

MEMORANDUM FOR RESPONDENT

On Behalf Of:

Equatoriana Super Markets S.A.

415 Business Centre
Oceanside
Equatoriana

RESPONDENT

Against:

Mediterraneo Wine Cooperative

140 Vineyard Park
Blue Hills
Mediterraneo

CLAIMANT



HOFSTRA UNIVERSITY SCHOOL OF LAW

COUNSEL:

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INDEX OF ABBREVIATIONS

\$	Dollars (United States)
¶/¶¶	Paragraph/Paragraphs
%	Percent
§	Section
Apr.	April
Arb.	Arbitration
Arb. Law of P.R.C.	Arbitration law of the People' Republic of China, 31 August 1994
Art./Arts.	Article/Articles
Aug.	August
Berm.	Bermuda
BGH	Bundesgerichtshof (German High Court)
Cass.	Cour de cassation (France)
CCL	Chinese Contract Law
Cir.	Circuit
CISG	United National Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Amend.	Claimant's Amended Statement of Claim
Cl. Ex.	Claimant's Exhibit
Cl. Memo.	Claimant's Memorandum
C.F.R.	Code of Federal Regulation (United States)
Co.	Company
Corp.	Corporation
Ct.	Court
CUECIC	United Nations Convention on the Use of Electronic Communications in International Contracts
CUECIC Explanatory Note	Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts
DAL	Danubian Arbitration Law
Dec.	December
DEG	Diethylene Glycol
Dis.	District
Dr.	Doctor
Ed.	Edition



English Arb. Act 1996	English Arbitration Act of 1996
Feb.	February
Fin.	Finland
Fr.	France
Ger.	Germany (Federal Republic of Germany)
German Arb. Law	German Arbitration Law of 1998
H.K.	Hong Kong
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
<i>id.</i>	<i>Idem</i> [the same]
i.e.	<i>Id est</i> [that is]
Inc.	Incorporated
JAMS	Judicial Arbitration and Mediation Services
JAMS SARP	Judicial Arbitration and Mediation Services Streamlined Arbitration Rules and Procedures
Jan.	January
Ltd.	Limited
Mar.	March
ME	Middle East
MLEC	UNCITRAL Model Law on Electronic Commerce
MLEC Guide	Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce
Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	United Nations on on Recognition and Enforcement of Foreign Arbitral Awards (1958)
n.	Note
NCPC	Noauveau code de procedure civile (France)
Nov.	November
OG Basel	Obergericht (Canton Appellate Court)
Oct.	October
OLG	Oberlandesgericht (Provincial Court of Appeal, Germany)
Pharm.	Pharmaceutical
PILA	Swiss Private International Law Act (Switzerland)
Pres.	Presiding



Proc. Or.	Procedural Order
Prof.	Professor
SDNY	Southern District of New York
Sec. Comm.	Secretariat Commentary
Sept.	September
Sing.	Singapore
Sup. Ct.	Supreme Court
Switz.	Switzerland
U.K.	United Kingdom
U.K. Sale of Goods	United Kingdom Sale of Goods Act 1979
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institution for the Unification of Private Law
U.S.	United States
v.	Versus

**INDEX OF AUTHORITIES**

- Alvarez, Guillermo
Aguilar** *Article II(2) of the New York Convention and the Courts*, in ICCA
CONGRESS SERIES NO. 9
Paris (1999)
Cited as: *Alvarez*
Cited in: ¶ 18
- Barceló, John, J., III** *Who Decides the Arbitrator’s Jurisdiction? Separability and
Competence Competence in Transnational Perspective*,
36 *Vanderbilt Journal of Transnational Law* 1115 (2003)
Cited as: *Barceló*
Cited in: ¶ 39
- Bianca, Cesare
Massimo
Bonell, Michael
Joachim (eds.)** COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980
VIENNA SALES CONVENTION
Giuffrè, Milan (1987)
Cited as: *Bianca/Bonell*
Cited in: ¶¶ 84, 93, 94, 97
- Blodgett, Paul C.** *UN Convention on the Sale of Goods and the “Battle of the
Forms*
18 *Colorado Lawyer* 423 (Mar. 1989)
Cited as: *Blodgett*
Cited in: ¶ 47, 52
- Born, Gary B.** INTERNATIONAL COMMERCIAL ARBITRATION
Transnational Publishers, Inc., 2d ed. (2001)
Cited as: *Born*
Cited in: ¶ 3
- Carbonneau,
Thomas, E.** THE LAW AND PRACTICE OF ARBITRATION
Juris Publishing Inc., 3d ed. (2003)
Cited as: *Carbonneau*
Cited in: ¶ 6
- Clark, C.R., et al** *Toxicological Assessment of Heat Transfer Fluids Proposed for
Use in Solar Energy Applications*,
51 *Toxicology and Applied Pharmacology* 529 (1979)
Cited as: *Clark/Sanchez*
Cited in: ¶ 94, 97, 104
- Calvery, H.O.
Klumpp, T.G.** *The Toxicity For Human Beings of Diethylene Glycol With
Sulfanilamide*
32 *South Medical Journal* 1105 (1939)
Cited as: *Calvery/Klumpp*
Cited in: ¶ 97



- Centre for Cancer Education** Online Medical Dictionary
Centre for Cancer Education, University of Newcastle upon Tyne (2007) available at <http://cancerweb.ncl.ac.uk/cgi-bin/omd?diethylene+glycol>
Cited as: *CCE*
Cited in: ¶ 98
- CISG-AC Opinion no 1, Electronic Communications under CISG, 15 Aug. 2003
Cited As: *CISG-AC Opinion no 1*
Cited in: ¶¶ 72, 74
- CISG Secretariat** EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
Cite as: *Sec. Comm. Art. __ (counterpart to CISG Art. __)*
Cited in: ¶¶ 55, 57, 93
- Enderlein, Fritz
Maskow, Dietrich** INTERNATIONAL SALES LAW
Oceana Publications, Inc.
New York (1992)
Cited as: *Enderlein/Maskow*
Cited in: ¶¶ 94, 97
- Enderlein, Fritz
Sarcevic, Petar
Volken, Paul (eds.)** *Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES
Oceana (1996)
Cited as: *Enderlein*
Cited in: ¶ 86
- Eörsi, Gyula** *Comments on Article 14 CISG [Offer]*, in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW
Giuffrè, Milan (1987)
Cited as: *Eörsi*
Cited in: ¶¶ 59, 60, 62, 63, 64, 66, 69
- Farnsworth, E.
Allan** INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS
Juris Publishing, New York (1984)
Cited as: *Farnsworth1984*
Cited in: ¶ 48, 59, 63
- Farnsworth, E.
Allan** *Article 19*, in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW
Giuffrè, Milan (1987)
Cited as: *Farnsworth1987*
Cited in: ¶¶ 48, 52, 53



- Gaillard, Emmanuel
Savage, John, eds.** FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION
Kluwer Law International (1999)
Cited as: *Fouchard/Gaillard/Goldman*
Cited in: ¶¶ 6, 10, 33
- Galpin, Vashti** *A Comparison of Legislation With Respect to Additives in Wine*,
Dissertation.
Kaapse Wynakademie (Feb. 2006) available at
<http://www.capewineacademy.co.za/seminars/vgalpin-cwmassign.pdf>
Cited as: *Galpin*
Cited in: ¶ 85
- Garnett, Richard,
et. al.** A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION
Oceana Publications (2000)
Cited as: *Garnett*
Cited in: ¶¶ 12, 29, 33, 35
- Garro, Alejandro
M.** *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*,
23 International Lawyer 443 (1989)
Cited as: *Garro*
Cited in: ¶ 63
- Giuliano, Adam M.** *Nonconformity in the Sale of Goods Between the United States and China: The New Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods*,
18 Florida Journal of International Law 331 (2006)
Cited as: *Giuliano*
Cited in: ¶ 85
- Glantz, Stanton A.** THE CIGARETTE PAPERS
University of California Press (1998)
Cited as: *Glantz*
Cited in: ¶ 100
- Gomes, R.
Liteplo, R.
Meek, M.E.** *Ethylene Glycol: Human Health Aspects*,
Concise International Chemical Assessment Document 45 (World Health Organization 2002) available at
<http://www.inchem.org/documents/cicads/cicads/cicad45.htm#fn12>
Cited as: *Gomes/Liteplo*
Cited in: ¶ 99



- Hanif, Mohammed
Mobarak, M. Reaz,
et al.** *Fatal Renal Failure Caused by Diethylene Glycol in Paracetamol
Elixir: The Bangladesh Epidemic*,
311 *British Medical Journal* 88 (1995)
Cited as: *Hanif/Mobarak*
Cited in: ¶ 97, 98
- Harpole, Sally, ed.** *Interpretation Regarding Certain Issues Relating to the
Application of the “People’s Republic of China Arbitration Law*,
Chinese Supreme People’s Court, 23 Aug. 2006, digest by Sally
Harpole & Co., ITA Board of Reporters
Cited as: *Interpretation of Arb. Law P.R.C.*
Cited in: ¶
- Honnold, John O.** UNIFORM LAW FOR THE INTERNATIONAL SALES UNDER THE 1980
UNITED NATIONS CONVENTION, 2d ed.
Kluwer Law International, The Hague (1991)
Cited as: *Honnold1991*
Cited in: ¶¶ 69, 93
- Honnold, John O.** UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980
UNITED NATIONS CONVENTION, 3d ed.
Kluwer Law International, The Hague (1999)
Cited as: *Honnold1999*
Cited in: ¶¶ 53, 60, 63, 84
- Huber, Peter
Mullis, Alastair** THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS
Sellier (2007)
Cited as: *Huber/Mullis*
Cited in: ¶ 84
- Jennings, R.Y.** *Nullity and Effectiveness in International Law*,
Cambridge Essays in International Law (1965)
Cited as: *Jennings*
Cited in: ¶ 7
- Juris Publications,
Inc.** *The New German Law on Arbitration*
9 *World Arbitration & Mediation Report* 45 (Feb. 2003)
Cited as: *World Arbitration & Mediation Report*
Cited in: ¶ 39
- Kaplan, Neil** *Is the Need for Writing as Expressed in the New York Convention
and the Model Law Out of Step with Commercial Practice?*,
12 *Arbitration International*, No.1 (1996)
Cited as: *Kaplan*
Cited in: ¶ 25



- Kelso, J. Clark** *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms*,
21 Columbia Journal of Transnational Law 529 (1982/3)
Cited as: *Kelso*
Cited in: ¶¶ 47, 53, 54
- Kucherepa, Peter** *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law*,
16 American Review of International Arbitration 409 (2005)
Cited as: *Kucherepa*
Cited in: ¶ 20
- Lando, Ole** *Article 30*, in BIANCA-BONELL COMMENTARY ON THE
INTERNATIONAL SALES LAW
Giuffrè, Milan (1987)
Cited as: *Lando1987*
Cited in: ¶ 56
- Lookofsky, Joseph** *United Nations Convention on Contracts for the International Sale of Goods*, in BLANPAIN ed., ENCYCLOPEDIA OF LAWS –
CONTRACTS, SUPPL. 29
The Hague (Dec. 2000)
Cited as: *Lookofsky*
Cited in: ¶¶ 47, 52, 56, 60, 62, 63, 92
- Lord, Richard A.** A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON,
Lawyers Cooperative Publishing, 4th ed.
Cited as: *Williston*
Cited in: ¶ 9, 57
- Mather, Henry** *Firm Offers Under the UCC and the CISG*,
105 Dickinson Law Review 31 (Fall 2000)
Cited as: *Mather*
Cited in: ¶ 64
- Mayer, Pierre** *The Limits of Severability of the Arbitration Clause*,
ICCA CONGRESS SERIES, NO. 9 (Paris 1999)
Cited as: *Mayer*
Cited in: ¶ 6, 10, 13
- O'Brien, Katherine
Selaniko, Joel D., et
al.** *Epidemic of Pediatric Deaths From Acute Renal Failure Caused
by Diethylene Glycol Poisoning*,
279 Journal of the American Medical Association 1175 (1998)
Cited as: *O'Brien/Selaniko*
Cited in: ¶¶ 97, 98, 99



