

**THE FIFTEENTH WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT**

MEMORANDUM FOR RESPONDENT

ON BEHALF OF

AGAINST

Equatoriana Supermarkets S.A.

415 Central Business Centre,
Oceanside, Equatoriana

Mediterraneo Wine Cooperative

140 Vineyard Park,
Blue Hills, Mediterraneo

RESPONDENT

CLAIMANT



UNIVERSITY OF GENEVA

COUNSEL

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**LIST OF ABBREVIATIONS**

§	section / paragraph
a. F.	alter Fassung (german for “old version”)
Art.	article
cf.	confer (refer to)
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
CISG-AC	CISG Advisory Council
cl	centilitres
Cl.	CLAIMANT
CNY	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)
Co.	Company
Corp.	Corporation
DAL	Danubian Arbitration Law
DB	Der Betrieb (German law journal)
DEG	diethylene glycol
DZWir	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (German law journal)
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ed.	Edition
et seq.	et sequentes (and following)
Exh.	Exhibit



g	Gram
GmbH	Gesellschaft mit beschränkter Haftung (German Limited Liability Company)
i.e.	id est (that means)
ibid.	ibidem (the same place)
ICC	International Chamber of Commerce and Industry
ICCA	International Council for Commercial Arbitration
ICC-Bull	ICC International Court of Arbitration Bulletin
ICSID	International Center for Settlement of Investment Disputes
Int. A.L.R.	International Arbitration Law Review
IPCS	International Programme on Chemical Safety
JAMS	Judicial Arbitration and Mediation Services JAMS International Arbitration Rules
l	litre
Ltd	Limited
mg	milligram
MLEC	UNCITRAL Model Law on Electronic Commerce
MüKO ZPO	Münchener Kommentar zur Zivilprozessordnung
NJW	Neue Juristische Wochenzeitschrift (German law journal)
No.	Number
O.I.V.	International Organisation of Vine and Wine
Op.	Opinion
p.	page
para.	paragraph
PCA	Permanent Court of Arbitration



pp.	pages
S.A.	Société Anonyme (French Joint Stock Company)
sect.	section
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL-ML	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT	The UNIDROIT Principles of International Commercial Contracts, 2004
US\$	United States Dollars
v.	versus
Vol.	volume
YCA	Yearbook of Arbitration
ZPO	Zivilprozessordnung (German code of civil procedure)



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STATEMENT OF FACTS

CLAIMANT: Mediterraneo Wine Cooperative is a wine producer and seller from grapes grown by its members.

RESPONDENT: Equatoriana Supermarkets SA is the largest operator of supermarkets in Equatoriana and a big wine seller.

- **7 May 2006 - 10 May 2006:** RESPONDENT sent a buying team to a trade fair for the wine industry where CLAIMANT presented its wines, and among them “Blue Hills 2005”.
- **14 May 2006 - 1 June 2006:** There were several letters exchanged between CLAIMANT and RESPONDENT praising CLAIMANT’s wine and preparing a sale of 20’000 cases “Blue Hills 2005” wine at 68 US\$ per case. RESPONDENT intended to use it for its wine promotion specifying that the wine should be of a very good quality.
- **10 June 2006 -11 June 2006:** RESPONDENT sent CLAIMANT a purchase order containing an arbitration clause by e-mail and by courier. In the accompanying letter RESPONDENT specified that it was under time pressure and that therefore the contract had to be concluded before 21 June 2006. The assistant of the sales manager Mr. Cox, Mrs. Kringle, received both e-mail and letter. She informed RESPONDENT of Mr. Cox’ absence.
- **18 June 2006:** After having been informed by newspaper reports that the wine contained antifreeze RESPONDENT sent an e-mail to revoke its offer.
- **19 June 2006:** CLAIMANT returned the signed purchase order in the afternoon claiming that it was unaware of the revocation due to an internal network failure.
- **20 June 2006 - 10 August 2006:** In an exchange of letters CLAIMANT insisted on the wine’s quality. It enclosed a report of Dr. Ericson that showed that “Blue Hills 2005” did not contain ethylene glycol, but diethylene glycol, which may be used as antifreeze as well. RESPONDENT continued to refuse to take delivery of the wine.
- **21 June 2007:** CLAIMANT referred the dispute to JAMS.
- **4 July 2007:** RESPONDENT engaged proceedings before the Commercial Court of Vindobona (hereinafter: the Court).
- **17 July 2007:** RESPONDENT sent a statement of defense specifying that it contested the jurisdiction of the arbitral tribunal (hereinafter: the Tribunal). It wanted that the Court ruled on the validity of the arbitration agreement. However, RESPONDENT complied with the arbitral procedure.



ARGUMENTS ON THE PROCEDURAL ISSUES

1. Counsel for RESPONDENT submit that the Tribunal should stay its proceedings (ISSUE I), that no arbitration agreement exists (ISSUE II), that Art. 17.3 JAMS was not breached and that therefore RESPONDENT neither has to bear CLAIMANT's cost of litigation nor terminate the proceedings before the Court (ISSUE III).

LAW APPLICABLE TO THE PROCEDURE

2. The place of arbitration is Vindobona, Danubia (*Cl. Exh. 5, p. 13*). Therefore Danubian Arbitration Law (hereinafter: DAL) is applicable as the *lex arbitri* (Art. 1 DAL). DAL is congruent with the UNCITRAL-ML with a single amendment in Art. 8(2) (*Request for Arbitration, para. 18, p. 6*). Art. 8(2) DAL is equivalent to the corresponding provision of the German Arbitration Law of 1998 (*Procedural Order 2, Question 2, p. 51*) which is to be found in § 1032(2) ZPO.
3. Equatoriana, Mediterraneo and Danubia are all party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention; hereinafter: CNY) (*Statement of Claim, para. 18, p. 6*).

ISSUE I: THE TRIBUNAL SHOULD STAY ITS PROCEEDINGS

4. The Court is competent to rule on the validity of the arbitration agreement (A). Accordingly, the Tribunal is not exclusively competent in this matter. In order to avoid the resulting parallel proceedings, the discretion of the Tribunal whether to continue the proceedings should be exercised in favour of a stay, which is in the interest of the parties (B).

A. The Court is competent to rule on the validity of the arbitration agreement

5. Being confronted with parallel proceedings it has to be decided whether the Tribunal or the Court is competent. The competence depends on the validity of the arbitration agreement. The difficulty lies in determining who has the power to rule on that validity. Contrasting with



Counsel for CLAIMANT's approach (*Memorandum for CLAIMANT, part one, p. 4 et seq.*), Counsel for RESPONDENT submit that the appropriate order is first to rule on the power to decide and secondly to discuss the validity of the arbitration agreement.

6. The competence-competence principle contained in Art. 16 DAL, main argument of Counsel for CLAIMANT (*Memorandum for CLAIMANT, para. 14-15*), is not absolute. One exception is to be found in Art. 8(2) DAL (1). The Court is entitled to a full examination of the validity of the arbitration agreement (2).

A. 1. Art. 8(2) DAL favours the state jurisdiction

7. The principle of competence-competence contained in Art. 16 DAL signifies that an arbitral tribunal can decide upon its own competence (*Redfern/Hunter, para. 5-39, cf. Memorandum for CLAIMANT, para. 14-15*). However, some *lex arbitri* favour state jurisdiction to decide on the validity of an arbitration agreement (*Gaillard, Les Manoeuvres dilatoires, p. 774*). This is the case with Art. 8(2) DAL which expressly provides for a state court to determine the validity of an arbitration agreement. Art. 5 DAL, as invoked by Counsel for CLAIMANT, does not hinder the Court to decide on the validity of the arbitration agreement, because the intervention of the Court is provided "*in this Law*" (Art. 5 DAL).
8. Art. 8(2) DAL states that "*prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible*". "This article favours state jurisdiction, marking a limit to the competence-competence principle.
9. The procedure of Art. 8(2) DAL is only available until the Tribunal has been constituted, i.e. before the appointment of the last arbitrator (*Kröll in Paulsson, Germany, p. 43; Schlosser in Stein/Jonas, §1032, para. 21*). RESPONDENT initiated the procedure on 4 July 2007 (*Procedural Order 2, question 9, p. 52*). The last arbitrator was appointed on 15 August 2007 (*Letter from the JAMS to Arbitrator 2, p. 45*). Therefore the time condition is met.
10. The procedure legally provided for by Art. 8(2) DAL was available to RESPONDENT. The Tribunal is not exclusively competent.

A. 2. The Court can engage a full review of the arbitration agreement

11. The negative effect of the competence-competence principle is to forbid a state court to rule on objections to the arbitration agreement before the arbitrators have ruled on it (*Poudret/Besson, para. 488; Fouchard/Gaillard/Goldman, para. 661*). Art. 8(2) DAL



excludes this negative effect. Consequently, the Court has authority to rule on the arbitration agreement.

12. Art. 8(2) DAL is equivalent to § 1032(2) ZPO of the German law, which enables a court to engage a full review of the arbitration agreement (*Kröll in Paulsson, Germany, p.5; Lew/Mistelis/Kröll, para. 14-67*).
13. Counsel for CLAIMANT base their arguments that it is the Tribunal who should decide on the arbitration agreement on Art. II(3) CNY and on Art. 8(1) UNCITRAL-ML (*Memorandum for Claimant, para. 16-17*). While it is true that the state court has to send a dispute back to arbitration unless it finds that the arbitration agreement is null, void or inoperative (*Memorandum for CLAIMANT, para. 16-17*), those articles do not hinder a court to engage in a full review of the arbitration agreement first.
14. While Art. 8(1) UNCITRAL-ML is sometimes interpreted as calling for a prima facie review only, exceptions to this interpretation are possible (*Bachand, p. 474*). The DAL in its Art. 8(2) contains such an exception.
15. The view that a prima facie review by the state court is not always sufficient, was confirmed in a Working Group comment on the former Art. IV(1) UNCITRAL-ML corresponding to the present Art. 8(1) UNCITRAL-ML: “(...) where the parties differed on the existence of a valid arbitration agreement, that ISSUE should be settled by the court, without first referring the ISSUE to an arbitral tribunal, which allegedly lacked jurisdiction” (*Working Group II, para. 77*).
16. The U.S. Court of Appeal held in *Titan Inc. v. Guangzhou Zhen Hua Shipping Co. Ltd, USA (2001)*, that the question of the validity of the arbitration agreement was proper for the District Court to decide, rather than for an arbitral tribunal.
17. It has been shown that not only the Tribunal but also the Court has competence to rule over the validity of the arbitration agreement. Hence, burdensome parallel proceedings can only be avoided by a decision of the Tribunal to stay its proceedings. Art. 8(2) DAL, like § 1032(2) ZPO does not only favour the decision of a state court, but it would usually also engender the stay of an arbitral procedure (*Husslein-Stich, p. 50*).

