

TWENTY-THIRD ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL
ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT



HEIDELBERG UNIVERSITY

CASE REFERENCE: SIAC ARB1991/25/VIS

ON BEHALF OF:

Orchis Worldwide Ltd.
Orchid Bee Drive
Capital City
Mediterraneo
CLAIMANT

AGAINST:

Darwin Natural Food plc
Louis Liger Avenue 1704
Oceanside
Equatoria
RESPONDENT

ANNA LOUISA HASSEL • MIRA LEHMANN • LILLI PETIRSCH
NOAH ROSENBOHM • EMMA SENDLER • VLADISLAVA SERZHENKO



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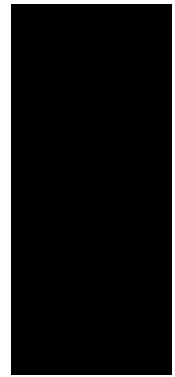


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Heidelberg, 11 December 2025

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TOBIAS CASPERS (Coach)

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ELENA STEGMANN (Coach)



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**TABLE OF ABBREVIATIONS**

Abbreviation	Explanation
AMA Protocol	SIAC-SIMC Arb-Med-Arb Protocol
Art.	Article
Artt.	Articles
<i>cf.</i>	<i>confer</i> (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CISG-online	Internet database on CISG decisions and materials, available at http://www.cisg-online.ch
cmt.	comment
DCL	Danubian Contract Law
<i>e.g.</i>	<i>exempli gratia</i> (for example)
ed.	edition
<i>emph. add.</i>	emphasis added
<i>et al.</i>	<i>et alii</i> (and others)
<i>et seq.</i>	<i>et sequens</i> (and following)
<i>et seqq.</i>	<i>et sequentes</i> (and following; more than one page/paragraph)
<i>etc.</i>	<i>et cetera</i> (and rest)
Exh. C	CLAIMANT'S Exhibit
Exh. R	RESPONDENT'S Exhibit
fn.	Footnote
<i>i.e.</i>	<i>id est</i> (that is)



Abbreviation	Explanation
<i>ibid.</i>	<i>ibidem</i> (the same place)
ICC	International Chamber of Commerce
<i>infra</i>	See below
MfC	Memorandum for CLAIMANT
No.	Number
NoA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p.	page
para.	paragraph
paras.	paragraphs
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
pp.	pages
Response	Response to the Notice of Arbitration
<i>sc.</i>	<i>scilicet</i> (to wit)
<i>supra</i>	See above
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration



Abbreviation	Explanation
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNIDROIT	International Institute for the Unification of Private Law
UTR	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
v.	<i>versus</i>
Vol.	Volume



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STATEMENT OF FACTS

Orchis Worldwide Ltd (“CLAIMANT”) and Darwin Natural Food plc (“RESPONDENT”) (together, the “Parties”) are the Parties to this Arbitration. CLAIMANT is a medium-sized cultivator and international supplier of orchids based in Mediterraneo. RESPONDENT, headquartered in Equatoriana, is part of a group of companies that is one of the largest producers of natural food and spices.

The Arbitration relates to whether RESPONDENT is liable for damages resulting from its failure to take delivery under the concluded Sales of Orchids Agreement (“SOA” or the “Contract”).

- 01/12/2021** CLAIMANT and Botanical Garden of Equatoriana (“**Botanical Garden**”) conclude a sales agreement for 300 *Vanilla Planifolia Mediterraniensis* orchids.
- 25/08/2022** After RESPONDENT takes over Botanical Garden including its contract with CLAIMANT, the Parties amend the Contract to 3,000 ± 10% orchids (the “**Orchids**”), with a delivery window between January and March 2024.
- 09/2023** The CITES Plants Committee recommends significantly restricting trade in orchids as of late January 2024. CLAIMANT raises concerns and proposes either seeking an anticipatory import permit or bringing delivery forward. RESPONDENT, however, stalls both options and instead assures CLAIMANT it will still be able to obtain the required import permit even after January 2024.
- 01/12/2023** RESPONDENT sets the delivery date for 27 March 2024.
- 01/02/2024** The CITES Conference uplists the *Vanilla Planifolia Mediterraniensis* orchid to CITES Appendix I, triggering a strict import-permit requirement. For commercial purposes, such permits are generally not granted.
- 10/02/2024** RESPONDENT informs CLAIMANT that, due to a political shift in Equatoriana, it is impossible to obtain the permit for timely delivery and expresses doubt whether delivery can occur at all.
- 15/02/2024** To avoid that the Orchids’ value decreases with summer flowering, CLAIMANT sells the Orchids intended for RESPONDENT to Herbal Cosmetics.
- 27/02/2024** RESPONDENT announces that it will divest itself entirely of its spice business and will not take delivery at all. CLAIMANT subsequently avoids the Contract.
- 19/12/2024** CLAIMANT commences the dispute resolution process by initiating mediation.
- 31/07/2025** CLAIMANT advances to arbitration and voluntarily discloses funding from AtJ-Financing and LitSure.



SUMMARY OF ARGUMENT

RESPONDENT concluded the Contract to expand its flowering vanilla business. With this objective in mind, RESPONDENT chose to tempt fortune: it assumed responsibility for securing any necessary import permit, brushing aside CLAIMANT's repeated warnings and ignoring all viable suggestions on how this regulatory risk could be overcome. When the regulatory winds, predictably, turned and RESPONDENT's vanilla venture began to wilt, RESPONDENT sought to reposition itself for divestment. Cloaking a self-assumed commercial risk as an external inevitability, RESPONDENT shifted onto CLAIMANT the very risk it had undertaken.

Part I: The Parties Agreed on the 2016 SIAC Rules to Govern the Arbitration

The wording and drafting history of the Arbitration Agreement—tailor-made under the 2016 framework—demonstrate the Parties' intention to subject any dispute *exclusively* to the 2016 SIAC Rules. Further, the proceedings commenced with the initiation of mediation before the 2025 SIAC Rules entered into force.

Part II: The Tribunal Should Not Order Disclosure of the Funding Agreements

Under the applicable 2016 SIAC Rules, the Tribunal lacks power to compel disclosure of the funding agreements. Even if it had such power, disclosure would be unwarranted. The agreements are not only irrelevant to the case but also privileged. Compelling disclosure would undermine CLAIMANT's right to a fair trial and endanger enforceability of an award.

Part III: RESPONDENT Breached the Contract and Is Not Exempt Under Art. 79 CISG

RESPONDENT breached the Contract by failing to obtain the required import permit. Having assumed and later confirmed its responsibility for the foreseeable risk of obtaining an import permit, RESPONDENT is precluded from invoking Art. 79 CISG or Clause 12 SOA. In any event, the threshold of Art. 79 CISG is not met. RESPONDENT had ample opportunity to overcome the impediment but remained idle; thus, it is liable.

Part IV: Art. 75 CISG Governs the Calculation of Damages

CLAIMANT properly relies on Art. 75 CISG to calculate damages, using the February 2024 sale to Herbal Cosmetics as substitute transaction. RESPONDENT's refusal to perform rendered formal avoidance dispensable. Alternatively, Art. 74 CISG yields the same result. Interpretation under Art. 8 CISG leads to the relevant quantity for calculating damages being 3,300 Orchids.



ARGUMENT

PART I: THE 2016 SIAC RULES GOVERN THIS ARBITRATION

1 CLAIMANT submits that the 2016 SIAC Rules govern this Arbitration. The Parties agreed to empower the Tribunal to determine *which version* of the SIAC Rules applies [POI-II, p. 52].

Under Rule 1.5 2025 SIAC Rules, the 2025 version of the rules applies only to arbitrations commenced after 1 January 2025, “*unless otherwise agreed by the parties*”. Clause 15 SOA (“**Arbitration Agreement**”) contains precisely such an agreement:

“any disputes [...] 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 [SIAC] (‘SIAC Rules’)” [*emph. add.*].

2 The interpretation of “**current**” in the Arbitration Agreement shows that the Parties agreed to apply the SIAC Rules in force at the time of Contract conclusion—the 2016 SIAC Rules [I]. Even if the Tribunal were to rely on the date of commencement of the proceedings, the 2016 SIAC Rules would still apply as this Arbitration commenced with the mediation proceedings in 2024 [II]. A potential award applying the 2016 SIAC Rules is not challengeable [III].

I. THE PARTIES’ AGREEMENT MANDATES ARBITRATION UNDER THE 2016 SIAC RULES

3 CLAIMANT and RESPONDENT’s predecessor expressly agreed to arbitrate under the 2016 SIAC Rules and RESPONDENT assumed this agreement with its takeover of Botanical Garden [A]. Moreover, when read in conjunction with other provisions in the Contract, “current” refers to the 2016 SIAC Rules [B].

A. Respondent ASSUMED AN ARBITRATION AGREEMENT REFERRING TO THE 2016 RULES

4 When CLAIMANT and Botanical Garden (both the “**Initial Parties**”) drafted the first version of the Contract (“**Initial Contract**”) on 1 December 2021, they compromised on arbitration under the 2016 SIAC Rules [1]. As Botanical Garden’s legal successor, RESPONDENT must submit to this Agreement and conduct the proceedings accordingly [2].

1. The Initial Parties Intended to Submit to Arbitration Only Under the 2016 Rules

5 The Tribunal should give effect to the intent of the Initial Parties and apply the 2016 SIAC Rules. The CISG governs the Arbitration Agreement by party agreement [POI-III(5), p. 53] and consistent with jurisprudence in all three relevant countries [POI-II, p. 52]. Under Art. 8(1), (3) CISG the Tribunal must consider the drafter’s intent where known or obvious to



the counterparty, taking into account all relevant circumstances [SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, Art. 8 paras. 2, 4]. Because of Botanical Garden’s strong aversion to litigation abroad, the Initial Parties reached a compromise: arbitrating in Danubia under the 2016 SIAC Rules [*Exh. C1-7, p. 8*]. To secure this compromise, the Parties made intentional changes to the SIAC Model Clause. These revisions (i) directly honored Botanical Garden’s expressed concerns, and (ii) omitted the wording that ordinarily triggers the presumption of a dynamic reference.

- 6 *First*, Botanical Garden proposed to replace the 2016 SIAC Model Clause’s reference “for the time being in force” with the term “current” during Contract negotiations [*Exh. C7, p. 21*]. This deviation from the Model Clause was intentional. Botanical Garden made acceptance of this wording a condition for agreeing to arbitration in general, and even for signing the Contract [*ibid.*]. In fact, Botanical Garden expressed that by “current” version it meant the 2016 SIAC Rules, which its chief contract officer had reviewed [*PO2-7, p. 56*]. CLAIMANT accepted this wording precisely to ensure the stability Botanical Garden required. Accordingly, Clause 15 SOA—interpreted under Art. 8(1), (3) CISG—must be read as referring to the 2016 SIAC Rules and the Tribunal should uphold this deliberate contractual choice.
- 7 *Secondly*, the presumption in favor of a dynamic reference, established in Singaporean jurisprudence, cannot apply as Clause 15 SOA omits the key terminology on which this presumption is based. The Singaporean High Court interpreted SIAC Model Clauses, reading “for the time being in force”. Under this particular wording, the Court presumed a dynamic reference [*AQZ v. ARA paras. 125, 127; cf. Car & Cars Pte Ltd v. Volkswagen AG para. 25*]. Clause 15 SOA reads “current”; for this specific wording the Singaporean High Court established no such presumption for the Tribunal to rely on.