- Onyenma, Emilia** *Drafting and Effective Arbitration Agreement in International Commercial Contracts*,
Vindobona Journal of International Commercial Law and Arbitration (2003)
Cited as: *Onyenma*
Cited in: ¶
- Pandya, Sunil K.** *An Unmitigated Tragedy*,
297 British Medical Journal 117 (1998)
Cited as: *Pandya*
Cited in: ¶ 99
- Petrochilos, Georgios** PROCEDURAL LAW IN INTERNATIONAL ARBITRATION
Oxford Publishing (2004)
Cited as: *Petrochilos*
Cited in: ¶¶ 6, 33
- Poikela, Teija** *Conformity of Goods in the 1980 United Nations Convention on Contracts for the International Sale of Goods*,
1 Nordic Journal of Commercial Law of the University of Turku, Finland 42 (Dec. 2003)
Cited as: *Poikela*
Cited in: ¶ 97
- Poudret, Jean-Francois Besson, Sebastien** COMPARATIVE LAW OF INTERNATIONAL ARBITRATION
Sweet & Maxwell 2d ed. (2007)
Cited as: *Poudret/Besson*
Cited in: ¶¶ 6, 10, 12, 13, 25, 30, 33, 35, 38, 39, 40
- Redfern, Alan Hunter, Martin** LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION
Sweet & Maxwell (2004)
Cited as: *Redfern/Hunter*
Cited in: ¶¶ 5, 6, 7, 12, 13, 15, 17, 25, 29, 30, 35, 38, 40, 41
- Robinson, Jancis** THE OXFORD COMPANION TO WINE, 2ND EDITION
Oxford University Press (1999)
Cited as: *Robinson*
Cited in: ¶ 85
- Samuel, A.** JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, US AND WEST GERMAN LAW
Zurich (1989)
Cited as: *Samuel*
Cited in: ¶ 30



- Sanders, Pieter** *L'autonomie de la clause compromissoire*, in HOMMAGE A
FREDERIC EISEMANN,
Liber Amicorum, Paris 1978
Cited as: *Sanders1978*
Cited in: ¶ 8, 13
- Sanders, Pieter** *A Twenty-Years' Review of the Convention on the Recognition
and Enforcement of Foreign Arbitral Awards*,
13 *International Lawyer* 269 (1979)
Cited as: *Sanders1979*
Cited in: ¶ 7
- Sanders, Pieter** THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION
Kluwer Law International (2004)
Cited as: *Sanders2004*
Cited in: ¶ 24
- Schlechtriem, Peter** THE SELLER'S OBLIGATION UNDER THE UNITED NATIONS
CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF
GOODS
Juris Publishing (1984)
Cited as: *Schlechtriem1984*
Cited in: ¶ 92
- Schlechtriem, Peter** *Uniform Sales Law – The UN Convention on Contracts for the
International Sale of Goods*,
Manz Vienna (1986)
Cited as: *Schlechtriem1986*
Cited in: ¶¶ 60, 62, 63, 69
- Schlosser, P.** DAS RECHT DES INTERNATIONALEN PRIVATEN
SCHIEDSGERICHTSBARKEIT
Basel (2005)
Cited as: *Schlosser*
Cited in: ¶ 30
- Schwebel, Stephen
M.** INTERNATIONAL ARBITRATION, THREE SALIENT PROBLEMS
Cambridge, Grotius Publications (1987)
Cited as: *Schwebel*
Cited in: ¶ 6, 7, 13
- Schultz, Rob** *Rolling Contract Formation Under the UN Convention on
Contracts for the International Sale of Goods*
35 *Cornell International Law Journal* 263 (Nov. 2001 / Feb. 2002)
Cited as: *Schultz*
Cited in: ¶ 53



- Sono, Kazuaki** FORMATION OF INTERNATIONAL CONTRACTS UNDER THE VIENNA CONVENTION: A SHIFT ABOVE THE COMPARATIVE LAW
Oceana Publications, New York (1986)
Cited as: *Sono*
Cited in: ¶ 57, 60, 63
- Steele, Brette L.** *Enforcing International Commercial Mediation Agreements As Arbitral Awards Under the New York Convention*
54 University of California Los Angeles Law Review 1385 (2007)
Cited as: *Steele*
Cited in ¶ 32
- UNCITRAL Secretariat** *Secretariat Commentary to the 1985 Model Law on International Commercial Arbitration*,
Available at:
<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>
Cited as: *Model Law Secretariat*
Cited in: ¶ 24
- Valdes, Juan Eduardo Figueroa** *The Principle of Kompetenz-Kompetenz in International Commercial Arbitration*,
22-7 Mealey's International Arbitration Report 16 (July 2007)
Cited as: *Valdes*
Cited in: ¶ 41, 69
- Van Alstine, Michael P.** *Consensus, Dissensus, and Contractual Obligations Through the Prism of Uniform International Sales Law*
37 Virginia Journal of International Law 1 (Fall 1996)
Cited as: *Van Alstine*
Cited in: ¶ 53
- van den Berg, Jan** THE NEW YORK ARBITRATION CONVENTION OF 1958
Kluwer Law 1981
Cited as: *van den Berg*
Cited in: ¶¶ 18, 19, 20, 21
- Varady, Tibor** *On Appointing Authorities in International Commercial Arbitration*,
2 Emory Journal of International Dispute Resolution 311 (1988)
Cited as: *Varady1988*
Cited in: ¶ 5, 7, 20, 24
- Vincze, Andrea** *Remarks on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 16 of the CISG*,
available at <http://cisgw3.law.pace.edu/cisg/biblio/vincze1.html>,
Oct. 2004
Cited as: *Vincze*



Cited in: ¶ 63, 69

**Woollery, T.
Armour, B.S., et al.**

Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses – United States, 1997-2001, 54(25) *Morbidity and Mortality Weekly Reports* 625 (July 2005) Office on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion, CDC.

Cited as: *Woollery/Armour*

Cited in: ¶ 100

**Ziegel, Jacob S.
Samson, Claude**

Analysis from a Provincial Common Law Perspective, in REPORT TO UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Toronto (July 1981)

Cited as: *Ziegel/Samson*

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Cited as: *Icao Council (ICJ)*
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Cited as: *SNE v. Joc Oil (Berm.)*
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Pia Investments v. Cassia, 1988 Rev. Arb. 649 (1988)
Cited as: *Pia Investments v. Cassia (Fr.)*
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Bundesgerichtshof [Supreme Court], 8 Mar. 1995 (VIII ZR 159/94)
Cited as: *BGH 8 Mar. 1995 (Ger.)*
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4Z SchH 03/99, BayObLGZ 1999, Nr. 58; BB, Beilage 8 zu Heft 37/2000 (RPS), S. 16, Deutsche Institution für Schiedsgerichtsbarkeit
Cited as: *4Z SchH 03/99 (Ger.)*
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Oberlandesgericht München, 25 Feb. 1995 (7 U 1720/94)
Cited as: *OLG, 25 Feb. 1995 (Ger.)*
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Cited as: *James Miller v. Whitworth Street Estates (U.K.)*
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A.C. 572 (1971)
Cited as: *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime
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Cited in: ¶ 30

Vale do Rio Doce Navigacao v. Shanghai Bao Steel Ocean Shipping, 2 Lloyd's Rep. 1
(2000)
Cited as: *Vale do Rio Doce Navigacao v. Shanghai Bao Steel Ocean Shipping (U.K.)*
Cited in: ¶ 38

JSC Zertafoni v. Rouly Holding, 2 Lloyd's Rep. 335 (2004)
Cited as: *JSC Zertafoni v. Rouly Holding (U.K.)*
Cited in: ¶ 25

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Cited as: *Beroman Aktiengesellschaft v. Societa Industriale Agricola "Tresse" Di Dr.
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Cited in: ¶ 10

Republic of Nicaragua v. Standard Fruit Co., 937 F. 2d 469 (9th Cir. 1991)
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Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., 2003 WL 1345136
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STATEMENT OF FACTS

CLAIMANT	Mediterraneo Wine Cooperative is a wine producer. Its principle place of business is Mediterraneo.
RESPONDENT	Equatoriana Super Markets S.A. is a super market operator and the largest retailer of wine in Equatoriana. Its principle office is in Equatoriana.
7-10 May 2006	Durhan Wine Fair takes place. Respondent shows interest in Claimant's Blue Hills 2005 for its upcoming wine promotion.
22 May 2006	Respondent informs Claimant of its desire to use Blue Hills 2005 as the lead wine in a promotion, and requests a price quote for between 10,000-20,000 cases.
1 June 2006	Claimant sends letter confirming the quality of Blue Hills 2005 and offers a 10% discount for purchase of 10,000 cases at \$72.00 per case, a 15% discount for purchase of 20,000 cases at \$68.00 per case, and \$5,000.00 for transportation expenses. Claimant also offers delivery in multiple shipments.
10 June 2006	Respondent submits a counter-offer to Claimant, using Claimant's quoted price of \$68.00 per case for 20,000 cases, but adding a new contingency provision and an arbitration clause. The letter accompanying Respondent's Purchase Order also states that the wine promotion has been moved from October to September and sets a deadline for closing the contract as 21 June 2006.
11 June 2006	Ms. Kringle emails Respondent, acknowledging receipt of Respondent's counter-offer, and informing Respondent that Mr. Cox will be unavailable until 19 June 2006. Respondent replies by asking her to make sure Mr. Wolf acts on the order immediately upon his return.
13 June 2006	Newspaper article published in Mediterraneo, stating that anti-freeze had been used in the production of wine from the Blue Hills region.
18 June 2006	Equatoriana newspapers report that anti-freeze has been used to sweeten wines in Mediterraneo. Respondent sends an email revoking the 10 June offer due to concerns regarding the contents of Blue Hills 2005, as well as the negative publicity surrounding wine produced in the Blue Hills region. Respondent's email is received by Claimant's server, but Claimant's internal network has a service failure.
19 June 2006	Morning: Mr. Cox returns from business trip, signs the Purchase Order, and sends it to Respondent via courier. Afternoon: Claimant's server is fixed and Mr. Cox reads the



	emailed revocation.
21 June 2006	The signed Purchase Order reaches Respondent.
15 July 2006	Claimant sends Professor Ericson's expert report to Respondent, confirming that Blue Hills 2005 contains DEG, a substance which can be used as anti-freeze fluid.
25 July 2006	Respondent sends letter reiterating its concerns and repeats that the offer was revoked.
30 July 2006	Claimant sends letter to Respondent extending an offer for an "unusually good price" if Respondent were to place an order with Claimant.
10 August 2006	Respondent sends letter to Claimant stating that the matter is closed and that Respondent would not be purchasing any wines from Meditarraneo for at least the next several years.
18 June 2007	Claimant submits request for arbitration.
29 June 2007	Ms. Arbitrator 1 accepts appointment.
10 July 2007	Respondent seeks declaratory judgment that no arbitration agreement exists as to the present dispute from Commercial Court of Vindobona, Danubia.
17 July 2007	Respondent submits Answer to JAMS.
3 August 2007	Professor Doctor Arbitrator 2 accepts appointment.
17 August 2007	Professor Doctor Presiding Arbitrator accepts appointment.



SUMMARY OF ARGUMENT

PART ONE. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO DECIDE THE INSTANT DISPUTE AND SHOULD DISMISS THE PROCEEDING. ALTERNATIVELY, THIS TRIBUNAL SHOULD STAY ARBITRATION BECAUSE OF APPLICABLE DANUBIAN LAW.

This Tribunal does not have jurisdiction over the instant dispute because the parties never entered into a valid contract. Even if the arbitration clause is examined independent from the underlying contract, the clause does not meet the form requirement of the New York Convention or DAL. Therefore, no arbitration agreement ever came into existence between the parties. Even if this Tribunal retains jurisdiction, the Tribunal should grant Respondent's request for a stay of the arbitral proceedings, pending a decision from the Commercial Court of Vindobona. DAL Article 8(2) grants Respondent the right to petition the Commercial Court for a ruling on the validity of the arbitration agreement. Danubia evinced a clear preference in Article 8(2) for its courts to rule on the validity of arbitration agreements in the first instance. Finally, practical considerations favor a stay of the arbitral proceedings until the Commercial Court's decision.