B. A stay is in the interest of the parties

18. As rightly indicated by Counsel for CLAIMANT, arbitrators have no obligation to stay the arbitration while court proceedings are pending. Art. 8(3) DAL allows the Tribunal to



commence or continue its proceedings (*Memorandum for CLAIMANT, para. 18*). Counsel for CLAIMANT do not substantiate with arguments their refusal of a stay. In some cases an arbitral tribunal might find it necessary to grant a stay (*Lew/Mistelis/Kröll, para. 14-51*). RESPONDENT's request for a stay benefits the interests of CLAIMANT and RESPONDENT (1) and was made in good faith (2).

B. 1. A stay benefits both parties

19. Counsel for CLAIMANT submit that there is no obligation for the Tribunal to grant a stay (*Memorandum for CLAIMANT, para. 21-24*). However, the Tribunal has the discretion to grant a stay and this will benefit both CLAIMANT and RESPONDENT.
20. According to *X AS v. BANK Y, Switzerland (2004)*, a Swiss Federal Supreme court case, “*the arbitral tribunal may also stay proceedings if it finds it appropriate considering the parties interests*”. It is a necessary decision to save costs and time of the parties (*Berger, p. 359*). The purpose of a stay is to avoid that time and money are spent for arbitral proceedings when subsequently a court decides there was no basis for an arbitral jurisdiction. In *X AS v. BANK Y* the stay was only declined on the grounds that the arbitral proceedings were already at a very advanced stage. In the present case on the contrary, the Tribunal is at the very beginning of its proceedings.
21. A state court would always have the last word concerning the arbitration agreement (*Redfern/Hunter, para. 7-41; Poudret/Besson, para. 457, Schlosser in Stein/Jonas, §1032, para. 22*). It seems likely that the Court will decide that in the present case no valid agreement exists (*cf. infra ISSUE II, para. 28 et seq.*).
22. If there is doubt on the competence of the arbitral tribunal, it will be better for the parties to have a decision at the beginning of the procedure. According to Art. V(1) CNY, a lack of jurisdiction would be a reason for resisting recognition and enforcement of an award under the convention (*Redfern, p.32*) which is another way for RESPONDENT to contest the award.
23. Arbitral proceedings are expensive (*Kaufmann-Kohler/Rigozzi, para. 55, Redfern/Hunter, para. 8-93*). It would be a waste of time and financial means to engage proceedings that in retrospect will be considered as having lacked legal basis.
24. Finally, “*the arbitral tribunal must take each and every step in order to ensure that the award which it has to render will be enforceable in the forum where enforcement is going to be sought*” (*ICC Cases No. 6515 and 6516, Final award, 1994*). The Tribunal should thus stay



its proceedings in favour of the Court proceedings in order to avoid rendering an award which cannot be enforced.

B. 2. RESPONDENT’S request for a stay is made in good faith

25. Indeed, the only limit preventing an arbitral tribunal to stay its proceedings would be when a party request a stay for purely tactical reasons and aims to delay proceedings. Such a behaviour cannot be reproached to RESPONDENT and no such reproach has been raised by CLAIMANT. *“It is not always easy to identify when the jurisdictional challenge is made in good faith and where it is merely to delay the process” (Lew/Mistelis/Kröll, para. 14-11).* However, in the case at hand the existence of an arbitration agreement must be seriously doubted, that is why RESPONDENT is in good faith in requiring court proceedings and a stay of the arbitral proceedings.
26. Nevertheless, RESPONDENT cooperated in the arbitration, thus not showing behaviour as it wanted to delay the proceedings, but it always indicated that it did not agree with the arbitral proceedings (*Letter from Equatoriana Supermarkets SA to the JAMS of 17 July 2007 and Statement of Defense, para. 7*). RESPONDENT granted a stay will be advantageous for both CLAIMANT and RESPONDENT. The issue of the validity of the arbitration agreement will be decided most adequately by the Court. A parallel arbitration should be avoided.

C. Summary of ISSUE I

27. Not only has the Court the power to rule on the existence of an arbitration agreement. The Tribunal should also await the Court’s decision on that matter in order to prevent a waste of resources of the parties.

ISSUE II: AN ARBITRATION AGREEMENT BETWEEN THE PARTIES DOES NOT EXIST

28. According to the Statement of Facts in the Memorandum for CLAIMANT, it is claimed that *“the parties agreed that (...) any dispute (...) would be referred to arbitration” (Memorandum for CLAIMANT, p. 1)*. In the following it will be demonstrated that this is incorrect since no valid arbitration agreement was concluded. Although meeting the formal



writing requirement the alleged “agreement” does not evidence the parties’ consent to refer disputes to arbitration (A). The arbitration clause has been effectively revoked by RESPONDENT (B).

A. The written arbitration clause does not evidence the parties’ consent to arbitrate

29. As Counsel for CLAIMANT correctly state, an arbitration agreement must be in writing (*Memorandum for CLAIMANT, para. 4-7*) and it must evidence the parties’ consent to refer their disputes to arbitration (*Memorandum for CLAIMANT, para. 1, 3*).
30. The formal writing requirement is stipulated both by the New York Convention in its Art. II (1) and by the DAL its Art. 7(2). The writing requirement is met; the purchase order with the arbitration clause was signed by both parties (*Cl. Exh. 5, p. 13*).
31. Nevertheless, the parties did not agree to arbitrate their dispute. Counsel for CLAIMANT correctly noticed that “*the element of consent is essential*” (*Redfern/Hunter, para. 1-11, cf. also Memorandum for CLAIMANT, para. 1, 3*). Since an arbitration agreement is always of contractual nature, arbitration can only take place when each party consented to it (*Lew/Mistelis/Kröll, para. 6-1*). While CLAIMANT might have wanted to consent to arbitration when signing the arbitration clause, RESPONDENT’s will to arbitrate can not be deduced from it.
32. RESPONDENT’s offer to arbitrate was ineffective at the time when it was accepted by CLAIMANT since by e-mail from 18 June 2006 the purchase order containing the arbitration clause was revoked (*Cl. Exh. 9, p. 17; cf. ISSUE II B, para. 33 et seq.; ISSUE IV, para. 94 et seq.*). RESPONDENT’s signature on the purchase order and the arbitration clause can thus not evidence its consent to arbitrate the present dispute.

B. RESPONDENT effectively revoked its offer to arbitrate

33. Counsel for CLAIMANT invokes the doctrine of separability or autonomy (hereinafter: autonomy) in order to argue that the arbitration agreement was unaffected by RESPONDENT’s revocation (*Memorandum for CLAIMANT, para. 9 et seq.*). The legitimacy of this doctrine, which is a “*foundation stone*” of modern legislation on arbitration and “*a truly international rule of law*” (*Rau, p. 82*), shall not be contested.
34. However, Counsel for CLAIMANT are mistaken when reasoning that the revocation does not affect the arbitration agreement because of its autonomy from the main contract



(*Memorandum for CLAIMANT, para. 13*). Firstly, the doctrine of autonomy cannot save an arbitral clause in a contract which does not exist at all (1). Secondly, the arbitration clause was revoked according to applicable Danubian law (2).

B. 1. The arbitration clause cannot be separable from a non-existing contract

35. The doctrine of autonomy is set out in Art. 16 DAL or Art. 16 UNCITRAL-ML: “(A)n arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”.
36. The doctrine has two components: the material autonomy in relation to the main contract and the legal autonomy in relation to the applicable law (*Poudret/Besson, para. 162; Lew/Mistelis/Kröll, para. 6-8*). It will first be explained why in the present case the arbitral clause cannot be materially autonomous from the fate of the main contract. In a second step the principle of legal autonomy will be applied to the present case (*cf. para. 47 et seq.*).
37. The principle of material autonomy meets its limits in cases in which the main contract does not exist at all. In line with the general principle *nihil ex nihilo fit*, nothing comes from nothing, an arbitration clause cannot exist independently from a contract which never came into existence (*cf. Smit, p. 20*). Something can only be separated from something else that exists (*Pollux Marine Agencies v. Louis Dreyfus Corp., USA (1978)*).
38. The Model Law’s cited provision on autonomy does not take into account situations in which the contract was null and void *ab initio* or never came into being at all (*Broches, Art. 16, para. 14*).
39. Counsel for CLAIMANT base their argumentation for the autonomy of the arbitration clause on the leading American case *Prima Paint, USA (1967)* (*Memorandum for CLAIMANT, para. 10 et seq.*). While it is true that the doctrine of autonomy became established in U.S. jurisprudence after the *Prima Paint* decision, the case at hand has to be distinguished from it.
40. The *Prima Paint* decision concerned a situation in which the parties had reached an agreement on a consulting contract which one party wanted to rescind on the basis of a fraudulent inducement. A contract had been formed but it was voidable. The case at hand on the contrary is one in which a contract has never been formed and no agreement has ever been reached. The offer was effectively revoked by RESPONDENT before it was accepted by CLAIMANT (*cf. ISSUE IV, para. 94 et seq.*). There was thus no “meeting of the minds” at all.



