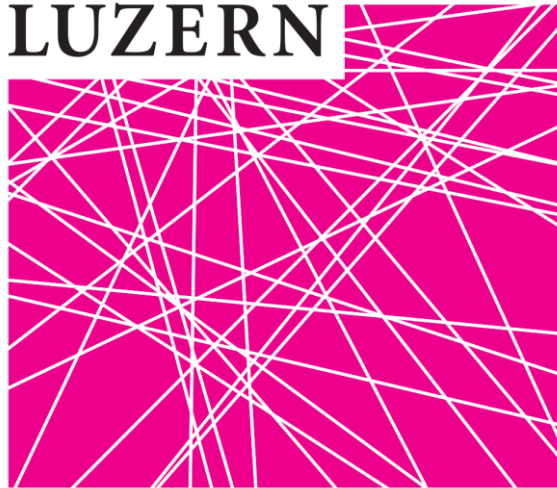


UNIVERSITÄT
LUZERN



Memorandum for CLAIMANT

VIAC Arbitration SCH-1975 – Kaihari Waina Ltd. v. Vino Veritas Ltd.

On behalf of
Kaihari Waina Ltd.
12 Riesling Street
Oceanside
Equatoriana

CLAIMANT

Against
Vino Veritas Ltd.
56 Merlot Rd.
St. Fundus, Vuachoua
Mediterraneo

RESPONDENT

INÈS HOLDEREGGER • FRANZISKA HÜGLI • MARCO KELLER
JEAN-MICHEL LUDIN • DARIO PICECCHI • LORENZA VASSALLO

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TABLE OF ABBREVIATIONS

AC	Advisory Council
Art.	Article
ASA	Swiss Arbitration Association (Association Suisse de l'Arbitrage)
AUS	Australia
AUT	Austria
BEL	Belgium
BNP	Banque Nationale de Paris
BvR	Federal Constitutional Court of Germany (Deutsches Bundesverfassungsgericht)
CAN	Canada
CCR	Commonwealth Law Reports
CE	CLAIMANT's exhibit
CEO	Chief Executive Officer
cf.	compare (confer)
chap.	chapter
CHN	China
CIArb	Chartered Institution of Arbitrators
CIETAC	China International Economic & Trade Arbitration Commission (Beijing, China)
CISG	United Nations Convention on Contracts for the International Sale of Goods
Co.	Corporation

Compromex	Mexican Commission for the Protection of Foreign Commerce
COO	Chief Operating Officer
CPR	International Institute for Conflict Prevention & Resolution (New York, United States of America)
DFT	Decision of the Swiss Federal Court (Entscheid des Schweizerischen Bundesgerichts)
e.g.	for example (exempli gratia)
ESP	Spain
et al.	and others (et alii/et aliae/et alia)
et seq./et seqq.	and the following one/s (et sequens/et sequentes)
EU	European Union
EUR	Euro
EWHC	High Court of Justice of England and Wales
FRA	France
FTCA	Foreign Trade Court of Arbitration of Serbia (Belgrade, Serbia)
GBR	United Kingdom of Great Britain and Northern Ireland
GER	Germany
GmbH	Limited Liability Company in Germany (Gesellschaft mit beschränkter Haftung)
HCA	High Court of Australia
i.e.	that is (id est)
IBA	International Bar Association
ICC	International Chamber of Commerce (Paris, France)

ICCA	International Council for Commercial Arbitration (The Hague, The Netherlands)
ICDR	International Centre for Dispute Resolution (New York, United States of America)
ICSID	International Centre for Settlement of Investment Disputes (Washington, D.C., United States of America)
Inc.	Incorporated
IRL	Ireland
ISR	Israel
LLC	Limited Liability Company in the United States of America
Ltd.	Limited
MAA	Moot Alumni Association
MEX	Mexico
Mr.	Mister
Ms.	Miss
No.	Number
NYC	New York Convention
NZL	New Zealand
Op.	Opinion
Ors.	Others
p./pp.	page/pages
para.	paragraph/paragraphs
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2

Pty.	Proprietary Company in Australia and South Africa
Rd.	Road
RE	RESPONDENT's exhibit
SA	Limited Company in Spain (Sociedad Anónima)
SA de CV	Variable Capital Company in Mexico (Sociedad Anónima de Capital Variable)
S.a.r.l.	Limited Company in France (Société à responsabilité limitée)
SGP	Singapore
SoC	Statement of Claim
SoD	Statement of Defense (Answer to Statement of Claim)
SRB	Serbia
St.	Saint
SUI	Switzerland
UN/U.N.	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA/U.S.	United States of America
USD	United States Dollar(s)
v.	against (versus)
VIAC	Vienna International Arbitral Centre (Vienna, Austria)
WKÖ	Austrian Economic Chamber (Wirtschaftskammer Österreich)
YUG	Yugoslavia

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STATEMENT OF FACTS

- 1 The parties to this arbitration are Kaihari Waina Ltd. (“**CLAIMANT**”) and Vino Veritas Ltd. (“**RESPONDENT**”, collectively “**the Parties**”).
- 2 **CLAIMANT** is a mid-sized wine merchant based in Equatoria. It specializes in selling top quality wines, particularly Mediterranean Mata Weltin wine from the Vuachoua region. CLAIMANT offers Mata Weltin wines of diamond quality which is deemed to be on a par with the best white wines in the world. Over the years, CLAIMANT has gained a reputation as a reliable business partner to its premium customers.
- 3 **RESPONDENT** is a first-class wine producer located in Mediterraneo. It operates the only vineyard in the Vuachoua region that has won the Mediterranean gold medal for its diamond Mata Weltin in the last five years.
- 4 On **April 22, 2009**, CLAIMANT and RESPONDENT entered into a framework agreement regarding the sale of diamond Mata Weltin (“**Framework Agreement**”). According to the Framework Agreement, CLAIMANT is entitled to annually receive a minimum of 7,500 up to a maximum of 10,000 bottles of diamond Mata Weltin from RESPONDENT, depending on CLAIMANT’s annual order. Pursuant to Art. 20 Framework Agreement, all disputes between the Parties are subject to arbitration in Vindobona by an International Arbitration Tribunal in accordance with its institutional arbitration rules, the VIAC Rules. Art. 20 Framework Agreement provides further that no discovery shall be allowed.
- 5 After RESPONDENT received several prizes for its diamond Mata Weltin, the demand from CLAIMANT’s customers for this exquisite wine increased considerably. On **November 4, 2014**, CLAIMANT ordered 10,000 bottles of diamond Mata Weltin 2014 from RESPONDENT in accordance with the Framework Agreement and expressed interest in buying an additional 2,000 bottles.
- 6 On **November 25, 2014**, RESPONDENT expressed its willingness to give CLAIMANT’s order a favorable consideration. However, on **December 1, 2014**, RESPONDENT informed CLAIMANT that it could only deliver 4,500–5,000 bottles because of the bad harvest in 2014. On the same day, RESPONDENT offered SuperWines, CLAIMANT’s direct competitor, 4,500 bottles of the same wine. On **December 2, 2014**, SuperWines accepted the offer. Ultimately, RESPONDENT sold an additional 1,000 bottles of diamond Mata Weltin 2014 to SuperWines, totaling 5,500 bottles. On **December 4, 2014**, RESPONDENT terminated the contract with CLAIMANT and refused to deliver the amount CLAIMANT had initially ordered.

- 7 On **December 8, 2014**, as a consequence of RESPONDENT's refusal to deliver, CLAIMANT sought an interim injunction restraining RESPONDENT from selling the 10,000 bottles CLAIMANT had ordered pursuant to the Framework Agreement. On **December 12, 2014**, the High Court of Mediterraneo ("**High Court**") granted the requested interim injunction.
- 8 On **January 30, 2015**, RESPONDENT filed for a declaration of non-liability with the High Court in an attempt to absolve itself from any future responsibilities to CLAIMANT. On **April 23, 2015**, the High Court ruled that it lacked jurisdiction to hear RESPONDENT's action and directed the Parties to arbitration, as specified in the Framework Agreement.
- 9 In obtaining the interim injunction and in defending against RESPONDENT's declaration of non-liability, CLAIMANT incurred litigation costs totaling USD 50,280. Following the proceedings, RESPONDENT's new management offered to deliver up to 4,500 bottles of wine as a sign of goodwill, but refused to reimburse CLAIMANT for its litigation costs. On **July 11, 2015**, CLAIMANT submitted its request for arbitration.

INTRODUCTION

- 10 RESPONDENT's breaches of the Framework Agreement, *i.e.*, its failure to deliver the 10,000 bottles of diamond Mata Weltin 2014 to CLAIMANT as well as its action for a declaration of non-liability before the High Court, posed a serious risk to CLAIMANT. It feared for its ability to meet customer demand and its reputation as a reliable merchant of high-quality wine. Faced with this economic pressure resulting from RESPONDENT's breaches, CLAIMANT was forced to act quickly and had to enforce its rights in the two proceedings before the High Court. Herewith, CLAIMANT incurred significant litigation costs which RESPONDENT must compensate **(I)**.
- 11 In addition, RESPONDENT failed to satisfy its contractual obligations to CLAIMANT under the pretext of the poor harvest in 2014. The true basis for RESPONDENT's failure to deliver the full amount of CLAIMANT's order, however, lied in RESPONDENT's intention to enter into a new business relationship with CLAIMANT's competitor, SuperWines. As a result, CLAIMANT is entitled to RESPONDENT's profits stemming from its breach of the Framework Agreement **(II)**.
- 12 To further establish its entitlement to the abovementioned profits, CLAIMANT requires specific and relevant documents regarding SuperWines' purchase of RESPONDENT's diamond Mata Weltin 2014. In the present arbitration proceedings, CLAIMANT asked for these necessary documents which RESPONDENT must produce **(III & IV)**.

ARGUMENT

I. CLAIMANT IS ENTITLED TO DAMAGES FOR THE LITIGATION COSTS OF USD 50,280 IT INCURRED BY ENFORCING ITS CONTRACTUAL RIGHTS

- 13 Prior to these arbitration proceedings, CLAIMANT was already forced to engage in legal proceedings twice to enforce its contractual rights against RESPONDENT. First, CLAIMANT had to obtain an interim injunction to prevent RESPONDENT from selling the 10,000 bottles of diamond Mata Weltin 2014 to other customers [*SoC, p. 5, para. 10*]. Second, RESPONDENT breached the arbitration clause included in the Framework Agreement by seeking a declaration of non-liability with the High Court of Mediterraneo. As a result, CLAIMANT had to appear in court again to protect its rights [*SoC, p. 5, para. 12*].
- 14 Although CLAIMANT was successful in both proceedings, CLAIMANT bore, according to the Mediterranean Code of Procedure, its own litigation costs totaling USD 50,280 [*CE 8, p. 16; CE 9, p. 17*]. Of this amount, USD 30,000 were attributable to fees billed by CLAIMANT's legal counsel, LawFix, relating to the interim injunction, while USD 15,000 were attributable to Lawfix's fees in representing CLAIMANT in the non-liability proceedings. The remaining amount of USD 5,280 consisted of court fees and services charged at an hourly rate of USD 150 [*CE 10, p. 18; CE 11, p. 19; PO 2, p. 58, para. 41*].
- 15 In the following, CLAIMANT will establish that the CISG, governing the Framework Agreement, applies to CLAIMANT's claim for its litigation costs **(A)** and that CLAIMANT has met the requirements of Art. 74 CISG to recover these costs **(B)**. Moreover, RESPONDENT cannot rely on Art. 80 CISG to escape its obligation to reimburse CLAIMANT's litigation costs, as CLAIMANT satisfied its duty to cooperate **(C)**. Finally, CLAIMANT will demonstrate that an award of damages by the Arbitral Tribunal does not undermine the High Court's decision in regard to the allocation of the litigation costs **(D)**.

A. The CISG applies to CLAIMANT's claim for its litigation costs

- 16 As the Parties agreed upon the CISG to govern the entire Framework Agreement, the CISG applies to RESPONDENT's breaches of the Framework Agreement **(1)**. Further, the litigation costs which CLAIMANT incurred because of RESPONDENT's breaches fall squarely within the scope of Art. 74 CISG **(2)**.