PART TWO. CLAIMANT SHOULD BE DENIED RECOVERY BECAUSE NO CONTRACT WAS EVER FORMED. EVEN IF A CONTRACT WAS FORMED, CLAIMANT IS NOT ABLE TO PROVIDE GOODS FIT FOR THEIR PARTICULAR PURPOSE OR ORDINARY USE.

Claimant and Respondent never entered into a binding contract for the sale of Blue Hills 2005. Claimant's initial offer of 1 June 2006 was rejected and ultimately superceded by the terms of Respondent's Purchase Order of 10 June 2006. This Purchase Order, which included new material terms – a contingency provision and an arbitration clause – qualifies as a counter-offer under the law of the CISG. Claimant failed to accept Respondent's counter-offer prior to receiving Respondent's emailed revocation. Even if Respondent's 10 June 2006 counter-offer was irrevocable and accepted by Claimant, Blue Hills 2005 was not fit for either its particular purpose or its ordinary use. Due to the presence of DEG, as well as its tarnished reputation, the wine was not fit to serve as the lead wine in Respondent's promotion. In addition, the grave health risks posed by DEG render Blue Hills 2005 unfit for drinking.



PART ONE. ARGUMENT TO PROCEDURAL ISSUES

I. THE INSTANT DISPUTE MUST BE DISMISSED BECAUSE THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO DECIDE THE MATTER

1. Respondent never formed a contractual relationship with Claimant, and the jurisdiction of this Tribunal to decide the instant dispute is therefore unfounded [A]. Even if the arbitration clause is separated from the underlying contract, the instant clause is not enforceable. This Tribunal lacks jurisdiction because a separable arbitration agreement was never properly formed in compliance with the New York Convention and DAL [B].

A. Because No Contract Came into Existence Between the Parties this Tribunal Does Not Have Jurisdiction to Hear the Instant Dispute

2. Respondent has made a timely challenge to this Tribunal's jurisdiction [1]. Because no legal relationship exists between the parties, this Tribunal lacks competence to hear this dispute [2]. Furthermore, because Respondent never contracted with Claimant, the doctrine of separability is not applicable and this Tribunal should find that it is without jurisdiction to hear the instant dispute [3].

1. Respondent made a timely and appropriate challenge to this Tribunal's jurisdiction

3. The jurisdiction of an arbitration panel, like the jurisdiction of a court, is not immune from challenge. Indeed, the jurisdiction of an arbitration panel to decide a dispute is one of the most contested regions of modern arbitral law [*SNE v. Joc Oil (Berm.)*; *Republic of Nicaragua v. Standard Fruit Co. (U.S. Cir. Ct.)*; *Jiangxi Export Corp. v. Sulanser Co. (H.K.)*]. If a party does not recognize the jurisdiction of a panel, it may avail itself of three appropriate responses: boycott the proceeding, contest the jurisdiction of the panel at the outset of the proceeding, or protest the eventual award on the basis of a jurisdictional defect [*Born 75*].
4. Here, Respondent made a timely and appropriate challenge to this Tribunal's jurisdiction in its Answer [¶ 1]. Respondent has also commenced an action in the Commercial Court of Vindobona, as authorized by DAL Article 8(2) [*Cl. Amend. ¶ 2*].

2. Respondent has no legal relationship with Claimant, and therefore this Tribunal lacks competence to determine its own jurisdiction

5. Respondent makes a "total challenge" to the jurisdiction of this Tribunal, denying that a



- contract ever came into existence between the parties [*Redfern/Hunter* ¶ 5-35; *Answer* ¶ 1]. This challenge is an attack to the formation of the “container contract,” a challenge that should be managed by a court, not an arbitral tribunal [*Varady* 86-87].
6. Arbitration is fundamentally “a *contractual* species . . .” [*Petrochilos* ¶ 2.49 (*emphasis added*); *Carbonneau* 2]. The entire power of an arbitral panel is derived from the legal relationship between the parties [*Fouchard/Gaillard/Goldman* ¶ 11]. The instant parties do not have a contractual relationship. Absent a contractual foundation, the jurisdictional premise of *kompetenz-kompetenz* is inapplicable in the instant case [*Redfern/Hunter* ¶ 3-10]. This Tribunal does not retain the inherent power to decide its own jurisdiction because Respondent rightfully challenges the foundation upon which the Tribunal is constructed [*Schwebel* 11; *Mayer*; *Valdes*]. Under the laws of most countries, “[the arbitral tribunal] has no priority to rule on its jurisdiction over a court before which an action on the merits has been brought” [*Poudret/Besson* ¶ 457]. Respondent initiated an action before the Commercial Court of Vindobona, cementing the priority of that Court to hear the instant dispute.
 7. Scholars have noted the important distinction between a null contract and one that never came into existence [*Redfern/Hunter* ¶ 5-43; *Sanders*1979; *Varady* 86; *Schwebel* 11; *Jennings*]. While a tribunal may retain *kompetenz-kompetenz* in the presence of a null contract, “[i]f the contract does not exist . . . it is difficult to see how such a document can give rise to a valid arbitration clause and hence to a valid arbitration” [*Redfern/Hunter* ¶ 5-43]. Were Claimant able to present *prima facie* evidence that a contract was concluded, this Tribunal would be faced with a more difficult question of jurisdiction [*Schwebel* 11]. However, Claimant cannot produce any evidence of a mutual agreement. Indeed, Respondent consistently and repeatedly refuted the existence of a contract [*Cl. Exs.* 9, 11, 14, 16].
 8. Article 16(1) of DAL determines only the nullity of a contract, skirting the issue of nonexistence. It is significant that DAL Article 16(1) omits mention of a nonexistent contract – a nonexistent contract, contrary to a null contract, destroys utterly the jurisdiction of a tribunal to decide even its own jurisdiction [*Sanders*1978]. Article 21 of DAL allows that “a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.” Article 21, like Article 16(1), is inapplicable where, as here, a party challenges the very existence of the contract.



9. Here, the contract does not exist because of a basic defect: Claimant did not manifest assent to the counter-offer prior to the counter-offer's revocation by Respondent in its 18 June 2006 email [*Cl. Ex. 9; infra, Part Two, I.A.*]. This email is evidence of Respondent's intent not to be bound by any terms of its previous counter-offer, including both the purchase of wine *and* the offer to arbitrate disputes. Because there was no intent to be bound, and because there was no mutual assent before the offer was revoked, no legal relationship came into existence [*CISG Arts. 14, 18; UNIDROIT Principles, Arts. 2.1.1, 2.1.6; Williston § 1:3*]. Consequently, there is no legal relationship from which this Tribunal may derive jurisdiction [*Valdes*].
10. Although commentators have muddied the distinction between nullity and non-existence, Respondent's claim is supported by more than "mere allegation" [*Fouchard/Galliard/Goldman ¶ 411*]. Even scholars reluctant to limit the autonomy of arbitration agreements concede that in "a total absence of consent" the tribunal must "apply the consequences of that finding by declining jurisdiction" [*Fouchard/Galliard/Goldman ¶ 411*]. Here, the lack of consent applies equally to the arbitration clause and the substantive portions, crippling the existence of both [*Poudret/Besson ¶ 164; Mayer; Beroman Aktiengesellschaft v. Societa Industriale Agricola "Tresse" Di Dr. Domenico E Dr. Antonio Dalferro (U.S. Dis. Ct.)*].
11. Because of the nature of Respondent's jurisdictional challenge, any award by this Tribunal will be in placed in doubt. Even France, a country that severely curtails challenges to arbitral awards in international disputes, provides a mechanism to set aside an award issued by a tribunal lacking jurisdiction [*NCPC Art. 1502; Egypt v. SPP (ME) (Fr. Cass.)*]. It would be both reasonable and prudent to dismiss the instant dispute at this juncture and avoid a latter challenge [*English Arb. Act 1996 § 64; PILA Art. 190(2)(b)*].

3. Because no agreement was reached between Respondent and Claimant, the doctrine of separability does not apply and therefore this Tribunal lacks a jurisdictional foundation to hear this dispute

12. Contrary to Claimant's assertions, the arbitration clause cannot be separated from the Purchase Order and examined as an autonomous provision [*Cl. Memo. ¶¶ 29-31*]. Generally, the doctrine of separability allows an arbitral panel to consider an arbitration clause independent of its underlying contract [*Redfern/Hunter ¶ 3-63*]. Although this doctrine applies to many arbitration disputes, there is one circumstance in which application is inappropriate: where the very existence of the underlying contract has been



- challenged [*Redfern/Hunter* ¶ 5-44; *Poudret/Besson* ¶ 167]. Here, Respondent challenges the very existence of the underlying contract and therefore the arbitration clause cannot be separated [*Poudret/Besson* ¶ 167; *Garnett* 37]. In this instance, Respondent never agreed to contract with Claimant and therefore never formed a commercial sales agreement [*Cl. Ex. 9; Part Two, I.A.*].
13. The doctrine of separability is a “convenient and pragmatic fiction” [*Redfern/Hunter* ¶ 5-36]. This fiction, however, is premised on the conclusion of a main contract [*Schwebel* 5; *Poudret/Besson* ¶ 164]. When a main contract is concluded, it is understood that the parties entered into two separate agreements: a sales agreement and an arbitration agreement [*Schwebel* 5; *Poudret/Besson* ¶ 164]. This duality ensures that an arbitral agreement survives any “defect” in the main contract [*Schwebel* 5; *Poudret/Besson* ¶ 164]. In this instance, however, no contract was concluded between the parties and there is nothing from which two agreements may be found. Without this contractual foundation, there is no rational basis for the fiction of separability [*Poudret/Besson* ¶ 167; *Mayer; Sanders*1978]. To find otherwise would impose a fiction on a fiction, an irrational result which would undoubtedly push the limits of arbitral legitimacy.
 14. In *SNE v. Joc Oil (Berm.)*, the responding party attempted to avoid the tribunal’s jurisdiction by pointing to a defect in the formation of the underlying contract. Under applicable Russian law, the contract needed two signatures from each party and only one signature from each party was present [*SNE v. Joc Oil (Berm.)*]. The court held that the arbitration clause was separable from the faulty contract, a holding that Claimant uses to prop its argument [*SNE v. Joc Oil (Berm.)*; *Cl. Memo.* ¶ 29]. Claimant’s reliance on *Joc Oil* is unfounded. In paragraphs 47 and 48 of its opinion, the court explains that the doctrine of separability is inapplicable if a contract “never . . . existed at all” [*SNE v. Joc Oil (Berm.)*]. The parties in *Joc Oil* performed as if a contract existed and evinced their intent in a single document [*SNE v. Joc Oil (Berm.)*]. Here, Respondent never acted as if there were a contract or manifested its assent to be bound in a legally enforceable document.
 15. The foundation of arbitration is the agreement [*Redfern/Hunter* ¶ 1-08]. If no agreement ever existed in the first place, then “the arbitral tribunal can have no valid existence, authority or jurisdiction” [*Redfern/Hunter* ¶ 5-43]. Because no underlying contract between Claimant and Respondent exists, no arbitration agreement exists. Accordingly, the doctrine of separability cannot apply and this Tribunal therefore lacks jurisdiction to



hear the instant dispute.

B. Even if this Tribunal Separates the Arbitration Clause from the Underlying Contract, it Should Decline Jurisdiction Because the Parties Never Entered into an Agreement to Arbitrate

16. If this Tribunal applies separability to inquire into the existence of the parties' alleged agreement to arbitrate, the Tribunal should find that no agreement was ever formed. The instant arbitration clause does not meet the form requirement of the New York Convention [1] or DAL [2]. As a result, no arbitration agreement exists and this Tribunal must decline jurisdiction.