41. The present case does not deal with the “termination” of a contract, which is the example used by Counsel for CLAIMANT (*Memorandum for CLAIMANT, para. 11*). According to the doctrine of autonomy an arbitration agreement survives the termination of an initially formed contract. However, an arbitration agreement cannot exist if the main contract never came into being. The arbitration agreement would otherwise have no object (*Sanders, p. 33*).
42. In cases concerning contract formation issues, it is for the court to decide whether assent to arbitration was given (*Rau, p. 30*). Given that the present case concerns contract formation issues such as the revocation of an offer, the Tribunal is not competent to rule over the existence of the contract.
43. This reasoning has been applied, amongst others, in the following decisions: In *Société Pia Investments v. Société L & B Cassia, France (1990)* the Cour de Cassation ruled that in international arbitration, the independent existence of the arbitration clause finds a limitation in the non-existence of the container or main contract (*translation, ibid. p. 861*).
44. The United States Court of Appeal held in *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc, USA (1991)* that *Prima Paint* is limited to challenges “seeking to avoid or rescind a contract - not to challenges going to the very existence of the contract” (*at p. 1140*). A similar reasoning was applied by the Colorado District Court in *Weis Builders, Inc. v. Kay S. Brown Living Trust, USA (2002)* (*cf. p. 1202*).
45. In *Sojuznefteexport v. Joc Oil Ltd., Bermuda (1990)* the Court of Appeal of Bermuda, which had to decide about the existence of an arbitral agreement, made the following distinction: “(...) was the sale contract the baseless fabric of a vision, insubstantial (i.e. non-existent) or was it (...) something which mundane lawyers describe as an invalid contract?” (*at p. 430*). The judges decided that an arbitration agreement can survive the invalidity of a contract, that it can not exist independently from a completely non-existent contract, i.e. a contract that never came into being.
46. The Tribunal is invited to follow the reasoning of the cited decisions. The contract between CLAIMANT and RESPONDENT never came into being (*cf. ISSUE IV, para. 94*). The arbitration clause does not have any object and cannot stand by itself. The Tribunal should therefore decline its jurisdiction over the matter.

B. 2. According to applicable Danubian Law, RESPONDENT revoked its offer

47. If the Tribunal nevertheless concluded that the arbitration agreement can subsist independently of a non-existent contract, Counsel for RESPONDENT submit that the arbitration



clause itself would have been revoked according to applicable Danubian law.

48. A consequence of the doctrine of autonomy is that the arbitration clause is legally separate of the container contract and can thus be governed by a law different from the law governing the rest of the contract (*Lew/Mistelis/Kröll, para. 6-23*).
49. The parties have not chosen any law to govern the substantive validity of the alleged arbitration agreement. However, according to Art. V(1)(a) CNY enforcement of an award may be refused if the agreement is not valid under the “*law of the country where the award was made*”. A comparable provision can be found in Art. 36(1)(a)(i) UNCITRAL-ML.
50. These provisions, although concerned with the enforcement or annulment of an award, are to be applied at the pre-award stage as well (*Lew/Mistelis/Kröll, para. 6-55; ICC case no. 6149, Interim award, 1990*). In the present case, the award would be made in Danubia. Danubian Law as the law of the seat of the arbitration is thus applicable to the substantive validity and existence of the arbitration agreement.
51. This is in line with Danubian jurisprudence on the conflict of laws: Danubian courts seek to apply the substantive law of the most appropriate country (*Procedural Order 2, question 7*). It is most appropriate to apply the law of the seat of the arbitration which constitutes the strongest connecting factor to the arbitration agreement (*Lew/Mistelis/Kröll, para. 6-62*).
52. An arbitration agreement being a contract (*Kaufmann-Kohler/Rigozzi, para. 174*), it is domestic Danubian contract law which is applicable to the question of its existence. The CISG is inapplicable since an arbitration agreement itself does not deal with the sale of goods; it is not in the CISG’s sphere of application. (*Kröll, p.45*).
53. According to domestic Danubian contract law, offers are revocable (*Procedural Order 2, question 7*). RESPONDENT could therefore revoke its offer. This has been done by e-mail from 18 June 2006; RESPONDENT revoked the arbitration clause when it revoked its offer to purchase the wine (*Cl. Exh. 9, p. 17*). Since the arbitration clause was included in the same document as the offer, one e-mail to revoke both the purchase offer and the arbitration clause must be considered as sufficient (*cf. Statement of Defense, para. 7, p. 38*).
54. Since according to Danubian law acceptance occurs upon its dispatch, this revocation must have reached CLAIMANT before the acceptance was sent, which means before the morning of 19 June 2006 (*Statement of Claim, para. 9, p. 5*). The e-mail entered CLAIMANT’s server on 18 June 2006 (*Statement of Claim, para. 10, p. 5*) and was thus received before the dispatch of the acceptance (for a detailed analysis of the “receipt” *cf. ISSUE IV, para. 121 et seq.*).
55. The offer to arbitrate was thus effectively revoked and could not be accepted. CLAIMANT



correctly noticed that arbitration agreements which are defective from the outset, suffering from defects in formation, are “*incapable of being performed*” and thus not enforceable according to Art. II(3) CNY (*Memorandum for CLAIMANT, para. 13*). The Tribunal should thus decline its jurisdiction over the dispute, since an unenforceable award would be of no use to the parties.

C. Summary of ISSUE II

56. Certainly there is a written arbitration clause. However, it has been shown that the clause does not evidence the parties’ consent to arbitrate since RESPONDENT never agreed to refer arising disputes to arbitration. A sales contract between CLAIMANT and RESPONDENT never existed. Consequently, no arbitration agreement can exist separately of it. Additionally, the arbitration clause itself was revoked according to applicable Danubian law.

**ISSUE III : FOR LACK OF BREACH OF ART. 17.3 JAMS NO CONSEQUENCE
CAN ARISE**

57. Art. 17.3 JAMS is not applicable to the case at hand (1). Therefore, RESPONDENT does not have to bear CLAIMANT’s costs for the litigation (2) and RESPONDENT does not have to terminate its litigation in front of the Court (3).

A. Art. 17.3 JAMS is not applicable

58. Art. 17.3 JAMS is not to be applied for two reasons. Firstly there is no arbitration agreement (1). Secondly its application is barred by Art. 8(2) DAL and public policy (2).

A. 1. The first condition of Art. 17.3 JAMS is not satisfied

59. Art. 1.1 JAMS contains the principle according to which the parties must have agreed to arbitrate under JAMS Rules to permit the latter rules to apply. The same condition is repeated in Art. 17.3 JAMS. Since there is no valid arbitration agreement in the present case (*cf. supra ISSUE II, para. 28 et seq.*) Art. 17.3 JAMS does not apply. Hence, CLAIMANT cannot invoke Art. 17.3 JAMS.



A. 2. Art. 8(2) DAL and public policy prevent the application of Art. 17.3 JAMS

60. Should the Tribunal nevertheless consider that there is a valid arbitration agreement in the present case, Counsel for RESPONDENT submit that RESPONDENT had not breached Art. 17.3 JAMS, contrary to what Counsel for CLAIMANT assert (*Memorandum for CLAIMANT, para. 25*).
61. Art. 1.5 JAMS provides that the JAMS Rules “will govern the conduct of the arbitration except that where any of these Rules is in conflict with a mandatory provision of applicable arbitration law of the place of the arbitration, that provision of law will prevail”.
62. In *Municipalité de Khoms El Mergeb v. Société Dalico* the French Cour de Cassation underlined the importance of mandatory provisions and international public policy (*Gaudemet-Tallon, p. 124*). Doctrine as well states that “(t)he parties may not confer powers upon an arbitral tribunal that would cause the arbitration to be conducted in a manner contrary to the mandatory rules or public policy of the state in which the arbitration is held” (*Redfern/Hunter, para. 6-07*).
63. Art. 8(2) DAL, especially allows for an application to a state court. It contrasts thus with Art. 17.3 JAMS. Art. 17.3 JAMS cannot apply if Art. 8(2) DAL prevails as a mandatory provision.
64. The question whether a provision like Art. 8(2) DAL is mandatory or not, i.e. whether the parties can derogate from it by party agreement, has been addressed by German commentators with regards to the corresponding § 1032(2) ZPO. In German law, § 1042(3) ZPO, which transposes purpose and structure of Art. 19 UNCITRAL-ML into German law (*Münch in MüKo ZPO, § 1042, para. 2*), concerns the primacy of mandatory law over party agreements. Mandatory are not only those rules which are explicitly labelled as such, but also all rules that concern the state procedure. Especially those rules concerning the conflict between state and arbitral procedure, like § 1032 (2) ZPO, cannot be derogated from (*Münch in MüKo ZPO, § 1042, para. 6*). Every party agreement on a procedural rule that concerns the state procedure is ineffective (*Wieczorek/Schütze, § 1034 a. F. [= present § 1042 (3) ZPO], para. 5*).
65. In consequence, the procedural possibility to apply to a court prior to the constitution of the arbitral tribunal, allowed for by Art. 8(2) DAL (as by § 1032 (2) ZPO), must be left to the parties. An agreement on a procedural rule like Art. 17.3 JAMS, which forbids the parties to use any state court procedure, is ineffective. Art. 8(2) DAL, which authorises RESPONDENT to bring the matter to the Court, prevails and consequently Art. 17.3 JAMS is inapplicable.
66. Moreover Art. 8(2) DAL materializes the fundamental right to submit a dispute to an



independent court and to benefit of a fair trial, which belongs to international public policy: another reason to make this provision prevail.

67. Given the inapplicability of Art. 17.3 JAMS, RESPONDENT cannot be considered as having breached it.

B. RESPONDENT is not liable for CLAIMANT's costs of litigation

68. Based on Art. 27.3 JAMS CLAIMANT requests “*compensation from RESPONDENT in the amount of additional expenses incurred as a result of the proceedings brought in the Commercial Court of Danubia*” (*Memorandum for CLAIMANT, para. 27; see also Amendment to Request for Arbitration, para. 6, p. 32*). In addition to the inapplicability of Art. 17.3 JAMS Counsel for RESPONDENT submit that it is inappropriate to allocate CLAIMANT's eventual costs to RESPONDENT (1). The same conclusion follows from the application of general principles of law (2).

