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TWENTY-THIRD ANNUAL  
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
HONG KONG – 15 MARCH TO 22 MARCH 2026

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**MEMORANDUM FOR CLAIMANT**



**UNIVERSITY OF ZURICH**  
**ARB1991/25/VIS**

ON BEHALF OF:

Orchis Worldwide Ltd

Orchid Bee Drive

Capital City

Mediterraneo

**CLAIMANT**

AGAINST:

Darwin Natural Food plc

Louis Liger Avenue 1704

Oceanside

Equatoriana

**RESPONDENT**



# Academic Integrity and Artificial Intelligence Disclosure Statement

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**COUNTRY:** Switzerland

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		

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We have used AI enhanced <b>translation tools</b> to translate sources relevant for our work on the Moot Problem.	X		
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We hereby certify the truthfulness of our statements, and confirm that we have not used AI applications in any other way in preparing the submission of this memorandum.

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## Index of Abbreviations

AC Opinion	Advisory Council Opinion
AMA	Arbitration-Mediation-Arbitration
ARB	Arbitration
Article	Article(s)
ASA Bulletin	Swiss Arbitration Association Bulletin
AUS	Commonwealth of Australia
AUT	Republic of Austria
BEL	Kingdom of Belgium
BCDR	Bahrain Chamber for Dispute Resolution
BGB	Bürgerliches Gesetzbuch (German Civil Law Book)
BGE/BGer	Decision of the Swiss Federal Tribunal
CAD	Republic of Canada
cf.	<i>con fer</i> (lat. compare)
ch.	chapter
CIETAC	China International Economic and Trade Arbitration Commission
CISG/CVIM	United Nations Convention on Contracts for the International Sale of Goods, 1980
CLAIMANT	Orchis Worldwide Ltd
CO	Swiss Code of Obligations
Conf.	Conference
Corp.	Corperation
CRCICA	Cairo Regional Centre for International Commercial Arbitration
ed.	edition
Ed./Eds.	Editor/Editors
e. g.	<i>exempli gratia</i> (lat. for example)
ENG	England and Wales (Jurisdiction within the United Kingdom)
ESP	Kingdom of Spain



et al.	<i>et alii</i> (lat. and others)
et seq./seqq.	<i>et sequentes</i> (lat. and the following)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FCA	Free Carrier
FRA	French Republic
GER	Federal Republic of Germany
GmbH (& Co KG)	Gesellschaft mit beschränkter Haftung (& Compagnie Kommanditgesellschaft; German company with limited liability)
GRE	Greece
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ibid.	<i>ibidem</i> (lat. in the same source)
ICC	International Chamber of Commerce
ICCA	International Congress and Convention Association
ICCA Report	ICCA Report No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, 2018
ICC Rules 2021	Arbitration Rules 2021 of the International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
LCIA	London Court of International Arbitration
LCIA Rules 2020	Arbitration Rules 2020 of the London Court of International Arbitration
Ltd	Private Company Limited
MKAC	Tribunal of international Commercial Arbitration of the Russian Federation Chamber of Commerce and Industry
Ms.	Miss
NLD	Kingdom of the Netherlands



No.	number
NoA	Notice of Arbitration
N.V.	(Aruban) Public limited liability company
p./pp.	page(s)
para./paras.	paragraph(s)
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles of International Commercial Contracts 2016
plc	Public limited company
Practice Note	SIAC Practice Note on Arbitrator Conduct in Cases involving External Funding (PN – 01/17, 31 March 2017)
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
Pty Ltd	(Australian) Proprietary Limited Company
Pte Ltd	(Singaporean) Private Limited Company
RESPONDENT	Darwin Natural Food plc
RNoA	Response to the Notice of Arbitration
S.A.	Sociedad Anónima/Société anonyme (Spanish/French limited company)
SCC	Stockholm Chamber of Commerce Arbitration Institute
SchiedsVZ	Zeitschrift für Schiedsverfahren
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre
SIAC Rules 2016	Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 6th Edition, 1 August 2016
SIAC Rules 2025	Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 7th Edition, 1 January 2025
SIMC	Singapore International Mediation Centre
SGP	Republic of Singapore
Srl	Limited liability Company
SUI	Swiss Confederation



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SWE	Sweden
TRAFFIC	Trade Records Analysis of Flora and Fauna in Commerce
UN	United Nations
UNICITRAL	United Nations Commission On International Trade Law
UNICITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
USD	United States Dollar
VIAC	Vienna International Arbitral Centre
Vol.	Volume
v.	<i>versus</i> (lat. against)
WA Pty Ltd	Western Australian Propriety Limited Company



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CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973
CITES Conf. 11.11	Resolution of the Conference of the Parties on the Regulation of trade in plants (Conf. 11.11)
Danubian Arbitration Law	Danubian Arbitration Law (verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration, 1985, with the 2006 amendments)
IBA Rules	International Bar Association Rules on the Taking of Evidence, 2020
ICC Rules 2021	Arbitration Rules 2021 of the International Chamber of Commerce
Incoterms® 2020	Incoterms® 2020 Rules by the International Chamber of Commerce (ICC)
LCIA Rules 2020	Arbitration Rules 2020 of the London Court of International Arbitration
PICC	UNIDROIT Principles of International Commercial Contracts, 2016
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## Statement of Facts

The parties to the present arbitration (“**Arbitration**”) are Orchis Worldwide Ltd (“**CLAIMANT**”) and Darwin Natural Food plc (“**RESPONDENT**”, together “**Parties**”). CLAIMANT, based in Mediterraneo, is a medium-sized company specialised in the growing and sale of orchids, in particular the Vanilla Planifolia Mediterraniensis (“**Vanilla Orchid**”). RESPONDENT, based in Equatoriana, is part of a group of companies that is one of the largest producers of natural food and spices.

On **1 December 2021**, CLAIMANT and the Botanical Garden in Equatoriana (“**Botanical Garden**”) entered into a sales agreement for 300 Vanilla Orchids (“**Original Sales Agreement**”). In **2022**, Botanical Garden and the Original Sales Agreement were taken over by RESPONDENT.

On **25 August 2022**, CLAIMANT and RESPONDENT replaced the Original Sales Agreement by contracting for the sale of 3,000 (+/- 10%) Vanilla Orchids at a price of 2,000 USD per orchid with delivery between 1 January and 31 March 2024 (“**Sales Agreement**”).

In **September 2023**, the Standing Committee of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“**CITES**”) suggested that the Vanilla Orchid be subject to an import permit in the following year.

On **1 November 2023**, a meeting at management level took place where the Parties discussed alternative delivery dates in **November 2023** or early **January 2024**. On **1 December 2023**, RESPONDENT informed CLAIMANT that it would only be able to take delivery on 27 March 2024.

On **1 February 2024**, the Conference of the Parties of CITES decided to introduce an import permit requirement for the Vanilla Orchid. On **10 February 2024**, RESPONDENT informed CLAIMANT that it could not obtain the necessary import permit for the agreed delivery date.

On **15 February 2024**, CLAIMANT concluded a substitute transaction (“**Cover Sale**”) with Herbal Cosmetics (“**Herbal Cosmetics**”). On **1 March 2024**, CLAIMANT avoided the Sales Agreement. On 15 May 2024, CLAIMANT delivered 3,300 Vanilla Orchids to Herbal Cosmetics at a price of 1,000 USD per orchid.

On **19 December 2024**, CLAIMANT initiated the proceedings by filing the notice of mediation to the Singapore International Mediation Centre (“**SIMC**”).



## Summary of Argument

**Issue A: The SIAC Rules 2016 apply to this Arbitration**, since RESPONDENT is bound by the Arbitration Agreement as contained in the Original Sales Agreement under the principle of separability. Therefore, the Parties' intent was to apply the Arbitration Rules of the Singapore International Arbitration Centre, 6<sup>th</sup> edition 1 August 2016 ("**SIAC Rules 2016**") to the Arbitration as both the subjective and objective interpretation lead to this conclusion. Moreover, since the Parties agreed on a single dispute resolution procedure starting with mediation, the proceedings were commenced with CLAIMANT's request for mediation on 19 December 2024.

**Issue B: The Tribunal should not order disclosure of CLAIMANT's Funding Agreements** as the prerequisites under the SIAC Rules 2016 are not met. First, the Funding Agreements are neither relevant to the case nor material to its outcome. Second, RESPONDENT fails to substantiate its request for disclosure of CLAIMANT's Funding Agreements and therefore, conducts a fishing expedition. Third, even if the SIAC Rules 2025 were to apply to this Arbitration, the Tribunal should exercise its discretion to refuse disclosure of CLAIMANT's Funding Agreements. Finally, in any case, CLAIMANT's Funding Agreements are protected by confidentiality.

**Issue C: CLAIMANT is entitled to damages** under Article 61(1)(b) CISG in conjunction with Article 74 – 77 CISG due to RESPONDENT's refusal to take delivery. RESPONDENT's liability is not excused under Article 79 CISG because the import permit requirement is no impediment beyond control. Even if the import permit requirement constituted an impediment beyond control, it was foreseeable at the time of contract conclusion. What is more, RESPONDENT could have reasonably avoided or overcome the import permit requirement by accepting earlier delivery, applying for an anticipatory import permit or reselling the goods. Lastly, there is no causal link between RESPONDENT's non-performance and the alleged impediment beyond control.

**Issue D: The damages amount to the difference between the price under the Sales Agreement and the Cover Sale price.** The damages must be calculated according to Article 75 CISG. First, the Cover Sale for 3,300 Vanilla Orchids constitutes a substitute transaction under Article 75 CISG because it has a sufficient temporal and material connection to the Sales Agreement. Second, CLAIMANT was entitled to conclude the Cover Sale after RESPONDENT's refusal to take delivery. Alternatively, 3,300,000 USD could still be recovered under Article 74 CISG.



## A. THE SIAC RULES 2016 APPLY TO THIS ARBITRATION

- 1 CLAIMANT initiated the Arbitration based on an arbitration agreement (“**Arbitration Agreement**”) held in Clause 15 of the Parties’ Sales Agreement. The Arbitration Agreement provides that “*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 **current** Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”)*” (*emphasis added; Exh. C 3, p. 13, Clause 15*).
- 2 The Arbitration Agreement included in the Sales Agreement originates from the Original Sales Agreement (*PO 2, p. 56, para. 8*). This Original Sales Agreement was concluded on 1 December 2021 between Botanical Garden and CLAIMANT (*Exh. R 1, p. 36, para. 2; NoA, p. 3, para. 6*). On 15 June 2022, RESPONDENT notified CLAIMANT of its takeover of Botanical Garden, including the Original Sales Agreement (*Exh. C 2, p. 9*). Pursuant to Clause 1.2 of the Original Sales Agreement, the obligations thereunder extend to the successors of Botanical Garden and CLAIMANT (*PO 2, p. 56, para. 8; cf. Exh. C 3, p. 10, Clause 1.2*). Consequently, RESPONDENT became bound to the Original Sales Agreement, including the Arbitration Agreement contained therein (*ibid.*).
- 3 On 25 August 2022, the Parties concluded the Sales Agreement for the delivery of 3,000 (+/- 10%) Vanilla Orchids, which incorporated the Arbitration Agreement of the Original Sales Agreement (*Exh. C 3, pp. 10 et seqq.; NoA, p. 3, para. 9; cf. PO 2, p. 56, para. 8*). Hence, the Arbitration Agreement and its meaning remained unchanged and were transferred verbatim into the Sales Agreement.
- 4 Yet, instead of adhering to the Arbitration Agreement, RESPONDENT now argues that the SIAC Rules 2025 apply to the Arbitration. Notwithstanding this argument, RESPONDENT remains bound by the Arbitration Agreement as concluded between Botanical Garden and CLAIMANT, as it constitutes a separate contract [I]. Consequently, by referring to the “*current*” SIAC Rules the Parties agreed to arbitrate under the SIAC Rules 2016 [II]. In addition, CLAIMANT initiated the Arbitration at a time when the SIAC Rules 2016 were in force; namely, on 19 December 2024 [III].