1. The arbitration clause does not meet New York Convention requirements

17. The New York Convention is the guiding force for analyzing whether an arbitration agreement was properly formed [*Redfern/Hunter* ¶ 3-05]. Danubia, Equatoriana, and Mediterraneo are all parties to the New York Convention [*Statement of Claim* ¶ 18]. Accordingly, the New York Convention governs this Tribunal's determination of whether a valid arbitration agreement exists.
18. New York Convention Article II sets forth a uniform minimum requirement for the form of the arbitration agreement, and a tribunal or court should accept nothing less [*van den Berg* 173, 178-79; *Alvarez*]. Article II(1) requires that the arbitration agreement be in writing. Article II(2) further explains that the writing requirement is satisfied if it conforms to one of two alternatives: the writing must be "signed by the parties" or it must be "contained in an exchange of letters or telegrams." Although the arbitration clause in the instant dispute is in writing, it does not conform with either of the Article II(2) requirements, and therefore does not constitute a valid arbitration agreement.
19. There is no question that the first option under Article II(2) necessitates the signatures of both parties on one document [*van den Berg* 192]. Claimant argues that when Mr. Cox added his signature to the Purchase Order, which was already signed by Mr. Wolf, he validly bound both parties to the arbitration clause [*Cl. Memo.* ¶ 32]. This argument fails in light of Respondent's explicit revocation of its counter-offer in Mr. Wolf's 18 June 2006 email to Mr. Cox [*Cl. Ex.* 9]. Mr. Cox attempted to sign and return the Purchase Order *after* the 18 June 2006 revocation, and thus attempted to sign an inactive document. Because the document was inactive, Mr. Cox's signature had no legal significance. Consequently, there is no valid document that contains both parties' signatures and no evidence of any mutual consent to arbitrate.



20. Ultimately, the requirement to sign a single legally enforceable document evinces a clear intent, by both parties, to arbitrate [*van den Berg 194; Kucherepa*]. Indeed, the legitimacy of arbitration can be preserved only if arbitration takes place in instances where both parties express a true intent to arbitrate [*Varady 92*]. Respondent, however, specifically expressed its intent not to arbitrate disputes with Claimant when Respondent revoked its counter-offer [*Cl. Ex. 9*]. As a result, the document cannot express any mutual consent to arbitrate and thus no agreement is possible, as mutual consent is paramount to a valid agreement.
21. The second option in Article II(2), the exchange of letters requirement, is met by a “mutual transfer of documents” [*van den Berg 192 (emphasis added)*]. A unilateral communication by one party to the other is not sufficient to satisfy the exchange requirement [*van den Berg 192*]. The exchange must sufficiently establish the parties’ mutual consent to arbitrate, and therefore “the parties must inform each other of their respective intentions” to arbitrate [*van den Berg 192; OG Basel, 3 June 1971 (Switz.)*].
22. In the instant dispute, the exchange of letters leading up to the alleged contract reflected only the parties’ intent to potentially buy and sell wine [*Cl. Exs. 1-4*]. Arbitration was never mentioned in any correspondence until the 10 June 2006 Purchase Order that was sent to Claimant [*Cl. Ex. 5*]. Because the arbitration clause was never discussed prior to this Purchase Order and was unilaterally presented to Claimant in a single document, there was no “exchange” as envisioned by Article II(2).
23. Furthermore, on 18 June 2006 Respondent informed Claimant of its intent not to be bound by the 10 June 2006 offer [*Cl. Ex. 9*]. At the time of the 18 June 2006 revocation, Claimant had not made any communication with respect to the arbitration clause. The 11 June 2006 email sent by Ms. Kringle merely confirmed receipt of the Purchase Order [*Cl. Ex. 7*]. The email did not mention an arbitration clause, nor did it give any indication that Claimant assented to the clause. In fact, the email indicated that no action could be taken with respect to the Purchase Order until Mr. Cox returned to the office, making it clear that no decision had been made and also that Ms. Kringle was without authority to bind Claimant to any agreement [*Cl. Ex. 7*]. Accordingly, on 18 June 2006 the correspondence with respect to the arbitration clause remained a unilateral gesture by Respondent and the required mutuality of exchange had not been met.



2. The arbitration clause does not meet DAL requirements

24. Even if DAL applies, the instant situation cannot satisfy the writing requirement. DAL Article 7 is the relevant writing requirement provision, and it closely mirrors New York Convention Article II [*Model Law Secretariat* ¶ 17; *Sanders2004* 67]. The different language in DAL Article 7 is meant only to clarify the New York Convention Article II requirements; it is not meant to change the form requirement in any substantive way [*Varady 148*; *Model Law Secretariat* ¶ 17]. DAL Article 7 clarifies that an “exchange” for purposes of the writing requirement may include “an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.”
25. The type of “implied consent” contemplated by DAL Article 7 occurs when one party alleges arbitration and the other party does not object to the arbitration but rather takes part in the proceedings [*Redfern/Hunter* ¶ 3-08; *Poudret/Besson* ¶ 183; *Kaplan*; *JSC Zertafoni v. Rouly Holding (U.K.)*]. The instant dispute is easily distinguishable from an implied consent scenario. While Claimant has submitted a Statement of Claim calling for arbitration, Respondent has denied the availability of arbitration from the outset. Additionally, there can be no argument that the Statement of Claim is an acceptance of the Purchase Order, because the Purchase Order was revoked well before the Statement of Claim was ever advanced. Even more, it would be unfair and impractical to circumvent the mutual consent requirement by allowing the Statement of Claim to constitute acceptance. If this were allowed, parties could simply stay silent on offers to arbitrate until a dispute occurred and then assess whether they wanted to file a claim in court or in an arbitral tribunal. This practice would foster uncertainty in dispute resolution agreements, and undermine the practical benefits of arbitration.
26. The instant arbitration clause fails to meet the form requirement under both the New York Convention and DAL. Accordingly, the parties never formed an arbitration agreement and this Tribunal has no foundation from which to derive its jurisdiction.

II. EVEN IF THIS TRIBUNAL FINDS THAT IT HAS JURISDICTION, THE ARBITRAL PROCEEDINGS SHOULD BE STAYED

27. This Tribunal should stay the arbitral proceedings regardless of its findings on jurisdiction. DAL Article 8(2) is applicable to this dispute and supersedes JAMS Rules [A]. Respondent made a timely and proper application to the Commercial Court of Vindobona under DAL Article 8(2) [B]. This Tribunal should stay proceedings in



anticipation of the judicial determination of its jurisdiction [C]. Respondent is subject to DAL, and therefore immune from any possible sanctions under JAMS Rule 27.3 [D].

A. DAL Article 8(2) Applies to the Present Dispute

28. Respondent effectively revoked the 10 June 2006 counter-offer [*Cl. Ex. 9*]. Since no arbitration agreement came into existence, JAMS Rules do not apply and Danubian law governs this dispute [1]. Even if the Tribunal finds an agreement and proceeds with JAMS Rules, DAL Article 8(2) is mandatory law that conflicts with, and therefore supersedes, JAMS Rules [2].

1. Seat law governs the dispute because the agreement stipulating JAMS Rules was not formed

29. Respondent effectively revoked the counter-offer to purchase wine from Claimant in its entirety [*Cl. Ex. 9*]. No aspect of the counter-offer was accepted, including the arbitration clause [*id.*]. Parties agreeing to engage in arbitration have the right to choose arbitration rules to govern the internal conduct of the arbitral proceedings [*Garnett 22*]. However, no arbitration agreement was reached in this dispute and JAMS Rules do not apply. All matters relating to the conduct and procedure of arbitration are subject to the law of the seat [*Garnett 20*]. Danubia was selected as the seat of arbitration, therefore the parties have submitted to its national laws [*Redfern/Hunter ¶ 2-19; James Miller v. Whitworth Street Estates (U.K.)*]. Accordingly, DAL governs this dispute.
30. Clearly, Respondent chose Danubia as the seat of arbitration because DAL is a system of law well suited to govern its commercial and arbitral relations [*Redfern/Hunter ¶ 2-41; Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A. (U.K.)*]. Danubia adopted the Model Law with an amendment to Article 8 [*Answer ¶ 4*]. The amended DAL Article 8(2) specifically allows parties to make an application to a national court prior to the constitution of the arbitral tribunal. Respondent was allowed to seize the court directly with an action concerning the validity of the arbitration agreement and the jurisdiction of the arbitrators [*Poudret/Besson ¶ 483; Schlosser 279*]. Like Danubia, other countries have adopted similar amendments to their laws, choosing to have the courts control arbitration directly without need for a prior ruling by the arbitral panel [*German Arb. Law § 1302; Arb. Law P.R.C. Art. 20; Samuel 190*]. Exercising their sovereign rights, these countries seek to ensure that arbitrations conducted within their territories follow the basic tenets of arbitration and comport with public policy and mandatory law [*Interpretation of Arb. Law P.R.C.*]. Disregarding DAL Article 8(2)



would violate Danubia's clear intent to maintain the opportunity for court involvement in arbitration.

2. Even if the Tribunal finds that an arbitration agreement exists, DAL Article 8(2) is mandatory law that supersedes conflicting JAMS Rules

31. DAL Article 8(2) is a conflicting provision of the law of the seat. JAMS Rule 1.5 warns parties that where "any of these Rules is in conflict with a mandatory provision of applicable arbitration law of the place of arbitration" JAMS Rules will *not* apply. DAL Article 8(2) was specifically incorporated as an amendment to provide parties judicial relief in Danubian courts prior to the constitution of the arbitral tribunal. JAMS Rule 17.3 precludes parties from applying to any court for relief. JAMS Rule 17.3 is in direct conflict with DAL Article 8(2).
32. In addition, DAL Article 8(2) is a mandatory provision. The provision states that "an application may be made to the court" [*DAL Art. 8(2)*]. The use of the word "may" is particularly relevant because the provision was copied from the German Arbitration Law of 1998 [*Proc. Or. 2 ¶ 2*]. Some countries, including Germany, interpret "may" as a mandatory "shall" [*Steele*]. Since the provision is an exact copy of German law, DAL Article 8(2) should be interpreted as mandatory law. DAL Article 8(2) is applicable, mandatory arbitration law that conflicts with JAMS Rules. Pursuant to JAMS Rule 1.5, DAL Article 8(2) is the controlling law of the instant dispute.
33. Failure to comply with mandatory rules of the seat of arbitration could make an award vulnerable to set aside proceedings [*Petrochilos ¶ 3.79; Turner Pte Ltd. v. Builder's Federal (Sing.)*]. To avoid this, a tribunal must respect mandatory laws of the seat [*Petrochilos ¶ 3.79*]. Even scholars in favor of limiting pre-enforcement court interference, recognize that mandatory laws of countries where an award is likely to be reviewed "cannot be entirely ignored by the arbitrators" [*Poudret/Besson ¶ 146 (quoting Fouchard/Gaillard/Goldman ¶¶ 1193)*]. Procedural fairness will be seriously compromised if this Tribunal ignores Respondent's mandatory right under DAL Article 8(2) to apply to a court for judicial relief [*Park1989*]. If this Tribunal ignores a mandatory rights conferred to Respondent by DAL, any award would be subject to set aside action [*Garnett 110; ICC Award 2879*]. This Tribunal should therefore stay arbitration and await the decision of the Commercial Court.



