TWENTY THIRD ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

VIENNA, MARCH 19TH– 24TH 2016

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF GENEVA

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

TEYMOUR BRANDER • ABDUL CARRUPT • NICOLAS ECKERT

KSENIA ILIYASH • DONIKA LATIFI • RACHEL SALEM

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TABLE OF ABBREVIATIONS

%	Per cent
&	And
§(§)	Paragraph(s)
ABA Rules	American Bar Association Model Rules of Professional Conduct
AC	Advisory Council
Art./Arts	Article/Articles
ASoC	Answer to Statement of Claim
Cf.	*Confer* (see)
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
DAL	Danubian Arbitration Law
ed.	Edition
Ed(s).	Editor(s)
et al.	*Et alii* (and others)
FA	Framework Agreement
FN	Footnote
HCM	High Court of Mediterraneo
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration 2010
ibid.	*Ibidem* (aforementioned, in the same place)

ICAC	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
ICC	International Chamber of Commerce
i.e.	*id est* (namely/that is)
Ltd	Limited
MAL	Mediterranean Arbitration Law
MfC	Memorandum for Claimant
Mr	Mister
MW	Mata Weltin
No.	Number(s)
p(p).	Page(s)
PO	Procedural Order
SCC	Stockholm Chamber of Commerce
SoC	Statement of Claim
SW	SuperWines
US	United States
USD	United States Dollar(s)
v.	*versus* (against)
VIAC	Vienna International Arbitration Centre
Vienna Rules	Rules of Arbitration of the Vienna International Arbitral Centre
Vignobilia	Vignobilia Ltd.

STATEMENT OF FACTS

VINO VERITAS LTD ("**RESPONDENT**") is a high quality wine producer in Mediterraneo. It is the only producer of Mata Weltin ("**MW**") wine of diamond quality in the Vuachoua region, recognised as one of the best wines worldwide.

KAIHARI WAINA LTD ("**CLAIMANT**") is a wine merchant based in Equatoriana. It has been buying RESPONDENT's MW of diamond quality for the last six years.

22 April 2009 — RESPONDENT and CLAIMANT ("**Parties**") conclude a Framework Agreement ("**FA**"). CLAIMANT insisted on the conclusion of a written contract, in spite of customary practice in the wine industry. The FA enables CLAIMANT to order up to 10'000 bottles. It also provides that "*all disputes shall be settled amicably and in good faith between the parties*". In case no agreement can be reached, the Parties' dispute "*shall be decided by arbitration in Vindobona by the International Arbitration Tribunal (VIAC)*". The Parties expressly agree that "*no discovery shall be allowed*".

August-September 2014 — Heavy rainfalls destroy nearly half of RESPONDENT's grapes. As a consequence, RESPONDENT's production drops to an all-time low.

3 November 2014 — RESPONDENT informs all of its customers about the extraordinary decrease in quantity.

4 November 2014 — For the first time, CLAIMANT orders the maximum amount of 10'000 bottles of MW provided for by the FA.

25 November 2014 — The Parties meet to discuss further business developments. RESPONDENT informs CLAIMANT that it will not be able to deliver 10'000 bottles of MW.

1 December 2014 — RESPONDENT notifies CLAIMANT that between 4'500 and 5'000 bottles will be delivered. This is one of the best quotas RESPONDENT offered to its important customers.

2 December 2014 — CLAIMANT refuses RESPONDENT's new offer and insists on the delivery of 10'000 bottles. CLAIMANT is the only customer to show no cooperation in spite of RESPONDENT's difficult situation.

4 December 2014	In view of CLAIMANT's attitude, RESPONDENT refuses to deliver any bottle from the 2014 vintage and declares the relationship with CLAIMANT terminated.
5 December 2014	CLAIMANT concludes a contingent fee agreement with LawFix, one of the top law firms of Mediterraneo.
8 December 2014	Without trying to settle the issue amicably, CLAIMANT files for an interim injunction before the High Court of Mediterraneo ("**HCM**") in order to prevent RESPONDENT from selling the 10'000 bottles. The provisional relief is subsequently granted.
First week of January 2014	RESPONDENT approaches CLAIMANT in an attempt to resolve the dispute. However, CLAIMANT insists on the delivery of the 10'000 bottles.
14 January 2014	As the dispute resolution clause was anything but clear, RESPONDENT asks CLAIMANT for clarification, failing which it will start court proceedings.
30 January 2015	Since CLAIMANT failed to answer the letter of 14 January 2014, RESPONDENT files an action for a declaration of non-liability before the HCM for the non-delivery of 10'000 bottles and for the termination of the underlying contract.
23 April 2015	CLAIMANT raises the *exceptio arbitri* and RESPONDENT's action is dismissed.
May 2015	In a further attempt to resolve the dispute, RESPONDENT offers to deliver 4'500 bottles. CLAIMANT remains silent regarding that offer.
11 July 2015	CLAIMANT initiates arbitration proceedings against RESPONDENT before the Vienna International Arbitral Centre ("**VIAC**"). It eventually accepts RESPONDENT's offer to deliver 4'500 bottles in its Statement of Claim ("**SoC**"). Although the offer has long expired, RESPONDENT accepts to deliver the said amount of bottles in a gesture of goodwill.

INTRODUCTION

1 Bad things happen even to the best grapes… Heavy rains, heat waves and low temperatures are the winegrowers' worst enemies. The storms that occurred in summer 2014 caused RESPONDENT many sleepless nights. Its greatest nightmares came true when it realised that nearly half of its grapes had rotted on the vine. This resulted in one of the worst harvest shortfalls in the last decade.

2 So as to maintain good business relationship with all of its customers, RESPONDENT allocated the bottles on a pro rata basis according to the ordinary strategy against a bad harvest in the wine industry. All of RESPONDENT's customers, including SW, agreed upon the apportionment. Only CLAIMANT proved to be uncooperative. It rushed into filing for interim relief before the HCM without attempting to settle the disagreement amicably. Moreover, it deliberately refrained itself from helping RESPONDENT to clarify the arbitration clause. This passiveness logically resulted in RESPONDENT seizing Mediterranean courts. Both court proceedings entailed attorneys' fees, for which CLAIMANT claims compensation. As icing on the cake, CLAIMANT claims the profits RESPONDENT realised in selling bottles to SW. In this regard, CLAIMANT requests the disclosure of all documents concerning the transaction between RESPONDENT and SW ("**Requested Documents**").

3 In its memorandum, CLAIMANT addresses first the issue of document disclosure, second, its claim for the award of litigation costs as damages and then, its claim for RESPONDENT's profits. However, the document disclosure is requested in order to quantify its claim for damages. RESPONDENT argues that CLAIMANT failed to prove its loss or, subsidiarily, its extent. This failure will influence the decision of the arbitral tribunal ("**Tribunal**") on the request for document disclosure. Therefore, RESPONDENT has decided to deviate from the order proposed by CLAIMANT. RESPONDENT requests the Tribunal to dismiss: CLAIMANT's claim for the award of attorneys' fees incurred in both court proceedings (**Issue I**); CLAIMANT's claim for RESPONDENT's profits made from the sale of its diamond MW 2014 (**Issue II**); and consequently, its request for document production (**Issue III**).

ISSUE 1: THE TRIBUNAL SHOULD DISMISS CLAIMANT'S REQUEST FOR THE AWARD OF ATTORNEYS' FEES AS DAMAGES

4 RESPONDENT agrees that granting CLAIMANT's request would raise no issue of *res judicata* or enforceability [*Memorandum for Claimant ("**MfC**"), p. 15, §51-55*]. However, it does not agree with CLAIMANT's reasoning. Indeed, contrary to what CLAIMANT believes, *res judicata* does not depend on the procedural or substantive nature of a ruling [*MfC, p. 15, §52*]. *Res judicata* prohibits the relitigation of a claim when a triple identity test is fulfilled: the claim involves the same parties, the same matter and the same legal grounds as the claim ruled on in a previous judgement [*ILA Report 2004, p. 2; Born, Cases, p. 1116; Vishnevskaya, p. 185*]. *In casu*, in both actions before the HCM, CLAIMANT asked for litigation costs on a procedural basis [*Procedural Order ("**PO**")2, p. 59, §44*]. CLAIMANT's request for attorneys' fees before the Tribunal involves the same parties and the same subject matter but it is a claim for damages based on Art. 74 of the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") [*MfC, p. 14, §48*]. Thus, the principle of *res judicata* does not apply.

5 Moreover, the *Electrical Appliance case* developed by CLAIMANT to support its argument that there is no issue of enforceability [*MfC, p. 15, §54*] is irrelevant. The decision of the Swiss Supreme Court relates to a request for annulment of the arbitral award and not to an issue of enforcement. Furthermore, the Swiss Supreme Court dismissed the appellant's claim because it was insufficiently substantiated. Hence, the Court did not rule whether there would be a violation of public policy in case of an award granting litigation costs as damages.

6 Although RESPONDENT does not contest the aforementioned issues, the Tribunal is still respectfully requested to dismiss CLAIMANT's claim for the reimbursement of USD 50'280. Indeed, CLAIMANT is not entitled to damages for these fees pursuant to Art. 74 CISG (**I**). In any case, should the Tribunal consider that the conditions of Art. 74 CISG are fulfilled, CLAIMANT still failed to mitigate its loss (**II**).

I. CLAIMANT IS NOT ENTITLED TO DAMAGES FOR THE ATTORNEYS' FEES INCURRED IN COURT PROCEEDINGS PURSUANT TO ART. 74 CISG

7 As requested by the Tribunal [*PO1, p. 50, §§2 and 4*], RESPONDENT will, for the time being, not contest that its termination of the FA and its refusal to deliver the full quantity of MW ordered by CLAIMANT was a breach of contract.

8 According to Art. 74 CISG, the aggrieved party may recover a "*sum equal to the loss suffered* […] *as a consequence of the breach* [of contract]". However, such a claim is limited to the damages foreseeable at the

time of the conclusion of the contract [*Cooling System case; Saltwater case; ICAC 406/1998; Schwenzer/Fountoulakis/Dimsey, p. 545; Zeller, Damages, p. 89; Hunter, p. 729; Schwenzer/Hachem/Kee, p. 597, §44.89*].

9 CLAIMANT is not entitled to recover the USD 50'280 attorneys' fees it incurred in court proceedings. First and foremost, attorneys' fees are not recoverable as damages under Art. 74 CISG (**A**). In any event, they were not caused by RESPONDENT (**B**) and RESPONDENT could not have foreseen the attorneys' fees incurred by CLAIMANT (**C**).

A. ATTORNEYS' FEES ARE NOT RECOVERABLE AS DAMAGES UNDER ART. 74 CISG

10 CLAIMANT correctly states that Art. 74 CISG should be interpreted in light of the principle of full compensation [*MfC, p. 17, §61; cf. infra p. 15, §§53-54*]. However, it wrongly submits that this principle "*demands reimbursement of all losses*" [*MfC, p. 17, §63*]. Certain types of losses are not recoverable under the CISG. Among those are, for instance, loss of a chance [*Art Books case; AC Opinion No. 6, §3.15; Huber/Mullis, p. 276*] and loss of goodwill [*MfC, p. 32, §125; Video Recorder case; Huber/Mullis, p. 280; cf. infra p. 23, §§92-93*]. In this regard, it will be demonstrated that the CISG does not allow for the recovery of attorneys' fees incurred in litigation proceedings.

11 Firstly, CLAIMANT alleges that Art. 74 CISG "*is non-exhaustive* [therefore] *no specific category of loss can be precluded by means of the wording*" [*MfC, p. 17, §59*]. Whilst this is not contested by RESPONDENT, it is clear that the plain wording of Art. 74 CISG does not support the recovery of attorneys' fees either [*Flechtner, pp. 150-151; Vanto, p. 212; Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 74, §69*]. However, a historical interpretation of Art. 74 CISG shows that the notion of damages does not include attorneys' fees. No reference is made to that issue in the *travaux préparatoires* of the CISG [*Flechtner, p. 151; Mullis, p. 44; Flechtner/Lookofsky, p. 98; Keily, p. 18*]. Indeed, it was considered as a matter outside the scope of the CISG [*Honnold, p. 580; Flechtner, p. 153*]. The legislative history of the CISG therefore suggests that the damages provisions were not meant to cover attorneys' fees.

12 Secondly, by ordering the reimbursement of CLAIMANT's attorneys' fees, the Tribunal would create a precedent that could lead to a violation of the CISG's principle of parties' equality. As the recovery of litigation expenses is not expressly provided for by the CISG [*cf. supra, p. 2, §11*], it should be determined in conformity with the CISG's general principles [*Art. 7(2) CISG; Lookofsky, Walking the Tightrope, p. 89; Zeller, Interpretation, p. 3*; *Dordevic/Pavic, p. 425; Felemegas, pp. 122-123; Dixon, pp. 425-426; Keily, p. 18*]. CLAIMANT alleges that the recovery of attorneys' fees is supported by the principle of full compensation

[*MfC, p. 17, §61*]. However, such an interpretation of Art. 74 CISG would amount to a violation of the principle of parties' equality [*Saidov, Law of Damages, p. 51; Gotanda, Damages, p. 130; Keily, p. 19; Jäger, p. 163; Schwenzer, p. 423*]. Indeed, only a winning claimant could recover its attorneys' fees. A respondent who successfully defended an action would be denied of such recovery because it would not be able to rely on a breach to base a damage claim. As expressed by the Advisory Council, such an "*unequal recovery of damages between* [the parties] *is contrary to the design of the* [CISG]" [*AC Opinion No. 6, §5.4; see also Honnold, p. 580; Mullis, p. 45; Flechtner/Lookofsky, p. 97; Vanto, p. 221; Bridge, p. 606, §12.53*].

13 Thirdly, the recovery of attorneys' fees is a matter of procedural law beyond the scope of the CISG [*Huber, in: Münch/Komm, Art. 74, §43; Flechtner/Lookofsky, p. 97; Honnold, p. 580; Dordevic, p. 218; Hunter, p. 64; Schwenzer/Hachem/Kee, p. 614, §44.169*]. Indeed, the CISG is meant to govern substantial issues related to international sales law and not procedural matters [*MCC Marble case*]. In many instances, provisions regarding the shifting of attorneys' fees are contained in procedural codes [*Flechtner, p. 154; Schlechtriem, Legal Costs, p. 74; Dordevic, p. 217; Gotanda, Costs and Attorneys' Fees, pp. 5-6; Flechtner/Lookofsky, pp. 94-95; Schwenzer/Hachem/Kee, p. 612, §44.165; Honnold, pp. 580-581*]. All these specific procedural rules would be circumvented by such an interpretation of the CISG [*Zapata case; Flechtner/Lookofsky, p. 98*].

14 In the leading case on the matter, the US Court of Appeals for the 7th Circuit specifically ruled on the recovery of attorneys' fees under similar circumstances [*Zapata case*]. Relying on Art. 74 CISG, the claimant claimed the reimbursement of attorneys' fees incurred in previous instances where each party bore its own costs. By overturning the first instance decision, the Court rejected the claim for reimbursement of attorneys' fees stating that the CISG does not allow for their recovery. Subsequent judgments steadily withheld from granting attorneys' fees as damages under the CISG, therefore confirming the reasoning and conclusions set out in the *Zapata case* [*San Lucio case; Norfolk Railway case; Chicago Prime Packers case; Ajax case*].