B. 1. The allocation of CLAIMANT's costs to RESPONDENT would be inappropriate

69. When RESPONDENT initiated the proceedings before the Court, it allowed for a fast clarification of the question on the validity of the arbitration agreement. RESPONDENT's action was thus with “*good cause*” in the sense of Art. 27.3 JAMS. Hence, there is no reason to draw inferences.
70. The Tribunal enjoys large discretion when deciding the inferences that may be drawn when confronted with an alleged breach. In the present case the allocation of CLAIMANT's eventual costs would be inappropriate, because CLAIMANT cannot prove that any damage will arise out of RESPONDENT's litigation.
71. There are two possible outcomes which depend on the answer as to whether an arbitration agreement exists or not. Under the first hypothesis, where no arbitration agreement existed (*cf. ISSUE II, para. 28 et seq.*), the consequence would be that the JAMS were not applicable and that the Tribunal was not competent to decide on any damages.
72. Under the second hypothesis, assuming that an arbitration agreement existed, the Court would find so. It would then impute the costs of litigation to RESPONDENT as the losing party. If any damage were still to subsist, the Tribunal - as soon as the dispute was referred to it by the Court - would then be able to decide on the allocation of damages. At the present stage it is not appropriate to make such a decision, because neither the Tribunal's jurisdiction nor the



occurrence of any damage are definite. Hence, the Tribunal has to dismiss the claim of CLAIMANT about the compensation of its costs before the Court.

B. 2. Transnational principles confirm the inappropriateness of requested cost allocation

73. An arbitral tribunal may apply transnational rules such as the UNIDROIT Principles as they are most appropriate (*UNIDROIT Commentary to the preamble, para. 4*). Doctrine considers the UNIDROIT Principles as generally applicable, because “[parties] to an international contract submit themselves to the legal principles of international trade” (*Van Houtte, p. 383*).
74. If the Tribunal were to consider those principles, the Tribunal would have to look at Art. 7.4.1 et seq. UNIDROIT. Art. 7.4.3 UNIDROIT specifies that compensation “is due only for harm, including future harm, that is established with a reasonable degree of certainty”.
75. The allegedly aggrieved party must not be placed in a better situation after the breach of the contract (*Osman, p. 179*). Damages “may not exceed the actual loss and are available only for loss which is proved by the claimant” (*Berger, The Creeping Codification of the Lex Mercatoria, p. 304*).
76. It has been shown in the preceding paragraphs 69 et seq. that in the present case there is no certainty that CLAIMANT will suffer damage. At this stage it is the Court and not the Tribunal which is competent to allocate the costs incurred in litigation. For instance, the UK Court of Appeal held in the case *Mantovani v. Carapelli SpA, UK (1979)* that a claim for compensation must be made before the court, not before the arbitral tribunal (*Wessel/North Cohen, p. 66*).
77. In the light of the above, Counsel for RESPONDENT ask the Tribunal to find that RESPONDENT is not obliged to pay for CLAIMANT’s costs for the proceedings before the Court.

C. RESPONDENT can continue its litigation in Court

78. Counsel for CLAIMANT, in their Memorandum of 6 December 2007, only ask for the allocation of costs incurred as a result of the litigation (*Memorandum for CLAIMANT, para. 25-27*). However, in the Amendment to Request for Arbitration an injunction to order RESPONDENT to terminate its litigation (anti-suit injunction) was claimed (*para. 6 at p. 32*). Although this request is not upheld in the Memorandum for CLAIMANT, Counsel for RESPONDENT submit a preventive defence.
79. To order an anti-suit injunction is not appropriate and the Tribunal does not have the power to



grant such an injunction. The Tribunal is not in a position to dictate the conduct of the Court and, by ordering an anti-suit injunction, it would interfere with the jurisdiction of the Commercial Court of Vindobona (*for similar situation see: ICC Case No. 9593, Final Award (1998), p. 112; ICSID Case No. ARB/01/13 (2002)*). Moreover, it would also breach the fundamental right of seeking relief before a court (*Lévy, p. 123*). For example, *Clavel* reports a refusal by a court of Brussels to render an anti-suit injunction, because it would violate Art. 6 ECHR (*Clavel, p. 698 ;see also Born/Fallon, para. 145*).

80. If the Tribunal issued an anti-suit injunction, RESPONDENT would have to wait until the end of the arbitral proceedings. However, it will then be able to submit the matter to the Court which would hold that the Tribunal lacked jurisdiction. As a result, time and money of the parties would have been wasted in the arbitration. The Court proceedings for determining the (in)validity of the arbitration agreement are in the interest of CLAIMANT and RESPONDENT.
81. It must be kept in mind that not only an arbitral tribunal benefits of the competence-competence principle, the Court has the right to rule over its own jurisdiction as well. “*Each court or tribunal has the power to decide on its own jurisdiction*” (*Lévy, p. 117*) and an arbitral tribunal “*has no authority to interfere with proceedings before State courts*” (*ICC Case No. 9593, Final Award (1998), p. 112; ICSID Case No. ARB/01/13 (2002)*).
82. When there are parallel proceedings on the same matter as in the case at hand, “*arbitrators may only rule on their own jurisdiction*” (*Lévy, p. 120*). The parties may be discouraged to refer the case to a state court if the arbitrators ruled that they were competent. Yet, they can not be enjoined by the arbitrators to refer the dispute to a court. Indeed, arbitrators are not entitled to decide over the competence of another tribunal or court (*Lévy, p. 120*).
83. By issuing an anti-suit injunction, the Tribunal would act as a judge in its own cause. In ordering an anti-suit injunction arbitrators may cause more harm than that they contribute to the resolution of the dispute. The measure might lead to “*the annulment of the award on the ground that the arbitral tribunal has been the judge in its own case and, hence, lacked impartiality*” (*Lévy, p. 129*).
84. A part of doctrine even considers anti-suit injunctions as always inadvisable and illegitimate. According to *Fouchard* “*they constitute more than a nuisance*” (*Fouchard, p. 153*). Indeed, they have a negative impact on the arbitration, leading to “*the aggravation of the dispute, the undermining of the procedure’s environment (or) retaliatory measures that may be taken in the form of anti-anti-suit injunctions by national courts*” (*Gaillard, pp. 36-37, see also Kerameus, p. 137; KBC v. Pertamina, USA (2003)*).



85. Another part of doctrine limits anti-suit injunction to cases where a party engaged in fraudulent conduct or an otherwise abusive behaviour in order to revoke the arbitration agreement (*Lévy, pp. 125-126 ; Gaillard, pp. 37-38*). In setting that limit this doctrine presumes anti-suit injunction to be inappropriate in most cases.
86. If the Tribunal considered itself competent to grant an anti-suit injunction, which is contested by Counsel for RESPONDENT (*cf. para. 79 et seq.*), it should still abstain from ordering an anti-suit injunction. Such a measure would be ineffective and is undesirable (*Gaillard, p. 39*).
87. Ordering an injunction might be reasonable if parallel proceedings were introduced with the aim to fraud the other party's rights and notably by attacking him in a distant jurisdiction causing difficulties and serious injustice to the other party (*Clavel, p. 675*). In other words, an anti-suit injunction may be issued when "*the ends of justice require it*", generally when the procedure brought before the other court is vexatious or oppressive (*Airbus Industrie G.I.E v. Patel and Others, UK (1998) ; Turner v. Grovit, ECJ (2004), para. 13; KBC v. Pertamina, USA, (2003)*).
88. The submission of the dispute to the Court by RESPONDENT is neither vexatious nor oppressive. RESPONDENT intends to clarify the situation about the alleged arbitration agreement. Neither were the merits of the case brought before the Court, nor is the Commercial Court of Vindobona, Danubia, a "*distant jurisdiction*" since it is situated in the same country as the Tribunal.
89. Counsel for RESPONDENT request the Tribunal to find that RESPONDENT is in its right to continue litigation before the Court for determining the (in)existence of the arbitration agreement.

D. Summary of ISSUE III

90. Art. 17.3 JAMS is not applicable in the present case, because the parties have not agreed to arbitration and, even if they had, Art. 8(2) DAL would prevail over Art. 17.3 JAMS. Hence, Art. 17.3 JAMS cannot have been breached. RESPONDENT is not to be held liable for CLAIMANT's costs for litigation in the Court based on Art. 27.3 JAMS. The allocation of damages which are not even definite to occur is inappropriate. RESPONDENT should not be required to stop its proceedings before the Court. Neither was it requested by Counsel for CLAIMANT in their Memorandum, nor is such an anti-suit injunction an appropriate measure.



ARGUMENTS ON THE SUBSTANTIVE ISSUES

91. CLAIMANT and RESPONDENT did not enter into a contract about the sale of 20,000 cases of “Blue Hills 2005” (ISSUE IV). If it were to be assumed that a sales contract was concluded “Blue Hills 2005” would not have been fit for the particular purpose made known to CLAIMANT, i.e. the featuring in RESPONDENT’s wine promotion (ISSUE V).

LAW APPLICABLE TO THE MERITS OF THE CASE

92. The CISG concerns international contracts of sale of goods; it especially governs the formation of such contracts in its Part II and the obligation of seller and buyer in its Part III (Art. 4 CISG). A contract of sale between CLAIMANT and RESPONDENT concerning 20,000 cases of “Blue Hills 2005” would be an international contract according to Art. 1(1)(a) CISG since the parties have their places of business in two different contracting states.
93. CLAIMANT’s place of business is in Mediterraneo, RESPONDENT’s place of business is situated in Equatoriana. Both Mediterraneo and Equatoriana have ratified the CISG. Therefore the CISG is applicable. The question is not disputed by the parties.

ISSUE IV: NO SALES CONTRACT WAS CONCLUDED

94. CLAIMANT received an offer by RESPONDENT on 10 June 2006 (A). However, this offer was revoked. According to the CISG there are three restrictions to the principle of revocability of offers (*Huber/Mullis, p. 82*). Firstly, revocation has to be made timely. Secondly and thirdly, the two exceptions stated in Art. 16(2) CISG must not be met.
95. Since the time condition is satisfied (B) and at the same time none of the two exceptions applies (C and D), RESPONDENT validly revoked its offer on 18 June 2006. Therefore, CLAIMANT’s acceptance of 19 June 2006 could have no effect. As a result, CLAIMANT and RESPONDENT did not conclude a sales contract.



