FIFTEENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

14 – 20 MARCH 2008

VIENNA

MEMORANDUM FOR CLAIMANT

ON BEHALF OF

Mediterraneo Wine Cooperative
140 Vineyard Park
Blue Hills
Mediterraneo
Tel: (0) 425-1930
Fax: (0) 425-1937

CLAIMANT

AGAINST

Equatoriana Super Markets S.A.
415 Central Business Centre
Oceanside
Equatoriana
Tel: (0) 555-7356
Fax: (0) 555-7359

RESPONDENT

UNIVERSITY OF CALIFORNIA
BERKELEY SCHOOL OF LAW

ANDREW DICKSON • KIM FOX • MARTYN NAYLOR • SETH SCHREIBERG

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Abbreviation	Explanation
¶ / ¶¶	Paragraph / paragraphs
§ / §§	Section / sections
U.S.$	United States Dollars
AAA	American Arbitration Association
AAA-IDR	American Arbitration Association International Dispute Resolution
Am.	American
App.	Appellate Court
Arb.	Arbitration
Art. / Arts.	Article / Articles
Assn.	Association
Bros.	Brothers
Cir.	Circuit (U.S. Circuit Court of Appeals)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
Cl.	Claimant
Com.	Commercial
Const.	Construction
Corp.	Corporation
Ed. / eds.	Editor / editors, or edition
e.g.	*Exemplum gratia* (for example)
Elec.	Electric
Ex.	Exhibit
F.	Federal Reporter
Fed. Cl.	U.S. Court of Federal Claims
FLR	Federal Law Reports
FTAC	Commission of the U.S.S.R. Chamber of Commerce and Industry in Moscow
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Center for Settlement of Investment Disputes
Id.	*idem* (the same)
i.e.	*id est* (that is)
Int'l	International
Ins.	Insurance
Kap.	Chapter

K.B.	King's Bench
Ltd.	Limited Company
Mem.	Memorandum
Mem'l	Memorial
n.	Note / Footnote
No.	Number
OIV	International Organisation of Vine and Wine
OIV Codex	International Oenological Codex
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law
Proc.	Procedure or procedural
Q.B.	Queen's Bench
Rd.	Section
Reg. / Regs.	Regulation / regulations
Resp.	Respondent
Rev.	Review
Sec.	Secretariat
S.D.N.Y.	Southern District of New York
Tech.	Technology
UCC	Uniform Commercial Code
U.K.	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States of America, United States Reports (in citations)
v.	*versus* (against)
vol.	Volume
Y.B.	Yearbook
ZPO	German Act of Civil Procedure

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

Australia

Bermuda

Germany

Hong Kong (*pre-1997)*

United Kingdom

United States of America

ARBITRAL AWARDS

OTHER

INTRODUCTION

1. This arbitration arises from a contract in which Equatoriana Super Markets ("Respondent") agreed to purchase 20,000 cases of "Blue Hills 2005" wine from Mediterraneo Wine Cooperative ("Claimant") for a total price of US$1,360,000 *[Cl. Ex. No. 5]*. The dispute is essentially about Respondent's attempt to evade the clear terms of a contract that Respondent itself proposed.

2. Claimant is a local wine maker. Respondent is a supermarket chain that sells wine to consumers. Their contract unambiguously allocated the risk between them by providing for delivery of wine in four installments, with the final shipment contingent upon satisfactory sales by a certain date. Claimant bore the risk that if sales were disappointing, it would not realize any profit on the fourth installment. Respondent bore the corresponding risk that sales of the first three installments might be disappointing.

3. Once risk became reality for Respondent, following the publication of a sensationalist newspaper article, Respondent panicked and devised a plan of action to dispose of its share of the allocated risk. First, Respondent attempted to revoke its offer by sending Claimant an email on a Sunday afternoon when Respondent knew Claimant's sales manager was away on business. Then, after Claimant failed to receive the purported revocation due to a network malfunction, and Claimant instead accepted Respondent's offer via e-mail and courier, Respondent still refused to honor its contractual obligations.

4. This forced Claimant to file a request for arbitration in accordance with the arbitration clause that Respondent had itself proposed. Although Respondent's clause clearly requires arbitration of all disputes, including disputes about contract formation, Respondent takes the position that it is not bound by that agreement either. Instead, continuing its pattern of bad faith, Respondent attempts to frustrate the arbitration proceeding by appealing to the national courts of Danubia for an order enjoining the arbitration. Respondent also makes the extraordinary request that the Tribunal avoid the cost and delay of the duplicate proceedings, for which Respondent is solely responsible, by staying this arbitration pending the outcome of its court action.

5. In these circumstances, Claimant requests that the Tribunal make five straightforward findings: (1) that the arbitration should not be stayed, (2) that the parties made a valid agreement to arbitrate, (3) that Claimant may recover its costs associated with the Danubian court case, (4) that the parties formed a binding contract of sale, and (5) that Claimant's wine conformed to the purposes of that contract. In short, the Tribunal should find that the parties got exactly what they bargained for.

STATEMENT OF FACTS

6. In **May 2006**, Claimant participated in a wine industry trade fair in Durhan, Oceania, where it debuted its "Blue Hills 2005" wine. After examining the wine, Respondent's wine buyer, Mr. Wolf, solicited a price quote for an order between 10,000 and 20,000 cases *[Cl. Ex. No.2]*. On 1 June 2006, Claimant's sales manager, Mr. Cox, responded with a quote for 20,000 cases and offered to deliver the wine in several shipments *[Cl. Ex. No. 3]*.

7. On **10 June 2006** Respondent sent a purchase order for "Blue Hills 2005" via email and courier *[Cl. Ex. Nos. 4, 5]*. The purchase order matched Mr. Cox's quote and included an arbitration clause that called for arbitration of "[a]ny dispute, controversy or claim arising out of or relating to this contract, including the formation . . . thereof . . . ." *[Cl. Ex. Nos. 4, 5]*. The wine was intended for Respondent's October 2006 wine promotion.

8. The order consisted of four shipments to be delivered between **10 August 2006** and **3 October 2006** *[Cl. Ex. No. 5]*. No date was specified for the fourth shipment, which was contingent on a certain volume of "Blue Hills 2005" sales. Respondent stated it would turn to another quality wine as the featured item in its promotion if the conclusion of the contract were delayed beyond **21 June 2006** *[Cl. Ex. No. 4]*.

9. On **11 June 2006** Claimant's employee, Ms. Kringle, informed Respondent that Claimant's Sales Manager, Mr. Cox, was due back on 19 June 2006 and would give the contract his immediate attention upon his return *[Cl. Ex. No. 6]*. Respondent acknowledged that this was acceptable *[Cl. Ex. No. 7]*.

10. On the morning of **19 June 2006**, Mr. Cox returned to the office and immediately signed and sent the contract by courier to Respondent *[Cl. Ex. No. 8]*. Respondent received the purchase order on 21 June 2006. In the afternoon of 19 June 2006, Claimant received an e-mail message from Respondent purporting to withdraw the purchase order *[Cl. Ex. No. 9]*.

11. Respondent justified its purported withdrawal by referencing a tabloid newspaper article reporting that "anti-freeze" had been added to certain wine from the Blue Hills region. Claimant immediately informed Respondent that the article was completely false, and that the legitimate sweetener added to "Blue Hills 2005" wine was not "anti-freeze" and was safe for consumption, as confirmed in an expert report. Claimant noted that they had concluded a contract and were prepared to make the first shipment of wine. *[Cl. Ex. No. 10, 12, 13]*.

12. On **10 August 2006** Respondent refused to honor the contract and stated that it would not purchase any wine from Mediterraneo for several years. *[Cl. Ex. No. 16]*. On **18 June 2007** Claimant submitted a request for arbitration and statement of claim to JAMS. It did so by invoking the arbitration clause found in the parties' contract. *[Cl. Ex. No. 5, ¶13]*.

13. Notwithstanding the plain language of the arbitration clause, Respondent filed suit in the Commercial Court of Vindobona, Danubia challenging the existence of the arbitration agreement *[Amendment to Statement of Claim ¶2]*.

SUMMARY OF ARGUMENT

14. **I. The Tribunal should not stay the arbitration.** Respondent offers no compelling reason to postpone the otherwise prompt resolution of this dispute. Respondent does not, and cannot, challenge the Tribunal's authority to rule on its own jurisdiction. The law of the seat of arbitration expressly permits the Tribunal to proceed despite Respondent's pending action in the Commercial Court. Respondent's argument that a stay will avert the expenses of parallel proceedings is without merit. When the Tribunal hears oral arguments, the parties will have fully briefed all issues, and the dispute will be ripe for the Tribunal's decision. The plain language of the arbitral clause covers disputes about the *formation* and *arbitrability* of the contract. Continuing the proceedings will avoid unnecessary delay and honor the clear intent of the parties.

15. **II. The parties formed a valid agreement to arbitrate.** The parties' agreement is valid under Danubia's Arbitration law and the New York Convention. Respondent challenges the Tribunal's jurisdiction on the basis of a purported withdrawal of its purchase order, but does not address the arbitration agreement itself. This challenge ignores the doctrine of severability, which allows the arbitration agreement to survive any challenge to the contract. Courts and tribunals also consider the intent of the parties to arbitrate as sufficient grounds for enforcing an arbitration agreement.

16. **III. Respondent violated its obligation to arbitrate.** Respondent breached JAMS Rule 17.3 by applying to the Danubia Commercial Court for relief. Respondent is in violation of its obligations to Claimant and the Tribunal. The Tribunal should infer that Respondent acted in bad faith and order Respondent to cover Claimant's costs associated with that action.

17. **IV. The parties formed a valid contract of sale.** Respondent's offer to purchase 20,000 cases of "Blue Hills 2005" was irrevocable because Respondent gave Claimant a fixed time for the acceptance of its offer *[CISG Art. 16(2)(a)].* Alternatively, the offer was irrevocable because Claimant acted reasonably in reliance on the offer being irrevocable *[CISG Art. 16(2)(b)].* Further, Respondent's e-mail was ineffective to revoke the contract because it deviated from the parties' established form of communication and it did not "reach" Claimant before acceptance was dispatched *[CISG Arts. 16(1), 24].*

18. **V. Claimant's wine conformed to the contract.** Claimant's wine was fit for all ordinary purposes and for all particular purposes made known by Respondent *[CISG Art. 35].* "Blue Hills 2005" was not only safe for consumption but it was also of reasonable quality to be used in Respondent's wine promotion. The concluded contract allocates risk between Claimant and Respondent through an installment delivery schedule, and Respondent now tries to avoid its share of this risk with unfounded allegations of non-conformity.

