33rd ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

27 MARCH – 2 APRIL 2026, VIENNA

ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS

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If you do not already have a copy of the Problem, it is available on the Vis Moot website, https://www.vismoot.org/wp-content/uploads/2025/11/33rd-Vis-Moot_Problem_FINAL_with_PO2.pdf. If you downloaded the Problem during October, you will need to download the revised version issued at the beginning of November, which includes Procedural Order No. 2 (PO 2).

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are *strongly urged* not to communicate any of the ideas contained in this analysis to their teams *before* the submission of the Memorandum for Respondent.

The analysis will be sent to all teams after all Memoranda for Respondent have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas that teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem; in particular, it does not address all possible interpretations of the various contractual provisions or other communications.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though entirely appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation if they want

to discuss certain issues specifically. They should do so if they want to make the in-depth discussion of a particular issue part of their evaluation.

INTRODUCTION

This year's case concerns a dispute arising from the termination of a Sale of Orchids Agreement ("Agreement") relating to the sale of (fictitious) orchids used for the production of vanilla (*Vanilla Planafolia Mediterreaniensis* – "Vanilla Orchid"). The primary reason for the termination was the inclusion of the Vanilla Orchid into Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which entails *de facto* the prohibition of any trade for primarily commercial purposes. As a consequence, Respondent, as the buyer, could not obtain the necessary import permit. Claimant sold the orchids at a lower price to another customer in another jurisdiction and terminated the contract with Respondent, claiming damages for the differences in price.

Procedurally, students have to discuss which version of the SIAC Arbitration Rules applies, i.e. the SIAC Rules 2016 or the SIAC Rules 2025, and whether under the applicable version of the SIAC Rules Claimant should be ordered to disclose the contracts with a third-party-funder and an ATE-Insurer.

On the merits, the first question is whether Respondent is excused for its failure to provide the import licence either under the force majeure clause contained in the contract or pursuant to Article 79 CISG. The second question concerns the amount of damages claimed, i.e. whether Claimant's sale to its other customer constituted a cover sale in the sense of Article 75 CISG and the relevant quantity of orchids for calculating damages resulting from a contract providing for the delivery of "3.000 orchids +/- 10%"

In their Case Management Conference on 9 October 2025, the Parties agreed that the Arbitral Tribunal, which had been constituted on the basis of the SIAC Rules 2016, as requested by Claimant, could decide on the applicable rules and should continue the proceedings on the basis of these rules even if it considered the SIAC Rules 2025 to be applicable.

THE FACTS

I. Parties, product and contractual history

Claimant, Orchis Worldwide Ltd, is a medium-sized company based in Mediterraneo engaged in the growing and sale of orchids.

Respondent, Darwin Natural Food plc, based in Equatoriana, is part of a group of companies that is one of the largest producers of natural food and spices. The most profitable product of its spice business is vanilla, which makes up for 30% of the overall profit of the spice business.

Most of the orchids sold and delivered by Claimant to its customers are hybrids created for the floriculture trade, both in cut and potted flowers. In addition, Claimant also has a line of business devoted to the research, preservation, propagation, and sale of high-priced rare natural orchids. The most important of these orchids is the *Vanilla Planifolia Mediterraniensis*, commonly known as "Vanilla Orchid". It is a rare species which only grows in Mediterraneo and four other countries. Due to the destruction of its natural habitat, it was originally listed as an endangered species in Appendix II CITES.

The cured pods of the Vanilla Orchid, often referred to as vanilla beans, contain vanillin of the highest quality. Despite its merits, the Vanilla Orchid has long been excluded from commercial use on any larger scale due to its rarity, vulnerability to root and stem rot, sensitivity to changes in temperature and moisture, and the complexities involved in its pollination and propagation. Flowers and beans of the Vanilla Orchid have been sold on an individual basis, often taken from wild varieties of this orchid.

Over the last few years, the interest in the Vanilla Orchid, as well as its price, has grown considerably. Due to its potential use for the production of spices and for medical and cosmetic purposes, it has acquired the status of a potential "super flower".

Growing the Vanilla Orchids is a complex process requiring specific facilities and trained personnel. It takes the orchids three years to be market-ready, and due to their sensitivity, around 10% of them do not survive the first three years. The Vanilla Orchid has a fairly short lifecycle and dies two to three years after its first flowering, which takes place in June/July.

Claimant can only grow up to 21,000 Vanilla Orchids at any time in its facilities, which results in an annual production of around 7,000 orchids.

On 1 December 2021, Claimant had entered into a contract with the Botanical Garden in Equatoriana ("Botanical Garden") for the delivery of 300 Vanilla Orchids at a price of 2,200 USD per orchid to be delivered on 23 January 2024. Already at that time, it was clear that the research to be done by the Botanical Garden with the orchids purchased was primarily conducted in the interests of Respondent and its business of researching, growing, and selling orchids (Claimant Exhibit C 1).

In 2022, the Botanical Garden ran into serious financial problems. It was taken over by Respondent and became part of Respondent's research facilities. In connection with the takeover, Mr. Edmond Albius, the director of Respondent's spice business line, contacted Claimant's CEO, Ms. Giorgia Theophrastus, via email. He informed Ms. Theophrastus that

Respondent intended to fulfil the contract as concluded between Claimant and Botanical Garden of Equatoriana and was interested in a much larger number of orchids and a change in the delivery terms, suggesting a meeting to discuss details (Claimant Exhibit C 2).

Due to the insolvency of another customer, Claimant was able to accommodate that request. On 25 August 2022, Claimant and Respondent agreed to amend the previously existing contract with the Botanical Garden of Equatoriana in three points: Respondent became the official buyer under the contract, the quantity to be delivered was changed from 300 to 3,000 +/- 10%, and upon Respondent's request, some flexibility as to the time of delivery was included. (Claimant Exhibit C 3).