15 Finally, the *Shoes case* cited by CLAIMANT [*MfC, p. 17, §60*] supports RESPONDENT's request to dismiss CLAIMANT's claim. Indeed, the Court awarded damages under Art. 74 CISG only for extra-judicial attorneys' fees, *e.g.* fees related to demands for payment. The attorneys' fees incurred in the litigation proceedings were however awarded pursuant to the German procedural law [*Shoes case; see also Flechtner, pp. 129-130*]. *In casu*, the attorneys' fees claimed by CLAIMANT were defrayed in the course of the litigation before the HCM. Therefore, according to the *Shoes case*, their recovery is not regulated by the CISG but by the Mediterranean procedural rules. In light of the above, CLAIMANT respectfully requests the Tribunal to acknowledge that attorneys' fees cannot be recovered under the CISG.

B. In any Case, Respondent Did Not Cause the Attorneys' Fees Incurred by Claimant

16 In order to be recoverable, a loss must result from a breach of contract [*Saidov, Law of Damages, p. 79*; *Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, §2; Schwenzer/Fountoulakis/Dimsey, p. 530*]. Should the Tribunal consider that attorneys' fees can be recovered under Art. 74 CISG, the fees incurred by CLAIMANT were, in any case, not caused by RESPONDENT. Indeed, CLAIMANT's action for interim injunction was unnecessary (**1**). As to RESPONDENT's action before the HCM, it was due to CLAIMANT's uncooperative attitude (**2**).

1. CLAIMANT's Action for Interim Injunction Was Unnecessary

17 CLAIMANT argues that "*the request for interim relief was a direct consequence of RESPONDENT's breach of contract, since it was necessary and reasonable in order to protect CLAIMANT's legitimate interests*" [*MfC, p. 18, §64*]. RESPONDENT contests this allegation.

18 A request for interim relief is justified when a risk of "*serious or irreparable harm*" threatens a party's right [*Bucy, p. 585; Bananas Import case*]. Thus, the urgency of obtaining a provisional measure is required [*Yesilirmak, p. 7; Kaufmann-Kohler/Rigozzi, p. 343, §6.120*].

19 *In casu*, CLAIMANT's application for interim relief was unnecessary because the delivery of the bottles was not at imminent risk. Indeed, RESPONDENT's wine had not yet been bottled at that time [*Answer to Statement of Claim ("**ASoC**"), p. 29, §34; PO2, p. 59, §45*], a fact known to CLAIMANT [*PO2, p. 59, §47*]. Moreover, the delivery of the bottles was not intended for the next six months [*ASoC, p. 29, §34*]. Contrary to CLAIMANT's allegation [*MfC, p. 18, §68*], the fact that RESPONDENT concludes contracts with its other customers before the actual bottling was not a factor of urgency. Indeed, those contracts are only concluded between January and March [*PO2, p. 59, §45*], whereas CLAIMANT filed for an interim injunction at the beginning of December [*SoC, p. 5, §10*]. Further, those contracts do not relate to the entire quantity finally bottled [*ibid.*]. The lack of urgency of the situation is supported by the majority view under Mediterranean law [*PO2, p. 59, §48*]. According to the latter, there was no imminent risk regarding the actual delivery of the bottles [*ibid.*]. Hence, the threshold of urgency for granting an interim injunction was not met [*ibid.*].

20 In this regard, contrary to CLAIMANT's arguments [*MfC, p. 18, §§66-67*], the available quantity of wine and the importance of a delivery are irrelevant in assessing the risk to which the bottles were exposed at the time of the action for interim injunction. CLAIMANT's application for interim relief was therefore unnecessary. RESPONDENT did not cause CLAIMANT's attorneys' fees incurred in proceedings for the interim injunction.

2. RESPONDENT's Action before the State Court Is Due to CLAIMANT's Uncooperative Attitude

21 CLAIMANT submits that "*it was not obligated to react to RESPONDENT's letter of 14 January 2015*" and therefore it cannot be held liable for RESPONDENT's action before the HCM [*MfC, pp. 21-22, §83*]. RESPONDENT contests this allegation.

22 Art. 80 CISG exempts the seller from liability when the buyer caused the non-performance by its own act or omission. In that regard, an indirect causation suffices "*where a risk has been realized which the promisee created by his conduct and which falls within his sphere of risk*" [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 80, §4; see also Magnus, in: Staudinger, Art. 80, §16; Boog/Schläpfer, in: Brunner, Art. 80, §5; Atamer, in: Kröll/Mistelis/Viscasillas, Art. 80, §4; Magnus, in: Honsell, Art. 80, §12*]. For instance, the omission to provide information relevant for the performance of the contract by the other party creates such a risk [*Atamer, in: Kröll/Mistelis/Viscasillas, Art. 80, §7*].

23 In the case at hand, not only did CLAIMANT draft a pathological clause but it also intentionally maintained RESPONDENT in an unclear situation preventing it from appointing its arbitrator. Indeed, it was CLAIMANT who inserted the arbitration clause in the FA [*Exhibit C12, p. 20*]. The clause is pathological because it designates a non existing institution [*Kaufmann-Kohler/Rigozzi, p. 130, §3.129*], namely "*the International Arbitration Tribunal (VIAC)*" [*Exhibit C1, p. 9, Art. 20*]. Thus, RESPONDENT, who is not familiar with the world of arbitration [*PO2, p. 60, §53*], did not know where it was supposed to file its action. Moreover, there are two possible VIAC arbitral institutions: in Vienna and in Vietnam [*"Vietnam International Arbitration Center"*]. The fact that Vindobona was cited as the seat is irrelevant to determine the correct institution. The choice of a seat lies in the first instance within the Parties [*Art. 20 Danubian Arbitration Law ("**DAL**")*] and therefore, does not suggest that the institution should be based in the same state. Furthermore, CLAIMANT did not use the VIAC model arbitration clause [*SoC, p. 6, §18*], which was another confusing factor for RESPONDENT. Thus, since CLAIMANT was the drafter of the clause, it was legitimate for RESPONDENT to inquire CLAIMANT about the relevant institution. As that institution could not be established, RESPONDENT considered the clause void for uncertainty [*Exhibit R2, p. 33*].

24 Art. 20 FA requires that the Parties settle their dispute amicably and in good faith [*Exhibit C1, p. 9*]. CLAIMANT's lack of answer to RESPONDENT's letter is a clear breach of that duty. CLAIMANT knew that the relevant institution was the Vienna International Arbitral Centre because it submitted its SoC to that institution [*Fasttrack to VIAC, p. 2*]. However, CLAIMANT led RESPONDENT to believe that the HCM was the competent authority and subsequently raised the *exceptio arbitri* [*Exhibit C9, p. 17*]. CLAIMANT's allegation

that RESPONDENT did not contest the validity of the arbitration clause [*MfC, p. 22, §86*] has no influence on CLAIMANT's duty to cooperate and clarify that clause.

25 Contrary to CLAIMANT's allegation [*MfC, p. 22, §84*], RESPONDENT's letter of 14 January 2015 was not an attempt to renegotiate the arbitration agreement. The wording "*we would be willing to agree on the VIAC standard clause with the addition that document disclosure is excluded*" [*Exhibit R2, p. 33*] was only a precision to RESPONDENT's intent to exclude all types of document disclosure [*cf. infra p. 29, §110*], should CLAIMANT still be interested in arbitration.

26 Thus, CLAIMANT created a risk by its conduct, *i.e.* the drafting of Art. 20 FA and its own omission to clarify the latter's content. According to Art. 80 CISG, RESPONDENT should be exempted from liability regarding CLAIMANT's attorneys' fees incurred in its defence against RESPONDENT's action.

27 Should the Tribunal find that the Parties share responsibility regarding RESPONDENT's action before the state court, it is requested to allocate the attorneys' fees on a pro-rata basis. Such an apportionment is indeed possible under Art. 80 CISG according to the prevailing legal opinion [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 80, §7; Boog/Schläpfer, in: Brunner, Art. 80, §11; Atamer, in: Kröll/Mistelis/Viscasillas, Art. 80, §§10 and 16; Magnus, in: Honsell, Art. 80, §12*].

C. IN ANY EVENT, RESPONDENT COULD NOT FORESEE THE ATTORNEYS' FEES INCURRED BY CLAIMANT

28 Should the Tribunal consider attorneys' fees as recoverable damages under the CISG and that the fees incurred by CLAIMANT were caused by RESPONDENT, the latter could, in any case, not foresee the occurrence of these fees.

29 Pursuant to Art. 74 CISG, a party may only be held liable for damages it "*foresaw or ought to have foreseen at the time of the conclusion of the contract*". The foreseeability of damages is thus to be considered in light of a subjective and an objective test [*Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 74, §44; Mullis, p. 46; Chengwei, §14.2.2; Huber/Mullis, p. 272; Knapp, in: Bianca/Bonell, Art. 74, §2.8*].

30 Regarding the subjective test, a party will be held liable if it foresaw the damage as a possible consequence of the breach [*Huber/Mullis, p. 272*]. The particularities of the contract as well as the customs of the industry in which the parties operate have to be taken into account [*Mullis, p. 46; Schlechtriem/Butler, p. 211; Knapp, in: Bianca/Bonell, Art. 74, §§2.10-2.11; Magnus, p. 264*]. The objective test requires that a reasonable person aware of the respective circumstances be able to anticipate the damages which might flow from the breach [*Cooling system case*; *Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, §49; Magnus, p. 264*].

31 In the present case, CLAIMANT is not entitled to recover USD 50'280 paid in attorneys' fees. Indeed, RESPONDENT could foresee neither the occurrence of CLAIMANT's attorneys' fees (**1**) nor their extent (**2**).

1. Attorneys' Fees Resulting from Court Proceedings Were Not Foreseeable

32 The foreseeability rule first requires that the breaching party foresaw that a breach would cause the type of loss that actually occurred [*Cooling System case; SCC 107/1997; Saidov, Law of Damages, p. 115; Knapp, in: Bianca/Bonell, Art. 74, §2.9; Honnold, p. 576; Zeller, Damages, p. 91*]. The burden of proof regarding the foreseeability of a damage lies on the aggrieved party [*Saltwater case; Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 74, §48; DiMatteo/Dhooge/Greene/Maurer/Pagnattaro, p. 154*]. By simply stating without any further analysis that "*attorneys' fees are generally foreseeable upon a breach of contract*" [*MfC, p. 19, §71*], CLAIMANT failed to prove the foreseeability of the damages.

33 Subjectively, RESPONDENT did not foresee the occurrence of litigation costs, including attorneys' fees as a possible consequence of a breach. At the time of the conclusion of the FA, RESPONDENT had just put an end to lengthy proceedings with another wine distributor [*Exhibit R1, pp. 31-32*]. It knew how expensive legal fees were in Mediterraneo and wanted to keep the costs of any dispute resolution as low as possible [*ibid.*]. RESPONDENT therefore gladly agreed to the arbitration clause as it is usually faster and cheaper than litigation [*Sussman, pp. 4-5; Born, Arbitration, pp. 87-88*]. Hence, when the FA was concluded, RESPONDENT did not anticipate litigation costs as a possible consequence of a breach.

34 Objectively, a reasonable Mediterranean wine producer in the same circumstances would not have foreseen the occurrence of litigation costs either. The whole wine industry is based on trust and disputes are primarily settled amicably [*ASoC, p. 27, §17; PO2, p. 57, §33*]. For example, among all RESPONDENT's customers, only CLAIMANT was unwilling to cooperate with regard to the drop in production [*Exhibit C7, p. 15; ASoC, p. 26, §11*]. Furthermore, in the few cases where no amicable settlement is reached, parties are reluctant to proceed with litigation. Indeed, the dispute resolution mechanism of choice is arbitration [*PO2, p. 57, §33*]. Moreover, in case of litigation in Mediterraneo, the losing party is, in principle, not required to reimburse the attorneys' fees incurred by the winning party [*PO2, p. 59, §44*]. A Mediterranean party cannot foresee that possible damages in case of a breach would include the other party's attorneys' fees. Therefore, RESPONDENT did not and could not foresee attorneys' fees as a type of damages. Consequently, at the time of the conclusion of the FA, RESPONDENT could not have reasonably foreseen the occurrence of litigation costs as a consequence of a breach of contract.

2. In any Case, the Amount of CLAIMANT's Attorneys' Fees Was Not Foreseeable

35 Should the Tribunal consider that RESPONDENT could foresee the occurrence of litigation costs, RESPONDENT argues that the amount of these fees was not foreseeable.

36 The foreseeability rule further requires that the extent of the loss be foreseeable [*Cooling System case; Used Car case; Saidov, Law of Damages, p. 116; Ferrari, Foreseeability, p. 312; Vékás, p. 164; Honnold, p. 576; Bridge, p. 608, §12.56; Knapp, in: Bianca/Bonell, Art. 74, §2.9*]. When the amount of the loss is excessive, the damage incurred cannot be considered as foreseeable [*Fabrics case; Stainless Steel Wire case; Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, §50; Huber/Mullis, pp. 273-274; Zeller, Damages, p. 91*].

37 CLAIMANT first tries to mislead the Tribunal by stating that "*contingency fees are fairly common in Mediterraneo*" [*MfC, p. 19, §73*]. While this could be true for certain legal practice areas, contingency fees are generally not used for more complex and unpredictable practice areas such as commercial litigation [*Business Litigation Update, p. 17*]. As a matter of fact, both CLAIMANT and RESPONDENT encountered difficulties in finding Mediterranean law firms willing to agree on such types of agreements for litigation cases [*PO2, pp. 58-59, §§39-42*]. RESPONDENT could thus not foresee that CLAIMANT would conclude a contingency agreement and, as a result, extensively increase the amount of the attorneys' fees.

38 CLAIMANT further bases its claim on the fact that the contingency fee agreed with LawFix is deemed "*reasonable in ordinary circumstances*" [*MfC, p. 19, §73; PO2, p. 58, §39*]. However, contingency fee agreements are negotiated in view of the particularities of each case. Whether the amount of the agreement is justified or not, should then be assessed according to the specificities of the case at hand. In this regard, the American Bar Association Model Rules of Professional Conduct ("**ABA Rules**") provide for a number of factors to determine the reasonableness of a contingent fee agreement [*Rule 1.5 ABA Rules*]. These factors may serve the Tribunal as guidance in the present case. The ABA Rules recommend to take into consideration, among others, the difficulty of the questions raised by the case as well as the skills and labour required to solve the case [*ibid.*].

39 First and foremost, no solid expertise was really needed since first-year associates were able to personally handle the interim injunction and the defence against RESPONDENT's action. Indeed, according to the invoice produced by LawFix, an hourly rate of USD 150 was charged [*Exhibit C11, p. 19*]. This represents the starting rate of a first-year associate [*PO2, p. 58, §39*]. Moreover, less than eight hours of work were needed to file for the interim injunction [*Exhibit C11, p. 19*]. A compensation of USD 30'000 is therefore hardly

justifiable [*Exhibit C10, p. 18*]. The same applies to the compensation of USD 15'000 for the defence against RESPONDENT's action since less than ten hours were billed [*Exhibits, C10-C11, pp. 18-19*].

40 In order to uphold the exorbitant contingent fee, CLAIMANT might argue that less time than anticipated was spent on the case [*PO2, p. 58, §39*]. However, such argument would be without merit since about three hundred hours would need to be billed to justify a USD 45'000 fee. This represents an enormous amount of time that could reasonably never be expected to be incurred in such undemanding proceedings. Accordingly, the contingent fee of USD 45'000 must be considered excessive. Therefore, RESPONDENT could not have foreseen the extent of the attorneys' fees incurred by CLAIMANT.

II. SHOULD THE TRIBUNAL CONSIDER THAT THE CONDITIONS OF ART. 74 CISG ARE FULFILLED, CLAIMANT FAILED TO MITIGATE ITS LOSS

41 In the event the Tribunal finds that CLAIMANT's request fulfils the conditions of Art. 74 CISG, its claim should still be entirely dismissed or at least, reduced because CLAIMANT failed to mitigate its loss.

