

ALBERT-LUDWIGS UNIVERSITÄT FREIBURG



Memorandum for Claimant

On behalf of
Mediterraneo Wine Cooperative
– Claimant –

Against
Equatoriana Super Markets S.A.
– Respondent –

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TABLE OF CONTENTS

INDEX OF ABBREVIATIONS..... V

INDEX OF AUTHORITIES VIII

INDEX OF CASES..... XXII

INDEX OF AWARDS..... XXVII

STATEMENT OF FACTS.....1

STATEMENT OF PURPOSE.....2

ARGUMENT TO THE PROCEDURAL ISSUES.....3

FIRST ISSUE: A STAY OF THE ARBITRAL PROCEEDINGS SHOULD NOT BE GRANTED.....3

A. Reasonable arguments necessitate the continuation of the Arbitral Proceedings3

 I. An interpretation of Art. 8(3) DAL leads to the conclusion that its purpose favours a continuation of arbitral proceedings4

 II. The current circumstances favour a continuation of the Arbitral Proceedings4

 1. The parties’ original intention was to submit disputes to arbitration.....5

 2. A continuation of the Arbitral Proceedings would lead to a timesaving resolution5

 3. RESPONDENT may not gain an undue privilege from its assumed breach of contract under Art. 17(3) JAMS IAR6

B. The continuation of Arbitral Proceedings is not excluded by reasonable objections6

 I. Arbitral Proceedings did already validly commence6

 1. Arbitral Proceedings were already initiated in terms of Art. 2(5) JAMS IAR and Art. 21 DAL7

 2. An initiation of Arbitration complies with Art. 8(3) DAL.....7

 II. RESPONDENT may not invoke that duplicate proceedings would lead to inappropriate costs8

 1. It was RESPONDENT’s conduct that caused double costs.....8



2. If duplicate proceedings are to be avoided the Commercial Court should stay its Proceedings.....8

Conclusion of the First Issue..... 10

SECOND ISSUE: AN ARBITRATION AGREEMENT WAS VALIDLY CONCLUDED 11

A. RESPONDENT’S offer to arbitrate required a separate revocation 11

B. RESPONDENT did not declare the intention to revoke its offer to arbitrate 12

 I. RESPONDENT’S email demonstrates that it did not intend to revoke its offer to arbitrate 13

 II. RESPONDENT’S subsequent conduct confirms that it did not intend to revoke its offer to arbitrate 14

Conclusion of the Second Issue 14

THIRD ISSUE: DUE TO RESPONDENT’S VIOLATION OF ART. 17(3) JAMS IAR THE TRIBUNAL SHOULD DRAW THE APPROPRIATE FINANCIAL AND PROCEDURAL INFERENCES 15

A. RESPONDENT’S commencement of action before the Commercial Court has breached the arbitration agreement..... 15

 I. The parties concluded an arbitration agreement that contained Art. 17(3) JAMS IAR 15

 II. The parties’ agreement on Art. 17(3) JAMS IAR supersedes Art. 8(2) DAL 15

B. As a result of RESPONDENT’S breach of the arbitration agreement, the Tribunal is requested to draw the appropriate financial and procedural inferences 16

 I. RESPONDENT should be ordered to terminate its litigation in the Commercial Court..... 17

 II. RESPONDENT should be ordered to pay the full costs of the litigation in the Commercial Court..... 17

 III. The Tribunal is requested to draw the inference that an arbitration agreement was validly concluded..... 18

Conclusion of the Third Issue 18



ARGUMENT TO THE SUBSTANTIVE ISSUES.....	19
FOURTH ISSUE: A CONTRACT OF SALE WAS CONCLUDED	19
A. RESPONDENT’S offer remained effective as it was not withdrawn according to Art. 15(2) CISG	19
B. RESPONDENT’S offer remained effective as it was not revoked according to Art. 16(1) CISG	20
I. RESPONDENT’S letter did not cause revocation of the offer	20
II. RESPONDENT’S email did not cause revocation of the offer.....	20
1. RESPONDENT’S offer was irrevocable according to Art. 16(2) CISG	20
a) RESPONDENT’S offer was irrevocable as it indicated its irrevocability pursuant to Art. 16(2)(a) CISG	21
b) Alternatively, RESPONDENT’S offer was irrevocable pursuant to Art. 16(2)(b) CISG	23
2. Even if the offer should be considered revocable, RESPONDENT’S e-mail did not reach CLAIMANT in due time.....	23
Conclusion of the Fourth Issue	25
FIFTH ISSUE: BLUE HILLS 2005 WAS FIT FOR THE PARTICULAR PURPOSE MADE KNOWN AS REQUIRED BY ART. 35(2)(b) CISG.....	26
A. The diethylene glycol concentration did not diminish the wine’s fitness for the particular purpose pursuant to Art. 35(2)(b) CISG.....	26
B. The press articles did not affect the wine’s contractual conformity according to Art. 35(2)(b) CISG	27
I. The press articles did not affect the wine’s fitness for the particular purpose pursuant to Art. 35(2)(b) CISG	27
1. Mere speculations cannot lead to nonconformity of the wine.....	28
2. The wine could have been sold successfully.....	28
a) The erroneous articles did not lead to a significant decline in sales	28
b) CLAIMANT refuted the newspaper articles immediately.....	29
c) The Austrian glycol wine scandal would not have had the effect of putting the customers’ confidence at risk.....	30



3. The economic analysis of law shows that CLAIMANT cannot be held liable under Art. 35(2)(b) CISG.....30

II. Additionally, the wine did conform with the contract according to Art. 35(2)(b) CISG because RESPONDENT’S reliance on CLAIMANT’S skill and judgment would not have been reasonable.....31

1. Reliance would not have been reasonable as RESPONDENT carefully examined and selected the goods before the purchase.....31

2. Reliance would not have been reasonable due to RESPONDENT being far more knowledgeable than CLAIMANT32

3. Reliance would not have been reasonable because RESPONDENT could not rely on CLAIMANT to prevent unpredictable external occurrences33

Conclusion on the Fifth Issue.....34

REQUEST FOR RELIEF35

CERTIFICATE XXX



INDEX OF ABBREVIATIONS

§	paragraph
\$	Dollar(s)
A. C.	Appeal Cases
All E. R.	All England Law Reports
Am. J. Comp. L.	American Journal of Comparative Law
APA	Austria Presse Agentur
Arb J	The Arbitration Journal
Art./Artt.	Article/Articles
BayObLG	Bayerisches Oberstes Landesgericht (Bavarian Supreme Court)
BayObLGZ	Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen (decisions)
BB	Betriebsberater (German law journal)
BG	Bundesgericht (Swiss Federal Supreme Court)
BGE	Entscheidungen des Bundesgerichts (decisions)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BMELV	Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz
<i>c/</i>	contre (versus)
cf.	confer
chap.	chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG-online	CISG Database (http://www.cisg-online.ch)
Claimant	Mediterraneo Wine Cooperative
Commercial Court	Commercial Court of Vindobona, Danubia
Cornell Int'l L J	Cornell International Law Journal
DAL	Danubian Arbitration Law
doc.	Document
DWI	Deutsches Weininstitut
DWV	Deutscher Weinbauverband



ed.	editor
eng.	English
et al.	et alii (and others)
et seq.	et sequentes (and following)
ECJ	Court of Justice of the European Communities
F. Supp.	Federal Supplement
F. 2d.	Federal Reporter, Second Series
HG	Handelsgericht (Swiss Commercial Court)
ICC	International Chamber of Commerce
I.C.L.Q.	The International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est (that means)
IHR	Internationales Handelsrecht
Inc.	Incorporated
Indian J Int'l L	Indian Journal of International Law
Intro.	Introduction
JAMS	Judicial Arbitration and Mediation Services
JAMS IAR	JAMS International Arbitration Rules
JDI	Journal du droit international
J Int'l Arb	Journal of International Arbitration
J. L. & Com.	The Journal of Law and Commerce
LG	Landgericht (German Regional Court)
Lloyd's Rep.	Lloyd's List Law Reports
kg	kilogramme
ml	millilitre
NJW	Neue Juristische Wochenschrift (German law journal)
No./Nos.	Number/Numbers
N. Y. 2d	New York Court of Appeals Reports, Second Series
NYT	New York Times
OGH	Oberster Gerichtshof (Austrian Supreme Court)
ÖGZ Weingalerie	Österreichische Gastronomie und Hotelzeitung – Weingalerie (Austrian wine journal)



OLG	Oberlandesgericht (German Regional Court of Appeals)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (German law journal)
Respondent	Equatoriana Super Markets S. A.
RIW	Recht der Internationalen Wirtschaft (German law journal)
SchiedsVZ	Zeitschrift für Schiedsverfahren (German law journal)
S. Ct.	Supreme Court Reporter
StuttgZ	Stuttgarter Zeitung (German newspaper)
sub.	subsection
U. K. Ct. App.	Court of Appeal (United Kingdom)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law ICA	UNCITRAL Model Law on International Commercial Arbitration
U. S.	United States
U. S. Ct. App.	United States Court of Appeals
U. S. Dist. Ct. (S. D. N. Y.)	United States District Court, Southern District, New York
v.	versus
Y.B. Com. Arb.	Yearbook of Commercial Arbitration
ZEuP	Zeitschrift für Europäisches Privatrecht
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

**INDEX OF AUTHORITIES**

- ACHILLES, Wilhelm Albrecht** Kommentar zum UN-Kaufrechtsübereinkommen (CISG),
Neuwied (2000)
(cited: *ACHILLES* – paras. 74, 90, 116).
- AUSTRIA PRESSE AGENTUR** 25 July 1985, APA230 5 WI,
available at: <http://www.apa.at>
(cited: *APA, 25 July 1985* – para. 114).
- BERGER, Roland** Das neue Schiedsverfahrensrecht in der Praxis: Analyse
und aktuelle Entwicklungen, in:
RIW 2001, pp. 7 - 19
(cited: *BERGER* – para. 27).
- BIANCA, Cesare Massimo** Commentary on the international Sales Law: the
BONELL, Michael Joachim 1980 Vienna Sales Convention,
Milano (1987)
(cited: *Bianca/Bonell/AUTHOR* – paras. 74, 80, 105).
- BMELV / DEUTSCHER** Vergleichende Liste der Oenologischen Verfahren: OIV,
WEINBAUVERBAND EU, USA (2005)
(cited: *BMELV/DWV* – para. 100).
- BORN, Gary A.** International Commercial Arbitration,
2nd Edition,
Ardsey, New York (2001).
(cited: *BORN* – paras. 11, 60, 67).



- CALAVROS, Constantin** Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit, Bielefeld (1988)
(cited: *CALAVROS* – paras. 7, 28).
- COATES, Clive** An Encyclopedia of the Wines and Domaines of France, Berkeley, Los Angeles (2000)
(cited: *COATES* – para. 100).
- CRAIG, Laurence**
PARK, William
PAULSSON, Jan International Chamber of Commerce Arbitration, 3rd Edition, Paris, New York (2000)
(cited: *CRAIG/PARK/PAULSSON* – para. 9).
- CZERWENKA, Beate** Rechtsanwendungsprobleme im inter-nationalen Kaufrecht – Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der inter-nationalen Kaufrechtsübereinkommen, Berlin (1988)
(cited: *CZERWENKA* – para. 90).
- DERAINS, Yves** Cour International d’Arbitrage de la Chambre de Commerce International, Chronique des sentences arbitral, in:
JDI 1997, pp. 1037 - 1088
(cited: *DERAINS* – para. 67).
- DEUTSCHES WEININSTITUT** Erlaubte Verfahren und önologische Behandlungen (List of Permitted Additives) (2002)
(cited: *DWI* – para. 100).



- DILGER, Konrad** „Das Zustandekommen von Kaufverträgen im Außenhandel nach internationalem Einheitsrecht und nationalem Sonderrecht“, in:
RabelsZ 45 (1981), pp. 169 - 195
(cited: *DILGER* – para. 80).
- ENDERLEIN, Fritz**
MASKOW, Dietrich
STROHBACH, Heinz Internationales Kaufrecht: Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention,
Berlin (1991)
(cited: *ENDERLEIN/MASKOW/STROHBACH* – para. 80).
- EÖRSI, Gyula** Problems of Unifying Law on the Formation of the Contracts for the International Sale of Goods, in:
27 Am. J. Comp. L. (1979), pp. 311 - 323
available at:
<http://www.cisg.law.pace.edu/cisg/biblio/eorsi.html>
(cited: *Eörsi*, “*Exceptions*” – para. 80).
- FARNSWORTH, E. Allan** Formation of Contract, in:
GALSTON, NINA M./SMIT, HANS:
International Sales: The United Nations Convention on Contracts for the International Sale of Goods, chap. 3,
New York (1984)
(cited: *FARNSWORTH* – para. 80).



- FERRARI, Franco** Burden of Proof under the CISG, in:
Review of the Convention on Contracts for the
International Sale of Goods (CISG), Kluwer Law
International (2000-2001), pp. 1 - 8,
available at: [http://www.cisg.law.pace.edu/cisg/
biblio/ferrari5.html](http://www.cisg.law.pace.edu/cisg/biblio/ferrari5.html)
(cited: *FERRARI* – para. 105).
- FOUCHARD, Phillipe**
GAILLARD, Emmanuel
GOLDMAN, Berthold On International Commercial Arbitration,
The Hague (1999)
(cited: *FOUCHARD/GAILLARD/GOLDMAN*
– paras. 7, 11, 53, 67).
- GALPIN, Vashti Christina** A comparison of legislation about wine-making additives
and processes (Cape Wine Master Seminar, University of
the Witwatersrand),
Johannesburg (2006),
available at: [http://www.cs.wits.ac.za/~vashti/ps/vgalpin-
cwm-print.pdf](http://www.cs.wits.ac.za/~vashti/ps/vgalpin-cwm-print.pdf)
(cited: *GALPIN* – para. 100).
- GEIMER, Reinhold** Internationales Zivilprozessrecht,
5th Edition,
Köln (2005)
(cited: *GEIMER* – para. 41).
- HERBER, Rolf**
CZERWENKA, Beate Internationales Kaufrecht: Kommentar zu dem
Übereinkommen der Vereinten Nationen vom 11. April
1980 über Verträge über den internationalen Warenkauf,
München (1991)
(cited: *HERBER/CZERWENKA* – paras. 88, 91).



