FIFTEENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION

MOOT

VIENNA 14. – 20. March 2008

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF HEIDELBERG

ON BEHALF OF:	**AGAINST:**
EQUATORIANA SUPER MARKETS S.A.	MEDITERRANEO WINE COOPERATIVE
415 CENTRAL BUSINESS CENTRE	140 VINEYARD PARK
OCEANSIDE	BLUE HILLS
EQUATORIANA	MEDITERRANEO

ANNE DERBOT • DENNIS LIEVENS

STEFANIE SUCKER • CAROLINE WESTPHAL

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INDEX OF ABBREVIATIONS

Art.	Article
BGH	Bundesgerichtshof (German Supreme Court)
cf.	conferatur (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Exh.	Claimant's Exhibit
Cl. Mem.	Claimant's Memorandum
DAL	Danubian Arbitration Law
ed.	editor
eds.	editores
GAL	German Arbitration Law
e.g.	exempli gratia (for example)
EC Reg. 1493/1999	Council Regulation (EC) No. 1493/1999 of 17 Mai 1999 on the common organisation of the market in wine (*Official Journal L 179 , 14/07/1999 P. 0001 – 0084)*
fn.	footnote
ICC	International Chamber of Commerce
i.e.	id est (that is)
JAMS	Judicial Arbitration & Mediation Services
LG	Landgericht (German district court)
ML	UNICTRAL Model Law on International Commercial Arbitration of 1985
ML on E-Commerce	UNCITRAL Model Law on Electronic Commerce of 1998
No.	number
NY Convention	UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
OLG	Oberlandesgericht (German Regional Court of Appeal)
p.	page
pp.	pages
para.	paragraph
paras.	paragraphs

PO	Procedural Order
Seq.	sequens (the following)
v.	versus (against)
Vol.	Volume
Y.B. Comm. Arb.	Yearbook Commercial Arbitration
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
§	section

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STATEMENT OF FACTS

CLAIMANT	Mediterraneo Wine Cooperative, based in Mediterraneo (hereinafter referred to as "CLAIMANT"), is specialised in producing and marketing wine in and out of Mediterraneo.
RESPONDENT	Equatoriana Super Markets S.A., based in Equatoriana (hereinafter called "RESPONDENT"), is both the largest operator of supermarkets and the largest retailer of wine in Equatoriana.
14 May 2006 to 1 June 2006	After a wine fair in Durhan, Oceania, CLAIMANT and RESPONDENT (hereinafter "the Parties") exchanged letters in which they envisaged concluding a sales contract on 20,000 cases of wine for a wine promotion, which RESPONDENT planned for October 2006. CLAIMANT recommended RESPONDENT its prize-winning "Blue Hills 2005" as an "outstandingly fine wine" "for a promotion of quality wines".
10 June 2006	RESPONDENT sent CLAIMANT a purchase order (hereinafter referred to as "Purchase Order") containing an arbitration clause based on the precedent negotiations with reference to the wine promotion.
18 June 2006	RESPONDENT declared the revocation of its offer by e-mail after discovering in all of Equatoriana's newspapers that anti-freeze had been used to sweeten the wine in the Blue Hills area in Mediterraneo. CLAIMANT purports to have received that declaration only on the afternoon of the following day due to an internal server failure.
19 June 2006	CLAIMANT dispatched the acceptance of the purchase offer, which RESPONDENT has declared to revoke the previous day.
18 June 2007	CLAIMANT filed its request for arbitration and nominated an arbitrator.
4 July 2007	RESPONDENT brought an action before the Commercial Court of Vindobona, Danubia (hereinafter "the Commercial Court") on grounds that the arbitral proceedings brought by CLAIMANT are inadmissible.
17 July 2007	RESPONDENT filed a Statement of Defense before this arbitral tribunal (hereinafter "the Tribunal") denying its jurisdiction and therefore calling for a stay of the proceedings. It then also nominated the second arbitrator.
9 August 2007	The Tribunal was constituted with the nomination of Prof. Dr. Presiding Arbitrator.

SUMMARY OF ARGUMENTS

I. THE TRIBUNAL SHOULD STAY ITS PROCEEDINGS TO AVOID PARALLEL PROCEEDINGS

The Tribunal should use its discretionary power under Art. 8(3) DAL to stay its proceedings. The Commercial Court is competent to decide fully and finally on the admissibility of arbitral proceedings under Art. 8(2) DAL. Its decision is binding upon the Tribunal and Danubian courts even in setting-aside proceedings. Thus, the arbitral proceedings are dependant upon the outcome of the litigation. Continuing with the arbitration would only waste time and money.

II. THE TRIBUNAL SHOULD DISMISS THE CLAIM BECAUSE IT DOES NOT HAVE JURISDICTION

If the Tribunal does not stay the proceedings, it should dismiss the arbitral claim because it lacks jurisdiction. Under the applicable Danubian law, the Parties have never concluded an arbitration agreement because RESPONDENT validly revoked its offer to arbitrate prior to the dispatch of the acceptance. RESPONDENT's participation in the arbitral proceedings cannot be interpreted as consent to arbitrate because RESPONDENT expressly objected to the Tribunal's jurisdiction.

III. THE TRIBUNAL MAY NOT DRAW THE CONSEQUENCES REQUESTED BY CLAIMANT FOR THE PURPORTED VIOLATION OF ART. 17.3 JAMS

RESPONDENT did not violate Art. 17.3 JAMS by bringing a claim on the admissibility of arbitration before the Commercial Court. Art. 17.3 JAMS conflicts with the mandatory provision of Art. 8(2) DAL and is thus not applicable pursuant to Art. 1.5 JAMS. At least, the Tribunal may not issue an anti-suit injunction without violating Danubian public policy and because the requirements for such an interim measure are not fulfilled. It may neither draw inferences on the merits of the case without infringeing RESPONDENT's right of a fair and equal trial.

IV. THE PARTIES NEVER CONCLUDED A SALES CONTRACT UNDER THE CISG

The Parties have not concluded a sales contract under the CISG. RESPONDENT validly revoked its offer to purchase CLAIMANT's wine before the latter dispatched its acceptance.

V. THE "BLUE HILLS 2005" DID NOT CONFORM WITH THE PURPORTED SALES CONTRACT

The "Blue Hills 2005" does not conform with the standard of *quality wine* destined for a promotion of fine wines agreed upon in the contract pursuant to Art. 35(1) CISG because it was contamined with diethylene glycol. At least, it was unfit for the particular purpose of leading a promotion of quality wines pursuant to Art. 35(2)(b) CISG because of the contamination and of its bad reputation after the broad media coverage of the wine scandal in the Blue Hills region.

ARGUMENT

I. THE TRIBUNAL SHOULD STAY ITS PROCEEDINGS TO AVOID PARALLEL PROCEEDINGS AND THUS AVOID AN UNNECESSARY INCREASE IN COSTS AND WASTE OF TIME

1. RESPONDENT respectfully asks the Tribunal to stay its proceedings. The Tribunal has the discretionary power to do so under Art. 8(3) Danubian Arbitration Law ("DAL") and should do so because parallel proceedings will not help resolve the Parties' underlying dispute, but rather aggravate it. Art. 8 (3) DAL is applicable because the Parties designated Danubia as the place of arbitration [*Statement of Claim, para. 17*]. As *lex loci arbitri* the DAL is the law governing the arbitral procedure [*Art. 1(2) DAL and R/H, para. 2-94*]. Art. 8(3) DAL states that "where an action or application referred to in subsection […] 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court." On 4 July 2007 RESPONDENT brought an action under Art. 8(2) DAL before the Commercial Court of Vindobona, Danubia, that arbitral proceedings are inadmissible. To avoid parallel proceedings the Tribunal should exercise its discretion pursuant to Art. 8(3) DAL and thus refrain from continuing its proceedings. This would be in keeping with the practice of tribunals generally and the recommendation that they "stay the proceedings and should only proceed differently if the court procedures are used as tactical manoeuvres to delay the proceedings" [*B/K/N- Huber, p. 156; Bundestag 13/5274, p. 38*], for example in rare and particular cases where it is obvious that one party is challenging the arbitration based on an obviously far-fetched and unfounded argumentation [*Lachmann, para. 684; Bundestag 13/5274, p. 38*].

2. RESPONDENT's argumentation is neither far-fetched nor obviously unfounded and its procedural behaviour is certainly not dilatory. In fact, RESPONDENT commenced litigation before the Commercial Court by challenging the admissibility of the arbitration under Art. 8(2) DAL because the latter should be the only authority allowed to rule on this matter prior to the constitution of the Tribunal (A). The decision of the Commercial Court on the admissibility of the arbitration is *res iudicata* and thus final and binding upon the Tribunal and other Danubian courts. Therefore, any arbitral proceedings are redundant because the Tribunal should never issue an award contrary to the Commercial Court's decision. If the Tribunal does render such an award, it would violate Danubian public policy rendering the award null and void (B).

Considering these arguments, the Tribunal should conclude that RESPONDENT has not been using dilatory tactics, nor has it provided the Tribunal with far-fetched and ungrounded arguments. Consequently the Tribunal should stay its proceedings to avoid parallel proceedings (C).

A. The Tribunal shall stay its proceedings because the Commercial Court should be the only authority able to rule on the admissibility of the arbitration prior to the constitution of the Tribunal

3. The Tribunal should stay its proceedings in light of the Danubian Legislator's intent to allow courts to resolve issues surrounding the admissibility of arbitration prior to the formation of arbitral tribunals. It should recognize that the Commercial Court is the only authority able to decide issues of admissibility of arbitration where one of the parties to a dispute sought to litigate them before the disputed arbitral tribunal was formed (1). *In casu*, the Commercial Court has jurisdiction to adjudicate the question of admissibility because all of the requirements of Art. 8 (2) DAL have been met (2).

1. The Commercial Court has jurisdiction to rule on the admissibility of arbitrations pursuant to Art. 8(2) DAL

4. The Commercial Court has jurisdiction to determine the admissibility of the arbitration under Art. 8 (2) DAL, which states that "prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible".

