Johann Wolfgang Goethe University / Frankfurt am Main

FIFTEENTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

14 – 20 March 2008

MEMORANDUM FOR RESPONDENT

On behalf of:	Against:
Equatoriana Super Markets S.A.	Mediterraneo Wine Cooperative
415 Central Business Centre	140 Vineyard Park
Oceanside, Equatoriana	Blue Hills, Mediterraneo
(RESPONDENT)	**(CLAIMANT)**

Counsel

Tobias Bastian • Anja Becker • Federico Parise-Kuhnle • Philipp Stegmann

JAMS

280 Park Avenue

West Bldg., 28th Floor

New York, NY 10017

United States of America

17 January 2008

JAMS International Arbitration Case No. 0123456789

RESPONDENT: Equatoriana Super Markets S.A.
415 Central Business Centre
Oceanside, Equatoriana

Represented by: Tobias Bastian
Anja Becker
Federico Parise-Kuhnle
Philipp Stegmann

Johann Wolfgang Goethe University
Frankfurt am Main, Germany

v.

CLAIMANT: Mediterraneo Wine Cooperative
140 Vineyard Park
Blue Hills, Mediterraneo

Represented by: Naomi Briercliffe
Matthew Brown
Gün Burak Erusta
Alexandra Goetz-Charlier
Angelina Grozdanova
Bahar Hatami Alamdari
Ahmed Khalil
Sara Paradisi
Hendrik Puschmann
Florence Richard de Vesvrotte
Nicholas Scott

The College of Law of England and Wales
London, United Kingdom

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Index of Abbreviations

$	dollar
AC	Advisory Council
AG	Amtsgericht / German District Court
app.	approximately
Art. / Artt.	Article/Articles
BayObLG	Bayerisches Oberstes Landesgericht
BGH	Bundesgerichtshof / German Federal Court of Justice
Bldg.	Building
cf.	confer
ch.	chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claim / Claimant
Co.	Company
CPC	Zivilprozessordnung / German Code of Civil Procedure
Corp.	Corporation
DAL	Danubian Arbitration Law
DM	Deutsche Mark / German mark
e.a.	emphasis added
e.g.	exempli gratia / for example
e-mail	electronic mail
ed.	edition
et al.	et alii / and others
et seqq.	et sequens / and the following
Ex. / Exs.	Exhibit / Exhibits
Fed. Cl.	United States Court of Federal Claims
fn.	footnote

i.e.	id est / that is
Inc.	Incorporated
JAMS	Judicial Arbitration and Mediation Service
JAMS Rules	JAMS International Arbitration Rules
LG	Landgericht / German Regional Court
lit.	liter / letter
Ltd.	Limited
Mr.	Mister
Ms.	Miss
ML	Model Law
MLEC	Model Law on Electronic Commerce
NJW	Neue Juristische Wochenschrift / German Law Journal
No.	Number
OLG	Oberlandesgericht / German Higher Regional Court
p. / pp.	page / pages
P.O.	Procedural Order
para. / paras.	paragraph / paragraphs
RR	Rechtsprechungsreport / judicial report
S.A.	Société Anonyme
SchiedsVZ	Zeitschrift für Schiedsverfahren / German Arbitration Journal
sec. / secc.	section / sections
St. Cl.	Statement of Claim
USSR	Union of Soviet Socialist Republics
U.N. / UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
U.S. / US	United States of America
v.	versus / against
Vol.	Volume

Statement of Facts

RESPONDENT is the largest operator of super markets with about 2,000 outlets and the largest retailer of wine in Equatoriana.

CLAIMANT is a wholesaler of wines from Mediterraneo. It produces and markets wine from grapes grown by its members.

7-10 May 2006 During the wine fair in Durhan, Oceania, RESPONDENT tasted CLAIMANT's red wine Blue Hills 2005.

1 June 2006 CLAIMANT acknowledges RESPONDENT's intention to feature Blue Hills 2005 as the lead wine in its planned wine promotion.

10 June 2006 RESPONDENT sent CLAIMANT an offer to purchase 20,000 cases of Blue Hills 2005. The offer contained an arbitration clause. In a cover letter, RESPONDENT announced the offer to lapse on 21 June 2006.

11 June 2006 CLAIMANT confirmed receipt of the offer by e-mail and informed RESPONDENT that Mr. Cox, CLAIMANT's responsible sales manager, would return to office on 19 June 2006. RESPONDENT urged CLAIMANT to act on the offer as soon as possible.

18 June 2006 All of Equatoriana's newspapers had a prominent article reporting that anti-freeze had been used to sweeten wine in the Blue Hills area. RESPONDENT revoked the offer by e-mail.

19 June 2006 CLAIMANT signed the contract and sent it by courier. In the evening, CLAIMANT took notice of RESPONDENT's revocation. The e-mail containing it was not retrieved earlier because CLAIMANT's server had a software failure.

15 July 2006 RESPONDENT received a report from Prof. Ericson, a wine expert. The report revealed that diethylene glycol, a potential anti-freeze, was used to sweeten Blue Hills 2005.

18 June 2007 JAMS received CLAIMANT's request for arbitration.

4 July 2007 RESPONDENT petitioned to the Commercial Court of Vindobona to decide whether the Arbitral Tribunal has jurisdiction in this case.

I. A stay of the arbitral proceedings should be granted

1 RESPONDENT respectfully requests the Arbitral Tribunal to grant a stay of the arbitral proceedings because the application to the Commercial Court of Vindobona, Danubia (hereinafter Commercial Court) was admissible and provides a legitimate reason for a stay. The principle of *Kompetenz-Kompetenz* neither bars the Commercial Court from ruling on the question of jurisdiction (**A.**) nor would a continuation of the arbitral proceedings pursuant to Art. 8 (3) Danubian Arbitration Law (hereinafter DAL) be reasonable in the case at issue (**B.**).

2 Prior to the constitution of the Arbitral Tribunal, RESPONDENT commenced an action in the Commercial Court to declare that no valid arbitration agreement exists between the parties. This action has been brought in compliance with Art. 8 (2) DAL which stipulates that

> "[p]rior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible".

3 Therefore, the Arbitral Tribunal should respect the law of Danubia being the law at the seat of this arbitration by staying its proceedings while the action on the validity of the arbitration agreement is still pending in the Commercial Court.

A. The principle of *Kompetenz-Kompetenz* does not bar the Commercial Court on rendering a decision on the validity of the arbitration agreement

4 First of all, RESPONDENT agrees with CLAIMANT's basic submission on the Arbitral Tribunal's power to rule on its own jurisdiction according to the principle of *Kompetenz-Kompetenz* (Memorandum for Claimant, para. 2). However, the application of this principle does not contradict RESPONDENT's petition to the Commercial Court. The principle of *Kompetenz-Kompetenz* is not to be understood as prohibiting a national court's decision on the matter of jurisdiction until an arbitral award is finally rendered (Schlosser in Stein/Jonas, sec. 1032, para. 11).

5 The *Kompetenz-Kompetenz* principle has been developed to overcome the conceptual difficulties arising out of any decision by arbitrators on their own jurisdiction (Lew/Mistelis/Kröll, ch. 14, para. 13). Any decision by an arbitral tribunal that no arbitration agreement was concluded would include a simultaneous finding that the tribunal also lacked jurisdiction to decide on its own jurisdiction. By avoiding the necessity of a confirming court decision, the principle of *Kompetenz-Kompetenz* merely serves a practical purpose. It does not affect the authority of national courts to rule on the Arbitral Tribunal's jurisdiction. This approach is acknowledged by the Danubian Arbitration Law, which for example in Art. 16 (3) DAL provides the parties with the opportunity

to challenge a "final" arbitral award within thirty days after having received notice of that ruling. Thus, excluding national courts from ruling on the matter of jurisdiction prior to an arbitral tribunal would violate the understanding of the *Kompetenz-Kompetenz* principle as acknowledged by the Danubian Arbitration Law.

6 In addition, the review by courts cannot be excluded by the parties (Voit in Musielak, sec. 1032, para. 3). CLAIMANT's submission that such an exclusion were in effect as both parties had agreed on an arbitration clause which would apply to "all issues out of and in relation to the dispute including the formation of the agreement itself" (Memorandum for Claimant, paras. 14, 25) cannot convince. The formation of an arbitration agreement cannot be covered by itself exclusively. A party denying to have ever agreed to arbitration would otherwise be deprived of all means to protect itself from being dragged into arbitration. This contravenes the principle of party autonomy. Indeed, a party that did neither wish nor intend to waive its fundamental right to have any disputes resolved by ordinary state courts following a public hearing (cf. the fair trial rights guaranteed by Art. 6 European Human Rights Convention) would otherwise be necessarily forced to have the jurisdictional issue resolved by an arbitral tribunal (Kasolowsky/Robinson, p. 461). Thus, the *Kompetenz-Kompetenz* that is granted to the Arbitral Tribunal cannot exclude the national courts.

B. Even under the terms of Art. 8 (3) DAL a stay of the arbitral proceedings is reasonable

7 Contrary to CLAIMANT's assertion (Memorandum for Claimant, paras. 1-16), even an application of Art. 8 (3) DAL would not lead to the continuation of the arbitral proceedings since the parties' envisioned arbitral agreement must be understood as favoring a stay of the arbitral proceedings in the present circumstances (**1.**). Additionally, a decision of the Commercial Court is formative for later stages of enforcement (**2.**).

8 Art. 8 (3) DAL reads as follows

> "[w]here an application to court is made, arbitral proceedings may nevertheless be commenced or continued".

Using the term "may" rather than "shall" or "must" provides the Arbitral Tribunal with discretion whether to stay or continue its proceedings (cf. A/40/17, para. 92; Dore, p. 103). By exercising this discretion, RESPONDENT respectfully asks the Arbitral Tribunal to grant a stay of its proceedings.

1. The parties' intention favors a stay of the arbitral proceedings

9 A stay of the proceedings meets the original intent of CLAIMANT and RESPONDENT. The

parties would have chosen the DAL which entitles to petition to the Commercial Court and provides for a stay of the arbitral proceedings (**a.**). Staying the arbitral proceedings is also the general rule in case of pending court proceedings (**b.**). Furthermore, a stay of the arbitral proceedings would be equally beneficial to RESPONDENT and CLAIMANT (**c.**).

a. The parties would have chosen DAL which entitles to petition to the Commercial Court and provides for a stay of the arbitral proceedings

10 The suggested arbitration clause stipulated Danubia as seat of arbitration. CLAIMANT neither rejected this nor the application of the DAL being the *lex arbitri*. In fact, CLAIMANT referred in its memorandum several times to the DAL as the applicable procedural law (Memorandum for Claimant, paras. 2, 4, 10-15). Consequently, if the Arbitral Tribunal were to find that there is a valid arbitration agreement, the DAL would govern any arbitration under this agreement.

