23rd Annual Willem C. Vis East International Commercial Arbitration Moot

MEMORANDUM FOR RESPONDENT

On Behalf of:

Darwin Natural Food plc

Louis Liger Avenue 1704

Oceanside, Equatoriana

– RESPONDENT –

Against:

Orchis Worldwide Ltd

Orchid Bee Drive

Capital City, Mediterraneo

– CLAIMANT –

Counsel for RESPONDENT

FABIO HERRERA AUE • LINA ALEXANDRA HORN • PAUL MARQUORDT

FELIX SCHNABL • OLIVIA FELICITAS LIGURIA STOLZENWALD • HELENA VICTORIA ZABEL

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School Name: Humboldt University of Berlin | Jurisdiction: Germany

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DEAR READER,

We are honored to present you our Memorandum for RESPONDENT. If you are reading our Memorandum in hardcopy format, the following remarks are not of importance to you. We kindly refer you to the beginning of our Memorandum and sincerely hope you will enjoy our submissions.

If, however, you are reading our Memorandum in digital format, please note that we have included hyperlinks throughout the pdf:

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Respectfully,

THE WILLEM C. VIS EAST MOOT TEAM OF THE HUMBOLDT UNIVERSITY OF BERLIN

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INDEX OF ABBREVIATIONS

&	and
%	Percent
Art.	Article
Artt.	Articles
cf.	confer
CIETAC	China International Economic and Trade Arbitration Commission
e.g.	exempli gratia; for example (Latin)
ed.	Editor
eds.	Editors
et al.	et alia; and others (Latin)
Ex.	Exhibit
i.e.	id est; that is (Latin)
ibid.	ibidem; in the same place (Latin)
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICC Force Majeure Model Clause	ICC Force Majeure and Hardship Clauses (March 2020)
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
M	Million
MfC	Memorandum for CLAIMANT
Mr	Mister
Ms	Miss
No.	Number
NoA	Notice of Arbitration

p.	page
pp.	pages
para.	paragraph
paras.	paragraphs
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RNoA	Response to the Notice of Arbitration
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Center
SIAC Model Clause	SIAC-SIMC Arb-Med-Arb Model Clause (1 September 2015)
sq.	et sequens; and the following one (Latin)
sqq.	et sequentia; and the following ones (Latin, pl.)
v.	versus; against (Latin)

INDEX OF LEGAL TEXTS

AMA Protocol	SIAC-SIMC Arb-Med-Arb Protocol (2014)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
DAL	Danubian Arbitration Law
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration (2020)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Practice Note 2017	SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding, PN – 01/17 (31 March 2017)
SIAC Rules 2016	Arbitration Rules of the Singapore International Arbitration Centre, 6th Edition (1 August 2016)
SIAC Rules 2025	Arbitration Rules of the Singapore International Arbitration Centre, 7th Edition (1 January 2025)
ULIS	Uniform Law on the International Sale of Goods (1964)
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (2006)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2016)

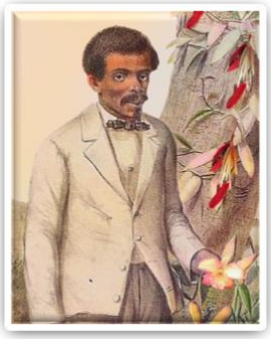
SUMMARY OF FACTS

1. The parties to this Arbitration are *Orchis Worldwide Ltd* ("**CLAIMANT**"), based in Mediterraneo and *Darwin Natural Food plc* ("**RESPONDENT**"), based in Equatoriana (both the "**Parties**"). CLAIMANT produces and sells *Vanilla Planifolia Mediterraniensis* (the "**Vanilla Orchid**"). RESPONDENT is a market leader in the spice market and bought Vanilla Orchids from CLAIMANT. This Arbitration relates to whether RESPONDENT can be held liable for not carrying out the Sales Agreement between the Parties (the "**Sales Agreement**") in light of rapid regulatory changes.

1/12/21	CLAIMANT and the Botanical Garden of Equatoriana concluded a contract for the delivery of Vanilla Orchids.
2022	RESPONDENT took over the Botanical Garden. The Parties then terminated the previous relationship between CLAIMANT and the Botanical Garden and replaced it with the Sales Agreement.
12/23	RESPONDENT fixed the delivery for 27 March 2024 to ensure that delivery does not take place before the construction of its specialized greenhouses is done.
1/2/24	The Conference of the CITES Parties suddenly moved the Vanilla Orchid to the highest regulated group of species (the "**CITES Decision**").
8/2/24	The Equatorianian Minister of Agriculture and Nature signaled a strict implementation of the CITES Decision.
10/2/24	RESPONDENT informed CLAIMANT of these developments and expressed doubts about the possibility of a future delivery.
14/2/24	The Equatorianian government announced that no import permits for the Vanilla Orchid would be issued pending further ministerial guidance.
15/2/24	CLAIMANT modified an existing contract with Herbal Cosmetics, selling the Vanilla Orchids previously intended for RESPONDENT.
26/2/24	The Equatorianian government signaled a full ban of the trade with the Vanilla Orchid.
27/2/24	RESPONDENT informed CLAIMANT that it would discontinue its vanilla business.
1/3/24	CLAIMANT declared avoidance of the Sales Agreement.
2/10/24	CLAIMANT concluded a new contract with Herbal Cosmetics.
19/12/24	CLAIMANT initiated Mediation.
31/07/25	After Mediation had failed, CLAIMANT filed the Notice of Arbitration (the "**NoA**"), thereby commencing the arbitral proceedings.

SUMMARY OF ARGUMENTS

2. The present Sales Agreement owes its existence to Edmond Albius – actually, to two of them. In 1841, the original Albius pioneered pollinating Vanilla Orchids. In 2025, his namesake – the director of RESPONDENT's spice line – carries forward that legacy, making the orchid's exquisite taste accessible to all. By contrast, CLAIMANT, who is teetering on the brink of insolvency, does not carry that legacy forward. Instead, CLAIMANT seeks to turn it into a means of financial exploitation by trying to extract money from RESPONDENT.



Edmond Albius holding an orchid [1863; colorized] – Figure 1

3. CLAIMANT wants to apply the outdated SIAC Rules 2016 because it fears the standards of third-party funding disclosure contained in the updated version. However, in their arbitration agreement, the Parties agreed to apply the 'current' SIAC Rules, rather than rigidly tying themselves to the SIAC Rules 2016. Thereby, the Parties as reasonable businesspersons signaled that updated versions of the SIAC Rules should be applicable. This Arbitration commenced with the NoA on 31 July 2025, where the 'current' SIAC Rules were the SIAC Rules 2025. (**Issue 1**)

4. Arbitration is expensive. It is uncertain if CLAIMANT or its third-party funders will reimburse RESPONDENT's costs if CLAIMANT loses the Arbitration. Without disclosure of the Funding Agreements, RESPONDENT cannot take any steps to protect itself – such as obtaining security for costs or seeking the joinder of a third-party funder. Moreover, CLAIMANT has signaled that it intends to recoup its funding costs from RESPONDENT. To protect itself against this audacious claim, RESPONDENT needs knowledge of the Funding Agreements. (**Issue 2**)

5. RESPONDENT was prevented from accepting delivery of the orchids in March 2024 due to import restrictions imposed by the Equatorianian government. If CLAIMANT had followed international standards and only provided artificially propagated orchids, rather than wild-cuts, RESPONDENT would have been permitted to accept the delivery. The unforeseeable and unavoidable change in the regulatory landscape resulting from the reclassification of the Vanilla Orchid under CITES, which prohibited RESPONDENT from accepting delivery, amounts to *force majeure* for which RESPONDENT should not be punished by a claim for damages. (**Issue 3**)

6. CLAIMANT's calculation of damages is no more than smoke and mirrors. CLAIMANT artificially increases its damages by claiming indemnity for the sale of 3,300 orchids – even though RESPONDENT only guaranteed to purchase 2,700 orchids under the Sales Agreement. As if this was not enough, CLAIMANT neglects that Art. 75 CISG requires a cover sale to be concluded only after avoidance. CLAIMANT hopes to conceal profits it made from the actual cover sale by labelling an irrelevant transaction as the correct cover sale. (**Issue 4**)

ARGUMENTS ON PROCEDURE

ISSUE 1: THE SIAC RULES 2025 APPLY

7. RESPONDENT respectfully requests the Tribunal to find that the SIAC Rules 2025 apply. The Parties agreed to arbitration under SIAC via a dispute resolution clause (the "**Arbitration Clause**") contained in their Sales Agreement [*MfC, para. 1*; *Ex. C3*]. Contrary to CLAIMANT's submission, it is not "*the 2016 SIAC Rules govern this arbitration*" [*MfC, para. 5*], but the SIAC Rules 2025.

8. When negotiating a dispute resolution clause with RESPONDENT's predecessor, the Botanical Garden of Equatoriana, CLAIMANT was only interested in finally resolving possible disputes in arbitration [*Ex. C1, para. 8*]. Now that a dispute has arisen, CLAIMANT suddenly goes rule shopping by insisting on applying an outdated set of rules – the SIAC Rules 2016 [*MfC, para. 5*]. Behind this maneuvering lies an attempt to evade the new third-party funding disclosure rules in the SIAC Rules 2025, which CLAIMANT believes to be disadvantageous [*infra paras. 42 sqq.*]. RESPONDENT urges the Tribunal to see through CLAIMANT's maneuvering and apply the Arbitration Clause as it was actually intended by the Parties.

9. Both Rule 1.2 SIAC Rules 2016 and Rule 1.5 SIAC Rules 2025 stipulate that a dispute falls within their scope of application when it is commenced after they come into force, "*unless otherwise agreed by the parties*". The SIAC Rules 2025 apply to disputes commenced after 1 January 2025. CLAIMANT contends that "*the Parties 'otherwise agreed' to have any future dispute administered in accordance with the 2016 SIAC Rules*" [*MfC, para. 14*]. This neglects that the Parties agreed to arbitrate under the rules "*current*" [*Ex. C3, Clause 15*] at the time of commencement of arbitration [**I.**]. The rules in force at the time of commencement of arbitration were the SIAC Rules 2025 [**II.**].

I. THE PARTIES AGREED ON THE RULES 'CURRENT' AT COMMENCEMENT OF ARBITRATION

10. CLAIMANT alleges that the "*Parties intended to be bound by the 2016 SIAC Rules*" [*MfC, para. 6*]. However, the Parties only agreed to the following Arbitration Clause:

> *"Any dispute […] 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***] [*Ex. C3, Clause 15*].

11. It is uncontested between the Parties that the Arbitration Clause is construed under Art. 8 CISG [*MfC, para. 10*; *PO1, para. II*]. Art. 8 CISG provides for a two-step approach: The

intent of a party is the starting point. In absence thereof, the reasonable person test applies. CLAIMANT contends "*that 'current' refers to the Parties' choice of the 2016 Rules*" [*MfC, para. 15*]. However, CLAIMANT bases this allegation on negotiations between CLAIMANT and the Botanical Garden [*MfC, paras. 11 sqq.*] that are not of relevance to the present case [**A.**]. A reasonable person would understand the wording of the Arbitration Clause to refer to the version of the SIAC Rules 'current' at the time of commencement of arbitration [**B.**]. The Arbitration Clause extends to the SIAC Rules 2025 even though they were not published at the time of contracting [**C.**].

A. THE PARTIES DID NOT INTEND TO APPLY THE SPECIFIC SIAC RULES 2016

12. It is uncontested that the Arbitration Clause was not individually negotiated by the Parties [*MfC, para. 13*; *PO2, para. 8*]. To establish CLAIMANT and RESPONDENT's intent, CLAIMANT conveniently relies on the drafting history of an arbitration agreement between different parties, CLAIMANT and the Botanical Garden [*MfC, paras. 11 sqq.*] (the "**Botanical Arbitration Agreement**"). It is true that the Arbitration Clause contains the same wording as the Botanical Arbitration Agreement. However, the Botanical Arbitration Agreement never specified for the application of the SIAC Rules 2016 [**1.**]. Even if it did, RESPONDENT is not bound by the Botanical Garden's intent [**2.**].

1. The Botanical Arbitration Agreement does not refer to the SIAC Rules 2016

13. CLAIMANT contends that the Botanical Arbitration Agreement "*anchor[s] the resolution of any dispute in the 2016 SIAC Rules*" [*MfC, para. 9*]. However, the Botanical Arbitration Agreement does not refer to the specific SIAC Rules 2016. Absent an express choice, parties are strongly presumed to have referred to the rules in force at the time of commencement of arbitration [*Balli case, p. 79*; *Jurong Engineering, para. 24*; *Shackelford, p. 899*]. CLAIMANT correctly identifies that *"[o]vercoming this presumption requires […] replacement in a way that must be intentional and explicit"* [*MfC, para. 6*]. If parties had intended for outdated rules to apply *"the particular set of rules could easily have been identified by name*" [*AQZ v. ARA, para. 127*; *Car & Cars case, para. 25*].