1. The Parties chose the CISG to govern the entire Framework Agreement, including the arbitration clause

- 17 According to the principle of party autonomy, the parties to an international commercial contract are free to choose the law applicable to their contract [*Art. 2(1) Hague Principles on*

Choice of Law; Poudret/Besson, para. 679; Redfern/Hunter, para. 3.97]. Furthermore, pursuant to the principle of separability, an arbitration clause is considered a separate agreement [*ICC Case No. 8938 (1996); Fouchard/Gaillard/Goldman, para. 425; Redfern/Hunter, para. 5.101*]. Therefore, the parties may also choose the law governing a contract's arbitration clause [*Naviera Amazonica v. Compania De Seguros (GBR, 1987); Flecke-Giammarco/Grimm, p. 42*].

- 18 In the present case, the Parties specified in Art. 20 Framework Agreement that the “*contract is governed by the law of Danubia **including the CISG***” [*CE 1, p. 9, emphasis added*]. In addition, during a telephone conference on October 1, 2015, they further specifically agreed that the CISG would govern “*the contract, **as well as the arbitration clause included in it***”, provided that no special procedural rules would apply to the arbitration clause [*PO 1, p. 51, para. 5(3), emphasis added*]. Accordingly, the CISG governs the entire Framework Agreement.
- 19 Procedural Order No. 2 further clarified that the CISG would govern all questions not regulated in the Danubian Arbitration Law which is an adoption of the UNCITRAL Model Law [*PO 1, p. 51, para. 5(4); PO 2, p. 61, para. 63*]. RESPONDENT alleged that the UNCITRAL Model Law applied to the damage claim resulting from RESPONDENT's breach of the arbitration clause [*SoD, p. 29, para. 37*]. However, neither the UNCITRAL Model Law nor the procedural rules on which the Parties agreed, *i.e.*, the VIAC Rules, regulate any damage claims [*Petsche, p. 35*]. That neither the Model Law nor the VIAC Rules address compensation of damage is unsurprising, given that the question of awarding damages is considered a substantive rather than a procedural issue [*Born I, p. 3083; Salomon/Sharp, p. 295; Waincymer, p. 1118*]. Consequently, as the Parties agreed that the CISG would govern all questions not regulated in the Danubian Arbitration Law [*PO 2, p. 61, para. 63*] and as no other procedural rules apply, the CISG governs CLAIMANT's claim for damages resulting both from RESPONDENT's breach of the Framework Agreement and from RESPONDENT's breach of the arbitration clause included in the Framework Agreement.

2. The compensation of litigation costs falls within the scope of Art. 74 CISG

- 20 CLAIMANT will establish that litigation costs are recoverable under the CISG according to its general principles **(a)**. Furthermore, the Convention's legislative history also supports the recoverability of litigation costs **(b)**.

a. Litigation costs are recoverable according to the general principles of the CISG

- 21 Art. 74 CISG does not expressly address whether litigation costs are recoverable as damages [*Piltz, p. 290; Schwenzler V, p. 423; Vanto, p. 212*]. However, as CLAIMANT will show, the CISG governs this issue and its general principles apply **(i)**. As Art. 74 CISG is based pri-

marily on the principle of full compensation, it includes compensation for CLAIMANT's litigation costs **(ii)**.

i) The general principles of the CISG apply to the compensation of litigation costs

- 22 RESPONDENT claimed that compensation of litigation costs is a procedural matter [*SoD*, p. 29, para. 32]. According to this allegation, the recoverability of litigation costs would, therefore, be beyond the Convention's scope and, thus, governed by domestic law.
- 23 Generally, the CISG undisputedly governs the recovery of losses [*Keily*, p. 18; *Magnus*, Art. 4, para. 16; *Siebr*, para. 15]. Art. 74 CISG follows a general approach to the concept of losses, as it does not address particular categories of loss [*Felemegas I*, p. 116; *Jäger*, p. 160; *Schwenzler III*, para. 18; *Witz*, para. 13]. Therefore, in accordance with Art. 7(2) CISG, the issue of litigation costs must be resolved in conjunction with the general principles on which the CISG is based [*cf. Magnus*, Art. 7, para. 38; *Schwenzler II*, para. 27; *Zeller I*, p. 140].
- 24 Having said that, whether the CISG permits the recovery of litigation costs as damages cannot be solved through a mere distinction between substantive and procedural matters [*CISG-AC Op. 6*, para. 5.2; *Jäger*, p. 160; *Schlechtriem I*, p. 76; *Schwenzler V*, p. 422]. As the Advisory Council determined: "Relying on such a distinction [...] is outdated and unproductive" [*CISG-AC Op. 6*, para. 5.2]. The designation of litigation costs as a substantive or a procedural issue varies among different legal systems [*CISG-AC Op. 6*, para. 5.2; *Djordjević*, p. 207; *Jäger*, p. 160; *Schwenzler V*, p. 422]. Were one to follow RESPONDENT's approach, the recoverability of litigation costs would hinge on how a given legal system qualifies such costs [*Djordjević*, pp. 207 et seq.; *Schwenzler II*, para. 28]. Such an approach, however, runs directly counter to the CISG's purpose of "bring[ing] uniformity to international business transactions" [*CISG-online Case No. 615 (USA, 2002)*] to promote legal certainty for merchants involved in international trade [*Keily*, p. 2; *Perales Viscasillas*, para. 7; *Saenger I*, para. 2]. This purpose is reflected in Art. 7(1) CISG which states that the CISG shall be interpreted with reference to "its international character and to the need to promote uniformity in its application". Consequently, attempting to determine the recoverability of litigation costs according to a given nation's law would be contrary to the CISG's express purpose of uniformity [*Diener*, p. 30; *Dixon*, p. 427; *Djordjević*, p. 207; *Vanto*, p. 208]. Instead, in order to uphold the uniform application of the CISG, whether litigation costs can be awarded as damages must be resolved in accordance with the Convention's general principles [*CISG-AC Op. 6*, para. 5.2; *Schwenzler V*, p. 423; *Zeller I*, p. 140].

ii) The principle of full compensation requires the reimbursement of CLAIMANT's litigation costs

- 25 According to Art. 74 CISG, an injured party may claim “*a sum equal to the loss, including loss of profit, suffered [...] as a consequence of the breach*” as damages. The rationale underlying this language is the principle of full compensation [CISG-online Case No. 643 (AUT, 2002); Neumayer/Ming, p. 487; cf. CISG-online Case No. 120 (AUT, 1994)]. According to the principle of full compensation, damages must place the injured party in the same economic position as if the other party had properly performed its obligations [CISG-online Case No. 140 (USA, 1995); Honnold, para. 403; Lookofsky II, para. 289; Secretariat Commentary, para. 3]. As a result, the breaching party can be held liable for all costs the non-breaching party incurred as a consequence of the breach [CISG-AC Op. 6, para. 1.1; Gotanda II, p. 112; Neumayer/Ming, p. 487].
- 26 In accordance with the principle of full compensation, there can be no debate that Art. 74 CISG covers incidental damages [Gotanda I, para. 16; Schneider, p. 226; Schwenzler III, para. 27], defined as all expenditures an aggrieved party incurs to avoid further loss which may arise as a consequence of the breach [Gotanda I, para. 21; Schwenzler III, para. 27; cf. Korpela, p. 108]. In particular, the aggrieved party has the right to be compensated for every reasonable expense generated in mitigating loss [Magnus, Art. 74, para. 54; Schönle/Koller, para. 32; Witz, para. 13]. Applying this principle in turn, mandates that legal costs incurred prior to a state court or arbitration proceeding should be reimbursed if the costs were necessary to mitigate the loss of the injured party [CISG-online Case No. 2024, (SUI, 2008); Magnus, Art. 74, para. 52; Schönle/Koller, para. 32; Witz, para. 13]. Numerous decisions have reaffirmed this conclusion [CISG-online Case No. 2164 (GER, 2009); CISG-online Case No. 1946 (SRB, 2008); CISG-online Case No. 1391 (ESP, 2006); CISG-online Case No. 1107 (BEL, 2005); CISG-online Case No. 961 (SUI, 2004); CISG-online Case No. 755 (GER, 2002); CISG-online Case No. 418 (SUI, 1997)].
- 27 Even in the well-known *Zapata Case*, which opponents of the reimbursement of litigation costs often quote, the U.S. Court of Appeal for the 7th Circuit argued in favor of the recoverability of litigation costs which incurred prior to the pending proceedings as incidental damages [CISG-online Case No. 684 (USA, 2002)]. In *Zapata*, a Mexican seller sued an American buyer who had refused to pay for the goods it had ordered for breach of contract. Additionally, the seller sued for reimbursement of the litigation costs it incurred for the court proceedings. While the court did not order the buyer to reimburse the seller for the litigation costs incurred during the proceedings, the court emphasized that “*certain pre-litigation*

legal expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as "incidental" damages" under the CISG. Therefore, this decision paved the way for the compensation of litigation costs incurred prior to rather than during court proceedings. This distinction is of paramount importance in the current case:

28 CLAIMANT's request for an interim injunction was granted on December 12, 2014 [CE 8, p. 16], and RESPONDENT's action for declaration of non-liability was dismissed on April 23, 2015 [CE 9, p. 17]. Both proceedings took place well before CLAIMANT initiated the present arbitration proceedings on July 11, 2015 [cf. Art. 7(1) VLAC Rules; SoC, p. 2]. Therefore, CLAIMANT incurred the litigation costs at issue prior to the pending arbitration proceedings. As will be shown [para. 39 et seqq.], these expenses were, at that time, necessary for CLAIMANT to mitigate its loss, as they were essential to ensure the delivery of the ordered 10,000 bottles of RESPONDENT's diamond Mata Weltin 2014 and to prevent further damage to CLAIMANT's reputation and business position. Thus, the litigation costs amount to incidental damages which, if they fulfill the requirements of Art. 74 CISG, must be reimbursed under the principle of full compensation.

b. The legislative history of the CISG supports the reimbursement of litigation costs

29 RESPONDENT asserted that the CISG would not cover litigation costs, purporting to rely on the allegation that the CISG's drafters and its signatory states did not intend to undermine the local rules on the recovery of costs [SoD, p. 29, para. 32]. RESPONDENT's allegation is unfounded.

30 When interpreting the CISG, its legislative history should be taken into consideration [DiMatteo/Janssen, p. 86; Felemegas II, chap. 6; Gruber, p. 96; Schwenzler II, para. 22]. However, it is only of fruitful use if it provides for an explicit solution [Zeller I, p. 149; cf. Neumann, pp. 59 et seq.; Quinn, p. 239]. Here, the CISG's drafting history reveals that the question whether litigation costs would be refundable was never a topic of discussion [Djordjević, p. 209; Flechtner, p. 151; Zeller II, p. 7]. In the absence of any indication that the CISG's drafters meant to exclude litigation costs from the category of recoverable damages, the CISG's legislative history confirms that the principle of full compensation is the underlying policy applicable to damages [Buschtöns, p. 18; Keily, p. 14; cf. CISG-online Case No. 140 (USA, 1995)]. If the drafters had intended to deviate from the guiding principle of full compensation in reference to the reimbursement of litigation costs, they would have expressly limited the CISG to exclude litigation costs from recoverable damages [cf. Zeller I, p. 149]. The fact that they

chose not to do so indicates that they did not intend to impose any such limitation. The Convention's drafting history, therefore, supports the recoverability of litigation costs.

B. The requirements to claim damages under Art. 74 CISG are fulfilled

31 To claim damages under Art. 74 CISG, three requirements have to be met: There must be a breach of contract **(1)**, a causal link between the breach of contract and the loss of the aggrieved party **(2)**, and the breaching party had to be able to foresee this loss as a consequence of the breach **(3)**. In the following, CLAIMANT will show that all three requirements are fulfilled in the instant case.