11 CLAIMANT also never suggested to exclude the application of certain provisions of the DAL. Thus, the opportunity of both parties to apply to the national courts according to Art. 8 (2) DAL to determine the validity of the arbitration agreement reflects the parties' intent which shall be respected by the Arbitral Tribunal by staying its proceedings.

12 Furthermore, contrary to CLAIMANT's assertions (Memorandum for Claimant, para. 34), the existence of Art. 17.3 JAMS Rules does not contravene this intention. Art. 17.3 JAMS Rules states that

> "[b]y 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".

13 Yet, CLAIMANT neglects Art. 1.5 JAMS Rules which constitutes that

> "[JAMS] Rules will govern the conduct of the arbitration <u>except where any of these Rules is in conflict with a mandatory provision</u> of applicable arbitration law of the place of the arbitration, <u>that provision of law will prevail</u>" [e.a.].

As Art. 8 (2) DAL is mandatory, it prevails over any JAMS Rules provision.

14 Commentaries on the verbatim sec. 1032 (2) of the German Code of Civil Procedure (hereinafter CPC) emphasize that this provision cannot be ruled out by any agreement of the parties and is consequently mandatory (Voit in Musielak, sec. 1032, para. 12; Paulsson/Petrochilos, p. 99 (web source)). Danubia has copied Art. 8 (2) DAL from the CPC (P.O. No. 2, para. 2). In conformity with the desire for uniformity of law in international arbitration (UNCITRAL Guide, para. 38), the interpretation of Art. 8 (2) DAL should follow the same standards that are applicable to

sec. 1032 (2) CPC. This approach is reasonable in order to ensure conformity and clarity in international dispute settlement. As a result, Art. 8 (2) DAL should be attributed the same mandatory character as sec. 1032 (2) CPC.

15 Moreover, the fact that Art. 8 (2) DAL deviates from its prototype in the UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL ML) is a strong indicator that it is meant to be mandatory. Any legal system that on the one hand adopts a model for the purpose of having an internationally standardized law but on the other hand deviates from this model is likely to have substantiated reasons. Art. 8 (2) DAL was rendered for the purpose of finding a fast and final decision over the matter of an arbitral tribunal's jurisdiction (cf. Schlosser in Stein/Jonas, sec. 1032, para. 21; Weigand, p. 710). This provision reflects the intention to avoid going through arbitral proceedings that absorb time and resources before even having determined the existence of an arbitration agreement (Windthorst, p. 230). As a result, drafting Art. 8 (2) into the DAL should not only be seen as mere deviation of the UNCITRAL ML but rather as an enhancement. Therefore, it can be assumed that the Danubian legislators set great value on the adherence of Art. 8 (2) DAL.

16 Additionally, the wording of Art. 8 (2) DAL sustains its mandatory character. The Danubian legislators did not include any phrase like "unless the parties have agreed otherwise". The provisions of the UNCITRAL ML that allow the parties to diverge from its legal prescriptions usually contain such wording (cf. Artt. 3 (1), 17, 21, 23 (2), 25, 26, and 33 (1), (2) UNCITRAL ML). Even though Art. 8 (2) DAL is the only amendment to the UNCITRAL ML (St. Cl., para. 8), the UNCITRAL ML serves as a basis for the remaining provisions of the DAL. For systematic reasons, it has to be assumed that if it were intended that parties are permitted to exclude Art. 8 (2) DAL, this provision would have contained a congruent wording. Such omission can only be interpreted as indicating the mandatory character of this provision.

17 Finally, Art. 8 (2) DAL is one of the few provisions that even apply if the place of arbitration is not within the territory of the seat of arbitration (cf. Art. 1 (2) DAL). Providing Art. 8 (2) DAL with an exceptional character in regard to the majority of all other provisions of the DAL emphasizes all the more its importance and its binding effect.

18 Consequently, Art. 8 (2) DAL is mandatory and, therefore, prevails over Art. 17.3. JAMS Rules according to Art. 1.5 JAMS Rules. Hence, the parties' intended agreement contained the permission to petition to the Commercial Court.

b. Staying the arbitral proceedings is the general rule

19 Since parallel proceedings on the same dispute are unequivocally undesirable, staying the arbitration proceedings awaiting the court's judgment is generally suggested (Albers in Baumbach et. al, sec. 1032, para. 10; Saenger in Saenger, sec. 1032, para. 18; Reichold in Thomas et al., sec. 1032, para. 6; Zimmermann, sec. 1032, para. 3). As Art. 8 (2) DAL is copied from sec. 1032 (2) CPC (P.O. No. 2, para. 2), the interpretation of sec. 1032 (2) CPC by courts and legal scholars should be taken into consideration when determining the scope of Art. 8 (2) DAL. Following their interpretation, staying the arbitral proceedings when a court is petitioned to rule upon the question of jurisdiction in accordance with Art. 8 (2) DAL is the general rule.

20 RESPONDENT admits that there are situations in which legal scholars opine that an arbitral tribunal should not grant a stay of proceedings. None of these situations is, however, present in the case at issue. One of the exceptions is that dilatory tactics which only aim at obstructing the proceedings should be prevented (Saenger in Saenger, sec. 1032, para. 18; Reichold in Thomas et al., sec. 1032, para. 6). RESPONDENT, however, strongly rejects CLAIMANT's assertion (Memorandum for Claimant, para. 9) that it in any way acted obstructively.

21 CLAIMANT bases this allegation on the fact that RESPONDENT regularly incorporates arbitration clauses into its purchase orders (Memorandum for Claimant, para. 12). However, this is irrelevant in the present case since the arbitration agreement was never validly concluded. Moreover, the prior arbitration clauses, CLAIMANT is referring to, would not have been operative either if these agreements never came into existence. Hence, RESPONDENT had no obligation to arbitrate and did not employ dilatory tactics. Rather, it legitimately exercised its right under Art. 8 (2) DAL in order to certify its position.

22 Another exception is recommended when a stay would likely cause loss of evidence (Albers in Baumbach et al., sec. 1032, para. 10). Yet, no loss of evidence is conceivable in the present case since the entire record of communications between the parties subsequent to the wine fair has been submitted to the Arbitral Tribunal (P.O. No. 2, para. 17).

23 Thus, the present case shows no exceptional circumstance under which the arbitration should be continued. Moreover, RESPONDENT's action before the Commercial Court is to be regarded as a legitimate procedural option since RESPONDENT can rely on Art. 8 (2) DAL. Consequently, the arbitral proceedings should be stayed.

c. Staying the arbitral proceedings would be beneficial to both parties

24 CLAIMANT and RESPONDENT could save unnecessary expenses if the Arbitral Tribunal

decides to stay its proceedings. Parallel proceedings before an arbitral tribunal and a national court generally take time and cost money. If the Commercial Court finds that the Arbitral Tribunal does not have jurisdiction to hear the present dispute, all expenses incurred by the arbitration from now on can be avoided by staying the arbitral proceedings. Additionally, any award rendered by the Arbitral Tribunal prior to this decision could be set aside by the Danubian courts on the ground of lack of jurisdiction (cf. Sanders, p. 176).

25 Even if the Commercial Court were to find that the arbitration agreement is valid, the Arbitral Tribunal could easily continue the proceedings with certainty regarding its jurisdiction. RESPONDENT admits that this situation would undisputedly result in a minor delay of the proceedings. However, when the Commercial Court has already declared the arbitration agreement to be valid this would bind the Danubian courts at a later stage (cf. Saenger in Saenger, sec. 1032, para. 16) and expedite the process of enforcement of the award, thereby possibly compensating any prior delay.

26 Furthermore, CLAIMANT submits that a delay of the arbitral proceedings would be an inefficient use of the Arbitral Tribunal's time (Memorandum for Claimant, para. 3-7). This assertion, however, cannot prevail. The arbitrators would effectively save time if the Arbitral Tribunal stayed its proceedings. The arbitrators would not have to spend their time on working on this dispute but would have the opportunity to proceed with other cases. Thus, in case of a stay, the Arbitral Tribunal's time would not be stressed at all. The arbitrators, thereby, would also avoid the risk that a negative decision on the Arbitral Tribunal's jurisdiction would render their efforts on deciding the matter in vain.

27 As a result, since CLAIMANT as well as RESPONDENT would benefit from a stay of the arbitral proceedings, it is reasonable to assume that both parties intended to agree on a stay in case of parallel court proceedings. The Arbitral Tribunal is therefore requested to follow the parties' intention and stay its proceedings.

2. A decision of the Commercial Court is formative for later stages of enforcement

28 Additionally, RESPONDENT challenges CLAIMANT's submission that a stay of the arbitral proceedings would be unreasonable because the Commercial Court would have the obligation to refer the parties back to arbitration (Memorandum for Claimant, para. 4). CLAIMANT asserts that the Commercial Court would exercise a mere *prima facie* verification of the existence of an arbitration agreement "as courts in jurisdiction with statutes similar to the [DAL] tend to do so" (Memorandum for Claimant, para. 5).

29 To underscore this assertion, CLAIMANT draws a parallel to the Indian Supreme Court ruling on *Shin-Etsu Chemical v. Aksh Optifibre* (Memorandum for Claimant, para. 6). Yet, CLAIMANT is misguided as this decision cannot be regarded as a persuasive case. The decision deals with the scope of review under a provision verbatim to Art. 8 (1) DAL. However, RESPONDENT never relied on Art. 8 (1) DAL but petitioned the Commercial Court pursuant to Art. 8 (2) DAL. CLAIMANT ignores the fact that the Indian Arbitration Act does not contain any provision similar to Art. 8 (2) DAL. Hence, the scope of court review in India alters considerably from the one in Danubia. Therefore, the judge's rationale in that case had different pre-conditions and may not be applied to the case at issue.

30 The record does not provide any information as to the interpretation of Art. 8 (2) DAL by the Danubian courts. Nonetheless, Art. 8 (2) DAL's model, sec. 1032 (2) CPC (P.O. No. 2, para. 2), was drafted to grant a binding and final decision on the question of jurisdiction (cf. Albers in Baumbach, sec. 1032, para. 9; Schroeter, p. 288). A full review is necessary to reach a decision that would bind the Danubian courts at a later stage. A court properly seized of the jurisdictional issue under sec. 1032 (2) CPC also "is to make a full determination [on the matter of jurisdiction]" (BayObLG 25 October 2001; Barceló, p. 1031; Münch in Rauscher, sec. 1032, para. 11; Schlosser in Stein/Jonas, sec. 1032, para. 21, Schroeter, p. 294). Therefore, the Commercial Court will also exercise a full review of the arbitration agreement to reach a binding and final decision as anticipated by Art. 8 (2) DAL.