ARGUMENT

I. THE TRIBUNAL SHOULD NOT STAY THE ARBITRATION

19. Respondent's request to stay the arbitration pending the outcome of Respondent's Danubian court action should be denied for three reasons. First, the Tribunal indisputably has the authority to rule on its own jurisdiction, under both the doctrine of "competence-competence," and the Danubian law on which Respondent itself relies **(A)**. Second, Respondent has failed to demonstrate that the arbitration should be stayed to avoid "duplicate proceedings." On the contrary, proceeding with the arbitration is more efficient **(B)**. And third, proceeding is consistent with the parties' clear intent to arbitrate disputes about "formation" of a contract, as reflected in the arbitration clause that Respondent itself proposed **(C)**.

A. THE TRIBUNAL HAS AUTHORITY TO RULE ON ITS OWN JURISDICTION

20. As an initial matter, Respondent does not dispute that the primary source of a Tribunal's authority is an agreement to submit to arbitration any disputes or differences between the parties *[Redfern/Hunter 1-08]*. Claimant and Respondent agreed that any dispute between the parties would be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules (*hereinafter* the "JAMS Rules") *[Cl. Ex. No. 5, ¶13]*. Respondent chose the following arbitration clause to include in its purchase order:

> Any dispute, controversy or claim arising out of or relating to this contract, ***including the formation***, interpretation, breach or termination ***thereof***, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules. The Tribunal will consist of three arbitrators. The place of arbitration will be Vindobona, Danubia. The language to be used in the arbitral proceedings will be English. Judgment upon the award rendered by the arbitrators may be entered by a court having jurisdiction thereof *[Cl. Ex. No. 5; emphasis added]*.

21. JAMS Rules 4.4 and 17.2 authorize a Tribunal to rule on objections to its jurisdiction.

22. Should a question exist as to the applicability of the JAMS arbitration rules to a determination of jurisdiction, the jurisdiction of the Tribunal must then stem from the *lex loci arbitri*, which in this case is the Danubian Arbitration Law *[JAMS 18.2; Redfern/Hunter 2-14]*. With one exception, Danubia's arbitration law is based on the UNCITRAL Model Law on International Arbitration (*hereinafter* "UNCITRAL Model Law") *[Statement of Claim ¶18]*.

23. Article 16(1) of the UNCITRAL Model Law states that a "Tribunal may rule on its own jurisdiction, including any objections with respect to . . . the arbitration agreement." This language codifies the internationally accepted doctrine of competence-competence, the applicability of which Respondent does not challenge *[Uzelac 153; Fouchard ¶653]*.

24. Danubia's amendment to the UNCITRAL Model Law reinforces the conclusion that Respondent's lawsuit does not deprive this Tribunal of jurisdiction to proceed with the arbitration. The amended law states that "[p]rior to the constitution of the arbitral Tribunal, an application may be made to the court to determine whether or not arbitration is admissible" *[Danubia Arb. Law Art. 8(2); Statement of Defense ¶4].* However, the law also allows parallel arbitration proceedings to proceed. Danubia's Arbitration law specifically provides that:

> Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court *[Danubia Arb. Law Art 8(3); Statement of Defense ¶4].*

25. Respondent concedes that "it is left to the best judgment of the arbitral organization or the arbitral Tribunal as to whether the arbitral proceedings should be continued" *[Statement of Defense ¶13].* In other words, Danubian law *expressly authorizes* the Tribunal to proceed with this arbitration.

26. The prevailing scholarly view also militates against staying the arbitration, even at the risk of parallel proceedings. The "arbitrators owe their allegiance to the parties . . . and are duty bound to examine their competence . . . without casting sideways glances at court proceedings . . . ." *[Söderland 315].*

27. The intent of UNCITRAL Model Law Article 16(1) was to make it impossible to derail arbitral proceedings simply by raising an objection to the "existence or validity" of the arbitration agreement *[Paulsson 115; González de Cossío 242; Fouchard ¶659].* UNICTRAL drafters resolved to continue allowing parallel proceedings, as they were "deemed to contribute to the prompt resolution of the arbitration" *[UNCITRAL REPORT 18, §§91-92].*

28. The International Chamber of Commerce also allows for parallel proceedings "in the interest of the rapid resolution of international commercial disputes" *[ICC Award No. 4862; ICC Award No. 3879; ICC Award No. 3572].*

29. Articles 8 and 16 of Danubia's arbitration law give the Tribunal the authority and responsibility to continue proceedings. Ultimately, "there is no principle of arbitration . . . that dictates to a Tribunal to suspend the proceedings due to such external issues as concurrent court proceedings" *[Söderlund 313].*

B. THE TRIBUNAL SHOULD PROCEED TO AVOID UNNECESSARY DELAY

30. Respondent argues the Tribunal should stay its proceedings "in favor of saving the expenses involved in what would be duplicate proceedings to determine the existence or non-existence of an arbitral agreement *[Statement of Defense* ¶13*].* Respondent's assertion of duplicative

costs fails because: **(1)** proceeding with the arbitration is actually *more* efficient; and **(2)** Respondent has failed to show any of the accepted criteria for a stay.

1. Proceeding with the arbitration will save time and money

31. Respondent's request that the Tribunal stay its proceedings in order to save the expenses of "duplicate proceedings" is extraordinary given that Respondent is solely responsible for having created any additional expenses and delay by filing the Danubian court action *[Statement of Defense ¶13].*

32. Arbitral proceedings, "since their outcome is final and binding, typically take less time than a full review" by the courts *[Lew/Mistelis/Kröll 8].* A stay would delay the case and increase its costs, regardless of the Commercial Court's decision. No decision from Danubia's Commercial Court on the question of arbitrability can be expected prior to the summer of 2008 *[Proc. Order No. 2 ¶10].* Thereafter, if Respondent believes the Tribunal erred in rendering its eventual award, it could raise any objections in a motion before the Danubian court to set aside the award. Right now, the best course for the Tribunal is to proceed with the arbitration to avoid unnecessary delay and to honor the parties' intent.

33. To state the issue as simply as possible: *why not* decide the matter now? The Tribunal has already taken steps to mitigate Respondent's cost concerns by ordering combined argument on the jurisdiction and the merits. By the time the Tribunal hears oral argument in this matter, both parties will have fully briefed all of the issues. The parties will face few, if any, additional expenses. Given the substantial costs of proceedings and appeals in a foreign legal system—including hiring local counsel, translating documents, conducting additional research, and writing additional briefs—Respondent's cost concerns are actually best served by proceeding with the arbitration.

34. If, as expected, the court rejects Respondent's attempt to enjoin the arbitration, then this Tribunal will need to proceed with the arbitration. It is much more efficient for the Tribunal to do this now. Returning to the Tribunal six or twelve months later would result in both an unjustified delay and additional expense. In the unlikely event that Respondent prevails in the court action, there will be further costs associated with appealing that decision, and even more costs related to filing a separate suit in a court with appropriate jurisdiction to resolve the substance of Claimant's contract claim. The Tribunal is just as competent as any court to rule on whatever objections Respondent may raise, and can avoid excessive costs by maintaining jurisdiction and not rewarding Respondent's dilatory tactics.

2. Respondent has failed to show any of the accepted criteria for a stay

35. The UNCITRAL Working Papers indicate "the principle underlying Article 16 that it was initially and primarily for the arbitral tribunal to decide on its competence, subject to ultimate court control *[UNCITRAL REPORT 7, 195].* To avoid postponing its own investigation, the

Tribunal must have evidence that the objection is so serious that it wishes to avoid the risk of wasting its and the parties' efforts *[Paulsson 115]*. "The better approach . . . is to provide that objections to the tribunal's jurisdiction should—as a matter of principle—be first presented to the tribunal, and consequently to defer judicial review until after the arbitrators have ruled on their own jurisdiction *[Bachand 466-467]*.

36. Without a similar stringent check on objections to jurisdiction in Danubia, the permissive language of Danubia Arb. Law Article 8(3) would lose its purpose. Danubia's exception to the UNCITRAL Model Law is identical to the German statute, ZPO 1032(2). In Germany, notwithstanding the allowance granted by ZPO 1032(2), legislators still view the discretion allowed under 1032(3) as a means of preventing stall tactics *[BT-DrS 13/5274 S. 38]*. German scholarship reinforces that interpretation *[Schwab/Walter, Kap. 7, Rd. 19]*. Parties reluctant to honor arbitration agreements should not have the opportunity to neutralize these provisions merely by initiating a court proceeding, regardless of the merits of the case, and make *arbitral proceedings* permissive, rather than court proceedings. Refusing a stay is thus critical to discouraging attempts to "effectively torpedo the arbitration proceedings by bringing the claim in state courts" *[Barceló 1125]*.

37. Respondent's request for a stay for reasons of duplicative costs is not a question as to the validity of the agreement. Respondent's implicit challenge to the validity of the agreement to arbitrate is actually a challenge to the formation of the contract, which speaks to the merits of the case. This type of challenge falls outside the purview of Danubia's Commercial Court, which only considers whether the arbitration agreement is "null and void, inoperative or incapable of being performed" *[Danubia Arb. Law Art. 8(1)]*.

38. While the record shows that the parties negotiated the price, quantity, and delivery of the "Blue Hills 2005" wine, at no time—until this arbitration began—did the parties dispute or question the agreement to arbitrate. Respondent attempted to withdraw only "the offer to *purchase*" *[Cl. Ex. No. 9]*, and later contested the validity of the contract as a whole *[Cl. Ex. No. 11]*. The first notice, however, that the arbitration agreement was in dispute came on 6 July 2007 in Respondent's action in Danubia's Commercial Court, almost a year after the agreement was concluded *[Amendment to Statement of Claim ¶2]*. Even now, Respondent alleges there is no arbitration agreement because there is no contract, ignoring the internationally accepted principle that the arbitration agreement is separate from the contract itself *[Statement of Defense ¶6-7, 13; On severability, see Infra, ¶53; On the validity of the agreement to arbitrate, see Infra, Part II]*.

