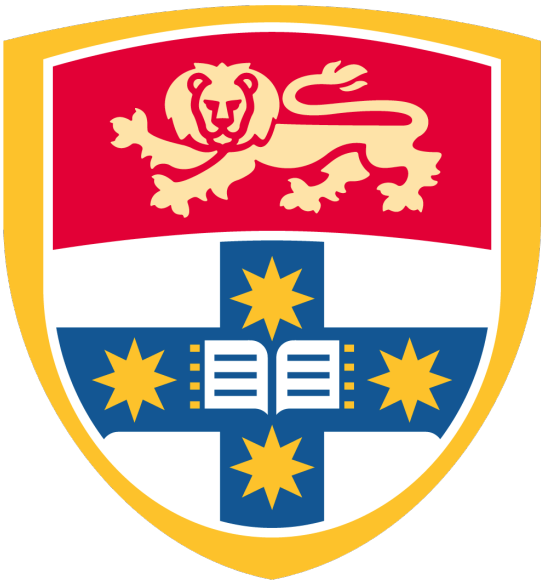
TWENTY-THIRD ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
19 TO 24 MARCH 2016

MEMORANDUM FOR RESPONDENT



THE UNIVERSITY OF SYDNEY

ON BEHALF OF:	AGAINST:
Vino Veritas Ltd.	Kaihari Waina Ltd.
56 Merlot Road	12 Riesling Street
St Fundus	Oceanside
Vuachoua	Equatoriana
Mediterraneo	
RESPONDENT	**CLAIMANT**

COUNSEL:

Andrew	Brendan	Penina	John
Bell	Hord	Su	Tsaousidis

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INDEX OF ABBREVIATIONS

Abbreviation	Term
/	and
¶(¶)	Paragraph(s)
§(§)	Section(s)
the Tribunal	The Arbitral Tribunal of Amadeus, Gomes and Graševina constituted for proceedings SCH-1975: *Kaihari Waina vs. Vino Veritas*
Arbitration Agreement	Art. 20 of the Framework Agreement, Cl. Ex. No. 1
Art(s).	Article(s)
ASOC	RESPONDENT's Answer to Statement of Claim
cf.	Compare
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Cl. Ex. No.	CLAIMANT's Exhibit Number
Cl. Memo.	CLAIMANT Memorandum
EUR	Euro
fn.	Footnote
IBA	International Bar Association
infra	below
LCIA	London Court of International Arbitration
p(p).	page(s)
Parties	CLAIMANT and RESPONDENT
The UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
PO No. 1	Procedural Order No. 1, dated 2 October 2015
Res. Ex. No.	RESPONDENT's Exhibit Number
SOC	Statement of Claim
supra	above
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNICTRAL Model Law On International Commercial Arbitration (incl. 2006 amendments)
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America

USD	US Dollar
vol.	Volume
VIAC	Vienna International Arbitral Centre
Vienna Rules	VIAC Rules of Arbitration 2013

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Treaties, Conventions and Rules

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, Treaty Series, Vol. 330, p. 3 Opened for Signature 10 June 1958 Entry into force: 7 June 1959	41, 52, 80
Principles of Transnational Civil Procedure	Principles of Transnational Civil Procedure Adopted by American Law Institute and UNIDROIT (International Institute for the Unification of Private Law) in 2004	45
IBA Guidelines	International Bar Association Guidelines on Party Representation in International Arbitration 2013 Adopted by IBA Council 25 May 2013 International Bar Association London	49
Trans-Lex Principles	*Trans-Lex Principle No. IV.6.4- No Contract to detriment of third party*, viewed 10 January 2016, http://www.trans-lex.org/931000.	79

Commentaries and Articles

Author (*Cited As*)	**Citation**	¶(¶)
Adar, Yehuda *Adar*	Israel In: DiMatteo, Larry A. (ed.), *International Sales Law: A Global Challenge*, Cambridge University Press, New York, 2014, pp. 518-539.	114
Andersen, Camilla Baasch *Andersen*	General Principles of the CISG – Generally Impenetrable? In: Anderson, Camilla B. and Schroeter, Ulrich G. (eds.), *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmonds & Hill Publishing, United Kingdom, 2008, pp. 13-33.	107
Ashford, Peter *Ashford 2012*	Document Production in International Arbitration: A Critique from 'Across the Pond' In: *Loyola University Chicago International Law Review*, vol. 10, no. 1, 2012, pp. 1-9.	15
Ashford, Peter *Ashford 2013*	*The IBA Rules on the Taking of Evidence in International Arbitration*, Cambridge University Press, Cambridge, 2013.	30, 32
Barnett, Katy *Barnett*	*Accounting for Profit for Breach of Contract: Theory and Practice*, Hart Publishing, Oxford, Portland, Oregon, 2012.	115, 118

Berger, Klaus *Berger*	*Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration 3rd Edition*, Kluwer Law International, Alpehn aan den Rijn, 2015.	44, 45
Berger, Klaus Peter *Berger 2011*	Chapter 2: The TransLex Principles: An Online Research Tool for the Vis Moot and International Arbitration In: Kröll, Stefan Michael; Mistelis, Loukas, et al. (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law International (2011), pp. 33 - 53	79
Berger, Benhard **Kellerhals,** Franz *Berger/Kellerhals*	*International and Domestic Arbitration in Switzerland: 2nd Edition*, Sweet & Maxwell, 2010, London.	88
Bernstein, Herbert **Lookofsky**, Joseph M. *Bernstein/Lookofsky*	*Understanding the CISG in Europe: a compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, Kluwer Law International, Alpehn aan den Rijn, 1997.	16
Bishop, Doak **Childs**, Thomas *Bishop/Childs*	*The Requirement of Fair and Equal Treatment with Respect to Document Production in International Arbitration* Paper prepared for the 12th International Arbitration Day of the International Bar Association in Dubai, February 2009.	47, 49
Boele-Woelki, Katharina *Boele-Woelki*	Terms of Co-Existence: The CISG and the UNIDROIT Principles In: Šarčević, Peter and Volken, Paul (eds.), *The International Sale of Goods Revisited,* Kluwer Law International, The Hague, 2001, pp. 203-241.	109

Bonell, Michael Joachim *Bonell 1987*	Article 7 In: C.M. Bianca and M.J. Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987, pp. 65-94.	104
Bonell, Michael Joachim *Bonell 2005*	*An International Restatement of Contract Law: The UNDROIT Principles of International Commercial Contracts: Third Edition*, Transnational Publishers, New York, 2005.	109
Born, Gary B. *Born 2012*	*International Arbitration: Law and Practice,* Kluwer Law International, Alpehn aan den Rijn, 2012.	80
Born, Gary B. *Born 2014*	*International Commercial Arbitration 2nd Edition*, Kluwer Law International, Alpehn aan den Rijn, 2014.	3, 6, 15, 19, 20, 25, 32, 33, 34, 43, 44, 47, 49, 51, 80, 81, 85, 87, 88
Born, Gary B. *Born 2015*	*International Arbitration: Cases and Materials 2nd Edition*, Kluwer Law International, Alpehn aan den Rijn, 2015.	73
Brunner, Christoph *Brunner*	*Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration*, Kluwer Law International, Alpehn aan den Rijn, 2008.	102
Brower, Charles N. **Sharpe**, Jeremy K. *Brower/Sharpe*	Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law In: Newman, Lawrence W. and Hill, Richard D. (eds.), *The Leading Arbitrators' Guide to International*	33

	Arbitration 2nd Edition, Juris Publishing, New York, 2008, pp. 218-431.	
Bühring-Uhle, Christian *Bühring-Uhle*	*Arbitration and Mediation in International Business 2nd Edition*, Kluwer Law International, Alpehn aan den Rijn, 2006.	3
Collins, Lawrence **Briggs**, Adrian **Harris**, Jonathan **McClean**, David **McLachlan**, Campbell **Morse,** Robin *Dicey/Morris/Collins*	*Dicey, Morris and Collins on The Conflict of Laws 14th Edition*, Sweet & Maxwell Limited, London, 2006.	41
Cordero-Moss, Guiditta *Cordero-Moss*	*International Commercial Contracts: Applicable Sources and Enforceability*, Cambridge University Press, United Kingdom, 2014.	79
Eiselen, Sieg *CISG-AC No.13*	CISG Advisory Council Opinion No. 13: Inclusion of Standard Terms under the CISG, 2013.	16
Emanuele, Ferdinando **Molfa**, Milo *Emanuele/Molfa*	*Selected Issues in International Arbitration: The Italian Perspective*, Thomson Reuters, Rome, 2014.	15
Enderlein, Fritz; **Maskow**, Dietrich *Enderlein/Maskow*	*International Sales Law, Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods*, Oceana Publications, New York, 1992.	7, 62

Farnsworth, Allan E. *Farnsworth*	Art 8 – Interpretation of the Contract In: Bianca, Ceasare and Bonell, Michael (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention,* Giuffrè, Milan, 1987, pp. 95-102.	13
Felemegas, John *Felemegas*	The award of counsel's fees under Article 74 CISG, in *Zapata Hermanos Sucesores v. Hearthside Baking Co.* (2001) In: *Vindobona Journal of International Commercial Law and Arbitration*, vol. 6, 2001, pp. 30-39.	62, 65
Ferrari, Franco *Ferrari 2003*	Gap-Filling and Interpretation of the CISG: Overview of International Case Law In: *Vindobona Journal of International Commercial Law & Arbitration*, vol. 7, 2003, pp. 63-92.	108, 112, 113
Ferrari, Franco *Ferrari 2004*	Interpretation of the Convention and Gap-Filling: Article 7 In: Ferrari, Franco; Flechtner, Harry and Bland, Ronald (eds.), *The UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention*, Sellier European Law Publishers, London, 2004, pp. 138-172.	39
Ferrari, Franco *Ferrari 2008*	Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts In: Andersen, Camilla B. and Schroeter, Ulrich G. (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmonds	62

& Hill Publishing, United Kingdom, 2008, pp. 134-167.

Ferrari, Franco
Ferrari 2009
Homeward Trend: What, Why and Why Not
In: *CISG Methodology*, Sellier European Law Publishers, Munich, 2009, pp. 171-207. 108

Flechtner, Harry M.
Flechtner 2002
Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking
In: *Northwestern Journal of International Law & Business*, vol. 22, no. 2, 2002, pp. 121-160. 57, 61

Flechtner, Harry M.
Lookofsky, Joseph M.
Flechtner/Lookofsky 2003
Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal
In: *Vindobona Journal of International Commercial Law and Arbitration*, vol. 7, 2003, pp. 93-104. 57

Flechtner, Harry M.
Lookofsky, Joseph M.
Flechtner/Lookofsky 2005
Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years
In: *Vindobona Journal of International Commercial Law and Arbitration*, vol. 9, no. 1, 2005, pp. 199-208. 108

Flechtner, Harry M.
Lookofsky, Joseph M.
Flechtner/Lookofsky 2006
Zapata Revisited: Attorneys' Fees Are (Still) Not Covered by the CISG
In: *Journal of Law & Commerce*, 2006, vol. 26, pp. 1-9. 61

Gabriel, Simon *Gabriel*	Chapter 13, Part XII: Damages for Breach of Arbitration Agreements In: Arroyo, Manuel (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, Alpehn aan den Rijn, 2013, pp. 1473-1481.	88
Gaillard, Emmanuel **Savage**, John *Gaillard/Savage*	*Fouchard Gaillard Goldman on International Commercial Arbitration, Savage and Gaillard (ed.),* Kluwer Law International, Alpehn aan den Rijn, 1999.	6
Garnett, Richard *Garnett*	*Substance and Procedure in Private International Law*, Oxford University Press, London, 2012.	38
Girsberger, Daniel **Gabriel,** Simon *Girsberger/Gabriel*	The Legal Nature of Arbitration Agreements under Swiss Law In: Gauch, Peter; Werro, Franz; Pichonnaz, Pascal (eds.), *Mélanges en l'honneur de Pierre Tercier*, Zürich (Schulthess), 2008, pp. 819-835.	88
Gotanda, John Y. *CISG-AC No. 6*	CISG Advisory Council Opinion No. 6: Calculation of Damages under CISG Article 74, 2006.	65, 110, 130, 131, 132, 144
Gotanda, John Y. *Gotanda 2004*	Recovering Lost Profits In International Disputes In: *Georgetown Journal of International Law*, vol. 36, no. 1, 2004, pp. 61-112.	69
Gotanda, John Y. *Gotanda 2006*	Damages in Lieu of Performance because of Breach of Contract In: *Villanova University School of Law: School of Law Working Paper Series*, 2006, Paper 53.	70

Gotanda, John Y. *Gotanda 2011*	Article 74-78 In: Kröll, Stefan; Mistelis, Loukas and del Pilar Perales Viscacillas, Maria (eds.), *The United Nations Convention on Contracts for the International Sale of Goods*, Hart Publishing, Munich, 2011, pp. 990-1042.	76, 130, 137, 138
Haugeneder, Florian **Netal,** Patrizia *Haugeneder/Netal*	Conduct of the Arbitration In: *Handbook Vienna Arbitration Rules: A Practitioner's Guide,* Verlag WKÖ Service GmbH, Germany, 2014, pp. 164-169.	5, 42, 50
Holmes, Eric M. *Holmes*	Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation In: *University of Pittsburg Law Review*, vol. 39, no. 3, 1978, pp. 381-452.	126
Holtzmann, Howard M. **Neuhaus**, Joseph E. *Holtzmann/Neuhaus*	*A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law and Taxation Publishers, Deventer, 1989.	86
Hondius, Ewoud **Janssen**, André *Hondius/Janssen*	Chapter 26: Disgorgement of Profits: Gain-Based Remedies Throughout the World In: Hondius, Ewoud and Janssen, André (eds.), *Disgorgement of Profits: Gain-Based Remedies throughout the World*, Springer, Cham, 2015, pp. 471-507.	114
Honnold, John O. *Honnold 1989*	*Documentary History of the Uniform Law for International Sales*, Kluwer Law And Taxation Publishers, Deventer, 1989.	103, 110

Honnold, John. O *Honnold 2009*	*Uniform Law for International Sales under the 1980 United Nations Convention 4th Edition, edited and updated by Harry M. Flechtner*, Kluwer Arbitration, Alpehn aan den Rijn, 2009.	16, 58, 61, 107, 110
Huber, Peter *Huber*	*The CISG: A New Textbook for Students and Practitioners*, Sellier European Law Publishers, Germany, 2007.	17, 39, 57, 107, 138
IBA Arbitration Committee *IBA Arbitration Committee*	*IBA Guidelines on Party Representation in International Arbitration,* International Bar Association, London, 2013.	49
IBA Subcommittee *IBA Subcommittee*	*IBA Subcommittee on Recognition and Enforcement of Arbitral Awards*, Report on the Public Policy Exception in the New York Convention, October 2015.	79
1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee *IBA Working Group*	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, International Bar Association, 2010.	28, 30, 34, 45
International Law Association Interim Report *ILA Interim Report*	*Interim Report: "Res judicata" and arbitration*, ILA Berlin Conference: International Commercial Arbitration, 2004.	80

Keily, Troy *Keily 1999*	Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG) In: *Vindobona Journal of International Commercial Law and Arbitration*, vol. 3, no. 1, 1999, pp. 15-40.	127
Keily, Troy *Keily 2003*	How Does the Cookie Crumble? Legal Costs under a Uniform Interpretation of the United Nations Convention on the Contracts for the International Sale of Goods In: *Nordic Journal of Commercial Law*, vol. 1, 2003, pp. 2-23.	65
Kleinheisterkamp, Jan *Kleinheisterkamp*	Article 1.3 In: Vogenauer, Stefan and Kleinheisterkamp, Jan (eds.) *Commentary On The UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, Oxford, 2009, pp. 125-127.	120
Knapp, Victor *Knapp 1987a*	Article 74 In: Bianca, Ceasare and Bonell, Michael (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987, pp. 538-548.	70, 71
Knapp, Victor *Knapp 1987b*	Article 77 In: Bianca, Ceasare and Bonell, Michael (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987, pp. 559-567.	95, 130

Kotrusz, Juraj *Kotrusz*	Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts In: *Uniform Law Review*, vol. 14, no. 1-2, 2009, pp. 119-163.	120
Koneru, Phanesh *Koneru*	The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach based on General Principles In: *Minnesota Journal of Global Trade*, vol. 6, no. 1, 1997, pp. 105-152.	110
Kröll, Stefan *Kröll 2005*	Selected Problems Concerning the CISG's Scope of Application In: *Journal of Law and Commerce*, vol. 25, 2005-6, pp. 39-57.	85
Kröll, Stefan *Kröll 2011*	The Burden of Proof for the Non-Conformity of Goods under Art. 35 of the CISG In: *Belgrade Law Review,* no. 3, 2011, pp. 162-180.	38, 39, 40
Kuitkowski, Diana *Kuitkowski*	The Law Applicable to Privilege Claims in International Arbitration In: *Journal of International Arbitration*, vol. 32, no. 1, 2015, pp. 65-105.	44
Legislative History of CISG Antecedents	Legislative History: CISG Antecedents In: Pace Database, viewed 5 January 2016, available at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-74.html.	143

