



CHEAT SHEET

33rd Willem C. Vis International Commercial Arbitration Moot

CLAIMANT ("CL") – *Orchis Worldwide Ltd*

(Mediterraneo)

Medium-sized company engaged in the growing and sale of Orchids / **SELLER** under the Agreement

Ms. Giorgia Theophrastus (CEO) [WS C1 p7-8]

Mr. Ferdinand Haarmann (head of sales) [WS C6 p16-17]

PROCEDURAL ISSUE (a) [PO1 p52 III.1.a.]

Which version of the SIAC Arbitration Rules applies to the proceedings?

Clause 15 Agreement: "Any dispute (...) shall be referred to and finally resolved (...) in accordance with the current Arbitration Rules (...) ("DR Clause") [C3 p13]

Background: Interpretation of the DR Clause governed by Art 8 CISG [PO1 p53 §5] (i.e., according to the understanding of a reasonable third person). The DR Clause was taken over from the First Agreement without discussion, but had been extensively discussed between CL and Botanical Garden.

CL: 2016 SIAC Rules applicable / **RE:** 2025 SIAC Rules applicable

- Understanding of "current" (SIAC Model Clause: "for the time being in force")
- Relevance of Botanical Garden's intention to apply the 2016 SIAC Rules (see email of CEO stating that current rules are acceptable) [C7 p21; PO2 p56 §7]

TO FURTHER CONSIDER:

- **RE took over Botanical Garden incl all commitments and liabilities** [C2 p9]
- **Parties "amended" only certain provisions of First Agreement** [NoA p3 §9]
- **Preamble of Agreement states that First Agreement is terminated** [C3 p10]
- **Negotiation history irrelevant because of merger clause** [C3 p10 §2.4]
- **Common practice to apply the latest set of arbitration rules to proceedings**
- **Initiation of mediation to be construed as commencement of the arbitration**

PROCEDURAL ISSUE (b) [PO1 p52 III.1.b.]

Can and should the tribunal order the requested disclosure of the funding agreement with ATJ-Financing ("ATJ") and the adverse cost insurance with LitSure under the 2016 SIAC Rules or Rule 38.4 of the 2025 SIAC Rules?

CL: Disclosure shall **not** be ordered / **RE:** Disclosure shall be ordered

Tribunal's power to order disclosure:

2025 SIAC Rules:

Rule 38.1: "A party shall disclose the existence of any third-party funding agreement and the identity and contact details of the third-party funder (...)."

Rule 38.4: "The Tribunal (...) may make such orders for disclosure in respect of the third-party funding agreement as it sees fit (...)."

2016 SIAC Rules:

- No express rule granting tribunals discretion to order disclosure of funding agreements, but general document production power if a document is "relevant to the case and material to its outcome" (Rule 27 f.)
- 2017-SIAC Practice Note concerning cases that involve funding empowers tribunals to order disclosure of certain elements of funding agreements

Reasoning of disclosure request:

- **CL at the brink of insolvency, making disclosure necessary for RE to be able to assess whether adverse costs are covered** [PO2 p58 §20]
- **Potential direct adverse cost claim against ATJ depending on the terms of the funding agreement (i.e., degree of control over proceedings)**
- **RE has not yet applied for security for costs** [RNoA p34 §20]
- **CL announced it will claim compensation for funding costs** [PO2 p59 §27]
- **ATJ is an aggressive funder, endangering procedural integrity** [R4 p40]
- **Agreements contain sensitive information, which CL wants to keep secret**

SALES AGREEMENT ("AGREEMENT")

Concluded on 25 August 2022 between CL and RE (together "Parties") for the sale of 3,000 +/-10% orchids used for the production of vanilla ("Orchids") at a price of USD 2,000 per Orchid [C3 p10-13]