14. CLAIMANT states that the Botanical Arbitration Agreement refers specifically to the SIAC Rules 2016 "*by declaring that the arbitration would be […] in accordance with 'the current' SIAC Rules*" [*MfC, para. 7*]. This must be rejected. It was known that the SIAC Rules 2016 would change when Botanical Arbitration Agreement was concluded in 2021: SIAC had announced their revision in July 2020 [*SIAC Website*]. Were the SIAC Rules 2016 of particular importance, they could have been easily identified by name. However, the Botanical Arbitration Agreement does not stipulate that disputes should be resolved in accordance with the specific SIAC Rules 2016 but rather with the 'current' SIAC Rules. Thus, it does not refer to the SIAC Rules 2016, but to the SIAC Rules in force at the time of commencement of arbitration.

2. In any case, RESPONDENT is not bound to the Botanical Garden's intent

15. CLAIMANT submits that RESPONDENT is bound to the Botanical Garden's intent as it "*assumed the commitments and liabilities […] [and] left [the dispute resolution clause] completely unchanged*" [*MfC, para. 13*]. It is true that RESPONDENT took over the Botanical Garden [*NoA, para. 7*]. However, the Parties terminated the Botanical Arbitration Agreement in 2022 [**a.**]. Even though the present Arbitration Clause has the same wording as the Botanical Arbitration Agreement, the Arbitration Clause must be interpreted independently [**b.**].

a. The Parties terminated the Botanical Arbitration Agreement

16. CLAIMANT relies on the fact that RESPONDENT "*assumed the commitments and liabilities of its predecessor [the Botanical Garden]"* [*MfC, para. 15*]. This omits that the Parties terminated the Botanical Arbitration Agreement and replaced it with their own Arbitration Clause.

17. In line with the doctrine of separability, the termination of a main agreement does not necessarily terminate the related arbitration agreement [*Gaillard et al., pp. 198 sq., 209*; *Redfern/Hunter, para. 2.107*]. However, the doctrine of separability does not necessarily protect an arbitration clause when parties choose to terminate the related contract [*Arbitration clause in insolvency, para. 21*; *ICC 7929, p. 316*]. In fact, a court recently stated that *"[a]n arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/novated by a later agreement*" [*Young Achievers, para. 6*; *cf. Kashyap v. Mist, para. 17*; *cf. Monde v. WZL, para. 39*].

18. On 25 August 2022, the Parties expressly added the following preamble to their newly concluded Sales Agreement containing the Arbitration Clause [*PO2, para. 8*]:

> *"The Agreement* ***replaces*** *the earlier agreement between Seller and the Botanical Gardens of Equatoriana concluded on 1 December 2021, which is hereby* ***terminated***" [***emphasis added***] [*Ex. C3, preamble*].

19. This preamble reflects the Parties' will to make a clear cut from the previous relationship between CLAIMANT and the Botanical Garden. Only such a clear cut could minimize legal risks by disposing of any unknown side agreements. This rationale applies in equal measure for both the substantive provisions of the previous contract and the dispute resolution clause – the Botanical Arbitration Agreement. Therefore, the Botanical Arbitration Agreement must also be deemed terminated.

b. The Arbitration Clause should not be interpreted in light of the drafting history of the Botanical Arbitration Agreement

20. CLAIMANT argues that as the Parties "*left Art. 15 completely unchanged*" [*MfC, para. 13*], the Arbitration Clause should be interpreted in light of the drafting history of Botanical Arbitration Agreement [*ibid.*]. This conclusion is flawed on two counts.

21. **On the one hand**, there is no evidence that CLAIMANT intended the Arbitration Clause to be interpreted exactly like the Botanical Arbitration Agreement. On the contrary, CLAIMANT was only ever interested in an enforceable award and never expressed any interest in a specific version of the SIAC Rules [*cf. Ex. C1, para. 8*]. Additionally, the preamble expresses the Parties' will to make a clear cut [*supra paras. 16 sqq.*]. This outcome would be frustrated if the Arbitration Clause would be interpreted in the light of the drafting history of the Botanical Arbitration Agreement.

22. **On the other hand**, CLAIMANT fails to establish that RESPONDENT knew that the Botanical Arbitration Agreement referred specifically to the SIAC Rules 2016. Under Art. 8(1) CISG, a party's intent is only determinative where the other party "*knew*" or "*could not have been unaware*" of it. RESPONDENT did not participate in the negotiations leading up to the Botanical Arbitration Agreement [*PO2, para. 5*]. Nevertheless, CLAIMANT tries to establish that RESPONDENT either knew or could not have been unaware of the Botanical Garden's intent to refer to the specific SIAC Rules 2016 by relying on three arguments. All of these are unconvincing.

23. **First**, CLAIMANT relies on Ms Gobley, an employee of the Botanical Garden who had "*reviewed the 2016 SIAC Rules*" [*MfC, para. 11*] before drafting the Botanical Arbitration Agreement. It is true that an employee's knowledge can in certain cases be attributed to the company [*Tesco Supermarkets, pp. 173, 199*; *Grantham, pp. 733 sq.*; *Luh Luh, p. 417*]. However, CLAIMANT conveniently omits that there is no attribution of knowledge if the employee in question has left its service and has not transferred its knowledge to the company [*El Ajou*; *Luh Luh, p. 423*]. Ms Gobley left the Botanical Garden in March 2022 [*PO2, para. 6*]. As this was before the Botanical Garden was taken over by RESPONDENT in summer 2022 [*Ex. C2*; *Ex. R1, para. 3*], Ms Gobley never transferred her knowledge to RESPONDENT.

24. **Second**, CLAIMANT could have argued that Mr Albius, head of RESPONDENT's spice business line, obtained knowledge about Ms Gobley's interpretation of the Botanical Arbitration Agreement [*Ex. C1, para. 9*]. It is true that Mr Albius was a board member of the Botanical Garden [*PO2, para. 5*]. However, this neither factually nor legally equates to RESPONDENT having knowledge of Ms Gobley's interpretation. Factually, the board meeting relating to the Botanical Arbitration Agreement merely addressed the general choice to consent to arbitration under foreign rules; there is no evidence that it addressed any specific version of the SIAC Rules [*cf. Ex. C7*]. Legally, the knowledge of a director is only imputed to its company if the director acquired that knowledge acting in its official capacity for the company [*David Payne, p. 619*; *Dolphina, para. 217*; *El Ajou*]. Even if Mr Albius participated in the board meeting, he did so as a board member of the Botanical Garden – not as RESPONDENT's representative [*cf. PO2, para. 5*].

25. **Third,** CLAIMANT argues that "*RESPONDENT had access to the email from the contract negotiation, including*

the email [that] indicated the […] intent to be bound by the 2016 SIAC Rules" [*MfC, para. 13*]. Under Art. 8(1) CISG, a party could not have been unaware of a fact if it closes its eyes to the facts before its face [*Fogt, p. 52*; *Honnold, p. 453*]. This is a very high bar, similar to gross negligence [*Fogt, p. 110*; *Magnus, Robert in: Staudinger, Art. 8 para. 12*; *Schmidt-Kessel in: Schlechtriem/Schwenzer/Schroeter, Art. 8 para. 16*]. The aforementioned e-mail was sent nearly one year before the Parties concluded the Arbitration Clause [*Ex. C7*]. CLAIMANT never informed RESPONDENT that it wanted the Arbitration Clause to be interpreted in line with the full drafting history of the Botanical Arbitration Agreement. Therefore, RESPONDENT could reasonably assume that it did not have to review every e-mail mentioning the Botanical Arbitration Agreement when the Arbitration Clause was concluded.

26. Thus, even if the Botanical Arbitration Agreement had originally referred to the specific SIAC Rules 2016, RESPONDENT was neither aware nor should have been aware of any intent by CLAIMANT to interpret the Arbitration Clause in light of the Botanical Arbitration Agreement. The Parties therefore did not intend the Arbitration Clause to refer to the specific SIAC Rules 2016.

B. A REASONABLE PERSON UNDERSTANDS THE ARBITRATION CLAUSE TO REFER TO THE RULES 'CURRENT' AT TIME OF COMMENCEMENT OF ARBITRATION

27. The Parties agreed on the 'current' SIAC Rules without any prior negotiations [*PO2, para. 8*]. Therefore, neither party clearly expressed what it meant by the term 'current'. If parties do not express any clear intent, the understanding of a reasonable person under Art. 8(2) CISG is decisive. Institutions periodically revise and update their rules to react to new developments and render proceedings more efficient [*AQZ v. ARA, para. 126*; *Lin et al., p. 5*; *Shackelford, p. 904*]. Therefore, it is reasonable to assume that parties want to refer to the rules in force at the time of commencement of arbitration [*Bunge v. Kruse, p. 286*; *Jurong Engineering, para. 24*; *Shackelford, p. 899*].

28. CLAIMANT argues that "*any possible ambiguity, such as whether the term 'current' could refer to the 2025 Rules, should be construed against the RESPONDENT as the drafter*" [*MfC, para. 15*]. This argument is inherently flawed as there is no indication that RESPONDENT is the drafter of the Arbitration Clause. Since there is no discernible party intent, the Arbitration Clause must be interpreted according to the reasonable person test. A reasonable person would assume that the Parties did not want to be bound by outdated rules. Consequently, the term 'current' must be interpreted as referring to the SIAC Rules 'current' at the time of commencement of arbitration.

C. THE ARBITRATION CLAUSE EXTENDS TO THE SIAC RULES 2025

29. CLAIMANT refuses any application of the SIAC Rules 2025 outright because "*the changes in the SIAC*

Rules 2025 are so significant that it cannot be assumed […] that the Parties […] consented to be bound by entirely different rules" [*Langweiler 14 August 2025, para. 4*]. However, the Arbitration Clause extends to the SIAC Rules 2025.

30. In principle, a party agreement on institutional arbitration can also cover institutional rules not yet in force [*Cremer v. Granaria, p. 592*; *Jurong Engineering, para. 24*; *Chik, p. 8*]. This applies as long as institutional rules are not so substantively modified that parties could not have expected it at the time of contracting [*Case 5622*; *Komplex v. Voest, p. 299*; *Lin et al., p. 8*]. There is no substantive change when only procedural aspects of institutional rules have changed [*AQZ v. ARA, para. 125*; *Car & Cars case, para. 31*; *Shackelford, p. 898*]. This is a very high bar: Tribunals have only held in exceptional circumstances that institutional rule changes were substantive, e.g. when an arbitral institution was replaced in the wake of German reunification [*LBEI case*; *Shackelford, pp. 908 sqq.*; *Lin et al., p. 8*]. The SIAC Rules 2025 do not present substantive change for two reasons.

31. **First**, the SIAC Rules 2025 are merely an updated version of the SIAC Rules 2016 and not a wholesale replacement. It has been held that "*matters such as the appointment of arbitrators, the conduct of proceedings and admissibility of evidence*" [*Car & Cars case, para. 31*; *cf. Bell case, para. 57*] are all of mere nature [*ibid.*]. The new provisions in the SIAC Rules 2025 relate to the efficiency of emergency arbitrations, pre-constitution administrative conferences, the SIAC Registrar's role as well as disclosure of third-party funding agreements [*Hanotiau, pp. 35 sqq.*]. Thus, the SIAC Rules 2025 do not differ substantively from the SIAC Rules 2016.

32. **Second**, these changes were foreseeable when the Parties concluded the Arbitration Clause. As SIAC had announced a revision of the SIAC Rules 2016 in July 2020 [*SIAC Website*], the changes were also within a foreseeable scope. This is illustrated by the example on third-party funding disclosure rules: SIAC had already issued a Practice Note on arbitrator conduct in cases involving third-party funding in 2017 that contained disclosure rules [*Selvaraj, Tan in: Balthasar, Part 3, O. para. 96*]. This was five years before the conclusion of the Arbitration Clause. It was therefore foreseeable that a future revision of the SIAC Rules would include similar provisions.

33. Therefore, the Parties' agreement encapsulated in the Arbitration Clause extends to the SIAC Rules 2025. The Parties agreed to apply the 'current' SIAC Rules at time of commencement of arbitration – even if these were the recently announced SIAC Rules 2025.

