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Memorandum for
CLAIMANT

On Behalf Of

Orchis Worldwide Ltd
Orchid Bee Drive
Capital City, Mediterraneo
– CLAIMANT –

Against

Darwin Natural Food plc
1704 Louis Liger Avenue
Oceanside, Equatoriana
– RESPONDENT –

LAURA HÖFLER • JULIA KAISER • JAN KRONE • REBECCA MOORE • LAURIN MUND
CHARLOTTE SCHMID • ANTONIA THOMASCHIK • LUCIE VAN ESSEN

Freiburg, Germany



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INDEX OF ABBREVIATIONS

Arb-Med-Arb	Arbitration-Mediation-Arbitration
Art./Arts.	Article/Articles
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	confer
ed.	editor/edition
et al.	et alii (and others)
etc.	et cetera
HGB	Handelsgesetzbuch (German Commercial Code)
Ltd	Limited
Med-Arb	Mediation-Arbitration
No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
plc	Private Limited Company
para./paras.	paragraph
PO	Procedural Order
RNoA	Response to Notice of Arbitration
SIAC	Singapore International Arbitration Centre
SIMC	Singapore International Mediation Centre
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v	Versus
Vol.	Volume
vol. ed.	Volume editor



INDEX OF LEGAL SOURCES

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington D.C., 1 July 1975
Danubian Arbitration Law	Verbatim adoption of the UNCITRAL Model Law
Danubian Contract Law	Verbatim adoption of the UNIDROIT Principles of International Commercial Contracts 2016
Equatorianian Contract Law	Verbatim adoption of the UNIDROIT Principles of International Commercial Contracts 2016
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, amended in 2006
NYC	New York Convention, New York City, 7 June 1959
SIAC Rules	SIAC Arbitration Rules
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016



STATEMENT OF FACTS

The parties to this arbitration are Orchis Worldwide Ltd [hereinafter: CLAIMANT] and Darwin Natural Food plc [hereinafter: RESPONDENT].

CLAIMANT is a medium-sized producer of the Vanilla Planifolia Mediterraniensis [hereinafter: Vanilla Orchid] based in Mediterraneo, who is engaged in the growing and sale of orchids.

RESPONDENT, based in Equatoriana, is part of a group of companies that is one of the largest producers of natural food and spices.

1 Dec 2021 Botanical Garden, a research institution based in Equatoriana, concludes a contract with CLAIMANT [hereinafter: the Initial Agreement] for the delivery of 300 Vanilla Orchids [*Exhibit C2, p. 9*].

2022 Facing financial problems, Botanical Garden is taken over by RESPONDENT, who assumes the Initial Agreement [*Exhibit C2, p. 9*].

25 Aug 2022 CLAIMANT and RESPONDENT [hereinafter: the Parties] amend the Initial Agreement. RESPONDENT is now obliged under the Sale of Orchids Agreement [hereinafter: the Agreement] to take delivery of 3,000 (+/-10%) Vanilla Orchids [*Exhibit C3, pp. 10-13*]. RESPONDENT can choose a delivery date between 1 January and 31 March 2024 [*Exhibit C3, p. 11, Clause 4.2*].

Aug 2023 SIAC releases the first draft of their 2025 SIAC Rules.

RESPONDENT's greenhouse construction is delayed; thus, it sets delivery to the latest date, without informing CLAIMANT [*Exhibit R1, p. 36, para. 5*].

End of Aug 2023 CITES recommends moving the Vanilla Orchid from Appendix II to Appendix I on 1 February 2024 [*Exhibit R1, p. 36, para. 6*]. The trade of Vanilla Orchids would then require an import permit [*Exhibit C4, p. 14*].

1 Dec 2023 RESPONDENT sets the delivery date to 27 March 2024 [*Exhibit C5, p. 15*].



- 2 Dec 2023** CLAIMANT warns RESPONDENT that the necessity of an import permit could hinder the performance of the Agreement [*NoA*, p. 4, para. 15].
- Jan 2024** Ecological activists and NGOs start a campaign to protect the natural habitat of Mediterraneo, in particular its orchids [*NoA*, p. 4, para. 16; *Exhibit R1*, p. 37, para. 8]
- 1 Feb 2024** The Vanilla Orchid is moved to Appendix I, an import permit becomes necessary. The market price drops significantly [*PO2*, p. 55, para. 2].
- 10 Feb 2024** RESPONDENT alleges that it would be impossible to obtain an import permit before the set delivery date [*Exhibit C6*, p. 16, para. 4].
- 15 Feb 2024** CLAIMANT concludes a new contract with Herbal Cosmetics for the Vanilla Orchids, which RESPONDENT refused to take [*Exhibit C6*, p. 17, para. 10].
- 14 May 2024** CLAIMANT delivers 3,300 Vanilla Orchids to Herbal Cosmetics [*Exhibit C6*, p. 17, para. 15; *PO2*, p. 60, para. 39(b)].
- 19 Dec 2024** CLAIMANT initiates mediation pursuant to Clause 15 of the Agreement [hereinafter: Arbitration Clause] with SIMC [*NoA*, p. 5, para. 28].
- 1 Jan 2025** The 2025 SIAC Rules come into force.
- Feb 2025** CLAIMANT secures third-party funding from AtJ-Financing and obtains adverse-costs insurance from LitSure [*PO2*, p. 58, para. 20].
- 31 Jul 2025** CLAIMANT files the Notice of Arbitration with SIAC [*Letter Langweiler*, p. 1].
- 14 Aug 2025** RESPONDENT requests the Tribunal to order full disclosure of CLAIMANT's third-party funding agreements [*RNoA*, p. 35, para. 28(b)].



INTRODUCTION

In the summer nights of 1791, a king stood between promise and reality. King Louis XVI of France was suddenly confronted with the possibility of a new constitution, one that threatened to limit his royal powers. Rather than facing this possibility, he tried to take the seemingly easy way out: fleeing Paris in secret, hoping the distant troops at Montmédy would rescue him. The flight, however, turned out to be a disastrous mistake. He and his family were captured, exposing the extent of the royal cowardice to the public. The King had tried to cling to the privileges of the crown while avoiding the responsibilities that came with it.

A similar pattern emerges with RESPONDENT. When the contract was concluded, the rules were clear: the 2016 SIAC Rules would govern these proceedings. Yet, RESPONDENT now seeks to apply the 2025 Rules instead. Just as Louis XVI was unwilling to accept his newly limited constitutional powers, RESPONDENT attempts to reshape the procedural framework to its own advantage [**Issue 1**].

Louis XVI sought insight into the plans and movements of his adversaries, hoping that knowledge of their strategies might allow him to escape the consequences of his own actions. Similarly, by demanding full disclosure of the third-party funding agreements, RESPONDENT attempts to gain strategic insight into CLAIMANT's arrangements, beyond what the circumstances permit. The Tribunal should therefore decline RESPONDENT's request [**Issue 2**].

The King thought his flight to Montmédy would solve all his problems, instead his responsibilities caught up to him and became his downfall. RESPONDENT too ignored the political changes that signalled a need for an import permit for the Vanilla Orchids. It disregarded all of CLAIMANT's warnings and, in doing so, needlessly risked the delivery of the Vanilla Orchids. Now that the consequences of the risk have caught up with RESPONDENT, it tries to avoid its responsibilities. However, RESPONDENT's breach of contract was a result of its own inaction and can therefore not be excused on the grounds of force majeure [**Issue 3**].

RESPONDENT asks the Tribunal to consider a different transaction when calculating damages under Art. 75 CISG. By doing so, RESPONDENT attempts to rewrite the consequences of its own actions, hoping to minimize its exposure as King Louis XVI hoped to minimize his own. The Tribunal is therefore respectfully requested to hold RESPONDENT liable for damages in the amount of USD 3,300,000 [**Issue 4**].



ISSUE 1: THE 2016 SIAC RULES APPLY TO THIS ARBITRATION

- 1 On 1 December 2021, CLAIMANT and Botanical Garden concluded the Initial Agreement. After RESPONDENT assumed ownership of Botanical Garden, Mr. Albius, the director of RESPONDENT's spices business line and former board member of Botanical Garden, agreed with CLAIMANT on minor adjustments to the Initial Agreement. These adjustments were limited to quantity and delivery arrangements. The Parties did not amend the Arbitration Clause.
- 2 In 2024, RESPONDENT failed to take delivery of the Vanilla Orchids and thereby violated its contractual obligations. Consequently, on 19 December 2024, CLAIMANT initiated the present dispute resolution proceedings. The Arbitration Clause reads:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the current Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”). The seat of the arbitration shall be Danubia. The Tribunal shall consist of three arbitrator(s). The language of the arbitration shall be English.

The parties further agree that at the first step of the dispute resolution process, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (“SIMC”). To secure the enforcement of any settlement reached in the course of the mediation, each party shall have the right to request to have the settlement be referred to the arbitral tribunal appointed by SIAC and turned into a consent award on agreed terms.” [*Exhibit C3, p. 13, Clause 15, emphasis added*].

- 3 This Arbitration Clause is based on the SIAC-SIMC Arb-Med-Arb model clause, which CLAIMANT and Botanical Garden altered in two respects. Firstly, they added the wording “current” and removed the wording “for the time being in force”. In doing so, their intention was to refer to the 2016 SIAC Rules [A]. Secondly, they agreed that mediation would be the first step of the dispute resolution process. As a result, the process commenced under the 2016 SIAC Rules, which continue to apply [B].

A. The Wording “Current SIAC Rules” Refers to the 2016 SIAC Rules

- 4 It is undisputed that the Agreement, including the Arbitration Clause, is governed by the CISG [PO1, p. 53, para. 4], rendering Art. 8 CISG the relevant standard to interpret the Arbitration



Clause. CLAIMANT and Botanical Garden intended to apply the 2016 SIAC Rules [I]. This intent is binding for RESPONDENT after taking over Botanical Garden [II]. A reasonable person would also find the 2016 SIAC Rules applicable [III].

I. CLAIMANT and Botanical Garden Intended to Apply the 2016 SIAC Rules

- 5 When drafting the Initial Agreement, CLAIMANT and Botanical Garden intended to apply the 2016 SIAC Rules. Pursuant to Art. 8(1) CISG, statements and other conduct of a party must be interpreted according to the actual intent of that party, where the other party knew or could not have been unaware of that intent. Moreover, all relevant circumstances, including negotiations, established practices, subsequent conduct of the parties, and trade usages, must be considered pursuant to Art. 8(3) CISG.
- 6 CLAIMANT and Botanical Garden replaced the phrase “for the time being in force” with the wording “current” to apply the 2016 SIAC Rules [1]. Additionally, they intended to agree on the 2016 SIAC Rules as the publicly available rules [2].