5. By introducing this article, the Danubian Legislator made a sovereign decision to restrict the *competence-competence* of arbitral tribunals by allowing the parties to a dispute to resort to litigation before Danubian courts to resolve the question of whether they in fact had agreed to arbitrate their dispute. This restriction is legitimate because "the basis for the *competence-competence* principle lies not in the arbitration agreement but in the arbitration laws of the country where the arbitration is held" [*Cl. Mem., para. 32; F/G/G, para. 658*]. Art. 8(2) DAL is a public policy provision that serves to protect the parties' right of free access to a national court in the period between the conclusion of the arbitration agreement and the constitution of the arbitral tribunal [*Musielak-Voit, § 1032, para. 11*]. For this reason, an argument based on the *competence-competence* rule fails. In fact, the parties do not have the power to derogate from Art. 8(2) DAL, as it is a mandatory rule of law. Therefore, with respect to this question, the Tribunal should take into account neither the wording of the arbitration clause nor its scope nor external means to interpret it, such as the *contra proferentem principle* [*see Cl. Mem., para. 38*].

6. Even if the Tribunal disagrees with the assessment that Art. 8(2) DAL represents a mandatory rule of law, it should nonetheless heed Art. 8(2) DAL based on the sound policy rationale behind it. Art. 8(2) DAL is an add-on to the text of the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("ML"), which Danubia adopted in full. Absent this provision, a defendant to an arbitral procedure would have to resort to only one of two unfavourable choices in terms of disputing the admissibility of the arbitration. First, the defendant could refuse to participate to the arbitration, thereby risking a default award against it, which then could be enforced against it absent a successful (but costly) set-aside procedure [*S/J-Schlosser, § 1032, para 21*]. Second, the defendant could participate in the arbitral proceedings and also suffer a duplication in costs and an additional waste of time if defendant later sought to set-aside the award and then re-litigate the dispute. The Danubian Legislator introduced an alternative to these two options in Art. 8(2) DAL, which ensures a swift and efficient dispute resolution by taking into account on the one hand, the fundamental procedural right of both parties to be heard by a Danubian court prior to the constitution of an arbitral tribunal and on the other hand, the parties autonomy to arbitrate.

7. The same policy behind Art. 8(2) DAL is supported by German law. In fact, by introducing Art. 8(2) DAL, the Danubian Legislator copied it from § 1032(2) of the German Arbitration Law of 1998 ("GAL"). Analyzing this article's legal history, the German Legislator likewise preferred to give the national courts the power to decide admissibility disputes in a pre-arbitral phase instead of giving the parties the full autonomy to arbitrate [*Carbonneau, p. 1157*].

8. Hence, the Danubian Legislator, like the German Legislator, stated an exception to the arbitral tribunal's competence-competence in the period prior to an arbitral tribunal's constitution [*Art. 8(2) DAL; section § 1032(2) GAL*]. Art. 8(2) DAL thus empowers RESPONDENT to present its claims to and to be heard by the Commercial Court as it is competent to rule on the admissibility of the arbitration.

2. The requirements of Art. 8(2) DAL have been met

9. The Commercial Court has jurisdiction to rule on the admissibility of the arbitration under Art. 8(2) DAL if the following two requirements have been met. First, the litigation must be brought prior to the constitution of an arbitral tribunal adjudicating the underlying dispute. "Prior to the constitution of an arbitral tribunal" means before all arbitrators have been appointed by the parties [*Musielak-Voit, § 1032, para. 10; MK-Münch, § 1032, para. 11; BayObLGZ 99, 263*]. Second, the application must address issues concerning the admissibility of arbitration,

such as the existence, validity and/or scope of the arbitration agreement [*Zöller-Geimer, § 1032, para. 23; BayOblGZ 99, 263*].

10. *In casu*, both requirements have been met. First, RESPONDENT applied to the Commercial Court in the first week of July [*Appointment of arbitrator, p. 30*]. Thus, RESPONDENT applied to the Commercial Court prior to the second arbitrator's appointment on 3 August 2007 [*Appointment of arbitrator, p. 42*] and the third, presiding arbitrator's appointment on 17 August 2007 [*Appointment of arbitrator, p. 47*]. Consequently, RESPONDENT's application was timely. The mere fact that the Tribunal was constituted while the litigation was pending does not deprive the Commercial Court of its jurisdiction to decide the admissibility of the arbitration [*Lachmann, para. 679; BayOblG 98*]. Second, RESPONDENT's application addresses the existence of the arbitration agreement and therefore the admissibility of the arbitral proceedings [*PO No. 1, para. 4*].

11. As the requirements of Art. 8(2) DAL have been met, the Commercial Court has jurisdiction to decide on the admissibility of arbital proceedings. Consequently, the Tribinal should stay its proceedings and await its decision.

B. The Commercial Court's final decision on the admissibility of the arbitration is binding upon the Tribunal and other Danubian Courts which makes the arbitral proceedings redundant

12. The Tribunal should stay its proceedings because the enforceability of a later award depends on the Commercial Court's decision on arbitrability. Art. 8(2) DAL gives the Court the competence to fully review the arbitration agreement (1). As res iudicata, the decision of the Commercial Court is binding on the Tribunal and any other Danubian Courts, which makes arbitral proceedings redundant until the Commercial Court has made its decision (2).

1. The Commercial Court will fully review the existence, validity and scope of the Arbitration Agreement

13. Pursuant to Art. 8(2) DAL, the Commercial Court will fully determine the existence, validity and scope of the arbitration agreement [*unanimous position in Germany concerning § 1032 ZPO: MK-Münch, § 1032, para. 11; S/J-Schlosser, § 1032, para. 21*]. Supported by "Economy of Means" considerations [*Bachand, p. 464*], the full review of the admissibility of the arbitration by a national court avoids the need of a full review in later set-aside proceedings and thus spares the parties additional arbitral proceedings and additional costs.

14. CLAIMANT's argument that Art. 8 DAL allows only for a prima facie review of whether the arbitration agreement is "manifestly null" or "patently void" [*Cl. Mem., para. 34*] is based on two misapprehensions. First, CLAIMANT's Memorandum cites only cases and literature referring to provisions based upon Art. 8(1) DAL. However, the reasoning under Art. 8(1) DAL cannot be transferred to Art. 8(2) DAL. Under Art. 8(1) DAL, the existence and validity of the arbitration agreement will only be treated as a preliminary question when an arbitration agreement is invoked as a defence in ongoing litigation before an otherwise competent national court. As the arbitrability of the underlying dispute is considered to be a prelimimary question in this context, any resolution thereof is not *res iudicata* and does not affect the competence of an arbitral tribunal to fully review the arbitration agreement again or in parallel. Under Art. 8(2) DAL, however, the admissibility of the proposed arbitration, including the validity and existence of the underlying arbitration agreement, is the only matter in dispute before the national court and will be fully reviewed. Any court decision on this matter will be *res iudicata*. [*Huber, p. 74; Zöller-Geimer, § 1032, para. 14, S/J-Schlosser, § 1059, para. 7*]. It should also be noted that the UNCITRAL Working Group opined that even Art. 8(1) DAL does not restrict the Court to a prima facie finding but gives it the discretion to review an arbitration agreement fully [*Third Working Group Report, see H/N, p. 315 and also Mayer, p. 344, para. 15; Lew/Mistelis/Kröll, p. 349, para. 14-61*]. It voted explicitly against the petition to introduce the word "manifestly" before the phrase "null and void" in Art. 8(1) ML [*H/N, p. 303, 315*]. Thus, the Commercial Court can fully review the existence, validity and scope of the agreement to arbitrate under Art. 8(2) DAL.

2. The Commercial Court's decision on the admissibility of the arbitration is final and binding on the Tribunal and any relevant Danubian court that decides on the same matter of dispute

15. CLAIMANT stated correctly that the Commercial Court "has power to determine [the arbitrators jurisdiction] finally" [*Cl. Mem., para. 30*]. As discussed above, a decision of a relevant Danubian court on the admissibility of the arbitration is binding upon an arbitral tribunal because it constitutes *res iudicata* [*see supra, para. 14*]. The arbitral proceedings are dependent on this decision since the Commercial Court's decision cannot be altered by the Tribunal. Consequently, the arbitral proceedings are redundant until the Commercial Court has made such a determination and should therefore be stayed.

16. Should the Tribunal continue its proceedings or even render an arbitral award despite a determination by the Danubian Court that the Tribunal is not competent, Danubian courts will declare such an award to be void [*in view of the identical norm of Section 1032 ZPO: Musielak-Voit, §*

1032, para. 14; Huber, p. 74; Zöller-Geimer, § 1032, para. 14; Nagel-Schlosser, p. 360]. Such an award would infringe upon the binding legal force of the court judgment and would be in "manifest disregard of the law" [*Eljer Mfg., Inc. v. Kowin Develop Corp.*]. Such an award violates Danubia's public policy, even if the Commercial Court came to its determination only after the Tribunal rendered its award [*B/K/N-Huber, para. 60*].

17. Danubian courts have the authority to declare any award rendered in violation of a determination of non-admissibility to be void in three situations. First, RESPONDENT may apply to a Danubian court under Art. 16(3) DAL to set aside a preliminary award by this Tribunal that it has jurisdiction. Second, RESPONDENT may apply to the relevant Danubian court under Art. 34(2)(a)(i) DAL to set aside the Tribunal's award on the merits of the sales dispute [*Lachmann, para. 686, 732, 2096; OLG Köln; BGH, 28.09.2001; BGH 12.07.1990*]. Third, the relevant Danubian court will declare any contradicting award void if CLAIMANT seeks recognition of this award in Danubia under Art. 36(1)(b)(ii) DAL.

18. Moreover, such an award is unlikely to be recognized and enforced before the courts of Equatoriana, where RESPONDENT has its seat and assets [*Request for Arbitration, p. 4, para. 3*]. Under Art. V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("NY Convention"), the competent Equatorianian Court is unlikely to recognize and enforce an arbitral award that "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made" [*see also R/H, para. 10-45*]. Since a Danubian court will set aside an arbitral award by this Tribunal, it is unlikely that such an award will be enforced in Equatoriana.

19. Any arbitral proceedings would therefore be redundant as well as unnecessarily costly until the Commercial Court has determined whether this Tribunal is competent to hear the parties' dispute. Therefore, the Tribunal should stay its proceedings and await the Commercial Court's decision.