II. THE RULES IN FORCE AT TIME OF COMMENCEMENT OF ARBITRATION ARE THE SIAC RULES 2025

34. CLAIMANT alleges that "*commencement of arbitration would occur upon the initiation of mediation proceedings*" [*MfC, para. 16*]. However, the SIAC Rules 'current' at the time of commencement of

arbitration were the SIAC Rules 2025. The SIAC Rules 2025 apply to arbitrations commenced after 1 January 2025 according to Rule 1.5 SIAC Rules 2025. Pursuant to Rule 6.2 SIAC Rules 2025, arbitration is commenced when the notice of arbitration is received by the SIAC Registrar [*cf. Selvaraj, Tan in: Balthasar, Part 3, O. para. 58*]. CLAIMANT's Notice of Arbitration was received by the SIAC Registrar on 31 July 2025 [SIAC 8 August 2025*, para. 1.1*]. Contrary to CLAIMANT's allegation, the Parties cannot deviate from SIAC's commencement requirement [**A.**]. Even if the Tribunal were to find otherwise, the Parties never agreed to such deviation [**B.**].

A. THE PARTIES CANNOT DEVIATE FROM SIAC'S COMMENCEMENT REQUIREMENT

35. According to CLAIMANT, "*the Parties tied commencement of arbitration to the initiation of mediation proceedings*" [*MfC, para. 1*]. However, such a deviation from Rule 6.2 SIAC Rules 2025 is not permissible. It is true that under Art. 21 DAL, parties are free to set the commencement date of arbitral proceedings. Parties can exercise this discretion by agreeing on institutional rules that have specific commencement requirements [*UNCITRAL Digest, p. 105*; *UNCITRAL Notes, para. 7*]. However, when parties have chosen institutional rules, they cannot deviate from their essential features in a manner that is unworkable or unacceptable to the institution itself [*Berger, p. 485*; *Craig, Park, Paulsson, p. 295*; *Pryles, p. 329*].

36. Disconnecting the commencement date from the notice of arbitration would be administratively unworkable for SIAC. The notice of arbitration determines the number of arbitrators and the language of proceedings [*Rule 6.3(g) SIAC Rules 2025*]. Moreover, parties can only request streamlined procedure after the notice of arbitration [*Rule 14.2 SIAC Rules 2025*]. Without the notice of arbitration, these key parameters cannot be determined leading to administrative difficulties. Furthermore, the essential nature of Rule 6.2 SIAC Rules 2025 is reinforced by its wording. Unlike other provisions such as Rules 1.5, 17.3, 19.1, 32.7, 50.1 and 59 SIAC Rules 2025, it does not contain the phrase "*unless otherwise agreed by the parties*". Thus, Rule 6.2 SIAC Rules 2025 is an essential feature of the SIAC Rules 2025; parties cannot freely deviate from it.

B. EVEN IF DEVIATION FROM SIAC'S COMMENCEMENT REQUIREMENT WERE PERMISSIBLE, THE PARTIES DID NOT DEVIATE

37. CLAIMANT alleges that the Parties agreed on a "*hybrid dispute resolution process based on the AMA Protocol*" [*MfC, para. 17*]. However, even if a deviation from SIAC's commencement requirement were permissible, the Parties never agreed to such deviation. It is uncontested that the Arbitration Clause was inspired by the SIAC Model Clause, which establishes an integrated arbitration and mediation procedure – **A**rb-**M**ed-**A**rb Procedure – under the AMA-Protocol. Under this protocol, the proceedings are automatically stayed after arbitration is commenced and referred to the

Singapore International Mediation Center (the "**SIMC**"). If mediation succeeds, arbitral proceedings automatically resume and the settlement is transformed into a consent award. CLAIMANT contends that the Parties agreed to adopt a "*modified AMA protocol"* [*MfC, para. 20*] under which *"mediation would trigger commencement of arbitration*" [*ibid.*]. Three reasons militate against this.

38. **First**, the Arbitration Clause neither references the AMA-Protocol nor establishes an Arb-Med-Arb Procedure. The Arbitration Clause distinguishes between mediation, the "*first step*" [*Ex. C3, Clause 15*] of the dispute resolution, and subsequent arbitration. CLAIMANT itself refers to a "*two-step procedure*" [*NoA, para. 30*]. Next, arbitration is not automatic; the Parties merely have "*the right*" [*Ex. C3, Clause 15*] to request the referral of a settlement to the arbitral tribunal "*appointed by SIAC*" [*ibid.*]. This means that the tribunal is only appointed after mediation has ended. Mediation and arbitration are therefore separate stages of the dispute resolution process which are not commenced simultaneously.

39. **Second**, according to CLAIMANT, a consent award could only be enforceable if the commencement of arbitration is backdated to the initiation of mediation [*MfC, para. 20*]. To satisfy the Parties "*desire to ensure the enforceability of a mediated settlement as an award*" [*MfC, para. 20*], CLAIMANT argues the Arbitration Clause must be construed as an Arb-Med-Arb clause. However, this is unnecessary as the Parties are not currently pursuing a consent award; mediation has failed [*NoA, para. 28*]. Moreover, a consent award resulting from a Med-Arb procedure is enforceable under the NYC because of its pro-enforcement principle [*Kaster, pp. 49 sq.*; *Sussman, p. 12*; *cf. Ehle in: Wolff, Art. I para. 74*; *cf. ICCA's guide to the NYC, pp. 17 sq.*].

40. **Third,** CLAIMANT argues that CLAIMANT and the Botanical Garden's "*motivation for having mediation be the beginning of the whole arbitral process was, in part, to pause the statute of limitations*" [*MfC, para. 20*]. This argument is misleading. The Botanical Garden's intent cannot be imputed onto RESPONDENT [*supra paras. 15 sqq.*]. Even if this were the case, the Botanical Garden only intended to treat the initiation of mediation as commencement of arbitration "*for the purpose of the statute of limitations*" [*Ex. C7*]. This fiction was not meant to have a general scope of application; it was only meant to affect material "*Equatorianian law*" [*ibid.*]. Therefore, the Parties did not agree to deviate from Rule 6.2 SIAC Rules 2025. Thus, this Arbitration was commenced on 31 July 2025 when the NoA was received by the SIAC Registrar.

41. **In sum and for the reasons set out above**, the SIAC Rules 2025 apply. CLAIMANT's attempted rule shopping must be rejected. The Parties did not agree on a specific set of SIAC Rules. Instead, they agreed to apply the rules in force at the time of commencement of arbitration. These rules are the SIAC Rules 2025, as the commencement of arbitration is not tied to the initiation of mediation.

ISSUE 2: THE TRIBUNAL SHOULD ORDER THE DISCLOSURE OF THE FUNDING AGREEMENTS

42. RESPONDENT respectfully requests the Tribunal to compel CLAIMANT to disclose its agreements with LitSure and AtJ-Funding (the "**Funding Agreements**"). While CLAIMANT has admitted the existence of the Funding Agreements, it asserts that there is no "*legitimate procedural need*" [*MfC, para. 2*] for their full disclosure. However, full disclosure is necessary to ensure fair proceedings.

43. Both Parties are market leaders in their industries [*Ex. C1, para. 5*; *NoA, para. 2*]. When they agreed to the Arbitration Clause, both Parties expected that the other party would have the assets to satisfy any award made against it. This, however, no longer holds true. It is uncontested between the Parties that CLAIMANT now faces an "*impending insolvency in June 2026*" [*MfC, para. 52*]. Nevertheless, CLAIMANT found a way to launch an arbitration it could not afford [*PO2, para. 20*]: It chose to become the pawn of a financial entrepreneur – the third-party funder AtJ-Funding.

44. The calculus of third-party funders such as AtJ-Funding is simple: They make a bet and cover a party's legal costs in return for a share of the award should CLAIMANT succeed. Reversely, if RESPONDENT succeeds, it is highly unlikely that CLAIMANT could or AtJ-Funding would reimburse RESPONDENT's costs [*cf. Ex. R4*]. While CLAIMANT points to the fact that it obtained "*adverse risk insurance with LitSure*" [*MfC, para. 34*], CLAIMANT has not disclosed the insured sum. In essence, CLAIMANT forces RESPONDENT into proceedings in which RESPONDENT could potentially not obtain reimbursement of its costs. To add insult to injury, CLAIMANT indicated that it seeks to obtain reimbursement of the costs of the Funding Agreements [*MfC, para. 24*; *PO2, para. 27*].

45. CLAIMANT refuses full disclosure of the Funding Agreements [*MfC, para. 25*]. However, disclosure is vital to establish to what extent the funders would cover RESPONDENT's costs. Moreover, only disclosure can allow RESPONDENT to prepare for a claim for reimbursement of CLAIMANT's funding costs. The Tribunal can and should remedy this unfair situation by ordering CLAIMANT to disclose the content of the Funding Agreements under Rule 38.4 SIAC Rules 2025 [**I.**]. Even if the SIAC Rules 2016 were to apply, it can and should use its general powers to the same effect [**II.**].

I. THE TRIBUNAL CAN AND SHOULD ORDER DISCLOSURE UNDER RULE 38.4 SIAC RULES 2025

46. CLAIMANT mistakenly contends that an order for disclosure of the Funding Agreements would be a "*disproportionately intrusive measure that is unjustifiably overbroad*" [*MfC, para. 36*]. However, under the applicable Rule 38.4 SIAC Rules 2025, the Tribunal can order the requested disclosure [**A.**]. It should do so in the present case to ensure fair proceedings [**B.**].

A. THE TRIBUNAL CAN ORDER DISCLOSURE UNDER RULE 38.4 SIAC RULES 2025

47. Rule 38.4 SIAC Rules 2025 grants the Tribunal the power to order disclosure of third-party funding agreements. It is uncontested between the Parties that "*AtJ-Financing [is a] third-party funder*" [*MfC, para. 23*]. However, CLAIMANT refuses disclosure of its agreement with LitSure claiming there is "*no basis for the request of disclosing the ATE-Insurance agreement*" [*Langweiler 14 August 2025, para. 6*]. CLAIMANT is mistaken; LitSure is a third-party funder.

48. The definition of third-party funding in Rule 2.1 SIAC Rules 2025 is an almost verbatim adoption of the deliberately broad definition endorsed by the ICCA-Queen Mary Task Force on Third-Party Funding [*ICCA-Queen Mary Report, p. 50*]. According to Rule 2.1 SIAC Rules 2025, a third-party funder is a third party to the arbitration with a "*Direct Economic Interest in the outcome of the arbitration proceedings*". The same rule clarifies that the concept of "*Direct Economic Interest*" includes both "*funding for, or indemnity against the award to be rendered*". This is generally understood to include so-called ATE-Insurances, which provide insurance against a party losing the proceedings and are concluded '**A**fter **T**he **E**vents' that led to a dispute [*ELI, p. 75*; *ICCA-Queen Mary Report, p. 94*; *cf. Speers Final Award, para. 169*].

49. LitSure is CLAIMANT's ATE-Insurer: It promises indemnity in case CLAIMANT is ordered to pay RESPONDENT's costs [*Langweiler 4 August 2025, para. 6*; *NoA, para. 32*]. If RESPONDENT succeeds, LitSure stands to lose as it will have to cover at least part of RESPONDENT's costs if CLAIMANT is ordered to reimburse them. Hence, it has a direct economic interest in the outcome of the arbitral proceedings because it provides indemnity against the award to be rendered. Thus, LitSure is a third-party funder under Rule 2.1 SIAC Rules 2025; Rule 38.4 SIAC Rules 2025 is applicable.

B. THE TRIBUNAL SHOULD ORDER DISCLOSURE TO ENSURE FAIR PROCEEDINGS

50. According to CLAIMANT, an order for disclosure of the Funding Agreements would be "*irrelevant and unnecessary*" [*MfC, para. 44*] under the SIAC Rules 2025. This must be rejected, as disclosure of the Funding Agreements is necessary to ensure fair proceedings in the present case.

51. Both Parties agree that "*Rule 38.4 of the 2025 SIAC Rules grants this Tribunal authority to order disclosure of the terms of third-party funding agreements 'as it sees fit'* " [*MfC, para. 36*]. Contrary to CLAIMANT's assertions [*MfC, paras. 36 sqq.*], the Tribunal should use this power in the present case. RESPONDENT should not be left in the dark about the extent to which CLAIMANT and its funders would compensate RESPONDENT's costs if its defense succeeds [**1.**]. Moreover, CLAIMANT has indicated that it may claim reimbursement of its funding costs if its claim succeeds; it is unfair to expect RESPONDENT to cover costs it cannot quantify [**2.**]. Finally, RESPONDENT's need for disclosure outweighs any interest in confidentiality of the Funding Agreements [**3.**].