- HIRSCH, Alain** The Place of Arbitration and the Lex Arbitri, in:
34 Arb J (1979), pp. 43 - 48
(cited: *HIRSCH* – para. 3).
- HOCHBAUM, Johann-Friedrich** Missglückte internationale Schiedsvereinbarungen-
Zweckverfehlung bei internationalen
Schiedsvereinbarungen nach deutschem Recht,
Heidelberg (1995)
(cited: *HOCHBAUM* – para. 41).
- HOLTZMANN, Howard M.** A Guide To The UNCITRAL Model Law On
NEUHAUS, Joseph E. International Commercial Arbitration: Legislative History
And Commentary,
Boston (1989)
(cited: *HOLTZMANN/NEUHAUS* – para. 7, 24).
- HONNOLD, John O.** Uniform Law for International Sales under the 1980
United Nations Convention,
2nd Edition
Boston (1991)
(cited: *HONNOLD* – paras. 74, 80, 122).
- HONSELL, Heinrich** Kommentar zum UN-Kaufrecht – Übereinkommen der
Vereinten Nationen über Verträge über den
Internationalen Warenkauf (CISG),
Berlin, Heidelberg et al. (1997)
(cited: *Honsell/AUTHOR* – para. 88).
- HUBER, Peter** Das Verhältnis von Schiedsgericht und staatlichen
Gerichten bei der Entscheidung über die Zuständigkeit, in:
SchiedsVZ 2003, pp. 73 - 75
(cited: *HUBER* – paras. 27, 53, 56).



- HUBER, Peter**
MULLIS, Alastair
- The CISG – A new textbook for students and practitioners,
Munich (2007)
(cited: *HUBER/MULLIS* – para. 105).
- HUBLEIN-STICH, Gabriele**
- Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit,
Köln, Berlin et al. (1990)
(cited: *HUBLEIN-STICH* – para. 7).
- HYLAND, Richard**
- Liability of the Seller for Conformity for the Goods under the UN Convention (CISG) and the Uniform UCC, in:
SCHLECHTRIEM, PETER (ed.),
Einheitliches Kaufrecht und nationales Obligationenrecht,
pp. 305 - 341,
Baden-Baden (1987)
(cited: *HYLAND* – para. 120).
- JANAL, Ruth M.**
- Sanktionen und Rechtsbehelfe bei der Verletzung verbraucherschützender Informations- und Dokumentationspflichten im elektronischen Geschäftsverkehr,
Berlin (2003)
(cited: *JANAL* – para. 92).
- JOHNSON, Hugh**
- Hugh Johnsons Weingeschichte (The Story of Wine),
Bern, Stuttgart (1990)
(cited: *JOHNSON* – para. 100).



- KAROLLUS, Martin** UN-Kaufrecht – Eine systematische Darstellung für Studium und Praxis, New York, Wien (1991)
(cited: *KAROLLUS* – para. 91).
- KIRSTEIN, Roland** Ökonomische Analyse des Rechts, in: MINTHE, ERIC, Neues in der Kriminalpolitik, Wiesbaden (2003)
available at: http://www.uni-saarland.de/fak1/fr12/csle/publications/2003-06_oear.pdf
(cited: *KIRSTEIN* – para. 117).
- KRITZER, Albert H.** Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Boston (1989)
(cited: *KRITZER* – para. 116).
- LACHMANN, Jens-Peter** Handbuch für die Schiedsgerichtspraxis, 2nd Edition, Köln (2002)
(cited: *LACHMANN* – para. 27).
- LEW, Julian D. M.** Comparative International Commercial Arbitration, The Hague (2003)
MISTELIS, Loukas A.
KRÖLL, Stefan M. (cited: *LEW/MISTELIS/KRÖLL* – para. 35).
- LIONNET, Klaus** Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit, 3rd Edition, Stuttgart (2005)
LIONNET, Annette (cited: *LIONNET/LIONNET* – para. 53).



- LÜDERITZ, Alexander** Pflichten der Parteien nach UN-Kaufrecht im Vergleich zu EKG und BGB, in: SCHLECHTRIEM, PETER (ed.), Einheitliches Kaufrecht und nationales Obligationenrecht, pp. 179 - 195, Baden-Baden (1987)
(cited: *LÜDERITZ* – para. 122).
- LÜKE, Gerhard**
WAX, Peter Münchener Kommentar zur Zivilprozessordnung, Volume 3, Internationales Zivilprozessrecht, 2nd Edition, München (2001)
(cited: *MüKoZPO/AUTHOR* – para. 19).
- MAGNUS, Ulrich** 25 Jahre UN-Kaufrecht, in: ZEuP 2006, pp. 96 - 123
(cited: *MAGNUS* – para. 32).
- MALIK, Shahdeen** Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity?, in: 25 Indian J Int'l L (1985), pp. 26 - 49
(cited: *MALIK* – para. 80).
- MORITZ, Hans-Werner**
DREIER, Thomas Rechts-Handbuch zum E-Commerce, 2nd Edition, Köln (2005)
(cited: *Moritz/Dreier/AUTHOR* – paras. 91, 92).



- MURRAY, John E.** An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International sale of Goods, in: 8 J. L. & Com. (1988), pp. 11 - 51, available at: <http://joe.law.pace.edu/cisg/biblio/murray.html> (cited: *MURRAY* – para. 79).
- NEW YORK TIMES** 24 July 1985, available at: <http://www.nytimes.com> (cited: *NYT, 24 July 1985* – para. 114).
- ÖSTERREICHISCHER WIRTSCHAFTSVERLAG GMBH** Österreichische Gastronomie und Hotelzeitung – Weingalerie, June 2005, Wien (2005), available at: <http://www.gast.at/html/Weingalerie605.pdf> (cited: *ÖGZ WEINGALERIE* – para. 110).
- POSNER, Richard A.** Economic Analysis of Law, 5th Edition, New York (1998) (cited: *POSNER* – para. 117).
- RAESCHKE-KESSLER, Hilmar** Die neue Rechtsprechung des Bundesgerichtshofes zur Schiedsgerichtsbarkeit, in: Jahrbuch für die Praxis der Schiedsgerichtsbarkeit, Volume 1 (1987), Heidelberg (1988) (cited: *RAESCHKE-KESSLER* – para. 41).



- REBMANN, Kurt**
SÄCKER, Franz Jürgen
RIXECKER, Roland Münchener Kommentar zum Bürgerlichen Gesetzbuch –
CISG,
4th Edition,
München (2004)
(cited: *MüKoBGB/AUTHOR* – paras. 80, 88, 122).
- REDFERN, Alan**
HUNTER, Martin Law and Practise of International Commercial Arbitration,
4th Edition,
London (2004)
(cited: *REDFERN/HUNTER* – paras. 3, 9, 35, 53).
- REDFERN, Alan** The Jurisdiction of an International Commercial
Arbitrator, in:
3 J Int'l Arb (1986), pp. 19 - 34
(cited: *REDFERN* – para. 9).
- REICHOLD, Klaus**
HÜBTEGE, Rainer
THOMAS, Heinz
PUTZO, Hans Zivilprozessordnung,
28th Edition,
München (2007)
(cited: *REICHOLD* – para. 7).
- RIBÉRAU-GAYON, Pascal**
DUBOURDIEU, Denis
DONÈCHE, Bernard
LONVAUD, Aline Handbook of Enology, Volume 1, The Microbiology of
Wine and Vinifications,
2nd Edition,
West Sussex (2006)
(cited: *RIBÉRAU-GAYON* – para. 100).
- ROBINSON, Jancis** The Oxford Companion to wine,
3rd Edition,
Oxford (2006)
(cited: *ROBINSON* – paras. 99, 100).



- SAENGER, Ingo** Zivilprozessordnung: Handkommentar,
2nd Edition,
Baden-Baden (2007)
(cited: *SAENGER* – paras. 7, 56).
- SCHÄFER, Hans-Bernd**
OTT, Claus Lehrbuch der ökonomischen Analyse des Zivilrechts,
4th Edition,
Berlin, Heidelberg (2005)
(cited: *SCHÄFER/OTT* – para. 117).
- SCHLECHTRIEM, Peter**
SCHWENZER, Ingeborg Kommentar zum Einheitlichen UN-Kaufrecht,
4th Edition,
München (2004)
(cited: *Schlechtriem/Schwenzer/AUTHOR*
– paras. 88, 90, 91, 92).
- SCHLECHTRIEM, Peter**
SCHWENZER, Ingeborg Commentary on the UN Convention on the
International Sale of Goods (CISG),
2nd Edition,
Oxford (2005)
(cited: *Schlechtriem/Schwenzer/AUTHOR (eng.)*
– paras. 74, 80, 92, 120).
- SCHLOSSER, Peter** Das Recht der internationalen Schiedsgerichtsbarkeit
2nd Edition,
Tübingen (1989)
(cited: *SCHLOSSER* – para. 41).



- SCHMIDT, Karsten** Münchner Kommentar zum Handelsgesetzbuch – Wiener UN - Übereinkommen über Verträge über den internationalen Warenkauf – CISG, 2nd Edition, München (2007)
(cited: *MüKoHGB/AUTHOR* – paras. 90, 91).
- SCHROETER, Ulrich G.** UN-Kaufrecht und Europäisches Gemeinschaftsrecht – Verhältnis und Wechselwirkungen, München (2005)
(cited: *SCHROETER* – paras. 32, 90).
- SCHROETER, Ulrich G.** Der Antrag auf Feststellung der Zulässigkeit eines schiedsrichterlichen Verfahrens gemäß § 1032 Abs. 2 ZPO, in:
SchiedsVZ 2004, pp. 288 - 296
(cited: *SCHROETER, Antrag* – paras. 7, 56).
- SCHWEBEL, Stephen M.** International Arbitration: Three Salient Problems, Cambridge (1987)
(cited: *SCHWEBEL* – para. 35).
- SCHWENZER, Ingeborg**
MOHS, Florian Old Habits Die Hard: Traditional Contract Formation in a Modern World, in:
IHR 2006, pp. 239 - 246,
(cited: *SCHWENZER/MOHS* – para. 80).
- SESSLER, Anke** Anmerkung zu Bayerisches Oberstes Landesgericht, Beschluss vom 09.09.1999, in:
BB Beilage 2000, Nr. 8, pp. 9 - 12.
(cited: *SESSLER* – para. 27)



- SOERGEL, Hans Th.** Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen,
Volume 13: Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG),
13th Edition,
Stuttgart (2000)
(cited: *Soergel/AUTHOR* – para. 91).
- SONO, Kazuaki** Restoration of the Rule of Reason in Contract Formation: Has There Been Civil and Common Law Disparity?, in:
21 Cornell Int'l L J (1988), pp. 477 - 486,
(cited: *SONO* – para. 80).
- STAUDINGER, Julius von**
MAGNUS, Ulrich Kommentar zum Bürgerlichen Gesetzbuch, CISG,
Berlin (2005)
(cited: *STAUDINGER/MAGNUS* – paras. 90, 91, 122).
- STEIN, Friedrich**
JONAS, Martin Kommentar zur Zivilprozessordnung,
22th Edition,
Volume 9: §§ 916-1068, EGZPO,
Tübingen (2002)
(cited: *Stein/Jonas/AUTHOR* - paras. 7, 19, 27).
- STUTTGARTER ZEITUNG** 9 July 1985,
available at: <http://www.stuttgarter-zeitung.de>
(cited: *STUTTGZ, 9 July 1985* – para. 114).



- UNCITRAL** Secretariat Commentary on the Draft Convention for the International Sale of Goods, prepared by the Secretariat UN-Doc. A/CONF/97/5,
available at:
<http://www.cisg-online.ch/cisg/materials-commentary.html>
(cited: *SECRETARIAT'S COMMENTARY* – para. 80).
- UNCITRAL** Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996),
New York (1999)
(cited: *GUIDE TO ENACTMENT* – para. 93).
- UNCITRAL** International Commercial Arbitration, Report of the Secretary-General: possible features of a model law on international commercial arbitration,
UN Doc. A/CN.9/207,
XII Y. B. Com. Arb. (1981), pp. 75 - 92
(cited: *UN DOC. A/CN.9/207* – para. 56).
- UNCITRAL** Yearbook of the United Nations Commission on International Trade Law, Volume VIII,
New York (1977)
(cited: *WORKING GROUP* – para. 90).
- VARADY, Tibor**
BARCELO, John J.
VON MEHREN, Arthur T. International Commercial Arbitration: A transnational perspective,
3rd Edition,
St. Paul, MN (2006)
(cited: *VARADY/BARCELO/vMEHREN* – para. 35).



- WEY, Marc** Der Vertragsschluss beim Internationalen Warenkauf,
UNCITRAL und Schweizerischem Recht,
Basel (1984)
(cited: *WEY* - para. 74).
- WITZ, WOLFGANG**
SALGER, HANNS-CHRISTIAN
LORENZ, MANUEL International Einheitliches Kaufrecht – Praktiker-
Kommentar und Vertragsgestaltung zum CISG,
Heidelberg (2000)
(cited: *WITZ / SALGER / LORENZ* – paras. 88, 116).
- ZÖLLER, Richard**
GEIMER, Reinhold Zivilprozessordnung,
26th Edition,
Köln (2007)
(cited: *Zölller/AUTHOR* – para. 7).
- ZWEIGERT, Konrad**
KÖTZ, Hein Einführung in die Rechtsvergleichung auf dem Gebiete
des Privatrechts,
3rd Edition,
Tübingen (1996)
(cited: *ZWEIGERT/KÖTZ* – para. 80).



