

FIFTEENTH ANNUAL  
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
14 TO 20 MARCH 2008

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# MEMORANDUM FOR CLAIMANT

*On Behalf of:*

**Mediterraneo Wine Cooperative**

140 Vineyard Park  
Blue Hills, Mediterraneo  
wine@off.mb

**CLAIMANT**

*Against:*

**Equatoriana Super Markets S.A.**

415 Central Business Centre  
Oceanside, Equatoriana  
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**RESPONDENT**



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**LIST OF ABBREVIATIONS**

¶	Paragraph
§	Section
Amended Claim	Amended Statement of Claim
Arb.	Arbitration
Art.	Article
Ass'n	Association
Austl.	Australia
Austr.	Austria
Belg.	Belgium
BLG	Bundesgerichtshof (Supreme Court of Germany)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CE	CLAIMANT's Exhibit No.
Cir.	Circuit
Ch.	Chapter
Claim	Statement of Claim
Co.	Company
CLOUT	Case Law on UNCITRAL Texts
DAL	Danubian Arbitration Law
Defense	Statement of Defense
DEG	Diethylene Glycol
Dr.	Doctor
ECC	2005 United Nations Convention on the Use of Electronic Communications in International Contracts
ed./eds.	Editor/Editors
GAOR	United Nations General Assembly Official Record
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
<i>i.e.</i>	“id est” (that is)



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<i>Infra</i>	“below”
<i>e.g.</i>	“ <i>exempli gratia</i> ” (for example)
<i>et seq.</i>	“ <i>et sequentes</i> ” (and following)
FDA	United States Food and Drug Administration
Fr.	France
Ger.	Germany
<i>Ibid.</i>	“ <i>ibidem</i> ” (the same)
ICC	International Chamber of Commerce
Inc.	Incorporated
<i>infra</i>	“ <i>vide infra</i> ” (see below)
<i>ipso jure</i>	“by the law itself”
Int’l	International
JAMS	Judicial Arbitration and Mediation Service
Ltd.	Limited
Model Law on EC/ML-EC	UNICITRAL Model Law on Electronic Commerce
Ms.	Miss
Mr.	Mister
Neth.	The Netherlands
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 7 June 1959
No	Number
OLG	Oberlandesgericht
PO	Procedural Order
PO2	Procedural Order No. 2
<i>Q</i>	Question
Req. for Arb. & St. of Cl.	Request for Arbitration and Statement of Claim
SA	Société Anonyme [ <i>France</i> ]
SDNY	Southern District of New York [ <i>Federal District Court—USA</i> ]
Sess.	Session
SpA	Societate per Azioni [ <i>Italy</i> ]



Supra	See Above
Switz.	Switzerland
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UK	United Kingdom
USA	United States of America
<i>v.</i>	Versus



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**Russia**

Sojuznefteexport v. Joc Oil Limited, Award in case no. 109/2980 (1984)  
*cited as: Sojuznefteexport v. Joc Oil (1984) (Russia)*  
*appears in: ¶15, 18*

**Switzerland**

Saudi Arabia v. ARAMCO  
27 ILR 117 (August, 23 1958)  
*cited as: Saudi Arabia v. ARAMCO (1958) (Switz.)*  
*appears in: ¶30, 37*

**United Kingdom**

Harbour Assurance Co. v. Kansa General, 1 Lloyds Rep 81, (1992)  
*cited as: Harbour Assurance Co. v. Kansa General (1992)(UK)*  
*appears in: ¶15*

Premium Nafta Products Limited v. Fili Shipping Company Limited, UKHL 40, House of Lords, (2007)  
*cited as: Premium Nafta Products Ltd v. Fili Shipping Co. (2007) (UK)*  
*appears in: ¶23*

R.G. Carter Ltd. V. Edmund Nuttall Ltd., BLR 232 TCC, (2000)  
*cited as: R.G. Carter Ltd. v. Edmund Nuttall Ltd. (2000) (UK)*  
*appears in: ¶29*

**United States**

American Design Associates v. Donald Install Associates, 786 F. 2d 265, (Court of Appeals) (1996)  
*cited as: American Design Associates v. Donald Install Associates (USA) (1996)*

BHP Power Inc. and King Ranch Power Co. v. Reinhold, Yearbook Commercial Arb. XXIII 949, (1998)  
*cited as: BHP Power v. Reinhold (1998) (USA)*  
*appears in: ¶29*

Corcoran v. Ardra Insurance Co., Ltd., 77 N.Y. 2d 255, [Court of Appeals], (1990)  
*cited as: Corcoran v. Ardra Insurance Co. (1990) (USA)*  
*appears in: ¶21, 22*

Filanto, S.p.A. v. Chilewich International Corp., 789 F.Supp. 1229, [Federal District Court], (1992)  
*cited as: Filantro S.p.A. v. Chilewich International Corp. (1992) (USA)*  
*appears in: ¶24*

First Options of Chicago v. Kaplan, 514 U.S. 938, [Supreme Court], (1995)  
*cited as: First Options v. Kaplan (1995) (USA)*  
*appears in: ¶2, 10*

In re Petition of Transrol Navegacao SA v edirekommanditselskaber Merc Scandia, XVII Y.B. Com. Arb. 499, 502 (1993)  
*cited as: In re Petition of Transrol Navegacao (1993) (USA)*  
*appears in: ¶24, 27, 41*



Ledee v. Ceramiche Ragno,  
684 F.2d 184, [Court of Appeals, 1<sup>st</sup> Circuit] (1982)  
*cited as: Ledee v. Ceramiche Ragno (1982) (USA)*  
*appears in: ¶20*

Prima Paint Corporation v. Flood & Conklin Manufacturing Co., 388 U.S.  
395, [Supreme Court], (1967)  
*cited as: Prima Paint Corporation v. Flood (1967) (USA.)*  
*appears in: ¶15*

Republic of Nicaragua v. Standard Fruit Company,  
937 F.2d 469, [Court of Appeals, 9<sup>th</sup> Circuit], (1991)  
*cited as: Republic of Nicaragua v. Standard Fruit Co. (1991) (USA.)*  
*appears in: ¶18, 23, 29, 30*

Rhone Mediterranee Compagnia Francese Di Assicurazioni E  
Riassicurazione v. Achille Lauro, 712 F.2d. 50, [Court of Appeals, 3<sup>rd</sup>  
Circuit], (1983)  
*cited as: Rhone Mediterranee (1983) (USA)*  
*appears in: ¶18, 20*



**STATEMENT OF FACTS**

Mediterraneo Wine Cooperative (“CLAIMANT”) has filed a request for arbitration against Equatoriana Super Markets S.A claiming US\$1,360,000. (“RESPONDENT”). CLAIMANT produces and markets wine from grapes grown by its members. It sells wine in both domestic and international markets. RESPONDENT is the largest operator of supermarkets in Equatoriana, with about 2,000 outlets; it is the largest retailer of wine in Equatoriana.

From 7 to 10 May 2006, CLAIMANT participated in the Durhan Wine Fair in Oceania. RESPONDENT sent Mr. Wolf and his buying team to purchase wines not previously marketed in Equatoriana. RESPONDENT planned a wine promotion during the month of October 2006 in Equatoriana. While at the fair, RESPONDENT's team showed interest in a prize-winning red wine shown by CLAIMANT, “Blue Hills 2005”.

On 14 May 2006, CLAIMANT's Sales Manager, Mr. Steven Cox, initiated negotiations by mail with Mr. Wolf of RESPONDENT. On 22 May 2006, Mr. Wolf replied, also by mail, expressing his interest in featuring Blue Hills 2005 in RESPONDENT's upcoming wine promotion and estimating a purchase of between 10,000 and 20,000 cases of wine. On 1 June 2006, Mr. Cox replied, again by mail, offering \$72 per case for 10,000 cases or \$68 per case for 20,000 per case.

On 10 June 2006, Mr. Wolf sent Mr. Cox RESPONDENT’S standard form purchase order, requesting 20,000 cases of Blue Hills 2005. In addition to a schedule for delivery of the 20,000 cases, the purchase order contained an arbitration clause referring any dispute arising out of or relating to the contract, including disputes over formation, interpretation, breach or termination, to arbitration under the JAMS International Arbitration Rules in Vindobona, Danubia. In a letter accompanying the purchase order, Mr. Wolf indicated that the wine promotion had been moved forward to September, and thus CLAIMANT would have to accept RESPONDENT’S offer by 21 June 2006, or else RESPONDENT would use another quality wine in the promotion.

When the letter and purchase order arrived on 10 June 2006, Mr. Cox was on a business trip. Mr. Cox was expected to return on 19 June 2006. A message to this effect was sent to Mr. Wolf by Ms. Sarah Kringle, assistant to Mr. Cox, on 11 June 2006. Mr. Wolf replied the same day-by e-mail-asking Ms. Kringle to be sure to have Mr. Cox act upon the Purchase Order “immediately on his



return,” since RESPONDENT was operating within a narrow time frame for its September wine promotion.

Mr. Cox returned to the office on the morning of 19 June 2006, immediately signed and returned the contract to Mr. Wolf by courier service. The courier’s tracking service shows that it was received by RESPONDENT on 21 June 2006.

On the afternoon of 19 June 2006, Mr. Cox received a message from Mr. Wolf sent only by email purporting to withdraw the offer. The message was received by CLAIMANT’s server on 18 June 2006, but a problem in the software prevented the server from communicating with computers on CLAIMANT’S internal network. Mr. Wolf stated in his email that the reason for RESPONDENT’S purported withdrawal of the offer was that the newspapers in Equatoriana had reported that anti-freeze had been used to sweeten wine produced in Mediterraneo’s Blue Hills region.

Mr. Cox immediately answered the same day by both courier and email, stating that the newspaper articles were sensationalist and completely incorrect. CLAIMANT retained a world-renowned leader in wine production research, Professor Sven Ericson, to prepare an expert report. On 15 July 2006, Mr. Cox sent Mr. Wolf a copy of the executive summary of this report. Professor Ericson noted that ethylene glycol, not diethylene glycol, is the common anti-freeze ingredient. It was diethylene glycol that had been used as a sweetening agent in the 2005 vintage. Although diethylene glycol is a potentially toxic substance when ingested in substantial quantities, only a minute quantity was present in the 2005 vintage, such that one would have to consume extraordinary amounts of Blue Hills 2005 before there would be any health effects from the diethylene glycol.

Despite these assurances, Mr. Wolf continued to refuse delivery of the wine, and in a letter dated 10 August 2006, declared the matter closed.

On 18 June 2007, CLAIMANT filed an request for arbitration with JAMS.