1. Disclosure is vital to protect RESPONDENT's ability to obtain reimbursement of costs if its defense succeeds

52. CLAIMANT assures the Tribunal that RESPONDENT's "*concern for securing costs against CLAIMANT is unfounded*" [*MfC, para. 45*]. However, only disclosure of the Funding Agreements can establish the truth of this assertion. If necessary, RESPONDENT could then take measures to protect its ability to obtain reimbursement of costs.

53. Under Rule 58.1 SIAC Rules 2025 a tribunal can make an adverse costs order, i.e. an order for one party to reimburse all or part of the other party's legal and other costs. Tribunals generally use this tool to award the successful party reimbursement of its costs at the end of the proceedings [*Born, § 23.08.C*; *Derains, para. 13*]. Of course, such an order provides no relief if the affected party is insolvent. This can lead to an unfair costs trap: While a claimant can abstain from starting proceedings against parties that are potentially insolvent, a respondent has no other choice but to defend itself against an insolvent claimant [*Redfern, O'Leary, p. 398*]. Third-party funding makes such a costs trap likelier as it allows impecunious parties to launch proceedings they could otherwise not have afforded [*Kritley, Wietrzykowsi, p. 26*].

54. This is exactly what has happened in the present case: It is uncontested that CLAIMANT faces an "*impending insolvency in June 2026*" [*MfC, para. 52*; *cf. PO2, para. 20*]. Only disclosure of the Funding Agreements makes it possible for RESPONDENT to escape the unfair costs trap. Disclosure would allow RESPONDENT to know if AtJ-Funding could be subject to an adverse costs order [**a.**]. It would also allow RESPONDENT to request security for costs if the Funding Agreements do not provide sufficient coverage of adverse costs [**b.**].

a. Disclosure allows RESPONDENT to know if AtJ-Funding could be forced to reimburse adverse costs

55. CLAIMANT alleges that "*any speculation that AtJ will control this proceeding by funding CLAIMANT's costs is overstated*" [*MfC, para. 60*]. However, disclosure of the Funding Agreements is necessary to establish to what extent AtJ-Funding controls the proceedings. This, in turn, could allow RESPONDENT to join AtJ-Funding to the proceedings to ensure that an adverse costs order could bind AtJ-Funding.

56. In a recent decision, the High Court in Equatoriana held that a third-party funder – AtJ-Funding – had to pay parts of the unfunded party's legal costs after the funded party turned out insolvent [*Ex. R4*]. Similarly, other national courts have established that third-party funders have to pay adverse costs if the funded claim fails [*Abu-Ghazaleh, p. 6*; *Excalibur, para. 39*]. A tribunal can, however, render adverse costs orders only against parties to the proceedings [*Tomorrow Sales Case, para. 36*]. Under Rule 18.10 SIAC Rules 2025, a party may request the tribunal to order the joinder of a third

party even after the constitution of the tribunal if the third party is *prima facie* bound by the arbitration agreement. A third party which participates in the performance of the underlying contract implicitly consents to be bound by the arbitration clause [*ICC Case No. 17768, para. 161*; *Born, § 10.02.C*; *cf. Redfern/Hunter, p. 61*]. As a consequence, a third-party funder implicitly consents to be bound by the arbitration agreement if it partakes in its performance by exercising active control over the proceedings, e.g. by controlling the funded party's legal strategy [*Born, § 10.02.Q*; *Mechantaf, p. 377*; *cf. Tomorrow Sales Case, paras. 28 sqq.*; *cf. Chan, p. 34*].

57. CLAIMANT maintains that there is "*no evidence […] that AtJ will exercise undue influence over these proceedings*" [*MfC, para. 61*]. CLAIMANT suggests that AtJ-Funding's reputation as a "*rough funder*" [*MfC, para. 37*] is solely based on disclosure of one funding agreement in a different case that is not "*indicative of the terms of its funding agreement with CLAIMANT*" [*MfC, para. 58*]. This ignores that a spokesman of the funding industry in Equatoriana declared that AtJ-Funding is generally "*known in the industry as a very aggressive player in relation to […] its influence on the conduct of the proceedings*" [*Ex. R4*]. Without disclosure, RESPONDENT cannot establish whether AtJ-Funding controls this Arbitration and if, consequently, AtJ-Funding is bound by the Arbitration Clause. In this case, RESPONDENT could request the joinder of AtJ-Funding to this Arbitration to ensure that AtJ-Funding could be bound by an adverse costs order. Absent disclosure, RESPONDENT cannot establish whether AtJ-Funding could be bound by an adverse costs order.

b. Disclosure allows RESPONDENT to request security for costs if necessary

58. CLAIMANT asserts that "*RESPONDENT's request to pursue disclosure as necessarily related to a security for costs order is baseless*" [*MfC, para. 47*]. This is wrong; only disclosure of the Funding Agreements allows RESPONDENT to determine whether it needs to make a request for security for costs.

59. Rule 48 SIAC Rules 2025 allows tribunals to make an order for security for costs, i.e. an order requiring one party to post security payment to ensure that the other party can recover its costs in case it prevails [*Choong, para. 12.31*; *cf. Kröll I, p. 97*]. CLAIMANT contends that the "*mere existence of third-party funding agreements*" [*MfC, para. 49*] is not enough to justify a security for costs order [*ibid.*]. RESPONDENT does not contest this. It precisely needs disclosure because the mere existence of the Funding Agreements is insufficient to justify an order for security for costs.

60. As CLAIMANT itself recognizes, "*[t]ribunals consider whether any funder has agreed to undertake an adverse cost award*" [*MfC, para. 50*]. In fact, scholars and arbitrators alike agree that an order for security for costs is warranted when there is strong indication that neither the funded party nor its third-party funders are likely to cover adverse costs [*Dirk Herzig, paras. 57 sq.*; *García Armas, para. 251*; *RSM, para. 81*; *Y and Z case, para. 26*; *Born, § 17.01.G.1.e*; *Redfern, O'Leary, p. 409*]. CLAIMANT relies on

Eskosol, an ICSID case, to establish that "*the existence […] of insurance makes risk of non-payment of an award non-existent*" [*MfC, para. 45, cf. 56*]. However, the tribunal in this case had knowledge of the exact insured sum and assessed whether the insurance is sufficient to protect the unfunded party's ability to obtain reimbursement of its costs [*Eskosol, para. 44*].

61. Finally, CLAIMANT relies on *IC Power*, another ICSID case, to establish that the "*terms of [a third-party funding] agreement are not relevant to security for costs"* [*MfC, para. 44*]. This is highly misleading: In *IC Power*, there was no indication that the funded party would not be able to comply with an adverse costs order [*IC Power, para. 37*]. In fact, the tribunal explicitly clarified that "*if the funded party is impecunious, then the funding terms and conditions […] may be relevant to assessing the [funded party's] ability to meet an adverse award*" [*IC Power, para. 37*; *cf. Muhammet Çap, paras. 11 sq.*].

62. In the present case, there is strong indication that CLAIMANT will not be able to comply with an adverse costs order as it will probably be insolvent by June 2026 [*PO2, para. 20*]. CLAIMANT has not disclosed how much, if any, adverse costs would be covered by AtJ-Funding and LitSure. If the funders do not sufficiently cover adverse costs, the conditions for an order for security for costs would be met. Without disclosure of the Funding Agreements, RESPONDENT has no way of knowing whether it needs to make a request for security for costs. The Tribunal should order disclosure as this would allow RESPONDENT, if necessary, to make a request for security for costs.

2. Disclosure is vital to allow RESPONDENT to prepare against CLAIMANT's claim for reimbursement of its funding costs

63. CLAIMANT recognizes that RESPONDENT has requested disclosure of the Funding Agreements because it needs them "*to defend itself against additional claims [for reimbursement of funding costs] made by CLAIMANT*" [*MfC, para. 24*]. CLAIMANT did not even attempt counter this argument.

64. Rule 58.1 SIAC Rules 2025 grants a tribunal the power to order a party to reimburse the other party's "*legal and other costs*" at the end of the proceedings. Various tribunals have asserted that legal and other costs include third-party funding costs [*Essar v. Norscot, paras. 19 sqq.*; *Speers Final Award, p. 159*; *ICCA-Queen Mary Report, p. 170*]. This is expressly codified in Rule 38.3 SIAC Rules 2025, which allows tribunals to take third-party funding into account when apportioning costs. The reimbursable funding costs include funders' returns and insurers' premiums [*Tanham, p. 87*]. Often, they can outweigh the legal costs of a party: In *Essar v. Norscot*, the funder's reimbursable return was 300% of the legal costs [*Essar v. Norscot, para. 5*]; in *Speers*, more than USD 10M were claimed as funding costs while the legal costs only amounted to USD 3.7M [*Speers Final Award, paras. 130, 140*]. This incalculable risk unfairly burdens the unfunded party; the funded party should therefore disclose details of the funding costs at an early stage of the proceedings [*Speers Final Award,*

para. 186; *ICCA-Queen Mary Report, p. 159*].

65. CLAIMANT has repeatedly threatened to claim reimbursement of its funding costs [*PO2, para. 27*; *cf. NoA, para. 37*]. However, CLAIMANT has not provided any information about their amount. This is particularly troubling as it is well known that AtJ-Funding has very aggressive financial terms [*Ex. R4*]. RESPONDENT cannot, at present, prepare for such a claim – it can neither set aside money to be able to comply with a reimbursement order nor prepare a legal defense against it. The Tribunal should remedy this untenable state of limbo by ordering disclosure of the Funding Agreements.

3. CLAIMANT's interest in confidentiality does not outweigh the need for disclosure

66. CLAIMANT contends that disclosure of the Funding Agreements would give RESPONDENT an "*undue insight into CLAIMANT's arbitration strategy*" [*MfC, para. 24*]. However, RESPONDENT's need for disclosure outweighs any interest in keeping the Funding Agreements confidential.

67. RESPONDENT does not contest that third-party funding agreements often contain information that are "*commercially sensitive*" [*MfC, para. 39*]. However, a funded party's interest in keeping a third-party funding agreement secret must give way if the other party has established a sufficient need for disclosure [*von Goeler, p. 196*; *cf. Muhammet Çap, para. 8*]. CLAIMANT contests this by relying on *Speers* to establish a "*funder's budget and assessment of CLAIMANT's case is sensitive information"* [*MfC, para. 41*]. However, in this 2020 SIAC case, the tribunal recognized that "*whether it is advantageous from the claimant's perspective to disclose the terms of their TPF arrangement is a different question from whether it is fair*" [*Speers Final Award, para. 184*]. Ultimately, it found that disclosure of a third-party funding agreement is necessary if the funded party wants to recover its funding costs at the end of the proceedings [*Speers Final Award, para. 186*].

68. The Funding Agreements do not contain any description of CLAIMANT's arbitration strategy [*PO2, para. 26*]. Moreover, CLAIMANT not only wants to recover its funding costs at the end of the proceedings; it also keeps RESPONDENT in the dark about its funders' willingness to cover adverse costs. The Funding Agreements do not contain any description of CLAIMANT's arbitration strategy [*PO2, para. 26*]. As established previously [*supra paras. 52 sqq.*], only their disclosure can ensure fair proceedings. This need for disclosure decisively outweighs CLAIMANT's confidentiality interest. The Tribunal should order disclosure of the Funding Agreements under Rule 38.4 SIAC Rules 2025.

II. EVEN IF THE SIAC RULES 2016 WERE TO APPLY, THE TRIBUNAL CAN AND SHOULD ORDER DISCLOSURE

69. CLAIMANT contends that if the SIAC Rules 2016 apply the Tribunal does not have the power to

order disclosure of the Funding Agreements [*MfC, para. 26*]. This is wrong. CLAIMANT relies on a decision by the Danubian Supreme Court that upheld an award in which the arbitrator stated that it did not have the power to order disclosure of a specific third-party funding agreement [*MfC, para. 27*]. However, CLAIMANT's reference is no substitute for a legal argument. CLAIMANT fails to provide the arbitrator's reasoning and to apply it to the present case. Moreover, the fact that the award was upheld does not imply that the arbitrator's reasoning is substantially correct. Under Art. 34 DAL, a Danubian court does not conduct a *de novo* revision of the merits of a case [*Born, § 25.03.A.2*; *Ortolani in: UNCITRAL Commentary, 865*]; the Court merely held there was no annulment ground under Art. 34 DAL. A correct reading of the SIAC Rules 2016 reveals that the Tribunal can and should order disclosure either under Rule 27(f) SIAC Rules 2016 [**A.**] or based on general fairness considerations [**B.**].