INDEX OF CASES

Argentina

Enrique C. Wellbers S.A.I.C. A. G. Extraktionstechnik Gesellschaft für Anlagenbau
M.B.M., 26 September 1988

Cámara Nacional de Apelaciones en lo Commercial

La Ley, 1989-E-302, Buenos Aires

(cited: *Cámara Nacional de Apelaciones en lo Commercial*, 26 Sep 1988 – para. 35)

Austria

Oberster Gerichtshof, 25 January 2006

CISG-online No. 1223

(cited: *OGH*, 25 Jan 2006 – para. 124)

Oberster Gerichtshof, 12 June 1988

15 Os 83/87

(cited: *OGH*, 12 June 1988 – para. 114)

Bermuda

Sojuznefteexport v. JOC Oil, 7 July 1989

Bermuda Court of Appeal

XV Y. B. Com. Arb. (1990), pp. 384 et seq.

(cited: *Sojuznefteexport v. JOC Oil* – para. 36)

Court of Justice of the European Communities

“Nordsee” Deutsche Hochseefischerei GmbH v. Entreprise Reederei Mond Hochseefischerei

Nordstern AG et al., 23 March 1982

Court of Justice of the European Communities, Case 102/81

VII Y. B. Com. Arb. (1983), pp. 183 - 191

(cited: *ECJ*, 23 Mar 1982 – para. 53)

**Germany**

Bundesgerichtshof, 23 November 1988

NJW 1989, pp. 218 - 220

(cited: *BGH, 23 Nov 1988 – para. 114*)

Bundesgerichtshof, 28 May 1979

NJW 1979, pp. 2567 - 2569

(cited: *BGH, 28 May 1979 – paras. 36, 38*)

Bayerisches Oberstes Landesgericht, 9 September 1999

BayObLGZ 99, pp. 255 et seq.

(cited: *BayObLG, 9 Sep 1999 – para. 27*)

Oberlandesgericht Frankfurt, 26 June 2006

CISG-online No. 1385

(cited: *OLG Frankfurt, 26 June 2006 – para. 32*)

Landgericht Frankfurt am Main, 6 July 1994

CISG-online No. 257

(cited: *LG Frankfurt, 6 July 1994 – para. 105*)

France

Cour de cassation, 7 May 1963

Ets Raymond Gosset v. Carapelli

JDI 1964, pp. 82 - 92

(cited: *Cour de cassation, 7 May 1963 – para. 35*)

Italy

Tribunale di Vigevano, 12 July 2000

CISG-online No. 493

(cited: *Tribunale di Vigevano, 12 July 2000 – para. 105*)

**Spain**

Tribunal Supremo, 17 February 1998

CISG-online No. 1333

(cited: *Tribunal Supremo, 17 Feb 1998 – para. 32*)

Switzerland

Bundesgericht, 14 May 2001

BGE 127 III, pp. 279-288

(cited: *Swiss Supreme Court, 14 May 2001 – para. 13, 25*)

Handelsgericht des Kantons Zürich, 26 April 1995

CISG-online No. 248

(cited: *HG Zürich, 26 April 1995 – para. 105*)

United Kingdom

Lesotho Highlands Development Authority v. Impregilo SpA, 30 June 2005

House of Lords

[2006] 1 A.C. 221

(cited: *Lesotho Highlands v. Impreglio, House of Lords – para. 35*)

Compagnie Tunisienne de Navigation S. A. v. Compagnie d'Armement Maritime S. A.,

14 July 1970

House of Lords

[1971] A. C. 572

(cited: *Tunisienne v. Armament Maritime, House of Lords – para. 3*)

Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd., 3 March 1970

House of Lords

[1970] 1 All E. R. 796

(cited: *Whitworth Street Estates v. James Miller & Partners, House of Lords – para. 3*)



Aggeliki Charis Compania Maritima SA v Pagnan SpA, 17 May 1994
Court of Appeal (Civil Division)
[1995] 1 Lloyd's Rep. 87
(cited: *Aggeliki v. Pagnan*, *U. K. Court of Appeal* – para. 60)

United States

Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.
Supreme Court of the United States
105 S.Ct. 3346
(cited: *Mitsubishi v. Soler*, *U. S. Supreme Court* – para. 41)

Genesco, Inc. v. T. Kakiuchi & Co. Ltd., 1 April 1987
United States Court of Appeals, Second Circuit
815 F. 2d 840
(cited: *Genesco v. Kakiuchi*, *U.S. Ct. App.* – para. 41)

Mineracao da Trindade-Samitri v. Utah International, 1 October 1984
United States Court of Appeals, Second Circuit
745 F. 2d 190
(cited: *Mineracao v. Utah International*, *U.S. Ct. App.* – para. 41)

McCreary Tire & Rubber Company v. CEAT S. p. A., 8 July 1974
United States Court of Appeals, Third Circuit
501 F. 2d 1032
(cited: *McCreary v. CEAT*, *U. S. Ct. App.* – para. 60)

Prima Paint Corporation v. Flood & Conklin Mfg. Co., 12 June 1967
United States Court of Appeals, Second Circuit
360 F. 2d 315
(cited: *Prima Paint v. Flood & Conklin*, *U. S. Ct. App.* – para. 35)



Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., 10 May 2002

United States District Court, Southern District, New York

CISG-online No. 653

(cited: *Geneva v. Barr, U. S. Dist. Ct. (S. D. N. Y.) – para. 88*)

Filanto, S. p. A. v. Chilewich International Corp, 14 April 1992

United States District Court, Southern District, New York

789 F. Supp. 1229

(cited: *Filanto v. Chilewich, U. S. Dist. Ct. (S. D. N. Y.) – para. 32*)

Robert R. Cooper v. Ateliers de la Motobecane, S. A., 18 November 1982

Court of Appeals of New York

57 N. Y. 2d 408

(cited: *Cooper v. Ateliers de la Motobecane, Ct. App. N. Y. – para. 60*)



INDEX OF AWARDS

Hamburg Friendly Arbitration

Buyer (nationality not indicated) v. Seller (Czech Republic)

Final award of 29 December 1998

XXIV Y. B. Com. Arb. (1999), pp. 13 - 22

(cited: *Hamburg Friendly Arbitration, 29 Dec 1998 – para. 3*)

International Chamber of Commerce

Company (United States of America) v. Company (Belgium)

Award No. 8694 (1996)

JDI 1997, pp. 1056 - 1058

(cited: *ICC Award No. 8694 (1996) – para. 67*)

Company (France) v. State Company (Iran)

Award No. 4381 (1986)

JDI 1986, pp. 1102 - 1113

(cited: *ICC Award No. 4381 (1986) – para. 35*)

Claimant (Germany) v. Defendant (Germany)

Award No. 4472 (1984)

JDI 1984, pp. 946 – 950

(cited: *ICC Award No. 4472 (1984) – para. 11*)

Supplier (USA) v. Buyer (India)

Award No. 4367 (1984)

XI Y. B. Com. Arb. XI (1986), pp. 134 - 139

(cited: *ICC Award No. 4367 (1984) – para. 11*)

Companies (Bahamas, Luxembourg) v. Companies (France)

Award No. 4402 (1983)

IX Y. B. Com. Arb. (1984), pp. 138 - 141

(cited: *ICC Award No. 4402 (1983) – para. 11*)



Company (Germany) v. a South-East Asian State

Award No. 1507 (1970)

JDI 1974, pp. 913 - 914

(cited: *ICC Award No. 1507 (1970) – para. 35*)

International Centre for Settlement of Investment Disputes

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan

Case No. ARB/03/29

2005 WL 3598900 (APPAWD)

(cited: *ICSID Case No. ARB/03/29 – paras. 60, 61*)



STATEMENT OF FACTS

CLAIMANT	Mediterraneo Wine Cooperative [<i>hereinafter</i> “CLAIMANT”] is a producer and distributor of wine. Its principal office is located in Mediterraneo.
RESPONDENT	Equatoriana Super Markets S. A. [<i>hereinafter</i> “RESPONDENT”] is an operator of super markets. Its principal office is located in Equatoriana.
07 May to 10 May 2006	Representatives of CLAIMANT and RESPONDENT initiate negotiations concerning the purchase of Blue Hills 2005 at the Durhan Wine Fair.
11 June 2006	CLAIMANT receives a purchase offer for 20,000 cases of Blue Hills 2005, to be accepted until 21 June 2006. The contract includes the JAMS Model Arbitration Clause. Ms Kringle (assistant to Mr Cox, sales manager for CLAIMANT) informs Mr Wolf (wine buyer for RESPONDENT) of Mr Cox’ absence from office until 19 June 2006. Mr Wolf reaffirms the importance of an immediate response.
16 and 17 June 2006	Newspaper articles are published in Equatoriana, alleging the use of anti-freeze in the production of Blue Hills 2005.
19 June 2006 (morning)	CLAIMANT dispatches its acceptance of the purchase offer.
19 June 2006 (afternoon)	CLAIMANT receives an e-mail which aims at revoking the purchase offer.
20 June 2006	RESPONDENT reaffirms its intention to revoke its purchase offer.
21 June 2006	RESPONDENT receives CLAIMANT’S acceptance.
15 July 2006	CLAIMANT submits to RESPONDENT a report by Prof. Ericson, dismissing the newspaper allegations as wrong.
10 August 2006	RESPONDENT insists that the matter is closed.
18 June 2007	CLAIMANT submits a Request for Arbitration to JAMS.
04 July 2007	RESPONDENT commences an action in the Commercial Court of Vindobona, claiming the arbitration agreement invalid.
17 August 2007	The Arbitral Tribunal is fully composed.



STATEMENT OF PURPOSE

In response to the Tribunal's Procedural Orders, Counsel makes the following submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the honourable Arbitral Tribunal to declare that:

- A stay of the Arbitral Proceedings should not be granted (**FIRST ISSUE**)
- An arbitration agreement was validly concluded (**SECOND ISSUE**)
- Due to Respondent's violation of Art. 17(3) JAMS IAR the Tribunal should draw the appropriate financial and procedural inferences (**THIRD ISSUE**)
- A contract of sale was concluded (**FOURTH ISSUE**)
- Blue Hills 2005 was fit for the particular purpose made known as required by Art. 35(2)(b) CISG (**FIFTH ISSUE**)



ARGUMENT TO THE PROCEDURAL ISSUES

FIRST ISSUE: A STAY OF THE ARBITRAL PROCEEDINGS SHOULD NOT BE GRANTED

- 1 Irrespective of the question whether an arbitration agreement has been validly concluded, CLAIMANT requests the Arbitral Tribunal to continue the Arbitral Proceedings.
- 2 After receiving the Statement of Claim, RESPONDENT commenced an action in the Commercial Court of Vindobona, Danubia [*hereinafter "Commercial Court"*] requesting it to declare that no arbitration agreement between RESPONDENT and CLAIMANT had been concluded [*Amendment to Request for Arbitration, para. 2, p. 31*]. RESPONDENT relies on Art. 8(2) Danubian Arbitration Law [*hereinafter "DAL"*] arguing that the Arbitral Proceedings should be stayed [*Statement of Defense, para. 13, p. 38*]. However, this argument is flawed.
- 3 The DAL is the relevant *lex arbitri* since the law governing the arbitral proceedings is the law of the country, where arbitration was initiated [*WHITWORTH STREET ESTATES V. JAMES MILLER & PARTNERS, HOUSE OF LORDS; TUNISIENNE V. ARMAMENT MARITIME, HOUSE OF LORDS; HAMBURG FRIENDLY ARBITRATION, 29 Dec 1998; PARK, p. 23; HIRSCH, p. 43; REDFERN/HUNTER, para. 2-05*]. Whilst Art. 8(2) DAL generally provides that “an application may be made to the court to determine whether or not arbitration is admissible”, Art. 8(3) DAL stipulates that “arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court”. The Arbitral Tribunal recognised that the authority to initiate or continue arbitral proceedings granted by Art. 8(3) DAL is therefore discretionary [*Procedural Order No. 1, para. 7, p. 49*].
- 4 The Tribunal is respectfully requested to exercise its discretion in favour of the continuation of the Arbitral Proceedings. First, reasonable arguments necessitate the continuation of the Arbitral Proceedings (**A**). Second, the continuation of the Arbitral Proceedings is not excluded by reasonable objections (**B**).
 - A. REASONABLE ARGUMENTS NECESSITATE THE CONTINUATION OF THE ARBITRAL PROCEEDINGS**
- 5 Arbitral Proceedings should be continued since an interpretation of Art. 8(3) DAL leads to the conclusion that its purpose favours a continuation of arbitration (**I**). Furthermore,



the current circumstances favour a continuation of the Arbitral Proceedings (II).

I. AN INTERPRETATION OF ART. 8(3) DAL LEADS TO THE CONCLUSION THAT ITS PURPOSE FAVOURS A CONTINUATION OF ARBITRAL PROCEEDINGS

6 The Tribunal has discretion to continue the Arbitral Proceedings. However, an interpretation of Art. 8(3) DAL leads to the conclusion that arbitral proceedings should be continued. Art. 8(3) DAL is to be interpreted with due regard to Art. 8(2) UNCITRAL Model Law on International Commercial Arbitration [*hereinafter* “UNCITRAL Model Law ICA”] as well as to § 1032(3) of the German Code of Civil Procedure [*hereinafter* “ZPO”]. This is due to Art. 8(3) DAL being modelled on Art. 8(2) UNCITRAL Model Law ICA and corresponding verbatim with § 1032(3) ZPO [*Procedural Order No. 2, para. 2, p. 51*].