B. Respondent Made a Timely and Proper Application to the Commercial Court of Vindobona

34. DAL Article 8(2) is an expansion of UNCITRAL Model Law Article 8 and mimics German Arbitration Law of 1998 § 1032(2) [*Proc. Or. 2 ¶ 2*]. Like German Arbitration Law § 1032(2), DAL Article 8(2) grants a respondent an additional power beyond the Model Law: to apply to a national Court to determine the admissibility of arbitration in a given dispute [*DAL Art. 8(2); German Arb. Law § 1032(2)*].
35. Such application can be made “prior to the constitution of the arbitration tribunal” [*DAL 8(2); German Arb. Law § 1032(2)*]. The constitution of an arbitral panel is considered to have taken place when all arbitrators have accepted their mandate [*Poudret/Besson ¶ 484; Berger 362*]. The two requirements for appointment of arbitrators is party agreement upon the candidacies of arbitrators and the arbitrators’ acceptance [*Redfern/Hunter ¶ 4-23*]. The ICJ considered the constitution process of a three arbitrator panel complete when the arbitrators and the umpire have been appointed [*Icao Council (ICJ)*]. Indeed, the process of arbitration cannot begin until the composition of the tribunal has been decided and the arbitrators have been appointed [*Garnett 57*]. Neither can an arbitral tribunal exercise any jurisdiction over the dispute and the parties until such tribunal has been brought into existence [*Redfern/Hunter ¶ 4-01*].
36. A respondent is fully within its rights to apply to a national court prior to the acceptance of nominations by the arbitrators, that is, prior to the constitution of the arbitral tribunal. Respondent exercised this right. Respondent applied to the Commercial Court of Vindobona on 4 July 2007, well before the constitution of this Tribunal [*Proc. Or. 2 ¶ 9*]. Professor Arbitrator 2 accepted the nomination on 3 August 2007 [*Letter, Prof. Arb. 2 to JAMS*]. Professor Doctor Presiding Arbitrator was nominated and accepted on 17 August 2007 [*Letter, Prof. Dr. Pres. Arb. to JAMS*]. At all times prior to 17 August 2007, Respondent was within its rights under DAL Article 8(2) to apply to the Court.
37. Claimant is incorrect when it contends that “once an arbitral proceeding is commenced . . . and there has been an appointment of at least one arbitrator, then the tribunal has been constituted” [*Cl. Memo. ¶ 22*]. Commencement of proceedings under DAL Article 21 does not amount to the constitution of the tribunal. Claimant mistakenly interprets the law when it infers that acceptance by less than all three arbitrators is equivalent to the constitution of the panel [*Cl. Memo. ¶ 22*]. Article 8(2) of DAL would be meaningless if its applicability was deemed, as Claimant suggests, to expire upon submission of a



request for arbitration [*Cl. Memo.* ¶ 21]. Any claimant would be able to forestall a respondent's DAL Article 8(2) petition by sending a request for arbitration and nominating an arbitrator. Since Respondent has no reason to challenge admissibility until the arbitration is commenced, court protection under DAL Article 8(2) would be nullified if this Tribunal accepted Claimant's interpretation. Even if this Tribunal applies JAMS Rules to determine this dispute, JAMS Rule 2.5 (which is identical to DAL Article 21) states that the arbitration is commenced on the date that JAMS receives the Request for Arbitration. JAMS Rule 7.2 allows the parties forty-five days after such commencement to establish the Tribunal. Claimant's contention that this Tribunal was constituted or established a mere eight days after the proceedings were commenced is directly contrary to JAMS Rules [*Cl. Memo.* ¶ 22]. Instead, this Tribunal should find that an arbitral tribunal is constituted once all of the arbitrators have been appointed.

38. DAL Article 8(2) is not modified by DAL Article 16(3) in the instant dispute. DAL Article 16(3) grants a tribunal jurisdiction to rule on a challenge of the tribunal's authority. This challenge must be raised before the submission of the statement of defense [*DAL Art. 16(2)*]. Thus, Respondent made timely claim, as it applied to the Court on 4 July 2007 and submitted the Statement of Defense on 17 July 2007 [*Proc. Or. 2* ¶ 9; *Answer*]. DAL Article 16(2) further indicates that the plea of the lack of jurisdiction should be raised before the tribunal as soon as the matter is raised during the arbitral proceedings. However, on 4 July 2007 the arbitral tribunal had not yet been constituted and Respondent would have been unable to raise its plea in front of a nonexistent body [*Redfern/Hunter* ¶ 4-01; *Vale do Rio Doce Navigacao v. Shanghai Bao Steel Ocean Shipping (U.K.)*]. Thus, unable to pursue the relief under DAL Article 16(3), Respondent rightfully resorted to the sole remaining remedy under DAL Article 8(2). Furthermore, Respondent has the right under DAL Article 16(3) to apply to a court for review of the tribunal's jurisdiction within thirty days of such determination by the tribunal. This precise issue has been pending before a court since before the constitution of this Tribunal. It would be prudent to stay the instant proceedings and await the judicial decision [*Poudret/Besson* ¶ 478; *Pia Investments v. Cassia (Fr.)*].

C. Because the Court Should Rule On the Validity of the Arbitration Agreement in the First Instance, this Tribunal Should Stay the Proceedings

39. Respondent rightfully sought judicial determination of this Tribunal's jurisdiction.



Judicial determination of jurisdiction at an earlier stage of the process was contemplated by the drafters of the German Arbitration Law of 1998, which is the basis for DAL Article 8(2) [*World Arbitration & Mediation Report*]. Germany incorporated direct court control over determining the validity of arbitration agreements and jurisdiction of tribunals in its Arbitral Law of 1998 [*German Arb. Law § 1032; Poudret/Besson ¶ 484*]. Moreover, Germany expressly moved away from its prior policy, where no judicial scrutiny was permitted, by adopting the amendment to the Model Law [*Barceló*]. Germany's current arbitration law contemplates a preference that "when a court is properly seized of a jurisdictional issue, it is to make a full determination" [*Barceló*]. Since Danubia has adopted Article 8(2) based on German Arbitration Law § 1032(2), it is reasonable to infer that Danubia contemplated similar consequences when it adopted the amendment.

40. It is well recognized that national courts are fundamental to the process of arbitration, especially at the beginning of arbitration to determine the validity or invalidity of the arbitration agreement [*Redfern/Hunter ¶ 1-138*]. A judicial determination at this stage is merely the recognition of validity or invalidity of the arbitration agreement, and is not a judicial attempt to rule on the merits of the dispute [*Poudret/Besson ¶ 484*]. Specifically, as the court noted in a German Arbitration Institute case applying § 1032(2): "the court may only ascertain if a valid arbitration agreement exists, if it is capable of being performed and if the subject-matter of the dispute falls within the scope of the arbitration agreement" [*4Z SchH 03/99 (Ger.)*]. When it adopted the precise language of German Arbitration Law § 1032(2), Danubia clearly sought to ensure the direct authority of its national courts to determine the validity of the arbitration agreement and minimize the possibility of conflicting decisions [*Poudret/Besson ¶ 484*].
41. Furthermore, the Commercial Court of Vindobona is the appropriate place to decide the instant jurisdictional dispute in the first instance. An agreement to arbitrate is an agreement to surrender the right to due process in a national court [*Redfern/Hunter ¶ 3-07*]. This is a bold move, and one that must be founded in valid party agreement [*Redfern/Hunter ¶¶ 3-07, 3-10*]. As a result, early court intervention is preferable when there is evidence that the parties did not mutually consent to arbitrate their disputes [*Valdes*]. This early intervention preserves the legitimacy of arbitration by ensuring that the parties have in fact abdicated their right to court action and replaced it with the right to arbitrate. In this instance, there is no evidence to support such a trade. Claimant



cannot produce a valid written document sufficient to evidence an agreement and Respondent has made it clear through its conduct that it never intended to arbitrate disputes with Claimant. In light of the lack of mutual consent, this Tribunal should stay the proceedings and defer to the Commercial Court of Vindobona to make the threshold jurisdictional determination. By doing so, this Tribunal will avoid the risk of acting *ultra vires* and, consequently, will ensure that it does not undermine the rights of the parties nor the credibility of international arbitration.

D. Respondent is Not Subject to Sanctions Under JAMS Rule 27.3

42. Claimant asserts that this Respondent is in violation of JAMS Rule 17.3, and this Tribunal should therefore use JAMS Rules 27.3 and 30.3 to grant Claimant's requested relief [*Cl. Memo.* ¶¶ 37-40]. Claimant's conclusion, however, is based on a faulty premise, specifically, that JAMS Rules govern the instant dispute. To the contrary, JAMS Rules are inapplicable because no valid arbitration agreement exists [*supra I.B.*].
43. Even if this Tribunal determines that an arbitration agreement exists and JAMS rules are applicable, Respondent did not breach JAMS Rule 17.3 and therefore there is no basis for the Tribunal to draw any "inferences" against Respondent [JAMS Rule 27.3; *Cl. Memo.* ¶ 39]. JAMS Rule 17.3 precludes a party from applying to a national court for relief regarding the Tribunal's jurisdiction. DAL Article 8(2), however, allows a party to bring jurisdictional challenges before a Danubian court in the first instance. Furthermore, DAL Article 8(2) is a mandatory provision of Danubian law that conflicts with JAMS Rule 17.5 [*supra* ¶¶ 31-33]. As a result, DAL Article 8(2) is applicable, not JAMS Rule 17.3, and Respondent was within its rights when it made its application to the Commercial Court of Vinodobona. Consequently, Respondent did not violate JAMS Rule 17.3. Article 27.3 is therefore inapplicable and the Tribunal is not justified in making any type of order for relief.
44. These arbitration proceedings should not continue because the parties never entered into a valid agreement to arbitrate. Respondent revoked its counter-offer, including the offer to arbitrate, before Claimant accepted the counter-offer. A continuation of these proceedings would be without the requisite jurisdictional foundation and any award would likely be unenforceable. This Tribunal should decline to exercise such baseless jurisdiction. Furthermore, Danubia has evinced a preference for its courts to rule on the validity of arbitration agreements in the first instance. Additionally, practical considerations favor a stay of the arbitral proceedings. Thus, this Tribunal should dismiss



the proceedings for lack of jurisdiction or, in the alternative, stay proceedings as the issue of arbitrability is properly before the Commercial Court of Vindobona.

PART TWO. ARGUMENT TO THE SUBSTANTIVE ISSUES

I. CLAIMANT AND RESPONDENT DID NOT ENTER INTO A VALID AND BINDING CONTRACT

45. Respondent received an offer from Claimant on 1 June 2006 [*Cl. Ex. 3*]. Respondent rejected that offer by sending Claimant a revocable counter-offer, which included two additional material terms: an arbitration clause and a contingency provision [*Cl. Ex. 5*] [A]. This counter-offer was revoked by Respondent prior to Claimant's attempted acceptance of the counter-offer [*Cl. Exs. 8-9*] [B].

A. Respondent Rejected Claimant's Offer with a Counter-Offer, Which Was Later Revoked

46. On 1 June 2006, Claimant made an offer to Respondent to sell a total of 20,000 cases of Blue Hills 2005 at \$68.00 per case [*Cl. Ex. 3*]. Respondent rejected the offer and submitted a counter-offer to Claimant on 10 June 2006 [*Cl. Ex. 4*]. Respondent's counter-offer included two additional material terms: an arbitration clause and a contingency provision altering the quantity of the goods to be delivered [*Cl. Ex. 5*]. The counter-offer constituted a rejection of Claimant's 1 June 2006 offer.
47. CISG Article 19(1) states that "a reply to an offer which . . . contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." The additional or different term must materially alter the offer in order to constitute a counter-offer [*CISG Art. 19(2)*]. The CISG includes a non-exclusive list of terms that are deemed material and would therefore reject the original offer [*Lookofsky 72; Blodgett 424-25; Kelso 529; CISG Art. 19(3)*]. That list includes "terms relating to . . . quantity of the goods . . . or the settlement of disputes" [*CISG Art. 19(3)*].
48. The arbitration clause at issue unmistakably affects the "the settlement of disputes" by foreclosing the parties' access to courts of law [*CISG Art. 19(3)*]. Commentary has explicitly included arbitration clauses as material terms when offering examples of common provisions that materially alter an offer [*Farnsworth1984 ¶ 3-15; Farnsworth1987 179*]. A United States Court of Appeals used similar reasoning when it found that an additional forum selection clause was a material alteration of an offer from a French seller of wine corks to a Canadian buyer [*Chateau des Charmes Wine Ltd. v.*



Sabate USA Inc., (U.S. Cir. Ct.). The court stated that the forum selection clause “relat[es] to the settlement of disputes” [*Chateau des Charmes Wine Ltd v. Sabate USA Inc., (U.S. Cir. Ct.)*]. “The settlement of disputes” must refer to arbitration clauses, just as it does forum selection clauses, or that statement in CISG Article 19(3) would be rendered meaningless [*CISG Art. 19(3)*].