2. RESPONDENT Is Bound to the Original Agreement as the Legal Successor

- 8 RESPONDENT must submit to the Arbitration under the 2016 SIAC Rules because it stepped into Botanical Garden’s legal position without any reservations. On 15 June 2022, RESPONDENT expressly stated that it would “take over [...] all its [*sc.* Botanical Garden’s] commitments and liabilities” [*Exh. C2, p. 9*]. Thereby, a full contractual succession that encloses *all* rights and obligations, including those arising under the Arbitration Agreement, is established.
- 9 Legal succession is an external gap under Art. 4 CISG; consequently, domestic law applies [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Ferrari*, Art. 4 para. 37]. Absent a contractual choice of law for the Arbitration Agreement, the law of the seat applies [BORN,



4.04[C][2][a]; BLACKABY/PARTASIDES/REDFERN, *paras. 3.12 et seq.*]. Here, Danubia is the seat of arbitration (*Clause 15 SOA*). Therefore, Danubian Contract Law (“DCL”), a verbatim adaptation of the UNIDROIT Principles of International Commercial Contracts [*POI-III(4)*, p. 53], governs the conclusion of the Arbitration Agreement. Under Art. 9.3.1 DCL, contract assignment transfers all rights and obligations to the assignee, who steps fully into the assignor’s shoes [*Cassa di Risparmio v. Rals International paras. 117, 122; Isolux v. WAPDA para. 77; BRÖDERMANN, Art. 9.3.1 para. 2*]. Contractual succession was even anticipated by the Initial Parties to safeguard contractual integrity via *Clause 1.2 SOA*. When RESPONDENT reviewed the Contract in 2022, the only “current” SIAC Rules in force were the 2016 SIAC Rules. RESPONDENT therefore assumed the Arbitration Agreement exactly as is—including its static reference to the 2016 SIAC Rules.

- 10 Under Art. 8(2) CISG, a reasonable person in CLAIMANT’s position [*cf. SCHLECHTRIEM/SCHWENZER/Schmidt-Kessel, Art. 8 para. 22*] would have understood that RESPONDENT is bound to the Arbitration Agreement it accepted unchanged. RESPONDENT amended only provisions concerning commercial matters: quantity and delivery [*Exh. R2, p. 38*]. It made no modifications to the Arbitration Agreement. A reasonable person would conclude that RESPONDENT adopted *Clause 15 SOA* with its reference to the 2016 SIAC Rules.
- 11 Even if the Tribunal considered the reference to “current” arbitration rules ambiguous—*quod non*—, this would have to be resolved to the detriment of RESPONDENT under the *contra proferentem* principle [*cf. KRÖLL/Zuppi Art. 8 para. 26; SCHLECHTRIEM/SCHWENZER/Schmidt-Kessel, Art. 8 para. 53*]. Botanical Garden drafted *Clause 15 SOA* [*Exh. C7, p. 21*] and RESPONDENT must bear the consequences of any ambiguity as its legal successor. This applies *a fortiori* because RESPONDENT had full access to Botanical Garden’s e-mail servers [*PO2-6, p. 56*] and thus, the entire negotiation history. A successor cannot appropriate Botanical Garden’s commercial advantages while disavowing its procedural commitments. RESPONDENT cannot evade the Agreement it inherited simply because it became inconvenient. Hence, the 2016 SIAC Rules apply.

B. THE STRUCTURE OF THE CONTRACT DEMONSTRATES THAT “CURRENT” REFERS TO THE RULES IN FORCE AT THE TIME OF CONTRACT CONCLUSION

- 12 The Contract’s structure demonstrates that “current” arbitration rules refers to the rules in force at the time of Contract conclusion. The Tribunal can rely on the drafting choices in the remainder of the Contract to interpret specific contractual clauses



[*cf.* SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schmidt-Kessel*, Art. 8 para. 31]. Thereby, it can distinguish a static from a dynamic reference. In Clause 1.1 SOA, the Parties expressly added “as amended from time to time” to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”); an unmistakably dynamic reference. In contrast, they omitted any such wording from Clause 15 SOA. This indicates that “current” is static and fixed at the moment of Contract conclusion, at which only the 2016 SIAC Rules existed.

- 13 RESPONDENT might submit that, as the Contract references the “Incoterms 2020”, CLAIMANT should have similarly included the edition year for the SIAC Rules. This does not convince. *First*, the ICC’s Model Clause contains the edition year by default [*cf. Incoterms 2020*, p. 3]. *Secondly*, Incoterms change with every edition [MÜLLER/STEINMETZ, pp. 28, 30], meaning that specifying the version is essential to preserve the Parties’ commercial choices. The SIAC Rules, however, do not contain embedded version numbers in their Model Clauses, nor does SIAC require or recommend specifying the edition. Thus, referencing “Incoterms 2020” does not support a dynamic reading of “current”; the two provisions serve entirely different functions.
- 14 Further, the wording of Clause 1.2 SOA excludes its own application to Clause 15 SOA as it exclusively refers to “statutes”, which the SIAC Rules are not. Clause 1.2 SOA provides that “[r]eferences to statutes include amendments and reenactments” [*Exh. C3*, p. 10]. A statute is a “law enacted and established by the will of the legislative department of government” [BLACK, p. 1107]. The broad interpretation of “statutes” further includes “[a]ll Acts of Parliament” [GARNER, p. 829]. The SIAC Rules are neither. Therefore, Clause 1.2 SOA does not apply to the interpretation of “current”.
- 15 Finally, even if Clause 1.2 SOA were relevant, it would not mandate a dynamic interpretation. As a mere rule of doubt, it must be applied consistently with the principle of *favor negotii*, which requires giving effect to all contractual terms [*Caratube v. Kazakhstan (II)*, para. 658; *Huntington Ingalls v. Venezuela (II)*, para. 44; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, Art. 8 para. 55]. Applying Clause 1.2 SOA expansively would deprive the express reference to “Incoterms 2020” of meaning. Consequently, Clause 1.2 SOA only operates where the wording or interpretation otherwise fails to clarify the reference. Since a proper interpretation of the Arbitration Agreement shows that the Parties referenced the 2016 SIAC Rules [*supra paras. 5 et seqq.*], Clause 1.2 SOA cannot transform a static reference into a dynamic one.



II. ALTERNATIVELY, THE 2016 SIAC RULES GOVERN THIS ARBITRATION AS THE RULES IN FORCE AT THE TIME OF THE COMMENCEMENT OF THE PROCEEDINGS

- 16 Even if the Tribunal were to interpret “current” arbitration rules as a reference to the rules in force at the time the Proceedings commenced, the 2016 SIAC Rules still apply. This Proceeding began on 19 December 2024, when CLAIMANT initiated mediation [*NoA-28, p. 5*], *i.e.*, before the 2025 SIAC Rules entered into force [*Rule 1.5 2025 SIAC Rules*].
- 17 CLAIMANT recognizes that there is a default mechanism under Rule 3.3 2016 SIAC Rules and Rule 6.2 2025 SIAC Rules, that deems the date of the receipt of the Notice of Arbitration (“NoA”) as the commencement date. However, this is only a default. The Parties—exercising their procedural autonomy [*Dyna-Jet v. Wilson Taylor, para. 81; BÖCKSTIEGEL, p. 2*] and consistent with Art. 21 UNCITRAL Model Law on International Commercial Arbitration, adopted in the Danubian Arbitration Law (“DAL”) [*POI-III-4, p. 53*—departed from this default regime. Under their individually drafted Arbitration Agreement, the proceedings began with mediation and advanced seamlessly to this Arbitration [*infra paras. 21 et seqq.*]. Consequently, the initiation of mediation—rather than the receipt of the NoA—marks the commencement of the proceedings.
- 18 Preliminarily, the Tribunal—not the SIAC Registrar—has the power to determine the definitive commencement of the Proceeding [A]. To give full effect to the Parties’ paramount objectives—ensuring that the mediation tolls the statute of limitations and that a settlement is enforceable under the NYC—the Tribunal must deem this Proceeding to have commenced with mediation in 2024 [B].

A. THE TRIBUNAL IS COMPETENT TO DETERMINE THE COMMENCEMENT DATE

- 19 The SIAC Registrar provisionally recorded 31 July 2025 as the commencement date for administrative purposes [*SIAC Letter from 8 August 2025, para. 2, p. 24*]. However, the Tribunal is competent to determine the commencement date of this Proceeding. The reason for this is *twofold*: *First*, on 8 October 2025 the Parties expressly agreed that the Tribunal—rather than the SIAC Registrar—should decide which version of the rules apply [*POI-II, p. 52*] and, by extension, the date of the commencement of the Proceeding.
- 20 *Secondly*, a decision of the Registrar is not binding in this Proceeding. In general, under Rule 40.1 2016 SIAC Rules, the SIAC Registrar’s decisions are binding upon the parties and the tribunal. However, in 2025 the Singapore Court of Appeal held in *DMZ v. DNA* in an *obiter* that under the 2016 SIAC Rules the SIAC Registrar’s decisions are only binding insofar as they



are (i) purely administrative in nature and (ii) consistent with the process agreed upon by the parties [*DMZ v. DNA*, *para. 61*]. In the case at hand, the decision is not purely administrative. The date of commencement determines whether the 2016 or 2025 SIAC Rules govern the disclosure of CLAIMANT’s funding agreements. This directly affects CLAIMANT’s rights, namely, the protection of privileged documents and equality of arms [*infra paras. 49 et seqq.*]. Further, the date the Registrar provisionally set is not consistent with the Parties’ agreement to commence the Proceeding with mediation [*infra paras. 21 et seqq.*]. Therefore, this Tribunal has power to determine the correct commencement date. Moreover, if the Tribunal erroneously adopts the SIAC Registrar’s decision without scrutiny, state courts can set the award aside [*cf. DMZ v. DNA*, *para. 57*]. Hence, the Tribunal is competent to determine commencement.

B. THE PROCEEDING COMMENCED WITH MEDIATION IN 2024

21 The Tribunal should deem that the Proceeding commenced with mediation on 19 December 2024. This interpretation gives effect to the Parties’ agreement regarding the statute of limitations [1] and, crucially, secures their paramount objective: the enforceability of a potential consent award [2].

1. To Toll the Statute of Limitations, the Proceeding Commenced With Mediation

22 The Parties expressly agreed that, for the purpose of the statute of limitations, arbitral proceedings should be treated as having commenced when mediation was initiated. Botanical Garden assumed—rightly under Equatorian law—that mediation alone does not toll limitation periods [*Exh. C7*, *p. 21*]. It therefore insisted that “the initiation of the mediation proceedings should be treated for the purpose of the statute of limitations as constituting the commencement of the arbitration proceedings” [*ibid.*]. CLAIMANT relied on this assessment [*Exh. C1-8*, *p. 8*].

23 RESPONDENT, as Botanical Garden’s legal successor [*supra paras. 8 et seqq.*], cannot dispute that the Proceeding already commenced with mediation. Doing so would amount to impermissible cherry-picking of its predecessor’s representations.

