda, p. 116*]. Hence, these cases cannot serve to support CLAIMANT's request. In fact, the only decision granting the reimbursement of legal fees under Art. 74 CISG [*HCC, 21 Mar 1996*] was based on an agreement between the parties that the breaching party would have to pay [*Flechtner, p. 132*]. At hand, the Parties concluded no such agreement. Therefore, CLAIMANT cannot rely on exceptional court decisions.

104 Beyond that, if the reimbursement of legal costs were allowed under the CISG the contingency fee agreement at hand would constitute a contract to the detriment of third parties [*Answer to Statement of Claim, p. 29 para. 35*]. CLAIMANT would not bear any risk of paying the fee as if it lost, the fee would not incur. Yet, in case CLAIMANT won, RESPONDENT would have to pay the full fee amounting to USD 45,000. Therefore, the contingency agreement would endorse a contract to the detriment of RESPONDENT if it were reimbursed.

105 In conclusion, CLAIMANT's incurred litigation costs are no reimbursable loss under Art. 74 CISG.

2. CLAIMANT's Loss Was Not Foreseeable to RESPONDENT

106 Contrary to CLAIMANT's assertion [*Claimant, para. 78 et seq.*], RESPONDENT ought not to have foreseen CLAIMANT's legal costs. Pursuant to Art. 74 s. 2 CISG, reimbursable loss is limited to the extent the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. The general extent of loss must have been foreseeable to the party in breach [*OGH, 14 Jan 2002; Schlechtriem/Schwenzer/Schwenzer, Art. 74 para. 50; Honnold/Flechtner, para. 406*].

107 Firstly, it was not foreseeable that CLAIMANT would agree on a contingency fee. The purpose of contingency fees is to allow individuals without the financial means to pay for lawyers on an hourly basis to press forward with claims [*Rosen-Zvi, p. 717; Cabrillo/Fitzpatrick, p. 165*]. CLAIMANT contracted to buy at least 7,500 bottles of wine annually from RESPONDENT, demonstrating its financial strength at the time of the conclusion of the contract [*Exhibit C 1, p. 9*]. It consistently increased its market share in the high-end wine business [*Statement of Claim, p. 3 para. 1*]. Moreover, contingency fees only function in active damage claims [*Rosen-Zvi, p. 717*]. RESPONDENT's declaration however is no active damage claim as the court can neither award damages if it declares its lacking jurisdiction nor if it grants the declaration. It is thus comprehensible that the two other firms CLAIMANT contacted were not willing to work on contingency fee basis [*PO 2, p. 58 para. 39*]. Hence, a reasonable person in the shoes of RESPONDENT ought not to have foreseen that CLAIMANT would agree on a contingency fee.

108 Secondly, the amount of legal costs was not foreseeable. In Mediterraneo, contingency fees are reasonable under ordinary circumstances [*PO 2, p. 58 para. 39*]. Ordinarily, the fee is calculated based on the damages awarded to the plaintiff at trial [*Cabrillo/Fitzpatrick, p. 165*]. Yet, at hand no award for damages was to be expected. CLAIMANT however promised to its lawyers the fixed amount of USD 15,000 for procedural matters [*Exhibit C 10, p. 18*]. Compared to the 8,5 hours spent on the case [*Exhibit C 11, p. 19*], the fee is extraordinarily high. A reasonable person in the shoes of RESPONDENT thus ought not to have foreseen the amount of CLAIMANT's legal costs.

3. CLAIMANT Violated Its Duty to Mitigate the Loss

109 Contrary to CLAIMANT's assertion [*Claimant, para. 82*], it violated its duty to mitigate the loss by agreeing on a contingency fee. Art. 77 CISG obliges the aggrieved party to *"take such measures as are reasonable in the circumstances to mitigate the loss"*. To take such measures, CLAIMANT should have hired lawyers charging on an hourly basis. The average Mediterranean hourly price rate for lawyers is USD 350 [*PO 2, p. 58 para. 39*]. Considering the 8,5 hours the lawyers spent, CLAIMANT's legal costs would have amounted to USD 2,995. Compared to USD 16,530 spent by CLAIMANT [*Exhibit C 11, p. 19*], it becomes evident that it violated its duty to mitigate the loss.