1. CLAIMANT and Botanical Garden Deviated from the SIAC Model Clause Wording to Apply the 2016 SIAC Rules

- 7 The SIAC model clause states:

“Any dispute arising out of or in connection with this contract [...] shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.”) by adding the wording “current” and removing the wording “for the time being in force” [*SIAC-SIMC Arb-Med-Arb model clause, emphasis added*].

- 8 In 2004, the Singapore Court of Appeal held that the phrase “for the time being in force” refers to the rules applicable at the date of the commencement of arbitration [*Black & Veatch v Jurong Engineering, SGCA 8 Jul 2004*]. The High Court of Singapore affirmed this interpretation in 2009 [*Car & Cars v Volkswagen, SGHC 19 Oct 2009*]. Thus, “for the time being in force” must be understood as a dynamic and flexible phrase, designed to accommodate any future iteration of the SIAC Rules.
- 9 By replacing “for the time being in force” with “current”, CLAIMANT and Botanical Garden demonstrated that they rejected the dynamic interpretation attached to the original



wording [*Exhibit C3, p. 13, Clause 15*]. Interpreting the amended clause, as if nothing had changed, would disregard CLAIMANT and Botanical Garden’s intention and deprive the deviation of any effect.

- 10 At the time of this deviation, the only “current” SIAC Rules were the 2016 SIAC Rules. CLAIMANT and Botanical Garden’s choice of wording must therefore be understood as a deliberate reference to the 2016 SIAC Rules.

2. CLAIMANT and Botanical Garden Intended to Agree on the Publicly Available Rules

- 11 CLAIMANT and Botanical Garden’s intention was to agree on the SIAC Rules that were published and publicly available at the time of the conclusion of the Initial Agreement. These were the 2016 SIAC Rules.
- 12 During the contractual negotiations in 2021, Botanical Garden expressed that they “had a look” at the SIAC Rules and that their “current version” was acceptable to them [*Exhibit C7, p. 21*]. CLAIMANT was aware of this and happy to follow the same approach [*Exhibit C1, p. 8, para. 8*]. The only publicly available “current version” was that of the 2016 SIAC Rules. The first public draft of the 2025 SIAC Rules was not released until August 2023 [*Wilske et al., SchiedsVZ, p. 104*], almost two years after the conclusion of the Initial Agreement. Thus, in 2021, CLAIMANT and Botanical Garden could only “have a look” at the 2016 SIAC Rules. Consequently, they intended to agree on the publicly available 2016 SIAC Rules.

II. This Intent Is Binding for RESPONDENT

- 13 The intent of CLAIMANT and Botanical Garden is binding for RESPONDENT. It declared that it would take on all existing commitments of Botanical Garden [*Exhibit C2, p. 9*]. Therefore, RESPONDENT also accepted the shared intent to apply the 2016 SIAC Rules [1]. RESPONDENT could not have been unaware of this intent [2]. Moreover, the intent did not change when amending the Initial Agreement [3].

1. RESPONDENT Accepted the Shared Intent to Apply the 2016 SIAC Rules

- 14 RESPONDENT accepted all existing commitments as the contractual successor to Botanical Garden. This includes the shared intent to arbitrate under the 2016 SIAC Rules. Clause 1.2 of the Initial Agreement states that “references to a Party include its permitted successors and assigns” [*Exhibit C3, p. 10, Clause 1.2*].



15 This clause extends all contractual rights and underlying commitments to a successor, but legal provisions regarding succession prevail [*Shashou v Sharma*, HC Delhi 1 September 2025; AAA-ICDR 14 Jun 2013; AAA 16 Feb 2016]. The contractual succession is neither governed by the CISG [*AGer Basel-Stadt* 24 Aug 2018, CISG-online No. 3906; *Sup Ct Poland* 19 Dec 2003, CISG-online No. 1222; OGH 25 Jun 1998; *BeckOK-BGB/Saenger*, Art. 4, para. 29], nor the Equatorianian Contract Law [*PO1*, p. 53, para. 4, cf. *Official Comments*, Art. 9.3.2 UNIDROIT Principles; *Brödermann*, Art. 9.3.2 UNIDROIT Principles]. RESPONDENT accepted all commitments, including the intent to apply the 2016 SIAC Rules. It cannot cherry-pick contractual commitments.

2. RESPONDENT Could Not Have Been Unaware of the Party Intent

- 16 RESPONDENT could not have been unaware of the intent of CLAIMANT and Botanical Garden to apply the 2016 SIAC Rules. A party could not have been unaware in the sense of Art. 8(1) CISG if it wilfully and recklessly failed to make the inquiries a reasonable person would make or if it failed to appreciate something obvious [*Beale*, CISG-AC Opinion No. 23, para. 104; *Schlechtriem/Schwenzler/Schroeter/Schmidt-Kessel*, Art. 8, para. 16; *Kröll et al./Kröll*, Art. 8, para. 28].
- 17 Since January 2021, Mr. Albius has been the director of RESPONDENT's business line "Spices" [*Exhibit R1*, p. 36, para. 1]. Therefore, his constructive awareness is legally attributed to RESPONDENT as the company's agent in a relevant position [cf. *JSC v Kolomoisky*, EWHC 30 Jul 2025; *Stockman v Arricano*, EWHC 30 Nov 2017; *BMO v BMP*, SGHC 26 May 2017; *Jetivia v Bilta*, UKSC 22 Apr 2015; *OLG Köln* 21 May 1996, CISG-online No. 254; *El Ajou v Dollar Land*, EWCA 2 Dec 1994].
- 18 Mr. Albius was also a board member of Botanical Garden [*PO2*, p. 56, para. 5] and it was this very board that initially requested Ms. Gobley, the chief contract officer of Botanical Garden, to modify the SIAC model clause [*Exhibit C7*, p. 21]. If Mr. Albius nonetheless failed to appreciate the obvious, he still could have inquired into Botanical Garden's intent regarding the Arbitration Clause. He had access to Botanical Garden's emails after RESPONDENT took over Botanical Garden [*PO2*, p. 56, para. 6]. This includes Ms. Gobley's email to CLAIMANT, in which she stated that Botanical Garden wants the 2016 SIAC Rules to apply [*PO2*, p. 56, para. 7; *Exhibit C7*, p. 21]. Moreover, he still could have asked Ms. Gobley why Botanical Garden saw the need to deviate from the SIAC model clause. Instead, however, he recklessly failed to appreciate the full context of the contractual relationship.



- 19 As a result, Mr. Albius, and therefore RESPONDENT, could not have been unaware of CLAIMANT and Botanical Garden's intent to apply the 2016 SIAC Rules.

3. This Intent Did Not Change When Amending the Initial Agreement

- 20 The intent did not change when the Parties replaced the Initial Agreement from 2021 with the Agreement. When one contract terminates another and both contracts contain identical arbitration clauses, both clauses are interpreted to have the same meaning [*CAFI v GTCS*, *EWHC 3 Jun 2025*]. The contract must be construed in light of the transaction as a whole [*cf. Acanthus v Watercare Services*, *NZHC 12 Mar 2025*; *UBS v HSH Nordbank*, *EWCA 18 Jun 2009*; *Salger/Trittmann/Elsing*, p. 258, paras. 38-39].
- 21 In 2025, the High Court of England and Wales held that there was no indication that rational business parties would choose to alter their arbitral intentions merely by entering into a replacement agreement. Therefore, the arbitration clauses were not interpreted differently [*CAFI v GTCS*, *EWHC 3 Jun 2025*]. Although this decision was not rendered under the CISG, both RESPONDENT and the seat of arbitration are situated in common law jurisdictions [*PO2*, p. 59, para. 33]. Therefore, the Tribunal may seek guidance from this decision.
- 22 In the present case, the Parties did not alter or replace the Arbitration Clause. In fact, RESPONDENT did not show any interest in the Arbitration Clause or its interpretation [*PO2*, p. 56, para. 8]. Consequently, the intent did not change when amending the Initial Agreement.

III. A Reasonable Party Would Also Find the 2016 SIAC Rules Applicable

- 23 A reasonable person would also conclude that the 2016 SIAC Rules apply. Pursuant to Art. 8(2) CISG, a party's statements and conduct must be interpreted according to the understanding that a reasonable person of the same kind would have under the same circumstances.
- 24 Firstly, the Paris Court of Appeal held in 2009 that the rules in force at the time of contract conclusion prevail unless the parties express a contrary intention [*CdA Paris 22 Jan 2009*]. The court reasoned that institutional rules constitute a permanent offer to the public. Accordingly, it held that the contract with the institution is formed once the parties incorporate an arbitration clause into their contract. In the present case, the Arbitration Clause was incorporated into the Agreement on 25 August 2022. The SIAC Rules in force at that time were the 2016 SIAC Rules and the Parties expressed no intention to deviate from their application.



- 25 Secondly, under a *contra proferentem* interpretation, “current” would refer to the 2016 SIAC Rules. It is established in arbitral practice and scholarship that if a term is unclear, the party that drafted or sought to enforce the term cannot rely on any ambiguity [ICC Case No. 8261; ICC Case No. 11869; ICC Case No. 17768; BGH 28 May 2014, CISG-online No. 2513; OLG Stuttgart 31 Mar 2008, CISG-online No. 1658; Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel, Art. 8, para. 47; Kröll et al./Zuppi, Art. 8, para. 26; Staudinger/Magnus, Art. 8, para. 18].
- 26 The template for the Arbitration Clause was provided by Botanical Garden and was not altered by CLAIMANT [PO2, p. 56, para. 7; Exhibit C7, p. 21]. RESPONDENT assumed the Initial Agreement when it replaced Botanical Garden [Exhibit C2, p. 9]. Therefore, RESPONDENT must be considered as the drafter of the Arbitration Clause. Otherwise, the *contra proferentem* principle could be circumvented simply by replacing the original drafter through corporate or contractual succession. RESPONDENT thus could not rely on any ambiguity of the term “current”, if there were any.
- 27 Consequently, a reasonable person of the same kind would also conclude that the 2016 SIAC Rules are applicable.

B. The Dispute Resolution Process Commenced and Stays under the 2016 SIAC Rules

- 28 The dispute resolution process commenced when the 2016 SIAC Rules were applicable and continues under the 2016 SIAC Rules. Its commencement date was 19 December 2024 [I]. Since the Med-Arb process is unitary, the rules in effect at its outset necessarily apply to all its stages [II].

I. The Arbitration Is Deemed to Have Commenced on 19 December 2024

- 29 The arbitration is deemed to have commenced when CLAIMANT initiated mediation on 19 December 2024. The 2025 SIAC Rules apply only to arbitrations commenced on or after 1 January 2025 [Rule 1.5 2025 SIAC Rules].
- 30 In an email to CLAIMANT, Ms. Gobley explained:
- “As under Equatorianian law, the initiation of mediation proceedings does not interrupt the statute of limitations, the initiation of the mediation proceedings should be treated for the purpose of the statute of limitations as constituting the commencement of arbitration proceedings.” [Exhibit C7, p. 21].