2. Enforceability of a Consent Award Presupposes Commencement With Mediation

24 The Parties’ paramount objective in drafting Clause 15 SOA was to ensure the enforceability of any consent award [a]. Under the NYC and Art. 30 DAL, enforceability is only ensured if the proceedings are deemed to have commenced with mediation [b]. A comparison with the SIAC-SIMC Arb-Med-Arb Protocol (“**AMA Protocol**”)—which pursues the same function—confirms this [c].



a. Enforceability Was the Parties' Paramount Objective

- 25 Clause 15 SOA expressly stipulates that the Parties may request the Tribunal to turn any mediated settlement into a consent award “[t]o secure [its] enforcement”. This objective lies at the heart of the Arbitration Agreement.
- 26 Enforceability prevails over Botanical Garden’s unilateral preference to resort to arbitration only as a last resort after an unsuccessful mediation. Simultaneously, the Parties required that any mediated settlement be internationally enforceable. These two aims cannot be reconciled unless mediation marks the commencement of the arbitral proceedings; otherwise, a consent award would fall outside the scope of the NYC and thus be unenforceable [*infra paras. 28 et seqq.*]. Botanical Garden’s negotiators were no experts [*Exh. C1-8, p. 8; PO2-7, p. 56*]. They altered the AMA-Protocol sequence without intending to deprive the Clause of its core function—enforceability [*ibid.*]. Therefore, the Tribunal must interpret Clause 15 SOA to preserve and not nullify this function.
- 27 Moreover, enforceability prevails over unilateral structural preferences. Under Rule 41.2 2016 SIAC Rules, the Tribunal must “make every reasonable effort to ensure the enforceability of any Award”. Yet, a mediated settlement would be of little value to the Parties without enforceability under the NYC since neither Mediterraneo nor Equatoriana has acceded to the Singapore Convention on Mediation, under which mediated settlements can be enforced internationally [*PO2-32, p. 59*]. Even if RESPONDENT does not share Botanical Garden’s hesitancy to arbitration, it certainly shares CLAIMANT’s interest in enforceability.

b. Enforceability Requires Mediation as the Commencement Point

- 28 A consent award is only enforceable if the entire proceedings—mediation and arbitration—are deemed to have commenced when the mediation began. Because neither Party’s jurisdiction has ratified the Singapore Convention on Mediation, the NYC is the only avenue for international enforceability.
- 29 Under Art. 1 NYC, enforcement is limited to awards “arising out of differences”. When a tribunal merely endorses a pre-existing settlement, no “difference” remains; the NYC therefore does not apply [*KASTER, p. 50; cf. NEWMARK/HILL, p. 83, SUSSMANN, p. 12*]. Art. 30 DAL confirms this: only settlements reached “during ongoing arbitrations” may be turned into consent awards that have the same effect as adjudicated awards [*BORN, 23.01[E][2]*]. This result would not be compatible with the express intent of the Parties [*supra paras. 25 et seqq.*].



c. Comparison with the AMA Protocol Confirms This

- 30 Comparing Clause 15 SOA with the AMA Protocol confirms this approach. The AMA Protocol was designed to circumvent this issue and to ensure enforceability of consent awards [SKREEKUMAR, *p. 91*]. It commences with *pro-forma* arbitration—when a dispute still exists—then immediately stays the arbitration for mediation and subsequently returns the matter to the arbitral tribunal for issuance of a consent award [*Paras. 1, 5, 8 et seqq. AMA Protocol*; BOOG, *p. 95*; *cf. PETTIBONE, p. 107*]. Mediation and arbitration thus form one unified, hybrid procedure [DHANKHAR, *p. 1*].
- 31 Botanical Garden drafted Clause 15 SOA expecting it to function like the AMA Protocol, with the only difference being that mediation would come first [*PO2-7, p. 56*]. CLAIMANT accepted Botanical Garden’s draft in the belief that the function of the AMA mechanism remained intact and that only cosmetics—not the legal effect—were altered [*Exh. C1-8, p. 8*]. Only a commencement with mediation preserves the AMA Protocol’s legal effects the Parties attempted to emulate. To give effect to the Parties’ objectives—rather than frustrate them—the Tribunal should find that the Proceeding commenced with mediation on 19 December 2024.

III. AN AWARD UNDER THE 2016 SIAC RULES IS NOT AT RISK OF BEING CHALLENGED

- 32 If the Tribunal applies the 2016 SIAC Rules, any subsequent challenge will be unsuccessful. RESPONDENT submits in its Response to the Notice of Arbitration (“**Response**”) that it may challenge such determination. Under Art. 34(2)(a)(iv) and Art. 36(1)(a)(iv) DAL, as well as Art. V(1)(d) NYC, an award may only be set aside or denied enforcement if the arbitral procedure explicitly deviated from the Parties’ agreement. This includes the applied procedural rules [*BGer No. 4A 124/2010, para. 33*; *China Agri v. Balli, pp. 77 et seqq.*; *Siginon v. Gitutho, p. 3 et seq.*].
- 33 Further, judicial review of the Tribunal’s choice of rules is only available where the reviewing court can conclude that the Arbitration Agreement unambiguously points to another set of rules—here, the 2025 SIAC Rules [*cf. Sofidif v. OIAETII para. 9*; BORN, 25.04[C]/[8]]. As demonstrated, the Arbitration Agreement does not unambiguously, or even plausibly, refer to the 2025 SIAC Rules [*supra paras. 3 et seqq.*]. RESPONDENT cannot meet this standard.
- 34 Moreover, CLAIMANT requests the Tribunal to issue a procedural order that the 2016 SIAC Rules apply to remove any uncertainty about the applicable version. This way, the Tribunal preempts any potential challenge on the grounds of due process.



IV. CONCLUSION

35 RESPONDENT assumed the Initial Contract with no alterations to the Arbitration Agreement. The Arbitration Agreement not only exclusively refers to the 2016 SIAC Rules, further the tailor-made procedure of the Parties commenced in 2024 before the 2025 SIAC Rules entered into force. Therefore, CLAIMANT requests the Tribunal to hinder RESPONDENT from cherry-picking its obligations and apply the 2016 SIAC Rules as provided by the Arbitration Agreement.

PART II: DISCLOSURE OF THE FUNDING AGREEMENTS IS UNJUSTIFIED

36 It is CLAIMANT's submission that the Tribunal should not disclose its litigation funding agreements ("LFAs") and thereby deny RESPONDENT's request [*Response-28*, p. 35]. CLAIMANT—an innovative and highly specialized cultivator—faces an opponent that is part of and funded by a large multinational group of companies [*Response-21*, p. 34]. CLAIMANT concluded two LFAs to support this Arbitration—namely, a funding agreement with AtJ-Financing ("AtJ") and an after the event insurance policy with LitSure. In full transparency and good faith, CLAIMANT already voluntarily disclosed the existence and identity of its external funder and insurer to address any concerns about arbitrators' conflict of interests. Yet, RESPONDENT demands access to the contents of these privileged agreements; a blunt attempt to gain insight into CLAIMANT's arbitration strategy.

37 Under the applicable 2016 SIAC Rules, the Tribunal should not compel disclosure of CLAIMANT's LFAs [I]. Even if the 2025 SIAC Rules were to apply—*quod non*—, the requirements for disclosure would not be met [II].

I. THE TRIBUNAL SHOULD NOT ORDER DISCLOSURE UNDER THE 2016 SIAC RULES

38 The Tribunal has no power to order disclosure of LFAs under the 2016 SIAC Rules [A]. In any event, the threshold for disclosure would not be satisfied [B].

A. THE TRIBUNAL LACKS AUTHORITY TO ORDER DISCLOSURE

39 The Tribunal lacks the power to compel disclosure of CLAIMANT's LFAs with AtJ and LitSure. To avoid the risk of annulment proceedings under Art. 34(2)(a)(iii) DAL, a tribunal must not exceed its mandate [*CBX v. CBZ*, para. 11; *CRW Joint Operatin v. PT Perusahaan Gas Negara*, para. 31; BORN, 25.04[F][1]]. Being the seat of Arbitration [*Clause 15 SOA*], Danubia is the relevant jurisdiction for any potential set-aside motion. In Danubian case law, no interpretation of the 2016 SIAC Rules has ever allowed a tribunal to compel disclosure of funding agreements [*PO2-36*, p. 59]. Crucially, the Danubian Supreme Court—which establishes



binding precedents considering Danubia’s status as a common law jurisdiction [*PO2-33*, *p. 59*—recently upheld an award under the 2016 SIAC Rules in which the arbitrator found that it had no power to order disclosure of LFAs [*PO2-36*, *p. 60*]. Therefore, the Tribunal should follow Danubian precedent and not order disclosure.

40 Third-party funding is not discussed by the 2016 SIAC Rules. In 2017, after Singapore legalized third-party funding [*Civil Law (Amendment) Act 2017*; *Speech by Senior Minister of State for Law para. 17*], the SIAC issued Practice Note PN-01/17 (31 March 2017) on Arbitrator Conduct in Cases Involving External Funding (“**Practice Note**”). SIAC Practice Notes are non-binding and purely advisory [*Rule 1.3 2016 SIAC Rules*; *Para. 2 Practice Note*; FAVALLI, *p. 3*]. In distinct cases, Para. 5 Practice Note allows the disclosure of the existence, identity and further “details of the External Funder’s interest in the outcome of the proceedings”—but not disclosure of the *entire* agreements. This is confirmed by *Speers v. Makemytrip*, in which the Tribunal—applying the 2013 SIAC Rules and the Practice Note—found that the Practice Note does not mandate disclosure of full LFAs [*Speers v. Makemytrip, First Partial Award, para. 81*]. The tribunal expressly recognized the risk of being unduly influenced by gaining insight into the counsel’s and funder’s assessment of the case [*ibid.*]. The High Court of Singapore upheld this partial award [*BTN and BTO v. BTP and BTQ, para. 3*]. Hence, disclosure of the unredacted agreements would exceed the Tribunal’s power.

B. IN ANY EVENT, THE THRESHOLD FOR DISCLOSURE IS NOT MET

41 Even if the Tribunal were to assume that the Practice Note allows the full disclosure of LFAs—*quod non*—, such disclosure would still be *inappropriate* by its standards. The Tribunal must consider the Parties’ submissions to secure balanced interests [*cf. Speers v. Makemytrip, First Partial Award, para. 81*]. Art. 9 IBA Rules on the Taking of Evidence in International Arbitration (2010) (“**IBA Rules**”) reflects internationally recognized best practices for document production [CHOONG/MANGAN/LINGARD, *para. 12.53*; ICCA REPORT, *p. 120*; MÖCKESCH, *para. 8.01*; *cf. Lone Pine v. Canada para. 251*; BORN, *16.01*] and provide further guidance to the Tribunal for deciding the issue at hand.

42 Measured against these standards, disclosure would excessively prejudice CLAIMANT’s legally protected interests [1]. The Tribunal should deny disclosure of the LFAs as their content is not relevant to this Case [2].