110 Agreeing on an hourly rate would not have been unreasonably burdensome for CLAIMANT. Contrary to CLAIMANT's allegation [*Statement of Claim, p. 5 para. 13*], it had sufficient liquid capital to hire lawyers on an hourly basis. Its annual profits amount to EUR 1.2 million [*PO 2, p. 58 para. 38*]. Further, at the time the dispute arose CLAIMANT could afford to invest EUR 12 million [*ibid.*]. Moreover, it paid all legal costs amounting to USD 50,280 without any support of RESPONDENT before it started arbitration [*PO 2, p. 58 para. 41*]. Bearing in mind that the contingency fee was fixed and no award for damages was to be expected from the proceedings [*see supra, para. 107*], CLAIMANT was aware that it would have to pay the fee from its own capital in case its defence was successful. In addition, it spontaneously bought 5,500 bottles at the price of EUR 42.20 per bottle from another high-end wine producer [*PO 2, p. 54 para. 11*]. Thus, it can be reasonably assumed that CLAIMANT had the financial resources to hire lawyers on an hourly basis. Hence, it violated its duty to mitigate the loss by agreeing on a contingency fee.

111 In conclusion, the requirements to award damages under the CISG are not met.

C. Damages Cannot Be Awarded Based on International Practice

112 CLAIMANT argues that a claim for damages can be based on international practice [*Claimant, para. 61 et seq.*]. In doing so, it relies on cases awarding damages for a breach of arbitration

agreement without being based on the CISG [*ibid.*]. However, the CISG exhaustively deals with remedies in Art. 74 CISG [*see supra, para. 97 et seqq.*]. Even if the Tribunal were to find that Art. 74 CISG is not exhaustively dealing with remedies, the rules for the interpretation of the CISG set out in Art. 7(1) CISG have to be applied. According to this, *"regard is to be had to its international character and to the need to promote uniformity in its application"*. The interpretation has to be independent from domestic preconception and must be acceptable in different legal systems [*Schlechtriem/Schwenzer/Schwenzer/Hachem, Art. 7 para. 8*]. Many cases CLAIMANT quotes are from common law systems [*cf. Red Cross Line v. Atlantic Fruit, US Sup Ct, 15 Nov 1924; West Tankers v. Generali Assicurazioni, EWHC, 4 Apr 2012*]. In these cases, English law or American law was applicable. Within those laws, established case law explicitly allows the reimbursement of loss for breach of arbitration agreement [*ibid.*]. The cases are, however, dependent on domestic preconceptions. Their solution is thus not acceptable in different legal systems. The single case from Spain quoted by CLAIMANT does not lead to an established international practice either. The substantive claim met the requirements to reimburse loss under Spanish law and was thus neither specific nor independent from domestic preconceptions [*STS, 12 Jan 2009*]. Hence, CLAIMANT's damages cannot be awarded based on international practice.

D. CLAIMANT Cannot Claim Its Legal Costs under Artt. 37, 44(1) Vienna Rules

113 CLAIMANT cannot argue that the Tribunal should allocate its legal costs incurred in the High Court proceedings to RESPONDENT under Art. 37 Vienna Rules. Pursuant to Art. 44(1) Vienna Rules, allocable costs of the arbitration comprise administrative fees, the party's costs and other expenses related to the arbitration. Attorney's fees incurred in state court proceedings are thus no costs of the arbitration but costs prior to it. An exception is only made if they are necessary to prepare the case and directly linked to the later filing of the claim [*Jäger, p. 120*]. CLAIMANT's legal costs are not related to the arbitration as its defence in the High Court was neither necessary to prepare nor directly linked to the subsequent arbitration claim. They are thus not comprised by Art. 44(1) Vienna Rules and cannot be allocated to RESPONDENT under the Vienna Rules.