1. RESPONDENT breached the Framework Agreement

32 Under Art. 74 CISG, a seller or buyer is liable for damages if it fails to perform any obligation under the contract [*Art. 45(1)(b) CISG; Huber/Mullis, p. 257; Magnus, Art. 74, para. 8; Saenger II, para. 3; Schwenzler III, para. 11*]. In the present case, RESPONDENT breached its contractual obligations to CLAIMANT twice:

33 First, it refused to deliver the bottles of wine ordered by CLAIMANT and then terminated the Framework Agreement [*CE 7, p. 15*]. The Parties, for this stage of the arbitration proceedings, have agreed that this behavior of RESPONDENT constituted a breach of contract [*PO 1, p. 50, para. 4*]. Thus, there is no need for CLAIMANT to address this breach any further.

34 Second, RESPONDENT initiated proceedings before the High Court of Mediterraneo seeking a declaration of non-liability, even though the Parties agreed in Art. 20 Framework Agreement to submit any dispute relating to the agreement to arbitration [*CE 1, p. 9; SoD, p. 27, para. 22*]. Parties to an arbitration agreement are obliged to refrain from initiating state court proceedings [*Art. II(3) NYC; ICC Case No. 10904 (2002); Born I, p. 1252; Fouchard/Gaillard/Goldman, para. 661*]. Thus, a party which files a lawsuit in a state court breaches the arbitration clause [*Gabbanelli Accordions & Imports v. Ditta Gabbanelli (USA, 2009); Born I, p. 1274*]. Accordingly, RESPONDENT, by filing a non-liability suit, violated its obligation to refrain from litigating the dispute in state courts. Consequently, the High Court correctly dismissed RESPONDENT's action and confirmed that RESPONDENT breached the arbitration clause in the Framework Agreement by attempting to file suit in a state court [*CE 9, p. 17*].

2. CLAIMANT's litigation costs are a direct consequence of RESPONDENT's breaches of the Framework Agreement

35 Pursuant to Art. 74 CISG, the aggrieved party must be compensated for the loss it suffered "as a consequence of the breach" of contract. A causal link exists when a breach of contract can-

not be eliminated without at the same time eliminating the loss [*Schmidt-Abrendts/Czarnecki, para. 10; Schönle/Koller, para. 22; Schwenger/Hachem/Kee, para. 44.46*].

- 36 In the current case, without RESPONDENT's refusal to deliver the wine CLAIMANT ordered and its initiation of the non-liability claim, CLAIMANT would not have had to seek legal assistance and would consequently not have had to bear litigation costs [*SoC, p. 7, para. 22; CE 11, p. 19; SoD, p. 27, para. 22*]. Therefore, there is a causal link between RESPONDENT's breaches of contract and the litigation costs CLAIMANT incurred.

3. RESPONDENT was able to foresee the litigation costs CLAIMANT incurred through both court proceedings

- 37 According to Art. 74 CISG, the breaching party must be able to foresee the extent of loss the other party sustains as a possible consequence of its contractual breach [*CISG-online Case No. 643 (AUT, 2002); Lookofsky II, para. 290; Schönle/Koller, para. 24*]. Costs incurred through pursuing one's rights are foreseeable and therefore recoverable if the assertion of rights is necessary and reasonable [*Magnus, Art. 74, para. 51; Saenger II, para. 15*]. By limiting its assertion of rights to the necessary and reasonable, a party at the same time complies with the duty to mitigate its loss under Art. 77 CISG [*Felemegas I, p. 98; Schäfer, para. 8; Schwenger/Hachem/Kee, para. 44.257 et seq.*]. Therefore, by showing that CLAIMANT's conduct fulfills these requirements, CLAIMANT will not only establish that the requirement of foreseeability is fulfilled but also that it complied with its duty to mitigate its loss under Art. 77 CISG.
- 38 In the following, CLAIMANT will show that its request for an interim injunction **(a)** as well as the defense before the High Court **(b)** were necessary. Furthermore, the costs incurred in both proceedings were reasonable **(c)**.

a. The court proceedings for the interim injunction were necessary

- 39 On December 4, 2014, RESPONDENT informed CLAIMANT that “*there [would] be **no delivery of any bottle** of the 2014 harvest to you [CLAIMANT] even if we [RESPONDENT] have to drink them ourselves*” [*CE 7, p. 15, emphasis added*]. Based on RESPONDENT's unequivocal refusal to honor its contractual obligation to CLAIMANT, CLAIMANT was forced to seek reasonable means to prevent any damage which it risked incurring.
- 40 At the time CLAIMANT requested the interim relief, there was an imminent risk that RESPONDENT would enter into binding contracts with other customers that would leave RESPONDENT unable to comply with its contractual duties to CLAIMANT. CLAIMANT was aware of several wine industry trade articles [*CE 6, p. 14*], according to which CLAIMANT's

biggest competitor, SuperWines, aimed to buy large quantities of RESPONDENT's diamond Mata Weltin 2014 [CE 4, p. 12]. However, SuperWines was not the only customer strongly interested in this excellent wine [cf. PO 2, p. 59, para. 48]. RESPONDENT's potential contracts with other customers entailed a significant risk for CLAIMANT; RESPONDENT's customers would likely enforce their right to specific performance in case RESPONDENT failed to deliver. As a result, CLAIMANT, which had placed its orders before all other customers [PO 2, p. 55, para. 15], ran a risk of not receiving the 10,000 bottles to which it was entitled.

41 This risk of non-delivery was even more threatening in light of the behavior of Mr. Weinbauer, RESPONDENT's former CEO. Mr. Weinbauer is known in the wine industry for his unpredictable temper. In the past, he terminated several relationships based solely on personal differences [CE 5, p. 13; CE 12, p. 20]. Thus, CLAIMANT was alarmed when Mr. Weinbauer stated that he considered the Framework Agreement to be terminated [CE 7, p. 15]. CLAIMANT was not in a position to anticipate what would happen next and feared that RESPONDENT would unrightfully sell its bottles of diamond Mata Weltin 2014 to other customers at any time.

42 However, CLAIMANT relied, and was contractually entitled to rely, on the delivery of the 10,000 bottles it ordered [CE 1, p. 9]. As CLAIMANT's business model is based on its "*Collectors Club*", its customers are entitled to indicate in their pre-orders how many bottles of a particular wine they would like to buy. Depending on the price CLAIMANT's customers are willing to pay for a bottle of wine, CLAIMANT guarantees to deliver between 70–90% of the pre-ordered amount [PO 2, p. 53, para. 6]. When CLAIMANT filed its request for interim relief, its customers had already placed pre-orders for 6,500 bottles, every one of which referred specifically to RESPONDENT's diamond Mata Weltin 2014, and some of which had already become binding [PO 2, pp. 53 et seq., para. 7 et seqq.]. Considering these specific pre-orders and CLAIMANT's guarantee to the members of its "*Collectors Club*", CLAIMANT could not accept the risk of a non-delivery and had to file an interim injunction to prevent RESPONDENT from selling the ordered 10,000 bottles to SuperWines or other customers. Since the VIAC Rules do not provide for the possibility of nominating an emergency arbitrator [Zeiler, para. 3] and as the Arbitral Tribunal was at that time not yet constituted, CLAIMANT had no other choice, given the imminent risks it faced, than to resort to the state court at the place of RESPONDENT's domicile to obtain the interim injunction in a timely manner.

b. The defense before the High Court was necessary

43 As CLAIMANT's in-house counsel, Ms. Lee, confirmed, RESPONDENT had "*agreed to the*

arbitration clause saying that they [RESPONDENT] were interested in arbitration as a fast and informal dispute resolution process” [CE 12, p. 20]. Aware of this advantage of arbitration proceedings, it must have been obvious to RESPONDENT that CLAIMANT would insist on its right to arbitrate. Furthermore, RESPONDENT could not expect CLAIMANT to accept the disadvantage of having to litigate the dispute in RESPONDENT’s home state court. Nevertheless, RESPONDENT chose to file for a declaration of non-liability before the High Court of Mediterraneo instead of arbitrating its dispute, although it knew it was required to do so.

- 44 To avoid contractually unauthorized proceedings before the foreign state court, CLAIMANT then had to invoke the arbitration clause. According to a universally accepted rule, a state court only refers to arbitration at the request of one of the parties and does not act on its own initiative [*Art. II (3) NYC; Born I, p. 1281; Fouchard/Gaillard/Goldman, para. 425; ICCA Guide, p. 37*]. Thus, CLAIMANT’s defense before the High Court was necessary, as it was the only way to ensure that arbitration proceedings, upon which the Parties had deliberately agreed, could take place.

c. The litigation costs were reasonable

- 45 RESPONDENT argued that the legal fees CLAIMANT paid its lawyers were not reasonable and too high [*SoD, p. 29, para. 33, 35*]. However, CLAIMANT will show that, by engaging LawFix on a contingency basis, it opted for the most cost-effective solution to retain counsel available at the time.
- 46 CLAIMANT is a mid-sized company with scarce financial resources [*SoC, p. 5, para. 13*]. In addition, when the dispute arose, CLAIMANT was in the early stages of investing EUR 12 million to acquire a small printing house. This investment would have tied up CLAIMANT’s entire liquid resources [*PO 2, p. 58, para. 38*]. Moreover, CLAIMANT was not able to obtain third party funding to finance its proceedings [*SoC, p. 5, para. 13*]. Therefore, and as the lawyers’ fees in Mediterraneo are known to be very high compared to the ones in CLAIMANT’s home jurisdiction, Equatoriana, CLAIMANT was eager to keep its litigation costs low [*SoC, p. 5, para. 13; p. 7, para. 22*]. However, CLAIMANT had to engage a counsel from Mediterraneo as mandated under Mediterranean law [*PO 2, p. 58, para. 39*].
- 47 Seen from the situation at the time, engaging LawFix on a contingency fee basis was the most cost-effective solution for CLAIMANT. If attorneys are expected to invest many billable hours in a given case, it is preferable for the client to have a relatively low hourly rate, combined with a contingency fee agreement instead of an agreement based on a higher hourly rate. The contingency fee agreement will keep the overall attorneys’ fees lower. At the point

CLAIMANT entered into the contingency fee agreement with LawFix, there were strong indications that its lawyers would have to bill a significant number of hours to enforce CLAIMANT's rights against RESPONDENT [PO 2, p. 58, para. 39]. Although RESPONDENT ultimately did not challenge the interim relief, the unequivocal wording Mr. Weinbauer chose to terminate the Framework Agreement led CLAIMANT to assume that RESPONDENT would subsequently challenge any interim injunction [CE 7, p. 15; RE 2, p. 33; PO 2, p. 58, para. 39]. This would have required CLAIMANT's counsel to engage in significant legal work at this stage of the proceedings. As CLAIMANT could not anticipate that its lawyers would have to spend fewer hours than expected obtaining and enforcing the interim injunction, opting for a contingency fee was the most economical solution when CLAIMANT engaged LawFix.

- 48 Furthermore, the fees LawFix charged were also reasonable under ordinary circumstances. Before CLAIMANT engaged LawFix, it contacted other legal firms which refused to work on a contingency fee basis [PO 2, p. 58, para. 39]. These refusals show that CLAIMANT acted in an appropriate manner by engaging LawFix. If the amount of the contingency fee had been unreasonably high, it can fairly be assumed that the other law firms would have immediately accepted CLAIMANT's offer to represent it in these proceedings. As Procedural Order No. 2 confirmed, under ordinary circumstances, *i.e.*, the circumstances CLAIMANT expected, the contingency fees were reasonable [PO 2, p. 58, para. 39]. Thus, there is no reason to qualify the contingency fees LawFix charged as unreasonable. In any event, arbitral tribunals only tend to cut down litigation fees in exceptional cases, namely if they are alarmingly high [Bühler, p. 273; *e.g.* ICC Case No. 5726 (1992); ICC Case No. 5008 (1992)].

C. RESPONDENT cannot rely on the exemption of Art. 80 CISG

- 49 On January 14, 2015, RESPONDENT claimed in a letter to CLAIMANT that the arbitration clause in the Framework Agreement was void for reasons of uncertainty [RE 2, p. 33]. RESPONDENT alleged that CLAIMANT wrongfully failed to reply to this letter and, thereby, caused the initiation of the non-liability proceedings [SoD, p. 27, para. 20 *et seqq.*]. RESPONDENT may seek to rely on the exemption of Art. 80 CISG to claim that CLAIMANT cannot be compensated for its damage since it caused RESPONDENT's breach of the Framework Agreement itself. RESPONDENT's argument does not hold water.
- 50 According to Art. 80 CISG, a party cannot rely on the other party's failure if the first party's act or omission caused such failure. However, it is noteworthy that an omission only triggers Art. 80 CISG if a party has a duty to act [Huber/Mullis, p. 266; Schwenzler III, para. 8]. Thus, a party's omission has to constitute a violation either of a contractual obligation, legal

duty or an obligation of good faith [*Magnus, Art. 80, para. 10*].