### I. RESPONDENT Is Bound by the Arbitration Agreement As Concluded Between CLAIMANT and Botanical Garden

- 5 Under the principle of separability, RESPONDENT is bound by the Arbitration Agreement as concluded between Botanical Garden and CLAIMANT because it remained unaffected by the



transition from the Original Sales Agreement to the Sales Agreement.

- 6 As a generally accepted concept in international arbitration, the principle of separability holds that an arbitration clause is separate from its underlying substantive contract (*BGE 119 II 380 [SUI 1993], para. 4(a); ICC Case 8938 [ICC 1996], para. 4; BORN, ch. 3.01*). As such, an arbitration agreement constitutes an independent contract that may survive the termination of the main contract in which it was embedded (*Pipeline Services v. ATCO Gas Australia [AUS 2014], para. 42; BLACKABY/PARTASIDES/REDFERN, para. 2.107*). Consequently, if a contract containing an arbitration agreement is terminated and replaced by a new contract, the arbitration agreement extends to the new contract, unless the parties have agreed otherwise (*ICC Case 9473 [ICC 2001]; SCC Case 2018/102 [SCC 2019], paras. 20, 23, 24; cf. Belgorkhimprom v. Koca [SWE 2019], paras. 22-23*).
- 7 In the case at hand, the Parties terminated the Original Sales Agreement and replaced it with the Sales Agreement (*PO 2, p. 56, para. 8; Exh. C 3, p. 10*). Yet, they did not explicitly agree to terminate the Arbitration Agreement (*PO 2, p. 56, para. 8*). Thus, according to the principle of separability, the termination of the Original Sales Agreement and its replacement with the Sales Agreement did not in any way influence the Arbitration Agreement. Also, RESPONDENT affirmed that all unchanged provisions of the Original Sales Agreement, including the Arbitration Agreement, were acceptable as they stood (*PO 2, p. 56, para. 8*).
- 8 Nor do the surrounding circumstances suggest a termination of the Arbitration Agreement. The Parties established a mark-up version of the Sales Agreement highlighting the differences between the Original Sales Agreement and the Sales Agreement (*Exh. C 3, pp. 10 et seq.; PO 2, p. 56, para. 8*). The Parties neither highlighted nor discussed any amendment of the Arbitration Agreement in the mark-up version (*Exh. C 3, p. 13, Clause 15; PO 2, p. 56, para. 8*). It is undisputed and RESPONDENT itself affirms that the Sales Agreement solely modified substantive issues, such as the price, the quantity of Vanilla Orchids and the delivery terms of the goods (*RNoA, pp. 31 et seq., paras. 5 et seq.; PO 2, p. 56, para. 8*). Therefore, the Arbitration Agreement is a verbatim adoption of the Arbitration Agreement contained in the Original Sales Agreement (*Exh. C 3, p. 13, para. 13, Clause 15*).
- 9 In conclusion, RESPONDENT remains bound to the Arbitration Agreement as contained in the Original Sales Agreement as the Parties neither implicitly nor explicitly terminated it.

## II. The Parties Agreed to Arbitrate Under the SIAC Rules 2016

- 10 The Parties agreed in the Arbitration Agreement to arbitrate under the SIAC Rules 2016.



- 11 To determine which version of the SIAC Rules applies to an arbitration, the relevant agreement must be interpreted (*LIN/LO/LO*, p. 4; *SHACKELFORD*, p. 908). According to PO 1, the CISG applies to the interpretation of arbitration clauses contained in sales contracts governed by the CISG (*PO 1*, p.53, para. 5). The Parties agreed that the Sales Agreement, including the Arbitration Agreement, is governed by the CISG (*PO 1*, p. 52, para. II). Therefore, the CISG applies to the Arbitration Agreement's interpretation.
- 12 The interpretation of an agreement under the CISG is governed by Article 8 CISG, which provides for a subjective and an objective interpretation (*ACHILLES*, Article 8, para. 1; *MELIS*, Article 8, para. 3). Under the subjective interpretation, an arbitral tribunal must interpret a contract clause according to the parties' real intent (*Article 8(1) CISG*; *CISG-online 1798 [ESP 2007]*, para. 107; *SCHMIDT-KESSEL*, Article 8, para. 21). If the parties' real intent cannot be determined, an arbitral tribunal will turn to the objective interpretation and interpret a contract clause pursuant to the understanding of a reasonable person in the parties' shoes (*Article 8(2) CISG*; *CISG-online 1278 [USA 2006]*, para. 7; *MANKOWSKI*, Article 8, para. 12;). When interpreting a contract clause, an arbitral tribunal shall examine all relevant circumstances of the case (*Article 8(3) CISG*; *WITZ*, Article 8, para. 11).
- 13 In the case at hand, the Parties' real intent was to apply the SIAC Rules 2016 to the Arbitration Agreement [1]. A reasonable third party in CLAIMANT's shoes would equally expect to arbitrate under the SIAC Rules 2016 [2].

### **1. The Parties' Real Intent Was to Apply the SIAC Rules 2016 to the Arbitration**

- 14 According to a subjective interpretation of the Arbitration Agreement, the Parties' real intent was to apply the SIAC Rules 2016 to the Arbitration.
- 15 The starting point of any interpretation pursuant to Article 8(1) CISG is the wording of the agreement (*Buyer v. Seller [VIAC 2020]*, para. 2.2.1.1; *BRUNNER/HURNI/KISSLING*, Article 8, para. 14). To determine the true meaning of an agreement, the negotiations leading up to its formation must be examined (*Article 8(3)*; *CISG-online 2425 [SUI 2011]*, para. 15; *SCHMIDT-KESSEL*, Article 8, para. 31;). Subsequently, an agreement should be interpreted in light of the meaning it had at the time it was concluded (*FERRARI*, p. 187).



- 16 In the present dispute, Ms. Goble, Chief Contract Officer of Botanical Garden, drafted the Arbitration Agreement during the negotiations leading up to the conclusion of the Original Sales Agreement between Botanical Garden and CLAIMANT (*Exh. C 1, p. 8, para. 8; Exh. C 7, p. 21*).
- 17 The Original Sales Agreement was primarily based on a template of CLAIMANT used for the sale of orchids (*Exh. C 1, p. 8, para. 7*). Nevertheless, Botanical Garden persisted on individually negotiating the Arbitration Agreement to satisfy its internal compliance requirements (*Exh. C 1, p. 7, para. 7; Exh. C 7, p. 21*). Botanical Garden was only willing to submit to the rules of a foreign arbitration institution, with seat outside of its home jurisdiction, after a cautious review of those rules and a prior board approval (*Exh. C 7, p. 21*). Consequently, Ms. Goble examined the SIAC Rules 2016 that were in force at that time and decided that this “*current version*” of the SIAC Rules was acceptable to Botanical Garden (*Exh. C 1, p. 8, para. 8; Exh. C 7, p. 21*).
- 18 Accordingly, Ms. Goble, with her professional experience as Chief Contract Officer, decided to add a reference to the “*current*” SIAC Rules in the Arbitration Agreement (*Exh. C 3, p. 13, para. 15*). The wording “*current*” referred to the SIAC Rules she had read, namely, the SIAC Rules 2016 (*PO 2, p. 56, para. 7*). CLAIMANT accepted the Arbitration Agreement and its reference to the SIAC Rules 2016 without further discussions (*Exh. C 1, p. 8, para. 8; PO 2, p. 56, para. 7*). Thus, Botanical Garden and CLAIMANT agreed to arbitrate under the SIAC Rules 2016.
- 19 As demonstrated above, RESPONDENT remains bound to the Arbitration Agreement negotiated between Botanical Garden and CLAIMANT (*see paras. 5 et seqq.*). Therefore, by taking over the Arbitration Agreement, RESPONDENT consented to arbitrate under the SIAC Rules 2016.
- 20 In conclusion, the Parties’ real intent was to apply the SIAC Rules 2016 to the Arbitration.

## **2. A Reasonable Third Party in CLAIMANT’s Shoes Would Expect to Arbitrate Under the SIAC Rules 2016**

- 21 Even if the Parties’ intent cannot be determined through a subjective interpretation, an objective interpretation would demonstrate that a reasonable third party in CLAIMANT’s shoes would expect to arbitrate under the SIAC Rules 2016.
- 22 If parties conclude identical arbitration clauses in different contracts and these clauses are not subject to scrutiny during negotiations, it is reasonable for a third party to expect that the arbitration clauses have the same meaning (*cf. CISG-online 1720 [GER 2007], para. 35*).
- 23 As established above, the arbitration clause in the Original Sales Agreement and the Sales



Agreement is identical (*see para. 8*). After the takeover of Botanical Garden, RESPONDENT obtained access to its email servers (*PO 2, p. 56, para. 6*). The servers contained Ms. Goble's email approving the applicability of the SIAC Rules 2016 to the Arbitration Agreement (*Exh. C 7, p. 21; PO 2, p. 56, para. 6*). However, even after obtaining access to the servers, RESPONDENT remained silent. Thus, a reasonable third party would expect to apply the SIAC Rules 2016.

24 Furthermore, if institutional arbitral rules are changed after the conclusion of an arbitration agreement, the arbitral tribunal must consider whether the parties could have reasonably foreseen to arbitrate under the modified rules (*LIN/LO/LO, p. 9; SHACKELFORD, p. 912*). It is accepted that the parties could not have foreseen modifications that fundamentally reshape the proceedings (*Komplex v. Voest-Alpine Stahl A9 [SUI 1990], para. 4(c)*). For instance, institutional arbitral rules only apply newly introduced proceedings to arbitration agreements concluded after the revised rules have come into force (*cf. Rule 29(6)(a) ICC Rules 2021; cf. Article 9.16 LCIA Rules 2020*). Following this rationale, fundamental changes cannot retrospectively become part of the parties' arbitration agreement, as they did not exist at the time of contract conclusion (*GREENBERG/MANGE, p. 200; LIN/LO/LO, p. 5*).

25 In the case at hand, the SIAC Rules 2025 reshape the arbitration proceedings fundamentally. They introduce several new proceedings, such as the coordinated procedure and the streamline procedure (*Rule 17 SIAC Rules 2025; Rule 13 SIAC Rules 2025; SIAC Highlights, pp. 1 et seq.*). The former facilitates the coordinated resolution of multiple arbitrations regarding a common question of law or facts, while the latter guarantees faster and more cost-efficient proceedings (*ibid.*). Besides that, the scope for expedited procedures and the emergency arbitrator procedures have been extended (*Rule 14 SIAC Rules 2025; Rule 12.1 SIAC Rules 2025; HANOTIAU SIAC, pp. 35 et seqq.*). The Parties could not have foreseen such fundamental changes at the time of conclusion of the Sales Agreement. Thus, a reasonable third party would expect to apply the SIAC Rules 2016.