CONCLUSION OF THE THIRD ISSUE

114 The Tribunal is not entitled to award damages for CLAIMANT's legal costs incurred in the High Court proceedings due to the effect of *res judicata.* Alternatively, CLAIMANT's damages cannot be reimbursed under the CISG. CLAIMANT's damages cannot be awarded based on international practice either. Moreover, they cannot be allocated to RESPONDENT under the Vienna Rules.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO DAMAGES FOR THE LEGAL COSTS INCURRED IN ITS APPLICATION FOR INTERIM RELIEF

115 On 3 November 2014, RESPONDENT informed all of its customers about the extraordinary drop in quantity of that year's harvest. It announced to negotiate with its customer's quantities available for each of them within the next weeks [*Answer to Statement of Claim, p. 26 para. 10*]. One day later, on 4 November 2014, CLAIMANT asked for the maximum amount designated by the Framework Agreement [*Exhibit C 2, p. 10*], despite usually ordering at the lower end of the agreed quantity range [*Answer to Statement of Claim, p. 26 para. 11*]. Hereupon, RESPONDENT offered a pro rata distribution in line with industry practice [*PO 2, p. 57 para. 31*] promising CLAIMANT one of the best quotas RESPONDENT gave to its large customers [*Answer to Statement of Claim, p. 26 para. 14*]. Yet, CLAIMANT implicitly accused RESPONDENT of lying [*Exhibit C 6, p. 14*] and was not willing to agree to any compromise. On 8 December 2014, CLAIMANT sought an interim injunction before the High Court of Mediterraneo. Within the proceeding, CLAIMANT asked for an order of costs [*PO 2, p. 59 para. 44*]. However, the High Court did not grant the order [*ibid.*] and ruled that each party had to bear its costs [*Exhibit C 8, p. 16*].

116 CLAIMANT is not entitled to the reimbursement of the legal costs incurred in the proceeding. The principle of *res judicata* prohibits any decision on the reimbursement of the legal costs **(A)**. Alternatively, CLAIMANT is neither entitled to claim its legal costs under Art. 74 CISG **(B)**, nor under Artt. 37, 44 Vienna Rules **(C)**.

A. The Principle of *Res Judicata* Prohibits a Decision on the Legal Costs

117 The Tribunal is not entitled to award damages since the decision of the High Court has *res judicata* effect. *Res judicata* unfolds its effect if there is identity of subject matters, cause of action and parties.

118 First of all, the subject matters are identical. In the proceeding before the High Court, CLAIMANT sought an order that would oblige RESPONDENT to pay CLAIMANT's legal costs [*PO 2, p. 59 para. 44*]. The court denied this claim so that in accordance with the Mediterranean procedural law each party had to bear its own costs. In the present arbitration, CLAIMANT requests the reimbursement of these legal costs from RESPONDENT. Thus, the reliefs sought by CLAIMANT are identical. Secondly, the cause of action is identical. There is no change of evidence or facts in regard to the cost decision. Thirdly, the same parties are involved, *i.e.* CLAIMANT and RESPONDENT. Thus, the criteria of the triple identity test are met. Therefore, the principle of *res judicata* prohibits a decision on the reimbursement of legal costs.

B. CLAIMANT Is Not Entitled to Claim Legal Costs as Damages under Art. 74 CISG

119 Even if the Tribunal were to find that the effect of *res judicata* did not unfold, the requirements of Art. 74 CISG would not be met. CLAIMANT submits that RESPONDENT is liable for the legal costs it incurred in the interim proceedings [*Claimant, para. 88*]. Yet, legal costs are not reimbursable under Art. 74 CISG **(I)**. In any case, the provision's further requirements are not met **(II)**.