51 Contrary to RESPONDENT's allegation, RESPONDENT never specifically asked CLAIMANT to clarify the forum. RESPONDENT simply stated that it considered the arbitration clause to be void and that it "*would be willing to agree on the VIAC standard clause*" [*RE 2, p. 33*]. This was not a request to clarify the forum but an offer to amend the arbitration clause. Even if RESPONDENT had expressly asked for a clarification, there was no need to clarify the arbitration clause in Art. 20 Framework Agreement as it was unambiguous. The clause explicitly states that potential disputes shall be settled by VIAC under its "*International Arbitration Rules*" in Vindobona [*CE 1, p. 9*]. In Vindobona, VIAC is the only international arbitral institution [*PO 2, p. 60, para. 55*]. A quick research on VIAC would have confirmed this outcome. Therefore, there was no need to clarify the content of the arbitration clause.

52 Even if RESPONDENT had been entitled to question the interpretation of the arbitration clause, it would have had to do so before an arbitral tribunal and not a state court. According to the principle of competence-competence, as applicable in all relevant jurisdictions, an arbitral tribunal has the competence to decide on its own jurisdiction prior to any state court [*Art. 16(1) UNCITRAL Model Law; Fouchard/Gaillard/Goldman, para. 655, 660; Redfern/Hunter, para. 5.108; cf. Born I, p. 1077*]. RESPONDENT, which at that time had already been represented by legal counsel [*RE 2, p. 33*], should have been aware of this basic principle and should have consequently sought for a declaration of non-liability before an arbitral tribunal. In summary, CLAIMANT had no duty to explain the content of the arbitration clause to RESPONDENT. Therefore, RESPONDENT cannot rely on Art. 80 CISG.

D. The Arbitral Tribunal does not undermine the High Court's decisions

53 RESPONDENT alleged that the Arbitral Tribunal would undermine the High Court's final and binding decisions in the previous proceedings if it awarded CLAIMANT damages for its litigation costs [*SoD, p. 29, para. 32*]. As CLAIMANT will show, this allegation is baseless.

54 A final and binding decision by a court or an arbitral tribunal, which has *res judicata* effect, cannot be reconsidered on the basis of the same subject matter [*cf. Report "Res judicata", p. 2; Redfern/Hunter, para. 9.173*]. To determine if a decision has *res judicata* effect, it is necessary to define the decision's subject matter.

55 The subject matter in the first proceeding before the High Court involved a request for an interim injunction. The second proceeding involved an application for a declaration of non-liability. As part of both decisions, the High Court allocated the litigation costs according to

the strict rule of the Mediterranean Code of Procedure which states that each party must bear its own costs [CE 8, p. 16; CE 9, p. 17; PO 2, p. 59, para. 44]. As a consequence, the High Court allocated the costs without considering the substance of the case, *i.e.*, RESPONDENT's breaches of the Framework Agreement.

56 Here, in contrast, the subject matter at issue involves the damages to which CLAIMANT is entitled as a consequence of RESPONDENT's contractual breaches. As the Arbitral Tribunal must evaluate and determine the amount of damages under the CISG, *i.e.*, based on substantive law, it will not reallocate CLAIMANT's litigation costs on the basis of procedural rules, such as the Mediterranean Code of Procedure. Allocating litigation costs as a procedural matter, as the High Court did in the two previous proceedings, is not equivalent to a substantive award of litigation costs as damages, which CLAIMANT is requesting here. Case law confirms that the allocation of litigation costs as a procedural matter cannot have *res judicata* effect with regard to a subsequent damage claim based on substantive law [cf. DFT 4A_232/2013 (SUI, 2013); *Union Discount v. Zoller* (GBR, 2001)].

57 To conclude, the High Court's decisions on the allocation of costs do not have a binding *res judicata* effect on the Arbitral Tribunal, as the High Court did not decide on awarding damages under substantive law. As such, the Arbitral Tribunal is free to render an award regarding the damages to which CLAIMANT is entitled.

E. Conclusion

58 The CISG applies to the damage arising from the litigation costs incurred by CLAIMANT. As all the requirements of Art. 74 CISG are fulfilled, CLAIMANT is entitled to its litigation costs in the total amount of USD 50,280. Furthermore, RESPONDENT cannot attempt to deny its liability by purporting to rely on the exemption of Art. 80 CISG, as CLAIMANT had no duty to react to RESPONDENT's offer to amend the arbitration clause. Lastly, by awarding the litigation costs to CLAIMANT, the Arbitral Tribunal does not undermine the decisions of the High Court in regard to the allocation of litigation costs.

II. CLAIMANT IS ENTITLED TO RESPONDENT'S PROFITS FROM THE SALE OF DIAMOND MATA WELTIN 2014 TO SUPERWINES

59 Instead of honoring its contractual obligations to deliver 10,000 bottles of diamond Mata Weltin 2014 to CLAIMANT [CE 2, p. 10], RESPONDENT chose to contract with SuperWines to make a larger profit and to benefit from SuperWines' market force and distribution network [PO 2, p. 55, para. 20; p. 57, para. 28]. Only after the High Court dismissed RESPONDENT's request for a declaration of non-liability did RESPONDENT offer to deliver 4,500 bot-

ties to CLAIMANT, less than half of CLAIMANT's original order [PO 1, p. 50, para. 1]. As the CISG governs the Framework Agreement [PO 1, p. 51, para. 5(3)], CLAIMANT would be entitled to enforce its right to specific performance pursuant to Art. 28 CISG by insisting on the delivery of the remaining 5,500 bottles. However, CLAIMANT refrained from doing so as it did not want to endanger its business relationship with RESPONDENT by creating delivery difficulties for RESPONDENT [PO 2, p. 54, para. 12]. Thus, CLAIMANT merely claims RESPONDENT's profits made on the 5,500 bottles it sold to SuperWines as damages under Art. 74 CISG [SoC, p. 7, para. 25 et seq.]. The claim of RESPONDENT's profits covers the difference between the price SuperWines paid for the 5,500 bottles and the price CLAIMANT would have paid RESPONDENT for the same number of bottles [PO 2, p. 62, para. 66].

- 60 As CLAIMANT will show, it is entitled to claim RESPONDENT's profits for two reasons: First, CLAIMANT's estimated loss of profit is at least equal to RESPONDENT's profits **(A)**. Second, even if RESPONDENT's profits exceed CLAIMANT's loss, RESPONDENT is obligated to disgorge the full amount of its profits from the sale to SuperWines **(B)**.

A. CLAIMANT suffered a loss of profit at least equal to RESPONDENT's profits

- 61 As CLAIMANT was deprived of the opportunity to sell 5,500 bottles of RESPONDENT's diamond Mata Weltin 2014 to its customers, it suffered a loss of profit [SoD, p. 28, para. 25; PO 1, p. 50, para. 1]. CLAIMANT will show that it has met the requirements to recover the amount of this loss from RESPONDENT under Art. 74 CISG **(1)**. However, as CLAIMANT cannot presently calculate the exact amount of loss it sustained, it is necessary to estimate this sum **(2)**. Thereby, RESPONDENT's profits from the sale to SuperWines should serve as a reference point for the estimation and the Arbitral Tribunal should award an amount at least equivalent to such profits to CLAIMANT **(3)**. Furthermore, the Arbitral Tribunal should not take CLAIMANT's profits made through the sale of Mata Weltin from another supplier into account, as CLAIMANT was unable to minimize its loss through this sale **(4)**.

1. RESPONDENT must compensate CLAIMANT for CLAIMANT's loss of profit under Art. 74 CISG

- 62 The requirements for recovering damages under Art. 74 CISG are the occurrence of a breach of contract [para. 32] as well as a causal link between the breach and the loss the aggrieved party suffered [para. 35]. Additionally, the breaching party had to be able to foresee that the loss would occur as a consequence of its contractual breach [para. 37]. These requirements are met in the present case. First, RESPONDENT breached the Framework Agreement by refusing to deliver the entire amount CLAIMANT had ordered [para. 33]. Sec-

ond, as CLAIMANT could not sell the anticipated amount of bottles and, thus, failed to make the corresponding profits, the causal link is given [*SoC*, p. 7, para. 26]. Third, RESPONDENT was in a position to foresee that CLAIMANT, as a wine merchant, would suffer a loss if it could not deliver the ordered bottles to its customers. As all requirements of Art. 74 CISG are met, CLAIMANT is entitled to an award of the damages it seeks.

2. The Arbitral Tribunal has the authority to estimate CLAIMANT's loss of profit

63 In general, a party must prove the extent of damage it claims with reasonable certainty [*CISG-AC Op. 6*, para. 2.9; *Magnus*, Art. 74, para. 61]. However, where it is almost impossible and, therefore, unreasonable for an injured party to calculate its loss, the injured party needs only to provide a basis upon which one may estimate the extent of damage under Art. 74 CISG [*CISG-AC Op. 6*, para. 2.9; *Koller/Mauerhofer*, p. 977; *Schmidt-Abrendts/Czarnecki*, p. 646; *Schwenzler I*, para. 65]. In the instant case, to determine its actual loss, CLAIMANT would have to know at what price it could have sold the entire 10,000 bottles of RESPONDENT's diamond Mata Weltin 2014. This information is not available for two reasons:

64 First, had RESPONDENT fulfilled its contractual obligation to deliver CLAIMANT's order of 10,000 bottles instead of contracting with SuperWines, CLAIMANT would have been in a stronger position on the market than it currently is. With 10,000 bottles on its account, CLAIMANT would have received almost a sixth of the 65,000 bottles RESPONDENT produced in 2014 [*SoD*, p. 26, para. 9]. Therefore, CLAIMANT could have relied on its position as a leading market player in determining the wine's sales price with its customers. Furthermore, had CLAIMANT received the remaining 5,500 bottles it ordered, instead of SuperWines, it would not have had to take the market power of its biggest competitor, SuperWines, into account when negotiating the price with its customers [*cf. CE 6*, p. 14; *PO 2*, p. 56, para. 22, 24]. However, as CLAIMANT was not able to negotiate with full market power, it cannot state with certainty which price it could have requested.

65 Second, no established market price for RESPONDENT's diamond Mata Weltin 2014 existed. The few specialized retailers which sold RESPONDENT's wine set prices between EUR 90–100 [*PO 2*, p. 55, para. 14]. However, as only very few bottles of this wine were available on the market, this price was far from being representative and can, therefore, not serve as a fixed market price [*cf. PO 2*, p. 55, para. 14].

66 To sum up, as CLAIMANT cannot consider the price it arranged with its customers for the 4,500 bottles RESPONDENT eventually offered, and as there is no exact market price on which CLAIMANT could rely, CLAIMANT is not in a position to reasonably calculate its loss

of profit. As a result, the Arbitral Tribunal has the authority to estimate the extent of CLAIMANT's loss under the CISG.