In September 2023, the Standing Committee of CITES suggested that the Vanilla Orchid should be moved at the next Conference of the Parties of CITES at the end of January 2024 from Appendix II to Appendix I (Claimant Exhibit C 4).

Directly after the recommendation of the Plants Committee, Claimant approached Respondent to discuss the possible consequences of the inclusion of the Vanilla Orchid into Appendix I. To minimize the risk associated with a possible inclusion into Appendix I, Claimant suggested moving the delivery date to a time before the next Conference of the Parties or at least to apply for an eventually needed import permit before that time. On 1 December 2023, following an internal evaluation of the risks and costs associated with all options, Respondent informed Claimant that delivery should occur on 27 March 2024 as originally planned (Claimant Exhibit C 5). Mr. Albius assured Claimant that in case the orchid would be moved to Appendix I Respondent would be able to obtain the necessary permit, given the generally favourable attitude of the local authorities in Equatoriana in granting permits and the existing good connections to the authorities (Claimant Exhibit C 6).

At the beginning of January 2024, ecological activists started an extensive campaign to protect the natural habitat of Mediterraneo, in particular its orchids. Respondent was one of the prime targets of that campaign and suffered serious losses also in its other food business.

On 1 February 2024, the Conference of the CITES Parties took the decision to include the Vanilla Orchid into Appendix I with immediate effect. As a consequence, from 1 February 2024 onwards, a delivery of the purchased Orchids required an import permit (Claimant Exhibit C 4).

On 2 February 2024, Claimant's Head of Sales, Mr. Haarmann tried unsuccessfully to contact Mr. Albius via phone to discuss the delivery of the Vanilla Orchids in light of the new developments. On 10 February 2024, Mr. Albius finally got back to Mr. Haarmann and told him that it would be impossible to obtain the import permit within the period required to meet the original delivery date. To the big surprise of Mr. Haarmann, Mr. Albius informed him that it was very doubtful that delivery could take place at all, contrary to his earlier assurances that a permit could be obtained.

As a consequence, Mr. Haarmann approached one of Claimant's other customers, Herbal Cosmetics, to discuss with them the potential for a delivery of the orchids reserved for Respondent. Herbal Cosmetics had concluded in January 2022 a contract for the delivery of a further 4,000 Vanilla Orchids in December 2024 "at the market price of 1 October 2024" for its high-priced luxury cosmetic line using fragrances from the Vanilla Orchid.

These orchids were to be produced by Claimant from new cuts and were supposed to flower for the first time in June/July 2025. During the initial discussion in December 2021/January 2022, and also later on several occasions, Herbal Cosmetics had made clear that it would be interested in buying larger quantities should such become available, even on short notice, given that the demand for its orchid-based cosmetics exceeded production by far.

When Mr. Haarmann approached Herbal Cosmetics on 12 February 2024 with the offer for a delivery of 3000 +/- 10% Vanilla Orchids ready to flower in 2024, Herbal Cosmetics was immediately interested. It was crucial for Claimant to sell and deliver the Vanilla Orchids before their first flowering in June or July, which would have diminished the value of the flowers by at least 30% given its short lifecycle of three to four flowerings. Furthermore, Claimant needed the greenhouse where the 3,300 Vanilla Orchids were being grown for a new batch of orchids.

In the end, a price of 1,000 USD per orchid was agreed as part of a package affecting also the existing contract of January 2022. It was 100 USD lower than the then-current market price to reflect the Herbal Cosmetics' inconveniences associated with accommodating a delivery on short notice. In a contract concluded on 15 February 2024 between Claimant and Herbal Cosmetics, it was agreed that in addition to the delivery of 3,300 orchids in April, the original contract of January 2022 for the delivery of 4,000 Orchids would be adapted to this new situation. While the other terms remained unchanged, it was agreed that Herbal Cosmetics had to take only 2,000 of the contracted Vanilla Orchids in December 2024, while the delivery of the remaining 2,000 was dependent on Herbal Cosmetics exercising an option for their delivery by 10 October 2024.

On 1 March 2024, after further unsuccessful negotiations with Respondent, Claimant terminated the contract with Respondent.

On 15 April 2024, Claimant delivered 3,300 Orchids to Herbal Cosmetics under the cover sale concluded with them on 15 February 2024. The price per Vanilla Orchid was 1,000 USD, and thus half of the price which Respondent would have been required to pay.

On 2 October 2024, Herbal Cosmetics exercised its option for the 2,000 Vanilla Orchids, which were subsequently delivered in December 2024 at the price of 3,200 USD.

II. Initiation of arbitration and relief sought

On 19 December 2024, after all efforts to settle the dispute with Respondent in negotiations had failed, Claimant started mediation proceedings before the Singapore International Mediation Centre in line with the dispute resolution clause contained in the contract. The mediation proceedings were not successful.

On 31 July 2025, Claimant thus initiated the current arbitration proceedings, originally asking the Arbitral Tribunal to make the following orders:

1) *"Respondent is ordered to pay damages in the amount of 3,300,000 USD*
2) *Respondent is ordered to pay the costs of the present arbitral proceedings*
3) *To order any further relief the Arbitral Tribunal considers appropriate, in particular in light of further requests by Claimant"*

In addition, it informed SIAC and Respondent that to "*bring the present arbitration Claimant had to rely on outside financial support from AtJ-Financing and obtained insurance for adverse cost coverage from the litigation risk insurance provider LitSure.*"

In its Notice of Arbitration and the accompanying letter Claimant asked that the proceedings should be initiated under the SIAC Rules 2016. On 8 August 2025, SIAC, after having heard the conflicting views of both Parties on the issue of the applicable rules, determined that the arbitration had commenced on 31 July 2025 and should be governed by the SICA Rules 2016 as requested by Claimant. At the same time SIAC made clear that the "*Parties are at liberty to address matters in respect of the applicable version of the SIAC rules before the Tribunal*".