1. CLAIMANT Has Compelling Interests Against Disclosure of the LFAs

43 The Tribunal should recognize that CLAIMANT has legitimate and legally protected interests against disclosure: Litigation and legal advice privilege cover the LFAs [a], disclosure would unduly intrude upon commercial confidentiality [b] and violate CLAIMANT's right to equality of arms and fair trial, thereby jeopardizing enforceability under the NYC [c].

a. The Agreements Cannot Be Disclosed as They Are Covered by Privilege

44 The LFAs fall within both litigation privilege and legal advice privilege because they reflect CLAIMANT's arbitration strategy. Hence, the Tribunal should not compel disclosure. The Tribunal has broad evidentiary discretion [CHOONG/MANGAN/LINGARD, p. 165; cf. ADG v. ADI, p. 111; TMM v. Pacific Richfield para. 115; BERGER, p. 507]. Under Rule 27(o) 2016 SIAC Rules, this expressly extends to questions of privilege. Further, Rule 19.2 2016 SIAC Rules stipulates that tribunals are not bound by any domestic evidence rules. When assessing privilege, tribunals should account for the parties' legitimate expectations [Art. 9(4)(3)(c) IBA Rules; Telecom Holding v. Canada, p. 13]. In international arbitration, it accords with the parties' expectations to apply transnational evidentiary principles [cf. Latam Hydro v. Peru para. 14; GOELER, p. 168; MÖCKESCH, p. 221]. RESPONDENT and CLAIMANT intentionally chose international arbitration to avoid domestic procedural idiosyncrasies [Exh. C1-7, p. 7; Exh. C1-8, p. 8]. Therefore, the Tribunal should apply transnational evidentiary principles, under which the LFAs fall into two well-established categories of privilege:

45 *First*, the LFAs are covered by litigation privilege. A document is privileged if (i) created when litigation is contemplated or underway and (ii) prepared for the dominant purpose of proceedings [Arroyo v. BP, para. 59; Dadourian v. Simms, para. 86; Three Rivers v. Bank of England, para 52; IBA Task Force, p. 10]. This principle is internationally recognized and extends to communication with third parties [IBA Task Force III, p. 1; e.g., Akzo Nobel v. Commission of European Communities, para. 41; Bank for International Settlements, para. 9; General Accident Assurance Company v. Chrusz paras. 24 et seqq.; Skandinaviska v. Asia Pacific Breweries paras. 70 et seqq.]. CLAIMANT concluded both LFAs (i) in February 2025 after the Proceedings commenced [PO2-20, p. 58] and (ii) did so to secure its ability to pursue the claim and manage financial exposure [PO2-20, p. 58]. Hence, the LFAs satisfy the test for litigation privilege.



46 *Secondly*, the LFAs are protected by legal advice privilege, which safeguards communications made for the purpose of seeking or receiving legal advice [*Pope & Talbot v. Canada*, para. 1.9; *Three Rivers v. Bank of England*, para. 34; KHODYKIN, p. 432]. The principle that communication reflecting legal advice must remain protected is internationally recognized [*IBA Task Force II*, p. 2; *ICCA Report*, p. 136; e.g., *Akzo Nobel v. Commission of European Communities*, para. 40; *BGH Neue Juristische Wochenschrift 1990*, p. 510 et seq.; *Latam Hydro v. Peru* para. 47]. Funding agreements necessarily reflect counsel’s case assessment, e.g., through settlement thresholds, termination rights or premium structures [*Arroyo v. BP*, para. 59; *Excalibur v. Texas Keystone*, para. 8; cf. GOELER, p. 164; *ICCA Report*, p. 132]. The LFA with AtJ contains information on the amount AtJ has committed to invest as well as premium-related details [*PO2-26*, p. 59], allowing RESPONDENT to gain insight into the case assessment made by CLAIMANT’s counsel. Accordingly, disclosure would reveal CLAIMANT’s arbitration strategy. The LFA falls under legal advice privilege.

47 CLAIMANT did not waive its privilege by concluding LFAs with AtJ and LitSure. Disclosure to third parties does not constitute a waiver if the parties share a common interest in the litigation and in maintaining confidentiality [*Glamis Gold v. USA*, para. 24; *Winterthur v. AG*, para. 78; *IBA Task Force VI*, p. 4; *ICCA Report*, p. 113; GOELER, p. 179]. CLAIMANT, AtJ and LitSure share the interest of succeeding in this arbitration and safeguarding confidentiality, as evidenced by their NDAs [*PO2-24*, p. 58]. A party must not exploit discovery to gain insight into its opponent’s legal reasoning [*Hickman v. Taylor*, p. 329]. Therefore, the Tribunal should deny RESPONDENT’s request for disclosure.

b. Disclosure Would Unduly Violate Commercial Confidentiality

48 The LFAs fall within the scope of Art. 9(2)(e) IBA Rules protecting commercially confidential information—the disclosure of which would give the opposing party an undue advantage. The PCA tribunal in *SAS v. Bolivia* identified *four* requirements for commercial confidentiality, which are all met in the case at hand: *First*, the documents are in CLAIMANT’s possession; *secondly*, they are not publicly available; *thirdly*, CLAIMANT treats them as confidential, as proven by the NDAs [cf. O’MALLEY para. 9.86]; and *fourthly*, they contain commercially sensitive information that would grant RESPONDENT insight into CLAIMANT’s cost structures [cf. *SAS v. Bolivia (PO2)*, para. 23]. Comparable standards are acknowledged across international arbitration [e.g., Art. 54(a) *WIPO Arbitration Rules*; *Coeur Mining v. Mexico, Annex para. 7*]. To ensure the confidentiality of CLAIMANT’s sensitive commercial information, the Tribunal should not order disclosure.



c. Disclosure Would Violate Equality of Arms and Jeopardize Enforcement

49 Additionally, disclosing the LFAs would violate CLAIMANT’s right to a fair trial and the equality of arms principle under Art. 18 DAL. A violation can bar enforcement under Art. V(1)(b) NYC [BORN, 15.04[B][1]; KRONKE, *Art. V(1)(b) para. 18*]. Forcing a funded party to reveal limits of its financial endurance, settlement thresholds or internal budgeting, provides the opposing party with a unilateral strategic insight. This is an outcome repeatedly rejected by tribunals [*Arroyo v. BP, para. 48*; *Speers v. Makemytrip, Final Award, para. 183*]. The agreement with AtJ contains exactly such sensitive information—namely, AtJ’s premium formula and the budget it is willing to invest [*PO2-26, p. 58*]. Compelling disclosure would distort procedural balance and risk rendering any award unenforceable.

2. The LFAs’ Content Is Irrelevant to This Proceeding

50 The LFAs’ content is irrelevant and immaterial to any issue before the Tribunal. In the first place, RESPONDENT—as the party seeking disclosure—must prove the LFAs contents’ relevance to this Case [*cf. Muhammet Çap v. Turkmenistan para. 44*; *Teinver v. Argentine Republic paras. 24 et seqq.*; *KHODYKIN, para. 6.130*]. However, RESPONDENT failed to do so.

51 RESPONDENT did not argue that the content of the LFAs is relevant to the merits of the Case. According to Art. 9(2)(a) IBA Rules, evidence that lacks sufficient relevance to the merits of the case must be excluded from document production [*GOELER, pp. 138 et seqq.*; *ZUBERBÜHLER, p. 52*]. RESPONDENT has not submitted any substantive matters the LFAs are relevant for and therefore, disclosure is not provided for.

52 Some tribunals have considered to order disclosure for purely procedural purposes [*Muhammet Çap v. Turkmenistan, para. 44*; *Tennant Energy v. Canada (PO4), paras. 96 et seqq.*]. However, even if the Tribunal were to adapt this approach, its threshold would not be met. Instead of demonstrating the procedural relevance of the LFAs to the Case, RESPONDENT merely submits speculations: neither a potential attempt to defend against hypothetical further damage claims [a], nor considering a security for costs application [b], nor unfounded assertions of alleged funder influence [c] justify disclosure.

a. Disclosure Is Irrelevant for Defense Against Potential Further Damage Claims

53 RESPONDENT’s submission that it depends on disclosure to defend itself against potential further damage claims [*Response-20, p. 34*] is incorrect. Those claims—if ever pursued—would relate only to cost allocation in the final stage of the proceedings and therefore should not be considered prematurely [*cf. Arroyo v. BP, para. 48*].



54 Even then, RESPONDENT will not need to access the LFAs for defense. Under Rule 37 2016 SIAC Rules, the Tribunal has the power to allocate “other costs” to the Parties. However, this extends only to *reasonable* third-party funding costs and LFA premiums [*Speers v. Makemytrip, Final Award, paras. 150, 169*]. Third-party funding is certainly reasonable if it is the only viable option to pursue a claim [*Veolia and Vilniaus Energija v. Vilnius Municipality and VŠT, para. 1845; ICCA Report, p. 158*]. Without third-party funding, CLAIMANT could not have pursued its claim while keeping its business running [*PO2-20, p. 58*].

55 However, RESPONDENT does not need to fear “excessive” funding costs as these are routinely limited to the standard market rate [*Speers v. Makemytrip Final Award, para. 197; ICCA Report, p. 159*]. Accordingly, disclosure of the LFAs is not needed for and does not support RESPONDENT’s potential defense.

b. Considering to Request Security for Costs Is No Reason for Disclosure

56 RESPONDENT submits that the Tribunal should order disclosure of the LFAs to evaluate a security for costs application [*Response-19, p. 34*]. This does not convince for *two* reasons: *First*, before a security for costs application can possibly justify disclosure, such application must be submitted [*Speers v. Makemytrip, First Partial Award, para. 81; Tennant Energy v. Canada (PO6), para. 22*]. This requirement ensures that CLAIMANT could voluntarily provide security for costs and thus avoid disclosing its LFAs. Subsequently, RESPONDENT’s mere consideration of security for costs application does not suffice.

57 *Secondly*, even if RESPONDENT were to eventually file an application, such request would not be successful. Security for costs is an exceptional measure [*Décision de procédure, ASA Bulletin 1997, para. 47; SAS v. Bolivia (PO10), para. 68; Tennant Energy v. Canada (PO6), para. 24*], allowed for where a party has a lack of financial resources and a proven history of not complying with cost orders [*Orlandini v. Bolivia paras. 143 et seq.; BORN, 17.02[G][4][e]*]. Tribunals have also granted security for costs in cases where the opposing party is funded by an *unknown* third-party funder [*RSM v. Saint Lucia paras. 81 et seqq.*]. However, there is no risk that adverse costs will not be paid in the case at hand. CLAIMANT has not only obtained funding from AtJ but also an insurance for this very risk from LitSure [*Response-19, p. 34*]. LitSure has an excellent reputation on the market [*PO2-23, p. 58*]; there is no indication it will not cover potential adverse costs. Consequently, RESPONDENT considering a security for costs application is no reason for disclosure.



c. There Is No Evidence of Undue Influence by the Third-Party Funder

58 RESPONDENT submits that AtJ could exert considerable influence on the proceedings [*Response-19*, p. 34]. However, third-party funding in itself does not provide grounds to assume influence on the arbitral proceedings [*Oxus Gold v. Republic of Uzbekistan*, para. 127]. Furthermore, any party remains free to conduct the proceedings as it sees fit. It is of no concern to the other party what motivates this conduct as long as it adheres to good faith and fair dealing [BORN, 15.01[E][1]]. For example, a party is perfectly free to set an internal settlement threshold as it may do so in cooperation with a third-party funder. Moreover, lawyers who could be under considerable influence of third-party funders are bound by professional ethics in every jurisdiction [ANDREWS, pp. 1388, 1434; TERRY, pp. 13 et seq.]. RESPONDENT merely speculates that ATJ *might* influence the Arbitration [*Response-20* p. 34; *Exh. R4*, p. 40], yet does not even identify the mechanism by which this could occur. Absent any concrete evidence, the Tribunal must reject “abstract” influence arguments.