A. RESPONDENT'S proposal of 10 June 2006 constitutes an offer

96. As Counsel for CLAIMANT correctly state in their Memorandum, the proposal made by RESPONDENT on 10 June 2006 constitutes an offer according to Art. 14 CISG (*Memorandum for CLAIMANT, para. 28*). On 10 June 2006 RESPONDENT “*offered to purchase*” (*Cl. Exh. 5, p. 13*) 20,000 cases of “Blue Hills 2005” which were to be delivered in four instalments from CLAIMANT for a total price of US\$ 1,360,000 (*Cl. Exh. 5, p. 13*). This is a sufficiently definite proposal constituting an offer according to Art. 14 CISG containing all essential elements such as goods, price and quantity.
97. Although Counsel for CLAIMANT have not done so, one might attempt to qualify CLAIMANT’s letter of 1 June 2006 as an offer. This would be an incorrect qualification of that letter. The letter does not specify a definite quantity, nor does it contain a calculation of a total price (*Cl. Exh. 3, p. 11*). It also does not convey an intention to be bound as required by Art. 14 CISG. There is no indication that RESPONDENT was invited to accept the proposal as an offer.
98. But even if one considered CLAIMANT’s letter of 1 June 2006 as an offer, RESPONDENT’s letter of 10 June 2006 would not constitute an acceptance of that offer but would have to be qualified as a counter-offer.
99. Art. 19(1) CISG stipulates that a reply containing modifications to an offer constitutes a counter-offer. By not unqualifiedly accepting the terms offered but introducing further specifications, RESPONDENT modified the first letter. Especially the included arbitration clause and the precision on the quantity, notably that the last 2,500 cases were to be contingent, modify the terms of the offer materially (Art. 19(3) CISG). RESPONDENT’s letter of 10 June 2006 can thus not constitute an acceptance.
100. Attention must be drawn to the wording of the letter of 10 June 2006 in which RESPONDENT expressly states to “*offer to purchase*” (*Cl. Exh. 5, p. 13*) and invites CLAIMANT to sign the contract and to return it (*Cl. Exh. 4, p. 12*). Furthermore, CLAIMANT recognized itself the order as to be open for its “*acceptance*” (*Request for Arbitration, para. 7, p. 5*) and qualified RESPONDENT’s letter of 10 June 2006 as offer (*Memorandum for CLAIMANT, para. 28*).
101. To summarise, RESPONDENT’s letter of 10 June 2006 constituted an offer or counter-offer. It will now be shown that RESPONDENT validly revoked that offer.

**B. RESPONDENT revoked the offer before CLAIMANT's acceptance**

102. As a preliminary remark it should be asserted that the fact that RESPONDENT used the verb “withdraw” in its revocation of 18 June 2006 does not impede the effect of the revocation. For lawyers the vocabulary “withdrawal” is a technical term in the sense of Art. 15(2) CISG, which means to terminate an offer in sending a message reaching the offeree before or at the same time as the offer. However, “(l)awyers must never accept the term that the parties have given a certain message at face value. Instead, they always have to look behind the wording of the message in order to ascertain its true legal meaning” (Berger, *Private Dispute Resolution*, para. 1-17). The e-mail of 18 June 2006 reflects RESPONDENT’s will to declare the revocation of the offer. This has been uncontested by CLAIMANT.
103. Art. 16(1) CISG sets out the basic principle that under the CISG offers are revocable. Therefore, as a matter of principle, RESPONDENT was entitled by law to revoke his offer.
104. According to Art. 16(1) CISG the time period for revocation is limited. Revocation becomes effective and terminates the offer as long as it reaches the offeree before dispatch of acceptance. Once dispatched, the acceptance turns a revocable offer into an irrevocable one. It is thus crucial to determine the point of time when revocation reached CLAIMANT, i.e. whether this was before or after CLAIMANT dispatched its acceptance on 19 June 2006.
105. Applying the CISG, RESPONDENT’s revocation reached CLAIMANT on 18 June 2006 (1). Applying the UNCITRAL Model Law on Electronic Commerce (hereinafter: MLEC) the same outcome is obtained (2). RESPONDENT’s revocation thus reached CLAIMANT before it dispatched its acceptance.

B. 1. Applying the CISG, the offer reached CLAIMANT on 18 June 2006

106. Counsel for CLAIMANT erred when stating in their Memorandum that receipt of the revocation took place on the afternoon of 19 June 2006 (*Memorandum for CLAIMANT*, para. 36). In order to determine the point of time when the revocation reached the addressee Art. 24 CISG is to be applied (*Schlechtriem in Schlechtriem/Schwenzer*, Art. 24, para. 1, *Schlechtriem*, Art. 24, para. 2). According to Art. 24 CISG, “an offer, declaration or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address (...)”.
107. The CISG, due to its adoption in 1980 and the pre-e-mail age, does not contain express provisions concerning electronic communication. In the meanwhile the question of electronic



communication has been commented on by the CISG advisory council, a private initiative aiming at the promotion of a uniform interpretation of the CISG (*Mistelis, para. 5*). According to its opinion, in electronic communication the term “reaches” corresponds to the point in time when an electronic communication has entered the addressee’s server, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that address (*CISG-AC, Op. no. 1, Art. 24*).

108. The advisory council suggests thus two prerequisites, both of which will be examined subsequently. In order that the revocation effectively reached the addressee, entry into the server is required (a) and consent to that type of communication must have been given (b).

a) *The revocation entered into CLAIMANT’s server on 18 June 2006*

109. As Counsel for CLAIMANT point out in their Request for Arbitration, entry of RESPONDENT’s revocation into the network server of Mediterraneo Wine Cooperative occurred on 18 June 2006 (*Request for Arbitration, para. 10, p. 5; Cl. Exh. 9, p. 17*). CLAIMANT had hypothetically the possibility to read the message, but due to “(...) a service failure on 18 June that was not corrected until the afternoon of 19 June” CLAIMANT factually could not read the message and dispatched its acceptance in the morning of 19 June 2006 ignoring the revocation on its server (*Request for Arbitration, para. 10, p. 5, Procedural Order 2, question 25, p. 55*).

110. The fact that CLAIMANT was prevented from reading the messages that had actually arrived on its server is irrelevant. The CISG advisory council comments on a case where entry in a server has taken place, but due to internal problems with the network system the message cannot be read: “Irrespective of how harsh it may be for the offeree that messages have arrived to his server but cannot be read by him due to internal problems, it is not appropriate to put the risk on the offeror for the offeree’s technical problems.” (*CISG-AC, Op. no. 1, Art. 15, para. 15.3*).

111. This is the present scenario: entry of the revocation into the server occurred the day before the dispatch of the acceptance. However, “the internal network at Wine Cooperative had a service failure” (*Request for Arbitration, para. 10, p. 5, Procedural Order 2, question 26, p. 55*) for the reason of which CLAIMANT was prevented from reading RESPONDENT’s revocation immediately upon its entry into the system.

112. Certainly these circumstances are tough luck for CLAIMANT and it is all too understandable that it now tries to shift the risk of that event to someone else. However, it is not only common sense but also doctrine’s opinion that internal network failures belong to the sphere



of risk of the addressee maintaining that server (*Borges, p. 319; CISG-AC, Op. no. 1, Art. 15, para. 15.3; Schlechtriem, Art. 24, para. 12*). The consequences of CLAIMANT's internal network problems are not to be borne by RESPONDENT. Entry into CLAIMANT's server took place on 18 June 2006.

b) CLAIMANT had consented to e-mail communication

113. A prerequisite for a valid revocation by e-mail is that the parties agreed on that mode of communication. To determine whether the parties have agreed on e-mail communication, the parties' statements have to be interpreted according to Art. 8 CISG.
114. Consent is given to e-mail communication when a party expresses its will to receive messages via that mode. Express consent in the form of a document will be rare and was not given in our case. However, consent may also be given impliedly.
115. Implied agreement among businessmen is made when indicating an e-mail address for instance on business cards, letterheads, etc. (*Borges, p. 251; Ultsch, DZWir 1997, p. 468 and NJW 1997, p. 3007; Vehlsage, DB 2000, p. 1804*).
116. CLAIMANT and RESPONDENT exchanged business cards on the Durhan Wine Fair (*Procedural Order 2, question 24, p. 55*). It had become clear that RESPONDENT was interested in "Blue Hills 2005" for its promotion (*Request for Arbitration, para. 5, p. 4*). Mr. Cox and Mr. Wolf exchanged business cards in order to facilitate further business contact in that regard and agreed on communication by e-mail.
117. Furthermore, implied consent is in particular to be assumed when the addressee himself, in communicating with the sender, has used the relevant type or format of electronic messages and electronic address (*Slechtriem in Schlechtriem/Schwenzer, Art. 24, para. 3*).
118. RESPONDENT had sent its offer by e-mail (*Cl. Exh. 4, p. 12*). Both, Mrs Kringle's confirmation of receipt of the offer (*Request for Arbitration, para. 8, p. 5; Cl. Exh. 6, p. 14*) and Counsel for CLAIMANT's statement in their Memorandum of 6 December 2007 according to which the offer was effective and enforceable under the MLEC (*Memorandum for CLAIMANT, para. 31 et seq.*) show that communication by e-mail was accepted by CLAIMANT.
119. There can be no question and it also has not been contested so far that Mrs Kringle was entitled to communicate on behalf of CLAIMANT. Personnel of the addressee working at his place of business are authorized to receive communication because of the principle of good faith as contained in the term "reasonable" in Art. 8(2) CISG (*Brunner, Art. 24, para. 3; Lüderitz/Fenge in Soergel, Art. 24, para. 4*). Mrs Kringle had access to all e-mails sent to Mr.



Cox (*Procedural Order 2, question 25, p. 55*). It is reasonable to assume that in her position as assistant of Mr. Cox (*Procedural Order 2, question 25, p. 55*) she was not only entitled to receive communication but also entitled to answer messages. Therefore, implied consent to e-mail communication was given when Mrs. Kringle exchanged messages with RESPONDENT.

120. Because CLAIMANT had consented to receiving e-mails by exchanging business cards and by replying to RESPONDENT's messages and because entry into CLAIMANT's server took place on 18 June 2006, RESPONDENT's revocation reached CLAIMANT timely in the sense of Art. 16 CISG together with Art. 24 CISG.

B. 2. Applying the MLEC, the offer reached CLAIMANT on 18 June 2006

121. The issue of the time of receipt of electronic communication is also covered by the MLEC which both Mediterraneo and Equatoriana have adopted (*Statement of Claim, para. 16, p. 6*). The MLEC does not substitute or overrule provisions of already existing conventions like the CISG but is a tool to interpret them (*GUIDE MLEC, para. 5*).