7 The purpose of Art. 8(3) DAL is to safeguard fast and cost-saving proceedings by avoiding delay tactics [*HOLTZMANN/NEUHAUS, p. 306; Stein/Jonas/SCHLOSSER, § 1032 para. 22; CALAVROS, p. 53; SAENGER, § 1032 para. 18; REICHOLD, § 1032 para. 6*]. Arbitral proceedings should consequently only be stayed if a risk of delay can reasonably be excluded [*Stein/Jonas/SCHLOSSER, § 1032 para. 22; HUBLEIN-STICH, p. 50; Zöller/GEIMER, § 1032 para. 25*]. Otherwise, parties could disrupt arbitral proceedings by systematically challenging the jurisdiction of the arbitral tribunal not only before the arbitrators, but also before the courts [*FOUCHARD/GAILLARD/GOLDMAN, para. 680*]. Consequently, a precipitous stay of arbitral proceedings should not be granted [*Stein/Jonas/SCHLOSSER, § 1032 para. 22; SCHROETER, Antrag, p. 291*] as it could lead to a significant loss of time and therefore undermine the purpose of Art. 8(3) DAL. Thus, an interpretation of Art. 8(3) DAL leads to the conclusion that its purpose necessitates a continuation of arbitral proceedings.

II. THE CURRENT CIRCUMSTANCES FAVOUR A CONTINUATION OF THE ARBITRAL PROCEEDINGS

8 The circumstances of the case at hand require a continuation of the Arbitral Proceedings. First, the parties originally intended to settle disputes by means of arbitration (1). Second, a continuation of the Arbitral Proceedings would lead to a timesaving resolution of the dispute (2). Third, RESPONDENT may not gain undue privilege from its assumed breach of contract under Art. 17(3) JAMS International Arbitration Rules [*hereinafter* “JAMS



IAR”] (3).

1. THE PARTIES’ ORIGINAL INTENTION WAS TO SUBMIT DISPUTES TO ARBITRATION

9 The Arbitral Tribunal is requested to consider the parties’ original intention to submit their disputes to arbitration and thus to continue Arbitral Proceedings. The intention of parties to submit any dispute to arbitration, manifested in an arbitration agreement, is the foundation stone of modern international commercial arbitration [*REDFERN/HUNTER, para. 1-08*]. Therefore, the parties’ agreement on arbitration is the primary source of the arbitral tribunal’s jurisdiction [*REDFERN/HUNTER, para. 1-13; CRAIG/PARK/PAULSSON, p. 44; REDFERN, p. 29*].

10 First, both RESPONDENT and CLAIMANT intended to arbitrate any disputes possibly arising out of their contractual relations. On 10 June 2006 RESPONDENT made a purchase offer including an arbitration clause [*Claimant’s Exhibit No. 5, p. 13*]. The offer was signed by CLAIMANT without amendments [*Claimant’s Exhibit No. 5, p. 13*]. Second, in contrast to well known model clauses [*e.g. DIS Arbitration clause 1998; ICC Arbitration Clause*] the explicit reference to “the formation of the contract” shows that the issue in dispute was intended to be settled by means of arbitration. Third, it was RESPONDENT who introduced the arbitration clause and nevertheless commenced litigation as soon as the dispute arose. It thereby violated the prohibition of contradictory behaviour (*venire contra factum proprium*). Hence, the Arbitral Proceedings should be continued since the parties originally intended to settle their disputes by means of arbitration and not in court.

2. A CONTINUATION OF THE ARBITRAL PROCEEDINGS WOULD LEAD TO A TIMESAVING RESOLUTION

11 In accordance with the principle of competence-competence, set out in Art. 16(1) DAL and generally accepted in international arbitration [*ICC AWARD NO. 4472/1984; ICC AWARD NO. 4402/1983; ICC AWARD NO. 4367/1984; FOUCHARD/GAILLARD/GOLDMAN, paras. 416, 650; BORN, p. 72*], the Tribunal has the power to rule on its own jurisdiction. The Tribunal should exercise this power since the oral hearings are scheduled in March 2008, and an award by the Tribunal may be issued shortly after that [*Procedural Order No. 1, para. 13, p. 50*] whereas the Commercial Court is not expected to render a decision before summer 2008 [*Procedural Order No. 2, para. 10, p. 53*]. Moreover, in case of a continuation, the Tribunal would already render a decision on the merits of the case far



before the Court would even decide whether an arbitration agreement existed. Therefore, a continuation of the Arbitral Proceedings leads to a timesaving resolution of the dispute.

3. RESPONDENT MAY NOT GAIN UNDUE PRIVILEGE FROM ITS ASSUMED BREACH OF CONTRACT UNDER ART. 17(3) JAMS IAR

- 12 Assuming that RESPONDENT breached the contract in taking legal action in the Commercial Court, it would gain undue privilege from its breach of contract if Arbitral Proceedings were not continued. Pursuant to Art. 17(3) JAMS IAR, “by agreeing to arbitration under these 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”. RESPONDENT would prevent the Tribunal from finding the validity of the arbitration agreement by breaching this very same agreement. Thereby the breach itself would prevent the breach from being detected. For preventing such undue privilege, Arbitration Proceedings should be continued.

B. THE CONTINUATION OF ARBITRAL PROCEEDINGS IS NOT EXCLUDED BY REASONABLE OBJECTIONS

- 13 As shown above, the purpose of Art. 8(3) DAL favours a continuation of arbitration. Moreover, reasonable arguments necessitate a continuation in the present case. An exception should only be made if relevant objections would justify an interruption of the proceedings [*BG, 14 May 2001*]. Such reasons do not exist since Arbitral Proceedings did already validly commence **(I)**. Furthermore, RESPONDENT may not invoke that duplicate proceedings would cause an inappropriate increase in costs **(II)**.

I. ARBITRAL PROCEEDINGS DID ALREADY VALIDLY COMMENCE

- 14 RESPONDENT argues that “where the arbitral proceedings have not yet begun” the discretion as to whether to commence the arbitration or not should be exercised in favour of staying the Arbitral Proceedings [*Statement of Defense, para. 13, p. 38*]. However, this argument fails to justify a stay of Arbitral Proceedings, since Arbitration was already validly instituted in terms of Art. 2(5) JAMS IAR and Art. 21 DAL **(1)**. In any case, the initiation of Arbitral Proceedings complied with the terms of Art. 8(3) DAL **(2)**.



1. ARBITRAL PROCEEDINGS WERE ALREADY INITIATED IN TERMS OF ART. 2(5) JAMS IAR AND ART. 21 DAL

- 15 In order to establish the time of commencement in the sense of Art. 8(3) DAL, reference must be made to the JAMS IAR, since they are chosen to be the Arbitration Rules [*Claimant's Exhibit No. 5, p. 13*]. Furthermore, the term commencement should be considered as defined in the Danubian Arbitration Law, the relevant *lex arbitri*.
- 16 According to Art. 2(5) JAMS IAR “arbitration will be deemed to have been commenced at the date on which JAMS receives the Request for Arbitration”. CLAIMANT filed its Request for Arbitration on 18 June 2007 [*Statement of Claim, p. 8*]. Hence, under Art. 2(5) JAMS IAR the Arbitral Proceedings have already commenced.
- 17 Further, Art. 21 DAL states that “arbitral proceedings [...] commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent”. JAMS sent a Request for Arbitration to RESPONDENT on 21 June 2007 [*JAMS to Super Markets, p. 27*]. The fact that RESPONDENT filed its action in the Commercial Court on 4 July 2007 [*Procedural Order No. 2, para. 9, p. 52*] leads to the conclusion that RESPONDENT had received CLAIMANT’S Request for Arbitration before 4 July 2007.
- 18 Summarising, Arbitral Proceedings were already initiated pursuant to Art. 2(5) JAMS IAR and Art. 21 DAL at the time RESPONDENT commenced litigation before the Commercial Court.

2. AN INITIATION OF ARBITRATION COMPLIES WITH ART. 8(3) DAL

- 19 The continuation of Arbitration is not excluded even if the Tribunal held that Arbitration has not yet commenced. Art. 8(3) DAL expressly states that while a decision about the tribunal’s jurisdiction is pending before a court, arbitral proceedings may nevertheless be commenced or continued [*Amendment to Request for Arbitration, para. 2, p. 31; Statement of Defense, para. 4, p. 37*]. Initiating arbitration while the issue is pending before the Court is moreover broadly accepted in practice as well as in academic writing [*Stein/Jonas/SCHLOSSER, § 1032 para. 22; MüKoZPO/MÜNCH, § 1032 para. 13*]. Thus, even if Arbitral Proceedings did not commence, Art. 8(3) DAL allows the initiation of proceedings the same way it allows the continuation.



II. RESPONDENT MAY NOT INVOKE THAT DUPLICATE PROCEEDINGS WOULD LEAD TO INAPPROPRIATE COSTS

20 RESPONDENT requests the Tribunal to grant a stay of the Arbitral Proceedings since a continuation of Arbitral Proceedings would lead to duplicate proceedings and expenses [*Statement of Defense, para. 13, p. 38*]. This objection fails to justify a stay of the Arbitral Proceedings since it was RESPONDENT'S conduct that caused double costs (1). In any case, it is the Commercial Court that should stay its ruling on this case to avoid duplicate proceedings (2).

1. IT WAS RESPONDENT'S CONDUCT THAT CAUSED DOUBLE COSTS

21 RESPONDENT may not invoke that the continuation of Arbitral Proceedings would lead to double costs as it was RESPONDENT itself who caused parallel proceedings and therefore double costs.

22 On 18 June 2007, CLAIMANT instituted Arbitration at JAMS [*Request for Arbitration, p. 4*]. RESPONDENT received the Request for Arbitration before taking legal action in the Court on 4 July 2007 [*Procedural Order No. 2, para. 9, p. 52*] and was therefore aware of the commencement of Arbitral Proceedings. RESPONDENT knew that its action would cause additional costs. The costs arising out of additional legal procedures were therefore not inappropriate, but foreseeable to RESPONDENT.

23 Hence, RESPONDENT may not invoke that duplicate proceedings and double costs would justify a stay of the Arbitral Proceedings.

2. IF DUPLICATE PROCEEDINGS ARE TO BE AVOIDED THE COMMERCIAL COURT SHOULD STAY ITS PROCEEDINGS

24 In any case it is not the Arbitral Tribunal but the Commercial Court that should stay its proceedings in order to avoid duplicate proceedings. Although a court's intervention is generally permitted by Art. 8(2) DAL, in the interest of efficiency of arbitral proceedings the court should stay its ruling on the tribunal's jurisdiction until an award is made [*Holtzmann/Neuhaus/HJERNER/HOLTZMANN, pp. 326, 329*]. The Tribunal has the possibility to decide on the validity of the arbitration agreement as a preliminary question. Thus, the Court Proceedings and not the Arbitral Proceedings should be stayed until an award is rendered.

25 Moreover, the Arbitral Proceedings should continue, because it was the first



authority seized. As expressed in the Fomento-case, the first authority seized should continue proceedings while the other should stay its proceedings [BG, 14 May 2001]. In this case the parties concluded a contract including an arbitration agreement. When the dispute between the parties arose, the claimant took legal action in a state court of Panama. Then, the claimant raised the exception of arbitration and commenced proceedings in a Swiss arbitral tribunal, whereupon the claimant challenged the arbitral tribunal's jurisdiction on this matter. The Swiss Supreme Court held that the court of Panama should rule on the issue since it was the first authority seized in accordance with Art. 9 Swiss Private International Law Statute. In the case at hand, the Arbitral Tribunal was the first authority seized. Consequently, it is the Commercial Court that should stay its ruling.

26 The principle of favouring the authority seized first is even more sensible when recalling that the Arbitral Proceedings already advanced. When comparing the proceedings of both the Commercial Court and the Arbitral Tribunal, a stay of the Arbitral Proceedings at this point appears to be a needless postponement of a final arbitral decision on the matter. Whereas the Court Proceedings have not advanced yet and a decision by the Court is only expected in summer 2008 [Procedural Order No. 2, para. 10, p. 53], all requirements for a commencement of the Arbitral Hearings are fulfilled and an award will already be rendered in March 2008.

27 First, the Arbitral Tribunal is already composed. A composition of an arbitral tribunal is generally completed as soon as the last-nominated arbitrator accepts his nomination [to the verbatim § 1032(2) ZPO: BAYOBLG, 9 Sep 1999; Stein/Jonas/SCHLOSSER, § 1032 para. 21; BERGER, p. 18; SESSLER, p. 9; LACHMANN, para. 457; HUBER, p. 74]. Both, CLAIMANT and RESPONDENT nominated their arbitrators, both of whom accepted their nominations [Ms. Arbitrator 1 to JAMS, p. 29; Prof. Arbitrator 2 to JAMS, p. 42]. Finally, the honourable Presiding Arbitrator accepted his nomination on 17 August 2007 [Letter from Prof. Dr. Presiding Arbitrator to JAMS, p. 47]. Thus, the Tribunal was fully composed and in the position to decide on the case.

28 Second, both parties filed their statements and therefore complied with the formal requirements of Art. 23(1) DAL [Statement of Claim, pp. 4-8; Amendment to Request for Arbitration, pp. 31-32; Statement of Defense, pp. 36-40]. The relevant exhibits are included in the Statement of Defense [Claimant's Exhibits Nos. 1-16]. The Statement of Claim and the Statement of Defense form the fundament of all further



proceedings [*CALAVROS*, p. 112].