49. Additionally, this Tribunal should find that the contingency provision materially alters Claimant’s offer. CISG Article 19(3) states that a term affecting the “quantity of goods,” such as this contingency provision, is material. In the present dispute, Respondent included a contingency provision making the final delivery of 2,500 cases of wine contingent upon 12,000 cases being sold by 25 September 2006 [*Cl. Ex. 5*]. This provision unquestionably affects the quantity of goods to be shipped. Claimant’s 1 June offer was for 20,000 cases of Blue Hills 2005, but the added contingency provision in Respondent’s 10 June counter-offer was for only 17,500 cases [*Cl. Exs. 3, 5*].
50. Similarly, a German Appellate Court found that an Italian buyer’s response to a German automobile seller’s offer constituted a rejection and counter-offer because the delivery date for the goods was altered by the buyer [*OLG, 25 Feb. 1995 (Ger.)*]. The quantity of the automobiles was not changed nor was the price. However, the court found that a change in the delivery date alone was enough to be a material alteration under CISG Article 19(3) [*OLG, 25 Feb. 1995 (Ger.)*].
51. “Time of delivery” in the German case and “quantity of the goods” in this dispute are both additional terms included in CISG Article 19(3) [*OLG, 25 Feb. 1995 (Ger.)*]. Despite other terms and qualities of the goods remaining unaltered in the German case, the additional or altered term is enough to defeat the offer and present a counter-offer [*OLG, 25 Feb. 1995 (Ger.)*]. In the instant dispute, not only does the quantity of goods change, but also the price of the goods is altered by the contingency provision. If a mere change in delivery date can be said to materially alter an offer then there should be no doubt that altering the quantity *and* price of the goods is a material alteration.
52. A contingency provision may be read into CISG Article 19(3) because it is “not an exclusive listing of clauses that materially alters the terms of the offer” [*Farnsworth 1987 179*]. By stating “among other things”, the list of material terms is meant to be quite broad [*Lookofsky 72*]. Any provision, deemed an item of “importance,” will be considered a material alteration to the offer [*Blodgett 425*]. The contingency provision



- was an important addition by Respondent because it ultimately altered the entire contract. The quantity, price, and delivery of the goods all change with the addition of the contingency provision. This clause was also important to the parties: it protected Respondent from an unpopular wine and left Claimant with an additional 2,500 cases of unsold Blue Hills 2005.
53. Scholars agree that the breadth of CISG Article 19(3) includes nearly every type of reply, leading to few variations being deemed immaterial [*Farnsworth*1987 178-79; *Honnold*1999 185; *Schultz* 281]. In fact, the exception found in CISG Article 19(2) “will rarely be applicable because of paragraph (3)” [*Farnsworth*1987 179]. It was the purpose of the drafters to limit the effectiveness of Article 19(2) by opting to include nearly all contract terms within subsection (3) of Article 19 [*Kelso* 529]. The consequence of this expansive definition is that almost all acceptances, other than a simple “yes,” will alter the offer materially [*Van Alstine* 24]. The Article 19(3) list includes *essentialia negotii* (i.e. price and quantity), and less fundamental terms, such as those related to the settlement of disputes [*Van Alstine* 16]. Under this analysis, the contingency provision, which directly affects the quantity and the price of the goods to be delivered, is material because it affects an essential term.
54. An alteration that affected the parties and the contract as a whole, to the extent that the present contingency provision and arbitration clause did, should not be considered an immaterial alteration. Immaterial alterations to an offer include “grammatical changes, typographical errors, or the specifications of [a] detail implicit in the offer” [*Kelso* 529]. These terms are immaterial because the offeree accepts precisely what the offeror originally intended to offer [*Kelso* 529]. Arbitration clauses and contingency provisions, however, are fundamentally different from the type of clerical errors that are ordinarily deemed immaterial.
55. Additions to an offer materially change the offer if the terms alter the parties’ obligations [*Sec. Comm. Art. 19 (counterpart to CISG Art. 17)*]. Here, the additional contingency provision altered the parties’ obligations. CISG Article 30 sets forth the seller’s obligations, which requires the seller to “deliver the goods.” The contingency provision clearly altered this obligation. Claimant’s final delivery of the goods was dependent upon a condition – Respondent’s sale of 12,000 cases of Blue Hills 2005 by 25 September 2006 [*Cl. Ex. 5*]. If that condition were not met, Claimant’s obligation to deliver the goods would be nullified [*id.*].



56. CISG Article 30 merely outlines the more specific seller obligations that are set out in later CISG Articles, such as Article 35 [Ziegel/Samson 33; Lando1987 246; Lookofsky 83]. CISG Article 35 addresses the seller's obligations for delivery of the goods, stating that, "the seller must deliver goods which are of the quantity...required by the contract" [CISG Art. 35]. This obligation is directly affected by the contingency provision because Respondent's 10 June 2006 counter-offer altered the quantity required.
57. CISG Article 19 reflects traditional theory that a contract arises out of a mutual agreement [Sec. Comm. Art. 19 (counterpart to CISG Art. 17); CISG Arts. 14, 18; UNIDROIT Principles, Arts. 2.1.1, 2.1.6; Williston § 1:3]. For that reason, "an acceptance must comply exactly with the offer" [Sec. Comm. Art. 19 (counterpart to CISG Art. 17)]. Without exact acceptance, a counter-offer supercedes the original offer [Sec. Comm. Art. 19 (counterpart to CISG Art. 17); Sono 124]. Therefore the original offeror must accept the counter-offer to form an enforceable contract [Sec. Comm. Art. 19 (counterpart to CISG Art. 17)]. Respondent, in its 10 June 2006 communication, included additional terms and thus created a counter-offer. This new counter-offer therefore superceded Claimant's original offer. Claimant, as the original offeror, was required to explicitly accept Respondent's counter-offer. Claimant failed to do so, and no enforceable contract was formed.

B. Respondent's Counter-Offer Was Revoked Prior to Claimant's Dispatch of Acceptance

58. Respondent's 10 June 2006 counter-offer was revocable until the time of dispatch of acceptance under CISG Article 16(1) as it did not become irrevocable under CISG Article 16(2) [1]. The counter-offer was revoked on 18 June 2006 when Respondent's revocation email entered Claimant's email server, satisfying both CISG and MLEC requirements for revocation [2].

1. Respondent's counter-offer was fully revocable at any time prior to dispatch of acceptance

59. Generally, "[u]ntil a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance" [CISG Art. 16(1)]. This provision was not a compromise between the civil law and common law concepts, but an outright endorsement of the common law treatment of offers [Eörsi 154; Farnsworth1984 ¶ 3-9]. Unless the exceptions of CISG Article 16(2) apply, an offer is revocable until acceptance is dispatched [Eörsi 154]. As a result, Respondent's counter-offer was



- revocable until Claimant dispatched acceptance because neither of the CISG Article 16(2) exceptions apply here.
60. The counter-offer was not irrevocable simply because Respondent mentioned 21 June 2006 in the counter-offer. Under CISG Article 16(2)(a) “an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable.” Based on the Secretariat Commentary, Professor Eörsi concluded that fixing a time for acceptance “is not in itself sufficient to make the offer irrevocable” [Eörsi 156; Sono 116-17]. A fixed date or a fixed time for acceptance is “one indication of the offeror’s intention” [Schlechtriem1986 n.173]. Alternatively, stating a fixed time may simply establish a set deadline indicating that the offer will lapse [Honnold1999 § 143.1; Lookofsky 66].
 61. In the instant dispute, Respondent sent an counter-offer to Claimant which provided that the offer had to be accepted by 21 June 2006 [Cl. Ex. 4]. Prior to this communication, Respondent did not mention deadlines as to when the contract had to be concluded. Respondent did relay to Claimant that the wine promotion was scheduled for October. In the letter accompanying the counter-offer, Mr. Wolf informed Mr. Cox that the wine promotion was rescheduled for September [id.].
 62. The party’s intent should be analyzed when determining whether the offer was irrevocable [Schlechtriem1986 52; Eörsi 157; Lookofsky 66]. The 21 June 2006 date was not intended to hold the counter-offer open, or to allow Claimant greater time in which to consider entering into the contract [Cl. Ex. 4]. Rather, the 21 June 2006 date was a deadline. The counter-offer would expire, or lapse, because of the rescheduling of the wine promotion. This conclusion is apparent from the nature of the communication.
 63. In making this determination, the legal system of the parties’ home jurisdiction may be part of the analysis [Schlechtriem1986 52; Eörsi 157; Vincze; Garro § II.A.3; Lookofsky 66]. When the parties are from different legal systems, each case should be determined on an individual basis and the determination should be made according to what the parties intended at the time of contracting [Vincze; Garro § II.A.3; Lookofsky 66]. Civil law countries hold a fixed time for acceptance or the setting of a date mean that that an the offer irrevocable [Eörsi 156; Farnsworth1984 ¶ 3-10; Sono 116-17]. Common law countries, on the other hand, are more likely to view the fixed date as indicating the moment the offer will lapse [Honnold1999 § 143.1; Farnsworth1984 ¶ 3-10; Sono 116-



- 17].
64. To determine what the parties meant at the time of the contract, the Tribunal should employ CISG Article 8 and interpret the contract accordingly [*Eörsi 157; Mather 45*]. Pursuant to CISG Article 8 the interpretation will rely on what Claimant knew or could not have been unaware of regarding Respondent's intent, or what a reasonable person in Claimant's position would have believed in those circumstances. The commercially reasonable person, involved with international trade, would not assume that the business practices in his country are the business practices in every country [*Mather 46*].
 65. Respondent did not intend to make this counter-offer irrevocable by stating 21 June 2006 as a fixed date. Instead, Respondent intended to let Claimant know that it would not be interested in entering into a contract that date. Respondent, an Equatoriana entity, is in a common law jurisdiction [*Proc. Or. 2 ¶ 7*] and could not have anticipated its statement of a date as creating an irrevocable counter-offer.
 66. Claimant's assertion that the date stated by Respondent is an indication that the offer was irrevocable is unreasonable under the circumstances [*Cl. Memo. ¶ 59*]. Claimant, a Mediterraneo entity, abides by the laws regarding contract formation as set by the CISG. The CISG itself does not take a clear and unambiguous stand on the position on the issue of what a fixed date means. The drafting committees adopted the text with the knowledge that the CISG did not settle the dispute between common law and civil law delegates [*Eörsi 153*].
 67. Further, Claimant received a counter-offer from Respondent, who is from a common law jurisdiction [*Cl. Ex. 5; Proc. Or. 2 ¶ 7*]. As Respondent drafted the contract that was sent for Claimant to sign, it was reasonable for Claimant to presume that Respondent would abide by its local law in the drafting of the agreement [*Cl. Ex. 5*]. Accordingly, the date stated by Respondent cannot be viewed by Claimant as conclusively making the offer irrevocable. Claimant, in conducting business with a foreign corporation, knew or could not have been unaware, that foreign jurisdictions impose legal consequences different from Claimant's. Though Claimant may not have known the details of the foreign legal system, and was not under an obligation to educate itself in foreign law, Claimant did know there was a possibility its local law would not be applied. Accordingly, it is unreasonable to interpret every aspect of the contract under Claimant's local law without any further inquiry.



68. Claimant asserts that “in the absence of indications to the contrary,” the counter-offer cannot be revoked [*Cl. Memo.* ¶ 62]. In the instant dispute, Respondent only indicated that Claimant’s response was needed earlier because the date of the wine promotion was pushed forward [*Cl. Ex. 4*]. As such, when the mentioning of a date is simply intended to express urgency or induce action, vendors would no longer be able to state any date in their negotiations for fear of the date making their offer irrevocable. Further, this goes against the CISG, as the CISG clearly favors revocable offers on the international level, subject only to two exceptions, captured in CISG Article 16(2).
69. Additionally, CISG Article 16(2)(b) is inapplicable to the instant dispute. CISG Article 16(2)(b) states that “an offer cannot be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.” The emphasis on reliance is loosely comparable to the common law concept of promissory estoppel [*Vincze, citing Geneva Pharm. Tech. Corp. v. Barr, Inc. (U.S. Dis. Ct.)*], and the civil law principle of *Treu und Glauben* (“good faith”) [*Eörsi 157*]. Reliance may be a factor when the offeree determines that the offer is irrevocable and acts under that assumption, and when a contract is concluded by the offeree’s performance of an action [*Honnold1991 164; Vincze; Schlechtriem1986 52*].
70. Claimant could not have acted in reliance because Claimant did not perform any action. Claimant asserts that “in the context of a strictly finite good, reliance can only be illustrated through omissions” [*Cl. Memo.* ¶ 68]. To adopt Claimant’s notion of reliance by omission would allow the exception to swallow the rule because, in effect, taking no action would then always be considered reliance.