II. EVEN UNDER THE 2025 SIAC RULES, THE TRIBUNAL SHOULD REFRAIN FROM ORDERING DISCLOSURE

59 Even if the Tribunal were to apply the 2025 SIAC Rules, disclosure of the LFAs would still be undue. Rule 38.4 2025 SIAC Rules requires tribunals to consider the parties’ views before ordering disclosure of any details beyond the existence or identity of the funder. This rule provides for slightly broader discretion than the Practice Note. It offers a non-exhaustive list of potential details of agreements tribunals may order but does not expressly authorize disclosure of full agreements—the remedy RESPONDENT seeks.

60 Under Rule 38.4 2025 SIAC Rules, any further disclosure relies on a balancing of interests. In the case at hand, that balance is unequivocal. RESPONDENT has demonstrated no legitimate or case-relevant interests justifying disclosure [*supra paras. 56 et seqq.*]. Contrarily, CLAIMANT has substantial, legally protected interests against disclosure. These interests, which are recognized both under the IBA Rules and by arbitral practice, would be materially impaired by compelled disclosure [*supra paras. 44 et seqq.*]. In light of this stark asymmetry, the Tribunal’s broader discretion under Rule 38.4 2025 SIAC Rules does not impact the outcome. Any disclosure would be incompatible with CLAIMANT’s rights and risks; jeopardizing enforceability of any eventual award. Hence, even under the 2025 SIAC Rules, the Tribunal must refrain from ordering disclosure.



III. CONCLUSION

61 The Tribunal must not allow RESPONDENT to exploit disclosure for gaining insight into CLAIMANT's arbitration strategy. The confidentiality of CLAIMANT's LFAs is safeguarded by privilege and commercial secrecy. Conversely, ordering disclosure would harm CLAIMANT simply because it was in a weaker financial position and had to rely on AtJ to access justice. This would be irreconcilable with equality of arms and a fair trial.

PART III: Claimant Is Entitled to Damages Due to an Unexcused Breach of Contract by Respondent

62 CLAIMANT requests the Tribunal to find that CLAIMANT is entitled to damages under Art. 61(1)(b) CISG. RESPONDENT's failure to obtain the required import permit for the delivery of the Orchids constitutes a breach of its contractual duty to enable delivery under Artt. 53, 60(a) CISG. RESPONDENT is not exempt from liability under Art. 79 CISG. The scope and amount of damages are governed by Artt. 74 *et seqq.* CISG [*infra paras. 98 et seqq.*].

63 In August 2022, the Parties concluded the Contract for the sale of Orchids to be delivered between 1 January 2024 and 31 March 2024 [*Exh. C3-4.2, p. 11*]. In September 2023, the CITES Plants Committee recommended the uplisting of the orchids from CITES Appendix II to Appendix I. Thereby, commercial trade was effectively restricted [*Exh. C4, p. 14*]. Despite this emerging risk, RESPONDENT assured CLAIMANT it would obtain the necessary permit even if the uplisting occurred [*NoA-15, p. 6*]. Unconcerned by CLAIMANT's repeated warnings about the potential uplisting and its impact on the performance of the Contract [*Exh. R1-7, p. 37*], RESPONDENT scheduled the delivery for the very end of the delivery period on 27 March 2025 [*Response-10, p. 32*]. On 1 February 2025, the orchids were officially included in CITES Appendix I, triggering the requirement for an import permit under Art. III(3) CITES for delivery from Mediterraneo (CLAIMANT) to Equatoriana (RESPONDENT) ("**Import Permit**") [*Exh. C6-4, p. 16*].

64 Obtaining an Import Permit was part of RESPONDENT's contractual obligation to enable timely delivery. When RESPONDENT failed to do so, it breached the Contract [**I**]. RESPONDENT cannot invoke Art. 79 CISG because it assumed full responsibility for securing the Import Permit through the Parties' risk allocation, and it must therefore bear the consequences of the very risk it knowingly undertook [**II**].



I. Respondent BREACHED ITS OBLIGATION TO OBTAIN AN IMPORT PERMIT IN TIME

- 65 When RESPONDENT failed to obtain the Import Permit in time for CLAIMANT to make delivery on 27 March 2024, it breached an essential contractual obligation. This obligation also complies with the FCA Incoterms 2020, which Clause 1.2 SOA incorporates into the Contract (“**Incoterms**”), and Artt. 53, 60(a) CISG.
- 66 Clause 5.1 SOA provides that the “[b]uyer shall obtain all import permits for the country of destination”, thereby assigning the Parties’ obligations regarding delivery—including the obtainment of necessary CITES Permits. This is further fully consistent with Section B7(b) FCA Incoterms under which the buyer has to “carry out and pay for all formalities required by [...] the country of import, such as: import license[s] [...]” and is thus responsible for it. Further, this allocation aligns with the fundamental assignment of obligations under the CISG: the buyer’s duty to enable delivery under Artt. 53, 60(a) CISG comprises obtaining import permits [*MKAC Case No. 27/2001 para. 3.3*; *ENDERLEIN/MASKOW Art. 60 para. 6.1*]. Such acts enabling delivery must be performed early enough for the seller to make delivery in time under the contract [*ENDERLEIN/MASKOW, Art. 60 para. 6.1*].
- 67 RESPONDENT breached its obligation when it failed to obtain the Import Permit in time for CLAIMANT to make delivery on 27 March 2024 as scheduled. This failure became evident on 10 February 2024, when RESPONDENT informed CLAIMANT that it would not secure the Import Permit in time [*Response-14, p. 33*]. Thus, RESPONDENT breached the Contract.

II. Respondent CANNOT INVOKE EXEMPTION FROM ITS FAILURE TO PERFORM

- 68 RESPONDENT cannot invoke a *force majeure* exemption—now that the risk has materialized. It is neither exempt from liability under Clause 12 SOA, which merely supplements Art. 79 CISG, nor under Art. 79 CISG itself, as RESPONDENT deliberately assumed the risk of a regulatory change impacting the issuance of Import Permits in Equatoriana.
- 69 The Tribunal should interpret Art. 79 CISG in light of Clause 12 SOA. While parties may modify Art. 79 CISG through contractual clauses under Art. 6 CISG [*UNCITRAL Digest of Case Law, p. 37*; *SCHLECHTRIEM/SCHWENZER/Hachem, Art. 79 paras. 24, 28 et seq.*], such clauses generally supplement the law rather than replace it; unless expressly stated otherwise [*BRUNNER, para. 386*]. As the party agreement, Clause 12 SOA prevails where it differs from Art. 79 CISG [*cf. KRÖLL/Atamer, Art. 79 para. 89*] but does not in itself constitute a separate possibility for exemption from liability: Clause 12 SOA mirrors the legal effect of



Art. 79 CISG—exemption from liability—and complements Art. 79 CISG with a non-exhaustive list of potential “impediments”. Thus, Clause 12 SOA supplements Art. 79 CISG.

70 Thereunder, RESPONDENT cannot invoke exemption from liability. First, since RESPONDENT assumed the risk for obtaining the Import Permit, it is precluded from invoking Art. 79 CISG from the outset [A]. Secondly, in any event, RESPONDENT fails to meet the cumulative requirements of Art. 79 CISG: the breaching party must prove that its non-performance was caused by an impediment beyond its control, which it could not have foreseen, and could neither have avoided nor overcome [*Milk Powder Case*, pp. 6 et seq.; BRUNNER/GOTTLIEB/Brunner, Art. 79 p. 562 para. 4; FERRARI/FLECHTNER/BRAND, Art. 79 para. 20]. RESPONDENT could reasonably have overcome the regulatory changes [B].

A. Respondent Is Precluded From Invoking Art. 79 CISG Because It Assumed the Risk for Obtaining the Import Permit

71 RESPONDENT cannot rely on Art. 79 CISG because it contractually assumed or—in the alternative—impliedly undertook the responsibility for the foreseeable risk of obtaining the Import Permit. Where a foreseeable risk is contractually allocated to one party and thus within its sphere of risk, that party is precluded from invoking Art. 79 CISG [KRÖLL/*Atamer*, Art. 79 para. 89].

72 Consequently, RESPONDENT cannot invoke Art. 79 CISG to gain exemption from liability: the risk of not being able to obtain the Import Permit due to regulatory changes was foreseeable [1] and the Parties, in full awareness, expressly allocated this risk exclusively to RESPONDENT [2]. In any event, RESPONDENT’s subsequent conduct amounted to an implied guarantee to obtain the Import Permit [3].

1. Respondent Could Have Foreseen the Regulatory Change at Contract Conclusion

73 The regulatory change was foreseeable at the time of Contract conclusion. Foreseeability is assessed objectively from the perspective of a reasonable person in the party’s position under Art. 8(2), (3) CISG [BRUNNER, p. 160; HEUZÉ, para. 470], and is determined on a case-by-case basis [LIU, para. 4.4]. Herein, contractual risk allocation and other results of negotiations—such as discounts—indicate the parties’ awareness of potential impediments at the time of contract conclusion [NEUMAYER/MING, Art. 79 para. 4; KRÖLL/*Atamer*, Art. 79 para. 50; cf. BRUNNER, p. 158]. Clause 1.1 SOA expressly references the “CITES [...] (as amended from time to time)”, demonstrating that the Parties anticipated CITES-related regulatory changes.



- 74 For a reasonable market participant in RESPONDENT’s position, the uplisting was foreseeable. International protection of endangered species is long-standing practice and permit regimes are frequently tightened [*cf. Melli Bank v. Holbud Case, para. 21*]. While the Orchids were already listed as endangered in CITES Appendix II [*NoA-3, p. 3*], habitat destruction and rising commercial demand [*Exh. C1-2, p. 7*] rendered the uplisting to CITES Appendix I and ensuing Import Permit difficulties foreseeable; especially for an experienced actor in botanical trade like RESPONDENT [*Exh. R1-3, p. 36; Response-7, p. 32*].
- 75 Further, foreseeability extends to the possibility of immediate enforcement of the uplisting. Conf.XX.8, as adopted in 2020 [*PO2-14, p. 57*], expressly permits decisions to take immediate effect [*ibid.*]. Conf.XX.8 was neither new nor unexpected for a reasonable person under Art. 8(2), (3) CISG. The absence of precedent increases—rather than reduces—the need for caution; a reasonable party must expect that any binding regulatory mechanism may be used [*cf. BRUNNER, p. 160*]. Conclusively, both the uplisting and its immediate enforcement were reasonably foreseeable.

2. RESPONDENT Cannot Invoke Art. 79 CISG Since the Risk Was Allocated to It

- 76 The Parties expressly imposed the foreseeable risk upon RESPONDENT through contractual risk allocation at the time of Contract conclusion [a]. If a party assumed a risk and the risk then materializes, it is precluded from invoking Art. 79 CISG [b]. The *Semi-Automatic Weapons Case* offers further guidance [c].

a. The Contract Explicitly Allocates the Risk Solely to RESPONDENT

- 77 The Contract—particularly through Clause 5.1 SOA and the FCA Incoterms 2020—allocates the entire permit-related risk to RESPONDENT, as it alone bears the obligation to obtain all necessary Import Permits and full responsibility for delivery [*supra para. 67*].
- 78 If a party enters a contract irrespective of a foreseeable risk, it is deemed to have assumed that risk [BIANCA/BONELL/Tallon, *Art. 79 para. 2.6.3.*; BRUNNER, *pp. 156 et seqq.*; DA SILVEIRA, *para. 223*; LIU, *para. 4.4*; NEUMAYER/MING, *Art. 79 para. 4*; RIMKE, *para. IV.C.1.b.2*].
- 79 This allocation is reinforced since the Parties replaced the CIF Incoterms with FCA Incoterms during renegotiations [*Response-7, p. 31*], shifting all delivery-related responsibility to RESPONDENT. This holds especially true under the review of Section A7(b) Incoterms, whereunder the seller is obligated to assist with import clearance but only “at the buyer’s request, risk and cost”. This allocation was decided on the basis that RESPONDENT alone was able to exercise control over the risk: it could set the delivery date [*Response-6, p. 32*], was in



direct contact with carriers from its group of companies [*Response-7, p. 32*], and could decide when to apply for a permit. This allocation did not go uncompensated, as CLAIMANT granted a discount and a flexible delivery window [*Response-6 et seq., p. 32; Exh. C5, p. 15*].