26 In conclusion, pursuant to an objective interpretation of the Arbitration Agreement, a reasonable third party in CLAIMANT's shoes would expect to apply the SIAC Rules 2016 to the Arbitration.

### **III. CLAIMANT Initiated the Arbitration Under the SIAC Rules 2016**

27 The Parties agreed on a single dispute resolution procedure starting with a request for mediation [1]. CLAIMANT filed its request for mediation before the SIAC Rules 2025 entered into force [2].



## 1. The Parties Agreed to Commence the Proceedings With a Request for Mediation

28 The Parties agreed to resolve any dispute governed by the Arbitration Agreement in a single dispute resolution procedure that commences with a request for mediation.

29 The combined use of mediation and arbitration as a single dispute resolution procedure is subject to the SIAC-SIMC Arbitration-Mediation-Arbitration Protocol (“**AMA Protocol**”) (*Schedule 1, pp. 46 et seqq. SIAC Rules 2016*). The commencement of the proceedings under the AMA Protocol interrupts the statute of limitations (*Schedule 1, p. 46, para. 2 SIAC Rules 2016; cf. Article 10.6 PICC*). Any settlement reached under the AMA Protocol may be turned into an enforceable arbitral award (*Schedule 1, p. 47, para. 9 SIAC Rules 2016*). The parties are generally free to deviate from the AMA Protocol and amend the prescribed procedure (*cf. BOOG, p. 96*). Where the parties have explicitly agreed on a hybrid dispute resolution, it is reasonable to regard mediation and arbitration as a single dispute resolution procedure (*Hercus v. Hercus [CAD 2001], para. 142; Heartronics Corporation v. EPI Life [SGP 2017], paras. 78, 111*).

30 When drafting the Arbitration Agreement, Botanical Garden and CLAIMANT intended to adopt a single dispute resolution procedure, which is a revised version modelled after the AMA Protocol (*Exh. C 7, p. 21; PO 2, p. 56, para. 7*). In effect, Botanical Garden and CLAIMANT agreed to a mediation-arbitration procedure (*ibid.*). The mediation proceedings should constitute an integral part of the Arbitration with the possibility to turn any settlement into an enforceable award (*Exh. C 1, p. 8, para. 8; Exh. C 3, p. 13, Clause 15; PO 2, p. 56, para. 7*). It was essential for Ms. Gobley that the first step of the proceedings would interrupt the statute of limitation which she communicated to CLAIMANT (*Exh. C 7, p. 21*). Consequently, Botanical Garden and CLAIMANT agreed that the request for mediation, as the first step of the single dispute resolution procedure, constitutes the commencement of the arbitration proceedings (*ibid.*). As established above, RESPONDENT is bound by this Arbitration Agreement (*see para. 5 et seqq.*).

31 In conclusion, the Parties agreed on a single dispute resolution procedure commencing with a request for mediation.

## 2. CLAIMANT Filed its Request for Mediation before the SIAC Rules 2025 Came into Force

32 CLAIMANT filed its request for mediation on 19 December 2024, which falls within the temporal scope of application of the SIAC Rules 2016.



- 33 According to Rule 3.3 SIAC Rules 2016, the receipt of the notice of arbitration by the SIAC Registrar (“**Registrar**”) commences the arbitration (*Rule 3.3 SIAC Rules 2016*). Nevertheless, the parties themselves can also agree which steps are necessary to effectively start the proceedings and when the arbitration begins according to the Danubian Arbitration Law, a verbatim adoption of the UNCITRAL Model Law (*PO 1, p. 54, para. 4; Article 21 UNCITRAL Model Law, LEW/MISTELIS/KRÖLL, para. 20-25*). When it comes to a conflict between the applicable arbitration rules and the parties’ arbitration agreement, the latter prevails (*BNP and BNQ v. BNR [SGP 2017], para. 4*).
- 34 In the present case, the Parties agreed to start the proceedings with a request for mediation (*see paras. 28 et seqq.*). Accordingly, it is this agreement between the Parties and not Rule 3.3 SIAC Rules 2016 which is crucial for determining the commencement date.
- 35 This applies regardless of the Registrar’s decision to set the commencement date of the Arbitration on 31 July 2025 (*Email of 8 August 2025, p. 24, para. 2*). By determining the commencement date of an arbitration proceeding, the Registrar is only making an administrative decision to facilitate the SIAC’s function of administering arbitrations (*DMZ v. DNA [SGP 2025], para. 43*). Hence, the Registrar will set a commencement date without assessing the facts of the case and any prior hearing from the parties (*DMZ v. DNA [SGP 2025], paras. 45, 49*). Such administrative decisions do not affect a tribunal’s power to decide on the issues in dispute (*BERGER, para. 17-7 et seq.; BORN, ch. 13.03(D); GERBAY, p. 118*). Consequently, decisions of the Registrar are without prejudice to a tribunal’s power to decide on the applicable arbitration rules (*cf. ICSID Case ARB/22/23 [ICSID 2023], para. 8*).
- 36 In the present dispute, it is disputed whether the SIAC Rules 2016 or the SIAC Rules 2025 apply to the Arbitration (*cf. RNoA, p. 34, para. 17*). The Tribunal has the power to determine the applicable SIAC Rules without being bound by the Registrar’s decision of 8 August 2025 (*cf. PO 1, p. 52, para. III(1)(a)*). Therefore, given the revised version of the AMA-Protocol adopted by the Parties (*see paras. 28 et seqq.*), the Tribunal should consider CLAIMANT’s request for mediation as the commencement date of the proceeding as shown above.
- 37 Thus, since the SIAC Rules 2025 only apply to arbitrations commenced on or after 1 January 2025 (*Rule 1.5 SIAC Rules 2025*) and CLAIMANT filed its request for mediation on 19 December 2024 (*NoA, p. 6, para. 31*), the proceedings were initiated under the SIAC Rules 2016.



38 In conclusion, CLAIMANT initiated the arbitration proceedings with its request for mediation under the SIAC Rules 2016.

39 **Conclusion Issue A:** Pursuant to the principle of separability, RESPONDENT remains bound by the Arbitration Agreement as contained in the Original Sales Agreement. Consequently, the SIAC Rules 2016 apply to the Arbitration as both the subjective and the objective interpretation lead to this conclusion: the Parties' real intent was to apply the SIAC Rules 2016 to the Arbitration Agreement, and a reasonable third party in CLAIMANT's shoes would expect to arbitrate under the SIAC Rules 2016. As the Parties agreed on a single dispute resolution procedure starting with mediation, the proceedings were initiated on 19 December 2024 with CLAIMANT's request for mediation. Therefore, the SIAC Rules 2016 apply to this Arbitration.

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## **B. THE TRIBUNAL SHOULD NOT ORDER THE REQUESTED DISCLOSURE OF CLAIMANT'S FUNDING AGREEMENTS**

40 The Tribunal should not order the disclosure of CLAIMANT's Third-Party Funding Agreement with AtJ-Financing ("**AtJ- Financing Agreement**") and CLAIMANT's After The Event-Insurance Agreement with LitSure ("**LitSure Agreement**"), together referred to as the "**Funding Agreements**". The prerequisites for disclosure under the SIAC Rules 2016 are not met [I]. Even if the SIAC Rules 2025 were to apply to this Arbitration, the Tribunal should exercise its discretion under Rule 38 SIAC Rules 2025 to refuse disclosure [II]. In any event, the Tribunal should not order disclosure of CLAIMANT's Funding Agreements, as they are protected by confidentiality [III].

### **I. The Prerequisites for Disclosure under the SIAC Rules 2016 Are Not Met**

41 The prerequisites for disclosure of CLAIMANT's Funding Agreements under the SIAC Rules 2016 are not met. CLAIMANT's Funding Agreements are neither relevant to the case nor material to its outcome, as CLAIMANT has already disclosed all necessary information regarding its cooperation with AtJ-Financing and LitSure [1]. Furthermore, RESPONDENT conducts a fishing expedition by requesting disclosure of CLAIMANT's Funding Agreements [2].

#### **1. The Funding Agreements Are Not Relevant to the Case or Material to Its Outcome**

42 CLAIMANT is not obliged to disclose the Funding Agreements, as they are neither relevant to the case nor material to its outcome.

43 According to Rule 27(f) SIAC Rules 2016, a tribunal may order disclosure of any document which



it considers relevant to the case and material to its outcome. These prerequisites are consistent with Article 3(3) of the IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”) (cf. *Lao Holdings N.V. et al. v. San Marco Capital Partners LCC et al.* [SIAC 2021], para. 233; *CHOONG/MANGAN/LINGARD*, Rule 27, para. 12.20). Hence, a document is relevant to the case if it assists the requesting party in establishing its factual allegations (*KHODYKIN/MULCAHY/FLETCHER*, Article 3, para. 6.96; *MARGHITOLA*, p. 49). A document is material to the outcome of the case, if the tribunal needs it to consider the factual issues from which legal conclusions are drawn (*KAUFMANN-KOHLER/BÄRTSCH*, p. 18; *MARGHITOLA*, p. 53).

44 What is more, the SIAC Practice Note on Arbitrator Conduct in Cases involving External Funding (“**Practice Note**”) sets out standards of practice regarding the disclosure of third-party funding agreements under the SIAC Rules 2016 (*Practice Note*, para. 1). According to the Practice Note, a tribunal may order disclosure in respect of third-party funding agreements if it deems such disclosure necessary or expedient (*Practice Note*, para. 5). Under the Practice Note, both the AtJ-Financing Agreement and the LitSure Agreement qualify as third-party funding agreements (cf. *Practice Note*, paras. 3(a), 3(c)).

45 Additionally, the Tribunal may consider the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (“**ICCA-Report**”), which offers guidance on third-party funding in international commercial arbitration (*ICCA-Report*, p. 13).

46 In the present dispute, the prerequisites for disclosure according to the Practice Note and Rule 27(f) SIAC Rules 2016 are not met. First, CLAIMANT’s Funding Agreements do not raise any independence issues with any member of the Tribunal [a]. Second, a potential request for security for costs by RESPONDENT does not depend on the requested disclosure [b]. Finally, a disclosure is not necessary, as AtJ-Financing’s and LitSure’s involvement does not negatively impact the Arbitration [c].

**a. CLAIMANT’s Funding Agreements Do Not Raise any Independence Issues**

47 CLAIMANT’s Funding Agreements do not raise any independence issues regarding any member of the Tribunal.

48 A primary rationale behind the disclosure of third-party funding agreements is the preservation of the arbitral tribunal’s impartiality and independence (*SCHERRER*, p. 96; *VON GOELER*, p. 132; *ICCA Report*, p. 82). Consequently, an arbitrator must disclose any circumstances that may give rise to justifiable doubts as to his impartiality or independence, including any relationship with a third-party



funder (*Practice Note, para. 4*). To determine a potential conflict of interest, the disclosure of the mere existence and identity of the third-party funder is considered entirely sufficient (*Blair James Speers et al. v. Makemytrip Limited et al. [SIAC 2017], para. 81; cf. CHADANIAN, p. 656*).