## ARGUMENT

### **I. THE TRIBUNAL SHOULD NOT STAY THE PROCEEDINGS.**

#### **A. THE TRIBUNAL SHOULD RULE ON ITS JURISDICTION.**

1. The doctrine of *competence-competence*, which establishes that arbitrators have the power to rule on challenges to their jurisdiction, is well-established in the field of international arbitration [*Fouchard at 397; Born at 85; Holtzmann/Neubaus at 478; Schwebel at 2*]. The doctrine is an important element in the resolution of disputes by international arbitration, as it permits arbitrators to proceed even when the existence of the arbitration clause itself is at issue [*Fouchard at 399; Lew/Mistelis/Kröll at 333; Varady/Barceló/Mebren at 119; Craig/Park/Paulson at 516; Svernlöv at 37-49*]. This interpretation of *competence-competence* is consistent with the contractual and juridical foundations of arbitration [*Fouchard at 31; TOPCO v. Libyan Arab Republic (1977) (Fr.)*].

2. This reading is essential in protecting the integrity of the arbitral procedure, for without it, ‘*a recalcitrant respondent could easily frustrate the parties’ agreement to have their dispute decided by arbitration or at least create considerable delay by merely contesting the existence or validity of the arbitration agreement*’ [*Lew/Mistelis/Kröll at 333*]. Moreover, the doctrine of *competence-competence* furthers the objective of effectuating the parties’ intent to arbitrate any and all disputes arising out of a contract, including the existence of the arbitration clause itself [*Smit at 40; Born at 86; First Options v. Kaplan (1995) (USA)*].

3. In this case, CLAIMANT need not rely on general principles of *competence-competence*, as the Tribunal is vested with the authority to resolve challenges to its jurisdiction directly by the language of the arbitration agreement [1]. In addition, both the JAMS Rules [2] and the Danubian Arbitration Law [3] expressly reserve this power for the Tribunal. Furthermore, JAMS Article 17.3 give the Tribunal exclusive jurisdiction [4].

#### **(1) The arbitration clause vests in the Tribunal the authority to rule on its own jurisdiction.**

4. The arbitration clause included on RESPONDENT’s standard purchase order form confers upon the tribunal the competence to resolve disputes regarding its jurisdiction [*See Born at 84; TOPCO v. Libyan Arab Republic (1977) (Fr.)*]. This agreement provides that



*[a]ny 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 . . . [CE 5 ¶13]*

RESPONDENT's decision to include such expansive language in its standard form arbitration agreement (i.e. all claims 'arising out of or relating to') demonstrates that it did not intend to confine the scope of disputes appropriate for submission to the arbitral tribunal to the substantive rights and obligations created by the contract of sale *[see Mustill/Boyd at 120]*.

**(2) The JAMS Rules confer competence on the Tribunal to determine its jurisdiction.**

5. In addition to framing the jurisdiction of the arbitral tribunal in such expansive terms, RESPONDENT's standard form arbitration agreement provides for arbitration under the JAMS International Arbitration Rules *[PO2 Q19]*; under which Article 17.1 of the JAMS Rules expressly reserves for the Tribunal the

*“the power to determine the existence or validity of a contract of which an arbitration clause forms a part.”*

6. It is within the Tribunal's authority to resolve this dispute, as RESPONDENT's challenge is predicated upon the purported withdrawal of its offer to CLAIMANT *[Claim ¶15]* and the express wording of RESPONDENT's standard form arbitration agreement, as well as the JAMS Rules, contemplate resolution of contract formation issues by an arbitral tribunal.

**(3) The Danubian Arbitration Law also confers upon the Tribunal the competence to determine its jurisdiction.**

7. The arbitration clause provides that *‘the place of the arbitration will be Vindobona, Danubia’ [CE 5 ¶13]*. The law of the Danubia, the arbitral seat, is the 1985 UNCITRAL Model Law as adopted by Danubia. Article 16(1) of that law provides that:

*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. . .*

This provision incorporates the principle of *competence-competence* *[Holtzmann/Neuhaus at 478; Commission Report A/40/17 at 152]*. Pursuant to this provision, the Tribunal has authority to consider challenges going directly to the arbitration agreement, including claims that the agreement never came into existence *[First Working Group Report A/CN.9/216: “there was general agreement that the*



*[UNCITRAL] [M]odel [L]aw should empower the arbitral tribunal to decide on any pleas as to its jurisdiction, including those based on non-existence or invalidity of an arbitration agreement”].*

**(4) JAMS Article 17.3 gives the Tribunal exclusive jurisdiction.**

8. JAMS Article 17.3 prohibits the parties from challenging the Tribunal’s jurisdiction in court before the Tribunal has had an opportunity to rule on its own jurisdiction *[JAMS Art. 17.3: 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]*. Where an application to determine the admissibility of an arbitration has been brought before a court, Article 8(3) of Danubian Arbitration Law provides that ‘*arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court*’. Pursuant to this permissive rule, the Tribunal should rule on its own jurisdiction, giving effect to the full scope of the parties’ demonstrated intention. The parties have undertaken not to petition the Court under JAMS Article 17.3. **[a]**. Further, JAMS Article 17.3 displaces Article 8(2) of the Danubian Arbitration Law, pursuant to which RESPONDENT brought its application before the court **[b]**.

a. The parties have agreed not to apply to the Court under JAMS Article 17.3.

9. An arbitration agreement, including any rules that it incorporates, may prescribe the method for resolving jurisdictional challenges *[Born at 84; ICC Case No. 5294 (1998)]*. By selecting the JAMS Rules to govern the arbitration, the parties have expressly agreed not to apply to court for judicial relief regarding jurisdiction until the Tribunal has ruled on its own jurisdiction.

10. Where the parties have designated rules governing the arbitration proceedings, and those rules allow the Tribunal to have the ‘first word’ on jurisdiction, that designation will suffice as clear and unmistakable intent to submit to the Tribunal’s power to determine jurisdiction *[Born at 92]*. This principle was illustrated in a United States Supreme Court case, *First Options v. Kaplan (1995) (USA)*, which established that where the parties have agreed to submit the question of jurisdiction itself to arbitration, *the court’s standard of reviewing the arbitrators decision about that matter should not differ from the standard the courts apply when they review any other matter the parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator [at 1943]*.



b. JAMS Article 17.3 displaces Danubian Arbitration Law Article 8(2).

11. The primacy of party autonomy is regarded as the hallmark of contemporary arbitral legislation [*Berger (1994) at 1*]. Party autonomy in international commercial arbitration embodies the principle that the parties retain their mutual right to control the rules and procedures that will govern their arbitration [*Seide at 175*]. Such autonomy is subject to the mandatory provisions of the laws governing the arbitral agreement and procedure [*Lew/Mistelis/Kröll at 338*].

12. Although Article 8(2) of the Danubian Arbitration Law allows a court to rule on the jurisdiction of an arbitral tribunal it is not a mandatory rule [*‘...an application may be made to the court...’ (emphasis added)*]. Thus, the parties are free to contract around it. The default allocation of authority between courts and arbitrators need not implicate, in any way, the power of the parties to structure the arbitration mechanism so as to advance their own interests.

13. For instance, parties can agree not to apply to courts for provisional or protective measures during the course of an arbitration [*Fouchard at 719-20*]. The parties’ decision to displace Article 8(2) of the Danubian Arbitration Law does not violate any underlying policy of that law [*Fouchard at 719 “The principle of concurrent jurisdiction is not a matter of public policy”*]. To the contrary, it is consistent with the policy of promoting the value of arbitration as an efficient means of settling disputes [*General Assembly Resolution 40/72*]. In fact, there is a “worldwide trend” for courts, including those in the US and UK, to enforce parties’ agreements not to litigate challenges to an arbitral tribunal’s jurisdiction [*Tweeddale/Tweeddale at 98*].

14. In conclusion, the Tribunal has competence to rule on its own jurisdiction, notwithstanding RESPONDENT’s challenge before the Vindobona Commercial Court [*DAL Art. 8(3)*]. Moreover, the parties have undertaken not to apply for judicial relief regarding jurisdiction until the Tribunal has ruled on such jurisdiction. Indeed, the Tribunal should continue these proceedings in accordance with JAMS Article 20(1) [*...the tribunal, exercising its discretion, will conduct the proceedings with a view to expediting the resolution of the dispute*]. For all these reasons, the Tribunal should not grant a stay.



## II. THE ARBITRATION AGREEMENT IS VALID

### A. THE ARBITRATION AGREEMENT IS VALID UNDER THE LAW GOVERNING THE ARBITRATION AGREEMENT

#### (1) The arbitration agreement is separable from the main contract

15. The doctrine of separability allows the Tribunal to evaluate the validity of the arbitration clause independently from the main contract in which it appears. [*Fouchard at 210; Lew/Mistelis/Kröll at 102; Schwebel at 5; Born at 67; Varady/Barcelor/Mehren at 141; Smit at 2; see also Harbour Assurance Co v. Kansa General (1992) (UK); Prima Paint Corporation v. Flood (1967) (USA); Sojuznefteexport v. JOC Oil (1984) (Russia); Gosset v. Carapelli (1981) (Fr.)*]. As a consequence of this doctrine, the Tribunal may apply a substantive law to the arbitration agreement different from that of the main contract [*Schmitthoff at 21*].

16. The arbitration is governed by the JAMS Rules [*CE 5 ¶13, supra I*]. These rules incorporate the principle of separability in JAMS Article 17.1:

*[A]n arbitration clause will be treated as an agreement independent of the other terms of the contract.*

When the arbitration clause incorporates institutional rules which include the principle of separability, then the autonomy of the clause can be justified on the basis of the parties express agreement [*Leboulanger at 16*].

17. JAMS Article 18.2 provides that the “*procedure applicable to the arbitration will be the procedure set forth in these Rules and in the arbitration law of the place of arbitration.*” Danubian Arbitration Law, as the law of the place of arbitration, has expressly adopted the doctrine of separability in Article 16(1). For the purpose of determining the existence or validity of an arbitration agreement, Article 16(1) provides that “*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*” [*see also CLOUT Case 114*].