39. Danubia's standard is the same standard used by German courts when evaluating motions brought under ZPO 1032(2) *[Bay ObIG 09.09.99 Case no. 4Z SchH 03/99]*, and accords with the standards of non-Model Law jurisdictions *[see Cross at 833; Prima Paint at 404]*. If the parties agreed as to "who has the primary power to decide arbitrability," as they have in the instant case, a court should defer to their decision *[First Options at 943]*.

40. Respondent fails to demonstrate that any distinct question as to the making or the performance of the agreement to arbitrate exists. Respondent improperly challenges the authority of this Tribunal to rule on its own jurisdiction by asserting a legal conclusion it intended to be determined through arbitration. As courts are advised to "curtail" their involvement even when a party contests the arbitration agreement's non-existence, invalidity or inapplicability *[Bachand 467]*, surely the Tribunal should not wait for a Court to deny Respondent's unwarranted claim before making its decision.

C. THE PARTIES INTENDED TO ARBITRATE DISPUTES ABOUT CONTRACT FORMATION

41. Respondent's request that the Tribunal stay its proceedings contravenes the clear intent of the parties. Respondent proposed that issues of formation and arbitrability be decided through arbitration. The evidence overwhelmingly indicates both parties intended to arbitrate issues of formation and arbitrability.

42. The intention of the parties must be examined "by taking into account what the parties reasonably and legitimately envisaged" *[Fouchard ¶477]*. Should the parties enter into a standard form of arbitration agreement recommended by one of the arbitral institutions, there should be no doubt as to their intentions *[Redfern/Hunter ¶3-65]*. The only clause governing this relationship is the JAMS Model Arbitration Clause, which covers any claim "relating to this contract . . . including formation" *[Cl. Ex. No. 5]*. The Clause also provides this Tribunal with jurisdiction where there is a dispute as to "whether the claims asserted are arbitrable" *[Cl. Ex. No. 5]*. Respondent chose the all-encompassing language of the JAMS Model Arbitration Clause and clearly sought to give the Tribunal jurisdiction over all disputes arising out of or related to this transaction, including formation and arbitrability issues.

43. Claimant agreed to arbitrate, not litigate, by signing the contract as indicated in its letter of 19 June 2006 *[Cl. Ex. No. 8]*. Courts have emphasized that it is unreasonable to attribute to parties' arbitration agreements an intention that there should be, in any foreseeable eventuality, two sets of proceedings, one before the court and one before an arbitrator *[Asheville]*. Respondent's actions have forced Claimant to appear in Commercial Court, but do not alter Claimant's unambiguous intent to arbitrate. The Tribunal should decline complicity with Respondent's duplicitous appeal.

II. THE PARTIES MADE A VALID AGREEMENT TO ARBITRATE

44. Respondent contends that the arbitration clause was a provision of the larger offer it purportedly withdrew, and that there is no arbitration clause without a valid contract *[Statement of Defense ¶7]*. To accept Respondent's position is to ignore—and indeed, to render meaningless—the plain language of the arbitration clause drafted by Respondent **(A)**. The agreement also is valid for several reasons: It meets the criteria for validity under Danubia's Arbitration Law and the New York Convention **(B)**; the agreement to arbitrate is

separate from the contract and survives any challenge to the contract as a whole **(C)**; and the parties' intent to arbitrate is sufficient to validate the arbitration agreement **(D)**.

A. RESPONDENT'S CHOSEN ARBITRATION CLAUSE COVERS FORMATION DISPUTES

45. Respondent chose to include in its purchase order a provision requiring arbitration of any dispute arising out of that contract, "including the ***formation*** . . . thereof" *[Cl. Ex. No. 5 ¶13; emphasis added]*. Respondent's entire defense rests on the theory that a contract was never formed because Respondent withdrew its offer. Such an argument is precisely the type of dispute expressly covered by the arbitration clause to which the parties agreed.

46. Respondent's decision to use this clause reflects not only its stated preference for arbitration, but also indicates that it wanted to protect itself from potentially costly litigation when its suppliers alleged the formation of a contract. To find this agreement invalid because of a failure to form a contract is to render the language of the arbitration clause meaningless.

B. THE ARBITRATION CLAUSE IS ENFORCEABLE UNDER DANUBIAN LAW

47. By accepting Respondent's offer on 19 June 2006, the parties formed an agreement to arbitrate as set forth in paragraph 13 of the contract. That agreement is valid under the terms of Danubia's domestic arbitration statute, as well as the New York Convention, as adopted by Danubia.

48. Article 7(2) of the Danubia Arbitration Law requires arbitration agreements to be in writing. An agreement is in writing if "it is contained in a document signed by the parties." As demonstrated below, the contract comports with the CISG *[see infra, Part IV, ¶71]*.

49. The arbitration agreement is also enforceable under Article II(3) of the New York Convention, which provides that an arbitration agreement in writing is invalid only if it is "null and void, inoperative or incapable of being performed." Respondent contests the validity of the arbitration clause by arguing that the entire contract was never concluded *[Statement of Defense ¶7]*. This argument fails under a consideration of the doctrine of severability *[see infra, Section C, ¶53-55]*. The arbitration agreement concluded between the parties is neither null or void, nor inoperative, nor incapable of being performed.

50. There was no defect in the formation of the arbitration agreement that would render it "null and void." Subject to specific national law definitions as well as UNCITRAL Model Law Article 8(1), an arbitration agreement is null and void when it was defective or invalid at the time of formation, typically as a result of "fraud, duress, illegality, mistake, and lack of capacity" *[Herrmann 53; Born 160; but see Fiona Trust, (whether contract containing the agreement to arbitrate had been procured by bribery is arbitrable)]*. Here, Respondent did not provide this Tribunal with evidence of any of the above-referenced deformities. Their claim that the contract was never entered into is not one of the recognized grounds for finding an agreement null or void.

51. Respondent argues that the agreement is inoperative or incapable of being performed because it was never concluded, but the arbitration agreement is sufficiently comprehensive, specific, and clear to permit performance. Courts have found performance impossible where the terms of an arbitration agreement are so vague, indefinite, or internally contradictory that the tribunal cannot ascertain the parties' intent *[Born 160].* Such clauses are commonly referred to as "pathological" *[Fouchard ¶484; Eisemann 129].* Even a pathological clause will be upheld, however, as long as the court or the tribunal can discern and give effect to the parties' intent *[Lew/Mistelis/Kröll 156-7; Fouchard ¶485].*

52. The arbitration clause chosen by Respondent includes "formation" and "arbitrability" within the scope of the agreement. Respondent's allegation that the contract was never entered into is a dispute specifically envisioned by the clause, as is a claim that the dispute is not arbitrable because the arbitration agreement may be invalid.

C. THE ARBITRATION AGREEMENT IS SEPARATE FROM OTHER CONTRACT TERMS

53. Notwithstanding Claimant's position that there is a valid contract, Respondent has mischaracterized the prevailing view in international commercial arbitration, which considers an arbitration clause to be separate and distinct from the main contract of which it forms a part, and as such, to be capable of surviving the termination or invalidity of that contract *[Redfern/Hunter ¶3-31; Jarvin 85].* This doctrine of separability (or severability) has been widely accepted and incorporated into institutional and international rules of arbitration *[see UNCITRAL (Art. 16(1)); LCIA (Art. 23.1); ICC (Art. 6.4); JAMS (Art. 17.1); AAA-IDR (Art. 15.2)].*

54. The purposes of the contract may fail, but the arbitration clause is not one of the purposes of the contract *[Redfern/Hunter ¶3-60 citing Heyman v. Darwins Ltd [1942] A.C. 356 at 374; OLG Hamburg, March 12, 1998 (6 U 110/97); OLG Köln, June 22, 1999 (9 Sch 8/98)].* Severability also ensures that parties are not "afforded the opportunity to evade [an] obligation to arbitrate by the simple expedient of alleging that the contract is void" *[Harbour Assurance at 93].*

55. Respondent's e-mail of 18 June 2006 purporting to withdraw the offer to purchase 20,000 cases of Blue Hills 2005 makes no mention of the agreement to arbitrate. To accept Respondent's assertion that the agreement to arbitrate was not separable from the main contract is to ignore both the established doctrine of severability, and the intent of the parties to arbitrate. Doing so would allow Respondent to avoid its obligation to arbitrate.

D. THE PARTIES' INTENT IS SUFFICIENT TO VALIDATE THE ARBITRATION CLAUSE

56. "Fundamentally, the separability doctrine is necessary to effectuate the parties' implied or express intent that any and all disputes between them be arbitrated, including disputes about the validity of their underlying contract" *[Harbour Assurance at 93].*

57. Where there is a meeting of the minds, an arbitration clause is valid, even where there is doubt as to the formation of the contract *[Colfax at 754-55]*. In Colfax, an employer sought a court order invalidating a collective bargaining agreement "because the parties never agreed on an essential term" *[Id.]*. The court held that even if there was no "meeting of the minds" on the definition of that critical term, at the very least "there was a meeting of the minds on the mode of arbitrating disputes between the parties" *[Id.]*.

58. Where an arbitration clause is vague *and* the contract was never finalized, courts will still refer the case to arbitration based on the parties' intent to arbitrate *[Standard Fruit]*. In Standard Fruit, negotiations between Nicaraguan Sandinistas and Standard Fruit Company led to a "Memorandum of Intent" termed an "agreement in principle" that included an arbitration clause *[Id. at 472]*. During the subsequent twenty-two months, many different and sometimes conflicting documents were exchanged, but "none were ever finalized or executed" *[Id. at 473]*. The court determined that "the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes," and found that even the "less than crystal clear" clause that referred arbitrators to a fictional arbitration association was valid pursuant to the parties' intent *[Id. at 478; see also, Moses Cone at 24-25; Howard Elec. at 850]*. Other courts also subscribe to the principle that the intent of the parties to arbitrate is paramount *[see Fiona Trust, supra ¶50; Lucky-Goldstar]*.