C. The Tribunal should stay its proceedings under Art. 8(3) DAL

20. To avoid costly and time consuming parallel proceedings and contradicting decisions, the Tribunal should use its discretion under Art. 8(3) DAL not to continue, in fact not even to commence its proceedings pending the outcome of the Commercial Court's decision. The Tribunal should stay its proceedings because CLAIMANT cannot satisfy the Tribunal that RESPONDENT has brought an unfounded or obstructive challenge to the arbitral proceedings. On the contrary, RESPONDENT has rightfully exercised its rights under Art. 8(2) DAL to have

the admissibility of arbitration firstly determined by the Commercial Court. RESPONDENT's litigation claims are neither unfounded nor far-fetched because the conclusion of an arbitration agreement is a focal point in the dispute between the Parties. Thus, CLAIMANT's allegation of dilatory tactics [*Cl. Mem., para. 29*] are false.

II. THE TRIBUNAL SHOULD DISMISS THE CLAIM BECAUSE IT DOES NOT HAVE JURISDICTION

21. If the Tribunal should not grant a stay of the proceedings, it should dismiss the arbitral claim because it does not have jurisdiction to hear the dispute. The Tribunal lacks jurisdiction because the Parties never concluded an arbitration agreement under the provisions of Danubian Law (A). If the Tribunal should nevertheless find that an arbitration agreement was concluded, it should consider this agreement to be void because its wording violates Danubian public policy (B).

A. The Parties never concluded an arbitration agreement

22. The Tribunal should find that an arbitration agreement never came into existence under Danubian Contract Law. The Parties did not include a choice-of-law clause in the proposed arbitration agreement. In the absence of such an agreement, in an analogy to Art. V(1)(a) of the NY Convention, the Tribunal should apply the law of the country where the award will be made as the appropriate conflicts of laws rule [*V/B/M, pp. 616-618.; van den Berg, p. 123-124*]. That country is the country of the seat of arbitration [*R/H, 2-94*]. As it is internationally recognised that conflict of law rules contained in international conventions should be understood to refer to substantive law, the law on contract formation of the seat of arbitration is applicable [*van den Berg, p. 177*], *in casu* Danubian law. Thus, RESPONDENT agrees with CLAIMANT that Danubian law should govern the "substantive issues of contract formation, validity, and legality" of the arbitration agreement [*Cl. Mem., para 17*].

23. Danubia follows the general common law rules on the formation of contract [*PO No. 2 para. 7*]. The Tribunal should find under the applicable Danubian law that an arbitration agreement was neither concluded between the Parties through their exchange of letters (1), nor through their conduct in the pre-arbitral proceedings (2).

1. The Parties did not conclude an arbitration agreement through their exchange of letters

24. The Tribunal should find that the Parties did not conclude an arbitration agreement through their exchange of letters. An arbitration agreement is a contract [*V/B/M, p. 89*]. The formation of a contract requires a "meeting of the minds" in the form of a definite offer by one party and an equally definite acceptance by the other party [*Ibbetson, p. 221; Anson, p. 27*].

25. The Tribunal should find that no arbitration agreement was formed because the offer to conclude such an agreement together with RESPONDENT's offer to conclude a sales contract was validly revoked. This happened prior to CLAIMANT`s dispatch of its acceptance.

26. RESPONDENT made an offer to conclude a sales contract containing an arbitration clause on 10 June 2006 and it declared that it revoked this offer on 18 June 2006 (a). This revocation reached CLAIMANT on 18 June 2006 and thus prior to the dispatch of CLAIMANT's acceptance of 19 June 2006 (b). At this point in time RESPONDENT could still revoke its offer because the offer was revocable (c) and it validly did so by e-mail (d). Any other interpretation of the foregoing would be inequitable because RESPONDENT would be considered solely bound to an arbitration agreement it did not conclude in the first place (e).

a. RESPONDENT validly revoked the offer to arbitrate

27. RESPONDENT has validly revoked its offer to arbitrate. On 10 June 2006, RESPONDENT made an offer to conclude a sales contract. The form contract that RESPONDENT used contained an arbitration clause. However, before CLAIMANT dispatch its acceptance of the offer RESPONDENT sent CLAIMANT an e-mail with the following content on 18 June 2006: "We regretfully inform you that we are withdrawing the offer to purchase 20,000 cases of Blue Hills 2005 made by us on 10 June 2006" [*Cl. Exh. No. 9*].

28. CLAIMANT's assertion that the e-mail of 18 June 2006 cannot be interpreted as a revocation of RESPONDENT's entire offer, including the arbitration clause [*Cl. Mem., para. 12*], neglects to take into account the rules on interpreting such statements. Under those rules as set forth in the common law, statements should be read from the perspective of the recipient and that particular recipients's reasonable understanding of the declarant's true intent. This objective test relies on the recipient's horizon and the conclusions which the recipient could logically draw [*Chitty on Contracts, para. 2-001; McKendrick, p. 407*].

29. All communications between CLAIMANT and RESPONDENT involved only sales personnel. Thus, the objective test takes the perspective of a reasonable businessman in the parties' position as its point of reference [*Samuel, p. 174*]. In his e-mail of 18 June 2006, Mr. Wolf, RESPONDENT's Principal Wine Buyer, declared to withdraw the "offer […] made by [RESPONDENT] on 10 June 2006". RESPONDENT's offer of 10 June 2006 contained a contract on the purchase of wine and an arbitration clause [*Cl. Exh. No.5*]. The arbitration clause is in one of the provisions of the contract form [*cf. Svernlov, p.37*]. By referring explicitly to this document, RESPONDENT expressed its intention to revoke all aspects of the Purchase Order including the arbitration clause. This understanding to terminate all proposed business and legal relations with CLAIMANT should be apparent to a reasonable businessman in CLAIMANT's position.

30. If the Tribunal should deem the wording of the e-mail of 18 June 2006 to be ambiguous, RESPONDENT would like to draw the Tribunal's attention to the fact that a reasonable businessman cannot be expected to fully understand complicated legal concepts such as the autonomy and separability of an arbitration clause in standard contract forms. As CLAIMANT's lengthy submission has shown, the scope and the effects of those concepts are largely disputed, even among legal experts [*Cl. Mem., para. 1-10*]. Thus, the reasonable Sales Manager of a wine producing company would not know that the offer to arbitrate must be revoked independently of the offer to conclude a sales contract. A reasonable Sales Manager would therefore understand RESPONDENT's declaration of 18 June 2006 as a revocation of the entire contract.

31. The fact that it was RESPONDENT who introduced the arbitration clause in the Purchase Order does not change the above interpretation. The wording of RESPONDENT's cover letter accompanying the Purchase Order indicates that RESPONDENT used a standard "contract form" in its offer [*Cl. Exh. No. 4*]. However, the e-mail sent by Mr. Wolf on Sunday, 18 June 2006 from his home was evidently not preformulated. The rule of *contra proferentem* therefore only applies to the contract form and not to the following communication between the Parties. Mr. Wolf's clumsiness in his declaration – speaking of "the offer to purchase" instead of "Purchase Order" and using the term "withdrawal" instead of "revocation" – cannot be measured against the strict standard applicable to the contract form. From a recipient's understanding, it should furthermore be taken into account that the e-mail was sent after RESPONDENT learned about the Mediterraneo Wine production scandal, which could cause "a commercial catastrophe far beyond the sales of wine" [*Cl. Exh. No. 9*] in the expectation that

CLAIMANT would act upon the offer the next day. To timely revoke his offer, Mr. Wolf had no choice but to act immediately and without consulting a lawyer.

32. In interpreting a declaration of intent, the true intent of the declaring party should prevail if it is discernable from the circumstances [*Evans in Pothier, Appendix V, p. 31*: *"As every contract derives its effect from the intention of the Parties, that intention, as expressed or inferred, must be the ground for every decision respecting its operation, and extend, and the grand object of consideration in every question with regard to its construction"*]. It would be an "utmost anomalous result" [*Svernlov, p. 48*] if a reasonable recipient of RESPONDENT's declaration assumed that RESPONDENT intended to revoke the main contract but to leave its offer to arbitrate open for acceptance. That offer would be completely unnecessary without the contract to which it refers and thus even be void because it lacks of subject matter to subject to arbitrate [*CFF, p. 13*].

b. The revocation reached CLAIMANT prior to the dispatch of its acceptance

33. The Tribunal should find that RESPONDENT's revocation reached CLAIMANT prior to the dispatch of CLAIMANT's acceptance. RESPONDENT revoked its offer to arbitrate of 10 June 2006 on 18 June 2006 and thus prior to the dispatch of CLAIMANT's acceptance on 19 June 2006.

34. Under Danubian contract law, which as stated above corresponds to the contract law of most common law jurisdictions [*PO No. 2 para. 7*], a person who has made an offer must be considered as continuously making it until he has "brought to the mind [of the offeree]" [*Henthorn v. Fraser, per Lord Herschell at p. 32*] that it is obsolete. Hence, the revocation is effective in law when it is communicated to the offeree prior to the dispatch of his acceptance [*Byrne v. Van Tienhoven; Chitty on Contracts, para. 2-081*].

35. CLAIMANT purports that the revocation, sent by e-mail, did not reach CLAIMANT before it dispatched the acceptance on 19 June 2006 due to a service failure in CLAIMANT's internal computer network. This service failure could not be corrected before the afternoon of 19 June 2006 [*Statement of Claim, para. 10*].

36. In general, a revocation sent by mail is effective when it would have come to the offeree's attention in the ordinary course of business [*Ealehill Ltd v. J Needham (Builders) Ltd (1973)*]. The point in time when a revocation made by electronic communication becomes effective "must be resolved by reference to the intentions of the parties, by sound business practice and by judgement where the risks should lie" [*LJ Wilberforce in: Brinkibon v Stahag*]. RESPONDENT sent

its offer to arbitrate on Saturday 10 June 2006. On Sunday 11 June 2006, CLAIMANT informed RESPONDENT via e-mail that the Purchase Order will not be dealt with until 19 June 2006 [*Cl. Exh. No. 6*]. Thus, CLAIMANT demonstrated that it had a business practice of reading incoming e-mails on a Sunday. When RESPONDENT sent its revocation by e-mail on Sunday 18 June 2006, RESPONDENT could therefore rely on CLAIMANT's practice of reading the e-mail on the same day, even on a Sunday.