In its Response to the Notice of Arbitration of 14 August 2025 Respondent denied all claims raised by Claimant and asked the Arbitral Tribunal to make the following orders:

a. *"To decline jurisdiction under the SIAC Rules 2016;*
b. *To order Claimant to disclose the Third Party Funding Agreement, including any ATE-Insurance concluded with or by AtJ-Funding or with other insurances;*
c. *To reject Claimant's damage claims;*
d. *To order Claimant to bear the costs of this arbitration."*

In essence, Respondent submits that contrary to Claimant's assertion, the Parties never agreed on the application of the SIAC Rules 2016. Thus, the proceedings should be conducted according to the SIAC Rules 2025, which were in force at the time of initiating the proceedings. In light of Claimant's weak financial position, the power explicitly given to it in Rule 38.1 SIAC Rules 2025, but also existing under the SIAC Rules 2016, and the need to adequately protect Respondent's procedural rights, the Arbitral Tribunal should order Claimant to disclose the agreements with AtJ-Funding and LitSure.

Respondent considered the failure to provide the required import permits to be excused under Article 79 CISG and the force majeure clause in the contract. In addition, Respondent considered the damages claimed to be not sufficiently proven and exaggerated. Neither did the sale of the 3,300 orchids to Herbal Cosmetics constitute a cover sale in the sense of Article 73, nor could the damages be calculated on the basis of 3,300 orchids, but only at the lowest number of orchids to be delivered under the contract, i.e. 2,700 orchids.

THE ISSUES

I. Overview

On 9 October 2025, the Arbitral Tribunal and the Parties agreed in a TelCo on a number of further procedural issues. In particular, it was agreed that the decision of SIAC as to the applicable rules is of a preliminary nature, that the Arbitral Tribunal is empowered to decide upon the issue and continue the proceedings on the basis of the rules considered to be applicable.

As a consequence, the Arbitral Tribunal asked the Parties to address the following issues in their submissions:

a. Which version of the SIAC Arbitration Rules applies to this arbitration?
b. Should the Arbitral Tribunal order the requested disclosure of the agreements under the SIAC Rules 2016 or Rule 38.4 SIAC Rules 2025?
c. Is CLAIMANT entitled to damages due to a breach of contract by RESPONDENT which is not excused by Article 79 CISG?
d. In case CLAIMANT should be entitled to damages, can the damages be calculated on the basis of Article 75 CISG in the way it is done by CLAIMANT, i.e. taking the difference between the price paid by Herbal Cosmetics for the delivery of the 3,300 Orchids on 14 May 2024 and the price RESPONDENT would have paid for the same amount under the Agreement.

In relation to question c, Ms. Fasttrack has made clear that "*should the Arbitral Tribunal find Article 79 CISG inapplicable to the present case, Respondent will also rely on Clause 12 of the Contract [force majeure clause] in its defence*" (PO 2 para 37 (p. 62)).
As far as question d is concerned, it was clarified that while the merits of Claimant's request to be awarded 3,300,000 USD as damages should be discussed, "*[t]eams are, in principle, free to rely exclusively on Art. 75 CISG invoked by Claimant, which does not want to open its books for Respondent to prove damages, or to advance the claim on a different legal basis.*" (PO 2 para 38 (p. 62))

II. General considerations

The teams are, in principle, free to select the order in which they address the various issues, as stated explicitly in PO1. In the present case, the vast majority of the teams will address the question in the order given.

The following remarks are merely intended to highlight the legal issues arising from the Problem. One of the major difficulties of this year's case is that there are potentially more (smaller) issues than can be discussed in a meaningful way within the page or time limit in the submission and the oral presentation. Thus, it is important that the students properly weigh the relevance and strength of the various arguments in light of their case stories. That applies in particular in relation to question c, where teams may have to make strategic choices whether they will discuss all possible defences, i.e. force majeure and Article 79 CISG, or concentrate on one, showing that already the stricter/more lenient standard is or is not met and thus the other does not have to be discussed.

III. Determination of the applicable version of the SIAC Rules (PO 1 para. III no. 1 a.)

1. Background

The dispute resolution agreement contained in the contract between the Parties was taken over without any further discussion from the previous contract between Claimant and the Botanical Garden. In that contract, the dispute resolution provision had been the object of extensive discussions between the Parties. Until that contract, the Botanical Garden, as a public entity, had never agreed to resolve any disputes outside the courts of Equatoriana

or through arbitration in Equatoriana, both of which were not acceptable to Claimant. Upon Claimant's suggestion, the CEO of the Botanical Garden, Ms. Nicola Gobley had taken a look at the then-applicable SIAC Rules 2016 and informed Claimant in an email of 26 November 2021 (Claimant Exhibit C 7) that

> *"[t]he current version of their arbitration rules with the AMA Protocol is acceptable to us, provided that we can agree on a modified version of the AMA Protocol."*

In relation to the required board approval for the submission to arbitration outside Mediterraneo Ms. Gobley stated:

> "*The approval was granted under the condition that the need for an actual decision should be minimized as much as possible by relying on other ADR-forms first. Consequently, the board requested me to modify the AMA Protocol in a way that the first step of the dispute resolution proceedings should be the mediation. 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.*
>
> *I have attached a revised version of the SIAC Model Clause to this email. Should the draft be acceptable to you we can finally sign the contract."*

The proposal made by her was accepted at the time by Claimant and then included without further discussion as Clause 15 into the contract between the Parties deviates as follows from

Clause 15 of the Contract	**AMA Protocol (1 Sept 2015)**
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"). ~~for the time being in force, which rules are deemed to be incorporated by reference in this clause~~.	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 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.
The seat of the arbitration shall be Danubia.	The seat of the arbitration shall be [Singapore].*
The Tribunal shall consist of three arbitrator(s).	The Tribunal shall consist of __ arbitrator(s).
The language of the arbitration shall be English.	The language of the arbitration shall be ___.