80 This finding is not altered by Clause 12.1 SOA. General *force majeure* clauses cannot override specific risk allocation [*Vine Wax Case, para. 21; BRUNNER, para. 151; KRÖLL/Atamer, Art. 79 para. 92*]. Thus, listing “government measures” in Clause 12.1 SOA, as the more general provision, cannot re-allocate the permit-risk the Contract distributed.

b. RESPONDENT is Precluded from Invoking Art. 79 CISG Since It Assumed the Risk

81 RESPONDENT cannot invoke Art. 79 CISG because it has assumed the risk for obtaining the Import Permit. If parties identify a specific contingency and allocate the risk to one party, this individual agreement precludes the party from invoking Art. 79 CISG [*Neoplan Bus Case, paras. 18, 24; cf. CLOUT Case 166, para. 8c; DA SILVEIRA, para. 223; FERRARI/FLECHTNER/BRAND, p. 830, para. 6; KRÖLL/Atamer, Art. 79 para. 89*]. The Parties expressly allocated the permit-risk to RESPONDENT. Therefore, it cannot invoke Art. 79 CISG.

c. The *Semi-Automatic Weapons Case* Offers Further Guidance

82 The Tribunal should consider the *Semi-Automatic Weapons Case* as persuasive authority. In the 1993 case, applying the CISG, the CIETAC tribunal addressed whether a US-American buyer that had contractually assumed responsibility for obtaining an import permit could claim *force majeure* after U.S. authorities subsequently prohibited the import of the goods. The tribunal held that the buyer remained liable because the contract had allocated the entire permit-risk to it; the later regulatory change did not exempt the buyer from liability [*Semi-Automatic Weapons Case, para. 9 p. 3*].

83 In the case at hand the same reasoning applies: under the Contract, the responsibility for obtaining the Import Permit rests entirely with RESPONDENT [*supra para. 81*]. Thus, like in the *Semi-Automatic Weapons Case*, a later regulatory rejection falls squarely within the risk RESPONDENT assumed and therefore cannot exempt it from liability.

3. In Any Event, RESPONDENT’s Subsequent Conduct Amounted to a Guarantee

84 Even if the Tribunal were not persuaded by the foregoing, RESPONDENT in any event assumed a unilateral guarantee through its subsequent conduct. Despite the mounting risk—the uplisting was already recommended—RESPONDENT reaffirmed its responsibility and assured CLAIMANT of its ability to secure the Permit.



- 85 Subsequent conduct can amount to a unilateral guarantee [AUDIT, *p. 101 para. 103*; FERRARI/KIENINGER/MANKOWSKI/*Ferrari*, *Art. 36 paras. 6 et seq.*]. This may also be substantiated through the party’s implicit actions [*ibid.*; AUDIT, *pp. 100 et seq. para. 103*; BIANCA/BONNELL/*Bianca*, *Art. 36 para. 3.2*; MUNICH COMMENTARY/*Gruber*, *Art. 36 paras. 18 et seq.*; SCHLECHTRIEM II, *p. 68*; SCHLECHTRIEM/SCHWENZER/*Schwenzer*, *Art. 36 para. 8*]. Under Art. 8(2), (3) CISG such conduct must be considered when interpreting obligations [SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, *Art. 8 paras. 56 et seqq.*]. A party assuming a guarantee cannot invoke Art. 79 CISG—regardless of the cause for non-performance [KRÖLL/*Atamer*, *Art. 79 para. 92*; SCHLECHTRIEM/SCHWENZER/*Schwenzer*, *Art. 79 para. 59*].
- 86 After recommendation of the uplisting, the risk of imminent regulatory changes was realistically assessable. Nevertheless, RESPONDENT “assured” CLAIMANT that “given [its] good contacts at the local authorities in Equatoriana [...] obtaining that permit even on short notice should not be a problem” [*NoA-15*, *p. 4*]. A reasonable party would understand this as RESPONDENT reaffirming and guaranteeing its risk-bearing role in the face of danger.
- 87 Having assumed and later confirmed its responsibility for the foreseeable risk, RESPONDENT is precluded from invoking Art. 79 CISG and thus liable.

B. IN ANY CASE, THE THRESHOLD OF ART. 79 CISG IS NOT SATISFIED SINCE Respondent COULD HAVE OVERCOME THE IMPEDIMENT

- 88 Even if the Tribunal were to find that RESPONDENT does not bear the exclusive risk to obtain the Import Permit and applies Art. 79 CISG, RESPONDENT would still fail to meet the high threshold of Art. 79 CISG. The alleged impediment lay squarely within RESPONDENT’s sphere of control, and RESPONDENT could—and should—have taken the feasible options to overcome it. In particular, it was reasonably expected of RESPONDENT to apply for an anticipatory permit [1], or to take delivery before 1 February 2024 [2].

1. RESPONDENT Could Have Overcome the Impediment by Applying for an Anticipatory Permit

- 89 RESPONDENT was reasonably expected to overcome the impediment since it had both discretion and capability to prevent the incipient materialization of the risk. Art. 79 CISG requires a party facing a potential impediment to take all reasonably expectable steps to overcome it, *e.g.*, doing all in its power as rapidly as possible [*cf. Macromex v. Globex International Case*, *p. 6 para. 17*; ENDERLEIN/MASKOW, *Art. 79 para. 6.1*; LIU, *para. 4.5*; *Secretariat Commentary*, *Art. 65 Comment 7*]. Clause 12.2 SOA reflects this standard; it requires the party invoking *force*



majeure to “use reasonable endeavors to mitigate the effects [of the event]”. Consistent with the principle of good faith enshrined in Art. 7(1) CISG, this includes monitoring political developments and timely pursuing any available administrative authorization to secure performance [ORTNER/KOROM/NEUMANN, *p. 514*].

90 On 1 December 2023, RESPONDENT set the delivery date for 27 March 2024. Immediately thereafter, a reasonable person would have sought an anticipatory Import Permit to forestall the risk of tightening regulation before the set date. Even RESPONDENT did not contest that this would have been a viable, and very likely successful option, since Equatorianian authorities had granted anticipatory permits in a comparable case of a looming inclusion into Appendix I [*NoA-12 p. 4*].

91 Despite CLAIMANT’s express concerns, RESPONDENT failed to seize this opportunity to ensure performance [*Exh. C5, p. 15*]. Instead, it disregarded the events indicating imminent regulatory change—the public outcry about lavish issuance practices, a targeted campaign against RESPONDENT [*Exh. C4, p. 14*], and the CITES Plants Committee’s recommendation—RESPONDENT merely “hoped” [*Exh. R1-6, p. 36*] for a favorable development. When it finally applied for an Import Permit on 5 February 2024, it was already too late [*PO2-17, p. 57*].

2. In the Alternative, RESPONDENT Could Have Overcome the Impediment by Taking Delivery Early

92 Alternatively, RESPONDENT could have taken delivery *before* 1 February 2024 and stored the Orchids in its old greenhouses for one month [*Exh. C5, p. 15*]. Thereby RESPONDENT would have overcome the impediment: an Import Permit was required for delivery only after 1 February 2024 [*PO2-14, p. 57*]. RESPONDENT confirmed that taking early delivery would have been feasible, but would have caused additional transportation and energy costs, as well as a higher rate of loss [*Exh. C5, p. 15; PO2-15, p. 57*]. RESPONDENT therefore submits that it could not have reasonably been expected to take delivery early. This does not convince.

93 It would be incumbent upon RESPONDENT to prove that potential loss from an early delivery—should it have occurred—would exceed what was reasonably expectable. A method to overcome the impediment is not reasonably expectable if it causes costs that surpass the ultimate “limit of sacrifice” [MOÑOZ, *CISG-AC No. 20, Comment 38*; SCHLECHTRIEM/SCHWENZER/Schwenger, *Art. 79 para. 31*; BRUNNER/GOTTLIEB/Brunner, *Art. 79 p. 585 para. 40*; *cf.* BIANCA/BONELL/Tallon, *Art. 79 para. 3.1*]. The ultimate limit of sacrifice is surpassed when the contractual balance is fundamentally altered [*cf. Tsakiroglou &*



Co. Ltd. v. Noble Thorl GmbH Case, pp. 331 et seq.; SCHWENZER II, pp. 714 et seq.]. This threshold is extremely high in practice [*FeMo Alloy Case*, para. 8; *Iron Molybdenum Case*, para. 41; *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH Case*, pp. 333 et seq.; *Vital Berry Marketing v. Dirafrast Frozen Fruit Industry NV*, paras. 19 et seq.; BIANCHI, p. 64; SCHWENZER I, p. 731].

94 RESPONDENT's asserted loss, however, does not surpass the ultimate limit of sacrifice. To begin with, RESPONDENT only submitted potential additional costs for transport by an allied company amounting to USD 165,000—merely 5% more than the delivery costs in March 2024 would have been [*Exh. C5*, p. 15; *PO2-15*, p. 57]. These costs in themselves do not deem taking delivery early unreasonable. Further costs cannot be considered because RESPONDENT has failed to substantiate them although it bears the burden of proof [*cf. FERRARI/FLECHTNER/BRAND*, Art. 79 para. 20]. Additionally, CLAIMANT invites the Tribunal to account for the development of the Orchid's market value. From the Contract's conclusion in August 2022 to the proposed early delivery before February 2024, the Orchid's price rose by 25%, from USD 2,000 to USD 2,500 [*PO2-2*, p. 55].

95 Considering this, the Tribunal should find that taking delivery early would not have fundamentally altered the contractual balance to RESPONDENT's detriment.

III. CONCLUSION

96 Now that the assumed risk has materialized, RESPONDENT must bear the consequences. Every reasonable party would have taken action to secure the performance of the Contract; instead, RESPONDENT painted the picture that the Contract was in safe hands. Where RESPONDENT could have eliminated the risk, it remained inactive, letting the impending events unfold.

97 No effort to compose a narrative can mask that RESPONDENT undertook an obligation and failed to perform it. CLAIMANT therefore requests the Tribunal to hold RESPONDENT to its commitments and ensure that CLAIMANT is not left to bear the bitter fruits of RESPONDENT's commercial choices.

PART IV: THE TRIBUNAL SHOULD APPLY ARTICLE 75 CISG TO CALCULATE THE DAMAGES CLAIMANT SUFFERED

98 CLAIMANT requests the Tribunal to calculate its damages under Art. 75 CISG. CLAIMANT accommodated RESPONDENT's commercial interest by granting additional time to consider an amendment of the Contract. Concurrently, CLAIMANT concluded a cover sale to mitigate its loss promptly, transparently and—considering time was of the essence—successfully. RESPONDENT



now seeks to re-characterize these mitigation efforts in an attempt to avoid liability; an approach that lacks support under the CISG.