59. The cases above show how strongly courts favor arbitration where there is reasonable evidence that the parties intended to arbitrate, even if one party later tries to renege on its obligation. As in Standard Fruit, the parties here agreed at least in principle to the price and quantity of goods to be delivered, and conceived of a broad arbitration clause explicitly mandating that disputes as to "formation" and "arbitrability" be referred to arbitration *[Cl. Ex. No. 5]*.

60. Arbitration tribunals may also broadly construe arbitration agreements to fulfill the parties' intent. In All-Union Export-Import Assoc. Sojuznefteexport (Moscow) v. JOC Oil, LTD, JOC took delivery of thirty-three oil shipments but did not pay *[Moscow FTAC]*. When Moscow initiated arbitration, JOC claimed the purchase agreement "had not been executed" appropriately, was void, and the arbitral panel thus lacked jurisdiction *[Born 59]*. The parties' arbitration clause did not include "formation," but submitted "all disputes or differences" to the Commission of the U.S.S.R. Chamber of Commerce and Industry in Moscow ["FTAC"] *[Id.]*. The panel found the arbitration clause valid, though the contract as a whole was invalidly formed *[Id. at 62]*. JOC's objection merely asserted that the contract "as a whole (together with the arbitration clause) is invalid" *[Bern 61]*, a claim insufficient to deny FTAC jurisdiction. The judgment was later enforced *[4 Mealey's Int'l Arb. Rep. B1 (1989) (Court of Appeal of Bermuda 1989)]*.

61. The Moscow arbitration is analogous to the present dispute, as Respondent alleges the arbitration clause is invalid because the larger contract does not exist. The arbitration clause between Claimant and Respondent is more comprehensive than the Moscow clause, specifically including formation disputes as arbitrable. Accordingly, the Tribunal should find that the agreement is valid and operable, and any doubts as to the existence of the contract do not affect the validity of the arbitration agreement.

III. RESPONDENT BREACHED ITS OBLIGATION TO ARBITRATE

62. Should the Tribunal find no compelling reason to stay the arbitration, and should it determine that the parties' arbitration agreement grants the Tribunal jurisdiction over this dispute, the Tribunal should find that Respondent breached its obligations to Claimant by applying to the Danubia Commercial Court for relief from this proceeding.

63. JAMS Rule 17.3 states that by agreeing to arbitration under the JAMS Rules, the parties will be treated as having agreed not to apply to any court or other judicial authority for any relief regarding the Tribunal's jurisdiction unless agreed to by the parities or ordered by the Tribunal. In combination, the effect of these rules is to give exclusive authority to the Arbitral Tribunal to determine its own jurisdiction.

64. If the Tribunal finds that a valid arbitration agreement was concluded, it necessarily follows that Respondent breached JAMS Rule 17.3. At least two consequences may flow from this conclusion. First, the Tribunal may infer that Respondent acted in bad faith **(A)**. Second, the Tribunal should award Claimant its costs associated with responding to the action in the Danubian courts **(B)**.

A. THE TRIBUNAL MAY INFER THAT RESPONDENT ACTED IN BAD FAITH

65. JAMS 27.3 provides, "[i]f a party, without showing good cause, fails to comply with any provision of, or requirement under, these Rules or any direction given by the Tribunal, the Tribunal may draw the inferences that it considers appropriate."

66. A "resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse" *[UNCITRAL REPORT 18, 11 (¶63)]*.

67. The Tribunal is within its power to draw an inference that the Respondent is acting in bad faith and attempting to avoid or delay the arbitration by taking the dispute to the Commercial Court. This strong-arm tactic places an undue burden on Claimant to prepare for litigation not envisaged at the time it entered into the agreement. As the largest distributor of wine in Equatoriana, Respondent is arguably in a much better position to afford the additional costs of litigation than Claimant. The JAMS Rules provide the Tribunal with authority to take into account an act of bad faith on the part of one of the parties.

B. CLAIMANT IS ENTITLED TO RECOVER ITS COSTS OF DEFENDING THE COURT ACTION

68. JAMS Rule 30.2 states:

> Unless the parties agree otherwise, the parties expressly waive and forgo any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision will not limit the Tribunal's authority to take into account a party's dilatory or bad faith conduct in the arbitration in apportioning arbitration costs between or among the parties.

69. The Tribunal is hereby requested to declare Respondent to have breached its obligations to Claimant and to order Respondent to terminate its litigation in the Danubia Commercial Court. In keeping with the JAMS Rules, the Tribunal is further requested to award Claimant its full costs associated with the litigation in the court, as well as its proportional costs in this proceeding.

CONCLUSION ON JURISDICTION

70. The Tribunal's authority to determine its own jurisdiction is not in dispute. The Tribunal should not stay the arbitration, as Respondent fails to demonstrate any of the accepted criteria for a stay. Its argument is based on an objection to duplicative costs that result from its own actions. Proceeding with the arbitration will save time and money, while honoring the parties' manifest intention to arbitrate. Respondent selected, and Claimant accepted, an arbitration clause that covers the formation of a contract and issues of arbitrability. The clause is separate from the other contract terms and survives any challenge to the contract. The agreement is enforceable under all applicable laws, and further validated by the parties' intent. Consequently, by appealing to the Commercial Court Respondent breached its obligation to arbitrate and the Tribunal should find accordingly.

IV. THE PARTIES CONCLUDED A BINDING CONTRACT OF SALE

71. As a preliminary matter, Claimant notes that the CISG is applicable to international sales contracts. Both Equatoriana and Mediterraneo are parties to the CISG and there is no choice of law clause in the present contract *[Statement of Claim ¶15]*. The Convention applies "to contracts of sale of goods between parties whose places of business are in different States" *[CISG Art. 1(1)(a)]*. Further, Respondent agrees that the rules in Part 2 of the CISG govern the formation of such contracts, including the one at issue here *[Statement of Defense ¶2]*. It is therefore undisputed that the CISG states the applicable law in this case.

72. The parties concluded a binding contract on 21 June 2006, when Respondent received the signed purchase order from Claimant in accordance with CISG Article 18(2). Respondent does not dispute that its purchase order constituted a valid offer, which became effective when it reached Claimant's place of business *[CISG Arts. 15(1), 24]*. The purchase order made the terms of the contract clear and "sufficiently definite" *[CISG Art. 14(1)]*: Claimant

was to deliver, in four installments, 20,000 cases of "Blue Hills 2005" wine for a total price of US$1,360,000. Nevertheless, Respondent contends that the offer was revoked before Claimant dispatched an acceptance, which would have prevented the conclusion of the contract *[CISG Art. 16(1)]*. This is the only element of the contract's formation disputed by Respondent.

73. The Arbitral Tribunal should find that the contract is binding because: **(A)** Respondent's offer was irrevocable before 21 June 2006 *[CISG Art. 16(2)]*; and **(B)** Respondent's purported revocation was ineffective anyway because it did not reach Claimant before an acceptance was dispatched *[CISG Arts. 16(1), 24]*. These arguments are in the alternative, so that even if the Tribunal decided that Respondent's offer was revocable, it could still conclude that the offer was not effectively revoked.

A. RESPONDENT'S OFFER WAS IRREVOCABLE

74. Respondent's offer of 10 June 2006 was irrevocable before 21 June 2006 because: **(1)** under CISG Article 16(2)(a), Respondent indicated "by stating a fixed time for acceptance" that revocation was precluded until 21 June 2006; and **(2)** under CISG Article 16(2)(b), Claimant reasonably relied on Respondent's offer being irrevocable and acted in reliance on that offer.

1. Respondent made the offer irrevocable by stating a fixed time for acceptance

75. Respondent clearly stated a fixed time for the acceptance of its offer by telling Claimant that it was "under rather intense time pressure" and would turn to another wine "if the contract closing were to be delayed beyond 21 June 2006" *[Cl. Ex. No. 4]*. From this statement, Claimant reasonably believed that Respondent's offer was irrevocable until 21 June 2006, and that it had until this date to accept. Respondent argues that the offer was not irrevocable, because the fixed time period was merely intended to set a time at which the offer would lapse. This conclusion is founded upon a flawed interpretation of Article 16(2)(a) and should be rejected by the Tribunal. Rather, based on **(a)** the plain text of Article 16(2)(a); **(b)** the parties' conduct; **(c)** the overwhelming weight of scholarly opinion; and **(d)** practical policy considerations, the Tribunal should find that the offer was irrevocable before 21 June 2006.

a. The plain language of Article 16(2)(a) indicates irrevocability

76. The Vienna Convention on the Law of Treaties provides the general rule of interpretation for international treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" *[Vienna Convention Art. 31]*. CISG Article 16(2)(a) states that an offer will be irrevocable if it indicates this fact "by stating a fixed time for acceptance or otherwise."

77. The ordinary meaning of Article 16(2)(a) must be that there are several possible ways for an offer to indicate irrevocability, as the term "or otherwise" makes clear. However, "stating a fixed time for acceptance" is a definite and sufficient indication of an offer's irrevocability. The CISG requires no additional facts or statements for an offer to be considered irrevocable. Rather, the language indicates that a fixed time is enough, even if more could be done. Consequently, "the mere statement of the duration of the offer will be sufficient to create an irrevocable offer under CISG" *[Murray 25].*

78. In this case, Mr. Wolf for Respondent stated a fixed time for acceptance by requiring that Claimant "promptly" sign and return the contract, adding that he would "have to turn to another quality wine . . . if the contract closing were to be delayed beyond 21 June 2006" *[Cl. Ex. No. 4].* This fixed time period for acceptance indicated the irrevocability of the offer until at least 21 June 2006. Therefore, Respondent could not possibly have revoked the offer before Claimant dispatched the acceptance, and the parties formed a binding contract of sale.

b. The parties' conduct confirms that the offer was irrevocable

79. In addition to the plain language of Article 16(2)(a), the parties' conduct also shows that the offer was irrevocable. When Claimant received Respondent's offer, Mr. Cox was away from his office on a business trip and was not expected back until 19 June 2006. Because his authorization was required before the purchase order could be signed and returned, his Secretary, Ms. Kringle, contacted Respondent to inform Mr. Wolf that Claimant would be unable to accept the offer until at least 19 June 2006 *[Cl. Ex. No. 6].* Mr. Wolf acknowledged that this was acceptable and said nothing about the offer being revocable before Claimant had an opportunity to consider whether to accept it *[Cl. Ex. No. 7].*

80. Claimant understood this correspondence as reaffirming the presumption of irrevocability created by the statement of a fixed time for acceptance. Therefore, Claimant did nothing to arrange alternative authorization, if possible, or to contact Mr. Cox to inform him of the offer. When interpreting the parties' correspondence, the Tribunal should have regard to CISG Article 8(1): "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."

