



# Twenty Third Annual Willem C. Vis International Commercial Arbitration Moot

## THE PROBLEM

Vienna, Austria  
October 2015 - March 2016

Oral Hearings  
March 19 – 24, 2016

Organised by:  
Association for the organisation and promotion of the  
Willem C. Vis International Commercial Arbitration Moot

And

Thirteenth Annual  
Willem C. Vis (East)  
International Commercial Arbitration Moot  
Hong Kong  
Oral Arguments  
March 6 – 13, 2016

Organized by:  
Vis East Moot Foundation Limited

# Contents

Document	Page
Fasttrack to VIAC (11 July 2015)	2
Statement of Claim (11 July 2015)	3
Claimant's Exhibit C 1 (Contract of 22 April 2009)	9
Claimant's Exhibit C 2 (Claimant's Order 4 November 2014)	10
Claimant's Exhibit C 3 (Respondent's Notice 1 December 2014)	11
Claimant's Exhibit C 4 (Excerpted articles about SuperWines of Nov/Dec. 2014)	12
Claimant's Exhibit C 5 (Witness Statement Ms Buharit)	13
Claimant's Exhibit C 6 (Claimant's letter of 2 December 2014)	14
Claimant's Exhibit C 7 (Respondent's Termination Letter of 4 December 2014)	15
Claimant's Exhibit C 8 (High Court - Interim Relief - 12 December 2014)	16
Claimant's Exhibit C 9 (High Court - Declaratory Relief - 23 April 2015)	17
Claimant's Exhibit C 10 (Contingent Fee Agreement - 5 December 2014)	18
Claimant's Exhibit C 11 (Invoice LawFix - 25 May 2015)	19
Claimant's Exhibit C 12 (Witness Statement Ms Lee)	20
VIAC's letter to the Claimant (Receipt of statement of claim - 15 July 2015)	21
VIAC's letter to the Respondent (Service of the statement of claim - 15 July 2015)	22
Answer to Statement of Claim (16 August 2015)	23
Respondent's Exhibit No. 1 (Witness Statement Mr Weinbauer)	31
Respondent's Exhibit No. 2 (Letter by Langweiler - 14 January 2015)	33
VIAC's letter to Claimant (Forwarding of Answer to Statement of Claim, comment on fast-track - 19 August 2015)	34
Claimant's letter rejecting expedited proceedings (Letter by Fasttrack - 21 August 2015)	35
VIAC's letter to the Parties (Advance on costs - 22 August 2015)	36
VIAC's letter to the Parties (Statement of acceptance of co-arbitrators - 28 August 2015)	38
<del>VIAC's letter to the Parties (Payment of advance on costs, commencement of proceedings, statement of acceptance of chairman - 15 September 2015)</del>	<del>43</del>
<del>VIAC's letter to the Arbitral Tribunal (Transmission of the file - 15 September 2015)</del>	<del>47</del>
Letter Chairman- Parties (2 October 2015)	49
Procedural Order No 1 (2 October 2015)	50

Horace Fasttrack  
Advocate at the Court  
14 Capital Boulevard  
Oceanside  
Equatoriana  
Tel. (0) 214 77 32 Telefax (0) 214 77 33  
fasttrack@host.eq

11 July 2015

By courier

The Secretariat of the Vienna International Arbitral Centre of the  
Austrian Federal Economic Chamber  
Wiedner Hauptstraße 63  
1045 Vienna  
Austria

Dear Madam/Sir,

On behalf of my client, Kaihari Waina Ltd, I hereby submit the enclosed Statement of Claim pursuant to the Vienna Rules 2013, Articles 7 and 10. A copy of the Power of Attorney authorising me to represent Kaihari Waina Ltd in this arbitration is also enclosed.

The CLAIMANT requests the payment of damages for a breach of contract.

The registration fee of EUR 1.500 has been paid. The relevant bank confirmation is attached.

The contract giving rise to this arbitration provides that the seat of arbitration shall be Vindobona, Danubia, and that the arbitration shall be conducted in English. The arbitration agreement provides for three arbitrators. Kaihari Waina Ltd hereby nominates Ms Maria Gomes as its arbitrator and requests that the VIAC appoints the chairman of the arbitral tribunal if the party nominated arbitrators cannot agree on a chairman or directly, if RESPONDENT is in agreement with such a facilitated procedure.

The required documents are attached.

Sincerely yours,



Horace Fasttrack

Attachments:  
Statement of Claim with Exhibits  
Power of Attorney  
CV of Ms Maria Gomes  
Proof of Payment of Registration Fee

11 July 2015

Horace Fasttrack  
Advocate at the Court  
14 Capital Boulevard  
Oceanside  
Equatoriana  
Tel (0) 214 77 32 Telefax (0) 214 77 33  
fasttrack@host.eq

By courier

The Secretariat of the Vienna International Arbitral Centre of the  
Austrian Federal Economic Chamber  
Wiedner Hauptstraße 63  
1045 Vienna  
Austria

*Kaihari Waina v. Vino Veritas*

Statement of Claim  
Pursuant to Article 7 Vienna Rules

Kaihari Waina Ltd  
12 Riesling Street  
Oceanside  
Equatoriana

- CLAIMANT-

Represented in this arbitration by Horace Fasttrack

Vino Veritas Ltd  
56 Merlot Rd  
St Fundus  
Vuachoua  
Mediterraneo

- RESPONDENT-

**Statement of Facts**

1. Kaihari Waina Ltd ("Kaihari"), the CLAIMANT, is a wine merchant specialised in top quality wines for the collectors' and high end gastronomy markets. Over recent years it has consistently increased its market share in a highly competitive market. Kaihari has developed a particular expertise in Mediterranean Mata Weltin wines from the Vuachoua region and has gained a reputation with its customers of being a particularly reliable source. Because of its high end customer base Kaihari only sells Mata Weltin wines of diamond quality. Diamond quality Mata Weltin has a minimum alcohol content of 12.5 vol% and has been judged as being on a par with the best white wines in the world. The wine gets its label "diamond" from the diamond lizard which sun-bathes on the stonewalls in the Vuachoua region.
2. The RESPONDENT, Vino Veritas Ltd ("Vino Veritas"), is one of the top vineyards in Mediterraneo. It is the only vineyard in the Vuachoua region that has won the Mediterranean gold medal for its diamond Mata Weltin in each of the last five years.

3. Kaihari has sold Vino Veritas diamond Mata Weltin wines for the last 6 years with great success. The base of the Parties' economic relationship is a framework contract concluded between them on 22 April 2009 [Exhibit C 1]. The framework contract provides in essence that, every year, CLAIMANT would buy a certain minimum number of bottles from RESPONDENT which in return committed to deliver bottles up to a maximum amount of 10.000 bottles. The exact amount will be determined every year by orders placed by CLAIMANT at the end of the year and normally before negotiations with other customers start.
4. For CLAIMANT the certainty of supply is crucial and part of its business model and success. The selected group of collectors and high end restaurants around the world which form the majority of CLAIMANT's customers want a quasi-guarantee that they will be supplied with the high end Mata Weltin wines they order annually. Over the years, Kaihari has always ordered between 7.500 and 8.500 bottles with a general tendency to increase.
5. Following a series of prizes granted to RESPONDENT's Mata Weltin wines from earlier vintages in the first months of 2014, by mid-September 2014 there had been a considerable increase in pre-orders from Claimant's customers. Consequently, on 4 November 2014, Kaihari ordered from RESPONDENT the maximum amount of guaranteed bottles under the contract. Furthermore, it made clear that in addition to those 10.000 bottles of diamond Mata Weltin from the 2014 vintage it would be willing to buy more and expand the co-operation with RESPONDENT further [Exhibit C 2].
6. On 1 December 2014, CLAIMANT received a letter from RESPONDENT stating that it would only deliver 4.500 – 5.000 bottles of the ordered wine [Exhibit C 3]. The RESPONDENT claimed that because of the 2014 harvest having yielded a much smaller than usual quantity of diamond Mata Weltin wines, it was not able to fulfil the CLAIMANT'S entire order. Vino Veritas stated that it had opted to fulfil its contractual obligation with its customers on a pro rata basis in order to maintain business relationships with all of them.
7. The CLAIMANT, while not denying that the 2014 harvest had yielded less than the normal quantity has, however, received information that the real reason for the RESPONDENT's breach of contract was not the shortfall in yield; information from industry sources suggests that the real reason for not delivering the entire 10.000 bottles has been that the RESPONDENT has contracted with SuperWines, thereby exceeding its available capacity. The RESPONDENT, rather than honouring its long standing contract and business relationship with CLAIMANT, tried to woo SuperWines, an international wine wholesaler which has recently started to expand into the high end market by delivering the sought-after quantity of its high end wine on demand without delay. However, not only did RESPONDENT want to establish a new business relationship, RESPONDENT also used the opportunity to make a larger profit. Reports published in industry journals around that time suggest that SuperWines paid a premium for the wine [Exhibit C 4].
8. The RESPONDENT's letter received on 1 December 2014 came as an unpleasant surprise to CLAIMANT. In a meeting on 25 November 2014, Ms Buharit, Claimant's development manager, had made clear to Mr Weinbauer, Respondent's CEO at the time, that CLAIMANT needed as a minimum the full quantity of bottles ordered but preferably more [Exhibit C 5]. Mr Weinbauer had left no doubts that no quantity larger than the 10.000 bottles Claimant had asked for could be delivered. However, he had created the impression that RESPONDENT would honour its contractual delivery commitments, even if that meant delivering fewer bottles to other customers. These other customers normally only place their binding orders in December or January. Consequently, at the time of RESPONDENT's letter there were no existing contractual obligations to such customers, even if they were long standing ones. CLAIMANT had pointed that out in its email of 2 December 2014 and had demanded the

delivery of 10.000 bottles of diamond Mata Weltin 2014. It had stated clearly that it was not interested in any future compensation for the non-delivery of 5500 bottles but would instead insist on performance [Exhibit C 6].