42 Art. 77 CISG requires that a party claiming damages endeavour to mitigate its loss [*Propane case; Excavator case; Schwenzer, in: Schlechtriem/Schwenzer, Art. 77, §1; Bridge, p. 614, §12.64*]. As long as it may be deemed reasonable, a party bears the obligation to avoid any loss and minimise an already existing loss [*Flagstone Tiles case; Propane case; Magnus, p. 279; Saidov, Law of Damages, p. 131*]. The measures to be taken in this regard should be those of a prudent businessperson placed in the position of the aggrieved party [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 77, §7; Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 77, §15; Propane case*]. If a party does not mitigate the loss, its claim for damages should be fully rejected [*Flagstone Tiles case; Metal Production Goods case; Magnus, p. 279*] or at least, reduced [*Brassiere Cups case; Sour Cherries case; Bridge, p. 614, §12.64; Knapp, in: Bianca/Bonell, Art. 77, §2.11*].

43 CLAIMANT violated its duty to mitigate the loss by immediately seeking interim relief and by failing to answer RESPONDENT's letter of 14 January 2015 (**A**). Moreover, CLAIMANT failed to minimise its damages by agreeing on an excessive contingent fee with its lawyers (**B**).

A. CLAIMANT IMMEDIATELY SOUGHT INTERIM RELIEF AND DID NOT ANSWER RESPONDENT'S LETTER OF 14 JANUARY 2015

44 CLAIMANT's interim injunction entailed USD 33'750 in attorneys' fees [*Exhibit C11, p. 19*]. As stated above, this request before the HCM was unnecessary [*cf. supra p. 15, §20*]. Had CLAIMANT respected its duty to settle the issue amicably and in good faith [*Art. 20 FA; cf. supra p. 16, §24*, the loss occurred would most certainly have been drastically reduced. The recourse to a neutral expert would have been a much more

favourable alternative. Art. 4 FA provides that in case of disagreement on the wine's price "*an expert appointed by the Mediterranean Wine Association*" shall settle the issue [*Exhibit C1, p. 9*]. Since its title reads as "*Quantities and Price*", the recourse to a neutral expert was envisaged by the Parties also in case of disagreement upon the quantity. Therefore, by immediately seeking interim relief entailing USD 33'750 in attorneys' fees, CLAIMANT violated its duty to mitigate the loss.

45 Furthermore, by not answering RESPONDENT's letter of 14 January 2015, CLAIMANT deliberately increased the incurred loss. CLAIMANT was forewarned that should it not provide further information, RESPONDENT would have no other choice but to act before the HCM [*Exhibit R2, p. 33*]. Nevertheless, in violation of its duty to cooperate, CLAIMANT never answered [*cf. supra p. 16, §24*]. In consequence, CLAIMANT failed to mitigate its loss as required by Art. 77 CISG by, firstly, seeking interim relief and, secondly, not answering RESPONDENT's letter of 14 January 2015.

B. CLAIMANT AGREED ON AN EXCESSIVE CONTINGENT FEE WITH ITS LAWYERS

46 The duty to mitigate the loss required CLAIMANT to hire a Mediterranean law firm on a regular hourly billing. This would have considerably limited the incurred attorneys' fees. CLAIMANT argues that it did not have sufficient means to engage a Mediterranean law firm on regular hourly fees [*SoC, p. 5, §13*]. This argument is surprising as CLAIMANT had sufficient assets to accept a USD 45'000 contingent fee. As demonstrated above, the excessiveness of the amount of this contingency agreement is striking [*cf. supra p. 19, §40*]. Because such agreements are prohibited in Equatoriana [*PO2, p. 58, §40*], it was presumably the first time CLAIMANT negotiated a contingent fee. LawFix took advantage of it by demanding an exorbitant compensation. A prudent businessperson would never have concluded such an agreement. Therefore, by agreeing on an excessive contingent fee, CLAIMANT violated its duty to mitigate the loss.

The Tribunal should dismiss CLAIMANT's request for the award of attorney's fees as damages. Indeed, CLAIMANT is not entitled to the reimbursement of the attorneys' fees incurred in court proceedings because the requirements of Art. 74 CISG are not met. In any event, CLAIMANT failed to mitigate its loss.

ISSUE 2: THE TRIBUNAL SHOULD DENY CLAIMANT'S CLAIM FOR RESPONDENT'S PROFITS

47 Contrary to CLAIMANT's allegation [*MfC, p. 23, §89*], the profits made by RESPONDENT in selling the 5'500 bottles to SW should not be awarded to CLAIMANT. Indeed, the CISG does not allow for disgorgement

damages (**I**). Moreover, RESPONDENT's profits cannot be used as a method of calculation of CLAIMANT's lost profits (**II**).

I. THE CISG DOES NOT ALLOW FOR DISGORGEMENT OF PROFITS

48 CLAIMANT is right when it states that "*as such, damages for breach of contract is a question governed by Art. 74 CISG*" [*MfC, pp. 24-25, §94*]. It correctly argues that "*the extent of recoverable losses under Art. 74 CISG is not expressly defined*" [*MfC, p. 24, §94*] and must be interpreted in conformity with the general principles on which the CISG is based [*Art. 7(2) CISG*].

49 CLAIMANT's reasoning is however contradictory when it claims disgorgement damages regardless of the requirements of Art. 74 CISG. Indeed, the disgorgement doctrine is incompatible with Art. 74 CISG (**A**). In addition, the CISG's goal of uniformity prohibits its application (**B**). Furthermore, the general principles raised by CLAIMANT do not promote disgorgement damages (**C**). In any event, the disgorgement doctrine is not applicable to the breach of core sales obligations (**D**).

A. THE DISGORGEMENT DOCTRINE IS INCOMPATIBLE WITH ART. 74 CISG

50 The disgorgement doctrine is incompatible with Art. 74 CISG because this provision requires a loss (**1**). Furthermore, disgorgement damages are prohibited as this provision is based on the principle of full compensation and excludes punitive damages (**2**).

1. The Requirement of a Loss under Art. 74 CISG Prohibits the Award of Disgorgement Damages

51 Commentators exclude disgorgement damages from the scope of damages recoverable under the CISG [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, §8; Schmidt-Ahrendts/Czarnecki, in Brunner, Art. 74, §18; Schönle/Th. Koller, in: Honsell, Art. 74, §5; Magnus, in: Staudinger, Art. 74, §18; Saidov, Law of Damages, p. 33*]. Indeed, Art. 74 CISG provides that "[d]*amages for breach of contract by one party consist of a sum equal to the loss, including loss of profits, suffered by the other party as a consequence of the breach*". Therefore, a loss is a fundamental requirement for a damage claim under the CISG [*AC Opinion No. 6, §2.9; Chengwei, §13.5*].

52 However, disgorgement damages consist of the award of profits realised by the party who is in breach of the contract [*Hondius/Janssen, p. 5; Weinrib, p. 55*]. It is not required that the aggrieved party has suffered any loss [*Schmidt-Ahrendts, p. 97; Barnett, p. 5*]. Thus, the requirement of a loss under Art. 74 CISG prohibits the award of disgorgement damages.

2. Art. 74 CISG Is Based on the Principle of Full Compensation and Prohibits Punitive Damages

53 The principle of full compensation underlies Art. 74 CISG [*Roofing case; Delchi Carrier case; Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, §5; Huber/Mullis, p. 268*; *Piltz, p. 287*]. It requires to place the aggrieved party "*in the same economic position it would have been in had the breach not occurred*" [*Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 74, §1; see also AC No. 6, §3.12*]. Thus, Art. 74 CISG allows solely for compensatory damages: the aggrieved party cannot recover more than its loss [*Schmidt-Ahrendts/Czarnecki, in: Brunner, Art. 74, §8; AC Opinion No. 6, §9*; *Chengwei, §13.5; Demir, p. 135; Brölsch, p. 43*]. In that regard, punitive damages are prohibited [*Schmidt-Ahrendts/Czarnecki, in: Brunner, Art. 74, §18; Magnus, in: Staudinger, Art. 74, §17; AC Opinion No. 6, §9.5*].

54 However, disgorgement damages do not focus on the situation of the aggrieved party but on that of the breaching party. The idea of disgorgement damages is to put the breaching party in the situation in which it would have been had it not breached the contract [*Demir, p. 137; Giglio, pp. 6-7*]. Disgorgement of profits is thus a supra-compensatory remedy [*Schmidt-Ahrendts, p. 93; Bock, Vertragsverletzung, §10*], which is independent from any factual loss suffered by the non-breaching party [*Barnett, p. 15; Giglio, p. 6*]. Moreover, disgorgement damages are based on a punitive rationale [*Barnett, p. 12; Hartmann, p. 197; see also Lord Hobhouse's dissenting opinion in Blake case*]. Therefore, they are incompatible with the principle of full compensation underlying Art. 74 CISG and the prohibition of punitive damages.

B. THE CISG'S GOAL OF UNIFORMITY PROHIBITS THE APPLICATION OF THE DISGORGEMENT DOCTRINE

55 According to CLAIMANT, disgorgement damages should be regarded as prompted by the CISG because courts would otherwise turn to domestic remedies, thereby undermining the CISG's goal of uniformity [*MfC, p. 24, §93*]. While uniformity is indeed fundamental, CLAIMANT is mistaken in claiming that it favours disgorgement damages.

56 Art. 7(1) CISG provides that "[i]*n the interpretation of* [the] *Convention, regard is to be had to its international character and to the need to promote uniformity in its application*". The goal of uniformity triggers an autonomous interpretation of the CISG [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 7, §8; Ferrari, Autonomous Interpretation, p. 139; Wagner, in: Brunner, Art. 7, §2; Trucks case*]. Indeed, the CISG aims to strike a compromise between civil and common law [*Eiselen, p. 613*]. Its international character requires that "[t]*he solutions developed* […] *be acceptable in different legal systems with different legal traditions*" [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 7, §8*]. Hence, when a question concerns a matter that is governed by the CISG

without being expressly settled in it, courts have to interpret the CISG in conformity with its general principles [*Art. 7(2) CISG; see also Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 7, §20*]. They are however prevented from applying their own domestic law [*Hartmann, p. 190; Ferrari, Autonomous Interpretation, p. 139; Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 7, §8; Trucks case*].

57 The legal remedies for a breach of contract are governed by the CISG [*Hartmann, pp. 190 and 197; Demir, p. 133*]. Thus, contrary to CLAIMANT's allegation [*MfC, p. 24, §93*], national jurisdictions cannot resort to domestic remedies in that realm. They will have to interpret the CISG in light of its general principles and hence, come to the conclusion that disgorgement damages are prohibited under the principle of full compensation [*cf. supra p. 15, §§53-54*].

58 The *Adras case*, cited by CLAIMANT in support of its allegation, was precisely criticised because of the domestic-based approach adopted by the Israeli Supreme Court [*Hartmann, p. 190*]. In this case, the respondent had agreed to sell steel to the claimant but had breached the contract in concluding a second sale with another customer. The contract was governed by the ULIS, the ancestor of the CISG. However, the Court awarded the gained profits under the Israeli law of unjust enrichment. This approach was strongly condemned as "*being inconsistent with the objective of ULIS to provide uniformity in international trade law*" [*Reich, Headnote; see also Schlechtriem, Experience with Uniform Sales Law, pp. 12-13; Adar, p. 523*]. An erroneous decision hardly constitutes a good precedent. Thus, allowing disgorgement damages would impair the goal of uniformity that the CISG pursues.

C. THE GENERAL PRINCIPLES OF THE CISG RAISED BY CLAIMANT DO NOT PROMOTE DISGORGEMENT DAMAGES

59 Contrary to CLAIMANT's contention, the prohibition of unjust enrichment (**1**), the principle of *pacta sunt servanda* (**2**) and the principle of good faith (**3**) do not support the award of disgorgement damages under Art. 74 CISG. Moreover, the principle of full compensation does not call for the application of disgorgement damages when the aggrieved party fears to be left undercompensated (**4**).

1. The Prohibition of Unjust Enrichment Is Irrelevant Regarding the Award of Damages for a Breach of Contract

60 CLAIMANT argues that RESPONDENT was "*unjustly enriched*" because it "*earned further profits at CLAIMANT's expense*" in selling "*5'500 bottles to SuperWines at a higher price*" [*MfC, p. 25, §96*]. According to CLAIMANT, the prohibition of unjust enrichment is encompassed in Art. 84 CISG and promotes disgorgement damages [*MfC, p. 25, §97*]. These allegations are incorrect.

61 Art. 84 CISG provides for the principle of restitution of performance *in case the contract has been avoided* [*see the title of Chapter V, Section V CISG: "Effects of avoidance"*]. The parties must restitute the goods or the price received and all benefits, respectively all interests, derived from them [*AC Opinion No. 9, §3.19*]. Restitution of performance should be clearly separated from the damages question [*AC Opinion No. 9, §1.5*]. Indeed, Art. 84 CISG expresses "*the idea that both parties should be put back into into the status quo ante with respect to their own performances,* [whereas] *the rationale of the damages provisions is precisely to put the aggrieved party into the hypothetical «status quo post proper performance»*" [*Schmidt, p. 1503*]. The authors cited by CLAIMANT [*MfC, p. 25, §97*] only mention the prohibition of unjust enrichment in connection with restitution of respective advantages in case the contract was avoided: *Flambouras* explains that the CISG governs unjust enrichment claims "*when the contract was overturned or avoided*" [*Flambouras, §IV.5*], whereas *Zoccolillo* [*Zoccolillo, §III. A*] and *Koneru* [*Koneru, §II.A*] express this opinion in connection with the determination of interest rates. Therefore, Art. 84 CISG prohibits unjust enrichment in connection with restitution of performance only. It is irrelevant in the realm of damages.

2. The Principle of *Pacta Sunt Servanda* Does Not Support the Award of Disgorgement Damages

62 CLAIMANT argues that the principle of *pacta sunt servanda* encompassed in the CISG requires the performance of the contract and prevents a party from breaching a contract in order to make higher profits [*MfC, p. 26, §§99-101*]. Allowing RESPONDENT to keep its profits would therefore undermine this principle [*MfC, pp. 26-27, §102*].

63 CLAIMANT overlooks that the CISG has already exhaustively dealt with the impact of *pacta sunt servanda* when addressing the remedies available for a breach of contract. The CISG seeks a balance between the right to require specific performance of continental European legal systems and the primacy of damages which is favoured by common law systems [*Müller-Chen, in: Schwenzer/Schlechtriem, Art. 28, §§1-2*]. It offers the aggrieved party both a right to specific performance and an entitlement to damages [*e.g. Art. 45 CISG*], without addressing the priority of one remedy over another [*Bridge, p. 601, §12.47*]. The right to compensatory damages is therefore an expression of *pacta sunt servanda* [*Bock, CISG, pp. 185-186; Hartmann, p. 197*]. Hence, the principle of *pacta sunt servanda* is already implemented in the CISG and does not require any additional remedy, such as disgorgement of profits.

3. The Principle of Good Faith Is Irrelevant in a Claim for Damages

64 CLAIMANT argues that the principle of good faith underlies the CISG and prohibits a party from gaining from a breach of contract [*MfC, p. 27, §103*].