81. This contract was important to Claimant. It was the first time Claimant's wine would have been sold in Equatoriana. Respondent was "the launch customer" for this new business venture *[Cl. Ex. No. 8].* Given the contract's importance, Claimant would not have left the offer unattended if there were a possibility that Respondent might suddenly revoke it. Claimant therefore expected that something as serious as the potential revocability of the offer would be made explicit to them. This expectation is particularly reasonable in light of Respondent's awareness that Claimant would be unable even to consider acceptance of the offer until 19 June 2006. Consequently, the Tribunal should interpret this correspondence

between the parties as further evidence of the irrevocability of Respondent's offer. Had the offer been revocable, both parties would have behaved differently.

82. Nothing in the parties' language or conduct suggests that either Claimant or Respondent considered the possibility of Respondent's offer being revoked. When Mr. Cox returned from his trip on 19 June 2006, he immediately signed and returned the order. At the time he dispatched Claimant's acceptance, Respondent's offer was irrevocable and the contract was concluded when the acceptance reached Respondent on 21 June 2006.

c. Scholarly opinion supports finding the offer was irrevocable

83. Since "there are no reported cases on [Article 16(2)(a)]," scholarly opinion should be used to guide interpretation of this provision *[UNCITRAL Digest of Case Law, Art. 16]*. Scholars have consistently described CISG Article 16 as "a compromise solution" between differing common law and civil law approaches to the revocability of offers *[Vincze in Felemegas 85; Winship 7; Ohnesorge/West 77]*. In general, the common law approach is that "the statement of a fixed time for acceptance merely indicates a time at the end of which an offer will lapse" *[Feltham 346]*. However, in many civil law countries, "a fixed time for acceptance is generally likely to be taken as indicating that the offer is irrevocable for that period" *[Id.]*. This approach has been adopted in Germany, Japan and Switzerland, where offers are considered automatically irrevocable for at least a reasonable period of time *[Malik 27]*.

84. Respondent argues that the fixed time for acceptance stated by Mr. Wolf should be interpreted using the common law approach. However, if, as most scholars suggest, CISG Article 16(2)(a) is genuinely a compromise between these two different approaches, then the interpretation Respondent urges must fail. Instead, the provision should be interpreted "in the spirit of civil law whose rule it embodies" *[Id. at 37]*. Consequently, "a fixed time should make the offer irrevocable, unless contrary intent is explicit" *[Id.]*. Since civil law countries accept the common law revocability rule in CISG Article 16(1), "common law countries should also make the concession of accepting irrevocability of offer in situations where it is coupled with an indication of a fixed time for acceptance, even if the offeror intended to fix a time for lapse" *[Id.]*.

85. Further, Respondent's argument that a common law approach would necessarily lead to the offer being revocable is undermined by the general movement in national and international practice toward strengthening the irrevocability of offers. Many common law countries are increasingly tending towards the civil law approach. For example, in the United States, the traditional common law rule of revocability has been modified by Article 2-205 of that country's Uniform Commercial Code (UCC) so that an offer will be irrevocable if made by a merchant in writing and contains an assurance that it will be held open (a "firm offer"). This

is a substantial departure from the old revocability rule *[James Baird].* Canadian law demonstrates a similar trend *[Vincze in Felemegas 88].*

86. Even if the Tribunal considers the plain text of Article 16(2)(a) unclear, many commentators posit that, at the very least, "the reference to a 'fixed time for acceptance' creates a presumption of irrevocability until the stated date" *[Honnold 163].* In some circumstances, this presumption may be rebutted by evidence that the fixed time was not understood as a promise not to revoke. The burden of rebutting this presumption falls on Respondent, and the conduct of the parties in the circumstances is evidence for the offer being understood as irrevocable *[see Supra, (A)(1)(b)].*

87. This presumption of irrevocability makes sense given that the offeror has the opportunity to make the terms of his offer as clear as possible: "An offeror who wishes to set a date for expiration of the offer and also to reserve the power to withdraw the offer should make this meaning clear. The Convention . . . respects the basic principle that the offeror is 'master of its offer'" *[Id.].*

88. Finally, a minority of commentators have suggested that a fixed time period may not indicate irrevocability where the offeror and the offeree are both from common law countries and might expect offers to be automatically revocable *[Vincze in Felemegas 91].* That suggestion does not apply here because Claimant's country of origin does not apply common law rules on contract formation *[Proc. Order No. 2].* However, even if Mediterraneo were a common law jurisdiction, the Tribunal should avoid this conclusion as it seriously undermines the CISG's objective, stated in its Preamble, of "the adoption of uniform rules." Allowing the revocability of offers to vary according to the parties' origins would be contrary to the spirit of uniformity in the CISG. Because Article 31 of the Vienna Convention on the Law of Treaties requires international treaties to be interpreted "in light of their object and purpose," the Tribunal should find accordingly.

d. Practical policy considerations favor finding irrevocability

89. In addition to the scholarly opinion on CISG Article 16, Claimant's argument that Respondent's offer was irrevocable is also supported by practical policy considerations. Clear rules are required for the governance of international commercial transactions, which, unlike most domestic sales contracts, presuppose a host of related contracts such as transnational carriage, mode of international payments, and insurance *[Malik 37].* Lack of clarity may give parties an incentive to make illusory promises because they know they will not be held to their commitments.

90. Moreover, revocation in the context of a fixed time for acceptance contravenes the principle of good faith implicit in the CISG. In working toward the conclusion of an international deal, parties should have confidence in the actions of their business partners. Many courts and tribunals have noted the importance of the parties' good faith, especially in the context of

international trade *[ICC Award No. 8365 1078, 1079; ICC Award No. 9593 107; Aiton Australia at 255].* Here, Respondent told Claimant it would have a fixed period in which to accept the offer. To maintain fairness, the Tribunal should hold Respondent to its commitment.

91. In sum, the complexities of international business require offers to be irrevocable in cases such as the one before the Tribunal. Respondent made an international sales offer and stated a fixed time period within which Claimant could accept the offer. In light of the international nature of the contract, and considering the correspondence between Ms. Kringle and Mr. Wolf, Claimant understood that the offer was irrevocable until 21 June 2006.

2. Claimant acted in reasonable reliance on the irrevocability of the offer

92. Under CISG Article 16(2)(b), an offer cannot be revoked if "it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." This provision has two essential elements: **(a)** there must be "reasonable" reliance; and **(b)** there must be an act by the party relying on the offer *[Vincze in Felemegas 90].*

a. Claimant's reliance was reasonable

93. Claimant reasonably relied on the irrevocability of Respondent's offer, as evidenced by the correspondence between Ms. Kringle and Mr. Wolf. Reliance on the irrevocability of an offer is reasonable if "another party in the same situation should have reached the same conclusion . . . . The irrevocability of the offer may be the result of circumstances" *[Enderlein/Maskow 90].* Circumstances likely to give an offeree "good reason" to believe that the offer was irrevocable include where "time- and cost-consuming investigations" are necessary for the acceptance of the contract *[Id.]* or "in the case of urgent orders" *[Vincze in Felemegas 90].*

94. Having received Mr. Wolf's letter of 10 June 2006, which contained Respondent's offer, Ms. Kringle promptly informed Respondent that Mr. Cox would be away from the office until 19 June 2006 and that the purchase order would receive his immediate attention upon his return *[Cl. Ex. No. 6].* Later the same day, Mr. Wolf acknowledged this, emphasizing that Mr. Cox should act on the order "immediately on his return" because Respondent was now "operating under a narrow time frame" for the September wine promotion *[Cl. Ex. No. 7].* Mr. Wolf did not say that Claimant needed to reply before 19 June 2006.

95. In these circumstances, where Claimant had informed Respondent that the person authorized to accept the contract was absent but would give immediate attention to the offer upon his return, Ms. Kringle's reliance, for Claimant, on the irrevocability of Respondent's offer was entirely reasonable.

b. Claimant acted in reliance on the offer's irrevocability

96. Claimant also *acted* on its reasonable reliance on the irrevocability of Respondent's offer, as required by CISG Article 16(2)(b). In this respect, "act means not only a positive act, but also a failure to act" *[Giannini 12]*. Further, according to the decision of the U.S. District Court for the Southern District of New York in Geneva Pharmaceuticals, CISG Article 16(2)(b) does not require the offeree's reliance to be foreseeable to the offeror nor detrimental to the offeree *[Id.]*.

97. Claimant "failed to act" within the meaning of Article 16(2)(b) when Ms. Kringle refrained from contacting Mr. Cox during his absence to inform him of the offer. Had she done so, he could have taken more expedient action to either accept or reject Respondent's offer earlier. In light of the contract's extreme importance to the Claimant (it was the first time that Claimant's wine would be sold in Equatoriana), if Ms. Kringle had been aware that Respondent might attempt to revoke its offer before 21 June 2006 she would surely have made more effort to contact Mr. Cox. Ms. Kringle could easily have tried a personal telephone number, or alternatively, found someone else at Claimant's place of business who could accept the offer in Mr. Cox's absence. But she did none of these things. Instead, in reasonable reliance on Respondent's irrevocable offer, she awaited Mr. Cox's return.

98. Further, it was foreseeable to Respondent that Ms. Kringle would take no action until Mr. Cox returned. Claimant's reliance-based inaction was ultimately detrimental, as Respondent subsequently attempted to revoke its offer and refused to honor its contractual obligations.