9. Mr Weinbauer completely overreacted to this reasonable request for contractual performance. He accused CLAIMANT of outrageous behaviour and purported to terminate the contract, threatening that no delivery would be made at all [Exhibit C 7].
10. At that time CLAIMANT had already received a considerable number of orders for diamond Mata Weltin 2014, some of which it had already accepted. Consequently, CLAIMANT had to protect its interest and its business reputation. Thus, on 8 December 2014, CLAIMANT sought an interim injunction in the High Court of Capital City, Mediterraneo, prohibiting RESPONDENT from selling to other customers the 10.000 bottles of diamond Mata Weltin 2014 ordered by CLAIMANT. The interim injunction was granted on 12 December 2014 [Exhibit C 8] and RESPONDENT refrained from challenging the order.
11. Given Mr Weinbauer's temper and the reduced quantity harvested it could not be guaranteed that RESPONDENT would actually deliver the 10.000 bottles that it had been enjoined to keep. Consequently, CLAIMANT in parallel immediately started to contact other top vineyards and managed to make substitute arrangements for the 5.500 bottles RESPONDENT had already refused to deliver in its first letter of 1 December 2014.
12. That CLAIMANT's action was justified is evidenced by the fact that RESPONDENT, in breach of the arbitration agreement, subsequently started court proceedings in the Courts of Mediterraneo seeking a declaration of non-liability. The request was denied, primarily on procedural grounds. CLAIMANT had invoked the arbitration agreement in the contract and the court denied jurisdiction [Exhibit C 9]. In the oral hearing the judge made clear, however, that he considered RESPONDENT to be in breach of its obligations under the contract and would most likely have rejected the action on the merits as well.
13. In both proceedings, CLAIMANT incurred considerable costs. CLAIMANT is a medium sized Equatorianan business that does not have sufficient liquid capital at its disposal to pay Mediterranean legal fees which are - compared to the fees in Equatoriana - very high. In addition the unfavourable exchange rate had exacerbated CLAIMANT's problem. Also no third party funding could be obtained. Therefore, CLAIMANT had engaged the local Mediterranean law firm, LawFix, on a contingency fee basis [Exhibit C 10]. Even though CLAIMANT was successful in the Mediterranean courts, under Mediterranean procedural law each party has to bear its own costs.
14. As a result of the rejection of RESPONDENT's application for a declaration of non-liability, its new management finally offered to deliver up to 4.500 bottles, as "a sign of their goodwill and to terminate all legal proceedings." It was, however, not willing to reimburse CLAIMANT for the costs and the damages incurred due to the unreasonable behaviour by Mr Weinbauer.
15. That makes the initiation of arbitration proceedings necessary. In the light of the successful business relationship in the past and an eventual future cooperation, CLAIMANT will limit this action to claiming the legal fees it had incurred and the damages it had suffered consequent on RESPONDENT's breaches of the contract. Under the condition that there is a firm commitment to deliver 4.500 bottles by 1 November 2015, CLAIMANT is willing to refrain from enforcing its right to specific performance in regard to the remaining 5.500 bottles of diamond Mata Weltin 2014. Instead, it will merely ask for the damages it incurred through the non-delivery. These are at least as high as the profit RESPONDENT obtained by selling 5.500 bottles to SuperWines.

## Nomination of Arbitrator

16. In accordance with the arbitration clause in the contract and Article 7 (5) of the Vienna Rules we nominate Ms Maria Gomes, 14 Heurigen Lane, Oceanside, Equatoriana, for confirmation by the Secretary General.

## Legal Evaluation

### Jurisdiction

17. The arbitral tribunal has jurisdiction over the RESPONDENT by virtue of the arbitration agreement contained in Article 20 of the contract between CLAIMANT and RESPONDENT of 22 April 2009 [**Exhibit C 1**]. The clause provides as follows:

#### **Art 20: Dispute Resolution/Applicable Law**

All disputes shall be settled amicably and in good faith between the parties. If no agreement can be reached the dispute shall be decided by arbitration in Vindobona by the International Arbitration Tribunal (VIAC) under its International Arbitration Rules in accordance with international practice. The number of arbitrators shall be three to be appointed in accordance with the Rules. The proceedings shall be conducted in a fast and cost efficient way and the parties agree that no discovery shall be allowed. The award shall be binding and each party shall comply with the award. This contract is governed by the law of Danubia including the CISG.

18. We are aware that the Parties did not use the VIAC Model Arbitration Clause available at <http://www.viac.eu/en/arbitration/model-clause>. Notwithstanding the lack of precision concerning the name of the institution the acronym “VIAC” shows that the Parties clearly wanted to arbitrate under the Vienna Rules and that the place of arbitration shall be Vindobona.

### Merits

19. RESPONDENT through its refusal to deliver the 10.000 bottles in accordance with the contract and by initiating court proceedings in Mediterraneo breached the Framework Agreement of 22 April 2009 and the arbitration clause contained in it. These breaches required CLAIMANT to seek interim relief in the state courts of Mediterraneo and led to legal costs which CLAIMANT is entitled to recover as damages pursuant to Articles 45, 74 CISG.
20. Pursuant to Article 4 of the Framework Agreement of 22 April 2009 [**Exhibit C 1**] and CLAIMANT's order of 4 November 2014 [**Exhibit C 2**], RESPONDENT was contractually obliged to deliver 10.000 bottles of diamond Mata Weltin 2014 to CLAIMANT.
21. In its letters of 1 and 4 December 2014, the RESPONDENT announced that it would not comply with its contractual obligation, first only in relation to 5.500 bottles and then, after a purported termination of the contract, in its entirety. CLAIMANT does not contest that the 2014 harvest of diamond Mata Weltin was of severely diminished quantity due to weather conditions. However, CLAIMANT has good reason to believe that the real cause for the part avoidance of the contract was not the diminished quantity of diamond Mata Weltin due to the disastrous harvest but rather that RESPONDENT wanted to win over SuperWines as a new customer [**Exhibits C 4**]. In light of wine industry practice not to enter into long term commitments but to negotiate the quantities year by year, CLAIMANT has serious doubts as to the existence of any firm commitments for delivery at the time of CLAIMANT's order which would have justified a pro rata allocation of the existing quantities. Therefore, RESPONDENT



cannot partly avoid the contract in accordance with Article 79 CISG but has to perform it in accordance with Article 28 CISG.

22. To ensure delivery and to prevent RESPONDENT selling and delivering the existing lower quantity of bottles to other customers, CLAIMANT had to seek interim relief in the courts of Mediterraneo which was granted. The costs incurred in this action are direct damages resulting from the RESPONDENT's breach of contract. They were foreseeable as it was clear that CLAIMANT had to protect its interest with its customers and could not afford the ordinary rates of Mediterranean lawyers. Legal costs can be claimed pursuant to Article 74 CISG.
23. The same applies to the costs incurred in the successful defence against the action for a declaration of non-liability brought by RESPONDENT in the courts of Mediterraneo. That action constituted a clear breach of Article 20 of the Framework Agreement which covered all matters in relation to the contract of 22 April 2009 and the order of 4 November 2014.
24. Under Article 74 CISG the CLAIMANT is entitled to the reimbursement of US\$50.280,00 in legal costs [Exhibit C 11].
25. In principle, CLAIMANT would also be entitled, pursuant to Article 28 CISG, to specific performance for the full amount of the 10.000 bottles ordered. As indicated above CLAIMANT wants a quick and amicable solution of the dispute. Therefore, CLAIMANT is, at present, not enforcing its right to specific performance in relation to all bottles but is willing to accept the offer made by RESPONDENT for the delivery of 4.500 bottles of diamond Mata Weltin 2014 if delivered by 1 November 2015.
26. ~~However, CLAIMANT will suffer lost profits in regard to the 5.500 bottles it will not be able to sell and demands damages in accordance with Article 74 CISG. To facilitate the calculation of damages and as a sign of goodwill Claimant merely claims the profits made by RESPONDENT from selling the 5.500 bottles to SuperWines. CLAIMANT has reason to believe that SuperWines has paid a substantial premium for the diamond Mata Weltin 2014 [Exhibit C 4]. CLAIMANT's profits from sales to its customers would most likely have been higher than the premium paid by SuperWines as a trader to RESPONDENT. Even if that should not be the case RESPONDENT should not be allowed to profit from breaching the contract with CLAIMANT and selling the bottles rightfully belonging to CLAIMANT to a third party. It is required by the principle of good faith underlying the CISG that a party breaching its contractual obligations should not profit from its wrongdoings. Due to the lack of available information CLAIMANT can do no more than estimate these damages at present which should not be below EUR 110.000.~~
27. To allow CLAIMANT to specify the amount claimed CLAIMANT makes the following **Procedural Request**

To order RESPONDENT to provide to CLAIMANT all documents from the period of 1 January 2014 – 14 July 2015 pertaining to communications between RESPONDENT and SuperWines in regard to the purchase of diamond Mata Weltin 2014 and any contractual documents, including documents relating to the negotiation of the said contract between SuperWines and the RESPONDENT in regard to the purchase of diamond Mata Weltin 2014. That includes in particular all documents relating to the number of bottles purchased and the purchase price.
28. These documents are not in the possession of CLAIMANT and are relevant and material to the outcome of the arbitration. Without these documents CLAIMANT is not able to calculate the damages it is claiming.