65 However, according to Art. 7(1) CISG, the principle of good faith in international trade must be taken into account for means of interpretation only. "*Article 7(1) cannot be used to establish rights and (additional) obligations outside the interpretation of* [the CISG]" [*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 7, §19; see also Huber/Mullis, p. 8*]. "*It does not* […] *impose a duty to act in good faith on contracting parties*" [*Walt, p. 42*]. The drafters of the CISG explicitly refused to incorporate a general requirement of good faith conduct because the different domestic standards might have led to uncertainty [*Garro, pp. 465-468; Lookofsky, Good Faith, p. 37, §2.10, FN 187*]. Moreover, Art. 74 CISG does not subordinate the award of damages to the bad faith of the breaching party. Therefore, good faith shall thus not be used as a condition for the award of damages.

4. The Principle of Full Compensation Does Not Call for the Award of Disgorgement Damages when the Aggrieved Party Fears to Be Left Undercompensated

66 Finally, CLAIMANT argues that aggrieved parties "*are often left undercompensated*" which goes against the principle of full compensation [*MfC, p. 28, §109*]. "*Therefore, in order to increase the chances of fully compensating the aggrieved party, considerations of disgorgement should be taken into account, especially when it would otherwise have difficulty proving its loss*" [*MfC, p. 28, §109*]. This reasoning cannot be followed.

67 CLAIMANT brings forward those arguments in support of its claim for disgorgement damages. However, that kind of damages does not require the proof of a loss [*cf. supra p. 14, §§51-52)*]. CLAIMANT seems to be confused regarding the difference between disgorgement damages and compensatory damages. Indeed, CLAIMANT cites *Schwenzer and Hachem*. However, those authors solely propose a calculation method for compensatory damages [*Schwenzer/Hachem, p. 101*]. They do not contend that disgorgement damages are available if the aggrieved party cannot prove its loss. CLAIMANT's argument is then irrelevant.

68 Moreover, CLAIMANT argues that "*benefits to the aggrieved party derived from damages* [are] *only to be deducted if it does not endanger full compensation*" [*MfC, p. 29, §111*] and cites *Schwenzer* [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, §42*] in support of its allegation. However, *Schwenzer*'s theory envisages and accepts a possible overcompensation of the aggrieved party [*ibid.*]. It is therefore contrary to Art. 74 CISG which prevents the enrichment of the aggrieved party in the award of damages [*cf. supra p. 15, §§53-54); see also Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 74, §33*]. In light of the above, the fact that CLAIMANT fears to be left undercompensated for a loss that it cannot prove is irrelevant regarding the award of disgorgement damages.

D. In any Event, The Disgorgement Doctrine Does Not Apply to Breaches of Core Sales Obligations

69 Claimant does not mention when and under which conditions disgorgement damages apply. As a matter of fact, even if national courts were allowed to interpret the CISG in light of their domestic law, they would not apply the disgorgement doctrine in the context of sales of goods.

70 The disgorgement doctrine in contract law is a creation of common law courts [*Blake case; cf. infra p. 19, §72*]. It is not adopted in civil law countries which rely on a compensatory approach [*e.g. Belgium, Hondius/Janssen, pp. 90-91; Greece, Hondius/Janssen, p. 233; Turkey, Hondius/Janssen, p. 254; Croatia, Hondius/Janssen, p. 373; Slovenia, Hondius/Janssen, p. 394*]. Even Art. 6:104 of the Dutch Civil Code, cited by Claimant [*MfC, p. 24, §92*], provides only for a method of assessing damages and not for an independent remedy for a breach of contract [*Hondius/Janssen, pp. 7-8; Donkersloot, pp. 11 and 14*].

71 Moreover, common law courts do not allow disgorgement damages for any types of contractual breaches. The breaching party must have failed to honour a specific obligation in parallel to the non-performance of the contract [*McCamus, p. 4*]. This will be the case, for instance, when there is a breach of a fiduciary duty [*Hondius/Janssen, p. 8; Photography case; Hotel case*], of a confidentiality agreement [*Blake case*] or of a negative covenant regarding proprietary rights [*Wrotham Park case; WWF case*].

72 Claimant cites the *Blake case* as reflecting an evolution of domestic law [*MfC, p. 24, §92*]. While deciding on the disgorgement of profits for the breach of a confidentiality agreement, the Lords admitted that such damages were also an available remedy for a simple breach of contract. However, the conditions and circumstances under which such damages may potentially be awarded are unclear. More importantly, "[a]*n account of profits will be appropriate only in exceptional circumstances*", *i.e.* essentially when compensatory damages and specific remedies prove inadequate [*Blake case*]. Therefore, the account of profits for a simple breach of contract is considered to be "*rather a seldom phenomenon*" [*Hondius/Janssen, p. 479*].

73 Moreover, a subsequent case law disapproved of the *Blake*'s approach in the area of commercial contracts. In the *AB Corporation* case, the arbitral tribunal held that compensatory damages usually sufficed in commercial contracts. It considered that it is in the nature of those contracts to be breached by a party when there is a more profitable opportunity and, accordingly, the law should not punish the wrongdoer [*AB Corporation case*].

74 Claimant erroneously mentions a SCC decision as an example of the award of disgorgement damages under the CISG [*SCC 2007; MfC, pp. 24-25, §94*]. First of all, the claimant's action for damages based on the CISG

was entirely dismissed. Secondly, the sole arbitrator did not apply the CISG in assessing the counterclaimant's claim for damages caused by the breach of confidentiality agreement. Furthermore, it ruled that the claimant's profits realised through the above-mentioned breach would be used as a method of evaluating the counterclaimant's loss [*SCC 2007*]. The awarded damages were thus compensatory. In conclusion, the disgorgement of damages is, in any event, not an available remedy in the realm of commercial contracts, including sales.

II. RESPONDENT'S PROFITS CANNOT BE USED AS A METHOD OF CALCULATION OF CLAIMANT'S LOST PROFITS

75 CLAIMANT submits that RESPONDENT's profits are sufficient evidence of its loss [*MfC, pp. 29-30, §§113-117*]. It further argues that it cannot calculate the extent of that loss and should therefore be allowed to use RESPONDENT's profits in this regard. According to CLAIMANT, the calculation of damages based on the profits made by the breaching party is allowed under certain conditions which - CLAIMANT argues - are satisfied in the case at hand.

76 All the propositions are inaccurate. First, RESPONDENT's profits are insufficient evidence of a loss suffered by CLAIMANT. Thus, the latter failed to prove its loss (**A**). Even if CLAIMANT had proven a loss, the conditions it mentioned for the use of RESPONDENT's profits as a calculation method are not fulfilled (**B**).

A. RESPONDENT'S PROFITS ARE INSUFFICIENT EVIDENCE OF A LOSS SUFFERED BY CLAIMANT, THUS CLAIMANT FAILED TO PROVE ITS LOSS

77 CLAIMANT argues that Art. 74 "*only requires a party to prove with "reasonable certainty" that it suffered a loss.* […] [It] *must therefore be applied in a flexible manner, taking into consideration the profits realised by the party in breach*" [*MfC, p. 30, §115*].

78 CLAIMANT correctly admits that it has the burden of proving its loss with reasonable certainty [*MfC, p. 30, §115*]. Indeed, the aggrieved party must prove both the existence of a loss and its extent [*AC Opinion No. 6, §§2-2.9; Saidov, Standards of Proving Loss, p. 13; Plastic Carpets case; Delchi Carrier case*]. The mathematical precision of the amount of loss suffered is not required [*AC Opinion No. 6, §3.13; Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, §65; Southwest Battery case; Sargon case; Mid-America Tablewares case*]. However, mere speculations without further substantial explanations are not sufficient [*Stainless Steel Wire case; Video Recorder case; Delchi Carrier case*]: there must be "*tangible evidence*" to support a claimant's allegations [*ICC 8362/1995; see also Competitive Business case*]. While the application of a reasonable level of certainty is assessed on a case-by-case basis [*AC Opinion No. 6, §3.12; Saidov, Standards of Proving Loss, p. 22; Gotanda,*

Recovery Lost Profits, p. 80], it is not meant to "*lift*" the aggrieved party's burden of proof as erroneously alleged by CLAIMANT [*MfC, p. 30, §118*].

79 In the case at hand, CLAIMANT submits that "*the profits made by RESPONDENT by selling 5,500 bottles of Mata Weltin 2014 to SuperWines suffice as evidence of the loss suffered by CLAIMANT*" [*MfC, p. 30, §114*]. Since CLAIMANT does not provide any indication whatsoever as to why those profits should be sufficient evidence of its own loss, CLAIMANT has not proven the occurrence of a loss.

80 Assuming but not conceding that CLAIMANT had proved its loss, it failed to adduce evidence of its extent with reasonable certainty. CLAIMANT is not convincing when it submits that "*the profits realised by the breaching party is evidence of the value of the goods*" [*MfC, p. 30, §117*].

81 Firstly, CLAIMANT ignores the existence of two different markets: RESPONDENT is a wine producer and CLAIMANT is a retailer of RESPONDENT's products. In order for retailers to make profits out of their business, the purchase price required from the ultimate customers must be higher than the purchase price paid to the wine producer. As a consequence, the price of the bottles and the profit margin are different on those two markets. Secondly, RESPONDENT fixes individual purchase price for each of its customers depending on the loyalty and the duration of their ongoing relationships [*PO2, p. 61, §61*]. CLAIMANT also enters into individual contracts with each of its customers [*PO2, p. 53, §2*]. It is then difficult to understand how RESPONDENT's contract price with SW would reflect CLAIMANT's pricing with is own customers. Finally, CLAIMANT wants to include in those profits the premium paid by SW to RESPONDENT. However, this premium was only a market entry fee paid in exchange for RESPONDENT's commitments to accept SW as its new customer and provide it with the same amount of bottles in the next two years [*PO2, p. 56, §24*]. Therefore, this profit should on no account be characterised as part of the profits RESPONDENT made from the sale of MW 2014. The fact that SW simultaneously paid the purchase price and the premium is of no relevance whatsoever. In other words, there is no connection between the profits made by RESPONDENT and the profits CLAIMANT would have made. Thus, CLAIMANT must be regarded as having failed to prove the extent of its loss.

B. EVEN IF CLAIMANT HAD PROVEN A LOSS, THE CONDITIONS MENTIONED BY CLAIMANT FOR THE USE OF RESPONDENT'S PROFITS AS A CALCULATION METHOD ARE NOT FULFILLED

82 According to CLAIMANT, this method requires the fulfilment of three conditions [*MfC, p. 31, §119*]. First, the aggrieved party cannot otherwise calculate its loss [*ibid.*]. Second, it has a legitimate interest in

preventing the breaching party from benefitting from the breach [*ibid.*]. Third, the breaching party has acted in a cynical or intentional way, or in bad faith [*ibid.*].

83 RESPONDENT contests the use of such method. First and foremost, a focus on the gain of the breaching party rather than on the effective loss of the aggrieved party has already been proven to be contrary to the principle of full compensation and the wording of Art. 74 CISG [*cf. supra p. 15, §54; see also Hartmann, p. 198*]. Moreover, the conditions mentioned by CLAIMANT for the use of that method are not fulfilled. First, CLAIMANT does not need to resort to RESPONDENT's profits in order to calculate its loss (**1**). Second, it has no legitimate interest in preventing RESPONDENT from benefitting from the breach of contract (**2**). Third, the assessment of RESPONDENT's conduct is an irrelevant criterion for the use of profits as calculation method (**3**).

1. CLAIMANT Can Calculate its Loss without Resorting to RESPONDENT's Profits

84 According to the first condition, lost profits must be extremely difficult to assess with other methods [*Saidov, Law of Damages, p. 34; Schwenzer/Hachem/Kee, p. 581-582, §§44.15-44.17*]. This requirement is not fulfilled in the case at hand.

85 CLAIMANT first argues that the calculation method of Art. 75 CISG does not apply in the present case. RESPONDENT agrees with that proposition but contests CLAIMANT's reasoning to sustain it. Contrary to what CLAIMANT seems to suggest [*MfC, pp. 31-32, §§120-123*], the issue at hand is not whether CLAIMANT has made a substitute purchase or not. Indeed, Art. 75 CISG requires that the contract be avoided. As CLAIMANT did not avoid the FA, Art. 75 CISG does not apply. Moreover, this provision does not set forth a method for calculation of lost profits [*Saidov, Law of Damages, pp. 173-174*] but merely enables the aggrieved party to recover "*the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under 74 CISG*" [*Art. 75 CISG*]. Profits lost by a reseller are part of the "*further damages*" and therefore, cannot be computed under Art. 75 CISG [*Art. 75 CISG; see also Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 75, §33; Schwenzer, in: Schlechtriem/Schwenzer, Art. 75, §12*].

86 Contrary to CLAIMANT's further allegation [*MfC, p. 31, §120*], it has sufficient data at its disposal to otherwise quantity its loss.

87 First and foremost, CLAIMANT can evaluate its lost profits by scanning the sales contracts it concluded with its own customers. Indeed, CLAIMANT enters into individual contracts with each of its customers [*PO2, p. 53, §2*]. It is able to screen those contracts so as to establish an average sales price for the wine purchased from RESPONDENT, respectively from Vignobilia Ltd. ("**Vignobilia**"). As CLAIMANT was finally able to

purchase 5'500 bottles from Vignobilia, the profits made by CLAIMANT in reselling these bottles must be offset against the damages for lost profits as required under the CISG [*AC Opinion, No. 6, §9.2; Gotanda, in Kröll/Mistelis/Viscasillas, Art. 74, §34*]. CLAIMANT could then calculate the profit margin differential in order to evaluate its lost profits.

88 Secondly, CLAIMANT could determine its lost profits on the basis of the average net profit of its past transactions involving RESPONDENT's MW. Such an approach is often used in international arbitral practice, particularly in case of long-lasting business relationships where circumstances in which the breaching party makes profits are similar to those prevailing in the past [*Saidov, Standards of Proving Loss, p. 35; UK Importer Case; Car Sales case*]. CLAIMANT has been selling RESPONDENT's MW for the last six years on the collectors' and high-end gastronomy markets [*SoC, p. 4, §§3-4*]. Therefore, CLAIMANT may be expected to rely on the past profits made in most recent years or in the years where the market conditions were similar to those prevailing in the 2013-2014 period to calculate its current loss.

89 A third alternative method would be to use the information available in the public domain, such as economic and financial data [*Competitive Business case*]. For instance, the market value of the goods can be taken into consideration for the calculation of lost profits [*Chicken case*]. *In casu*, CLAIMANT could use the average resale price applied by several retailers for RESPONDENT's diamond MW and Vignobilia's MW.

90 Recourse to experts testimony is also possible [*AC Opinion No. 6, §2.9; Mining Venture case; Saidov, Standards of Proving Loss, p. 21*]. CLAIMANT could designate an independent expert of the wine market to establish the value of RESPONDENT's MW 2014. Such an external intervention is already provided for in Art. 4 FA should the Parties fail to agree on the wholesale price: "*a reasonable market price will be determined by an expert appointed by the Mediterranean Wine Association*" [*Exhibit C1, p. 9*].

91 In light of the above and contrary to its allegation, CLAIMANT possesses sufficient information to calculate its actual loss of profit without resorting to RESPONDENT's profits as a calculation method.