37. The fact that an offeree does not actually read a message when it arrives does not prevent a revocation from being effective [*The Brimnes; Schwentzer/Müller-Chen, p. 16; Anson, p. 56*]. CLAIMANT was hindered from receiving incoming messages due to its own internal service failure. That failure was outside of RESPONDENT's control and RESPONDENT did not even know of the service failure. As CLAIMANT has invited RESPONDENT to communicate with it by e-mail, it must bear the consequences of the chosen way of communication. Mr. Cox for CLAIMANT had opened the possibility to communicate via e-mail when it handed Mr. Wolf for RESPONDENT its business card containing his individual e-mail address at the Durhan Wine Fair [*PO No. 2, para. 24*]. Since RESPONDENT had been invited to communicate by e-mail, as a matter of fair dealing, CLAIMANT's system should at least have alerted RESPONDENT of the computer failure through an error report, which would have enabled RESPONENT to revoke its offer by alternative means. Further to the idea that the least-cost avoider must bear the risk of any failures within its sphere of influence, CLAIMANT should bear the risks resulting from the internal network failure. Thus, the Tribunal should find that the RESPONDENT timely revoked its offer to arbitrate.

38. Should the Tribunal find that the message reached CLAIMANT only on 19 June 2006, being the next business day, RESPONDENT's revocation would nonetheless have reached CLAIMANT first thing in the morning of 19 June 2006 and thus still prior to CLAIMANT's dispatch of the acceptance.

c. RESPONDENT was entitled to revoke its offer because the offer was revocable

39. On 18 June 2006, RESPONDENT validly revoked the offer because it was not bound to it. An offer creates no enforceable legal rights until it is accepted, and it may be terminated at any time [*CFF, p. 62; P No. 2(7), p. 52*].

40. Exceptions to this rule of common law are very rare and are in this case not applicable. A promise to keep an offer open needs consideration to make it binding [*Feriell/Navin, p. 87; Craswell/Schwartz, p. 226*], meaning that CLAIMANT would have had to change its legal position

in exchange for RESPONDENT's obligation to keep the offer open [*Chirelstein, p. 14*]. The offeree is said to "purchase an option" when the offeror makes a separate contract not to revoke the offer during a stated period. RESPONDENT had not bound itself by a separate contract to keep the offer open and was thus free to revoke at any time. The proposed sales contract was not an option contract since the offer was not associated with a right to bring about the formation of a contract in spite of any attempt at revocation [*cf. James, p. 2; Skaloper/Staifer, PFZ 57 (2007) pp. 62, 94*].

41. The fact that RESPONDENT had set a time limit for the acceptance is irrelevant under the Common Law doctrine of revocation [*Anson, p. 51, 53*]. This rule applies even though the offeror has promised to keep the offer open for a specified time, for such a promise is unsupported by consideration and is therefore not binding [*CFF, p. 62; Chitty on Contracts, para. 2-080*].

42. The offer was also not made irrevocable either through the correspondence with Ms. Kringle of 11 June 2006. After receiving RESPONDENT's offer of 10 June 2006, Ms. Kringle for CLAIMANT informed RESPONDENT that the Purchase Order would not be dealt with until 19 June 2006 [*Cl. Exh. No. 6*]. RESPONDENT thanked Ms. Kringle for this information, reminding her that if the named date passed, RESPONDENT would look for alternative wines. This correspondance has a purely informative character about the business situation of both parties and is thus without any legal effect on RESPONDENT's right to revoke its offer.

d. RESPONDENT validly revoked the offer by e-mail

43. In the absence of a contrary party agreement, the common law does not prescribe any form requirement for the formation of a contract [*Chitty on Contracts, para. 4-001; Anson, p. 73*]. At common law, consideration replaces the need for a specific form, as the Parties' willingness to change their legal position by offering consideration already is a mechanism ensuring that the Parties think through their decision to contract [*Treitel, p. 176*]. Based on their brief history, the Parties had not come to an even implied agreement with respect to contractual form.

44. The form requirements of Art. II of the NY Convention also are not applicable in this case. Art. II NY Convention's treatment of the form of an arbitration agreement does not extend to issues surrounding the actual formation of the arbitration agreement. The question whether there was a "meeting of the minds" at the time of contracting for arbitration thus must be resolved by the law to which Art. V(1)(a) NY Convention refers [*van den Berg, p. 177*]. That law is Danubian contract law.

45. Even if there had been a written form requirement, and this requirement extended to revocations of an offer to arbitrate, commercial contracts which are made by e-mail satisfy the requirement of writing [*Treitel, p. 186*]. Thus, the form of RESPONDENT's revocation was valid.

e. Binding RESPONDENT solely to the arbitration agreement would be inequitable

46. As shown above, a "meeting of the minds" between the Parties, with respect to agreeing to arbitrate any disputes relating to the proposed contract, never occurred. Thus, neither an arbitration agreement nor a sales contract was formed to which the doctrine of separability could apply [*Schwebel, p.2*]. CLAIMANT's legal conclusions concerning the interpretation of RESPONDENT's revocation in view of the doctrine of seperability [*Cl. Mem., para. 11*] are therefore unfounded.

47. Even if the doctrine of separability should be applied in the interpretation of the revocation, such an approach would lead to the counter-intuitive and indeed absurd result that the offer to conclude an arbitration agreement was still open as the offer to conclude a sales contract had been validly revoked. This solution is inequitable. CLAIMANT itself relies on principles of good faith when quoting Gaillard and Savage with the statement that "an argument of pure form, which is wholly out of the context or plainly contrary to the structure or the purpose of the agreement" shoud be rejected [*Cl. Mem., para. 13*]. The principle of equity in negotiations demands that the other party does not stretch the interpretation of party intent with purely formalistic arguments for its own benefit [*CFF, p. 28*]. CLAIMANT's interpretation that RESPONDENT only revoked the offer to conclude a sales contract and kept its offer to arbitrate over a non-existing contract open [*Cl. Mem., paras. 11 et seq.*], thus is to be rejected as formalistic and inequitable.

48. CLAIMANT used the same formalistic approach when it argued that the written exchange between the Parties created a presumption that there was a "meeting of the minds" with respect to the formation of the arbitration agreement [*Cl. Mem., para. 20*]. If an offer has been validly revoked, the offer cannot give rise to legal consequences any more, even if that offer was made in writing. The fact that CLAIMANT sent an acceptance in writing is irrelevant because the acceptance was dispatched after RESPONDENT's revocation came into effect. CLAIMANT's argument disregards that under common law principles a written offer statement alone does not give rise to a "meeting of the minds", and thus also not to a contract [*Ferriell/Navin, p. 145*]. An

offer, even in wirting is solely a statement of intent and may be terminated at any time until the acceptance is dispatched [*Anson, p. 51*].

49. Last, CLAIMANT invokes good faith to support the argument that RESPONDENT cannot revoke its offer to arbitrate [*Cl. Mem., para 13*]. RESPONDENT had no obligation to contract with CLAIMANT. RESPONDENT carefully selects its business partners. After learning about the scandal in the Mediterraneo wine production, RESPONDENT could not maintain business relations with CLAIMANT without putting at risk its economic survival. Thus, RESPONDENT's revocation does not breach the principle of good faith and indeed was made in good faith.

2. An arbitration agreement was not formed by RESPONDENT's conduct during the pre-arbitral proceedings

50. Although CLAIMANT did not mention the fact that RESPONDENT participated in the arbitral proceedings, an arbitration agreement was not concluded by way of RESPONDENT's participation in the arbitral proceedings. A party's intent may be inferred from its conduct, and in the light of the circumstances of the case [*Anson, p. 30*].

51. RESPONDENT's pre-arbitral conduct more precisely its appointment of an arbitrator and its submission of a Statement of Defense, cannot be classified as consent to the Tribunal's jurisdiction [*Gildeggen, p. 23; Sareika, pp. 173, 174, 202*]. RESPONDENT clearly indicated that it did not recognize the Tribunal's jurisdiction by participation in the pre-arbitral proceedings, and thus did not waive its right to object to the jurisdiction of the Tribunal pursuant to Art. 28.1 JAMS and Art. 4 ML. Hence, the arbitral juristdiction must not be inferred and RESPONDENT must not be deemed to have waived its rights to object [*First Options v. Kaplan; China Minmetals v. Chi Mei*].

52. RESPONDENT felt obligated to react to CLAIMANT's reproaches by appointing an arbitrator and submitting a Statement of Defense to ensure that if the Tribunal did have competence to adjudicate the dispute, it preserved its right to be heard. Otherwise, RESPONDENT would risk being subject to a less factually fair and impartial arbitration, since RESPONDENT otherwise would have no influence on the appointment of the second and third arbitrators as foreseen by Art. 7.4 JAMS. This course of action does not, however, give rise to consent to an arbitration agreement. Indeed, the Tribunal should not draw any inferences from the RESPONDENT's participation as the RESPONDENT has challenged the jurisdiction of the Tribunal at every available opportunity.

B. In the alternative, the Tribunal should dismiss CLAIMANT's claims because the Tribunal's ground for jurisdiction, the arbitration agreement, is void

53. If the Tribunal should find that an arbitration agreement was formed, it should still dismiss CLAIMANT's requests on grounds that the arbitration agreement is void because the wording of the arbitration clause derogates from Art. 8(2) DAL. This article is a public policy provision protecting the parties' right of free access to a national court in the period prior to the constitution of an arbitral tribunal [*see supra, paras. 5-6*]. Generally, "public policy may in no case be disregarded; if it is, arbitral proceedings are null and void."[*R-S, p. 500 and fn. 117*]. Specifically, under Art. 34(2)(a)(i) DAL an arbitral award can be set aside if "the said agreement is not valid [...] under the law of this State". Also under Art. V(1)(a) NY Convention "recognition and enforcement of the award may be refused[...] if [...] the said agreement is not valid under the the law of the country where the award was made". Both articles express that an arbitration agreement is invalid if it is contrary to the law of the country where the award was made [*R/H, para. 3-06*], *in casu* Danubia.

54. In the case at hand, the wording of the arbitration clause is in conflict with the public policy provision of Art. 8(2) DAL which states that "any dispute […], including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules". This clause empowers the Tribunal with the sole jurisdiction to decide on disputes concerning arbitrability and is therefore incompatible with Art. 8(2) DAL. It denies RESPONDENT the right to be heard by the Commercial Court prior to the constitution of the Tribunal. Therefore, RESPONDENT respectfully requests the Tribunal to dismiss the entire claim because the Arbitration Agreement violates Art. 8(2) DAL.