49 In the case at hand, CLAIMANT intentionally disclosed the existence of its Funding Agreements and the identity of AtJ-Financing and LitSure in its notice of arbitration (*NoA, p. 6, para. 32*). On 10 September 2025, the members of the Tribunal became aware of CLAIMANT's Funding Agreements on receiving a copy of the notice of arbitration (*cf. Email of 10 September 2025, p. 47, para. 3.6*). The members of the Tribunal affirmed that the involvement of AtJ-Financing and LitSure does not raise any independence concerns (*PO 2, p. 58, para. 21*).

50 In conclusion, CLAIMANT disclosed all relevant information, and further disclosure is not necessary to safeguard the independence of the Tribunal.

**b. RESPONDENT's Potential Request for Security for Costs Does Not Depend on Further Disclosure**

51 The Tribunal does not need additional information regarding CLAIMANT's Funding Agreements to assess any potential request for security for costs by RESPONDENT.

52 Pursuant to Rule 27(j) SIAC Rules 2016, a tribunal may order any party to provide security for costs. For this purpose, the tribunal will examine whether there is a risk that the claimant may be unable to satisfy an adverse cost award (*CHOONG/MANGAN/LINGARD, Rule 27, para. 12.31*). In that context, disclosure of third-party funding agreements is regularly sought to clarify whether the third-party funder is liable for adverse costs (*cf. Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia, PO 14 [PCA 2013], para. 3; CHADANIAN, p. 559*). Nevertheless, the mere involvement of a third-party funder in an arbitration does not indicate anything about the financial status of the funded party (*Practice Note, para. 9*). Accordingly, a potential order for security for costs does not solely rely on the existence of third-party funding agreement and its terms (*ibid.*).

53 Alternatively, a tribunal should consider the strength of both parties' cases on a preliminary basis (*CHOONG/MANGAN/LINGARD, Rule 27, para. 12.36(a)*). Before funding a case, third-party funders will conduct a rigorous case assessment, including factual and legal enquiries on the case (*ICCA Report, p. 71; VON GOELER, p. 15*). A third-party funder will only finance a case with solid success prospectives (*SMITH/WESOLOWSKI, p. 244 et seq.; cf. ICCA Report, p. 71*).

54 In the present dispute, RESPONDENT requests further disclosure of CLAIMANT's Funding Agreements



to support a potential request for security for costs (*RNoA*, p. 34, para. 20). Nevertheless, the Tribunal already has all information necessary to consider such a request by RESPONDENT.

55 First, CLAIMANT is one of the leading producers of Vanilla Orchids, a good that continues to be in high demand because of its reputation as a “*superflower*” in both the food and pharmaceutical industries (*Exh. C 1*, p. 7, paras. 2, 6). While the state of CLAIMANT’s finances became widely known after the reporting of internal incident in its greenhouse facilities, CLAIMANT is now negotiating future deliveries of Vanilla Orchids in 2026 and 2027 (*PO 2*, p. 58, para. 20). Moreover, as part of its prudent risk management, CLAIMANT has secured support from AtJ-Financing and LitSure (*ibid.*).

56 Second, CLAIMANT has disclosed from the very beginning that it has obtained insurance for adverse cost coverage through its LitSure Agreement (*NoA*, p. 6, para. 32). Consequently, RESPONDENT’s concerns that AtJ-Financing is known to normally not provide funding for adverse cost awards (*RNoA*, p. 34, para. 19) are unjustified. CLAIMANT approached LitSure precisely because AtJ-Financing had informed it that including potential adverse cost coverage in the budget would make funding prohibitively expensive (*PO 2*, p. 58, para. 25). Hence, the Funding Agreements’ terms are not relevant.

57 Finally, the fact that LitSure and AtJ-Financing, after conducting a thorough assessment of the case, committed to provide financial support for the present claim reflects positively on CLAIMANT’s financial situation and litigation prospects.

58 Consequently, all necessary information is available for the Tribunal to assess a potential request for security for costs by RESPONDENT.

**c. AtJ-Financing’s and LitSure’s Involvement Has No Negative Impact on the Arbitration**

59 Disclosure of CLAIMANT’s Funding Agreements is not necessary since AtJ-Financing’s and LitSure’s involvement does not have any negative impact on the Arbitration.

60 Most third-party funding agreements are structured to prevent the funder from influencing the conduct of the case (*ICCA Report*, p. 28; *MÜLLER*, p. 142; *SAHANI*, ch. 11.3.2). Only in exceptional circumstances might the involvement of a third-party funder negatively affect an arbitration (*cf. ICSID Case ARB/19/19 [ICSID 2020]*, para. 35). Such circumstances arise if the third-party funding agreement does not define the exact funding amount in advance, thus obliging the funded party to



obtain approval for every procedural step (*MÜLLER, p. 142; VON GOELER, pp. 139 et seq.*). Likewise, such circumstances exist if the funding agreement grants the funder control over the timing and terms of a settlement (*ibid.*).

61 In the case at hand, none of these exceptional circumstances apply. RESPONDENT casts AtJ-Financing in a bad light, speculating that it might influence the conduct of the Arbitration (*RNoA, p. 34, para. 19*). This accusation is unfounded. First, the AtJ-Financing Agreement fixes the amount AtJ-Financing commits to the Arbitration (*PO 2, pp. 58 et seq., para. 26*). Second, it does not define any settlement thresholds that would restrict CLAIMANT's decision to accept or reject a settlement (*ibid.*). Third, it does not describe any arbitration strategy which CLAIMANT is required to pursue (*ibid.*). Lastly, there is no indication that the LitSure Agreement would negatively affect the Arbitration. Thus, the Funding Agreements contain enough safeguards to prevent AtJ-Financing and LitSure from negatively influencing the Arbitration.

62 In conclusion, disclosure is not necessary to safeguard the integrity of the proceedings, as AtJ-Financing's and LitSure's involvement does not have any negative impact on the Arbitration.

## **2. RESPONDENT Conducts a Fishing Expedition by Requesting the Disclosure of CLAIMANT's Funding Agreements**

63 RESPONDENT's request for disclosure is inadmissible as it lacks any substantiation and amounts to a fishing expedition.

64 Under Article 3(3) IBA Rules, a party seeking disclosure must demonstrate specificity, relevance and materiality of its request (*cf. Lao Holdings N.V. and Sanum Investments Limited. [SIAC 2021], para. 233*). In its request for disclosure, a party must define in sufficient detail a narrow and specific category of documents (*MARGHITOLA, p. 39*). Broad requests for "any and all documents" or vaguely relating to a topic do not meet the specificity standard (*O'MALLEY, para. 3.35*).

65 In terms of relevance and materiality, the requesting party must substantiate why the documents sought are relevant to the case and material to its outcome (*Article 3(3)(b) IBA Rules; see para. 43*). The purpose of Article 3(3) IBA Rules is to prevent fishing expeditions based on unfounded allegations (*MARGHITOLA, p. 35; RAESCHKE-KESSLER, p. 417*). Since such requests solely aim at identifying possible claims or new arguments, they are not admissible in international arbitration (*HANOTIAU, p. 358; KHODYKIN/MULCAHY/FLETCHER, para. 6.110*).

66 In the case at hand, RESPONDENT fails to define a narrow and specific category of documents. RESPONDENT requests disclosure of "the Third-Party Funding Agreement, including any ATE-



*Insurance Agreement concluded with or by ATJ-Financing or with other insurances*” (RNoA, p. 35, para. 28(b)). Accordingly, RESPONDENT is trying to access every possible existing document concerning CLAIMANT’s Funding Agreements. Hence, RESPONDENT’s request lacks the required specificity.

67 Furthermore, RESPONDENT fails to substantiate relevance and materiality of the Funding Agreements to the Arbitration. RESPONDENT’S only reason for its request for disclosure is based on vague accusations against AtJ-Financing (*see para. 61*). It portrays AtJ-Financing as a “*rough funder*”, allegedly prone to influencing the proceedings (RNoA, p. 34, para. 19). However, as shown above, this characterisation is purely speculative, and RESPONDENT disregards that the mere existence of a third-party funder does not justify disclosure (*see paras. 59 et seqq.*). Consequently, RESPONDENT presents no valid reason why disclosure is necessary for its request for security for costs (*cf. RNoA, p. 34, para. 20*). Rather, RESPONDENT admits that it solely aims to identify further damages claims reserved by CLAIMANT (RNoA, p. 34, para. 20), thereby rendering its request inadmissible.

68 In conclusion, RESPONDENT’S request for disclosure must be rejected, as it fails to substantiate its request and merely conducts a fishing expedition.

## **II. Even under the SIAC Rules 2025, the Tribunal Should Refuse Disclosure of CLAIMANT’S Funding Agreements**

69 Even if the SIAC Rules 2025 were to apply to the Arbitration, the Tribunal should use its discretion under Rule 38 SIAC Rules 2025 to refuse disclosure of CLAIMANT’S Funding Agreements.

70 According to Rule 38.4 SIAC Rules 2025, a tribunal has the discretion to order disclosure of third-party funding agreements. Rule 38 SIAC Rules 2025 was introduced to the SIAC Rules to preserve the high standards of impartiality and independence of arbitrators and the integrity of the proceedings (*SIAC Highlights, p. 3*).

71 In the present case, both the AtJ-Financing Agreement and the LitSure Agreement qualify as third-party funding agreements under the SIAC Rules 2025 (*cf. Rule 2.1 SIAC Rules 2025*). The Tribunal is not required to order disclosure of CLAIMANT’S Funding Agreements according to Rule 38 SIAC Rules 2025. CLAIMANT has complied with its disclosure obligation under Rule 38.1 SIAC Rules 2025 [1]. Additionally, CLAIMANT has disclosed the adverse costs liability provided by LitSure [2]. Finally, disclosure of LitSure’s and AtJ-Financing’s interest in the outcome of the Arbitration is not necessary [3].



### **1. CLAIMANT Complied With Its Disclosure Obligation Under Rule 38.1 SIAC Rules 2025**

72 CLAIMANT has complied with its disclosure obligation under Rule 38.1 SIAC Rules 2025.

73 Rule 38.1 SIAC Rules 2025 obliges a party to disclose the existence of any third-party funding agreement. In that case, a party has to disclose the identity of the third-party funder (*Rule 38.1 SIAC Rules 2025*). This disclosure obligation aims to safeguard a tribunal's independence (*see para. 70*).

74 In the case at hand, CLAIMANT has disclosed the existence of its Funding Agreements and the identity of LitSure and AtJ-Financing (*NoA, p. 6 para. 32*). As shown above, CLAIMANT's Funding Agreements do not raise any independence issues regarding any member of the Tribunal (*see para. 49*).

75 Therefore, CLAIMANT complied with its disclosure obligation.

### **2. CLAIMANT Has Disclosed the Adverse Costs Liability Provided by LitSure**

76 CLAIMANT has disclosed that it has obtained adverse costs liability through its LitSure Agreement.

77 Pursuant to Rule 38.4 SIAC Rules 2025, a tribunal may order disclosure in respect of whether the third-party funder has committed to undertake adverse cost liability.