92 Additionally, CLAIMANT submits that it is entitled to damages for loss of goodwill. However, contrary to what CLAIMANT suggests [*MfC, p. 32, §125*], the recovery of the loss of goodwill under the CISG is disputed [*cf. supra p. 5, §10; Video Recorder case; Huber/Mullis, p. 280; AC Opinion No. 6, §7.2; Schönle/Th. Koller, in: Honsell, Art. 74, §7; Schwenzer/Hachem/Kee, p. 619, §44.194-195*]. In any event, a claim for loss of goodwill is denied if it lacks substantiation regarding the occurrence of an "*actual loss of business*" [*Blase/Höttler, p. 50*; *see also Schönle/Th. Koller, in: Honsell, Art. 74, §7; Schwenzer/Hachem/Kee, p. 619, §44.195*; *Footwear case; Video Recorder Case; Defective Wine case*]. The aggrieved party must prove that the harm to its reputation has caused

pecuniary damages [*Footwear case; Defective Wine case*], *e.g.* by producing evidence of a reduction of its sales quotas [*Video Recorder case*]. The standard of proof is high as the mere fact that customers failed to place new orders is not considered sufficient proof of a loss within the meaning of Art. 74 CISG [*Defective Wine case*].

93 In the case at hand, CLAIMANT alleges that it will suffer a loss of goodwill because "*its customers will not receive a product in accordance with their expectations*" [*MfC, p. 32, §125*] and certainty of supply is part of its business model [*ibid.*]. However, by the time of their pre-orders, CLAIMANT's customers were forewarned of a lack of available bottles of RESPONDENT's MW due to the bad harvest [*PO2, p. 54, §8*]. They were willing to accept Vignobilia's wine as a substitute [*PO2, p. 54, §§10-12*]. Besides, out of the received pre-orders, CLAIMANT only guaranteed 800 bottles of RESPONDENT's MW [*PO2, pp. 53-54, §7*]. Those pre-orders can be satisfied with the 4'500 bottles delivered by RESPONDENT [*PO1, p. 50, §1*]. Furthermore, CLAIMANT itself admits not knowing "*how the shift of vineyard has affected the orders from its customers*" and "*how that will affect CLAIMANT's future dealings with its customers*" [*MfC, p. 33, §126*]. At this stage, CLAIMANT provides no information regarding an actual loss of its clientele or a decrease in its business turnover. Therefore, should the Tribunal consider that the CISG governs loss of goodwill, CLAIMANT failed to prove its loss.

94 In conclusion, in the event the Tribunal considers that CLAIMANT has proven a loss, CLAIMANT does not depend in any way on RESPONDENT's profits to calculate its loss.

2. CLAIMANT Does Not Have a Legitimate Interest in Preventing RESPONDENT from Benefitting from the Breach of Contract

95 The condition of "*a legitimate interest in preventing the breaching party from benefitting from its breach*" [*Saidov, Law of Damages, p. 34*] refers to a situation where the aggrieved party breached a specific obligation in parallel to the non-performance of the contract. This condition stems from the *Blake*'s doctrine of disgorgement damages [*cf. supra p. 19, §§70-71; Saidov, p. 34*]. *Saidov* cites, for instance, the situation where the parties were bound by a confidentiality agreement [*Saidov, p. 34*; *SCC 2007*] or concluded a negative covenant prohibiting the sale on a particular market [*Saidov, pp. 34-35*; *Jeans Bonaventure case*]. Hence, the breach of a core sales obligation is insufficient [*cf. supra p. 19, §§70-71*]. In the case at hand, the Parties did not agree upon any additional obligation of conduct which could reflect CLAIMANT's legitimate interest in depriving RESPONDENT of its profits [*Exhibit C1, p. 9; ASoC, pp. 26-27, §15*]. In that regard, the fact that SW is CLAIMANT's biggest competitor or that the wine industry is based on mutual trust [*MfC, p. 33, §129*] does not provide such a legitimate interest. As a result, the second condition mentioned by CLAIMANT is not fulfilled.

3. RESPONDENT's Conduct Is an Irrelevant Criterion for the Use of Profits as Calculation Method

96 With respect to the condition of cynical, intentional conduct or bad faith of the party in breach, it has already been established that it does not apply in the realm of damages under the CISG [*cf. supra p. 18, §95*]. This condition is rejected because the CISG does not impose an obligation of good faith conduct on the parties [*ibid.*]. Moreover, it introduces a punitive element prohibited by the CISG [*cf. supra p. 15, §§53-54*].

97 In the *Jeans Bonaventure case* relied on by CLAIMANT [*MfC, p. 31, §119*], the Court of Appeal reversed the previous decision ordering the appellant (the respondent at first instance) to pay damages for lost profits. It did not address the specific method of calculation with the breaching party's profits. The Court considered the defendant (the plaintiff at first instance) conduct contrary to the principle of good faith set forth in Art. 7 CISG and therefore condemned it to pay 10'000 French Francs for abuse of process. The Court held that the defendant had shown bad faith in denying having breached the contract and in adopting the judicial position of the plaintiff before the lower instance [*Jeans Bonaventure case*]. This reasoning was heavily criticised [*Zeller, Damages, p. 115; Sheehy, p. 174; Walt, pp. 61-62; Sim, §IV.A.5*]. First, by condemning the defendant for its bad faith conduct, the Court wrongfully imposed a positive obligation of good faith conduct on the contracting parties [*Sim, §IV.A.5*; *cf. supra p. 18, §65*]. Moreover, as established before [*cf. supra p. 15, §§53-54*], Art. 74 CISG only provides for compensatory damages. By condemning the appellant for abuse of process, the Court "*used the principle of good faith as a tool to levy, in essence, a fine*" [*Zeller, Good Faith, §i.iii; see also Zeller, Damages, p. 115; Sim, §IV.A.5*; *Sheehy, p. 174*]. Thus, the Court failed to distinguish punitive damages from compensatory damages [*Sim, §IV.A.5*]. Such controversial past decision can hardly be relied on as a meaningful precedent. In light of the above reasoning, the criterion of good faith is an irrelevant criterion to justify the use of profits as a method of calculation.

The Tribunal should deny CLAIMANT's claim for RESPONDENT's profits because the CISG does not allow for disgorgement of profits. Moreover, RESPONDENT's profits cannot be used as a method of calculation for CLAIMANT's alleged lost profits.

ISSUE 3: THE TRIBUNAL SHOULD DENY CLAIMANT'S REQUEST FOR DOCUMENT PRODUCTION IN THE EVENT THE CLAIM FOR RESPONDENT'S PROFITS IS GRANTED

98 In order to quantify its claim for RESPONDENT's profits, CLAIMANT seeks to obtain the disclosure of the Requested Documents. However, its request should be denied because the Parties excluded the Tribunal's

power to order document production (**I**). Should the Tribunal find that it is empowered by the Parties to issue a production order, it should nonetheless dismiss CLAIMANT's request (**II**).

I. THE EXCLUSION OF DISCOVERY IN THE ARBITRATION CLAUSE PREVENTS THE TRIBUNAL FROM ORDERING THE PRODUCTION OF THE REQUESTED DOCUMENTS

99 The Parties decided to exclude the Tribunal's power in regard to document production in Art. 20 FA, which reads: "[t]*he proceedings should be conducted in a fast and cost efficient way and the parties agreed that no discovery shall be allowed*". However, CLAIMANT wrongfully argues that the purpose of this clause was the mere exclusion of extensive requests for document production as practised in US jurisdictions [*MfC, p. 4, §9*]. Where the meaning of an arbitration clause is disputed by the parties, it shall be interpreted by the arbitral tribunal [*Born, Arbitration, p. 1317*].

100 As explained by CLAIMANT, the Parties agreed that the CISG would govern the interpretation of the arbitration clause [*PO1, p. 51, §3; PO2, p. 61, §63; MfC, p. 5, §10*]. Hence, the rules of interpretation provided for in Art. 8 CISG apply.

101 By virtue of Art. 8(1) CISG, a contract shall first be interpreted according to the parties' intent "*where the other party knew or could not have been unaware what that intent was*" [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §§11 and 17; see also MCC Marble case*] at the time of the conclusion of the contract [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §19*]. CLAIMANT rightfully submits that the Parties did not communicate their intent in regard to Art. 20 FA and to the words "*no discovery shall be allowed*" [*MfC, p. 5, §10; PO2, p. 60 §53*]. Therefore, none of them could have known or been aware of the other party's intention. This criterion is thus inapplicable in the case at hand.

102 When the parties' intention is not determinable according to the subjective interpretation of the clause, the tribunal should resort to the objective interpretation of Art. 8(2) CISG [*Fruits & Vegetables case; MCC Marble case; TETA case; Guang Dong case; ICC 8324/1995*]. As addressed by CLAIMANT, the understanding of the words "*no discovery shall be allowed*" in Art. 20 FA should be that of a hypothetical reasonable person of the same kind as the Parties placed in the same circumstances [*MfC, p. 5, §10; see also Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §20*]. In determining that understanding, one must take into account the circumstances set forth in Art. 8(3) CISG [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §21*]. The starting point of the interpretation is the wording of the clause [*ICAC 54/1999; Trade Accounts case; Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §21*].

103 CLAIMANT first argues that the term "*discovery*" used in the arbitration clause must be distinguished from "*document production*" in international arbitration [*MfC, p. 5, §11*]. However, its allegation is based on a definition of "*document production*" used by *Marghitola* for the mere purpose of his book [*ibid.; Marghitola, p. 8*] and therefore does not reflect a consensus amongst legal scholars and practitioners. Moreover, while the word "*discovery*" originally referred to the US evidentiary process, it is nowadays also used by many authors and practitioners to address evidence-taking in general and document production in particular [*Conrad/Cilingir/Baumann, in: Conrad/Münch/Black-Branch, p. 24, §2.22-2.23; Lemaire/Raynouard, in: Conrad/Münch/Black-Branch, p. 161, §4.161-4.165; Stippl/Sedrati-Müller, in: Conrad/Münch/Black-Branch, p. 285, §6.172-6.173; Born, Drafting, p. 95; Griffin, pp. 20-22; Kirby, p. 694; Hancock/Reed, pp. 346-347; Oil Companies case*]. As there is no precise definition of the concept of document production in international arbitration, the employed terminology is not determinative to establish the scope of materials to be produced [*Born, Arbitration, p. 2322; Marghitola, p. 8*].

104 Moreover, CLAIMANT wrongfully bases its argument on the usual meaning of the word "*discovery*" as used in US proceedings. First, the usual meaning of a word does not establish a presumption that the parties intended to adopt it: the parties' intention prevails [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §41; Tantalum Carbide case*]. Second, it is hazardous to refer to the usual meaning of a term, in particular when it has various meanings depending on legal systems [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §42*]. As stated above, the word "*discovery*" does not have the same meaning in international arbitration as in US procedure [*cf. supra p. 27, §103*]. Therefore, resorting to the usual meaning is irrelevant for the purpose of determining the Parties' intention.

105 The CISG also requires the contract to be interpreted as a whole [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §30; Hurni, in: Brunner, Art. 8, §14; ICAC 95/2004*]. Individual terms must not be viewed as isolated but considered within the whole context of the contract, including the interests of the parties [*ibid.*]. In this regard, usages between the parties or in a specific area can be used if they facilitate the determination of the understanding of a reasonable person [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §47; Hurni, in: Brunner, Art. 8, §20; Zuppi, in: Kröll/Mistelis/Viscasillas, Art. 8, §27*]. The words "*fast and cost efficient*" must be considered in relation to the practice in the wine industry. Players in this industry are used to entering into commercial relationships without written contracts and to settling their disputes amicably [*Exhibit C7, p. 15; ASoC, pp. 25-26, §7; PO2, p. 57, §33*]. RESPONDENT exceptionally agreed on a written contract providing for arbitration with "*fast and cost efficient*" arbitral proceedings [*ASoC, p. 25, §7; Exhibit C1, p. 9*]. Authors and parties to international arbitrations admit that the duration and the costs of arbitration have increased

considerably due principally to the evidentiary process of document production and despite possible recourse to the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 ("**IBA Rules**") [*Marghitola, pp. 4 and 150-151; Bouchenaki/El-Ahdab, p. 68; Matar, p. 2; Transcript of GAR 24 May 2011*]. Accordingly, and considering the present relationship as a whole, the best way to minimise length and costs and to keep the procedure close to an amicable settlement was to exclude all types of requests for document production.

106 CLAIMANT also argues that the Parties' agreement to arbitrate under the Rules of Arbitration of the Vienna International Arbitral Centre ("**Vienna Rules**") and in accordance with the practice in international arbitration prohibits US-style discovery [*MfC, p. 6, §13*]. Such an argument actually benefits to RESPONDENT. It is widely admitted that US-style discovery is not permissible in international arbitration unless the parties expressly agreed on its application or the case has a close connection with the USA [*Marghitola, p. 9; Stippl/Sedrati-Müller, in: Conrad/Münch/Black-Branch, p. 285, §§6.174-6.180; Born, Arbitration, p. 2358; Hancock/Reed, p. 346*]. Hence, there was no need for the Parties to exclude it from their arbitral proceedings. If one follows CLAIMANT's interpretation of the exclusion, the arbitration clause would thus be of little use and significance in regard to document production. This would be inconsistent with the principle of *favor negotii* inferred from Art. 8 CISG whereby ambiguous clauses should be interpreted in such a way as to produce legal effects [*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §51; Hurni, in: Brunner, Art. 8, §21*].

107 The Tribunal should also consider the *contra proferentem* principle when resorting to the objective interpretation [*Born, Arbitration, p. 1324; Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8, §49; Hurni, in: Brunner, Art. 8, §21; Zuppi, in: Kröll/Mistelis/Perales Viscasillas, Art. 8, §24; Vogenauer, in: Vogenauer, p. 604, §2; Automobile case*]. According to this principle, if the parties' intent is not verifiable, the party that included an unclear term in the contract must bear the risk of its ambiguity [*ibid.*]. In other words, the tribunal must favour an interpretation against the party that drafted the ambiguous term or insisted on including it in the contract [*Born, Arbitration, p. 1324; Vogenauer, in: Vogenauer, p. 607, §9; Nuclear Power Plant case*]. CLAIMANT is the one who submitted the text of Art. 20 FA to RESPONDENT [*Exhibit C12, p. 20*]. If CLAIMANT intended to mean US-style discovery only, it was its duty to draft it unambiguously. Therefore, the Tribunal should privilege an interpretation to the detriment of CLAIMANT.

108 Finally, CLAIMANT argues that an exclusion of all types of documents may infringe the Parties' right to be heard [*MfC, p. 6, §15*]. However, CLAIMANT should have realised that the scholarly opinion it relied on, namely that of *Born,* does not include discovery in the right to be heard [*MfC, p. 6, §15; Born, Arbitration, p.*

2180]. According to that opinion, parties to an arbitration are authorised to validly exclude requests for document production in their arbitration clause [*Born, Drafting, p. 96*]. Therefore, interpreting the clause as excluding all types of document production would not amount to a violation of the Parties' right to be heard.

109 In the event that the Tribunal decides to ignore the Parties' intention by directing the disclosure of RESPONDENT's documents, it runs the risk of having its award annulled, unrecognised or unenforceable pursuant to Art. 34(2)(a)(iv) DAL and 36(1)(a)(iv) Mediterranean Arbitration Law ("**MAL**") respectively. Indeed, both provisions provide that an award may be set aside or that its enforcement may be refused, if "*the arbitral procedure was not in accordance with the agreement of the parties*". In order to preserve the parties' procedural autonomy, an arbitral tribunal should not be allowed to rule against the parties' intent with respect to the procedure [*Born, Arbitration, pp. 3261 and 3560*]. Whether the proceedings have been conducted in compliance with the parties' intent is essentially a matter of interpretation of the arbitration agreement [*Born, Arbitration, p. 3561*]. In this regard, arbitral tribunals are often faced with the task to enlighten an unclear wording of the clause without contradicting it [*Latex case*]. Thus, if the parties' intention is clear for a reasonable person in the position of the parties, the arbitral tribunal must follow it [*ibid.*].