#### (2) The arbitration clause is valid under the Danubian Arbitration Law

##### a. Danubian Arbitration Law is the governing substantive law of the arbitration agreement

18. According to the doctrine of separability, the substantive law governing the arbitration agreement may be different from the law governing the main contract [*Fouchard at 212; Born at 68; Sojuznefteexport v JOC Oil (1984) (Russia)* “*The requirements laid down for the recognition and validity of the two contracts...need not coincide*”; *Republic of Nicaragua v Standard Fruit Co. (1991) (USA)*]. The



Tribunal may apply the law of the place of arbitration to govern the validity of the arbitration [Redfern/Hunter at 77, see also *Rhone Mediterranee (1983) (USA)*].

b. Danubian Arbitration Law applies to determine the validity of the arbitration agreement, with regard to the New York Convention

19. Article 8(1) of the Danubia Arbitration Law measures the validity of arbitration agreements. This provision is identical to Article 8(1) of the UNCITRAL Model Law which in turn adopted the language of Article II(3) of the New York Convention, and provides that a court shall refer parties to arbitration unless it finds the parties' arbitration agreement "null and void [i], inoperable [ii] or incapable of being performed [iii]" [Born at 161]. Unlike other Model Law countries, Danubia adopted this clause without modification [Binder at 90-91, see also *Peruvian Arbitration Law Art. 99*], and is itself a New York Convention signatory; it therefore follows that the terms in Article 8(1) should be interpreted in the same manner as under Article II(3) [Binder at 90]. Although the New York Convention is addressed to courts, the Tribunal is encouraged to consider the potential recognition and enforceability of any award rendered in each of the relevant states and apply the rules of validity that the relevant national courts would follow [Fouchard at 124; van den Berg at 177; Lew/Mistelis/Kröll at 159].

(i) *The arbitration agreement is not 'null and void'.*

20. The terms 'null and void' in Article II(3) of the New York Convention have generally been read to encompass a narrow set of defects capable of affecting the arbitration clause itself, including misrepresentation, duress, illegality, and fraud [van den Berg at 156; Born at 99, 160; *Ledee v. Ceramiche Ragno (1982) (USA)*]. 'Null and void' is to be read "narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate" [Rhone Mediterranee (1983) (USA)]. RESPONDENT does not challenge the arbitration agreement on any of these narrowly defined and widely recognized grounds.

(ii) *The arbitration agreement is operative.*

21. An arbitration agreement is inoperative if the parties have implied or expressly revoked it [Born at 160; Redfern/Hunter at 168; van den Berg at 158; *Corcoran v. Ardra Insurance Co. (1990) (USA)*]. However, even if the main contract was *void ab initio* or never came into existence, a valid



arbitration agreement can still be found under Article 16(1) of Danubian Arbitration Law. An arbitration agreement may be considered inoperative where it was once valid but has ceased to have effect, for instance where it has been revoked [*van den Berg at 158; Born at 160*]. Here, the arbitration agreement was validly formed when CLAIMANT accepted the offer, and has not been revoked [*infra section IV*].

(iii) *The arbitration agreement is capable of being performed.*

22. The comprehensive, clear and specific arbitration agreement drafted by the RESPONDENT is identical to the JAMS model arbitration clause. It is capable of being performed as JAMS Rules are frequently used to govern arbitration proceedings. “[T]he expression ‘incapable of being performed’ appears to refer to more practical aspects of the prospective arbitration proceedings” [*Redfern/Hunter at 168; see also Born at 160, Corcoran v. Ardra Insurance Co. (1990) (USA)*], and is therefore not at issue here.

**(3) The revocation of the purchase order would not affect the validity or existence of the arbitration agreement.**

23. Finally, considered separately, arbitration agreements must be found valid in the absence of a challenge to the arbitration provision that is separate and distinct from any challenge to the underlying contract [*Republic of Nicaragua v. Standard Fruit Co. (1991) (USA)*]. Where the arbitration clause is not challenged specifically, it will not be invalidated [*DAL Art. 16.1; Premium Nafta Products Ltd v. Fili Shipping Co. (2007) (UK) at 19: ‘...the arbitration agreement can be invalidated only on a ground which related to the arbitration agreement and is not merely a consequence of the main agreement.’*]. The mere allegation that the offer of the main contract was revoked does not suffice to imply that the arbitration agreement was also revoked. RESPONDENT’s claim [*Defense ¶7*] does not implicate the arbitration clause itself, [*Defense ¶7*], and therefore no valid challenge to the validity of the agreement has been made.

**B. THE ARBITRATION AGREEMENT IS VALID UNDER THE SUBSTANTIVE LAW OF THE CONTRACT.**

24. The Tribunal may also, at its discretion, apply the substantive law governing the main contract to the arbitration clause [*Lew at 136*]. As the law applicable to the main contract [*Defense ¶2*], the CISG contemplates its application to arbitration agreements [*Schlechtriem (2005) at 114*]. Like the



Danubian Arbitration Law, Article 81(1) of the CISG incorporates the doctrine of separability, requiring an independent analysis of the validity of the arbitration clause distinct from the validity of the contract [*Schlechtriem (2005) at 858; UNILEX R.G. 1701/93 (1995) (Belg.); Synthetic window parts case (2004) (Ger.); Sonox Sia v. Albury Grain Sales Inc.(1998) (Can.); Filanto, S.p.A. v. Chilewich International Corp. (1992) (USA)*]. Therefore, should the Tribunal choose to apply the law governing the main contract to the arbitration clause, severability is particularly relevant as the Tribunal would still apply CISG analysis to the clause.

25. In addition to the RESPONDENT's failure to validly revoke the offer under the CISG [*infra section IV*], CLAIMANT reasonably interpreted the arbitration agreement to be irrevocable [1], and relied on that interpretation in good faith [2]. Most relevant to the arbitration agreement, Article 16(2)(b) of the CISG provides that “*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*”.

**(1) Claimant's interpretation of the arbitral clause as an intention to arbitrate was reasonable.**

26. Pursuant to Article 8(2) of the CISG, CLAIMANT is entitled to interpret RESPONDENT's offer to arbitrate “*according to the understanding [of] a reasonable person*” [*CISG Art. 8(2)*]. In this case, the CLAIMANT reasonably interpreted the RESPONDENT's conduct of including an arbitration clause in the contract as an express intention to arbitrate. The reasonableness of this interpretation is determined according to Article 8(3), which provides for consideration of “*negotiation circumstances, established practices between the parties, and usages and any subsequent conduct of the parties*” [*CISG Art. 8(3)*] prior to the dispute. Here, the arbitration clause was included as the RESPONDENT's standard dispute settlement clause [PO2 Q19], suggesting that CLAIMANT's usage was consistent with a historical preference for arbitration. The CLAIMANT therefore reasonably interpreted the RESPONDENT'S behavior as an intention to arbitrate.

**(2) CLAIMANT relied on an offer to arbitrate in good faith.**

27. By accepting RESPONDENT's offer, CLAIMANT relied on the provision in the offer to settle any dispute relating to formation of the agreement, including any issues relating to the validity and acceptance, by arbitration [*CE 5 ¶13*]. Though the CISG does not expressly address the principle of estoppel, it nonetheless incorporates a special application of the principle of good faith (*venire contra factum proprium*) under Art 16(2)(b) [*CLOUT Case 94*]. Further to this, “*where, in their*



conduct, [parties] manifest that intent to their opposing party who relied on that manifestation of intent, and proceeds to dispute resolution through arbitration, it is unjust to discredit the arbitration” [In re Petition of Transrol Navegacao (1993) (USA)]. CLAIMANT relied upon the RESPONDENT’S arbitration agreement by filing its claim in accordance with its terms. In so far as they have not expressly provided otherwise, the parties should be presumed to intend to retain their arbitration agreement for disputes concerning the consequences of the revocation of the main contract [Fouchard at 440].

### **C. THE VALIDITY OF THE ARBITRATION AGREEMENT IS INDEPENDENT OF THE MAIN CONTRACT.**

28. Should the Tribunal find that the main contract was validly revoked, the arbitration agreement nevertheless survives [1], and the Tribunal must uphold the parties consent to arbitrate [2].

#### **(1) The arbitration agreement is valid even if the contract was never concluded.**

29. Even if the main contract were deemed never to have existed, the arbitration clause will still survive as a separate agreement in Model Law jurisdictions arising out of the “definite legal relationship [between parties] whether contractual or not” [Engineering Development Co v Municipal Corporation of Delhi (2001) (India); Shackleton at 26]. This is especially compelling in cases where “there is no evidence of objection to arbitration before the dispute arises” [Shackleton at 31] as in the instant case. The RESPONDENT included the arbitration clause in its offer as part of its standard contract for its business transaction [PO2 Q19] It follows that “[w]here international parties commit themselves to arbitrate a dispute they are in effect attempting to guarantee a forum for any disputes [an agreement to arbitrate should be enforced], regardless of where it is found” [Republic of Nicaragua v. Standard Fruit (1991) (USA)]. Even if the arbitration agreement was revoked, the agreement is still binding, arising out of the parties’ legal relationship to resolve any disputes arising from their dealings by arbitration [BHP Power v. Reinhold (1998) (USA); see also R.G. Carter Ltd. v. Edmund Nuttall Ltd. (2000) (UK)].

#### **(2) The parties consented to arbitrate.**

30. By drafting an arbitration clause and including it in the offer, the RESPONDENT demonstrated an intention to arbitrate [Claim ¶ 6; ¶17; see American Design Associates v. Donald Install Associates (USA)]. It is necessary to consider the intent of the parties, as the consent of the parties is



the foundation of international arbitration [*Redfern/Hunter at 131*]. The tribunal must give full effect to even “*the most minimal indication of parties intent to arbitrate*” [*Republic of Nicaragua v. Standard Fruit (1991) (USA)*]. When considering the intention to arbitrate in good faith, the Tribunal must take “*into account the consequences of [the...] commitments the parties may be considered [...to have] reasonably and legitimately envisaged*” [*Amco Asia Corp. v Republic of Indonesia (1984) (Fr.); Saudi Arabia v. ARAMCO (1958) (Switz.)*]. By using its standard form including an arbitration agreement, RESPONDENT unambiguously consented to arbitrate.

31. Consent should be determined from “*the common intention of the parties, [...] also having regard to the usages of international commerce*” [*ICC Case No. 4381(1986)*]. In this case, the use of an arbitration agreement in an international contract for the sale of goods, demonstrates intention to arbitrate upon which the CLAIMANT relied. In contesting the validity of the arbitration agreement, the RESPONDENT cannot argue in good faith that it never intended to arbitrate as it initiated and drafted the agreement to arbitrate itself. The CLAIMANT therefore submits that the Tribunal find the parties’ agreement to valid under all possible applicable laws and as arising from the parties’ own demonstrated intention to arbitrate.

32. In summary, the parties intended to arbitrate and have concluded a valid agreement to do so. This agreement is valid under Danubian Arbitration Law, with regard to the New York Convention and the JAMS Rules. The agreement is also valid under the substantive law of the main contract. Moreover, the validity of the arbitration agreement can be evaluated independently of the main contract.