2. Respondent’s revocation reached and was received by Claimant before dispatch of acceptance, revoking the counter-offer

71. CISG Article 24 “defines the point of time at which any indication of intention ‘reaches’ the addressee for the purposes of Part II” of the CISG [*Secretariat Commentary on Article 22 of the 1978 Draft (draft counterpart of CISG Article 24)*]. The MLEC “applies to any kind of information in the form of a data message used in the context of commercial activities” [*MLEC Art. 1*]. Both Equatoriana and Mediterraneo have adopted the MLEC in their entirety [*Statement of Claim ¶ 16; Proc Or. 2 ¶ 4*]. Accordingly, CISG Article 24 states the general principles, but is not precisely on point.
72. An offer may be revoked by the offeror until the moment the offeree dispatches acceptance [*CISG Art. 16(1)*]. When the revocation is electronic, “[a]n offer may be



revoked if the revocation enters the offeree's server before the offeree has dispatched an acceptance" [*CISG-AC Opinion no 1 Art. 16(1)*]. In the instant dispute, Respondent sent an email to Claimant on 18 June 2006 [*Cl. Ex. 9*]. This email entered the Claimant's server on 18 June 2006 but was not retrieved by Claimant until 19 June 2006, after Claimant dispatched acceptance [*Cl. Ex. 10*].

73. The time of dispatch of an email is the time that it "enters an information system outside the control of the originator" [*MLEC Art. 15(1)*]. Upon entering Claimant's information system on 18 June 2006 [*Statement of Claim ¶ 10*], the revocation was not under Respondent's control, and was therefore dispatched. The time of receipt of an email is determined to be the time when the data message enters the designated information system [*MLEC Art. 15(2)(a)(i)*]. Claimant concedes that the revocation email entered Claimant's server on 18 June 2006 [*Statement of Claim ¶ 10; Cl. Memo. 26*]. The email was therefore subject to Claimant's control, pursuant to the test of *MLEC Art. 15(2)(a)(i)*.
74. An "information system" is a "system for generating, sending, receiving, storing or otherwise processing data messages" [*MLEC Art. 2*], such as a "communications network" [*MLEC Guide ¶ 40*]. When referring to an information system, "server" is also used [*CISG-AC Opinion no 1 Art. 16(1)*]. A data message "enters" an information system when the data message becomes available for processing within that information system" [*MLEC Guide ¶ 103*]. This objective test was also adopted by the CUECIC [*CUECIC Explanatory Note ¶ 183*]. Though the CUECIC explains this objective test as including the requirement that the communication be "capable of being retrieved," the CUECIC acknowledges that this is presumed to be the same time as when the communication enters the information system and does not operate to add an additional requirement to the *MLEC* standard [*CUECIC Explanatory Note ¶ 183*]. This result is the same "if the addressee has not designated an information system" [*MLEC Art. 15(2)(b)*].
75. The *MLEC* standard, which applies the objective test of looking to the time the revocation enters the server, is thus satisfied. The server malfunction does not invalidate the revocation, nor does the time of receipt get tolled until 19 June 2006. The email could be received and was effective, independent of the server malfunction, and the server malfunction should not therefore defeat the email's effectiveness. Despite the fact that the revocation was not retrieved until 19 June 2006, the revocation was "capable of being retrieved" [*CUECIC Explanatory Note ¶ 183*]. That Claimant's server did not retrieve it, because of a malfunction or otherwise, does not void a valid, retrievable revocation.



- Claimant, in fact, acknowledges that the sender does not bear the risk of the email being received if the email is in a consented to format and sent to a designated address [*Cl. Memo.* ¶ 50].
76. Claimant's interpretation of the standard is that the message "needs to be accessible to the recipient" [*Cl. Memo.* ¶ 51]. Claimant's application of this standard to Respondent's revocation adds an additional requirement that is not expressed in the MLEC. Claimant essentially argues that the email must be capable of being processed by the server and that the server must also function properly to process the email [*Cl. Memo.* ¶ 51]. This is not the applicable standard under the MLEC.
77. Claimant's comparison of email to communications in a foreign language is logically inapplicable [*Cl. Memo.* ¶ 52]. The reason the email was not processed properly by Claimant's server was a malfunction, not because of the format or condition of the email itself. Respondent's communication was sent in a format that was capable of being retrieved, and in fact was retrieved in its original form once the malfunction was corrected [*Statement of Claim* ¶ 10; *CUECIC Explanatory Note* ¶ 183]. The delay caused by Claimant's server does not render the email itself defective.
78. Adopting Claimant's contentions in this case would impose an unreasonable burden on a sender of electronic communications. A sender would not be able to rely on an electronic message reaching its destination because any malfunction, regardless of at the source, would completely invalidate the correspondence. This would make electronic communication inefficient because each message would mandate a follow up phone call or a follow up letter mailed to the recipient of the electronic message to verify receipt. Such a result would be contrary to the objective of the MLEC – to eliminate obstacles to electronic communication and commerce [*MLEC Guide* ¶ 5].
79. The address the email was sent to was the designated address. The address the 18 June 2006 revocation was sent to appeared on the business card that Claimant presented to Respondent at the wine fair [*Proc. Or.* 2 ¶ 24]. By presenting this information, Claimant held out that the contact information on the business card was a valid means of communication, and consented to being contacted by any means listed.
80. A contrary determination would be illogical. The same analysis used to determine that the email was not designated, or not consented to, would also apply to the physical street address and telephone number listed on the card. The result would be the same; any



communication sent to Claimant could be considered not consented to. Claimant acknowledged receipt and replied to the communication, implicitly relaying to Respondent that this was an acceptable means of communication and that this was the designated address [*Cl. Ex. 6*]. Despite the small number of email exchanges between the parties, this alone should not constitute grounds for denying legal effect, validity, and enforceability [*MLEC Art. 5*].

81. The revocation sent to Claimant by Respondent was effective on 18 June 2006, prior to dispatch of acceptance. As the offer was revocable and did not qualify for the exceptions under CISG Art. 16(2) to make it irrevocable, the offer was revoked.

II. EVEN IF A CONTRACT WAS FORMED, CLAIMANT DID NOT PROVIDE CONFORMING GOODS

82. Respondent did not have an opportunity at the trade fair to conduct a proper test for the presence of DEG in Blue Hills 2005. Respondent's conduct at the fair, therefore constitutes an inspection rather than a sale by sample [**A**]. In each correspondence after meeting Claimant, Respondent communicated that the particular purpose for Blue Hills 2005 was to serve as the featured wine in an upcoming wine promotion. The wine containing DEG is not fit for this particular purpose [**B**]. Wine containing DEG loses its material use and reduced its trade value and Claimant has therefore attempted to deliver goods to Respondent which are also unfit for their ordinary use [**C**].

A. Respondent's Viewing of the Goods at the Trade Fair Constituted an Inspection

83. Claimant cannot invoke an exemption to liability based on the inspection that took place at the trade fair, because Respondent did not learn of the presence of DEG in Blue Hills 2005 at this time. Respondent made a reasonable inspection of the goods and was unaware of the nonconformity at the conclusion of the alleged contract.
84. Article 35(3) of the CISG states that "[t]he seller is not liable . . . for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity." Scholars note that "could not have been aware" goes beyond "mere . . . or even gross negligence and requires something much closer to 'blind eye' recklessness" [*Huber/Mullis 142*]. Claimant can only invoke CISG Article 35(3) when an inspection would have made Respondent aware, or where Respondent could not have been unaware, of the presence of DEG in Blue Hills



2005. Respondent had no way of knowing that DEG was present in Blue Hills 2005 without conducting a chemical analysis [*Proc. Or. 2 ¶ 13*]. Further, CISG Article 35(3) does not impose an obligation upon the buyer to investigate [*Honnold1999 259*]. As a result, Respondent did not have an affirmative duty to ask Claimant about the presence of DEG or to perform a chemical analysis at the trade fair. Without a chemical analysis of the wine, the non-conformity caused by the presence of DEG remained hidden. Accordingly, Respondent was unaware of the wine's nonconformity. Under CISG Article 35(3), "the seller is liable for defects not known by the buyer and not reasonably discoverable by examining the goods" [*Bianca/Bonell 277*]. Respondent examined the goods as was reasonable for the situation and surroundings.

85. Under CISG Article 35(2)(c) a seller is obligated to deliver goods that conform to a sample or model. However, when there is a latent defect in the goods, Respondent cannot be obligated to accept goods that contain harmful substances. Though the CISG is silent as to what results when there is a sale based upon a sample containing a latent defect, other nations have addressed this problem in their laws [*CCL; U.K. Sale of Goods*]. For example, CCL states "the object delivered by the seller shall still meet the normal standards of the kind" [*CCL § 169; Guiliano*]. Under this rationale, Claimant would be required to deliver wine that complied with the normal quality standards of other wines. Blue Hills 2005 does not conform to the normal standard because wine does not normally contain dangerous chemicals [*Robinson 197; Galpin*]. Similarly, the U.K. Sale of Goods § 15 states that when a sale is based upon a sample the goods "will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample." Without chemical analysis of Blue Hills 2005 detection of DEG is impossible. The presence of this poison in the wine makes the quality unsatisfactory. Further, had Respondent known of the presence of DEG in the wine, it surely would not have chosen Blue Hills 2005 as its lead wine.

B. The Goods Furnished by Claimant Were Not Fit For the Particular Purpose Expressly Made Known to Claimant

86. CISG Article 35(2)(b) states that "goods do not conform with the contract unless they . . . are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment." If the purpose is known, then the "principle of fairness" mandates that the



seller ensure the goods comply with that purpose [*Enderlein 145*].

87. Claimant contests that the particular purpose of the contract “ought not to be construed as taking lead [sic] in the promotion” [*Cl. Memo.* ¶ 72]. Instead, Claimant asserts that the particular purpose made known to Claimant was that “Blue Hills 2005 will be featured in the promotion” [*Cl. Memo.* ¶ 74]. While Claimant makes much of the difference between the terms “lead wine” and “featured wine,” a reasonable business person would not engage in similar linguistic gymnastics. The two terms are functionally interchangeable and therefore, Respondent concedes that for the purposes of this arbitration, the particular purpose should be construed as advocated by Claimant, namely that the wine “is fit to feature in a wine promotion in Equatoriana” [*Cl. Memo.* ¶ 76].
88. Respondent does not allege, despite Claimant’s statements to the contrary, that the particular purpose of the contract included a requirement that the goods “sell well” [*Cl. Memo.* ¶ 75]. Rather, any issues of marketability or merchantability are properly analyzed under an ordinary use analysis [*Part Two, II.C*].