Lew, Julian DM **Mistelis**, Loukas A **Kröll**, Stefan *Lew/Mistelis/Kröll*	*Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2003.	6, 21, 38, 85
Lionnet, Klaus **Lionnet**, Annette *Lionnet/Lionnet*	*Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit 3rd Edition,* Richard Bloorberg Verlag, Stuttgart, 2005.	25
Lookofsky, Joseph M *Lookofsky*	Walking the Article 7(2) Tightrope Between CISG and Domestic Law In: *Journal of Law and Commerce*, vol. 25, 2005, pp. 87-105.	65
Osborne, Phillip James *Osborne*	Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980 In: Pace Database, 2006, viewed 1 January 2016, available at http://www.cisg.law.pace.edu/cisg/biblio/osborne.html.	62
Marghitola, Reto *Marghitola*	*Document Production in International Arbitration*, Kluwer Law International, Alpehn aan den Rijn, 1995.	15
McKendrick, Ewan *McKendrick 2009*	Article 7.4.2 In: Vogenauer, Stefan and Kleinheisterkamp, Jan (eds.) *Commentary on the UNIDROIT Principles Of International Commercial Contracts (PICC)*, Oxford University Press, Oxford, 2009, pp. 872-879.	120

McKendrick, *Ewen McKendrick 2013*	Breach of Contract, Restitution for Wrongs and Punishment In: Burrows, Andres and Peel, Edwin (eds), *Current Issues and Problems*, Oxford University Press, Oxford, 2003, pp. 93-112.	115
McKendrick, Ewan *McKendrick 2015*	Article 7.4.2 In: Vogenauer, Stefan (ed.) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) Second Edition*, Oxford University Press, 2015, pp. 980- 987.	120
Mcllwrath, Michael **Savage**, John *Mcllwrath/Savage*	*International Arbitration and Meditation: A Practical Guide,* Kluwer Law International, Alpehn aan den Rijn, 2010.	49
Moses, Margaret *Moses*	Inherent Powers of Arbitrators to Deal with Ethical Issues In: Rovine, Arthur (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012,* Martinus Nijhoff, 2011, pp. 90-106.	21
Mullis, Alistair *Mullis*	Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention In: *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2007, pp. 31-51.	61
Nesbitt, Simon **Darowski**, Michael *Nesbitt/Darowski*	LCIA Arbitration Rules, Article 22 [Additional Powers] In: Mistelis, Loukas A. (ed.), *Concise International Arbitration 2nd Edition*, Kluwer Law International, Alpehn aan den Rijn, 2015, pp. 533-539.	15

O'Malley, Nathan *O'Malley*	*Rules of Evidence in International Arbitration: An Annotated Guide,* Informa, London, 2012.	21, 29, 32, 35, 36, 44, 47
Park, William W *Park*	*Arbitration of International Business Disputes: Studies in Law and Practice*, Oxford University Press, Oxford, 2006.	23, 25, 47
Petrochilos, Georgios *Petrochilos*	*Procedural Law in International Arbitration (Oxford Private International Law Series),* Oxford University Press, London, 2004.	52
Posner, Richard A. *Posner*	*Economic Analysis of Law: 8th Edition*, Aspen Publishers, New York, 2011.	118, 119
Poudret, Jean-François **Besson,** Sébastien *Poudret/Besson*	*Comparative Law of International Arbitration 2nd Edition*, Sweet & Maxwell, England, 2007.	15, 32, 98
Powers, Paul J. *Powers*	Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods In: *Journal of Law and Commerce*, vol. 18, no. 2, 1999, pp. 333-353.	126
Raeschke-Kessler, Hilmar *Raeschke-Kessler*	The Production of Documents in International Arbitration- A Commentary on Article 3 of the New IBA Rules of Evidence In: *Arbitration International,* vol. 18, no. 4, pp. 411-430.	28
Rau, Alan *Rau*	The Culture of American Arbitration and the Lessons of ADR	3

	In: *Texas International Law Journal,* vol. 40, 2005, pp. 449-536.	
Redfern, Alan **Hunter,** Martin **Blackaby,** Nigel **Partasides,** Constantine *Redfern/Hunter*	Redfern & Hunter on International Arbitration 6th Edition, Oxford University Press, Oxford, 2015.	15, 22, 41, 77, 80
Reiser, Rachel *Reiser*	Applying Privilege in International Arbitration: The Case for a Uniform Rule In: *Cardozo Journal of Conflict Resolution*, vol. 13, 2012, pp. 653-678.	45
Riznik, Peter *Riznik*	Article 77 CISG: Reasonableness of the Measures Undertaken to Mitigate the Loss In: Pace Database, 2009, accessed 31 November 2015, available at http://cisgw3.law.pace.edu/cisg/biblio/riznik.html	71
Roney, David P. **Müller**, Anna K. *Roney/Müller*	The Arbitral Procedure In: Kaufmann-Kohler, Gabrielle and Stucki, Blaise (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, Kluwer Law International, Zurich, pp. 49-56.	42, 51
Rubinstein, Javier H. **Guerrina**, Britton B. *Rubinstein/Guerrina*	The Attorney-Client Privilege and International Arbitration In: *Journal of International Arbitration*, Kluwer Law International, vol. 18, no. 6, 2001, pp. 586-602.	45

Sachs, Klaus *Sachs*	Use of Documents and Document Discovery: 'Fishing Expeditions' versus Transparency and Burden of Proof In: *German Arbitration Journal,* vol. 3, 2004, pp. 193-198.	5, 34
Saidov, Djakhongir *Saidov 2002*	Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods In: *Pace International Law Review*, vol. 14, no. 2, 2002, pp. 307-377.	76
Saidov, Djakhongir *Saidov 2008*	*The Law of Damages in International Sales: The CISG and other International Instruments,* Hart Publishing, Oxford, 2008.	57, 64, 66, 121, 134, 135
Saidov, Djakhongir **Cunnington,** Ralph *Saidov/Cunnington*	Current Themes in the Law of Contract Damages: Introductory Remarks In: Saidov, Djakhongir and Cunnington, Ralph (eds.), *Contract Damages: Domestic and International Perspectives*, Hart Publishing, England, 2008, pp. 1-29.	143
Secretariat Commentary *Sec. Comm. Art. 69*	Text of Secretariat Commentary on Article 69 of the 1978 Draft In: Pace Database, viewed 31 December 2015, available at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-84.html.	105

Schlechtriem, Peter *Schlechtriem 1986*	*Uniform Sales Law- The UN-Convention on Contracts for the International Sale of Goods*, Manz, 1986, accessed through Pace Database, viewed 18 January 2016, http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-27.html.	139
Schlechtriem, Peter *Schlechtriem 2002*	Case Comment: Attorneys' Fees as Part of Recoverable Damages In: *Pace International Law Review*, vol. 14, no. 1, 2002, pp. 205-209.	57, 78
Schlechtriem, Peter *Schlechtriem 2005*	Article 7 In: Schlechtriem, Peter and Schwenzer, Ingeborg (eds.), *Commentary on the Convention on the International Sale of Goods (CISG) 2nd Edition,* Oxford University Press, Oxford, 2005, pp. 93-110.	107
Schlechtriem, Peter *Schlechtriem 2006*	Legal Costs as Damages in the Application of UN Sales Law In: *Journal of Law and Commerce*, vol. 26, pp. 71-80.	65
Schlechtriem, Peter *Schlechtriem 2007a*	Non-Material Damages – Recovery under the CISG In: *Pace International Law Review*, vol. 19, 2007, pp. 89-102.	121
Schlechtriem, Peter *Schlechtriem 2007b*	Calculation of damages in the event of anticipatory breach under the CISG In: Pace Database, viewed 24 December 2015, available at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem20.html.	131

Schlechtriem, Peter **Butler**, Petera *Schlechtriem/Butler*	*UN Law on International Sales: The UN Convention on the International Sale of Goods*, Springer-Verlag, Berlin, 2009.	87, 88
Schmidt-Ahrendts, Nils *Schmidt-Ahrendts*	Disgorgement of Profits Under the CISG In: Schwenzer, Ingeborg and Spagonolo, Lisa (eds.), *State of Play: the 3rd Annual MAA Schechtriem CISG Conference, 14 April 2011, Vienna,* Eleven International Publishing, The Hague, 2012, pp. 89-102.	102, 111, 112, 118, 131, 140
Schmidt-Kessel, Martin *Schmidt-Kessel*	Article 8 In: Schwenzer, Ingeborg (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) 3rd Edition*, Oxford University Press, London, 2010, pp. 145-196.	7, 8, 10, 12, 17
Sheppard, Audley **von Schlabrendorff**, Fabian *von Schlabrendorff/ Sheppard 2005*	Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution In: Aksen, Gerald and Briner, Robert (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: liber amicorum in honour of Robert Briner*, ICC Publishing, Paris, 2005, pp. 743-774.	45, 53
Sheppard, Audley **von Schlabrendorff**, Fabian *von Schlabrendorff/ Sheppard 2012*	*Privilege and Confidentiality: An International Handbook*, Bloomsbury Professional, Haywards Heath, 2012.	46, 52

Shore, Laurence *Shore*	Three Evidentiary Problems in International Arbitration In: *German Arbitration Journal*, vol. 76, 2004, pp. 76-80.	23
Schwarz, Franz T. **Konrad,** Christian W. *Schwarz/Konrad*	*The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer Law International, The Netherlands, 2009.	42, 51
Schwenzer, Ingeborg *Schwenzer 2010a*	Article 74 In: Schwenzer, Ingeborg (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG): 3rd Edition*, Oxford University Press, Oxford, 2010, pp. 99-1026.	64, 75, 76, 121
Schwenzer, Ingeborg *Schwenzer 2010b*	Article 77 In: Schwenzer, Ingeborg (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) 3rd Edition*, Oxford University Press, London, 2010, pp. 10142-1048.	95
Schwenzer, Ingeborg *Schwenzer 2010c*	Article 80 In: Schwenzer, Ingeborg (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) 3rd Edition*, Oxford University Press, London, 2010, pp. 1088-1094.	96
Schwenzer, Ingeborg **Hachem,** Pascal *Schwenzer/Hachem 2008*	The Scope of the CISG Provisions on Damages In: Saidov, Djakhongir and Cunnington, Ralph (eds.), *Contract Damages: Domestic and International Perspectives*, Hart Publishing, England, 2008, pp. 91-105.	63, 66

Schwenzer, Ingeborg **Hachem**, Pascal *Schwenzer/Hachem 2010*	Article 7 In: Schwenzer, Ingeborg (ed.), *Schlechtriem & Schwenzer: Commentary On The International Sale Of Goods 3rd Edition*, Oxford University Press, Oxford, 2010, pp. 120-144.	39, 58, 108, 109
Schwenzer, Ingeborg **Hachem**, Pascal **Kee**, Christopher *Schwenzer/Hachem/Kee*	*Global Sales and Contract Law*, Oxford University Press, Oxford, 2012.	57, 63, 121
Sim, Disa *Sim*	*The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods* In: Pace Database, 2001, viewed 23 December 2015, available at http://www.cisg.law.pace.edu/cisg/biblio/sim1.html.	107, 108
Sindler, Michelle **Wüstemann**, Tina *Sindler/Wüstemann*	Privilege Across Borders in Arbitration – Multi-Jurisdictional Nightmare or a Storm in a Teacup? In: *ASA Bulletin,* vol. 23, no. 4, 2005, pp. 610-639.	43, 45
Smith, Lionel *Smith*	Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach' In: *Canadian Business Law* Journal, Vol. 24, 1994-95, pp. 121 – 140.	119
Spagnolo, Lisa *Spagnolo*	*CISG Exclusion and Legal Efficiency,* Kluwer Law International, Alpehn aan den Rijin, 2014.	119
Stoll, Hans **Gruber**, Georg *Stoll/Gruber*	Section II: Damages In: Schlechtriem, Peter and Schwenzer, Ingeborg (eds.), *Commentary on the Convention on the International*	95, 102, 122, 138, 144

	Sale of Goods (CISG) 2nd Edition, Oxford University Press, Oxford, 2005, pp. 745-793.	
UNCITRAL Digest *Digest*	UNCITRAL Digest on the United Nations Convention on Contracts for the International Sale of Goods: 2012 Edition.	96, 145, 147
Viscasillas, Pilar Perales *Viscasillas*	Article 7 In: Kröll, Stefan; Mistelis, Loukas and Perales Pilar, Viscacillas, (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG),* C.H. Beck, Munich, 2011, pp. 111-141.	103, 104, 120
Vogenauer, Stefan *Vogenauer*	Article 5.2.5 In: Vogenauer, Stefan and Kleinheisterkamp, Jan (eds.) *Commentary On The UNIDROIT Principles Of International Commercial Contracts (PICC)*, Oxford University Press, Oxford, 2009, pp. 604-607.	16, 17
Volpin, Cristina *Volpin*	The ball is in your court: Evidential burden of proof and the proof-proximity principle in EU competition law In: *Common Market Law Review*, vol. 51, no. 4, 2014, pp. 1159-1185.	40
Voser, Voser **Raneda,** Julie *Voser/Raneda*	Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution In: *ASA Bulletin,* vol. 33 no. 4, 2015, pp. 742-779.	80
Waddams, Stephen *Waddams*	Gains Derived from Breach of Contract: Historical and Conceptual Perspectives	117

	In: Saidov, Djakhongir and Cunnington, Ralph (eds.) *Contract Damages: Domestic and International Perspectives*, Hart Publishing, England, 2008, pp. 187-206.	
Waincymer, Jeff *Waincymer*	*Procedure and Evidence in International Arbitration*, Kluwer Law International, Alpehn aan den Rijn, 2012.	21, 23
Wehrli, Daniel *Wehrli*	Contingency Fees / Pactum De Palmario 'Civil Law Approach' In: *ASA Bulletin,* vol. 28, no. 2, 2008, pp. 241-258.	76
Zeller, Bruno *Zeller 2000*	*Good Faith- The Scarlet Pimpernel of the CISG*, In: Pace Database, 2001, viewed 23 December 2015, available as http://www.cisg.law.pace.edu/cisg/biblio/zeller2.html.	110, 126
Zeller, Bruno *Zeller 2009*	The Observance of Good Faith in International Trade In: *CISG Methodology,* Sellier European Law Publishers, Munich, 2009, pp. 133-151.	127
Ziegel, Jacob *Ziegel*	Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods In: Pace Database, accessed 18 January 2016, available at http://cisgw3.law.pace.edu/cisg/text/ziegel74.html	70

Cases

Austria

Court	Citation	¶(¶)
Oberster Gerichtshof	Case No: 10 Ob 1506/94 11 February 1997 Cited as: *OGH 11 February 1997*	18
Oberlandesgericht Graz	Case No: 5 R 93/04t 29 July 2004 Cited as: *OBH Graz 29 July 2004*	145
Oberster Gerichtshof	Case No: 1 Ob 518/95 6 February 1996 Cited as: *OGH 6 February 1996*	71
Oberster Gerichtshof	Case No: 2 Ob 547/93 10 November 1994 Cited as: *OGH 10 November 1994*	13
Oberlandesgericht Graz	Case No: 2 R 62/02h 16 September 2002 Cited as: *OLG Graz 16 September 2002*	63, 139

Belgium

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Hof van Beroep Gent	*N.V. Maes Roger v N.V. Kapa Reynolds* 10 May 2004 Cited as: *N. V. Maes Roger v N.V. Kapa Reynolds*	71

Canada

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Ontario Court of Justice	*Noble China Inc. v Lei Kat Cheong* (1998) 42 OR (3d) 69 Cited as: *Noble China v Lei Kat Cheong*	41
Superior Court of Justice, Ontario	*Stephen Shane and Donald Shane v JCB Belgium N.V.* Case No: 02-CV-19871 14 November 2003 Cited as: *Stephan Shane v JCB Belgium*	63

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Helsingin hoviokeus	Case No: S 00/82 26 October 2000 Cited as: *Finland 26 October 2000*	110

France

Court	Citation	¶(¶)
Court of Appeal of Grenoble	*Calzados Magnanni v Shoes General International* 21 October 1999 Cited as: *Calzados Magnanni*	110