55. Should the Tribunal find that the violation of Art. 8(2) DAL only concerns this controversial part of the arbitration agreement, RESPONDENT respectfully submits that this partial invalidity affects the validity of the entire arbitration clause because RESPONDENT would not have agreed to conclude the remaining arbitration agreement without this part of the arbitration clause. With the partial remainder of the arbitration clause, RESPONDENT would have to bear double legal costs – as it has already – if it were to dispute the existence or validity of an arbitration agreement in two fori. First, it would have to file a claim before the Mediterranean national court to dispute the admissibility of the arbitration and second, it would possibly have to turn to the JAMS Tribunal in Danubia to discuss the merits of the sales dispute. Concluding, the Tribunal should dismiss the claim because the purported arbitration agreement is to be considered entirely void as it violates Art. 8(2) DAL.

III. THE TRIBUNAL SHOULD NOT DRAW THE CONSEQUENCES REQUESTED BY CLAIMANT FOR THE PURPORTED VIOLATION OF ART. 17.3. JAMS

56. The Tribunal should neither issue an anti-suit injunction nor impose sanctions on RESPONDENT for allegedly violating Art. 17.3 JAMS and the purported arbitration agreement. RESPONDENT in fact violated neither the arbitration agreement nor Art. 17.3 JAMS (A). An anti-suit injunction against RESPONDENT would, furthermore, violate Danubian public policy rules. Even if there was no violation of public policy, in any case the prerequisites for an injunction are not fulfilled (B). Furthermore, the Tribunal should not draw inferences as this would infringe its right of a fair and equal trial (C). Last, the Tribunal should not order RESPONDENT to pay CLAIMANT's litigation costs (D).

A. The Tribunal should neither issue an anti-suit injunction nor sanction RESPONDENT for allegedly violating the arbitration agreement and Art. 17.3 JAMS

57. By commencing an action in the national courts of Danubia to determine whether the Parties' dispute is subject to arbitration, RESPONDENT did neither violate and cannot have violated the purported arbitration agreement nor Art. 17.3 JAMS - which obligates the parties to an arbitration agreement to refrain from applying to courts for a determination on the arbitral tribunal's jurisdiction. In fact, the purported arbitration agreement was not validly formed and therefore never became binding on the Parties [*see supra, paras. 21-55*]. Thus, RESPONDENT cannot be obligated to abide by it. Nor can RESPONDENT be held to abide by the JAMS Rules, as the JAMS rules would have become binding on RESPONDENT only had it agreed to arbitrate, which it did not. For that reason the Tribunal should not issue an anti-suit injunction under Art. 26.1 JAMS nor should it draw adverse inferences under Art. 27.3 JAMS nor should it order RESPONDENT to pay CLAIMANT's litigation costs. There is no and there cannot be any violation of the JAMS Rules on RESPONDENT's part.

58. Even if the Tribunal should find that the purported arbitration agreement was validly concluded, Art. 17.3 JAMS is not applicable in this case. Art. 1.5 JAMS states that: "these Rules will govern the conduct of the arbitration except that where any of these Rules is in conflict with a mandatory provision of applicable arbitration law of the place of the arbitration, that provision of law will prevail." Art. 17.3 JAMS conflicts with Art. 8(2) DAL. Thus, whereas Art. 17.3 JAMS asserts that "by agreeing to arbitration under these [JAMS] Rules, the parties will be treated as having agreed not to apply to any court or other judicial authority for any relief regarding the

Tribunal's jurisdiction," Art. 8(2) DAL explicitly allows RESPONDENT to submit questions concerning the admissibility of the arbitration to the Commercial Court, before the Tribunal is constituted. Art. 17.3 JAMS derogates from the public policy provision of Art. 8(2) DAL because it allocates jurisdiction over questions of arbitrability only to the Tribunal, denying RESPONDENT the right to be heard by Danubian courts prior to the constitution of the Tribunal [*see supra, para. 5*]. However, by entering into an arbitration agreement, parties "may not confer powers upon an arbitral tribunal that would cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the state in which the arbitration is held" [*R/H, para. 6-07*]. For that reason the public policy provision of Art. 8(2) DAL will and must prevail over Art. 17.3 JAMS [*a fortiori reading of Art. 1.5 JAMS*]. Consequently, RESPONDENT could not have violated Art. 17.3 JAMS because it is not applicable to the present dispute. The Tribunal should apply Art. 8(2) DAL, which explicitly permits RESPONDENT's litigation.

59. For these reasons, the Tribunal should not issue an anti-suit injunction and it likewise should not sanction RESPONDENT - be it through adverse inferences or the imposition of CLAIMANT's litigation costs on RESPONDENT - for having sought to litigate the issue of arbitrability.

B. Even if Art. 17.3 JAMS was violated, the Tribunal should not issue an anti-suit injunction

60. In casu, the Tribunal should find that an arbitration agreement exists, was validly concluded, and even that RESPONDENT violated this agreement, it should still not order an anti-suit injunction. Otherwise, RESPONDENT's right to be heard by a Danubian court prior to the constitution of an arbitral tribunal would be infringed (1). Moreover, the requirements for such an injunction are not even met (2).

1. An anti-suit injunction would deny RESPONDENT's right to seek relief before national courts prior to the constitution of the Tribunal

61. The Tribunal should not issue an anti-suit injunction because doing so would infringe the public policy underlying Danubian arbitral law [*see supra, para. 5*]. Prior to the constitution of the arbitral tribunal, Art. 8(2) DAL attributes a national court the power to fully revise any arbitral admissibility issues, even if the moment, at which this court makes its decision, falls after the constitution of the arbitral tribunal [*S/J-Schlosser, § 1032, para. 2*]. This means that in the short time span between the constitution of the arbitral tribunal and the moment of the court decision,

an arbitral tribunal should not deny the national court's jurisdiction by ordering an anti-suit injunction.

62. If the Tribunal nevertheless issues an anti-suit injunction while litigation concerning the admissibility of arbitration of the underlying dispute is pending, "such an order would infringe the sovereignty of [Danubia] and the jurisdiction of the [Danubian Court], as well as deny the […] litigant his right of free access to the courts" [*Düsseldorf; see also Court of Appeals Greece*]. Indeed, "arbitrators must ensure that [anti-suit injunctions] do not violate a party's fundamental right if seeking relief before national courts" [*Levy, p. 123*]. Strengthened by the fact that RESPONDENT never agreed to arbitrate [*see supra, para. 21-55*] and thus never waived its right of free access to the courts, RESPONDENT should not be deprived of this fundamental procedural right [*Gaillard, p. 9*]. For these reasons, the Tribunal should not issue an anti-suit injunction.

2. The requirements for an anti-suit injunction have not been met

63. Even if the Tribunal should find that RESPONDENT violated Art. 17.3 JAMS and that it is competent to issue an anti-suit injunction, the Tribunal's recourse to an anti-suit injunction is "not available for mere breach of a contractual obligation such as an arbitration clause" [*Clavel, p. 669*]. In fact, arbitrators should only issue anti-suit injunction when they become aware that one of the parties has engaged in fraud or other abusive behaviour while seeking to revoke the arbitration agreement [*Levy, p. 126*].

64. Moreover, to issue an anti-suit injunction against RESPONDENT, certain additional internationally recognised requirements must be fulfilled cumulatively. First, the requesting party should satisfy the Tribunal that the anti-suit injunction is "urgent, aimed at preventing irreparable harm or necessary to facilitate the enforcement of the upcoming award" [*Gaillard, p.37; Turner v. Grovit; Levy, p. 125-126; see also Yuang v. Myanmar; Tokios Tokelés v. Ukraine*]. Second, the requesting party must demonstrate a likelihood of success on the merits [*RBSD v. Dongsan; R-S, p. 644*]. Third, the requesting party must show that the anti-suit injunction will not aggravate the dispute [*Gaillard, p. 6*].

65. CLAIMANT did not prove any of the foregoing requirements. For this reason alone, the Tribunal is to decline the request of CLAIMANT to order an anti-suit injunction against RESPONDENT. However, all of the mentioned requirements are also not met. First, CLAIMANT cannot satisfy the Tribunal that the anti-suit injunction is urgently needed and aimed at preventing irreparable harm. The possible costs arising from the litigation do not rise to

the level of irreparable harm because these are only "monetary damages" [*R-S, p.643; Boeing v. Iran*]. Second, CLAIMANT has not demonstrated a likelihood of success on the merits. Indeed, RESPONDENT has already shown that the purported arbitration agreement is either non-existent or invalid [*see supra, para. 21-55*] and thus that there is no basis for success on the merits for CLAIMANT. Third, the anti-suit injunction would not prevent an aggravation of the dispute because RESPONDENT cannot be blamed for aggravating the procedure. Quite the contrary, by using its right of free access to a national court, RESPONDENT opted for the fastest and most efficient way to have a final decision on the admissibility of arbitral proceedings before the Court. It is only CLAIMANT's opposition to a stay of arbitral proceedings that aggravates the dispute by insisting on parallel proceedings. Therefore, the Tribunal should refuse CLAIMANT's request for an anti-suit injunction because it does not and cannot satisfy the Tribunal that any of the necessary requirements are met – even less, that they are fulfilled cumulatively.

C. Even if Art. 17.3 JAMS was violated, the Tribunal cannot draw inferences on the merits of the overall dispute in favour of CLAIMANT because this would infringe RESPONDENT's right of a fair and equal trial

66. Even if the Tribunal should find that RESPONDENT violated Art. 17.3 JAMS, it does not follow that the Tribunal may draw inferences on the merits of the sales dispute to the detriment of RESPONDENT. According to Art. 27.3 JAMS, "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". This rule ensures that an arbitral tribunal can only draw inferences that are causally linked to the specific failure or non-compliance of a party with a procedural order or a JAMS provision. For example, such a link is present between a party that fails to comply with an order to provide a certain document and the arbitral tribunal's inferences not to consider any documents of that party after a certain time limit [*De Vries, p. 15; Plant, p. 83*]. This means that the arbitral tribunal can only draw inferences that are linked to the merits of the particular dispute in which a violation has occurred.