78 In the present case, CLAIMANT has disclosed the adverse costs coverage provided by LitSure (*NoA, p. 6, para. 32*). Accordingly, ordering disclosure on whether LitSure and AtJ-Financing have committed to undertake adverse cost liabilities is redundant.

79 Therefore, the Tribunal should not order disclosure of CLAIMANT's Funding Agreements as CLAIMANT has already disclosed the existence of adverse costs liability provided by LitSure.

### **3. Disclosure of LitSure's and AtJ-Financing's Interest in the Arbitration Is Not Necessary**

80 The preservation of the Arbitrations' integrity does not require disclosure of LitSure's and AtJ-Financing's interest in the outcome of the Arbitration.

81 Pursuant to Rule 38.4 SIAC Rules 2025, a tribunal may order disclosure of a third-party funder's interest in the outcome of the proceedings. Nevertheless, considering the rationale of Rule 38 SIAC Rules 2025, a tribunal should only order such disclosure if it is necessary to preserve the integrity of the proceedings (*see para. 70*). Moreover, as noted by an arbitral tribunal administered under the SIAC, the disclosure of the third-party funder's interest could even negatively affect the proceedings since such details reflect how the funded party and the funder assess their chances of success (*Blair James Speers et al. v. Makemytrip Limited et al.*



[SIAC 2017], para. 81).

82 In the present dispute, there are no indications that the involvement of AtJ-Financing and LitSure would negatively influence the Arbitration (*see para. 59 et seqq.*). Furthermore, a disclosure of CLAIMANT's Funding Agreements would allow both the Tribunal and RESPONDENT to gain insight into AtJ-Financing's and LitSure's assessment of CLAIMANT's chances of success.

83 Hence, the Tribunal should refuse disclosure of AtJ-Financing's and LitSure's interest in the outcome of the Arbitration, as it is not necessary to preserve the integrity of the Arbitration.

84 In conclusion, the Tribunal should use its discretion under Rule 38 SIAC Rules 2025 to refuse disclosure of CLAIMANT's Funding Agreements.

### III. In any Case, CLAIMANT's Funding Agreements Are Protected by Confidentiality

85 In any case, the Tribunal should not order disclosure of CLAIMANT's Funding Agreements, as they are protected by confidentiality.

86 Pursuant to Rule 27(o) SIAC Rules 2016 and Rule 50.2(k) SIAC Rules 2025, a tribunal has the power to determine any claim of legal or other privilege. Claims of confidentiality are considered to fall under the scope of "other privilege" (*CHOONG/MANGAN/LINGARD, para. 12.54*). Under the SIAC framework, tribunals often take guidance from the IBA Rules when assessing a claim of confidentiality (*cf. CHOON/MANGAN/LINGARD, para. 12.53*). According to Article 9(2)(e) IBA Rules, a tribunal shall not order disclosure of any document which is protected by commercial or technical confidentiality.

87 Third-party funding agreements contain commercially confidential information when they reflect the funder's assessment of the case (*CRIVELLARO/MELCHIONDA, p. 286*). As described above, third-party funders and After The Event-insurers conduct rigorous due diligence of the factual and legal basis of a claim (*see para. 53*). The results of this case assessment are then incorporated into the formula for the calculation of the amount payable to the funder under the funding agreement (*cf. Blair James Speers et al. v. Makemytrip Limited et al. [SIAC 2017], para. 81; CRIVELLARO/MELCHIONDA, p. 286*).

88 When considering a request for disclosure, a tribunal must weigh a party's interest in preserving confidentiality against the counterparty's interest in obtaining access to potential evidence (*KHODYKIN/MULCAHY/FLETCHER, para. 12.283; cf. MARGHITOLA, p. 93*). A tribunal should refuse disclosure if producing the document is likely to cause significant damage to the party holding the



document (*KHODYKIN/MULCAHY/FLETCHER, para. 12.281*). Such significant damage could especially occur where the funding agreement specifies the formula for the calculation of the amount payable to the funder, thereby reflecting the prospects of success for the funded party (*Arroyo & Ors v. BP Exploration Company [ENG 2010], para. 48*). The disclosure of such information would equip the counterparty with a tactical advantage vis-à-vis the funded party (*ibid.*).

89 In the present dispute, both the LitSure Agreement and the AtJ-Financing Agreement include confidentiality clauses (*PO 2, p. 58, para. 24*). CLAIMANT has agreed not to disclose the terms and conditions of the Funding Agreements unless required by law, ordered by a court or arbitral tribunal, or agreed by the parties (*ibid.*).

90 RESPONDENT would gain commercially confidential information through disclosure. The AtJ-Financing Agreement stipulates a formula for the calculation of the amount payable to AtJ-Financing in case of CLAIMANT prevailing in the Arbitration (*PO 2, pp. 58 et seq., para. 26*). Thus, AtJ-Financing's assessment of the case, and consequently CLAIMANT's prospects in the Arbitration, become apparent (*see para. 82*). What's more, disclosure would reveal CLAIMANT's litigation budget by showing the amount that AtJ-Financing commits to the Arbitration (*PO 2, p. 58, para. 26*). As such disclosure would cause significant damage to CLAIMANT's case, the confidentiality of its Funding Agreements must be preserved.

91 In conclusion, the Tribunal should not order disclosure of the Funding Agreements as they are protected by confidentiality.

92 **Conclusion Issue B:** The Tribunal should not order disclosure of CLAIMANT's Funding Agreements because the prerequisites under the SIAC Rules 2016 are not met. The Funding Agreements are neither relevant to the case nor material to its outcome. Furthermore, RESPONDENT fails to substantiate its request for disclosure of CLAIMANT's Funding Agreements and thus, conducts a fishing expedition. Additionally, even if the SIAC Rules 2025 were to apply to this Arbitration, the Tribunal should exercise its discretion to refuse disclosure of CLAIMANT's Funding Agreements. Lastly, in any case, CLAIMANT's Funding Agreements are protected by confidentiality.

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### C. CLAIMANT IS ENTITLED TO DAMAGES

93 On 25 August 2022, the Parties concluded the Sales Agreement. CLAIMANT agreed to deliver 3,000 (+/- 10%) of its rare and in demand premium Vanilla Orchids at a price of 2,000 USD per orchid, while RESPONDENT agreed to take delivery and pay the purchase price (*NoA, p. 3, para. 9*;



*Exh. C 3, pp. 10 et seqq.*)

94 In the present case, RESPONDENT argues that the import requirement introduced by CITES on 1 February 2024 constitutes an impediment beyond control to its ability to take delivery pursuant to Article 79 CISG (*Exh. C 4, p. 14; RNoA, p. 34, para. 23*). On 10 February 2024, RESPONDENT declared that obtaining an import permit would be “impossible” (*NoA, p. 4, para. 19; Exh. R 1, p. 37, para. 11*). At that time, RESPONDENT was already searching for a purchaser for its entire vanilla business because of financial losses and reputational issues (*Exh. C 6, p. 17, para. 13; Exh. R 1, p. 37, para. 10*). Thus, RESPONDENT used the newly required import permit as a convenient exit strategy to avoid its contractual obligation to take delivery.

95 CLAIMANT is entitled to damages pursuant to Article 61(1)(b) CISG in conjunction with Article 74 – 77 CISG because RESPONDENT’s refusal to take delivery constitutes a breach of the Sales Agreement [I]. RESPONDENT’s liability is not excused by Article 79 CISG [II].

### **I. RESPONDENT Breached the Sales Agreement**

96 RESPONDENT’S refusal to take delivery constitutes a breach of the Sales Agreement.

97 Where the buyer fails to perform any of its obligations under the contract or the CISG, Article 61(1)(b) CISG entitles the seller to claim damages as provided in Article 74 – 77 CISG (*BRUNNER/MOSIMANN, Article 61, para. 6; SCHNYDER/STRAUB, Article 61, paras. 62 et seqq.*). While Article 61(b) CISG is the legal basis for a damages claim, Article 74 – 77 CISG regulate the modalities for calculation (*CISG 694 [FRA 2001], para. 79; BELL, Art. 61, para. 4*). A party can claim damages even before performance was due under Article 61(1)(b) and Article 72(3) CISG (*UNCITRAL Yearbook V 1974, p. 42, para. 135 et seqq.; STOLL, p. 627*).

98 A party that explicitly and unequivocally rejects or denies its contractual obligation materially breaches the contract (*CISG 749 [ICC 1997], p. 3; cf. CISG-online 439 [USA 1999], p. 6; FOUNTOULAKIS, Article 72, para. 37*). In the case of a serious and final refusal to perform before the performance date, the breaching party is precluded from arguing that no breach of contract has yet occurred because of the binding effect of its declaration (*SCHMIDT-AHRENDTS, p. 18; STOLL, p. 627*).

99 The refusal to take delivery on the pretext that no import permit was obtained constitutes a breach of contract (*CISG/2002/17 [CIETAC 1997], para. 5*). This was also confirmed when a Greek tribunal ruled that the refusal to comply with the main obligations prior to the performance date constitutes a breach of contract (*cf. CISG-online 5924 [GRE 2006]*). In that case, the seller declared before the



delivery date that it would not deliver the agreed quantity due to an impediment according to Article 79 CISG (*ibid.*). Given these circumstances, the refusal to comply with the main obligations under the contract constitutes a breach according to Article 72(3) CISG (*FLAMBOURAS, p. 24*). Similarly, a German tribunal affirmed the existence of a definitive refusal to perform when the seller stated that it “**would be unable**” to deliver the entire contractually agreed quantity (*emphasis added; CISG-online 516 [GER 1999], para. 6*).

100 Despite the fact that RESPONDENT wanted to obtain an import permit to transport the Vanilla Orchids from Mediterraneo to Equatoriana (*RNoA, p. 32, para. 9*), it did not apply until 5 February 2024 (*NoA, p. 4, para. 12; PO 2, p. 57, para. 17*). On 10 February 2024, prior to the delivery date, RESPONDENT explicitly declared that “*the permit would **definitely not** be granted in time for the planned delivery on 27 March 2024*” and thus RESPONDENT could not take delivery (*emphasis added; PO 2, p. 59, para. 28; cf. RNoA, p. 33, para. 14*). Moreover, RESPONDENT expressed “*serious doubts as to whether delivery could take place at all*” for another date in the future (*ibid.*). However, on 10 February 2024 RESPONDENT had still not received any notice from Equatoriana’s authorities regarding the import permit application. Only four days later, on 14 February 2024, did the responsible authorities inform RESPONDENT that no import permit could be issued yet (*PO 2, p. 57, para. 17*). Accordingly, RESPONDENT prematurely declared its serious and final refusal to perform.

101 On 27 February 2024, RESPONDENT unequivocally affirmed its earlier refusal to take delivery of 10 February 2024. It informed CLAIMANT that it would put up the entire spice business line for sale to protect its food business and that “*it was **impossible** for it to fulfil the contract*” (*emphasis added; PO 2, p. 59, para. 28; cf. Exh. R 1, p. 37, para. 11*). Thus, by 27 February 2024 at the latest, it was definitive that RESPONDENT would not take delivery of the Vanilla Orchids on 27 March 2024 (*Exh. R 3, p. 39*).

