

Kaihari Waina , Ltd., Claimant

V

Vino Veritas, Ltd., Respondent

## **Request for Arbitration**

### **I. Parties**

1. Claimant: Kaihari Waina Ltd (“Kaihari”), is a wine merchant specialised in top quality wines for the collectors’ and high end gastronomy markets.
2. 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.

### **II. Facts**

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. The framework contract provides in essence that, every year, KAIHARI would buy a certain minimum number of bottles from Vino Veritas 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 KAIHARI at the end of the year and normally before negotiations with other customers start.
4. For KAIHARI 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 KAIHARI’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 Vino Veritas’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 Kaihari’s customers. Consequently, on 4 November 2014, Kaihari ordered from Vino Veritas 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 Vino Veritas further.
6. On 1 December 2014, KAIHARI received a letter from Vino Veritas stating that it would only deliver 4.500 – 5.000 bottles of the ordered wine. The Vino Veritas 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 KAIHARI’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 KAIHARI, while not denying that the 2014 harvest had yielded less than the normal quantity has, however, received information that the real reason for the Vino Veritas'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 Vino Veritas has contracted with SuperWines, thereby exceeding its available capacity. The Vino Veritas, rather than honouring its long standing contract and business relationship with KAIHARI, 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 Vino Veritas want to establish a new business relationship, Vino Veritas 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.

8. The Vino Veritas's letter received on 1 December 2014 came as an unpleasant surprise to KAIHARI. In a meeting on 25 November 2014, Ms Buharit, Kaihari's development manager, had made clear to Mr Weinbauer, Respondent's CEO at the time, that KAIHARI needed as a minimum the full quantity of bottles ordered but preferably more. Mr Weinbauer had left no doubts that no quantity larger than the 10.000 bottles Kaihari had asked for could be delivered. However, he had created the impression that Vino Veritas 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 Vino Veritas's letter there were no existing contractual obligations to such customers, even if they were long standing ones. KAIHARI 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.

9. Mr Weinbauer completely overreacted to this reasonable request for contractual performance. He accused KAIHARI of outrageous behaviour and purported to terminate the contract, threatening that no delivery would be made at all.

10. At that time KAIHARI had already received a considerable number of orders for diamond Mata Weltin 2014, some of which it had already accepted. Consequently, KAIHARI had to protect its interest and its business reputation. Thus, on 8 December 2014, KAIHARI sought an interim injunction in the High Court of Capital City, Mediterraneo, prohibiting Vino Veritas from selling to other customers the 10.000 bottles of diamond Mata Weltin 2014 ordered by KAIHARI. The interim injunction was granted on 12 December 2014 and Vino Veritas refrained from challenging the order.

11. Given Mr Weinbauer's temper and the reduced quantity harvested it could not be guaranteed that Vino Veritas would actually deliver the 10.000 bottles that it had been enjoined to keep. Consequently, KAIHARI in parallel immediately started to contact other top vineyards and managed to make substitute arrangements for the 5.500 bottles Vino Veritas had already refused to deliver in its first letter of 1 December 2014.

12. That KAIHARI's action was justified is evidenced by the fact that Vino Veritas, 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. KAIHARI had invoked the arbitration agreement in the contract and the court denied jurisdiction. In the oral hearing the judge made clear, however, that he considered Vino Veritas 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, KAIHARI incurred considerable costs. KAIHARI 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 KAIHARI's problem. Also no third party funding could be obtained. Therefore, KAIHARI had engaged the local Mediterranean law firm, LawFix, on a contingency fee basis. Even though KAIHARI 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 Vino Veritas'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 KAIHARI 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, KAIHARI will limit this action to claiming the legal fees it had incurred and the damages it had suffered consequent on Vino Veritas's breaches of the contract. Under the condition that there is a firm commitment to deliver 4.500 bottles by 1 November 2015, KAIHARI 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 Vino Veritas obtained by selling 5.500 bottles to SuperWines.

### III. Applicable law

16. The arbitral tribunal has jurisdiction over the Vino Veritas by virtue of the arbitration agreement contained in Article 20 of the contract between Kaihari and Vino Veritas of 22 April 2009. 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.

### V. Relief Requested

17. Statement of Relief sought:

- (a) Payment of damages to be determined by the profits the Vino Veritas made by selling 5.500 bottles of Mata Weltin 2014 to SuperWine.
- (b) Reimbursement of legal costs of US\$ 50.280,00.
- (c) Vino Veritas shall bear the cost of this arbitral proceedings.

Kaihari Waina , Ltd., Claimant

v.

Vino Veritas, Ltd., Respondent

## I. Affirmative defense

1. In its Statement of Claim, Kaihari engaged in broad speculations and wild legal reasoning in an effort to present Vino Veritas Ltd. in a bad light and to justify untenable claims. From the beginning Kaihari 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. Kaihari tried to force Vino Veritas to breach its contracts with other customers. In a clear violation of the duty to solve upcoming problems in good faith Kaihari 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 Vino Veritas was forced to commence court proceedings and, third, by not agreeing on expedited proceedings before a sole arbitrator. Last but not least Kaihari is now trying to obtain business secrets from Vino Veritas by its request for discovery of documents completely ignoring that the parties explicitly excluded discovery in their arbitration agreement.

2. The first time Kaihari showed any willingness to cooperate was by purporting to accept in its Statement of Claim the offer to deliver 4.500 bottles of Mata Weltin 2014 which Vino Veritas 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, Vino Veritas will deliver 4.500 bottles of Mata Weltin 2014 to Kaihari. 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. Vino Veritas hopes that in return Kaihari 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.

## II. Damages

4. The Tribunal has no power to grant Kaihari'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.

5. Kaihari 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.

6. The costs allegedly incurred by Kaihari in defending VINO Veritas'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.

7. Kaihari 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. Kaihari cannot merely claim the alleged gain made by VINO Veritas by selling the 5,500 bottles to SuperWines. The mark-up paid by SuperWines relates to other factors which have nothing to do with Kaihari. 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.

#### IV. Relief requested

8. In light of this VINO Veritas requests the Arbitral Tribunal

- (a) to reject Kaihari's request for document production;
- (b) to reject all claims for damages raised by Kaihari;
- (c) to order Kaihari to pay VINO Veritas's costs incurred in this arbitration.

根据“附件2：第十七届贸仲杯参赛队员选拔案件材料”，以英语简要总结本案争议焦点并就此自选其中一方立场阐述可能提出的论点及依据，总字数要求不少于500单词。本项内容注重考察报名同学的英语书面表达能力和法律思维能力，案例法条等理据引用不必详尽。