29. The exclusion of “discovery” in the arbitration clause was meant only to cover extensive discovery proceedings which are practice in some jurisdictions such as the USA with wide reaching requests for all types of documents, depositions and interrogatories. It was not intended to exclude the standard type of document production requests as are common in international arbitration and are in line with the IBA Rules on the Taking of Evidence [Exhibit C 12]. Furthermore, pursuant to Article 28 Vienna Rules, the Tribunal has to ensure that the Parties’ right to be heard is not infringed which would be the case if no document production were granted.
30. In addition to this procedural request, CLAIMANT makes the following two requests on the merits, the first of which will be specified once the documents have been disclosed.

**Statement of Relief sought:**

1. ~~Payment of damages to be determined by the profits the RESPONDENT made by selling 5.500 bottles of Mata Weltin 2014 to Super Wine.~~
2. Reimbursement of legal costs of US\$ 50.280,00.
3. RESPONDENT shall bear the cost of this arbitral proceedings.



Horace Fasttrack

Enclosures: Exhibits C 1 – C 11

## FRAMEWORK AGREEMENT

### Art 1: Contracting Parties

Seller: Vino Veritas Ltd, 56 Merlot Rd, St Fundus Vuachoua, Mediterraneo

Buyer: Kaihari Waina Ltd, 12 Riesling Street, Oceanside, Equatoriana

### Art 2: Obligations of the seller

The seller agrees to sell annually to the buyer up to 10.000 bottles of its wine of diamond quality to the buyer at a price to be agreed between the parties in accordance with the following provisions.

The seller agrees to support the buyer in its marketing activities wherever possible without disruption to its ordinary course of business.

### Art 3: Obligations of the buyer

The buyer agrees to buy a minimum of 7.500 bottles of wine of diamond quality from the seller as a price to be agreed by the parties in accordance with the following provisions.

The buyer agrees to market and resell the wine as a premium product and to refrain from any actions which may damage the reputation of the seller or its wine.

### Art 4: Quantities and Price

The buyer will each year no later than 20 December place its orders for that year's vintage. The parties will then enter into negotiations to determine the price for the orders. If no price can be agreed between the parties a reasonable market price will be determined by an expert appointed by the Mediterranean Wine Association. The price fixed by the expert shall not be more than 15% higher than the price for the previous year.

[...]

### Art 19: Duration and termination

This contract shall run for a minimum period of 5 years.

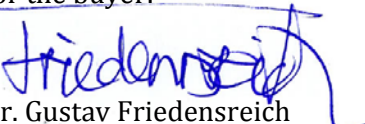
Thereafter, unless either a party terminates the contract before 1 January of any year the contract is prolonged automatically for one year.

### Art 20: Dispute Resolution/Applicable Law


All disputes shall be settled amicably and in good faith between the parties. If no agreement can be reached the dispute shall be decided by arbitration in Vindobona by the International Arbitration Tribunal (VIAC) under its International Arbitration Rules in accordance with international practice. The number of arbitrators shall be three to be appointed in accordance with those Rules. The proceedings shall be conducted in a fast and cost efficient way and the parties agree that no discovery shall be allowed. The award shall be binding and each party shall comply with the award. This contract is governed by the law of Danubia including the CISG.

Date: 22 April 2009

For the buyer:

  
Mr. Gustav Friedensreich

For the seller

  
Mr. Werner Weinbauer



Oceanside, 4 November 2014

Werner Weinbauer  
Vino Veritas Ltd  
56 Merlot Rd  
St Fundus  
Vuachoua  
Mediterraneo

***Order: 10.000 bottles of Diamond Mata Weltin***

Dear Mr Weinbauer,

First of all let me congratulate you on the various prizes your wines have won during this year. They are well deserved and underline your status as the top vineyard in Mediterraneo.

In line with our overall agreement we herewith order the maximum guaranteed number of 10.000 bottles of diamond Mata Weltin 2014. In light of the number of pre-orders we have already received, we would be more than happy to buy another 2.000 bottles, so that the 10.000 bottles guaranteed under the contract is really the minimum we need.

Ms Buharit, our development manager, would like to visit you on 25 November to discuss this order and our new marketing strategy which offers exiting opportunities for you. Please let me know whether the date suits you and what time would be most convenient.

Kind regards

Best wishes

Gustav Friedensreich



### EXHIBIT C 3

St Fundus, 1 December 2014

Kaihari Waina Ltd  
12 Riesling Street  
Oceanside  
Equatoriana  
-by email-

Dear Mr Friedensreich,

As already discussed with Ms Buharit we will only be able to deliver 4.500 – 5.000 bottles of Mata Weltin 2014 at a price of EUR 41,50 per bottle to you. This year's harvest was made particularly difficult by the very wet second half of August which at the same time was marked by high night temperatures. That combination led to a great deal of rot in the grapes. Since the weather conditions did not improve during September the harvest was one of the most in recent memory. That resulted in one of the worst harvests in the last ten years in relation to quantity, albeit one of the best quality ones. We only will be able to bottle half of the usual quantity of diamond Mata Weltin.

Given our long lasting relationship with all our customers we have decided that it is in the best interests of everyone that we distribute the available quantities pro rata and deliver therefore only up to half of the ordered quantities to each of them. From the first impression, we are confident that the quality of the 2014 vintage will compensate you and your customers at least for some of the inconvenience caused by the bad harvest.

The proposal submitted by Ms Buharit looks in some parts very interesting but because of our new strategy we will in the future, however, be unlikely to be able to guarantee delivery of more than 8.000 bottles per year. We should discuss that during the price negotiations agreed for next week.

We are looking forward to be able to present you a high quality elegant and nutty diamond Mata Weltin in May 2015.

Kind regards

Werner Weinbauer

56 MERLOT RD, ST FUNDUS, VUACHOUA, MEDITERRANEO, TEL + 587 4 587128, FAX + 587 4 587129, EMAIL  
VINOVERITAS@VINOVERITAS.COM

The Vineyard  
2 December 2014

## SuperWines the New Kid on the Block

Jean Barolo, former manager of LiquorLoja which went into liquidation five years ago, is now heading SuperWines. In an interview he talked about the mistakes that were made at LiquorLoja and what he personally had learned from that experience. ... It is understood that SuperWines paid a premium to convince Vino Veritas to supply to SuperWines.

Liquor Retail  
1 December 2014

## SuperWines– A Force to be Reckon With

SuperWines is a new force in the alcohol retailing and one which has the potential to shake up the wine industry in particular. Jean Barolo, former manager of LiquorLoja, will bring considerable experience especially to the wine side of the business. An acclaimed wine judge, he will pay special attention to high end wines, probably from the region. It will be interesting to see whether the strategy of paying a premium for particular popular wines and spirits will pay off this time– it has failed once before....

The Wine Connoisseur  
28 November 2014

## *Wine News*

For many, wine is everything but “just” another alcoholic beverage. For some, it is an investment, however, for many, a glass of the most elegant and high quality wine at the end of a long day is the epitome of sophistication. Jean Barolo’s aim is to let a wider community participate in that sophistication. Barolo who is an acclaimed wine judge and has worked in the wine industry for 30 years, has taken the helm of SuperWines. SuperWines, which has taken the place of LiquorLoja as a major retailer of alcoholic beverages in Equatoriana, Danubia, and Mediterraneo, has the distribution network to allow the distribution of high end wines at reasonable prices. With a marketing machine behind it and Barolo’s expertise and standing among the winegrowers, SuperWines will be very attractive to for all wineries that want to expand their reach. Highly respected for its gold medal winning reds, Vinto Vineyard in Danubia has already teamed up with SuperWines. Rumour has it that other high end vineyards will follow suit.....Rumour has it that SuperWines attractiveness for the producers also has something to do with it paying premium prices.....

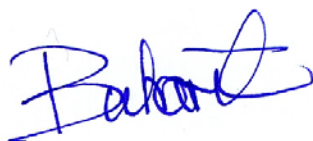
**Witness Statement Isme Buharit**

My name is Isme Buharit. I was born on 21 July 1980 in Oceanside, Equatoriana. I am currently residing at 23 Silvaner Rd, Oceanside, Equatoriana. I am the development manager at Kaihari Waina Ltd, 12 Riesling Street, Oceanside, Equatoriana.