31 As a result, staying the arbitral proceedings would be more effective. The Commercial Court's full review on the arbitration agreement will end in an uninterrupted and definitive decision on the question of jurisdiction at an early stage of the proceedings. Therewith, the parties avoid arbitral proceedings which may prove in vain at the stage of enforcement (Lew/Mistelis/Kröll, ch. 14, para. 50; Saenger in Saenger, sec. 1032, para. 18).

32 Although the Arbitral Tribunal could continue the arbitration even against a negative judgment of the Commercial Court, any possibly rendered award would have to be enforced by means of litigation. Any foreign court that would decide on its enforceability is likely to follow the Commercial Court's decision and dismiss a request for enforcement (cf. Schroeter, p. 296; Schlosser in Stein/Jonas, sec. 1061, para. 154). This derives from the fact that the court would evaluate the validity of the arbitration agreement, which is a precondition for an enforceable award, under the same standards as the Commercial Court. Therefore, the court would arrive at the same result. In light of these submissions, RESPONDENT respectfully requests the Arbitral Tribunal to stay its proceedings.

II. The parties did not conclude a valid arbitration agreement

33 Despite CLAIMANT's allegations (Memorandum for Claimant, paras. 17-32), an arbitration agreement has not been concluded between CLAIMANT and RESPONDENT. RESPONDENT revoked its offer to arbitrate in its e-mail of 18 June 2006 (Cl. Ex. No. 9). This revocation was valid as RESPONDENT revoked the offer to arbitrate before CLAIMANT accepted it (**A.**). Furthermore, a potential irrevocability of the purchase order does not extend to the arbitration offer (**B.**).

A. RESPONDENT validly and timely revoked the arbitration clause

34 By sending its revocation of the purchase order, RESPONDENT validly revoked its offer to arbitrate along with its offer to purchase on Sunday, 18 June 2006 (Cl. Ex. No. 9). It is irrelevant that RESPONDENT spoke of "withdrawing" the offer because RESPONDENT clearly communicated its intention not to be bound to the offer any longer (cf. Schnyder/Straub in Honsell, Art. 16, para. 8). A separate revocation of the offer to arbitrate would have been unreasonable (**1.**). The doctrine of separability does not demand for separate revocations either (**2.**). CLAIMANT's alleged acceptance of the offer on 21 June 2006 was therefore too late.

1. A separate revocation of the offer to arbitrate would have been unreasonable

35 Revoking the arbitration agreement separately would have been unreasonable since the offer to purchase and the offer to arbitrate were contained in one single document (Cl. Ex. No. 5). There is no reason why RESPONDENT should now be expected to send two revocations. Such behavior would at its best have caused confusion. Thus, RESPONDENT acted most logically and uncomplicated by sending a single revocation that covered both offers.

36 Moreover, both parties are businessmen. By revoking the "purchase order", RESPONDENT meant what every reasonable businessman would have understood: that the whole content of the document headed "purchase order" was revoked. It can also not be expected that laymen in arbitral issues are aware of the separability of arbitration agreements. RESPONDENT's revocation must therefore be interpreted accordingly. Since there was only one purchase order, a single revocation was sufficient to revoke both offers.

2. The doctrine of separability does not demand for two separate revocations

37 Even under the terms of the doctrine of separability, separate revocations are not required in the case at issue. An arbitration agreement always has to allude to a determined contractual or non-contractual legal relationship (Lörcher et al., para. 43). RESPONDENT extinguished the

arbitration offer along with its correlating purchase offer as it revoked the purchase order (cf. paras. 71-106).

38 While the widely accepted doctrine of separability is certainly not contested by RESPONDENT, it may not be overlooked that this principle is not without exceptions and that such an exception applies in case the arbitration agreement is alleged to have never come into force. It is rather symptomatic that even CLAIMANT itself, trying to support its position, cited two cases that argue strongly in RESPONDENT's favor (Memorandum for Claimant, para. 18-19).

39 Firstly, contrary to CLAIMANT's assertion, in the decision *Heyman v. Darwins Ltd.*, the House of Lords did not establish separability of the arbitration agreement "even if the main contract were found to be void, void *ab initio*, or even illegal" (Memorandum for Claimant, para 18). Conversely, the House of Lords stipulated that "[i]f one party to the alleged contract is contending that [the contract] is void *ab initio*, the arbitration clause cannot operate, for on this view the clause itself also is void". The court set forth that under circumstances similar to the present constellation "disputes […] as to whether the contract which contains the clause has ever been entered into at all […] cannot go to arbitration under the clause" (Heyman v. Darwins Ltd; cf. Harbour v. Kansa; Garnett et al., p. 37-38; Svernlöv/Carroll, p. 44).

40 Secondly, CLAIMANT misguidedly refers to the French Supreme Court decision of the case *Gosset v. Carapelli*. It quotes the court "the agreement to arbitrate […] is always […] completely autonomous in law, which excludes the possibility of being affected by the possible invalidity of the main contract" (Memorandum for Claimant, para. 19). However, CLAIMANT omits to notice the end of this sentence "except in exceptional circumstances" (Gosset v. Carapelli). Following this, separability is not always a matter of course. The term "exceptional circumstances" may very well refer to agreements alleged never to have been entered into (Svernlöv/Carroll, p. 45). The ratio of this decision, thus, applies in favor of RESPONDENT rather than CLAIMANT.

41 In addition, an arbitral tribunal held that an arbitration clause may not be operative in cases where it is clearly indicated by the facts and circumstances that a valid contract never existed between the parties (Elf Aquitaine v. National Iranian Oil; cf. Paulsson/Sanders, p. 5). The need to obviate the separability doctrine in such cases is emphasized even more by another arbitral tribunal in *Pollux. v. Dreyfus*. It held that an arbitration clause is not separable in context of a dispute as to the existence of the main contract (Pollux v. Dreyfus). Since RESPONDENT does

not challenge the validity of the contract but its conclusion in the first place, the rationale of these decisions applies to the case at issue.

42 Thus, the general deduction from the doctrine of separability, that an arbitration clause is not affected by the invalidity of the main contract, cannot apply for arbitration clauses in agreements alleged never to have been entered into (Svernlöv/Carroll, p. 47). If the principle agreement was never entered into, the arbitration agreement contained therein must be affected as well (Svernlöv, p. 118). Hence, since the purchase order was revoked the contract never came into existence (paras. 71-106) and neither did the arbitration agreement.

B. Potential irrevocability of the purchase offer would not extend to the offer to arbitrate

43 Even if one were to assume that the purchase offer was irrevocable due to the expiry date, the offer to arbitrate would still have been validly revoked. According to the doctrine of separability, an arbitration clause, when incorporated in the substantive contract, is a separate and stand-alone contract (Sojuznefteexport v. Joc Oil; Lew/Mistelis/Kröll, ch. 8, para. 7; Yoshida, p. 107). Therefore, the alleged irrevocability would not extend from one contract to the other.

44 RESPONDENT put the expiry date only on the substantive part of the contract, announcing that it "would have to turn to another quality wine as the featured item in our wine promotion if the contract closing were to be delayed beyond 21 June 2006" (Cl. Ex. No. 4). Even if this deadline were to be construed as a fixed time for acceptance, it does not interfere with the fact that RESPONDENT clearly communicated that it no longer wanted to solve disputes by arbitration before the moment the parties purportedly contracted.

45 Concludingly, the arbitration agreement was validly revoked by RESPONDENT's e-mail on 18 June 2006 (Cl. Ex. No. 9). Therefore, the Arbitral Tribunal is respectfully requested to find that no arbitration agreement exists between the parties.

III. A violation of Art. 17.3 JAMS Rules does not entail any consequences

46 As a valid arbitration agreement referring to JAMS Rules never existed between the parties, RESPONDENT could not violate any of its provisions by applying to the Commercial Court. However, even if the Arbitral Tribunal were to find that CLAIMANT and RESPONDENT validly concluded an arbitration agreement, applying to the Commercial Court pursuant to Art. 8 (2) DAL does not interfere with JAMS Rules (**A.**). Yet, even if RESPONDENT violated Art. 17.3 JAMS Rules, this infringement should not entail any penalty (**B.**).

A. A petition to the Commercial Court does not constitute a breach of the JAMS Rules

47 RESPONDENT's action pursuant to Art. 8 (2) DAL before the Commercial Court is not a

breach of JAMS Rules. As Art. 8 (2) DAL is mandatory, it prevails over any contravening provision of the JAMS Rules (**1.**). Furthermore, CLAIMANT's reference to the *delocalized arbitration* theory does not preclude the application of Art. 8 (2) DAL (**2.**).

1. Art. 8 (2) DAL prevails over Art. 17.3 JAMS Rules

48 CLAIMANT submits that RESPONDENT breached Art. 17.3 JAMS Rules by filing an action before the Commercial Court (Memorandum for Claimant, para. 34). However, as shown above (paras. 12-17), Art. 8(2) DAL is mandatory and, thus, prevails over Art. 17.3 JAMS. Therefore, disregarding Art. 17.3 JAMS Rules does not constitute a breach of the JAMS Rules.

2. The application of the *delocalized arbitration* theory does not preclude the application of Art. 8 (2) DAL

49 RESPONDENT challenges CLAIMANT's submission that the application of the *delocalized arbitration* theory would lead the Arbitral Tribunal to refuse the procedural rules at the seat of arbitration and therewith the application of Art. 8 (2) DAL (Memorandum for Claimant, para. 38). This approach runs contrary to CLAIMANT's previous submissions (cf. Memorandum for Claimant, para. 2) as it affirms the application of the DAL to this case.

50 It is true that authors and some national legislation endorse to neglect the seat of arbitration as a decisive factor for the applicable procedural law in absence of a parties' choice (Fouchard/Gaillard/Goldman, para. 1178 with further references). However, assuming RESPONDENT and CLAIMANT concluded an arbitration agreement, they agreed on DAL to govern the alleged arbitration (paras. 10-11). Therefore, the *delocalized arbitration* theory cannot apply in the present case.

51 In case the Arbitral Tribunal were to find that the parties did not agree on DAL as the procedural law, the *delocalized arbitration* theory still would not lead to the preclusion of Art. 8 (2) DAL. Even supporters of the *delocalized arbitration* theory acknowledge that "irrespective of the law [that] governs the [arbitral] procedure", the mandatory provisions of the law of the country in which an action can be brought to set an award aside must be taken into account (Fouchard/Gaillard/Goldman, paras. 1193-1194). Since Danubia is the seat of the arbitration, an action to set aside the award would be admissible pursuant to Art. 34 DAL (Weigand, p. 1277). Thus, the mandatory provisions of the DAL shall be taken into account by the Arbitral Tribunal.