- 31 RESPONDENT may argue that the initial reason for this specification was to suspend the limitation period and not to determine the applicable SIAC Rules. However, such an approach would lead to



two different commencement dates for the arbitration. Having two clocks running for the commencement of the arbitration could cause contradicting results.

- 32 Moreover, the fact that CLAIMANT and Botanical Garden based their Arbitration Clause on the SIAC-SIMC Arb-Med-Arb protocol demonstrates that the dispute resolution process is deemed to have commenced under the 2016 SIAC Rules. Under the protocol, the dispute resolution process begins with arbitration, which is then immediately put on hold to allow the parties to attempt mediation [*SIAC-SIMC Arb-Med-Arb model clause*].
- 33 CLAIMANT and Botanical Garden deviated from the protocol solely in a formal respect. They postponed the formality of filing the Notice of Arbitration until the end of mediation. Had they left the protocol unmodified, it would be undisputed that the arbitration commenced immediately before the mediation. The modification was never intended to fragment the dispute resolution process [*PO2, p. 56, para. 7*]. Rather, CLAIMANT and Botanical Garden sought to encourage mediation in good faith wherever feasible [*PO2, p. 56, para. 7; Exhibit C7, p. 21*]. Accordingly, basing the Arbitration Clause on the protocol demonstrates that the dispute resolution process is deemed to have commenced in December 2024 before the 2025 SIAC Rules became applicable.

II. The 2016 SIAC Rules Continue to Apply Throughout the Arbitration

- 34 The nature of the Med-Arb process prevents any change of rules once the process has begun. The SIMC-SIAC Med-Arb mechanism is treated as a unitary process by tribunal and court practice, regardless of when its individual stages were initiated [*Heartronics v EPI, SGHC 17 Oct 2017; Hercus v Hercus, Superior Ct Ontario 1 Jan 2001; cf. Lu, HNLR, pp. 256, 258; Redfern/Hunter, p. 47, para. 1.139*]. Consequently, the rules applicable at the start of the Med-Arb process are applicable throughout its entire course. Otherwise, the unitary process would be artificially split. CLAIMANT and Botanical Garden agreed on a Med-Arb process that commenced under the 2016 SIAC Rules. RESPONDENT cannot change horses mid-race.

CONCLUSION OF THE FIRST ISSUE

- 35 In conclusion, the 2016 SIAC Rules should apply to this arbitration. The wording “current SIAC Rules” refers to the 2016 SIAC Rules, as intended by CLAIMANT and Botanical Garden. Their intent is binding for RESPONDENT as the legal successor of Botanical Garden. A reasonable person would also find the 2016 SIAC Rules applicable. Furthermore, the dispute resolution process commenced and continues under the 2016 SIAC Rules.



ISSUE 2: THE TRIBUNAL SHOULD NOT ORDER FULL DISCLOSURE OF THE FUNDING AGREEMENTS

- 36 In the ongoing arbitral proceedings, CLAIMANT relies on external funding by AtJ-Financing and has obtained insurance for adverse cost coverage from the litigation risk insurance provider LitSure. In its Notice of Arbitration, CLAIMANT has already disclosed the existence and identity of its third-party funders. Nevertheless, RESPONDENT now requests the Tribunal to order full disclosure of CLAIMANT's agreements with AtJ-Financing and LitSure [hereinafter: the Funding Agreements], without specifying any desired details.
- 37 RESPONDENT has no legitimate interest in the full disclosure. Rather, RESPONDENT is simply fishing for valuable details of the repayment terms between CLAIMANT and its funders. As a result, RESPONDENT would gain a tactical advantage, leaving the Parties positioned unequally. Until RESPONDENT proves that full disclosure of the Funding Agreements would reveal any possible conflicts of interest or is otherwise material to the outcome of the proceedings, CLAIMANT is not obliged to make a full disclosure.
- 38 Neither the 2016 SIAC Rules [A] nor the 2025 SIAC Rules [B] provide a legal basis for ordering full disclosure. And even if the Tribunal had the authority to order full disclosure, it should refrain from doing so [C].

A. The Tribunal Cannot Order Full Disclosure of the Funding Agreements Under the 2016 SIAC Rules

- 39 The Tribunal cannot order full disclosure of the Funding Agreements under the 2016 SIAC Rules. There is neither an express legal basis [I] nor an implied legal basis [II] justifying full disclosure. The SIAC Practice Note from 2017 on Arbitrator Conduct in Cases Involving External Funding [hereinafter: the Practice Note] does not empower the Tribunal to order full disclosure of the Funding Agreements either [III].

I. There Is No Express Legal Basis for Disclosure in the 2016 SIAC Rules

- 40 The 2016 SIAC Rules do not contain any express legal basis for the disclosure of agreements with third-party funders or insurances. Third-party funding was not expressly permitted in Singapore until 2017 [*Civil Law (Third-Party Funding) Regulations 2017; Marquais/Grec, ALA*], p. 60]. The legalisation of third-party funding in 2017 was meant to enhance Singapore's popularity as a preferred arbitral seat and thus expedite the economy [*Lye/Chung, Int'l Arb Rep*, p. 8; *Ziyaeva/Al-*



Rashid, CPR]. Upon legalisation, SIAC introduced the 2017 Investment Arbitration Rules, which were the first set of rules to expressly grant tribunals the authority to order disclosure regarding third-party funders [*Choong et al., p. 63, para. 3.29; Hee Sub, PLA*]. These rules were supposed to provide more transparency for the tribunals to avoid any conflict of interest between arbitrators and third-party funders [*Hee Sub, PLA; Brekoulakis et al., ICCA Reports No. 4, p. 82*]. In this context, the 2025 SIAC Rules were then introduced, adding a specific provision about third-party funding [*Rule 38 2025 SIAC Rules*]. The addition of provisions regarding third-party funding in the SIAC Investment Arbitration Rules, as well as in the 2025 SIAC Rules, serves to highlight the absence of such regulations in the 2016 SIAC Rules. Consequently, the 2016 SIAC Rules do not contain an express legal basis for the disclosure of third-party funding agreements.

II. There Is No Implied Legal Basis for Disclosure in the 2016 SIAC Rules

- 41 Contrary to RESPONDENT’s allegation, there is no implied legal basis justifying full disclosure of the Funding Agreements in the 2016 SIAC Rules. Rule 27 contains several sub-provisions on the production of evidence. However, Rule 27(f) is the only provision to allow for the production of “documents”. It states that:

“the Tribunal shall have the power to: order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome.”

- 42 RESPONDENT did not demonstrate that the entire Funding Agreements are relevant to the case and material to its outcome pursuant to Rule 27(f). Documents are relevant when they are useful to prove a fact that has a logical connection to the proceedings. They are considered material if they are sufficiently needed for a complete assessment of the legal issues and their outcome [*cf. Born, p. 2362; Pilkov, Int J Arb, p. 149; Raeschke-Kessler, Arb Int, p. 427*].
- 43 The Funding Agreements, requested by RESPONDENT, concern CLAIMANT’s financial support in the course of the proceedings. They are not needed for a complete assessment of the legal issues and their outcome, as they have no logical connection to the merits of the case, which concern the damage claim due to RESPONDENT’s breach of contract. The Funding Agreements are – if at all – only relevant to the enforcement of the award and its cost distribution between the Parties pursuant to the New York Convention [*Art. I NYC*]. Therefore, they are not relevant and material to the resolution of the award itself.



- 44 Consequently, the Funding Agreements are not relevant to the case and material to its outcome pursuant to Rule 27(f) of the 2016 SIAC Rules.

III. The Practice Note Does Not Empower the Tribunal to Order the Disclosure of Entire Agreements

- 45 The Practice Note does not include provisions that grant the Tribunal the power to order the disclosure of entire agreements. It states that,

“[u]nless otherwise agreed by the Disputant Parties, the Tribunal shall have the power to conduct such enquiries as may appear to the Tribunal to be necessary or expedient, which shall include ordering the disclosure of the existence of any funding relationship with an External Funder and/or the identity of the External Funder and, where appropriate, details of the External Funder’s interest in the outcome of the proceedings, and/or whether or not the External Funder has committed to undertake adverse costs liability.” [*SLAC PN-01/17*, p. 2, para. 5].

- 46 For tribunals, the Practice Note merely serves as a non-binding guideline for arbitrators in cases involving external funding [*SLAC PN-01/17*, p. 1]. It empowers the tribunal to request information limited to certain aspects of the third-party funding arrangement: Namely, the existence of any funding relationship, the funder’s identity, and appropriate details regarding the third-party funder’s interest in the outcome of the proceedings, and any commitment to adverse costs liability. Thus, it cannot reasonably be interpreted as authorising complete and full disclosure of agreements with a third-party funder or an insurance [*Transpole v SBS, HC Delhi 29 May 2023*].
- 47 Even if the Practice Note were to be interpreted differently, CLAIMANT has already disclosed the existence and identity of its third-party funders, as well as their commitment to adverse costs liability [*RNoA*, p. 34, para. 19; *NoA*, p. 6, para. 32]. RESPONDENT has also not demonstrated that there is any conflict of interest that necessitates the disclosure of intimate details of AtJ-Financing’s and LitSure’s interests. All required details of the Practice Note are thereby already disclosed.
- 48 Consequently, the Practice Note is irrelevant to this case, as it does not include provisions that grant the Tribunal the power to order full disclosure of the Funding Agreements.



B. The Tribunal Cannot Order Full Disclosure of the Funding Agreements Under Rule 38.4 of the 2025 SIAC Rules

49 Even if the 2025 SIAC Rules were applicable to this arbitration, the Tribunal cannot order full disclosure of the Funding Agreements. Rule 38 of the 2025 SIAC Rules contains provisions regarding third-party funders. According to Rule 38.4,

“the Tribunal may order the disclosure of the information referred to in Rule 38.1 and, after considering the views of the parties, may make such orders for disclosure in respect of the third-party funding agreement as it sees fit including in respect of details of the third-party funder’s interest in the outcome of the proceedings and whether the third-party funder has committed to undertake adverse costs liability.”

50 Thus, the Tribunal may only request two specific kinds of information regarding third-party funders. Firstly, those details referred to in Rule 38(1), namely the identity and contact details of the third-party funder. Secondly, whether the third-party funder is liable for adverse costs, as well as appropriate details regarding the third-party funder’s interest in the outcome of the proceedings.