99. In sum, because Ms. Kringle's inaction demonstrates her direct and reasonable reliance on Respondent's offer being irrevocable until 21 June 2006, Claimant reasonably relied on the irrevocability of Respondent's offer and, further, acted on this reliance within the meaning of CISG Article 16(2)(b). Accordingly, the Tribunal should find that Respondent's offer was irrevocable under CISG Article 16(2)(b) until 21 June 2006 and that, as a result, a contract was concluded between the parties when Claimant's acceptance reached Respondent on 21 June 2006 *[CISG Art. 18(2)]*.

B. RESPONDENT'S PURPORTED REVOCATION WAS INEFFECTIVE

100. Even if Respondent's offer had been revocable, Respondent's purported revocation would remain ineffective because: **(1)** e-mail was not an appropriate form of communication for the revocation message in the circumstances; and **(2)** Respondent's e-mail did not "reach" Claimant before an acceptance was dispatched *[CISG Arts. 16(1), 24]*.

1. E-mail was not appropriate for a revocation message in these circumstances

101. Respondent's e-mail of 18 June 2006 was an unsuitable form of communication for revocation in these particular circumstances. Respondent had repeatedly emphasized the urgency of the situation to Claimant and it was foreseeable that Mr. Cox would attend to the

contract immediately upon his return, even before checking his e-mail inbox. Respondent was aware of these circumstances and yet did nothing to bring the e-mail to Claimant's attention. A single e-mail, unaccompanied by a hard copy and sent late on a Sunday afternoon, was an anomalous form of communication in light of the parties' previous course of dealing, which involved the use of couriers to transmit hard copies. Given the ease with which Respondent could have confirmed Claimant's receipt of the e-mail, the Tribunal is requested to conclude that Respondent's e-mail was incapable of revoking its offer.

102. Communications between negotiating parties are not always intended or understood to have binding, and therefore legal, effect. In relation to such communications, CISG Article 8(1) states that "statements made by . . . a party are to be interpreted according to his intent." Moreover, in discerning either the actual intent of the parties or their understanding, "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, [and] usages" *[CISG Art. 8(3)]*. CISG Article 9(1) states, "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."

103. Taken together, these provisions mean that "parties to a contract might be or become bound by a particular course of dealing which they have established as between themselves, by virtue of their previous commercial practices and conduct, and which can fairly be regarded as a common basis of understanding for interpreting their expression and other conduct"*[ICC Award No. 9117 96]*.

104. The 1996 UNCITRAL Model Law on Electronic Commerce is a further essential guide to interpretation, particularly because both Equatoriana and Mediterraneo have adopted it as national legislation *[Proc. Order No. 2 ¶4]*. Article 12 of the Model Law recognizes that "a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message." However, the 1996 Guide to Enactment instructs, "Article 12 is not to impose the use of electronic means of communication . . . . Thus, Article 12 should not be used as a basis to impose on the addressee the legal consequences of a message, if the use of a non-paper-based method for its transmission comes as a surprise to the addressee" *[1996 Guide to Enactment 48, 78]*.

105. An examination of the parties' modes of communication throughout their negotiations up until the Respondent's purported revocation on 18 June 2006 reveals an established course of dealing, which falls within "established practices" in CISG Art. 9(1). Communications between Mr. Wolf and Mr. Cox were never conducted solely by means of electronic communication. The only e-mail between the two men was accompanied by a hard copy sent by courier *[Cl. Ex. Nos. 1-4, 8]*. Mr. Wolf's purported revocation e-mail was therefore an anomaly in the established practice between the two *[Cl. Ex. No. 9]*. In light of this established practice, Claimant was entitled to expect more than a single e-mail to revoke the

offer, especially given the extreme implications of any revocation for Claimant. As it constituted the first international sales agreement between the parties, and was worth US$1,360,000, the conclusion of a contract was very important to both Claimant and Respondent.

106. Given this established practice, a revocation message of such importance required Respondent to do more than send one brief e-mail to Claimant, receipt of which was not confirmed (either electronically or by telephoning the Claimant), on a Sunday afternoon. In light of the significant consequences of the message for both parties, it would have been prudent for Respondent to confirm that the message had been received. This is especially true since Mr. Wolf was aware that Mr. Cox would attend to the contract immediately upon his return, as requested by Respondent itself, and that he was likely do so before checking his e-mail inbox. It is probable that his inbox was rather full because of his absence and going through all of his messages would be a time-consuming task. As a result of their established practice, Claimant would not expect an unaccompanied e-mail from Respondent.

107. Therefore, it was reasonable and foreseeable to Respondent that, as the extreme urgency of the situation had been made so clear to him, Mr. Cox would dispatch Claimant's acceptance before checking his e-mail inbox. This conclusion is further supported by Article 12 of the Model Law on Electronic Commerce, which prohibits electronic communications that, as Mr. Wolf's e-mail did, "surprise" the addressee. Claimant does not argue that e-mail is generally an unacceptable form of communication in contractual negotiations. The relevance of e-mail in many commercial negotiations is undisputed. Rather, Claimant contends that *in this particular situation*, the use of unconfirmed e-mail for such a critical communication came as an unreasonable "surprise" to Claimant, and that it is therefore improper to allow Respondent to rely upon it now.

108. As a matter of public policy, the forms of communication used by parties to conduct their dealings should be foreseeable to each of them. While negotiating parties could choose from a number of efficient and reliable communication methods—including voice-mail, text messaging, instant messaging, or even through online communities and social networking websites—in many commercial negotiations such modes of communication would not be sufficient to alter the legal position of the parties unless established as a regular method of dealing between them. The Tribunal should not allow an anomalous e-mail, sent in violation of an established course of dealing, to substantially alter the parties' contractual relationship, resulting in such significant commercial implications for both parties.

2. Respondent's email did not "reach" Claimant before it accepted the offer

109. Even if e-mail could be considered an appropriate form of revocation in the circumstances, Respondent's e-mail indicating its intent to revoke the offer was ineffective because it did not "reach" Claimant before Mr. Cox dispatched an acceptance. This conclusion is compelled by

CISG Article 16(1), which states that an offer may only be revoked "if the revocation reaches the offeree *before he has dispatched an acceptance*" *[emphasis added]*. In the period between the dispatch of an acceptance and "the moment the indication of assent reaches the offeror" which makes the acceptance effective, an offer *cannot* be revoked *[CISG Arts. 16(1), 18(2)]*. Therefore, Respondent's revocation arrived too late to be effective and a contract was ultimately concluded when Claimant's acceptance reached Respondent.

110. CISG Article 24 states that "an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address." Article 24 is silent on the subject of e-mail, and the CISG provides no explicit guidance on when an e-mail is considered to "reach" the recipient *[Eiselen 27]*. However, the Model Law on Electronic Commerce, which both Equatoriana and Mediterraneo have adopted, supports interpreting CISG Article 24 to mean that an e-mail does not "reach" the addressee simply by entering its server.

111. Article 15(2) of the Model Law states that receipt of a data message occurs when it enters the addressee's information system. Clarifying Article 15, the Guide to Enactment explains that "*where the information system of the addressee . . . functions improperly*" the message may not bind the recipient because "the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times" *[1996 Guide to Enactment 56; emphasis added]*.

112. Further, a revocation is only effective when it is actually communicated to the offeree. Even in common law jurisdictions, where the "postal rule" allows the acceptance of an offer to be effective as soon as it is posted (even if it does not actually arrive at the addressee's location), the rule for revocation is different: "To be effective, the revocation must be communicated to and received by the offeree and not just be posted. This is the receipt rule, and applies whether the communication is instantaneous or otherwise" *[Haigh 36]*.

113. The need for revocation to actually be communicated to the recipient is demonstrated by the English case of Byrne v. van Tienhoven, where Lindley J in the Common Pleas Division held that "a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties" *[Byrne at 3447]*. More recently, the English House of Lords classified telex messages, similar in many ways to e-mails, with other forms of instantaneous communication, such as the telephone *[Brinkibon 41]*. Lord Wilberforce stated that such forms of communication were subject to "the general rule . . . that a contract is formed when acceptance of an offer is communicated by the offeree to the offeror" *[Id.]*. This is applicable to revocation messages sent by the offeror as well. The use of English common law authority on this issue is especially appropriate given the common law origin of the revocability rule in Article 16(1) *[see supra, (A)(1)(c)]*.

114. Although Mr. Wolf's e-mail purporting to revoke Respondent's offer was sent on 18 June 2006, the data message could not be retrieved until the afternoon of 19 June 2006, after Mr. Cox had dispatched Claimant's acceptance *[Cl. Ex. No. 10].* In accordance with the Model Law's Guide to Enactment, the service failure on 18 June 2006 meant that the message did not "reach" Claimant until after the acceptance was dispatched. Any other conclusion would effectively place Claimant under the burdensome obligation of maintaining its information system functioning at all times, which is entirely contrary to the intent of the Model Law.

115. Further, requiring notification of the revocation to actually be communicated to Claimant is fair and reasonable in the circumstances of this case. The legal effectiveness of an electronic communication should accord with "the observance of good faith in international trade" highlighted in CISG Article 7(1). In this case, several factors indicate that the revocation message should be considered ineffective. First, Respondent "surprised" Claimant with an e-mail message contrary to an established practice between the parties.

116. Second, there are "risks involved in the transmission of the communication" and, as the choice of communication method was Respondent's, it should bear the burden of those risks *[Eiselen 26].* E-mail is not a risk-free form of communication: "E-mails can suffer from delays, they can 'disappear,' be rejected by corporate firewalls, arrive incomplete, or become garbled for any number of technical reasons. Any of these factors can occur at any stage in the transmission process" *[Haigh 28].*

117. Third, "if [a] party is in a position to monitor the success of a communication with relative ease and little cost, then fairness may dictate that this party should bear the risk" *[Eiselen 26].* Respondent was in a position where confirmation of receipt of the e-mail would have been easily achieved, whether by a telephone call to Claimant or other electronic means of acknowledgment. In light of these fairness issues, the Tribunal should find that Respondent's e-mail was ineffective to revoke the offer and, consequently, that a contract was concluded between the parties.