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.	The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms

On 19 December 2024, Claimant initiated mediation proceedings with SIMC, which were not successful and about which no further information is provided.

On 31 July 2025, Claimant then submitted its Notice of Arbitration to SIAC, which was based on the SIAC Rules 2016.

On 2 August 2025, SIAC requested both Parties to comment on the applicable version of the SIAC Rules, given that, according to their Rule 1.5, the SIAC Rules 2025

> "… shall come into force on 1 January 2025 and, unless otherwise agreed by the parties, shall apply to any arbitration which is commenced on or after that date."

In its email of 4 August 2025, Claimant maintained its position that the SIAC Rules 2016 are applicable invoking two arguments based on the wording and the drafting history of the arbitration agreement. First, Claimant interpreted the reference in the arbitration agreement to the "current Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules")" (emphasis added) as an agreement of the Parties on the application of the SIAC Rules 2016. Second, Claimant submitted that contrary to the determination by SIAC, the arbitration proceedings commenced with the initiation of the mediation proceedings on 19 December 2024.

2. Arguments

The issue turns largely on the interpretation of the arbitration agreement, in particular the two passages relied upon by Claimant. It has to be determined whether, in light of its drafting history

- the reference to the "current Arbitration Rules" can be interpreted as an agreement of the Parties on the application of the SIAC Rules 2016 and
- the initiation of the mediation proceedings on 19 December 2024 constituted the start of the arbitration proceedings.

In the present case, the Parties have agreed that the interpretation of the Arbitration Agreement is governed by Article 8 CISG. As there is no information about the actual intent of the Parties involved (Art. 8 (1) CISG), the understanding of a "reasonable person of the same kind as the other party" (Art. 8 (2) CISG) is relevant.

In determining such an understanding, pursuant to Article 8 (3) CISG

> "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties" (Article 8 (3) CISG).

The wording of the clause is on both issues not conclusive and can be used by both sides to support their position, in particular with the support of existing case law in connection with the SIAC Rules, but also other arbitration rules.

Other circumstances which may play a role are

- the declarations in Ms Gobley's email of 26 November 2022 that
  - "current version of [SIAC's] arbitration rules with the AMA protocol is acceptable to us"
  - an amendment of the AMA protocol was intended, which is a single procedure
  - "the initiation of the mediation proceedings should be treated for the purpose of the statute of limitations as constituting the commencement of arbitration proceedings" (Claimant Exhibit C 7)
- the statements by Respondent's CEO, Mr. Albius, in his email of 15 June 2022 that Respondent would take over all obligations of the Botanical Garden, including those arising out of the contract with Claimant
- the Preamble of the Agreement
- the practice under most arbitration rules, including both versions of the SIAC Rules, to make new rules applicable to all proceedings initiated after their entry into force, as well as existing exceptions in case of major changes (e.g. for emergency arbitration under ICC Rules) or generally (ICSID)
- the contra proferentem rule of interpretation

In invoking Ms Gobley's statements and/or the *contra proferentem* rule one always has to take into account that they were not made by the Parties themselves but by a third party in connection with a contract which had been replaced by the Sales Agreement.

In addition, the relevance of the – preliminary(?) – determinations by SIAC as to the applicable rules and/or the commencement of the arbitration proceedings may be discussed.

IV. Request to order disclosure of the financing agreements under the relevant SIAC Rules The exclusion of Exhibits C 7 and R 3 from the file (PO 1 para. III no. 1 b.)

1. Background

In its Notice of Arbitration, Claimant disclosed that "to bring the present arbitration", it

- had to rely on outside financial support from AtJ-Financing and
- had obtained insurance for adverse cost coverage from the litigation risk insurance provider LitSure.

Furthermore, it reserved the right "to claim further damages should such occur, in particular, through the conduct of the arbitral proceedings."

In its Response to the Notice of Arbitration Respondent requested that, beyond the disclosed existence of financial support, the underlying contracts should also be disclosed due to the reputation of AtJ-Funding as one of the "rough funders" in the industry. That characterization is based on an article in the journal "The Insider" of 4 August 2025 (Respondent Exhibit R 4) reporting about a case in which AtJ-Funding was ordered to disclose one of its agreements and to pay the legal fees of the Respondent. In that article a spokesman of the funding industry in Equatoriana declared that the agreement disclosed does not reflect the normal practice, but that AtJ-Funding

> "is known in the industry as a very aggressive player in relation to the cases funded, the terms of the financing agreement and its influence on the conduct of the proceedings."

It is further the "only funder which has not submitted to the Code of Conduct of the funding industry" and, according to the information provided by Respondent is

In light of AtJ-Funding's reputation, Respondent considered the disclosure of both funding agreements to be relevant "i*n particular for a possible request for security for costs and its defense against further damage claims reserved by Claimant*."

In its Response, Respondent further informed the Tribunal that is "receives financial and personnel support in this arbitration from its parent company, Darwin Natural Food Holding plc."

2. Arguments

Rule 38.4 SIAC Rules 2025 explicitly grants the Tribunal the power to order disclosure of third-party funding agreements stating:

> The Tribunal may order the disclosure of the information referred to in Rule 38.1 [third-party funding agreement] 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.

By contrast, the SIAC Rules 2016 do not contain a comparable express conferral of powers as to orders for a disclosure of funding agreements. Rule 27, setting out the procedural powers of the tribunal, does not explicitly mention a power to order the disclosure of funding agreements but merely generally refers in "documents … which the Tribunal considers relevant to the case and material to its outcome".