On 25 November 2014 I visited Vino Veritas to discuss Kaihari's new marketing strategy with Mr Weinbauer. This was a courtesy visit to cement the relationship Kaihari had with Vino Veritas. Diamond Mata Weltin from Vino Veritas has been one of our most popular high end wines. In addition, Vino Veritas is a popular tourist attraction being located only 80km from Equatoriana's capital Villanova and offering wine tastings in a 16<sup>th</sup> century monastery. We wanted to develop a partnership with Vino Veritas combining our retail experience and our market presence with their product.

The meeting with Mr Weinbauer had been difficult. He had been very annoyed by our order of 10.000 bottles, after he had apparently sent us a fax the day before telling us that only a smaller amount could be delivered. Due to problem with our fax machine that fax had not been properly printed out and never reached the relevant persons. Mr Weinbauer is known in the industry to be personally very difficult and very impulsive. In the past he has terminated relationships with several customers for personal differences. Therefore, I was very alarmed when he told me that after the receipt of our order he had originally been inclined to deliver no bottles to us and to immediately terminate the contract with us. I had told him that we had never received the fax and tried to explain to him why it was so crucial for us to receive the bottles ordered. At the end of the discussion, I had the impression that we had managed to convince him to deliver the quantities requested. He had promised to give our offer "a favourable consideration". I remember that wording very well as in my subsequent report to Mr Friedensreich about the meeting we discussed whether that meant that we could even get more than the 10.000 bottles guaranteed under the Framework Agreement.

After the meeting had finished I had another walk around the adjacent vineyard and the cellar to test out a few ideas for photo shots. I left Vino Veritas therefore later than anticipated. I was just about to get into my car when a Mercedes with SuperWines logos on both doors pulled up beside me in the car park. I think I recognised Jean Barolo in the driver seat. I have never met Jean Barolo personally, however, his photo often appears in the relevant industry journals.



Isme Buharit  
Oceanside, 8 July 2015



Oceanside, 2 December 2014

Werner Weinbauer  
Vino Veritas Ltd  
56 Merlot Rd  
St Fundus Vuachoua  
Mediterraneo

***Order: 10.000 bottles of Diamond Mata Weltin***

Dear Mr Weinbauer,

We have been very surprised by your letter of yesterday and cannot accept the proposal you made as to quantities. At the meeting on 25 November Ms Buharit made clear that we needed all 10.000 bottles of wine. That amount is guaranteed to us under Article 2 of the Framework Agreement and has already largely been promised to our customers.

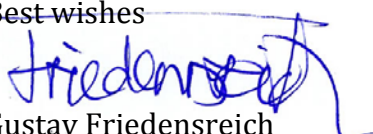
We understand that there has been a drop in quantity this year. However, we doubt that at present you already have binding orders which exceed the quantity harvested and that would legally oblige you to deliver on a pro rata basis. Our relationship was deliberately structured in a way that we would order before all other customers. That allowed you to guarantee us delivery up to the maximum amount agreed and then to negotiate with the other customers concerning the remaining quantity.

You will understand that we are in particular not willing to give up some of our bottles for the delivery to our biggest competitor SuperWines. According to press releases they are buying large quantities from you for the first time.

Since we know you to be a trustworthy business partner we are confident that you will honour your contractual obligations to us and that this will not affect our long lasting and mutually beneficial relationship. As Ms Buharit already told you we are willing to cooperate even more closely with you and use your facilities more frequently for wine events with our collectors creating additional opportunities for you.

The price of EUR 41,50 per bottle is accepted.

Best wishes

  
Gustav Friedensreich





**EXHIBIT C 7**

St Fundus, 4 December 2014

Kaihari Waina Ltd  
12 Riesling Street  
Oceanside  
Equatoriana  
-by email-

Hello Mr Friedensreich,

I find your behaviour extraordinary!!! Uncooperative and rude!!!

In all my years in the industry I have never experienced anything comparable. You are the only customer I have ever had which is unwilling to cooperate in finding a mutually acceptable solution to the problems created by the extremely low quantities of grapes harvested this year. Instead, you accuse me of lying and misrepresenting the real reasons for our request as well as the outcome of my conversation with Ms. Buharit.

You do not seem to understand the world of high end wine making. Our whole business is based on mutual trust and long lasting relationships. Already your insistence on a written framework contract and fixed quantities five years ago again was extremely unusual. At the time, I ascribed that to your lack of experience in the field. Now I realize that this is just your way of doing business. Since that is, however, not my way of doing business, I consider our relationship terminated.

To avoid any doubts: there will be no delivery of any bottle of the 2014 harvest to you even if we have to drink them ourselves which I doubt given the interest in our quality product.

Goodbye

Werner Weinbauer

56 MERLOT RD, ST FUNDUS, VUACHOUA, MEDITERRANEO, TEL + 587 4 587128, FAX + 587 4 587129, EMAIL  
VINOVERITAS@VINOVERITAS.COM

**IN THE HIGH COURT OF MEDITERRANEO**  
**IN THE CAPITAL CITY JUDICIAL DIVISION**

**FILE NO: IJCV/K/111/2014**

**BETWEEN**

KAIHARI WAINA LTD

PLAINTIFF/APPLICANT

**AND**

VINO VERITAS LTD

DEFENDANT

**ORDER**

UPON THIS MOTION dated 8<sup>th</sup> day of December 2014, coming before the Court and praying as follows:

An Interim Injunction restraining the Defendant by itself, agents, or representatives from selling or committing for sale any number of bottles of the Defendant's diamond Mata Weltin 2014 that would prevent it from supplying a total of 10.000 bottles to the Plaintiff pending the determination of the claim by a court or an arbitral tribunal.

[.....]

**IN ACCORDANCE WITH SECTION 54 OF THE DECLARATORY JUDGMENT ACT 2013 IT IS HEREBY ORDERED AS FOLLOWS:**

The Defendant by itself, agents, or representatives is hereby restrained from selling or committing for sale any number of bottles of the Defendant's diamond Mata Weltin 2014 that would prevent it from supplying a total of 10.000 bottles to the Plaintiff pending the determination of the claim by a court or an arbitral tribunal.

Each Party bears its own costs.



Dr Pablo Friulano

12 December 2014

**IN THE HIGH COURT OF MEDITERRANEO**  
**IN THE CAPITAL CITY JUDICIAL DIVISION**

**FILE NO: DCCV/M/14/2015**

**BETWEEN**

VINO VERITAS LTD

PLAINTIFF/APPLICANT

**AND**

KAIHARI WAINA LTD

DEFENDANT

**D E C L A R A T I O N**

UPON THIS MOTION dated 30<sup>th</sup> day of January 2015, coming before the Court and praying as follows:

1. A Declaration that the Plaintiff by itself, agents, or representatives is not liable for the breach of the contract between the parties to this Declaration, namely the non-delivery of 10.000 bottles of the Plaintiff's diamond Mata Weltin 2014, due to an Act of God and a rightful termination of the underlying contract.
2. As an auxiliary declaration that the Plaintiff is not compelled to specific performance of 10.000 bottles of the Plaintiff's diamond Mata Weltin 2014.

[.....]

**UNDER SECTION 28 OF THE DECLARATORY JUDGMENT ACT 2013 IT IS  
HEREBY DECLARED AS FOLLOWS:**

1. The action initiated by the Plaintiff is hereby dismissed since the court lacks jurisdiction due to the existence of an arbitration clause.
2. Each Party bears its own costs.



Dr Leila Malbec

23 April 2015



## CONTINGENT FEE AGREEMENT

Date 05/12/2014

The Client Kaihari Waina Ltd, represented by Gustav Friedensreich, 12 Riesling Street, Oceanside, Equatoriana retains Amadir Xynisteri of LawFix, 64 Petit Verdoe, Capital City, Mediterraneo to perform the legal services set out in paragraph (1) below. The attorney agrees to perform them faithfully and with due diligence.

- (1) The claim, controversy, and other matters with reference to which the services are to be performed in the Courts of Mediterraneo are

the contract between Kaihari Waina Ltd, 12 Riesling Street, Oceanside, Equatoriana and Vino Veritas Ltd, 56 Merlot Rd, St Fundus, Vuachoua, Mediterraneo of 22 April 2009

- (2) The contingency upon which compensation is to be paid as:

- Winning on procedural matters pertaining to the contract: US \$15,000
- Winning on issues pertaining to the merits of the contract: US \$30,000

- (3) [.....]

- (4) The client is in any event to be liable to the attorney for an hourly rate of US \$ 200 in regard to any work undertaken in relation to the matter stated in (1) and for his/her reasonable expenses and disbursements.

- (5) [....]

This agreement and its performance are subject to Rule 3.05 of the Supreme Court of Mediterraneo.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.  
CLIENT ACKNOWLEDGES RECEIPT OF A COPY OF THIS AGREEMENT.