102 Moreover, at the beginning of 2024, climate activists launched a social media campaign against RESPONDENT to ensure the sufficient protection of the Vanilla Orchid (*Exh. C 4, p. 14*). This campaign against RESPONDENT’s products resulted in a serious drop in sales in RESPONDENT’s spice business in January and February 2024 (*RNoA, p. 33, para. 15; Exh. R 1, p. 37, para. 10; PO 2, p. 57, para. 16*). On 15 February 2024, the *Equatorianian Business Gazette* reported that RESPONDENT had decided to discontinue its vanilla activities and seek a purchaser for its spice line (*Exh. C 6, p. 17, para. 13*). Hence, RESPONDENT’s refusal to take delivery of the Vanilla Orchids on the pretext that no import permit could be obtained camouflages its underlying motivation. In fact, RESPONDENT



sought an excuse to exit the Sales Agreement because it had suffered serious reputational damage, which meant its spice business was no longer feasible.

103 Thus, RESPONDENT's unequivocal and repeated refusals to take delivery resulted in a breach of the Sales Agreement.

## II. RESPONDENT's Liability Is Not Excluded Under Article 79 CISG

104 RESPONDENT is liable for its breach of contract, as it cannot be exempted under Article 79 CISG.

105 The exemption under Article 79(1) CISG requires that a party's non-performance was due to an impediment beyond its control, that the impediment could not have reasonably been expected at the time of contract conclusion, and that the impediment could not have been avoided or overcome (*CISG-AC Opinion No. 7, para. 1; LEE, p. 296*). A party is exempt from liability pursuant to Article 79 CISG only if it proves these requirements cumulatively (*ATAMER, Article 79, para. 43*).

106 Pursuant to Article 6 CISG, the parties may derogate from Article 79 CISG by contractually modifying its risk allocation or requirements (*CISG-online 261 [GER 1997], para. 38; UNCITRAL CISG Commentary, Article 79, para. 23*). In cases where the parties do not wish to replace the exemption regime entirely with a contractual provision, Article 79 CISG remains applicable (*SCHWENZER/KÖHLER, Article 79, para. 64*).

107 In the case at hand, Clause 12.1 of the Sales Agreement stipulates that "***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.***" (*emphasis added; Exh. C 3, p. 13, Clause 12.1*). The contractual "*Force majeure*" Clause 12 of the Sales Agreement is thus a concretisation of Article 79 CISG because of its similar wording.

108 Accordingly, none of the requirements pursuant to Article 79 CISG are satisfied. RESPONDENT's performance was not hindered by an impediment beyond control [1]. Even if an impediment existed, it was foreseeable [2]. RESPONDENT could have avoided or overcome the impediment [3]. Lastly, RESPONDENT's refusal was not caused by the alleged impediment [4].

### 1. RESPONDENT's Performance Was Not Hindered by an Impediment Beyond Control

109 The alleged import permit requirement does not qualify as an impediment beyond RESPONDENT's control under Article 79(1) CISG.



- 110 Article 79(1) CISG requires that the impediment constitutes an external barrier to performance, and that non-performance be caused by an impediment outside the obligor's sphere of control (*CISG-online 1777 [USA 2008], para. 90; DA SILVEIRA, p. 204; PICHONNAZ, paras. 1686 et seqq.*). Under the CISG, the parties' agreement and circumstances primarily determine the content of their obligations (*PILTZ, Article 30, para. 27*). Where the parties agree on a delivery term such as an Incoterm, that agreement establishes the place and manner of delivery and sets the borderline between their respective spheres of responsibility (*cf. CISG-online 533 [FRA 1998], p. 3; BRUNNER/DIMSEY, Article 30, para. 2*).
- 111 If a contract contains the Incoterm Free Carrier ("FCA"), the place of delivery can either be a contractually agreed upon place (*Incoterms 2020, p. 240, A2 (3); ADEMUNI-ODEKE, p. 19*) or the seller's premises. If the named place of delivery is not at the seller's premises, the seller is only obliged to transport the goods to the named place of delivery (*Incoterms 2020, p. 240, A2 (3b); PILTZ, Article 30, para. 34*). Additionally, the seller must place the goods at the disposal of the carrier nominated by the buyer and have them ready for unloading (*ibid.*). Under Article 60 CISG, taking of delivery occurs at the specified location and not in the country of destination (*MOHS, Article 60, para. 5, para. 34; cf. ADEMUNI-ODEKE, p. 19*).
- 112 In the case at hand, the Parties specifically agreed on "*FCA Capital City International Airport, Incoterms® 2020*" (*Exh. C 3, p. 11, Clause 4.1*). Contrary to RESPONDENT's defence, the alleged difficulty in acquiring an import permit in Equatoriana does not constitute an external barrier to performance. RESPONDENT's only relevant obligation was to take delivery at Capital City International Airport (*Exh. C 3, p. 11, Clause 4.1*). The airport is entirely in Mediterraneo (*cf. NoA, p. 2*), meaning that RESPONDENT does not need an import permit to take delivery of the Vanilla Orchids. While the import permit may influence RESPONDENT's preferred plan to import the orchids into Equatoriana, it does not preclude RESPONDENT from fulfilling its obligations under the Sales Agreement. RESPONDENT thus falsely connects the ability to take delivery with the possibility of obtaining the import permit (*see para. 100*).
- 113 Accordingly, the import permit requirement only concerns RESPONDENT's import arrangements for Equatoriana, but it does not constitute an impediment beyond control in the sense of Article 79(1) CISG.



## 2. The Import Permit Requirement Was Foreseeable

- 114 Even if the requirement for an import permit constituted an impediment beyond RESPONDENT'S control, RESPONDENT cannot rely on Article 79 CISG because the alleged impediment was foreseeable.
- 115 To be excused under Article 79(1) CISG, the breaching party must not have been able to reasonably foresee the impediment at the time of contract conclusion (*LOOKOFSKY, p. 163*). Accordingly, the actual knowledge at the time of contract conclusion of the party seeking exemption is an important factor in this assessment (*CISG-online 1106 [BEL 2005], p. 4; BRUNNER, p. 160*). Besides that, foreseeability is assessed based on what a reasonable person under similar circumstances and in the same trade would have foreseen (*cf. CISG-online 1309 [NLD 1998], para. 24; CISG-online 925 [USA 2004], para. 16; ATAMER, Article 79, para. 50*).
- 116 In the orchids business, all orchid species are listed in the Appendices of CITES (*Article III, IV CITES; Review orchid trade, p. 6*). Since 1990, orchids have increasingly become subject to stricter regulations (*Traffic Bulletin, p. 12*). Notably, the reclassification from Appendix II CITES to Appendix I CITES has been a recurring phenomenon (*Traffic Bulletin, p. 12*). Consequently, orchids newly listed under Appendix I CITES will require an import permit (*Article III (3), Article IV (4) CITES*).
- 117 In the case at hand, the Vanilla Orchid was reclassified from Appendix II CITES to Appendix I CITES (*Exh. C 4, p. 14*). Given the well-established precedent of reclassifications, RESPONDENT could have reasonably foreseen such regulatory change.
- 118 The Parties expressly included a clause assigning the responsibility for obtaining any import permits to RESPONDENT in Clause 5.1(b) of the Sales Agreement (*Exh. C 3, p. 11, Clause 5.1(b)*). This contractual choice demonstrates that the Parties anticipated the possibility of a future import permit requirement. In addition, the Parties expressly allocated the ongoing responsibility for monitoring possible regulatory changes to RESPONDENT in Clause 5.2 of the Sales Agreement, thus being aware of the need for adaptations in response to any regulatory changes (*see para. 124; Exh. C 3, p. 11, Clause 5.2*).
- 119 Moreover, at the time of contract conclusion, the Vanilla Orchid was already classified as an endangered species under Appendix II CITES (*NoA, p. 3, para. 3*). In the past, the Vanilla Orchids had already been on the verge of being included into Appendix I CITES (*cf. NoA, p. 4, para. 12*). Given the increasing regulatory scrutiny in the orchid trade, RESPONDENT, as an experienced



international trader in plants, must have been aware that the Vanilla Orchid was going to be reconsidered for reclassification from Appendix II CITES to Appendix I CITES. Consequently, leading to an import permit requirement.

120 Therefore, the import permit requirement was foreseeable because the Parties referenced such a permit requirement in Clause 5 of the Sales Agreement and RESPONDENT must have considered a reclassification from Appendix II CITES to Appendix I CITES.

### 3. RESPONDENT Could Have Reasonably Avoided or Overcome the Alleged Impediment

121 Even if the need for an import permit constituted an impediment beyond RESPONDENT's control and was not foreseeable, RESPONDENT could have reasonably avoided or overcome the alleged impediment.

122 Under Article 79(1) CISG, a party is exempt only if the impediment was not avoidable or could not be overcome. An impediment is avoidable whenever the breaching party could have prevented its effects by acting diligently (*ATAMER, Article 79, para. 54; Secretariat Commentary, Article 65, para. 7*). In international trade, strict standards apply: a party must take all measures within its capacity to secure performance, even if this entails financial loss or substantial additional effort (*ACHILLES, Article 79, para. 10; SCHWENZER/KÖHLER, Article 79, para. 14*). Furthermore, a party has to take measures before the event occurs and cannot simply wait for difficulties to arise (*ATAMER, Article 79, para. 54; TALLON, Article 79, para. 2.6.2*).

123 Regarding import permit requirements, a party cannot rely on Article 79 CISG to exempt itself from liability if it refuses to take delivery of the goods on the pretext that no import permit was obtained (*CISG/2002/17 [CIETAC 1997], para. 5*). An import permit requirement does not constitute an import prohibition (*CISG-online 2928 [CIETAC 2003], para. 48*). Consequently, in that instance, the buyer could have been able to overcome the requirement and performed the contract (*ibid.*).

124 In September 2023, the reclassification of the Vanilla Orchids to Appendix I CITES in February 2024 was publicly discussed (*NoA, p. 3, para. 10; RNoA, p. 32, para. 9*). Despite knowing that an import permit might soon be required and having five months to act (*ibid.*), RESPONDENT failed to take any reasonable and timely measures until 1 February 2024 (*cf. PO 2, p. 57, para. 17*).

125 First, RESPONDENT could and should have applied for an anticipatory import permit in November 2023. At that time, Equatoriana's responsible authorities had granted such import permits (*NoA, p. 4, para. 12*). However, RESPONDENT only filed its application four days after the Vanilla Orchid had already been listed in Appendix I CITES with immediate effect (*PO 2, p. 57, para. 17*).



RESPONDENT argues that the import permit requirement would only enter into force 90 days after the CITES decision (*PO 2, p. 57, para. 14*). Subsequently, RESPONDENT completely ignored the immediate application of such a decision pursuant to Conf.XX.8 (*PO 2, p. 57, para. 14*): in effect, a practice that had existed since 2020 (*ibid.*). Accordingly, RESPONDENT could have easily applied for an anticipatory permit in November 2023.