1. Blue Hills 2005 is not fit for the particular purpose made known to Claimant

89. The wine provided by Claimant to Respondent was not fit for its particular purpose. Blue Hills 2005 could not serve as the featured wine in a wine promotion in Equatoriana due to the extreme negative publicity surrounding wine from the Blue Hills region, and due to the existence of anti-freeze in the wine. On the morning of 18 June 2006, *all* of the newspapers in Equatoriana reported that anti-freeze was being used to sweeten wine in the Blue Hills region [*Cl. Ex. 9*]. The widespread public perception was that the wine was not fit for consumption. Therefore, Respondent could not effectively market or sell the wine, and had it proceeded with using Blue Hills 2005, potentially risked ruining the entire planned wine promotion. Respondent, therefore, took the only available commercially reasonable course of action.
90. Claimant’s reliance on the New Zealand Mussels case, also known as the German Mussels case, is misplaced in this instance. The factual circumstances between the German Mussels case and the case at issue here are distinguishable. First and foremost, the alleged non-conformity claimed by the buyer was based on a German food regulation that mandated a lower level of cadmium than was present in the mussels [*BGH 8 Mar. 1995 (Ger.)*]. The levels of cadmium were, however, acceptable in Switzerland, the seller’s country [*BGH 8 Mar. 1995 (Ger.)*]. The holding of the court focused not on the



ability of the general public to consume the mussels, but rather, whether the seller had any obligation to know of the specialized laws of the buyer's country [*BGH 8 Mar. 1995 (Ger.)*]. In ruling that no such obligation existed, the court did not address the situation present here, namely whether massive and widespread negative publicity of a wine serves to make it unfit to function as a featured wine in a wine promotion. Respondent does not allege that the inclusion of DEG violated the laws or regulations of either Claimant's or Respondent's countries. Therefore, the holding in the German mussels case is irrelevant to the present dispute.

91. Claimant further asserts that the existence of DEG within the wine and the negative publicity associated with it is not relevant to the particular purpose as Claimant was not informed that these considerations would be taken into account [*Cl. Memo. ¶ 83*]. Claimant is correct when it states that Respondent did not object to either the existence of the DEG or to the negative publicity surrounding it prior to the conclusion of the alleged contract. However, this is simply because Claimant failed to inform Respondent that the wine it was marketing contained anti-freeze. Furthermore, the newspaper articles uncovering the presence of DEG were not published prior to the conclusion of the alleged contract. It is disingenuous for Claimant to assert that it should not be held liable for the latent defect in the wine when Claimant itself failed to notify Respondent of its existence. Principles of fairness mandate that Respondent should not be forced to pay for wine which contained defects that Respondent was not, and could not have been, aware of at the time of contracting.

2. Respondent actually and reasonably relied on Claimant's skill and judgment throughout the course of the party's dealings

92. Pursuant to CISG Article 35(2)(b), the buyer must establish that it informed the seller of the particular purpose and that it actually and reasonably relied on the seller's skill and judgment [*Schlechtriem 1984 ¶ 6-19*]. Once the particular purpose is made known to the seller, the seller assumes an implied obligation that the goods will be fit for such purpose [*Lookofsky 92*]. Because of the seller's assumed obligation, it is reasonable for the buyer to rely on the seller's skill and judgment to fulfill that obligation [*Lookofsky 92*].
93. Reliance on the skill and judgment of the seller is reasonable where skill and judgment is common in the seller's trade [*Bianca/Bonell 275; Honnold 1991 257*]. Furthermore, because there is a presumption of reasonable reliance, the buyer's degree of knowledge in the trade area is irrelevant so as long as the buyer does not have more knowledge than the



- seller [*Helsinki Ct. Appeals (Fin.)*]. Finally, the buyer does not have to inform the seller that he is relying on his judgment [*Sec. Comm. Art. 33 (counterpart to CISG Art. 35)*]. This is because the inherent implication of CISG Article 35(2) is that the buyer may rely on the seller to select and furnish a good that will satisfy the stated purpose [*Honnold1991 257*].
94. Scholars have stated that the “circumstances in which the buyer may not rely on the seller’s skill and judgment cannot be specified in advance but must be ascertained case by case” [*Bianca/Bonell 274*]. Furthermore, when determining whether reliance on the seller’s skill or judgment has occurred, it is relevant whether the buyer acted “contrary to the advice of the seller” which would be an obvious indicator that there was no reliance [*Enderlein/Maskow 145*].
95. In the present matter, it is clear that Respondent actually and reasonably relied on Claimant’s skill and judgment in selecting Blue Hills 2005 as the featured in its planned wine promotion. Claimant asserts that there could be no reliance because Respondent selected the Blue Hills 2005 brand [*Cl. Memo. ¶ 87*]. However, Respondent did not “insist” on a particular brand [*Cl. Memo. ¶ 87*]. Rather, Respondent relied on the fact that Blue Hills 2005 had won numerous awards, and relied on Claimant to reveal any potential defects in the wine. Had Claimant in fact stated that another brand of wine would be preferable, Respondent would have likely followed the suggestion. There is nothing in the record to indicate that such actions were taken.
96. Despite Claimant’s assertions, a knowledge “gap” does exist between the knowledge and experience of Claimant and Respondent [*Cl. Memo. ¶ 85-86*]. Respondent is an operator of super markets and cannot be expected to have a detailed and comprehensive knowledge of every item that it carry in their stores. Conversely, Claimant is an experienced marketer and producer of wine, selling wine both domestically and internationally [*Statement of Claim ¶ 2*]. Claimant should have been aware that DEG would be viewed negatively by the wine consuming public and should have notified Respondent of its presence in Blue Hills 2005. There is no evidence in the record that Respondent chose Blue Hills 2005 contrary to the advice of Claimant, or that Respondent had knowledge of the wine manufacturing process which was greater than the knowledge possessed by Claimant. As Claimant is an established producer and seller of wine, it was not unreasonable for Respondent to rely on Claimant to assure that the wine provided would be fit for the particular purpose explicitly made known to Claimant.



C. The Goods Furnished By Claimant Were Not Fit For Ordinary Use

97. Under Article 35(2)(a) of the CISG, “except where the parties have agreed otherwise, the goods do not conform with the contract unless they are *fit for the purposes* for which goods of the same description would *ordinarily be used*” (*emphasis added*). Conversely, goods are unfit for their ordinary use when they have “defects which impede their material use” [*Enderlein/Maskow 143; Poikela*]. Yet, even if the defects do not affect the material use of the goods, they still may be unfit for ordinary use if the defects “lessen conspicuously their value affecting trade use” [*Bianca/Bonell 273*]. Blue Hills 2005 contains the chemical DEG, which is commonly regarded as a dangerous and toxic substance [*O’Brien/Selaniko; Calvery/Klumpp; Hanif/Mobarak; Clark/Sanchez*]. As such, the use of DEG in Blue Hills 2005 renders it unfit for ordinary use because it impedes on the wine’s material use (i.e. its merchantability) [*Cl. Ex. 13*] and as a result, lessens its trade value [*Cl. Exs. 9, 14; Proc. Or. 2 ¶ 21*].
98. This dangerous chemical is used in anti-freeze because it lowers the temperature at which water freezes [*Cl. Ex. 13*]. However, it is also occasionally used as a sweetening agent [*id.*]. This use of DEG can be quite harmful and even fatal. For example, in Bangladesh, three-hundred ninety-nine children developed kidney failure, and most of them died, after being given cough syrup contaminated with DEG [*Hanif/Mobarak*]. In Haiti, eighty-five children also died due to ingesting cough syrup contaminated with DEG [*O’Brien/Selaniko*]. Another infamous incident involving DEG poisoning occurred in the U.S., where one-hundred and seven people were killed [*Wax; CCE*]. This incident was the catalyst for the creation of the U.S. Food and Drug Administration [*Wax; CCE*].
99. Following ingestion, the signs of DEG’s toxicity generally progress in three stages. First, there are effects on the central nervous system such as lethargy, seizures, and comas [*Gomes/Liteplo*]. In addition to the substance’s immediate effect on the central nervous system, it also triggers neurological effects such as facial paralysis, slurred speech, loss of motor skills, and impaired vision due to “bilateral optic atrophy” [*Gomes/Liteplo*]. This suggests cranial nerve damage [*Gomes/Liteplo*]. Second, it progresses to effects on the heart and lungs including tachycardia and hypertension [*Gomes/Liteplo*]. Finally, necrosis, renal failure, and death occur [*Gomes/Liteplo; O’Brien/Selaniko; Pandya*].
100. The lethal effect of this chemical is underscored by the fact that even cigarette companies have banned its use in their products [*Glantz 124*]. In the U.S. alone, Cigarettes cause an estimated 438,000 premature deaths annually and use such nefarious additives as



- formaldehyde, ammonia, tar, carbon monoxide, arsenic, and hydrogen cyanide [Woollery/Armour]. Yet, cigarette companies now refuse to use DEG as an additive because it is not “recognized as safe” [Glantz 124].
101. The ordinary use of goods of the same description as Blue Hills 2005 (i.e. wine) is to be imbibed. While the addition of the deadly chemical DEG does not make the wine impossible to drink, it does impede on its material use (i.e. its merchantability). The merchantability of particular goods goes beyond the use of the goods sold and also embraces their resale value [Ziegel/Samson]. Thus, it is possible for goods to be unmerchantable even though they are fit for use. Professors Ziegel and Samson use the examples of a new car with discolored paintwork or badly scratched furniture to illustrate this point [Ziegel/Samson]. While the paint of the car or the scratches on the furniture do not affect their material use, the resale value of that car or piece of furniture is certainly diminished. The same situation has occurred in the present dispute. Sales of Blue Hills 2005 have been “slower than would otherwise have been expected,” since the publishing of the many negative newspaper articles [Proc. Or. 2 ¶ 21]. This is evidence that its trade value, and its reputation as a quality wine, has been conspicuously lessened. As such, it is certainly likely that the diminished trade value and merchantability of Blue Hills 2005 would translate into a diminished resale value if it were on Respondent’s shelves.
102. Generally, the test of a particular goods’ merchantability is “whether a reasonable buyer, knowing of the defects, would have bought the goods without an abatement on the price” [Ziegel/Samson]. Blue Hills 2005 cannot even pass this test. After the defect of the tainted wine was exposed and made known to Mr. Wolf and the world, Mr. Cox offered to sell the wine at “an unusually good price” [Cl. Ex. 15]. But even with this abatement, the Mr. Wolf still refused to purchase the wine [Cl. Ex. 16]. A commercially reasonable buyer in a similar situation would certainly do the same.
103. Therefore, because the use of DEG in Blue Hills 2005 impedes its merchantability and resale value, coupled with the conspicuous lessening of its trade value due to negative publicity, Blue Hills 2005 is unfit for the purposes for which goods of the same description would ordinarily be used.
104. As demonstrated, Claimant’s arguments for recovery are without merit. Respondent was at liberty to revoke its 10 June 2006 counter-offer at any time prior to Claimant’s dispatch of acceptance; a right which Respondent exercised. Because Respondent’s 18 June 2006



email reached Claimant nearly a day before its dispatch of acceptance, no binding contract ever existed between the parties [*Cl. Ex. 9*]. Even if the Tribunal deems the counter-offer to have been irrevocable and validly accepted by Claimant, Claimant's goods were unfit for both their particular purpose and their ordinary use.



PRAYER FOR RELIEF

In light of the above submissions, Counsel respectfully requests this Tribunal to find that:

- No arbitration agreement was entered into between Equatoriana Super Markets S.A. and Mediterraneo Wine Cooperative;
- The 10 July 2006 Purchase Order that Equatoriana Super Markets S.A. delivered to Mediterraneo Wine Cooperative constituted a revocable counter-offer;
- Equatoriana Super Markets S.A. revoked its counter-offer by email on 18 June 2006; and
- The 20,000 cases of Blue Hills 2005 did not conform and were not fit for their particular purpose or ordinary use under the CISG.

Consequently, Equatoriana Super Markets S.A. requests this Tribunal to:

- Dismiss Mediterraneo Wine Cooperative's claim because this Tribunal has no jurisdiction over this dispute;
- Stay the proceedings awaiting the decision of the Commercial Court of Vindobona, if the claim is not dismissed;
- Deny recovery to Mediterraneo Wine Cooperative's claim as no valid contract was concluded between the parties;
- Deny recovery to Mediterraneo because even if a valid contract was formed, Mediterraneo Wine Cooperative did not perform in conformity with the contract; and
- Order Mediterraneo Wine Cooperative to pay all costs of the arbitration, including the cost of Equatoriana Super Markets S.A.'s legal representation.

(signed)

/S/Nicole Fidler

/S/Ella Govshtein

/S/Drew Gulley

/S/Mariam Habib

/S/Nana Japaridze

/S/Adam Marshall

/S/Sean Masson

/S/Meghan Rudy

/S/Tamara Schmidt

/S/Timothy Schmidt

/S/Robert Szyba

17 January 2008