52 All the more, Art. 8 (2) DAL is a non-territorial provision pursuant to Art. 1 (2) DAL. Therefore, a party can rely on this provision even if the place of arbitration is in a different state and the only connection to DAL would be the court action brought in Danubia (cf. Weigand, p. 1193). In light

of these submissions, Art. 8 (2) DAL is applicable to the arbitration and the Arbitral Tribunal should consider RESPONDENT's action before the Commercial Court to be in compliance with JAMS Rules.

B. If there was a violation of JAMS Rules, it should not be penalized in this case

53 Even if the Arbitral Tribunal finds that RESPONDENT's violation of Art. 17.3 JAMS Rules is a breach of JAMS Rules, it is requested not to derive any sanction from this infringement. CLAIMANT bases its argumentation on Art. 27.3 JAMS Rules (Memorandum for Claimant, para. 43). Yet, Art. 27.3 JAMS Rules can neither be applied to claim arbitration costs nor litigation costs (**1.**). Additionally, a breach of Art. 17.3 JAMS Rules does not influence the allocation of these costs (**2.**). Furthermore, the Arbitral Tribunal should disregard CLAIMANT's request to prevent RESPONDENT from litigation since the Arbitral Tribunal is not entitled to order RESPONDENT to withdraw its action before the Commercial Court (**3.**).

1. Art. 27.3 JAMS Rules cannot be applied to claim costs arising out of the arbitration or litigation

54 CLAIMANT states that the Arbitral Tribunal should order RESPONDENT to pay the costs of litigation as well as the costs of arbitration (Memorandum for Claimant, para. 43). These claims, however, may not be granted pursuant to Art. 27.3 JAMS Rules. This provision is no legal basis to claim damages (**a.**). Even if Art. 27.3 JAMS Rules is considered as a legal basis for CLAIMANT's action, the requirements of this provision are not fulfilled in the case at hand (**b.**).

a. Art. 27.3 JAMS Rules is no legal basis to claim damages

55 Art. 27.3 JAMS Rules does not constitute a proper basis to claim damages. Art. 27.3 JAMS Rules reads as follows:

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

This provision is headed "Default". This heading already demonstrates that Art. 27.3 JAMS Rules is only supposed to govern defaults arising out of procedural issues, i.e. a party failing to submit proof or to present its case (cf. Artt. 27.1, 27.2 JAMS Rules).

56 In fact, the definition of the term "inferences" supports this interpretation. An inference is "a conclusion reached by considering other facts and deducting a logical consequence from [these facts]" (Black's Law Dictionary). Thus, Art. 27.3 JAMS Rules simply allows the Arbitral Tribunal to find its own conclusion in case parties neglect to present their case on certain issues and fail to

provide evidence. It does, however, not enable the Arbitral Tribunal to derive sanctions from it. Hence, Art. 27.3 JAMS Rules cannot be a proper basis for damage claims.

b. The requirements of Art. 27.3 JAMS Rules are not fulfilled

57 Even if the Arbitral Tribunal were to find that Art. 27.3 JAMS Rules provides for damages, RESPONDENT's action would not be covered since it acted with good cause pursuant to Art. 27.3 JAMS Rules. "Good cause" is defined as a legally sufficient reason why an action should be excused (Black's Law Dictionary).

58 CLAIMANT argues that the parties had concluded a valid arbitration agreement which expels any application to other judicial review than by the Arbitral Tribunal (cf. Memorandum for Claimant, para. 34). Even if the Arbitral Tribunal supports this position, there are no grounds given why RESPONDENT's action would lack a good cause. RESPONDENT acted as any diligent person would have done. It intended to reach a fast and definitive answer to whether the Arbitral Tribunal has jurisdiction. It petitioned the Commercial Court even before the Arbitral Tribunal was constituted. Contrary to CLAIMANT's submission (Memorandum for Claimant, para. 3), RESPONDENT is not trying to delay the proceedings but trying to certify its position that the Arbitral Tribunal has no jurisdiction on the matter (cf. para. 20).

59 Since RESPONDENT is of the opinion to have revoked both offers in its e-mail on 18 June 2006 (Cl. Ex. No. 9), it had no reason to believe that an application to the Commercial Court would breach any provision of JAMS Rules. RESPONDENT filed its action before the Commercial Court simply to protect its rights as it did not find itself bound to any agreement with CLAIMANT.

60 In light of these submissions, RESPONDENT showed good cause by applying to the Commercial Court. Hence, Art. 27.3 JAMS Rules cannot apply. The Arbitral Tribunal is requested to dismiss CLAIMANT's action and not to attribute the costs of arbitration and litigation to RESPONDENT.

2. A breach of Art. 17.3 JAMS Rules neither influences the allocation of the arbitration costs nor of the litigation costs

61 Neither the allocation of the arbitration costs nor of the litigation costs are affected by a breach of Art. 17.3 JAMS Rules. The costs for arbitration are ultimately regulated in Art. 34.4 JAMS Rules (**a.**). Additionally, the allocation of the litigation costs is not within the competence of the Arbitral Tribunal but a matter of Danubian Law (**b.**).

a. The parties would have incurred the arbitration costs anyway

62 CLAIMANT concludes that the Arbitral Tribunal should order RESPONDENT to bear the costs of arbitration including the costs incurred by the parties as consequence of the alleged breach of Art. 17.3 JAMS Rules (Memorandum for Claimant, para. 36). In any case, these consequences cannot be derived from a breach of the arbitration agreement. The parties would have incurred the costs of arbitration even if RESPONDENT had not challenged the Arbitral Tribunal's jurisdiction on this dispute. Therefore, RESPONDENT's action before the Commercial Court is not causal for the costs of arbitration.

63 Furthermore, the costs of arbitration are merely distributed according to Art. 34.4 JAMS Rules which states that

> "[t]he Tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable".

Reasonability has to be determined in light of all circumstances of the case, especially which party prevails with regard to the substantive issues. This regulation is exclusive. Therefore, a breach of Art. 17.3 JAMS Rules cannot be decisive for the allocation of arbitration costs.

b. The allocation of litigation costs is exclusively in the competence of the Commercial Court

64 The Commercial Court has exclusive jurisdiction over the allocation of costs incurred by litigation. Most legislations have rules that empower their national courts to allocate litigation costs (cf. secc. 90-91 CPC; Rule 44.3 English Civil Procedure Rules; secc. 41-55 Austrian Civil Procedure Code). The cost allocation rules of the *lex fori* should be regarded as comprehensive and exclusive regime for that matter (Huber/Mullis, p. 278). It is likely that Danubian law also assigns the decision on the allocation of litigation costs to its courts. The Arbitral Tribunal is referred to the possibility that its decision may interfere with the Commercial Court's matters. Therefore, it is kindly requested to uphold the national court's competences to allocate litigation costs.

65 Even if the Arbitral Tribunal had the right to grant litigation costs as damages, the amount awarded may not exceed CLAIMANT's actual damage. Assuming that CLAIMANT wins before the Commercial Court and the latter follows the "Loser pays – Rule", it would already be entitled to claim compensation through a court decision on the costs. Insofar, to avoid overcompensation, the Arbitral Tribunal is requested to only reward damages CLAIMANT incurred which go beyond what it is awarded by the Commercial Court.

3. The Arbitral Tribunal cannot order RESPONDENT to withdraw from its litigation

66 Contrary to CLAIMANT's request (Amendment to Request for Arbitration, para. 6), the Arbitral Tribunal cannot order RESPONDENT to terminate its litigation before the Commercial Court. An anti-suit injunction would enable the Arbitral Tribunal to restrain RESPONDENT from commencing or continuing legal proceedings before another judicial authority (cf. Ruiz-Jarabo Colomer, p. 217). However, JAMS Rules do not provide for such an instrument. The mere existence of Art. 17.3 JAMS Rules does not provide a basis for the Arbitral Tribunal to order an anti-suit injunction against RESPONDENT. This applies especially, considering the differences between court proceedings and arbitrations. Judges issue anti-suit injunctions to protect other court proceedings, whereas arbitrators decide on their own cause and, hence, may lack impartiality (Lévy in Gaillard, pp. 125, 129).

67 Moreover, in *Turner v. Grovit* the European Court of Justice condemned anti-suit injunctions. It held that an injunction to restrain a party from commencing or continuing proceedings before a foreign court undermines this court's jurisdiction to determine the dispute. Any judgment by the Arbitral Tribunal stigmatizing RESPONDENT's behavior as abusive would imply an assessment of whether the proceeding brought before the Commercial Court are appropriate or not. Such an assessment would run counter to the principle of mutual trust (cf. Turner v. Grovit).

68 Even in case the Arbitral Tribunal considered anti-suit injunctions to be admissible in general, this device should only be applied restrictively (Lévy in Gaillard, p. 124). It has been designed to prevent vexatious or oppressive litigation in order to impede proceedings already pending (Schwebel in Gaillard, p. 8). Furthermore, they have to be aimed at preventing irreparable harm (Lévy in Gaillard, p. 125). RESPONDENT neither did act vexatiously, nor caused irreparable harm. It acted in accordance with proper procedural law applicable to the arbitral proceedings. RESPONDENT's action seems all the more reasonable, as national courts always have the last word in arbitral matters (Redfern/Hunter, ch. 7, para. 4). Thus, a posterior appeal of the parties to the Commercial Court would have been possible and just.

69 Furthermore, RESPONDENT's action does not contravene basic arbitration principles. Contrary to CLAIMANT's assertions (Memorandum for Claimant, para. 8), the UNCITRAL ML does not allow a private dispute resolution excluding any interference by national courts. Art. 5 DAL explicitly allows court intervention to arbitration as it states that

> "[i]n matters governed by this Law no court shall intervene except where so provided in this Law".

Since Art. 8 (2) DAL provides for a determination of the Arbitral Tribunal's jurisdiction prior to

its constitution, this safeguard of arbitration is not affected.

70 In conclusion, RESPONDENT has not breached any provision of the JAMS Rules. Even if RESPONDENT violated Art. 17.3 JAMS Rules, the Arbitral Tribunal is requested not to impose any sanctions on RESPONDENT since it did not act in bad faith.

IV. CLAIMANT and RESPONDENT did not conclude a sales contract

71 CLAIMANT and RESPONDENT did not conclude a sales contract. The conclusion of a contract requires an agreement under the terms of Art. 14 et seqq. United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG). This convention is applicable since CLAIMANT's and RESPONDENT's places of business are located in different states which both have adopted the CISG (St. Cl., paras. 1, 3, 15).

72 Yet, the parties did not reach such an agreement. Rather, RESPONDENT revoked its offer on 18 June 2006, one day before CLAIMANT allegedly dispatched its acceptance (**A.**). Contrary to CLAIMANT's submissions, RESPONDENT's offer was revocable (**B.**).

A. The revocation reached CLAIMANT before it dispatched the purported acceptance

73 RESPONDENT's revocation reached CLAIMANT before 19 June 2006, the date the purported acceptance was dispatched. Therefore, it fulfills the requirement of Art. 16 CISG that a valid revocation has to reach the offeree "before he has dispatched an acceptance".