67. *In casu*, the merits of the present dispute only concerns the issues of the existence and validity of the arbitration agreement and the jurisdiction of the Tribunal. When deciding on the merits of the jurisdiction issue, the Tribunal can therefore only draw inferences on the decision whether or not to terminate or continue its proceedings, "without treating any such failure [violation] as an admission of the claimant's allegations" [*R/H, para. 6-122*]. It does not allow the Tribunal to draw inferences to benefit a party in its decision on the merits of the overall sales dispute as there

is no causal link between the procedural violation and the inferences on the merits of the overall dispute.

68. Otherwise, RESPONDENT would be infringed in its right of a fair and equal trial, codified in the public policy provision of Art. 18 DAL which states that "the parties shall be treated with equality". RESPONDENT would be unfairly disfavoured if it were to lose on the merits of the entire dispute for the mere fact that it violated a comparatively minor procedural provision. In fact, this rule of "public policy may in no case be disregarded; if it is, arbitral proceedings are null and void" [*R-S, p. 500*].

D. Even if RESPONDENT violated Art. 17.3 JAMS , the Tribunal may not and should not order RESPONDENT to pay for CLAIMANT's litigation costs

69. The Tribunal should not order RESPONDENT to pay CLAIMANT's litigation costs because the latter did not show that RESPONDENT is legally obligated to reimburse CLAIMANT under any applicable laws. Furthermore, the Tribunal does not have the power to order such a sanction as such an order would violate the Court's exclusive right to apportion costs among the Parties.

IV. THE PARTIES NEVER CONCLUDED A SALES CONTRACT UNDER THE CISG BECAUSE RESPONDENT VALIDLY REVOKED ITS OFFER TO PURCHASE 20,000 CASES OF "BLUE HILLS 2005"

70. The Tribunal should find that the purported sales contract was never concluded between CLAIMANT and RESPONDENT as there was no valid offer under the provisions of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). *In casu*, if there was a sales contract, the CISG would be applicable to the formation of this sales contract. Pursuant to Art. 1(1)(a) CISG, the subject-matter is the existence of a contract of sale of goods between CLAIMANT and RESPONDENT which have their places of business in two member-states of the CISG, namely in Equatoriana and Mediterraneo [*Statement of Defense, p. 36; Statement of Claim, p. 4*]. According to Art. 14 CISG and Art. 18 CISG a sales contract is concluded if an offer is accepted by the offeree in due time. RESPONDENT made an offer to purchase 20,000 cases of "Blue Hills 2005" on 10 June 2006. Afterwards, RESPONDENT validly and timely

revoked its offer under the provisions of CISG which could therefore not be accepted by CLAIMANT. It was on 18 June 2006 when RESPONDENT revoked its offer (A). This revocation reached CLAIMANT the same day and thus in due time, i.e. before the latter dispatched its acceptance (B). On this point of time, RESPONDENT was entitled to revoke his offer because it was still revocable (C). Furthermore, the revocation was not subject to any form requirements (D).

A. CLAIMANT revoked its offer of the purported sales contract on 18 June 2006 after it learned about the scandalous wine production in Mediterraneo

71. RESPONDENT sent CLAIMANT an offer to conclude a sales contract on 20,000 cases of "Blue Hills 2005" for the wine promotion in October 2006. Unexpectedly, in the morning of 18 June 2006 all the newspapers in Equatoriana reported about the outrages production-methods of wine in the Blue Hills region of Mediterraneo. The articles concerned the scandal that anti-freeze had been used to sweeten wine in Mediterraneo. RESPONDENT concluded that it would amount to a "commercial catastrophe" if such an adulterated wine was promoted in its name. For that reason, it effectively revoked its offer via e-mail on 18 June 2006.

B. The revocation reached CLAIMANT before it had dispatched its acceptance and therefore the revocation has become effective in due time

72. RESPONDENT send its revocation to CLAIMANT on 18 June 2006 via e-mail. The fact that the revocation was sent on a Sunday is irrelevant because the reaching under Art. 24 CISG is determined independently of holidays and non-working days in international commerce (1). Moreover, the revocation timely reached CLAIMANT's server on the same day. Although Mr. Wolf could not read the revocation on that same day due to CLAIMANT's internal server problem, the revocation reached CLAIMANT on 18 June 2006 (2).

1. The fact that the revocation in form of an e-mail was sent on Sunday is irrelevant

73. Although CLAIMANT did not mention that the revocation was sent on a Sunday and this day is a non-working day in some countries, it did not hinder the revocation to become effective. According to Art. 24 CISG the effective reaching of the revocation does not depend on working days or holidays. Considering the provision's history [*Cf. Honsell/Schnyder/Straub, Art. 24, para. 28*; *Staudinger-Magnus, Art. 24, para. 18*] the effective reaching is independent of CLAIMANT's possibility to take note of it [*Cf. Schlechtriem, Art. 24, para. 14*]. This rule was introduced because of the fact that the application of the CISG would cause "insalubrity and legal uncertainty" if all the different national non-working days had to be considered [*Schlechtriem, Art. 24, para. 14*].

Furthermore, there is *only* one single exception from this rule which concerns the acceptance, Art. 20 (2) CISG. *A contrario*, in all other cases national holidays and non-business days are irrelevant in order to establish a world-wide effective communication [*S/S-Schlechtriem, Art. 24, para. 14*]. *In casu*, CLAIMANT never mentioned its out-of-office times. On the contrary, CLAIMANT's assistant Ms. Kringle communicated with RESPONDENT on Sunday, 11 June 2006. Thus, CLAIMANT has to be bound in good faith on its own behaviour and cannot allege that the revocation is ineffective because it was sent on a Sunday.

2. RESPONDENT's revocation reached CLAIMANT before the latter dispatched its acceptance

74. RESPONDENT respectfully states that CLAIMANT's allegation that RESPONDENT's revocation was not effective is incorrect. According to Art. 16(1) CISG a revocable offer "may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." RESPONDENT dispatched the revocation of its offer via e-mail on 18 June 2006. The same day, it was received on CLAIMANT's e-mail server. On 19 June 2006 CLAIMANT dispatched the acceptance of the offer. Consequently, RESPONDENT's revocation reached CLAIMANT's server *indeed* before the dispatch of the acceptance.

75. Art. 24 CISG determines the point of time when a declaration reaches by stating that "[…] any other indication of intention 'reaches' the addressee when it is […] delivered by any other means to […] his mailing address […]." At the time when the CISG was construed, modern forms of electronic communication were not known or at least not widely used. Thus, the CISG contains a "*gap*" which should be filled by application of the UNCITRAL Model on Electronic Commerce (hereafter called "ML on E-Commerce"). Art. 7(2) CISG was introduced to fill gaps in the CISG [*Keily, para. 5c*] and states that "general principles" should fill gaps when "the Convention governs an issue but does not expressly speak to it" [*Hillmann, art. 7*]. The ML on E-Commerce expressly addresses the issue of gap-filling under CISG. According to Art. 15(2)(a)(i) of the ML on E-Commerce a data message is received "when it enters an information system". Entry is determined by the fact that the information becomes available for processing within that information system [*Guide to ML on E-Commerce, para. 103*]. *In casu*, RESPONDENT's e-mail entered CLAIMANT's information system, its server, and became actually available for processing on 18 June 2006. However, CLAIMANT argues on this undisputable factual basis, that the e-mail did not reach it before the afternoon of 19 June 2006 because it was not able to read it due to some internal service failure [*Cl. Mem., para. 69*]. But an internal service failure does not hinder the reaching. This interpretation is supported by the explanatory notes of the

Working Group on the ML on E-Commerce which states that the non-functioning or malfunctioning should "be within the sphere of the recipient" [*A/CN.9/387, para. 155*]. Consequently, the fact that CLAIMANT was not able to read the message which had effectively entered its information system is irrelevant. RESPONDENT's revocation reached CLAIMANT on 18 June 2006.

76. Even if the Tribunal should differ from this view, the revocation must also be considered as having reached CLAIMANT on 18 June 2006 under Art. 24 CISG. CLAIMANT unfortunately misunderstood the CISG Advisory Council and thus quoted the wrong passage [*Cl. Mem., para. 63*]. The applicable situation is "Situation A" which states:

77. "From a pragmatic point of view it is clear that the addressee of an electronic withdrawal may read it as soon as it is located on his server. He may have problems reaching his server due to internal problems in his network system. This is normally within *his 'sphere of influence'*. Irrespective of how harsh it may be for the offeree that messages have arrived to his server but cannot be read by him due to internal problems, *it is not appropriate to put the risk on the offeror for the offeree's technical problems* [*emphasize added*]. The offeree may reduce the risk by choosing appropriate internet service providers or designing an adequate technical infrastructure to make sure that the internal communication functions satisfactorily. The sender of an electronic communication ought not to assume this risk." [*CISG-AC*]

78. CLAIMANT attempts to rebut this risk allocation by arguing that the Parties have established a practice of sending communications by courier [*Cl. Mem., para. 63*]. This is not proven by their actual behaviour. Both parties have made use of electronic communication whenever time was of the essence [*Cl. Exh. No. 4, 6, 7, 10-12*].

C. RESPONDENT's offer was not irrevocable as stating of a time limit does not make an offer irrevocable under the provisions of CISG

79. RESPONDENT objects to CLAIMANT's allegation that the proper reading of Art. 16(2)(a) CISG provides that an offer fixing a delay for acceptance should be deemed irrevocable [*Cl. Mem., para. 52*]. Understanding RESPONDENT's declaration correctly, the Tribunal should find that the offer was revocable at all times (1). In the alternative, the allegation that Art. 16(2)(a) CISG is to be read as a presumption that such an offer is irrevocable [*Cf. Cl. Mem., para. 55*] is unsustainable (2).

1. Mentioning the date 21 June 2006 does not make the offer irrevocable until that date

80. CLAIMANT argues that the mention of the date 21 June 2006 in the cover letter to the purchase order of 10 June 2006 made the offer irrevocable until that specified date [*Cl. Mem. para. 51*]. However, this allegation is untenable because RESPONDENT never intended to be bound by its offer until 21 June 2006 and never stated so.