V. CLAIMANT'S WINE WAS FIT FOR THE PURPOSES OF THE CONTRACT

118. Claimant's wine was fit for all purposes of the parties' contract. Respondent only disputes the fitness of the wine for the "particular purpose" of a wine promotion, and does not appear to dispute the wine's fitness for ordinary purposes *[Statement of Defense ¶19].* Nor could Respondent do so, as the wine was entirely suitable for ordinary usage, being both safe for consumption and of reasonable quality. Further, Claimant argues that "Blue Hills 2005" also conforms to all "particular purposes," as it was a suitable wine for the promotion. Consequently, in accordance with CISG Article 35, the wine is: **(A)** fit for all purposes for which wine would ordinarily be used; and **(B)** suitable for all particular purposes made known to Claimant at the time the contract was concluded. Thus, Claimant conformed to the contract and Respondent must now make payment and take delivery of the wine.

A. CLAIMANT'S WINE CONFORMED TO ALL ORDINARY PURPOSES

119. Claimant's wine conformed to the "quantity, quality and description required by the contract" *[CISG Art. 35(1)]* and was "fit for the purposes for which goods of the same description would ordinarily be used" *[CISG Art. 35(2)(a)]*. The wine conformed to the contract because: **(1)** Claimant was prepared to deliver the quantity of "Blue Hills 2005" wine required by the contract; **(2)** "Blue Hills 2005" is safe for consumption; **(3)** "Blue Hills 2005" is of reasonable quality; and **(4)** the addition of a sweetener to "Blue Hills 2005" was reasonable in the circumstances and does not affect the quality of the wine. Therefore, the Tribunal should find that "Blue Hills 2005" conforms to the parties' contract.

1. Claimant made available 20,000 cases of wine, per Respondent's order

120. Respondent promised in its purchase order to pay for 20,000 cases of "Blue Hills 2005" wine at a price of US$68.00 per case for a total price of US$1,360,000, and to take delivery in four installments *[Cl. Ex. No. 5]*. Claimant was prepared to deliver this quantity of "Blue Hills 2005" wine, as specified in the contract and examined by Mr. Wolf at the May 2005 Durhan Wine Fair *[Cl. Ex. Nos. 2, 11, 12]*. Therefore, the wine that Claimant was prepared to deliver conforms to the quantity and description agreed in the contract.

2. "Blue Hills 2005" is safe for consumption

121. Since the wine is intended for consumption, it must be safe to drink. "Blue Hills 2005" is safe. The small amount of diethylene glycol that was necessarily added to "bring the must to the proper level for fermentation" did not contaminate the wine *[Cl. Ex. No. 13]*. Yale University Professor Mark Cullen and University of Wisconsin Professor Steven Taylor have concluded that wine with a low level of diethylene glycol is not harmful: "A consumer who drank wine containing [a] small amount of diethylene glycol would not have experienced any adverse health effects" *[Molotsky]*. Professor Sven Ericson, Head of the Wine Research Institute at Mediterraneo State University, agrees that it would "be necessary to consume an extraordinary amount of Blue Hills 2005 before there would be any health concerns . . . . The alcohol in the wine would induce toxic effects prior to those resulting from the diethylene glycol" *[Cl. Ex. No. 13]*.

3. "Blue Hills 2005" is of reasonable quality

122. Article 35(2)(a), the default rule for conformity of goods, states that goods conform to the contract if they "have the characteristics necessary for their normal or commercial use" *[Henschel 191]*. In the absence of internationally-accepted fixed standards, "the starting point for assessing ordinary use is objective, in other words, it should not be made on the basis of what the individual buyer or seller believes about it, since that would arbitrary" *[Id. at 197-99]*.

123. A commercial contract for a consumable, such as wine, requires that the goods be safe for consumption and of sufficient quality to be resold. The first of these two purposes has been addressed above. In connection with the purpose that consumable goods should be capable of being resold, "there is a dispute about whether . . . they should be average quality or merely of merchantable quality, so that goods of below average quality may also be said to conform to the contract" *[Id. at 204]*. Application of an alternative "reasonable" standard seems to have solved this dispute. A recent arbitral tribunal in the Netherlands held that "neither the merchantability test nor the average quality test are to be used in CISG cases and that the reasonable quality standard . . . is to be preferred" *[Netherlands Arbitration Institute Case No. 2319 ¶117]*. Further, "this solution is in conformity with the UNIDROIT Principles Article 5.1.6, which explicitly refers to a reasonable quality that is not less than average in the circumstances" *[Id.]*.

124. The Netherlands Arbitral Tribunal concluded that "goods are fit for their ordinary use if it is reasonable to expect a certain quality having regard to price and all other relevant circumstances" *[Id. at ¶118]*.

125. While the Claimant encourages the Tribunal to assess the wine using the "reasonable" quality test, the wine would in fact conform to any of the three aforementioned tests, as it is of a higher standard than that required to be capable of resale. In addition to being safe for consumption, the wine is of award-winning quality, being "among the best [its] price bracket" *[Cl. Ex. No. 2]*. Respondent agreed that "Blue Hills 2005" was an "exceptionally fine wine" and the Durhan Wine Fair judges awarded it a prize for its quality and price *[Cl. Ex. Nos. 1-3]*.

4. Adding a sweetener was reasonable and does not affect the wine's quality

126. Adding a sweetening agent to "Blue Hills 2005" was entirely reasonable following the "unusually cold and wet" growing season in 2005. As Professor Ericson said, "it is normal to introduce a sweetening agent to bring the must to the proper level for fermentation" *[Cl. Ex. No. 13]*. Most wine-producing countries, including Australia, New Zealand, South Africa and the United States, allow sweetening agents to be added to wine, and it is considered acceptable practice *[Galpin 42]*. The European Union also provides various ways to sweeten wine *[Id.]*.

127. Moreover, the addition of this particular sweetening agent, diethylene glycol, accords with international standards. The International Oenological Codex, produced by the International Organisation of Vine and Wine, which has "recognized competence for its works concerning vines, wine, [and] wine-based beverages" permits small amounts of diethylene glycol *[OIV Codex]*.

128. Further, in one of the cases to emerge from the Austrian wine controversy of the 1980s, the German Federal Court of Justice held that the addition of diethylene glycol did not

necessarily mean that a wine would be unsuitable for an "Auslese" stamp of superior wine quality. The Court was clear that such a sweetener would not automatically disqualify a wine from reaching this high standard *[BGH NJW 1989, 218-20].*

129. Where the standards required of goods are not explicitly stated in the contract, the seller is not taken to be aware of the standards required in the buyer's country. A seller will only be held to the standards applicable in some country other than his own if he is explicitly made aware that certain standards are required under the contract. Absent a contrary indication, therefore, the norms and public law requirements in the seller's country are deemed applicable. This "absolutely prevailing opinion" is expressed and applied by the German Federal Supreme Court's 1995 well-known *Mussels* decision, where the court held that "the compliance with specialized public law provisions of the buyer's country or the country of use cannot be expected" *[Mussels citing Schlechtriem Art. 35, Bianca 274, Neumayer, Art. 35].*

130. In *Mussels*, a Swiss seller delivered mussels intended for consumption to a German buyer. The mussels contained a higher level of cadmium than accepted by Germany's public health regulations and thus could not be sold for consumption there. Nevertheless, the Court found the seller in conformity with its contractual obligations *[Mussels].* Consequently, it is "for the buyer to observe his own country's public law provisions and to specify those requirements in the sales contract" *[Kruisinga 51].*

131. Neither Equatoriana nor Mediterraneo have any specific laws or regulations governing the use of diethylene glycol in wine. Moreover, the amount of diethylene glycol that can be present in consumables in general in both countries is lower than the amount in "Blue Hills 2005" *[OIV Codex].* Therefore, the wine was not only factually safe, but it also complied with standards adopted in both parties' countries. In accordance with the *Mussels* rule, if Respondent wished to introduce a novel standard, that standard must have been made known. *Mussels* is especially compelling in the present situation since the mussels in that case did not comply with public law standards in the buyer's country, whereas Claimant's wine *does* comply with Equatoriana's national requirements.

132. Thus, Claimant's wine conforms to Equatoriana's national standards. But, even if it did not, the *Mussels* proposition provides that the norms in the seller's country are applicable unless the buyer has explicitly made the seller aware of alternative standards. In this respect, the Mutual Acceptance Agreement on Oenological Practices (1999), a multilateral treaty adopted by many of the world's leading wine-producing countries, is a practical recognition of the *Mussels* rule. Article 5(1) of the Mutual Acceptance of Oenological Practices states that "parties shall accept other's laws, regulations and requirements relating to oenological practices and the mechanisms to regulate them." As Respondent did not inform Claimant of any specific requirement relating to oenological practices, it must accept those of the Claimant.

133. Furthermore, Mr. Wolf is the "Principal Wine Buyer" for a major super market chain *[Cl. Ex. No. 2]*. Therefore, he can be considered a sophisticated wine connoisseur with detailed knowledge and expertise in his field. This high level of expertise meant that he knew or should have known about the poor growing season in 2005 and the likely consequences it would have for the wine production process.

134. Any such wine expert would also know that there is an enormous variety and range of sweetening practices used in different parts of the world, resulting in "major differences between the jurisdictions" *[Galpin 48]*. Further, an expert like Mr. Wolf would be aware that such sweeteners are often used to counter the negative effects of a bad season and, if the particular nature of the sweetener used mattered to him, it would be his duty to make that clear to the wine seller, as indicated by the *Mussels* rule. Mr. Wolf, despite his expertise, did not do so, and Claimant is therefore entitled to deliver wine that conformed to various prevailing standards, including those of its own country.

B. CLAIMANT'S WINE CONFORMED TO ALL KNOWN PARTICULAR PURPOSES

135. Claimant's wine is fit for "any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract" *[CISG Art. 35(2)(b)]*. Respondent has not clearly explained why the wine was not fit for any "particular purpose." Specifically, Respondent said nothing about diethylene glycol or any other sweetener, and certainly did not tell Claimant that sweeteners were unacceptable. However, Respondent seems to be arguing that the wine was not fit for the "particular purpose" of being used in Respondent's wine promotion.