A. THE TRIBUNAL CAN AND SHOULD ORDER DISCLOSURE UNDER RULE 27(F) SIAC RULES 2016

70. CLAIMANT mistakenly contends that the Tribunal should not order disclosure as they are "*irrelevant to this case and immaterial to its outcome*" [*MfC, para. 43*]. This is misleading.

71. Under Rule 27(f) SIAC Rules 2016, a tribunal can order disclosure of documents in the possession of one party if it considers them relevant to the case and material to its outcome. It is well-established that tribunals can order disclosure of third-party funding agreements under document production rules [*SAS v. Bolivia, para. 82*; *Tayeb v. Qatar, para. 13*; *von Goeler, p. 136*; *cf. ICCA-Queen Mary Report, p. 118*]. The Funding Agreements are relevant and material to RESPONDENT's request for security for costs [**1.**] and its defense against a claim for reimbursement of CLAIMANT's funding costs [**2.**].

1. The Funding Agreements are relevant and material to RESPONDENT's request for security for costs

72. CLAIMANT wrongfully contends that the Funding Agreements are not relevant and material to RESPONDENT's request for security for costs [*MfC, para. 34*]. This should be rejected.

73. A document is relevant to a case if it could support a party's legal contention [*Khodykin, Mulcahy, Fletcher, p. 858*; *O'Malley, p. 60*]; it is material to its outcome if it can affect the tribunal's decision on this specific contention [*O'Malley, p. 63*; *Zuberbühler et al., p. 68*]. Rule 27(j) SIAC Rules 2016 allows a tribunal to issue a security for costs order. Such an order should be issued whenever both a funded party and its funders are likely unwilling or unable to comply with an adverse costs order [*supra paras. 59 sqq.*].

74. CLAIMANT contends that the requested disclosure is irrelevant to a request for security for costs because of "*CLAIMANT's adverse risk insurance with LitSure*" [*MfC, para. 34*]. However, CLAIMANT has never stated what the insured sum is. The Funding Agreements probably detail to what extent the funders would cover adverse costs. This information could support RESPONDENT's contention that it needs to obtain security for costs to safeguard its ability to obtain reimbursement of costs. Disclosure is also material as it will affect the Tribunal's decision: The funders' willingness to cover adverse costs is key in determining whether to order security for costs. The Funding Agreements are relevant and material to RESPONDENT's request for security for costs.

2. The Funding Agreements are relevant and material to RESPONDENT's defense against a claim for reimbursement of funding costs

75. CLAIMANT argues that the Funding Agreements are relevant and material to RESPONDENT's defense "*against additional claims made by CLAIMANT*" [*MfC, para. 24*]. This is wrong. A document can be relevant and material to a party's defense against a claim by another party; the requesting party does not need to have the burden of proof for the legal contention it seeks to prove or disprove [*Born, § 16.02.E.4.f*; *Jaffe, Dulani, Stute, p. 11*; *Khodykin, Mulcahy, Fletcher, para. 6.134*; *Marghitola, pp. 55 sqq.*]. Pursuant to Rule 37 SIAC Rules 2016, a tribunal can order a party to pay all or a part of the "*legal or other costs*", which has been interpreted to include third-party funding costs, including ATE-Insurance costs [*cf. supra paras. 64 sqq.*]. However, this only applies to reasonable funding costs [*Essar v. Norscot, para. 63*; *Speers Final Award, para. 197*]. Costs are unreasonable if they exceed what the losing party can be expected to reimburse, e.g. if they are three times higher than the legal costs [*Speers Final Award, para. 197*].

76. CLAIMANT has reserved a claim for reimbursement of its funding costs [*PO2, para. 27*; *cf. NoA, para. 37*]. It is well-known that CLAIMANT's third-party funder, AtJ-Funding, charges very high fees and is generally a "*rough funder*" [*Ex. R4*]. The Funding Agreements are relevant since they are likely to show that the funding costs exceed what RESPONDENT can be expected to shoulder as adverse costs; thus, they are likely to establish the unreasonableness of these costs. They are also material as they could thereby affect the outcome of RESPONDENT's defense against a claim for reimbursement of these costs. The Funding Agreements are relevant and material to RESPONDENT's defense. Under Rule 27(f) SIAC Rules 2016, the Tribunal should order their disclosure.

B. THE TRIBUNAL CAN AND SHOULD ORDER DISCLOSURE TO ENSURE FAIR PROCEEDINGS

77. Under the SIAC Rules 2016, the Tribunal can and should order disclosure to ensure fair proceedings. Both Parties agree that, in absence of a specific rule, a tribunal has "*broad discretionary*

powers" [*MfC, para. 28*] to conduct the proceedings in a fair manner [*Born, § 17.01*]. In fact, Rule 41.3 SIAC Rules 2016 explicitly tasks tribunals to "*act in the spirit of these Rules*" and ensure fair proceedings whenever the SIAC Rules 2016 are silent on a given topic.

78. According to CLAIMANT "*[t]here is no guidance within the 2016 SIAC Rules on whether ordering disclosure of third-party funding agreements is fair*" [*MfC, para. 29*]. This ignores the Practice Note 2017 which expressly allows for broad disclosure of "*details of the External Funder's interest in the outcome of the proceedings*" under Rule 5. An order for disclosure is necessary to ensure fair proceedings [*cf. supra paras. 52 sqq.*]. This is sufficient to ground such an order under the SIAC Rules 2016.

79. **In sum and for the reasons set out above**, the Tribunal should order disclosure of the Funding Agreements. CLAIMANT has decided to pursue an arbitration it could not afford through third-party funding. RESPONDENT has no way of knowing whether CLAIMANT or its funders would comply with an adverse costs order. To put the cherry on top, CLAIMANT has hinted that it will claim its funding costs from RESPONDENT in the unlikely event it succeeds. Disclosure of the Funding Agreements is vital to allow RESPONDENT to prepare for such a claim.

ARGUMENTS ON THE MERITS

ISSUE 3: CLAIMANT IS NOT ENTITLED TO DAMAGES

80. RESPONDENT respectfully requests the Tribunal to reject CLAIMANT's claim for damages under Art. 61(1)(b) CISG. CLAIMANT bases this claim on RESPONDENT "*failing to perform its contractual obligations*" [*MfC, para. 93*] by not being able to take delivery on 27 March 2024. However, CLAIMANT's narrative obscures the true cause of this situation: RESPONDENT could not obtain the necessary import permits for the delivery of the orchids because of a rapidly unfolding series of sovereign measures beginning with the changes of CITES regulations that rendered performance impossible – a *force majeure* event. In fact, the delivery was only subject to the *force majeure* event because CLAIMANT did not respect its contractual obligations.

81. CITES is an international treaty, regulating the trade with endangered species, to which both Equatoriana and Mediterraneo are parties [*Ex. R1, para. 6*]. For a long time, the wild-cut Vanilla Orchid had been lightly regulated because both countries opposed a general prohibition of its trade [*Ex. C4*; *Ex. R1, para. 6*]. To the general surprise, on 1 February 2024, the CITES Conference of the Parties (the "**CoP**") reclassified wild-cut Vanilla Orchids by moving them from CITES Appendix II to Appendix I (the "**CITES Decision**") [*NoA, para. 17*]. Thereby the CoP prohibited the commercial trade with wild-cut Vanilla Orchids. Following the CITES Decision, Equatoriana abruptly shifted its previous liberal approach of granting import permits for the

Vanilla Orchid [*PO2, paras. 17 sq.*; *Ex. R1, para. 9*]. Instead, it effectively suspended trade and signaled a full ban was forthcoming [*ibid.*]. This regulatory cascade placed RESPONDENT in a position where compliance with the contract became impossible. Contrary to CLAIMANT's assertions [*MfC, paras. 65 sqq.*], this is a textbook case of *force majeure*.

82. The Sales Agreement is governed by the CISG [*PO1, para. II*]. Under Art. 61(1)(b) CISG, a seller may claim damages if a buyer does not perform. It is true that RESPONDENT did not carry out the Sales Agreement as it could not take delivery of the orchids on 27 March 2024. However, CLAIMANT is precluded from a claim for damages as it caused RESPONDENT's actions [**I.**]. In any case, RESPONDENT is exempted from liability due to *force majeure* [**II.**].

I. CLAIMANT CAUSED RESPONDENT'S NON-PERFORMANCE

83. CLAIMANT conveniently ignores that it caused RESPONDENT's inability to take delivery. If CLAIMANT had simply produced goods conforming to international standards, the CITES Decision would not have affected the Sales Agreement. Consequently, pursuant to Art. 80 CISG, CLAIMANT may not rely on RESPONDENT's non-performance, excluding its claim for damages.

84. Under Art. 80 CISG, a party may not rely on another party's failure to perform to the extent that such failure was caused by the first party's act or omission. This act or omission must attain a certain significance; a party's breach of contract always satisfies this threshold [*Atamer in: Kröll/Mistelis/Perales Viscasillas, Art. 80 para. 4*; *Sommerfeld in: MüKoHGB, Art. 80 para. 5*]. Such a breach of contract may result from a delivery of non-conforming goods [*Saenger in: Ferrari et al., Art. 35 para. 16*]. It is presumed that only goods produced in accordance with international production standards conform to a contract even if parties do not expressly contractually stipulate so [*'Bio Suisse' certified organic juices and oils case, paras. 26, 39 sq.*; *Frozen fish case I, paras. 18, 24*; *Schwenzer, Fountoulakis in: Schlechtriem/Schwenzer/Schroeter, Art. 35 para. 16*].

85. There is an international production standard that plants should be propagated without affecting wild populations in order to preserve their genetic diversity [*Guidance on artificial propagation CITES, p. 4*]. This is recognized by Art. VII(4) CITES which clarifies that the commercial trade of artificially propagated plants is never prohibited – even if its wild form falls under such prohibition.

86. 30% of the orchids CLAIMANT produced for RESPONDENT were wild-cuttings [*PO2, para. 3*]. Since these wild-cuttings were not labelled, all of CLAIMANT's orchids had to be treated as potentially containing wild-cut orchids [*ibid.*]. In consequence, none of CLAIMANT's orchids fell under the exception of Art. VII(4) CITES. When the Vanilla Orchid was reclassified by the CITES Decision, all of CLAIMANT's orchids were suddenly untradable for commercial purposes. If CLAIMANT had complied with international standards by abstaining from wild-cuttings CLAIMANT's orchids would

have been tradeable for commercial purposes. Thus, CLAIMANT's decision to produce its orchids with wild-cuttings directly caused RESPONDENT's inability to take delivery of the orchids.

II. IN ANY CASE, RESPONDENT IS EXCUSED DUE TO *FORCE MAJEURE*

87. In any case, RESPONDENT's inability to take delivery is excused due to *force majeure*. CLAIMANT contends that "*RESPONDENT is not exempted from performance by Article 79 of the CISG*" [*MfC, para. 65*] and "*the Force Majeure Clause in the sales agreement*" [*MfC, para. 97*]. This must be rejected.

88. Further, CLAIMANT contends that "*the alleged impediment is not a force majeure event under UNIDROIT Art. 7.1.7*" [*MfC, para. 107*], which is entirely irrelevant. CLAIMANT relies on the fact that the UNIDROIT Principles constitute the contractual law in the Parties' countries of origin [*MfC, para. 107*]. This misses the key point. Any excuse under Art. 7.1.7 UNIDROIT is immaterial, as the CISG displaces national law, a result to which the Parties have expressly agreed [*PO1, para. II*]. Accordingly, only Art. 79 CISG and Clause 12 Sales Agreement could be applied.

89. However, Clause 12 Sales Agreement excludes the application of Art. 79 CISG [**A.**]. RESPONDENT is excused under Clause 12 Sales Agreement [**B.**]. Even if the Tribunal were to find that Clause 12 Sales Agreement is not a self-contained *force majeure* clause and partially modifies Art. 79 CISG, RESPONDENT would still be excused [**C.**].

A. CLAUSE 12 SALES AGREEMENT EXCLUDES THE APPLICATION OF ART. 79 CISG

90. While there are two potential exclusion grounds for *force majeure* in the present case, Clause 12 Sales Agreement excludes the application of Art. 79 CISG. Art. 79(1) CISG, the CISG provision dealing with *force majeure*, reads as follows:

> *"A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."*

91. The Parties included an own *force majeure* clause in Clause 12.1 Sales Agreement:

> *"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"* [*Ex. C3, Clause 12*].