126 Second, RESPONDENT could have avoided the impediment by accepting an earlier delivery before 1 February 2024. On 1 November 2023, CLAIMANT expressly offered to deliver in January 2024 to avoid potential import permit issues. Instead, RESPONDENT declined this offer, arguing that early delivery would involve additional storage costs and only one new greenhouse would be available (*NoA, p. 3 et seq., para. 11; Exh. C 5, p. 15*). Nevertheless, RESPONDENT could have housed at least part of the orchids in the newly available greenhouse and temporarily housed the remaining orchids in its existing facilities (*Exh. C 5, p. 15*). RESPONDENT kept the delivery date of 27 March 2024 even after a clear warning from CLAIMANT on 2 December 2023 about the seriousness of the import permit. It assured CLAIMANT that obtaining an import permit “*would not be a problem*” (*NoA, p. 4, para. 15*). By refusing an earlier delivery, RESPONDENT prioritised cost considerations over searching for means to avoid the alleged impediment and secure dutiful performance.

127 Third, RESPONDENT could have overcome the alleged impediment by taking delivery in Capital City, Mediterraneo and reselling the orchids to different customers. After RESPONDENT’s refusal to take over the orchids, CLAIMANT was able to sell the goods to Herbal Cosmetics (*NoA, p. 5, para. 24*). Therefore, there was an accessible alternative market for the Vanilla Orchids with potential customers.

128 Accordingly, the alleged impediment was avoidable by either applying for an anticipatory permit, accepting an available earlier delivery, or reselling the Vanilla Orchids. RESPONDENT failed to take any reasonable measures to avoid or overcome the alleged impediment.

#### **4. There Is No Causal Link Between RESPONDENT’s Non-Performance and the Alleged Impediment**

129 Between RESPONDENT’S non-performance and the import permit requirement there is no causal link.

130 Pursuant to Article 79(1) CISG, the failure to perform has to be “*due to an impediment*”. Even if the breaching party had taken all reasonable measures to avoid and overcome the impediment, it must still be certain that the breaching party could not have performed (*MAGNUS, p. 19*). This presupposes a genuine causal link between the external event and the non-performance (*CISG-*



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*online 1520 [MKAC 2005], para. 3.3.5; CISG-online 1653 [USA 2008], paras. 4 et seq.; TALLON, Article 79, para. 2.6.6).*

131 Appendix I CITES includes exceptions to the import permit requirement according to Article VII(4) CITES. A plant listed in Appendix I CITES does not require an import permit if it is “*artificially propagated*”, as it is then treated as a species listed in Appendix II CITES (*CITES Conf. 11.11, p. 2*). A plant is artificially propagated if it is grown under controlled conditions and has been derived from cultivated parental stock (*ibid.*).

132 As demonstrated above, the import permit was not needed for taking of delivery (*see paras. 109 et seqq.*). Furthermore, RESPONDENT cannot prove with certainty that it would not have obtained the import permit. First of all, RESPONDENT cannot demonstrate that any exception to the import permit requirement of Appendix I CITES would not have applied. On the contrary, an exception was highly plausible, as the Vanilla Orchids were predominantly cultivated from parental stock and grown under controlled conditions by artificial pollination, which indicates artificial propagation pursuant to Article VII CITES (*cf. Exh. C1, p. 7, para. 6; PO 2, p. 55, para. 3*). Second, Equatoriana abstained from voting on the reclassification of the Vanilla Orchid during the CITES vote (*NoA, p. 4, para. 17*). In view of this, RESPONDENT cannot demonstrate that Equatoriana would no longer continue its practice of granting import permits and applying exemptions (*Exh. C 4, p. 14*). Finally, RESPONDENT’s import permit application was not formally rejected (*PO 2, p. 57, para. 17*). Instead, RESPONDENT withdrew its application after receiving preliminary information from the authorities (*ibid.*).

133 In conclusion, the causal link between RESPONDENT’s non-performance and the alleged impediment of the import permit requirement cannot be established. Consequently, RESPONDENT cannot rely on Article 79 CISG to excuse its liability.

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134 **Conclusion Issue C:** CLAIMANT is entitled to damages under Article 61(1)(b) CISG in connection with Article 74 – 77 CISG due to RESPONDENT’s refusal to take delivery. RESPONDENT’s liability is not excused by Article 79 CISG because the import permit requirement is no impediment beyond control. Even if the import permit requirement constituted an impediment beyond control, it was foreseeable. Moreover, RESPONDENT could have avoided the impediment by either accepting earlier delivery or applying for an anticipatory import permit. Furthermore, RESPONDENT could have overcome the impediment by reselling the goods. Lastly, there is no causal link between RESPONDENT’s non-performance and the alleged impediment beyond control.

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## **D. THE DAMAGES AMOUNT TO THE DIFFERENCE BETWEEN THE PRICE UNDER THE SALES AGREEMENT AND THE COVER SALE PRICE**

135 As demonstrated in Issue C, RESPONDENT breached the Sales Agreement by refusing to take delivery of the Vanilla Orchids. As a consequence, CLAIMANT was left with 3,300 extremely sensitive and highly perishable Vanilla Orchids that could not be stored beyond mid-May 2024 (*NoA*, p. 5, para. 23; *Exh. C 6*, p. 16, para. 5). Given CLAIMANT's limited greenhouse capacity and the imminent first flowering of the Vanilla Orchids, it had no alternative but to act immediately to prevent the total loss of the orchids. The only viable option was to resell the orchids through a substitute transaction. Accordingly, CLAIMANT concluded the Cover Sale with Herbal Cosmetics for all 3,300 Vanilla Orchids at a price of 1,000 USD per orchid (*NoA*, p. 5, para. 24; *Exh. C 6*, p. 17, paras. 10, 15).

136 The damages must be calculated in accordance with Article 75 CISG by taking the difference between the contract price in the Sales Agreement and the price of the Cover Sale [I]. In the alternative, the damages can be calculated pursuant to Article 74 CISG [II].

### **I. The Damages Must Be Calculated in Accordance With Article 75 CISG**

137 The damages must be calculated pursuant to Article 75 CISG.

138 Pursuant to Article 75 CISG, damages based on a substitute transaction are available only if certain requirements are met. First, the aggrieved party must have effectively avoided the contract (*CISG-online 720 [SUI 2002]*, p. 4, para. 3.1; *DJORDJEVIĆ, Article 75, para 5*). Second, it must have entered into a substitute transaction (*ibid.*). Lastly, it must ensure that this transaction was made in a reasonable manner and within a reasonable time (*CISG-online 526 [ICC 1995]*, para. 17).

139 The damages under Article 75 CISG are calculated by taking the difference between the price under the avoided contract and the price of the substitute transaction (*CISG-online 587 [AUS 2000]*, paras 98, 99; *CISG-online 665 [GER 2000]*, para. 12; *ACHILLES, Art 75, para 5*). The aggrieved party is therewith placed in the same economic position it would have occupied had the contract been duly performed (*CISG-AC Opinion No. 8*, p. 5, para. 2.1.2).

140 In the present case, CLAIMANT concluded the Cover Sale on 15 February 2024 with Herbal Cosmetics [1]. CLAIMANT rightfully entered into the Cover Sale after RESPONDENT's refusal to take delivery [2].



## 1. CLAIMANT Concluded a Cover Sale with Herbal Cosmetics

141 CLAIMANT concluded the Cover Sale with Herbal Cosmetics on 15 February 2024 as a direct replacement for RESPONDENT's refusal to take delivery. The Cover Sale has a sufficient temporal [a] and a sufficient material connection [b] to the Sales Agreement.

### a. The Cover Sale Has a Sufficient Temporal Connection to the Sales Agreement

142 The Cover Sale has a sufficient temporal connection to the Sales Agreement.

143 To qualify as a substitute transaction a sufficient temporal connection to the avoided contract is required (*CISG-online 261 [GER 1997], para. 37; BRUNNER/SCHMIDT-AHRENDTS/CZARNECKI, Article 75, para. 4*). If multiple contracts are concluded within a timeframe, the substitute transaction must be clearly identifiable as the one replacing the avoided agreement (*CISG-online 113 [USA 1994], para. 40; SCHÖNLE/KOLLER, Article 75, para. 11*).

144 Where a substitute transaction is concluded before the formal declaration of avoidance, the relevant starting point is the moment of the final refusal to perform (*CISG-online 2656 [SUI 2014], p. 90 et seqq., para. 1.3.1; SCHWENZER/KÖHLER, Article 75, para. 7*). If a substitute transaction is concluded within two weeks after the refusal to perform, the temporal connection is established (*CISG-online 261 [GER 1997], para. 37*).

145 CLAIMANT only entered into one substitute transaction within close proximity of RESPONDENT's refusal to take delivery in February 2024 (*NoA, p. 5, para. 24*). It concluded the Cover Sale five days after RESPONDENT's refusal to perform and within two weeks of the Sales Agreement's avoidance (*see Statement of Facts*). Consequently, the Cover Sale is clearly identifiable as the contract replacing the Sales Agreement.

146 Thus, the Cover Sale has a sufficient temporal connection to the Sales Agreement.

### b. The Cover Sale Has a Sufficient Material Connection to the Sales Agreement

147 The Cover Sale has a sufficient material connection to the Sales Agreement since it concerns the same goods, quantity, and delivery mechanism.

148 Under Article 75 CISG, a substitute transaction must replace the avoided contract (*CISG-AC Opinion No. 8, p. 7, para. 2.3.4.; Secretariat Commentary, Article 71, para. 4*). To replace the avoided contract, a substitute transaction needs to be able to secure the aggrieved party's interest in performance and be connected to the original contract (*CISG-online 6861 [GER 2023], para. 56*;



*DJORDJEVIĆ, Article 75, para. 12*). Establishing this connection requires the terms of the substitute transaction to be substantially similar in subject matter and commercial purpose, but they need not be identical (*DJORDJEVIĆ, Article 75, para. 12; Secretariat Commentary, Article 71, para. 4*). The decisive factors for the connection include the same type of goods, comparable quantity and similar terms regarding place and time of delivery (*CISG/1995/06 [CIETAC 1995], para. 3 (3); CISG-online 1412 [CIETAC 1997], para. III (2); CISG-online 587 [AUS 2000], paras. 95 et seq.; CISG-online 6861 [GER 2023]; BRUNNER/SCHMIDT-AHRENDTS/CZARNECKI, Article 75, para. 4*).

149 Where a contract contains a quantity option, one party will regularly hold the right to specify the amount of goods (*CISG-online 1509 [USA 2007], para. 3; CISG-online 1769 [USA 2008], para. 2*).

150 The option right has to be established by considering all relevant circumstances of the case pursuant to Article 8(3) CISG, when it is unclear which party holds that right (*CISG-online 6272 [CRCICA 2023], paras. 210 et seq.; SCHROETER, Article 14, paras. 47, 74*). If a contract has been avoided, it has to be determined what exact quantity would have been delivered (*SAIDOV, p. 198*).

151 In the case at hand, the type and quality of goods under the Cover Sale were identical to those under the Sales Agreement. The batch of Vanilla Orchids reserved for RESPONDENT was meant to flower in June/July 2024 (*NoA, p. 5, para. 23; Exh C 6, p. 17, para. 12*). To avoid a loss of up to 30% in commercial value of the orchids, CLAIMANT had to resell this batch before the flowering period (*NoA, p. 5, para. 23*). CLAIMANT did so by delivering the Vanilla Orchids on 14 May 2024 to Herbal Cosmetics (*NoA, p. 5, para. 26, PO 2, p. 60, para. 39(b)*).