- 29 Accordingly, the Arbitral Hearings could be commenced without further loss of time and wasted effort. Resuming the continuation of Arbitral Proceedings is the more sensible solution due to their advanced state and a stay of the Court Proceedings should thus be issued.
-

- 30 **CONCLUSION OF THE FIRST ISSUE:** The Arbitral Proceedings should not be stayed since the purpose of Art. 8(3) DAL favours a continuation of arbitration. This principle is not excluded by reasonable objections since the Arbitral Proceedings were already validly commenced and duplicate proceedings would not lead to inappropriate costs for RESPONDENT. Quite the contrary, the parties' original intent and the timesaving aspect favour a continuation of Arbitral Proceedings.
-

**SECOND ISSUE: AN ARBITRATION AGREEMENT WAS VALIDLY CONCLUDED**

31 CLAIMANT and RESPONDENT concluded an arbitration agreement irrespective of the validity of the sales contract. On 10 June 2006 RESPONDENT sent a purchase offer including an arbitration clause. According to this clause “any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof [...] will be referred to and finally determined by arbitration” [*Claimant’s Exhibit No. 5, p. 13*]. Since CLAIMANT accepted the offer on 19 June 2006, the arbitration agreement became effective. Thus, the parties effectively agreed to settle arising disputes by means of arbitration.

32 RESPONDENT alleges to have revoked its purchase offer, including the offer to arbitrate under Art. 16 of the United Nations Convention on Contracts for the International Sale of Goods [*hereinafter “CISG”*]. The CISG is applicable as the law governing the sales contract also governs the arbitration clause [*FILANTO V. CHILEWICH, U. S. DIST. CT. (S.D.N.Y.); TRIBUNAL SUPREMO, 17 Feb 1998; OLG FRANKFURT, 26 JUN 2006; MAGNUS, p. 111; SCHROETER, p. 121*].

33 However, RESPONDENT’S offer to arbitrate required a revocation separate from the revocation of the purchase offer (A). As RESPONDENT did not declare the intention to revoke its offer to arbitrate (B), the parties validly entered into an arbitration agreement.

A. RESPONDENT’S OFFER TO ARBITRATE REQUIRED A SEPARATE REVOCATION

34 An offer to arbitrate is independent from the offer to conclude a sales contract. Hence, a revocation of RESPONDENT’S offer to arbitrate required an independent declaration, expressly or impliedly made known to CLAIMANT.

35 According to Art. 17(1)(2) JAMS IAR, which adopts the doctrine of separability, an arbitration clause contained in a contract shall be treated as an independent contract in itself. [*PRIMA PAINT V. FLOOD & CONKLIN, U. S. CT. APP.; COUR DE CASSATION, 7 May 1963; LESOTHO HIGHLANDS V. IMPREGGIO, HOUSE OF LORDS; CAMARA NACIONAL DE APELACIONES EN LO COMMERCIAL, 26 Sep 1988; ICC Award No. 1507/1970; ICC Award No. 4381/1986; REDFERN/HUNTER, para. 5-36; VARADY/BARCELO/vMEHREN, p. 125; LEW/MISTELIS/KRÖLL, para. 6-9*]. Therefore, the parties to an agreement containing an arbitration clause conclude not one but two agreements, “the arbitral twin of which survives any birth defect or acquired disability of the principal agreement” [*SCHWEBEL,*



p. 5].

36 Furthermore, the separability doctrine does not only distinguish between an arbitration contract and a sales contract, but also between the corresponding declarations of intent. Therefore, a party that offers to conclude a contract including an arbitration clause introduces in fact two offers, the offer to purchase and the offer to arbitrate [*SOJUZNEFTEEXPORT V. JOC OIL, BERMUDA COURT OF APPEAL; BGH, 28 May 1979*].

37 In *SOJUZNEFTEEXPORT V. JOC OIL*, the contract containing an arbitration agreement was not concluded since it was not signed by two authorised persons as required by the applicable Russian law. Contrary to the respondent's allegation, the court held that the signature requirements applying to the acceptance of the main offer did not extend to the acceptance of the offer to arbitrate. Thus, the acceptance to arbitrate became effective and the arbitration agreement was validly concluded.

38 The same conclusion was drawn by the German Federal Supreme Court [*BGH, 28 May 1979*]. The relevant case concerned an association member who entered into a contract including an arbitration clause although he was not authorised to do so. With regard to a later authorisation by the association the court held that the main contract and the arbitration agreement are deemed to be two separate agreements. It is therefore possible to authorise the arbitration agreement itself. Hence, an offer to arbitrate must be regarded as being separate from the offer to conclude a sales contract.

39 RESPONDENT introduced two independent offers by issuing the document on 10 June 2006. It contained first, an offer to conclude a sales contract and second, an offer to arbitrate. As a consequence, RESPONDENT did not automatically revoke its arbitration offer by attempting to revoke its purchase offer on 18 June 2006 [*Claimant's Exhibit No. 9, p. 17*]. Its offer to arbitrate would have required an independent revocation made known to CLAIMANT.

B. RESPONDENT DID NOT DECLARE THE INTENTION TO REVOKE ITS OFFER TO ARBITRATE

40 Although RESPONDENT could have declared a revocation of its offer to arbitrate and its offer to purchase by one declaration, an interpretation of its conduct leads to the conclusion that the offer to arbitrate was not intended to be revoked.

41 It is widely accepted that arbitration agreements should be interpreted as broad as possible and that interpretation should favour arbitration (in *favorem validitatis*)



[*MITSUBISHI V. SOLER*, U. S. SUPR. CT.; *MINERACAO V. UTAH INTERNATIONAL*, U. S. CT. APP.; *GENESCO V. KAKIUCHI*, U. S. CT. APP.; *RAESCHKE-KESSLER*, p. 237; *SCHLOSSER*, para. 420; *GEIMER*, para. 3799a; *HOCHBAUM*, pp. 34-48]. Thus, the intent to revoke the offer to arbitrate has to be communicated sufficiently clear. Art. 8(3) CISG provides that in order to determine the intent of a party due consideration has to be given to all relevant circumstances including the negotiations and any subsequent conduct of the parties. RESPONDENT'S e-mail dated 18 June 2006 demonstrates that it did not intend to revoke its offer to arbitrate (I). This conclusion is further confirmed by RESPONDENT'S subsequent conduct (II).

I. RESPONDENT'S E-MAIL DEMONSTRATES THAT IT DID NOT INTEND TO REVOKE ITS OFFER TO ARBITRATE

42 An interpretation of RESPONDENT'S e-mail dated 18 June 2006 leads to the conclusion that it did not intend to revoke its offer to arbitrate.

43 On 18 June 2006 RESPONDENT sent an e-mail to CLAIMANT, intending to revoke its purchase offer. The e-mail reads that RESPONDENT is revoking its "offer to purchase 20,000 cases of Blue Hills 2005" [*Claimant's Exhibit No. 9*, p. 17]. The offer to arbitrate or an eventual revocation of the latter is, however, not mentioned. Thus, the intent to revoke the offer to arbitrate was not declared.

44 Furthermore, the wording of the arbitration clause itself favours this interpretation. It provides that any disputes concerning the "formation of the contract" should be resolved by means of arbitration [*Claimant's Exhibit No. 5*, p. 13]. It was foreseeable that a revocation of the purchase offer would possibly lead to a disagreement between CLAIMANT and RESPONDENT. As RESPONDENT itself introduced the arbitration clause it must have been aware of the content of the arbitration clause and therefore must also have realised that the arising dispute was specifically addressed in the arbitration clause. In spite of this awareness, RESPONDENT chose the words "I am revoking the offer to purchase 20,000 cases of Blue Hills 2005" and refrained from referring to the offer to arbitrate.

45 Accordingly, an interpretation of RESPONDENT'S e-mail dated 18 June 2006 leads to the conclusion that it did not intend to revoke its offer to arbitrate.



II. RESPONDENT'S SUBSEQUENT CONDUCT CONFIRMS THAT IT DID NOT INTEND TO REVOKE ITS OFFER TO ARBITRATE

46 An interpretation of RESPONDENT'S conduct subsequent to its e-mail dated 18 June 2006 confirms that the offer to arbitrate was not intended to be revoked.

47 In the further correspondence between the parties, RESPONDENT confirmed several times that it was revoking "the offer to purchase 20,000 cases of Blue Hills 2005" [*Claimant's Exhibits Nos. 11, 14, pp. 19, 23*]. Again, the offer to arbitrate was not mentioned. Even when the disagreement between CLAIMANT and RESPONDENT grew more urgent and both parties had already consulted their lawyers [*Claimant's Exhibits Nos. 10, 11, pp. 18, 19*] RESPONDENT refrained from referring to the offer to arbitrate. At that point it became clear that the different views would result in a dispute that was most likely not to be resolved by a mere "I am sorry" [*Claimant's Exhibit No. 16, p. 25*] but required either litigation or arbitration. Still, RESPONDENT did not refer to its offer to arbitrate. It was therefore reasonable to assume that RESPONDENT still intended to submit the arisen dispute to arbitration.

48 Summarising, an interpretation of RESPONDENT'S conduct leads to the conclusion that it did not intend to revoke its offer to arbitrate.

49 **CONCLUSION OF THE SECOND ISSUE:** The offer to arbitrate is an autonomous offer which does not depend on the offer to conclude a sales contract. In order to revoke the offer a separate revocation is essential. At hand, irrespective of the alleged revocation of the purchase offer, RESPONDENT did not revoke its offer to arbitrate. The offer was still effective when CLAIMANT dispatched its acceptance on 19 June 2006, whereby the parties agreed on arbitration. In any case, the offer to arbitrate was not revoked since it was irrevocable pursuant to Art. 16(2) CISG and the revocation was not communicated in due time as will be demonstrated in the Fourth Issue.



THIRD ISSUE: DUE TO RESPONDENT’S VIOLATION OF ART. 17(3) JAMS IAR THE TRIBUNAL SHOULD DRAW THE APPROPRIATE FINANCIAL AND PROCEDURAL INFERENCES

50 By concluding an arbitration agreement, the parties made the JAMS IAR part of their contract. Pursuant to Art. 17(3) JAMS IAR “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”. RESPONDENT’S commencement of action before the Commercial Court has breached the arbitration agreement (A). The Tribunal may therefore draw the appropriate financial and procedural inferences (B).

A. RESPONDENT’S COMMENCEMENT OF ACTION BEFORE THE COMMERCIAL COURT HAS BREACHED THE ARBITRATION AGREEMENT

51 RESPONDENT argues that Art. 8(2) DAL allows commencing legal action in a court [*Statement of Defense, para. 11, p. 38*]. However, a reliance upon Art. 8(2) DAL fails to justify litigation since first, the parties concluded an arbitration agreement that contained Art. 17(3) JAMS IAR (I) and second, this agreement supersedes Art. 8(2) DAL (II).

I. THE PARTIES CONCLUDED AN ARBITRATION AGREEMENT THAT CONTAINED ART. 17(3) JAMS IAR

52 The parties effectively agreed on the JAMS IAR [*Claimant’s Exhibit No. 5, p. 13*] and thereby on Art. 17(3) JAMS IAR. Art. 1(2) JAMS IAR stipulates that “when the [JAMS IAR] govern the arbitration, the parties will be deemed to have made the rules a part of their arbitration agreement“. Hence, CLAIMANT and RESPONDENT effectively agreed on Art. 17(3) JAMS IAR being part of their arbitration agreement.

II. THE PARTIES’ AGREEMENT ON ART. 17(3) JAMS IAR SUPERSEDES ART. 8(2) DAL

53 RESPONDENT may argue that Art. 17(3) JAMS IAR is not applicable since Art. 8(2) DAL would stipulate that prior to the composition of the arbitral tribunal, an application to the court may be made to determine whether or not arbitration is admissible. However, Art. 8(2) DAL is not a mandatory provision and was superseded by the parties in the present case. Party autonomy is a core principle of arbitration [*REDFERN/HUNTER*,



para. 1-11; FOUCHARD/GAILLARD/GOLDMAN, para. 45; ECJ, 23 Mar 1982]. The choice of arbitration rules therefore enables the parties to complement the *lex loci arbitri* and to deviate from its non-mandatory provisions [*LIONNET/LIONNET, p. 158*].

54 A mandatory rule invalidates those decisions that have been made by the parties in utilisation of their autonomy. Therefore the mandatory nature of Art. 8(2) DAL would have to be easily discernible. This is not the case for the following reasons.

55 First, according to Art. 8(2) DAL an application to the court may only be made “prior to the constitution of the arbitral tribunal”. The possibility to file a complain before the court is therefore restricted to a specific time frame [*HUBER, p. 74*]. It is not apparent why this provision should be regarded as mandatory up to a certain point of time whereas it is not even applicable at all once that period of time has elapsed.

56 Second, the Danubian Arbitration Law is an adoption of the UNCITRAL Model Law ICA, which itself does not contain a rule corresponding to Art. 8(2) DAL [*cf. SAENGER, § 1032 para. 13; HUBER, p. 74, SCHROETER, Antrag, p. 288*]. The UNCITRAL Commission was generally aware of the indispensability of mandatory provisions [*UN DOC. A/CN.9/207, para. 19*]. A rule not even considered to be useful by the drafters of the UNCITRAL is not deemed to be mandatory if it is added by the national legislator.

57 In conclusion, Art. 8(2) DAL is not a mandatory provision. Thus, the parties effectively waived Art. 8(2) DAL. By commencing an action before the Commercial Court, RESPONDENT violated Art. 17(3) JAMS IAR and therefore breached the arbitration agreement.

B. AS A RESULT OF RESPONDENT’S BREACH OF THE ARBITRATION AGREEMENT, THE TRIBUNAL IS REQUESTED TO DRAW THE APPROPRIATE FINANCIAL AND PROCEDURAL INFERENCES

58 As a result of RESPONDENT’S breach of the arbitration agreement, “the Tribunal may draw the inferences that it considers appropriate”, Art. 27(3) JAMS IAR. In the case at hand, RESPONDENT failed to comply with Art. 17(3) JAMS IAR. As a consequence, CLAIMANT is burdened with additional costs and efforts. Therefore, Counsel requests the Tribunal to order RESPONDENT to terminate its litigation in the Commercial Court **(I)** and to order RESPONDENT to pay the full costs of litigation **(II)**. Furthermore, the Tribunal is requested to draw the inference that an arbitration agreement was validly concluded **(III)**.