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Amtsgericht Alsfeld	Case No: 31 C 534/94 12 May 1995 Cited as: *AG Alsfeld 12 May 1995*	71

Oberlandesgericht Stuttgart	Case No: 6 U 220/07 31 March 2008 Cited as: OLG Stuttgart 31 March 2008	16, 18
Oberlandesgericht Koblenz	Case No: 2 U 31/96 31 January 1997 Cited as: *OLG Koblenz 31 January 1997*	96
Oberlandesgericht Hamburg	Case No: 1 U 167/95 28 February 1997 Cited as: OLG Hamburg 28 February 1997	145
Bundesgerichtshof	Case No: VII ZR121/98 24 March 1999 Cited as: *BGH 24 March 1999*	99
Bundesgerichtshof	Case No: VII ZR 304/00 9 January 2002 Cited as: *BGH 9 January 2002*	39
Bundesgerichtshof	Case No: VIII ZR 321/03 30 June 2004 Cited as: *BGH 30 June 2004*	39
Landgericht Darmstadt	Case No: 10 O 72/00 9 May 2000 Cited as: *LG Darmstadt 9 May 2000*	137
Landgericht Hamburg	Case No: 5 O 543/88 26 September 1990 Cited as: *LG Hamburg 26 September 1990*	11

Landgericht Kassel	Case No: 11 O 4187/95 15 February 1996 Cited as: *LG Kassel 15 February 1996*	12
Oberlandesgericht Dresden	Case No: 2 U 2723/99 27 December 1999 Cited as: *OLG Dresden 27 December 1999*	8, 13
Landgericht Düsseldorf	Case No: 31 O 223/91 9 July 1992 Cited as: *LG Düsseldorf 9 July 1992*	96
Amtsgericht Augsburg	Case No: 11 C 4004/95 29 January 1996 Cited as: *AG Augsburg 29 January 1996*	63
Reichgericht	Cited in: Fischer-Zernin, Vincent and Junker, Abbo, 'Between Cylla and Charybdis: Fact Gathering in German Arbitration', *Journal of International Arbitration*, vol. 4, 1987, p. 9 Cited as: *RG 1892*	34

Hong Kong

Court	**Citation**	**¶(¶)**
High Court of Hong Kong	*Taigo Ltd v China Master Shipping Ltd* [2010] Case No: HKCFI 5330; HCCT22/2010 17 June 2010 Cited as: *Taigo Ltd v China Master Shipping*	51

Hong Kong Court of First Instance	*Leviathan Shipping Co Ltd v Sky Sailing Overseas Ltd* [1998] 4 HKC 347 Cited as: *Leviathan Shipping v Sky Sailing Overseas*	73

India

Court	Citation	¶(¶)
Supreme Court of India	*Central Inland Water Transport v Brojo Nath Ganguly* [1986] 2 SCR 278 Cited as: *Central Inland Water Transport v Brojo Nath Ganguly*	18

Ireland

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High Court of Ireland	*Osmond Ireland on Farm Business Ltd v Fergal McFarland* [2010] IEHC 295 Cited as: *Osmond v Fergal McFarland*	73

Israel

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Supreme Court of Israel	*Harlow & Jones Ltd v Adras* (1983) 37(1) P.D. 225 Cited as: *Harlow & Jones v Adras*	143
Supreme Court of Israel	*Adras Building Material v Harlow & Jones GmbH* Cited as: *Adras v Harlow & Jones*	114, 143

Italy

Court	Citation	¶(¶)
Tribunale di Pavia	*Tessile 21 S.r.l v Ixela S.A.* 29 December 1999 Cited as: *Tribunale di Pavia 29 December 1999*	69

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Supreme Court of Poland	Case No: V CSK 456/06 2007 11 May 2007 Cited as: *Poland 11 May 2007*	96

Russia

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Federal Arbitration Court for the Moscow Region	Case No: KG-A40/3632-00 24 August 2000 Cited as: *Federal Arbitration Court for the Moscow Region 24 August 2000*	63

Singapore

Court	Citation	¶(¶)
High Court	*Dongwoo Mann Hummel Co Ltd v Mann Hummel Gmb* [2008] 3 SLR 871 Cited as: *Dongwoo Mann & Hummel*	54

Switzerland

Court	Citation	¶(¶)
Commercial Court Zürich	Case No: HG 970238.1 10 February 1999 Cited as: *HG Zürich 10 February 1999*	137

Kantonsgericht Appenzell Ausserrhoden	Case No: Proz, Nr. 433/02 10 March 2003 Cited as: *KG Appenzell Ausserrhoden 10 March 2003*	63
Obergericht des Kantons Thurgau	Case No: ZBR.2006.26 12 December 2006 Cited as: *OG des KT 12 December 2006*	71
Cour de Justice Genève	Case No: ACJC/524/2006 12 May 2006 Cited as: *CJ Genève 12 May 2006*	11
Cour de Justice Genève	Case No: C/12709/2001 15 November 2002 Cited as: *CJ Genève 15 November 2002*	58
Bundesgerichtsentscheid	Case No: 116 la 56 20 September 1990 Cited as: *BGE 116*	88
Bundesgerichtsentscheid	Case No: 101 II 168 S. 169 17 March 1975 Cited as: *BGE 101*	88
Bundesgerichtsentscheid	Case No: 41 II 537 20 September 1990 Cited as: *BGE 41*	88

United Kingdom

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Privy Council	*Attorney-General v Blake* [2001] AC 268 Cited as: *AG v Blake*	113
England and Wales High Court (Chancery Division)	*Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC Ch 458 Cited as: *Esso v Niad*	115
Court of Appeal	*Halifax Building Society v Thomas* [1996] Ch 217 Cited as: *Halifax Building Society*	116
England and Wales High Court (Commercial Court)	*ABB AG v Hochtief Airport GmbH and Ors* [2006] EWHC 388 Cited as: *AG v Hochtief Airport*	52, 54
House of Lords	*Union Discount v Zoller* [2002] 1 WLR 1517 Cited as: *Union Discount v Zoller*	91
England and Wales High Court (Queen's Bench)	*Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co.* [1998] 4 All ER 570 Cited as: *Westacre Investments v Jugoimport-SDPR Holdings Co.*	88
Commercial Court of England	*Elektrim SA v Vivendi Universal SA Rev 1* [2007] APP.L.R 01/19 Cited as: *Elektrim SA v Vivendi Universal SA*	32

United States of America

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Court of Appeals (7th Circuit)	*Zapata Hermanos Sucesores, SA v Hearthside Baking Co.* 313 F.3d 385 (7th Cir., 2002) Cited as: *Zapata*	56, 57, 61, 63, 65
Court of Appeals (11th Circuit)	*Robins v Day* 954 F.2d 679 Cited as: *Robins v Day*	43
Court of Appeals (11th Circuit)	*MCC Marble Ceramic Centre Inc v Ceramica Nuova D'agostino S.P.A* 144 F.3d 1384 (1998) Cited as: *MCC Marble*	11
District Court for the Southern District of New York	*P.T. Reasuransi Unum Indonesia v Evanston Insurance Co.* 1992 WL 40073 (S.D.N.Y) Cited as: *Reasuransi v Evanston*	52
District Court for the Southern District of New York	*Geneva Pharmaceutical Technology Corp. v Barr Laboratories Inc.* 10 May 2002 98 Civ. 861, 99 Civ. 3607 Cited as: *Geneva Pharmaceutical*	126
Supreme Court	*Snepp v United States* (1980) 444 US 507 Cited as: *Snepp v US*	113
Court of Appeals (7th Circuit)	*Re Davis Chemical Corp v Diasonics Inc* 826 F.2d 678 (1987) Cited as: *Re Davis Chemical Corp v Diasonics Inc*	135

District Court, Northern District of Illinois, Eastern Division	Ajax Tool Works, Inc., Plaintiff, v. Can-Eng Manufacturing Ltd., Defendant., 2003 U.S. Dist. LEXIS 1306 Cited as: *Ajax Tool Works v Can-Eng*	62
Court of Appeals (5th Circuit)	*Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F 3D 287 (5th Cir., 2004) Cited as: *Karaha Bodas v Perusahaan 5th Circuit*	51, 54
United States District Court for Kansas	*In re Application by Rhodianyl S.A.S and Rhodia Operations S.A.S for Order of Discovery Pursuant to 27 U.S.C §1783* Cited as: *Re Rhodianyl*	14

Arbitral Decisions

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Arbitral Tribunal-Vienna	Case No. SCH-4318 1994 Cited as*: Vienna SCH-4318*	110
Vienna International Arbitral Centre	Case No: SCH- 5176 2012 Cited as: *Vienna SCH-5176*	85

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China International Economic and Trade Arbitration Commission	7 January 2000 Cited as: *CIETAC 7 January 2000*	18
China International Economic and Trade Arbitration Commission	21 October 2005 Cited as: *CIETAC 21 October 2005*	63

France

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International Chamber of Commerce	Case No: 8611 23 January 1997 Cited as: *ICC No. 8611*	107
International Chamber of Commerce	Case No: 1000 2006 Cited as: *ICC No. 1000*	28, 29
International Chamber of Commerce	Case No: 46501 1987 Cited as: *ICC No. 4650*	44
International Chamber of Commerce	Case No: 2730 1984 Cited as: *ICC No. 2730*	44

International Chamber of Commerce	Case No. 11258 2004 Cited as: *ICC No. 11258*	35
International Chamber of Commerce	Case No. 12279 2003 Cited as: *ICC No. 12279*	35
International Chamber of Commerce	Case No. 7197 1992 Cited as: *ICC No. 7197*	69

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International Centre for Settlement of Investment Disputes	*Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* December 18, 2000 Cited as: *Karaha Bodas v Perusahaan ICSID*	32
International Centre for Settlement of Investment Disputes	Case No: ARB/01/12 14 July 2006 Cited as: *Azurix Corp v Argentine Republic*	53
International Centre for Settlement of Investment Disputes	Case No: ARB/05/22 24 July 2008 Cited as: *Biwater Gauff v United Republic of Tanzania*	32

STATEMENT OF FACTS

1. Kaihara Waina Ltd. (**CLAIMANT**) is an elite wine merchant in Equatoriana. Vino Veritas Ltd. (**RESPONDENT**) is a leading vineyard in Mediterraneo.

2. On 22 April 2009, CLAIMANT and RESPONDENT concluded a Framework Agreement. Article 2 of the Framework Agreement gave CLAIMANT the right to annually purchase between 7,500 and 10,000 bottles of RESPONDENT's diamond quality wine. The Arbitration Agreement provided that all disputes were to be resolved by the 'International Arbitration Tribunal', a non-existent arbitral body. It also stated that 'no discovery shall be allowed'.

3. In January 2014, RESPONDENT began negotiating with a new client, SuperWines. In September 2014, adverse weather reduced RESPONDENT's harvest by almost 50%. On 3 November 2014, RESPONDENT informed CLAIMANT that it would distribute its decreased yield on a pro-rata basis. This approach was consistent with industry practice. On 1 December 2014, RESPONDENT offered CLAIMANT 50% of its original order. Although SuperWines had offered a higher price, it was only given 30% of its order. However, CLAIMANT demanded the delivery of 10,000 bottles and as a result, on 4 December 2014, RESPONDENT terminated the contract.

4. On 8 December 2014, CLAIMANT commenced proceedings in Mediterraneo seeking an injunction to restrain RESPONDENT from selling all of its wine. CLAIMANT engaged LawFix Solicitors on a contingency fee arrangement. RESPONDENT did not defend the proceedings due to its Chief Operating Officer's health issues. The injunction was granted on 12 December 2014.

5. In early January, RESPONDENT sought to find an amicable solution to the dispute with CLAIMANT. On 14 January 2015, RESPONDENT informed CLAIMANT that it believed the Arbitration Agreement was defective and inoperative, and that it would seek a declaration of non-liability in Mediterranean courts within two weeks if this could not be clarified. Rather than responding, CLAIMANT waited until the proceedings were commenced to invoke the Arbitration Agreement. The declaration was denied on 23 April 2015.

6. RESPONDENT subsequently delivered 4,500 bottles to CLAIMANT. CLAIMANT ordered 5,500 bottles from Vignobilia as a substitute, which CLAIMANT's customers almost universally accepted.

7. CLAIMANT submitted its Statement of Claim to VIAC on 11 July 2015 and the present Tribunal was constituted. CLAIMANT refused to agree to fast-track proceedings unless RESPONDENT would depart from the Arbitration Agreement to include discovery.

SUMMARY OF ARGUMENTS

1. Following the worst harvest in a decade, RESPONDENT attempted to accommodate all of its customers in a fair manner and in accordance with industry practice. CLAIMANT has obstructed RESPONDENT's solution.

2. In doing so, CLAIMANT has incurred unforeseeable and unreasonable legal expenses which it now demands from RESPONDENT. Further, CLAIMANT seeks to strip RESPONDENT of all profits from its transaction with SuperWines. To this end, CLAIMANT requests an expansive order for discovery of all documents relating to RESPONDENT's sale to SuperWines.

3. In response, RESPONDENT makes three submissions:

   (a) The Tribunal should deny CLAIMANT's request for discovery. The Parties expressly agreed to exclude discovery from the present proceedings. The documents are not necessary for CLAIMANT to make its case. Granting the request would violate RESPONDENT's right to due process, disclose commercially sensitive information and place an undue burden on RESPONDENT **(Issue 1)**.

   (b) The Tribunal should reject CLAIMANT's request for damages for the legal costs it incurred in Mediterraneo. Expenses of this type are not recoverable under the CISG or the UNCITRAL Model Law. CLAIMANT's legal costs were unreasonably high and CLAIMANT failed to mitigate these costs **(Issue 2)**.

   (c) The Tribunal may not disgorge RESPONDENT's profits from its sale to SuperWines. The CISG does not permit the disgorgement of profits for the benefit of the buyer. Nor should the Tribunal award CLAIMANT damages for loss of profits and goodwill under Art. 74 of the CISG, quantified as RESPONDENT's profits. This loss is not sufficiently certain for an award of damages. Even if CLAIMANT could identify its loss, the proposed method of quantification is wholly inappropriate **(Issue 3)**.

ISSUE 1: THE TRIBUNAL SHOULD DENY CLAIMANT'S PROCEDURAL REQUEST

1. CLAIMANT has requested that the Tribunal order RESPONDENT to produce all documents relating to its correspondence and contractual relationship with one of its customers, SuperWines, over a period of 18 months (the **Procedural Request**). CLAIMANT makes the Procedural Request for the stated purpose of quantifying its damages in **Issue 3**. CLAIMANT seeks to calculate its loss by reference to the profit RESPONDENT earned from its sale to SuperWines. This method is neither appropriate nor available under the CISG [*infra* ¶¶141-148]. CLAIMANT should therefore be required to prove the loss it actually suffered on the basis of its own contracts [PO No. 2, ¶2].

2. The Tribunal should refuse to grant the Procedural Request regardless of the method that CLAIMANT uses to calculate its loss, because the Tribunal lacks the power to order the Procedural Request **(I)**. Alternatively, the Procedural Request should be denied on discretionary grounds **(II)**. In any event, the Procedural Request violates the mandatory laws of the *lex arbitri* **(III)**.

I. The Tribunal lacks the power to grant the Procedural Request

3. Party autonomy is the cornerstone of international arbitration [*Born 2014*, p. 1257, §8.02[B]; *Bühring-Uhle*, §3[I][1]; *Rau*, p. 534]. The Parties agreed that these proceedings would be conducted under the Vienna Rules, in line with the other provisions of the Arbitration Agreement [PO No. 1, ¶2]. Hence, the Parties selected Danubia as the seat of arbitration [Cl. Ex. No. 1], which has adopted the UNCITRAL Model Law [PO No. 1, ¶5(3)]. Article 19(1) of the UNCITRAL Model Law empowers the Parties to determine arbitral procedure.

4. Article 28(1) of the Vienna Rules empowers the Tribunal to conduct the proceedings 'in accordance with the Vienna Rules and the agreement of the parties, but otherwise in the manner it deems appropriate'. Here, the Arbitration Agreement expressly provides that proceedings 'shall be conducted in a fast and cost-efficient way' and that 'no discovery shall be allowed.' The Arbitration Agreement should be interpreted by applying the provisions of the CISG **(A)**. The application of the CISG establishes that the Parties excluded all discovery procedures [cf. Cl. Memo. ¶104] **(B)**. Accordingly, ordering any discovery would violate the fundamental principle of party autonomy enshrined in the Vienna Rules and the UNCITRAL Model Law.