3. The profits RESPONDENT made through its sale to SuperWines serve as a reference point to estimate CLAIMANT's loss and should be awarded to CLAIMANT

- 67 If a breaching party makes a profit by selling goods already promised to a third party, the appropriate method to estimate the loss of the aggrieved party involves relying on the gain of the breaching party [*cf. Schmidt-Abrendts, pp. 98 et seqq.; Schwenzler III, para. 6, 43; Schwenzler/Hachem, p. 101*]. Therefore, the profits RESPONDENT made through its sale to SuperWines should serve as a reference point to estimate CLAIMANT's loss.
- 68 RESPONDENT profited from its sale to SuperWines, as the latter was willing to pay a premium price per bottle. This price is rumored to be EUR 15–20 higher than the EUR 41,50 CLAIMANT agreed to pay per bottle of RESPONDENT's diamond Mata Weltin 2014 [*CE 3, p. 11; PO 2, p. 56, para. 24*]. Relying on RESPONDENT's profits as a method of calculation is appropriate, as several factors indicate that CLAIMANT would have likely reached a higher profit per bottle than the premium SuperWines paid to RESPONDENT:
- 69 RESPONDENT's grapes were of extraordinary quality and promised an excellent vintage of diamond Mata Weltin 2014 [*CE 3, p. 11; SoD, p. 26, para. 9*]. Further, it received a series of prizes for its earlier vintages in the first months of 2014 [*SoC, p. 4, para. 5; CE 2, p. 10*]. A leading wine critic even praised RESPONDENT's wine as one of the “*best white wines worldwide*” [*SoD, p. 26, para. 8*]. The awards and the outstanding appraisals RESPONDENT's wines received increased the demand for its diamond Mata Weltin 2014 [*SoC, p. 4, para. 5; PO 2, p. 54, para. 9*]. Moreover, only a reduced number of this excellent wine was available because of the poor harvest in 2014 [*CE 3, p. 11; PO 2, p. 55, para. 14*]. These reasons compel the conclusion that, as demand exceeded supply, the price of a diamond Mata Weltin 2014 bottle on the market increased considerably compared to past years. This conclusion is bolstered further by the fact that some retailers sold a limited amount of diamond Mata Weltin 2014 for EUR 90–100 per bottle [*PO 2, p. 55, para. 14*]. Although CLAIMANT cannot rely on this price to calculate its loss of profit [*para. 65*], it nonetheless highlights the immense price potential a bottle of RESPONDENT's diamond Mata Weltin 2014 has on the market. Thus, the evidence strongly suggests that CLAIMANT's profits would have most likely been higher than the premium SuperWines paid to RESPONDENT for the 5,500 bottles.
- 70 In conclusion, RESPONDENT's profits from the sale to SuperWines should serve as a reference point to estimate CLAIMANT's loss of profit and should be awarded to CLAIMANT.

RESPONDENT's profits are equal to the difference between the purchase price SuperWines paid for one bottle and the purchase price CLAIMANT would have paid for one bottle, *i.e.*, "*premium*", multiplied by the 5,500 bottles RESPONDENT sold to SuperWines. Therefore, the following formula applies to calculate RESPONDENT's profits:

$$\text{RESPONDENT's profits} = 5,500 \text{ bottles} \times \underbrace{(\text{SuperWines' purchase price} - \text{CLAIMANT's purchase price})}_{\text{premium SuperWines paid}}$$

- 71 CLAIMANT would have purchased the 5,500 bottles for EUR 41,50 [PO 2, p. 62, para. 66]. However, the price SuperWines paid is unknown [PO 2, p. 56, para. 24]. Inserting the price CLAIMANT would have paid into the formula provides the following result:

$$\text{RESPONDENT's profits} = 5,500 \text{ bottles} \times (\text{EUR } \mathbf{X} - \text{EUR } 41,50)$$

- 72 This formula reveals that the only missing variable to calculate RESPONDENT's profits is SuperWines purchase price, *i.e.*, the variable **X**. Therefore, to determine the exact amount of RESPONDENT's profits, to which CLAIMANT is entitled, CLAIMANT requires the documents it requested evidencing the price SuperWines paid [para. 109]. For mere illustration purposes, had SuperWines paid EUR 61,50 (**X**) per bottle, the premium would equal EUR 20 and RESPONDENT would have made a profit of EUR 110,000 with the sale to SuperWines.

4. CLAIMANT's purchase of 5,500 bottles of Mata Weltin from Vignobilia does not diminish CLAIMANT's loss

- 73 On February 2, 2015, CLAIMANT managed to buy 5,500 bottles of Mata Weltin from Vignobilia, another top vineyard in Mediterraneo [PO 2, p. 54, para. 10 et seq.]. As a consequence, CLAIMANT could sell its customers a mixture of RESPONDENT's diamond Mata Weltin 2014 and Vignobilia's Mata Weltin [PO 2, p. 54, para. 10]. RESPONDENT might allege that the purchase of Vignobilia's Mata Weltin amounts to a cover purchase which diminished the loss CLAIMANT suffered as a result of RESPONDENT's non-delivery of the 10,000 bottles CLAIMANT ordered. However, CLAIMANT will show that the 5,500 bottles of Mata Weltin it bought from Vignobilia are not a cover purchase but an additional transaction which CLAIMANT would have made in any event.
- 74 In general, if a party makes a profit through a cover purchase, that profit must be subtracted from the loss the party suffered through a breach of contract [Magnus, Art. 77, para. 11; Saenger III, para. 4; Schwenzler IV, para. 10]. However, if the aggrieved party would have made the substitute arrangement in any event, such an arrangement does not amount to a replacement, *i.e.*, a cover purchase, but to an additional transaction. Profits from such addi-

tional transactions do not have to be subtracted from the aggrieved party's loss [cf. *CISG-AC Op. 8, para. 3.4; Gotanda I, para. 56; Saidov, p. 366*].

- 75 Here, long before RESPONDENT refused to honor its contractual obligation to CLAIMANT, the latter had been trying to enlarge its supplier base by contacting the three other top wine producers from Mediterraneo [*PO 2, p. 54, para. 11*]. On February 2, 2015, Vignobilia, one of these top producers, informed CLAIMANT that one of its customers had gone insolvent and that the 5,500 bottles of Mata Weltin originally allocated to that customer were available. CLAIMANT immediately offered to buy these bottles. However, CLAIMANT did not buy this wine as a substitute for RESPONDENT's wine, but to finally reach its goal of acquiring a new supplier and, thus, becoming more independent of RESPONDENT [*PO 2, p. 54, para. 11*].
- 76 CLAIMANT's business field is still growing and far from being saturated. Various circumstances evidence CLAIMANT's increasing market potential: Its pre-orders for RESPONDENT's wine increased considerably, almost by 20% compared to the prior year [*SoC, p. 4, para. 4 et seq.; PO 2, p. 54, para. 8*]. Therefore, CLAIMANT was willing to buy 2,000 bottles in addition to the 10,000 bottles of RESPONDENT's wine it was contractually entitled to order [*CE 2, p. 10*]. Furthermore, the fact that CLAIMANT wanted to expand its relationship with RESPONDENT [*CE 1, p. 9; CE 5, p. 13*] and that CLAIMANT tried to enlarge its supplier base in general, demonstrate the high demand from top end customers for excellent wine [*PO 2, p. 54, para. 11*]. Accordingly, given the high market demand, CLAIMANT would have purchased and sold the bottles from Vignobilia even if RESPONDENT had delivered the bottles CLAIMANT ordered. Thus, the wine of Vignobilia is not a replacement for RESPONDENT's wine but rather an additional purchase which does not diminish CLAIMANT's loss of profit.

B. In any case, CLAIMANT is entitled to the full amount of RESPONDENT's profits

- 77 Even if estimating the amount of CLAIMANT's loss of profit were not an option to calculate its damage, or if RESPONDENT's gains were higher than CLAIMANT's loss, CLAIMANT would still be entitled to receive RESPONDENT's profits. CLAIMANT will show that the disgorgement of RESPONDENT's profits is necessary to uphold the uniformity of the CISG **(1)** and that a correct interpretation of the CISG mandates this remedy in the present case **(2)**.

1. Disgorgement of profits is necessary to uphold the uniformity of the CISG

- 78 There is an increasing tendency in domestic legal systems indicating that damages should not only compensate the aggrieved party but also set an incentive for the parties to abide by their contractual obligations [*Bock, p. 175; Schmidt-Abrendts, p. 96; Schwenzler III, para. 6; cf. Israel/O'Neill, p. 6*]. As a result of this preventive approach, various domestic courts have

upheld a claim for disgorgement of profits [*Loulan v. Fengxian Property* (CHN, 2013); *Bank of America v. Mutual Trust* (CAN, 2002); *Attorney General v. Blake* (GBR, 2000); *Adras Building Material v. Harlow & Jones* (ISR, 1988); *Bunny v. FSW* (AUS, 1982); *Snepp v. U.S.* (USA, 1980); *Hickey v. Roches Stores* (IRL, 1976)]. Some national statutes such as the Dutch Civil Law even expressly allow gain-based damages in breach of contract cases [*Art. 6:104 Dutch Civil Code*].

- 79 This development is certainly relevant when interpreting the CISG [*Bock*, p. 184; *Schwenzer III*, para. 7; cf. *Schwenzer/Hachem*, pp. 92 et seq.], as a contemporaneous interpretation of Art. 7 CISG demands that the CISG should not only be interpreted but also developed uniformly in accordance with changes in the domestic legal landscape [*Bock*, p. 185]. Otherwise, courts would resort to domestic legal systems which affirmed the disgorgement of profits and, therefore, apply diverging domestic laws instead of the CISG. Such a result would undermine the Convention's goal of promoting uniformity [*Schwenzer III*, para. 7; *Schwenzer/Hachem*, p. 102; cf. *Felemegas II*, chap. 3; *Schmidt-Abrendts*, pp. 95 et seq.].
- 80 The *Adras Case* is a prime example reflecting the risk that certain courts may resort to domestic law when treaties governing international sales do not provide for disgorgement of profits. In this case, governed by the ULIS, the Supreme Court of Israel was faced with a "second sale" of goods [*Adras Building Material v. Harlow & Jones* (ISR, 1988)]. An Israeli importer of steel ("Buyer") sued a German seller ("Seller") for selling portions of the Buyer's order of steel pursuant to a contract to a third party. The court held that the aggrieved Buyer could claim the Seller's profits from its second sale to the third party as damages. However, as the ULIS did not recognize a disgorgement claim, the court resorted to domestic law and granted the claim under national unjust enrichment law. This decision was criticized as endangering the purpose of a private law treaty to provide uniformity in international trade law [*Adar*, p. 523; *Reich*, p. 2; *Schlechtriem II*, pp. 11 et seq.]. To avoid such a homeward trend in the CISG, the Convention must be correctly interpreted to include the disgorgement of profits, in accordance with the legal tendency set forth in the previous section.

2. The general principles of the CISG require RESPONDENT to disgorge its profits from the sale to SuperWines

- 81 Pursuant to Art. 4 CISG, the Convention generally governs remedies arising out of non-performance. Although Art. 74 CISG does not explicitly mention a right to disgorge profits, the disgorgement of profits constitutes a remedy arising out of non-performance and is, therefore, governed by the CISG [*Hartmann*, p. 190; cf. *Honsell*, p. 361; *Schmidt-Abrendts*, p. 95; *Schwenzer III*, para. 43].

- 82 As the CISG governs but does not expressly address the issue of disgorgement, the general principles of the CISG apply [*Art. 7(2) CISG; Bock p. 18; Schwenzler II, para. 27; cf. Magnus, Art. 74, para. 38; Quinn, p. 228*]. An important principle underlying Art. 74 CISG, is the principle of full compensation [*para. 25*]. However, it is not the sole principle on which the Convention is based. The principles of good faith and *pacta sunt servanda* represent an equally fundamental basis. They should, therefore, be respected when interpreting Art. 74 CISG [*Schmidt-Abrendts, pp. 93 et seq.; Schwenzler/Leisinger, p. 271; cf. Ferrari, p. 154*].
- 83 In the following, CLAIMANT will show that RESPONDENT's violation of the principle of good faith justifies the disgorgement of profits **(a)** and that upholding the principle of *pacta sunt servanda* also requires disgorgement of RESPONDENT's profits **(b)**.
- a. RESPONDENT must disgorge its profits based on good faith**
- 84 Good faith not only serves as a means to interpret the CISG but also as a recognized principle of the CISG [*CISG-online Case No. 2123 (YUG, 2002); CISG-online Case No. 504 (MEX, 1998); CISG-online Case No. 151 (FRA, 1995); Lookofsky I, p. 34*]. The principle of good faith imposes an obligation on the parties to act honestly and fairly when performing their contractual duties [*Powers, p. 334*]. In particular, each party is required to respect the interests of its counterparty [*Perales Viscasillas, para. 25; Saenger I, para. 6; Schlechtriem/Butler, para. 48*]. Based on this principle, the breaching party must disgorge the profits it realized through selling the same goods a second time to another customer, as it may not profit from breaching the first contract [*cf. Schmidt-Abrendts, p. 94; Schwenzler III, para. 43*].
- 85 Here, RESPONDENT alleged that it was not able to deliver the full ordered amount of diamond Mata Weltin 2014 to CLAIMANT due to the poor harvest [*CE 3, p. 11*]. However, the real reason why RESPONDENT exceeded its available capacity lies in its contract with SuperWines [*PO 2, pp. 56 et seq., para. 27*]. On December 1, 2014, RESPONDENT informed CLAIMANT that it could not fulfill CLAIMANT's entire order but that it, "*in the best interests of everyone*", would deliver on a pro rata basis to all of its longstanding customers [*CE 3, p. 11*]. On the exact same day, despite informing CLAIMANT of its pro rata delivery, RESPONDENT sent a notice to SuperWines, which at that time was not even a customer of RESPONDENT, offering SuperWines 4,500 bottles of diamond Mata Weltin 2014 [*SoC, p. 6, para. 21; CE 4, p. 12; CE 6, p. 14; PO 2, p. 56, para. 22*]. Ultimately, RESPONDENT even went so far as to sell 5,500 bottles to SuperWines [*PO 2, p. 56, para. 22*]. Given that RESPONDENT itself stated that only longstanding customers would be entitled to receive a pro rata delivery [*CE 3,*

p. 11], RESPONDENT's decision to supply a completely new customer with any diamond Mata Weltin 2014 at all constitutes a breach of RESPONDENT's duty of good faith.