I. RESPONDENT SHOULD BE ORDERED TO TERMINATE ITS LITIGATION IN THE COMMERCIAL COURT

59 The Arbitral Tribunal is respectfully requested to order RESPONDENT to terminate its litigation in the Commercial Court.

60 A party must not bypass the mutually agreed method of settling disputes [*MCCREARY V. CEAT, U. S. CT. APP.*; *COOPER V. ATELIERS DE LA MOTOBECANE, CT. APP. N. Y.*; *AGGELIKI V. PAGNAN, U. K. CT. APP.*; *ICSID CASE NO. ARB/03/29*; *BORN, p. 946*]. RESPONDENT breached the arbitration agreement by commencing litigation. Thus, it bypassed the mutually agreed method of settling disputes. It is of highest priority to immediately stop litigation and therefore end the ongoing violation.

61 This is in accordance with *ICSID CASE NO. ARB/03/29*. In this case the tribunal found itself in a situation, in which the respondent had commenced litigation despite the parties' agreement on arbitration. It granted the claimant's request and issued an order recommending the respondent to "take whatever steps may be necessary" to ensure that the court decisions were not enforced.

62 Further, litigation disregards the general procedure of determining the tribunal's competence according to the parties' agreement. Pursuant to Art. 17(2) JAMS IAR the tribunal may rule on its jurisdiction as a preliminary ruling or as a part of the final award. This is a suitable remedy for RESPONDENT, should it still wish to object the Tribunal's jurisdiction. However, RESPONDENT did not follow this predefined track. The course of action should therefore head back towards the scheme originally intended and agreed upon as stated in the JAMS IAR. This requires a stop of the ongoing breach of the arbitration agreement, i.e. a halt of litigation before the Commercial Court. Since Danubia's courts are known to be supportive of arbitration [*Procedural Order No. 2, para. 18, p. 54*] it seems likely that the Commercial Court will decide accordingly. Hence, an order to terminate litigation would not disrupt RESPONDENT'S motion for judicial review but merely anticipate an equivalent court decision.

63 The Tribunal is therefore requested to order RESPONDENT to terminate litigation before the Commercial Court.

II. RESPONDENT SHOULD BE ORDERED TO PAY THE FULL COSTS OF THE LITIGATION IN THE COMMERCIAL COURT

64 By filing a lawsuit in the Commercial Court RESPONDENT burdens CLAIMANT with



additional expenses. The Tribunal is requested to allocate these expenses to RESPONDENT as the party in breach of contract.

- 65 RESPONDENT'S breach of the arbitration agreement must not put CLAIMANT in a worse situation than it would have been in, had RESPONDENT adhered to the agreement. As a result of RESPONDENT'S breach of the arbitration agreement, CLAIMANT has to bear additional expenses for representation before the Court as well as Court costs. These would not have arisen if RESPONDENT had abided by the arbitration agreement. In conclusion, RESPONDENT shall be ordered to pay the full costs it caused by addressing the Commercial Court.

III. THE TRIBUNAL IS REQUESTED TO DRAW THE INFERENCE THAT AN ARBITRATION AGREEMENT WAS VALIDLY CONCLUDED

- 66 Due to RESPONDENT'S breach of Art. 17(3) JAMS IAR the Tribunal is requested to draw the inference, that RESPONDENT and CLAIMANT concluded an arbitration agreement.

- 67 A party's misconduct can urge the arbitral tribunal to draw all necessary inferences [*DERAINS, p. 1058; FOUCHARD/GAILLARD/GOLDMAN, para. 1275; BORN, p. 971*]. In the ICC AWARD NO. 8694/1996 the tribunal requested the respondent to produce a specific document as evidence. The respondent however hindered the tribunal from revealing the content of the document by not producing it. Therefore, the tribunal drew the inference that the adverse of the alleged content was true. In the case at hand, RESPONDENT tries to hinder the Tribunal from determining the validity of the arbitration agreement by commencing an action before a state court and requesting a stop of the Arbitral Proceedings. According to the ICC case the Tribunal should therefore draw the adverse inference that the arbitration agreement was validly concluded.

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- 68 **CONCLUSION OF THE THIRD ISSUE:** RESPONDENT violated Art. 17(3) JAMS IAR by commencing litigation in the Commercial Court. The Arbitral Tribunal is therefore requested to order RESPONDENT to terminate litigation and to pay its full costs. Further, the Tribunal may draw the inference that the arbitration agreement was validly concluded.
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ARGUMENT TO THE SUBSTANTIVE ISSUES

FOURTH ISSUE: A CONTRACT OF SALE WAS CONCLUDED

- 69 On 21 June 2006, CLAIMANT and RESPONDENT concluded a contract of sale according to Art. 23 CISG.
- 70 The CISG is the law applicable to the merits of the case. Pursuant to Art. 18(1)(2) JAMS IAR, the Tribunal is to apply the law it determines to be most appropriate. The Convention governs international sales contracts between parties in different Contracting States according to Art. 1(1)(a) CISG. Both Mediterraneo and Equatoriana have adopted the CISG [*Statement of Claim, para. 15, p. 6; Statement of Defense, para. 2, p. 36*]. Furthermore, the dispute at hand arose out of a sales contract. Thus, the CISG is the law most appropriate pursuant to Art. 18(1)(2) JAMS IAR.
- 71 On 10 June 2006, RESPONDENT sent a purchase offer in accordance with Art. 14(1) CISG, ordering 20,000 cases of Blue Hills 2005 at a price of US\$1,360,000 [*Claimant's Exhibit No. 5, p. 13*]. Further, it fixed a time for acceptance by insisting to enter into the sales contract by 21 June 2006 [*Claimant's Exhibit No. 4, p. 12*]. CLAIMANT accepted the offer within the stipulated time [*Claimant's Exhibits Nos. 10, 11, pp. 18, 19*]. Thereby the parties concluded a contract of sale according to Art. 23 CISG.
- 72 RESPONDENT states, that it effectively withdrew its offer before CLAIMANT dispatched its acceptance [*Claimant's Exhibit No. 11, p. 19*]. However, the offer remained effective as it was neither withdrawn according to Art. 15(2) CISG (A), nor revoked according to Art. 16(1) CISG (B).

A. RESPONDENT'S OFFER REMAINED EFFECTIVE AS IT WAS NOT WITHDRAWN ACCORDING TO ART. 15(2) CISG

- 73 Neither RESPONDENT'S letter dispatched on 20 June 2006 [*Claimant's Exhibit No. 11, p. 19*] nor its e-mail sent on 18 June 2006 [*Claimant's Exhibit No. 9, p. 17*] had the effect of withdrawing the purchase offer according to Art. 15(2) CISG. Pursuant to Art. 15(2) CISG an offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.
- 74 In accordance with Art. 24 CISG an offer reaches the addressee when it is handed to an authorised person [*HONNOLD, para. 179; Schlechtriem/Schwenzer/SCHLECHTRIEM*



(eng), Art. 24 para. 12 “all commentators agree”; Bianca/Bonell/FARNSWORTH, Art. 24 para. 2.4; ENDERLEIN/MASKOW/STROHBACH, Art. 24 para. 4; ACHILLES, Art. 24 para. 3; WEY, para. 795]. RESPONDENT’S offer was received by Ms Kringle on 11 June 2006 [Claimant’s Exhibit No. 6, p. 14]. Being an assistant to Mr Cox, Ms Kringle was authorised to receive messages. Hence, RESPONDENT’S offer reached CLAIMANT on 11 June 2006. Consequently, the offer could not have been withdrawn after 11 June 2006.

B. RESPONDENT’S OFFER REMAINED EFFECTIVE AS IT WAS NOT REVOKED ACCORDING TO ART. 16(1) CISG

- 75 The offer was not revoked according to Art. 16(1) CISG. RESPONDENT’S letter dated 20 June 2006 [Claimant’s Exhibit No. 11, p. 19] did not cause revocation of the offer **(I)**. Neither did RESPONDENT’S e-mail dispatched on 18 June 2006 [Claimant’s Exhibit No. 9, p. 17] have the effect of revoking the purchase offer **(II)**.

I. RESPONDENT’S LETTER DID NOT CAUSE REVOCATION OF THE OFFER

- 76 The letter dated 20 June 2006 did not revoke the purchase offer. Pursuant to Art. 16(1) CISG “an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.” CLAIMANT dispatched its acceptance in the morning of 19 June 2006 [Statement of Claim, para. 9, p. 5; Claimant’s Exhibit No. 8, p. 16]. Accordingly, RESPONDENT’S letter dispatched on 20 June 2006 reached CLAIMANT too late to have caused revocation.

II. RESPONDENT’S E-MAIL DID NOT CAUSE REVOCATION OF THE OFFER

- 77 The e-mail dispatched on 18 June 2006 did not have the effect of revoking the offer as RESPONDENT’S offer was irrevocable according to Art. 16(2) CISG **(1)**. Even if RESPONDENT’S offer should be considered revocable, revocation was not communicated effectively **(2)**.

1. RESPONDENT’S OFFER WAS IRREVOCABLE ACCORDING TO ART. 16(2) CISG

- 78 The offer at hand was irrevocable because it indicated its irrevocability pursuant to Art. 16(2)(a) CISG **(a)**. Alternatively, the offer was irrevocable as CLAIMANT reasonably relied on the offer as being irrevocable and acted in reliance on the offer pursuant to Art. 16(2)(b) CISG **(b)**.



a) RESPONDENT'S OFFER WAS IRREVOCABLE AS IT INDICATED ITS IRREVOCABILITY PURSUANT TO ART. 16(2)(a) CISG

79 The offer was irrevocable. According to Art. 16(2)(a) CISG “an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable”. This provision introduces a presumption towards irrevocability of an offer including a fixed time for acceptance. Except for cases in which the offeree made clear that the offer was not meant to be binding, establishing a fixed time for acceptance renders the offer irrevocable [*MURRAY, sec. E*].

80 This can be derived from the mere wording of the provision. Art. 16(2)(a) CISG provides without reservation that an offer shall be irrevocable when specifying a fixed period for acceptance [*MüKoBGB/GRUBER, Art. 16 para. 12*]. Another argument can be drawn from the provision's nature as an attempt to balance different legal systems [*SCHWENZER/MOHS, p. 242; DILGER, p. 186*]. While the general rule of Art. 16(1) CISG allowing revocation up to the point at which the offeree dispatches an acceptance is devoted to common law principles, the restriction of Art. 16(2)(a) CISG refers to a civil law perspective [*HONNOLD, para. 142; MALIK, sec. III; ZWEIGERT/KÖTZ, p. 37; SONO, p. 478; ENDERLEIN/MASKOW/STROHBACH, Art. 16 para. 1*]. From a civil law perspective, an offer specifying a fixed time for acceptance is binding until the set time of expiry [*Schlechtriem/Schwenzler/SCHLECHTRIEM (eng.), Art. 16 para. 9; Bianca/Bonell/EÖRSI, Art. 16 para. 2.2.1; EÖRSI, “Exceptions”*]. Thus, irrevocability “does not require a promise on the part of the offeror not to revoke his offer” [*SECRETARIAT'S COMMENTARY, Art. 14 para. 6*]. Quite the contrary, “an offeror wishing to fix a time for lapse but not for irrevocability should make his intention plain” [*FARNSWORTH, chap. 3 pp. 10-12*].

81 In its letter submitted with the purchase order dating 10 June 2006 [*Claimant's Exhibit No. 4, p. 12*] RESPONDENT emphasised its need for completing the contract not later than 21 June 2006. The only reasonable deduction CLAIMANT could have made from this was that RESPONDENT had fixed a time for acceptance. On the other hand, RESPONDENT'S intention not to be bound by the offer can neither be derived from the proposed contract nor from the accompanying letter nor from the preceding correspondence. Thus, RESPONDENT did not rebut the legal presumption towards irrevocability. The offer must therefore be regarded as being irrevocable as the presumption of Art. 16(2)(a) CISG applies.

82 In addition to this, the offer at hand indicated its irrevocability. First, RESPONDENT



created the impression of depending on the purchase by emphasising repeatedly that Blue Hills 2005 was to be the leading wine in the planned promotion. In its accompanying letter RESPONDENT drew attention towards its “intense time pressure to prepare the wine promotion” [*Claimant’s Exhibit No. 4, p. 12*] and describes the wine as having “just the right character to take the lead in the promotion” [*Claimant’s Exhibit No. 2, p. 10*]. All of which indicates that RESPONDENT depended on the conclusion of the contract. Moreover, RESPONDENT expressed its reluctance to purchase a substitute wine. Thus, even assuming that establishing a fixed time for acceptance would not by itself render the offer irrevocable, RESPONDENT in this case positively indicated that the offer was meant not to be revocable.

83 Second, by altering the conditions of purchase regarding the proposed price RESPONDENT made its offer subject to further expectations. A party cannot reasonably put forward changes to the offered price and at the same time deny its will to abide by these favourable conditions.

84 Finally, irrevocability of the offer at hand can also be derived from RESPONDENT’S subsequent conduct, Art. 8(3) CISG. A day after submitting the purchase order RESPONDENT’S representative Mr Wolf sent an e-mail to Ms Kringle asking her to have Mr Cox act on the offer immediately on his return to office [*Claimant’s Exhibit No. 7, p. 15*]. At this point Mr Wolf already knew from Ms Kringle, that Mr Cox was not expected back to office before 19 June 2006. By giving his express consent for the offer not to be dealt with before 19 June 2006, Mr Wolf on behalf of RESPONDENT indicated that the offer was not meant to be revocable at least until Mr Cox would return to office on 19 June 2006. Further strengthening this impression, RESPONDENT at this point once more decided against ordering another wine for the planned promotion and thereby expressed its intention to comply with its initial offer.