5. Article 29 of the Vienna Rules does not confer the power to grant the Procedural Request [cf. Cl. Memo. ¶104]. Although Art. 29 of the Vienna Rules permits the Tribunal to order discovery 'on its own initiative', the plain wording of the provision precludes the Tribunal from making an order

of discovery upon the request of a party [*Sachs*, p. 195; *Haugeneder/Netal*, p. 171, §1.1]. In any event, the Tribunal's power to order discovery under this provision is excluded by the Parties' agreement [Art. 19(1) UNCITRAL Model Law].

A. The Arbitration Agreement should be interpreted in accordance with the CISG

6. The parties may choose the law governing an arbitration agreement [*Gaillard/Savage*, p. 220, ¶424]. An arbitration agreement is separate from the main contract [*Lew/Mistelis/Kröll*, ¶¶6-7]. Here, the Parties agreed that the CISG regulates all matters not governed by Danubian Arbitration Law [PO No. 2, ¶63]. Danubian Arbitration Law has adopted the UNCITRAL Model Law. As the UNCITRAL Model Law contains no provisions on interpretation [*Born 2014*, pp. 1320-25, §9.02[C]], the Tribunal should construe the Arbitration Agreement in accordance with the CISG.

7. CLAIMANT's assertion that the UNIDROIT Principles govern the interpretation of the Arbitration Agreement is therefore contrary to the Parties' agreement [Cl. Memo. ¶10]. Nonetheless, the interpretive provisions in the UNIDROIT Principles and the CISG are materially identical [*Schmidt-Kessel*, p. 157, ¶3; *Enderlein/Maskow*, p. 62, ¶2.3]. Therefore, the Tribunal would reach the same conclusion under either body of law.

B. The Parties excluded discovery under the Arbitration Agreement

8. Article 8 of the CISG governs the interpretation of contractual provisions [*Schmidt-Kessel*, p. 146, ¶1; *OLG Dresden 27 December 1999*]. A contract should be construed according to a party's actual intention if the other party knew or could not have been unaware of the intention [Art. 8(1) CISG]. Otherwise, a contract should be construed in accordance with the understanding of a reasonable person [Art. 8(2) CISG]. The clause should not be interpreted in line with CLAIMANT's alleged intention as RESPONDENT did not and could not have known of it **(1)**. Instead, the Tribunal should adopt the reasonable person's understanding that discovery was excluded **(2)**. If the clause is considered ambiguous, it should be construed *contra proferentem* against CLAIMANT **(3)**.

1. RESPONDENT could not have known of CLAIMANT's alleged intention

9. First, CLAIMANT relies on Ms Kim Lee's evidence to assert that it intended to 'exclude only very broad US-style discovery' but otherwise preserve other document production procedures [Cl. Memo. ¶¶106-8]. However, Ms Lee's evidence is unreliable. Ms Lee had been working for CLAIMANT part-time since her second year of law school [Cl. Ex. No. 12, ¶2]. At the time of the negotiations she was 18 years old and had no prior negotiation experience [Cl. Ex. No. 12, ¶2].

She had never seen an arbitration agreement or a discovery exclusion clause [Cl. Ex. No. 12, ¶3]. Her opinion was based on a 'vague' discussion with CLAIMANT's then Chief Operating Officer, Mr Friedensreich, and a search of Wikipedia [Cl. Ex. No. 12, ¶4]. Ms Lee's evidence is unreliable since her understanding of the clause was inadequate in these circumstances.

10. There is no other evidence demonstrating CLAIMANT's alleged intention to preserve 'discovery in line with the IBA Rules' [cf. Cl. Memo. ¶¶106-8]. CLAIMANT must prove that it held this intention at the formation of the Arbitration Agreement [*Schmidt-Kessel*, p. 154, ¶19]. The Parties were unaware of the IBA Rules at the time of contracting [PO No. 2, ¶53] and Mr Friedensreich had a 'very vague' understanding of the clause [Cl. Ex. No. 12, ¶4]. Accordingly, CLAIMANT has not proved that it held a specific understanding of the term 'discovery'.

11. Second, even if CLAIMANT did hold an intention to preserve limited discovery, this intention does not bind the Parties unless RESPONDENT was aware or could not have been unaware of it [Art. 8(1) CISG]. A party cannot be aware of an unexpressed intention [*LG Hamburg 26 September 1990*; *CJ Genève 12 May 2006*; *MCC Marble*]. CLAIMANT only communicated that the Arbitration Agreement was 'taken from the contracts of a multinational' and did not refer to any distinction between 'discovery' and 'production' [PO No. 2, ¶53]. Mr Weinbauer's experience with an unrelated discovery request is irrelevant to whether RESPONDENT knew of CLAIMANT's technical understanding of the term 'discovery' [cf. Cl. Memo. ¶107]. Consequently, CLAIMANT has not proved that RESPONDENT was aware of CLAIMANT's intention.

12. Further, it cannot be said that RESPONDENT could not have been unaware of CLAIMANT's intention. The standard for constructive knowledge under Art. 8(1) of the CISG is gross negligence [*Schmidt-Kessel*, p. 153, ¶13.2; *LG Kassel 15 February 1996*]. RESPONDENT's lack of knowledge was not grossly negligent because CLAIMANT never communicated its purported intention [*supra* ¶11].

2. A reasonable person would conclude that the Parties excluded discovery

13. As no subjective intention can be established under Art. 8(1) of the CISG, the Tribunal should interpret the phrase 'no discovery shall be allowed' in accordance with the understanding of a reasonable person [Art. 8(2) CISG; *Farnsworth*, p. 98, ¶2.4]. The reasonable person considers 'all relevant circumstances,' including the parties' relationship and negotiations [Art. 8(3) CISG; *OGH 10 November 1994*]. The parties' language is the 'primary' consideration [*OLG Dresden 27 December 1999*; *HG Aargau 5 February 2008*].

14. A reasonable person would not construe the term 'discovery' as referring only to domestic United States evidentiary procedures. The plain wording of the Arbitration Agreement states that 'no discovery shall be allowed' [Cl. Ex. No. 1]. Unlike in *Re Rhodianyl*, the term 'discovery' is not qualified as 'American-style discovery,' the Arbitration Agreement does not contain a similar qualification. Further, neither party is domiciled in the United States and the Arbitration Agreement makes no reference to the United States [Cl. Ex. No. 1]. Finally, CLAIMANT concedes that US-style discovery includes 'many' evidentiary procedures such as interrogatories and depositions [Cl. Memo. ¶110]. However, during the negotiations the Parties made no reference to any evidentiary procedure other than requests for documents [Cl. Ex. No. 12, ¶6; Res. Ex. No. 1, ¶¶4-8; PO No. 2, ¶53].

15. The Tribunal should construe the term 'discovery' in accordance with its meaning in international arbitration. There is no universal understanding in arbitration that 'discovery' is distinct from 'document production' [*Poudret/Besson*, p. 555, §652; *Marghitola*, p. 7, §2.03[A]; *Emanuele/Molfa*, p. 9, §3.4; *Redfern/Hunter*, ¶6.94, fn. 73]. Indeed, 'it is not inherent in the terms' that 'discovery necessarily encompasses a broader notion and range of materials than disclosure' [*Born 2014*, p. 2322, fn. 9]. The terms are used interchangeably to refer to the disclosure of documents [*Born 2014*, p. 2321, §16.01; *Ashford 2012*, p. 2; *Nesbitt/Darowski*, p. 535, ¶6]. The reasonable person would understand the clause 'no discovery shall be allowed' as excluding <u>all</u> disclosure procedures.

3. In the case of ambiguity, the clause should be construed *contra proferentem* against CLAIMANT

16. Even if the Tribunal determines that the meaning of the term 'discovery' is ambiguous, it should exclude all discovery under the principle of *contra proferentem*. Under the principle, ambiguous terms are construed against the party that provided the clause [*Bernstein/Lookofsky*, p. 131; *DiMatteo*, p. 202] regardless of whether that party drafted the clause [*Vogenauer*, p. 606, ¶7]. It is accepted that the *contra proferentem* principle applies under Art. 8(2) of the CISG [*CISG-AC No. 13*, §9.1; *Honnold 2009*, p. 158, ¶107.1; *OLG Stuttgart 31 March 2008*]. Since CLAIMANT supplied the Arbitration Agreement [Cl. Ex. No. 12, ¶3; Res. Ex. No. 1, ¶7], the Tribunal should construe the clause against CLAIMANT and exclude all discovery.

17. CLAIMANT relies on domestic commentaries to argue that the *contra proferentem* principle only applies to standard contractual terms [Cl. Memo. ¶113]. However, there is no such restriction under the CISG [*Schmidt-Kessel*, p. 170, ¶49; *Huber*, p. 15]. Applying the *contra proferentem* principle

to both standard and individually negotiated terms is consistent with the international application of the principle, as evidenced by Art. 4.6 of the UNIDROIT Principles [*Vogenauer*, p. 606, ¶6].

18. CLAIMANT also asserts that the *contra proferentem* principle only applies to parties with unequal bargaining power [Cl. Memo. ¶113]. CLAIMANT relies on *Central Inland Water Transport v Brojo Nath Ganguly* [Cl. Memo. ¶113]. However, this case did not concern the CISG, contractual construction or even international arbitration and therefore should not be followed. Instead, under the CISG, the *contra proferentem* principle has been applied to contracts concluded between sophisticated commercial parties with equal bargaining power [*OLG Stuttgart 31 March 2008*; *OGH 11 February 1997*; *CIETAC 7 January 2000*].

II. In the alternative, the Tribunal should refuse the Procedural Request in its discretion

19. Even if the Tribunal finds that the Parties did not exclude all discovery, it should still refuse the Procedural Request. The Tribunal can determine procedure 'in the manner it deems appropriate' [Art. 28(1) Vienna Rules], including the scope of any discovery procedure [*Born 2014*, p. 2319, §16.01]. The Tribunal should exercise its discretion to only allow very limited discovery **(A)**. Even if the Tribunal applies the IBA Rules, it should refuse the Procedural Request **(B)**.

A. Discovery should be limited to very specific requests for identified documents

20. The Tribunal should determine discovery procedure in accordance with the 'evidentiary needs of the case and the Parties' legitimate expectations' [*Born 2014*, p. 2341, §16.01[E]]. As a result, the Tribunal should not determine discovery procedure in accordance with the IBA Rules **(1)**. Rather, the Tribunal should only permit very narrow requests for identified documents in line with the Parties' agreement for cost-efficient arbitration **(2)**.

1. The Tribunal should not use the IBA Rules to determine discovery procedure

21. CLAIMANT argues that the Tribunal should adopt the IBA Rules as the evidentiary procedure of the arbitration [Cl. Memo. ¶118-9]. This should not be accepted. First, the IBA Rules cannot bind the Tribunal without the Parties' explicit consent [*Waincymer*, p. 757; *Lew/Mistelis/Kröll*, ¶22-29; *Moses*, p. 102]. The Parties were not aware of the IBA Rules at the time of contracting [PO No. 2, ¶52] and they did not mention the IBA Rules in their agreement. Applying a set of rules in the absence of the Parties' agreement would violate the principle of party autonomy [*O'Malley*, p. 7, ¶1.20].

22. Second, the application of the IBA Rules in the courts of Equatoriana and Danubia does not mean that the Tribunal must apply them [cf. Cl. Memo. ¶119]. The Tribunal is only bound by the mandatory laws of the *lex arbitri* [*Redfern/Hunter*, ¶26-71]. Since there is no indication that the IBA Rules form part of the mandatory law, they do not bind the Tribunal.

23. Third, it would be equally incorrect to suggest that the IBA Rules apply merely because the Parties agreed to determine the dispute 'in accordance' with international practice. The IBA Rules are not a 'neutral compromise between legal systems' [Cl. Memo. ¶110]. Rather, they are 'a misguided combination of…different traditions' [*Shore*, p. 76-80; *Park*, p. 142] that reflects the 'common law domination over long-standing principles of civilian evidence law' [*Waincymer*, p. 758]. The IBA Rules should not be applied in these proceedings.

2. Limited discovery is consistent with the Parties' expectations

24. Instead, the Tribunal should only permit very narrow requests for specifically identified documents. First, broad requests for discovery are inconsistent with the Parties' agreement to conduct the proceedings in a 'fast and cost efficient way' [Cl. Ex. No. 1; PO No. 2, ¶53]. The Parties chose arbitration as it would be an 'efficient' mode of dispute resolution [PO No. 2, ¶53]. However, since requests for large numbers of documents are costly [*infra* ¶¶42-45], the Tribunal should only permit requests for specifically identified documents.

25. Second, allowing discovery beyond specific documents is inconsistent with the Parties' legitimate expectations. The Tribunal should consider the Parties' background in determining procedure [*Park*, p. 461; *Kaufmann-Kohler/Bärtsch*, p. 20; *Born 2014*, p. 2341, §16.01[E]]. Civil law jurisdictions, such as RESPONDENT's domicile [PO No. 2, ¶68], generally do not permit the discovery of adverse documents [*Kaufmann-Kohler/Bärtsch*, p. 17]. Indeed, the disclosure of internal documents in civil law jurisdictions is often considered 'totally unacceptable' [*Lionnet/Lionnet*, pp. 499-500; *Kaufmann-Kohler/Bärtsch*, p. 20]. Permitting discovery beyond limited requests for particular documents would therefore violate RESPONDENT's legitimate expectations.

26. Third, the Parties do not need extensive discovery in this arbitration. CLAIMANT may calculate damages in **Issue 2** and **Issue 3** on the basis of documents in its possession [*infra* ¶¶141-148] and RESPONDENT has not requested discovery. Accordingly, restricting discovery to the production of very specific documents is consistent with the Parties' evidentiary needs. If the Tribunal adopts this procedure, the Procedural Request should be refused because a request for 'all documents' is not sufficiently specific.

B. The Procedural Request should be declined even if the Tribunal applies the IBA Rules

27. In the alternative, the Procedural Request should be refused under the IBA Rules. The documents sought under the Procedural Request contain commercially sensitive information **(1)**. They are neither narrowly described nor material to the outcome of the proceedings **(2)**. Moreover, granting the Procedural Request would place an undue burden on RESPONDENT **(3)** and undermine the allocation of the burden of proof under the CISG **(4)**.

1. The Procedural Request would disclose commercially confidential information

28. The Procedural Request should be declined due to the commercially sensitive nature of the requested documents. Under Art. 9.2(e) of the IBA Rules, the Tribunal may refuse a discovery request if there would be a compelling infringement of commercial confidentiality, or in other words, if there is an 'unacceptable invasion of privacy' [*ICC No. 1000*]. Article 9.2(2) of the IBA Rules was implemented to protect 'valid business secrets' [*Raeschke-Kessler*, p. 429], particularly those found in a party's internal documents [*IBA Working Group*, p. 36]. CLAIMANT's Procedural Request, which extends to internal minutes and memoranda [PO No. 2, ¶61], should be denied on this basis.

29. First, granting the Procedural Request would disclose RESPONDENT's confidential pricing system. The disclosure of a business formula is generally considered a compelling infringement of commercial confidence [*O'Malley*, p. 301, ¶9.84]. Here, RESPONDENT formulates an individual price for each customer based on a number of factors such as personal loyalty and long-term business strategies [PO No. 2, ¶61]. The Procedural Request is analogous to a request for the 'financial inner workings of a company', which an ICC tribunal refused on grounds of compelling commercial confidence [*ICC No. 1000*]. Second, the Procedural Request undermines RESPONDENT's ability to bargain with CLAIMANT. RESPONDENT has a contractual right to terminate the Framework Agreement from January 2016 [Cl. Ex. No. 1, Art. 19]. Granting the Procedural Request would disclose RESPONDENT's private plans on whether it intended to continue the Framework Agreement.

30. The disclosure of RESPONDENT's confidential information is not mitigated by the general confidentiality of the arbitration. Article 3.13 of the IBA Rules requires the Parties to treat documents obtained in an arbitration as confidential. However, this obligation merely prevents the disclosure of the documents to third parties [*Sheppard/von Schlabrendorff 2012*, p. 376, fn. 61; *IBA*

Working Group, p. 13]. Since CLAIMANT would still learn the commercially confidential information, the Procedural Request should be refused on grounds of confidence [*Ashford 2013*, p. 217].

2. The requested documents are neither narrowly described nor material to the outcome of the proceedings

31. If the Procedural Request is not denied on grounds of confidence, the Tribunal may order the production of a 'narrow and specific category of documents' that is 'relevant and material to the outcome of the case' under Art. 3.3 of the IBA Rules. CLAIMANT has requested 'all documents' pertaining to RESPONDENT's communications and contracts with SuperWines over 18 months.