51 It is undisputed that CLAIMANT disclosed the existence and contact details of its funders in compliance with Rule 38.1 as well as their liability to cover adverse costs [*RNoA*, p. 34, para. 19; *NoA*, p. 6, para. 32].

52 Aside from that fact, RESPONDENT’s request for full disclosure does not align with the purpose of Rule 38.4 [I], and the entire Funding Agreements are not “details” according to Rule 38.4 [II].

I. RESPONDENT’S Request Does Not Align with the Intent Behind Rule 38.4

53 Rule 38.4 intends to improve efficiency and avoid any conflicts of interest between third-party funders and arbitrators [*Highlights of the SIAC Rules 2025*, p. 3, Rule 38; *Ohaga/Akinyi, NCLA ADRJ*, pp. 142-145]. To emphasise this, Rule 38.3 prohibits parties from entering into a third-party funding relationship after a tribunal is constituted [*Weatherley/Moran*, para. 3]. Therefore, the tribunal cannot order the disclosure of entire agreements with a third-party funder without an indication of a possible conflict of interest. RESPONDENT does not even allege any conflict of interest between CLAIMANT’s funders and the Tribunal [*RNoA*, p. 35, para. 28]. Therefore, RESPONDENT’s request for full disclosure is not intended by Rule 38.4. Consequently, the Tribunal cannot order full disclosure of the Funding Agreements under Rule 38.4 of the 2025 SIAC Rules.



II. The Entire Funding Agreements Are Not “Details” in the Sense of Rule 38.4

- 54 The entire Funding Agreements are not captured by “details” pursuant to Rule 38.4. The provision only allows for disclosure of specific relevant “details” [*Rule 38.4 SIAC Rules 2025*]. The wording suggests that SIAC itself considers the disclosure to be a sensitive topic and does not grant the disclosure of entire agreements with third-party funders [*Hee Sub, PLA; SIAC 9 Jun 2020; SIAC PA 30 Apr 2018*]. RESPONDENT requested full disclosure of the Funding Agreements, without specifying which details it might need and why. Such a broad request is not contained in the “details” a tribunal can request pursuant to Rule 38.4. Thereby, the “details” required by Rule 38.4 of the 2025 SIAC Rules do not include full disclosure of the Funding Agreements.

C. Even If the Tribunal Had the Authority, It Should Refrain from Ordering Full Disclosure

- 55 Even if the Tribunal could order full disclosure under either SIAC Rules, it should not do so, as this would ultimately disregard confidentiality between CLAIMANT and its funders [I]. RESPONDENT has no legitimate interest in the Funding Agreements [II], and full disclosure would position the Parties unequally in the proceedings [III].

I. Disclosure Would Infringe Confidentiality Between CLAIMANT and Its Funders

- 56 Disclosing the entirety of the Funding Agreements would disregard confidentiality between CLAIMANT and its third-party funder as well as its insurance provider. When deciding a disclosure request, a tribunal must take a party’s legitimate interest in confidentiality into account [*cf. ICSID PO4 22 Apr 2025; ICSID 22 Jun 2010; PCA PO4 27 Feb 2020*]. To underline this fact, party autonomy allows the parties to include confidentiality clauses within their agreements with third parties [*Balthasar/Balthasar, p. 14, para. 18; cf. Balthasar/Niedermaier, p. 786, paras. 73-74*].
- 57 In the present case, CLAIMANT, AtJ-Financing and LitSure included confidentiality clauses within the Funding Agreements [*PO2, p. 58, para. 24*]. Full disclosure of the Funding Agreements would reveal information which is not only immaterial to the outcome of the proceedings, but which should also be protected by agreed confidentiality. It is irrelevant that CLAIMANT and its funders recognised the Tribunal’s power to order disclosure within their confidentiality clauses [*cf. PO2, p. 58, para. 24*], as the Tribunal is still bound to consider agreed commitment to confidentiality [*cf. Ad hoc DC 11 Mar 2002*].



58 Accordingly, the Tribunal should not order full disclosure of the Funding Agreements as it would subsequently infringe upon confidentiality between CLAIMANT and its funders.

II. RESPONDENT Has No Legitimate Interest in Disclosure of the Funding Agreements

59 RESPONDENT has not presented any legitimate reason for its interest in full disclosure of the Funding Agreements. RESPONDENT alleges that it requires the Funding Agreements for a possible request for security for costs and its defence against further damage claims reserved by CLAIMANT [RNo4, p. 34, para. 20].

60 However, RESPONDENT does not need the entire Funding Agreements as they are not required for a possible security for costs request [1]. They are also not useful to prepare a defence against any further damage claims [2].

1. The Entire Funding Agreements Are Not Required for a Possible Security for Costs Request

61 The entire Funding Agreements are not relevant for determining a possible request for security for costs. When requesting the tribunal to order security for costs, the requesting party must prove “that the counterparty is incapable of paying the eventual costs award in the event that the applicant party prevails in the proceeding” [Mino/Antuña, JM Note, para. 6; cf. ICSID PO7 20 Dec 2023; ICSID DSC 27 Jan 2020; SCC PO4 22 Mar 2021].

62 Firstly, the agreements include details which are irrelevant to assess CLAIMANT’s ability to cover procedural costs. The agreement with AtJ-Financing for instance includes the amount CLAIMANT would owe AtJ-Financing in case CLAIMANT prevails in the arbitration [PO2, pp. 58-59, para. 26]. This is irrelevant in regard to CLAIMANT’s ability to meet a potential cost award. Thus, disclosure of the entire agreement with AtJ-Financing is not relevant for determining whether CLAIMANT is able to finance the proceedings.

63 Secondly, RESPONDENT’s alleged concern about CLAIMANT’s funders not paying for a possible costs award is unfounded. AtJ-Financing is a reliable funder. It is known that AtJ-Financing has previously covered the costs, even after the insolvency of the company it funded [Exhibit R4, p. 40]. LitSure, which would cover adverse costs at the end of the proceedings, has a very good reputation on the market [PO2, p. 58, para. 23]. Moreover, it appears contradictory that RESPONDENT feigns concern for CLAIMANT’s financial capacity but insists on applying the more costly SIAC Rules to this arbitration [cf. SIAC Schedule of Fees 2016; SIAC Schedule of Fees 2025]. Consequently,



RESPONDENT's concern is unfounded and does not justify its request for full disclosure of the Funding Agreements.

- 64 Therefore, the disclosure of the Funding Agreements is not relevant for determining whether or not CLAIMANT is able to finance the proceedings and thereby for a possible request for security for costs.

2. The Entire Funding Agreements Are Not Useful to Prepare a Defence Against Further Damage Claims

- 65 RESPONDENT does not require full disclosure of the Funding Agreements to prepare its defence against further damage claims reserved by CLAIMANT.
- 66 The agreement with AtJ-Financing does not expressly describe any arbitration strategy [PO2, pp. 58-59, para. 26] and therefore, does not contain any details about further damage claims reserved by CLAIMANT. Moreover, CLAIMANT has already specified potential future damage claims. CLAIMANT mentioned it might seek reimbursement of reasonable funding costs [PO2, p. 59, para. 27]. Thus, RESPONDENT already knows what further claims might be issued by CLAIMANT and does not require the Funding Agreements.
- 67 Even if the Funding Agreements did contain any information about CLAIMANT's arbitration strategy, RESPONDENT still has no legitimate interest in their full disclosure. As a large and experienced company [Exhibit C4, p. 14], RESPONDENT is aware that arbitrating parties often reserve the right to claim further damages. It thereby does not require full disclosure of the Funding Agreements to prepare its defence. Additionally, future damage claims are irrelevant for the legal issues at hand, as CLAIMANT has only brought one claim to this arbitration. The Funding Agreements would, therefore, still not be material to the outcome of the case.
- 68 Lastly, RESPONDENT also has other measures to prepare its defence against further damage claims. In particular, parties can rely on negative declaratory relief preventing the opposing party from subsequently bringing an action to vindicate the right denied by the declaration [ICC Case No. 26994/FS/GL; Hannaway et al., OLB]. Therefore, the Funding Agreements are not needed.
- 69 Consequently, RESPONDENT has not demonstrated that the Funding Agreements in their entirety are required to prepare its defence against further damage claims. Furthermore, RESPONDENT has not demonstrated that full disclosure is relevant for a possible request for security for costs.



III. Full Disclosure Would Position the Parties Unequally

- 70 The Tribunal should not grant RESPONDENT's request for full disclosure of the Funding Agreements, as this would give RESPONDENT an unfair advantage and thus position the Parties unequally in the course of the proceedings.
- 71 According to Art. 18 of the Danubian Arbitration Law, which is a verbatim adoption of the UNCITRAL Model Law [PO1, p. 53, para. 4], "the parties shall be treated with equality". Rule 38 of the 2025 SIAC Rules intends to strengthen the counterparties' rights to reveal potential procedural imbalances due to a conflict of interest between a third-party funder and the Tribunal [*Allen et al., GAN*]. However, if the disclosure were to reveal details which went beyond the third-party funders' potential ties to the tribunal, the party receiving funding would be put at a disadvantage. This is not the intention of either the SIAC Rules or the Practice Note.
- 72 Should the Tribunal grant RESPONDENT's request for full disclosure of the Funding Agreements, RESPONDENT would gain access to valuable details contained in these agreements. Such details may consist of internal settlements or the third parties' assessment of the case [*Mutuma, NCLA ADRJ, pp. 20-21*]. This would position the Parties unequally in the course of the proceedings.
- 73 Moreover, if the Tribunal granted RESPONDENT's request, giving it a tactical advantage, this advantage could not be mitigated. RESPONDENT is funded by its parent company, Darwin Natural Foods Holding plc [*RNoA, p. 34, para. 21*]. Thus, the Tribunal does not have the legal grounds pursuant to the SIAC Rules to order the disclosure of RESPONDENT's funding plan.
- 74 Consequently, the Tribunal should not order full disclosure of the Funding Agreements, as this would position the Parties unequally. The Tribunal would otherwise risk rendering an unenforceable award pursuant to Art. V(1)(b) NYC [*cf. Wolff/Wolff, Art. V NYC, paras. 537-538*].

CONCLUSION OF THE SECOND ISSUE

- 75 The Tribunal cannot order full disclosure of the Funding Agreements neither under der 2016 nor the 2025 SIAC Rules. The 2016 SIAC Rules do not contain a legal basis. Even if the 2025 SIAC Rules were applicable, the Tribunal cannot order full disclosure, as CLAIMANT already provided all information required by Rule 38.4. RESPONDENT has no legitimate interest in the Funding Agreements. Moreover, full disclosure would position the Parties unequally and disregard confidentiality between CLAIMANT and its funders. Consequently, the Tribunal cannot and should not order the disclosure of the Funding Agreements under either SIAC Rules.