110 In the present case, the above development shows that the purpose of Art. 20 FA agreed by the Parties was the exclusion of all types of requests for document production. Assuming that the Tribunal interprets the clause as a mere exclusion of US-style discovery, the Tribunal would then be in violation of the Parties' agreement on the arbitral procedure. This would hence constitute a ground for annulment and an obstacle to enforcement.

II. SHOULD THE TRIBUNAL FIND THAT IT IS EMPOWERED BY THE PARTIES TO ORDER DOCUMENT PRODUCTION, CLAIMANT'S REQUEST SHOULD BE DISMISSED IN ITS ENTIRETY

111 CLAIMANT urges the Tribunal to apply the IBA Rules when assessing its request for document production [*MfC, pp. 7-8, §§18-23*]. RESPONDENT respectfully reminds the Tribunal that it is not bound by them.

112 RESPONDENT does not believe that it is necessary to argue whether and to what extent the IBA Rules do reflect the international practice with respect to the document production in international arbitration [*MfC, p. 7, §§19-20*]. The important point is, on the one hand, that the IBA Rules are not *per se* mandatory for the arbitral tribunal [*Born, Arbitration, p. 2212*] and, on the other hand, that, as they are part of soft law [*Kaufmann-Kohler/Rigozzi, pp. 26-27, §§1.77-1.78 and p. 318, §6.68*], the parties need to expressly agree

upon their application [*Art. 1(1)(2) IBA Rules; Born, Arbitration, p. 2212; Haugeneder/Netal, in: Handbook Vienna Rules, Art. 29, p. 172, §5*]. In the case at hand, the Parties did not consent to the application of the IBA Rules. CLAIMANT cannot merely rely on the reference to "*international practice*" in Art. 20 FA to infer the Parties' intention to adopt them [*MfC, p. 7, §19*]. Moreover, it is undisputed that the Parties were unaware of the IBA Rules at the time of the conclusion of the FA [*PO2, p. 60, §53*], which alone should settle this point.

113 The Tribunal must comply with the set of rules chosen by the Parties [*Art. V(1)(d) NYC; Art. 19(1) DAL; Art. 34(2)(a)(iv) DAL; Art. 36(1)(a)(iv) DAL*]. However, neither the DAL nor the Vienna Rules require the Tribunal to apply the IBA Rules when assessing CLAIMANT's request for document production.

114 RESPONDENT does not contest that the Tribunal may regard the IBA Rules as useful guidance on the issue of document production [*Kaufmann-Kohler/Rigozzi, p. 318, §6.68*; *Zuberbühler/Hofmann/Oetiker/Rohner, Preamble, §13 and Art. 3, §68*; *Born, Arbitration, p. 2212*; *CME case*; *Thunderbird case*]. It is however of the opinion that their *harum-scarum*, *talis qualis* application could jeopardise the flexibility of arbitral proceedings [*Redfern/Hunter, p. 30, §1.104 and p. 377, §6.81; Sachs, p. 196*] and thus, ignore the specific needs of the dispute at hand [*Redfern/Hunter, p. 30, §1.104*]. Should the Tribunal decide to rely upon the IBA Rules as guidelines for the assessment of CLAIMANT's request for document disclosure, it is respectfully requested to take into account the special requirements of the present case.

115 Irrespective of the Tribunal's decision with regard to the application of the IBA Rules, CLAIMANT's request for document disclosure shall be dismissed in its entirety. Indeed, contrary to CLAIMANT's submissions, the Requested Documents are irrelevant to the present case (**A**). Should the Tribunal recognise the relevance of the Requested Documents, they still lack materiality to the outcome of the present case (**B**). Even if the Tribunal holds that the Requested Documents are indeed material, CLAIMANT's request is excessively broad and thus, amounts to a fishing expedition (**C**). Moreover, CLAIMANT's right to be heard does not hinder the Tribunal from dismissing its document request (**D**). Finally, the Requested Documents are protected by commercial confidentiality (**E**).

A. THE REQUESTED DOCUMENTS ARE IRRELEVANT TO THE PRESENT CASE

116 Contrary to CLAIMANT's assertions [*MfC, pp. 9-10, §§28-30*], the Requested Documents are irrelevant to the present case. It is generally accepted that a relevant document is intended to prove the asserted facts and allegations on which a legal claim is based [*Raeschke-Kessler, p. 427; Ylikantola, p. 133; Kaufmann-Kohler/Bärtsch, p. 18*]. However, CLAIMANT wrongfully asserts that the Requested Documents can provide it with the information enabling it to prove and quantify its damages. As explained above, RESPONDENT's

profits made from the sale of its diamond MW 2014 to SW cannot and do not reflect CLAIMANT's lost profits [*cf. supra p. 30, §81*]. The Requested Documents are therefore irrelevant to the case.

B. IN ANY EVENT, THE REQUIREMENT OF MATERIALITY IS NOT MET

117 Even if the Tribunal considers the Requested Documents as relevant to the case, they are not material to its outcome. A document is deemed material if the arbitral tribunal's final decision is likely to be influenced by it [*O'Malley, Commentary, pp. 472-473; Born, Arbitration, p. 2362*; *Ylikantola, p. 133; Karaha Bodas Co case; ABB case*]. Therefore, where the requesting party can adduce evidence of the asserted facts and allegations by other means, the requested documents will not affect the final award [*Marghitola, p. 53*; *O'Malley, Rules of Evidence, p. 58, §§3.75-3.76*; *Zuberbühler/Hofmann/Oetiker/Rohner, Art. 3, §§136-137; Hosang, p. 798; Kaufmann-Kohler/Bärtsch, p. 18; Karaha Bodas Co case; ABB case*]. As demonstrated above [*cf. supra p. 32, §91*], the evidence which is available to CLAIMANT is sufficiently cogent to calculate CLAIMANT's damages and consequently, its claim for RESPONDENT's profits. The Requested Documents are therefore immaterial to the outcome of CLAIMANT's claim and the request should be denied in its entirety.

C. IN ANY CASE, CLAIMANT'S REQUEST IS EXCESSIVELY BROAD AND THUS, AMOUNTS TO A FISHING EXPEDITION

118 CLAIMANT's request is excessively broad and therefore, should be dismissed for amounting to a fishing expedition. Contrary to CLAIMANT's assertion [*MfC, p. 10, §32*], the fishing expedition does not only aim at searching new claims. It also encompasses blind searches for evidence [*Habegger, p. 30, §34*]. The fishing expedition occurs "*where a party requests production of a very vaguely identified group of documents in the hope of finding supporting material in the adversary's evidence*" [*Kozlowska, p. 53*]. Indeed, the purpose of the document production is to prove a case and not to build it [*Tercier/Bersheda, p. 80; Hanotiau, p. 358*]. Therefore, the request for documents merely intended to gather information or to create a factual basis for the claim amounts to a fishing expedition [*Tercier/Bersheda, p. 80; Habegger, p. 30, §34*].

119 Furthermore, contrary to what it argues [*MfC, p. 11, §34 and p. 12, §37*], CLAIMANT requests the disclosure of two categories of documents, namely: "*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*" [*SoC, p. 7, §27; MfC, p. 3, §1*]; and "*any contractual documents, including documents relating to the negotiation of the said contract between SuperWines and the RESPONDENT in regard to the purchase of diamond Mata Weltin 2014*" [*ibid.*]. Both the first (**1**) and the second category (**2**) of the Requested Documents are defined too broadly.

1. The First Category of the Requested Documents Is Overly Broad

120 Requests aiming at "*all documents relating to*" or "*all the correspondence exchanged between the parties*" are generally dismissed, especially if they stretch over a long period of time [*Hanotiau, p. 358; O'Malley, Rules of Evidence, p. 41, §3.35; Railroad Development case*]. Indeed, they do not satisfy the requirement of narrowness and specificity [*Jenkins, pp. 376, 382 and 385; O'Malley, Rules of Evidence, p. 41, §3.35*]. Such broadly formulated requests essentially seek inspection of the other party's file, which is inadmissible in international arbitration [*Raeschke-Kessler, p. 417*]: "[i]*f the request is just a shot in the dark, asking for "all documents relating to…", then this is exactly the type of "fishing expedition" that is prohibited in international arbitration*" [*Karrer, p. 116*]. Such requests disturb a balance which the international arbitration practice strives to reach between the common law and civil law approach with respect to the document disclosure [*Grierson/van Hooft, p. 178; Kaufmann-Kohler/Rigozzi, pp. 318-319, §6.72*]. The burden of establishing what types of documents are relevant and the task of formulating a sufficiently narrow and specific category lies exclusively within the requesting party [*Grierson/van Hooft, p. 178*].

121 In the famous *Biwater Gauff case*, three eminent arbitrators held that some of the requested documents were relevant to the issues in dispute. However, the requests were overly broad - and the production of those documents unduly burdensome - insofar as the requests pertained to *"all documents relating to the subject matter of the request*[s]" [*Biwater Gauff case*]. Therefore, the tribunal considered several requests beginning with "*all documents relating to*" not to have met the requirement of a narrow and specific category and either dismissed them in their entirety or drastically narrowed them down.

122 In the present case, CLAIMANT request for "*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*" [*SoC, p. 7, §27; MfC, p. 3, §1*] does not comply with the requirement of a narrow and specific category.

123 Moreover, the nineteen-month timeframe mentioned in CLAIMANT's request is too vague in view of the circumstances of the case even if it is true that a general timeframe suffices [*MfC, p. 11, §35*]. CLAIMANT wrongly prevails itself of a Swiss Supreme Court's decision to prove the reasonableness of the indicated timeframe [*MfC, pp. 11-12, §36; Semiconductors case*]. While it is true that defendant's request bore upon the documents established between August 2004 and April 2006, the arbitral tribunal subsequently limited the time period to ten months. Moreover, the Court dismissed the appeal against the production order solely on the basis of the non-appealability of such orders. Finally, as the defendant's claim bore upon the commission on all the sales effected between August 2004 and April 2006, it was logical that the request for disclosure

itself was intended to cover an identical time period. Hence, the timeframe was adapted to the circumstances of the case.

124 *In casu*, CLAIMANT maintains that it is requesting only the information enabling it to quantify its claim for damages [*MfC, pp. 11-12, §33*]. Therefore, it is hardly understandable why it needs all the documents relating to the communications between SW and RESPONDENT established within this nineteen-month period. Contrary to what CLAIMANT asserts [*MfC, p. 11, §35*], the negotiations between RESPONDENT and SW began in May 2014 only and lasted until July 2014 [*PO2, p. 56, §21*]. As to SW's offer to buy 15'000 bottles of MW 2014, it was submitted on 25 November 2014 only [*MfC, p. 11, §35*]. CLAIMANT omits to mention that all the sales contracts bearing upon 95% of RESPONDENT's annual production are usually concluded by March [*PO2, p. 59, §45*]. Therefore, the purchase price sought by CLAIMANT would reasonably be established within this eleven-month period. To conclude, the first category of the Requested Documents is overly broad.

2. The Second Category of the Requested Documents Is Overly Broad

125 As CLAIMANT correctly asserts, a request is narrow and specific when it is reasonably limited regarding its subject matter, content and time [*MfC, pp. 10-11, §33; Thunderbird case*]. However, it wrongfully extends the indicated timeframe to the second category of the Requested Documents [*MfC, p. 11, §34*]. The formulation of the request is clear: CLAIMANT seeks access to "*all documents* […] *and any contractual documents, including documents relating to the negotiation of the said contract between SuperWines and the RESPONDENT*" [*MfC, p. 3, §1*]. In order for the requested category to fulfil the requirement of narrowness and specificity, the presumed date or timeframe within which the requested documents were established shall be specified [*Zuberbühler/Hofmann/Oetiker/Rohner, Art. 3, §§112-113; Raeschke-Kessler, p. 418; O'Malley, Commentary, p. 468; Tercier/Bersheda, p. 95; Kaufmann-Kohler/Bärtsch, p. 18; Habegger, p. 25, §16 and p. 31, §36; Ylikantola, p. 132; Munk Schober, p. 23*]. In the present case, CLAIMANT fails to limit in time the second category of the Requested Documents. For this reason, its request should be dismissed as excessively broad.

126 If the Tribunal decides to extend the indicated timeframe to the second category, for the reason mentioned above [*cf. supra p. 33, §124*], it is kindly requested to consider it as unreasonably extensive and arbitrary, and thus, dismiss the request in its entirety.

127 By filing such a broadly worded request, CLAIMANT hopes to find evidence in support of its claim for RESPONDENT's profits as it deliberately failed to substantiate its demand. Moreover, the request denotes CLAIMANT's intention to obtain information going beyond the purchase price paid by SW. Such malicious

intention derives from the last sentence of CLAIMANT's request where it asks for "*in particular all documents relating to the number of bottles purchased and the purchase price*". CLAIMANT's request shall therefore be defined as a fishing expedition for information, and perhaps for new claims. It should consequently be dismissed in its entirety.

D. CLAIMANT'S RIGHT TO BE HEARD DOES NOT HINDER THE TRIBUNAL FROM DISMISSING ITS REQUEST

128 CLAIMANT might have argued that the dismissal of its document request would violate its right to be heard. However, it is universally accepted that an arbitral tribunal is not bound to hear all the evidence adduced by the parties so as to comply with their right to be heard [*Kaufmann-Kohler/Rigozzi, p. 281, §6.33*; *Karaha Bodas Co case; Football Players case; Nickel Products case*]. Therefore, any refusal by the arbitral tribunal to address relevant evidence does not violate the parties' procedural rights [*Karaha Bodas Co case*]. Only the dismissal of evidence which is material to the outcome of the case impairs the parties' procedural right to a fair trial [*Kaufmann-Kohler/Rigozzi, p. 281, §6.33*; *Karaha Bodas Co case; Football Players case; Nickel Products case*]. As stated above [*cf. supra p. 30, §116 and p. 31, §117*], CLAIMANT's request is neither relevant, nor material. Hence, the dismissal of its request will by no means undermine its right to be heard.

E. THE REQUESTED DOCUMENTS ARE PROTECTED BY COMMERCIAL CONFIDENTIALITY

129 Contrary to CLAIMANT's contention [*MfC, p. 12, §38*], the Requested Documents are covered by commercial confidentiality.

130 CLAIMANT submits that there is no express or formal confidentiality agreement between RESPONDENT and SW [*MfC, pp. 12-13, §41*]. While it is undisputed that the Parties did not conclude a written sales contract [*PO2, p. 56, §23*], CLAIMANT nonetheless overlooks the fact that such a confidentiality agreement may not necessarily be in writing. A confidentiality agreement is an additional obligation imposed upon the parties to a sales contract [*Schwenzer/Hachem/Kee, p. 329, §28.24 and p. 332, §28.38*] and is not subject to any form requirements [*Art. 11 CISG*]. In the present case, both parties expected from each other that the terms and conditions of their contract would not be revealed [*PO2, p. 56, §25*]. The intention to keep the actual price paid by SW confidential is supported by the fact that it remained confined to the exclusive knowledge of the Parties [*PO2, p. 56, §24*]. Therefore, SW and RESPONDENT were bound by a valid confidentiality agreement whose breach can trigger RESPONDENT's liability towards SW. This should be acknowledged by the Tribunal as duties owed to a third party and the risk of legal liability are crucial in assessing the objection based on business confidentiality [*Marghitola, p. 94*].