74 RESPONDENT agrees with CLAIMANT that the UNCITRAL Model Law on Electronic Commerce (hereinafter UNCITRAL MLEC) is to be applied to determine the moment when RESPONDENT's revocation reached CLAIMANT (Memorandum for Claimant, para. 78).

75 As CLAIMANT accurately points out, pursuant to Art. 15 (2) a lit. i UNCITRAL MLEC, the moment of receipt occurs when the sender's e-mail enters the addressee's server (Memorandum for Claimant, para. 79). CLAIMANT further admits that RESPONDENT's e-mail containing the revocation entered CLAIMANT's server instantly after its dispatch on 18 June 2006 (Memorandum for Claimant, para. 80). Nevertheless, CLAIMANT denies timely receipt of the revocation. It, however, consented to receive e-mails with any content (**1.**). In this regard, an e-mail was an adequate means of communication to revoke the offer (**2.**). Receipt occurred the moment the e-mail entered CLAIMANT's server (**3.**). The fact that the revocation was sent on a Sunday does not hinder the receipt (**4.**). Therefore, the revocation reached CLAIMANT in due time.

1. CLAIMANT consented to receive e-mails with any content

76 Electronic declarations of intent are legally valid if the offeree has expressed somehow that he is willing to receive electronic communication (CISG AC Opinion No. 1, para. 15.4). CLAIMANT acknowledges that it has shown such willingness (Memorandum for Claimant, para. 85).

77 CLAIMANT, nevertheless, tries to deny that it has consented to receive a revocation via e-mail (Memorandum for Claimant, para. 83). It quotes the CISG Advisory Council (hereinafter CISG AC) stating that the addressee also has to consent "to receiving electronic messages of that type, in that format, and to that address" (CISG AC Opinion No. 1, para. 15.6) to contrive an effective receipt of an electronic message. CLAIMANT argues that it only consented to receive foreseeable messages via e-mail and that it, therefore, did not receive the allegedly unforeseeable revocation on 18 June 2006 (Memorandum for Claimant, paras. 86-88 and 92). It strives to substantiate its submissions by giving an interpretation as to the meaning of the term "type". At this point, CLAIMANT states that "type" "does not allude to the nature of the communication" [e.a.] (Memorandum for Claimant, para. 84). Contrary to that, CLAIMANT refers in para. 86 to "the type, or nature, of the message" and uses both terms synonymously. If CLAIMANT holds the opinion that "type" would relate to the content, i.e. nature, of the message, it has failed to present convincing reasons for this interpretation. There are, however, profound reasons against this understanding.

78 The CISG AC used the phrase "messages of that type, in that format, and to that address" to describe whether the offeree is able to process and understand the electronic message (CISG AC Opinion No. 1, para. 15.6). A revocation, however, cannot be classified as a "type" of message but rather as the content of a message since it does not affect the ability to process or understand the message. Contrary to CLAIMANT's assertions (Memorandum for Claimant, para. 86), the content of the message cannot be the crucial point to determine if the message has "reached" the addressee. Examples given by the CISG AC for inappropriate communications are "incompatible computer programs" and messages "being written in a language that the offeree is unable to understand" (CISG AC Opinion No. 1, para. 15.6). None of these examples applies to the present case. Neither the foreseeability of a message nor its content are named as decisive factors. Thus, CLAIMANT's submission to have not agreed to receiving unforeseeable messages lacks any legal foundation.

79 Moreover, even if the Arbitral Tribunal finds that CLAIMANT had only consented to receive foreseeable messages, RESPONDENT's revocation was indeed foreseeable. CLAIMANT knew about the newspaper article in Mediterraneo (Cl. Ex. No. 10). Mr. Cox was also aware that

diethylene glycol was used to sweeten the wine (P.O. No. 2, para. 22). Thus, CLAIMANT at least had to reckon with the possibility that RESPONDENT would react to the media scandal before 21 June 2006. Hence, RESPONDENT's message was foreseeable.

2. An e-mail was sufficient to revoke the offer

80 CLAIMANT also submits that it only consented to receive messages via e-mail as far as these messages were additionally sent by courier. Since the revocation was only sent by e-mail, CLAIMANT denies valid receipt (Memorandum for Claimant, para. 89). Yet, electronic communication itself would be senseless if all e-mails had to be sent additionally by courier. Such a requirement would not simplify but complicate written correspondence without cause. CLAIMANT cannot rely on the fact that previous messages between the parties were sent by e-mail and courier. In their correspondence, CLAIMANT first skipped the routine of dispatching messages via e-mail and courier when it answered RESPONDENT solely by means of e-mail on 11 June 2006 (Cl. Ex. No. 6). Arguing now that communication solely via e-mail is insufficient would thus be contradictory behavior and would amount to a violation of the principle *venire contra factum proprium* (principle of estoppel).

81 Moreover, it took CLAIMANT just a single day to reply. This response was obviously sent before a message sent by courier could possibly have been delivered as the courier needs three days to deliver messages to CLAIMANT (cf. St. Cl., para. 9). By e-mail RESPONDENT could, hence, rely on the prompt transmission of the message and its notice by CLAIMANT.

82 It would furthermore be unreasonable to exclude e-mail from today's means of communication in business. Art. 9 (2) CISG states that

> "[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage [...] which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned".

Nowadays, for reasons of speed and comfort, a lot of deals are performed electronically, i.e. via e-mail, fax, or blackberry messages. Considering the circumstances – Mr. Cox was to return on the next day and the wine lost more and more of its prior shine – it was important for RESPONDENT to revoke the offer as quickly as possible. Therefore, an instantly transmitted e-mail was the most appropriate way of communication.

83 In fact, sending the revocation by courier would not have been feasible since the courier could not have reached CLAIMANT before 19 June 2006. RESPONDENT knew about the utmost

importance of that date as Mr. Cox was announced to return from his business trip and predicted to dispatch his acceptance (Cl. Ex. No. 6). RESPONDENT also could not have sent the revocation earlier than 18 June 2006. As a diligent businessman, Mr. Wolf did not panic and did not revoke the offer immediately after the first articles condemning wine from the Blue Hills region were published. The first article on 13 June 2006 was only published in Mediterraneo (Cl. Ex. No. 13) and furthermore in a newspaper that is famous for exaggerated reports (Cl. Ex. No. 10). The articles in Equatoriana followed not until 16 and 17 June 2006 (P. O. No. 2, para. 28). RESPONDENT waited to revoke the offer until it was clear that the scandal was inevitable and persistent. Only when all of Equatoriana's newspapers had prominent articles discussing the adulteration of the wine on 18 June 2006 (Cl. Ex. No. 9), RESPONDENT revoked its purchase offer. This was reasonable business practice and should not be attributed to RESPONDENT's disadvantage.

3. Receipt occurred the moment the e-mail entered CLAIMANT's server

84 CLAIMANT argues that pursuant to Art. 15 UNCITRAL MLEC, the CISG AC considered the retrievability as the decisive factor for the moment a message is received (Memorandum for Claimant, para. 81). However, Art. 15 (2) a lit. i UNCITRAL MLEC stipulates that

> "if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs at the time when the data message enters the designated information system".

The term "designated information system" refers to a system that has been specifically designated by a party, for instance in cases where an offer expressly specifies the address to which acceptance should be sent (Guide to enactment, para. 102).

85 In this matter, CLAIMANT seems to have misunderstood the CISG AC. The CISG AC does not attribute the risk for the offeree's technical problems to the offeror "[i]rrespective 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" (CISG AC Opinion No. 1, para. 15.3). The CISG AC merely states that it is within the addressee's "sphere of influence" to provide for adequate means to ensure that his internal communication functions (CISG AC Opinion No. 1, para. 15.3; Hahnkamper, p. 150). Thus, not the retrievability of the revocation but the moment it entered the server is decisive. Consequently, the revocation reached CLAIMANT on 18 June 2006.

86 Furthermore, it would amount to an unreasonable insecurity for the addressor if he would have to bear the risk of delay of that originates from the addressee's sphere of influence. Since the

server was actually located on CLAIMANT's premises (P.O. No. 2, para. 27), RESPONDENT could neither influence nor cure CLAIMANT's software malfunction.

87 Art. 15 (2) a lit. ii UNCITRAL MLEC does not apply to this case. Following this provision, receipt would not have occurred until the data message was actually retrieved by CLAIMANT. However, this provision only applies when the message is sent to another than the designated information system. Yet, Mr. Cox's e-mail address was designated in the present case. Mr. Wolf and Mr. Cox had exchanged business cards with their addresses at the wine fair. Subsequently, all e-mails were sent to their individual e-mail addresses (P.O. No. 2, para. 24). Therefore, the frequent use is sufficient to express designation of this information system.

88 Even if the Arbitral Tribunal found that Mr. Cox's e-mail address was not a designated information system, Art. 15 (2) b UNICITRAL MLEC would also contrive timely receipt of the revocation. It stipulates that

> "if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee".

Since the server is located at the premises of CLAIMANT (P.O. No. 2, para. 27), it is in any event an information system of the addressee. Therefore, even in this alternative, CLAIMANT would also have received RESPONDENT's revocation on 18 June 2006.

4. The fact that it was a Sunday does not hinder the receipt of the revocation

89 Even if CLAIMANT had argued that the time chosen by RESPONDENT to revoke the offer was inadequate since the revocation was sent on a Sunday (Cl. Ex. No. 9), this would still not hinder the receipt of the revocation. Communication between the parties repeatedly occurred on Sundays. In fact, Art. 9 (1) CISG states that

> "[t]he parties are bound [...] by any practices which they have established between themselves".

90 CLAIMANT first contacted RESPONDENT on Sunday, 14 May 2006 (Cl. Ex. No. 1). Moreover, CLAIMANT sent another message on Sunday, 11 June 2006 (Cl. Ex. No. 6). Hence, as CLAIMANT itself commenced negotiations with RESPONDENT on a Sunday and answered RESPONDENT's offer very promptly on such a day, it was more than reasonable for RESPONDENT to contact CLAIMANT on Sundays.

91 Even if the Arbitral Tribunal finds Sunday to be an improper day to receive business related messages, RESPONDENT's offer still reached CLAIMANT before it dispatched the acceptance. A message sent outside of customary business hours is generally received on the next business

day that follows (Saenger in Bamberger/Roth, Art. 24, para. 4; Neumayer, p. 761, fn. 74; Lüderitz/Fenge in Soergel, Art. 24, para. 5). Therefore, CLAIMANT received the revocation at least in the very morning of Monday, 19 June 2006, i.e. before CLAIMANT dispatched the alleged acceptance.