32. First, contrary to CLAIMANT's assertion [Cl. Memo. ¶121], the Procedural Request is not adequately described. In *Biwater Gauff v United Republic of Tanzania*, an ICSID tribunal applied Art. 3.3 of the IBA Rules to a request for 'all documents relating to' an issue and deemed it overly broad [*O'Malley*, p. 41, ¶3.35; *Born 2014*, p. 2361, §16.02[E]; *Ashford 2013*, ¶3-10]. By contrast, a sufficiently described request in *Elektrim SA v Vivendi Universal SA* sought 'agendas, presentations, submissions, memos [and] reports' [*Poudret/Besson*, p. 556, ¶653]. In addition, a request for documents over 18 months is not sufficiently 'narrow and specific'. In *Karaha Bodas v Perusahaan ICSID*, a request for 'all documents' within a 9-month period was determined to be too broad.

33. Second, the requested documents are not material to the outcome of the arbitration as CLAIMANT can present its case without them [cf. Cl. Memo. ¶124; *Brower/Sharpe*, p. 319; *Born 2014*, p. 2362, §16.02[E][4]]. For the reasons given *infra* ¶¶148-53, the Tribunal should assess CLAIMANT's damages based on any loss evidenced in its own contracts.

34. Third, even if the Tribunal calculates CLAIMANT's damages as RESPONDENT's gain, the only material document from the 18-month period is SuperWines' order submitted in November 2014 [PO No. 2, ¶¶22-3]. The Procedural Request is merely a 'fishing expedition' to identify possible further claims [*Born 2014*, p. 2360, §16.02[E]], such as RESPONDENT's alleged lack of good faith. The present case is factually similar to *RG 1892* where a request for business records founded on a suspicion that one of the parties had contracted with others on more advantageous terms was determined to be a fishing expedition. Since Art. 3.3 of the IBA Rules does not permit 'fishing expeditions' [*IBA Working Group*, p. 8; *Schewnzer/Ali*, p. 108; *Sachs*, p. 196], the Tribunal should deny the Procedural Request.

3. The Procedural Request would place an undue burden on RESPONDENT

35. Under Art. 9.2(c) of the IBA Rules, the Tribunal may refuse a discovery request if producing the evidence imposes an 'unreasonable burden.' In assessing the burden, the Tribunal should examine whether the 'probative weight of the requested evidence is worth the burden of production' [*O'Malley*, p. 294, ¶9.67; *ICC No. 11258*; *ICC No. 12279*]. Here, the burden of the Procedural Request outweighs the minimal probative weight of the evidence.

36. First, the terms of the Procedural Request place heavy burden on RESPONDENT. Requests for 'all documents' capture a broad range of documents tangentially related to the subject matter [*O'Malley*, p. 297, ¶9.74]. RESPONDENT and SuperWines did not conclude a written contract [PO No. 2, ¶23]. Moreover, the Procedural Request seeks the production of communications between RESPONDENT and SuperWines, and documents pertaining to such communications, over an extensive period of time [SOC, ¶27]. As a result, CLAIMANT correctly concedes that it is requesting 'a considerable volume of documents' [Cl. Memo. ¶122]. As RESPONDENT is 'not a major company' [Res. Ex. No. 1, ¶4], it would experience a considerable burden in complying with the Procedural Request.

37. Second, the probative weight of the documents is low as they are not necessary to quantify CLAIMANT's loss [*supra.* ¶¶148-53]. As a result, the Procedural Request should be denied as it imposes an undue burden on RESPONDENT for documents of minimal probative value.

4. The Procedural Request would subvert the burden of proof under the CISG

38. Even if the Procedural Request complies with the IBA Rules, it should be denied as it interferes with the allocation of burden of proof under the CISG. The burden of proof is the duty to prove a claim [*Garnett,* p. 198, ¶7.15], which includes the 'evidentiary burden' of producing supporting evidence [*Kröll 2011*, p. 166; *Lew/Mistelis/Kröll*, ¶¶22-25].

39. The CISG regulates the burden of proof because it is a matter governed by, but not expressly settled in, the Convention under Art. 7(2) [*Schwenzer/Hachem 2010*, p. 86; *Ferrari 2004*, p. 164]. The burden of proof is allocated according to the 'proximity of proof', which places the burden on the party in the best position to produce evidence [*Schwenzer/Hachem 2010,* p. 86, ¶26; *Kröll 2011*, p. 171; *BGH 30 June 2004*]. Normally, that is on the party making the legal claim [*Huber*, p. 37; *BGH 9 January 2002*].

40. Granting the Procedural Request disturbs this allocation of the burden of proof. CLAIMANT should bear the burden of proving its damages in **Issue 3** because it is better placed to prove its loss through its own contracts [PO No. 2, ¶2; *infra* ¶¶148-53]. Allocating the burden of proof on this basis is intended to encourage the parties to produce relevant evidence [*Volpin*, p. 1162]. Therefore, discovery of another party's documents would subvert this allocation [*Kröll 2011*, p. 170, fn. 26] because the requesting party could avoid the obligation of submitting its own evidence. The Tribunal should thus reject the Procedural Request as ordering discovery conflicts with the evidence-based allocation of the burden of proof under the CISG.

III. Granting the Procedural Request would violate the mandatory laws of the *lex arbitri*

41. Alternatively, the Tribunal should deny the Procedural Request on the basis of due process. The right to due process under Art. 18 of the UNCITRAL Model Law is a mandatory rule of the *lex arbitri* [*Noble China v Lei Kat Cheong*] from which the Tribunal cannot derogate [*Dicey/Morris/Collins*, p. 715, ¶16-009; *Redfern/Hunter*, ¶6.02]. The Tribunal should deny the Procedural Request to protect RESPONDENT's right to equal treatment **(A)**. Denying the Procedural Request will not affect CLAIMANT's right to be heard **(B)**. The arbitral award may be rendered unenforceable under the New York Convention if the Procedural Request is granted **(C)**.

A. The Procedural Request would contravene RESPONDENT's right to equal treatment

42. The Parties should 'be treated with equality' under Art. 18 of the UNCITRAL Model Law and Art. 28(1) of the Vienna Rules [*Haugeneder/Netal*, p. 167, ¶14]. Hence, the Tribunal must apply similar procedural requirements to all parties [*Roney/Müller*, p. 58; *Schwarz/Konrad*, ¶20-223]. The right to equal treatment permits RESPONDENT to invoke Equatoriana's business secrets privilege **(1)**. Further, granting the Procedural Request amounts to unequal treatment due to CLAIMANT's record-keeping policy **(2)**.

1. The Procedural Request can only be granted by applying unequal privilege rules

43. RESPONDENT should be permitted to rely on Equatoriana's business secrets privilege due to its right to equal treatment. The Tribunal has a discretion to determine the applicable privilege law [*Waincymer*, §10.17.3] which the Parties may invoke to exclude compliance with discovery [*Sindler/Wüstemann*, p. 611; *Born 2014*, p. 2377, ¶16.02[E]; *Robins v Day*].

44. The Tribunal should first apply the national privilege law 'most closely connected' to the requested communication [*Berger*, p. 503-4; *Born 2014*, p. 2384, §16.02[E]; *O'Malley*, pp. 285-286, ¶9.42]. This

approach is consistent with international practice [*ICC No. 4650*; *ICC No. 2730*] and the Parties' legitimate expectation that domestic privilege laws apply [*Kuitkowski*, p. 94, §5.3; *Berger*, ¶26-97].

45. However, the Parties would be treated unequally if they were subject to different privilege laws [*Sindler/Wüstemann,* p. 621]. In this case, the Tribunal should apply the 'most protective privilege' to both Parties [*Berger*, p. 504; *Sindler/Wüstemann* p. 636; *von Schlabrendorff/Sheppard 2005*, p. 772]. The Tribunal may uniformly apply the privilege law of one party, even if that party does not rely on the privilege, since the party could expect to rely on it [*Rubinstein/Guerrina*, p. 601]. This approach protects the parties' reliance interests by ensuring that they do not experience 'pro-disclosure surprises' [*Reiser*, p. 674] and is recognised as the most efficient means of managing privilege in the Principles of Transnational Civil Procedure [Art. 18(1)] and by the IBA Working Group [p. 70].

46. In this arbitration, the Parties are subject to different privilege laws. RESPONDENT's communications are connected to RESPONDENT's place of residence, Mediterraneo [Cl. Ex. No. 1; *Sheppard/von Schlabrendorff 2012*, pp. 369-70, ¶23-20]. CLAIMANT is most closely connected to its domicile, Equatoriana [Cl. Ex. No. 1]. The evidence law of Mediterraneo does not include business secrets privilege due to its very limited discovery procedure [ASOC, ¶30]. By contrast, the law of Equatoriana contains a business secrets privilege, which would cover the documents, the subject of the Procedural Request [ASOC, ¶30]. Hence, while the documents in the Procedural Request would be disclosed under Mediterranean law, they would be privileged in Equatoriana [ASOC, ¶30]. Therefore, the Tribunal should remedy the inequality between the Parties by permitting RESPONDENT to invoke Equatoriana's business secrets privilege and decline the Procedural Request.

2. CLAIMANT's record-keeping policy leads to unequal treatment

47. The right to equal treatment requires that parties have equal opportunity for discovery [*O'Malley*, p. 35, ¶3.25; *Park*, p. 54]. A party may be treated unequally if the other party limits the production of, or destroys, relevant documents [*Bishop/Childs*, p. 9]. As equal treatment is only concerned with the opportunity to access evidence [*Born 2014*, p. 2174, §15.04], a party may be treated unequally even if it does not request discovery.

48. CLAIMANT's record-keeping policy denies RESPONDENT an equal opportunity for discovery. CLAIMANT has requested RESPONDENT's internal documents including meeting minutes and memoranda [PO No. 2, ¶23]. However, RESPONDENT would not be able to request similar

documents from CLAIMANT, as CLAIMANT has instructed its employees to report meeting outcomes orally and avoid creating internal documents [Cl. Ex. No. 12, ¶3; PO No. 2, ¶60].

49. Further, CLAIMANT's document destruction policy contravenes equality between the Parties. It is increasingly recognised that parties should preserve documents in anticipation of international arbitration [*Born 2014*, p. 2368, §16.02[E][4][h]; Guideline 12 IBA Guidelines]. However, CLAIMANT introduced a policy requiring the 'systematic destruction' of all documents produced after 5 years to evade complying with discovery requests [Cl. Ex. No. 12, ¶3]. Consequently, RESPONDENT cannot discover CLAIMANT's documents pertaining to the negotiation or first year of the Framework Agreement [Cl. Ex. No. 1]. The reasonableness of the document retention policy is immaterial since parties should suspend document retention policies which may destroy information relevant to an arbitration [*Mcllwrath/Savage,* p. 125, ¶3-017; *IBA Arbitration Committee*, p. 12]. CLAIMANT's failure to preserve relevant evidence creates inequality as RESPONDENT is denied an equal opportunity to request discovery [*Bishop/Childs*, p. 9].

B. The requested documents are not necessary for CLAIMANT to present its case

50. The Tribunal should reject CLAIMANT's assertion that its right to be heard would be infringed without the granting of the Procedural Request [cf. Cl. Memo. ¶130]. The right to be heard entitles the Parties to present evidence [Art. 18 UNCITRAL Model Law; Art. 28(1) Vienna Rules; *Haugeneder/Netal*, p. 169, ¶25].

51. The right to be heard 'does not generally include discovery' [*Born 2014*, p. 2180 §15.04[B]; *Roney/Müller*, p. 57; *Schwarz/Konrad*, ¶20-070]. As illustrated in *Karaha Bodas v Perusahaan 5th Circuit*, CLAIMANT's right to be heard is not infringed if the Procedural Request is denied because it has the opportunity to present other evidence. CLAIMANT can calculate its damages through reference to its actual loss demonstrated in its contracts [*infra* ¶¶141-148]. Further, as illustrated in *Taigo Ltd v China Master Shipping*, the scope of CLAIMANT's right to be heard is influenced by the Parties' agreement to exclude or limit discovery. This agreement reduces CLAIMANT's ability to 'now complain' that excluding discovery limits its right to be heard [*Taigo Ltd v China Master Shipping*].

C. Granting the Procedural Request may render the arbitral award unenforceable

52. Granting the Procedural Request may render the award unenforceable under the New York Convention as it would violate RESPONDENT's right to equal treatment. The Tribunal has a duty to make an enforceable award [*Sheppard/von Schlabrendorff 2005*, p. 371, ¶23.21] and domestic courts may refuse to enforce the award if there is a serious or substantial violation of the Parties' due

process rights [Arts. V(1)(b), V(2)(b) New York Convention; *Petrochilos,* p. 99, ¶3.119; *AG v Hochtief Airport*; *Reasuransi v Evanston*].

53. Permitting the application of different privilege laws and unequal access to evidence is a substantial violation of RESPONDENT's right to equal treatment [*Azurix Corp v Argentine Republic*]. This is particularly so, given the 'fundamental importance ascribed to the right of legal privilege' [*von Schlabrendorff/Sheppard 2005*, p. 767].

54. Contrastingly, the award will not be rendered unenforceable if discovery is denied [cf. Cl. Memo. ¶131]. Courts and tribunals have consistently found that the mere denial of discovery, without anything more, is not sufficiently serious to warrant setting aside an award [*Karaha Bodas v Perusahaan 5th Circuit*; *AG v Hochtief Airport*; *Dongwoo Mann & Hummel*].

CONCLUSION

The Tribunal should deny CLAIMANT's Procedural Request. The Parties specifically agreed to exclude discovery, a costly and inefficient process that is contrary to RESPONDENT's right to equal treatment. The Procedural Request is immaterial, inadequately defined and contrary to the structure of the CISG. The Procedural Request should be denied as it is a tactic to burden RESPONDENT and claim its confidential information.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO DAMAGES FOR THE LEGAL COSTS FROM THE PRE-ARBITRAL PROCEEDINGS

55. CLAIMANT is not entitled to damages for its litigation expenses in Mediterraneo. Article 74 of the CISG bars the recovery of litigation costs **(I)**. CLAIMANT is not entitled to damages for legal fees arising from its application for interim relief **(II)**. CLAIMANT should not recover damages for legal fees incurred during RESPONDENT's application for a declaration of non-liability **(III)**.

I. Pre-arbitral legal costs are not recoverable under the CISG

56. CLAIMANT's assertion that pre-arbitral legal costs are recoverable as damages under the CISG has no legal basis and is against the weight of authority [cf. Cl. Memo. ¶10]. Instead, the Tribunal should follow the reasoning of Judge Posner in the 2002 U.S. 7th Circuit Court of Appeals decision in *Zapata*. The court found that legal costs cannot be recovered under the CISG for two reasons.

First, legal costs are a procedural matter that is outside the scope of the CISG **(A)**. Second, and in the alternative, legal costs are not recoverable under the CISG **(B)**.

A. Liability for legal costs is a procedural issue that is not governed by the CISG

57. CLAIMANT's contention that Judge Posner erred in applying American procedural law to the question of legal costs is incorrect [cf. Cl. Memo. ¶9]. Legal costs are a procedural matter governed by the *lex fori* [*Flechtner/Lookofsky 2005*, §1; *Schwenzer/Hachem/Kee*, p. 612; *Flechtner 2002*, p. 153; *Huber*, p. 278]. Hence, Judge Posner's approach conforms to the international consensus on the procedural nature of legal costs [*Saidov 2008*, p. 51; *Schlechtriem 2002*, §1]. As the CISG 'is about contracts, not about procedures' [*Zapata*], legal costs cannot be recovered as substantive damages under the CISG [*Flechtner/Lookofsky 2003*, p. 94]. The Tribunal should refer to this distinction between 'procedural' and 'substantive' as it is relevant to determining whether legal costs are governed by the CISG [*Flechtner/Lookofsky 2006*, p. 3].

58. The Tribunal should uphold this separation between 'procedural' and 'substantive' issues. Courts and tribunals have consistently held that the CISG does not regulate procedural matters [*CJ Genève 15 November 2002*; *Schwenzer/Hachem 2010*, Art. 4, ¶24].

B. Even if the CISG governs legal costs, they cannot be awarded as damages

59. Even if pre-arbitral legal fees are substantive, they are not recoverable under the CISG [cf. Cl. Memo. ¶5]. Judge Posner correctly finds that 'loss' under Art. 74 of the CISG does not include legal costs **(1)**. The principle of full compensation does not allow the recovery of pre-arbitral legal costs **(2)**. Further, litigation fees should not be awarded as incidental damages **(3)**.

1. Legal costs are not a 'loss' under Article 74 of the CISG

60. Article 74 of the CISG permits a party to recover damages 'equal to the loss … suffered as a consequence of the breach.' CLAIMANT concedes that the CISG does not provide a precise definition of 'loss' [Cl. Memo. ¶5]. Accordingly, the Tribunal should interpret Art. 74 in accordance with the international character of the CISG [Art. 7(1) CISG].