92. CLAIMANT correctly points out that a contractual *force majeure* clause can exclude the application of Art. 79 CISG [*MfC, para. 98*; *Ukrainian corn case*]. Just as in the *Ukrainian corn case*, the Parties replaced Art. 79 CISG with their self-contained *force majeure* clause.

93. Under Art. 6 CISG, parties to a contract can derogate from CISG provisions. If parties draft a self-contained *force majeure* clause they derogate from Art. 79 CISG as a whole [*Brunner, p. 388*; *cf. Gujarat case, para. 149*]. If a *force majeure* clause does not itself provide an exhaustive definition of *force majeure*, it is still deemed to partially modify Art. 79 CISG [*Oil Corp. v. Libyan Sun, p. 587*; *Brunner, p. 388*; *cf. Gujarat case, para. 149*].

94. In the *Gujarat case*, a 2015 ICC case, the tribunal held that a contractual clause was a self-contained *force majeure* clause and therefore excluded any application of the national statute on *force majeure* [*Gujarat case, paras. 145 sqq.*]. It relied on multiple indicators: The contractual clause referred to typical *force majeure* events [*Gujarat case, para. 143*]. It further stipulated that those events were "*beyond reasonable control of a party*" [*Gujarat case, paras. 143, 145 sqq.*]. The tribunal also held that the omission of typical requirements of *force majeure*, such as "*foreseeability*" or "*impossibility*" merely underscored that the parties wanted to depart from some of the requirements of *force majeure* under the applicable contract law [*Gujarat case, para. 152*].

95. Clause 12 Sales Agreement bears a striking resemblance to the contractual clause of the *Gujarat case*. Like the *Gujarat* clause, it contains a list of events that are typically "*beyond […] reasonable control*" [*Ex. C3, Clause 12*]. The events included in the list are partially the same as in the *Gujarat case*, e.g. "*acts of God*", "*war*", "*government measures*" [*Ex. C3, Clause 12*; *cf. Gujarat case, para. 143*]. The Parties chose not to include some requirements of Art. 79 CISG, e.g. foreseeability and surmountability. As established in the *Gujarat case*, this is an indication of their will to depart from Art. 79 CISG. The Parties' will to replace Art. 79 CISG by their own self-contained *force majeure* clause is further evidenced by their use of the wording "*A Party is not liable for failure […]*" [*Ex. C3, Clause 12.1*] which exactly mirrors Art. 79 CISG. Therefore, Clause 12 Sales Agreement is a self-contained *force majeure* clause. Thus, the Parties excluded the application of Art. 79 CISG.

B. RESPONDENT IS EXCUSED UNDER CLAUSE 12 SALES AGREEMENT

96. CLAIMANT contends that "*the Force Majeure Clause in the sales agreement does not exempt RESPONDENT*" [*MfC, para. 97*]. This disregards that the CITES Decision is a *force majeure* event under Clause 12 Sales Agreement [**1.**]. Furthermore, the notice requirement of Clause 12.2 Sales Agreement was fulfilled [**2.**].

1. The CITES Decision is a *force majeure* event under Clause 12 Sales Agreement

97. CLAIMANT argues that "*[i]mport permits were not detailed as a form of impediment in the Parties' Sales Agreement*" [*MfC, para. 103*]. This is incorrect as RESPONDENT explicitly relies on the CITES Decision [*RNoA, para. 23*]. The CITES Decision is an event beyond its control.

98. Under Clause 12.1 Sales Agreement a party is exempted from liability if its failure to perform is caused by an event "*beyond […] reasonable control*" such as a "*governmental measure*" [*Ex. C3, Clause 12*]. The clause thereby follows a well-established principle under Art. 79 CISG: Sovereign acts – particularly import and export restrictions or statutory trade prohibitions – are widely recognized as typical impediments beyond a party's control [*Achilles in: Achilles, Art. 79 para. 7*; *Huber, Mullis in: Huber/Mullis, § 13 p. 259*; *Magnus, Ulrich in: Staudinger, Art. 79 para. 28*; *Sommerfeld in: MüKoHGB, Art. 79 para. 37*].

99. CLAIMANT relies on the fact that the "*import permits [existed] before the CITES Decision*" [*MfC, para. 101*]. However, CLAIMANT omits that the CITES Decision made obtaining an import permit impossible for RESPONDENT. RESPONDENT already applied for an import permit on 5 February 2024 – almost two months before the scheduled delivery on 27 March 2024 [*PO2, para. 17*; *Ex. C5*]. Nevertheless, on 8 February 2024, the competent minister of Equatoriana publicly committed to revise the Equatorianian practice of issuing import permits [*PO2, para. 17*]. Ultimately, RESPONDENT was not able to obtain an import permit because on 14 February 2024 the Equatorianian government ceased to issue any import permits for the Vanilla Orchid until further notice [*PO2, para. 17*].

100. RESPONDENT's failure to obtain an import permit resulted from an event beyond its reasonable control. RESPONDENT is therefore excused under Clause 12 Sales Agreement.

2. RESPONDENT has not forfeited its right to rely on Clause 12 Sales Agreement

101. CLAIMANT contends that RESPONDENT forfeited its right to rely on Clause 12 Sales Agreement "*because it did not reasonably notify CLAIMANT of the alleged impediment*" [*MfC, para. 99*]. This contention is unfounded. RESPONDENT complied with Clause 12.2 Sales Agreement [**a.**]. In any case, CLAIMANT misconstrues the legal consequence of a breach of Clause 12.2 Sales Agreement [**b.**].

a. RESPONDENT complied with Clause 12.2 Sales Agreement

102. CLAIMANT mistakenly argues that "*RESPONDENT waited 10 days to inform CLAIMANT of the alleged impediment, thus not meeting the 5-day notice requirement*" [*MfC, para. 104*]. Clause 12 Sales Agreement stipulates that "*[t]he affected Party shall notify the other within 5 days of becoming aware*". RESPONDENT did notify CLAIMANT within five days after becoming aware of the effects of the CITES Decision.

103. When the CITES Decision was adopted on 1 February 2024, there was widespread doubt that Equatoriana would implement it; it was known that the Equatorianian government often refused to enact the prohibitions of CITES [*Ex. R1, para. 6*]. On 8 February 2024, the competent minister announced a 180°-shift in the Equatorianian policy: It would now follow a restrictive approach [*Ex. R1, para. 9*]. Thus, the five-day notification period ran until 13 February 2024.

RESPONDENT notified CLAIMANT on 10 February 2024, well within the required timeframe. Accordingly, RESPONDENT provided timely notice under Clause 12.2 Sales Agreement.

b. In any case, a breach of Clause 12.2 Sales Agreement does not lead to forfeiture

104. In any case, Clause 12.2 Sales Agreement does not establish a forfeiture mechanism that would prevent a party from relying on Clause 12.1 Sales Agreement. CLAIMANT alleges that "*RESPONDENT did not meet the requirements […] and cannot use [Clause 12 Sales Agreement] to claim exemption from liability for Force Majeure*" [*MfC, para. 106*]. This misconstrues Clause 12.2 Sales Agreement for two reasons.

105. **First**, Clause 12 Sales Agreement does not specify the legal effect of its breach. If a provision lacks express legal consequences for non-compliance, the obligation is to be understood as directory rather than mandatory [*N.N. Global Mercantile v. Indo Unique Flame case, para. 189*; *Shah v. Khyber Pakhtunkhwa case, para. 18*]. That is precisely the case here: Clause 12.2 Sales Agreement contains no reference to legal consequences in the event of a breach. Accordingly, Clause 12.2 Sales Agreement must be considered directory rather than mandatory.

106. **Second**, this understanding is confirmed by the clause's close alignment with Art. 79 CISG and the ICC Force Majeure Model Clause, an international standard. Under both standards, a party that does not conform with the notice requirement does not forfeit its right to rely on *force majeure*. It is therefore the absolute exception that a notification obligation constitutes a barrier to invoking *force majeure*. This systematic comparison indicates that Clause 12.2 Sales Agreement likewise constitutes nothing more than a gentleman's courtesy.

107. Thus, even a breach of Clause 12.2 Sales Agreement would not preclude a party from relying on *force majeure*; accordingly, RESPONDENT remains excused under Clause 12 Sales Agreement.

C. EVEN IF CLAUSE 12 SALES AGREEMENT ONLY SPECIFIED SOME REQUIREMENTS OF ART. 79 CISG, RESPONDENT WOULD STILL BE EXCUSED

108. CLAIMANT contends that "*RESPONDENT is not exempt under Article 79(1) of the CISG*" [*MfC, para. 68*]. However, even if Clause 12 Sales Agreement merely specified some requirements of Art. 79 CISG, RESPONDENT would still be excused. The CITES Decision was an impediment beyond RESPONDENT's control [**1.**], which was not foreseeable at the time of contracting [**2.**] and could not possibly have been avoided or overcome [**3.**].

1. The CITES Decision was an impediment beyond RESPONDENT's control

109. CLAIMANT argues that "*RESPONDENT's inability to obtain an import permit was not an impediment*" [*MfC, para. 70*]. However, RESPONDENT's performance was impeded by the CITES Decision and

subsequent Equatorianian government measures. This constitutes an impediment beyond RESPONDENT's control; RESPONDENT did not contractually assume this risk.

110. An impediment beyond control is an event preventing performance that lies outside a party's sphere of control [*Köhler, Schwenzer in: Schlechtriem/Schwenzer/Schroeter, Art. 79 para. 11*]. This includes sovereign acts such as import and export restrictions [*Achilles in: Achilles, Art. 79 para. 7*; *Magnus, Ulrich in: Staudinger, Art. 79 para. 28*]. CLAIMANT argues that "*RESPONDENT was contractually obligated to assume the risk of possible import restrictions*" [*MfC, para. 78*]. However, a party only assumes a risk if it guarantees that performance will remain unaffected by the occurrence of an impediment [*Urangesellschaft v. Nynco Trading case, para. 281*; *cf. Gujarat case*]. A contractual stipulation is not automatically a guarantee [*Brunner, p. 132*]. This holds especially true when import and export restrictions are imposed with unprecedented speed and scope [*Macromex Srl. v. Globex International Inc., p. 3*; *Gillette, Walt, p. 301*].

111. The CITES Decision was an event beyond RESPONDENT's factual control [*supra paras. 97 sqq.*]. Furthermore, CLAIMANT submits that "*RESPONDENT's contractual allocation of risk put the alleged impediment within its sphere of control*" [*MfC, para. 75*]. However, RESPONDENT never assumed the risk of a CITES rules change affecting import permits.

112. CLAIMANT relies on Clause 5.1 Sales Agreement [*MfC, para. 75*]. However, this clause merely states that "*[t]he Buyer shall obtain all import permits for the country of destination*". There is no indication that the Parties agreed on a contractual guarantee against any future regulatory changes. This holds all the more true as the CITES Decision was abruptly adopted with immediate effect which was without precedent [*Ex. C4*; *Ex. R1, para. 6*]. In essence, CLAIMANT argues that every contractual obligation is a guarantee [*MfC, para. 75*]. This would deprive *force majeure* of any effect.

113. This conclusion is further reinforced by the principle of *contra proferentem* [*Schmidt-Kessel in: Schlechtriem/Schwenzer/Schroeter, Art. 8 para. 47*; *Zuppi in: Kröll/Mistelis/Perales Viscasillas, Art. 8 para. 26*]. As the Sales Agreement is solely based on CLAIMANT's template and Clause 5.1 Sales Agreement was not negotiated [*PO2, para. 8*; *Ex. C1, para. 7*], its ambiguity must be interpreted against CLAIMANT. Therefore, RESPONDENT did not assume the risk of a CITES Decision.

2. The CITES Decision was not foreseeable at the time of contracting

114. CLAIMANT argues that a "*change in import restrictions in a commercial transaction for the Vanilla Orchids was foreseeable at the formation of the contract in August 2022*" [*MfC, para. 79*]. This argument is without merit. On 25 August 2022, when contracting the Sales Agreement, the CITES Decision and its implementation by Equatoriana were not foreseeable to RESPONDENT. According to Art. 79 CISG, an event is foreseeable if a reasonable person in the party's position at the time of

contracting could have anticipated its occurrence [*Atamer in: Kröll/Mistelis/Perales Viscasillas, Art. 79 para. 50*; *Magnus, Ulrich in: Staudinger, Art. 79 para. 32*; *Secretariat Commentary, para. Art. 65 para. 4*].