136. For Respondent to successfully argue this under CISG Article 35(2)(b), it must satisfy four conditions. First, there must be a particular purpose for the goods. Second, explicitly or implicitly the seller must have been made aware of this particular purpose. Third, the seller must have been made aware of it before entering into the contract. And fourth, the buyer must have reasonably relied on the seller's skill and judgment in the circumstances *[Henschel 222]*.

137. Claimant does not dispute that the third condition is met here. However, the first, second, and fourth criteria are not present because **(1)** use in a wine promotion is not a "particular purpose" that imposes any special requirements beyond fitness for ordinary use; **(2)** Respondent did not reasonably rely on seller's skill and judgment in selecting an appropriate wine for its promotion; **(3)** Claimant's wine was suitable for Respondent's wine promotion; and **(4)** Respondent should not, as a matter of public policy, be able to enforce a requirement of "good reputation" without making this explicit in the contract.

1. The contract required nothing more than fitness for ordinary use

138. For CISG Article 35(2)(b) to apply, as Respondent argues, the goods must be intended for a purpose that lies outside what is considered the ordinary use of the goods. A typical example might be where the goods are to be used under special climatic conditions, such as in arctic regions, and this may lead to a requirement for the goods to be particularly durable *[Henschel 222]*. In a decision from the French Court of Appeals, a Portuguese buyer wanted to dismantle the warehouse he had bought from a French seller, and to re-assemble it elsewhere. The seller had been made aware of this unusual purpose and a portion of the contract price was attributable to dismantling the warehouse. Some metal elements of the warehouse were damaged in the process and it was impossible to re-assemble. The court held that the seller's goods did not comply with the contract because the buyer was made expressly aware of this unusual purpose, and the buyer was awarded compensation *[Id. at 224]*.

139. Respondent's wine promotion is not a "particular purpose" in the sense required by CISG Article 35(2)(b), as it connotes no special purposes that wine is not ordinarily used for. Because dismantling and then re-assembling a warehouse is not an ordinary purpose in the contemplation of parties when buying and selling a warehouse, the buyer had to make this "particular purpose" known. Using wine for a supermarket wine promotion is *not* an unusual purpose when sale of wine is contemplated, as it requires nothing more than that the wine be safe for consumption and of reasonable quality to be resold. These are the ordinary purposes of wine, and it was argued above that Claimant's wine conforms to all such purposes.

140. *Mussels* establishes that the norm for "particular purposes" is assumed to be that of the seller's country *[Id.]*. If Respondent had particular requirements for a special wine promotion, Respondent should have made Claimant aware of them in a "crystal clear and recognizable way" *[LG Darmstadt, 9 May 2000; LG München, 27 February 2002]*. It is possible to conceive of situations where certain wine promotions might require special qualities of wine. For example, an organic wine promotion might require a total absence of any additives. Respondent's promotion was not such an organic promotion, and, as Respondent did not make any special purposes "crystal clear" to Claimant, the Tribunal should reject Respondent's arguments based on non-conformity for any "particular purpose."

2. Respondent did not reasonably rely on claimant's skill and judgment

141. Further, Respondent did not, at any time, reasonably rely on Claimant's skill and judgment, as required by CISG Article 35(2)(b). Any such reliance is unreasonable "if the buyer takes part in the selection of the goods, examines the goods before purchase . . . or insists on a particular brand" *[Schlechtriem 422]*. In this case, Respondent had the choice of any of Claimant's wines exhibited at the Durhan wine fair, which included at least three award-winning wine varieties, as well as the numerous wines offered by Claimant's competitors *[Cl. Ex. Nos. 1, 2]*. After examining the wines on offer, Mr. Wolf specifically selected "Blue

Hills 2005" as "just the right character to take the lead in the promotion" *[Cl. Ex. No. 2]*. Consequently, Mr. Wolf had plenty of opportunity to sample and select the wine for the promotion and should not now be allowed to suggest that Claimant somehow chose the wine for him.

3. Claimant's wine was suitable for respondent's promotion

142. In any event, Respondent has offered no evidence to support a conclusion that the wine's reputation in fact has been substantially tarnished. Any negative publicity that may currently exist was originally generated by *Mediterraneo Today*, "a sensation seeking newspaper, that is always looking for scandal, and . . . will make it up if necessary" *[Cl. Ex. No. 10]*. Given the dubious credibility of this publication, consumers are unlikely to alter their purchasing habits based on one of its sensationalist articles.

143. Consequently, the effects of this publicity can be countered by Respondent's marketing team, which can point to the awards won by "Blue Hills 2005" and the legal action being considered by Claimant against the newspaper *[Cl. Ex. No. 10]*. In his report, Professor Ericson indicated that the negative reaction to wine from the Blue Hills region might be due to the newspaper mistaking *diethylene* glycol for *ethylene* glycol, which is toxic but which was not used in the wine production process. As he says, the two chemicals are "wholly distinct" and, while ethylene glycol is often used as an anti-freeze, diethylene glycol is rarely used for that purpose. To the extent that diethylene glycol can be used as anti-freeze, many safe products also have potentially undesirable alternative uses. For example, toothpaste may be used as oven-cleaner, but is no less safe because of it. Similarly, salt can be toxic in large quantities, and also has anti-freeze properties, but no one would dispute that it is safe to put in food in reasonable levels. By educating its consumers, Respondent can reduce any negative effects of the tabloid reports, if indeed consumers remember the stories at all.

144. Further, the sales of "Blue Hills 2005" in Equatoriana could have been affected by many factors, not just negative publicity. The parties' contract represented the first time wine from Mediterraneo would be sold in Equatoriana, and it may have been unpopular even without the newspaper reports, for example due to local or national consumer bias. Further, Claimant did not guarantee that the media would not publish false and defamatory articles about its wine, and it would be unreasonable to impose such a guarantee on Claimant. Both parties bore some amount of risk and structured their contract accordingly. The installment nature of the contract meant that Respondent did not have to take delivery of the fourth shipment of wine unless a minimum of 12,000 cases had been sold by 25 September 2006 *[Cl. Ex. No. 5]*. Furthermore, Respondent maximized its risk by choosing to order double the number of cases it had originally considered, the upper limit of the range acceptable to it *[Cl. Ex. No. 2]*. Consequently, it cannot be said with any certainty that the wine has a bad reputation and, even if it could, the contract already allocates the risk of this against Respondent.

4. Respondent never explicitly made a reputation requirement

145. The "particular purpose" Respondent alleges in this case concerns the reputation of the wine in Respondent's country, irrespective of the wine's actual content. Mr. Wolf for Respondent stated that "even though there may be no health concerns associated with the quantities [of sweetener] used in the Blue Hills 2005 . . . it would be inviting a commercial disaster to feature the wine in one of our promotions after the negative publicity it has received" *[Cl. Ex. No. 14].* This makes clear that Mr. Wolf was concerned about the potential adverse impact the sensationalist newspaper article might have on wine sales.

146. The abstract concept of "reputation" should not, as a matter of public policy, be considered an acceptable "particular purpose" capable of being "made known" so easily. Rather, good reputation, if desired by the buyer, should be well-defined and made explicit in the contract. This argument is supported by both the factual situation here, and by the broader requirements of international trade and commerce.

147. As previously explained, the risk of non-sale was allocated by the contract. Claimant bore a certain amount of risk because the fourth shipment was contingent on a certain level of wine sales. The Tribunal should not re-negotiate that risk after-the-fact, effectively allowing Respondent to shirk its obligations now that its share of the risk has materialized. In an inverse hypothetical situation, if a newspaper article praising Claimant's wine had been published, and Claimant could now demand a higher price for its wine in Equatoriana, it would not be permissible or fair to allow it to avoid the contract and go elsewhere for greater profits. Unpredictable fluctuations in reputation should not control such important international commercial transactions.

148. It is contrary to public policy to allow good reputation to become part of the contract without, at least, express stipulation. If the importance of reputation were to be made known in any case where the good name of the product were relevant, thousands of commercial, and even consumer, contracts could potentially be avoided by the argument that the contract was dependent on the products maintaining their good name. As almost every commercial transaction is linked to a brand, such as Gucci, Evian, or Nestle, any negative publicity associated with that brand could call into question the conformity of high-quality goods.

149. In this respect, the German Federal Court of Justice has avoided consideration of whether good reputation should constitute an inherent attribute of goods, deliberately leaving the question open when the issue arose in relation to the sale of a disreputable hotel *[Stundenhotel, BGH NJW 1992, 2564-2566].* The English courts are similarly aware of the significant commercial implications of allowing contracts to be avoided where the reputation of the goods has been affected, as the Court of Appeal decision in *International Galleries* suggests. In that case, a buyer was unable to set aside his contract for a painting when it emerged that it was not, as previously believed, a Constable.

150. Further, reputation is such a subjective and vague concept that courts and arbitral tribunals might become overwhelmed with a vast range of frivolous claims, making assessment of a uniform standard in meritorious cases difficult. This would severely undermine the CISG's aspirations to achieve "uniform rules" on sales standards *[CISG Preamble]*.

151. Therefore, as a matter of public policy, the Tribunal should not allow the reputation of Claimant's wine to constitute a relevant "particular purpose," and even if the Tribunal disagrees, Claimant's wine conforms to this "particular purpose" anyway.

CONCLUSION ON THE MERITS

152. Respondent's offer was irrevocable, either by virtue of the fixed time period or because of Claimant's reasonable reliance on irrevocability. Respondent's e-mail purporting to revoke the offer was insufficient to constitute a revocation and, in any case, did not "reach" Claimant in time to effect revocation. And Claimant's goods conform in all respects to the requirements of the concluded contract. The Tribunal should find accordingly.

REQUEST FOR RELIEF

In light of the submissions made above, Claimant respectfully asks the Tribunal to find:

(1) the arbitration should not be stayed;

(2) the parties formed a valid and enforceable arbitration agreement;

(3) Respondent acted in bad faith by filing suit in the Danubian court, and Claimant is entitled to recover its costs associated with that action;

(4) the parties formed a valid and enforceable contract of sale; and

(5) Claimant's wine conformed to the parties' contract.

Respectfully submitted on 6 December 2007 by

/s/	/s/
Andrew Dickson	Kim Fox
/s/	/s/
Martyn Naylor	Seth Schreiberg

on behalf of Claimant
MEDITERRANEO WINE COOPERATIVE