61. First, the drafters of the CISG did not intend to disturb the allocation of legal costs under the *lex fori* [cf. Cl. Memo. ¶5; *Mullis*, p. 43; *Flechtner 2002*, p. 150]. The *travaux préparatoires* do not discuss whether legal costs are a 'loss' [*Zapata*] despite the 'great importance' of the issue [*Flechtner/Lookofsky 2006*, p. 7]. Interpreting the CISG in accordance with its *travaux préparatoires* maintains its international character [*Honnold 2009*, p. 88-91]. Further, as noted by Judge Posner,

the absence of an express allocation on legal costs indicates that states do not intend to undo local rules when ratifying the CISG [*Flechtner 2002*, p. 125].

62. Second, 'loss' should not be interpreted in accordance with Danubian and Mediterranean law [cf. Cl. Memo. ¶9]. Using domestic authority to aid interpretation is contrary to the international character of the CISG [*Ferrari 2008*, p. 139; *Osborne*, §4.1; *Felemegas*, p. 9]. Instead, the CISG should be interpreted with authority from various legal systems [*Enderlein/Maskow*, p. 55].

63. Third, CLAIMANT wrongly argues that the term 'loss' in Art. 74 of the CISG includes pre-arbitral legal costs due to the weight of authority [Cl. Memo. ¶5]. For example, one case cited by CLAIMANT awards legal costs under procedural law [Cl. Memo. ¶8; *OLG Graz 16 September 2002*]. In fact, the weight of international authority favours recovering legal costs under the relevant procedural law rather than the CISG [*Flechtner/Lookofsky 2003*, §1; *Schwenzer/Hachem/Kee*, p. 612]. This includes Canada [*Stephan Shane v JCB Belgium*], China [*CIETAC 21 October 2005*], Germany [*AG Augsburg 29 January 1996*], Switzerland [*KG Appenzell Ausserrhoden 10 March 2003*], Russia [*Federal Arbitration Court for the Moscow Region 24 August 2000*] and the US [*Ajax Tool Works v Can-Eng*; *Zapata*]. The Tribunal should follow this authority to uniformly interpret the CISG [Art. 7(1) CISG].

2. Full compensation does not allow for the recovery of legal costs under the CISG

64. CLAIMANT asserts that the principle of full compensation allows for the recovery of pre-arbitral litigation costs [Cl. Memo. ¶¶5-6]. The principle of full compensation may assist interpretation if legal costs are a matter governed, but not expressly settled, by the CISG [Art. 7(2) CISG]. Legal costs are not recoverable under the principle of full compensation. First, the scope of full compensation is ill defined [*Schwenzer 2010a*, p. 1001, ¶5] and only guarantees the 'full' recovery of losses within the scope of Art. 74 of the CISG [*Saidov 2008*, p. 392]. As above, pre-arbitral legal costs are not within the scope of Art. 74 [*supra* ¶¶60-63].

65. Second, the principle of full compensation may be displaced by other principles [*Lookofsky*, p. 97]. Structural equality between buyer and seller is fundamental to the CISG [*Keily 2003*, §6.2(b); *Felemegas*, §4(c)(iv)(d); *Schwenzer/Hachem 2008*, p. 104]. As Judge Posner finds in *Zapata*, the recovery of pre-arbitral costs violates the principle of equal treatment because 'a successful respondent will not be able to recover its legal costs if the claimant has not committed a breach of contract.' Contrastingly, a successful claimant may recover its legal costs as there is breach of contract enlivening its right to damages [*Saidov 2008*, p. 51; *Schlechtriem 2006*, p. 76]. The principle of equal treatment hence bars the recovery of legal costs under the CISG [*CISG-AC No. 6,* ¶5.4].

3. Pre-arbitral legal costs are not incidental damages under the CISG

66. CLAIMANT's pre-arbitral legal costs do not meet the requirements of incidental damages under Art. 74 of the CISG. Pre-arbitral legal costs are not recoverable as incidental damages if 'they cannot be neatly separated from the costs of litigation' [*Saidov 2008*, p. 52; *Schwenzer/Hachem 2008*, p. 105]. CLAIMANT's legal costs were intrinsically related to the proceedings as they were incurred to establish 'the provisional assessment of the legal situation' [*Saidov 2008*, p. 52]. Further, equality between the Parties [*supra* ¶64] precludes the recovery of pre-arbitral legal costs as incidental damages [*Saidov 2008*, p. 52; *Schwenzer/Hachem 2008*, p. 105]. Accordingly, pre-arbitral legal costs cannot be recovered under the CISG.

II. CLAIMANT is not entitled to legal costs related to its application for an injunction

67. Even if the Tribunal could award damages for legal costs under the CISG, it should not allow CLAIMANT to recover its legal expenses from its injunction in Mediterraneo [Cl. Memo. ¶19]. The Tribunal can assume that RESPONDENT has breached the Framework Agreement at this stage of the proceedings [PO No. 1, ¶2].

68. CLAIMANT contends that it can recover damages under Arts. 74 and 77 of the CISG from its interim application [Cl. Memo. ¶¶30-46]. However, CLAIMANT's legal costs were not caused by RESPONDENT's conduct **(A)**. CLAIMANT's loss was not reasonably foreseeable and CLAIMANT failed to mitigate its loss **(B)** and in any event, the ruling of the High Court of Mediterraneo was final **(C)**.

A. RESPONDENT did not cause CLAIMANT's loss

69. A party cannot recover damages unless it demonstrates a causal connection between its loss and contractual breach [Art. 74 CISG; *ICC No. 7197*]. Since CLAIMANT has not made an argument on this matter, it has not discharged its burden of proof [*Gotanda 2004*, p. 79; *Tribunale di Pavia 29 December 1999*]. In any event, CLAIMANT was not compelled to seek an injunction in December 2014 [Cl. Ex. No. 11] as non-delivery of the wine would not have occurred until May 2015 [PO No. 2, ¶45]. Hence, RESPONDENT did not cause CLAIMANT's loss.

B. CLAIMANT's legal costs were neither foreseeable nor reasonable

70. CLAIMANT's legal costs were neither reasonably foreseeable [cf. Cl. Memo. ¶¶21-9]. Under Art. 74 of the CISG, damages are only recoverable if the breaching party foresaw or should have foreseen

the possibility of loss [*Gotanda 2006*, p. 55; *Ziegel*, ¶74.2(b)]. Foreseeability is assessed at the time of contract formation [*Knapp 1987a*, p. 542].

71. Additionally, under Art. 77 of the CISG, CLAIMANT must take all steps to mitigate its loss that can be expected from a reasonable person acting in good faith [*Riznik*, ¶4; *OGH 6 February 1996*; *OG des KT 12 December 2006*]. Accordingly, CLAIMANT's damages are limited to legal fees which are reasonably incurred [*AG Alsfeld 12 May 1995*]. The Tribunal should reduce any award of damages if it determines that CLAIMANT failed to mitigate its loss [*Knapp 1987a*, p. 559; *Maes Roger v Kapa Reynolds*]. CLAIMANT did not act reasonably by initiating interlocutory proceedings in Mediterraneo **(1)** or by engaging LawFix on a contingency fee basis **(2)**.

1. It was not foreseeable or reasonable to seek an injunction in Mediterraneo

72. CLAIMANT's contention that its injunction was reasonable and foreseeable should be rejected [cf. Cl. Memo. ¶23]. First, CLAIMANT's obligation to deliver 4,710 bottles at the time of the injunction [PO No. 2, ¶¶6-7] would have been fulfilled by RESPONDENT's offer of 5,000 bottles [Cl. Ex. No. 3]. In any event, CLAIMANT could rely on the force majeure provision in its pre-orders to excuse non-delivery due to the inclement weather [PO No. 2, ¶6].

73. Second, there was no need for CLAIMANT to seek relief in a domestic court. Interim judicial measures 'maintain the status quo pending the outcome of the arbitration' [*Redfern & Hunter,* ¶7.14; *Osmond v Fergal McFarland*] and are appropriate in situations of urgency [*Leviathan Shipping v Sky Sailing Overseas*; *Redfern & Hunter,* ¶7.27; *Born 2015,* p. 2522, §17.04[A]]. However, there was no imminent threat to CLAIMANT when it sought its injunction. The 2014 vintage was not yet bottled and would not have been delivered for another five months [PO No. 2, ¶45]. CLAIMANT knew that RESPONDENT would not start contracting with other customers for another two months [PO No. 2, ¶29; Cl. Ex. No. 6, ¶2]. Therefore, CLAIMANT did not urgently require domestic relief.

74. Third, even if an injunction was necessary, CLAIMANT should have sought interim relief through VIAC. Under expedited VIAC proceedings, a VIAC tribunal could have been constituted and interim relief granted within fifteen days [Arts. 11, 45(3), 45(6) Vienna Rules]. CLAIMANT could have received interim relief by 23 December 2014, before RESPONDENT's negotiations with other customers began in January 2015 [PO No. 2, ¶29].

2. It was not foreseeable or reasonable to engage LawFix on a contingency basis

75. CLAIMANT's contingency fee arrangement with LawFix was not foreseeable or reasonable [cf. Cl. Memo. ¶¶43-4]. Contrary to CLAIMANT's contention [Cl. Memo. 27], RESPONDENT must foresee the extent of CLAIMANT's loss [*Schwenzer 2010a*, p. 1020, ¶50]. However, RESPONDENT did not expect that CLAIMANT would enter into a contingency arrangement that was unreasonable in the circumstances [PO No. 2, ¶39]. Indeed, the Parties had agreed that dispute resolution would be conducted in a 'cost-efficient' manner [Cl. Ex. No. 1]. Further, the Tribunal should reject CLAIMANT's statement that its legal costs were reasonable as LawFix charged less than the market hourly rate [cf. Cl. Memo. ¶43]. CLAIMANT omits LawFix's USD 45,000 contingency fee [Cl. Ex. No. 11] and the fact that LawFix's ordinary hourly partner rate was USD 100 more expensive per hour than the average Mediterranean law firm [PO No. 2, ¶39].

76. Second, CLAIMANT incorrectly asserts that the fee arrangement was reasonable in light of its financial situation [Cl. Memo. ¶¶43, 4]. A party's financial circumstances are irrelevant since reasonableness is assessed from the perspective of a reasonable person [*Schwenzer 2010a*, p. 1045, ¶7; *Saidov 2002*, pp. 353-354]. Further, contingency fee arrangements 'made for personal reasons… such as a lack of funds' are generally unreasonable [*Wehrli*, p. 252].

77. Third, CLAIMANT failed to mitigate its loss by paying an excessive amount to LawFix. CLAIMANT paid a USD 30,000 contingency fee on the basis that the interim injunction was a win on the merits of the dispute [PO No. 2, ¶¶4, 41; Cl. Ex. No. 11]. However, an interim injunction is a matter of procedure since it merely preserves the status quo 'pending the determination of the claim by a court or an arbitral tribunal' [Cl. Ex. No. 8, ¶4; *Redfern/Hunter*, ¶5.27]. Hence, CLAIMANT's legal costs were not reasonable since the injunction did not trigger the USD 30,000 contingency fee.

78. Fourth, the Tribunal should reject CLAIMANT's contention that its legal costs were foreseeable because contingency fees are 'fairly common' in Mediterraneo [Cl. Memo. ¶43]. As the Parties are from different jurisdictions, the Tribunal should consider the reasonableness of legal fees from the perspective of the seat [*Schlechtriem 2002,* §3(a)]. Although contingent fees are permitted in Danubia, there is no evidence of their frequency [PO No. 2, ¶40].

79. Fifth, the Tribunal should consider that CLAIMANT concluded its contract with LawFix to the detriment of RESPONDENT, who under CLAIMANT's submissions would ultimately be liable for the amount of CLAIMANT's debt to LawFix. The operation of the contingency arrangement created a fee that was ultimately unreasonable in these circumstances [PO No. 2, ¶39]. Trans-Lex Principle

No. IV.6.4 prohibits concluding agreements to the detriment of a third party. The Trans-Lex Principles are a highly regarded codification of the *lex mercatoria* [*Cordero-Moss*, p.52]. They may be used to fill inform the content of the CISG for matters not settled in its express terms [*Berger 2011*, §5.2].

C. Liability for costs was finally determined by the High Court of Mediterraneo

80. The Tribunal should refuse CLAIMANT's application for pre-arbitral legal costs under the principle of *res judicata* [cf. Cl. Memo. ¶¶15-8]. The doctrine of *res judicata* is an international principle which binds state courts and international tribunals [*Voser/Raneda*, §1]. Under *res judicata*, parties cannot reargue a claim before a tribunal when the matter has been finally determined by a domestic court [*Born 2014*, p. 3735, §27.01[A][1]; *Redfern/Hunter*, ¶9.173; *ILA Interim Report*, p. 3, §A]. The *res judicata* principle hence promotes fairness and commercial efficiency [*Born 2014*, p. 3777, §27.01[A][3]]. Failure to abide by the *res judicata* principle will render the award liable to be set aside on the basis that it is contrary to public policy [Art. V(2)(b) New York Convention; *Born 2012*, p. 360, §16.07[C]; *IBA Subcommittee*, pp. 15, 18].

81. CLAIMANT should not be allowed to recover pre-arbitral costs since the claim for costs was determined in Mediterraneo [cf. Cl. Memo. ¶15]. A legal claim includes 'all claims or rights of legal action that arise out of a single set of facts' [*Born 2014*, p. 3735, §27.01[A][1]; *ILA Final Report*, p. 34, fn. 109], including the issue of allocation of costs. The High Court of Mediterraneo conclusively determined that the Parties were to bear their own costs in relation to each of the two domestic proceedings arising from this dispute [Cl. Ex. No. 8; Cl. Ex. No. 9].

III. CLAIMANT is not entitled to legal costs related to the application for the declaration of non-liability

82. CLAIMANT incorrectly states that it may claim its legal expenses from the declaration proceedings [Cl. Memo. ¶¶11-4]. CLAIMANT cannot recover damages for a breach of the Arbitration Agreement **(A)**. In any event, CLAIMANT is responsible for its own legal costs **(B)**.

A. Damages are not available for breach of an arbitration agreement

83. Contrary to CLAIMANT's arguments [Cl. Memo. ¶12], the UNCITRAL Model Law regulates the Arbitration Agreement to the exclusion of Art. 74 of the CISG **(1)**. Damages are not available since arbitration agreements do not create substantive obligations **(2)**. The High Court of Mediterraneo finally determined CLAIMANT's right to legal expenses **(3)**.

1. The law governing the Arbitration Agreement does not allow for damages

84. CLAIMANT seeks damages under Art. 74 of the CISG [Cl. Memo. ¶19]. CLAIMANT has incorrectly assumed that Art. 74 applies to the Arbitration Agreement [Cl. Memo. ¶¶11-4]. The UNCITRAL Model Law exhaustively regulates the remedies arising out of breach of the Arbitration Agreement, and does not allow for the recovery of damages. Even if the Tribunal determines that the CISG governs the Arbitration Agreement, recovery of legal expenses is unavailable [*supra* ¶¶58-68].

85. The Arbitration Agreement is separable from the Framework Agreement [Art. 16 UNCITRAL Model Law; *Lew/Mistelis/Kröll*, ¶¶6-7; *Kröll 2005*, pp. 44, 45; *Vienna SCH-5176*]. The doctrine of separability is designed to ensure that arbitration agreements are not susceptible to any flaws in the primary sales contract and so that the parties may accurately delineate the scope of the applicable law [*Born 2014*, p. 351, §3.01]. The Arbitration Agreement may therefore be governed by a separate body of law [*Lew/Mistelis/Kröll*, ¶6-23]. The Parties agreed that all matters relating to the Arbitration Agreement not regulated by the Danubian Arbitration Law are governed by the CISG [PO No. 2, ¶63]. The Danubian Arbitration Law is an adoption of the UNCITRAL Model Law [PO No. 2, ¶58; PO No. 1, ¶3].

86. The UNCITRAL Model Law defines the remedial consequences for a breach of an arbitration agreement as a stay of proceedings and referral to arbitration [Art. 8(1) UNCITRAL Model Law]. Article 74 of the CISG therefore cannot apply since the UNCITRAL Model Law regulates remedial consequence for breach of an arbitration agreement. Given that the UNCITRAL Model Law does define the consequences for the breach, the omission of a provision on damages implies that they are unavailable. The UNCITRAL Model Law is designed to be 'as comprehensive and complete as possible' and thus omissions should be taken as deliberate to avoid confusion [*Holtzmann/ Neuhaus*, p. 1145].