In SIAC's Practice Note on Arbitrator Conduct in Cases involving External Funding (PN - 01/17, 31 March 2017 "External Funding Practice Note"), applicable to all SIAC arbitrations, it is, however, clearly stated that under Rule SIAC Rules 2016, the Tribunal also has the power to order disclosure of funding agreements.

Note 5 of SIAC's External Funding Practice Note provides:

> "Unless 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."

According to Notes 9 to 11 of the External Funding Practice Note:

> *"9. The involvement of an External Funder alone shall not be taken as an indication of the financial status of a Disputant Party. The Tribunal may take into account factors other than the involvement of an External Funder in an order for security for legal or other costs.*
>
> *10. The Tribunal may take into account the existence of any External Funder in apportioning the costs of the arbitration.*
>
> *11. The Tribunal may take into account the involvement of an External Funder in ordering in its award that all or a part of the legal or other costs of a Disputant Party be paid by another Disputant Party."*

Factors which may be relevant for the discussion and the existence of the tribunal's powers, as well as its exercise, are:

- the fact that a Practice Note was issued under the SIAC Rules 2016 – relevance if there was a power to do so?
- the differences between the two agreements and whether the term "third-party funding agreement" also covers the insurance
- the reservation declared by Claimant as to claiming further damages for arbitration costs, the tribunal's power to take into account funding in its costs order
- the burden of proving such additional damages
- the existence of an adverse cost coverage insurance
- fairness, as Respondent receives outside funding from the parent company on undisclosed terms

- level playing field and risk disclosing litigation strategy.

V. Is Respondent "excused" for not providing the required import permit? (PO 1 para. III no. 1 c)

1. Background

In their Agreement the Parties regulated explicitly not only the place of delivery ("FCA Capital City International Airport, Incoterms® 2020") but also who had to provide eventually required export and import permits. Clause 5 states:

> 5. EXPORT/IMPORT & COMPLIANCE
>
> 5.1 Phytosanitary & CITES. The Seller shall obtain and provide with each Shipment (a) an official phytosanitary certificate issued by the competent NPPO in Mediterraneo; and (b) CITES export permits where required for any listed orchid species. The Buyer shall obtain all import permits for the country of destination.
>
> 5.2 Regulatory Compliance. Each Party shall comply with all applicable laws, including plant health regulations, biosecurity rules, phytosanitary, packaging and waste regulations, air transport rules (including IATA Perishable Cargo Regulations (PCR) and any applicable airline SOPs) and anti-corruption/money-laundering laws.

At the time of contracting, the Vanilla Orchid had been listed in Appendix II CITES. Thus, the trade in it was regulated by Article IV CITES. Pursuant to Article IV (4) CITES the only import requirement was the presentation of the export permit required under Article IV (2) CITES, and the Vanilla Orchid could be traded commercially.

In September 2023, upon a recommendation of the Plants Committee of CITES and after a controversial discussion, the Standing Committee of CITES suggested that the Vanilla Orchid should be moved at the next Conference of the Parties of CITES at the end of January 2024 from Appendix II to Appendix I. Furthermore, the Standing Committee suggested making use of the new powers under the Conf. XX.8[1] and give immediate effect to the amendment (Claimant Exhibit C 4). According to Article XV (1)(c) CITES, normally, amendments "*adopted at a meeting shall enter into force 90 days after the meeting*".

Directly after the recommendation of the Plants Committee, Claimant approached Respondent to discuss the possible consequence of the inclusion of the Vanilla Orchid into Appendix I. The inclusion of a plant in Appendix I largely excludes any trade of the plant for primarily commercial purposes. Pursuant to Article III CITES, in addition to a "qualified" export permit for any specimen of a species included in Appendix I, the grant of an import permit is also required, the existence of which is in turn also a requirement for the grant of the export permit. Article III (3) provides in relation to the import of specimen of species included in Appendix I as follows:

[1] This conference resolution is entirely fictitious and the power to order immediate effect does not exist in reality but was invented for the Moot Problem.

> 3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:
>
> (a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
>
> (b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
>
> (c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.
>
> [...]

On 1 November 2023, following initial evaluations of the legal situation and possible options by the legal departments of both Parties, a meeting at the management level took place. At that meeting Claimant's Head of Sales, Mr. Ferdinand Haarmann, suggested that, in light of the potential inclusion into Appendix I, Respondent should either

- move forward the date for delivery to the week before the Conference of the Parties, or
- apply already in November 2023 for an import permit to ensure its grant in case such a permit should be necessary. In a comparable case of a looming inclusion into Appendix I, which Equatoriana did not support, its authorities had adopted such an approach of an anticipatory grant of permits.

Respondent promised to consider moving forward the delivery date, which internally had already been fixed for 27 March 2024 due to the delay in the construction of the new greenhouses, built specifically for the Vanilla Orchids.

On 1 December 2023, Respondent informed Claimant that delivery had to occur on 27 March 2024 as planned (Claimant Exhibit C 5). At the time, it was clear that the dedicated solar-powered greenhouses would not be ready for use until at the earliest the end of February 2024. Consequently, an early delivery, while possible, would have involved considerable additional costs and risks for Respondent. By that time, only one of the three greenhouses would have been available. Consequently, two/thirds of the Vanilla Orchid to be delivered would have been exposed to additional risks. According to the email of Mr. Albius *"they would have to be stored at commercially unreasonable costs in one of the existing greenhouses and would then have to be moved to the new greenhouse, exposing them to additional stress".*

In the telephone conversation on the next day, Mr. Haarmann informed Mr. Albius that this could create problems with the performance of the contract, as the required import permit would only be granted for non-commercial purposes. Mr. Albius assured Mr. Haarmann that, given his good contacts at the local authorities in Equatoriana and their issuance

practice, obtaining that permit even on short notice should not be a problem (Claimant Exhibit C 6).