### **III. THE TRIBUNAL SHOULD IMPOSE ADVERSE CONSEQUENCES ON THE RESPONDENT FOR ITS VIOLATION OF JAMS ARTICLE 17.3.**

#### **A. THE TRIBUNAL SHOULD ISSUE AN ANTI-SUIT INJUNCTION AGAINST RESPONDENT.**

33. CLAIMANT seeks an order enjoining RESPONDENT to refrain from pursuing the pending proceedings before the Vindobona Commercial Court thereby prohibiting any action that might jeopardize the award or further delay the dispute submitted to the Tribunal. RESPONDENT’s application to the Commercial Court is in contravention of its undertaking to resolve disputes concerning the Tribunal’s jurisdiction by arbitration, in accordance with JAMS Article 17.3. The Tribunal has jurisdiction to issue an anti-suit injunction, and should exercise that



jurisdiction in light of the risk posed by parallel judicial proceedings to the effectiveness of the final award.

34. The Tribunal has the power to issue an anti-suit injunction [*Gaillard at 238*]. This power has been recognized by the UNCITRAL Working Group on Arbitration, which since its fortieth session has drafted a new Article 17 of the UNICTRAL Model Law in order to regulate the enforcement of interim measures, including anti-suit injunctions, issued by arbitral tribunals. The new draft of that amendment specifically enables arbitrators to order a party to “*take action that would prevent...current or imminent harm or [is likely] to prejudice the arbitral process itself*” [*Working Group, Forty-Third Session*].

35. There are three bases from which the Tribunal derives authority to issue an anti-suit injunction. First, the Tribunal has jurisdiction to sanction violations of an arbitration agreement in order to avoid aggravation of the dispute **(1)**. Secondly, the Tribunal has the power to take any measure necessary to ensure the effectiveness of the arbitral award **(2)**. Finally the Tribunal must protect the effectiveness of the arbitral award rendered **(3)**.

**(1) The Tribunal has the power to enjoin parties from breaching the arbitration agreement.**

36. Where a party submits a dispute covered by an arbitration agreement to a domestic court, arbitral tribunals have consistently recognized their power to award damages for such breaches of the arbitration agreement, taking into account the costs incurred by the other party in domestic court proceedings [*ICC Case No. 5946 (1990); ICC Case No. 8887(1998)*]. Similarly, arbitrators also have the power to make reparations in kind by ordering specific performance of the arbitration agreement. In this context, anti-suit injunctions operate as an order against the party in breach to comply with its contractual undertaking to arbitrate the dispute it has submitted to domestic courts [*Gaillard at 240*].

**(2) The Tribunal has the power to take measures necessary to avoid aggravation of the dispute.**

37. Parties must refrain from conduct that aggravates the dispute being arbitrated [*Gaillard at 241; ICC Case No. 3896 (1982); Amco Asia Corporation v. Republic of Indonesia (1984) (Fr.)*]. RESPONDENT’s application to the Vindobona Commercial Court requesting a ruling on the



jurisdiction of the Tribunal constitutes one such aggravating factor, as it imposes new and unforeseen costs on CLAIMANT, who must now defend itself in concurrent judicial proceedings.

**(3) The Tribunal must protect the effectiveness of the arbitral award rendered.**

38. By applying to the Vindobona Commercial Court for a ruling on the jurisdiction of the Tribunal, RESPONDENT has created the risk of divergent rulings on that same matter, thereby undermining the effectiveness of any award rendered by the Tribunal. This potentially creates a ground for refusal to enforce the award under Article V(1)(e) of the New York Convention, further destabilizing the award. It is a firmly established principle of international arbitration that tribunals must render an award capable of being recognized and enforced [*Gaillard at 241; ICC Case No. 3896 (1982): “the parties must abstain from any action likely to have a prejudicial effect on the execution of the forthcoming decision”*]. In defending the effectiveness of the arbitral award, particularly its capability of enforcement in other jurisdictions (such as Equatoriana), the Tribunal should enjoin RESPONDENT from pursuing the application before the Court.

**B. THE CLAIMANT IS ENTITLED TO COSTS ARISING FROM THE RESPONDENT’S BAD FAITH CONDUCT.**

**(1) The JAMS Rules provide that the Tribunal may make inferences in light of party non-compliance.**

39. JAMS Article 27.3 anticipates relief from parties disobeying its own arbitration rules, stipulating that: *“if 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.”* CLAIMANT submits that RESPONDENT violated the JAMS Rules without showing good cause [a] and the Tribunal should draw an inference of bad faith as a result of RESPONDENT’s conduct [b].

- a. The RESPONDENT filed a claim before the Danubian Commercial Court without good cause.

40. RESPONDENT did not honor its agreement to submit the question of jurisdiction to the Tribunal pursuant to Article 17.3. If RESPONDENT were to be unsatisfied by this Tribunal’s decision, it has the opportunity to appeal such a decision, both before the courts under JAMS Article 17.3 which allows a submission to court after the Tribunal has ruled, and under Article



V 5(1)(a) of the New York Convention, which provides for the refusal to recognize awards on the grounds of lack of jurisdiction. With both a competent body and multiple forms of recourse, the RESPONDENT is not reasonably justified in its decision to file before the court.

b. The Tribunal should infer that the RESPONDENT acted in bad faith.

41. RESPONDENT's application to the Danubian Court is made in bad faith conduct. A party is deemed to have acted in bad faith when its actions differ from its original intention at the time the contract was signed [*Foucharde at 1470*]. RESPONDENT has engaged in conduct that is specifically prohibited under the JAMS Rules. RESPONDENT's action gives rise to an inference of bad faith. An inconsistent representation that RESPONDENT intended to arbitrate by conducting itself as such, followed by an effort to manipulate the courts to prevent proceedings to decide the dispute constitutes "serious prejudice [...against CLAIMANT] condon[ing] inequitable manipulation of courts and litigants" [*In re Petition of Transrol Navegacao (1993) (USA) at 505*]. In similar situations, "litigants [have been prevented] from playing 'fast and loose' with the court" [*ibid. at 504*].

**(2) The Tribunal may take bad faith conduct into account when apportioning costs between the parties.**

42. The Tribunal should award the costs of arbitration against the RESPONDENT. JAMS Article 30.2 grants the Tribunal authority to consider dilatory or bad faith conduct in the arbitration in apportioning arbitration costs between or among the parties. Drafted in language identical to ICDR Article 28.5, the CLAIMANT is not exempt from such an award under JAMS 30.2. It is also within the discretion of arbitral tribunals to award such damages in cases of misconduct in order to punish the injurer [*LETCO v. Liberia (1986) (Fr.)*]. Here, the RESPONDENT's conduct merits the awarding of costs to compensate for its violation of JAMS Article 17.3.

43. As a consequence of RESPONDENT's violation of JAMS Article 17.3, the Tribunal should order an anti-suit injunction against the RESPONDENT so as to protect the integrity of the arbitral process and preserve the effectiveness of any award rendered. In addition, the Tribunal should award costs against RESPONDENT in light of its bad faith conduct.

**IV. THE PARTIES CONCLUDED A CONTRACT OF SALE.**

44. The United Nations Convention on Contracts for the International Sale of Goods (hereinafter “CISG”) governs the merits of this dispute. The CISG applies to contracts for the sale of goods between parties whose places of business are in different States when those States are both Contracting States [CISG Art. 1(1)(a)]. In this case, CLAIMANT’s principle place of business is in Mediterraneo [Claim ¶1], and RESPONDENT’s principle place of business is in Equatoriana [Claim ¶3]. Mediterraneo and Equatoriana are both Contracting States [Claim ¶15]; accordingly, this dispute falls within the CISG’s sphere of application.

45. A contract of sale was concluded between the Parties in this case. A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the CISG [CISG Art. 23]. The 1 June 2006 letter from CLAIMANT to RESPONDENT [CE 3] constitutes an effective offer **(A)**, and the 10 June 2006 letter and purchase order from RESPONDENT to CLAIMANT [CE 4; CE 5] constitute an effective counter-offer **(B)**. This counter-offer was not revoked **(C)**. Thus when CLAIMANT signed the purchase order and returned it to RESPONDENT on 21 June 2006, within the RESPONDENT’s fixed time limit, CLAIMANT’s acceptance became effective and the contract of sale was concluded **(D)**.

**A. CLAIMANT’S 1 JUNE 2006 LETTER TO RESPONDENT CONSTITUTES AN EFFECTIVE OFFER.**

46. CLAIMANT’s letter to RESPONDENT sent 1 June 2006 [CE 3] constitutes an effective offer pursuant to Article 14(1) of the CISG. *First*, the letter is addressed to a specific person: Mr. Harald Wolf of RESPONDENT. *Second*, the letter is sufficiently definite; it indicates the goods to be sold, CLAIMANT’s wine marketed under the title Blue Hills 2005, and it expressly makes provision for determining both quantity and price (an order of 10,000 cases would cost US\$72.00 per case, and an order of 20,000 cases would cost US\$68.00 per case). *Third*, the letter demonstrates CLAIMANT’s intention to be bound upon RESPONDENT’s acceptance. CLAIMANT concluded the 1 June 2006 letter by offering to deliver an order of 20,000 cases in several different shipments per RESPONDENT’s instructions, indicating that CLAIMANT was ready, willing and able to fulfill an order for up to 20,000 cases of Blue Hills 2005 whenever RESPONDENT chose to receive them. *Finally*, CLAIMANT’s offer became effective pursuant to Article 15(1) of the CISG when it was delivered by mail to RESPONDENT’s place of business –



Super Market's Central Business Centre in Oceanside, Equatoriana – thereby “reaching” the offeree pursuant to Article 24 of the CISG.

**B. RESPONDENT'S 10 JUNE 2006 LETTER AND PURCHASE ORDER CONSTITUTE AN EFFECTIVE COUNTER-OFFER.**

47. “A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer” [*CISG Art. 19(1)*], when these additional or different terms materially alter the terms of the offer [*CISG Art. 19(2)*]. “Material” alterations include additional or different terms relating to, among others, payment, quantity, and the settlement of disputes [*CISG Art. 19(3)*].

48. RESPONDENT's letter and purchase order sent to CLAIMANT on 10 June 2006 [*CE 4; CE 5*] collectively constitute such a counter-offer. RESPONDENT's letter begins by purporting to accept CLAIMANT's price of US\$68.00 for 20,000 cases of Blue Hills 2005. However, the accompanying purchase order makes two material alterations to CLAIMANT's offer, neither of which had been previously discussed in the negotiations between the Parties: (1) Clause 2 makes delivery of the final installment of 2,500 cases contingent upon a minimum of 12,000 cases having been sold by 25 September 2006; and (2) Clause 13 of the purchase order contains a dispute settlement term requiring arbitration under the JAMS Rules in Vindobona, Danubia. These material alterations to quantity and dispute settlement convert RESPONDENT's purported acceptance into a counter-offer [*CISG Art. 19(1); 19(3)*].