85 To conclude, the offer at hand must be regarded as being irrevocable since the presumption towards irrevocability of Art. 16(2)(a) CISG applies. Additionally, irrevocability was positively indicated and can be derived from RESPONDENT’S subsequent conduct. Thus, according to Art. 16(2)(a) CISG RESPONDENT’S offer was irrevocable until 21 June 2006.



b) ALTERNATIVELY, RESPONDENT'S OFFER WAS IRREVOCABLE PURSUANT TO ART. 16(2)(b) CISG

86 The offer was irrevocable according to Art. 16(2)(b) CISG. An offer is irrevocable pursuant to Art. 16(2)(b) CISG where first, it was reasonable for the offeree to rely on the offer as being irrevocable and second, the offeree has acted in reliance on the offer.

87 At hand, CLAIMANT had reason to rely on the offer's irrevocability. Reliance was in particular justified because RESPONDENT indicated its dependence on purchasing Blue Hills 2005 as well as its reluctance to order a substitute wine.

88 CLAIMANT also acted in reliance on the offer's irrevocability. Art. 16(2)(b) CISG does not require the offeree to positively act on the offer but also applies when the offeree refrains from taking any action [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 16 para 11; WITZ/SALGER/LORENZ, Art. 16 para. 14; Bamberger/Roth/SAENGER, Art. 16 para. 4*]. Neither does Art. 16(2)(b) CISG require damages of any sort to have followed from the offeree refraining from acting [*GENEVA V. BARR, U. S. DIST. CT.; MüKoBGB/GRUBER, Art. 16 para. 17; Honsell/SCHNYDER/STRAUB, Art. 16 para. 25; HERBER/CZERWENKA, Art. 16 para. 10*]. Ms Kringle refrained from contacting Mr Cox before he would return to his office although she could have done so. Considering that the amount of wine to be sold under the contract in dispute equals 23 percent of the total amount produced [*Procedural Order No. 2, para. 20, p. 54*] she would certainly have taken measures to have a contract of such importance completed immediately. In refraining from taking measures Ms Kringle acted in reasonable reliance on the offer's irrevocability. Thus, RESPONDENT'S offer was irrevocable until 21 June 2006 according to Art. 16(2)(b) CISG.

2. EVEN IF THE OFFER SHOULD BE CONSIDERED REVOCABLE, RESPONDENT'S E-MAIL DID NOT REACH CLAIMANT IN DUE TIME

89 RESPONDENT'S offer was not revoked effectively as the e-mail sent on 18 June 2006 did not reach CLAIMANT before having dispatched its acceptance as required under Art. 16(1) CISG.

90 The CISG is the law applicable with regard to receipt of electronic messages. Both Equatoriana and Mediterraneo have adopted the UNCITRAL Model Law on Electronic Commerce [*Statement of Claim, para. 16, p. 6*], which contains more specific provisions governing receipt of electronic messages than the CISG. However, where a matter is governed by the CISG the Convention takes priority over any national law [*SCHROETER,*



§ 20 paras. 10, 43; *Staudinger/MAGNUS, Art. 4 para. 12; CZERWENKA, p. 166; MüKoHGB/BENICKE, Art. 4 para. 4*]. Art. 24 CISG governs receipt of messages “delivered by any [...] means”, which generally includes e-mail [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 24 para. 10; Staudinger/MAGNUS, Art. 24 para. 15; ACHILLES, Art. 24 para. 3; Working Group, p. 86*]. Thus, the CISG is applicable with regard to receipt of electronic messages.

91 Art. 24 CISG requires a declaration of will to enter the addressee’s ‘own sphere’ in a manner that the addressee has opportunity to notice [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 24 para. 12; Staudinger/MAGNUS, Art. 24 para. 15; MüKoHGB/FERRARI, Art. 24 para. 8; HERBER/CZERWENKA, Art. 24 para. 2; Soergel/LÜDERITZ/FENGE, Art. 24 para. 4; Moritz/Dreier/HOLZBACH/SÜßENBERGER, p. 385; KAROLLUS, pp. 58-59*].

92 The addressee’s own sphere does not reach beyond his sphere of actual control. Therefore, with regard to electronic communication the addressee’s own sphere is to be restricted to his personal computer [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 24 para. 12*]. The server system is not part of the addressee’s own sphere as it cannot be controlled in a way one controls one’s personal computer or letterbox. Thus, in case of a server failure, “the message reaches the addressee only after the server is operating again, i.e. when the message can be retrieved” [*Schlechtriem/Schwenzer/SCHLECHTRIEM (eng.), Art. 24 para. 3; JANAL, p. 96*]. It appears justified to allocate the risk of loss, damage or delay to the dispatcher since he could have decided for more secure means of communication [*Moritz/Dreier/HOLZBACH/SÜßENBERGER, part C para. 154*].

93 Besides, the addressee is equally protected under the UNCITRAL Model Law on Electronic Commerce. Receipt under the Model Law does not occur “where the information system of the addressee does not function at all or functions improperly” as the Model Law does not intend to impose “the burdensome obligation to maintain [the addressee’s] information system functioning at all times” [*UNCITRAL Model Law on Electronic Commerce, Guide to Enactment, para. 104*].

94 Moreover, not correcting the network system until the afternoon of 19 June 2006 cannot be construed to constitute a breach of duty on CLAIMANT’S part, as RESPONDENT sent its alleged revocation on a Sunday [*Claimant’s Exhibit No. 9, p. 17*] and CLAIMANT cannot be expected to correct its server on a Sunday.

95 RESPONDENT’S e-mail was transferred to CLAIMANT’S server on 18 June 2006. Due



to a server failure, the message was submitted to Mr Cox' personal computer not before the afternoon of 19 June 2006 [*Statement of Claim, para. 10, p. 5*]. Accordingly, RESPONDENT'S purported revocation did not reach CLAIMANT before it dispatched its acceptance in the morning of 19 June 2006. Thus, RESPONDENT'S e-mail did not reach CLAIMANT in due time pursuant to Art. 16(1) CISG and therefore could not have had the effect of revoking the purchase offer.

96 CONCLUSION OF THE FOURTH ISSUE: RESPONDENT'S offer was not withdrawn according to Art. 15(2) CISG. It was not revoked either. First, the offer was irrevocable pursuant to Art. 16(2)(a) CISG. Second, the offer was irrevocable according to Art. 16(2)(b) CISG. And third, the e-mail in question did not reach CLAIMANT before dispatching its acceptance in the morning of 19 June 2006. Thus, a contract of sale was concluded by CLAIMANT'S acceptance reaching RESPONDENT.



FIFTH ISSUE: BLUE HILLS 2005 WAS FIT FOR THE PARTICULAR PURPOSE MADE KNOWN AS REQUIRED BY ART 35(2)(b) CISG

97 Blue Hills 2005 was in conformity with the contract according to Art. 35(2)(b) CISG. RESPONDENT planned to sell the wine as the leading product in an upcoming wine promotion which was made known as the particular purpose [*Claimant's Exhibit No. 2, p. 10*]. First, the wine was fit for the particular purpose as the diethylene glycol concentration did not diminish its objective quality (A). Second, the press articles did not affect the wine's contractual conformity according to Art. 35(2)(b) CISG either (B).

A. THE DIETHYLENE GLYCOL CONCENTRATION DID NOT DIMINISH THE WINE'S FITNESS FOR THE PARTICULAR PURPOSE PURSUANT TO ART. 35(2)(b) CISG

98 Blue Hills 2005 was fit to serve as the leading wine in the planned promotion as it has always been of excellent quality. Both the Jury at the Durhan Wine Fair and RESPONDENT itself confirmed the outstanding quality of Blue Hills 2005 [*Claimant's Exhibits Nos. 1, 2, pp. 9, 10*]. The introduction of the sweetening agent diethylene glycol did not diminish the wine's award winning quality. First, the diethylene glycol concentration met the legal requirements in both Ecuatoriana and Mediterraneo and was not detrimental to health. Second, the use of additives like diethylene glycol did not affect the wine's character as a quality wine.

99 First, both Ecuatoriana and Mediterraneo enacted provisions concerning the generally permitted concentration of diethylene glycol in consumables. Accordingly, diethylene glycol is an officially recognised food additive for which both countries specified a reasonable maximum concentration. It is not to be confounded with anti-freeze fluid. The concentration of diethylene glycol verified in Blue Hills 2005 is below the amount legally permitted in both countries [*Procedural Order No. 2, para. 11, p. 53*]. Diethylene glycol is only detrimental to health "when consumed in excessive amounts" [*Ericson Report, para. 8, p. 21; cf. ROBINSON, p. 49*]. Prof. Ericson, Head of the Wine Research Institute of the Mediterraneo State University in conclusion confirms that CLAIMANT used a harmless additive [*Ericson Report, pp. 21-22*].

100 Second, RESPONDENT may not argue that additives like diethylene glycol were generally inappropriate to use in the production of high quality wines. Therefore, the wine's objective quality cannot be questioned in this regard. Although non-specialists at



times tend to expect quality food to be untreated food, producing wine requires more than grape-pressing and bottling. Oenology has a long tradition of enriching techniques that include using a huge number of processing aids [COATES, p. 20; DWI, *List of permitted additives*; BMELV/DWV pp. 2-6; JOHNSON, p. 289]. These are used to balance differences in ripeness and are necessary to “ensure a good wine because one seldom gets grapes that are exactly perfect” [GALPIN, p. 15; cf. TROOST, p. 572]. Additives conforming with the regulations in force constitute a “real improvement and an enhancement in value” [TROOST, p. 570; cf. OIV-International Codex, pp. 12, 185; RIBÉRAU-GAYON, pp. 313-314]. Even under the Austrian Wine Law, which is considered to be the world’s strictest, corrective actions are permitted in the production of “quality wine” pursuant to Art. 10 [ROBINSON, p. 49; ÖGZ WEINGALERIE, Jun 2005, p. 2]. The report prepared by Prof. Ericson likewise emphasised that using sweetening agents is common practice and “wholly lawful” [Ericson Report, para. 4, p. 21].

101 In conclusion, the wine’s diethylene glycol concentration met the legal requirements and was not detrimental to health. Moreover, the introduction of additives such as diethylene glycol does not affect the wine’s character as a wine of high quality. Thus, Blue Hills 2005 was fit to take the lead in RESPONDENT’S marketing campaign.

B. THE PRESS ARTICLES DID NOT AFFECT THE WINE’S CONTRACTUAL CONFORMITY ACCORDING TO ART. 35(2)(b) CISG

102 The published press articles did not affect the wine’s fitness for the particular purpose pursuant to Art 35(2)(b) CISG (I). Furthermore, RESPONDENT’S reliance on CLAIMANT’S skill and judgement would not have been reasonable (II).

I. THE PRESS ARTICLES DID NOT AFFECT THE WINE’S FITNESS FOR THE PARTICULAR PURPOSE PURSUANT TO ART. 35(2)(b) CISG

103 The wine was fit to be featured in the planned promotion as the published newspaper articles did not amount to an actual threat to the marketing campaign. As shown above, the objective quality of Blue Hills 2005 cannot be questioned. Thus, with regard to the wine’s suitability for the planned promotion, only publicity matters are left to be considered.

104 RESPONDENT suspects, that a promotion featuring Blue Hills 2005 would have created a commercial catastrophe [Claimant’s Exhibit No. 9, p. 17]. However, such argument must



fail. First, mere speculations cannot lead to non-conformity of the wine **(1)**. Second, the wine could have been sold successfully **(2)**. Third, the economic analysis of law shows that CLAIMANT cannot be held liable under Art. 35(2)(b) CISG **(3)**.

1. MERE SPECULATIONS CANNOT LEAD TO NONCONFORMITY OF THE WINE

- 105** Contractual conformity of goods cannot be construed to depend on one-sided speculation. If this were the case, any party could cause non-conformity of the sold goods by questioning their fitness for the particular purpose made known without any duty of approval. In contrary, the complaining party has to provide evidence of the facts allegedly amounting to a breach of contract [*TRIBUNALE DI VIGEVANO, 12 Jul 2000; HG ZÜRICH, 26 Apr 1995; LG FRANKFURT, 6 Jul 1994; Bianca/Bonell/BIANCA, Art. 36 para. 3.1; Huber/Mullis/HUBER, § 2 p. 37; FERRARI, para. III*]. Mere suspicion can therefore not shift the burden of proof to the seller.
- 106** RESPONDENT did not provide evidence such as a market poll that could aid in proving its assertion. Therefore, RESPONDENT'S assessment remains a mere allegation. The suspicion alone does not suffice to render the wine unfit for the particular purpose under Art. 35(2)(b) CISG.