122. For the time of receipt Art. 15(2) MLEC stipulates: Where the addressee designated an information system – like an e-mail-address – receipt occurs upon entry of the message into that system (Art. 15(2)(a)(i) MLEC) or, when the message enters into another than the designated information system, receipt occurs upon retrieval (Art. 15(2)(a)(ii) MLEC).

123. Where no information system – like an e-mail-address – was designated, receipt occurs upon entry of the message into any information system of the addressee (Art. 15(2)(b) MLEC).

124. RESPONDENT sent its revocation by e-mail to Mr. Cox' e-mail address (*Cl. Exh. 9, p. 17*). This e-mail address had been mentioned on his business card exchanged with RESPONDENT on the Durhan Wine Fair (*Procedural Order 2, question 24, p. 55*).

125. Irrespective of whether one considers the revocation as to have been sent to a designated information system or not, revocation reached CLAIMANT on 18 June 2006.

126. Under the first hypothesis, if one considered Mr. Cox' e-mail address as a designated information system in the meaning of Art. 15(2)(a) MLEC, subsection (ii) of that Article would be excluded, since in any case revocation was not sent to another e-mail address than the designated one. Thus, subsection (i) would apply. Consequently, receipt occurred upon entry into the system. RESPONDENT's revocation entered into CLAIMANT's server 18 June 2006 (*Request for Arbitration, para. 10, p. 5; Cl. Exh. 9, p. 17*).

127. Under the second hypothesis, if one considered on the other hand that Mr. Cox' e-mail



address was not designated by being indicated on his business card, Art. 15(2)(b) MLEC would apply.

128. Art. 15(2)(b) MLEC stipulates that unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

129. Under this article as well, receipt occurs upon entry of a message into the system. This was, again, when RESPONDENT's revocation entered into CLAIMANT's server on 18 June 2006 (*Request for Arbitration, para. 10, p. 5; Cl. Exh. 9, p. 17*).

130. Analysing the present case according to the CISG and the MLEC, receipt of the revocation on behalf of CLAIMANT took place on 18 June 2006. The offer of 10 June 2006 was therefore terminated on 18 June 2006.

131. It is sometimes argued, but has not been done so by CLAIMANT, that receipt cannot occur outside business hours (*Farnsworth in Bianca/Bonell, Art. 24, para. 3.2*). However, it must be admitted that receipt would then occur at the latest with the beginning of the next workday, thus in the morning of 19 June 2006 which was a Monday. Still, this would be before the dispatch of the acceptance. Hence, the acceptance occurred after receipt of the revocation. The acceptance could thus not deploy any effect.

C. The offer does not indicate its irrevocability according to Art. 16(2)(a) CISG

132. Art. 16(2)(a) CISG states that an offer cannot be revoked if it indicates that it is irrevocable. It will be shown that RESPONDENT's offer neither does so by stating a fixed time for acceptance (1) nor otherwise (2).

C. 1. The date of 21 June 2006 does not indicate irrevocability

133. The adoption of Art. 16(2) CISG was considerably debated in the Vienna conference (history of the provision in *Eörsi in Bianca/Bonell, Art. 16, para. 1*). In line with their national law, most common law delegates wanted to understand the final version of the provision so that a fixed time would not in itself make the offer irrevocable, while some civil law delegates understood it as a mere presumption and others in a way that a fixed time always entails the irrevocability (*Legislative History, doc. 16*).

134. The wording of Art. 16(2)(a) CISG stayed to some extent ambiguous and therefore its



interpretation is disputed (*Schlechtriem in Schlechtriem/Schwenzer, Art. 16, para. 9*). It is suggested that the interpretation which is the most consistent with the provision's history is that the fixing of time for acceptance should be merely regarded as one factor indicating irrevocability but that it is not conclusive (*Schlechtriem, Art. 16, para. 9; Huber/Mullis, p. 82 et seq; Eörsi in Bianca/Bonell, Art. 16, para. 2.2.1; Staudinger/Magnus, Art. 16, para 12; Schnyder/Straub in Honsell, Art. 16, para. 20*). A statement fixing a time for acceptance is thus a rebuttable presumption on the irrevocability of the offer.

135. It can be held that the fixing of a time can have only one of two purposes. By fixing a time for acceptance the offeror might want to promise to hold the offer open until that date, hence declare its irrevocability. Alternatively, it might want to declare the automatic expiration of the offer at that date (*Honnold, Art. 16, para. 143.1*).

136. By examining RESPONDENT's offer containing the date of 21 June 2006 it is clear that its purpose was to let the offer expire. The clause was not intended to indicate the irrevocability of the offer. This is objectively recognizable, since RESPONDENT motivated the setting of that deadline.

137. RESPONDENT stated that it was under time pressure because of the scheduling for the wine promotion and that the maximum time period for acceptance was until 21 June 2006. At the same time it asked CLAIMANT to react quickly (*Cl. Exh. 4, p. 12*). The repeated reference to the time element was not intended to grant CLAIMANT a time for contemplation but to indicate a time-limit for expiration. Contrary to what CLAIMANT contends, RESPONDENT did not state the date because of or in knowledge of the absence of Mr. Cox (*Memorandum for CLAIMANT, para. 34*). It was only after the revocation that RESPONDENT learned of his absence (*Cl. Exh. 6, p. 14*).

138. On the contrary, RESPONDENT motivated the setting of the time period, because it was only interested in "Blue Hills 2005" for the promotion. This has been stated by both CLAIMANT and RESPONDENT in the preliminary discussions (*Cl. Exh. 1-4, p. 9 et seq.*). Thus, RESPONDENT did not want to offer to buy the wine after 21 June 2006.

139. RESPONDENT made its intention clear: the indication of the date of 21 June 2006 served two objectives, both related to the wine promotion. Firstly, it served as the maximum date until which RESPONDENT was interested in buying "Blue Hills 2005" to be used for the promotion. RESPONDENT had no interest in offering to buy the wine later than that date, which was thus a date of expiration. Secondly, it served RESPONDENT to ensure to respect its own scheduling.

140. Besides the objectively recognisable meaning of that deadline, it is also subjectively evident



that the statement of time was not intended to declare the irrevocability of the offer. Since Art. 16(2)(a) CISG is a provision of interpretation, it supplements Art. 8 CISG in that respect (*Honnold, Art. 16, para. 143.1*). Art. 8 CISG governs the interpretation of statements made by the parties and allows for taking into account the parties' legal background (*Schlechtriem/Schwenzer, Art. 16, para. 10*).

141. RESPONDENT is from a legal background in which offers generally cannot be declared irrevocable: “*Equatoriana follows the general common law rules*” (*Procedural Order 2, question 7, p. 52*). For parties from common law countries an offer stating a fixed time for acceptance will not automatically indicate the irrevocability but would on the contrary typically need further indications to that effect (*Schlechtriem in Schlechtriem/Schwenzer, Art. 16, para. 9 et seq.; Eörsi in Bianca/Bonell, Art. 16, para. 2.2.1*).
142. The Commentary on Art. 2.4 UNIDROIT Principles, which is identical to Art. 16 CISG, specifies that when the offeror comes from a legal background where fixing of a time for acceptance is not sufficient to indicate irrevocability, the offeror will normally not have had such an intention (*UNIDROIT Commentary, Art. 2.4, para. 2.a*). As has been shown in the preceding paragraph, RESPONDENT is from such a legal background. It must thus be admitted that RESPONDENT never intended to declare the offer's irrevocability.
143. Not only were no further indications in favour of the offer's irrevocability given. Rather, by motivating the statement of time with the upcoming promotion, RESPONDENT conveyed that it would not be interested in buying the wine after the 21 June 2006 and thus intended to let the offer lapse with that date. The presumption that the statement of the date was intended to grant CLAIMANT a period for considering the offer is thus rebutted.

C. 2. Irrevocability is not indicated “otherwise”

144. The irrevocability was also not indicated “otherwise”. One might be tempted, as Counsel for CLAIMANT seems to do in its Memorandum of 6 December 2007, to interpret the parties subsequent e-mail communication in a way as to admit an indication of the offer's irrevocability (*Memorandum for CLAIMANT, para. 34*). However, the fact that RESPONDENT asked CLAIMANT to act immediately on its return (*Cl. Exh. 7, p. 15*) cannot be interpreted as indication for the offer's irrevocability in the sense of Art. 16(2)(a) CISG.
145. The wording of Art. 16(2)(a) CISG clearly states that the offer *itself* must indicate the offer's irrevocability. Since the offer itself does not contain further indications the offer was



revocable.

D. CLAIMANT did not act in reasonable reliance according to Art. 16(2)(b) CISG

146. The third restriction to the principle of revocability stipulated in Art. 16(2)(b) CISG is not met either. CLAIMANT did not act in reasonable reliance on the offer's irrevocability.

147. The provision requires two cumulative conditions to be satisfied in order to apply. None of the conditions is met: it was neither reasonable for CLAIMANT to rely on the irrevocability of the offer (1), nor did it act in reliance (2).

D. 1. There could be no reasonable reliance on the irrevocability of the offer

148. An offeree may reasonably rely on the irrevocability of an offer, when it is justified in the particular case (*Schlechtriem in Schlechtriem/Schwenzer, Art. 16, para 11*). This is notably the case when extensive preparation consuming time or money is needed in order to consider acceptance of the offer (*Staudinger/Magnus, Art. 16, para. 13; Enderlein/Maskow, Art. 16, para 8; Brunner, Art. 16, para. 2*). As the word "extensive" indicates and some doctrine expressly states, the criterion of reasonable reliance is not to be admitted easily (*Neumayer/Ming, Art. 16, para. 5b*).

149. In the present case no circumstances exist which would satisfy the conditions. CLAIMANT has not shown in what manner efforts consuming time or money were made with regards to considering acceptance of the offer. Hence, it was not reasonable for CLAIMANT to rely on the irrevocability offer.