- **1 December 2021:** CL and Botanical Garden conclude agreement for the delivery of 300 Orchids for research purposes primarily in the interest of RE ("First Agreement") [NoA p3 §6; RNoA p31 §2; R1 p36 §2]
- **June 2022:** Botanical Garden faces financial difficulties, is therefore taken over by RE and becomes one of RE's research facilities [NoA p3 §7; C1 p8 §9; C2 p9]
- **25 August 2022:** Parties "replace" First Agreement by Agreement, according to which RE may determine the date of delivery of the Orchids between 1 January and 31 March 2024 (Clause 4.2) [C3 p10-13; R2 p38]
- **September 2023:** Initiation of process to move the Orchids to Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna ("CITES"), ratified by Equatoriana, which would prohibit the issuance of import permits for commercial purposes by the end of January 2024 [NoA p3 §10; C4 p14]
- **1 November 2023:** CL proposes that delivery date be moved ahead or RE applies for an anticipatory import permit to avoid potential consequences of the Orchids' inclusion into CITES Appendix I [NoA p3-4 §11-12]
- **1 December 2023:** RE rejects CL's request to move the delivery date (i.e., 27 March 2024) ahead, assuring CL that RE would be able to obtain the necessary import permit [NoA p4 §14-15; C5 p15; C6 p16 §3]
- **January 2024:** Ecological activism against RE to protect Mediterraneo's natural habitat [NoA p4 §16; C4 p14]
- **1 February 2024:** CITES includes the Orchids into Appendix I with immediate effect, deviating from the usual 90-day transition period for such changes [C4 p14; R1 p37 §8; Clarification p54; PO2 p57 §14]
- **5 February 2024:** RE applies for an import permit, but is informed on 14 February 2024 by the Equatorian authorities that no permits would be issued pending further ministerial guidance [PO2 p57-58 §17]
- **8 February 2024:** Equatorian minister announces that Equatoriana will do everything it takes to protect the Orchids and take a much more restrictive approach to the grant of permits [RNoA p33 §13; R1 p37 §9]
- **10 February 2024:** RE informs CL that it is doubtful that delivery can take place at all and in any case impossible to obtain the import permit in time to meet the delivery date [R1 p37 §9; PO2 p59 §28]
- **12 February 2024:** CL approaches long-term customer Herbal Cosmetics with an offer for a short-term delivery of 3,000 +/-10% Orchids [NoA p4-5 §20-23; C6 p16-17 §9]
- **15 February 2024:** CL sells 3,200 +/-5% Orchids to Herbal Cosmetics at USD 1,000 per Orchid (market price at 1,100 per Orchid as of 1 February 2024), i.e., at half the price RE would have paid [C6 p17 §10]
- **27 February 2024:** RE calls CL and informs that RE will discontinue its spices division and that "under these circumstances it was impossible (...) to fulfill the contract" [RNoA p33 §15-16; R1 p37 §11; PO2 p59 §28]
- **1 March 2024:** CL terminates Agreement after confirmation of RE ending vanilla activities and unsuccessful negotiations and RE withdraws its application for an import permit [C6 p17 §14; R3 p39; PO2 p57 §17]
- **14 May 2024:** CL delivers 3,300 Orchids to Herbal Cosmetics at a price of USD 1,000 per Orchid [NoA p5 §26; C6 p17 §15; exact date clarified in PO2 p60 §39b]
- **2 October 2024:** Herbal Cosmetics exercises an option to purchase additional 2,000 Orchids for USD 3,200 per Orchid from CL (i.e., at the market price as of 1 October 2024) [NoA p5 §27; C6 p17 §17]
- **19 December 2024:** CL initiates mediation, which is unsuccessful and terminated in June 2025 [PO2 p59 §30]
- **31 July 2025:** CL initiates arbitration under the 2016 SIAC Rules, requests damages in the amount of USD 3,300,000 from RE and informs that it "had to rely on outside financial support from ATJ-Financing and obtained insurance for adverse cost coverage from the litigation risk insurance provider LitSure" [NoA p2-6]
- **14 August 2025:** RE requests that (i) the 2025 SIAC Rules are applied to the proceedings, (ii) CL is ordered to disclose the agreements with ATJ and LitSure and (iii) CL's damage claims be rejected [RNoA p31-35]

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Links to sources:

Problem (including PO2) / Analysis for Arbitrators
2016 SIAC Arbitration Rules / 2025 SIAC Arbitration Rules
CISG / Danubian Contract Act (UNIDROIT Principles)

RESPONDENT ("RE") – *Darwin Natural Food plc*

(Equatoriana)

Part of a group of companies engaged in the production of natural food and spices / **BUYER** under the Agreement

Mr. Edmond Albius (director of spices division) [WS R1 p36-37]

Botanical Garden (Equatoriana)

Taken over by RE in 2022 and used as research facility by RE

Ms. Nicola Gobley (chief contract officer until March 2022)

MERITS ISSUE (c) [PO1 p52 III.1.c.]

Is CL entitled to damages due to a breach of contract by RE, which is not excused by Art 79 CISG?

Background: It is undisputed that RE had to obtain the import permit, which it failed to do, thereby breaching the Agreement. RE considers itself excused from liability under Clause 12 of the Agreement and Art 79 CISG.

CL: YES (RE **not** excused) / **RE:** NO (RE excused from liability)

Clause 12.1 Agreement (force majeure): "(...) A Party is not liable for failure or delay caused by events beyond its reasonable control, including (...) government measures (...)." [C3 p13]

Art 79 (1) CISG: "A party is not liable (...) if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it (...)."

TO FURTHER CONSIDER:

- Relation of Clause 12 and Art 79: Derogation or concurrent application?
- **RE had right to determine time of delivery and could have moved the delivery date ahead (when performance was still possible)** [C3 p11 §4.2]
- **RE could have applied for an anticipatory import permit** [PO2 p57 §14]
- **Early delivery would have been costly and risked Orchids** [PO2 p57 §15]
- **Past prevailing government practice to comply with CITES leniently and grant permits in case some research purposes included** [R1 p36-37 §6]
- **Unexpected deviation from usual 90-day transition period to change CITES import requirements (effective immediately)** [PO2 p57 §14]

MERITS ISSUE (d) [PO1 p52 III.1.d.]

In case CL should be entitled to damages, can the damages be calculated on the basis of Art 75 CISG as done by CL, i.e., taking the difference between the price paid by Herbal Cosmetics for the 3,300 Orchids delivered on 14 May 2024 (sold on 15 February 2024) and the price RE would have paid for the same amount under the Agreement?

Art 75 CISG: "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, (...) the seller has resold the goods, (...) may recover the difference between the contract price and the price in the substitute transaction (...)."

CL: YES (15 February-sale relevant) / **RE:** NO (2 October-sale relevant)

- **15 February-sale** concluded before formal avoidance of the Agreement (Art 75 requires final and indefinite refusal to perform), but RE's non-performance was already clearly foreseeable in February 2024
- **CL even made a profit under the 2 October-sale** (sold at a higher price than to RE), but this transaction concerns a different batch of Orchids

TO FURTHER CONSIDER:

- Eligibility of 15-February and 2-October-sale as cover sale under Art 75?
- Number of Orchids used for damage calculation: Parties dispute who had the right to determine the number of Orchids (3,000 +/-10%)
- **Urgency of the sale, because Orchids would have lost 30% of their value if delivered after their first flowering in June or July** [NoA p5 §23]