49. This counter-offer “reached” CLAIMANT pursuant to Article 24 of the CISG when it was delivered by courier to CLAIMANT's place of business in Blue Hills, Mediterraneo [*CE 4*]. Copies of the letter and purchase order were also sent by email to Mr. Cox's individual address at Wine Cooperative [*CE 4, PO2 Q24*], receipt of which was confirmed in the 11 June 2006 email that Sarah Kringle, assistant to Mr. Cox, sent to Mr. Wolf [*CE 6*]. At this time, RESPONDENT's counter-offer became effective within the meaning of Article 15(1) of the CISG. Although Mr. Wolf's email to Mr. Cox, sent 18 June 2006, purports to “withdraw” the counter-offer [*CE 9*], a counter-offer cannot be withdrawn after it has reached the offeree [*CISG Art. 15(2)*].

**C. RESPONDENT'S COUNTER-OFFER WAS NOT REVOKED.**

50. Respondent's counter-offer also was not revoked. Taken together, the content of RESPONDENT's 10 June 2006 letter and the larger contractual context made it such that the



purchase order could not be revoked (1). In the alternative, RESPONDENT's counter-offer was not properly revoked (2).

(1) **RESPONDENT's Counter-Offer Could Not Be Revoked.**

51. Article 16(1) of the CISG permits revocation prior to dispatch of acceptance [*Secretariat Commentary 14.1; Schwenzler/Mohs at 241; Lookofsky at 65*]. However, Article 16(2) cuts two deep exceptions into this general rule [*Honnold 3<sup>rd</sup> at 159*], such that only a “feeble assumption of revocability” remains [*Enderlein/Maskow at 88*]. Revocation is prohibited either if the counter-offer “indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable” [*CISG Art. 16(2)(a)*] or if it was reasonable for CLAIMANT to rely on the counter-offer as being irrevocable and CLAIMANT has acted in reliance on the counter-offer [*CISG Art. 16(2)(b)*].

- a. The content and context of RESPONDENT's 10 June 2006 letter indicate that the purchase order was irrevocable.

52. RESPONDENT's 10 June 2006 letter concludes with this warning:

*“Since we are now under rather intense time pressure to prepare the wine promotion, we would have to turn to another quality wine as the featured item in our promotion if the contract closing were to be delayed beyond 21 June 2006.”* [CE 4]

RESPONDENT's threat to “turn to another quality wine” fixed a 21 June time-limit for CLAIMANT's acceptance of RESPONDENT's counter-offer.

53. CISG scholars disagree over whether reference in an offer to a fixed time for acceptance necessarily indicates, pursuant to Article 16(2)(a) of the CISG, that the offer is irrevocable until that stated date. Some scholars view an offer made subject to a time-limit for acceptance as irrevocable until the time-limit expires [*Neumayer/Ming at 157-160*]. Other scholars conclude that a fixed time for acceptance creates a rebuttable presumption of irrevocability, with the burden of proof on the offeror to show that the time limit was intended to indicate only when the offer would lapse [*Honnold 3<sup>rd</sup> at 162; Schlechtriem in Schlechtriem-Schwenzler at 211*]. For still others, fixing a time-limit for acceptance is but one factor indicating irrevocability, to be considered in the larger contractual context pursuant to the interpretative principles of Article 8 of the CISG [*Enderlein/Maskow at 89; Lookofsky at 66; Eörsi in Bianca-Bonnell at 157*].

54. Accepting for the purposes of this memorandum the latter view (the view most difficult for CLAIMANT to establish), RESPONDENT's time limit for acceptance, understood



within the larger contractual context, indicates that RESPONDENT intended the counter-offer to be irrevocable until 21 June 2006.

55. *First*, the preliminary negotiations between the Parties indicate RESPONDENT's intention to be bound by irrevocability until 21 June. RESPONDENT repeatedly indicated a desire for exclusive dealings with CLAIMANT in general and for Blue Hills 2005 in particular. At the Durhan Wine Fair in early May 2006, RESPONDENT indicated its interest in Blue Hills 2005 for its wine promotion [CE 1]. RESPONDENT then communicated by letter to CLAIMANT its intent that Blue Hills 2005 "take the lead" in the promotion and expressed interest in 10,000 to 20,000 cases of the wine [CE 2]. Although this letter indicates RESPONDENT's uncertainty as to the quantity of wine it would ultimately purchase, it expresses no uncertainty on the part of RESPONDENT that it would indeed make a large purchase. RESPONDENT did not, at any point throughout the preliminary negotiations, indicate that it was, or would be, considering alternative wines so long as CLAIMANT accepted RESPONDENT's counter-offer prior to 21 June. Moreover, by assuring CLAIMANT that US\$68.00 per case was "an acceptable price for a wine of that quality" [CE 4], RESPONDENT indicated that it was not shopping around for a better deal. Taken together, RESPONDENT communicated to CLAIMANT that it considered Blue Hills 2005 to be the right wine at the right price, and thus the 21 June time limit in the 10 June 2006 letter indicated that RESPONDENT was bound by irrevocability until that date, and that conclusion of the contract of sale depended only upon CLAIMANT's prompt acceptance of the purchase order.

56. *Second*, RESPONDENT's subsequent conduct corroborated its intention to be bound by irrevocability until 21 June. In his 11 June 2006 email to Sarah Kringle, Mr. Wolf of RESPONDENT stressed the urgency for Mr. Cox to sign and return the purchase order immediately upon his return [CE 7]. Again RESPONDENT gave no indication that the 21 June time limit was only for acceptance and not for irrevocability. To the contrary, RESPONDENT's eagerness to quickly conclude the contract and obtain Blue Hills 2005 in time for its September 2006 promotion reinforces RESPONDENT's intention to hold its counter-offer open for CLAIMANT's award-winning and acceptably-priced wine.

b. CLAIMANT's reasonable reliance makes the purchase order irrevocable.

57. Notwithstanding any uncertainty that may exist as to RESPONDENT's intentions for the 21 June 2006 time limit, CLAIMANT's reasonable reliance on the irrevocability of RESPONDENT's counter-offer achieves the same result: RESPONDENT cannot revoke its



purchase order until 21 June. “In commercial relations, and particularly in international commercial relations, the offeree should be able to rely on any statement by the offeror which indicates that the offer will be open for a period of time” [*Secretariat Commentary* § 14.6 ¶2]. Thus Article 16(2)(b) of the CISG prohibits revocation when “it was reasonable for the offeree to rely on the offer as being irrevocable” and “the offeree has acted in reliance on the offer”. In other words, the offeror is bound by the reliance which it has induced [*Schlechtriem in Schlechtriem-Schwenzer at 212*]. This protects the good faith belief of the offeree [*Enderlein/Maskow at 90*] whose frustrated expectations were both lawful and reasonable in a given situation [*Eörsi at 157*].

58. Article 8(2) of the CISG requires that an assessment of the reasonableness of reliance on irrevocability be conducted with regard to the offeree’s understanding [*Schlechtriem in Schlechtriem-Schwenzer at 212*]. Thus in this case, regard must be had to CLAIMANT’s understanding of the content and context of the 10 June 2006 letter. This is particularly important, given the differences in domestic law principles on revocability in Mediterraneo and Equatoriana. The general rule of revocability in CLAIMANT’s country, Mediterraneo, is similar to that in the CISG [*PO2 Q7*]. By contrast, RESPONDENT’s domestic law of revocability follows the common law’s general presumption of revocability [*PO2 Q7*], which would impose a stricter test for reasonable reliance on the irrevocability of an offer [*Malik*]. As a party’s understanding of the revocability of offers is often influenced by its domestic contract law principles [*Schlechtriem in Schlechtriem-Schwenzer at 212; Enderlein/Maskow at 90*], it would be inappropriate to impose Mediterraneo’s stricter test for reasonable reliance on CLAIMANT’s understanding of RESPONDENT’s 21 June time-limit.

59. The content and context of RESPONDENT’s 10 June 2006 letter made it reasonable for CLAIMANT to rely on the irrevocability of the purchase order. RESPONDENT fixed a 21 June time-limit in the 10 June 2006 letter [*CE 4*]. RESPONDENT gave no indication that the 21 June deadline did not also apply to irrevocability. RESPONDENT repeatedly communicated to CLAIMANT during their preliminary negotiations that Blue Hills 2005 was the right wine at the right price [*CE 2; CE 4*]. At no point during these negotiations did RESPONDENT indicate that it had been or would be seeking alternative wines to take the lead in its promotion. While RESPONDENT’s 22 May 2006 letter indicated some uncertainty over the quantity to be ordered – somewhere between 10,000 and 20,000 cases – it did not indicate any uncertainty that such an order would be placed [*CE 2*]. RESPONDENT’s subsequent correspondence with Ms. Sarah Kringle [*CE 7*] also gave no indication that the time limit for acceptance did not also apply to irrevocability. And RESPONDENT continued to insist upon Mr.



Cox's quick turnaround of the purchase order [CE 7] so that RESPONDENT could seal what to that point had been exclusive dealings with CLAIMANT and Blue Hills 2005. In light of these circumstances, it was reasonable for CLAIMANT to rely on the purchase order as being held open and irrevocable until 21 June 2006.

60. Furthermore, CLAIMANT acted in reliance on the counter-offer. "Acts" in reliance include not only positive acts, but also omissions; for example, a demonstrable choice not to solicit further offers [*Schlechtriem in Schlechtriem-Schwenzer at 212*]. In this case, CLAIMANT reserved nearly one-fourth of its stock of award-winning Blue Hills 2005 (20,000 of the 87,000 cases [PO2 Q20]) in reliance on RESPONDENT's purchase of 20,000 cases. CLAIMANT removed this large volume of valuable inventory from the market in reliance on RESPONDENT's purchase *before* the sensationalist and misleading newspaper articles on diethylene glycol affected its sales – in its letter of 22 May 2006, RESPONDENT indicated it would purchase between 10,000 and 20,000 cases of Blue Hills 2005 [CE 2]; the diethylene glycol misinformation was not circulated until 13 June at the earliest [CE 13] – and continued to hold it for RESPONDENT despite relatively strong domestic demand (ultimately, all but 3000 cases have been sold by CLAIMANT [PO2 Q21]), thereby foregoing the revenue that solicitation of further offers could have generated.

61. Moreover, the foreseeability of reliance is an additional relevant factor pointing to the reasonableness of an offeree's act of reliance under Article 16(2)(b) of the CISG [*Lookofsky at 68*]. In this case, CLAIMANT's choice not to solicit further offers for these 20,000 cases was foreseeable by RESPONDENT from the Parties' preliminary negotiations. As early as 22 May 2006, RESPONDENT set the parameters for its purchase – between 10,000 and 20,000 cases [CE 2] – and shortly thereafter, CLAIMANT communicated to RESPONDENT that it was ready, willing and able to deliver up to 20,000 cases [CE 3]. From these preliminary negotiations, RESPONDENT ought to have foreseen that CLAIMANT had reserved a sizable quantity of valuable wine in reliance on RESPONDENT's forthcoming purchase.