In describing Respondent's reaction to the recommendation of the Plant Committee Mr. Albius stated in para. 6 of his witness statement:

> "At the end of August, the Plant Committee then issued its recommendation to move the Vanilla Orchid to Appendix I at the next Conference of the Parties on 1 February 2024. We were surprised by the recommendation, including the suggestion to rely on the new facilities under Resolution Conf. XX.8 to shorten or abandon the period under Article XV (1) (c) CITES. We were not overly concerned. We hoped that Mediterraneo and the other producers would raise sufficient support to oppose such a decision. Furthermore, as Equatoriana had voted against the recommendation, we were confident that even in case of an inclusion into Appendix I, we would be granted an import permit. The authorities in Equatoriana did not really believe that the prohibition of trade was the best way to protect endangered species. Thus, despite considerable criticism from other member states, the authorities in Equatoriana had been very generous in issuing import permissions as long as some research purpose could arguably be made out. That would have been no problem for us, as some of the vines were intended to be used for further research. Furthermore, we were confident that at least the immediate effect of the inclusion would be rejected."

At the beginning of January 2024, activists from "The Last Orchid" started an extensive campaign to protect the natural habitat of Mediterraneo, in particular its orchids. Respondent was one of the prime targets of that surprisingly successful campaign, which in the end also affected its other food business in a way that Respondent's CEO decided to put the entire business line "Spices" up for sale to protect the food business.

On 1 February 2024, despite strong objections from Mediterraneo and some other countries, with Equatoriana abstaining, the Conference of the CITES Parties took the decision to include the Vanilla Orchid into Appendix I with immediate effect, pursuant to Conf.XX.8, a resolution that had never been invoked before. As a consequence, from 1 February 2024 onwards, a delivery of the purchased Orchids required an import permit (Claimant Exhibit C 4).

On 2 February 2024, Mr. Haarmann tried unsuccessfully to contact Mr. Albius via phone to discuss the delivery of the Vanilla Orchids in light of the new developments.

Meanwhile, on 5 February 2024, Respondent applied for an import permit but was later informed by the Equatorianian authorities that no permits would be issued pending further ministerial guidance.

On 8 February 2024, following a very critical report in the leading newspaper, Agriculture and Conservation, a few days earlier, the Minister of Agriculture and Nature of Equatoriana announced in an interview that authorities would do everything it takes to ensure an effective protection of the Vanilla Orchid and other endangered species covered by CITES. He promised a review and, if necessary, a revision of the practice of the grant of import permits with a restrictive approach to existing exceptions.

On 10 February 2024, Mr. Albius finally got back to Mr. Haarmann and informed him that it

- would be impossible to obtain the import permit within the period required to meet the planned delivery date on 27 March 2024 and
- very doubtful that delivery could take place at all.

As a result of that Claimant sold the Vanilla Orchids reserved for Respondent to another customer at a price of USD 1,000 (15 February 2024), terminated the Agreement (1 March 2024) and claimed the difference in price as damages.

Following the announcement of the Minister of Agriculture and Nature of Equatoriana on 8 February 2024, on 26 February 2024, the Equatorianian government signaled its intention to go further and to prohibit trade in orchids entirely. However, the process stalled within the government, and the proposed prohibition ultimately was not finalised, overshadowed by more pressing matters.

2. Arguments

It is uncontested that pursuant to the agreed delivery term (FCA Capital City International Airport, Incoterms® 2020) and Clause 5.1 of the Agreement Respondent had to deal with all import formalities, including the now required import permit. The failure to obtain such an import permit thus constitutes a breach of contract.

Respondent, however, considers itself to be excused from liability for the breach of contract under either the force majeure clause in the Agreement or Article 79 CISG.

Clause 12 of the Contract provides:

> 12. FORCE MAJEURE
>
> 12.1 Events. 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, embargoes, government measures, strikes, war, civil unrest, natural disasters, and carrier-wide disruptions.
>
> 12.2 Notice & Mitigation. The affected Party shall notify the other within 5 days of becoming aware and use reasonable endeavours to mitigate the effects. Performance times are extended accordingly.

Article 79 CISG provides in its relevant parts as follows:

> "(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.
>
> [...]
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by

the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

Claimant considers neither of the excuses to be applicable. In its view, Respondent could have overcome all problems by accepting an earlier delivery in January, by applying for an import permit before the inclusion of the Vanilla Orchid in Appendix I or by engaging with the governmental authorities.

In addressing the problem, teams have to make the following two strategic choices, which will affect their presentation. First, they have to determine whether they want to address both possible defences (force majeure clause and Article 79) or only one, with the stricter/more lenient requirements, and identify the requirements for this defence. Second, they have to decide and specify what they consider to be the relevant change in circumstances which is the cause for Respondent's breach of its contractual obligation, i.e. the inclusion of the Vanilla Orchid in Appendix I (including its immediate effect) or the change in the attitude of the authorities in granting permits or both. The latter decision will be relevant for the discussion under Article 79 on whether the changes were foreseeable and, in particular, whether Respondent could overcome their consequences and has given sufficient and timely notice.

Factors which may play a role in the discussion in relation to whether there was an impediment beyond control (or an event beyond its reasonable control) which could not reasonable be expected or overcome by Respondent are:

- the right to determine the time of delivery explicitly granted to Respondent and internally already exercised;
- the costs and risks associated with an earlier delivery (direct costs/reputation);
- the contravention of the purpose of the inclusion of the Vanilla Orchid in Appendix through the premature application for an import permit or reliance on the research exception;
- the immediate application pursuant to the Conf.XX.8 had never been invoked before, and both countries involved historically complied with CITES obligations leniently;
- intention of Equatorianian government to prohibit trade of Orchids entirely in the nearest future.