I. Legal Costs Are Not Reimbursable under Art. 74 CISG

120 Contrary to CLAIMANT's allegation [*Claimant, para. 88 et seqq.*], legal costs are not recoverable under Art. 74 CISG. The CISG is a substantive law on sales contracts while attorney's fees are a procedural matter outside its scope [*see supra, para. 99*]. This is confirmed by the intent of the drafters of the CISG, who did not consider the recoverability of attorney's fees [*cf. Honnold, Document History*]. In addition, the recoverability of legal fees would cause anomalies, contradicting the purpose of uniformity of the Convention [*see supra, para. 100*]. Furthermore, CLAIMANT cannot rely on exceptional court decisions which reimbursed attorney's fees under Art. 74 CISG, as they refer to pre-litigation costs or did not apply the CISG [*see supra, para. 103*].

121 Consequently, the claimed legal costs are not reimbursable under Art. 74 CISG.

II. Even If the Tribunal Were to Find That Legal Costs Were Reimbursable under Art. 74 CISG, Its Requirements Would Not Be Met

122 Contrary to CLAIMANT's allegation [*Claimant, para. 98*], the legal costs were not foreseeable **(1)**. Furthermore, CLAIMANT violated its duty to mitigate the loss **(2)**.

1. CLAIMANT's Legal Costs Were Not Foreseeable

123 At the time of the conclusion of the contract, neither the fact that CLAIMANT would seek an interim injunction **(a)** nor the amount of the legal costs **(b)** was foreseeable to RESPONDENT.

a) CLAIMANT's Application for Interim Relief Was Not Foreseeable

124 CLAIMANT might argue that Mr. Weinbauer's email from 4 December 2014 established an imminent threat, making the interim injunction foreseeable. In that email, Mr. Weinbauer reacted to CLAIMANT's insistence on delivery by purporting the termination of the contract and claiming to rather drink the wine itself than to deliver it to CLAIMANT. Taking into account the number of bottles in dispute, namely 10,000, this statement of Mr. Weinbauer could obviously not be taken seriously. Mr. Weinbauer was known for his temper. CLAIMANT itself calls him

"*impulsive*" [*Exhibit C 5, p. 13*]. Thus, CLAIMANT should have been aware that Mr. Weinbauer's email could not be taken seriously and did not constitute an imminent threat to RESPONDENT's performance. Hence, CLAIMANT may not argue that the application for interim injunction was foreseeable due to Mr. Weinbauer's email.

125 To the contrary, a reasonable person could not have foreseen the application for interim measure on 8 December 2014, as there was no imminent threat. Interim measures are remedies which aim to safeguard and preserve the rights of the parties [*Hickie, para. 26*]. CLAIMANT might argue that its interest in RESPONDENT's performance of the order was threatened in early December. The Parties determined in Art. 4 Framework Agreement to place their order for each year's vintage in December. However, the question of the delivery does not arise before spring, as the wine gets bottled in May or June [*Exhibit R 2, p. 33*]. Thus, on 8 December 2014, at least six month before bottling, there was no imminent threat to RESPONDENT's performance. This is supported by the majority view in Mediterranean law, which would have denied the interim injunction [*PO 2, p. 59 para. 48*]. Hence, the application for an interim injunction in December was not foreseeable.

126 Furthermore, the application for an interim injunction was not foreseeable considering the agreement to "*settle all disputes amicably*" in Art. 20 Framework Agreement [*Exhibit C 1, p. 9*]. On 2 December 2014, CLAIMANT sent an email to RESPONDENT, in which it insisted on the delivery of 10,000 bottles for the first time [*Exhibit C 6, p. 14*]. Less than a week later, on 8 December 2014, it sought interim injunction before the state court [*Exhibit C 10, p. 18*]. Contrary to the Parties' agreement, CLAIMANT did not try to contact RESPONDENT to settle the dispute "*amicably*". Thus, considering Art. 20 Framework Agreement, it was not foreseeable that CLAIMANT would immediately go to the state court to apply for an interim injunction.