**(2) In the alternative, RESPONDENT's counter-offer was not effectively revoked.**

62. Even if RESPONDENT's counter-offer was revocable, it could not have been revoked by RESPONDENT's 18 June email message [CE 9]. The email did not "reach" CLAIMANT before CLAIMANT dispatched its acceptance for two reasons. First, because CLAIMANT did not consent to doing business on this deal by email (a); and second, because



RESPONDENT's email was incapable of being retrieved by Mr. Cox before he dispatched CLAIMANT's acceptance (b).

- a. RESPONDENT's email did not "reach" CLAIMANT before CLAIMANT dispatched its acceptance because CLAIMANT did not consent to doing business on this deal by email.

63. The CISG is flexible enough to encompass modern forms of communication [*Schwenzer/Mohs at 239*]. For example, although Article 24 of the CISG does not *directly* make provision for email in its definition of "reaches" [*Eiselen at 28*], the reference to "any other means" of delivery indicates that the CISG did not intend to exclude any specific kind of communication.

64. However, the addressee must have expressed that he is willing to communicate electronically [*Ramberg at 107*]. Since electronic communication is particularly vulnerable to technical difficulties – such as incompatible software, missing attachments, unreadable formats, and the inability to retrieve messages from servers – the addressee must have consented to receive electronic messages of the type, in the format, and to the electronic address used by the sender [*Schlechtriem in Schlechtriem-Schwenzer at 268; CISG AC-Op. 1, Opinion to Art. 16(1)*]. Because merchants rarely expressly agree on means of communication, and the willingness and ability to communicate electronically varies considerably in different situations [*Ramberg at 107*], Articles 8 and 9 of the CISG must be used to determine consent.

65. The negotiations between the parties, the practices established between themselves, and Mr. Cox's conduct subsequent to his return from his business trip confirm that Mr. Cox did not consent to doing business on the Blue Hills 2005 deal by email.

66. Mr. Cox initiated the negotiations between the parties, and he chose to do so by letter [*CE 1*]. Mr. Wolf, on behalf of RESPONDENT, then chose to continue the negotiations by letter [*CE 2*], ratifying and reinforcing Mr. Cox's choice. Continuing the practice established between themselves, Mr. Cox then responded by letter with CLAIMANT's offer of 1 June 2006 [*CE 3*]. At this point, Mr. Cox left on his business trip.

67. It was Mr. Wolf of RESPONDENT who first deviated from this pattern of communication via letter when he sent his counter-offer (the letter and purchase order of 10 June 2006) by *both* courier and email [*CE 4; CE 5*]. What is significant about Mr. Wolf's action, however, is not the email but the hard copies of the 10 June letter and purchase order that were sent by courier. The copies sent by courier *continued* the practice of communicating by traditional mail established between the Parties and *invited* Mr. Cox to accept the counter-offer in similar fashion.



68. The first communication by email from CLAIMANT was not sent by Mr. Cox, but by his assistant, Sarah Kringle [CE 6]. Ms. Kringle had access to all of Mr. Cox's email messages [PO2 Q25] and chose email as *her* preferred means of communication to confirm the receipt of RESPONDENT's counter-offer and to notify Mr. Wolf of Mr. Cox's absence.

69. However, Ms. Kringle's choice to communicate by email cannot be imputed to Mr. Cox as evidence of his consent to doing business on this deal via email. Mr. Wolf was aware that only Mr. Cox had authority to conclude this deal. It was Mr. Cox who represented CLAIMANT at the Durhan Wine Fair and with whom Mr. Wolf spoke in person at that time; it was Mr. Cox who initiated the negotiations (via letter); it was Mr. Cox who continued the correspondence (via letter) and made the initial offer to RESPONDENT (via letter); it was only to Mr. Cox that all of the correspondence was addressed; and it was only Mr. Cox who, as "Sales Manager" for the Mediterraneo Wine Cooperative, had the power to bind CLAIMANT to any resulting contract. Indeed, a reasonable person in Mr. Wolf's position would infer from Ms. Kringle's email of 11 June that she was merely an "Assistant to Mr. Steven Cox, Sales Manager" and that – because conclusion of the contract must await his return due to RESPONDENT's material alterations [CE 6; Claim ¶8] – Ms. Kringle's actions with respect to the negotiations between the parties in no way represented or bound Mr. Cox either in general or with respect to this deal in particular.

70. That Mr. Cox did not consent to email for this deal was confirmed by his conduct upon his return. Despite having received and having access to RESPONDENT's counter-offer via both courier and email, Mr. Cox physically signed the *couriered* copy and returned that copy *via courier only* [CE 5; CE 8]. Mr. Cox's two uses of email [CE 10; CE 12] came only *after* the conclusion of the contract, only *in response* to RESPONDENT's use of email, and, significantly, only *in addition* to traditional correspondence by courier.

71. In sum, the only authority and addressee for this deal – Mr. Cox – consistently used traditional mail to initiate, negotiate, conclude, and follow-up on the contract. His actions alone govern this contract, and they establish traditional mail as the only means of communication to which CLAIMANT consented.

- b. RESPONDENT's email attempting to revoke RESPONDENT's offer did not "reach" CLAIMANT before CLAIMANT dispatched its acceptance because the email was not capable of being retrieved.



72. Although Mr. Wolf's attempted revocation on 18 June was received by the server at Wine Cooperative that day [*Claim ¶10*], a software problem prevented the server from communicating with the various computers in the internal network at Wine Cooperative [*PO2 Q26*]. Mr. Cox did not receive Mr. Wolf's email message until the afternoon of 19 June [*Claim ¶10*]. By that time, Mr. Cox had already signed and dispatched the purchase order by courier [*Claim ¶9; CE 8*].

73. Even assuming CLAIMANT consented to doing business on this deal by email, RESPONDENT's attempted revocation of 18 June did not "reach" CLAIMANT before CLAIMANT dispatched its acceptance, because an email "reaches" the addressee only if it is capable of being retrieved by the addressee.

*(i) General principles of the CISG require that an email be capable of being retrieved by the addressee before it is deemed to have "reached" the addressee.*

74. General principles of the CISG indicate that a communication "reaches" the addressee only when it is capable of being retrieved by the addressee. Questions concerning matters governed by the CISG which are not expressly settled in it are to be first settled in conformity with the general principles on which it is based [*CISG Art. 7(2)*]. The principle underlying Article 24's definition of "reach" in the CISG is that any communication must either be received by the recipient personally or must be effectively placed at his disposal in a place where he usually receives such communications or where he should expect to find such communications in the ordinary course of business [*Eiselen at 28*]. Thus the key requirement of Article 24 of the CISG is that the communication must be placed at the addressee's disposal and be capable of being *accessed or retrieved* by the addressee before it is deemed to have "reached" the addressee [*Coetzee at 18*].

75. In the electronic communication context, an email is only capable of being retrieved by the addressee if it reaches the individual mailbox of the addressee [*Schlechtriem in Schlechtriem-Schwenzer at 268; Eiselen at 25 and 30*]. Pursuant to Article 24 of the CISG, letters sent by traditional mail must arrive in the addressee's mailbox. By analogy, it will not always suffice that electronic messages arrive in the addressee's server, because a central server is not always under the addressee's control, as a real mailbox would be [*Schlechtriem in Schlechtriem-Schwenzer at 268*]. This is precisely the case here. Although the server is located on the premises of Wine Cooperative, only one person (not the addressee, Mr. Cox) is responsible for its operation, and the software problem of 18-19 June 2006 was beyond even that person's abilities to fix [*PO2 Q27*]. Given the distinction between



control of a server and control of an individual email inbox, for an addressee to be able to *access* and *retrieve* a message within the meaning of Article 24 of the CISG, that message must reach the individual mailbox of the addressee.

*(ii) The proper allocation of risk requires that an emailed revocation be capable of being retrieved by the addressee before it is deemed to have “reached” the addressee.*

76. The proper allocation of risk requires that Mr. Cox be able to retrieve the RESPONDENT’s attempted revocation before it is deemed to have “reached” CLAIMANT.

77. *First*, a revocation is a departure from the expected sequence of correspondence between negotiating parties, in that it attempts to terminate the ongoing negotiations. Therefore, the burden of proof for an effective revocation is on the party alleging revocation [*Schlechtriem in Schlechtriem-Schwenzer at 209*]. Moreover, it is only fair that the party modifying the existing legal relationship bear the risk of the chosen method of communication and ensures that an effective channel of communication is used [*Eiselen at 26*]. In this case, RESPONDENT, as the party modifying the legal relationship by seeking to terminate negotiations, should bear the risk of its choice to communicate by email.

78. *Second*, RESPONDENT’s revocation was also a departure from the expected means of communication, in that it was sent solely by email, whereas communication had previously occurred via traditional letter or a combination of couriered and emailed letters. Fairness requires that the reasonableness of using a risky communication method be evaluated according to the advantages and disadvantages of its use [*Eiselen at 27*]. The only possible advantage to communicating solely via email accrued to RESPONDENT: knowing that Mr. Cox would return from his business trip on 19 June and that he would most likely sign the purchase order immediately [*CE 6*], RESPONDENT needed a rapid means by which to communicate revocation of its counter-offer. Especially in this case, where there is no express agreement between the parties, the multitudinous disadvantages to email communication – including the potential for incompatible software, inadequate programs, missing attachments, and faulty servers [*Ramberg at 108; Schlechtriem in Schlechtriem-Schwenzer at 268*] – outweigh any potential gain from RESPONDENT’s eleventh-hour revocation attempt.

79. *Third*, the “mailbox rule” embodied in Article 16(1) of the CISG places the burden of delayed transmission on the party attempting revocation. Although Article 16(1) of the CISG generally allows revocation, it comes at a price to the party attempting revocation: if the offeror



attempts to revoke his offer, he has to be aware that it may be too late to do so because the offeree by this time may have already dispatched his acceptance [*Enderlein/Maskow at 88*]. The purpose of the mailbox rule is to reduce uncertainty for the offeree – uncertainty created by allowing revocation in the first instance – by permitting the offeree to cut short the time available for revocation [*Eörsi at 156*]. Article 16(1) of the CISG embeds an element of surprise [*Eörsi at 156*] or suspense [*Schlechtriem in Schlechtriem-Schwenzler at 210*], but this element was the deliberate choice of a drafting compromise between, on the one hand, permitting revocation, and on the other, the need to protect the offeree [*Schlechtriem in Schlechtriem-Schwenzler at 209*].

80. In sum, RESPONDENT should bear the risk of delay in an electronically transmitted revocation by requiring that email messages reach Mr. Cox’s individual mailbox before they are deemed to have “reached” CLAIMANT.