Witness to Signature

[signed]

-----  
(to Client)

[signed]

-----  
(Client)

[signed]

-----  
(to Attorney)

64 Petit Verdoe, Capital City, Mediterraneo, tel +587 673345, fax +587 673346, [lawfix@xyz.com](mailto:lawfix@xyz.com)

[signed]

-----  
(Attorney)

INVOICE 1254

25.5.2015

Kaihari Waina Ltd  
12 Riesling Street  
Oceanside  
Equatoriana

*Kaihari Waina Ltd v Vino Veritas Ltd*  
contractual dispute

DATE	DESCRIPTION	PRICE RATE	TOTAL
04.12.2014	Consultation <i>Kaihari v Vino Veritas</i> re strategy (phone)	2hrs@\$ 150	\$300
05.12.2014	Follow up meeting to discuss interim injunction (phone)	1hr @\$150	\$150
05.12-08.12.2014	Research, drafting of interim injunction	4hrs@\$150	\$600
08.12.2014	Filing of interim injunction	1/2hr@\$150	\$75
08.12.2014	Court fees	\$2000	\$2000
04.02.2015	Consultation in regard to Vino Veritas' declaration sought in High Court (phone)	3hrs@\$150	\$450
08.02-13.03.2015	Research, drafting of response, consultation	5hrs@\$150	\$750
13.03.2015	Filing of response	1/2hr@\$150	\$75
SUBTOTAL			\$4,400
SALES TAX 20%			\$880
CONTINGENCY			\$45,000
<b>TOTAL DUE BY 1 JUNE 2015</b>			<b>\$50.280,00</b>

Thank you for your  
instructions!

**Witness Statement Mrs. Kim Lee**

I was born on 25 August 1990. I am presently the sole inhouse lawyer working for Kaihari Waina Ltd, the Claimant.

I have been working for Kaihari Waina part time since my second year at law school. I remember the negotiations leading to the contract with Vino Veritas very well because they were the first negotiations in which I was involved. Furthermore, I had been told that the negotiations could be difficult. Apparently contracts are normally concluded orally in the business and the top vineyards do not want to commit themselves to binding delivery obligations, limiting their freedom to allocate production the way they like. I had been told that Mr Weinbauer, the then CEO of Respondent, was personally not easy. He had the reputation in the industry of being very emotional, easy to annoy and there were rumors in trade circles that he allocated bottles very much according to his liking of particular customers and that he had been willing to terminate long standing contracts merely for personal differences with the relevant persons on the customers' side.

I received the draft contract from our then COO, Mr. Friedensreich, who was also a lawyer. I had neither seen an arbitration clause nor an exclusion of discovery clause before, so I asked Mr Friedensreich particularly about this specific clause. He said that it had been recommended to him by his brother who is the head of dispute resolution in a multinational company. The brother's company had been involved in a multimillion court case with extensive pre-trial discovery in the US courts. As a consequence they had inserted this arbitration clause into all their contracts excluding discovery of documents. At the same time the company had implemented a document retention policy reducing the number of documents produced and ordering their systematic destruction after 5 years.

He explained that we had taken over the clause and also tried to produce as little paper as possible. I spent the evening before the actual negotiation reading through the contract again. Since Mr. Friedensreich had been very vague about arbitration and discovery I looked up both terms in Wikipedia to get a better understanding of the clause.

My understanding of the clause was that it was meant to exclude only very broad US-style discovery including letter interrogatories and requests for broad groups of documents. It was, however, not intended to restrict any party from asking for documents in line with the principles which are common in arbitration as evidenced by the IBA Rules on Taking of Evidence in International Arbitration. For me it was clear that we could not restrict the possible evidence in a way which would affect a party's right to be heard.

I doubt that Respondent had a very specific view on the clause. During the discussion of our draft Respondent agreed to the arbitration clause saying that they were interested in arbitration as a fast and informal dispute resolution process. For them it was important that there should be no major costs involved in dispute resolution. They had apparently been involved recently in litigation in which the other party wanted to see large quantities of documents.



Kim Lee  
8 July 2015

Horace Fasttrack  
Advocate at the Court  
14 Capital Boulevard  
Oceanside  
Equatoriana

E-mail: fasttrack@host.eq

By e-mail in advance and by letter

Internationales Schiedsgericht  
der Wirtschaftskammer Österreich  
Wiedner Hauptstraße 63, 1045 Wien

T +43 (0)5 90 900 4398  
F +43 (0)5 90 900 216  
E office@viac.eu  
W www.viac.eu

Vienna, 15 July 2015  
SCH-1975/VM

Re: Case no. SCH-1975 KAIHARI WAINA vs. VINO VERITAS

Dear Mr. Fasttrack,

This is to confirm receipt of your Statement of Claim dated 11 July 2015 on 14 July 2015 and of the registration fee of EUR 1,500 in the above mentioned case. Please be aware that according to Article 10 para. 3 Vienna Rules the registration fee is non-refundable and shall not be deducted from the paying party's advance on costs.

The case is registered under the reference number SCH-1975. We kindly ask you to use this reference number in your further correspondence and submissions.

We have forwarded the Statement of Claim to the Respondent and have invited the Respondent to submit the Answer to the Statement of Claim within a period of 30 days after receipt thereof.

Please note that the arbitration case is administered according to the Vienna Rules 2013 (in force as from 1 July 2013). Article 45 provides for an expedited procedure (fast-track proceedings), if both parties agree thereto no later than the submission of the Answer to the Statement of Claim. If you agree to this procedure, please inform us accordingly.

Please find attached a copy of the Rules of Arbitration (Vienna Rules 2013).

With kind regards,

INTERNATIONAL ARBITRAL CENTRE  
OF THE AUSTRIAN FEDERAL ECONOMIC CHAMBER



Manfred Heider  
Secretary General

Enclosure:  
Vienna Rules 2013



*Joseph Langweiler*  
Advocate at the Court  
75 Court Street  
Capital City  
Mediterraneo  
Tel. (0) 146-9845 Telefax (0) 146-9850  
Langweiler@lawyer.me

16. August 2015

By courier  
The Secretariat of the Vienna International Arbitral Centre of the  
Austrian Federal Economic Chamber  
Wiedner Hauptstraße 63  
1045 Vienna  
Austria

*Kaihari Waina v. Vino Veritas*

Answer to Statement of Claim

Kaihari Waina Ltd.  
12 Riesling Street  
Oceanside  
Equatoriana

- CLAIMANT -

Represented in this arbitration by Horace Fasttrack,

Vino Veritas Ltd.  
56 Merlot Rd  
St Fundus  
Vuachoua  
Mediterraneo

- RESPONDENT -

Represented in this arbitration by Joseph Langweiler

## **Introduction**

1. In its Statement of Claim, CLAIMANT engaged in broad speculations and wild legal reasoning in an effort to present Vino Veritas Ltd ("RESPONDENT") in a bad light and to justify untenable claims. From the beginning CLAIMANT was very uncooperative in trying to solve the problems created by the extremely bad harvest in 2014 in accordance with the wine industry practice and its obligation to settle disputes in an amicable way. Instead of looking for a workable solution in regard to those problems. CLAIMANT tried to force RESPONDENT to breach its contracts with other customers. In a clear violation of the duty to solve upcoming problems in good faith CLAIMANT created unnecessary costs by, first, immediately initiating court proceedings for interim relief, then, second, not cooperating in finding a solution to the unclear arbitration clause so that RESPONDENT was forced to commence court proceedings and, third, by not agreeing on expedited proceedings before a sole arbitrator. Last but not

least CLAIMANT is now trying to obtain business secrets from RESPONDENT by its request for discovery of documents completely ignoring that the parties explicitly excluded discovery in their arbitration agreement.

2. The first time CLAIMANT showed any willingness to cooperate was by purporting to accept in its Statement of Claim the offer to deliver 4.500 bottles of Mata Welting 2014 which RESPONDENT made in May 2015. However, the offer was originally made in an effort to deal with the entire dispute and was only open for acceptance for two weeks. Irrespective of that and without recognizing any legal obligation to do so, and none exists, RESPONDENT will deliver 4.500 bottles of Mata Welting 2014 to CLAIMANT. That is intended to constitute no more than a gesture of good will and should not be interpreted as recognition of any legal duty of delivery under the parties' agreement.
3. RESPONDENT hopes that in return CLAIMANT will reconsider its decision to reject our offer to have the dispute resolved by a sole arbitrator in expedited proceedings pursuant to Article 45 VIAC Rules.

### **Nomination of Arbitrator and Jurisdiction of Arbitral Tribunal**

4. RESPONDENT recognizes the jurisdiction of the arbitral tribunal to avoid any further costs. Furthermore, should CLAIMANT not indicate within the next week that it is willing to agree on fast-track proceedings before a sole arbitrator, RESPONDENT nominates as its arbitrator in this case Mr Oleg Graševina, Grapes Road 5, St Fundus, Vuachoua, Mediterraneo. For that case, we also accept direct appointment of the Chairman of the Tribunal by VIAC.