92 In sum, to "reach" the addressee, it is sufficient that an e-mail enters the addressee's server. In this respect, it is irrelevant whether the addressee has actually read it or not, e.g. due to technical problems. In any event, the revocation reached CLAIMANT before the dispatch of the alleged acceptance and terminated RESPONDENT's offer.

B. RESPONDENT's offer was revocable

93 RESPONDENT revoked its purchase order by e-mail on 18 June 2006 (Cl. Ex. No. 9). Art. 16 CISG establishes the free revocability of an offer before the offeree has dispatched an acceptance as a general principle (Explanatory Note, para. 19). Art. 16 (1) CISG states

> "[u]ntil a contract is concluded an offer may be revoked".

94 Art. 16 (2) CISG lists exceptions to this principle (Honnold, Art. 16, paras. 140-141). Contrary to CLAIMANT's submissions, RESPONDENT argues that these exceptions do not apply: The offer was neither irrevocable under Art. 16 (2) a CISG (**1.**) nor under Art. 16 (2) b CISG (**2.**).

1. RESPONDENT's offer was not irrevocable under Art. 16 (2) a CISG

95 CLAIMANT argues that if an offer contains a time for acceptance, it should be interpreted as irrevocable (Memorandum for Claimant, para. 60). RESPONDENT rejects this submission because the irrevocability of an offer has to be clearly articulated (**a.**). As RESPONDENT comes from a common law country, understanding the deadline as a mere expiry date for the offer is reasonable (**b.**). The subsequent communication between the parties did not lead to an irrevocable offer either (**c.**).

a. Irrevocability of an offer has to be clearly articulated

96 The phrase "we have to turn to another quality wine […] if the contract closing were to be delayed beyond 21 June 2006" (Cl. Ex. No. 4) did not express that RESPONDENT committed itself to the offer until 21 June 2006. The date merely states when the offer expired.

97 Such an expiry date does not automatically entail irrevocability of the offer. Whether a fixed time for acceptance excludes revocability depends on the wording (Valioti (web source)). Pursuant to Art. 16 (2) a CISG, an offer is only irrevocable if the offeror clearly demonstrated his intent to be personally bound by the offer until the time mentioned. This is underlined by the exemplary expressions given in commentaries, e.g. "Our offer is firm till ..." (Schnyder/Straub in Honsell,

Art. 16, para. 19), "I will hold this offer open until ..." or unambiguous wording such as "irrevocable, binding, guarantee" (Huber/Mullis, p. 82; Schlechtriem in Schlechtriem, Art. 16, para. 8).

98 Unequivocal wording is equitable since a voluntary waiver of the right to revoke does not entail any advantages for the offeror. It has to be taken into account that as there were other quality wines that could have led RESPONDENT's promotion, concluding a contract with CLAIMANT was not of utmost importance for RESPONDENT. Since a binding offer would only have implicated disadvantages for RESPONDENT, its offer could only be understood to be irrevocable if irrevocability had been clearly articulated. Yet, RESPONDENT's offer did not contain such wording. It, thus, remained revocable.

b. Understanding the deadline as a mere expiry date for the offer is reasonable

99 Considering the fact that RESPONDENT comes from a country where offers are freely revocable even though they contain a fixed time for acceptance (cf. P.O. No. 2, para. 7), the presumption that RESPONDENT's offer was irrevocable is unfeasible. In common law, a fixed time for acceptance represents a time for lapse; in civil law, it may represent an irrevocable offer (P.O. No. 2, para. 7). This difference was widely debated during the drafting of the formation provisions of the CISG. Art. 16 (2) a CISG was drafted to bridge this major difference between the common law and the civil law system (Reinhart, Art. 16, para. 3; Winship, p. 7). The provision is carefully worded to ensure that stating a fixed time for acceptance does not *per se* indicate irrevocability (cf. Erösi in Bianca/Bonell, Art. 16, para. 2.2.2; Enderlein/Maskow/Strohbach, Art. 16, para. 7; Herber/Czerwenka, Art. 16, para. 8; Schnyder/Straub in Honsell, Art. 16, para. 20; Karollus, p. 65; Ferrari in Krüger et al., Art. 16, para. 17; Piltz, para. 44). Specifically, it allows common law parties to fix a time for acceptance unfettered by the civil law presumption of irrevocability.

100 RESPONDENT simply demanded CLAIMANT to take great care for a rash contract closing because the promotion was moved from October to September. As RESPONDENT requested CLAIMANT to "move quickly" and to "return [the signed purchase order] to me promptly" [e.a.], it communicated its immense time pressure. This request was contained in the same letter that stipulated the expiry date (Cl. Ex. No. 4). It was of paramount importance for RESPONDENT to have a definite contracting partner for its wine promotion. In no case did RESPONDENT declare the offer irrevocable. With regard to RESPONDENT coming from a common law country, a reasonable person of the same kind as CLAIMANT would have

understood the date RESPONDENT mentioned to indicate no more than an expiry date for the offer.

c. The subsequent communication did not bind RESPONDENT to its offer

101 CLAIMANT further submits that the subsequent communication between the parties indicated the irrevocability of the offer at least until 19 June 2006 (Memorandum for Claimant, para. 63). However, the wording "immediately on his return" (Cl. Ex. No. 7) that RESPONDENT used in its e-mail of 11 June 2006 did not constitute a binding offer. RESPONDENT, again, merely urged a quick contract closing by repeating its time pressure. It asked CLAIMANT to "act on our purchase order immediately" since it was "operating under a narrow time frame" (Cl. Ex. No. 7). CLAIMANT acknowledged this in para. 62 of its memorandum. Consequently, the subsequent communication indicated nothing but RESPONDENT's hurry.

102 Moreover, the fact that CLAIMANT neglected to inform RESPONDENT of Mr. Cox's long absence until it received the offer cannot be attributed to RESPONDENT's disadvantage. RESPONDENT's e-mail from 11 June 2006 (Cl. Ex. No. 7) was simply a courteous reaction to CLAIMANT's notification of Mr. Cox's absence (Cl. Ex. No. 6). Without this notification, RESPONDENT would not have commented on the offer subsequently. In fact, the original content of the offer did not change. Therefore, CLAIMANT cannot derive any legal consequences of that mere courtesy. On no account did RESPONDENT subsequently declare the offer irrevocable. CLAIMANT's negligence cannot lead to its advantage.

2. RESPONDENT's offer was not irrevocable under Art. 16 (2) b CISG

103 RESPONDENT's offer also was not irrevocable under Art. 16 (2) b CISG. Under this provision, an offer is irrevocable if the offeree acts in reasonable reliance on the irrevocability. Yet, CLAIMANT's conduct even shows that CLAIMANT itself did not rely on the offer's irrevocability. Ms. Kringle, Mr. Cox's assistant, informed RESPONDENT that Mr. Cox was absent from the office until 19 June 2006 (Cl. Ex. No. 6). If CLAIMANT had relied on the irrevocability of the offer until 21 June 2006, this message would have been superfluous. Since Mr. Cox's return was expected before the offer would have expired, CLAIMANT could still have accepted in time.

104 In addition, CLAIMANT did not act in reliance on the irrevocability of the offer. CLAIMANT's mere procrastination of acceptance cannot amount to an act under Art. 16 (2) b CISG. Otherwise, the general principle of revocability would virtually be reversed because it is nearly impossible to prove that a party could have accepted earlier.

105 CLAIMANT submits that its failure to sell Blue Hills 2005 elsewhere between 10 and 18 June 2006 constituted an act of reliance (Memorandum for Claimant, para. 71). However, it is generally acknowledged that Art. 16 (2) b CISG requires financially considerable arrangements such as commencing production, undertaking of costly calculations, acquiring materials, hiring additional employees or the seller's shipment of goods in response to an order (Honnold, Art. 16, para. 144; Gruber in Krüger, Art. 16, para. 17; Schlechtriem in Schlechtriem, Art. 16, para. 11; Magnus in Staudinger, Art. 16, para. 13). CLAIMANT undertook none of these actions. It also fails to submit that there were any other potential buyers of Blue Hills 2005. Yet, there are still 3,000 cases left unsold (St. Cl., para. 14; P.O. No. 2, para. 21).

106 Since the application of Art. 16 (2) a and Art. 16 (2) b CISG did not render RESPONDENT's offer irrevocable, it was terminated by RESPONDENT's revocation on 18 June 2006. Therefore, there was no offer open to be accepted on 19 June 2006 and no contract could have been validly concluded.

V. Blue Hills 2005 is not fit for the particular purpose of the contract

107 Even if the Arbitral Tribunal were to find that CLAIMANT and RESPONDENT validly concluded a sales contract, Blue Hills 2005 is not fit for the particular purpose made known to CLAIMANT at the conclusion of the contract. This inference derives from the fact that Blue Hills 2005 neither meets the essentials of quality (**A.**) nor of merchantability (**B.**). CLAIMANT is also responsible that Blue Hills 2005 adheres to the particular purpose because RESPONDENT reasonably relied on CLAIMANT's skill and judgment at the moment the contract was concluded (**C.**).

108 RESPONDENT offered to purchase 20,000 cases of the wine Blue Hills 2005 from CLAIMANT. The particular purpose of the contract was to buy a wine that would be the flagship of a major wine promotion. RESPONDENT made this expressly known to CLAIMANT during the negotiations (Cl. Ex. No. 2). CLAIMANT acknowledged this purpose (Memorandum for Claimant, para. 100). The prerequisites were an outstanding quality and the merchantability of the wine.

109 In regard to the quality, the parties did not refer to any official designation (P.O. No. 2, para. 23). CLAIMANT and RESPONDENT used general descriptions like "outstandingly fine wine" (cf. Cl. Exs. No. 1, 2, 3, 4).

110 The requisite of merchantability is contained in Art. 35 (2) a CISG. It is expectable that goods purchased by a retailer are meant to be resold (BGH 2 March 2005; Achilles, Art. 35, para. 4;

Schwenzer in Schlechtriem/Schwenzer, Art. 35, para. 14; Witz/Salger/Lorenz, Art. 35, para. 9). This requisite must apply more than ever to an operator of super markets like RESPONDENT who clearly buys and sells at retail.

A. A quality wine must not contain diethylene glycol

111 The wine CLAIMANT tries to foist on RESPONDENT is adulterated with diethylene glycol. It cannot be considered a "quality wine". The fact that the wine was called a quality wine at different times by both parties (Cl. Exs. No. 1, 2, 3, 4) and received a prize at the wine fair in Durhan (Cl. Ex. No. 1) does not hinder this conclusion.

112 CLAIMANT's entrusted wine expert, Prof. Ericson, confirms that diethylene glycol is used as an anti-freeze (Cl. Ex. No. 13). Furthermore, diethylene glycol is usually used as solvent or plasticizer for plastic, lacquer, paint and varnish, as coupling in printing inks, as preservative or rust remover, as disinfectant, and even in the manufacture of explosives (Product Identification (web source)).