ISSUE 3: RESPONDENT IS NOT EXEMPT FROM PAYING DAMAGES TO CLAIMANT

- 76 CITES is an international agreement, designed to prevent that trade in species of wild plants and animals threatens their survival. It contains the Appendices I-III, which list species classified by their required level of protection. Species enlisted in Appendix I are threatened with extinction and must be subjected to strict trade regulations [*Art. II(1) CITES*]. Trade is only permitted in exceptional cases and requires export and import permits [*Art. II(1), III CITES*]. Appendix II includes species which may become threatened with extinction [*Art. II(2)(a) CITES*]. The trade of species included in Appendix II requires an export permit only [*Art. IV CITES*].
- 77 During the Agreement's conclusion, the Vanilla Orchid had already been enlisted in Appendix II of CITES. When concerns about its commercial exploitation arose in September 2023, the CITES Committee made the recommendation to move the Vanilla Orchid to Appendix I in January 2024.
- 78 After this recommendation, CLAIMANT offered to deliver before the Vanilla Orchids would be moved to Appendix I [hereinafter: the Appendix Move] to avoid the risk of RESPONDENT not obtaining an import permit. According to Clause 5.1 of the Agreement, RESPONDENT is obliged to obtain an import permit for Equatoriana. An import permit will only be granted if the species is not primarily used for commercial purposes. RESPONDENT planned to use about 90% of the Vanilla Orchids for commercial purposes. RESPONDENT nevertheless refused to take delivery before the Appendix Move. In January 2024, trade in Vanilla Orchids became subject to a media campaign with RESPONDENT as the main target. Still, RESPONDENT deliberately chose to do nothing to prevent a looming disruption of the Agreement.
- 79 RESPONDENT blindly relied on its government's former lenient policy of granting import permits for commercial use. It assured CLAIMANT on several occasions that obtaining permits and arranging transport would be no problem. When Equatoriana's government then adjusted its permit policy to comply with CITES, RESPONDENT suddenly claimed that the combination of the Appendix Move and the change in policy [hereinafter: the Event] constituted a force majeure event beyond its control.
- 80 Contrary to RESPONDENT's assertions, its breach of the Agreement does entitle CLAIMANT to damages according to Arts. 61(1)(b), 74 CISG [A]. RESPONDENT is not excused from paying these damages on the grounds of force majeure [B].



A. CLAIMANT Is Entitled to Damages According to Arts. 61(1)(b), 74 CISG

- 81 Pursuant to Art. 61(1)(b) CISG, the seller may claim damages as provided in Art. 74 CISG if the buyer fails to perform any of his obligations. Pursuant to Arts. 53, 60 CISG, the buyer must take over the goods and do all the acts which could reasonably be expected of him in order to enable the seller to make delivery. As per Clause 5.1 of the Agreement, the buyer is obligated to obtain all import permits [*Exhibit C3, p. 11, Clause 5.1*]. However, RESPONDENT failed these obligations by not obtaining the necessary import permit, which prevented it from taking the delivery. Consequently, it is liable for the resulting damages under Arts. 61(1)(b), 74 CISG.

B. RESPONDENT Is Not Exempt on the Grounds of Force Majeure

- 82 RESPONDENT is not exempt from paying damages on the grounds of force majeure. Whether a party is exempt from liability is governed by Clause 12 of the Agreement [hereinafter: the Force Majeure Clause]. According to the Force Majeure Clause:

“A party is not liable for failure or delay caused by events beyond its reasonable control, including but not limited to acts of God, extreme weather, epidemics/pandemics, quarantine restrictions, embargos, government measures, strikes, war, civil unrest, natural disasters, and carrier-wide disruptions.” [*Exhibit C3, p. 13, Clause 12.1*].

- 83 If the parties to a contract incorporate a force majeure clause, Art. 79 CISG does not apply, since Art. 6 CISG provides that the parties’ own agreement preempts other provisions of the CISG [*DiMatteo et al./DiMatteo, p. 726, para. 132*]. This does not, however, preclude using Art. 79 CISG as a supplementary guide for interpreting the contractual provision [*cf. ICC Case No. 23069; Ad hoc 14 Nov 2022; Koller, ius.full, p. 49*]. A reasonable person would conclude that, where the CISG governs the contract and similar terminology is used, the parties intended to rely on the CISG’s interpretation of such terminology [*OLG Hamburg 28 Feb 1997, CISG-online No. 261, para. 30: even held that a force majeure clause differently worded than Art. 79 CISG did not alter the parties’ intent to follow the standard of Art. 79 CISG*]. This is further emphasised by the fact that under Art. 8 CISG the contract shall be interpreted with the aid of the applicable default law, namely the CISG [*Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel, Art. 8, para. 26*]. Thus, the Force Majeure Clause applies, with Art. 79 CISG as a supplementary interpretative guideline.
- 84 RESPONDENT is not exempt from liability because the Event was not beyond its control [I] and could have been avoided [II].



I. The Event Was Not Beyond RESPONDENT's Control

- 85 Exemption under the Force Majeure Clause requires an event beyond the reasonable control of the party. An event lies within a party's sphere of control if it took over the contractual risk associated with it [*Schlechtriem/Schwenzer/Schroeter/Schwenzer/Köhler, Art. 79, para. 11; Kröll et al./Atamer, Art. 79, para. 44; MüKo-BGB/Huber, Art. 79, para. 7; Honsell/Magnus, Art. 79, para. 10; Gillette/Walt, p. 302; Piltz, p. 216; Achilles, Art. 79, para. 5; Brunner/Brunner/Sgier, Art. 79, para. 6; Soergel-BGB/Lutzj, Art. 79, para. 7; Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 12, Brunner, p. 117; Schroeter, p. 311, para. 782; cf. Berman, SIH, p. 40*].
- 86 In the present case, RESPONDENT firstly, assumed the risk of obtaining an import permit in case that the Vanilla Orchid would be moved into Appendix I [1]. Secondly, RESPONDENT also assumed the risk of taking delivery in case of a change in policy [2], which is why the Event is not beyond its control.

1. RESPONDENT Assumed the Risk of Obtaining an Import Permit in Case of an Appendix Move

- 87 Clause 5.1(b) of the Agreement states that “[t]he Buyer shall obtain all import permits for the country of destination.” This means that RESPONDENT needs to obtain all import permits for Equatoriana. When the Agreement was concluded, no import permit was required because the Vanilla Orchid was still listed in Appendix II, only requiring an export permit for its trade. Thus, the Parties envisioned circumstances in which an import permit would become necessary. This is also highlighted by the wording of the Agreement [*Exhibit C3, p. 10, Clause 1.1*], which points out that the CITES Convention and consequently its Appendices [*Art. 2(1) CITES*] might be amended from time to time. The Appendix Move is precisely such a circumstance, envisioned by the Parties. Therefore, RESPONDENT assumed the risk of obtaining an import permit in case the Vanilla Orchid would be moved into Appendix I.

2. RESPONDENT Assumed the Risk of Taking Delivery in Case of a Change in Equatoriana's Permit Policy

- 88 When interpreting a contract to the understanding of a reasonable person in accordance with Art. 8(2)(3) CISG, the “subsequent conduct” of the parties must be taken into account. A reasonable person would conclude from RESPONDENT's conduct, after the Agreement's conclusion, that it assumed the risk of taking delivery in case of a change of Equatoriana's import permit policy.



- 89 Firstly, this became apparent on 1 December 2023, when RESPONDENT intentionally chose to take delivery after the Appendix Move, relying on its government’s policies [*Exhibit R1*, pp. 36-37, paras. 6-7; *Exhibit C5*, p. 15]. Two months prior, CITES announced the vote to include the Vanilla Orchid in Appendix I at the end of January 2024 [*Exhibit C4*, p. 14]. After this announcement, CLAIMANT offered to deliver before the Appendix Move [*Exhibit R1*, p. 37, para. 7; *Exhibit C5*, p. 15]. This would have completely avoided the need for any Appendix I import permits. RESPONDENT refused this offer [*Exhibit C5*, p. 15]. Instead, it chose to rely on Equatorian authorities to grant an import permit, when the Vanilla Orchid would be moved to Appendix I.
- 90 Secondly, RESPONDENT refused to apply for an anticipatory import permit. The Parties had also discussed the alternative of applying for an anticipatory import permit [*PO2*, p. 57, para. 14]. In a comparable case, Equatoriana had granted such a permit before a species was moved into Appendix I [*NoA*, p. 4, para. 12]. Instead, RESPONDENT chose to postpone dealing with the issue until shortly before the delivery, relying on the authorities in Equatoriana not to change their policy [*PO2*, p. 57, para. 14].
- 91 Thirdly, RESPONDENT did not change the delivery date. In January 2024, a media campaign turned public opinion against RESPONDENT and its commercial exploitation of the Vanilla Orchid [*Exhibit R1*, p. 37, para. 8]. The campaign equally targeted Equatoriana’s practice to issue import permits for commercial trade in Appendix I, which had been under criticism before [*Exhibit C4*, p. 14]. However, RESPONDENT did not consider a change in strategy necessary. Instead, it chose to keep relying on an eroding government practice [*Exhibit R1*, p. 37, para. 8].
- 92 Lastly, even after the Appendix Move, RESPONDENT still reassured CLAIMANT that delivery could take place on 27 March 2024 [*Exhibit C6*, p. 16, para. 3].
- 93 CLAIMANT presented ample opportunity to safeguard performance from being affected. Yet, RESPONDENT chose to rely exclusively on a criticised government practice [*Exhibit C4*, p. 14], assuring CLAIMANT several times that it would obtain the import permit. From this subsequent conduct, a reasonable person would conclude that RESPONDENT assumed the risk of taking delivery, in case Equatoriana changed its policy. Consequently, the Event cannot be considered beyond RESPONDENT’s control.

II. RESPONDENT Could Have Avoided the Event

- 94 The Force Majeure Clause requires that the Event could not have been avoided [1]. As RESPONDENT could have avoided the Event, it cannot be exempt from liability [2].



1. The Force Majeure Clause Requires That the Event Could Not Have Been Avoided

95 RESPONDENT might argue that under the Force Majeure Clause, it will only have to prove that the Event was beyond its control to be exempt from liability. However, a reasonable person in accordance with Art. 8(2)(3) CISG would conclude that the Event must also be unavoidable. Firstly, the wording of the Force Majeure Clause implies that the event must be unavoidable [a]. Secondly, it is not in the interest of either party that an avoidable event exempts from liability [b]. Thirdly, a reasonable person would not consider the Parties to have deviated from the general force majeure standard [c].

a. The Wording of the Force Majeure Clause Implies That the Event Must Be Unavoidable

96 If an event is truly beyond a party's control, the party could neither have avoided nor overcome it. Conversely, if a party were able to prevent the event, it would lie within the party's control [*cf. BeckOGK-CISG/Bach, Art. 79, para. 5*]. Thus, the wording of the Force Majeure Clause implies that the event must have been unavoidable for the affected party.