- 99 CLAIMANT is entitled to USD 3,300,000 in damages under Art. 75 CISG. First, the only relevant cover sale is the transaction concluded with Herbal Cosmetics on 15 February 2024 for the delivery of 3,000 \pm 5% Orchids [I]. Secondly, Art. 75 CISG applies notwithstanding that CLAIMANT formally declared avoidance after the conclusion of the cover sale [II]. Thirdly, the correct reference quantity for calculating damages is 3,300 Orchids [III]. Alternatively, CLAIMANT is entitled to USD 2,970,000 under Art. 76 CISG [IV].

I. THE FEBRUARY 2024 SALE FORMS THE BASIS FOR CALCULATING DAMAGES

- 100 Subsequent to RESPONDENT's breach, CLAIMANT concluded a contract with Herbal Cosmetics ("Herbal") on 15 February 2024 for the sale of 3,200 \pm 5% Orchids at the price of USD 1,000 per Orchid ("February 2024 Sale"). On the same date, CLAIMANT also amended one of its existing contracts with Herbal concluded in January 2022 for the delivery of 4,000 orchids in December 2024 ("January 2022 Sale"). Under the amended terms, Herbal was obligated to take 2,000 orchids in December 2024 and was granted an option to purchase the remaining 2,000 orchids until 10 October 2024. Herbal exercised its option on 2 October 2024.
- 101 RESPONDENT contends that Herbal's October 2024 exercise of its option under the January 2022 Sale—not the February 2024 Sale—constitutes the relevant cover sale under Art. 75 CISG and that CLAIMANT allegedly derived a gain on that basis [*Response-26*, p. 35]. This does not convince. Only the February 2024 Sale has the requisite close connection to the breached Contract and accordingly qualifies as the relevant substitute transaction under Art. 75 CISG [A]. By contrast, the January 2022 Sale represents an independent contractual relationship following its own commercial logic and therefore cannot constitute the cover sale under Art. 75 CISG [B].

A. THE FEBRUARY 2024 SALE IS SUFFICIENTLY CONNECTED TO THE CONTRACT

- 102 CLAIMANT is entitled to invoke the February 2024 Sale as cover sale under Art. 75 CISG. Cover sale, in essence, means that the "seller has resold *the goods*" [KRÖLL/Djordjević, *Art. 75 para. 11 emph. add.*]. In cases where the aggrieved party regularly carries out similar transactions, it is incumbent upon them to prove that a specific transaction is the relevant cover sale [GOTANDA, *CISG-AC No. 8, Comment 2.3.4*; HONNOLD/FLECHTNER, *para. 410.1; Secretariat Commentary, Art. 72 para. 3*]. To prove the latter, the substitute transaction must be intended and suitable to meet the aggrieved party's fulfillment interest [SCHLECHTRIEM/SCHWENZER/Schwenzer, *Art. 75 para. 3*]. A party's fulfillment interest is



satisfied if the cover sale is in sufficient temporal and substantive connection to the contract so that the consequences of the breach are compensated [*Glass Crushing Machine Case*, para. 56]. Conversely, transactions the seller would have performed irrespectively of the breach (*i.e.*, lost volume sales) lack substantive connection and cannot serve as a basis for Art. 75 CISG [GOTANDA, *CISG-AC No. 8, Comment 3.4*; SCHLECHTRIEM/SCHWENZER/Schwenzler, *Art. 75 para. 12*].

103 The February 2024 Sale fully satisfied CLAIMANT’s fulfillment interest. CLAIMANT’s fulfillment interest consisted of the sale of the entire batch of the generation of Orchids scheduled to flower in June/July 2024 (“**Summer 2024 Orchids**”) and of generating production capacity for the next cycle [*PO2-4, p. 55*]. RESPONDENT’s breach prevented CLAIMANT from delivering the Summer 2024 Orchids under the Contract.

104 The February 2024 Sale substituted this Contract: it involved the *exact* generation of Orchids in the same quantity CLAIMANT expected to supply to RESPONDENT [*Exh. C6-10, p. 17*] and enabled CLAIMANT to start production of the next batch. Furthermore, CLAIMANT’s production did not exceed market demand [*Exh. C1-11, p. 8*]. Accordingly, the February 2024 Sale was only possible because RESPONDENT’s breach freed up capacity and would not have occurred irrespectively of the breach. This demonstrates the requisite substantive connection.

105 Moreover, the February 2024 Sale also meets the temporal-proximity requirement as it was concluded within only five days after RESPONDENT’s breach became apparent [*Exh. C6-11, p. 17*]. This prompt substitution demonstrates the immediate temporal link to the original Contract. Accordingly, the requisite substantive and temporal connection with the Contract exists. The February 2024 Sale constitutes the relevant cover sale under Art. 75 CISG.

B. THE JANUARY 2022 SALE LACKS A SUFFICIENT CONNECTION TO THE CONTRACT

106 Conversely, the January 2022 Sale cannot serve as cover sale under Art. 75 CISG because it did not satisfy CLAIMANT’s fulfillment interest. A subsequent transaction lacks the required substantive connection where it does not cover the same quantity, production batch and quality of the goods [*Canned Oranges Case I, para. III*; *Steel Bars Case VI, para. 103*].

107 The January 2022 Sale did not relate to the Summer 2024 Orchids intended for RESPONDENT, but instead to a different batch of orchids flowering in June/July 2025 [*NoA-21, pp. 4 et seq.*]. Herbal’s later exercise of its option also related only to 2,000 orchids, falling short of the 3,300 Orchids CLAIMANT originally intended for RESPONDENT. Since the Summer 2024 Orchids—in contrast to other batches—were also partly propagated using wild cuttings [*PO2-3, p. 55*], there



is significant difference in quality compared to other batches as trade with wildy propagated orchids is subject to strict restrictions under the CITES. The January 2022 Sale also lacks temporal connection as Herbal exercised its option more than eight months after RESPONDENT's breach.

108 CLAIMANT and Herbal did use the down payment from the January 2022 Sale as partial payment for the February 2024 Sale. However, this did not merge the two transactions. Instead, the January 2022 Sale was expressly amended to require new down payments, one due in April 2024 and one dependent upon the exercise of the option [*Exh. C6-10 et seq.*, p. 17]. The Parties therefore assigned separate payments to separate sales, rendering them legally and commercially distinct. CLAIMANT even relinquished the security of the first down payment to conclude the February 2024 Sale. Hence, only the February 2024 Sale substantively and temporally substituted the Contract and is the basis for calculating damages under Art. 75 CISG.

II. ART. 75 CISG APPLIES ALTHOUGH AVOIDANCE OCCURRED AFTER THE COVER SALE

109 Under Art. 75 CISG, a sale “in replacement” of the original contract is decisive. The substitute transaction is usually—but not necessarily—required to be concluded after avoidance. Where, as in the case at hand, the seller enters into a substitute transaction in direct response to the buyer's breach and subsequently declares avoidance, the sequence is immaterial. Accordingly, the February 2024 sale qualifies as cover sale [A]. Alternatively, if the Tribunal were to rely strictly on the wording of Art. 75 CISG rather than its purpose, CLAIMANT would still be entitled to the same quantum under Art. 74 CISG [B].

A. THE FEBRUARY 2024 SALE IS GOVERNED BY ART. 75 CISG

110 Art. 75 CISG governs the calculation of damages despite the substitute sale preceding formal avoidance. The reason for this is *twofold*: *First*, RESPONDENT's unequivocal declaration not to perform the Contract renders avoidance a pure formality and thus dispensable [1]. *Secondly*, the rationale behind Art. 75 CISG is adhered to because CLAIMANT formally avoided the Contract promptly after the cover sale [2].

1. Avoidance Was Dispensable as RESPONDENT Refused to Perform the Contract

111 RESPONDENT refused to perform its contractual obligations on 10 February 2024, rendering avoidance of the Contract prior to the cover sale on 15 February 2024 redundant. If the breaching party clearly stated that it will not perform the contract, *e.g.*, because timely performance is impossible [*Caffeine Case*, p. 6; *Compound Fertilizer Case*, para. 13], Art. 75 CISG applies directly irrespective of avoidance by the aggrieved party [*Chinese Wire Rod Case*



II, para. V.1.2.2; PVC Foil Case, para. 44; KRÖLL/Djordjević, Art. 75 para. 9]. In accordance with the good-faith principle in Art. 7(1) CISG, the breaching party is precluded from arguing that the aggrieved party did not formally avoid the contract [Iron Molybdenum Case, para. 33; Kaptan v. Schnitzer, para. 176; STAUDINGER/Magnus, Art. 75 para. 8].

112 In the case at hand, RESPONDENT notified CLAIMANT on 10 February 2024 that it would definitely not obtain the Import Permit in time for delivery on 27 March 2024 [*Response-14, p. 33*]. This was the last business day of the agreed upon delivery window, adherence to which was—as set out in Clause 4.2 SOA—of the essence. Thereby, RESPONDENT definitively refused performance. RESPONDENT’s argument that CLAIMANT did not avoid the Contract violates good faith because avoidance would merely formalize what RESPONDENT itself had already made clear: the Contract would not be performed. Therefore, any formal avoidance after RESPONDENT’s definite refusal would have been a technicality without function. Consequently, the February 2024 Sale must be taken into account under Art. 75 CISG.

2. CLAIMANT’S Avoidance Satisfied the Rationale of Art. 75 CISG

113 Alternatively, CLAIMANT validly avoided the Contract on 1 March 2024 while still satisfying the rationale of Art. 75 CISG. Under Art. 64(1)(a), 72 CISG, the seller may avoid the contract as soon as it is evident that a fundamental breach will occur [SCHLECHTRIEM/SCHWENZER/*Fountoulakis, Art. 72, para. 35*]. Under the Contract, timely delivery was of the essence [*supra para. 112*]. RESPONDENT’s announcement that timely delivery would not be possible therefore constituted an anticipated fundamental breach [*cf. Cobalt Sulphate Case, para. 20; WINNICK, p. 872*], which entitled CLAIMANT to avoid the Contract from that point onward.

114 Under Art. 75 CISG, the substitute transaction must generally be concluded within “reasonable time after avoidance”. This requirement strives to prevent speculation at the breaching party’s expense [ACHILLES, *Art. 75 para. 3; SCHLECHTRIEM/SCHWENZER/Schwenzer, Art. 75 para. 7*]. Otherwise, a party could claim specific performance and simultaneously rely on a “cover sale” to calculate damages, allowing speculation based on market fluctuations [HUBER/MULLIS, *p. 286*]. In cases where this risk is non-existent, also a sale preceding formal avoidance can qualify as cover sale under Art. 75 CISG [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Köhler, Art. 75 para. 5a; STAUDINGER/Magnus, Art. 75 para. 14*].

115 In the case at hand, market speculation by strategically timing formal avoidance was objectively impossible: *First*, CLAIMANT could not have delivered the Summer 2024 Orchids to both



RESPONDENT *and* Herbal. Accordingly, it could not have claimed specific performance while also relying on a cover sale. *Secondly*, strategic delay of avoidance to rely on Art. 76 CISG to calculate damages rather than Art. 75 CISG in case the market price drops is unfeasible. Under Art. 77 CISG, CLAIMANT was obligated to mitigate damages; if it fails to do so, its claim will be reduced by the amount caused by the delay [*cf.* SCHLECHTRIEM/SCHWENZER/*Schwenzer*, *Art. 76 para. 10*; ZELLER, *pp. 204 et seqq.*]. Therefore, RESPONDENT's mere formalistic argument that avoidance occurred after the cover sale does not convince. Art. 75 CISG applies.