113 CLAIMANT alleges that it is common for wine to be sweetened, especially when the grapes did not ferment properly (Memorandum for Claimant, para. 108). However, Prof. Ericson acknowledged that usually natural sugars like cane or beet sugar are used for this purpose (Cl. Ex. No. 13). In addition, diethylene glycol is found to be one of the two universally recognized illegal compounds for wine – besides methanol (Spahni, p. 30). Hence, even the unprofitable climatic conditions in 2005 in Mediterraneo do not justify the use of diethylene glycol. CLAIMANT could at least have used natural sweetening additives instead. Therefore, Blue Hills 2005 must not contain diethylene glycol to be fit for the particular purpose of the contract.

114 This argument is supported by the fact that Blue Hills 2005 was not merely supposed to be a "drinkable" (Memorandum for Claimant, para. 128), ordinary beverage. Since it should have cost RESPONDENT US$ 5.66 a bottle (Cl. Ex. No. 4), it was quite to be expected that it would be priced US$ 10-12 at retail. Such price demands for an unblemished product. Beyond the fact that the alleged health safety of an anti-freeze in wine sounds rather dubious to potential customers, a quality wine, i.e. a superior product, must not contain such a chemical.

115 In support of this position, the District Court of Wolfsburg held in 1986 that the agreed or even ordinary use of a wine in the price bracket around DM 10 (app. US$ 5.55 in 1986 = app. US$ 9.85 in 2008) is obviously not only to drink the wine without any health danger but to enjoy it on special occasions in a special atmosphere. Already the simple suspicion that the wine

could contain diethylene glycol ruins the possibility to enjoy the wine (AG Wolfsburg 2 April 1986). This decision has been confirmed by the Regional Court of Lübeck (LG Lübeck 23 September 1986), which held that even the suspicion itself is sufficient, no matter whether the wine actually contains diethylene glycol or not. Since Blue Hills 2005 in fact contains diethylene glycol, the ratio of these decisions applies all the more. Therefore, Blue Hills 2005 does not fulfill the prerequisite of the contractually agreed quality.

116 To this matter, CLAIMANT draws an incorrect parallel to a decision of the German Federal Court of Justice (Memorandum for Claimant, para. 139). The court held that the delivery of mussels from New Zealand containing cadmium, a very poisonous substance, in a higher level than allowed by the buyer's national provisions does not represent a breach of contract, as they were still consumable (BGH 8 March 1995). However, this ratio does not apply as the facts of that case have to be clearly distinguished from the situation in the case at hand. Mussels absorb cadmium naturally from seawater and its content is ineluctable (German Federal Office for Consumer Protection and Food Safety (web source)). The cadmium itself does not frighten the consumers of mussels since they anticipate its presence. The same applies, for example, to solanine, another highly toxic substance (U.S. Department of Health), which inevitably grows along with potatoes or tomatoes.

117 Contrary to these two natural substances, diethylene glycol was added artificially to Blue Hills 2005 (Cl. Ex. No. 13). Therefore, the defect is not the concentration of diethylene glycol in Blue Hills 2005 but its presence *per se*. Consumers expect a wine free from a substance tainted by such scandal. The consequences of the consumption of diethylene glycol are unclear for most customers. They would probably not buy a product which they consider dangerous since they are usually risk averse. Therefore, RESPONDENT would not be able to make reasonable use of Blue Hills 2005, i.e. sell the wine. Hence, the ratio of the court decision does not apply to the case at issue.

118 Concludingly, as diethylene glycol disqualifies any wine, Blue Hills 2005 did not meet the quality requirements set by the particular purpose of the contract.

B. The newspaper articles ruined Blue Hills 2005's merchantability in Equatoriana

119 The newspaper articles that uncovered the adulteration with diethylene glycol rendered Blue Hills 2005 unfit for the particular purpose to be the flagship of a promotion for quality wines. Even to be fit for ordinary purposes, goods must be resalable in the ordinary course of business (Secretariat Commentary, Art. 35, para. 5). The salability of Blue Hills 2005 was even

more important as this wine was intended to take the lead in the promotion. Even though CLAIMANT might allege that the use of diethylene glycol is safe, the wine is not salable for the following reasons. Firstly, potential customers in Equatoriana would doubt about the safety of Blue Hills 2005 (**1.**). Secondly, there is a conspicuous similarity with the infamous Austrian Wine Scandal from 1985 (**2.**). Finally, Blue Hills 2005 leading RESPONDENT's wine promotion would have been fatal (**3.**).

1. Customers in Equatoriana would doubt about the safety of Blue Hills 2005

120 Customers would refrain from buying Blue Hills 2005 because they would doubt about its safety despite Prof. Ericson's report and the fact that no health problems associated with its consumption were reported so far. The toxic properties of diethylene glycol are well known (Gratzer, p. 122). Even a New York Times article, a paper certainly not known to be "always looking for scandal" (Cl. Ex. No. 10) recently called diethylene glycol "a killer" (Bogdanich/Hooker (web source)).

121 One of the most infamous cases of mass poisoning of the 20th century, the Elixir Sulfinamide disaster of 1937, involved diethylene glycol. It was used to dissolve sulfanilamide in a solution, i.e. Elixir Sulfanilamide. After being treated with that solution, 105 persons died (Gratzer, p. 122; Wax (web source)). This tragedy even induced the U.S. Congress to pass the Federal Food, Drug and Cosmetic Act one year later.

122 Other cases of death were reported in 2006 in Panama, where diethylene glycol was used in 260,000 bottles of cold medicine as a sugar substitute. The patients suffered from a syndrome characterized by gastrointestinal symptoms, renal failure and paralysis. The local authorities confirmed 100 cases of death by May 2007 (Bogdanich/Hooker (web source)).

123 Even the consumption of minor amounts of diethylene glycol can cause nerve depression, liver and kidney lesions, urination retardation, nausea, vomiting and diarrhea (Material Safety Data Sheet (web source)). Consequently, Blue Hills 2005 containing a substance that may cause such health risks is a severe deterrent to potential customers. The wine, thus, is not merchantable.

2. The strong similarity with the Austrian Wine Scandal of 1985 is crushing for the reputation of Blue Hills 2005

124 The Arbitral Tribunal's attention should be drawn to the strong similarity of the present constellation to the infamous Austrian Wine Scandal of 1985. Just as in the case at issue, diethylene glycol was used to sweeten wine. This caused a major stir and had a disastrous effect on the Austrian wine industry. The Austrian wine export literally collapsed from 450,000

hectoliters to 44,000 hectoliters (Stuttgarter Zeitung (web source)). Austrian wine was removed from stores in Austria and countries all around the world, including the United States (Tagliabue (web source)). German and American authorities even advised consumers not to drink Austrian wine because it might cause health problems (BGH 23 November 1988; Banfi v. U.S.). There even were several trials where persons involved in the scandal were condemned to prison (BGH 19 July 1995) or to pay high fines (Stuttgarter Zeitung (web source)).

125 The adverse worldwide publicity led to the adoption of a severe wine law in Austria which now is one of the strictest in the world. Still, it took decades before Austrian wines found any market abroad again (Gratzer, p. 122). Even nowadays, the scandal is still well known and diethylene glycol is instantly and inevitably associated with it. The negative publicity was crushing for Blue Hills 2005's reputation within Equatoriana. It is, thus, inconceivable that Blue Hills 2005, a wine that is shadowed with such inglorious connotations, could be suitable for the lead in a major wine promotion in Equatoriana.

126 In addition, the media scandal was foreseeable for CLAIMANT since it always knew about the chemical adulteration (P.O. No. 2, para. 22). Thus, despite CLAIMANT's allegation (Memorandum for Claimant, para. 130), no basic principle deriving from Art. 79 CISG excludes CLAIMANT's responsibility.

3. Blue Hills 2005 leading RESPONDENT's wine promotion would have been fatal

127 If RESPONDENT had featured Blue Hills 2005 as the leader of its promotion campaign, it would have suffered a commercial disaster. The promotion would have stood under the veil of slandering publicity (**a.**) RESPONDENT could not trust in established clientele for Blue Hills 2005 as none of CLAIMANT's wines had been marketed previously in Equatoriana (**b.**). Since the name of the wine – Blue Hills 2005 – even contains the name of the region attacked in the newspaper articles, it is inevitably linked to the scandal (**c.**).

a. RESPONDENT's promotion would have stood under the veil of slandering publicity

128 Blue Hills 2005 was produced in the area which was the source of the scandal. From 13 to 16 June 2006 (Cl. Ex. No. 13; P.O. No. 2, para. 28) the scandal spread from Mediterraneo to Equatoriana, where all newspapers discussed the case. The negative press coverage would very likely have had a devastating effect on the outcome of the promotion which was planned for September. At that time, the magnitude of the scandal's impact would most likely have reached its climax. The promotion would have stood under the veil of slandering publicity.

129 In a recent decision, the German Federal Court of Justice decided that the suspicion of ingredients possibly harmful to human health and the resulting non-salability in itself can constitute non-conformity regardless of whether the suspicion was, in the end, founded or not (BGH 2 March 2005). In the present case, the massive adverse press coverage gave the impression that the consumption of wine containing diethylene glycol is dangerous. Such a wine is no longer salable.

130 Furthermore, featuring Blue Hills 2005 would not only have affected RESPONDENT's promotion but also its company as a whole. RESPONDENT is a reliable super market chain that has grown to be the largest in its country and built up its reputation over the years (cf. St. Cl., para. 4). If RESPONDENT had used this wine, which was part of the scandal, as the leader of its promotion, this most likely would have even increased the negative press coverage. Hence, by refusing to feature Blue Hills 2005, RESPONDENT not only saved its own credibility but even mitigated CLAIMANT's loss of reputation.

b. CLAIMANT has no established clientele in Equatoriana

131 The consequences of the negative press coverage would very likely have had a deep impact on the selling rates of Blue Hills 2005 in Equatoriana. CLAIMANT is unknown in Equatoriana since none of its wines has been marketed there before (cf. Cl. Ex. No. 8). As a result, customers could not rely on previous positive experiences with any of CLAIMANT's products.

132 CLAIMANT's affirmation that only minor sales drops occurred (Memorandum for Claimant, para. 134) is irrelevant, since it was based predominantly on data of its domestic market (P.O. No. 2, para. 21). In Mediterraneo, CLAIMANT likely has already gained the trust of its customers. The situation in Equatoriana is totally distinct as Blue Hills 2005 was meant to be launched for the first time on the Equatorianean market (St. Cl., para. 5).