### **Statement of Facts**

5. RESPONDENT is a medium size high quality wine producer in Mediterraneo. It has an annual production of around 100.000 bottles per year which it sells to a number of selected customers including most of the leading restaurants in Mediterraneo. Some of them have been buying our wines for 40 years and numerous personal friendships have developed. Nearly all of them have maintained their relationship even during the times when the reputation of the wine from Mediterraneo had been seriously affected by a scandal created by some of the mass producers in other regions. Each of these restaurants only buys between 200 and 500 bottles a year. Irrespective of these small quantities they are crucial for the reputation of RESPONDENT's wines and therefore for the price RESPONDENT can obtain on the market.
6. The remaining 60 per cent of RESPONDENT's wine production is sold to major foreign wine merchants for high end wines which distribute the wines to customers all over the world. Five years ago, RESPONDENT's biggest customer was bought by a major conglomerate and shortly thereafter went insolvent due to an exodus of its best people. Consequently, RESPONDENT had to replace that customer at very short notice and selected CLAIMANT who had already tried to get into business with RESPONDENT for several years.
7. CLAIMANT insisted on entering into a framework contract, deviating from the ordinary industry practice. Due to the special situation at the time and believing that any problems that might eventually arise would be resolved amicably RESPONDENT was willing to enter into such a contract giving CLAIMANT the option to purchase up to around 10% of RESPONDENT's annual production [**Exhibit R 1**]. That made CLAIMANT the RESPONDENT's second biggest customer. The framework contract provided for a range within which CLAIMANT could annually order bottles from the new vintage. Claimant originally wanted the option to order a larger quantity but RESPONDENT resisted that request. It wanted to ensure that even in bad years CLAIMANT's demands could be met by the bottles RESPONDENT normally reserved for itself without affecting the delivery to other customers too much. Given the amicable relationship with all its customers and industry practice there

was, however, an expectation that in bad years, the parties would jointly find a solution which allowed RESPONDENT to keep a certain minimum of bottles.

8. In recent years, CLAIMANT has ordered at the lower end of the agreed quantity range. 2013 for example it ordered only 8.000 bottles. At the beginning of 2014, however, several of RESPONDENT's products won prizes at major trade fairs. Furthermore, a leading wine critic enthusiastically described RESPONDENT's top wine Diamond-Gold Selection 2010 as "one of the best white wines worldwide, with an enormous potential to age and probably one of the best investments in wine presently available: 98 points."
9. It seems that in light of that positive press CLAIMANT entered into several contracts with leading restaurants in the summer of 2014. Until early August, it seemed that the 2014 vintage would be excellent. During the last two weeks of August and in September it rained so much that nearly half of the grapes rotted on the vine. As a consequence, the amount of grapes available to RESPONDENT for wine production dropped to an all-time low, leaving only a production of about 65.000 bottles in 2014. Quality-wise the remaining grapes were excellent and promised an absolutely extraordinary year.
10. On 3 November 2014, a few days after the vintage had been brought in, RESPONDENT immediately informed its customers by fax about that extraordinary drop in quantity. It announced that one would try to negotiate with the customers quantities available for each of them within the next weeks.
11. All other customers showed understanding our difficult situation and entered into negotiations resulting in reduced quantities all round. Only CLAIMANT proved completely uncooperative. The day after the fax was sent notifying RESPONDENT's customers of the reduced quantity available CLAIMANT made, for the first time, an order at the top end of the agreed range and ordered 10.000 bottles [Exhibit C 2].
12. At that time RESPONDENT was already considering terminating the contract because CLAIMANT's offensive behavior in ignoring the reduced harvest had led to a complete destruction of trust, trust being one of the crucial elements in the high end wine trade. As a consequence, RESPONDENT intensified its discussion with SuperWines which had already been going on since the beginning of the year, when Mr Barolo had become CEO of SuperWines. He is one of the most reputable wine critics and previously had regular connections with RESPONDENT.
13. On 25 October 2014, CLAIMANT's development manager, Ms Buharit, came to visit RESPONDENT to discuss further business opportunities, including using RESPONDENT's facilities for major promotional events. She asserted that CLAIMANT had never received RESPONDENT's fax of 3 November 2014 which could have explained CLAIMANT's behavior. She informed Mr Weinbauer about the urgent need for 10.000 bottles but no firm commitment to supply that quantity was ever given. Mr Weinbauer merely said that with that explanation of CLAIMANT's order of 4 November 2014 the immediate termination of the contract was no longer an issue and that he would give CLAIMANT's order "a favorable consideration". We cannot see how Ms Buharit could interpret that as a promise to deliver the whole quantity ordered in 2014 which even exceeded the amounts delivered in previous years when there was no problem with the harvest.
14. With its letter of 1 December 2014, RESPONDENT informed CLAIMANT that it was willing to deliver 4.500 – 5000 bottles to CLAIMANT [Exhibit C 3]. That is more than 50% of the bottles delivered in previous years and one of the best quotas RESPONDENT gave to its existing larger customers.
15. SuperWines, which was a new customer, was only promised 30% of the 15.000 bottles they wanted to order, even though they had from the beginning of the negotiations in early summer 2014 been willing to pay a premium to become our biggest customer. Thus, instead of making profits to the detriment of its existing customers, as alleged by CLAIMANT, RESPONDENT was in fact willing to forego profits out of loyalty to its existing customers. One

always has to keep in mind that there was never any exclusivity agreement or any other provision which could have prevented RESPONDENT from enlarging its potential customer base. There had been reports about financial difficulties at the end of 2013 with RESPONDENT's then biggest customer, which made it commercially necessary for RESPONDENT to develop a fall back plan should that customer become insolvent, as it fortunately did not. That and the appointment of Mr Barolo as the CEO of SuperWines led to the discussions with SuperWines in summer 2014.

16. CLAIMANT's reaction to RESPONDENT's generous offer was a slap in the face to Mr Weinbauer. Instead of cooperating in resolving the difficulties created by the extremely low harvest CLAIMANT not only insisted on full delivery of a number of bottles it never previously ordered but also – at least implicitly – accused Mr Weinbauer of lying about the real reasons for the reduction in delivery.
17. This personal attack in combination with CLAIMANT's uncooperative behavior led Mr Weinbauer to conclude that CLAIMANT would not be a suitable distributor for such high end and unique products as RESPONDENT's wines. Good personal relationships and trust are part of the DNA of the trade in top class wines. Written contracts are rare and parties hardly ever go to court or arbitration given their long time relationships. Top class wines are not a product like any other but a personal statement. Consequently, false allegations and uncooperative behavior violate fundamental principles of the business and entitle the other side to terminate an existing contract.
18. Mr Weinbauer terminated the contract in his letter of 4 December 2014 [Exhibit C 7]. The wording clearly evidenced how personally hurt and disappointed he was. His sarcastic reaction may also have been influenced by the news he had received the day before that he urgently needed heart surgery, which in turn resulted in him turning over the family run business to his son in law on the 1 January 2015, two years before originally planned.
19. CLAIMANT, instead of trying to clarify misunderstandings or to seek a solution, as would have been normal industry practice, turned around and immediately started court proceedings to obtain an interim injunction against RESPONDENT. Due to Mr Weinbauer's health problems and in order not to escalate the dispute any further RESPONDENT did not participate in the proceedings for interim relief. In particular, it did not subsequently challenge the injunction granted by the judge on the basis of the CLAIMANT's distorted description of the facts.
20. Instead, RESPONDENT's new management approached CLAIMANT in the first week of January 2015 as one of its first steps and tried to resolve the dispute. However, no agreement was possible with CLAIMANT who unequivocally demanded the delivery of 10.000 bottles of diamond Mata Weltin 2014. RESPONDENT, however, needed certainty as to the legal situation and as to the number of bottles available for the contracts with other customers. Given CLAIMANT's behavior the only option for Respondent to clarify the legal situation was to start an action for a declaration of non-liability, i.e. that the contract had been validly terminated or RESPONDENT would at least be excused from having to deliver more than 4.500 bottles.
21. In its letter of 14 January 2015 [Exhibit R 2] RESPONDENT made another approach to resolve the dispute or at least clarify the forum in which an action had to be brought, as the arbitration clause – provided by CLAIMANT – was everything but clear. Again CLAIMANT did not cooperate even though the clause itself explicitly states that disputes should be resolved in good faith.
22. When RESPONDENT finally started the action in the state courts of Mediterraneo on 30 January 2015, CLAIMANT immediately invoked the arbitration clause which in its view provided for VIAC arbitration. Had CLAIMANT done so before, RESPONDENT would have never started court proceedings but would have immediately gone to VIAC arbitration. The Court rejected the action as inadmissible.

23. After that decision RESPONDENT made another effort to resolve the dispute and offered to deliver to CLAIMANT 4.500 bottles, although in RESPONDENT's view the contract had been rightfully terminated by Mr Weinbauer.
24. Again CLAIMANT stayed silent concerning that offer but instead started this arbitration where it finally came back to the offer which had long expired.
25. To show its commitment to amicable dispute resolution RESPONDENT is still willing to deliver 4.500 bottles of Mata Weltin 2014 and will deliver them at market price to CLAIMANT before 1 October 2016.
26. All other claims by CLAIMANT are, however, devoid of any legal substance and contrary to the express contractual stipulations between the parties. In particular the procedural motion is primarily intended to obtain confidential business information from RESPONDENT and to create sufficient nuisance for my client so that it agrees to pay the damages created solely by CLAIMANT's uncooperative behavior.