150. Certainly doctrine admits that the significance of a statement of a fixed time for acceptance might also apply to Art. 16(2)(b) CISG and not only to Art. 16(2)(a) CISG which expressly addresses statements fixing a period (*Schlechtriem in Schlechtriem/Schwenzer, Art. 16, para. 11; Eörsi in Bianca/Bonell, Art. 16, para. 2.2*). However, Counsel for CLAIMANT's contention that it was reasonable for CLAIMANT to rely on the irrevocability of the offer because of the date invoked in the letter accompanying the offer is not correct (*Memorandum for CLAIMANT, para. 35*). As shown above, the date of 21 June 2006 was recognizably invoked in order to declare the expiration of the offer with that date (*cf. para. 136 et seq.*).

D. 2. There was no act in reliance on the irrevocability of the offer

151. CLAIMANT's reliance on the irrevocability of the offer was not only unreasonable, it did also



not act on it. Actions performed in reliance on the irrevocability of the offer are for example: commencing production, acquiring materials or concluding contracts for those purposes, organizing a tender bid, undertaking of costly calculations, taking employees (*Schlechtriem in Schlechtriem/Schwenzer, Art. 16, para. 11*) or undertaking extensive investigation as to whether the offer should be accepted (*Secretariat Commentary, Art. 14, para. 8*).

152. CLAIMANT has not shown that it acted in reliance. Counsel for CLAIMANT's contention (*Memorandum for CLAIMANT, para. 35*) that the dispatch of the acceptance constituted an act in reliance is faulty. If every acceptance constituted an act in reliance the condition would always be met and the condition of Art. 16(2)(b) CISG as such would be superfluous. Therefore the last exception to the principle of the revocability is not met either.

E. Summary of ISSUE IV

153. It has been shown that none of the three restrictions to the principle of revocability of the offer was met. Neither was RESPONDENT's revocation untimely, nor did the offer indicate its irrevocability, nor did CLAIMANT act in reasonable reliance to the offer's irrevocability. The fact that CLAIMANT was unaware of the revocation due to an internal network failure is not imputable to RESPONDENT. RESPONDENT thus validly terminated its offer on 18 June 2006. CLAIMANT's acceptance of 19 June 2006 could not have an effect. Therefore, no sales contract was concluded.

ISSUE V: BLUE HILLS DOES NOT FIT THE PARTICULAR PURPOSE

154. Should the Tribunal nevertheless find that a sales contract was validly concluded, Counsel for RESPONDENT submit that "Blue Hills 2005" would not have been conform to the contract requirements.

155. In response to Counsel for CLAIMANT's allegations that the wine was ready to be delivered and conforming to the agreement (*Memorandum for CLAIMANT, para. 41 et seq.*) it will be demonstrated that CLAIMANT was bound to the particular purpose made known to it (A), for which "Blue Hills 2005" was not fit (B).



A. CLAIMANT had the obligation to deliver goods fit for the particular purpose

156. When the seller knows the buyer's particular purpose, he has the obligation to deliver goods which are fit for this purpose (*Audit, para. 98; Schlechtriem in Schlechtriem/Schwenzler, Art. 35, para. 18; Neumayer/Ming, Art. 35, p. 279; Heuzé, para. 297*).
157. Art. 35(1) CISG states that “*the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*”. When the parties' agreement is insufficient to determine the conformity with the goods, paragraph (2) plays a suppletive role by setting a series of objective standards by which the performance must be judged (*Bianca in Bianca/Bonell, Art. 35, para. 2.2.; Neumayer/Ming, Art. 35, p. 271*).
158. In its letter to RESPONDENT, CLAIMANT wrote that “Blue Hills 2005” is “*an outstanding choice for a promotion of quality wines*” (*Cl. Exh. 1, p. 9*). With this declaration, CLAIMANT warranted that the goods would be fit for RESPONDENT's particular purpose. According to Art 35(2)(b) CISG, the particular purpose which was expressly made known to CLAIMANT before the alleged conclusion of the contract is thus binding (1). RESPONDENT relied and could reasonably rely on CLAIMANT's skill and judgement (2) and CLAIMANT is not exempt from liability (3).

A. 1. CLAIMANT knew the particular purpose before the alleged contract conclusion

159. The first condition of the application of Art 35(2)(b) CISG is that the fitness for any particular purpose was expressly or impliedly made known to the seller at the time of the conclusion of the contract. In May 2006 RESPONDENT attended the Durhan fair in the search for wine fit for the promotion it was planning for October 2006 (*Statement of Claim, para. 5, p. 4*). A few days after the event, CLAIMANT wrote to RESPONDENT to suggest a wine fit for the particular purpose: “Blue Hills 2005” (*Cl. Exh. 1, p. 9*). Therefore CLAIMANT knew the particular purpose for the wine promotion at the time of the alleged conclusion of the contract.
160. A seller learning of a particular purpose can raise an objection if it does not want to be bound by it (*Slechtriem in Schlechtriem/Schwenzler, Art. 35, para. 21*). In the case at hand, CLAIMANT had on the contrary confirmed that the wine was fit for the particular purpose: “*You are making a very wise choice in choosing Blue Hills 2005 as the lead wine in your promotion. I cannot but comment once again that this is an exceptionally fine wine that will certainly satisfy all of your customers*” (*Cl. Exh. 3, p. 11*). Therefore, CLAIMANT is bound by



the particular purpose.

A. 2. RESPONDENT relied on CLAIMANT's skill and judgement

161. The second condition of the application of Art 35(2)(b) CISG is that the buyer has relied and it was reasonable for him to rely on the seller's skill and judgement.
162. Often, when the particular purpose is made known to the seller, the buyer relies on the seller's skill and judgement concerning the fitness for the purpose (*Bianca in Bianca/Bonell, Art. 35, para. 2.5.2*). Such reliance also depends on the respective technical competences of the parties (*Heuzé, para. 298*). This is the common rule that if the seller is a specialist or expert in the manufacture or procurement of goods for the particular purpose intended by the buyer (*Schlechtriem in Schlechtriem/Schwenzer, Art. 35, para. 23*). *In casu* the seller is a producer and marketer of wine, selling wine both domestically and for export (*Statement of Claim, para. 2, p. 4*). It has a long history of wine production (*Cl. Exh. 1, p. 9*) and therefore CLAIMANT knew the different techniques to make the wine and the different components which could be added. There is a noteworthy difference between the parties' activities and RESPONDENT could reasonably rely on the skill and judgement of CLAIMANT, specialist in wine production.
163. Reliance on the seller's skill and judgement cannot be denied because of the fact that RESPONDENT tried the wine at the fair (*Procedural Order 2, para. 15, p. 53*). RESPONDENT did not settle its choice at the time of the fair: it was only after CLAIMANT contacted it stating that "Blue Hills 2005" would be perfect for the wine promotion that RESPONDENT decided to purchase the wine. In the letter accompanying the purchase order, RESPONDENT once again recalled the importance of this wine promotion (*Cl Exh. 4, p. 12*). "Blue Hills 2005" was thus not chosen because of the sample, but because of CLAIMANT's assertion that it would be fit for the promotion.
164. In any case Article 35(2)(b) CISG must take priority if the seller confirms that the goods are fit for a particular purpose and the buyer is unable to check this by reference to the sample or model (*Schlechtriem in Schlechtriem/Schwenzer, Art. 35, para. 25*). In the case at hand, even though RESPONDENT did try the wine, the diethylene glycol was undetectable (*Procedural Order 2, para. 13, p. 53*). The presence of diethylene glycol cannot be determined by tasting the wine (*Procedural Order 2, para. 13, p. 53*). Furthermore, the buyer has no obligation to undertake deep analysis of the goods through complex or sophisticated professional methods



or to ask for technical expertise before the conclusion of the contract (*Bianca in Bianca/Bonell*, Art. 35, para. 2.8.2; *Enderlein/Maskow*, Art. 35, para. 20). As experienced as it was (*Procedural Order 2*, para. 15, p. 53), RESPONDENT's buying team could not have discovered the diethylene glycol unless it examined the product in a laboratory and conducted chemical analyses as Professor Ericson did (*Cl. Exh. 13*, pp. 21-22). Even the jury at the fair failed to notice any irregularity (*Cl. Exh. 1*, p. 9).

165. In conclusion, RESPONDENT could not but rely on CLAIMANT's skill and judgement with regards to the choice of a leading wine for the promotion.

A. 3. CLAIMANT is not exempt from liability

166. Counsel for CLAIMANT argued that under Art. 80 CISG CLAIMANT was exempt from liability (*Memorandum for CLAIMANT*, para. 45, p. 22). This question can only be treated at a further stage of the procedure, as it does not relate to the question of the fitness for the particular purpose (*Procedural Order 1*, para. 11, p. 50). However, it might be argued that CLAIMANT would be exempt from liability under Art. 35(3) CISG, if RESPONDENT knew or could not have been unaware of the lack of conformity of the goods.

167. It has already been assessed above (*cf. para. 164*) RESPONDENT could not be aware of the presence of diethylene glycol in the wine. An attractive price for a product does not constitute an indication of a potential lack of conformity. With regards to the price, quality can be more or less good within a tolerable degree, but not conspicuously below the standard reasonably expectable by the buyer (*Bianca in Bianca/Bonell*, Art. 35, para. 3.1).

168. Therefore, one cannot argue that the initial price of "Blue Hills 2005" (*Cl. Exh. 1*, p. 9) was lower than what one would reasonably expect of a wine of quality. Other wines in its price bracket were of good quality (*Cl. Exh. 2*, p. 10). In conclusion, when a normal examination of the product does not reflect the lack of conformity, the seller is responsible for hidden defects that would need an unusual examination in order to be detected (*Audit*, para. 102; *Bianca in Bianca/Bonell*, Art. 35, para. 2.8.2; *Granulated plastic case, Germany (1996)*). CLAIMANT had thus no reason to be exempt from delivering wine fit for the particular purpose.

B. Blue Hills 2005 is not fit for the particular purpose

169. It is true that the amounts of diethylene glycol present in "Blue Hills 2005" do not exceed the permitted amounts in consumables according to the legislations of Equatoriana and



Mediterraneo (*Procedural Order 2, para. 11, p. 53*). However, the particular purpose excluded the presence of diethylene glycol in the wine which was to lead the promotion (1). In any case a wine flawed by controversy like “Blue Hills 2005” could not have been used for the promotion (2).