97 The fact that Art. 79 CISG explicitly mentions that the event must be unavoidable does not prevent such an interpretation. Unlike Art. 79 CISG, the Force Majeure Clause refers to events beyond a party's "reasonable" control. This wording calls for an even broader, more practical assessment of what lies within a party's sphere of control. This implies all the more that the wording of the Force Majeure Clause requires an event to be unavoidable.

b. It Is Not in the Interest of Either Party That an Avoidable Event Exempts from Liability

98 It is in neither party's interest that an avoidable event exempts from liability. By including a force majeure clause, the parties intend to exempt from liability only in exceptional circumstances [*ICC Case No. 23069*]. If the Force Majeure Clause were interpreted in a way to exempt a party, even where an easily avoidable event occurs, it would render the Force Majeure Clause ineffective and easily exploitable. Even where a minor effort would make it possible to overcome an event, a party would be exempt. By contrast, in a scenario where CLAIMANT would not have been able to deliver the Vanilla Orchids due to predictable extreme weather conditions, the Event could have been avoided by delivering earlier. In such a scenario, the Force Majeure Clause would not have been in RESPONDENT's interest either. Thus, it is not in the interest of either party that an avoidable event exempts a party from liability.



c. A Reasonable Person Would Not Consider the Parties to Have Deviated from the General Force Majeure Standard

- 99 A reasonable person would not consider the Parties to have deviated from the general force majeure standard. The principle of “force majeure” stems from the Roman doctrine of *rebus sic stantibus* under which an unforeseeable and extraordinary change of circumstances, rendering a contractual obligation extremely burdensome, exempts from liability [*Schwenzler, VUWLR, p. 710*]. Further, the term “force majeure” is described in French law as “the event that prevents the party from performance and is irresistible and unforeseeable” [*Kiraz/Üstün, Unif Law Rev, p. 439; Berger/Behn, MJDR, pp. 95-96*]. This understanding is not only affirmed by the CISG but is also adopted by the UNIDROIT Principles in Art. 7.1.7 and the ICC Model Clause 2020 [*CRCICA 19 Feb 2023, CISG-online No. 6272; Vogenauer/Kleinheisterkamp, p. 771, para. 11; Bianca/Bonell/Tallon, Art. 79, p. 578; Klotz, p. 219; Schwenzler, VUWLR, p. 712*].
- 100 In the present case, this interpretation is especially highlighted by the title of the clause “Force Majeure” [*Exhibit C3, p. 13, Clause 12*]. Additionally, the Parties refer to a “Force Majeure Event under Clause 12” in Clause 10.3 of the Agreement [*Exhibit C3, p. 13, Clause 10.3*]. This displays that the Parties wanted to implement a Force Majeure Clause, which entails all requirements typically contained in a force majeure standard. This includes that an event must be unavoidable. Therefore, a reasonable person would not consider the Parties to have deviated from the general force majeure standard.

2. The Event Was Avoidable

- 101 RESPONDENT could have avoided the Event. Once the occurrence of an unforeseen event becomes sufficiently concrete, a party must do everything in its capacity to prevent timely performance from being affected by the event [*Kröll et al./Atamer, Art. 79, paras. 54-55; BeckOGK-CISG/Bach, Art. 79, para. 43; MüKo-HGB/Sommerfeld, Art. 79, para. 42*]. A party may not await events which might later justify its non-performance [*Secretariat Commentary, Art. 65, para. 7; Staudinger/Magnus, Art. 79, para. 34; Kröll et al./Atamer, Art. 79, para. 54*].
- 102 Since the Event had become sufficiently concrete [a], and RESPONDENT did not do everything in its capacity to prevent performance from being affected [b], it cannot be exempt from liability.



a. The Event Had Become Sufficiently Concrete

- 103 The Event had become sufficiently concrete. This is true for both the Appendix Move and Equatoriana’s change of import-permit policy. Whether the occurrence of the Event had become sufficiently concrete for RESPONDENT is determined from the view of a reasonable person in its situation, pursuant to Art. 8(2)(3) CISG.
- 104 The Appendix Move became sufficiently concrete to RESPONDENT after the CITES Committee made its recommendation in September 2023. In fact, approximately half of CITES recommendations end in an appendix move [*CITES Official Records*, p. 11]. RESPONDENT had hoped on Mediterraneo raising the necessary support to oppose the Appendix Move [*Exhibit R1*, pp. 36-37, para. 6]. This “hope” highlights that RESPONDENT was aware of the potential negative consequences for the delivery.
- 105 RESPONDENT’s hopes did not materialise. To the contrary, as the further developments in January 2024 unfolded, the Appendix Move became increasingly more probable. The media campaign of “The Last Orchid” raised attention to the protection of the endangered Vanilla Orchid and its commercial exploitation, scrutinising the countries and companies associated [*RNoA*, p. 33, para. 12; *Exhibit C4*, p. 14]. It became very likely that the parties to CITES would vote the Vanilla Orchid into Appendix I.
- 106 RESPONDENT cannot argue that the Appendix Move had not become sufficiently concrete, due to the application of Conf.XX.8, which allows inclusions into Appendix I or II to come into effect immediately [*PO2*, p. 57, para. 14]. Normally, Art. XV(1)(c) CITES stipulates that an Appendix amendment comes into effect after 90 days. Accordingly, once the recommendation for an immediate effect was made, RESPONDENT should have treated the Appendix Move as a matter of utmost relevance instead of remaining passive.
- 107 The media campaign also marks the point at which RESPONDENT must have anticipated a change in Equatoriana’s lenient import-permit policy. The growing public pressure made a stricter approach by the authorities only a matter of time.
- 108 Consequently, both the change of Equatoriana’s import permit policy and the Appendix Move would have been sufficiently concrete to a reasonable person in RESPONDENT’s situation.



b. RESPONDENT Did Not Do Everything in Its Capacity to Avoid the Event

109 RESPONDENT did not do everything in its capacity to avoid the Event when it became sufficiently concrete. Firstly, RESPONDENT could have obtained an anticipatory import permit from September 2023 onwards [aa]. Secondly, RESPONDENT should have also taken delivery in January 2024 [bb].

aa. RESPONDENT Could Have Obtained an Anticipatory Import Permit from September 2023 Onwards

110 Equatoriana had adopted the approach of granting anticipatory import permits prior to a looming inclusion of a species into Appendix I [*NoA, p. 4, para. 12*]. Import permits of species included in Appendix I are valid for a period of 12 months [*Provision 15(b) CITES Model Law*].

111 Had RESPONDENT obtained the anticipatory import permit in September 2023, it could have taken delivery on its chosen date, 27 March 2024. In fact, this would have been the one time where RESPONDENT should have relied on Equatoriana's policies. If it had done so beforehand, RESPONDENT would have been able to take delivery regardless of the later changes in Equatoriana's import policies. This simple and proactive measure could have been expected from a company of such magnitude to ensure that the delivery would be secured.

112 RESPONDENT could have taken delivery with an anticipatory import permit, as Equatoriana never imposed an outright trade prohibition of Vanilla Orchids, where a valid import permit was in place. On 26 February 2024, it merely "signalled" the intention to adopt such a ban, without ever enacting it [*PO2, p. 58, para. 18*]. Therefore, RESPONDENT could have avoided the Event by obtaining an anticipatory permit ever since September 2023.

bb. RESPONDENT Should Have Taken Delivery in January 2024

113 Generally, a party can be expected to avoid a disruptive event in order to fulfil the contract, even if this entails incurring substantial additional expenses and significant losses from the transaction. The limit is drawn at the point where exorbitant or existential endangering additional costs would arise [*OLG Hamburg 28 Feb 1997, CISG-online No. 261; Staudinger/Magnus, Art. 79, para. 34; Schlechtriem/Schwenzer/Schroeter/Schwenzer/Köhler, Art. 79, para. 14; MüKo-BGB/Huber, Art. 79, para. 9; Kröll et al./Atamer, Art. 79, para. 56; BeckOGK-CISG/Bach, Art. 79, para. 46; BeckOK-BGB/Saenger, Art. 79, para. 7; Herberger et al./Baetge, Art. 79, para. 30, Güllemann, p. 225*]. A



comparable case refers to “the absolute limit of sacrifice” which must be reached before a party is exempt from its duty to perform [OLG Hamburg 28 Feb 1997, CISG-online No. 261].

- 114 In the present case, delivery would have been entirely possible before the Appendix Move, even on short notice [PO2, p. 57, para. 15]. RESPONDENT, however, argues that such an early delivery would bear “commercially unreasonable costs” [Exhibit C5, p. 15]. These would include higher delivery and storage costs, as two-thirds of the Vanilla Orchids would have to be stored in “unsuitable old greenhouses” [PO2, p. 57, para. 15]. RESPONDENT as one of the world’s largest food and spice producers [Exhibit C4, p. 14], can be expected to bear the additional costs caused by delivery, as they would not have constituted an existential threat. Thus, RESPONDENT was expected to take on these costs, to take delivery before the Appendix Move would come into effect. Consequently, RESPONDENT should have taken the delivery in January 2024. Thus, the event was avoidable, and RESPONDENT is not exempt on the grounds of force majeure.

CONCLUSION OF THE THIRD ISSUE

- 115 In conclusion, CLAIMANT is entitled to damages under Arts. 61(1)(b), 74 CISG, as RESPONDENT did not take the delivery due to its failure to obtain the required import permit. RESPONDENT is not exempt from liability to pay these damages on the grounds of force majeure, since the Event was not beyond RESPONDENT’s control and could have been avoided.



ISSUE 4: CLAIMANT IS ENTITLED TO USD 3,300,000 IN DAMAGES PURSUANT TO ART. 75 CISG

- 116 On 25 August 2022, CLAIMANT and RESPONDENT entered into a Sales Agreement for 3,000 (+/- 10%) Vanilla Orchids, flowering in June/July 2024 at a contract price of USD 2,000 per piece. On 10 February 2024, RESPONDENT declared that it was unsuccessful in obtaining the relevant import permit to take CLAIMANT's delivery of the Vanilla Orchids. As the Vanilla Orchids were supposed to flower in June/July, they had to be delivered before the middle of May. Consequently, CLAIMANT needed to find a new buyer quickly to fulfil its duty to mitigate damages under Art. 77 CISG.
- 117 On 15 February 2024, CLAIMANT and Herbal Cosmetics concluded a contract, under which CLAIMANT was able to resell the 3,300 Vanilla Orchids originally intended for RESPONDENT. Despite its best efforts, CLAIMANT was only able to sell the Vanilla Orchids at a price of USD 1,000 each, due to the drastic market price drop in the beginning of February 2024. Pursuant to Art. 75 CISG, CLAIMANT is entitled to USD 3,300,000 damages, i.e., the difference between the original Sales Agreement with RESPONDENT and the transaction with Herbal Cosmetics.
- 118 CLAIMANT conducted a cover sale consistent with Art. 75 CISG [A]. Additionally, CLAIMANT is entitled to calculate the damages on the quantity of 3,300 Vanilla Orchids [B]. Thus, CLAIMANT's damages amount to USD 3,300,000 [C].