81. CLAIMANT declared that Art. 16(2)(a) CISG is to be understood in the way that the stating of a fixed time should mean that the offer is irrevocable until that time [*Cl. Mem., para. 52 seq*]. Such an understanding does not comply with the history of Art. 16(2)(a) CISG [*Cf. Schlechtriem, Art. 16, para. 9*]. At the end of the Vienna conference, the following interpretation prevailed: The setting of a fixed time limit is only one factor indicating an intention to be bound [*S/S-Schlechtriem, Art. 16, para. 9*]. Thus, a mere indication of a time limit does generally not lead to the conclusion that the offeror intends to be bound for that period of time. This becomes clear considering Art. 18(2)(2) CISG which provides that the term of acceptance is at first only significant for the ability to accept the offer [*W/S/L-Witz, Art. 16, para. 10*]. Such an understanding of the term of the acceptance is universal in all common law Jurisdictions [*Honnold, Art. 16, para 143.1; Dilger, p. 191 seq.*]. The different approaches to irrevocability should also be prevented because of the need to promote uniformity according to Art. 7(1) CISG and to avoid a conflict among lawyers of different legal systems [*S/S-Schlechtriem, Art. 16, para. 9*].

82. The fixed time limit was only set by RESPONDENT to show that the offer would lapse after this time as RESPONDENT had to schedule the wine promotion and had to plan the entire organisation. This effectively rebuts RESPONDENT's alleged intention to make an irrevocable offer [*Cf. E/M/S, Art. 16, para. 7; Honnold, para. 143.1, Staudinger-Magnus, Art. 16, para. 12; Karollus, p. 65*]. Moreover, the entire circumstances which have to be taken into account under Art. 8(1) CISG and Art. 8(3) CISG do not reveal RESPONDENT's intent to be bound: RESPONDENT neither mentioned a binding character nor any other indications which would make the offer binding. Even CLAIMANT's allegation that the communication with Ms. Kringle made the offer irrevocable [*Cf. Cl. Mem., para. 52*] is rebutted resolutely by RESPONDENT as this was just an advice to sign the contract before 21 June 2006. After this deadline the offer was supposed to lapse in order that RESPONDENT had enough time to search for a new wine to take the lead in its wine promotion in October 2006.

83. Therefore, stating a time limit did not make the offer irrevocable and therefore RESPONDENT's offer is to be deemed irrevocable.

2. Setting a time limit does not create a presumption that the offer is irrevocable, and such a presumption would be successfully rebutted

84. Art. 16(2)(a) CISG does *not even* create a presumption that an offer is irrevocable, when the offeror mentions a delay for the acceptance. This is due to the fact that the setting of a time limit is *only one* of many factors which may indicate an intention to be bound [*Cf. W/S/L-Witz, Art. 16, para. 10*].

85. Even if the Tribunal should find that the setting of a time limit creates a presumption, this presumption is refutable [*Honnold, para. 143.1, Staudinger-Magnus, Art. 16, para. 12; Karollus, p. 65*]. It may be rebutted by showing that the period was only intended to indicate that the offer would lapse after that time [*Audit, Art. 16, para. 64*]. RESPONDENT respectfully states that it successfully rebutted the presumption setting of a time limit was important considering the scheduling for RESPONDENT's wine promotion.

86. Even a reasonable person according to Art. 8(2) CISG [*mentioned in Cl. Memorandum, para. 56*] would realize that the time limit was just an indication that the offer would lapse after that time [*see supra, para 83*]. RESPONDENT never showed the slightest intention to be bound for that period and thus, to make the offer irrevocable. Therefore, the Tribunal shall deem the offer as being revocable.

D. The revocation was not subject to any form requirements

87. RESPONDENT revoked its offer effectively via e-mail because the parties have chosen a wide range of forms of communication. Art. 11 CISG does not subject a sales contract to any form requirements. This provision guarantees an efficient exchange of declarations of intent especially in international commerce and considering the fast development of modern communication [*Schlechtriem, Art. 11, para. 4*]. Therefore, it is logical that all other declarations of intent which are not mentioned in art. 11 CISG but depend on a sales contract should also not be subject of any form requirements [*Schlechtriem, Art. 11, para. 9*]. This interpretation is based on the general provision Art. 7(2) CISG which states that all "questions concerning matters governed by this Conevention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based." One of such general principle is the guarantee of efficient commercial communication, even if the revocation as a declaration of intent is not

subject to any form requirements. Thus, RESPONDENT's revocation was not obliged to fulfil any form requirement. Consequently, this revocation has become effective.

88. Even the argument that RESPONDENT sent some attached letters to CLAIMANT [*Cl. Mem., para. 64*] does not establish "any practice[s] which the parties have established" according to Art. 8(3) CISG. Such a "course of dealing" has to be established during a long period considering additional indicators like framework contracts [*Schlechtriem, Art. 8, para. 2*]. In the case at hand, the Parties communication was a variety of letters and e-mails. There is no obvious establishment of any usage which could lead to an implicit form requirement. Thus, RESPONDENT was free in his choice to sent its revocation via e-mail or any other desired form of communication. Consequently, the revocation in form of an e-mail was effective as RESPONDENT was not bound on any form requirements.

89. In sum, RESPONDENT validly and timely revoked its offer to purchase 20,000 cases of "Blue Hills 2005". Therefore, a sales contract was never concluded between the Parties.

V. EVEN IF THE TRIBUNAL SHOULD FIND THAT THE PARTIES CONCLUDED A SALES CONTRACT, THE GOODS DID NOT CONFORM WITH THE CONTRACT

90. The "Blue Hills 2005" wine is not in conformity with the purported contract. Neither the quality of the wine (A) nor its reputation in Equatoriana (B) satisfy the requirements of conformity set forth by Art. 35 CISG.

91. CLAIMANT's blanket allegation that RESPONDENT bears the burden of proof on the issue of non-conformity of the goods [*Cl. Mem., para.74*] is not persuasive. Since CLAIMANT has not performed under the purported contract yet, its burden of showing that the goods conform to that contract has not extinguished [*Cf. OLG München 1995; S/S-Stoll/Gruber, Art. 79, para. 53*]. It is widely accepted under CISG that each party bears the burden of proof over those facts which are exclusively within its sphere of control [*Tribunale de Vigevano 2000; HG Zürich 1999; HG Zürich 1995; Ferrari, p.7*]. Therefore, the seller's burden to prove conformity of its goods with the contract shifts to the buyer only upon delivery [*HG Zürich 1998*]. Only CLAIMANT can speak to the conformity of the wine as it remains within its control. Hence, the overall burden of proof resides with CLAIMANT.

A. "Blue Hills 2005" is not in conformity with the purported contract pursuant to Art. 35(1) CISG and Art. 35(2)(b) CISG due to the artificially added diethylene glycol

92. The pre-contractual agreements show that "Blue Hills 2005" must be a wine suitable "to take the lead" in a promotion of quality wines [*Cf. Cl. Exh. Nos.1, 2 and 3*]. The high quality standard of a leading wine in its field was a contractual requirement under Art. 35(1) CISG which CLAIMANT did not satisfy (1). At least, the purpose to use CLAIMANT's wine "Blue Hills 2005" as the leading wine in a wine promotion constitutes a particular purpose under Art. 35(2)(b) CISG (2). A wine containing the toxic substance of diethylene glycol like "Blue Hills 2005" is not a quality wine suitable to lead a wine promotion because of its low quality and is therefore neither in conformity with the standard contractually agreed upon under Art. 35(I) CISG nor – subsidiary –with the particular purpose under Art. 35(2)(b) CISG.

1. "Blue Hills 2005" was not in conformity with the purported contract due to its contamination with diethylene glycol

93. Art. 35(1) CISG states that the seller must deliver goods which are of the quality "required by the contract". In the provision of Art. 35(1) CISG "quality" means the good's physical condition [*LG Aachen; Cour de Cassation 1996*]. *In casu*, the contract required that "Blue Hills 2005" had the physical condition of a quality wine suitable as a lead wine in a promotion.

94. The pre-contractual declarations of the Parties may be used to determine "the intent of a party or the understanding" of the Parties because Art. 8(3) CISG dictates that in the interpretation of declarations of intent "due consideration is to be given to all relevant circumstances of the case including the negotiations". In its first letter after the Durhan wine fair CLAIMANT itself proposed to sell "Blue Hills 2005" because it was an "outstanding choice for a promotion of quality wines" [*Cl. Exh. No. 1*]. RESPONDENT replied that it was "interested in featuring the Blue Hills 2005 in our wine promotion" and reaffirmed that it was supposed "to take the lead in the promotion" [*Cl. Exh. No. 2*]. CLAIMANT recognized that high standard in its answer of 1 June 2006 and even raised the quality standard by stating that RESPONDENT was "making a wise choice in choosing Blue Hills 2005 as the lead wine in your wine promotion." [*Cl. Exh. No. 3*]. It further commented "that this is an exceptionally fine wine that will certainly satisfy all your customers" [*Cl. Exh. No. 3*]. These pre-contractual documents demonstrate that the Parties agreed upon a high quality standard of wine in the purported sales contract itself. The wine had to be suitable to be the lead wine in a promotion of quality wines in. Therefore, the non-conformity of "Blue Hills 2005" must be measured against the standard of Art. 35(I) CISG.

95. Quality wine may generally not contain any additives, at least no sweetening additives. [*Statement of Deutsches Weininstitut; Mainz*]. However, the "Blue Hills 2005" wine CLAIMANT made available contained about 0.15 g diethylene glycol per 75cl bottle. Although CLAIMANT states that the traceable quantity of diethylene glycol is less than the maximum authorized in Equatorina and Mediterraneo [*Cl. Mem., para. 82*], this does not change the fact that a high quality wine as required by the contract may not contain any added substances at all, especially not toxic substances as diethlylene glycol [*it is even prohibited in many countries including all countries of the European Union because of EC Reg. 1493/1999*]. The wine "Blue Hills 2005" was thus not in conformity with the contractual requirements.

96. CLAIMANT purports to have concluded a sales contract with RESPONDENT, a potential major customer being the largest retailer of wine in Equatoriana, for the wholesale price of US$ 68,00 which equals US$ 5,67 per bottle of wine. The Parties have agreed upon the quality standard of a leading wine for a quality wine in its price bracket. Taking into account that the wholesale and the retail price tend to differ considerably, the quality that can be expected of a wine that costs more than 6 US$ per bottle indicates a rather upscale price bracket. If at all, toxic sweetening agents can be used only in very low-end products. A wine leading a promotion of quality wines sold at a price of more than 6 US$ per bottle cannot be expected to contain sweetening agents, particularly not noxious and toxic additives as diethylene glycol.