2. Arbitration agreements contain solely procedural obligations

87. CLAIMANT argues that damages are available for the breach of the arbitration agreement as it creates substantive obligations materially identical to those of the primary contract [Cl. Memo. ¶31]. However, arbitration agreements only operate on a procedural level [*Schlechtriem/Butler*, p. 42, ¶41]. This aligns with the legally separate nature of the Arbitration Agreement from the primary contract [*Born 2014*, p. 360, §3.02[B][2]]. It follows that CLAIMANT may not recover the substantive remedy of damages [*Jaroslavsky*, p. 26, ¶88].

88. Arbitration agreements govern the relationship between parties and judicial or arbitral bodies [*Gabriel*, ¶25; *Jaroslavsky*, p. 26, ¶90]. They only require substantive performance by the courts in directing the parties to the appropriate procedure [*Girsberger/Gabriel*, p. 832, ¶2; *Berger/Kellerhals*, ¶297]. In fact, the 'primary obligations under the agreement to arbitrate exist only for the purpose of informing the parties by means of an award what their rights and obligations are under the underlying contract' [*Westacre Investments Inc. v Jugoimport-SPDR Holdings Co.*; *Born 2014*, p. 360, §3.02[B][2]]. Hence, arbitration agreements only create procedural directives rather than substantive obligations [*Schlechtriem/Butler*, p. 42, ¶41; *BGE 116*; *BGE 101*; *BGE 41*].

89. A remedy for substantive breaches of the primary contract cannot be engaged for breaches of procedural directives and therefore CLAIMANT is limited to procedural remedies [*Jaroslavsky*, pp. 25-26, ¶¶87-88].

3. Liability was finally determined by the High Court of Mediterraneo

90. As with liability for costs incurred in the proceedings for an injunction, liability in this proceeding is similarly *res judicata* between the parties [*supra* ¶¶82-83]. The Tribunal should not reconsider the matter as it has already been decided by the High Court [Cl. Ex. No. 9].

91. Further, CLAIMANT relies on *Union Discount v Zoller* to prove its proposition that damages are available for a breach of an arbitration agreement [Cl. Memo. ¶12]. However, *Union Discount v Zoller* endorses the application of *res judicata* by deciding that the recovery of legal expenses as damages can only be awarded when the domestic court made no relevant order.

B. CLAIMANT caused its own loss in the proceedings

92. CLAIMANT's refusal to communicate caused its loss. In the first week of January and by its letter of 14 January, RESPONDENT attempted to minimise costs and resolve the dispute amicably by negotiating with CLAIMANT [Res. Ex. No. 2; cf. Cl. Memo. ¶13]. CLAIMANT failed to respond in breach of its legal obligations **(1)**, and is therefore responsible for all of its legal expenses **(2)**.

1. CLAIMANT was required to clarify the status of the Arbitration Agreement

93. CLAIMANT breached several legal obligations by failing to communicate with RESPONDENT.

94. First, the Parties agreed that '[a]ll disputes shall be settled amicably and in good faith' [Cl. Ex. No. 1]. This explicit obligation of good faith requires cooperation between the parties [*Kazazi*, p.

119, §A]. The obligation also included refraining from aggravating the dispute and required CLAIMANT to seek an efficient resolution [*Kazazi*, p. 119, §A].

95. Second, CLAIMANT was required to mitigate its loss [Art. 77 CISG; *Knapp 1987b*, p. 560, ¶2.1]. This requires undertaking all 'possible and appropriate measures to prevent the occurrence of loss' [*Schwenzer 2010b*, p. 1042, ¶1]. By contrast, CLAIMANT ignored an opportunity to resolve the dispute amicably knowing that this would lead to significant legal costs in the High Court. [*Stoll/Gruber*, Art. 77, ¶3]. Further, the expectations of the parties strongly inform the content of the duty to mitigate [*Schwenzer 2010b*, p. 1045, ¶7]. CLAIMANT had previously agreed to allow RESPONDENT to keep bottles for itself in times of storage [ASOC, ¶7]. This gave rise to a legitimate expectation that CLAIMANT would support commercially reasonable solutions in times of hardship.

96. Third, CLAIMANT may not rely on RESPONDENT's breach as CLAIMANT caused it by omission [Art. 80 CISG]. Parties may not imply that actions are not breaches of contract if they intend to receive damages pursuant to that breach [*LG Düsseldorf 9 July 1992*; *Digest*, p. 402, fn. 12]. CLAIMANT's lack of objection to RESPONDENT's proposed course of judicial action implies that the decision was acceptable. Article 80 of the CISG imports a test of objective causation [*Poland 11 May 2007*]. It is therefore irrelevant that CLAIMANT may provide excuses, such as forgetfulness [*Schwenzer 2010c*, p. 1089, ¶3; *OLG Koblenz 31 January 1997*; PO No. 2, ¶57].

2. CLAIMANT is responsible for all legal expenses

97. CLAIMANT was in a position to avert all loss by communicating with RESPONDENT to ensure that the proceedings did not occur. RESPONDENT approached CLAIMANT 'in the first week of January 2015… and tried to resolve the dispute' [ASOC, ¶20]. CLAIMANT refused to compromise contrary to the prior understanding of the Parties [ASOC, ¶¶7, 20]. CLAIMANT did not respond to RESPONDENT's letter of 14 January 2015 even though RESPONDENT was, by that time, under pressure to organise distribution of its vintage [ASOC, ¶20]. Therefore, CLAIMANT entirely released RESPONDENT of its liability for expenses in the declaration proceedings, since CLAIMANT's conduct departed from its legal obligations [cf. Cl. Memo. ¶37].

98. RESPONDENT also clearly indicated to CLAIMANT on 14 January 2015 that RESPONDENT believed the Arbitration Agreement to be inoperative and that it intended to instigate court proceedings [Res. Ex. No. 2, ¶5]. The Parties had nominated the fictitious 'International Arbitration Tribunal' as the relevant arbitral body [Cl. Ex. No. 1]. Nominating a non-existent institution may make an arbitration agreement impossible to enforce and will likely create significant uncertainty for the

parties [*Poudret/Besson*, p. 128, ¶159]. RESPONDENT set a clear two-week deadline for a response, which provided ample time for CLAIMANT to respond [Res. Ex. No. 2, ¶6]. CLAIMANT has provided no acceptable explanation. CLAIMANT's forgetfulness is unreasonable and inconsistent with its duty to cooperate and mitigate loss [PO No. 2, ¶57]. Negotiations could have averted the proceedings.

99. CLAIMANT is under a duty to take all reasonable measures to mitigate its loss [*BGH 24 March 1999*]. CLAIMANT suggests that it fulfilled this duty by immediately invoking the Arbitration Agreement at the proceedings [Cl. Memo. ¶38]. However, CLAIMANT would have incurred the same contingency fees even if the proceedings had continued [Cl. Ex. No. 11].

CONCLUSION

Article 74 of the CISG does not allow damages for legal costs, especially in this case because CLAIMANT's expenses were unreasonable and unforeseeable. CLAIMANT should not recover damages for expenses in proceedings brought in breach of an arbitration clause. In any case, CLAIMANT caused its own loss by failing to communicate with RESPONDENT.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO RESPONDENT'S PROFITS

100. CLAIMANT has proposed two methods to extract RESPONDENT's profits and avoid proving its loss [Cl. Memo. ¶¶49-103]. Neither method is supported by the CISG. Therefore, the Tribunal should not disgorge RESPONDENT's profits **(I)**, nor should it quantify CLAIMANT's damages as RESPONDENT's profits under Art. 74 of the CISG **(II)**.

I. The Tribunal may not disgorge RESPONDENT's profits

101. RESPONDENT made a profit from its sale to SuperWines. CLAIMANT now seeks to deprive, or disgorge, RESPONDENT of this profit even if it exceeds CLAIMANT's loss [Cl. Memo. ¶¶71-103]. However, disgorgement is not available under the CISG **(A)** and conflicts with its general principles **(B)**. It is also unavailable under the law of Danubia **(C)**. Finally, RESPONDENT's actions do not justify disgorgement **(D)**.

A. The CISG does not permit disgorgement

102. The CISG does not provide an unlimited suite of remedies and has excluded disgorgement [cf. Cl. Memo. ¶¶71-6]. There is no express provision in the CISG that allows disgorgement in favour of the buyer [*Schmidt-Ahrendts*, p. 89]. Nor is disgorgement supported by Art. 74 of the CISG, since

it does not compensate loss [*Schmidt-Ahrendts*, p. 102; *Brunner*, p. 355, fn. 1780; *Stoll/Gruber*, p. 762, ¶31].

103. The absence of disgorgement from the detailed structure of the CISG implies that it is excluded from the Convention. It is thus an 'external gap' which is 'a matter not governed by the CISG.' This differs from an 'internal gap', where the CISG does not expressly govern a matter, but regulates it according to its general principles [*Viscasillas*, p. 132, ¶47; Art. 7(2) CISG]. This is further supported by the drafting history of the CISG, which affects the interpretation of the scope of the CISG [*Viscasillas*, p. 134, ¶52]. The drafting states intended that parties who acquire substitute performance in response to non-delivery would recover the cost of the substitute and any further loss of profit [Arts. 74 and 75 CISG; *Honnold 1989*, p. 351, ¶471]. There is no suggestion that the drafting states intended to provide for remedies which were not written into the text of the CISG.

B. The principles of the CISG do not support disgorgement as a remedy

104. Disgorgement is inconsistent with the CISG's underlying values. When filling internal gaps under Art. 7(2) of the CISG, the Tribunal should consider analogies with existing articles before the 'general principles on which the CISG is based' [*Viscasillas*, p. 134 ¶53; *Bonell 1987*, p. 78, §2.3.2.1]. This is followed by external principles of international sales law and then domestic law [*Viscasillas*, p. 134, ¶53; p. 139, ¶61]. Disgorgement is not supported by analogy to other CISG provisions **(1)** or good faith **(2)**. Further, trade efficiency is of paramount performance under the CISG **(3)**.

1. Disgorgement is not available by analogy to Article 84(2) of the CISG

105. Article 84(2) of the CISG only requires the buyer to restore to the seller the benefit it has derived from returnable goods. It is therefore clearly inapplicable to the present dispute. The provision is limited to circumstances where the buyer must return the items purchased after it failed to perform its obligations or requested substitute goods [*Sec. Comm. Art. 69*, ¶¶1-3]. This is distinct from stripping a seller of its profits, especially where they have no obligation to return the goods. Further, Art. 84 of the CISG operates to restore parties to the economic position that they were in prior to the formation of an agreement [*Fountoulakis*, p. 1132, ¶3]. This is fundamentally different from restoring the benefits gained through breach of contract.

2. Good faith does not provide for disgorgement

106. The imprecise and limited notion of good faith cannot be used to create a remedy which is not found in the text of the CISG [cf. Cl. Memo. ¶¶71-2]. In fact, good faith does not even regulate performance of the contract **(a)**. In any event, breaching the obligation of good faith would not entitle a party to disgorge profits **(b)**.

(a) There is no substantive obligation to act in good faith

107. The CISG does not contain a freestanding obligation to act in good faith. Article 7(1) of the CISG does not oblige parties to act in good faith [cf. Cl. Memo. ¶71]. It imports the doctrine of good faith into the interpretation the CISG, not the legal relationship between parties [*Honnold 2009*, p. 135, §94; *Huber*, p. 8; *Schlechtriem 2005*, p. 95, ¶7; *ICC No. 8611*]. The text and drafting history of Art. 7(1) of the CISG reflect this. A 'general duty to observe good faith and fair dealing was explicitly not included in the CISG as agreement could not be reached' [*Andersen*, p. 30]. Additionally, such an obligation would 'only create confusion and undermine the CISG's objective of harmonising the law' [*Sim*, §VI].

108. Cases that deviate from this drafting structure to import a substantive obligation of good faith generally reflect a 'homeward trend' [*Sim*, §IV B 2; *Schwenzer/Hachem 2010*, pp. 127-8, ¶17]. A 'homeward trend' is 'the tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained onto the international provisions of the Convention' [*Flechtner/Lookofsky 2005*, p. 202; *Ferrari 2009*, pp. 181, 2]. These cases threaten the uniform and autonomous interpretation of the CISG [*Ferrari 2003*, p. 65].

109. CLAIMANT invokes Art. 1.7(1) of the UNIDROIT Principles which explicitly obliges parties to 'act in accordance with good faith and fair dealing' [Cl. Memo. ¶71]. This article cannot be used to interpret the CISG. The UNIDROIT Principles may not fill gaps in the CISG unless 'the relevant provisions…are the expression of a general principle underlying CISG' [*Bonell 2005*, p. 320; *Boele-Woelki,* p. 234]. The UNIDROIT Principles have sharply and consciously deviated from the CISG to include an explicit obligation of good faith and therefore should not inform the content of the CISG on this point [*Schwenzer/Hachem 2010*, p. 128, ¶17].

110. In any event, the content of any alleged obligation of good faith is uncertain [*Koneru*, p. 139; *Vienna SCH-4318*; *Finland 26 October 2000*]. Good faith is not defined by the text of the CISG [*Zeller 2000*]. The scope of this obligation was the subject of substantial division during the drafting of the CISG [*Honnold 1989*, pp. 369, 476; *Honnold 2009*, p. 134, §94; *Koneru*, pp. 138-9]. An uncertain principle

should not justify a remedy as powerful and uncompromising as disgorgement. This is especially since disgorgement conflicts with the foundational principles underlying the CISG. One such principle is full compensation [*CISG-AC No. 6*, §1]. The damages provisions of the CISG do not permit over-compensation [*Morrissey/Graves*, p. 272, fn. 12]. However, the purpose of disgorgement goes beyond reparation [*Edelman*, p. 82]. Indeed, CLAIMANT seeks to recover a sum that may exceed its loss [PO No. 1, ¶5].

(b) In any event, good faith does not require disgorgement of profits

111. Even if a positive obligation of good faith exists under the CISG, it would not provide for the disgorgement of profits as a remedy for breach of contract [cf. Cl. Memo. ¶71]. Rather, the enterprising party who created the benefits of a second transaction upon breach should be fairly and justly allocated their profits [*Schmidt-Ahrendts*, pp. 94, 99].

112. CLAIMANT relies on a number of inconsistent domestic cases to import the remedy of disgorgement into the CISG [Cl. Memo. ¶72]. However, using domestic decisions to interpret the CISG is contrary to the autonomous application of the Convention [*Ferrari 2003*, p. 68]. Regardless, the decisions cited by CLAIMANT [Cl. Memo. ¶72] have not created coherent remedies in their home jurisdictions and have 'rather created confusion than clarity' by applying inconsistent standards and reasoning [*Schmidt-Ahrendts*, pp. 96-7]. Indeed, coherent principles have yet to emerge on a domestic level [*Hondius/Janssen*, p. 499].

113. In any case, the authorities are individually unpersuasive [cf. Cl. Memo. ¶72]. First, *AG v Blake* concerned the release of intelligence by a government officer, which is not analogous to a sale of goods. Second, it does not account for the skill of the defendant in creating a secondary profitable transaction [*Edelman*, p. 171]. Further, *AG v Blake* was influenced by English fiduciary law. *AG v Blake* cited *Snepp v US*, which applied equitable remedies for breach of fiduciary duty in similar factual circumstances. Such logic is inapplicable to the CISG [*Ferrari 2003*, p. 68], and is factually dissimilar to breaches of sale of goods contracts.

114. In *Adras v Harlow & Jones* [Cl. Memo. ¶72], a German company on-sold steel to a third party buyer in breach of contract following a rise in market price. Although the Israeli Supreme Court granted disgorgement, its decision was heavily shaped by an Israeli enrichment statute. Hence, the Court 'ignored the international context of the transaction [and] failed to address the fundamental questions of whether and to what extent its approach could be justified under the ULIS or CISG' [*Adar*, p. 523].

115. The English decision in *Esso v Niad* [Cl. Memo. ¶72, 77] concerned a supplier raising its prices in breach of an agreed pricing scheme at the expense of the wholesaler's other distributors. First, *Esso v Niad* does not support disgorgement as its award was one of damages. Second, it relied on the plaintiff's 'legitimate interest' in performance. The 'legitimate interest' test is 'hopelessly ill-defined and difficult to apply' [*Barnett*, p. 48]. *Esso v Niad* consequently adopted an unjustifiably broad approach in its eagerness to confiscate profits [*McKendrick 2013*, p. 112]. Finally, unlike in *Esso v Niad*, CLAIMANT could have vindicated any 'legitimate interest' through specific performance [Cl. Memo. ¶77]. CLAIMANT waived specific performance in order to protect the prospect of future business with RESPONDENT [PO No. 2, ¶12].

116. Finally, *Halifax Building Society* [Cl. Memo. ¶72] concerned an unsuccessful claim for domestic equitable remedies following fraud. This law has no relevance to the CISG.