131 The disclosure of the Requested Documents would not only lead to the breach of confidentiality agreement, but also seriously threaten SW's business reputation. It can be reasonably assumed that CLAIMANT's request extends to the information pertaining to the premium paid by SW [*MfC, p. 12, §40*]. Even though Mr Barolo revealed the payment of a market entry free [*ibid.*], the amount of the premium remained confidential [*PO2, p. 56, §24*]. Indeed, it is not excluded that SW paid an unusually high sum to become RESPONDENT's client [*PO2, p. 55, §17*]. Therefore, it could easily be perceived by SW's future customers and competitors as an act of commercial bribery and consequently, jeopardise SW's good standing.

132 Finally, CLAIMANT is seeking access to information pertaining to the purchase price paid by SW [*MfC, p. 3, §1*]. The price calculation, and thus the price itself, typically falls within the realm of commercial confidentiality [*Marghitola, p. 93*]. Furthermore, RESPONDENT practises customised pricing for each customer and the prices do not necessarily reflect the true market conditions [*PO2, p. 61, §61*]. As individual pricing is part of RESPONDENT's business strategy and arguably key to its commercial success, it is sensible decision for RESPONDENT to keep prices confidential and to refuse to disclose them to third parties, including unconcerned customers. In light of the above, commercial confidentiality should be held as requiring the Tribunal to abstain from ordering the production of the Requested Documents.

In the event CLAIMANT's claim for damages is granted, the Tribunal should deny CLAIMANT's request for document production. First, the exclusion of discovery in the arbitration clause prevents the Tribunal from considering the production of the Requested Documents. Moreover, should the Tribunal finds that it is generally empowered to order document production, CLAIMANT's request should be dismissed in its entirety for its non-compliance with the requirements of document production as established by international practice.

PRAYER FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Tribunal to:

1) Dismiss CLAIMANT's claim for the award of attorneys' fees as damages;

2) Deny CLAIMANT's request for the disgorgement of RESPONDENT's profits;

3) Deny CLAIMANT's request to use RESPONDENT's profits as a method of calculation of its alleged damages;

4) Dismiss CLAIMANT's request for document production in its entirety.

TABLE OF AUTHORITIES

Blase/Höttler Blase Friedrich, Höttler Philipp, *Claiming Damages in Export Trade*, *On Recent Developments of Uniform Law*

in: *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2004-2005*, Munich 2006

Cited in: §92

Bock, Vertragsverletzung Bock Anne-Florence, *Gewinnherausgabe als Folge einer Vertragsverletzung*, Basel 2010

Cited in: §54

Bock, CISG Bock Anne-Florence, *Gewinnherausgabeansprüche gemäss CISG*

in: Büchler Andreas, Müller-Chen Markus (Eds.), *Private Law - national - global - comparative Festschrift für Ingeborg Schwenzer zum 60. Geburtstag (Band I)*, Bern 2011, pp. 175-189

Cited in: §63

Born, Arbitration Born Gary B., *International Commercial Arbitration,* 2nd ed., Alphen on the Rhine 2014

Cited in: §§33, 99, 103, 106, 107, 108, 109, 112, 114, 117

Born, Cases Born Gary B., *International Arbitration Cases and Materials*, 2nd ed., Alphen on the Rhine 2015

Cited in: §4

Born, Drafting Born Gary B., *International Arbitration and Forum Selection Agreements: Drafting and Enforcing,* 4th ed., Alphen on the Rhine 2013

Cited in: §§103, 108

Bouchenaki / El-Ahdab Bouchenaki Amal, El-Ahdab Jalal, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*

in: Albert Jan van den Berg (Ed.), *Arbitration Advocacy in Changing Times, ICCA Congress Series, Volume 15*, Kluwer Law International 2011, pp. 65-113

Cited in: §105

Bridge Bridge Michael, *The International Sales of Goods*, 3rd ed., Oxford 2013

Cited in: §§12, 36, 42, 63

Brölsch Brölsch Martin W., *Schadenersatz und CISG*, Frankfurt am Main 2007

Cited in: §53

[*Author*], *in: Brunner* Brunner Christoph (Ed.), *UN-Kaufrecht-CISG*, 2nd ed., Bern 2014

Cited in: §§22, 27, 51, 53, 56, 105, 106, 107

Bucy Bucy Dana Renée, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*

in: 25 American University International Law Review 2010, pp. 579-609

Cited in: §18

Business Litigation Update Fox Warner S., Levinson Martin A., Ellingburg C Michael, *Atlernative Fee Arrangements: An Idea Whose Time Has Come?*

in: Alfa International Business Litigation Update, Issue 1, 2010, pp. 13-22

Cited in: §37

[Author], in: Conrad/Münch/Black-Branch	Conrad Nicole, Münch Peter, Black-Branch Jonathan (Eds.), *International Commercial Arbitration Standard Clauses and Forms Commentary*, Basel 2013 Cited in: §§103, 106
Chengwei	Chengwei Liu, *Remedies for Non-Performance: Perspectives from CISG, UNIDROIT Principles & PECL*, 2003 available at: http://cisgw3.law.pace.edu/cisg/biblio/chengwei.html Cited in: §§29, 51, 53
Demir	Demir Eylem, *Die Schadensersatzregelung im UN-Kaufrecht,* Bern 2015 Cited in: §§53, 54, 57
DiMatteo/Dhooge/Greene/Maurer/Pagnattaro	DiMatteo Larry A., Dhooge Lucien J., Greene Stephanie, Maurer Virginia G., Pagnattaro Marisa Anne, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, New York 2005 Cited in: §32
Dixon	Dixon David, *Que Lastima Zapata! Bad CISG Ruling on Attorneys' Fees Still Haunts U.S. Courts* in: 38 The University of Miami Inter-American Law Review 2007, pp. 405-429 Cited in: §12
Donkersloot	Donkersloot Raphaël, *Exploring a New Remedy for Breach of Contract: a Comparative Study on Account of Profits*, Leiden 2014 Cited in: §70

Dordevic Dordevic Milena,*"Mexican Revolution" in CISG Jurisprudence and Case-Law: Attorneys' Fees as (Non) Recoverable Loss for Breach of Contract*

in: Vasiljevic Mirko, Kulms Rainer, Josopovic Tatjana, Stanivukovic Maja (Eds.), *Private Law Reform in South East Europe : Liber Amicorum Christa Jessel-Holst*, Belgrade 2010, pp. 199-220

Cited in: §13

Dordevic / Pavic Dordevic Milena, Pavic Vladimir, *The CISG in Southeastern Europe*

in: DiMatteo Larry A. (Eds.), *International Sales Law: A Global Challenge*, Cambridge 2014, pp. 419-452

Cited in: §12

Eiselen Eiselen Sieg ,*The CISG as Bridge between Common Law and Civil Law*

in: DiMatteo Larry A. (Eds.), *International Sales Law: A Global Challenge*, Cambridge 2014, pp. 612-629

Cited in: §56

Felemegas Felemegas John, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*

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

Cited in: §12

Ferrari, Foreseeability Ferrari Franco, *Foreseeability under Article 74 CISG*

in: Saidov Djakhongir, Cunnington Ralph (Eds.), *Contract damages: Domestic and International Perspectives,* Oxford 2008, pp. 305-327

Cited in: §36

Ferrari, Autonomous Interpretation

Ferrari Franco, *Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts*

in: Andersen Camilla B., Schroeter Ulrich G. (Eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, London 2008, pp. 134-167

Cited in: §56

Flambouras

Flambouras Dionysios P., *Case Law of Greek Courts for the Vienna Convention (1980) for International Sale of Goods*

in: 2 Nordic Journal of Commercial Law 2009, pp. 1-39

Cited in: §61

Flechtner

Flechtner Harry, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking*

in: 22 Northwestern Journal of International Law & Business 2001/2002, Issue 2, pp. 121-160

Cited in: §§11, 13, 15

Flechtner/Lookofsky

Flechtner Harry, Lookofsky Joseph, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*

in: 7 Vindobona Journal of International Commercial Law and Arbitration 2003, pp. 93-104

Cited in: §§11, 12, 13

Hanotiau Hanotiau Bernard, *Massive Productions of Documents and Demonstrative Exhibits*

in: Giovannini Teresa, Mourre Alexis (Eds.), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossier of the ICC Institute of World Business Law, Volume 6*, Kluwer Law International ICC 2009, pp. 357-363

Cited in: §§118, 120

Hartmann Hartmann Felix, *Ersatzherausgabe und Gewinnhaftung beim internationalen Warenkauf*

in: 5 Internationales Handelsrecht 2009, pp. 189-200

Cited in: §§54, 56, 57, 58, 63, 83

Hondius / Janssen Hondius Ewoud, Janssen André (Eds.), *Disgorgement of Profits: Gain-Based Remedies throughout the World*, Heidelberg, New York Dordrecht London 2015

Cited in: §§52, 70, 71, 72

Honnold Honnold John O., *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed., Alphen on the Rhine 2009

Cited in: §§11, 12, 13, 32, 36

[*Author*], *in: Honsell* Honsell Heinrich (Ed.), *Kommentar zum UN-Kaufrecht*, Heidelberg, Dordrecht London New York 2010

Cited in: §§22, 27, 51, 92

Hosang Hosang F. Alain, *Adverse Inferences as a Consequence of the Non- Production of Documents According to the 2010 IBA Rules of Evidence in International Commercial Arbitration*

in: Büchler Andreas, Müller-Chen Markus (Eds.), *Private Law - national - global - comparative Festschrift für Ingeborg Schwenzer zum 60. Geburtstag (Band I)*, Bern 2011

Cited in: §117

Huber/Mullis Huber Peter, Mullis Alastair, *The CISG: A new textbook for students and practitioners*, Munich 2007

Cited in: §§10, 29, 30, 36, 53, 65, 92

Hunter Hunter Howard O., *Modern Law of Contracts: Revised Edition, Volume 2,* Tennesse 2015

Cited in: §§8, 13

ILA Report 2004 2004 International Law Association Berlin Conference, International Arbitration, *Interim Report: "Res Judicata" and Arbitration*

available at: http://www.ila-hq.org/en/committees/index.cfm/cid/19

Cited in: §4

Jäger Jäger Markus, *Reimbursement for Attorney's fees*, The Hague 2010

Cited in: §12

Jenkins Jenkins Jane, *International Construction Arbitration Law*, 2nd ed., Alphen on the Rhine 2013

Cited in: §120

Karrer Karrer A. Pierre, *Introduction to International Arbitration Practice: 1001 questions and answers*, Alphen on the Rhine 2014

Cited in: §120

Kaufmann-Kohler/Bärtsch Kaufmann-Kohler Gabrielle, Bärtsch Philippe, *Discovery in international arbitration: How much is too much?*

in: 1 SchiedsVZ 2004, pp. 12-21

Cited in: §§116, 117, 125

Kaufmann-Kohler/Rigozzi Kaufmann-Kohler Gabrielle, Rigozzi Antonio, *International Arbitration: Law and Practice in Switzerland*, Oxford 2015

Cited in: §§18, 23, 112, 116, 120, 128

Keily Keily Troy, *How does the Cookie Crumble? Legal Costs under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods*

in: 1 Nordic Journal of Commercial Law 2003

Cited in: §§11, 12

Kirby Kirby Jennifer, *Efficiency in International Arbitration; Whose Duty Is It?*

in: 32 Journal of International Arbitration, Kluwer Law International 2015, Issue 6, pp. 689-696

Cited in: §113

Magnus Magnus Ulrich, *Remedies: Damages, Price Reduction, Avoidance, Mitigation and Preservation*

in: DiMatteo Larry A. (Ed.), *International Sales Law: A Global Challenge*, Cambridge 2014, pp. 257-285

Cited in: §§30, 42

Marghitola Marghitola Reto, *Document Production in International Arbitration*, Alphen on the Rhine 2015

Cited in: §§103, 105, 106, 117, 130, 132

[*Author*], *in: Staudinger* Martinek Michael (Ed.), *Staudinger Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)*, Berlin 2013

Cited in: §§22, 51, 53

Matar Matar Amir, *Second International Conference for a Euro-Mediterranean Community of International Arbitration*

in: Kluwer Arbitration Blog, 24 December 2015

available at: http://kluwerarbitrationblog.com/2015/12/24/second-international-conference-for-a-euro-mediterranean-community-of-international-arbitration/

Cited in: §105

McCamus McCamus John D., *Disgorgement for Breach of Contract: a Comparative Perspective*

in: 36 Loyola of Los Angeles Law Review 2003

Cited in: §71

Mullis Mullis Alastair, *Twenty-Five Years On - The United Kingdom, Damages and the Vienna Sales Convention*

in: 71 Rabels Zeitschrift für Ausländisches Privatrecht 2007, pp. 35-51

Cited in: §§11, 12, 29, 30

Munk Schober Munk Schober Aleksandra, *Urkundenedition im internationalen Schiedsverfahren*, Zurich Basel Geneva 2007

Cited in: §125

O'Malley, Rules of Evidence O'Malley Nathan D., *Rules of Evidence in International Arbitration: An Annotated Guide*, London 2012

Cited in: §§117, 120

O'Malley, Commentary O'Malley Nathan D., *An Annotated Commentary on the 2010 Revised IBA Rules of Evidence for International Arbitration*

in: 27 The International Construction Law Review, October 2010, pp. 463-510

Cited in: §§117, 125

Piltz Piltz Burghard, *Litigation Costs as Reimbursable Damages*

in: DiMatteo Larry A. (Ed.), *International Sales Law: A Global Challenge*, Cambridge 2014, pp. 286-294

Cited in: §53

Raeschke-Kessler Raeschke-Kessler Hilmar, *The Production of Documents in International Arbitration - A Commentary on Article 3 of the New IBA Rules of Evidence*

in: 18 Arbitration International 2002, pp. 411-430

Cited in: §§116, 120, 125

Redfern/Hunter	Blackaby Nigel, Partasides Constantine, Redfern Alan, Hunter Martin, *Redfern and Hunter on International Arbitration,* 6th ed., Oxford 2015 Cited in: §114
Reich	Reich Arie, *Case abstract of Adras Construction Co. Ltd. v. Harlow & Jones GmbH*, 2 November 1988 Available at: http://cisgw3.law.pace.edu/cases/881102i5.html Cited in: §58
Sachs	Sachs Klaus, *Use of documents and document discovery: "Fishing expeditions" versus transparency and burden of proof* in: 5 SchiedsVZ 2003, pp. 193-198 Cited in: §114
Saidov, Law of Damages	Saidov Djakhongir, *The Law of Damages in International Sales: The CISG and other International Instruments*, Oxford Portland Oregon 2008 Cited in: §§12, 16, 36, 42, 51, 84, 95
Saidov, Standards of Proving Loss	Saidov Djakhongir, *Standards of Proving Loss and Determining the Amount of Damages* in: 22 Journal of Contract Law, March 2006, pp. 1-76 Cited in: §§78, 90
Schlechtriem, Experience with Uniform Sales Law	Schlechtriem Peter, *Uniform Sales Law - The Experience with Uniform Sales Law in the Federal Republic of Germany,* in: 92 Juridisk Tidskrift 1991, pp. 1-28 Cited in: §58

Schlechtriem, Legal Costs Schlechtriem Peter, *Legal Costs as Damages in the Application of UN Sales Law*

in: 26 Journal of Law and Commerce 2006, pp. 71-80

Cited in: §13

Schlechtriem/Butler Schlechtriem Peter, Butler Petra, *UN Law on International Sale: The UN Convention on the International Sale of Goods*, Berlin Heidelberg 2009

Cited in: §30

[*Author*], *in:* *Schlechtriem/Schwenzer* Schlechtriem Peter, Schwenzer Ingeborg (Eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG),* 3rd ed., Oxford 2010

Cited in: §§16, 22, 27, 30, 36, 42, 51, 53, 56, 65, 68, 78, 85, 101, 102, 104, 105, 106, 107