- 86 Moreover, CLAIMANT has valid reasons to believe that RESPONDENT's intention behind choosing this course of action was to profit from the premium SuperWines paid. This premium, which RESPONDENT itself confirmed that SuperWines paid [*SoD*, p. 30, para. 39], is assumed to be around EUR 15–20 over the EUR 41,50 CLAIMANT had contractually agreed to pay RESPONDENT as purchase price per bottle [*CE 3*, p. 11; *PO 2*, p. 55, para. 14; p. 56, para. 24]. Therefore, through contracting with SuperWines, RESPONDENT was able to sell a bottle of diamond Mata Weltin 2014 for a price about 35–50% higher than the price agreed with CLAIMANT [*CE 1*, p. 9; *PO 2*, p. 55, para. 14]. This price difference reveals that RESPONDENT had a significant financial incentive to breach the contract.
- 87 In addition, RESPONDENT knew that SuperWines was CLAIMANT's biggest competitor and aimed to adopt CLAIMANT's business model [*CE 6*, p. 14; *PO 2*, p. 56, para. 26]. Nevertheless, RESPONDENT rejected CLAIMANT's order and shortly thereafter entered into a contract with SuperWines, thereby knowingly exceeding its available wine inventory and leaving CLAIMANT high and dry [*CE 3*, p. 11; *PO 2*, pp. 56 et seq., para. 22, 27]. In so doing, RESPONDENT knowingly acted to the detriment of CLAIMANT's business interests, in violation of the principle of good faith. Particularly in the wine industry, the mutual respect of interests is of considerable importance. Indeed, RESPONDENT itself stated that “*good personal relationships and trust are part of the DNA of the trade in top class wines*” [*SoD*, p. 27, para. 17]. A successful relationship based on trust necessarily implies that the parties take the interests of their counterparties into account and support each other. Even more saliently, RESPONDENT accepted an explicit contractual obligation under Art. 2 Framework Agreement to support CLAIMANT “*in its marketing activities wherever possible without disruption to its ordinary course of business*” [*CE 1*, p. 9]. Therefore, RESPONDENT should have taken the interests of CLAIMANT into account by not entering into a new contract with SuperWines, and its decision to nonetheless contract with SuperWines breached the duty of good faith.
- 88 In sum, RESPONDENT breached its contractual obligations towards CLAIMANT apparently with the sole intention of making a larger profit, to the detriment of CLAIMANT's interests and in violation of the principle of good faith. This principle, therefore, supports a decision by the Arbitral Tribunal ordering RESPONDENT to disgorge all profits from its sale to SuperWines to CLAIMANT.

b. RESPONDENT must disgorge its profits based on the principle of *pacta sunt servanda*

- 89 The CISG is also based on the principle of *pacta sunt servanda*, according to which contractual promises must be kept [*Chengwei, chap. 1; Fogt, p. 184; Schwenzler II, para. 35*]. This fundamental principle is corroborated by the strict rules for avoidance of contracts [*CISG-online Case No. 709 (GER, 2002); CISG-online Case No. 642 (AUT, 2000); CISG-online Case No. 413 (SUI, 1998)*]. Consequently, the CISG aims to incent the parties to perform their obligations under a contract [*Bock, p. 185; Schmidt-Abrendts, p. 93*]. To satisfy this goal of the CISG, a breaching party should be forced to disgorge its gains from breaching a contract [*Barnett, p. 107; Bock, p. 186; Schmidt-Abrendts, p. 93; Schwenzler/Hachem/Kee, para. 44.15*].
- 90 Here, RESPONDENT's undisputed failure to comply with its contractual obligations to CLAIMANT, violated the principle of *pacta sunt servanda* and resulted in severe consequences to CLAIMANT. CLAIMANT had considerable pre-orders for RESPONDENT's diamond Mata Weltin 2014 and depended on the delivery of a specific number of bottles pursuant to the Framework Agreement [*para. 42*]. RESPONDENT's failure to comply with the Framework Agreement not only hindered CLAIMANT from honoring its contractual obligations to its customers, but also endangered CLAIMANT's established reputation as a particularly reliable source [*cf. SoC, p. 3, para. 1*]. It is crucial for CLAIMANT to receive the wine it ordered to uphold its reliability, as its high-end customers demand top quality wines such as RESPONDENT's diamond Mata Weltin 2014 for every vintage [*PO 2, p. 60, para. 52*]. To ensure that RESPONDENT honors its obligations and to avoid severe consequences for its customers in the future, the principle of *pacta sunt servanda* also weighs in favor of ordering RESPONDENT to disgorge its profits to CLAIMANT.

C. Conclusion

- 91 For the foregoing reasons, CLAIMANT is entitled to RESPONDENT's profits made through the sale to SuperWines. CLAIMANT suffered a loss of profit which it presently cannot calculate accurately, as it can neither rely on the price it agreed upon with its customers with regard to the 4,500 bottles it will finally receive, nor on a transparent market price for RESPONDENT's diamond Mata Weltin 2014. Consequently, the Arbitral Tribunal has the authority to estimate CLAIMANT's loss of profit, using RESPONDENT's profits as a reference point. CLAIMANT is then entitled to an award of damages in the amount of this profit. Moreover, even if RESPONDENT's profits were higher than CLAIMANT's loss, the principles of good faith and *pacta sunt servanda* require the Arbitral Tribunal to find that RESPONDENT

should not benefit from its breach. For this reason as well, CLAIMANT is entitled to receive damages in the full amount of RESPONDENT's profits.

III. THE ARBITRAL TRIBUNAL HAS THE POWER TO ORDER RESPONDENT TO PRODUCE DOCUMENTS

- 92 As shown above [*para. 59 et seqq.*], CLAIMANT is entitled to receive RESPONDENT's profits from the sale to SuperWines. To specify its entitlement, CLAIMANT needs to know the price SuperWines paid RESPONDENT for the 5,500 bottles of diamond Mata Weltin 2014. Once CLAIMANT receives this information, it will be in a position to calculate RESPONDENT's profits [*para. 109*]. Further, CLAIMANT needs to assess the circumstances, in particular, the time and the content of RESPONDENT's negotiations with SuperWines, to confirm to what extent RESPONDENT violated the principle of good faith [*para. 110*]. Especially, CLAIMANT needs to verify that RESPONDENT used the bad harvest as false pretenses to breach its obligations to CLAIMANT with the intention to simply profit from the sale to SuperWines. Accordingly, CLAIMANT has asked for documents from January 1, 2014, to July 14, 2015, pertaining to communications and contractual negotiations between RESPONDENT and SuperWines regarding the purchase of diamond Mata Weltin 2014. Particularly, it asked for the price of the bottles SuperWines paid [*SoC, p. 7, para. 27*].
- 93 According to RESPONDENT, the Arbitral Tribunal has no power to order the production of documents [*SoD, p. 28, para. 27*]. To the contrary, CLAIMANT will show that the Arbitral Tribunal has the power to order RESPONDENT to produce documents for the following reasons: First, the Arbitral Tribunal has wide discretion in the taking of evidence in accordance with the VIAC Rules and the UNCITRAL Model Law **(A)**. Second, the Parties only excluded discovery but not the production of documents **(B)**. Third, the Arbitral Tribunal may conduct the arbitral proceedings in accordance with international practice as agreed by the Parties in Art. 20 Framework Agreement **(C)**.

A. The Arbitral Tribunal has wide discretion in the taking of evidence

- 94 An arbitral tribunal's power to order the production of documents may derive from the parties' agreement, the chosen institutional rules, and the *lex arbitri* [*Böckstiegel, p. 2; Marghitola, p. 20*]. The agreement between the parties is the starting point to resolve issues regarding the taking of evidence [*Working Group Report "Contract Practices"*]. The institutional arbitration rules and the *lex arbitri*, which the parties chose, complement and limit the parties' agreement [*Berger/Kellerhals, para. 13; Born II, p. 59; Schäfer/Verbist/Imboos, p. 10*].

95 In the present case, the Parties agreed that the Arbitral Tribunal would conduct the proceedings in accordance with the VIAC Rules [CE 1, p. 9; PO 1, p. 50, para. 2]. As Danubia is the seat of the arbitration, the UNCITRAL Model Law is the relevant *lex arbitri* [PO 1, p. 51, para. 5(3)]. Pursuant to Art. 28(1) VIAC Rules and Art. 19(2) UNCITRAL Model Law, the Arbitral Tribunal should conduct the arbitration proceedings in accordance with the Parties' agreement. To the extent that the Parties have not found an agreement, the Arbitral Tribunal should conduct the proceedings in the manner it deems appropriate. Both, the VIAC Rules and the UNCITRAL Model Law lack specific provisions regarding the taking of evidence [Broches, Art. 19, para. 15; Haugeneder/Netal II, para. 3 et seq.]. By agreeing on the VIAC Rules and Danubia as the seat of arbitration, the Parties gave the Arbitral Tribunal wide discretion in the taking of evidence.

B. The Parties only excluded extensive U.S.-style discovery

96 To establish how the Parties intended to regulate the taking of evidence, it is necessary to interpret the Parties' agreement. In Art. 20 Framework Agreement, the Parties declared that “*the dispute shall be decided [...] in accordance with international practice*” and that “*proceedings shall be conducted in a fast and cost efficient way and the parties agree that no discovery shall be allowed*” [CE 1, p. 9]. CLAIMANT will show in the following: By inserting this clause into the Framework Agreement, the Parties intended to exclude extensive disclosure of documents as, *inter alia*, practiced in the U.S. However, the Parties did not intend to exclude regular and ordinary document production which is in line with international practice and which does not hinder the efficient conduct of the arbitration proceedings.

97 The interpretation of an arbitration clause must be based on the parties' mutual intent [Insignia v. Alstom (SGP, 2009)]. To establish the parties' understanding of the clause, the surrounding circumstances, the text and the purpose of the clause must be taken into consideration [Toll v. Alphapharm (AUS, 2004); Pacific Carriers v. BNP Paribas (AUS, 2004); ICC Case No. 7929 (1995)].

98 Here, as the Parties addressed the term “*discovery*” in their arbitration clause, it is necessary to interpret this term. “*Discovery*” refers almost exclusively to U.S. practice [Redfern/Hunter, para. 1.119; cf. Elsing/Townsend, p. 6; Zuberbühler/Hofmann/Oetiker/Rohner, para. 16, 18]. In U.S.-style discovery, the parties are allowed to request the production of any documents which can somehow lead to evidence supporting the requesting party's case or weakening the adversary's case [Keteltas, p. 6; Miller, p. 356; Redfern/Hunter, para. 1.120; von Mehren, p. 985; cf. O'Malley/Conway, p. 371]. The following examples demonstrate the broad nature of

discovery: In discovery proceedings in Washington State, the court ordered a defendant to produce e-mails which would take nearly four years to restore and would cost USD 834,285 [*Starbucks v. ADT Security (USA, 2009)*]. In another case, the court ordered a defendant to produce an 18,000-page customer complaint database [*In re Facebook (USA, 2011)*]. Not only e-mails and databases are the subject of today's U.S.-style discovery: Hard drives [*Cornwell v. Ohio Surgical Center (USA, 2009)*] and Facebook passwords [*Romano v. Steelcase (USA, 2010)*]; *McMillen v. Hummingbird Speedway (USA, 2010)*] are just the tip of the iceberg. Even metadata, *i.e.*, data about data, is disclosable [*Peacock v. Merrill (USA, 2008)*]; *Ryan v. Gifford (USA, 2007)*]; *Duval/Robson, p. 201*]. In summary, U.S.-style discovery is broad in the sense that even information about information is disclosable. It was the exclusion of such broad document production which the Parties had in mind when drafting the arbitration clause.