B. 1. The wine leading the promotion could not contain diethylene glycol

170. The fitness of the goods must be examined in light of the parties’ understanding of the particular purpose. It is a question of interpretation of what reasonable parties would have agreed upon as qualities conforming to the contract (*Schlechtriem in Schlechtriem/Schwenzer, Art. 35, para. 12*).

171. Art. 8 CISG helps to determine the understanding of the parties at the moment of the conclusion of the contract (*Farnsworth in Bianca/Bonell, Art. 8, para. 1.1; Honnold, Art. 8, para. 105*). CLAIMANT declared that “Blue Hills 2005” was perfectly fit for the particular purpose (*Cl. Exh 1, p. 9; Memorandum for CLAIMANT, para. 44, p. 22*). CLAIMANT was aware of the presence of diethylene glycol in the wine (*Procedural Order 2, question 22, p. 54*). Its understanding that this wine was fit would have nevertheless been binding if RESPONDENT knew the presence of diethylene glycol or could not have been unaware of it. However, until the discovery of the newspaper articles RESPONDENT did not know that Blue Hills 2005 contained diethylene glycol (*Cl. Exh. 9, p. 17*) and it was not reasonable for it to expect its presence (*cf. para. 164 et seq.*). Consequently, CLAIMANT’s intent cannot prevail neither under Art. 8 (1) nor (2) CISG.

172. RESPONDENT’s statement concerning the “*right character to take the lead in (its) promotion*” (*Cl. Exh. 2, p. 10*) was made with the intent that the wine could not contain such a substance as diethylene glycol. Pursuant to Art. 8 (2) CISG its intent prevails if a reasonable person of the same kind and in the same circumstances as the other party would have had the same understanding as it (*Farnsworth in Bianca/Bonell, Art. 8, para. 2.4; Roland Schmidt GmbH v. Textil, Switzerland (2000); Fabrics Case, Switzerland (1997)*).

Therefore a reasonable person of the same kind as CLAIMANT is an experienced wine producer and retailer for both national and international market (*Statement of Claim, para. 2, p. 4; Cl. Exh. 1, p. 9*). Therefore, certain knowledge on wine and trade usages can be expected. As mentioned above, it is presumed of the producer to know which additives can be used without risking adulterating the wine. In relation to the particular purpose, even though the



seller does not have the obligation to enquire on the buyer's needs, it has the duty, on the other hand, to ask for any information pertinent to the satisfaction of these needs, when these needs were made known (*Heuzé, para. 297*).

173. Diethylene glycol is “an organic compound described by the structural formula $HO-CH_2-CH_2-O-CH_2-CH_2-OH$. It is a clear, hygroscopic, odorless liquid. It is miscible with water and polar organic solvents such as alcohols and ethers” (*Diethylene glycol in Chemie.DE*). Like ethylene glycol, a solution of diethylene glycol and water is used as a coolant. Both have the characteristic to lower the freezing point of water and elevate its boiling point making it more suitable for hot climates (*ibid.*). Diethylene glycol is found as a component in antifreeze and gas conditioning formulations, brake fluids, cosmetics, lubricants, mould-release agents, inks, book-binding adhesives, and dyeing agents; it is used as a softening agent for textiles, and as a plasticizer for cork, adhesives, paper, and packaging materials (*IPCS Monograph*). It is not common in wines.

174. Also oenological standards do not permit the use of diethylene glycol for quality wines. Reference to usages can be made pursuant to Art. 8(3) CISG. Art. 9(2) CISG further provides that the parties are considered to have impliedly made applicable to their contract a usage of which they knew or ought to have known and regularly observed. The party's regular activity in the relevant usage's sphere of observance (whether place or industry) is sufficient to apply the trade's standards (*Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 9, para. 19; Timber case, Austria (1998); Wood Case, Austria (2000); Peters v. Kulmbacher Spinnerei Produktions, Netherlands (1996)*). For instance, in the *Skin care products case* the Court has decided that the seller “must have been aware of the international contents of the shelf-life concept” (*Skin care products case, Finland (1998)*).

175. In the present case CLAIMANT should have been aware that a few years ago, in Austria, hundreds of thousands of gallons of Austrian wine have been contaminated with diethylene glycol, provoking an international polemic destroying the Austrian wine market even if the amount of diethylene glycol in the Austrian wine was less dangerous than the alcohol (*Prial in The New York Times, 24 July 1985; Tagliabue in The New York Times, 2 August 1985*). The International Organisation of Vine and Wine (O.I.V.) limits the authorized content of diethylene glycol to 10 mg/l (*Resolution OENO 18/2002*) - quantities which are largely exceeded in the “Blue Hills 2005” (0.15 g DEG per 75 cl bottle of “Blue Hills 2005” corresponds to 200 mg/l) (*Cl. Exh. 13, p. 21*). A reasonable person of the same kind as CLAIMANT could not have understood that a wine containing such amounts of diethylene



glycol is “*an exceptionally fine wine that will certainly satisfy all (RESPONDENT’s) customers*” (Cl. Exh. 3, p. 11).

176. Art. 8(3) CISG eventually provides that in determining the understanding of the parties due consideration is to be given to their subsequent conduct (*Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8, para. 50*). CLAIMANT reacted on RESPONDENT’s revocation by declaring that “*the statement that anti-freeze fluid ha(d) been used in the production of wine from the Blue Hills region of Mediterraneo is completely incorrect*” (Cl. Exh. 10, p. 18). CLAIMANT further announced that it would sue the publisher of the articles in its country (*ibid.*). Therefore it must be deduced that if CLAIMANT considers as outrageous the alteration of wine with a substance which is used as antifreeze it he may have not have understood that wine containing diethylene glycol is fit for a promotion.

B. 2. A controversial wine cannot lead a promotion

177. If the buyer cannot use the goods for the particular purpose it can claim non-conformity of the goods based on Art. 35(2)(b) CISG (*Heiz, p. 656*).

178. Direct evidence that the standards of Art. 35 CISG were violated was accepted by the courts (*UNCITRAL Digest, Art. 35, para. 15; Wine Case, Germany (1995)*). In the present case, after the publication of the articles in *Equatoriana* (Cl. Exh. 9, p. 17), it became evident that RESPONDENT could not use “Blue Hills 2005” to promote in its supermarkets.

179. In fact a promotion should enable to increase the availability and the consumption of a product. With a controversial product this objective cannot be achieved. Already slight doubts on the healthiness of the product can affect sales in a negative manner.

180. Certainly “*food must be fit to eat; even reasonable suspicion that the food may be contaminated constitutes a lack of conformity*” (*Schwenzer in Schlechtriem/Schwenzer, Art. 35, para. 14*). In the *Frozen Pork Case, German (2004)*, the court stated that the existence of a suspicion of contamination meant already a fault and that the seller had to prove that the suspicion was unfounded. “Blue Hills 2005” contains a substance, diethylene glycol, which is commonly used as anti-freeze. CLAIMANT tried to prove that the wine was not contaminated by invoking Professor Ericson’s report (*CLAIMANT’s Memorandum, para. 44, p. 22; Cl. Exh. 13, p. 22*). However, this report does not dissipate the doubts concerning diethylene glycol: Prof. Ericson admitted that diethylene glycol can be used as antifreeze and that there exists a controversy over the amount of this substance that can safely be consumed (Cl. Exh. 13, p.



21). Therefore CLAIMANT failed to dissipate the suspicion on the presence of diethylene glycol in “Blue Hills 2005”.

181. The nature of the wine promotion forbids the composition of the leading product to be this controversial. According to the decision rendered in the *Meat Case, Switzerland (1998)* a seller must take in consideration that the buyer can lose clients since a deficient product can cause difficulties between it and its customers. After the wine scandal in Austria, sales figures dropped sharply destroying the Austrian wine market for many years (*cf. para. 174*). A similar development in the sale of “Blue Hills 2005” is to be expected. Following the revelation of the scandalous techniques of production sales of the wine have slowed down (*Statement of Claim, para. 14, p. 6; Procedural Order 2, para. 21, p. 54*).

182. It was therefore fundamental for RESPONDENT that the wine would be fit for its promotion. RESPONDENT is in fact the largest supermarket operator in Equatoriana with about 2'000 outlets retailing other products than wine (*Statement of Claim, para. 4, p. 4*) and a defective product used as a feature item in such a large promotion can create a commercial catastrophe. Such failure to fit the particular purpose, causing further harm to the reputation of the aggrieved party, constitutes a fundamental breach according to Art. 25 CISG (*Schwenzer in Schlechtriem/Schwenzer, Art. 35, para. 32; Meat Case, Switzerland (1998); Soyprotein products case, Switzerland (2003)*).

C. Summary of ISSUE V

183. RESPONDENT made known to CLAIMANT the particular purpose before a contract could have been concluded. It relied on CLAIMANT's skill and judgement to provide a wine that could lead the major promotion it was planning. No reason permitted CLAIMANT to be exempt from its liability. Diethylene glycol does not conform to the parties' understanding of quality wine fit for a wine promotion. What is more “Blue Hills 2005” could not have been used for its particular purpose. Therefore, RESPONDENT was in its rights to refuse to take the delivery.



REQUEST FOR RELIEF

In response to the Statement of Claim, the Amendment to Request for Arbitration, the Memorandum for CLAIMANT and the Tribunal's procedural orders Counsel for RESPONDENT make the above submissions. Counsel for RESPONDENT respectfully request that the Honourable Tribunal:

- grants a stay of the arbitral proceedings pending decision of the Commercial Court of Vindobona, Danubia, on the existence or non-existence of an arbitration agreement between the parties (ISSUE I);
- finds that no arbitration agreement was formed between the parties and consequently denies its jurisdiction over the dispute (ISSUE II);
- finds that RESPONDENT has not breached Art. 17.3 JAMS and neither has to pay CLAIMANT's costs of litigation nor terminate the litigation before the Court (ISSUE III);
- finds that no valid sales contract was concluded between the parties (ISSUE IV);
- finds that "Blue Hills 2005" was not fit for the particular purpose which was made known to CLAIMANT (ISSUE V).

Sarah CHOJECKI

(Signed)

Antonia DIETSCHÉ

(Signed)

Aurélien FLÜCKIGER

(Signed)

Nathalie HOFMANN

(Signed)

Laure MEYER

(Signed)

Alexia SENN

(Signed)

17 January 2008