A. CLAIMANT Conducted the Cover Sale Consistent with Art. 75 CISG

- 119 The cover sale which CLAIMANT concluded with Herbal Cosmetics was conducted pursuant to Art. 75 CISG. Under Art. 75 CISG, a party can claim damages:

“If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.”

- 120 CLAIMANT acquired the right to conduct a cover sale on 10 February 2024 [I]. The cover sale was an appropriate replacement [II]. It is undisputed that in this case the cover sale is to be considered as conducted reasonably [PO2, p. 59, para. 29].



I. CLAIMANT Had the Right to Conduct a Cover Sale on 10 February 2024

- 121 CLAIMANT acquired the right to conduct a cover sale from 10 February 2024 onwards. Although a formal declaration of avoidance was not given until 1 March 2024, CLAIMANT's course of action is fully supported.
- 122 The wording of Art. 75 CISG stipulates that a cover sale has to take place at "a reasonable time after avoidance". Contrary to the wording, courts and doctrine have found that if the circumstances clearly show that the other party seriously and finally refuses to perform, a declaration of avoidance is not necessary to conduct a cover sale [*first established in: OLG Hamburg 28 Feb 1997, CISG-online No. 261; later also applied in: OLG Naumburg 24 Apr 2019, CISG-online No. 4506; OLG Brandenburg 5 Feb 2013, CISG-online No. 2400; OLG München 15 Sep 2004, CISG-online No. 1013; OLG Graz 29 Jul 2004; LG Hamburg 26 Nov 2003, CISG-online No. 875; OLG Bamberg 13 Jan 1999, CISG-online No. 516; cf. ICC Case No. 23757/FS; ICC Case No. 24898/FS; CCIG 28 Aug 2009; CIETAC 16 Apr 2013; Huber/Mullis, p. 284; MüKo-BGB/Sommerfeld, Art. 75, para. 5; DiMatteo et al./Bridge, pp. 586-587, para. 56; Schmidt-Abrendts, p. 77]. In their ruling, the courts relied on the principle of good faith based on Art. 7 CISG.*
- 123 On 10 February 2024, it became evident that RESPONDENT could not accept delivery, since it would be unable to obtain the import permit within the required time period [*Exhibit C6, p. 16, para. 4*]. Without the import permit, RESPONDENT could not exercise the agreed delivery [*Exhibit C6, p. 16, para. 4*]. Considering the short lifecycle and the sensitivity of the Vanilla Orchids, it was vital for CLAIMANT to perform the delivery in the agreed period of time [*No. 4, p. 5, para. 23*]. Thereby, RESPONDENT seriously and finally refused to perform its obligations under the Agreement.
- 124 Due to the non-performance of RESPONDENT, CLAIMANT needed to react right away, as the Vanilla Orchids would otherwise have perished. Since time is of the essence for the delivery [*Exhibit C3, p. 11, Clause 4.2*], RESPONDENT fundamentally breached the Agreement.
- 125 Thus, the formal declaration of avoidance became unnecessary. Consequently, considering the sensitive nature of the Vanilla Orchids, CLAIMANT acquired the right to conduct a cover sale on 10 February 2024.

II. The Cover Sale with Herbal Cosmetics Was an Appropriate Replacement

- 126 Contrary to what RESPONDENT alleges [RNoA, p. 35, para. 26], the cover sale CLAIMANT concluded was an appropriate replacement. The ongoing business relationship with Herbal Cosmetics did not affect the cover sale. In general, a cover sale must be identified and must qualify as an appropriate replacement [Kröll et al./Djordjević, Art. 75, para. 13; Witz et al./Witz, Art. 75, para. 6; Gillette/Walt, p. 379; Borisova, NJCL 2003, p. 4]. Therefore, the cover sale must satisfy the aggrieved party's contractual fulfilment interest [CIETAC 30 Nov 1997; LG Dortmund 12 Jul 2023, CISG-online No. 6861; Downs Investment v Perwaja Steel, Sup Ct of Queensland 17 Nov 2000; OLG Hamburg 28 Feb 1997, CISG-online No. 261; Ferrari et al./Saenger, Art. 75, para. 4; BeckOGK-CISG/Bach, Art. 75, para. 10].
- 127 CLAIMANT resold the Vanilla Orchids, intended for RESPONDENT, to Herbal Cosmetics with the cover sale in 2024 [Exhibit C6, p. 17, para. 15]. Two years prior, in 2022, CLAIMANT entered into a different sales agreement with Herbal Cosmetics [Exhibit C6, p. 16, para. 8]. The contract from 2022 consisted of 4,000 Vanilla Orchids ready to flower for the first time in 2025 [Exhibit C6, p. 16, para. 8], while the cover sale contains 3,300 Vanilla Orchids ready to flower in 2024 [Exhibit C6, p. 17, para. 12]. These two contracts need to be differentiated, since only the transaction on 15 February 2024 is relevant for CLAIMANT's fulfilment interest.
- 128 Fig. 1 shows the differences between the original contract from 2022 (green) and the cover sale from 2024 (purple) in relation to the market price development.

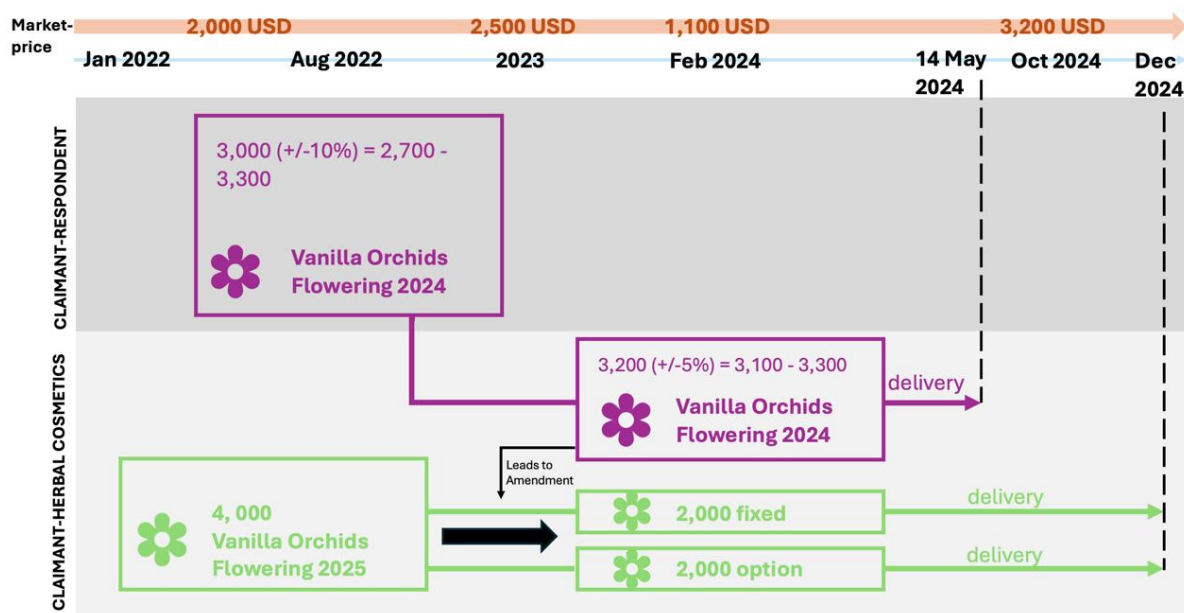


Fig 1.



- 129 Firstly, as illustrated in *Fig 1*, the contracts contain different goods. The original contract from 2022 between CLAIMANT and Herbal Cosmetics (*green*) concerned Vanilla Orchids ready to flower for the first time in 2025 [*Exhibit C6, p. 16, para. 8*]. The cover sale (*purple*) concerned the Vanilla Orchids that CLAIMANT intended to sell to RESPONDENT, which were grown to flower in 2024 [*Exhibit C6, p. 17, para. 12*]. These exact Vanilla Orchids were delivered to Herbal Cosmetics on 14 May 2024 as part of the cover sale [*Exhibit C6, p. 17, para. 15; PO2, p. 60, para. 39(b)*], while the Vanilla Orchids from the 2022 contract were delivered in December 2024 [*Exhibit C6, p. 17, para. 17*]. Consequently, the contracts contain different goods. Therefore, to satisfy CLAIMANT's contractual fulfilment interest, only the goods of the 2024 cover sale can act as an appropriate replacement.
- 130 Secondly, the contract between Herbal Cosmetics and CLAIMANT had been concluded in January 2022 [*Exhibit C6, p. 16, para. 8; NoA pp. 4-5, para. 21*], before RESPONDENT and CLAIMANT even started their business relationship in June 2022 [*Exhibit C2, p. 9*].
- 131 Thirdly, the original contract between CLAIMANT and Herbal Cosmetics, concluded in January 2022, was still performed as initially agreed [*Exhibit C6, pp. 16-17, paras. 8, 17*]. When concluding the cover sale, CLAIMANT allowed Herbal Cosmetics to only take 2,000 of the 4,000 Vanilla Orchids originally agreed upon under the 2022 contract. Taking all 4,000 Vanilla Orchids could have caused storage or staffing problems for Herbal Cosmetics, as it had already obtained 3,300 Vanilla Orchids through the 2024 cover sale [*Exhibit C6, p. 17, paras. 9-11*]. Nonetheless, Herbal Cosmetics took the full quantity and the 2022 contract was performed as agreed upon in January 2022 [*Exhibit C6, p. 17, para. 17; NoA, p. 5, para. 27*]. The contract from 15 February 2024 (*purple*) is a separate contract, simply to the same buyer: Herbal Cosmetics.
- 132 Lastly, CLAIMANT conducted the cover sale with Herbal Cosmetics in order to satisfy its contractual fulfilment interest, to resell the goods intended for RESPONDENT. The original contract from January 2022 does not satisfy CLAIMANT's contractual fulfilment interest regarding the 3,300 Vanilla Orchids intended for RESPONDENT. Furthermore, the contract from 2022 (*green*) was an entirely different transaction and its existence does not stand in the way of a reasonable cover sale pursuant to Art. 75 CISG.
- 133 Consequently, the cover sale was a separate transaction made in replacement for the original transaction between RESPONDENT and CLAIMANT.