127 In conclusion, CLAIMANT's application for interim injunction was not foreseeable.

b) The Amount of Legal Costs Incurred in the Interim Relief Was Not Foreseeable

128 Contrary to CLAIMANT's allegation [*Claimant, para. 111*], the extent of the claimed costs was not foreseeable. First of all, the general extent of legal costs incurred was not foreseeable since it was not foreseeable that CLAIMANT would enter into a contingency fee agreement [*see supra, para. 107*]. Additionally, even if the general agreement on a contingency fee had been foreseeable, the amount of this fee would not have been foreseeable since it is unreasonable. A contingency fee is reasonable if it equals the time spent multiplied by a fee equivalent to a fee of the relevant market [*Jäger, p. 137*]. The contingency fee agreed upon by CLAIMANT for winning on merits was USD 30,000 [*Exhibit C 10, p. 18*]. The average hourly fee for a partner in Mediterranean law firms

amounts to USD 350 [*PO 2, p. 58 para. 39*]. Thus, applying the reasonableness standard laid out above, a contingency fee of USD 30,000 would have been reasonable if CLAIMANT could have expected the lawyer to spend more than 85 hours on the case. Taking into account that CLAIMANT's interim measure sought was no complex claim but a usual interim injunction, this cannot be assumed. While it is true that less time than anticipated was spent on the case [*PO 2, p. 58 para. 39*], expecting 85 hours of work would be unreasonable. Therefore, CLAIMANT's legal costs in this amount were not foreseeable to a reasonable business man.

2. Alternatively, CLAIMANT Has Violated Its Duty to Mitigate Its Loss

129 By agreeing on a contingency fee, CLAIMANT violated the duty to mitigate its loss. CLAIMANT should have hired lawyers on an hourly basis [*see supra, para. 109*]. This would not have been unreasonably burdensome for CLAIMANT as it had the financial means to do so [*see supra, para. 110*]. Thus, CLAIMANT violated its duty to mitigate its loss.

130 In conclusion, the requirements of Art. 74 CISG are met.

C. CLAIMANT's Legal Costs Cannot Be Reimbursed under Artt. 37, 44 Vienna Rules

131 CLAIMANT might argue that its legal costs are reimbursable under procedural law [*see supra, para. 99*]. However, they fall outside the scope of Artt. 37, 44 Vienna Rules. Art. 37 Vienna Rules gives the tribunal the power to allocate the costs in the manner it deems appropriate. Art. 44(1) Vienna Rules determines that these costs comprise administrative fees, the costs for representation before the tribunal and arbitration-related expenses [*VIAC Handbook/Peters, Art. 37 para. 16*]. This includes costs which incur in the arbitration itself, but not necessarily costs that have been incurred before the start of the arbitration [*Jäger, p. 120*]. Attorney's fees incurred prior to the arbitration can only be reimbursed if they were necessary for the preparation of the case and directly linked to the filing of the claim [*ibid.*]. CLAIMANT's legal costs incurred through the application for an interim injunction. This order was neither necessary for the preparation of the case of this arbitration nor directly linked to the filing of the claim. Hence, CLAIMANT's legal costs are no costs related to the arbitration within the meaning of Art. 44(1) Vienna Rules. Thus, CLAIMANT is not entitled to recover its legal costs under Artt. 37, 44 Vienna Rules.

CONCLUSION OF THE FOURTH ISSUE

132 CLAIMANT is not entitled to damages for its legal costs as the effect of *res judicata* prohibits another decision on the cost allocation of the attorney's fees. In any case, CLAIMANT could neither claim its litigation costs under the CISG nor under Artt. 37, 44 Vienna Rules.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

- The Tribunal should not grant CLAIMANT's request for the production of documents [**Issue 1**].
- CLAIMANT is not entitled to claim the profits RESPONDENT made by selling 5,500 bottles to SuperWines [**Issue 2**].
- CLAIMANT is not entitled to damages for the legal costs incurred in its defence in the High Court proceedings [**Issue 3**].
- CLAIMANT is not entitled to damages for the legal costs incurred in its application for interim relief [**Issue 4**].

CERTIFICATE

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

(signed)
Christian Berzdorf

(signed)
Annemarie Bork

(signed)
Linus Dethloff-Wieland

(signed)
Jonatan Flaig

(signed)
Felix Karpp

(signed)
Philipp Koepsell

(signed)
Linda Kropholler

(signed)
Frederike Reuter