*(iii) The UNCITRAL Model Law on Electronic Commerce requires that an email be capable of being retrieved by the addressee before it is deemed to have “reached” the addressee*

81. Resort to the UNCITRAL Model Law on Electronic Commerce as a supplement to the CISG indicates that an electronic communication “reaches” the addressee only when it is capable of being retrieved by the addressee. Because the problems of electronic communications and their “reaching” of the addressee were not fully realized by the drafters of the CISG [*Schlechtriem in Schlechtriem-Schwenzler at 267*], if the Tribunal finds that the general principles of the CISG do not fully settle the question of when an emailed revocation “reaches” the addressee, the question must then be settled in conformity with the law applicable by virtue of the rules of private international law [*CISG Art. 7(2)*].

82. An arbitral tribunal’s selection of the appropriate rules of private international law is generally limited to the conflict-of-laws rules of the arbitral situs, the conflict-of-laws rules of the arbitral institution, or the general principles of conflict-of-laws embodied in international conventions [*Born at 526-531*].

83. Selection of any of these conflict-of-laws rules leads to application of the Model Law on EC. If the Tribunal selects the conflict-of-laws rules of the arbitral situs (Danubia), it must seek to apply the substantive law of the most appropriate country, which either is the law of the seller’s country or the law of the buyer’s country [*PO2 Q7*]. In this case, the Model Law on EC was adopted as domestic law in both Equatoriana and Mediterraneo without modification [*PO2 Q4*]. Its



sphere of application extends to any kind of electronic commercial exchange [*ML-EC Art. 1*], with particular regard to international sales [*ML-EC Resolution*].

84. Application of the conflict-of-laws rules of either the arbitral institution (JAMS) or the general principles embodied in international conventions leads to the same result. JAMS Article 18.1, UNCITRAL Model Law Article 28(2), and the European Convention on International Commercial Arbitration Article VII(1) all instruct the tribunal, in the absence of law designated by the parties, to apply the law or rules of law which it determines to be most appropriate. As the contract of sale in this case was negotiated, was concluded, and was to be performed entirely within Equatoriana and Mediterraneo, choosing either country's electronic commerce law leads to application of the Model Law on EC.

85. Under the Model Law on EC, a data message such as an email [*ML-EC Art. 2(a)*] is received by the addressee when it "enters" the addressee's "information system" [*ML-EC Art. 15(2)(a)(i) or ML-EC Art. 15(2)(b)*]. An "information system" is broadly defined as "a system for generating, sending, receiving, storing or otherwise processing data messages" [*ML-EC Art. 2(f)*]. A data message "enters" an information system when it "becomes available for processing" within that information system [*Guide to ML-EC at 103*].

86. The most reasonable interpretation of "becom[ing] available for processing" within the context of the Model Law on EC is that the data message be capable of being retrieved by the addressee. This reflects the concern of the drafters of the Model Law on EC that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times [*Guide to ML-EC at 104*]. If merely entering the addressee's server is sufficient to "become available for processing," then the addressee himself (Mr. Cox, in this case) would have to maintain his information system at all times, lest a communication be "received" without the addressee's ability to access and act on it.

87. That the most reasonable interpretation of "entry" is "capable of being retrieved by the addressee" was confirmed by the drafters of the United Nations Convention on the Use of Electronic Communications in International Contracts. Article 10(2) of the ECC provides that the time of receipt of an electronic communication is the "time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee." Furthermore, an electronic communication is presumed to be capable of being retrieved by the addressee "when it reaches the addressee's electronic address" – not just the addressee's server. Because the drafters of the ECC intended the effect of Article 10 of the ECC to be consistent with Article 15 of the Model



Law on EC [*Mazzotta at 281; ECC Explanatory Note at 55*], the ECC's explicit adoption of the requirement that an email be "capable of being retrieved by the addressee" should correspond to the interpretation of "entry" under the Model Law on EC.

**D. CLAIMANT'S 19 JUNE 2006 ACCEPTANCE BECAME EFFECTIVE ON 21 JUNE.**

88. Mr. Cox's conduct indicating assent to RESPONDENT's counter-offer is an acceptance pursuant to Article 18(1) of the CISG. Immediately upon his return from his business trip on the morning of 19 June, Mr. Cox physically signed the purchase order [*CE 5*] and sent it along with his letter of 19 June [*CE 8*] by courier to Mr. Wolf at the same address to which he had sent all previous correspondence (also by traditional mail [*CE 1; CE 3*]). As far as Mr. Cox or anyone else at Wine Cooperative was aware, the purchase order was in effect until 21 June and Mr. Wolf needed immediate action due to the "narrow time frame" for the wine promotion in September [*CE 7*].

89. Because the acceptance was dispatched on the morning of 19 June 2006, before RESPONDENT's revocation "reached" CLAIMANT, the revocation was ineffective, giving CLAIMANT's acceptance until 21 June 2006 to reach RESPONDENT.

90. An acceptance is effective at the moment the indication of assent reaches the offeror [*CISG Art. 18(2)*]. The tracking service of the courier company shows that the signed purchase order was received at Super Markets on 21 June 2006 [*Claim ¶9*]. Thus, Mr. Cox returned the purchase order within the time RESPONDENT had fixed and using the means of communication (courier service) employed by the RESPONDENT for the counter-offer. The acceptance became effective on 21 June 2006, and the contract of sale was concluded at that time.



**V. BLUE HILLS 2005 IS FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO CLAIMANT AT THE TIME OF THE CONCLUSION OF THE CONTRACT.**

91. Article 35(1) of the CISG establishes that “the seller must deliver goods of the quantity, quality, and description required by the contract.” Article 35(2) sets out the basic default standards of quality that are presumed to be part of the agreement subject to the parties specifying otherwise [*Gabriel at 120*]. RESPONDENT has never contested the quantity, quality, or description as required by the contract [*CISG Art. 35(1)*]. Nor has RESPONDENT argued that Blue Hills 2005 was not fit for its ordinary purpose, as provided for in Article 35(2)(a). Further, RESPONDENT has not alleged that Blue Hills 2005 was not identical to the wine sampled at the Durhan Wine Fair, as provided for in Art. 35(2)(c).

92. RESPONDENT alleges only that Blue Hills 2005 was not fit for the *particular* purpose made known to CLAIMANT at the time of the conclusion of the contract [*Defense ¶19*]. This allegation is unfounded. The particular purpose made known to CLAIMANT at the time of the conclusion of the contract was that Blue Hills 2005 would be the lead wine in RESPONDENT’s September 2006 wine promotion **(A)**. Blue Hills 2005 was fit for this particular purpose **(B)**. In the alternative, RESPONDENT did not reasonably rely on CLAIMANT’s skill and judgment when selecting a wine merchantable in Equatoriana **(C)**.

**A. THE PARTICULAR PURPOSE MADE KNOWN TO CLAIMANT WAS THAT BLUE HILLS 2005 WOULD BE THE LEAD WINE IN RESPONDENT’S IN-STORE WINE PROMOTION.**

93. Under Article 35(2)(b) of the CISG, a buyer is considered to have “made known” a particular purpose if, on the basis of an objective assessment of the buyer’s statements and conduct, the seller knew or could not have been unaware of the buyer’s purpose. The key factor is that the buyer entrusted the seller to ensure that the goods conform to the contract [*Henschel (2005) at 239; see also Enderlein/Maskow at 145*].

94. RESPONDENT’s particular purpose was to showcase Blue Hills 2005 in its upcoming wine promotion. In his 14 May 2006 letter to RESPONDENT, Mr. Cox of CLAIMANT acknowledged that RESPONDENT was interested in Blue Hills 2005 for its wine promotion [*CE 1*]. Mr. Wolf of RESPONDENT replied that he was interested in featuring the Blue Hills 2005, as



“it has just the right character to take the lead in the promotion” [CE 2]. Mr. Cox confirmed this particular purpose in his 1 June 2006 offer [CE 3].

95. Aside from these general references in the pre-contractual negotiations, however, the parties never discussed what it meant for a wine to possess “just the right character” [CE 2] to be the “lead wine in [RESPONDENT’s] promotion” [CE 3]. When Mr. Wolf spoke of the “promotion of quality wines,” he spoke in general terms [PO2 Q23].

96. In the absence of express provisions, “it is not possible to determine once and for all the precise degree of quality to which the buyer is entitled....The quality can be more or less good within a tolerable degree, at least not conspicuously below the reasonable standard expected according to the price and circumstances” [Bianca in Bianca-Bonell at 281]. Thus, “[w]here the quality of performance is neither fixed by, nor determinable from the contract, a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances” [Henschel (2004) at 16]. Hence, because RESPONDENT’s purchase order did not define what qualities a feature wine in a wine promotion would require [CE 5], CLAIMANT was required to render goods of “reasonable quality” expected under the circumstances [Henschel (2004) at 22].

#### **B. BLUE HILLS 2005 WAS FIT FOR THIS PARTICULAR PURPOSE.**

97. The burden is on RESPONDENT to prove the non-conformity of the wine. [BGH (1995) (Ger.)]. RESPONDENT cannot meet this burden, as Blue Hills 2005 was fit for the particular purpose of being the featured wine in RESPONDENT’s wine promotion. It was a unique and award-winning wine that met all consumption regulations in both Equatoriana and Mediterraneo [1] CLAIMANT is not required to have to have specialized knowledge about any particular consumption norms in Equatoriana regarding the use of diethylene glycol as a sweetening agent [2], and CLAIMANT is not liable for general suspicion which renders the goods unusable [3].

##### **(1) Blue Hills 2005 is a unique and award-winning wine.**

98. Blue Hills 2005 has “just the right character” [CE 2] to take the lead in RESPONDENT’s wine promotion.

99. At the Durhan Wine Fair, RESPONDENT specifically sought out wine not previously marketed in Equatoriana [Claim ¶5]. As indicated by Mr. Cox in his acceptance of RESPONDENT’s purchase order, the Blue Hills 2005 deal was to have been the first time wine from Mediterraneo that would be marketed in Equatoriana [CE 8]. Thus Blue Hills 2005 would



have provided RESPONDENT with a unique product to be the “feature” in its promotion, enticing Equatoriana consumers with greater variety and novel products.

100. Blue Hills 2005 was not just unique; it received accolades within the wine-drinking world. Jurists at the Durhan Wine Fair, sampling Blue Hills 2005 with exactly the same chemical properties and processing as the Blue Hills 2005 to be delivered to RESPONDENT [PO2 ¶15], awarded this wine a prize among the reds [CE 1]. As RESPONDENT admitted, Blue Hills 2005 was “among the best in its price bracket” [CE 2].

101. In addition to Blue Hills 2005, other wines among CLAIMANT’s offerings were awarded prizes and accolades. Two of Mediterraneo Wine Cooperative’s white wines won prizes at the Durhan Wine Fair, along with Blue Hills 2005 [CE 1]. Thus, a consumer in Equatoriana considering whether to buy Blue Hills 2005 would be purchasing not just an award-winning wine, but an award-winning vintage.