Some teams may also raise arguments concerning the application of CITES, such as whether the Vanilla Orchid propagated by the Claimant qualifies as an artificially propagated plant and is therefore exempt under Article VII (4) CITES. Under that provision, plant species listed in Appendix I that are artificially propagated for commercial purposes are deemed to be specimens of Appendix II species. However, this issue is not decisive for the legal analysis, as the Vanilla Orchid in that batch does not fully qualify for the artificially propagated exemption (PO 2, para. 3).

VI. Is Claimant entitled to damages in the amount of USD 3,300 and entitled to calculate and prove them on the basis of Article 75 CISG? (PO 1 para. III no. 1 d)

1. Background

The Parties' Agreement (Claimant Exhibit C 3) is based on the Claimant's model contract, into which agreed details were included (underlined parts). Among the few insertions changed in comparison to the contract concluded between Claimant and the Botanical Garden were those in Clauses 2.1 (Quantity), 4.1 (Delivery Term) and 4.2 (Delivery Schedule).

In relation to the quantities, Clause 2.1 provides:

> 2.1 Quantity. The Seller shall sell, and the Buyer shall purchase a total of 3,000 (+/- 10%) orchid plants as specified in Schedule 1.

In relation to place and time of delivery, Clause 4 provides:

> 4.1 Delivery Term. Delivery shall be FCA Capital City International Airport, Incoterms® 2020.
>
> 4.2 Delivery Schedule. Shipments shall be made between 1 January 2024 and 31 March 2024 on the date determined by the Buyer in accordance with the schedule in Schedule 1. Time is of the essence, subject to Clause 12 (Force Majeure).

The Botanical Garden Contract provided for the sale of 300 Vanilla Orchids to be delivered CIF Oceanside on 23 January 2024. Respondent had requested greater flexibility concerning the delivery dates as it was building new, solar-powered greenhouses specifically for the very sensitive Vanilla Orchid. While these greenhouses were to be delivered in January, Respondent wanted to be able to accommodate the risk of eventual delays, which later materialized. In return for that flexibility as to the time of delivery Respondent was willing to organize the shipment of the goods, as one of the few carriers with the necessary equipment and expertise to ship the sensitive Vanilla Orchids belonged to the same group of companies as Respondent, which thus got very favorable condition. For the transport of the Vanilla Orchids, special climatized transport boxes have to be used, which, depending on their size, can either take 100 or 150 orchids each. Given the limited number of those special boxes available, it is very difficult to organize transport on short notice. The relevant transportation contracts are normally concluded at least 4 - 6 months before the actual delivery.

In relation to the quantity tolerance, Mr. Albius stated in para. 4 of his witness statement:

> "I am not entirely certain who had suggested the quantity tolerance which I then included into my proposal of 22 August 2022. In the end, it seemed beneficial as a safeguard against both natural production and transport losses, as well as against the non-availability of sufficient transportation capacity."

Following the inclusion of the Vanilla Orchid in Appendix I with immediate effect, the delivery of the Vanilla Orchids contracted for was only possible if Respondent provided the necessary import permit.

On 10 February 2024, Respondent's Mr. Albius informed Claimant's Mr. Haarmann via telephone that it

- would be impossible to obtain the import permit within the period required to meet the planned delivery date on 27 March 2024, and
- very doubtful that delivery could take place at all.

In light of Respondent's earlier assurances, Mr. Haarmann was surprised by that information. He made clear to Mr. Albius that Claimant had only limited space in its own greenhouses and had to deliver the Vanilla Orchids before mid-May either to Darwin Natural Food or to another customer, given their flowering period in June/July. In case of the delivery to another customer, Claimant would then only be able to deliver orchids to Darwin Natural Food by the end of the year. Mr. Albius promised to take that information into account and get back to Claimant as soon as possible.

The next day, Mr. Haarmann discussed the call with Claimant's CEO. Ms. Theophrastos was not surprised by the developments, taking into account existing rumours that the newly appointed CEO of Darwin Natural Food was considering discontinuing its vanilla activities in light of the pressure from the environmental groups and the resulting serious reputational damages inflicted on its other business. She requested Mr Haarmann to contact other customers, in particular, Herbal Cosmetics, to enquire whether they would be interested in purchasing the available orchids.

Herbal Cosmetics, based in Ruritania, launched in 2021 a luxury cosmetic line under the name of "Vanilla Flowers", relying on flavour compounds of the Vanilla Orchid. In light of the unexpected success of the line and unsatisfied demand, Herbal Cosmetics contacted Orchis in December 2021 and tried to buy a larger quantity of Vanilla Orchids for delivery as early as possible. In addition to an initial delivery of 1000 plants in 2023 at a fixed price of 2,300 USD per piece, primarily for research purposes, Herbal Cosmectics and Claimant had entered into a contract in January 2022 for the delivery of 4,000 Vanilla Orchids in December 2024 "at the market price of 1 October 2024". These orchids were to be produced by Orchis Worldwide from new cuts and were supposed to flower for the first time in June/July 2025. During the initial discussion in December 2021, but also later on several occasions, Herbal Cosmetics had made clear that it would be interested in buying larger quantities should such become available, even on short notice, given that the demand for its orchid-based cosmetics exceeded production by far.

On 12 February 2024, Mr. Haarmann contacted Mr. Ayur Veda, the purchase manager of Herbal Cosmetics and informed him about the potential availability on short notice of a delivery of 3000 +/- 10% Vanilla Orchids ready to flower in June/July 2024.