- 99 The fact that the Parties agreed to a cost-efficient and fast dispute resolution also corroborates with the Parties' exclusion of U.S.-style document production: CLAIMANT intended to avoid extensive document production on the recommendation of CLAIMANT's former COO's brother, who had been involved in court proceedings with extensive discovery in the U.S. courts [*CE 12, p. 20*]. The same is true for RESPONDENT. Only five years ago, RESPONDENT had found itself in extensive proceedings of taking evidence where the counterparty requested large quantities of documents from the past six years [*CE 12, p. 20*; *RE 1, p. 31*]. Based on this unpleasant experience, Mr. Weinbauer stated that RESPONDENT wanted to avoid extensive document production as used in the common law world [*RE 1, p. 31*]. In other words, both Parties specifically chose the term "discovery" because they wanted to exclude extensive document production as known in certain common law jurisdictions.
- 100 To justify its position that any and all document production had been excluded, RESPONDENT alleged that there was no reason to exclude only U.S.-style discovery since the present case had no connections to the U.S. [*SoD, p. 28, para. 28*]. However, as CLAIMANT has established, both Parties had good reasons to specifically exclude U.S.-style discovery given their experiences in the past. Additionally, RESPONDENT disregarded the risk that an arbitrator used to broad discovery similar to U.S. discovery might be appointed. An arbitrator from the U.S. or another common law country could likely favor extensive document disclosure, as the legal background, tradition and education influence an arbitrator's approach towards document production [*Born I, p. 2204*; *Marghitola, p. 188*; *Patocchi, p. 66*]. This risk was even more significant because CLAIMANT is domiciled in a country with a common law system, in which broad document production was generally accepted at the time the arbitra-

tion clause was drafted [PO 2, p. 61, para. 59]. In fact, CLAIMANT did appoint Ms. Gomes, an arbitrator from the common law country of Equatoria [Statement of acceptance of co-arbitrators, p. 38]. Thus, it made perfect sense for the Parties to exclude “discovery” to prevent any arbitrator from resorting to broad document disclosure typically used in his or her home country. Nonetheless, it left the Parties with the option to choose an arbitrator from their home country who would share the understanding of their home country’s legal system. In conclusion, the circumstances, the text and the purpose of the Framework Agreement show that the Parties merely wanted to exclude extensive and expensive document production, not the disclosure of documents *per se*.

C. The Arbitral Tribunal has the power to conduct the taking of evidence in accordance with international practice

101 As the Arbitral Tribunal has the power to grant document production, the question remains how the Arbitral Tribunal should conduct document production proceedings. Neither the VIAC Rules nor the UNCITRAL Model Law contains specific provisions regulating the production of documents [para. 95].

102 In the present case, aside from the exclusion of U.S.-style discovery [para. 96 et seqq.], the Parties have not agreed on any other specific rules regarding document production. However, the Parties agreed in Art. 20 Framework Agreement to decide disputes in “accordance with international practice”. This direction empowers the Arbitral Tribunal to follow and apply internationally accepted procedures.

IV. CLAIMANT IS ENTITLED TO RECEIVE THE REQUESTED DOCUMENTS FROM RESPONDENT

103 To order internationally accepted document production, several requirements have to be met. In the following, CLAIMANT will first establish the requirements for document production in international practice **(A)**. Subsequently, CLAIMANT will show that its procedural request fulfilled these international requirements **(B)**. Last, CLAIMANT will demonstrate that the production of the requested documents is necessary to safeguard both its right to be heard and the principle of fair treatment **(C)**.

A. According to international practice, the Arbitral Tribunal may grant procedural requests for specific and relevant documents

104 Parties’ expectations regarding document production differ depending on their legal backgrounds and experience. In the instant case, CLAIMANT is domiciled in a common law country, whereas RESPONDENT has its domicile in a civil law country [PO 2, p. 62, para. 68].

As a general rule, and particularly, in a case with parties from different legal backgrounds, document production must be based on a compromise between the various methods of the taking of evidence in the common and civil law systems [*Jingzhou*, p. 603; *Marghitola*, p. 16; *Trittmann*, p. 22; cf. *Drymer/Gobeil*, p. 212]. The IBA Rules contain such a compromise, because these rules embody elements from both legal systems [*Ashford*, p. 2; *Elsing/Townsend*, p. 61; *Schwarz/Konrad*, para. 20-241 et seq.; *Veeder*, p. 321].

105 International practice requires the parties to request relevant and specific documents [*Hanotian*, pp. 358 et seq.; *Lew*, p. 21; *Raeschke-Kessler*, p. 53]. Without the criteria of relevance and specificity, one would open the floodgates to fishing expeditions and would risk the disclosure of documents like in-house communication or even meta data [*Columbia Pictures v. Bunnell (USA, 2007)*; *Cross/Abramson/Deason*, p. 543; *Ides/May*, p. 615; *Nazzini*, p. 907]. The requirements of relevance and specificity are found not only in Art. 3(3) IBA Rules, but also in institutional rules such as in Art. 38(2) CIETAC Rules and Art. 21(4) ICDR Rules. Last but not least, the procedural laws of all states that have a connection to the current dispute, namely Mediterraneo, Equatoriana and Danubia contain provisions which are nearly identical to Art. 3 IBA Rules [*PO 2*, p. 61, para. 59]. The implementation of the requirements of relevance and specificity in the abovementioned provisions show that they are internationally accepted. In addition to these two criteria, it is required that the requested documents may not already be in the possession of the requesting party [cf. Art. 3(3)(c) IBA Rules]. Otherwise, the document request is not necessary.

106 The IBA Rules reflect international practice on the taking of evidence [*Kreindler*, p. 157; *Marghitola*, p. 34; *Redfern/Hunter*, para. 6.95; *Welser/De Berti*, p. 80; cf. *Born I*, pp. 2347 et seq.; *El-Ahdab/Bouchenaki*, p. 98] and are frequently used [*Born I*, p. 2348; *Hill*, p. 9; *Marghitola*, p. 33; *Müller*, p. 78; *Veeder*, p. 321]. Furthermore, their international relevance is established by the fact that most of the revisions and enactments of rules relating to document production directly address or discuss the IBA Rules; e.g., the ICC Report on E-Document Production in para. 3(B) et seq. and para. 5(A) et seq., the CPR Protocol on Disclosure in section 2a as well as the CIArb Protocol for E-Disclosure in para. 3(4) and para. 5.

107 As the IBA Rules represent international best practices, arbitral tribunals consult them as a reference point for the taking of evidence even without an explicit agreement or reference to these rules [*VIAC Award No. 5243 (AUT, 2013)*; *ICC Case No. 16655 (2011)*; *Glamis Gold v. U.S. (USA, 2009)*; *Railroad Development v. Guatemala (USA, 2008)*; *Noble Ventures v. Romania (USA, 2005)*]. In addition, the preamble to the IBA Rules specifies that parties and arbitral

tribunals can “use them [the IBA Rules] as guidelines in developing their own procedures” [IBA Rules Preamble, para. 2, first sentence]. It follows, therefore, that the Arbitral Tribunal should conduct document production in accordance with international practice which allows document requests for specific and relevant information.

B. The requirements to grant CLAIMANT’s document request are met

108 CLAIMANT will show that the Arbitral Tribunal should order RESPONDENT to produce the requested documents in accordance with international practice, for example, in line with the IBA Rules. Thus, CLAIMANT will demonstrate that its document request met the requirements of international practice, *i.e.*, that CLAIMANT asked for relevant **(1)** and specific **(2)** documents which were not in its possession **(3)**. Furthermore, CLAIMANT will show that the requested documents are not confidential **(4)**.

1. CLAIMANT requires the requested documents to confirm its entitlement

109 As shown above [para. 67 *et seqq.*], CLAIMANT needs to know the price SuperWines paid to RESPONDENT as a reference point to estimate its own loss. Moreover, CLAIMANT also needs to know the price SuperWines paid to claim the disgorgement of RESPONDENT’s profits. According to the abovementioned formula [para. 70 *et seqq.*], the variable **X**, *i.e.*, the price SuperWines paid, is the only variable missing to calculate RESPONDENT’s profits. Thus, the documents regarding SuperWines’ purchase price are relevant for CLAIMANT.

110 Furthermore, the documents regarding the contractual negotiations between RESPONDENT and SuperWines are essential to further establish that RESPONDENT intentionally terminated the contract with CLAIMANT to profit from its new business relationship with SuperWines. There are strong reasons for believing that RESPONDENT’s excuse for not delivering the promised amount of wine bottles due to a poor harvest was a mere pretext. RESPONDENT failed to fulfill CLAIMANT’s order, and instead offered SuperWines 4,500 bottles of diamond Mata Weltin 2014 [para. 85]. In this light, the fact that the 5,500 bottles sold to SuperWines amounted to the exact same number of bottles which CLAIMANT did not receive is unlikely to be a coincidence. It is CLAIMANT’s position that the time and content of the contractual negotiations will likely reveal whether RESPONDENT willfully decided not to deliver the promised bottles to CLAIMANT because of its own financial interests [para. 86]. The contractual negotiations could show that SuperWines offered RESPONDENT a much higher premium, on their last meeting, on November 25, 2014, than SuperWines had previously offered. On December 1, 2014, RESPONDENT then informed CLAIMANT that it could not deliver the entire quantity to which CLAIMANT was entitled [CE 6, p. 14]. The contractual negotiations

would, therefore, confirm that although RESPONDENT knew about the shortage of the available quantity of wine, RESPONDENT agreed to contract with SuperWines and, thereby, risked breaching its obligations to CLAIMANT. The contractual negotiations could also show that RESPONDENT planned to build on SuperWines' distribution network to increase its sales market regardless of the fact that it was required to supply CLAIMANT with a promised amount of bottles. As CLAIMANT was entitled to order up to 10,000 bottles of wine, RESPONDENT should have considered its contractual obligations to CLAIMANT when contracting with SuperWines, rather than only its own financial interests. Thus, the documents are relevant to verify that RESPONDENT violated the principle of good faith by breaching its contractual obligations to CLAIMANT out of financial interests.

2. CLAIMANT specifically requested documents concerning RESPONDENT's sale of the 5,500 bottles of diamond Mata Weltin 2014 to SuperWines

111 CLAIMANT's procedural request [*SoC*, p. 7, para. 27] is a specific document request which contains several qualifiers to specify and describe the documents at issue. First, CLAIMANT only asked for documents between two particular parties, namely between RESPONDENT and SuperWines, as it appears that RESPONDENT sold the exact amount of bottles CLAIMANT did not receive to SuperWines [*para. 110*]. Second, the request was limited to a specific time period in which negotiations between RESPONDENT and SuperWines took place, *i.e.*, from January 1, 2014 to July 24, 2015. This time period was important, as RESPONDENT and SuperWines first started negotiating SuperWines' purchase in January 2014 [*PO 2*, p. 55, para. 20]. Third, by asking for documents from this negotiation period, CLAIMANT narrowed its request to a specific topic, *i.e.*, the communication and contractual documents in regard to the purchase of diamond Mata Weltin 2014, particularly documents "relating to [...] the purchase price" SuperWines paid [*SoC*, p. 7, para. 27]. Thus, the documents CLAIMANT requested only concerned a narrow subject matter and were easily identifiable.