115. CLAIMANT correctly points out that "*the Vanilla Orchid was listed under Appendix II of CITES […] at the time of the formation of the contract*" [*MfC, para. 80*]. However, contrary to its assertions, the fact that the classification of the Vanilla Orchid was left unchanged until 2024 signals regulatory continuity, not an impending change. In fact, the reclassification of a species with immediate effect was unprecedented [*PO2, para. 14*]. Moreover, CoP decisions, such as the CITES Decision, are highly political, shaped by unpredictable multilateral negotiations and policy trade-offs [*Ex. R1, para. 6*]. Furthermore, Equatoriana was very skeptical of trade prohibitions and had always implemented CITES classifications very leniently [*Ex. R1, para. 6*; *RNoA, para. 9*]. Thus, the CITES Decision and its implementation was not foreseeable at the time of the conclusion of the Sales Agreement.

3. RESPONDENT could not avoid or overcome the CITES Decision

116. CLAIMANT contends that "*RESPONDENT could have reasonably avoided or overcome the consequences of the alleged impediment*" [*MfC, para. 84*]. This must be rejected; RESPONDENT could neither have avoided nor overcome the CITES Decision.

117. In accordance with Art. 79 CISG, a party can rely on *force majeure* if it could not have avoided or overcome the consequences of the impediment. The party relying on *force majeure* must act diligently and take every reasonable step to ensure the performance of the contract once the *force majeure* event is sufficiently conceivable [*Vine wax case, paras. 21 sq.*; *Brunner in: Brunner/Gottlieb, Art. 79 para. 40*; *Magnus, Ulrich in: Staudinger, Art. 79 para. 34*]. What steps can reasonably be expected depends on the contractual allocation of risks [*Huber, Mullis in: Huber/Mullis, § 13 p. 262*; *Köhler, Schwenzer in: Schlechtriem/Schwenzer/Schroeter, Art. 79 para. 14*].

118. RESPONDENT took every reasonable step to avoid and overcome the CITES Decision and the following import restrictions. CLAIMANT's contrary assertion overlooks two vital considerations.

119. **First**, CLAIMANT wrongfully alleges that RESPONDENT applied for an import permit too late [*MfC, paras. 85, 88*]. Contrarily, the legal obstacle of an import permit was only introduced by Equatoriana on 8 February 2024 [*PO2, para. 16*; *Ex. R1, para. 9*]; RESPONDENT nonetheless went beyond its obligation by proactively applying for an import permit on 5 February 2024 [*PO2, para. 17*] – nearly two months before the scheduled delivery on 27 March 2024 [*Ex. C5*].

120. **Second**, CLAIMANT erroneously argues that "*RESPONDENT could have arranged for early delivery*" [*MfC, para. 89*] and would have had to "*bear the additional costs*" [*MfC, para. 92*] in order to overcome the impediment. RESPONDENT rightfully refused the proposition of earlier delivery by pointing to the contractual allocation of risks: The Parties wanted to ensure that delivery would not take place

before RESPONDENT's greenhouses were ready. They therefore agreed that RESPONDENT would unilaterally set the delivery date within a three-month window [*Ex. C3, Clause 4.2*]. Only one greenhouse would have been ready before the CoP [*Ex. C5*].

121. Earlier delivery would have forced RESPONDENT to rely on inadequate storage, risking a "*potentially total loss*" [*PO2, para. 15*]. The Parties had sought to avoid this exact outcome. Forcing RESPONDENT to bear the financial burden of early delivery ignores the contractual risk allocation and would exceed what Art. 79 CISG demands. RESPONDENT could not avoid or overcome the CITES Decision and its national implementation. Therefore, RESPONDENT is excused from liability by *force majeure* under Art. 79 CISG as all its requirements are met.

122. **In sum and for the reasons set out above**, CLAIMANT's claim for damages is baseless. CLAIMANT sowed the seed for RESPONDENT's inability to take over the orchids. Moreover, RESPONDENT is excused by *force majeure*.

ISSUE 4: IN ANY CASE, CLAIMANT DID NOT SUFFER ANY DAMAGE

123. RESPONDENT respectfully requests the Tribunal to hold that CLAIMANT did not suffer any damage. CLAIMANT alleges that it "*is entitled to receive 3,300,000 USD in damages from RESPONDENT*" [*MfC, para. 4*]. This allegation is based on a wrong application of Art. 75 CISG, which reads as follows:

> "*If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, […] the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction […]*".

124. In accordance with this, the seller can conclude a substitute transaction – a cover sale – after avoiding the original contract and is only then entitled to recover the difference between the cover sale price and the contract price from the buyer.

125. CLAIMANT wants to maximize the damages it claims from RESPONDENT by labeling a particularly unfavorable transaction as the cover sale. CLAIMANT's cherry picking is all too obvious; CLAIMANT blatantly violates the wording of Art. 75 CISG by picking a transaction that was not concluded 'after avoidance' of the Sales Agreement. Instead of acknowledging this, CLAIMANT turns the wording of Art. 75 CISG on its head.

126. CLAIMANT uses "*3,300 orchids, at 1,000 USD"* for its calculation of damages and alleges that they amount to USD 3.3M [*MfC, para. 130*]. This obscures that CLAIMANT suffered no damage at all. Beside the fact, that the right quantity for any calculation is 2,700 orchids [**I.**], CLAIMANT actually resold the orchids at an even higher price than it would have under the Sales Agreement [**II.**]. Thus, CLAIMANT even made a profit rather than suffering a loss.

I. CLAIMANT USES THE INCORRECT QUANTITY AS THE CORRECT QUANTITY IS 2,700 ORCHIDS

127. CLAIMANT alleges that "*the contracted 3,300*" [*MfC, paras. 131 sq.*] orchids shall be used for the damages calculation [*ibid.*]. This would be the maximum amount under the contractually agreed range of 3,000 **± 10%** orchids. However, the right quantity is the minimum amount of 3,000 **- 10%** orchids, i.e. 2,700 orchids.

128. In cases where a contract contains a quantity range, the exact quantity must be determined at a later point [*cf. Monoammonium phosphate case, para. 24*]. When the right to determine the exact quantity is not explicitly assigned to a party, the contract is interpreted in accordance with the parties' intent under Art. 8(1) CISG [*Brunner, Hurni, Kissling in: Brunner/Gottlieb, Art. 8 para. 22*].

129. CLAIMANT wrongfully contends that 3,300 orchids should be used for the calculation as "*RESPONDENT was contractually obligated to accept [any quantity] […] between 2,700 and 3,300 [orchids]*" [*MfC, para. 131*]. CLAIMANT derives its right to determine the exact quantity from its unsubstantiated and surprising assertion that "*[t]he use of a plus or minus quantity in a contract is to protect the seller*" [*MfC, para. 131*]. By this, CLAIMANT misconstrues the Parties' intent.

130. In fact, the Parties intended the contractual range of **± 10%** in Clause 2.1 Sales Agreement to reflect two mutual risks [*PO2, para. 9*; *Ex. R1, para. 4*; *Ex. R2*]. On the one hand, CLAIMANT needed a buffer as it was not sure how many orchids it would be able to produce [*ibid.*]. On the other hand, RESPONDENT took over the obligation of the critical air transport of the orchids and therefore needed a safeguard against insufficient transport capacity [*ibid.*]. This was a pressing concern as the transport of the sensitive Vanilla Orchid requires special climatized transport boxes and special carriers that are difficult to obtain on short notice, leading to frequent bottlenecks [*RNoA, para. 7*]. This conclusion is further reinforced by a decision of the Austrian Supreme Court which held that the party responsible for transporting the goods is entitled to define the final quantity within a contractual range [*Monoammonium phosphate case, para. 24*].

131. It might be true that "*CLAIMANT delivered 3,300 (3,000 + 10%) Vanilla orchids*" [*MfC, para. 130*] to a substitute buyer [*ibid.*]. However, CLAIMANT could not rely on the sale of this amount under the Sales Agreement. Even if CLAIMANT had been able to produce the maximum amount of 3,300 orchids, CLAIMANT could not have been sure that RESPONDENT would have taken over more than 2,700 orchids: The final amount of orchids to be delivered would have depended on a host of different variables, e.g. airplane scheduling or unavailability of transport boxes [*Ex. R1, para. 4*; *Ex. R2*]. RESPONDENT was therefore not obligated to transport and take over more than the minimum amount of 2,700 orchids.

132. Consequently, the Parties only bindingly agreed on the delivery of 2,700 orchids. CLAIMANT could not rely on the delivery of more. Therefore, 2,700 is the relevant quantity for the calculation of damages under Art. 75 CISG.

II. CLAIMANT USES THE INCORRECT PRICE DIFFERENCE AS CLAIMANT ACTUALLY RESOLD THE ORCHIDS AT AN EVEN HIGHER PRICE

133. CLAIMANT portrays an irrelevant transaction as the cover sale [*MfC, para. 127*] and thereby uses the incorrect price difference. Under the true cover sale, CLAIMANT resold the orchids to Herbal Cosmetics at an even higher price than it would have to RESPONDENT under the Sales Agreement, thus making a profit.

134. CLAIMANT's contract concluded with Herbal Cosmetics on 15 February 2024 (the "**February Contract**") is not a cover sale under Art. 75 CISG [**A.**]. Only Herbal Cosmetics' option exercised on 2 October 2024 (the "**October Contract**") fulfills the requirements of Art. 75 CISG and consequentially constitutes the true cover sale [**B.**].

A. THE FEBRUARY CONTRACT IS NOT THE COVER SALE AS IT WAS CONCLUDED BEFORE AVOIDANCE OF THE SALES AGREEMENT

135. CLAIMANT maintains that the cover sale "*was finalized 15 February 2024*" [*MfC, para. 127*], i.e. the February Contract. However, the February Contract does not satisfy the express requirement of Art. 75 CISG that a cover sale has to be concluded '**after avoidance**'.

136. CLAIMANT was not entitled to conclude a cover sale before avoiding the Sales Agreement [**1.**]. CLAIMANT did not avoid the Sales Agreement before concluding the February Contract [**2.**]. The reasonableness of the February Contract is both irrelevant and undisputed [**3.**].

1. CLAIMANT had to avoid the Sales Agreement prior to concluding a cover sale

137. CLAIMANT contends that it was entitled to conclude a cover sale **before avoiding** the Sales Agreement [*MfC, para. 126*]. This, however, is baseless. There are no exceptions to the express requirement of Art. 75 CISG that a cover sale must be concluded '**after avoidance**' of the original contract [**a.**]. Even if there were an exception, it would not be fulfilled in the present case [**b.**]

a. There is no exception to the 'after avoidance' requirement of Art. 75 CISG

138. CLAIMANT argues that it had the right to conclude a cover sale before avoiding the Sales Agreement [*MfC, para. 126*]. This stands in contrast to the express wording of Art. 75 CISG, which mandates that every cover sale must be concluded 'after avoidance' of the original sales contract. CLAIMANT argues that a party can deviate from this and conclude a cover sale before avoidance if

it is clear that one party will not perform [*MfC, para. 126*]. However, any exception to the sequence of events encapsulated in the 'after avoidance' requirement should be rejected [*CISG-AC No. 8, para. 2.3.3*; *Djordjević in: Kröll/Mistelis/Perales Viscasillas, Art. 75 paras. 5 sqq.*; *Schwenzer, Köhler in: Schlechtriem/Schwenzer/Schroeter, Art. 75 para. 5a*]. This is for three reasons.

139. **First**, prior avoidance is necessary because it ensures that both parties have legal certainty. As long as a contract is in force, parties are required to act in accordance with it [*Portuguese cloth case, para. 5*]. When a seller concludes a cover sale, the seller resells the contract goods and thereby undermines the very basis of the original contract. Without prior avoidance, a cover sale places the buyer in a state of limbo: It would be obligated to perform and entitled to expect the seller's performance, even though the seller has already sold the contract goods to a third-party [*Portuguese cloth case, para. 5*].

140. **Second**, strict adherence to the wording of Art. 75 CISG is supported by the definition of a cover sale: A cover sale is defined as a transaction intended to replace a failed original contract [*CISG-AC No. 8, para. 2.3.4*; *Djordjević in: Kröll/Mistelis/Perales Viscasillas, Art. 75 para. 12*; *Morrissey, Graves, p. 282*; *Sommerfeld in: MüKoHGB, Art. 75 para. 7*]. A contract can only replace an original contract if that original contract has ceased to exist – after its avoidance; if the original contract still exists, another contract would only be an additional contract, not a substitute.

141. **Third**, the drafting history of Art. 75 CISG confirms that the sequence of events was a conscious decision by the drafters of the CISG. The requirement that the cover sale follows the avoidance was specifically included in Art. 75 CISG even though it was not present in Art. 85 ULIS, the predecessor of the CISG [*Djordjević in: Kröll/Mistelis/Perales Viscasillas, Art. 75 para. 4*; *Secretariat Commentary, p. Art. 71*].