2. THE WINE COULD HAVE BEEN SOLD SUCCESSFULLY

- 107** RESPONDENT'S allegation that promoting the wine would create a financial catastrophe is not even reasonably certain. First, the erroneous articles did not lead to a significant decline in sales **(a)**. Second, CLAIMANT refuted the newspaper articles immediately **(b)**. Third, the Austrian glycol wine scandal would not have had the effect of putting the customers' confidence at risk **(c)**.

a) THE ERRONEOUS ARTICLES DID NOT LEAD TO A SIGNIFICANT DECLINE IN SALES

- 108** Due to the adverse newspaper articles, RESPONDENT worried that Blue Hills 2005 would not be sold successfully. Since RESPONDENT did not provide evidence on the basis of which the wine's marketing position could be analysed, other indications have to be considered in order to achieve a realistic understanding of the wine's suitability for the planned promotion.
- 109** No significant drop in sales was established by CLAIMANT subsequent to the articles' publications. Judging from CLAIMANT'S sales the ill-informed newspaper articles did not



seriously affect the costumers' confidence in Blue Hills 2005 neither in the domestic nor in the foreign market [*Procedural Order No. 2, para. 21, p. 54*]. Unlike RESPONDENT'S allegations, CLAIMANT'S sale rates are hard figures. Accordingly, RESPONDENT'S anxiety that "it would be inviting a commercial disaster" [*Claimant's Exhibit No. 14, p. 23*] to offer the wine is unreasonable.

b) CLAIMANT REFUTED THE NEWSPAPER ARTICLES IMMEDIATELY

- 110 Worries over a sustained decline in sales due to the incorrect newspaper articles were not reasonable since CLAIMANT immediately refuted the articles. Equatorianian newspapers stated that "anti-freeze fluid" had been used to dulcify Mediterranean wine amounting to a "scandal in the production of wine in Mediterraneo" [*Claimant's Exhibit No. 9, p. 17*]. In reaction to the untenable allegations, CLAIMANT immediately requested an investigation of its wine production by Prof. Ericson, the world renowned specialist in vinification processes [*Claimant's Exhibit No. 10, p. 18; Statement of Claim, para. 11, p. 5*].
- 111 Prof. Ericson clarified in his report that as a matter of fact the common anti-freezer monoethylene glycol was not used in producing the wine. Instead, the harmless sweetening agent diethylene glycol was introduced during the vinification process [*Ericson Report, para. 4, p. 21*]. Although diethylene glycol can also be used as anti-freeze fluid which according to the report is a rare use for it, at hand its purpose was to sweeten the wine. Using a sweetening agent was normal and necessary as the vintage year had been unusually wet and cold [*Ericson Report, para. 4, p. 21*]. Accordingly, arguing that anti-freeze fluid had been used in producing Blue Hills 2005 would be quite as sensible as calling a bread knife a sword because apparently both can be used for cutting things.
- 112 The incorrect press articles were therefore effectively refuted. Moreover, the planned wine promotion was scheduled nearly three months after the articles were published [*Claimant's Exhibits Nos. 4, 9, pp. 12, 17*]. As yesterday's news is tomorrow's fish-and-chips paper, it remains unlikely that the press articles would have had an impact on RESPONDENT'S consumers' buying behaviour at all. Thus, the wine was fit for being successfully sold in the planned promotion.



c) THE AUSTRIAN GLYCOL WINE SCANDAL WOULD NOT HAVE HAD THE EFFECT OF PUTTING THE CUSTOMERS' CONFIDENCE AT RISK

- 113 RESPONDENT might argue that the consumers' experiences with the Austrian wine scandal in 1985 would have threatened the saleability of the wine.
- 114 However, the Austrian wine scandal is by no means comparable to the situation at hand. The diethylene glycol concentration of Blue Hills 2005 conformed to the legal requirements and was not in any way detrimental to health [*Procedural Order No. 2, para. 11, p. 53*]. In contrast, chemical analysis of the Austrian wines proved that those contained dangerous concentrations up to 200 times higher than the amount present in Blue Hills 2005 [*STUTTGZ, 9 Jul 1985; APA, 25 Jul 1985*]. Moreover, Austrian wine-growers used diethylene glycol to sell cheap wine as certified vintages [*NYT, 24 Jul 1985*] and thereby committed fraud and violated the Austrian Wine Law [*OGH, 12 Jun 1988; BGH, 23 Nov 1988*].
- 115 RESPONDENT might also argue that irrespective of hard facts, customers may refrain from buying Blue Hills 2005 as the wine appears connected to the very unpleasant experiences with the Austrian wine scandal. The truth is that there is no evidence available as to what extent any glycol scandal had an actual effect on the public opinion in Equatoriana. Accordingly, the Austrian wine scandal would not have threatened the wine's fitness for the particular purpose.

3. THE ECONOMIC ANALYSIS OF LAW SHOWS THAT CLAIMANT CANNOT BE HELD LIABLE UNDER ART. 35(2)(b) CISG

- 116 According to principles of the economic analysis of law, resolving the issue at hand lies within RESPONDENT'S sphere of responsibility. Under Art. 35(2)(b) CISG the seller is generally responsible for the goods to be fit for the particular purpose made known. However, the seller's responsibility is limited to ascertaining the goods' fitness for the particular purpose, which is the general possibility of using the goods as planned. It lies within the buyer's sphere of responsibility to actually use the goods in a way that the particular purpose they were bought for may be achieved [*KRITZER, Art. 35 para. 5; WITZ/SALGER/LORENZ, Art. 35 para. 9; ACHILLES, Art. 35 para. 4*].
- 117 The spheres of responsibility are difficult to distinguish whenever neither of the parties can be deemed to have responsibly caused the arisen difficulties. In these cases the principles of the economic analysis of law lay down that liability shall be assigned to the



party that can manage the situation more effectively [*POSNER, pp. 106-108; SCHÄFER/OTT, pp. 412-413; KIRSTEIN, p. 7*]. Accordingly, where none of the parties in fact caused certain problems regarding the use of the sold goods, liability under Art. 35(2)(b) CISG is to be assigned to the party that was in the position to manage the arisen difficulties easier and more effectively than the other [*POSNER, p. 119; SCHÄFER/OTT, p. 406*].

118 In the present case, none of the parties caused the alleged difficulties in selling the wine. These were due to ill-informed newspaper articles. In presenting the Ericson Report CLAIMANT did all it could to aid RESPONDENT in selling the wine, whereas RESPONDENT had the competence to actually dispel the unreasonable concerns about Blue Hills 2005 and restore the wine's reputation. Being the largest distributor of wine in Equatoriana [*Statement of Claim, para. 4, p. 4*], it is further reasonable to assume that RESPONDENT could have managed the alleged difficulties far easier and more effectively than CLAIMANT. Thus, in accordance with the principles of economic analysis of law RESPONDENT'S alleged difficulties were a matter of selling the wine rather than a matter of the wine's fitness for the particular purpose. RESPONDENT is in any case responsible for selling the wine. CLAIMANT can therefore not be held liable under Art. 35(2)(b) CISG.

II. ADDITIONALLY, THE WINE DID CONFORM WITH THE CONTRACT ACCORDING TO ART 35(2)(b) CISG BECAUSE RESPONDENT'S RELIANCE ON CLAIMANT'S SKILL AND JUDGEMENT WOULD NOT HAVE BEEN REASONABLE

119 The wine did in any case conform to the contract according to Art 35(2)(b) CISG for lack of reasonable reliance. Thereafter, the goods conform with the contract irrespective of their fitness for the particular purpose, if the buyer did not reasonably rely on the seller's skill and judgement. RESPONDENT'S reliance on CLAIMANT'S skill would not have been reasonable as RESPONDENT carefully examined and selected the goods before purchase (1), as RESPONDENT was far more knowledgeable than CLAIMANT (2) and because RESPONDENT could not rely on CLAIMANT to prevent unpredictable external occurrences (3).

1. RELIANCE WOULD NOT HAVE BEEN REASONABLE AS RESPONDENT CAREFULLY EXAMINED AND SELECTED THE GOODS BEFORE THE PURCHASE

120 Reasonable reliance is excluded as RESPONDENT carefully examined and selected the



goods before purchase. “There may not be any reliance if the buyer takes part in the selection of the goods, examines the goods before purchase [...] or insists on a particular brand” [*Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 23; cf. HYLAND, pp. 320-322*].

121 At hand, RESPONDENT undertook every single one of the above mentioned actions. RESPONDENT’S experts selected the particular brand of wine for the promotion after having carefully examined the wine at Durhan Wine Fair [*Claimant’s Exhibits Nos. 1, 2, pp. 9, 10*]. RESPONDENT stated that Blue Hills 2005 had “just the right character” [*Claimant’s Exhibit No. 2, p. 10*] and that the offered price was “an acceptable price for a wine of that quality” [*Claimant’s Exhibit No. 4, p. 12*]. It thereby clarified, that its experts examined Blue Hills 2005 carefully and made their selection without relying on CLAIMANT’S skill and judgement. CLAIMANT can therefore not be held responsible for RESPONDENT’S autonomous decision to purchase Blue Hills 2005.

2. RELIANCE WOULD NOT HAVE BEEN REASONABLE DUE TO RESPONDENT BEING FAR MORE KNOWLEDGEABLE THAN CLAIMANT

122 RESPONDENT did not reasonably rely on CLAIMANT’S skill as RESPONDENT was far more knowledgeable than CLAIMANT. Where the seller is evidently less competent than the buyer, the buyer would usually not have reason to rely on the seller’s skill. Claiming the seller responsible in these cases must be considered inappropriate [*HONNOLD, para. 226; Staudinger/MAGNUS, Art. 35 paras. 31-32; MüKoBGB/GRUBER, Art. 35 para. 13; LÜDERITZ, pp. 185-186*].

123 RESPONDENT’S alleged difficulties in selling the wine would not be due to any actual characteristics of the wine but caused by an ill-informed press campaign. Thus, not the knowledge about the wine as such but the knowledge about marketing is decisive. RESPONDENT is knowledgeable about marketing wine in Equatoriana as it is the largest retailer of wine in the country [*Request for Arbitration and Statement of Claim, para. 4, p. 4*]. In contrary, CLAIMANT made clear that its wine was to be marketed for the first time in Equatoriana [*Claimant’s Exhibit No. 8, p. 16*]. Therefore, no experience could be expected in this field. Since CLAIMANT was not knowledgeable about selling wine in Equatoriana, RESPONDENT could not reasonably rely on CLAIMANT’S skill regarding the marketing campaign.



3. RELIANCE WOULD NOT HAVE BEEN REASONABLE BECAUSE RESPONDENT COULD NOT RELY ON CLAIMANT TO PREVENT UNPREDICTABLE EXTERNAL OCCURRENCES

124 RESPONDENT could not reasonably rely on CLAIMANT to prevent unpredictable external occurrences. The situation at hand bears a resemblance to a case decided by the Austrian Supreme Court [*OGH, 25 Jan 2006*].

125 A Serbian buyer purchased a large amount of frozen pork liver from an Austrian seller. It was made known that the goods were to be used in the buyer's country. Unexpectedly and without acceptable reason, Serbian authorities denied import of the goods. The seller had sold goods of the same type and quality for use in Serbia on several occasions before. On these occasions no difficulties had occurred. The buyer then claimed damages. The Austrian Supreme Court held that since the seller could not be expected to know that the goods would be denied import, the buyer could not reasonably rely on the seller to have prevented the difficulties in importing the goods to Serbia. Accordingly, the goods were held complying with the contract pursuant to Art. 35(2)(b) CISG for lack of reasonable reliance.

126 The underlying rule of this decision stipulates that unpredictable external occurrences, although possibly affecting the suitability of the goods for a particular purpose, may not lead to non-conformity of the goods according to Art. 35(2)(b) CISG because the buyer cannot reasonably rely on the seller to prevent such difficulties.

127 This rule is applicable to the present case. First, RESPONDENT'S alleged problems in marketing the wine in Equatoriana were due to external occurrences. The alleged difficulties were not due to any actual characteristics of the wine but were caused by ill-informed and untenable press articles. Accordingly, neither of the parties themselves caused the alleged difficulties, just as both parties in the case before the Austrian Supreme Court were not responsible for the Serbian authorities' conduct. The problems in selling the wine were due to external occurrences.

128 Second, CLAIMANT did not know, nor could it reasonably be expected to know that problems in selling the wine would arise. The article published in *Mediterraneo Today* was the only hint from which anyone from a Mediterranean perspective could have derived that problems were about to emerge [*Claimant's Exhibit No. 10, p. 18*]. As media interest is governed by unpredictable forces no one could be expected to foresee that this article would actually put a threat to marketing the wine in another country. Before dispatching its acceptance on 19 June 2006 CLAIMANT could therefore not reasonably be



expected to foresee that problems would arise, just like the Austrian seller could not be expected to know that the goods would be denied import.

- 129 In consequence, if the suitability of the wine for the promotion was diminished at all, these challenges were due to unpredictable external occurrences. As the Austrian Supreme Court has outlined, in situations like these, the seller cannot be held responsible under Art. 35(2)(b) CISG for lack of reasonable reliance.
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- 130 **CONCLUSION OF THE FIFTH ISSUE:** Blue Hills 2005 was in conformity with the contract according to Art. 35(2)(b) CISG. First, the wine was fit for the promotion as it has always been of excellent quality. Second, the incorrect press articles did not affect the saleability of Blue Hills 2005 either. This is due to the fact that the wine could have been sold successfully as the customers' confidence was not at risk. Moreover, RESPONDENT was in any case excluded from alluding to non-conformity as it could not reasonably rely on CLAIMANT'S skill and judgement. Thus, Blue Hills 2005 was fit for the particular purpose made known as required by Art. 35(2)(b) CISG.
-



REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the honourable Arbitral Tribunal to declare that:

- A stay of the Arbitral Proceedings should not be granted (**FIRST ISSUE**)
- An arbitration agreement was validly concluded (**SECOND ISSUE**)
- Due to Respondent's violation of Art. 17(3) JAMS IAR the Tribunal should draw the appropriate financial and procedural inferences (**THIRD ISSUE**)
- A contract of sale was concluded (**FOURTH ISSUE**)
- Blue Hills 2005 was fit for the particular purpose made known as required by Art. 35(2)(b) CISG (**FIFTH ISSUE**)

**CERTIFICATE**

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Freiburg im Breisgau,

6 December 2007

(signed)

Lina Ali

(signed)

Mark A. Czarnecki

(signed)

Max B. Fahr

(signed)

Sebastian Gößling

(signed)

Marc Grün

(signed)

H. Henning Heyne

(signed)

Lenke Schulze

(signed)

Sophie C. Thürk