B. CLAIMANT Is Entitled to Calculate Its Damages Based on the Quantity of 3,300 Vanilla Orchids

- 134 CLAIMANT is entitled to calculate damages based on the quantity of 3,300 Vanilla Orchids pursuant to Art. 75 CISG. That is because CLAIMANT was able to deliver 3,300 Vanilla Orchids and is entitled to determine the quantity.
- 135 Since no specific quantity was agreed upon beyond the provision (+/-10%), further contractual interpretation of the Agreement is required. Moreover, the Parties did not explicitly agree on who should determine the quantity [I]. A reasonable person would conclude that CLAIMANT had the right to determine the quantity [II].

I. The Parties Did Not Explicitly Include a Right to Determine the Quantity

- 136 The Parties did not explicitly agree on who should determine the quantity under the Agreement. Pursuant to Art. 8(1) CISG, statements made by either party are to be interpreted according to the intent. In Clause 2.1 of the Agreement, the Parties established the flexibility of the quantity. However, neither the Agreement nor Schedule 1 specified which Party would determine the exact number of Vanilla Orchids. The issue was also not discussed during their negotiations [*PO2, p. 56, para. 8*]. Thus, the Parties did not explicitly agree on who should determine the quantity.

II. A Reasonable Person Would Conclude That CLAIMANT Had the Right to Determine the Quantity of the Vanilla Orchids

- 137 CLAIMANT had the right to determine the quantity. Since the Parties' intent cannot be determined, Art. 8(2)(3) CISG needs to be considered. Pursuant to Art 8(2) CISG, if no intent can be determined, the understanding of a reasonable person of the same kind as the other party is relevant. Art. 8(3) CISG further specifies that all relevant circumstances, including negotiations, established practices, subsequent conduct of the parties, and trade usages, must be considered. In case the parties' intent remains undeterminable, the hypothetical intent must be considered [*Schlechtriem/Schwenzler/Schroeter/Schmidt-Kessel, Art. 8, para. 27; Secretariat Commentary, Art. 7, paras. 4, 6; cf. ICC Case No. 10329*].
- 138 It is common practice in the industry to use provisions like the one CLAIMANT relies on [*PO2, p. 56, para. 9*]. According to Art. 14 CISG the provision “(+/-10%)” is sufficiently specific [*OGH 10 Nov 1994, CISG-online No. 117*]. As part of a group of companies that is one of



the largest producers of natural food and spices [*Exhibit C4, p. 14*], RESPONDENT must have known the regular use of the provision [*Exhibit R2, p. 38*].

- 139 The reason for the regular use is that the production of such a fast perishing good is extremely difficult and losses are often outside of the producer's sphere of control. The growing of the Vanilla Orchids is a very complex process. The sensitivity of the Vanilla Orchids results in problematic cuttings and a lower success rate compared to other orchid species [*Exhibit C1, p. 7, paras. 4-5*]. CLAIMANT uses the provision for contracts involving more than 2,000 Vanilla Orchids. This allows for flexibility concerning unforeseen fluctuations in quantity [*PO2, p. 56, para. 9*]. Thus, the provision ensures the seller's ability to perform their contractual obligations, even if they experience losses during production. Consequently, a reasonable person would consider the common industry practice and conclude that CLAIMANT can determine the quantity.
- 140 Additionally, RESPONDENT demanded an increase in the quantity agreed upon in the Initial Agreement from 300 to 3,000 (+/-10%) Vanilla Orchids and expressly stated that its primary objective in purchasing the Vanilla Orchids was to expand its spice business [*Exhibit C2, p. 9*]. This demonstrates that RESPONDENT had no interest in limiting or precisely determining the number of Vanilla Orchids; it simply sought to obtain as large a quantity as possible. By contrast, CLAIMANT had a concrete commercial interest in determining the final quantity within the agreed range, particularly in light of production risks inherent to cultivating the sensitive Vanilla Orchids. Consequently, the structure and purpose of the quantity provision indicate that CLAIMANT was entitled to determine the exact number of Vanilla Orchids to be delivered within the (+/-10%).
- 141 Considering the circumstances, CLAIMANT had the right to determine the quantity of the Vanilla Orchids to be sold. Since CLAIMANT was able to deliver the full quantity [*PO2, p. 56, para. 9*], it must also be entitled to calculate its damages on the Vanilla Orchids effectively supplied.

C. CLAIMANT's Damages Amount to USD 3,300,000

- 142 CLAIMANT conducted a reasonable cover sale pursuant to Art. 75 CISG and was entitled to deliver 3,300 Vanilla Orchids. Therefore, CLAIMANT is entitled to damages in the amount of USD 3,300,000. Those damages cannot be reduced, since CLAIMANT fulfilled its obligation to mitigate damages pursuant to Art. 77 CISG [I]. Consequently, CLAIMANT is entitled to USD 3,300,000 according to Art. 75 CISG [II].



I. CLAIMANT Fulfilled Its Obligations to Mitigate Damages Pursuant to Art. 77 CISG

143 CLAIMANT can claim the full damages, since it has fulfilled its obligation to mitigate damages under Art. 77 CISG, by concluding the cover sale with Herbal Cosmetics. Art. 77 CISG states that:

“a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach.”

144 Therefore, the promisee is obliged to mitigate the damages in accordance with Art. 77 CISG [*VLAC Case No. SCH-4366, CISG-online No 121; HGer Aargau 10 Mar 2010, CISG-online No. 2176; Ct App Antwerp 22 Jan 2007, CISG-online No. 1585*]. Further, the seller is not allowed to unreasonably delay the cover sale by speculating at the expense of the buyer [*ICDR 7 Aug 2007; Witz et al./Witz, Art. 77, para. 8; MüKo-BGB/Huber, Art. 77, para. 11; cf. Schroeter, p. 335, para. 838; Honnold/Flechtner, Art. 75, para. 410.1*].

145 CLAIMANT was obliged to react immediately. Due to the nature of the Vanilla Orchids, it was CLAIMANT’s primary goal to resell the 3,300 Vanilla Orchids that were originally intended for RESPONDENT as soon as possible. If they had not been sold before the middle of May, they would have significantly lost in value [*Exhibit C6, p. 17, para. 12*]. By the time of the first flowering in June/July 2024, the value of the Vanilla Orchids would have dropped by at least 30 % [*No. A, p. 5, para. 23*].

146 In the sale with Herbal Cosmetics, CLAIMANT not only secured a suitable buyer, but also successfully resold the Vanilla Orchids in close accordance with the market price. Considering the drop of the market price, the political changes and the Appendix Move [*PO2, p. 55, para. 2*], it was extremely difficult to find a buyer. The longer CLAIMANT would have waited, the less likely it would have been to find a buyer willing to pay more than USD 1,000. Thus, had CLAIMANT waited any longer, it would have unreasonably speculated to the detriment of RESPONDENT and violated its obligations under Art. 77 CISG.

147 To be able to sell the Vanilla Orchids as quickly as possible, CLAIMANT gave Herbal Cosmetics the option to only take half of the quantity they had originally agreed upon [*Exhibit C6, p. 17, para. 11*]. CLAIMANT thereby risked an already established deal, with substantial economic value, to be able to conduct a cover sale and mitigate the damages for RESPONDENT.

148 Therefore, CLAIMANT acted diligently under the circumstances and fulfilled its duty to mitigate the damages in accordance with Art. 77 CISG.



II. As a Result, CLAIMANT Is Entitled to USD 3,300,000

149 Consequently, CLAIMANT can claim the full damages in the amount of USD 3,300,000. Pursuant to Art. 75 CISG, the aggrieved party can claim and calculate damages based on the difference between the contract price and the price in the substitute transaction. In the Agreement, the Parties agreed on USD 2,000 per Vanilla Orchid. Therefore, CLAIMANT would have made profits in the amount of USD 6,600,000. The cover sale was concluded at a price of USD 1,000 per Vanilla Orchid [*Exhibit C6, p. 17, para. 10*]. Thus, the cover sale amounted to USD 3,300,000, which is half the price of the Agreement. Since CLAIMANT was able to resell the full quantity, the damages are calculated based on 3,300 Vanilla Orchids and amount to USD 3,300,000.

CONCLUSION OF THE FOURTH ISSUE

150 Since RESPONDENT was not able to fulfil its contractual obligations, CLAIMANT reacted directly in order to mitigate damages. Even though the market had changed rapidly after the Appendix Move, CLAIMANT successfully conducted a cover sale with Herbal Cosmetics. Through this transaction, CLAIMANT was able to resell the full quantity reserved for RESPONDENT and keep the damages to a minimum. Consequently, CLAIMANT is entitled to damages in the amount of USD 3,300,000 pursuant to Art. 75 CISG.

REQUEST FOR RELIEF

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

- The 2016 SIAC Rules apply to this arbitration [**Issue 1**].
- The Arbitral Tribunal should not order the full disclosure of the requested Funding Agreements [**Issue 2**].
- CLAIMANT is entitled to damages due to a breach of contract by RESPONDENT, which is not excused on the grounds of force majeure [**Issue 3**].
- CLAIMANT is entitled to damages in the amount of USD 3,300,000 pursuant to Art. 75 CISG [**Issue 4**].

APPENDIX 3

Academic Integrity and Artificial Intelligence Disclosure Statement

UNIVERSITY: University of Freiburg

COUNTRY: Germany

ACADEMIC INTEGRITY	YES	UNSURE	NO
We confirm that this memorandum does not include text from any source, whether the source was in hard copy or online available, which has not been properly distinguished by quotation marks or citation.	X		

USE OF AI			
We have used AI-enhanced tools for team-internal administrative tasks .	X		
We have used AI-enhanced search engines or library catalogues for researching sources and (factual or legal) information on the Moot Problem.	X		
We have used AI enhanced translation tools to translate sources relevant for our work on the Moot Problem.			X
We have used AI enhanced translation tools to translate parts of the text submitted in this Memorandum into English from any other language.			X
We have used AI to generate high-level briefings on relevant factual and legal topics which are not submitted as part of the memorandum but have been solely used to advance our own understanding.			X
We have used AI-enhanced tools as a tutor to guide and support our preparation and learning.			X
We have used AI-enhanced proof-reading tools.	X		
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We have used AI tools to generate statements that are now included in the memo . Please tick yes even if you have altered or amended the text generated by AI before submission.			X
We have submitted documents issued by the Vis Moot Association to an AI-tool .			X

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<p>We have used an AI tool that has been trained on Vis Moot documents to generate text that is part of our Memorandum</p>			X
<p>Other (please specify):</p>			X

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CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team. Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.



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Julia Kaiser



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