## Legal Evaluation

### Request for Document Production

27. The Tribunal has no power to grant CLAIMANT's request for document production. Pursuant to Article 28 Vienna Rules, the Tribunal has to "conduct the arbitration in accordance with the Vienna Rules and the agreement of the Parties". Not only do the Vienna Rules not mention document production but, to the contrary, in their arbitration agreement the Parties explicitly excluded any type of discovery, which is merely another word for document production.
28. The fact that Claimant now contends that it only wanted to exclude broad discovery in the American style is merely a defensive lie or at best a purposeful reading of the clause in an effort to support the unsupportable. In an international arbitration with no connection to the USA the American rules on discovery would anyway not be applicable, so that there was no need to exclude them or any other discovery rules of a comparable reach. The parties were intending to exclude the type of document production one often finds in practice under the IBA Rules, which have anyhow not been selected in this arbitration.
29. CLAIMANT can also not rely on an alleged violation of the right to be heard. The type of document production requested by CLAIMANT is by no means a necessary requirement for the right to be heard. The law of Mediterraneo, for example, in its procedural code does not provide for any document disclosure beyond the possibility to request the production of one or several sufficiently specified documents. A request to produce classes of documents is not foreseen.
30. To the contrary, the granting of CLAIMANT's request would unduly favor CLAIMANT and thereby violate RESPONDENT's right to equal treatment. CLAIMANT seems to have implemented a certain policy to prevent it being obliged to disclose certain documents. Furthermore, CLAIMANT comes from a jurisdiction which has, in its Code of Procedure, a provision dealing with the disclosure of documents containing identical wording to Article 3 IBA Rules upon which CLAIMANT relies. Consequently, the local law has developed a number of exceptions and privileges which free CLAIMANT from any obligation to present documents which could be relevant in this arbitration. In particular, the exception for documents involving business secrets has been interpreted so broadly that CLAIMANT would not be obliged to disclose the RESPONDENT contracts and pre-contractual communications with its final customers. By contrast, the law in Mediterraneo has not developed such a sophisticated scheme of privileges and exception, since its Code of Procedure only allows for disclosure requests directed to one or several particular documents.
31. Last but not least, document production is not necessary. The CISG contains an elaborate set of rules on the burden of proof allocating it according to the availability of proof. The balance



developed in these rules would be disturbed if a party could additionally request the other party to produce documents. CLAIMANT must prove its damages by submitting its contracts with its customers which it does not want to do for obvious reasons.

### **Request for damages: Cost for interim relief**

32. CLAIMANT has no claim for damages for either the legal costs it incurred or the costs for its application for interim relief. In general, procedural costs are not recoverable as damages under the CISG. The recoverability of legal fees is regulated in the procedural laws. The drafters of the CISG and the States signing the CISG did not want to undo the local rules on the recovery of costs in legal proceedings through the CISG. The decision of the High Court of Capital City is a final and binding decision as to the costs recoverable for that action. The decision of the legislature as to which costs are recoverable in civil proceedings is a matter of procedural law. It should not be circumvented by reliance on claims for damages allegedly foreseen under substantive laws.
33. Even if legal costs were in principle recoverable as damages under the CISG, which they are not, CLAIMANT is not entitled to reimbursement for the amount claimed. Neither were the damages foreseeable nor were the fees reasonable.
34. There was no need for CLAIMANT to have asked for interim relief. The wine had not yet been bottled and, contrary to the decision of the Court, there was no imminent threat that the wine would be distributed to any other customer within the next six months. Consequently, neither RESPONDENT nor any other reasonable third party could foresee that CLAIMANT would immediately start proceedings for interim relief once RESPONDENT had terminated the contract.
35. Furthermore, it was neither foreseeable nor reasonable that CLAIMANT would enter into the type of contingency fee agreement it did. To allow the reimbursement of such contingency fees would amount to endorsing the contract to the detriment of third parties. CLAIMANT promised its lawyers a higher fee than normal and now wants to be paid by RESPONDENT.
36. The costs incurred in defending the action in the state courts are entirely due to CLAIMANT's behavior. CLAIMANT had an obligation to clarify the uncertainty created by the pathological arbitration clause contained in the contract. It clearly breached that obligation and at least violated its obligation to mitigate damages under the CISG. Furthermore, damages are not available as a remedy for the breach of an arbitration agreement.

### **Request for damages: Cost for declaratory relief**

37. The costs allegedly incurred by CLAIMANT in defending RESPONDENT's application in the High Court of Capital City, Mediterraneo, for declaratory relief are not recoverable either for the same reasons. They even apply here a fortiori as the claims concern an alleged breach of the arbitration agreement. The arbitration agreement is a separate agreement to which the CISG does not apply but instead the UNCITRAL Model Law does. The Model Law does not contain any provision providing for damages for breach of an arbitration agreement.
38. Even if the CISG or the substantive law of any of Danubia, Equatoriana or Mediterraneo (in relation to damages all three jurisdictions having adopted the relevant UNIDROIT-Principles on International Commercial Contracts) were applicable, CLAIMANT would have been primarily responsible for the cost incurred. Following CLAIMANT's request for interim relief, RESPONDENT informed CLAIMANT by letter of 14 January 2015 [Exhibit R 2] that it intended to initiate proceedings for a declaration of non-liability. At the same time, RESPONDENT told CLAIMANT that it considered the arbitration clause to be unclear and unworkable and would therefore start court proceedings unless CLAIMANT informed RESPONDENT within 10 days about its understanding of the clause and made an offer to rectify the unclear clause.

CLAIMANT did not react to this request. Had it reacted, as would have been required by the clause and good faith, RESPONDENT would not have initiated the court proceedings.

**~~Request for damages: 5.500 bottles~~**

~~39. CLAIMANT has not proven any damages it incurred due to the non-delivery of the 5.500 bottles. In an effort to avoid disclosure of its own customer base it has not submitted any of the contracts it has with its customers or explained its calculation of damages. CLAIMANT cannot merely claim the alleged gain made by RESPONDENT by selling the 5.500 bottles to Super Wines. The mark-up paid by Super Wines relates to other factors which have nothing to do with CLAIMANT. Article 74 CISG exists to compensate a party for actual damages suffered but is not intended to force disgorgement of profits made by the other party due to a breach of contract.~~

**Statement of Relief Sought**

In light of this RESPONDENT requests the Arbitral Tribunal

1. to reject CLAIMANT's request for document production;
2. ~~to reject all claims for damages raised by CLAIMANT;~~
3. to order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.



Joseph Langweiler

**Annexes**

Exhibit R 1: Witness Statement of Mr Weinbauer

Exhibit R 2: Letter of 14 January 2015 by Mr Langweiler



Witness Statement  
Mr. Werner Weinbauer

I was born on 1. December 1946. Until 31 December 2014 I was the Managing Director and main shareholder of VINO Veritas Ltd., one of the leading quality wine producers in Mediterraneo.

I had negotiated the Framework Agreement for Respondent's side. Normally, we conclude all our contracts orally and personal relationships play an important role for us. Claimant, however, insisted on a written contract guaranteeing it a steady supply. In return, Claimant was willing to commit to a minimum purchase and pay in the first year for a certain number of the bottles upfront.

At the time, we had been short of cash due to other investments we had made the year before. Furthermore, we had just lost one of our major customers due to its insolvency and the insolvency administrator even started litigation against us since we stopped the delivery of bottles which had not been paid for. The need to improve cash flow and to allocate the bottles at short notice led us to agree to a written contract. It is customary practice in the wine industry that seller freely determines every year the number of bottles it can allocate to a particular buyer. Consequently, buyers are normally interested in a good relationship with the wineries which made the minimum delivery obligation in our view acceptable. In light of the termination right we were convinced that Claimant would also sit down with us and find an acceptable solution for problems created by low quantities.

We had received a draft of the contract from Mr Friedensreich the week before and had gone through the draft with our local lawyer. Since we are not a major company and had had a recent bad experience with the insolvency administrator of our former customer it was crucial for us to keep the costs of any dispute resolution low.

In that law suit which the insolvency administrator of our former customer had started before the courts in Mediterraneo, she had asked to see all our correspondence with the producer of the wine capsules we had used for the last six years. In that case the request had finally been defeated as the law of Mediterraneo in principle requires each party to prove its case with the evidence it has available. Only in very limited circumstances can a party ask a court to order the other party to produce a specific document.


Our lawyer told us, however, that in other jurisdictions, in particular those from the common law world, such requests are common and are often granted. Any such request would be seriously disruptive to our business and could require us to disclose business secrets to the market. Consequently, we wanted to avoid having to face such requests again.

In light of that, I was very happy when I saw the clause excluding such request in the draft contract received from Mr Friedensreich. I even explicitly mentioned that during the meeting in which the contract was finalized.

I understood the clause to exclude all types of requests for documents which go beyond requests for particular documents in very specific circumstances. Given that the law of Mediterraneo allows only requests for particular documents I had no doubts that such a provision would also be possible.

At the end of 2014, I had to step down as the managing director of Vino Veritas due to health problems. The position has then been taken over by my son in law. He has studied law but has never practiced as a lawyer.

St Fundus, 2.8.2015



Werner Weinbauer

*Joseph Langweiler*  
Advocate at the Court  
75 Court Street Capital City  
Mediterraneo  
Tel. (0) 146-9845 Telefax (0) 146-9850,  
Langweiler@lawyer.me

Horace Fasttrack  
Advocate at the Court  
14 Capital Boulevard  
Oceanside  
Equatoriana

14 January 2015

*Re: Kaihari Waina v Vino Veritas*

Dear Mr. Fasttrack,

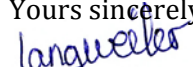
As already expressed at our last meeting my client has been very disappointed by the behaviour of Kaihari Waina and its application for interim relief to the High Court of Capital City. As you know Mr Weinbauer had to undergo open heart surgery the day after the application had been filed so that Vino Veritas did not pay much attention to the action. Otherwise the injunction would probably not have been granted as it lacks any justification. There is no imminent danger of disposal of the wine (diamond Mata Weltins 2014) to other customers as the wine will only be bottled in May or June.