On 15 February 2024, an oral agreement was reached upon the delivery of 3,200 orchids +/- 5%, FCA Capital City, on 15 April 2024, for a price of 1,000 USD per orchid. Upon Herbal Cosmetic's request, the price per orchid was 100 USD lower than the last recorded market price of 1 February 2024 of 1,100 USD to reflect the disruption caused by such a delivery on very short notice and the risk that, due to the lack of sufficient personnel for the pollination, fewer orchid beans would be produced.

For the payment of that delivery, it was agreed that the 30% down payment in the amount of 2,500,000 USD under the January 2022 contract would be used, and the remainder would be paid against documents. Furthermore, upon delivery of the Vanilla Orchids in April 2024, Herbal Cosmetics would make a further down payment in the amount of 1,000,000 USD for the further deliveries in December 2024.

Concerning the number of orchids to be delivered in December 2024, it was agreed that, in light of the Vanilla Orchids already received in April, Herbal Cosmetics would only be

obliged to take another 2,000 Vanilla Orchids in December, while for the remaining 2,000, it would receive an option for their delivery. That option would have to be exercised by 10 October 2024 at the latest. Upon exercise of the option, a further down payment would be due, ensuring that overall an amount of 30% of the final sum due for the 4,000 Vanilla Orchids was received. The remainder of the 2022 contract, based on the Claimant's model contract, was to remain in force.

On the same day, the Equatorianian Business Gazette reported that Darwin Natural Food made the decision to search for a purchaser of its spice line and to discontinue until then its vanilla activities.

On 1 March 2024, following the confirmation about a possible sale of the spice business and further unsuccessful negotiations, Claimant finally terminated the contract with Respondent on 1 March 2024.

On 15 April 2024, Claimant delivered 3,300 Orchids to Herbal Cosmetics as a cover sale concluded with them after Herbal Cosmetics had provided import permits issued by the governmental authorities in Ruritania. The price per Vanilla Orchid was 1,000 USD, and thus half of the price which Respondent would have been required to pay.

Claimant has claimed the difference (USD 3,300) between the price paid by Herbal Cosmetics for the 3,300 orchids delivered on 15 April 2024 (1,000 USD) and the price which had been agreed in the Agreement between the Parties (2,000 USD) as damages pursuant to Article 75 CISG.

2. Arguments

Claimant bases its damage claim for 3,300,000 USD primarily on Article 75 CISG, as it "does not want to open its books for Respondent" (PO2 para.38). If teams consider that the information provided would justify a damage claim under a different CISG provision, they are free to argue that.

Claimant considers the sale of the 3,300 Orchids to Herbal Cosmetics as a cover sale in the sense of Article 75 CISG. Article 75 provides (emphasis added):

> "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"

Despite the requirement of Article 75 CISG to conclude the substitute transaction after the avoidance of the contract, Claimant may argue that it had rightfully concluded a cover sale prior to the formal avoidance of the contract, because at the time of the cover sale, it was already apparent Respondent would not perform its obligations under the Agreement. Moreover, such a proactive approach in consistent with Article 77 CISG imposing the duty to mitigate damage.

Respondent contests the application of Article 75 CISG to the oral sales agreement concluded with Herbal Cosmetics on 15 February 2024. First, the agreement was

reached nearly two weeks before the contract with Respondent was avoided on 1 March 2024. Article 75 applies only to sales concluded after the avoidance of the contract. Second, the transaction consisted to a large extent of merely bringing forward the delivery under an existing contract. In essence, Herbal Cosmetics merely brought forward the delivery under the already existing contract in exchange for a very favourable price. If there was a cover sale, it would have been the sale concluded on 2 October 2024. Under that transaction, Claimant made a gain in comparison to the original contract with Respondent.

Furthermore, in Respondent's view, only the lowest number of Vanilla Orchids to be delivered under the Agreement can be taken into account for the calculation of damages under Article 75 CISG and not the highest number as done by Claimant. Contrary to Claimant's contention Respondent had the right to determine the exact number of Vanilla Orchids to be delivered. The Parties agreed in their contract that Respondent would determine the exact time for delivery within the agreed period and would organize the transport. That naturally also entailed the right to determine the exact amounts to be delivered.

Teams may raise arguments concerning the commercial reasonableness of the sale, in particular whether the cover sale price, which was set at half the contractual price provided in the Agreement, was reasonable. Given the last recorded market price at the time (1,100 USD), the short notice of the sale and its urgency the argument is difficult to make.

Some teams may invoke Article 72 CISG to claim that Claimant was entitled to avoid the Agreement as early as on 10 February 2024 due to the Respondent's anticipatory breach. Teams pursuing this argument must be prepared to demonstrate not only that Respondent would have committed a fundamental breach, but also that the Claimant duly notified avoidance as required by Article 26 CISG.

In discussing the applicability of Article 75, notwithstanding the fact that the Agreement was only officially terminated on 1 March 2024, the following factors may play a role

- urgency of the sale, giving the need to deliver the orchids before the end of May to avoid a loss of value of 30% due to a first flowering
- statements by Mr. Albius during a telephone conversation on 10 February that
    - it would be unlikely that an import permit could be obtained not only for the original delivery date, but at all
    - he would take into account the information provided by Mr. Haarmann and get back with a final decision as soon as possible (final and serious refusal to perform?)

In discussing whether the delivery of the 3,300 Orchids was merely the bringing forward of an existing contractual obligation, the following factors may be relevant

- the number of orchids to be delivered within the amount contracted for under the 2022 agreement has changed, as well as other essential terms such as delivery time and price
- use of funding provided under the 2022 agreement for payment of the delivery

In discussing whether the damages should be calculated on the basis of the highest, lowest or specified quantity to be delivered under the Agreement, the following factors may play a role

- changes made to the delivery terms and their background
- express regulation of the right to determine the time for delivery / no specific rule on who determines the quantity
- problems with organizing the transport.