3. The CISG promotes the importance of trade efficiency

117. Even if RESPONDENT breached the Framework Agreement to respond to a shift in demand for its goods, this was an efficient breach. CLAIMANT will suffer no detriment after receiving compensatory damages, and RESPONDENT will have been able to put its wine to better use [*Waddams*, p. 197].

118. Damages for loss of profit under Art. 74 of the CISG will place a party in the 'position it would have been in if the contract had been performed' [*Schmidt-Ahrendts*, p. 93, ¶3.1.1]. Therefore, parties should be indifferent between receiving damages and performance [*Barnett*, p. 64]. Parties should thus be able to conclude separate agreements, as RESPONDENT did, where their economic gain exceeds liability in damages under the first contract [*Posner*, p. 151].

119. This approach should be accepted, as efficiency was a fundamental justification for the CISG [*Spagnolo*, p. 25, §3.01]. Disgorgement bars parties from responding to market changes [*Smith*, p. 133]. It would thus force parties to stay in inefficient contracts, preventing international markets from implementing a flexible and needs-based allocation of resources [*Posner*, p. 151].

120. The UNIDROIT Principles may be used to 'gap-fill' the CISG on this point. The UNIDROIT Principles may complete the CISG where it is fragmentary [*Viscasillas*, p. 139, ¶61]. This is appropriate given the aim for legal uniformity and that the UNIDROIT Principles were shaped the CISG [*Kotrusz*, §2.2]. The UNIDROIT Principles provide for compensatory damages, leaving no place for disgorgement of profits [*McKendrick 2015*, p. 982, ¶5]. The UNIDROIT Principles

have therefore 'embraced the concept of efficient breach' and heavily mediated the doctrine of *pacta sunt servanda* [*Kleinheisterkamp*, p. 125, ¶2; *McKendrick 2009*, p. 874, ¶5].

121. The Tribunal should not apply the abstract 'performance principle', which bases damages on the personal expectation of performance rather than the objective value of the goods [*Schwenzer 2010a*, p. 1001, ¶6; *Schwenzer/Hachem/Kee*, p. 585, ¶44.28]. However, a party may demand specific performance or liquidate damages where there is a subjective interest in performance [*Schlechtriem 2007a*]. Therefore, efficiency ought to be prioritised over *pacta sunt servanda* [*Saidov 2008*, p. 29].

C. The law of Danubia may not be applied to disgorge RESPONDENT's profits

122. CLAIMANT may not turn to domestic law if it is unsuccessful in receiving disgorgement under the CISG. The CISG exhaustively regulates the legal consequences of breach, barring CLAIMANT from seeking domestic remedies [*Stoll/Gruber*, p. 762, ¶31]. Regardless, Danubian law does not provide parallel restitutionary remedies. The contract law of Danubia is a verbatim adoption of the UNIDROIT Principles [PO No. 1, ¶4], which the Parties applied to the Arbitration Agreement [PO No. 2, ¶63]. The UNIDROIT Principles unequivocally prohibit disgorgement [*infra* ¶120].

D. In any event, RESPONDENT's actions do not justify disgorgement

123. Even if disgorgement is available as a remedy under the CISG, the Tribunal should not grant it in this case. This is because RESPONDENT did not act in bad faith [cf. Cl. Memo. ¶74]. If good faith requires reasonableness [Cl. Memo. ¶71], CLAIMANT is not entitled to a disgorgement of profits since the commercially reasonable decision was to pursue a more advantageous transaction in the context of a substantially reduced harvest.

124. First, RESPONDENT promptly informed CLAIMANT of its supply difficulties [Cl. Ex. No. 3] and allocated CLAIMANT a 20% greater pro-rata distribution than it did to SuperWines. RESPONDENT made this concession to CLAIMANT [ASOC, ¶15] even though SuperWines offered to pay a premium and the harvest had been substantially reduced by harsh weather [PO No. 2, ¶31].

125. Second, RESPONDENT annually renegotiates with each client [ASOC, ¶7]. Accordingly, it is immaterial that this was the first year that RESPONDENT contracted with SuperWines, especially as it had been negotiating with SuperWines prior to taking other orders [Cl. Ex. No. 4].

126. Third, CLAIMANT incorrectly alleges that the pro-rata distribution was baseless [Cl. Memo. ¶73]. The notion of good faith is influenced by community standards [*Zeller 2000*, §2(i)(iii)], customary practice and individual expectations [*Powers*, pp. 351-2; *Holmes*, p. 452]. The CISG has a 'strong

preference' for supporting custom [*Geneva Pharmaceutical*, ¶25]. RESPONDENT's pro-rata distribution was in good faith and in accordance with industry practice [PO No 2, ¶31]. Further, it was consistent with RESPONDENT's previous approach to distribution following a poor harvest [PO No 2, ¶32].

127. Fourth, proceeding with the SuperWines sale at the expense of other distributions was not bad faith [cf. Cl. Memo. ¶75]. Good faith 'does not require the abandoning of self interest' [*Keily 1999*, §2]. The SuperWines sale provided RESPONDENT with financial security [ASOC, ¶15], and negotiations started well before the poor harvest [PO No. 2, ¶¶20-1].

II. CLAIMANT may not recover damages under Article 74 of the CISG quantified as RESPONDENT's gain

128. If it is unsuccessful in its claim for disgorgement, CLAIMANT seeks to calculate damages under Art. 74 of the CISG as RESPONDENT's profits [Cl. Memo. ¶48]. This claim does not rely upon the general principles of the CISG to strip RESPONDENT of its profits, but rather uses them to measure CLAIMANT's loss [Cl. Memo. ¶47].

129. However, CLAIMANT has contracts that prove its loss [PO No. 2, ¶2], which makes its proposed measure of loss unnecessary [cf. Cl. Memo. ¶¶48-70]. CLAIMANT may not successfully recover damages for lost profits which it has failed to identify **(A)**, including for loss of volume of wine that could have been resold **(B)**. CLAIMANT should not recover damages for loss of goodwill or reputation **(C)**. CLAIMANT may not quantify its alleged loss by reference to RESPONDENT's profits **(D)**.

A. CLAIMANT has not suffered identifiable lost profits

130. CLAIMANT must identify its loss with reasonable certainty [*CISG-AC No. 6*, §2]. However, CLAIMANT's substitute agreement with Vignobilia nullified all identifiable loss. Damages should hence be reduced to the extent that a substitute transaction decreases loss [*Knapp 1987b*, p. 561, ¶2.8; *Gotanda 2011*, p. 1037, ¶16].

131. CLAIMANT has not discharged its burden of proving its loss with reasonable certainty [cf. Cl. Memo. ¶¶51-5]. CLAIMANT must 'provide a basis upon which a tribunal can reasonably estimate the extent of damages' rather than assume loss has occurred [*Schmidt-Ahrendts*, p. 101]. CLAIMANT must 'open its books' [*Schlechtriem 2007b*, §I; *CISG-AC No. 6*, ¶1.2.2] to identify loss with

reasonable certainty [*CISG-AC No. 6*, ¶2.2]. CLAIMANT has refused to do this in these proceedings [PO No. 2, ¶2].

132. It is uncertain whether CLAIMANT's customers would have ordered higher quantities if RESPONDENT had fully delivered CLAIMANT's order [PO No. 2, ¶13]. The vast majority of CLAIMANT's customers accepted Vignobilia wine as a substitute [PO No. 2, ¶10]. Further, CLAIMANT's profit from the substitute Vignobilia wine is uncertain [PO No. 2, ¶13]. Therefore, CLAIMANT has failed to identify loss with reasonable certainty. This bars recovery under Art. 74 of the CISG [*CISG-AC No. 6*, ¶2.2].

B. CLAIMANT may not recover damages for loss of volume

133. CLAIMANT purchased 5,500 bottles from Vignobilia to replace RESPONDENT's wine [PO No. 2, ¶11]. CLAIMANT would not have been able to purchase, and subsequently sell, more wine if RESPONDENT had performed the contract.

134. CLAIMANT is unable to prove that it would have sold more than the original 10,000 bottles [*Saidov 2008*, p. 66]. Since the number of future customers is always uncertain and speculative, loss of volume is difficult to prove and does not 'correspond with the realities of commercial life' [*Saidov 2008*, p. 67]. CLAIMANT intensified its efforts to buy from Vignobilia in light of RESPONDENT's conduct [PO No. 2, ¶11]. Therefore, CLAIMANT's purchase of wine from Vignobilia was largely motivated by RESPONDENT's non-delivery [PO No. 2, ¶11]. It is unlikely that CLAIMANT would have contracted with Vignobilia without RESPONDENT's non-delivery and was therefore limited to 10,000 bottles in either situation.

135. CLAIMANT must prove that further sales would have been profitable [*RE Davis Chemical Corp v Diasonics Inc*, ¶20; *Saidov 2008*, p. 68]. SuperWines was competing for CLAIMANT's customers [SOC ¶7; PO No. 2, ¶17]. Vinexzell overcame financial difficulties to compete with CLAIMANT [PO No. 2, ¶21]. Since there were more competitors in the market, CLAIMANT cannot assume that it would have been successful in making further sales.

C. CLAIMANT may not recover damages for loss of goodwill or reputation

136. CLAIMANT argues that RESPONDENT's actions have damaged its reputation [Cl. Memo. ¶100]. However, CLAIMANT has not proven that its loss is either sufficiently certain or material. Its loss is therefore not recoverable [*Calzados Magnanni*].

137. Loss of goodwill must be 'substantiated and explained completely' for it to be recoverable [*HG Zürich 10 February 1999*; *LG Darmstadt 9 May 2000*]. This standard is more stringent than reasonable certainty [*Gotanda 2011*, p. 1009, ¶66]. It has not been proven that CLAIMANT actually suffered loss of goodwill or reputation. There is no evidence suggesting that CLAIMANT's customers held CLAIMANT in lesser esteem [PO No. 2, ¶10].

138. Further, Art. 74 of the CISG does not permit recovery of non-material loss [*Gotanda 2011*, p. 1009, ¶66; *Stoll/Gruber*, Art. 74, ¶46]. Therefore, only financially quantified loss of goodwill is recoverable [*Huber*, p. 270, §(e)]. It has not been proven that CLAIMANT's customers were deterred from future dealings with CLAIMANT such that it would suffer financial loss [*supra* ¶137].

139. RESPONDENT notified CLAIMANT by fax on 4 November 2014 that it would be unable to produce more than 5,000 bottles [ASOC ¶¶10, 13]. CLAIMANT did not receive this fax due to an error in transmission, a mistake that went unnoticed until 25 November 2014 [Cl. Ex. No. 5]. However, an error in transmitting a communication does not preclude reliance on that communication [Art. 27 CISG]. Consequently, it is CLAIMANT who bears the risk of loss that would have been avoided by the communication [*OLG Graz 16 September 2002*]. As a result, the Tribunal should regard CLAIMANT as having continued to accept pre-orders even though it had notice that there was a risk that those orders could not be fulfilled [*Schlechtriem 1986*, p. 61]. Therefore, CLAIMANT could have mitigated any loss of goodwill by avoiding making promises to deliver wine which was not guaranteed.

D. CLAIMANT may not quantify its loss as RESPONDENT's profits

140. The Tribunal should adopt the most appropriate measure of CLAIMANT's loss to determine RESPONDENT's liability in damages [*Schmidt-Ahrendts*, p. 99]. CLAIMANT argues that RESPONDENT's profit from the resale to SuperWines reflects its loss [Cl. Memo. ¶¶66-70]. This is the difference between the prices paid by CLAIMANT and SuperWines [PO No. 2, ¶66]. However, this is an inaccurate method of quantifying damages.

141. CLAIMANT's method of calculating damages by reference to the profit made in a separate sale is unavailable under the CISG **(1)**. Instead, CLAIMANT should calculate its damages by identifying the cost of the Vignobilia sale under Art. 75 of the CISG in conjunction with its actual loss of profit under Art. 74 of the CISG **(2)**.

1. CLAIMANT should not be able to rely on its preferred method of quantification

142. First, the price that SuperWines paid for RESPONDENT's wine does not represent CLAIMANT's loss. RESPONDENT's pricing system is tailored to individual customers and is not based on economic considerations alone [PO No. 2, ¶61]. The price that RESPONDENT offered to SuperWines may have been based on the long-standing relationship between RESPONDENT and SuperWines' Chief Executive Officer and the fact that SuperWines had access to new markets [PO No. 2, ¶¶28, 61]. SuperWines had offered to pay a premium price as part of a unique business strategy to rapidly establish a position in the high-end wine market [PO No. 2, ¶24]. Further, as RESPONDENT is a wholesaler, its profit is likely different to the profit that CLAIMANT would have made from on-selling wine to its individual high-end customers [SOC ¶26]. These factors indicate that the price SuperWines paid for the wine bears little connection to the economic profit that CLAIMANT would have produced from re-selling the wine to its customers.

143. Second, the Supreme Court of Israel decided in *Harlow & Jones Ltd v Adras* that the gain made by a resale in breach of contract cannot be calculated by reference to the breaching party's profit since that gain provides poor evidence of the other party's loss. This decision applied Art. 82 of the ULIS, which is materially identical to Art. 74 of the CISG [*Legislative History of CISG Antecedents*, Art. 82]. Crucially, *Harlow & Jones Ltd v Adras* was reversed by *Adras v Harlow & Jones* [Cl. Memo. ¶72], only because the latter applied a domestic restitutionary statute. This confirms the view that resale profit is not a proxy for loss since it lacks the necessary connection [*Jaffey*, p. 152; *Saidov/Cunnington* p. 27; *Harlow & Jones Ltd v Adras*].

144. Third, Art. 74 of the CISG limits parties to recovering their own loss [*CISG-AC No. 6*, ¶9.5; *Stoll/Gruber*, p. 762, ¶31]. A gains-based measure therefore ought to be rejected given the possibility that RESPONDENT's profits may exceed CLAIMANT's loss [PO No. 2, ¶17].

2. Claimant should identify its lost profits by reference to its concluded contracts

145. Article 75 of the CISG allows the buyer to recover the difference in purchase price for replacement goods bought after the seller has avoided the contract [*Digest*, p. 358, ¶2]. The Tribunal may assume that RESPONDENT has avoided the Framework Agreement [PO No. 1, ¶4]. In any case, non-performance is sufficient to count as 'avoidance' for Art. 75 [*OLG Hamburg 28 February 1997*; *OBH Graz 29 July 2004*].

146. CLAIMANT bought wine from Vignobilia at EUR 42.20 per bottle [PO No. 2, ¶11]. The agreed price for RESPONDENT's wine was EUR 41.50 [PO No. 2, ¶14]. Therefore, CLAIMANT is entitled to the difference in price as damages [Art. 75 CISG]. This amounts to EUR 0.70 per bottle.

147. This figure may be adjusted to account for loss of profit from selling different wine under Art. 74 of the CISG [*Digest*, p. 359, ¶12]. CLAIMANT's profit from the 4,500 bottles of RESPONDENT's wine which were delivered provide the fairest indication of the profit it would have made from the other 5,500 bottles [cf. Cl. Memo. ¶66-9]. Further, CLAIMANT may compare its sale prices to other retail prices of RESPONDENT's customers [PO No. 2, ¶14]. Near universal acceptance of the substitute indicates that the market prices of the two brands of wine were similar and therefore that CLAIMANT incurred minimal loss [PO No. 2, ¶10]. Therefore, the Tribunal should accept CLAIMANT's offer to submit its contracts in a subsequent hearing [PO No. 2, ¶2].

CONCLUSION

The Tribunal may not disgorge RESPONDENT's profits as this remedy is unavailable under the CISG. In the alternative, RESPONDENT has not acted in bad faith and its actions do not justify the remedy. Further, RESPONDENT's profit is an inaccurate measure of CLAIMANT's loss under Art. 74 of the CISG. CLAIMANT is able to accurately prove its loss using its own documents and should do so.

REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT request that the Tribunal order that:

(1) CLAIMANT's Procedural Request be refused;

(2) the claim for damages for legal costs incurred in both proceedings in Mediterraneo be dismissed;

(3) the claim for disgorgement of RESPONDENT's profits, or for damages in the amount of RESPONDENT's profits be dismissed; and

(4) CLAIMANT submit a detailed list of contracts for its actual loss to be assessed by the Tribunal at a later date without regard to RESPONDENT's profits.

CERTIFICATE OF VERIFICATION

Pursuant to Rule 77 of the Willem C. Vis International Commercial Arbitration Moot Rules 2015, the persons who have signed below confirm that only such persons wrote this Memorandum.

Andrew Bell

Brendan Hord

Penina Su

John Tsaousidis

Sydney
19 January 2015
Counsel for RESPONDENT