142. Contrary to CLAIMANT's contentions [*MfC, paras. 126 sqq.*], any exception to the 'after avoidance' requirement should be rejected. Consequently, CLAIMANT was not entitled to conclude a cover sale before avoiding the Sales Agreement.

b. Even if there were an exception to the 'after avoidance' requirement, it is not applicable to the present case

143. CLAIMANT argues that it was entitled to conclude a cover sale before avoiding the Sales Agreement because RESPONDENT had definitely refused to perform [*MfC, para. 128*]. To support this, CLAIMANT relies on the *Iron Molybdenum case* [*MfC, para. 126*].

144. It is true that in the *Iron Molybdenum case*, the court ruled that there is an exception to the obligation to give notice of avoidance. However, the court's exception is not general but strictly limited to special circumstances: Prior avoidance is only unnecessary when a party has definitely refused any

performance [*Iron molybdenum case, paras. 32 sq.*]. A simple refusal to perform in due time is therefore insufficient.

145. CLAIMANT tries to portray it as though the present case were similar to the *Iron Molybdenum case* [*MfC, para. 126*]. It alleges that the conclusion of the February Contract followed RESPONDENT's definitive refusal to perform. However, there was no such definitive refusal to perform. CLAIMANT could have relied on three aspects; none amount to a definite refusal.

146. **First**, CLAIMANT alleges that "*RESPONDENT made clear on 10 February 2024 that it would not perform its sales contract*" [*MfC, para. 129*]. This twists the relevant facts. On 10 February 2024, RESPONDENT informed CLAIMANT that due to the CITES Decision it would not obtain an import permit for 27 March 2024 [*NoA, para. 19*]. However, RESPONDENT consciously left the door open for later performance: it stated that it was merely "*doubtful that delivery could take place at all*" [*NoA, para. 19*]. Doubt is not certainty. Even after 10 February 2024, RESPONDENT continued its efforts to obtain the import permit for enabling delivery [*PO2, para. 17*]. In fact, RESPONDENT's application for an import permit was still pending until 1 March 2024 [*PO2, para. 17*]. Therefore, RESPONDENT did not definitely refuse to perform on 10 February 2024.

147. **Second**, CLAIMANT could have further pointed to the rumors in the industry that RESPONDENT was considering discontinuing its vanilla activities [*Ex. C6, para. 6*]. It is true that on 15 February 2024, the Equatorianian Business Gazette alleged that RESPONDENT had taken a decision to discontinue its vanilla activities [*Ex. C6, para. 13*]. However, RESPONDENT only announced a decision on 27 February 2024 [*RNoA, para. 15*]. On this date, RESPONDENT immediately communicated its decision to CLAIMANT [*PO2, para. 28*; *Ex. R1, para. 11*]. Up until this point, RESPONDENT had not definitely refused performance.

148. **Third**, CLAIMANT could have relied on Clause 4.2 Sales Agreement which states that "*time is of the essence*" to argue that any refusal to take delivery by 27 March 2024 is automatically a definitive breach. However, this misconstrues Clause 4.2 Sales Agreement. Under Art. 8(1) CISG, a contractual clause must above all be construed in line with party intent; not every phrase must always be understood in its technical sense [*Gruber in: MüKoBGB, Art. 8 Rn. 10*; *Schmidt-Kessel in: Schlechtriem/Schwenzer/Schroeter, Art. 8 Rn. 1*]. Under Art. 8(3) CISG, all relevant circumstances must be considered when ascertaining party will. The phrase "*time is of the essence*" is best understood in the special context of Vanilla Orchid trade. It is well known that the Vanilla Orchid should be transported between December and May [*Ex. C6, para. 12*; *PO2, paras. 4, 15*]. This is because the Vanilla Orchid blooms in June or July [*NoA, para. 23*]. A delivery after 27 March 2024, but before June or July 2024, was therefore within the essential timeframe. This is demonstrated by the fact that CLAIMANT delivered Vanilla Orchids to Herbal Cosmetics in April 2024 [*Ex. C6, para. 15*;

PO2, para. 39]. RESPONDENT did not refuse any delivery before June or July 2024.

149. Therefore, RESPONDENT did not definitely refuse to perform on 10 February 2024. Thus, even if CLAIMANT's exception were allowed under Art. 75 CISG, its requirements would not be fulfilled in the present case.

2. CLAIMANT did not avoid before 15 February 2024

150. CLAIMANT argues that "*[i]t was acceptable and reasonable for CLAIMANT to make a substitute transaction before it received formal notice of RESPONDENT's avoidance*" [emphasis added] [*MfC, para. 4*]. CLAIMANT suggests that RESPONDENT has impliedly avoided the Sales Agreement before CLAIMANT concluded the February Contract. This is highly misleading.

151. Art. 26 CISG, the provision dealing with the declaration of avoidance, reads as follows:

> *"A declaration of avoidance of the contract is effective* ***only if made by notice*** *to the other party"* [***emphasis added***].

152. Therefore, avoidance is only possible by an express notice of avoidance communicated to the other party [*Magnus, p. 423*]. This is necessary to ensure legal certainty as it would otherwise be difficult to recognize at which date the contract was terminated [*Björklund in: Kröll/Mistelis/Perales Viscasillas, Art. 26 para. 1*; *Magnus, p. 426*]. This notice can be done by any means; it only needs to be express [*Björklund in: Kröll/Mistelis/Perales Viscasillas, Art. 26 para. 2*; *Magnus, p. 427*].

153. RESPONDENT never expressly avoided the Sales Agreement. To establish the contrary, CLAIMANT relies on the phone call between the Parties on 10 February 2024 when "*Mr. Albius stated it was impossible to obtain the proper permits under the circumstances [of the CITES Decision]*" [*MfC, para. 128*]. However, RESPONDENT never mentioned that it wanted to avoid the Sales Agreement.

154. RESPONDENT did not avoid the Sales Agreement before 15 February 2024. Hence, the Sales Agreement had not been avoided before the conclusion of the February Contract. Therefore, the February Contract cannot be the cover sale under Art. 75 CISG.

3. The reasonableness of the February Contract is both irrelevant and undisputed

155. Not only does the February Contract not meet the aforementioned requirements of a cover sale under Art. 75 CISG but CLAIMANT also oversees the guidance given by the Tribunal not to discuss the question of reasonableness of the February Contract [*cf. MfC, pp. 29–32*]. The Tribunal has held the following in the Procedural Order No. 2:

> *"Insofar as the sale to Herbal Cosmetics can be classified in relation to timing and quantities as a cover sale in the sense of Art. 75 CISG, it can be considered reasonable"* [*PO2, para. 29*].

B. THE OCTOBER CONTRACT IS THE CORRECT COVER SALE AND RESULTED IN ADDITIONAL PROFITS

156. CLAIMANT could have argued that the October Contract is unrelated to the Sales Agreement and should therefore not be used for the calculation of damages. The October Contract is the only contract that was concluded 'after avoidance' and therefore fulfills the requirements of a cover sale under Art. 75 CISG. Consequently, this contract should be used for the calculation of damages.

157. As set out above, Art. 75 CISG requires the cover sale to be concluded after the avoidance of the contract [*supra paras. 138 sqq.*]. Whenever there are difficulties in identifying the correct cover sale, the first transaction after avoidance shall be deemed the cover sale [*CISG-AC No. 8, para. 2.3.4*; *Djordjević in: Kröll/Mistelis/Perales Viscasillas, Art. 75 para. 13*; *Schwenzer, Köhler in: Schlechtriem/Schwenzer/Schroeter, Art. 75 para. 3*].

158. The October Contract is the first contract concluded 'after avoidance' of the Sales Agreement [**1.**]. Since it economically replaces the Sales Agreement, it is the correct cover sale [**2.**].

1. The October Contract is the first contract 'after avoidance' of the Sales Agreement

159. The October Contract was concluded on 2 October 2024; it therefore is the first contract concluded 'after avoidance' of the Sales Agreement.

160. In accordance with Art. 23 CISG, a contract is concluded when an acceptance of an offer becomes effective. An offer can be made irrevocable by the offeree under Art. 16(2)(a) CISG. The use of wording such as "*option*" simply evidences the offeree's intention to be bound to an irrevocable offer [*Schroeter in: Schlechtriem/Schwenzer/Schroeter, Art. 16 para. 30*].

161. On 15 February 2024, CLAIMANT granted Herbal Cosmetics an "*option*" to buy 2,000 orchids [*NoA, para. 24*; *Ex. C6, para. 12*]. This wording shows that CLAIMANT made an irrevocable offer to Herbal Cosmetics. On 2 October 2024, Herbal Cosmetics exercised this option [*NoA, para. 27*; *Ex. C6, para. 17*]; it thereby accepted CLAIMANT's offer.

162. Consequently, CLAIMANT and Herbal Cosmetics concluded a new contract on 2 October 2024 – the October Contract. CLAIMANT has not pointed out any other contract concluded between the 1 March 2024 and 2 October 2024 [*cf. NoA*].

163. Therefore, the October Contract is the first contract CLAIMANT concluded 'after avoidance' of the Sales Agreement on 1 March 2024.

2. The October Contract economically replaces the Sales Agreement

164. CLAIMANT could have argued that the October Contract cannot be the true cover sale as it does not replace the Sales Agreement. It could have based this on two key points: The October Contract

concerned a different batch of orchids and addressed a different quantity than the Sales Agreement. In reality, the differences do not preclude the October Contract from being the cover sale.

165. A cover sale aims to mitigate the seller's loss and satisfying the seller's performance interest [*Djordjević in: Kröll/Mistelis/Perales Viscasillas, Art. 75 para. 1*; *Schwenzer, Köhler in: Schlechtriem/Schwenzer/Schroeter, Art. 75 para. 2*]. A cover sale only has to be a functional economic equivalent of the avoided contract [*Schwenzer, Köhler in: Schlechtriem/Schwenzer/Schroeter, Art. 75 paras. 2 sq.*]. Therefore, the cover sale does not need to be identical as the avoided contract [*Djordjević in: Kröll/Mistelis/Perales Viscasillas, Art. 75 para. 12*; *Huber in: MüKoBGB, Art. 75 para. 17*]. The goods must only be of the same type and quality [*Ukrainian chemical fertilizer case, para. 17*; *Huber in: MüKoBGB, Art. 75 para. 14*].

166. CLAIMANT could have contended that the October Contract concerned a different batch of orchids than the Sales Agreement; the orchids of the October Contract blossom later than the orchids of the Sales Agreement. However, it is sufficient that the goods under the October Contract were of the same type and quality as those under the Sales Agreement, i.e. Vanilla Orchids. Moreover, the Sales Agreement merely refers to "*orchid plants*" [*Ex. C3, Clause 2.1*] and does not specify any blossom year. This underscores that it is unsignificant that the October Contract concerns younger orchids than the Sales Agreement.

167. CLAIMANT could have further relied on the difference in quantity between the October Contract and the Sales Agreement. This must be rejected; the October Contract fully satisfies CLAIMANT's fulfillment interest. Under the Sales Agreement, CLAIMANT could only rely on selling 2,700 [*supra paras. 127 sqq.*] for USD 2,000 per orchid [*Ex. C3, Clause 3.1*]. This would have brought a total revenue of **USD 5.4M**. Under the October Contract, CLAIMANT sold 2,000 orchids for USD 3,200 per orchid [*NoA, para. 27*]. This brought a total revenue of **USD 6.4M**, being **USD 1M** more than what CLAIMANT was entitled to expect under the Sales Agreement.

168. Therefore, the October Contract more than satisfied CLAIMANT's fulfillment interest. The October Contract is the only conceivable cover sale under Art. 75 CISG. As a consequence of this cover sale, CLAIMANT suffered no financial loss at all.

169. **In sum and for the reasons set out above,** CLAIMANT did not suffer any damage but even made a profit.

REQUEST FOR RELIEF

Based on the aforesaid, RESPONDENT respectfully requests the Tribunal to grant the relief as set out below:

1) To apply the SIAC Rules 2025;

2) To order CLAIMANT to disclose its Funding Agreements with AtJ-Funding and LitSure;

3) To reject CLAIMANT's damages claim;

4) To order CLAIMANT to bear the costs of this Arbitration.

Berlin, 22 January 2026

Counsel for RESPONDENT

Fabio César Herrera Aue

Lina Alexandra Horn

Paul Marquordt

Felix Schnabl

Olivia Felicitas Liguria Stolzenwald

Helena Victoria Zabel

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