133 In this sense, CLAIMANT's submissions that Blue Hills 2005 performed exceptionally well at the wine fair in Durhan (Memorandum for Claimant, para. 125) cannot refute the assumption that the Equatorianean customers would be averse to a wine containing diethylene glycol. The commendation by a prize alone does not result in the trust of unsettled potential customers. By contrast, most customers that buy wine in a super market are laymen when it comes to judging the significance of a prize. Furthermore, massive negative press coverage would degrade any prize.

c. The name of the affected region in the label of Blue Hills 2005 deters potential customers

134 Moreover, the wine at issue carries the name of the Blue Hills region on its very own label. This region was reported to be the epicenter of the scandal (cf. Cl. Ex. No. 9). RESPONDENT's customers would have been more than confused if RESPONDENT had featured Blue Hills 2005 as the leader of its wine promotion after such a scandal. Since Blue Hills 2005 is inevitably linked to negative thoughts, the name itself severely threatens its merchantability.

135 A wine which carries such an infamous name cannot take the lead in a promotion. It is not RESPONDENT's obligation to restore Blue Hills 2005's salability. The general obligations of the buyer are solely to pay the price for the goods and take delivery of them as required by the contract and the CISG (Explanatory Note, para. 26).

136 CLAIMANT refers to a decision of the Higher Regional Court of Frankfurt (Memorandum for Claimant, para. 138). The court held that shoes which were made from a material different from what was agreed on by the parties were still in conformity with the contract, because the defects did not prevent the buyer from making reasonable use of the shoes nonetheless (OLG Frankfurt 18 January 1994). This ratio does not apply to the case at issue. Since Blue Hills 2005 was blemished, RESPONDENT would never be able to feature this wine as the leader of its promotion. Thus, RESPONDENT would never be able to reach the purpose of the contract made known to CLAIMANT. Probably, it would even not have been able to sell this wine at all.

137 Following these submissions, the Arbitral Tribunal is requested to find the merchantability of Blue Hills 2005 unable to fit the particular purpose of the contract.

C. RESPONDENT reasonably relied on CLAIMANT's skill and judgment

138 Despite CLAIMANT's elaborate submissions (Memorandum for Claimant, paras. 100-121), Art. 35 (2) b 2nd half-sentence CISG is not applicable in this case. The mentioned provision states that the obligation to comply with the particular purpose of the contract is obsolete

> "where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment".

139 However, RESPONDENT did reasonably rely on CLAIMANT's skill and judgment on how well Blue Hills 2005 would suit the particular purpose of the contract. It falls on the seller to show that the buyer did not rely, or that it was unreasonable for it to rely on the seller's expertise (Honnold, Art. 35, para. 226). Nevertheless, CLAIMANT fails to prove RESPONDENT's non-reliance convincingly.

140 CLAIMANT misjudges the scope of Art. 35 (2) b 2nd half-sentence CISG as it refers to the wrong kind of skill and judgment (**1.**). RESPONDENT's selection of Blue Hills 2005 did not indicate non-reliance (**2.**). RESPONDENT had not to be aware of the sweetening of Blue Hills 2005 (**3.**). Thus, reliance on CLAIMANT skill and judgment is evident.

1. CLAIMANT refers to the wrong kind of skill and judgment

141 CLAIMANT correctly states that a decisive indicator to prove non-reliance is the buyer having more experience on the relevant subject matter than the seller (Gruber in Krüger et al., Art. 35, para. 13). However, it misjudges the term "subject matter" as it refers to the wrong "experience". CLAIMANT highlights RESPONDENT's great knowledge of the Equatorianean wine market (Memorandum for Claimant, paras. 102-103, 107). Yet, only the experience to judge the wine's mere ability to succeed on the market and to represent a major wine promotion is relevant in the present case. This is underlined by the crux of Art. 35 (2) b CISG, the buyer's "reliance on the seller to select and furnish a commodity that will satisfy a stated purpose" (Honnold, Art. 35, para. 226). Hence, RESPONDENT reasonably relied that CLAIMANT would deliver a wine that is decent enough to lead the planned wine promotion and to have a positive effect on the business development.

142 Reliance is generally given if knowledge about the merchantability is common in the seller's trade branch (cf. Bianca in Bianca/Bonell, p. 276). Contrary to CLAIMANT's assertions (Memorandum for Claimant, para. 103), CLAIMANT has experience in how to market wine. Even though not in Equatoriana, CLAIMANT has been marketing wine domestically and since 1997 also abroad (St. Cl., para. 2; Cl. Ex. No. 1). Therefore, RESPONDENT reasonably relied on CLAIMANT's judgment concerning the wine's ability to succeed on the market.

143 The fact that the buyer is also knowledgeable in the particular area does not in itself nullify its reliance (Schwenzer in Schlechtriem, Art. 35, para. 23). Non-reliance would be given if CLAIMANT's conduct did imply in any way that it does not have any knowledge concerning the merchantability of the wine in question (cf. Enderlein/Maskow/Strohbach, Art. 35, para. 14; Herber/Czerwenka, Art. 35, para. 5; Secretariat Commentary, Art. 33, para. 10). However, CLAIMANT presented itself as a competent wholesaler of wine (cf. Cl. Ex. No. 1). It had a good and established reputation. Winning prizes at the wine fair had become common for CLAIMANT in recent years (Cl. Ex. No. 1). Moreover, it confidently assured that Blue Hills 2005 would be "an outstanding choice for a promotion of quality wines" (Cl. Ex. No. 1).

144 CLAIMANT further tries to prove non-reliance by referring to RESPONDENT making the fourth installment contingent upon the sale of at least sixty percent of the wine previously delivered (Memorandum for Claimant, paras. 113-115). This is not persuasive since RESPONDENT would not have purchased Blue Hills 2005 at all if it had not relied on the salability of the wine.

2. RESPONDENT's selection of Blue Hills 2005 did not indicate non-reliance

145 CLAIMANT also submits that a buyer demonstrates non-reliance in case he actively participates in the selection of the goods (Memorandum for Claimant, paras. 110-112). RESPONDENT would like to draw the Arbitral Tribunal's attention to the fact that it was CLAIMANT that first contacted RESPONDENT after their initial encounter at the wine fair (Cl. Ex. No. 1). By that time, RESPONDENT still had many other options for its wine promotion as it stated "[t]here were many excellent wines on offer" (Cl. Ex. No. 2). After CLAIMANT solicited Blue Hills 2005, RESPONDENT eventually decided to purchase it. This shows that RESPONDENT relied on CLAIMANT's skill and judgment.

146 Furthermore, employing a professional team to find an adequate wine to lead one's major wine promotion and thereby comparing different sorts with each other is common sense. It is even commercially compelling to try a product that lives and dies with its taste. Especially, when a product is purchased in huge amounts for resale, it would be remote from everyday life not to assure oneself of its quality prior to making a purchase order. Therefore, RESPONDENT's selection of the wine was a commercial imperative and not an indicator of non-reliance.

3. RESPONDENT had not to be aware of the sweetening of Blue Hills 2005

147 CLAIMANT alleges that RESPONDENT had to be aware of the presence of diethylene glycol (Memorandum for Claimant, para. 108). This submission fails to convince. There are no grounds that RESPONDENT knew about the unprofitable climatic conditions in Mediterraneo in 2005 giving rise to additional sweetening. In fact, if RESPONDENT had known about the use of diethylene glycol, it would never have purchased Blue Hills 2005 irrespective of negative media publicity. CLAIMANT never used sweetening agents in any vintage year apart from 2005 (Cl. Ex. No. 13). Therefore, RESPONDENT could reasonably rely on the fact that CLAIMANT would have informed it about this change.

148 CLAIMANT further argues that RESPONDENT's professional wine buying team sufficiently scrutinized the wine's fitness for the promotion (Memorandum for Claimant, paras. 105). The presence of diethylene glycol, however, was untraceable for the wine buying team at the wine fair.

In order to detect this substance, a chemical analysis is indispensable (P.O. No. 2, para. 13). Considering this, CLAIMANT cannot rely on the fact that RESPONDENT tasted a sample of Blue Hills 2005. Reliance is not excluded when the buyer scrutinizes a sample if the seller affirms that the good is fit for the particular purpose and the buyer cannot recognize the opposite (Achilles, Art. 35, para. 11; Schwenzer in Schlechtriem/Schwenzer, Art. 35, para. 25).

149 RESPONDENT reasonably expected that CLAIMANT would disclose any potential danger that might impair the scheduled promotion. It refrained from informing itself about the composition of the wine because it relied on CLAIMANT's skill and judgment as to an adequate production process of a quality wine. If the seller knows that the goods ordered by the buyer would not be satisfactory for the particular purpose, the principle of good faith requires the seller to inform the buyer about that fact (Secretariat Commentary, Art. 35, para. 9). At hand, Mr. Cox knew about the whole production process of Blue Hills 2005 and therewith was aware of the use of diethylene glycol (P.O. No. 2, para. 22). Bearing the Austrian Wine Scandal of 1985 and its disastrous economical aftermath for the Austrian wine industry in mind, it was likely that a repeated use of diethylene glycol would cause a similar *éclat*. For this reason, Mr. Cox was obliged to disclose the use of diethylene glycol. The Arbitral Tribunal should consider the fact that even when RESPONDENT became aware of the use and confronted CLAIMANT with it, CLAIMANT denied the adulteration (Cl. Exs. No. 10, 12).

150 After all, CLAIMANT fails to substantiate its allegation of RESPONDENT's non-reliance. Hence, Art. 35 (2) b 2nd half-sentence CISG does not exclude CLAIMANT's obligation to deliver a wine that is fit to lead a wine promotion.

151 In conclusion, RESPONDENT made known to CLAIMANT the particular purpose to present Blue Hills 2005 as the leader of its wine promotion in Equatoriana and RESPONDENT then reasonably relied on CLAIMANT's expertise. CLAIMANT breached its obligations by delivering a wine that was neither of an adequate quality nor merchantable. Therefore, the Arbitral Tribunal is requested to find that Blue Hills 2005 was not fit for the particular purpose of the contract.

Request for Relief

In light of the above submissions, Counsel for RESPONDENT respectfully requests the Arbitral Tribunal to find that:

- a stay of the arbitral proceedings should be granted;
- neither an arbitration agreement nor a sales contract were concluded between RESPONDENT and CLAIMANT.

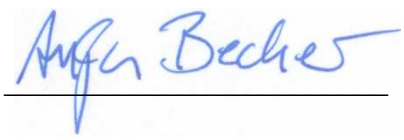
Alternatively, if the Arbitral Tribunal finds that a sales contract was concluded, Counsel for RESPONDENT respectfully requests the Arbitral Tribunal to find that:

- the wine Blue Hills 2005 is not fit for the particular purpose of this contract.

Consequently, RESPONDENT requests the Arbitral Tribunal to dismiss CLAIMANT's request for arbitration and to order CLAIMANT to pay all costs of the arbitration.

On behalf of RESPONDENT, 17 January 2008

(Tobias Bastian)



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