B. ALTERNATIVELY, ART. 74 CISG APPLIES AND LEADS TO THE SAME CALCULATION

116 Even if the Tribunal were to find that the threshold of Art. 75 CISG is not satisfied, CLAIMANT could still rely on Art. 74 CISG as the more general provision [*cf.* *Jewelry Case I, para. 24* HUBER/MULLIS, *p. 283*] and recover the same amount thereunder. Under Art. 74 CISG, CLAIMANT can recover the price difference between the Contract and the February 2024 Sale either as direct loss [1] or alternatively as mitigation costs under Art. 77 CISG [2].

1. THE COVER SALE IS A DIRECT LOSS UNDER ART. 74 CISG

117 The price difference between the Contract and the February 2024 Sale is reimbursable under Art. 74 CISG. This does not circumvent the avoidance requirement under Art. 75 CISG.

118 Under Art. 74 CISG, the aggrieved party is reimbursed for any reasonably foreseeable loss caused by a breach [FERRARI/KIENINGER/MANKOWSKI/*Ferrari, Art. 74 para. 8*]. This generally holds true for cover sales [SCHLECHTRIEM/SCHWENZER/*Schwenzer, Art. 74 para. 50; Art. 75 para. 5*] which are commercial practice to mitigate damages [*cf.* KRÖLL/*Djordjević, Art. 77 para. 13*]. RESPONDENT's breach caused CLAIMANT to sell the 3,300 Orchids at a price of USD 1,000 each instead of USD 2,000 each, amounting to a net loss of USD 3,300,000 [*Exh. C6-15, p. 17*]. This concrete loss also was foreseeable: RESPONDENT—as an experienced market participant—must have known that perishable goods can on short notice only be sold well below market price [*cf. Ukrainian Chemical Fertilizer Case, para. 18*]. Hence, the USD 3,300,000 loss for CLAIMANT qualifies for reimbursement under Art. 74 CISG.

119 In contrast to what RESPONDENT might argue, applying Art. 74 CISG does not circumvent the avoidance requirement in Art. 75 CISG. The Tribunal should join courts, arbitral tribunals and scholars that consistently found that Art. 74 CISG applies when the substitute sale occurs before avoidance [*Delchi Carrier, SpA v. Rotorex Corp, para. 20; Jewelry Case I, paras. 23 et seq.; Scheldebouw B.V. v. Hero Glas GmbH, para. 31; FARNSWORTH, p. 252*], particularly if—as in the case at hand [*Exh. R3, p. 39*—the goods are perishable or continued production depends



on freeing capacity [GOTANDA, *CISG-AC No. 6, Comment 8.1*; SCHLECHTRIEM, *p. 386*]. Denying compensation in such cases would be incompatible with the CISG's remedial system [*ibid.*].

120 Unlike Art. 75 CISG, Art. 74 CISG does not presuppose formal avoidance before the cover sale. Therefore, the primary obligations persist [SCHLECHTRIEM I, *p. 389*]. Accordingly, Art 74 CISG, under which the invoking party has to deduct the value of the goods already received from its claim, regularly leads to lower damages compared to Art. 75 CISG, where the entire contract is compensated [*ibid.*]. In the present case, CLAIMANT is entitled to USD 3,300,000 equally under Art. 74 CISG. Since the Contract has not even been partially performed, no set off for received payment is required. Thus, Art. 74 CISG does not circumvent Art. 75 CISG.

2. The Cover Sale Was Part of CLAIMANT's Obligation Under Art. 77 CISG

121 Even if the Tribunal were to decline characterizing the February 2024 Sale as direct loss under Art. 74 CISG, the resulting loss is compensable as a reasonable mitigation measure under Art. 77 CISG. Art. 77 CISG obligates the aggrieved party to take reasonable steps to reduce its loss. In return, the costs of such mitigation measures are reimbursable under Art. 74 CISG [*South Korean Stainless Wire Case, para. 21*; SCHLECHTRIEM/SCHWENZER/Schwenzler, *Art. 77 para. 11*]. This extends to cover sales, which constitute a paradigmatic form of mitigation [HUBER, *p. 159*; HUBER/BACH, *pp. 589 et seq.*].

122 Without the February 2024 Sale, CLAIMANT would have suffered far greater loss, amounting to at least USD 4,059,000. Buying Vanilla Orchids requires lengthy planning regarding cultivation [*Exh. C1-5, p. 7*; *Exh. C6-9, p. 16*], flowering cycles, and highly sensitive transport conditions [*Response-7, p. 32*]. Therefore, absent the February 2024 Sale, CLAIMANT would have been forced to sell the Orchids only after flowering in mid-May 2024, when the market price drops by 30%—from USD 1,100 [*PO2-4, p. 55*] to USD 770 per Orchid [*cf. PO2-2, p. 55*]. For the 3,300 Orchids, this would have resulted in a net loss of USD 4,059,000. The February 2024 Sale thus reduced the loss by at least USD 759,000 compared to the predictable alternative.

123 Furthermore, CLAIMANT would have been unable to cultivate the next batch of Orchids destined for its pre-existing business partners without freeing its greenhouses in spring [*Exh. R3, p. 39*]. This would have exposed CLAIMANT to further contractual penalties or damage claims—an outcome CLAIMANT is obligated to avoid under Art. 77 CISG.



124 Accordingly, CLAIMANT’s February 2024 Sale was a commercially reasonable mitigation measure under Art. 77 CISG. Under Artt. 74, 77 CISG, the loss in the amount of USD 3,300,000 allocated to the mitigation sale is fully reimbursable.

III. THE RELEVANT QUANTITY FOR CALCULATING DAMAGES IS 3,300 ORCHIDS

125 CLAIMANT is entitled to full compensation of USD 3,300,000. Clause 2.1 SOA provides for a quantity of “3,000 ± 10%” Orchids to be delivered. RESPONDENT argues—conveniently—that damages must be calculated on the lowest possible quantity of 2,700 Orchids [*Response-27*, p. 35]. This is incompatible with the facts and the CISG. Damages must reflect the quantity that would have been delivered had the Contract been duly performed [A]. On the facts, CLAIMANT would have delivered 3,300 Orchids [B].

A. DAMAGES MUST REFLECT THE CONTRACTUAL QUANTITY TO BE DELIVERED

126 CLAIMANT must be compensated for the quantity to be delivered under the Contract—not a hypothetical quantity RESPONDENT retrospectively finds advantageous. Under the CISG’s principle of total compensation [*BIANCA/BONELL/Knapp*, Art. 74 para. 3.2], the aggrieved party must be placed in the same economic position as if the contract had been duly performed [*Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, para. 48; *Secretariat Commentary*, Art. 70 Comment 3].

127 Accordingly, where the contract quantity is flexible, damages due to a cover sale must be calculated based on the performance quantity objectively expected under the original contract—not the lowest point of range [*Agrocorp v. Emerald Grain*, paras. 34 et seq.; *Diammonium Phosphate Case*, paras. 190 et seqq.]. Selecting the minimum quantity would distort the contractual equilibrium and unjustifiably reward RESPONDENT. The CISG does not permit such windfalls.

B. Claimant WOULD HAVE DELIVERED 3,300 ORCHIDS UNDER THE CONTRACT

128 Applying Art. 8 CISG to Clause 2.1 SOA leads to only one conclusion: CLAIMANT would have delivered 3,300 Orchids under the Contract—the number that actually resulted after production and transport variation.

129 Clause 2.1 SOA is silent on which party determines the exact quantity. Art. 8(2), (3) CISG accordingly requires consideration of negotiations and subsequent conduct. RESPONDENT, through Mr. Albius, explained that the routinely used ± 10% mechanism was intended to absorb “natural production variation” and “transport losses” [*Exh. R2*, p. 38; *PO2-9*, p. 56]. This



commercial purpose is confirmed by the February 2024 Sale to Herbal, where a narrower $\pm 5\%$ deviation could be implemented because the quantity could be estimated more precisely with the delivery date already in sight [*Exh. C6-10, p. 17*].

130 The actual production outcome for the 2024 batch was 3,300 surviving Orchids [*PO2-9, p. 56*]. That is, objectively, the quantity that would have been delivered to RESPONDENT. Pursuant to the principle of total compensation, CLAIMANT must therefore be compensated for the loss associated with these 3,300 Orchids.

131 Conversely, no reasonable person under Art. 8(2) CISG would interpret Clause 2.1 SOA as granting RESPONDENT unilateral discretion to depress the quantity down to the lowest point of range. Such a reading would contradict the commercial purpose of the Clause—risk allocation for natural loss—and would enable RESPONDENT to force CLAIMANT into unavoidable surplus sales at distressed prices. This cannot reflect the Parties' intent.

132 Lastly, even if the Tribunal were to find any ambiguity in Clause 2.1 SOA—*quod non*—it must be resolved *contra proferentem*. Under Art. 8 CISG, ambiguities must be construed against the drafter [*cf. CISG-AC No. 13, Rule 9; HONNOLD/FLECHTNER, Art. 8 para. 107.1*]. RESPONDENT drafted the Clause and failed to specify any mechanism for determining the quantity within the $\pm 10\%$ range [*Exh. R2, p. 38*]. RESPONDENT must bear the consequences of this drafting choice. Therefore, the relevant quantity is 3,300 Orchids.

IV. Claimant IS ALTERNATIVELY ENTITLED TO USD 2,970,000 UNDER ART. 76 CISG

133 Even if the Tribunal were to find that the February 2024 Sale does not qualify for the calculation of damages under Artt. 75 or 74 CISG, CLAIMANT is nevertheless entitled to damages under Art. 76 CISG. Where no qualifying cover sale is available, Art. 76 CISG mandates that damages be calculated as the difference between the contract price and the market price at the time of avoidance [*KRÖLL/Djordjević, Art. 76 para. 15*].

134 At the time of avoidance, the market price was USD 1,100 per Orchid [*PO2-2, p. 55*]. Under the contract, CLAIMANT would have delivered 3,300 Orchids at the price of USD 2,000 per Orchid. The resulting price difference of USD 900 per Orchid, multiplied by 3,300 Orchids, yields damages of USD 2,970,000 recoverable under Art. 76 CISG.

V. CONCLUSION

135 CLAIMANT acted reasonably at every stage and even, while mitigating its own loss, accommodated RESPONDENT's commercial interests. RESPONDENT's attempt to reinterpret



these mitigation efforts to escape its liability cannot succeed. CLAIMANT requests the Tribunal to dismiss RESPONDENT's opportunistic reliance on the lowest permissible quantity and to hold RESPONDENT accountable for the damages it caused: USD 3,300,000.



REQUEST FOR RELIEF

Based on the aforesaid, CLAIMANT requests the Tribunal to grant the relief set out herein below:

- 1) to find that the 2016 SIAC Rules govern this Arbitration;
- 2) to issue a procedural order that the applicable arbitration rules are the 2016 SIAC Rules;
- 3) to dismiss RESPONDENT’s request for disclosure of the third-party funding agreements;
- 4) to find that RESPONDENT breached the Contract and CLAIMANT is entitled to damages;
- 5) to find that the amount of damages is USD 3,300,000;
- 6) to order RESPONDENT to bear the costs of this Arbitration and to reimburse CLAIMANT for all costs incurred in connection with it.

Heidelberg, 11 December 2025
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