152 RESPONDENT argues that a different agreement between CLAIMANT and Herbal Cosmetics formed the substitute transaction (*RNoA, p. 35, para. 26*). This argument overlooks the fact that the orchids under that agreement were meant to flower for the first time in June/July 2025 (*NoA, p. 4 et seq., para. 21*). Accordingly, those orchids flowered one year later than the Vanilla Orchids reserved for RESPONDENT. Thus, the Vanilla Orchids delivered under that different contract were not identical to the orchids for RESPONDENT under the Sales Agreement. Hence, in terms of identical goods only the Sales Agreement and the Cover Sale are materially connected.

153 Moreover, CLAIMANT delivered the same quantity of Vanilla Orchids to Herbal Cosmetics as it would have delivered to RESPONDENT. CLAIMANT was obliged to deliver 3,000 (+/- 10%) Vanilla Orchids to RESPONDENT under the Sales Agreement (*see para. 93*). This quantity clause is part of CLAIMANT's standard template, which it regularly uses in its large-scale contracts (*PO 2, p. 56, para. 9*). CLAIMANT uses this (+/- 10%) margin to provide the necessary flexibility, as up to 10% of



the sensitive Vanilla Orchids fail to survive the first three years of production until they are market-ready (*NoA*, p. 3, para. 8; *PO 2*, p. 56, para. 9). Given these fluctuations, only CLAIMANT knows how many plants will ultimately be available at the time of delivery. Thus, CLAIMANT was entitled to specify the final quantity of Vanilla Orchids delivered to RESPONDENT.

154 CLAIMANT would have delivered 3,300 Vanilla Orchids to RESPONDENT due to a low level of losses in 2024 (*PO 2*, p. 56, para. 9). RESPONDENT's breach left CLAIMANT with a surplus of 3,300 Vanilla Orchids in its greenhouse, which had to be cleared to make space for the next propagation cycle (*Exh. C 3*, p. 5, para. 23). Consequently, CLAIMANT delivered 3,300 Vanilla Orchids to Herbal Cosmetics (*see para. 135*). Through this step, it replaced its injured interest. Therefore, the Sales Agreement and the Cover Sale are materially connected as they cover the same quantity of Vanilla Orchids.

155 Finally, the Cover Sale mirrors the essential terms of delivery under the Sales Agreement. Both contracts stipulate delivery under FCA Incoterms® 2020 (*Exh. C 3*, p. 11, Clause 4.1; *Exh. C 6*, p. 17, para. 10). Moreover, the delivery place under the Cover Sale is Capital City, Mediterraneo, which is comparable to the delivery place under the Sales Agreement at Capital City International Airport, Mediterraneo (*ibid.*). In addition, the delivery date under the Sales Agreement was 27 March 2024 (*NoA*, p. 4 para. 14, *Exh. C 5*, p. 15), while the delivery date under the Cover Sale was 14 May 2024 (*NoA*, p. 5, para. 26). No other delivery to Herbal Cosmetics is scheduled within that timeframe (*Exh. C 6*, p. 17, para. 15).

156 Accordingly, the Cover Sale has a sufficient material connection to the Sales Agreement.

157 In conclusion, the Cover Sale constitutes a substitute transaction within the meaning of Article 75 CISG. Therefore, the Cover Sale is reasonable (*PO 2*, p. 58, para. 29).

## **2. CLAIMANT Was Entitled to Conclude the Cover Sale After RESPONDENT's Refusal**

158 CLAIMANT was entitled to conclude the Cover Sale after RESPONDENT's refusal to take delivery and subsequently rightfully avoided the Sales Agreement pursuant to Article 72(3) CISG.

159 To calculate damages under Article 75 CISG, the aggrieved party must have avoided the contract (*see para. 138*) According to Article 72(3) CISG in conjunction with Article 72(1) CISG, a party may avoid a contract if the counterparty has declared that it will unambiguously and definitively not perform its obligations (*CISG-online 1120 [CIETAC 1996], paras. 13 et seq.; CISG-online 916 [GER 2004], para. 23; FLECHTNER, Article 72, para. 523*). Those obligations in question must concern duties which, when breached, are considered fundamental within the meaning of Article 25



CISG (*CISG-online 439 [USA 1999]*, p. 6; *DA SILVEIRA, Anticipatory breach*, p. 28; *ENDERLEIN/MASKOW, Article 72*, p. 291). A breach of contract is fundamental pursuant to Article 25 CISG if it deprives the aggrieved party of what it is entitled to expect under the contract. A fundamental breach is generally assumed when the buyer definitively refuses to take delivery (*CISG-online 6210 [GER 2022]*, para. 62; *BRUNNER/LEISINGER, Article 25, para. 23*). Finally, the aggrieved party must declare the contract avoided in accordance with Article 26 CISG (*FOUNTOULAKIS, Article 72, para. 40*).

160 However, where the breaching party has clearly and definitively refused to perform, the aggrieved party may conclude a substitute transaction under Article 75 CISG without a formal declaration of avoidance pursuant to Article 26 CISG (*CISG-Online 516 [GER 1999]*, para. 6; *CISG-Online 2165 [GER 2009]*, para. 39; *CISG-online 4506 [GER 2019]*, para. 44; *CISG-online 6861 [GER 2023]*, para. 58.). For instance, German courts have held that the requirement of a separate declaration of avoidance would be a mere formality inconsistent with commercial reasonableness and good faith under Article 7(1) CISG (*CISG-online 1013 [GER 2004]*, para. 14, 16, 17; *CISG-online 2400 [GER 2013]*, para. 65; *HUBER, Article 75, para. 4*). A party which refuses to perform its obligations violates the principle of good faith by insisting on a formal declaration of avoidance (*cf. CISG-Online 261 [GER 1997]*, para. 33; *UNCITRAL CISG Commentary, Article 7, para. 13*).

161 In the present case, CLAIMANT has demonstrated that RESPONDENT clearly and definitively refused to perform its obligation to take delivery under the Sales Agreement on 10 February 2024 (*see paras. 96 et seqq.*). RESPONDENT's refusal deprived the Sales Agreement of any further contractual effect. Once RESPONDENT had expressly declared that it would not fulfil its main obligation, CLAIMANT could no longer reasonably demand performance. Therefore, RESPONDENT's refusal constitutes a fundamental breach. Consequently, CLAIMANT would have been entitled to formally avoid the Sales Agreement on 10 February 2024.

162 However, such a formal declaration of avoidance would have served no purpose and would have constituted a mere formality. CLAIMANT was therefore not required to declare avoidance before concluding a substitute transaction, as RESPONDENT's prior refusal already rendered such a declaration redundant. Accordingly, CLAIMANT acted in a commercially reasonable manner by concluding the Cover Sale. On 1 March 2024, CLAIMANT formally declared the Sales Agreement avoided (*NoA, p. 5, para. 25; Exh. R 3, p. 39*).



163 In contrast, RESPONDENT is acting in bad faith because it is insisting on a formal declaration of avoidance prior to the conclusion of the Cover Sale even though it repeatedly refused to perform its main obligation under the Sales Agreement (*RNoA*, p. 35, para. 26; *see paras. 96 et seqq.*).

164 Thus, CLAIMANT was entitled to conclude the Cover Sale immediately after RESPONDENT'S repeated and unequivocal refusal to take delivery. Subsequently, CLAIMANT rightfully avoided the Sales Agreement pursuant to Article 72(3) CISG.

165 In conclusion, all requirements under Article 75 CISG are fulfilled. Therefore, the damages must be calculated by taking the difference between the Sales Agreement price and the price in the Cover Sale. Consequently, CLAIMANT is entitled to claim 3,300,000 USD damages resulting from the difference between the total Sales Agreement price of 6,600,000 USD ( $3,300 * 2,000 USD$ ) and the price of the Cover Sale 3,300,000 USD ( $3,300 * 1,000 USD$ ).

## II. In the Alternative, the Damages Are Calculated Under Article 74 CISG

166 In the alternative, the damages must be calculated pursuant to Article 74 CISG.

167 To calculate damages in accordance with Article 74 CISG, there must first be a breach of contract that resulted in a loss. Furthermore, only “*losses which were suffered as a consequence of the breach*” are compensable (*Article 74 CISG; KNAPP, Article 74, para. 2.6*). Lastly, recoverable damages are limited to losses that the breaching party had or ought to have foreseen at the time of contract conclusion pursuant to Article 74, sentence 2 CISG (*CISG-online 2398 [AUT 2013], para. 4; DJORDJEVIĆ, Article 74, para. 26*). Foreseeability according to Article 74, sentence 2 CISG is regularly satisfied where a substitute transaction has been concluded (*BRUNNER/SCHMIDT-AHRENDTS/CZARNECKI, Article 75, para. 1; SCHWENZER/KÖHLER, Article 75, para. 8*).

168 If a substitute transaction that does not fall within the scope of Article 75 CISG has been concluded, damages can alternatively be determined pursuant to Article 74 CISG (*cf. ICC Case 8674 [ICC 1996]; CISG-AC Opinion No. 6, para. 8.1; FOUNTOULAKIS, Article 72, para. 44*). They are calculated by taking the difference between the price of the avoided contract and the price obtained under the substitute transaction (*ibid.*). Under these circumstances, the damages pursuant to Article 74 CISG regularly lead to the same amount as under Article 75 CISG (*ibid.*).

169 In the present case, RESPONDENT breached the Sales Agreement (*see paras. 96 et seqq.*), which caused a loss. Accordingly, CLAIMANT would have received 6,600,000 USD for the Vanilla Orchids and not merely the Cover Sale price of 3,300,000 USD if RESPONDENT would not have refused to perform its main obligations under the Sales Agreement (*see para. 165*). Moreover, given the highly



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perishable nature of the goods, it was foreseeable for RESPONDENT that its refusal would result in a substitute transaction to mitigate damages. Therefore, CLAIMANT incurred a loss of 3,300,000 USD resulting from the difference between 6,600,000 USD and 3,300,000 USD.

170 In the alternative, the damages thus must be calculated according to Article 74 CISG and amount to 3,300,000 USD.

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171 **Conclusion Issue D:** The damages amount to the difference between the Sales Agreement price and the price under the Cover Sale. The damages must be calculated in accordance with Article 75 CISG. First, the Cover Sale for 3,300 Vanilla Orchids constitutes a substitute transaction pursuant to Article 75 CISG because it has a sufficient temporal and material connection to the Sales Agreement. Second, CLAIMANT was entitled to conclude the Cover Sale after RESPONDENT's refusal to take delivery. In the alternative, 3,300,000 USD could still be recovered under Article 74 CISG.

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## Requests

In light of the submissions above, on behalf of CLAIMANT, we herewith respectfully request the Tribunal:

- a) to order that the SIAC Rules 2016 govern the present arbitration;
- b) to reject RESPONDENT's request for disclosure of the AtJ-Funding Agreement and the LitSure Agreement;
- c) to order RESPONDENT to pay damages in the amount of 3,300,000 USD;
- d) to order RESPONDENT to bear the costs of the present arbitration;
- e) to make any other order the Tribunal considers appropriate.

Respectfully submitted on 11 December 2025 by

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We hereby confirm that only the people whose names are listed above have written this memorandum.