2. At least, "Blue Hills 2005" was not in conformity with the purported Contract pursuant to Art. 35(2)(b) CISG due to the added diethylene glycol

97. In the alternative, "Blue Hills 2005" did at least not conform with the purported contract pursuant to Art. 35(2)(b) CISG because it was not fit for the particular purpose made known to CLAIMANT at the time of concluding the contract (a). The application of Art. 35(2) CISG is not barred by Art. 35(3) CISG because CLAIMANT cannot establish that RESPONDENT knew or could not have been unaware of the non-conformity of the wine (b).

a. "Blue Hills 2005" was not in conformity with the purported contract pursuant to Art. 35(2)(b) CISG

98. Even if the Tribunal was to find that the Parties have not agreed upon the quality standard of a leading wine in a promotion of quality wines, "Blue Hills 2005" at least failed to comply with Art. 35(2)(b) CISG.

99. Art. 35(2)(b) CISG states that goods do not conform with a contract unless they are "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgement". The particular purpose made known to CLAIMANT in a completely clear and recognizable way [*cf. Helsinki Court of Appeal; LG München 2002; LG Darmstadt 2000; District Court Veurne*] that the particular purpose of "Blue Hills 2005" was "to take the lead" in the promotion of quality wines [*see supra para. 96, Cl. Exh. No. 2*]. The fact that CLAIMANT fully understood this particular purpose of "Blue Hills 2005" is demonstrated by its letter of 1 June 2006 in which it stated: "You are making a wise choice in choosing "Blue Hills 2005" as the lead wine in your wine promotion." [*Cl. Exh. No. 3*].

100. CLAIMAMT's allegation [*Cl. Mem., para. 84*] that the formulation "lead feature" for a promotion of quality wines was too vague to determine the particular purpose is not conclusive. The particular purpose implied that the wine would be of such a high quality to lead a promotion of quality wines. In contrary of CLAIMANT's allegation [*Cl. Mem., para. 80*], this particular purpose required "Blue Hills 2005" to be of better quality than just "consumable" but to be of a leading quality in its price bracket. Good quality wines should not contain any artificial sweetening agents [*see supra, para. 96*]. As the "Blue Hills 2005" wine CLAIMANT made available to RESPONDENT contained diethylene glycol, it was not fit for the particular purpose of leading a promotion of quality wines.

101. Furthermore, Art. 35(2)(b) CISG requires that the buyer must have reasonably relied on the seller's "skill and judgement" [*cf. Honnold, Art. 35 para. 226; S/S-Schwenzer, Art. 35, para. 50*]. The seller, being CLAIMANT, has not met its burden of proof because he has not shown that RESPONDENT did not reasonably rely on CLAIMANT's skill and judgement. CLAIMANT is an expert in producing and retailing wines. Where the seller is an expert in relation to its goods, it is very exceptional for him to be able to prove that it was unreasonable for the buyer to rely on the seller's skill and judgement [*S/S-Schwenzer, Art. 35 para. 23*]. Contrary to CLAIMANT's allegations [*Cl. Mem.*, *para. 74*], the fact that a team of RESPONDENT tasted the wine at the Durhan wine fair did not shift the burden of proof to RESPONDENT. Diethylene glycol can neither be discerned by its taste [*PO No. 2, para. 13*] nor by its optical appearance [*Statement of the German Ministry for Nutrition, Agriculture and the Protection of Consumers*]. Even many standard chemical analyses do not detect diethylene glycol [*Statement of the German Chamber of Agriculture of*

Rhineland-Palatinate]. Since RESPONDENT was not in possession of the wine, it had no means to detect the diethylene glycol inside the wine.

102. RESPONDENT was thus put in a position of reliance on CLAIMANT which gave rise to a duty to inform RESPONDENT about the addition of diethylene glycol. In general, a seller who recognizes that the goods chosen by the buyer are not fit for the particular purpose for which they are intended, is required under the principle of good faith to inform the buyer of that fact [*Secretariat's Commentary, Official Records, Art. 33, No. 9*; S/*S-Schwenzer, Art. 35 para. 23*]. Under Art. 7 CISG, the principle of good faith applies to the interpretation of the individual contract and to the Parties' contractual relationship as such [*cf. ICC Award No. 8611 (France 1997); CCIB VB/94124 (Hungary 1995); SARL Bri Production "Bonaventure" v. Society Pan African Export (France 1995)*]. This provides for the existence of a duty to inform based on the general principle of co-operation of the contracting parties [*BGH VIII ZR 60/01 (Germany 2001); Staudinger-Magnus, Art. 7, para. 47; S/S-Ferrari, Art. 7, para. 54*]. CLAIMANT's Sales Manager, Mr. Cox, was very well aware of the addition of diethylene glycol to "Blue Hills 2005" [*PO No. 2, para. 22*]. By not informing RESPONDENT about that fact, CLAIMANT exposed RESPONDENT to the risk of an invaluable commercial catastrophe which would very likely substantially endanger the purpose of the contract. In addition, he failed with his duty to cooperate [*cf. Maritime International Nominees Establishment v. Republic of Guinea (US 1988); Leigh, p. 598*; *W/S/L-Witz, Art. 7, para. 15*; *B/B-Bonell, Art. 7, para. 2.3.2.2.*]. He even endangered CLAIMANT's position as the largest wine retailer and as the largest operator of super markets in Equatoriana. As an expert in the business, CLAIMANT thus had to point out to RESPONDENT the reservation concerning the applicability of the goods for the agreed purpose [*cf. HG Kanton Aargau 2002*].

b. CLAIMANT cannot exclude its liability pursuant to Art. 35(3) CISG

103. CLAIMANT tries to evade its liability pursuant to Art. 35(3) CISG [*Cl. Mem., para. 95 et. seq.*] which states that "the seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such a lack of conformity". However, CLAIMANT's liability cannot be excluded pursuant to Art. 35(3) CISG because the lack of conformity of "Blue Hills 2005" was not apparent. Liability can only be excluded for a lack of conformity which is obvious [*S/S-Schwenzer, Art. 35, para. 34*]. The seller is liable for the defects not known by the buyer and not reasonably discoverable by usual examination of the goods [*B/B-Bianca, Art. 35, para. 2.8.2.*].

104. Although RESPONDENT had a team at the Durhan wine fair, this team could not detect the diethylene glycol inside "Blue Hills 2005" as it reasonably relied on CLAIMANT. In any event, it is not a wine buyer's duty to submit the wine to extensive chemical testing [*LG Trier 1995*]. The buyer has no obligation to examine the goods before the conclusion of the contract [*Staudinger-Magnus, Art. 35, para. 48; Piltz, § 5 no. 44; Aue, p. 83; Heilmann, p. 209; E/M/S, Art. 35, para. 20; Honnold, Art. 35, para. 229*]. In particular, the seller cannot escape liability for lack of conformity merely by offering the buyer an opportunity to examine the goods [*S/S-Schwenzer, Art. 35, para. 35*]. Consequently, CLAIMANT is liable for the lack of conformity of its "Blue Hills 2005" wine pursuant to Art. 35(2)(b) CISG.

B. "Blue Hills 2005" was not in conformity with the purported Contract pursuant to Art. 35(2)(b) CISG due its bad reputation

105. Besides, "Blue Hills 2005" did not conform with the contract pursuant to Art. 35(2)(b) CISG since it had such a bad reputation that it was not suitable to lead a promotion of quality wines. The particular purpose of being the leading wine in a promotion of quality wines required "Blue Hills 2005" to be a wine with a good reputation that would fascinate customers and professionals. However, after the purported conclusion of the contract, "Blue Hills 2005" turned out to be affected by a very bad reputation which made it unfit for RESPONDENT's particular purpose pursuant to Art. 35(2)(b) CISG.

106. RESPONDENT intended to purchase an "outstandingly" [*Cl. Exh. No. 1*] and "exceptionally" [*Cl. Exh. No.* 3] fine wine which had just recently won a prize in a wine fair. Upon realizing that CLAIMANT had in store only wine with a very poor reputation, RESPONDENT made the commercially correct and legally justified decision to revoke the offer. Such wine could not fulfil the intended particular purpose to take the lead in a promotion of quality wines: Wine is a luxury and lifestyle article that people use to ease themselves in stressful situations. Such a luxury product depends on its good reputation and may not have the reputation of containing any artificial or even toxic additives that destroy peoples' health and their ideas of pleasure and relaxation in connection with wine. However, this is exactly the reputation of "Blue Hills 2005" wine. It was therefore not suitable for the particular purpose to lead a promotion of quality wines. The importance of reputation for a wine is best demonstrated by the disturbance and the scandal the newspaper articles about the use of anti-freeze in wine production caused. RESPONDENT cannot be burdened with the risk to severely damage its reputation by selling CLAIMANT's "Blue Hills 2005."

VI. PRAYER FOR RELIEF

Equatoriana Super Markets S.A. respectfully requests the Tribunal to find that:

1. The Tribunal should stay its proceedings pending the outcome of the Danubian Commercial Court's decision on the admissibility of arbitration in this case;
2. If the Tribunal decides against staying the proceedings, it should dismiss CLAIMANT's request to arbitrate the dispute;
3. If the Tribunal decides to hear the dispute, it should find that RESPONDENT is not liable for the purchase price of US$ 1,360,000 and in the consequence RESPONDENT is also not liable for the storage costs of US$ 5,000 and interestes on the said sums
4. The Tribunal should order CLAIMANT to pay all costs of arbitration, including costs incurred by the Parties pursuant to Art. 34.4 JAMS.

The Tribunal should come to the aforementioned conclusions on the basis of the following reasoning:

1. The decision of the Danubian Commecial Court will be final and binding for the Tribunal concerning the lack of an arbitration agreement and should therefore be awaited to avoid parallel proceedings;
2. Equatoriana Super Markets S.A. and Mediterraneo Wine Cooperative have never concluded an arbitration agreement;
3. Equatoriana Super Markets S.A. and Mediterraneo Wine Cooperative have never entered into a sales contract on the purchase of 20,000 cases of "Blue Hills 2005" wine.

Heidelberg, 17 January 2008

Counsels
(signed)

Anne Derbot	Dennis Lievens	Stefanie Sucker	Caroline Westphal