3. CLAIMANT does not possess the requested documents

112 In the present case, CLAIMANT asked for the communication and contractual documents between RESPONDENT and SuperWines, in particular the price of the bottles SuperWines purchased. CLAIMANT was not a contracting party and, therefore, never received such contractual information. RESPONDENT, by contrast, is in the possession of the requested documents and admitted that negotiations and orders by SuperWines exist [*SoD*, pp. 26 et seq., para. 15; *PO 2*, p. 56, para. 24]. The negotiations occurred *inter alia* in e-mails summarizing meetings and minutes discussing the cooperation with SuperWines [*PO 2*, p. 56, para. 23].

4. The requested document production does not affect business secrets

- 113 RESPONDENT alleged that the documents CLAIMANT requested contained business secrets which could not be disclosed [*SoD*, p. 25, para. 1]. CLAIMANT will establish that the documents' content cannot be sufficiently qualified as business secrets.
- 114 The arbitral tribunal must determine whether documents are confidential and, consequently, may be excluded from evidence [*Art. 9(2)(e) IBA Rules*; *Müller*, p. 71; *Perkins*, p. 273]. Documents are ordinarily referred to as confidential if the holder intends to keep them secret, *i.e.*, if the holder restricts their content to insiders, as the secret has an objective value to the holder [*Confold Pacific v. Polaries (USA, 2006)*; *Esso v. Plowman (AUS, 1995)*; *Marghitola*, p. 92].
- 115 Although RESPONDENT qualified the requested documents as business secrets without giving any reasons [*SoD*, p. 25, para. 1; p. 28, para. 30; *RE 1*, p. 31], no express or formal confidentiality agreement existed between RESPONDENT and SuperWines [*PO 2*, p. 56, para. 25]. If the two parties had truly discussed business secrets, they would have expressly agreed to keep their secrets confidential. Therefore, RESPONDENT and SuperWines did not intend to keep the documents confidential. Further, not only did RESPONDENT and SuperWines not express the intention to keep their contractual details confidential, but they in fact released such details themselves. For example, Mr. Barolo, SuperWines' CEO, confirmed in an interview that SuperWines paid a premium price for each bottle of wine to become RESPONDENT's new business partner, although the exact price remained unknown [*PO 2*, p. 56, para. 24]. As the exact price is unknown, CLAIMANT still needs the documents to determine this price. In addition, RESPONDENT stated that it could not deliver SuperWines the promised 15,000 bottles but only 30% thereof, although SuperWines had been willing to pay a premium price [*SoD*, p. 26, para. 15]. As indicated in Procedural Order No. 2, the exact amount of bottles SuperWines purchased was disclosed [*PO 2*, p. 56, para. 24]. Additionally, various industry journals reported that SuperWines paid a premium price [*CE 4*, p. 12]. It seems unlikely that the journals received such information without any contribution from RESPONDENT or SuperWines. The disclosure in the media and the statements made speak against RESPONDENT's allegation that its contractual negotiations with SuperWines include compelling business secrets as RESPONDENT would not have disclosed such compelling business secrets itself. In summary, RESPONDENT's and SuperWines' disclosure of the contractual information shows that they did not have any confidentiality concerns.
- 116 In addition, several reasons demonstrate that there is no objective value for RESPONDENT in keeping documents relating to SuperWines confidential: First, CLAIMANT is not request-

ing any information affecting the heart of RESPONDENT's business as a wine producer, *i.e.*, any contractual information containing details with regard to RESPONDENT's wine production, such as the grape plantation, harvest process, or even wine formula. Second, based on the requested information, it is not possible to deduce business details concerning any other business relation of RESPONDENT, as it engages in an individual pricing for each customer [PO 2, p. 61, para. 61]. Instead, only the quality of each year's vintage and the loyalty of a customer as non-economic factors are decisive to determine the price [PO 2, p. 55, para. 14; p. 61, para. 61], and such information is not the object of CLAIMANT's request. To the contrary, the requested documents only contain information about the negotiations between RESPONDENT and SuperWines regarding the last year's vintage [SoC, p. 7, para. 27; PO 2, p. 61, para. 61]. Consequently, there is no valid basis for claiming that the requested documents contain any compelling business secrets.

- 117 Even assuming that some parts of the documents were confidential, a party should be allowed to obtain confidential information if justified interests require their disclosure. In other words, if a party has legitimate interest in obtaining information not intended for the public eye, the arbitral tribunal can nonetheless disclose the information to protect the legitimate interests [*Milsom & Standish v. Outen & Ablyazov* (GBR, 2011); *Myanmar v. Win* (SGP, 2003); *Quinto/Singer*, p. 205]. The arbitral tribunal has to balance diverging interests and has to determine if reasons exist which outweigh the confidentiality interests, *e.g.*, it has to consider possible impacts on the parties or the relevance of the documents [*Foreman v. Kingstone* (NZL, 2003); *Schmidt v. Rosewood Trust* (GBR, 2003); *Metzler*, pp. 252 *et seq.*].
- 118 In the present case, CLAIMANT's interests outweigh RESPONDENT's concerns regarding any potential confidentiality of the requested documents for the following reasons: RESPONDENT has to produce only documents concerning the purchase of diamond Mata Weltin 2014 from one of its business partners. The requested information is limited to the vintage of 2014 and does not concern any details about wine production [para. 111]. Moreover, RESPONDENT does not have to fear a potential breach of a confidentiality agreement with SuperWines if it discloses the requested contractual information, as there is no such agreement. By contrast, CLAIMANT depends on RESPONDENT's documents to calculate its entitlement [para. 72]. CLAIMANT does not have access to the required information, namely the exact price SuperWines paid and the contractual documents [para. 112]. For these reasons CLAIMANT's interests outweigh any interests RESPONDENT may allege.

119 Finally, even if the Tribunal were to find that parts of the requested documents were confidential, it would still be entitled to order the production of such documents accompanied by a protective order. Protective orders preserve confidential information from disclosure, e.g., through an explicit duty of confidentiality or through redacting parts of the text [Born I, p. 2388; Smeureanu, pp. 171 et seq.; Zuberbühler/Hofmann/Oetiker/Rohner, Art. 9, para. 53]. An explicit duty of confidentiality obliges the party which receives confidential information to keep the information secret and to only use it during the instant proceedings [Lee, para. 172; cf. Redfern/Hunter, para. 2.161]. A further alternative would allow the redaction of parts of the text by blacking out confidential parts which do not necessarily have to be disclosed. Such measures are in line with international practice [cf. Art. 9(4) IBA Rules]. As the Arbitral Tribunal has wide discretion regarding the production of documents [para. 95], it may decide if and which protective order may be necessary and suitable if RESPONDENT requests such measures.

120 Consequently, producing the requested documents with a protective order would permit CLAIMANT to receive the relevant and necessary facts to prove its claim. At the same time, it would allow RESPONDENT to protect compelling confidential information from unlimited disclosure. For instance, an explicit confidentiality agreement would prevent any involved party from using the received information outside of the arbitration proceedings. As a result, the ordering of the requested documents would not violate compelling business secrets of RESPONDENT, and would, thus, satisfy all parties' interests. Accordingly, the Arbitral Tribunal should grant CLAIMANT's request.

C. If the Arbitral Tribunal were to deny document production, it would violate CLAIMANT's right to be heard and the fair treatment principle

121 RESPONDENT argued that CLAIMANT could not allege a violation of the right to be heard if the latter did not receive the requested documents [SoD, p. 28, para. 29]. Furthermore, RESPONDENT argued that granting CLAIMANT's document request would instead violate its right to be treated equally [SoD, p. 28, para. 30]. As CLAIMANT will show, it is, to the contrary, entitled to the requested documents, as the Arbitral Tribunal would otherwise violate CLAIMANT's right to be heard and unduly favor RESPONDENT.

122 The right to be heard is a fundamental principle of a fair proceeding and a procedural safeguard [Baldwin, p. 233; Schwarz/Konrad, para. 20-031]. It provides the possibility for each party to present the relevant facts and views of the case [Gbangbola & Lewis v. Smith Sherriff (GBR, 1998); O'Malley, para. 9.115]. Additionally, the parties must have the possibility to

participate in the taking of evidence [*Duarib v. Jallais (FRA, 1998)*; *Decision of the Federal Constitutional Court (GER, 1985)*; *Haugeneder/Netal I, para. 17*]. The principle of fair treatment demands that each party must have had an appropriate opportunity to present its case without a significant disadvantage to the other party [*cf. Dombo Bebeer v. the Netherlands (FRA 1993)*; *Schwarz/Konrad, para. 20-017*].

- 123 The right to be heard and the principle of fair treatment are reflected in Art. 28(1) VIAC Rules and Art. 18 UNCITRAL Model Law as well as in Art. V(1)(b) NYC. According to Art. V(1)(b) NYC, an arbitral award is unenforceable if a party is denied the opportunity to be heard in a meaningful manner [*Qingdao v. P and S (USA 2009)*; *Iran Aircraft v. Avco (USA 1992)*]. This provision is applicable in Equatoriana and Mediterraneo which are both members of the NYC [PO 2, p. 61, para. 58].
- 124 Here, to present all relevant facts to the Arbitral Tribunal, it is necessary for CLAIMANT to receive the requested documents. Only with these documents, CLAIMANT can specify its claim such that the Arbitral Tribunal can render an award which takes all decisive facts into account [*para. 109 et seq.*]. Otherwise, neither CLAIMANT nor the Arbitral Tribunal can calculate the exact amount of RESPONDENT's profits, to which CLAIMANT is entitled, or verify to which extent RESPONDENT made its profits in breach of its duties towards CLAIMANT [*para. 110*]. Additionally, the Arbitral Tribunal would treat CLAIMANT unfairly because RESPONDENT can argue its case with a lead on information since RESPONDENT possesses the requested documents. This information gap between RESPONDENT and CLAIMANT results in an unfair disadvantage for CLAIMANT. With the relevant documents, RESPONDENT can attempt to counter the arguments which CLAIMANT made [*para. 59 et seq.*]. In contrast, CLAIMANT cannot anticipate such counterarguments if it lacks the requested documents. The lack of symmetry on information is unfair, given that it was RESPONDENT which breached the Framework Agreement and ignored its contractual duty to deliver 10,000 bottles of diamond Mata Weltin 2014 to profit from a new business relationship. Only because of RESPONDENT's behavior does CLAIMANT now depend on document production to estimate its exact loss and to confirm RESPONDENT's violation of good faith. On these grounds, denying CLAIMANT's document request would infringe on CLAIMANT's right to be heard and violate the principle of fair treatment. As a consequence, rendering an enforceable award requires that CLAIMANT receives the requested documents.

D. Conclusion

125 The Arbitral Tribunal should grant CLAIMANT's document request in line with international practice. The requested and specified documents are relevant for the outcome of these proceedings and CLAIMANT cannot produce them by itself. Additionally, the documents are not confidential, but are of paramount importance to CLAIMANT, as set forth above. Finally, the disclosure of the documents would foster a fair process and, thereby, an enforceable award.

PROCEDURAL REQUEST

Counsel, on behalf of CLAIMANT, respectfully requests the Arbitral Tribunal to order RESPONDENT to produce the documents from the period of January 1, 2014, to July 14, 2015, pertaining to communications and contractual documents between RESPONDENT and SuperWines in regard to the purchase of diamond Mata Weltin 2014.

PRAYERS FOR RELIEF

Counsel, on behalf of CLAIMANT, respectfully requests the Arbitral Tribunal:

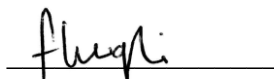
- 1) To order RESPONDENT to reimburse CLAIMANT for its litigation costs in the amount of USD 50,280 which CLAIMANT incurred in the proceedings before the High Court;
- 2) To order RESPONDENT to pay CLAIMANT a sum at least equal to RESPONDENT's profits made by selling the 5,500 bottles of diamond Mata Weltin 2014 to SuperWines instead of CLAIMANT;
- 3) To order RESPONDENT to bear all the costs arising from this arbitration.

Respectfully submitted,

Lucerne, December 10, 2015



Inès Holderegger



Franziska Hügli



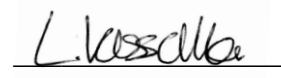
Marco Keller



Jean-Michel Ludin



Dario Picocchi



Lorenza Vassallo