Nevertheless, the new management of Vino Veritas has decided that it will, at present, refrain from challenging the decision to avoid further unnecessary costs.

We are still interested in an amicable solution. As we and our other customers need certainty in the matter the window for negotiations is fairly short. If no settlement can be reached within the next two weeks, we will initiate proceedings applying for a declaration of non-liability. You will find the draft application attached.

In our view the arbitration clause is void for uncertainty as the institution mentioned in the clause does not exist. If you consider the clause to be an arbitration clause in favour of VIAC arbitration we would be willing to agree on the VIAC standard clause with the addition that document disclosure is excluded. Otherwise we will start court proceedings before the High Court in Capital City, which has already been selected by you for your application for interim relief for the lifting of which we will also apply.

I look forward to hearing from you at your earliest convenience but not later than 28 January 2015.

Yours sincerely  
  
Joseph Langweiler

To:  
Mr. Horace Fasttrack  
Advocate at the Court  
14 Capital Boulevard  
Oceanside  
Equatoriana

Internationales Schiedsgericht  
der Wirtschaftskammer Österreich  
Wiedner Hauptstraße 63, 1045 Wien

T +43 (0)5 90 900 4398  
F +43 (0)5 90 900 216  
E [office@viac.eu](mailto:office@viac.eu)  
W [www.viac.eu](http://www.viac.eu)

E-mail: [fasttrack@host.eq](mailto:fasttrack@host.eq)

Mr. Joseph Langweiler  
Advocate at the Court  
75 Court Street  
Capital City  
Mediterraneo

E-mail: [Langweiler@lawyer.me](mailto:Langweiler@lawyer.me)

By e-mail in advance and by DHL courier services

Vienna, 19 August 2015  
SCH-1975/VM

**Re: Case no. SCH-1975 KAIHARI WAINA vs. VINO VERITAS**

Dear Sirs,

We confirm receipt of the Answer to the Statement of Claim dated 16 August 2016 on 18 August 2016 (copy enclosed for the Claimant) in which the Respondent proposes to have the proceedings conducted as fast-track proceedings according to Article 45 Vienna Rules with a sole arbitrator.

We kindly request Claimant to comment on this proposal until 26 August 2015 and advise whether an agreement on fast-track proceedings and a sole arbitrator was already reached between the parties. Thereafter, we will calculate the advance on costs.

Kind regards,

INTERNATIONAL ARBITRAL CENTRE  
OF THE AUSTRIAN FEDERAL ECONOMIC CHAMBER



Alice Fremuth-Wolf  
Deputy-Secretary General

Enclosure for the Claimant: Answer to the Statement of Claim

From Mr. Falco Amadeus  
Chairman of the Arbitral Tribunal  
In the case VIAC (SCH-1975)  
40 Klimmt Road, Vindobona, Danubia

To: Horace Fasttrack  
14 Capital Boulevard  
Oceanside, Equatoriana

Joseph Langweiler  
75 Court Street  
Capital City, Mediterraneo

Vindobona, 2 October 2015

*VIAC SCH-1975*  
*Kaihari Waina . /. Vino Veritas*

Dear Colleagues,

Please find enclosed Procedural Order No 1 in the above referenced arbitration proceedings.

Both Parties are requested to comply with the orders made and the Arbitral Tribunal reserves the right to draw negative inferences from any non-compliance with Procedural Order No 1.

Yours sincerely,



Falco Amadeus  
Chairman of the Arbitral Tribunal

Encl.: Procedural Order No 1

VIAC Arbitration  
**Procedural Order No 1**

2 October 2015

1. After its constitution and receipt of the file from the VIAC the Arbitral Tribunal invited the Parties to participate in a telephone conference on 1 October 2015. At that meeting the Arbitral Tribunal and the Parties discussed the various options in structuring the arbitral proceedings in a cost and time-efficient manner, taking into account the undertaking by RESPONDENT's new management to deliver 4.500 bottles of Mata Veltin 2014 by 1 November 2015. The Arbitral Tribunal wants to thank both parties for their very cooperative approach and their willingness to resort to unusual undertakings to potentially reduce costs.
2. The Arbitral Tribunal takes note of the facts that RESPONDENT
  - does not challenge the jurisdiction of this Arbitral Tribunal but that RESPONDENT explicitly consented at the Telephone Conference that this Arbitral Tribunal established on the basis of the VIAC Rules has jurisdiction to hear the dispute under the VIAC-Rules in line with the other provisions of the arbitration agreement.
  - will – for the time being – not contest that the termination of contract was a breach of contract, but reserves the right to do so should the Arbitral Tribunal come to the conclusion that in such a case RESPONDENT would be liable for the damages requested by CLAIMANT;
  - will deliver 4.500 bottles of Mata Veltin 2014 without prejudice and without admitting or recognizing any legal obligation under the contract to do so.
3. Both parties are reminded that the above undertakings were given by RESPONDENT's new management solely as an effort to facilitate the proceedings and to allow for cost efficient dispute resolution. They may merely be used to prove such a commitment of RESPONDENT to efficient dispute resolution. In no way should they be understood as the admitting of a particular view or understanding at the time the contract was entered into.
4. In the light of these undertakings, the particularities of the case, the Parties' discussions and in agreement with the Parties the Arbitral Tribunal has decided to address CLAIMANT's claims for damages first on the basis of the assumption that the termination of the contract and the refusal to deliver any wine was a breach of contract. Furthermore, the Arbitral Tribunal will first merely address the questions whether an existing damages claim in principle covers the various heads of damages claimed. Any detailed discussion will then occur subsequently once the Arbitral Tribunal has taken a decision on whether or not to grant the request for document production. In the light of the Arbitral Tribunal's conclusion on the damages which may be due in such a scenario RESPONDENT is then entitled to decide whether it wishes to pursue its original defence that the decision to terminate the relationship was not a breach of contract but justified in the light of both the limited quantities of wine produced in 2014 and CLAIMANT's behavior. That would then be addressed in a second phase of this case, should RESPONDENT decide to seek a decision on whether any such breach ever actually occurred.
5. In the light of these considerations the Arbitral Tribunal hereby makes the following orders:
  - (1) In their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the Parties are required to address the following issues:

- a. Does the tribunal have the power and, if so, should it order RESPONDENT to produce the documents requested by CLAIMANT?
- b. Is CLAIMANT entitled to the damages claimed for the litigation costs of US\$ 50.280 incurred partly
  - i. in its application for interim relief?
  - ii. in its successful defence against the proceedings in the High Court of Capital Cityß
- ~~c. Can CLAIMANT claim the profits RESPONDENT made by selling the bottles to SuperWines as part of its damages, even if that includes further profits?~~

The Parties are free to decide in which order they address the various issues. **No further** questions going to the merits of the claims should be addressed.

~~(2) For their submissions the following Procedural Timetable applies:~~

- ~~a. Claimant's Submission: not later than 10 December 2015~~
- ~~b. Respondent's Submission: no later than 19 January 2016~~

(3) The submissions are to be made in accordance with the Rules of the Moot agreed upon at the telephone conference. Consequently, concerning the procedural issues in No. (1)(a), the Parties should address the question on the basis that the tribunal's general jurisdiction is now uncontested. Only its power to order document production under the existing arbitration clause in favour of an arbitration under the Vienna Rules is contested. Furthermore, the parties are in agreement that the contract, as well as the arbitration clause included in, it are governed in principle by the CISG, if no special procedural rules apply to the arbitration clause. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006-amendments.

(4) It is undisputed between the Parties that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG. The general contract law of all three states is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts.

~~(5) In the event Parties need further information, Requests for Clarification must be made not later than 22 October 2015 via their online party [team] account.~~

~~(5 bis) For those institutions participating ONLY IN THE VIS EAST questions should be emailed to [clarifications@vismoot.org](mailto:clarifications@vismoot.org). Where an institution is participating in both Hong Kong and Vienna, the Hong Kong team should submit its questions together with those of the team participating in Vienna via the latter's account on the Vis website.~~

~~Clarifications must be categorized as follows:~~

- ~~1. Questions relating to applicable procedural law~~
- ~~2. Questions relating to applicable substantive law~~
- ~~3. Questions concerning the arbitration agreement~~
- ~~4. Questions concerning the conclusion of the Framework Agreement (with exception of the arbitration agreement)~~



- ~~5. Questions concerning the contacts with SuperWines/Mr Barolo~~
- ~~6. Questions concerning the visit of Ms Buharit~~
- ~~7. Questions concerning Claimant's business~~
- ~~8. Questions concerning Respondent's business~~
- ~~9. Questions concerning the application for interim relief~~
- ~~10. Questions concerning the application for a declaration of non-liability~~
- ~~11. Questions concerning the fee agreement~~
- ~~12. Other questions~~

- ~~6. Both Parties are invited to attend the Oral Hearing scheduled for 19 – 24 March 2016 in Vindobona, Danubia (7 – 13 March 2016 in Hong Kong). The details concerning the timing and the venue will be provided in due course.~~

For the Arbitral Tribunal



Falco Amadeus  
Chairman of the Tribunal