102. Furthermore, Blue Hills 2005 complies with all applicable health regulations in both Equatoriana and Mediterraneo. Neither Equatoriana nor Mediterraneo require the labeling of ingredients [PO2 Q12]. Neither Equatoriana nor Mediterraneo forbid the use of diethylene glycol in consumables [PO2 Q11]. And both Equatoriana and Mediterraneo permit the use of diethylene glycol in wine at levels that exceed that of Blue Hills 2005 [PO2 Q11].

**(2) CLAIMANT is not expected to know any particular consumption norms in Equatoriana.**

103. CLAIMANT did not violate the contract by using diethylene glycol during the fermentation process of Blue Hills 2005 [CE 13]. In another case involving the chemical composition of goods, a German court held that “there was no violation of Article 35 when the seller delivered shellfish containing a high level of cadmium because the parties did not specify a maximum cadmium level in their agreement” [OLG Frankfurt 1994 (Ger.)]. While it may not be typical for RESPONDENT to specify the chemical make-up of the wine in its contract, it is not unreasonable to expect that the qualified wine buying team [Claim ¶5; PO2 Q15] that RESPONDENT sent to the Durhan Wine Fair would have been aware of the common use of sweetening agents – whether beet juice, sugar, or diethylene glycol [CE 13] – and specify any restriction as to their use when negotiating contracts of sale.

104. If the presence of ingredients considered atypical in Equatoriana would render Blue Hills 2005 unfit to be featured in its wine promotion, RESPONDENT had a duty to inform



CLAIMANT of this fact. “The CISG stipulates nothing with respect to qualitative prerequisites...in the buyer’s country. An obligation of the seller to fulfill those requirements would have to be expressly agreed in the contract.” [*Enderlein/Maskow* §8].

105. Just as a seller is not obligated to deliver goods which conform with special legislation in the buyer’s country absent special circumstances [*Henschel (2004) In discussing mussels case; OLG Frankfurt 1994 (Ger.); BGH (2005) (Ger.); OG (2000) (Austr.)*], CLAIMANT is not obligated to deliver goods which conform with special consumption norms in the buyer’s country, absent special circumstances. CLAIMANT was not aware of the peculiarities of RESPONDENT’s local market, nor was he required to know the norms for wine consumption in Equatoriana. Rather, the burden was on RESPONDENT to inform CLAIMANT of any particular norms applicable in Equatoriana [*Henschel at 7: “seller cannot be assumed to know of the norms in the buyer’s state”*].

106. Unless RESPONDENT informed CLAIMANT of any norms in Equatoriana differing from those in Mediterraneo which might impact the merchantability of the wine, CLAIMANT was entitled to adhere to the norms of his country, Mediterraneo [*Enderlein/Maskow* §8]. In Mediterraneo, it is normal to use a sweetening agent to ensure the proper level of fermentation [*CE 13*]; diethylene glycol was commonly used as a sweetening agent in Mediterraneo during the 2005 season [*CE 13*]; the negligible amount of diethylene glycol used during the fermentation of Blue Hills 2005 is not toxic to humans at normal, or even at extraordinary, wine consumption levels [*CE 13*]; the presence of diethylene glycol did not remarkably affect the sales of Blue Hills 2005 in Mediterraneo [*PO2 Q21*]; and the diethylene glycol did not render the wine undrinkable in either country [*PO2 Q11*].

**(3) CLAIMANT is not liable for general suspicion which renders the goods unusable.**

107. Because RESPONDENT failed to inform CLAIMANT of any particular consumption norms in Equatoriana that might impair the merchantability of Blue Hills 2005, RESPONDENT attempts to rely on an even lesser standard—the tainted image of the goods resulting from “negative publicity” [*CE 14*—to allege that Blue Hills 2005 is not merchantable. However, a seller cannot be held liable for a general suspicion surrounding certain goods which consequently renders them unusable and thereby non-conforming under Article 35(2)(b) of the CISG [*Schlechtriem (1995) § 2, ¶7*].



108. The German Supreme Court recently confirmed this proposition in a 2005 case involving imported pork [*BGH (2005) (Ger.)*]. Before all installments of Belgian pork reached Bosnia-Herzegovina via German intermediaries, suspicion arose that the goods might be contaminated with dioxin, a chemical highly toxic to humans. In response, Germany, Belgium, Bosnia-Herzegovina, and the European Union passed administrative measures requiring Belgian meat to be certified as dioxin-free, thus rendering the contaminated pork unsaleable. Although the Court found that a violation of Article 35(2)(b) of the CISG existed at the time the suspicion arose, this is only because the suspicion was grounded in bona fide health concerns, which were later validated. In other words, it was not the suspicion of dioxin which created the non-conformity, but rather the *existence* of dioxin in the pork.

109. By contrast, the suspicion in Equatoriana did not reflect an existing harm. Mr. Wolf of RESPONDENT premised his avoidance of the contract on sensationalist newspaper articles falsely alleging that anti-freeze had been used during wine production in the Blue Hills region of Mediterraneo [*CE 9*]. As explained by Professor Sven Ericson, ethylene glycol is the highly toxic principal ingredient in most brands of anti-freeze [*CE 13*]. The sweetening agent used by CLAIMANT is diethylene glycol [*CE 13*].

110. Diethylene glycol is harmless in the negligible amount contained in Blue Hills 2005 [*CE 13*]. Thus, no valid health concerns exist which would support a finding of non-conformity under Article 35(2)(b) of the CISG. The allegations that anti-freeze was used to produce Blue Hills 2005 was a general suspicion circulated by a newspaper of questionable reputation [*CE 10*]. CLAIMANT fully investigated and refuted the allegation [*CE 12; CE 13*]. Given that (1) Blue Hills 2005 contains only 0.15 grams of diethylene glycol per 75 centiliter bottle [*CE 13*]; (2) the density of diethylene glycol is 1.18 grams per cubic centimeter [*Merck Index at 3149*]; and (3) a fatal dose for humans is considered between 0.44-0.45 cubic centimeters per kilogram bodyweight [*CE 13*], a 70 kilogram individual would have to consume an extraordinary amount of Blue Hills 2005 (230-235 bottles) before consuming a lethal dose. At the minute levels present in Blue Hills 2005 (0.002 grams per kilogram bodyweight for a 70 kilogram individual), the alcohol in the wine would induce toxic effects before a person could be harmed by diethylene glycol [*CE 13*].

111. Diethylene glycol remains a permissible additive in consumables in both Equatoriana and Mediterraneo and the amount present in Blue Hills 2005 is less than the permitted amount in both countries [*PO2 Q11*].

**C. ALTERNATIVELY, THE EXCEPTIONS OF ARTICLE 35(2)(B) APPLY.**

112. In the alternative, RESPONDENT did not rely on CLAIMANT's skill and judgment when selecting a wine merchantable in Equatoriana [1]; or it was not reasonable for RESPONDENT to rely on CLAIMANT's skill and judgment [2].

**(1) RESPONDENT did not rely on CLAIMANT's skill and judgment.**

113. The seller is not liable for failing to deliver goods fit for a particular purpose if the circumstances show that the buyer did not rely on the seller's skill and judgment [*Secretariat Commentary* ¶7]. The buyer does not rely on the skill of the seller if the buyer participates in choosing the goods, inspects the goods before he buys them, or insists on a particular brand [*Enderlein/Maskow* at 321].

114. RESPONDENT sent a team of experienced wine buyers to the Durhan Wine Fair [PO2 Q15]; these buyers personally selected Blue Hills 2005 as the feature wine for its in-store wine promotion [*Claim* ¶5, CE 2]. Mr. Wolf, Principal Wine Buyer for RESPONDENT, the largest operator of super markets and the largest retailer of wine in Equatoriana [*Claim* 4], was uniquely positioned to be aware of the risks inherent to selling wine in Equatoriana, including any peculiar consumption norms or preferences. He sampled and then personally selected the wines at the wine fair [CE 1]. Thus, RESPONDENT did not rely on CLAIMANT's skill or judgment when selecting Blue Hills 2005.

**(2) It was unreasonable for RESPONDENT to rely on CLAIMANT's skill and judgment.**

115. Even if RESPONDENT did rely on CLAIMANT's judgment, it was unreasonable for RESPONDENT to do so.

116. In general, it is reasonable for a buyer to rely on a seller's professional skill and judgment, if (1) the seller is a specialist in the manufacture or trade in the goods of the description which shall be used for the particular purpose intended by the buyer, and (2) the buyer does not possess professional skill or judgment [*Henschel (2005)* at 236; *Kruisinga* §4.3].

117. In this instance, it is conceded that CLAIMANT is an expert in the manufacture and sale of wines to resellers. RESPONDENT, however, is the expert for the particular purpose intended by the contract—the resale of wine to Equatoriana consumers through a wine promotion. “It may be different [with respect to reliance] if the buyer is the expert and the seller...is a mere intermediary”



[*Kruisinga* §4.3]. CLAIMANT acted as the intermediary between the Wine Cooperative members and the consumers served by RESPONDENT. As noted above, Mr. Wolf for RESPONDENT is the Principal Wine Buyer for the largest operator of super markets in Equatoriana and the largest retailer of wine in that country [*Claim 4*]. Since only RESPONDENT could be aware of the unique needs and preferences of consumers in Equatoriana, it would be unreasonable for RESPONDENT to rely on CLAIMANT's judgment with respect to the most appropriate wine to feature in a wine promotion.

### **REQUEST FOR RELIEF**

118. In response to the Tribunal's Procedural Orders and RESPONDENT'S Statement of Defense, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons states in this Memorandum, Counsel respectfully requests the Tribunal to declare:

- (a) That stay of the arbitral proceedings should not be granted awaiting a decision of the Commercial Court of Vindobona, Danubia;
- (b) That an arbitral agreement was concluded between Mediterraneo Wine Cooperative and Equatoriana Super Markets, S.A.;
- (c) That Equatoriana Super Markets, S.A. is in violation of JAMS International Arbitration Rule 17.3;
- (d) That a contract of sale was concluded between Mediterraneo Wine Cooperative and Equatoriana Super Markets, S.A.; and
- (e) That Blue Hills Wine 2005 was fit for the particular purpose that had been made known to Mediterraneo Wine Cooperative at the conclusion of the contract.

119. Consequently, Counsel requests that the Tribunal:

- (a) Issue an anti-suit injunction ordering Equatoriana Super Markets, S.A. to discontinue all proceedings before the Commercial Court of Vindobona, Danubia; and
- (b) Order RESPONDENT to pay all costs of arbitration, including costs incurred by the parties and all costs arising out of the proceedings before the Vindobona Commercial Court.