Schmidt Schmidt Mareike, *Profiting from Substitute Transactions? - Offsetting Losses and Benefits under the CISG*

in: Büchler Andreas, Müller-Chen Markus (Eds.), *Private Law - national - global - comparative Festschrift für Ingeborg Schwenzer zum 60. Geburtstag (Band II)*, Bern 2011, pp. 1499-1512

Cited in: §61

Schmidt-Ahrendts Schmidt-Ahrendts Nils, *Disgorgement of Profits under the CISG*

in: Schwenzer Ingeborg, Spagnolo Lisa (Eds.), *State of play, The 3rd Annual MAA Schlechtriem CISG Conference: International Commerce and Arbitration, Volume 11*, The Hague 2012, pp. 89-102

Cited in: §§52, 54

Vékás Vékás Lajos, *The Foreseeability Doctrine in Contractual Damage Cases*

in: 43 Acta Juridica Hungarica 2002, pp. 145-174

Cited in: §36

Vishnevskaya Vishnevskaya Olga, *Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?*

in: 32 Journal of International Arbitration, Kluwer Law International 2015, Issue 2, pp. 173-214

Cited in: §4

[*Author*], *in: Vogenauer* Vogenauer Stefan (Ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC),* 2nd ed., Oxford 2015

Cited in: §107

Walt Walt Steven D., *Modest Role of Good Faith in Uniform Sales Law*

in: 8 Virginia Public Law and Legal Theory 2014, pp. 37-73

Cited in: §§65, 97

Weinrib Weinrib Ernest J., *Punishment and Disgorgement as Contract Remedi es*

in: 78 Chicago-Kent Law Review 2003, pp. 55-103

Cited in: §52

[Author], in: Münch/Komm Westermann Harm Peter (Ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 3, CISG,* Munich 2016

Cited in: §13

Yesilirmak Yesilirmak Ali, *Provisional Measures in International Commercial Arbitration*, The Hague 2005

Cited in: §18

Ylikantola Ylikantola Timo, *Document discovery in current international arbitration practice: Are there differences between common law and What's the civil law traditions?*

in: 16 Vindobona Journal of International Commercial Law and Arbitration 2012, pp. 123-144

Cited in: §116, 117, 125

Zeller, Damages Zeller Bruno, *Damages under the Convention on Contracts for the International Sale of Goods*, 2nd ed., Oxford 2009

Cited in: §§8, 32, 36, 97

Zeller, Good Faith Zeller Bruno, *Good Faith - The Scarlet Pimpernel of the CISG*, May 2000

Available at: http://www.cisg.law.pace.edu/cisg/biblio/zeller2.html

Cited in: §97

Zeller, Interpretation Zeller Bruno, *Interpretation of Article 74 - Zapata Hermanos v. Hearthside Baking - Where Next?*

in: 1 Nordic Journal of Commercial Law 2004

Cited in: §12

Zoccolillo Zoccolillo Alan F., *Determination of the Interest Rate Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: General Principles vs. National Law*

in: 1 Vindobona Journal J. 3 1997, pp. 3-43

Cited in: §61

Zuberbühler / Hofmann / Oetiker / Rohner Zuberbühler Tobias, Hofmann Dieter, Oetiker Christian, Rohner Thomas, *IBA Rules of Evidence*: *Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Zurich Basel Geneva 2012

Cited in: §§114, 117, 125

TABLE OF ARBITRAL AWARDS

Cited as	Reference
	Ad hoc Arbitration
AB Corporation case	AB Corporation v. CD Company (The "Sine Nomine") Third interim final award 19 November 2001 available at: http://www.ucc.ie/law/restitution/archive/englcases/sine_nomine.htm) Cited in: §73
CME case	CME Czech Republic B.V. v. The Czech Republic Partial award and separate opinion 13 September 2001 available at: http://www.italaw.com/cases/documents/282 Cited in: §114
Oil Companies case	Hulley Enterprises Limited (Cyprus) v. The Russian Federation Final Award 18 July 2014 Case No.: AA 226 available at: http://www.kluwerarbitration.com/CommonUI/document.aspx?id=kli-ka-15-8-017 Cited in: §103

Thunderbird case International Thunderbird Gaming Corporation v. The United Mexican States

Procedural Order No. 2

31 July 2003

available at: http://www.italaw.com/cases/571

Cited in: §§114, 125

Arbitration Court of the Chamber of Commerce and Industry of Budapest

Sour Cherries case Seller (Hungary) v. Buyer (Austria)

Award of the 25 May 1999

Case No.: VB 97142

available at: http://cisgw3.law.pace.edu/cases/990525h1.html

Cited in: §42

International Centre for Settlement of Investment Disputes

Biwater Gauff case Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania

Procedural Order No. 2

24 May 2006

Case No.: ARB/05/22

available at: http://www.italaw.com/cases/157

Cited in: §121

Railroad Development case Decision on Provisional Measures

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23

15 October 2008

Cited in: §120

International Chamber of Commerce

ICC 8324/1995 ICC Case No. 8324 of 1995

available at: http://cisgw3.law.pace.edu/cases/958324i1.html

Cited in: §102

ICC 8362/1995 ICC Case No. 8362 of 1995

available at:
http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn6101

Cited in: §78

International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation

ICAC 406/1998 ICAC Case No. 406 of 1998

Buyer (Great Britain) v. Seller (Russian Federation)

available at: http://cisgw3.law.pace.edu/cases/000606r1.html

Cited in: §8

ICAC 54/1999 ICAC Case No. 54 of 1999

Buyer (USA) v. Seller (Russian Federation)

available at: http://cisgw3.law.pace.edu/cases/000124r1.html

Cited in: §102

ICAC 95/2004 ICAC Case No. 95 of 2004

Seller (Russian Federation) v. Buyer (Turkey)

available at: http://cisgw3.law.pace.edu/cases/050527r1.html

Cited in: §105

Stockholm Chamber of Commerce

SCC 107/1997	SCC Award No. 107 of 1997 available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=435&step=FullText Cited in: §32
SCC 2007	SCC Award No. (Unavailable) of 2007 Seller (Brazil) v. Buyer (People's Republic of China) available at: http://cisgw3.law.pace.edu/cases/070405s5.html Cited in: §§74, 95

Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade

Metal Production Goods case	Seller (Germany) v. Buyer (Ukraine) Award of the 9 July 1999 available at: http://cisgw3.law.pace.edu/cases/990709u5.html Cited in: §42

TABLE OF COURT DECISIONS

Cited as	Reference
	Austria
Automobile case	Oberlandesgericht Stuttgart [Provincial Court of Appeal] 31 March 2008 Case No.: 6 U 220/07 Cited in: §107
Cooling System case	Oberster Gerichtshof [Supreme Court] 14 January 2002 Case No.: 7 Ob 301/01t Cited in: §§8, 30, 32, 36
Excavator case	Oberlandesgericht Graz [Provincial Court of Appeal] 24 January 2002 Case No.: 4 R 219/01k Cited in: §42
Propane case	Oberster Gerichtshof [Supreme Court] 6 February 1996 Case No.: 10 Ob 518/95 Cited in: §42

Roofing case Oberster Gerichtshof [Supreme Court]

9 March 2000

Case No.: 6 Ob 311/99z

Cited in: §53

Canada

Photography case Jostens Canada Ltd v. Gibsons Studio Ltd

Court of Appeal for British Columbia

28 April 1999

Case No.: [1999] BCCA 273

Cited in: §71

England and Wales

ABB case ABB AG v. Hochtief Airport GmbH and Another

High Court of Justice

8 March 2006

Case No.: [2006] EWHC 388

Cited in: §117

Blake case Attorney General v. Blake and Another

House of Lords

27 July 2000

Case No.: [2000] UKHL 45

Cited in: §§54, 70, 71, 72

Hotel case Murad and Another v. Al-Saraj and Another

Court of Appeal

29 July 2005

Case No.: [2005] EWCA Civ 959

Cited in: §71

Wrotham Park case Wrotham Park Estate Co Ltd v. Parkside Homes Ltd

High Court of Justice

19 October 1973

Case No.: [1974] 1 WLR 798

Cited in: §71

WWF case World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc

Court of Appeal

2 April 2007

Case No.: [2008] 1 WLR 445

Cited in: §71

European Union

Bananas Import case Camar Srl v. Commission of the European Communities and Council of the European Union

Order of the President of the Court

Court of Justice of the European Union (CJEU), Court of First Instance

15 April 1998

Case No.: C-43/98 P(R)

Cited in: §18

Finland

Plastic Carpets case Helsingin Hoviokeus [Helsinki Court of Appeal]

26 October 2000

Case No.: S 00/82

Cited in: §78

France

Brassiere Cups case Cour d'appel de Rennes [Provincial Court of Appeal]

27 May 2008

Case No.: 07/03098

Cited in: §42

Footwear case Sté Calzados Magnanni v. SARL Shoes General International

Cour d'appel de Grenoble [Appeal Court]

21 October 1999

Case No.: 97/03974

Cited in: §92

Jeans Bonaventure case SARL BRI Production "Bonaventure" v. Société Pan African Export

Cour d'appel Grenoble [Appeal Court]

22 February 1995

Case No.: 93/3275

Cited in: §§95, 97

Germany

Defective Wine case	LandGericht München [District Court] 30 August 2002 Case No.: 12 HKO 5593/01 Cited in: §92
Fabrics case	Oberlandesgericht Bamberg [Provincial Court of Appeal] 13 January 1999 Case No.: 3 U 83/98 Cited in: §36
Flagstone Tiles case	Amtsgericht Alsfeld [Petty District Court] 12 May 1995 Case No.: 31 C 534/94 Cited in: §42
Shoes case	Oberlandesgericht Düsseldorf [Provincial Court of Appeal] 14 January 1994 Case No.: 17 U 146/93 Cited in: §15
Stainless Steel Wire case	Bundesgerichtshof [Federal Supreme Court] 25 June 1997 Case No.: VIII ZR 300/96 Cited in: §§36, 78

Trade Accounts case Oberlandesgericht Dresden [Provincial Court of Appeal]

27 December 1999

Case No.: 2 U 2723/99

Cited in: §102

Used Car case Oberlandesgericht Köln [Provincial Court of Appeal]

21 May 1996

Case No.: 22 U 4/96

Cited in: §36

Video Recorder case Landgericht Darmstadt [District Court]

9 May 2000

Case No.: 10 O 72/00

Cited in: §§10, 78, 92

Hong Kong

Latex case Wah-Chang International Co. Ltd and Another v. Tiong Huat Rubber Factory Bhd.

Civil Court of Appeal

18 January 1991

Case No: 1 HKC 28

Cited in: §109

Israel

Adras Case	Adras Chmorey Binyan v. Harlow & Jones GmbH Israeli Supreme Court 2 November 1988 Case No.: 20/82 Cited in: §58

New Zealand

Trucks case	RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller High Court of New Zealand 30 July 2010 Case No.: CIV-2009-409-000363 Cited in: §56

Switzerland

Art Books case	Handelsgericht Zurich [Commercial Court] 10 February 1999 Case No.: HG 970238.1 Cited in: §10
Electrical Appliance case	Tribunal Fédéral [Swiss Supreme Court] 30 September 2013 Case No: 4A_232/2013 Cited in: §5

Fruits & Vegetables case	Handelsgericht Aargau [Commercial Court] 26 November 2008 Case No.: HOR.2006.79/AC/tv Cited in: §102
Saltwater case	Handelsgericht Zurich [Commercial Court] 26 April 1995 Case No.: HG 920670 Cited in: §§8, 32
Semiconductors case	Bundesgericht [Swiss Supreme Court] 15 April 2013 Case No.: 4A_596/2012 Cited in: §123
Football Players case	Tribunal Fédéral [Swiss Supreme Court] 23 March 2005 Case No.: 4P.26/2005 Cited in: §128
Nickel Products case	Tribunal Fédéral [Swiss Supreme Court] 17 April 2013 Case No.: 4A_669/2012 Cited in: §128

TETA case Bundesgericht [Supreme Court]

5 April 2005

Case No.: 4C.474/2004

Cited in: §102

United States

Ajax case Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd

United States District Court, Northern District of Illinois

29 January 2003

Case No.: 01 C 5938

Cited in: §14

Chicago Prime Packers case Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.

United States District Court, Northern District of Illinois

21 May 2004

Case No.: 01 C 4447

Cited in: §14

Chicken case Macromex Srl. v. Globex International, Inc.

United States District Court, Southern District of New York

16 April 2008

Case No.: 08 Civ. 114 (SAS)

Cited in: §89

Competitive Business case	Hal Edwards v. Container Kraft & Paper Supply Co. et al. California Court of Appeals, Second District 2 July 1958 Case No.: Civ. No. 22291 Cited in: §§78, 89
Delchi Carrier case	Rotorex Corp. v. Delchi Carrier S.p.A. United States Court of Appeals, 2nd Circuit 6 December 1995 Case No.: 95-7182, 95-7186 Cited in: §53, 78
Guang Dong case	Guang Dong Light Headgear Factory Co. Ltd v. ACI International Inc. United States District Court, Kansas 28 September 2007 Case No.: 03-4165-JAR Cited in: §102
Karaha Bodas Co case	Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara United States Court of Appeals, 5th Circuit 23 March 2004 Case No.: 02-20042, 03-20602 Cited in: §§117, 128

MCC Marble case	MCC Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A. United States Court of Appeals, 11th Circuit 29 June 1998 Case No.: 97-4250 Cited in: §§13, 101, 102
Mid-America Tablewares case	Mid-America Tablewares, Inc. v. Mogi Trading Co. United States Court of Appeals, 7th Circuit 22 November 1996 Case No.: 96-1843 Cited in: §78
Mining Venture case	Houston Corporation Incorporated v. T.K. Meredith et al. Supreme Court of Nevada 4 December 1986 Case No.: 17091 Cited in: §90
Norfolk Railway Company case	Norfolk Southern Railway Company v. Power Source Supply, Inc. United States District Court, Western District of Pennsylvania 25 July 2008 Case No.: 07-140-JJf Cited in: §14

Nuclear Power Plant case	Shaw Group, Inc. v. Triplefine International Corporation United States Court of Appeals, 2nd Circuit 4 March 2003 Case No: 01-9038, 01-9352 Cited in: §107
San Lucio case	San Lucio, S.r.l. et al. v. Import & Storage Services, LLC et al. United States District Court, New Jersey 15 April 2009 Case No.: 07-3031 (WJM) Cited in: §14
Sargon case	Sargon Enterprises, Inc. v. University of Southern California Case No.: 149 Cal. Rptr. 3d 614, 288 P.3d 1237 Cited in: §78
Southwest Battery case	Southwest Battery Corporation v. C.E. Owen et al. Supreme Court of Texas 4 May 1938 Case No.: 7177, 131 Tex. 423 Cited in: §78
Tantalum Carbide case	Treibacher Industries, AG v. Allegheny Technologies, Inc. United States Court of Appeals, 11th Circuit 12 September 2006 Case No.: 05-13995 Cited in: §104

Zapata case Zapata Hermanos Sucesores S.A. v. Hearthside Baking Company Inc.

Unite States Court of Appeals, 7th Circuit

19 November 2002

Case No.: 01-3402, 02-1867, 02-1915

Cited in: §§13, 14

CERTIFICATE

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

Geneva, 19 January 2016

Teymour BRANDER

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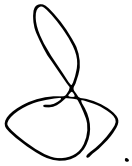
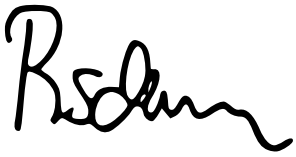


Donika LATIFI



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